CODE OF IOWA

1939

CONTAINING

ALL STATUTES OF A GENERAL AND PERMANENT NATURE

To and including the acts of a permanent nature of the Forty-eighth General Assembly, 1939

COMPILED AND EDITED BY
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PREFACE TO CODE, 1924

The first publication of Iowa laws which bore any semblance to a code was *The Statute Laws of the Territory of Iowa*, 1838-1839, sometimes referred to as *The Old Blue Book*. A few years later there appeared the *Revised Statutes of the Territory of Iowa*, 1842-1843, popularly known as *The Blue Book*, revised and compiled by a joint committee of the Territorial Legislature, which went into effect July 1, 1843.

On January 25, 1848, the first General Assembly appointed a committee composed of Charles Mason, Wm. G. Woodward, and Stephen Hempstead to "draft, revise and prepare a code of laws for the State of Iowa". This work was accomplished in a very creditable manner and the first code of the state, known as the *Code of 1851*, was enacted by the legislature and approved by the Governor, February 5, 1851. This code was in the form of a single act, and although it was considered in chapters and sections by the legislature, it passed both houses on the last day of the session as a single bill, and on the same day was approved by the Governor.

Following the adoption of the new constitution in 1857 the seventh General Assembly in 1858 passed a joint resolution appointing William Smyth of Linn County, W. T. Barker of Dubuque County, and Charles Ben Darwin of Des Moines County "Commissioners to draft and report to the Judiciary Committee of the two houses a Code of Civil and Criminal procedure; * * * and to Revise and Codify the General Laws of the State so far as practicable".

These commissioners reported to the eighth General Assembly in 1860 a code of civil and criminal practice and these proposed bills became the law with few changes. The commissioners construed the statute as authorizing them only to make a compilation of the remaining laws and they limited their work to this, but in their report expressed the opinion that a real codification of all of the law would be very desirable but would take the "painful labor of many minds working in concert for many years".

This *Revision of 1860* was apparently not satisfactory and the *Code of 1873* soon followed. The thirteenth General Assembly in 1870 appointed William H. Seevers of Mahaska County, John C. Polley of Clinton County, and William J. Knight of Dubuque County, as commissioners to carefully revise the statutes of this state, rewrite the same, omit obsolete parts, insert all amendments, transpose words and sentences, and when necessary, to change the phraseology. Judge Polley, however, removed from the state and Wm. G. Hammond, Chancellor of the Law Department of the State University, was appointed to fill the vacancy. The report of this commission was the basis of the *Code of 1873*. The General Assembly saw that it was not possible to do the work in the regular session and this work was done at an adjourned session which lasted thirty-six days. This code took effect September 1, 1873, and section 47 thereof provided that: "All public and general statutes passed prior to the present session of the general assembly, and all public and special acts, the subjects whereof are revised in this code, or which are repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed."

The *Code of 1873* continued to be the official code of the state for twenty-four years, although supplemented in a measure by private compilations known as McClain's Code and Miller's Code, respectively, which were officially recognized by the General Assembly, and came into general use throughout the state.

The twenty-fifth General Assembly in 1894 passed a bill providing for the appointment of a commission of five persons to carefully revise and codify the laws, rewrite the same and divide them into appropriate parts and arrange them into titles, chapters, and sections, omit all parts repealed or obsolete, insert all amendments to make the laws complete, transpose words and sentences, arrange the same into sections or paragraphs, number them, change the phraseology, and make any and all alterations necessary to improve, systematize, harmonize, and make the laws clear and intelligible.

This commission consisted of Emlin McClain, Chancellor of the Law Department of the State University, appointed by the Senate, John Y. Stone and

Charles Baker, appointed by the House, and H. S. Winslow and H. F. Dale, appointed by the Supreme Court.

This commission reported to the twenty-sixth General Assembly a "Proposed Code" with an "Explanatory Report". The General Assembly undertook the work of code revision; but finding that it could not be done at the regular session, an extra session was called which convened January 19, 1897. The proposed code reported by the commissioners was little more than a compilation, comparatively few changes being recommended. The General Assembly followed in general the work of the code commissioners, but made numerous changes in the law, entirely rewriting several parts of it. On May 11, 1897, a recess was taken until July 1st, and the extra session finally adjourned July 2, 1897, having been in session one hundred eleven days, and the laws, under the constitution, took effect ninety days thereafter.

After having served the people for about twenty-five years, the *Code of 1897* and the supplements thereto became so complicated and cumbersome that the thirty-eighth General Assembly provided for a new revision of the laws by the passage of an act (38 G. A., ch. 50) which contained provisions similar to those which resulted in the *Code of 1897*. This act provided for the appointment of a commission consisting of three members, one of whom was to be the Supreme Court Reporter, and the two remaining members were to be named by the Governor from a list of five persons especially fitted for such work, submitted to him by the Chief Justice of the Supreme Court. The commissioners appointed were James H. Trewin of Cedar Rapids, who had been chairman of the code supervising committee of the twenty-sixth General Assembly; J. C. Mabry of Albia, and U. G. Whitney, the Reporter of the Supreme Court.

The act providing for the appointment of the commission suggested no definite plan for the work or the report of the commission, but directed it to edit and codify the laws of Iowa, "reporting necessary and desirable changes to the General Assembly". It also provided that the commission should "submit a report to the Legislature calling attention by reference to the section of the code, to all repealed laws by section and reference to the session repealing same and calling attention to such portions of the laws as may be found to be conflicting, or redundant or ambiguous or such as otherwise require legislative action to make clear; and shall include in such reports the comments and recommendations of the commission or editor upon the subject of any part of said code". Also, the Governor was requested by this act "to convene the Legislature in extra session during the month of January, 1920, or as soon thereafter as practicable, for the consideration of said report and code".

The commission organized March 19, 1919, by selecting James H. Trewin as chairman and U. G. Whitney as secretary. Believing it would be impracticable for the General Assembly to formulate bills, and guided by the experience of the twenty-sixth General Assembly, the commission presented to the thirty-eighth General Assembly the following plan for the pending code revision:

"First. To prepare an orderly compilation of the laws, omitting all laws of a local or temporary character, etc., and cause the same to be printed on or before December 1, 1919, without change in wording;

"Second. To prepare a report, setting forth a codification of such parts of the law as in the judgment of the commission is necessary, and that such codification shall be prepared in the form of bills as substitutes for the sections or chapters codified, as the case may be;

"Third. To separately report such amendments to the laws as codified as, in the judgment of the commission, are necessary for the public interest." (See *House Journal*, 1919, page 1101.)

The code commissioners prepared and published as directed an orderly compilation of the laws which is known as the *Compiled Code of Iowa*, 1919, and also prepared two hundred fifty-three bills, comprising two thousand sixty pages, which amended, revised, and codified certain sections, chapters, and titles of the *Compiled Code*. The commissioners made this report to the thirty-eighth General Assembly on February 1, 1920, accompanying the report with a schedule of the commissioners' bills, together with a table showing the sections codified.

The Governor having failed to call the extra session as requested, the *Compiled Code* and the commissioners' bills came before the regular session of the thirty-ninth General Assembly. Committees of the House and Senate compared the *Compiled Code* with the sources from which it was derived. The thirty-ninth General Assembly directed that its acts of a general and permanent nature be published in the form of a supplement to the *Compiled Code*, and that the code commissioners' bills be amended to conform with the legislation passed by it. Provision was also made for an extra session at which it was contem-

plated the work of code revision would receive exclusive consideration. The Governor did not see fit, however, to call such extra session and the matter of code revision was again delayed until the meeting of the fortieth General Assembly.

The fortieth General Assembly, at its regular session, had before it all of the code commissioners' amended bills and the advantage of a book of briefs of the bills prepared by the commissioners, but found time to pass only a small number of these bills. Governor Kendall then called an extra session to convene April 18, 1923, the day following the adjournment of the regular session. After meeting and organizing, the General Assembly recessed until December 4, 1923. Provisions were again made for conforming the bills to the acts of the regular session of the fortieth General Assembly, and also for a cumulative supplement to the *Compiled Code*. These were prepared, and all the bills, together with a number of additional bills, were reprinted, the briefs, for greater convenience, being printed under the appropriate sections of the bills.

The extra session of the fortieth General Assembly reconvened on December 4, 1923, and immediately began consideration of the code commissioners' bills. It soon became apparent that the work would be greatly facilitated by calling the code commissioners in consultation, and such action was authorized. The commissioners remained to the end of the session as advisors and assistants to the General Assembly, and appreciation of this assistance found expression in resolutions passed by the Assembly at the close of the session. It is estimated that approximately one-third of the sections of the *Compiled Code* were amended and revised in the process of producing the *Code of 1924*. Historical references at the end of each section disclose the origin of the section and any subsequent legislative action. The sections which were affected by the codification can therefore be determined by an examination of such historical references.

The General Assembly completed its work on April 26, 1924. In chapter 3, laws of the extra session of the fortieth General Assembly, (sections 168, 169, and 172 of this Code) the preparation and publication of the *Code of 1924* were provided for. Some of these provisions are new in code building in Iowa. For instance, chapters are numbered consecutively without regard to titles. Each page contains two columns, and a chapter analysis is placed at the head of each chapter. It is believed that these features will meet with approval.

The volume contains no tables of corresponding sections and no annotations, but the law provides for the publication of such tables and annotations in separate volumes.

Provision was made that the President of the Senate should appoint two members of the Senate, and the Speaker of the House three members of the House, who should constitute a code supervising committee, to have "general supervision and oversight over the work of editing the code and the work of the code editor in preparing the code for publication and of the printing and binding thereof". The members selected from the Senate were Charles M. Dutcher of Iowa City and Ed. M. Smith of Winterset; and those from the House were C. F. Clark of Cedar Rapids, E. P. Harrison of Oakland, and Clyde H. Doolittle of Manchester.

In view of the fact that under the constitution all of the provisions of the *Code of 1924* which were passed by the extra session of the fortieth General Assembly would take effect "ninety days after the adjournment" of such extra session, and of the fact that the code could not be prepared and published within ninety days from April 26, 1924, the General Assembly, in order that its laws might be published and ready for distribution before taking effect, recessed until July 22, 1924.

Upon reconvening on July 22d, the General Assembly, upon the recommendation of the code supervising committee, passed several bills curing manifest errors which had crept into the work of the extra session. Some of these corrections have been carried into the code as published, and all will be found in the session laws published by the authority of the General Assembly.

The extra session of the fortieth General Assembly, having been in session one hundred fifty-five days, finally adjourned on July 30, 1924, and the laws passed by it, except those which took effect by publication, will become effective "ninety days after the adjournment".

The committee believes that the *Code of 1924* is more logically arranged than the *Code of 1897*. It is divided into many more titles and chapters, and most of the duplications and inconsistencies which resulted from the enactment of many statutes since the *Code of 1897*, sometimes without regard to the then existing law, have been eliminated. Wherever changes have been made, it has been the endeavor to express the law in concise and clear language, short sen-

tences and sections, and it is confidently believed that it will be more readily found and more easily understood than the law appearing in any previous code of Iowa.

One of the important accomplishments of the fortieth General Assembly was the laying of the foundation for continuous code revision in providing that the code editor shall in future submit recommendations to the General Assembly for amending, revising, and codifying the laws; and it is sincerely hoped that every succeeding General Assembly will appoint appropriate committees and give serious consideration to such recommendations and that some portions of the law will be amended, revised, and codified at each session, and thus the enormous expense and the consumption of time of the members of the General Assembly in going through another general revision will be avoided. Under the law enacted, there will be a new code issued every four years; and it is, in our judgment, entirely feasible and economical to do this and thus with timely revisions of portions of the law prevent in the future the great complication and confusion into which our laws fell between the adoption of the *Code of 1897* and the present time.

The index of this code has been prepared by Mr. Jacob Van der Zee of the faculty of the State University of Iowa. As far as possible it has followed the index to the *Code of 1897*, with which users of the code are familiar. We believe that it is a great improvement over any previous index and predict that it will give general satisfaction.

In compiling and editing the present volume, the committee desires to especially commend the work of Hon. U. G. Whitney, the Code Editor. He has worked untiringly and intelligently to produce a creditable code. He has been ably assisted by Mr. O. K. Patton, of the law faculty of the State University of Iowa, and others, all of whom have displayed commendable zeal in their work.

While this code contains all the laws of the state of a general and permanent nature, it should be borne in mind that its contents were not enrolled and passed as a whole by any General Assembly. The book therefore is a compilation of the laws of Iowa, published under the authority of the state.

The "Tables of Corresponding Sections" and the "Book of Annotations" will appear in due season; and it is hoped that in content, workmanship, and design the work of "code revision" started in the thirty-eighth General Assembly and ending in the extra session of the fortieth General Assembly will meet with the approval of the lawyer and the layman.

Respectfully submitted,

CHARLES M. DUTCHER, *Chairman*
C. F. CLARK, *Vice Chairman*
CLYDE H. DOOLITTLE, *Secretary*
ED. M. SMITH
E. P. HARRISON
Code Supervising Committee.

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HISTORICAL CHRONOLOGICAL OUTLINE

OF

CODES AND SESSION LAWS

SHOWING

1. Territorial or other governmental jurisdictions over the territory which is now the state of Iowa.
2. Assemblies and session laws—territorial and state.
3. Official and private codes with code revision publications.

(Date shown at each Iowa territorial and state session is starting date; G.A. means General Assembly; Stat. L. means United States Statutes at Large; vol. means volume.)

LOUISIANA PURCHASE—Treaty of Paris, April 30, 1803.

LOUISIANA DISTRICT—U. S. Authority established October 31, 1803 (2 Stat. L. 245).

INDIANA TERRITORY—Louisiana District attached thereto for governmental purposes from October 1, 1804 (2 Stat. L. 287, 289), to July 4, 1805 (2 Stat. L. 331). Capital at Saint Vincennes (now Vincennes, Indiana).

STATUTES APPLICABLE:

Laws Adopted by the Governor *(William Henry Harrison)* **and the Judges of the Territory.** (1 vol., reprint of 1886) passed at the following sessions:
1. January 12, 1801
2. January 30, 1802
3. February 16, 1802
4. October 1, 1804 (Republished with laws governing Missouri Territory, see Missouri Territory below).

LOUISIANA TERRITORY from July 4, 1805 (2 Stat. L. 331), to December 7, 1812 (2 Stat. L. 743).

STATUTES APPLICABLE:

Laws Passed by the Governor and Judges Assembled in Legislature October 1810 (1 vol.). Capital at St. Louis. This territory renamed Missouri Territory, December 7, 1812.

MISSOURI TERRITORY from December 7, 1812 (2 Stat. L. 743), to August 10, 1821 (Proclamation of James Monroe in "Messages and Papers of the Presidents", vol. II, page 97). Capital at St. Louis.

STATUTES APPLICABLE:

Laws of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the year 1824 (1 vol. reprint). Covers period from October 1, 1804, to August 10, 1821

Digest of the Laws of Missouri Territory to 1818 with Spanish Land Grant Regulations.

UNDIVIDED U. S. TERRITORY from August 10, 1821, to June 28, 1834 (4 Stat. L. 701). This was the part of Missouri Territory remaining after the state of Missouri, containing the seat of the government of the territory, was admitted to the Union. This remaining territory had no local constitutional status nor capital.

MICHIGAN TERRITORY from June 28, 1834 (4 Stat. L. 701) to July 4, 1836 (5 Stat. L. 10). Capital at Detroit.

STATUTES APPLICABLE:

Ordinance for Government of the Northwest Territory, July 13, 1787

Laws of the Territory of Michigan, 1827 (1 vol.)

Laws of Legislative Boards, 1821–1823 (1 vol.)

Acts of Legislative Councils—First to Sixth sessions and Sixth special session —1824 to 1835 (several volumes).

WISCONSIN TERRITORY from July 4, 1836 (6 Stat. L. 10), to July 4, 1838 (5 Stat. L. 235). Capital at Belmont until March 4, 1837; then at Madison, but legislative sessions held at Burlington (now Iowa) until June 23, 1838, awaiting completion of buildings at Madison.

STATUTES APPLICABLE:

Laws of Wisconsin Territory, 1836–1838, first session starting October 25, 1836; second session starting November 6, 1837; special session held at Burlington (now Iowa) from June 11, 1838, to June 23, 1838. Act of Congress creating the Territory of Iowa approved June 12, 1838, effective July 4, 1838.

IOWA TERRITORY from July 4, 1838 (5 Stat. L. 235), to December 28, 1846 (9 Stat. L. 117). Capital at Burlington until 1841, and Iowa City until February 1, 1857, when finally located at Des Moines.

STATUTES APPLICABLE:

Statute Laws of Iowa Territory, 1838–1839. November 12, 1838, enacted wholly at first session—commonly called "Old Blue Book"

Territorial Session Laws—1839–1840, November 4, 1839
Territorial Session Laws, extra session—1840, July 6, 1840
Territorial Session Laws—1840–1841, November 2, 1840
Territorial Session Laws—1841–1842, December 6, 1841
Territorial Session Laws—1842–1843, December 5, 1842
Revised Statutes of Iowa Territory, 1843 (compilation, commonly called "Blue Book")
Territorial Session Laws—1843–1844, December 4, 1843
Territorial Session Laws, extra session—1844, June 17, 1844
Territorial Session Laws—1845, May 5, 1845
Territorial Session Laws—1845–1846, December 1, 1845.

STATE OF IOWA (Territorial Sessions end—State Sessions begin).
1 G.A. November 30, 1846 (Ch. 78, §5 made Territorial Laws applicable to the state of Iowa. Iowa became a state December 28, 1846)
1 G.A. January 3, 1848, extra session
2 G.A. December 3, 1848
3 G.A. December 3, 1850
Code, 1851 (enacted) effective July 1, 1851. See 3 G.A., Ch. 98, §5
4 G.A. December 6, 1852
5 G.A. December 4, 1854
5 G.A. July 2, 1856, extra session
6 G.A. December 1, 1856
Constitutional Debates (2 vols.) 1857
Journal of Convention (1 vol.) 1857
7 G.A. January 4, 1858
Report of Code Commission on Civil Practice, 1859 (1 vol.)
8 G.A. January 9, 1860
Revision of 1860 (compiled, except part III Civil Practice and part IV Criminal Practice, which were enacted July 4, 1860). Acts do not appear in session laws
8 G.A. May 15, 1861, extra session
9 G.A. January 13, 1862
9 G.A. September 3, 1862, extra session
10 G.A. January 11, 1864
11 G.A. January 8, 1866
12 G.A. January 13, 1868
13 G.A. January 10, 1870
Templin's Compendium of Repeals and Amendments, 1871 (a private publication)
Proposed revision, 1872 (2 vols.) as reported to 14th G.A.
Code Commission's Report, 1872 (1 vol.)
14 G.A. January 8, 1872
Report of Code Commissioners [with proposed revision] 1873 (1 vol.) as reported to 14th Adj. G.A.
14 G.A. January 15, 1873, adjourned session
Code, 1873 (enacted), effective September 1, 1873, see §49 thereof. Acts do not appear in session laws of adjourned session
15 G.A. January 12, 1874
Overton's Annotated Code of Civil Procedure for Iowa and Wisconsin, 1875 (a private publication)
16 G.A. January 10, 1876
17 G.A. January 14, 1878
Templin's Compendium of Repeals and Amendments, 1878 (a private publication)
Stacy's Code of Civil Procedure, 1878 (a private publication)
Davis' Criminal Code, 1879 (a private publication)
18 G.A. January 12, 1880
McClain's Annotated Statutes, 1880 (2 vols., a private publication)
Miller's Rev. and Anno. Code, 1880 (includes statutes to July 4, 1880, and annotations including vol. 51 Iowa—some editions in 1 vol.; other editions in 2 vols., a private publication)
19 G.A. January 9, 1882
Miller's Rev. and Anno. Code, 1883 (includes statutes to July 4, 1882, and annotations including vol. 59 Iowa, a private publication)
20 G.A. January 14, 1884
McClain's Supplement, 1882–1884 (a private publication)
McClain's Annotated Statutes, 1884 (1 vol., same as McClain's Statutes, 1880, 2 vols., with the supplement 1882–1884 bound therein)
Miller's Rev. and Anno. Code, 1884 (includes statutes to July 4, 1884, and annotations including vol. 61 Iowa, a private publication)
Miller's Annotated Code, 1886 (published in 1885, includes statutes to July 4, 1884, and annotations including vol. 64 Iowa—some editions in 1 vol.; other editions in 2 vols., a private publication)
21 G.A. January 11, 1886
22 G.A. January 9, 1888
McClain's Annotated Code, 1888 (some editions in 1 vol.; other editions in 2 vols., a private publication)
Miller's Rev. and Anno. Code, 1888 (includes statutes to July 4, 1888, and annotations including May term, 1888, a private publication)
23 G.A. January 13, 1890
Miller's Rev. and Anno. Code, 1888–1890 (same as edition of 1888 together with acts 23 G.A., and annotations including May term 1890—some editions in 1 vol.; other editions in 2 vols., a private publication)
24 G.A. January 11, 1892

McClain's Supplement 1888–1892 (a private publication)
25 G.A. January 8, 1894
26 G.A. January 13, 1896
Proposed revision, 1896 (commonly called "Black Code")
Code Commission's Report, 1896 (1 vol.)
Black Code substitute bills, 1897
26 G.A. January 19, 1897, extra session
Code, 1897 (enacted), effective October 1, 1897, see §50 thereof, [two editions]. Acts do not appear in session laws of extra session
27 G.A. January 10, 1898
28 G.A. January 8, 1900
29 G.A. January 13, 1902
Supplement of 1902 (compiled)
30 G.A. January 11, 1904
31 G.A. January 8, 1906
32 G.A. January 14, 1907
Supplement of 1907 (compiled—contained all of supplement of 1902)
32 G.A. August 31, 1908, extra session
33 G.A. January 11, 1909
34 G.A. January 9, 1911
35 G.A. January 13, 1913
Supplement of 1913 (compiled—contained all of supplements of 1902 and 1907)
36 G.A. January 11, 1915
Supplemental Supplement of 1915 (compiled)
37 G.A. January 8, 1917
38 G.A. January 13, 1919
Compiled Code of 1919 (included all law to date as determined by the Code Commission, with repealed and obsolete matter omitted; only a limited edition published as a preliminary step in Code Revision)
Code Commission's Report, 1919 (1 vol.)
39 G.A. January 10, 1921
Supplement to Compiled Code, 1921
Supplement to Code Commission's Report, 1922
Code Revision Bills, 1922 (as revised after 39 G.A.)
Briefs of Code Commission Bills, 1922
40 G.A. January 8, 1923
Supplement to Compiled Code, 1923
Code Revision Bills, 1923 (as revised after 40 G.A.)
Minutes of Code Supervising Committee, 1924 (original in Code Editor's office)
40 G.A. December 4, 1923, extra session
40 G.A. July 22, 1924, adjourned session
Code, 1924 (compiled, except for those chapters which were revised and enacted by the 40th Ex. G.A.). Only those acts which were effective on publication appear in session laws. The remaining Code Revision acts were effective on October 28, 1924
41 G.A. January 12, 1925
42 G.A. January 10, 1927
Code, 1927 (compiled)
42 G.A. March 5, 1928, extra session
43 G.A. January 14, 1929
44 G.A. January 12, 1931
Code, 1931 (compiled)
45 G.A. January 9, 1933
45 G.A. November 6, 1933, extra session
46 G.A. January 14, 1935
Code, 1935 (compiled)
46 G.A. December 21, 1936, extra session
47 G.A. January 11, 1937
48 G.A. January 9, 1939
Code, 1939 (compiled)

EDITORS' INTRODUCTION TO CODE, 1924

It is important for the users of this book to understand fully the nature of the volume. The legislature has designated it as the *Code of 1924*, but it is a somewhat different book than the *Code of 1897* or the *Code of 1873*.

NATURE OF THE CODE OF 1924

This volume, as stated in the preface of the supervising committee, is a *compilation* rather than a *code;* it is in fact an extensively amended *Code of 1897*, compiled in one volume and containing the following:

1. All the sections of the *Code of 1897*, the *Supplement of 1913*, and the *Supplemental Supplement of 1915*, of a *general* and *permanent* nature, which were still in force at the close of the extra session of the fortieth general assembly.
2. All the sections of the acts of the thirty-seventh, thirty-eighth, thirty-ninth, and fortieth (regular) general assemblies, of a *general* and *permanent* nature, which were still in force at the close of the extra session of the fortieth general assembly.
3. All the sections of the acts of the extra session of the fortieth general assembly (known as the code revision session) of a *general* and *permanent* nature.

The sections which comprise the *Code of 1924* were not, therefore, all enacted at one session of the legislature. Indeed some of the sections of this volume were enacted at the extra session of the twenty-sixth general assembly and some at every subsequent session of the legislature down to and including the extra session of the fortieth general assembly. The statutes, therefore, of which this volume is the prima facie evidence, are to be found in the original enrollments of all the sessions of the general assembly from the extra session of the twenty-sixth general assembly down to and including the extra session of the fortieth general assembly: they are not to be found merely in the original enrollments of the extra session of the fortieth general assembly.

The sections, however, which were enacted at the code revision session can be easily determined by examining the historical reference at the end of each section. Every section which has a citation in the reference like either one of the following was enacted at the extra session of the fortieth general assembly:

40 Ex. G. A., H. F. 2, § 1. (See section 4 of the code)
40 Ex. G. A., S. F. 9, § 1. (See section 139 of the code)
40 Ex. G. A., ch. 3, § 27. (See section 47 of the code)

The abbreviation "Ex." in the above citations stands for the *extra session;* "H. F." means *house file;* and "S. F." indicates *senate file.* The last citation differs from the first two in that the reference is to the session laws instead of to a house or senate file. In other words, this citation can be found in the published session laws of the extra session, while the first two citations can be found only in the original enrollments of the extra session on file in the office of the Secretary of State and are published for the first time in this volume.

WORK PREPARATORY TO CODE REVISION

Perhaps the true nature of the *Code of 1924* can be better comprehended by understanding the manner in which it was compiled. In this connection it is necessary to review briefly the work which was done prior to the convening of the code revision session of the legislature.

Chapter 50, acts of the thirty-eighth general assembly, created a Code Commission to perform the following duties:

1. Compile all the existing statutory law of the state of a *general* and *permanent* nature in one volume.
2. Rearrange, revise, and rewrite such portions of the above compilation with such modifications and additions as were deemed necessary in order to simplify, clarify, and reduce the body of the law into one harmonious whole.

The Code Commission discharged the above duties by preparing (1) the *Compiled Code of 1919*, which consisted of all the statutory law of a *general* and *permanent* nature reclassified and rearranged, and (2) the *Report of the Code Commission*, which contained 253 recommendations in the form of legislative bills.

Due to the delay in completing the code revision program it was necessary for both the thirty-ninth and fortieth general assemblies to provide for bringing the *Compiled Code* and the *Report of the Code Commission* down to date. This was done in the case of the *Compiled Code* by the issuance of a supplement in 1921 and a supplement in 1923. In the case of the *Report of the Code Commission* a number of revised and several new bills were prepared after the close of the thirty-ninth and the fortieth general assemblies and finally all the bills were reprinted with the explanatory notes of the drafters under each section.

This brief history has been necessary because, although the *Code of 1924* is technically an extensively amended *Code of 1897*, compiled in one volume, it is in fact the *Compiled Code* and the *Supplement of 1923*, plus the legislative changes made in those two volumes by the adoption of code revision bills presented to the legislature at the extra session of the fortieth general assembly.

About two-thirds of the sections in the *Compiled Code and the Supplement of 1923*—comprising about half of the matter in those volumes—were not affected by any act of the extra session. Hence, those sections appear in the *Code of 1924* in the same language in which they appeared in the *Compiled Code* and in the *Supplement*—amounting to about 7,875 of the 14,027 sections. The remaining portion of the *Code of 1924*—consisting of approximately 6,152 sections—was made up from the original enrollments of the extra session of the fortieth general assembly. Thus it is evident that if the nature of the present code is to be understood it is necessary at this point to describe briefly how the *Compiled Code* and the *Supplement of 1923* were made.

The material for these volumes was taken from seven official depositories: the *Code of 1897, the Supplement of 1913, the Supplemental Supplement of 1915*, and the session laws of the thirty-seventh, thirty-eighth, thirty-ninth, and fortieth (regular) general assemblies. The statute law gathered up from these several sources embraced approximately 15,000 sections.

Inasmuch as a considerable portion of this mass of legislation consisted of repealing and amendatory sections, a large number of them were culled out and eliminated by carrying out the legislative direction contained therein. Authorized changes were also made in the remaining sections. Thus, for example, where the old law required the executive council to audit claims against the state, the words "state board of audit" were substituted; "state normal school" was changed to "state teachers' college"; and where certain state educational institutions once managed by boards of trustees were later placed under the state board of education, the name of the new board was substituted.

This editorial work on nearly 15,000 sections of law, without changing their meaning or eliminating any portion unless expressly authorized, resulted in the survival of a total of 10,495 sections. Even in cases where two or more sections or even whole chapters, like those dealing with drainage, concerned the same subject, no matter whether certain provisions were redundant or cumulative or plainly contradictory, they were allowed to stand in the *Compiled Code* and the *Supplement* just as they appeared in the official depositories.

These volumes were intended to be stepping stones in the code revision program. No changes were made in the law, but the statutes were merely brought together in these volumes for convenience of reference by the legislature when considering proposed changes or the new wording of sections which were presented in the form of code revision bills.

Although no changes were made in the law in these volumes a new classification, however, was attempted. The *Code of 1897* consisted of four parts: Public Law, Private Law, Code of Civil Practice, and Code of Criminal Procedure; each was divided into titles; and these twenty-six titles were further subdivided into chapters. All legislation enacted by the general assembly since 1897 had been fitted into this arrangement.

A general survey of the law, however, seemed to demand a rearrangement. As a result the division of the code into four parts was dispensed with as having no special value; the twenty-six titles were broken up into thirty-four titles, and over three hundred new chapters were introduced. Twenty-one of the old title headings were slightly altered, and of the five remaining, title III was broken up into new ones covering "Courts of Record of Original Jurisdiction" and "Supreme Court", and titles XIX, XX, XXIII, and XXVI were reduced to the status of chapters under other titles. On the other hand eleven subjects formerly appearing as chapters were raised to the prominence of titles.

It was this new arrangement of the law in the *Compiled Code* and the *Supplement* which the legislature had before it when it convened in extra session and out of which it was to build a new code. In addition to this compilation it also had presented to it over 200 code revision bills which had been drawn

with reference to the sectionizing, chapterizing, and classification of the *Compiled Code* and the *Supplement.*

Most of these bills, with a few modifications here and there, were enacted by the legislature and under the constitution become effective ninety days after the final adjournment of the special session, with the exception of a few which were put into operation by publication.

PREPARATION OF THE CODE OF 1924

When the editors began the task of preparing the *Code of 1924* for publication they had the following materials with which to work:

1. Those sections of the *Compiled Code* and the *Supplement* which had not been affected by any code revision bill—consisting of approximately two-thirds of the sections in those volumes and approximately one-half the material.

2. Those sections of the acts of the extra session of the fortieth general assembly which were of a *general* and *permanent* nature.

Thus a somewhat different task was presented than at any prior code revision in this state. It was necessary for the editors to *fit these two classes of material together* so as to leave the whole body of the law in as logical and orderly an arrangement as possible.

In this work the new arrangement adopted in the *Compiled Code* and the *Supplement* was used, although it was deemed advisable to classify the law under thirty-six titles and six hundred sixty chapters as compared with thirty-four titles and six hundred nineteen chapters used in the *Compiled Code* and the *Supplement.*

This arrangement of the new code is very important to the lawyer. Before any attempt is made to use this volume extensively a careful study should be made of the analysis of the code by titles and chapters which appears at the beginning of the volume. In this way the reader can fix in his mind the general location of subjects. For example, the last eight titles of the new code are devoted to the courts and their procedure—formerly these provisions were scattered throughout the code.

The compilation of the new code was accomplished by first cutting and pasting the sections of the *Compiled Code* and the *Supplement* which were to be used upon large size sheets of stiff paper—one section to a sheet. Copies were then made of the original enrollments of the special session of the fortieth general assembly and each section to be used was in a similar manner mounted upon one of these sheets. The sheets used were perforated on the left-hand side so that they could be laced together and tied into strong binders for future handling and safekeeping. When the code was finally compiled in this ponderous form it comprised 13,253 pages, divided into 49 volumes—each volume having the appearance of a large scrap book.

After the material for the new code was assembled in this form it was necessary to classify, arrange, and edit it, so that the titles, chapters, and sections could be numbered consecutively. In doing this the editors were authorized by the legislature:

"1. To correct therein all misspelled words in the original enrollments.

2. To correct all manifest grammatical and clerical errors including punctuation but without changing the meaning.

3. To transpose sections or to divide sections so as to give to distinct subject matters a section number but without changing the meaning."

In parts of the code where there was practically no code revision the power to divide sections was used quite extensively. Indeed, when the *Compiled Code* and the *Supplement* were edited a large number of sections were divided, especially in the titles on "Criminal Law" and "Criminal Procedure". This same policy was followed in editing the *Code of 1924.* As a matter of fact the idea of short sections was embodied in the code revision bills and is one of the outstanding features of the new code.

In editing the material for the new code, in addition to the above work, it was necessary to read each section to see if it contained a cross reference. There are over 4,500 sections in the code which are referred to specifically in other sections. In every one of these instances it was necessary to convert the old compiled code or supplement number or the section number of the legislative enactment of the extra session, as the case might be, into the proper section number of the new code. This process alone consumed weeks of careful and tedious work and was greatly complicated by the fact that all of the sections of the new code were not enacted by the same legislature nor with regard to each other: they represent an accumulation of legislative enactments covering

a period of twenty-seven years. It was found that in many instances sections which were referred to in other sections had been changed without any regard to the sections in which the cross references appeared. In these cases it was necessary to determine the new reference by comparing the subject matter of the old and the new sections—a merely mechanical method of converting the old numbers into those of the new code could not be relied upon.

Moreover, each section of the new code had to be provided with a historical reference. In case of those sections taken from the *Compiled Code* and the *Supplement* the same historical reference was used as appeared under the section in those two volumes, although a number of errors were corrected. But in case of the sections enacted by the code revision session or which were divided in the course of the editorial work it was necessary to prepare a new historical reference for each one of these sections. In those portions of the code in which the codification work made an entirely new arrangement of the law or severely resectionized it, this task proved to be a very difficult one.

Furthermore, each section had to be read to see if the catchwords formerly appearing on the section were correct. In many instances new catchwords were provided and a large number of corrections were made throughout the volume. After this process was completed a chapter analysis was inserted at the head of each chapter. This analysis was made by listing the section number and catchwords for each section in the chapter.

In order to carry out the legislative program of having the new code take effect in October, it was necessary for the editors to use a large corps of workers. Indeed, the amount of work entailed in the orderly and logical grouping of title contents preparatory to the renumbering of titles, chapters, and sections, the preparation and verification of historical references, the discovery and conversion of cross references, together with the general editorial work incident to the publication of 14,027 sections of law, meant that the editorial staff had to work at top speed from April until September, much more rapidly at times than the editors desired, but the legislature had fixed the time limit, and the work had to be done accordingly.

The accuracy of the historical references and the cross references, and whatever excellence the work may have in general, are due in a large degree to the patience and tireless efforts of the workers in the office of the Code Editor.

The courteous treatment and helpful suggestions received from the Code Supervising Committee, which had general supervision of the work, are gratefully acknowledged.

U. G. WHITNEY
O. K. PATTON

OFFICE OF THE CODE EDITOR
STATE HOUSE, DES MOINES, IOWA
SEPTEMBER, 1924

EDITOR'S INTRODUCTION TO CODE, 1939

Contents. The Code of 1939 contains all the general statutes up to and including the acts of the forty-eighth general assembly (April, 1939). Phrased otherwise, the Code of 1939 is the Code of 1935, (1) with all repealed parts thereof omitted, and (2) with all amendments and new subject matter enacted by the forty-sixth extra, forty-seventh, and forty-eighth general assemblies added.

Preparation in general. In preparing this volume the plan of editing previous codes has been followed except as to some of the section numbers, namely those sections bearing letter-numbers, and the new sections. Under the letter-number system heretofore used on new sections inserted in the code, two more letter-numbers would be required for the sections newly enacted by the forty-seventh and forty-eighth general assemblies, thus adding two more letters to search for when already the letter-numbered sections were in some places undesirably, though unavoidably, arranged so that the numbers were not always in alphabetical sequence. For instance, 9283-g3 came ahead of 9283-b1 in the Code of 1935. This seemingly has caused inconvenience. Consequently, the decimal system of numbering, now being used in many recent codes, has been used for these and for the new sections. Only the letter-numbered sections and those sections transferred through reorganization or otherwise appear with decimal numbers.

A few examples illustrating the operation of the decimal system may be pertinent. That group of sections numbered 1541-a1 to 1541-a6 in the Code of 1935 became numbers 1541.1 to 1541.6 in the Code of 1939. Another group of sections numbered 1921-f1 to 1921-f129, Code of 1935, with sections 1921-g1 to 1921-g6 interspersed among them, being a group of more than one hundred sections, necessitated starting the decimal numbers with 1921.001 in order that the last section be given number 1921.133 in the Code of 1939. The whole numbers are undisturbed and section number 1922 follows these decimal numbers. Therefore a numerical sequence can be maintained in numbering sections by the use of the decimal system.

In drafting legislative bills the decimal numbers would be written as "One thousand five hundred forty-one and one-tenth (1541.1)", or "Five thousand and nine hundredths (5000.09)", or "One thousand nine hundred twenty-one and one hundred thirty-three thousandths (1921.133)"—the "and" being used where the decimal appears.

While the perfect system has perhaps not yet been devised for inserting new sections into a code having its sections numbered in fixed numerical sequence, the flexibility of the decimal system and its advantage in maintaining a sequential arrangement of numbers are circumstances which preponderate strongly in favor of its use. Nevertheless, as long as new laws are passed which must be inserted in the code, this problem of numbering will remain, but it is anticipated that the decimal numbering system will aid in their convenient arrangement.

List of codes and session laws. Following the ANALYSIS OF THE CODE BY TITLES AND CHAPTERS is the HISTORICAL CHRONOLOGICAL OUTLINE OF CODES AND SESSION LAWS which has been included for convenience in ascertaining what statutes, codes and session laws governing Iowa have heretofore been published.

Constitutionality sections. To save space for more needed material, a number of usual and formal "constitutionality" sections have been replaced with notes indicating that such provisions do exist—the thought being that if the constitutionality were challenged, the session laws or the act itself would be examined, and that such a note indicating the existence of a constitutionality clause would suffice in the code.

Repealed chapters and sections. Repealed chapters and sections are indicated as in the Code of 1935. Where sections have been repealed, the catchwords have been dropped in order to save space in the belief that the catchwords to repealed sections have no real value.

Historical references. The plan of historical references as outlined in the introduction to the Code of 1931 has been continued in the Code of 1939. However, a mere inspection of the historical references under a section in any

one code will not give the entire historical development, because under a practice previously adopted, *the references to the session laws* have been carried *only* in that edition of the code wherein those laws were first codified. Session law references, therefore, in any one code will ordinarily refer only to sessions of the legislature held between the publication of that code and the last preceding code. An exception appears in this code under section 482.01. A 39th G. A. reference is found there because this law was originally omitted from the Code of 1924 as being a temporary law. This section now appears in the code for the first time because subsequent legislation has apparently dealt with it as general and permanent law. Thus its first appearance in the code carries the earlier session law reference. In subsequent editions of the code it has been the practice to omit those session law references which have once appeared in the code. To find all such session law references since the adoption of the present code system, it is necessary to check the section in each code back to the Code of 1924.

Divided sections. Sections of former codes and of acts of the general assemblies which have been divided by the Code Editor have been marked with a note following that portion of the former section which appears first in the code. A glance at the historical references on the succeeding sections will show how many were contained in one section in a former code. However, in many instances, two or more sections which appear from their historical references to have been in one section in the 1897 code, or some other previous code, have been divided by legislative act rather than editorially. Those sections divided by the legislature, as distinguished from those divided editorially, can be verified by following back the historical references as explained above. It will appear from the session law historical references in the Code of 1924 that many of the divided sections originated in the code revision session of the fortieth general assembly in extra session. These code revision acts were not printed in a separate volume of session laws.

Tables. Quite frequently inquiries are received which are readily answered by referring to the tables of corresponding sections which immediately precede the detailed index. The tables cover the transition from the Code of 1935 to the Code of 1939, including the acts of the intervening legislatures. Earlier tables appear in the earlier codes. Attention was called to these tables in the introduction to the Code of 1927. They appear to have escaped the attention of many users of the code. A desire for the inclusion of the mortality tables in the code has been indicated by the bar, so the American experience tables of mortality have been added to the other tables.

Detailed index. This index has been revised and amplified as explained in the prefatory note immediately preceding it.

Skeleton index. The skeleton index on colored paper, following the detailed index, has been retained as an aid in quickly locating *general* subject matters.

Folio lines. Since the code is divided into titles, the proper title number has been added to the general information appearing in the heavy black type at the top of each page.

Eye-conditioned paper. The paper used in the code is termed by paper manufacturers as "eye conditioned" because it has been specially prepared to reduce the glare which occurs from paper under certain lighting conditions, and thus reduce eyestrain. The relief of eyestrain to any small degree is always worthy of consideration.

Errors discovered. The system under which the code is now being handled contemplates an early discovery and correction of all errors, contradictions, and imperfections therein. The members of the great bar of Iowa can render valuable assistance in the work. Lawyers and judges, and all users of the code in the broad and varied application of the statutes, are constantly finding imperfections which have escaped the attention of others. It will be of great value to the state if these observations are reported to the Code Editor, in order that corrective legislative action may be suggested.

RICHARD REICHMANN,
Code Editor

OFFICE OF THE CODE EDITOR
STATE HOUSE, DES MOINES, IOWA
OCTOBER, 1939

ABBREVIATIONS

C51	Code of 1851
R60	Revision of 1860
C73	Code of 1873
C97	Code of 1897
S13	Supplement 1913
SS15	Supplemental Supplement 1915
C24	Code of 1924
C27	Code of 1927
C31	Code of 1931
C35	Code of 1935
GA	General Assembly
§ or Sec.	Section
Ch	Chapter
Et seq.	And following
HF	House File
SF	Senate File
Ex.	Extra Session

PUBLICATION OF THE CODE, 1924

[*Part of chapter 3, Acts of the Fortieth General Assembly, Special Session.*]

1. Style of code.
2. Editorial work.
3. Present code.
4. Code supervising committee.

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

SECTION 1. **Style of code.** The code shall be prepared and published substantially in the following form and style:

1. The printing of the text shall be in double columns from type forms thirty-seven (37) picas wide by fifty-four (54) picas high and in nine (9) point type solid and with spacing of approximately six (6) points between each section.

2. The chapters shall be numbered consecutively (commencing with number one (1)) and without regard to titles.

3. Each section shall be indicated by a number printed in bold face type.

4. Each section shall have appropriate catchwords printed in bold face type contrasting with the text and followed immediately by the first word of the section.

5. Proper historical references shall immediately follow the last word of each section.

6. The code provided for herein shall include:

a. An analysis of the code by titles and chapters.

b. The declaration of independence.

c. Articles of confederation.

d. The constitution of the United States.

e. Laws of the United States relating to citizenship, naturalization, and the authentication of records.

f. The constitution of Iowa.

g. The act admitting Iowa into the union as a state.

h. Chapter analysis at the head of each chapter.

i. All of the statutes of Iowa of a general and permanent nature.

j. The rules of the supreme court.

k. An index covering the constitution and statutes of the state of Iowa and the rules of the supreme court.

7. The code editor shall prepare and there shall be published such tables of corresponding sections of prior codes, supplements thereto, and session laws as may be determined by the code supervising committee. The committee shall publish the same in a separate volume, free distribution and sale of which shall be made the same as copies of the code.

8. The code shall be printed upon a good quality of paper and bound in good grade of buckram to specifications prepared by the state printing board and approved by the code supervising committee.

SECTION 2. **Editorial work.** The code editor in preparing the copy for an edition of the code shall have power:

1. To correct therein all misspelled words in the original enrollments.

2. To correct all manifest grammatical and clerical errors including punctuation but without changing the meaning.

3. To transpose sections or to divide sections so as to give to distinct subject matters a section number but without changing the meaning.

SECTION 3. **Present code.** The editor of the code shall, with all due diligence, proceed with the preparation of the code and the printing board shall proceed with like diligence and cause said code to be issued at the earliest possible time.

SECTION 4. **Code supervising committee.** Before the adjournment of the extra session of the fortieth general assembly, the president of the Senate shall appoint two members of the Senate and the speaker of the House shall appoint three members of the House, who shall constitute a code supervising committee, which committee shall have general supervision and oversight of the work of editing the code and the work of the code editor in preparing the code for publication and of the printing and binding thereof. The code supervising committee shall meet with the code editor at his office in the statehouse at such times as, in their judgment, may be necessary to properly supervise the work of the code editor, and to aid the code editor in the proper and expeditious work of preparing and publishing the code in compliance with the provisions of this act. The members of the code supervising committee shall be paid their actual and necessary expenses incurred in the performance of their duties as provided for herein.

This act took effect by publication April 17, 1924.

THE DECLARATION OF INDEPENDENCE

IN CONGRESS, JULY 4, 1776.

[*Literal reprint of the declaration of independence as it appears in the Revised Statutes of the United States, 1878.*]

The unanimous Declaration of the thirteen united States of America.

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from

Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government:

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.

New Hampshire.—JOSIAH BARTLETT, WM. WHIPPLE, MATTHEW THORNTON.

Massachusetts Bay.—SAML. ADAMS, JOHN ADAMS, ROBT. TREAT PAINE, ELBRIDGE GERRY.

Rhode Island.—STEP. HOPKINS, WILLIAM ELLERY.

Connecticut.—ROGER SHERMAN, SAM'EL HUNTINGTON, WM. WILLIAMS, OLIVER WOLCOTT.

New York.—WM. FLOYD, PHIL. LIVINGSTON, FRANS. LEWIS, LEWIS MORRIS.

New Jersey.—RICHD. STOCKTON, JNO. WITHERSPOON, FRAS. HOPKINSON, JOHN HART, ABRA. CLARK.

Pennsylvania.—ROBT. MORRIS, BENJAMIN RUSH, BENJA. FRANKLIN, JOHN MORTON, GEO. CLYMER, JAS. SMITH, GEO. TAYLOR, JAMES WILSON, GEO. ROSS.

Delaware.—CAESAR RODNEY, GEO. READ, THO. M'KEAN.

Maryland.—SAMUEL CHASE, WM. PACA, THOS. STONE, CHARLES CARROLL of Carrollton.

Virginia.—GEORGE WYTHE, RICHARD HENRY LEE, TH. JEFFERSON, BENJA. HARRISON, THOS. NELSON, JR., FRANCIS LIGHTFOOT LEE, CARTER BRAXTON.

North Carolina.—WM. HOOPER, JOSEPH HEWES, JOHN PENN.

South Carolina.—EDWARD RUTLEDGE, THOS. HEYWARD, JUNR., THOMAS LYNCH, JUNR., ARTHUR MIDDLETON.

Georgia.—BUTTON GWINNETT, LYMAN HALL, GEO. WALTON.

ARTICLES OF CONFEDERATION

[*Adopted by the Congress of the United States November 15, 1777, and submitted for ratification to the several states. Ratification consummated and proclaimed March 1, 1781.*]

PREAMBLE.

ARTICLE I. Style of confederacy.

ARTICLE II. Each state retains all powers not expressly delegated to congress.

ARTICLE III. Obligations and purposes of the league of the states.

ARTICLE IV. Freedom of intercourse between the states—surrender of fugitives from justice—records, acts and judicial proceedings of courts to be received with full faith and credit by other states.

ARTICLE V. Congress—how organized and maintained—each state to have one vote—privileges of delegates.

ARTICLE VI. No state may send embassies or make treaties—persons holding office not to accept presents, emoluments or titles from foreign states—nor shall titles of nobility be granted—no two or more states to make treaties without consent of congress—no state duties to interfere with foreign treaties — restriction upon naval armaments and military forces—militia — arms and munitions — war powers limited and defined.

ARTICLE VII. Military appointments.

ARTICLE VIII. Equalization of war charges and expenses for the common defence—based upon the value of land and improvements thereon—taxes to be levied by states.

ARTICLE IX. Powers of congress—declaring peace and war—entering into treaties—captures and prizes—letters of marque and reprisal—courts for trial of piracies and felonies on high seas—appeals in cases of captures—differences between states—mode of choosing commissioners or judges—private right of soil claimed under two or more states—coining money—weights and measures—Indian affairs—post routes—army—navy—committee of the states—other committees—civil officers—president—public expenses—borrowing money—bills of credit—land and naval forces—quotas based on a census—states to raise and equip men at expense of United States—enumeration of measures requiring the assent of a majority of the states—adjournments of congress—journals—copies of proceedings to be furnished to states if desired.

ARTICLE X. Powers of the committee of the states.

ARTICLE XI. Canada allowed to join the Union—other colonies to require the assent of nine states.

ARTICLE XII. United States pledged for payment of bills of credit and borrowed moneys.

ARTICLE XIII. States bound by decisions of congress—union to be perpetual—changes in articles to be agreed to by every state—ratification and pledge.

[*Literal reprint of the articles of confederation as they appear in the Revised Statutes of the United States, 1878.*]

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventyseven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz.

"*Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.*

Article I. The stile of this confederacy shall be "The United States of America."

Article II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion,

sovereignty, trade, or any other pretence whatever.

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

Article V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Article VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such

manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States.—fixing the standard of weights and measures throughout the United States.—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated —establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—

appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secresy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

Article X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

Article XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents,

fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we re[s]pectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

On the part & behalf of the State of New Hampshire.

JOSIAH BARTLETT,
JOHN WENTWORTH, JUNR.. August 8th, 1778.

On the part and behalf of the State of Massachusetts Bay.

JOHN HANCOCK,
SAMUEL ADAMS,
ELDBRIDGE GERRY,
FRANCIS DANA,
JAMES LOVELL,
SAMUEL HOLTEN.

On the part and behalf of the State of Rhode Island and Providence Plantations.

WILLIAM ELLERY,
HENRY MARCHANT,
JOHN COLLINS.

On the part and behalf of the State of Connecticut.

ROGER SHERMAN,
SAMUEL HUNTINGTON,
OLIVER WOLCOTT,
TITUS HOSMER,
ANDREW ADAMS.

On the part and behalf of the State of New York.

JAS. DUANE,
FRA. LEWIS,
WM. DUER,
GOUV. MORRIS.

On the part and in behalf of the State of New Jersey, Novr. 26, 1778.

JNO. WITHERSPOON,
NATHL. SCUDDER.

On the part and behalf of the State of Pennsylvania.

ROBT. MORRIS,
DANIEL ROBERDEAU,
JONA. BAYARD SMITH,
WILLIAM CLINGAN,
JOSEPH REED, 22d July, 1778.

On the part & behalf of the State of Delaware.

THO. M'KEAN, Feby. 12, 1779,
JOHN DICKINSON, May 5th, 1779,
NICHOLAS VAN DYKE.

On the part and behalf of the State of Maryland.

JOHN HANSON, March 1, 1781,
DANIEL CARROLL, Mar. 1, 1781.

On the part and behalf of the State of Virginia.

RICHARD HENRY LEE,
JOHN BANISTER,
THOMAS ADAMS,
JNO. HARVIE,
FRANCIS LIGHTFOOT LEE.

On the part and behalf of the State of No. Carolina.

JOHN PENN, July 21st, 1778,
CORNS. HARNETT,
JNO. WILLIAMS.

On the part & behalf of the State of South Carolina.

HENRY LAURENS,
WILLIAM HENRY DRAYTON,
JNO. MATHEWS,
RICHD. HUTSON,
THOS. HEYWARD, JUNR.

On the part & behalf of the State of Georgia.

JNO. WALTON, 24th July, 1778,
EDWD. TELFAIR,
EDWD. LANGWORTHY.

CONSTITUTION OF THE UNITED STATES OF AMERICA

[Recommended by the convention of the states to congress on September 17, 1787, and by it submitted on September 28, 1787, to the states for ratification, which, by the concurrence of nine states, was consummated and proclaimed, and, on March 4, 1789, the government commenced operations under the new constitution.]

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[*Literal reprint of the constitution of the United States as it appears in Senate Document No. 96, Sixty-Seventh Congress, Second Session.*]

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief

Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quo-

rum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: —"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place

or Places as the Congress may by Law have directed.

SECTION. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Statutory provision, ch 45.1.

ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

Attest WILLIAM JACKSON Secretary — G° WASHINGTON— Presidt and deputy from Virginia

New Hampshire	JOHN LANGDON NICHOLAS GILMAN
Massachusetts	NATHANIEL GORHAM RUFUS KING
Connecticut	WM SAML JOHNSON ROGER SHERMAN
New York.....	ALEXANDER HAMILTON
New Jersey	WIL: LIVINGSTON DAVID BREARLEY. WM PATERSON. JONA: DAYTON
Pennsylvania	B FRANKLIN THOMAS MIFFLIN ROBT MORRIS GEO. CLYMER THOS FITZSIMONS JARED INGERSOLL JAMES WILSON GOUV MORRIS
Delaware	GEO: READ GUNNING BEDFORD jun JOHN DICKINSON RICHARD BASSETT JACO: BROOM
Maryland	JAMES MCHENRY DAN OF ST THOS JENIFER DANL CARROLL
Virginia	JOHN BLAIR— JAMES MADISON JR.
North Carolina	WM BLOUNT RICHD DOBBS SPAIGHT. HU WILLIAMSON
South Carolina	J. RUTLEDGE CHARLES COTESWORTH PINCKNEY CHARLES PINCKNEY PIERCE BUTLER.
Georgia	WILLIAM FEW ABR BALDWIN

In Convention Monday, September 17th 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia,

Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention.

G° WASHINGTON Presidt.

W. JACKSON Secretary.

AMENDMENTS TO THE CONSTITUTION.

AMENDMENT 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 2.

A well regulated Militia, being necessary to the security of a free State, the right of the

people to keep and bear Arms, shall not be infringed.

AMENDMENT 3.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT 4.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT 7.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT 8.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 9.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT 10.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The first ten amendments were proposed by congress to the legislatures of the several states on September 25, 1789, and were ratified by all of the states, except Connecticut, Georgia and Massachusetts, before the end of the year 1791, thereby becoming a part of the organic law, pursuant to the fifth article of the original constitution.

AMENDMENT 11.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The above amendment was submitted by congress to the legislatures of the several states on March 5, 1794, and was, in a message of the president to congress January 8, 1798, declared to have been duly ratified by the legislatures of three-fourths of the states.

AMENDMENT 12.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a ma-

jority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The above amendment was submitted by congress to the legislatures of the several states on December 12, 1803, in lieu of the original third paragraph of the first section of the second article, and was proclaimed by the secretary of state on September 25, 1804, to have been duly ratified.

AMENDMENT 13.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

The above amendment was submitted by congress to the legislatures of the several states on February 1, 1865, and was proclaimed by the secretary of state on December 18, 1865, to have been duly ratified.

AMENDMENT 14.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The above amendment was submitted by congress to the legislatures of the several states on June 16, 1866, and was proclaimed by the secretary of state on July 28, 1868, to have been duly ratified.

AMENDMENT 15.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

The above amendment was submitted by congress to the legislatures of the several states on February 27, 1869, and was proclaimed by the secretary of state on March 30, 1870, to have been duly ratified.

AMENDMENT 16.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The above amendment was submitted by congress to the legislatures of the several states on July 12, 1909, and was proclaimed by the secretary of state on February 25, 1913, to have been duly ratified.

AMENDMENT 17.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator

chosen before it becomes valid as part of the Constitution.

The above amendment was submitted by congress to the legislatures of the several states on May 16, 1912, and was proclaimed by the secretary of state on May 31, 1913, to have been duly ratified.

AMENDMENT 18.

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The above amendment was submitted by congress to the legislatures of the several states on December 17, 1917, and was proclaimed by the acting secretary of state on January 29, 1919, to have been duly ratified.

Repealed by amendment 21, December 5, 1933.

AMENDMENT 19.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

The above amendment was submitted by congress to the legislatures of the several states on June 5, 1919, and was proclaimed by the secretary of state on August 26, 1920, to have been duly ratified.

AMENDMENT 20.

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

The above amendment was submitted by congress to the legislatures of the several states on March 8, 1932, and was proclaimed by the secretary of state on February 6, 1933, to have been duly ratified.

AMENDMENT 21.

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The above amendment was submitted by congress to the several states on February 21, 1933, for ratification by convention, and was proclaimed by the acting secretary of state on December 5, 1933, to have been duly ratified.

CITIZENSHIP

GENERAL PROVISIONS

[*Reprinted from the Revised Statutes of the United States, 1878, as amended.*]

Revised to July 1, 1939.

SECTION 1992. All persons born in the United States and not subject to any foreign power, excluding Indians* not taxed, are declared to be citizens of the United States.

*Act of June 2, 1924, [43 Stat. L. 253] declared Indians born in the United States to be citizens.

SECTION 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

[Amended by act of May 24, 1934, 48 Stat. L. 797.]

SECTION 1994. Repealed, but see act of September 22, 1922, ch 411, §6, 42 Stat. L. 1021, *post*.

SECTION 1995. All persons born in the district of country formerly known as the territory of Oregon, and subject to the jurisdiction of the United States on the 18th May, 1872, are citizens in the same manner as if born elsewhere in the United States.

SECTION 1996. All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the president, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.

Subsequent statutes provide for the removal, upon certain conditions, of the disabilities imposed by section 1996. See acts of August 14, 1888, ch 890,§§1–3, 25 Stat. L. 442; March 2, 1889, ch 390,§§1–9. 25 Stat. L. 871; March 2, 1891, ch 498, 26 Stat. L. 824; July 27, 1892, ch 273, 27 Stat. L. 278; March 2, 1895, ch 181, 28 Stat. L. 814.

SECTION 1997. No soldier or sailor, however, who faithfully served according to his enlistment until the 19th day of April, 1865, and who, without proper authority or leave first obtained, quit his command or refused to serve after that date, shall be held to be a deserter from the army or navy; but this section shall be construed solely as a removal of any disability such soldier or sailor may have incurred, under the preceding section, by the loss of citizenship and of the right to hold office, in consequence of his desertion.

SECTION 1998. Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: *Provided,* that the provisions of this section and said section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: *And provided further,* that the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the president where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests: *And provided further,* that the provisions of section eleven hundred and eighteen of the Revised Statutes of the United States that no deserter from the military service of the United States shall be enlisted or mustered into the military service, and the provisions of section two of the act of congress approved August first, eighteen hundred and ninety-four, entitled "An act to regulate enlistments in the army of the United States," shall not be construed to preclude the reenlistment or muster into the army of any person who has deserted, or

may hereafter desert, from the military service of the United States in time of peace, or of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, whenever the reenlistment or muster into the military service of such person or soldier shall, in view of the good conduct of such person or soldier subsequent to such desertion or service, be authorized by the secretary of war. [Amended by act of August 22, 1912, ch 336,§1, 37 Stat. L. 356.]

SECTION 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic.

SECTION 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens.

SECTION 2001. Whenever it is made known to the president that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the president forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the president shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the president shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the president to congress.

CITIZENSHIP GRANTED TO CERTAIN INDIANS

[*Act of February 8, 1887, ch 119,§6, 24 Stat. L. 390, amended, March 3, 1901, ch 868, 31 Stat. L. 1447, and May 8, 1906, ch 2348, 34 Stat. L. 182.*]

Every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

[*Act of November 6, 1919, ch 95, 41 Stat. L. 350.*]

Every American Indian who served in the military or naval establishments of the United States during the war against the imperial German government, and who has received or who shall hereafter receive an honorable discharge, if not now a citizen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship with all the privileges pertaining thereto, without in any manner impairing or otherwise affecting the property rights, individual or tribal, of any such Indian or his interest in tribal or other Indian property.

[*Act of June 2, 1924, 43 Stat. L. 253.*]

All noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *provided,* that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

[*Act of May 7, 1934, 48 Stat. L. 667.*]

SECTION 1. The Indians of the Tsimshian Tribe, and those people known as Metlakahtlans, who emigrated from Metlakahtla, British Columbia, Canada, to Annette Island, in the Alexander Archipelago in Southeastern Alaska in the year 1887, and there established a colony known as Metlakahtla, Alaska, and any and all other British Columbia Indians who joined them there not later than January 1, 1900, and have since resided continuously therein, having been faithful and loyal to the Constitution, laws and the Government of the United States, are hereby declared to be citizens of the United States.

SEC. 2. The granting of citizenship to the said Indians shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakahtla Colony. And any reservations heretofore made by any act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alteration, or repeal by the Congress or the President, respectively.

EXPATRIATION OF CITIZENS

[*Act of March 2, 1907, ch 2534, 34 Stat. L. 1228.*]

SECTION 1. Repealed by act of June 4, 1920, ch 223,§5, 41 Stat. L. 751.

SECTION 2. Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the department of state may prescribe: *And provided also,* that no American citizen shall be allowed to expatriate himself when this country is at war.

SECTION 3. Repealed, but see act of September 22, 1922, ch 411,§7, 42 Stat. L. 1022, *post.*

SECTION 4. Repealed, but see act of September 22, 1922, ch 411,§6, 42 Stat. L. 1022, *post.*

SECTION 5. A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: *Provided,* that such naturalization or resumption shall take place during the minority of such child: *And provided further,* that the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States. [Amended by act of May 24, 1934, 48 Stat. L. 797.]

SECTION 6. All children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

SECTION 7. Duplicates of any evidence, registration, or other acts required by this act shall be filed with the department of state for record.

[*Act of May 24, 1934, 48 Stat. L. 797.*]

SEC. 3. A citizen of the United States may upon marriage to a foreigner make a formal renunciation of his or her United States citizenship before a court having jurisdiction over naturalization of aliens, but no citizen may make such renunciation in time of war, and if war shall be declared within one year after such renunciation then such renunciation shall be void.

CITIZENSHIP OF MARRIED WOMEN

[*Act of September 22, 1922, 42 Stat. L. 1021; amended by act of March 3, 1931, 46 Stat. L. 1511.*]

SEC. 3. (a) A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after this section, as amended, takes effect, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens.

(b) Any woman who before this section, as

amended, takes effect, has lost her United States citizenship by residence abroad after marriage to an alien or by marriage to an alien ineligible to citizenship may, if she has not acquired any other nationality by affirmative act, be naturalized in the manner prescribed in section 4 of this Act, as amended. Any woman who was a citizen of the United States at birth shall not be denied naturalization under section 4 on account of her race.

(c) No woman shall be entitled to naturalization under section 4 of this Act, as amended, if her United States citizenship originated solely by reason of her marriage to a citizen of the United States or by reason of the acquisition of United States citizenship by her husband.

Section 1994 of the Revised Statutes and section 4 of the Expatriation Act of 1907 were repealed by act of September 22, 1922, 42 Stat. L. 1021, 1022. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the Expatriation Act of 1907.

Section 3 of the Expatriation Act of 1907 was repealed by act of September 22, 1922, 42 Stat. L. 1021. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section. A woman who has resumed under such section citizenship lost by marriage shall, upon the passage of this Act, have for all purposes the same citizenship status as immediately preceding her marriage.

[*Act of June 25, 1936, 49 Stat. L. 1917.*]

That hereafter a woman, being a native-born citizen, who has or is believed to have lost her United States citizenship solely by reason of her marriage prior to September 22, 1922, to an alien, and whose marital status with such alien has or shall have terminated, shall be deemed to be a citizen of the United States to the same extent as though her marriage to said alien had taken place on or after September 22, 1922; *Provided however,* That no such woman shall have or claim any rights as a citizen of the United States until she shall have duly taken the oath of allegiance as prescribed in section 4 of the Act approved June 29, 1906 (34 Stat. 596; U.S.C., title 8, sec. 381), at any place within or under the jurisdiction of the United States before a court exercising naturalization jurisdiction thereunder or, outside of the jurisdiction of the United States, before a secretary of embassy or legation or a consular officer as prescribed in section 1750 of the Revised Statutes of the United States (U.S.C., title 22, sec. 131); and such officer before whom such oath of allegiance shall be taken shall make entry thereof in the records of his office or in the naturalization records of the court, as the case may be, and shall deliver to such person taking such oath, upon demand, a certified copy of the proceedings had, including a copy of the oath administered, under the seal of his office or of such court, at a cost not exceeding $1, which shall be evidence of the facts stated therein before any court of record or judicial tribunal and in any department of the United States.

[This chart is here inserted for convenience only and is no part of the citizenship statutes. While carefully prepared, nevertheless the statutes should be consulted.]

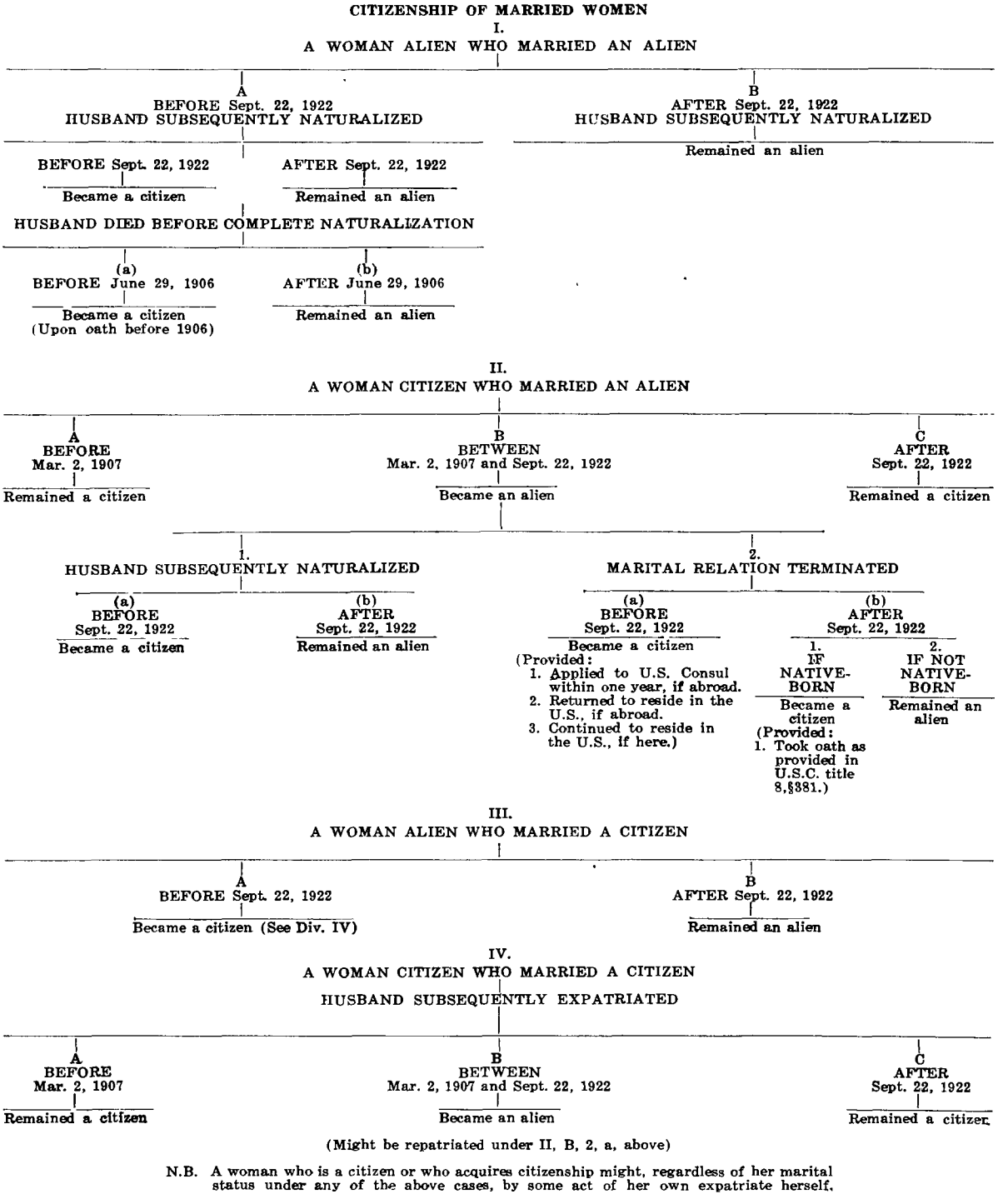

N.B. A woman who is a citizen or who acquires citizenship might, regardless of her marital status under any of the above cases, by some act of her own expatriate herself.

NATURALIZATION OF ALIENS

GENERAL PROVISIONS

[*Reprinted from the Revised Statutes of the United States, 1878.*]

REVISED AND WITH AMENDMENTS APPLIED UP TO JULY 1, 1939.

SECTION 2165. Repealed. See act of June 29, 1906, ch 3592,§26, 34 Stat. L. 603.

SECTION 2166. Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States.

The above section was repealed by act of May 9, 1918, ch 69, §2, 40 Stat. L. 542, but as to certain aliens who had served in the armies of the United States prior to January 1, 1900, it remains in full force and effect. The subject matter of this section is now covered by §4 of act of June 29, 1906, *post*.

SECTION 2167. Repealed. See act of June 29, 1906, ch 3592,§26, 34 Stat. L. 603.

SECTION 2168. Repealed. See act of June 29, 1906, ch 3592,§26, 34 Stat. L. 603.

SECTION 2169. The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.

See also act of June 24, 1935, on p. 37.

SECTION 2170. Repealed. See act of March 2, 1929, 45 Stat. L. 1514.

SECTION 2171. Repealed. See act of May 9, 1918, ch 69,§1, 40 Stat. L. 542; also, act of June 29, 1906, ch 3592,§4, subdivision eleven, *post*.

SECTION 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the revolutionary war, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed.

SECTION 2173. Repealed. See act of June 29, 1906, ch 3592,§26, 34 Stat. L. 603.

SECTION 2174. Repealed. See act of May 9, 1918, ch 69,§2, 40 Stat. L. 542.

ALASKANS

[*Treaty of March 30, 1867, 15 Stat. L. 542.*]

Article III. The inhabitants of the ceded territory, * * * with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

CANAL ZONE or the REPUBLIC OF PANAMA

[*Act of August 4, 1937, 50 Stat. L. 558.*]

Any person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States.

SEC. 2. Any person born in the Republic of Panama on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States employed by the Government of the United States or by the Panama Railroad Company, is declared to be a citizen of the United States.

CHINESE

[*Act of May 6, 1882, ch 126,§14, 22 Stat. L. 61.*]

Exception, act of June 24, 1935, on p. 37.

Hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

HAWAIIANS

[*Act of April 30, 1900, 31 Stat. L. 141.*]

SEC. 4. All persons who were citizens of the Republic of Hawaii on August 12th, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.

All citizens of the United States resident in the Hawaiian Islands who were resident there on or since August 12th, 1898, and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii.

RESIDENCE IN HAWAII

[*Act of April 30, 1900, ch 339, 31 Stat. L. 161, amended, act of May 27, 1910, ch 258,§9, 36 Stat. L. 448.*]

SECTION 100. For the purposes of naturalization under the laws of the United States residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands.

All records relating to naturalization, all declarations of intention to become citizens of the United States, and all certificates of naturalization filed, recorded, or issued prior to the taking effect of the naturalization act of June twenty-ninth, nineteen hundred and six, in or from any circuit court of the territory of Hawaii, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this act further validated or legalized.

[*Act of June 29, 1938, 52 Stat. L. 1249.*]

All certificates of naturalization granted by the United States District court for the District of Hawaii between January 1, 1919, and July 1, 1922, are hereby declared to be valid insofar as failure of the record to contain final order under the hand of the court is concerned, but shall not be by this Act further validated or legalized.

PUERTO RICANS

[*Act of March 2, 1917, 39 Stat. L. 953.*]

SEC. 5. All citizens of Puerto Rico, as defined by section seven of the act of April 12, 1900, "temporarily to provide revenues and a civil government for Puerto Rico, and for other purposes," and all natives of Puerto Rico, who were temporarily absent from that island on April 11, 1899, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States: *Provided,* That any person hereinbefore described may retain his present political status by making a declaration, under oath, of his decision to do so within six months of the taking effect of this act * * *.

[*Act of June 27, 1934, 48 Stat. L. 1245.*]

All persons born in Puerto Rico on or after April 11, 1899, (whether before or after the effective date of this Act) and not citizens, subjects, or nationals of any foreign power, are hereby declared to be citizens of the United States: *Provided,* this Act shall not be construed as depriving any person, native of Puerto Rico, of his or her American citizenship heretofore otherwise lawfully acquired by such person; or to extend such citizenship to persons who shall have renounced or lost it under the treaties and/or laws of the United States or who are now residing permanently abroad and are citizens or subjects of a foreign country: *And provided further,* any woman, native of Puerto Rico and permanently residing therein, who, prior to March 2, 1917, had lost her American nationality by reason of her marriage to an alien eligible to citizenship, or by reason of the loss of the United States citizenship by her husband, may be naturalized under the provisions of section 4 of the Act of September 22, 1922, as amended.

[*Act of May 16, 1938, 52 Stat. L. 377.*]

SEC. 5c. Any person of good character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and born in Puerto Rico on or after April 11, 1899, who has continued to reside within the jurisdiction of the United States, whose father elected on or before April 11, 1900, to preserve his allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain entered into on April 11, 1899, and who, by reason of misinformation regarding his or her own citizenship status failed within the time limits prescribed by section 5 or section 5a hereof to exercise the privilege of establishing United States citizenship and has heretofore erroneously but in good faith exercised the rights and privileges and performed the duties of a citizen of the United States, and has not personally sworn allegiance to any foreign government or ruler upon or after attainment of majority, may make a sworn declaration of allegiance to the United States before any United States district court. Such declaration shall set forth facts concerning his or her birth in Puerto Rico, good character, attachment to the principles of the Constitution of the United States, and being well disposed to the good order and happiness of the United States, residence within the jurisdiction of the United States, and misinformation regarding United States citizenship status, and shall be accompanied by proof thereof satisfactory to the court. After making such declaration and submitting such proofs, such person shall be admitted to take the oath of allegiance before the court, and thereupon shall be considered a citizen of the United States.

VIRGIN ISLANDERS

[*Act of February 25, 1927, 44 Stat. L. 1234.*]

The following persons and their children born subsequent to January 17, 1917, are hereby declared to be citizens of the United States:

(a) All former Danish citizens who, on January 17, 1917, resided in the Virgin Islands of the United States, and are now residing in those Islands or in the United States or Porto Rico, and who did not make the declaration required to preserve their Danish citizenship by article 6 of the treaty entered into on August 4, 1916, between the United States and Denmark, or who, having made such a declaration, have heretofore renounced or may hereafter renounce it by a declaration before a court of record;

(b) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in those islands, and are now residing in those islands or in the United States or Porto Rico, and who are not citizens or subjects of any foreign country; and

(c) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in the United States, and are now residing in the Virgin Islands of the United States, and who are not citizens or subjects of any foreign country.

SEC. 2. The following persons, if not ineligible to citizenship, may, upon petition filed within one year after the effective date of this Act, and upon full and complete compliance with all other provisions of the naturalization laws, be naturalized without making a declaration of intention:

(a) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in those islands or in the United States, and who are now residing in those islands or in the United States or Porto Rico, and who are citizens or subjects of any foreign country;

(b) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in the United States, and are now residing in the United States or Porto Rico, and who are not citizens or subjects of any foreign country; and

(c) Except as otherwise provided in this section or in section one, all persons who, on January 17, 1917, resided in the Virgin Islands of the United States, and are now residing in those islands, and who are not citizens of the United States; and

(d) All natives of the Virgin Islands of the United States who are, on the date of enactment of this subdivision, residing in continental United States, the Virgin Islands of the United States, Porto Rico, the Canal Zone, or any other insular possession or territory of the

United States, who are not citizens or subjects of any foreign country, regardless of their place of residence on January 17, 1917. [Amended by act of June 28, 1932, 47 Stat. L. 336.]

SEC. 3. All persons born in the Virgin Islands of the United States on or after January 17, 1917 (whether before or after the effective date of this Act), and subject to the jurisdiction of the United States, are hereby declared to be citizens of the United States.

BUREAU OF NATURALIZATION

[Act of June 29, 1906, ch 3592, 34 Stat. L. 596–607, amended, acts of March 4, 1909, ch 321,§§74–81, 35 Stat. L. 1102; June 25, 1910, ch 401,§§1, 3, 36 Stat. L. 829; March 4, 1913, ch 141, 37 Stat. L. 736; May 9, 1918, ch 69,§§1–3, 40 Stat. L. 542; May 25, 1926, 44 Stat. L. 652; June 8, 1926, 44 Stat. L. 709; March 2, 1929, 45 Stat. L. 1512–1516; March 4, 1929, 45 Stat. L. 1545, 1546; June 21, 1930, 46 Stat. L. 791; March 3, 1931, 46 Stat. L. 1511; May 25, 1932, 47 Stat. L. 165–167; April 19, 1934, 48 Stat. L. 597, 598; May 24, 1934, 48 Stat. L. 797, 798.]

The bureau of immigration and naturalization is hereby divided into two bureaus to be known hereafter as the bureau of immigration and the bureau of naturalization. (U. S. C. t.8, sec. 353.)

The bureau of naturalization under the direction and control of the secretary of labor, shall have charge of all matters concerning the naturalization of aliens. It shall be the duty of the said bureau [of immigration] to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof. [Amended by act of March 4, 1913.]

The registry of aliens at ports of entry may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the commissioner general of immigration, in accordance with regulations prescribed by the commissioner general of immigration with the approval of the secretary of labor, that he—(1) entered the United States prior to June 3, 1921; (2) has resided in the United States continuously since such entry; (3) is a person of good moral character; and (4) is not subject to deportation.

For the purposes of the immigration laws and the naturalization laws an alien, in respect of whom a record of registry has been made as authorized shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of his entry.

Upon the making of a record of registry as authorized the certificate of arrival required by the fourth paragraph of the second subdivision of section 4 may be issued upon application to the commissioner of naturalization, in accordance with regulations prescribed by the commissioner of naturalization, with the approval of the secretary of labor. [Act of March 2, 1929, 45 Stat. L. 1513.]

SECTION 3. Exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

United States circuit* and district courts now existing, or which may hereafter be established by congress in any state, United States district courts for the territories of Arizona*, New Mexico*, Oklahoma*, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory*; also all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

The naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts.

The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the bureau of * * * * naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said bureau.

*Discontinued by acts of Congress.

SECTION 4. An alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to reside permanently therein, and that he will, before being admitted to citizenship, renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty

of which the alien may be at the time of admission a citizen or subject. Such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien. No declaration of intention or petition for naturalization shall be made outside of the office of the clerk of court. [Amended by act of March 4, 1929, 45 Stat. L. 1545.]

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: *Provided,* that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen, or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

As to each period of residence at any place in the county where the petitioner resides at the time of filing his petition, there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such period has been a person of good moral character. [Amended by act of March 2, 1929, 45 Stat. L. 1513.]

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the department of (commerce and) labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Fourth. No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications required by this subdivision during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by this Act to be included in the petition. If the petitioner has resided in two or more places in such county and for this reason two witnesses can not be procured to testify as to all such residence, it may be proved by the oral testimony of two such witnesses for each such place of residence, in addition to the affidavits required by this Act to be included in the petition. At the hearing, residence within the United States but outside the county, and the other qualifications required by this subdivision during such residence shall be proved either by depositions made before a naturalization examiner or by the oral testimony of at least two such witnesses for each place of residence.

Absence from the United States for a continuous period of more than six months and less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of

filing the petition of naturalization or during the period between the date of filing the petition and the date of final hearing, shall be presumed to break the continuity of such residence, but such presumption may be overcome by the presentation to the naturalization court of satisfactory evidence that such individual had a reasonable cause for not returning to the United States during such absence. Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship immediately preceding the date of filing the petition for naturalization or during the period between the date of filing the petition and the date of final hearing, shall break the continuity of such residence, except, that in the case of an alien—

(a) who has been lawfully admitted into the United States for permanent residence,

(b) who has resided in the United States for at least one year thereafter, and

(c) who has made a declaration of intention to become a citizen of the United States, who shall be deemed an eligible alien for the purposes of this paragraph and who thereafter has been sent abroad as an employee of or under contract with the Government of the United States, or who thereafter proceeded abroad as an employee or representative of, or under contract with an American institution of research recognized as such by the Secretary of Labor, or as an employee of a firm or corporation engaged in the development of foreign trade and commerce of the United States, or a subsidiary thereof, or any such eligible alien as above defined who has proceeded abroad temporarily and has within a period of one year of his departure from the United States become an employee or representative of, or who is under contract with such an American institution of research, or has become an employee of such an American firm or corporation, no such absence shall break the continuity of residence in the United States if—

(1) Prior to the beginning of such absence, or prior to the beginning of such employment, contract or representation on behalf of an American institution of research or an American firm or corporation as aforesaid, such alien has established to the satisfaction of the Secretary of Labor that his absence for such period is to be on behalf of such government or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged solely or principally in the development of such foreign trade and commerce, or whose residence abroad is necessary to the protection of the property rights abroad of such firm or corporation; and

(2) Such alien proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose.

An alien who has been lawfully admitted into the United States for permanent residence, and who is the wife or husband of a citizen of the United States so engaged abroad within one of the above-mentioned categories, shall be considered as residing in the United States for the purpose of naturalization notwithstanding any absence from the United States.

This amendment shall not affect cases of aliens who prior to the date of its enactment have established to the satisfaction of the Secretary of Labor, pursuant to an Act entitled "An Act to amend the naturalization laws in respect of residence requirements, and for other purposes," approved June 25, 1936, that absence from the United States was to be or had been for the purpose of carrying on activities described therein. [Amended by act of June 29, 1938, 52 Stat. L. 1247.]

Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Sixth. [Repealed by act of May 24, 1934, 48 Stat. L. 798.]

Seventh. Any native-born Philippino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States navy or marine corps or the naval auxiliary service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the regular or the volunteer forces, or the national army, [Amended by act of May 25, 1932, 47 Stat. L. 166] (not applicable to petition filed before this date), or in the United States navy or marine corps, or in the United States coast guard, or who has served for three years on board of any vessel of the United States government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the army reserve or regular army reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the bureau of naturalization, in accordance with the requirements of this subdivision it is shown that such residence can not be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien

declarant who has served in the United States army or navy, or the Philippine constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction; notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the bureau of naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the government from the bureau of naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the state, territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien, who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the bureau of naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the government from the bureau of naturalization at the hearing as provided by section eleven of the act of June twenty-ninth, nineteen hundred and six. Members of the naturalization bureau and service may be designated by the secretary of labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the act of June twenty-ninth, nineteen hundred and six (thirty-fourth statutes at large, part one, page five hundred and ninety-six), may also be performed by the commissioner or deputy commissioner of naturalization: [The proviso that it should not be lawful to make a declaration of intention on, or within thirty days preceding, an election day was repealed by the act of May 25, 1926 (44 Stat. L. 652, U. S. C. t.8,§374.)] *Provided further*, that service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry; except that this proviso shall not apply in the case of service on American-owned vessels by an alien who has been lawfully admitted to the United States for permanent residence. [Amended by act of May 25, 1932, 47 Stat. L. 165.]

During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any state court shall charge or collect any fee for this service unless the laws of the state require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the state shall be charged or collected. A full accounting for all of these transactions shall be made to the bureau of naturalization in the manner provided by section thirteen of the act of June twenty-ninth, nineteen hundred and six.

Eighth. [Repealed by act of June 15, 1935, 49 Stat. L. 376.]

Ninth. For the purpose of carrying on the work of the bureau of naturalization of sending the names of the candidates for citizenship to the public schools and otherwise promoting instruction and training in citizenship responsibilities of applicants for naturalization, as provided in this subdivision, authority is hereby given for the reimbursement of the printing and binding appropriation of the department of labor upon the records of the treasury department from the naturalization fees deposited in the treasury through the bureau of naturalization for the cost of publishing the citizenship textbook prepared and to be distributed by the bureau of naturalization to those candidates for citizenship only who are in attendance upon the public schools, such reimbursement to be made upon statements by the commissioner of naturalization of books actually delivered to such student candidates for citizenship, and a monthly naturalization bulletin, and in this duty to secure the aid of and cooperate with the official state and national organizations, including those concerned with vocational education and including personal services in the District of Columbia, and to aid the local army exemption boards and cooperate with the war department in locating declarants subject to the army draft and expenses incidental thereto.

Tenth. Any person not an alien enemy, who resided uninterruptedly within the United States during the period of five years next preceding July 1, 1920, and was on that date otherwise qualified to become a citizen of the United States, except that he had not made a declaration of intention required by law and who during or prior to that time, because of misinformation regarding his citizenship status erroneously exercised the rights and performed the duties of a citizen of the United States in good faith. may file the petition for naturalization prescribed by law without making the preliminary declaration of intention required of other aliens, and upon satisfactory proof to the court that he has so acted may be admitted as a citizen of the United States upon complying in all respects with the other requirements of the naturalization law. [Act of May 25, 1932, 47 Stat. L. 167.]

Eleventh. No alien who is a native, citizen, subject, or denizen of any country, state, or sovereignty with which the United States is at war shall be admitted to become a citizen of the United States unless he made his declaration of intention not less than two nor more than seven years prior to the existence of the state of war, or was at that time entitled to become a citizen of the United States, without making a declaration of intention, or unless his petition for naturalization shall then be pending and is otherwise entitled to admission, notwithstanding he shall be an alien enemy at the time and in the manner prescribed by the laws passed upon that subject: *Provided,* that no alien embraced within this subdivision shall have his petition for naturalization called for a hearing, or heard, except after ninety days' notice given by the clerk of the court to the commissioner or deputy commissioner of naturalization to be present, and the petition shall be given no final hearing except in open court and after such notice to the representative of the government from the bureau of naturalization, whose objection shall cause the petition to be continued from time to time for so long as the government may require: *Provided, however,* that nothing herein contained shall be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien; and section twenty-one hundred and seventy-one of the Revised Statutes of the United States is hereby repealed: *Provided further,* that the president of the United States may, in his discretion, upon investigation and report by the department of justice fully establishing the loyalty of any alien enemy not included in the foregoing exemption, except such alien enemy from the classification of alien enemy, and thereupon he shall have the privilege of applying for naturalization.

Twelfth. Any person who, while a citizen of the United States and during the existing war in Europe, entered the military or naval service of any country at war with a country with which the United States is now at war, who shall be deemed to have lost his citizenship by reason of any oath or obligation taken by him for the purpose of entering such service, may resume his citizenship by taking the oath of allegiance to the United States prescribed by the naturalization law and regulations, and such oath may be taken before any court of the United States or of any state authorized by law to naturalize aliens or before any consul of the United States, and certified copies thereof shall be sent by such court or consul to the department of state and the bureau of naturalization, and the act (public fifty-five, sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen), is hereby repealed.

Any individual who claims to have resumed his citizenship under the provisions of this subdivision may make application to the commissioner of naturalization, accompanied by two photographs of the applicant, for a certificate of repatriation. Upon proof to the satisfaction of the commissioner that the applicant is a citizen and that the citizenship was resumed as claimed, such individual shall be furnished a certificate of repatriation by the commissioner, but only if such individual is at the time within the United States. The certificate of repatriation issued under this subdivision shall have the same effect as a certificate issued by a court having naturalization jurisdiction, and the provisions of subdivisions (b) and (c) of section 33 shall apply in respect of proceedings and certificates of repatriation under this subdivision in the same manner and to the same extent, including penalties, as they apply in respect of proceedings and certificates of citizenship issued under such section. [Paragraph added by act of June 21, 1930, 46 Stat. L. 791.]

Thirteenth. Any person who is serving in the

military or naval forces of the United States at the termination of the existing war, and any person who before the termination of the existing war may have been honorably discharged from the military or naval services of the United States on account of disability incurred in line of duty, shall, if he applies to the proper court for admission as a citizen of the United States, be relieved from the necessity of proving that immediately preceding the date of his application he has resided continuously within the United States the time required by law of other aliens, or within the state, territory, or the District of Columbia for the year immediately preceding the date of his petition for naturalization, but his petition for naturalization shall be supported by the affidavits of two credible witnesses, citizens of the United States, identifying the petitioner as the person named in the certificate of honorable discharge, which said certificate may be accepted as evidence of good moral character required by law, and he shall comply with the other requirements of the naturalization law.

Fourteenth. (a) The judge of any United States district court, or the senior judge of such court if there are more judges than one, is hereby authorized, in his discretion, to designate one or more examiners or officers of the bureau of naturalization (including the naturalization service) serving as such examiner or officer within the territorial jurisdiction of such court, to conduct preliminary hearings upon petitions for naturalization to such court, and to make findings and recommendations thereon. For such purposes any such designated examiner or officer is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpoena witnesses, and to administer oaths, including the oath of the petitioner to his petition and the oath of his witnesses.

(b) The findings of any such designated examiner or officer upon any such preliminary hearing shall be submitted to the court at the final hearing upon the petition required by section 9, with a recommendation that the petition be granted or denied or continued, with the reasons therefor. Such findings and recommendations shall be accompanied by duplicate lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by the designated examiner or officer. The judge to whom such findings and recommendations are submitted shall by written order approve such recommendations with such exceptions as he may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of such lists shall thereafter be filed permanently of record in such court and the duplicate list shall be sent by the clerk of such court to the commissioner of naturalization.

(c) The provisions of section 9 requiring the examination of the petitioner and witnesses under oath before the court and in the presence of the court shall not apply in any case where a designated examiner or officer has conducted the preliminary hearing authorized by this subdivision; except that the court may, in its discretion and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court. [Added by act of June 8, 1926, 44 Stat. L. 709.]

SECTION 5. The clerk of the court shall, if the petitioner requests it at the time of filing the petition for citizenship, issue a subpoena for the witnesses named by such petitioner to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned upon notice to the bureau of naturalization in such manner and at such time as the commissioner of naturalization, with the approval of the secretary of labor, may by regulation prescribe. [Amended by act of March 3, 1931, 46 Stat. L. 1511.]

SECTION 6. Petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing of such petition: *Provided,* that no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful, at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith. [Amended by act of March 3, 1931, 46 Stat. L. 1511.]

SECTION 7. No person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States.

SECTION 8. No alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: *Provided,* that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States; *And provided further,* that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention

to become a citizen of the United States in conformity with the law in force at the date of making such declaration: *Provided further,* that the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.

SECTION 9. Every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court.

SECTION 10. Repealed by sec. 6 (e), act of March 2, 1929, 45 Stat. L. 1516.

SECTION 11. The United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

SECTION 15. It shall be the duty of the United States district attorneys for the respective districts, *or the commissioner or deputy commissioner of naturalization,* [Act of May 9, 1918, 40 Stat. L. 542.] upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the department of state, furnish the department of justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the bureau of naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the bureau of immigration and naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

SECTION 28. The commissioner of naturalization, with the approval of the secretary of labor, shall make such rules and regulations and such changes in the forms as may be necessary for properly carrying into execution the various provisions of this act. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this act shall be admitted in evidence equally with the originals in any and all proceedings under this act and in all cases in which the originals thereof might be admissible as evidence. [Amended by act of March 2, 1929, 45 Stat. L. 1515.]

SECTION 30. All the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any state or organized territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the

United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law.

[*Act of March 2, 1929, 45 Stat. L. 1515.*]

SECTION 32. (a) If any certificate of citizenship issued to any citizen, or any declaration of intention furnished to any declarant, under the naturalization laws, is lost, mutilated, or destroyed, the citizen or declarant may, upon the payment to the commissioner of a fee * * *, make application (accompanied by two photographs of the applicant) to the commissioner of naturalization for a new certificate or declaration. If the commissioner finds that the certificate or declaration is lost, mutilated, or destroyed, he shall issue to the applicant a new certificate or declaration with one of such photographs of the applicant affixed thereto: *Provided* an alien veteran as defined in section 1, shall not be required to pay the fee required by this subdivision. [Amended by act of April 19, 1934, 48 Stat. L. 597.]

(b) Upon the payment to the commissioner of naturalization of a fee * * * the commissioner shall issue, for any naturalized citizen, a special certificate of citizenship, with a photograph (furnished by such citizen) affixed thereto, for use by such citizen only for the purpose of obtaining recognition as a citizen of the United States by the country of former allegiance of such citizen. Such certificate, when issued, shall be furnished to the secretary of state for transmission by him to the proper authority in such country of former allegiance.

SECTION 33. (a) Any individual over twenty-one years of age who claims to have derived United States citizenship through the naturalization of a parent, or a husband, may, upon the payment of a fee * * * , make application to the commissioner of naturalization, accompanied by two photographs of the applicant, for a certificate of citizenship. [Amended by act of May 25, 1932, 47 Stat. L. 166.] Upon proof to the satisfaction of the commissioner that the applicant is a citizen and that the alleged citizenship was derived as claimed, and upon taking and subscribing to, before a designated representative of the bureau of naturalization within the United States, the oath of allegiance required by the naturalization laws of a petitioner for citizenship, such individual shall be furnished a certificate of citizenship by the commissioner, but only if such individual is at the time within the United States. In all courts, tribunals, and public offices of the United States, at home and abroad, of the District of Columbia, and of each state, territory, or insular possession of the United States, the certificate of citizenship issued under this section shall have the same effect as a certificate of citizenship issued by a court having naturalization jurisdiction.

(b) (Penal provisions) [Act of March 2, 1929, 45 Stat. L. 1516.]

[*Act of March 4, 1929, 45 Stat. L. 1545.*]

SEC. 2. Section 1 [being the first subdivision of section 4 of the act of June 29, 1906] of this Act shall take effect sixty days after its enactment. A declaration of intention made before the expiration of such sixty-day period, whether before or after the enactment of this Act, in which appears an erroneous statement of allegiance, shall not be held invalid for such cause if the error was due to a change of political boundaries, or the creation of new countries, or the transfer of territory from one country to another. Nothing in this section shall permit the reinstatement of a petition for naturalization dismissed for such cause, but in such case the benefits of this section may be obtained by filing a new petition before the expiration of the period of validity of the declaration of intention.

[*Act of March 2, 1929, 45 Stat. L. 1513.*]

SEC. 4. No declaration of intention shall be made by any alien under such Act of June 29, 1906, as amended, or, if made, be valid, until the lawful entry for permanent residence of such alien shall have been established, and a certificate showing the date, place, and manner of his arrival shall have been issued; except that no such certificate shall be required if the entry was on or before June 29, 1906. [Amended by act of May 25, 1932, 47 Stat. L. 166.]

[*Act of March 3, 1931, 46 Stat. L. 1511.*]

SECTION 3. (a) Any person, born in the United States, who had established permanent residence in a foreign country prior to January 1, 1917, and who has heretofore lost his United States citizenship by becoming naturalized under the laws of such foreign country, may, if eligible to citizenship and if, prior to the enactment of this Act, he has been admitted to the United States for permanent residence, be naturalized upon full and complete compliance with all of the requirements of the naturalization laws, with the following exceptions: (1) the five-year period of residence within the United States shall not be required; (2) the declaration of intention may be made at any time after admission to the United States, and the petition may be filed at any time after the expiration of six months following the declaration of inten-

tion; (3) if there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

(b) After naturalization such person shall have the same citizenship status as immediately preceding the loss of United States citizenship.

[*Act of May 25, 1932, 47 Stat. L. 165.*]

All petitions for citizenship made outside the United States in accordance with the seventh subdivision of section 4 of the naturalization act of June 29, 1906, as amended, upon which naturalization has not been heretofore granted, are hereby declared to be invalid for all purposes.

[*Act of April 19, 1934, 48 Stat. L. 598.*]

SEC. 5. In all naturalization proceedings in which an alien applying for certificate of citizenship is represented by counsel, there is hereby established a limit of $25 for counsel's fees, except where legal action before a court requires extended legal service when the court may approve a reasonable fee in excess of $25.

NATURALIZATION OF WIFE AND MINOR CHILDREN OF INSANE ALIENS MAKING HOMESTEAD ENTRIES

[*Act of February 24, 1911, ch 151, 36 Stat. L. 929.*]

[Repealed by act of May 24, 1934, 48 Stat. L. 798.]

NATURALIZATION OF MARRIED WOMEN

[*Act of September 22, 1922, ch 411, 42 Stat. L. 1022; amended by act of July 3, 1930, 46 Stat. L. 854; act of May 24, 1934, 48 Stat. L. 797.*]

The right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.

SECTION 2. An alien who marries a citizen of the United States after the passage of this act, as here amended, or an alien whose husband or wife is naturalized after the passage of this act, as here amended, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, he or she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(a) No declaration of intention shall be required;

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the state or territory where the naturalization court is held, he or she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least three years immediately preceding the filing of the petition. [Amended by act of May 24, 1934, 48 Stat. L. 797.]

SECTION 4. (a) A woman who has lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband may, if eligible to citizenship and if she has not acquired any other nationality by affirmative act, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions: (1) No declaration of intention and no certificate of arrival shall be required, and no period of residence within the United States or within the county where the petition is filed shall be required; (2) The petition need not set forth that it is the intention of the petitioner to reside permanently within the United States; (3) The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner; (4) If there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

(b) After her naturalization such woman shall have the same citizenship status as if her marriage, or the loss of citizenship by her husband, as the case may be, had taken place after this section, as amended, takes effect.

(b) The amendment made by this section to section 4 of such act of September 22, 1922, shall not terminate citizenship acquired under such section 4 before such amendment. (Act of July 3, 1930, 46 Stat. L. 854.)

SECTION 5. (Repealed by act of March 3, 1931, 46 Stat. L. 1511.)

[*Act of July 2, 1932, 47 Stat. L. 571.*]

A woman born in Hawaii prior to June 14, 1900, shall, if residing in the United States on the date of the enactment of this Act, be considered to have been a citizen of the United States at birth.

PERSONS OF FOREIGN BIRTH SERVING IN MILITARY OR NAVAL FORCES OF THE UNITED STATES DURING THE WORLD WAR

[*Act of July 19, 1919, ch 24, §1, 41 Stat. L. 222.*]

Any person of foreign birth who served in the military or naval forces of the United States during the present war [world war], after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the act of June 29, 1906, thirty-fourth statutes at large, part 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States.

CERTAIN ALIENS DEBARRED FROM NATURALIZATION

[*Act of July 9, 1918, ch 143, 40 Stat. L. 885.*]

A citizen or subject of a country neutral in the present war [world war] who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the president may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.

NATURALIZATION OF DECLARANTS WHO HAVE SERVED IN THE NAVAL RESERVE FORCE IN TIME OF WAR

[*Act of May 22, 1917, ch 18, 40 Stat. L. 84.*]

The act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, be, and the same is hereby, amended by adding after the proviso under the heading "Naval reserve force," which reads as follows: "*Provided,* that citizens of the insular possessions of the United States may enroll in the naval auxiliary reserve," a further proviso as follows: *Provided further,* that such persons who are not citizens of the United States, but who have or shall have declared their intention to become citizens of the United States, and who are citizens of countries which are at peace with the United States, may enroll in the naval reserve force subject to the condition that they may be discharged from such enrollment at any time within the discretion of the secretary of the navy, and such persons who may, under existing law, become citizens of the United States, and who render honorable service in the naval reserve force in time of war for a period of not less than one year may become citizens of the United States without proof of residence on shore and without further requirement than proof of good moral character and certificate from the secretary of the navy that such honorable service was actually rendered.

CERTAIN RESIDENT ALIEN WORLD WAR VETERANS

[*Act of June 24, 1935.*]

Notwithstanding the racial limitations contained within section 2169 of the Revised Statutes of the United States, as amended (U. S. C., title 8, sec. 359), and within section 14 of the Act of May 6, 1882, as amended (U. S. C., title 8, sec. 363), any alien veteran of the World War heretofore ineligible to citizenship because not a free white person or of African nativity or of African descent may be naturalized under this Act if he—

(a) Entered the service of the armed forces of the United States prior to November 11, 1918;

(b) Actually rendered service with the armed forces of the United States between April 6, 1917, and November 11, 1918;

(c) Received an honorable discharge from such service for any reason other than his alienage;

(d) Resumed his previous permanent residence in the United States or any Territory thereof; and

(e) Has maintained a permanent residence continuously since the date of discharge and is now a permanent resident of the United States or any Territory thereof; upon compliance with all the requirements of the naturalization laws, except—

(f) No certificate of arrival and no declaration of intention shall be required;

(g) No additional residence shall be required before the filing of petition for certificate of citizenship; and

(h) The petition for certificate of citizenship shall be filed with a court having naturalization jurisdiction prior to January 1, 1937.

SEC. 2. Certificates of citizenship heretofore issued and heretofore granted by any court having naturalization jurisdiction under the provisions of the Act of May 9, 1918, or of the Act of July 19, 1919, to any alien veteran who is eligible to be naturalized under the provisions of section 1 of this Act, and orders or judgments authorizing such certificates, are hereby declared to be valid for all purposes in so far as the race of the veteran is concerned. Such certificates may be stamped, declaring their validity under this Act, by the Commissioner of Immigration and Naturalization upon submission of satisfactory proof to establish identity.

Certificates declared valid under the foregoing paragraph, which have been lost, mutilated, destroyed, or surrendered to any official of the United States may be replaced by a new certificate bearing date of original certificate upon compliance with the provisions of section 32 (a) of the Act of June 29, 1906, as amended.

SEC. 3. On applications filed for any benefits under this Act, the requirement of fees for naturalization documents is hereby waived.

AUTHENTICATION OF RECORDS

[*Reprinted from the Revised Statutes of the United States, 1878.*]

[U. S. C. t.28, §§ 687, 688. Revised to Dec. 5, 1932.]

SECTION 905. The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

SECTION 906. All records and exemplifications of books, which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the state, or territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the state, territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken.

ADMISSION OF IOWA INTO THE UNION

AN ACT FOR THE ADMISSION OF THE STATE OF IOWA INTO THE UNION

[*Approved December 28, 1846.*]

WHEREAS, the people of the Territory of Iowa did, on the eighteenth day of May, anno Domini eighteen hundred and forty-six, by a convention of delegates called and assembled for that purpose, form for themselves a constitution and State government—which constitution is republican in its character and features—and said convention has asked admission of the said Territory into the Union as a State, on an equal footing with the original States, in obedience to "An Act for the Admission of the States of Iowa and Florida into the Union," approved March third, eighteen hundred forty-five [5 Stat. L. 742, 743.], and "An Act to define the Boundaries of the State of Iowa, and to repeal so much of the Act of the third of March, one thousand eight hundred and forty-five as relates to the Boundaries of Iowa," which said last act was approved August fourth, anno Domini eighteen hundred and forty-six [9 Stat. L. 52.]: Therefore—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Iowa shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatsoever.

SEC. 2. *And be it further enacted,* That all the provisions of "An Act supplemental to the Act for the Admission of the States of Iowa and Florida into the Union," approved March third, eighteen hundred and forty-five [5 Stat. L. 788–790.], be, and the same are hereby declared to continue and remain in full force as applicable to the State of Iowa, as hereby admitted and received into the Union.

APPROVED, December 28, 1846. [9 Stat. L. 117.]

[Accepted by the State of Iowa, 2d G. A., ch 91, January 15, 1849.]

CONSTITUTION OF THE STATE OF IOWA

[*With the exception of the summary which appears at the beginning of the constitution and the catchwords which precede each section, the constitution as it appears here is a literal print of the original constitution on file in the office of the secretary of state.*]

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AMENDMENTS OF 1904.

1. Biennial elections.
2. Senators—number—apportionment.
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AMENDMENT OF 1928.

Legislative department.

Preamble. WE, THE PEOPLE OF THE STATE OF IOWA, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa, the boundaries whereof shall be as follows:

Boundaries. Beginning in the middle of the main channel of the Mississippi River, at a point due East of the middle of the mouth of the main channel of the Des Moines River, thence up the middle of the main channel of the said Des Moines River, to a point on said river where the Northern boundary line of the State of Missouri—as established by the constitution of that State—adopted June 12th. 1820—crosses the said middle of the main channel of the said Des Moines River; thence Westwardly along the said Northern boundary line of the State of Missouri, as established at the time aforesaid, until an extension of said line intersects the middle of the main channel of the Missouri River; thence up the middle of the main channel of the said Missouri River to a point opposite the middle of the main channel of the Big Sioux River, according to Nicollett's Map; thence up the main channel of the said Big Sioux River, according to the said map, until it is intersected by the parallel of forty three degrees and thirty minutes North latitude; thence East along said parallel of forty three degrees and thirty minutes until said parallel intersects the middle of the main channel of the Mississippi River; thence down the middle of the main channel of said Mississippi River to the place of beginning.

ARTICLE I.

BILL OF RIGHTS.

Rights of persons. SECTION 1. All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Political power. SEC. 2. All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it.

Religion. SEC. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

Religious test—witnesses. SEC. 4. No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.

Referred to in §13252.1

Dueling. SEC. 5. Any citizen of this State who may hereafter be engaged, either directly, or indirectly, in a duel, either as principal, or accessory before the fact, shall forever be disqualified from holding any office under the Constitution and laws of this State.

Laws uniform. SEC. 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Liberty of speech and press. SEC. 7. Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appear to the jury that the matter charged as libellous was true, and was published with good motives and for justifiable ends, the party shall be acquitted.

Personal security — searches and seizures. SEC. 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Right of trial by jury—due process of law. SEC. 9. The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

Rights of persons accused. SEC. 10. In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the

same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel.

When indictment necessary. SEC. 11. All offences less than felony and in which the punishment does not exceed a fine of One hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offence, unless on presentment or indictment by a grand jury, except in cases arising in the army, or navy, or in the militia, when in actual service, in time of war or public danger.

As to indictment and the number of grand jurors, see amendment 3 of 1884.

Twice tried—bail. SEC. 12. No person shall after acquittal, be tried for the same offence. All persons shall, before conviction, be bailable, by sufficient sureties, except for capital offences where the proof is evident, or the presumption great.

Habeas corpus. SEC. 13. The writ of habeas corpus shall not be suspended, or refused when application is made as required by law, unless in case of rebellion, or invasion the public safety may require it.

Military. SEC. 14. The military shall be subordinate to the civil power. No standing army shall be kept up by the State in time of peace; and in time of war, no appropriation for a standing army shall be for a longer time than two years.

Quartering soldiers. SEC. 15. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war except in the manner prescribed by law.

Treason. SEC. 16. Treason against the State shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open Court.

Bail—punishments. SEC. 17. Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.

Eminent domain. SEC. 18. Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

See amendment of 1908.

Imprisonment for debt. SEC. 19. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud; and no person shall be imprisoned for a militia fine in time of peace.

Right of assemblage—petition. SEC. 20. The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives and to petition for a redress of grievances.

Attainder—ex post facto law—obligation of contract. SEC. 21. No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed.

Resident aliens. SEC. 22. Foreigners who are, or may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens.

Slavery—penal servitude. SEC. 23. There shall be no slavery in this State; nor shall there be involuntary servitude, unless for the punishment of crime.

Agricultural leases. SEC. 24. No lease or grant of agricultural lands, reserving any rent, or service of any kind, shall be valid for a longer period than twenty years.

Rights reserved. SEC. 25. This enumeration of rights shall not be construed to impair or deny others, retained by the people.

An additional section (section 26) was added to article I by the amendment of 1882. The supreme court, however, in the case of Koehler v. Hill, 60 Iowa 543, on April 21, 1883, held that, owing to certain irregularities, the amendment did not become a part of the constitution. See amendment of 1882.

ARTICLE II.

RIGHT OF SUFFRAGE.

Electors. SECTION 1. Every white male citizen of the United States, of the age of twenty one years, who shall have been a resident of this State six months next preceding the election, and of the County in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorised by law.

The above section was amended in 1868 by striking the word "white" from the first line thereof. See first amendment of 1868.

For qualifications of electors, see also amendment 19, U. S. constitution.

Privileged from arrest. SEC. 2. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom.

From military duty. SEC. 3. No elector shall be obliged to perform military duty on the day of election, except in time of war, or public danger.

Persons in military service. SEC. 4. No per-

son in the military, naval, or marine service of the United States shall be considered a resident of this State by being stationed in any garrison, barrack, or military or naval place, or station within this State.

Disqualified persons. SEC. 5. No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.

Ballot. SEC. 6. All elections by the people shall be by ballot.

For provisions relative to general election, see amendment of 1916; see also code, §504

ARTICLE III.

OF THE DISTRIBUTION OF POWERS.

Departments of government. SECTION 1. The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

LEGISLATIVE DEPARTMENT.

General assembly. SECTION 1. The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives; and the style of every law shall be, "Be it enacted by the General Assembly of the State of Iowa."

Sessions. SEC. 2. The sessions of the General Assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members; unless the Governor of the State shall, in the meantime, convene the General Assembly by proclamation.

Representatives. SEC. 3. The members of the House of Representatives shall be chosen every second year, by the qualified electors of their respective districts, on the second Tuesday in October, except the years of the Presidential election, when the election shall be on the Tuesday next after the first Monday in November; and their term of office shall commence on the first day of January next after their election, and continue two years, and until their successors are elected and qualified.

For provisions relative to the time of holding the general election, see amendment of 1916; see also code, §504.

Qualifications. SEC. 4. No person shall be a member of the House of Representatives who shall not have attained the age of twenty-one years, be a free white male citizen of the United States, and shall have been an inhabitant of this State one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the County, or District he may have been chosen to represent.

For amendments striking "free white" and "male", see amendments of 1880, 1926.

Senators—qualifications. SEC. 5. Senators shall be chosen for the term of four years, at the same time and place as Representatives; they shall be twenty-five years of age, and possess the qualifications of Representatives as to residence and citizenship.

Number and classification. SEC. 6. The number of Senators shall not be less than one third, nor more than one half the representative body; and shall be so classified by lot, that one class, being as nearly one half as possible, shall be elected every two years. When the number of Senators is increased, they shall be annexed by lot to one or the other of the two classes, so as to keep them as nearly equal in numbers as practicable.

See amendment No. 2 of 1904, also amendment of 1928.

Officers—elections determined. SEC. 7. Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law.

Quorum. SEC. 8. A majority of each house shall constitute a quorum to transact business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

Authority of the houses. SEC. 9. Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and, with the consent of two thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the General Assembly of a free and independent State.

Protest—record of vote. SEC. 10. Every member of the General Assembly shall have the liberty to dissent from, or protest against any act or resolution which he may think injurious to the public, or an individual, and have the reasons for his dissent entered on the journals; and the yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals.

Privileged from arrest. SEC. 11. Senators and Representatives, in all cases, except treason, felony, or breach of the peace, shall be privileged from arrest during the session of

the General Assembly, and in going to and returning from the same.

Vacancies. SEC. 12. When vacancies occur in either house, the Governor or the person exercising the functions of Governor, shall issue writs of election to fill such vacancies.

Doors open. SEC. 13. The doors of each house shall be open, except on such occasions, as, in the opinion of the house, may require secrecy.

Adjournments. SEC. 14. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

Bills. SEC. 15. Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the Speaker and President of their respective houses.

Executive approval—veto. SEC. 16. Every bill which shall have passed the General Assembly, shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to re-consider it; if, after such re-consideration, it again pass both houses, by yeas and nays, by a majority of two thirds of the members of each house, it shall become a law, notwithstanding the Governors objections. If any bill shall not be returned within three days after it shall have been presented to him, Sunday excepted, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by adjournment, prevent such return. Any bill submitted to the Governor for his approval during the last three days of a session of the General Assembly, shall be deposited by him in the office of the Secretary of State, within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof.

Passage of bills. SEC. 17. No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.

Receipts and expenditures. SEC. 18. An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws, at every regular session of the General Assembly.

Referred to in §221.4

Impeachment. SEC. 19. The House of Representatives shall have the sole power of impeachment, and all impeachments shall be tried by the Senate. When sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two thirds of the members present.

Officers subject to impeachment—judgment. SEC. 20. The Governor, Judges of the Supreme and District Courts, and other State officers, shall be liable to impeachment for any misdemeanor or malfeasance in office: but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit, under this State; but the party convicted or acquitted shall nevertheless be liable to indictment, trial, and punishment, according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the General Assembly may provide.

Members not appointed to office. SEC. 21. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people.

Disqualification. SEC. 22. No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

Failure to account. SEC. 23. No person who may hereafter be a collector or holder of public monies, shall have a seat in either House of the General Assembly, or be eligible to hold any office of trust or profit in this State, until he shall have accounted for and paid into the treasury all sums for which he may be liable.

Appropriations. SEC. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.

Compensation of members. SEC. 25. Each member of the first General Assembly under this Constitution, shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled, in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no General Assembly shall have power to increase the compensation of its own members. And when convened in extra session they shall receive the same mileage and per diem compensation, as fixed by law for the regular session, and none other.

Statutory provisions, code, §§14, 14.1–14.3, 15.

Time laws to take effect. SEC. 26. No law of the General Assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next after the passage thereof. Laws passed at a special session, shall take effect ninety days after the adjournment of the General Assembly by which they were passed. If the General Assembly shall deem any law of immediate importance, they may provide

that the same shall take effect by publication in newspapers in the State.

Supplementary provisions, §53 et seq.

Divorce. SEC. 27. No divorce shall be granted by the General Assembly.

Lotteries. SEC. 28. No lottery shall be authorized by this State; nor shall the sale of lottery tickets be allowed.

Acts—one subject—expressed in title. SEC. 29. Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

Local or special laws—general and uniform—boundaries of counties. SEC. 30. The General Assembly shall not pass local or special laws in the following cases:

For the assessment and collection of taxes for State, County, or road purposes;

For laying out, opening, and working roads or highways;

For changing the names of persons;

For the incorporation of cities and towns;

For vacating roads, town plats, streets, alleys, or public squares;

For locating or changing county seats.

In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, cast for and against it.

Extra compensation — payment of claims. SEC. 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly.

Oath of members. SEC. 32. Members of the General Assembly shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear, or affirm, (as the case may be,) that I will support the Constitution of the United States, and the Constitution of the State of Iowa, and that I will faithfully discharge the duties of Senator, (or Representative, as the case may be,) according to the best of my ability." And members of the General Assembly are hereby empowered to administer to each other the said oath or affirmation.

Census. SEC. 33. The General Assembly shall, in the years One thousand eight hundred and fifty nine, One thousand eight hundred and sixty three, One thousand eight hundred and sixty five, One thousand eight hundred and sixty seven, One thousand eight hundred and sixty nine, and One thousand eight hundred and seventy five, and every ten years thereafter, cause an enumeration to be made of all the white inhabitants of the State.

The above section was amended in 1868 by striking the word "white" therefrom. See second amendment of 1868.

This section repealed by amendment of 1936.

Senators — number — method of apportionment. SEC. 34. The number of senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties, according to the number of white inhabitants in each.

The above section has been amended three times. In 1868 it was amended by striking the word "white" therefrom. See third amendment of 1868.

In 1904 this section was repealed and a substitute adopted in lieu thereof. See amendment No. 2 of 1904.

In 1928 it was amended by adding a limiting clause. See amendment of 1928.

Senators—representatives—number—apportionment—districts. SEC. 35. The Senate shall not consist of more than fifty members, nor the House of Representatives of more than one hundred; and they shall be apportioned among the several counties and representative districts of the State, according to the number of white inhabitants in each, upon ratios to be fixed by law; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled to one representative; and any one county containing in addition to the ratio fixed by law, one half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed.

The above section has been amended twice. In 1868 it was amended by striking the word "white" therefrom. See fourth amendment of 1868.

In 1904 this section was repealed and a substitute adopted in lieu thereof. See amendment No. 2 of 1904.

Ratio of representation. SEC. 36. At its first session under this Constitution, and at every subsequent regular session, the General Assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative.

The above section was repealed in 1904 and a substitute adopted in lieu thereof. See amendment No. 2 of 1904.

Districts. SEC. 37. When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district.

See amendment No. 2 of 1904, section 35.

Elections by general assembly. SEC. 38. In all elections by the General Assembly, the members thereof shall vote viva voce and the votes shall be entered on the journal.

ARTICLE IV.

EXECUTIVE DEPARTMENT.

Governor. SECTION 1. The Supreme Executive power of this State shall be vested in a Chief Magistrate, who shall be styled the Governor of the State of Iowa.

Election and term. SEC. 2. The Governor shall be elected by the qualified electors at the time and place of voting for members of the General Assembly, and shall hold his office two years from the time of his installation, and until his successor is elected and qualified.

Lieutenant governor — returns of elections. SEC. 3. There shall be a Lieutenant Governor, who shall hold his office two years, and be elected at the same time as the Governor. In voting for Governor and Lieutenant Governor, the electors shall designate for whom they vote as Governor, and for whom as Lieutenant Governor. The returns of every election for Governor, and Lieutenant Governor, shall be sealed up and transmitted to the seat of government of the State, directed to the Speaker of the House of Representatives, who shall open and publish them in the presence of both Houses of the General Assembly.

For statutory provisions, see code, §874.

Election by general assembly. SEC. 4. The persons respectively having the highest number of votes for Governor and Lieutenant Governor, shall be declared duly elected; but in case two or more persons shall have an equal and the highest number of votes for either office, the General Assembly shall, by joint vote, forthwith proceed to elect one of said persons Governor, or Lieutenant Governor, as the case may be.

Contested elections. SEC. 5. Contested elections for Governor, or Lieutenant Governor, shall be determined by the General Assembly in such manner as may be prescribed by law.

For statutory provisions, see code, §§987 to 993, inc.

Eligibility. SEC. 6. No person shall be eligible to the office of Governor, or Lieutenant Governor, who shall not have been a citizen of the United States, and a resident of the State, two years next preceding the election, and attained the age of thirty years at the time of said election.

Commander in chief. SEC. 7. The Governor shall be commander in chief of the militia, the army, and navy of this State.

Duties of governor. SEC. 8. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

Duty as to state accounts, §1225.

Execution of laws. SEC. 9. He shall take care that the laws are faithfully executed.

Vacancies. SEC. 10. When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the General Assembly, or at the next election by the people.

Convening general assembly. SEC. 11. He may, on extraordinary occasions, convene the General Assembly by proclamation, and shall state to both Houses, when assembled, the purpose for which they shall have been convened.

Message. SEC. 12. He shall communicate, by message, to the General Assembly, at every regular session, the condition of the State, and recommend such matters as he shall deem expedient.

Adjournment. SEC. 13. In case of disagreement between the two Houses with respect to the time of adjournment, the Governor shall have power to adjourn the General Assembly to such time as he may think proper; but no such adjournment shall be beyond the time fixed for the regular meeting of the next General Assembly.

Disqualification. SEC. 14. No person shall, while holding any office under the authority of the United States, or this State, execute the office of Governor, or Lieutenant Governor, except as hereinafter expressly provided.

Term—compensation of lieutenant governor. SEC. 15. The official term of the Governor, and Lieutenant Governor, shall commence on the second Monday of January next after their election, and continue for two years, and until their successors are elected and qualified. The Lieutenant Governor, while acting as Governor, shall receive the same pay as provided for Governor; and while presiding in the Senate, shall receive as compensation therefor, the same mileage and double the per diem pay provided for a Senator, and none other.

Pardons—reprieves—commutations. SEC. 16. The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the General Assembly at its next meeting, when the General Assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the General Assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted.

Lieutenant governor to act as governor. SEC. 17. In case of the death, impeachment, resignation, removal from office, or other disability of the Governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the Lieutenant Governor.

President of senate. SEC. 18. The Lieutenant Governor shall be President of the Senate, but shall only vote when the Senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of Governor, the Senate shall choose a President protempore.

Vacancies. SEC. 19. If the Lieutenant Governor, while acting as Governor, shall be impeached, displaced, resign, or die, or otherwise become incapable of performing the duties of the office, the President pro tempore of the Senate shall act as Governor until the vacancy is filled, or the disability removed; and if the President of the Senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of Governor, the same shall devolve upon the Speaker of the House of Representatives.

Seal of state. SEC. 20. There shall be a seal of this State, which shall be kept by the Governor, and used by him officially, and shall be called the Great Seal of the State of Iowa.

Grants and commissions. SEC. 21. All grants and commissions shall be in the name and by the authority of the people of the State of Iowa, sealed with the Great Seal of the State, signed by the Governor, and countersigned by the Secretary of State.

Secretary—auditor—treasurer. SEC. 22. A Secretary of State, Auditor of State and Treasurer of State, shall be elected by the qualified electors, who shall continue in office two years, and until their successors are elected and qualified; and perform such duties as may be required by law.

ARTICLE V.

JUDICIAL DEPARTMENT.

Courts. SECTION 1. The Judicial power shall be vested in a Supreme Court, District Courts, and such other Courts, inferior to the Supreme Court, as the General Assembly may, from time to time, establish.

Supreme court. SEC. 2. The Supreme Court shall consist of three Judges, two of whom shall constitute a quorum to hold Court.

See sec. 10 following; also §12801 of the code.

Election of judges—term. SEC. 3. The Judges of the Supreme Court shall be elected by the qualified electors of the State, and shall hold their Court at such time and place as the General Assembly may prescribe. The Judges of the Supreme Court so elected, shall be classified so that one Judge shall go out of office every two years; and the Judge holding the shortest term of office under such classification, shall be Chief Justice of the Court, during his term, and so on in rotation. After the expiration of their terms of office, under such classification, the term of each Judge of the Supreme Court shall be six years, and until his successor shall have been elected and qualified. The Judges of the Supreme Court shall be ineligible to any other office in the State, during the term for which they shall have been elected.

Jurisdiction of supreme court. SEC. 4. The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior Judicial tribunals throughout the State.

Jurisdiction, §12822.

District court and judge. SEC. 5. The District Court shall consist of a single Judge, who shall be elected by the qualified electors of the District in which he resides. The Judge of the District Court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of Judge of the Supreme Court, during the term for which he was elected.

Jurisdiction of district court. SEC. 6. The District Court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

Conservators of the peace. SEC. 7. The Judges of the Supreme and District Courts shall be conservators of the peace throughout the State.

Style of process. SEC. 8. The style of all process shall be, "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.

Salaries. SEC. 9. The salary of each Judge of the Supreme Court shall be two thousand dollars per annum; and that of each District Judge, one thousand six hundred dollars per annum, until the year Eighteen hundred and Sixty; after which time, they shall severally receive such compensation as the General Assembly may, by law, prescribe; which compensation shall not be increased or diminished

during the term for which they shall have been elected.

For statutory provisions relative to salary of judges of the supreme court, see §12816.1 and the biennial salary act.

Judicial districts. SEC. 10. The State shall be divided into eleven Judicial Districts; and after the year Eighteen hundred and sixty, the General Assembly may re-organize the Judicial Districts and increase or diminish the number of Districts, or the number of Judges of the said Court, and may increase the number of Judges of the Supreme Court; but such increase or diminution shall not be more than one District, or one Judge of either Court, at any one session; and no re-organization of the districts, or diminution of the number of Judges, shall have the effect of removing a Judge from office. Such re-organization of the districts, or any change in the boundaries thereof, or increase or diminution of the number of Judges, shall take place every four years thereafter, if necessary, and at no other time.

See amendment 2 of 1884; also §12801 of the code.

Judges—when chosen. SEC. 11. The Judges of the Supreme and District Courts shall be chosen at the general election; and the term of office of each Judge shall commence on the first day of January next, after his election.

Attorney general. SEC. 12. The General Assembly shall provide, by law, for the election of an Attorney General by the people, whose term of office shall be two years, and until his successor shall have been elected and qualified.

District attorney. SEC. 13. The qualified electors of each judicial district shall, at the time of the election of District Judge, elect a District Attorney, who shall be a resident of the district for which he is elected, and who shall hold his office for the term of four years, and until his successor shall have been elected and qualified.

The above section was repealed in 1884 and a substitute adopted in lieu thereof. See amendment 4 of 1884.

System of court practice. SEC. 14. It shall be the duty of the General Assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the Courts of this State.

For provisions relative to the grand jury, see amendment 3 of 1884.

ARTICLE VI.

MILITIA.

Composition — training. SECTION 1. The militia of this State shall be composed of all able-bodied white male citizens, between the ages of eighteen and forty five years, except such as are or may hereafter be exempt by the laws of the United States, or of this State, and shall be armed, equipped, and trained, as the General Assembly may provide by law.

The above section was amended in 1868 by striking the word "white" therefrom. See fifth amendment of 1868.

Exemption. SEC. 2. No person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace: Provided, that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens.

Officers. SEC. 3. All commissioned officers of the militia, (staff officers excepted,) shall be elected by the persons liable to perform military duty, and shall be commissioned by the Governor.

ARTICLE VII.

STATE DEBTS.

Credit not to be loaned. SECTION 1. The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the State shall never assume, or become responsible for, the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the State.

Limitation. SEC. 2. The State may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

Losses to school funds. SEC. 3. All losses to the permanent, School, or University fund of this State, which shall have been occasioned by the defalcation, mismanagement or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the State. The amount so audited shall be a permanent funded debt against the State, in favor of the respective fund, sustaining the loss, upon which not less than six per cent. annual interest shall be paid. The amount of

liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article.

War debts. SEC. 4. In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the State in war; but the money arising from the debts so contracted shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

Contracting debt—submission to the people. SEC. 5. Except the debts herein before specified in this article, no debt shall be hereafter contracted by, or on behalf of this State, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal of such debt, within twenty years from the time of the contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each County, if one is published therein, throughout the State, for three months preceding the election at which it is submitted to the people.

For statutory provisions, see code, §§70, 72.

Legislature may repeal. SEC. 6. The Legislature may, at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may, at any time, forbid the contracting of any further debt, or liability, under such law; but the tax imposed by such law, in proportion to the debt or liability, which may have been contracted in pursuance thereof, shall remain in force and be irrepealable, and be annually collected, until the principal and interest are fully paid.

Tax imposed distinctly stated. SEC. 7. Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

ARTICLE VIII.

CORPORATIONS.

How created. SECTION 1. No corporation shall be created by special laws; but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided.

Taxation of corporations. SEC. 2. The property of all corporations for pecuniary profit, shall be subject to taxation, the same as that of individuals.

State not to be a stockholder. SEC. 3. The State shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the State.

Municipal corporations. SEC. 4. No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

Banking associations. SEC. 5. No act of the General Assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.

State bank. SEC. 6. Subject to the provisions of the foregoing section, the General Assembly may also provide for the establishment of a State Bank with branches.

Specie basis. SEC. 7. If a State Bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each others liabilities upon all notes, bills, and other issues intended for circulation as money.

General banking law. SEC. 8. If a general Banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of State, of all bills, or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the State Treasurer, in United States stocks, or in interest paying stocks of States in good credit and standing, to be rated at ten per cent. below their average value in the City of New York, for the thirty days next preceding their deposit; and in case of a depreciation of any portion of said stocks, to the amount of ten per cent. on the dollar, the bank or banks owning such stock shall be required to make up said deficiency by depositing additional stocks: and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.

Stockholders' responsibility. SEC. 9. Every stockholder in a banking corporation or insti-

tution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held for all of its liabilities, accruing while he or she remains such stockholder.

Bill-holders preferred. SEC. 10. In case of the insolvency of any banking institution, the bill-holders shall have a preference over its other creditors.

Specie payments—suspension. SEC. 11. The suspension of specie payments by banking institutions shall never be permitted or sanctioned.

Amendment or repeal of laws — exclusive privileges. SEC. 12. Subject to the provisions of this article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two thirds of each branch of the General Assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.

Analogous provision, §8376.

ARTICLE IX.

EDUCATION AND SCHOOL LANDS.

1st. Education.

Board of education. SECTION 1. The educational interest of the State, including Common Schools and other educational institutions, shall be under the management of a Board of Education, which shall consist of the Lieutenant Governor, who shall be the presiding officer of the Board, and have the casting vote in case of a tie, and one member to be elected from each judicial district in the State.

Eligibility. SEC. 2. No person shall be eligible as a member of said Board who shall not have attained the age of twenty five years, and shall have been one year a citizen of the State.

Election of members. SEC. 3. One member of said Board shall be chosen by the qualified electors of each district, and shall hold the office for the term of four years, and until his successor is elected and qualified. After the first election under this Constitution, the Board shall be divided, as nearly as practicable, into two equal classes, and the seats of the first class shall be vacated after the expiration of two years; and one half of the Board shall be chosen every two years thereafter.

First session. SEC. 4. The first session of the Board of Education shall be held at the Seat of Government, on the first Monday of December, after their election; after which the General Assembly may fix the time and place of meeting.

Limitation of sessions. SEC. 5. The session of the Board shall be limited to twenty days, and but one session shall be held in any one year, except upon extraordinary occasions, when, upon the recommendation of two thirds of the Board, the Governor may order a special session.

Secretary. SEC. 6. The Board of Education shall appoint a Secretary, who shall be the executive officer of the Board, and perform such duties as may be imposed upon him by the Board, and the laws of the State. They shall keep a journal of their proceedings, which shall be published and distributed in the same manner as the journals of the General Assembly.

Rules and regulations. SEC. 7. All rules and regulations made by the Board shall be published and distributed to the several Counties, Townships, and School Districts, as may be provided for by the Board, and when so made, published and distributed, they shall have the force and effect of law.

Power to legislate. SEC. 8. The Board of Education shall have full power and authority to legislate and make all needful rules and regulations in relation to Common Schools, and other educational institutions, that are instituted, to receive aid from the School or University fund of this State: but all acts, rules, and regulations of said Board may be altered, amended or repealed by the General Assembly; and when so altered, amended, or repealed they shall not be re-enacted by the Board of Education.

Governor ex officio a member. SEC. 9. The Governor of the State shall be, *ex officio,* a member of said Board.

Expenses. SEC. 10. The Board shall have no power to levy taxes, or make appropriations of money. Their contingent expenses shall be provided for by the General Assembly.

State university. SEC. 11. The State University shall be established at one place without branches at any other place, and the University fund shall be applied to that Institution and no other.

Common schools. SEC. 12. The Board of Education shall provide for the education of all the youths of the State, through a system of Common Schools and such school shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school as aforesaid may be deprived of their portion of the school fund.

Compensation. SEC. 13. The members of the Board of Education shall each receive the same per diem during the time of their session, and mileage going to and returning therefrom, as members of the General Assembly.

Quorum—style of acts. SEC. 14. A majority of the Board shall constitute a quorum for the transaction of business; but no rule, regulation, or law, for the government of Common Schools or other educational institutions, shall pass without the concurrence of a majority of all the members of the Board, which shall be expressed by the yeas and nays on the final passage. The style of all acts of the Board shall be, "Be it enacted by the Board of Education of the State of Iowa."

Board may be abolished. SEC. 15. At any time after the year One thousand eight hundred and sixty three, the General Assembly shall have power to abolish or re-organize said Board of Education, and provide for the educational interest of the State in any other manner that to them shall seem best and proper.

The board of education was abolished in 1864 by 10 GA, ch 52, §1. For statutory provisions, see code, §3912 et seq.

2nd. School Funds and School Lands.

Control—management. SECTION 1. The educational and school funds and lands, shall be under the control and management of the General Assembly of this State.

Permanent fund. SEC. 2. The University lands, and the proceeds thereof, and all monies belonging to said fund shall be a permanent fund for the sole use of the State University. The interest arising from the same shall be annually appropriated for the support and benefit of said University.

Perpetual support fund. SEC. 3. The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this State, for the support of schools, which may have been, or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new States, under an act of Congress, distributing the proceeds of the public lands among the several States of the Union, approved in the year of our Lord one thousand eight hundred and forty one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent. as has been or may hereafter be granted by Congress, on the sale of lands in this State, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the General Assembly may provide, shall be inviolably appropriated to the support of Common schools throughout the State.

Fines—how appropriated. SEC. 4. The money which may have been or shall be paid by persons as an equivalent for exemption from military duty, and the clear proceeds of all fines collected in the several Counties for any breach of the penal laws, shall be exclusively applied, in the several Counties in which such money is paid, or fine collected, among the several school districts of said Counties, in proportion to the number of youths subject to enumeration in such districts, to the support of Common Schools, or the establishment of libraries, as the Board of Education shall, from time to time provide.

Similar constitutional provision, Art. XII, §4.
Analogous statute, §12554.

Proceeds of lands. SEC. 5. The General Assembly shall take measures for the protection, improvement, or other disposition of such lands as have been, or may hereafter be reserved, or granted by the United States, or any person or persons, to this State, for the use of the University, and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be, and remain, a permanent fund, the interest of which shall be applied to the support of said University, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the General Assembly as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said University.

Agents of school funds. SEC. 6. The financial agents of the school funds shall be the same, that by law, receive and control the State and county revenue for other civil purposes, under such regulations as may be provided by law.

Distribution. SEC. 7. The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the General Assembly.

ARTICLE X.

AMENDMENTS TO THE CONSTITUTION.

How proposed—submission. SECTION 1. Any amendment or amendments to this Constitution may be proposed in either House of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to, by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution of this State.

For statutory provisions, see code, §§69, 71 to 75, inc., 761 to 768, inc.

More than one amendment. SEC. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.

Convention. SEC. 3. At the general election to be held in the year one thousand eight hundred and seventy, and in each tenth year thereafter, and also at such times as the General Assembly may, by law, provide, the question, "Shall there be a Convention to revise the Constitution, and amend the same?" shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified, voting at such election, for and against such proposition, shall decide in favor of a Convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such Convention.

ARTICLE XI.

MISCELLANEOUS.

Justice of peace — jurisdiction. SECTION 1. The jurisdiction of Justices of the Peace shall extend to all civil cases, (except cases in chancery, and cases where the question of title to real estate may arise,) where the amount in controversy does not exceed one hundred dollars, and by the consent of parties may be extended to any amount not exceeding three hundred dollars.

Counties. SEC. 2. No new County shall be hereafter created containing less than four hundred and thirty two square miles; nor shall the territory of any organized county be reduced below that area; except the County of Worth, and the counties west of it, along the Northern boundary of this State, may be organized without additional territory.

Indebtedness of political or municipal corporations. SEC. 3. No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness.

Referred to in §5902.

Boundaries of state. SEC. 4. The boundaries of the State may be enlarged, with the consent of Congress and the General Assembly.

Oath of office. SEC. 5. Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the Constitution of the United States, and of this State, and also an oath of office.

How vacancies filled. SEC. 6. In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified.

Land grants located. SEC. 7. The General Assembly shall not locate any of the public lands, which have been, or may be granted by Congress to this State, and the location of which may be given to the General Assembly, upon lands actually settled, without the consent of the occupant. The extent of the claim of such occupant, so exempted, shall not exceed three hundred and twenty acres.

Seat of government established—state university. SEC. 8. The seat of Government is hereby permanently established, as now fixed by law, at the City of Des Moines, in the County of Polk; and the State University, at Iowa City, in the County of Johnson.

ARTICLE XII.

SCHEDULE.

Supreme law—constitutionality of acts. SECTION 1. This Constitution shall be the supreme law of the State, and any law inconsistent therewith, shall be void. The General Assembly shall pass all laws necessary to carry this Constitution into effect.

Laws in force. SEC. 2. All laws now in force and not inconsistent with this Constitution, shall remain in force until they shall expire or be repealed.

Proceedings not affected. SEC. 3. All indictments, prosecutions, suits, pleas, plaints, process, and other proceedings pending in any of the courts, shall be prosecuted to final judgement and execution; and all appeals, writs of error, certiorari, and injunctions, shall be carried on in the several courts, in the same manner as now provided by law; and all offences, misdemeanors, and crimes that may have been committed before the taking effect of this Constitution, shall be subject to indictment, trial and punishment, in the same manner as they would have been, had not this Constitution been made.

Fines inure to the state. SEC. 4. All fines, penalties, or forfeitures due, or to become due, or accrueing to the State, or to any County therein, or to the school fund, shall inure to the State, county, or school fund, in the manner prescribed by law.

Analogous statute, §12554.
Similar constitutional provision, Art. IX (2nd div.), §4.

Bonds in force. SEC. 5. All bonds executed to the State, or to any officer in his official capacity, shall remain in force and inure to the use of those concerned.

First election for governor and lieutenant governor. SEC. 6. The first election under this Constitution shall be held on the second Tuesday in October, in the year one thousand eight hundred and fifty seven, at which time the electors of the State shall elect the Governor and Lieutenant Governor. There shall also be elected at such election, the successors of such State Senators as were elected at the August election, in the year one thousand eight hundred and fifty-four, and members of the House of Representatives, who shall be elected in accordance with the act of apportionment, enacted at the session of the General Assembly which commenced on the first Monday of December one thousand eight hundred and fifty six.

First election of officers. SEC. 7. The first election for Secretary, Auditor, and Treasurer of State, Attorney General, District Judges, Members of the Board of Education, District Attorneys, members of Congress and such State officers as shall be elected at the April election, in the year One thousand eight hundred and fifty seven, (except the Superintendent of Public Instruction,) and such county officers as were elected at the August election, in the year One thousand eight hundred and fifty six, except Prosecuting Attorneys, shall be held on the second Tuesday of October, one thousand eight hundred and fifty-eight: *Provided,* That the time for which any District Judge or other State or County officer elected at the April election in the year One thousand eight hundred and fifty eight, shall not extend beyond the time fixed for filling like offices at the October election in the year one thousand eight hundred and fifty eight.

For judges of supreme court. SEC. 8. The first election for Judges of the Supreme Court, and such County officers as shall be elected at the August election, in the year one thousand eight hundred and fifty-seven, shall be held on the second Tuesday of October, in the year One thousand eight hundred and fifty nine.

General assembly—first session. SEC. 9. The first regular session of the General Assembly shall be held in the year One thousand eight hundred and fifty-eight, commencing on the second Monday of January of said year.

Senators. SEC. 10. Senators elected at the August election, in the year one thousand eight hundred and fifty-six, shall continue in office until the second Tuesday of October, in the year one thousand eight hundred and fifty nine, at which time their successors shall be elected as may be prescribed by law.

Offices not vacated. SEC. 11. Every person elected by popular vote, by vote of the General Assembly, or who may hold office by executive appointment, which office is continued by this Constitution, and every person who shall be so elected or appointed, to any such office, before the taking effect of this constitution, (except as in this Constitution otherwise provided,) shall continue in office until the term for which such person has been or may be elected or appointed shall expire: but no such person shall continue in office after the taking effect of this Constitution, for a longer period than the term of such office, in this Constitution prescribed.

Judicial districts. SEC. 12. The General Assembly, at the first session under this Constitution, shall district the State into eleven Judicial Districts, for District Court purposes; and shall also provide for the apportionment of the members of the General Assembly, in accordance with the provisions of this Constitution.

Submission of constitution. SEC. 13. This Constitution shall be submitted to the electors of the State at the August election, in the year one thousand eight hundred and fifty-seven, in the several election districts in this State. The ballots at such election shall be written or printed as follows: Those in favor of the Constitution, "New Constitution—Yes." Those against the

Constitution, "New Constitution—No." The election shall be conducted in the same manner as the general elections of the State, and the poll-books shall be returned and canvassed as provided in the twenty-fifth chapter of the code, and abstracts shall be forwarded to the Secretary of State, which abstracts shall be canvassed in the manner provided for the canvass of State officers. And if it shall appear that a majority of all the votes cast at such election for and against this Constitution are in favor of the same, the Governor shall immediately issue his proclamation stating that fact, and such Constitution shall be the Constitution of the State of Iowa, and shall take effect from and after the publication of said proclamation.

Proposition to strike out the word "white". SEC. 14. At the same election that this Constitution is submitted to the people for its adoption or rejection, a proposition to amend the same by striking out the word "White" from the article on the Right of Suffrage, shall be separately submitted to the electors of this State for adoption or rejection in manner following—Namely:

A separate ballot may be given by every person having a right to vote at said election, to be deposited in a separate box; and those given for the adoption of such proposition shall have the words, "Shall the word 'White' be stricken out of the Article on the Right of Suffrage? Yes." And those given against the proposition shall have the words, "Shall the word 'White' be stricken out of the Article on the Right of Suffrage? No." And if at said election the number of ballots cast in favor of said proposition shall be equal to a majority of those cast for and against this Constitution, then said word "White" shall be stricken from said Article and be no part thereof.

Mills county. SEC. 15. Until otherwise directed by law, the County of Mills shall be in and a part of the sixth Judicial District of this State.

For provisions relative to first biennial election, see amendment No. 1 of 1904.

Done in Convention at Iowa City, this fifth day of March in the year of our Lord One thousand eight hundred and fifty seven, and of the Independence of the United States of America, the eighty first.

In testimony whereof we have hereunto subscribed our names.

TIMOTHY DAY
S. G. WINCHESTER
DAVID BUNKER
D. P. PALMER
GEO. W. ELLS
J. C. HALL
JOHN. H. PETERS
WM. A. WARREN
H. W. GRAY
ROBT. GOWER
H D. GIBSON
THOMAS SEELY

A. H. MARVIN
J. H. EMERSON
R. L. B. CLARKE
JAMES A YOUNG
D. H. SOLOMON
M W. ROBINSON
LEWIS TODHUNTER
JOHN EDWARDS
J. C. TRAER
JAMES F. WILSON
AMOS HARRIS
JNO T. CLARK

S AYERS
HARVEY J. SKIFF
J. A. PARVIN
W. PENN. CLARKE
JEREMIAH HOLLINGSWORTH
WM. PATTERSON
D. W. PRICE.
ALPHEUS SCOTT
GEORGE GILLASPY
EDWARD JOHNSTONE
AYLETT R COTTON.

FRANCIS SPRINGER *President.*

Attest:
TH: J. SAUNDERS, *Secretary.*
E. N. BATES *Asst. Secretary.*

PROCLAMATION.

Whereas an instrument known as the "New Constitution of the State of Iowa" adopted by the constitutional convention of said State on the fifth day of March A. D. 1857 was submitted to the qualified electors of said State at the annual election held on Monday the third day of August 1857 for their approval or rejection.

And whereas an official canvass of the votes cast at said election shows that there were Forty thousand three hundred and eleven votes cast for the adoption of said Constitution and Thirty eight thousand six hundred and eighty-one votes were cast against its adoption, leaving a majority of sixteen hundred and thirty votes in favor of its adoption.

Now therefore I, JAMES W. GRIMES, Governor of said State, by virtue of the authority conferred upon me, hereby declare the said New Constitution to be adopted, and declare it to be the supreme law of the State of Iowa.

In testimony whereof I have hereunto set my hand and affixed the Great Seal of the State of Iowa.

L.S. Done at Iowa City this Third day of September A. D. 1857 of the Independence of the United States the eighty second and of the State of Iowa the eleventh.

JAMES W. GRIMES.

By the Governor,
ELIJAH SELLS,
Secretary of State.

AMENDMENTS TO THE CONSTITUTION

AMENDMENTS OF 1868

1st Strike the word "White" from Section 1 of Article 2 thereof;
2d Strike the word "White," from Section 33 of Article 3, thereof;
3d Strike the word "White," from Section 34 of Article 3 thereof;
4th. Strike the word White from Section 35 of Article 3 thereof;
5th Strike the word "White" from Section 1 of Article 6, thereof;

AMENDMENT OF 1880

Strike out the words "free white" from the third line of section four (4) of article three (3) of said constitution, relating to the legislative department.

AMENDMENT OF 1882

Add as Section 26 to Article. I. of said constitution the following:

SECTION 26 No person shall manufacture for sale, or sell, or keep for sale, as a beverage any intoxicating liquors whatever, including ale, wine and beer. The General Assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall thereby provide suitable penalties for the violation of the provisions hereof.

On April 21, 1883, the supreme court, in the case of Koehler v. Hill, 60 Iowa, 543, held that, owing to certain irregularities, this amendment, as submitted to and adopted by the people, did not become a part of the constitution.

For prohibition of intoxicating liquors, see also amendment 18, U. S. constitution, p. 19, now repealed by amendment 21.

AMENDMENTS OF 1884

Amendment 1. The general election for State, District County and Township officers shall be held on the Tuesday next after the first Monday in November.

The above amendment, published as section 7 of article II, was repealed by the amendment of 1916.

Amendment 2. At any regular session of the General Assembly, the State may be divided into the necessary Judicial Districts for District Court purposes, or the said Districts may be re-organized and the number of the Districts and the Judges of said Courts increased or diminished; but no re-organization of the Districts or diminution of the Judges shall have the effect of removing a Judge from office.

Amendment 3. The Grand Jury may consist of any number of members not less than five, nor more than fifteen, as the General Assembly may by law provide, or the General Assembly may provide for holding persons to answer for any criminal offense without the intervention of a Grand Jury.

Amendment 4. That Section 13 of Article 5 of the Constitution be stricken therefrom, and the following adopted as such Section.

SECTION 13. The qualified electors of each county shall, at the general election in the year 1886, and every two years thereafter elect a County Attorney, who shall be a resident of the county for which he is elected, and shall hold his office for two years, and until his successor shall have been elected and qualified.

AMENDMENTS OF 1904

AMENDMENT NO. 1

Add as Section 16, to Article 12 of the constitution, the following:

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

Practically the same amendment as the above was ratified in 1900, but the supreme court, in the case of State ex rel. Bailey v. Brookhart, 113 Iowa, 250, held that said amendment was not proposed and adopted as required by the constitution, and did not become a part thereof. The above amendment of 1904 has apparently been superseded by the amendment of 1916.

AMENDMENT NO. 2

That Sections thirty-four (34) thirty-five (35) and thirty-six (36) of Article three (3) of the constitution of the State of Iowa, be repealed and the following be adopted in lieu thereof.

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

See amendment of 1928; also Art. III, sec. 6.

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

SECTION 36. The General Assembly shall, at the first regular session held following the adoption of this amendment, and at each succeeding regular session held next after the taking of such census, fix the ratio of representation, and apportion the additional representatives, as herein before required.

AMENDMENT OF 1908

That there be added to Section Eighteen (18) of Article One (1) of the constitution of the State of Iowa the following:

The General Assembly, however, may pass laws permitting the owners of land to construct drains, ditches, and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, vest the proper authorities with power to construct and maintain levees, drains, and ditches and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of the State by special assessments upon the property benefited thereby. The General Assembly may provide by law for the condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches, and levees, and prescribe the method of making such condemnation.

AMENDMENT OF 1916

To repeal section seven (7) of article two (2) of the constitution of Iowa and to adopt in lieu thereof the following, to-wit:

"The general election for state, district, county and township officers in the year 1916 shall be held in the same month and on the same day as that fixed by the laws of the United States for the election of presidential electors, or of president and vice-president of the United States; and thereafter such election shall be held at such time as the general assembly may by law provide."

The above amendment repealed the first amendment of 1884, which was published as section 7 of article II. See also amendment No. 1 of 1904.

For statutory provisions, see code, §504.

AMENDMENT OF 1926

Strike out the word "male" from section four (4) of article three (III) of said constitution, relating to the legislative department.

AMENDMENT OF 1928

That the period (.) at the end of said section thirty-four (34) of Article three (3) of the constitution of the state of Iowa be stricken and the following inserted:

", but no county shall be entitled to more than one (1) senator."

See Art. III, sec. 6; also amendment No. 2 of 1904.

AMENDMENT OF 1936

Amend article three (III) by repealing section thirty-three (33) relating to the state census.

IOWA-MISSOURI BOUNDARY COMPROMISE

48TH GENERAL ASSEMBLY

State of Iowa

CHAPTER 304

AN ACT to provide for the relinquishment of jurisdiction over certain lands lying in Lee County, State of Iowa, to the State of Missouri.

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

SECTION 1. The Des Moines river in its present course, as heretofore declared by the Congress of the United States, shall be and remain the true boundary line between the State of Missouri and the State of Iowa.

SEC. 2. The State of Iowa hereby relinquishes all jurisdiction to all lands in Lee County lying south and west of the Des Moines River, being south and east of the east and west boundary line between the States of Iowa and Missouri.

SEC. 3. The title of record in Missouri to any lands, the jurisdiction of which is relinquished to the State of Iowa, shall be accepted as the record title by the courts of Iowa.

SEC. 4. Nothing in this act shall be deemed or construed to affect pending litigation, if any,

affecting the title to any of the land being relinquished by the State of Missouri to the State of Iowa. Provided further that any matter now in controversy and affecting the title to the land being relinquished by the State of Missouri to the State of Iowa shall be continued in the courts of the State of Missouri until the final determination thereof and such final determination shall be accepted by the courts of the State of Iowa with full force and effect.

SEC. 5. The land being relinquished to the State of Iowa, upon which taxes have been lawfully imposed in the State of Missouri during the year preceding transfer, shall not thereafter be subject to the imposition of taxes in the State of Iowa until the next succeeding year.

SEC. 6. The effective date of the relinquishment of jurisdiction over the lands herein described shall be midnight of the thirty-first (31st) day of December following the passage of the Act of Congress approving the relinquishment of jurisdiction.

SEC. 7. This Act shall be void and of no effect unless a similar Act relinquishing and waiving to the State of Iowa all claim of jurisdiction over land lying north and east of the Des Moines River is passed by the legislature of the State of Missouri at its present session.

SEC. 8. (Effective on publication, April 23, 1939.)

60TH GENERAL ASSEMBLY

State of Missouri

AN ACT authorizing the compromising and settling of a controversy between the State of Missouri and the State of Iowa over a part of the boundary between said states caused by a shifting of the channel of the Des Moines River and providing for the re-affirmance and re-establishing of said boundary line as being the Des Moines River, as heretofore established by Congress, and providing for the relinquishment of all claim of jurisdiction by Missouri to all lands lying north and east of the Des Moines River, and providing that the title of record in Iowa to any lands, the jurisdiction of which is relinquished by the State of Missouri, shall be accepted as the record title by the Courts of the State of Missouri, and providing further for the disposition of pending litigation, and providing for the jurisdiction of the courts over said land, the imposition of taxes thereon, and the effective date of this Act, and providing that said Act shall be void and of no effect unless a similar Act is passed by the Legislature of the State of Iowa, at its present session, relinquishing all claim of jurisdiction over all land lying south and west of the Des Moines River, with an emergency clause, and declaring this to be a revision bill, and also a subject matter recommended by the Governor in a special message to the General Assembly.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. The Des Moines River shall be the true boundary line as between Missouri and Iowa.

SEC. 2. The State of Missouri hereby relinquishes all jurisdiction to all lands lying north and east of the Des Moines River.

SEC. 3. The title of record in Iowa to any lands, the jurisdiction of which is relinquished to the State of Missouri, shall be accepted as the record title by the Courts of the State of Missouri.

SEC. 4. Nothing in this Act shall be deemed or construed to affect pending litigation, if any, affecting the title to any of the land being relinquished by the State of Iowa to the State of Missouri. Provided further that any matter now in controversy and affecting the title to the land being relinquished by the State of Iowa to the State of Missouri shall be continued in the courts of the State of Iowa until the final determination thereof, and such final determination shall be accepted by the Courts of the State of Missouri with full force and effect.

SEC. 5. The land being relinquished to the State of Missouri, upon which taxes have been lawfully imposed in the State of Iowa during the year preceding transfer, shall not thereafter be subject to the imposition of taxes in the State of Missouri until the next succeeding year.

SEC. 6. The effective date of the relinquishment of jurisdiction over the land herein described shall be midnight of the thirty-first (31st) day of December following the passage of the Act of Congress approving the relinquishment of jurisdiction.

SEC. 7. This Act shall be void and of no effect unless a similar act relinquishing and waiving to the State of Missouri, all claim of jurisdiction over land in Lee County, Iowa, lying south and west of the Des Moines River is passed by the Legislature of the State of Iowa at its present session.

SEC. 8. A controversy existing between the Courts of the State of Missouri and the Courts of the State of Iowa as to which has jurisdiction over certain land abutting upon the Des Moines River and between the County of Lee in Iowa and the County of Clark in Missouri as to the right to levy and collect taxes on said land and so that the public peace may be preserved, creates and there is an emergency which exists within the meaning of the Constitution and this Act shall take effect and be in force from and after its passage and approval.

SEC. 9. By reason of revising the Statutes relating to boundaries of counties and settling a dispute as to the boundary between this state and the state of Iowa which is the northern boundary of Clark County, the General Assembly hereby declares this bill to be a revision bill within the meaning of Section 41, Article IV, of the Constitution of Missouri; and also, this bill has in pursuance of Section 41, Article IV, of the Constitution of Missouri been recommended by the Governor, by special message, for the consideration of the General Assembly.

[House committee substitute for Senate Bill No. 350. Effective June 16, 1939.]

ACT OF CONGRESS

Approved August 10, 1939

WHEREAS, under date of December 13, 1937, the State of Missouri commenced suit against the State of Iowa in the Supreme Court of the United States for the purpose of determining the boundary line between the County of Clark in the State of Missouri and the County of Lee in the State of Iowa; and

WHEREAS, by stipulation filed in the said Supreme Court of the United States, it was proposed that the legislature of Iowa and the legislature of Missouri pass like bills, the State of Missouri waiving and relinquishing to the State of Iowa all jurisdiction to lands lying North and East of the Des Moines River, now in the County of Clark, State of Missouri, and the State of Iowa waiving and relinquishing to the State of Missouri all lands lying South and West of the Des Moines River, and now in the County of Lee, State of Iowa, and that said Acts be submitted to the Congress of the United States for its approval; and

WHEREAS, in accordance with said stipulation, the Forty-eighth General Assembly of the State of Iowa did at such session pass such Act, this Act being known and designated as House File No. 651, Acts of the Forty-eighth General Assembly of Iowa, bearing the signatures of John R. Irwin, Speaker of the House; Bourke B. Hickenlooper, President of the Senate; and the signature and approval of George A. Wilson, Governor of Iowa, under date of April 18th, 1939, said Act being thereupon properly published and becoming law under date of April 23, 1939; and

WHEREAS, said Act provided in substance that the Des Moines River in its present course as heretofore declared by the Congress of the United States, shall be and remain the true boundary line between the State of Missouri and the State of Iowa; that the State of Iowa relinquishes all jurisdiction to all lands in Lee County lying South and West of the Des Moines River, being South and East of the East and West boundary line between the States of Iowa and Missouri, and that the effective date of the relinquishment of jurisdiction shall be as of midnight of the 31st day of December following the passage of the Act of Congress approving the relinquishment of jurisdiction; and

WHEREAS, in accordance with stipulation as aforesaid, the Sixtieth General Assembly of the State of Missouri did, at such session, pass a like Act, this Act being known and designated as Senate Bill 350 of the Acts of the Sixtieth General Assembly of Missouri and bearing the signature and approval of Lloyd C. Stark, Governor of Missouri, under date of June 16, 1939; and

WHEREAS, said Act provides in substance that the Des Moines River shall be the true boundary line as between Missouri and Iowa; that the State of Missouri relinquishes all jurisdiction to all lands lying North and East of the Des Moines River and that the effective date of the relinquishment of jurisdiction over the land herein described shall be as of midnight of the 31st day of December following the passage of the Act of Congress approving the relinquishment of jurisdiction; and

WHEREAS, the said acts of the States of Iowa and Missouri constitute an agreement between said States establishing a boundary between said States; Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress is hereby given to such agreement and to the establishment of such boundary; and said acts of the States of Iowa and Missouri are hereby approved. [Pub. Res. No. 47, 76th Congress.]

Approved, August 10, 1939.

THE CODE OF IOWA

1939

AS AUTHORIZED BY CHAPTER THIRTEEN HEREOF

TITLE I

SOVEREIGNTY AND JURISDICTION OF THE STATE, AND THE LEGISLATIVE DEPARTMENT

CHAPTER 1

SOVEREIGNTY AND JURISDICTION OF THE STATE

1 State boundaries.
2 Sovereignty.
3 Concurrent jurisdiction.
4 Acquisition of lands by United States.
4.1 Federal fish and game refuge.
4.2 Conditions.
4.3 Legislative grant.
4.4 Applicability of statute.
4.5 National forests.
4.6 Offenses.

1 State boundaries. The boundaries of the state are as defined in the preamble of the constitution. [C51,§1; R60,§1; C73,§1; C97,§1; C24, 27, 31, 35,§1.]

Referred to in §2

2 Sovereignty. The state possesses sovereignty coextensive with the boundaries referred to in section 1, subject to such rights as may at any time exist in the United States in relation to public lands, or to any establishment of the national government. [C51,§2; R60,§2; C73,§2; C97,§2; C24, 27, 31, 35,§2.]

3 Concurrent jurisdiction. The state has concurrent jurisdiction on the waters of any river or lake which forms a common boundary between this and any other state. [C51,§3; R60,§3; C73,§3; C97,§3; C24, 27, 31, 35,§3.]

See Act of Congress, Aug. 4, 1846 [9 Stat. L. p. 52]

4 Acquisition of lands by United States. The United States of America may acquire by condemnation or otherwise for any of its uses or purposes any real estate in this state, and may exercise exclusive jurisdiction over its holding.

This state reserves, when not in conflict with the constitution of the United States or any law enacted in pursuance thereof, the right of service on real estate held by the United States of any notice or process authorized by its laws; and reserves jurisdiction, except when used for naval or military purposes, over all offenses committed thereon against its laws and regulations and ordinances adopted in pursuance thereof.

Such real estate shall be exempt from all taxation, including special assessments, while held by the United States. [R60,§§2197, 2198; C73,§4; C97,§4; S13,§§4-a–4-d, 2024-c; C24, 27, 31, 35,§4.]

Referred to in §4.4

4.1 Federal fish and game refuge. The state of Iowa hereby consents that the government of the United States may in any manner acquire in this state such areas of land or water or of land and water as said government may deem necessary for the establishment of the "Upper Mississippi River Wild Life and Fish Refuge" in accordance with the act of congress, approved June 7, 1924, provided the states of Illinois, Wisconsin, and Minnesota grant a like consent. [C27, 31, 35,§4-a1.]

Referred to in §§4.2, 4.4

4.2 Conditions. Any acquisition by the government of the United States of land and water,

or of land or water, under section 4.1 shall be first approved by the state conservation commission, by the state conservation director of this state, and the executive council. [C27, 31, 35,§4-a2.]

Referred to in §4.4

4.3 Legislative grant. There is hereby granted to the government of the United States, so long as it shall use the same as a part and for the purposes of the said "Upper Mississippi River Wild Life and Fish Refuge", all areas of land subject to overflow and not used for agricultural purposes or state fish hatcheries or salvaging stations, owned by this state within the boundaries of the said refuge, as the same may be established from time to time under authority of the said act of congress. [C27, 31, 35,§4-a3.]

Referred to in §4.4

4.4 Applicability of statute. Section 4 shall apply to all lands acquired under sections 4.1 to 4.3, inclusive. [C27, 31, 35,§4-a4.]

4.5 National forests. The consent of the state of Iowa is hereby given to the acquisition by the United States, by purchase, gift, or condemnation with adequate compensation, of such lands in Iowa as in the opinion of the federal government may be needed for the establishment, consolidation and extension of national forests and/or for the establishment and extension of wild life, fish and game refuges and for other conservation uses in the state; provided, that the state of Iowa shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil process in all cases, and such criminal process as may issue under the authority of the state of Iowa against any persons charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this law had not been passed. [C35,§4-f1.]

4.6 Offenses. Power is hereby conferred upon the congress of the United States to pass such laws and to make or provide for the making of such rules and regulations, of both a civil and criminal nature, and provide punishment therefor, as in its judgment may be necessary for the administration, control and protection of such lands as may be from time to time acquired by the United States under the provisions of this law. [C35,§4-f2.]

CHAPTER 2

GENERAL ASSEMBLY

Referred to in §1140

5 Sessions—place.
6 Temporary organization.
7 Certificates of election.
8 Temporary officers—committee on credentials.
9 Permanent organization.
10 Officers—tenure.
11 Oaths.
12 Parliamentary rules.
13 Journals.
14 Compensation of full-time members.
14.1 Mileage of presiding officers.
14.2 Compensation of lieutenant governor.
14.3 Compensation of speaker.
15 Compensation of part-time members.
16 Payment at regular session.
17 Payment at extra or adjourned session.
18 Officers and employees.
19 Compensation of officers and employees.
20 Issue of warrants.
21 Appropriation.
22 Freedom of speech.
23 Contempt.
24 Punishment for contempt.
25 Warrant—execution.
26 Fines—collection.
27 Punishment—effect.
28 Witness—attendance compulsory.
29 Witnesses—compensation.
30 Joint conventions.
31 Secretary—record.
32 Canvass of votes for governor.
33 Tellers.
34 Method of canvassing vote.
35 Election—vote—how taken.
36 Second poll.
37 Certificates of election.
38 Adjournment.
38.1 Confirmation of appointments.
39 Committee on retrenchment and reform.
40 Appointive members.
41 Organization—meetings.
42 Authority during recess.
43 Record.
44 Compensation and expenses.
45 Duties.
46 May take evidence.

5 Sessions—place. The sessions of the general assembly shall be held at the seat of government, unless the governor shall convene them at some other place in times of pestilence or public danger. [C51,§4; R60,§13; C73,§5; C97,§5; C24, 27, 31, 35,§5.]

6 Temporary organization. At ten o'clock in the forenoon of the day on which the general assembly shall convene, and at the place of convening the houses respectively, the president of the senate, or in his absence some person claiming to be a member, shall call the senate to order. If necessary, a temporary president shall be chosen from their own number by the persons claiming to be elected senators; and some person claiming to be elected a member of the house of representatives shall call the house to order, and the persons present claiming to be elected to the senate shall choose a secretary, and those of the house of representatives, a clerk for the time being. [C51,§5; R60,§14; C73,§6; C97,§6; C24, 27, 31, 35,§6.]

7 Certificates of election. Such secretary and clerk shall receive and file the certificates of election presented, each for his own house, and make a list therefrom of the persons who appear

to have been elected members of the respective houses. [C51,§6; R60,§15; C73,§7; C97,§7; C24, 27, 31, 35,§7.]

8 **Temporary officers—committee on credentials.** The persons so appearing to be members shall proceed to elect such other officers for the time being as may be requisite; and when so temporarily organized shall choose a committee of five, who shall examine and report upon the credentials of the persons claiming to be members. [C51,§7; R60,§4; C73,§8; C97,§8; C24, 27, 31, 35,§8.]

9 **Permanent organization.** The members reported by the committee as holding certificates of election from the proper authority shall proceed to the permanent organization of their respective houses by the election of officers. [C51, §8; R60,§5; C73,§9; C97,§9; C24, 27, 31, 35,§9.]

10 **Officers—tenure.** The speaker of the house of representatives shall hold his office until the first day of the meeting of the regular session next after that at which he was elected. All other officers elected by either house shall hold their offices only during the session at which they were elected, unless sooner removed. [R60,§16; C73,§13; C97,§17; C24, 27, 31, 35, §10.]

11 **Oaths.** Any member may administer oaths necessary in the course of business of the house of which he is a member, and, while acting on a committee, in the course of business of such committee. [C51,§10; R60,§7; C73,§10; C97,§10; C24, 27, 31, 35,§11.]

12 **Parliamentary rules.** In the absence of other rules, those of parliamentary practice comprised in Robert's Rules of Order Revised shall govern. [R60,§686; C73,§27; C97,§31; C24, 27, 31, 35,§12.]

13 **Journals.** The secretary of the senate and the clerk of the house of representatives shall preserve copies of the printed daily journals of their respective bodies, as corrected, certify to their correctness, and file them with the secretary of state at the adjournment of the legislature. The secretary of state shall cause the same to be bound and preserved as the original journals of the senate and the house. [C97,§132; C24, 27, 31, 35,§13.]

Printing of journals, §§259-261

14 **Compensation of full-time members.** The compensation of the members of the general assembly, except the speaker, shall be: To every member, for each full regular session, one thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session; and in going to and returning from the place where the general assembly is held, five cents per mile, by the nearest traveled route; but in no case shall the compensation for any extra session exceed ten dollars per day, exclusive of mileage. [C51,§11; R60,§18; C73,§12; C97,§12; S13,§12; C24, 27, 31, 35,§14.]

S18, §12, editorially divided

14.1 **Mileage of presiding officers.** The mileage of the lieutenant governor while acting as president of the senate and the mileage of the speaker of the house shall be the same as that of a member of the general assembly. [C27, 31, 35,§14-a1.]

41GA, ch 18, §2, editorially divided

14.2 **Compensation of lieutenant governor.** The compensation of the lieutenant governor while acting as president of the senate shall be double the compensation of a member of the general assembly. [C27, 31, 35,§14-a2.]

14.3 **Compensation of speaker.** The speaker of the house of representatives shall receive as compensation for his services as speaker and as a member of the general assembly a sum equal to twice the compensation of a member of the general assembly. [C27, 31, 35,§14-a3.]

15 **Compensation of part-time members.** When a vacancy occurs during the session of the general assembly, and by reason thereof the term of office of any member does not cover the entire session, such member shall be paid as follows:

To a member whose term of office covers fifteen session days or less, three hundred dollars.

To a member whose term of office covers more than fifteen session days and less than thirty-one such days, five hundred dollars.

To a member whose term of office covers more than thirty session days and less than fifty-one such days, seven hundred dollars.

To a member whose term of office covers more than fifty session days, one thousand dollars. [S13,§12; C24, 27, 31, 35,§15.]

16 **Payment at regular session.** Within thirty days after the convening of the general assembly, the presiding officers of the two houses shall jointly certify to the state comptroller the names of the members, officers, and employees of their respective houses, and the amount of mileage due each member, respectively, who shall thereupon draw a warrant upon the state treasurer for the amount due each member for mileage, as above certified, and shall also issue to the lieutenant governor, as president of the senate, and the speaker of the house of representatives, and to each member of the general assembly, at the end of said thirty days, a warrant for one-half the salary due him for the session, and the remaining one-half at the close of the session. [C97,§14; C24, 27, 31, 35,§16.]

17 **Payment at extra or adjourned session.** At any extra or adjourned session, the compensation of the lieutenant governor, speaker of the house of representatives, and members shall be paid semimonthly during such session, upon certificate of the presiding officer of each house showing the number of days of allowance and compensation as provided by law. [C97,§14; C24, 27, 31, 35,§17.]

18 Officers and employees. Each house of the general assembly may employ such officers and janitors as it shall deem necessary for the conduct of its business. [C97,§152; S13,§152; C24, 27, 31, 35,§18.]

19 Compensation of officers and employees. The compensation of the officers and employees of the general assembly shall be fixed by joint action of the house and senate by resolution at the opening of the session, or as soon thereafter as conveniently can be done, and no other or greater compensation shall be allowed such officers and employees, except that they shall be furnished by the state such stationery and supplies as may be necessary for the proper discharge of their duties. [C73,§12; C97,§13; C24, 27, 31, 35,§19.]

20 Issue of warrants. The state comptroller shall also issue to each officer and employee of the general assembly, from time to time, upon certificates signed by the president of the senate and the speaker of the house, warrants for the amount due for services rendered. [C97,§15; C24, 27, 31, 35,§20.]

21 Appropriation. Said warrants shall be paid out of any moneys in the treasury not otherwise appropriated. [C97,§16; C24, 27, 31, 35,§21.]

22 Freedom of speech. No member shall be questioned in any other place for any speech or debate in either house. [C51,§9; R60,§6; C73, §11; C97,§11; C24, 27, 31, 35,§22.]

23 Contempt. Each house has authority to punish as for a contempt, by fine or imprisonment or both, any person who commits any of the following offenses against its privileges, dignity, or authority:

1. Arresting a member, knowing him to be such, in violation of his privilege, or assaulting, or threatening to assault, or threatening any harm to the person or property of, a member, knowing him to be such, for anything said or done by him in such house as a member thereof.

2. Attempting by menace, or by force, or by any corrupt means, to control or influence a member in giving his vote, or to prevent his giving it.

3. Disorderly or contemptuous conduct, tending to disturb its proceedings.

4. Refusal to attend, or to be sworn, or to affirm, or to be examined, as a witness before it, or before a committee thereof, when duly subpoenaed.

5. Assaulting or preventing any person going before it, or before any of its committees, by its order, the offender knowing such fact.

6. Rescuing or attempting to rescue any person arrested by its order, the offender knowing of such arrest.

7. Impeding any officer of such house in the discharge of his duties as such, the offender knowing his official character. [C51,§12; R60, §8; C73,§14; C97,§18; C24, 27, 31, 35,§23.]

24 Punishment for contempt. Fines and imprisonment for contempt shall be only by virtue of an order of the proper house, entered on its journals, stating the grounds thereof. [C51,§14; R60,§10; C73,§15; C97,§19; C24, 27, 31, 35,§24.]

C97, §19, editorially divided

25 Warrant—execution. Imprisonment shall be effected by a warrant, under the hand of the presiding officer, for the time being, of the house ordering it, countersigned by the acting secretary or clerk, running in the name of the state, and directed to the sheriff or jailer of the proper county. Under such warrant, the proper officer will be authorized to commit and detain the person. [C51,§14; R60,§10; C73,§15; C97,§19; C24, 27, 31, 35,§25.]

Approval of warrant and expenses, §§1225.04, 1225.05

26 Fines—collection. Fines shall be collected by a similar warrant, directed to any proper officer of any county in which the offender has property, and executed in the same manner as executions for fines issued from courts of record, and the proceeds paid into the state treasury. [C51,§14; R60,§10; C73,§15; C97,§19; C24, 27, 31, 35,§26.]

Executions generally, §13976

27 Punishment—effect. Imprisonment for contempt shall not extend beyond the session at which it is ordered, and shall be in the jail of the county in which the general assembly is then sitting; or, if there be no such jail, then in one of the nearest county jails.

Punishment for contempt shall not constitute a bar to any other proceeding, civil or criminal, for the same act. [C51,§§13, 15; R60,§§9, 11; C73,§16; C97,§20; C24, 27, 31, 35,§27.]

28 Witness—attendance compulsory. Whenever a committee of either house, or a joint committee of both, is charged with an investigation requiring the personal attendance of witnesses, any person may be compelled to appear before such committee as a witness by serving an order upon him, which service shall be made in the manner required in case of a subpoena in a civil action in the district court, such order stating the time and place he is required to appear, signed by the presiding officer of the house appointing the committee, and attested by its acting secretary or clerk; or, in case of a joint committee, signed and attested by such officers of either house. [C73,§17; C97,§21; C24, 27, 31, 35,§28.]

Referred to in §29
As to service, §11334
Criminating questions, §§11267, 11268

29 Witnesses — compensation. Witnesses shall be entitled to the same compensation for attendance under section 28 as before the district court, but shall not have the right to demand payment of their fees in advance. [C73, §18; C97,§22; C24, 27, 31, 35,§29.]

As to fees, §§11326–11329

30 Joint conventions. Joint conventions of the general assembly shall meet in the hall of the house of representatives for such purposes

as are or shall be provided by law. The president of the senate, or, in his absence, the president pro tempore of the senate shall preside at such joint conventions. [R60,§§674, 675; C73, §19; C97,§23; C24, 27, 31, 35,§30.]

31 Secretary—record. The clerk of the house of representatives shall act as secretary of the convention, and he and the secretary of the senate shall keep a fair and correct record of the proceedings of the convention, which shall be entered on the journal of each house. [R60, §677; C73,§21; C97,§25; C24, 27, 31, 35,§31.]

32 Canvass of votes for governor. The general assembly shall meet in joint session on the second Tuesday of January, or as soon thereafter as both houses have been organized after the biennial election, and canvass the votes cast for governor and lieutenant governor and determine the election; and when the canvass is completed, the oath of office shall be administered to the persons so declared elected and the governor shall deliver to the joint assembly any message he may deem expedient. [S13,§30-a; C24, 27, 31, 35,§32.]

33 Tellers. After the time for the meeting of the joint convention has been designated and prior thereto, each house shall appoint one teller, and the two shall act as judges of the election. [R60,§676; C73,§20; C97,§24; C24, 27, 31, 35,§33.]

34 Method of canvassing vote. Canvassing the votes for governor and lieutenant governor shall be conducted according to the foregoing provisions, so far as applicable. [C73,§26; C97, §30; C24, 27, 31, 35,§34.]

35 Election—vote—how taken. When any officer is to be elected by joint convention, the names of the members shall be arranged in alphabetical order by the secretaries, and each member shall vote in the order in which his name stands when thus arranged. The name of the person voted for, and the names of the members voting, shall be entered in writing by the tellers, who, after the secretary shall have called the names of the members a second time, and the name of the person for whom each member has voted, shall report to the president of the convention the number of votes given for each candidate. [R60,§§678, 679; C73,§22; C97, §26; C24, 27, 31, 35,§35.]

36 Second poll. If no person shall receive the votes of a majority of the members present, a second poll may be taken, and so on from time to time until some person receives such majority. [R60,§680; C73,§23; C97,§27; C24, 27, 31, 35,§36.]

37 Certificates of election. When any person shall have received a majority of the votes as aforesaid, the president shall declare him to be elected, and shall, in the presence of the convention, sign two certificates of such election, attested by the tellers, one of which he shall transmit to the governor, and the other shall be preserved among the records of the convention and entered at length on the journal of each house. The governor shall issue a commission to the person so elected. [R60, §682; C73,§25; C97,§29; C24, 27, 31, 35,§37.]

38 Adjournment. If the purpose for which the joint convention is assembled is not concluded, the president shall adjourn the same from time to time as the members present may determine. [R60,§681; C73,§24; C97,§28; C24, 27, 31, 35,§38.]

38.1 Confirmation of appointments. When the nomination of a public officer is required to be confirmed by the senate, the nomination shall not be considered by the senate until it shall have been referred to a committee of five senators who shall, if possible, represent different political parties. The committee shall be appointed by the president of the senate, without motion, and shall report to the senate in executive session. The consideration of the nomination by the senate shall not be had on the same legislative day on which the nomination is so referred, unless it be the last day of the session. [C27, 31, 35,§38-b1.]

39 Committee on retrenchment and reform. The chairman of the committees on ways and means, judiciary, and appropriations, of the senate and house, respectively, and two members from the senate, to be appointed by the president of the senate, and two members from the house, to be appointed by the speaker of the house, at each regular session, shall constitute a standing committee on retrenchment and reform. In case there is more than one committee for judiciary, ways and means, or appropriations, the speaker of the house or the president of the senate shall designate the member to sit on the committee on retrenchment and reform. Any vacancy occurring on the committee while the legislature is not in session shall be filled by the presiding officer of the house in the event the vacancy occurs in the membership of said committee from the house and by the lieutenant governor in the event the vacancy occurs in the membership of said committee from the senate. [C97,§181; S13,§181; C24, 27, 31, 35,§39; 48GA, ch 39,§§1, 2.]

40 Appointive members. Both of the appointive members in the senate and the house, respectively, shall be named from the representatives of the minority parties, if there be such; provided, however, that if there be but one member of the minority party in either the senate or the house, the representation on said committee in such house shall be one member from the minority party. [C97,§181; S13,§181; C24, 27, 31, 35,§40.]

41 Organization—meetings. The committee shall organize by electing a chairman and a secretary from its membership, and may meet at such times and places as may be ordered by resolution or upon call of the chairman and three other members of the committee. [C97, §181; S13,§181; C24, 27, 31, 35,§41.]

42 Authority during recess. The authority granted by law to the joint committee on re-

trenchment and reform shall continue after adjournment of the legislature and until the succeeding legislature shall convene and organize, with the same force and effect as is now granted by law to such committee during the period the legislature is in session. [C97,§181; S13,§181; C24, 27, 31, 35,§42.]

43 **Record.** The committee shall make a record of its meetings and transactions, which record shall be kept in the office of the secretary of state and shall be open to public inspection. [C97,§181; S13,§181; C24, 27, 31, 35,§43.]

44 **Compensation and expenses.** For meetings of the committee other than those held during the time the legislature is in session, each member of the committee shall receive his actual traveling expenses and a per diem of ten dollars per day for each day in attendance. [C97,§181; S13,§181; C24, 27, 31, 35,§44.]

45 **Duties.** Said committee shall examine into the reports and official acts of the executive council and of each officer, board, commission, and department of the state at the seat of government, in respect to the conduct and expenditures thereof, and the receipts and disbursements of public funds thereby. [C97,§182; C24, 27, 31, 35,§45.]

46 **May take evidence.** Said committee shall have the same power to summon and examine witnesses, administer oaths, compel the production of books, papers, and evidence, and to punish for contempt, as the district court. [C97, §183; C24, 27, 31, 35,§46.]

Administration of oaths, §1215
Contempt, §§11333, 11334; also ch 536
Production of books and papers, §§11316, 11322

CHAPTER 3

STATUTES AND RELATED MATTERS

47 Form of bills.
48 Length of sections.
49 Head notes and historical references.
50 Bills—approval—passage over veto.
51 Failure of governor to return bill.
52 Acts—where deposited.
53 Acts effective July 4.
54 Publication of acts.
55 Designation of papers.
56 Acts effective—certification.
57 Private acts—when effective.
58 Appropriation acts—when effective.
59 Pro rata effect of appropriations.
60 Certain appropriations prohibited.
61 Copies of acts effective by publication.
62 Cost of publishing.

47 **Form of bills.** Bills designed to amend, revise, codify, or repeal a law:

1. Shall refer to the number of the section or sections of the code to be amended.
2. Shall refer to the number of the chapter or chapters and title of the code to be amended.
3. Shall refer to the number of the general assembly and of the sections and chapters of the acts thereof to be amended in case the bill relates to a section or sections of an act not appearing in the code.
4. All references shall be expressed in words, followed by the numerals in parentheses, and if omitted the reporter of the supreme court in preparing acts for publication in the session laws shall supply the same. [C73,§38; C97,§41; S13,§§41-a,-b; C24, 27, 31, 35,§47.]

Form and style of printing bills, §262

48 **Length of sections.** Where practicable, sections of bills shall not exceed sixteen lines in length and shall be germane to the title, chapter, or section to which they relate. [C24, 27, 31, 35, §48.]

49 **Head notes and historical references.** Proper head notes may be placed at the beginning of a section of a bill, and at the end of the section there may be placed a reference to the section number of the code, or any session law from which the matter of the bill was taken, but neither said head notes nor said historical references shall be considered as a part of the law as enacted. [C24, 27, 31, 35,§49.]

50 **Bills—approval—passage over veto.** If the governor approves a bill, he shall sign and date it; if he returns it with his objections and it afterwards passes as provided in the constitution, a certificate, signed by the presiding officer of each house in the following form, shall be indorsed thereon or attached thereto: "This bill, having been returned by the governor, with his objections, to the house in which it originated, and, after reconsideration, having again passed both houses by yeas and nays by a vote of two-thirds of the members of each house, has become a law this.....day of....." [C51,§§16, 17; R60,§§19, 20; C73,§§28, 29; C97, §32; C24, 27, 31, 35,§50.]

Constitutional provision, Art. III, §16

51 **Failure of governor to return bill.** When a bill has passed the general assembly, and is not returned by the governor within three days as provided in the constitution, it shall be authenticated by the secretary of state indorsing thereon: "This bill, having remained with the governor three days (Sunday excepted), the general assembly being in session, has become a law this.....day of.....,

.....,

Secretary of State."

[C51,§18; R60,§21; C73,§30; C97,§33; C24, 27, 31, 35,§51.]

Constitutional provision, Art. III, §16

52 **Acts—where deposited.** The original acts of the general assembly shall be deposited with and kept by the secretary of state. [C51, §19; R60,§22; C73,§31; C97,§34; C24, 27, 31, 35, §52.]

53 **Acts effective July 4.** All acts and resolutions of a public nature passed at regular

sessions of the general assembly shall take effect on the fourth day of July following their passage, unless some specified time is provided in the act, or they have sooner taken effect by publication. [C51,§22; R60,§25; C73,§34; C97,§37; C24, 27, 31, 35,§53.]

Acts of private nature, §57
Constitution, Art. III, §26

54 Publication of acts. Acts which are to take effect from and after publication in newspapers shall be published in two or more papers. [C51,§21; R60,§24; C73,§33; C97,§36; S13,§36; C24, 27, 31, 35,§54.]

S13, §36, editorially divided

55 Designation of papers. In case either or both of the papers named in the act should fail or decline to publish said act as required therein, the secretary of state may designate another paper or papers in which publication shall be made, and if such papers are not designated in the act, the same may be designated by the secretary of state, and the act published accordingly. [C73,§33; C97,§36; S13,§36; C24, 27, 31, 35,§55.]

56 Acts effective—certification. All such acts shall take effect from and after the date of the last publication, and the secretary of state shall make and sign, on the original roll of each of such acts, a certificate, stating in what papers it was published, and the date of the last publication in each of them, which certificate and the printing thereof at the foot of the act shall be presumptive evidence of the facts therein stated. [C51,§21; R60,§24; C73,§33; C97,§36; S13,§36; C24, 27, 31, 35,§56.]

Proof of publication, §11349

57 Private acts—when effective. Acts of a private nature which do not prescribe the time when they take effect, shall do so on the thirtieth day next after they have been approved by the governor, or indorsed as provided in this chapter. [C51,§20; R60,§23; C73,§32; C97,§35; C24, 27, 31, 35,§57.]

58 Appropriation acts—when effective. All annual appropriations shall be for the fiscal year beginning with July 1 and ending with June 30 of the succeeding year, and when such appropriations are made payable quarterly, the quarters shall end with September 30, December 31, March 31, and June 30; but nothing in this section shall be construed as increasing the amount of any annual appropriation. [S13, §116-a; C24, 27, 31, 35,§58.]

Referred to in §59

59 Pro rata effect of appropriations. Annual appropriations shall be disbursed in accordance with the provisions of the acts granting the same pro rata from the time such acts shall take effect up to the first day of the succeeding quarter as provided in section 58. [S13, §116-b; C24, 27, 31, 35,§59.]

60 Certain appropriations prohibited. No appropriations shall be made to any institution not wholly under the control of the state. [S13, §116-c1; C24, 27, 31, 35,§60.]

61 Copies of acts effective by publication. The secretary of state shall, immediately after an act of a general nature takes effect by publication, furnish a certified copy of such act to each clerk of the district court, who shall retain the same on file for public inspection for at least six months, and shall furnish copies thereof on payment of a fee of ten cents for each one hundred words. [SS15,§36-a; C24, 27, 31, 35, §61.]

62 Cost of publishing. The compensation for the publication of laws which are ordered by the general assembly to take effect by publication, unless otherwise fixed, shall be audited and paid by the state, and shall be one-third the rates of legal advertisements allowed by law. There is hereby provided from any money in the state treasury not otherwise appropriated, a sum sufficient to pay for such publication. [C73,§44; C97,§47; C24, 27, 31, 35,§62.]

CHAPTER 4

CONSTRUCTION OF STATUTES

63 Rules.
64 Common-law rule of construction.

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

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

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

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

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

5. *Highway—road.* The words "highway" and "road" include public bridges, and may be held

equivalent to the words "county way", "county road", "common road", and "state road".

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

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

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

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

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

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

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

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

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

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

16. *Town.* The word "town" means an incorporated town, and may include cities.

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

18. *Written—in writing.* The words "written" and "in writing" may include any mode of representing words and letters in general use, except that signatures, when required by law, must be made by the writing or mark of the person.

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

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

21. *Executor—administrator.* The term "executor" includes administrator, and the term "administrator" includes executor, where the subject matter justifies such use.

22. *Numerals—figures.* The Roman numerals and the Arabic figures are to be taken as parts of the English language.

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

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

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

26. *Population.* The word "population", where used in this code or any statute hereafter passed, shall be taken to be that as shown by the last preceding state or national census, unless otherwise specially provided. [C51,§§26, 2513; R60, §§29, 4121, 4123, 4124; C73,§45; C97,§48; C24, 27, 31, 35,§63.]

Similar provision as to par. 26, §429

64 Common-law rule of construction. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice. [C51, §2503; R60,§2622; C73,§2528; C97,§3446; C24, 27, 31, 35,§64.]

CHAPTER 5

UNIFORM STATE LAWS

65 Commission on uniform laws—vacancies.
66 Tenure—compensation—expenses.
67 Organization.
68 Duties—reports.

65 Commission on uniform laws—vacancies. The governor shall appoint three commissioners, each of whom shall be a member of the bar of this state, in good standing, who shall constitute and be known as the commission on uniform state laws, and upon the death, resignation, or refusal to serve of any of the commissioners so appointed, the governor shall make an appointment to fill the vacancy so caused, such new appointment to be for the unexpired balance of the term of the original appointee. [C24, 27, 31, 35,§65.]

66 Tenure—compensation—expenses. Said commissioners shall hold office for a term of four years, and until their successors are duly appointed, but nothing herein contained shall be construed to render a commissioner who has faithfully performed his duties ineligible for reappointment. No member of said commission shall receive any compensation for his services as commissioner, but each commissioner shall be entitled to receive his actual disbursements for expenses in performing the duties of his office. [C24, 27, 31, 35,§66.]

67 Organization. The commissioners shall meet at the state capitol at least once in two years and shall organize by the election of one of their number as chairman and another as secretary, who shall hold their respective offices for a term of two years and until their successors are elected and qualified. [C24, 27, 31, 35,§67.]

68 Duties—reports. It shall be the duty of each of said commissioners to attend the meeting of the national conference of commissioners on uniform state laws, or to arrange for the attendance of at least one of their number at such national conference, and both in and out of such national conference they shall do all in their power to promote uniformity in state laws, upon all subjects where uniformity may be deemed desirable and practicable; said commission shall report to the legislature at its next session, and from time to time thereafter as said commission may deem proper, an account of its transactions, and its advice and recommendations for legislation. This report shall be printed for presentation to each legislature. It shall also be the duty of said commission to bring about as far as practicable the uniform judicial interpretation of all uniform laws and generally to devise and recommend such additional legislation or other or further course of action as shall tend to accomplish the purposes of this chapter. [C24, 27, 31, 35,§68.]

CHAPTER 6

CONSTITUTIONAL AMENDMENTS AND PUBLIC MEASURES

69 Publication of proposed amendment.
70 Publication of proposed public measure.
71 Proof of publication—record—report to legislature.
72 Submission at general election.
73 Submission at special election.
74 Certification—sample ballot.
75 Proclamation.
76 Canvass—declaration of result—record.
77 Expenses.
77.1 Action to test legality.
77.2 Parties.

69 Publication of proposed amendment. Whenever any proposition to amend the constitution has passed the general assembly and been referred to the next succeeding legislature, the secretary of state shall cause the same to be published, once each month, in two newspapers of general circulation in each congressional district in the state, for the time required by the constitution. [C97,§55; S13,§55; C24, 27, 31, 35, §69.]

Referred to in §§71, 761–768
Time of publication, Constitution, Art. X, §1

70 Publication of proposed public measure. Whenever any public measure has passed the general assembly which under the constitution must be published and submitted to a vote of the entire people of the state, the secretary of state shall cause the same to be published, once each month, in at least one newspaper of general circulation in each county in the state, for the time required by the constitution. [C24, 27, 31, 35,§70.]

Referred to in §§71, 761–768
Time of publication, Constitution, Art. VII, §5

71 Proof of publication—record—report to legislature. Proof of the publication specified in sections 69 and 70 shall be made by the affidavits of the publishers of the newspapers designated by the secretary of state, and such affidavits, with the certificate of the secretary of state of the selection of such newspapers, shall be filed in his office, recorded in a book kept for that purpose, and preserved by him, and in the case of constitutional amendments he shall report to the following legislature his action in the premises. [C97,§55; S13,§55; C24, 27, 31, 35, §71.]

72 Submission at general election. Whenever a public measure has passed the general assembly which under the constitution must be submitted to a vote of the entire people of the state and no time is fixed by the constitution or legislature for such submission, or whenever a proposition to amend the constitution has been adopted by two succeeding general assemblies and no time is fixed by the last general assembly adopting the same for its submission to the people, said measure or amendment shall be submitted to the people at the ensuing general election, in the manner required by law. [C97,§56; C24, 27, 31, 35,§72.]

Submission, §§69, 70, 73, 761–768; Constitution, Arts. VII, X

73 Submission at special election. The general assembly may provide for the submission of a constitutional amendment to the people at a special election for that purpose, at such time as it may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed by law for the submission of a constitutional amendment at a general election. [C97,§58; C24, 27, 31, 35,§73.]

See note under §72

74 Certification—sample ballot. The secretary of state shall, not less than twenty days preceding any election at which a constitutional amendment or public measure is to be submitted to a vote of the entire people of the state, transmit to the auditor of each county a certified copy of such amendment or measure and a sample of the ballot to be used in such cases, prepared in accordance with law. [C24, 27, 31, 35,§74.]

75 Proclamation. Whenever a proposition to amend the constitution is to be submitted to a vote of the electors, the governor shall include such proposed amendment in his election proclamation. [C97,§57; C24, 27, 31, 35,§75.]

Additional provisions, §507 et seq.

76 Canvass—declaration of result—record. The judges of election, county boards of canvassers, and other election officials shall canvass

the vote on any constitutional amendment or public measure, and make return thereof, in the same manner as required by law for the canvass and return of the vote for public officers. The board of state canvassers shall canvass such returns, declare the result, and enter the same of record, immediately following and in connection with the proofs of publication of such amendment or measure, in the book kept for that purpose by the secretary of state. [C97,§56; C24, 27, 31, 35,§76.]

Canvass of votes, ch 41

77 **Expenses.** Expenses incurred under the provisions of this chapter shall be audited and allowed by the state comptroller, and paid out of any money in the state treasury not otherwise appropriated. [C97,§59; C24, 27, 31, 35,§77.]

77.1 **Action to test legality.** Whenever an amendment to the constitution of the state of Iowa shall have been proposed and agreed to by the general assembly and shall have been agreed to by the succeeding general assembly, any taxpayer may file suit in equity in the district court at the seat of government of the state, challenging the validity, legality or constitutionality of such amendment, or the procedure connected therewith, and in such suit the district court shall have jurisdiction to determine the validity, legality or constitutionality of said amendment or the procedure connected therewith, and enter its decree accordingly, and may grant a writ of injunction enjoining the governor and secretary of state from submitting such constitutional amendment, if it, or the procedure connected therewith shall have been found to be invalid, illegal or unconstitutional. [C31, 35,§77-d1.]

General procedure, §§11059, 11121.1, 11123.1, 11436.1, 12832.1, 12847.1, 12871.1

77.2 **Parties.** In such suit the taxpayer shall be plaintiff and the governor and secretary of state shall be defendants. Any taxpayer may intervene, either as party plaintiff or defendant. [C31, 35,§77-d2.]

TITLE II

EXECUTIVE DEPARTMENT

CHAPTER 7

GOVERNOR

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

78 Office—secretary.
79 Journal.
80 Counsel.
81 Expenses.
82 Highway construction patents.
83 Reward for arrest.
84 Accounting.

78 Office—secretary. The governor shall keep his office at the seat of government, in which shall be transacted the business of the executive department of the state. He shall keep a secretary at said office during his absence. [C73,§55; C97,§60; C24, 27, 31, 35,§78.]

79 Journal. He shall cause a journal to be kept in the executive office, in which a record shall be made of each official act as done, except if in cases of emergency an act is done away from the office, such entry shall be made as soon thereafter as may be. He shall cause a like military record to be kept of his acts done as commander in chief. [C73,§§56, 57; C97,§61; C24, 27, 31, 35,§79.]

80 Counsel. Whenever the governor is satisfied that an action or proceeding has been commenced which may affect the rights or interests of the state, he may employ counsel* to protect such rights or interests; and when any civil action or proceeding has been or is about to be commenced by the proper officer in behalf of the state, he may employ additional counsel to assist in the cause. [C51,§40; R60,§44; C73,§59; C97, §63; C24, 27, 31, 35,§80.]

Employment by executive council, §152
*See amendment to §152 by 48GA, ch 44, §1

81 Expenses. The expenses thus incurred, and those caused in executing the laws, may be allowed by him and paid from the contingent fund. [C51,§41; R60,§45; C73,§60; C97,§64; C24, 27, 31, 35,§81.]

82 Highway construction patents. The governor, whenever he deems such action to be in the interest of the public, shall have power to direct the attorney general to appear for and on behalf of any county, city, town, or other municipality of this state or for and on behalf of any officer thereof or contractor therewith, whenever any such county, city, town, or other municipality or officer or contractor is a party to any action or proceeding in any court wherein is involved the validity of any alleged patent on any matter or thing entering into highway, bridge, or culvert construction, or on any parts thereof, and may employ such legal assistance in addition to the attorney general as he may deem necessary and may pay for the same out of any fund in the state treasury not otherwise appropriated. Whenever the attorney general is so directed by the governor it shall be his duty to comply therewith. [S13,§64-a; C24, 27, 31, 35,§82.]

Employment by executive council, §152
Special counsel, §4630.1

83 Reward for arrest. Whenever the governor is satisfied that a crime has been committed within the state, punishable by death or by imprisonment in the penitentiary for a term of ten years or more, and the person committing the same has not been arrested or has escaped from arrest or custody or his whereabouts is unknown, he may in his discretion, offer a reward not exceeding five hundred dollars for the arrest and delivery to the proper authorities of such persons, which reward, upon the certificate of the governor that the same has been earned, shall be audited and paid by the state.

Such reward shall be paid only upon the conviction of said person and affirmance thereof by the supreme court, if appealed thereto. [R60, §57; C73,§58; C97,§62; C24, 27, 31, 35,§83.]

84 Accounting. All fees paid to the governor shall be turned over to the treasurer of state. [SS15,§4-e; C24, 27, 31, 35,§84.]

CHAPTER 7.1

BUDGET AND FINANCIAL CONTROL ACT

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84.01 Title. This chapter shall be known and may be cited as the "Budget and Financial Control Act". [C35,§84-e1.]

84.02 Definitions. When used in this chapter:

1. The terms, "department and establishment" and "department" or "establishment", mean any executive department, commission, board, institution, bureau, office, or other agency of the state government except the courts, by whatever name called, other than the legislature, that uses, expends or receives any state funds.

2. "State funds" means any and all moneys appropriated by the legislature, or money collected by or for the state, or an agency thereof, pursuant to authority granted by any of its laws.

3. "Private trust funds" means any and all endowment funds and any and all moneys received by a department or establishment from private persons to be held in trust and expended as directed by the donor.

4. "Special fund" means any and all government fees and other revenue receipts earmarked to finance a governmental agency to which no general fund appropriation is made by the state.

5. "Repayment receipts" means those moneys collected by a department or establishment that supplement an appropriation made by the legislature.

6. "Budget" means the budget document required by this chapter to be transmitted to the legislature.

7. "Government" means the government of the state of Iowa.

8. "Unincumbered balance" means the unobligated balance of an appropriation after charging thereto all unpaid liabilities for goods and services and all contracts or agreements payable from an appropriation or a special fund.

9. "Code" or "the code" means the code of Iowa. [C35,§84-e2.]

84.03 Governor. The governor of the state shall have:

1. Direct and effective financial supervision over all departments and establishments, and every state agency by whatever name now or hereafter called, including the same power and supervision over such private corporations, persons and organizations that may receive, pursuant to statute, any funds, either appropriated by, or collected for, the state, or any of its departments, boards, commissions, institutions, divisions and agencies.

2. The efficient and economical administration of all departments and establishments of the government.

3. The initiation and preparation of a balanced budget of any and all revenues and expenditures for each regular session of the legislature. [C35,§84-e3.]

84.04 State comptroller — salary — bond. There is hereby created an office to be known as "office of state comptroller", which shall be directly attached to the office of the governor and shall be under the general direction, supervision and control of the governor. Such office shall be in immediate charge of an officer to be known as "state comptroller", who shall be appointed by the governor, with the approval, in executive session, of two-thirds of the senate, and shall hold office at his pleasure and shall receive a salary not to exceed forty-five hundred dollars a year. Before entering upon the discharge of his duties, he shall take the constitutional oath of office and he shall give a surety bond in such penalty as may be fixed by the governor, payable to the state, but such penalty shall not be less than twenty-five thousand dollars conditioned upon the faithful discharge of his duties. The premium on his bond shall be paid out of the state treasury. [C24,§§309, 311–316; C27,§§309, 311, 313–316; C31,§§309, 311, 314–316, 1063; C35,§84-e4.]

84.05 General powers and duties. The state comptroller shall have the power and authority to:

1. *Assistants.* Employ, with the approval of the governor, two assistant comptrollers and

such clerical assistants as he may find necessary.

2. *Compensation of employees.* Fix the compensation, with the approval of the governor, of any person employed by him, provided that the total amount paid in salaries shall not exceed the appropriation made for that purpose.

3. *Discharge of employees.* Discharge any employee of his department.

4. *Delegated powers and duties.* Perform and exercise all those duties and powers now delegated by law and performed by the state auditor which relate to bookkeeping and accounting.

5. *Miscellaneous duties.* Exercise and perform such other powers and duties as may be prescribed by law. [C51,§§50–58; R60,§§71–79, 1967; C73,§§66–74; C97,§§89–97, 162; S13,§§89, 162, 163-a, 170-e,-f; SS15,§§170-r,-s,-t,-u; C24, 27, 31,§§102–109, 391–407; C27, 31,§130-a1; C31, §397-d1; C35,§84-e5.]

84.06 Specific powers and duties. The specific duties of the state comptroller shall be:

1. *Audit of claims.* To audit all demands by the state, and to preaudit all accounts submitted for the issuance of warrants;

2. *Collection and payment of funds.* To control the payment of all moneys into the treasury, and all payments from the treasury by the preparation of appropriate warrants, or warrant checks, directing such collections and payment;

3. *Contracts.* To certify, record and incumber all formal contracts to prevent overcommitment of appropriations and allotments;

4. *Forms.* To prescribe all accounting and business forms and the system of accounts and reports of financial transactions by all departments and agencies of the state government other than those of the legislative branch;

5. *Accounts.* To keep the central budget and proprietary control accounts of the state government. Budget accounts are those accounts maintained to control the receipt and disposition of all funds, appropriations and allotments. Proprietary accounts are those accounts relating to assets, liabilities, income and expense;

6. *Preaudit system.* To establish and fix a reasonable imprest cash fund for each state department and/or institution for disbursement purposes where needed; provided, that these revolving funds shall be reimbursed only upon vouchers approved by the state comptroller. It is the purpose of this subdivision to establish a preaudit system of settling all claims against the state and to centralize all disbursements of the state government other than the disbursements of the state fair board, the institutions under the state board of education and state conservation commission;

7. *Fair board and board of education.* To control the financial operations of the state fair board and the institutions under the state board of education: (a) By charging all warrants issued to the respective educational institutions and the state fair board to an advance account to be further accounted for and not as an expense which requires no further accounting; (b) by charging all collections made by the educational institutions and state fair board to the respective advance accounts of the institutions and state fair board, and by crediting all such repayment collections to the respective appropriations and special funds; (c) by charging all disbursements made to the respective allotment accounts of each educational institution or state fair board and by crediting all such disbursements to the respective advance and inventory accounts; and (d) by requiring a monthly abstract of all receipts and of all disbursements, both money and stores, and a complete account-current each month from each educational institution and the state fair board;

Referred to in §101.2

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

9. *Apportionment of interest.* To apportion the interest of the permanent school fund on the first Monday of March and September of each year, among the several counties in proportion to the number of persons between five and twenty-one years of age in each, as shown by the last report filed with him by the superintendent of public instruction;

10. *Report of standing appropriations.* To biennially prepare a separate report containing a complete list of all standing appropriations showing the amount of each appropriation and the purpose for which such appropriation is made and furnish a copy of such report to each member of the general assembly on or before the first day of each regular session;

11. *Budget document.* To prepare the budget document and draft the legislation to make it effective;

12. *Allotments.* To perform the necessary work involved in reviewing requests for allotments as are submitted to the governor for approval;

13. *Transfer of appropriations.* To determine the need for all transfers of appropriations submitted to the governor for approval under the authority of section 27* hereof;

*Section 27 of original bill rejected by legislature

13-a. *Certification for levy.* On August 1 the state comptroller shall, for each year of the biennium, certify to the state tax commission, the amount of money to be levied for general state taxes.

14. *Investigations.* To make such investigations of the organization, activities and methods of procedure of the several departments and establishments as he may be called upon to make by the governor and/or the governor and executive council, or the legislature;

15. *Legislative aid.* To furnish to any committee of either house of the legislature having jurisdiction over revenues or appropriations such aid and information regarding the financial affairs of the government as it may request;

16. *Rules and regulations.* To make such rules and regulations, subject to the approval of the governor, as may be necessary for effectively

carrying on the work of the state comptroller's office;

17. *Budget report.* The comptroller shall prepare and file in his office, on or before the first day of December of each even-numbered year, a state budget report, which shall show in detail the following:

a. Classified estimates in detail of the expenditures necessary, in his judgment, for the support of each department and each institution and department thereof for the ensuing biennium.

b. A schedule showing a comparison of such estimates with the askings of the several departments for the current biennium and with the expenditures of like character for the last two preceding bienniums.

c. A statement setting forth in detail his reasons for any recommended increases or decreases in the estimated requirements of the various departments, institutions and departments thereof.

d. Estimates of all receipts of the state other than from direct taxation and the sources thereof for the ensuing biennium.

e. A comparison of such estimates and askings with receipts of a like character for the last two preceding bienniums.

f. The expenditures and receipts of the state for the last completed fiscal year, and estimates of the expenditures and receipts of the state for the current fiscal year.

g. A detailed statement of all appropriations made during the two preceding bienniums, also of unexpended balances of appropriations at the end of the last fiscal year and estimated balances at the end of the current fiscal year.

h. Estimates in detail of the appropriations necessary to meet the requirements of the several departments and institutions for the next biennium.

i. Statements showing:

(1) The condition of the treasury at the end of the last fiscal year.

(2) The estimated condition of the treasury at the end of the current fiscal year.

(3) The estimated condition of the treasury at the end of the next biennium, if his recommendations are adopted.

(4) An estimate of the taxable value of all the property within the state.

(5) The estimated aggregate amount necessary to be raised by a state levy.

(6) The millage necessary to produce such amount.

(7) Such other data or information as the comptroller may deem advisable.

18. *General control.* To perform such other duties as may be required to effectively control the financial operations of the government as limited by this chapter. [C51,§50; R60,§§71, 1967; C73,§66; C97,§89; S13,§§89, 161-a; C24, 27, 31,§§102, 130, 329; C35,§84-e6; 47GA, ch 87,§1; 48GA, ch 40,§1; ch 41,§5.]

Referred to in §84.24

84.07 Accounting. The comptroller may at any time require any person receiving money, securities, or property belonging to the state, or having the management, disbursement, or other disposition of the same, an account of which is kept in his office, to render statements thereof and information in reference thereto. [C51, §52; R60,§73; C73,§68; C97,§91; C24, 27, 31, §104; C35,§84-e7.]

45GA, ch 4, §7, editorially divided

84.08 Stating account. If any officer who is accountable to the treasury for any money or property neglects to render an account to the comptroller within the time prescribed by law, or, if no time is so prescribed, then, within twenty days after being required so to do by the comptroller, the comptroller shall state an account against him from the books of his office, charging ten percent damages on the whole sum appearing due, and interest at the rate of six percent per annum on the aggregate from the time when the account should have been rendered; all of which may be recovered by action brought on such account, or on the official bond of such officer. [C51,§54; R60,§75; C73, §70; C97,§93; C24, 27, 31,§105; C35,§84-e8.]

Referred to in §84.10

84.09 Compelling payment. If any such officer fails to pay into the treasury the amount received by him within the time prescribed by law, or, having settled with the comptroller, fails to pay the amount found due, the comptroller shall charge such officer with twenty percent damages on the amount due, with interest on the aggregate from the time the same became due at the rate of six percent per annum, and the whole may be recovered by an action brought on such account, or on the official bond of such officer, and he shall forfeit his commission. [C51,§55; R60,§76; C73,§71; C97,§94; C24, 27, 31,§106; C35,§84-e9.]

Referred to in §84.10

84.10 Defense to claim. The penal provisions in sections 84.08 and 84.09 are subject to any legal defense which the officer may have against the account as stated by the comptroller, but judgment for costs shall be rendered against the officer in the action, whatever be its result, unless he rendered an account within the time named in sections 84.08 and 84.09. [C51,§56; R60,§77; C73,§72; C97,§95; C24, 27, 31,§107; C35,§84-e10.]

84.11 Requested credits — oath required. When a county treasurer or other receiver of public money seeks to obtain credit on the books of the comptroller's office for payment made to the treasurer, before giving such credit, the comptroller shall require him to take and subscribe an oath that he has not used, loaned, nor appropriated any of the public money for his private benefit, nor the benefit of any other person. [C51,§57; R60,§78; C73,§73; C97,§96; C24, 27, 31,§108; C35,§84-e11.]

84.12 Requisition for information. In those cases where the comptroller is authorized to call upon persons or officers for information, or statements, or accounts, he may issue his requisition therefor in writing to the person or officer

called upon, allowing reasonable time, which, having been served and return made thereon to the comptroller, as a notice in a civil action, shall be evidence of the making of the requisition therein expressed. [C51,§58; R60,§79; C73, §74; C97,§97; C24, 27, 31,§109; C35,§84-e12.]

84.13 Claims—limitations. The state comptroller shall be limited in authorizing the payment of claims, as follows:

1. *Six months limit.* No claim shall be allowed by the state comptroller's office when such claim is presented after the lapse of six months from its accrual.

2. *Convention expenses.* No claims for expenses in attending conventions, meetings, conferences or gatherings of members of any association or society organized and existing as quasi-public association or society outside the state of Iowa shall be allowed at public expense, unless authorized by the executive council; and claims for such expenses outside of the state shall not be allowed unless the voucher is accompanied by so much of the minutes of the executive council, certified to by its secretary, showing that such expense was authorized by said council. This section shall not apply to claims in favor of the governor, attorney general, Iowa state commerce commissioners, or to trips referred to in section 3284.

45GA, ch 44, §2, not applied

3. *Payment from fees.* No claims for per diem and expenses payable from fees shall be approved for payment in excess of such fees where the law provides that such expenditures are limited to the special funds collected and deposited in the state treasury. [C51,§53; R60,§74; C73,§69; C97,§92; S13,§170-f; SS15,§170-s,-t; C24, 27, 31,§§393, 398, 407; C35,§84-e13; 47GA, ch 205,§1.]

THE BUDGET

84.14 Budget transmitted. Not later than February 1 of the year of each biennial legislative session, the governor shall transmit to the legislature a document to be known as a budget, setting forth his financial program for each of the fiscal years of the ensuing biennium and having the character and scope hereinafter set forth. [SS15,§191-b; C24, 27, 31,§334; C35, §84-e14; 48GA, ch 41,§1.]

Referred to in §84.20

84.15 Nature and contents. The budget shall consist of three parts, the nature and contents of which shall be as follows:

PART I

Governor's budget message. Part I shall consist of the governor's budget message, in which he shall set forth:

1. His program for meeting all the expenditure needs of the government for each of the years of the biennium to which the budget relates, indicating the classes of funds, general or special, from which such appropriations are to be made and the means through which such expenditures shall be financed;

2. Financial statements giving in summary form:

a. The condition of the treasury at the end of the last completed fiscal year, the estimated condition of the treasury at the end of the year in progress, and the estimated condition of the treasury at the end of each of the two years to which the budget relates if his budget proposals are put into effect;

b. Statements showing the bonded indebtedness of the government, debt authorized and unissued, debt redemption and interest requirements and condition of the sinking funds, if any;

c. A summary of appropriations recommended for each of the two years of the biennium to which the budget relates for each department and establishment and for the government as a whole, in comparison with the actual expenditures for the last completed fiscal year and the estimated expenditures for the year in progress;

d. A summary of the revenue, estimated to be received by the government during each of the two years of the biennium to which the budget relates, classified according to sources, in comparison with the actual revenue received by the government during the last completed fiscal year and estimated income during the year in progress; and

e. Such other financial statements, data and comments as in his opinion are necessary or desirable in order to make known in all practicable detail the financial condition and operation of the government and the effect that the budget as proposed by him will have on such condition and operations.

If the estimated revenues of the government for the ensuing biennium as set forth in the budget on the basis of existing laws, plus the estimated amounts in the treasury at the close of the year in progress, available for expenditure in the ensuing biennial period is less than the aggregate recommended for the ensuing biennial period as contained in the budget, the governor shall make recommendations to the legislature in respect to the manner in which such deficit shall be met, whether by an increase in the state tax or the imposition of new taxes, increased rates on existing taxes, or otherwise, and if the aggregate of such estimated revenues, plus estimated balances in the treasury is greater than such recommended appropriations for the ensuing biennial period, he shall make such recommendations in reference to the application of such surplus to the reduction of debt or otherwise, to the reduction in taxation, or to such other action as in his opinion is in the interest of the public welfare.

PART II

Recommended appropriations. Part II shall present in detail for each of the two years of the ensuing biennium his recommendations for appropriations to meet the expenditure needs of the government from each general class of funds, in comparison with actual expenditures for each of said purposes during the last completed fiscal year and estimated expenditures

for the year in progress, classified by departments and establishments and indicating for each the appropriations recommended for:

a. Meeting the cost of administration, operation and maintenance of such departments and establishments, and

b. Appropriations for meeting the cost of land, public improvements and other capital outlays in connection with such departments and establishments.

Each item of expenditure, actual, or estimated, and appropriations recommended for administration, operation and maintenance of each department or establishment shall be supported by detailed statements showing the actual and estimated expenditures and appropriations classified by objects according to a standard scheme of classification to be prescribed by the state comptroller, hereinabove provided for.

PART III

Appropriation bills. Part III shall embrace a draft or drafts of appropriation bills having for their purpose to give legal sanction to the appropriations recommended to be made in Parts I and II. Such appropriation bills shall indicate the funds, general or special, from which such appropriations shall be paid, but such appropriations need not be in greater detail than to indicate the total appropriation to be made for:

a. Administration, operation and maintenance of each department and establishment for each fiscal year of the biennium, and

b. The cost of land, public improvements and other capital outlays for each department and establishment, itemized by specific projects or classes of projects of the same general character. [SS15,§191-b; C24, 27, 31,§§332, 333, 335; C35,§84-e15.]

Referred to in §§84.18, 84.20

84.16 Biennial departmental estimates. On, or before, September 1, next prior to each biennial legislative session, all departments and establishments of the government shall transmit to the state comptroller, hereinabove provided for, on blanks to be furnished by him, estimates of their expenditure requirements, including every proposed expenditure, for each fiscal year of the ensuing biennium, classified so as to distinguish between expenditures estimated for (a) administration, operation and maintenance, and (b) the cost of each project involving the purchase of land or the making of a public improvement or capital outlay of a permanent character, together with such supporting data and explanations as may be called for by the state comptroller, hereinabove provided for. In case of the failure of any department or establishment to submit such estimates within the time above specified, the governor shall cause to be prepared such estimates for such department or establishment as in his opinion are reasonable and proper. [S13,§163-a;SS15,§191-a; C24, 27, 31,§§327, 328; C35,§84-e16; 48GA, ch 41,§2.]

Referred to in §84.18

84.17 Biennial estimate of income. On, or before, October 1, next prior to each biennial legislative session, the state comptroller, hereinabove provided for, shall prepare an estimate of the total income of the government for each fiscal year of the ensuing biennium, in which the several items of income shall be listed and classified according to sources or character, departments or establishments producing said funds and brought into comparison with the income actually received during the last completed fiscal year and the estimated income to be received during the year in progress. [C35,§84-e17.]

Referred to in §84.18

84.18 Tentative budget. Upon the receipt of the estimates of expenditure requirements called for by section 84.16 and the preparation of the estimates of income called for by section 84.17 and not later than December 1, next succeeding, the state comptroller, hereinabove provided for, shall cause to be prepared a tentative budget conforming as to scope, contents and character to the requirements of section 84.15 and containing the estimates of expenditures and revenue as called for by sections 84.16 and 84.17, which tentative budget shall be transmitted to the governor. [C24, 27, 31,§332; C35,§84-e18; 48GA, ch 41,§3.]

Referred to in §84.19

84.19 Hearings. Immediately upon the receipt by him of the tentative budget provided for by section 84.18 the governor shall make provision for public hearings thereon, at which he may require the attendance of the heads and other officers of all departments, establishments and other persons receiving or requesting the grant of state funds and the giving by them of such explanations and suggestions as they may be called upon to give or as they may desire to offer in respect to items of requested appropriations in which they are interested. The governor shall also extend invitations to the governor-elect and the state comptroller to be present at such hearings and to participate in the hearings through the asking of questions or the expression of opinion in regard to the items of the tentative budget. [C24, 27, 31,§331; C35, §84-e19; 48GA, ch 41,§4.]

84.20 Preparation of budget. Following his inauguration, the governor shall proceed to the formulation of the budget provided for by sections 84.14 and 84.15. [C35,§84-e20.]

84.21 Supplemental estimates. The governor shall transmit to the legislature supplemental estimates for such appropriations as in his judgment may be necessary on account of laws enacted after transmission of the budget, or as he deems otherwise in the public interest. He shall accompany such estimates with a statement of the reasons therefor, including the reasons for their omission from the budget. Whenever such supplemental estimates amount to an aggregate which, if they had been contained in the budget, would have required the governor to make a recommendation for the raising of additional revenue, he shall make such recommendation. [C35,§84-e21.]

84.22 Prohibited estimates or requests. No estimate or request for an appropriation and no request for an increase in an item of any such estimate or request, and no recommendation as to how the revenue needs of the government should be met, shall be submitted to the legislature or any committee thereof by any officer or employee of any department or establishment, unless at the request of either house of the general assembly. [SS15,§191-b; C24, 27, 31,§338; C35,§84-e22.]

EXECUTION OF THE BUDGET

84.23 Availability of appropriations. The appropriations made shall not be available for expenditure until allotted as provided for in section 84.24. All appropriations now or hereafter made are hereby declared to be maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full. The governor shall restrict allotments only to prevent an overdraft or deficit in any fiscal year for which appropriations are made. [C35,§84-e23.]

84.24 Quarterly requisitions—exceptions—modifications. Before an appropriation for administration, operation and maintenance of any department or establishment shall become available, there shall be submitted to the governor, not less than twenty days before the beginning of each quarter of each fiscal year, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the ensuing quarter. Such requisition shall contain such details of proposed expenditures as may be required by the governor.

The governor shall approve such allotments, unless he finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event he may modify such allotments to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year, and shall submit copies of the allotments thus approved or modified to the head of the department or establishment concerned, and to the state comptroller, hereinabove provided for, who shall set up such allotments on his books and be governed accordingly in his control of expenditures.

Allotments of appropriations made for equipment, land, permanent improvements, and other capital projects may, however, be allotted in one amount by major classes or projects for which they are expendable without regard to quarterly periods.

Allotments thus made may be subsequently modified by the governor either upon the written request of the head of the department or establishment concerned, or in the event the governor finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, upon his own initiative to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year; and the head of the department or establishment and the state comptroller, hereinabove provided for, shall be given notice of such modification in the same way as in the case of original allotments.

Provided, however, that the allotment requests of all departments and establishments collecting governmental fees and other revenue which supplement a state appropriation shall attach to the summary of requests a statement showing how much of the proposed allotments are to be financed from (a) state appropriations, (b) stores, and (c) repayment receipts.

The procedure to be employed in controlling the expenditures and receipts of the state fair board and the institutions under the state board of education, whose collections are not deposited in the state treasury, will be that outlined in section 84.06, subdivision 7.

The finding by the governor that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, as provided herein, shall be subject to the concurrence in such finding by the executive council before reductions in allotment shall be made, and in the event any reductions in allotment be made, such reductions shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations. [C35,§84-e24.]

Referred to in §§84.23, 84.25

84.25 Conditional availability of appropriations. All appropriations made to any department or establishment of the government as receive or collect moneys available for expenditure by them under present laws, are declared to be in addition to such repayment receipts, and such appropriations are to be available as and to the extent that such receipts are insufficient to meet the costs of administration, operation and maintenance, or public improvements of such departments:

Provided, that such receipts or collections shall be deposited in the state treasury as part of the general fund or special funds in all cases, except those collections made by the state fair board, the institutions under the state board of education and the state conservation commission.

Provided further, that no repayment receipts shall be available for expenditures until allotted as provided in section 84.24; and

Provided further, that the collection of repayment receipts by the state fair board and the institutions under the state board of education shall be deposited in a bank or banks duly designated and qualified as state depositories, in the name of the state of Iowa, for the use of such boards and institutions, and such funds shall be available only on the check of such boards or institutions depositing them, which are hereby authorized to withdraw such funds, but only after allotment by the governor as provided in section 84.24; and

Provided further, that this chapter shall not apply to endowment and/or private trust funds or to gifts to institutions owned or controlled by the state or to the income from such endowment and/or private trust funds, or to private funds belonging to students or inmates of state institutions.

The provisions of this chapter shall not be construed to prohibit the state fair board from creating an emergency or sinking fund out of the receipts of the state fair and state appropriation for the purpose of taking care of any emergency that might arise beyond the control of the board of not to exceed fifty thousand dollars. [C35,§84-e25.]

84.26 Reversion of unincumbered balances. All unincumbered balances of annual administration, operation and maintenance appropriations except those of the state conservation commission and except those for the state fair board shall revert to the state treasury at the end of each fiscal year of a given biennium and to the credit of the general fund or special funds from which the appropriation and/or appropriations were made; except that capital expenditures for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made: provided, that this section shall not be construed to repeal the provisions of sections 290 to 293, inclusive. [C35,§84-e26.]

84.27 Charging off unexpended appropriations. Except when otherwise provided by law, the comptroller shall transfer to the general fund of the state any unexpended balance of any annual or biennial appropriation remaining at the expiration of six months after the close of the fiscal period for which the appropriation was made. At the time the transfer is made on the books of his office he shall certify such fact to the treasurer of state, who shall make corresponding entries on the books of the treasurer's office. [C27, 31,§130-a1; C35,§84-a1.]

Not part of Budget and Financial Control Act (45GA, ch 4)

84.28 General supervisory control. The governor and the state comptroller and any officer of the office of state comptroller, hereinabove provided for, when authorized by the governor, are hereby authorized to make such inquiries regarding the receipts, custody and application of state funds, existing organization, activities and methods of business of the departments and establishments, assignments of particular activities to particular services and regrouping of such services, as in the opinion of the governor, will enable him to make recommendations to the legislature, and, within the scope of the powers possessed by him, to order action to be taken, having for their purpose to bring about increased economy and efficiency in the conduct of the affairs of government. [C35,§84-e27.]

84.29 Fiscal year. The fiscal year of the government shall commence on the first day of July and end on the thirtieth day of June. This fiscal year shall be used for purposes of making appropriations and of financial reporting and shall be uniformly adopted by all departments and establishments of the government. [C35, §84-e28.]

84.30 Biennial fiscal term. The biennial fiscal term of the state ends on the thirtieth day of June in each even-numbered year, and the succeeding biennial fiscal term begins on the day following. [C73,§129; C97,§123; S13,§123; C24, 27, 31,§129; C35,§84-a2.]

Not part of Budget and Financial Control Act (45GA, ch 4)

84.31 Misuse of appropriations. Any board member, commissioner, director, manager, building committee, or other officer, or person connected with any institution, or other state department or establishment as herein defined, to which an appropriation is made, who shall expend any appropriation for any purpose other than that for which the money was appropriated, budgeted and allotted or who shall consent thereto, shall be liable to the state for such sum so spent, and the sum so spent, together with interest and costs, shall be recoverable in an action to be instituted by the attorney general for the use of the state, which action shall be instituted in the district court of Polk county. [C35,§84-e29.]

84.32 Use of appropriations. No appropriation nor any part thereof shall be used for any other purpose than that for which it was made without specific authority of the general assembly, except as otherwise provided by law. [C97,§187; SS15,§170-q; C24, 27, 31,§345; C35, §84-a3.]

Referred to in §390
Not part of Budget and Financial Control Act (45GA, ch 4)

84.33 Misdemeanors — removal — impeachment. A refusal to perform any of the requirements of this chapter, and the refusal to perform any rule or requirement or request of the governor and/or the state comptroller made pursuant to or under authority of this chapter, by any board member, commissioner, director, manager, building committee or other officer or person connected with any institution, or other state department or establishment as herein defined, shall subject the offender to a penalty of two hundred and fifty dollars, to be recovered in an action instituted in the district court of Polk county by the attorney general for the use of the state, and shall also constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. If such offender be not an officer elected by vote of the people, such offense shall be sufficient cause for removal from office or dismissal from employment by the governor upon thirty days notice in writing to such offender; and, if such offender be an officer elected by vote of the people, such offense shall be sufficient cause to subject the offender to impeachment. [S13,§163-a; C24, 27, 31,§330; C35,§84-e30.]

Constitutionality, §84-e31, code 1935; 45GA, ch 4, §31
Omnibus repeal, §84-e32, code 1935; 45GA, ch 4, §33

CHAPTER 8

SECRETARY OF STATE

Beer permit board—duties, §§1921.096, 1921.097
Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

85 Duties—records.
86 Records relating to cities and towns.
87 Commissions.
88 Fees.
88.1 Salary.

85 Duties—records. The secretary of state shall keep his office at the seat of government, and perform all duties required of him by law; he shall have charge of and keep all the acts and resolutions of the territorial legislature and of the general assembly of the state, the enrolled copies of the constitutions of the state, and all bonds, books, records, maps, registers, and papers which are now or may hereafter be deposited to be kept in his office, including all books, records, papers, and property pertaining to the state land office. [C51,§43; R60,§59; C73,§61; C97,§66; C24, 27, 31, 35,§85.]

86 Records relating to cities and towns. He shall receive and preserve in his office all papers transmitted to him in relation to the incorporation of cities and towns, or the annexation of territory thereto, or the consolidation or abandonment of municipal corporations; and shall keep an alphabetical list of said cities and towns in a book provided for that purpose, in which shall be entered the name of the town or city, the character of the same, whether town or city, the county in which situated, and the date of organization. [R60,§1046; C73,§65; C97,§67; C24, 27, 31, 35,§86.]

87 Commissions. All commissions issued by the governor shall be countersigned by the secretary, who shall register each commission in a book to be kept for that purpose, specifying the office, name of officer, date of commission, and tenure of office; provided, however, that notarial commissions shall be registered only in the office of the governor. [C51,§44; R60,§60; C73,§62; C97,§68; S13,§68; C24, 27, 31, 35,§87.]

88 Fees. The secretary of state shall collect all fees directed by law to be collected by him, including the following:

1. For certificate, with seal attached, two dollars.
2. For a copy of any law or record, upon the request of any private person or corporation, for every hundred words, twenty-five cents.

[C51,§2524; R60,§4133; C73,§3756; C97,§85; C24, 27, 31, 35,§88.]

88.1 Salary. The salary of the secretary of state shall be five thousand dollars per annum. [C31, 35,§88-c1.]

CHAPTER 9

LAND OFFICE

89 Records.
90 Separate grants.
91 Tract books.
92 Land office—how kept—certified copies.
93 Patents.
94 When patents issued.
95 Corrections.
96 Maps—field notes—records—papers.
97 Color of title relinquished.
98 Quitclaim deeds.
99 Lists of federal granted lands.
99.1 Dubuque and Pacific railroad lands.
100 University lands.
101 Effect of patents.

89 Records. The books and records of the land office shall be so kept as to show and preserve an accurate chain of title from the general government to the purchaser of each smallest subdivision of land; to preserve a permanent record, in books suitably indexed, of all correspondence with any of the departments of the general government in relation to state lands; to preserve, by proper records, copies of the original lists furnished by the selecting agents of the state, and of all other papers in relation to such lands which are of permanent interest. [R60,§§92, 95; C73,§83; C97,§72; C24, 27, 31, 35, §89.]

90 Separate grants. Separate tract books shall be kept for the university lands, the saline lands, the half-million acre grant, the sixteenth sections, the swamp lands, and such other lands as the state now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate. [R60,§94; C73,§84; C97, §73; C24, 27, 31, 35,§90.]

91 Tract books. Said tract books shall be ruled in a manner similar to those used in the United States land offices, so as to record each tract by its smallest legal subdivisions, its section, township, and range, to whom sold, and when, the price per acre, to whom patented, and when. [R60,§93; C73,§85; C97,§74; C24, 27, 31, 35,§91.]

92 Land office—how kept—certified copies. The land office shall be kept open during business hours. The documents and records therein shall be subject to inspection by parties having an interest therein, and certified copies thereof, signed by the secretary, with the seal of his office attached, shall be deemed presumptive evidence of the facts to which they relate, and on request they shall be furnished by him for a

reasonable compensation. [R60,§101; C73,§86; C97,§75; C24, 27, 31, 35,§92.]

93 Patents. Patents for lands shall issue from the land office, shall be signed by the governor and recorded by the secretary; and each patent shall contain therein a marginal certificate of the book and page on which it is recorded, which certificate shall be signed by the secretary, and all patents shall be delivered free of charge. [R60,§97; C73,§87; C97,§76; C24, 27, 31, 35,§93.]

94 When patents issued. No patents shall be issued for any lands belonging to the state, except upon the certificate of the person or officer specially charged with the custody of the same, setting forth the appraised value per acre, name of person to whom sold, date of sale, price per acre, amount paid, name of person making final payment, and of person who is entitled to the patent, and, if thus entitled by assignment from the original purchaser, setting forth fully such assignment, which certificate shall be filed and preserved in the land office. [R60,§§98, 99; C73,§88; C97,§77; C24, 27, 31, 35,§94.]

95 Corrections. The secretary is authorized and required to correct all clerical errors of his office in name of grantee and description of tract of land conveyed by the state, found upon the records of such office; he shall attach his official certificate to each conveyance so corrected, giving the reasons therefor; record the same with the record of the original conveyance, and make the necessary corrections in the tract and plat books of his office. Such corrections, when made in accordance with the foregoing provisions, shall have the force and effect of a deed originally correct, subject to prior rights accrued without notice. [C73,§89; C97,§78; C24, 27, 31, 35,§95.]

96 Maps—field notes—records—papers. The secretary of state shall receive and safely keep in his office, as public records, any field notes, maps, records, or other papers relating to the public survey of this state, whenever turned over to the state in pursuance of law; the United States at all times to have free access thereto for the purpose of taking extracts therefrom or making copies thereof. [C73,§90; C97,§79; C24, 27, 31, 35,§96.]

97 Color of title relinquished. Whenever the governor is satisfied by the commissioner of the general land office that the title to any lands which may have been certified to the state under any of the several grants is inferior to the rights of any valid interfering preemptor or claimant, he is authorized and required to release by deed of relinquishment such color of title to the United States, to the end that the requirements of the interior department may be complied with, and that such tract or tracts of land may be patented by the general government to the legal claimants. [C73,§91; C97,§80; C24, 27, 31, 35,§97.]

98 Quitclaim deeds. Whenever the governor is satisfied by proper record evidence that any tract of land which may have been deeded by virtue of any donation or sale to the state is not the land intended to have been described, and that an error has been committed in making out the transfers, in order that such error may be corrected, he is authorized to quitclaim the same to the proper owner thereof, and to receive a deed or deeds for the lands intended to have been deeded to the state originally. [C73,§92; C97, §81; C24, 27, 31, 35,§98.]

99 Lists of federal granted lands. In cases where lands have been granted to the state of Iowa by act of congress, and certified lists of lands inuring under the grant have been made to the state by the commissioner of the general land office, as required by act of congress, and such lands have been granted, by act of the general assembly, to any person or company, and such person or company shall have complied with and fulfilled the conditions of the grant, the secretary of state is hereby authorized to prepare, on the application of such person or company, or on the application of a party claiming title to any land through such person or company, a list or lists of lands situated in each county inuring to such applicant, from the lists certified by the commissioner of the general land office, as aforesaid, which shall be signed by the governor of the state, and attested by the secretary of state, with the state seal, and then be certified to by the secretary to be true and correct copies of the lists made to this state, and deliver them to such applicant, who is hereby authorized to have them recorded in the proper county, and when so recorded they shall be notice to all persons the same as deeds now are, and shall be evidence of title in such grantee, or his or its assigns, to the lands therein described, under the grant of congress by which the lands were certified to the state, so far as the certified lists made by the commissioner aforesaid conferred title to the state; but where lands embraced in such lists are not of the character embraced by such acts of congress or the acts of the general assembly of the state, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be void; but lands in litigation shall not be included in such lists until the actions are determined and such lands adjudged to be the property of the company; nor shall the secretary include, in any of the lists so certified to the state, lands which have been adjudicated by the proper courts to belong to any other grant, or adjudicated to belong to any county or individual under the swamp-land grant, or any homestead or preemption settlement; nor shall said certificate so issued confer any right or title as against any person or company having any vested right, either legal or equitable, to any of the lands so certified. [C73,§93; C97,§82; C24, 27, 31, 35,§99.]

99.1 Dubuque and Pacific railroad lands. The secretary of state is hereby authorized upon the application of any person claiming title under the trust deeds executed by the Dubuque and Pacific railroad company, to secure its con-

struction bonds, to any lands included in the list of lands certified to the state of Iowa, by the commissioner of the general land office and approved by the secretary of the interior, as selected to satisfy the grant made to the state of Iowa, by act of congress approved May 15, 1856, in aid of the construction of a railroad from Dubuque to Sioux City; to certify said land as inuring to the grantees of the said Dubuque and Pacific railroad company, which certificate shall be signed by the governor, and attested by the secretary of state, with the seal of the state, and deliver the same to such applicant who is hereby authorized to have said certificate recorded in the county in which the land so certified, is situated, and when so recorded, shall be notice to all persons the same as deeds now are, and shall be evidence of the title from the state of Iowa, to any person deriving title to said land under the Dubuque and Pacific railroad company, to the land therein described under the grant of congress by which the land was certified to the state so far as the certified lists made by the commissioner aforesaid, conferred title to the state, but where lands embraced in such lists are not of the character embraced by such acts of congress or the acts of the general assembly of the state, and are not intended to be granted thereby, the lists so far as these lands are concerned, shall be void; nor shall the secretary include, in any of the lists so certified to the state, lands which have been adjudicated by the proper courts to belong to any other grant, or adjudicated to belong to any county or individual under the swamp-land grant, or any homestead or preemption settlement; nor shall said certificate so issued confer any right or title as against any person or company having any vested right, either legal or equitable, to any of the lands so certified. [35GA, ch 6,§1.]

This section is an act of the 35GA, effective April 4, 1913, and here appears in the code for the first time. It was omitted from S13 perhaps as a duplication of section 99

100 University lands. The secretary of state is hereby authorized to issue patents for lands, the legal title to which is vested in the state university, in cases wherein it is shown to the satisfaction of the governor and attorney general that such lands have been in fact sold by the authority of the state and paid for, and that the certificates of purchase have been lost or destroyed. [C97,§83; C24, 27, 31, 35,§100.]

101 Effect of patents. The patents thus issued shall inure to the benefit of the original purchaser and his grantees only, and a clause to this effect shall be inserted in the patent. [C97,§84; C24, 27, 31, 35,§101.]

CHAPTER 10

AUDITOR OF STATE

Applicable to special charter cities, §6750.1
Beer permit board—duties, §§1921.096, 1921.097
Identification and use of publicly owned automobiles, etc., §18316.1 et seq.

AUDIT OF STATE DEPARTMENTS

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REPORTS

130.3 Title of act.
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130.5 Annual report.
130.6 Biennial report.
130.7 Individual audit reports.
130.8 Fees.
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AUDIT OF STATE DEPARTMENTS

101.1 Definition. The term "department" shall be construed to mean any authority charged by law with official responsibility for the expenditure of public money of the state and any agency receiving money from the general revenues of the state. [C24, 27, 31,§339; C35,§101-a1.]

Referred to in §390

101.2 Annual settlements. The auditor of state shall annually, and oftener if deemed necessary, make a full settlement between the state and all state officers and departments and all persons receiving or expending state funds, and shall annually make a complete audit of the books and accounts of every department of the state.

Provided, that the accounts, records and documents of the treasury department shall be audited daily;

Provided further, that a preliminary audit of the educational institutions and the state fair board shall be made periodically, at least quarterly, to check the monthly reports submitted to the comptroller's office as required by section

84.06, subsection 7 of chapter 7.1 and that a final audit of such state agencies shall be made at the close of each fiscal year. [C97,§161; S13, §161-a; C24, 27, 31,§340; C35,§101-a2.]

Referred to in §390

101.3 State highway commission. The annual audit of the accounts of the state highway commission shall be made by accountants from the office of the auditor of state in connection with a certified public accountant, and there is hereby annually appropriated from any funds in the state treasury, not otherwise appropriated, a sum sufficient to defray the compensation of such certified public accountant. [C31,§340-c1; C35,§101-a3.]

Referred to in §390

101.4 Report of audits. The auditor of state shall make or cause to be made and filed and kept in his office written reports of all audits and examinations, which reports shall set out in detail the following:

1. The actual condition of such department found to exist on every examination.

2. Whether, in his opinion,

a. All funds have been expended for the purpose for which appropriated.

b. The department so audited and examined is efficiently conducted, and if the maximum results for the money expended are obtained.

c. The work of the department so audited or examined needlessly conflicts with or duplicates the work done by any other department.

3. All illegal or unbusinesslike practices.

4. Any recommendations for greater simplicity, accuracy, efficiency, or economy in the operation of the business of the several departments and institutions.

5. Comparisons of prices paid and terms obtained by the various departments for goods and services of like character and reasons for differences therein, if any.

6. Any other information which, in his judgment, may be of value to him.

All such reports shall be filed and kept in his office. [S13,§161-a; C24, 27, 31,§342; C35,§101-a4.]

Referred to in §§130.7, 390

101.5 Method of keeping accounts. Each department and institution of the state shall keep its records and accounts in such form and by such methods as to be able to exhibit in its reports the matters required by the auditor of state, unless otherwise specifically prescribed by law. The failure of the head of any department of the state to comply with this provision shall be ground for his suspension from office. [S13,§161-a; C24, 27, 31,§343; C35,§101-a5.]

Referred to in §390
Suspension of state officers, ch 57

102 to 109, inc. Rep. by 45GA, ch 4,§12

110 Transferred. Now appears as §130.8

111, 112 Transferred. Now appear as §130.1 and §130.2

AUDIT OF COUNTIES, CITIES, AND SCHOOL DISTRICTS

113 Examination of counties. The financial condition and transactions of all counties shall be examined once each year by the auditor of state. [S13,§§100-d, 1056-a11,-a13; C24, 27, 31, 35,§113; 47GA, ch 89,§1; 48GA, ch 42,§2.]

Referred to in §1921.058

114 State examiners. The auditor of state shall appoint such number of state examiners of accounts as may be necessary to make such examinations. Said examiners shall be of recognized skill and integrity, familiar with the system of accounting in county, school and city offices, and with the laws relating to the county, school and city affairs. Each examiner shall give bond in the sum of two thousand dollars, conditioned as bonds of county officers, which bonds shall be approved and filed as bonds of state officers. Such examiners shall be subject at all times to the direction of said auditor of state. [S13,§§100-a, 1056-a11; C24, 27, 31, 35, §114.]

Referred to in §1921.058
Conditions, approval, filing of bonds, §§1059, 1073, 1077

115 Assistants. The auditor of state shall appoint such additional assistants to the examiners as may be necessary, who shall be subject to discharge at any time by the auditor. Such assistants shall receive such reasonable compensation as the auditor may fix and shall be paid in the same manner as examiners. The compensation of such assistants shall be considered as part of the cost of examination. [S13,§100-a; C24, 27, 31, 35,§115.]

Payment of compensation, §§125, 126

116 Examinations. Said examiners shall have the right while making said examinations, to examine all papers, books, records, and documents of any of said officers and shall have the right in the presence of the custodian or his deputy, to have access to the cash drawers and cash in the official custody of such officer, and a like right, during business hours, to examine the public accounts of the county, school or city in any depository which has public funds in its custody pursuant to the law. [S13,§§100-d, 1056-a11; C24, 27, 31, 35,§116.]

Referred to in §1921.058
Depositories, §7420.22

117 Scope of examinations. All examinations shall be made without notice to the office examined. On every examination inquiry shall be made as to the financial condition and resources of the county, school or city; whether the cost price for improvements and material in said county, school or city is in excess of the cost price for like things in other counties, schools or cities of the state; whether the county, school or city authorities are complying with the law; and whether the accounts and reports are being accurately kept. [S13,§§100-d, 1056-a11; C24, 27, 31, 35,§117.]

Referred to in §1921.058

118 Subpoenas. The auditor of state and all examiners shall, in all matters pertaining to an authorized examination, have power to issue

subpoenas of all kinds, administer oaths and examine witnesses, either orally or in writing, and the expense attending the same, including the expense of taking oral examinations in shorthand, shall be paid as other expenses of the examiner. [S13,§§100-d, 1056-a11; C24, 27, 31, 35, §118.]

Expenses, §§125, 126

119 Refusal to testify. In case any witness duly subpoenaed refuses to attend, or refuses to produce documents, books, and papers, or shall attend and refuse to make oath or affirmation, or, being sworn or affirmed, shall refuse to testify, the auditor of state or the examiner may apply to the district court, or any judge of said district having jurisdiction thereof, for the enforcement of attendance and answers to questions as provided by law in the matter of taking depositions. [S13,§100-d; C24, 27, 31, 35,§119.]

Procedure for contempt, §§11333, 11334, 11341, 11367; also ch 536

120 Reports. A report of such examination shall be made in triplicate signed and verified by the officers making the examination; one copy to be filed with the auditor of state, one copy with the officer under investigation, and one copy to the county auditor who shall transmit same to the board of supervisors if a county office is under investigation, or with the president of the school board if a school is under investigation, or with the mayor of the city council if a city office is under examination. All reports shall be open to public inspection. [S13,§§100-d, 1056-a11; C24, 27, 31, 35,§120.]

Referred to in §1921.058

121 Report filed with county attorney. If said examination discloses any irregularity in the collection or disbursement of public funds or in the abatement of taxes a copy of said report shall be filed with the county attorney and it shall be his duty to cooperate with the state auditor, and, in proper cases, with the attorney general, to secure the correction of the irregularity. [S13,§100-d; C24, 27, 31, 35,§121.]

122 Duty of attorney general. In the event such examination discloses any grounds which would be ground for removal from office, a fourth copy of said report shall be provided and filed by the auditor of state in the office of the attorney general of the state, who shall thereupon take such action as, in his judgment, the facts and circumstances warrant. [S13,§100-d; C24, 27, 31, 35,§122.]

123 Disclosures prohibited. No such examiner shall make any disclosure of the result of any investigation, except as he is required by law to report the same or to testify in court. Any violation of this provision shall be ground for removal. [S13,§100-d; C24, 27, 31, 35,§123.]

Exception, §11268

124 Examination of cities, townships, and schools. The financial condition and transactions of all cities and city offices,* and all school offices, other than those in rural and village independent districts and school townships and all consolidated school districts and independent school districts in cities and towns of less than five thousand population, shall be examined at least once each year and such examination may be made by the auditor of state, or in lieu of the examination by state accountants the local governing body whose accounts are to be examined, in case it elects so to do, may contract with, or employ, certified or registered public accountants, certified and registered in the state of Iowa, and pay the same from the proper public funds.

Any township or municipal corporation not embraced within the foregoing provisions of this chapter and any school corporation in which an annual examination is not required may, on application to the auditor of state, secure an examination of its financial transactions and condition of its funds, or a like examination shall be had on application of one hundred or more taxpayers, or if there are fewer than five hundred taxpayers, then by five percent thereof. The examination in any such school district may be had upon the written request of the county superintendent of schools. In lieu of such examination by state accountants, the local governing body may contract with, or employ, certified or registered public accountants and pay the same from the proper public funds. [S13,§§100-e, 1056-a12; C24, 27, 31, 35,§124; 47GA, ch 89,§2; 48GA, ch 42,§3.]

Referred to in §1921.058
*Special charter city reference included in §6750.1

124.1 Examiner's powers and duties. Where an examination is made under contract with, or employment of, certified or registered public accountants, the examiner shall, in all matters pertaining to an authorized examination, have all of the powers and be vested with all the authority of state examiners employed by the auditor of state, and the cost and expense of the examination shall be paid by the city, town, school district, or township procuring the examination. An itemized sworn statement of the per diem and expense of the examiner shall be filed with the clerk of the city, town, township, or school district, before payment thereof. Upon completion of such examination, a certified copy thereof shall forthwith be filed, by the accountant employed, with the auditor of state. [48GA, ch 42,§4.]

125 Bills—audit and payment. Where the examination is made by the state auditor under the provisions of this chapter, each examiner shall file with the local governing body and also with the auditor of state a detailed, itemized and sworn voucher of his per diem and expense, which expense shall not exceed the sum of three dollars per day for the time such examiner is actually engaged in such examination. The said statement or voucher shall be subject to approval by such governing body and when so approved shall be forwarded to the auditor of state. If the local governing body fails to disapprove the said statement of expense within ten days from the filing thereof the auditor of state and state comptroller may approve the said

claim and the same shall be paid from any unappropriated funds in the state treasury. Repayment to the state shall be made as provided by section 126. [S13,§§100-a,-e, 1056-a11; C24, 27, 31, 35,§125; 48GA, ch 42,§5; ch 43,§2.]

126 Repayment—objections. Upon payment by the state of the per diem and expenses aforesaid, the auditor of state shall at once file with the warrant-issuing officer of the county, school, or city, whose offices were examined, a copy of the vouchers so paid by the state. Upon audit and approval by the board of supervisors, city, county, or school board, the said warrant-issuing officer shall draw his warrant for said amount on the general fund of the county, school, or city in favor of the auditor of state, which warrant shall be placed to the credit of the general fund of the state. In the event of the disapproval of any items of said vouchers by the county, school, or city authorities, written objections shall be filed with the auditor of state and said disapproved items of said vouchers shall not be paid to the auditor of state until changed and final approval is given.

Whenever the county board of supervisors, the school board, or the council shall file written objections with the auditor of state, he or his representative may hold a public hearing in the city where the examination was made, on the question of compensation and expenses, and shall give the complaining board notice of the time and place of hearing. After such hearing he shall have the power to reduce the compensation and expenses of the examiner and assistant examiner whose bills have been questioned. Any examiner or assistant examiner who shall be found guilty of padding his per diem or expense account shall be immediately discharged by the auditor of state and shall not be eligible for reemployment in either position. Such examiner or assistant examiner must thereupon reimburse the auditor of state for all such compensation and expenses so found to have been overpaid to him and in the event of his failure so to do, the auditor of state may collect the same amount from the examiner's bondsman by suit, if necessary. [S13,§§100-a,-e, 1056-a11; C24, 27, 31, 35,§126; 48GA, ch 42,§6; ch 43,§1.]

Referred to in §§125, 1921.058

127, 128 Rep. by 41GA, ch 2

129 Transferred to §84-a2, code 1935, now §84.30

130 Rep. by 45GA, ch 4,§12

Section 130-a1, code 1931, transferred to §84-a1, code 1935, now §84.27

130.1 Uniform system of accounting. The auditor of state shall prescribe a uniform system of blanks and forms for all financial accounts, receipts, and reports of all county, city and town offices, including offices of cities acting under special charter. Said system shall, as far as practicable, follow the classifications and definitions of such transactions in use in the national census office, when not in conflict with the laws of this state. Said blanks and forms shall, by said auditor, be revised, from time to time, in order to render the same more efficient and to meet changes in the law. [S13,§§100-b, 550-a, 741-a, 1056-a10,-a13; C24, 27, 31,§111; C35,§130-a2.]

130.2 Duty to install. It shall be the specific duty of each county, school, city and town officer to install and use in his office a system of uniform blanks and forms as prescribed by law. State examiners of accounts are charged with the specific duty to assist all such officers in installing said system. [S13,§§100-b,-c, 1056-a10; C24, 27, 31,§112; C35,§130-a3.]

Referred to in §1921.058

REPORTS

130.3 Title of act. This act [45GA, ch 5] shall be known and may be cited as the "State Audit Act". [C35,§130-e1.]

130.4 Reports required. The auditor of state shall make the following reports:

1. An annual report to the governor and general assembly of all municipal financial operations;
2. A biennial report to the governor and the general assembly of all operations of his office; and
3. Individual audit reports giving the results of all examinations and audits of all departments and establishments and all fiscal officers of the state and local governments. [C35, §130-e2.]

130.5 Annual report. The annual report shall include statistics of all municipal financial operations similar to those now tabulated and reported in his annual report on municipal finances. [C35,§130-e3.]

130.6 Biennial report. The biennial report shall include:

1. A narrative report and such statistical statements as the state auditor deems essential to display the results of his audits of the state departments and establishments;
2. A narrative report and statistical statements of all county financial operations similar to that now tabulated and reported in his biennial report; and
3. Statistics on building and loan associations now required by law to be published biennially.

The biennial report shall also include the results of his audit of the documents and the records of the state comptroller's office created in the budget and financial control act, which records shall be audited by him; and, the results of his audit of all taxes and other revenue collected and paid into the treasury, and the sources thereof. This report shall also include his recommendations to improve the business methods of the government and any other matters having for their purpose to bring about increased economy and efficiency in the conduct of the affairs of the government. [C35,§130-e4.]

130.7 Individual audit reports. The individual audit reports shall include exhibits and schedules to report data similar to that now

required by section 101.4,* and shall as nearly as possible correspond and be prepared similar in form to the audit reports rendered by certified public accountants, and such reports shall include information as to the assets and liabilities of the various departments and institutions audited as of the beginning and close of the fiscal year audited, the receipts and expenditures of cash, the disposition of materials and other properties, and the net income and net operating cost. These reports shall also set forth the cost as to each inmate, member, or student per year in the various classifications of expenses, and shall make comparisons thereof, and shall give such other information, suggestions, and recommendations as may be deemed of advantage and to the best interests of the taxpayers of the state: provided, that the daily audit report of the state treasury shall be submitted to the state comptroller; provided, further, that copies of all individual audit reports of all state departments and establishments shall be transmitted to the executive council and to the state comptroller's office after the completion of each audit, and that copies of all local government audits shall, until otherwise provided, be also supplied to the comptroller's office; provided, further, that copies of such audit reports shall also be supplied to the officers of the counties, schools, cities and towns, as now provided by law; and, provided further, that summaries of the findings, recommendations, and comparisons, together with any other information deemed essential, shall be printed and distributed to members of the legislature, and such officials, including state officers, as may be designated by the executive council. [C35, §130-e5.]

*Section 101.4, formerly §342
Constitutionality, §130-e6, code 1935; 45GA, ch 5, §12
Omnibus repeal, §130-e7, code 1935; 45GA, ch 5, §13

130.8 Fees. The auditor of state shall collect such fees as are provided for in the title on building and loan associations. [C97,§100; C24, 27, 31,§110; C35,§130-a4.]

Not part of State Audit Act (45GA, ch 5)
See §§9379, 9380

130.9 Salary. The salary of the auditor of state shall be five thousand dollars per annum. [C31, 35,§130-c1.]

Not part of State Audit Act (45GA, ch 5)

CHAPTER 11

TREASURER OF STATE

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

131 Office—accounts.
132 Daily balance sheet.
133 Record and payment of warrants.
134 Receipts.
135 Payment.
137 Report to and account with comptroller.
138 Interest on bonds.
141 Cash balance.
142 Restoration of cash balance.
143 Deposits by state officers.
143.1 Unclaimed fees.
143.2 Statement required.
143.3 Payment of claims.
144 Statement itemized.
145 Comptroller and treasurer to keep account.
146 Swamp land indemnity.
147 Biennial report.
147.1 Salary.

131 Office—accounts. The treasurer shall keep his office at the seat of government, and shall keep an accurate account of the receipts and disbursements at the treasury in books kept for that purpose, in which he shall specify the names of the persons from whom money is received, and on what account, and the time thereof. [C51,§62; R60,§83; C73,§75; C97,§101; C24, 27, 31, 35,§131.]

132 Daily balance sheet. The treasurer of state shall so keep the books of his office that at the close of each day's business the account of each fund will show the balance or deficit therein, and show also the total amount of the money in the state treasury, and should the books not be in balance, the daily statement shall show the amount of the surplus or deficit by which the books fail to balance. [C24, 27, 31, 35,§132.]

133 Record and payment of warrants. He shall enter in a book the memorandum of warrants issued as certified to him by the state comptroller, and receive in payment of public dues the warrants so issued in conformity with law, and redeem the same, if there be money in the treasury not otherwise appropriated, and on receiving any such warrant shall cause the person presenting it to indorse it, and shall write on the face thereof "redeemed", and enter in the book containing the comptroller's memoranda, in appropriate columns, the name of the person to whom paid, date of payment, and amount of interest paid. [C51,§63; R60, §84; C73,§76; C97,§102; C24, 27, 31, 35,§133.]

134 Receipts. When money is paid him, the treasurer shall execute receipts in duplicate therefor, stating the fund to which it belongs, one of which must be delivered to the comptroller in order to obtain the proper credit, and the treasurer must be charged therewith. [C51, §64; R60,§85; C73,§77; C97,§103; C24, 27, 31, 35,§134.]

135 Payment. He shall pay no money from the treasury but upon the warrants of the comptroller, and only in the order of their presentation. [C51,§65; R60,§86; C73,§78; C97,§104; S13,§104; C24, 27, 31, 35,§135.]

Related provisions, §§84.06, 1171.15
Warrants not paid for want of funds, §§1171.11–1171.17

136 Rep. by 45ExGA, ch 6

137 Report to and account with comptroller. Once in each week he shall certify to the comptroller the number, date, amount, and payee of each warrant taken up by him, with the date when taken up, and the amount of interest allowed; and on the first Monday of January, and the first day of April, July, and October, annually, he is directed to account with the comptroller and deposit in his office all such warrants received at the treasury, and take the comptroller's receipt therefor. [C51,§67; R60,§88; C73,§80; C97,§106; S13,§106; C24, 27, 31, 35, §137.]

Analogous provisions, §§5164, 5649

138 Interest on bonds. When interest on any bonds of the state becomes due, the treasurer shall provide funds for the payment thereof on the day and at the place where payable; and persons holding such bonds are required to present the same at such place within ten days from such day, at the expiration of which time the funds remaining unexpended and vouchers for interest paid shall be returned to the treasury. [C73,§82; C97,§108; C24, 27, 31, 35,§138.]

139, 140 Rep. by 44GA, ch 2

Deposits in general, ch 352.1

141 Cash balance. The treasurer of state shall not draw on the funds in any county treasury so long as the receipts from all sources, not including primary road funds, belonging to the state, are sufficient to maintain in the state treasury and authorized depositories in the aggregate, a cash balance of two million dollars. [C24, 27, 31, 35,§141.]

Statements by county treasurer of state funds, §5166

142 Restoration of cash balance. When said cash balance is reduced below two million dollars the treasurer of state may draw upon each county treasurer in proportion to the amount in his possession, a sum sufficient in the aggregate to increase said cash balance to an amount not to exceed three million dollars. [C24, 27, 31, 35,§142.]

Referred to in §§5167, 5168
County treasurer to honor draft, §5167

143 Deposits by state officers. All elective and appointive state officers, boards, commissions, and departments, except the state fair board, the state board of education, and the board of control of state institutions, shall, within ten days succeeding the collection thereof, deposit, with the treasurer of state, or to the credit of said treasurer in any depository by him designated, ninety percent of all fees, commissions, and moneys collected or received; the balance actually collected in cash, remaining in the hands of any officer, board, or department shall not exceed the sum of five thousand dollars and no money collected shall be held more than thirty days. [C73,§3778; C97,§191; S13,§170-d; C24, 27, 31, 35,§143.]

Referred to in §12819

143.1 Unclaimed fees. All officers, boards, and commissions of the state government shall on the first Monday in January and July of each year pay to the treasurer of state for the use of the state, all fees and charges not belonging to the said office, and in his or its hands at the date of preceding payment, even though unpresented checks are outstanding against said funds, and take the treasurer's receipt therefor. [C27, 31, 35,§143-b1.]

Analogous provision, §10838

143.2 Statement required. At the time of making such payment the officer, board, or commission shall furnish the said treasurer a written statement which shall show in detail the amount due each person and for what due and such other information as may be necessary to clearly designate each claim. A duplicate of such statement and receipt shall be filed with the comptroller. [C27, 31, 35,§143-b2.]

Analogous provision, §10839

143.3 Payment of claims. The comptroller shall charge the treasurer of state with the amount of the payment as so much state revenue and shall enter the various claims upon the proper records as claims allowed, and on demand and proper proof by the person entitled thereto shall issue warrants accordingly, provided such demand is made within five years from the time the treasurer received said funds. [C27, 31, 35, §143-b3.]

Analogous provision, §10840

144 Statement itemized. Each deposit shall be accompanied by an itemized statement of the sources from which the money has been collected, and the funds to be credited, a duplicate of which shall, at the time, be filed with the comptroller. [S13,§170-d; C24, 27, 31, 35,§144.]

145 Comptroller and treasurer to keep account. The treasurer and comptroller shall each keep an accurate account of the moneys so deposited. [S13,§170-f; C24, 27, 31, 35,§145.]

Sections 145-b1 to 145-b5, inc., code 1935, transferred. Now appear as §§482.02 to 482.06, inc.

146 Swamp land indemnity. All swamp land indemnity money paid by the federal government to this state under any act of congress relating thereto shall be paid by the treasurer of state to the county treasurer of the county where the land, on account of which such payment is made, is located. The county treasurer shall be liable on his bond for the safe custody of said funds and shall promptly notify the board of supervisors of the receipt thereof. Said funds shall be applied by the said supervisors as required by law. [S13,§§116-d,-e,-f; C24, 27, 31, 35,§146.]

147 Biennial report. The treasurer of state shall, biennially, at the time provided by law, report to the governor the state of the treasury and exhibit therein the amount received and paid out by the treasurer since his last report, and the balance remaining in the treasury. [C51, §68; R60,§89; C73,§81; C97,§107; C24, 27, 31, 35, §147.]

Time of report, §246

147.1 Salary. The salary of the treasurer of state shall be five thousand dollars per annum. [C31, 35,§147-c1.]

CHAPTER 12

ATTORNEY GENERAL

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

148 Department of justice.
149 Duties.
150 Disqualification—substitute.
151 Assistant attorneys general.
151.1 Assistant for tax commission.
151.2 Assistant for social welfare board.
152 Special counsel.
153 Expenses.
153.1 Salary.

148 Department of justice. The department of justice, with the attorney general as head thereof, shall be located at the seat of government. [R60,§124; C73,§§150, 3770; C97, §§208, 211; S13,§§208, 211; C24, 27, 31, 35,§148.]

149 Duties. It shall be the duty of the attorney general, except as otherwise provided by law to:

1. Prosecute and defend all causes in the supreme court in which the state is a party or interested.
2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.
3. Prosecute and defend all actions and proceedings brought by or against any state officer in his official capacity.
4. Give his opinion in writing, when requested, upon all questions of law submitted to him by the general assembly or by either house thereof, or by any state officer, elective or appointive. Questions submitted by state officers must be of a public nature and relate to the duties of such officer.
5. Prepare drafts for contracts, forms, and other writings which may be required for the use of the state.
6. Report to the governor, at the time provided by law, the condition of his office, opinions rendered, and business transacted of public interest.
7. Supervise county attorneys in all matters pertaining to the duties of their offices, and from time to time to require of them reports as to the condition of public business intrusted to their charge.
8. Promptly account, to the treasurer of state, for all state funds received by him.
9. Keep in proper books a record of all official opinions, and a register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which books shall be delivered to his successor.
10. Perform all other duties required by law. [R60,§§124–127, 130, 131; C73,§§150–153; C97, §§208–210; S13,§208-a; C24, 27, 31, 35,§149.]

Biennial report, §249

150 Disqualification—substitute. If, for any reason, the attorney general be disqualified from appearing in any action or proceeding, the executive council shall appoint some suitable person for that purpose and defray the reasonable expense thereof from any unappropriated funds in the state treasury. [C24, 27, 31, 35, §150.]

151 Assistant attorneys general. The attorney general may appoint a first assistant attorney general and such other assistant attorneys general as may be authorized by law, who shall devote their entire time to the duties of their positions. The assistant attorneys general shall, subject to the direction of the attorney general, have the same power and authority as the attorney general. [C97,§212; S13,§212; C24, 27, 31, 35,§151.]

Special assistants: Highway commission, §4630.1; motor vehicle dealers licensing act, §5039.12

151.1 Assistant for tax commission. The attorney general may appoint one assistant attorney general to perform and supervise the legal work of the state tax commission, and in such event the salary and necessary traveling expenses of such assistant attorney general shall be paid from the appropriation to said state tax commission, and upon request of the attorney general the state tax commission shall provide and equip a suitable office and the necessary secretarial assistance for such assistant attorney general. [48GA, ch 44,§3.]

151.2 Assistant for social welfare board. The attorney general may appoint one assistant attorney general to perform and supervise the legal work of the state board of social welfare, and in such event the salary and necessary traveling expenses of such assistant attorney general shall be paid from the appropriation to said state board of social welfare, and upon request of the attorney general the state board of social welfare shall provide and equip a suitable office and the necessary secretarial assistance for such assistant attorney general. [48GA, ch 44,§4.]

152 Special counsel. No compensation shall be allowed to any person for services as an attorney or counselor to any department of the state government, or the head thereof, or to any state board or commission, but the executive council may employ legal assistance, at a reasonable compensation, in any pending action or proceeding to protect the interests of the state, but only upon a sufficient showing, in writing, made by the attorney general, that his department cannot for reasons stated by him perform said service, which reasons and action of the council shall be entered upon its records. This section shall not affect the office of the commerce counsel nor legal counsel of the Iowa unemployment compensation commission. [S13,

§208-b; C24, 27, 31, 35,§152; 48GA, ch 44,§§1, 2; ch 45,§1.]

Commerce counsel, §7919
Employment by governor, §§80-82

153 Expenses. The attorney general and his assistants shall be repaid their actual and necessary expenses incurred in transacting their official duties at places other than the seat of government. [C73,§3770; C97,§211; S13, §211; C24, 27, 31, 35,§153.]

153.1 Salary. The salary of the attorney general shall be six thousand dollars per annum, and the salaries of the first assistant attorney general and other assistant attorneys general shall be such as may be fixed by law. [C31, 35, §153-c1.]

CHAPTER 13

REPORTER OF THE SUPREME COURT AND CODE EDITOR

GENERAL PROVISIONS

154 Appointment.
155 Office.
156 Duties.
157 Recommendations—printing and reference.

SUPREME COURT REPORTS

158 Access to opinions.
159 Standard for reports.
160 New edition.
161 Copyrights.
161.1 Skeleton-digest of opinions.

THE CODE

166 Original enrolled bills.
168 Style of code.
169 Editorial work.
169.1 Formal matters omitted.
170 Future codes.
171 Preparation.
172 Citation of permanent code.
173 Citation of session laws.
174 Citation of prior codes.
175 Official statutes.
176 Publication of parts of code.

GENERAL PROVISIONS

154 Appointment. Within ninety days prior to the first secular day in January, 1927, and every four years thereafter the judges of the supreme court shall appoint a reporter of the supreme court who shall hold office for four years from said secular day and until his successor has been appointed, and has qualified. Vacancies shall be filled by said judges for the unexpired portion of the term. Chapter 60 shall not apply to appointments under this section. [C73,§583; C97,§1067; S13,§§207-a,-b; C24, 27, 31, 35,§154.]

155 Office. The office of the reporter of the supreme court shall be at the seat of government. He shall devote his entire time to the duties of his office. [C97,§213; SS15,§224-a; C24, 27, 31, 35,§155.]

156 Duties. The reporter of the supreme court shall be editor of the code and his duties shall be to:

1. Submit such recommendations as he deems proper to each general assembly for the purpose of amending, revising, and codifying such portions of the law as may be conflicting, redundant, or ambiguous, and to lay said recommendations before the presiding officers of each house.

2. Edit and compile the code after each even-numbered session of the general assembly so that the same may be printed as herein provided.

3. Prepare and cause to be published immediately following the issuance of the code in 1931, and every two years thereafter, a volume which shall by proper annotations show the construction placed by the supreme court of this state and the federal courts on all statutes of this state since the then existing permanent volume of annotations. The edition of 1931 and all subsequent volumes shall constitute a cumulation of the edition of 1927 and shall be so continued until said cumulation shall reach a size sufficient for a permanent volume.

4. Promptly prepare syllabi for all opinions of the supreme court and an index and proper tables for each volume of the reports, and he may publish advance sheets of said reports. [C51,§46; R60,§§62, 113, 115, 144; C73,§§35, 155, 156; C97,p.5,§§38, 216; S13,p.3; SS15,§§224-c,-h; C24, 27, 31, 35,§156; 48GA, ch 46,§1.]

Temporary paragraph deleted by code editor

157 Recommendations—printing and reference. The recommendations of the editor of the code shall be printed in such numbers as the printing board deems necessary for public use, and when laid before the presiding officers of the respective houses shall be referred in each house to appropriate committees. [C24, 27, 31, 35,§157.]

SUPREME COURT REPORTS

158 Access to opinions. He shall, under the direction of the judges of the supreme court, have such access to the opinions of the court as will enable him to discharge his duties. [R60,§112; C73,§154; C97,§213; SS15,§224-b; C24, 27, 31, 35,§158.]

159 Standard for reports. The size, style, type, binding, and appearance of volume 195 of the supreme court reports shall be substantially followed in the future publications of said reports. A majority of the judges of the supreme court may prescribe a different standard volume. [C97,§218; SS15,§224-d; C24, 27, 31, 35,§159.]

160 New edition. The supreme court may, when the public interest requires it, order the publication of a new edition of any volume of its reports of which the copyright is not owned by the state, and may require compliance therewith within six months by an order entered of record. Failure to comply with said order shall

work a forfeiture of said copyright to the state. [R60,§120; C73,§158; C97,§214; SS15,§224-f; C24, 27, 31, 35,§160.]

161 Copyrights. All supreme court reports and books of annotations hereafter published shall be copyrighted in the name of the state of Iowa; but this shall not be construed to prevent the contractor by whom any volume of the reports of the supreme court is published, his representatives, or assigns, from continuing the exclusive publication and sale of such volume so long as he or they shall, in all respects, comply with the requirements of their contract. [C97,§217; SS15,§224-g; C24, 27, 31, 35,§161.]

161.1 Skeleton-digest of opinions. The state printing board is directed to cause to be printed, from time to time, in cumulated, pamphlet form, and from copy to be furnished by the code editor, the skeleton card digest which covers the current opinions of the supreme court and which is being maintained in the office of said code editor. The code editor shall have sole charge of the proof reading. Said pamphlet shall be sold by the superintendent of printing at a price which will fairly reimburse the state for the cost of printing and paper stock. [C35,§240-**g1.**]

162 to 165, inc. Transferred. Now appear as §§221.1 to 221.5, inc.

THE CODE

166 Original enrolled bills. In the preparation of the code the editor of the code shall have the right to the possession of the enrolled bills. [C24, 27, 31, 35,§166.]

167 Transferred. Now appears as §221.6.

168 Style of code. The code shall be prepared and published substantially in the following form and style:

1. The printing of the text shall be in double columns from type forms thirty-seven picas wide by fifty-four picas high and in nine point type solid with spacing of approximately six points between sections.
2. The chapters shall be numbered consecutively (commencing with number one) and without regard to titles.
3. Each section shall be indicated by a number printed in bold face type.
4. Each section shall have appropriate catchwords printed in bold face type contrasting with the text and followed immediately by the first word of the section.
5. Proper historical references shall immediately follow the last word of each section.
6. The code provided for herein shall include:

a. An analysis of the code by titles and chapters.
b. The declaration of independence.
c. Articles of confederation.
d. The constitution of the United States.
e. Laws of the United States relating to citizenship, naturalization, and the authentication of records.
f. The constitution of **Iowa.**
g. The act admitting Iowa into the union as a state.
h. Chapter analysis at the head of each chapter.
i. All of the statutes of Iowa of a general and permanent nature.
j. The rules of the supreme court.
k. An index covering the constitution and statutes of the state of Iowa and the rules of the supreme court.

7. The code editor may insert under any section a reference to any other related section or subject matter.
8. The chapter number shall appear at the top of each page.
9. The code shall be printed upon a good quality of paper and bound in good grade of buckram to specifications prepared by the state printing board. [C97,p.5; S13,p.3; C24, 27, 31, 35,§168.]

169 Editorial work. The code editor in preparing the copy for an edition of the code shall have power to:

1. Correct therein all misspelled words in the original enrollments.
2. Correct all manifest grammatical and clerical errors including punctuation but without changing the meaning.
3. Transpose sections or to divide sections so as to give to distinct subject matters a section number but without changing the meaning. [C24, 27, 31, 35,§169.]

169.1 Formal matters omitted. When any act of the general assembly subsequent to the issuance of the code of 1924 contains in the substantive part of the act a reference to a section of the code and designates such section by such reference as "Code, 1924", "Code, 1927", "Code, 1931", etc., or the equivalent thereof, the code editor is directed in the preparation of the ensuing code to omit the year indicated by such reference. [C27, 31, 35,§169-b1.]

170 Future codes. A new code shall be issued as soon as possible after the final adjournment of each even-numbered regular session of the general assembly. The code editor shall, immediately after the issuance of a new code, prepare copy for the ensuing code, and at all times keep the same revised to date in the files of his office. The printing board shall cause such code to be printed and bound at the time required by law but the proof reading on such code shall be solely under the direction and control of the code editor. [C24, 27, 31, 35, §170.]

171 Preparation. All new editions of the code shall be so prepared and printed that each section of the general statute law shall appear in said new edition in its new or finally revised and amended form. All sections of law of a general nature enacted after the last preceding code, shall be inserted in each new edition in such logical order as the editor of the code may determine. [C24, 27, 31, 35,§171.]

172 Citation of permanent code. The permanent codes published subsequent to the adjournment of the extra session of the fortieth general assembly shall be known and cited as "The Code,————", giving year of edition of such code. [C24, 27, 31, 35,§172.]

173 Citation of session laws. The session laws of each general assembly shall be known and cited as ".....General Assembly, Chapter....., Section....." (inserting the appropriate number). [C24, 27, 31, 35,§173.]

174 Citation of prior codes. All prior codes and supplements shall be cited by the year in which published. [C24, 27, 31, 35,§174.]

175 Official statutes. The code and session laws published under authority of the state shall constitute the only authoritative publications of the statutes of this state. No other publications of the statutes of the state shall be cited in the courts or in the reports or rules thereof. [C97,p.5; S13,p.3; C24, 27, 31, 35,§175.]

176 Publication of parts of code. The printing board may cause to be printed from time to time, in the form of leaflets, folders, or pamphlets and in such numbers as the board deems reasonable, parts of the code for the use of public officers. Such orders shall be limited to actual needs as shown by experience or other competent proof, and the printing shall, as far as practicable, be done from the plates or slugs from which the code has been printed. [C97, p.5; S13,p.3; C24, 27, 31, 35,§176.]

177 Rep. by 48GA, ch 183,§9

CHAPTER 14

STATE PRINTING BOARD

178 Board created.
179 Appointive members.
180 Financial interest.
181 Appointment and tenure.
182 Compensation.
183 Duties.
184 Printing defined.
185 Printing for state institutions.
186 Contracts with state institution.
187 Specifications and rules.
188 Advertisements for bids.
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190 Information furnished.
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178 Board created. A state printing board, hereinafter referred to as "the printing board", is hereby created. Said board shall be composed of the secretary of state, auditor of state, attorney general, and of two appointive members to be appointed by the governor. [C24, 27, 31, 35,§178.]

179 Appointive members. The appointive members of said board shall be residents of this state, of good moral character, and shall have had at least five years actual experience in the printing trade. [C24, 27, 31, 35,§179.]

180 Financial interest. No member of said board and no appointee thereof shall be financially interested, directly or indirectly, in any plant or business in which work is performed for the state, under the provisions of this and chapters 15 and 16, nor shall he be interested in any contract let under said chapters. [C24, §§180, 214; C27, 31, 35,§180.]

Similar provisions, §§275, 3828.101, 3922, 4685, 4686.14, 4755.10, 5361, 5673, 5828, 6534, 6710, 13324, 13327

181 Appointment and tenure. The governor shall, on or before July 1, each year, appoint one member of said board which appointee, after qualifying, shall serve for two years from said date. Appointees to fill vacancies shall serve from the date of appointment and qualification and for the unexpired term. [C24, 27, 31, 35, §181.]

182 Compensation. The appointive members shall receive a compensation of ten dollars and actual expenses for each day actually employed hereunder in the business of the state. [C24, 27, 31, 35,§182.]

183 Duties. The printing board shall:

1. Let contracts, except as provided in section 205, for all printing for all state offices, departments, boards, and commissions when the cost of such printing is payable out of any taxes, fees, licenses, or funds collected for state purposes.

2. Direct the manner, form, style, and quantity of all public printing when such matters are not otherwise expressly prescribed by law.

3. Employ and discharge all assistants necessary to enable the board to perform its duties and determine the compensation of such assistants when not otherwise determined by law.

4. Prescribe rules, not inconsistent with law, for the conduct of its business.

5. Keep a full and detailed record of all its meetings, actions, and proceedings.

6. Hear and determine all complaints which may be made to it with reference to any official action of the superintendent of printing.

7. Make biennial reports to the governor as to the cost of the public printing for each department during the preceding fiscal term, with recommendations of any retrenchments that can be made therein.

8. Perform all other duties required by law. [C24, 27, 31, 35,§183.]

Blanks relative to university hospitals, §§3986, 4029
Printing for board of educational examiners, §3898
Style of code and supreme court reports, §§159, 168
Time of biennial report, §246

184 Printing defined. The term "printing" as used in this and chapters 15 and 16 shall include binding and may include material, processes, or operations necessary to produce a finished printed product, but shall not include binding, rebinding or repairs of books, journals, pamphlets, magazines and literary articles by any library of the state or any of its offices, departments, boards and commissions held as a part of their library collection. [C24, 27, 31, 35, §184; 48GA, ch 47,§1.]

185 Printing for state institutions. The power of the printing board to let contracts shall not embrace printing for any state institution when such institution, through its governing board, is able and desires to do such printing in its own printing plant. [C24, 27, 31, 35,§185.]

186 *Contracts with state institution.* The printing board may, without advertising for bids, enter into contracts or make provision for doing any of the work coming under the provisions of this and chapters 15 and 16 at any school or institution under the ownership or control of the state. In all such cases, the work shall be done under conditions substantially the same as those provided for in the case of contracts with individuals and the same standard of quality or product shall be required. [C24, 27, 31, 35,§186.]

187 Specifications and rules. The printing board shall, from time to time, adopt and print specifications and rules covering all matters relating to printing that are the subject of contracts, which specifications and rules shall contain, among other things, the following:

1. Provisions for the grouping of the work to be done or material furnished, so far as the same can be made the subject of general contracts, into classes according to the character or use thereof, or with relation to the department for which intended, or in any manner most convenient for securing bids and entering into contracts. All or any part of the printing needed for any department, board, or commission may be placed in a class by itself.

2. Estimates of the probable amount of work to be done, or material to be purchased, under each class or item, during the period of the proposed contracts.

3. Provisions for furnishing and keeping on file samples of work or stock, and other things necessary to assure compliance with the contracts.

4. Fixed standards for books and booklets, and for other printing so far as practicable, and for stock and material.

5. A schedule of maximum rates or prices, so far as the same can be made applicable, with provision that bids not within the maximum (each class being computed as a unit), may be rejected.

6. Details as to the delivery of stock to the state and placing the same in possession of contractors, and for delivery of the finished product and for a complete accounting for stock and reasonable allowance for waste where it is unavoidable.

7. A rule as to part payment for work in process of completion, or material in process of delivery, in proportion to the part completed or delivered.

8. General regulations necessary to assure prompt and satisfactory compliance with the proposed contracts, the submission of samples, the delivery of the product (which may be at the expense of the state), the preparation and filing of bills, and such general matters as will assure to the state the utmost economy and efficiency. [C24, 27, 31, 35,§187.]

188 Advertisements for bids. The secretary of the board shall, from time to time as directed by the board, advertise for bids for the doing of the public printing. Such advertisements shall be published once each week for three consecutive weeks in seven newspapers in seven different cities of the state, one of which newspapers shall be published in Des Moines. [C24, 27, 31, 35,§188.]

189 Requirements. Said advertisements shall state where and how specifications and other necessary information may be obtained, the time during which the board will receive bids, and the day, hour, and place when bids will be publicly opened and contracts awarded. [C24, 27, 31, 35,§189.]

190 Information furnished. The secretary of the board shall supply prospective bidders and others on request with the specifications and rules of the board, blank forms for bids, samples of printing so far as possible, and all other information pertaining to the subject. [C24, 27, 31, 35,§190.]

191 Specifications public. The specifications shall be kept on file in the office of the secretary, open to public inspection, together with samples, so far as possible, of the work to be done or the material to be furnished. [C24, 27, 31, 35,§191.]

192 Form of bids. Bids must be:

1. In writing and only on the blanks furnished with the specifications.

2. Signed by the bidder.

3. Submitted in sealed envelopes which shall be properly indorsed.

4. In the hands of the secretary of the board by the time fixed in the advertisements for bids. [C24, 27, 31, 35,§192.]

193 Deposit with bid. Each bidder must deposit with the board at the time he files his bid, a certified check payable to the state treasurer for an amount to be fixed in the specifications, either covering all classes or items, or separate checks for each bid in case he makes more than one bid. Checks deposited by unsuccessful bidders, and by successful bidders when they have entered into the contract, shall be returned to them. [C24, 27, 31, 35,§193.]

194 Opening of bids—award. All bids shall be publicly opened and read and the contracts let at the time and place fixed therefor, or on such adjourned day or days as may be named by the board, of which adjournment all parties shall take notice. In the award of contracts, due consideration shall be given not only to the price bid, but to the mechanical and other equipment, and financial responsibility of the bidder, and his ability and experience in the performance of like or similar contracts. [C24, 27, 31, 35,§194.]

195 Rejection of bids—procedure. The board shall have the right to reject any or all bids, and in case of rejection or because of failure of a bidder to enter into a contract, the board may advertise for and secure new bids. [C24, 27, 31, 35,§195.]

196 Combination of bidders. When the board is satisfied that bidders have presented bids pursuant to an agreement, understanding, or combination to prevent free competition, it shall reject all of them and readvertise for bids as in the first instance. [C24, 27, 31, 35,§196.]

197 Acceptance of bid. Each accepted bid shall have indorsed thereon, over the signature of the printing board or of a majority thereof, the word "accepted" with the date of such acceptance, which indorsement shall constitute immediate notice to the bidder of the fact of acceptance. [C24, 27, 31, 35,§197.]

198 Duration of contract. Contracts for printing and for work and material relating thereto shall be for a period not exceeding three years. [C24, 27, 31, 35,§198.]

199 Duty to enter into contract—forfeiture. Each successful bidder must within ten days after the award, enter into a contract in accordance with his bid, and unless this is done, or the delay is for reasons satisfactory to the board, the certified check submitted with the bid shall be forfeited to the state. The specifications on which the bid is made shall constitute a part of the contract. [C24, 27, 31, 35, §199.]

200 Contract provisions. Such contracts shall, among other provisions, provide that:

1. The contractor shall complete all unfinished portions of jobs or orders in hand at the expiration of the contract.

2. The contract may be canceled, or other agreed penalty imposed, for failure to perform the terms thereof in a manner satisfactory to the printing board.

3. The contractor may be released on such conditions as may be agreed on, in case of injury to his plant by fire, or other providential contingency.

4. In order to avoid delay and inconvenience in the departments, and unnecessary transportation charges to the state, deliveries of printing for the various state officials, departments, boards, and commissions shall be made in such manner as the printing board, after consultation with the various departments, shall order. [C24, 27, 31, 35,§200.]

201 Bond. A bond for the faithful performance of the contract shall be required in connection with each contract, in an amount to be fixed by the printing board, which bond shall be filed with and approved by the board. [C24, 27, 31, 35,§201.]

202 Written orders. No printing shall be performed under any contract except on written orders therefor, on detailed forms prescribed by the printing board, and duly signed by the secretary of the board or by some person authorized by the board. Every order shall designate the contract under which the order is given, the class of the required printing, the definite quantity and kind thereof, and be issued in duplicate with a stub copy preserved. A separate series of stubs and duplicates shall be used for each class of printing. [C24, 27, 31, 35,§202.]

203 Assistants outside Des Moines. The printing board may, at the various points in the state, outside the city of Des Moines, at which state institutions or departments are located, appoint assistants and empower such assistants to issue in the name of the printing board, orders for printing. Such assistants shall be furnished with a copy of the contract under which the orders are to be given, necessary blank order books and proper instructions as to their procedure. Such assistants on issuing an order shall immediately forward the original thereof to the printing board. [C24, 27, 31, 35,§203.]

Referred to in §206

204 Acceptance of printing—penalty. No printing shall be accepted as in compliance with the contract when such printing is not of the grade of workmanship which is usually employed by first-class printers on printing of such class, nor when such printing is not of the full quality contracted for. If immediate necessity and lack of time to procure printing elsewhere compel the use of defective printing furnished by a contractor, it shall be accepted without approval, and one-half of the contract price thereof shall be deducted as liquidated damages for such breach of contract. [C24, 27, 31, 35,§204.]

205 Contracts by institutional heads. The printing board may authorize the managing board, or head, or chief executive officer of any institution or department of the state located outside the city of Des Moines to secure, under the specifications of the board, competitive bids for printing needed by such institution or department, and submit such bids to the printing board. If said board approves any of said bids, such authorized board, head, or officer may contract for such printing with such bidder, but such contract shall not be valid until a duplicate copy thereof is filed with and approved by the printing board. [C24, 27, 31, 35,§205.]

Referred to in §183

206 Emergency contracts. The board may at any time award a special contract or may authorize its assistants as designated in section 203 to award a special contract for any work or material coming within the provisions of this and chapters 15 and 16 but not included in contracts already in existence, or which cannot properly be made the subject of a general contract, if the amount of each such contract shall not exceed the amount of five hundred dollars, and if special bids have been duly solicited by the said board from persons or firms engaged in the kind of work under consideration who have indicated a desire to bid on the class of work to be done. [C24, 27, 31, 35,§206.]

207 Paper. The board may contract for paper as part of the printing or may purchase paper and furnish the same to the contractor. All paper purchased for use of the state shall, when practicable, have a distinguishing mark or water line by which it can be identified. [R60, §2170; C73,§121; C97,§165; S13,§165; C24, 27, 31, 35,§207.]

208 Paper account. The board shall keep an accurate account with anyone doing printing for the state, and charge him with the value of all paper drawn, and credit him with all paper used on behalf of the state, and compel an accounting for all paper not so used. [C97, §169; C24, 27, 31, 35,§208.]

209 Account with each department. The printing board shall keep an account with each separate officer, board, department, and commission of the state to which printing is furnished by the state, and in such manner as to show in detail at all times what printing has been so furnished, and the cost thereof. [C24, 27, 31, 35,§209.]

210 Bills—departments debited. On the payment of a warrant for printing, if the official, board, department, or commission for which the printing was furnished has a contingent or support or other fund in the state treasury from which said warrant would be paid were it not for this section, the treasurer of state shall at once charge said fund with the amount of the cost of said printing. If such official, board, department, or commission has no such fund in the state treasury but has such fund in his or its own possession, the treasurer of state shall at once notify such official, board, department, or commission of the amount so paid by him for such printing, and said official, board, department, or commission shall at once reimburse the treasurer of state from his or its contingent or support fund for such payment, which reimbursement shall be credited to the unappropriated funds of the state. [C24, 27, 31, 35, §210.]

Referred to in §211

211 Superintendent to separate items. Should the amount of a warrant for printing include printing for more than one officer, board, department, or commission, the secretary of the board of printing shall at once furnish the treasurer with a statement of the correct amounts chargeable under section 210 to each officer, board, department, or commission. [C24, 27, 31, 35,§211.]

212 Vouchers—form—audit. All bills accruing under contracts for printing shall be filed with the printing board. They shall be in duplicate, or in larger numbers if ordered by the board, verified and itemized with full details necessary for computation according to the terms of the contract and orders given in relation thereto or according to law, and shall be accompanied by samples of the work or materials when practicable and when so ordered by the board.

All such bills shall be examined and approved by the printing board and the duplicate vouchers passed to the state comptroller.

All bills approved by the board shall be indorsed accordingly before presentation to the comptroller. [C24, 27, 31, 35,§212.]

CHAPTER 15

SUPERINTENDENT OF PRINTING

Referred to in §§180, 184, 186, 206

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GENERAL PROVISIONS

213 Appointment. The printing board shall, by a majority vote, appoint some person having the same qualifications as the appointive members of the board who shall be officially known as superintendent of printing. Said superintendent shall serve during the pleasure of the board. [SS15,§144-e; C24, 27, 31, 35,§213.]

214 Rep. by 42GA, ch 7

215 Duties. The superintendent of printing shall:

1. Have an office at the seat of government and devote his entire time to the duties of his position.

2. Have charge of the office equipment and supplies of the printing board and of the stock, if any, required in connection with printing contracts.

3. Have general supervision, under the direction of said board, of all matters pertaining to the enforcement of the contracts of the printing board.

4. Keep a detailed record of all meetings and proceedings of the printing board and of the award of contracts by said board.

5. Prepare, under the directions of said board, the specifications and advertisements for printing.

6. Have control and direction of the document department.

7. Have legal custody of all codes, session laws, books of annotations, tables of corresponding sections, and reports of the supreme court, and sell, account for, and distribute the same as provided by law.

8. Be responsible on his official bond for the public property coming into his possession.

9. Be ex officio secretary and general executive officer of the state printing board.

10. In odd-numbered years, compile for publication the Iowa official register which shall contain historical, political, and other statistics of general value, but nothing of a partisan character.

11. Prepare the manuscript copy of all laws, acts, and joint resolutions passed at each session of the general assembly, and arrange the same in chapters with comprehensive index and in such manner that each chapter will show the number of the house or senate file, and cause the same to be printed. In so doing he shall have the right to the possession of the enrolled bills.

12. Annually, September 1, cause to be printed in pamphlet form, to be paid for out of the general fund not otherwise appropriated, and gratuitously distributed upon request, the name, residence, official title, salary and traveling and subsistence expense of the personnel of each of the departments, boards, and commissions of the state government. The head of each department, board, or commission shall, on request of said superintendent, furnish the latter with the data covering said particular department, board, or commission. Such report shall be mailed to each member of the general assembly within ten days after the printing of such report. All employees who have drawn salaries, fees, or expense allowances from more than one department or subdivision shall be listed separately under the proper departmental heading.

13. Perform such other duties as are necessary, or incident to his position, or which may be ordered by the printing board, or required by law. [C97,§§70, 218–223; S13,§70; SS15,§§144-h, -i,-j, 224-d; C24, 27, 31, 35,§215; 48GA, ch 48, §§1, 2.]

Data for official register, §§284, 427, 4540
Sale and distribution, §§235, 237, 238, 238.1, 238.2, 239, 265.1

216 Manuscript — editing — general directions. The manuscript of every report or document, or for any book, booklet, bulletin, or anything to be printed, or a copy thereof, shall be

transmitted to the superintendent of printing at the time it is filed or as soon as it is ready for printing, with all photographs, drawings, maps, engravings, charts, or other material properly a part thereof. He shall edit, revise, condense, and arrange the same for printing, simplify where practicable the typographical arrangement, and, when not otherwise covered, give all necessary instructions for the type, illustrations, headings, titles, paper, cover, binding, and other similar details. The authority here given to edit, revise, condense, and eliminate portions of manuscript shall apply notwithstanding any provisions elsewhere. Where tables or other matters are once printed it shall be sufficient thereafter to refer to the same without repeating them. [SS15,§144-i; C24, 27, 31, 35,§216.]

217 Cooperation. It shall be the duty of the said superintendent to advise with the officials and heads of departments as to the preparation of manuscript or copy for any printed matter, so the same may be handled in the most economical manner in the editing and printing. Officials or employees shall conform so far as practicable to all regulations of the superintendent for the improvement of the reports or other publications, or for decreasing the expense of preparation, printing, or distribution. [SS15, §144-i; C24, 27, 31, 35,§217.]

218 Appeals. In case of a disagreement between the superintendent and the head of any department as to the editing of manuscript, an appeal may be taken to the printing board which shall have authority to determine the matter in controversy. [SS15,§144-i; C24, 27, 31, 35,§218.]

219 Record relative to documents. The superintendent shall keep a record of the number of each report or document ordered printed, the number received, and the number and manner of distribution. [SS15,§144-j; C24, 27, 31, 35,§219.]

220 Reserve supply. The superintendent shall designate, subject to the approval of the printing board, the number of copies of reports and publications to be held in reserve, and copies thus held in reserve shall be distributed only upon the written request of the head of the department, approved by the superintendent, and ordered by the printing board. [SS15,§144-j; C24, 27, 31, 35,§220.]

221 Unused documents. The superintendent shall from time to time make report to the printing board of any documents in his custody deemed not needed and which have been printed five years or more, and if such report has the written approval of the head of the department from which the documents were issued, the printing board may condemn and order such documents sold, and the proceeds turned into the unappropriated funds of the state. [SS15, §144-l; C24, 27, 31, 35,§221.]

SESSION LAWS

221.1 Standard. The size, style, type, binding, general arrangement, and tables of the published acts of the fortieth general assembly shall be substantially followed in the future publication of the session laws. [C73,§36; C97, §39; C24, 27, 31, 35,§162.]

221.2 Mandatory arrangement of subject matters. The acts of each general assembly shall, as nearly as possible, be arranged in said published volume in the same consecutive order in which the same or similar subject matters are arranged in the code. [C31, 35,§162-d1.]

221.3 Duty of secretary of state. The secretary of state shall prepare and deliver to the superintendent of printing for insertion in each published volume of session laws, a correct list of state officers, judges of the supreme, district, superior, and municipal courts, members of the general assembly, and commissioners for this state in other states. [C24, 27, 31, 35,§163.]

221.4 Duty of comptroller. There shall also be inserted in each volume of the session laws, the statement of the condition of the state treasury as provided by the constitution. Said statement shall be furnished by the state comptroller. [C24, 27, 31, 35,§164.]

See Constitution, Art. III, §18

221.5 Copies of enrolled bills. The enrolling clerks of the house and senate shall prepare a clear and distinct carbon copy of each enrolled bill or resolution at the time of preparing the original, and immediately deliver said copy to the superintendent of printing. [SS15,§224-i; C24, 27, 31, 35,§165.]

221.6 Appropriation. There is hereby appropriated, out of any funds in the state treasury not otherwise appropriated, for the purpose of providing the necessary clerical assistance in preparing said volume of session laws the sum of one thousand two hundred dollars, or so much thereof as may be necessary, for each special or regular session, which amount shall be wholly available for each session immediately upon the legal organization of the general assembly. [C24, 27, 31, 35,§167.]

DISTRIBUTION

222 Custody of documents and storage rooms. The superintendent shall receive and have the custody of the Iowa documents, reports, and all other printed matter and make and supervise the distribution of the same in such manner as will be most economical and useful to the public. He shall have charge of the state storage building or rooms, in which he shall keep the reports and documents. [SS15, §§144-m,-n; C24, 27, 31, 35,§222.]

Geological reports, §234
Reports of grand army of the republic, §479

223 Information as to documents. The superintendent shall advise the public of the publication of reports and documents and of the

nature of the material therein, and give information as to the publications that are for free distribution and how to obtain them. [SS15, §§144-j,-n; C24, 27, 31, 35,§223.]

224 Mailing lists. The superintendent shall require from officials or heads of departments mailing lists, or addressed labels or envelopes, for use in distribution of reports and documents. He shall revise such lists, eliminating duplications and adding thereto libraries, institutions, public officials, and persons having actual use for the material. He shall arrange such lists so as to reduce to the minimum the postage or other cost for delivery. [SS15,§144-n; C24, 27, 31, 35,§224.]

225 Copies to departments. The superintendent shall furnish the various officials and departments with copies of their reports needed for office use or to be distributed to persons calling for the same. [SS15,§144-n; C24, 27, 31, 35,§225.]

226 Assembly members. The official reports, the completed journals of the general assembly, the miscellaneous documents, other publications, and at least thirty copies of the official register, shall be sent to each of the members of the general assembly, and, so far as they are available, additional copies upon their request. [SS15,§144-n; C24, 27, 31, 35,§226.]

227 Libraries. The completed journals of the general assembly, and the official register shall be sent to each free public library in Iowa, the state library, the library commission, libraries at state institutions, and college libraries. [SS15,§§144-m,-n; C24, 27, 31, 35, §227.]

228 Newspapers. The journals of the general assembly and the official register shall be sent to each newspaper of general circulation in Iowa, and editors of newspapers in Iowa shall be entitled to other publications on request when they are available. [SS15,§§144-m,-n; C24, 27, 31, 35,§228.]

229 Congressional library. Two copies of each publication shall be sent to the library of congress. [C97,§126; S13,§126; SS15,§§144-m, -n; C24, 27, 31, 35,§229.]

230 County auditors. The completed journals of the general assembly, and the official register shall be sent to each county auditor, who shall be required to keep the same at all times available for the inspection of the public. [C97,§126; S13,§126; SS15,§§144-m,-n; C24, 27, 31, 35,§230.]

231 County superintendent. The official register shall be distributed, in addition to the foregoing provisions, to the school libraries, through the county superintendent of schools to whom they shall be sent in bulk, and who shall direct their distribution each in his own county. [C97,§71; S13,§71; C24, 27, 31, 35,§231.]

232 Rep. by 41GA, ch 2

233 General distribution. The superintendent may send additional copies of publications to other state officials, individuals, institutions, libraries, or societies that may make request therefor. [C24, 27, 31, 35,§233.]

Distribution to state historical sbciety, §4548
Reports of engineering examiners, §1863

234 Geological reports. The reports and bulletins of the geological survey shall be placed at the disposal of the state geologist. [C97, §126; S13,§126; C24, 27, 31, 35,§234.]

Sale and distribution of reports, §4558

235 Transferred. Now appears as §238.1

236 Purchase by municipalities—accounting. The board of supervisors may purchase and pay for out of the general fund such additional number of copies of the code and session laws as may be deemed necessary for the use of county and township officers. The council or commission of each city or town including cities acting under special charter shall have like power in order to supply the public offices of the city or town.

Each officer, except a state officer, at the expiration of his term of office, shall deliver any code and session laws furnished to him to his successor in office. [C73,§§39, 40, 43; C97,p.4, §§43, 46; S13,pp.1, 2,§§43, 46; C24, 27, 31, 35, §236.]

237 Old codes—free distribution. The superintendent of printing may distribute gratuitously, to interested persons, the code of 1897 and all supplements and supplemental supplements thereto; also all codes which have been issued subsequent to the code of 1897 and which have been supplanted by a newly issued code; also all session laws which antedate the publication of the last issued code by at least four years; provided that he shall maintain in reserve such number of copies of each such books as may be fixed by the executive council. Such reserve when fixed shall not be distributed except on the order of the executive council. [S13,§46-a; C24, 27, 31, 35,§237; 47GA, ch 90,§1.]

238 Former statutes. Upon application, in writing, from the librarian or chief executive officer of any incorporated college in this state, the superintendent of printing shall, upon the approval of the executive council, forward to said applicant, without charge, bound volumes of the laws heretofore enacted. [S13,p.3; C24, 27, 31, 35,§238.]

Section 238-a1, code 1935, transferred to §238.3

238.1 Code — session laws. The superintendent of printing shall make free distribution of the code, and of the acts of each general assembly, as follows:

1. To state law library for exchange purposes ..... 125 copies
2. To law library of state university for exchange purposes ..... 50 copies
3. To state historical department. 5 copies
4. To state historical society .... 5 copies
5. To each judge of the supreme, district, superior, and municipal courts of Iowa ..... 1 copy

6. To each judge of the federal courts in Iowa ..... 1 copy
7. To the clerk of the supreme court of Iowa ..... 1 copy
8. To the clerk of each federal court in Iowa ..... 1 copy
9. To each state institution under the control of either the state board of education or state board of control ..... 1 copy
10. To each state officer ..... 2 copies
11. To the separate departments of principal state offices ..... 1 copy
12. To each member of the present and subsequent general assemblies.. 1 copy
13. To chief clerk of the house.... 1 copy
14. To secretary of the senate .... 1 copy
15. To the reporter of the supreme court and code editor such number of copies as will enable him to perform the duties of his office.
16. To the clerk of the district court, the county attorney, the county auditor, the county recorder, the county treasurer, the sheriff, and the county superintendent of each county in the state, to the clerk of each superior or municipal court in the state, and also for use in each court room of the district, superior, or municipal court ..... 1 copy
17. To library of congress ..... 7 copies
18. To library of the Iowa state college of agriculture and mechanic arts ..... 1 copy
19. To library of the United States department of justice ..... 1 copy
20. To library of the judge advocate general, United States war department ..... 1 copy
21. To library of the United States department of agriculture ..... 1 copy
22. To library of the United States department of labor ..... 1 copy
23. To United States general land office ..... 1 copy
24. To legal staff, office of public debt, United States treasury department ..... 1 copy
25. To library of the United States department of state ..... 1 copy
26. To law library of the United States department of the interior.... 1 copy
27. To library of the United States department of internal revenue ..... 1 copy
[C73,§39; C97,p.4,§42; S13,p.1,§42; C24, 27, 31, 35,§235.]

238.2 Book of annotations and tables of corresponding sections. The superintendent of printing shall make free distribution of the book of annotations to the code, and of the supplements to said book of annotations, and of the book of tables of corresponding sections of the code, as follows:
1. To state law library for exchange purposes ..... 60 copies
2. To law library of state university for exchange purposes ..... 40 copies
3. To state historical department 2 copies
4. To state historical society ..... 1 copy
5. To the office of each judge of the supreme, district, superior, and municipal courts, and of the federal courts in Iowa ..... 1 copy
6. To the office of each clerk of the federal courts in this state, and of the supreme, district, superior and municipal courts of this state ..... 1 copy
7. To the office of governor, secretary of state, auditor of state, treasurer of state, commissioner of insurance, and commerce counsel, each... 1 copy
8. To the office of attorney general 5 copies
9. To each member of the general assembly ..... 1 copy
10. To the office of the reporter of the supreme court and code editor... 5 copies
11. To the office of each county auditor, and county attorney ..... 1 copy
12. To each court room of the district, superior, and municipal courts 1 copy
[C27, 31, 35,§238-a2.]

238.3 Code commission briefs. The superintendent of printing is authorized to make free distribution of the book known as briefs of code commission bills. [C27, 31, 35,§238-a1.]

238.4 Free distribution of skeleton-digest. Free distribution of said pamphlets [skeleton-digest] shall be made as follows:
1. To each judge of the supreme, district, municipal, and superior courts, two copies.
2. To the attorney general and to each assistant attorney general, two copies.
3. To the code editor, not to exceed twenty-five copies. [C35,§240-g2.]

See section 161.1 for publication of skeleton-digest

239 Supreme court reports. The superintendent of printing shall make free distribution of the reports of the supreme court as follows:
1. To library of congress ..... 2 copies
2. To library supreme court United States ..... 2 copies
3. To each supreme, district, superior, and municipal judge (not including police judges) ..... 1 copy
4. To each United States district judge whose district lies within this state ..... 1 copy
5. To the clerk of the supreme court ..... 1 copy
6. To the attorney general ..... 2 copies
7. To the state law library ..... 90 copies
8. To each county ..... 1 copy
9. To each county where district court is held in more than one place.. 2 copies
10. To supreme court reporter .... 3 copies
11. To law library state university 50 copies
12. To library state historical society ..... 5 copies
13. To the library Iowa state college of agriculture and mechanic arts ..... 2 copies
14. To supreme court consultation room ..... 10 copies
15. To the governor ..... 1 copy
[R60,§119; C73,§159; C97,§215; SS15,§224-e; C24, 27, 31, 35,§239.]

240 Exchange. The volumes delivered to the state [law] library shall be used for the purpose of effecting exchange with other states, foreign countries and provinces, for similar reports. All books received in such exchange shall become a part of the state library. [R60, §119; C73,§159; C97,§215; SS15,§224-e; C24, 27, 31, 35,§240.]

Section 240-g1, code 1935, transferred to §161.1
Section 240-g2, code 1935, transferred to §238.4

241 Legislative journals and bills. The daily journals of the general assembly and the printed bills shall be sent by the superintendent of printing by mail to subscribers therefor. The journals of both houses for any one session shall be sent on payment of two dollars, and the bills on payment of five dollars. The said superintendent shall cause to be printed a sufficient number of copies to fill orders received and reported to him. [C97,§§127, 130; SS15, §§132-b,-c,-d; C24, 27, 31, 35,§241.]

242 Cumulative legislative bulletin. The superintendent of printing shall, throughout each legislative session, and commencing with the close of the fourth week thereof, compile and cause to be printed, each alternate week, a cumulative bulletin of bills and joint resolutions, which bulletin shall contain a brief history of each bill, and detailed information as to the status of legislation, and shall be conveniently indexed. The last issue of each bulletin shall be brought down to the time of final adjournment and shall be promptly furnished to all members of the general assembly and to such others as the superintendent may determine. [C24, 27, 31, 35,§242.]

Referred to in §243

243 Enrolling clerks to keep records. The enrolling clerks of the senate and house shall, under the directions of the secretary of the senate and house, respectively, keep a daily cumulative record of the information required in section 242 and in such manner that the same may be promptly furnished to the superintendent at the close of each week. [C24, 27, 31, 35, §243.]

CHAPTER 16

OFFICIAL REPORTS AND DOCUMENTS

Referred to in §§180, 184, 186, 206

244 Official reports—preparation.
245 Made to governor.
246 Biennial reports—time covered and date of filing.
247 Annual reports—time covered and date of filing.
248 Governor.
249 Attorney general.
250 Auditor of state on municipal finances.
251 Superintendent of banking.
252 Highway commission.
253 Commerce commission.
254 Mine inspectors.
255 Delay.
256 Governor may grant extension.
257 Number of copies—style.
259 Legislative journals.
260 Legislative proceedings.
261 Corrected journals.
262 Legislative bills.
263 Legalizing acts of local nature.
264 Miscellaneous documents.
265 Legal publications.
265.1 Price.
265.2 Price of departmental reports.
266 Annotations.
267 New editions.
268 Number printed.
269 Other necessary publications.
270 Governor may fix filing date.
271 Title pages—complimentary insertions.

244 Official reports — preparation. State officials, boards, commissions, and heads of departments shall prepare and file written official reports, in simple language and in the most concise form consistent with clearness and comprehensiveness of matter, required by law or by the governor.

Before filing any report its author shall carefully edit the same and strike therefrom all minutes of proceedings, and all correspondence, petitions, orders, and other matter which can be briefly stated, or which is not important information concerning public affairs, and consolidate so far as practicable all statistical tables.

Any report failing to comply substantially with this section shall be returned to its author for correction, and until made so to comply shall not be printed.

This section shall not be construed as depriving the superintendent of printing of the right to edit and revise said report. [C24, 27, 31, 35, §244.]

245 Made to governor. All official reports shall be made to the governor unless otherwise provided.

Reports after being filed with the governor and considered by him shall be delivered to the superintendent of printing. [C24, 27, 31, 35, §245.]

Reports transmitted to general assembly, §1432

246 Biennial reports — time covered and date of filing. Reports of the following officials and departments shall cover the biennial period ending June 30 in each even-numbered year, and shall be filed as soon as practicable after the end of the reporting period:

1. State comptroller on fiscal condition of state.
2. Treasurer of state as to the condition of the treasury.
3. Secretary of agriculture.
4. Superintendent of public instruction.
5. Board of control.
6. Board of education.

7. Board of parole.
8. Printing board.
9. Industrial commissioner.
10. Commissioner of public health.
11. Commissioner of labor.
12. Board of curators of state historical society.
13. Curator of historical, memorial, and art department.
14. State librarian.
15. Library commission.
16. Custodian of public buildings and grounds.
17. State conservation director.
18. Adjutant general.

[C73,§125; C97,§122; S13,§122; C24, 27, 31, 35, §246.]

Adjutant general, §467.44
Auditor of state, §§130.4, 130.6
Board of accountancy, §1905.02
Board of control, §§3285, 3384.21
Board of curators of state historical society, §4547
Board of education, §§3938, 4003
Board of parole, §3811
Commissioner of labor, §1513, par. 4
Commissioner of public health, §§2216, 2227
Custodian of public buildings and grounds, §274
Industrial commissioner, §1432
Library trustees (semiannual), §4541.03, par. 13
Printing board, §183, par. 7
Secretary of agriculture, §2600
Secretary of executive council, §284
Social welfare board, §§3661.017, 3828.06, 3828.068
State board for vocational education, §§3858, par. 15, 3857
State comptroller, Const., Art. III, §18; §§84.06, 84.14-84.18, 221.4, 3934, 4486
State conservation director, §1710
State tax commission, §§6943.022, 6943.026, par. 12
Superintendent of public instruction, §§3832, par. 13, 3849
Treasurer of state, §§147, 3848, 4003

247 Annual reports—time covered and date of filing. Reports of the following officials and departments shall cover the year ending December 31 of each year, and shall be filed as soon as practicable after said date:

1. Commissioner of insurance.
2. Apiarist.
3. State geologist.
4. Fire marshal.
5. Board of accountancy.
6. Board of engineering examiners.
7. Inspector of passenger boats. [C24, 27, 31, 35,§247.]

Apiarist, §4040
Auditor of state, §§130.4, 130.5
Board of architectural examiners, §1905.61
Commissioner of insurance, §§8614, 8615
Commission for the blind, §1541.6, par. 7
Engineering examiners, §1863
Fair board, §2893
Fire marshal, §1653
Iowa liquor control commission, §1921.053
Savings and loan supervisor, §9360
Social welfare board, §§3661.007, 3828.008, 3828.068
State geologist, §4555
State tax commission, §§6943.022, 6943.099

248 Governor. The biennial report of the governor to the general assembly on reprieves, commutations, pardons, and remission of fines and forfeitures shall cover the two years ending with December 31 immediately preceding the convening of the general assembly in regular session and shall be filed as soon as practicable after said date. [C24, 27, 31, 35,§248.]

249 Attorney general. The biennial report of the attorney general shall cover the period of his regular term and shall be filed as soon as practicable after the expiration of said term and not later than February 1. [C24, 27, 31, 35, §249.]

250 Auditor of state on municipal finances. The annual report of the auditor of state on municipal finances shall cover the year ending March 31 preceding the filing of the report, and shall be filed as soon as possible after said date and not later than September 1. [C24, 27, 31, 35,§250.]

251 Superintendent of banking. The annual report of the superintendent of banking shall cover the year ending June 30 of each year, and shall be filed as soon as practicable after said date and not later than September 1. [C24, 27, 31, 35,§251.]

Annual report, §9148

252 Highway commission. The annual report of the state highway commission shall cover the year ending June 30 and shall be filed not later than September 1 of each year, provided the summary report of county highway engineers may be filed on a date not later than February 1. [C24, 27, 31, 35,§252; 48GA, ch 49,§1.]

Additional provision, §4626, par. 8

253 Commerce commission. The annual report of the Iowa state commerce commission shall, as to all statistical data, cover the year ending December 31 preceding the filing of the report, and the proceedings of the commission to date of filing the report each year. Said report shall be filed on or before December 1. [C24, 27, 31, 35,§253; 47GA, ch 205,§1.]

Additional provision, §7877

254 Mine inspectors. The report of the mine inspectors shall cover the biennial period ending December 31 of each odd-numbered year, and shall be filed on or before August 15 following the end of said reporting period. [C97, §2483; S13,§2483; C24, 27, 31, 35,§254.]

Additional provision, §1237

255 Delay. Should the governor deem the delay in filing a report to be unreasonable he shall take such steps as will correct the delinquency. [C24, 27, 31, 35,§255.]

256 Governor may grant extension. The governor shall have authority to grant an extension of time for the completion of any report or any portion thereof, but in the case of any delay deemed by him to be unnecessary or unreasonable he shall take whatever steps may be necessary to have the delayed report prepared for filing. [C24, 27, 31, 35,§256.]

257 Number of copies—style. The annual and biennial reports shall be published, printed, and bound in such number as the board of printing may order. The officials and heads of departments shall furnish the printing board with information necessary to determine the number of copies to be printed.

They shall be printed on good paper, in legible type with pages substantially six inches by nine inches in size. They may be divided for binding where one portion should receive larger distribution than another, or be issued in parts or sections for greater convenience. [C73,§130; C97,§125; S13,§125; C24, 27, 31, 35,§257.]

258 Rep. by 45GA, ch 9,§6

259 Legislative journals. The record of the transactions of the senate and house shall be published in a daily journal, printed in number as authorized by the general assembly or directed by the superintendent of printing. The completed journals shall be published in book form, with index and record of bills, in an edition of not less than one thousand in library binding and not less than one thousand in paper covers. There shall also be printed for the general assembly or the members thereof such other material necessary for the transaction of legislative business. [C97,§§127, 130; SS15,§§132-b, -d; C24, 27, 31, 35,§259.]

260 Legislative proceedings. The reports of the legislative proceedings shall be delivered by the secretary of the senate and the chief clerk of the house to the superintendent of printing promptly upon completion, and he shall cause such reports to be printed in accordance with the contracts covering the same. He shall require that proof copies of the daily journal be furnished the next legislative day after date and shall promptly deliver them to the sergeants at arms of each house. The corrections and changes made therein by the general assembly shall be made before the printing of the corrected or completed journal. [C24, 27, 31, 35,§260.]

261 Corrected journals. The journal, as corrected by order of the general assembly, shall be printed promptly and be delivered by the superintendent to the sergeants at arms of each house. An index, record and history of bills, and list of bills passed, shall be prepared by the superintendent of printing for the completed edition of the journal. [C24, 27, 31, 35,§261.]

262 Legislative bills. The bills introduced in the general assembly shall be printed on good paper with pages approximately eight inches by ten inches in size with type not less than ten point in size, the lines spaced with pica slugs, each printed line to be one line of the original bill as introduced, and the lines of each section to be separately numbered. The number of copies of each bill to be printed unless otherwise ordered shall be fixed by the superintendent according to the needs of the general assembly, and to supply subscribers therefor. [C24, 27, 31, 35,§262.]

Recommendations of code editor, §157

263 Legalizing acts of local nature. A bill which seeks to legalize the acts of any official or board or other official body, in regard to any matter not of public nature, shall not be considered until it is printed as a bill and distributed to members of the general assembly, and the printing shall be without expense to the state. The superintendent of printing shall not order any such bill printed until he has received a deposit to cover the cost thereof at the rate of not less than two dollars per page, and shall exclude from the journals all such bills. Local or legalizing acts of a strictly private interest shall not be printed in the journal, but are to be printed in bill form only when the cost of such printing shall be deposited with the superintendent of printing at the rate of two dollars per page, and the newspaper publication of such bill shall be without expense to the state, and same shall not be published until the cost of same has been paid to the secretary of state. [C24, 27, 31, 35,§263.]

264 Miscellaneous documents. There shall be published, printed, and bound, uniform with the official reports, unless otherwise provided, and for the periods indicated, the following miscellaneous documents, each of which shall be compiled by the head or secretary of the department or association having charge thereof:

1. Iowa year book of agriculture, annually.
2. Iowa official register, biennially.
3. Assessments by state tax commission relative to public utilities, annually.
4. Proceedings of Iowa academy of science, annually. [C24, 27, 31, 35,§264; 48GA, ch 50,§1.]

265 Legal publications. The code, session laws, annotations, tables of corresponding sections, and reports of the supreme court shall be printed, and paid for in the same manner as other public printing. [C97,§§218–224; SS15, §224-d; C24, 27, 31, 35,§265.]

265.1 Price. Said publications shall be sold at a price to be established and fixed by the state printing board.

1. Code.
2. Session laws.
3. Daily journals and bills.
4. Book of annotations to the code.
5. Supplements to the book of annotations.
6. Tables of corresponding sections to the code.
7. Reports of the supreme court. [C27, 31, 35, §265-a1.]

See §241
Skeleton-digest, see §161.1

265.2 Price of departmental reports. The state printing board is hereby authorized to establish and fix a selling price for all other state departmental reports and any other state publications it may designate, which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports. [C35,§265-e1.]

266 Annotations. Books of annotations shall, so far as practicable, be printed and bound in the same manner, form, and style as the code. [C24, 27, 31, 35,§266.]

267 New editions. New editions of the code, book of annotations, and reports of the supreme court may be published by the printing board when the supply on hand of the last edition becomes exhausted and when a new edition is necessary in order to meet the demand. [C24, 27, 31, 35,§267.]

268 Number printed. The number of each edition of the code, tables of corresponding sections, session laws, annotations, and reports of supreme court shall be determined by the printing board. [C73,§37; C97,§40; C24, 27, 31, 35, §268.]

269 Other necessary publications. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board. [C24, 27, 31, 35,§269.]

Additional geological reports, §4557
Publication of parts of code, §176
Publication of board of control bulletins, §3329

270 Governor may fix filing date. The governor shall have the right to fix a date for the completion of or filing of any copy or manuscript for any miscellaneous document or other publication, or for any portion of the manuscript, and to compel compliance with such orders the same as in the case of the official reports. The superintendent of printing shall report to the governor any failure to furnish manuscript or other delay affecting any publication. [C24, 27, 31, 35,§270.]

271 Title pages—complimentary insertions. The superintendent of printing shall provide the necessary printer's copy for a suitable title page for each publication requiring such title which shall contain the name of the author, but no such title shall have written or printed thereon or attached thereto the words "Compliments of" followed by the name of the author, nor any other words of similar import. [C24, 27, 31, 35,§271.]

CHAPTER 17

CUSTODIAN OF PUBLIC BUILDINGS

272 Appointment and tenure.
273 Duties.
274 Biennial report.
275 Interest in contracts.
275.1 Rules—violation.

272 Appointment and tenure. The executive council shall appoint a custodian of public buildings and grounds who shall hold office during the pleasure of said council. [C97,§145; SS15,§147; C24, 27, 31, 35,§272.]

273 Duties. It shall be the duty of the custodian, except as otherwise provided by law, to:

1. Have charge of, preserve and adequately protect the state capitol and grounds, and all other state grounds and buildings at the seat of government, and all property connected therewith or used therein or thereon.
2. See that all parts and apartments of said buildings are properly ventilated and kept clean and in order.
3. See that all visitors, at proper hours, are properly escorted over said grounds and through said buildings, free of expense.
4. Have at all times, charge of and supervision over the police, janitors, and other employees of his department in and about the capitol and other state buildings at the seat of government.
5. Institute, in the name of the state, and with the advice and consent of the attorney general, civil and criminal proceedings against any person for injury or threatened injury to any public property under his control, or for committing or threatening to commit a nuisance therein or thereon.
6. Keep in his office a complete record containing an itemized account of all state property, including furniture and equipment, under his care and control, and plans and surveys of the public grounds, buildings, and underground constructions at the seat of government.
7. Perform all other duties required by law or order of the executive council. [C73,§120; C97,§§147, 148, 150; S13,§150; SS15,§147; C24, 27, 31, 35,§273.]

274 Biennial report. The custodian shall, at the time provided by law, make a verified report which shall cover all transactions for the preceding biennial period and show in detail:

1. All expenditures made on account of the department of public buildings and property.
2. The condition of all real and personal property of the state under his care or control, together with a report of any loss or destruction, or injury to any such property, with the causes thereof.
3. The measures necessary for the care and preservation of the property under his control.
4. Any recommendations as to methods which would tend to render the public service more efficient and economical.
5. Any other matter ordered by the governor. [C97,§151; S13,§151; C24, 27, 31, 35,§274.]

Time of report, §246

275 Interest in contracts. The custodian shall not have any pecuniary interest, directly or indirectly, in any contract for supplies furnished to the state, or in any business enterprise involving any expenditure by the state; and a violation of the provisions of this section

shall be deemed a misdemeanor, and on conviction thereof he shall be fined in any sum not exceeding one thousand dollars, and be removed from office. [C97,§153; C24, 27, 31, 35,§275.]

Similar provisions, §§180, 3828.101, 3922, 4685, 4686.14, 4755.10, 5361, 5673, 5828, 6534, 6710, 18324, 18327

275.1 Rules — violation. The executive council shall establish, publish, and enforce rules regulating and restricting the use by the public of the capitol building and the capitol grounds and all buildings and erections thereon. Such rules when established shall be posted in conspicuous places about said buildings and grounds. Any person violating any such rule shall be guilty of a misdemeanor and upon conviction be punished by a fine of not to exceed one hundred dollars or by imprisonment in the county jail not to exceed thirty days. [C27, 31, 35,§275-b1.]

CHAPTER 18

EXECUTIVE COUNCIL

276 Membership.
277 Secretary.
278 Records kept.
282 Supplies.
283 Requisition blanks.
284 Report for official register.
286 Contingent fund.
287 Anticipation of revenues.
288 Compromise of claims.
289 Court costs.
290 Report of unexpended balances.
291 Notice to transfer balance.
292 Order of transfer.
293 Duty to transfer.
294 Exception.
295 Assignment of rooms.
295.1 Veteran's newsstand.
296 Repairs—supplies.
296.1 Mailing room.
297 Advertisement for bids.
298 Contracts.
299 Identification of state property.
300 Sale of state property.
301 Supply account.
302 Officers entitled to supplies.
303 Postage.
304 Drawing supplies.
305 Account with officer.
306 Performance of duty—expense.
307 Necessary record.
308 Additional compensation and expenses.

276 Membership. The executive council shall consist of the:

1. Governor,
2. Secretary of state,
3. Auditor of state,
4. Treasurer of state, and
5. Secretary of agriculture.

A majority shall constitute a quorum. No deputy shall act on the council for his principal. [R60,§993; C73,§111; C97,§155; C24, 27, 31, 35,§276.]

277 Secretary. The executive council shall choose a secretary who shall hold office during its pleasure, and perform such duties as may be required by law or by the executive council. [R60,§999; C73,§§119, 120; C97,§§156, 157; S13, §§156, 157; C24, 27, 31, 35,§277.]

Additional duties, §§1797, 1862, 1864

278 Records kept. He shall keep a complete record of the proceedings of the executive council. [C73,§119; C97,§§156, 157; S13,§157; C24, 27, 31, 35,§278.]

279 to 281, inc. Rep. by 45GA, ch 10,§2

See §6943.022

282 Supplies. He shall have charge of the supplies and postage purchased for state use, and shall keep a stock book record and ledger account of the receipts and disbursements thereof. [C73,§§119, 120; S13,§157; C24, 27, 31, 35, §282.]

283 Requisition blanks. He shall, under the direction of the executive council, prepare and maintain forms for requisitions for supplies for persons entitled to draw the same. [C73,§§119, 120; C97,§157; S13,§157; C24, 27, 31, 35,§283.]

Officers entitled to supplies, §302

284 Report for official register. He shall, as soon as practicable after January 1 of each odd-numbered year, prepare a report of the proceedings of the executive council for the two preceding calendar years. Said report shall include a statement of:

1. The official canvass of the votes cast at the last general election.
2. The cities and towns, the class of which may have been changed.
3. Other acts of said council that are of general interest.

Said report shall be published in the Iowa official register. [C73,§120; C97,§157; S13,§157; C24, 27, 31, 35,§284.]

285 Rep. by 45GA, ch 10,§2

See §6943.022

286 Contingent fund. A contingent fund set apart for the use of the executive council may be expended for the purpose of paying the expenses of suppressing any insurrection or riot, actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause, and for no other purpose whatever. [C73,§120; C97,§170; C24, 27, 31, 35,§286.]

287 Anticipation of revenues. The executive council may anticipate the revenues for any year, when the current revenues for such year are insufficient to pay all warrants issued in said year, by causing state warrants, in an amount not exceeding the estimated state revenues for said year, and drawing not to exceed five percent per annum, to be issued, advertised, and sold on sealed bids to the highest bidder. All

bids and all records pertaining thereto, and the names of all purchasers shall be kept on file. [S13,§170-a; C24, 27, 31, 35,§287.]

288 Compromise of claims. The executive council, on a written report to it by the attorney general together with his opinion as to the legal effect of the facts, may determine by resolution to be duly entered in its official records, the terms on which claims of doubtful equity or collectibility, and in favor of the state, may be compromised and settled with all or any of the parties thereto. Such terms may be withdrawn prior to acceptance, or in case the debtor fails to comply therewith within a reasonable time. The attorney general shall have full authority to execute all papers necessary to effect any such settlement. [S13,§170-h; C24, 27, 31, 35,§288.]

289 Court costs. The executive council may pay, out of any money in the state treasury not otherwise appropriated, any expense incurred, or costs taxed to the state, in any proceeding brought by or against any of the state departments or in which the state is a party or interested. [S13,§170-i; C24, 27, 31, 35,§289.]

290 Report of unexpended balances. All commissions, boards, officers or persons placed in charge, by statute, of special work for which a specific appropriation of state funds has been made, shall, biennially, report to the executive council the progress of such special work, the balance on hand in such fund, a list of all unpaid bills, and the amount of each, then outstanding, with such other information as the council shall from time to time require. [SS15, §170-q; C24, 27, 31, 35,§290.]

Referred to in §§84.26, 294

291 Notice to transfer balance. When said council is satisfied that the work for which such special fund was created has been completed or abandoned, it shall fix a day for hearing on the question whether the unexpended balance then on hand should be transferred to the general revenue fund of the state, and shall cause a ten days notice of such hearing to be given such commission, board, officer, or person, at which hearing showing may be made why such unexpended balance should not be so transferred. [SS15,§170-q; C24, 27, 31, 35,§291.]

Referred to in §§84.26, 294

292 Order of transfer. If after such hearing the council shall find that said special work has been completed or abandoned, and that there is no good reason why such transfer should not then be made, such findings shall be made a matter of record in the minutes of its proceedings, and the secretary of the council shall at once file a copy of such proceedings with the state comptroller. [SS15,§170-q; C24, 27, 31, 35, §292.]

Referred to in §§84.26, 294

293 Duty to transfer. The state comptroller shall, on receipt from the secretary of the council of a copy of such record, make such transfer. [SS15,§170-q; C24, 27, 31, 35,§293.]

Referred to in §§84.26, 294

294 Exception. Sections 290 to 293, inclusive, shall not apply to any appropriation for any purpose connected with the operation of any state institution under the control of the state board of control of state institutions, unless the board shall certify to the said council that an unexpended balance of such appropriation will not be needed. [S13,§123; C24, 27, 31, 35,§294.]

295 Assignment of rooms. The executive council shall control the assignment of rooms in the capitol building, provided that room four in the basement story shall be the permanent quarters of the Grand Army of the Republic, department of Iowa. Assignments may be changed at any time. Assignment of rooms which are necessary for legislative purposes, shall terminate on the convening of the general assembly. The various officers to whom rooms have been so assigned may control the same while the assignment to them is in force. Official apartments shall be used only for the purpose of conducting the business of the state. [C97,§§152, 164; S13, §§152, 164; C24, 27, 31, 35,§295.]

295.1 Veteran's newsstand. The executive council shall, on the application of any disabled, honorably discharged soldier, sailor, marine, or nurse of the army or navy of the United States in the late civil war, Spanish-American war, Philippine insurrection, China relief expedition, or war with Germany, cause to be reserved in the state capitol a reasonable amount of space in the lobby of said state capitol to be used by such applicant rent-free as a stand for the sale of news, tobaccos, and candies and may in such application permit installation of merchandise vending machines. Should there be more than one applicant for such reserved space, the executive council shall award the same to the person in their opinion most deserving of the same. The executive council shall prescribe the regulations by which the stand shall be operated. [48GA, ch 59,§1.]

Courthouses, §5130.1

296 Repairs—supplies. The executive council may contract for the repairing of all buildings and grounds of the state at the seat of government, for the necessary telephone, telegraph, lighting, and water service for such buildings and grounds, for all necessary furniture, fuel, stores, and supplies for the said buildings and grounds, and for the various departments of the state government at the seat of government. Payment for telephone, telegraph, water, and lighting service shall not exceed the minimum charge to private parties. [C51,§§45, 60; R60, §§61, 81, 2170; C73,§§120, 121; C97,§§164, 165; S13,§§164, 165; C24, 27, 31, 35,§296.]

296.1 Mailing room. The executive council shall designate and set apart in the capitol building, a room to be known as the mailing room, and shall install therein one or more postage metering machines for the purpose of metering first and second class mail and parcel post mail. All officials of the state, whether elected or appointed, whose offices are located in the capitol building or in buildings adjacent there-

to, or whose offices are located in the city of Des Moines, Iowa, shall be and they are hereby required to dispatch their first and second class and parcel post mail to the mailing room so designated for the purpose of having the same sealed, metered and posted.

This section shall not apply to registered mail. [C35,§296-e1.]

297 Advertisement for bids. The secretary of the executive council shall, from time to time, on the order of the council, advertise in two newspapers published at the seat of government, and in such other newspapers as the council may order, for sealed proposals for furnishing supplies (except government postage and other noncompetitive supplies) which advertisements shall state the kind, quality, quantity, and time and place of delivery, the time and place when such proposals will be opened, and when the same must be filed with such secretary, and other matters as the council may direct. [R60,§2169; C73,§121; C97,§166; S13,§166; C24, 27, 31, 35,§297.]

298 Contracts. All bids shall be opened at the time and place specified. Contracts shall be let to the lowest responsible bidder, but the council may reject all bids and readvertise. Successful bidders shall give security, to be approved by the council, for the faithful performance of all contracts. [R60,§2169; C73,§121; C97,§167; C24, 27, 31, 35,§298.]

299 Identification of state property. All furniture, stores, or supplies for use in and about the capitol shall, when practicable, be marked with the word "Iowa". [C97,§165; S13, §165; C24, 27, 31, 35,§299.]

300 Sale of state property. Said council may dispose of any personal property when the same shall, for any reason, become unnecessary or unfit for further use by the state. [S13,§165; C24, 27, 31, 35,§300; 48GA, ch 51,§1.]

301 Supply account. The executive council shall take charge of all property purchased, and shall keep a complete and itemized account of all such property, with the cost and disposition thereof. [R60,§2170; C73.§122; C97,§§168, 169; S13,§168; C24, 27, 31, 35,§301.]

302 Officers entitled to supplies. The council shall, unless otherwise provided, furnish the following officers and departments with all articles and supplies required for the public use and necessary to enable them to perform the duties imposed upon them by law:

1. Governor.
2. Secretary of state.
3. Auditor of state.
4. Treasurer of state.
5. Secretary of agriculture.
6. Attorney general.
7. Judges of supreme court.
8. Clerk of supreme court.
9. Reporter of supreme court.
10. Iowa state commerce commissioners.
11. Commerce counsel.
12. General assembly and members thereof.
13. Standing and special committees of the general assembly.
14. Chief clerk of the house.
15. Secretary of the senate.
16. Superintendent of public instruction.
17. Board of control of state institutions.
18. State board of education and the finance committee thereof.
19. Insurance department.
20. Historical department.
21. Mine inspectors.
22. Labor commissioner.
23. Board of parole.
24. State department of health.
25. State comptroller.
26. State board of educational examiners.
27. State library.
28. Law library.
29. State library commission.
30. State printing board and superintendent of printing.
31. State fire marshal.
32. Industrial commissioner.
33. Adjutant general.
34. Custodian public buildings and grounds.
35. State tax commission.
36. State conservation commission.

This section shall not be construed to prevent the furnishing of supplies to other officers who are entitled to receive them under other provisions of law. [R60,§2170; C73.§122; C97 §168; S13,§168; C24, 27, 31, 35,§302; 47GA, ch 205,§1; ch 235,§8; 48GA, ch 36,§2; ch 52,§1; ch 175,§20.]

303 Postage. Postage shall not be furnished to the general assembly, its members, officers, employees, or committees. [C97,§168; S13,§168; C24, 27, 31, 35,§303.]

304 Drawing supplies. Supplies shall be delivered only on a written requisition on the secretary of said council, signed by the officer entitled thereto, specifying the amount and kind necessary. The secretary shall take receipts for all such supplies and file and preserve the same. [R60,§2170; C73,§122; C97,§169; C24, 27, 31, 35,§304.]

305 Account with officer. The council shall keep an accurate, itemized account with each office, board, commission, or person drawing supplies, charging thereto the several articles furnished at the cost price. [C97,§169; C24, 27, 31, 35,§305.]

306 Performance of duty—expense. The executive council shall not employ others, or incur any expense, for the purpose of performing any duty imposed upon such council when such duty may, without neglect of their usual duties, be performed by the members, or by their regular employees, but, subject to such limitation, the council may incur the necessary expense to perform or cause to be performed any legal duty imposed on said council, and pay the same out of any money in the state treasury not otherwise appropriated. [S13,§§170-l,-n,-p; C24, 27, 31, 35,§306.]

Referred to in §307

307 Necessary record. Before incurring any expense authorized by section 306, the council shall, in each case, by resolution, entered upon its records, set forth the necessity for incurring such expense, the special fitness of the one employed to perform such work, the definite rate of compensation or salary allowed, and the total amount of money that may be expended. Compensation or salary for personal services in such cases must be determined by unanimous vote of all members of the council. [S13,§§170-m,-n; C24, 27, 31, 35,§307.]

308 Additional compensation and expenses. Members of the executive council and its regular employees shall be paid no additional salary or compensation for special service, but shall receive their necessary traveling expenses, including subsistence, when absent from the seat of government on official business. [S13,§170-o; C24, 27, 31, 35,§308.]

CHAPTER 18.1

DISPATCHER OF STATE AUTOMOBILES

308.1 Authority in governor.
308.2 Upkeep on state cars.
308.3 Car dispatcher—employees—duties.
308.4 Violations—withdrawing use of car.
308.5 Private use—rate for state business.
308.6 Penalty for private use.

308.1 Authority in governor. Upon the taking effect of this chapter, the authority to assign all state-owned motor vehicles to state officers and employees, or to state offices, departments, bureaus, and commissions, shall be transferred and vested in the governor. Until an assignment of such vehicles is made by the governor, each of these state motor vehicles shall continue to be operated by the state officer, department, bureau, or commission which now uses them. [48GA, ch 131,§1.]

308.2 Upkeep on state cars. The upkeep and maintenance of said motor vehicles shall be paid out of the budgets of the state office departments, bureaus and commissions to which they may be assigned. [48GA, ch 131,§2.]

308.3 Car dispatcher — employees — duties. In order to carry out the powers vested in him by this chapter, the governor shall appoint a state car dispatcher and such other employees as may be necessary and which are provided for in the biennial state appropriation act, to carry out the provisions of this chapter. The secretary of the executive council may be appointed by the governor as the state car dispatcher, without additional compensation. Subject to the approval of the governor, the said state car dispatcher shall have the following duties:

1. He shall assign to a state officer or employee or to a state office, department, bureau, or commission, one or more motor vehicles which may be required by said officer or department, after said officer or department has shown the necessity for such transportation. The state car dispatcher shall have the power to assign said motor vehicle either for part time or full time. He shall have the right to revoke said assignment at any time.

2. The state car dispatcher may cause all state-owned motor vehicles to be inspected periodically. Whenever such inspection reveals that repairs have been improperly made on said motor vehicle or that the operator of same is not giving it the proper care, he shall report such fact to the head of the department to which such motor vehicle has been assigned, together with recommendation for improvement.

3. The state car dispatcher may install a system of keeping a record of the total and per mile cost of each motor vehicle, which shall be substantially as follows: In each motor vehicle, shall be placed two record books containing numbered sheets. In one such book shall be entered the purchases of gasoline, lubricating oil and grease, giving the quantity and price paid. In the other book, shall be entered the cost and nature of repairs and new parts. One copy of each such order shall be sent to the state car dispatcher at such times as he may designate. Each operator of a state-owned motor vehicle shall make a quarterly report to the state car dispatcher, in such manner as he may prescribe, as to the number of miles traveled during the past three months by said motor vehicle. He shall cause these costs and mileages to be entered quarterly in a cost history card for each state-owned motor vehicle and said costs shall be reduced to a cost-per-mile for each such motor vehicle. It shall be his duty to call to the attention of the head of the department to which such motor vehicle has been assigned, any evidence of mishandling of the motor vehicle as revealed by the cost history card, periodical inspections, and other information obtained by the state car dispatcher.

4. The state car dispatcher shall purchase all new motor vehicles for all branches of the state government, and the cost of the same shall be paid out of the budgets of the department, bureau, commission, or state office to which they may be assigned. Before purchasing any motor vehicle he shall make requests for public bids by advertisement and he shall purchase the vehicles from the lowest responsible bidder for the type and make of car designated. No passenger motor vehicle except ambulances, busses or trucks shall be purchased for an amount in excess of the sum of one thousand dollars retail delivered price.

5. In the event that it shall be deemed necessary for a state officer or employee to use his own motor vehicle on state business, the state car dispatcher may authorize such use and allowance for same. This shall not apply to single emergency trips when it may be necessary for state officers and employees to take a bus.

6. The state car dispatcher may authorize the establishment of motor pools consisting of a number of state-owned cars under his supervision and which he may cause to be stored in a public or private garage. In the event that such pool is established by the state car dispatcher, any state officer or employee shall not use state-owned cars except when he shall find it necessary to use a state-owned motor vehicle to make a trip outside of the city of Des Moines on state business, and he shall notify the state car dispatcher of such intention, if possible, within a reasonable length of time before the said trip is to be made. The said state car dispatcher may assign one of the motor vehicles from the motor pool to said state officer or employee for such trip. If two or more state officers or employees are required to make a trip to the same destination and return to Des Moines at the same time, the state car dispatcher may assign one car to these state officers or employees to make such trip.

Upon request of the governor, the state comptroller is authorized to set up a revolving fund of one thousand dollars against which he may charge the expenditures for the motor vehicles in said motor pool. The state car dispatcher shall cause to be charged to the budgets of the different departments the expense of said trips, and the payment of same shall be credited to the motor pool revolving fund.

7. The state car dispatcher shall cause to be marked on every state-owned motor vehicle a sign in a conspicuous place which indicates its ownership by the state except cars necessary for use in police work. All state-owned motor vehicles shall display registration plates bearing the word "official" except cars assigned for use in police work for which ordinary plates may be used when necessary but only upon order of the state car dispatcher who shall keep an accurate record of the registration plates used on all state cars.

8. The state car dispatcher shall have the authority to make such other rules regarding the operation of state-owned motor vehicles. with the approval of the governor, as may be necessary to carry out the purpose of this chapter. [48GA, ch 131,§3.]

Marking of vehicles generally, §13316.2
"Official" plates, see §§5001.03, 5012.08
Police car plates, see §5001.03

308.4 Violations—withdrawing use of car. If any state officer or employee violates any of the provisions of this chapter, the state car dispatcher shall have the authority to withdraw the assignment of any state-owned motor vehicle or revoke the allowance for the use of his privately owned motor vehicle, to any such state officer or employee. An appeal from such order by the state car dispatcher may be taken to the governor whose decision shall be final. [48GA, ch 131,§4.]

308.5 Private use—rate for state business. No state officer or employee shall use any state-owned car for his own personal private use, nor shall he be compensated for driving his own motor vehicle except if such is done on state business and in such case he shall not receive more than four cents per mile. [48GA, ch 131, §5.]

See §1225.01 for contra rate

308.6 Penalty for private use. Any state officer or employee found guilty of using any state-owned motor vehicle for his own private business or pleasure shall, upon conviction, be fined not to exceed one hundred dollars or imprisoned not to exceed thirty days in the county jail. [48GA, ch 131,§6.]

Omnibus repeal, 48GA, ch 131, §7
Private use of public property generally, §13316.1

CHAPTER 19

DIRECTOR OF THE BUDGET

This chapter (§§309 to 326, inc.) repealed by 45GA, ch 4,§10

CHAPTER 20

STATE BUDGET

This chapter (§§327 to 338, inc.) repealed by 45GA, ch 4,§10

CHAPTER 21

EXAMINATION OF AND SETTLEMENTS WITH DEPARTMENTS

339 Transferred. Now appears as §101.1

340 Transferred. Now appears as §101.2

Section 340-c1, code 1931, now appears as §101.3

341 Omitted. Authority for state accountant (§318) repealed by 45GA, ch 4,§10

342 Transferred. Now appears as §101.4

343 Transferred. Now appears as §101.5

344 Rep. by 45GA, ch 15

345 Transferred. Now appears as §84.32

CHAPTER 22

APPEAL BOARD—STATE INSTITUTION CONSTRUCTION CONTRACTS

Referred to in §§390, 1063, 3757

346 Board created.
348 Vacancies and removals.
349 Jurisdiction.
350 Compensation and expense.

346 Board created. There shall be nominated by the governor and appointed in the manner required for the appointment of the state comptroller, two competent persons to act with the comptroller as members of an appeal board in certain cases. Their terms of office shall be for four years, beginning on the first day of July of each odd-numbered year. [C24, 27, 31, 35,§346.]

Method of appointment, §84.4

347 Rep. by 44GA, ch 10

348 Vacancies and removals. Vacancies in appointments of such members of the appeal board shall be filled and the removal from office shall be accomplished in the same manner as provided for the comptroller. [C24, 27, 31, 35, §348.]

Vacancies, §1152

349 Jurisdiction. The said members of the appeal board and the state comptroller shall sit and act together as a board of appeal and the comptroller shall be chairman of the board. Said board shall only consider and determine appeals from the action of the state board of education, the state board of control, or the state fair board in respect to the letting of contracts for buildings or other improvements in which the amount involved is in excess of twenty-five thousand dollars. The hearings before the board shall be de novo and the evidence shall be preserved on file. The decision of the board shall be final and be entered of record in the office of the comptroller. [C24, 27, 31, 35, §349.]

350 Compensation and expense. The members of the appeal board, other than the comptroller, shall be paid on a per diem basis and the amount of their compensation shall be fixed by the executive council. [C24, 27, 31, 35,§350.]

CHAPTER 23

PUBLIC CONTRACTS AND BONDS

Referred to in §§390, 5903.13, 6066.27, 7714.04, 7714.06

351 Terms defined.
352 Notice of hearing.
353 Objections—hearing—decision.
354 Appeal—limitation.
355 Information certified to comptroller.
356 Notice of hearing on appeal.
357 Hearing and decision.
358 Enforcement of performance.
359 Nonapproved contracts void.
360 Appeal board.
361 Witness fees—costs.
362 Report on completion.
363 Issuance of bonds—notice.
364 Objections.
365 Notice of hearing.
366 Decision.
367 Bonds and taxes void.

351 Terms defined. The words "public improvement" as used in this chapter shall mean any building or other construction work to be paid for in whole or in part by the use of funds of any municipality.

The word "municipality" as used in this chapter shall mean county, except in the exercise of its power to make contracts for secondary road improvements, city, including those acting under special charter, town, township, school district, state fair board, state board of education, and state board of control. [C24, 27, 31, 35,§351.]

352 Notice of hearing. Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing. [C24, 27, 31, 35, §352.]

353 Objections — hearing — decision. At such hearing, any person interested may appear and file objections to the proposed plans, specifications or contract for, or cost of such improvement. The governing body of the municipality proposing to enter into such contract shall hear said objections and any evidence for or against the same, and enter of record its decision thereon. [C24, 27, 31, 35,§353.]

354 Appeal — limitation. As hereinafter provided, interested objectors may appeal from such decision to the state comptroller by serving notice thereof on the clerk or secretary of such municipality within ten days after such decision is entered of record, provided that—

1. For all school districts, except independent school districts in cities and towns and consolidated school districts, and for townships, the amount involved for the whole improvement is five thousand dollars or more.

2. For counties, cities of the second class,

towns, and for consolidated school districts and for independent school districts in whole or in part in cities of the second class or towns, ten thousand dollars or more.

3. For cities of the first class, including cities under special charter, and for school districts in whole or in part in cities of the first class and in cities under special charter, for state institutions and state fair board, twenty-five thousand dollars or more.

4. The number of objectors required to perfect an appeal shall be as follows:

Under subsection 1—ten.

Under subsection 2—twenty-five.

Under subsection 3—fifty.

[C24, 27, 31, 35,§354.]

355 Information certified to comptroller. In case an appeal is taken, such body shall forthwith certify and submit to the comptroller for examination and review the following:

1. A copy of the plans and specifications for such improvement.
2. A copy of the proposed contract.
3. An estimate of the cost of such improvement.
4. A report of the kind and amount of security proposed to be given for the faithful performance of the contract and the cost of such security.
5. A copy of the objections, if any, which have been urged by any taxpayer against the proposed plans, specifications or contract, or the cost of such improvement.
6. A separate estimate of the architect's or engineer's fees and cost of supervision.
7. A statement of the taxable value of the property within the municipality proposing to make such improvement.
8. A statement of the several rates of levy of taxes in such municipality for each fund.
9. A detailed statement of the bonded and other indebtedness of such municipality.
10. In case of state institutions and state fair board, the last three requirements may be omitted. [C24, 27, 31, 35,§355.]

356 Notice of hearing on appeal. The comptroller shall forthwith fix a time and place in the municipality or nearby convenient place for hearing said appeal, and notice of such hearing shall be given by registered mail to the executive officer of the municipality, and to the first five persons whose names appear upon the notice of appeal, at least ten days before the date fixed for such hearing.

The hearing on contracts for the state institutions and state fair board shall be at the seat of government. [C24, 27, 31, 35,§356.]

Appeal board, §360

357 Hearing and decision. At such hearing, the appellants and any other interested person may appear and be heard. The comptroller shall examine, with the aid of competent assistants, the entire record, and if he shall find that the form of contract is suitable for the improvement proposed and that such improvements can be made within the estimates therefor, he shall approve the same. Otherwise he shall recommend such modifications of the plans, specifications, or contract, as in his judgment shall be for the public benefit, and if such modifications are so made, he shall approve the same.

The comptroller shall certify his decision to the body proposing to enter into such contract, whereupon the municipality shall advertise for bids and let the contract subject to the approval of the comptroller who shall at once render his final decision thereon and transmit the same to the municipality. [C24, 27, 31, 35,§357.]

358 Enforcement of performance. After any contract for any public improvement has been completed and any five persons interested request it, the comptroller shall examine into the matter as to whether or not the contract has been performed in accordance with its terms, and if on such investigation he finds that said contract has not been so performed, and so reports to the body letting such contract, it shall at once institute proceedings on the contractor's bond for the purpose of compelling compliance with the contract in all of its provisions. [C24, 27, 31, 35,§358.]

359 Nonapproved contracts void. If an appeal is taken, no contract for public improvements shall be valid unless the same is finally approved by the comptroller. In no case shall any municipality expend for any public improvement any sum in excess of five percent more than the contract price without the approval of the comptroller. [C24, 27, 31, 35,§359.]

360 Appeal board. If the appeal is from the action of the state board of education, state board of control, or state fair board, the additional members of the appeal board* shall sit with the comptroller and they shall hear the appeal as an appeal board, and in such case the words "state comptroller" as used in this chapter shall, so far as applicable, be construed to mean such appeal board. [C24, 27, 31, 35,§360.]

*See chapter 22

361 Witness fees—costs. Witness fees and mileage for witnesses on hearing appeals shall be the same as in the district court; but objectors or appellants shall not be allowed witness fees or mileage. Costs of hearings and appeals shall be paid by the municipality. [C24, 27, 31, 35,§361.]

Witness fees, §11326

362 Report on completion. Upon the completion of the improvement the executive officer or governing board of the municipality shall file with the comptroller a verified report showing:

1. The location and character of the improvement.
2. The total contract price for the completed improvement.
3. The total actual cost of the completed improvement.
4. By whom, if anyone, the construction was supervised.
5. By whom final inspection was made.
6. Whether or not the improvement complies with its contract, plans and specifications.

7. Any failure of the contractor to comply with the plans and specifications. [C24, 27, 31, 35,§362.]

363 Issuance of bonds—notice. Before any municipality shall institute proceedings for the issuance of any bonds or other evidence of indebtedness, excepting such bonds or other evidence of indebtedness as have been authorized by a vote of the people of such municipality, and except such bonds or obligations as it may be by law compelled to issue, a notice of such action, including a statement of the amount and purpose of said bonds or other evidence of indebtedness shall be published at least once in a newspaper of general circulation within such municipality at least ten days before the meeting at which it is proposed to issue such bonds. [C24, 27, 31, 35,§363.]

Referred to in §§5570.4, 5903.13, 6066.27
Sixty percent vote required, §1171.18

364 Objections. At any time before the date fixed for the issuance of such bonds or other evidence of indebtedness, five or more taxpayers may file a petition in the office of the clerk or secretary of the municipality setting forth their objections thereto. [C24, 27, 31, 35,§364.]

Referred to in §§5570.4, 5903.13, 6066.27

365 Notice of hearing. Upon the filing of any such petition, the clerk or secretary of such municipality shall immediately certify a copy thereof, together with such other data as may be necessary in order to present the questions involved, to the comptroller, and upon receipt of such certificate, petition and information, he shall fix a time and place for the hearing of such matter, which shall be not less than ten nor more than thirty days thereafter. Said hearing shall be held in the municipality in which it is proposed to issue such bonds or other evidence of indebtedness, or in some other nearby convenient place fixed by the comptroller. Notice of such hearing shall be given by registered mail to the executive officer of the municipality and to the five persons whose names first appear on the petition at least ten days before the date of such hearing. [C24, 27, 31, 35,§365.]

Referred to in §§5570.4, 5903.13, 6066.27

366 Decision. The comptroller shall examine the entire record and if he finds that the bonds are to be issued and arrangements for payment have been made in accordance with law he shall approve the same, otherwise he shall recommend such modifications as in his judgment are necessary to comply with the provisions of the state law and if such modifications are so made he shall approve the same, and his decision shall be final. The same shall be certified to the executive officer of the municipality affected.

In case there is no appeal, the board of the municipality affected may issue such bonds or other evidence of indebtedness, if legally authorized so to do, in accordance with the proposition published, but in no greater amount.

In case of an appeal, the municipality may issue such bonds or other evidence of indebtedness in accordance with the decision of the comptroller. [C24, 27, 31, 35,§366.]

Referred to in §§5570.4, 5903.13, 6066.27

367 Bonds and taxes void. Any bonds or other evidence of indebtedness issued contrary to the provisions of this chapter, and any tax levied or attempted to be levied for the payment of any such bonds or interest thereon, shall be null and void. [C24, 27, 31, 35,§367.]

Referred to in §§5570.4, 5903.13, 6066.27

CHAPTER 24

LOCAL BUDGET LAW

Referred to in §390

368 Short title.
369 Definition of terms.
370 Requirements of local budget.
371 Time of filing estimates.
372 Estimates itemized.
373 Emergency fund—levy.
373.1 Supplemental estimates.
374 Estimated tax collections.
375 Filing estimates—notice of hearing.
376 Levies void.
377 Meeting for review.
378 Record by certifying board.
379 Procedure by levying board.
380 Tax limited.
381 Further tax limitation.
382 Expenses—how paid.
383 Budgets certified.
384 Summary of budget.
385 Levying board to spread tax.
386 Tax rates final.
387 Transfer of inactive funds.
388 Transfer of active funds—poor fund.
389 Supervisory power of state board.
390 Violations.
390.1 State appeal board.
390.2 Protest to budget.
390.3 Hearing on protest.
390.4 Appeal.
390.5 Review by and powers of board.
390.6 Rules of procedure—record.
390.7 Decision certified to county.
390.8 Appropriation for expenses.

368 Short title. This chapter shall be known as the "Local Budget Law". [C24,27,31,35,§368.]

40ExGA, ch 4,§60, editorially divided

369 Definition of terms. As used in this chapter and unless otherwise required by the context:

1. The word "municipality" shall mean the county, city, town, school district and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district.

2. The words "levying board" shall mean board of supervisors of the county and any other public body or corporation that has the power to levy a tax.

3. The words "certifying board" shall mean any public body which has the power or duty to

certify any tax to be levied or sum of money to be collected by taxation.

4. The words "fiscal year" shall mean the year ending on the thirtieth day of June, and any other period of twelve months constituting a fiscal period, and ending at any other time.

5. The word "tax" shall mean any general or special tax levied against persons, property, or business, for public purposes as provided by law, but shall not include any special assessment nor any tax certified or levied by township trustees.

6. The words "state board" shall mean the state appeal board as created by section 390.1. [C24, 27, 31, 35,§369; 47GA, ch 91,§1.]

370 Requirements of local budget. No municipality shall certify or levy in any year any tax on property subject to taxation unless and until the following estimates have been made, filed, and considered, as hereinafter provided:

1. The amount of income thereof for the several funds from sources other than taxation.

The estimate of such total income other than taxation, for cities over seventy-five thousand population, shall be computed as follows in each fund; the estimate of that portion of this income which is derived from licenses, fees, fines and other miscellaneous items of income other than taxes, shall be no larger than the actual collection of these different items of income, but not including transfers from other funds, during the preceding twelve months ending June 30. Also, to such total estimate, may be added any new source of income other than taxes but only after it shall actually have been authorized by the city council and such estimate of this new source of income must be reasonable.

2. The amount proposed to be raised by taxation.

In cities over seventy-five thousand population, the amount proposed to be raised by taxation may be five and twenty-seven hundredths percent larger than the amount proposed to be expended as provided in subsection three after deducting balances from the preceding year if any, and income from sources other than taxation. Nothing herein shall be construed as permitting a tax levy in excess of the millage rates elsewhere provided.

3. The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing.

4. A comparison of such amounts so proposed to be expended with the amounts expended for like purposes for the two preceding years. [C24, 27, 31, 35,§370; 47GA, ch 92,§1.]

Referred to in §§375, 5663

371 Time of filing estimates. All such estimates and any other estimates required by law shall be made and filed a sufficient length of time in advance of any regular or special meeting of the certifying board or levying board, as the case may be, at which tax levies are authorized to be made to permit publication, discussion, and consideration thereof and action thereon as hereinafter provided. [C24, 27, 31, 35, §371.]

Referred to in §375

372 Estimates itemized. The estimates herein required shall be fully itemized and classified so as to show each particular class of proposed expenditure, showing under separate heads the amount required in such manner and form as shall be prescribed by the state board. [C24, 27, 31, 35,§372; 47GA, ch 91,§2.]

Referred to in §375

373 Emergency fund—levy. Each municipality as defined herein, may include in the estimate herein required, an estimate for an emergency fund. Each such municipality shall have power to assess and levy a tax for such emergency fund at a rate not to exceed one mill upon the taxable property of the municipality, provided that no such emergency tax levy shall be made until such municipality shall have first petitioned the state board to make such levy and received its* approval thereof. Transfers of moneys may be made from the emergency fund to any other fund of the municipality for the purpose of meeting deficiencies in any such fund arising from any cause, provided, however, that no such transfer shall be made except upon the written approval of the state board, and then only when such approval is unanimously requested by the governing body of said municipality. [C24, 27, 31, 35,§373; 47GA, ch 91,§2.]

Referred to in §§375, 380
*Pronoun "his" changed by code editor

373.1 Supplemental estimates. Supplemental estimates for particular funds may be made for levies of taxes for future years when the same are authorized by law. Such estimates may be considered, and levies made therefor at any time by filing the same, and upon giving notice in the manner required in section 375. Such estimates and levies shall not be considered as within the provisions of section 374. [C27, 31, 35,§373-a1.]

Referred to in §375

374 Estimated tax collections. The amount of the difference between the receipts estimated from all sources other than taxation and the estimated expenditures for all purposes, including the estimates for emergency expenditures, shall be the estimated amount to be raised by taxation upon the assessable property within the municipality for the next ensuing fiscal year. The estimate shall show the number of dollars of taxation for each thousand dollars of the assessed value of all property that is assessed. [C24, 27, 31, 35,§374.]

Referred to in §§373.1, 375

375 Filing estimates—notice of hearing. Each municipality shall file with the secretary or clerk thereof the estimates required to be made in sections 370 to 374, inclusive, at least twenty days before the date fixed by law for certifying the same to the levying board and shall forthwith fix a date for a hearing thereon, and shall publish such estimates and any annual levies previously authorized as provided in sec-

tion 1179.2, with a notice of the time when and the place where such hearing shall be held at least ten days before the hearing. Provided that in rural independent districts and school townships such estimates and the notice of hearing thereon shall be posted in three public places in the district in lieu of publication.

For a county, such publication shall be in the official newspapers thereof.

For any other municipality such publication shall be in a newspaper published therein, if any, if not, then in a newspaper of general circulation therein. [C24, 27, 31, 35,§375.]

Referred to in §373.1

376 Levies void. The verified proof of the publication of such notice shall be filed in the office of the county auditor and preserved by him. No levy shall be valid unless and until such notice is published and filed. [C24, 27, 31, 35,§376.]

377 Meeting for review. The certifying board or the levying board, as the case may be, shall meet at the time and place designated in said notice, at which meeting any person who would be subject to such tax levy, shall be heard in favor of or against the same or any part thereof. [C24, 27, 31, 35,§377.]

Referred to in §390.2

378 Record by certifying board. After the hearing has been concluded, the certifying board shall enter of record its decision in the manner and form prescribed by the state board and shall certify the same to the levying board, which board shall enter upon the current assessment and tax roll the amount of taxes which it finds shall be levied for the ensuing fiscal year in each municipality for which it makes the tax levy. [C24, 27, 31, 35,§378; 47GA, ch 91,§2.]

40ExGA, ch 4,§69, editorially divided

379 Procedure by levying board. Any board which has the power to levy a tax without the same first being certified to it, shall follow the same procedure for hearings as is hereinbefore required of certifying boards. [C24, 27, 31, 35, §379.]

380 Tax limited. No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 373, 381 and paragraph 4 of section 5259. [C24, 27, 31, 35,§380.]

Excess expenditures legalized, 45GA, ch 170

381 Further tax limitation. No tax shall be levied by any municipality in excess of the estimates published, except such taxes as are approved by a vote of the people, but in no case shall any tax levy be in excess of any limitation imposed thereon now or hereafter by the constitution and laws of the state. [C24, 27, 31, 35, §381.]

Referred to in §380
Tax limit, Constitution, Art. XI, §8; ch 319

382 Expenses—how paid. The cost of publishing the notices and estimates required by this chapter, and the actual and necessary expenses of preparing the budget shall be paid out of the general funds of each municipality respectively. [C24, 27, 31, 35,§382.]

383 Budgets certified. The local budgets of the various municipalities shall be certified by the chairman of the certifying board or the levying board, as the case may be, in duplicate to the county auditor not later than the fifteenth day of August each year on blanks prescribed by the state board, and according to rules and instructions which shall be furnished all certifying and levying boards in printed form by said state board.

One copy of said budget shall be retained on file in his office by the county auditor, and the other shall be certified by him to the state board. [C24, 27, 31, 35,§383; 47GA, ch 91,§2.]

384 Summary of budget. Before forwarding copies of local budgets to the state board, the county auditor shall prepare a summary of each budget, showing the condition of the various funds for the fiscal year, including the budgets adopted as herein provided. Said summary shall be printed as a part of the annual financial report of the county auditor, and one copy shall be certified by him to the state board. [C24, 27, 31, 35,§384; 47GA, ch 91,§2.]

385 Levying board to spread tax. At the time required by law the levying board shall spread the tax rates necessary to produce the amount required for the various funds of the municipality as certified by the certifying board, for the next succeeding year, as shown in the approved budget in the manner provided by law. One copy of said rates shall be certified to the state board. [C24, 27, 31, 35,§385; 47GA, ch 91, §2.]

386 Tax rates final. The several tax rates and levies of the municipalities thus determined and certified in the manner provided in the preceding sections, except such as are authorized by a vote of the people, shall stand as the tax rates and levies of said municipality for the ensuing year for the purposes set out in the budget. [C24, 27, 31, 35,§386.]

387 Transfer of inactive funds. Subject to the provisions of any law relating to municipalities, when the necessity for maintaining any fund of the municipality has ceased to exist, and a balance remains in said fund, the certifying board or levying board, as the case may be, shall so declare by resolution, and upon such declaration, such balance shall forthwith be transferred to the general or contingent fund of the municipality, unless other provisions have been made in creating such fund in which such balance remains. [C24, 27, 31, 35,§387.]

388 Transfer of active funds—poor fund. Upon the approval of the state board, it shall be lawful to make temporary or permanent transfers of money from one fund of the municipality to another fund thereof; but in no event shall there be transferred for any purpose any of the

funds collected and received for the construction and maintenance of secondary roads. The certifying board or levying board, as the case may be, shall provide that money temporarily transferred shall be returned to the fund from which it was transferred within such time and upon such conditions as the state board shall determine, provided that it shall not be necessary to return to the emergency fund, or to any other fund no longer required, any money transferred therefrom to any other fund. No transfer shall be made to a poor fund unless there is a shortage in said fund after the maximum permissible levy has been made for said fund. [C24, 27, 31, 35,§388; 47GA, ch 91,§2.]

Analogous provision, §4644.15

389 Supervisory power of state board. The state board shall exercise general supervision over the certifying boards and levying boards of all municipalities with respect to budgets and shall prescribe for them all necessary rules, instructions, forms, and schedules. The best methods of accountancy and statistical statements shall be used in compiling and tabulating all data required by this chapter. [C24, 27, 31, 35,§389; 47GA, ch 91,§2.]

390 Violations. Failure on the part of any public official to perform any of the duties prescribed in chapters 22, 23, and 24, and sections 84.32 and 101.1 to 101.5, inclusive, shall constitute a misdemeanor, and shall be sufficient ground for removal from office. [C24, 27, 31, 35, §390.]

390.1 State appeal board. There is hereby created to administer this act [47GA, ch 91], a state board to be known as the state appeal board, which state board shall consist of the

1. Comptroller,
2. Auditor of state, and
3. Treasurer of state

each of whom shall personally serve as a member of the state board during his tenure of office. At its first meeting, which shall be held within thirty days after July 4, 1937, and at each annual meeting held thereafter, the state board shall organize by the election, from their own number, of a chairman and a vice-chairman; and by appointing a secretary. Two members of the state board shall constitute a quorum for the transaction of any business. The state board may, from time to time, as such services are required, appoint one or more competent and specially qualified persons as deputies, to appear and act for it at initial hearings as hereinafter provided. The annual meeting of the state board shall be held on the second Tuesday of January in each year. Each deputy appointed by the state board shall be entitled to receive the amount of his traveling and other necessary expenses actually incurred while engaged in the performance of his official duties as hereinafter set out. Such expenses to be audited and approved by the state board and proper receipts filed therefor. [47GA, ch 91,§3.]

Referred to in §6261.1

390.2 Protest to budget. Not later than the first Monday in September, a number of persons in any municipality equal to one-fourth of one percent of those voting for the office of governor at the last general election in said municipality, but in no event less than ten, who are affected by any proposed budget, expenditure or tax levy, or by any item thereof, may appeal from any decision of the certifying board or the levying board, as the case may be, by filing with the county auditor of the county in which such municipal corporation is located, a written protest setting forth their objections to such budget, expenditure or tax levy, or to one or more items thereof, and the grounds for such objections; provided that at least three of such persons shall have appeared and made objection, either general or specific, as provided by section 377. Upon the filing of any such protest, the county auditor shall immediately prepare a true and complete copy of said written protest, together with the budget, proposed tax levy or expenditure to which objections are made, and shall transmit the same forthwith to the state board, and shall also send a copy of such protest to the certifying board or to the levying board, as the case may be. [47GA, ch 91,§3.]

Referred to in §6261.1

390.3 Hearing on protest. The state board, within a reasonable time, shall fix a date for an initial hearing on such protest and shall designate a deputy to hold such hearing, which shall be held in the county or in one of the counties in which such municipality is located. Notice of the time and place of such hearing shall be given by registered mail to the chief executive officer of the municipality and to the first ten property owners whose names appear upon such protest, at least five days before the date fixed for such hearing. At all such hearings, the burden shall be upon the objectors with reference to any proposed item in the budget which was included in the budget of the previous year and which such objectors propose should be reduced or excluded; but the burden shall be upon the certifying board or the levying board, as the case may be, to show that any new item in the budget, or any increase in any item thereof, is necessary, reasonable and in the interests of the public welfare. [47GA, ch 91,§3.]

Referred to in §§390.4, 6261.1

390.4 Appeal. The deputy designated to hear any particular appeal shall attend in person and conduct such hearing in accordance with the procedure prescribed in section 390.3, and shall promptly report the proceedings had at such hearing, which report shall become a part of the permanent record of the state board. At the request of either party, or on his own motion, the deputy shall employ a stenographer to report the proceedings, in which event the stenographic notes shall be filed with the report. Either party desiring to have a transcript of such notes presented to the state board with the deputy's report, may have the same made at his initial expense, such expense to eventually follow the result. [47GA, ch 91,§3.]

Referred to in §6261.1

390.5 Review by and powers of board. It shall be the duty of the state board to review

and finally pass upon all proposed budget expenditures, tax levies and tax assessments from which appeal is taken and it shall have power and authority to approve, disapprove or reduce all such proposed budgets, expenditures and tax levies so submitted to it upon appeal, as herein provided; but in no event may it increase such budget, expenditure, tax levies or assessments or any item contained therein. Said state board shall have authority to adopt rules and regulations not inconsistent with the provisions of this chapter, to employ necessary assistants, authorize such expenditures, require such reports, make such investigations and take such other action as it deems necessary to promptly hear and determine all such appeals; provided, however, that all persons so employed shall be selected from persons then regularly employed in some one of the offices of the members of said state board. [47GA, ch 91,§3.]

Referred to in §6261.1

390.6 Rules of procedure—record. The manner in which objections shall be presented, and the conduct of hearings and appeals, shall be simple and informal and in accordance with the rules prescribed by the state board for promptly determining the merits of all objections so filed, whether or not such rules conform to technical rules of procedure. Such record shall be kept of all proceedings, as the rules of the state board shall require. [47GA, ch 91, §3.]

Referred to in §6261.1

390.7 Decision certified to county. After a hearing upon such appeal, the state board shall certify its decision with respect thereto to the county auditor, and such decision shall be final. The county auditor shall make up his records in accordance with such decision and the levying board shall make its levy in accordance therewith. Upon receipt of such decision, the county auditor shall immediately notify both parties thereof, whereupon the certifying board shall correct its records accordingly, if necessary. Final disposition of all such appeals shall be made by the state board on or before October 15 of each year. [47GA, ch 91,§3.]

Referred to in §6261.1

390.8 Appropriation for expenses. For the purpose of carrying out the provisions of this act [47GA, ch 91], there is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, the sum of five thousand dollars, or so much thereof as is necessary, for each annual period. [47GA, ch 91,§4.]

Omnibus repeal, 47GA, ch 91, §5

CHAPTER 25

STATE BOARD OF AUDIT

This chapter (§§391 to 407, inc.) repealed by 45GA, ch 4

CHAPTER 26

CENSUS

424 Federal and state cooperation.
425 Federal census.
426 Publication.
427 Publication in official register.
428 Evidence.
429 Population of counties, cities, and towns.

408 to 423, inc. Rep. by 45GA, ch 16

424 Federal and state cooperation. The executive council is authorized, so far as practicable, to cooperate with the census bureau of the United States in the gathering, compilation, and publication of census statistics. [S13, §177-a; C24, 27, 31, 35,§424.]

425 Federal census. The secretary of state shall, whenever a general census is taken by the federal government, procure from the supervisor of such census, or other proper federal official, a copy of such part of said census as gives the population of the state of Iowa by counties, by cities, and by towns, and file the same in his office and attach thereto, dated and signed by him, a certificate that the same is the census report furnished to him by said federal official. [S13,§177-c; C24, 27, 31, 35, §425.]

426 Publication. He shall at once cause such census report and certificate to be published once in each of two daily newspapers of the state and of general circulation, and from and after the date of such publication said census shall be in full force and effect throughout the state. On payment of a fee of two dollars he shall furnish a certified copy of the whole or any part of such census report. [S13, §177-c; C24, 27, 31, 35,§426.]

427 Publication in official register. The superintendent of printing shall publish said federal census report and certificate aforesaid in full in each copy of the Iowa official register. [S13,§177-c; C24, 27, 31, 35,§427.]

428 Evidence. Said certified census records in the office of the secretary of state, and said authorized publications, including the certificates attached thereto, shall be competent evidence of all matters therein contained. [S13, §177-c; C24, 27, 31, 35,§428.]

40GA, ch 226, §21, editorially divided

429 Population of counties, cities, and towns. Whenever the population of any county, city or town is referred to in any law of this state, it shall be determined by the last certified, or certified and published, official census, whether the same be a state or national census, unless otherwise provided. If there be a difference between the original certified record in the office of the secretary of state and the published census the former shall prevail. [C97,§177; S13,§§177,-c; C24, 27, 31, 35,§429.]

Similar provision, §63, par. 26

CHAPTER 27

DEPUTIES OF STATE OFFICERS

430 Deputies.

430 Deputies. The secretary, auditor, treasurer of state, and secretary of agriculture may each appoint, in writing, any person, except one holding a state office, as deputy, for whose acts the appointing officer shall be responsible, and from whom the appointing officer shall require bond, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner. The appointment and revocation shall be filed with and kept by the secretary of state. [C51,§§411–413, 416; R60,§§642–644, 647; C73,§§766–768, 770, 3756–3758; C97,§§87, 99, 116; S13,§§87, 99, 116; C24, 27, 31, 35,§430.]

431 Deputy to qualify.

431 Deputy to qualify. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and when so qualified he shall, in the absence or disability of the appointing officer, unless otherwise provided, perform all the duties pertaining to the office of the appointing officer. [C51,§§411, 412, 416; R60,§§642, 643, 647; C73,§§766, 767, 770; C97,§§87, 99, 116; S13,§§87, 99, 116; C24, 27, 31, 35,§431.]

Deputy may not act on executive council, §276
Oath of principal, §1054

TITLE III

MILITARY CODE AND RELATED MATTERS

CHAPTER 28

MILITARY CODE

This chapter (§§432 to 467, inc.) repealed by 45 ExGA, ch 10,§64, and chapter 28.1 enacted in lieu thereof

CHAPTER 28.1

MILITARY CODE

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467.02 General definitions.
467.03 Military organizations prohibited.
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467.05 Not to be discriminated against.
467.06 Organization — armament — equipment — discipline.
467.07 Composition of national guard.
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467.60 Call by president—term of service.
467.61 Articles of war shall govern.
467.62 Fines—disposition.
467.63 United States army regulations.

467.01 Military forces. The military forces of this state shall consist of those persons subject to military duty in the militia as defined in the constitution of the state, and those persons subject to duty in the national guard as defined in the national defense act [39 Stat. L. ch 134] of the United States, except that honorably discharged soldiers, sailors, and marines of the United States shall be exempt from military service in this state at their election. [C51, §621; R60,§1002; C73,§1039; C97,§2167; S13, §2215-f1; C24, 27, 31,§432; C35,§467-f1.]

Members of fire companies exempt, §1656

467.02 General definitions. When used in this chapter, the following words, terms and phrases shall have the following meanings:

The word "militia" shall mean the forces provided for in the constitution of Iowa.

The term "national guard" shall mean that part of the military force of the state that is organized, equipped and federally recognized under the provisions of the national defense act of the United States as the "national guard of the United States and the state of Iowa." It shall also include the term "national guard of the state of Iowa."

The word "company" as used in this chapter shall be understood and construed to include a company of infantry, engineers, signal corps, a flight of the air service, a battery of field artillery, a troop of cavalry, or any similar organization in any branch of the military service authorized by federal law for this state, including a permanent detachment.

The word "battalion" applies in like manner to "squadron" of cavalry, and of the air service.

The term "active service" shall be understood and construed to be service on behalf of the state, in case of public disaster, riot, tumult, breach of the peace, resistance of process, or whenever the same is threatened, whenever called upon in aid of civil authorities, or under martial law, or at encampments whether ordered by state or federal authority, or upon any other duty requiring the entire time of the organization or person, except when called or drafted into the federal service by the president of the United States.

The term "on duty" shall include periods of drill and such other training and service as may be required under state or federal law, regulations, or orders.

The terms "in service of the United States" and "not in service of the United States", used herein, shall be understood to mean and be the same as such terms are used in the national defense act of congress [39 Stat. L. ch 134], approved June 3, 1916, and amendments thereto. [C97,§2168; S13,§2215-f2; C24, 27, 31,§433; C35, §467-f2.]

Referred to in §467.61

467.03 Military organizations prohibited. It shall be unlawful for any body of men, other than the national guard and the troops of the United States, to associate themselves together as a military organization within the limits of this state without the written permission of the governor, which he may at any time revoke, but this provision shall not prevent civic, social, or benevolent organizations from wearing uniforms and swords not in conflict with the other provisions of this chapter. [C97,§2200; S13,§2215-f5; C24, 27, 31,§436; C35,§467-f3.]

467.04 Uniform—by whom worn—when—penalty. Every person who at any time wears a uniform of the United States army, navy, marine corps, or the national guard, or any part of such uniform, or a uniform or a part of a uniform similar thereto, within the bounds of the state, is guilty of a misdemeanor, and if found guilty of such offense, he shall be punished by a fine of not less than fifty dollars and not more than one hundred dollars, or by imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment; provided, that nothing in this section shall be construed as prohibiting officers or enlisted men of the national guard of the state of Iowa, or any other state, or of the United States army, navy, marine corps, or revenue service, or forest service, or cadets of any university, college or school, from wearing such uniform or parts of uniform, while on military duty or duty connected therewith; and provided, further, that nothing in this section shall be construed as prohibiting members of any veterans association from wearing their uniforms; and provided, further, that nothing in this section shall be construed as prohibiting persons of the theatrical profession from wearing such uniforms in any playhouse or theater while actually engaged in following their profession, and provided, further, that nothing in this section shall be construed as prohibiting the uniformed ranks of civic societies from parading or traveling in a body or being in encampments, or going to or from their places of meeting or assembling in a lodge room in their adopted uniforms. [S13,§2215-f35; C24, 27, 31,§463; C35,§467-f4.]

467.05 Not to be discriminated against. No person shall discriminate against any officer or enlisted man of the national guard because of his membership therein. No person shall prohibit or refuse entrance to any officer or enlisted man of the army or navy of the United States, or of the military forces of this state, into any public entertainment or place of amusement because such officer or enlisted man is wearing a uniform of the organization to which he belongs. No employer, officer or agent of any corporation, company, firm or other person, shall discharge any person from employment because of being an officer, warrant officer or enlisted man of the military forces of the state, or hinder or prevent him from performing any military service he may be called upon to perform by proper authority, in respect to his employment, trade or business. Any person violating any of the provisions of this section shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail for a period of not to exceed thirty days, or by both such fine and imprisonment. [C35,§467-f5.]

467.06 Organization — armament — equipment—discipline. The organization, armament, equipment and discipline of the national guard, and the militia when called into active service. except as hereinafter specifically provided, shall be the same as that which is now or may be hereafter prescribed under the provisions of federal law and regulations as to those requirements which are mandatory therein, but as to those things which are optional therein they shall become effective when an order or regulation to that effect shall have been promulgated by the governor. [C51,§§623–631; R60,§§1004–1015; C73,§§1038–1057; C97,§2186; S13,§2215-f3; C24, 27, 31,§434; C35,§467-f6.]

467.07 Composition of national guard. The national guard shall consist of such organizations as may be specified by the secretary of war, with the approval of the governor, in accordance with federal law and regulations. [C73, §1045; C97,§2168; SS15,§2215-f4; C24, 27, 31, §435; C35,§467-f7.]

467.08 Regulations governing. The national guard shall be subject to the provisions of federal law and regulations relating to the govern-

ment, discipline and uniforming thereof, and to the provisions of the military code of Iowa, and to regulations published pursuant thereto. [C51, §631; R60,§1012; C73,§1044; C97,§2205; S13, §§2215-f6,-f7; C24, 27, 31,§§437, 438; C35,§467-f8.]

467.09 Incorporation of companies. Companies may incorporate under the chapter of the code authorizing corporations not for pecuniary profit. The articles of incorporation may provide for the methods of administration of civil business, and may provide for such officers as may be deemed necessary. The articles of incorporation shall be approved by the regimental commander and the adjutant general, and such approval indorsed thereon, before the same are recorded. They must provide, among other things, that the name of the corporation shall be identical with the military designation of the organization, and that the officers of the company shall be officers of the corporation. [S13, §2215-f8; C24, 27, 31,§439; C35,§467-f9.]

Incorporation, ch 394

467.10 Rules and bylaws—capacity to sue. Each company may make rules and bylaws for its own government, not in conflict with existing laws, regulations and orders, subject to the approval of the regimental commander. Any person who is, by such rules and bylaws, made the custodian of any funds, whether originally derived from federal, state or other sources, shall have legal capacity to sue for the collection thereof or an accounting therefor. [C97, §2182; S13,§2215-f9; C24, 27, 31,§440; C35,§467-f10.]

467.11 Qualifications of officers. Officers of the national guard, except the adjutant general, the assistant adjutant general, the United States property and disbursing officer, and/or the state quartermaster, shall be selected from the classes of persons having the qualifications prescribed by federal law and regulations. They shall be appointed by the governor upon the recommendation of their superiors in the chain of command. They shall be commissioned when they shall have successfully passed such tests as to physical, moral and professional fitness as shall be prescribed by federal law and regulations. Each officer when commissioned shall take the oath of office prescribed by congress, and shall hold office until he shall have attained the age of sixty-four years, unless his commission is sooner vacated by resignation, death or as hereinafter provided. In case the officer has no immediate superiors, within the state, in the chain of command, he shall be appointed, as above provided, upon the recommendation of the adjutant general. The commission shall designate the arm or branch of service in which the officer is commissioned. [C51,§§624, 626–628; R60,§§1005, 1007–1009; C73,§§1047, 1048; C97, §§2176–2180; S13,§2215-f10; C24, 27, 31,§441; C35,§467-f11.]

467.12 Commissions may be vacated. The moral character, capacity and general fitness for the service of any national guard officer may be determined at any time by an efficiency board as provided by federal law and regulations. Commissions of officers of the national guard may be vacated upon resignation, absence without leave for three months, upon the recommendation of an efficiency board, or pursuant to sentence of a court martial. Any officer permanently removing from the state shall resign his commission upon request of the adjutant general or make application to be placed upon the inactive list, and upon failure so to do, his commission shall be revoked by the governor. Officers rendered surplus by the disbandment of their organization shall be disposed of as provided by federal law and regulations. Officers may, upon their own application, be placed on the inactive list, as may be authorized by federal law and regulations. [C97,§§2183, 2199; S13, §2215-f11; C24, 27, 31,§442; C35,§467-f12.]

467.13 Unassigned list. There shall be maintained in the office of the adjutant general a list to be known as the unassigned list, to which officers may be transferred, pending their resignation or removal from the service. Any officer may be transferred by the adjutant general to such unassigned list upon the recommendation of his commanding officer, either immediate or remote. Before such transfer is made the adjutant general shall notify the officer, either in person or by registered letter mailed to his last known address of the intended transfer. The officer shall have ten days from the date of mailing of said notice in which to apply to the adjutant general for an efficiency board. Should the officer fail to apply for an efficiency board, the transfer shall be made upon the expiration of the ten-day period. If the officer requests an efficiency board, the adjutant general will be governed by the finding of such board. All officers transferred to such unassigned list shall remain subject to military discipline and to courts martial for military offenses to the same extent and in like manner as if upon the active list. [C35,§467-f13.]

467.14 Inactive national guard. An inactive national guard may be organized and maintained as may be prescribed or authorized by federal law and regulations. [C35,§467-f14.]

467.15 Retirement of commissioned officers. Any commissioned officer of the national guard who has, or shall have served as such officer for a period of not less than ten years in the national guard, or who has, or shall have served, for a period of not less than ninety days, in the army or navy of the United States during any war, and who is honorably discharged therefrom, and who has, or shall have served as such officer in the national guard for a period of not less than five years, who resigns or is retired, or who is now or may hereafter become disabled and retired, may, upon his request in writing to the adjutant general, stating his grounds therefor, be placed, by order of the commander in chief, on a roll in the office of the adjutant general to be known as the "roll of retired officers." Any officer registered on the roll of

retired officers as above provided is entitled to wear the uniform of the rank last held by him on state or other occasions of ceremony, when the wearing of such uniform is not in conflict with federal law. The adjutant general shall have the power, on good cause shown, to retire any officer, as herein provided, in the next higher grade held by said officer during his military service. [C35,§467-f15.]

467.16 Officers—powers and duties—administration of oaths. In addition to the powers and duties prescribed in this chapter, all commissioned officers of the national guard shall have the same powers and perform the same duties as commissioned officers of similar rank and position in the army of the United States insofar as may be authorized by federal law. They are authorized to administer oaths in all matters connected with the service. [C35,§467-f16.]

467.17 Bonds of officers. Each officer to whom there shall be issued, or who shall be accountable for arms, equipment, uniforms, and any other state or United States property for military uses, or who shall have the control, custody, or disbursement of funds as provided for in this chapter, shall, before the delivery to him of such arms, equipment, uniform, and other state or United States property, and the receipt of such funds, execute and deliver to the adjutant general a bond therefor, with sureties to be approved by the governor, and payable to the state, in such amount as may be fixed by the governor, conditioned for the proper care, use, and return in good order, wear, use, and unavoidable loss and damage excepted, of all such state and United States property, and the proper care and faithful disbursement and accounting of all funds coming into the hands of such officer. Upon the violation of any of the conditions of such bond, action thereon shall be brought by the adjutant general on behalf of the state, and any recovery thereon shall be credited to the guard funds of the state. It shall be the duty of the attorney general of the state to prosecute all actions upon such bonds. [R60,§1013; C73,§1050; C97,§2190; S13,§2215-f12; C24, 27, 31,§443; C35,§467-f17.]

467.18 Accounting to adjutant general. No further payments shall be made under any provision of this chapter to the accountable officer of any organization or unit who does not fully and satisfactorily account to the adjutant general for all moneys theretofore paid to him under any provisions of this chapter. [S13, §2215-f28; C24, 27, 31,§456; C35,§467-f18.]

467.19 False certificate or return. Any officer or soldier of the national guard who knowingly makes any false certificate of muster or false return of federal or state property or funds in his possession shall be guilty of a misdemeanor. [C97,§2192; S13,§2215-f30; C24, 27, 31,§458; C35,§467-f19.]

467.20 Misuse of funds or property. Any officer or soldier of the national guard who wilfully neglects or refuses to apply all money, in his possession drawn from the state treasury, to the purpose for which such money was appropriated or who fails or refuses to account for or return any state or federal property or funds in his possession shall be guilty of the crime of embezzlement by bailee and punished accordingly. [C97,§2192; S13,§2215-f30; C24, 27, 31, §458; C35,§467-f20.]

467.21 Compensation for services, death and injury. Officers and enlisted men while in active service of the state shall receive the same pay and allowances as paid for the same rank or grade for service in the army of the United States. If the said active service is under martial law or is aid to civil authorities, enlisted men shall receive an additional sum of one dollar per day; provided, however, that no officer or enlisted man who is an employee of the state and receives compensation from the state as such employee during said active service shall receive the compensation herein provided.

In the event any officer or enlisted man shall be killed while on duty or in active service, in line of duty, or shall die as a result of injuries received while on duty or in active service, in line of duty, his dependents, as defined by the workmen's compensation law of the state, shall receive the maximum compensation as provided by the said law.

Officers and/or enlisted men who suffer injuries or contract disease, in line of duty, while on duty or in active service, shall receive hospitalization and medical treatment, and the pay and allowances of their grade during the period that they are unable to resume their civilian occupation; but no commissioned officer shall be paid after the termination of said service or duty more than the pay and allowances of a second lieutenant.

Any claim for the death or for illness or disease contracted in the line of duty while in active service shall be filed with the adjutant general within six months from the date of the death or the contraction of the illness or disease of any officer or enlisted man.

All payments herein provided for shall be paid on the approval of the adjutant general by warrant drawn against any state funds not otherwise appropriated.

In the event of compensation for said service, death or injuries, being paid in part by the federal government, the state shall pay only the balance necessary to make the above designated amounts. [C51,§625; R60,§1006; C73,§1051; C97,§§2189, 2212, 2213; S13,§2215-f23; C24, 27, 31,§452; C35,§467-f21; 48GA, ch 54,§§1, 2.]

467.22 Enlistments. All enlistments in the national guard shall be as prescribed by federal law and regulations. [C97,§2173; S13,§2215-f13; C24, 27, 31,§444; C35,§467-f22.]

467.23 State staff corps and detachment. The number and grade of officers and enlisted men in the state staff corps and detachment shall be as prescribed by federal law and regulations, but in case of war, invasion, insurrection, riot

or imminent danger thereof, the governor may temporarily increase such force to meet such emergency. All officers of state staff corps and detachment appointed shall have had previous military experience and shall hold their positions until they shall have reached the age of sixty-four years, unless retired prior to that time by reason of resignation, disability, or for cause to be determined by an efficiency board or a court martial, as the exigencies of the case may warrant, legally convened for that purpose, and vacancies among said officers shall be filled by appointment from the officers of the national guard. [C51,§§624, 626–628; R60,§§1005, 1007–1009; C73,§§1047, 1048; C97,§§2176–2180; S13, §2215-f10; C24, 27, 31,§441; C35,§467-f23.]

467.24 Exemptions. Every officer and soldier of the national guard shall be exempt from jury duty and the payment of poll tax and/or labor on the road on account of poll tax during his term of service. No member of the national guard shall be arrested, or served with any summons, order, warrant, or other civil process after having been ordered to any duty, or while going to, attending, or returning from, any place to which he is required to go for military duty. Nothing herein shall prevent his arrest by order of a military officer or for a felony or breach of the peace committed while not in the actual performance of his duty. The articles of equipment personally owned by such members shall be exempt from seizure or sale for debt. Every member of the national guard who has faithfully served the full term of his commission or enlistment, shall, upon application, be entitled to an honorable discharge, exempting him from military duty except in time of war or public danger. [C97,§2209; S13,§2215-f33; C24, 27, 31,§461; C35,§467-f24.]

467.25 State and municipal officers and employees not to lose pay while on duty. All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. [C35,§467-f25.]

467.26 Governor to be commander in chief. The governor shall be the commander in chief of the military forces, except so much thereof as may be in actual service of the United States, and may employ the same for the defense or relief of the state, the enforcement of its laws, and the protection of life and property therein. [C35,§467-f26.]

Constitutional provisions, Art. IV, §7

467.27 Staff of the governor—how selected. The staff of the governor shall consist of the adjutant general, who shall be the chief of staff; the assistant adjutant general, who shall be assistant chief of staff, and twelve aides. The aides shall be detailed at the pleasure of the governor, from the active, reserve, or retired commissioned personnel of the national guard, officers reserve corps, or the regular army on duty in the state, with the rank then held by them or last held by them. [C73,§1054; C97, §2174; SS15,§2215-f14; C24, 27, 31,§445; C35, §467-f27.]

467.28 Governor may order out troops. The governor shall have the power, in cases of insurrection, invasion, or breaches of peace, or imminent danger thereof, to order into the service of the state such of its military forces as he may think proper, under the command of such officer as he may designate. [C51,§623; R60, §1004; C73,§1051; C97,§§2169, 2170; S13,§2215-f19; C24, 27, 31,§449; C35,§467-f28.]

467.29 Aid to civil authorities. When the law enforcing officers of any subdivision or subdivisions of the state are unable to maintain law and order, the governor shall have the power, on the request of the civil authorities of such subdivision or subdivisions, in case of breaches of peace or imminent danger thereof, to order into active service of the state such of its military forces as he may deem proper, under the command of such officer as he may designate, for the purpose of aiding the civil authorities in maintaining law and order in such subdivision or subdivisions. [C35,§467-f29.]

467.30 Assault on troops. Whenever the national guard is called into service under proclamation of the governor for the performance of any duties contemplated in this chapter, any person who wilfully assaults, or fires at, or throws any dangerous missile at, against, or upon any member or body of the national guard so engaged, or civil officer or other persons lawfully aiding or assisting them in the discharge of their duties, shall be deemed guilty of a felony and upon conviction shall be imprisoned in the state penitentiary not more than two years. [C35,§467-f30.]

467.31 Compensation and expenses of national guard. When in active service of the state, pursuant to the order of the governor, the compensation and expenses of the national guard and claims of the members thereof for injury or illness incurred in line of duty, shall be paid out of any funds in the state treasury not otherwise appropriated. [C51,§625; R60, §1006; C73,§1051; C97,§§2189, 2212, 2213; S13, §2215-f23; C24, 27, 31,§452; C35,§467-f31.]

467.32 Transfer of civil or criminal cases. When a military district is established under martial law, the chief justice or an associate justice of the supreme court may, upon written agreement of the parties or their attorneys, or good cause being shown, order any civil or criminal case on file in the office of the clerk of any court of record within the military district transferred to any court of record outside of the military district. The said cause shall be docketed without fee and proceed in all respects with the same force and effect as though transferred on a change of venue. When the said military district is dissolved, the cause and all

proceedings in connection therewith may be retransferred by the court to the original court, where it shall be redocketed without fee. [48GA, ch 55,§1.]

467.33 Military court—civil jurisdiction. The governor may establish within the military district a military court or commission to take jurisdiction and cognizance of all public offenses against the peace and dignity of the state, and the violation of ordinances and military rules and regulations which are now, or may hereafter be, promulgated or enacted for the preservation of law and order and the public safety.

The military court or commission may make such orders, judgments, and decrees in civil cases as may be agreed upon by the litigants or their attorneys, or as may be necessary because of an emergency or to prevent waste, with the same force and effect as though made and entered by a judge of the district court in regular term time. The said court or commission shall have full power and authority to issue all necessary process for the conduct of its proceedings, and like power to compel the attendance of witnesses therein as are exercised by civil courts of the state. [48GA, ch 55,§2.]

467.34 Courts of inquiry. Courts of inquiry, to consist of one or more officers, may, and on the request of the officers involved shall, be instituted by the governor for the purpose of investigating the conduct of any officer, or any accusation or imputation against him, or any acts made the subject of military complaint. Such court of inquiry shall, without delay, report a statement of facts and, when required, the evidence adduced and an opinion with recommendations thereon to the governor, who may, in his discretion, thereupon order court martial for the trial of the officer whose conduct has been inquired into. [C97,§§2196–2198; SS15,§2215-f36; C24, 27, 31,§464; C35, §467-f32.]

467.35 Jurisdiction outside of occupied territory. Troops occupying a military district established under martial law, may, if necessary, pursue, arrest and subpoena persons wanted in said military district, anywhere within the state of Iowa. [C35,§467-f33.]

467.36 Service of process. All peace officers of the state shall serve process and execute the orders of a military court in the same way and to the same extent as corresponding instruments of civil courts. [C35,§467-f34.]

467.37 Offenders may be committed to jail. In default of payment of any fine, forfeiture, or costs imposed by any military court after approval of sentence by the reviewing authority, the offender shall be committed to any county jail designated by said courts for a period equal to one day for each dollar of fine imposed and unpaid. [C35,§467-f35.]

467.38 Prisoners to be kept in county jail. The keepers and wardens of all county jails or state institutions are required to receive and confine all military offenders or other persons when delivered to them, under the proper certificate of commitment of a military court or commanding officer, for and during the term of sentence or confinement as set forth in said commitment. [C35,§467-f36.]

467.39 Not liable for acts performed under orders. The commanding officer and members of any of the military forces engaged in the suppression of an insurrection, the dispersion of a mob, or the enforcement of the laws, shall have the same immunity as peace officers. [C35,§467-f37.]

467.40 Attorney general or judge advocate to defend. If a suit or proceeding shall be commenced in any court by any person against any officer of the military forces for any act done by such officer in his official capacity in the discharge of any duty under this chapter, or against any soldier acting under the authority or order of any such officer, or by virtue of any warrant issued by him pursuant to law, it shall be the duty of the attorney general or judge advocate to defend such person. The costs of such defense shall be paid out of any funds in the state treasury not otherwise appropriated. Before any suit or proceeding shall be filed or maintained against any officer or soldier as herein provided, the plaintiff shall be required to give security, to be approved by the court in a sum not less than one hundred dollars to secure the costs. If the plaintiff fails to recover judgment such costs shall be taxed and judgment rendered therefor against him and his sureties. When troops are called into service of the state by the governor under martial law or as aid to the civil authorities, the judge advocate shall, in addition to his other duties, become an assistant attorney general for the duration of the emergency. [C35,§467-f38; 48GA, ch 56,§1.]

467.41 No action shall be maintained. No action or proceeding shall be maintained against any officer by whom a military court is ordered, or against any member of a military court or commission, officer or agent acting under its authority, or reviewing its proceedings, on account of the imposition of a fine or penalty or for the execution of a sentence of any person, unless it be shown that such officer, member or agent has acted from motives of malice. [C35, §467-f39.]

467.42 Adjutant general. There shall be an adjutant general of the state who shall be appointed and commissioned by the governor, upon the recommendation of a majority of the general officers and regimental commanders of the national guard, upon the expiration of the term of the present adjutant general, and shall have the rank of brigadier general who shall hold office for a term of four years. At the time of his appointment he shall be a commissioned officer of the national guard with not less than ten years military service in the armed forces of this state or of the United States, at least five of which have been commis-

sioned service, and who shall have reached the grade of a field officer. He shall be removed only upon conviction of a violation of the articles of war, by a court martial appointed pursuant to such articles. [C73,§1054; C97,§2174; SS15, §2215-f14; C24, 27, 31,§445; C35,§467-f40.]

Time of filing report, §246

467.43 Assistant adjutant general. There shall be an assistant adjutant general of the state who shall be appointed by the governor, upon the recommendation of the adjutant general. He shall have such rank as is consistent with federal law and regulations and at the time of his appointment shall be a commissioned officer of the national guard with not less than five years military service in the armed forces of this state or of the United States, at least three of which shall have been commissioned service and he shall have reached the grade of captain. He shall hold office as provided for the adjutant general. [C73,§1054; C97,§2174; SS15,§2215-f14; C24, 27, 31,§445; C35,§467-f41.]

467.44 Duties. The adjutant general shall have control of the military department of the state, and perform such duties as pertain to the office of the adjutant general under federal law and regulations. He shall superintend the preparation of all letters and reports required by the United States from the state, and perform all the duties prescribed by law. He shall have charge of the state military reservations, and all other property of the state kept or used for military purposes. It shall be the duty of the adjutant general to cause an inventory to be taken at least once each year of all military stores, property and funds under his jurisdiction. He shall in each year preceding a regular session of the general assembly make out a detailed report of the transactions of his office, the expenses thereof, and such other matters as shall be required by the governor for the period since the last preceding report, and the governor may at any time require a similar report.

The adjutant general shall make and preserve by counties a permanent registry of the graves of all persons who shall have served in the military or naval forces of the United States in time of war, and whose mortal remains may rest in Iowa.

The adjutant general is authorized to enter into an agreement with the secretary of war to operate the water plant at Camp Dodge for the use and benefit of the United States, its successors and assigns, upon such terms and conditions as shall be approved by the governor, provided, that such operation shall be at a profit to the state.

The assistant adjutant general shall serve in the office of the adjutant general and aid him by performing such duties as the adjutant general may assign him. In the absence or disability of the adjutant general he shall perform the duties of that office as acting adjutant general. [C73,§§1054, 1055; C97,§2175; SS15, §2215-f15; C24, 27, 31,§§446, 446-c1, 447; C35, §467-f42.]

467.45 Reservations—improvement authorized. The adjutant general, with the approval of the governor, is authorized to expend from the funds appropriated for the support and maintenance of the national guard, and the permanent Camp Dodge improvement fund, such amounts as may be necessary in the purchase of additional land, erection of buildings and other improvements on the state military reservations and rifle ranges purchased by the state for the use of the national guard or purchased by the United States for the use of the national guard, when, in his judgment, such buildings and improvements will be for the benefit of the national guard. [S13,§2215-f41; C24, 27, 31, §466; C35,§467-f43.]

467.46 Swimming pool at Camp Dodge. The adjutant general shall have authority to lease or operate the swimming pool at Camp Dodge. The net proceeds therefrom shall be deposited with the treasurer of state as a permanent Camp Dodge improvement fund. [C35,§467-f44.]

467.47 Governor to appoint disbursing officer. The governor, pursuant to federal authority, shall appoint, designate, or detail, upon recommendation of the adjutant general, an officer of the national guard who shall be property and disbursing officer of the United States for the state of Iowa. He shall receipt and account for all funds and property belonging to the United States in possession of the national guard of this state, and shall make such returns and reports concerning the same as may be required by the secretary of war. He shall render, through the war department, such accounts of federal funds intrusted to him for disbursement as may be required by the treasury department. Before entering upon the performance of his duties as property and disbursing officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the secretary of war, for the faithful performance of his duties and for the safekeeping and proper disposition of the federal property and funds intrusted to his care. The said property and disbursing officer may also be the quartermaster of the state. [R60, §1013; C73,§1050; C97,§2190; S13,§2215-f12; C24, 27, 31,§443; C35,§467-f45.]

467.48 State quartermaster. There shall be detailed from the quartermaster corps of the state, an officer who shall be the quartermaster and property officer of the state, and as such, shall have charge of and be accountable for, under the adjutant general, all the state military property, and who may be the United States property and disbursing officer. He shall keep such property returns and reports on the same and shall give such bond to the state of Iowa as the governor may direct. [C35,§467-f46.]

467.49 Armory board. The governor shall appoint an armory board which shall consist of the adjutant general, and four other officers from the active, inactive, or retired commissioned personnel of the national guard. The board shall meet at such times and places as are

ordered by the governor. The four officers so appointed shall serve at the pleasure of the governor. The board shall, for each unit of the national guard, fix the rent allowance to be paid by the state for other than state-owned armories, and shall acquire, contract, erect, purchase, sell, maintain, repair and alter state-owned armories subject to the laws made and provided therefor. Said board may lease property to be used for armory purposes, said lease to extend for any period but not to exceed fifteen years.

The board shall fix the amount to be paid to commanding officers of each division, brigade, regiment, battalion, company or other unit of the national guard for headquarters expenses and shall provide by regulation how the same shall be disbursed by such commanding officers. The actions of the armory board shall be subject to the approval of the governor.

The allowances made by the armory board shall, when approved by the governor, be paid from the funds appropriated for the support and maintenance of the national guard. [C97, §§2203, 2204, 2214; SS15,§§2215-f24,-f25; C24, 27, 31,§453; C35,§467-f47.]

467.50 **Tax exemptions of armories—use of public utilities.** All personal and real property held and used for armory or military purposes shall be exempt from taxation; and it shall be lawful for any county or city or town which owns public utilities to grant to any organization or unit of the national guard, which is stationed in such place, the free use of such public utilities. [S13,§2215-f40; C24, 27, 31, §465; C35,§467-f48.]

467.51 **Rifle ranges.** The sum of three hundred dollars annually or so much thereof as is necessary, is hereby allowed to each company or other unit of the national guard for the procurement, construction, and maintenance of a rifle or pistol range. The payments herein provided shall be made from the funds appropriated for the support and maintenance of the national guard. [S13,§2215-f26; C24, 27, 31, §454; C35,§467-f49.]

467.52 **Drill allowances for organizations.** Each company or similar unit of the national guard showing attendance and actual drill of those present for such drills as are prescribed in compliance with the national defense act or subsequent amendment thereto, or substitute therefor, and such regulations as may be prescribed from time to time by the secretary of war, pursuant thereto, shall be allowed semiannually for miscellaneous military purposes, the sum of four dollars per capita, based on the average enlisted strength during such semiannual period, but when the average attendance during any semiannual period falls below fifty percent of the average enlisted strength in that period, then and in that event such unit shall forfeit all right or claim to any such allowance. The semiannual periods herein referred to shall begin January 1 and July 1. This allowance shall be paid from the funds appropriated for the support and maintenance of the national guard, and the adjutant general shall prescribe regulations governing its expenditure. [SS15,§2215-f27; C24, 27, 31,§455; C35,§467-f50.]

467.53 **Training.** The governor may order the national guard into camp for field training each year for such period as he may direct. He may, in his discretion, order such organizations or personnel of the national guard, as he may deem proper, to assemble for purposes of drill, instruction, parade, ceremonies, guard and escort duty, and schools of instruction, and prescribe all regulations and requirements therefor.

The governor shall also provide for the participation of the national guard, or any portion thereof, in field training at such times and places as may be designated by the secretary of war, pursuant to any act of congress. [C73, §1049; C97,§§2184, 2185; S13,§2215-f21; C24, 27, 31,§450; C35,§467-f51.]

467.54 **Inspections.** The governor may order such inspections of the different organizations, units and personnel of the national guard as he may deem proper and necessary.

The forms and mode of inspection shall be prescribed by the adjutant general. [C73,§1049; C97,§2191; S13,§2215-f22; C24, 27, 31,§451; C35, §467-f52.]

467.55 **Service and merit badges.** The adjutant general, from the funds appropriated for the support and maintenance of the national guard, shall procure and issue to the members of the national guard, entitled thereto, merit and/or service badges for such service and periods of service, under such regulations and according to the design and pattern thereof, as may be determined by the adjutant general. Members of the national guard who, by order of the president, have served or shall serve in federal forces during a national emergency, shall be entitled to count the period of such federal service toward the procurement of a service badge. [S13,§2215-f34; C24, 27, 31,§462; C35, §467-f53.]

467.56 **Trespass.** Any person who shall trespass upon any military reservation, camp or armory, in violation of the orders of the commander thereof, or officer charged with the responsibility therefor, or shall molest, or interfere with any member of the national guard, in the discharge of his duty, shall be guilty of a misdemeanor. The commanding officer of such force may order the arrest of such person and cause him to be delivered to a peace officer or magistrate. [C97,§2188; S13,§2215-f29; C24, 27, 31,§457; C35,§467-f54.]

Punishment, §12894

467.57 **Distribution and recovery of government property.** The commanding officer of a company receiving clothing or equipment for the use of his command shall distribute same to the members of his command, taking receipts and requesting the return of each article at such time and place as he shall direct.

Upon the direction of any company com-

mander it shall be the duty of the county attorney of the county where such military organization is located, to bring action in the name of the state of Iowa against any person for the recovery of any property issued by said company commander or his predecessor, or for the value thereof as set forth in the price list promulgated by the federal government.

All sums so collected shall be paid to such company commander and used for the replacement of military property charged to the organization. [C35,§467-f55.]

467.58 Supplies and equipment. All arms, clothing, equipment, and other military property furnished or issued by the federal government or the state or for which an allowance has been made, shall be used for military purposes only, and each officer and soldier upon being separated from the military service of the state, or upon demand of his commanding officer, shall forthwith surrender such military property in his possession to said commanding officer. Any member of the national guard who shall neglect to return to the armory of the unit, or place in charge of the commanding officer of the organization to which he belongs, any arms, clothing, equipment, or other military property or portion thereof, belonging to the federal government or the state, upon being notified by said commanding officer so to do, shall be guilty of a misdemeanor. [C51,§629; R60,§1010; C73,§1050; C97, §2190; SS15,§2215-f31; C24, 27, 31,§459; C35, §467-f56.]

Punishment, §12894

467.59 Destruction or injury of military property. Every person who shall wilfully or wantonly injure or destroy any articles of arms, clothing, equipment, or other military property furnished or issued by the federal government or the state, and refuses to make good such injury or loss; or who shall sell, dispose of, secrete or remove the same with intent to sell or dispose of it, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail for not more than four months, or by both such fine and imprisonment. [R60,§1014; C73, §1050; C97,§2194; S13,§2215-f32; C24, 27, 31, §460; C35,§467-f57.]

467.60 Call by president—term of service. Whenever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against the authority of the government of the United States, or the president is unable, with the regular forces at his command, to execute the laws of the union, it shall be lawful for the president to call forth such number of the national guard as he may deem necessary to assist in repelling such invasion, suppressing such rebellion, or to assist in enabling him to execute such laws, and to issue his orders for that purpose, through the governor, to such officers of the national guard as he may think proper; and the president may specify, in his call, the period for which such service is required, and the guard so called forth shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the president; provided, that no commissioned officer or enlisted man of the guard shall be held to serve beyond the term of his existing commission or enlistment.

Whenever the president shall require, in any of the designated instances, more troops than can be supplied by the national guard, the governor shall, in his discretion, organize forthwith such other national guard forces as he may deem necessary, or order into the service of the United States so many of the unorganized militia of the state as is required, designating the same by draft if a sufficient number do not volunteer, and shall commission officers therefor.

Officers and enlisted men called into federal service through the guard shall upon completion of such service continue to serve the balance of their enlistment period the same as though it had not been interrupted by such service. [C97, §2169; S13,§2215-f18; C24, 27, 31,§448; C35, §467-f58.]

467.61 Articles of war shall govern. Whenever any portion of the national guard shall be in "active service" as defined by section 467.02, the articles of war governing the armies of the United States as now or hereafter in effect, shall be in force and regarded as a part of this chapter, so far as said forces are concerned, until said forces shall be relieved from said duty; except that confinement in the penitentiary shall be in the penitentiary of this state, and provided that offenses committed while in active service may be tried and punished by a court martial lawfully appointed, after this active duty has terminated, and if found guilty the accused shall be punished according to the articles of war and the rules and regulations governing the United States armies, but within the limits prescribed by federal law for courts martial in the national guard; and provided, also, that in any case when the offense charged is also made an offense by the civil law of this state, the officer whose duty it is to approve the charge may, in his discretion, order the person charged to be turned over to the civil authorities for trial. [C97,§§2196–2198; SS15,§2215-f36; C24, 27, 31,§464; C35,§467-f59.]

467.62 Fines—disposition. The proceeds of all fines in summary, general and special court-martial cases shall be paid to the adjutant general and paid into the maintenance fund of the national guard, and all costs of prosecution shall be paid out of the same fund. [C35,§467-f60.]

467.63 United States army regulations. All matters relating to the organization, discipline and government of the military forces not otherwise provided for in this chapter, shall be decided by the custom, regulations, and usage of the United States army. [C35,§467-f61.]

Constitutionality, §467-f62, code 1935; 45ExGA, ch 10, §63

CHAPTER 29

STATE BANNER—DISPLAY OF FLAG

468 Specifications of state banner.
469 Use of state banner.
470 Flags on public buildings.
471 Mothers day.
471.1 Independence Sunday.
471.2 Columbus day.

468 Specifications of state banner. The banner designed by the Iowa society of the daughters of the American revolution and presented to the state, which banner consists of three vertical stripes of blue, white, and red, the blue stripe being nearest the staff and the white stripe being in the center, and upon the central white stripe being depicted a spreading eagle bearing in its beak blue streamers on which is inscribed, in white letters, the state motto, "Our liberties we prize and our rights we will maintain" and with the word "Iowa" in red letters below such streamers, as such design now appears on the banner in the office of the governor of the state of Iowa, is hereby adopted as a distinctive state banner, for use on all occasions where a distinctive state symbol in the way of a banner may be fittingly displayed. [C24, 27, 31, 35,§468.]

469 Use of state banner. Such design may be used as a distinctive state banner and may as such be displayed on all proper occasions where the state is officially represented as distinct from other states, either at home or abroad, or wherever it may be proper to distinguish the citizens of Iowa from the citizens of other states, such display in all cases to be subservient to and along with the display of the national emblem and, when displayed with the latter, to be placed beneath the stars and stripes. [C24, 27, 31, 35,§469.]

470 Flags on public buildings. It shall be the duty of the custodians of all public buildings of the state to raise over such building the flag of the United States of America, upon each secular day when weather conditions are favorable, and it shall be the duty of any board of public officers charged with the duty of providing for the supplies of any such public building to provide, in connection with other supplies for any such building of the state, a suitable flag for the purposes herein provided. [S13,§2804-c; C24, 27, 31, 35,§470.]

Display of flags on school sites, §4253

471 Mothers day. The governor of this state is hereby authorized and requested to issue annually a proclamation calling upon our state officials to display the American flag on all state and school buildings, and the people of the state to display the flag at their homes, lodges, churches, and places of business, on the second Sunday in May, known as mothers day, as a public expression of reverence for the homes of our state, and to urge the celebration of mothers day in said proclamation in such a way as will deepen home ties, and inspire better homes and closer union between the commonwealth, its homes, and their sons and daughters. [C24, 27, 31, 35,§471.]

471.1 Independence Sunday. The governor is hereby authorized and requested to issue, annually, a proclamation, calling upon the citizens of Iowa to assemble themselves in their respective communities for the purpose of holding suitable religious-patriotic services and the display of the American colors, in commemoration of the signing of the Declaration of Independence, on Independence Sunday, which is hereby established as the Sunday preceding the Fourth of July of each year, or on the Fourth when that date falls on Sunday. [C27, 31, 35,§471-b1.]

471.2 Columbus day. The governor of this state is hereby authorized and requested to issue annually a proclamation, calling upon our state officials to display the American flag on all state and school buildings and the people of the state to display the flag at their homes, lodges, churches, and places of business on the twelfth day of October, known as Columbus day; to commemorate the life and history of Christopher Columbus and to urge that services and exercises be had in churches, halls and other suitable places expressive of the public sentiment befitting the anniversary of the discovery of America. [C35,§471-g1.]

CHAPTER 30

DESECRATION OF FLAG

472 Desecration of flag.
473 Actions for penalty.
474 "Federal flag and insignia" defined.
475 "State flag and insignia" defined.
476 Presumptive evidence of desecration.
477 Enforcement.

472 Desecration of flag. Any person who in any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, ensign, shield, or other insignia of the United States, or upon any flag, ensign, great seal, or other insignia of this state, or shall expose or cause to be exposed to public view, any such flag, standard, color, ensign, shield, or other insignia of the United States, or any such flag, ensign, great seal, or other insignia of this state, upon which shall have been printed, painted, or otherwise placed, or to which shall be attached,

appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose any article or substance, being an article of merchandise or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color, ensign, shield, or other insignia of the United States, or any such flag, ensign, great seal, or other insignia of this state, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed, or who shall publicly mutilate, deface, defile or defy, trample upon, cast contempt upon, satirize, deride or burlesque, either by words or act, such flag, standard, color, ensign, shield, or other insignia of the United States, or flag, ensign, great seal, or other insignia of this state, or who shall, for any purpose, place such flag, standard, color, ensign, shield, or other insignia of the United States, or flag, ensign, great seal, or other insignia of this state, upon the ground or where the same may be tread upon, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars or by imprisonment for not more than thirty days and shall also forfeit a penalty of fifty dollars for each such offense, to be recovered, with costs, in a civil action or suit in any court having jurisdiction. [S13,§5028-a; C24, 27, 31, 35,§472.]

37GA, ch 411, editorially divided

473 **Actions for penalty.** Such action or suit may be brought by and in the name of the state, on the relation of any citizen thereof, and such penalty, when collected, less the reasonable cost and expense of action or suit and recovery, to be certified by the clerk of the district court of the county in which the offense is committed, shall be paid into the county treasury for the benefit of the school fund, and two or more penalties may be sued for and recovered in the same action or suit. [S13,§5028-a; C24, 27, 31, 35, §473.]

474 **"Federal flag and insignia" defined.** The words "flag, standard, color, ensign, shield, or other insignia of the United States" as used in this chapter, shall include any flag, standard, color, ensign, shield, or other insignia of the United States, or any picture or representation of any of them, made of any substance or represented on any substance, and of any size, evidently purporting to be any such flag, standard, color, insignia, shield, or other insignia of the United States of America, or a picture or a representation of any of them. [S13,§5028-a; C24, 27, 31, 35,§474.]

475 **"State flag and insignia" defined.** The words "flag, ensign, great seal, or other insignia of this state" as used in this chapter, shall include any flag, ensign, great seal, or other insignia, or any picture or any representation of any of them, made of any substance or represented on any substance, and of any size, evidently purporting to be any such flag, ensign, great seal, or other insignia of the state, or a picture or a representation of any of them. [S13,§5028-a; C24, 27, 31, 35,§475.]

476 **Presumptive evidence of desecration.** The possession by any person other than a public officer, as such, of any flag, standard, color, ensign, shield, or other insignia of the United States, or flag, ensign, great seal, or other insignia of this state, on which shall be anything made unlawful by this chapter, or of any article or substance or thing on which shall be anything made unlawful by this chapter, shall be presumptive evidence that the same is in violation of this chapter. [S13,§5028-a; C24, 27, 31, 35,§476.]

477 **Enforcement.** It shall be the duty of the sheriffs of the various counties, chiefs of police, and town marshals to enforce the provisions of this chapter, and for failure to do so they may be removed as by law provided.

This chapter shall not be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in private correspondence, on any of which shall be printed, painted, or placed, said flag, disconnected from any advertisement.

Nothing in this chapter shall be construed as rendering unlawful the use of any trademark or trade emblem actually adopted by any person, firm, corporation, or association prior to January 1, 1895. [C24, 27, 31, 35,§477.]

General removal law, §1091

CHAPTER 31

GRAND ARMY OF THE REPUBLIC

479 Distribution of annual reports.

478 Rep. by 42GA, ch 16

479 **Distribution of annual reports.** The department of Iowa, Grand Army of the Republic, shall furnish to the superintendent of printing, for distribution to state institutions, fifty copies of the annual reports of the department. [C24, 27, 31, 35,§479.]

CHAPTER 32

PENSIONS

480 Northern border brigade.
481 Spirit Lake relief expedition of 1857.
482 Mitchell's cavalry.

480 Northern border brigade. The survivors of the northern border brigade, as shown by the roster of Iowa soldiers (volume 6, pp. 181 to 207, inclusive), or their widows shall receive a monthly pension of twenty dollars, during the lifetime of each such survivor or his widow, to be paid from the state treasury on the proper voucher being made, and out of funds not otherwise appropriated; provided that in cases where the said survivors are now receiving pensions from the federal government this section shall not apply. [C24, 27, 31, 35,§480.]

481 Spirit Lake relief expedition of 1857. The survivors of the Spirit Lake relief expedition of 1857, as shown by the roster of Iowa soldiers (volume 6, pp. 922 to 937, inclusive), or their widows shall receive a monthly pension of twenty dollars per month, during the lifetime of each such survivor or widow, to be paid from the state treasury on the proper voucher being made, and out of funds not otherwise appropriated. [C24, 27, 31, 35,§481.]

482 Mitchell's cavalry. The survivors of the frontier guards of Mitchell's cavalry as shown by the original muster roll and pay rolls of a military company organized and commanded by John Mitchell under the authority of a commission dated July 4, 1861, signed by Governor Samuel J. Kirkwood and identified as "John Mitchell's Company of Iowa Volunteers", all of which commission, pay roll, and return thereon, is on file in the official archives of Iowa in the historical department, and the surviving widows of deceased members thereof, shall receive a pension of two hundred forty dollars on the first day of June, 1923, and twenty dollars per month thereafter during the lifetime of each such person, to be paid from the state treasury on the proper voucher being made, and out of funds not otherwise appropriated; provided that in cases where the said persons are now receiving a pension from the federal government, this section shall not apply. [C24, 27, 31, 35, §482.]

CHAPTER 32.1

BONUS BOARD

Referred to in §3828.060

482.01 Creation of board.
482.02 Investment of bonus and disability fund.
482.03 Choice of securities.
482.04 Collection and disposition of interest.
482.05 Payment of claims.
482.06 Rules and regulations.
482.07 Orphans educational fund.
482.08 Money comprising fund.
482.09 Expenditure by board.
432.10 Eligibility and payment of aid.
482.11 Expenses chargeable to fund.

482.01 Creation of board. There is hereby created a board to be known as the "bonus board" to consist of the state auditor, the state treasurer, the adjutant general and the adjutant of the Iowa department of the American Legion. [39GA, ch 332,§7.]

This section is here inserted in the code for the first time. The act was originally temporary in nature but since then the legislature has added some permanent duties to the board. The temporary features of the act may be found in the acts of the 39th GA, ch 332

482.02 Investment of bonus and disability fund. The treasurer of state upon the order of the bonus board shall invest such portions of the additional bonus and disability fund created by section 8, chapter 332, acts of the thirty-ninth general assembly, as said board may from time to time specify. [C27, 31, 35,§145-b1.]

Referred to in §482.06

482.03 Choice of securities. In issuing such order to the treasurer of state said bonus board shall specify the securities in which such sums are to be invested, but in no event shall the board specify securities other than those issued by the United States or the state of Iowa. [C27, 31, 35,§145-b2.]

Referred to in §482.06

482.04 Collection and disposition of interest. The interest from such investments shall be collected by the treasurer of state and shall constitute a part of the additional bonus and disability fund provided by section 8, chapter 332, acts of the thirty-ninth general assembly, to be disbursed by the treasurer of state upon the order of said bonus board for the purposes prescribed in said section. [C27, 31, 35,§145-b3.]

Referred to in §482.06

482.05 Payment of claims. When any award from such additional bonus and disability fund is made by said bonus board, payment shall be made in the manner provided in section 7*, chapter 332, acts of the thirty-ninth general assembly. [C27, 31, 35,§145-b4.]

Referred to in §482.06
*See §84.06, par. 2

482.06 Rules and regulations. Said bonus board shall have power to establish such rules and regulations as the board deems necessary to carry out the provisions of sections 482.02 to 482.05, inclusive. [C27, 31, 35,§145-b5.]

482.07 Orphans educational fund. The bonus board is hereby authorized and empow-

ered to administer the world war orphans educational aid fund as hereinafter provided. [47GA, ch 88,§1.]

482.08 Money comprising fund. Any money hereafter appropriated for the purpose of aiding in the education of children of soldiers, sailors, marines, or nurses, as provided by this act [47GA, ch 88], shall be known as the world war orphans educational aid fund. [47GA, ch 88,§2.]

482.09 Expenditure by board. Said bonus board is authorized to expend not to exceed one hundred fifty dollars per year for any one child who shall have lived in the state of Iowa for two years preceding application for aid hereunder, and who is the child of a man or woman who died during the world war between the dates of April 6, 1917 and July 2, 1921, while serving in the army, navy, marine corps or nursing corps of the United States, or as a result of such service, to defray the expenses of tuition, matriculation, laboratory and similar fees, books and supplies, board, lodging, and any other reasonably necessary expense for such child or children incident to attendance at any educational or training institution of college grade, or in any business college or vocational training school of standards approved by said bonus board, said educational institutions to be located within the state of Iowa. [47GA, ch 88,§3; 48GA, ch 57,§1.]

482.10 Eligibility and payment of aid. Eligibility for aid hereunder shall be determined upon application to the Iowa bonus board, whose decision shall be final. The eligibility of eligible applicants shall be certified by the adjutant general of Iowa to the comptroller of Iowa, and all amounts that may be or may become due to any individual or any training institution under this act shall be paid to the individual or institution by said comptroller upon receipt by him of certification by the president or governing board of such educational or training institution as to accuracy of charges made, and as to the attendance of the individual at such educational or training institution. It shall be proper for the bonus board to pay over said annual sum of one hundred fifty dollars to such educational or training institution in a lump sum, or in such installments as the circumstances may warrant, upon receiving from such institution such written undertaking as the bonus board may require to assure the use of said funds for such child for the authorized purposes and for no other purpose. No person shall be eligible for the benefits of this act [47GA, ch 88; 48GA, ch 57] until he shall have graduated from a high school or educational institution offering a course of training equivalent to high school training. [47GA, ch 88,§4; 48GA, ch 57,§1.]

482.11 Expenses chargeable to fund. Any expense incurred in carrying out the provisions of this act [47GA, ch 88] shall be chargeable to this fund. [47GA, ch 88,§5.]

CHAPTER 32.2

REVOLUTIONARY WAR MEMORIAL COMMISSION

482.12 Commission created.
482.13 Personnel.
482.14 Without compensation.
482.15 To locate graves.
482.16 Approval.
482.17 Marker.
482.18 Records.
482.19 Definition.
482.20 Appropriation.

482.12 Commission created. A commission of three persons is hereby created for the purpose of determining the location in this state of the unmarked graves of soldiers or sailors who served in the war of the American revolution, and to supervise, as herein provided, the erection over each of said unmarked graves of a suitable marker or monument. [C27, 31, 35,§482-a1.]

482.13 Personnel. Said commission shall be known as the revolutionary war memorial commission. It shall consist of the curator of the historical, memorial, and art department of the state library, who shall be chairman of said commission, and of two other persons, one of whom shall be a member of the association known as the Sons of the American Revolution, and one who shall be a member of the association known as the Daughters of the American Revolution, which two latter members shall be appointed by the governor. [C27, 31, 35,§482-a2.]

482.14 Without compensation. Said commission shall serve without compensation, but shall be furnished by the executive council with such necessary stationery and postage as will enable it to perform its duties. [C27, 31, 35, §482-a3.]

482.15 To locate graves. Said commission shall proceed with due diligence to collect and preserve in some proper manner, trustworthy evidence of the location of the grave of each soldier or sailor of the American revolution who is buried in this state. [C27, 31, 35,§482-a4.]

482.16 Approval. When evidence has been obtained which satisfies the commission or a majority thereof of the location of an unmarked grave in which a soldier or sailor of the American revolution was buried, the commission shall lay such testimony before the executive council for its approval or disapproval. [C27, 31, 35, §482-a5.]

482.17 Marker. If the finding of the commission is approved by said council, the commission shall, at a cost not exceeding two hundred fifty dollars for each grave, erect over said unmarked grave a marker or monument

with such inscription thereon as it may deem appropriate. [C27, 31, 35,§482-a6.]

482.18 **Records.** The commission shall preserve full minutes of its proceedings and findings and the same shall be filed with said curator and become a part of the records of his office, and said minutes, proceedings, findings, correspondence, and other documents bearing upon the fact of the burial in Iowa of soldiers and sailors of the revolution, shall be published as a report to the general assembly. [C27, 31, 35,§482-a7.]

482.19 **Definition.** The term "unmarked grave" shall be deemed to include a grave over which a monument or marker now exists in a state of material decay. [C27, 31, 35,§482-a8.]

482.20 **Appropriation.** There is hereby appropriated from any funds in the state treasury not otherwise appropriated the sum of twenty-five hundred dollars or so much thereof as may be necessary, which shall be expended solely in the payment of said markers or monuments. [C27, 31, 35,§482-a9.]

CHAPTER 33

MEMORIAL HALLS AND MONUMENTS FOR SOLDIERS, SAILORS AND MARINES

Referred to in §§5813, 5829

483 Memorial buildings and monuments.
484 Petition.
485 Election.
486 Notice.
487 Acquisition of site.
488 Bonds.
489 Levy for bonds.
490 Levy for maintenance.
491 Commissioners appointed—vacancies.
492 Qualifications—method of appointing.
493 When posts do not exist.
494 When one post fails to act.
495 When posts do not act.
496 Selection of successors.
497 Ex officio member.
498 Disbursement of funds.
499 Gifts and bequests.
500 Name—uses.
501 Record—monuments—how inscribed.
502 Funds, monuments, and memorials previously initiated.
502.1 Joint memorials.
502.2 Unexpended funds.
502.3 Contract to repay.
502.4 Investment of funds.
502.5 Accumulations.
502.6 General powers.

483 **Memorial buildings and monuments.** Memorial buildings and monuments designed to commemorate the service rendered by soldiers, sailors, and marines of the United States may be erected and equipped at public expense in the manner provided by this chapter by:

1. Any county which has not heretofore made an appropriation for such purpose under any prior law.

2. Any town or city operating under any form of government. [C97,§§435, 436; C24, 27, 31, 35, §483.]

484 **Petition.** The petition for the erection and equipment of any such hall or monument shall request the submission of the proposition to a vote of the people and shall:

1. When it is proposed to erect the same at the expense of the county, be signed by ten percent of the qualified electors thereof as shown by the poll list in the last preceding general election, or by a majority of the members of the Grand Army of the Republic, the Spanish-American War Veterans Association, the American Legion, Disabled American Veterans of the World War, and the Veterans of Foreign Wars of the United States, of the county.

2. When it is proposed to erect the same at the expense of a city or town, be signed by ten percent of the qualified electors thereof as shown by the poll list in the last preceding regular municipal election. [C97,§435; C24, 27, 31, 35,§484.]

485 **Election.** Upon the filing of the requisite petition, the board of supervisors, or city or town council, as the case may be, shall cause the proposition to be submitted at a regular election, or at a special election to be called if requested in the petition, in substantially the following form:

"Shall the county (or city or town) of .....erect and equip (or purchase and equip) a memorial building (or erect a monument) as provided in chapter 33 of the code, and issue bonds in the sum of..... dollars to cover the expense of the same (or levy a tax of.....mills on the dollar for a period of.....years to defray the expense of the same)?" [C24, 27, 31, 35,§485.]

486 **Notice.** Notice of such election shall be given by publication in one newspaper published in the county, city, or town, as the case may be, once each week for at least four consecutive weeks. If no newspaper is published therein, then such notice may be given by posting in three public places within the limits of said corporation, and by publication for four consecutive weeks in a newspaper of general circulation in the county; the last publication to be not less than five nor more than twenty days prior to such election. [C97,§435; C24, 27, 31, 35,§486.]

487 **Acquisition of site.** When the proposition to erect any such building or monument has been carried by a majority vote of all voters voting thereon, any such county, city, or town shall have the power to purchase or condemn grounds suitable for a site for any such building or monument. Such condemnation proceedings shall be in the manner provided for taking private property for works of internal public improvement. [C24, 27, 31, 35,§487.]

Condemnation procedure, ch 366
Vote required to authorize bonds, §1171.18

488 Bonds. For the purpose of providing funds for the acquisition of necessary ground therefor, and for purchasing, erecting, constructing, or reconstructing such building or monument, and for the necessary equipment therefor, the county, city, or town may issue bonds to be known as liberty memorial bonds, to be issued and sold as provided by law relative to general county and city bonds; they shall provide for portions of such bonds to become due at different, definite periods, but none in less than five nor more than twenty years from date. In issuing such bonds, such county, city, or town may become indebted in an amount which, added to all other indebtedness, shall not exceed five percent of the actual value of the taxable property in such county, city, or town as determined by the last state and county tax lists. [C24, 27, 31, 35,§488.]

City bonds, ch 320
County bonds, ch 266
Payment and maturity, ch 63.1
Sale of bonds, ch 63

489 Levy for bonds. For the purpose of liquidating such bonds together with the interest thereon, such county, city, or town shall levy upon all the property within the limits thereof, subject to taxation for such purpose, in addition to all other taxes provided by law, a special tax not exceeding in any one year two mills on the dollar for a period of not exceeding twenty years. [C24, 27, 31, 35,§489.]

490 Levy for maintenance. In case a building or monument be constructed or purchased under this chapter, the county, city, or town shall thereafter provide annually a levy of not more than one and one-fourth mills on all the taxable property within said county, city, or town for the development, operation, and maintenance of such building or monument in care of a city or town. [C24, 27, 31, 35,§490.]

491 Commissioners appointed — vacancies. When the proposition to erect any such building or monument has been carried by a majority vote, the board of supervisors or the city or town council, as the case may be, shall appoint a commission consisting of five members, in the manner and with the qualifications hereinafter provided, which shall have charge and supervision of the erection of said building or monument, and when erected, the management and control thereof.

The term of office of each member shall be three years, and any vacancies occurring in the membership shall be filled in the same manner as the original appointment. [C97,§436; C24, 27, 31, 35,§491.]

Referred to in §502.1

492 Qualifications—method of appointing. Each such commissioner shall be an honorably discharged soldier, sailor, or marine of the United States, selected in the following manner:

Within sixty days after the election, each post of the Grand Army of the Republic, Spanish-American War Veterans, and the American Legion, Disabled American Veterans of the World War, and the Veterans of Foreign Wars of the United States, in the county, city, or town, as the case may be, shall appoint three delegates who shall, within ninety days after such election, meet in convention in the county, city, or town, as the case may be, and by ballot select five commissioners, whose names shall be forthwith furnished to the board of supervisors, or the city or town council, as the case may be, whereupon said board of supervisors or city or town council shall by resolution appoint them as such commissioners. [C97,§436; C24, 27, 31, 35,§492.]

493 When posts do not exist. In case no post of any one of said associations is maintained in the county, city, or town, as the case may be, then those which do exist shall proceed in the manner above provided and elect said commissioners. [C24, 27, 31, 35,§493.]

494 When one post fails to act. In case any post which does exist fails to send delegates to said convention, then the delegates which do attend shall proceed as above indicated and elect said commissioners. [C24, 27, 31, 35,§494.]

495 When posts do not act. In case no convention of delegates from said posts meets and elects said commissioners, then the board of supervisors of the county, or the city or town council, as the case may be, shall, at the expiration of ninety days after the election to erect a building or monument, select and appoint five commissioners. [C24, 27, 31, 35,§495.]

496 Selection of successors. Not less than sixty days before the expiration of the term of office of said commissioners, their successors in office shall be selected in the manner above provided, but if no selection shall have been made in said manner at the expiration of said term of office, then the board of supervisors, or the city or town council, as the case may be, shall appoint such successors. [C24, 27, 31, 35,§496.]

497 Ex officio member. In case any such memorial hall or building shall be a city or town hall, coliseum or auditorium, the mayor of such city or town may be an ex officio member of the commission heretofore provided for, in which case there shall be selected but four commissioners as otherwise provided, and such four, together with the mayor, shall constitute a commission of five. [C24, 27, 31, 35,§497.]

498 Disbursement of funds. All funds voted under the provisions of this chapter shall be disbursed by the county or city officers, only upon the written order of said commissioners. Such commission shall report to and make settlement with the board of supervisors or the city council, as the case may be, at the time and in the manner required of county and city officers. [C97,§436; C24, 27, 31, 35,§498.]

Collection and accounting of fees, ch 263
Examination of accounts, §5253
Reports by city officers, §§5676.2, 5677
Settlement of accounts, §5130
Settlement with county treasurer, §7408

499 Gifts and bequests. Gifts and bequests to any county, city, or town, or to the commis-

sion, for any of the purposes provided in this chapter, may be accepted and the property shall be used in accordance with the provisions of this chapter, and as may be expressly designated by the donor. [C24, 27, 31, 35,§499.]

500 Name—uses. Any such memorial hall or building shall be given an appropriate name and shall be available so far as practical for the following purposes:

1. The special accommodations of soldiers, sailors, marines, nurses, and other persons who have been in the military or naval service of the United States.
2. For military headquarters, memorial rooms, library, assembly hall, gymnasium, natatorium, club room, and rest room.
3. County, town, or city hall, offices for any county or municipal purpose, community house, recreation center, memorial hospital, and municipal coliseum or auditorium.
4. Similar and appropriate purposes in general community and neighborhood uses, under the control and regulation of the custodians thereof. [C24, 27, 31, 35,§500.]

501 Record — monuments — how inscribed. When any such memorial hall shall be erected, the commission shall cause to be kept a record therein which shall contain the name of each soldier, sailor, and marine, who served honorably in any of the wars in which the United States has been engaged, and who enlisted or entered the service from the county, city, or town, as the case may be, stating the time of his service, the name of the war and organization in which he served, and whether or not he died in the service.

When any such monuments shall be erected, the names of the deceased soldiers, sailors, and marines referred to in this section shall be placed thereon, and from time to time the names of others who subsequently die. [C97,§435; C24, 27, 31, 35,§501.]

502 Funds, monuments, and memorials previously initiated. In any case of funds heretofore raised or in the process of being raised, by tax levy or other provision of law heretofore existing, for any of the purposes provided by this chapter, the board of supervisors or the city or town council, as the case may be, shall cause such funds to be used and applied to all intents and purposes for the acquisition of necessary ground and the purchase, erection, construction or reconstruction and equipment of such monument or memorial building in the same manner and to the same extent as if such funds had been raised for said purpose by a bond issue, as provided in this chapter, and all the provisions of this chapter shall apply to said funds.

All other provisions of this chapter shall apply to any monument or memorial heretofore constructed or hereafter constructed from funds raised under any provision of law heretofore existing.

In all cases covered by this section, the taking effect of this chapter shall fix the time for the selection and appointment of the commissioners to all intents and purposes the same as an election on the proposition to erect a memorial building or monument, as provided in this chapter. [C24, 27, 31, 35,§502.]

502.1 Joint memorials. Any city or town may join with the county in which such city or town is located in the joint erection or purchase of memorial buildings or monuments and suitable ground and equipment therefor, and the maintenance thereof, providing the council of such city or town and the board of supervisors of such county can so agree, but in cases where commissioners have already been appointed under section 491, such agreement shall be between such commissioners, but if only one of such parties has appointed commissioners, then such agreement shall be between the commissioners already appointed and the council of such city or town or the board of supervisors of such county, as the case may be. [C27, 31, 35,§502-b1.]

502.2 Unexpended funds. Whenever in any county, funds have been raised by taxation for the purpose of erecting and maintaining memorial buildings or monuments, and said funds are under control of a commission as provided in this chapter, and said funds have remained unexpended for a period of five years or more, and when no unpaid obligation exists against said funds, the said commission, or a majority of the members thereof, may disburse said funds for the erection, purchase or improvement of one or more memorial buildings, monuments, parks, playgrounds, swimming pools, homes or club rooms for duly incorporated and acting American Legion posts in the county. [C31, 35,§502-c1.]

Referred to in §§502.4, 502.6

502.3 Contract to repay. When such erection, purchase or improvement has been made, the commission shall take from the American Legion post which is the beneficiary of such erection, purchase or improvement, the promissory obligation of such post to repay the amount expended by the commission with or without annual interest, together with such security as the commission may require. [C31, 35,§502-c2.]

Referred to in §502.6

502.4 Investment of funds. Funds not disbursed as provided in section 502.2 may be invested by said commission in such securities as are authorized by section 12772. [C31, 35, §502-c3.]

Referred to in §502.6

502.5 Accumulations. All interest accumulations shall become part of the principal fund and all uninvested funds shall be kept on deposit with the county treasurer. [C31, 35,§502-c4.]

Referred to in §502.6

502.6 General powers. For the purpose of carrying out the provisions of sections 502.2 to 502.5, inclusive, the commission shall have authority to receive and to convey title to real estate, to take mortgage or other security and to release or transfer the same. [C31, 35,§502-c5.]

CHAPTER 34

REGISTRATION OF ALIENS

503 Registration of aliens.

503 Registration of aliens. When a state of war exists between the United States and a foreign country, or, in the judgment of the governor, public safety or necessity requires such action, the governor may, by proclamation, direct every subject or citizen of such foreign countries as the governor may designate in such proclamation, who are in this state, or who may from time to time come into the state, to appear within twenty-four hours after the date specified in such proclamation or after arrival within the state, before such public authorities as the governor may designate in such proclamation, and personally register his or her name, residence, business, length of stay and such other information as the governor may require. Such proclamation shall be published in such newspapers as the governor may designate. Every person to whom such proclamation is applicable shall also comply with such rules of personal identification as the governor shall from time to time prescribe. The occupant of every private residence, and the owner, lessee or proprietor, operating or managing every hotel, inn, boarding or rooming house, shall, within twenty-four hours after the date specified in such proclamation, notify such public authorities of the presence therein of every subject or citizen of a foreign country to whom such proclamation is applicable, and shall each day thereafter notify such public authorities of the arrival thereat or departure therefrom of every such subject or citizen. A failure to comply with any such proclamation or to perform any act required by this section shall be a misdemeanor, and punishable by a fine not exceeding one thousand dollars, or imprisonment for one year, or both. [C24, 27, 31, 35,§503.]

TITLE IV

ELECTIONS AND OFFICERS

Referred to in §§5620, 5629, 5908, 6199, 6939, 10190

CHAPTER 35

TIME OF ELECTION AND TERM OF OFFICE

504 General election.
505 Special election.
506 Proclamation concerning election.
507 Proclamation concerning revision of constitution.
508 Notice of election.
509 Notice of special election.
510 Time of choosing officer.
511 Term of office.
512 State officers—term.
513 United States senators.
514 Judges of the supreme court.
515 Superintendent of public instruction.
516 Commerce commissioners.
517 Judge of district court.
518 State senators.
519 Representatives.
520 County officers.
521 Board of supervisors and township trustees.
522 Board of supervisors—limitation.
523 Justices and constables.
523.1 Township trustees—manner of election.
524 Township clerk.
525 Township assessor.
526 Sex no disqualification.

504 General election. The general election for state, district, county, and township officers shall be held throughout the state on Tuesday, next after the first Monday in November of each even-numbered year. [C51,§239; R60,§459; C73,§573; C97,§1057; S13,§1057-a; C24, 27, 31, 35,§504.]

Constitution, amendments of 1904, 1916

505 Special election. Special elections authorized by law, or held to fill vacancies in any office to be filled by the vote of the qualified voters of the entire state or of any district, county, or township may be held at the time designated by such law, or by the officer authorized to order such election. [C51,§237; R60,§460; C73,§574; C97,§1058; C24, 27, 31, 35,§505.]

506 Proclamation concerning election. At least thirty days before any general election, the governor shall issue his proclamation, designating all the offices to be filled by the vote of all the electors of the state, or by those of any congressional, legislative, or judicial district, and transmit a copy thereof to the sheriff of each county. Said proclamation shall designate by number the several districts in which congressional and judicial officers are to be chosen without other description.

The office of senator in the state legislature shall be designated substantially as follows:

"In the senatorial districts numbered (giving the number of each senatorial district in which a senator is to be chosen), each one senator."

The office of representative in the state legislature shall be designated as follows:

"In the counties of (naming the counties in which two representatives are to be chosen) each two representatives. In all other counties of the state, each one representative." [R60,§462; C73, §577; C97,§1061; SS15,§1061; C24, 27, 31, 35, §506.]

Additional provision, §75

507 Proclamation concerning revision of constitution. In the years in which the constitution requires a vote on the question of calling a convention and revising the constitution, the following question shall be included in said proclamation:

"Shall there be a convention to revise the constitution and amend the same?" [C97,§1061; SS15,§1061; C24, 27, 31, 35,§507.]

Constitutional requirement, Art. X, §3

508 Notice of election. The sheriff shall give at least ten days notice thereof, by causing a copy of such proclamation to be published in some newspaper printed in the county; or, if there be no such paper, by posting such a copy in at least five of the most public places in the county. [R60,§463; C73,§578; C97,§1062; C24, 27, 31, 35,§508.]

Referred to in §509

509 Notice of special election. A similar proclamation shall be issued before any special election ordered by the governor, designating the time at which such special election shall be held; and the sheriff of each county in which such election is to be held shall give notice thereof, as provided in section 508. [R60,§464; C73, §579; C97,§1063; C24, 27, 31, 35,§509.]

510 Time of choosing officer. At the general election next preceding the expiration of the term of any officer, his successor shall be elected. [R60,§461; C73,§575; C97,§1059; C24, 27, 31, 35,§510.]

511 Term of office. The term of office of all officers chosen at a general election for a full

term shall commence on the second secular day of January next thereafter, except when otherwise provided by the constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor. [R60,§462; C73,§576; C97,§1060; S13,§1060; C24, 27, 31, 35,§511.]

Governor and lieut. governor, const., Art. IV, §15
Judges supreme and district courts, const., Art. V, §11

512 State officers — term. The governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, secretary of agriculture, and attorney general shall hold office for a term of two years. [C51,§239; R60,§§465, 466; C73,§§580, 581; C97,§§1064, 1065; S13,§1065; C24, 27, 31, 35,§512.]

513 United States senators. Senators in the congress of the United States shall be elected in the same manner in which state officers are elected. [R60,§674; C73,§26; C97,§30; S13, §1087-c; C24, 27, 31, 35,§513.]

Term of office, constitution (U.S.), amendment 17

514 Judges of the supreme court. Three judges of the supreme court shall be chosen at each general election. The term of office of each judge shall be six years. [R60,§467; C73, §582; C97,§1066; S13,§§193-1a, 1066; C24, 27, 31, 35,§514.]

Provision for eighth and ninth judges, 42GA, ch 230; 43GA, ch 260

515 Superintendent of public instruction. The superintendent of public instruction shall be elected at the general election in 1926 and each fourth year thereafter. [C73,§580; C97, §1064; S13,§2627-a; C24, 27, 31, 35,§515.]

516 Commerce commissioners. Two Iowa state commerce commissioners shall be elected at the general election in 1926 and each fourth year thereafter. One Iowa state commerce commissioner shall be elected in the year 1924 and each fourth year thereafter. [C97,§1068; S13, §1068; C24, 27, 31, 35,§516; 47GA, ch 205,§1.]

517 Judge of district court. Judges of the district court shall be elected at the general election in each judicial district and hold office for four years, except when elected to fill a vacancy, in which case the election shall be only for the unexpired term. [C51,§239; R60,§468; C73,§§584, 585; C97,§1069; C24, 27, 31, 35,§517.]

518 State senators. Senators in the general assembly shall be elected at the general election in the respective senatorial districts and shall hold office for the term of four years. [C51,§239; R60,§471; C73,§588; C97,§1071; S13, §1071; C24, 27, 31, 35,§518.]

519 Representatives. Members of the house of representatives shall be elected at the general election in the respective representative districts and hold office for the term of two years. [C51, §239; R60,§470; C73,§587; C97,§1070; S13, §1070; C24, 27, 31, 35,§519.]

520 County officers. There shall be elected in each county, at each general election, an auditor, a treasurer, a clerk of the district court, a sheriff, a recorder of deeds, a county attorney, and a coroner, who shall hold office for the term of two years. [C51,§§96, 239; R60,§§224, 472, 473; C73,§589; C97,§1072; S13,§1072; C24, 27, 31, 35,§520.]

521 Board of supervisors and township trustees. There shall be elected, biennially, in counties and townships, members of the board of supervisors and township trustees, respectively, for a term of three years to succeed those whose terms of office will expire on the second secular day of January following said election; there shall also be elected a member or members for a term of three years to succeed those whose terms will expire on the second secular day in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office. [C51,§239; R60, §475; C73,§§295, 591; C97,§§411, 1074; S13, §1074; SS15,§411; C24, 27, 31, 35,§521.]

522 Board of supervisors—limitation. No person shall be elected a member of the board of supervisors who is a resident of the same township with any of the members holding over, except that:

1. A member-elect may be a resident of the same township as a member he is elected to succeed.
2. In counties having five or seven supervisors two members may be residents of a township which embraces a city of thirty-five thousand population. [C97,§411; SS15,§411; C24, 27, 31, 35,§522.]

523 Justices and constables. In all townships, except such as are included in the territorial limits of municipal courts, there shall be elected, biennially, two justices of the peace and two constables, who shall hold office two years and be county officers. [C51,§§221, 243; R60, §§443, 474, 477, 478; C73,§§389, 590, 592, 593; C97,§1073; SS15,§1073; C24, 27, 31, 35,§523.]

523.1 Township trustees—manner of election. Township trustees and the township clerk shall, in townships which embrace no city or town, be elected by the voters of the entire township. In townships which embrace a city or town, said officers shall be elected by the voters of the township who reside outside the corporate limits of such city or town; but any such officer may be a resident of said city or town. [C27, 31, 35,§523-b1.]

524 Township clerk. There shall be elected, biennially, in each civil township one township clerk, who shall hold his office for the term of two years. [C51,§239; R60,§475; C73,§591; C97,§1075; S13,§1075; C24, 27, 31, 35,§524.]

525 Township assessor. Township assessors shall be elected biennially and shall hold office for two years. In townships embracing no city or town, the election shall be by the voters of the entire township. In townships embracing a city or town, the election shall be by the voters of the township residing outside the corporate limits of such city or town. Such assessor shall

be a resident of the territory of the township outside such city or town. [R60,§475; C73, §§390, 591; C97,§§565, 1075; S13,§§565, 1075; C24, 27, 31, 35,§525.]

526 Sex no disqualification. No person shall be disqualified on account of sex from holding any office created by the statutes of this state. [C24, 27, 31, 35,§526.]

CHAPTER 35.1

CONGRESSIONAL DISTRICTS

526.1 Districts designated.

526.1 Districts designated. The state of Iowa is hereby organized and divided into nine congressional districts, which shall be composed, respectively, of the following counties:

First district shall consist of the counties of Washington, Louisa, Jefferson, Henry, Des Moines, Lee, Van Buren, Iowa, Johnson, Cedar and Muscatine.

Second district shall consist of the counties of Linn, Jones, Dubuque, Jackson, Clinton and Scott.

Third district shall consist of the counties of Wright, Franklin, Butler, Bremer, Hardin, Grundy, Black Hawk, Marshall, Tama and Benton.

Fourth district shall consist of the counties of Buchanan, Delaware, Clayton, Allamakee, Fayette, Winneshiek, Howard, Chickasaw, Floyd, Mitchell, Worth and Cerro Gordo.

Fifth district shall consist of the counties of Davis, Wapello, Keokuk, Mahaska, Poweshiek, Monroe, Jasper, Appanoose, Lucas, Clarke, Union, Wayne, Decatur and Ringgold.

Sixth district shall consist of the counties of Story, Dallas, Polk, Madison, Warren and Marion.

Seventh district shall consist of the counties of Harrison, Shelby, Audubon, Guthrie, Pottawattamie, Cass, Adair, Mills, Montgomery, Adams, Taylor, Page and Fremont.

Eighth district shall consist of the counties of Crawford, Carroll, Greene, Boone, Calhoun, Webster, Hamilton, Pocahontas, Humboldt, Palo Alto, Kossuth, Hancock, Emmet and Winnebago.

Ninth district shall consist of the counties of Lyon, Osceola, Dickinson, Sioux, O'Brien, Clay, Plymouth, Cherokee, Buena Vista, Woodbury, Ida, Sac and Monona. [C27, 31, 35,§526-a1.]

Constitutional provision, Art. III, §37

CHAPTER 35.2

STATE SENATORIAL DISTRICTS

526.2 Districts designated.

526.2 Districts designated. The number of senators in the general assembly is hereby fixed at fifty, and they are hereby apportioned among the several counties according to the number of inhabitants in each, and under said apportionment the state is hereby divided into fifty senatorial districts, each district to have one senator, as follows:

1. Lee county shall constitute the first district.
2. Jefferson county and Van Buren county shall constitute the second district.
3. Appanoose county and Davis county shall constitute the third district.
4. Lucas county and Wayne county shall constitute the fourth district.
5. Decatur county, Ringgold county, and Union county shall constitute the fifth district.
6. Adams county and Taylor county shall constitute the sixth district.
7. Fremont county and Page county shall constitute the seventh district.
8. Mills county and Montgomery county shall constitute the eighth district.
9. Des Moines county shall constitute the ninth district.
10. Henry county and Washington county shall constitute the tenth district.
11. Clarke county and Warren county shall constitute the eleventh district.
12. Keokuk county and Poweshiek county shall constitute the twelfth district.
13. Wapello county shall constitute the thirteenth district.
14. Mahaska county shall constitute the fourteenth district.
15. Marion county and Monroe county shall constitute the fifteenth district.
16. Adair county and Madison county shall constitute the sixteenth district.
17. Audubon county, Dallas county, and Guthrie county shall constitute the seventeenth district.
18. Cass county and Shelby county shall constitute the eighteenth district.
19. Pottawattamie county shall constitute the nineteenth district.
20. Louisa county and Muscatine county shall constitute the twentieth district.
21. Scott county shall constitute the twenty-first district.
22. Clinton county shall constitute the twenty-second district.
23. Jackson county shall constitute the twenty-third district.
24. Cedar county and Jones county shall constitute the twenty-fourth district.
25. Iowa county and Johnson county shall constitute the twenty-fifth district.

26. Linn county shall constitute the twenty-sixth district.
27. Calhoun county and Webster county shall constitute the twenty-seventh district.
28. Marshall county shall constitute the twenty-eighth district.
29. Jasper county shall constitute the twenty-ninth district.
30. Polk county shall constitute the thirtieth district.
31. Boone county and Story county shall constitute the thirty-first district.
32. Woodbury county shall constitute the thirty-second district.
33. Buchanan county and Delaware county shall constitute the thirty-third district.
34. Crawford county, Harrison county, and Monona county shall constitute the thirty-fourth district.
35. Dubuque county shall constitute the thirty-fifth district.
36. Clayton county shall constitute the thirty-sixth district.
37. Hamilton county, Hardin county, and Wright county shall constitute the thirty-seventh district.
38. Black Hawk county and Grundy county shall constitute the thirty-eighth district.
39. Bremer county and Butler county shall constitute the thirty-ninth district.
40. Allamakee county and Fayette county shall constitute the fortieth district.
41. Mitchell county, Winnebago county, and Worth county shall constitute the forty-first district.
42. Howard county and Winneshiek county shall constitute the forty-second district.
43. Cerro Gordo county, Franklin county, and Hancock county shall constitute the forty-third district.
44. Chickasaw county and Floyd county shall constitute the forty-fourth district.
45. Benton county and Tama county shall constitute the forty-fifth district.
46. Cherokee county, Ida county, and Plymouth county shall constitute the forty-sixth district.
47. Clay county, Dickinson county, Emmet county, Kossuth county, and Palo Alto county shall constitute the forty-seventh district.
48. Carroll county, Greene county, and Sac county shall constitute the forty-eighth district.
49. Lyon county, O'Brien county, Osceola county, and Sioux county shall constitute the forty-ninth district.
50. Buena Vista county, Humboldt county, and Pocahontas county shall constitute the fiftieth district. [C27, 31, 35,§526-a2.]

Constitutional provision, amendment No. 2 of 1904

CHAPTER 35.3

STATE REPRESENTATIVE DISTRICTS

526.3 Ratio of representation.
526.4 Number.
526.5 Determination of tie.

526.3 Ratio of representation. The ratio of representation for the purpose of determining the counties which shall be entitled to two representatives, each, is fixed at twenty-four thousand nine hundred fifty-nine. [C27, 31, 35,§526-b1.]

Constitutional provision, amendment No. 2 of 1904

526.4 Number. The counties of Polk, Woodbury, Linn, Scott, Pottawattamie, Dubuque, Black Hawk, Clinton and Lee shall each be entitled to two representatives in the house of representatives of this state. All other counties shall each be entitled to one representative. [C27, 31, 35,§526-b2.]

526.5 Determination of tie. Should two or more counties happen to have the same population and each of such counties be equally entitled to the ninth place among the nine counties having two representatives, the executive council shall determine the question by lot and preserve a record of the result thereof. [C27, 31, 35,§526-b3.]

CHAPTER 36

NOMINATIONS BY PRIMARY ELECTION

527 "Primary election" defined.
528 "Political party" defined.
529 Offices affected by primary.
530 Delegates and party committeemen.
531 Applicable statutes.
532 Nomination of United States senators.
533 Time of holding.
534 Secretary of state to furnish blanks.
535 County auditor to furnish blanks.
536 Blanks furnished by others.
537 Filing of nomination papers.
538 Noting time of filing.
539 Failure to file nomination papers.
540 Form of nomination papers.
541 Requirements in signing.
542 Withdrawals and additions not allowed.
543 Affidavit to nomination papers.
544 Affidavit by candidate.
545 Manner of filing affidavit.
546 Signatures required.
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551 Publication of notice.
552 Correction of errors.
553 Ballot—form.
554 Printing of ballots.
556 Names of candidates—arrangement.
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559 Judges and clerks.
560 Expenses of primary elections.

561 Supplies—poll books and ballots.
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601 Secretary of state to certify nominees.
602 Certificate in case of additional nominations.
603 Tie vote.
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605 Failure of convention to fill.
606 Vacancies in nominations subsequent to convention.
607 Vacancies in nomination of United States senator.
607.1 Vacancies in nominations of presidential electors.
608 Vacancies in office prior to convention.
609 Vacancies in office subsequent to convention—United States senator.
610 Vacancies in office of congressman or state senator.
611 Vacancies in office of state senator or representative.
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613 Committee may call convention.
614 Vacancies in nominations and in offices for subdivisions of county.
615 Certification of nominations.
616 County convention.
617 Delegates.
618 Election.
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620 Notification and certificate as to delegates.
621 Term of office of delegates.
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625 Nominations prohibited.
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627 Central committee—vacancies.
628 District convention.
629 Call for district convention.
630 Duty of county auditor.
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632 Nominations.
633 Nominations prohibited.
634 State convention.
635 Organization—proxies prohibited.
636 Nominations authorized.
637 Nominations prohibited.
638 State central committee—platform.
639 Nominations in certain cities and towns.
640 Duty of city and town officers.
641 Time of holding municipal primary.
642 Percentage of signers.
643 Certain names not printed on ballots.
644 Plurality vote nominates and elects.
645 Expense.
646 Misconduct.
647 Bribery—illegal voting.
648 Nominations by petition.

527 "Primary election" defined. The term "primary election" as used in this chapter shall be construed to apply to an election by the members of various political parties:

1. For the purpose of placing in nomination candidates for public office.
2. For selecting delegates to conventions.
3. For the selection of party committeemen.

[S13,§1087-a2; C24, 27, 31, 35,§527.]

528 "Political party" defined. The term "political party" shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two percent of the total vote cast at said election.

A political organization which is not a "political party" within the meaning of this section may nominate candidates and have the names of such candidates placed upon the official ballot by proceeding under chapters 37.1 and 37.2. [S13,§1087-a3; C24, 27, 31, 35,§528.]

Nominations by petition, §648

529 Offices affected by primary. Candidates of all political parties for all offices which are filled at a regular biennial election by direct vote of the people, except the office of judge of the supreme and district courts, shall be nominated at a primary election at the time and in the manner hereinafter directed. [S13,§1087-a1; C24, 27, 31, 35,§529.]

Nomination and election of judges, ch 38

530 Delegates and party committeemen. Delegates to the county convention of political parties and party county committeemen of such parties shall be elected at said primary election at said times and places. [S13,§1087-a1; C24, 27, 31, 35,§530.]

531 Applicable statutes. The provisions of chapters 40, 41, and 605 shall apply, so far as applicable, to all said primary elections, except as hereinafter provided. [S13,§1087-a1; C24, 27, 31, 35,§531.]

Criminal offenses, §§646, 647
General criminal statutes, ch 605

532 Nomination of United States senators. Senators in the congress of the United States,

in case of a full term, shall be nominated in the year preceding the expiration of the term of office of the incumbent. In case of a vacancy, such senators shall be nominated in the year in which occurs the first biennial election following the occurrence of the vacancy. [R60,§674; C73,§26; C97,§30; S13,§1087-c; C24, 27, 31, 35, §532.]

Vacancies filled by governor, §1152, par. 1

533 Time of holding. The primary election by all political parties shall be held at the usual voting places of the several precincts on the first Monday in June in each even-numbered year. [S13,§1087-a4; C24, 27, 31, 35,§533.]

534 Secretary of state to furnish blanks. The secretary of state shall, at state expense, furnish blank nomination papers, in the form provided in this chapter, to any qualified elector who desires to petition for the nomination of any candidate, or to any person who intends to be a candidate, for any office for which nomination papers are required to be filed in his office. [S13,§1087-a11; C24, 27, 31, 35,§534.]

Referred to in §535

535 County auditor to furnish blanks. The county auditor shall, at county expense, perform the duty specified in section 534, as to all offices for which nomination papers are required to be filed in his office. [S13,§1087-a11; C24, 27, 31, 35,§535.]

536 Blanks furnished by others. Blank nomination papers which are in form substantially as provided by this chapter may be used even though not furnished by the secretary of state or county auditor. [C24, 27, 31, 35,§536.]

537 Filing of nomination papers. Nomination papers in behalf of a candidate shall be filed:

1. For an elective county office, in the office of the county auditor at least thirty days prior to the day fixed for holding the primary election.
2. For United States senator, for an elective state office, for representative in congress, and for member of the general assembly, in the office of the secretary of state not more than sixty days nor less than forty days prior to the day fixed for holding said primary election. [S13, §1087-a10; C24, 27, 31, 35,§537.]

Referred to in §539

538 Noting time of filing. The officer receiving nomination papers for filing shall indorse thereon the day, and time of day, of filing. [C24, 27, 31, 35,§538.]

539 Failure to file nomination papers. No candidate for any office named in section 537 shall have his name printed on the official primary ballot of his party unless nomination papers are filed as therein provided. [S13, §1087-a10; C24, 27, 31, 35,§539.]

540 Form of nomination papers. All nomination papers shall be about eight and one-half by thirteen inches in size and in substantially the following form:

"I, the undersigned, a qualified elector of .....county, and state of Iowa, and a member of the.....party, hereby nominate .....of..... county, state of Iowa, who has affiliated with and is a member of the.....party, as a candidate for the office of.....to be voted for at the primary election to be held in June, 19....."

No signatures shall be counted unless they are on sheets each having such form written or printed at the top thereof. [S13,§1087-a10; C24, 27, 31, 35,§540.]

541 Requirements in signing. The following requirements shall be observed in the signing and preparation of nomination blanks:

1. Each signer may sign as many nomination papers for the same office as there are officers to be elected to said office, and no more.
2. Each signer shall add his residence, with street and number, if any, and the date of signing.
3. All signers, for all nominations, of each separate part of a nomination paper, shall reside in the same county.
4. When more than one sheet is used, the sheets shall be neatly arranged and securely fastened together before filing, and shall be considered one nomination paper.
5. Only one candidate shall be petitioned for or nominated in the same nomination paper. [S13,§1087-a10; C24, 27, 31, 35,§541.]

542 Withdrawals and additions not allowed. A nomination paper, when filed, shall not be withdrawn nor added to, nor any signature thereon revoked. [S13,§1087-a10; C24, 27, 31, 35,§542.]

543 Affidavit to nomination papers. The affidavit of a qualified elector, other than the candidate, shall be appended to each such nomination paper, or papers, if more than one for any candidate, stating that he is personally acquainted with all the persons who have signed the same; that he knows them to be electors of that county and believes them to be affiliated with the party named therein; that he knows that they signed the same with full knowledge of the contents thereof; that their respective residences are truly stated therein; and that each signer signed the same on the date stated opposite his name. [S13,§1087-a10; C24, 27, 31, 35,§543.]

544 Affidavit by candidate. Every candidate shall make and file an affidavit in substantially the following form:

"I,....., being duly sworn, say that I reside at.....street, (city or town) of....., county of .....in the state of Iowa; that I am eligible to the office for which I am a candidate, and that the political party with which I affiliate is the.....party; that I am a candidate for nomination to the office of .....to be made at the primary election to be held in June, 19...., and hereby request that my name be printed upon the official

primary ballot as provided by law, as a candidate of the.....party. I furthermore declare that if I am nominated and elected I will qualify as such officer.

(Signed).....

Subscribed and sworn to (or affirmed) before me by..... on this..... day of....., 19....

.....
(Name)

....."
(Official title)

[S13,§1087-a10; C24, 27, 31, 35,§544.]

Referred to in §§545, 547, 643

545 Manner of filing affidavit. The affidavit provided in section 544 shall be filed with the nomination papers when such papers are required; otherwise alone. [S13,§1087-a10; C24, 27, 31, 35,§545.]

Nomination paper not required, §547

546 Signatures required. Nomination papers shall be signed as follows:

1. If for a state office, or United States senator, by at least one percent of the voters of the party of such candidates, in each of at least ten counties of the state, and in the aggregate not less than one-half of one percent of the total vote of his party in the state, as shown by the last general election.

2. If for a representative in congress, or senator in the general assembly in districts composed of more than one county, by at least two percent of the voters of his party, as shown by the last general election, in at least one-half of the counties of the district, and in the aggregate not less than one percent of the total vote of his party in such district, as shown by the last general election.

3. If for an office to be filled by the voters of the county, by at least two percent of the party vote in the county, as shown by the last general election.

In each of the above cases, the vote to be taken for the purpose of computing the percentage shall be the vote cast for governor. [S13,§1087-a10; C24, 27, 31, 35,§546.]

547 Township or precinct office. The name of a candidate for an office to be filled by the voters of any subdivision of a county, including the office of party committeeman, shall be printed on the official primary ballot of his party:

1. If a nomination paper signed by ten qualified voters of said subdivision is filed in his behalf with the county auditor at least thirty days prior to such primary election, or

2. If the candidate files with the county auditor, thirty days prior to such primary election, his personal affidavit as provided by section 544. [S13,§1087-a10; C24, 27, 31, 35,§547.]

548 Nominations certified. The secretary of state shall, at least thirty days before a primary election, furnish to each county auditor a certificate under his hand and seal, which certificate shall show:

1. The name and post-office address of each person for whom a nomination paper has been filed in his office, and for whom the voters of said county have the right to vote at said election.

2. The office for which such person is a candidate.

3. The political party from which such person seeks a nomination. [S13,§1087-a12; C24, 27, 31, 35,§548.]

549 Rep. by 43GA, ch 40; see ch 35

550 Notice of election. Such auditor shall, immediately after receiving said certified matter from the secretary of state, publish a proclamation of the time of holding the primary election, the hours during which the polls will be open, the offices for which candidates are to be nominated, and that the primary election will be held in the regular polling places in each precinct. [S13,§1087-a12; C24, 27, 31, 35,§550.]

551 Publication of notice. Such notice shall appear once before the primary election, in not to exceed two newspapers of general circulation published in such county. One of such newspapers shall represent the political party which cast the largest vote in such county at the last preceding general election, and the other, if any, shall represent the political party which cast the next largest vote in such county at such general election. [S13,§1087-a12; C24, 27, 31, 35,§551.]

552 Correction of errors. The county auditor shall correct any errors or omissions in the names of candidates and any other errors brought to his knowledge before the printing of the ballots. [S13,§1087-a12; C24, 27, 31, 35, §552.]

553 Ballot—form. The official primary election ballot shall be prepared, arranged, and printed substantially in the following form:

PRIMARY ELECTION BALLOT
(Name of Party)
of
.....Township or Precinct, ...Ward, City or Town of....., County of....., State of Iowa.

Primary election held on the.....day of June, 19....

FOR UNITED STATES SENATOR
(Vote for one.)
☐ William K. Brown
☐ J. R. Wayne
☐ .....

FOR GOVERNOR
(Vote for one.)
☐ Howard Collins
☐ William Longley
☐ .....

(Followed by other elective state and district officers in order.)

FOR COUNTY AUDITOR
(Vote for one.)
☐ William Strong
☐ Robert Thompson
☐ .....

(Followed by other elective county officers in order.)

FOR DELEGATES TO COUNTY CONVENTION
(Vote for ....)
☐ .....
☐ .....
☐ .....
☐ .....
☐ .....

FOR TOWNSHIP CLERK
(Vote for one.)
☐ John H. Black
☐ Joseph Raymond
☐ .....

FOR TOWNSHIP TRUSTEES
(Vote for two.)
☐ Clarence Foster
☐ William Jones
☐ H. S. Wilson
☐ .....

(Followed by other elective township officers in order.)

FOR PARTY COMMITTEEMEN
(Vote for one man and for one woman.)
☐ John Doe
☐ Richard Roe
☐ .....
☐ Martha Doe
☐ Mary Roe
☐ .....

[S13,§1087-a14; C24, 27, 31, 35,§553.]

554 **Printing of ballots.** The ballots of each political party shall be printed in black ink, on separate sheets of paper, uniform in color, quality, texture, and size, with the name of the political party printed at the head of said ballots, which ballots shall be prepared by the county auditor in the same manner as for the general election, except as in this chapter provided. [S13,§1087-a13; C24, 27, 31, 35,§554.]

Preparation of ballots, §§556, 557, 748–770, 775–777

555 Rep. by 43GA, ch 40

556 **Names of candidates — arrangement.** The names of all candidates for offices shall be arranged and printed upon the primary election ballots in the following manner: The county auditor shall prepare a list of the election precincts of his county, by arranging the various townships, towns, and cities in the county in alphabetical order, and the wards or precincts of each city, town, or township in numerical order under the name of such city, town, or township. He shall then arrange the surnames of all candidates for such offices alphabetically for the respective offices for the first precinct in the list; thereafter, for each succeeding precinct, the names appearing first for the respective offices in the last preceding precinct shall be placed last, so that the names that were second before the change shall be first after the change. [S13,§1087-a13; C24, 27, 31, 35, §556.]

Referred to in §6639

557 **Township or district candidates.** The names of candidates for all offices to be filled by the voters of a territory smaller than a county shall be arranged and printed alphabetically, according to the surnames, for the respective offices. [S13,§1087-a13; C24, 27, 31, 35,§557.]

558 **Sample ballots.** The county auditor shall take from the official printed ballots of each precinct ten ballots of each political party, and shall write or stamp, in red ink, near the top of each ballot, the words "sample ballot" and shall sign or stamp his official signature thereunder. Said ballots shall be delivered to the judges, but shall not be voted, received, or counted. Said judges shall, before the opening of the polls, cause said sample ballots to be posted in and about the polling places. [S13, §1087-a15; C24, 27, 31, 35,§558.]

559 **Judges and clerks.** Judges and clerks of primary elections shall be selected, appointed, and shall organize, and vacancies shall be filled, as in case of general elections. Judges are authorized to administer oaths as hereinafter provided. [SS15,§1087-a5; C24, 27, 31, 35, §559.]

Administration of oaths, §§572, 793, 798, 807
Double election boards, ch 42
Organization, §§792, 793
Selection of judges, §§730–736

560 **Expenses of primary elections.** The expenses of primary elections shall be paid in the same manner as expenses of general elections. The compensation of judges and clerks shall be thirty cents per hour. [SS15,§1087-a5; C24, 27, 31, 35,§560.]

Election expenses, §835

561 **Supplies—poll books and ballots.** All necessary election supplies, including poll books, as provided by law for the general election, together with a sufficient number of official primary ballots of each party, shall be furnished for the primary election board for each precinct by the county auditor. [S13,§1087-a16; C24, 27, 31, 35,§561.]

Election supplies, §746

562 **Form of poll books.** Such poll books shall contain blank spaces for the names of the candidates of the several parties for the different offices to be written in and shall be in substantially the following form:

No.	Name	Republican	Democrat	Prohibitionist	Socialist
1	James Smith.....	X			
2	Tom Jones.....	.....	X		
3	Dan Brown.....	.....	.....	X	
4	George White.....	.....	.....	.....	X

[S13,§1087-a16; C24, 27, 31, 35,§562.]

563 **Designating party affiliation.** It shall be the duty of the clerks of the primary election when entering the name of a voter to place in the poll books a cross, thus (X), in the column designating the party ticket which was given to said voter upon his application for a ticket. [S13,§1087-a16; C24, 27, 31, 35,§563.]

564 **Australian ballot.** The Australian ballot system as now used in this state, except as herein modified, shall be used at said primary election. The indorsement of the judges and

the facsimile of the auditor's signature shall appear upon the ballots as provided for general elections. [S13,§1087-a6; C24, 27, 31, 35,§564.]

Australian ballot system, ch 40
Indorsement by judges, §799
Signature of officer, §775

565 Opening of polls. In cities where registration is required, the polls shall be open from seven o'clock a. m. to eight o'clock p. m., and in all other precincts from eight o'clock a. m. to eight o'clock p. m. [S13,§1087-a6; C24, 27, 31, 35,§565.]

Analogous provision, §791

566 Voter confined to party ticket. The elector shall be allowed to vote for candidates for nomination on the ballot of the party with which he is registered as affiliated, and shall receive no other ballot. The voter shall return the ballot, folded, to one of the judges who shall deposit it in the ballot box. [S13,§1087-a6; C24, 27, 31, 35,§566.]

567 Ballot for another party's candidate. If any primary elector write upon his ticket the name of any person who is a candidate for the same office upon some other party ticket than that upon which his name shall be so written, such ballot shall be so counted for such person only as a candidate of the party upon whose ballot his name is written, and shall in no case be counted for such person as a candidate upon any other ticket. [S13,§1087-a6; C24, 27, 31, 35, §567.]

568 Records of party affiliation. Prior to all primary elections, the county auditor shall, for each precinct, prepare two alphabetically arranged lists of all voters, with their party affiliation, as shown by the poll books of the last preceding primary election, and deliver the same to the judges at least one day prior to each primary election. All such lists shall, with the poll books, be returned by the judges to the auditor. [S13,§1087-a7; C24, 27, 31, 35,§568.]

Referred to in §718.24
Registration cards in lieu of lists, §718.24
Temporary provision in §568, code 1931, omitted

569 Change of party affiliation. Any elector, who, having declared his party affiliation, desires to change the same, may, not less than ten days prior to the date of any primary election, file a written declaration with the county auditor stating his change of party affiliation, and the auditor shall enter a record of such change on the poll books of the last preceding primary election in the proper column opposite the voter's name and on the voting list. [S13, §1087-a8; C24, 27, 31, 35,§569.]

Criminal offenses, §13286

570 New voters. Any elector whose party affiliation has not, for any reason, been registered, or any elector who has changed his residence to another precinct, or a first voter or citizen of this state casting his first vote in this state, shall be entitled to vote at any primary election by declaring his party affiliation at the time of voting. [S13,§1087-a8; C24, 27, 31, 35,§570.]

571 Challenges. Each political party shall be entitled to have two party challengers present at each polling place, to be appointed by the respective party committeemen. Any judge or clerk of the primary election or any party challenger may challenge any voter upon the grounds mentioned in section 796 and such challenge shall be determined as there provided. [S13,§1087-a9; C24, 27, 31, 35,§571.]

572 Change of affiliation. Any elector whose party affiliation has been recorded as provided by this chapter, and who desires to change his party affiliation on the primary election day, shall be subject to challenge. If the person challenged insists that he is entitled to vote the ticket of the political party to which he has transferred his political affiliation and the challenge is not withdrawn, one of the judges shall tender to him the following oath: "You do solemnly swear (or affirm) that you have in good faith changed your party affiliation to and desire to be a member of the.....party." If he take such oath he shall thereupon be given a ticket of such political party and the clerks of the primary election shall change his enrollment of party affiliation accordingly. [S13,§1087-a9; C24, 27, 31, 35,§572.]

Perjury in examination, §13290

573 Counting ballots and returns. Upon the closing of the polls the judges and clerks shall immediately:

1. Place the ballots of the several political parties in separate piles.
2. Separately count the ballots of each party, and make the correct entries thereof on the tally sheets.
3. Certify to the number of votes cast upon the ticket of each political party for each candidate for each office.
4. Seal the ballots cast on behalf of each of the parties in separate envelopes, and on the outside of such envelope write or print the names of said party's candidates for all offices and opposite each name enter the number of votes cast for such candidate in said precinct.
5. Seal all the envelopes of all political parties in one large envelope and on the outside thereof, or on a paper attached thereto, enter the number of votes cast by each party in said precinct.
6. Seal the poll books, containing the tally sheets and certificates of the election judges, in an envelope, on the outside of which are written or printed in perpendicular columns the names of the several political parties with the names of the candidates for the different offices under their party name, and opposite each candidate's name enter the number of votes cast for such candidate in said precinct.
7. Enter at the bottom of each party column on said envelope the total vote cast by said party in said precinct. [S13,§1087-a17; C24, 27, 31, 35,§573.]

Returns as to delegates and committeemen, §619

574 Delivering returns. Said judges and clerks shall deliver said poll books, tally sheets,

certificates, envelopes containing ballots, and all unused supplies to the county auditor within twenty-four hours after the close of the polls. Said auditor shall carefully preserve said returns and envelopes in the condition in which received and deliver them to the county board of canvassers. [S13,§1087-a17; C24, 27, 31, 35, §574.]

Referred to in §575

575 Messenger sent for returns. If the returns from any precinct are not delivered as provided in section 574, the county auditor shall forthwith send a messenger for any such missing returns, and said messenger shall be paid as provided for such services in the general election law. [S13,§1087-a17; C24, 27, 31, 35, §575.]

Messengers, §§862, 886

576 Elector may ascertain vote cast. Any elector of the county shall have the right, before the day fixed for canvassing the returns, to ascertain the vote cast for any candidate in any precinct in the county, as shown on the outside of the envelope containing the poll books. [S13,§1087-a17; C24, 27, 31, 35,§576.]

577 Canvass by county board. On the second Tuesday next following the primary election, the board of supervisors shall meet, open and canvass the returns from each voting precinct in the county, and make abstracts thereof, stating in words written at length:

1. The number of ballots cast in the county by each political party, separately, for each office.
2. The name of each person voted for and the number of votes given to each person for each different office. [S13,§1087-a19; C24, 27, 31, 35,§577.]

578 Signing and filing of abstract. The members of the board shall sign said abstracts and certify to the correctness thereof, and file the same with the county auditor. [S13,§1087-a19; C24, 27, 31, 35,§578.]

579 Finality of canvass. Such canvass and certificate shall be final as to all candidates for nomination to any elective county office or office of a subdivision of a county. [S13,§1087-a19; C24, 27, 31, 35,§579.]

580 Who nominated for county office. The candidate or candidates of each political party for each office to be filled by the voters of the county having received the highest number of votes, and not less than thirty-five percent of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office, except that no candidate whose name is not printed on the official ballot who receives less than ten percent of the whole number of votes cast in the county for governor on the party ticket with which he affiliates, at the last general election, shall be declared to have been nominated to any such office. [S13,§1087-a19; C24, 27, 31, 35,§580.]

Failure to nominate, §624

581 Who nominated for township office. The candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate or candidates of his party for such office, except that no candidate whose name is not printed on the official primary ballot, who receives less than five percent of the votes cast in such subdivision for governor on the party ticket with which he affiliates, at the last general election, nor less than five votes, shall be declared to have been nominated to any such office. [S13,§1087-a19; C24, 27, 31, 35, §581.]

582 Right to place on ballot. Each candidate so nominated shall be entitled to have his name printed on the official ballot to be voted for at the general election without other certificate. [S13,§1087-a19; C24, 27, 31, 35,§582.]

583 Nominee certified. The said canvassing board shall separately prepare and certify a list of the candidates of each party so nominated. It shall deliver to the chairman of each party central committee for the county a copy of the list of candidates nominated by the party he represents; and shall also certify and deliver to such chairman a list of the offices to be filled by the voters of a county for which no candidate of his party was nominated because of the failure of any candidate for any such office to receive the legally required number of votes, together with the names of the candidate for each of such offices voted for at the primary election and the number of votes received by each of such candidates. [S13,§1087-a19; C24, 27, 31, 35,§583.]

584 Recount. Any candidate whose name appears upon the official primary ballot of any voting precinct may require the board of supervisors of the county in which such precinct is situated to recount the ballots cast in any such precinct as to the office for which he was a candidate, by filing with the county auditor not later than one o'clock p. m. on Monday after the official canvass made by the board of supervisors is finished, a showing in writing, duly sworn to by such candidate, that fraud was committed, or error or mistake made, in counting or returning the votes cast in any such precinct as to the office for which he was a candidate. [S13,§1087-a18; C24, 27, 31, 35,§584.]

Referred to in §587

585 Showing must be specific. The showing for such recount must be specific, and from it there must appear reasonable ground to believe that a recount of the ballots would produce a result as to the applicant's candidacy different from the returns made by the judges. [S13,§1087-a18; C24, 27, 31, 35,§585.]

Referred to in §587

586 Recount granted. If such showing is made to the satisfaction of the board, it shall thereupon recount the ballots cast in any such precinct for the office for which the contestant was a candidate, and if the result reached by the board on the recount of the ballots as to

such office be different from that returned by the judges of election, it shall be substituted therefor as the true and correct return and so regarded in all subsequent proceedings. The action of the board shall be final and no other contest of any kind shall be permitted. [S13, §1087-a18; C24, 27, 31, 35,§586.]

Referred to in §587

587 **"Candidate" defined.** The term "candidate" as used in sections 584 to 586, inclusive, shall include and apply to persons voted for as delegates and party committeemen. [S13, §1087-a18; C24, 27, 31, 35,§587.]

588 **Abstracts to secretary of state.** The county board of canvassers shall also make a separate abstract of the canvass as to the following offices and certify to the same and forthwith forward it to the secretary of state, viz:

1. United States senator.
2. All state offices.
3. Representative in congress.
4. Senators and representatives in the general assembly. [S13,§1087-a20; C24, 27, 31, 35, §588.]

589 **Returns filed and abstracts recorded.** When the canvass is concluded, the board shall deliver the original returns to the auditor, who shall file the same and record each of the abstracts above mentioned in the election book. [SS15,§1087-a21; C24, 27, 31, 35,§589.]

590 **Publication of proceedings.** The published proceedings of the canvassing board shall be confined to a brief statement of:

1. The names of the candidates nominated by the electors of the county or subdivision thereof and the offices for which they are so nominated.
2. The offices for which no nomination was made by a political party participating in the primary, because of the failure of the candidate to receive the legally required number of votes cast by the party for such office. [SS15,§1087-a21; C24, 27, 31, 35,§590.]

591 **Canvass by state board.** On the second Monday after the June primary election, the executive council shall meet as a canvassing board, and open and canvass the abstract returns received from each county in the state. The board shall make an abstract of its canvass, stating in words written at length, the number of ballots cast by each political party, separately, for each office designated in the abstracts forwarded to the secretary of state, the names of all the persons voted for, and the number of votes received by each person for each office, and shall sign and certify thereto. [S13,§1087-a22; C24, 27, 31, 35,§591.]

592 **State canvass conclusive.** The canvass and certificates by the state board of canvassers shall be final as to all candidates named therein. [S13,§1087-a22; C24, 27, 31, 35,§592.]

593 **Who nominated.** The candidate of each political party for each office to be filled by vote of the people having received the highest number of votes in the state or district of the state, as the case may be, provided he received not less than thirty-five percent of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office, except as provided in section 594. [S13,§1087-a22; C24, 27, 31, 35,§593.]

Failure to nominate, §§628, 636

594 **Minimum requirement for nomination.** A candidate whose name is not printed on the official ballot, must, in order to be nominated, receive such number of votes as will equal at least ten percent of the whole number of votes cast for governor at the last general election in the state, or district of the state, as the case may be, on the ticket of the party with which such candidate affiliates. [C24, 27, 31, 35,§594.]

Referred to in §593

595 **Nominee's right to place on ballot.** Each candidate so nominated shall be entitled to have his name printed on the official ballot to be voted at the general election without other certificate. [S13,§1087-a22; C24, 27, 31, 35,§595.]

596 **Certified list of nominees.** The state board of canvassers shall prepare and certify separate lists of the candidates nominated by each party, as shown by the state canvass, and deliver to the chairman of each party central committee for the state a copy of the list of candidates nominated by the party which said chairman represents. [S13,§1087-a22; C24, 27, 31, 35,§596.]

597 **Certificates in case of failure to nominate.** Said state board shall, at once after completing its canvass, prepare separate certificates for each political party as to each office for which no candidate was nominated because of the failure of any candidate for any such office to receive the legally required number of votes cast by such party for such office. Such certificates shall show the names of the several candidates for each of such offices voted for at the primary election and the number of votes received by each of said candidates. [S13, §1087-a22; C24, 27, 31, 35,§597.]

Referred to in §598

598 **Delivery of certificates.** The certificate provided in section 597 shall be sent:

1. To the chairman of the state central committee of said party, in case of offices to be filled by the voters of the entire state.
2. To the chairman, if known, of the district central committee of said party, and to each county auditor, in case of offices to be filled by the voters of any district of the state composed of more than one county.
3. To the chairman of the county central committee of said party, and to the county auditor, in case of offices to be filled by the voters of a district of the state composed of one county. [S13,§1087-a22; C24, 27, 31, 35,§598.]

599 **Messenger sent for abstracts.** If returns of abstracts have not been received by the state canvassing board from all the counties by the time fixed for such state canvass, the secretary of state shall immediately send a mes-

senger after said missing abstracts, and the said board may adjourn from time to time until said abstracts are received. [S13,§1087-a22; C24, 27, 31, 35,§599.]

600 State returns filed and recorded. When the canvass is concluded, the board shall deliver the original abstract returns to the secretary of state, who shall file the same in his office and record the abstracts of the canvass of the state board and certificates attached thereto in the book kept by him known as the election book. [S13,§1087-a23; C24, 27, 31, 35,§600.]

601 Secretary of state to certify nominees. Not less than fifteen days before the general election the secretary of state shall certify to the auditor of each county, under separate party headings, the name of each person nominated as shown by the official canvass made by the executive council, or as certified to him by the proper persons when any person has been nominated by a convention or by a party committee, or by petition, his place of residence, the office to which he is nominated, and the order in which the tickets of the several political parties shall appear on the official ballot. [C97,§1105; S13, §1087-a23; SS15,§1105; C24, 27, 31, 35,§601.]

Referred to in §602

602 Certificate in case of additional nominations. If, after the foregoing certificate has been forwarded, other authorized nominations are certified to the secretary of state, including nominations to be voted on at any time at a special election, said secretary shall at once, in the form provided in section 601, certify said nominations to the county auditors with a statement showing the reason therefor. [S13,§1087-a23; C24, 27, 31, 35,§602.]

603 Tie vote. In case of a tie vote resulting in no nomination for any office, or election of delegates or party committeemen, the tie shall forthwith be determined by lot by the board of canvassers, or judges of election, as the case may be. [S13,§1087-a24; C24, 27, 31, 35,§603.]

604 Vacancies in nominations prior to convention. Vacancies in nominations made in the primary election when such vacancies occur before the holding of the county, district, or state convention shall be filled:

1. By the county convention if the office in which the vacancy occurs is to be filled by the voters of the county.
2. By a district convention if the office in which the vacancy occurs is to be filled by the voters of a district composed of more than one county.
3. By the state convention if the office in which the vacancy occurs is to be filled by the voters of the entire state. [S13,§§1087-a24, -a24a; C24, 27, 31, 35,§604.]

605 Failure of convention to fill. If the convention does not fill such vacancy, the same shall, except in case of vacancy in the office of United States senator, be filled by the party central committee for the county, district, or state as the case may be. [S13,§§1087-a24,-a24a; C24, 27, 31, 35,§605.]

606 Vacancies in nominations subsequent to convention. Vacancies in nominations made in the primary election when such vacancies occur after the holding of a county, district, or state convention, shall, except as provided in section 607, be filled by the party central committee for the county, district, or state as the case may be. [S13,§§1087-a24,-a24a; C24, 27, 31, 35,§606.]

607 Vacancies in nomination of United States senator. Vacancies in nominations made in the primary election, for office of United States senator, when such vacancy occurs after the holding of the state convention or too late to be filled by said convention and thirty days prior to the holding of the regular November election, shall be filled by a state convention. For this purpose, the chairman of the party's state central committee shall, within ten days after said vacancy occurs, reconvene the delegates to the last preceding state convention. [S13,§1087-a24a; C24, 27, 31, 35,§607.]

Referred to in §606

607.1 Vacancies in nominations of presidential electors. Vacancies in nominations of presidential electors shall be filled by the party central committee for the state. [C31, 35, §607-c1.]

608 Vacancies in office prior to convention. Nominations occasioned by vacancies in office when such vacancies occur too late for the filing of nomination papers for candidates in the primary election, and before the holding of the county, district, or state convention, shall be made by the convention which has jurisdiction to make nominations for the office in question. [S13,§1087-a24; C24, 27, 31, 35,§608.]

Filling vacancies, §§624, 628, 636

609 Vacancies in office subsequent to convention—United States senator. Nominations occasioned by vacancies in office when such vacancies occur after the holding of the county, district, or state convention, or when they occur before said convention, but too late to be made thereby, shall be made by the party central committee for the county, district, or state, as the case may be, except that when the vacancy is in the office of senator of the United States, and occurs thirty days prior to the holding of the regular November election, nomination shall be made by convention as provided in case of vacancies in nominations for such office. [S13, §§1087-a24,-a24a; C24, 27, 31, 35,§609.]

Nominations by convention, §607

610 Vacancies in office of congressman or state senator. A nomination to be voted on at a special election and occasioned by a vacancy in the office of representative in congress, or senator in the general assembly for a district composed of more than one county, shall be made by a convention duly called by the district central committee. [S13,§1087-a24; C24, 27, 31, 35,§610.]

611 Vacancies in office of state senator or representative. A nomination to be voted on at a special election and occasioned by a vacancy in the office of representative in the general assembly, or of a senator in such assembly for a district composed of one county, shall be made by the county central committee. [S13, §1087-a24; C24, 27, 31, 35,§611.]

612 County convention reconvened. When a nomination is directed to be made by a district convention composed of more than one county, and the county convention in any county of the district has adjourned without selecting delegates to such convention, the county convention shall be reconvened for the purpose of making such selection. [C24, 27, 31, 35,§612.]

613 Committee may call convention. A party central committee empowered to make a nomination to fill a vacancy, either in a nomination authorized to be made at the primary or to fill a vacancy in office, may, in lieu of exercising such right, call a convention to make such nomination. [C24, 27, 31, 35,§613.]

614 Vacancies in nominations and in offices for subdivisions of county. Vacancies in nominations made in the primary election, and nominations occasioned by vacancies in offices, when such offices are to be filled by a territory smaller than a county shall be filled by the members of the party committee for the county from such subdivision. [S13,§1087-a24; C24, 27, 31, 35, §614.]

615 Certification of nominations. Nominations made in case of vacancies, and nominations made by state, district, and county conventions, shall, under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be forthwith certified to the proper officer by the chairman and secretary of the convention, or by the committee, as the case may be, and if such certificate is received in time, the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election. [S13,§1087-a24; C24, 27, 31, 35,§615.]

616 County convention. Each political party shall hold a county convention at the county seat on the fourth Saturday following each primary election, which convention shall convene at ten o'clock a. m. [S13,§1087-a25; C24, 27, 31, 35,§616; 48GA, ch 58,§1.]

617 Delegates. Said county convention shall be composed of delegates elected at the last preceding primary election. The number of delegates from each voting precinct shall be determined by a ratio adopted by the respective party county central committees, and a statement designating the number from each voting precinct in the county shall be filed by such committee in the office of the county auditor at least thirty days before the primary election; if not so done, the auditor shall fix the number. [S13, §1087-a25; C24, 27, 31, 35,§617.]

618 Election. The requisite number of names of candidates of his choice for delegates to the county convention to which each precinct is entitled shall be written, or pasted with uniform white pasters, on the blank lines upon the ballot, by the voter while in the booth, or by someone designated by a voter unable to write, after the ballots are received and before they are deposited, and the requisite number of persons from each precinct who receive the highest number of votes shall be the delegates from the precinct to the county convention. [S13, §1087-a25; C24, 27, 31, 35,§618.]

619 Returns as to delegates and committeemen. Returns shall be made by the judges of election respecting delegates and members of the county central committee in the same manner as for other offices, except that the judges of election shall canvass the returns as to delegates and members of the county central committee, and certify the result to the auditor with the returns. [S13,§1087-a25; C24, 27, 31, 35, §619.]

Returns, §573

620 Notification and certificate as to delegates. The auditor shall, immediately after the final count and canvass of the votes and returns by the board of supervisors, notify the delegates and members of the county central committee who have thus been elected, of their election, and of the time and place of holding the county convention, and shall on the second Thursday following the primary election, deliver a certified list thereof to the chairman of the respective party central committees for the county. [S13,§1087-a25; C24, 27, 31, 35,§620.]

621 Term of office of delegates. The term of office of such delegates shall begin on the day following the final canvass of the votes by the board of supervisors, and shall continue for two years and until their successors are elected. [S13,§1087-a25; C24, 27, 31, 35,§621.]

622 Calling convention to order. When the delegates, or a majority thereof, or when delegates representing a majority of the precincts, thus elected, shall have assembled in the county convention, the convention shall be called to order by the chairman of the county central committee, who shall present the certified list of delegates and members of the county central committee, and a list of the offices for which no nomination was made at the primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor. [S13, §1087-a25; C24, 27, 31, 35,§622.]

623 Proxies prohibited. If any precinct shall not be fully represented the delegates present from such precinct shall cast the full vote thereof, and there shall be no proxies. [S13, §1087-a25; C24, 27, 31, 35,§623.]

624 Duties performable by county convention. The said county convention shall:

1. Make nominations of candidates for the party for any office to be filled by the voters

of a county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor.

2. Make nominations in those cases where a nomination made in the primary election has become vacant before the convening of the convention.

3. Make nominations to fill vacancies in office occurring too late to file nomination papers in the primary election.

4. Elect delegates to the next ensuing regular state convention, to the state judicial convention, and to all district conventions of that year, including judicial district convention, upon such ratio of representation as may be determined by the party organization for the state, district or districts of the state, as the case may be. Delegates to district conventions need not be selected in the absence of any apparent reason therefor.

5. Elect a member of the party central committee for the senatorial and congressional districts composed of more than one county.

6. Elect the member, or members, of the judicial district central committee as required by the law relative to the nomination and election of supreme, district, and superior judges. [S13, §1087-a25; C24, 27, 31, 35,§624.]

Judicial district central committee, §662
Judicial delegates, §666
Legally required vote, §§580, 581
Vacancies in office, §608

625 Nominations prohibited. In no case shall the county convention make a nomination for an office for which no person was voted for in the primary election of such party, except nominations to fill vacancies in office when such vacancies occurred too late for the filing of nomination papers. [S13,§1087-a25; C24, 27, 31, 35,§625.]

626 Party committeemen. A man member and a woman member of the county central committee for each political party shall, at said primary election, be elected from each precinct. The term of office of a member shall begin immediately following the adjournment of the county convention and shall continue for two years and until his or her successor is elected and qualified, unless sooner removed by the county central committee for inattention to duty, incompetency, or failure to support the ticket nominated by the party which elected such member. [S13,§1087-a25; C24, 27, 31, 35,§626.]

627 Central committee — vacancies. The county central committee elected in the primary election shall organize on the day of the convention, immediately following the same.

Vacancies in such committee may be filled by majority vote of the committee, but no two members thereof from the same precinct shall be of the same sex. [S13,§1087-a25; C24, 27, 31, 35,§627.]

628 District convention. Each political party shall hold a senatorial or congressional convention in districts composed of more than one county:

1. When no nomination was made in the primary election for the office of senator in the general assembly, or of representative in congress, as the case may be, because of the failure of any candidate to receive the legally required number of votes cast by his party for such candidates.

2. When a vacancy exists in a nomination made in the primary election.

3. When a nomination is required to fill a vacancy in either of said offices, and when said vacancy occurred after said primary election, or, if before said election, too late for the filing of nomination papers. [S13,§1087-a26; C24, 27, 31, 35,§628.]

Referred to in §632
Legally required vote, §593
Vacancies in office, §608

629 Call for district convention. The district central committee, through its chairman, shall as soon as practicable after the necessity for such convention is known, issue a call for such senatorial or congressional convention, and immediately file a copy thereof with each county auditor in the district. Said call shall state the number of delegates to which each county will be entitled, the time and place of holding the convention, and the purpose thereof. [S13, §1087-a26; C24, 27, 31, 35,§629.]

630 Duty of county auditor. The county auditor, in case the district delegates for his county have not been selected, shall deliver a copy of said call to the chairman of the convention which selects said delegates. [S13, §1087-a26; C24, 27, 31, 35,§630.]

631 Organization. The organization of a district convention and the procedure therein shall be substantially the same as in the state convention. [S13,§1087-a26; C24, 27, 31, 35, §631.]

Organization, §635

632 Nominations. The convention when organized shall make nominations to meet any of the conditions named in section 628. [S13, §1087-a26; C24, 27, 31, 35,§632.]

633 Nominations prohibited. In no case shall any district convention of a party make a nomination for an office for which no person was voted for in the primary election of such party, except nominations to fill vacancies in office when such vacancies occurred too late for the filing of nomination papers. [S13,§1087-a26; C24, 27, 31, 35,§633.]

634 State convention. Each political party shall, not earlier than the first nor later than the fifth Wednesday following the county convention, hold a state convention at such time and place as may be determined by the party organization. [S13,§1087-a27; C24, 27, 31, 35, §634.]

State judicial convention, §656

635 Organization—proxies prohibited. The convention shall be called to order by the chair-

man of the state central committee, who shall thereupon present a list of delegates, as certified by the various county conventions, and effect a temporary organization. If any county shall not be fully represented, the delegates present from such county shall cast the full vote thereof, and there shall be no proxies. [S13,§1087-a27; C24, 27, 31, 35,§635.]

Organization of district convention, §631

636 Nominations authorized. Said state convention shall make nominations of candidates for the party for any office to be filled by the voters of the entire state:

1. When no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor.
2. When a vacancy exists in a nomination made in the primary election.
3. When a nomination is required to fill a vacancy in an office and when such vacancy occurred after the primary election, or, if before such election, too late for the filing of nomination papers.
4. Presidential electors in those years when presidential candidates are to be voted on.
5. In all cases otherwise provided by law. [S13,§1087-a27; C24, 27, 31, 35,§636.]

Legally required vote, §593
Vacancies in office, §608

637 Nominations prohibited. In no case shall the state convention of a party make a nomination for an office for which no person was voted for in the primary election of such party, except nominations to fill vacancies in office when such vacancies occurred too late for the filing of nomination papers. [S13,§1087-a27; C24, 27, 31, 35,§637.]

638 State central committee—platform. Said convention shall elect a state central committee consisting of one man and of one woman from each congressional district, adopt a state platform, and transact such other business as may properly be brought before it. The state central committee elected at said state convention may organize at pleasure for political work as is usual and customary with such committees, and shall continue to act until succeeded by another committee duly elected. [S13,§1087-a27; C24, 27, 31, 35,§638.]

639 Nominations in certain cities and towns. This chapter shall, so far as applicable, govern the nominations of candidates by political parties for all offices to be filled by a direct vote of the people in cities of the first class and cities acting under a special charter having a population of over fifteen thousand, except all such cities as adopt a plan of municipal government which specifically provides for a nonpartisan primary election.

In other cities, and in towns, candidates of a political party which at the last preceding general state election cast, in such city or town, for its candidate for governor at least two percent of the total vote cast in such city or town, may, under the provisions of chapter 37.1, be nominated by a convention or caucus for city or town offices elective by the people. [S13,§1087-a34; C24, 27, 31, 35,§639.]

Cities under commission plan, §6492 et seq.
Cities under manager plan, §6634 et seq.
Judges of superior court, §673

640 Duty of city and town officers. The duties devolving upon the county auditor and board of supervisors, by this chapter, shall, in municipal elections, devolve upon the city auditor and city council, respectively. Said council shall meet to perform said duties within two days next following the primary election. [S13, §1087-a34; C24, 27, 31, 35,§640.]

641 Time of holding municipal primary. Municipal primaries shall be held on the last Monday in February of the year in which general municipal elections are held. [S13,§1087-a34; C24, 27, 31, 35,§641.]

642 Percentage of signers. The percentage of voters signing petitions required for printing the name of a candidate upon the official primary ballot shall be the same as is required of a candidate for a county office and shall be based upon the vote cast for mayor by the respective parties in the preceding city election. [S13,§1087-a34; C24, 27, 31, 35,§642.]

Signatures required, §546

643 Certain names not printed on ballots. The names of candidates for city precinct committeemen, and for delegates to the city convention shall not be printed upon the official primary ballot, but in each case a blank line or lines shall be provided therefor. A candidate for ward alderman or ward councilman may have his name printed on the primary ballot by filing in the office of the city clerk at least thirty days prior to the day fixed for holding the primary election, an affidavit as provided in section 544. [S13,§1087-a34; C24, 27, 31, 35,§643.]

644 Plurality vote nominates and elects. A plurality shall nominate the party candidate for alderman and a plurality shall elect the precinct committeemen and delegates to the city convention. [S13,§1087-a34; C24, 27, 31, 35,§644.]

645 Expense. The entire expense of conducting said municipal primary election shall be audited by the city council and paid by the city. [S13,§1087-a34; C24, 27, 31, 35,§645.]

646 Misconduct. Any party committeeman or any primary election officer or public officer upon whom a duty is imposed by this chapter or by chapters herein made applicable, who shall wilfully neglect to perform any such duty, or who shall wilfully perform it in such a way as to hinder the objects thereof, or shall disclose to anyone, except as may be ordered by any court of justice, the manner in which a ballot may have been voted, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment. [S13,§1087-a31; C24, 27, 31, 35,§646.]

Applicable chapters, §531

647 Bribery — illegal voting. Whoever is guilty of any of the following acts shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than six months, to wit:

1. Offering or giving a bribe, either in money or other consideration, to any elector for the purpose of influencing his vote at a primary election.
2. Receiving and accepting such bribe by an elector entitled to vote at any primary election.
3. Making false answers to any of the provisions of this chapter relative to his qualifications and party affiliations.
4. Wilfully voting or offering to vote at a primary election by one who has not been a resident of this state for six months next preceding said primary election, or who is not twenty-one years of age, or who is not a citizen of the United States.
5. Wilfully voting or offering to vote at a primary election by one who knows himself not to be a qualified elector of the precinct where he votes or offers to vote.
6. Violating any provision of this chapter, or any provision of law made applicable to this chapter.
7. Knowingly procuring, aiding, or abetting any violation specified in this section. [S13, §1087-a33; C24, 27, 31, 35,§647.]

Applicable chapters, §531

648 Nominations by petition. This chapter shall not be construed to prohibit nomination of candidates for office by petition as hereafter provided in this title, but no person so nominated shall be permitted to use the name of any political party authorized or entitled under this chapter to nominate a ticket by primary vote, or that has nominated a ticket by primary vote under this chapter. [S13,§1087-a29; C24, 27, 31, 35,§648.]

Nominations by petition, ch 37.2

CHAPTER 37

NOMINATIONS BY CONVENTION OR PETITION

This chapter (§§649 to 655, inc.) repealed by 41GA, ch 27, and chapters 37.1 and 37.2 enacted in lieu thereof

CHAPTER 37.1

NOMINATIONS BY NONPARTY POLITICAL ORGANIZATIONS

Referred to in §§528, 639, 6697

655.01 Political nonparty organizations.
655.02 Nominations certified.
655.03 Certificate.
655.04 Objections—time and place of filing.
655.05 Notice of objections.
655.06 Hearing before secretary of state.
655.07 Hearing before county auditor.
655.08 Hearing before mayor.
655.09 Withdrawals.
655.10 Effect of withdrawal.
655.11 Vacancies filled.
655.12 Insufficient time for convention.
655.13 Certificates in matter of vacancies.
655.14 Filing of certificates.
655.15 Presumption of validity.
655.16 Correction of errors.

655.01 Political nonparty organizations. Any convention or caucus of qualified electors representing a political organization which is not a political party as defined by law, may, for the state, or for any division or municipality thereof, or for any county, or for any subdivision thereof, for which such convention or caucus is held, make one nomination of a candidate for each office to be filled therein at the general election. [C97, §1098; C24, §649; C27, 31, 35, §655-a1.]

Referred to in §655.02
Political party defined, §528

655.02 Nominations certified. Nominations made under section 655.01 shall be certified by the chairman and secretary of the convention or caucus, who shall enter their place of residence opposite their signatures, and attach to said certificate their affidavit to the effect that the certificate is true. [C97,§1099; C24,§650; C27, 31, 35,§655-a2.]

655.03 Certificate. Said certificate shall state:

1. The name of each candidate nominated.
2. The office to which each candidate is nominated.
3. The name of the political organization making such nomination, expressed in not more than five words.
4. The place of residence of each nominee, with the street or number thereof, if any.
5. In case of presidential electors, the names of the candidates for president and vice president shall be added to the name of the organization.
6. The name and address of each member of the organization's executive or central committee.
7. The provision, if any, made for filling vacancies in nominations. [C97,§1099; C24,§650; C27, 31, 35,§655-a3.]

Additional certification, §655.13

655.04 Objections—time and place of filing. Objection to the legal sufficiency of a certificate of nomination or to the eligibility of a candidate may be filed by any person who would have the right to vote for a candidate for the office

in question. Such objections must be filed with the officer with whom such certificate is filed and within the following time:

1. Those with the secretary of state, not less than twenty days before the day of election.

2. Those with other officers, not less than eight days before the day of election.

3. In case of nominations to fill vacancies occurring after said twenty or eight days, as the case may be, or in case of nominations made to be voted on at a special election, within three days after the filing of the certificate. [C97, §1103; C24,§654; C27, 31, 35,§655-a4.]

Referred to in §§655.20, 670

655.05 Notice of objections. When objections are filed notice shall forthwith be given to the candidate affected thereby, addressed to his place of residence as given in the certificate of nomination, stating that objections have been made to said certificate, also stating the time and place such objections will be considered. [C97, §1103; C24,§654; C27, 31, 35,§655-a5.]

Referred to in §670

655.06 Hearing before secretary of state. Objections filed with the secretary of state shall be considered by the secretary and auditor of state and attorney general, and a majority decision shall be final; but if the objection is to the certificate of nomination of one or more of the above named officers, said officer or officers so objected to shall not pass upon the same, but their places shall be filled, respectively, by the treasurer of state, the governor and the superintendent of public instruction. [C97,§1103; C24,§654; C27, 31, 35,§655-a6.]

Referred to in §670

655.07 Hearing before county auditor. Objections filed with the county auditor shall be considered by the county auditor, clerk of the district court, and county attorney, and a majority decision shall be final; but if the objection is to the certificate of nomination of one or more of the above named county officers, said officer or officers so objected to shall not pass upon such objection, but their places shall be filled, respectively, by the county treasurer, the sheriff, and county superintendent. [C97,§1103; C24, §654; C27, 31, 35,§655-a7.]

Referred to in §670

655.08 Hearing before mayor. Objections filed with the city or town clerk shall be considered by the mayor and clerk and one member of the council chosen by the council by ballot, and a majority decision shall be final; but if the objection is to the certificate of nomination of either of said city or town officials, he shall not pass upon said objection, but his place shall be filled by a member of the council against whom no such objection exists, chosen as above provided. [C97,§1103; C24,§654; C27, 31, 35,§655-a8.]

Referred to in §670

655.09 Withdrawals. Any candidate named under this chapter may withdraw his nomination by a written request, signed and acknowledged by him before any officer empowered to take acknowledgment of deeds. Such withdrawal must be filed as follows:

1. In the office of the secretary of state, at least thirty days before the day of election.

2. In the office of the proper county auditor, at least twenty-five days before the day of the election.

3. In the office of the proper city or town clerk, at least twelve days before the day of the election.

4. In the office of the secretary of state, in case of a special election to fill vacancies, at least sixteen days before the day of election.

5. In the office of the proper county auditor, or city or town clerk, in case of a special election to fill vacancies, at least twelve days before the day of election. [C97,§1101; SS15, §1101; C24,§652; C27, 31, 35,§655-a9.]

Referred to in §655.20

655.10 Effect of withdrawal. No name so withdrawn shall be printed on the official ballot under such nomination. [C97,§1101; SS15,§1101; C24,§652; C27, 31, 35,§655-a10.]

Referred to in §655.20

655.11 Vacancies filled. If a candidate named under this chapter declines a nomination, or dies before election day, or should any certificate of nomination be held insufficient or inoperative by the officer with whom it is required to be filed, or in case any objection made to any certificate of nomination, or to the eligibility of any candidate therein named, is sustained by the board appointed to determine such questions, the vacancy or vacancies thus occasioned may be filled by the convention, or caucus, or in such manner as such convention or caucus has previously provided. [C97,§1102; C24,§653; C27, 31, 35,§655-a11.]

655.12 Insufficient time for convention. If the time is insufficient for again holding such convention or caucus, or in case no such previous provisions have been made, such vacancy shall be filled by the regularly elected or appointed executive or central committee of the particular division or district representing the political organization holding such convention, or caucus. [C97,§1102; C24,§653; C27, 31, 35, §655-a12.]

655.13 Certificates in matter of vacancies. The certificates of nominations made to supply such vacancies shall state, in addition to the facts required in an original certificate, the name of the original nominee, the date of his death or declination of nomination, or the fact that the former nomination has been held insufficient or inoperative, and the measures taken in accordance with the above requirements for filling a vacancy, and shall be signed and sworn to by the presiding officer and secretary of the convention, or caucus, or by the chairman and secretary of the committee, as the case may be. [C97,§1102; C24,§653; C27, 31, 35,§655-a13.]

Original certificates, §655.03

655.14 Filing of certificates. Said certificates of nominations shall be filed as follows:

1. For state, congressional, judicial, and legislative offices, with the secretary of state, not more than sixty, nor less than forty days before the general election.

2. For all other offices, except for cities and towns, with the county auditors of the respective counties, not more than sixty, nor less than thirty, days before the general election.

3. For city and town offices, with the clerks thereof, not more than forty, nor less than fifteen, days before the city or town election.

4. In case of special elections to fill vacancies for offices to be filled by the electors of a larger district than a county, with the secretary of state, not less than fifteen days before the time of holding such special election.

5. In case of special elections to fill vacancies for offices to be filled by the voters of a county, with the county auditor, not less than twelve days before the time of holding such special election. [C97,§1104; SS15,§1104; C24, §655; C27, 31, 35, §655-a14.]

655.15 Presumption of validity. Certificates thus filed, and being apparently in conformity with law, shall be regarded as valid, unless objection in writing thereto shall be made, and, under proper regulations, shall be open to public inspection, and preserved by the receiving officer for not less than six months after the election is held. [C97,§1104; SS15, §1104; C24,§655; C27, 31, 35,§655-a15.]

Referred to in §655.20

655.16 Correction of errors. Any error found in such certificate may be corrected by the substitution of another certificate, executed as is required for an original. [C97,§1104; SS15, §1104; C24,§655; C27, 31, 35,§655-a16.]

CHAPTER 37.2

NOMINATIONS BY PETITION

Referred to in §§528, 648, 675, 6697

655.17 Nominations by petition.
655.18 Adding name by petition.
655.19 Preparation of petition.
655.20 Filing — presumption — withdrawals—objections.

655.17 Nominations by petition. Nominations for candidates for state offices may be made by nomination paper or papers signed by not less than one thousand qualified voters of the state; for county, district or other division, not less than a county, by such paper or papers signed by at least two percent of the qualified voters residing in the county, district or division; as shown by the total vote of all candidates for governor at the last preceding general election in such county, district or division; and for township, city, town or ward, by such paper or papers signed by not less than twenty-five qualified voters, residents of such township, city or ward. [C97,§1100; C24,§651; C27, 31, 35,§655-a17.]

655.18 Adding name by petition. The name of a candidate placed upon the ballot by any other method than by petition shall not be added by petition for the same office. [C97,§1100; C24, §651; C27, 31, 35,§655-a18.]

Other methods, chs 36, 37.1; also §6492 et seq., §6634 et seq.

655.19 Preparation of petition. Each petitioning voter shall add to his signature his place of business, post-office address and date of signing. Before filing said petition, there shall be indorsed thereon or attached thereto the affidavit of at least one of the signers of said petition, which affidavit or affidavits shall show:

1. The name and residence (including street and number, if any) of said nominee, and the office to which he is nominated.

2. That each of said signers are qualified voters of the state and entitled to vote for such nominee for such office.

3. That each of said petitioners voluntarily signed said petition.

Such petition when so verified shall be known as a nomination paper. [C97,§1100; C24,§651; C27, 31, 35,§655-a19.]

655.20 Filing — presumption — withdrawals—objections. The time and place of filing nomination petitions, the presumption of validity thereof, the right of a candidate so nominated to withdraw and the effect of such withdrawal, and the right to object to the legal sufficiency of such petitions, or to the eligibility of the candidate, shall be governed by the law relating to nominations by political organizations which are not political parties. [C97,§1104; SS15,§1104; C24,§§652, 654, 655; C27, 31, 35,§655-a20.]

Statutes applicable, ch 37.1

CHAPTER 38

NOMINATION AND ELECTION OF JUDGES

656 State judicial convention.
657 Call.
658 Delegates.
659 Number.
660 Procedure.
661 Nomination.
662 District central committee.
663 District judicial convention.
664 Call.
665 Filing.
666 Delegates.
667 Organization.
668 District judges—how elected.
669 Certification.
670 Objections.
671 Certification to county auditor.
672 Form of printing of ballots.
673 Judges of superior court.
674 General election laws applicable.
675 Nominations by petition.

656 State judicial convention. A state judicial convention of each political party shall be held not less than one nor more than two weeks after the regular state convention of such party. [C24, 27, 31, 35,§656.]

657 Call. Such state judicial convention shall convene at a time and place to be fixed by the state party committee, which shall issue a call therefor in the same manner that the call for the regular state convention is issued. [C24, 27, 31, 35,§657.]

Regular state convention, §634

658 Delegates. Delegates to the state judicial convention shall be elected at, and certified by, the county conventions at the same time and in the same manner as delegates to the regular state convention, except that no person shall be elected to act as delegate to both conventions. [C24, 27, 31, 35,§658.]

Certification of delegates, §635

659 Number. Each county shall be entitled to the same number of delegates at the state judicial convention that it is entitled to have at the regular state convention. [C24, 27, 31, 35, §659.]

Number of delegates, §624

660 Procedure. The method of procedure, organization, and voting of delegates shall be the same in the state judicial convention as is provided for the regular state party convention. [C24, 27, 31, 35,§660.]

Organization of state convention—no proxies, §635

661 Nomination. The state judicial convention shall nominate candidates for the office of judge of the supreme court and may transact such other business as is proper. Such judges shall be elected at the general election in November in the same manner as the governor is elected, except that the state board of canvassers shall canvass the returns and declare the result. [C24, 27, 31, 35,§661.]

662 District central committee. In each judicial district there shall be a district central committee composed of one member from each county of such district, except that in districts composed wholly of one county there shall be three members of such committee, and in districts composed of two counties there shall be two members of such committee from the county having the larger population. Such committeemen shall be selected by the county convention in each county held in accordance with the provisions of the law relative to nominations by primary election. Vacancies in any such district committee shall be filled by the county central committee of the county where such vacancy occurs. [C24, 27, 31, 35,§662.]

Judicial district central committee, §624

663 District judicial convention. In each judicial district in which a judge of the district court is to be elected, a judicial convention shall be held by each political party participating in the primary election of that year. Such convention shall be held not earlier than the first, nor later than the fifth, Thursday following the date of holding the county convention. [C24, 27, 31, 35,§663.]

Time of holding county convention, §616

664 Call. Not less than ten days nor more than forty days before the day fixed for holding the county convention, a call for such judicial convention to be held shall be issued by the party central committee for such district, and published in at least one newspaper of general circulation in each county in the district, which shall state, among other things, the number of delegates each county in the district shall be entitled to, and the time and place of holding the convention. [C24, 27, 31, 35,§664.]

Time of holding county convention, §616

665 Filing. Such call shall be filed with the county auditor in each county in the district not less than five days before the date of holding the county convention as now fixed by law, and the county auditor shall attach a copy thereof to the certified list of delegates required to be delivered by him to the chairman of the county central committee of the respective political parties. [C24, 27, 31, 35,§665.]

Time of holding county convention, §616

666 Delegates. Each county convention held in such judicial district shall select such number of delegates to the judicial convention as is specified for that county in the call for such judicial convention. [C24, 27, 31, 35,§666.]

Similar provision, §624

667 Organization. The organization and procedure in such judicial district convention shall be the same as in the state convention. Such convention may nominate as many candidates for the office of judge of the district court as there are judges in said district to be elected at the general election to be held in the

year in which such convention is held, and may transact such other business as may properly come before it. [C24, 27, 31, 35,§667.]

Organization of state convention, §635

668 District judges—how elected. Judges of the district court shall be elected at the general election in the same manner as state senators are elected. [C24, 27, 31, 35,§668.]

Election of state senators, §518

669 Certification. All nominations for the office of judge of the supreme or district court shall be certified to the secretary of state, as near as may be in the same manner that nominations for other state offices are now certified under existing law. [C24, 27, 31, 35,§669.]

Certification of nominations, §615

670 Objections. Objections to the legal sufficiency of such certificate of nomination or eligibility of the candidate shall be governed by the provisions of law of this title relative to objections to certificates of nomination by political organizations which are not political parties. [C24, 27, 31, 35,§670.]

Objections, §§655.04–655.08

671 Certification to county auditor. The names of such nominees shall, at the time of certifying nominations under the primary election, be certified by the secretary of state to the officer having charge of the printing of the ballots. [C24, 27, 31, 35,§671.]

Time of certification, §601

672 Form of printing of ballots. The names of such nominees shall be printed on the ballot under the proper party designation in the manner required by law for the printing of the names of candidates for state and district offices. [C24, 27, 31, 35,§672.]

Arrangement of party nominees, §749

673 Judges of superior court. Judges of superior courts shall be nominated and elected in the manner provided by law for the nomination and election of other elective officers in the cities where such courts are located. [C24, 27, 31, 35,§673.]

Election of superior court judges, §10700
Primary elections in certain cities, §639

674 General election laws applicable. All the laws relating to the certificates of nomination, filing the same, certifying nominations to the officers having charge of the printing of the ballots, printing of the names of candidates on the official ballot, the method of withdrawal, filling vacancies, conducting general elections, canvassing the ballot, announcing the result, recounting the ballot, publishing notice of nomination and election, contesting the election, and the penalty for illegal voting, misconduct of the election officials, and the making of the sworn return, shall, so far as applicable, be the same for the election of supreme, district, and superior judges as is now provided by the general election laws for the election of state, district, county, and city officers. [C24, 27, 31, 35,§674.]

675 Nominations by petition. Candidates for the offices named in this chapter may be nominated by petition as elsewhere provided in this title, but no person so nominated shall be permitted to use the name of any political party authorized under this chapter to nominate candidates for such office. [C24, 27, 31, 35,§675.]

Nominations by petition, ch 37.2

CHAPTER 39

REGISTRATION OF VOTERS

Referred to in §718.20. Permanent registration, ch 39.1

676 Registration required.
677 Registers.
678 Vacancies.
679 Consolidation of precincts.
680 Books and supplies.
681 Effect of consolidation.
682 Qualifications.
683 Oath of registers.
684 Term and compensation.
685 Notice.
686 Time of publication.
687 Form of registry books.
688 Expenses.
689 Public inspection.
690 Place of meeting of registers.
691 Time of meeting of registers.
692 Duration of meetings.
693 Right of registration.
694 Oath.
695 Questions propounded to applicant.
696 Completing registration.
697 Keeping registry book.
698 Alphabetical list.
699 Posting.
700 Correction.
701 Certifying and copying.
702 Division.
703 Use of lists at election.
704 Return of alphabetical lists.
705 Corrections of lists.
706 Sick voters.
707 Registration on election day.
708 Certificates granted on election day.
709 Wrongful striking from list.
710 Certificates delivered to judges.
711 Registers to certify duplicate registrations.
712 Striking off names.
713 New registry—how often.
714 Registration book in nonpresidential years.
715 Transfer constitutes registration.
716 Clerk to furnish registration records.
717 Clerk to preserve records.
718 Penalty.

676 Registration required. Registration of voters shall be made for all elections, in all cities, including cities acting under special charter, having a population of ten thousand or more, not counting inmates of any state institution. Provided, however, that by city ordinance,

registration of voters may be required in any city having a population of not less than six thousand and not more than ten thousand.

Registration of voters shall not be made for school elections except as otherwise provided. [C73,§599; C97,§§1076, 1078, 1131; S13,§1076-a; SS15,§1076; C24, 27, 31, 35,§676.]

Registration in school districts, §§4216.16–4216.18, 4216.33, 4216.34

677 **Registers.** The city council shall, for each precinct in the city and on or before the sixth Monday preceding each general election, appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election, from three names presented by each chairman of the city central political committee of such parties, to be registers of voters. [C73,§599; C97,§1076; SS15, §1076; C24, 27, 31, 35,§677.]

678 **Vacancies.** If for any cause any register shall not be appointed at or before the time above mentioned, or, if appointed, shall be unable for any cause to serve, the mayor of such city shall forthwith, on similar recommendation, make such appointments and fill all vacancies. [C97,§1076; SS15,§1076; C24, 27, 31, 35,§678.]

679 **Consolidation of precincts.** All cities in which registration is required, including cities under special charter, may, by resolution passed not less than thirty days or more than sixty days preceding any general, city, or special election, consolidate the voting precincts of the city into registration districts for the purpose of registration only and appoint registers for such registration districts and designate the place of meeting, at one of the usual voting places within the consolidated district; but such registers must be residents and electors of the registration district in which they are to serve. [C24, 27, 31, 35,§679.]

680 **Books and supplies.** In case of consolidation as aforesaid, the registers for the consolidated district shall be furnished with separate blank registration books for each voting precinct embraced in the consolidation, and each registration shall be entered in the books for that voting precinct of which the registering voter is a resident and in no other books. Said registers shall perform within said consolidated district all the duties which would devolve upon the several boards of registers in case there were no consolidation. [C24, 27, 31, 35,§680.]

681 **Effect of consolidation.** An order of consolidation as aforesaid shall have the effect of terminating the term of office of all registers of all precincts embraced in the consolidation, and the registers appointed to act in the consolidated district shall serve only for the election in question. [C24, 27, 31, 35,§681.]

682 **Qualifications.** Said registers shall be electors of the precinct in which they are to serve, of good clerical ability, temperate, of good habits and reputation, and shall be able to speak the English language understandingly. [C97, §1076; SS15,§1076; C24, 27, 31, 35,§682.]

683 **Oath of registers.** Said registers shall qualify by taking an oath or affirmation to the effect that they will well and truly discharge all of the duties required of them by law. [C97, §1076; SS15,§1076; C24, 27, 31, 35,§683.]

684 **Term and compensation.** Registers shall hold their office for two years and receive compensation at the rate of three dollars for each day of eight hours engaged in the discharge of their duties. [C97,§1076; SS15,§1076; C24, 27, 31, 35,§684.]

685 **Notice.** The times and places of making registration of voters shall be published by the mayor in the two leading political party papers published in such city, except no publication shall be required for a special election. If there be but one such paper published in the city, publication of notice therein shall be sufficient. [C73,§597; C97,§1085; C24, 27, 31, 35, §685.]

686 **Time of publication.** The publication shall be made for a period of three days prior to the opening of the registry book, if the paper is a daily paper, and for one week, if a weekly paper, and shall call the attention of the voters to the necessity of complying with the laws with reference to registration, in order to be entitled to vote at the ensuing election. [C97,§1085; C24, 27, 31, 35,§686.]

687 **Form of registry books.** Registry books shall be substantially in the following form:

REGISTER OF VOTERS.....PRECINCT.....WARD

Number	Residence	Name	Age	Nativity	Color	Term of Residence			Naturalized	Date of papers	Court	By act of congress	Qualified voter	Date of application	Last preceding place of residence	Signature
						Precinct, street number	County	State								
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
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...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
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...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...

[C73,§596; C97,§1077; S13,§1077; C24, 27, 31, 35,§687.]

688 **Expenses.** Said registry book and all blanks and materials necessary to carry out the provisions of this chapter shall be furnished by the city clerk and shall be printed at the equal expense of the city and county. Registers shall be paid by the city in city elections and in all other cases by the county. [C97,§§1076, 1077; S13,§1077; SS15,§1076; C24, 27, 31, 35,§688.]

689 **Public inspection.** Registry books shall be open for public inspection and examination during the time fixed for registration. [C73,

§596; C97,§1077; S13,§1077; C24, 27, 31, 35, §689.]

690 Place of meeting of registers. The registers, in case the city council fails to consolidate the voting precincts into registration districts, shall meet at the usual voting place in the precinct for which they have been appointed. In case of such consolidation, the registers shall meet at the usual voting place specified in the resolution of the city council consolidating the precincts. The meeting of the registers on election day shall be at the regular polling places and the duties to be performed by the registers shall be that of registration and to also act as clerks of election. [C73,§597; C97,§§1077, 1082; C24, 27, 31, 35,§690.]

691 Time of meeting of registers. Registers shall meet:

1. On the second Thursday prior to any general, city, or special election.
2. On the last Saturday before any such election.
3. On the day of such election. [C73,§§597, 600; C97,§§1077, 1080, 1082; S13,§1077; C24, 27, 31, 35,§691.]

692 Duration of meetings. At the first meeting the registers shall hold a session for two consecutive days, and in presidential years, the session shall be for three consecutive days. All sessions shall be from eight o'clock a. m. to nine o'clock p. m., except on election day, when the session shall end with the closing of the polls. [C73,§597; C97,§§1077, 1080; S13,§1077; C24, 27, 31, 35,§692.]

693 Right of registration. Any person claiming to be a voter, or that he will be on election day, may appear before said registers in the election precinct where he claims the right to vote, and make and subscribe, under oath, the statement in said registry book. The signature of the applicant shall be made at the right-hand end of the line under the column "Signature". No person shall register at any other time or place than is designated in this chapter, except as otherwise specially provided by law. [C73,§597; C97,§§1077, 1078; S13,§1077; C24, 27, 31, 35,§693.]

Registration by absent voter, §956

694 Oath. The following oath shall be administered by one of the registers to each applicant for registration:

"You do solemnly swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence, name, place of birth, your qualifications as an elector, or voter, and your right as such to register and vote under the laws of this state." [C73,§597; C97,§1077; S13,§1077; C24, 27, 31, 35,§694.]

695 Questions propounded to applicant. The registers shall, after the administration of said oath, carefully and fully examine said applicant relative to all matters of information indicated by the registry book and, in addition:

1. Whether said applicant came into the precinct for the sole purpose of voting at said election.
2. How long he intends to reside in said precinct.
3. Such other questions as may tend to test his qualifications as a resident of the precinct, citizenship, and right to vote. [C73,§597; C97, §1077; S13,§1077; C24, 27, 31, 35,§695.]

696 Completing registration. If the applicant appears to have the right to be registered, the registers shall fill out the above prescribed form of statement, which the applicant shall sign and swear to, as above provided. [C73,§597; C97,§1077; S13,§1077; C24, 27, 31, 35,§696.]

697 Keeping registry book. The following requirements shall be observed in the making of registrations, and in the preparation and keeping of the registry book:

1. Each statement for each registrant shall be dated and consecutively numbered, commencing with the number "1" at each registration.
2. The registry book shall, at the close of each day's registration, be ruled off so as to prevent further entries.
3. The registry book shall, when not in use by the registers, be kept in the custody of the city clerk until disposed of as provided by law. [C97,§1078; C24, 27, 31, 35,§697.]

Destruction of books, §858

698 Alphabetical list. The registers shall, within three days after the completion of the registration, made in the second week preceding the election, prepare two alphabetical lists of the names of all persons registered, which lists shall contain, for each person, all the information appearing on the registry book, and, in addition, the date when each person removed to such precinct from his last preceding place of residence when such removal occurred within one year. [C97,§1079; C24, 27, 31, 35,§698.]

699 Posting. One of said lists shall be forthwith conspicuously posted by the registers at the usual place of holding elections in such precinct, for inspection of the public, and the other copy shall be retained in their possession. [C73,§599; C97,§1079; C24, 27, 31, 35, §699.]

700 Correction. At the meeting on Saturday preceding the election the registers shall:

1. Revise and correct the registry book by striking therefrom the name of any person not entitled to vote at said election.
2. Add to such book, consecutively numbering them, the names of all persons applying for registration who on election day will be entitled to vote in said precinct.
3. Revise and correct the alphabetical list which is in their possession so that it will correspond to the registration to date. [C73, §599; C97,§1080; C24, 27, 31, 35,§700.]

701 Certifying and copying. When the alphabetical list has been revised and corrected, it shall be certified and copied by the registers,

who shall deliver, or cause to be delivered, such list and copy to the judges of the election of the proper precinct, which delivery shall be made on election day, and before the opening of the polls. [C73,§§599, 600; C97,§1080; C24, 27, 31, 35,§701.]

702 Division. The original of said alphabetical list and the copy thereof may each be divided by the registers into not exceeding three separately bound parts. [C24, 27, 31, 35,§702.]

703 Use of lists at election. At the opening of the polls and before any ballot shall be received, the judges of the election shall appoint one of their number, or one of the clerks, to check the name of each voter whose name is on the alphabetical lists, to whom a ballot is delivered. [C97,§1080; C24, 27, 31, 35,§703.]

704 Return of alphabetical lists. The copy of the alphabetical list thus delivered shall be preserved by the judges, and returned with the vote from that precinct, and the original alphabetical list shall be returned to the city clerk. [C73,§599; C97,§1080; C24, 27, 31, 35,§704.]

705 Corrections of lists. All proceedings of registers shall be public, and any person entitled to vote in a precinct shall have the right to be heard before them in reference to corrections of or additions to the lists of such precinct. No person shall be admitted to registry unless he appears in person, except as in this chapter provided, and, if demanded, he shall furnish to the registers such proofs of his right thereto as may by law be required by judges of election of any person offering to vote. [C97,§1081; C24, 27, 31, 35,§705.]

Sick and absent voters, §§706, 956

706 Sick voters. If an elector is, by reason of sickness, unable to go to the place of registry on any day the registers may be in session, the registers shall, upon the filing before them, by a registered elector, of an affidavit to that effect, visit such sick elector at his place of residence on any day when not in session, administer the proper oath, and place his name on the registry book and alphabetical list, if found entitled thereto. [C97,§1081; C24, 27, 31, 35,§706.]

707 Registration on election day. Registration on election day shall be granted to the following named persons and to no others:

1. To a person who was absent from the city during all the days fixed for registration.
2. To a person who, being a foreigner, has received his final papers since the last preceding day for registration.
3. To a person whose name was, on the preceding Saturday, and in the absence of such person, stricken from the registration, and who, on said election day, shall prove to the satisfaction of said registers that he is a lawfully qualified voter of said precinct. [C97,§1082; C24, 27, 31, 35,§707.]

Referred to in §708

708 Certificates granted on election day. Certificates of registration granted on election day shall contain:

1. All the data showing the qualification of the voter as shown by the registration.
2. The special matter showing this voter's right to such certificate under section 707.
3. A signed verification of all such data and matter by the applicant.
4. An indorsement by the registers to the effect that the person therein named is a qualified voter in that precinct and that he is entitled to be registered as such.
5. An affidavit of a freeholder who is a registered voter in that precinct, who shall make oath to the qualification of the applicant as a voter in that precinct. [C97,§1082; C24, 27, 31, 35,§708.]

709 Wrongful striking from list. If the applicant be one whose name was stricken from registration, such affidavit of said freeholder shall contain the facts showing the right of said applicant to vote in that precinct. Registration in such cases shall be made in the manner required for regular registration. [C97, §1082; C24, 27, 31, 35,§709.]

Regular registration, §§698–695

710 Certificates delivered to judges. Certificates of registration granted on election day shall be handed in to the judges of election when a ballot is delivered to him. The data therefrom, showing the voter's name and his qualification as a voter, shall be entered on the alphabetical lists by the judges and clerks of the election, under the appropriate headings, and the original certificate shall be returned to the city clerk, who shall carefully preserve it in the same manner and for the same time as the alphabetical list and poll book. [C97,§1082; C24, 27, 31, 35,§710.]

Preservation, §858

711 Registers to certify duplicate registrations. The registers, prior to each election except presidential elections, and after completing their registration, shall certify the names of all persons by them registered to the registers of the ward or precinct of the same city, which the registration shows such persons gave as their last place of residence. [C97,§1083; C24, 27, 31, 35,§711.]

Referred to in §712

712 Striking off names. The registers to whom names are certified under section 711 shall strike the names of such persons so certified from the registry lists of the ward or precinct in which they last resided, if found thereon. [C97, §1083; C24, 27, 31, 35,§712.]

713 New registry—how often. A new registry of voters shall be taken in each year of a presidential election. [C97,§1084; C24, 27, 31, 35,§713.]

714 Registration book in nonpresidential years. For all state or municipal elections, general or special, except in presidential years, the registers shall prepare a new registry book by copying from the poll book of the preceding general election all the names found therein, adding thereto those of all persons registered

and voting at any subsequent election, which new registry book shall show all the facts of qualification of each voter as they appear on the last preceding registry book, and which, when thus made up, shall be used at each election until a new registry book is prepared as required by law. [C73,§594; C97,§1084; C24, 27, 31, 35, §714.]

Referred to in §715
New registry book, §713

715 Transfer constitutes registration. Every person thus registered, as provided in section 714, shall be considered as entitled to vote at any election at which said registry book may be used, unless his name shall be dropped by the correction of registration, as authorized by law. [C97,§1084; C24, 27, 31, 35,§715.]

Striking off names, §700

716 Clerk to furnish registration records. The city clerk shall, on the application of the registers, deliver to them, prior to their first meeting for each election, the registry book, alphabetical list, and poll book, which they require in order to properly prepare the necessary registry book for the next ensuing election; all of which shall be returned to him when they have completed their work for such election. [C73,§599; C97,§1086; C24, 27, 31, 35,§716.]

717 Clerk to preserve records. The city clerk shall carefully preserve all registry books and alphabetical lists and other papers pertaining to the registration, until destroyed as provided by law. [C97,§1086; C24, 27, 31, 35,§717.]

Destruction of books, §858

718 Penalty. If any register or judge of election shall wilfully neglect or disregard any duty imposed, or shall make, or permit to be made, any registration, statement, or list, except at the time and place and in the manner herein authorized and prescribed, or shall knowingly make, or permit to be made, any false statement as aforesaid, or if any person shall wilfully make, or authorize to be made, any statement required to be made, false in any particular, or shall violate any of the provisions of this chapter, every such register or judge of election, person or persons, shall be guilty of a misdemeanor. [C97,§1087; C24, 27, 31, 35,§718.]

Punishment, §12894

CHAPTER 39.1

PERMANENT REGISTRATION

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718.01 Commissioner of registration. The office of commissioner of registration is hereby created in all cities now or hereafter having a population of more than one hundred twenty-five thousand inhabitants. The city clerk of each such city is hereby constituted such commissioner of registration. [C27, 31, 35,§718-b1.]

Referred to in §718.20
Permissive adoption, §718.22

718.02 Definitions. For the purposes of this chapter, the word "elections" shall be held to mean general, municipal, special, school, or primary elections, and shall include state, county, and municipal elections. [C27, 31, 35,§718-b2.]

Referred to in §718.20

718.03 Registration required. From and after July 1, 1928, no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this chapter. [C27, 31, 35,§718-b3.]

Referred to in §718.20

718.04 Commissioner of registration — duties. The said commissioner of registration shall have complete charge of the registration of all qualified voters within such city. He shall appoint such deputies and clerks as may be necessary, from the two political parties receiving the highest vote at the last general election. The number of such deputies and clerks for all precinct registration places, and the central registration office, shall be equally divided between the members of the two said political parties. These appointments shall be subject to the approval of the city council. The commissioner of registration shall provide such printed forms and blanks as may be necessary, together with such other supplies and equipment as are necessary to properly carry out the provisions of this chapter. Subject to the provisions of this chapter, the city council shall prescribe by ordinance such reasonable rules and regulations as to office hours and places and manner of registration as may be necessary. Registration places shall be established throughout the city in the proportion of one to each precinct which shall be open for registration as provided under this chapter during not less than two nor more than four days between July 1 and

up to and including the tenth day prior to the next election following the adoption of the plan for registration provided in this chapter. Such registration places shall be selected by the commissioner of registration and shall be open between seven o'clock a. m. and nine o'clock p. m. The commissioner of registration shall appoint the two clerks of election for each precinct, who shall have charge of the election register. [C27, 31, 35,§718-b4.]

Referred to in §718.20

718.05 Registration lists. The commissioner of registration shall proceed to take the necessary steps for establishing the permanent registration plan. He shall provide for an original list of qualified voters, indexed alphabetically, which shall be kept at the office of the commissioner of registration in a place and in such manner as to be properly safeguarded. Such list shall be known as the "original registration list" and shall not be removed from the commissioner's office except upon order of court. A second list, to be known as the "duplicate registration list", shall be prepared by the commissioner from the original registration list. Such duplicate registration list shall be open to public inspection at all reasonable times. [C27, 31, 35,§718-b5.]

Referred to in §718.20

718.06 Form of records. For the purpose of expediting the work of the commissioner of registration, for uniformity, and for preparation of abstracts and other forms in use by the election boards, the registration records shall be substantially as follows:

Suitable card index devices shall be provided. There shall also be provided suitable index cards of sufficient facial area to contain in plain writing and figures the data required thereon. The following information concerning each applicant for registry shall be entered on the card:

1. Ward.
2. Election precinct.
3. If a man:

a. The name of the applicant, giving surname and christian names in full.

b. Residence, giving name and number of the street, avenue, or other location of the dwelling, and such additional clear and definite description as may be necessary to give the exact residence of the applicant.

c. Date of birth.

d. Term of residence in the United States; in the state; in the county; in the precinct.

e. Nativity.

f. Citizenship. (If naturalized give date of papers and court; also date of naturalization of parents.)

g. Date of application for registration.

h. Signature of voter. (The applicant after registration shall be required to sign his name on both the original and duplicate registration lists.)

4. If a woman:

a. The information requested shall be the same as for the males, with such additional information as may be necessary to determine the qualifications of the applicant for registration. Provided, that, after such original registration, whenever any change of name shall occur, due to marriage or divorce, such applicant shall not be allowed to vote until she has re-registered; and after such re-registration, the previous registration card shall be removed from the files. [C27, 31, 35,§718-b6.]

Referred to in §718.20

718.07 Change of residence. There shall be provided removal notices to be given out upon request for the use of any registered voter moving to a new location. These notices shall be printed upon thin card, shall contain a blank form showing where the applicant last resided and the address and exact location to which he is moving, and shall have a line for his signature similar to the one upon the original registration card. Upon receipt of such removal notices, but not later than ten days prior to any election, the commissioner of registration shall make entry of any such change of residence on the original and duplicate registration lists and the applicant shall thereupon be qualified to vote in the new election precinct. The voter who changes his residence within ten days preceding an election shall vote in the precinct where he is registered. [C27, 31, 35,§718-b7.]

Referred to in §718.20

718.08 Election register. The commissioner shall compile and shall deliver to the judges of election in each precinct the duplicate registration list of the voters in that precinct, which shall be known as the election register. Such register shall contain the name and address of every registered voter in that election precinct, indexed by street and house number, or alphabetically by surname, together with a space following each name in which shall be recorded the words "voted" or "not voted", as the case may be; also a space for remarks in which shall be recorded any challenges, affidavit or other information as may be required. The entry of the words "voted" or "not voted", challenge, affidavit, or other information, shall be made by the judges of election immediately after approving the certificate of registration. [C27, 31, 35,§718-b8.]

Referred to in §§718.20, 718.21

718.09 Correction of list. For the purposes of preventing fraudulent voting and for eliminating excess names, following the close of registration or at any other time as may be deemed necessary, the commissioner of registration may send by mail to any voter whose name appears on the original registration list, a notice bearing a statement substantially as follows:

You are hereby notified that your name and address appear on the original registration list as shown on the opposite side of this card. If there is any mistake in the above name and address, present this card at the office of the commissioner of registration, No..... City Hall, for correction on or before..... ....., 19..... The return of this card by the post office to the commissioner of

registration will be accepted as evidence on which to challenge your vote on election day.

.....,
Commissioner of Registration.

Upon the return by the post office of any such notice, the commissioner of registration shall, and at other times may, direct an authorized clerk to check up, in person, the name and address of any voter, and if said voter is found to have removed from the address as recorded on the original registration list, the commissioner of registration shall cause to be entered on the election register of the proper precinct, in the proper space opposite the said voter's name, the word "challenged". No one so challenged shall be permitted to vote except by complying with all the provisions applicable to the proving of challenges. [C27, 31, 35,§718-b9.]

Referred to in §718.20

718.10 Deceased persons — record. Every fifteen days, or at any more frequent times, the commissioner of health or other officer in charge of the death records in any such city shall report to the commissioner of registration the names and addresses of all persons over twenty-one years of age who have died within such city. The commissioner of registration shall, upon receipt of such report, examine the original registration list and duplicate registration list and shall remove therefrom, to an inactive file, the registration cards of all registered persons certified by the health commissioner as deceased. [C27, 31, 35,§718-b10.]

Referred to in §718.20

718.11 Time and method of registration. The commissioner of registration, or a duly authorized clerk acting for him, shall, up to and including the tenth day next preceding any election, receive the application for registration of all such qualified voters as shall personally appear for registration at the office of the commissioner or at any other place as is designated by him for registration, who then are or on the date of election next following the day of making such application will be entitled to vote. Any qualified voter who applies for registration shall subscribe to the following oath or affidavit:

"You do solemnly swear or affirm that you will fully and truly answer such questions as shall be put to you, touching your qualifications as a voter, under the laws of this state?"

Upon being sworn, the applicant shall answer such questions as are required, as hereinbefore set forth, and the clerk shall fill out the form which the applicant shall sign, and he shall not be required to register again for any election; provided, however, that failure to vote at least once in four calendar years wherein elections are held shall operate as a challenge and shall require the applicant to re-register. In case a qualified voter is unable to write his name, he shall be required to make a cross, which shall be certified by the signing of the name of the applicant by the registration clerk taking the application. A qualified voter who is unable to sign his name shall not be permitted to mail or hand in removal notices as is in this chapter provided, but must appear in person to secure a removal of his name to his new voting precinct. [C27, 31, 35,§718-b11.]

Referred to in §718.20

718.12 Disabled or absent voters. Any person entitled to register who is permanently disabled by sickness or otherwise, or who will be absent from the election precinct until after the next succeeding election, may up to and including the tenth day next preceding an election, apply in writing to the commissioner of registration who shall thereupon forward to such voter duplicate registration cards which shall be executed by the voter before a notary public and returned to the commissioner of registration. If such registration cards are properly executed and show that the voter is duly qualified, then such cards shall be placed in the registration lists. [C27, 31, 35,§718-b12.]

Referred to in §718.20

718.13 Election registers. The commissioner of registration shall have nine full days between the last day of registration and election day to perfect his election registers and, for that purpose, nine days before any election day shall be days upon which voters may not register. During these nine days the commissioner shall complete the election registers and, on the day before election day, he shall deliver them as required by law to each election precinct. [C27, 31, 35,§718-b13.]

Referred to in §718.20

718.14 Revision of lists. At the close of each calendar year after the fourth year of the registration under this chapter, clerks of registration shall check up the original registration list for the purpose of eliminating excess names and, to that end, they shall examine the election registers and whenever it appears that a registered voter has not voted at least once in four calendar years wherein elections are held, his card shall be taken from the original and duplicate registration lists and placed in a transfer file, and a printed postal card notice of that fact with the information that his vote has been challenged, and that the voter must re-register to remove such challenge, shall be sent to the last known address of said voter. When removal notices are received by the clerks, they shall examine the signatures and compare them with the original and, if they are not similar, a postal card notice specifying a refusal to transfer for that cause, shall be sent to the applicant at the new address given. [C27, 31, 35,§718-b14.]

Referred to in §718.20

718.15 Challenges. Any person may challenge a registration at any time by filing a written challenge with the commissioner of registration. Persons so challenging shall appear before the commissioner of registration thereafter to prove their challenge, and the person so challenged shall have notice of the challenge. The commissioner shall decide the right to the entry under the evidence. Either party may appeal to the district court of the county in

which the challenge is made, and a date for the hearing shall be fixed and the decision of such court shall be final. [C27, 31, 35,§718-b15.]

Referred to in §718.20

718.16 Penalties. Any officer or employee who shall wilfully fail to perform or enforce any of the provisions of this chapter, or who shall unlawfully or fraudulently remove any registration card or record from its proper compartment in the registration records, or who shall wilfully destroy any record provided by this chapter, or any person who shall wilfully or fraudulently register more than once, or register under any but his true name, or votes or attempts to vote by impersonating another who is registered, or who wilfully or fraudulently registers in any election precinct where he is not a resident at the time of registering, or who adds a name or names to a page or pages, or who violates any of the provisions of this chapter, shall be guilty of felony and, upon conviction, shall be imprisoned in the state penitentiary for not less than one year. [C27, 31, 35,§718-b16.]

Referred to in §718.20

718.17 Qualification of officers. Before entering upon his duties, each officer or clerk in whatever capacity shall subscribe to an oath in such form as provided by the attorney for the city. [C27, 31, 35,§718-b17.]

Referred to in §718.20

718.18 Expenses. The cost of material, equipment and labor for the installation and maintenance of the permanent registration system shall be shared equally by the county and the city, and the city council of such city shall provide out of the current revenues of the city sufficient funds, based upon the estimate prepared by the commissioner of registration and subject to the approval of the city council. The city council of any city in which this chapter applies may, in its judgment, compensate the commissioner of registration for the additional service required by the performance of the duties herein described, in addition to any salary such commissioner of registration as city clerk may receive at the time of the adoption of this chapter, and notwithstanding any provisions of the charter of such city, and the compensation so paid to the commissioner of registration may be retained by him, notwithstanding any provisions in the charter or ordinances of such city to the contrary. The city council shall by ordinance fix the compensation paid to deputies or clerks. [C27, 31, 35,§718-b18.]

Referred to in §§718.19, 718 20

718.19 Registration fund. The city council of any city having a population of one hundred twenty-five thousand or over may establish a permanent registration fund and the money provided by said city council under authority of section 718.18 shall be placed in said fund.

The money received from the county in which said city is located for one-half of the expenses of the installation and maintenance of the permanent registration system as provided for in section 718.18 shall be placed in said permanent registration fund. [C35,§718-e1.]

718.20 Nonapplicability of statutes. The provision of chapter 39, and lines 6 to 10, inclusive, of section 795, shall not be applicable to sections 718.01 to 718.18, inclusive, of this chapter. [C27, 31, 35,§718-b19.]

718.21 Certificate of registration. In municipalities having permanent registration for elections, before any person offering to vote receives the ballots from the judge or is permitted to enter the voting machine, a certificate containing the following information shall be signed by the applicant:

CERTIFICATE OF REGISTERED VOTER

I hereby certify that I am a qualified voter duly registered under the permanent registration act of 1927 in the.....precinct,..... ward, city of....., county of ....., Iowa.

Party affiliation (if primary election) ....

.....

Signature of voter.....

Address .....

Approved:

.....,

Judge or Clerk of Election.

The certificate of registration shall be approved by a judge or clerk of election if the signature of the voter on the certificate of registration and the signature on the registry list appear to be the same. The voter shall present this certificate to the judge in charge of the ballots or voting machine, as proof of his right to vote. After voting the voter shall present his certificate of registration to the judge or clerk in charge of the register of election, who shall make entry as provided in section 718.08. The certificates shall be arranged in alphabetical order after the close of the election, placed in envelopes provided for that purpose, and returned to the city clerk as commissioner of registration. [C27, 31, 35,§718-b20.]

Referred to in §718.25

718.22 Permissive adoption. The city council of any other city, including cities acting under special charter, in which registration of voters is required, may, by ordinance, adopt the plan for registration provided in this chapter. When the city council of any such city enacts an ordinance establishing such plan, all of the provisions of this chapter shall apply to such city. [C27, 31, 35,§718-b21.]

718.23 Ordinances. The council may adopt ordinances necessary to carry into effect the provisions of this chapter. [C27, 31, 35,§718-b22.]

718.24 Party affiliations. The lists of voters provided for in section 568 need not be prepared in cities having the permanent registration system. The registration cards provided for in this chapter shall be used in lieu of such lists. [C31 35,§718-c1.]

718.25 Entries required. The entries required to be made in sections 800 and 808 shal be made on the certificates of registration provided for in section 718.21. [C31, 35,§718-c2.]

Omnibus repeal, §718-b23, code 1935; 42GA, ch 21, §23

CHAPTER 40

METHOD OF CONDUCTING ELECTIONS

Referred to in §§646, 932. Made applicable to primary elections, §531. Criminal offenses, ch 605

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719 Elections included. The provisions of his chapter shall apply to all elections known to the laws of the state, except school elections. [C97,§1088; C24, 27, 31, 35,§719.]

School elections, ch 211.1

720 **Terms defined.** For the purposes of this chapter:

1. The term "general election" means any election held for the choice of national, state, judicial, district, county, or township officers.
2. The term "city election" means any municipal election held in a city or town.
3. The term "special election" means any other election held for any purpose authorized or required by law. [C97,§1089; C24, 27, 31, 35, §720.]

721 **Election precincts.** Election precincts shall, except as otherwise provided, be as follows:

1. Each township when there is no part of a city therein.
2. The portion of a township outside the limits of any city.
3. Such divisions of cities as may be fixed by the council by ordinance.
4. Each incorporated town, for town elections. [C51,§245; R60,§480; C73,§§501, 605; C97,§1090; S13,§1090; C24, 27, 31, 35,§721.]

Exceptions, §§722–725

722 **Change in precincts by supervisors.** The board of supervisors may divide a township, or part thereof, into two or more precincts, or change or abolish such division. An order establishing precincts shall define their boundaries. [C73,§603; C97,§1090; S13,§1090; C24, 27, 31, 35,§722.]

723 **City precincts.** The council of a city may, from time to time, by ordinance definitely fixing the boundaries, divide the city into such number of election precincts as will best serve the convenience of the voters. [C97,§1090; S13, §1090; C24, 27, 31, 35,§723.]

724 **Power to combine township and city precincts.** The board of supervisors and the council of any city of less than thirty-five hundred inhabitants, not including the inmates of any state institution, may combine any part of the township outside of such city with any or all the wards or precincts thereof as one election precinct, or change or abolish such precinct. [C97,§1090; S13,§1090; C24, 27, 31, 35,§724.]

725 **Portions of townships combined.** No precinct shall contain different townships or parts thereof, except where, by reason of the existence of a village or incorporated town on or near a township line, the board of supervisors may create a voting precinct in compact form, from said town or village, and may include therein territory adjoining and adjacent to said village or town, which is situated in two or more townships. [C97,§1090; S13,§1090; C24, 27, 31, 35,§725.]

Referred to in §726

726 **Changes in precincts.** In cases contemplated in section 725, the board may, from time to time, make such changes in said boundaries as the convenience of the voters may require. [S13,§1090; C24, 27, 31, 35,§726.]

727 **Proper place of voting.** No person shall vote in any precinct but that of his residence, except as provided in section 5628. [C73, §605; C97,§1090; S13,§1090; C24, 27, 31, 35, §727.]

728 **Polling places for certain precincts.** Polling places for precincts outside the limits of a city, but within the township, or originally within and set off as a separate township from the township in which the city is in whole or in part situated, and a polling place for a township which entirely surrounds another township containing a city, may be fixed at some room or rooms in the courthouse or in some other building within the limits of the city as the board of supervisors may provide. [C97,§1091; S13, §1091; C24, 27, 31, 35,§728.]

729 **Notice of boundaries of precincts.** The board of supervisors or council shall number or name the several precincts established, and cause the boundaries of each to be recorded in the records of said board of supervisors or council, as the case may be, and publish notice thereof in some newspaper of general circulation, published in such county or city, once each week for three consecutive weeks, the last to be made at least thirty days before the next general election. The precincts thus established shall continue until changed. [C73,§604; C97,§1092; C24, 27, 31, 35,§729.]

730 **Election boards.** Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors of another party qualified and willing to act as such judge or clerk. Nothing in this chapter shall change or abrogate any of the provisions of law relating to double election boards. [C51,§§246, 248; R60,§§481, 483; C73,§606; C97,§1093; SS15, §1093; C24, 27, 31, 35,§730.]

Additional clerks, §690
Boards in primary elections, §559
Double election boards, ch 42

731 **Judges in cities and towns.** In cities and towns, the councilmen shall be judges of election; but in case more than two councilmen belonging to the same political party or organization are residents of the same election precinct, the county board of supervisors may designate which of them shall serve as judge. [C97,§1093; SS15,§1093; C24, 27, 31, 35,§731.]

732 **Judges and clerk in township precincts.** In township precincts, the clerk of the township shall be a clerk of election of the precinct in which he resides, and the trustees of the township shall be judges of election, except that, in townships not divided into election precincts, if all the trustees be of the same political party, the board of supervisors shall determine by lot which two of the three trustees shall be judges of such precinct. [C51,§§246, 248; R60,§§481, 483; C73,§606; C97,§1093; SS15,§1093; C24, 27, 31, 35,§732.]

733 Supervisors to choose additional members. The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented. [C97,§1093; SS15, §1093; C24, 27, 31, 35,§733.]

734 Council to act in cities and towns. In city and town elections, the powers given in this chapter and duties herein made incumbent upon the board of supervisors shall be performed by the council. [C97,§1093; SS15,§1093; C24, 27, 31, 35,§734.]

City and town elections, §5627 et seq.

735 Boards with only one voting machine. The election board in precincts using only one voting machine shall consist of three judges, only two of whom shall be of the same political party, and two of whom shall also act as clerks. [C24, 27, 31, 35,§735.]

736 Vacancies occurring on election day. If, at the opening of the polls in any precinct, there shall be a vacancy in the office of clerk or judge of election, the same shall be filled by the members of the board present, and from the political party which is entitled to such vacant office under the provisions of this chapter. [C51, §247; R60,§482; C73,§607; C97,§1093; SS15, §1093; C24, 27, 31, 35,§736.]

Vacancies in primary elections, §559

737 Boards for special elections—duty of auditor. The election board at any special election shall be the same as at the last preceding general election. In case of vacancies happening therein, the county auditor may make the appointments to fill the same when the board of supervisors is not in session. [C97,§1093; SS15, §1093; C24, 27, 31, 35,§737.]

738 Compensation of members. The members of election boards shall receive thirty cents per hour while engaged in the discharge of their duties. Compensation shall be paid to members of election boards only after the vote has been canvassed and it has been determined in the course of such canvass that the poll book jurat has been properly executed by the election board. [SS15,§1093; C24, 27, 31, 35,§738.]

739 Polling places. In townships the trustees, except as otherwise provided, shall provide, at the expense of the county, suitable places in which to hold all elections provided for in this chapter, and see that the same are warmed and lighted. [C51,§§222, 245; R60,§§444, 480; C73, §§391, 603; C97,§§566, 1113; C24, 27, 31, 35, §739.]

Referred to in §740

740 Duty of mayor and clerk. In cities and towns, the duties placed upon the trustees by section 739 shall be performed by the mayor and clerk. [C97,§1113; C24, 27, 31, 35,§740.]

741 Notice of change. When a change is made from the usual place of holding elections in the township, notice of such change shall be given by posting up notices in three public places in the township, ten days prior to the day on which the election is to be held. [C51,§222; R60,§444; C73,§391; C97,§566; C24, 27, 31, 35, §741.]

742 Schoolhouses as polling places. In precincts outside of cities and towns the election shall, if practicable, be held in the public school building. All damage to the building or furniture shall be paid by the county. [C97,§1113; C24, 27, 31, 35,§742.]

Expenses, §835
Schoolhouses as polling places, §4371

743 Arrangement and number of polling places and booths. The number, arrangement, and construction of polling places and voting booths shall be as follows:

1. A guard rail shall be so constructed and placed that only such persons as are inside such rail can approach within six feet of the ballot box, or of the booths.
2. The voting booths shall be so arranged that they can only be reached by passing within said guard rail, and so that they shall be in plain view of the election officers, and both booths and ballot boxes shall be in plain view of persons outside of the guard rail.
3. Each booth shall be at least three feet square, and have three sides inclosed, the side in front to open and shut by a door swinging outward, or closed with a curtain.
4. Each side of the booth shall be seven feet high, and the door or curtain shall extend to within two feet of the floor, and shall be closed while the voter is preparing his ballot.
5. Each booth shall contain a shelf at least one foot wide, at a convenient height for writing, and shall be well lighted.
6. The number of voting booths shall not be less than one to every sixty voters or fraction thereof who voted at the last preceding election in the precinct.
7. The booths and compartments shall be so built and arranged, if possible, as to be permanent, so that after the election they may be taken down and deposited with the township, city, or town clerk, as the case may be, for safekeeping and for future use. [C97,§1113; C24, 27, 31, 35, §743.]

744 Ballot boxes. The auditor shall furnish each precinct in the county, except as provided in section 745, the necessary ballot boxes with locks and keys therefor. [C51,§254; R60, §489; C73,§614; C97,§1130; S13,§1130; C24, 27, 31, 35,§744.]

745 Separate ballot box and ballots for township officers. When the territory of a precinct is such that one or more of the officers of a township can be legally voted for by only a part of the precinct voters, the auditor shall prepare separate ballots for such township officer or officers, and the trustees shall furnish a separate ballot box in which such special ballots shall be deposited when voted. Only such special ballots shall be placed in said special ballot box. The

judges of election shall have the right to administer an oath to any person and to examine him under oath in order to determine whether he is entitled to vote for the township officer or officers. [C97,§1130; S13,§§1090, 1130; C24, 27, 31, 35,§745.]

Referred to in §744

746 Auditor to furnish poll books and supplies. The auditor shall prepare and furnish to each precinct two poll books, and all other books, blanks, materials, and supplies necessary to carry out the provisions of this chapter. Each poll book shall contain a column for the names of the voters, a column for the number, and sufficient printed blank leaves to contain the entries of the oaths, certificates, and returns. [C51,§255; R60,§490; C73,§615; C97,§§1113, 1132; C24, 27, 31, 35,§746.]

747 Voting by ballot. In all elections regulated by this chapter, the voting shall be by ballots printed and distributed as hereinafter provided, except as may be otherwise specially directed by law. [C97,§1097; C24, 27, 31, 35, §747.]

748 All candidates on one ballot—exception. The names of all candidates to be voted for in such election precinct, except presidential electors, shall be printed on one ballot, except that at any election where voting machines are used, and it is impossible to place the names of all candidates on the machine ballot, the county auditor, city clerk, or town clerk, may provide a separate printed ballot for the township ticket; one of each of said printed ballots to be furnished each qualified voter. [C51, §256; R60,§491; C73,§616; C97,§1106; S13, §1106; C24, 27, 31, 35,§748; 47GA, ch 94,§1.]

Referred to in §§749, 913

749 Arrangement of party nominees. All nominations of any political party or group of petitioners, except as provided in section 748, shall be placed under the party name or title of such party or group, as designated by them in their certificates of nomination or petitions, or if none be designated, then under some suitable title, and the ballot shall contain no other names, except as provided in section 750. [C97,§1106; S13,§1106; C24, 27, 31, 35,§749.]

Referred to in §913

750 Candidates for president in place of electors. The candidates for electors of president and vice president of any political party or group of petitioners shall not be placed on the ballot, but in the years in which they are to be elected the names of candidates for president and vice president, respectively, of such parties or group of petitioners shall be placed on the ballot, as the names of candidates for United States senators are placed thereon, under their respective party, petition, or adopted titles for each political party, or group of petitioners, nominating a set of candidates for electors. [C97,§1106; S13,§1106; C24, 27, 31, 35,§750.]

Referred to in §§749, 913

751 One square for president and vice president. Upon the left-hand margin of each separate column of the ballot, immediately opposite the names of the candidates for president and vice president, a single square, the sides of which shall not be less than one-fourth of an inch in length, shall be printed in front of a bracket inclosing the names of the said candidates for president and vice president. The votes for said candidates shall be counted and certified to by the election judges in the same manner as the votes for other candidates. [C24, 27, 31, 35, §751.]

Referred to in §913
Canvass of votes, ch 41

752 United States senators. At all general elections next preceding the expiration of the term of office of United States senator, there shall be placed upon the official ballot in the proper place the names of candidates for all parties or groups of petitioners for said office that have been nominated by law. The votes for said candidates shall be counted and certified to by the election judges in the same manner as votes for other candidates. [S13,§1106; C24, 27, 31, 35,§752.]

Referred to in §913
Canvass of votes, ch 41

753 Order of arranging names. Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket. [C97,§1106; S13,§1106; C24, 27, 31, 35,§753.]

Referred to in §913
Order of names in primaries, §556

754 Candidates of nonparty organization. The term "group of petitioners" as used in the foregoing sections shall embrace an organization which is not a political party as defined by law. [C24, 27, 31, 35,§754.]

Referred to in §913
Nonparty organization, §528; also ch 87.1
Political party defined, §528

755 Columns to be separated. Each of the columns containing the list of candidates, including the party name, shall be separated by a distinct line. [C97,§1106; S13,§1106; C24, 27, 31, 35,§755.]

Referred to in §913

756 Candidate's name to appear but once. The name of a candidate shall not appear upon the ballot in more than one place for the same office, whether nominated by convention, primary, caucus, or petition, except as hereinafter provided. [C97,§1106; S13,§1106; C24, 27, 31, 35,§756.]

Referred to in §913
Name to be repeated, §759

757 Dual nomination. When two or more political parties, or when two or more political organizations which are not political parties, or when a political party and a political organization which is not a political party, nominate the same candidate for the same office, such nominee

shall forthwith designate, in writing, the political party name, or the political organization name, under which he desires to have his name printed on the official ballot for the ensuing general election; such written designation shall be filed with the officer with whom the nomination paper, or certificate of nomination by a convention or caucus, is filed and the name of such nominee shall appear on the ballot in accordance therewith. [C97,§1106; S13,§§1087-a6, 1106; C24, 27, 31, 35,§757.]

Referred to in §§758, 913

758 Failure to designate. If the designation referred to in section 757 be not filed, the following rules shall govern:

1. If the nomination be by two or more political parties, the name of such nominee shall be printed under the party designation under which nomination papers were first filed in his behalf.

2. If the nomination be by a political party and also by a political organization which is not a political party, the name of such nominee shall be printed under the name of the political party or political organization first filing nomination papers, or certificate of nomination, as the case may be.

3. If the nomination be by two or more political organizations which are not political parties, the name of such nominee shall be printed under the name of the political organization first filing a certificate of nomination of such candidate. [C97,§1106; S13,§§1087-a6, 1106; C24, 27, 31, 35, §758.]

Referred to in §913

759 Nominees for judge of district court. The name of a nominee for the office of judge of the district court shall be printed on said general official ballot as a candidate of each political party, political organization, or group of petitioners nominating such candidate. The bar association or convention of attorneys of any county or judicial district shall be deemed a political organization for the purpose of this section. [S13,§1106; C24, 27, 31, 35,§759.]

Referred to in §913
Nonparty organizations, §528; also ch 37.1

760 Form of official ballot. Said ballot shall be substantially in the following form:

○ REPUBLICAN

☐ For President, A.... B...., of Ohio. For Vice President, C.... D...., of New York.
☐ For United States Senator, E..... F....., of.....County.
☐ For Governor, G..... H....., of.....County.
☐ For Lieutenant Governor, I..... J....., of.....County.
☐ For Judge of Supreme Court, L..... M....., of.....County.

○ DEMOCRATIC

☐ For President, N.... O...., of Virginia. For Vice President, P.... Q...., of Indiana.
☐ For United States Senator, R..... S....., of.....County.
☐ For Governor, T..... U....., of.....County.
☐ For Lieutenant Governor, V..... W....., of.....County.
☐ For Judge of Supreme Court, X..... Y....., of.....County.

○ PROHIBITION

☐ For President, A.... B...., of Maine. For Vice President, C.... D...., of Illinois.
☐ For United States Senator, E..... F....., of.....County.
☐ For Governor, G..... H....., of.....County.
☐ For Lieutenant Governor, I..... J....., of.....County.
☐ For Judge of Supreme Court, L..... M....., of.....County.

○ UNION LABOR

☐ For President, N.... O...., of Idaho. For Vice President, P.... Q...., of Ohio.
☐ For United States Senator, R..... S....., of.....County.
☐ For Governor, T..... U....., of.....County.
☐ For Lieutenant Governor, V..... W....., of.....County.
☐ For Judge of Supreme Court, X..... Y....., of.....County.

[C97,§1106; S13,§1106; C24, 27, 31, 35,§760.]

Referred to in §§913, 914

761 Constitutional amendment or other public measure. When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a separate ballot, preceded by the words, "Shall the following amendment to the constitution (or public measure) be adopted?" [C97,§1106; S13, §1106; C24, 27, 31, 35,§761.]

Referred to in §763

762 Form of ballot. Upon the right-hand margin, opposite said words, two spaces shall be left, one for votes favoring such amendment or public measure, and the other for votes opposing the same. In one of these spaces the word "yes" or other word required by law shall be printed; in the other, the word "no" or other word required, and to the right of each space a square shall be printed to receive the voting cross. [C97,§1106; S13,§1106; C24, 27, 31, 35,§762.]

Referred to in §763

763 General form of ballot. Ballots referred to in sections 761 and 762 shall be substantially in the following form:

"Shall the following amendment to the constitution (or public measure) be adopted?" YES ☐ NO ☐

(Here insert in full the proposed constitutional amendment or public measure.) [C97, §1106; S13,§1106; C24, 27, 31, 35,§763.]

Referred to in §4218

764 Marking ballots on public measures. The elector shall designate his vote by a cross

mark, thus, "X", placed in the proper square. [C97,§1106; S13,§1106; C24, 27, 31, 35,§764.]

Referred to in §4218

765 Notice on ballots. At the top of ballots on such public measures shall be printed the following:

"[Notice to voters. For an affirmative vote upon any question submitted upon this ballot make a cross (X) mark in the square after the word 'Yes'. For a negative vote make a similar mark in the square following the word 'No'.]" [S13,§1106; C24, 27, 31, 35,§765.]

Referred to in §4218

766 Different measures on same ballot. If more than one constitutional amendment or public measure is to be voted upon, they shall be printed upon the same ballot, one below the other, with one inch space between the several constitutional amendments or public measures to be submitted. [S13,§1106; C24, 27, 31, 35, §766.]

767 Printing of ballots on public measures. All of such ballots for the same polling place shall be of the same size, similarly printed, upon yellow colored paper. On the back of each such ballot shall be printed appropriate words, showing that such ballot relates to a constitutional or other question to be submitted to the electors, so as to distinguish the said ballots from the official ballot for candidates for office, and a facsimile of the signature of the auditor or other officer who has caused the ballot to be printed. [S13,§1106; C24, 27, 31, 35,§767.]

768 Indorsement and delivery of ballots. Ballots on such public measures shall be indorsed and given to each voter by the judges of election, as in case of ballots generally, and shall be subject to all other laws governing ballots for candidates, so far as the same shall be applicable. [S13,§1106; C24, 27, 31, 35,§768.]

769 County auditor to control printing. For all elections held under this chapter, except those of cities or towns, the county auditor shall have charge of the printing of ballots in his county, and shall cause to be placed thereon the names of all candidates which have been certified to him by the secretary of state, in the order the same appear upon said certificate, together with those of all other candidates to be voted for thereat, whose nominations have been made in conformity with law. [C97,§1107; SS15,§1107; C24, 27, 31, 35,§769.]

770 Candidates for township offices—when omitted. The name of a candidate for a township office shall not be placed upon the general official ballot for a precinct when the territory of said precinct is such that only a part of the precinct voters can legally vote for said candidate. In such case special ballots shall be prepared as heretofore provided. [C97,§1107; SS15, §1107; C24, 27, 31, 35,§770.]

Separate ballots, §745

771 City or town clerk to control printing. In city or town elections, the clerk shall have charge of the printing of the ballots, and shall cause to be placed thereon the names of all candidates to be voted for thereat, whose nominations have been made as provided by law. [C97, §1107; SS15,§1107; C24, 27, 31, 35,§771.]

772 Publication of ballot. For publication of the official ballot, forty cents for each ten lines of brevier or its equivalent may be charged. the space necessarily occupied thereby being measured as if it were in brevier type set solid. In no case shall the cost of publishing the official ballot exceed forty dollars for each of the two papers in which it shall be published, except in presidential years, when it shall not exceed the sum of seventy dollars for each of said papers. [C73,§3832; C97,§1293; S13,§1293; C24, 27, 31, 35,§772.]

773 Delivery of ballots to judges. In all cases the ballots shall be furnished the election judges at the polling place in each precinct not less than twelve hours before the opening of the polls on the morning of the election. [C97,§1107; SS15,§1107; C24, 27, 31, 35,§773.]

774 Maximum cost of printing. The cost of printing the official election ballots shall not exceed twenty-five dollars per thousand ballots or fraction thereof except in presidential years, when the cost shall not exceed thirty dollars per thousand where two thousand or more ballots are printed for a county. Where less than two thousand ballots are printed the price shall not exceed thirty dollars per thousand, except in presidential years when the price shall not exceed forty dollars per thousand or fraction thereof. [SS15,§1107; C24, 27, 31, 35,§774.]

775 Method and style of printing ballots. Ballots shall be prepared as follows:

1. They shall be on plain white paper, through which the printing or writing cannot be read.
2. The party name shall be printed in capital letters, not less than one-fourth of an inch in height.
3. The names of candidates shall be printed in capital letters, not less than one-eighth, nor more than one-fourth of an inch in height.
4. A square, the sides of which shall not be less than one-fourth of an inch in length, shall be printed at the beginning of each line in which the name of a candidate is printed, except as otherwise provided.
5. On the outside of the ballot, so as to appear when folded, shall be printed the words "Official ballot", followed by the designation of the polling place for which the ballot is prepared, the date of the election, and a facsimile of the signature of the auditor or other officer who has caused the ballot to be printed. [C97,§1109; S13,§1109; C24, 27, 31, 35,§775.]

One square for president, etc., §751
Signature in primary elections, §564

776 Vacancies certified before ballots are printed. The name supplied for a vacancy by the certificate of the secretary of state, or by nomination certificates or papers for a vacancy filed with the county auditor, or city or town

clerk, shall, if the ballots are not already printed, be placed on the ballots in place of the name of the original nominee. [C97,§1108; C24, 27, 31, 35,§776.]

777 Vacancies certified after ballots are printed. If vacancies be certified after the ballots have been printed, new ballots, whenever practicable, shall be furnished. [C97, §1108; C24, 27, 31, 35,§777.]

778 Inserting name of vacancy nominee. When it may not be practicable, after a vacancy has been certified, to have new ballots printed, the election officers having charge of them shall place the name supplied for the vacancy upon each ballot used before delivering it to the judges of election. [C97,§1108; C24, 27, 31, 35, §778.]

779 Furnishing judges name of vacancy nominee—pasters. If said ballots have been delivered to the judges of election before a vacancy has been certified, said auditor or clerk shall immediately furnish the name of such substituted nominee to all judges of election within the territory in which said nominee may be a candidate.

Pasters with the name of the substituted nominee thereon shall likewise be furnished the voter with his ballot when possible to do so. [C97,§1108; C24, 27, 31, 35,§779.]

Referred to in §780

780 Filling in name of vacancy nominee. Judges of election having charge of the ballots shall, in the case contemplated in section 779, place the name supplied for the vacancy upon each ballot issued before delivering it to the voter, by affixing a paster, or by writing or stamping the name thereon. [C97,§1108; C24, 27, 31, 35,§780.]

781 Time of printing—inspection and correction. Ballots shall be printed and in the possession of the officer charged with their distribution in time to enable him to furnish ballots to absent voters as provided by law. Said printed ballots shall be subject to the inspection of candidates and their agents. If mistakes are discovered, they shall be corrected without delay, in the manner provided in this chapter. [C97,§1110; C24, 27, 31, 35,§781.]

Ballot to absent voter, §928
Correction of primary ballots, §552

782 Number ballots delivered. The officers charged with the printing of the ballots shall cause ballots of the kind to be voted in each precinct, to be delivered to the judges of election as follows: In general elections which are presidential elections seventy-five ballots for every fifty votes, or fraction thereof, cast in said precinct at the last preceding general election which was also a presidential election; and in general elections which are not presidential elections, seventy-five ballots for every fifty votes, or fraction thereof, cast therein at the last preceding general election which was not a presidential election. [C97,§1110; C24, 27, 31, 35,§782.]

783 Packing ballots — delivery — receipts. Such ballots shall be put up in separate sealed packages, with marks on the outside, clearly designating the polling place for which they are intended and the number of ballots inclosed, and receipt therefor shall be given by the judge or judges of election to whom they are delivered, which receipt shall be preserved by the officer charged with the printing of the ballots. [C97, §1110; C24, 27, 31, 35,§783.]

784 Reserve supply of ballots. Any officer charged with the printing and distribution of ballots shall provide and retain at his office an ample supply of ballots, in addition to those distributed to the several voting precincts, and if at any time the ballots furnished to any precinct shall be lost, destroyed, or exhausted before the polls are closed, on written application, signed by a majority of the judges of such precinct, or signed and sworn to by one of such judges, he shall immediately cause to be delivered to such judges, at the polling place, such additional supply of ballots as may be required, and sufficient to comply with the provisions of this chapter. [C97,§1110; C24, 27, 31, 35,§784.]

785 Form of reserve supply. For general elections, the supply of ballots so retained shall only equal the number provided for the precinct casting the largest vote at the preceding general election, and shall include only the portions of the various tickets to be voted for throughout the entire county, with blank spaces in which the names of candidates omitted may be written by the voter, and with blank spaces in the indorsement upon the back of such ballots, in which the name of the precinct shall be written by the judges of election. [C97,§1110; C24, 27, 31, 35, §785.]

786 Attorney general to furnish instructions. The attorney general shall prepare, and from time to time revise, written instructions to the voters relative to voting, and deliver such instructions to the secretary of state. Such instructions shall cover the following matters:

1. The manner of obtaining ballots.
2. The manner of marking ballots.
3. That unmarked or improperly marked ballots will not be counted.
4. The method of gaining assistance in marking ballots.
5. That any erasures or identification marks, or otherwise spoiling or defacing a ballot, will render it invalid.
6. Not to vote a spoiled or defaced ballot.
7. How to obtain a new ballot in place of a spoiled or defaced one.
8. Upon the right of an employee to absent himself for two hours for the purpose of voting, by application for leave so to do made before the day of election, without deduction from his salary or wages.
9. Any other matters thought necessary.

[C97,§1111; C24, 27, 31, 35,§786.]

787 Copies of instructions. The secretary of state shall furnish county auditors and city

clerks with copies of the foregoing instructions. [C97,§1111; C24, 27, 31, 35,§787.]

788 Judges furnished instructions. The county auditor and city clerk shall cause copies of the foregoing instructions to be printed in large, clear type, under the heading of "Card of Instructions", and shall furnish the judges of election with a sufficient number of such cards as will enable them to comply with section 789. [C97,§1111; C24, 27, 31, 35,§788.]

789 Posting instruction cards and sample ballots. The judges of election, before the opening of the polls, shall cause said cards of instructions to be securely posted as follows:

1. One copy in each voting booth.
2. Not less than four copies, with an equal number of sample ballots, in and about the polling place. [C97,§1112; C24, 27, 31, 35,§789.]

Referred to in §788
Sample primary ballots, §558
Sample voting machine ballots, §915

790 Publication of list of nominations. The county auditor shall, prior to the day of election, publish a list of all nominations made as provided by law, and to be voted for at such election, except township, city, or town officers. Such publication shall be, as near as may be, in the form in which such nominees will appear on the official ballot. Such publication shall be in two newspapers, representing, if possible, the political parties which cast at the preceding general election the largest number and the next largest number of votes. [C97,§1112; C24, 27, 31, 35,§790.]

791 Time of opening and closing polls. At all elections the polls shall be opened at eight o'clock in the forenoon, except in cities where registration is required, when the polls shall be opened at seven o'clock in the forenoon, or in each case as soon thereafter as vacancies in the places of judges or clerks of election have been filled. In all cases the polling places shall be closed at eight o'clock in the evening. [C51, §251; R60,§486; C73,§611; C97,§1096; S13, §1096; C24, 27, 31, 35,§791.]

Analogous provision, §565

791.1 Voters entitled to vote. All persons entitled to vote at said election who are within said polling places at the time said polling places are closed shall be permitted to vote. [C27, 31, 35,§791-a1.]

792 Oath. Before opening the polls, each of the judges and clerks shall take the following oath: "I, A. B., do solemnly swear that I will impartially, and to the best of my knowledge and ability, perform the duties of judge (or clerk) of this election, and will studiously endeavor to prevent fraud, deceit, and abuse in conducting the same." [C51,§249; R60,§484; C73,§609; C97,§1094; C24, 27, 31, 35,§792.]

Referred to in §4216.11
Organization in primary elections, §559.

793 How administered. Any one of the judges or clerks present may administer the oath to the others, and it shall be entered in the poll books, subscribed by the person taking it, and certified by the officer administering it. [C51,§250; R60,§485; C73,§610; C97,§1095; C24, 27, 31, 35,§793.]

Referred to in §4216.11
Oaths in primary elections, §559

794 Ballot furnished to voter. The judges of election of their respective precincts shall have charge of the ballots and furnish them to the voters. Any person desiring to vote shall give his name, and, if required, his residence, to such judges, one of whom shall thereupon announce the same in a loud and distinct tone of voice. [C97,§1114; C24, 27, 31, 35,§794.]

795 Voting under registration. In precincts where registration is required, if such name is found on the register of voters by the officer having charge thereof, he shall likewise repeat such name in the same manner; if the name of the person desiring to vote is not found on the register of voters, his ballot shall not be received until he shall have complied with the law prescribing the manner and conditions of voting by unregistered voters. [C97,§1114; C24, 27, 31, 35,§795.]

Referred to in §718.20
Registration on election day, §707

796 Challenges. Any person offering to vote may be challenged as unqualified by any judge or elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified. No judge shall receive a ballot from a voter who is challenged, until such voter shall have established his right to vote. [C51,§258; R60,§493; C73,§619; C97,§1115; C24, 27, 31, 35, §796.]

Referred to in §571

797 Examination on challenge. When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him under oath touching his qualifications as a voter. [C51,§259; R60,§494; C73, §620; C97,§1115; C24, 27, 31, 35,§797.]

798 Oath in case of challenge. If the person challenged be duly registered, or if such person is offering to vote in a precinct where registration is not required, and insists that he is qualified, and the challenge be not withdrawn, one of the judges shall tender to him the following oath:

"You do solemnly swear that you are a citizen of the United States, that you are a resident in good faith of this precinct, that you are twenty-one years of age as you verily believe, that you have been a resident of this county sixty days, and of this state six months next preceding this election, and that you have not voted at this election."

If said person takes such oath, his vote shall be received. [C51,§259; R60,§494; C73,§620; C97,§1115; C24, 27, 31, 35,§798.]

799 Voter to receive one ballot—indorsement by judge. One of the judges of election shall give the voter one ballot and only one, on the back of which a judge shall indorse his in-

itials, in such manner that they may be seen when the ballot is properly folded. No ballot without said official indorsement shall be deposited in the ballot box. The voter's name shall immediately be checked on the registry list. [C97,§§1116, 1117; C24, 27, 31, 35,§799.]

Indorsement in primary elections, §564

800 Names to be entered on poll book. The name of each person, when a ballot is delivered to him, shall be entered by each of the clerks of election in the poll book kept by him, in the place provided therefor. [C51,§260; R60,§495; C73, §621; C97,§1116; C24, 27, 31, 35,§800.]

Referred to in §718.25
Entries on registration certificates, §718.25

801 Marking and return of ballot. On receipt of the ballot, the voter shall, without leaving the inclosed space, retire alone to one of the voting booths, and without delay mark his ballot, and, before leaving the voting booth, shall fold the same in such manner as to conceal the marks thereon, and deliver the same to one of the judges of election. The number of the voter on the poll books or register lists shall not be indorsed on the back of his ballot. [C51,§257; R60,§492; C73,§617; C97,§§1117, 1119; S13, §1119; C24, 27, 31, 35,§801.]

802 Depositing ballots. One of the judges of election shall at once, after receiving the ballot, in the presence of the voter, deposit such ballot in the ballot box and the voter shall quit said inclosed space as soon as he has voted. [C51,§257; R60,§492; C73,§617; C97,§1117; C24, 27, 31, 35,§802.]

803 Failure to vote—return of ballot. Any voter who, after receiving an official ballot, decides not to vote, shall, before retiring from within the guard rail, surrender to the election officers the official ballot which has been given him, and such fact shall be noted on each of the poll lists. A refusal to surrender such ballot shall subject the person so offending to immediate arrest and the penalties provided in this chapter. [C97,§1117; C24, 27, 31, 35,§803.]

Penalty, §836

804 Prohibited ballot—taking ballot from polling place. No voter shall vote or offer to vote any ballot except such as he has received from the judges of election, nor take or remove any ballot from the polling place before the close of the poll. [C97,§1117; C24, 27, 31, 35,§804.]

805 Limitation on time for voting. No voter shall be allowed to occupy a voting booth already occupied by another, nor remain within said inclosed space more than ten minutes, nor to occupy a voting booth more than five minutes, in case all of said voting booths are in use and other voters waiting to occupy the same, nor to again enter the inclosed space after having voted; nor shall more than two voters in excess of the whole number of voting booths provided be allowed at any one time in such inclosed space, except by the authority of the election officers to keep order and enforce the law. [C97, §1117; C24, 27, 31, 35,§805.]

806 Selection of officials to assist voters. At, or before, the opening of the polls, the judges of each precinct shall select two members of the election board, of different political parties, to assist voters who may be unable to mark their ballots. [C97,§1118; C24, 27, 31, 35,§806.]

807 Assisting voter. Any voter who may declare upon oath that he cannot read the English language, or that, by reason of any physical disability other than intoxication, he is unable to mark his ballot, shall, upon request, be assisted by said two officers, in marking said ballot. Said officers shall mark said ballot as directed by the voter, and shall thereafter give no information regarding the same. [C97,§1118; C24, 27, 31, 35,§807.]

808 Assistance indicated on poll book. The clerks of election shall enter upon the poll lists, after the name of any elector who received such assistance in marking his ballot, a memorandum of the fact. [C97,§1118; C24, 27, 31, 35,§808.]

Referred to in §718.25
Entry on registration certificate, §718.25

809 Voting mark. The voting mark shall be a cross which shall be placed in the circle at the head of a ticket, or in the squares opposite the names of candidates. [C97,§§1119, 1121; S13,§§1119, 1121; C24, 27, 31, 35,§809.]

Referred to in §815

810 But one vote for same office except in groups. No voter shall vote for more than one candidate for the same office, nor for a greater number of candidates for two or more offices of the same class than there are offices of such class to be filled at such election. [C97,§1120; S13, §1120; C24, 27, 31, 35,§810.]

Referred to in §815

811 How to mark a straight ticket. If the names of all the candidates for whom a voter desires to vote appear upon the same ticket, and he desires to vote for all candidates whose names appear upon such ticket he may do so in any one of the following ways:

1. He may place a cross in the circle at the top of such ticket without making a cross in any square beneath said circle.
2. He may place a cross in the square opposite the name of each such candidate without making any cross in the circle at the top of such ticket.
3. He may place a cross in the circle at the top of such ticket and also a cross in any or all of the squares beneath said circle. [C97,§§1119, 1120; S13,§§1119, 1120; C24, 27, 31, 35,§811.]

Referred to in §815

812 Voting part of ticket only. If the names of all the candidates for whom the voter desires to vote appear upon a single ticket but he does not desire to vote for all the candidates whose names appear thereon, he shall place a cross in the square opposite the name of each such candidate for whom he desires to vote without making any cross in the circle at the top of such ticket. [C97,§§1119, 1120; S13,§§1119, 1120; C24, 27, 31, 35,§812.]

Referred to in §815

813 Group candidates for offices of same class. Where two or more offices of the same class are to be filled at the same election, and all of the candidates for such offices, for whom the voter desires to vote, appear upon his party ticket at the top of which he has marked a cross in the circle, he need not otherwise indicate his vote for such candidates; but if the name of any candidate for whom he desires to vote for such office appears upon a different ticket, then as to such group of candidates the cross in the circle does not apply and to indicate his choice the voter must place a cross in the square opposite the name of each such candidate for whom he desires to vote whether the same appears under such marked circle or not. [C97,§§1119, 1120; S13,§§1119, 1120; C24, 27, 31, 35,§813.]

Referred to in §815

814 How to mark a mixed ticket. If the names of all candidates for whom a voter desires to vote do not appear upon the same ticket, he may indicate the candidates of his choice by marking his ballot in any one of the following ways:

1. He may place a cross in the circle at the top of a ticket on which the names of some of the candidates for whom he desires to vote appear and also a cross in the square opposite the name of each other candidate of his choice, whose name appears upon some ticket other than the one in which he has marked the circle at the top.

2. He may place a cross in the square opposite the name of each candidate for whom he desires to vote without placing any cross in any circle. [C97,§§1119, 1120; S13,§§1119, 1120; C24, 27, 31, 35,§814.]

Referred to in §815

815 Counting ballots. The ballots shall be counted according to the markings thereon, respectively, as provided in sections 809 to 814, inclusive, and not otherwise. If, for any reason, it is impossible to determine from a ballot, as marked, the choice of the voter for any office, such ballot shall not be counted for such office. When there is a conflict between the cross in the circle on one ticket and the cross in the square on another ticket on the ballot, the cross in the square shall be held to control, and the cross in the circle in such case shall not apply as to that office. Any ballot marked in any other manner than as authorized in sections 809 to 814, inclusive, and in such manner as to show that the voter employed such mark for the purpose of identifying his ballot, shall be rejected. [C97,§1120; S13,§1120; C24, 27, 31, 35, §815.]

816 Writing name on ballot. The voter may also insert in writing in the proper place the name of any person for whom he desires to vote and place a cross in the square opposite thereto. The writing of such name without making a cross opposite thereto, or the making of a cross in a square opposite a blank without writing a name therein, shall not affect the validity of the remainder of the ballot. [C97, §1119; S13,§1119; C24, 27, 31, 35,§816.]

817 Spoiled ballots. Any voter who shall spoil his ballot may, on returning the same to the judges, receive another in place thereof, but no voter shall receive more than three ballots, including the one first delivered to him. None but ballots provided in accordance with the provisions of this chapter shall be counted. [C97, §1121; S13,§1121; C24, 27, 31, 35,§817.]

818 Defective ballot does not nullify vote. No ballot properly marked by the voter shall be rejected:

1. Because of any discrepancy between the printed ballot and the nomination paper, or certificate of nomination, or certified abstract of the canvassing board.

2. Because of any error in stamping or writing the indorsement thereon by the officials charged with such duties.

3. Because of any error on the part of the officer charged with such duty in delivering the wrong ballots at any polling place. [C97,§1122; C24, 27, 31, 35, §818.]

819 Defective ballots. Said defective ballots shall be counted for the candidate or candidates for such offices named in the nomination papers, certificate of nomination, or certified abstract. [C97,§1122; C24, 27, 31, 35,§819.]

820 Wrong ballots. Said wrong ballots shall be counted as cast for all candidates for whom the voter had the right to vote, and for whom he did vote. [C97,§1122; C24, 27, 31, 35,§820.]

821 Persons permitted at polling places. The following persons shall be permitted to be present at and in the immediate vicinity of the polling places, provided they do not solicit votes:

1. Any person who is by law authorized to perform or is charged with the performance of official duties at the election.

2. Any number of persons, not exceeding three from each political party having candidates to be voted for at such election, to act as challenging committees, who are appointed and accredited by the executive or central committee of such political party or organization.

3. Any number of persons not exceeding three from each of such political parties, appointed and accredited in the same manner as above prescribed for challenging committees, to witness the counting of ballots. [C97,§1124; C24, 27, 31, 35,§821.]

822 Ordering arrest. Any judge or clerk of election shall order the arrest of any person who conducts himself in a noisy, riotous, tumultuous or disorderly manner at or about the polls, so as to disturb the election, or insults or abuses the judges or clerks of election, or commits a breach of the peace, or violates any of the provisions of this chapter. [C51,§253; R60,§488; C73,§613; C97,§1128; C24, 27, 31, 35,§822.]

823 May commit disorderly person. Any constable or special policeman may forthwith arrest such person and bring him before the judges of election, and they, by a warrant under their

hands, may commit him to the jail of the county for a term not exceeding twenty-four hours, but they shall permit him to vote. [C51,§253; R60, §488; C73,§613; C97,§1128; C24, 27, 31, 35,§823.]

824 **Prohibited acts on election day.** The following acts, except as specially authorized by law, are prohibited on any election day:

1. Loitering, congregating, electioneering, treating voters, or soliciting votes, during the receiving of the ballots, within one hundred feet of any outside door of any building affording access to any room where the polls are held, or of any outside door of any building affording access to any hallway, corridor, stairway, or other means of reaching the room where the polls are held.
2. Interrupting, hindering, or opposing any voter while in or approaching the polling place for the purpose of voting.
3. A voter allowing any person to see how his ballot is marked.
4. A false statement by a voter as to his ability to mark his ballot.
5. Interfering or attempting to interfere with a voter when inside the inclosed space, or when marking his ballot.
6. Endeavoring to induce a voter to show how he marks, or has marked his ballot.
7. Marking, or causing in any manner to be marked, on any ballot, any character for the purpose of identifying such ballot. [C97,§§1124, 1134; S13,§1137-a5; C24, 27, 31, 35,§824.]

Referred to in §825
Assisting voter, §807
Opposing by challenge, §796
Voting mark, §809

825 **Penalty.** Any violation of the provisions of section 824 shall be punished by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment for not less than ten days nor more than thirty days in the county jail, or by both fine and imprisonment. [C97,§1134; C24, 27, 31, 35,§825.]

826 **Employees entitled to time to vote.** Any person entitled to vote at a general election shall, on the day of such election, be entitled to absent himself from any services in which he is then employed for a period of two hours, between the time of opening and closing the polls, which period may be designated by the employer, and such voter shall not be liable to any penalty, nor shall any deduction be made from his usual salary or wages, on account of such absence, but application for such absence shall be made prior to the day of election. [C97, §1123; C24, 27, 31, 35,§826.]

Referred to in §827

827 **Intimidation of employees by employer.** Any employer who shall refuse to an employee the privilege conferred by section 826, or shall subject such employee to a penalty or reduction of wages because of the exercise of such privilege, or shall in any manner attempt to influence or control such employee as to how he shall vote, by offering any reward, or threatening discharge from employment, or otherwise intimidating or attempting to intimidate such employee from exercising his right to vote, shall be punished by a fine of not less than five dollars nor more than one hundred dollars. [C97,§1123; C24, 27, 31, 35,§827.]

828 **Unlawful acts.** It shall be unlawful for any person, prior to the closing of the polls, willfully to do any of the following acts:

1. Destroy, deface, tear down, or remove any list of candidates, card of instruction, or specimen ballot posted as provided by law.
2. Remove or destroy any of the supplies or articles furnished for the purpose of enabling voters to prepare their ballots. [C97,§1135; C24, 27, 31, 35,§828.]

Referred to in §829
Posting required, §§558, 789

829 **Penalty.** Any person violating section 828 shall be fined not less than ten dollars nor more than one hundred dollars, or imprisoned not less than ten nor more than thirty days, or be punished by both said fine and imprisonment. [C97,§1135; C24, 27, 31, 35,§829.]

830 **Official neglect or misconduct.** Any public officer upon whom a duty is imposed by this chapter, who shall willfully neglect to perform such duty, or who shall willfully perform it in such a way as to hinder the object thereof, or shall disclose to anyone, except as may be ordered by any court of justice, the manner in which any ballot may have been voted, shall be punished by a fine of not less than five dollars nor more than one thousand dollars, or by imprisonment in the penitentiary not less than one nor more than five years, or by both fine and imprisonment. [C97,§1137; C24, 27, 31, 35,§830.]

831 **Special police.** The city council shall detail and employ, at each election, from citizens, or from the police force of the city, from two to four special policemen for each voting precinct and fully empower them for the special occasion of such election to prevent violations of this chapter, or of any other lawful command made under this chapter. Said special police shall be men of good character and reputation and shall be appointed on the nomination of the principal political committee of each political party recognized as the two leading parties, and in equal numbers from each of said political parties. No other peace officer than those above named shall exercise his authority for preserving order at or within one hundred feet of such voting places, unless called in by an emergency. If no policeman be in attendance, the judges of election may appoint one or more specially, by writing, who shall have all the powers of such special policeman. [C97,§1125; C24, 27, 31, 35,§831.]

832 **Constables.** Except in voting precincts within any city, any constable of the township, who may be designated by the judges of election, shall attend at the place of election; if none attend, the judges of the election may, in writing, specially appoint one or more, who shall have all the powers of a regular constable. [C51,

§252; R60,§487; C73,§612; C97,§1126; C24, 27, 31, 35,§832.]

Powers of constable, §10629; also chs 621–623

833 Preserving order. All special policemen and constables are authorized and required to preserve order and peace at all places of election, and such special policemen, constables, and all other persons are authorized and required to obey the lawful orders and commands of said judges of election given to prevent violations of this chapter. [C51,§252; R60,§487; C73,§612; C97,§1127; C24, 27, 31, 35,§833.]

834 Compensation of police. The special policemen appointed under the provisions of this chapter, when not appointed from the police force of the city, shall be entitled to receive two dollars a day for their services. [S13,§1129; C24, 27, 31, 35,§834.]

835 Election expenses. The expense of necessary booths, guard rails, and ballot boxes shall be paid by the county. All other election expenses authorized by law shall be paid by the county in case of general elections or special elections held by the county, and in all other cases by the city, town, or other municipality in which the election is held. [C97,§1129; S13, §1129; C24, 27, 31, 35,§835.]

Schoolhouses as polling places, §§742, 4371

836 Penalty. Any person violating or attempting to violate any provisions or requirements of this chapter, or failing or refusing to comply with any order or command of an election officer, made in pursuance of the provisions of this chapter, shall, unless otherwise provided, be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or by imprisonment of not less than twenty days, nor more than six months, in the county jail. [C97, §1133; C24, 27, 31, 35,§836.]

837 Promise of position. It shall be unlawful for any candidate for any office to be voted for at any primary, general, municipal, or special election, prior to his nomination or election, to promise, either directly or indirectly, to support or use his influence in behalf of any person or persons for any position, place, or office, or to promise directly or indirectly to name or appoint any person or persons to any place, position, or office in consideration of any person or persons supporting him or using his, her, or their influence in securing his or her nomination, election, or appointment. [S13, §1134-a; C24, 27, 31, 35,§837.]

Referred to in §839

838 Promise of influence. It shall be unlawful for any person to solicit from any candidate for any office to be voted for at any primary, municipal, general, or special election, or any candidate for appointment to any public office, prior to his nomination, election, or appointment, a promise, directly or indirectly, to support or use his or her influence in behalf of any person or persons for any position, place, or office, or a promise either directly or indirectly to name or appoint any person or persons to any place, position, or office in consideration of any person or persons supporting him or her, or using his, her, or their influence in securing his or her nomination, election, or appointment. [S13,§1134-b; C24, 27, 31, 35,§838.]

Referred to in §839

839 Penalty. Any person violating any of the provisions of sections 837 and 838 shall be deemed guilty of a misdemeanor and punished by a fine of not less than fifty dollars nor more than three hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months. [S13,§1134-c; C24, 27, 31, 35,§839.]

CHAPTER 41

CANVASS OF VOTES

Chapter applicable to primary elections, §531

840 Canvass by judges.
841 Judges declare election.
842 Double or defective ballots.
843 Ballots objected to.
844 Disputed ballots returned separately.
845 Ballots in excess of poll list.
846 Error on county office—township office.
847 Error on state or district office—tie vote.
848 Return of ballots not voted.
849 Record of ballots.
850 Proclamation of result.
851 Return and preservation of ballots.
852 Destruction of general election ballots.
853 Destruction of primary election ballots.
854 Destruction in abeyance pending contest.
855 Return of board.
856 Return of poll book and registration book.
857 Return of remaining poll and registration books.
858 Preservation of books.
859 Canvass of returns for city, town and township officers.
860 Abstracts of votes—certificates of election.
861 Notice to candidate of his election.
862 Messengers for missing returns.
863 Canvass by board of supervisors.
864 Abstract of votes.
865 Duplicate abstracts.
866 Declaration of election.
867 Returns filed.
868 Certificate of election.
869 Abstracts forwarded to secretary of state.
870 Abstracts for governor and lieutenant governor.
871 Indorsement on other envelopes.
872 Forwarding of envelopes.
873 Missing abstracts.
874 Abstracts on governor.
875 Envelopes containing other abstracts.
876 State canvassing board.
877 Time of state canvass.
878 Abstract.
879 Record of canvass.
880 Certificate of election.
881 Certificates mailed.
882 Senator or congressman.

883 Tie vote.
884 Canvass public—result determined.
885 Special elections—canvass and certificate.
886 Messengers for election returns.

840 Canvass by judges. When the poll is closed, the judges shall forthwith, and without adjournment:

1. Publicly canvass the vote, and credit each candidate with the number of votes counted for him.
2. Ascertain the result of the vote.
3. Compare the poll lists and correct errors therein.
4. Cause each clerk to keep a tally list of the count. [C51,§§261, 266; R60,§§496, 501; C73, §§622, 626; C97,§1138; C24, 27, 31, 35,§840.]

841 Judges declare election. The candidate receiving the highest number of votes, if for an office in that precinct alone, shall be declared elected, and the judges shall issue certificates accordingly. [C97,§1138; C24, 27, 31, 35,§841.]

842 Double or defective ballots. If two or more marked ballots are so folded together as to appear to be cast as one, the judges shall indorse thereon "Rejected as double". Such ballots shall not be counted, but shall be folded together and kept as hereinafter directed. Every ballot not counted shall be indorsed "Defective" on the back thereof. [C51,§262; R60,§497; C73, §623; C97,§1139; C24, 27, 31, 35,§842.]

Referred to in §844

843 Ballots objected to. Every ballot objected to by a judge or challenger, but counted, shall be indorsed on the back thereof "Objected to", and there shall also be indorsed thereon, and signed by the judges, a statement as to how it was counted. [C97,§1139; C24, 27, 31, 35, §843.]

Referred to in §844

844 Disputed ballots returned separately. All ballots indorsed as required by sections 842 and 843 shall be inclosed and securely sealed in an envelope, on which the judges shall indorse "Disputed ballots", with a signed statement of the precinct in which, and date of the election at which, they were cast. [C97,§1139; C24, 27, 31, 35,§844.]

845 Ballots in excess of poll list. If the ballots for any office exceed the number of the voters in the poll lists, such fact shall be certified, with the number of the excess, in the return. [C51,§263; R60,§498; C73,§627; C97, §1140; C24, 27, 31, 35,§845.]

846 Error on county office—township office. If, in case of such excess, the vote of the precinct where the error occurred would change the result as to a county office if the person appearing to be elected were deprived of so many votes, then the election shall be set aside as to him in that precinct, and a new election ordered therein; but no person residing in another precinct at the time of the general election shall be allowed to vote at such special election. If the error occurs in relation to a township office, the trustees may order a new election or not, in their discretion. [C51,§263; R60,§498; C73,§627; C97,§1140; C24, 27, 31, 35,§846.]

847 Error on state or district office—tie vote. If the error be in relation to a district or state office, it shall be certified with the number of the excess to the state canvassers. If the error affects the result of the election, the canvass shall be suspended and a new vote ordered in the precinct where the error occurred. When there is a tie vote due to such an excess, there shall be a new election. No person residing in another precinct at the time of the general election shall be allowed to vote at such special election. When the new vote is taken and returned, the canvass shall be completed. [C51, §263; R60,§498; C73,§627; C97,§1140; C24, 27, 31, 35,§847.]

848 Return of ballots not voted. Ballots not voted, or spoiled by voters while attempting to vote, shall be returned by the judges of election to the officer or authorities charged with their printing and distribution, and a receipt taken therefor, and they shall be preserved for six months. [C51,§269; R60,§504; C73,§630; C97, §1141; C24, 27, 31, 35,§848.]

C97, §1141, editorially divided

849 Record of ballots. Such officer shall keep a record of the number of ballots delivered for each polling place, the name of the person to whom, and the time when, delivered, and enter upon such record the number and character of the ballots returned, with the time when and the person by whom they are returned. [C97,§1141; C24, 27, 31, 35,§849.]

850 Proclamation of result. When the canvass is completed one of the judges shall publicly announce the total number of votes received by each of the persons voted for, the office for which he is designated, as announced by the clerks, and the number of votes for, and the number of votes against, any proposition which shall have been submitted to a vote of the people. [C97,§1142; C24, 27, 31, 35,§850.]

851 Return and preservation of ballots. Immediately after making such proclamation, and before separating, the judges shall fold in two folds, and string closely upon a single piece of flexible wire, all ballots which have been counted by them, except those indorsed "Rejected as double", "Defective", or "Objected to", unite the ends of such wire in a firm knot, seal the knot in such a manner that it cannot be untied without breaking the seal, inclose the ballots so strung in an envelope, and securely seal such envelope. The judges shall at once return all the ballots to the officer from whom they were received, who shall carefully preserve them for six months. [C51,§269; R60,§504; C73,§630; C97,§1142; C24, 27, 31, 35,§851.]

Referred to in §924

852 Destruction of general election ballots. If at the expiration of six months no contest is

pending, the officer having the ballots in custody, without opening the package in which they have been inclosed, shall destroy the same by burning, in the presence of two electors, one from each of the two leading political parties, who shall be designated by the chairman of the board of supervisors, or, in municipal elections, by the mayor of the city or town. [C97,§1143; S13, §1143; C24, 27, 31, 35,§852.]

853 Destruction of primary election ballots. The ballots cast at a primary election, with the nomination papers, shall, where no contest is pending, be destroyed ten days prior to the holding of the general election following the primary election at which said ballots were cast. [C97,§1143; S13,§§1087-a10, 1143; C24, 27, 31, 35,§853.]

854 Destruction in abeyance pending contest. If a contest is pending, the ballots shall be kept until the contest is finally determined, and then so destroyed. [C97,§1143; S13,§1143; C24, 27, 31, 35,§854.]

855 Return of board. A return shall be made in each poll book, giving, in words written at length, the whole number of ballots cast for each officer, except those rejected, the name of each person voted for, and the number of votes given to each person for each different office; which return shall be signed by the judges, and be substantially as follows:

At an election at .....in.....township, or in.....precinct of.....township, in .....county, state of Iowa, on the..... day of .....A. D....., there were..... ballots cast for the office of.....of which

A.....B.....had.....votes.

C.....D.....had.....votes.

(and in the same manner for any other officer).

A true return: L... M... N... O... P... Q... } Judges of Election.

Attest: R..... S..... T..... U..... } Clerks of Election.

[C51,§§267, 303; R60,§§502, 537; C73,§§628, 661; C97,§1144; C24, 27, 31, 35,§855.]

856 Return of poll book and registration book. In each precinct, one of the poll books containing the aforesaid signed and attested return, and one of the registration books, if any, shall be delivered by one of the judges within two days to the county auditor. [C51, §268; R60,§§333, 503, 1131; C73,§§503, 629; C97, §1145; C24, 27, 31, 35,§856.]

857 Return of remaining poll and registration books. The other of said poll books and the other registration book, if any, shall be forthwith delivered by one of the judges to the township, city, or town clerk, depending on whether the precinct is a township, city, or town precinct. [C51,§268; R60,§§333, 503, 1131; C73, §§503, 629; C97,§1145; C24, 27, 31, 35,§857.]

858 Preservation of books. The receiving officer shall file said books, and the registry books and lists and other papers pertaining to registration, in his office, and preserve the same for three years and until the determination of any contest then pending, after which they shall be destroyed. [C51,§268; R60,§§333, 503, 1131; C73,§§503, 629; C97,§1145; C24, 27, 31, 35,§858.]

859 Canvass of returns for city, town and township officers. If there are two or more precincts in any township, city, or ward, the trustees and clerk, or the mayor and clerk, as the case may be, shall, on the day after the election, meet and canvass the returns from all precincts for votes cast for officers to be elected by such township, city, or ward. [R60,§1131; C73,§§502, 631; C97,§1146; C24, 27, 31, 35,§859.]

860 Abstracts of votes—certificates of election. The returns shall be opened in the presence of all the canvassers, and an abstract of votes made and signed by them, and the result declared, and a certificate of election signed by them giving the candidates elected. If the mayor shall have been a candidate at such election, a justice of the peace of the county, selected by the clerk, shall act with him in making the canvass. [R60,§1131; C73,§§503, 631; C97,§1146; C24, 27, 31, 35,§860.]

861 Notice to candidate of his election. Notice of the result of the election of township, city, and town officers shall be given by the township, city, or town clerk, as the case may be, within five days thereafter by mailing notice to each person who has been declared elected, which notice shall specify the office to which such person has been elected and require him to appear before the proper officer and qualify according to law. [C51,§317; R60,§548; C73,§633; C97,§1147; C24, 27, 31, 35,§861.]

Qualification by public officers, ch 53

862 Messengers for missing returns. The county auditor shall, on the fourth day following an election, send messengers for all returns not then received by him. The expense of securing such returns shall be paid by the county. [C51,§270; R60,§505; C73,§634; C97,§1148; C24, 27, 31, 35,§862.]

Mileage paid messengers, §886

863 Canvass by board of supervisors. At their meeting on the Monday after the general election, at twelve o'clock, noon, the board of supervisors shall open and canvass the returns, and make abstracts, stating, in words written at length, the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office. [C51,§§271, 304, 305; R60,§§335, 506, 538, 539; C73,§§635, 662; C97,§1149; C24,,27, 31, 35,§863.]

864 Abstract of votes. The abstract of the votes for each of the following classes shall be made on a different sheet:

1. President and vice president of the United States.
2. Governor and lieutenant governor.
3. All state officers not otherwise provided for.

4. Representatives in congress.
5. Senators and representatives in the general assembly for the county alone.
6. Senators in the general assembly by districts comprising more than one county.
7. Judges of the district court.
8. County officers.
9. Senators in the congress of the United States. [C51,§§272, 304, 305; R60,§§507, 538, 539; C73,§§636, 662; C97,§1150; S13,§1150; C24, 27, 31, 35,§864.]

Additional provision, §76

865 Duplicate abstracts. All abstracts of votes, except the abstracts of votes for county officers, shall be made in duplicate, and signed by the board of county canvassers. One of said abstracts shall be forwarded to the secretary of state, and the other filed by the county auditor. [C51,§§272, 304, 305; R60,§§507, 538, 539; C73,§§637, 662; C97,§1151; S13,§1151; C24, 27, 31, 35,§865.]

866 Declaration of election. Each abstract of the votes for such officers as the county alone elects, except district judges, and senators and representatives in the general assembly, shall contain a declaration of whom the canvassers determine to be elected. [C51,§275; R60,§509; C73,§639; C97,§1152; C24, 27, 31, 35,§866.]

867 Returns filed. When the canvass is concluded, the board shall deliver the original returns to the auditor, who shall file the same, and record each of the abstracts above mentioned in the election book. [C51,§276; R60, §§335, 510; C73,§640; C97,§1154; C24, 27, 31, 35, §867.]

868 Certificate of election. When any person is thus declared elected, there shall be delivered to him a certificate of election, under the official seal of the county, in substance as follows:

STATE OF IOWA, }
.....County. }

At an election holden in said county on the .....day of ....., A. D. ....., A..... B..... was elected to the office of ..... of the said county for the term of ..... years from the .....day of....., A. D. ..... (or if he was elected to fill a vacancy, say for the residue of the term ending on the ..... day of ....., A. D. .....), and until his successor is elected and qualified.

C..... D.....,
President of Board of Canvassers.

Witness, E..... F.....,
County Auditor (clerk).

Such certificate shall be presumptive evidence of his election and qualification. [C51,§277; R60,§§511, 514; C73,§641; C97,§1155; C24, 27, 31, 35,§868.]

869 Abstracts forwarded to secretary of state. The auditor shall, within ten days after the election, forward to the secretary of state, in separate, securely sealed envelopes, one of the said duplicate abstracts of votes for each of the following offices:

1. President and vice president of the United States.
2. Governor and lieutenant governor.
3. United States senator.
4. Representative in congress.
5. Supreme and district judges.
6. Senators and representatives in the general assembly for the county alone.
7. Senators in the general assembly in districts comprising more than one county.
8. All state officers not otherwise specified above. [C51,§§283, 284, 305; R60,§§517, 518, 539; C73,§§645, 662; C97,§1157; S13,§1157; C24, 27, 31, 35,§869.]

870 Abstracts for governor and lieutenant governor. The envelope containing the abstracts of votes for governor and lieutenant governor shall be indorsed substantially as follows: "Abstract of votes for governor and lieutenant governor from ..... county". After being so indorsed said envelope shall be addressed, "To the Speaker of the House of Representatives". [C51,§283; R60, §517; C73,§645; C97,§1157; S13,§1157; C24, 27, 31, 35,§870.]

Referred to in §871

871 Indorsement on other envelopes. Said remaining envelopes shall be indorsed substantially in the manner provided in section 870, with changes necessary to indicate the particular office, and each shall be addressed, "To the Secretary of State". [C51,§§283, 305; R60,§§517, 539; C73,§§645, 662; C97,§1157; S13, §1157; C24, 27, 31, 35,§871.]

872 Forwarding of envelopes. Said envelopes, including the one addressed to the speaker, after being prepared, sealed, and indorsed as aforesaid, shall be placed in one package and forwarded to the secretary of state. [C51,§§284, 305; R60,§§518, 539; C73, §§645, 662; C97,§1157; S13,§1157; C24, 27, 31, 35,§872.]

873 Missing abstracts. If the abstracts from any county are not received at the office of the secretary of state within fifteen days after the day of election, he shall send a messenger to the auditor of such county, who shall furnish him with them, or, if they have been sent, with a copy thereof, and he shall return them to the secretary without delay. [C51,§285; R60,§519; C73,§649; C97,§1158; C24, 27, 31, 35, §873.]

Mileage paid messengers, §886

874 Abstracts on governor. The envelopes containing the abstracts of votes for governor and lieutenant governor shall not be opened by the secretary of state, but he shall securely preserve the same and deliver them to the speaker of the house of representatives at the time said abstracts are canvassed as provided by law. [C24, 27, 31, 35,§874.]

Canvass for governor, §32 et seq.; also Const., Art. IV, §3

875 **Envelopes containing other abstracts.** All other envelopes containing abstracts of votes shall be kept by the secretary of state, unopened, until the time fixed by law for the canvass of such abstracts, and they shall then be opened only in the presence of the state board of canvassers. [C51,§286; R60,§520; C73,§650; C97,§1159; C24, 27, 31, 35,§875.]

Canvass by state canvassers, §877

876 **State canvassing board.** The executive council shall constitute a board of canvassers of all abstracts of votes required to be filed with the secretary of state, except for the offices of governor and lieutenant governor. No member of such board shall take part in canvassing the votes for an office for which he is a candidate. [C51,§287; R60,§521; C73,§§647, 651; C97, §§1160, 1162; S13,§1162; C24, 27, 31, 35,§876.]

Additional provision, §76

877 **Time of state canvass.** On the twentieth day after the day of election, the board of state canvassers shall open and canvass all of the returns. If they are not received from all the counties, it may adjourn, not exceeding twenty days, for the purpose of obtaining them, and, when received, shall proceed with the canvass. The returns of votes cast for senators and representatives in the general assembly shall be canvassed at least twenty days prior to the convening of the general assembly. [C51,§§288, 306; R60,§§522, 540; C73,§§647, 652, 663; C97, §§1161, 1162; S13,§1162; C24, 27, 31, 35,§877.]

Canvass under special election, §885

878 **Abstract.** It shall make an abstract stating, in words written at length, the number of ballots cast for each office, the names of all the persons voted for, for what office, the number of votes each received, and whom it declares to be elected; which abstract shall be signed by the canvassers in their official capacity and as state canvassers, and have the seal of the state affixed. [C51,§§289, 306; R60,§§523, 540; C73, §§653, 663; C97,§1163; C24, 27, 31, 35,§878.]

879 **Record of canvass.** The secretary of state shall file the abstracts when received and shall have the same bound in book form to be kept by him as a record of the result of said state election, to be known as the state election book. [C51,§290; R60,§524; C73,§654; C97, §1164; S13,§1164; C24, 27, 31, 35,§879.]

880 **Certificate of election.** Each person declared elected by the state board of canvassers shall receive a certificate thereof, signed by the governor, or, in his absence, by the secretary of state, with the seal of state affixed, attested by the other canvassers, to be in substance as follows:

STATE OF IOWA:

To A..... B....., Greeting: It is hereby certified that, at an election holden on the ..... day of ..... you were elected to the office of ..... of said state, for the term of ..... years, from and after the ..... day of ..... (or if to fill a vacancy, for the residue of the term, ending on the ..... day of .....).

Given at the seat of government this ..... day of .....

If the governor be absent, the certificate of the election of the secretary of state shall be signed by the auditor. The certificate to members of the legislature shall describe, by the number, the district from which the member is elected. [C51,§§288, 306; R60,§§522, 540; C73, §§652, 657, 663; C97,§1165; C24, 27, 31, 35,§880.]

881 **Certificates mailed.** The secretary of state shall deliver or mail certificates of election to the persons declared elected. [C51,§§292, 294; R60,§§526, 528; C73,§§648, 656, 658; C97, §1167; C24, 27, 31, 35,§881.]

882 **Senator or congressman.** The certificate of the election of a senator or representative in congress shall be signed by the governor, with the seal of the state affixed, and be countersigned by the secretary of state. [C51,§294; R60,§528; C73,§658; C97,§1166; C24, 27, 31, 35, §882.]

883 **Tie vote.** If more than the requisite number of persons, including presidential electors, are found to have an equal and the highest number of votes, the election of one of them shall be determined by lot. The name of each of such candidates shall be written on separate pieces of paper, as nearly uniform in size and material as possible, and placed in a receptacle so that the names cannot be seen. In the presence of the board of canvassers, one of them shall publicly draw one of such names, and such person shall be declared elected. The result of such drawing shall be entered upon the abstract of votes and duly recorded, and a certificate of election issued to such person, as provided in this chapter. [C51,§§281, 282, 307, 316; R60,§§515, 516, 541, 547; C73,§§632, 643, 644, 664; C97, §1169; C24, 27, 31, 35,§883.]

Referred to in §4216.21

884 **Canvass public — result determined.** All canvasses of returns shall be public, and the persons having the greatest number of votes shall be declared elected. [C51,§§262, 273, 307; R60,§§497, 508, 541; C73,§§623, 638, 664; C97, §1170; C24, 27, 31, 35,§884.]

885 **Special elections—canvass and certificate.** In case a special election has been held, the board of county canvassers shall meet at one o'clock in the afternoon of the second day thereafter, and canvass the votes cast thereat. The county auditor, as soon as the canvass is completed, shall transmit to the secretary of state an abstract of the votes so canvassed, and the state board, within five days after receiving such abstracts, shall canvass the returns. A certificate of election shall be issued by the county or state board of canvassers, as in other cases. All the provisions regulating elections, obtaining returns, and canvass of votes at general elections, except as to time, shall apply to spe-

cial elections. [R60,§673; C73,§§791–793; C97, §1171; C24, 27, 31, 35,§885.]

Referred to in §971.17
Certificate, §§868, 880

886 Messengers for election returns. Messengers sent for the returns of elections shall be paid from the state or county treasury, as the case may be, ten cents a mile going and returning. [C51,§295; R60,§529; C73,§3827; C97, §1172; C24, 27, 31, 35,§886.]

Messengers, §§575, 862, 873

CHAPTER 42

DOUBLE ELECTION BOARDS

887 Election counting board.
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889 "Receiving" and "counting" boards defined.
890 Selection of counting board—duties.
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887 Election counting board. In all election precincts the board of supervisors may appoint for each primary and general election three additional judges and two additional clerks to be known as the election counting board. [C24, 27, 31, 35,§887.]

Referred to in §889
Election boards, §730 et seq.
39GA, ch 60, §1, editorially divided

888 Qualifications. Each of such appointees shall be of good moral character, well informed, able to read, write, and speak the English language, shall be a voter in the election precinct in which he is to serve, and entitled to vote therein. [C24, 27, 31, 35,§888.]

Referred to in §889

889 "Receiving" and "counting" boards defined. The judges and clerks of election as provided in existing law shall be known as the receiving board and it shall be their duty to supervise the casting of ballots at said election, and the judges and clerks provided for in sections 887 and 888 shall be known as the counting board. [C24, 27, 31, 35,§889.]

Regular election boards, §730
39GA, ch 60, §2, editorially divided

890 Selection of counting board — duties. The counting board shall be chosen from the two political parties casting the highest number of votes at the last general election. Not more than two judges nor more than one clerk shall belong to the same political organization, provided that two of such judges shall be chosen from the political party casting the highest number of votes at the last preceding general election. The receiving board shall perform all the functions of judges and clerks of election as now provided by law except as to counting and certifying the vote as by this chapter provided. [C24, 27, 31, 35, §890.]

Duties, §§893, 895, 899

891 Oath. All judges and clerks shall take an oath as now provided in existing law for judges of election and in addition to such oath the counting board shall take the following oath:

"I.....do swear (or affirm) that I will duly attend to the ensuing election during the continuance thereof as a member of the counting board; that I will not, prior to the closing of the polls, communicate in any manner, directly or indirectly, by word or sign, the progress of the counting, nor the result so far as ascertained, nor any information whatsoever in relation thereto; that I will make and return a perfect return of the said election, and will in all things truly, impartially, and faithfully perform my duty respecting the same to the best of my judgment and ability; that I am not directly or indirectly interested in any bet or wager on the result of this election." [C24, 27, 31, 35,§891.]

Oath, §792
39GA, ch 60, §7, editorially divided

892 Administration of oath. This oath shall be administered at the time the board enters upon its duties by a clerk of the receiving board who is hereby empowered to administer such oath. [C24, 27, 31, 35,§892.]

893 Duties of double boards. The counting boards shall proceed to the respective voting places to which they have been appointed, at one o'clock p. m., or in any precinct in which the board of supervisors shall deem it necessary, at such earlier hour after nine o'clock a. m., as such board of supervisors may direct, and shall take charge of the ballot box containing the ballots already cast in that precinct when at least fifty ballots have been cast. It shall retire to a partitioned space or room provided for that purpose and there proceed to count and tabulate the ballots as it shall find them deposited in the ballot box. The receiving board shall continue to receive the votes of electors in the other box provided, until such time as the counting board shall have finished counting and tabulating the ballots cast in the first ballot box. The two boards shall then exchange the first box for the second box and so continue until they have counted and tabulated all the votes cast on that election day. When the hour arrives for closing the polls, the receiving board shall certify to all matters pertaining to casting of ballots and shall then unite with the counting board in the counting of ballots. The judges shall then divide the ballots

not counted and each group of judges and clerks shall proceed to canvass their portion of the same. When the canvass has been completed the judges and clerks shall report the result of their canvass, which report shall be incorporated in the returns provided by law. [C24, 27, 31, 35, §893.]

Return, §855

894 **Ballot boxes.** It shall be the duty of the board of supervisors to provide the judges of election with such ballot boxes and other election supplies as may be required to be furnished in duplicate to accomplish the purpose of this chapter. [C24, 27, 31, 35,§894.]

895 **Manner of counting.** Whenever the counting board receives from the receiving board the ballot box, they shall also be furnished a statement from the receiving board giving the number of votes as shown by the poll books up to that time, which shall equal the number of votes in the ballot box. The counting board shall on opening the ballot box first count the ballots therein. If the number of ballots found in the ballot box exceeds the number as shown by the statement received from the receiving board the counting judges shall proceed to examine the official indorsement of said ballots, and, if any ballots are found that do not bear proper official indorsement, said ballots shall be kept separate and a record of such ballots shall be made and returned under the head of excess ballots. The counting board shall then proceed to count the ballots as now provided by law. [C24, 27, 31, 35,§895.]

Counting primary ballots, §573
Counting general election ballots, §840 et seq.

896 **Secrecy of ballot.** The space or room occupied by the counting board shall be policed in such manner as to prevent any person, or persons, from gaining information regarding the progress of the count before the polls are closed. [C24, 27, 31, 35,§896.]

897 **Presence of persons.** No person shall be admitted into the space or room where such ballots are being counted until the polls are closed, except the counting board. [C24, 27, 31, 35,§897.]

898 **Counting quarters — guarding ballots.** Boards of supervisors shall provide suitable places for the counting of ballots, but when it becomes necessary to remove the ballot box from one room to another, or from one building to another, and at all times when they are in possession of the counting board, they shall be under constant observation of at least two counting judges. [C24, 27, 31, 35,§898.]

899 **Certification of count—returns.** Both boards shall certify to all matters pertaining to counting and canvassing of votes and shall return poll books and ballots to the county auditor as provided by law. [C24, 27, 31, 35,§899.]

Return of books and ballots, §§844, 848, 851, 856, 857

900 **Compensation of board.** Compensation for counting judges and clerks shall be the same as now provided by law for clerks and judges of election. [C24, 27, 31, 35,§900.]

Compensation, §738

901 **Applicability of law.** This chapter shall apply to all general and primary elections, but shall not apply to school elections or town elections, or where voting machines are used. [C24, 27, 31, 35,§901.]

902 **Violations.** Any judge or clerk violating the provisions of this chapter shall be guilty of a misdemeanor, and, upon conviction thereof, shall be liable to a fine of not to exceed five hundred dollars, or imprisonment in the county jail not to exceed six months. Any person so convicted shall be disfranchised for five years thereafter. [C24, 27, 31, 35,§902.]

Referred to in §903
39GA, ch 60, §8, editorially divided

903 **Circulation of information.** Anyone circulating or attempting to circulate any information with reference to the result of the counted ballots shall be guilty of a misdemeanor and punished as provided by section 902. [C24, 27, 31, 35,§903.]

CHAPTER 43

VOTING MACHINES

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904 **Use of voting machines.** At all state, county, city, town, primary, and township elections held in the state, ballots or votes may be cast, registered, recorded, and counted by means of voting machines, as hereinafter provided. [S13,§1137-a7; C24, 27, 31, 35,§904.]

905 Purchase. The board of supervisors of any county, or the council of any incorporated city or town in the state may, by a two-thirds vote, authorize, purchase, and order the use of voting machines in any one or more voting precincts within said county, city, or town, until otherwise ordered by said board of supervisors or city or town council. [S13,§1137-a8; C24, 27, 31, 35,§905.]

906 Terms of purchase. The local authorities, on the adoption and purchase of a voting machine, may provide for the payment therefor in such manner as they may deem for the best interest of the locality, and may for that purpose issue bonds, certificates of indebtedness, or other obligations, which shall be a charge on the county, city, or town. Such bonds, certificates, or other obligations may be issued with or without interest, payable at such time or times as the authorities may determine, but shall not be issued or sold at less than par. [S13,§1137-a14; C24, 27, 31, 35,§906.]

907 Commissioners — term — removal. The governor shall appoint three commissioners, not more than two of whom shall be from the same political party. The said commissioners shall hold office for the term of five years, subject to removal at the pleasure of the governor. [S13, §1137-a9; C24, 27, 31, 35,§907.]

908 Examination of machine. Any person or corporation owning or being interested in any voting machine may call upon the said commissioners to examine the said machine, and make report to the secretary of state upon the capacity of the said machine to register the will of voters, its accuracy and efficiency, and with respect to its mechanical perfections and imperfections. Their report shall be filed in the office of the secretary of state and shall state whether in their opinion the kind of machine so examined can be safely used by such voters at elections under the conditions prescribed in this chapter. If the report states that the machine can be so used, it shall be deemed approved by the commissioners, and machines of its kind may be adopted for use at elections as herein provided. Any form of voting machine not so approved cannot be used at any election. [S13,§1137-a10; C24, 27, 31, 35,§908.]

S13,§1137-a10, editorially divided

909 Compensation. Each commissioner is entitled to one hundred fifty dollars for his compensation and expenses in making such examination and report, to be paid by the person or corporation applying for such examination. No commissioner shall have any interest whatever in any machine reported upon. Provided that said commissioner shall not receive to exceed fifteen hundred dollars and reasonable expenses in any one year; and all sums collected for such examinations over and above said maximum salaries and expenses shall be turned into the state treasury. [S13,§1137-a10; C24, 27, 31, 35, §909.]

910 Construction of machine approved. A voting machine approved by the state board of voting machine commissioners must be so constructed as to provide facilities for voting for the candidates of at least seven different parties or organizations, must permit a voter to vote for any person for any office although not nominated as a candidate by any party or organization, and must permit voting in absolute secrecy.

It must also be so constructed as to prevent voting for more than one person for the same office, except where the voter is lawfully entitled to vote for more than one person for that office; and it must afford him an opportunity to vote for any or all persons for that office as he is by law entitled to vote for and no more, at the same time preventing his voting for the same person twice.

It may also be provided with one ballot in each party column or row containing only the words "presidential electors", preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors.

Such machine shall be so constructed as to accurately account for every vote cast upon it. [S13,§1137-a11; C24, 27, 31, 35,§910.]

911 Experimental use. The board of supervisors of any county or the council of any city or town may provide for the experimental use at an election in one or more districts, of a machine which it might lawfully adopt, without a formal adoption thereof; and its use at such election shall be as valid for all purposes as if it had been lawfully adopted. [S13,§1137-a12; C24, 27, 31, 35,§911.]

912 Duties of local authorities. The local authorities adopting a voting machine shall, as soon as practicable thereafter, provide for each polling place one or more voting machines in complete working order, and shall thereafter keep them in repair, and shall have the custody thereof and of the furniture and equipment of the polling place when not in use at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within the county, city, or town as the officers adopting the same may direct. [S13,§1137-a13; C24, 27, 31, 35,§912.]

913 Ballots — form. All ballots shall be printed in black ink on clear, white material, of such size as will fit the ballot frame, and in as plain, clear type as the space will reasonably permit. The party name for each political party represented on the machine shall be prefixed to the list of candidates of such party. The order of the list of candidates of the several parties or organizations shall be arranged as provided in sections 748 to 760, inclusive, except that the lists may be arranged in horizontal rows or vertical columns. [S13,§1137-a15; C24, 27, 31, 35, §913.]

913.1 Locking of unused party row. At all general elections the officer in charge of preparing the ballot upon every voting machine shall cause the party row next underneath the names of the republican candidates, and also the party row underneath the names of the democratic candidates, to be locked and left blank except when more than seven political parties have nominated candidates whose names are entitled to be placed on the official ballot. [C27, 31, 35, §913-a1.]

914 Exception — party circle and general form. The provisions of section 760 shall not be applicable to voting machines owned prior to April 1, 1921, by any county or municipality insofar as they relate to the party circle and the form of the ballot generally; but nothing herein contained shall prohibit the use of voting machines equipped to comply with the foregoing provisions. [C24, 27, 31, 35,§914.]

915 Sample ballots. The officers or board charged with the duty of providing ballots for any polling place shall provide therefor two sample ballots, which shall be arranged in the form of a diagram showing the entire front of the voting machine as it will appear after the official ballots are arranged for voting on election day. Such sample ballots shall be open to public inspection at such polling place during the day of election and the day next preceding election day. [S13,§1137-a16; C24, 27, 31, 35, §915.]

916 Two sets of ballots. Two sets of ballots shall be provided for each polling place for each election for use in the voting machine. [S13,§1137-a17; C24, 27, 31, 35,§916.]

917 Delivery of ballots. The ballots and stationery shall be delivered to the election board of each election precinct before ten o'clock in the forenoon of the day next preceding the election. [S13,§1137-a18; C24, 27, 31, 35,§917.]

918 Duties of election officers—independent ballots. The judges of election and clerks of each precinct shall meet at the polling place therein, at least three-quarters of an hour before the time set for the opening of the polls at each election, and shall proceed to arrange within the guard rail the furniture, stationery, and voting machine for the conduct of the election. The judges of election shall then and there have the voting machine, ballots, and stationery required to be delivered to them for such election; and, if it be an election at which registered voters only can vote, the registry of such electors required to be made and kept therefor. The judges shall thereupon cause at least two instruction cards to be posted conspicuously within the polling place. If not previously done, they shall arrange, in their proper place on the voting machine, the ballots containing the names of the offices to be filled at such election, and the names of the candidates nominated therefor. If not previously done, the machine shall be so arranged as to show that no vote has been cast, and the same shall not be thereafter operated, except by electors in voting. Before the polls are open for election, each judge shall carefully examine every machine and see that no vote has been cast, and the same shall be subject to inspection of the election officers. Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office, are herein referred to as independent ballots. When two or more persons are to be elected to the same office, and the machine requires that all independent ballots voted for that office be deposited in a single receptacle or device, an elector may vote in or by such receptacle or device for one or more persons whose names do not appear upon the machine with or without the names of one or more persons whose names do so appear. With that exception, and except for presidential electors, no independent ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any independent ballot so voted shall not be counted. An independent ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. [S13,§1137-a19; C24, 27, 31, 35,§918.]

919 Voting machine in plain view—guard rail. The exterior of the voting machine and every part of the polling place shall be in plain view of the election officers. The voting machine shall be placed at least three feet from every wall and partition of the polling place, and at least three feet from the guard rail, and at least four feet from the clerk's table. A guard rail shall be constructed at least three feet from the machine, with openings to admit electors to and from the machine. [S13,§1137-a20; C24, 27, 31, 35,§919.]

920 Method of voting. After the opening of the polls, the judges shall not allow any voter to pass within the guard rail until they ascertain that he is duly entitled to vote. Only one voter at a time shall be permitted to pass within the guard rail to vote. The operating of the voting machine by the elector while voting shall be secret and obscured from all other persons, except as provided by this chapter in cases of voting by assisted electors. No voter shall remain within the voting machine booth longer than one minute, and if he shall refuse to leave it after the lapse of one minute, he shall be removed by the judges. [S13,§1137-a21; C24, 27, 31, 35,§920.]

921 Instructions. In case any elector after entering the voting machine booth shall ask for further instructions concerning the manner of voting, two judges of opposite political parties shall give such instructions to him; but no judge or other election officer or person assisting an elector shall in any manner request, suggest, or seek to persuade or induce any such elector to vote any particular ticket, or for any particular candidate, or for or against any particular amendment, question, or proposition. After receiving such instructions, such elector

shall vote as in the case of an unassisted voter. [S13,§1137-a22; C24, 27, 31, 35,§921.]

922 Injury to machine. No voter, or other person, shall deface or injure the voting machine or the ballot thereon. It shall be the duty of the judges to enforce the provisions of this section. During the entire period of an election, at least one of their number, designated by them from time to time, shall be stationed beside the entrance to the booth and shall see that it is properly closed after a voter has entered it to vote. He shall also, at such intervals as he may deem proper or necessary, examine the face of the machine to ascertain whether it has been defaced or injured, to detect the wrongdoer, and to repair any injury. [S13, §1137-a23; C24, 27, 31, 35,§922.]

923 Canvass of vote. As soon as the polls of the election are closed, the judges of the election thereat shall immediately lock the voting machine against voting and open the counting compartments in the presence of all persons who may be lawfully within the polling place, and proceed to canvass the vote. [S13,§1137-a24; C24, 27, 31, 35,§923.]

924 Locking machine. The judges of election shall, as soon as the count is completed and fully ascertained as in this chapter required, lock the machine against voting, and it shall so remain for the period of thirty days.

Whenever independent ballots have been voted, the judges shall return all of such ballots properly secured in a sealed package as prescribed by section 851. [S13,§1137-a25; C24, 27, 31, 35,§924.]

Independent ballots, §918
Locking unused party row, §913.1

925 Written statements of election. After the total vote for each candidate has been ascertained, and before leaving the room or voting place, the judges shall make and sign written statements of election, as required by the election laws now in force, except that such statements of the canvass need not contain any ballots except the independent ballots as herein provided. [S13,§1137-a26; C24, 27, 31, 35,§925.]

926 What statutes apply—separate ballots. All of the provisions of the election law now in force and not inconsistent with the provisions of this chapter shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this chapter shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures. [S13,§1137-a27; C24, 27, 31, 35,§926.]

CHAPTER 44

ABSENT VOTERS LAW

927 Right to vote—conditions.
928 Application for ballot.
929 School secretary.
930 Application blanks.
931 Form of blank application.
932 Residence.
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934 Party affiliation.
935 Ballot mailed.
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938 Duty of auditor.
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944 Manner of preserving ballot and application.
945 Delivery of ballot.
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954 Affidavit envelope constitutes registration.
955 Alphabetical list completed.
956 Ballot envelope preserved.
957 Challenges.
958 Ballot of deceased voter.
959 Laws made applicable.
960 False affidavit.
961 Refusal to return ballot.
962 Offenses by officers.

927 Right to vote—conditions. Any qualified voter of this state may, as provided in this chapter, vote at any general, municipal, special, or primary election, or at any election held in any independent town, city, or consolidated school district:

1. When, in the conduct of his business or due to other necessary travel, he expects to be absent on election day from the county in which he is a qualified voter.

2. When, through illness or physical disability, he expects to be prevented from personally going to the polls and voting on election day. [SS15, §1137-b; C24, 27, 31, 35, §927.]

Referred to in §§928, 4216.34

928 Application for ballot. Any voter, under the circumstances specified in section 927, may, on any day not Sunday, election day, or a holiday and not more than twenty days prior to the date of election, make application to the county auditor, or to the city or town clerk, as the case may be, for an official ballot to be voted at such election. [SS15,§1137-c; C24, 27, 31, 35, §928.]

929 School secretary. In the application of this chapter to elections held in independent city, town, and consolidated school districts, the secretary of the school board shall perform the duty

herein imposed on the county auditor or clerk of the city or town. [C24, 27, 31, 35,§929.]

For school districts having printed ballots, §4216.08

930 Application blanks. Said officers shall furnish to any qualified voter of the county, city, or town of which they are such officers, blanks on which to make application for such ballot. [SS15, §1137-d; C24, 27, 31, 35,§930.]

931 Form of blank application. Applications for ballots shall be made on blanks substantially in the following form:

"APPLICATION FOR BALLOT TO BE VOTED AT THE.....ELECTION ON .....

State of.....}ss.
County of.....}

I, ..., do solemnly swear that I have been a resident of the state of Iowa for six months, of the county of..... for sixty days, and of the.....precinct of..... ward of the city, town, or township of.....ten days next preceding this election, and that I am a duly qualified voter entitled to vote at said election; that my occupation is ....., and that on account of.....
(Business, illness, or physical disability)
I cannot be at the polls on election day, and I hereby make application for an official ballot or ballots to be voted by me at such election, and that I will return said ballot or ballots to the officer issuing same, before the day of said election. I am affiliated with the .....party.
(Fill out only in case of primary election)

Signed.....

Date.....
Residence (street and number, if any).....
City or town.....
P. O. Address.....

Subscribed and sworn to before me this.....
.....day of....., A. D. 19....,
....."

[SS15,§1137-d; C24, 27, 31, 35,§931.]

Referred to in §932

932 Residence. The requirement in section 931 for ten days residence in the precinct shall not apply to general elections as defined in chapter 40. [C24, 27, 31, 35,§932.]

933 Penalty clause added. Immediately below said form, sections 960 and 961 shall be printed in full. [SS15,§1137-d; C24, 27, 31, 35, §933.]

934 Party affiliation. Said application shall designate the voter's party affiliation only when the application is for a primary election ballot. [SS15,§1137-d; C24, 27, 31, 35,§934.]

935 Ballot mailed. Upon receipt of such application, and immediately after the ballots are printed, it shall be the duty of such auditor or clerk to mail to said applicant, postage prepaid, such official ballot or ballots as such applicant would have the right to cast at such election. [SS15,§1137-e; C24, 27, 31, 35,§935.]

40ExGA, SF27, §8, editorially divided

936 Application mailed. If the voter is absent from the county and requests said application by letter, the auditor may send him both the application and ballot at the same time. [C24, 27, 31, 35,§936.]

937 Personal delivery of ballot. Such officer shall deliver said ballot or ballots to any qualified elector applying in person at the office of such auditor or clerk, as the case may be, and subscribing to the foregoing application, not more than fifteen days before the date of said election, but said ballot shall be immediately marked, inclosed in the ballot envelope with proper affidavit thereon, and returned to said officer. [SS15,§1137-e; C24, 27, 31, 35,§937.]

938 Duty of auditor. It shall be the duty of said auditor or clerk to fold said ballot or ballots in the manner in which they are required to be folded when voted, and to inclose the same in an unsealed envelope, to be furnished by him, which envelope shall bear upon the face thereof the name, official title, and post-office address of such auditor or clerk. [SS15,§1137-f; C24, 27, 31, 35,§938.]

939 Voter's affidavit on envelope. On the reverse side of said unsealed envelope shall be printed a blank form of affidavit in substantially the following form:

"State of.....}ss.
County of.....}

I, ..., do solemnly swear that the following matters relating to my qualifications for registration and voting are true; residence, city, town, or township of....., street, No....., ...county, Iowa. Age.....years. Nativity ..... Color..... Sex..... Term of residence in precinct.....Term of residence in county.....Term of residence in state..... Naturalized..... Date of naturalization papers..... Court in which naturalized..... Date of application..... Whether by act of congress..... Whether qualified voter ..... Last preceding place of residence, city, town, or township of....., ... street, No.....
I am affiliated with the.....party.
(Fill out only in case of primary election)
I am engaged in the business or work of.....; that I shall be prevented from attending the polls on the day of election on account of (here affiant will state whether absence from the county of his residence or physical disability), and that I have marked the inclosed ballot in secret.

Signed.....

Subscribed and sworn to before me this..... day of....., A. D....., and I hereby certify that the affiant exhibited the inclosed ballot to me unmarked; that he then in my presence and in the presence of no other person, and in such manner that I could not see his vote, marked such ballot and inclosed and sealed the same in

this envelope; that the affiant was not solicited or advised by me for or against any candidate or measure.

. . . . . .
. . . . . .
(Official title.)"

[SS15,§1137-f; C24, 27, 31, 35,§939.]

940 Party affiliation. Said affidavit shall designate the voter's party affiliation only in case the ballot inclosed is a primary election ballot. [SS15,§1137-f; C24, 27, 31, 35,§940.]

941 Marking ballot. The voter, on receipt of said ballot or ballots, shall, in the presence of the officer administering the oath and of no other person, mark such ballot or ballots, but in such manner that such officer will not know how such ballot is marked. [SS15,§1137-g; C24, 27, 31, 35,§941.]

942 Taking and subscribing oath. After marking such ballot, the voter shall, before said officer, make and subscribe to the affidavit on the reverse side of the envelope, and, in the presence of such officer, fold such ballot, or ballots, separately, so as to conceal the markings thereon, and deposit the same in said envelope, which shall then be securely sealed. [SS15,§1137-g; C24, 27, 31, 35,§942.]

943 Mailing or delivering ballot. The sealed envelope containing the said ballot or ballots may be personally delivered by the voter to the auditor, deputy, or clerk at the office of said auditor or clerk, prior to election day. If not so delivered, said envelope shall be inclosed in a carrier envelope, which shall also be securely sealed, and mailed by the voter, postage paid, to reach said auditor or clerk prior to election day. [SS15, §1137-g; C24, 27, 31, 35,§943.]

944 Manner of preserving ballot and application. Upon receipt of such ballot, the auditor or clerk shall at once inclose the same, unopened, together with the application made by the voter, in a large carrier envelope, securely seal the same, and indorse thereon, over his official signature, the following:

1. Names of the judges of election of the precinct (naming it) of which the voter is a resident.
2. The name of the city or town in which or near which such judges will hold the election in said precinct.
3. The street number, or other clear designation of the polling place in said precinct, and a statement that "This envelope contains an absent voter's ballot and must be opened only at the polls on election day while said polls are open." [SS15,§§1137-h,-i; C24, 27, 31, 35,§944.]

945 Delivery of ballot. In case said voter's ballot is received by the auditor or clerk prior to the delivery of the official ballots to the judges of election of the precinct in which said elector resides, such ballot, envelope, and application, sealed in the carrier envelope, shall be inclosed in such package and therewith delivered to the judges of such precinct. [SS15,§§1137-h,-i; C24, 27, 31, 35,§945.]

Referred to in §946

946 Auditor may mail or personally deliver. If said voter's ballot be received after the time specified in section 945, said receiving officer shall at once mail said carrier envelope, postage prepaid, to said judges. Said officer may, in person or by deputized agent, personally deliver said envelope to said judges, if he can so do without expense to the county, city, or town. [SS15, §1137-i; C24, 27, 31, 35,§946.]

947 Receipt for ballot. In case ballots and applications are personally delivered, the delivering officer shall take the receipt of the judges therefor. [SS15,§1137-i; C24, 27, 31, 35,§947.]

948 Ballots rejected. All ballots forwarded to absent voters and not received by the auditor or city or town clerk in time for delivery to the judges of election before the closing of the polls, shall be rejected. [C24, 27, 31, 35,§948.]

949 Casting ballots. At any time between the opening and closing of the polls on such election day the judges of election of said precinct shall open the outer or carrier envelope only, announce the absent or disabled voter's name, and compare the signature upon the application with the signature upon the affidavit on the ballot envelope. In case the judges find the affidavits executed, that the signatures correspond, the applicant a duly qualified elector of the precinct, and that the applicant has not voted in person at said election, they shall open the envelope containing the voter's ballot in such manner as not to deface or destroy the affidavit thereon, and take out the ballot or ballots therein contained without unfolding or permitting the same to be unfolded or examined, and, having indorsed the ballot in like manner as other ballots are required to be indorsed, deposit the same in the proper ballot box and enter the voter's name in the poll book, the same as if he had been present and voted in person. [SS15,§1137-j; C24, 27, 31, 35,§949.]

950 Precincts using voting machines. In precincts using voting machines, none of said ballot envelopes shall be opened until immediately after the closing of the polls to voters who vote in person. If there be more than one absent voter's ballot entitled to be cast, they shall, without being unfolded, be thoroughly intermingled in some proper manner, after which they shall be unfolded and counted. The judges of election all being present shall count and shall post the results of the total votes cast for each candidate and/or all votes cast for and against any proposition which shall have been submitted to a vote of the people in a record book provided for that purpose so that a complete, separate, and distinct record may be had of the votes cast as shown by the absent voters' ballots, together with the record of the total votes so cast as shown by both voting machine and absent voters' ballots and such record shall

be signed by all of the judges. [C24, 27, 31, 35, §950; 47GA, ch 95,§1.]

951 **Rejecting ballot.** In case such affidavit is found to be insufficient, or that the signatures do not correspond, or that the applicant is not a duly qualified elector in such precinct, or that the ballot envelope is open, or has been opened and resealed, or that the ballot envelope contains more than one ballot of any one kind, or that said voter has voted in person, such vote shall not be accepted or counted. [SS15,§1137-j; C24, 27, 31, 35,§951.]

952 **Rejected ballots—how handled.** Every ballot not counted shall be indorsed on the back thereof "Rejected because (giving reason therefor)." All rejected ballots shall be inclosed and securely sealed in an envelope on which the judges shall indorse "Defective ballots", with a statement of the precinct in which and the date of the election at which they were cast, signed by the judges and returned to the same officer and in the same manner as by law provided for the return and preservation of official ballots voted at such election. [SS15,§1137-j; C24, 27, 31, 35,§952.]

Return of rejected ballots, §844

953 **Rejection of ballot—return of envelope.** If the ballot is rejected, said ballot envelope, with the affidavit of the voter indorsed thereon, shall be returned with said rejected ballot in the envelope indorsed "Defective ballots". [C24, 27, 31, 35,§953.]

954 **Affidavit envelope constitutes registration.** The affidavit upon the ballot envelope shall constitute a sufficient registration of the voter in precincts where registration is required. [C24, 27, 31, 35,§954.]

955 **Alphabetical list completed.** The judges of election shall, in case the ballot is deposited in the box, enter the voter's name on the alphabetical lists if not already there, with the same data as is entered when a certificate of registration is filed. [C24, 27, 31, 35,§955.]

956 **Ballot envelope preserved.** The ballot envelope having the voter's affidavit thereon shall, in case the ballot is deposited in the box, be preserved and returned with the certificates of registration, poll book, and alphabetical lists to the city clerk, who shall preserve the same, and it shall be used by the registers of election, in precincts where registration is required, in making up the new registry lists from the poll books, and such affidavit shall serve as the registration record of the voter for the new registry books and lists. [C24, 27, 31, 35,§956.]

957 **Challenges.** The vote of any absent voter may be challenged for cause and the judges of election shall determine the legality of such ballot as in other cases. [SS15,§1137-k; C24, 27, 31, 35,§957.]

Challenges, §§796–798

958 **Ballot of deceased voter.** When it shall be made to appear by due proof to the judges of election that any elector, who has so marked and forwarded his ballot, has died before the ballot is deposited in the ballot box, then the ballot of such deceased voter shall be indorsed, "Rejected because voter is dead", and be returned by the judges of election with the unused ballots to the official issuing it; but the casting of the ballot of a deceased voter shall not invalidate the election. [SS15,§1137-l; C24, 27, 31, 35,§958.]

959 **Laws made applicable.** This chapter and all other election laws now in force, and not inconsistent with this chapter, shall apply to all counties, cities, and towns in which voting machines are used, and the proper election officials in such counties shall take such action as is necessary to carry out the provisions of this chapter. [SS15,§1137-m; C24, 27, 31, 35, §959.]

960 **False affidavit.** Any person who shall wilfully swear falsely to any of such affidavits shall be guilty of perjury, and punished accordingly. [SS15,§1137-n; C24, 27, 31, 35,§960.]

Referred to in §933

961 **Refusal to return ballot.** Any person who, having procured an official ballot or ballots, shall wilfully neglect or refuse to cast or return the same in the manner provided, or who shall wilfully violate any provision of this chapter, shall, unless otherwise provided, be fined not to exceed one hundred dollars, or imprisoned in the county jail not to exceed thirty days. Any person who applies for a ballot and wilfully neglects or refuses to return the same shall be deemed to have committed an offense in the county to which such ballot was returnable. [SS15,§1137-n; C24, 27, 31, 35,§961.]

Referred to in §933

962 **Offenses by officers.** If any county auditor, city or town clerk, or any election officer shall refuse or neglect to perform any of the duties prescribed by this chapter, or shall violate any of the provisions thereof, he shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the county jail not to exceed ninety days. [SS15, §1137-n; C24, 27, 31, 35,§962.]

CHAPTER 45

PRESIDENTIAL ELECTORS

963 Time of election—qualifications.
964 How elected.
965 Canvass.
966 Nonpolitical parties.
967 Presidential nominees.
968 Certificate.
969 Meeting—certificate.
970 Certificate of governor.
971 Compensation.

963 Time of election — qualifications. At the general election in the years of the presidential election, or at such other times as the congress of the United States may direct, there shall be elected by the voters of the state one person from each congressional district into which the state is divided, and two from the state at large, as electors of president and vice president, no one of whom shall be a person holding the office of senator or representative in congress, or any office of trust or profit under the United States. [C51,§301; R60,§535; C73, §659; C97,§1173; S13,§1173; C24, 27, 31, 35, §963.]

964 How elected. A vote for the candidates of any political party, or group of petitioners, for president and vice president of the United States, shall be conclusively deemed to be a vote for each candidate nominated in each district and in the state at large by said party, or group of petitioners, for presidential electors and shall be so counted and recorded for such electors. [C24, 27, 31, 35,§964.]

965 Canvass. The canvass of the votes for candidates for president and vice president of the United States and the returns thereof shall be a canvass and return of the votes cast for the electors of the same party or group of petitioners, respectively, and the certificate of such election made by the governor shall be in accord with such return. [C24, 27, 31, 35,§965.]

966 Nonpolitical parties. The term "group of petitioners" as used in this chapter shall embrace an organization which is not a political party as defined by law. [C24, 27, 31, 35,§966.]

Nonparty organization defined, §528

967 Presidential nominees. The names of the candidates for president and vice president, respectively, of a political party as defined in the law relating to primary elections, shall, at least twenty days prior to the election, be certified to the secretary of state by the chairman and secretary of the state central committee of said party. [C24, 27, 31, 35,§967.]

"Political party" defined, §528

968 Certificate. At the expiration of ten days from the completed canvass, the governor, under his hand and the seal of state, shall issue to each presidential elector declared elected a certificate of his election, the same in substance as required in other cases, and shall notify him to attend at the seat of government at noon on the second Monday in January following his election, reporting his attendance to him. If there be a contest of the election, no certificate shall issue until it is determined. [C51,§308; R60,§542; C73,§665; C97,§1168; C24, 27, 31, 35, §968.]

Certificate of election, §880

969 Meeting—certificate. The presidential electors shall meet in the capitol, at the seat of government, at noon of the second Monday in January after their election, or as soon thereafter as practicable. If, at the time of such meeting, any elector for any cause is absent, those present shall at once proceed to elect, from the citizens of the state, a substitute elector or electors, and certify the choice so made to the governor, and he shall immediately cause the person or persons so selected to be notified thereof. [C51,§§308–310; R60,§§542–544; C73, §§665–667; C97,§1174; C24, 27, 31, 35,§969.]

970 Certificate of governor. When so met, the said electors shall proceed, in the manner pointed out by law, with the election, and the governor shall duly certify the result thereof, under the seal of the state, to the United States secretary of state, and as required by act of congress relating to such elections. [C51,§311; R60,§545; C73,§668; C97,§1175; C24, 27, 31, 35, §970.]

971 Compensation. The electors shall each receive a compensation of five dollars for every day's attendance, and the same mileage as members of the general assembly. [C51,§312; R60, §546; C73,§669; C97,§1176; C24, 27, 31, 35, §971.]

Mileage, §14

CHAPTER 45.1

AMENDMENTS TO FEDERAL CONSTITUTION

Federal constitutional provision, Art. V

971.01 Ratification by convention.
971.02 Proclamation.
971.03 Election—date.
971.04 Delegate-at-large.
971.05 Nomination by mass convention.
971.06 Electors—organization.
971.07 County convention.
971.08 Candidates—statement required.
971.09 Nominations certified.
971.10 Judges and clerks.
971.11 Secretary to furnish ballots.
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971.17 Applicable statutes—canvass of votes.
971.18 Expenses.
971.19 Compensation prohibited.
971.20 State convention.
971.21 Journal.
971.22 Certification of ratification.
971.23 When chapter inoperative.

971.01 Ratification by convention. Within sixty days from the date on which the governor of Iowa shall receive notice of an amendment to the constitution of the United States proposed by the congress of the United States for ratification by convention in the several states, it shall be the duty of the governor, by proclamation to call such convention, to be held at the seat of government in Des Moines, not later than three months from the date of issuance of such proclamation. [C35,§971-e1.]

Referred to in §971.02

971.02 Proclamation. The proclamation to be issued by the governor, as provided in section 971.01, shall fix the date and time for the holding of such convention and the date of the holding of a special election for the election of delegates to such convention. [C35,§971-e2.]

971.03 Election—date. The date of the special election provided to be stated in the said proclamation shall not be more than thirty days before the date fixed for the holding of such convention. [C35,§971-e3.]

971.04 Delegate-at-large. Subject to the provisions of this chapter, each county in the state shall be entitled to nominate two persons from among the qualified voters in each county, respectively, to be candidates for the office of delegate-at-large to the state convention, provided, however, that one of such candidates shall be nominated by those favoring the ratification of such amendment, and one nominated by those opposed to the ratification of such amendment. Said delegates shall be nominated as hereinafter provided. [C35,§971-e4.]

971.05 Nomination by mass convention. The nominations for delegates to such convention from each county shall be made at mass conventions of the qualified electors of such county in the manner provided for in this chapter. [C35,§971-e5.]

971.06 Electors — organization. Upon the issuance of a proclamation by the governor calling such convention, the qualified voters in each county in the state shall organize themselves into two groups, one of which groups shall consist of those persons favoring the ratification of the amendment proposed by the congress of the United States, and the other to consist of persons opposed thereto. [C35,§971-e6.]

971.07 County convention. At eleven o'clock a. m., on the fourth Monday following the date of issuance of such proclamation by the governor, the group of qualified voters in each county favoring the ratification of such proposed amendment, and the group opposed thereto, shall convene in separate county conventions at the seat of government of such county, at such places as the county auditor of such county shall designate, and such auditor shall publish such designation of places by one publication in two newspapers if there be such two newspapers of general circulation in said county, at least three days prior to said convention, and shall nominate one delegate as a candidate to the convention hereinafter provided for. [C35,§971-e7.]

971.08 Candidates—statement required. No person shall be nominated at any county convention held under the provisions of this chapter until he has executed and delivered to the chairman of such county convention a statement signed by him or her and attested by the chairman and secretary of the convention in the following form:

DELEGATE'S STATEMENT.

I, ..., hereby certify that I am a qualified elector of the state of Iowa; that for more than.....(years) (months) last past I have resided in the.....; that I am favorable to (or opposed to) the ratification of the amendment to the constitution of the United States of America, proposed by the congress of the United States on the..... day of ....., 19.....

Dated this.....day of ....., 19.....

.....
For ratification
.....Against ratification
Chairman, county convention
For ratification
.....Against ratification
Secretary, county convention
[C35,§971-e8.]

971.09 Nominations certified. It shall be the duty of the chairman and secretary of each

of such county conventions before adjournment thereof to certify the name of the person nominated as delegate to the convention by their respective county conventions to the secretary of state, which certification and the written statement of the person so nominated shall be delivered to the secretary of state not later than nine o'clock in the forenoon of the third day following the day during which the county convention was held. [C35,§971-e9.]

971.10 Judges and clerks. The chairman and secretary of each county convention shall select from among the membership of its group in such county one person to act as judge of election, and two persons to act as clerks of election, in each of the several voting precincts in such county; the persons so selected to perform such services without compensation, and the said chairman and secretary of each of such county conventions shall certify to the county auditor the names and addresses of the persons so selected, which certification shall be made not later than nine o'clock in the forenoon of the second day following the date on which such county convention was held. In the event that the judge and clerk or clerks of election, as above provided, shall fail or refuse to act, the chairman and secretary of the respective county conventions are authorized to fill the vacancy thus caused, and if practicable shall certify the names appointed to fill such vacancy to the county auditor. If vacancies occur in the office of the judge or clerk of election, and they are not filled as herein provided, then and in that event, the acting judges and clerks shall fill such vacancies, and the failure of any judge or clerk of election named, as in this chapter provided, to act at the election, shall in no wise invalidate the election. [C35,§971-e10.]

971.11 Secretary to furnish ballots. All the ballots for such special election shall be furnished by the secretary of state and delivered by him to the several county auditors in the state for distribution to each election precinct in their respective counties at least three days prior to the date of such special election. [C35, §971-e11.]

45GA, ch 1,§18, editorially divided

971.12 Cost of ballots. The cost of printing said ballots shall not exceed a proportionate amount, space and composition considered, of the cost of printing ballots for a general state election. [C35,§971-e12.]

45GA, ch 2,§3, editorially divided

971.13 Publication required. The secretary of state shall cause said ballots, together with the governor's proclamation of such special election, to be published in two newspapers of general circulation in each county at least ten days prior to the date of such special election. [C35,§971-e13.]

971.14 Ballots—arrangement of names. It shall be the duty of the secretary of state, as the certificates of nomination of candidates for election to the office of delegate-at-large to the state convention are filed in his office, as in this chapter provided, to list the same alphabetically by counties in two groups, one group to consist of the names of the nominees favoring the ratification of the proposed constitutional amendment, and the other to consist of the names of the nominees opposed thereto. [C35,§971-e14.]

971.15 Form of ballot. The ballot to be voted at such special election shall be of such measurement and type size as the secretary of state may designate, and shall be in substantially the following form:

BALLOT FOR VOTING FOR DELEGATES-AT-LARGE TO A STATE CONVENTION
(THE PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES)
(Here set out proposed amendment)
INSTRUCTIONS TO VOTERS
CANDIDATES FOR DELEGATES-AT-LARGE TO THE STATE CONVENTION

Group of Candidates Favoring Ratification	Group of Candidates Opposing Ratification	Group of Unofficial Candidates—Names to be Written in by Voter if He so Desires
○	○	○
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

The use of voting machines at such special election is hereby prohibited. [C35,§971-e15.]

971.16 Marking ballot. At the special election to be held for the purpose of electing delegates to the state convention, as in this chapter provided, each of the groups of candidates officially nominated shall be voted upon as a unit by placing a cross in the circle at the head of such group; provided, however, if any qualified voter shall so choose to do, he may disregard each of the groups of candidates officially nominated as in this chapter provided, and cast his ballot for any other qualified elector of the state. If any such voter shall so determine to disregard the groups of candidates officially nominated and desire to vote for some other elector or electors as candidates, he shall write such elector's name or names, in number not to exceed ninety-nine, on the blank lines provided therefor appearing on the ballot in the right hand column designated "Group of unofficial candidates—names to be written in by voter if he so desires"; and shall vote for such candidates whose names are so written in by him as a unit by placing a cross in the circle appearing at the head of such group. The candidates in the group receiving the largest number of votes shall be the delegates to said convention. [C35,§971-e16.]

Delegates, §971.04

971.17 Applicable statutes — canvass of votes. All the statutes relating to the manner

of conducting elections for state and county officers, so far as applicable, shall govern the election of delegates, except the canvass of the vote and certification thereof shall be made in accordance with section 885. [C35,§971-e17.]

971.18 Expenses. The expense of holding such election shall be paid by the state treasurer, out of funds in his hands not otherwise appropriated. All bills of necessary and proper expense incurred according to law, shall be submitted to the county auditors in the several counties by claimants with itemized, verified statements of account, which shall be filed with said county auditors within ten days after the holding of such election, and the several county auditors shall thereupon duly itemize and certify such claims for expense to the state comptroller, who shall draw warrants therefor to the persons entitled thereto in the amount found to be due. [C35,§971-e18.]

971.19 Compensation prohibited. No delegate shall receive any compensation, directly or indirectly, for his services as such delegate. [C35,§971-e19.]

971.20 State convention. The convention shall be the judge of the election and qualification of its members and shall have power to elect its president, secretary, and other officers and to adopt its own rules. [C35,§971-e20.]

971.21 Journal. The convention shall keep a journal of its proceedings in which shall be recorded the vote of each delegate on the question of ratification of the proposed amendment. Upon final adjournment the journal shall be filed with the secretary of state. [C35,§971-e21.]

971.22 Certification of ratification. If the convention shall agree, by vote of the majority of the total number of delegates present, to the ratification of the proposed amendment, a certificate to that effect shall be executed by the president and secretary of the convention and transmitted to the secretary of state, who shall transmit the certificate under the great seal of the state of Iowa, to the secretary of state of the United States. [C35,§971-e22.]

971.23 When chapter inoperative. If at or about the time of submitting any such amendment, congress shall either in the resolution submitting the same or by statute prescribe the manner in which the conventions shall be constituted and shall not except from the provisions of such statute or resolution such states as may theretofore have provided for constituting such conventions, the preceding provisions of this chapter shall be inoperative; the convention shall be constituted and shall operate as the said resolution or act of congress shall direct; and all officers of the state who may, by the said resolution or statute, be authorized or directed to take any action to constitute such a convention for this state, are hereby authorized and directed to act thereunder and in obedience thereto, with the same force and effect as if acting under a statute of this state. [C35,§971-e23.]

CHAPTER 46

STATEMENT OF EXPENSES

972 Statement.
973 Requirement.
974 Filing.
975 Statements by party chairmen.
976 Additional statements.
977 Public inspection.
978 Limitation on expenses.
979 Limitation as to senator and representative.
980 Penalty.

972 Statement. Every candidate for any office voted for at any primary, municipal, or general election shall, within thirty days after the holding of such election, file a true, detailed, and sworn statement showing all sums of money or other things of value disbursed, expended, or promised, directly or indirectly, by him, and to the best of his knowledge and belief by any other person or persons in his behalf, for the purpose of aiding or securing his nomination or election. [S13,§1137-a1; C24, 27, 31, 35,§972.]

973 Requirement. Such statement shall show the dates, amounts, and from whom such sums of money or other things of value were received, and the dates, amounts, purposes, and to whom paid or disbursed, and shall include the assessment of any person, committee, or organization in charge of the campaign of such candidate. [S13,§1137-a1; C24, 27, 31, 35,§973.]

974 Filing. Such statement shall be filed:

1. With the county auditor, in case of municipal or county offices.

2. With the secretary of state, in case of state or federal offices. [S13,§1137-a1; C24, 27, 31, 35,§974.]

975 Statements by party chairmen. The chairman of each party central committee for the state, district, or county shall file a true, detailed, and sworn statement of receipts and expenditures within thirty days after the general election. The chairmen of state and district central committees shall file said statements with the secretary of the state; and the chairmen of county central committees, with the county auditor. Such statements shall contain all the information required to be filed by candidates, and in addition thereto shall state the amounts or balances remaining on hand. [S13, §1137-a3; C24, 27, 31, 35,§975.]

976 Additional statements. If after the filing of any of the foregoing statements said candidate or chairman shall, directly or indirectly, receive any money or other thing of value contributed, expressly or tacitly, for the pur-

pose of reimbursing or aiding said candidate in his nomination or election, or for the purpose of defraying the expense of said committee, said candidate, or chairman, as the case may be, shall within thirty days after the receipt of such contribution or gift file a like sworn statement. [C24, 27, 31, 35,§976.]

977 **Public inspection.** Said statements shall be open at all times to the inspection of the public, and remain on file and be a part of the permanent records in the office where filed. [S13,§1137-a4; C24, 27, 31, 35,§977.]

978 **Limitation on expenses.** It shall be unlawful for any candidate to expend in connection with any primary election campaign more than fifty percent of the annual salary applicable to the position for which he is a candidate, and unlawful for him to expend in connection with his campaign for election to any office more than fifty percent of the annual salary applicable to the position for which he is a candidate. [C24, 27, 31, 35,§978.]

40ExGA, SF 29, §7, editorially divided

979 **Limitation as to senator and representative.** It shall be unlawful for anyone who is a candidate for the office of state representative or state senator to expend in connection with any primary election campaign or general election campaign more than fifty percent of the salary of a member at one regular session of the general assembly. [C24, 27, 31, 35,§979.]

980 **Penalty.** The violation of any provision of this chapter shall constitute a misdemeanor. [S13,§1137-a6; C24, 27, 31, 35,§980.]

Punishment, §12894

CHAPTER 47

CONTESTING ELECTIONS—GENERAL PROVISIONS

981 Grounds of contest.
982 Certificate withheld.
983 Incumbent.
984 Change of result.
985 Recanvass in case of contest.
986 Other contests.

981 **Grounds of contest.** The election of any person to any county office, or to a seat in either branch of the general assembly, may be contested by any person eligible to such office; and the election of any person to a state office, or to the office of presidential elector, by any eligible person who received votes for the same office; and the grounds therefor shall be as follows:

1. Misconduct, fraud, or corruption on the part of judges of election in any precinct, or of any board of canvassers, or any member of either board, sufficient to change the result.
2. That the incumbent was not eligible to the office at the time of election.
3. That the incumbent has been duly convicted of an infamous crime before the election, and the judgment has not been reversed, annulled, or set aside, nor the incumbent pardoned, at the time of election.
4. That the incumbent has given or offered to any elector, or any judge, clerk, or canvasser of the election, any bribe or reward in money, property, or thing of value, for the purpose of procuring his election.
5. That illegal votes have been received or legal votes rejected at the polls, sufficient to change the result.
6. Any error in any board of canvassers in counting the votes, or in declaring the result of the election, if the error would affect the result.
7. Any other cause which shows that another person was the person duly elected. [C51,§§339, 341, 368, 380, 387; R60,§§569, 571, 598, 610, 617; C73,§§692, 718, 730, 737; C97,§1198; C24, 27, 31, 35,§981.]

982 **Certificate withheld.** If notice of contesting the election of an officer is filed before the certificate of election is delivered to him, it shall be withheld until the determination of the contest. [C51,§367; R60,§597; C73,§713; C97, §1219; C24, 27, 31, 35,§982.]

983 **Incumbent.** The term "incumbent" in this chapter means the person whom the canvassers declare elected. [C51,§340; R60,§570; C73,§693; C97,§1199; C24, 27, 31, 35,§983.]

984 **Change of result.** When the misconduct, fraud, or corruption complained of is on the part of the judges of election in a precinct, it shall not be held sufficient to set aside the election, unless the rejection of the vote of that precinct would change the result as to that office. [C51,§342; R60,§572; C73,§694; C97, §1200; C24, 27, 31, 35,§984.]

985 **Recanvass in case of contest.** The parties to any contested election shall have the right, in open session of the court or tribunal trying the contest, and in the presence of the officer having them in custody, to have the ballots opened, and all errors of the judges in counting or refusing to count ballots corrected by such court or tribunal. [C97,§1143; S13, §1143; C24, 27, 31, 35,§985.]

986 **Other contests.** All the provisions of the chapter in relation to contested elections of county officers shall be applicable, as near as may be, to contested elections for other offices, except as herein otherwise provided, and in all cases process and papers may be issued to and served by the sheriff of any county. [C51,§§379, 396; R60,§§609, 626; C73,§§729, 745; C97,§1250; C24, 27, 31, 35,§986.]

Contesting election of county officer, ch 52

CHAPTER 48

CONTESTING ELECTIONS OF GOVERNOR AND LIEUTENANT GOVERNOR

987 Notice—grounds.
988 Notice to incumbent.
989 Houses notified.
990 Contest court.
991 Powers and proceedings.
992 Testimony.
993 Judgment.

987 Notice—grounds. The contestant for the office of governor or lieutenant governor shall, within thirty days after the proclamation of the result of the election, deliver to the presiding officer of each house of the general assembly a notice of his intent to contest, and a specification of the grounds of such contest, as provided in chapter 52. [C51,§388; R60,§618; C73,§738; C97,§1239; C24, 27, 31, 35,§987.]

988 Notice to incumbent. As soon as the presiding officers have received the notice and specifications, they shall make out a notice, directed to the incumbent, including a copy of the specifications, which shall be served by the sergeant at arms. [C51,§389; R60,§619; C73, §739; C97,§1240; C24, 27, 31, 35,§988.]

989 Houses notified. The presiding officers shall also immediately make known to their respective houses that such notice and specifications have been received. [C51,§390; R60,§620; C73,§740; C97,§1241; C24, 27, 31, 35,§989.]

990 Contest court. Each house shall forthwith proceed, separately, to choose seven members of its own body in the following manner:

1. The names of members of each house, except the presiding officer, written on similar paper tickets, shall be placed in a box, the names of the senators in their presence by their secretary, and the names of the representatives in their presence by their clerk.

2. The secretary of the senate in the presence of the senate, and the clerk of the house of representatives in the presence of the house, shall draw from their respective boxes the names of seven members each.

3. As soon as the names are thus drawn, the names of the members drawn by each house shall be communicated to the other, and entered on the journal of each house. [C51,§391; R60, §621; C73,§741; C97,§1242; C24, 27, 31, 35, §990.]

991 Powers and proceedings. The members thus drawn shall constitute a committee to try and determine the contested election, and for that purpose shall hold their meetings publicly at the place where the general assembly is sitting, at such times as they may designate; and may adjourn from day to day or to a day certain, not more than four days distant, until such trial is determined; shall have power to send for persons and papers, and to take all necessary means to procure testimony, extending like privileges to the contestant and the incumbent; and shall report their judgment to both branches of the general assembly, which report shall be entered on the journals of both houses. [C51, §392; R60,§622; C73,§742; C97,§1243; C24, 27, 31, 35,§991.]

992 Testimony. The testimony shall be confined to the matters contained in the specifications. [C51,§393; R60,§623; C73,§743; C97, §1244; C24, 27, 31, 35,§992.]

993 Judgment. The judgment of the committee pronounced in the final decision on the election shall be conclusive. [C51,§394; R60, §624; C73,§744; C97,§1245; C24, 27, 31, 35, §993.]

CHAPTER 49

CONTESTING ELECTIONS FOR SEATS IN THE GENERAL ASSEMBLY

994 Statement served.
995 Subpoenas.
996 Depositions.
997 Return of depositions.
998 Statement and depositions—notice.
999 Power of general assembly.

994 Statement served. The contestant for a seat in either branch of the general assembly shall, within thirty days after the incumbent is declared elected, serve on the incumbent a statement as required in relation to county officers, except the list of illegal votes, which shall be served with the notice of taking depositions relative to them, and if no such deposition is taken, then twenty days before the first day of the next session. [C51,§381; R60,§611; C73, §731; C97,§1233; C24, 27, 31, 35,§994.]

Statement of contest, §1024

995 Subpoenas. Any judge or clerk of a court of record may issue subpoenas in the above cases, as in those provided in chapters 51 and 52, and compel the attendance of witnesses thereunder. [C51,§382; R60,§612; C73, §732; C97,§1234; C24, 27, 31, 35,§995.]

996 Depositions. Depositions may be taken in such cases in the same manner and under the same rules as in an action at law in the district court, but no cause for taking the same need be shown. [C51,§383; R60,§613; C73,§733; C97, §1235; C24, 27, 31, 35,§996.]

Depositions in general, §11358 et seq.

997 Return of depositions. A copy of the statement, and of the notice for taking depositions, with the service indorsed, and verified by affidavit if not served by an officer, shall be

returned to the officer taking the depositions, and then, with the depositions, shall be sealed up and transmitted to the secretary of state, with an indorsement thereon showing the nature of the papers, the names of the contesting parties, and the branch of the general assembly before whom the contest is to be tried. [C51, §384; R60,§614; C73,§734; C97,§1236; C24, 27, 31, 35,§997.]

998 **Statement and depositions — notice.** The secretary shall deliver the same unopened to the presiding officer of the house in which the contest is to be tried, on or before the second day of the session, regular or special, of the general assembly next after taking the depositions, and the presiding officer shall immediately give notice to his house that such papers are in his possession. [C51,§385; R60,§615; C73,§735; C97,§1237; C24, 27, 31, 35,§998.]

999 **Power of general assembly.** Nothing herein contained shall be construed to abridge the right of either branch of the general assembly to grant commissions to take depositions, or to send for and examine any witness it may desire to hear on such trial. [C51,§386; R60, §616; C73,§736; C97,§1238; C24, 27, 31, 35, §999.]

CHAPTER 50

CONTESTING ELECTIONS OF PRESIDENTIAL ELECTORS

1000 Court of contest.
1001 Clerk.
1002 Oath.
1003 Statement.
1004 Organization and trial.
1005 Judgment.

1000 **Court of contest.** The court for the trial of contested elections for presidential electors shall consist of the chief justice of the supreme court, who shall be presiding judge of the court, and four judges of the district court not interested, to be selected by the supreme court, two of whom, with the chief justice, shall constitute a quorum for the transaction of the business of the court. If the chief justice should for any cause be unable to attend at the trial, the judge longest on the supreme court bench shall preside in place of the chief justice; and any question arising as to the membership of the court shall be determined by the members of the court not interested in the question. [C97, §1246; C24, 27, 31, 35,§1000.]

C97,§1246, editorially divided

1001 **Clerk.** The secretary of state shall be the clerk of the court, or, in his absence or inability to act, the clerk of the supreme court. [C97,§1246; C24, 27, 31, 35,§1001.]

1002 **Oath.** Each member of the court, before entering upon the discharge of his duties, shall take an oath before the secretary of state, or some officer qualified to administer oaths, that he will support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection, or hope of reward, he will, to the best of his knowledge and ability, administer justice according to law and the facts in the case. [C97,§1246; C24, 27, 31, 35,§1002.]

1003 **Statement.** The contestant shall file the statement provided for in chapter 52 in the office of the secretary of state within ten days from the day on which the returns are canvassed by the state board of canvassers, and, within the same time, serve a copy of the same, with a notice of the contest, on the incumbent. [C97, §1247; C24, 27, 31, 35,§1003.]

1004 **Organization and trial.** The clerk of the court shall, immediately after the filing of the statement, notify the judges herein named, and fix a day for the organization of the court within three days thereafter, and also notify the parties to the contest. The judges shall meet on the day fixed, and organize the court, and make and announce such rules for the trial of the case as they shall think necessary for the protection of the rights of each party and a just and speedy trial of the case, and commence the trial of the case as early as practicable thereafter, and so arrange for and conduct the trial that a final determination of the same and judgment shall be rendered at least six days before the second Monday in January next following. [C97, §1248; C24, 27, 31, 35,§1004.]

1005 **Judgment.** The judgment of the court shall determine which of the parties to the action is entitled to hold the office of presidential elector, and shall be authenticated by the presiding judge and clerk of the court and filed with the secretary of state; and the judgment so rendered shall constitute a final determination of the title to the office, and a certificate of appointment shall be issued to the successful party as an elector. [C97,§1249; C24, 27, 31, 35,§1005.]

CHAPTER 51

CONTESTING ELECTIONS OF STATE OFFICERS

Referred to in §995

1006 Contest court.
1007 Clerk.
1008 Statement filed.
1009 Selection of court.
1010 Notice of selection.
1011 Organization.
1012 Contest relative to office of district judge.
1013 Delivery of papers.
1014 Time of trial.
1015 Notice to incumbent—trial.
1016 Subpoenas—depositions.
1017 Judgment filed—execution.
1018 Power of judge.
1019 Compensation of judges.

1006 Contest court. The court for the trial of contested state offices, except that of governor and lieutenant governor, shall consist of three district judges, not interested, who shall be selected by the chief justice of the supreme court, except that when the chief justice is a party to the contest, the governor shall select said district judges. [C51,§369; R60,§599; C73, §719; C97,§1224; C24, 27, 31, 35,§1006.]

1007 Clerk. The secretary of state shall be the clerk of this court; but if the person holding that office is a party to the contest, the clerk of the supreme court, or, in case of his absence or inability, the auditor of state shall be clerk. [C51,§370; R60,§600; C73,§720; C97,§1225; C24, 27, 31, 35,§1007.]

1008 Statement filed. The statement as provided in chapter 52 must be filed with such clerk within thirty days from the day when incumbent was declared elected. [C51,§371; R60, §601; C73,§721; C97,§1226; C24, 27, 31, 35, §1008.]

1009 Selection of court. Upon the filing of such statement, the chief justice of the supreme court, or governor, as the case may be, shall select the membership of the court to try such contest, and immediately certify such selection to the clerk of the supreme court. Vacancies shall also be filled by the chief justice, or governor, as the case may be. [C24, 27, 31, 35,§1009.]

1010 Notice of selection. The clerk of the supreme court, on receipt of such certificate, shall forthwith in writing notify the members of such court of contest of their selection. [C51, §372; R60,§602; C73,§722; C97,§1227; C24, 27, 31, 35,§1010.]

1011 Organization. The members so selected for said contest court shall, in cases of contest over offices other than district judge, meet at the seat of government within ten days after said notification and qualify by taking the oath required in case of contest over the office of presidential elector, and proceed, at said place, with the discharge of their duties. [C51,§375; R60,§605; C73,§725; C97,§1229; C24, 27, 31, 35, §1011.]

Oath, §1002

1012 Contest relative to office of district judge. In case of contests relative to the office of district judge, such selected members of said court shall meet, qualify, and transact the business of said court of contest at such place or places as they may designate, and in such case, after organizing, may select a clerk other than the one heretofore specified. [C24, 27, 31, 35, §1012.]

1013 Delivery of papers. Upon the organization of said court of contest, all papers in the possession of the clerk of the supreme court shall be forthwith delivered to said court of contest. [C24, 27, 31, 35,§1013.]

1014 Time of trial. The time for the trial of any contest relative to a state office shall not be set beyond the last Monday in January following the election. [C51,§372; R60,§602; C73, §722; C97,§1227; C24, 27, 31, 35,§1014.]

1015 Notice to incumbent—trial. Upon the organization of said court of contest, the court shall cause a notice of said contest to be served on the incumbent, together with a copy of the statement of contest filed by the contestant. No trial shall be held sooner than twenty days following said notice, except by consent of all parties. [C51,§372; R60,§602; C73,§722; C97, §1227; C24, 27, 31, 35,§1015.]

1016 Subpoenas—depositions. The secretary of state, the several clerks of the supreme and district courts, under their respective seals of office, and either of the judges of the supreme or district courts, under their hands, may issue subpoenas for witnesses to attend this court; and disobedience to such process may be treated as a contempt. Depositions may also be taken as in the case of contested county elections. [C51,§373; R60,§603; C73,§723; C97,§1228; C24, 27, 31, 35,§1016.]

Contempts, ch 536
Depositions in county contest, §1035

1017 Judgment filed — execution. A transcript of the judgment rendered by such court, filed in the office of the clerk of the supreme court, shall have the force and effect of a judgment of the supreme court, and execution may issue therefrom in the first instance against the party's property generally. [C51,§377; R60, §607; C73,§727; C97,§1231; C24, 27, 31, 35 §1017.]

1018 Power of judge. The presiding judge of this court shall have authority to carry into effect any order of the court, after the adjourn-

ment thereof, by attachment or otherwise. [C51, §378; R60,§608; C73,§728; C97,§1232; C24, 27, 31, 35,§1018.]

1019 Compensation of judges. The judges shall be entitled to receive for their travel and attendance the sum of six dollars each per day, with such mileage as is allowed to members of the general assembly, to be paid from the state treasury. [C51,§376; R60,§606; C73,§726; C97, §1230; C24, 27, 31, 35,§1019.]

Mileage, §14

CHAPTER 52

CONTESTING ELECTIONS OF COUNTY OFFICERS

Referred to in §§987, 995, 1003, 1008

1020 Contest court.
1021 Judges.
1022 Clerk.
1023 Sheriff to attend.
1024 Statement.
1025 Bond.
1026 When auditor is party.
1027 Names of voters specified.
1028 Trial—notice.
1029 Place of trial.
1030 Subpoenas.
1031 Postponement.
1032 Procedure—powers of court.
1033 Sufficiency of statement.
1034 Amendment—continuance.
1035 Testimony.
1036 Voters required to testify.
1037 Judgment.
1038 How enforced.
1039 Appeal.
1040 Judgment.
1041 Process—fees.
1042 Compensation.
1043 Costs.
1044 How collected.

1020 Contest court. The court for the trial of contested county elections shall be thus constituted: The chairman of the board of supervisors shall be the presiding officer, and the contestant and incumbent may each name a person who shall be associated with him. [C51, §343; R60,§573; C73,§695; C97,§1201; C24, 27, 31, 35,§1020.]

1021 Judges. The contestant and incumbent shall each file in the auditor's office, on or before the day of trial, a written nomination of one associate judge of the contested election, who shall be sworn in manner and form as trial jurors are in trials of civil actions; if either the contestant or the incumbent fails to nominate, the presiding judge shall appoint for him. When either of the nominated judges fails to appear on the day of trial, his place may be filled by another appointment under the same rule. [C51, §§347, 348; R60,§§577, 578; C73,§700; C97, §1206; C24, 27, 31, 35,§1021.]

1022 Clerk. The county auditor shall be clerk of this court, and keep all papers, and record the proceedings in the election book, in manner similar to the record of the proceedings of the district court, but when the county auditor is a party, the court shall appoint a suitable person as clerk, whose appointment shall be recorded. [C51,§344; R60,§574; C73,§696; C97, §1202; C24, 27, 31, 35,§1022.]

1023 Sheriff to attend. The court or presiding judge may direct the attendance of the sheriff or a constable when necessary. [C51, §359; R60,§589; C73,§708; C97,§1214; C24, 27, 31, 35,§1023.]

1024 Statement. The contestant shall file in the office of the county auditor, within twenty days after the day when the incumbent was declared elected, a written statement of his intention to contest the election, setting forth the name of the contestant, and that he or she is qualified to hold such office, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which statement shall be verified by the affidavit of the contestant, or some elector of the county, that the causes set forth are true as he verily believes. [C51,§345; R60,§575; C73,§697; C97, §1203; C24, 27, 31, 35,§1024.]

C97,§1203, editorially divided

1025 Bond. The contestant must also file with the county auditor a bond, with security to be approved by said auditor, conditioned to pay all costs in case the election be confirmed, or the statement be dismissed, or the prosecution fail. [C51,§345; R60,§575; C73,§697; C97, §1203; C24, 27, 31, 35,§1025.]

1026 When auditor is party. When the auditor is a party, the clerk of the district court shall receive such statement and approve such bond. [C73,§697; C97,§1203; C24, 27, 31, 35, §1026.]

1027 Names of voters specified. When the reception of illegal or the rejection of legal votes is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, with the precinct where they voted or offered to vote, shall be set forth in the statement. [C51,§346; R60,§576; C73,§698; C97,§1204; C24, 27, 31, 35,§1027.]

1028 Trial—notice. The chairman of the board of supervisors shall thereupon fix a day for the trial, not more than thirty nor less than twenty days thereafter, and shall cause a notice of such trial to be served on the incumbent, with a copy of the contestant's statement, at least ten days before the day set for trial. [C51, §§347, 349, 350; R60,§§577, 579, 580; C73,§699; C97,§1205; C24, 27, 31, 35,§1028.]

1029 Place of trial. The trial of contested county elections shall take place at the county seat, unless some other place within the county is substituted by the consent of the court and parties. [C51,§357; R60,§587; C73,§707; C97, §1213; C24, 27, 31, 35,§1029.]

1030 Subpoenas. Subpoenas for witnesses may be issued at any time after the notice of trial is served, either by the clerk of the district court or by the county auditor, and shall command the witnesses to appear at ....., on ....., to testify in relation to a contested election, wherein A .... B .... is contestant and C .... D .... is incumbent. [C51,§§352, 356; R60,§§582, 586; C73,§§704, 706; C97,§1210; C24, 27, 31, 35,§1030.]

1031 Postponement. The trial shall proceed at the time appointed, unless postponed for good cause shown by affidavit, the terms of which postponement shall be in the discretion of the court. [C51,§353; R60,§583; C73,§701; C97,§1207; C24, 27, 31, 35,§1031.]

1032 Procedure—powers of court. The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers of the district court necessary to the right hearing and determination of the matter, to compel the attendance of witnesses, swear them and direct their examination, to punish for contempt in its presence or by disobedience to its lawful mandate, to adjourn from day to day, to make any order concerning intermediate costs, and to enforce its orders by attachment. It shall be governed by the rules of law and evidence applicable to the case. [C51,§§354, 358, 361; R60,§§584, 588, 591; C73,§702; C97,§1208; C24, 27, 31, 35, §1032.]

1033 Sufficiency of statement. The statement shall not be dismissed for want of form, if the particular causes of contest are alleged with such certainty as will sufficiently advise the incumbent of the real grounds of contest. [C51,§355; R60,§585; C73,§705; C97,§1211; C24, 27, 31, 35,§1033.]

C97,§1211, editorially divided

1034 Amendment—continuance. If any part of the causes are held insufficient, they may be amended, but the incumbent will be entitled to an adjournment, if he states on oath that he has matter of answer to the amended causes, for the preparation of which he needs further time. Such adjournment shall be upon such terms as the court thinks reasonable; but if all the causes are held insufficient and an amendment is asked, the adjournment shall be at the cost of contestant. If no amendment is asked for or made, or in case of entire failure to prosecute, the proceedings may be dismissed. [C51, §§355, 361; R60,§§585, 591; C73,§705; C97,§1211; C24, 27, 31, 35,§1034.]

1035 Testimony. The testimony may be oral or by deposition, taken as in an action at law in the district court. [C51,§351; R60,§581; C73, §703; C97,§1209; C24, 27, 31, 35,§1035.]

Depositions in general, §11358 et seq.

1036 Voters required to testify. The court may require any person called as a witness, who voted at such election, to answer touching his qualifications as a voter, and, if he was not a qualified voter in the county where he voted, then to answer for whom he voted. [C51, §360; R60,§590; C73,§709; C97,§1215; C24, 27, 31, 35,§1036.]

1037 Judgment. The court shall pronounce judgment whether the incumbent or any other person was duly elected, and adjudge that the person so declared elected will be entitled to his certificate. If the judgment be against the incumbent, and he has already received the certificate, the judgment shall annul it. If the court find that no person was elected, the judgment shall be that the election be set aside. [C51,§362; R60,§592; C73,§714; C97,§1220; C24, 27, 31, 35,§1037.]

1038 How enforced. When either the contestant or incumbent shall be in possession of the office, by holding over or otherwise, the presiding judge shall, if the judgment be against the party so in possession of the office and in favor of his antagonist, issue an order to carry into effect the judgment of the court, which order shall be under the seal of the county, and shall command the sheriff of the county to put the successful party into possession of the office without delay, and to deliver to him all books and papers belonging to the same; and the sheriff shall execute such order as other writs. [C73,§715; C97,§1221; C24, 27, 31, 35,§1038.]

Referred to in §1039

1039 Appeal. The party against whom judgment is rendered may appeal within twenty days to the district court, but, if he be in possession of the office, such appeal will not supersede the execution of the judgment of the court as provided in section 1038, unless he gives a bond, with security to be approved by the district judge in a sum to be fixed by him, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that, if the judgment appealed from be affirmed, he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered. The court shall hear the appeal in equity and determine anew all questions arising in the case. [C73,§716; C97,§1222; S13,§1222; C24, 27, 31, 35,§1039.]

Presumption of approval of bond, §12759.1

1040 Judgment. If, upon appeal, the judgment is affirmed, the district court may render judgment upon the bond for the amount of damages, against the appellant and the sureties thereon. [C73,§717; C97,§1223; C24, 27, 31, 35, §1040.]

1041 Process—fees. The style, form, and manner of service of process and papers, and the fees of officers and witnesses, shall be the same as in the district court, so far as the nature of the case admits. [C51,§§356, 374; R60,§§586, 604; C73,§§706, 724; C97,§1212; C24, 27, 31, 35, §1041.]

1042 Compensation. The judges shall be entitled to receive four dollars a day for the time occupied by the trial. [C51,§363; R60, §593; C73,§710; C97,§1216; C24, 27, 31, 35, §1042.]

1043 Costs. The contestant and the incumbent are liable to the officers and witnesses for the costs made by them, respectively; but if the election be confirmed, or the statement be dismissed, or the prosecution fail, judgment shall be rendered against the contestant for costs; and if the judgment be against the incumbent, or the election be set aside, it shall be against him for costs. [C51,§364; R60,§594; C73,§711; C97,§1217; C24, 27, 31, 35,§1043.]

1044 How collected. A transcript of the judgment, filed and recorded in the office of the clerk of the district court as provided in relation to transcripts from justices' courts, shall have the same effect as there provided, and execution may issue thereon. [C51,§365; R60,§595; C73,§712; C97,§1218; C24, 27, 31, 35,§1044.]

Transcripts from justice court, §§10572–10574

CHAPTER 53

TIME AND MANNER OF QUALIFYING

1045 Time.
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1047 Unavoidable casualty.
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1049 Governor and lieutenant governor.
1050 Judges.
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1052 Vacancies—time to qualify.
1053 Temporary officer.
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1055 Oath on bond.
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1045 Time. Each officer, elective or appointive, before entering upon his duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the second secular day in January of the first year of the term for which such officer was elected. [C51, §§319, 334, 335; R60,§§549, 564, 565; C73,§§670, 685–687; C97,§1177; S13,§1177; C24, 27, 31, 35, §1045.]

Prescribed oath, §§1049, 1050, 1054; bonds, ch 54
Unavoidable casualty, §1047

1046 City and town officers. City and town officers shall so qualify within ten days after their election has been declared by the board of canvassers. [C51,§§319, 334, 335; R60,§§549, 564, 565; C73,§§670, 685–687; C97,§1177; S13, §1177; C24, 27, 31, 35,§1046.]

1047 Unavoidable casualty. When on account of sickness, the inclement state of the weather, unavoidable absence, or casualty, an officer has been prevented from qualifying within the prescribed time, he may do so within ten days after the time herein fixed. [C97,§1177; S13,§1177; C24, 27, 31, 35,§1047.]

General time to qualify, §§1045, 1046, 1048–1052

1048 Contest. In case the election of an officer is contested, the successful party shall qualify within ten days after the decision is rendered. [C51,§335; R60,§565; C73,§687; C97, §1177; S13,§1177; C24, 27, 31, 35,§1048.]

1049 Governor and lieutenant governor. The governor and lieutenant governor shall each qualify within ten days after the result of the election shall be declared by the general assembly, by taking an oath in its presence, in joint convention assembled, administered by a judge of the supreme court, to the effect that he will support the constitution of the United States and the constitution of the state of Iowa, and will faithfully and impartially, and to the best of his knowledge and ability, discharge the duties incumbent upon him as governor, or lieutenant governor, of this state. [C51,§§320, 334; R60,§§550, 564; C73,§§671, 685; C97,§1178; C24, 27, 31, 35,§1049.]

1050 Judges. All judges of courts of record shall qualify by the first day of January following the election, by taking and subscribing an oath to the effect that they will support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection, or hope of reward, they will, to the best of their knowledge and ability, administer justice according to the law, equally to the rich and the poor. [C51,§§322, 334; R60,§§552, 564; C73,§§673, 685; C97,§1179; C24, 27, 31, 35,§1050.]

Failure to take oath, §13313

1051 Officer holding over. When it is ascertained that the incumbent is entitled to hold over by reason of the nonelection of a successor, or for the neglect or refusal of the successor to qualify, he shall qualify anew, within the time provided by section 1052. [C51,§338; R60,§568; C73,§690; C97,§1195; S13,§1195; C24, 27, 31, 35, §1051.]

1052 Vacancies—time to qualify. Persons elected or appointed to fill vacancies, and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint, or qualify, as provided in chapter 59, shall qualify within ten days from such election, appointment, or failure to elect, appoint, or qualify, in the same manner as those originally elected or appointed

to such offices. [C51,§440; R60,§668; C73,§786; C97,§1275; C24, 27, 31, 35,§1052.]

Referred to in §1051

1053 Temporary officer. Any person temporarily appointed to fill an office during the incapacity or suspension of the regular incumbent shall qualify, in the manner required by this chapter, for the office so to be filled. [C73, §691; C97,§1194; C24, 27, 31, 35,§1053.]

Similar provisions, §§1125, 1135

1054 Other officers. All other civil officers, elected by the people or appointed to any civil office, unless otherwise provided, shall take and subscribe an oath substantially as follows:

"I, ..., do solemnly swear that I will support the constitution of the United States and the constitution of the state of Iowa, and that I will faithfully and impartially, to the best of my ability, discharge all the duties of the office of.....(naming it) in (naming the township, town, city, county, district, or state, as the case may be), as now or hereafter required by law." [C51,§§331, 332; R60,§§561, 562, 1084, 1132; C73,§§504, 514, 675, 676; C97,§1180; C24, 27, 31, 35,§1054.]

Referred to in §§1055, 4216.28
Exceptions as to oath, §§1049, 1050
Failure to take oath, §13313

1055 Oath on bond. Every civil officer who is required to give bond shall take and subscribe the oath provided for in section 1054, on the back of his bond, or on a paper attached thereto, to be certified by the officer administering it. [C51,§331; R60,§561; C73,§675; C97,§1181; C24, 27, 31, 35,§1055.]

Officers required to give bonds, ch 54

1056 Re-elected incumbent. When the incumbent of an office is re-elected, he shall qualify as above directed. [C51,§338; R60,§568; C73, §690; C97,§1193; C24, 27, 31, 35,§1056.]

C97,§1193, editorially divided

1057 Approval conditioned. When the re-elected officer has had public funds or property in his control, under color of his office, his bond shall not be approved until he has produced and fully accounted for such funds and property to the proper person to whom he should account therefor; and the officer or board approving the bond shall indorse upon the bond, before its approval, the fact that the said officer has fully accounted for and produced all funds and property before that time under his control as such officer. [C73,§690; C97,§1193; C24, 27, 31, 35, §1057.]

CHAPTER 54

OFFICIAL AND PRIVATE BONDS

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1074 Time for approval.
1075 Approval by auditor.
1076 Failure of board to approve—application to judge.
1077 Custody of bond.
1078 Recording.
1079 Failure to give bond.

1058 Bond not required. Bonds shall not be required of the following public officers:

1. Governor.
2. Lieutenant governor.
3. Members of the general assembly.
4. Judges of the supreme, district, superior, and municipal courts.
5. Township trustees.
6. Aldermen, councilmen, and commissioners of cities and towns. [C51,§323; R60,§553; C73, §674; C97,§1182; S13,§1182; SS15,§694-c11; C24, 27, 31, 35,§1058.]

1059 Conditions of bond of public officers. All other public officers, except as otherwise specially provided, shall give bond with the conditions, in substance, as follows:

That as ..... (naming the office), in ..... (city, town, township, county, or state of Iowa), he will render a true account of his office and of his doings therein to the proper authority, when required thereby or by law; that he will promptly pay over to the officer or person entitled thereto all moneys which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands at the termination of his office; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities, or other property appertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud, or oppression, discharge all duties now or hereafter required of his office by law. [C51,§324; R60,§§554, 1084, 1132; C73,§§504, 514, 674; C97,§1183; C24, 27, 31, 35,§1059.]

Construction of public bonds, §12552

1060 Liability of surety. The sureties on such bond shall be liable for all money or public property that may come into the hands of such officer at any time during his possession of such office. [C51,§324; R60,§§554, 1084, 1132; C73,§§504, 514, 674; C97,§1183; C24, 27, 31, 35, §1060.]

1061 Conditions of other bonds. All other bonds required by law, when not otherwise specially provided, shall be conditioned as the bonds of public officers. [S13,§§1177-a,-d; C24, 27, 31, 35,§1061.]

1062 Want of compliance—effect. All bonds required by law shall be construed as impliedly containing the conditions required by statute, anything in the terms of said bonds to the contrary notwithstanding. [C51,§337; R60, §567; C73,§689; C97,§1192; S13,§1177-c; C24, 27, 31, 35,§1062.]

Implied conditions, §§4651, 9928

1063 State officers—amount of bonds. State officers shall give bonds in an amount as follows:

1. Secretary of state, auditor of state, attorney general, clerk of the supreme court, not less than ten thousand dollars.
2. Treasurer of state, not less than three hundred thousand dollars.
3. Members of board of control of state institutions, twenty-five thousand dollars.
4. Each member of the finance committee of the state board of education, twenty-five thousand dollars.
5. Each treasurer of a state institution under the control of the state board of education, shall furnish a surety bond, the amount thereof to be determined by the said board.
6. Commissioner of public health, secretary of agriculture, and each Iowa state commerce commissioner, not less than five thousand dollars.
7. Superintendent of public instruction, not less than two thousand dollars.
8. Custodian of public buildings and grounds, such amount as the executive council may fix.
9. Commissioner of insurance, fifty thousand dollars.
10. Superintendent of banking, twenty thousand dollars.
11. State fire marshal, five thousand dollars.
12. Mine inspectors, two thousand dollars.
13. Labor commissioner, two thousand dollars.
14. Deputy labor commissioner, one thousand dollars.
15. Members state conservation commission, five thousand dollars.
16. State conservation director, ten thousand dollars.
17. State conservation officers, one thousand dollars.
18. Secretary of executive council, such amount as the executive council may fix.
19. State librarian, five thousand dollars.
20. Law librarian, three thousand dollars.
21. Curator historical department, one thousand dollars.
22. Superintendent of printing, five thousand dollars.
23. Industrial commissioner, one thousand dollars.
24. Members state highway commission, five thousand dollars.
25. Reporter of the supreme court, not less than one thousand dollars.
26. Members of appeal board under chapter 22, five thousand dollars.
27. All other public officers, in the amount provided by law, or as fixed under section 1064.

1. [C51,§326; R60,§§128, 556; C73,§678; C97, §1184; C24, 27, 31, 35,§1063.]
2. [C51,§326; R60,§556; C73,§678; C97, §1184; C24, 27, 31, 35,§1063.]
3. [S13,§2727-a2; C24, 27, 31, 35,§1063.]
4. [S13,§2682-i; C24, 27, 31, 35,§1063.]
5. [R60,§1739; C73,§1614; C97,§2654; C24, 27, 31, 35,§1063.]
6. [C97,§1184; C24, 27, 31, 35,§1063; 47GA, ch 205.]
7. [C51,§326; C73,§678; C97,§1184; C24, 27, 31, 35,§1063.]
8. [C97,§145; SS15,§147; C24, 27, 31, 35, §1063.]
9. [S13,§1683-r; C24, 27, 31, 35,§1063.]
10. [C24, 27, 31, 35,§1063.]
11. [S13,§2468-a; C24, 27, 31, 35,§1063.]
12. [C97, SS15,§2478; C24, 27, 31, 35,§1063.]
13. [C97,§2469; S13,§2469; C24, 27, 31, 35, §1063.]
14. [C24, 27, 31, 35,§1063.]
15. [C31,§1703-d7; C35,§1063.]
16. [C24, 27, 31, 35,§1063.]
17. [SS15,§2562; C24, 27, 31, 35,§1063.]
18. [S13,§157; C24, 27, 31, 35,§1063.]
19. [C51,§446; R60,§691; C73,§1890; C97, §2860; S13,§2881-h; C24, 27, 31, 35,§1063.]
20. [C24, 27, 31, 35,§1063.]
21. [S13,§2881-h; C24, 27, 31, 35,§1063.]
22. [SS15,§144-g; C24, 27, 31, 35,§1063.]
23. [C24, 27, 31, 35,§1063.]
24. [SS15,§1527-s; C24, 27, 31, 35,§1063.]
25. [C73,§678; C97,§1184; C24, 27, 31, 35, §1063.]
26. [C24, 27,§347; C31, 35,§1063.]
27. [C24, 27, 31, 35,§1063.]

1064 Amount of bond, when not fixed by law. In all cases where no amount or a minimum amount is fixed by law for the official bond of a public officer, the approving officer or board shall fix the bond at such amount as public interest may require. [C24, 27, 31, 35, §1064.]

Referred to in §1063

1065 County officers. The bonds of the following county officers, viz: clerks of the district courts, county attorneys, recorders, coroners, auditors, superintendents of schools, sheriffs, justices of the peace, and constables, and city, town, and township assessors shall each be in a penal sum to be fixed by the board of supervisors. [C51,§§326, 327; R60,§§556, 557; C73,

§678; C97,§1185; S13,§1185; C24, 27, 31, 35, §1065.]

1066 Minimum bonds of county officers. Bonds of members of the board of supervisors, clerks of the district courts, county auditors, sheriffs, and county attorneys shall not be in less sum than five thousand dollars each, and those of justices and constables, not less than five hundred dollars each. [C51,§327; R60,§557; C73,§678; C97,§1185; S13,§§1182-a, 1185; C24, 27, 31, 35,§1066.]

1066.1 Bond of county treasurer. The bond of the county treasurer shall be in the sum of ten thousand dollars. [C24,§1066; C27, 31, 35, §1066-a1.]

1067 Expense of treasurer's bond paid by county. If any county treasurer shall elect to furnish a bond with any association or incorporation as surety as provided in this chapter, the reasonable cost of such bond shall be paid by the county where the bond is filed. [S13,§1185; C24, 27, 31, 35,§1067.]

Surety company bonds authorized, §1071

1067.1 Township clerk — expense of bond. All bonds required of the township clerk shall be furnished and paid for by the township. [C27, 31, 35,§1067-b1.]

1068 Municipal officers. The bonds of all municipal officers who are required to give bonds shall each be in such penal sum as may be provided by law or as the council shall from time to time prescribe by ordinance; but the bonds of mayors shall not be in less sum than five hundred dollars each. [R60,§§1084, 1132; C73,§§504, 514; C97,§1185; S13,§1185; C24, 27, 31, 35,§1068.]

Bonds not required §1058

1069 Bonds of deputy officers. Bonds required by law of deputy state, county, city, and town officers shall, unless otherwise provided, be in such amounts as may be fixed by the governor, board of supervisors, or the council, as the case may be, with sureties as required for the bonds of the principal, and filed with the same officer. The giving of such bond shall not relieve the principal from liability for the official acts of the deputy. [C51,§411; R60,§642; C73,§766; C97,§1186; C24, 27, 31, 35,§1069.]

Bonds of deputies, §§430, 5241

1070 Minimum number of sureties—qualifications. Every bond required by this chapter, except as hereinafter specified, shall be executed with at least two sureties, each of whom shall be a freeholder of the state. The bonds of the state treasurer and of the county treasurer shall have not less than four sureties, possessed of like qualifications. [C51,§§328, 329; R60,§§558, 559; C73,§679; C97,§1187; C24, 27, 31, 35,§1070.]

1071 Surety company bonds. Any association or incorporation which does the business of insuring the fidelity of others, and which has authority by law to do business in this state, shall be accepted as surety upon bonds required by law. [C97,§1187; C24, 27, 31, 35,§1071.]

1072 Beneficiary of bond. All bonds of public officers shall run to the state, and be for the use and benefit of any corporation, public or private, or person injured or sustaining loss, with a right of action in the name of the state for its or his use. [C51,§325; R60,§555; C73, §677; C97,§1188; S13,§1188; C24, 27, 31, 35, §1072.]

1073 Approval of bonds. Bonds shall be approved:

1. By the governor, in case of state and district officers, elective or appointive.
2. By the board of supervisors, in case of county officers, township clerks, and assessors.
3. By a judge or the clerk of the district court of the county in question, in case of members of the board of supervisors.
4. By the township clerk, in case of other township officers.
5. By the mayor, or as may be provided by ordinance, in case of city and town officers.
6. By the city or town council, in case of the office of mayor. [C51,§330; R60,§560; C73,§680; C97,§1188; S13,§§1182-a, 1188; C24, 27, 31, 35, §1073.]

Bonds of notary public, §1200

1074 Time for approval. All bonds shall be approved or disapproved within five days after their presentation for that purpose, and indorsed, in case of approval, to that effect and filed. [C51,§330; R60,§560; C73,§680; C97, §1188; S13,§1188; C24, 27, 31, 35,§1074.]

1075 Approval by auditor. When a bond, approvable by the board of supervisors, of any public officer is presented after the final adjournment of the January session of said board, except those of the county auditor and treasurer, the auditor may approve such bond, in which case he shall report his action to the board at its next session. The action of the auditor in approving the bond shall stand as the action of the board unless the board enters its disapproval. If such disapproval be entered, the new bond must be given within five days from the date of such decision, but the old bond shall stand good for all acts done up to the time of the approval of the new bond. [C51,§330; R60, §560; C73,§680; C97,§1189; C24, 27, 31, 35, §1075.]

1076 Failure of board to approve—application to judge. If the board of supervisors refuses or neglects to approve the bond of any county officer, he may within five days thereafter, or after the expiration of the time allowed for such approval, present the same for approval to a judge of the district court of the proper district, who shall fix a day for the hearing. Notice of such hearing shall be given the board and return made in the same manner as in a civil action, and the court or judge at the time fixed shall, unless good cause for postponement be shown, proceed to hear the matter and approve the bond, if found sufficient, and such approval shall have the same force and effect as

an approval by the board. [C73,§681; C97, §1190; C24, 27, 31, 35,§1076.]

Notice and return, ch 489

1077 **Custody of bond.** The bonds and official oaths of public officers shall, after approval and proper record, be filed:

1. For all state officers, elective or appointive, except those of the secretary of state, with the secretary of state.
2. For the secretary of state, with the state auditor.
3. For county and township officers, except those of the county auditor, with the county auditor.
4. For county auditor, with the county treasurer.
5. For members of the board of supervisors, and for justices of the peace, with the clerk of the district court.
6. For officers of cities and towns, and officers not otherwise provided for, when both bond and oath are required, in the office of the officer or clerk of the body approving the bond.
7. For officers of cities and towns when only an oath is required, in the office of the mayor. [C51,§333; R60,§563; C73,§682; C97,§§1188, 1191; S13,§§1182-a, 1188; C24, 27, 31, 35,§1077.]

1078 **Recording.** The secretary of state, each county auditor, and each auditor or clerk of a city or town, shall keep a book, to be known as the "Record of Official Bonds", and all official bonds shall be recorded therein in full as follows:

1. In the record kept by the secretary of state, the official bonds of all state officers, elective or appointive, except the bonds of notaries public.
2. In the record kept by the county auditor, the official bonds of all county officers, elective or appointive, justices of the peace, township clerks, constables, and all assessors.
3. In the record kept by the city or town auditor or clerk, the official bonds of all city or town officers, elective or appointive.

Said records shall have an index which, under the title of each office, shall show the name of each principal, his sureties, and the date of the filing of the bond.

A bond when recorded shall be returned to the officer charged with the custody thereof. [C73,§683; C97,§1196; S13,§1196; C24, 27, 31, 35,§1078.]

1079 **Failure to give bond.** Any officer who acts in an official capacity without giving bond when such bond is required shall be fined in an amount not exceeding the amount of the bond required of him. [C73,§684; C97,§1197; C24, 27, 31, 35,§1079.]

CHAPTER 55

ADDITIONAL SECURITY AND DISCHARGE OF SURETIES

1080 Additional security.
1081 New bond.
1082 Effect.
1083 Sureties on bonds of public officers.
1084 Notice.
1085 Subpoenas.
1086 Hearing—order—effect.
1087 Failure to comply.
1088 Justice of the peace.
1089 Sureties on other bonds.
1090 Return of premium by surety.

1080 **Additional security.** Whenever the governor shall deem it advisable that the bonds of any state officer shall be increased and the security enlarged, or a new bond given, he shall notify said officer of the fact, the amount of new or additional security to be given, and the time when the same shall be executed; which said new security shall be approved and filed as provided by law. [R60,§660; C73,§772; C97,§1280; C24, 27, 31, 35,§1080.]

Referred to in §1082
Approval and filing of bonds, §§1073, 1077

1081 **New bond.** Any officer or board who has the approval of another officer's bond, when of the opinion that the public security requires it, upon giving ten days notice to show cause to the contrary, may require him to give additional security by a new bond, within a reasonable time to be prescribed. [C51,§§418, 419; R60,§§649, 650; C73,§773; C97,§1281; C24, 27, 31, 35,§1081.]

Referred to in §1082
Approval, §1073

1082 **Effect.** If a requisition made under either of the foregoing sections be complied with, both the old and the new security shall be in force; if not, the office shall become and be declared vacant, and the fact be certified to the proper officer, to be recorded in the election book or township record. [C51,§420; R60,§§651, 661; C73,§774; C97,§1282; C24, 27, 31, 35,§1082.]

1083 **Sureties on bonds of public officers.** When any surety on the bond of a public officer desires to be relieved of his obligation, he may petition the approving officer or board for relief, stating the grounds therefor. [C51,§421; R60, §652; C73,§775; C97,§1283; C24, 27, 31, 35, §1083.]

Approving officers, §1073

1084 **Notice.** The surety shall give the principal at least twenty-four hours notice of the presenting and filing of the petition, with a copy thereof. At the expiration of this notice the approving officer may hear the matter, or may postpone it, as justice requires. [C51,§422; R60,§653; C73,§776; C97,§1284; C24, 27, 31, 35, §1084.]

1085 **Subpoenas.** The approving officer may issue subpoenas in his official name for witnesses, compel them to attend and testify, in the same way an officer authorized to take deposi-

tions may. [C51,§427; R60,§658; C73,§780; C97, §1288; C24, 27, 31, 35,§1085.]

Enforcing attendance, etc., §§11341, 11367

1086 Hearing—order—effect. If, upon the hearing, there appears substantial ground for apprehension, the approving officer or board may order the principal to give a new bond and to supply the place of the petitioning surety within a reasonable time to be prescribed, and, upon such new bond being given, the petitioning surety upon the former bond shall be declared discharged from liability on the same for future acts, which order of discharge shall be entered in the proper election book, but the bond will continue binding upon those who do not petition for relief. [C51,§424; R60,§655; C73, §777; C97,§1285; C24, 27, 31, 35,§1086.]

1087 Failure to comply. If the new bond is not given as required, the office shall be declared vacant, and the order to that effect entered in the proper election book. [C51,§425; R60,§656; C73,§778; C97,§1286; C24, 27, 31, 35, §1087.]

1088 Justice of the peace. If the proceedings relate to a justice of the peace, and he is removed from office, the county auditor shall notify the proper township trustees or clerk of the removal. [C51,§426; R60,§657; C73,§779; C97,§1287; C24, 27, 31, 35,§1088.]

1089 Sureties on other bonds. When the principal on the bond has been appointed by a judge or court or is under the jurisdiction of a court, the petition for release must be presented to said court and the release shall be made subject to the orders of said court.

Such petition for release may be presented either by the principal or the surety on the bond.

Sureties on other bonds required by law who desire to be released of their obligation may proceed in the manner required for release in case of bonds of public officers.

The provisions of this section shall not apply to sureties on bonds given to secure the performance of contracts for public works, nor to sureties on appearance bonds in criminal cases. [C51,§421; R60,§652; C73,§775; C97,§1283; S13, §1177-b; C24, 27, 31, 35,§1089.]

Release of obligation, §1083 et seq.

1090 Return of premium by surety. When a surety is released as heretofore provided, he shall refund to the party entitled thereto the premium paid, if any, less a pro rata part thereof for the time said bond has been in force. [S13, §1177-b; C24, 27, 31, 35,§1090.]

CHAPTER 56

REMOVAL FROM OFFICE

Referred to in §§1921.012, 6675, 6676, 6799, 6815

1091 Removal by court.
1092 Jurisdiction.
1093 Who may file petition.
1093.1 Bond for costs.
1094 Petition—other pleading.
1095 Notice.
1096 Suspension from office.
1097 Effect of suspension.
1097.1 Salary pending charge.
1098 Governor to direct filing.
1099 Duty of county attorney.
1100 Special prosecutor.
1101 Application for outside judge.
1102 Appointment of judge.
1103 Order by appointed judge.
1104 Filing order—effect.
1105 Notice to accused.
1106 Nature of action—when triable.
1107 Temporary officer.
1108 Judgment of removal.
1109 Hearing on appeal.
1110 Effect of appeal.
1111 Effect of dismissal.
1112 Want of probable cause.
1113 Expense of judge and reporter.
1114 Appointive state officers.
1115 Subpoenas—contempt.
1116 Witness fees.
1117 City or town officers.
1118 Ordinance.

1091 Removal by court. Any appointive or elective officer, except such as may be removed only by impeachment, holding any public office in the state or in any division or municipality thereof, may be removed from office by the district court for any of the following reasons:

1. For wilful or habitual neglect or refusal to perform the duties of his office.
2. For wilful misconduct or maladministration in office.
3. For corruption.
4. For extortion.
5. Upon conviction of a felony.
6. For intoxication, or upon conviction of being intoxicated. [S13,§1258-c; C24, 27, 31, 35, §1091.]

Impeachable officers, Constitution, Art. III, §20
Industrial commissioner, §1430
Member board of control, §3278
Member state board of education, §3916
Mine examiner, §1227
Mine inspector, §1234
Municipal officers, §§1117, 5638, 6532, 6539 et seq.
Notary public, §1206
Peace officers, §477
Registered architects, §1905.58
State comptroller, §84.04

1092 Jurisdiction. The jurisdiction of the proceeding provided for in this chapter shall be as follows:

1. As to state officers whose offices are located at the seat of government, the district court of Polk county.
2. As to state officers whose duties are confined to a district within the state, the district court of any county within such district.
3. As to county, municipal, or other officers, the district court of the county in which such officers' duties are to be performed. [C24, 27, 31, 35,§1092.]

1093 Who may file petition. The petition for removal may be filed:

1. By the attorney general in all cases.
2. As to state officers, by not fewer than twenty-five electors of the state.
3. As to any other officer, by five qualified electors of the district, county, or municipality where the duties of the office are to be performed.
4. As to district officers, by the county attorney of any county in the district.
5. As to all county and municipal officers, by the county attorney of the county where the duties of the office are to be performed. [S13, §1258-d; C24, 27, 31, 35,§1093.]

1093.1 Bond for costs. If the petition for removal is filed by any one other than the attorney general or the county attorney, the court shall require the petitioners to file a bond in such amount and with such surety or sureties as the court may require, said bond to be approved by the clerk, to cover the costs of such removal suit, including attorney fees, if final judgment is not entered removing the officer charged. [C35,§1093-e1.]

Presumption of approval of bond, §12759.1

1094 Petition—other pleading. The petition shall be filed in the name of the state of Iowa. The accused shall be named as defendant, and the petition, unless filed by the attorney general, shall be verified. The petition shall state the charges against the accused and may be amended as in ordinary actions, and shall be filed in the office of the clerk of the district court of the county having jurisdiction. The petition shall be deemed denied but the accused may plead thereto. [S13,§§1258-d,-e; C24, 27, 31, 35, §1094.]

Amendments generally, §§11140, 11182, 11184, 11557

1095 Notice. Upon the filing of a petition, notice of such filing and of the time and place of hearing shall be served upon the accused in the manner required for the service of notice of the commencement of an ordinary action. Said time shall not be less than ten days nor more than twenty days after completed service of said notice. [S13,§1258-f; C24, 27, 31, 35,§1095.]

Service of notice, ch 489

1096 Suspension from office. Upon the filing of the petition in the office of the clerk of the district court, and presentation of the same to the judge, the court or judge may suspend the accused from office, if in his judgment sufficient cause appear from the petition and affidavits which may be presented in support of the charges contained therein. [S13,§1258-g; C24, 27, 31, 35,§1096.]

1097 Effect of suspension. In case of suspension, the order shall be served upon the officer in question and it shall be unlawful for him to exercise or attempt to exercise any of the functions of his office until such suspension is revoked. [C24, 27, 31, 35,§1097.]

1097.1 Salary pending charge. An order of the district court or of a judge thereof suspending a public officer from the exercise of his office, after the filing of a petition for the removal from office of such officer, shall, from the date of such order, automatically suspend the further payment to said officer of all official salary or compensation until said petition has been dismissed, or until said officer has been acquitted on any pending indictments charging misconduct in office. [C35,§1097-e1.]

1098 Governor to direct filing. The governor shall direct the attorney general to file such petition against any of said officers whenever he has reasonable grounds for such direction. The attorney general shall comply with such direction and prosecute such action. [S13, §§1258-d,-e; C24, 27, 31, 35,§1098.]

Referred to in §1099

1099 Duty of county attorney. The county attorney of any county in which an action is instituted under section 1098 shall, at the request of the attorney general, appear and assist in the prosecution of such action. In all other cases instituted in his county, the county attorney shall appear and prosecute when the officer sought to be removed is other than himself. [S13,§1258-d; C24, 27, 31, 35,§1099.]

1100 Special prosecutor. When the proceeding is brought to remove the county attorney, the court may appoint an attorney to appear in behalf of the state and prosecute such proceedings. [S13,§1258-d; C24, 27, 31, 35,§1100.]

1101 Application for outside judge. At any time not less than five days prior to the time the accused is required to appear, a copy of the petition may be filed by either party in the office of the clerk of the supreme court, together with an application to the supreme court for the appointment of a judge outside the judicial district in which the trial is to be had to hear said petition. [S13,§1258-f; C24, 27, 31, 35,§1101.]

1102 Appointment of judge. It shall be the duty of the chief justice of the supreme court, upon the filing of said copy and application, or in his absence or inability to act, any justice thereof, to forthwith issue a written commission directing a district judge outside of such district to proceed to the county in which the complaint was filed, and hear the same. The clerk of the supreme court shall transmit a certified copy of said order to the clerk of the district court where the cause is pending. [S13,§1258-f; C24, 27, 31, 35,§1102.]

1103 Order by appointed judge. Upon the receipt of such commission, said judge shall immediately make an order fixing a time and place of hearing in the county in which the petition is filed. Said time shall not be less than ten days nor more than twenty days from the date of the order. [S13,§1258-f; C24, 27, 31, 35, §1103.]

1104 Filing order—effect. Said order shall be forwarded to the clerk of the district court of the county in which the hearing is to be had. Said order shall supersede the time and place

specified in any notice already served. [S13, §1258-f; C24, 27, 31, 35,§1104.]

1105 Notice to accused. The clerk shall file said order, and forthwith give the defendant, by mail, notice of the time and place of hearing. [S13,§1258-f; C24, 27, 31, 35,§1105.]

1106 Nature of action—when triable. The proceeding shall be summary in its nature, shall be triable as an equitable action, and may be heard either in vacation or term time. [S13, §1258-g; C24, 27, 31, 35,§1106.]

Trial of equitable action, ch 496

1107 Temporary officer. Upon such suspension, the board or person authorized to fill a vacancy in the office shall temporarily fill the office by appointment. In case of a suspension of a clerk or sheriff, the district court or judge thereof may supply such place by appointment until a temporary appointment shall be made. Such orders of suspension and temporary appointment of county and township officers shall be certified to the county auditor, and be by him entered in the election book; those of city and town officers, certified to the clerk and entered upon the records; in case of other officers, to the person or body making the original appointment. [C51,§§404, 407, 410; R60,§§635, 638, 641; C73, §§752, 753, 758; C97,§1257; S13,§1258-g; C24, 27, 31, 35,§1107.]

1108 Judgment of removal. Judgment of removal, if rendered, shall be entered of record, and the vacancy forthwith filled as provided by law. [S13,§1258-h; C24, 27, 31, 35,§1108.]

Removal under indictment, §13310
Vacancies in office, ch 59

1109 Hearing on appeal. In case of appeal, the supreme court shall fix the time of hearing and the filing of abstracts and arguments, and said cause shall be advanced and take precedence over all other causes upon the court calendar, and shall be heard at the next term after the appeal is taken, provided the abstract and arguments are filed in said court in time for said action to be heard. [S13,§1258-i; C24, 27, 31, 35,§1109.]

1110 Effect of appeal. The taking of an appeal by the defendant and the filing of a supersedeas bond shall not operate to stay the proceedings of the district court or judge, or restore said defendant to office pending such appeal. [S13,§1258-i; C24, 27, 31, 35,§1110.]

1111 Effect of dismissal. If the petition be dismissed on final hearing on the merits, the defendant shall have judgment against the state, if the action was instituted by the attorney general, and against the county, city, town, or other subdivision of the state if the action is otherwise instituted, for the reasonable and necessary expenses incurred by the defendant in making his defense, including a reasonable attorney fee, to be fixed by the court or judge. Such payment shall be made out of any funds in the state treasury not otherwise appropriated, or out of the general fund of the county, city, town, or other subdivision of the state, as the case may be. [S13,§1258-i; C24, 27, 31, 35,§1111.]

1112 Want of probable cause. If the action is instituted upon complaint of citizens, and it appears to the court that there was no reasonable cause for filing the complaint, such expense may be taxed as costs against the complaining parties. [S13,§1258-i; C24, 27, 31, 35,§1112.]

1113 Expense of judge and reporter. A judge who is required to preside at such hearing, outside of his judicial district, and the judge's official reporter who is required to report such hearing, shall be allowed, from the state treasury, their necessary and actual expenses incurred by reason of such hearing. [S13,§1258-j; C24, 27, 31, 35,§1113.]

1114 Appointive state officers. Any appointive state officer may also be removed from office by a majority vote of the executive council for any of the following causes:

1. Habitual or wilful neglect of duty.
2. Any disability preventing a proper discharge of the duties of his office.
3. Gross partiality.
4. Oppression.
5. Extortion.
6. Corruption.
7. Wilful misconduct or maladministration in office.
8. Conviction of felony.
9. A failure to produce and fully account for all public funds and property in his hands at any inspection or settlement.
10. Becoming ineligible to hold the office.

[S13,§1258-b; C24, 27, 31, 35,§1114.]

Industrial commissioner, §1430
Member of board of control, §3278
Member state board of education, §3916
Mine examiner, §1227
Mine inspector, §1234
Registered architects, §1905.58
State comptroller, §84.04

1115 Subpoenas—contempt. The executive council, in any investigation held by it, may issue subpoenas for witnesses and for the production of records, books, papers, and other evidence. If a witness, duly subpoenaed, refuses to appear, or refuses to testify, or otherwise refuses to comply with said subpoena, such fact shall be certified by such council to the district court or judge of the county where the hearing is being held and said court or judge shall proceed with said refusal as though the same had occurred in a legal proceeding before said court or judge. [C24, 27, 31, 35,§1115.]

Contempts, ch 536

1116 Witness fees. Said witnesses, if in the employ of the state, shall not be entitled to any witness fees, but shall receive the mileage allowed witnesses in the district court. Other witnesses shall receive the fees and mileage allowed witnesses in district court. A sum sufficient to pay said fees and mileage is hereby appropriated out of any unappropriated funds in the state treasury. [C24, 27, 31, 35,§1116.]

Witness fees, §11326 et seq.

1117 City or town officers. Any city or town officer elected by the people may be removed from office, after hearing on written charges filed with the council of such city or town, for any cause which would be ground for an equitable action for removal in the district court, but such removal can only be made by a two-thirds vote of the entire council. [R60,§1087; C73,§516; C97,§1258; SS15,§1258; C24, 27, 31, 35,§1117.]

Removal of municipal officers, §§1091, 5638, 6532, 6539 et seq.

1118 Ordinance. The council, including councils of cities acting under special charters, may, by ordinance, provide as to the manner of preferring and hearing such charges. No person shall be twice removed by the council from the same office for the same offense. Proceedings before the council shall not be a bar to proceedings in the district court as in this chapter provided. [R60,§1087; C73,§516; C97,§1258; S13,§1258-a; SS15,§1258; C24, 27, 31, 35,§1118.]

CHAPTER 57

SUSPENSION OF STATE OFFICERS

Referred to in §101.5

1119 Commission to examine accounts.
1120 Power of commission.
1121 Refusal to obey subpoena—fees.
1122 Nature of report.
1123 Duty of governor.
1124 Effect of order—penalty.
1124.1 Salary pending charge.
1125 Temporary appointment.
1126 Governor to protect state.
1127 Governor to report to general assembly.
1128 Failure to impeach or convict.
1129 Compensation of commissioners.
1130 Reports revealing grounds of removal.

1119 Commission to examine accounts. The governor shall, when of the opinion that the public service requires such action, appoint, in writing, a commission of three competent accountants and direct them to examine the books, papers, vouchers, moneys, securities, and documents in the possession or under the control of any state officer, board, commission, or of any person expending or directing the expenditure of funds belonging to or in the possession of the state. [R60,§§46, 47, 55, 56; C73,§759; C97, §1259; C24, 27, 31, 35,§1119.]

1120 Power of commission. Said commissioners while in session shall have power to issue subpoenas, to call any person to testify in reference to any fact connected with their investigation, and to require such persons to produce any paper or book which the district court might require to be produced. Each commissioner shall have power to administer oaths. [R60,§54; C73,§765; C97,§1260; C24, 27, 31, 35, §1120.]

1121 Refusal to obey subpoena—fees. If any witness, duly subpoenaed, refuses to obey said subpoena, or refuses to testify, said commission shall certify said fact to the district court or judge thereof of the county where the investigation is being had and said court or judge shall proceed with said witness in the same manner as though said refusal had occurred in a legal proceeding before said court or judge.

Witnesses shall be paid in the manner provided for witnesses before the executive council and from the same appropriation. [C24, 27, 31, 35,§1121.]

Contempts, ch 536
Payment of witnesses before council, §1116
Witness fees, §11326 et seq.

1122 Nature of report. Such accountants shall make out a full, complete, and specific statement of the transactions of said officer with, for, or on behalf of the state, showing the true balances in each case, and report the same to the governor, with such suggestions as they may think proper. [R60,§§46, 47, 55, 56; C73,§759; C97,§1259; C24, 27, 31, 35,§1122.]

1123 Duty of governor. The governor, if he finds from said report that matters exist which would be grounds for removing said officer from office, shall proceed as follows:

1. If the officer is an elective state officer, not removable under impeachment proceedings, or if said officer is an appointive state officer, he shall lay a copy of said report before the attorney general.

2. If the officer is an appointive state officer, he shall also lay a copy of said report before the executive council.

3. If the officer is one who is removable only under impeachment proceedings he shall, by written order, forthwith suspend such officer from the exercise of his office, and require him to deliver all the moneys, books, papers, and other property of the state to him, to be disposed of as hereinafter provided. [R60,§48; C73,§760; C97,§1261; C24, 27, 31, 35,§1123.]

Failure to keep proper accounts, §101.5
Impeachable officers, Constitution, Art. III, §20; also, §1131
Removal by executive council, §1114
Suspension member state board of education, §3917

1124 Effect of order—penalty. It shall be unlawful for such officer, after the making of such order of suspension, to exercise or attempt to exercise any of the functions of his office until such suspension shall be revoked; and any attempt by the suspended officer to exercise such office shall be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both fine and imprisonment. [R60,§49; C73,§761; C97,§1261; C24, 27, 31, 35,§1124.]

1124.1 Salary pending charge. An order of the governor suspending an impeachable state officer from the exercise of his office shall, from

the date of said order, automatically suspend the further payment to said officer of all official salary or compensation, except as herein provided. If articles of impeachment are duly voted against said officer during the general assembly first convening after said order, and the accused is convicted thereon, all right to said suspended salary or compensation shall be deemed forfeited by said officer. If said articles are not so voted, or if the said officer be acquitted on duly voted articles, the said suspended salary or compensation shall be forthwith paid to said officer, unless an indictment or its equivalent, growing out of his misconduct while in office, is then pending against the said officer, in which case said salary or compensation shall be paid to said officer only on his acquittal or the dismissal of the charges. [C35, §1124-e1.]

1125 Temporary appointment. On the making of such order, the governor shall appoint a temporary incumbent of said office. Such appointee, after qualifying, shall perform all the duties and enjoy all the rights belonging to the said office, until the removal of the suspension of his predecessor, or the appointment or election of a successor. [R60,§51; C73,§762; C97, §1262; C24, 27, 31, 35,§1125.]

Qualification by temporary officer, §§1053, 1135

1126 Governor to protect state. When the governor shall suspend any public officer, he shall direct the proper legal steps to be taken to indemnify the state from loss. [R60,§52; C73, §763; C97,§1263; C24, 27, 31, 35,§1126.]

1127 Governor to report to general assembly. Forthwith after the organization of the general assembly first convening after the making of said order of suspension, the governor shall lay before it the order and all information and evidence relating thereto in his possession. [C24, 27, 31, 35,§1127.]

1128 Failure to impeach or convict. The adjournment of such assembly without voting articles of impeachment against such officer or a verdict of "not guilty" on such articles duly preferred, shall work a revocation of such order of suspension. [C24, 27, 31, 35,§1128.]

1129 Compensation of commissioners. Said commissioners shall each receive for the time actually employed in the performance of their duties the sum of ten dollars per day, which sum shall be paid out of any unappropriated funds in the state treasury. [R60,§53; C73, §764; C97,§1264; C24, 27, 31, 35,§1129.]

1130 Reports revealing grounds of removal. When any report as to the condition of a state office, other than the report of said commission, is made and filed under authority of law, and said report reveals grounds for the removal from office of a public officer, the person filing said report shall also file a copy thereof with the governor and with the attorney general. [C24, 27, 31, 35,§1130.]

CHAPTER 58

IMPEACHMENT

1131 Impeachment defined.
1132 Specification of charges—majority must concur.
1133 Board of managers—articles.
1134 Notice to governor.
1135 Officer suspended—temporary appointment.
1136 President of senate—notice to senate.
1137 Warrant of arrest.
1138 Appearance—answer—counsel.
1139 Organization of court.
1140 Powers of court.
1141 Record of proceedings—administering oaths.
1142 Process for witnesses.
1143 Punishment.
1144 Compensation—fees—payment.

1131 Impeachment defined. An impeachment is a written accusation against the governor, or a judge of the supreme, district, or superior court, or other state officer, by the house of representatives before the senate, of a misdemeanor or malfeasance in office. [R60,§4937; C73,§4546; C97,§5469; C24, 27, 31, 35,§1131.]

1132 Specification of charges—majority must concur. An impeachment must specify the offenses charged as in an indictment. If more than one misdemeanor or malfeasance is charged, each shall be stated separately and distinctly. A majority of all the members of the house of representatives elected must concur in the impeachment. [C51,§§3157, 3158; R60,§§4938–4940; C73,§§4547–4549; C97,§5470; C24, 27, 31, 35,§1132.]

1133 Board of managers—articles. When an impeachment is concurred in, the house of representatives shall elect from its own body seven members whose duty it shall be to prosecute the same, and, as a board of managers, they shall be authorized to exhibit and present articles of impeachment in accordance with the resolutions of the house previously adopted. [C97,§5471; C24, 27, 31, 35,§1133.]

1134 Notice to governor. When an impeachment is concurred in, the clerk of the house of representatives must forthwith in writing notify the governor thereof. [C97,§5472; C24, 27, 31, 35,§1134.]

1135 Officer suspended—temporary appointment. Every officer impeached shall be suspended by the governor from the exercise of his official duties until his acquittal, and the governor shall forthwith appoint some suitable person to temporarily fill the office, and he, having qualified as required by law, shall perform all the duties and enjoy all the rights pertaining to the office until the removal of the suspension of his predecessor or the election of a successor.

[C51,§3165; R60,§4948; C73,§4554; C97,§5473; C24, 27, 31, 35,§1135.]

Qualification by temporary officer, §§1053, 1125

1136 President of senate—notice to senate. If the president of the senate is impeached, notice thereof must be immediately given to the senate, which shall thereupon choose another president, to hold his office until the result of the trial is determined. [C51,§3167; R60,§4949; C73,§4555; C97,§5474; C24, 27, 31, 35,§1136.]

1137 Warrant of arrest. When presented with an impeachment, the senate must forthwith cause the person accused to be arrested and brought before it. The warrant of arrest or other process shall be issued by the secretary of the senate, signed by him, and may be served by any person authorized by the senate or president. [C51,§§3159, 3160; R60,§§4941, 4942; C73, §§4550, 4551; C97,§5475; C24, 27, 31, 35,§1137.]

Approval of warrant and expenses, §§1225.04, 1225.05

1138 Appearance—answer—counsel. Upon the appearance of the person impeached, he is entitled to a copy of the impeachment, and to a reasonable time in which to answer the same, and shall be allowed counsel as in an ordinary criminal prosecution. [C51,§3161; R60,§4943; C73,§4552; C97,§5476; C24, 27, 31, 35,§1138.]

Right to counsel, §13773
Time to plead, §13780

1139 Organization of court. When an impeachment is presented, the senate shall, after the hour of final adjournment of the legislature, be forthwith organized as a court of impeachment for the trial thereof, at the capitol.

An oath or affirmation shall be administered by the secretary of the senate to its president, and by him to each member of that body, to the effect that he will truly and impartially try and determine the charges of impeachment according to the law and evidence.

No member shall sit on the trial or give his evidence thereon until he has taken such oath or affirmation.

The organization of such court shall be perfected when such presiding officer and the members present, but not less than a majority of the whole number, have taken and subscribed the oath or affirmation. [C51,§3162; R60,§4944; C73,§4553; C97,§5477; C24, 27, 31, 35,§1139.]

1140 Powers of court. The court of impeachment shall sit in the senate chamber, and have power:

1. To compel the attendance of its members as the senate may do when engaged in the ordinary business of legislation.
2. To establish rules and regulations necessary for the trial of the accused.
3. To appoint from time to time such subordinate officers, clerks, and reporters as are necessary for the convenient transaction of its business, and at any time to remove any of them.
4. To issue subpoenas, process, and orders, which shall run into any part of the state, and may be served by any adult person authorized so to do by the president of the senate, or by the sheriff of any county, or his deputy, in the name of the state, and with the same force and effect as in an ordinary criminal prosecution, and to compel obedience thereto.
5. To exercise the powers and privileges conferred upon the senate for punishment as for contempts in the chapter entitled "General Assembly".
6. To adjourn from time to time, and to dissolve when its work is completed. [C97,§5478; C24, 27, 31, 35,§1140.]

Contempts, §23 et seq., ch 536

1141 Record of proceedings—administering oaths. The secretary of the senate, in all cases of impeachment, shall keep a full and accurate record of the proceedings, which shall be a public record; and shall have power to administer all requisite oaths or affirmations, and issue subpoenas for witnesses. [R60,§4959; C73, §4570; C97,§5479; C24, 27, 31, 35,§1141.]

1142 Process for witnesses. The board of managers and counsel for the person impeached shall each be entitled to process for compelling the attendance of persons or the production of papers and records required in the trial of the impeachment. [C97,§5480; C24, 27, 31, 35, §1142.]

1143 Punishment. When any person impeached is found guilty, judgment shall be rendered for his removal from office and his disqualification to hold any office of honor, trust, or profit under the state. [C97,§5481; C24, 27, 31, 35,§1143.]

1144 Compensation — fees — payment. The presiding officer and members of the senate, while sitting as a court of impeachment, and the managers elected by the house of representatives, shall receive the sum of six dollars each per day, and mileage at the rate of five cents per mile in going from and returning to their places of residence by the ordinary traveled routes; the secretary, sergeant at arms, and all subordinate officers, clerks, and reporters, shall receive such amount as shall be determined upon by a majority vote of the members of such court. The same fees shall be allowed to witnesses, to officers, and to other persons serving process or orders, as are allowed for like services in criminal cases, but no fees can be demanded in advance. The state treasurer shall, upon the presentation of certificates signed by the presiding officer and secretary of the senate, pay all of the foregoing compensations and the expenses of the senate incurred under the provisions of this chapter. [C97,§5482; C24, 27, 31, 35,§1144.]

Sheriff's fees, §5191
Witness fees, §11326 et seq.
Witnesses in criminal cases, ch 646

CHAPTER 59

VACANCIES IN OFFICE

Referred to in §1052

1145 Holding over.
1146 What constitutes vacancy.
1147 Possession of office.
1148 Resignations.
1149 Vacancy in general assembly.
1150 Vacancy in state boards.
1151 Duty of officer receiving resignation.
1152 Vacancies—how filled.
1153 Person removed not eligible.
1154 Appointments.
1155 Tenure of vacancy appointee.
1156 Officers elected to fill vacancies—tenure.
1157 Vacancies—when filled.
1158 Special election to fill vacancies.

1145 Holding over. Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law. [C51, §241; C73,§784; C97,§1265; C24, 27, 31, 35, §1145.]

1146 What constitutes vacancy. Every civil office shall be vacant upon the happening of either of the following events:

1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over.

2. A failure of the incumbent or holdover officer to qualify within the time prescribed by law.

3. The incumbent ceasing to be a resident of the state, district, county, township, city, town, or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised.

4. The resignation or death of the incumbent, or of the officer elect before qualifying.

5. The removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant.

6. The conviction of incumbent of an infamous crime, or of any public offense involving the violation of his oath of office. [C51,§§334, 429; R60,§§564, 662, 1132; C73,§§504, 686, 781; C97,§1266; C24, 27, 31, 35,§1146.]

Duty of holdover officer to requalify, §1051
Vacancy on board of supervisors, §5115

1147 Possession of office. When a vacancy occurs in a public office, possession shall be taken of the office room, the books, papers, and all things pertaining thereto, to be held until the qualification of a successor, as follows: Of the office of the county auditor, by the clerk of the district court; of the clerk or treasurer, by the county auditor; of any of the state officers, by the governor, or, in his absence or inability at the time of the occurrence, as follows: Of the secretary, by the treasurer; of the auditor, or superintendent of public instruction, by the secretary; of the treasurer, by the secretary and auditor, who shall make an inventory of the money and warrants therein, sign the same, and transmit it to the governor; and the secretary shall take the keys of the safe and desks, after depositing the books, papers, money and warrants therein, and the auditor shall take the key of the office room. [C51,§444; R60,§671; C73,§788; C97,§1267; C24, 27, 31, 35,§1147.]

1148 Resignations. Resignations in writing by civil officers may be made as follows, except as otherwise provided:

1. By the governor, to the general assembly, if in session, if not, to the secretary of state.

2. By state senators and representatives, and all officers appointed by the senate or house, or by the presiding officers thereof, to the respective presiding officers of the senate and house, when the general assembly is in session, and such presiding officers shall immediately transmit to the governor information of the resignation of any member thereof; when the general assembly is not in session, all such resignations shall be made to the governor.

3. By senators and representatives in congress, all officers elected by the qualified voters in the state or any district or division thereof larger than a county, or chosen by the general assembly, all judges of courts of record, all officers, trustees, inspectors, and members of all boards and commissions now or hereafter created under the laws of the state, and all persons filling any position of trust or profit in the state, for which no other provision is made, to the governor.

4. By all county and township officers, to the county auditor, except that of the auditor, which shall be to the board of supervisors.

5. By all councilmen and officers of cities and towns, to the clerk or mayor. [C51,§430; R60, §663; C73,§782; C97,§1268; C24, 27, 31, 35, §1148.]

1149 Vacancy in general assembly. When a vacancy shall occur in the office of senator or representative in the general assembly, except by resignation, the auditor of the county of his residence shall notify the governor of such fact and the cause. [C51,§443; R60,§672; C73,§§789, 790; C97,§1269; C24, 27, 31, 35,§1149.]

1150 Vacancy in state boards. In case of a vacancy from any cause, other than resignation or expiration of term, occurring in any of the governing boards of the state institutions, the secretary thereof shall immediately notify the governor. [C97,§1270; C24, 27, 31, 35,§1150.]

1151 Duty of officer receiving resignation. An officer receiving any resignation, or notice of any vacancy, shall forthwith notify the board, tribunal, or officer, if any, empowered to fill the same by appointment. [C97,§1271; C24, 27, 31, 35,§1151.]

1152 Vacancies — how filled. Vacancies shall be filled by the officer or board named, and

in the manner, and under the conditions, following:

1. *United States senator.* In the office of United States senator, when the vacancy occurs when the senate of the United States is in session, or when such senate will convene prior to the next general election, by the governor.

2. *State offices.* In all state offices, judges of courts of record, officers, trustees, inspectors, and members of all boards or commissions, and all persons filling any position of trust or profit in the state, by the governor, except when some other method is specially provided.

3. *Supreme court appointees.* In the offices of clerk and reporter of the supreme court, by the supreme court.

4. *County offices.* In county offices, including justices of the peace and constables, by the board of supervisors.

5. *Board of supervisors.* In the membership of the board of supervisors, by the clerk of the district court, auditor, and recorder.

6. *Clerk of the district court.* In the office of the clerk of the district court, by the said court or by a judge thereof, by order entered of record in the court journal which order shall be effective until the vacancy shall be filled in the manner provided by law.

7. *Township offices.* In township offices, including trustees, by the trustees, but where the offices of the three trustees are all vacant, the county auditor shall appoint. [C51,§436; R60, §664; C73,§§513, 783, 794; C97,§1272; S13, §1272; C24, 27, 31, 35,§1152.]

Auditor temporarily to act as recorder, §5170
General power of governor, Constitution, Art. IV, §10
Special sheriff or coroner, §5199

1153 Person removed not eligible. No person can be appointed to fill a vacancy who has been removed from office within one year next preceding. [C51,§441; R60,§669; C73,§787; C97, §1273; C24, 27, 31, 35,§1153.]

1154 Appointments. Appointments under the provisions of this chapter shall be in writing, and filed in the office where the oath of office is required to be filed. [C51,§439; R60, §667; C73,§785; C97,§1274; C24, 27, 31, 35, §1154.]

Place of filing oath, §1077

1155 Tenure of vacancy appointee. An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified. [C51,§§429, 439; R60,§§662, 667, 1101; C73,§§ 530, 781, 785; C97,§1276; C24, 27, 31, 35,§1155.]

1156 Officers elected to fill vacancies—tenure. Officers elected to fill vacancies, either at a special or general election, shall hold for the unexpired portion of the term, and until a successor is elected and qualified, unless otherwise provided by law. [R60,§1083; C73,§513; C97, §1277; C24, 27, 31, 35,§1156.]

Duty to requalify, §1052

1157 Vacancies—when filled. If a vacancy occurs in an elective office in a city, town, or township ten days, or a county office fifteen days, or any other office thirty days, prior to a general election, it shall be filled at such election, unless previously filled at a special election. [C51,§§431–435; R60,§§672, 1101; C73, §§530, 789, 794, 795; C97,§1278; C24, 27, 31, 35, §1157.]

1158 Special election to fill vacancies. A special election to fill a vacancy shall be held for a representative in congress, or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order such special election at the earliest practicable time, giving ten days notice thereof. [C51,§443; R60,§672; C73,§789; C97,§1279; C24, 27, 31, 35, §1158.]

CHAPTER 60

SOLDIERS PREFERENCE LAW

Referred to in §154
Veterans' newsstands, §§295.1, 5130.1

1159 Appointments and promotions.
1160 Physical disability.
1161 Duty to investigate and appoint.
1162 Mandamus.
1162.1 Appeals.
1163 Removal—certiorari to review.
1164 Burden of proof.
1165 Exceptions.

1159 Appointments and promotions. In every public department and upon all public works in the state, and of the counties, cities, towns, and school boards thereof, including those of cities acting under special charters, honorably discharged soldiers, sailors, marines, and nurses from the army and navy of the United States in the late civil war, Spanish-American war, Philippine insurrection, China relief expedition, or war with Germany, who are citizens and residents of this state, shall, except in the position of school teachers, be entitled to preference in appointment, employment, and promotion over other applicants of

no greater qualifications. [S13,§1056-a15; C24, 27, 31, 35,§1159.]

Referred to in §1162.1

1160 Physical disability. The persons thus preferred shall not be disqualified from holding any position hereinbefore mentioned on account of age or by reason of any physical disability, provided such age or disability does not render such person incompetent to perform properly the duties of the position applied for. [S13, §1056-a15; C24, 27, 31, 35,§1160.]

1161 Duty to investigate and appoint. When such soldier, sailor, marine, or nurse shall apply for appointment or employment under this chapter, the officer, board, or person whose duty it is or may be to appoint or employ some person to fill such position or place shall, before appointing or employing anyone to fill such position or place, make an investigation as to the qualifications of said applicant for such place or position, and if the applicant is of good moral character and can perform the duties of said position so applied for, as hereinbefore provided, said officer, board, or person shall appoint said applicant to such position, place, or employment. Said appointing officer, board or* person shall set forth in writing and file for public inspection, the specific grounds upon which it is held that the person appointed is entitled to said appointment, or in the case such appointment is refused, the specific grounds for the refusal thereof. [S13,§1056-a15; C24, 27, 31, 35, §1161.]

*"of" in enrolled bill

1162 Mandamus. A refusal to allow said preference, or a reduction of the salary for said position with intent to bring about the resignation or discharge of the incumbent, shall entitle the applicant or incumbent, as the case may be, to maintain an action of mandamus to right the wrong. [S13,§§1056-a15,-a16; C24, 27, 31, 35,§1162.]

Referred to in §1162.1

1162.1 Appeals. In addition to the remedy provided in section 1162, an appeal may be taken by any person belonging to any of the classes of persons to whom a preference is hereby granted, from any refusal to allow said preference, as provided in this chapter, to the district court of the county in which such refusal occurs. The appeal shall be made by serving upon the appointing board within twenty days after the date of the refusal of said appointing officer, board, or persons to allow said preference, a written notice of such appeal stating the grounds of the appeal; a demand in writing for a certified transcript of the record, and all papers on file in his office affecting or relating to said appointment. Thereupon, said appointing officer, board, or person, shall, within ten days make, certify, and deliver to appellant such a transcript; and the appellant shall, within five days thereafter, file the same and a copy of the notice of appeal with the clerk of said court, and said notice of appeal shall stand as appellant's complaint and thereupon said cause shall be entered on the trial calendar of said court for trial the same as in case of an appeal from a justice of the peace. The court shall receive and consider any pertinent evidence, whether oral or documentary, concerning said appointment from which the appeal is taken, and if the court shall find that the said applicant is qualified as defined in section 1159, to hold the position for which he has applied, said courts shall, by its mandate, specifically direct the said appointing officer, board or persons as to their further action in the matter. An appeal may be taken from judgment of the said district court on any such appeal on the same terms as an appeal is taken in civil actions. [C35,§1162-g1.]

Appeals, §§12832, 12837

1163 Removal — certiorari to review. No person holding a public position by appointment or employment, and belonging to any of the classes of persons to whom a preference is herein granted, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employee or appointee to a review by a writ of certiorari. [S13,§1056-a16; C24, 27, 31, 35, §1163.]

1164 Burden of proof. The burden of proving incompetency or misconduct shall rest upon the party alleging the same. [S13,§1056-a16; C24, 27, 31, 35,§1164.]

40GA, ch 227, §6, editorially divided

1165 Exceptions. Nothing in this chapter shall be construed to apply to the position of private secretary or deputy of any official or department, or to any person holding a strictly confidential relation to the appointing officer. [S13,§1056-a16; C24, 27, 31, 35,§1165.]

CHAPTER 61

NEPOTISM

1166 Employments prohibited.

1167 Payment prohibited.

1166 Employments prohibited. It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of the state or by virtue of the ordinance of any city or town in the state, to appoint as deputy, clerk, or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity, within the third degree, to the person elected, appointed, or making said appointment, unless such appointment shall first be approved by the officer, board, council, or commission whose duty

it is to approve the bond of the principal; provided this provision shall not apply in cases where such person appointed receives compensation at the rate of six hundred dollars per year or less, nor shall it apply to persons teaching in public schools. [C24, 27, 31, 35,§1166.]

Approving officers and boards, §1073
Computation of degrees, §63, par. 24

1167 Payment prohibited. No person so unlawfully appointed or employed shall be paid or receive any compensation from the public money and such appointment shall be null and void and any person or persons so paying the same or any part thereof, together with his bondsmen, shall be liable for any and all moneys so paid. [C24, 27, 31, 35,§1167.]

CHAPTER 62

DUTIES RELATIVE TO PUBLIC CONTRACTS

Referred to in §4026

1168 Unauthorized contracts.
1169 Executive council may authorize indebtedness.
1170 Divulging contents of sealed bids.
1171 Penalty.

1168 Unauthorized contracts. Officers empowered to expend, or direct the expenditure of, public money of the state shall not make any contract for any purpose which contemplates an expenditure of such money in excess of that authorized by law. [R60,§2181; C73,§127; C97, §§185, 186; C24, 27, 31, 35,§1168.]

Analogous provision, §5258

1169 Executive council may authorize indebtedness. Nothing herein contained shall prevent the incurring of an indebtedness on account of support funds for state institutions, upon the prior written direction of the executive council, specifying the items and amount of such indebtedness to be increased, and the necessity therefor. [C97,§186; C24, 27, 31, 35,§1169.]

1170 Divulging contents of sealed bids. No public officer or deputy thereof, if any, shall directly or indirectly or in any manner whatsoever, at any other time or in any other manner than as provided by law, open any sealed bid or convey or divulge to any person any part of the contents of a sealed bid, on any proposed contract concerning which a sealed bid is required or permitted by law. [S13,§1279-a; C24, 27, 31, 35, §1170.]

Referred to in §1171

1171 Penalty. A violation of the provisions of section 1170 shall, in addition to criminal liability, render the violator liable, personally and on his bond, if any, to liquidated damages in the sum of one thousand dollars for each violation, to inure to and be collected by the state, county, city, town, school district, or other municipal corporation of which the violator is an officer or deputy. [S13,§1279-a; C24, 27, 31, 35, §1171.]

CHAPTER 62.1

PREFERENCE FOR IOWA PRODUCTS AND LABOR

1171.01 Preference authorized—conditions.
1171.02 Advertisements for bids—form.
1171.03 Iowa labor.
1171.04 "Person" defined.
1171.05 Violations.
1171.06 Iowa coal.
1171.07 Bids and contracts.
1171.08 Certificate.
1171.09 Violations—remedy.
1171.10 Exceptions.

1171.01 Preference authorized—conditions. Every commission, board, committee, officer or other governing body of the state, or of any county, township, school district, city or town, and every person acting as contracting or purchasing agent for any such commission, board, committee, officer or other governing body shall use only those products and provisions grown and coal produced within the state of Iowa, when they are found in marketable quantities in the state and are of a quality reasonably suited to the purpose intended, and can be secured without additional cost over foreign products or products of other states. [C27, 31, 35, §1171-b1.]

1171.02 Advertisements for bids — form. All requests hereafter made for bids and proposals for materials, products, supplies, provisions and other needed articles to be purchased at public expense, shall be made in general terms and by general specifications and not by brand, trade name or other individual mark. All such requests and bids shall contain therein a paragraph in easily legible print, reading as follows:

"By virtue of statutory authority, a preference will be given to products and provisions grown and coal produced within the state of Iowa." [C27, 31, 35,§1171-b2.]

1171.03 Iowa labor. Every commission, board, committee, officer or other governing body of the state, or of any county, township, school district, city or town, and every person acting as contracting agent for any such commission, board, committee, officer or other governing body of the state, or of any county, township, school district, city or town, shall give preference to Iowa labor in the constructing or building of any public improvement or works, and every contract entered into by any

such commission, board, committee, officer or other governing body of the state for the construction or building of any public improvement or works shall contain a provision requiring that preference shall be given to Iowa domestic labor in the constructing or building of such public improvement or works. The provisions of this and sections 1171.04 and 1171.05 shall not apply to the purchase of materials and supplies to be used in the construction of any road or highway. [C31, 35,§1171-d1.]

Referred to in §1171.05

1171.04 "Person" defined. A person shall be deemed to be a domestic laborer of this state if he is a citizen and has resided in this state for more than six months. [C31, 35,§1171-d2.]

Referred to in §§1171.03, 1171.05

1171.05 Violations. Any officer or person who is connected with, or is a member or agent or representative of any commission, board, committee, officer or other governing body of this state, or of any county, township, school district, city or town, or contractor, who fails to give preference to Iowa labor as required in sections 1171.03 and 1171.04, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail for not to exceed thirty days. Each separate case of failure to give preference to Iowa labor shall constitute a separate offense. [C31, 35, §1171-d3.]

Referred to in §1171.03

1171.06 Iowa coal. It shall be unlawful for any commission, board, county, officer or other governing body of the state, or of any county, township, school district, city or town, to purchase or use any coal, except that mined or produced within the state by producers who are, at the time such coal is purchased and produced, complying with all the workmen's compensation and mining laws of the state. The provisions of this section shall not be applicable if coal produced within the state cannot be procured of a quantity or quality reasonably suited to the needs of such purchaser, nor if the equipment now installed is not reasonably adapted to the use of coal produced within the state, nor if the use of coal produced within the state would materially lessen the efficiency or increase the cost of operating such purchaser's heating or power plant, nor to mines employing miners not now under the provisions of the workmen's compensation act or who permit the miners to work in individual units in their own rooms. [47GA, ch 93,§1.]

Referred to in §§1171.07, 1171.09, 1171.10

1171.07 Bids and contracts. Before any user of coal designated in section 1171.06, whose annual consumption of coal exceeds, in delivered value, the sum of three hundred dollars, shall purchase any coal, it shall make request for bids for such coal by advertising in an official paper published in the county in which the purchaser has its principal office, and such advertisement shall, among other things, state the date, time and place such bids shall be received, which date and time shall not be less than fifteen days after publication, and the advertisement shall contain the approximate quantity and description of coal to be purchased, and the bids for such coal shall be opened in public at the time, date and place indicated in the said advertisement and, unless the purchasing body shall determine that the general good of the state, including the best interests of the taxpayer and the employment of labor, the adaptability of the coal offered, or the efficiency and cost of operation of purchaser's plant makes it advisable to do otherwise, the contract shall be let to the lowest responsible bidder, but any and all bids may be rejected; however, if all bids are rejected, then an advertisement for bids shall again be made as hereinbefore provided. After any bid is accepted, a written contract shall be entered into and the successful bidder shall furnish a good and sufficient bond with qualified sureties for the faithful performance of the contract. Any contract for purchase of coal provided for in sections 1171.06 to 1171.09, inclusive, may contain the provision that the purchaser may, in the event of an emergency, purchase coal elsewhere without advertising for bids in any year, for not more than ten percent of said purchaser's annual coal requirements. [47GA, ch 93,§2; 48GA, ch 60,§1.]

Referred to in §§1171.08, 1171.09, 1171.10

1171.08 Certificate. No bid for coal produced in Iowa, which comes under the provisions of section 1171.07, shall be considered unless it states the name of the producer and gives the location of the mine from which the coal is to be produced, and unless there is attached thereto a certificate of the secretary of the state mine inspectors that the producer designated in such bid is now complying with all the workmen's compensation and mining laws of the state. [47GA, ch 93,§3.]

Referred to in §§1171 07, 1171.09, 1171.10

1171.09 Violations—remedy. Any contract entered into or carried out in whole or in part, in violation of the provisions of sections 1171.06 to 1171.08, inclusive, shall be void and such contract or any claim growing out of the sale, delivery or use of the coal specified therein, shall be unenforceable in any court. In addition to any other proper party or parties, any unsuccessful bidder at a letting provided for in said sections shall have the right to maintain an action in equity to prevent the violation of the terms of said sections. [47GA, ch 93,§4.]

Referred to in §§1171.07, 1171.10

1171.10 Exceptions. The provisions of sections 1171.06 to 1171.09, inclusive, shall not apply to municipally owned and operated public utilities nor to school townships and rural independent districts. [47GA, ch 93,§5.]

CHAPTER 62.2

PUBLIC WARRANTS NOT PAID FOR WANT OF FUNDS

1171.11 Applicability.
1171.12 Indorsement and interest.
1171.13 Record of warrants.
1171.14 Assignment of warrant.
1171.15 Call for payment.
1171.16 Mailing notice—terminating interest.
1171.17 Indorsement of interest.

1171.11 Applicability. This chapter shall apply to all warrants which are legally drawn on a public treasury, including the treasury of a city acting under special charter, and which, when presented for payment, are not paid for want of funds. [C35,§1171-f1.]

1171.12 Indorsement and interest. When any such warrant is presented for payment, and not paid for want of funds, or only partially paid, the treasurer shall indorse the fact thereon, with the date of presentation, and sign said indorsement, and thereafter said warrant or the balance due thereon, shall draw interest at five percent per annum on state and county warrants, and six percent per annum on city, drainage and school warrants, unless the treasurer arranges for the sale of said warrant at par at a lower rate of interest. [C51,§§65, 153; R60, §§86, 361; C73,§§78, 328, 1748; C97,§§104, 483, 660, 2768; S13,§§104, 483; C24, 27, 31,§§135, 4318, 5160, 5645, 7496; C35,§1171-f2.]

1171.13 Record of warrants. The treasurer shall keep a record of all warrants so indorsed, which record shall show the number and amount, the date of presentation, and the name and post-office address of the holder, of each warrant. [C51,§§66, 153; R60,§§87, 361; C73, §§79, 328; C97,§§105, 483, 660; S13,§483; C24, 27, 31,§§136, 5160, 5646, 7496; C35,§1171-f3.]

1171.14 Assignment of warrant. When any warrant shall be assigned or transferred after being so indorsed, the assignee or transferee shall be under duty, for his own protection, to notify the treasurer in writing of such assignment or transfer and of his post-office address. Upon receiving such notification, the treasurer shall correct the aforesaid record accordingly. [C24, 27, 31, §7497; C35,§1171-f4.]

1171.15 Call for payment. When the treasurer has funds on hand in the fund on which such warrants are drawn, sufficient to pay a warrant, he shall, by notice posted at his office and in a place readily accessible to the public, call said warrant or warrants for payment, giving the number thereof. Said warrants shall be paid in the order of presentation. [C51,§§66, 153; R60,§§87, 361; C73,§§79, 328; C97,§§105, 484, 660; C24, 27, 31,§§136, 5161, 5647, 7496; C35, §1171-f5.]

1171.16 Mailing notice—terminating interest. In addition to the posting aforesaid, the treasurer shall mail to each holder of a warrant, in accordance with the aforesaid record, a notice of his readiness to pay said warrant, describing it by number and amount, and note the date of such mailing on the record aforesaid. On the expiration of thirty days from the date of said mailing, interest on said warrant shall cease irrespective of the posting aforesaid. [C51, §§66, 153; R60,§§87, 361; C73,§§79, 328; C97, §§105, 484, 660; C24, 27, 31,§§136, 5161, 5647, 7496, 7498; C35,§1171-f6.]

1171.17 Indorsement of interest. When a warrant which legally draws interest is paid, the treasurer shall indorse upon it the date of payment, and the amount of interest allowed. [C51,§153; R60,§361; C73,§328; C97,§§484, 660; C24, 27, 31,§§5161, 5646, 5648, 7496; C35,§1171-f7.]

Analogous section, §7400

CHAPTER 63

AUTHORIZATION AND SALE OF PUBLIC BONDS

Referred to in §§4644.52, 5278, 6117

1171.18 Bonds—election—vote required.
1172 Notice of sale.
1173 Sealed and open bids.
1174 Rejection of bids.
1175 Selling price.
1176 Commission and expense.
1177 Penalty.
1178 Sale of state bonds.
1179 Exchange of bonds.

1171.18 Bonds — election — vote required. When a proposition to authorize an issuance of bonds by a county, township, school district, city or town, or by any local board or commission, is submitted to the electors, such proposition shall not be deemed carried or adopted, anything in the statutes to the contrary notwithstanding, unless the vote in favor of such authorization is equal to at least sixty percent of the total vote cast for and against said proposition at said election. [C31, 35,§1171-d4.]

Referred to in §6261.2

1172 Notice of sale. When public bonds are offered for sale, the official or officials in charge of such bond issue shall, by advertisement published for two or more successive weeks in at least one official newspaper of the county, give notice of the time and place of sale of said

bonds, the amount to be offered for sale, and any further information which may be deemed pertinent. [C24, 27, 31, 35,§1172.]

1173 Sealed and open bids. Sealed bids may be received at any time prior to the calling for open bids. After the sealed bids are all filed, the official or officials shall call for open bids. After all of the open bids have been received the substance of the best open bid shall be noted in the minutes. The official or officials shall then open any sealed bids that may have been filed and they shall note in the minutes the substance of the best sealed bid. [C24, 27, 31, 35, §1173.]

1174 Rejection of bids. Any or all bids may be rejected, and the sale may be advertised anew, in the same manner, or the bonds or any portion thereof may thereafter be sold at private sale to any one or more of such bidders, or other persons, by popular subscription or otherwise. In case of private sales, the said bonds shall be sold upon terms not less favorable to the public than the most favorable bid made by a bona fide and responsible bidder at the last advertised sale. [C24, 27, 31, 35,§1174.]

1175 Selling price. No public bond shall be sold for less than par, plus accrued interest. [C24, 27, 31, 35,§1175.]

Applicable to special charter cities, §6752

1176 Commission and expense. No commission shall be paid, directly or indirectly, in connection with the sale of a public bond. No expense shall be contracted or paid in connection with such sale other than the expenses incurred in advertising such bonds for sale. [C24, 27, 31, 35,§1176.]

Applicable to special charter cities, §6752

1177 Penalty. Any public officer who fails to perform any duty required by this chapter or who does any act prohibited by this chapter, shall be guilty of a misdemeanor. [C24, 27, 31, 35,§1177.]

Applicable to special charter cities, §6752
Punishment, §12894

1178 Sale of state bonds. All contracts for the sale of bonds issued by the state shall be subject to the approval of the executive council. [C24, 27, 31, 35,§1178.]

1179 Exchange of bonds. Nothing in this chapter shall be deemed to prevent the exchange of bonds for legal indebtedness evidenced by bonds, warrants, or judgments as otherwise provided by law. [C24, 27, 31, 35,§1179.]

CHAPTER 63.1

MATURITY AND PAYMENT OF BONDS

Applicable to special charter cities, §6752.1

1179.1 Mandatory retirement.
1179.2 Mandatory levy.
1179.3 Tax limitations.
1179.4 Permissive application of funds.
1179.5 Exceptions.
1179.6 Place of payment.

1179.1 Mandatory retirement. Hereafter issues of bonds of every kind and character by counties, cities, towns, and school districts shall be consecutively numbered. The annual levy shall be sufficient to pay the interest and approximately such portion of the principal of the bonds as will retire them in a period not exceeding twenty years from date of issue. Each issue of bonds shall be scheduled to mature serially in the same order as numbered. [C27, 31, 35,§1179-b1.]

1179.2 Mandatory levy. The governing authority of these political subdivisions before issuing bonds shall, by resolution, provide for the assessment of an annual levy upon all the taxable property in such public corporation sufficient to pay the interest and principal of such bonds within a period named not exceeding twenty years. A certified copy of this resolution shall be filed with the county auditor or auditors of the counties, as the case may be, in which such public corporation is located; and the filing thereof shall make it a duty of such officer or officers to enter annually this levy for collection until funds are realized to pay the bonds in full. [C27, 31, 35,§1179-b2.]

Referred to in §375

1179.3 Tax limitations. Tax limitations in any law for the issuance of bonds shall be based on the latest equalized valuation then existing and shall only restrict the amount of bonds which may be issued. [C31, 35,§1179-c1.]

1179.4 Permissive application of funds. Whenever the governing authority of such political subdivision shall have on hand funds derived from any other source than taxation which may be appropriated to the payment either of interest or principal, or both principal and interest, of such bonds such funds may be so appropriated and used and the levy for the payment of the bonds correspondingly reduced. [C27, 31, 35,§1179-b3.]

1179.5 Exceptions. The provisions of this chapter shall not apply to bonds, the interest or principal of which are payable out of the primary road fund or out of special assessments against benefited property. [C27, 31, 35,§1179-b4.]

1179.6 Place of payment. The principal and interest of all bonds of any public body in this state, issued subsequent to this act [45ExGA, ch 15] becoming effective, shall be payable at the office of the treasurer or public official charged with the duty of making payment. [C35,§1179-f1.]

Probably effective after March 22, 1934. See Arnold v. Board, 151 Iowa 155

CHAPTER 64

COMMISSIONERS IN OTHER STATES

1180 Appointment.
1181 Seal.
1182 Application.
1183 Oath.
1184 Certificate of qualifications.
1185 Authentication of certificate.
1186 Fees—filing of application.
1187 Issuance of commission.
1188 Disposition of commissions.
1189 Governor to keep record.
1190 Published list of commissioners.
1191 Powers.
1192 Evidentiary effect of official acts.
1193 Signature and seal as evidence.
1194 Fees.
1195 Resident commissioner for foreign state—conditions.
1196 Authority of resident commissioner.

1180 Appointment. The governor may appoint and commission, in each of the states of the United States, other than this state, and in each territory or insular possession of the United States, one or more commissioners who shall continue in office for three years from the date of commission. Such appointment may be revoked at any time by the governor. [C51, §71; R60,§188; C73,§267; C97,§383; C24, 27, 31, 35,§1180.]

1181 Seal. Each such commissioner shall have an official seal, on which shall be engraved the words, "Commissioner for Iowa", with his surname and at least the initials of his christian name; also the name of the state in which he acts, which seal must be so engraved as to make a clear impression on wax, wafer, or paper. [C73,§268; C97,§384; C24, 27, 31, 35,§1181.]

1182 Application. Any person desiring to be appointed such commissioner shall make application in substantially the following form:

State of.....}
County of.....} ss.

I,....., do hereby apply to his excellency, the governor of Iowa, for appointment as commissioner for the state of Iowa in the state of.....; that I am a resident of said state and reside at.....in said state; that I do solemnly swear that I will support, protect, and defend the constitution of the United States, and the constitution of the state of Iowa, and that I will well and truly execute and perform all the duties of such commissioner, under and by virtue of the laws of the state of Iowa during my term of office; and that opposite my signature hereto, I have attached a true impression of my official seal.

(Official Seal) .....

Subscribed and sworn to by the above named ..... before me, this..... day of..... A. D., 19....

Witness my hand and official seal.

.....

.....

[C51,§73; R60,§190; C73,§272; C97,§388; C24, 27, 31, 35,§1182.]

1183 Oath. The oath to said application shall be taken and subscribed:

1. Before a clerk of a court of record in the state in which the applicant is to exercise his appointment, if made, or

2. Before a duly authorized commissioner for Iowa, resident in said state.

The said oath shall be certified to under the signature of the person administering it, with the seal of his court, or with the seal of the said commissioner, as the case may be. [C51, §73; R60,§190; C73,§272; C97,§388; C24, 27, 31, 35,§1183.]

1184 Certificate of qualifications. A certificate in substantially the following form, and executed by a judge of a court of record of the state in which the applicant proposes to act, shall accompany said application:

State of.....}
County of.....} ss.

I, ..., do hereby certify that I am a duly qualified and acting judge of (name of court).....; that I am personally acquainted with....., know him to be a resident of the state of....., a person of good moral character, and fully competent to perform the duties of commissioner of the state of Iowa.

Witness my official signature this..... day of....., 19....

.....

(Official signature)

[C24, 27,31, 35,§1184.]

Referred to in §1185

1185 Authentication of certificate. The clerk of the court specified in the certificate provided for in section 1184 shall, under his official signature and the seal of said court, certify to the nature of said court, and to the official position and genuineness of signature of the person executing said certificate. [C24, 27, 31, 35, §1185.]

1186 Fees—filing of application. Said application shall be accompanied by a fee of fifteen dollars. Said application shall remain permanently on file in the office of the governor. [C51, §§73, 2524; R60,§§190, 4133; C73,§§272, 3756; C97,§§85, 388; C24, 27, 31, 35,§1186.]

1187 Issuance of commission. If said application is in due form the governor shall, if he is satisfied of the fitness of the applicant, issue to said applicant duplicate commissions substantially in the following form:

STATE OF IOWA
EXECUTIVE DEPARTMENT

To all to whom these presents shall come, greeting.

Know ye that I, ... Governor of the State of Iowa, reposing special confidence in....., in the name and by the au-

thority of the people of the said state, do hereby appoint and commission him a commissioner, resident in the state of....., to administer oaths, to take depositions and affidavits to be used in the courts of this state, and to take acknowledgments or proof of deeds and other instruments to be recorded and used in this state, to take effect on and after the ..... day of.....A. D., 19....., and do authorize him to discharge according to law the duties of said office and to hold and enjoy the same, together with all the powers, privileges, and emoluments thereto appertaining for the term of three years from said date.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Iowa. Done at Des Moines, this..... day of.....in the year of our Lord, one thousand nine hundred and.....

BY THE GOVERNOR:

Attest:

....

Secretary of State.

[C73,§273; C97,§389; C24, 27, 31, 35,§1187.]

1188 Disposition of commissions. One duplicate commission shall be forwarded to the person commissioned. The other duplicate shall be forwarded to the secretary of state of the state in which said commissioner has been appointed to act. [C73,§273; C97,§389; C24, 27, 31, 35,§1188.]

1189 Governor to keep record. The governor shall keep in his office a complete record of all appointments made by him pursuant to the provisions of this chapter. [C73,§276; C97, §392; C24, 27, 31, 35,§1189.]

1190 Published list of commissioners. The governor shall cause to be published with the session laws of each general assembly a full and complete list of all commissioners for Iowa who are duly qualified, and whose commissions do not expire on or before the fourth day of July of the year in which such publication is made, which list shall give the post-office address, date of qualification, and date of expiration of the commission, of each commissioner. [C73,§274; C97,§390; C24, 27, 31, 35,§1190.]

1191 Powers. A commissioner appointed as herein required shall have all the powers enumerated in said commission. [C51,§71; R60, §188; C73,§267; C97,§383; C24, 27, 31, 35,§1191.]

1192 Evidentiary effect of official acts. Oaths administered by any such commissioner, affidavits and depositions taken by him, and acknowledgments and proofs of deeds and other instruments, as aforesaid, certified by him, over his official signature and seal, are made as effectual in law, to all intents and purposes, as if done and certified by a clerk of the district court, or justice of the peace, or notary public, of this state. [C51,§72; R60,§189; C73,§271; C97,§387; C24, 27, 31, 35,§1192.]

1193 Signature and seal as evidence. The signature and impression of the official seal of a person purporting to be a commissioner shall be deemed presumptively genuine, and shall be entitled to the same credit as evidence in the courts and public offices of this state as the signature and seal of a clerk of the district court, or notary public of this state. [C51,§74; R60,§191; C73, §269; C97,§385; C24, 27, 31, 35,§1193.]

1194 Fees. Such commissioner is authorized to demand for his services the same fees as may be allowed for similar services by the laws of the state in which he is to exercise his office. [C51,§75; R60,§192; C73,§270; C97,§386; C24, 27, 31, 35,§1194.]

1195 Resident commissioner for foreign state—conditions. Commissioners of like nature appointed in this state under the authority of any other of the states of the United States, or under authority of any of the territories or insular possessions of the United States shall obtain from the issuing authority of such state, territory, or insular possession, a duplicate of his commission and file the same with the governor of this state. [C51,§77; R60,§194; C73, §275; C97,§391; C24, 27, 31, 35,§1195.]

Referred to in §1196

1196 Authority of resident commissioner. The commissioners specified in section 1195 are hereby invested with the authority of a justice of the peace to issue subpoenas, requiring the attendance of witnesses before them to give their testimony by deposition or affidavit, in any matter in which such deposition or affidavit may be taken by the law of such other state. They are also authorized to administer oaths in any matter in relation to which they are required or permitted by such law of the other states; and false swearing in such cases is hereby made subject to the penal laws of this state relating to perjury. [C51,§77; R60,§194; C73,§275; C97, §391; C24, 27, 31, 35,§1196.]

Issuance of subpoenas, §11320

CHAPTER 65

NOTARIES PUBLIC

1197 Appointment.
1198 When appointments made.
1199 Notice of expiration of term.
1200 Conditions.
1201 Certificate filed.
1202 Revocation—notice.
1203 Powers within county of appointment.
1204 Powers within adjoining county.
1205 Oaths and protest by interested notary.
1205.1 Corporation employee as notary.
1206 Improperly acting as notary.
1207 Acting under maiden name.
1208 Record to be kept.
1209 Death—resignation—removal.
1210 Neglect to deposit records.
1211 Neglect of executor to deposit records.
1212 Change of residence.
1213 Duty of clerk as to records.
1214 Notary fees.

1197 Appointment. The governor may at any time appoint one or more notaries public in each county and may at any time revoke such appointment. [C51,§78; R60,§195; C73,§258; C97,§373; S13,§373; C24, 27, 31, 35,§1197.]

1198 When appointments made. Such appointments, if for a full term, shall be made on July 4, 1924, and on the same day each three years thereafter. All commissions shall expire on the fourth day of July in the same years. No commission shall be for a longer period than three years. [C51,§78; R60,§195; C73,§258; C97, §373; S13,§373; C24, 27, 31, 35,§1198.]

1199 Notice of expiration of term. The governor shall, on or before May 1 preceding the expiration of each commission, notify each notary public of such expiration and furnish him with a blank application for reappointment and a blank bond. [C97,§373; S13,§373; C24, 27, 31, 35, §1199.]

1200 Conditions. Before any such commission is delivered to the person appointed, he shall:

1. Procure a seal on which shall be engraved the words "Notarial Seal" and "Iowa", with his surname at length and at least the initials of his christian name.
2. Execute a bond to the state of Iowa in the sum of five hundred dollars conditioned for the true and faithful execution of the duties of his office, which bond, when secured by personal surety, shall be approved by the clerk of the district court of the county of his residence; all other bonds shall be approved by the governor.
3. Write on said bond, or a paper attached thereto, his signature, and place thereon a distinct impression of his official seal.
4. File such bond with attached papers, if any, in the office of the governor.
5. Remit to the governor the sum of five dollars for the three-year period provided by law.

When the governor is satisfied that the foregoing requirements have been fully complied with, he shall execute and deliver a commission to the person appointed. [C51,§§80, 83; R60, §§197, 200, 207–209; C73,§259; C97,§374; S13, §374; C24, 27, 31, 35,§1200.]

1201 Certificate filed. When the governor delivers a commission to the person appointed, he or his secretary shall make a certificate of such appointment and forward the same to the clerk of the district court of the proper county, who shall file and preserve the same in his office, and it shall be deemed sufficient evidence to enable such clerk to certify that the person so commissioned is a notary public during the time such commission is in force. [C73,§260; C97,§375; S13,§375; C24, 27, 31, 35,§1201.]

1202 Revocation—notice. Should the commission of any person appointed notary public be revoked by the governor, he shall immediately notify such person and also the clerk of the district court of the proper county, through the mail. [C73,§261; C97,§376; S13,§376; C24, 27, 31, 35,§1202.]

1203 Powers within county of appointment. Each notary is invested, within the county of his appointment, with the powers and shall perform the duties which pertain to that office by the custom and law of merchants. [C51,§79; R60,§196; C73,§262; C97,§377; S13,§377; C24, 27, 31, 35, §1203.]

Referred to in §1204

1204 Powers within adjoining county. Such notary public is also invested with the powers specified in section 1203 in any county adjoining the county of his appointment, provided he has filed in such adjoining county, with the clerk of the district court, a certified copy of his certificate of appointment. [S13,§377; C24, 27, 31, 35,§1204.]

1205 Oaths and protest by interested notary. Any notary public, who is at the same time an officer, director, or stockholder of a corporation, is also hereby invested with the power to administer oaths to any officer, director, or stockholder of such corporation in any matter wherein said corporation is interested, and is hereby authorized to protest for nonacceptance or nonpayment, bills of exchange, drafts, checks, notes, and other negotiable or nonnegotiable instruments which may be owned or held for collection by such corporation, as fully and effectually as if he were not an officer, director, or stockholder of such corporation. [C24, 27, 31, 35,§1205.]

1205.1 Corporation employee as notary. Any employee of a corporation who is a notary public and who is not a stockholder in said corporation, and who is not otherwise financially interested in the subject matter of said instrument, is hereby authorized to take acknowledgments of any person on an instrument running to such corporation, regardless of the title or position that said notary shall hold as an employee of such corporation. [48GA, ch 61,§1.]

1206 Improperly acting as notary. If any notary public exercises the duties of his office after the expiration of his commission, or when otherwise disqualified, or appends his official signature to documents when the parties have not appeared before him, he shall be fined not less than fifty dollars, and shall be removed from office by the governor. [R60,§210; C73, §3975; C97,§4912; C24, 27, 31, 35,§1206.]

1207 Acting under maiden name. When a female has, prior or subsequent to the adoption of this code, been commissioned a notary public, and has, after the issuance of said commission and prior to the expiration thereof, contracted a marriage, the official acts of such notary public after said marriage and prior to the expiration of said commission shall not be deemed illegal or insufficient because, after said marriage, she performed said official acts under the name in which said commission was issued. [C24, 27, 31, 35,§1207.]

1208 Record to be kept. Every notary public is required to keep a true record of all notices given or sent by him, with the time and manner in which the same were given or sent, and the names of all the parties to whom the same were given or sent, with a copy of the instrument in relation to which the notice is served, and of the notice itself. [C51,§81; R60,§198; C73,§263; C97,§378; C24, 27, 31, 35,§1208.]

1209 Death—resignation—removal. On the death, resignation, or removal from office of any notary, his records, with all his official papers, shall, within three months therefrom, be deposited in the office of the clerk of the district court in the county for which such notary shall have been appointed. [C51,§85; R60,§202; C73,§264; C97,§379; C24, 27, 31, 35,§1209.]

1210 Neglect to deposit records. If any notary, on his resignation or removal, neglects for three months so to deposit them, he shall be guilty of a misdemeanor and be liable in an action to any person injured by such neglect. [C51,§85; R60,§202; C73,§264; C97,§379; C24, 27, 31, 35,§1210.]

Punishment, §12894

1211 Neglect of executor to deposit records. If an executor or administrator of a deceased notary wilfully neglects, for three months after his acceptance of that appointment, to deposit in said clerk's office the records and papers of a deceased notary which came into his hands, he shall be held guilty of a misdemeanor. [C51,§85; R60,§202; C73,§264; C97,§379; C24, 27, 31, 35, §1211.]

Punishment, §12894

1212 Change of residence. If a notary remove his residence from the county for which he was appointed, such removal shall be taken as a resignation. [C51,§86; R60,§203; C73,§265; C97,§380; C24, 27, 31, 35,§1212.]

1213 Duty of clerk as to records. Each clerk aforesaid shall receive and safely keep all such records and papers of the notary in the cases above named, and shall give attested copies of them, under the seal of his court, for which he may demand such fees as by law may be allowed to the notaries, and such copies shall have the same effect as if certified by the notary. [C51,§87; R60,§204; C73,§266; C97,§381; C24, 27, 31, 35,§1213.]

Fees, §1214

1214 Notary fees. Notaries public shall be entitled to the following fees:

1. For all services in connection with the legal protest of a bill or note, two dollars.
2. For being present at a demand, tender, or deposit and noting the same, seventy-five cents.
3. For administering an oath, ten cents.
4. For certifying to an oath under his official seal, twenty-five cents.
5. For any other certificate under seal, twenty-five cents. [C51,§2542; R60,§4151; C73, §3801; C97,§382; C24, 27, 31, 35,§1214.]

CHAPTER 66

ADMINISTRATION OF OATHS

1215 General authority.
1216 Limited authority.
1217 Jurat by deputy.

1215 General authority. The following officers are empowered to administer oaths and to take affirmations:

1. Judges of the supreme, district, superior, municipal, and police courts.
2. Official court reporters of district, superior, and municipal courts in taking depositions under appointment or by agreement of counsel.
3. Clerks and deputy clerks of the supreme, district, superior, police, and municipal courts.
4. Justices of the peace within the county of their residence.
5. Notaries public within the county of their appointment, and within any adjoining county in which they have filed with the clerk of the district court of said adjoining county a certified copy of their certificate of appointment. [C51, §§227, 979, 980, 1594; R60,§§201, 449, 1843, 1844, 2684; C73,§§277, 278, 396; C97,§393; C24, 27, 31, 35,§1215.]

Referred to in §§1216, 4216.28
Fees for administering and certifying oaths, §§1214, 1220, 10636
Members of general assembly, §11

1216 Limited authority. The following officers and persons are empowered to administer oaths and to take affirmations in any matter pertaining to the business of their respective office, position, or appointment:

1. Governor, secretary of state, secretary of agriculture, auditor of state, treasurer of state, attorney general.

2. Members of all boards, commissions, or bodies created by law.
3. All county officers other than those named in section 1215.
4. Mayors and clerks of cities and towns, judges and clerks of election, township clerks, assessors and surveyors.
5. All duly appointed referees or appraisers.
6. All investigators for old age assistance as provided for under chapter 189.1.
7. Fieldmen, auditors and other employees of the income, corporation and sales tax division of the state tax commission, as set forth in chapter 329.3. [C51,§§980, 1865; R60,§§1844, 3201; C73, §§277, 278; C97,§393; C24, 27, 31, 35,§1216; 48GA, ch 62,§1; ch 175,§20.]

Referred to in §4216.28
Fish and game shipments, §1782

1217 Jurat by deputy. In preparing a jurat to an oath or affirmation administered by a deputy, it shall be sufficient for the deputy to affix his own name, together with the designation of his official position, and the seal of his principal, if any. [C24, 27, 31, 35,§1217.]

CHAPTER 67

SALARIES, FEES, MILEAGE, AND EXPENSES IN GENERAL

1218 Salaries paid monthly.
1219 Appraisers of property.
1220 General fees.
1221 When fees payable.
1222 Fees payable in advance.
1223 Receipt for fees paid.
1224 Report of fees.
1225 State accounts—inspection.
1225.01 Charge for use of automobile.
1225.02 Mileage and expenses—prohibition.
1225.03 Mileage and expenses—when unallowable.
1225.04 Warrants prohibited.
1225.05 Particularities required.

1218 Salaries paid monthly. The salaries of all officers authorized in this code shall be paid in equal monthly installments at the end of each month, and shall be in full compensation for all services, except as otherwise expressly provided. [C73,§3780; C97,§1289; C24, 27, 31, 35,§1218.]

1219 Appraisers of property. The compensation of appraisers appointed by authority of law to appraise property for any purpose shall be fifty cents per hour for each appraiser for the time necessarily spent in effecting the appraisement and five cents a mile for the distance traveled in going to and returning from the place of appraisement, which shall, unless otherwise provided, be paid out of the property appraised or by the owner thereof. [C51,§2550; R60,§4158; C73,§3813; C97,§1290; SS15,§1290-a; C24, 27, 31, 35,§1219.]

1220 General fees. Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:
1. For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents.
2. For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents.
3. For making out a transcript of any public papers or records under his control for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents. [C51,§2523; R60,§4132; C73, §3819; C97,§1291; C24, 27, 31, 35,§1220.]

1221 When fees payable. When no other provision is made on the subject, the party requiring any service shall pay the fees therefor upon the same being rendered, and a bill of particulars being presented, if required. [C51, §2557; R60,§4164; C73,§3837; C97,§1295; C24, 27, 31, 35,§1221.]

1222 Fees payable in advance. All fees, unless otherwise specifically provided, are payable in advance, if demanded, except in the following cases:
1. When the fees grow out of a criminal prosecution.
2. When the fees are payable by the state or county.
3. When the orders, judgments, or decrees of a court are to be entered, or performed, or its writs executed. [C73,§3842; C97,§1298; C24, 27, 31, 35,§1222.]

1223 Receipt for fees paid. Every person charging fees shall, if required by the person paying them, give him a receipt therefor, setting forth the items, and the date of each. [C51, §2549; R60,§4157; C73,§3836; C97,§1294; C24, 27, 31, 35,§1223.]

1224 Report of fees. All officers required by the provisions of this code to collect and pay over fines and fees shall, except as otherwise provided, on the first Monday in January in each year, make report thereof under oath to the board of supervisors of the proper county, showing the amount of fines assessed, and the amount of fines and fees collected, together with vouchers for the payment of all sums collected to the proper officer. [R60,§4314; C73,§3973; C97, §1301; C24, 27, 31, 35,§1224.]

Accounting by justices and constables, §10639 et seq.

1225 State accounts—inspection. The books, accounts, vouchers, and funds belonging to, or kept in, any state office or institution, or in the charge or under the control of any state officer or person having charge of any state funds or property, shall, at all times, be open or subject to the inspection of the governor or any committee appointed by him, or by the general assembly or either house thereof; and the governor shall see that such inspection of the office of state treasurer is made at least four times in every twelve months. [C51,§§59, 69; R60,

§§80, 90; C73,§132; C97,§184; C24, 27, 31, 35, §1225.]

1225.01 Charge for use of automobile. When a public officer or employee is entitled to be paid his expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of five cents per mile of actual and necessary travel. [C31, 35, §1225-d1.]

44GA, ch 12, §6, editorially divided
See §308.5 for contra rate

1225.02 Mileage and expenses—prohibition. No law shall be construed to give to a public officer or employee both mileage and expenses for the same transaction. [C31, 35,§1225-d2.]

Analogous provision, §5191, par. 10

1225.03 Mileage and expenses—when unallowable. No public officer or employee shall be allowed either mileage or transportation expense when he is gratuitously transported by another, nor when he is transported by another public officer or employee who is entitled to mileage or transportation expense. [C31, 35, §1225-d3.]

1225.04 Warrants prohibited. No warrant shall be issued requiring any peace officer to go beyond the boundaries of the state at public expense except with the approval of a judge of the district court. [C35,§1225-e1.]

1225.05 Particularities required. The board of supervisors shall not approve any claim for mileage or other travelling expenses presented by any peace officer including the sheriff and his deputies and municipal court bailiffs and deputy bailiffs, unless the destinations, and number of miles covered in each trip are given, or, in the case of extended trips, unless railroad, hotel, and other travelling expenses, excepting meals, are verified by receipts. [C35,§1225-e2.]

When mileage untaxable, §2013.5

TITLE V

POLICE POWER

CHAPTER 67.1

DEPARTMENT OF PUBLIC SAFETY

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1225.06 Department created. There is hereby created a department of the state government which shall be known and designated as the department of public safety, which shall consist of a commissioner of public safety and of such officers and employees as may be required. [48GA, ch 120,§1.]

1225.07 Commissioner — appointment. The chief executive officer of the department of public safety shall be the commissioner of public safety. The governor shall, within sixty days after this chapter shall have become effective, and in every fourth year after the year 1939, within sixty days following the organization of the regular session of the general assembly in said year, appoint, with the approval of two-thirds of the members of the senate in executive session, a commissioner of public safety, who shall be a man of high moral character, of good standing in the community in which he lives, of recognized executive and administrative capacity, and who shall be selected solely with regard to his qualifications and fitness to discharge the duties of his office. He shall have been for a period of at least five years, immediately prior to his appointment, a resident of the state of Iowa. The commissioner of public safety shall devote his entire time to the duties of his office and shall serve for a period of four years from July 1 of the year of his appointment at an annual salary of four thousand dollars. The governor, with the approval of the executive council, may remove the commissioner of public safety for cause after a public hearing before the executive council. [48GA, ch 120,§2; ch 121,§1.]

1225.08 Vacancy. A vacancy in the office of the commissioner of public safety that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes. Prior to the expiration of said thirty days, the governor shall transmit to the senate for its confirmation an appointment for the unexpired portion of the regular term. A vacancy occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session, and for the unexpired portion of the regular term. [48GA, ch 120,§3.]

1225.09 Highway patrol. The commissioner shall succeed in the administration and control of the Iowa highway safety patrol established under chapter 134, acts of the forty-seventh general assembly. The commissioner is authorized to employ the members of said patrol; however, not to exceed one hundred twenty-five men, and not more than sixty percent of said patrol shall at any time be members of the same political party. Provided, however, the present personnel of the highway patrol in good standing are excepted from the provisions of this section. [C27, 31,§5017-a1; C35,§§5018-g1,-g2; 47GA, ch 134,§§30, 31; 48GA, ch 120,§§4, 40.]

1225.10 Officers of patrol. The commissioner is authorized to appoint a chief, a first and second assistant and all other supervisory officers of said patrol. All appointments and promotions shall be made on the basis of seniority and merit examination. There shall not be more than twenty supervisory officers in the said patrol unless the membership thereof is increased to such a number as to require the appointment of additional supervisory officers. [47GA, ch 134,§32; 48GA, ch 120,§§5, 40.]

1225.11 Railway special agents. The commissioner may appoint as special agent any person who is regularly employed by a common carrier by rail to protect the property of said common carrier, its patrons, and employees.

Such special agents shall not receive any compensation from the state. [48GA, ch 120,§6.]

Referred to in §1225.19

1225.12 Patrolmen and employees—salaries. The commissioner, with the approval of the governor, shall appoint such deputies, inspectors, officers, clerical workers and other employees as may be required to properly discharge the duties of this department, provided, however, that all members in good standing of what was* heretofore known as the Iowa highway safety patrol shall, upon the enactment of this chapter, immediately become members of this department without appointment and the rank and salary of all members of the Iowa highway safety patrol shall remain the same as heretofore fixed by statute, or as may be provided for in this chapter.

The commissioner may delegate to the members of the Iowa highway safety patrol such additional duties in the enforcement of this chapter as he may deem proper and incidental to the duties now imposed upon them by law.

The salaries of all members and employees of the department and the expenses of the department shall be fixed by the legislative appropriation therefor. [C27, 31,§5017-a1; C35, §5018-g9; 47GA, ch 134,§41; 48GA, ch 120,§§7, 40; ch 121,§23.]

*Verb "is" changed to "was" by code editor

1225.13 Duties of department. It shall be the duty of the department of public safety to prevent crime, to detect and apprehend criminals and to enforce such other laws as are hereinafter specified. The members of the department of public safety, except clerical workers therein, shall have and exercise all the powers of any peace officer of the state.

1. They shall not exercise their general powers within the limits of any city or town, except

a. When so ordered by the direction of the governor;

b. When request is made by the mayor of any city or town, with the approval of the commissioner;

c. When request is made by the sheriff or county attorney of any county with the approval of the commissioner;

d. While in the pursuit of law violators or in investigating law violations;

e. While making any inspection provided by this chapter, or any additional inspection ordered by the commissioner;

f. When engaged in the investigating and enforcing of fire and arson laws.

When any member of the department shall be acting in cooperation with any other local peace officer, or county attorney in general criminal investigation work, or when acting on a special assignment by the commissioner, his jurisdiction shall be statewide.

However, the above limitations shall in no way be construed as a limitation as to their power as officers when a public offense is being committed in their presence.

2. In more particular, their duties shall be as follows:

a. To enforce all state laws;

b. To enforce all laws relating to traffic on the public highways of the state, including those relating to the safe and legal operation of passenger cars, motorcycles, motor trucks and busses; to issue operators' and chauffeurs' licenses; to see that proper safety rules are observed and to give first aid to the injured;

c. To investigate all fires; to apprehend persons suspected of arson; to enforce all safety measures in connection with the prevention of fires; and to disseminate fire-prevention education;

d. To collect and classify, and keep at all times available, complete information useful for the detection of crime, and the identification and apprehension of criminals. Such information shall be available for all peace officers within the state, under such regulations as the commissioner may prescribe;

e. To operate such radio broadcasting stations as may be necessary in order to disseminate information which will make possible the speedy apprehension of lawbreakers, as well as such other information as may be necessary in connection with the duties of this office. [SS15,§65-b; C24,§13410; C27, 31,§§5017-a1, 13410; C35,§§5018-g6, 13410; 47GA, ch 134,§36; 48GA, ch 120,§§8, 40.]

1225.14 Peace officers short course. For the instruction of law-enforcement officers of this state, including members and prospective members of the department of public safety and peace officers of the several counties, townships, cities and towns, the commissioner of public safety is hereby authorized and directed to utilize the existing peace officers short course and the laboratories and facilities in connection therewith in the college of law of the state university of Iowa. [48GA, ch 120,§10.]

1225.15 Course of instruction. The course or courses of instruction for peace officers shall include instruction in the following subjects and such others as shall be deemed advisable by the college of law and the commissioner of public safety:

1. Criminal law.
2. Identification of criminals and fingerprinting.
3. Methods of criminal investigation.
4. Rules of criminal evidence.
5. Presentation of cases in court.
6. Making of complaints and securing of criminal warrants.
7. Securing and use of search warrants.
8. How to secure extradition and return.
9. Small arms instruction.
10. Regulation of traffic.
11. First aid. [48GA, ch 120,§11.]

1225.16 Attendance at short course. The commissioner of public safety is authorized to send members of the department of public safety to any course of instruction for peace officers, not exceeding a total of six weeks length in any one year, given by the college of law of the state university of Iowa, or the course of instruction in public safety education given at Iowa state college of agriculture and

mechanic arts, and such members shall be considered on duty while in attendance upon such authority. The legislative body in any county, city, including cities under special charter, or town, may authorize the attendance at such course of any law-enforcing officer under the jurisdiction of such county, city or town and may provide for the payment of the actual and necessary expenses of such person while in attendance, which payment shall be made out of the general fund of such county, city or town. [48GA, ch 120,§12.]

1225.17 Training schools. The commissioner is authorized to hold a training school for candidates for or members of the department of public safety, and may send to recognized training schools such members as the commissioner may deem advisable, for periods not to exceed one month in any calendar year. The expenses of such school of training shall be paid in the same manner as other expenses of the patrol. [C27, 31,§5017-a1; C35,§5018-g10; 47GA, ch 134, §38; 48GA, ch 120,§§13, 40.]

1225.18 Diplomas. To each person satisfactorily completing the course of study prescribed, an appropriate certificate or diploma shall be issued. [48GA, ch 120,§14.]

1225.19 Examination — oath — probation — dismissal. No applicant for membership in the department of public safety, except clerical workers and special agents appointed under section 1225.11, shall be appointed as a member until he has passed a satisfactory physical and mental examination. In addition, such applicant must have resided in the state of Iowa for at least the period of two years, immediately prior to making application, must be a citizen of the United States, of good moral character, and be not less than twenty-two years of age. The mental examination shall be conducted under the direction or supervision of the commissioner of public safety and may be oral or written or both. Each applicant shall take an oath on becoming a member of the force, to uphold the laws and constitution of the United States and of the state of Iowa. During the period of six months after appointment, any member of the department of public safety, except members of the present Iowa highway safety patrol who have served more than six months, shall be subject to dismissal at the will of the commissioner. After the six months service, no member of the department, who shall have been appointed after having passed the before-mentioned examinations, shall be subject to dismissal unless charges have been filed with the secretary of the executive council and a hearing held before the executive council, if requested by said member of the department, at which he shall have an opportunity to present his defense to such charges. The decision of the executive council by majority vote shall be final. All rules and regulations regarding the enlistment, appointment, and employment affecting the personnel of the department shall be established by the commissioner with the approval of the governor. [C27, 31,§5017-a1; C35,§§5018-g3,-g5; 47GA, ch 134,§§33–35; 48GA, ch 120,§§15, 40.]

1225.20 Bonds. All special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting the members of the clerical force shall, upon appointment, give bond, conditioned upon the faithful discharge of their duties, in the sum of five thousand dollars, which bond shall be approved by the appointing officer. The premium on said bond shall be paid from the funds of this department. [C24, §13409; C27, 31,§§5017-a1, 13409; C35,§§5018-g8, 13409; 47GA, ch 134,§40; 48GA, ch 120,§§16, 40.]

1225.21 General allocation of duties. In general, the allocation of duties of the department of public safety shall be as follows:

1. Commissioner's office.
2. Division of statistics and records.
3. Division of criminal investigation and bureau of identification.
4. Division of highway safety and uniformed force.
5. Division of fire protection.
6. Division of inspection.

Nothing in the aforesaid allocation of duties shall be interpreted to prevent flexibility in inter-departmental operations or to forbid other divisional allocations of duties in the discretion of the commissioner of public safety. [48GA, ch 120,§17.]

1225.22 Expenses and supplies. It shall be the duty of the commissioner of public safety to provide for the members of the department when on duty, suitable uniforms, subsistence, arms, equipment, quarters, and other necessary supplies, and also the expense and means of travel and boarding the members of the department, according to rules and regulations made by the commissioner, as may be provided by appropriation. [SS15,§65-c; C24,§13408; C27, 31,§§5017-a1, 13408; C35,§§5018-g7, 13408; 47GA, ch 134,§39; 48GA, ch 120,§§18, 40.]

1225.23 Public safety education. The commissioner may cooperate with any recognized agency in the education of the public in highway safety and no money shall be expended for such purpose except it be specifically appropriated by the legislature for that purpose.

Any recognized agency receiving appropriations of state money for public safety shall annually file with the auditor of state an itemized statement of all its receipts and expenditures. [48GA, ch 120,§19.]

1225.24 Divisional headquarters. The commissioner of public safety may, subject to the approval of the governor, establish divisional headquarters at various places in the state. [48GA, ch 120,§20.]

1225.25 Fees and rewards. No fees or rewards shall be retained personally by members of the department in addition to their salaries, and any such fees or rewards earned by any members of said department shall be credited

to the fund as herein provided to pay the expenses of this department. All salaries herein provided for and all expenses incurred under the provisions of this chapter shall be allowed and audited in the same manner as in other state offices, and shall be payable out of moneys hereafter appropriated. [C27,31,§5017-a1; C35, §5018-g11; 47GA, ch 134,§42; 48GA, ch 120, §§21, 40.]

DUPLICATION IN POLICE OFFICERS PROHIBITED

1225.26 Prohibition on other departments. All other departments and bureaus of the state are hereby prohibited from employing special peace officers or conferring upon regular employees, any police powers to enforce provisions of the statutes, which are specifically reserved by this act [48GA, ch 120] to this department. But the commissioner of public safety shall, upon the requisition of the attorney general, from time to time assign for service in the department of justice such of its officers, not to exceed six in number, as may be requisitioned by the attorney general for special service in the department of justice, and when so assigned such officers shall be under the exclusive direction and control of the attorney general. [C24, 27, 31, 35,§13407; 48GA, ch 120,§95; ch 121,§4.]

1225.27 "Special state agents" construed. Whenever mention is made, in the code, of "special state agents" in connection with law enforcement, the same shall be construed to mean members of the state department of public safety. [48GA, ch 120,§96.]

1225.28 Industrial disputes. The police employees of the department shall not be used or called upon for service within any municipality in any industrial dispute unless actual violence has occurred therein, and then only either by order of the governor or on the request of the chief executive officer of the municipality or the sheriff of the county wherein the dispute has occurred if such request is approved by the governor. [48GA, ch 120,§97.]

1225.29 Liquor control fund. The liquor control commission shall pay to the general fund for services received by it, at the hands of this department, the sum of twenty-five hundred dollars per month. [48GA, ch 120,§99.]

Constitutionality, 48GA, ch 120, §100
Eligibility of former employees, 48GA, ch 120, §98

CHAPTER 67.2

ITINERANT MERCHANTS

1225.30 Definition of the included class.
1225.31 License required.
1225.32 Application—contents—fees.
1225.33 Insurance policies and bonds required.
1225.34 Department as process agent.
1225.35 Service of original notice.
1225.36 Issuance of license—plates.
1225.37 Nontransferability.
1225.38 Revocation of license.
1225.39 Departmental rules.
1225.40 Fees to treasurer.
1225.41 Exemption from peddler's license.
1225.42 Penalties.
1225.43 Injunction proceedings.

1225.30 Definition of the included class.

1. When used in this chapter:

a. "Motor vehicle" shall have the same meaning as when used in any statutes regulating the use and operation of motor vehicles; provided, that in this chapter the term shall always include as one vehicle a tractor-semitrailer or tractor-trailer combination.

b. "Highway" shall mean any thoroughfare defined by any statute or ordinance as a public highway or street.

c. "Person" shall mean a natural person, firm, partnership, association, corporation, trust, trustee, lessee, or receiver, as the context may require, regardless of the gender of the pronoun used in conjunction therewith.

d. "Department" shall mean the motor vehicle department* of the state.

e. "Established place of business" shall mean any permanent warehouse, building, or structure, at which a permanent business is carried on throughout the year or usual production or marketing season in good faith, and at which stocks of the property being transported are produced, stored, or kept in quantities reasonably adequate for, and usually carried for the requirements of such business, and which is recognized as a permanent place of business. It shall not mean tents, temporary stands or other temporary quarters.

f. "Insurance company" shall mean any insurance company, insurance association, reciprocal or interinsurance exchange authorized to do business in the state of Iowa.

g. "Itinerant merchant" shall mean any person who transports personal property for sale by him within this state, by use of a motor vehicle, except as herein otherwise provided.

2. The term "itinerant merchant" shall not mean or include the following:

a. A person using a motor vehicle operated by him or his agent, for the transportation of milk, dairy products, grain, fruits, vegetables, livestock, poultry, or other agricultural products, produced or fed by him on a farm operated by him, including those instances in which an entire crop or field is purchased from a producer, or any person using a motor vehicle, for the transportation of newspapers, magazines, or books.

b. A person transporting property when such transportation is incident to a business conducted by him at an established place of business operated by him, either within or without this state, and when said property is being transported to or from said established place of business, and when the entire course of such transportation extends not more than three hundred and fifty miles from said established place of business; provided, however, that when the entire course of

said transportation is for the purpose of delivery of said property subsequent to sale thereof said three hundred and fifty miles restriction shall not apply.

c. A person licensed under the provisions of sections 3148 or 3149.

d. A person operating in the manner of an itinerant merchant within a radius of fifty miles from his residence, provided he has secured a permit to be issued him without charge on application to the county auditor or the department, said permit to set forth the city, town or township of his residence and the Iowa motor vehicle license number of the vehicle used by him. The permit shall be carried by such operator at all times.

e. A salesman selling manufactured articles produced by his employer who sells the same to retail dealers for the purpose of resale. [48GA, ch 209,§1.]

Referred to in §1225.31
*See §5000.02

1225.31 License required. No person shall engage in business or use any motor vehicle in this state as an itinerant merchant, as defined and fixed in section 1225.30, without complying with the chapter and without obtaining from the department the license required by this chapter. [48GA, ch 209,§2.]

1225.32 Application — contents — fees. An applicant for a license to engage in business as an itinerant merchant shall be made to the department or county auditor upon forms to be prepared by the department. A separate application and license shall be required for each motor vehicle to be operated. In addition to any other essential information required by the department, said application shall state the following: Name and legal status of the applicant; his business address; if a natural person his residence address; if not a natural person the names and business and residence addresses of the principal and managing officers, agents or partners; a general description of the business to be conducted and the area in this state in which it will be conducted; an exact description of the motor vehicle to be used including the make, type, manufacturer's rated loading capacity, motor number, serial number, place where registered, and registration or license number; such application shall be sworn to.

Upon payment of the license fee as hereinafter determined, the department shall issue a license which shall entitle the applicant to be an itinerant merchant. The fee shall be based upon the maximum weight of the load which said merchant may transport at any one time and shall be as follows: On not to exceed one thousand pounds at one time, ten dollars; on not to exceed three thousand pounds at one time, twenty-five dollars; on a load in excess of three thousand pounds at one time, forty dollars. Provided however that the license fee of an itinerant merchant for transportation of property in a motor vehicle which is licensed under chapter 251.1 shall be the sum of two dollars regardless of the weight of the load. The fee shall be reduced twenty-five percent if the license is obtained after March 31 and before July 1 in any year; fifty percent if after June 30 and before October 1; and seventy-five percent if after September 30. Each license shall expire at the end of the calendar year. [48GA, ch 209,§3.]

1225.33 Insurance policies and bonds required.

1. No license shall be issued by the department until the applicant shall have filed with each application, and the same have been approved by the department, an insurance policy and a bond issued by a company as herein defined authorized to do business within the state of Iowa as follows:

a. An indemnity bond in the penal sum of two hundred and fifty dollars for an itinerant merchant operating with more than twenty-five hundred pounds actual load. Such bond shall be in such form as may be prescribed by the department for the purpose of protecting the public against fraud, conditioned upon the use of honest weights, measures, and grades, if the commodities to be handled by the itinerant merchant are those customarily sold by weight, measure and grade; accurate representation as to quality or class of such commodities, and the actual payment of checks, drafts, debentures or other securities delivered by such itinerant merchant in exchange for the purchase of commodities to be handled by him. The surety on such bond shall be a surety company authorized to engage in the surety business in this state. In such bond the surety shall appoint the head of the motor vehicle department the agent of the surety for the service of process in the event that personal service cannot be had upon it within the state and shall designate the post-office address to which process against said surety in any suit on said bond may be sent or served. Whenever the bond provided for in this section shall be exhausted, the department shall forthwith cancel the license. Said license so canceled shall be renewed for the balance of the period for which issued by filing an additional bond with corporate surety in like amount conditioned as required in the previous bond.

Nothing in this section shall be construed to impose upon the surety on any such bond a greater liability than the total amount thereof or the amount remaining unextinguished by any prior recovery or recoveries as the case may be.

No suit or action against the surety on any such bond shall be brought later than one year from the accrual of the cause of action thereon.

b. A liability insurance policy which shall bind the obligors to pay damages for injuries to persons and damage to property resulting from the negligent operation of the motor vehicle operated under authority of the itinerant merchant's license, said policy or bond to be conditioned to pay any sum up to five thousand dollars for personal injury to or death of one individual, and up to ten thousand dollars for personal injuries or deaths resulting from any single accident, and up to one thousand dollars for damage to property in any single accident.

2. Every insurance policy and bond filed with

the department under the provisions of this chapter shall contain an indorsement or provision that the same shall not be canceled by the obligor, shall not expire, and shall not become reduced in amount, until ten days after notice thereof by registered United States mail has been sent to the department. Upon receipt of such notice the department shall immediately send the itinerant merchant at his last known address by registered United States mail, return receipt requested, a notice advising him that unless a new insurance policy or bond is filed prior to the time such cancellation, expiration or reduction becomes effective, the license of such itinerant merchant shall be revoked at the time such cancellation, expiration or reduction becomes effective. If a new policy or bond is not filed in accordance with such notice the department must revoke said license at said time.

3. Any person having a cause of action against the itinerant merchant arising out of the matters described in paragraph a of subsection 1 of this section may join said itinerant merchant and the surety on his bond in the same action, or may sue said surety without joining said itinerant merchant in the action if the itinerant merchant is deceased or if it is impossible to obtain jurisdiction of his person within the state. [48GA, ch 209,§4.]

Referred to in §1225.38

1225.34 Department as process agent. Before a license shall issue, the applicant shall sign and file with the department an irrevocable power of attorney appointing the department his agent to accept service of original notice, in the event that personal service cannot be had upon the applicant in this state, for all causes of action against him arising out of the conduct of his business as an itinerant merchant and the operation of the motor vehicle described in the application. [48GA, ch 209,§5.]

Referred to in §1225.35

1225.35 Service of original notice. Whenever service of original notice in any cause of action described in section 1225.34 cannot be made upon the itinerant merchant and/or the bonding company within the state of Iowa, such service may be made upon either or both by sending sufficient copies of such original notice to the department by registered United States mail. The department shall immediately upon receipt thereof indorse upon each copy the date and hour received and shall file one copy, whereupon service of said original notice shall be deemed to be completed upon said itinerant merchant and/or said bonding company as of the date of said filing. The department shall immediately send one copy of said original notice to said itinerant merchant and/or one copy to said bonding company at the last known address of each, return receipt requested. The venue of any such action may be laid in any county of this state in which said cause of action arose, or in any other place authorized by law. [48GA, ch 209,§6.]

1225.36 Issuance of license—plates. Upon the approval of the application and upon compliance with the terms of this chapter, the department shall issue to the applicant a license as an itinerant merchant. Such license shall be numbered, shall specifically describe the itinerant merchant and the motor vehicle as they are described in the application, and shall at all times be carried in the cab of the motor vehicle described and be subject to inspection by any proper person. The department shall also issue to the itinerant merchant a license plate containing the same number as the license, of distinctive color and size, which shall at all times be displayed on the rear of the motor vehicle described in the license. [48GA, ch 209,§7.]

1225.37 Nontransferability. No license or license plate issued pursuant to this chapter may be sold or transferred, and no license or license plate may be transferred from one vehicle to another. [48GA, ch 209,§8.]

1225.38 Revocation of license. The department may revoke any license or permit issued under the provisions of this chapter after proper hearing before it, by the sending of due notice thereof by registered letter, to the itinerant merchant at his last known address, return receipt requested, not less than twenty days before the date of said hearing, for any of the following causes:

1. Failure to comply with the provisions of this chapter or to pay the sales tax as provided by law or misrepresentation of the source, condition, quality, weight or measure of the products sold by the itinerant merchant.

2. If any judgment recovered against any itinerant merchant with reference to the operation of his business remains unpaid for a period of six months, provided such judgment be not stayed under a supersedeas bond upon appeal from such judgment.

The department shall give immediate notice of the revocation of any license issued under the provisions of this chapter, to the surety or insurance company issuing the bond or policy to the licensee as provided in section 1225.33. [48GA, ch 209,§9.]

1225.39 Departmental rules. The department shall make and enforce such rules for the administration of this chapter as may be necessary and proper. [48GA, ch 209,§10.]

1225.40 Fees to treasurer. All fees received by the department from the issuance of licenses shall be deposited monthly with the treasurer of state. [48GA, ch 209,§11.]

1225.41 Exemption from peddler's license. Nothing in this chapter shall be construed to repeal or amend any statute delegating authority to any county or municipal corporation to license, tax, or regulate peddlers or itinerant merchants; provided that any person licensed under the provisions of this chapter shall not be required to obtain the license required by section 7174. [48GA, ch 209,§12.]

1225.42 Penalties. Any person violating any provision of this chapter shall be guilty of a misdemeanor, except as herein otherwise pro-

vided, and shall upon conviction thereof be punished by a fine of not more than one hundred dollars or by imprisonment in the county jail not exceeding thirty days. [48GA, ch 209,§13.]

1225.43 Injunction proceedings. Any county attorney, may commence an action in any court of competent jurisdiction, in the name of the state as plaintiff on the relation of such county attorney, to enjoin any person from violating any of the provisions of this chapter. Such action may be maintained upon due showing that the defendant has violated any of the provisions of this chapter. [48GA, ch 209,§14.]

Constitutionality, 48GA, ch 209, §15

CHAPTER 68

COAL MINES AND MINING

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1226 Board of examiners. The executive council shall, on or before June 30 of each even-numbered year, appoint a board of five examiners, consisting of two practical miners and two mine operators, all holding certificates of competency as mine foremen, and one mining engineer, each of whom shall have had at least five years actual experience in his profession immediately preceding his appointment, who shall hold office for a term of two years, and until their successors have been appointed and have qualified. [C97,§2479; S13,§2479-a; C24, 27, 31, 35,§1226.]

1227 Qualification—malfeasance—removal. No member of said board shall be interested in or connected with any school, scheme, plan, or device having for its object the preparation, education, or instruction of persons in the knowledge required of applicants for certificates of competency. Any member of said board shall be summarily removed from office by the executive council, upon due notice and hearing, for violation of the law, misfeasance or malfeasance in the performance of his duties, or for other sufficient cause and his successor shall thereupon be appointed by the said executive council for the unexpired term. [S13,§2479-a; C24, 27, 31, 35,§1227.]

Removal by executive council, §1114

1228 Mine inspectors—examinations. The board shall meet in the office of the state mine inspectors at the seat of government on the first Monday in March of each even-numbered year for the examination of applicants for certificates of competency for mine inspector, and at such other times and places as shall be necessary in the discharge of its duties. It shall adopt rules and regulations and prescribe and conduct such examinations of applicants as shall carry out the purpose and intent of this chapter in relation to the qualifications of mine inspectors. Notice of all such examinations shall be published in at least one newspaper in each mine district not less than fifteen days preceding the date of such examination. [C97,§2480; S13,§2489-c; C24, 27, 31, 35,§1228.]

40ExGA, SF 41, §3, editorially divided.

1229 Mine foremen and hoisting engineers. The board shall hold such meetings at such times and places as may be necessary for the examination of applicants for certificates of mine hoisting engineers and mine foremen. It shall prescribe and adopt such rules and regulations therefor as may be reasonably necessary for the conducting of such examination, which shall include among other things to be determined by the board, the following:

EXAMINATION OF MINE FOREMEN

A knowledge on the part of such applicants of:

1. The conditions relating to the safety of the underground workings of a mine.

2. The nature and properties of noxious, poisonous, and explosive gases found in mines.

3. The different systems of working coal mines and ventilation thereof.

4. The administering of first aid treatment to injured workmen.

EXAMINATION OF HOISTING ENGINEERS

A knowledge on the part of such applicants of the conditions relating to the safety of machinery in charge of a mine hoisting engineer, including all property connected therewith used in operating such machinery and also the machinery utilized at escape ways and shafts and ventilating apparatus. [C97, §2480; S13, §2489-c; C24, 27, 31, 35,§1229.]

1230 Scope of examinations — certificates. Such questions shall not be exclusive of any other questions to be presented by the board, but the board shall prepare and present such additional questions as they may deem best to carry out the spirit and intent of the law. The board shall issue to those examined and found to possess the requisite qualifications, certificates of competency for the position of mine foremen or mine hoisting engineers. [S13, §§2489-c,-d; C24, 27, 31, 35,§1230.]

1231 Examination — mine inspector. The examination for mine inspectors shall consist of oral and written questions in theoretical and practical mining and mine engineering, on the nature and properties of noxious and poisonous gases found in mines, and on the different systems of working and ventilating coal and gypsum mines. During the progress of the examination, access to books, memoranda, or notes shall not be allowed, and the board shall issue to those examined and found to possess the requisite qualifications, certificates of competency for the position of mine inspector; but certificates shall be granted only to persons of twenty-five years of age or over, of good moral character, citizens of the state, and with at least five years experience in the practical working of mines, and who have not been acting as agent or superintendent of any mines for at least six months next preceding such examination. [C97,§2481; C24, 27, 31, 35,§1231.]

1232 Mine inspectors—vacancies. The governor shall on or before July 1, 1927, and every four years thereafter, appoint three mine inspectors from those receiving certificates of competency from the board of examiners as by law provided, who shall hold their office for a term of four years and until their successors shall be appointed and qualify, subject to removal by him for cause. Any vacancies occurring shall be filled in the same manner as original appointments, for the unexpired term only. [C73,§1567; C97,§2478; SS15,§2478; C24, 27, 31, 35,§1232.]

1233 Removal of inspector—bond—notice. Charges of gross neglect of duty or malfeasance in office against any inspector may be made in writing, sworn to, and filed with the governor, and must be made by five miners, or one or more mine operators; such charges shall be accom-

panied with a bond in the sum of five hundred dollars, running to the state, with two or more sureties approved by the clerk of the district court of the county in which the sureties reside, conditioned for the payment of all costs and expenses arising from the investigation of the charges, and thereupon the governor shall convene the board of examiners at such time and place as he may designate, giving the inspector and the person whose name first appears in the charge ten days notice thereof. [C97,§2484; S13,§2484; C24, 27, 31, 35,§1233.]

1234 Manner of trial—report of findings—costs. The board, at the time and place fixed, shall proceed to hear, try, and determine the matter, and for this purpose shall summon any material witness desired by either party, and any member may administer the proper oath to all witnesses. Evidence may also be taken by deposition as in other cases, and continuances of the hearing may be granted in furtherance of justice and upon the application of either party. After the evidence has been fully heard, the board shall report to the governor its action and decision. If the charges are sustained, the inspector shall be forthwith removed by the governor, and the costs and expenses of the hearing taxed against the inspector, but if the charges are not sustained, the costs shall be taxed against the parties filing the charges and their bondsmen. [C97,§2484; S13,§2484; C24, 27, 31, 35,§1234.]

Depositions in general, §11358 et seq.

1235 Appeal—notice—manner of trial. The aggrieved party shall have the right to appeal from such findings and order to the district court of any county in the district of the inspector against whom charges were made, by giving notice in writing to the board, or any member thereof, served in the same manner as original notices, within ten days from the time of filing the findings with the governor, or if the order of removal is made, within ten days therefrom. Upon such appeal all matters shall be heard bearing upon the charges made, and the pleadings may be amended within the discretion of the court. The appeal shall be tried as an equitable action and the first term after the appeal is perfected shall be the trial term. Upon such hearing the court shall render and enter such order or decree as the evidence warrants in equity and justice. Nothing herein contained shall prevent the governor from proceeding under any law provided for the suspension or removal of state officers for malfeasance or nonfeasance in office. [S13,§2484; C24, 27, 31, 35, §1235.]

Method of trial, ch 496
Service of notice, §11060
Suspension by governor, ch 57

1236 Qualifications of inspector. Each inspector shall devote his entire time and attention to the business incumbent upon him. An inspector shall in no way be financially interested in or connected with any mining property or directly or indirectly act as agent, officer, or representative of any person, firm, or corporation engaged or interested in mining or any business connected therewith. [C97,§2478; SS15,§2478; C24, 27, 31, 35,§1236.]

1237 General office — report to governor. The three inspectors shall maintain a general office at the seat of government and keep therein all records, correspondence, documents, apparatus, or other property pertaining to their office; they shall at the time provided by law, make a biennial report to the governor of their official doings, including therein all matters which by this chapter are specially committed to their charge, adding such suggestions as to needed future legislation as in their opinion may be important. [C73,§1569; C97,§2483; S13,§2483; C24, 27, 31, 35,§1237.]

Biennial report, §254

1238 Inspection districts—local office—expenses. The governor shall divide the state into three inspection districts, and assign one inspector to each district. Each inspector shall maintain an office at some suitable place in his district, to be approved by the governor, and shall reside in the district and remain therein, unless otherwise engaged in the conduct of his official duties. The expenses of the local office of the mine inspector, including rental and other necessary expenses, not exceeding one hundred eighty dollars per year, shall be paid by the state. [C97,§2482; S13,§2482; C24, 27, 31, 35, §1238.]

1239 Duties of inspector—record. He shall examine, test, and adjust, as often as he deems necessary, all scales, beams, and other apparatus used in weighing coal at the mines. He shall examine all the mines in his district as often as the time will permit, which examination shall be made at least once every six months, keep a record of the inspections made, showing date, the condition in which the mine is found, the extent and manner in which the laws relating to the government of mines and their operation are observed and obeyed, the progress made in improvements for better security to health and life, number of accidents happening and their character, the number employed, and such other matters as may be of public interest and connected with the mining industries of the state. [C73,§1567; C97,§2482; S13,§2482; C24, 27, 31, 35,§1239.]

1240 Posting of reports. Inspectors, immediately after making an inspection, shall post or cause to be posted, at some convenient and conspicuous place to which employees of such mine and their representatives shall have free access, a summary report of the conditions found to exist in the mine, together with any requests or orders made for changes or repairs. [C24, 27, 31, 35,§1240.]

Referred to in §1241

1241 Duty of mine owner. The owner of every mine in this state, subject to inspection, shall provide a suitable place for the posting of reports as provided in section 1240, which place shall be so located and constructed as to protect

the report, when posted, from the weather and from improper removal. The place for posting such report and the means of protection therefor, shall conform to the direction of the mine inspector. [C24, 27, 31, 35,§1241.]

1242 Unlawful destruction. Any person who, without the consent of the mine inspector, intentionally destroys such report, or place for keeping the same, shall be deemed guilty of a misdemeanor. [C24, 27, 31, 35,§1242.]

Punishment, §12894

1242.1 Filling or sealing abandoned mine. It shall be the duty of the owner, lessee, operator of the mine or owner of land on which mine is located, to permanently fill, or seal all openings to the same immediately after it is finished or abandoned, so as to prevent any person or animal from entering or falling into the said finished or abandoned mine; and before said filling or sealing is commenced or undertaken, the mine owner, lessee or operator shall notify the mine inspector of the district in which the mine is located, and the same shall be subject to the approval of said mine inspector who is hereby authorized and empowered to prescribe the manner and the kind of material with which the same shall be filled or sealed. [C35,§1241-g1.]

Referred to in §§1242.3, 1242.4

1242.2 Opening or breaking seal. It shall be unlawful for any person, firm or corporation to open or to break any seal placed on any finished or abandoned mine; or to open or to break any seal placed on any mine ordered closed by the mine inspector, unless said person, firm or corporation, has first received a written permit from the mine inspector to do so, and then only in the manner prescribed by him in said permit. [C35,§1241-g2.]

Referred to in §§1242.3, 1242.4

1242.3 Removal of machinery or material. It shall be unlawful for any owner, lessee, or operator of any coal mine, or any person, firm or corporation, to take or move away from the premises of a finished or an abandoned mine any machinery, equipment or material without the consent of the mine inspector until first all the requirements of sections 1242.1 to 1242.4, inclusive, have been complied with, and have been approved in writing by the mine inspector. [C35,§1241-g3.]

Referred to in §1242.4

1242.4 Penalty. Any owner, lessee, operator, or the agent thereof, or officer, or agent of any firm or corporation, refusing or neglecting to comply with the provisions of sections 1242.1 to 1242.3, inclusive, in relation to filling, or sealing the openings of finished or abandoned mines, shall be fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding six months, or both. [C35,§1241-g4.]

Referred to in §1242.3

1242.5 New mines—license. Any person or persons, firm or corporation, contemplating opening a coal mine, either by shaft, slope, drift, or strip methods, to mine or produce for sale, barter or trade, shall first obtain a license from the state mine inspector of the district in which the intended mine is to be located, which permit shall be issued as hereinafter provided, permitting and authorizing said opening in said location and at a specified time. [47GA, ch 96,§2.]

Referred to in §1242.7

1242.6 Form of license. The state mine inspectors are hereby authorized to provide a suitable form upon which application shall be made, which shall include name of operator, post-office address, location of mine, kind of power to be used for hoisting and haulage, kind of opening, name of supervising official, and number of years of actual mining experience. The applicant shall be required to furnish all necessary information before a license shall be issued. It shall be the duty of the state mine inspectors to issue said permit, without cost, when the above provisions have been complied with. [47GA, ch 96,§3.]

Referred to in §1242.7

1242.7 Personal use excepted. The provisions of sections 1242.5 to 1242.8, inclusive, shall not apply to any person who shall mine coal on his own property for his own personal use. [47GA, ch 96,§4.]

1242.8 Violations—injunction. If at any time the owner, operator, lessee, agent or managing officer fails to comply with the above provisions, it shall be the duty of the mine inspector, in whose district said mine is located, to file a complaint with the county attorney of the county in which said mine is located, who shall bring action in the name of the state to enjoin further operation until the above provisions are complied with. [47GA, ch 96,§5.]

Referred to in §1242.7

1243 Right to enter mine. The inspector shall have the right at all reasonable times, by day or night, to enter any mine in his district or any district to which he may be sent by the governor, for the purpose of ascertaining its condition, and the manner of its operation, by making personal examination and inquiry in relation thereto, but not so as to unnecessarily obstruct or impede the working of the mine; and to this end the mine owner or person in charge shall furnish such mine inspector all necessary assistance. [C97,§2482; S13,§2482; C24, 27, 31, 35,§1243.]

1244 Terms defined. Wherever the word "operator" occurs in this chapter it shall include the owner, lessee, agent, managing officer, and person in charge of any mine. [C24, 27, 31, 35,§1244.]

1245 Maps—surveys. The operator of any mine shall comply with the following provisions relative to maps and surveys:

1. *Scale.* Each mine map shall be drawn to a scale of not more than two hundred feet to the inch.

2. *General specifications.* Each map shall show the name of the state, county, and township in which the mine is located, the designa-

tion of the mine, the name of the company or operator, the certificate of the mining engineer or surveyor as to the accuracy and date of the survey, the north point, and the scale to which the map is drawn.

3. *Boundaries and surface lines.* Every such map or plan shall correctly show the surface boundary lines of the coal rights pertaining to each mine and all section or quarter section lines or corners within the same, the lines of town lots and streets, the tracks and sidetracks of all railroads, the location of all wagon roads, rivers, streams, and ponds, and reservations made of coal and mineral.

4. *Underground conditions.* For the underground workings said map shall show all shafts, slopes, tunnels, or other openings to the surface or to the workings of a contiguous mine; all excavations, entries, rooms, and crosscuts; the location of the escape ways, and of the fan or furnace or other means of ventilation and the direction of air currents, and the location of permanent pumps, hauling engines, engine planes, abandoned works, fire walls, and standing water.

5. *Separate maps.* A separate and similar map drawn to the same scale in all cases shall be made of each and every seam of coal operated in any mine in this state. A separate map shall also be made of the surface whenever the surface buildings, lines, or objects are so numerous as to obscure the details of the mine workings if drawn upon the same sheet with them, and in such case the surface map shall be drawn upon transparent cloth or paper so that it can be laid upon the map of the underground workings and thus truly indicate the local relation of lines and objects on the surface to the excavations of the mine and any other principal workings of the mine.

6. *Rise and dip of seam.* Each map of underground workings shall also show by profile drawing and measurement, the last one hundred fifty feet approaching the boundary lines, showing the rise and dip of the seam.

7. *Copies.* The original or true copies of all such maps shall be kept at the office of the mine, and true copies thereof shall also be furnished the state mine inspector for the district in which said mine is located, within thirty days after the completion of the same.

8. *Extensions.* An accurate extension of the last preceding survey of every mine in active operation shall be made once in every twelve months prior to July 1 of every year and the result of such survey, with the date thereof, shall be promptly and accurately entered upon the original map, and a true, correct, and accurate copy of said extended map shall be forwarded to the inspector of mines in the district in which said mine is located so as to show all changes in plan of new work in the mine, and all extensions of the old workings to the most advanced face or boundary of said workings which have been made since the last preceding survey, and the parts of the mine abandoned or worked out after the last preceding survey shall be clearly indicated and shown by colorings, which copy must be delivered to the inspector of mines within thirty days after the last survey is made.

9. *Abandoned mine.* When any coal mine is worked out or is about to be abandoned or indefinitely closed, the operator of the same shall make or cause to be made a completed and extended map of said mine and the result of the same shall be duly extended on all maps of the mine and copies thereof so as to show all excavations and the most advanced workings of the mine, and their exact relation to the boundary or section lines on the surface, and deliver to the inspector a copy of the completed map.

10. *Surveys ordered.* The inspector shall order a survey to be made of the workings of any mine, and the result to be extended on the maps of the same and the copies thereof, when in his judgment the safety of the workmen, the support of the surface, the conservation of the property, or the safety of an adjoining mine requires it. If not made by the operator when ordered by the inspector, such inspector shall cause it to be made and paid for by the state and the amount collected from the operator. [C97,§2485; S13, §2485; C24, 27, 31, 35,§1245.]

1246 Failure to furnish map. When the operator of any mine neglects or refuses for a period of ninety days to furnish to said inspector the map or plan, or a copy thereof, of such mine or any extension thereof, as provided in this chapter, the inspector shall cause to be made an accurate map or plan of such mine or extension as the case may be, at the expense of the operator. The cost shall be paid by the state and recovered from such operator. It shall be the duty of the county attorney of the county in which such mine is located, at the request of the inspector, to bring action in the name of the state for such recovery. [S13,§2485-a; C24, 27, 31, 35,§1246.]

1247 Maps property of state — custody — copies. The maps so delivered to the inspector shall be the property of the state and shall remain in the custody of the inspector during his term of office, and be delivered to his successor in office. They shall be kept at the office of the inspector and be open to examination by all persons interested in the same; but such examination shall only be made in the presence of the inspector or his office assistant, and he shall not permit any copies of the same to be made without the written consent of the operator or the owner of the property, except as otherwise provided. [C97,§2485; S13,§2485; C24, 27, 31, 35, §1247.]

1248 Escape ways and air shafts. The operator of any mine shall construct and maintain at least two distinct openings for each seam of coal worked, which, in mines operated by shaft, shall be separated by natural strata of not less than three hundred feet in breadth, and in mines operated by slope or drift not less than two hundred feet in breadth. through which ingress and egress at all times shall be unobstructed to the employees and persons having occasion to use the same as escape ways or places of exit from the mine; but where five or a less number of

persons are employed, the mine inspector in the exercise of a sound discretion shall have the power to waive the requirements of this section. [C97,§2486; S13,§2486; C24, 27, 31, 35,§1248.]

1248.1 Constructing escape shafts. In all mines there shall be allowed one year to make escape shafts or other means of exit as provided by law, but not more than twenty persons shall be employed in such mine at any time until the provisions of the law relating to escape shafts or other means of exit shall have been complied with and after the expiration of the period above mentioned it shall not be operated until made to conform to the provisions of law with reference to the escape shafts or other means of exit. [C97, §2487; S13,§2487; C27, 31, 35,§1248-a1.]

1249 Stairways—air and escape shafts. All escape shafts not provided with hoisting appliances as hereinafter provided shall have stairs at an angle of not more than sixty degrees in ascent, nor less than two and one-half feet in width, with proper, safe, and substantial landings at convenient and easy distances, and equipped with substantial hand rails or banisters. If a shaft be used for an escape way and air shaft, that part used as an escape way shall be divided and partitioned closely with substantial material from the part used as an air shaft, all of which shall be kept in safe condition. [S13,§2486-a; C24, 27, 31, 35,§1249.]

1250 Hoisting appliances for escape shafts. All escape shafts not provided with stairs shall be provided with suitable appliances for hoisting underground workmen at all times, ready for use both day and night, while the workmen are in the mine. The hoisting apparatus shall be separate and apart from the hoisting shaft, and the equipment shall include a depth indicator, brake on the drum, steel or iron cable, safety catches on cages, and covers on cages to securely protect any person while on the cage. [S13, §2486-b; C24, 27, 31, 35,§1250.]

1251 Underground connection. Where two or more mines are connected underground the owners by joint agreement may use the hoisting shaft, slope, or drift of the one as an escape way for the other, and the road or traveling ways thereto on either side shall be kept clear of every obstruction to travel by the respective operators, and the intervening doors, if any, shall remain unlocked and ready at all times for immediate use. When such connection has once been established between contiguous mines, it shall be unlawful for the operator of either mine to close the same without consent both of contiguous operators and of the inspector of mines of the district; but when either operator desires to abandon mining operations, the expenses and duty of maintaining such connection shall devolve upon the party continuing operation. [S13, §2486-c; C24, 27, 31, 35,§1251.]

1252 Location of shafts — approval. No escape shaft or other place of exit, air shaft or opening for ventilation, not including hoisting shafts, shall be located or constructed without first giving notice to the mine inspector, and obtaining his approval thereof in writing, who shall retain a copy and file in his office and preserve with other records of that mine. [S13, §2486-d; C24, 27, 31, 35,§1252.]

1253 Additional air way or escape way. The mine inspector of the district in which any mine is located shall have the right at any time to order such additional air way or escape way, shaft, opening, or other place of exit as may be deemed necessary for the purpose of furnishing necessary additional ventilation or means of escape. [S13,§2486-d; C24, 27, 31, 35,§1253.]

1254 Appeal from order—trial. The operator shall have the right to appeal from such order to the district court, where the action shall be tried in equity, and shall have precedence over any and all other cases, and the first term held after the taking of such appeal shall be the trial term; but in any case the mine inspector may elect, by giving five days notice to the party taking the appeal, to bring said cause on for hearing before any judge of the judicial district in which such mine is located, who shall have discretion to fix a time and place for such trial in vacation. Upon such hearing the court shall render and enter such order or decree as the evidence warrants in equity and justice. [S13,§2486-d; C24, 27, 31, 35,§1254.]

Method of trial, ch 496

1255 Ventilation — obstruction prohibited. Escape ways shall be ventilated and kept free from vitiated air, accumulation of ice, and obstructions of every kind; nor shall steam or heated air be discharged therein during the daytime unless an attendant be kept in charge thereof and the equipment so arranged that the steam or warm air may be readily turned off at any time, and a conspicuous signboard placed in plain view indicating the point where the steam or warm air may be turned off. All surface or other water which flows therein shall be conducted by rings or other means to receptacles so as to keep the stairway reasonably free from water. [S13,§2486-e; C24, 27, 31, 35, §1255.]

1256 Traveling ways—signboards. In any mine affected by this chapter and every seam of coal or other mineral worked therein, the following requirements shall apply:

1. *Ways.* There shall be constructed, kept, and maintained safe and accessible traveling ways to and from any and all escape ways or places of exit, which shall be maintained free from falls of roof, standing water, and other obstructions and made at least five feet high and seven feet wide. In any case when, in the judgment of the inspector of the district where the mine is located, it is impracticable by reason of any conditions to make the traveling way of such dimensions, then the traveling way may be made and maintained not less than three feet in height and six feet in width, upon written permission of the mine inspector.

2. *Signboards.* At all points where the passage or traveling ways to an escape shaft or place

of exit intersect other roadways or entries, conspicuous signboards shall be placed thereat indicating the way to such shaft or place of exit.

3. *Inspection.* All traveling ways shall be inspected by the mine foreman or his assistant at least once each week, and written report of their condition made and filed in the office of the mine, which shall be open for examination to all the employees of the mine and all other persons entitled thereto at all reasonable times. [S13,§2486-f; C24, 27, 31, 35,§1256.]

Referred to in §1257

1257 Dispute as to orders—copy—appeal. If any dispute or difference should arise as to the findings or orders of the mine inspector under the provisions of section 1256, between such inspector and employer operating the mine, or between such inspector and at least five employees working in the mine, then and in that case the inspector shall furnish, on demand, to the aggrieved party or parties a copy of his findings or orders complained of and he shall also file the originals thereof in the general office of the state mine inspectors, and the aggrieved party or parties may have the right to appeal from said findings and orders to the district court of the county in which said mine is located on the same terms and conditions as appeals from orders relating to air shafts and escape ways. [S13,§2486-f; C24, 27, 31, 35, §1257.]

Referred to in §1258

1258 Time and manner of trial—final order. When an appeal is taken as provided in section 1257, the case shall be docketed and precedence given over all other cases excepting criminal cases where the party is in jail, and the inspector may bring the case on for hearing before any judge of the judicial district where the mine is located by giving five days notice in writing to the opposite party. If the evidence shows that the order was a reasonable one as made by the inspector the findings and order of the inspector shall stand as made by him. If the evidence shows that the order was not a reasonable one, the court shall vacate it or so modify it as to be equitable and just. [S13,§2486-f; C24, 27, 31, 35,§1258.]

1259 Traveling way around hoisting shafts. At the bottom of each hoisting shaft there shall be constructed a safe and convenient traveling way around the shaft for employees and animals, and it shall be unlawful for any person to pass across the shaft bottom in any other manner than by such traveling way, except such employees as may be necessary to perform the work at the bottom of the shaft, or those engaged in making repairs. [S13,§2486-j; C24, 27, 31, 35,§1259.]

1260 Place of refuge in haulage roads. On all single-track haulage roads where hauling is done by machinery or other mechanical device, and on all gravity or inclined planes in mines where it is impracticable to construct a separate traveling way, and which persons employed in the mines must use while performing their work, or travel, on foot, to and from their work, places of refuge must be cut in the side wall not less than three feet in depth and four feet wide and five feet high, and not more than twenty yards apart unless there be a clear space of not less than two and one-half feet between the car when on the track and the rib or side of the entry of the haulage way. [S13, §2486-k; C24, 27, 31, 35,§1260.]

Referred to in §1261

1261 Separate traveling way—exception. In no case shall such haulage way referred to in section 1260 be used as a traveling way unless it shall first be determined by the inspector that it is impracticable to construct, keep, or maintain a separate traveling way; and in all cases, unless otherwise determined by the inspector to be impracticable, there shall be kept and maintained a separate traveling way for the employees which shall at all times be maintained in good and safe condition and free from falls of roof and other obstructions. [S13,§2486-k; C24, 27, 31, 35,§1261.]

1262 Signals—tripcar lights On every such haulage way over one hundred feet in length used as a traveling way and when haulage is done by tail rope or cable, a signal line and code of signals shall be maintained so as to afford means of communication at all times between the haulage engineer and persons along such haulage way; and a conspicuous light shall be carried on the front of trip or train of cars moved by mechanical means. [S13,§2486-k; C24, 27, 31, 35,§1262.]

1263 Doors in haulage ways. On all haulage ways where doors are maintained to direct the air current, it shall be unlawful for any person at any time to leave any of the doors open that direct the air current. Each person shall, after passing through such doors, see that they are properly closed. [S13,§§2488-c, 2489-16a; C24, 27, 31, 35,§1263.]

1264 Entries used by draft animals. All entries constructed after July 4, 1911, in which the haulage is done by animals and wherein employees work or use the same as a means of ingress and egress to and from their working places, shall be maintained substantially eight feet in width from one rib or side of the entry or haulage way to the opposite side, and shall be kept free from timbers or refuse and as even on the surface each side of the track as may be reasonably practicable; but this section shall not apply to such haulage ways in longwall work when the inspector of the district where the mine is located shall determine that it is impracticable to maintain such width of entry or haulage way. [S13,§2486-l; C24, 27, 31, 35, §1264.]

1265 Area of breaks-through in rooms. All breaks-through in entries must be of an area of not less than twenty-five feet and in rooms not less than twenty feet to secure proper ventilation. [S13,§2488-e; C24, 27, 31, 35,§1265.]

1266 Breaks-through in entries. All breaks-through in entries except the last one shall be securely closed and all stoppings in breaks-through except the one next to the last in entries shall be made with some substantial material so as to securely and completely close the same, and prevent the air from passing through or in any part thereof, which shall be subject to the state mine inspector's approval, who is hereby authorized and empowered to require any change to be made in the material or construction of such stoppings. The stopping in next to the last break-through in entries may be constructed temporarily of some suitable material until one additional break-through has been made, when the temporary stopping shall be replaced by permanent stopping as by this section provided. [S13,§2488-d; C24, 27, 31, 35, §1266.]

1267 Breaks-through in rooms. All breaks-through in the rooms, except the last one, shall be closed and securely fastened so as to prevent the air from passing through the same, which stoppings shall be subject to the approval of the mine inspector of the district in which the mine is operated. [S13,§2488-e; C24, 27, 31, 35,§1267.]

1268 Closing of abandoned rooms. The mouth or openings of all abandoned rooms, entries, and workings shall be securely closed with permanent stoppings, in such manner as to prevent the passage of air or the escape of gases. [S13,§2488-e; C24, 27, 31, 35,§1268.]

1269 Precaution against fire. It shall be unlawful to erect, keep, or maintain any inflammable structure or building or other material in the space intervening between the main or hoisting shaft, slope, or drift, and the escape shaft or other place of exit; or any powder magazine in such location or manner as to jeopardize the free and safe exit of employees from the mine by any escape shaft or other place of exit in case of fire or other casualty to the main shaft, slope, drift, buildings, or other structures. [S13,§2486-g; C24, 27, 31, 35,§1269.]

1270 Boiler and engine rooms. All boiler and engine rooms at any mine shall be constructed of fireproof material, and in no case shall the boiler room be placed within sixty feet of the hoisting shaft, slope, or drift. [S13, §2486-h; C24, 27, 31, 35,§1270.]

1271 Shaft lights. In all cases, after twilight, or when steam or other causes obscure the plain view of the top and openings of any shaft, there shall be maintained a good and substantial light, but in no case shall an open light or torch be used. [S13,§2486-i; C24, 27, 31, 35,§1271.]

1272 Ventilation. The operator of any mine shall provide and maintain an amount of ventilation of not less than one hundred cubic feet of air per minute for each person employed in the mine and not less than five hundred cubic feet of air per minute for each animal used therein, which shall be so circulated throughout the mine as to dilute, render harmless, and expel all noxious and poisonous gases in all working parts of the mine. In no case shall the air current be a greater distance than sixty feet from the working face, except when making crosscuts in entries for an air course, then the distance shall not be greater than seventy feet; but in a special case requiring it, the state mine inspector may, in writing, grant permission to go beyond the limit herein mentioned. When the air current is carried to the working face of the room in double room mining, such air current shall be treated as a compliance with this section. [C97,§2488; S13,§2488; C24, 27, 31, 35, §1272.]

1273 Air measurements—record. The measurement of the air currents in any mine shall be taken at the bottom of the intake and near the mouth of each split thereof, and also near the working face of the entries. The person in charge of the mine shall be furnished with an anemometer by the owner or lessee of the mine, and shall take the measurements of the air as in this section provided at least once each week and make a record thereof showing the time and place the measurements were taken. Such record shall be kept at the office of the mine, and a report showing such measurements sent each month to the inspector of the district. [S13,§2488; C24, 27, 31, 35,§1273.]

1274 Air current split—men on split. In every mine the air current shall be split and so conducted that not more than eighty employees at any time shall be working on or in each split, except in case of emergency. But the inspector of the district where the mine is located may in writing grant permission for a greater number, not exceeding fifty additional, when the required number of cubic feet of air per minute is properly circulated therein. [S13, §2488-a; C24, 27, 31, 35,§1274.]

1275 Contrivances for supplying air. Efficient means in the way of exhaust steam, fans, furnaces, or other contrivances of sufficient capacity shall be kept in operation to supply air current, but if a furnace is used it shall be so constructed by lining the upcast for a distance of not less than fifty feet or for such greater distance as in special cases may be required by the mine inspector, with incombustible material. No furnace shaft shall be constructed in connection with an escape shaft or other way of exit for the employees of a mine. [C97,§2488; S13, §§2486-d, 2488-b; C24, 27, 31, 35,§1275.]

1276 Unhealthful conditions. When the mine inspector finds the air insufficient or the employees working under unsafe or improper health conditions, he shall at once give notice to the mine operator, and upon failure to make the necessary changes within such time as the inspector shall fix, such inspector shall order the employees, except such as may be necessary to correct the defect and make the repairs, to cease work and remain out of the mine until such conditions are corrected. [C97,§2488; S13, §2488-f; C24, 27, 31, 35,§1276.]

1277 Speaking tubes. The operator of any mine shall, where the voice cannot be distinctly heard from top to bottom, provide and maintain a metal speaking tube or other adequate means of communication and keep the same in complete order from the bottom or interior to the top or exterior. [C97,§2489; S13,§2489; C24, 27, 31, 35,§1277.]

1278 Signalman at bottom. In all cases where mechanical means are used in any mine to hoist or lower employees, the operator of such mine shall keep and maintain a suitable, sober, and competent person at the top and at the bottom in charge of the signals during such time of lowering and raising the employees, who shall be and remain on duty for at least thirty minutes before and after the usual hours for beginning and stopping the ordinary work of the mine. [C97,§2489; S13,§2489; C24, 27, 31, 35,§1278.]

1279 Safety appliances and regulations.
1. *Brakes.* In all shafts where the employees are raised and lowered by machinery there shall be provided a good and sufficient brake on the drum, so adjusted that it may be operated by the engineer without leaving his post at the levers.
2. *Flanges on drum.* Flanges shall be so arranged on the ends of the drum of any engine used that when the whole cable is wound on the drum, there shall be not less than four inches of clearance between the outer surface of the cable and the outer edge of the flanges.
3. *Hoisting cable.* The ends of the hoisting cable shall be well secured on the drum and at least two and one-half laps of the same shall remain on the drum when the cage is at rest at the lowest caging place in the shaft.
4. *Index dial.* An index dial or indicator shall be so arranged and placed as to indicate to the engineer at all times the true position of the cages in the shaft.
5. *Safety catches.* All cages used in any shaft shall be equipped with efficient safety catches and suspended between good substantial guides, and so constructed overhead with boiler iron that falling objects cannot strike persons on the cage.
6. *Safety gates.* At all landings and openings at the top of all shafts there shall be maintained an approved safety gate constructed in such manner as at all times to close the opening or entrance to the shaft when the cage is not at rest at that point. There shall be adequate springs at the top of each slope and a trail or dog attached to each train used therein. [S13, §2489-1a; C24, 27, 31, 35,§1279.]

1280 Persons allowed on cage. Not more than ten persons shall be allowed on any cage when ascending or descending, and such less number as may be fixed by the mine inspector. No person at any time shall be allowed to ride in the shaft or any cage with a car, tools, or other material, or when such car, tools, or material is on the opposite cage, except when absolutely necessary in the performance of work in the making of repairs. No person shall ride upon a loaded trip in any part of the mine, except the conductor or person in charge thereof or any person in the performance of his duty. [S13,§2489-1a; C24, 27, 31, 35,§1280.]

1281 Speed of cage carrying men. Cages on which employees are riding shall not be lifted or lowered at a rate of speed greater than four hundred feet per minute, and no cage having any unstable or self-dumping platform or device shall be used for the carriage of employees or material other than coal or mineral unless the same is provided with some convenient device by which the cage platform can be securely locked when employees are being conveyed thereon. [S13,§2489-2a; C24, 27, 31, 35,§1281.]

1282 Code of signals—location. In all mines operated by machinery there shall be placed in plain view of the engineer while at his post of duty, and in a conspicuous place at the top and at the bottom of each shaft, slope, or drift, the following code of signals, which shall be used between the engineer and the other employees in the operation of the mine:
1. One ring or whistle shall signify to hoist coal or empty cage; and also to stop when the cage is in motion.
2. Two rings or whistles shall signify to lower cage.
3. Three rings or whistles shall signify that employees are ready to enter cage either top or bottom; when return signal of one ring or whistle is received from the engineer employees may enter the cage, but not before, when one ring or whistle shall be given to start.
4. Four rings or whistles shall signify to hoist slowly; warning of danger.
5. Five rings or whistles shall signify accident within the mine and a call for stretcher and supplies.
6. Six rings or whistles shall call for a reversal of the fan.
7. From top to bottom one ring or whistle shall signify all ready, get on cage.
8. Two rings or whistles from top to bottom shall signify send away empty cage which shall be answered from the bottom with one ring or whistle and the cage may then be moved.
9. The operator of such mine may with written consent of the mine inspector add to this code of signals in his discretion when deemed necessary for the efficiency of the mine or the safety of the employees, but any addition thereto shall be placed as in this section provided for the code of signals. [S13,§§2489-3a,-4a; C24, 27, 31, 35,§1282.]

1283 Engineers—competency. The operator of any mine shall not place in charge of any engine in and around the mine any but competent and sober engineers who shall not permit any person but those designated to handle, operate, or interfere with it or any part of the machinery except such as may be necessary in making proper and needed repairs, and then only when the engine or machinery is not in use in hoisting or lowering employees or hoisting coal

or mineral. [S13,§2489-3a; C24, 27, 31, 35, §1283.]

1284 Engineer to inspect machinery. It shall be the duty of the engineer at least once each day to carefully inspect all of the machinery and apparatus under his charge and all of its parts, and if any defects appear which will render its use unsafe to any employee in the mine, he shall cease operating the machinery until the defects are corrected. [S13,§2489-3a; C24, 27, 31, 35,§1284.]

1285 Persons not permitted in engine room. No person but the engineer shall be allowed in the engine room except on business connected with the operation of the mine or to repair machinery, and in such case the person shall immediately retire therefrom when the work is completed or business transacted, and no person shall be permitted to talk to the engineer while in the performance of his duty in hoisting or lowering employees, coal, or mineral. [S13, §2489-3a; C24, 27, 31, 35,§1285.]

1286 "Mine foreman" defined. The term "mine foreman" as used in this chapter and the law of this state, shall mean and be construed to be one in charge of the underground workings or departments of the mine or any part thereof, either by day or night. [S13, §2489-14a; C24, 27, 31, 35,§1286.]

1287 Certificate of competency. It shall be unlawful for any operator of any coal mine to employ any person as mine foreman, pit boss, or hoisting engineer at any coal mine employing five or more persons therein, and for any person to attempt to discharge such duties unless he shall hold a certificate of competency for such position as provided in this chapter. [S13, §§2489-a,-f; C24, 27, 31, 35,§1287.]

1288 Temporary employment. In case of the discharge, resignation, or disability of any person lawfully performing the duties of foreman, pit boss, or hoisting engineer, the operator shall have sixty days within which to secure the services of a certificated person to take the place of the one so discharged, resigned, or disabled; and during such time a competent and capable person may be temporarily employed to perform such services, whether holding a certificate or not. [S13,§2489-a; C24, 27, 31, 35,§1288.]

1289 Certificate of competency — how procured. Any person may secure such certificate of competency who satisfactorily passes the examination, written and oral, prescribed by the board of examiners. [S13,§§2489-b,-d; C24, 27, 31, 35,§1289.]

1290 Revocation of certificate. In any case where a mine foreman, pit boss, engineer, or other person receiving a certificate under the law pertaining to mines and mining within this state has wilfully disobeyed the orders of the mine inspector or has been convicted of a misdemeanor relating to his duties in mine operation, his certificate shall be revoked, upon complaint being filed with the board of examiners, who shall proceed to hear the case at such time and place as it may determine, which shall be as soon as practicable after the charges are filed and notice given by it to the accused. The board shall have power to subpoena witnesses and administer oaths and a majority of the board shall be required to determine the questions at issue; the costs incurred shall be taxed to the losing party and collected as in other cases. [S13, §2489-15a; C24, 27, 31, 35, §1290.]

Taxation and collection of costs, ch 497 and §11754

1291 Fees — certificates recorded. Every person applying for a certificate under this chapter shall pay to the examining board a fee of two dollars, and every successful applicant shall pay to said board an additional fee of two dollars, all of said fees to be accounted for and paid into the state treasury. Each certificate issued under this chapter shall be recorded in the office of the examining board, and shall show the name, age, residence, and mining experience of the person to whom it was issued. [S13,§2489-e; C24, 27, 31, 35,§1291.]

1292 Duties of foreman or pit boss. The duties of the mine foreman or pit boss in charge of any mine or any part thereof shall be:

1. *Inspection.* To make careful inspection of the mine from day to day by himself or assistant and at all times when in his judgment conditions may require.
2. *Directions and rules.* To give such directions and formulate such rules for the guidance of the men employed in the mine as skillful and safe operation of the mine may require.
3. *Props.* To see that the mines are at all times sufficiently supplied with props of proper lengths, caps, and other timbers necessary to securely prop the roof of such mine and the rooms wherein the men are employed, and such material shall be conveniently placed for the use of the miners upon their request.
4. *Ventilation.* To keep a careful watch over the ventilating apparatus and airways, together with all of the stoppings, doors, and other means of directing the air current.
5. *Minors.* To keep a record of the boys under sixteen years of age employed by him during the time of school vacation, showing their ages, names, and residence of parents or guardians and character of employment, which record shall be kept at the office of the mines and open for inspection at all reasonable times.
6. *Daily examination.* To examine all escape ways, the traveling ways leading thereto, or cause them to be examined by his assistant, once each day, and make written report of the conditions and file in the office at the mine, which report shall be open for examination at all reasonable times to representatives of the employees and other persons entitled thereto, and send a copy of such report each month to the mine inspector of the district in which said mine is operated.
7. *Guarding dangerous ways.* If he finds any escape way or traveling way impassable or dangerous, he shall immediately upon the dis-

covery of the defect, place such obstructions at the defective place as may be reasonably necessary to apprise the employees of the danger. [S13,§2489-13a; C24, 27, 31, 35,§1292.]

1293 Duty of miners and other employees. It shall be the duty of each employee:

1. *Examination of working place.* To examine his working place upon entering the same and not commence to mine or load coal or other material until it is made safe.

2. *Prop and timber roof.* To securely prop and timber the roof of his working place therein and to obey any order or orders given by the superintendent or mine foreman relating to the width of the working place and to the security of the mine in the part thereof where he is at work.

3. *Waste.* To avoid waste of props, caps, timbers, and other material, and when he has any such not suitable for his purpose to place the same at some convenient point near the track, and where the same may be readily seen, and inform the mine foreman, or other person in charge, of their being unsuitable for the purpose intended.

4. *Drawslate.* When drawslate or other like material is over the coal, to see to it that proper timbers are placed thereunder for his safety before working under the same. [S13,§2489-16a; C24, 27, 31, 35,§1293.]

1294 Unlawful to injure property. No workman or other person shall knowingly commit any of the following acts:

1. Injure a water gauge, barometer, air course, brattice, or any equipment, machinery, or livestock.

2. Obstruct or throw open any airway, handle or disturb any part of the machinery or the hoisting engine of the mine.

3. Open a door of a mine and neglect to close it.

4. Endanger the mine or those working therein.

5. Disobey any order given in pursuance of law or do a wilful act whereby the safety of persons working in or about a mine or the security of the mine or the machinery connected therewith may be endangered.

6. Place any refuse material or any obstruction in any part of the air course or any part of the breaks-through in the entries or rooms other than as by this chapter provided. [S13,§2489-17a; C24, 27, 31, 35,§1294.]

1295 Use of intoxicants prohibited. No person shall go into, at, or around a mine or the buildings, tracks, or machinery connected therewith while under the influence of intoxicants, and no person shall use, carry, or have in his possession, at, in, or around the mine or the buildings, tracks, or machinery connected therewith, any intoxicants. [S13,§2489-18a; C24, 27, 31, 35,§1295.]

1296 Shot examiners—proof of competency. In all mines where the coal is blasted from the solid, competent persons shall be employed to examine all drill holes before they are charged. Before entering upon the discharge of their duties, said examiners shall give proof of their competency to the mine inspector of the district in which the mine where they are employed is located, and said inspector shall certify to the operator of each mine the persons who have given proof of their competency to act in the capacity of shot examiners. The mine inspector shall refuse to give permission to any person to act as shot examiner who, in his judgment, is not competent. He shall revoke any permission granted should it appear that a shot examiner is incompetent, negligent, or careless in the performance of his work. [S13,§2495-b; C24, 27, 31, 35,§1296.]

1296.1 Drill holes—unlawful charging. In charging drill holes with powder or other explosives it shall be unlawful for any miner or other person to use any tamper, scraper, or tool that is not tipped on each end thereof with at least five inches of brass, copper, or other nonsparking metal, and no drill hole shall be charged until the shot examiner shall have examined the same. [C24,§1297; C27, 31, 35,§1296-a1.]

1297 Drill holes—when unlawful to charge. The shot examiner shall forbid the charging or firing of any drill hole with powder or other explosive if in his judgment it would be unsafe to the employees or the mine to discharge the shot. In any case where the shot examiner forbids the charging or firing of any drill hole, he shall make a cross with chalk markings at the mouth of the hole when condemned, and make an entry thereof in a book kept by him for that purpose, stating the name of the person working in such place, the number of drill holes therein which he forbids being charged, and the date thereof, which record shall be retained for at least one week. It shall be unlawful for any shot firer or other person to discharge any shot or blast which has been condemned by the shot examiner. In any case when the mine foreman shall have forbidden the charging of any drill hole or the firing of any shot, no person shall be permitted to charge such hole or fire such shot. If the shot examiner forbids the charging of a hole or the firing of a shot, the mine foreman shall not cause the hole to be charged or the shot fired. [S13,§2489-19a; C24, 27, 31, 35,§1297.]

1297.1 Firing while others in mine. No shot firer or any other person shall do any blasting or exploding of shots in any coal mine of this state, nor shall any superintendent or mine foreman permit the firing of shots or blasting in any coal mine in this state, until each and every person except the shot firer or firers is out of said mine. [47GA, ch 97,§1.]

1298 Transportation of powder. No person, firm, or corporation shall be permitted to transport, carry, or convey by any electrical means whatever, any powder or other explosives into any coal mine until after the coal miners and other employees have ceased their work and

departed from the mines. [S13,§2496-a; C24, 27, 31, 35,§1298.]

1299 Transportation and delivery. The transportation and delivery of all powder and other explosives in coal mines shall be done by the operator or by men employed by him for that purpose. [S13,§2496-d; C24, 27, 31, 35,§1299.]

1300 Storage of powder—what permitted. No operator of any coal mine shall suffer or permit, under any circumstances, the storing of powder or other explosives in any coal mine except as follows:

1. Each miner shall be permitted to have in his separate and individual possession at one time not more than two kegs containing twenty-five pounds of powder each, and other explosives sufficient for one day's use.

2. Such powder or other explosive shall be kept by the miner in a wooden or metallic box or boxes securely locked, and said boxes shall be kept at a reasonable distance from the track; and black powder and high explosives shall be kept in separate boxes. [S13,§2496-b; C24, 27, 31, 35,§1300.]

Referred to in §1301

1301 Supply for following day. It shall not be construed as storing powder, as defined in section 1300, to deposit the powder or other explosives at the end of the electrical or mechanical haulage at the face of the mine for the following day's use, if deposited in conformity with the provisions of section 1300. [S13, §2496-c; C24, 27, 31, 35,§1301.]

1302 Supply of caps—timbers—props. The operator of any mine shall at all times keep a sufficient supply of props, caps, and other necessary timbers to be used by employees in the mine, convenient and ready for use, and shall send such materials down when requested and deliver them at the places where needed. [S13, §2489-5a; C24, 27, 31, 35,§1302.]

1303 Material for tamping. In all mines where coal is blasted from the solid, the operator shall furnish sand, soil, or clay to be used for tamping which shall be delivered to the employee and placed at a convenient distance from the working places ready for use, and so as not to obstruct any employee in his work. No person shall be permitted to use any substance or material other than sand, soil, or clay for tamping. [S13,§2489-6a; C24, 27, 31, 35,§1303.]

1304 Sprinkling of roadways. The operator of any mine shall not permit the accumulation of dust upon and along any roadway; and where any roadway is dry and dusty, shall cause the same to be sprinkled at least once each week and as much oftener as conditions may require. [S13,§2489-7a; C24, 27, 31, 35,§1304.]

1305 Stables—location—construction—use. The operator of any mine shall not locate a stable at any point in a mine where the air current supplied to the employees passes through such place and in no case shall such stable be located without first having the written approval of the mine inspector of that district, a copy of which shall be filed in his office. The material used in the construction of stables in mines shall, as nearly as practicable, be incombustible and such stables shall not be used as a place for storing any inflammable material, except such hay as may be reasonably necessary for one day's use. [S13,§2489-8a; C24, 27, 31, 35,§1305.]

1306 Telephone systems. In all mines where the working parts thereof exceed two thousand feet from the foot of the slope, shaft, or the mouth of a drift as the case may be, a good and substantial telephone system or other like suitable means of communication shall be maintained at all times ready for use, from the bottom to some suitable and convenient point at or near the face of such working parts which shall be extended as the works of the mine progress two thousand feet therefrom. [SS15, §2489-10a; C24, 27, 31, 35,§1306.]

1307 Stretchers—blankets—bandages. The operator of any mine shall at all times keep at some convenient place at the mine, in readiness for use in case of accident, one good and substantial stretcher for each fifty employees or fraction thereof engaged in the operation of the mine, and proper and sufficient blankets for each stretcher, together with a sufficient supply of bandages. [S13,§2489-11a; C24, 27, 31, 35,§1307.]

1307.1 Washing facilities. The operator of any coal mine, in the operation of which more than twenty persons are employed, shall provide and maintain adequate washing facilities for all employees in and about said mine. [C27, 31, 35, §1307-a1.]

Referred to in §1307.2

1307.2 Inspection. It shall be the duty of the mine inspector of each mining district to inspect the washing facilities provided or maintained at each mine in his district and to make such reasonable orders as will carry out the provisions of this and section 1307.1. [C27, 31, 35,§1307-a2.]

1308 Gasoline and engines—use and location. No gasoline engine, except gasoline haulage motors where the exhaust is properly cared for, or supplies of gasoline therefor, shall be located in or near the air current which supplies the employees of any mine with air, but in all cases shall be placed upon the return of the air and located at least twenty feet from any and all traveling ways. In no case shall any gasoline engine or place for supply of gasoline be located without first having the approval in writing of the mine inspector, who shall determine the suitability of the location of said engine and supplies. The supply of gasoline shall be kept at the place designated and shall not exceed twelve gallons at any one time. [S13,§2489-9a; C24, 27, 31, 35,§1308.]

1309 Temporary location of engine. In case of emergency a gasoline engine may be temporarily placed where needed and the inspector

of the district in which the mine is located immediately notified thereof; he shall at once proceed to the mine and determine as to the safety of the employees while the engine is so operated at such location. If in his judgment the operation thereof can be continued at such place with reasonable safety to the employees, such operation may be continued while the employees are at work until the emergency shall have passed; otherwise the inspector shall order the employees, except such as are required to operate the engine and work connected therewith, to leave the mine until the same is made safe. [S13,§2489-9a; C24, 27, 31, 35,§1309.]

1310 Fire extinguishers required. At all hoisting shafts, air shafts, escape shafts, and places of exit, boiler and engine rooms, stables in mines, and places where gasoline engines are used, there shall be kept ready for use at all times at least two hand fire extinguishers of approved make, conveniently placed for immediate use when needed. [S13,§2489-9a; C24, 27, 31, 35,§1310.]

1310.1 Gas masks. In all coal mines of this state where shot firemen fire shots, the owner, operator, or person in charge of such mine shall furnish each shot fireman with an efficient gas mask, approved by the mine inspector of the district where such mine is located, which shall be examined each day and kept in proper condition to serve the purposes intended. [C27, 31, 35,§1310-b1.]

Referred to in §1310.2

1310.2 Shooting without mask. It shall be unlawful for any person to perform the duties of shot fireman in any coal mine in this state without having in his possession and on his person an efficient gas mask as required by section 1310.1. [C27, 31, 35,§1310-b2.]

1311 Gasoline motors prohibited. In any mine hereafter opened or equipped for operation no gasoline haulage motor shall be installed or used in the underground workings for any purpose, and it shall be the duty of the mine inspector to enforce the provisions of this section. [C24, 27, 31, 35,§1311.]

1312 Purity of illuminating oil. Only pure animal or vegetable oil or other means for illuminating purposes equally as safe and free from smoke or offensive odor shall be used in any mine in this state. For the purpose of determining the purity of oils the department of agriculture shall fix a standard of purity and establish regulations for testing the same, and when so determined and established shall be binding on all courts and other authorities. When any substance used for illuminating purposes in a mine leaves any refuse after use which gives off any gas or offensive odor, it shall be removed from the mine at the end of his day's work by the person using it. [C97,§2493; S13,§2493; C24, 27, 31, 35,§1312.]

Authority of department, §2590

1313 Inspection by oil inspector. The department of agriculture shall inspect and test all oil offered for sale, sold, or used for illuminating purposes in coal mines in this state, and for such purposes the inspector of said department may enter upon the premises of any person. If upon test and examination the oil shall meet the requirements made by said department, said inspector shall brand, over his official signature, the barrel or vessel holding the same, with the date and words "Approved for illuminating coal mines". Should it fail to meet such requirements, he shall brand it over his official signature, and date, "Rejected for illuminating coal mines". All inspection shall be made within this state, and paid for by the person for whom the inspection is made at the rate of ten cents per barrel or vessel, which charge shall be a lien on the oil inspected, and be collected by the inspector. Each inspector shall be governed in all things respecting his record and returns as provided in the general law relative to inspection of petroleum products. [S13,§2495-a; C24, 27, 31, 35,§1313.]

Inspection of petroleum products, ch 159

1314 Proceedings when law violated. When any such inspector has good reason to believe that oil is being sold or used in violation of the provisions of this chapter, he shall make complaint to the county attorney of the county in which the offense was committed, who shall forthwith commence proceedings against the offender. All reasonable expenses for analyzing suspected oil shall be paid by the owner of the oil when it is found that he is selling or offering to sell impure oil in violation of the provisions of this chapter. Such expenses may be recovered in a civil action, and in criminal proceedings such expenses shall be taxed as part of the costs. [S13,§2495-a; C24, 27, 31, 35,§1314.]

1315 Electrical current permitted in mines. All wires or cables at or in any mine used for transmitting electrical current in excess of one hundred volts shall be armored or insulated insofar as practicable, except trolley and all return wires or cables. Wires or cables used for conducting or transmitting current in excess of two hundred seventy-five volts shall be placed and protected for the safety of persons and animals as provided in section 1316. [C24, 27, 31, 35,§1315.]

1316 Electrical current. All wires, cables, or transformers used at or in any mine for transmitting, conducting, or transforming electrical current in excess of two hundred seventy-five volts shall be armored, insulated, isolated, or placed so as to prevent injury to persons and animals insofar as possible consistent with the use for which such instrumentalities are intended. At the approach to a transformer, if used, there shall be displayed a sign, with the word "danger" and the number of volts of electrical current conducted, indicated thereon in large plain letters and figures, on which light shall be thrown at all times when electrical cur-

rent is being conducted or transmitted. [C24, 27, 31, 35,§1316.]

Referred to in §1315

1317 Grounding and insulation of current. Electric pumps and stationary electric machines shall be insulated and grounded in their emplacement, by the use of wires or other equivalent means and inspected with such frequency and kept in such repair that contact therewith will be rendered harmless insofar as possible consistent with the use for which such machinery is intended. [C24, 27, 31, 35,§1317.]

1318 Electrical equipment. It shall be unlawful for any person to inspect, repair, handle, disturb, or interfere with any of the electrical equipment or machinery of a mine except the mine inspector, operator, superintendent, mine foreman, or those designated by such persons to do such work, and those whom such designated persons may request or permit to aid in the work of handling or repairing. [C24, 27, 31, 35, §1318.]

1319 Scales and weighers — duties — damages. The operator shall, if the miners are paid by weight, provide the mine with suitable scales of standard make, and require the person selected to weigh the coal delivered from the mine to take and subscribe an oath before some person authorized to administer oaths, to the effect that he will keep the scales correctly and truly balanced, and accurately weigh and a true record keep of each car delivered, which oath, with that of the checkweighman hereinafter provided for, shall be conspicuously displayed with record of weights at the place of weighing, which record shall carry the account of each miner by itself, be open to the inspection at all proper times of miners and all others having a pecuniary interest in the mine. All damages sustained on account of a failure to weigh and credit to the proper person any coal mined shall be recoverable in an action brought within two years from the time the right thereto accrued, and a knowledge of a violation of this provision by the miner shall not be a defense thereto. [C97,§2490; S13, §2490; C24, 27, 31, 35,§1319.]

1320 Checkweighman—duties. The miners employed and working in any mine may furnish a competent checkweighman, who, before entering upon his duties, shall take and subscribe an oath to the effect that he is duly qualified and will faithfully discharge his duties as checkweighman, and he shall at all proper times have access to and the right to examine the scales, machinery, or apparatus used in weighing, and to see all measures and weights of coal mined and the accounts kept thereof; but not more than one person on the part of the miners collectively shall have this right, and such examination and inspection shall be so made as to create no unnecessary interference with the use of such scales, machinery, or apparatus. [C97,§2490; S13,§2490; C24, 27, 31, 35,§1320.]

Referred to in §1319

1321 When weighed—weights—impurities. The operator shall, where the miner is to be paid by the ton or other quantity, unless otherwise agreed upon in writing, weigh the coal before screening, and the miner shall be credited at the rate of eighty pounds to the bushel and two thousand pounds to the ton, but no payment shall be required for sulphur, rock, slate, blackjack, dirt, or other impurities which may be loaded or found with the coal. [C97, §2490; S13,§2490; C24, 27, 31, 35,§1321.]

1322 Pay days—failure to pay—damages. All wages shall be paid in money upon demand semimonthly, by paying the amount earned during the first fifteen days of each month not later than the first Saturday after the twentieth of said month, and for those earned after the fifteenth of each month not later than the first Saturday after the fifth of the succeeding month. A failure or refusal to make payment within five days after demand shall entitle the laborer to recover the amount due him, and one dollar per day additional, not exceeding the amount due, for each day such payment is neglected or refused, and in any action therefor the court shall tax as a part of the costs a reasonable attorney fee to plaintiff's attorney. [C97,§2490; S13, §2490; C24, 27, 31, 35,§1322.]

Referred to in §1323

1323 Wages how paid—coercion prohibited. The operator shall not sell, give, deliver, or issue, directly or indirectly, to any person employed, in payment for labor due or as advances for labor to be performed, any script, check, draft, order, or other evidence of indebtedness payable or redeemable otherwise than in money at its face value. He shall not compel or in any manner endeavor to coerce any employee to purchase goods or supplies from any particular person, firm, company, or corporation, but upon demand all wages shall be paid in money as provided in section 1322. [C97,§2490; S13,§2490; C24, 27, 31, 35,§1323.]

1324 Annual reports — what to contain. The operator of any mine shall, on or before the first day of February in each year, send to the office of the inspector of the district where the mine is located, upon blanks furnished by the state, a correct return with respect to the year ending January 1 of each year showing the quantity of coal mined and the number of persons ordinarily employed at, in, and around such mine, designating the number of persons below and above ground, and such other information as required by such blank. [SS15,§2489-12a; C24, 27, 31, 35,§1324.]

1325 Uniform reports. The inspectors shall prepare uniform blanks which shall be used in all cases where reports are required to be made to the district mine inspectors or the inspectors at their general office. [S13,§2484-a; C24, 27, 31, 35,§1325.]

1326 Report of accidents. Forthwith upon the happening of any accident resulting in the death of an employee, the operator shall report

the same by mail or otherwise to the mine inspector of the district and the coroner of the county in which the accident happens. In all other cases of personal injury, not resulting in death, the operator shall make a report to the mine inspector of the district upon a standard form provided by the inspector for that purpose, containing a detailed statement of the extent of the injury and the manner in which it occurred. [C97,§2482; S13,§2482; SS15,§2489-12a; C24, 27, 31, 35,§1326.]

1327 Safety of employees. In addition to any and all other remedies, if any owner or person in charge of any mine shall fail to provide any of the appliances specified in this chapter for the safety of the employees, or the appliances provided do not conform to such requirements, or such owner or agent shall neglect, for twenty days after notice given in writing by the mine inspector of such failure to remedy the same, such inspector may apply to the district court, or any judge thereof, in an action brought in the name of the state, for writ of injunction to restrain the working of the mine with more persons than are necessary to make the improvements needed and prevent deterioration of the mine, until such appliances have been supplied. In case an injury happens to those engaged in work because of such failure, the negligence of such operator shall be held to be the proximate cause of such injury. [C73,§1568; C97,§2492; C24, 27, 31, 35,§1327.]

1328 Changes not covered by statute. In all cases not covered by statute when it is found necessary that some change, improvement, or device is required to reasonably secure the safety or health of the employees of any mine, and the operator neglects or refuses to make the change or improvement or supply the device needed within a reasonable time after written notice so to do given by the inspector of the district in which the mine is located, the inspector shall file a verified petition with the clerk of the district court of the county where the mine is located setting forth all such facts and asking a mandatory writ to compel the making of such improvements. [C73,§1568; S13,§2494-a; C24, 27, 31, 35,§1328.]

1329 Notice of time and place of hearing. Such inspector shall give five days notice to the accused in the same manner as original notices are served, stating the time and place and the name of the judge before whom the case will be tried. The accused party shall be required to appear at the time and place mentioned in the notice, which may be at any place convenient for the judge in the judicial district. [S13, §2494-a; C24, 27, 31, 35,§1329.]

Service of notice, §11060

1330 Title of proceeding — time to plead. The proceeding shall be entitled the state of Iowa as plaintiff and the operator as defendant, who shall plead on or before noon of the fourth day after notice. At the time and place fixed in the notice the case shall be heard and tried by the judge in equity, who shall make such order as the evidence warrants. [S13,§2494-a; C24, 27, 31, 35,§1330.]

Method of trial, ch 496

1331 Witnesses. The clerk of the district court where such petition has been filed shall issue subpoenas at the request of either party, and witnesses shall be required to respond thereto as in other cases, and it shall be the official duty of the county attorney to represent the plaintiff in all matters pertaining to such proceeding. Pending such proceeding the judge may, if he deems it advisable for the safety of the employees, order the mine closed until such hearing is completed, and if changes are ordered, then till such changes are made. [S13, §2494-a; C24, 27, 31, 35,§1331.]

Attendance of witnesses, §11323 et seq.

1332 Burden of proof. The burden of proof shall rest upon the plaintiff to show that the proposed change, improvement, or device is reasonably required for the safety or health of the employees. If the evidence in the whole case shows that the proposed change, improvement, or device is necessary for the purposes intended, the judge shall forthwith issue a mandatory order specifying the improvements required and the time within which they shall be made, and enter the same of record in the district court of the county in which the mine is located. [S13, §2494-a; C24, 27, 31, 35,§1332.]

1333 Contempt of court—penalty. If the defendant fails to comply with the order made by the judge within the time fixed, such defendant may be charged with contempt of court, and upon conviction thereof be fined not to exceed five hundred dollars and committed to the county jail until such fine is paid. [S13,§2494-a; C24, 27, 31, 35,§1333.]

Contempts, ch 536

1334 Right of adjoining landowner. Upon affidavit of any person owning land in the vicinity of any mine, or his agents, filed with the inspector of the district stating that it is necessary for the protection of his property to know how near his land the excavations in the mine extend, the inspector shall make an examination or employ a surveyor therefor if necessary, to determine the length and direction of entries and other works toward the land of the applicant and the extent of excavation of same on all of his land, if any, and file a report thereof in his office. The inspector may in such case permit examination of such map or copies thereof as may be in his custody, for the purpose of determining the location of the workings. If it be found necessary to survey the premises to discover the facts, the owner or person filing the affidavit shall first give a bond or other security to the inspector in favor of the state in the sum of one hundred dollars conditioned to pay all costs and expenses incurred thereby. [S13, §2485-b; C24, 27, 31, 35,§1334.]

1335 Expenses. The necessary expenses incurred and compensation of five dollars per day to the inspector for the use of the state and

ten dollars per day to the surveyor shall be paid by the applicant except when it shall be shown that said applicant's property has been undermined, in which case the expense shall be paid by the mine owner, operator, lessee, or person in charge. [S13,§2485-b; C24, 27, 31, 35,§1335.]

1336 Double damages. In any case where any operator, without permission, takes coal from adjoining land, he shall be liable for double damages to the owner and for all expenses caused thereby. [S13,§2485-b; C24, 27, 31, 35, §1336.]

1337 Violations—misdemeanors—penalties. Any person, firm, or corporation violating any of the provisions of this chapter shall be guilty of a misdemeanor and shall be punished as hereinafter provided, respectively:

1. *Maps.* Any owner, operator, lessee, or person in charge of any mine, refusing or neglecting to comply with the provisions of this chapter in relation to making and furnishing to the mine inspector maps of such mine, shall be fined one hundred dollars and be imprisoned in the county jail until such fine and costs are paid.

2. *Orders.* Any person, employer, or employee refusing or neglecting to comply with any order of the mine inspector relating to insufficient air, improper ventilation, or unsafe and improper health conditions in any mine, shall be fined not less than five dollars nor more than one hundred dollars.

3. *Unlawful employment.* Any owner, operator, lessee, agent, or managing officer of any mine who shall employ any mine foreman, pit boss, or hoisting engineer who does not hold a certificate of competency from the board of examiners, except as otherwise provided in this chapter, shall be fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding six months, or both.

4. *Explosives.* Any owner, lessee, operator, or the agent thereof, or officer or agent of any firm or corporation violating any of the provisions of this chapter relating to the transportation and storage of powder and other explosives in and about any mine, shall be fined not exceeding one hundred dollars or imprisoned in the county jail not exceeding thirty days.

5. *Illuminating oils.* Any person, firm, corporation, or their agents or employees, violating any of the provisions of this chapter relating to inspection, selling, or offering to sell illuminating oils or any other substance for illuminating purposes in any mine, shall be fined not less than twenty-five dollars nor more than one hundred dollars.

6. *Oils.* Any owner, operator, lessee, or employee of any mine violating any of the provisions of this chapter prohibiting the use or sale or permitting the use or sale of impure or adulterated oil or other substance for illuminating purposes in any mine, shall be fined not less than five dollars nor more than twenty-five dollars.

7. *Weighing.* Any owner, lessee, or operator, or any party in charge of any mine, or any weighman or checkweighman violating any of the provisions of this chapter relating to the correct weighing and recording of the weights of coal mined at any mine shall be fined not exceeding five hundred dollars or be imprisoned in the county jail not exceeding sixty days.

8. *General prohibitions.* Any miner, workman, or other person violating any of the provisions of this chapter relating to injuring or interfering with any air course or brattice, obstructing or throwing open doors in mines, disturbing any part of the machinery or equipment, disobeying any orders in carrying out the provisions of this chapter, riding upon a loaded car or other means of transportation in the mine except as in this chapter permitted, doing any act whereby the lives, limbs, or health of persons or the security of the mine and machinery are endangered, or neglecting or refusing to securely prop or support the roof and entries under his control, or neglecting or refusing to obey any order of the superintendent in relation to the safety of the mine in the part under his control, shall be fined not exceeding one hundred dollars or imprisoned in the county jail not exceeding thirty days. [C97,§§2491, 2494; S13, §§2485-a, 2488-f, 2489-f, 2494, 2496-e; C24, 27, 31, 35,§1337.]

CHAPTER 69

GYPSUM MINES

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1338 Escape shafts. The owner or person in charge of any gypsum mine operated by shaft or one having a slope or drift opening in which five or more men are employed shall construct and maintain at least two distinct openings, which in shaft mines hereafter constructed shall be separated by not less than three hundred feet and in slope or drift mines by not less than

two hundred feet in breadth through which, in every shaft or slope mine, ingress and egress at all times shall be unobstructed and free from water. [S13,§2496-f; C24, 27, 31, 35,§1338.]

S13,§2496-f, editorially divided

1339 Stairs. All escape shafts hereafter constructed shall have stairs at an angle of not more than sixty degrees in descent, with a stairway not less than two feet in width, kept in safe condition, with proper landings at easy and convenient distances apart and adequate means of escape from mines now in operation. [S13,§2496-f; C24, 27, 31, 35,§1339.]

1340 Fans—combustible materials. Such owner or person shall provide all air shafts with fans for ventilating purposes, and no combustible material shall be allowed to be or remain between any escape shaft and hoisting shaft, nor shall any building hereafter erected be located within two hundred feet of an escape shaft without written permission from the state inspector. [S13,§2496-f, C24, 27, 31, 35,§1340.]

1341 Joint use. Where two or more mines are connected underground the several owners may, by agreement, use the hoisting shaft or slope of one mine as an escape for the other. No escape shaft shall be located or constructed without first giving notice to, and obtaining the approval in writing of the state mine inspector. [S13,§2496-f; C24, 27, 31, 35,§1341.]

1342 Ventilation. The owner or person in charge of any mine shall provide and maintain, whether the mine be operated by shaft, slope, or drift, an amount of ventilation of not less than one hundred cubic feet of air per minute for each person, nor less than five hundred cubic feet of air per minute for each mule or horse employed therein, which shall be so circulated throughout the mines as to dilute, render harmless, and expel all noxious and poisonous gases in all working parts of the same. [S13,§2496-h; C24, 27, 31, 35,§1342.]

S13,§2496 h, editorially divided

1343 Air measurement. In no case shall the air current be a greater distance than sixty feet from the working face, except when making crosscuts in entries for air courses; then, in that case, the distance shall not be greater than seventy feet; but the state mine inspector may, in writing, grant permission to go beyond the limit herein mentioned, when the conditions are such in a special case as to require it. [S13, §2496-h; C24, 27, 31, 35,§1343.]

1344 Insufficient air. When the mine inspector shall find the air insufficient, or men working under unsafe conditions, he shall at once give notice to the mine owner or his agent or person in charge, and upon the failure to make the necessary changes within a reasonable time, to be fixed by him, he may order the men out, to remain out until the mine is put in proper condition. [S13,§2496-h; C24, 27, 31, 35,§1344.]

1345 Speaking tubes — safety appliances. The owner or person in charge of any mine shall in all mines operated by shaft or slope, where the voice cannot be distinctly heard, provide and maintain a metal speaking tube or other means of communication, kept in complete order from the bottom or interior to the top or exterior, also a sufficient safety catch and proper cover overhead on all cages, and an adequate brake to all drums or other devices used for lowering or hoisting persons, an approved safety gate at the top of each shaft, springs at the top of each slope, and a trail attached to each train used therein. [S13,§2496-i; C24, 27, 31, 35,§1345.]

S13,§2496-i, editorially divided

1346 Competent engineers. He shall not knowingly place in charge of any engine used in or about the operation of the mines any but experienced, competent, and sober engineers, who shall have the same qualifications as are required of hoisting engineers at coal mines, and who shall not allow anyone but those designated for that purpose to handle or in any way interfere with it or any part of the machinery, nor shall more than ten persons be allowed to descend or ascend in any cage at one time, or such less number as may be fixed by the state mine inspector, nor anyone but the conductor on a loaded car or cage. [S13,§2496-i; C24, 27, 31, 35,§1346.]

1347 Props. He shall at all times keep a sufficient supply of timber to be used as props, convenient and ready for use, and shall send such props down when required and deliver them to the places where needed. [S13,§2496-i; C24, 27, 31, 35,§1347.]

1348 Violation — writ of injunction. In addition to any and all other remedies, if any owner or person in charge of any mine shall fail to provide the requirements herein specified, or such owner or agent neglect for twenty days after notice given in writing by the state mine inspector of such failure to remedy the same, such inspector may apply to the district court or any judge thereof in an action brought in the name of the state for a writ of injunction to restrain the working of the mine with more persons at the same time than are necessary to make the improvements needed, save as may be required to prevent waste, until such appliances have been provided, and in case an injury happens to those engaged in the work because of such failure, the same shall be held culpable negligence on the part of the operator of the mine. [S13,§2496-j; C24, 27, 31, 35,§1348.]

1349 Duties and powers of inspector. It is hereby made the duty of the state mine inspector to enforce the provisions of this chapter. He shall have the right to enter any gypsum mine under the provisions of this chapter, at any time, but shall not unnecessarily interfere with the working of any mine, nor shall more than six months intervene between examinations of any such mine. [S13,§2496-k; C24, 27, 31, 35, §1349.]

1350 Fatal accidents—reports. Every person in charge of a mine under the provisions of this chapter shall, within twenty-four hours after a fatal accident happens to any employee in or around the mine, report the same to the coroner of the county in which the mine is operated and to the state mine inspector. [S13, §2496-l; C24, 27, 31, 35,§1350.]

1351 Maps. The owner, operator, lessee, or person in charge of any gypsum mine shall make or cause to be made an accurate map or plan of such mine, drawn to a scale not more than two hundred feet to the inch, on which shall appear the name of the state, county, and township in which the mine is located, the designation of the mine, the name of the company or owner, operator, lessee, or person in charge, the certificate of the mining engineer or surveyor as to the accuracy and date of the survey, the north point, and the scale to which the drawing is made. [S13,§2496-m; C24, 27, 31, 35,§1351.]

S13,§2496-m, editorially divided

1352 Details required. Every such map or plan shall correctly show the surface boundary lines of the rights pertaining to each mine and all section or quarter-section lines or corners within the same; the lines of town lots or streets; the tracks or sidetracks of all railroads, the location of all wagon roads, rivers, streams, ponds, and reservations made of gypsum and mineral. For the underground workings said map shall show all shafts, slopes, tunnels, or other opening to the surface or to the workings of a contiguous mine; all excavations, entries, rooms, and crosscuts; the location of the escape ways, and of the fan or furnace or other means of ventilation and the direction of air currents and the location of permanent pumps, hauling engines, engine planes, abandoned works, fire walls, and standing water. [S13,§2496-m; C24, 27, 31, 35,§1352.]

1353 Separate maps. A separate and similar map drawn to the same scale in all cases shall be made of each and every seam of gypsum operated in any mine in the state. A separate map shall also be made of the surface whenever the surface buildings, lines, or objects are so numerous as to obscure the details of the mine workings if drawn upon the same sheet with them and in such case the surface map shall be drawn upon transparent cloth or paper so it can be laid upon the map of the underground workings and thus truly indicate the local relation of lines and objects on the surface to the excavation of the mine, together with any other principal workings of the mines. [S13,§2496-m; C24, 27, 31, 35,§1353.]

1354 Rise and dip of seam. Each map shall also show, by profile drawing and measurement, the last one hundred fifty feet approaching the boundary lines, showing the rise and dip of the seam. [S13,§2496-m; C24, 27, 31, 35,§1354.]

1355 Copies. The original or true copies of all such maps shall be kept at the office of the mine and true copies thereof shall also be furnished the state mine inspector for the district in which said mine is located within thirty days after the completion of the same. [S13,§2496-m; C24, 27, 31, 35,§1355.]

1356 Custody and examination. The maps so delivered to the inspector shall be the property of the state and shall remain in the custody of the said inspector during his term of office and be delivered to his successor in office. They shall be kept at the office of the inspector and be open to examination to all persons interested in the same. But such examinations shall only be made in the presence of the inspector or his office assistant, and he shall not permit any copies of the same to be made without the written consent of the operator or the owner of the property, except as herein and otherwise provided. [S13,§2496-m; C24, 27, 31, 35,§1356.]

1357 Additional survey. An accurate extension of the last preceding survey of every mine in active operation shall be made once in every twelve months prior to July 1 of every year and the result of such survey with the date thereof shall be promptly and accurately entered upon the original map and a true, correct, and accurate copy of said extended map shall be forwarded to the inspector of mines in the district in which said mine is located so as to show all changes in plan of new work in the mine, and all extension of the old workings to the most advanced face or boundary of said workings which have been made since the last preceding survey, and the parts of the mine abandoned or worked out after the last preceding survey shall be clearly indicated and shown by colorings, which copy must be delivered to the inspector of mines within thirty days after the last survey is made. [S13,§2496-m; C24, 27, 31, 35,§1357.]

1358 Abandoned mine. When any gypsum mine is worked out or is about to be abandoned or indefinitely closed, the owner, operator, lessee, or person in charge of the same shall make or cause to be made a complete extended map of said mine and the result of the same shall be duly extended on all maps of the mine and copies thereof so as to show all excavations and the most advanced workings of the mine and their exact relation to the boundary of section lines on the surface, and deliver to the inspector a copy of the completed map. [S13,§2496-m; C24, 27, 31, 35,§1358.]

1359 Inspector may order survey. The state inspector of mines shall order a survey to be made of the workings of any mine and the result to be extended on the maps of the same and the copies thereof whenever in his judgment the safety of the workmen, the support of the surface, the conservation of the property, or the safety of the adjoining mine requires it; and if not made by the owner, operator, lessee, or person in charge when ordered by the inspector it shall be made or caused to be made by the inspector and paid for by the state and the amount collected from the owner, operator, lessee, or person in charge as other debts are collected. [S13,§2496-m; C24, 27, 31, 35,§1359.]

1360 Violations. Any owner or person in charge of any gypsum mine who shall fail to comply with the provisions of this chapter, or any of them, or shall hinder or obstruct the carrying out of any of the requirements of this chapter shall be punished by imprisonment in the county jail not exceeding sixty days or by a fine not exceeding five hundred dollars; or if any miner, workman, or other person knowingly injure or interfere with any air course or brattice, or obstruct or throw open doors or disturb any part of the machinery, or disobey any order given in carrying out the provisions of this chapter whereby the lives and health of the persons or the security of the mines and machinery is endangered, or shall neglect or refuse to securely prop any entries under his control, or refuse to obey any order given by the superintendent in relation to the safety of the mine or that part of the mine under his charge or control, he shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [S13,§2496-n; C24, 27, 31, 35,§1360.]

CHAPTER 69.1

OIL AND GAS WELLS

1360.01 Protection of underground fresh water strata.
1360.02 Offset drilling.
1360.03 Notice to be given state geologist.
1360.04 Plugging dry and abandoned wells.
1360.05 Log, potential and plugging record to be filed.
1360.06 Duty to have forfeited lease released—affidavit of noncompliance—notice to landowner—remedies.
1360.07 Action to obtain release—damages, costs and attorney's fees—attachment.
1360.08 Extension upon contingency—affidavit.
1360.09 Liens for labor or materials and of contractor and subcontractor — manner of perfecting liens—enforcement of liens.
1360.10 State or any municipality to have authority to execute leases.

1360.01 Protection of underground fresh water strata. The driller, owner, or operator, drilling well or wells for oil and gas purposes, shall use such practical methods as pipe, cement, mud, or any other scientific method, known or commonly used in the oil industry, as will properly protect all contiguous underground fresh water strata from pollution or contamination to a depth of three hundred feet. The provisions of this section shall not apply to hole or holes core-drilled for geological purposes. It shall be the duty of any such driller, owner, or operator to file with the state geologist a sworn report, on blanks to be furnished by the state geologist, which report shall contain a complete record of their compliance with this section. Said report shall be filed within sixty days after the completion of said well. [48GA, ch 63,§1.]

1360.02 Offset drilling. If oil or gas is discovered in paying quantities on an adjoining leasehold, and the products therefrom are taken out of the ground and marketed, and said well is within three hundred thirty feet of another lessor's property line, then within ninety days after written notice has been given lessee to the effect that such oil or gas has commenced to be transported off and marketed from the said adjoining premises, the lessee or lessees of the land lying within three hundred thirty feet of the said wells shall begin to drill an offset well to each of such wells so located, so as to properly protect the lessor from drainage from offsetting wells; and upon failure on his part to so commence said offset well, and complete same with diligence, the said contract and lease shall automatically expire and become null and void. [48GA, ch 63,§2.]

1360.03 Notice to be given state geologist. Notice shall be given to the state geologist of the intention to drill, deepen, or plug any well or wells drilled for oil or gas purposes, and of the exact location of each and every such well. In case of drilling, notice shall be given in writing at least five days prior to the commencement of drilling operations for oil and gas. [48GA, ch 63,§3.]

1360.04 Plugging dry and abandoned wells. Dry or abandoned wells must be plugged by confining all oil, gas, or water in the strata in which they occur by the use of mud-laden fluid and in addition to mud-laden fluid, cement and plugs may be used, and all such wells shall first be thoroughly cleaned out of the bottom of the hole and before the casing is removed from the hole, the hole shall be filled from the bottom up to the top with mud-laden fluid of maximum density and which shall weigh at least twenty-five percent more than equal volume of water; provided, the state geologist may direct that some other method shall be used. Before plugging dry and abandoned wells, notice shall be given to the state geologist and to all available adjoining lease and property owners and they may be present to witness the plugging of these wells; but plugging shall not be delayed because of the inability to deliver notices to adjoining lease and property owners. [48GA, ch 63,§4.]

1360.05 Log, potential and plugging record to be filed. The owner or operator shall, upon the completion of any well, drilled for oil or gas purposes, file with the state geologist a complete record or log of the same, duly signed and sworn to, upon the blanks to be furnished by the state geologist; and upon plugging any well for any cause whatsoever, a complete record of the plugging thereof shall be made out and fully verified on blanks to be furnished by the state geologist; and producers shall also report in writing, separately, the potential of any producing well, within ten days from the com-

pletion of its initial potential test. [48GA, ch 63,§5.]

1360.06 Duty to have forfeited lease released —affidavit of noncompliance—notice to landowner—remedies. When any oil or gas lease, heretofore, or hereafter, given on land situated in Iowa and recorded, shall become forfeited by failure of lessee to comply with its provisions or of the Iowa law, it shall be the duty of lessee, within sixty days after date of forfeiture of any such lease, to have such lease surrendered in writing, duly acknowledged and placed on record in the county where the leased land is situated, or lease may be released by a marginal release on margin of record thereof, without cost to owner of land described therein. If said lessee shall fail to execute and record a release of such recorded lease within the time provided for, then the owner of the land may execute and file with the recorder of the county or counties in which such forfeited lease has been recorded an affidavit of noncompliance in substantially the following form:

AFFIDAVIT OF NONCOMPLIANCE

State of Iowa }
County of..... } ss.

....., being first duly sworn, upon his oath deposes and says that he is.....as referred to in an oil and gas mining lease dated the.....day of.....,19..., and which lease is recorded in Volume....., Page....., of the County Records of.....County, ..., and which said lease covers the following described lands: .....
.....

And further, deponent says that on the..... day of....., 19..., under the terms of said lease, there should have been paid to him or deposited to his credit in the.....Bank of.....the sum of.....Dollars ($.....), the payment of which was necessary in order to keep the above described lease in force and effect. Deponent hereby swears the above payment has never been made to him or his representatives, in money or otherwise, nor has same been deposited to his credit in the above bank.

And further, deponent says that there has been no drilling or development of any nature or kind whatsoever done on the land covered by the lease referred to herein, as called for under the terms of said lease.

.....
.....

Subscribed and sworn to before me, a Notary Public in and for.....County, Iowa, this .....day of....., 19....

.....
Notary Public

My commission expires.....

Affidavit of the Banker

State of..... }
County of..... } ss.

I, ..., (Cashier) (President) of the ..... Bank of ....., being first duly sworn, upon my oath hereby declare that there has not been deposited to the credit of.....in the.....Bank of....., by..... or any other party, any sum of money whatsoever, in payment of rental under the terms of said oil and gas mining lease herein referred to.

Witness my hand this.....day of....., 19....

.....
(Cashier) (President) of.....Bank

Subscribed and sworn to before me, a Notary Public in and for said County and State on the .....day of....., 19....

.....
Notary Public

My commission expires.....

If the lessee shall, within thirty days after the filing of such affidavit, give notice in writing to the county recorder of the county where said land is located that said lease has not been forfeited and that said lessee still claims that said lease is in full force and effect, then the said affidavit shall not be recorded but the county recorder shall notify the owner of the land of the action of the lessee, and the owner of the land shall be entitled to the remedies provided by this chapter for the cancellation of such disputed lease. If the lessee shall not notify the county recorder as above provided, then the county recorder shall record said affidavit, and thereafter the record of the said lease shall not be notice to the public of the existence of said lease or of any interest therein or rights thereunder, and said record shall not be received in evidence in any court of the state on behalf of the lessee against the lessor, and said lease shall stand forfeited. [48GA, ch 63,§6.]

1360.07 Action to obtain release—damages, costs and attorney's fees—attachment. Should the owner of such lease neglect or refuse to execute a release as provided by this chapter, or contend lease is in full force and effect, then the owner of the leased premises may sue in any court of competent jurisdiction to obtain such release, and he may also recover in such action the sum of one hundred dollars as damages, and all costs, together with a reasonable attorney's fee for preparing and prosecuting the suit, and he may also recover any additional damages that the evidence in the case will warrant. In all such actions, writs of attachment may issue as in other cases. [48GA, ch 63,§7.]

1360.08 Extension upon contingency—affidavit. If a recorded lease contains the statement of any contingency upon the happening of which the term of any such lease may be extended, the owner of said lease may at any time before the expiration of the definite term of said lease file with said county recorder an affidavit setting forth the description of the lease, that the affiant is the owner thereof and the facts showing that the required contingency has happened, or the record of such lease shall not impart notice to the public of the continuance of said lease. This affidavit shall be recorded in full by the county recorder and such record together with that of the lease shall be

due notice to the public of the existence and continuing validity of said lease, until the same shall be forfeited, canceled, set aside, or surrendered according to law. [48GA, ch 63,§8.]

1360.09 Liens for labor or materials and of contractor and subcontractor—manner of perfecting liens—enforcement of liens. Provisions of chapter 451 as to mechanic's liens and/or labor and materials furnished for improvements on real estate and of contractors and subcontractors, shall apply to labor and materials furnished for gas and/or oil wells, or pipe lines, and such liens shall not attach on the real estate, but shall attach to the whole of the lease held, and upon the gas and/or oil wells, buildings and appurtenances and pipe lines for which said labor or materials were furnished, and shall be perfected and enforced as provided by said chapter. [48GA, ch 63,§9.]

1360.10 State or any municipality to have authority to execute leases. The state or any municipality is hereby authorized to enter into a gas or oil lease upon such terms as may be agreed upon, subject to the approval of the district court of the county in which the land is located, upon filing an application in the district court of such county and by giving notice to the public by publishing a notice of the said application for four weeks in the newspaper designated for legal publications in said county stating the time and place where said application will come on for hearing and that objections thereto will be heard at such time. [48GA, ch 63,§10.]

Constitutionality, 48GA, ch 63, §11

CHAPTER 70

WORKMEN'S COMPENSATION

Referred to in §§1431, 1432, 1436, 1462, 1467, 1468, 1477.2, 1477.3, 1479, 1480, 1481.1, 11766

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1361 To whom not applicable. This chapter shall not apply to:

1. Any household or domestic servant.
2. Persons whose employment is of a casual nature.
3. Persons engaged in agriculture, insofar as injuries shall be incurred by employees while engaged in agricultural pursuits or any operations immediately connected therewith, whether on or off the premises of the employer.
4. As between a municipal corporation, city, or town, and any person or persons receiving any benefits under, or who may be entitled to benefits from, any "firemen's pension fund" or "policemen's pension fund" of any municipal corporation, city, or town, except as otherwise provided by law. [S13,§2477-m; C24, 27, 31, 35, §1361.]

Referred to in §§1362, 1477.5, 1479
Compensation to peace officers, §1422

1362 Compulsory when. Where the state, county, municipal corporation, school district, or city under any form of government is the employer, the provisions of this chapter for the payment of compensation and amount thereof for an injury sustained by an employee of such employer shall be exclusive, compulsory, and obligatory upon both employer and employee, except as otherwise provided in section 1361. [S13,§2477-m; C24, 27, 31, 35,§1362.]

1363 Acceptance presumed. Except as provided by this chapter, it shall be conclusively presumed that every employer has elected to provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury. [S13,§2477-m; C24, 27, 31, 35, §1363.]

Referred to in §§1364, 1477.2

1364 Rejection. The presumption as stated in section 1363 shall continue and be in force until notice in writing of an election to the contrary shall have been given to the employees by posting the same in some conspicuous place where the business is carried on, and also by filing notice with the industrial commissioner with return thereon by affidavit showing the date and place notice was posted. Any employer beginning business and giving notice at once of his rejection of this chapter shall not be considered as under such provisions, but such employer shall not be relieved of the payment of compensation until thirty days after the posting and filing of such notice with the industrial commissioner. [S13,§2477-m; C24, 27, 31, 35, §1364.]

Referred to in §1477.2

1365 Employer's notice to reject. An employer's notice of election to reject the provisions of this chapter shall be substantially in the following form:

To the employees of the undersigned, and the Iowa industrial commissioner:

You are hereby notified that the undersigned rejects the provisions to provide, secure, and pay compensation to employees of the undersigned for injuries received as provided in chapter 70 of the code, and elects to pay damages for personal injuries received by such employee under the common law and statutes of this state as modified by sections 1375 and 1379 of said chapter.

Signed.....
(Employer.)

State of Iowa, }ss.
.....County.}

The undersigned on oath says that a true copy of the foregoing notice was on the.....
day of....., 19...., posted at.....
(State fully place where posted.)
.....

Subscribed and sworn to before me by.....
.....this..... day of....., 19....
.....
(Notary Public.)

[S13,§2477-m; C24, 27, 31, 35,§1365.]

1366 Posting notice to reject. The employer shall keep such notice posted in some conspicuous place where the business is carried on, which shall apply to the employees subsequently employed by the employer with the same force and effect and to the same extent as employees in the employ at the time the notice was given. [S13,§2477-m; C24, 27, 31, 35,§1366.]

1367 Defenses when employee rejects. In the event an employee elects to reject the provisions of this chapter, the rights and remedies thereof shall not apply where such employee brings an action to recover damages for injuries received arising out of and in the course of his employment, except as otherwise provided by this chapter; and in such actions the employer shall have the right to plead and rely upon any and all defenses including those at common law, and the defenses of contributory negligence, assumption of risk, and fellow servant rule, except as otherwise provided by law. [S13,§2477-m2; C24, 27, 31, 35,§1367.]

Referred to in §1369
Assumption of risk, §§1495, 7961, 8159
Contributory negligence, §§8158, 8159, 11210

1368 Certain defenses not available. When an employee who has rejected the provisions of this chapter, receives an injury through failure of the employer to furnish or failure to exercise reasonable care to keep and maintain any safety device, appliance, or equipment as required by law, statutory rule or regulation, or through the violation of any other statutory requirements or regulations on the part of such employer, then the doctrine of assumed risk in relation to such cause of injury shall not be available as a defense to such employer in any action for damages on account of such injury. [S13,§2477-m2; C24, 27, 31, 35,§1368.]

Referred to in §1369

1369 Employee's notice to reject. The notice required to be given by an employee shall be substantially in the following form:

To.....and the Iowa in-
(Name of employer.)
dustrial commissioner:

You are hereby notified that the undersigned hereby elects to reject the terms, conditions, and provisions of chapter 70 of the code for the payment of compensation as provided thereby, and elects to rely upon the common law as modified by sections 1367 and 1368 of said chapter for the right to recover for personal injury which I may receive, if any, arising out of and in the course of my employment while in line of duty for my employer above named.

Dated this.....day of....., 19....

Signed.....

State of Iowa, }ss.
.....County.}

The undersigned on oath says that the above written notice was on the.....day of
....., 19...., served on the within named employer of the undersigned by delivering to.....a true copy thereof.

.....
(Name of person serving.)

Subscribed and sworn (or affirmed) to before me by the said ..... this
..... day of....., 19....
.....
(Notary Public.)

[S13,§2477-m2; C24, 27, 31, 35,§1369.]

1370 Affidavit of employee as to rejection. When an employee or one who is an applicant for employment rejects the provisions of this chapter, he shall, in addition to such notice, state in an affidavit to be filed with said notice who, if any person, requested, suggested, or demanded of such person to reject the provisions of this chapter. If such request, suggestion, or demand has been made of such employee by any person, such employee shall state the name of the person who made the request, suggestion, or demand, and all of the circumstances relating thereto, the date and place made, and persons present, and if it be found that the employer of such employee, or an employer to whom an applicant for employment has applied, or any person a member of the firm, association, corporation, or agent or official of such employer, made a request, suggestion, or demand to such employee or applicant for employment to reject the provisions of this chapter, the rejection made under such circumstances shall be conclusively presumed to have been fraudulently procured, and such rejection shall be null and void and of no effect, unless such employee has a permanent disability at the time of making the affidavit, then and in that event such rejection shall be presumed to have been fraudulently procured. [S13,§2477-m2; C24, 27, 31, 35,§1370.]

1371 Interested person not to administer oath. No person interested in the business of such employer, financially or otherwise, shall be permitted to administer the oath to the affiant required in case an employee or applicant for employment elects to reject the provisions of this chapter. And the person administering such oath to such affiant shall carefully read the notice and affidavit to such person making such rejection, and shall explain that the purpose of the notice is to bar such person from recovering compensation in accordance with the schedule and terms of this chapter in the event that he sustains an injury in the course of such employment; all of which shall be shown by certificate of the person administering the oath herein contemplated.

The industrial commissioner shall refuse to file the notice and affidavit, unless the same fully and in detail complies with the requirements hereof.

If such rejection, affidavit, or certificate is found insufficient for any cause, they shall be returned to the person who executed the instrument, with the reasons indorsed thereon by the industrial commissioner. [S13,§2477-m2; C24, 27, 31, 35,§1371.]

1372 Tenure of election. When the employer or employee has given notice in compliance with this chapter electing to reject the terms thereof, such election shall continue and be in force until such employer or employee shall thereafter elect to come under the provisions of this chapter as is provided in section 1373. [S13, §2477-m3; C24, 27, 31, 35,§1372.]

1373 Waiver of election to reject. When an employer or employee rejects the provisions of this chapter, such party may at any time thereafter elect to waive the same by giving notice in writing in the same manner required of the party in electing to reject the provisions of this chapter, which shall become effective when filed with the industrial commissioner and posted at the place of business. [S13,§2477-m3; C24, 27, 31, 35,§1373.]

Referred to in §1372

1374 Liability when employer and employee reject. When the employer and the employee elect to reject the provisions of this chapter, the liability of the employer shall be the same as though the employee had not rejected the provisions hereof. [S13,§2477-m4; C24, 27, 31, 35, §1374.]

1375 Defenses not available when employer rejects. An employer who rejects the provisions of this chapter in the manner and form provided, shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the course of the employment on the grounds that:

1. The employee assumed the risks inherent in or incidental to or arising out of his or her employment, or the risks arising out of the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising out of the failure of the employer to furnish reasonably safe tools or appliances, or the risks arising out of the failure of the employer to exercise reasonable care in selecting reasonably competent employees in the business, or on the ground that the employer exercised reasonable care in selecting reasonably competent employees in the business.

2. The injury was caused by the negligence of a coemployee.

3. The employee was negligent, unless such negligence was wilful and with intent to cause the injury, or the result of intoxication on the part of the injured party. [S13,§2477-m; C24, 27, 31, 35,§1375.]

Referred to in §1365

1376 Wilful injury—intoxication. No compensation under this chapter shall be allowed for an injury caused:

1. By the employee's wilful intent to injure himself or to wilfully injure another.

2. When intoxication of the employee was the proximate cause of the injury. [S13,§§2477-m, -m1; C24, 27, 31, 35,§1376.]

1377 Implied acceptance. Where the employer and employee have not given notice of an election to reject the terms of this chapter, every contract of hire, express or implied, shall be construed as an implied agreement between them and a part of the contract on the part of the employer to provide, secure, and pay, and on the part of the employee to accept compensation in the manner as by this chapter provided for all personal injuries sustained arising out of and in the course of the employment. [S13,§2477-m; C24, 27, 31, 35,§1377.]

1378 Contract to relieve not operative. No contract, rule, regulation, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided. [S13,§2477-m7; C24, 27, 31, 35,§1378.]

1379 Negligence presumed. In actions by an employee against an employer for personal injury sustained, arising out of and in the course of the employment, when the employer has rejected the provisions of this chapter, the following provisions shall apply:

1. It shall be presumed:

a. That the injury to the employee was the direct result and growing out of the negligence of the employer.

b. That such negligence was the proximate cause of the injury.

2. In such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence. [S13,§2477-m; C24, 27, 31, 35, §1379.]

Referred to in §1365

1380 Rights of employee exclusive. The rights and remedies provided in this chapter for an employee on account of injury shall be exclusive of all other rights and remedies of such employee, his personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury; and all employees affected by this chapter shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions, and provisions hereof until notice in writing shall have been served upon his employer, and also on the industrial commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer. [S13,§2477-m2; C24, 27, 31, 35,§1380.]

1381 Subsequent election to reject. An employer having come under this chapter, who thereafter elects to reject the terms, conditions, and provisions thereof, shall not be relieved from the payment of compensation to any employee who sustains an injury arising out of and in the course of the employment before the election to reject becomes effective; and in such cases the employer shall be required to secure the payment of any compensation due or that may become due to such employee, subject to the approval of the industrial commissioner. [S13,§2477-m5; C24, 27, 31, 35,§1381.]

1382 Liability of others — subrogation. When an employee receives an injury for which compensation is payable under this chapter, and which injury is caused under circumstances creating a legal liability against some person other than the employer to pay damages, the employee, or his dependent, or the trustee of such dependent, may take proceedings against his employer for compensation, and the employee or, in case of death, his legal representative may also maintain an action against such third party for damages. When an injured employee or his legal representative brings an action against such third party, a copy of the original notice shall be served upon the employer by the plaintiff, not less than ten days before the trial of the case, but a failure to give such notice shall not prejudice the rights of the employer, and the following rights and duties shall ensue:

1. If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or his insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which he is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

2. In case the employee fails to bring such action within ninety days, or where a city or town or city under special charter is such third party, within thirty days after written notice so to do given by the employer or his insurer, as the case may be, then the employer or his insurer shall be subrogated to the rights of the employee to maintain the action against such third party, and may recover damages for the injury to the same extent that the employee might. In case of recovery, the court shall enter judgment for distribution of the proceeds thereof as follows:

a. A sum sufficient to repay the employer for the amount of compensation actually paid by him to that time.

b. A sum sufficient to pay the employer the present worth computed on a six percent basis of the future payments of compensation for which he is liable, but such sum thus found shall not be considered as a final adjudication of the future payments which the employee shall receive and the amount received by the employer, if any, in excess of that required to pay the compensation shall be paid to the employee.

c. The balance, if any, shall be paid over to the employee.

3. Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; and the consent of the employer or insurer, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, then upon the written approval of the industrial commissioner.

4. A written memorandum of any settlement, if made, shall be filed by the employee in the office of the industrial commissioner. [S13, §2477-m6; C24, 27, 31, 35,§1382.]

1383 Notice of injury—failure to give. Unless the employer or his representative shall have actual knowledge of the occurrence of an

injury, or unless the employee or someone on his behalf or some of the dependents or someone on their behalf shall give notice thereof to the employer within fifteen days after the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if such notice is given or knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced thereby, and then only to the extent of such prejudice; but if the employee or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of another, or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice; but unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed. [S13,§2477-m8; C24, 27, 31, 35, §1383.]

1384 Form of notice. No particular form of notice shall be required, but may be substantially as follows:

To.....

You are hereby notified that on or about the .....day of....., 19...., personal injury was sustained by....., while in your employ at.....
(Give name and place employed and point
.....; and that compensation
where located when injury occurred.)
will be claimed therefor.

Signed.....

No variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employee, by name, received an injury in the course of his employment on or about a specified time, at or near a certain place. [S13,§2477-m8; C24, 27, 31, 35, §1384.]

1385 Service of notice. The notice may be served on anyone upon whom an original notice may be served in civil cases. Service may be made by any person, who shall make return verified by affidavit upon a copy of the notice, showing the date and place of service and upon whom served; but no special form of the return of service of the notice shall be required. It shall be sufficient if the facts therefrom can be reasonably ascertained. The return of service may be amended at any time. [S13,§2477-m8; C24, 27, 31, 35,§1385.]

Service of notice, §11060

1386 Limitation of actions. No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of the injury causing such death or disability for which compensation is claimed. [C24, 27, 31, 35,§1386.]

1387 Professional and hospital services. In addition to other compensation hereinafter provided, the employer, with notice or knowledge of injury, shall furnish reasonable surgical, medical, osteopathic, chiropractic, nursing and hospital services and supplies therefor. Provided, however, that in exceptional cases the industrial commissioner shall fix the amount, which in no event shall exceed six hundred dollars, to be expended for medical, surgical and hospital services and supplies.

Charges believed to be excessive may be referred to the industrial commissioner for adjustment under authority of section 1462. [S13, §2477-m9; C24, 27, 31, 35,§1387; 47GA, ch 98,§1.]

Referred to in §1389

1388 Burial expense. When death ensues from the injury, the employer shall pay the reasonable expenses of burial of such employee, not to exceed one hundred fifty dollars, which shall be in addition to other compensation or any other benefit provided for in this chapter. [S13, §2477-m9; C24, 27, 31, 35,§1388.]

Referred to in §1389

1389 Liability in case of no dependents. When the injury causes death of an employee who leaves no dependents, then the employer shall pay the reasonable expense of the employee's sickness, if any, and the expense of burial, as provided in sections 1387 and 1388, and this shall be the only compensation; provided that if, from the date of the injury until the date of the death, any weekly compensation shall have become due and unpaid up to the time of the death, the same shall be payable to the estate of the deceased employee. [S13,§2477-m9; C24, 27, 31, 35,§1389.]

1390 Compensation schedule. In all cases where an employee receives a personal injury for which compensation other than for medical, surgical, and hospital services and burial expenses, is payable, such compensation shall be upon the basis of sixty percent per week of the average weekly earnings but not to exceed fifteen dollars nor less than six dollars per week, except if at the time of his injury his earnings are less than six dollars per week, then he shall receive in weekly payments a sum equal to the full amount of his weekly earnings. [S13, §2477-m9; C24, 27, 31, 35,§1390.]

1391 Maturity date and interest. Compensation payments shall be made each week beginning on the twenty-second day after the injury, and each week thereafter during the period for which compensation is payable, and if not paid when due, there shall be added to such weekly compensation payments, interest at six percent from date of maturity. [C24, 27, 31, 35,§1391.]

1392 Death cases — dependents.

1. When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of his injury, the

weekly compensation for a period of three hundred weeks from the date of his injury.

2. When the injury causes the death of a minor employee whose earnings were received by the parent, the compensation to be paid such parent shall be two-thirds the weekly compensation for an adult with like earnings.

3. If the employee leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid, shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of the injury.

4. When weekly compensation has been paid to an injured employee prior to his death, the compensation to dependents shall run from the date to which compensation was fully paid to such employee, but shall not continue for more than three hundred weeks from the date of the injury.

5. Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

6. Except as otherwise provided by treaty, whenever, under the provisions of this and chapters 71 and 72, compensation is payable to a dependent who is an alien not residing in the United States at the time of the injury, the employer shall pay fifty percent of the compensation herein otherwise provided to such dependent, and the other fifty percent shall be paid into the state treasury. But if the nonresident alien dependent is a citizen of a government having a compensation law which excludes citizens of the United States, either resident or nonresident, from partaking of the benefits of such law in as favorable degree as herein extended to the nonresident alien, then said compensation which would otherwise be payable to such dependent shall be paid into the state treasury. [S13,§§2477-m9,-m10; C24, 27, 31, 35,§1392.]

1393 When compensation begins. Except as to injuries resulting in permanent partial disability, compensation shall begin on the fifteenth day of disability after the injury.

If the period of incapacity extends beyond the thirty-fifth day following the date of injury, then the compensation for the fifth week shall be increased by adding thereto an amount equal to two-thirds of one week of compensation.

If the period of incapacity extends beyond the forty-second day following the date of injury, then the compensation for the sixth week shall be increased by adding thereto an amount equal to two-thirds of one week of compensation.

If the period of incapacity extends beyond the forty-ninth day following the date of injury, then the compensation for the seventh week shall be increased by adding thereto an amount equal to two-thirds of one week of compensation.

If the period of incapacity extends beyond the forty-ninth day following the date of injury, then the compensation thereafter shall be only the weekly compensation. [S13,§2477-m9; C24, 27, 31, 35,§1393.]

Referred to in §1394

1394 Temporary disability. For injury producing temporary disability, and beginning on the fifteenth day thereof, the employer shall pay the weekly compensation during the period of such disability, but not exceeding three hundred weeks, including the periodical increase in cases to which section 1393 applies. [S13,§2477-m9; C24, 27, 31, 35,§1394.]

1395 Permanent total disability. For an injury causing permanent total disability, the employer shall pay the weekly compensation during the period of his disability, not, however, beyond four hundred weeks. [S13,§2477-m9; C24, 27, 31, 35,§1395.]

1396 Permanent partial disabilities. Compensation for permanent partial disability shall begin at the date of injury and shall be based upon the extent of such disability, and for all cases of permanent partial disability included in the following schedule compensation shall be paid as follows:

1. For the loss of a thumb, weekly compensation during forty weeks.

2. For the loss of a first finger, commonly called the index finger, weekly compensation during thirty weeks.

3. For the loss of a second finger, weekly compensation during twenty-five weeks.

4. For the loss of a third finger, weekly compensation during twenty weeks.

5. For the loss of a fourth finger, commonly called the little finger, weekly compensation during fifteen weeks.

6. The loss of the first or distal phalange of the thumb or of any finger shall equal the loss of one-half of such thumb or finger and compensation shall be one-half of the time for the loss of such thumb or finger.

7. The loss of more than one phalange shall equal the loss of the entire finger or thumb.

8. For the loss of a great toe, weekly compensation during twenty-five weeks.

9. For the loss of one of the toes other than the great toe, weekly compensation during fifteen weeks.

10. The loss of the first phalange of any toe shall equal the loss of one-half of such toe and the compensation shall be one-half of the time provided for the loss of such toe.

11. The loss of more than one phalange shall equal the loss of the entire toe.

12. For the loss of a hand, weekly compensation during one hundred fifty weeks.

13. The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred twenty-five weeks.

14. For the loss of a foot, weekly compensation during one hundred twenty-five weeks.

15. The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred weeks.

16. For the loss of an eye, weekly compensation during one hundred weeks.

17. For the loss of an eye, the other eye having been lost prior to the injury, weekly compensation during two hundred weeks.

18. For the loss of hearing in one ear, weekly compensation during fifty weeks, and for the loss of hearing in both ears, weekly compensation during one hundred fifty weeks.

19. The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or of any two thereof, caused by a single accident, shall equal permanent total disability, to be compensated as such.

20. In all other cases of permanent partial disability, the compensation shall bear such relation to the periods of compensation stated in the above schedule as the disability bears to those produced by the injuries named in the schedule. [S13,§2477-m9; C24, 27, 31, 35,§1396.]

1397 Basis of computation.

1. Compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages, or earnings in the employment of the same employer during the year next preceding the injury.

2. Employment by the same employer shall mean in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

3. The annual earnings, if not otherwise determinable, shall be three hundred times the average daily earnings in such computation.

4. If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. If this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average of those days when he was working during the year next preceding the accident, shall be the basis for the computation.

5. In case of injured employees who earn either no wages or less than three hundred times the usual daily wage or earnings of the adult day laborer in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; or if information of that kind is not obtainable, then the class most kindred or similar in the same general employment in the same neighborhood.

6. For employees in a business or enterprise which customarily shuts down and ceases operation during a season of each year, the number of working days which it is the custom of such business or enterprise to operate each year instead of three hundred shall be the basis for computing the annual earnings; but the minimum number of days which shall be used as a basis for the year's work shall not be less than two hundred.

7. Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed on him by the nature of the employment.

8. In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, was disabled and drawing compensation under the provisions of this chapter, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries which he shall have suffered. [S13,§2477-m15; C24, 27, 31, 35,§1397.]

1398 Contributions from employees. The compensation herein provided shall be the measure of liability which the employer has assumed for injuries or death that may occur to employees in his employment subject to the provisions of this chapter, and it shall not be in anywise reduced by contribution from employees or donations from any source. [S13,§2477-m12; C24, 27, 31, 35,§1398.]

1399 Examination of injured employees. After an injury, the employee, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employee; but if the employee requests, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employee to submit to such examination shall deprive him of the right to any compensation for the period of such refusal. When a right of compensation is thus suspended, no compensation shall be payable for the period of suspension. [S13, §2477-m11; C24, 27, 31, 35,§1399.]

1400 Statement of earnings. The employer shall furnish, upon request of an injured employee or dependent or any legal representative acting for such person, a statement of the earnings, wages, or salary and other matters relating thereto during the year or part of the year that such employee was in the employment of such employer for the year preceding the injury; but not more than one report shall be required on account of any one injury. [C24, 27, 31, 35,§1400.]

1401 Refusing to furnish statement. On failure of the employer to furnish such state-

ment of earnings for thirty days after receiving written request therefor from an injured employee, his agent, attorney, dependent, or legal representative, such employer shall pay a penalty of twenty-five dollars for each offense to be collected by the commissioner in any court having jurisdiction and paid into the state treasury. [C24, 27, 31, 35,§1401.]

1402 Conclusively presumed dependent. The following shall be conclusively presumed to be wholly dependent upon the deceased employee:

1. The surviving spouse, with the following exceptions:

a. When it is shown that at the time of the injury the surviving spouse had wilfully deserted deceased without fault of the deceased, then such survivor shall not be considered as dependent in any degree.

b. When the surviving spouse was not married to the deceased at the time of the injury.

c. When the deceased leaves no dependent children and the surviving spouse remarries, then all compensation shall cease on the date of such marriage.

2. A child or children under sixteen years of age, and over said age if physically or mentally incapacitated from earning, whether actually dependent for support or not upon the parent at the time of his or her death. An adopted child or children or stepchild or stepchildren shall be regarded the same as issue of the body.

3. A parent of a minor who is receiving the earnings of the employee at the time when the injury occurred. Step parents shall be regarded as parents. [S13,§2477-m16; C24, 27, 31, 35, §1402.]

Referred to in §1403

1403 Payment to spouse. If the deceased employee leaves a surviving spouse, the full compensation shall be paid to her or him, subject to the exceptions in section 1402; provided that where a deceased employee leave a surviving spouse and a child or children under sixteen years of age, or over said age if physically or mentally incapacitated from earning, the industrial commissioner may make an order of record for an equitable apportionment of the compensation payments.

If the spouse dies before full payment, the balance shall be paid to the person or persons wholly dependent on deceased, if any, share and share alike. If there are none wholly dependent, then such balance shall be paid to partial dependents, if any, in proportion to their dependency.

If the deceased leaves dependent child or children who was or were such at the time of the injury, and the surviving spouse remarries, then and in such case, the unpaid portion of the compensation shall be paid to the proper compensation trustee for the use and benefit of such dependent child or children. [S13,§2477-m16; C24, 27, 31, 35,§1403.]

1404 Payment to actual dependents. In all other cases, questions of dependency in whole or in part shall be determined in accordance with the facts as of the date of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be equally divided among them. If there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them in the proportion each dependency bears to their aggregate dependency. [S13,§2477-m16; C24, 27, 31, 35,§1404.]

1405 Commutation. Future payments of compensation may be commuted to a present worth lump sum payment on the following conditions:

1. When the period during which compensation is payable can be definitely determined.

2. When the written approval of such commutation by the industrial commissioner has been filed in the proceedings to commute.

3. When it shall be shown to the satisfaction of the court or a judge thereof that such commutation will be for the best interest of the person or persons entitled to the compensation, or that periodical payments as compared with a lump sum payment will entail undue expense, hardship, or inconvenience upon the employer liable therefor. [S13,§2477-m14; C24, 27, 31, 35,§1405.]

1406 Proceedings for commutation. A written petition for commutation may be made to the district court in and for the county in which the injury occurred or to any judge thereof, and shall have indorsed thereon the approval of the industrial commissioner.

Notice of the filing or presentation of such petition shall be served upon the opposite party or parties for the time and in the manner required for original notices. The court or judge in term time or vacation shall hear and determine the matter as a proceeding in equity and render such judgment and decree, granting such commutation in whole or in part or dismissing the petition, as equity will warrant on the facts presented.

In any case parties in interest may agree in writing to waive presenting the petition for commutation to the district court and in such case, if the application is approved by the industrial commissioner, governed by the law applicable to the district court, he may enter an order for commutation which shall have the same force and effect as if made by the district court with the right upon the part of either party to file a certified copy thereof in the district court as provided for an award. [S13,§2477-m14; C24, 27, 31, 35,§1406.]

Filing of award, §12707
Method of trial, ch 496
Time and manner of service, §§11059, 11060

1407 Basis of commutation. When the commutation is ordered, the court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest, calculated at five percent per annum. Upon the payment of such amount the employer shall be discharged from all further liability on account of such injury or death, and be entitled to a duly executed release, upon filing

which the liability of such employer under any agreement, award, finding, or judgment shall be discharged of record. [S13,§2477-m14; C24, 27, 31, 35,§1407.]

1408 **Partial commutation.** When partial commutation is ordered, the court shall fix the lump sum to be paid at an amount which will equal the future payments for the period commuted, capitalized at their present value upon the basis of interest calculated at five percent per annum, with provisions for the payment of weekly compensation not included in such commutation, subject to any provisions of the law applicable to such unpaid weekly payments; all remaining payments, if any, to be paid at the same time as though such commutation had not been made. [S13,§2477-m15; C24, 27, 31, 35, §1408.]

1409 **Trustees for incompetent.** When an injured minor employee, or a minor dependent, or one mentally incompetent, is entitled to compensation under this chapter, payment shall be made to a trustee appointed by the judge of the district court for the county in which the injury occurred, and the money coming into the hands of said trustee shall be expended for the use and benefit of the person entitled thereto under the direction and orders of the judge during term time or in vacation. If the judge making the appointment deems it advisable, a trustee may be appointed to serve for more than one county in the district and the expenses shall be paid ratably by each county according to the amount of work performed in each county. The trustee shall qualify and give bond in such amount as the judge may direct, which may be increased or diminished from time to time as the court may deem best. [S13,§2477-m13; C24, 27, 31, 35, §1409.]

1410 **Report of trustee—compensation.** The trustees shall make annual reports to the court of all money or property received and expended for each person; and for services rendered as trustee, shall be paid such compensation by the county as the court may direct by written order directed to the auditor of the county, who shall issue a warrant therefor upon the treasurer of the county in which the appointment is made. [S13,§2477-m13; C24, 27, 31, 35,§1410.]

1411 **Alien dependents in foreign country.** In case a deceased employee for whose injury or death compensation is payable leaves surviving him an alien dependent or dependents residing outside the United States, the consul general, consul, vice consul, or consular agent of the nation of which the said dependent or dependents are citizens, or the duly appointed representative of such consular official resident in the state of Iowa, shall be regarded as the exclusive representative of such dependent or dependents, and said consular officials or their representatives shall have the same rights and powers in all matters of compensation which said nonresident aliens would have if resident in the state of Iowa. [C24, 27, 31, 35,§1411.]

1412 **Consular officer as trustee.** Such consular officer or his duly appointed representative resident in the state of Iowa shall file in the district court of the county in which the accident occurred resulting in the death of said employee evidence of his authority, and thereupon the court or a judge thereof shall appoint him a trustee for such nonresident alien dependents, and thereafter he shall be subject to the jurisdiction of said court until his final report of distribution and payment has been filed and approved. Such consular official or his said representative shall qualify as such trustee by giving bond with approved sureties in a sum to be fixed by said court or judge, and the amount of said bond may be increased or decreased from time to time as said court or judge may direct. [C24, 27, 31, 35,§1412.]

1413 **Notice to consular officer.** If such consular officer, or his duly appointed representative, shall file with the industrial commissioner evidence of his authority, the industrial commissioner shall notify such consular officer or his representative of the death of all employees leaving alien dependent, or dependents, residing in the country of said consular officer so far as same shall come to his knowledge. [C24, 27, 31, 35,§1413.]

Analogous provision, §11845.1

1414 **Contracts to avoid compensation.** Any contract of employment, relief benefit, or insurance, or other device whereby the employee is required to pay any premium or premiums for insurance against the compensation provided for in this chapter, shall be null and void; and any employer withholding from the wages of any employee any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine not less than ten dollars nor more than fifty dollars for each offense. [S13,§2477-m17; C24, 27, 31, 35, §1414.]

1415 **Waivers prohibited.** No employee or dependent to whom this chapter applies, shall have power to waive any of the provisions of this chapter in regard to the amount of compensation which may be payable to such employee or dependent hereunder. [S13,§2477-m17; C24, 27, 31, 35,§1415.]

1416 **Contracts presumed fraudulent.** Any contract or agreement made by any employer or his agent or attorney with any employee or any other dependent under the provisions of this chapter within twelve days after the injury shall be presumed to be fraudulent. [S13, §2477-m18; C24, 27, 31, 35,§1416.]

1417 **Employees in interstate commerce.** So far as permitted, or not forbidden, by any act of congress, employers engaged in interstate or foreign commerce and their employees working only in this state shall be bound by the provisions of this chapter in like manner and with the same force and effect in every respect as by this chapter provided for other employers

and employees. [S13,§2477-m21; C24, 27, 31, 35, §1417.]

1418 Employees of state. All valid claims now due or which may hereafter become due employees of the state under the provisions of this chapter shall be paid out of any funds in the state treasury not otherwise appropriated. [C24, 27, 31, 35,§1418.]

Referred to in §1420

1419 Payment of state employees. The state comptroller is hereby authorized and directed to draw warrants on the state treasury for any and all amounts due state employees under the provisions of this chapter upon there being filed in his office, either a memorandum of settlement approved by the industrial commissioner or of an award made by a board of arbitration, for which no review is pending, or an order of the industrial commissioner from which no appeal has been taken, or a judgment of any court of the state accompanied by a certificate of the industrial commissioner setting forth the amount of compensation due and the statutory provisions under which the same should be paid. [C24, 27, 31, 35,§1419.]

Referred to in §1420

1420 Approval not required. Claims for compensation under sections 1418 and 1419 shall not require approval by the state comptroller. [C24, 27, 31, 35,§1420.]

1421 Definitions. In this and chapters 71 and 72, unless the context otherwise requires, the following definitions of terms shall prevail:

1. "Employer" includes and applies to any person, firm, association, or corporation, state, county, municipal corporation, city under special charter and under commission form of government, school district, and the legal representatives of a deceased employer.

2. "Workman" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, except as hereinafter specified.

3. The following persons shall not be deemed "workmen" or "employees":

a. A person whose employment is purely casual and not for the purpose of the employer's trade or business.

b. A person engaged in clerical work only, but clerical work shall not include anyone who may be subject to the hazards of the business.

c. An independent contractor.

d. A person holding an official position, or standing in a representative capacity of the employer, or an official elected or appointed by the state, county, school district, municipal corporation, city under special charter or commission form of government.

4. The term "workman" or "employee" shall include the singular and plural of both sexes. Any reference to a workman or employee who has been injured shall, when such workman or employee is dead, include his dependents as herein defined or his legal representatives; and where the workman or employee is a minor or incompetent, it shall include his guardian, next friend, or trustee.

5. The words "injury" or "personal injury" shall be construed as follows:

a. They shall include death resulting from personal injury.

b. They shall not include injury caused by the wilful act of a third person directed against an employee for reasons personal to such employee, or because of his employment.

c. They shall not include a disease unless it shall result from the injury.

6. The words "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

7. The word "court" wherever used in this and the two succeeding chapters, unless the context shows otherwise, shall be taken to mean the district court. [S13,§2477-m16; C24, 27, 31, 35,§1421.]

1422 Peace officers. Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, and any and all of their deputies, and any and all other such legally appointed or elected law-enforcing officers, who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment, meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office, be killed outright, or become temporarily or permanently physically disabled, or if said disability result in death, shall be entitled to compensation, the same to be paid out of the general funds of the state for all such injuries or disability.

Where death occurs, compensation shall be paid to the dependents of the officer, as in other compensation cases. Such compensation shall be the maximum allowed in compensation cases. The industrial commissioner shall have jurisdiction as in other cases. [C24, 27, 31, 35,§1422.]

CHAPTER 71

INDUSTRIAL COMMISSIONER

Referred to in §§1392, 1421, 1467, 1468, 1477.2, 1477.3, 1479, 1481.1

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1464 Witness fees.
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1423 Industrial commissioner—term. The governor shall, prior to the adjournment of the general assembly in 1925, and each six years thereafter, appoint, with the approval of the senate, an industrial commissioner whose term of office shall be six years from July 1 of the year of appointment. He shall maintain his office at the seat of government. An appointment to fill a vacancy may be made when the senate is not in session, but shall be acted upon at the next session thereof. [S13,§2477-m22; C24, 27, 31, 35,§1423.]

Confirmation procedure, §38.1

1424 Appointment of deputy. The commissioner shall, in writing, appoint a deputy for whose acts he shall be responsible, and who shall serve during the pleasure of the commissioner. [C24, 27, 31, 35,§1424.]

1425 Duties of the deputy. In the absence or disability of the industrial commissioner, or when acting under the directions of the commissioner, the deputy shall have all of the powers and perform all of the duties of the industrial commissioner pertaining to his office. [C24, 27, 31, 35,§1425.]

1426 Rep. by 44GA, ch 23

1427 Political activity and contributions. It shall be unlawful for the commissioner, or any appointee of the commissioner while in office, to espouse the election or appointment of any candidate to any political office, contribute to the campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointment to any political office, and any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined one hundred dollars, and it shall be sufficient cause for removal from office. [S13,§§2477-m23,-m37; C24, 27, 31, 35, §1427.]

1428 Political promises. Any person who is a candidate for appointment as commissioner who makes any promise to another, express or implied, in consideration of any assistance or influence given or recommendation made that the candidate will, if appointed as a commissioner, appoint such person or one whom he may recommend to any office within the power of the commissioner to appoint, shall be fined one hundred dollars. [S13,§2477-m38; C24, 27, 31, 35,§1428.]

1429 Recommendations of commissioner. All recommendations to the governor of any person asking the appointment of another as commissioner shall be reduced to writing, signed by the person presenting the same, which shall be filed by the governor in his office and open at all reasonable times for public inspection, and all recommendations made by any person to the commissioner for the appointment of another within the power of the commissioner to appoint, shall be reduced to writing, signed by the person presenting the same, and filed by the commissioner and open for public inspection at all reasonable times. If any person recommending the appointment of another within the contemplation of this section refuses to reduce the same to writing, it shall be the duty of the person to whom the recommendation is made, to make a memorandum thereof, stating the name of the person recommended and the name of the person who made the same, which shall be filed in the office of the governor or the commissioner as the case may be. [S13,§2477-m39; C24, 27, 31, 35,§1429.]

1430 Interest in affected business. It shall be unlawful for the commissioner to be financially interested in any business enterprise coming under or affected by this chapter during his term of office, and if he violates this statute, it shall be sufficient grounds for his removal from

office, and in such case the governor shall at once declare the office vacant and appoint another to fill the vacancy. [S13,§2477-m39; C24, 27, 31, 35,§1430.]

Similar provisions, §§275, 3922, 4685, 4755.11, 5324, 5361, 5673, 5828, 6534, 6710, 13324, 13327.

1431 Duties. It shall be the duty of the commissioner:

1. To establish and enforce all necessary rules and regulations not in conflict with the provisions of this chapter and chapters 70 and 72 for carrying out the purposes thereof.
2. To prepare and distribute the necessary blanks relating to computation, adjustment, and settlement of compensation arising thereunder.
3. To preside as chairman of boards of arbitration for the settlement of controversies.
4. To keep records of all proceedings and decisions of such boards, issue subpoenas for witnesses, administer oaths, examine books and records of parties subject to such provisions.
5. In general to do all things not inconsistent with law in carrying out said provisions according to their true intent and purpose. [S13, §2477-m24; C24, 27, 31, 35,§1431.]

Vocational education, §§3853, 3854

1432 Biennial reports. The commissioner shall, at the time provided by law, make a biennial report to the governor setting forth in appropriate form the business and expense of the office for the two preceding years, the number of arbitrations and the results thereof, and such other matters pertaining to his office as may be of public interest, together with any recommendations for change or amendment of the laws as found in this chapter and chapters 70 and 72, and such recommendations, if any, shall be transmitted by the governor to the first general assembly in session thereafter. [S13, §2477-m24; C24, 27, 31, 35,§1432.]

Time of making report, §246

1433 Records of employer—right to inspect. All books, records, and pay rolls of the employers, showing or reflecting in any way upon the amount of wage expenditure of such employers, shall always be open for inspection by the industrial commissioner or any of his representatives presenting a certificate of authority from said commissioner for the purpose of ascertaining the correctness of the wage expenditure, the number of men employed, and such other information as may be necessary for the uses and purposes of the commissioner in his administration of the law.

Information so obtained shall be used for no other purpose than to advise the commissioner or insurance association with reference to such matters.

A refusal on the part of the employer to submit his books, records, or pay rolls for the inspection of the commissioner or his authorized representatives presenting written authority from the commissioner, shall subject the employer to a penalty of one hundred dollars for each such offense, to be collected by civil action in the name of the state, and paid into the state treasury. [S13,§2477-m36; C24, 27, 31, 35,§1433.]

1434 Reports of injuries. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employees in the course of their employment and resulting in incapacity for a longer period than one day. Within forty-eight hours, not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury causing incapacity for a longer period than one day, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose. [S13, §2477-m36; C24, 27, 31, 35,§1434.]

Referred to in §1435

1435 Additional reports. Upon the termination of the disability of the injured employee, or if such disability extends beyond a period of sixty days, at the expiration of such period the employer shall make a supplemental report on blanks to be procured from the commissioner for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex, and occupation of the injured employee, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner.

Any employer who fails to make the report required by this and section 1434 shall be liable to a penalty of fifty dollars for each offense, to be recovered by the commissioner. The commissioner shall be represented by the county attorney in the county in which such proceeding is brought. [S13,§2477-m36; C24, 27, 31, 35,§1435.]

1436 Compensation agreements. If the employer and the employee reach an agreement in regard to the compensation, a memorandum thereof shall be filed with the industrial commissioner by the employer or employee, and unless the commissioner shall, within twenty days, notify the employer and employee of his disapproval of the agreement by registered letter sent to their addresses as given on the memorandum filed, the agreement shall stand approved and be enforceable for all purposes, except as otherwise provided in this and chapters 70 and 72.

In case the injured employee is a minor, either he or his trustee may execute the memorandum of agreement and may give a valid and binding release for the compensation paid on his account.

Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this and the preceding chapter. [S13,§2477-m25; C24, 27, 31, 35,§1436.]

1437 Board of arbitration. If the employer and injured employee or his representatives or dependents fail to reach an agreement in regard to compensation, either party may file a petition and copy thereof with the industrial commissioner, stating therein his or her claims in general terms and asking that a board of arbitration be formed. Thereupon the commissioner

shall in writing notify the parties to name their respective members of such board. Such board shall consist of three persons, one of whom shall be the industrial commissioner or his deputy, who shall act as chairman. The other two shall be named, respectively, by the two parties. [S13, §2477-m26; C24, 27, 31, 35,§1437.]

1438 Waiver of right. If either party fails to appoint an arbitrator by the time fixed for hearing by the commissioner, such defaulting party shall be deemed to have waived the right to appoint an arbitrator and hearing shall proceed without such appointment. Parties may, in writing filed with the commissioner, waive the appointment of arbitrators and in such case the hearing shall proceed before the commissioner or his deputy with the same force and effect as if tried before a board with respective representatives. [S13,§2477-m28; C24, 27, 31, 35, §1438.]

1439 Oath of arbitrators. The arbitrators appointed by the parties shall be sworn by the chairman to take the following oath:

"I, ..., do solemnly swear (or affirm) that I will faithfully perform my duties as arbitrator and will not be influenced in my decision by any feeling of friendship or partiality toward either party.

(Signed) ....."

[S13,§2477-m27; C24, 27, 31, 35,§1439.]

1440 Powers of board — hearings. The board of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the board shall be in the county where the injury occurred, but by written stipulation of the parties filed in the case it may be held at any other place in the state. If the injury occurred outside this state the hearings of the board shall be held in the county seat of this state which is nearest to the place where the injury occurred unless the interested parties and the industrial commissioner mutually agree by written stipulation that the same may be held at some other place. [S13,§2477-m29; C24, 27, 31, 35,§1440.]

1441 Liberal rules of evidence. While sitting as a board of arbitration, or when conducting a hearing on review, or in making any investigation or inquiry, neither the board of arbitration nor the commissioner shall be bound by common law or statutory rules of evidence or by technical or formal rules of procedure; but they shall hold such arbitrations, or conduct such hearings and make such investigations and inquiries in such manner as is best suited to ascertain and conserve the substantial rights of all parties thereto. Process and procedure under this chapter shall be as summary as reasonably may be. [C24, 27, 31, 35,§1441.]

Referred to in §1481.2

1442 Appointment of reporter. If either, or both, parties to any proceeding hereunder shall furnish compensation for a shorthand reporter in such reasonable amount as the commissioner shall fix, the commissioner shall appoint a reporter to report the proceedings of any hearing before the commissioner or a board of arbitration. The amount so paid shall be taxed as other costs. Any such reporter shall faithfully and accurately report any proceeding for which he or she shall be employed. [C24, 27, 31, 35,§1442.]

Taxation of costs, §1463

1443 Transcript of evidence—compensation. The official shorthand reporter appointed for any hearing before the commissioner or a board of arbitration on written request by either party to the controversy, or by the commissioner, shall make a transcript of the evidence or so much thereof as shall be requested, to be paid for at the rate of not to exceed ten cents for each one hundred words. The transcript shall be paid for by the party requesting it, and if used as the record of the evidence on a review or appeal, the expense shall be taxed as part of the costs against the losing party, or apportioned as the case may be. [C24, 27, 31, 35,§1443.]

1444 Depositions. The deposition of any witness may be taken and used as evidence in any hearing pending before a board of arbitration or the industrial commissioner in compensation proceedings.

Such depositions shall be taken in the same manner as provided for the taking of depositions for use in the district court, and when so taken shall be admissible in evidence in such hearings in the same manner, subject to the same rules governing the admission of evidence as in the district court.

Either party upon written notice, may elect to take the deposition of a witness, who may live within one hundred miles of the place of hearing, if the testimony of such witness is desired to show the physical condition of the injured party or testimony relating to the cause of injury.

Application for a commission to take depositions in such case shall be filed in the office of the clerk of the district court of the county wherein the injury occurred. [C24, 27, 31, 35, §1444.]

Depositions, §11358 et seq.

1445 Witnesses — books and records. The district court is hereby empowered to enforce by proper proceedings the provisions of this chapter relating to the attendance and testimony of witnesses and the examination of books and records. [S13,§2477-m24; C24, 27, 31, 35, §1445.]

Contempts, ch 536

1446 Findings of arbitration board filed. The decision of the board of arbitration, together with a statement or certificate of evidence submitted before it, its findings of fact, rulings of law, and any other matters pertinent to questions arising before it, shall be filed with the industrial commissioner. [S13,§2477-m29; C24, 27, 31, 35,§1446.]

1447 Review. Any party aggrieved by the decision or findings of a board of arbitration may, within ten days after such decision is filed

with the industrial commissioner, file in the office of the commissioner a petition for review, and the commissioner shall thereupon fix a time for the hearing on such petition and notify the parties.

At such hearing, the commissioner shall hear the parties, consider all evidence taken before the board of arbitration if it has been transcribed, and may hear any additional evidence, and he may affirm, modify, or reverse the decision of the board, or may remand it to the board for further findings of facts.

Additional evidence to that presented and admitted in arbitration proceedings shall not be introduced by either party unless such party gives the opposite party, or his attorney, five days notice thereof in writing, stating the particular phase of the controverted claim to which such additional evidence will apply. [S13, §§2477-m29,-m32; C24, 27, 31, 35,§1447.]

1448 Decision and findings of fact. The decision of the industrial commissioner in any case on review before him shall be in writing, filed in his office, and shall set forth his findings of fact and conclusions of law. [S13,§2477-m32; C24, 27, 31, 35,§1448.]

1449 Appeal. Any party aggrieved by any decision or order of the industrial commissioner in a proceeding on review, may within thirty days from the date such decision or order is filed, appeal therefrom to the district court of the county in which the injury occurred, by filing in the office of the commissioner a written notice of appeal setting forth in general terms the decision appealed from and the grounds of the appeal. The commissioner shall forthwith give notice to the other parties in interest. [S13, §2477-m33; C24, 27, 31, 35,§1449.]

Referred to in §1481.1

1450 Transcript on appeal. Within thirty days after a notice of appeal is filed with the commissioner, he shall make, certify, and file in the office of the clerk of the court to which the appeal is taken, a full and complete transcript of all documents in the case, including any depositions, and a transcript or certificate of the evidence, if reported, together with the notice of appeal. [S13,§2477-m33; C24, 27, 31, 35,§1450.]

Referred to in §1481.2

1451 Trial on appeal. The first term after the appeal is taken shall be the trial term, and if the appeal is taken during a term, it shall be triable at that term at any time after ten days from the date of filing the transcript by the commissioner and ten days notice in writing by either party upon the other. Such appeal shall have precedence on the docket and for trial over all other civil business except appeals of the same kind which shall be tried in the order in which they are filed, except as otherwise agreed in writing by all parties in interest and filed. [C24, 27, 31, 35,§1451.]

1452 Record on appeal—findings of fact conclusive. The transcript as certified and filed by the industrial commissioner shall be the record on which the appeal shall be heard, and no additional evidence shall be heard. In the absence of fraud the findings of fact made by the industrial commissioner within his powers shall be conclusive. [C24, 27, 31, 35,§1452.]

1453 Decision on appeal. Any order or decision of the industrial commissioner may be modified, reversed, or set aside on one or more of the following grounds and on no other:

1. If the commissioner acted without or in excess of his powers.
2. If the order or decree was procured by fraud.
3. If the facts found by the commissioner do not support the order or decree.
4. If there is not sufficient competent evidence in the record to warrant the making of the order or decision. [C24, 27, 31, 35,§1453.]

Referred to in §1481.3

1454 Judgment or order remanding. When the district court, on appeal, reverses or sets aside an order or decision of the industrial commissioner, it may remand the case to the commissioner for further proceedings in harmony with the holdings of the court, or it may enter the proper judgment, as the case may be. Such judgment or decree shall have the same force and effect as if action had been originally brought and tried in said court. [C24, 27, 31, 35,§1454.]

1455 Costs on appeal. The clerk shall charge no fee for any service rendered in compensation cases except the filing fee and transcript fees when the transcript of a judgment is required. The taxation of costs in such appeals shall be in the discretion of the court. [C24, 27, 31, 35, §1455.]

1456 Appeal to supreme court. An appeal may be taken to the supreme court from any final order, judgment, or decree of the district court, but such appeal shall be docketed, placed upon the term calendar, and submitted in the same time and manner as criminal cases in said court. [C24, 27, 31, 35,§1456.]

Time and manner of taking appeal, §13994 et seq.; supreme court rule 32

1457 Review of award or settlement. Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner at the request of the employer or of the employee at any time within five years from the date of the last payment of compensation made under such award or agreement, and if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded or agreed upon. [S13,§2477-m34; C24, 27, 31, 35,§1457.]

Referred to in §1458

1458 Notice of review. When any interested party desires a review of payments or settlement as provided in section 1457, he shall file a petition for review with the industrial commissioner setting forth the grounds upon which the right

of review is claimed. The commissioner shall give the parties in interest notice of the time fixed for such hearing, which shall not be less than five days from the date of filing such petition. [S13,§2477-m34; C24, 27, 31, 35,§1458.]

1459 Notice and service. Any notice to be given by the commissioner or court provided for in this chapter shall be in writing, but service thereof shall be sufficient if registered and deposited in the mail, addressed to the last known address of the parties, unless otherwise provided in this chapter. [S13,§2477-m34; C24, 27, 31, 35, §1459.]

1460 Place of hearing. All petitions for review of the decision and findings of a board of arbitration shall be held at the seat of the government, and all petitions for review of payments or settlements shall be heard in the county where the injury occurred, provided, however, with the approval of the industrial commissioner the parties interested may agree upon another place of hearing. [C24, 27, 31, 35, §1460.]

1461 Examination by physician—fee. The industrial commissioner may appoint a duly qualified, impartial physician to examine the injured employee and make report. The fee for this service shall be five dollars, to be paid by the industrial commissioner, together with traveling expenses, but the commissioner may allow additional reasonable amounts in extraordinary cases. Any physician so examining any injured employee shall not be prohibited from testifying before the industrial commissioner, board of arbitration, or any other person, commission, or court, as to the results of his examination or the condition of the injured employee. [S13, §2477-m30; C24, 27, 31, 35,§1461.]

1462 Fees — approval — lien. All fees or claims for legal, medical, hospital, and burial services rendered under this chapter and chapters 70 and 72 shall be subject to the approval of the industrial commissioner, and no lien for such service shall be enforceable without the approval of the amount thereof by the industrial commissioner. For services rendered in the district court and supreme court, the attorney's fee shall be subject to the approval of a judge of the district court. [S13,§§2477-m20,-m35; C24, 27, 31, 35,§1462.]

Referred to in §1887

1463 Compensation of arbitrators — costs. The arbitrators except the commissioner shall each receive five dollars as a fee for services, but the industrial commissioner may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the employer, who may deduct an amount equal to one-half the sum from any compensation found due the employee. All other costs incurred in the hearing before a board of arbitration or the commissioner shall be taxed in the discretion of such board or the commissioner as the case may be. [S13,§2477-m31; C24, 27, 31, 35,§1463.]

1464 Witness fees. Witness fees and mileage on hearings before an arbitration board or the industrial commissioner shall be the same as in the district court. [S13,§2477-m24; C24, 27, 31, 35,§1464.]

Witness fees and mileage, §11326 et seq.

1465 Judgment by district court on award. Any party in interest may present a certified copy of an order or decision of the commissioner, or an award of a board of arbitration from which no petition for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree or judgment in accordance therewith and cause the clerk to notify the parties. Such decree or judgment, in the absence of an appeal from the decision of the industrial commissioner, shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. [S13, §2477-m33; C24, 27, 31, 35,§1465.]

1466 Judgment—modification of. Upon the presentation to the court of a certified copy of a decision of the industrial commissioner, ending, diminishing, or increasing the compensation under the provisions of this chapter, the court shall revoke or modify the decree or judgment to conform to such decision. [S13, §2477-m33; C24, 27, 31, 35,§1466.]

CHAPTER 72

COMPENSATION LIABILITY INSURANCE

Referred to in §§1392, 1421, 1431, 1432, 1436, 1462, 1477.2, 1477.3, 1479, 1481.1

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1481.4 Appeal.

1467 Insurance of liability required. Every employer subject to the provisions of this and chapters 70 and 71, unless relieved therefrom as hereinafter provided, shall insure his liability thereunder in some corporation, association, or organization approved by the commissioner of insurance.

Every such employer shall exhibit, on demand of the insurance commissioner, evidence of his compliance with this section; and if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under the common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the provisions relating to compensation for injury to employees. [S13,§2477-m41; C24, 27, 31, 35,§1467.]

1468 Notice of failure to insure. Any employer who fails to insure his liability as required herein shall keep posted a sign of sufficient size and so placed as to be easily seen by his employees in the immediate vicinity where working, which sign shall read as follows:

"NOTICE TO EMPLOYEES

You are hereby notified that the undersigned employer has failed to insure his liability to pay compensation as required by law, and that because of such failure he is liable to his employees in damages for personal injuries sustained by his employees in the same manner and to the same extent as though he had legally exercised his right to reject the provisions relating to compensation.

(Signed) ....."

Any employer coming under the provisions of this and chapters 70 and 71 who fails to comply with this section or to post and keep the above notice in the manner and form herein required, shall be guilty of a misdemeanor. [C24, 27, 31, 35,§1468.]

Punishment, §12894

1469 Maximum commission for renewal. No insurer of any obligation under this chapter shall either by himself or through another, either directly or indirectly, charge or accept as a commission or compensation for placing or renewing any insurance under this chapter, more than fifteen percent of the premium charged. [S13,§2477-m46; C24, 27, 31, 35,§1469.]

1470 Mutual companies. For the purpose of complying with this chapter, groups of employers by themselves or in an association with any or all of their workmen, may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the insurance commissioner; and membership in such mutual insurance organization as approved, together with evidence of the payment of premiums due, shall be evidence of compliance with this chapter. [S13, §2477-m42; C24, 27, 31, 35,§1470.]

1471 Benefit insurance. Subject to the approval of the industrial commissioner, any employer or group of employers may enter into or continue an agreement with his or their workmen to provide a scheme of compensation, benefit, or insurance in lieu of compensation and insurance; but such scheme shall in no instance provide less than the benefits provided and secured, nor vary the period of compensation provided for disability or for death, or the provisions of law with respect to periodic payments, or the percentage that such payments shall bear to weekly wages, except that the sums required may be increased; and the approval of the industrial commissioner shall be granted, if the scheme provides for contribution by workmen, only when it confers benefits, in addition to those required by law, commensurate with such contributions. [S13,§2477-m43; C24, 27, 31, 35, §1471.]

1472 Certificate of approval. When such scheme or plan is approved by the industrial commissioner, he shall issue a certificate to that effect, whereupon it shall be legal for such employer, or group of employers, to contract with any or all of his or their workmen to substitute such scheme or plan for the provisions relating to compensation and insurance during a period of time fixed by said department. [S13, §2477-m44; C24, 27, 31, 35,§1472.]

1473 Termination of plan — appeal. Such scheme or plan may be terminated by the industrial commissioner on reasonable notice to the interested parties if it shall appear that the same is not fairly administered, or if its operation shall disclose latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the purpose of this chapter; but from any such order of said industrial commissioner the parties affected, whether employer or workman, may, upon the giving of proper bond to protect the interests involved, appeal to the district court in the same time and manner as appeals from actions of the industrial commissioner, which appeal shall be tried as an equitable action. [S13,§2477-m45; C24, 27, 31, 35,§1473.]

Appeal to district court, §1449

1474 Insolvency clause prohibited. No policy of insurance issued under this chapter shall contain any provision relieving the insurer from payment if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation, or the compensation, or any part of it, is unpaid. [S13,§2477-m48; C24, 27, 31, 35,§1474.]

1475 Policy clauses required. Every policy shall provide that the workman shall have a first lien upon any amount becoming due on account of such policy to the insured from the insurer, and that in case of the legal incapacity, inability, or disability of the insured to receive the amount due and pay it over to the insured workman, or his dependents, said insurer shall pay the same directly to such workman, his agent, or to a trustee for him or his dependents, to the extent of any obligation of the insured to said workman or his dependents. [S13,§2477-m48; C24, 27, 31, 35,§1475.]

1476 Other policy requirements. Every policy issued by an insurance corporation, association, or organization to insure the payment of compensation shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer, and the insurer shall be bound by every agreement, adjudication, award, or judgment rendered against the insured. [S13,§2477-m47; C24, 27, 31, 35,§1476.]

1477 Relief from insurance. When an employer coming under this chapter furnishes satisfactory proofs to the insurance commissioner of such employer's solvency and financial ability to pay the compensation and benefits as by law provided and to make such payments to the parties when entitled thereto, or when such employer deposits with such commissioner security satisfactory to him and the industrial commissioner as guaranty for the payment of such compensation, such employer shall be relieved of the provisions of this chapter requiring insurance; but such employer shall, from time to time, furnish such additional proof of solvency and financial ability to pay as may be required by such insurance commissioner or industrial commissioner. [S13,§2477-m49; C24, 27, 31, 35,§1477.]

Referred to in §1479

1477.1 Mines—conclusive presumption. It shall be conclusively presumed that the work and operation of any and all coal mines, or production of coal, under whatever system of operation is an extra hazardous business, enterprise and occupation. [C35,§1477-g1.]

1477.2 Interpretative clause. The law as the same appears in section 1364 and other sections of chapters 70, 71, and 72, including the words "except as provided in this chapter" as the same appear in section 1363 all insofar as it relates to the right to reject the terms, provisions and conditions of the compensation law, shall not apply to any employer or employee engaged in the operation of coal mines, or production of coal, under any system of removing coal for sale, but all provisions of the law in chapters 70, 71, and 72 relating to compensation for injuries sustained arising out of and in the course of such employment shall be exclusive, compulsory and obligatory upon the employer and employee in such employment. [C35,§1477-g2.]

1477.3 Mines—insurance required. It shall be unlawful for any person, firm, association, corporation or partnership to engage in the business of operating a mine under any system of removing coal for sale, or any work in connection therewith, or incident thereto, without first obtaining insurance covering compensation payments or obtaining relief therefrom as provided in chapters 70, 71, and 72, as herein amended. Any violation of this section shall be deemed a misdemeanor and upon conviction of such offense the offender shall be punished by a fine of not less than ten dollars nor more than one hundred dollars. Each day such offense is committed shall be regarded as a separate, wrongful act and may be prosecuted in one proceeding, but in separate counts, at the election of the prosecuting attorney. [C35, §1477-g3.]

1477.4 Injunctions. It shall be the duty of the attorney general of the state and/or the county attorney of the county where such offense has been committed, or when he has reason to believe such offense is about to be committed to bring an action in equity in the name of the state to enjoin such offenders from continuing such wrongful acts, and the court or judge before whom such action is brought shall, if the facts warrant, issue a temporary or permanent writ of injunction without bond. [C35, §1477-g4.]

1477.5 Bond in lieu of insurance. Any employer who has more than five persons engaged in hazardous employment, except the employments recited in section 1361, and who has failed, omitted, and neglected to secure the payment of compensation by carrying insurance or is not relieved therefrom as by the statutes in

such cases provided, shall furnish a bond approved by the industrial commissioner, as to form and security, conditioned to secure and pay workmen's compensation in accordance with the law; such bond shall be in such amount as may be fixed by the industrial commissioner having due regard for the number of employees and considering the industrial experience in such industry as a class. [C31, 35,§1477-c1.]

Referred to in §1477.8

1477.6 Notice to be posted. Such employer shall post and keep posted in some conspicuous place upon the premises where the business is conducted, a notice in form approved by the industrial commissioner, stating the nature of the security furnished by such employer to secure the compensation payments contemplated by the law. [C31, 35,§1477-c2.]

Referred to in §1477.8

1477.7 Duty of mine inspectors. It shall be the duty of each coal mine inspector in his inspection district to report to the industrial commissioner, on blanks furnished by the commissioner, any employer who has failed, omitted, or neglected to comply with the provisions of the law with reference to the posting and keeping posted the notice as provided by law, with such other information required by the commissioner, and it shall be the duty of each factory inspector to perform like service in their respective districts. [C31, 35,§1477-c3.]

Referred to in §1477.8

1477.8 Failure to comply — proceedings. Upon the receipt of information by the industrial commissioner of any employer failing to comply with sections 1477.5 to 1477.7, inclusive, he shall at once notify such employer by registered mail, that unless such employer comply with the requirements of law, legal proceedings will be instituted to enforce such compliance.

Unless such employer comply with the provisions of the law within fifteen days after the giving of such notice, the industrial commissioner shall report such failure to the attorney general, whose duty it shall be to bring an action in a court of equity to enjoin the further violation. Upon decree being entered for a temporary or permanent injunction, a violation shall be a contempt of court and punished as provided for contempt of court in other cases. [C31, 35,§1477-c4.]

Contempts, generally, ch 536

1478 Revocation of release from insurance. The insurance commissioner with the concurrence of the industrial commissioner may, at any time, upon reasonable notice to such employer and upon hearing, revoke for cause any order theretofore made relieving any employer from carrying insurance as provided by this chapter. [S13,§2477-m49; C24, 27, 31, 35,§1478.]

1479 Employer failing to insure. When any employer has more than five persons employed in hazardous employment, excepting the employments recited in the first section of chapter 70, and such employer has elected to reject the compensation provisions of said chapter, or when any such employer has not rejected the terms and provisions thereof by filing and posting notices as provided in chapter 70, but has failed to insure his or its liability in one of the ways provided in this chapter, unless relieved from carrying such insurance as provided in section 1477, then any such employer's employee who has not rejected the provisions of chapters 70, 71, and 72, in case of personal injury in the course of, and arising out of such employment, shall have the right to elect to collect compensation as provided in chapters 70 and 71, or collect damages at common law as modified by said chapter 70. [C24, 27, 31, 35,§1479.]

Referred to in §§1480, 1481.1, 1481.3

1480 Manner of election — failure to elect. Any employee entitled to make an election as provided in section 1479 shall do so in writing signed by himself indicating the election, made and filed with the industrial commissioner within sixty days after receiving an injury for which such employee is entitled to either compensation or damages.

If such injured employee or one having the right to elect for him, fails to make an election within sixty days, then and in that event it shall be conclusively presumed that the employee elected to accept compensation according to the schedule of compensation as provided in chapter 70. [C24, 27, 31, 35,§1480.]

Referred to in §§1481, 1481.1, 1481.3

1481 Notice to employer of election. Within five days after a written election has been filed in the office of the industrial commissioner as provided in section 1480, the commissioner shall give notice thereof in writing to the employer by registered mail as provided for giving other notice by the commissioner. [C24, 27, 31, 35,§1481.]

Referred to in §§1481.1, 1481.3
Notice and service, §1459

1481.1 Trial by jury. When an injured employee has exercised his or her right to enforce a compensation claim, based upon the provisions of sections 1479, 1480, and 1481, and an appeal, as provided in section 1449, is taken to the district court from a decision or award as made by the industrial commissioner, the employer and/or the insurance carrier, on the hearing on such appeal in the district court, shall have the right of trial by jury upon the issues of fact tendered and allowable within the terms of chapters 70, 71, and 72, and made of record in arbitration proceedings and/or upon hearing before the industrial commissioner. But the right of a trial by jury shall only apply to compensation cases within the purview of sections 1479, 1480, and 1481. [C35,§1481-e1.]

1481.2 Evidence—instructions. On the trial of the case in the district court with a jury, the evidence, when certified by the industrial commissioner or his deputy, as provided in section 1450, shall be the only competent, relevant and material evidence in the case which shall be read from the record thus certified, subject to

the rulings of the trial judge upon objections made in the commissioner's court and urged in the district court. But the law of procedure and evidence, as provided in section 1441, shall apply and govern insofar as reasonably applicable. The trial judge shall give the jury written instruction on the law of the case, but the jury shall determine the facts upon the issues submitted. [C35,§1481-e2.]

1481.3 Waiver of jury. Upon questions of law raised in the district court, the appeal shall be considered as if made upon one or more of the grounds for appeal, as provided in section 1453. If demand in writing for a jury trial has not been made and filed with the clerk of the court to which the appeal is taken, within five days before the case is assigned for hearing, it shall be conclusively presumed that the party entitled thereto has waived a jury trial, and in such case the hearing of the case and appeals to the supreme court of Iowa shall, in all respects, be governed by the rules of law and procedure applicable to workmen's compensation cases to which sections 1479, 1480, and 1481 do not apply. [C35,§1481-e3.]

1481.4 Appeal. When the case is tried with a jury, an appeal may be taken to the supreme court of Iowa on alleged errors of law upon the same grounds and governed by the law and procedure as provided for civil cases triable with a jury. [C35,§1481-e4.]

CHAPTER 73

HEALTH AND SAFETY APPLIANCES

1482 Enforcement.
1483 Water closets—separate for each sex.
1484 Washing facilities.
1485 Seats for female employees.
1486 Steam and water gauges and valves.
1487 Safety appliances.
1488 Removal of guards or appliances.
1489 Blowers and pipes for dust.
1490 Pipes and flues for gases.
1491 Notice of violation.
1492 Record of accidents.
1493 Report of accidents—evidence.
1494 Penalties.
1495 Assumption of risks.

1482 Enforcement. It shall be the duty of the commissioner of labor of the state, and the mayor and chief of police of every city or town, to enforce the provisions of this chapter. [SS15, §4999-a5; C24, 27, 31, 35,§1482.]

1483 Water closets—separate for each sex. Every manufacturing or mercantile establishment, workshop, or hotel in which five or more persons are employed, shall be provided with a sufficient number of water closets, earth closets, or privies for the reasonable use of the persons employed therein, which shall be properly screened and ventilated and kept at all times in a clean condition and free from all obscene writing or marking; and such water closets or privies shall be supplied in the proportion of at least one to every twenty employees; and if women or girls are employed in such establishment, the water closets, earth closets, or privies used by them shall have separate approaches and be separate and apart from those used by the men or boys. [S13,§4999-a1; C24, 27, 31, 35, §1483.]

Referred to in §§1491, 1494

1484 Washing facilities. In factories, mercantile establishments, mills, and workshops, adequate washing facilities shall be provided for all employees; and when the labor performed by the employees is of such a character as to require or make necessary a change of clothing, wholly or in part, by the employees, there shall be provided a dressing room, or rooms, lockers for keeping clothing, and adequate washing facilities separate for each sex, and no person or persons shall be allowed to use the facilities assigned to the opposite sex. A sufficient supply of water suitable for drinking purposes shall be provided. [S13,§4999-a1; C24, 27, 31, 35,§1484.]

Referred to in §§1491, 1494

1485 Seats for female employees. All employers of females in any workshop, mercantile, or manufacturing business or establishment shall provide and maintain suitable seats, when practicable, for the use of such female employees, at or beside the counter or workbench where employed, and permit the use thereof by such employees to such extent as the work engaged in may reasonably admit. [C97,§4999; C24, 27, 31, 35,§1485.]

Referred to in §§1491, 1494
Similar provisions, §1536

1486 Steam and water gauges and valves. Every person owning or operating a steam boiler in this state shall provide the same with steam gauge, safety valve, and water gauge, and keep the same in good order. [C73,§4064; C97,§§5025, 5026; S13,§4999-a2; C24, 27, 31, 35,§1486.]

Referred to in §§1491, 1494

1487 Safety appliances. It shall be the duty of the owner, agent, superintendent, or other person in charge of any workshop, manufacturing or other industrial establishment or concern operated by machinery, either in a fixed location or when portable and moved from place to place therein in carrying on such industry, so far as practicable, to install and keep in order belt shifters or other safe mechanical means for throwing belts on and off pulleys, install loose pulleys, and protect, by guards or housing, all gearing, cogs, belting, shafting, tumbling rods, universal or knuckle joints, set screws, saws, planes, and other machinery, when so located or used that employees may receive injury thereby. The provisions of this chapter shall not apply to agricultural pursuits. [C73,§4064; C97, §5025; S13,§4999-a2; C24, 27, 31, 35,§1487.]

Referred to in §§1491, 1494
See §1495 and note following

1488 Removal of guards or appliances. When any person shall remove any guard or safety appliance from any machine or other equipment, or shall so adjust or place the same as to destroy or impair its use in preventing bodily injury or safeguarding health, for the purpose of enabling the employee operating said machine to perform any special work that cannot otherwise be performed, it shall be the duty of said employee or employer to immediately replace it after such special work has been completed. [SS15,§4999-a5; C24, 27, 31, 35, §1488.]

Referred to in §§1491, 1494

1489 Blowers and pipes for dust. All persons, companies, or corporations operating any factory or workshop where emery wheels or emery belts of any description, or tumbling barrels used for rumbling or polishing castings, are used, shall provide the same with blowers and pipes of sufficient capacity, placed in such a manner as to protect the person or persons using same from the particles of dust produced or caused thereby, and to carry away said particles of dust arising from or thrown off such wheels, belts, and tumbling barrels, while in operation, directly to the outside of the building, or to some receptacle placed so as to receive or confine such particles of dust; but grinding machines upon which water is used at the point of grinding contact, and small emery wheels which are used temporarily for tool grinding, are not included within the provisions of this section, and the shops employing not more than one man at such work may, in the discretion of the labor commissioner, be exempt from the provisions hereof. [S13,§4999-a4; C24, 27, 31, 35,§1489.]

Referred to in §§1491, 1494

1490 Pipes and flues for gases. Any factory, workshop, printshop, or other place where molten metal or other material which gives off deleterious gases or fumes is kept or used shall be equipped with pipes or flues so arranged as to give easy escape to such gases or fumes into the open air, or provided with other adequate ventilators. [S13,§4999-a4;C24, 27, 31, 35,§1490.]

Referred to in §§1491, 1494

1491 Notice of violation. When the commissioner or his inspector shall discover or have reason to believe that any provision of sections 1483 to 1490, inclusive, is being violated, he shall give to the person, company, corporation, or the manager or superintendent thereof, a notice in writing to comply with such provision within a reasonable time to be fixed in said notice and which time shall be of not less than seven nor more than thirty days duration, except that such time may be extended by the commissioner for good cause shown.

In fixing the time in such notice, the commissioner shall take into consideration the nature of the failure or defect constituting the violation, the danger to be apprehended therefrom, and the probable length of time and amount of labor required to remedy or cure such defect. [SS15,§4999-a5; C24, 27, 31, 35,§1491.]

1492 Record of accidents. Manufacturers, manufacturing corporations, proprietors, or corporations operating any mercantile establishment, mill, workshop, business house, or mine, other than those subject to inspection by the state mine inspector, shall keep a careful record of any accident occurring to an employee while at work for the employer, when such accident results in the death of the employee or in such bodily injury as will or probably may prevent him from returning to work within two days thereafter. The said record shall at all times be open to inspection by an inspector of the bureau of labor. [S13,§2477-1a; C24, 27, 31, 35,§1492.]

Referred to in §1494

1493 Report of accidents—evidence. Within forty-eight hours after the occurrence of an accident, the record of which is required to be kept, a written report thereof shall be forwarded to the commissioner of labor and said commissioner may require further and additional report to be furnished him should the first report be by him deemed insufficient. No statement contained in any such report shall be admissible in any action arising out of the accident therein reported. [S13,§2477-1a; C24, 27, 31, 35,§1493.]

Referred to in §1494

1494 Penalties. Any person, corporation, firm, agent, or superintendent violating any of the provisions of this chapter shall be guilty of a misdemeanor and shall be punished as follows:

1. For a violation of any one of the provisions of sections 1483, 1484, and 1485, by a fine not exceeding ten dollars for each offense.
2. For a violation of section 1486, by a fine of not less than fifty dollars nor more than five hundred dollars.
3. For a violation of any one of the provisions of sections 1487, 1488, 1489, 1490, 1492, and 1493, by a fine not exceeding one hundred dollars. [C73,§4064; C97,§§4999, 5025, 5026; S13,§§2477-1a, 4999-a1,-a2; SS15,§4999-a5; C24, 27, 31, 35,§1494.]

1495 Assumption of risks. In all cases where the property, works, machinery, or appliances of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, work, machinery, or appliances to furnish reasonably safe machinery, appliances, or place to work, the employee shall not be deemed to have assumed the risk, by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employee may have had knowledge when the employer had knowledge of such defect, except when in the usual and ordinary course of his employment it is the duty of such employee to make the repairs, or remedy the defects. Nor shall the employee under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent

person would not have continued in the prosecution of the work; but this statute shall not be construed so as to include such risks as are incident to the employment; and no contract which restricts liability hereunder shall be legal or binding. [S13,§4999-a3; C24, 27, 31, 35,§1495.]

This section (1495) was placed in this chapter by the code editor simply because the chapter seemed to afford a logical location for the section. Said section was no part of 40ExGA, S F 43, which now appears as sections 1482 to 1494, inclusive. The importance of this last statement will appear by reading the last sentence of section 1487, which sentence was an amendment injected into section 1487 by the 40ExGA

Railroad employees, §8159

CHAPTER 74

BOARDS OF ARBITRATION

1496 Petition for appointment.
1497 Notification by governor.
1498 Governor to appoint for parties.
1499 Third appointee.
1500 Agreement to be bound by decision.
1501 Oath—organization.
1502 Compensation.
1503 Evidence—witnesses.
1504 Oath—rule of evidence.
1505 Subpoenas—by whom served—fees.
1506 Investigation—report filed—public inspection.
1507 Investigation—decision.
1508 Decision—report to governor.
1509 Decision filed and published.

1496 Petition for appointment. When any dispute arises between any person, firm, corporation, or association of employers and their employees or association of employees, of this state, except employers or employees having trade relations directly or indirectly based upon interstate trade relations operating through or by state or international boards of conciliation, which has or is likely to cause a strike or lockout, involving ten or more wage earners, and which does or is likely to interfere with the due and ordinary course of business, or which menaces the public peace, or which jeopardizes the welfare of the community, and the parties thereto are unable to adjust the same, either or both parties to the dispute, or the mayor of the city, or the chairman of the board of supervisors of the county in which said employment is carried on, or on petition of any twenty-five citizens thereof over the age of twenty-one years, or the labor commissioner, after investigation, may make written application to the governor for the appointment of a board of arbitration and conciliation, to which board such dispute may be referred under the provisions of this chapter; and the manager of the business of any person, firm, corporation, or association of such employers, or any organization representing such employees, or if such employees are not members of any organization, then a majority of such employees affected may make the application as provided in this chapter, but in no case shall more than twenty employees be required to join in such application. [S13,§2477-n; C24, 27, 31, 35,§1496.]

Referred to in §1497

1497 Notification by governor. The governor shall at once upon application made to him as herein provided, and upon his being satisfied that the dispute comes within the provisions of section 1496, notify the parties to the dispute of the application for the appointment of a board of arbitration and conciliation and make request upon each party to the dispute that each of them recommend within three days from the date of notice, the names of five persons who have no direct interest in such dispute and are willing and ready to act as members of the board, and the governor shall appoint from each list submitted one of such persons recommended. [S13, §2477-n1; C24, 27, 31, 35,§1497.]

40GA, ch 230, §2, editorially divided

1498 Governor to appoint for parties. Should either of the parties fail or neglect to make any recommendation within the said period, the governor shall, as soon thereafter as possible, appoint a fit person who shall be deemed to be appointed on the recommendation of the parties in default. [S13,§2477-n1; C24, 27, 31, 35,§1498.]

1499 Third appointee. The members of the board so appointed shall within five days of their appointment recommend to the governor the name of one person who is ready and willing to act as a third member of the board, and upon failure or neglect upon their part to make such recommendation within the said period, or upon the failure or refusal of the person so recommended to act, the governor shall as soon thereafter as possible appoint some person to act as the third member of the board. [S13,§2477-n1; C24, 27, 31, 35,§1499.]

1500 Agreement to be bound by decision. In all cases when the application is made by both parties to the dispute, they shall set forth in the application whether or not they agree to be bound by the decision of the board of arbitration and conciliation; and if both parties agree to be so bound by such decision, then the same shall be binding and enforceable as set out in section 1507. [S13,§2477-n2; C24, 27, 31, 35, §1500.]

1501 Oath—organization. Each member of the board shall, before entering upon the duties of his office, be sworn to a faithful and impartial discharge thereof; they shall organize at once by the choice of one of their number as chairman, and one of their number as secretary, and shall have power to employ all necessary clerks and stenographers to properly carry out the duties of their appointment. [S13,§2477-n3; C24, 27, 31, 35,§1501.]

S13,§2477-n3, editorially divided

1502 Compensation. The members of the board shall receive a compensation of five dol-

lars per diem for the time actually employed, together with their traveling and other necessary expenses, the same to be payable out of the state treasury upon warrants drawn by the state comptroller. [S13,§2477-n3; C24, 27, 31, 35,§1502.]

1503 Evidence—witnesses. For the purpose of this inquiry the board shall have all the powers of summoning before it and enforcing the attendance of witnesses, of administering oaths, and of requiring witnesses to give evidence, to produce books, papers, and other documents or things as the board may deem requisite to the full investigation of the matters into which it is inquiring, as is vested in the district court in civil cases. [S13,§2477-n4; C24, 27, 31, 35,§1503.]

40GA, ch 230, §8, editorially divided

1504 Oath—rule of evidence. Any member of the board may administer an oath, and the board may accept, admit, and call for such evidence as in equity and good conscience it thinks material and proper, whether strictly legal evidence or not. [S13,§2477-n4; C24, 27, 31, 35, §1504.]

1505 Subpoenas — by whom served — fees. A subpoena or any notice may be delivered or sent to any sheriff, constable, or any police officer who shall forthwith serve the same, and make due return thereof, according to directions. Witnesses in attendance and officers serving subpoenas or notices shall receive the same fees as are allowed in the district court, payable from the state treasury, upon the certificate of the board that such fees are due and correct. The board shall have the same power and authority to maintain and enforce order at the hearings and obedience to its writs of subpoena as is by law conferred upon the district court for like purposes. [S13,§2477-n4; C24, 27, 31, 35,§1505.]

Contempts, ch 536
Officers' fees, §5191
Witness fees, §11326 et seq.

1506 Investigation—report filed—public inspection. The board shall as soon as practical, visit the place where the controversy exists, and make careful inquiry into the cause, and the said board may, with the consent of the governor, conduct such inquiry beyond the limits of the state. The board shall hear all persons interested who come before it, advise the respective parties what ought to be done or submitted to by either or both of the parties to the dispute to adjust said controversy, and make a written decision thereof, which shall at once be made public and open to public inspection and shall be recorded by the secretary of the board, and a copy of such report shall be filed in the office of the clerk of the city or town in which the controversy arose and shall be open for public inspection. [S13,§2477-n5; C24, 27, 31, 35,§1506.]

1507 Investigation—decision. The board of arbitration and conciliation shall within ten days from the date of their appointment, unless such time shall be extended by the governor, complete the investigation of any controversy submitted to them, and during the pendency of such period neither party shall engage in any strike or lockout. Any decision made by the board shall date from the date of the appointment of the board and shall be binding upon the parties who join in the application as herein provided for a period of one year. [S13,§2477-n6; C24, 27, 31, 35,§1507.]

Referred to in §1500

1508 Decision—report to governor. Within five days after the completion of the investigation, unless the time is extended by the governor for good cause shown, the board or a majority thereof shall render a decision, stating such details as will clearly show the nature of the controversy and the point disposed of by them, and make a written report to the governor of their findings of fact and of their recommendation to each party to the controversy. [S13, §2477-n7; C24, 27, 31, 35,§1508.]

1509 Decision filed and published. Every decision and report shall be filed in the office of the governor, and a copy served upon each party to the controversy, and a copy furnished to the labor commissioner for publication in the report of the commissioner, who shall cause such decision and report to be published at a rate of not to exceed thirty-three and one-third cents per ten lines of brevier type or its equivalent in two newspapers of general circulation in the county in which the business is located upon which the dispute arose.

All evidence taken and exhibits and documents offered shall be carefully preserved and at the close of the investigation shall be filed in the office of the governor of the state and shall only be subject to inspection upon his order. [S13,§2477-n7; C24, 27, 31, 35,§1509.]

CHAPTER 75

BUREAU OF LABOR

Referred to in §1551.18

1510 Labor commissioner.
1511 Appointment.
1512 Vacancies.
1513 Industrial statistics and information.
1514 Other duties—jurisdiction in general.
1515 Appointment of inspectors.
1516 Woman inspector—duties.
1517 Traveling expenses—limitation.
1518 Right to enter premises.
1519 Power to secure evidence.
1520 Prosecutions for violations.
1521 Reports to bureau.
1522 Persons furnishing information.
1523 Reports and records preserved.
1524 Definition of terms.
1525 Violations—penalties.
1525.1 Acceptance of federal act.
1525.2 State agency.

1510 Labor commissioner. The bureau of labor shall be under the control of a labor commissioner, who shall have his office at the seat of government and shall devote his entire time to the duties of his office. [C97,§2469; S13,§2469; C24, 27, 31, 35,§1510.]

1511 Appointment. The governor shall, within sixty days after the organization of the regular session of the general assembly in 1925, and each two years thereafter, appoint, with the approval of two-thirds of the members of the senate, a labor commissioner who shall serve for a period of two years from July 1 of the year of appointment. [C97,§2469; S13,§2469; C24, 27, 31, 35,§1511.]

Confirmation procedure, §38.1

1512 Vacancies. A vacancy in said position which may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes in regular session. Prior to the expiration of said thirty days the governor shall transmit to the senate for its confirmation an appointment for the unexpired portion of the regular term.

Vacancies occurring during a session of the general assembly shall be filled as regular appointments are filled and before the end of said session and for the unexpired portion of the regular term. [C97,§2469; S13,§2469; C24, 27, 31, 35,§1512.]

1513 Industrial statistics and information. The duties of said commissioner shall be:

1. To safely keep all records, papers, documents, correspondence, and other property pertaining to or coming into his hands by virtue of his office, and deliver the same to his successor, except as otherwise provided.

2. To collect, assort, and systematize statistical details relating to all departments of labor in the state, especially in its relation to the commercial, social, educational, and sanitary conditions surrounding the laboring classes, the means of escape from and the protection of life and health in factories, the employment of children, the number of hours of labor exacted from them and from women, and to the permanent prosperity of the mechanical, manufacturing, and productive industries of the state.

3. To collect as fully as practicable such information and reliable reports from each county in the state, the amount and condition of the mechanical and manufacturing interests, the value and location of the various manufacturing and coal productions of the state, also sites offering natural or acquired advantages for the profitable location and operation of different branches of industry; he shall by correspondence with interested parties in other parts of the United States, impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers.

4. To submit the foregoing statistics and information to the governor in biennial reports in which he shall give a statement of the business of the bureau since the last regular report, and shall compile therein such information as may be considered of value to the industrial interests of the state, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics, and apprentices, wages earned, the savings from the same, with age and sex of laborers employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, the proportion of married laborers and mechanics who live in rented houses, with the average annual rental, and the value of property owned by laborers and mechanics; to include in such report what progress has been made with schools now in operation for the instruction of students in the mechanic arts, and what systems have been found most practical, with details thereof.

5. To issue from time to time, with the consent of the executive council, bulletins containing information of importance to the industries of the state and to the safety of wage earners. [C97,§§2469, 2470; S13,§§2469, 2470; C24, 27, 31, 35,§1513.]

Destruction of records, §1523
Time of making biennial report, §246

1514 Other duties—jurisdiction in general. The commissioner shall have jurisdiction and it shall be his duty to supervise the enforcement of:

1. All laws relating to safety appliances and inspection thereof and health conditions in manufacturing and mercantile establishments, workshops, machine shops, and other industrial concerns within his jurisdiction.

2. All laws of the state relating to child labor.

3. All laws relating to the state free employment bureau* and employment agencies.

*See section 1551.18

4. Such other provisions of law as are now or shall hereafter be within his jurisdiction. [S13,§2477-f; SS15,§§2477-g1, 4999-a5,-a10; C24, 27, 31, 35,§1514; 48GA, ch 120,§62.]

Employment agencies, §§1525.2, 1542 et seq.
Vocational education, §§3838, 3853, 3854

1515 Appointment of inspectors. The appointment, by the commissioner, of all factory inspectors shall be subject to the approval of the executive council. [S13,§2477; C24, 27, 31, 35,§1515.]

1516 Woman inspector—duties. One of the factory inspectors in the bureau of labor shall be a woman, who shall inspect the sanitary and general conditions of all factories, workshops, hotels, cafes, restaurants, stores, and all other establishments and places where women and children are employed; collect statistics and report the same to the commissioner with such recommendations as she believes will improve working conditions of women and children, and to which the commissioner shall make special reference in his biennial reports to the governor. She shall perform such other services under the direction of the commissioner as will tend to promote the health and general welfare of the women and children employed in the industries within the state. [S13,§2477; C24, 27, 31, 35,§1516.]

1517 Traveling expenses—limitation. The commissioner, inspectors, and other employees of the office shall be allowed their necessary traveling expenses while in the discharge of their duties. Such expense in the aggregate, exclusive of salaries, shall not exceed the sum of four thousand dollars per annum. [C97, §2477; S13,§2477; C24, 27, 31, 35,§1517.]

1518 Right to enter premises. The labor commissioner and the inspectors shall have the power to enter any factory or mill, workshop, mine, store, business house, public or private work, when the same is open or in operation, for the purpose of gathering facts and statistics such as are contemplated by this chapter, and to examine into the methods of protection from danger to employees, and the sanitary conditions in and around such buildings and places, and make a record thereof. [C97,§2472; S13, §2472; C24, 27, 31, 35,§1518.]

1519 Power to secure evidence. The labor commissioner and his deputy shall have the power to issue subpoenas, administer oaths, and take testimony in all matters relating to the duties required of them, said testimony to be taken in some suitable place in the vicinity to which testimony is applicable. No witness shall be compelled by such subpoena to go outside the county of his residence, except when the hearing is in a county adjoining the county of his residence, then he shall be required to obey such subpoena. Witnesses subpoenaed and testifying before the commissioner or an inspector shall be paid the same fees as witnesses before a justice's court, such payment to be made out of the general funds of the state on voucher by the commissioner, but such expense for witnesses shall not exceed one hundred dollars annually. [C97,§2471; S13,§2471; C24, 27, 31, 35,§1519.]

1520 Prosecutions for violations. If the commissioner or an inspector shall learn of any violation of, or neglect to comply with the law in respect to the employment of children, or in respect to fire escapes, or the safety of employees, or for the preservation of health, such officer may give the county attorney of the county in which such factory or building is situated, written notice of the facts, whereupon that officer shall institute the proper proceedings against the person guilty of such offense or neglect.

If the commissioner or inspector is of the opinion that such violation or neglect is not wilful, or is an oversight or of a trivial nature, he may in his discretion fix a time within which the defect or evil may be corrected and notify the owner, operator, superintendent, or person in charge, and if corrected within the time fixed, then the commissioner or inspector shall not cause prosecution to be begun. [C97,§2472; S13,§2472; C24, 27, 31, 35,§1520.]

1521 Reports to bureau. It shall be the duty of every owner, operator, or manager of every factory, mill, workshop, mine, store, business house, public or private work, or any other establishment where labor is employed, as herein provided, to make to the bureau, upon blanks furnished by the commissioner, such reports and returns as he may require for the purpose of compiling such labor statistics as are contemplated in this chapter; and the owner, operator, or business manager shall make such reports or returns within sixty days from the receipt of blanks furnished by the commissioner, and shall certify under oath to the correctness of the same. [C97,§2474; S13,§2474; C24, 27, 31, 35,§1521.]

1522 Persons furnishing information. Any use of the names of individuals, firms, or corporations furnishing the commissioner information required by this chapter for his biennial report, in such manner as to disclose any of their private or personal affairs, is hereby prohibited. [C97,§2475; C24, 27, 31, 35,§1522.]

1523 Reports and records preserved. No report or return made to said bureau in accordance with the provisions of this chapter, and no schedule, record, or document gathered or returned by its officers or employees, shall be destroyed within two years after the collection or receipt thereof. At the expiration of two years all records, schedules, or papers accumulating in said bureau during said period that may be considered of no value by the commissioner may be destroyed by authority of the executive council first obtained. [C97,§2476; C24, 27, 31, 35, §1523.]

1524 Definition of terms. The expressions "factory", "mill", "workshop", "mine", "store", "business house", and "public or private work",

as used in this chapter, shall be construed to mean any factory, mill, workshop, mine, store, business house, public or private work, where wage earners are employed for a compensation. [C97,§2473; SS15,§2473; C24, 27, 31, 35,§1524.]

1525 Violations—penalties. Persons violating any of the provisions of this chapter shall be punished as in this section provided, respectively:

1. Any owner, superintendent, manager, or person in charge of any factory, mill, workshop, store, mine, hotel, restaurant, cafe, business house, public or private work, who shall refuse to allow the commissioner of labor or any inspector or employee of the bureau of labor to enter the same, or who shall hinder or deter him in collecting information which it is his duty to collect shall be fined not exceeding one hundred dollars or imprisoned in the county jail not exceeding thirty days.

2. Any person duly subpoenaed to attend a hearing before the commissioner or deputy or a court in any proceeding provided by this chapter who shall wilfully neglect or refuse to attend or testify at the time and place named in the subpoena shall be fined not exceeding fifty dollars or imprisoned in the county jail not exceeding thirty days.

3. Any officer or employee of the bureau of labor, or any person making unlawful use of names or information obtained by virtue of his office, shall be fined not exceeding five hundred dollars or imprisoned in the county jail not exceeding one year.

4. Any owner, operator, or manager of a factory, mill, workshop, mine, store, business house, public or private work, who shall neglect or refuse for thirty days after receipt of notice from the commissioner to furnish any reports or returns he may require to enable him to discharge his duties shall be fined not to exceed one hundred dollars or imprisoned in the county jail not to exceed thirty days. [C97,§§2471, 2472, 2474, 2475; S13,§§2471, 2472, 2474; C24, 27, 31, 35,§1525.]

1525.1 Acceptance of federal act. The state of Iowa hereby accepts the provisions of the act of congress approved June 6, 1933, [29 USC,§49 et seq.] entitled, "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes." [C35,§1525-f1.]

1525.2 State agency. The state bureau of labor is hereby designated and constituted the agency of the state for the purposes of such act [29 USC,§49 et seq.] with full power to cooperate with all authorities of the United States having powers or duties under such act and to do and perform all things necessary to secure to the state the benefits of such act in the promotion and maintenance of a system of public employment offices. [C35,§1525-f2.]

This section suspended; see §1551.18
State employment agencies, §1542 et seq.

CHAPTER 76

CHILD LABOR

1526 Child labor—age limit—exception.
1527 Hours of labor—noon intermission.
1528 Where part-time school prevails.
1529 Cleaning or operating machinery.
1530 Permit for child labor.
1531 Labor permit—how obtained.
1532 What permit shall show.
1533 Duplicate permit filed.
1534 Superintendent of public instruction.
1535 Authority of officers.
1536 Life, health, or morals endangered.
1537 Street occupations forbidden.
1538 Street occupations for boys.
1539 Night work prohibited.
1540 Violations—penalties.
1541 Enforcement—duties of officers.

1526 Child labor—age limit—exception. No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise or messages; but nothing in this section shall be construed as prohibiting any child from working in any of the above establishments or occupations when operated by his parents. [SS15,§2477-a; C24, 27, 31, 35, §1526.]

Referred to in §§1527, 1530

1527 Hours of labor—noon intermission. No person under sixteen years of age shall be employed at any of the places or in any of the occupations specified in section 1526 before the hour of seven o'clock in the morning or after the hour of six o'clock in the evening, and if such person is employed exceeding five hours of each day, a noon intermission of not less than thirty minutes shall be given between the hours of eleven and one o'clock, and such person shall not be employed more than eight hours in any one day, exclusive of the noon hour intermission; nor shall any such person be employed more than forty-eight hours in any one week. [SS15,§2477-c; C24, 27, 31, 35,§1527.]

1528 Where part-time school prevails. When in any organized school district there shall have been established a part-time school, department, or class, no person under sixteen years of age shall be employed for more than forty hours in any one week. [C24, 27, 31, 35,§1528.]

1529 Cleaning or operating machinery. The following acts shall be unlawful:

1. Directing or permitting any boy under six-

teen or girl under eighteen years of age to clean machinery while it is in motion.

2. Permitting any boy or girl under sixteen years of age to operate or assist in operating any freight or passenger elevator.

3. Permitting any boy or girl under sixteen years of age to operate or assist in operating dangerous machinery; but this provision shall not apply to pupils working under an instructor in manual training departments in public schools of the state or under an instructor in a school, shop, or industrial plant, in a course of vocational education approved by the state board for vocational education. [SS15,§2477-a; C24, 27, 31, 35,§1529.]

1530 Permit for child labor. No child under sixteen years of age shall be employed, permitted, or suffered to work in or in connection with any of the establishments or occupations mentioned in section 1526 unless the person, firm, or corporation employing such child procures and keeps on file, accessible to any officer charged with the enforcement of this chapter, a work permit issued as hereinafter provided, and keeps two complete lists of the names and ages of all such children under sixteen years of age employed in or for such establishments or in such occupations, one on file in the office and one conspicuously posted near the principal entrance of the place or establishment in which such children are employed.

On termination of the employment of a child whose permit is on file, such permit shall be returned by the employer within two days to the officer who issued it with a statement of the reasons for the termination of such employment.

A work permit shall be issued for every position obtained by a child between the ages of fourteen and sixteen years. The permit in no case shall be issued to the child, parent, guardian, or custodian, but to its prospective employer. [SS15,§2477-d; C24, 27, 31, 35,§1530.]

1531 Labor permit—how obtained. A work permit shall be issued only by the superintendent of schools or by a person authorized by him in writing, or, where there is no superintendent of schools, by a person authorized in writing by the local school board in the community where such child resides, upon the application of the parent, guardian, or custodian of the child desiring such permit. The person authorized to issue work permits shall not issue any such permit, except as provided in sections 1537 and 1538, until he has received, examined, approved, and filed:

1. A written agreement from the person, firm, or corporation into whose service the child under sixteen years of age is about to enter, promising to give such child employment, describing the work to be performed and agreeing to return the work permit of such child to the office from which it was issued within two days after the termination of the employment of such child.

2. The school record of such child filled out and signed by the superintendent of the school which such child has last attended certifying that the child is able to read intelligently and write legibly simple sentences in the English language and has completed a course of study equivalent to six yearly grades in reading, writing, spelling, English language, geography, and arithmetic. Such school record shall give also the name, date of birth, and residence of the child as shown on the records of the school and also the name of its parent, guardian, or custodian. In exceptional cases where a child is strong, healthy, and well developed physically, superintendents or local school boards may, with the approval of the labor commissioner, issue permits for boys and girls between the ages of fourteen and sixteen, with less educational acquirements, good for vacation only.

3. A certificate signed by a medical inspector of schools, or if there be no such inspector, then by a physician appointed by the board of education, certifying that the applicant for the work permit has reached the normal development of a child of its age and is in sufficiently sound health and physically able to perform the work for which the permit is sought.

4. Evidence of age showing that the child is fourteen years old, or more, which shall consist of one of the following proofs required in the order herein designated as follows:

a. A transcript of the birth certificate filed according to law with a registrar of vital statistics or other officer charged with the duty of recording births.

b. A passport or a transcript of a certificate of baptism showing the date of birth and place of baptism of such child.

c. A school census record.

d. In cases where none of the above named proofs are obtainable, a certificate signed by the local medical inspector of schools, or if there be no such inspector, then by a physician appointed by the local board of education, certifying that in his opinion the applicant for the work permit is fourteen years of age or more. [SS15,§2477-d; C24, 27, 31, 35,§1531.]

1532 What permit shall show. Every such work permit shall state the name, sex, the date and place of birth, the residence of the child in whose name it is issued, the color of hair and eyes, the height and weight, the proof of age, the school grade completed, the name and location of the establishment where the child is to be employed, the work for which the permit is issued, that the papers required for its issuance have been duly examined, approved, and filed, and that the person named therein has personally appeared before the officer issuing the permit and has been examined. [SS15,§2477-d; C24, 27, 31, 35,§1532.]

1533 Duplicate permit filed. A duplicate of every such work permit issued shall be filled out and forwarded to the office of the labor commissioner between the first and the tenth day of the month following the month in which it is issued. [SS15,§2477-d; C24, 27, 31, 35,§1533.]

40ExGA, HF 44, §8, editorially divided

1534 Superintendent of public instruction. The blank forms for the work permit, the em-

ployer's agreement, the school record, and the physician's certificate shall be formulated by the superintendent of public instruction and furnished by him to the local school authorities. [SS15,§2477-d; C24, 27, 31, 35,§1534.]

1535 **Authority of officers.** Any officer whose duty it is to enforce the provisions of this chapter shall have authority to demand of any employer in or about whose place or establishment a child apparently under the age of sixteen years is employed, permitted, or suffered to work, and whose permit is not filed as required by this chapter, that such employer shall either furnish him within ten days the same documentary evidence of age of such child as is required upon the issuance of a work permit, or shall cease to employ or permit or suffer such child to work in such place or establishment. [SS15,§2477-d; C24, 27, 31, 35,§1535.]

1536 **Life, health, or morals endangered.** No person under sixteen years of age shall be employed at any work or occupation which, by reason of its nature or the place of employment, the health of such person may be injured, or morals depraved, or at any work in which the handling or use of gunpowder, dynamite, or other like explosive is required, or in or about any mine during the school term, or in or about any hotel, cafe, restaurant, bowling alley, pool or billiard room, cigar store, barber shop, or in any occupation dangerous to life or limb.

No female under twenty-one years of age shall be employed in any capacity where the duties of such employment compel her to remain constantly standing. [SS15,§2477-b; C24, 27, 31, 35,§1536.]

Serving beer, §1921.116
Similar provisions, §1485

1537 **Street occupations forbidden.** No boy under eleven years of age nor girl under eighteen years of age shall be employed, permitted, or suffered to work at any time in any city of ten thousand or more inhabitants within this state in or in connection with the street occupations of peddling, bootblacking, the distribution or sale of newspapers, magazines, periodicals, or circulars, nor in any other occupations in any street or public place, except that in such cities, the superintendent of schools or person authorized by him, upon sufficient showing made by a judge of the superior, municipal, or juvenile court, may, in exceptional cases, issue a permit to a boy under eleven years of age. [SS15,§2477-a1; C24, 27, 31, 35,§1537.]

Referred to in §§1531, 1538

1538 **Street occupations for boys.** No boy between eleven and sixteen years of age shall be employed or permitted to work in any such city in connection with any of the occupations mentioned in section 1537 unless he complies with all the requirements for the issuance of work permits as described in this chapter except the filing of an employer's agreement, but the school record so required shall certify only that the boy is regularly attending school and that the work in which he wishes to engage will not interfere with his progress at school. Upon compliance with these requirements such boy shall be entitled to receive from the officer authorized to issue work permits a badge which shall authorize such boy to engage in the above-mentioned occupations at such time or times, between four a.m. and seven-thirty p.m. each day, as the public schools of the city or district where such boy resides are not in session, but at no other time, except that during the summer school vacation such boy may engage in such occupation until the hour of eight-thirty p.m. All such badges issued in the same calendar year shall be of the same color, which color shall be changed each year, and shall become void upon the first day of January following their issuance. [SS15,§2477-a1; C24, 27, 31, 35,§1538.]

Referred to in §1531

1539 **Night work prohibited.** No person under eighteen years of age shall be employed in the transmission, distribution, or delivery of goods or messages between the hours of ten in the evening and five in the morning in any city of ten thousand or more inhabitants. [SS15, §2477-c; C24, 27, 31, 35,§1539.]

1540 **Violations — penalties.** Any parent, guardian, or other person, who having under his control any person under sixteen years of age causes or permits said person to work or be employed in violation of the provisions of this chapter, or any person making, certifying to, or causing to be made or certified to, any statement, certificate, or other paper for the purpose of procuring the employment of any person in violation of said provisions, or who makes, files, executes, or delivers any such statement, certificate, or other paper containing any false statement for the purpose of procuring the employment of any person in violation of this chapter, or for the purpose of concealing the violation thereof in such employment, and any person, firm, or corporation, or the agent, manager, superintendent, or officer of any person, firm, or corporation, whether for himself or such person, firm, corporation, either by himself or acting through any agent, foreman, superintendent, or manager, who employs any person, or permits any person to be employed in violation of the provisions of this chapter, or who shall refuse to allow any authorized officer or person to inspect any place of business under said provisions, if demand is made therefor at any time during business hours, or who shall wilfully obstruct such officer or person while making such inspection, or who shall fail to keep posted the lists containing the names of persons employed under sixteen years of age and other information as required by this chapter, or who shall knowingly insert any false statement in such list, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days.

The parent or person in charge of any child who shall engage in any street occupation in violation of any of the provisions of this chapter

shall be punished by a fine of not more than fifteen dollars.

Whoever furnishes or sells to any minor any article of any description with the knowledge that said minor intends to sell said article in violation of the provisions of this chapter relating to street occupations, shall be punished by a fine of not less than fifteen dollars nor more than one hundred dollars for each offense.

Whoever violates any other provision of this chapter, shall be fined not to exceed one hundred dollars. [S13,§2477-e; SS15,§2477-a1; C24, 27, 31, 35,§1540.]

1541 **Enforcement — duties of officers.** It shall be the duty of the labor commissioner, his deputies, inspectors, and assistants, to enforce the provisions of this chapter. It shall also be the duty of all mayors and police officers, town and city marshals, sheriffs and their deputies, school superintendents, school truant and attendance officers, within their several jurisdictions, to cooperate in the enforcement of such provisions and furnish the labor commissioner, his deputies and assistants all information coming to their knowledge regarding any violations of such provisions. All such officers and any person authorized in writing by any court of record shall have authority to enter for purposes of investigation any of the establishments and places mentioned in this chapter and to freely question any person therein as to any violations of such provisions.

It shall be the duty of county attorneys to investigate all complaints made to them of violations of any such provisions, and to prosecute all such cases of violation within their respective counties. [S13,§2477-f; SS15,§2477-a1; C24, 27, 31, 35,§1541.]

CHAPTER 76.1

COMMISSION FOR THE BLIND

1541.1 Membership.
1541.2 Tenure.
1541.3 Officers—assistants.
1541.4 Expenses.
1541.5 Bureau of information.
1541.6 Duties.

1541.1 Membership. The Iowa commission for the blind is hereby created. Said commission shall consist of the superintendent of the state school for the blind, and two other members to be appointed by the governor. [C27, 31, 35,§1541-a1.]

1541.2 Tenure. Prior to July 1 of each year, commencing with 1926, the governor shall appoint a member of said board to succeed the member whose term of office expires on said date. All such appointees shall serve for a period of two years from July 1 of the year of appointment. [C27, 31, 35,§1541-a2.]

1541.3 Officers — assistants. The commission shall elect its own officers and shall employ such assistants as may be necessary to carry out the provisions of this chapter, and hold such meetings as it may determine. [C27, 31, 35, §1541-a3.]

1541.4 Expenses. The members of the commission shall receive no compensation for their services, but shall be entitled to receive their traveling and other necessary expenses incurred in the performance of their duties as members of the commission. [C27, 31, 35,§1541-a4.]

1541.5 Bureau of information. The commission for the blind shall act as a bureau of information and industrial aid for the blind, such as assisting the blind in finding employment, teaching them industries; giving them such assistance as may be necessary or advisable in helping the adult blind in marketing their products. [C27, 31, 35,§1541-a5.]

1541.6 Duties. The commission shall:

1. Prepare and maintain a complete register of the blind of the state which shall describe the condition, cause of blindness, capacity for education and industrial training, and such other facts as the commission deems of value.
2. Assist in marketing of products of blind workers of the state.
3. Ameliorate the condition of the blind by promoting visits to them in their homes for the purpose of instruction and by such other lawful method as the commission deems expedient.
4. Make inquiries concerning the causes of blindness to ascertain what portion of such cases are preventable and cooperate with the other organized agents of the state in the adoption and enforcement of proper preventive measures.
5. Provide for suitable vocational training whenever the commission shall deem it advisable and necessary. The commission may establish workshops for the employment of the blind, paying suitable wages for work under such employment. The commission may provide or pay for, during their training period, the temporary lodging and support of persons receiving vocational training. The commission shall have authority as provided in this chapter to use any receipts or earnings that accrue from the operation of workshops, but a detailed statement of receipts or earnings and expenditures shall be made monthly to the state comptroller.
6. Discourage begging, either directly or indirectly, on the part of the blind within the limits of the state.
7. Make an annual report to the governor of its proceedings for each fiscal year. It shall

embody therein a properly classified and tabulated statement of its estimates for the ensuing year with its own opinion of the necessity or expediency of appropriations in accordance with such estimates. Such annual report shall also present a concise review of the work of the commission for the preceding year with such suggestions and recommendations for improving the condition of the blind as may be expedient.

8. Perform all other duties required of it by law. [C27, 31, 35,§1541-a6.]

Annual report, §247

CHAPTER 77

STATE EMPLOYMENT BUREAU AND EMPLOYMENT AGENCIES

See §1551.18 for transfer of duties to Unemployment Compensation Commission

1542 Free employment bureau.
1543 Duty as to free employment services.
1544 Extension of service.
1545 Service free.
1546 Failure to procure employment.
1546.1 Limitation of fee.
1546.2 Unlawful practices—civil liability.
1547 Copy of application or agreement.
1548 Division of fees prohibited.
1549 Records required.
1550 Investigation by labor commissioner.
1551 Violations.

1542 Free employment bureau. The labor commissioner shall maintain in his office at the seat of government a department to be called the state free employment bureau, and he is hereby directed to adopt such rules and regulations as are necessary to carry out the purposes of this chapter. He shall, with the approval of the executive council, appoint a competent person who shall be placed in charge of such work and be known as the chief clerk of the bureau, whose term of office shall be the same as that of the commissioner. [SS15,§2477-g1; C24, 27, 31, 35,§1542.]

Administration of sections 1542 to 1545, inclusive, transferred to Unemployment Compensation Commission, §1551.18

1543 Duty as to free employment services. It shall be the duty of the commissioner through the free employment service to:

1. Adopt all means at his command to bring together those desiring to employ labor and those desiring employment.

2. Supply information as to opportunities for securing employment and the character and conditions of work to be performed in the various industries of the state including agricultural pursuits.

3. Adopt all available means for steadying employment and avoiding unemployment. [SS15, §2477-g2; C24, 27, 31, 35,§1543.]

1544 Extension of service. With the approval of the executive council, the commissioner may establish within the state such branches of free employment agencies as shall afford the best distribution of labor, and for such purposes may cooperate with any federal, state, municipal, or other free employment bureau or association. [SS15,§2477-g2; C24, 27, 31, 35,§1544.]

1545 Service free. No fee or compensation shall be received, either directly or indirectly, from persons applying to the bureau for employment or help. [SS15,§2477-g2; C24, 27, 31, 35, §1545.]

1546 Failure to procure employment. Every person, firm, or corporation who shall agree or promise, or who shall advertise through the public press, or by letter, to furnish employment or situations to any person or persons, and in pursuance of such advertisement, agreement, or promise, shall receive any money, personal property, or other valuable thing whatsoever, and who shall fail to procure for such person or persons acceptable situations or employment as agreed upon, within the time stated or agreed upon, or if no time be specified then within a reasonable time, shall upon demand return all such money, personal property, or valuable consideration of whatever character. The provisions of this section, however, shall not apply to registration fees of one dollar or less. [S13, §2477-h; C24, 27, 31, 35,§1546; 48GA, ch 71,§2.]

1546.1 Limitation of fee. No such person, firm, or corporation shall charge a fee for the furnishing or procurement of any situation or employment which shall exceed ten percent of the wages offered for the first month of any such employment or situation furnished or procured.

The provisions of this section shall not apply to the furnishing or procurement of employment in any profession for which a license or certificate to engage therein is required by the laws of this state, nor to the furnishing or procurement of vaudeville acts, circus acts, theatrical, stage or platform attractions or amusement enterprises. [C27, 31, 35,§1546-a1; 48GA, ch 71, §1.]

1546.2 Unlawful practices—civil liability. No person, firm, or corporation shall send an application for employment to an employer who has not applied to such person, firm, or corporation for help or labor. Nor shall any person, firm, or corporation engaged in the business of operating an employment agency or bureau, fraudulently promise or deceive either through a false notice or advertisement or other means, any applicant for help or employment with regard to the service to be rendered by such person, firm, corporation, agency, or bureau. Any person who violates any of the provisions of this section shall be liable in a civil suit for damages to any person who is damaged or injured thereby and shall also be guilty of a misdemeanor, and upon conviction, shall be punished as provided in section 1551. [C27, 31, 35, §1546-a2.]

1547 Copy of application or agreement. It shall be unlawful for any person, firm, or corporation to receive any application for employment from, or enter into any agreement with, any person to furnish or procure for said person any employment unless there is delivered to such person making such application or contract, at the time of the making thereof, a true and full copy of such application or agreement, which application or agreement shall specify the fee or consideration to be paid by the applicant. [S13,§2477-i; C24, 27, 31, 35,§1547.]

1548 Division of fees prohibited. It shall be unlawful for any person, firm, or corporation, or any person employed or authorized by such person, firm, or corporation, to receive any part of any fee or any percentage of wages or any compensation of any kind whatever, that is agreed upon to be paid by any such employee to any employment bureau or agency for services rendered to any such employee in procuring for him employment with such person, firm, or corporation. [S13,§2477-j; C24, 27, 31, 35,§1548.]

1549 Records required. Every person, firm, or corporation operating an employment agency or engaged in the business of finding employment for others, for which any fee is charged, shall keep a record of the applications received and what, if any, employment was found or furnished to the applicant, giving the name of each applicant and the name and address of his employer, if employment is found, and the fee charged each applicant. [C24, 27, 31, 35,§1549.]

1550 Investigation by labor commissioner. The labor commissioner, his deputy or inspectors, and the chief clerk of the bureau shall have authority to examine at any time the records, books, and any papers relating in any way to the conduct of any employment agency or bureau within the state, and must investigate any complaint made against any such employment agency or bureau, and if any violations of law are found he shall at once file or cause to be filed, an information against any person, firm, or corporation guilty of such violation of law. [S13,§2477-k; C24, 27, 31, 35,§1550.]

1551 Violations. Any person, firm, or corporation violating any of the provisions of this chapter, or who shall refuse access to records, books, or other papers relative to the conduct of such agency or bureau, to any person having authority to examine same, shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not to exceed thirty days. [S13,§2477-l; C24, 27, 31, 35,§1551.]

Referred to in §1546.2

CHAPTER 77.1

LICENSE FOR EMPLOYMENT AGENCIES

1551.01 License.
1551.02 Application.
1551.03 Issuance or refusal.
1551.04 Fee.
1551.05 Revocation of license.
1551.06 Violations.

1551.01 License. Every person, firm or corporation who shall keep or carry on an employment agency for the purpose of procuring or offering to procure help or employment, or the giving of information as to where help or employment may be procured either directly or through some other person or agency, and where a fee, privilege, or other thing of value is exacted, charged or received either directly or indirectly, for procuring, or assisting or promising to procure employment, work, engagement or situation of any kind, or for procuring or providing help or promising to provide help for any person, whether such fee, privilege, or other thing of value is collected from the applicant for employment or the applicant for help, shall before transacting any such business whatsoever procure a license from a commission, consisting of the secretary of state, the industrial commissioner, and the labor commissioner, all of whom shall serve without compensation. [C31, 35,§1551-c1.]

Referred to in §§1551.02, 1551.03, 1551.06

1551.02 Application. Application for such license shall be made in writing to the commission provided in section 1551.01. It shall contain the name of the applicant, and if applicant be a firm, the names of the members, and if it be a corporation, the names of the officers thereof; and the name, number and address of the building and place where the employment agency is to be conducted. It shall be accompanied by the affidavits of at least two reputable citizens of the state in no way connected with applicant, certifying to the good moral character and reliability of the applicant, or, if a firm or corporation, of each of the members or officers thereof, and that the applicant is a citizen of the United States, if a natural person; also a surety company bond in the sum of two thousand dollars to be approved by the labor commissioner and conditioned to pay any damages that may accrue to any person or persons because of any wrongful act, or violation of law, on the part of applicant in the conduct of said business. There shall also be filed with the application a schedule of fees to be charged for services rendered to patrons, which schedule shall not be changed during the term of license without consent being first given by the commission.

Any person, firm, or corporation applying for a license, as provided in this chapter, to operate an employment agency for furnishing or procuring of employment shall furnish the commission with its contract form, which form shall distinctly provide that no fee or other thing of value in excess of one dollar shall be collected in advance of the procuring of employment and no license shall be issued unless such contract form contains such provision. Thereafter, any

person, firm, or corporation to whom a license has been issued that violates this provision of its contract shall have his license canceled. [C31, 35,§1551-c2.]

1551.03 Issuance or refusal. The commission shall fully investigate all applicants for the license required by section 1551.01, and shall not issue any license earlier than one week after the application therefor is filed, provided, however, that the commission shall either grant or refuse such license within thirty days from the date of the filing of the application. All licenses issued under the provisions of this chapter shall expire on June 30 next succeeding their issuance. [C31, 35,§1551-c3.]

1551.04 Fee. The annual license fee shall be fifty dollars. [C31, 35,§1551-c4.]

1551.05 Revocation of license. The commission may revoke at any time any such a license issued by it upon good cause shown and when there has been a substantial violation of any of the provisions of law regulatory of such business. [C31, 35,§1551-c5.]

1551.06 Violations. Any person in any manner undertaking to do any of the things described in section 1551.01, without first securing a license as herein provided, shall be guilty of a misdemeanor. [C31, 35,§1551-c6.]

Punishment, §12894

CHAPTER 77.2

UNEMPLOYMENT COMPENSATION

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SHORT TITLE

1551.07 Name. This chapter shall be known and may be cited as the "Unemployment Compensation Law". [46GA, ch 4,§1; 47GA, ch 102,§1.]

DECLARATION OF STATE PUBLIC POLICY

1551.08 Guide for interpretation. As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. [46ExGA, ch 4, §2; 47GA, ch 102,§2.]

BENEFITS

1551.09 How paid and amounts.

A. *Payment.* Twenty-four months after the date when contributions first accrue under this chapter, benefits shall become payable from the fund; provided, that wages earned for services defined in section 1551.25, subsection "G" paragraph 7 (c), irrespective of when performed, shall not be included for purposes of determin-

ing eligibility, under section 1551.10 or full-time weekly wages, under subsection "D" of this section, for the purposes of any benefit year commencing on or after July 1, 1939, nor shall any benefits with respect to unemployment occurring on and after July 1, 1939, be payable under subsection "E" of this section on the basis of such wages. All benefits shall be paid through employment offices in accordance with such regulations as the commission may prescribe.

B. *Weekly benefit amount for total unemployment.* Each eligible individual who is totally unemployed [as defined in section 1551.25 subsection "J" paragraph 1] in any week shall be paid with respect to such week benefits at the rate of fifty per centum of his full-time weekly wages but not more than fifteen dollars per week, nor less than either five dollars, or his full-time weekly wage, whichever is the lesser.

C. *Weekly benefit amount for partial unemployment.* Each eligible individual who is partially unemployed [as defined in section 1551.25 subsection "J" paragraph 2], in any week shall be paid with respect to such week a partial benefit. Such partial benefit shall be an amount which, if added to his wages [as defined in section 1551.25 subsection "M"] for such week, would exceed his weekly benefit amount [as defined in section 1551.25 subsection "O"] by two dollars.

D. *Determination of full-time weekly wage.*

1. The full-time weekly wage of any individual means the weekly wages that such individual would receive if he were employed at the most recent wage rate earned by him in employment by an employer in his base period and for the customary scheduled full-time week prevailing for his occupation in the enterprise in which he last earned wages in employment by an employer during his base period.

2. If the commission finds that the full-time weekly wage, as above defined, would be unreasonable or arbitrary or not readily determinable with respect to any individual, the full-time weekly wage of such individual shall be deemed to be one-thirteenth of his total wages in employment by employers in that quarter in which such total wages were highest during his base period.

E. *Duration of benefits.* The maximum total amount of benefits payable to any eligible individual during any benefit year shall not exceed the balance credited to his account with respect to wages earned in employment by employers during his base period, or fifteen times his weekly benefit amount, whichever is the lesser. The commission shall maintain a separate account for each individual who earns wages in employment by an employer subsequent to December 31, 1936. After the expiration of each calendar quarter, the commission shall credit each such account with one-sixth of such wages earned by such individual during such quarter, or sixty-five dollars, whichever is the lesser. Benefits paid to an eligible individual shall be charged against amounts which have been credited to his account on the basis of wages earned in employment by employers during his base period and which have not previously been charged hereunder, in the same chronological order as such wages were earned.

F. *Part-time workers.*

1. As used in this subsection the term "part-time worker" means an individual whose normal work is in an occupation in which his services are not required for the customary scheduled full-time hours prevailing in the establishment in which he is employed, or who, owing to personal circumstances, does not customarily work the customary scheduled full-time hours prevailing in the establishment in which he is employed.

2. The commission shall prescribe fair and reasonable general rules applicable to part-time workers, for determining their full-time weekly wage, and the total wages in employment by employers required to qualify such workers for benefits. [46ExGA, ch 4,§3; 47GA, ch 102,§3; 48GA, ch 67,§1; ch 68,§8.]

Referred to in §1551.26

BENEFIT ELIGIBILITY CONDITIONS

1551.10 Required findings. An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:

A. He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the commission may prescribe.

B. He has made a claim for benefits in accordance with the provisions of section 1551.12 subsection "A".

C. He is able to work, and is available for work.

D. Prior to any week, in any benefit year, for which he claims benefits he has been totally unemployed for a waiting period of two weeks (and for the purposes of this subsection, two weeks of partial unemployment shall be deemed to be equivalent to one week of total unemployment). Such weeks of total or partial unemployment or both need not be consecutive. No week shall be counted as a week of total unemployment for the purposes of this subsection:

1. If benefits have been paid with respect thereto;

2. Unless the individual was eligible for benefits with respect thereto in all respects except for the requirements of subsections "B" and "E" of this section;

3. Unless it occurs after benefits first could become payable to any individual under this chapter.

E. He has within the first four out of the last five completed calendar quarters immediately preceding the first day of his benefit year, earned wages in employment by employers equal to not less than fifteen times his weekly benefit amount. [46ExGA, ch 4,§4; 47GA, ch 102,§4; 48GA, ch 67, §§2, 6.]

Referred to in §§1551.09, 1551.26

DISQUALIFICATION FOR BENEFITS

1551.11 Causes. An individual shall be disqualified for benefits:

A. *Voluntary quitting.* If he has left his work voluntarily without good cause attributable to his employer, if so found by the commission.

B. *Discharge for misconduct.* If the commission shall find that he has been discharged for misconduct in connection with his employment, his weekly benefits shall then be paid by the commission into the unemployment compensation fund for the week in which he was discharged and for not less than the two nor more than the nine weeks which immediately follow such week (in addition to the waiting period), as determined by the commission in each case according to the circumstances and seriousness of the misconduct. The balance of such weekly benefit shall be paid to him.

C. *Failure to accept work.* If the commission finds that he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the commission or to accept suitable work when offered him, or to return to his customary self-employment, if any.

1. In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence, and any other factor which it finds bears a reasonable relation to the purposes of this subsection.

2. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(b) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(c) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

D. *Labor disputes.* For any week with respect to which the commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that:

1. He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

2. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute:

Provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises.

E. *Other compensation.* For any week with respect to which he is receiving or has received remuneration in the form of:

1. Wages in lieu of notice;

2. Compensation for temporary disability under the workmen's compensation law of any state or under a similar law of the United States; or

3. Old-age benefits under title II of the social security act [42 USC., ch 7], as amended, or similar payments under any act of congress;

4. Benefits paid as retirement pay or as private pension.

Provided, that if such remuneration is less than the benefits which would otherwise be due under this chapter, he shall be entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration.

F. *Benefits from other state.* For any week with respect to which or a part of which he has received or is seeking unemployment benefits under an unemployment compensation law of another state or of the United States, provided that if the appropriate agency of such other state or of the United States finally determines that he is not entitled to such unemployment benefits, this disqualification shall not apply. [46ExGA, ch 4,§5; 47GA, ch 102,§5; 48GA, ch 64, §1; ch 67,§§3, 4; ch 68,§7.]

Referred to in §§1551.12, 1551.25

CLAIMS FOR BENEFITS

1551.12 Filing—determination—appeal.

A. *Filing.* Claims for benefits shall be made in accordance with such regulations as the commission may prescribe.

B. *Initial determination.* A representative designated by the commission, and hereinafter referred to as a deputy, shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal or to the commission, which shall make its determinations with respect thereto in accordance with the procedure described in subsection "C" of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of section 1551.11 subsection "D", the deputy shall promptly transmit his full finding of fact with respect to that subsection to the commission, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit

to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or other interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the commission, shall be paid only after such determination; provided: That if an appeal tribunal affirms a decision of a deputy, or the commission affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.

C. *Appeals.* Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the commission, unless within ten days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection "E" of this section.

D. *Appeal tribunals.* To hear and decide disputed claims, the commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman, one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the commission and be paid a fee, as fixed by the commission per day of active service on such tribunal, plus necessary expenses. No person shall participate on behalf of the commission in any case in which he is an interested party. The commission may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

E. *Commission review.* The commission may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The commission shall permit such further appeal by any of the parties interested in a decision of an appeal tribunal and by the deputy whose decision has been overruled or modified by an appeal tribunal. The commission may remove to itself or transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceeding so removed to the commission shall be heard in accordance with the requirements of subsection "C", by the full membership of the commission, or, in the absence or disqualification of the labor representative or the employer representative on the commission, by the public representative acting alone. The commission shall promptly notify the interested parties of its findings and decision.

F. *Procedure.* The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the commission for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.

G. *Witness fees.* Witnesses subpoenaed pursuant to this section shall be allowed fees and necessary traveling expenses at a rate fixed by the commission, which fees shall be charged to the unemployment compensation administration fund of the commission.

H. *Appeal to courts.* Any decision of the commission in the absence of an appeal therefrom as herein provided shall become final ten days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the commission as provided by this chapter. The commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney who is a regular salaried employee of the commission or who has been designated by the commission for that purpose, or at the commission's request, by the attorney general.

I. *Court review.* Within ten days after the decision of the commission has become final, any party aggrieved thereby may secure judicial review thereof by commencing an action in the district court of the county in which the claimant was last employed or resides, provided that if the claimant does not reside in the state of Iowa the action shall be brought in the district court of Polk county, Iowa, against the commission for the review of its decision, in which action any other party to the proceeding before the commission shall be made a defendant. In such action, a petition which need not be verified, but which shall state the grounds upon which a review is sought, shall be served on a member of the commission or upon such person as the commission may designate and such service shall be deemed completed service on all parties, but

there shall be left with the party so served as many copies of the petition as there are defendants and the commission shall forthwith mail one such copy to each such defendant. With its answer, the commission shall certify and file with said court all documents and papers and a transcript of all testimony taken in the matter, together with its findings of fact and decision therein. The transcript as certified and filed by the commission shall be the record on which the appeal shall be heard, and no additional evidence shall be heard. In the absence of fraud any finding of fact by the commission, after notice and hearing as herein provided, shall be binding upon the court on appeal, when supported by substantial and competent evidence. The commission may also, in its discretion, certify to such* courts, questions of law involved in any decision by it. Such actions, and the questions so certified, shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the workmen's compensation law of this state.

*First part of this sentence repeated in the amendment 48GA, ch 65, §2

J. *Decision on appeal.* Any order or decision of the commission may be modified, reversed, or set aside on one or more of the following grounds and on no other:

1. If the commission acted without or in excess of its powers.
2. If the order or decree was procured by fraud.
3. If the facts found by the commission do not support the order or decree.
4. If there is not sufficient competent evidence in the record to warrant the making of the order or decision.

K. *Judgment or order remanding.* When the district court, on appeal, reverses or sets aside an order or decision of the commission, it may remand the case to the commission for further proceedings in harmony with the holdings of the court, or it may enter the proper judgment, as the case may be. Such judgment or decree shall have the same force and effect as if action had been originally brought and tried in said court.

L. *Appeal.* An appeal may be taken from any final order, judgment, or decree of the district court to the supreme court of Iowa, in the same manner, but not inconsistent with the provisions of this chapter, as is provided in civil cases. It shall not be necessary in any judicial proceeding under this section, to enter exceptions to the rulings of the commission and no bond shall be required for entering such appeal. Upon the final determination of such judicial proceeding, the commission shall enter an order in accordance with such determination. A petition for judicial review shall not act as a supersedeas or stay unless the commission shall so order. [46ExGA, ch 4,§6; 47GA, ch 102,§6; 48GA, ch 65, §§1, 2; ch 69,§1.]

Referred to in §§1551.10, 1551.25

CONTRIBUTIONS

1551.13 Payment—rates.

A. *Payment.*

1. On and after July 1, 1936, contributions shall accrue and become payable by each employer with respect to wages payable for employment as defined in section 1551.25 subsection "G" occurring during such calendar year except that for the six months period beginning July 1, 1936, such contributions shall accrue and become payable solely from employers with respect to wages payable for employment occurring on and after July 1, 1936. Such contributions shall become due and be paid to the commission for the fund at such time and in such manner as the commission may prescribe. Contributions required from an employer shall not be deducted, in whole or in part, from the wages of individuals in his employ.

2. In the payment of any contribution, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

B. *Rate of contribution by employers.* Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

1. One and eight-tenths per centum with respect to employment for the six months period beginning July 1, 1936, provided that if the total of such contributions at such one and eight-tenths per centum rate equals less than nine-tenths of one per centum of the annual payroll of any employer for the calendar year 1936, such employer shall pay, at such time as the commission shall prescribe, an additional lump sum contribution with respect to employment for such six months period beginning July 1, 1936, equal to the difference between nine-tenths of one per centum of his annual payroll for the calendar year 1936 and the total of his contributions at such one and eight-tenths per centum rate for such six months period beginning July 1, 1936, and provided further that in no event shall employers' contributions at such one and eight-tenths per centum rate exceed nine-tenths of one per centum of his annual payroll for the calendar year 1936;

2. One and eight-tenths per centum with respect to employment in the calendar year 1937;

3. Two and seven-tenths per centum with respect to employment during the calendar years 1938, 1939, 1940, 1941; and

4. With respect to employment after December 31, 1941, the percentage determined pursuant to subsection "C" of this section.

C. *Future rates based on benefit experience.*

1. The commission shall maintain a separate account for each employer, and shall credit his account with all the contributions which he has paid on his own behalf. But nothing in this chapter shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him into the fund either on his own behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged against the account of his most recent employers in his base period, against whose accounts the maximum charges hereunder have not previously been made, in the inverse chronological order in which the employment of such individual occurred, but the maximum amount so charged against the account of any

employer shall not exceed one-sixth of the wages payable to such individual by each such employer for employment which occurs on and after the first day of such individual's base period, or sixty-five dollars per completed calendar quarter or portion thereof, whichever is the lesser. The commission shall by general rules prescribe the manner in which benefits shall be charged against the accounts of several employers for whom an individual performed employment during the same week.

2. The commission may prescribe regulations for the establishment, maintenance, and dissolution of joint accounts by two or more employers, and shall, in accordance with such regulations and upon application by two or more employers to establish such an account, or to merge their several individual accounts in a joint account, maintain such joint account as if it constituted a single employer's account.

3. Each employer's rate shall be two and seven-tenths per centum, except as otherwise provided in the preceding or following provisions of this section. No employer's rate shall be less than two and seven-tenths per centum after December 31, 1937, unless and until there shall have been three calendar years after he becomes liable for contributions under this chapter throughout which any individual in his employ could have received benefits if eligible.

4. Each employer's rate for the twelve months commencing January 1 of any calendar year, after December 31, 1941, shall be determined on the basis of his record up to the beginning of such calendar year. If, at the beginning of such calendar year, the total of all his contributions, paid on his own behalf, for all past years exceeds the total benefits charged to his accounts for all such years, his contribution rate shall be:

(a) One and eight-tenths per centum, if such excess equals or exceeds seven and one-half but is less than ten per centum of his average annual pay roll [as defined in section 1551.25 subsection "A" paragraph 2];

(b) Nine-tenths of one per centum, if such excess equals or exceeds ten per centum of his average annual pay roll. If the total of his contributions, paid on his own behalf for all past periods or for the past sixty consecutive calendar months, whichever period is more advantageous to such employer for the purposes of this paragraph, is less than the total benefits charged against his account during the same period, his rate shall be three and six-tenths per centum.

5. No employer's rate for the period of twelve months commencing January 1 of any calendar year after December 31, 1937, shall be less than two and seven-tenths per centum, unless the total assets of the fund, excluding contributions not yet paid at the beginning of such calendar year, exceed the total benefits paid from the fund within the last preceding calendar year; and no employer's rate shall be less than one and eight-tenths per centum unless such assets at such time were at least twice the total benefits paid from the fund within such last preceding year. [46ExGA, ch 4,§7; 47GA, ch 102,§7; 48GA, ch 67,§5.]

Referred to in §1551.26

PERIOD, ELECTION, AND TERMINATION OF EMPLOYER'S COVERAGE

1551.14 Conditions and requirements.

A. Any employing unit which is or becomes an employer subject to this chapter within any calendar year shall be subject to this chapter during the whole of such calendar year.

B. Except as otherwise provided in subsection "C" of this section, an employing unit shall cease to be an employer subject to this chapter, as of the first day of January of any calendar year, if it files with the commission, prior to the fifteenth day of February of such year, a written application for termination of coverage, and the commission finds that there was no fifteen different weeks within the preceding calendar year, within which such employing unit employed eight or more individuals in employment subject to this chapter. For the purpose of this subsection, the two or more employing units mentioned in paragraph 2 or 3 or 4 of section 1551.25 subsection "F" shall be treated as a single employing unit.

C. 1. An employing unit, not otherwise subject to this chapter, which files with the commission its written election to become an employer subject hereto for not less than two calendar years, shall with the written approval of such election by the commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January 1 of any calendar year subsequent to such two calendar years, only if at least thirty days prior to such first day of January, it has filed with the commission a written notice to that effect.

2. Any employing unit for which services that do not constitute employment as defined in this chapter are performed, may file with the commission a written election that all such services performed by individuals in its employ in one or more distinct establishments or places of business shall be deemed to constitute employment for all the purposes of this chapter for not less than two calendar years. Upon the written approval of such election by the commission, such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be deemed employment subject hereto as of January 1, of any calendar year subsequent to such two calendar years, only if at least thirty days prior to such first day of January such employing unit has filed with the commission a written notice to that effect. [46ExGA, ch 4,§8; 47GA, ch 102,§8; 48GA, ch 66,§1.]

Referred to in §1551.25

UNEMPLOYMENT COMPENSATION FUND

1551.15 Control, management and use.

A. *Establishment and control.* There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the commission exclusively for the purposes of this chapter. This fund shall consist of: (1) All contributions col-

lected under this chapter, together with any interest thereon collected pursuant to section 1551.20; (2) all fines and penalties collected pursuant to the provisions of this chapter; (3) interest earned upon any moneys in the fund; (4) any property or securities acquired through the use of moneys belonging to the fund; and (5) all earnings of such property or securities. All moneys in the fund shall be mingled and undivided.

B. *Accounts and deposits.* The state treasurer shall be ex officio treasurer and custodian of the fund and shall administer such fund in accordance with the directions of the commission. The state comptroller shall issue warrants upon the fund pursuant to the order of the commission and such warrants shall be paid from the fund by the treasurer. The treasurer shall maintain within the fund three separate accounts: (1) A clearing account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund shall, upon receipt thereof by the commission, be forwarded to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to section 1551.20 shall be paid by the treasurer from the clearing account upon warrants issued by the comptroller under the direction of the commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section 904 of the social security act as amended, any provisions of law in this state relating to the deposit, administration, release or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund. Except as herein otherwise provided moneys in the clearing and benefit account may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The treasurer shall give a separate bond conditioned upon the faithful performance of his duties as custodian of the fund in an amount fixed by the governor and in form and manner prescribed by law. Premiums for said bond shall be paid from the administration fund.

C. *Withdrawals.* Moneys shall be requisitioned from this state's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the commission. The commission shall from time to time requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to the account of this state therein, as the commission deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account, and shall disburse such moneys upon warrants drawn by the comptroller pursuant to the order of the commission for the payment of benefits solely from such benefit account. Expenditures of such moneys from the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. All warrants issued by the comptroller for the payment of benefits and refunds shall bear the signature of the comptroller. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the commission, shall be redeposited with the secretary of the treasury of the United States, to the credit of this state's account in the unemployment trust fund, as provided in the subsection "B" of this section.

D. *Management of funds in the event of discontinuance of unemployment trust fund.* The provisions of subsections "A", "B", and "C" to the extent that they relate to the unemployment trust fund shall be operative only so long as such unemployment trust fund continues to exist and so long as the secretary of the treasury of the United States continues to maintain for this state a separate book account of all funds deposited therein by this state for benefit purposes, together with this state's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein, belonging to the unemployment compensation fund of this state shall be transferred to the treasurer of the unemployment compensation fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the commission, in accordance with the provisions of this chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities; such securities as are authorized by the laws of the state of Iowa for the investment of trust funds. The treasurer shall dispose of securities and other properties belonging to the unemployment compensation fund only under the direction of the commission.

E. *Transfer to railroad account.* Notwithstanding any requirements of the foregoing subsections of this section, the commission shall, prior to July 1, 1939, authorize and direct the secretary of the treasury of the United States to transfer from this state's account in the unemployment trust fund, established and maintained pursuant to section 904 of the social security act as amended, to the railroad unemployment insurance account, established and maintained pursuant to section 10 of the railroad unemployment insurance act*, an amount hereinafter referred to as the preliminary amount;

and shall, prior to January 1, 1940, authorize and direct the secretary of the treasury of the United States to transfer from this state's account in said unemployment trust fund to said railroad unemployment insurance account an additional amount, hereinafter referred to as the liquidating amount. The social security board shall determine both such amounts after consultation with the commission and the railroad retirement board. The preliminary amount shall consist of that proportion of the balance in the unemployment compensation fund as of June 30, 1939, as the total amount of contributions collected from "employers" as the term "employer" is defined in section 1(a) of the railroad unemployment insurance act, and credited to the unemployment compensation fund bears to all contributions theretofore collected under this chapter and credited to the unemployment compensation fund. The liquidating amount shall consist of the total amount of contributions collected from "employers" as the term "employer" is defined in section 1(a) of the railroad unemployment insurance act pursuant to the provisions of this chapter during the period July 1, 1939 to December 31, 1939, inclusive. [46ExGA, ch 4,§9; 47GA, ch 102,§9; 48GA, ch 68,§1.]

Referred to in §§1551 19, 1551.26

*See 45 USC., ch 11

UNEMPLOYMENT COMPENSATION COMMISSION

1551.16 The commission, secretary and divisions.

A. *Commission created.* There is hereby created a commission to be known as the Iowa unemployment compensation commission. The commission shall consist of three members who shall devote their entire time to the duties of their office; one of whom shall be a representative of labor, one of whom shall be a representative of employers, and one of whom shall be impartial and shall represent the public generally. During his term of membership on the commission no member shall serve as an officer or committee member of any political party organization, and not more than two members of the commission shall be members of the same political party. Each of the three members of the commission shall be appointed by the governor immediately after the effective date of this chapter, subject to approval by a two-thirds vote of the members of the senate in executive session, and shall serve for a term of six years, or until his successor is appointed and qualified, except that

1. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and

2. The terms of the members first appointed after the date of enactment of this chapter shall expire, as designated by the governor at the time of appointment, one member on June 30, 1939, and one member on June 30, 1941, and one member on June 30, 1943, or in each of the foregoing instances until his successor is appointed and qualified.

The governor may at any time, after notice and hearing, remove any commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in the performance of his duties as a member of the commission. Before entering upon the discharge of his official duties, each member of the commission shall take and subscribe to an oath of office, which shall be filed in the office of the secretary of state. Any vacancy occurring for any cause in the membership of this commission shall be filled for the unexpired term by appointment by the governor subject to approval by a two-thirds vote of the members of the senate in executive session at the next regular session of the legislature. Each member of the commission shall be entitled to receive as compensation for his services the sum of forty-five hundred dollars per year, payable monthly. In addition to the compensation hereinbefore prescribed, each member of the commission shall be entitled to receive the amount of his traveling and other necessary expenses actually incurred while engaged in the performance of his official duties. For the purposes of this chapter the first meeting in January shall be designated the annual meeting. Two members of the commission shall constitute a quorum for the transaction of business. At its first meeting, and at each annual meeting held thereafter, the commission shall organize by the election of a chairman and vice chairman from its own number, each of whom, except those first elected, shall serve for a term of one year and until his successor is elected. The commission shall adopt and use an official seal for the authentication of its orders and records. The commission shall establish and maintain its principal place of business in the city of Des Moines.

B. *Secretary.* The commission shall select and appoint a secretary of the commission. He shall serve at the pleasure of the commission and shall perform such duties and receive a salary not to exceed twenty-four hundred dollars per year. Before entering upon the discharge of his official duties the secretary shall execute a bond, payable to the state of Iowa in such amount and with such sureties as shall be approved by the commission, conditioned upon the faithful discharge of his official duties, and he shall likewise take and subscribe an oath, which shall be indorsed upon his official bond, and the bond and oath when so executed shall be filed in the office of the secretary of state.

C. *Divisions.* The commission shall establish two coordinate divisions: the Iowa state employment service division created pursuant to section 1551.18, and the unemployment compensation division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel, budget and duties, but shall coordinate one with the other in such manner as the commission may prescribe. [46ExGA, ch 4,§10; 47GA, ch 102 §10; ch 103,§1; 48GA, ch 69,§2.]

ADMINISTRATION

1551.17 Powers, rules and personnel.

A. *Duties and powers of commission.* It shall be the duty of the commission to administer the

chapter; and it shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable to that end. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the commission shall prescribe. Not later than the fifteenth day of February of each year, the commission shall submit to the governor a report covering the administration and operation of this chapter during the preceding calendar year and shall make such recommendations for amendments to this chapter as the commission deems proper. Such report shall include a balance sheet of the moneys in the fund. Whenever the commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the governor and the legislature, and make recommendations with respect thereto.

B. *Regulations and general and special rules.* General and special rules may be adopted, amended, or rescinded by the commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective ten days after filing with the secretary of state and publication in one or more newspapers of general circulation in this state. Special rules shall become effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the commission and shall become effective in the manner and at the time prescribed by the commission. Each employer shall post and maintain printed statements of all regulations in places readily accessible to individuals in his service, and shall make available to each such individual at the time he becomes unemployed a printed statement of such regulations relating to the filing of claims for benefits. Such printed statements shall be supplied by the commission to each employer without cost to him.

C. *Publication.* The commission shall cause to be printed for distribution to the public the text of this chapter, the commission's regulations and general rules, its annual reports to the governor, and any other material the commission deems relevant and suitable and shall furnish the same to any person upon application therefor.

D. *Personnel.* Subject to other provisions of this chapter, the commission is authorized to appoint, fix the compensation, but not to exceed for any employee twenty-four hundred dollars per year except the compensation for certified public accountants, actuaries which shall not exceed thirty-six hundred dollars per year, and legal counsel which shall not exceed four thousand dollars per year, provided, however, that the above scale of compensation shall not apply to the Iowa state employment service division provided for in section 1551.18 subsection "A", and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. The commission shall classify its positions and shall establish salary schedules and minimum personnel standards for the positions so classified. All positions shall be filled by persons selected and appointed on the basis of competency and fitness for the position to be filled. The commission shall not appoint or employ any person who is an officer or committee member of any political party organization or who holds or is a candidate for any elective public office. The commission shall establish and enforce fair and reasonable regulations for appointments, promotions and demotions based upon ratings of efficiency and fitness and for terminations for cause. The commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this chapter, and may in its discretion bond any person handling moneys or signing checks hereunder. Not more than sixty percent of the employees of the said commission shall be members of any one political party.

E. *Advisory councils.* The commission may appoint a state advisory council and local advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representatives because of their vocation, employment, or affiliations, and of such members representing the general public as the commission may designate. Such councils shall aid the commission in formulating policies and discussing problems related to the administration of this chapter and in assuring impartiality and freedom from political influence in the solution of such problems. Such advisory councils shall serve without compensation, but shall be reimbursed for any necessary expenses.

F. *Employment stabilization.* The commission with the advice and aid of such advisory councils as it may appoint, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the state, of reserves for public works to be used in times of business depression and unemployment; to promote the reemployment of unemployed workers throughout the state in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.

G. *Records and reports.* Each employing unit shall keep true and accurate work records, containing such information as the commission may prescribe. Such records shall be open to inspection and be subject to being copied by the commission or its authorized representatives at any reasonable time and as often as may be necessary. The commission may require from any employing unit any sworn or unsworn reports,

with respect to persons employed by it, which the commission deems necessary for the effective administration of this chapter. Information thus obtained shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the employing unit's identity, but any claimant at a hearing before an appeal tribunal or the commission shall be supplied with information from such records to the extent necessary for the proper presentation of his claim. Any employee or member of the commission who violates any provision of this section shall be fined not less than twenty dollars nor more than two hundred dollars, or imprisoned for not longer than ninety days, or both.

H. *Oaths and witnesses.* In the discharge of the duties imposed by this chapter, the chairman of an appeal tribunal and any duly authorized representative or member of the commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this chapter.

I. *Subpoenas.* In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of this state within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the commission, or appeal tribunal, or any member or duly authorized representative thereof, shall have jurisdiction to issue to such person an order requiring such person to appear before the commission, or an appeal tribunal, there to produce evidence if so ordered or there to give testimony touching the matter under investigation or in question; any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who shall without just cause fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if it is in his power to do so, in obedience to a subpoena, shall be punished by a fine of not more than two hundred dollars or by imprisonment, for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

J. *Protection against self-incrimination.* No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the commission, or an appeal tribunal, or in obedience to a subpoena in any cause or proceeding provided for in this chapter, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty of forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

K. *State-federal cooperation.* In the administration of this chapter, the commission shall cooperate to the fullest extent consistent with the provisions of this chapter, with the federal social security board, created by the social security act, passed by congress and approved August 14, 1935, as amended; shall make such reports, in such form and containing such information as the federal social security board may from time to time require, and shall comply with such provisions as the federal social security board may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by the federal social security board governing the expenditures of such sums as may be allotted and paid to this state under title III of the social security act for the purpose of assisting in administration of this chapter. Upon request therefor the commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits and such recipient's rights to further benefits under this chapter.

The commission may make its records relating to the administration of this chapter available to the railroad retirement board, and may furnish the railroad retirement board such copies thereof as the railroad retirement board deems necessary for its purposes. The commission may afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law. The railroad retirement board or any other agency requiring such services and reports from the commission shall pay the commission such compensation therefor as the commission determines to be fair and reasonable. [46ExGA, ch 4,§11; 47GA, ch 102,§11; 48GA, ch 68,§2.]

Referred to in §1551.25

EMPLOYMENT SERVICE

1551.18 State service absorbed.

A. *State employment service.* The Iowa state employment service, as provided in chapters 75 and 77 of the code, is hereby transferred to the commission as a division thereof, which shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this chapter and for the purpose of performing such duties as are within the purview of the act of congress entitled "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes", approved June 6, 1933 (48 Stat. 113; U S. C., title 29, section 49, as amended). The said

division shall be administered by a full-time salaried director, who shall be charged with the duty to cooperate with any official or agency of the United States having powers or duties under the provisions of the said act of congress, as amended, and to do and perform all things necessary to secure to this state the benefits of the said act of congress, as amended, in the promotion and maintenance of a system of public employment offices. The Iowa state employment service division is hereby designated and constituted the agency of this state for the purposes of said act. The commission is directed to appoint the director, other officers and employees of the Iowa state employment service. Such appointment shall be made in accordance with regulations prescribed by the director of the United States employment service. If this chapter shall become inoperative for the reason prescribed in section 1551.27, the Iowa state employment division shall not be affected thereby, but such division shall, upon the happening of such contingency, be deemed to be a division of the bureau of labor of the state of Iowa, with the same force and effect as if this chapter had not been passed, and that all funds and property made available to the Iowa state employment service division under this chapter shall under such contingency become, and shall be declared to be, the funds and property of the Iowa state employment service of the bureau of labor of Iowa. The commission may cooperate with or enter into agreements with the railroad retirement board with respect to the establishment, maintenance, and use of employment service facilities. The railroad retirement board shall compensate the commission for such services or facilities in the amount determined by the commission to be fair and reasonable.

B. *Financing.* All moneys received by this state under the said act of congress, as amended, shall be paid into the special "employment service account" in the unemployment compensation administration fund, and said moneys are hereby made available to the Iowa state employment service to be expended as provided by this section and by said act of congress. For the purpose of establishing and maintaining free public employment offices, the commission is authorized to enter into agreements with the railroad retirement board, or any other agency of the United States charged with the administration of an unemployment compensation law, with any political subdivision of this state, or with any private, nonprofit organization, and as a part of any such agreement the commission may accept moneys, services, or quarters as a contribution to the employment service account. [46ExGA, ch 4,§12; 47GA, ch 102,§12; 48GA, ch 68,§§3, 4.]

Referred to in §§1551.16, 1551.17, 1551.19

UNEMPLOYMENT COMPENSATION ADMINISTRATION FUND

1551.19 Control and use.

A. *Special fund.* There is hereby created in the state treasury a special fund to be known as the unemployment compensation administration fund. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the commission. All moneys in this fund shall be expended solely for the purpose of defraying the cost of the administration of this chapter, and for no other purpose whatsoever. The fund shall consist of all moneys appropriated by this state, and all moneys received from the United States, or any agency thereof, including the social security board, the railroad retirement board, and the United States employment service, or from any other source, for such purpose. Moneys received from the railroad retirement board, or any other agency, as compensation for services or facilities supplied to said board or agency shall be paid to the commission, and the commission shall allocate said moneys to the fund and the employment service account thereof on the same basis as expenditures are made from such fund or account for such services or facilities. All moneys in this fund shall be deposited, administered, and disbursed, in the same manner and under the same conditions and requirements as is provided by law for special funds in the state treasury. Any balances in this fund shall not lapse at any time, but shall be continuously available to the commission for expenditure consistent with this chapter. The state treasurer shall give a separate and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation administration fund in an amount and with such sureties as shall be fixed and approved by the governor. The premiums for such bond and the premiums for the bond given by the treasurer of the unemployment compensation fund under section 1551.15, shall be paid from the moneys in the unemployment administration fund.

B. *Employment service account.* A special "employment service account" shall be maintained as a part of the unemployment compensation administration fund for the purpose of maintaining the public employment offices established pursuant to section 1551.18 and for the purpose of cooperating with the United States employment service. There is hereby transferred to the employment service account of the unemployment compensation administration fund, the unexpended balance of any money heretofore appropriated or received for the Iowa state employment service. In addition, there shall be paid into such account the moneys designated in section 1551.18 subsection "B", and such moneys as are apportioned for the purpose of this account from any moneys received by this state under title III of the social security act, as amended. [46ExGA, ch 4,§13; 47GA, ch 102,§13; 48GA, ch 68,§5; ch 69,§3.]

COLLECTION OF CONTRIBUTIONS

1551.20 Priority—refunds.

A. *Interest on past-due contributions.* Contributions unpaid on the date on which they are due and payable, as prescribed by the commission, shall bear interest at the rate of one per centum per month from and after such date until payment plus accrued interest is received by the commission, provided that

the commission may prescribe fair and reasonable regulations pursuant to which such interest shall not accrue with respect to contributions required. Interest collected pursuant to this subsection shall be paid into the unemployment compensation fund.

B. *Collection.* If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this chapter and cases arising under the workmen's compensation law of this state.

C. *Priorities under legal dissolutions or distributions.* In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes and claims for wages preferred as provided by statute. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the federal bankruptcy act of 1898, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section 64(b) of that act [11 USC., §104(b), as amended].

D. *Refunds, compromises and settlements.* In any case in which the commission finds that an employer has paid contributions or interest thereon, which have been erroneously paid, and who has filed an application for adjustment thereof, the commission shall make such adjustment, compromise, settlement, and make such refund of erroneous payments as it finds just and equitable in the premises. Refunds so made shall be charged to the fund to which the erroneous collections have been credited, and shall be paid to the claimant without interest. Any claim for such refund shall be made within three years from the date of payment. For like cause, adjustments, compromises or refunds may be made by the commission on its own initiative.

E. *Nonresident employing units.* Any employing unit which is a nonresident of the state of Iowa and for which services are performed in insured work within the state of Iowa by having such services performed within the state of Iowa shall be deemed:

1. To agree that such employing unit shall be subject to the jurisdiction of the district court of the state of Iowa over all civil actions and proceedings against such employing unit for all purposes of this chapter, and

2. To appoint the secretary of state of this state as its lawful attorney upon whom may be served all original notices of suit and other legal processes pertaining to such actions and proceedings, and

3. To agree that any original notice of suit or any other legal process so served upon such nonresident employing unit shall be of the same legal force and validity as if personally served on it in this state.

F. *Applicability.* Sections 5079-d13 to 5079-d22, inclusive*, chapter 251, code of Iowa, 1935, shall be applicable to all civil actions and proceedings brought against any employing units under the provisions of subsection "E". [46ExGA, ch 4,§14; 47GA, ch 102,§14; 48GA, ch 66, §§2, 3; ch 69,§7.]

Referred to in §§1551.15, 1551.22
*Repealed by 47GA, ch 134,§527

PROTECTION OF RIGHTS AND BENEFITS

1551.21 Waiver—fees—assignments.

A. *Waiver of rights void.* Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this chapter from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by any individual in his employ. Any employer or officer or agent of an employer who violates any provision of this subsection shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned for not more than six months, or both.

B. *Limitation of fees.* No individual claiming benefits shall be charged fees of any kind in any proceeding under this chapter by the commission or its representatives or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the commission, or an appeal tribunal or a court may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the commission. Any person who violates any provisions of this subsection shall, for each such offense, be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both.

C. *No assignment of benefits—exemptions.* Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be void, and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts. Any waiver of any exemption provided for in this subsection shall be void. [46ExGA, ch 4,§15; 47GA, ch 102,§15.]

1551.22 Offenses.

A. *Penalties.* Whoever makes a false statement or representation knowing it to be false

or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this chapter, either for himself or for any other person, shall be punished by a fine of not less than twenty dollars nor more than fifty dollars or by imprisonment for not longer than thirty days. Each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

B. *False statement.* Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto, or to avoid or reduce any contribution or other payment required from an employing unit under this chapter, or who wilfully fails or refuses to make any such contributions or other payment or to furnish any reports required hereunder or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment for not longer than sixty days, or by both such fine and imprisonment; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal, shall constitute a separate offense.

C. *Unlawful acts.* Any person who shall wilfully violate any provisions of this chapter or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

D. *Misrepresentation.* Any person who, by reason of the nondisclosure or misrepresentation by him or by another, of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) has received any sum as benefits under this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the commission, either be liable to have such sum deducted from any future benefits payable to him under this chapter or shall be liable to repay to the commission for the unemployment compensation fund, a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in section 1551.20 subsection "B" for the collection of past-due contributions. [46ExGA, ch 4,§16; 47GA, ch 102,§16; 48GA, ch 69,§6.]

REPRESENTATION IN COURT

1551.23 Counsel.

A. *Legal services.* In any civil action to enforce the provisions of this chapter, the commission and the state may be represented by any qualified attorney who is a regular salaried employee of the commission and is designated by it for this purpose or, at the commission's request, by the attorney general. In case the governor designates special counsel to defend on behalf of the state, the validity of this chapter, the expenses and compensation of such special counsel employed by the commission in connection with such proceeding may be charged to the unemployment compensation administration fund.

B. *County attorney.* All criminal actions for violations of any provision of this chapter, or of any rules or regulations issued by the commission pursuant thereto, shall be prosecuted by the prosecuting attorney of any county in which the employer has a place of business or the violator resides, or, at the request of the commission, shall be prosecuted by the attorney general. [46ExGA, ch 4,§17; 47GA, ch 102,§17.]

1551.24 Nonliability of state. Benefits shall be deemed to be due and payable under this chapter only to the extent provided in this chapter and to the extent that moneys are available therefor to the credit of the unemployment compensation fund, and neither the state nor the commission shall be liable for any amount in excess of such sums. [46ExGA, ch 4,§18; 47GA, ch 102,§18.]

DEFINITIONS

1551.25 Scope. As used in this chapter, unless the context clearly requires otherwise:

A. 1. "Annual pay roll" means the total amount of wages payable by an employer (regardless of the time of payment) for employment during a calendar year.

2. "Average annual pay roll" means the average of the annual pay rolls of any employer for the last three or five years, whichever average is higher.

B. "Benefits" means the money payments payable to an individual, as provided in this chapter, with respect to his unemployment.

C. "Commission" means the unemployment compensation commission established by this chapter.

D. "Contributions" means the money payments to the state unemployment compensation fund required by this chapter.

E. "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this chapter. Whenever any employing unit contracts with or has under it any contractor or subcontractor for any work which is part of its usual trade,

occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection "F" or section 1551.14 subsection "C", the employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such work; except that each such contractor or subcontractor who is an employer by reason of subsection "F" or section 1551.14 subsection "C" shall alone be liable for the contributions measured by wages payable to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or subcontractor who is not an employer by reason of subsection "F" or section 1551.14 subsection "C", may recover the same from such contractor or subcontractor, except as any contractor or subcontractor who would in the absence of the foregoing provisions be liable to pay said contributions, accepts exclusive liability for said contributions under an agreement with such employer made pursuant to general rules of the commission. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work, and provided, further, that such employment was for a total of not less than eight hours in any one calendar week.

F. "Employer" means:

1. Any employing unit which for some portion of a day in each of fifteen different weeks within either the current or the preceding calendar year, excepting the calendar year 1935 (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such day);

2. Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter;

3. Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph 1 of this subsection;

4. Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph 1 of this subsection;

5. Any employing unit which, having become an employer under paragraph 1, 2, 3 or 4, has not, under section 1551.14, ceased to be an employer subject to this chapter; or

6. For the effective period of its election pursuant to section 1551.14 subsection "C" any other employing unit which has elected to become fully subject to this chapter.

7. Any employing unit which has in its employ any employee who is not covered by the unemployment compensation law of any other state and which employee is subject to the title IX federal social security act.

G. 1. Except as otherwise provided in this subsection G, "employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

2. The term "employment" shall include an individual's entire service, performed within or both within and without this state if:

(a) The service is localized in this state, or

(b) The service is not localized in any state but some of the service is performed in this state and (1) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (2) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

3. Services performed within this state but not covered under paragraph 2 of this subsection shall be deemed to be employment subject to this chapter if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

4. Services not covered under paragraph 2 of this subsection, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this chapter if the individual performing such services is a resident of this state and the commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter.

5. Service shall be deemed to be localized within a state if:

(a) The service is performed entirely within such state, or

(b) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

6. Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commission that

(a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact.

7. The term "employment" shall not include:

(a) Service performed in the employ of this state, or of any political subdivision thereof, or of any instrumentality of this state or its political subdivisions;

(b) Service performed in the employ of any other state or its political subdivisions, or of the United States government, or of an instrumentality of any other state or states or their political subdivisions or of the United States;

(c) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress; provided, that the commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of congress, which agreements shall become effective ten days after publication thereof in the manner provided in section 1551.17 subsection "B" for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under such act of congress, or who have, after acquiring potential rights to unemployment compensation under such act of congress, acquired rights to benefits under this chapter;

(d) Agricultural labor;

(e) Domestic service in a private home;

(f) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(g) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(h) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(i) Services performed during school vacations or outside of school hours by students who devote their time and efforts chiefly to their studies, rather than to incidental employment.

H. "Employment office" means a free public employment office, or branch thereof, operated by this state or maintained as a part of a state-controlled system of public employment offices.

I. "Fund" means the unemployment compensation fund established by this chapter, to which all contributions required and from which all benefits provided under this chapter shall be paid.

J. "Total and partial unemployment".

1. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to him and during which he performs no services (other than odd jobs or subsidiary work for which no wages as used in this subsection are payable to him).

2. An employee shall be deemed "partially unemployed" in any week of less than full-time work if his wages payable for such week fail to equal two dollars more than the weekly benefit amount he would be entitled to receive if totally unemployed and eligible.

3. As used in this subsection, the term "wages" shall include only that part of wages for odd jobs or subsidiary work, or both, which is in excess of three dollars in any one week.

4. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the commission may by regulation otherwise prescribe.

K. "State" includes, in addition to the states of the United States, Alaska, Hawaii, and the District of Columbia.

L. "Unemployment compensation administration fund" means the unemployment compensation administration fund established by this chapter, from which administration expenses under this chapter shall be paid.

M. "Wages" means all remuneration payable for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash. The reasonable cash value of remuneration payable in any medium other than cash, shall be estimated and determined in accordance with rules prescribed by the commission.

N. "Week" means such period or periods of seven consecutive calendar days ending at midnight, or as the commission may by regulations prescribe.

O. "Weekly benefit amount". An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total unemployment. An individual's weekly benefit amount, as determined for the first week of his benefit year, shall constitute his weekly benefit amount throughout such benefit year.

P. "Benefit year" of a claimant means the fifty-two consecutive weeks period beginning with the day on which he filed a valid claim for benefits and thereafter, the fifty-two consecutive weeks period beginning with the day on which such claimant next files a valid claim after the termination of his last preceding benefit year. Any claim for benefits made in accordance with section 1551.12 subsection "A" shall be deemed to be a valid claim for the purposes of this subsection if the individual has earned the wages for insured work required under the provisions of this chapter.

Q. "Base period" means the period beginning with the first day of the nine completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which he filed a valid claim.

R. "Calendar quarter" means the period of three consecutive calendar months ending on March 31, June 30, September 30 or December

31, excluding, however, any calendar quarter or portion thereof which occurs prior to January 1, 1937, or the equivalent thereof as the commission may by regulation prescribe.

S. "Customary self-employment". An employee shall be deemed to be engaged in "his customary self-employment", as said words are used in section 1551.11, during the periods in which he customarily devotes the major portion of his working time and efforts: (1) to his individual enterprises and interests; or (2) to her duties as housewife; or (3) to attending classes and preparing his studies for any school or college.

T. "Insured work" means employment for employers. [46ExGA, ch 4,§19; 47GA, ch 102, §19; 48GA, ch 64,§2; ch 65,§§3-5; ch 69,§§4, 5; ch 70,§1.]

Referred to in §§1551.09, 1551.13, 1554.14

1551.26 Reciprocal benefit arrangements. A. The commission is hereby authorized to enter into arrangements with the appropriate agencies of other states or the federal government whereby potential rights to benefits accumulated under the unemployment compensation laws of several states or under such a law of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms which the commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund.

B. The commission may enter into arrangements with the appropriate agencies of other states or of the federal government (1) whereby wages or services, upon the basis of which an individual may become entitled to benefits under the unemployment compensation law of another state or of the federal government, shall be deemed to be wages for employment by employers for the purposes of section 1551.09 and section 1551.10 subsection "E", provided such other state agency or agency of the federal government has agreed to reimburse the fund for such portion of benefits paid under this chapter upon the basis of such wages or services as the commission finds will be fair and reasonable as to all affected interests, and (2) whereby the commission will reimburse other state or federal agencies charged with the administration of unemployment compensation laws with such reasonable portion of benefits, paid under the law of any such other states or of the federal government upon the basis of employment or wages for employment by employers, as the commission finds will be fair and reasonable as to all affected interests. Reimbursements so payable shall be deemed to be benefits for the purposes of section 1551.09 subsection "E" and section 1551.15, but no reimbursement so payable shall be charged against any employer's account for the purposes of section 1551.13. The commission is hereby authorized to make to other state or federal agencies and receive from such other state or federal agencies, reimbursements from or to the fund, in accordance with arrangements pursuant to this section. [46ExGA, ch 4,§20; 47GA, ch 102,§20; 48GA, ch 68,§6.]

Constitutionality, 46ExGA, ch 4, §§22, 23; 47GA, ch 102, §§22, 23
Omnibus repeal, 48GA, ch 64, §3
Omnibus repeal, 48GA, ch 65, §6
Omnibus repeal, 48GA, ch 67, §7
Omnibus repeal, 48GA, ch 68, §9
Omnibus repeal, 48GA, ch 69, §8
Saving clause, 46ExGA, ch 4,§21; 47GA, ch 102,§21

1551.27 Termination. If at any time title IX of the social security act, as amended, shall be amended or repealed by congress or held unconstitutional by the supreme court of the United States, with the result that no portion of the contributions required under this chapter may be credited against the tax imposed by said title IX, in any such event the operation of the provisions of this chapter requiring the payment of contributions and benefits shall immediately cease, the commission shall thereupon requisition from the unemployment trust fund all moneys therein standing to its credit, and such moneys, together with any other moneys in the unemployment compensation fund shall be refunded, without interest and under regulations prescribed by the commission, to each employer by whom contributions have been paid, proportionately to his pro rata share of the total contributions paid under this chapter. Any interest or earnings of the fund shall be available to the commission to pay for the costs of making such refunds. When the commission shall have executed the duties prescribed in this section and performed such other acts as are incidental to the termination of its duties under this chapter, the provisions of this chapter, in their entirety, shall cease to be operative. [46ExGA, ch 4,§24; 47GA, ch 102, §24.]

Referred to in §1551.18
Omnibus repeal, 47GA, ch 102,§25

CHAPTER 78

CIGARETTES AND TOBACCO

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1552 Definition of words, terms and phrases. The following words, terms and phrases, when used in this chapter, shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

1. "Cigarette" shall mean and include any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any other material. Provided the definition herein shall not be construed to include cigars. Excepting where the context clearly shows that cigarettes alone are intended, the term "cigarettes" shall mean and include cigarettes, cigarette papers or wrappers, and tubes upon which a tax is imposed by section 1556.01.

2. "Individual packages of cigarettes" shall mean and include every package of cigarettes ordinarily sold at retail, and shall include any and every package of cigarettes upon which a federal stamp or token is required. "Packages of cigarettes" shall also include books and sets of papers, wrappers, or tubes.

3. "Person" shall mean and include every individual, firm, association, joint stock company, syndicate, copartnership, corporation, trustee, agency or receiver, or respective legal representative.

4. "Place of business" is construed to mean and include any place where cigarettes are sold or where cigarettes are stored or kept for the purpose of sale or consumption; or if sold from any vehicle or train, the vehicle or train on which or from which such cigarettes are sold shall constitute a place of business.

5. "Stamps" shall mean the stamp or stamps printed, manufactured or made by authority of the commission, as hereinafter provided, and issued, sold or circulated by it and by the use of which the tax levied hereunder is paid. It shall also mean any impression, indicium, or character fixed upon packages of cigarettes, cigarette papers, or tubes by metered stamping machine or device which may be authorized by the commission to the holder of state or manufacturers' permits and by the use of which the tax levied hereunder is paid.

6. "Counterfeit stamp" shall mean any stamp, label, print, indicium or character which evidences, or purports to evidence the payment of any tax levied by this chapter, and which stamp, label, print, indicium or character has not been printed, manufactured or made by authority of the commission as hereinafter provided, and issued, sold or circulated by it.

7. "Previously used stamp" shall mean and include any stamp which is used, sold, or possessed for the purpose of sale or use, to evidence the payment of the tax herein imposed on an individual package of cigarettes after said stamp has, anterior to such use, sale or possession, been used on a previous or separate individual package of cigarettes to evidence the payment of tax as aforesaid.

8. "First sale" shall mean and include the first sale or distribution of cigarettes in intrastate commerce, or the first use or consumption of cigarettes within this state.

9. "Drop-shipment" shall mean and include any delivery of cigarettes received by any person within this state when payment for such cigarettes is made to the shipper or seller by or through a person other than the consignee.

10. "Commission" shall mean the state tax commission of Iowa or its duly authorized assistants and employees.

11. "Attorney general" shall mean the attorney general of the state of Iowa or his duly authorized assistants and employees.

12. "Distributor" shall mean and include every person in this state who manufactures or produces cigarettes or who ships, transports, or imports into this state or in any manner acquires or possesses cigarettes without stamps affixed for the purpose of making a "first sale" of the same within the state.

13. "Wholesaler" shall mean and include every person other than a distributor or distributing agent who engages in the business of selling or distributing cigarettes within the state, for the purpose of resale.

14. "Retailer" shall mean and include every person in this state who shall sell, distribute, or offer for sale for consumption or possess for the purpose of sale for consumption, cigarettes irrespective of quantity or amount or the number of sales.

15. "Distributing agent" shall mean and include every person in this state who acts as an agent of any manufacturer outside of the state by storing cigarettes received in interstate commerce from such manufacturer subject to distribution or delivery to distributors upon orders received by said manufacturer in interstate commerce and transmitted to such distributing agent for fulfillment from such place of storage.

16. "Manufacturer" shall mean and include every person who ships cigarettes into this state from outside the state.

17. "State permit" shall mean and include permits issued by the commission to distributors, wholesalers, and retailers within the state.

18. "Retail permit" shall mean and include permits issued to retailers.

19. "Manufacturer's permit" shall mean and

include permits issued by the commission to a manufacturer.

20. "Distributing agent's permit" shall mean and include permits issued by the commission to distributing agents. [C24, 27, 31, 35,§1552; 48GA, ch 72,§§1, 36; ch 73,§10.]

1553 Sale or gift to minor prohibited. No person shall furnish to any minor under twenty-one years of age by gift, sale, or otherwise, any cigarette or cigarette paper, or any paper or other substance made or prepared for the purpose of use in making of cigarettes. No person shall directly or indirectly by himself or agent sell, barter, or give to any minor under sixteen years of age any tobacco in any other form whatever except upon the written order of his parent or guardian or the person in whose custody he is. [C97,§§5005,5006; C24, 27, 31, 35,§1553.]

Referred to in §§1554, 1556

1554 Violation. Any person who shall violate any of the provisions of section 1553 shall for the first offense be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than thirty days. For a second or any subsequent violation such person shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than one month nor more than six months or by both such fine and imprisonment. [C97,§§5005, 5006; C24, 27, 31, 35,§1554.]

1555 Minors required to give information. Any minor under twenty-one years of age in any place other than at the home of his parent or parents, being in the possession of a cigarette or cigarette papers, shall be required at the request of any peace officer, juvenile court officer, truant officer, or teacher in any school to give information as to where he or she obtained such article. [S13,§5007-c,-d; C24, 27, 31, 35,§1555.]

Referred to in §1556

1556 Violation. Any minor under twenty-one years of age refusing to give information as required by section 1555 shall be guilty of a misdemeanor and if eighteen years of age or over, shall be punished by a fine not exceeding five dollars or by imprisonment in the county jail not exceeding five days, or by both such fine and imprisonment.

If such minor shall be under the age of eighteen years he or she shall be certified by the magistrate or justice of the peace before whom the case is tried, to the juvenile court of the county for such action as said court shall deem proper.

If any minor having been convicted of violating section 1555 shall give information which shall lead to the arrest of the person or persons having violated any of the provisions of section 1553 and shall give evidence as a witness in any proceedings that may be prosecuted against said person or persons, the court in its discretion may suspend sentence against the offending minor. [S13,§§5007-c,-d; C24, 27, 31, 35,§1556.]

1556.01 Tax imposed.

1. There is hereby levied, assessed, and imposed, and shall be collected and paid to the commission the following taxes on all cigarettes used or otherwise disposed of in this state for any purpose whatsoever:

Class A. On cigarettes weighing not more than three pounds per thousand, one mill on each such cigarette.

Class B. On cigarettes weighing more than three pounds per thousand, two mills on each such cigarette.

Class C. On cigarette papers or wrappers or any papers made or prepared for the purpose of making cigarettes, made up in packages, books, or sets, on each such package, book, or set, containing:

a. Fifty papers or less, one-half cent.

b. More than fifty papers but not more than one hundred papers, one cent.

c. More than one hundred papers, one-half cent for each fifty or fractional part thereof.

Class D. On tubes, one cent for each fifty tubes or fractional part thereof.

2. The said tax shall be paid only once by the person making the "first sale" in this state, and shall become due and payable as soon as such cigarettes are subject to a first sale in Iowa, it being intended to impose the tax as soon as such cigarettes are received by any person in Iowa for the purpose of making a "first sale" of same. If the person making the "first sale" did not pay such tax, it shall be paid by any person into whose possession such cigarettes come until said tax has been paid in full. No person, however, shall be required to pay a tax on cigarettes brought into this state on or about his person in quantities of forty cigarettes or less, when such cigarettes have had the individual packages or seals thereof broken and when such cigarettes are actually used by said person and not sold or offered for sale.

3. Payment of such tax shall be evidenced by stamps purchased from the commission and securely affixed to each individual package of cigarettes in amounts equal to the tax thereon as imposed by this chapter, or by the impressing of an indicium upon individual packages of cigarettes, under regulations prescribed by the commission.

4. The tax imposed shall be in lieu of any other occupation or excise tax imposed by the state or any political subdivision thereof on cigarettes. [C24, 27, 31, 35,§1570; 48GA, ch 72, §§2, 36; ch 73,§10.]

Referred to in §1552

1556.02 Printing and custody of stamps. The state printing board shall be and is hereby required to design and have printed or manufactured, cigarette tax stamps of such size, denomination, and type and in such quantities as may be determined by the commission. The stamps shall be so manufactured as to render them easy to be securely attached to each individual package of cigarettes or cigarette papers. Such stamps shall be in the possession of and under the control of the comptroller.

Upon requisition of the commission, the comptroller shall deliver to it the stamps designated in such requisition, and shall charge the commission with the stamps so delivered, and shall keep an accurate record of all stamps coming into and leaving his possession. [C24, 27, 31, 35,§1574; 48GA, ch 72,§§3, 36; ch 73,§10.]

1556.03 Sale and exchange of stamps.

1. Stamps shall be sold by and purchased from the commission only. The commission shall sell stamps to the holder of a state or manufacturer's permit which has not been revoked and to no other person. Stamps shall be sold to such permit holders at a discount of not to exceed five percent from the face value. Stamps shall be sold in unbroken sheets of one hundred stamps only.

2. Orders for cigarette tax stamps shall be sent direct to the commission, and it shall be the duty of the commission to invoice the stamps ordered to the purchaser upon a form of invoice to be prescribed by the commission.

3. Stamps in unbroken sheets of one hundred stamps may be exchanged, with the commission, for stamps of a different denomination. The commission shall be authorized to make refunds on unused stamps to the person who purchased said stamps at a price equal to the amount paid for such stamps when proof satisfactory to said commission is furnished that any stamps upon which a refund is requested were properly purchased from said commission and paid for by the person requesting such refund. In making such refund, the commission shall prepare a voucher showing the amount of refund due and to whom payable and the comptroller shall then issue a warrant on the commission* for same.

The commission may promulgate rules and regulations providing for refunds of the face value of stamps affixed to any cigarettes which have become unfit for use and consumption, unsalable, or for any other legitimate loss which may occur, upon proof of such loss. Refund shall be made by issuing new stamps of an aggregate value of the tax paid on the cigarettes adjudged to be unfit for use, consumption, unsalable, or any other loss suffered.

4. The commission shall have the power and authority in the enforcement of this chapter to recall any stamps which have been sold by it and which have not been used, and it shall be the duty of said commission, upon receipt of such recalled stamps to issue stamps of other serial numbers therefor. The purchaser of any stamps shall be required to surrender any unused stamps for exchange upon demand of the said commission.

5. The commission shall keep a record of all stamps sold by it or under its direction, of all stamps exchanged by it, and of all refunds made by it. [C27, 31, 35,§§1574-a1; C24, 27, 31, 35, §1575; 48GA, ch 72,§§4, 36; ch 73,§10.]

*Treasurer changed to commission by 48GA, ch 73, §10

1556.04 Change of design. The design of the stamps used may be changed as often as the commission may deem necessary for the best enforcement of the provisions of this chapter. [48GA, ch 72,§5; ch 73,§10.]

1556.05 Affixing of stamps by distributors. Except as provided in section 1556.12, every distributor in this state shall cause to be affixed upon every individual package of cigarettes received by him, upon which no sufficient tax stamp is already affixed, a stamp or stamps of an amount equal to the tax due thereon. Such stamps shall be affixed within forty-eight hours, exclusive of Sundays and legal holidays, from the hour the cigarettes were received, and shall be affixed before such distributor sells, offers for sale, consumes, or otherwise distributes or transports the same. It shall be unlawful for any person, other than a distributing agent or distributor, bonded pursuant to section 1556.09, or common carrier to receive or accept delivery of any cigarettes without stamps affixed to evidence the payment of the tax, or without having in his possession the requisite amount or number of stamps necessary to stamp such cigarettes, and the possession of any unstamped cigarettes, without the possession of the requisite amount or number of stamps, shall be prima facie evidence of the violation of this provision. [C24, 27, 31, 35,§1571; 48GA, ch 72,§§6, 36.]

1556.06 Cancellation of stamps. No stamps affixed to a package of cigarettes shall be cancelled by any letter, numeral or other mark of identification or otherwise mutilated in any manner that will prevent or hinder the commission in making an examination as to the genuineness of said stamp; provided, however, that the commission may direct and require such cancellation of the tax stamps affixed to packages of cigarettes or cigarette papers which, in its judgment, is necessary and essential to carry out properly the provisions of this chapter. [48GA, ch 72,§7; ch 73,§10.]

1556.07 Use of stamping machines. The commission, with the consent of the executive council, may purchase and supply suitable machines or devices to the holders of a state or manufacturer's permit, or authorize the leasing by the permit holder of such machines or the metering device or both, and provide under proper regulation and direction for the impression of a distinctive imprint, indicium or character upon individual packages of cigarettes, cigarette papers and tubes as evidence of the payment of the tax imposed by this chapter, in lieu of the purchase and affixation of stamps as provided herein.

In the event the commission and executive council decide to purchase such machines they shall be paid for out of the revenue derived from this chapter.

The machines or devices shall be so constructed as to record or meter the number of impressions or indicia made and shall at all times be open for inspection by the commission.

All of the provisions of this chapter relating to the collection of the tax by means of the sale and affixation of stamps shall apply in the use of the stamping machines or devices, including the right of refund as provided herein. [48GA, ch 72,§8; ch 73,§10.]

1556.08 Distributor's, wholesaler's, and retailer's permits.

1. *Permits required.* Every distributor, wholesaler, and retailer in this state, now engaged or who desires to become engaged in the sale or use of cigarettes, upon which a tax is required to be paid, shall obtain a state and/or retail cigarette permit as a distributor, wholesaler, or retailer, as the case may be.

2. *Issuance.* The commission shall issue state permits to distributors, wholesalers, and retailers subject to the conditions hereinafter provided. Cities and towns, including special charter cities and cities operating under a commission form of government, may issue retail permits to dealers within their respective limits. County boards of supervisors may issue retail permits to dealers in their respective counties, outside of the corporate limits of cities and towns. Upon issuance of a retail permit by a city or town council or board of supervisors, such council or board shall forthwith certify to the commission the action so taken.

3. *Fees—expiration.* All permits provided for in this chapter shall expire on June 30 of each year. No permit shall be granted or issued until the applicant shall have paid for the period ending June 30 next, to the state tax commission or the city, town or county granting such permit, the fees provided for in this chapter. The annual state permit fee for a distributor and wholesaler shall be one hundred dollars when the permit is granted during the months of July, August, or September, provided that whenever a state permit holder shall operate more than one place of business, a duplicate state permit shall be issued for each additional place of business on payment of five dollars for each such duplicate state permit, but refunds as provided in this chapter shall not apply to any duplicate permit issued.

The fee for retail permits to be issued under the provisions of this chapter shall be as follows when the permit is granted during the months of July, August, or September:

a. In towns and other places outside any city or town fifty dollars.

b. In cities of the second class seventy-five dollars.

c. In cities of the first class one hundred dollars.

If any permit is granted during the months of October, November, or December, the said fee shall be three-fourths of the above maximum schedule; if granted during the months of January, February, or March, one-half of said maximum schedule, and if granted during the months of April, May, or June, one-fourth of the said maximum schedule.

4. *Refunds.*

a. An unrevoked permit for which the holder has paid the full annual fee may be surrendered during the first nine months of said year to the officer issuing it, and the state tax commission, or the city, town, or county granting the permit shall make refunds to the said holder as follows:

Three-fourths of the annual fee if the surrender is made during July, August, or September.

One-half of the annual fee if the surrender is made during October, November, or December.

One-fourth of the annual fee if the surrender is made during January, February, or March.

b. An unrevoked permit for which the holder has paid three-fourths of a full annual fee may be so surrendered during the first six months of the period covered by said payment and the said state tax commission, city, town, or county shall make refunds to the holder as follows:

A sum equal to one-half of an annual fee if the surrender is made during October, November, or December.

A sum equal to one-fourth of an annual fee if the surrender is made during January, February, or March.

c. An unrevoked permit for which the holder has paid one-half of a full annual fee may be so surrendered during the first three months of the period covered by said payment, and the said state tax commission, city, town or county, shall refund to the holder a sum equal to one-fourth of an annual fee.

5. *Application—bond.* Said permits shall be issued only upon applications accompanied by the fee indicated above, and by an adequate bond as provided in section 1556.09, and upon forms furnished by the commission upon written request. The failure to furnish such forms shall be no excuse for the failure to file the same unless absolute refusal is shown. Said forms shall set forth:

a. The manner under which such distributor, wholesaler, or retailer, transacts or intends to transact such business as distributor, wholesaler or retailer.

b. The principal office, residence, and place of business in Iowa, for which the permit is to apply.

c. If the applicant is not an individual, the principal officers or members thereof, not to exceed three, and their addresses.

d. Such other information as the commission shall by rules and regulations prescribe.

6. *No sales without permit.* No distributor, wholesaler or retailer shall sell any cigarettes until such application has been filed and the fee prescribed paid for a permit and until such permit is obtained and only while such permit is unrevoked and unexpired.

7. *Number of permits—trucks.* An application shall be filed and a permit obtained for each place of business owned or operated by a distributor, wholesaler, or retailer, excepting that no permit need be obtained for a delivery or sales truck of a distributor or wholesaler holding a permit, provided that the commission may by regulation require that said truck bear the distributor's or wholesaler's name, and that the permit number of the place of business for and from which it operates be conspicuously displayed on the outside of the body of the truck, immediately under the name.

8. *Group business.* Any person who operates both as a distributor and wholesaler in the same place of business shall only be required to obtain a state permit for the particular place of business where such operation of said business is conducted. A separate retail permit, however, shall be required if any distributor or wholesaler sells cigarettes at both retail and wholesale.

9. *Permit—form and contents.* Each permit issued shall describe clearly the place of business for which it is issued, shall be nonassignable, consecutively numbered, designating the kind of permit, and shall authorize the sale of cigarettes in this state subject to the limitations and restrictions herein contained. The retail permits shall be upon forms furnished by the commission.

10. *Permit displayed.* The permit shall, at all times, be publicly displayed by the distributor, wholesaler, or retailer, at his place of business, so as to be easily seen by the public and the persons authorized to inspect the same. The proprietor or keeper of any building or place wherein cigarettes shall be kept for sale, or with intent to sell, shall upon request of the commission or any peace officer exhibit his permit to so keep and sell. His refusal or failure to so exhibit such permit shall be prima facie evidence that such cigarettes are kept for sale or with intent to sell in violation of the provisions of this chapter. [S13, §5007-a; C24, 27, 31, 35,§§1557, 1558, 1560, 1563, 1564, 1584; C31, 35,§1563-d1; 48GA, ch 72,§§9, 36; ch 73,§10.]

1556.09 Bonds.

1. No retail permit, state permit, or manufacturer's permit shall be issued until the applicant therefor shall file a bond, with good and sufficient surety, to be approved by the commission or the body granting the permit, which bond shall be in favor of the state of Iowa and for the benefit of the county, city, or town, as the case may be, and conditioned upon the payment of taxes, damages, fines, penalties, and costs adjudged against the permit holder for violation of any of the provisions of this chapter.

Said bonds shall be on forms prescribed by the commission and in the following amounts:

a. Retail permit, not less than five hundred dollars.

b. State permit, not less than five hundred dollars.

c. Manufacturer's permit, not less than five thousand dollars.

2. No distributor or person shall engage in interstate business unless he files a bond, with good and sufficient surety in an amount of not less than one thousand dollars. The amount of the bond required of such distributor or other person shall be fixed by the commission, subject to the minimum limitation herein provided. Said bond shall be approved by the commission and payable to the state of Iowa in Des Moines, Polk county, Iowa, and conditioned upon the payment of taxes, damages, fines, penalties, and costs adjudged against the permit holder for violation of any of the requirements of this chapter affecting said distributor or other person, on a form prescribed by the commission.

3. An additional bond or a new bond may be required by the commission at any time an existing bond becomes insufficient or the surety thereon becomes unsatisfactory, which additional bond, or new bond, shall be supplied within ten days after demand. On failure to supply a new bond or additional bond within ten days after demand, the commission shall have the power and the authority to cancel any existing bond made and secured by and for said distributor or other person. In the event said bond is canceled, said distributor or other person shall within forty-eight hours after receiving cigarettes or forty-eight hours after said cancellation, excluding Sundays and legal holidays, cause any cigarettes in his possession to have the requisite amount of stamps affixed to represent the tax as herein provided. [C24, 27, 31, 35,§§1561, 1562; 48GA, ch 72,§§10, 36; ch 73, §10.]

Referred to in §§1556.05, 1556.08, 1556.10, 1556.12

1556.10 Records and reports of permit holders.

1. The commission is authorized to prescribe such forms as may be necessary for the efficient administration of this chapter and is authorized to require such uniform books and records to be used and kept by each permit holder as it deems necessary. The commission may also require each permit holder to keep and retain in his possession evidence on prescribed forms of all transactions involving the purchase and sale of cigarettes or the purchase and use of stamps as herein provided. All of such evidence shall be kept for a period of two years from the date of each transaction, for the inspection at all times by the commission.

2. Where a state permit holder sells cigarettes at retail, he shall be required to issue an invoice to his retail department for cigarettes to be sold at retail and such cigarette invoices shall be kept separate and apart.

3. The commission may by regulation require every holder of a manufacturer's or state permit to make and deliver to the commission on or before the tenth day of each month a report or reports for the preceding calendar month, upon a form or forms prescribed by the commission, and may require that such reports shall be properly sworn to and executed by the permit holder or his duly authorized representative.

4. Every permit holder shall, when requested by the commission, make such additional reports as the commission deems necessary and proper and shall at the request of the commission furnish full and complete information pertaining to any transaction of the permit holder involving the purchase or sale or use of cigarettes or purchase of cigarette stamps.

5. Every person engaged in the business of selling cigarettes in interstate commerce only, who has, by furnishing the bond required in section 1556.09, been permitted to set aside or store cigarettes in this state for the conduct of such interstate business without the stamps affixed thereto, shall be required to keep such records and make such reports to the commission as are required by it.

6. If any distributor or other person fails or refuses to pay any tax, penalties, or cost of audit hereinafter provided, and it becomes necessary to bring suit or to intervene in any manner for the establishment or collection of said claims, in any judicial proceedings, any report filed in the office of the commission by

such distributor or other person, or his representative, or a copy thereof, certified to by the commission, showing the number of cigarettes sold by such distributor or his representative, upon which such tax, penalty or cost of audit has not been paid, or any audit made by the commission or its representative from the books or records of said distributor or other person when signed and sworn to by such representative as being made from the records of said distributor or persons from or to whom such distributor or other person has bought, received, or delivered cigarettes, whether from a transportation company or otherwise, such report or audit shall be admissible in evidence in such proceedings and shall be prima facie evidence of the contents thereof; provided, however, that the incorrectness of said report or audit may be shown. [C27, 31, 35,§§1570-b1, -b2; 48GA, ch 72,§§11, 36; ch 73,§10.]

1556.11 Manufacturer's permit. The commission may, at its discretion, and upon application of any manufacturer, issue without charge to such manufacturer a manufacturer's permit. Such application shall contain such information as the commission shall prescribe. The holder of such manufacturer's permit shall be authorized to purchase stamps from the commission, and to affix such stamps to individual packages of cigarettes outside of this state, prior to their shipment into the state. [48GA, ch 72,§12; ch 73,§10.]

1556.12 Distributing agent's permit.

1. Every distributing agent in the state, now engaged, or who desires to become engaged, in the business of storing unstamped cigarettes which are received in interstate commerce for distribution or delivery only upon order received from without the state or to be sold outside the state, shall file with the commission, an application for a distributing agent's permit, on a form prescribed by the commission, to be furnished upon written request, the failure to furnish shall be no excuse for the failure to file the same unless an absolute refusal is shown. Said form shall set forth the name under which such distributing agent transacts or intends to transact such business as a distributing agent, the principal office and place of business in Iowa to which the permit is to apply, and if other than an individual, the principal officers or members thereof and their addresses. The commission may require any other information it may desire in said application. No distributing agent shall engage in such business until such application has been filed and fee in the sum of one hundred dollars paid for the permit and until the permit has been obtained. Such permit shall expire on June 30 following the date of issuance. All of the provisions of the last two paragraphs of section 1556.09, relative to bonds, are incorporated herein and by this reference made applicable to distributing agents. Upon failure to furnish adequate bond as required, the permit shall be revoked without hearing. An application shall be filed and a permit obtained for each place of business owned or operated by a distributing agent.

2. Upon receipt of the application and bond and the permit fee herein provided for, the commission may issue to every distributing agent for the place of business designated a nonassignable consecutively numbered permit, authorizing the storing, and distribution of unstamped cigarettes within this state when such distribution is made upon interstate orders only. A distributing agent may also transport unstamped cigarettes in his own conveyances to the state boundary for distribution outside the state, and any nonresident customer of such distributor may purchase and convey unstamped cigarettes to the state line for distribution outside the state. Such nonresident purchaser shall be required to have in his possession an invoice evidencing the purchase of such unstamped cigarettes, which must be exhibited upon request to any peace officer or agent charged with the enforcement of this chapter.

3. Cigarettes set aside for interstate business must be kept separate from intrastate stock and those not so kept shall be considered as intrastate stock and subject to the same requirements as cigarettes possessed for the purpose of a "first sale".

4. It shall be unlawful for any distributing agent to sell at retail cigarettes, cigarette papers or tubes from automobiles, trucks, or any similar conveyances. [48GA, ch 72,§13; ch 73,§10.]

Referred to in §1556.05

1556.13 Forms for records and reports. The commission shall furnish, without charge, to holders of the various permits, such forms in sufficient quantities as will enable such permit holders to make the reports required to be made under this chapter. The permit holders shall furnish at their own expense such books, records, and invoices, as are required to be used and kept, but such books, records, and invoices shall be in exact conformity to the forms prescribed for that purpose by the commission, and shall be kept and used in the manner prescribed by the commission; provided that the commission may, in its discretion, by express order in certain cases, authorize permit holders to keep their records in a manner and upon forms other than those so prescribed. Such authorization may be revoked at any time. [48GA, ch 72,§14; ch 73, §10.]

1556.14 Examination of records and premises.

1. For the purpose of enabling the commission to determine the tax liability of permit holders or any other person dealing in cigarettes or to determine whether a tax liability has been incurred, it shall have the right to inspect any premises where cigarettes are manufactured, produced, made, stored, transported, sold, or offered for sale or exchange, and to examine all of the records required to be kept or any other records that may be kept incident to the conduct of the cigarette business of said permit holder or any other person dealing in cigarettes.

2. The said authorized officers shall also have

the right as an incident to determining the said tax liability, or whether a tax liability has been incurred, to examine all stocks of cigarettes and cigarette stamps and for the foregoing purpose said authorized officers shall also have the right to remain upon said premises for such length of time as may be necessary to fully determine said tax liability, or whether a tax liability has been incurred.

3. It shall be unlawful for any of the foregoing permit holders to fail to produce upon demand of the commission any records required herein to be kept or to hinder or prevent in any manner the inspection of said records or the examination of said premises. [48GA, ch 72,§15; ch 73,§10.]

1556.15 Subpoena for witnesses and papers. For the purpose of enforcing the provisions of this chapter and of detecting violations thereof, the commission shall have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses and the production of all relevant books, papers and records. Such attendance and production may be required at the statehouse at Des Moines, Iowa, or at any place convenient for such investigation. In case any person fails or refuses to obey a subpoena so issued, the commission may procure an order from the district court in the county where such person resides, or where such person is found, requiring such person to appear for examination and/or to produce such books, papers, and records as are required in the subpoena. Failure to obey such order shall be punished by such court as contempt thereof. [48GA, ch 72,§16; ch 73,§10.]

1556.16 Cigarettes retailer may not sell. Unless a retail permit holder shall also hold a state permit, it shall be unlawful for a retailer to sell or have in his possession, cigarettes, upon which the stamp tax has not been affixed. [48GA, ch 72,§17.]

1556.17 Revocation of permit.

1. If any person holding a permit issued by the commission under the provisions of this chapter, including a retailer permit for railway car, has violated any provision of this chapter, or any rule or regulation promulgated hereunder, the commission may revoke the permit issued to said person, after giving such permit holder an opportunity to be heard upon five days written notice stating the reason for such contemplated revocation and the time and place at which he may appear and be heard. The said hearing shall be held in the county of the permit holder's place of business, or in a county in or through which it transacts business. Such notice shall be given by mailing a copy thereof by registered mail to the permit holder's place of business as the same appears on his application for a permit. If, upon such hearing, the commission shall find that such violation has occurred, it may revoke the permit or permits.

2. If any retailer has violated any of the provisions of this chapter, the board of supervisors or the city or town council which issued the permit may revoke his permit or permits upon the same hearing and notice as is prescribed in the preceding paragraph.

3. If a permit is revoked no new permit shall be issued to the permit holder for any place of business, or to any other person for the place of business at which such violation occurred, until one year has expired from the date of revocation, unless good cause to the contrary is shown to the issuing authority. [C24, 27, 31, 35,§1559; 48GA, ch 72,§§18, 36; ch 73,§10.]

Referred to in §1556.18

1556.18 Retailer's permit for railway car.

1. Subject to the provisions of this chapter, a retailer's permit may be issued by the commission to any dining car company, sleeping car company, railroad or railway company. Such permit shall authorize the holder thereof to keep for sale, and sell, cigarettes at retail on any dining car, sleeping car or passenger car operated by such applicant in, through or across the state of Iowa, subject to all of the restrictions imposed upon retailers under this chapter. The application for such permit shall be in such form and contain such information as may be required by the commission. Each such permit shall be good throughout the state. Only one such permit shall be required for all cars operated in this state by such applicant, but a duplicate of such permit issued as herein provided, shall be posted in each car in which such cigarettes are sold and no further permit shall be required or tax levied for the privilege of selling cigarettes in such cars. No cigarettes shall be sold in such cars without having affixed thereto stamps evidencing the payment of the tax as provided in this chapter.

2. As a condition precedent to the issuing of a retailer's permit for railway car, the applicant shall file with the commission a bond in favor of the state of Iowa for the benefit of all parties interested in the amount of five hundred dollars conditioned upon the payment of all taxes, fines and penalties and costs in this chapter provided.

3. The annual fee for a retailer's permit for railway car shall be twenty-five dollars and two dollars for each duplicate thereof, which fee shall be paid to the commission. The commission shall issue duplicates of such permits from time to time as applied for by such companies.

4. The provisions of subsections 1 and 3 of section 1556.17 shall apply to the revocation of such permit and the issuance of a new one. [48GA, ch 72,§19; ch 73,§10.]

1556.19 Carrier to permit access to records. Every common carrier in this state having custody of books or records showing the transportation of cigarettes both interstate and intrastate shall give and allow the commission free access to such books and records. [48GA, ch 72, §20; ch 73,§10.]

1556.20 Administration.

1. The commission shall administer the provisions of this chapter, and it is hereby made the duty of the commission to collect, supervise and enforce the collection of all taxes and penalties that may be due under the provisions of this chapter.

2. Said commission also shall have the power and authority to make and publish rules and regulations, not inconsistent with this chapter, necessary and advisable for its detailed administration, to enforce the provisions thereof, and to collect the taxes and fees herein imposed. The commission may promulgate rules and regulations hereunder providing for the refund on stamps which by reason of damage become unfit for sale or use.

3. The state tax commission is hereby authorized to appoint an assistant, whose sole duty it shall be to administer and enforce the provisions of this chapter, including the collection of all taxes provided for herein. In such enforcement the state tax commission may call to its aid the attorney general, the special agents of the state, any county attorney or any peace officer. The commission is authorized to appoint such clerks and additional help as may be needed to carry out the provisions of this chapter. [C24, 27, 31, 35,§1576; 48GA, ch 72,§§21, 36; ch 73,§10.]

1556.21 Liens and actions. All of the provisions for the lien of the tax, its collection, and all actions as provided in the sales tax act shall apply to the tax imposed by this chapter, except that where the sales tax and the cigarette tax may become conflicting liens, they shall be of equal priority. [C24, 27, 31, 35,§1565; 48GA, ch 72,§§22, 36.]

Sales tax act, ch 329.3

1556.22 Venue of actions to collect. Venue of any civil proceedings filed under the provisions of this chapter to collect the taxes, fees and penalties levied herein shall be in a court of competent jurisdiction in Polk county, Iowa, or in any court having jurisdiction. [48GA, ch 72, §23.]

1556.23 Assessment of tax by commission. If after any audit, examination of records, or other investigation the commission finds that any person has sold cigarettes, without stamps affixed thereto as required by this chapter or that any person has failed to pay any tax herein imposed upon such person, the commission shall fix and determine the amount of tax due, and shall assess such tax against such person, together with a penalty, which is hereby imposed, equal to the amount of said tax. If any person fails to furnish evidence satisfactory to the commission showing purchases of sufficient stamps to stamp unstamped cigarettes purchased by him, the presumption shall be that such cigarettes were sold without the proper stamps affixed thereto. [C24, 27, 31, 35,§1568; 48GA, ch 72, §§24, 36; ch 73,§10.]

Referred to in §1556.24

1556.24 Notice and appeal. The commission shall notify any person assessed pursuant to section 1556.23 by sending a written notice of such determination and assessment by registered mail to the principal place of business of such person as shown on his application for permit, if any, and in case no such application was filed by such person, to his last known address. Such person may appeal from such determination and assessment to the district court in the same manner and subject to the same procedure as is provided in section 6943.061. [48GA, ch 72,§25; ch 73,§10; ch 175,§20.]

1556.25 Assessment of cost of audit. The commission may employ auditors or other persons to audit and examine the books and records of any permit holder or other person dealing in cigarettes to ascertain whether such permit holder or other person has paid the amount of the taxes required to be paid by him under the provisions of this chapter. If such taxes have not been paid, as required, the commission shall assess against such permit holder or other person, as additional penalty, the reasonable expenses and costs of such investigation and audit. [48GA, ch 72,§26; ch 73,§10.]

1556.26 Civil penalty for certain violations. If a permit holder shall (a) fail to keep any of the records required to be kept by the provisions of this chapter, or (b) if a permit holder shall sell any cigarettes upon which a tax is required to be paid by this chapter without at the time having a valid permit, or (c) if any distributor, wholesaler, or distributing agent shall fail to make any reports to the commission required herein to be made, or (d) make a false or incomplete report to said commission, or (e) if any distributing agent shall store any unstamped cigarettes in the state or distribute or deliver any unstamped cigarettes within this state without at the time of said storage or delivery having a valid permit, or (f) if any person affected by this chapter shall fail or refuse to abide by the provisions hereof or the rules and regulations promulgated hereunder, or violate the same, he shall be civilly liable to the state as a penalty in the sum of fifty dollars for each offense. Each violation shall constitute a separate offense, and the same violation shall constitute a separate offense for each day it continues. [C24, 27, 31, 35,§1572; 48GA, ch 72,§§27, 36; ch 73,§10.]

1556.27 Seizure and forfeiture—procedure.

1. All cigarettes on which taxes are imposed by this chapter, which shall be found in the possession or custody, or within the control of any person, for the purpose of being sold or removed by him in violation of this chapter, and all cigarettes which are removed or are deposited or concealed in any place with intent to avoid payment of taxes levied thereon, and any automobile, truck, boat, conveyance or other vehicle whatsoever, used in the removal or transportation of such cigarettes for such purpose, and all equipment or other tangible personal property incident to and used for such purpose, found in the place, building or vehicle where such cigarettes are found, may be seized by the commission, with or without process and the same shall be from the time of such seizure forfeited to the state of Iowa, and a proceeding in the nature of a proceeding in rem shall be filed in a court of competent jurisdiction in the county of seizure to maintain such seizure and declare and perfect said forfeiture as hereinafter provided. All such cigarettes, vehicles and property so seized as

aforesaid, remaining in the possession or custody of the commission, sheriff or other officer for forfeiture or other disposition as provided by law, shall be deemed to be in the custody of law and irrepleviable.

2. The commission, when taking the seizure aforesaid, shall immediately make a written report thereof showing the name of the agent or representative making the seizure, the place and person where and from whom such property was seized and an inventory of same and appraisement thereof at the reasonable value of the article seized, which report shall be prepared in duplicate, signed by the agent or representative so seizing, the original of which shall be given to the person from whom said property is taken, and a duplicate copy of which shall be filed in the office of the commission and shall be open to public inspection.

3. The county attorney of the county of seizure, shall at the request of the commission, file in the county and court aforesaid forfeiture proceeding in the name of the state of Iowa as plaintiff, and in the name of the owner or person in possession as defendant, if known, and if unknown, then in the name of said property seized and sought to be forfeited. Upon the filing of said proceeding, the clerk of said court shall issue notice to the owner or person in possession of such property to appear before such court upon the date named therein, which shall not be less than two days from service of such notice, to show cause why the forfeiture aforesaid should not be declared, which notice shall be served by the sheriff of said county. In the event the defendant in said proceeding is a nonresident of the state or his residence is unknown, or in the event the name of such defendant is unknown, upon affidavit by the commission to this effect, notice shall be given as ordered by the court.

4. In the event final judgment is rendered in the forfeiture proceedings aforesaid, maintaining the seizure, and declaring and perfecting the forfeiture of said seized property, the court shall order and decree the sale thereof to the highest bidder, by the sheriff at public auction in the county of seizure after notice is given in the manner provided in the case of the sale of personal property under execution, and the proceeds of such sale, less expense of seizure and court costs, shall be paid into the state treasury.

5. In the event the cigarettes seized hereunder and sought to be sold upon forfeiture, shall be unstamped, the officers selling the same shall be furnished by the commission, sufficient stamps which shall be affixed to the cigarettes prior to the sale thereof. [48GA, ch 72,§28; ch 73,§10.]

1556.28 Seizure not to affect criminal prosecution. The seizure, forfeiture and sale of cigarettes and other property under the terms and conditions hereinabove set out, shall not constitute any defense to the person owning or having control or possession of such property from criminal prosecution for any act or omission made or offense committed under this chapter or from liability to pay penalties provided by this chapter. [48GA, ch 72,§29.]

1556.29 Restrictions on injunction. Any person who shall invoke the power and remedies of injunction against the state tax commission of Iowa to restrain or enjoin it from enforcement of the collection of the tax levied herein upon any grounds for which an injunction may be issued shall file such proceedings in a court of competent jurisdiction in Polk county, Iowa, and venue for such injunction is hereby declared to be in Polk county, Iowa. [48GA, ch 72,§30; ch 73,§10.]

1556.30 Tax and fees paid to general fund. The proceeds derived from the sale of stamps and the payment of taxes, fees and penalties provided for under this chapter, and the permit fees received by the commission from all permits issued by it, shall be credited to the general fund of the state of Iowa. All permit fees provided for in this chapter and collected by cities and towns in the issuance of permits granted by such municipalities shall be paid to the treasurer of the city or town wherein the permit is effective and credited to the general fund of said city or town. Permit fees so collected by counties shall be paid to the county treasurer and credited to the general fund of such county. [C24, 27, 31, 35,§1569; 48GA, ch 72, §§31, 36; ch 73,§10.]

1556.31 Certain unlawful acts enumerated.

1. Except as otherwise provided in this chapter, it shall be unlawful for any person to have in his possession for sale, distribution, or use, or for any other purpose, in excess of forty cigarettes, or to sell, distribute, use, or present as a gift or prize cigarettes upon which a tax is required to be paid by this chapter, without having affixed to each individual package of cigarettes or cigarette papers, the proper stamp evidencing the payment of such tax and the absence of said stamp on said individual package of cigarettes shall be notice to all persons that the tax has not been paid and shall be prima facie evidence of the nonpayment of said tax.

2. No person, other than a common carrier and a distributor's truck bearing the distributor's name and permit number in plain view on the outside of such truck, shall transport within this state cigarettes upon which a tax is required to be paid, without having stamps affixed to each individual package of said cigarettes; and no person shall fail or refuse, upon demand of the commission, or any peace officer to stop any vehicle transporting cigarettes for a full and complete inspection of the cargo carried.

3. No person shall use, sell, offer for sale, or possess for the purpose of use or sale, within this state, any previously used stamp or stamps, or attach any such previously used stamps to an individual package of cigarettes, nor shall any person purchase stamps from any person other than the state tax commission or sell stamps purchased from said commission.

4. No person shall knowingly use, consume, or smoke, within this state, cigarettes upon which a tax is required to be paid, without said tax having been paid.

5. No person, unless he be the holder of a permit, or his representative, shall solicit the sale of cigarettes, provided that this section shall not prevent solicitation by a nonpermit holder for the sale of cigarettes to any state permit holder.

6. It shall be unlawful to sell or vend cigarettes by means of a device known as a vending machine.

7. It shall be unlawful for a person other than a holder of a retail permit to sell cigarettes at retail.

Violation of this section by the holder of a distributor's, wholesaler's, or manufacturer's permit shall be grounds for the revocation of such permit. [C24, 27, 31, 35,§1573; C27, 31, 35, §1575-a2; 48GA, ch 72,§§32, 36; ch 73,§10.]

1556.32 Certain offenses and penalties provided. Whoever shall violate any provision of this chapter for which a fine and/or imprisonment is not elsewhere specifically provided, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment for not to exceed thirty days or by both such fine and imprisonment in the discretion of the court. [48GA, ch 72,§33.]

1556.33 Counterfeiting and previously used stamps. Any person who shall print, engrave, make, issue, sell, or circulate, or shall possess or have in his possession with intent to use, sell, circulate, or pass, any counterfeit stamp or previously used stamp, or who shall use, or consent to the use of, any counterfeit stamp or previously used stamp in connection with the sale, or offering for sale, of any cigarettes, or who shall place, or cause to be placed, on any individual package of cigarettes, any counterfeit stamp or previously used stamp, shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars nor more than one thousand dollars or by imprisonment not more than one year or both such fine and imprisonment. [C24, 27, 31, 35,§1573; 48GA, ch 72,§§34, 36.]

1556.34 Manufacturer's samples. The commission may, in its discretion, authorize a manufacturer to distribute in the state through his factory representative, free sample packages of cigarettes containing five cigarettes or less, when such individual packages bear a stamp equal to the tax herein imposed. Such packages shall bear the word "Sample" in letters easily read. Such authority may be withdrawn at any time in the discretion of the commission. [48GA, ch 72,§35; ch 73,§10.]

Constitutionality, 48GA, ch 72, §39
Former taxes and penalties reserved, 48GA, ch 72, §37
Previous offenses unaffected, 48GA, ch 72, §38

1557 to 1584, inc. Rep. by 48GA, ch 72,§36

1585 Advertisement near public schools. No bills, pictures, posters, placards, or other matter used to advertise the sale of tobacco in any form shall be distributed, posted, painted, or maintained within four hundred feet of premises occupied by a public school or used for school purposes. This provision shall not apply to advertisement in newspapers regularly published and distributed to subscribers and purchasers as such. [S13,§5028-s; C24, 27, 31, 35, §1585.]

Referred to in §1586

1586 Penalty. Any person violating any of the provisions of section 1585 shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [S13,§5028-t; C24, 27, 31, 35,§1586.]

CHAPTER 79

HOUSES USED FOR PROSTITUTION, GAMBLING, OR POOL SELLING

1587 Houses of prostitution, etc.
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1587 Houses of prostitution, etc. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, or gambling, or pool selling as defined by section 13216 is guilty of a nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution, or gambling, or pool selling as defined by section 13216 is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are also declared a nuisance and shall be enjoined and abated as hereinafter provided. [SS15,§4944-h1; C24, 27, 31, 35,§1587.]

1588 Injunction—procedure. When a nuisance is kept, maintained, or exists, as defined in this chapter, the county attorney, or any citizen of the county, or any society, association, or body incorporated under the laws of this state, may maintain an action in equity in the name of the state of Iowa, upon the relation of such county attorney, citizen, or corporation to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same from further conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists, from further permitting such building or ground or both to be so used. [SS15,§4944-h2; C24, 27, 31, 35,§1588.]

1589 Notice—temporary writ—without bond. The defendants shall be served with notice as in other actions and in such action the court, or judge in vacation, shall upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if the existence of such nuisance shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise as the complainant may elect, unless the court or judge by previous order, shall have directed the form and manner in which such evidence shall be presented. [SS15,§4944-h2; C24, 27, 31, 35,§1589.]

Time and manner of service, §11059 et seq.

1590 "Owners" defined—notice. The person in whose name the real estate affected by the action stands on the books of the county auditor, for the purposes of taxation, shall be presumed to be the owner thereof, and in case of unknown persons having or claiming any ownership, right, title, or interest in property affected by the action, such may be made parties to the action by designating them in the notice and petition as "all other persons unknown claiming any ownership, right, title, or interest in the property affected by the action" and service thereon may be had by publishing such notice in the manner prescribed for the publication of original notices in ordinary actions. [SS15, §4944-h9; C24, 27, 31, 35,§1590.]

Service by publication, §11081 et seq.
40ExGA, HF 52, §4, editorially divided

1591 Trial. Any person having or claiming such ownership, right, title, or interest, and any owner or agent in behalf of himself and such owner may make, serve, and file his answer therein within twenty days after such service, and have trial of his rights in the premises by the court; and if said cause has already proceeded to trial or to findings and judgment, the court shall by order fix the time and place of such trial and shall modify, add to, or confirm such findings and judgment as the case may require. Other parties to said action shall not be affected thereby. [SS15,§4944-h9; C24, 27, 31, 35,§1591.]

1592 Temporary restraining order. Where a temporary injunction is prayed for, the court, or judge in vacation, on the application of plaintiff, may issue an ex parte restraining order, restraining the defendants and all other persons from removing or in any manner interfering with the furniture, fixtures, musical instruments, and movable property used in conducting the alleged nuisance, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. [SS15,§4944-h2; C24, 27, 31, 35,§1592.]

1593 Writ—how served. The restraining order may be served by handing to and leaving a copy of said order with any person in charge of said property or residing in the premises or apartment wherein the same is situated, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such premises or apartment where such nuisance is alleged to be maintained, or by both such delivery and posting. [SS15,§4944-h2; C24, 27, 31, 35,§1593.]

40ExGA, HF 52, §6, editorially divided

1594 Inventory. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property situated in and used in conducting or maintaining such nuisance. [SS15,§4944-h2; C24, 27, 31, 35,§1594.]

1595 Mutilation or removal of notice. Where such order is so posted, mutilation or removal thereof, while the same remains in force, shall be a contempt of court, provided such posted order contains thereon or therein a notice to that effect. [SS15,§4944-h2; C24, 27, 31, 35,§1595.]

1596 Notice. Three days notice in writing shall be given the defendants of the hearing of the application for temporary injunction, and if then continued at the instance of defendant, the temporary writ as prayed shall be granted as a matter of course. [SS15,§4944-h2; C24, 27, 31, 35,§1596.]

40ExGA, HF 52, §7, editorially divided

1597 Answer. Each defendant so notified shall serve upon the complainant or his attorney a verified answer on or before the date fixed in said notice for said hearing, and such answer shall be filed with the clerk of the district court of the county wherein such cause is triable, but the court may allow additional time for so answering, providing such extension of time shall not prevent the issuing of said temporary writ as prayed for. The allegations of the answer shall be deemed to be traversed without further pleading. [SS15,§4944-h2; C24, 27, 31, 35,§1597.]

1598 Scope of injunction. When an injunction has been granted, it shall be binding on the defendant throughout the judicial district in which it was issued, and any violation of the provisions of the injunction or temporary restraining order herein provided, shall be a contempt and punished as hereinafter provided. [SS15,§4944-h2; C24, 27, 31, 35,§1598.]

Punishment, §1606

1599 Trial term. The action when brought shall be triable at the first term of the court. [SS15,§4944-h3; C24, 27, 31, 35,§1599.]

40ExGA, HF 52, §8, editorially divided

1600 Evidence. In such action evidence of the general reputation of the place shall be competent for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge thereof and of acquiescence and participation therein on the part of the owners, lessors, lessees, users, and all those in possession of or having charge of, as agent or otherwise, or having any interest in any form of property used in conducting or maintaining said nuisance. [SS15,§4944-h3; C24, 27, 31, 35,§1600.]

1601 Dismissal. If the complaint is filed by a citizen or a corporation, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed and the dismissal approved by the county attorney in writing or in open court. [SS15,§4944-h3; C24, 27, 31, 35,§1601.]

40ExGA, HF 52, §9, editorially divided

1602 Delay in trial. If the court is of the opinion that the action ought not to be dismissed, he may direct the county attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any citizen of the county or the county attorney may be substituted for the complaining party and prosecute said action to judgment. [SS15,§4944-h3; C24, 27, 31, 35,§1602.]

1603 Costs. If the action is brought by a citizen or a corporation and the court finds there were no reasonable grounds or cause for said action, the costs may be taxed to such citizen or corporation. [SS15,§4944-h3; C24, 27, 31, 35, §1603.]

1604 Violation of injunction. In case of the violation of any injunction granted under the provisions of this chapter, or of a restraining order or the commission of any contempt of court in proceedings under this chapter, the court, or in vacation a judge thereof, may summarily try and punish the offender. [SS15, §4944-h4; C24, 27, 31, 35,§1604.]

SS15,§4944-h4, editorially divided

1605 Procedure. The proceedings shall be commenced by filing with the clerk of the court a complaint under oath, setting out and alleging facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. [SS15, §4944-h4; C24, 27, 31, 35,§1605.]

1606 Penalty. A party found guilty of contempt under the provisions of this chapter shall be punished by a fine of not less than two hundred nor more than one thousand dollars or by imprisonment in the county jail not less than three nor more than six months or by both fine and imprisonment. [SS15,§4944-h4; C24, 27, 31, 35,§1606.]

1607 Abatement—sale of property. If the existence of the nuisance be admitted or established in an action as provided in this chapter, or in a criminal proceeding in the district court, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale of such in the manner provided for the sale of chattels under execution, and shall direct the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released as hereinafter provided. [SS15,§4944-h5; C24, 27, 31, 35,§1607.]

Referred to in §1611
Sale of chattels, §11722 et seq.
40ExGA, HF 52, §10, editorially divided

1608 Fees. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property, on execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court. [SS15,§4944-h5; C24, 27, 31, 35,§1608.]

Fees, §5191

1609 Breaking closed building—punishment. If any person shall break and enter or use a building, erection, or place so directed to be closed, he shall be punished as for contempt as provided in this chapter. [SS15,§4944-h5; C24, 27, 31, 35,§1609.]

Punishment, §1606

1610 Duty of county attorney. In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction, it shall be the duty of the county attorney to proceed promptly under this chapter to enforce the provisions and penalties thereof; and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. [SS15,§4944-h6; C24, 27, 31, 35,§1610.]

SS15, §4944-h6, editorially divided

1611 Proceeds. All moneys collected under this chapter shall be paid to the county treasurer. The proceeds of the sale of the personal property as provided in section 1607, shall be applied in payment of the costs of the action and abatement or so much of such proceeds as may be necessary, except as hereinafter provided. [SS15,§4944-h6; C24, 27, 31, 35,§1611.]

1612 Release of property. If the owner of the premises in which said nuisance has been maintained appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the court in the full value of the

property, to be ascertained by the court, or in vacation by the judge thereof, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or in vacation the judge, if satisfied of his good faith, may order the premises, closed or sought to be closed under the order of abatement, delivered to said owner, and said order of abatement canceled so far as the same may relate to said real property. The release of the property under the provisions of this section shall not release it from the injunction herein provided against the property nor any of the defendants nor from any judgment, lien, penalty, or liability to which it may be subject by law. [SS15,§4944-h7; C24, 27, 31, 35, §1612.]

1613 Mulct tax. When a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purpose prohibited by this chapter, there shall be imposed upon said building and the ground upon which the same is located and against the person or persons maintaining said nuisance and the owner or agent of said premises, a tax of three hundred dollars. The imposing of said tax shall be made by the court as a part of the proceeding. [SS15,§4944-h8; C24, 27, 31, 35,§1613.]

Nuisance defined, §1587
40ExGA, HF 52, §12, editorially divided

1614 Certification and payment of tax. The clerk of said court shall make and certify a return of the imposition of said tax forthwith to the county auditor, who shall enter the same as a tax upon the property, and against the persons upon which or whom the lien was imposed, as and when the other taxes are entered, and the same shall be and remain a lien on the land upon which such lien was imposed until fully paid. Any such lien imposed while the tax books are in the hands of the auditor shall be immediately entered therein. The payment of said tax shall not relieve the persons or property from any other penalties provided by law. [SS15, §4944-h8; C24, 27, 31, 35,§1614.]

1615 Collection of tax. The provisions of the law relating to the collection of taxes in this state, the delinquency thereof, and sale of property for taxes shall govern in the collection of the tax herein prescribed insofar as the same are applicable. [SS15,§4944-h8; C24, 27, 31, 35,§1615.]

Collection of taxes, ch 346 et seq.
40ExGA, HF 52, §13, editorially divided

1616 Application of tax. The said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property as hereinbefore provided, and the remainder of said tax together with the unexpended portion of the proceeds of the sale of personal property shall be distributed to the temporary school fund of the county, except that ten percent of the amount of the whole tax collected and of the whole proceeds of the sale of said personal property, as provided in this chapter, shall be paid by the treasurer to the attorney representing the state in the injunction action, at the time of final judgment. [SS15,§4944-h8; C24, 27, 31, 35, §1616.]

1617 Tax assessed. When such nuisance has been found to exist under any proceeding in the district court or as in this chapter provided, and the owner or agent of such building or ground whereon the same has been found to exist was not a party to such proceeding, nor appeared therein, the said tax of three hundred dollars shall, nevertheless, be imposed against the persons served or appearing and against the property as in this chapter set forth. [SS15, §4944-h9; C24, 27, 31, 35,§1617.]

1618 Constitutionality section: 36GA, ch 71, §10

CHAPTER 80

STATE FIRE MARSHAL

Enforcement of compressed gas system law, ch 80.1

1619 Fire marshal.
1624 Duties of city and other officers.
1625 Time for investigation—report.
1626 Refusal of officer to investigate.
1627 Record of fires.
1628 Testimony under oath.
1629 Oaths—attendance of witnesses.
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1644 Enforcing decree and judgment.
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1646 Time for compliance with order.
1647 Refusal to obey orders.
1648 Notice.
1649 Entry of tax.
1650 Investigation may be private.
1651 Fire drills in public schools.
1652 Bulletin.
1653 Annual report.
1654 Fee for fires reported.

1619 Fire marshal. The chief officer of the division of fire protection in the department of public safety shall be known as the state fire marshal. [S13,§§2468-a,-m; C24, 27, 31, 35, §1619; 48GA, ch 120,§48.]

1620 to 1623, inc. Rep. by 48GA, ch 120,§47
Section 1623-c1, code 1935, repealed by 48GA, ch 120, §47

1624 Duties of city and other officers. The state fire marshal shall cause immediate investigation to be made of the cause, origin, and circumstances of every fire occurring within the state, when so requested by any official mentioned in this section, or the sheriff, deputy sheriff, or county attorney of any county. The chief of the fire department of every city, town, or village in which a fire department is established, the mayor of every town or city in which no fire department exists, and the township clerk of every township, outside the limits of any city, town, or village, shall investigate the cause, origin, and circumstances of every fire occurring in such city, town, village, or township by which property has been destroyed or damaged, and whether such fire was the result of carelessness or design. [S13,§§2468-d,-e; C24, 27, 31, 35,§1624; 48GA, ch 120,§49.]

1625 Time for investigation—report. The state fire marshal shall have the right to supervise and direct such investigation when notified as above provided. The officer making investigation of fires occurring in cities, villages, towns, or townships, shall forthwith notify said fire marshal, and shall within one week of the occurrence of the fire furnish to the said fire marshal a written statement of all facts relating to the cause and origin of the fire and such other information as may be called for by the blanks provided by said fire marshal. [S13,§2468-e; C24, 27, 31, 35,§1625.]

1626 Refusal of officer to investigate. Any chief of a fire department, mayor, or township clerk who fails or refuses to make the investigation and report required of him, shall be fined in a sum not less than five dollars nor more than one hundred dollars. [S13,§2468-e; C24, 27, 31, 35,§1626.]

1627 Record of fires. The fire marshal shall keep in his office a record of all fires occurring in the state, showing the name of the owners, name or names of occupants of the property at the time of the fire, the sound value of the property, the amount of insurance thereon, the total amount of insurance collected, the total amount of loss to the property owner, together with all the facts, statistics, and circumstances, including the origin of the fire, which may be determined by the investigation. Such record shall at all times be open to public inspection. [S13,§2468-f; C24, 27, 31, 35,§1627.]

1628 Testimony under oath. The fire marshal or his designated subordinates shall, when in their opinion further investigation is necessary, take or cause to be taken the testimony under oath of all persons supposed to have knowledge of any facts, or to have means of knowledge in relation to the matter in which an examination is herein required to be made, and shall cause the same to be reduced to writing. [S13,§2468-g; C24, 27, 31, 35,§1628; 48GA, ch 120,§50.]

1629 Oaths—attendance of witnesses. The fire marshal and his designated subordinates shall each have power in any county in the state to administer an oath and compel the attendance of witnesses before them, or either of them, to testify in relation to any matter which is by the provisions of this chapter a subject of inquiry and investigation, and may require the production of any books, papers, or documents necessary for such investigation. [S13,§2468-h; C24, 27, 31, 35,§1629; 48GA, ch 120,§51.]

1630 Refusal to testify or produce books. Any witness who refuses to be sworn, or refuses to testify, except as otherwise provided by law, or who disobeys any lawful order of said fire marshal, or his designated subordinates, or who fails to produce any books, papers, or documents touching any matter under examination, shall

be guilty of a misdemeanor, and shall be fined not exceeding one hundred dollars or imprisoned in the county jail not exceeding thirty days. [S13,§2468-h; C24, 27, 31, 35,§1630; 48GA, ch 120,§52.]

1631 Crimes in connection with fires. If the fire marshal shall be of the opinion that there is evidence sufficient to charge any person with the crime of arson, or with attempt to commit the crime of arson, or of conspiracy to defraud, or criminal conduct in connection with such fire, he shall cause such person to be arrested and charged with the offense, or either of them, and shall furnish to the proper county attorney all such evidence, together with the names of witnesses and all of the information obtained, including a copy of all matter and testimony taken in the case. [S13,§2468-g; C24, 27, 31, 35,§1631; 48GA, ch 120,§53.]

1632 Authority to enter and inspect. The state fire marshal, and his designated subordinates, in the performance of their duties, shall have authority to enter any building or premises and to examine the same and the contents thereof. [S13,§2468-i; C24, 27, 31, 35, §1632; 48GA, ch 120,§54.]

1632.1 Fire escapes. It shall be the duty of the fire marshal to enforce all laws relating to fire escapes. [48GA, ch 120,§63.]

Similar provision, §1669

1632.2 Additional authority. In order to effect the purposes of this chapter, the chief of the fire department aforesaid shall have authority to enter any building or premises and to examine the same and the contents thereof, and orally or in writing, to order the correction of any condition contemplated by section 1633. Should said order be not complied with the officer making the inspection shall report such inspection and the facts thereof to the state fire marshal who shall proceed as though the inspection had been made by himself. [C31, 35, §1632-c1.]

1633 Removal or repair. When the fire marshal acting in person or through his designated subordinate shall find any building or structure, which for want of proper repair or by reason of age and dilapidated condition, is especially liable to fire, and is so situated as to endanger other buildings or property therein, or when any such official shall find in any building or upon any premises combustible or explosive matter or inflammable materials dangerous to the safety of any buildings or premises, he shall in writing order the same to be removed or remedied and such order shall be complied with by the owner or occupant of said building or premises, within such reasonable time as the fire marshal shall specify. [S13, §2468-j; C24, 27, 31, 35,§1633; 48GA, ch 120,§55.]

Referred to in §1632.2

1634 Review of order. Any owner, lessee, or occupant of a building may, within five days after an order is issued for the removal, destruction, or repair thereof, or the removal of the contents thereof or the change of any other conditions, file with the fire marshal a petition for a review of such order. Thereupon the marshal shall fix a place which shall be within the county where the property is situated, and a time, for such review, which shall be not less than three nor more than ten days after the filing of such petition, and notify the petitioner thereof. [C24, 27, 31, 35,§1634.]

1635 Hearing on review. The marshal shall hear the evidence both for and against said order and may affirm, modify, or revoke such order according to the facts presented at such hearing, and make record of his findings and final order. [C24, 27, 31, 35,§1635.]

1636 Appeal. Any owner, lessee, or occupant of a building may appeal to the district court of the county where such building is located from a final order of the fire marshal requiring the removal, destruction, or repair of such building, or the removal of any of its contents, or changing of its condition in any other respect, within thirty days from the delivery to such person of a copy of such final order. [S13,§2468-j; C24, 27, 31, 35,§1636.]

1637 How appeal taken. Such appeal shall be taken by filing in the office of the fire marshal notice of such appeal, specifying the order appealed from and the court and term thereof to which the appeal is taken, accompanied by a bond in the penal sum of one hundred dollars with sureties approved by the clerk of said court, conditioned to pay all costs that shall be adjudged against appellant and abide the decree, judgment, and order of the court. [C24, 27, 31, 35,§1637.]

1638 How tried—trial term. Said appeal shall be tried in equity and the first term shall be the trial term, and if filed in term time shall be triable at any time after the filing of the transcript. The court may affirm, modify, or revoke the order from which the appeal is taken. [C24, 27, 31, 35,§1638.]

1639 Transcript. Forthwith after notice of appeal is filed in the office of the fire marshal, he shall make or cause to be made a certified transcript of the proceedings on review before him, including the order appealed from, notice of appeal, bond and all documentary evidence filed in the proceeding and transmit the same to the clerk of said court who shall docket said appeal and entitle it in the name of the appellant against the state of Iowa. [C24, 27, 31, 35, §1639.]

1640 County attorney. The county attorney shall represent the state and the fire marshal, but not to the exclusion of any other attorney who may be engaged in said cause. [C24, 27, 31, 35,§1640.]

1641 Appeal to supreme court. Either party may appeal from a judgment or order of the district court within the time and in the manner provided by law for appeals in ordinary actions. [C24, 27, 31, 35,§1641.]

Time and manner of appeal, §§12832, 12837

1642 Suspension of order. Any order of the fire marshal from which an appeal has been taken to the district or supreme court, shall remain suspended during the pendency of such appeal. [C24, 27, 31, 35,§1642.]

1643 Costs. If the appellant fails in the appeal the costs shall be taxed against him, but if the order is revoked or annulled the costs shall be taxed to the state. If the order shall be modified, the court may in its discretion apportion the costs. [C24, 27, 31, 35,§1643.]

1644 Enforcing decree and judgment. The court shall issue such mandatory and other writs as shall be necessary to enforce its decree, judgment, or any final order in any such case, and may punish as for contempt of court any refusal to obey the same. [C24, 27, 31, 35, §1644.]

Contempts, ch 536

1645 Appeal exclusive remedy. Unless appealed from as in this chapter provided, any order made by the fire marshal shall be final, and the right of appeal as herein provided shall be the exclusive remedy against the enforcement of such orders. [C24, 27, 31, 35,§1645; 48GA, ch 120,§56.]

1646 Time for compliance with order. When no petition of review has been filed or when the fire marshal on review or the court on appeal has affirmed or modified an order for the removal, destruction, or repair of a building, or the removal of any of its contents, or the change of any of its conditions, the owner, lessee, or occupant shall comply with such order within thirty days after the delivery of the same or a copy thereof to him, either personally or by registered letter to his last known address, or by service upon his duly appointed agent. If such owner, lessee, or occupant shall fail to comply with such order he shall be subject to a penalty of ten dollars for each day of failure or neglect after the expiration of said period, which shall be recovered in the name of the state and paid into the treasury of the county where collected. [S13,§2468-j; C24, 27, 31, 35, §1646.]

1647 Refusal to obey orders. If any person fails to comply with a final order of the marshal or of a court on appeal and within the time fixed, then such officers are empowered and authorized to cause such building or premises to be repaired, torn down, demolished, materials and all dangerous conditions removed, as the case may be, and at the expense of such person, and if such person within thirty days thereafter fails, neglects, or refuses to repay said officers the expense thereby incurred by them, such officers shall certify said expenses, together with twenty-five percent penalty thereon, to the auditor of the county in which said property is situated. [C24, 27, 31, 35,§1647; 48GA, ch 120,§57.]

40ExGA, HF 53, §27, editorially divided

1648 Notice. Notice of the reasonableness and amount of assessment shall be given in a manner as provided for giving notice in ordinary actions by the marshal or his designated subordinate to the property owner, also notifying the property owner that a hearing thereon shall be had before the auditor of said county on a day not less than ten nor more than fifteen days from the date of completed service of notice upon the property owner and if no appeal is taken therefrom to the district court at the time fixed in said notice the auditor shall hear and determine the matter. Any person aggrieved by the order and determination of the auditor may appeal therefrom to the district court of the county by serving notice within twenty days thereafter upon said auditor; and such appeal shall be heard and determined by the court as in cases of appeals from the order of the fire marshal as provided in this chapter. [C24, 27, 31, 35,§1648; 48GA, ch 120,§58.]

Service of notice, §11060

1649 Entry of tax. Said auditor shall enter said expense on the tax records of said county as a special charge against the real estate on which said building is or was situated, if in the name of such person, otherwise as a personal tax against such person, and the same shall be collected as other taxes and, when collected, shall, together with the penalty thereon, be refunded to the fire marshal, and by him paid into the state treasury where it shall be credited to the appropriation for expenses of the fire marshal's office. [C24, 27, 31, 35,§1649.]

Collection of taxes, ch 346

1650 Investigation may be private. Investigation by or under the direction of the state fire marshal or his designated subordinates may in their discretion be private. They may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined. [C24, 27, 31, 35,§1650; 48GA, ch 120,§59.]

1651 Fire drills in public schools. It shall be the duty of the state fire marshal and his designated subordinate to require teachers of public and private schools, in all buildings of more than one story, to have at least one fire drill each month, and to require all teachers of such schools, whether occupying buildings of one or more stories, to keep all doors and exits of their respective rooms and buildings unlocked during school hours. [S13,§2468-k; C24, 27, 31, 35,§1651; 48GA, ch 120,§60.]

1652 Bulletin. The state fire marshal shall prepare a bulletin upon the causes and dangers of fires, arranged in not less than four divisions or chapters, and under the direction of the executive council shall publish and deliver the same to the public schools throughout the state. [S13, §2468-k; C24, 27, 31, 35,§1652.]

1653 Annual report. The state fire marshal shall file with the governor annually, at the time provided by law, a detailed report of his official acts and of the affairs of his office which report shall be published and distributed as the

reports of other state officers. [S13,§2468-n; C24, 27, 31, 35,§1653.]

Time of filing report, §247

1654 Fee for fires reported. There shall be paid to the chief of the fire department, and to mayors of incorporated towns, and to the township clerk of every township, who are by this chapter required to report fires to the state fire marshal, the sum of fifty cents for each fire so reported to the satisfaction of the state fire marshal and in addition thereto there shall be paid to township clerks mileage at the rate of ten cents per mile for each mile traveled to and from the place of fire. Said allowances shall be paid by the state fire marshal out of any funds appropriated for the use of the office of said state fire marshal, provided that such fees shall not be paid to any full-time salaried public official who is paid for full time at such duties. [S13, §2468-o; C24, 27, 31, 35,§1654; 48GA, ch 120, §61.]

1655 Rep. by 48GA, ch 120,§47

CHAPTER 80.1

COMPRESSED GAS SYSTEMS

1655.1 Definition.
1655.2 Installation and maintenance.
1655.3 Prohibition.
1655.4 Enforcement.
1655.5 Nonpermissible use of plant.

1655.1 Definition. A compressed gas for the purpose of this chapter is an inflammable liquefied hydrocarbon material having a vapor pressure exceeding twenty-five pounds per square inch gauge at seventy degrees F. and/or any inflammable liquefied hydrocarbon material with a lesser vapor pressure, but not less than nine pounds absolute vapor pressure at seventy degrees F., when same is used as or in a similar manner to "bottled gas" for purposes such as cooking, water heating, and the like by the gas feed, liquid feed, or other utilization system, or as raw material in "Pentane-air" machines and the like, other than where used industrially for cutting, fabricating, etc. [C35,§1655-g1.]

1655.2 Installation and maintenance. All compressed gas systems to be used for house lighting, cooking, water heating, and refrigeration, hereafter installed, shall be installed and maintained in the following manner:

Location and operation. Cylinders and regulating equipment shall be located outside of any building excepting buildings specially constructed for the sole purpose of housing the equipment. The discharge from safety reliefs shall be located not less than five feet away from any opening in such building which is below the level of such discharge.

Cylinders shall be set upon a firm fireproof foundation.

Extra cylinders shall be stored outside of any building where the gas is being utilized and where they may be protected from extreme heat. No combustible material shall be piled within twenty feet of cylinder, also fires, and electrical apparatus such as switches and other apparatus which may cause sparking shall not be located within twenty feet of the cylinders or regulating equipment.

Piping. Piping for systems conveying gas to the building and gas burning appliances in the gaseous phase shall be standard full-weight wrought iron, or steel or brass or copper pipe, or seamless copper, brass, or other nonferrous tubing approved by the national board of fire underwriters. All lines leading to consuming devices shall be proven free from leaks by testing at a pressure not less than the maximum working pressure as determined by the regulator setting. Installation shall comply with the recommended good practice requirements for the installation, maintenance and use of piping and fittings for city gas.

In systems of a type in which compressed gas in liquid form enters the building only heavy walled seamless brass or copper tubing may be used. Internal diameter of such tubing should not be greater than three thirty-seconds inch and wall thickness not less than three sixty-fourths inch. Tubing shall be as short as possible and so attached and protected as to avoid injury or damage. Tubing shall be tested and proven tight under a pressure of at least fifty pounds per square inch after all connections have been made.

Cylinders. Only cylinders which are constructed and maintained in accordance with the regulations of the interstate commerce commission for this class of service shall be considered suitable for employment in any compressed gas system for house heating, lighting, cooking, water heating, refrigeration, etc.

Shipments of containers in this class of service shall be made in accordance with the then existing regulations of the interstate commerce commission on covering the transportation and handling of such fuels.

When cylinders are not in use, outlet valves shall be kept tightly closed even though cylinders may be considered empty.

Cylinders shall be protected against mechanical injury or tampering at all times. [C35, §1655-g2.]

1655.3 Prohibition. No person, firm, corporation, or concern shall keep for sale, handle or install any compressed gas system which does not comply with the foregoing rules and regulations and any violation of this section shall be punishable by fine not to exceed five hundred dollars or a term in the county jail not to exceed sixty days or by both such fine and imprisonment as the court may direct. [C35,§1655-g3.]

1655.4 Enforcement. It shall be the duty of the office of the state fire marshal to oversee and enforce the above regulations. [C35,§1655-g4.]

1655.5 Nonpermissible use of plant. The owner or operator of any compressed gas system, hereafter installed, which does not conform with the foregoing regulations, shall, upon written notice personally served or sent by registered mail from the office of state fire marshal, cease to use or operate the system until the same complies with or conforms to the foregoing regulations and any failure to comply with the regulations after notice as above prescribed or any failure to install compressed gas systems otherwise than above directed shall be punishable by a fine not to exceed five hundred dollars or imprisonment in the county jail not to exceed sixty days or by both such fine and imprisonment as the court may direct. [C35,§1655-g5.]

CHAPTER 81

FIRE COMPANIES

1656 Exemptions of members.
1657 Certificate of service—evidence.
1658 Certificate of exemption.
1659 False claim to exemption.

1656 Exemptions of members. Any person while an active member of any fire engine, hook and ladder, hose, or any other company for the extinguishment of fire, or the protection of property at fires, under the control of the corporate authorities of any city or town, shall be exempt from the performance of military duty and labor on the roads on account of poll tax, and from serving as a juror. Any person who has been an active member of such company in any city or town as aforesaid, and has faithfully discharged his duties as such for the term of ten years, shall thereafter be exempt from military duty in time of peace, from serving as a juror, and from labor on the roads. [R60,§1763; C73,§1560; C97,§2462; C24, 27, 31, 35,§1656.]

1657 Certificate of service—evidence. Any person who has thus served in any company for the term of ten years shall receive from the foreman of the company of which he shall have been a member a certificate to that effect, and on its presentation to the clerk he shall file the same in his office and give his certificate, under the corporate seal, to such person, setting forth the name of the company of which such person was a member and the duration of such membership, which certificate shall be received in all courts as evidence that the person legally holding the same is entitled to such exemption. [R60,§1764; C73,§1561; C97,§2463; C24, 27, 31, 35,§1657.]

1658 Certificate of exemption. To entitle a person to exemption from labor on the roads before the expiration of the term of ten years, he shall, on or before the first day of April of each year, file with the clerk of the city or town a certificate, signed by the foreman of the company of which he is a member, that the holder thereof is an active member of said fire company, and thereupon the clerk shall enter said exemption upon the street tax list for that year. [C73,§1562; C97,§2464; C24, 27, 31, 35,§1658.]

1659 False claim to exemption. Any person who shall by misrepresentation, or by the use of a false certificate or the certificate of any other person, endeavor to avail himself of the benefits of this chapter, upon conviction thereof, shall be imprisoned in the county jail for a period of not more than six nor less than one month, and pay a fine of not less than ten nor more than one hundred dollars. [R60,§1765; C73,§1563; C97,§2465; C24, 27, 31, 35,§1659.]

CHAPTER 82

FIRE ESCAPES AND OTHER MEANS OF ESCAPE FROM FIRE

1660 Fire escapes.
1661 Terms defined.
1662 Fire escapes required.
1663 Location of fire escapes and exits.
1664 How constructed.
1665 Construction and arrangement.
1666 Class of escapes—stairways.
1667 Doors to open outward.
1668 Number and size of exits.
1669 Supervision of fire escapes.
1670 Standard specifications.
1671 Rules and regulations.
1672 Building inspectors.
1673 Powers and duties.
1675 Notice to owner.
1676 Appeal.
1677 Violations.

1660 Fire escapes. All buildings, structures, and inclosures of three or more stories in height, and such other buildings of a less number of stories as are in this chapter specially designated, shall be equipped with such protection against fire, and means of escape therefrom, as in this chapter provided. [SS15,§4999-a6; C24, 27, 31, 35,§1660.]

1661 Terms defined. The word "building" as used in this chapter shall include all structures or inclosures of each of the classes mentioned or referred to herein. The word "story" shall include a basement story when such basement story is on the average five feet or more above the ground. [SS15,§4999-a6; C24, 27, 31, 35,§1661.]

1662 Fire escapes required. Every building, structure, or inclosure of three or more stories, and every schoolhouse of two stories and not provided with two stairways located approximately at each end of the hallway in the second story, and every structure having a stage, and every theater or opera house of more than one story, or having balconies or galleries, shall have at least the number of fire escapes of the kind prescribed by law as determined by the following formula:

Number of fire escapes shall equal C times P.

P equals the average maximum number of persons on the story with the highest number above the first story.

C is a coefficient and is fixed, and shall be taken for the various classes of buildings as follows:

1. Buildings having wooden or combustible walls, C equals .020.
2. Buildings having brick or combustible walls with combustible interior, C equals .014.
3. Buildings having brick or incombustible walls and incombustible roof and slow burning construction, C equals .012.
4. Buildings of fireproof construction throughout, C equals .007.
5. Buildings of wooden or combustible walls equipped with efficient water sprinkler system, C equals .014.
6. Buildings having brick or incombustible walls with combustible interior equipped with efficient water sprinkler system, C equals .008.
7. Buildings having brick or incombustible walls and incombustible roof and slow burning construction equipped with efficient water sprinkler system, C equals .006.
8. Fireproof buildings equipped with efficient water sprinkler system, C equals .003.

When the result of the said formula is one or any fraction thereof, the number of escapes shall be one. The number of additional escapes required shall include any fraction as a unit, except when such fraction shall be thirty-three hundredths or less, in which case the fraction may be dropped if permitted by the inspector. [SS15,§4999-a7; C24, 27, 31, 35,§1662.]

1663 Location of fire escapes and exits. The following regulations as to location of fire escapes and exits are hereby established:

1. The first fire escape required by law shall be placed as far as possible from the existing inside stairway or passage to the lower floors of the building, taking into account the hazard and the path or route of access to the escape from such stairway.

2. The distance to the nearest fire escape from any inside stairway or passage to the lower floor shall not exceed two hundred feet by way of the path or route of access to such fire escape from such stairway or passage.

3. Additional fire escapes to those otherwise provided by law shall be provided wherever it is necessary to pass within twenty feet of any stairway or elevator shaft from any portion of the building more than twenty feet from such stairway or shaft to reach the fire escape required by the provisions of law and where there are peculiar, unusual, or extreme hazards, additional fire escapes may be required by those authorized by law to regulate and fix the number and requirements of fire escapes.

4. When the inspector shall deem it necessary on account of the height of any building or on account of the number of persons ordinarily occupying said building, either permanently or temporarily in the course of business, such building shall be equipped with a sufficient number of fire escapes to permit the exit of all occupants within the following periods of time:

a. Buildings with wooden or combustible walls, two minutes.

b. Buildings having brick or incombustible walls with combustible interior, three minutes.

c. Buildings having brick or incombustible walls and incombustible roof and slow burning interior construction, four minutes.

d. Buildings of fireproof construction throughout, fifteen minutes; or a less period of time if hazard of merchantable contents of such building may so require.

In estimating the period of time required the rate of descent on the fire escapes shall not be taken in excess of one and five-tenths feet of vertical distance, or height, per second, when said fire escapes are fully loaded, which rate of descent shall be estimated to permit the exit of not to exceed one person per second; but the time of complete exit as herein provided may be increased where efficient sprinkler systems are installed, such increase of time to be determined by the character and efficiency of the sprinkling system unless peculiar or unusual hazards exist. [SS15,§4999-a7; C24, 27, 31, 35,§1663.]

1664 How constructed. All fire escapes shall be constructed as described in the following classifications:

Class A. Fire escapes of this class shall consist of those more safe and efficient than outside ladders and stairways and which shall have been approved as such by the state fire marshal, and may include inside stairways and means of escape in fireproof buildings when approved by said fire marshal.

Class B. Fire escapes of this class shall consist of a suitable outside stairway of not less than twenty-two inches clear width of steel or wrought iron constructed with platform and with stationary stairway carried down to within six and one-half feet of the ground, or with a drop or counterbalanced stairway from the second story platform or balcony to the ground.

Class C. Fire escapes of this class shall consist of at least one ladder, not less than eighteen inches in width, of steel or wrought iron construction, of sufficient size and strength for safety, attached to the outside walls of the building and provided with platforms of steel or wrought iron inclosed by suitable railings and of such dimensions and in such proximity to the windows of each story above the first as to render access to the ladder from each story easy and safe, the said ladder to extend to within six and one-half feet of the ground or to be provided with a drop ladder hung at the second

story in such a manner that it can be easily lowered for use. [SS15,§4999-a8; C24, 27, 31, 35, §1664; 48GA, ch 120,§64.]

1665 Construction and arrangement.

1. All of the above classes of fire escapes shall be of suitable material, construction, arrangement, and location to make the same safe and efficient and no fire escape of a higher class shall be less safe and efficient than one of a lower class and the provisions of each lower class with respect to platform, access to windows and openings, and sufficiency of strength shall apply to the upper class except where allowed to be modified by those having authority.

2. All fire escapes reaching the top floor shall have suitable extensions reaching from the upper platform to safe landing on the roof of the building; but the state fire marshal may waive this provision when on examination he finds that such ladder would be an element of danger.

3. All fire escapes of any of the foregoing classes shall have such windows or openings leading to the platform or balconies of the same as shall be necessary to make the same safe and efficient, and all routes or paths of access to said fire escapes shall be safe and sufficient, with all doors of rooms leading to fire escapes one-half glass and equipped with mortise latches or equivalent so that the same may be easily and quickly opened by breaking the glass and turning the latches from the inside of the doors, all so as to render access to the fire escape from each floor above the first easy and safe. No window or door leading to the platform of a fire escape shall be fastened against exit.

4. The attachment of all fire escapes shall be made in a thorough and substantial manner and sufficient to carry the full load that may be placed on said fire escapes when the same are crowded, with a factor of safety of not less than four.

5. Suitable signs indicating the location of fire escapes shall be posted at all entrances to elevators, stairways, landings, and in all rooms.

6. In all buildings which are used for lodging or sleeping purposes, and in opera houses, theaters, and public assembly halls, and other buildings occupied or used at night where, in the judgment of the state fire marshal, this provision should apply, red lights shall be maintained at night or when the buildings are darkened, to indicate the place or opening through which access to the fire escape is obtained. Red lights shall not be used for lighting purposes in such buildings at locations where they may be mistaken for an exit light. [SS15,§4999-a8; C24, 27, 31, 35,§1665; 48GA, ch 120,§65.]

1666 Class of escapes—stairways.

1. Hotels, lodging houses, tenements, apartment buildings, schools, retail or department stores, seminaries, college buildings, office buildings, hospitals, asylums, opera houses, theaters, assembly halls, and factories required by law to be equipped with fire escapes shall be equipped with those of class "A" or class "B". All other buildings and structures required to be equipped with fire escapes shall be equipped with those of class "A", "B", or "C", or with a combination of such classes.

2. Class "C" shall not be used on any building over three stories in height in which more than five persons are at any one time allowed upon any one of the floors above said third story nor where any of the persons allowed upon any floor above the third story are females or minors; but the state fire marshal may under peculiar conditions and where the hazards are not great:

a. Permit fire escapes of class "C" to be used on buildings of more than three stories, but when ladder fire escapes are permitted on buildings more than three stories in height the ladders thereof must offset at the platforms and must not continue in the same line for more than one story.

b. Permit fire escapes of class "C" or other approved means of escape to be used on an ordinary dwelling of not more than three stories in height and temporarily used in part for lodging purposes when not more than five persons, none of whom are under sixteen years of age, occupy the third floor.

3. Where stairways not less than forty-four inches in clear width are provided they shall be taken as the equivalent of two or more single stairways in proportion to their width, provided the means of escape and efficiency and safety of said escapes are not thereby diminished. [SS15,§4999-a9; C24, 27, 31, 35,§1666; 48GA, ch 120,§66.]

1667 Doors to open outward. The entrance and exit doors of all hotels, churches, lodge halls, courthouses, assembly halls, theaters, opera houses, colleges, public schoolhouses, and other structures where the hazard is deemed sufficient by the inspector, and the entrance doors to all class and assembly rooms in public school buildings, shall open outward and shall not be fastened against exit or so the same cannot be easily opened from within. [SS15,§4999-a9a; C24, 27, 31, 35,§1667.]

1668 Number and size of exits. Inspectors shall, subject to the final decision of the state fire marshal, have power to determine the number and size of exits from all theaters, opera houses, and assembly halls, and from other buildings having one or more balconies, the location of such exits with reference to fire escapes, and shall require that no exit shall be fastened so as to prevent free passage from the building. [SS15,§4999-a10; C24, 27, 31, 35,§1668; 48GA, ch 120,§67.]

1669 Supervision of fire escapes. The state fire marshal, except when otherwise specially provided by law, shall have general charge and supervision of the inspection and regulation of fire escapes and means of escape and of the enforcement of the law relating thereto, and for this purpose the inspectors named herein, and others upon whom there is imposed by law or ordinance any duty with reference to fire escapes, shall be subject to his direction and to the rules and regulations adopted by such state fire

marshal. [SS15,§4999-a10; C24, 27, 31, 35,§1669; 48GA, ch 120,§68.]

Fire escapes, §§1632.1, 2843, 6362

1670 Standard specifications. The said state fire marshal shall adopt standard uniform specifications for the various classes of fire escapes provided by law and shall furnish such specifications to all persons who are by law made inspectors of fire escapes and means of escape from fire, and such persons shall keep the same on file in their respective offices. [SS15,§4999-a10; C24, 27, 31, 35,§1670; 48GA, ch 120,§69.]

1671 Rules and regulations. The state fire marshal shall make all necessary rules and regulations to carry out the purpose of this law and have the same printed in pamphlet form for distribution; and he shall have the power to approve any and all plans relating to fire escapes of the various classes, and it shall be his duty to see that the same conform to the law, and to make rulings and orders relative thereto, and where any dispute or disagreement arises with respect to the plans and specifications for any fire escape or means of escape from fire, the state fire marshal shall have the power and authority to determine and pass upon the same and make orders relative thereto. [SS15,§4999-a10; C24, 27, 31, 35,§1671; 48GA, ch 120,§70.]

1672 Building inspectors. The building inspector or other officer performing like duties in cities having such officer, and if there be no such officer, then the chief of the fire department, and if there be no chief of a paid fire department, the mayor of such city or town, or if the building is not within the corporate limits of any city or town, then the chairman of the board of supervisors, shall inspect all fire escapes within their respective jurisdictions, except buildings otherwise required by law to be inspected. [SS15, §4999-a10; C24, 27, 31, 35,§1672.]

1673 Powers and duties. Such inspection officers shall as often as necessary, and whenever complaint is made, carefully inspect and examine such fire escapes, and such inspection shall include all paths or routes between any interior passage to a lower floor and the opening and means of access to the said fire escapes, and the signs, lights, exits, and means of escape of all buildings required to be equipped with fire escapes and required to have certain exits and means of escape; and upon the complaint of any person that any fire escape, exit, or means of escape from fire is being maintained contrary to law, or any rule or regulation relative thereto or relative to protection against fire is being violated, such inspector shall examine into the conditions complained of and determine what, if any, requirements should be made in relation thereto, and shall have power to make all reasonable requirements and regulations in conformity with the law and to determine all matters with respect to fire escapes, protection from fire, and means of escape from buildings. [SS15, §4999-a10; C24, 27, 31, 35,§1673.]

1674 Rep. by 48GA, ch 120,§71

1675 Notice to owner. It shall be the duty of any inspector required by law to inspect fire escapes or means of escape from fire to serve or cause to be served a written notice in behalf of the state of Iowa upon the owner, if he be a resident of the county in which the buildings are situated, or if he be a nonresident of such county, then upon his agent or lessee, that the buildings are not provided with fire escapes in accordance with the provisions of this chapter, or that the fire escapes or means of escape from fire are defective, unsafe, or dangerous, notifying such owner of such lack of fire escapes, condition of the building, defective, dangerous, or unsafe means of escape from fire or any matter relating thereto, and notifying him to comply with the law and requirements of the state fire marshal within sixty days after the service of such notice; but the time of such notice may be extended by the state fire marshal if necessary. [SS15,§4999-a10; C24, 27, 31, 35, §1675; 48GA, ch 120,§72.]

1676 Appeal. The owner, by himself, his agent, or lessee, may appeal from the action or requirement of any inspector at any time within sixty days after the service of such notice by a written communication addressed to said state fire marshal, setting forth such objections as he may have to the complaint, requirement, or regulations of such inspector; and it shall be the duty of the state fire marshal to pass upon and determine all matters of disagreement relating to fire escapes and the means of escape from fire in buildings, and all rules, regulations, findings, and orders made by the state fire marshal in his discretion, shall be reasonable and not unduly burdensome. [SS15,§4999-a10; C24, 27, 31, 35,§1676; 48GA, ch 120,§73.]

1677 Violations. Any person who shall violate any of the provisions of law relating to fire escapes or means of escape from fire, or any owner, agent, or trustee having the full care and control of any building and who has been served with notice as provided herein and who shall, within sixty days of the service of the notice, or within the time as extended by the state fire marshal, fail and neglect to comply with the requirements of law, or of the state fire marshal, or who shall fail, refuse, or neglect to perform any order or requirement fixed by law, or by the state fire marshal, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars. Each additional week of neglect to comply with such notice, order, or requirement shall constitute a separate offense. [SS15,§4999-a11; C24, 27, 31, 35,§1677; 48GA, ch 120,§74.]

CHAPTER 83

PASSENGER AND FREIGHT ELEVATORS

1678 General equipment.
1679 Violations.
1683 Ordinances.
1684.1 Door or gate interlock.

1678 General equipment. Every elevator and elevator opening and machinery connected therewith in every elevator, hoistway, hatchway, and wellhole shall be so constructed, guarded, equipped, maintained, and operated as to render it safe for the purposes for which it is used. Nothing herein contained shall be construed to apply to any elevator hoisting device and anything connected therewith coming under the jurisdiction of the state mine inspector. [C24, 27, 31, 35,§1678.]

1679 Violations. Every person, firm, or corporation operating an elevator in violation of any of the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or by imprisonment in the county jail not to exceed thirty days or by both such fine and imprisonment. [C24,§§1679, 1684; C27, 31, 35,§1679.]

1680 to 1682, inc. Rep. by 41GA, ch 31

1683 Ordinances. Cities and towns and cities with a commission form of government are hereby empowered to enact ordinances providing for the inspections and regulation of the operation of such elevators and of the operators thereof. [C24, 27, 31, 35,§1683.]

1684 Rep. by 41GA, ch 31

1684.1 Door or gate interlock. The hoistway doors and gates of all passenger elevators shall be equipped with an approved interlock (locking device), electrical, mechanical, or electro-mechanical, which will prevent the normal operation of the elevator car: unless the hoistway door at which the car is standing is closed and locked; or unless all hoistway doors are closed and locked; and second, shall prevent opening the hoistway door from the landing side except by a key or special mechanism; unless the car is standing at the landing door; or unless the car is coasting past the landing with its operative device in the "Stop" position. The interlock shall not prevent the movement of the car when the emergency release is in temporary use or when the car is being moved by a car-leveling device. [C27, 31, 35,§1684-a1.]

CHAPTER 84

LIABILITY OF HOTEL KEEPERS AND STEAMBOAT OWNERS

1685 Limitation on liability.
1686 Exception.
1687 Nature of liability.
1688 Limitation on liability.
1689 Leaving baggage after registering off.
1690 Forwarding baggage.
1690.1 Nonliability—conveyance.
1690.2 Liability—conveyance.
1690.3 Liability during transit.

1685 Limitation on liability. No keeper of any hotel, inn, or eating house, nor the owner of any steamboat, shall be liable to any guest for more than one hundred dollars for the loss of or injury to any money, jewelry, articles of gold or silver manufacture, precious stones, personal ornaments, documents of any kind, or other similar property, if such keeper or owner at all times provides:

1. A metal safe or vault, in good order and fit for the safekeeping of such property.
2. Locks or bolts on the door and proper fastenings on the transoms and windows of the sleeping quarters used by guests.
3. Printed notices posted up in a conspicuous place in the office or other public room and in the quarters occupied by guests, stating that such places for safe deposit are provided for the use and accommodation of guests and patrons. [C97,§3138; S13,§3138; C24, 27, 31, 35, §1685.]

Referred to in §§1686, 1687

1686 Exception. The limited liability provided in section 1685 shall not apply where:

1. A guest has offered to deliver such valuables to said keeper or owner for custody in such metal safe or vault, and
2. Said keeper or owner has omitted or refused to receive and deposit the same in such safe or vault and give such guest a receipt therefor.

But such keeper or owner shall not be required to receive from any one guest for deposit in such safe or vault, property having a market value of more than five hundred dollars. [C97, §3138; S13,§3138; C24, 27, 31, 35,§1686.]

Referred to in §1687

1687 Nature of liability. The liability of such keeper or owner for loss of or injury to personal property placed by any guest in his care, other than that described in sections 1685 and 1686, shall be that of a depository for hire. [C24, 27, 31, 35,§1687.]

1688 Limitation on liability. In no event shall the liability of such keeper or owner exceed the following amounts:

1. For each trunk and its contents, two hundred fifty dollars.

2. For each valise and its contents, one hundred fifty dollars.
3. For each box, bundle, or package and its contents, fifty dollars.
4. For any and all other miscellaneous effects of each guest, not exceeding one hundred dollars. [C24, 27, 31, 35,§1688.]

1689 Leaving baggage after registering off. In case baggage or other personal property of a guest has remained in any hotel, inn, eating house, or steamboat forty-eight hours after the guest has paid his bill and registered off and the relation of keeper and guest has ceased, such keeper or owner may hold such baggage or property at the risk of the owner. [C24, 27, 31, 35, §1689.]

1690 Forwarding baggage. In case baggage or other property has been forwarded to any hotel, inn, eating house, or steamboat, and the owner of such baggage or property does not within forty-eight hours become a guest, such keeper or owner may hold such baggage or property at the risk of the owner. [C24, 27, 31, 35, §1690.]

1690.1 Nonliability—conveyance. No keeper or owner of any hotel, inn or eating house shall be liable by reason of his innkeeper's liability or his responsibility as innkeeper to any guest for the loss of or damage to the automobile or other conveyance of such guest left in any garage not personally owned and operated by such hotel, inn or eating house or the owner or keeper thereof. [C31, 35,§1690-c1.]

1690.2 Liability—conveyance. The liability of the keeper or owner of any hotel, inn or eating house, for the loss of or damage to the conveyance of any guest or the personal property of such guest left in such conveyance, where said hotel, inn or eating-house keeper is the owner and operator of such garage, shall be that of a bailee for hire, except that such hotel, inn, rooming-house or eating-house keeper or owner shall not be liable to the guest in an amount in excess of fifty dollars for loss or damage to personal property left in the conveyance unless said guest shall have listed with said hotel, inn, rooming house or eating house, the personal property contained in said automobile or conveyance, at the time the same is left in said garage so owned by and operated by the said hotel, inn, rooming house or eating house. [C31, 35,§1690-c2.]

Referred to in §1690.3

1690.3 Liability during transit. Except as provided in section 1690.2 no keeper or owner of any hotel, inn, rooming house or eating house shall be liable for the loss of or damage to the personal property kept therein of any guest, while the said conveyance is in transit between the said hotel, inn, rooming house or eating house and any garage in which the same is temporarily stored, nor for any damage done by said conveyance while in transit, unless in said transit the same is being driven or operated by an employee or agent of the said hotel, inn, rooming house or eating house. [C31, 35,§1690-c3.]

CHAPTER 85

WATER NAVIGATION REGULATIONS

Referred to in §1703.60

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1691 to 1703, inc. Rep. by 45GA, ch 29

1703.01 Inspectors and conservation officers. The state conservation commission shall appoint one or more qualified persons as inspectors of passenger boats. He shall hold office at the will of the commission, make such reports as the commission may require, and receive such compensation as the commission may determine. He shall be required to give bond for the faithful performance of his duties in the sum of two thousand dollars.

The commission is herewith empowered and authorized to employ such number of qualified persons as it may deem advisable to serve as conservation officers.

Boat inspectors and conservation officers are herewith vested with the powers, and charged with the duties of peace officers, in enforcing the provisions of this chapter. [C97,§2511; C24, 27, 31,§1691; C35,§1703-e1.]

1703.02 Boats—inspection and license. Any person having upon the inland waters of the

state any boat, operated by machinery used for hire or offered for hire, must have his craft and all its appurtenances annually inspected and licensed before it is so used.

Every such owner shall file in the office of the secretary of the commission an application for inspection of boats and licensing thereof, on a blank to be furnished by the commission for that purpose.

Any boat licensed for hire under this chapter shall have the rights and privileges incident to landing, mooring, and use of the state pier located on West Okoboji lake at Arnolds Park, Dickinson county, Iowa, upon payment to the conservation commission of an annual fee of twenty-five dollars.

The boat inspector shall have the power and authority to determine whether the boat is safe for the transportation of passengers and upon what waters it may be used, to determine and designate the number of passengers, including crew, that may be carried, to determine whether the machinery, equipment and all appurtenances are such as to make said boat seaworthy where used and equipped as provided herein, and such other matters as are pertinent.

After said boat has been inspected and licensed as provided herein, the license shall be kept posted in a conspicuous place upon or in said boat and shall be so maintained at all times by the owner of said boat.

Any license issued for the operation of a boat shall be in effect only for the calendar year in which such license is issued.

The owner of all boats used for hire is held responsible for the proper equipping and licensing thereof, as provided in this chapter. [C97, §2512; S13,§2512; C24, 27, 31,§1692; C35,§1703-e2; 48GA, ch 77,§6.]

1703.03 Engineer or pilot license. No motor boat shall be operated for hire by a pilot or engineer upon the inland waters of the state, without his first having obtained an annual engineer's and/or pilot's license hereby required for all operators, who have charge of the steering or directing of the boat's course, or who do steer or direct the boat's course. An engineer's license is required for all operators, who have charge of or operate the equipment by which the boat is propelled. If one person acts in a dual or alternate capacity, he shall first obtain both an engineer's and pilot's license.

Any person desiring a pilot's or engineer's license shall file with the commission an application therefor upon forms prepared and furnished by the commission. Such license may be issued by the boat inspector or inspectors aforesaid. Before the boat inspector shall issue such license, he shall investigate the competency of the applicant, his acquaintance with and experience in boat work, his habits as to sobriety, his mental and physical qualifications for the work, his acquaintance with the waters for which application to operate upon is made, his familiarity with the laws and regulations pertaining to boat operation, and all other pertinent matters. Such license shall not be issued to any one under the age of eighteen years.

Any license issued for operating as a pilot or as an engineer shall be in effect only for the calendar year in which such license is issued. [C97,§2512; S13,§2512; C24, 27, 31,§1694; C35, §1703-e3.]

1703.04 Fees. The annual fee for the inspection and licensing of boats operated for hire shall be based upon the passenger carrying capacity, including crew, for which said boat is licensed to operate.

Such fee shall be computed at the rate of fifty cents per person capacity, but shall not exceed the maximum of twenty dollars.

The fee for inspecting and licensing each sailboat operated for hire shall be not less than one dollar.

The annual fee for pilot's license is one dollar.

The annual fee for an engineer's license is two dollars.

The provisions for this section shall not apply to rowboats propelled by outboard motors, except that all rowboats whether with or without outboard motors, which are rented to the public for hire, and including boats furnished with leased cottages, shall be subject to annual inspection by the boat inspector. For such inspection, a fee of twenty-five cents per boat shall be charged. If such boat or boats are found to be in satisfactory condition, the boat inspector shall attach thereto a small metal plate—said plate giving the date of inspection and the passenger carrying capacity. The responsibility for requesting such inspection with sufficient notice is upon the owner of the boat or boats, and no such rowboat or boats offered or used for hire shall be so used until such inspection has been made and the craft or crafts found to be in satisfactory condition.

The boat inspector shall collect all license fees, and these shall be turned over to the general treasury and be available for the use of the commission. [C97,§2512; S13,§2512; C24, 27, 31, 35,§1694; C35,§1703-e4.]

1703.05 Suspension or revocation. The boat inspector or inspectors may for cause temporarily suspend or revoke the license of any boat, pilot, or engineer that has been issued under this chapter, and the commission, after a due hearing in the matter at its next session, shall make final determination in the matter. Any license issued upon an application, or a statement which is untrue as to any material facts, shall be void from date of issue. Any license which is revoked or found void shall forthwith be returned to the commission. [C97,§2513; S13, §2513; C24, 27, 31,§1695; C35,§1703-e5.]

1703.06 Penalty. If any owner, agent or master of any boat, plying the inland waters of the state, shall hire or offer to hire, such boat for the carrying of a person or persons thereon, without first obtaining annually, before operating such boat in service, a license as in this chapter required, or if such owner, agent or master, having obtained such license, shall permit or receive for carriage on such boat a greater number of persons than authorized

therein, or if any person shall act as pilot or engineer on any boat mentioned for which inspection and license are herein required, without first obtaining a license therefor, or if having such license he continues to follow such avocation after the same has been revoked or has expired, he shall be fined in the sum of not to exceed one thousand dollars or imprisoned* in the county jail not to exceed one year or punished by both fine and imprisonment; but the provisions of this chapter shall not apply to vessels licensed by authority of the United States. [C97,§2513; S13,§2513; C24, 27, 31, §1695; C35,§1703-e6.]

*"Imprisonment" in enrolled bill

1703.07 Block numbers on boat. Every licensed motorboat operated for hire shall have visible, upon both sides of the bow, a block number corresponding to the license number, plainly marked in figures not less than four inches in height. Such number shall be in color contrasting with the color of the boat. [C35,§1703-e7.]

C 35, §1703-e7, editorially divided

1703.08 Registration. All machinery propelled boats, not operated for hire and capable of a speed of eight miles or more per hour, shall be registered with the commission. No fee shall be required for such registration. The registry number shall be plainly marked, upon both sides of the bow, in block figures not less than four inches in height. Such number shall be in color contrasting with the color of the boat. [C35,§1703-e7.]

Section 1703-e8, code 1935, repealed by 47GA, ch 99,§1
Constitutionality, §1703-e9, code 1935; 45GA, ch 29, §9
Omnibus repeal, §1703-e11, code 1935; 45GA, ch 29, §11

1703.09 Definition of "motorboat". A motorboat is defined as any boat or watercraft propelled by machinery. Any boat or craft propelled by attachment to another craft which is propelled by machinery shall be deemed a motorboat. [47GA, ch 99,§4.]

1703.10 Classes of boats. For the purpose of this chapter boats are classified as follows:

Class I. All steamboats.

Class II. All boats with inboard motors used for commercial purposes.

Class III. All motorboats with inboard motors used for private purposes.

Class IV. All motorboats of plane or gliding type, including combination plane and displacement types, propelled by an outboard motor.

Class V. All rowboats of displacement type, with outboard motor.

Class VI. All rowboats or canoes propelled by hand.

Class VII. All sailboats. [47GA, ch 99,§5.]

1703.11 Equipment requirements. No person shall operate any boat as hereinafter designated on the waters of the state which is not equipped as follows:

1. A fire extinguisher of type and size approved by the commission, shall be carried by all motorboats when operated for hire. Such fire extinguisher shall be capable of extinguishing burning gasoline and be of the carbon dioxide, carbon tetrachloride or foam type.

2. Any boat, except steamboats, carrying passengers for hire shall be equipped with air tanks of sufficient capacity to sustain afloat the boat when full of water with all her full complement of passengers and crew on boat.

3. Every motorboat carrying passengers for hire shall carry one life preserver, life belt, buoyant cushion, or ring buoy of type approved by the commission for each person on board.

4. No motorboat, propelled in whole or in part by gas, gasoline or naphtha, shall be operated unless the same is provided with an exhaust or muffler device so constructed and used as to muffle the noise of the exhaust, and no such boat shall be operated with a cut-out or any such device which shall make the muffler ineffective.

5. No motorboat in class I, II, III, or IV shall be operated unless it be equipped with a whistle, horn or sound device capable of making a signal that can be heard from a distance of one thousand feet in calm weather. Sirens are specifically prohibited.

6. Owners of steamboats operated for hire are hereby required to carry boiler insurance covering each steamboat so operated and copies of the insurance policies shall be filed with the commission. [47GA, ch 99,§6.]

1703.12 Arrangement of lights. No person shall operate any boat during the period between thirty minutes after sundown and sunrise which is not equipped with lights as herein prescribed:

1. Every motorboat in class I, II, or III* and all boats in class IV, which in the latter case are capable of a speed of eight miles or more per hour, shall have the following lights:

a. A bright white light in forepart of the boat as near the bow as practical, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel; namely, from right ahead to two points abaft the beam on either side. The glass of the lens shall be not less than three and one-half inches in diameter. In general, this light shall, when in use, be kept pointed in direction boat is traveling.

b. A white light aft (stern) to show all around the horizon. A combined lantern in the forepart of the vessel and lower than the white light aft, showing green to starboard and red to port, so fixed as to throw the light from right ahead to two points abaft the beam on their respective sides.

c. All boats in class IV, not capable of exceeding eight miles per hour, shall have a constant white light in the forepart of the vessel and to be so constructed as to be visible all around the horizon.

*"III or" in enrolled act

2. All boats in class V and VI shall have, when operated on any lake, and when over three

hundred feet from shore, a white light that is constant and so placed as to be visible from any direction.

3. All boats in class VI shall have when operated on any river or stream, a white light which is constant and so placed as to be visible from any direction.

4. All boats in class VII shall have a white light on deck forward of the mast. Such light shall be so constructed as to be visible from any direction. [S13,§2514-a; C24, 27, 31,§1697; 47GA, ch 99,§7; 48GA, ch 78,§1.]

OPERATION LAWS

1703.13 Speed limits. No person shall operate any boat on any of the waters of the state under the jurisdiction of the commission in such a manner as to endanger life and property nor in any manner other than herein prescribed:

1. No boat in class II, III, IV or V shall be operated on a state-owned lake at a speed greater than five miles per hour when within two hundred fifty feet from another craft.

2. No boat in class I, II, III, IV or V shall be operated at a speed exceeding five miles per hour unless vision is unobstructed three hundred feet ahead.

3. It shall be unlawful to operate any motorboat within three hundred feet of the shore of any lake at a speed greater than ten miles per hour.

4. It shall be unlawful for class I, II, III, and IV boats to operate on West Okoboji lake within the following named zones, which zones shall be marked by the conservation commission with buoys not more than six hundred feet apart to separate from the main portion of West Okoboji lake such zones, to wit:

a. That portion of West Okoboji known as Browns Bay and lying south of a direct line connecting the Lime Kiln Point and Pocahontas Point.

b. That portion of West Okoboji known as Emersons Bay, and the area adjacent thereto and lying west of a line drawn from a point three hundred feet east of Gull Point, due south and intersecting the north boundary of zone one.

c. That portion of West Okoboji lying to the westward of a line drawn from a point three hundred feet east of Gull Point northwest to the southwest corner of Babcock's property on the north shore of Millers Bay.

d. That portion of West Okoboji lying eastward of a line drawn due south from Manhattan Point and intersecting the northeast boundary of zone three.

e. That portion of West Okoboji lying to the eastward of a line drawn from Colcords Point southward to a point three hundred feet due southwest of Dixons Point.

Except that all boats in said classes may operate in such zones at a maximum speed of ten miles per hour for the purpose of going to or from landings. [47GA, ch 99,§8; 48GA, ch 78,§2.]

1703.14 Right-of-way rules. Boat traffic shall be governed by the following rules:

1. Passing from rear—keep to the left.

2. Passing head-on—keep to the right.

3. Passing at right angles—boat at the right has right-of-way, other conditions being equal.

4. Sailboats have right-of-way over all other boats. Motorboats, when passing sailboats, shall always pass on windward side.

5. Any boat backing from a landing has the right-of-way over incoming boats. [47GA, ch 99, §9.]

1703.15 Aircraft prohibited. Aircraft shall not make use of waters under the jurisdiction of the commission for the purpose of landing and carrying passengers or other purposes, except at a time of danger or distress when such use may be necessary or unavoidable. [47GA, ch 99,§10.]

ARTIFICIAL LAKES, BOAT RACES

1703.16 Certain boats excluded.

1. No motorboat in class I, II, or III and no boats in classes IV and V, shall be permitted on any artificial lake under the jurisdiction of the commission.

2. No person shall operate any sailboat on any artificial lake under the jurisdiction of the commission except those lakes specifically designated by the commission. All sailboats so operated must be of a type and size approved by the commission.

3. All privately owned boats on artificial lakes under the jurisdiction of the commission shall be kept only at locations designated by the commission.

4. All privately owned rowboats used on or kept at the artificial lakes under the jurisdiction of the commission shall be seaworthy for the waters where they are kept or used. They shall not be loaded to the extent that more than one-third of the height of the freeboard is submerged. All such boats shall be removed from state property whenever ordered by the commission, and, in any event, shall be removed from such property not later than December 1 of each year. [47GA, ch 99,§11; 48GA, ch 78,§3.]

1703.17 Races. No boat race or regatta shall be conducted upon state waters unless permission is granted by the commission.

Boats not participating in such race or regatta shall remain at least fifty feet from the racing course during such contest.

Laws pertaining to speeds or passing distances shall not apply to boats or boat operators engaged in such race or regatta. [47GA, ch 99, §12.]

BUOYS AND STRUCTURES

1703.18 Regulations for buoys.

1. No private buoy or any obstruction of any kind shall be maintained less than one hundred feet from shore nor more than three hundred feet, except by permission from the commission.

2. All private buoys must float in a vertical position with at least eighteen inches project-

ing above the water and shall be painted white or have a white flag of at least one square foot in area attached thereto.

3. It shall be unlawful to tamper with, move or attempt to move any state-owned buoy.

4. No boat shall be anchored away from the shore and left unguarded unless it be attached to a buoy. [47GA, ch 99,§13.]

1703.19 Structures along shore. No person shall maintain or erect any structure beyond the line of private ownership along or upon the shores of state-owned waters in such a manner as to obstruct the passage of pedestrians along the shore between the ordinary high water mark and the water's edge, except by permission of the commission. [47GA, ch 99,§14.]

1703.20 Driving over ice. No craft or vehicle operating on the surface of ice on the inland meandered lakes and streams of the state and propelled by machinery in whole or in part shall be operated without a permit being issued for such operation by the commission. Ice cutting machinery, automobiles, motorcycles and trucks, when such are used without endangering public safety are excepted from the provisions of this section. Any such permit issued may be revoked by the commission if such craft or vehicle is operated in a careless manner or endangers others. [47GA, ch 99,§15.]

GENERAL PROVISIONS

1703.21 Negligence not exonerated. Nothing in this chapter shall exonerate any owner, operator or crew of any craft from the consequences of any neglect to carry lights, signals or equipment or from any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. [47GA, ch 99,§16.]

1703.22 Federal craft—exception. The provisions of this chapter shall not apply to craft licensed by authority of the United States when such craft are operated in accordance with the federal laws and regulations therefor, provided that such craft comply with the provisions of this chapter relating to lights and operation. [47GA, ch 99,§17; 48GA, ch 78,§4.]

1703.23 Accidents reported. All navigation accidents shall be reported as promptly as possible to the nearest police officer and to the commission or its authorized representative. [47GA, ch 99,§18.]

1703.24 Overloading boats for hire. No person offering a boat for hire nor any person using a rented boat shall permit said boat to be occupied by more passengers and crew than the licensed capacity of the boat permits. [47GA, ch 99,§19.]

1703.25 Unworthy boats drydocked. No person shall place, or allow to remain in the public waters any boat for hire which has failed to pass inspection. [47GA, ch 99,§20.]

1703.26 Official duty exemption. Members of the commission, its deputies, agents and employees shall not be deemed violating the provisions of this chapter applying to the work of the commission while on duty and acting within the scope of their employment. [47GA, ch 99, §21.]

1703.27 Penalty. Any person violating any of the provisions of this chapter shall, upon conviction, be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [S13,§2514-d; C24, 27, 31, §1700; C35,§1703-e10; 47GA, ch 99,§§2, 22.]

Constitutionality, 47GA, ch 99, §136

CHAPTER 85.1

STATE CONSERVATION COMMISSION

Referred to in §1703.60

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

1703.28 Creation of commission—membership.
1703.29 Appointment.
1703.30 Full-time appointments.
1703.31 Vacancies.
1703.32 Compensation.
1703.33 Expenses generally.
1703.34 Bonds—surety.
1703.35 Premium.
1703.36 Offices.
1703.37 Organization and meetings.
1703.38 Conservation director.
1703.39 Term and salary.
1703.40 Officers and employees.
1703.41 Conservation officers.
1703.42 Peace officers.
1703.43 Removal.
1703.44 Funds.
1703.45 Report of funds.
1703.46 Expenditures.
1703.47 Divisions of department.
1703.48 Political activity.
1703.49 General duties.
1703.50 Specific powers.
1703.51 Orders—publication.
1703.52 Interpretation and limitations.
1703.53 Federal wildlife act—assent.

1703.28 Creation of commission—membership. There is hereby created a state conservation commission which shall consist of seven citizens of the state who are interested in and have substantial knowledge of the subjects embraced in this chapter. Not more than four of

said members shall, when appointed, belong to the same political party. No person appointed to said commission shall during his term hold any other state or federal office. [S13,§1400-p; C24, 27,§§1795, 2604; C31,§§1703-d2,-d3, 1795, 2604; C35,§1703-g1.]

1703.29 Appointment. Said members shall be appointed by the governor with the approval of two-thirds of the members of the senate. [C24, 27,§1795; C31,§§1703-d2, 1795; C35,§1703-g2.]

1703.30 Full-time appointments. During the session of the general assembly in 1937 and at a corresponding time each two years thereafter, the governor shall appoint two or three members, as the case may be, for a full term of six years. [C24, 27,§1796; C31,§§1703-d3, 1796; C35,§1703-g3.]

See 46GA, ch 13,§3

1703.31 Vacancies. In case of vacancies, the governor shall appoint for the unexpired portion of the term, and if the general assembly be not then in session the governor shall, upon the convening of the general assembly, promptly report said appointment to the senate for its approval. [C31,§1703-d5; C35,§1703-g4.]

1703.32 Compensation. Each member of the commission shall receive the sum of seven dollars and fifty cents for each day actually and necessarily employed in the discharge of official duties, provided said compensation shall not exceed five hundred dollars for each fiscal year. [C31,§1703-d6; C35,§1703-g5.]

1703.33 Expenses generally. The members and employees of the commission, the conservation director and conservation officers shall be reimbursed for all actual and necessary expenses incurred by them in the discharge of their official duties when absent from their usual place of abode, unless said appointees or employees are serving under a contract which requires them to defray their own expenses. [C31,§1703-d6; C35,§1703-g6.]

1703.34 Bonds — surety. The commission may require bonds of appointees and employees other than those herein specifically named. All bonds insuring the fidelity of the commissioners, and of the appointees and employees of the commission shall be signed by a surety authorized by law to execute such bonds. [C31,§1703-d7; C35,§1703-g7.]

1703.35 Premium. The premium on all the aforesaid fidelity bonds shall be paid from the administration fund of the commission. [C31, §1703-d7; C35,§1703-g8.]

1703.36 Offices. The commission shall keep its office at the seat of government. The executive council shall supply and properly furnish said rooms. [C31,§1703-d10; C35,§1703-g9.]

1703.37 Organization and meetings. Said commission shall organize annually by the election of a chairman. The commission shall meet annually at the seat of government on the first Tuesday of January, April, July, and October and at such other times and places as it may deem necessary. Meetings may be called by the chairman, and shall be called by the chairman on the request of two members of the commission. [C31,§§1703-d8,-d9; C35,§1703-g10.]

1703.38 Conservation director. The commission shall employ an administrative head who shall be known as state conservation director and be responsible to the commission for the execution of its policies. He shall be a person of executive ability and possess special knowledge relative to the duties herein imposed on the commission. [C31,§§1703-d16,-d19; C35, §1703-g11.]

1703.39 Term and salary. Said director shall serve during the pleasure of the commission and shall receive an annual salary, not to exceed four thousand dollars, to be fixed by the commission. [C31,§1703-d17; C35,§1703-g12.]

1703.40 Officers and employees. Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said commission. Said officers shall be known as state conservation officers. The salaries of the state conservation officers shall not exceed one thousand five hundred dollars per year. [C31, §§1703-d20,-d22; C35,§1703-g13.]

1703.41 Conservation officers. No person shall be appointed as a conservation officer until he has satisfactorily passed a competitive examination, held under such rules as the commission may adopt, and other qualifications being equal only those of highest rank in examinations shall be appointed. [C35,§1703-g14.]

1703.42 Peace officers. Conservation officers shall have the power of, and be deemed peace officers within the scope of the duties herein imposed on them. The conservation officers are likewise given the power of peace officers with respect to all violations of the motor vehicle laws and all public offenses committed in their presence. [C73,§4052; C97,§2540; SS15,§§2539 2540; C24, 27, 31,§1715; C35,§1703-g15; 47GA, ch 99,§135a.]

1703.43 Removal. The appointees and employees aforesaid may be removed by the said director at any time subject to the approval of the commission. [C31,§1703-d20; C35,§1703-g16.]

1703.44 Funds. The financial resources of said commission shall consist of three funds:

1. A state fish and game protection fund,
2. A state conservation fund, and
3. An administration fund.

The state fish and game protection fund, ex-

cept as otherwise provided, shall consist of all moneys accruing from license fees and all other sources of revenue arising under the division of fish and game.

The conservation fund, except as otherwise provided, shall consist of all other funds accruing to the conservation commission.

The administration fund shall consist of an equitable portion of the gross amount of the two aforesaid funds, to be determined by the commission, sufficient to pay the expense of administration entailed by this chapter. [C31, §§1703-d23, 1820; C35,§1703-g17.]

Referred to in §1703.53

1703.45 Report of funds. The conservation director shall, at least monthly, make return and pay to the treasurer of state all moneys then in his hands belonging to the aforesaid funds. [C31,§§1703-d23, 1820; C35,§1703-g18.]

1703.46 Expenditures. All funds accruing to the fish and game protection fund, except the said equitable portion, shall be expended solely in carrying on the activities embraced in the division of fish and game.

All administrative expense shall be paid from the administration fund.

All other expenditures shall be paid from the conservation fund.

All expenditures under this act [46GA, ch 13] shall be subject to approval by the state comptroller. [C35,§1703-g19.]

Referred to in §1703.53

1703.47 Divisions of department. The department of conservation, herein created, shall consist of the following divisions:

1. A division of fish and game which shall include matters relating to fish and fisheries, waterfowl, game, fur-bearing and other animals, birds, and other wildlife resources.

2. A division of lands and waters which shall include matters relating to state waters, state parks, forests and forestry, and lakes and streams, including matters relating to scenic, scientific, historical, archaeological, and recreational matters.

3. A division of administration which shall include matters relating to accounts, records, enforcement, technical service, and public relations. [C35,§1703-g20.]

Section 1703-g21, code 1935, repealed by 47GA, ch 99, §23

1703.48 Political activity. No member, officer, or employee of the commission shall, directly or indirectly, exert his influence to induce any other officers or employees of the state to adopt his political views, or to favor any particular candidate for office, nor shall such member, officer, or employee contribute in any manner, directly or indirectly, any money or other things of value to any person, organization or committee for political campaign or election purposes. Any person violating this section shall be removed from his office or position. [C35,§1703-g22.]

Constitutionality, §1703-g23, code 1935; 46GA, ch 13, §37

1703.49 General duties. It shall be the duty of the commission to protect, propagate, increase and preserve the fish, game, fur-bearing animals and protected birds of the state and to enforce by proper actions and proceedings the laws, rules and regulations relating thereto. The commission shall collect, classify, and preserve all statistics, data and information as in its opinion shall tend to promote the objects of this chapter; shall conduct research in improved conservation methods and disseminate information to residents of Iowa in conservation matters. [C31, 35,§1703-d11.]

44GA, ch 26, §7, editorially divided

1703.50 Specific powers. The commission is hereby authorized and empowered to:

1. Expend any and all moneys accruing to the fish and game protection fund from any and all sources in carrying out the purposes of this chapter; any act, or acts, not consistent with this provision are hereby repealed so far as they may apply to the fish and game protection fund;

2. Acquire by purchase, condemnation, lease, agreement, gift and devise lands or waters suitable for the purposes hereinafter enumerated, and rights-of-way thereto, and to maintain the same for the following purposes, to wit:

a. Public hunting, fishing and trapping grounds and waters to provide areas in which any person may hunt, fish, or trap in accordance with the provisions of the law and the regulations of the commission;

b. Fish hatcheries, fish nurseries, game farms and fish, game, fur-bearing animal and protected bird refuges;

3. Extend and consolidate lands or waters suitable for the above purposes by exchange for other lands or waters and to purchase, erect and maintain buildings necessary to the work of the commission;

4. Capture, propagate, buy, sell, or exchange any species of fish, game, fur-bearing animals and protected birds needed for stocking the lands or waters of the state, and to feed, provide and care for such fish, animals and birds;

5. The commission is hereby authorized to adopt and enforce such departmental rules governing procedure as may be necessary to carry out the provisions of this chapter; also to carry out any other laws the enforcement of which is vested in the commission;

6. The commission is hereby further authorized to adopt, publish and enforce such administrative orders as are authorized in section 1794.001;

7. Pay the salaries, wages, compensation, traveling and other necessary expenses of the state conservation commissioners, state conservation director, state conservation officers and other employees of the commission, and to expend money for necessary supplies and equipment, and to make such other expenditures as may be necessary for the carrying into effect the purposes of this chapter. [C31, 35,§1703-d12; 47GA, ch 99,§24.]

1703.51 Orders — publication. Administrative orders shall be made only after an investigation of the matter concerned and shall take effect, unless otherwise designated in the order,

after publication in at least one newspaper of general state circulation or in a newspaper having circulation in the territory affected. A copy of all such orders shall before publication be filed with the secretary of state. [C31,§1703-d13; C35,§1703-e12; 47GA, ch 99,§25.]

1703.52 Interpretation and limitations. The foregoing sections shall not be construed as authorizing the commission to change any penalty for violating any game law or regulation, or change the amount of any license established by the legislature, or to promulgate any open season on any fish, animal or bird contrary to the laws of the state of Iowa, or to extend except as provided in this chapter any open season or bag limit on any kind of fish, game, fur-bearing animal or of any birds prescribed by the laws of the state of Iowa or by federal laws or regulations, or to contract any indebtedness or obligation beyond the funds to which they are lawfully entitled. [C31, 35,§1703-d15; 47GA, ch 99,§28.]

1703.53 Federal wildlife act—assent. The state of Iowa hereby assents to the provisions of the act of congress entitled "An act to provide that the United States shall aid the states in wildlife restoration projects, and for other purposes," approved September 2, 1937 [50 Stat. L. 917.], and the state conservation commission is hereby authorized and empowered to perform such acts as may be necessary to the conduct and establishment of cooperative wildlife-restoration projects, as defined in said act of congress, in compliance with said act and with rules and regulations promulgated by the secretary of agriculture thereunder; and no funds accruing to the state of Iowa from license fees paid by hunters shall be diverted for any other purpose than as set out in sections 1703.44 and 1703.46. [48GA, ch 75,§1.]

CHAPTER 85.2

ACQUISITION OF LANDS BY CONSERVATION COMMISSION

Referred to in §1703.60

1703.54 Lands.
1703.55 Taxes.
1703.56 Expenditures.
1703.57 Revenues—segregation.
1703.58 Payment.
1703.59 General powers.

1703.54 Lands. The state conservation commission is hereby authorized to accept gifts, donations or contributions of land suitable for forestry or conservation purposes and to enter into agreements with the federal government or other agencies for acquiring by lease, purchase or otherwise such lands as in the judgment of the commission are desirable for said purposes. [C35,§1703-g24.]

1703.55 Taxes. All lands acquired under this chapter by the state conservation commission or any agency of the federal government shall be subject to the regular tax levies as other real estate in said taxing district in each and every year and this provision of law shall be written into every conveyance of real estate under this chapter. The valuation of said land for assessment and taxation shall be limited to the price at which same was purchased by the state conservation commission or any agency of the federal government. [C35,§1703-g25.]

1703.56 Expenditures. When lands are acquired or leased, the said commission is authorized to make expenditures from any of its funds not otherwise obligated, for the management, development and utilization of such areas; to sell or otherwise dispose of products from such lands, and to make such rules and regulations as may be necessary to carry out the purposes of this chapter. [C35,§1703-g26.]

1703.57 Revenues—segregation. All revenues derived from lands now owned or later acquired under the provisions of this chapter shall be segregated by the treasurer of state for the use of the state conservation commission in the acquisition, management, development and use of such lands until all obligations incurred have been paid in full. Thereafter, fifty percent of all net profits accruing from the administration of such lands shall be applicable for such purposes as the general assembly may prescribe, and fifty percent shall be paid into the temporary school funds of the county in which lands are located. [C35,§1703-g27.]

1703.58 Payment. Obligations for the acquisition of land incurred by the commission shall be paid solely and exclusively from revenues derived from such lands and shall not impose any liability upon the general credit and taxing power of the state. [C35,§1703-g28.]

1703.59 General powers. The commission shall have full power and authority to sell, exchange or lease lands under its jurisdiction when in its judgment it is advantageous to the state to do so, provided said sale, lease or exchange shall not be contrary to the terms of any contract which it has entered into. [C35,§1703-g29.]

CHAPTER 86

FISH AND GAME CONSERVATION

Referred to in §1703.60

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1703.60 Definitions. Words and phrases as used in chapters 85 to 87.1, inclusive, and such other chapters as relate to the subject matter of these chapters shall be construed as follows:

1. "Closed season": That period of time during which hunting, fishing, trapping or taking is prohibited.
2. "Open season": That period of time during which hunting, fishing, trapping or taking is permitted.
3. "Measurement of fish": Length from end of nose to longest tip of tail.
4. "Person": Person shall mean any person, firm, partnership or corporation.
5. "Sell and sale": Selling, bartering, exchanging, offering or exposing for sale.
6. "Possession": Both active and constructive possession and any control of things referred to.
7. "Transport and transportation": All carrying or moving or causing to be carried or moved.
8. "Take or taking or attempting to take or hunt": Any pursuing, or any hunting, fishing, killing, trapping, snaring, netting, searching for or shooting at, stalking or lying in wait for any game, animal, bird or fish protected by the state laws or regulations adopted by the commission whether or not such game be then subsequently captured, killed or injured.
9. "Bag limit or possession limit": The number of any kind of game, fish, bird or animal or other wildlife form permitted to be taken or held in a specified time.
10. "Contraband": The term "contraband" as used in the laws pertaining to the work of the commission shall mean anything, the possession of which was illegally procured, or the possession of which is unlawful.
11. "Alien": Alien shall not be construed to mean any person who has applied for naturalization papers.
12. "Director": The term "director" shall mean the regularly appointed director of the state conservation commission and wherever such director is authorized or required to do an act, unless otherwise provided, it shall be construed as authorizing performance by a regular assistant or duly authorized agent of such director. [48GA, ch 78,§24.]

1704 State ownership and title—exceptions. The title and ownership of all fish, mussels, clams, and frogs in any of the public waters of the state, and in all ponds, sloughs, bayous, or other land and waters adjacent to any public waters stocked with fish by overflow of public waters, and of all wild game, animals, and birds, including their nests and eggs, and all other wildlife, found in the state, whether game or non-game, native or migratory, except deer in parks and in public and private preserves, the ownership of which was acquired prior to April 19, 1911, are hereby declared to be in the state, except as otherwise in this chapter provided. [S13,§§2562-c, 2563-j; SS15,§2562-b; C24, 27, 31, 35,§1704; 48GA, ch 77,§14.]

1705 Conclusive presumption. Any person catching, taking, killing, or having in possession any of such fish, mussels, clams, frogs, game, animals, or birds, their nests or eggs, or other wildlife in violation of the provisions of this chapter, shall be held to consent that the title to the same shall be and remain in the state for the purpose of regulating and controlling the catching, taking, or having in possession the same, and disposing thereof after such catching, taking, or killing. [S13,§2562-c; SS15, §2562-b; C24, 27, 31, 35,§1705; 48GA, ch 77,§15.]

1706, 1707 Rep. by 45GA, ch 30,§4. See §1794.026

1708 Rep. by 44GA, ch 26,§17

1709 Fish hatcheries — game farms. The state conservation director shall have the right to establish and control the state hatcheries and game farms, which shall be used for the purpose of stocking the waters of the state with fish and the natural covers with game birds to the extent of the means provided for that purpose; and impartially and equitably distribute all birds, eggs, and fry raised by or furnished to the state, or for it through other sources, in the streams, lakes, and natural covers of the state. [C97, §2539; SS15,§2539; C24, 27, 31, 35,§1709.]

1709.1 State game refuges. Whenever any land, stream, or lake has been declared by the state conservation commission to be a public park and has been taken for public park purposes, or where any land is now owned and used by the state of Iowa, the state conservation director shall have the right and power to establish state game refuges or sanctuaries on such land where the same is suitable for this purpose. [C27, 31, 35,§1709-a1.]

41GA, ch 32, §1, editorially divided

1709.2 Game management area. Whenever the commission shall establish and create a game management area upon any public lands or waters, or with the consent of the owner thereof upon any private lands or waters, it shall with the consent of such owner, if any, have the right to post and prohibit, and to regulate or limit such lands or waters against trespassing, and/or against hunting, fishing or trapping, and any violation thereof shall be unlawful. [C35,§1709-e1.]

1709.3 Hunting on game refuges. It shall be unlawful to hunt, pursue, kill, trap or take any wild animal, bird, or game on any state game refuge so established at any time of the year, and no one shall carry firearms thereon, providing, however, that predatory birds and animals may be killed or trapped under the

authority and direction of the state conservation director.

The director shall have the authority to specify the distance from a state game refuge where shooting may be prohibited, and shall have notice of same published in one newspaper in the county so affected, provided, however, this prohibition shall not apply to owners or tenants hunting on their own land outside of game refuge. [C27, 31, 35,§1709-a2.]

1709.4 Notice of establishment. Whenever any such refuge or preserve is established by the director, he shall publish one notice of such establishment in an official newspaper in the county in which the refuge is located and shall post notices in conspicuous places around the said refuge. [C27, 31, 35,§1709-a3.]

1709.5 Spawning grounds. The director shall have the right to set aside certain portions of any state waters for spawning grounds where the same are suitable for this purpose for such length of time as he may deem advisable by the placing of notices around such area, and it shall be unlawful for any person to fish or to in any manner interfere with the spawning of fish in this area. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [C31, 35,§1709-c1.]

Punishment, §12894

1710 Reports and accounting. At the time provided by law, the director shall make a report to the governor of his doings for the preceding biennial period, including therein an itemized statement of all receipts and disbursements; also all contracts for the taking of soft fish from the waters of this state, with the profits accruing from such contracts; also such other information upon the subject of the culture of fish and the protection of game as may be of value. All funds derived under said contracts shall be paid into the state fish and game protection fund. [C97,§2539; SS15,§2539; C24, 27, 31, 35, §1710.]

Time of report, §246

1711 Rep. by 41GA, ch 33

1712 Rep. by 46GA, ch 13,§36

1713 Arrests—assistance of peace officers. State conservation officers may arrest without warrant any person violating the provisions of this chapter. They may serve and execute any warrant or process issued by any court in enforcing said provisions, in the same manner as any peace officer might serve and execute the same, and they shall receive the same fee therefor. They may call to their aid any peace officer or other person, whose duty shall then be to enforce or aid in enforcing the provisions of this chapter. [C97,§2562; SS15,§2562; C24, 27, 31, 35,§1713.]

Arrest, ch 621 et seq.

1714 Seizure of unlawful game. It shall be the duty of the director, conservation officers, and police officers of the state, to seize with or without warrant and take possession of any fish, furs, birds, or animals, or mussels, clams, and frogs, except for bait which have been caught, taken, or killed at a time, in a manner, or for a purpose, or had in possession or under control, or offered for shipment, or illegally transported in the state or to a point beyond the borders thereof, contrary to the provisions of this chapter. [SS15,§2539; C24, 27, 31, 35,§1714; 48GA, ch 77,§1.]

1715 Rep. by 45GA, ch 30,§4

1716 Search warrants. Any court having jurisdiction of the offense, upon receiving proof of probable cause for believing that any fish, mussels, clams, frogs, birds, furs, or animals caught, taken, killed, had in possession, under control, or shipped, contrary to any of the provisions of this chapter, or hidden or concealed in any place, shall issue a search warrant and cause a search to be made in any place therefor. The property so seized under such warrant shall be safely kept under the direction of the court so long as necessary for the purpose of being used as evidence in any trial, and if such trial results in a conviction the property seized shall be confiscated by the director or his officers. [SS15,§2539; C24, 27, 31, 35,§1716.]

Search warrant proceedings, ch 617

1717 Rep. by 46GA, ch 13,§36

1718 to 1729, inc. Rep. by 45GA, ch 30,§4. See §§1794.082–1794.098

1730 to 1740, inc. Rep. by 45GA, ch 30,§4. See §§1794.029–1794.048

1741 Dams—fishways. It shall be unlawful for any person, firm, or corporation to place, erect, or cause to be placed or erected, any dam or other device or contrivance in such manner as to hinder or obstruct the free passage of fish up, down, or through such waters, except as otherwise provided in this chapter. Dams for manufacturing or other lawful purposes may be erected across the waters of the state. No permanent dam or obstruction across such waters shall be erected or maintained which is not provided with a fishway, except by written approval of the state conservation director, nor shall any pumping station or plant except sand pumping and dredging machines, in or connected with such waters be constructed or operated except by written approval of the state conservation director, which is not provided with screens to prevent fish from entering the pumping station or plant. Such fishways and screens shall be constructed and used according to the plans and specifications prepared and furnished by the director. Any dam, obstruction, or pumping plant which is not so constructed is a public nuisance and may be abated accordingly. [C97,§§2540, 2547, 2548; S13,§2547; SS15,§§2540, 2548; C24, 27, 31, 35,§1741; 48GA, ch 77,§2.]

1742 Injury to dam. It shall be unlawful for any owner or his agent to remove or destroy any existing dam, or alter it in a way so as to lower the water level, without having received

written approval from the state conservation director. [C24, 27, 31, 35,§1742; 48GA, ch 77,§3.]

1743 Rep. by 46GA, ch 13,§36

1744 Taking by director for stocking and exchange. The director may take from any of the public waters of the state, at any time and in any manner, any fish for the purpose of propagating or restocking other waters, or exchanging with fish commissioners or wardens of other states or the federal government. [C97, §2546; S13,§2546; C24, 27, 31, 35,§1744.]

1745 Undesirable fish. It shall be the duty of the director, so far as is possible, to remove from the inland waters of the state at any time and in any manner, provided that he shall do so with minimum injury to the lake or stream or the other fish, any undesirable or injurious fish. All such fish removed shall be destroyed or disposed of so as to eliminate them, so far as is possible, from the inland waters of the state. The proceeds, if any, from the sale of these fish shall be credited to the state fish and game protection fund. Undesirable or injurious fish shall mean any species that in the judgment of the commission exist in improper proportions to other aquatic life.

In the removal of undesirable and injurious fish by net or seine, other than the removal of such fish by the director, he shall enter into written contract for the taking of such fish from the public waters of the state. All such contracts shall be let to the highest bidder. Bids shall be made in percentages of gross receipts for the sale of the fish so taken, to be paid to the state, but no contract shall be let until the director shall have advertised for such bids once each week for two consecutive weeks in three newspapers of the state of Iowa for general circulation.

Said advertisement for bids shall state the date, time and place at which such bids will be received. Upon receipt of the bids the director shall submit all bids received, together with the proposed contract, to the treasurer of the state for his approval, and if the treasurer of state finds that any one of the bids received from any bidder is a fair and proper bid and is one advantageous to the state, and that the person making such bid is competent and reliable, and that the contract protects the interests of the state, then he shall approve the bid and contract, but if he finds that such bid is not fair, proper and advantageous to the state or that the person making the bid is not competent and reliable or that the contract does not fairly protect the interests of the state, he shall reject all bids and contracts; and then the director shall re-advertise in the same manner and for the same length of time as heretofore provided, and the bids and contracts shall again be submitted to the treasurer of state for his approval as heretofore provided, until a fair, proper and advantageous bid and a competent and reliable bidder is received and found. All contracts for the removal of rough fish from any waters of the state shall not be for more than one year and shall specify:

1. The particular waters from which such fish are to be taken.
2. The compensation to be paid the state, and the times and terms of payment.
3. That no fish shall be taken except in the presence and under the supervision of some regularly employed representative of the conservation commission.
4. That all expense incurred by the commission in connection with such contract shall be paid by the person holding such contract.
5. That such contract may be forfeited and canceled by the state in the event of a breach thereof.
6. Such other provisions for the protection of the state's interest as the director may require. [C97,§2546; S13,§2546; C24, 27, 31, 35, §1745; 48GA, ch 77,§16.]

1746 Bond. The holder of such contract shall, prior to the taking of any fish thereunder, file with the treasurer of state a corporate surety bond payable to the state of Iowa in the penal sum of one thousand dollars. Said bond to be approved by the treasurer of state. No contract shall be issued unless the bond required herein is attached to said contract and delivered to the treasurer of state. Such bond shall be conditioned for the faithful performance of the contract, the payment of all damages resulting from a breach thereof, and such other conditions as to the director may seem right and proper. [C24, 27, 31, 35,§1746.]

1747 to 1761, inc. Rep. by 45GA, ch 30,§4. See §§1794.068–1794.078

1762 Reciprocity of states. Any person licensed by the authorities of Illinois, Minnesota, Missouri, Wisconsin, Nebraska, and South Dakota to take fish, game, mussels, or fur-bearing animals from or in the waters forming the boundary between such states and Iowa, may take them from that portion of said waters lying within the territorial jurisdiction of this state, without having procured a license therefor from the state conservation director of this state, in the same manner that persons holding Iowa licenses may do, if the laws of Illinois, Minnesota, Missouri, Wisconsin, Nebraska, or South Dakota, respectively, extend a similar privilege to persons so licensed under the laws of Iowa, but this section shall not apply to commercial fishermen on the Mississippi river. [C24, 27, 31, 35,§1762; 48GA, ch 77,§4.]

1763 to 1776, inc. Rep. by 45GA, ch 30,§4. See §§1794.011–1794.024

1777 Parrots and canaries. This chapter shall not be construed to forbid the selling or shipping of parrots, canaries, or any other cage birds which are imported from other countries or not native to any part of the United States. [S13,§2563-r; C24, 27, 31, 35,§1777.]

1778 Birds as targets. No person shall keep or use any live pigeon or other bird as a target, to be shot at for amusement or as a test of skill in marksmanship, or shoot at a bird kept or

used for such purpose, or be a party to such shooting, or lease any building, room, field, or premises, or knowingly permit the use thereof, for the purpose of such shooting. [S13,§2563-i; C24, 27, 31, 35,§1778.]

1779 Rep. by 45GA, ch 30,§4. See §1794.027

1780 **Transportation for sale prohibited.** It shall be unlawful for any person, firm, or corporation to offer for transportation or to transport by common carrier or vehicle of any kind, to any place within or without the state, for the purposes of sale, any of the fish, game, animals, or birds taken, caught, or killed within the state, or to peddle any of such fish, game, animals, or birds.

It shall be unlawful to ship from the state any birds caught, taken, or killed in the state, or to take, ship, or carry from the state for any purpose any such fish, game, animals, or birds unless lawfully caught, taken, or killed by a nonresident licensee under the provisions of this chapter, who may take or carry such birds as have been lawfully caught, taken or killed, or take, carry, or ship such fish, game, or animals as have been lawfully caught, taken, or killed, to his place of residence as indicated on such license. [C97,§2555; SS15,§§2540, 2555; C24, 27, 31, 35,§1780.]

Referred to in §1785

1781 **Transportation regulations.** Any person, firm, or corporation desiring the shipment or transportation of any fish or animals shall deliver to the common carrier to which the shipment is offered, a statement under oath, in duplicate, showing the name and address of the shipper, the date and number of his license, where and by what officer issued, the name and residence of the consignee to whom the shipment is made, the kind and number of fish or animals in the shipment, that the same have not been unlawfully killed, bought, sold, or had in possession, and are not being shipped for the purpose of market or sale, and that such shipment does not contain a greater number of fish or animals than may be lawfully shipped in one day. One copy of such affidavit shall be retained by the common carrier receiving such shipment, for the period of twelve months thereafter, and the other copy shall be attached in a secure manner to the package or container of such fish or animals. [C97,§2555; SS15,§§2540, 2555; C24, 27, 31, 35, §1781.]

Referred to in §1785

1782 **Oaths—administration of.** In addition to all officers authorized by law to administer oaths, the agent of any common carrier receiving for transportation any fish, animals, or birds, as in this chapter provided, is hereby authorized to administer the required oath. [C97,§2540; SS15,§2540; C24, 27, 31, 35,§1782.]

Referred to in §1785
Oaths generally, §1215

1782.1 **Unlawful transportation.** No person, except as otherwise provided, shall ship, carry or transport in any one day, game, fish, birds, or animals, except fur-bearing animals in excess of the number legally permitted to be in possession of such a person. [C97,§2555; SS15, §2555; C24, 27, 31,§1783; C35,§1782-e1.]

Referred to in §1785

1783 Rep. by 45GA, ch 30,§4

1784 **Shipping restrictions.** It shall be unlawful for any common carrier to receive for transportation any game, fish, animals, or birds in greater numbers or in any other way or manner than in this chapter provided. [C97,§2555; SS15,§2555; C24, 27, 31, 35,§1784.]

Referred to in §1785

1785 **Exceptions.** The foregoing provisions regarding the possession and transportation of fish shall not apply to such fishing as is done under written permits from the state conservation director or to such fishing as is permitted with nets or seines in certain boundary waters of the state or fishing done on private fishing preserves. Nothing in the foregoing sections 1780 to 1784, inclusive, shall pertain to rabbits. [C97,§§2546, 2547; S13,§§2546, 2547; SS15, §2547-a; C24, 27, 31, 35,§1785; 48GA, ch 77,§7.]

40ExGA, HF 54, §74, editorially divided

1786 **Commercial shipments.** It shall be unlawful for any person, firm or corporation to ship any fish taken with licensed nets or seines unless there is attached to each container a tag stating the name and address of the consignor and consignee, the amount of each kind contained therein, the waters from which taken, and that same were taken with licensed nets or seines. [C24, 27, 31, 35,§1786.]

1787 **Entire shipment contraband.** In the shipping of fish, game, animals, birds, or furs, whenever a container includes one or more fish, game, animals, birds or furs that are contraband, the entire contents of the container shall be deemed contraband, and shall be seized by the director or his officers. [C24, 27, 31, 35, §1787.]

1788 **Game brought into the state.** It shall be lawful for any person, firm, or corporation to have in possession any fish or game lawfully taken outside the state and lawfully brought into the state, but the burden of proof shall be upon the person in such possession to show that such fish or game was lawfully killed and lawfully brought into the state. [SS15,§2555; C24, 27, 31, 35,§1788.]

1789 **Violation.** Whoever shall take, catch, kill, injure, destroy, have in possession, buy, sell, ship, or transport any frogs, fish, mussels, birds, their nests, eggs, or plumage, fowls, game, or animals in violation of the provisions of this chapter or of administrative orders of the state conservation commission or whoever shall use any device, equipment, seine, trap, net, tackle, firearm, drug, poison, explosive, or other substance or means, the use of which is prohibited by this chapter, or use the same at a time, place or in a manner or for a purpose prohibited, or do any other act in violation of such provisions

for which no other punishment is provided, shall be fined not less than ten dollars nor more than one hundred dollars or be imprisoned in the county jail not more than thirty days.

Each fish, fowl, bird, bird's nest, egg, or plumage, and animal unlawfully caught, taken, killed, injured, destroyed, possessed, bought, sold, or shipped shall be a separate offense. [R60,§§4381–4383; C73,§§4048, 4053, 4063; C97, §§2543, 2544, 2551, 2552, 2556, 2558, 2561; S13, §§2547-e, 2551-b, 2561, 2563-a8,-i,-o,-s,-v; SS15, §§2540-a, 2544, 2551, 2552, 2556; C24, 27, 31, 35, §1789; 47GA, ch 99,§26; 48GA, ch 77,§5.]

Referred to in §1794.081

1790 Violations relating to dams. Whoever shall erect any dam or other obstruction prohibited by this chapter or at a place or in a manner prohibited, or shall injure or destroy any dam lawfully erected, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not more than one hundred days. [C97, §§2548, 2550; SS15,§2548; C24, 27, 31, 35,§1790.]

1791 Violations by common carrier. Any common carrier which shall violate any of the provisions of this chapter relating to receiving, having in possession, shipping or delivering any fish, fowls, birds, birds' nests, eggs, or plumage, game or animals, in violation of the provisions of this chapter or contrary to the regulations and restrictions therein provided, and any agent, employee, or servant of such corporation violating such provisions, shall be fined not less than one hundred dollars nor more than three hundred dollars, and any such agent, employee, or servant may be imprisoned not exceeding thirty days. [C73,§4049; C97,§2557; C24, 27, 31, 35,§1791.]

1792 Attorney general and county attorneys. It shall be the duty of the attorney general, when requested by the director, to give his opinion in writing upon any question of law arising under this chapter; and it shall be the duty of all county attorneys in this state when requested by the director or any conservation officer, to prosecute all criminal actions brought in their respective counties for violations of the provisions of this chapter. Nothing in this chapter shall be construed as prohibiting any person from instituting legal proceedings for the enforcement of any of the provisions thereof. [R60,§4385; C73,§4051; C97,§2559; SS15, §2559; C24, 27, 31, 35,§1792.]

1793 Information—venue. In all prosecutions under this chapter, any number of violations may be charged in one information, but each charge shall be set out in a separate count if more than one charge is included in one information.

Prosecutions for violations may be brought in the county in which any fish, fowl, bird, bird's nest, eggs, or plumage, or animals protected by this chapter were unlawfully caught, taken, killed, trapped, ensnared, bought, sold, or shipped unlawfully, or in any county into or through which they were received, transported, or found in possession of any person. [R60, §4385; C73,§4051; C97,§2559; SS15,§2559; C24, 27, 31, 35,§1793.]

1794 Presumptive evidence. It shall be presumptive evidence of a violation of the provisions of this chapter for any person to:

1. Fail to have a license upon his person at any time required by law, or then refuse to exhibit the same on request of any person desiring to examine it.
2. Have in his possession any fish, game, furs, birds, birds' nests, eggs or plumage, or animals, which have been unlawfully caught, taken, or killed.
3. Be in possession of such fish, game, furs, birds, or animals at a time when or place where it shall be unlawful to take, catch, or kill the same, except game, birds or animals, during the first ten days of the closed season.
4. Have in his possession any implements, devices, equipment or means whatever of taking fish, birds, or animals protected by this chapter at any place where the possession or use thereof is prohibited. [C97,§2554; S13,§2563-a10; SS15, §§2554, 2555; C24, 27, 31, 35,§1794.]

Analogous provision, §1794.098

PROPAGATION AND PROTECTION OF FISH, GAME, WILD BIRDS AND ANIMALS

1794.001 Prohibited acts. It shall be unlawful for any person to take, pursue, kill, trap or ensnare, buy, sell, possess, transport, or attempt to so take, pursue, kill, trap or ensnare, buy, sell, possess, or transport any game, protected non-game birds, fur-bearing animals or fur or skin of such animals, mussels, frogs, spawn or fish, or any part thereof, except upon the terms, conditions, limitations and restrictions set forth herein, and administrative orders necessary to carry out the purposes set out in section 1794.002, or as provided by the code. [R60,§4381; C73,§4048; C97,§§2551, 2555; S13,§§2562-c, 2563-j,-k,-m,-n; SS15,§§2540, 2551, 2555, 2562-b, -c, 2563-a1,-a2,-u; C24, 27, 31,§§1718, 1719, 1755, 1767, 1774; C31,§1718-c1; 47GA, ch 99,§29.]

Referred to in §1794.081
Analogous provision, §1780

1794.002 Biological balance maintained. The open seasons, closed seasons, bag limits, catch limits, possession limits and territorial limitations set forth herein pertaining to fish, game and various species of wildlife are based upon a proper biological balance as hereinafter defined being maintained for each species or kind. The seasons, catch limits, bag limits, possession limits and territorial limitations set forth herein shall prevail and be in force and effect for each and every species of wildlife to which they pertain as long as the biological balance for each species or kind remain such as to assure the maintenance of an adequate supply of such species. The commission is hereby designated the sole agency to determine the facts as to whether such biological balance does or does not exist. If the commission, after investigation finds that the number and/or sex of each or any species or kind of wildlife is at variance to aforesaid con-

dition, the commission shall by administrative order extend, shorten, open or close seasons and/or change catch limits, bag limits and/or possession limits or areas in accordance with said findings. For the purpose of this section, biological balance is defined as that condition when all losses to population are compensated by natural reproductive activity or artificial replenishment, replacement or stocking. [47GA, ch 99,§30; 48GA, ch 78,§5.]

Referred to in §§1794.001, 1794.081

DEFINITIONS

1794.003 Fur-bearing animals. The following are hereby declared to be fur-bearing animals for the purpose of regulation and protection under this chapter: beaver, badger, mink, otter, muskrat, raccoon, skunk, opossum, spotted skunk or civet cat, weasel, coyote, wolf, ground hog, red fox and gray fox. [C97,§2553; SS15, §2553; C24, 27, 31,§1766; 47GA, ch 99,§31.]

Referred to in §1794.081

1794.004 Game. For the purposes of this act [47GA, ch 99] the term "game" shall be construed to mean all of the wild animals and wild birds specified in this section except those designated as not protected, and shall include the heads, skins, and any part of same, and the nests and eggs of birds and their plumage.

1. The Anatidae: such as swans, geese, brant and ducks.
2. The Rallidae: such as rails, coots, mudhens, and gallinules.
3. The Limicolae: such as shore birds, plovers, surf birds, snipe, woodcock, sandpipers, tatlers, gotwits and curlews.
4. The Gallinae: such as wild turkeys, grouse, pheasants, partridges and quail.
5. The Columbidae: mourning doves and wild rock doves only.
6. The Sciuridae: such as gray squirrels, fox squirrels and flying squirrels.
7. The Leporidae: cottontail rabbits and jack rabbits only.
8. The Cervidae: such as deer and elk. [S13, §§2563-k,-m,-n; C24, 27, 31,§1774; 47GA, ch 99, §32; 48GA, ch 78,§6.]

Referred to in §1794.081

1794.005 Non-game birds protected. Protected non-game birds shall include any wild bird other than game, either resident or migratory, including the plumage, skins, body, or any part thereof, and their nests and eggs, except that the following are not protected by this act [47GA, ch 99]: European starling, English or house sparrow, blackbird, crow, sharpshinned hawk, Cooper's hawk and great horned owl. [S13,§2563-q; C24, 27, 31,§1776; 47GA, ch 99, §33.]

Referred to in §1794.081

1794.006 Mussels. As used in this chapter, the word "mussels" shall mean and embrace the pearly, fresh water mussels or clams or naiad, and the shells thereof. [C24, 27, 31,§1763; 47GA, ch 99,§34.]

Referred to in §1794.081

1794.007 Fish. The term "fish" as used in this chapter shall mean any fish of the class Pisces. [47GA, ch 99,§35.]

Referred to in §1794.081

1794.008 Frogs. The term "frog" as used in this chapter shall mean any frog of the family Ranidae. [47GA, ch 99,§36.]

Referred to in §1794.081

1794.009 Spawn. The term "spawn" as used in this chapter shall mean any of the eggs of any fish, frog, or mussel. [47GA, ch 99,§37.]

Referred to in §1794.081

1794.010 Importing fish and game—permits. It shall be unlawful except as otherwise provided for any person, firm or corporation, to bring into the state of Iowa for the purpose of propagating or introducing, or to place or introduce into any of the inland or boundary waters of the state, any fish or spawn thereof that are not native to such waters, or introduce or stock any bird or animal that are not native to Iowa, unless application is first made in writing to the commission for a permit therefor and such permit granted. Such permit shall be granted only after the commission has made such investigation or inspection of the fish, birds or animals as it may deem necessary to determine whether or not such fish, birds or animals are free from disease and whether or not such introduction will be beneficial or detrimental to the native wildlife and the people of the state, and may or may not approve such planting, releasing or introduction according to its findings. Nothing in the above shall prohibit licensed game breeders from securing native or exotic birds or animals from outside the state and bringing them into the state and they shall not be required to have a permit as provided above when such birds or animals are not released to the wild but are held on the game breeder's premises as breeding stock. [47GA, ch 99,§38; 48GA, ch 78,§7.]

Referred to in §1794.081

TERRITORIES, OPEN SEASONS, BAG AND POSSESSION LIMITS FOR GAME

1794.011 Restrictions. It shall be unlawful for any person except as otherwise provided, to wilfully disturb, pursue, shoot, kill, take or attempt to take or have in possession any game bird or animal at any time except during the open season period embraced within the dates, both inclusive, specified for each variety and each locality, respectively, or in the open season take in any one day in excess of the number designated for each variety and/or each locality, respectively, or have in possession any variety of game bird or animal in excess of the number allowed in possession as indicated in the following table:

Kind of Animal and Locality	Open Season	Bag Limit	Possession Limit
SQUIRRELS—Gray, Fox. Entire state.	August 1—October 15	6	12
RABBITS—Cottontail and Jack. Entire state.	August 1—March 1	10	
QUAIL—Bobwhite. Open season in following counties: Lucas, Appanoose, Monroe, Wapello, Davis, Van Buren, Jefferson, Henry, Lee, Des Moines, Louisa, Muscatine, Wayne, Decatur, Clarke. All counties not named above are closed.	November 15—December 15 Shooting allowed each open day from eight a. m. to five p. m.	8	8
PHEASANTS— Chinese, Mongolian, ringneck. Open season in following counties: Lyon, Osceola, Hardin, Dickinson, Emmet, Winnebago, O'Brien, Sioux, Clay, Palo Alto, Kossuth, Hancock, Worth, Mitchell, Floyd, Winneshiek, Cerro Gordo, Butler, Grundy, Black Hawk, Buchanan, Franklin, Wright, Humboldt, Pocahontas, Buena Vista, Cherokee, Plymouth, Woodbury, Sac, Ida, Calhoun, Howard, Chickasaw, Bremer, Fayette, and all those portions of Monona, Harrison and Pottawattamie counties lying west of highway 75, and all those portions of Pottawattamie, Mills and Fremont counties lying west of highway 275. All areas not named above are closed.	November 12—November 14 Shooting allowed each open day from twelve noon to five p. m.	3 male birds	6 male birds
DUCKS—Entire state.	September 15—November 30	10	10
GEESE, BRANT—Entire state.	September 15—November 30	4	4
HUNGARIAN PARTRIDGES— Open season in following counties: O'Brien, Sioux, Lyon, Osceola, Dickinson, Emmet, Kossuth, Winnebago, Worth, Palo Alto, Clay. All counties not named above are closed.	November 12—November 14 Shooting allowed each open day from twelve o'clock noon to five p. m.	2	2
COOT, MUDHEN, GREBE— Entire state.	September 15—November 30	15	15
WILSON OR JACKSNIPE— Entire state.	September 15—November 30	15	15
EUROPEAN STARLINGS—	Continuous	None	None

[R60,§4381; C73,§4048; C97,§§2551, 2552; S13, §2563-q; SS15,§§2551, 2552, 2563-u; C24,§§1767, 1768, 1776; C27, 31,§§1767, 1767-a1, 1768, 1776; 47GA, ch 99,§39; 48GA, ch 77,§§9, 10; ch 78,§8.]

Referred to in §1794.081

1794.012 Special permit to kill. The owner or operator of any fish hatchery may kill or take any pied-billed grebe, gull or tern, American bittern, black-crowned night heron, merganser, great blue heron, also known as blue crane, poorjoe or cranky, or kingfisher, within the bounds of such hatchery after having been issued a permit by the commission. Each such permittee shall file with the commission an itemized report showing the species and number of birds killed during the period covered by the permit. Report shall be filed on or before January 1 each year. Failure to file such report shall be grounds for refusal to issue subsequent permits. [S13,§2563-q; C24, 27, 31,§1776; 47GA, ch 99,§40.]

Referred to in §1794.081

1794.013 Selling birds. No part of the plumage, skin or body of any bird protected by this chapter shall be sold or had in possession for sale, irrespective of whether said bird was

captured or killed within or without the state, except as otherwise provided. [47GA, ch 99,§41.]
Referred to in §1794.081

1794.014 Hunting license not trapping license. A hunting license shall not permit the holder to trap any fur-bearing animal as defined in this chapter. [SS15,§2563-a1; C24, 27, §1718; C31,§1718-c1; 47GA, ch 99,§42.]
Referred to in §1794.081

1794.015 Exhibiting catch to officer. Any person who shall have in his possession any game bird or game animal, fish or fur or part thereof shall upon request of the director or any conservation officer or any peace officer exhibit the same to him, and a refusal to do so shall constitute a violation of this act [47GA, ch 99]. [C31,§1768-c1; 47GA, ch 99,§43.]
Referred to in §1794.081

1794.016 Chasing from dens. It shall be unlawful to have in possession while hunting or to use while hunting any ferret or mechanical device or any substance to be used for chasing animals from their dens. [C31,§1767-c1; 47GA, ch 99,§44.]
Referred to in §1794.081

1794.017 Shooting rifle over water or highway. No person shall at any time shoot any rifle on or over any of the public waters or public highways of the state. [C31,§1772-c2; 47GA, ch 99,§45.]
Referred to in §1794.081

1794.018 Selling game. Except as otherwise provided, it shall be unlawful for any person to buy or sell, dead or alive, any bird or animal or any part thereof which is protected by this chapter but nothing in this section shall apply to fur-bearing animals or rabbits. [C97,§2554; SS15,§2554; C24, 27, 31,§1769; 47GA, ch 99,§46.]
Referred to in §1794.081

1794.019 Training dogs. It shall be unlawful to train any bird dog on game in the wild from March 15 to July 15 each year. A pistol or revolver shooting blank cartridges may be used while training bird dogs during closed season. It shall be unlawful to train any foxhound, raccoon hound or trailing dog on any fur-bearing animal between sunset and sunrise for thirty days just prior to the open season on raccoon. It shall be unlawful for any person to use a dog to hunt, molest, or chase any raccoon thirty days before the opening of the season for the hunting or trapping of raccoons. [47GA, ch 99,§47; 48GA, ch 77,§11; ch 78,§9.]
Referred to in §1794.081

1794.020 Possession and storage. Any person having lawful possession of game may hold same for not to exceed ten days after the close of the open season for such game. A permit to hold such game for a longer period may be granted by the commission. [47GA, ch 99,§49.]
Referred to in §1794.081

1794.021 Trapping birds or poisoning animals. No person except those acting under the authority of the state conservation director shall capture or take or attempt to capture or take, with any trap, snare or net, any game bird, nor shall any person use any poison or any medicated or poisoned food or any other substance for the killing, capturing or taking of any game bird or animal. [R60,§4381; C73,§4048; C97,§2551; SS15,§§2539, 2551; C24, 27, 31,§1773; 47GA, ch 99,§50.]
Referred to in §1794.081

GAME BREEDERS

1794.022 Raising game. It shall be unlawful for any person to raise or sell game of the kinds protected by this chapter without first procuring a game breeder's license as provided by law. [47GA, ch 99,§51.]
Referred to in §1794.081

1794.023 License to possess. A licensed game breeder may hold in possession at any time any game bird, game animal or fur-bearing animal raised by him or obtained from without the state or from a licensed game breeder within the state. Such licensee may buy, sell, or otherwise dispose of such game birds, game animals, fur-bearing animals, or any part thereof. Possession and use of such game birds, game animals or fur-bearing animals obtained from a licensed game breeder shall be deemed lawful, provided that no game birds so obtained may be sold for food. [47GA, ch 99,§52.]
Referred to in §1794.081

1794.024 Records—report. Any holder of a game breeder's license shall keep a record of all purchases* and all sales of stock showing the kinds and numbers of each, dates of transactions, and from whom purchased, and to whom sold. Such record shall be open for inspection by the commission at any time. Each licensee shall on or before May 1 of each year file a report with the commission setting out the information mentioned above on forms supplied by the commission. [47GA, ch 99,§53.]
Referred to in §1794.081
*"Purchased" in enrolled act

BAIT DEALERS

1794.025 Sale of bait—license. Any person may be authorized to sell minnows, frogs, and clams for fish bait upon the payment of a license fee of five dollars to the commission. Minnow and bait boxes and tanks shall be open to inspection by the director and conservation officers at all times. They shall have tanks and bait boxes of sufficient size, with proper aeration to keep the bait alive and prevent heavy loss.

Such license shall authorize the licensee to take from the lakes and streams in the state that are not closed to the taking of minnows, frogs and clams, sufficient minnows, frogs and clams to carry on and supply his customers with bait for hook and line fishing.

Such licensees shall comply with all state laws pertaining to possession, taking, selling of bait handled by them and any licensee upon conviction for violating any state conservation laws.

shall forfeit his license if demanded by the director.

Holders of a bait dealer's license, when obtaining bait from lakes and streams, shall take only such sized bait as can be used and shall return all small minnows and frogs to the water immediately with as little loss as possible. [48GA, ch 78,§10.]

Referred to in §1794.081

PRIVATE FISH HATCHERY

1794.026 License — regulations. It shall be unlawful for any person to operate a private fish hatchery or engage in the business of propagating fish native to the state of Iowa in private waters until such person has applied for and has been issued a private fish hatchery license as provided by state law. Such license shall be renewed each year.

The term "private fish hatchery" covering private fish hatcheries shall include all private ponds, with or without buildings, used for the purpose of propagating or holding fish for commercial purposes.

No license shall be issued to operate private fish hatcheries on privately owned or nonmeandered lakes and streams or ponds that may become stocked with fish from public waters by overflow or natural migration.

Holders of private fish hatchery licenses may, in said hatchery, possess, propagate, buy, sell, deal in and transport the fish produced from breeding stock lawfully acquired, but all fish sold for food purposes must comply with the state law regarding size limits.

They may sell fish for stocking purposes within or without the state, but no fish shall be sold for stocking purposes within the state that are not native to the state and to the waters where stocked.

Each operator of a private fish hatchery shall make an annual report of the number, kinds and sizes of the fish propagated and to whom sold during the license year on forms supplied by the commission. Failure to make such report shall be grounds for refusal to renew the license under which the hatchery operates.

Operators of private fish hatcheries shall secure their breeding stock from licensed private fish hatcheries in the state or from lawful sources outside the state and it shall be unlawful for such hatcheries to secure stock in any other way.

Private fish hatchery operators who hold and feed carp, buffalo and other fish lawfully taken by commercial fishermen, may hold, feed and sell such fish under private fish hatchery licenses. [C73,§4054; C97,§2545; C24, 27, 31,§1707; 48GA, ch 78,§10.]

Referred to in §1794.081

SCIENTIFIC COLLECTING

1794.027 License. The commission may, after investigation, issue to any person a scientific collector's license under which license such person may be permitted to collect for scientific purposes only, any birds, nests, eggs, or wild animals or fish. No person to whom such license is issued shall dispose of any such collection or part thereof except upon written permission of the commission. The application for such license shall be made upon blanks to be furnished by the commission. Each holder of such license shall within thirty days after the expiration of such file with the commission a report showing all specimens by him collected. Such license may be revoked at any time for cause. [S13, §§2563-o,-p; C24, 27, 31,§1779; 47GA, ch 99,§54.]

Referred to in §1794.081

1794.028 Banding or marking. It shall be unlawful for any person to capture birds or animals for banding purposes except that the commission may, after investigation, issue a permit to any person permitting him to capture birds or animals for the purpose of banding or marking same for scientific study, but no such birds or animals may be killed or injured or retained in possession, but must be liberated safely and promptly. Such permit may be revoked at any time for cause. Each holder of such permit shall report to the commission once each month the number, kind of birds or animals banded, and the band numbers. [47GA, ch 99,§55.]

Referred to in §1794.081

ANGLING LAWS

1794.029 Seasons and limits. Except as expressly provided in this chapter a closed season is established for each variety of fish listed in the following tables; provided, however, that within the meandering lines of the waters of the Mississippi and Missouri rivers, and within the inland waters in Lee county, Iowa, continuous pole and line fishing, only, shall be permitted for all fish, except that there shall be a closed season on pike during March and April and a closed season on large and small mouth bass during March, April, and May. Restrictions as to the daily catch limit, possession limit, minimum length and weight shall remain as provided in this section. The table designated "A" shall be applicable to all waters of the state except the Mississippi river and Missouri river. The table designated "B" shall be applicable to the Mississippi river and Missouri river only. Such closed season shall extend during all the time in each year except the period embraced within the dates, both inclusive, set opposite the names of each variety in the column headed "open season"; and except as expressly provided in this chapter no person shall take, capture, or kill fish of any such variety at any time other than the open season therefor, nor in the open season in excess of the daily catch limit in any one day, nor have in possession in excess of the possession limit at any time, nor under the minimum length or weight for each fish designated opposite each variety in the columns headed respectively "daily catch limit", "possession limit" and "minimum length or weight". Measurement of length shall be taken in a straight line from the tip of the snout to the utmost end of the tail fin.

TABLE A

Kind of Fish	Open Season	Daily Catch Limit	Possession Limit	Minimum Length or Weight
Trout—brown, rainbow, brook	5 a. m. May 1 to 9 p. m. September 30. Trout shall be fished for only from one hour before sunrise to 9 p. m. each day	8	16	7 inches
Northern pike	May 15 to November 30	8	16	15 inches
Large-mouth bass	June 15 to November 30	5	10	12 inches
Small-mouth bass	June 15 to November 30	5	10	10 inches
Sand pike, Sauger pike, wall-eyed pike	May 15 to November 30	8	16	13 inches
Bullheads	Continuous	25	50	None
Sheepshead	Continuous	25* No catch or possession limits	50*	None
Rock sturgeon, sand sturgeon, paddlefish	August 1 to November 30	15	30	Rock sturgeon and paddlefish — not less than five pounds. Sand sturgeon not less than one pound.
Yellow perch, yellow bass, striped bass, silver bass	May 15 to November 30	15	30	7 inches
Crappies, calico bass	June 15 to November 30	15	30	7 inches
Warmouth bass, rock bass, sunfish, bluegills	June 15 to November 30	15	30	5 inches
Catfish	May 1 to May 30 in inland streams only and July 1 to November 30 in all inland waters	15	30	12 inches
Suckers, redhorse	Continuous	15	30	None
Carp, buffalo, quillback, gar, dogfish	Continuous	None	None	None
Minnows	May 12 to November 30	None	None	None
Frogs	May 12 to November 30	Four dozen (Bait dealers excepted)	Eight dozen (Bait dealers excepted)	(Applies to bait dealers only)

The total catch limit of all fish under this division, excluding those having a continuous open season on which there is no daily catch limit, shall not exceed twenty-five per day.

*Figures "25" and "50" not stricken by 48GA, ch 78, §11

TABLE B

Kind of Fish	Open Season	Daily Catch Limit	Possession Limit	Minimum Length or Weight
Rock sturgeon, sand sturgeon, paddlefish	August 1 to November 30	None	None	Rock sturgeon not less than five pounds. Sand sturgeon not less than one pound. Paddlefish not less than five pounds.
Northern pike	Continuous	15	30	15 inches
Catfish	Continuous	15	30	12 inches
Sheepshead	Continuous	None	None	None
Bullheads, carp, buffalo, gar, quillback, dogfish, suckers, redhorse	Continuous	None	None	None
Large-mouth bass, small-mouth bass	June 1 to March 1 next	5	10	10 inches
Crappie, perch, yellow bass, silver bass	Continuous	15	30	7 inches
Sunfish, bluegill, rock bass, warmouth bass	Continuous	15	30	5 inches
Wall-eyed pike	May 1 to March 1 next	8	16	13 inches
Minnows	Continuous	None	None	None

It shall be unlawful for any person at any time to have in possession more than thirty fish of all kinds in the aggregate, except that this aggregate possession limit shall not apply to the fish named in this section on which there is no daily catch limit, or to the director and his duly authorized representatives when carrying out duties imposed by state law, or commercial fishermen, or wholesale fish markets, when operating under proper license and dealing in commercial fish. [C97,§2540; SS15,§2540; C24, 27, 31,§§1731, 1732, 1733; 47GA, ch 99,§56; 48GA, ch 77,§§12, 13; ch 78,§11.]

Referred to in §1794.081

1794.030 Special restrictions. In Lake Wapello in Davis county and Upper Keomah lake in Mahaska county fish may be taken only between five o'clock a. m. June 15 and ten-thirty p. m. November 30, each year. Fish may be taken from such artificial lakes during such open season only between five o'clock a. m. and ten-thirty p. m. each day. Lake Keomah proper, Lake Macbride and Upper Pine lake shall be open to fishing beginning June 15, 1938, under such restrictions as herein apply to Lake Wapello. [47GA, ch 99,§57.]

Referred to in §1794.081

1794.031 Special local limits. It shall be unlawful for any person to take from Lake Wapello in Davis county and Upper Keomah lake in Mahaska county in any one day more than twelve fish in the aggregate of which twelve not more than five may be black bass and not more than seven may be crappies. [47GA, ch 99,§58.]

Referred to in §1794.081

1794.032 Bait inspected. It shall be unlawful for any person to use for bait in any state-owned artificial lake minnows or small fish which have not been inspected and approved by a representative of the commission. [47GA, ch 99,§59.]

Referred to in §1794.081

1794.033 Releasing unlawful catch. Any fish caught that is less than lawful minimum length or weight shall be handled with wet hands and released under water immediately with as little injury as possible. [47GA, ch 99, §60.]

Referred to in §1794.081

1794.034 Hooks. No person shall at any time take from the waters of the state any fish, except as otherwise provided in this chapter, except with hook, line and bait, nor shall any person use more than two lines with one hook on each line in still fishing or trolling, and in fly fishing not more than one fly may be used on one line, and in trolling and bait casting not more than one trolling spoon or artificial bait may be used on one line. No person shall leave such fish line or lines and hooks in the water unattended or take or attempt to take any fish by snagging or to purposely hook them in any other part than in the mouth. One hook shall mean a single, double or treble pointed hook,

and all hooks attached as a part of an artificial bait or lure shall be counted as one hook. [C73, §4052; C97,§§2540, 2542; SS15,§2540; C24, 27, 31,§1734; 47GA, ch 99,§61.]

Referred to in §1794.081

1794.035 Trot lines. It shall be unlawful for any person to use in the inland waters of the state open to the use of trot or throw lines, more than five throw lines or trot lines and such lines shall not have in the aggregate more than fifteen hooks, but no person shall leave such line set, and he shall be in constant attention of such line, and no person shall use such throw line or trot line in any stocked lake or within three hundred feet of any dam or spillway or in any stream or portion of stream, closed or posted against the use of such tackle. One end of such throw line or trot line shall be set from the shore and be visible above the shore water line, but no such throw line or trot line shall be set entirely across a stream or body of water. [C73, §4052; C97,§§2540, 2542; SS15,§2540; C24, 27, 31,§1734; 47GA, ch 99,§62; 48GA, ch 78,§12.]

Referred to in §1794.081

1794.036 Where permitted. It shall be unlawful to use trot or throw lines in the rivers and streams of the state, except in the Mississippi river, Missouri river, Big Sioux river, Skunk river, and all rivers and streams south of United States highway 30 as it is now located. [C73,§4052; C97,§§2540, 2542; C24, 27, 31,§1734; 47GA, ch 99,§63.]

Referred to in §1794.081

1794.037 Number permitted. It shall be unlawful for any one person to use, in the Mississippi river, Missouri river or Big Sioux river, more than one throw or trot line having more than twenty-five hooks. [C73,§4052; C97,§§2540, 2542; C24, 27, 31,§1734; 47GA, ch 99,§64.]

Referred to in §1794.081

1794.038 Unlawful means — exception. It shall be unlawful, except as otherwise provided, to use on or in the waters of the state any grabhook, snaghook, artificial light, any kind of a net, seine, trap, firearm, dynamite, or other explosives, or poisonous or stupefying substances, lime, ashes or electricity in the taking or attempting to take any fish, except that gaffhooks or landing nets may be used to assist in landing fish. No person shall take or kill, or attempt to take or kill any fish by hand fishing, providing however, that it shall be lawful to spear carp, buffalo, quillback, gar and dogfish in the overflow waters of the Mississippi river, and in Cedar and Iowa rivers, in Muscatine and Louisa counties. [C97,§2540; SS15,§2540; C24, 27, 31, §1735; 47GA, ch 99,§65; 48GA, ch 78,§13.]

Referred to in §1794.081

1794.039 Trolling. It shall be unlawful to fish by trolling from any machine-propelled or sail boat on any of the inland waters of the state, or on any boundary water except the Mississippi river or Missouri river. [C24, 27, 31,§1737; 47GA, ch 99,§66.]

Referred to in §1794.081

1794.040 Stocking private water. No private water may be stocked by the commission unless the owner agrees that such waters shall be open to the public for fishing. [47GA, ch 99,§67.]

Referred to in §1794.081

1794.041 Selling black bass. It shall be unlawful for any person to buy, sell, barter or to offer for sale any black bass or part thereof whether taken within or without the state. [C24, 27, 31,§1754; 47GA, ch 99,§68.]

Referred to in §1794.081

1794.042 Minnows — nets — violations. For the purpose of taking minnows only, it shall be lawful for any person to use a minnow dip net not to exceed four feet in diameter or a minnow seine not to exceed fifteen feet in length and having a mesh not smaller than one-fourth inch bar measure or larger than one-half inch bar measure and on issuance of permit by the commission, licensed bait dealers may use minnow seines not exceeding fifty feet in length.

"Minnows" shall be defined as chubs, shiners, suckers, dace, stonerollers, mud-minnows, redhorse, blunt-nose, fat-head, or other small fish commonly used for fish bait that have only one dorsal fin.

"Commercial purposes" shall be construed to mean selling, giving, or furnishing to others.

It shall be unlawful for any person:

1. To take or attempt to take minnows for commercial purposes from any of the waters of the state, or transport the same without first procuring a bait dealer's license therefor as provided by state law; provided, however, that no license other than a license to fish in the waters of this state shall be required of persons taking minnows for their individual use for bait.

2. To seine, take, attempt to take, transport or carry away any minnows from the waters of any stream inhabited or stocked with trout, except that chubs, suckers and redhorse may be taken from trout streams with pole and line during open trout season, and chubs may be taken with pole and line only, at any time, from streams not stocked with trout.

3. To transport in any manner or for any purpose outside this state any minnows, dead or alive, taken in the state except that the director may transport for the purposes set out by state law.

4. To use minnows except for bait in hook and line fishing.

The commission shall have the power to designate the lakes and streams and parts of same from which minnows shall not be taken when investigation shows that the minnow population should be protected for the best management of the lake or stream and if such investigation shows that lakes or streams or any portion of them should be closed to taking minnows for such length of time as deemed advisable by the commission. Then in that case the director is hereby authorized to post such lakes and streams or portions of them with notices or signs which clearly state that the lake or stream or portion so posted is closed to the taking of minnows and

it shall be unlawful for any person to take in any manner, minnows from such posted streams.

Minnow traps not exceeding twenty-four inches in length may be used wherever the taking of minnows is allowed. [C73,§4052; C97, §2541; C24, 27, 31,§1736; 47GA, ch 99,§69; 48GA, ch 78,§14.]

Referred to in §1794.081

1794.043 Selling minnows outside state. Except as otherwise provided no person shall carry, transport or ship or cause to be carried, transported or shipped any minnows for the purpose of sale beyond the boundaries of the state. [47GA, ch 99,§70.]

Referred to in §1794.081

1794.044 Prohibited bait. It shall be unlawful to transport or to use or to sell or offer for bait or to place into any inland waters of the state or into any waters from which waters of the state may become stocked any young fish of carp, quillback, gar, or dogfish, and any minnows or young fish of any of these species taken shall not be returned to any such waters, but shall be destroyed. [47GA, ch 99,§71.]

Referred to in §1794.081

1794.045 Frog season. It shall be unlawful for any person to take, capture or have in possession frogs from November 30 to June 1 in any year. [47GA, ch 99,§72.]

Referred to in §1794.081

1794.046 Frogs—catching—selling. It shall be unlawful to take, attempt to take, or kill in any manner whatsoever, or to sell, or have in possession, or to transport in any manner, any species of frogs in the state except as follows:

Frogs may be taken from May 12 to the following November 30.

Frogs may be taken by holders of a fishing license only and they may be used for bait or food purposes, but no person shall take more than four dozen frogs in any one day or have in possession at any one time more than eight dozen frogs. Licensed bait dealers authorized by law to sell bait may have in their possession to supply the bait needs of their customers, not more than twenty dozen frogs.

No person shall use any device, net, barrier or fence of any kind which prevents frogs from having free access to and egress from the water.

Transportation out of the state in any manner or for any purposes, of frogs taken in Iowa, is prohibited.

Nothing in this chapter shall be construed to prevent the purchase, sale or possession of frogs or any portion of the carcasses of frogs that have been legally taken and shipped in from without the state.

Nothing herein shall prevent any person from catching frogs on his own premises for his private use. [47GA, ch 99,§73; 48GA, ch 78,§15.]

Referred to in §1794.081

1794.047 Prohibited areas. It shall be unlawful for any person at any time, except as otherwise provided, to take any fish, minnows, frogs, or other aquatic, biological life from any state fish hatchery, nursery or other area under the jurisdiction of the commission operated for fish production purposes. [47GA, ch 99,§74.]

Referred to in §1794.081

1794.048 Federal employees excepted. The United States commissioner of fisheries, and his duly authorized agents, are hereby authorized to conduct fish culture operations, rescue work on the boundary waters of the state, and other operations necessary for rescue and hatchery work. [47GA, ch 99,§75.]

Referred to in §1794.081

TRAPPING OF FUR-BEARING ANIMALS

1794.049 Open seasons. Except as otherwise provided, no person shall take, capture, kill, or have in possession any fur-bearing animal or any part thereof of any of the following varieties at any time except the period embraced within the dates, both inclusive, set opposite the names of each variety below, except where such killing, trapping, or ensnaring may be for the protection of public or private property. Provided, it shall be lawful for any person to have in his possession, sell, transport, or otherwise dispose of during such open season as herein provided, and for ten days thereafter, the carcass of, hide or skin of any animal named in this section.

1. Badger	November 10 to January 10,
2. Mink	November 10 to January 10,
3. Raccoon	November 10 to January 10,
4. Skunk	November 10 to January 10,
5. Oppossum	November 10 to January 10,
6. Civet cat	November 10 to January 10,
7. Muskrat	November 10 to January 10,
8. Red fox or gray fox	Continuous open season,
9. Beaver and otter	Continuous closed season,
10. Weasel	Continuous open season,
11. Ground hog	Continuous open season,
12. Wolf, coyote	Continuous open season.

[C97,§2553; SS15,§2553; C24, 27, 31,§1766; C27, 31,§1766-a1; 47GA, ch 99,§76; 48GA, ch 78,§25.]

Referred to in §1794.081

1794.050 Selling furs outside state. It shall be unlawful for any person except a licensed fur dealer to ship, transport, or sell any skin or hide of any fur-bearing animal defined in this chapter to dealers or buyers outside of this state unless he first obtains from the commission a special permit tag authorizing such shipment. [C27, 31,§1766-a2; 47GA, ch 99,§77; 48GA, ch 78,§16.]

Referred to in §1794.081

1794.051 Permit to hold hides. Upon application, which shall be filed with the commission within ten days after the close of the open season, any person may be permitted to hold hides or skins of fur-bearing animals lawfully taken for a longer time than specified above. Such application shall be verified and shall show the number and varieties of the skins or hides to be held by the applicant. The com-

mission shall thereupon issue a permit to such applicant to hold such skins or hides, which permit shall authorize the holder to sell or otherwise dispose of such skins or hides. [C31, 1766-c4; 47GA, ch 99,§78.]

Referred to in §1794.081

1794.052 Disturbing dens. It shall be unlawful for any person to molest or disturb, in any manner, any muskrat house, beaver dam, skunk, mink, or raccoon den except in the presence of a conservation officer. [47GA, ch 99,§79; 48GA, ch 78,§17.]

Referred to in §1794.081

1794.053 Shooting or spearing. No person shall kill with shotgun, or spear any beaver, mink, otter, or muskrat, or have in possession any of said animals or the carcasses, skins or parts thereof that have been killed with shotgun or spear. [C31,§1767-c2; 47GA, ch 99,§80.]

Referred to in §1794.081

1794.054 Box traps—disturbing dens—tags for traps. Except as otherwise provided in this act [47GA, ch 99], no person shall at any time, use or attempt to use any colony or box trap including figure four box traps, in taking, capturing, trapping or killing any game bird or animal or fur-bearing animals.

It shall be unlawful for any person, except as otherwise provided, to use any chemicals, explosives, smoking devices, mechanical ferrets, wire, tool, instrument, or water to remove fur-bearing animals from their dens.

A license tag for each trap for which a license fee has been paid, stamped with the year of issuance, shall be furnished by the commission without additional charge. All licensed traps, when in use, shall have said tag attached to trap or chain and conservation officers shall have authority to confiscate any trap when found in use without such tag attached. Tags shall be renewed annually. [R60,§4381; C73, §4048; C97,§§2551, 2558; SS15,§§2539, 2551; C24, 27, 31,§§1771, 1773; 47GA, ch 99,§81; 48GA, ch 78,§18.]

Referred to in §1794.081

FUR DEALERS

1794.055 Definition. The term "fur dealer" as used in this chapter shall mean any person, firm, partnership, or corporation engaged in the business of buying, bartering, trading or otherwise obtaining raw hides or skins of fur-bearing animals. [47GA, ch 99,§82.]

Referred to in §1794.081

1794.056 License. A license shall be required of each such fur dealer. The commission shall, upon application and the payment of the required license fee, furnish proper certificates to dealers. [C31,§1766-c3; 47GA, ch 99,§83.]

Referred to in §1794.081

1794.057 Agent's license. The commission shall, upon application and the payment of the required fee, issue a certificate to each person who, as an agent or representative of a licensed fur dealer, buys or sells fur or hides for such dealer. The dealer to whose agent or representative such a certificate is issued shall be responsible for all his acts as such representative or agent. No fur dealer shall be entitled to operate under such agent's certificate. [C31,§1766-c3; 47GA, ch 99,§84.]

Referred to in §1794.081
Fee provision repealed by 48GA, ch 76,§1

1794.058 Possession by dealer. A licensed fur dealer may have in his possession at any time skins or hides of animals which have been lawfully taken. [C31,§1766-c4; 47GA, ch 99,§85.]

Referred to in §1794.081

1794.059 Report. Fur dealers shall, within fifteen days after the close of the open season in which fur-bearing animals may be lawfully taken, prepare and file with the commission a verified inventory. Such inventory shall show the number and kind of hides and skins which have been purchased. [C31,§1766-c1; 47GA, ch 99,§86.]

Referred to in §1794.081

1794.060 Reporting violations. It shall be the duty of each fur dealer to report to the commission, the name of any person if known to such dealer, who attempts to sell any skins or hides which appear to have been unlawfully possessed by said person. [C31,§1766-c2; 47GA, ch 99,§87.]

Referred to in §1794.081

MUSSELS

1794.061 License. It shall be unlawful for any person to take, catch or kill mussels for commercial purposes without first having procured a mussel license as provided by law. [C24, 27, 31,§1755; 47GA, ch 99,§88.]

Referred to in §1794.081

1794.062 Where and when taken. It shall be unlawful, except as provided in this chapter, for any person to take, catch, kill, or have in possession mussels except from the waters and at the times prescribed in this section:

The Mississippi river and the Missouri river are open at all times. All other state waters are closed except as follows: That section of the Red Cedar (Cedar) river having for its upper boundary the dam in Waterloo, Black Hawk county, and having for its lower boundary the point of junction with the Iowa river in Louisa county; that section of the Iowa river having for its upper boundary the North river bridge at Marengo, Iowa county, and having for its lower boundary the point of junction with the Mississippi river in Louisa county and that section of the Des Moines river having for its upper boundary the Minneapolis and St. Louis railway bridge located one and one-half miles north of Coalville, Pleasant Valley township, Webster county, and having for its lower boundary the point of junction with the Mississippi river in Lee county, open to taking of mussels between June 15 and November 30, each year. [47GA, ch 99,§89.]

Referred to in §1794.081

1794.063 Exceptions—use. Manufacturers of pearl buttons or of fish bait may at any time possess mussels which have been lawfully taken. Nothing in this or preceding sections shall be construed to prohibit a licensed fisherman from taking mussels to be used by him for food or bait. [47GA, ch 99,§90.]

Referred to in §1794.081

1794.064 Definitions. For the purposes of this chapter the term "crowfoot bar" shall mean a bar of any material bearing a series of hooks designed to catch or adapted for catching mussels by the insertion of such hooks between the shells of the mussels; "commercial purposes" shall mean and be presumed to be the taking, catching, killing or having in possession mussels for the purpose of the sale of the shell or viscera, unless the contrary is proven; "rig" shall mean one boat equipped with not more than four crowfoot bars, one boat equipped with power, and one barge. [C24, 27, 31,§1763; 47GA, ch 99,§91.]

Referred to in §1794.081

1794.065 Manner of taking. It shall be unlawful for any person to operate more than one boat for each license, or one rig in taking, catching or killing mussels for commercial purposes. One additional boat for the purpose of towing, may be used, but only when no apparatus for taking, catching, or killing mussels is used or kept thereon.

It shall be unlawful for any person to have in possession in the water while engaged in taking, catching or killing mussels for commercial purposes, more than four crowfoot bars, or for more than two such bars to be in the water at the same time, or for any crowfoot bar to be of greater length than twenty feet.

It shall be lawful for any person to use a fork and/or hands in the taking, catching or killing of mussels, provided it is not done at the same time crowfoot bars are being used. [C24, 27, 31,§1758; 47GA, ch 99,§92.]

Referred to in §1794.081

1794.066 Undersized mussels. It shall be unlawful for any person to take, or kill, offer for sale or have in possession for commercial purposes, any mussel of a size less than one and three-fourths inches in greater dimensions. Undersized mussels shall be immediately culled and returned to the water from where taken, without avoidable injury, except that the so-called "pig-toes" may be retained. [C24, 27, 31,§1759; 47GA, ch 99,§93.]

Referred to in §1794.081

1794.067 Report. On or before April 1, each year, the holder of a mussel license shall make a written report to the commission on blanks furnished by the commission stating the total weight of mussels taken, caught or killed under such license, the names and location of waters from which the mussels were taken and the amount received for the shells or viscera sold or processed and sold. Failure to make such report shall authorize the commission to refuse the issuance of another license until the report is filed. [C24, 27, 31,§1757; 47GA, ch 99,§94.]

Referred to in §1794.081

COMMERCIAL FISHING

1794.068 Nets or seines. It shall be unlawful except as otherwise provided for any person to use any net or any seine in taking fish other than in the lawful taking of minnows. [47GA, ch 99,§95.]

Referred to in §1794.081

1794.069 Seining—closed waters. It shall be lawful to use seines, pound nets, dip nets, hoop nets, gill nets, fyke nets, fiddler nets, or trammel nets in the Missouri river or Mississippi river, except as hereinafter provided in this section but only when such nets or seines have been properly licensed, and properly tagged, in accordance with the provisions of chapter 86.1, and of this section, and only when such nets or seines comply with the provisions of law and at such times and in such manner and for the taking of such species of fish as are permitted by law.

It shall be unlawful for any person to place any net or seine of any kind within one hundred yards of the mouth of any tributary stream emptying into the Mississippi river or Missouri river.

All licensed nets or seines shall have attached for each five hundred feet or portion thereof a metal tag identifying the net and license for its use. Identification tags shall be furnished by the commission and a charge of ten cents shall be made for each tag and such tags shall be renewed annually. Tags must at all times be attached to fishing tackle while in use and conservation officers shall have authority to confiscate any net or seine when found in use without such tag attached.

It shall be unlawful for any person to fish with or use any wooden fish basket or trap of any kind in the boundary or inland waters of the state.

It shall be unlawful for fish peddlers, wholesale fish markets, jobbing houses or other places for the wholesale or retail marketing of fish to have in possession catfish under the legal thirteen inch commercial size limit provided in Iowa laws.

The following waters are closed to the use of all fishing tackle except that pole, line and hook may be used for the purpose of taking fish:

That part of the Mississippi river in Lee county, Iowa, between the Mississippi River Power company dam and the Toledo, Peoria and Western railway and vehicle bridge at Keokuk, Iowa; and also an area in Dubuque county described as follows: beginning at a point on the west bank of the Mississippi river at the north and south center line of section twenty-four township eighty-eight north, range four east of the fifth P. M., Dubuque county, Iowa, thence northwesterly along the west bank of the Mississippi river to the north line of the southwest one-quarter of the southeast one-quarter of section ten, township eighty-eight north, range four east of the fifth P. M., thence easterly to

the head of Green's island otherwise charted as "Nine Mile Island", thence southeasterly along the east bank of Green's island to the downstream end thereof, thence to the point of beginning; that part of the Mississippi river in Dubuque county, Iowa, known as "Zollicoffers Lake" in sections ten, eleven, fourteen, fifteen and twenty-three, township ninety north, range two west; that part of the Mississippi river in Allamakee county, Iowa, known as "Big Lake" in sections four, five, eight, nine, sixteen and seventeen, township ninety-nine north, range three west; that part of Cassville Slough, also known as "Twelve Mile Slough", below government lock and dam number ten in Clayton county, Iowa; that part of the Mississippi river in Allamakee county known as "Mud Hen Lake" located in sections one and two, township ninety-six north, range three west; that part of the Mississippi river known as the "Breaks and Coolegar Shute", located in sections twenty, twenty-nine, and thirty-two, township seventy-four north, range two, west of the fifth P. M., Louisa county, Iowa; that part of the Mississippi river known as "Gun Lake" located in sections thirty-four and thirty-five, township ninety-seven north, range three west of the fifth P.M., Allamakee county, Iowa. [SS15,§2547-a; C24, 27, 31,§§1747, 1750; 47GA, ch 99,§96; 48GA, ch 78,§19.]

Referred to in §§1794.071, 1794.081

1794.070 Size of mesh. It shall be unlawful for any person to fish with or to use any seine, pound net, hoop net, dip net, fiddler net or fyke net, having a mesh of less than one and one-half inches square or bar measure or to fish with or to use any trammel net having a mesh of less than two inches square or bar measure, or to fish with or use a gill net having a mesh of less than three and three-quarters inches square or bar measure. Such measurements shall apply to meshes when in use and no allowance shall be made for shrinkage due to any cause. Any commercial fishing equipment in use shall be subject to inspection by the commission or its authorized agents at any time. [S13,§2547-c; C24, 27, 31, §1751; 47GA, ch 99,§97; 48GA, ch 78,§20.]

Referred to in §1794.081

1794.071 Nets permitted in boundary rivers —license. It shall be lawful to fish with and to use pound nets, dip nets, gill nets, hoop nets, fyke nets, fiddler nets and trammel nets in the Mississippi river and Missouri river at any time. Provided a trot line license is procured for the sum of one dollar, the holder of said license may use a trot line, with no more than one hundred hooks, in the waters of the Mississippi and Missouri rivers. A tag as provided in section 1794.069, paragraph three, shall be attached thereto. [SS15,§2547-a; C24, 27, 31, §1747; 47GA, ch 99,§98; 48GA, ch 78,§21.]

Referred to in §1794.081

1794.072 Season seining permitted. It shall be lawful to fish with or to use seines in the Mississippi river and Missouri river between June 15 and May 15 of the following year, both dates inclusive but at no other time. [47GA, ch 99, §99.]

Referred to in §1794.081

1794.073 Permissive catch. It shall be lawful to take from the waters of the Mississippi river and Missouri river with licensed and tagged nets or seines the following species of fish: carp, buffalo, gar, suckers, quillback, sheepshead, northern pike, pickerel, bullheads, dogfish, rock sturgeon, sand sturgeon, catfish or paddlefish, subject to minimum weight or length requirements provided by law. [S13,§2547-c; C24, 27, 31,§1751; 47GA, ch 99,§100.]

Referred to in §1794.081

1794.074 Catching in boundary rivers. It shall be lawful to take from the waters of the Mississippi river and the Missouri river with licensed and tagged nets or seines, and have in possession the following list of fish taken from said waters: carp, buffalo, suckers, redhorse, bullheads, quillback, catfish, gar, northern pike, pickerel, sheepshead or dogfish, at any time.

It shall be unlawful to take or have in possession paddlefish, rock sturgeon or sand sturgeon from December 1 to July 31 of the following year, both dates inclusive. [S13,§2547-c; C24, 27, 31,§1751; 47GA, ch 99,§101.]

Referred to in §1794.081

1794.075 Size limits. It shall be lawful for any person to take or catch, with licensed nets or seines, any catfish not less than thirteen inches long, any buffalo not less than fifteen inches long, any northern pike or pickerel not less than eighteen inches long, any bullhead not less than nine inches long, any sheepshead not less than ten inches long, any sucker or redhorse not less than twelve inches long, any sand sturgeon weighing not less than one pound, any rock sturgeon weighing not less than five pounds, any paddlefish weighing not less than five pounds. [S13,§2547-c; C24, 27, 31,§1751; 47GA, ch 99,§102; 48GA, ch 78,§22.]

Referred to in §1794.081

1794.076 Gar destroyed. It shall be unlawful for any person to place any gar pike in any waters of the state and such fish when taken shall be destroyed. [47GA, ch 99,§103.]

Referred to in §1794.081

1794.077 Sale of fish. It shall be lawful for the holder of a net or seine license to possess and sell such species and sizes of fish as are lawfully taken and such fish may be delivered to original buyers and/or may be sold by such licensee at a place on the bank to which they are brought from the nets or seines, but any such sales shall be made by the licensee or his agent. Any other sale of fish taken under this section shall require a wholesale fish market or fish peddler's license. [SS15,§2547-a; C24, 27, 31, §1752; 47GA, ch 99,§104.]

Referred to in §1794.081

1794.078 Report of licensee. Each holder of a net or seine license shall make a report to the commission annually showing the amounts, kinds and value of fish caught during the period

of the license, where fish were caught and kind of tackle used. Failure or refusal to make said report shall be cause for the commission to refuse issuance of license or renewal until such report is made. [C24, 27, 31,§1749; 47GA, ch 99, §105.]

Referred to in §1794.081

1794.079 Wholesale license. It shall be unlawful for any person, firm or corporation to peddle fish or to operate a wholesale fish market, jobbing house, or other place for the wholesale marketing of fish, or distribution of fish, without first procuring a license. The commission shall upon application and the payment of the required fee furnish a license to wholesale fish markets or fish peddlers. The commission may upon application and the payment of the required fee issue a certificate to each person who as a representative of a wholesale fish market is engaged in peddling fish. [SS15,§2547-a; C24, 27, 31,§1752; 47GA, ch 99,§106.]

Referred to in §1794.081

1794.080 Records and report. Each holder of a wholesale fish-market or fish-peddler's license shall keep an accurate* record of the species and quantities of all fish taken from Iowa waters acquired or handled by such licensee during the license year. Such records shall be open at all reasonable times to inspection by the commission. Such licensee shall within thirty days after the expiration of the license make a report upon blanks furnished by the commission of all fish acquired or handled by such licensee. Failure to make such report shall be cause to refuse to issue a new license. [C24, 27, 31,§1753; 47GA, ch 99,§107.]

Referred to in §1794.081
* "accurage" in enrolled act

1794.081 Penalties. Whoever shall violate any of the provisions of the foregoing sections numbered 1794.001 to 1794.080, inclusive, shall be punished as is provided in section 1789. [47GA, ch 99,§108.]

Constitutionality, 47GA, ch 99, §136

CHAPTER 86.1

FISH AND GAME LICENSES AND CONTRABAND ARTICLES AND GUNS

Referred to in §1703.60

1794.082 Licenses.
1794.083 Blanks.
1794.084 Issuance of license.
1794.085 Depositaries—bond.
1794.086 Fees.
1794.087 Lost or destroyed blanks.
1794.088 Duplicate licenses and permits.
1794.089 Accounting.
1794.090 Duplicate issuance.
1794.091 Tenure of license.
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1794.093 Showing license to officer.
1794.094 Unlawful use—effect.
1794.095 Revocation or suspension.
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CONTRABAND ARTICLES

1794.099 Public nuisance.
1794.100 Confiscation.
1794.101 Trial.
1794.102 Order.

GUNS

1794.103 "Gun" defined.
1794.104 Manner of conveyance.
1794.105 Prohibited guns.

1794.082 Licenses. Except as otherwise provided in this chapter, no person shall fish, trap, hunt, pursue, catch, kill or take in any manner, or use or have possession of, or sell or transport all or any portion of any wild animal, bird, game or fish, the protection and regulation of which is desirable for the conservation of the resources of the state, without first procuring a license or certificate so to do and the payment of a fee as follows:

Fishing licenses:	
All persons legal residents of the state, except otherwise provided	$ 1.00
Hunting licenses:	
All persons legal residents of the state, except otherwise provided	1.00
Hunting and fishing combined licenses:	
All persons legal residents of the state, except otherwise provided	1.50
Hunting license:	
Nonresident or alien	15.00
Fishing license:	
Six-day license for nonresident or alien	1.50
Fishing license for longer than six days for nonresident or alien	3.00
Game breeder's license	2.00
Trapping license for legal resident of state using not more than fifteen traps	1.00
Trapping license for legal resident of state using more than fifteen traps, per trap including tag*	.15
Trapping license for nonresident or alien	25.00
and in addition thereto a fee, including tag, per trap	.25
Fur-dealer's license	10.00
Nonresident fur-dealer's license	50.00
Net or seine licenses for residents of state:	
Each 300 feet or fraction thereof of trammel net	10.00
Each 500 feet or fraction thereof of seine	15.00
Each pound net with less than 100 feet lead on each side	3.00
Each pound net 100 or more feet lead on each side	6.00
Each bait, dip, hook or fyke net used for commercial purposes	1.00

* "tax" in enrolled act

Fees for net and seine licenses issued to nonresidents of state shall be double that required of residents.

Mussel licenses:	
Legal residents	2.00
Mussel licenses:	
Nonresidents	25.00
Wholesale fish-market or fish-peddler's license	10.00
Peddlers, employed by wholesale fish market, certificate	1.00
Scientific collector's license	2.00
Private fish hatcheries	2.00
Bait dealer's license	5.00
Each one hundred feet of gill net or fraction thereof	2.00

[S13,§§2563-a2, -o, -p; SS15,§§2547-a, 2562-b, 2563-a1; C24, 27, 31,§§1706, 1718, 1719, 1748, 1752, 1756, 1779; C27, 31,§1719-a1; C31,§§1718-c1, 1766-c3; C35,§1794-e1; 48GA, ch 76,§1.]

1794.083 Blanks. The state conservation director shall provide blanks for, and determine in addition to the following requirements, the method of issuing licenses. [S13,§2563-a3; C24, 27, 31,§1722; C35,§1794-e2.]

1794.084 Issuance of license. All licenses other than hunting, fishing, and trapping licenses, shall be issued by the director upon application to the departmental office at Des Moines.

Hunting, fishing, and trapping licenses shall be issued by the recorder of each county. [SS15, §2563-a4; C24, 27, 31,§1724; C35,§1794-e3.]

1794.085 Depositaries — bond. The county recorder may designate various depositaries for the sale of such licenses other than the office of the county recorder. The director may designate depositaries other than those designated by the recorders of the various counties, but in so doing the interest of the state shall be fully protected either by a sufficient cash deposit or a satisfactory bond. Depositaries designated by the county recorder or the director may have the privilege of charging an additional five percent of the cost of each license to be retained for the service rendered in issuing the license. [C31,§1724-c1; C35,§1794-e4.]

1794.086 Fees. The county recorder shall be responsible for all fees for the issuance of hunting and fishing licenses sold through his office, or issued through his office and sold by others. All unused license blanks shall be surrendered to the county recorder upon his demand. [C31,§1724-c1; C35,§1794-e5.]

1794.087 Lost or destroyed blanks. When license blanks in the possession of the county recorder or depositaries are accidentally destroyed, either by fire or theft, the holder of such blanks shall only be relieved from accountability upon the presentation of satisfactory proof and the filing of a bond to the director that such blanks have actually been so destroyed. [C35,§1794-e6.]

1794.088—Duplicate licenses and permits. Whenever any license, certificate or permit, for which a fee has been set, has been lost, destroyed or stolen, the director or the county recorder where the license was issued in the first instance, may issue a certificate to replace said license, if written evidence is filed with either director or recorder, in affidavit form, by the person to whom the original was issued, setting forth the circumstances and accompanied by a fee of twenty-five cents, said fee to be kept by the county recorder for the use of the county, if issued by him, and placed in the fish and game protection fund if issued by the director. If, on examination of the evidence, the director or the recorder, as the case may be, is satisfied that said license has been lost, destroyed or stolen, he shall issue a duplicate license which shall be plainly marked "duplicate" and said duplicate shall serve in lieu of the original license and it shall contain the same information and signature as the original. [48GA, ch 76,§2.]

1794.089 Accounting. Within five days after the end of each month, each county recorder shall remit to the director, all duplicate licenses and all fees for such licenses issued during the previous month. On or before the tenth of April each year, each county recorder shall remit to the director all unused license blanks for the previous year, and he shall make a final accounting for all license fees received for that period. [SS15,§2563-a4; C24, 27, 31,§1725; C35, §1794-e7.]

1794.090 Duplicate issuance. All licenses shall be issued in duplicate, one copy of which shall be given to the applicant, one shall be forwarded to the director, and the license stub shall be retained in the office of the county recorder. [C35,§1794-e8.]

1794.091 Tenure of license. Every license shall expire on April 1 following its issuance. [S13,§2563-a8; C24, 27, 31,§1727; C35,§1794-e9.]

1794.092 Form of license. All hunting, fishing, and trapping licenses shall contain a general description. Such licenses shall be upon such forms as the commission shall adopt. The occupation, address and the signature of the applicant and all signatures and other writing shall be in ink. All licenses shall bear a facsimile signature of the director and the signature of the recorder by whom it is issued. All licenses shall clearly indicate the nature of the privilege granted. [S13,§§2563-a3,-a8; C24, 27, 31,§§1722, 1727; C35,§1794-e10; 47GA, ch 99, §109.]

1794.093 Showing license to officer. Every person shall, while fishing, hunting or trapping, show his license, certificate or permit, to any conservation officer, constable, sheriff, deputy sheriff, police officer, peace officer, or the owner or person in lawful control of the land or water upon which licensee may be hunting, fishing or trapping when requested by said persons to do so. Any failure to so carry or refusal to show or so exhibit his license, certificate or permit,

shall be a violation of this chapter. [48GA, ch 76,§3.]

Analogous provision, §1794

1794.094 Unlawful use—effect. The use of a license by a person other than that to whom issued shall nullify said license and such use shall constitute a misdemeanor. [S13,§2563-a9; C24, 27, 31,§1729; C35,§1794-e11.]

Penalty, §12894

1794.095 Revocation or suspension. Upon the conviction of a licensee of any violation of chapter 86 of the code, or of this act [45GA, ch 30], or of any administrative order adopted and published by the state conservation commission, the* magistrate may, as a part of the judgment, revoke the license of said licensee, or suspend the same for any definite period. [S13, §2563-a9; C24, 27, 31,§1729; C35,§1794-e12; 47GA, ch 99,§110.]

*Word "the" inserted

1794.096 Record of revocation. Whenever a license is revoked the date and cause of such revocation shall be noted on the stub retained by the county recorder and upon the duplicate on file in the office of the commission. The commission may refuse the issuance of a new license to any person whose license has theretofore been revoked. [S13,§2563-a7; C24, 27, 31, §1726; C35,§1794-e13.]

1794.097 Game birds or animals as pets. Any person may possess not more than two game birds or fur-bearing animals confined as pets without being required to purchase a license as a game breeder, but he shall not be allowed to increase his stock beyond the original number nor shall he be allowed to kill or sell such stock. [C24, 27, 31,§1720; C35,§1794-e14.]

45GA, ch 30, §23, editorially divided

1794.098 License not required. Owners or tenants of land, and their children, may hunt, fish or trap upon such lands and may shoot ground squirrels, gophers or woodchucks upon adjacent roads without securing a license so to do.

No female resident of the state, except when fishing in state-owned lakes, shall be required to have a fishing license, nor shall a resident of the state under sixteen years of age be required to have a license to fish in the waters of the state. [S13,§2563-a3; C24, 27, 31,§§1720, 1723; C35, §1794-e15; 48GA, ch 77,§8.]

CONTRABAND ARTICLES

1794.099 Public nuisance. Any device, contrivance or material used to violate any regulation adopted by the commission, or any other provision of this chapter, is hereby declared to be a public nuisance, and it shall be the duty of the state conservation director and his officers, or any peace officer, to seize such devices, contrivances or materials so used, without warrant or process, and to deliver them to some magistrate having jurisdiction. Provided, however, no gun, fishing rod, fishing tackle or automobile shall be construed to be a public nuisance under this section. [C73,§4052; C97,§2540; SS15, §§2539, 2540; C24, 27, 31,§1715; C35,§1794-e16; 48GA, ch 77,§17.]

1794.100 Confiscation. Said magistrate, upon said delivery being made to him, shall docket the proceeding and fix a day and hour for hearing thereon which shall not be more than ten nor less than three days after said delivery. Written notice of the time and place of said hearing shall be personally served upon the person from whom the aforesaid articles or things were taken if such person is found in the county, otherwise, said notice shall be served by posting the same in some conspicuous place as near as reasonably possible to the place where the seizure was made. Said notice shall be so served at least two full days prior to said hearing. [C35, §1794-e17.]

1794.101 Trial. Trial of said cause shall be, so far as practicable, by the same procedure as is provided in chapter 617* of the code, so far as the same is applicable, and except as hereinafter provided. [C35,§1794-e18.]

*See 45GA, ch 30, §8, and 46GA, ch 125, §45

1794.102 Order. On said hearing, said magistrate may order such devices, contrivances or materials confiscated and destroyed, or, placed at the disposal of the director who may either use or sell the same, depositing the proceeds of such sale in the fish and game protection fund. [C35,§1794-e19.]

GUNS

1794.103 "Gun" defined. The word "gun" as used in this chapter, shall include every kind of a gun or rifle, except a revolver or pistol, and shall include those provided with pistol mountings which are designed to shoot shot cartridges. [C31,§1772-c1; C35,§1794-e20.]

45GA, ch 30, §24, editorially divided

1794.104 Manner of conveyance. No person, except as permitted by law, shall have or carry any gun in or on any vehicle on any public highway, unless such gun be taken down or contained in a case, and the barrels and magazines thereof be unloaded. [C24, 27, 31,§1772; C35, §1794-e21.]

1794.105 Prohibited guns. No person shall use a swivel gun, nor any other firearm, except such as is commonly shot from the shoulder or hand in the hunting, killing or pursuit of game, and no such gun shall be larger than number 10 gauge. [C97,§2558; C24, 27, 31,§1771; C35, §1794-e22.]

CHAPTER 87

CONSERVATION AND PUBLIC PARKS

Referred to in §1703.60

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ICE, SAND AND GRAVEL REMOVAL

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1795, 1796 Rep. by 46GA, ch 13,§36

1797 Secretary. The secretary of the executive council shall, without additional compensation, act as secretary of the state conservation commission. [C24, 27, 31, 35,§1797.]

1798 Duties in general. The commission shall investigate places in Iowa rich in natural history, forest reserves, archaeological specimens, and geological deposits; and the means of promoting forestry and maintaining and preserving animal and bird life and the conservation of the natural resources of the state. [C24, 27, 31, 35,§1798.]

1799 Duties as to parks. It shall be the duty of the commission, under the supervision and direction of the executive council, to establish, maintain, improve, and beautify public parks and preserves upon the shores of lakes, streams, or other waters, or at other places within the state which have become historical or which are of scientific interest, or which by reason of their natural scenic beauty or location are adapted therefor. The commission shall have the power under such supervision and direction, to maintain, improve or beautify state-owned bodies of water, and to provide proper public access thereto. The commission shall have the power to provide and operate facilities for the proper public use of the areas above described. [C24, 27, 31, 35,§1799; 48GA, ch 76,§4.]

Section 1799-b1, code 1935, repealed by 47GA, ch 99, §111

1799.1 Construction permit — regulations. No person, association or corporation shall build or erect any pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind upon or over any state-owned land or water under the jurisdiction of the commission, without first obtaining from such commission a written permit. The commission shall charge a fee of not less than ten dollars nor more than twenty-five dollars per year in the discretion of the commission for each such permit issued for any pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind, used for commercial purposes.

It shall be the duty of the commission to adopt and enforce rules and regulations governing and regulating the building or erection of any such pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind, and said commission may prohibit, restrict or order the removal thereof, when in the judgment of said commission it will be for the best interest of the public.

Any person, firm, association, or corporation violating any of the provisions of this section or any rule or regulation adopted by the commission under the authority of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not to exceed one hundred dollars or by imprisonment in the county jail not to exceed thirty days. [C27, 31, 35,§1799-b2.]

1799.2 Obstruction removed. The commission shall have full power and authority to order the removal of any pier, wharf, sluice, piling, wall, fence, obstruction, erection or building of any kind upon or over any state-owned lands or waters under their supervision and direction, when in their judgment it would be for the best interests of the public, the same to be removed

within thirty days after written notice thereof by the commission. Should any person, firm, association or corporation fail to comply with said order of the commission within the time provided, the commission shall then have full power and authority to remove the same. [C27, 31, 35,§1799-b3.]

1799.3 **Costs—lien.** The cost of such removal shall be paid by the owner of said pier, wharf, sluice, piling, wall, fence, obstruction, erection or building, and the state shall have a lien upon the property removed for such costs. Said costs shall be payable at the time of removal and such lien may be enforced and foreclosed, as provided for the foreclosure of chattel mortgages in chapter 523. [C31, 35,§1799-d1.]

1800 **Eminent domain.** The executive council may, upon the recommendation of the commission, purchase or condemn lands for public parks. No contract for the purchase of such public parks shall be made to an amount in excess of funds appropriated therefor by the general assembly. [C24, 27, 31, 35,§1800.]

1801 **Highways.** The executive council may, upon the recommendation of the commission, purchase or condemn highways connecting such parks with the public highways. When such highways have been purchased or condemned the same shall be public highways of this state and shall be maintained as other public highways of the county. [C24, 27, 31, 35,§1801.]

1802 **Condemnation statutes.** All the provisions of the law relating to the condemnation of lands for public state purposes shall apply to the provisions hereof in and so far as applicable. [C24, 27, 31, 35,§1802.]

Eminent domain, ch 365 et seq.

1803 **Title to lands.** The title to all lands purchased, condemned, or donated, hereunder, for park or highway purposes, shall be taken in the name of the state and if thereafter it shall be deemed advisable to sell any portion of the land so purchased or condemned, the proceeds of such sale shall be placed to the credit of the said public state parks fund to be used for such park purposes. [C24, 27, 31, 35,§1803.]

1804 **Gifts.** The commission with the written consent of the executive council, may accept gifts of land or other property, or the use of lands or other property for a term of years, and improve and use the same as public state parks. [C24, 27, 31, 35,§1804.]

1805 **Conditions — lands.** The conditions attached to a gift shall be entered in writing as part of the record of the title by which the state takes the lands, and shall be inscribed upon any chart, map, or description of said park if the conditions are made by the grantor in lieu of money as a consideration paid by the state. [C24, 27, 31, 35,§1805.]

40ExGA, SF 55, §3, editorially divided

1806 **Conditions—personalty.** If the donation be other than real estate and a particular specification for its use be made by the donor, no part of such donation shall be used or expended for any other purpose. [C24, 27, 31, 35, §1806.]

1807 **Reversion of gift.** If the lands transferred to the state as a gift, or if lands purchased in whole or in part by the state from moneys given for that purpose, shall be abandoned or sold and not used for state park purposes, the donor shall reclaim the land or funds donated by filing his request in writing with the executive council within six months of the time of the abandonment or sale by the state of such lands, but no interest or other charge shall be demanded of or paid by the state. Any unclaimed funds shall be used for park purposes. [C24, 27, 31, 35,§1807.]

1808 **Use of private funds.** The commission may permit the improvement of parks, when established, or the improvement of bodies of water, upon the border of which such parks may be established, by the expenditure of private funds, such improvement to be done, however, under the direction of the commission, by and with the consent of the executive council. [C24, 27, 31, 35,§1808.]

1809 **Landscape architect.** The commission may call upon the state college of agriculture and mechanic arts for the services of at least one competent landscape architect, engineer, or gardener, who shall, under the direction of the commission, proceed to work with it in the improvement of the state property under the control of said commission. The president of said college shall, when called upon, designate the landscape architect, engineer, or gardener, as the case may be, who shall work with said commission. [C24, 27, 31, 35,§1809.]

Referred to in §1811
40ExGA, SF 55, §6, editorially divided

1810 Rep. by 44GA, ch 38

1811 **Expense and compensation.** All necessary expenses incurred by such landscape architect, engineer, or gardener, under the provisions of section 1809, shall be paid in the same manner as are other expenditures by the commission, but no compensation shall be paid for such services. [C24, 27, 31, 35,§1811.]

1812 **Jurisdiction.** Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto. [C24, 27, 31, 35,§1812.]

40GA, ch 33, §9, editorially divided

1813 **Boundaries.** The commission shall at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property when said commission deems it feasible and neces-

sary, and shall where deemed advisable mark the same so that the boundaries of such state-owned property may be easily ascertainable to the public. [C24, 27, 31, 35,§1813.]

1814 Highway commission — duties. The commission may call upon the highway commission for the services of at least one competent engineer, who shall, under the direction of the conservation commission, proceed to work in conjunction with it in carrying out the true spirit and purpose of this chapter. [C24, 27, 31, 35,§1814.]

40GA, ch 33, §10, editorially divided

1815 County engineer — duties. The commission may call upon the county engineer of any county to advise relative to the true boundary between the state-owned property and private property in the county, and to furnish plats and surveys showing such true boundary lines, and when directed by the commission, shall mark such boundary lines as herein provided. [C24, 27, 31, 35,§1815.]

1816 Surveys and plats. All surveys and plats shall be filed with the secretary of the commission, and shall become public records of this state. [C24, 27, 31, 35,§1816.]

1817 Compensation. The compensation and expenses of the highway engineer shall be paid as a part of the maintenance of the highway commission, and of the county engineer by the county, as the case may be. [C24, 27, 31, 35, §1817.]

1818 Boundaries—adjustment. Whenever a controversy shall arise as to the true boundary line between state-owned property and private property, the commission may, with the approval of the executive council, adjust said boundary line or take such other action in the premises, all with the approval of the executive council, as in its judgment may seem right. When such disputed boundary line is fixed it shall be surveyed and marked as herein provided. [C24, 27, 31, 35, §1818.]

40GA, ch 33, §12, editorially divided

1819 Leases. The commission may, with the approval of the executive council, lease for periods not exceeding five years such parts of the property under its jurisdiction as to it may seem advisable. All leases shall reserve to the public of the state the right to enter upon the property leased for any lawful purpose. [C24, 27, 31, 35,§1819.]

1820, 1821 Rep. by 46GA, ch 13,§36

1821.1 Special police. The commission in carrying out its duties may appoint the state conservation director, chief of division of lands and waters, chief of division of fish and game, and four assistants and boat inspectors as special police. Such officers are hereby vested with the powers and charged with the duties of peace officers while in the performance of their official duties. [C35,§1821-e1; 48GA, ch 76,§5.]

1822 Management by municipalities. The commission may, subject to the approval of the executive council, enter into an agreement or arrangement with the board of supervisors of any county or the council of any city or town whereby such county, city, or town shall undertake the care and maintenance of any state park. Counties, cities, and towns are authorized to maintain such parks and to pay the expense thereof from the general fund of such county, city, or town as the case may be. [C24, 27, 31, 35,§1822.]

1822.1 Expenditure by cities. Any one or more cities or towns may through action of its city or town council expend money to aid in the purchase of land within the county for state parks which, when purchased, shall be the property of the state of Iowa, to be cared for as state parks. [C27, 31, 35,§1822-a1.]

Referred to in §1822.3
41GA, ch 121, §1, editorially divided

1822.2 Limitation on expenditures. The amount to be paid by such city or cities, or by such town or towns shall in no event exceed one-half of the total purchase price of the land involved in any single purchase, and in no event shall the total amount paid by such city or cities, or by such town or towns in any single purchase exceed the sum of fifty thousand dollars. [C27, 31, 35,§1822-a2.]

Referred to in §1822.3

1822.3 City funds available. Any such city or cities, or any town or towns aiding in the purchase of land for state parks, as provided for in sections 1822.1 and 1822.2 may pay for the same out of the general fund, or the park fund, or may issue bonds for the payment of the same and levy a tax for the payment of such bonds and the interest thereon. [C27, 31, 35, §1822-a3.]

1823 Sale of islands. No islands in any of the meandered streams and lakes of this state or in any of the waters bordering upon this state shall hereafter be sold, except with the majority vote of the executive council upon the majority recommendation of the commission, and in the event any of such islands are sold as herein provided the proceeds thereof shall become a part of the funds to be expended under the terms and provisions of this chapter. [C24, 27, 31, 35,§1823.]

1824 Sale of park lands. The executive council may, upon a majority recommendation of the commission, sell or exchange such parts of public lands under the jurisdiction of the commission as in its judgment may be undesirable for conservation purposes, excepting state-owned, meandered lands already surveyed and platted at state expense as a conservation plan and project tentatively adopted and now in the process of rehabilitation and development authorized by a special legislative act. Such sale or exchange shall be made upon such terms, conditions or considerations as the commission may recommend and that may be approved by the executive council, whereupon the secretary

of state shall issue a patent therefor in the manner provided by law in other cases. The proceeds of any such sale or exchange shall become a part of the funds to be expended under the provisions of this chapter. [C24, 27, 31, 35, §1824.]

1825 **Form of conveyance.** Conveyances shall be in the name of the state, signed by the governor and secretary of state, with the great seal of the state attached. [C24, 27, 31, 35, §1825.]

1826 Rep. by 45GA, ch 35,§1

1827 **Powers in municipalities.** Municipalities, or individuals, or corporations organized for that purpose only, acting separately or in conjunction with each other, may establish like parks outside the limits of cities or towns, and when established without the support of the public state parks fund, the municipalities, corporations, or persons establishing the same, as the case may be, shall have control thereof independently of the executive council; but none of the said municipalities, individuals, or corporations, acting under the provisions of this section shall establish, maintain or operate any such park as herein contemplated for pecuniary profit. [C24, 27, 31, 35,§1827.]

1828 Rep. by 42GA, ch 40

1828.01 **Prohibited destructive acts.** It shall be unlawful for any person to use, enjoy the privileges of, destroy, injure or deface plant life, trees, buildings, or other natural or material property, or to construct or operate for private or commercial purposes any structure, or to remove any plant life, trees, buildings, sand, gravel, ice, earth, stone, wood or other natural material, or to operate vehicles, within the boundaries of any state park, preserve, or stream or any other lands and/or waters under the jurisdiction of the conservation commission as defined in this chapter or as may hereafter be amended for any purpose whatsoever, except upon the terms, conditions, limitations and restrictions as set forth herein. [47GA, ch 99, §113.]

Referred to in §1828.23

1828.02 **Speed limit.** The maximum speed limit of all vehicles on state park and preserve drives, roads and highways shall be fifteen miles per hour. All driving shall be confined to designated roadways. [47GA, ch 99,§114.]

Referred to in §1828.23

1828.03 **Excessive loads.** Excessively loaded vehicles shall not operate over state park or preserve drives, roads or highways. The determination as to whether the load is excessive will be made by the state conservation director or his representative and will depend upon the load and the road conditions. [47GA, ch 99,§115; 48GA, ch 78,§23.]

Referred to in §1828.23

1828.04 **Parking.** All vehicles shall be parked in designated parking areas, and no vehicle shall be left unattended on any state park or preserve drive, road or highway, except in the case of an emergency. [47GA, ch 99,§116.]

Referred to in §1828.23

1828.05 **Hitching to trees.** No horse or other animal shall be hitched or tied to any tree or shrub, or in such a manner as to result in injury to state property. [47GA, ch 99,§117.]

Referred to in §1828.23

1828.06 **Fires.** No fire shall be built, except in a place provided therefor, and such fire shall be extinguished when site is vacated unless it is immediately used by some other party. [47GA, ch 99,§118.]

Referred to in §1828.23

1828.07 **Removing plants, flowers or fruit.** No person shall, in any manner, remove, destroy, injure or deface any tree, shrub, plant, or flower, or the fruit thereof, or disturb or injure any structure or natural attraction, except that upon written permission of the commission certain specimens may be removed for scientific purposes. [47GA, ch 99,§119.]

Referred to in §1828.23

1828.08 **Firearms, etc.** The use by the public of firearms, fireworks, explosives and weapons of all kinds is prohibited in all state parks and preserves. [47GA, ch 99,§120.]

Referred to in §1828.23
See also §§5762, 12959, 13245.08 to 13245.10, inc.

1828.09 **Littering grounds.** No person shall place any waste, refuse, litter or foreign substance in any area or receptacle except those provided for that purpose. [47GA, ch 99,§121.]

Referred to in §1828.23

1828.10 **Prohibited areas.** No person shall enter upon portions of any state park or preserve in disregard of official signs forbidding same, except by permission of the state conservation director or his representative. [47GA, ch 99,§122.]

Referred to in §1828.23

1828.11 **Animals on leash.** No privately owned animal shall be allowed to run at large in any state park or preserve or upon lands or in waters owned by or under the jurisdiction of the commission except by permission of the commission. Every such animal shall be deemed as running at large unless the owner carries such animal or leads it by a leash or chain not exceeding six feet in length, or keeps it confined in or attached to a vehicle. [47GA, ch 99, §123.]

Referred to in §1828.23

1828.12 **Closing time.** Except by arrangement or permission granted by the director or his authorized representative, all persons shall vacate state parks and preserves before ten-thirty o'clock p. m. Areas may be closed at an earlier or later hour, of which notice shall be given by proper signs or instructions. The provisions of this section shall not apply to authorized camping in areas provided for that purpose. [47GA, ch 99,§124.]

Referred to in §1828.23

1828.13 Camping. The commission is hereby authorized to fix fees for camping and other special privileges which shall be in such amounts as may be determined by the commission upon a basis of the cost of providing and reasonable value of such privileges. [47GA, ch 99,§125.]

Referred to in §1828.23

1828.14 Camping areas. No person shall camp in any portion of a state park or preserve except in portions prescribed or designated by the commission. [47GA, ch 99,§126.]

Referred to in §1828.23

1828.15 Time limit. No person shall be permitted to camp for a period longer than that designated by the commission for the specific state park or preserve, and in no event longer than for a period of two weeks. [47GA, ch 99, §127.]

Referred to in §1828.23

1828.16 Registering—vacating. Any person who camps in any state park or preserve shall register his or her name and address with the park custodian and advise the custodian when the camp is vacated. [47GA, ch 99,§128.]

Referred to in §1828.23

1828.17 Camping refused. Custodians are given authority to refuse camping privileges and to rescind any and all camping permits for cause. [47GA, ch 99,§129.]

Referred to in §1828.23

ICE, SAND AND GRAVEL REMOVAL

1828.18 Agreement with commission. No person shall remove any ice, sand, gravel, stone, wood or other natural material from any lands or waters under the jurisdiction of the commission without first entering into an agreement with the commission. [47GA, ch 99,§130.]

Referred to in §1828.23

1828.19 Permits. The commission may enter into agreements for the removal of ice, sand, gravel, stone, wood, or other natural material from lands or waters under the jurisdiction of the commission if, after investigation, it is determined that such removal will not be detrimental to the state's interest. The commission may specify the terms and consideration under which such removal is permitted and issue written permits for such removal. [47GA, ch 99, §131.]

Referred to in §1828.23

1828.20 Barriers on ice field. Any person removing ice under a permit shall erect barriers on any part of an ice field where ice is cut, where said field crosses or traverses any part of a stream or lake that is used as a way of passage. [47GA, ch 99,§132.]

Referred to in §1828.23

1828.21 Dredging. In removing sand, gravel, or other material from state-owned waters by dredging, the operator shall so arrange his equipment that other users of the lake or stream shall not be endangered by cables, anchors, or any concealed equipment. No waste material shall be left in the water in such manner as to endanger other craft or to change the course of any stream. [47GA, ch 99,§133.]

Referred to in §1828.23

1828.22 Disturbing natural bank. Where operations are entirely on private property adjacent to a public lake or stream the natural bank between the state and privately owned areas shall not be removed except by permission of the commission. [47GA, ch 99,§134.]

Referred to in §1828.23

1828.23 Penalties. Any person violating any of the provisions of the foregoing sections numbered 1828.01 to 1828.22, inclusive, shall, upon conviction, be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [47GA, ch 99,§135.]

CHAPTER 87.1

DAMS AND SPILLWAYS

Referred to in §1703.60

1828.24 Resolution of necessity.
1828.25 Expert plan.
1828.26 Hearing—damages.
1828.27 Adoption of plan.
1828.28 Appraisal of damages.
1828.29 Filing appraisement.
1828.30 Damages determined.
1828.31 Appeal—bond.
1828.32 Final determination and costs.
1828.33 Tentative plan.

1828.24 Resolution of necessity. Whenever, in the opinion of the state conservation commission, it is necessary and desirable for it to erect a dam or spillway across a stream or at the outlet of a lake, or to alter or reconstruct an existing dam or spillway, so as to increase or decrease its permanent height, or to permanently affect the water level above the structure, it shall proceed with said project by first adopting a resolution of necessity to be placed upon its records, in which it shall describe in a general way the work contemplated. [C24, 27, 31,§1826; C35,§1828-e1.]

1828.25 Expert plan. The commission, upon receipt of a report and plan prepared by a competent civil engineer, showing the work contemplated, the effect on the water level, and probable cost and such other facts and recommendations as may be deemed material, may approve said plan which shall be considered a tentative plan only, for the project. [C24, 27, 31,§1826; C35, §1828-e2.]

1828.26 Hearing—damages. After said approval the commission, if it wishes to proceed

further with the project, shall, with the consent of the executive council, fix a date of hearing not less than two weeks from date of approval of the plan. Notice of the day, hour and place of hearing, relative to proposed work, shall be provided by publication at least once a week for two consecutive weeks in some newspaper of general circulation published in the county where the project is located, or in the county or counties where the water elevations are affected, under the tentative plan approved. The last of such publication or publications shall not be less than five days prior to the day set for hearing. Any claim by any persons whomsoever, for damages which may be caused by said project shall be filed with the commission at or prior to the time of the hearing provided herein. [C24, 27, 31,§1826; C35,§1828-e3.]

1828.27 **Adoption of plan.** If, at the time of the hearing, the commission shall find that the improvement would be conducive to the public convenience, welfare, benefit or utility, and the cost thereof is not excessive, and no claim shall have been filed for damages, it may adopt the tentative plan as final or may modify the plan, provided said modification will not, to any greater extent than the tentative plan, materially and adversely affect the interests of littoral or riparian owners. [C24, 27, 31,§1826; C35,§1828-e4.]

1828.28 **Appraisal of damages.** If, at the time of the hearing, the claims for damages shall have been filed, further proceedings shall be continued to an adjourned, regular, or special session, the date and place of which shall be fixed at the time of adjournment and of which all interested parties shall take notice, and the commission shall have the damages appraised by three appraisers to be appointed by the chief justice of the supreme court. One of these appraisers shall be a registered civil engineer resident of the state and two shall be freeholders of the state, who shall not be interested in nor related to any person affected by the proposed project. [C24, 27, 31,§1826; C35,§1828-e5.]

1828.29 **Filing appraisement.** The appraisers appointed to determine the damages caused by the proposed project shall view the premises and determine and fix the amount of damages to which each claimant is entitled and shall, at least three days before the date fixed by the commission to hear and determine the same, file with the secretary of the commission reports in writing showing the amount of damages sustained by each claimant. Should good cause for delay exist, the commission may postpone the time of final action on the project. [C24, 27, 31, §1826; C35,§1828-e6.]

1828.30 **Damages determined.** At the time fixed for hearing and after receipt of the report of the appraisers, the commission shall examine said report, both for and against each claim for damages and compensation and shall, with the consent of the executive council, determine the amount of damages and compensation due each claimant and may affirm, increase or diminish the amount awarded by the appraisers. After such action, the commission may thereupon adopt a final plan for the project, and proceed with its construction, or it may dismiss the entire proceedings. [C24, 27, 31,§1826; C35, §1828-e7.]

1828.31 **Appeal—bond.** Appeals from orders or actions of the commission fixing the amount of compensation awarded or damages sustained by any claimant shall be treated as ordinary proceedings. All other appeals shall be triable in equity. The court may, in its discretion, order the consolidation for trial of two or more of such equitable cases. All appeals shall be taken within twenty days after date of final action or order of the commission from which such appeal is taken, by filing with the secretary of the commission a notice of appeal designating the court to which the appeal is taken, the order or action appealed from and stating that the appeal will come on for hearing at the next succeeding term of the court and designating such term. This notice shall be accompanied by an appeal bond with sureties to be approved by the clerk of the district court conditioned to pay all costs adjudged against the appellant. [C24, 27, 31,§1826; C35,§1828-e8.]

45GA, ch 85, §8, editorially divided

1828.32 **Final determination and costs.** The amount of damages or compensation found by the court shall be entered of record. Unless the result on the appeal is more favorable to the appellant than the action of the commission, all costs of the appeal shall be taxed to the appellant, but if more favorable, the cost shall be taxed to the appellees. All damages assessed and all costs occasioned under this chapter shall be paid from the funds of the commission. [C24, 27, 31,§1826; C35,§1828-e9.]

1828.33 **Tentative plan.** If, at the time of hearing on the tentative plan, no objectors appear and no claim for damages or compensation shall have been filed, or if proper waivers giving consent to the construction of the proposed improvement have been obtained from all parties affected then the commission may adopt the tentative plan as final and proceed with the work proposed. [C24, 27, 31,§1826; C35,§1828-e10.]

CHAPTER 88

FENCES

1829 Partition fences.
1830 Trimming and cutting back.
1831 Powers of fence viewers.
1832 Decision.
1833 Contribution postponed.
1834 Default—damages and fees collected as taxes.
1835 Service of notice on nonresidents.
1836 Orders.
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1838 Entry and record of orders.
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1842 Lands in different townships.
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1844 Right to build fence on line.
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1847 Duty to maintain tight fences.
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1849 Duty to keep fence tight.
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1851 Appeal.
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1853 Record kept—fees of clerk.

1829 Partition fences. The respective owners of adjoining tracts of land shall upon written request of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year. [C51,§§895, 900, 901; R60,§§1526, 1531, 1532; C73,§§1489, 1494, 1495; C97,§2355; C24, 27, 31, 35,§1829.]

39GA, ch 76, §1, editorially divided

1830 Trimming and cutting back. If said fence be hedge, the owner thereof shall trim or cut it back twice during each calendar year, the first time during the month of June and the last time during the month of September, to within five feet from the ground, unless such owners otherwise agree in writing to be filed with and recorded by the township clerk. [C51, §900; R60,§1531; C73,§1494; C97,§2355; C24, 27, 31, 35,§1830.]

1831 Powers of fence viewers. The fence viewers shall have power to determine any controversy arising under this chapter, upon giving five days notice in writing to the opposite party or parties, prescribing the time and place of meeting to hear and determine the matter named in said notice. Upon request of any landowner, the fence viewers shall give such notice to all adjoining landowners liable for the erection, maintenance, rebuilding, trimming, or cutting back, or repairing of a partition fence, or to pay for an existing hedge or fence. [C51, §§896, 898, 902, 909; R60,§§1527, 1529, 1533, 1540; C73,§§1490, 1492, 1496, 1503; C97,§2356; C24, 27, 31, 35,§1831.]

Referred to in §1833
Trustees as fence viewers, §5543
C97,§2356, editorially divided

1832 Decision. At said time and place the fence viewers shall meet and determine by written order the obligations, rights, and duties of the respective parties in such matter, and assign to each owner the part which he shall erect, maintain, rebuild, trim or cut back, or pay for, and fix the value thereof, and prescribe the time within which the same shall be completed or paid for, and, in case of repair, may specify the kind of repairs to be made. [C51, §§896, 898, 902, 909; R60,§§1527, 1529, 1533, 1540; C73,§§1490, 1492, 1496, 1503; C97,§2356; C24, 27, 31, 35,§1832.]

Referred to in §1833

1833 Contribution postponed. In case a landowner desires to erect a partition hedge or fence when the owner of the adjoining land is not liable to contribute thereto, the fence viewers may assign to each owner the part which he shall erect, maintain, rebuild, and repair, trim or cut back, by pursuing the method provided in sections 1831 and 1832; but the adjoining owner shall not be required to contribute thereto until he becomes liable so to do, as elsewhere in this chapter provided. [C51,§901; R60,§1532; C73,§1495; C97,§2357; C24, 27, 31, 35,§1833.]

1834 Default—damages and fees collected as taxes. If the erecting, rebuilding or repairing of such fence be not completed within thirty days from and after the time fixed therefor in such order, the adjoining owner may do or complete the same, and the value thereof may be fixed by the fence viewers, and unless the sum so fixed, together with all fees of the fence viewers caused by such default, as taxed by them, is paid to the landowner so erecting, rebuilding, trimming or cutting back or repairing such fence, within ten days after the same is so ascertained; or when ordered to pay for an existing fence, and the value thereof is fixed by the fence viewers, and said sum, together with the fees of the fence viewers, as taxed by them, remains unpaid by the party in default for ten days, the fence viewers shall certify to the county auditor the full amount due from the party or parties in default, including all fees and costs taxed, together with a description of the real estate owned by the party or parties in default along or upon which the said fence exists, and the county auditor shall enter the same upon the tax list and the amount shall be collected as other taxes and when so collected same shall be paid to the party or parties entitled thereto. [C51,§§897, 899, 902; R60,§§1528, 1530, 1533; C73,§§1491, 1493, 1496; C97,§2358; S13,§2358; C24, 27, 31, 35,§1834.]

Collection of taxes, ch 346 et seq.
Fees of fence viewers, §5571

1835 Service of notice on nonresidents. The notice by the fence viewers provided for in this chapter may be served upon any owner nonresident of the county where his land is situated, by publication thereof, once each week, for two consecutive weeks in a newspaper

printed in the county in which the land is situated, proof of which shall be made as in case of an original notice and filed with the fence viewers, and a copy delivered to the occupant of said land, or to any agent of the owner in charge of the same. [C97,§2359; S13,§2359; C24, 27, 31, 35,§1835.]

Proof of service, §11085

1836 Orders. All orders and decisions made by the fence viewers shall be in writing, signed by at least two of them, and filed with the township clerk. [C97,§2360; C24, 27, 31, 35,§1836.]

C97,§2360, editorially divided

1837 Notice. All notices in this chapter required to be given shall be in writing, and return of service thereof made in the same manner as notices in actions before a justice of the peace. [C97,§2360; C24, 27, 31, 35,§1837.]

Service and return, §§10524, 11060

1838 Entry and record of orders. Such orders, decisions, notices, and returns shall be entered of record at length by the township clerk, and a copy thereof certified by the township clerk to the county recorder, who shall record the same in his office in a book kept for that purpose, and index such record in the name of each adjoining owner as grantor to the other. [C97,§2360; C24, 27, 31, 35,§1838.]

1839 Record conclusive. The record in the recorder's office, unless modified, by appeal as hereinafter provided, shall be conclusive evidence of the matters therein stated, and such record or a certified copy thereof shall be competent evidence in all courts. [C97,§2360; C24, 27, 31, 35,§1839.]

Appeal, §1851

1840 Division by agreement—record. The several owners may, in writing, agree upon the portion of partition fences between their lands which shall be erected and maintained by each, which writing shall describe the lands and the parts of the fences so assigned, be signed and acknowledged by them, and filed and recorded in the office of the recorder of deeds of the county or counties in which they are situated. [C51,§905; R60,§1536; C73,§1499; C97,§2361; C24, 27, 31, 35,§1840.]

1841 Orders and agreements—effect. Any order made by the fence viewers, or any agreement in writing between adjoining landowners, when recorded in the office of the recorder of deeds, as in this chapter provided, shall bind the makers, their heirs, and subsequent grantees, except, if the land of either shall cease to be used as a means for revenue or benefit, the same shall be inoperative while not thus used. [C51,§905; R60.§1536; C73,§1499; C97,§2362; C24, 27, 31, 35,§1841.]

1842 Lands in different townships. When the adjoining lands are situated in different townships in the same or different counties, the clerk of the township of the owner making the application shall select two trustees of his township as fence viewers, and the clerk of the other township one from his township, who shall possess, in such case, all the powers given to fence viewers in this chapter, but all orders, notices, and valuations and taxation of costs made by them must be recorded in both townships and in the office of the recorder of deeds of each county. [C51,§906; R60,§1537; C73,§1500; C97, §2363; C24, 27, 31, 35,§1842.]

1843 Fence on another's land. When a person has made a fence or other improvement on an inclosure, which is found to be on land of another, such person may enter upon the land of the other and remove his fence or other improvement and material, upon his first paying, or offering to pay, the other party for any damage to the soil which may be occasioned thereby, and the value of any timber used in said improvement taken from the land of such other party, if any; and if the parties cannot agree as to the damages, the fence viewers may determine them as in other cases; such removal shall be made as soon as practicable, but not so as to expose the crops of the other party. [C51,§§907, 908; R60,§§1538, 1539; C73,§§1501, 1502; C97,§2364; C24, 27, 31, 35,§1843.]

1844 Right to build fence on line. A person building a fence may lay the same upon the line between him and the adjacent owners, so that it may be partly on one side and partly on the other, and the owner shall have the same right to remove it as if it were wholly on his own land. [C51,§910; R60,§1541; C73,§1504; C97, §2365; C24, 27, 31, 35,§1844.]

1845 Fence on one side of line. The provisions concerning partition fences shall apply to a fence standing wholly upon one side of the division line. [C51,§911; R60,§1542; C73,§1505; C97,§2366; C24, 27, 31, 35,§1845.]

1846 "Lawful fence" defined. A lawful fence shall consist of:

1. Three rails of good substantial material fastened in or to good substantial posts not more than ten feet apart.
2. Three boards not less than six inches wide and three-quarters of an inch thick, fastened in or to good substantial posts not more than eight feet apart.
3. Three wires, barbed with not less than thirty-six iron barbs of two points each, or twenty-six iron barbs of four points each, on each rod of wire, or of four wires, two thus barbed and two smooth, the wires to be firmly fastened to posts not more than two rods apart, with not less than two stays between posts, or with posts not more than one rod apart without such stays, the top wire to be not more than fifty-four nor less than forty-eight inches in height.
4. Wire either wholly or in part, substantially built and kept in good repair, the lowest or bottom rail, wire, or board not more than twenty nor less than sixteen inches from the ground, the top rail, wire, or board to be between forty-eight and fifty-four inches in height and the middle rail, wire, or board not less than twelve

nor more than eighteen inches above the bottom rail, wire, or board.

5. Any other kind of fence which, in the opinion of the fence viewers, shall be equivalent thereto. [R60,§§1544, 1545; C73,§1507; C97, §2367; S13,§2367; C24, 27, 31, 35,§1846.]

Referred to in §1850

1847 Duty to maintain tight fences. All partition fences may be made tight by the party desiring it, and when his portion is so completed, and securely fastened to good substantial posts, set firmly in the ground, not more than twenty feet apart, the adjoining property owner shall construct his portion of the adjoining fence, in a lawful tight manner, same to be securely fastened to good substantial posts, set firmly in the ground, not more than twenty feet apart. [R60, §1545; C73,§1507; C97,§2367; S13,§2367; C24, 27, 31, 35,§1847.]

Referred to in §1850

1848 "Tight fence" defined. All tight partition fences shall consist of:

1. Not less than twenty-six inches of substantial woven wire on the bottom, with three strands of barbed wire with not less than thirty-six barbs of at least two points to the rod, on top, the top wire to be not less than forty-eight inches, nor more than fifty-four inches high.

2. Good substantial woven wire not less than forty-eight inches nor more than fifty-four inches high with one barbed wire of not less than thirty-six barbs of two points to the rod, not more than four inches above said woven wire.

3. Any other kind of a tight partition fence which, in the opinion of the fence viewers, is equivalent thereto. [C97,§2367; S13,§2367; C24, 27, 31, 35, §1848.]

Referred to in §1850

1849 Duty to keep fence tight. In case adjoining owners or occupants of land shall use the same for pasturing sheep or swine, each shall keep his share of the partition fence in such condition as shall restrain such sheep or swine. [C73,§1507; C97,§2367; S13,§2367; C24, 27, 31, 35,§1849.]

Referred to in §1850

1850 Controversies. Upon the application of either owner, after notice is given as prescribed in this chapter, the fence viewers shall determine all controversies arising under sections 1846 to 1849, inclusive, including the partition fences made sheep and swine tight. [C97, §2367; S13,§2367; C24, 27, 31, 35,§1850.]

Notice, §§1831, 1835, 1837

1851 Appeal. An appeal may be taken to the district court from any order or decision of the fence viewers by any person affected, in the same manner appeals are taken from justices of the peace, except that the appeal bond shall be approved by the township clerk, in which event the township clerk, after recording the original papers, shall file them in the office of the clerk of the district court, certifying them to be such, and the clerk shall docket them, entitling the applicant or petitioner as plaintiff, and it shall stand for trial as other cases. [C97,§2369; C24, 27, 31, 35,§1851.]

Manner of taking appeal, §10584 et seq.
Presumption of approval, §12759.1

1852 Certification of decree. Upon the final determination of said appeal the clerk of the district court shall certify to the recorder of deeds the fact that a judgment has been entered upon such appeal, with the book and page of such judgment, and the recorder shall thereupon enter on his record a notation that a judgment on appeal has been entered and that the same may be found in the office of the clerk of the district court, in the book and page designated in said certificate. [C24, 27, 31, 35,§1852.]

1853 Record kept—fees of clerk. The township clerk shall enter all matters herein required to be made of record in his record book, and shall receive ten cents for each one hundred words in entering of record and making certified copies of the matters herein provided for, and twenty-five cents additional for his certificate thereto when required, and shall also receive the costs of recording in the office of the recorder of deeds of any instrument required to be so recorded. [C97,§2370; C24, 27, 31, 35,§1853.]

CHAPTER 89

CIVIL ENGINEERS

1854 Registered engineers and surveyors.
1855 Terms defined.
1856 Board of engineering examiners—qualifications.
1857 Appointment and tenure.
1858 Vacancies—how filled.
1859 Official seal—bylaws.
1860 Attorney general to assist—general powers.
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1870 Land surveyor's certificate.
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1874 Expenditures.
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1875.1 Violations.
1876 Applicability of chapter.

1854 Registered engineers and surveyors. No person shall practice professional engineering or land surveying in the state unless he be a registered professional engineer or a registered land surveyor as provided in this chapter, except as permitted by the last section thereof. [C24, 27, 31, 35,§1854; 47GA, ch 101.]

1855 Terms defined. The "board" means the Iowa state board of engineering examiners provided by this chapter.

The term "professional engineer" as used in this chapter shall mean a person, who, by reason of his knowledge of mathematics, the physical sciences, and the principles of engineering, acquired by professional education and/or practical experience, is qualified to engage in engineering practice as hereinafter defined.

The practice of "professional engineering" within the meaning and intent of this chapter includes any professional service, such as consultation, investigation, evaluation, planning, designing, or responsible supervision of construction in connection with structures, buildings, equipment, processes, works, or projects, wherein the public welfare, or the safeguarding of life, health or property is or may be concerned or involved, when such professional service requires the application of engineering principles and data.

The mere execution, as a contractor, of work designed by a professional engineer, or the supervision of the construction of such work as a foreman or superintendent shall not be deemed to be active practice in engineering work.

The term "land surveyor" as used in this chapter shall mean a person who engages in the practice of land surveying as hereinafter defined.

The practice of "land surveying" within the meaning and intent of this chapter includes surveying of areas for their correct determination and description and for conveyancing, or for the establishment or re-establishment of land boundaries and the platting of lands and subdivisions thereof. [C24, 27, 31, 35,§1855; 47GA, ch 101.]

1856 Board of engineering examiners—qualifications. There is hereby created a state board of engineering examiners consisting of five members who shall be appointed by the governor. Each member of the board shall be a professional engineer at least thirty-five years of age, and shall have been a resident of this state for at least three years immediately preceding his appointment and shall have had at least ten years active practice preceding his appointment and during such time shall have had charge of engineering work as principal or assistant for at least two years, and shall be a member in good standing of a recognized state or national engineering society. No two members of said board shall be from the same branch of the profession of engineering. [C24, 27, 31, 35, §1856; 47GA, ch 101.]

1857 Appointment and tenure. Appointments to said board shall be made as follows:

1. Two members on July 1, 1925, and each four years thereafter.
2. Three members on July 1, 1927, and each four years thereafter. [C24, 27, 31, 35,§1857; 47GA, ch 101.]

1858 Vacancies—how filled. Vacancies in the membership of the board caused by death, resignation, or removal from office, shall be filled by an appointment from the governor for the unexpired portion of the term. [C24, 27, 31, 35, §1858; 47GA, ch 101.]

1859 Official seal—bylaws. The board shall adopt and have an official seal which shall be affixed to all certificates of registration granted and may make all bylaws and rules, not inconsistent with law, necessary for the proper performance of its duty. [C24, 27, 31, 35,§1859; 47GA, ch 101.]

1860 Attorney general to assist — general powers. Such board, or any committee thereof, shall be entitled to the counsel and to the services of the attorney general, and shall have power to compel the attendance of witnesses, and may take testimony and proofs and may administer oaths concerning any matter within its jurisdiction. [C24, 27, 31, 35,§1860; 47GA, ch 101.]

Administration of oaths, §1216
Attendance of witnesses, ch 646

1861 Compensation and expenses. Each member of the board shall receive as compensation the sum of ten dollars per day for the time actually spent in traveling to and from, and in attending sessions of the board and its committees, and shall receive all necessary traveling and incidental expenses incurred in the discharge of

his duties, but in no event shall the state be chargeable with any expense incurred under the provisions of this chapter. [C24, 27, 31, 35, §1861; 47GA, ch 101.]

1862 Organization of the board—meetings—quorum. The board shall elect annually from its members a chairman and a vice chairman. The secretary of the executive council, or one of his assistants, to be designated by him, shall act as secretary of said board. The board shall hold at least one stated meeting on the first Tuesday of December of each year, and special meetings shall be called at other times by the secretary at the request of the chairman or three members of the board. At any meeting of the board, three members shall constitute a quorum. The board shall have power to employ such additional clerical assistants and incur such office expense as may be necessary to properly carry out the provisions of this chapter. [C24, 27, 31, 35,§1862; 47GA, ch 101.]

1863 Annual report. At the time provided by law, the board shall submit to the governor a written report of its transactions for the preceding year, and shall file with the secretary of state a copy thereof, together with a complete statement of the receipts and expenditures of the board, attested by the affidavits of the chairman and the secretary, and a complete list of those registered under this chapter with their addresses and the dates of their certificates of registration. Said report shall be printed by the state and a copy mailed to, and placed on file in the office of the clerk of each incorporated city or town in the state and in the office of the auditor of each county therein. [C24, 27, 31, 35,§1863; 47GA, ch 101.]

Annual report, §247

1864 Secretary—duties of. The secretary shall keep on file a record of all certificates of registration granted and shall make annually such revisions of said record as may be necessary. In revising said record the secretary shall communicate annually by mail with every professional engineer and surveyor registered hereunder, as provided in section 1869.1. [C24, 27, 31, 35,§1864; 47GA, ch 101.]

1865 Engineering examiners fund. The secretary shall collect and account for all fees provided for by this chapter and pay the same to the state treasurer who shall keep such moneys in a separate fund to be known as the fund of the board of engineering examiners, which shall be continued from year to year and shall be drawn on only for the expenses and compensation of said board of examiners as provided in this chapter. [C24, 27, 31, 35, §1865; 47GA, ch 101.]

1866 Applications and examination fees. Applications for registration shall be on forms prescribed and furnished by the board, shall contain statements made under oath, showing the applicant's education and detail summary of his technical work, and shall contain not less than five references, of whom three or more shall be engineers having personal knowledge of his engineering experience. The examination fee shall be fifteen dollars which shall accompany the application. Should the board deny the issuance of a certificate of registration to any applicant who has appeared for examination, the initial fee deposited shall be retained as an application fee. [C24, 27, 31, 35, §1866; 47GA, ch 101.]

1866.1 General requirements for registration. The following shall be considered as minimum evidence satisfactory to the board that the applicant is qualified for registration as a professional engineer, or land surveyor, respectively, to wit:

1. As a professional engineer:

a. Graduation from an approved course in engineering of four years or more in an approved school or college; and a specific record of an additional two years or more of practical experience in engineering work of a character satisfactory to the board.

b. Successfully passing a written, or written and oral, examination designed to show knowledge and skill approximating that attained through graduation from an approved four year engineering course; and a specific record of six years or more of practical experience in engineering work.

2. As a land surveyor:

a. Graduation from an approved course in surveying in an approved school or college; and an additional two years or more of practical experience in land surveying work.

b. Successfully passing a written, or written and oral, examination in surveying prescribed by the board; and a specific record of six years or more of practical experience in land surveying work. The practical experience required in this section may be obtained under the exemption provisions of section 1876.

In considering the qualifications of applicants, responsible charge of engineering teaching may be construed as responsible charge of engineering work. The satisfactory completion of each year of an approved course in engineering in an approved school or college, without graduation, shall be considered as equivalent to a year of practical experience. Graduation in a course other than engineering from a college or university of recognized standing shall be considered as equivalent to two years of practical experience; provided, however, that no applicant shall receive credit for more than four years of practical experience because of educational qualifications.

Any person having the necessary qualifications prescribed in this chapter to entitle him to registration shall be eligible for such registration though he may not be practicing his profession at the time of making his application.

Provided, that no person shall be eligible for registration as a professional engineer, or land surveyor, who is not of good character and reputation. [47GA, ch 101.]

1867 Examinations—report required. Examinations for registration shall be given at

stated or called meetings of the board. The scope of the examinations and the methods of procedure shall be prescribed by the board. As soon as practicable, after the close of each examination, a report shall be filed in the office of the secretary of the board by the members conducting such examinations. Said report shall show the action of the board upon each application, whereupon the secretary of the board shall notify each applicant of the result of his examination. [C24, 27, 31, 35,§1867; 47 GA, ch 101.]

1868 Seal—certificate evidence of registration. Each registrant shall provide himself with a suitable seal with a uniform inscription thereon formulated by the board, with which he shall stamp all plans, specifications, surveys, and reports made or issued by him. A certificate of registration provided for in this chapter shall be presumptive evidence that the person named therein is legally registered. [C24, 27, 31, 35,§1868; 47GA, ch 101.]

1869 Certificate. To any applicant who shall have passed the examination as a professional engineer and who shall have paid an additional fee of ten dollars, the board shall issue a certificate of registration as a professional engineer signed by the chairman and secretary of the board under the seal of such board, which certificate shall authorize the applicant to practice professional engineering as defined in this chapter. Such certificate shall not carry with it the right to practice land surveying, unless specifically so stated in said certificate, which permission shall be granted by the board without additional fee in cases where the applicant duly qualifies as a land surveyor as prescribed by the rules of said board. [C24, 27, 31, 35,§1869; 47GA, ch 101.]

1869.1 Expirations and renewals. Certificates of registration shall expire on the last day of the month of December following their issuance or renewal and shall become invalid on that date unless renewed. It shall be the duty of the secretary of the board to notify every person registered under this chapter, of the date of expiration of his certificate and the amount of the fee that shall be required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of the expiration of said certificate. Renewal may be effected at any time during the month of December by the payment of a fee of two dollars. The failure on the part of any registrant to renew his certificate annually in the month of December as required above shall not deprive such a person of the right of renewal, but the fee to be paid for the renewal of a certificate after the month of December shall be increased two dollars per year for each year or fraction of a year that payment of renewal is delayed; provided, however, that the maximum fee for delayed renewal shall not exceed ten dollars. [C27, 31, 35,§1869-b1; 47GA, ch 101.]

Referred to in §1864

1870 Land surveyor's certificate. To any applicant who shall have passed the examination as a land surveyor and who shall have paid an additional fee of ten dollars, the board shall issue a certificate of registration signed by its chairman and secretary under the seal of the board, which certificate shall authorize the applicant to practice land surveying as defined in this chapter and to administer oaths to his assistants and to witnesses produced for examination, with reference to facts connected with land surveys being made by such land surveyor. [C24, 27, 31, 35,§1870; 47GA, ch 101.]

Administration of oaths, ch 66; also §5490

1871 Foreign registrants. The board shall from time to time examine the requirements for registration of professional engineers and land surveyors in other states, territories, and countries, and shall record those in which in the judgment of the board standards not lower than those provided by this chapter are maintained. The secretary of the board upon presentation to him of satisfactory evidence, by any person, that he holds a certificate of registration issued to him by proper authority in any state, territory or country so recorded, and upon the receipt of a fee of ten dollars, shall issue to such person a certificate of registration to practice professional engineering or land surveying as provided by this chapter, signed by the chairman and the secretary under the seal of the board, whereupon the person to whom such certificate is issued shall be entitled to all the rights and privileges conferred by the certificate issued after examination by the board. [C24, 27, 31, 35, §1871; 47GA, ch 101.]

1872 Revocation of certificate. The board shall have the power by a four-fifths vote of the entire board to revoke the certificate of any professional engineer or land surveyor registered hereunder, found guilty of any fraud or deceit in his practice, or guilty of any fraud or deceit in obtaining his certificate, or in case he is found by the same vote to be incompetent. [C24, 27, 31, 35,§1872; 47GA, ch 101.]

1873 Procedure. Proceedings for the revocation of a certificate of registration shall be begun by filing with the secretary of the board written charges against the accused. The board shall designate a time and place for a hearing, and shall notify the accused of this action and furnish him a copy of all charges at least thirty days prior to the date of the hearing. The accused shall have the right to appear personally or by counsel, to cross-examine witnesses or to produce witnesses in his defense. [C24, 27, 31, 35,§1873; 47GA, ch 101.]

1874 Expenditures. Warrants for the payment of expenses and compensations provided by this chapter shall be issued by the state comptroller upon presentation of vouchers drawn by the chairman and secretary of the board and approved by said comptroller, but at no time shall the total amount of warrants exceed the total amount of the examination and

registration fees collected as herein provided. [C24, 27, 31, 35,§1874; 47GA, ch 101.]

1875 **Injunction.** Any person who is not legally authorized to practice in this state according to the provisions of this chapter, and shall practice, or shall in connection with his name use any designation tending to imply or designate him as a professional engineer or land surveyor, may be restrained by permanent injunction. [C24, 27, 31, 35,§1875; 47GA, ch 101.]

1875.1 **Violations.** Any person who violates such permanent injunction or presents or attempts to file as his own the certificate of registration of another, or who shall give false or forged evidence of any kind to the board, or to any member thereof, in obtaining a certificate of registration, or who shall falsely impersonate another practitioner of like or different name, or who shall use or attempt to use a revoked certificate of registration, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for three months, or by both such fine and imprisonment. [C24, 27, 31, 35,§1875; 47GA, ch 101.]

1876 **Applicability of chapter.** This chapter shall not apply to any full-time employee of any corporation while doing work for that corporation, except in the case of corporations offering their services to the public as professional engineers or land surveyors.

Corporations engaged in designing and building works for public or private interests not their own shall be deemed to practice professional engineering within the meaning of this chapter. With respect to such corporations all principal designing or constructing engineers shall hold certificates of registration hereunder. This chapter shall not apply to corporations engaged solely in building said work. This chapter shall not apply to any professional engineer or land surveyor working for the United States government, nor to any professional engineer or land surveyor employed as an assistant to a professional engineer or land surveyor registered under this chapter, nor to the operation and/or maintenance of power and mechanical plants or systems, nor to any professional engineer or land surveyor from without this state until a reasonable length of time as prescribed by the rules of the board shall have elapsed to permit the registration of such a person under this chapter, provided that, before practicing within this state, he shall have applied for the issuance to him of a certificate of registration and shall have paid the fee prescribed in this chapter. [C24, 27, 31, 35,§1876; 47GA, ch 101.]

Referred to in §§1854, 1866.1

CHAPTER 90

CERTIFIED SHORTHAND REPORTERS

1877 Board of examiners.
1878 Appointment.
1879 Examination.
1880 Who eligible.
1881 Temporary substitutes appointed.
1882 Unlawful use of title.
1883 Examination fee.
1884 Revocation of certificates.
1885 Violations punished.

1877 **Board of examiners.** The board of examiners for court reporters herein provided for shall consist of three members, two of whom shall be official shorthand reporters of the district court of Iowa and one of whom shall be a practicing attorney of the state of Iowa. [C24, 27, 31, 35,§1877.]

1878 **Appointment.** The said board of examiners shall be appointed by the chief justice of the supreme court for a term of three years, and the said board of examiners shall, subject to the approval of the chief justice of the supreme court, make such rules and regulations as may be necessary for the proper performance of its duties. [C24, 27, 31, 35,§1878.]

1879 **Examination.** The board of examiners shall fix stated times for the examination of the candidates and shall receive for their services only their necessary traveling expenses, such expenses to be paid from such funds as may accrue hereunder. [C24, 27, 31, 35,§1879.]

1880 **Who eligible.** No person shall be appointed to the position of shorthand reporter of any district, superior, or municipal court in this state, unless he be a certified shorthand reporter who has been found competent to report court proceedings, references, or proceedings of like character, by the board of examiners provided for in this chapter. [C24, 27, 31, 35,§1880.]

1881 **Temporary substitutes appointed.** If the regularly appointed shorthand reporter should be disabled from performing his duty, the judge of such court may appoint a substitute whom he deems competent to act during the disability of the regular reporter, or until his successor is appointed. [C24, 27, 31, 35,§1881.]

1882 **Unlawful use of title.** Any citizen of the state of Iowa who shall have received from the board of examiners a certificate of his qualifications as a shorthand reporter, as herein provided, shall be styled and known as a certified shorthand reporter, and no other person shall assume such title or use the abbreviation C. S. R., or any words, letters, or figures to indicate that the person using the same is a certified shorthand reporter. [C24, 27, 31, 35,§1882.]

1883 **Examination fee.** Each applicant for examination shall pay to the clerk of the supreme court as an examination fee the sum of five dollars, payable before the examination is

commenced. The fees thus paid to said clerk shall be by him paid into the state treasury upon receipt thereof, to be kept as a special fund to be used as provided for in this chapter. [C24, 27, 31, 35,§1883.]

1884 **Revocation of certificates.** The board of examiners may revoke any such certificate for sufficient cause, after written notice to the holder thereof and hearing thereon. Any member of the board of examiners may, upon being duly designated by said board or a majority thereof, administer oaths or take testimony concerning any matter within the jurisdiction of said board. [C24, 27, 31, 35,§1884.]

1885 **Violations punished.** Any violation of the provisions of this chapter shall be punished by a fine not exceeding one hundred dollars. [C24, 27, 31, 35,§1885.]

CHAPTER 91

CERTIFIED PUBLIC ACCOUNTANTS

This chapter (§§1886 to 1905, inc.) repealed by 43GA, ch 59, and chapter 91.1 enacted in lieu thereof

CHAPTER 91.1

ACCOUNTANCY

1905.01 Board of accountancy.
1905.02 Powers and duties.
1905.03 Annual register.
1905.04 No compensation—expenses.
1905.05 Annual meetings.
1905.06 Definitions.
1905.07 Other terms defined.
1905.08 Examination.
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1905.10 Registration of applicants.
1905.11 Oath.
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1905.13 Renewal of certificates.
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1905.15 Confidential information.
1905.16 Corporations.
1905.17 Unlawful practice.
1905.18 Penalties.
1905.19 Exceptions.

1905.01 **Board of accountancy.** The board of accountancy shall consist of three members, all of whom shall be practicing certified public accountants, having practiced accountancy in this state for at least five years. Within sixty days after this chapter takes effect, the governor shall appoint the members of said board for terms as follows: one for a term ending June 30, 1930, one for a term ending June 30, 1931; and one for a term ending June 30, 1932, and upon the expiration of each of said terms and of each succeeding term, a member shall be appointed for a term of three years but no person shall be eligible for more than two consecutive terms of office. Vacancies occurring in the membership of the board for any cause shall be filled by the governor for the unexpired term. [SS15, §2620-b; C24, 27,§1886; C31, 35,§1905-c1.]

1905.02 **Powers and duties.** The board shall have power and it shall be its duty to: (1) adopt, print, publish, and distribute reasonable rules not inconsistent with the provisions of this chapter for the guidance of the public, registered practitioners, and applicants for examination; (2) compel the attendance of witnesses; (3) administer oaths; (4) take testimony; (5) require proof in all matters pertaining to the administration of this chapter; (6) keep a record of all their proceedings including applications for examinations, registration, and certificates to practice showing the reasons for the refusal of any such application or for the revocation or suspension of any registration or certificate to practice; (7) preserve testimony taken in all hearings provided for in this chapter. Testimony may be oral or by deposition; and when oral the questions and answers shall be taken down by a certified shorthand reporter and full transcripts thereof made for the use of the parties interested; (8) the treasurer elected shall upon assuming office file with the auditor of state a good and sufficient bond in a company authorized to do business in this state in the penal sum of five thousand dollars and shall on or before June 30 in each year, pay all sums remaining after the payment of the expenses authorized by this chapter into the state treasury to be there carried to the credit of and subject to withdrawal by the board of accountancy; (9) the board shall make a biennial report to the governor of its proceedings, with an account of all moneys received and disbursed, a list of the names of all practitioners whose certificates to practice have been revoked or suspended, and such other information as it may deem proper or the governor request, and do all other things required by this chapter to be done by said board. [SS15,§§2620-c,-d,-g,-h; C24, 27, §§1888, 1889, 1895, 1899, 1902; C31, 35,§1905-c2.]

1905.03 **Annual register.** The board of accountancy shall have printed and published for public distribution, in January of each year, an annual register which shall contain the names, arranged alphabetically by classifications, of all practitioners registered under this chapter; the names of the board of accountancy; and such other matters as may be deemed proper by the board of accountancy. Copies of said reports shall be mailed to each registered practitioner. [SS15,§2620-d; C24, 27, §1895; C31, 35,§1905-c3.]

Time of report, §247

1905.04 No compensation — expenses. No compensation shall be paid to any member of the board for services as such, but the members thereof shall be allowed the necessary traveling, printing and other expense incident to the discharge of their duties. Bills for the expense of the board or its members shall be audited and allowed by the state comptroller and shall be paid from the fees received under the provisions of this chapter. [SS15,§2620-h; C24, 27,§1900; C31, 35,§1905-c4.]

1905.05 Annual meetings. The board shall hold an annual meeting during the first week in July of each year, and a special meeting within sixty days after this chapter takes effect, for the purpose of electing from its accountant members, a chairman, a secretary and a treasurer; and it shall meet not less than four times each year, at least two of which meetings shall be held at the statehouse. Two members shall constitute a quorum except as otherwise provided. [SS15,§2620-c; C24, 27,§1888; C31, 35, §1905-c5.]

1905.06 Definitions. All persons engaged in the practice of accountancy, within the meaning and intent of this chapter, who, holding themselves out to the public as qualified practitioners, and maintaining an office for this purpose, either in their own names, or as office managers and/or as managing officers of assumed name, association or corporate organization, perform for compensation, on behalf of more than one client, a service which requires the audit or verification of financial transactions and accounting records; the preparation, verification and certification of financial, accounting, and related statements for publication or for credit purposes; and/or who in general and incidental to such work, render professional assistance in any and all matters of principal and detail concerning accounting procedure and the recording, presentation and certification of financial facts. [SS15,§2620-a; C24, 27,§1890; C31, 35,§1905-c6.]

Referred to in §1905.07

1905.07 Other terms defined.

1. A "certified public accountant" is a person who receives from the board of accountancy of the state, a certificate under any law of the state relating to certified public accountants and which certificate has not been revoked under due process of law; and is entitled to use the abbreviation C.P.A. in connection with his name. All other practitioners may use their title in full as stated herein and no other.

2. A "public accountant" is a person who is engaged in the practice of accountancy at the time of enactment of this chapter and who is not a certified public accountant, but who can qualify as a practitioner under the provisions of section 1905.06.

3. A "senior accountant or senior staff accountant" means a person employed by a practitioner entitled to registration under this chapter, and who, through the experience deemed necessary by his employer, has qualified and has been placed in charge of public accounting assignments.

4. A "junior accountant" is a person who, through lack of experience, is required to work under the supervision of a senior accountant or a practitioner as herein defined.

5. "Office", as used in section 1905.06, means one or more office rooms through which public accounting work is handled.

6. "Office managers and/or managing officers" as used in section 1905.06, mean persons having charge of public accountancy work handled through an office as defined in subsection 5 of this section. [SS15,§2620-a; C24, 27,§1890; C31, 35,§1905-c7.]

1905.08 Examination. All applicants for registration and certificates to practice accountancy, except persons actually engaged in such practice at the date of the passage of this chapter, and except as provided in section 1905.10, and all persons who desire to become certified public accountants shall be required to take a written examination to be conducted by the board of accountancy, and upon satisfactorily passing the same shall receive certificates as certified public accountants and shall be entitled to practice as such upon the payment of annual fees as in this chapter provided.

Such examination shall be upon the following subjects: Theory of accounts, practical accounting, auditing, taxation, general commercial knowledge, and commercial law.

Examinations as above provided shall be conducted by the board of accountancy at least once each year in May or November, or both, as the board may deem expedient.

The board shall at its meetings establish the time and place of holding such examinations, and shall cause to be published a notice thereof for not less than three consecutive days in each of three daily newspapers published in this state, the last publication to be not less than sixty days prior to such examination, and shall notify all candidates of their success or failure within a reasonable time, stating the grade received on each paper or subject. [SS15,§2620-d; C24, 27,§1891; C31, 35,§1905-c8.]

Referred to in §§1905.09, 1905.10

1905.09 Qualifications for examination. Every applicant for the examination provided for in section 1905.08 must be over twenty-one years of age, a resident of this state, a citizen of the United States or have declared his or her intention to become such, of good moral character, a graduate of a high school having at least a four-year course of study or its equivalent as determined by the board of accountancy, or shall pass a preliminary examination to be given by the board at least thirty days before the regular examination; and a graduate of a college or university commerce course of at least three years, majoring in accounting, and in addition shall have had at least one year's service as a staff accountant in the employ of a practitioner entitled to registration under this chapter.

The following shall, however, be accepted in lieu of the college or university commerce course and the one year of service:

1. Three years continuous practical accounting experience as a public accountant or as a staff accountant.

2. Three years continuous employment as a field examiner under a revenue agent-in-charge of the income tax bureau of the treasury department of the United States, or as a field examiner in the auditors, budget directors, banking or insurance departments of this state. [SS15, §2620-d; C24, 27,§1892; C31,35,§1905-c9.]

1905.10 Registration of applicants. All applicants for registration and certificates to practice accountancy shall be required to take and pass the examination provided for in section 1905.08, except as follows:

1. The holders of unrevoked certified public accountant certificates granted in this state prior to September 30, 1929, and who are not engaged in practice at that time may register their certificates in December, 1929.

2. The holders of unrevoked certified public accountant certificates granted by other states or of equivalent certificates granted by the recognized authority of foreign countries may register their certificates, provided such certificates were issued as the result of an examination which, in the judgment of the board of accountancy, was equivalent to the standard set by it, or the holders thereof shall have been in continuous practice thereunder for at least seven years.

3. All senior accountants who have been continuously employed as such for at least three years prior to June 30, 1929, by practitioners entitled to registration under this chapter or as senior accountants in the employ of public accountants of recognized standing in other states shall be registered as public accountants, provided the last year of such employment shall have been in this state.

4. Certificates to practice either as certified public accountants or public accountants, shall not be issued to any person referred to herein until such person shall have filed with the board of accountancy a written declaration of intention to practice as defined by this chapter. [SS15, §§2620-d,-f; C24, 27,§§1895, 1896; C31, 35,§1905-c12.]

Referred to in §1905.08

1905.11 Oath. Every applicant for certificate to practice accountancy shall be required, prior to the issuance thereof, to subscribe and file with the board the following oath: I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the state of Iowa, and that I will faithfully and conscientiously perform the duties of a practitioner of accountancy to the best of my ability and in accordance with the law.

Every person having been granted a certificate to practice accountancy under the provisions of this chapter, or any renewal thereof, shall give a bond in the sum of five thousand dollars to the auditor of state before entering upon the discharge of his duties for the faithful performance of the same. [C31, 35,§1905-c13.]

1905.12 Fees. The board of accountancy shall collect the following fees:

1. For examination of applicants, the sum of twenty-five dollars.

2. For registration of certified public accountant certificates granted by other states and foreign countries, the sum of twenty-five dollars.

3. For issuance of certificates to practice, the sum of ten dollars in December, 1929, and annually thereafter; for periods of less than six months, five dollars.

4. For registration of firm, assumed, association or corporate names; of certified public accountants not in practice; and of senior accountants entitled thereto, the sum of five dollars payable in December, 1929, and annually thereafter.

On the failure of payment of any of the annual fees above provided, the registration shall be automatically canceled and any registrant so defaulting shall not be entitled to receive a certificate to practice until he or she shall have paid the registration fee as provided herein, together with the amount of such default or arrears. [SS15,§2620-d; C24, 27,§§1894, 1897; C31, 35,§1905-c14.]

1905.13 Renewal of certificates. Registrations and certificates to practice shall be subject to renewal in December, of each year upon payment of the fees provided by this chapter. [C31, 35,§1905-c15.]

1905.14 Revocation. The board of accountancy shall revoke and cancel the registration or certificate to practice of any person upon proof that the holder thereof has been convicted of a felony or any lesser offense involving dishonesty or fraud; or has been principal or accessory to the issuance or certification of false or fraudulent financial or related statements; or has obtained registration and certificate to practice or either by means of false statements or representations; or may suspend such registration and certificates or either upon proof that the holder thereof has been guilty of unprofessional or unethical conduct in connection with the practice of accountancy. Such suspension shall be for such period of time, not exceeding one year, as in the discretion of the board shall be deemed appropriate.

Neither revocation nor suspension as herein provided shall be ordered by the board until a written notice stating the name of the person or persons who filed the charges, or that the board initiated the charges; a full and complete copy of the charges which have been preferred; and fixing the time and place where the hearing shall be had; shall have been served upon the person against whom such charges are filed in the manner of serving original notices in the district court of Iowa, at least twenty days before the date fixed for hearing.

The board may adjourn such hearing from time to time upon request of the party charged,

for the purpose of a fair hearing, and the certificate holder shall have the right to be represented by counsel.

All hearings as herein provided shall be before the full board, and a two-thirds vote of the members thereof shall be required before any cancellation, revocation or suspension shall be ordered.

The district court is empowered to enforce by proper proceedings the provisions of this chapter relating to the attendance and testimony of witnesses and the examination of books and records. [SS15,§2620-g; C24, 27,§1899; C31, 35,§1905-c16.]

1905.15 Confidential information. The information acquired by registered practitioners or their employees, agents, or servants in the course of professional engagements shall be deemed confidential and privileged, and except by written permission of the clients involved, or of their heirs or personal representatives, shall not be disclosed to any person; provided, however, that nothing contained in this section shall be construed to modify, change, or otherwise affect the criminal or bankruptcy laws of this state or of the United States. [C31, 35,§1905-c17.]

1905.16 Corporations. Articles of incorporation shall not, after the passage of this chapter, be granted which include among their objects, the practice of accountancy, but nothing contained in this chapter shall be construed to alter, abridge, revoke or in any manner affect the rights and powers of existing corporations. [C31, 35,§1905-c18.]

1905.17 Unlawful practice. It shall be unlawful after September 30, 1929, for any person to practice accountancy in this state as defined in this chapter either as an individual or as a member of any firm or association or under a firm, assumed or corporate name, whether maintaining an office for such practice or not, unless such person is the holder of a certificate to practice for the current year or is entitled to registration as in this chapter provided and has made application therefor. [SS15,§2620-i; C24, 27,§1904; C31, 35,§1905-c19.]

1905.18 Penalties. Any person, firm or corporation who shall practice accountancy in this state in violation of the provisions of this chapter, or who shall in any manner hold themselves out to the public as practitioners of accountancy without having complied with all of the provisions of this chapter, shall for each such offense be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding thirty days, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment.

Any person, firm or corporation who shall sign, execute, or publish any report, financial, accounting, or related statement, designating himself or themselves as registered or certified practitioners or knowingly permit the printing and publication of any announcement in writing to the effect that such report or statement has been prepared by a registered or certified practitioner when in fact the person, firm or corporation preparing the same was not registered or certified as in this chapter provided, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding one year.

Any practitioner of accountancy who shall wilfully or knowingly utter or certify to the correctness of any report, financial, accounting, or related statement, which is known to such practitioner to be false, misleading to the public, or designed to mislead any person, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine of not to exceed five thousand dollars, or by imprisonment in the state prison for a term not exceeding two years, or by both such fine and imprisonment in the discretion of the court. [SS15,§§2620-i, -j; C24, 27, §§1904, 1905; C31, 35,§1905-c20.]

1905.19 Exceptions. Nothing contained in this chapter shall be construed to prevent:

1. The holders of certified public accountant certificates granted by other states from practicing in this state in connection with temporary engagements incident to their professional practice in the states of their domicile but, who have neither office nor legal address in this state; provided they file with the board of accountancy, and with the auditor of state, at least five days before commencing work for a client, the written appointment of a registered practitioner in this state to act as agent upon whom legal service may be had in all matters which may arise from such temporary professional engagements.

2. The employment by registered practitioners of nonregistered persons to serve as staff accountants provided the latter do not issue reports or accounting statements in their own names except such office records as may be customary.

3. Attorneys at law duly admitted to practice in this state from doing anything usual and proper in connection with their duties as such attorneys.

4. The employment of persons by more than one individual firm or corporation for the purpose of keeping books, making trial balances, or performing general commercial bookkeeping. [C31, 35,§1905-c21.]

Constitutionality, §1905-c22, code 1935; 43GA, ch 59, §24

CHAPTER 91.2

REAL ESTATE BROKERS

1905.20 License required.
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1905.20 License required. It shall be unlawful for any person, copartnership, association or corporation, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman, without a license issued by the Iowa real estate commissioner. [C31, 35,§1905-c23.]

Referred to in §1905.57
43GA, ch 215, §1, editorially divided

1905.21 License to legal entity. No copartnership, association, or corporation shall be granted a license, unless every member or officer of such copartnership, association or corporation, who actively participates in the brokerage business of such copartnership, association or corporation, shall hold a license as a real estate broker, and unless every employee who acts as a salesman for such copartnership, association or corporation shall hold a license as a real estate salesman. [C31, 35,§1905-c24.]

1905.22 "Salesman" defined. A real estate salesman within the meaning of this chapter is any person who for a compensation or valuable consideration is employed either directly or indirectly by a real estate broker, to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to lease, to rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon, as a whole or partial vocation. [C31, 35,§1905-c25.]

43GA, ch 215,§2, editorially divided

1905.23 Nonapplicability of chapter. The provisions of this chapter shall not apply to any person, copartnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management of such property and the investment therein, nor shall the provisions of this chapter apply to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate, nor shall this chapter apply to an attorney admitted to practice in Iowa; nor shall it be held to include, while acting as such, a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to include a trustee acting under a trust agreement, deed of trust, or will, or the regular salaried employees thereof; nor shall it be held to include any state or national bank, chartered to do business in the state, acting within the powers granted in its charter; nor shall it be held to include any auctioneer while selling real estate at public auction for any of the parties exempted under this section. [C31, 35,§1905-c26.]

1905.24 Real estate commissioner. The secretary of state shall be the real estate commissioner and shall be charged with the administration of this chapter.

The real estate commissioner shall be provided by the executive council with such office space, office furniture, fuel, light and other proper conveniences necessary for the carrying out of this chapter. He shall employ a secretary and such clerks and assistants as deemed necessary to discharge the duties imposed by the provisions of this chapter and shall outline the duties of such secretary, clerks and assistants and fix their compensation subject to the general laws of the state. Necessary printing and supplies shall be purchased by the commissioner subject to the general laws of the state. [C31, 35,§1905-c27.]

43GA, ch 215, §3, editorially divided

1905.25 Seal—records. The commissioner shall adopt a seal with such design as the commissioner may prescribe engraved thereon by which it shall authenticate its proceedings. Copies of all records and papers in the office of the commissioner, duly certified and authenticated by the seal of said commissioner shall be received in evidence in all courts equally and

with like effect as the original. All records kept in the office of the commissioner under authority of this chapter shall be open to public inspection under such rules and regulations as shall be prescribed by the commissioner. [C31, 35, §1905-c28.]

1905.26 Fees and expenses. All fees and charges collected by the commissioner under the provisions of this chapter shall be paid into the general fund in the state treasury. All expenses incurred by the commissioner under the provisions of this chapter, including compensation to the secretary, clerks and assistants shall be paid out of the general fund in the state treasury upon approval by the state comptroller. No expenditures shall be made in excess of the license fees and receipts under the provisions of this chapter during any fiscal year of its operation. [C31, 35,§1905-c29.]

1905.27 Qualifications. Licenses shall be granted only to persons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public and only after satisfactory proof has been presented to the commissioner. The applicant must be a person whose application has not been rejected in this or any other state within six months prior to date of application, or whose real estate license has not been revoked in this or any other state within two years prior to date of application. [C31, 35,§1905-c30.]

1905.28 Application. Every applicant for a real estate broker's license shall apply therefor in writing upon blanks prepared or furnished by the real estate commissioner.

Such application shall be accompanied by the recommendation of at least two citizens, real estate owners, not related to the applicant, who have owned real estate for a period of one year or more, and who have known applicant for a period of six months, in the county in which said applicant resides, or has his place of business, which recommendation shall certify that the applicant bears a good reputation for honesty, truthfulness, fair dealing and competency, and recommending that a license be granted to the applicant.

Every applicant for a broker's license shall state the name of the person, firm, partnership, copartnership, association or corporation with which he will be associated in the business of real estate, and the location of the place, or places, for which said license is desired, and set forth the period of time, if any, which said applicant has been engaged in the real estate business.

Every applicant for a license shall furnish a sworn statement setting forth his present address, both of business and residence, a complete list of all former places where he may have resided or been engaged in business for a period of sixty days or more, during the last five years, accounting for such entire period, and the length of such residence, together with the name and address of at least one real estate owner in each of said counties where he may have resided or have been engaged in business and whether he has been convicted of a criminal offense involving moral turpitude, and if so, what offense.

Every applicant for a salesman's license shall, in addition to the requirements of this section, also set forth the period of time, if any, during which he has been engaged in the real estate business, stating the name and address of his last employer and the name and the place of business of the person, firm, partnership, copartnership, association or corporation then employing him, or into whose service he is about to enter. The application shall be accompanied by a written statement by the broker in whose service he is about to enter, stating that in his opinion the applicant is honest, truthful, and of good reputation, and recommending that the license be granted to the applicant.

Every application for a license, under the provisions of this chapter, shall be accompanied by the license fee herein prescribed. In the event that the commissioner does not issue the license, the fee shall be returned to the applicant. [C31, 35,§1905-c31.]

43GA, ch 215, §6, editorially divided

1905.29 Additional proofs. The commissioner, with due regard to the paramount interests of the public, may require such other proof as shall be deemed desirable as to the honesty, truthfulness, integrity, reputation, and competency of the applicant. [C31, 35,§1905-c32.]

1905.30 Rules and regulations. The commissioner is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this chapter. [C31, 35,§1905-c33.]

1905.31 Hearing. The commissioner, after an application in proper form has been filed, shall, before refusing to issue a license, set the application down for a hearing and determination as hereinafter provided in sections 1905.46 to 1905.53, inclusive. [C31, 35,§1905-c34.]

1905.32 License. The commissioner shall issue to each licensee a license in such form and size as shall be prescribed by the commissioner. This license shall show the name and address of the licensee and in case of a real estate salesman's license, shall show the name of the real estate broker by whom he is employed. Each license shall have imprinted thereon the seal of the commissioner, and in addition to the foregoing shall contain such matter as shall be prescribed by the commissioner. [C31, 35,§1905-c35.]

43GA, ch 215, §8, editorially divided

1905.33 Delivery in certain cases. The license of each real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed and shall be kept in the custody and control of such broker. [C31, 35,§1905-c36.]

1905.34 Display of license. It shall be the duty of each real estate broker to conspicuously display his license in his place of business. [C31, 35,§1905-c37.]

1905.35 Official card. The commissioner shall prepare and deliver to each licensee a pocket card, which card among other things shall contain an imprint of the seal of the commissioner and shall certify that the person whose name appears thereon is a licensed real estate broker or real estate salesman, as the case may be, and if it is a real estate salesman's card it shall also contain the name and address of his employer, the matter to be printed on such pocket card, except as above set forth, shall be prescribed by the commissioner. [C31, 35,§1905-c38.]

1905.36 Re-investigation. At any time within six months—but not thereafter—after the issuance of an original certificate of registration the commissioner may upon his own motion and shall upon the verified complaint, in writing, of any person, provided such complaint, or such complaint, together with evidence, documentary or otherwise presented therewith, shall make out a prima facie case that the registrant is unworthy to hold such certificate, notify the registrant, in writing, that the question of his honesty, truthfulness and integrity shall be reopened and determined de novo. Such written notice may be served by delivery thereof personally to the registrant or by mailing same by registered mail to the last known business address of the registrant. Thereupon the commissioner may require and procure further proof of the registrant's trustworthiness and competency, and if such proof shall not be satisfactory, such certificate shall be recalled and shall thereafter be null and void. Upon the recall of any such certificate it shall be the duty of the registrant to surrender to the commissioner such certificate and any pocket card received by him under the provisions hereof. [C31, 35,§1905-c39.]

1905.37 Annual fee. The annual fee for each real estate broker's license shall be ten dollars. The annual fee for each real estate salesman's license shall be five dollars. Provided that when a copartnership, association or corporation shall have paid an annual fee of ten dollars, and shall have designated one of its members or officers as hereinafter provided in section 1905.38, the annual fees payable by any other member or officer actively engaged in the real estate business of such copartnership, association, or corporation shall be five dollars, for which a salesman's license shall be issued, but any such member or officer shall be entitled to a broker's license upon the payment of the usual fee therefor. [C31, 35,§1905-c40.]

1905.38 License—effect. When a real estate broker's license is granted to any copartnership or association, consisting of more than one person, or to any corporation, this shall entitle the copartnership, association or corporation to designate one of its members or officers, who upon compliance with the terms of this chapter, shall without payment of any further fee, upon issuance of said broker's license, be entitled to perform all of the acts of a real estate salesman contemplated by this chapter. The person so designated, however, must make application for a salesman's license which application shall accompany the application of the real estate broker, and be filed with the commissioner, at the same time. If, in any case, the person so designated by a real estate broker shall be refused a license by the commissioner, or in case such person ceases to be connected with such real estate broker, said broker shall have the right to designate another person who shall make application as in the first instance.

Each real estate broker's license which may be granted to an individual shall entitle such individual to perform all of the acts contemplated by this chapter without any application upon his part and without payment of any fee other than the real estate broker's annual fee. [C31, 35,§1905-c41.]

Referred to in §1905.37

1905.39 Expiration of license. Every license shall expire on the thirty-first day of December of each year. The commissioner shall issue a new license for each ensuing year, in the absence of any reason or condition which might warrant the refusal of the granting of a license, upon receipt of the written request of the applicant and the annual fee therefor, as herein required. [C31, 35,§1905-c42.]

1905.40 Revocation—effect. The revocation of a broker's license shall automatically suspend every real estate salesman's license granted to any person by virtue of his employment by the broker whose license has been revoked, pending a change of employer and the issuance of a new license. Such new license shall be issued upon payment of a fee of one dollar, if granted during the same year in which the original license was granted. [C31, 35,§1905-c43.]

1905.41 Action for commission. No person, copartnership or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for any services performed as a real estate broker or salesman without alleging and proving that such person, copartnership or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose. [C31, 35,§1905-c44.]

1905.42 Place of business. Every real estate broker shall maintain a place of business in this state. If the real estate broker maintains more than one place of business within the state, a duplicate license shall be issued to such broker for each branch office maintained. Provided, that if such broker be a copartnership, association or corporation, a duplicate shall be issued to the members or officers thereof, and a single

fee of one dollar in each case shall be paid for each duplicate license. [C31, 35,§1905-c45.]

1905.43 **Change in place of business.** Notice in writing shall be given to the commissioner by each licensee of any change of principal business location, whereupon the commissioner shall issue a new license for the unexpired period without charge. The change of business location without notification to the commissioner shall automatically cancel the license theretofore issued. [C31, 35,§1905-c46.]

1905.44 **Surrender of license.** When any real estate salesman shall be discharged or shall terminate his employment with the real estate broker by whom he is employed, it shall be the duty of such real estate broker to immediately deliver or mail by registered mail to the commissioner such real estate salesman's license. The real estate broker shall at the time of mailing such real estate salesman's license to the commissioner address a communication to the last known residence address of such real estate salesman, which communication shall advise such real estate salesman that his license has been delivered or mailed to the commissioner. A copy of such communication to the real estate salesman shall accompany the license when mailed or delivered to the commissioner. It shall be unlawful for any real estate salesman to perform any of the acts contemplated by this chapter either directly or indirectly under authority of said license from and after the date of receipt of said license from said broker by the commissioner; provided, that another license shall not be issued to such real estate salesman until he shall return his former pocket card to the commissioner or shall satisfactorily account to him for the same. Provided, further, that not more than one license shall be issued to any real estate salesman for the same period of time. [C31, 35,§1905-c47.]

1905.45 **Revocation or suspension.** The commissioner may upon his own motion and shall upon the verified complaint in writing of any person, provided such complaint, or such complaint together with evidence, documentary or otherwise, presented in connection therewith, shall make out a prima facie case, investigate the actions of any real estate broker or real estate salesman, or any person who shall assume to act in either such capacity within this state, and shall have the power to suspend or to revoke any license issued under the provisions of this chapter, at any time where the licensee has by false or fraudulent representation obtained a license, or where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

1. Making any substantial misrepresentation, or
2. Making any false promises of a character likely to influence, persuade or induce, or
3. Pursuing a continued and flagrant course of misrepresentation, or making of false promises through agents or salesmen or advertising or otherwise, or
4. Acting for more than one party in a transaction without the knowledge of all parties for whom he acts, or
5. Accepting a commission or valuable consideration as a real estate salesman for the performance of any of the acts specified in this chapter, from any person, except his employer, who must be a licensed real estate broker, or
6. Representing or attempting to represent a real estate broker other than his employer, without the express knowledge and consent of the employer, or
7. Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belongs to others, or
8. Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public, or
9. Paying a commission or valuable consideration to any person for acts or services performed in violation of this chapter, or
10. Any other conduct, whether of the same or a different character from that hereinbefore specified, which constitutes improper, fraudulent, or dishonest dealing.

Any unlawful act or violation of any of the provisions of this chapter by any real estate salesman, employee, or partner or associate of a licensed real estate broker, shall not be cause for the revocation of a license of any real estate broker, partial or otherwise, unless it shall appear to the satisfaction of the commissioner that said employer, partner or associate had guilty knowledge thereof. [C31, 35,§1905-c48.]

1905.46 **Hearings.** The commissioner shall before denying an application for license or before suspending or revoking any license set the matter down for a hearing and at least twenty days prior to the date set for the hearing he shall notify the applicant or licensee in writing, which said notice shall contain an exact statement of the charges made and the date and place of hearing. The applicant or licensee at all such hearings shall have the opportunity to be heard in person and by counsel in reference thereto. Such written notice may be served by delivery of same personally to the applicant or licensee or by mailing same by registered mail to the last known business address of such applicant or licensee. If such applicant or licensee be a salesman the commissioner shall also notify the broker employing him or in whose employ he is about to enter by mailing notice by registered mail to the broker's last known business address. The hearing on such charges shall be at such time and place as the commissioner shall prescribe. [C31, 35,§1905-c49.]

Referred to in §1905.31
48GA, ch 215, §10, editorially divided

1905.47 **Procedure.** In the preparation and conduct of hearings the commissioner shall have power to require by subpoena the attendance and testimony of witnesses and the production of papers, and the commissioner may sign subpoenas, administer oaths, and affirmations, examine witnesses and receive evidence. [C31, 35,§1905-c50.]

Referred to in §1905.31

1905.48 Fees and mileage. The fees and mileage shall be the same as prescribed by law in judicial procedure in the courts of this state in civil cases. [C31, 35,§1905-c51.]

Referred to in §1905.31

1905.49 Request for witnesses. Any party to any hearing before the commissioner shall have the right to the attendance of witnesses in his behalf at such a hearing upon making a request thereof to the commissioner and designating the person or persons sought to be subpoenaed. [C31, 35,§1905-c52.]

Referred to in §1905.31

1905.50 Contempts. In case of disobedience to a subpoena the commissioner may invoke the aid of any court of competent jurisdiction in requiring the attendance and testimony of witnesses and the production of papers; and such court may issue an order requiring the persons to appear before the commissioner and give evidence or to produce papers as the case may be; and any failure to obey such order of the court may be punished by the court as a contempt thereof. [C31, 35,§1905-c53.]

Referred to in §1905.31

1905.51 Testimony generally. Testimony may be taken by deposition as in civil cases, and any person may be compelled to appear and depose in the same manner as witnesses may be compelled to appear and testify as hereinbefore provided. [C31, 35,§1905-c54.]

Referred to in §1905.31

1905.52 Refusal to attend. Any person who shall neglect or refuse to attend and testify or to answer any lawful inquiry or to produce documentary evidence if in his power to do so in obedience to a subpoena or lawful requirement by such commissioner shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished as provided in sections 1905.56 and 1905.57. [C31, 35,§1905-c55.]

Referred to in §1905.31

1905.53 Findings of fact. If the commissioner shall determine that any applicant is not qualified to receive a license, a license shall not be granted to such applicant, and if the commissioner shall determine that any licensee is guilty of a violation of any of the provisions of this chapter, the license shall be suspended or revoked. The commissioner, upon request of the applicant or licensee, shall furnish said applicant or licensee with a definite statement of its finding of facts and its reason or reasons for refusing to grant the license or for suspension of the rights of the licensee or for the revocation of the license, as the case may be. The findings of fact made by the commissioner acting within his powers shall, in the absence of fraud, be conclusive, but the district court shall have the power to review questions of law involved in any final decision or determination of the commissioner; provided that an application is made by the aggrieved party within thirty days after such determination by certiorari, mandamus, or by any other method permissible under the rules and practices of said court, or the laws of this state, and said court may make such further orders in respect thereto as justice may require. [C31, 35,§1905-c56.]

Referred to in §1905.31

1905.54 Nonresidents. A nonresident of this state may become a real estate broker or a real estate salesman by conforming to all of the conditions of this paragraph and this chapter.

In his discretion the commissioner may recognize in lieu of the recommendations and statements required to accompany an application for license, the license issued to a nonresident broker, or salesman in such other state, upon payment of the license fee and the filing by the applicant with the commissioner of a certified copy of applicant's license issued by such other state.

1. Provided that such applicant, if a broker, shall maintain an active place of business in the state by which he is originally licensed; and

2. Provided further that every nonresident applicant shall file an irrevocable consent that suits and actions may be commenced against such applicant in the proper court of any county of this state in which a cause of action may arise in which the plaintiff may reside, by the service of any process or pleading authorized by the laws of this state on the commissioner, said consent stipulating and agreeing that such service of such process or pleadings on said commissioner shall be taken and held in all courts to be as valid and binding as if due service had been made upon said applicant in the state of Iowa. Said instrument containing such consent shall be authenticated by the seal thereof, if a corporation, or by the acknowledged signature of a member or officer thereof, if otherwise. All such applications, except from individuals, shall be accompanied by the duly certified copy of the resolution of the proper officers or managing board, authorizing the proper officer to execute the same. In case any process or pleadings mentioned in the case are served upon the commissioner, it shall be by duplicate copies, one of which shall be filed in the office of the commissioner and the other immediately forwarded by registered mail to the main office of the applicant against which said process or pleadings are directed. [C31, 35, §1905-c57.]

1905.55 Reports. The commissioner shall at least semiannually prepare a list of the names and addresses of all licensees licensed by him under the provisions of this chapter, and of all persons whose license has been suspended or revoked within one year; together with such other information relative to the enforcement of the provisions of this chapter as it may deem of interest to the public. One of such lists shall be mailed to the clerk of the district court in each county of the state and shall be held by said clerk of the district court as a public record. Such lists shall also be mailed by the commissioner to any person in this state upon request. [C31, 35,§1905-c58.]

1905.56 Violations. Any person or corporation violating a provision of this chapter shall upon conviction thereof, if a person, be punished by a fine of not more than five hundred dollars, or by imprisonment for a term not to exceed six months or by both such fine and imprisonment, in the discretion of the court, and if a corporation, be punished by a fine of not more than one thousand dollars. Any officer or agent of a corporation, or member or agent of a copartnership or association, who shall personally participate in or be accessory to any violation of this chapter by such copartnership, association or corporation, shall be subject to the penalties herein prescribed for individuals. Any court of competent jurisdiction shall have full power to try any violation of this chapter and upon conviction the court may at its discretion revoke the license of the person, copartnership, association or corporation so convicted.

All fines and penalties shall inure to the commissioner, and shall be placed in the general fund of the state.

This law shall not be construed to release any person from civil liability or criminal prosecution under the general laws of this state. [C31, 35,§1905-c59.]

Referred to in §1905.52
43GA, ch 215, §13, editorially divided

1905.57 Reference to court. The commissioner may refer a complaint for violation of section 1905.20 before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal officers of this state to enforce the provisions hereof and collect the penalties herein provided. [C31, 35, §1905-c60.]

Referred to in §1905.52
Constitutionality, §1905-c61, code 1935; 43GA, ch 215, §14

CHAPTER 91.3

REGISTERED ARCHITECTS

1905.58 Appointment of board.
1905.59 Officers.
1905.60 Records—roster.
1905.61 Report.
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1905.64 Plans by others.
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1905.67 Renewals.
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1905.69 Payment of expenses.
1905.70 Revocation.
1905.71 Penalty for violation.

1905.58 Appointment of board. Within ninety days after the approval of this chapter the governor shall appoint five architects who have been in active practice in the state of Iowa for not less than ten years, as members of the board of architectural examiners, hereinafter called the board. Two of the members of the first board so appointed shall be designated by the governor to hold office until July 1, 1930, and three until July 1, 1932. Thereafter all appointments shall be for a period of five years, the terms to begin on July 1 in the year of appointment. Each member shall file with the secretary of state the constitutional oath of office and shall hold office until his successor is appointed and has qualified. The governor may remove any member of the board for misconduct, incapacity, or neglect of duty. [C27, 31, 35, §1905-b1.]

Constitutional oath of office, Constitution, Art. XI, §5
General removal provisions, §§1091, 1114
Statutory oath of office, §1064

1905.59 Officers. During the month of July of each year the board shall elect from its members a president, vice president, and secretary. The duties of the officers shall be such as are usually performed by such officers. All meetings of the board, except as provided in section 1905.70, shall be held at the seat of government. The members of the board shall serve without pay. [C27, 31, 35,§1905-b2.]

1905.60 Records—roster. The board shall keep a record, open to public inspection at all reasonable times, of its proceedings relating to the issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain a roster showing the name, place of business and residence, and the date and number of the certificate of registration of every registered architect entitled to practice his profession in the state of Iowa. [C27, 31, 35,§1905-b3.]

1905.61 Report. On or before the thirtieth day of June of each year the board shall submit to the governor a report of its transactions for the preceding year, together with a complete statement of the receipts and expenditures of the board. This report shall include a roster of the name, place of business and number of certificate of registration of every registered architect entitled to practice his profession in the state of Iowa. A copy of this report shall be filed with the secretary of state. [C27, 31, 35, §1905-b4.]

1905.62 Duties. The board shall be charged with the duty of enforcing the provisions of this chapter and may incur such expense as shall be necessary thereto, and shall make rules for the examination of applicants for the certificate of registration provided by this chapter, and shall, after due public notice, hold at least two meetings each year, not less than three months apart, for the purpose of examining applicants for registration and the transaction of business pertaining to the affairs of the board as such. No action at any meeting can be taken without three votes in accord. [C27, 31, 35,§1905-b5.]

1905.63 Certificate. Any person wishing to practice architecture in the state of Iowa under

the title "Architect" shall secure from the board a certificate under the title "Architect" as provided by this chapter. Each member of a firm or corporation practicing architecture must have a certificate of registration under the provisions of this chapter. Any properly qualified person, who shall have been exclusively engaged in the practice of architecture in the state at the time this chapter takes effect, may, within ninety days after the approval of this chapter, apply for and will be granted a certificate of registration without examination, by payment to the board of the fee for certificate of registration as prescribed in section 1905.68. [C27, 31, 35,§1905-b6.]

1905.64 Plans by others. Nothing contained in this chapter shall prevent any person from making plans and specifications or supervising the construction of any building or part thereof, for himself or others, provided he does not use any form of the word or title "Architect". [C27, 31, 35,§1905-b7.]

1905.65 Examination. Any citizen of the United States, or any person who has declared his intention of becoming such citizen, being at least twenty-one years of age and of good moral character, may apply for a certificate of registration or for such examination as shall be requisite for such certification under this chapter; but before receiving such certificate, this applicant shall submit satisfactory evidence of having completed the course in a high school or the equivalent thereto, and of having subsequently thereto completed such courses in mathematics, history and languages as may be prescribed by the board.

Upon complying with the above requirements, the applicant shall satisfactorily pass an examination in such technical and professional subjects as shall be prescribed by the board. In lieu of examination, the board may accept satisfactory evidence of the applicant's knowledge of architectural practice and of any one of the qualifications set forth under subsections 1, 2, and 3 of this section.

1. A diploma of graduation or satisfactory certificate from an architectural college or school that he has completed a technical course approved by the board of architectural examiners, and subsequent thereto, of at least two years satisfactory experience in the office of a reputable architect.

2. Registration or certification during the current year as an architect in another state or country, where the qualifications prescribed at the time of such registration or certification were equal to those prescribed in this state at date of application.

3. An architect who has practiced architecture for a period of more than ten years outside of this state shall, except as otherwise provided in subsection 2, be required to take only a practical examination, the nature of which shall be prescribed by the board. [C27, 31, 35,§1905-b8.]

Referred to in §1905.66

1905.66 Registration. When the applicant has complied with the requirements as set forth in section 1905.65, to the satisfaction of at least three members of the board, and has paid the fees prescribed in section 1905.68, the secretary shall enroll the applicant's name and address in the roster of registered architects and issue to him a certificate of registration, signed by the officers of the board, which certificate shall entitle him to practice as an architect in the state of Iowa. [C27, 31, 35,§1905-b9.]

1905.67 Renewals. Every registered architect in the state who desires to continue the practice of his profession shall, annually, during the month of June of each year, renew his certificate of registration, and pay to the board the renewal fee required by section 1905.68.

Every certificate and renewal shall expire on the thirtieth day of June following its issuance. [C27, 31, 35,§1905-b10.]

1905.68 Fees. The fee to be paid to the board by an applicant for an examination under this chapter shall be ten dollars. The fee to be paid to the board by an applicant for a certificate of registration as a registered architect shall be fifteen dollars.

The fee to be paid to the board for renewal of a certificate shall be ten dollars.

All fees provided for by this chapter shall be paid to and receipted for by the treasurer of state, who shall keep such moneys in a separate fund, to be known as the fund of the board of architectural examiners, which shall be continued from year to year, and shall not be used for any purposes other than the purposes of this chapter. [C27, 31, 35,§1905-b11.]

Referred to in §§1905.63, 1905.66, 1905.67

1905.69 Payment of expenses. The members of the board shall be reimbursed for the actual expenses incurred in attending the meetings of the board and for office supplies, printing and clerical hire, and other necessary expenses incurred in carrying out the provisions of this chapter, from moneys in the fund of the board of architectural examiners only. Warrants for payments of expenses of the board shall be issued by the state comptroller and paid by the treasurer of state upon presentation of vouchers regularly drawn by the president and secretary of the board, provided, however, that at no time shall the total amount of vouchers exceed the total amount in the fund of the board of architectural examiners. [C27, 31, 35,§1905-b12.]

1905.70 Revocation. The board may revoke any certificate after thirty days notice with grant of hearing to the holder thereof, if proof satisfactory to the board be presented in the following manner:

1. In case it is shown that the certificate was obtained through fraud or misrepresentation.

2. In case the holder of the certificate has been found guilty by such board or by a court of justice of any fraud or deceit in his professional practice, or has been convicted of a felony by a court of justice.

3. In case the holder of the certificate has been found guilty by such board of gross incompe-

tency or of negligence in the planning or construction of buildings.

4. In case it is proved to the satisfaction of such board that the holder of the certificate is an habitual drunkard, or is habitually addicted to the use of narcotic drugs.

Proceedings for the revocation of a certificate shall be begun by filing written charges against the accused with the board. A time and place for the hearing of the charges shall be fixed by the board. Where personal service or services through counsel cannot be effected, services may be had by publication. At the hearing, the accused shall have the right to be represented by counsel, to introduce evidence and to examine and cross-examine witnesses. The board shall have the power to subpoena witnesses, to administer oaths to such witnesses, and to employ counsel. The board shall make a written report of its findings, which report shall be filed with the secretary of state, and which shall be conclusive. [C27, 31, 35,§1905-b13.]

Referred to in §1905.59

1905.71 Penalty for violation. On and after the passage* of this chapter the use of the title "Architect", or the use of any word or any letters or figures indicating or intending to imply that the person using the same is an architect, without compliance with the provisions of this chapter, the making of any wilfully false oath or affirmation in any matter or proceeding where an oath or affirmation is required by this chapter, shall be deemed a misdemeanor, punishable with a fine of not more than two hundred dollars, or imprisonment for not more than one year, or both. [C27, 31, 35,§1905-b14.]

*Approved March 28, 1927

CHAPTER 92

GOLD AND SILVER ALLOY

1906 Fraudulent marking.
1907 Tests.
1908 "Sterling silver."
1909 "Coin silver."
1910 Other articles of silver.
1911 Tests for articles.
1912 Gold plated or gold filled articles.
1913 Silver plated articles.
1914 Violation.
1915 "Person" defined.

1906 Fraudulent marking. Any person making for sale, selling, or offering to sell or dispose of, or having in possession with intent to sell or dispose of, any article of merchandise made, in whole or in part, of gold or any alloy of gold, and having stamped, branded, engraved, or imprinted thereon, or upon any tag, card, or label attached thereto, or upon any container in which said article is inclosed, any mark indicating or designed to indicate that the gold or alloy in such article is of a greater degree of fineness than the actual fineness or quality thereof, unless the actual fineness thereof, in the case of flatware or watchcases, be not less by more than three one-thousandths parts, and in case of all other articles be not less by more than one-half carat than the fineness indicated by the marks stamped, branded, engraved, or imprinted upon any part of such article, or upon any tag, card, or label attached thereto, or upon any container in which such article is inclosed according to the standards and subject to the qualifications hereinafter set forth, is guilty of a misdemeanor. [S13,§5077-b; C24, 27, 31, 35,§1906.]

Referred to in §1907

1907 Tests. In any test for the ascertainment of the fineness of the gold or alloy in any such article, according to the foregoing standards, the part of the gold or alloy taken for the test shall be such portion as does not contain or have attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of said article; and in addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold and its alloys contained in any article mentioned in this and section 1906, except watchcases and flatware, including all solder or alloy of inferior metal used for brazing or uniting the parts of the article, all such gold, alloys, and solder being assayed as one piece, shall not be less than the fineness indicated by the mark stamped, branded, engraved, or imprinted upon such article, or upon any tag, card, or label attached thereto, or upon any container in which said article is inclosed. [S13,§5077-b; C24, 27, 31, 35,§1907.]

1908 "Sterling silver." Any person making for sale, selling, or offering to sell or dispose of, or having in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of silver or of any alloy of silver and having marked, stamped, branded, engraved, or imprinted thereon, or upon any tag, card, or label attached thereto or upon any container in which said article is inclosed, the words "sterling silver" or "sterling" or any colorable imitation thereof, unless nine hundred twenty-five one-thousandths of the component parts of the metal purporting to be silver of which such article is manufactured are pure silver, subject to the qualifications hereinafter set forth, is guilty of a misdemeanor, but in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard. [S13,§5077-b1; C24, 27, 31, 35,§1908.]

Referred to in §1911

1909 "Coin silver." Any person making for sale, selling, or offering to sell or dispose of, or having in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of silver or of any alloy of silver and having marked, stamped, branded, engraved, or imprinted thereon, or upon any tag,

card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is inclosed, the words "coin" or "coin silver", or any colorable imitation thereof, unless nine hundred one-thousandths of the component parts of the metal appearing or purporting to be silver of which such article is manufactured are pure silver, subject to the qualifications hereinafter set forth, is guilty of a misdemeanor; but in case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standards. [S13, §5077-b1; C24, 27, 31, 35,§1909.]

Referred to in §1911

1910 Other articles of silver. Any person making for sale, selling, or offering to sell or dispose of, or having in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of silver or of any alloy of silver and having stamped, branded, engraved, or imprinted thereon, or upon any tag, card, or label attached thereto, or upon any container in which said article is inclosed, any mark or word, other than the word "sterling" or the word "coin", indicating, or designed to indicate that the silver or alloy of silver in said article is of a greater degree of fineness than the actual fineness or quality, unless the actual fineness of the silver or alloy of silver of which said article is composed be not less by more than four one-thousandths parts than the actual fineness indicated by the said mark or word, other than the word "sterling" or "coin", stamped, branded, engraved, or imprinted upon any part of said article, or upon any tag, card, or label attached thereto, or upon any container in which said article is inclosed, subject to the qualifications hereinafter set forth, is guilty of a misdemeanor. [S13,§5077-b1; C24, 27, 31, 35, §1910.]

Referred to in §1911
Punishment, §1914

1911 Tests for articles. In any test for the ascertainment of the fineness of any such article mentioned in this and sections 1908 to 1910, inclusive, according to the foregoing standards, the part of the article taken for the test shall be such portion as does not contain or have attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article, and provided further and in addition to the foregoing test and standards, that the actual fineness of the entire quantity of metal purporting to be silver contained in any article mentioned in sections 1908 to 1910, inclusive, including all solder or alloy of inferior fineness used for brazing or uniting the parts of any such article, all such silver, alloy, or solder being assayed as one piece, shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark stamped, branded, engraved, or imprinted upon such article, or upon any tag, card, or label attached thereto, or upon any container in which said article is inclosed. [S13,§5077-b1; C24, 27, 31, 35,§1911.]

1912 Gold plated or gold filled articles. Any person making for sale, selling, or offering to sell or dispose of, or having in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal having deposited or plated thereon, or brazed or otherwise affixed thereto, a plate, plating, covering, or sheet of gold or of any alloy of gold and which article is known in the market as "rolled gold plate", "gold plate", "gold filled", or "gold electroplate", or by any similar designation, and having stamped, branded, engraved, or imprinted thereon, or upon any tag, card, or label attached thereto, or upon any container in which said article is inclosed, any word or mark usually employed to indicate the fineness of gold, unless said word be accompanied by other words plainly indicating that such article or part thereof is made of rolled gold plate, or gold plate, or gold electroplate, or is gold filled, as the case may be, is guilty of a misdemeanor. [S13,§5077-b2; C24, 27, 31, 35,§1912.]

1913 Silver plated articles. Any person making for sale, selling, or offering to sell or dispose of, or having in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal having deposited or plated thereon, or brazed or otherwise affixed thereto, a plate, plating, covering, or sheet of silver or of any alloy of silver, and which article is known in the market as "silver plate" or "silver electroplate", or by any similar designation, and having stamped, branded, engraved, or imprinted thereon, or upon any tag, card, or label attached thereto, or upon any container in which said article is encased or inclosed, the word "sterling" or the word "coin" either alone or in conjunction with any other words or marks, is guilty of a misdemeanor. [S13,§5077-b3; C24, 27, 31, 35,§1913.]

1914 Violation. Every person guilty of a violation of the provisions of this chapter, and every officer, manager, director, or agent of any such person directly participating in such violation or consenting thereto, shall be punished by a fine of not more than five hundred dollars or imprisonment for not more than three months, or both, at the discretion of the court; but nothing in this chapter shall apply to articles manufactured prior to June 13, 1907. [S13,§5077-b4; C24, 27, 31, 35,§1914.]

1915 "Person" defined. The term "person" as used in this chapter shall embrace persons, firms, partnerships, companies, corporations, and associations. [C24, 27, 31, 35,§1915.]

CHAPTER 93

ORGANIZATIONS SOLICITING PUBLIC DONATIONS

1915.1 Conditions.
1915.2 Fees.
1915.3 Revocation of permit.
1915.4 Exceptions.
1915.5 Enforcement.
1915.6 Violations.

1915.1 Conditions. No organization, institution, or charitable association, either directly or through agents or representatives, shall solicit public donations in this state, unless it be a corporation duly incorporated under the laws of this state or authorized to do business in this state; has first obtained a permit therefor from the secretary of state; and has filed with the secretary of state a surety company bond in the sum of one thousand dollars, running to the state and conditioned that the applicant will devote all donations directly to the purpose stated and for which the donations were given, and will otherwise comply with the laws of this state and the requirements of the secretary of state in regard thereto. The secretary of state shall have full discretion as to whom he will issue permits, and shall satisfy himself before issuing any such permit that the applicant is reputable and that the purposes for which donations from the public are to be solicited are legitimate and worthy. [S13,§5077-c; C24,§1916; C27, 31, 35,§1921-b1.]

1915.2 Fees. The secretary of state shall collect a fee of one dollar for each such permit issued. Such a permit will authorize the applicant therefor, either directly or through its agents or representatives, to solicit public donations in any county, city or township in this state, subject, however, to such restrictions as the secretary of state may prescribe. [S13,§5077-c; C24,§1917; C27, 31, 35,§1921-b2.]

1915.3 Revocation of permit. Said permit shall expire annually on the thirty-first day of December following the date of issuance, or it may be suspended or revoked at any time at the discretion of the secretary of state when in his judgment the authority vested therein is abused or the transactions consummated thereunder are not in conformity with the intent and purpose of this chapter. [C24,§1918; C27, 31, 35,§1921-b3.]

1915.4 Exceptions. Nothing in this chapter, however, shall be construed to prohibit any person as representative or agent of any local organization, church, school, or any recognized society or branch of any church or school, from publicly soliciting funds or donations from within the county in which such person resides, or such church, school, institution, organization, or charitable association is located, or within an adjoining county if such residence or location is within six miles of such adjoining county. Any such organized institution or charitable association having a permit under the provisions of this chapter shall file an annual report with the secretary of state during the month of December of each year, which report shall contain the following information:

1. The names and post-office addresses of its officers, and whether any change has been made during the year previous to making such report.
2. A detailed statement of all moneys received during the year previous to making said report.
3. A detailed statement of moneys disbursed during the year previous to making said report, and for what purpose.

At the time of filing this annual report said organization, institution, or charitable association shall pay to the secretary of state a filing fee in the sum of two dollars. [S13,§5077-c; C24,§§1919, 1920; C27, 31, 35,§1921-b4.]

1915.5 Enforcement. The secretary of state shall enforce the provisions of this chapter and may call to his aid the attorney general, the county attorney of any county, and any peace officer in the state, for the purpose of investigation and prosecution. He may call upon the extension division of the state university of Iowa and the board of control of state institutions for assistance. [C27, 31, 35,§1921-b5.]

1915.6 Violations. Any person who shall violate the provisions of this chapter or who shall solicit funds without a permit, or if under a permit thereafter divert the same to purposes other than for which said donations were contributed, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one hundred dollars or by imprisonment in the county jail for not to exceed thirty days. [S13,§5077-d; C24,§1921; C27, 31, 35,§1921-b6.]

1916 to 1921, inc. Rep. by 42GA, ch 44

TITLE VI

ALCOHOLIC BEVERAGES

Referred to in §§3800, 13177
Applicable to special charter cities, §6898

CHAPTER 93.1

IOWA LIQUOR CONTROL ACT

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

1921.001 Public policy declared.
1921.002 Conflicting statutes superseded.
1921.003 General prohibition.
1921.004 Sacramental wines.
1921.005 Definitions.
1921.006 Commission created.
1921.007 Appointment—term.
1921.008 Vacancies.
1921.009 Bonds.
1921.010 Organization—salary—assistants.
1921.011 Expenses.
1921.012 Removal.
1921.013 Exemption from suit.
1921.014 Prohibition on members and employees.
1921.015 Place of business.
1921.016 Powers.
1921.017 Rules and regulations.
1921.018 State liquor stores.
1921.019 Special distributors.
1921.020 Vendors.
1921.021 Qualifications of employees.
1921.022 Sales regulated.
1921.023 Consumption on premises.
1921.024 Restrictions on sales—seals—labeling.
1921.025 Sales prohibited.
1921.026 Transportation permitted.
1921.027 Permits.
1921.028 Fees.
1921.029 Nature of permit.
1921.030 Signature to permit.
1921.031 Duplicate permits.
1921.032 Suspension or cancellation of permit.
1921.033 Surrender of permit.
1921.034 Presentation by unlawful holder.
1921.035 Revocation of permits.
1921.036 Manufacturer's license.
1921.037 Wholesaler's license.
1921.038 Conditions—bond.
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1921.041 Cash sales.
1921.042 Consumption in public places—intoxication.
1921.043 Minors.
1921.044 Interdicted person.
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1921.056 Native wines.
1921.057 Examination of accounts.
1921.058 Auditing.
1921.059 "Bootlegger" defined.
1921.060 Nuisances.
1921.061 Penalty.
1921.062 Injunction.
1921.063 Temporary writ.
1921.064 Notice.
1921.065 Scope of injunction.
1921.066 Trial of action.
1921.067 General reputation.
1921.068 Contempt.
1921.069 Trial of contempt action.
1921.070 Penalty for contempt.
1921.071 Injunction against bootlegger.
1921.072 Conditions.
1921.073 Order of abatement.
1921.074 Use of abated premises.
1921.075 Fees.
1921.076 Proceeds of sale.
1921.077 Abatement of nuisance.
1921.078 Abatement before judgment.
1921.079 Existing liens.
1921.080 Abatement bond a lien.
1921.081 Attested copies filed.
1921.082 Forfeiture of bond.
1921.083 Procedure.
1921.084 Method of trial.
1921.085 Judgment.
1921.086 Appeal.
1921.087 County attorney to prosecute.
1921.088 Prompt service.
1921.089 Evidence.
1921.090 Counts.
1921.091 Penalties generally.
1921.092 Violations by members and employees—acceptance of bribe.
1921.093 Duty of county attorney and peace officers.
1921.094 Saving clause as to permits.

1921.001 Public policy declared. This chapter shall be cited as the "Iowa Liquor Control Act", and shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose, and it is declared to be the public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as hereinafter pro-

vided for in this chapter through the medium of an Iowa liquor control commission by this chapter created, in which is vested the sole and exclusive authority to purchase alcoholic liquors, as defined herein, for the purpose of resale. [C35,§1921-f1.]

1921.002 Conflicting statutes superseded. Wherever any provisions of the existing laws are in conflict with the provisions of this chapter, the provisions of this chapter shall control and supersede all such existing laws.* [C35, §1921-f2.]

*See saving clause, 45ExGA, ch 24, §2

1921.003 General prohibition. It shall be unlawful to manufacture for sale, sell, offer or keep for sale, possess and/or transport vinous, fermented, spirituous, or alcoholic liquor, except beer as defined in chapter 93.2, or as the same may hereafter be amended for any purpose whatsoever, except upon the terms, conditions, limitations and restrictions as set forth herein. [C35,§1921-f3.]

Referred to in §1921.005

1921.004 Sacramental wines. Nothing in this chapter shall affect the purchase or use of sacramental wines to be used exclusively for sacramental purposes. [C35,§1921-f4.]

Permits to clergymen, ch 104

1921.005 Definitions. For the interpretation of this chapter, unless the context indicates a different meaning:

1. "Commission" means the commission created by this chapter under the name of the "Iowa liquor control commission".

2. "Alcohol" means the product of distillation of any fermented liquor, rectified either once or oftener, whatever may be the origin thereof, and includes synthetic ethyl alcohol.

3. "Spirits" means any beverage which contains alcohol obtained by distillation mixed with drinkable water and other substances in solution, and includes, among other things, brandy, rum, whisky, and gin.

4. "Wine" means any alcoholic beverage obtained by the fermentation of the natural sugar contents of fruits, (grapes, apples, etc.) or other agricultural products containing sugar (honey, milk, etc.).

5. "Alcoholic liquor" includes the three varieties of liquor above defined (alcohol, spirits, and wine), and every liquid or solid, patented or not, containing alcohol, spirits, or wine, and susceptible of being consumed by a human being, for beverage purposes. Any liquid or solid containing more than one of the three varieties above defined is considered as belonging to that variety which has the highest percentage of alcohol, according to the order in which they are above defined.

6. "Person" includes any natural person, association, partnership, corporation, and club.

7. "Whosoever" when used in reference to any offender under this chapter, includes every person who acts for himself or for any other person, and includes also such other person.

8. "Residence" means the premises where a person resides, permanently, or temporarily.

9. "License" means a contract between the commission and a licensee entitled thereto under the provisions of this chapter.

10. "Manufacture" means to distill, rectify, ferment, brew, make, mix, concoct, or process any substance or substances capable of producing a beverage containing more than one-half of one per centum of alcohol by volume and includes "blending", "bottling", or the preparation for "sale".

11. "Package" means any container or containers, receptacle or receptacles used for holding liquor.

12. "Distillery", "winery", and "brewery" means not only the premises wherein "alcohol" or "spirits" is distilled, or rectified "wine" is fermented, but in addition a "person" owning, representing or in charge of such premises and the operations conducted thereon, including the blending and bottling or other handling and preparation of "alcoholic liquor" in any form.

13. "Importer" means the "person" transporting or ordering, authorizing or arranging the transportation or shipment of "alcoholic liquor" into the state of Iowa whether such "person" is a resident or citizen of Iowa or not.

14. "Interdicted person" means a person to whom the sale of liquor is prohibited by an order of the commission or the court under this chapter.

15. "Import" means the transporting or ordering or arranging for the transportation or shipment of "alcoholic liquor" into the state of Iowa whether by a resident of the state or otherwise.

16. "State liquor store" means a store established by the liquor control commission under this chapter for the sale of alcoholic liquor in the original package for consumption off the premises.

17. "Special distributor" means a person especially designated by the commission to dispense alcoholic liquors, subject to the provisions of this chapter, in such cities and towns as in the opinion of the commission there is not sufficient demand for a state liquor store.

18. "Warehouse" means any premises or place primarily constructed or used or provided with facilities for the storage in transit or other temporary storage of perishable goods and/or for the conduct of normal warehousing business.

19. "Public place" includes any place, building or conveyance to which the public has or is permitted to have access and any place of public resort.

20. "Permit" means a permit for the purchase and/or consumption of liquor by an individual under this chapter.

21. Whenever reference shall be made to anything forbidden under this chapter, and relating to alcoholic liquor, the words, "to sell" includes: to solicit, or receive an order for; to keep or expose for sale; to deliver for value or in any other way than purely gratuitously; to peddle; to keep with the intent to sell; to keep or transport in contravention of section 1921.003; to traffic in for a valuable consideration, promised or obtained directly or in-

directly, or under any pretext or by any means whatsoever, to procure or allow to be procured for any other person; and the word, "sale" includes every act of selling as above defined.

22. "Wholesaler" means any person who shall sell, barter, exchange, offer for sale or have in possession with intent to sell, alcoholic liquor and wines to retailers for resale. [C35, §1921-f5.]

1921.006 Commission created. There is hereby created a commission composed of three electors of this state to be known and designated as the Iowa liquor control commission, not more than two of whom shall belong to the same political party, and no two of whom shall, at the time of appointment, reside in the same congressional district. The commission shall be held strictly accountable for the enforcement of the provisions of this chapter. [C35,§1921-f6.]

45ExGA, ch 24, §5, editorially divided

1921.007 Appointment—term. The members of the first commission shall be appointed by the governor, subject to approval of the senate by a majority vote of the members in executive session, as follows: one for a term to expire July 1, 1935; one for a term to expire July 1, 1937; and one for a term to expire July 1, 1939. Said terms shall begin immediately upon the appointment, approval and qualification.

Thereafter, the term of each member of said commission shall be six years; and the governor shall, within sixty days following the organization of each regular session of the general assembly, appoint, with the approval of a majority of the members of the senate in executive session, a successor to the member of said commission whose term of office will expire July 1 next following. [C35,§1921-f7.]

1921.008 Vacancies. Any vacancy or vacancies on said commission which may occur when the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days following the organization of the next general assembly. Prior to the expiration of said period of thirty days, the governor shall transmit to the senate for its approval an appointment for the unexpired portion of the regular term. Any vacancy or vacancies occurring when the general assembly is in session shall be filled in the same manner as regular appointments are made, and before the end of such session, and for the unexpired portion of the regular term. [C35,§1921-f8.]

1921.009 Bonds. The commissioners shall post a bond or bonds, at the expense of the state, with such sureties as the executive council shall approve to guarantee to the state the proper handling and accounting of such moneys and merchandise and other properties as may be required in the administration of this chapter. It shall be the duty of the commission to secure from all agents, servants, and employees of the commission holding positions of trust a bond or bonds with such sureties as the commission will approve adequate to guarantee to the state the proper handling and accounting of all moneys, merchandise and other properties. [C35, §1921-f9.]

1921.010 Organization—salary—assistants. The commission shall, on July 1 of each year, select one of its members as chairman, who shall serve in such capacity for the succeeding year. Each member of the commission shall devote his entire time to the duties of his office, and his salary shall be four thousand five hundred dollars a year. Said commission may employ a secretary and such other assistants and/or employees as may reasonably be necessary, and at such salary each as may be fixed by said commission. [C35,§1921-f10.]

1921.011 Expenses. Members of the commission and said secretary, assistants and/or employees shall be allowed their actual and necessary expenses while traveling on business of the commission outside of their place of residence; provided, however, that an itemized account of such expenses shall be verified by the member, secretary, assistant and/or employee making claim for payment and shall be approved by a majority of the members of the commission. If such account is paid, the same shall be filed in the office of said commission and be and remain a part of its permanent records. All of said salaries and expenses shall be payable out of the liquor control act fund created by this chapter. [C35,§1921-f11.]

1921.012 Removal. Any member, secretary, officer or employee of said commission shall be removable for any of the causes and in the manner provided by chapter 56 of the code, as amended, relating to removal from office; such removal shall not be in lieu of any other punishment that may be prescribed by the laws of the state of Iowa. [C35,§1921-f12.]

1921.013 Exemption from suit. The commission, or any member of the commission, shall not be personally liable for any action at law for damages sustained by any person because of any action performed or done by the commission, or any member of the commission, in the performance of their respective duties in the administration and in the carrying out of the purposes and provisions of this chapter. [C35,§1921-f13.]

1921.014 Prohibition on members and employees. No member, officer or employee of said commission shall, while holding such office or position, hold any other office or position under the laws of this state or of any other state or of the United States, and shall not engage in any occupation or business inconsistent and/or interfering with the duties of such employment; and no such member, officer or employee shall, while holding such office or position, serve on or under or be a member of any committee of any political party, and shall not, directly or indirectly, use his influence to induce any other officer or officers, employee or employees, elector or electors of this state to adopt his political views or to favor any particular candidate for office, nor shall any such member, officer or

employee contribute in any manner, directly or indirectly, any money or other things of value to or for any person or persons, committee or committees, for campaign or election purposes. Any such member, officer or employee who violates any of the terms and/or provisions of this section shall be deemed guilty of corruption. [C35,§1921-f14.]

1921.015 Place of business. The principal place of business of the liquor control commission shall be in the city of Des Moines, and the executive council shall provide suitable quarters or offices for the liquor control commission in Des Moines. [C35,§1921-f15.]

1921.016 Powers. The commission shall have the following functions, duties and powers:

1. To buy, import, and have in its possession for sale and sell liquors in the manner set forth in this chapter.

2. To establish, maintain and/or discontinue state liquor stores and special distributors and to determine the cities and towns including cities and towns under special charter and cities under commission form of government in which state liquor stores and special distributors shall be located. However, no liquor store or special distributor shall be established within three hundred feet of any school building used for school purposes or any church used as such.

3. To grant and refuse, or cancel for cause, permits for the purchase of liquor.

4. To rent, lease, and/or equip any building or any land necessary to carry out the purposes of this chapter.

5. To lease all plants and lease or buy equipment it may consider necessary and useful in carrying into effect the objects and purposes of this chapter.

6. To appoint vendors, clerks, or other employees required for the operation or carrying out of this chapter and to dismiss the same, but not without cause deemed by the commission in its discretion as sufficient; to fix their salaries or remuneration; assign them their title, duties and powers.

7. To issue and grant permits and licenses; and to revoke all such licenses and permits for cause, under this chapter.

8. To determine the nature, form and capacity of all packages containing liquor kept or sold under this chapter; provided, that all spirituous and vinous liquor shall be purchased and sold only in the original package.

9. To license, inspect and control the manufacture of alcoholic liquors and regulate the entire liquor industry in the state.

10. To employ a chemist, maintain a laboratory, to test, label and certify to all alcoholic liquors sold in Iowa.

11. To establish and maintain in its own name in the state treasury a special account, hereinafter known as the liquor control act fund, in an amount necessary for use of the commission, said amount to be determined by the state comptroller.

The commission shall refer all alleged violations of the liquor control act to the state department of public safety. [C35,§1921-f16; 48GA, ch 120,§93.]

1921.017 Rules and regulations.

1. The commission may make such rules and regulations not inconsistent with this chapter, which to the commission may seem expedient or necessary for carrying out the provisions of this chapter and for the efficient administration thereof.

2. Without attempting or intending to limit the power of the commission as to the provisions contained in subsection 1 hereof, it is declared that the commission may and it does have the power to make regulations in the manner set forth in the foregoing subsection and that said powers shall extend to and include the following:

a. Prescribing the duties of the secretary, officers, clerks, servants, agents, or employees of the commission and regulating their conduct while in the discharge of their duties.

b. Regulating the management, equipment and merchandise of state liquor stores, and warehouses in and from which liquors are transported, kept or sold and prescribing the books and records to be kept therein. This paragraph shall apply to special distributors insofar as in the opinion of the commission it is deemed necessary for proper regulation and control.

c. Regulating the purchase of liquor generally and the furnishing of liquor to state liquor stores and special distributors established under this chapter, determining the classes, varieties, and brands of alcoholic liquors to be kept in state warehouses or for sale at any state liquor store or by any special distributor.

d. Prescribing forms or information blanks to be used for the purpose of this chapter or the regulations made thereunder and the terms and conditions under which permits and licenses may be issued or granted.

e. Prescribing the nature and character of proof to be furnished and conditions to be observed in the issuance of duplicate permits where the originals have been either lost or destroyed.

f. Providing for the issuing and distributing of price lists showing the price to be paid by purchasers for each brand, class or variety of liquors kept for sale under this chapter, and such prices shall be uniform throughout the state.

g. Prescribing what official seals or labels should be attached to the packages of liquor sold under this chapter including the various kinds of official seals or labels for the different classes or varieties or brands of liquors.

h. Prescribing the kind, quantity, and character of liquors which may be purchased or sold under any permits including the quantity which may be purchased or sold at any one time or within any specified period of time.

i. Prescribing the duties of employees authorized to issue permits or licenses under this chapter.

j. Prescribing, subject to this chapter, the days and hours during which state liquor stores and special distributors shall be kept open for the purpose of the sale or dispensing of liquors.

k. Prescribing, subject to this chapter, the

records of sales to permit holders and by those holding licenses, for the report of the same to the commission and for the confidential character of the reports or records of individual permit holders.

l. Prescribing the place and the manner in which liquor may be lawfully kept or stored by the licensed manufacturer under this chapter.

m. Prescribing the time, manner, means, and method by which distillers, brewers, vendors, or others having permission under this chapter may deliver or transport liquors and prescribing the time, manner, means, and methods by which liquor under this chapter may be lawfully conveyed, carried, or transported.

n. Prescribing, subject to the provisions of this chapter, the conditions and qualifications necessary for the obtaining of licenses and the books and records to be kept and the remittance to be made by those holding licenses and determining the number of persons, firms, or corporations who shall be entitled to licenses and providing for the inspection of the records of all such licenses.

o. Prescribing the conditions and qualifications necessary for the obtaining of permits under this chapter.

p. Prescribing the purchase of liquor and furnishing liquor to state liquor stores and special distributors under this chapter.

3. The liquor control commission shall prepare, print and furnish all forms required under this chapter. [C35,§1921-f17.]

1921.018 State liquor stores. The commission shall establish and maintain in any city or incorporated town, including cities under special charter and cities under commission form of government, which the commission may deem advisable, a state liquor store or stores or special distributors, as provided for in section 1921.019 of this chapter, for storage and sale of liquor in accordance with the provisions of this chapter and the regulations made thereunder. The commission may, from time to time, as determined by it, fix the prices of the different classes, varieties, or brands of liquor to be sold. [C35,§1921-f18.]

1921.019 Special distributors.

1. In cities and towns where the establishment of a state liquor store, under the provisions of this chapter, does not seem advisable, the commission may select a special distributor, who shall have been in business in and a resident of such city or town not less than two years immediately prior to such appointment, to sell alcoholic liquors for consumption off the premises; provided, however, that in no case such special distributor shall be the holder of a class "B" permit to sell beer as provided in chapter 93.2, nor shall such special distributor be granted such beer permit while being such distributor.

2. Special distributors shall be paid a sum to be fixed by the commission, but in no event shall this sum be in excess of nine hundred dollars per annum. All alcoholic liquors sold by such distributors shall be sold in the original package at the price fixed by the commission, without profit to the distributor, and in accordance with the rules and regulations of the commission.

3. At any time, if in the judgment of the commission it shall appear advisable, the commission may establish a state liquor store in such city or town to replace the special distributor.

4. If, after a state liquor store has been in operation in any city or town, such store should show a loss to the state, the commission may discontinue such store and select a special distributor in accordance with the provisions of this chapter.

5. No special distributor shall be selected in any city or town where there is a state liquor store in operation. [C35,§1921-f19.]

Referred to in §1921.018

1921.020 Vendors. In the conduct and management of state liquor stores the commission is empowered to employ a person who shall be known as a "vendor" who shall, subject to the directions of the commission, observe all provisions of this chapter and the rules and regulations of the commission. [C35,§1921-f20.]

1921.021 Qualifications of employees. The liquor control commission shall prescribe from time to time by rule or regulation the qualifications to be possessed by persons desiring employment in state liquor stores or establishments. [C35,§1921-f21.]

1921.022 Sales regulated.

1. A vendor or special distributor may not sell to any person nor may any person purchase alcoholic liquors from such vendor unless the person be the holder of a permit entitling such person to purchase liquors under such permit in conformity with the provisions of this chapter and the regulations established by the commission.

2. Before the vendor or special distributor shall sell or deliver to any person any alcoholic liquors he shall:

a. Have first demanded and received the permit or order in writing dated and signed by the purchaser setting forth the number of his permit, the kind and quantity of the liquor ordered or furnish such information in writing as may be determined by the regulations established by the commission.

b. Have received from the purchaser his permit and have indorsed thereon the kind and quantity of liquor sold, the date of sale and such other information as may be required by the commission.

c. Have demanded and received the purchase price of such liquor in cash. [C35,§1921-f22.]

1921.023 Consumption on premises. No vendor, officer, clerk, servant, agent, or employee of the commission employed in any state liquor store, state-owned warehouse, or special distributor, shall allow any alcoholic liquor to be consumed on the premises of such state warehouse, store, or special distributor nor shall any person consume any liquor on such premises. [C35,§1921-f23.]

1921.024 Restrictions on sales — seals — labeling. No alcoholic liquor shall be sold to

any purchaser except in sealed container with the official seal or label prescribed by the commission and no such container shall be opened upon the premises of any state warehouse, store or special distributor. Such seal or label shall bear the seal of the commission and a facsimile of the signature of the chairman of the liquor control commission and shall certify the quality, age, and contents of the bottle or package on which it is affixed and must be attached and sealed to all liquors sold in the state. Possession of alcoholic liquors bought or sold in the state which do not carry such label or seal shall be considered a violation of this chapter. No alcoholic liquor shall be labeled "whisky" unless it is a distillate of fermented mash of grain or mixture of grains. Spirits, the alcoholic content of which is distilled of any other substance, must be labeled "imitation". No spirits shall contain any substance, compound or ingredient which is injurious to health or deleterious for human consumption. [C35,§1921-f24.]

1921.025 Sales prohibited. It shall be unlawful to transact the sale or delivery of any liquor in, on, or from the premises of any state liquor store, special distributor or warehouse:

1. After the closing hour as established by the commission.
2. On any legal holiday.
3. On any Sunday.
4. On any national or state election day.
5. On any municipal election day held in the municipality in which such store, warehouse or special distributor may be situated.
6. During such other periods or days as may be designated by the commission. [C35,§1921-f25.]

1921.026 Transportation permitted. It shall be lawful to transport, carry or convey liquors as defined by this chapter from the place of purchase by the commission to any state warehouse, store, special distributor or depot established by the commission for the purposes of this chapter or from one such place to another and when so permitted by this chapter the regulations made thereunder and in accordance therewith, it shall be lawful for any common carrier, or other person to transport, carry, or convey liquor sold by a vendor or a special distributor from a state warehouse, store or depot to any place to which the same may be lawfully delivered under this chapter and the regulations established by the commission; provided, however, that no common carrier or other person shall break, open, allow to be broken or opened any container or package containing alcoholic liquor or to use or drink or allow to be used or drunk any liquor therefrom while in the process of being transported or conveyed; provided, however, that nothing in this chapter shall affect the right of any permit holder to purchase, possess, or transport alcoholic liquors as defined by this chapter and subject to the provisions of this chapter and the regulations made thereunder. [C35,§1921-f26.]

1921.027 Permits.

1. There shall be two classes of permits under this chapter:

a. Individual permits.

b. Special permits.

2. Upon application being made, in the form and manner prescribed by the commission, to the commission, or to any agent authorized by the commission to issue permits accompanied by payment of the prescribed fee, and upon the commission or such authorized agent being satisfied that the applicant has complied with the rules and regulations established by the commission for the issuance of such a permit for the purchase, possession and/or transportation of alcoholic liquors under this chapter, the commission or such authorized agent shall issue to the applicant a permit of the class applied for as follows:

a. An "individual permit" in the form prescribed by the commission may be granted to an individual of the full age of twenty-one years who is not disqualified under the provisions of this chapter entitling the applicant to purchase liquor or beverages for medicinal or personal purposes in accordance with the terms and provisions of such permit and the provisions of this chapter by complying with such terms and conditions as may be prescribed by the commission.

b. A "special permit" in form as prescribed by the commission and subject to its issuance and/or use to such rules and regulations as the commission may adopt, may be issued as provided in this section, notwithstanding the other provisions of this chapter, as follows:

(1) To a physician, pharmacist, dentist or veterinarian, which will entitle the holder to purchase liquor from the state liquor stores or special distributors for use medicinally and in compounding prescriptions and to sell the same for use medicinally in the compounded prescription only upon the prescription of a licensed physician or surgeon, and to purchase liquor from the state liquor stores or special distributors for use in manufacturing or compounding lotions, compounds, and other like commodities not susceptible for beverage purpose, and to sell the same for public use.

(2) To a soldiers home, sanitarium, hospital, college or home for the aged which will entitle the holder to purchase liquor from the state liquor stores or special distributors for use for medicinal, laboratory and scientific purposes only.

c. Notwithstanding any of the provisions of this chapter, patent and proprietary medicines, tinctures, food products, extracts, toilet articles and perfumes, and other like commodities, none of which are susceptible of use as a beverage, but which require as one of their ingredients alcohol or vinous liquors, may be manufactured and sold within this state, provided a special permit so to do is first obtained, as in this subsection provided.

Any person, firm or corporation desiring such permit shall file with the liquor commission the affidavit of such person, member of the firm, secretary or other managing officer of the cor-

poration, as the case may be, stating therein the following facts:

(1) The name, place of business and post-office address of the person, firm or corporation desiring such permit.

(2) The business in which said person, firm or corporation is engaged and the articles manufactured by them which require in their manufacture the use of alcohol or vinous liquors.

(3) That neither the applicant, nor any member of the firm, nor officer of the corporation has been convicted of any violation of the laws of this state with reference to the sale of intoxicating liquors within three years last past prior to the date of said affidavit.

If the liquor commission is satisfied that the facts stated in said affidavit are true and that the applicant is a person fit and proper to be entrusted with the permit applied for, the same shall be issued upon the filing by the applicant of a bond in the sum of two thousand dollars, with approved sureties, conditioned that the applicant will faithfully observe the provisions of this chapter and the rules and regulations of the commission.

Such special permit when so issued shall entitle the holder thereof to import into the state, or purchase from licensed distillers within the state or from the commission, alcohol or vinous liquors for use in manufacture, in accordance with the terms of said permit, and to sell the product of such manufacture, regardless of any of the other provisions of this chapter with respect to purchase and sale of alcohol or vinous liquors.

It shall be the duty of every manufacturer holding such special permit under the provisions of this subsection whenever such manufacturer shall purchase any alcoholic liquor from any person, firm or corporation, other than the liquor commission, immediately upon receipt thereof to file with the liquor commission a report of the receipt of such liquor in accordance with the rules and regulations as they may be established by the liquor commission.

3. Nothing in this chapter shall prohibit the legitimate sale of patent and proprietary medicines, tinctures, food products, extracts, toilet articles and perfumes, and other like commodities, none of which are generally classified or used as a beverage but which require as one of their ingredients alcoholic or vinous liquors, through the ordinary retail or wholesale channels. [C35,§1921-f27.]

Referred to in §1921.028

1921.028 Fees. On all such [individual] permits issued on or after July 1, 1934, the fee shall be one dollar, and such permits shall expire on June 30 following date of issuance.

For a "special permit" under clause b of subsection 2 of section 1921.027 the fee shall be three dollars per year. [C35,§1921-f28.]

Referred to in §1921.029

1921.029 Nature of permit. A permit shall be a purely personal privilege and shall expire on June 30 following date of issuance, except as provided in section 1921.028, and shall be revocable for cause. It shall not constitute property nor shall it be subject to attachment and execution nor shall it be alienable nor assignable and in any case it shall cease upon the death of the permittee. Every permit shall be issued in the name of the applicant and no person holding a permit shall allow any other person to use the permit. [C35,§1921-f29.]

1921.030 Signature to permit. No permit shall be issued or delivered to an applicant for the same unless said applicant has in the presence of some person duly authorized by the commission written his signature thereon or filed his signature with such duly authorized person in the manner prescribed by the regulations as fixed by the commission for the purpose of the future identification of said permit holder and until the signature has been witnessed and attested to by such duly authorized official authorized to issue permits. [C35,§1921-f30.]

1921.031 Duplicate permits. Any permit holder whose permit has been lost, destroyed, or stolen may make application to the commission or such other duly authorized agent entitled to issue permits and upon satisfactory proof of loss, destruction, or theft of said permit, subject to the conditions contained in the regulations, may obtain a duplicate permit in lieu of the permit so lost, destroyed, or stolen for which duplicate permit a fee of fifty cents shall be paid. [C35,§1921-f31.]

1921.032 Suspension or cancellation of permit. Whenever the holder of any permit issued under the provisions of this chapter violates any of the provisions of this chapter or any regulations made thereunder or is an interdicted person or is otherwise disqualified from holding such permit, the commission, upon satisfactory proof of such fact, the existence of such violation, the interdiction or disqualification of such permit holder, may, in its discretion, with or without hearing, suspend the permit and any and all rights of said permit holders for such period of time as the commission may see fit or may fully cancel said permit. [C35,§1921-f32.]

1921.033 Surrender of permit. Whenever a permit has been suspended or canceled as herein provided the holder of such permit shall forthwith deliver the same to the commission. Upon failure of the permit holder to deliver said permit to the commission upon request, the commission shall forthwith cancel the same. In the case of a suspension of the permit, the commission shall return the permit to the holder at the expiration of such period of suspension. Where the permit has been canceled, the commission shall notify the vendors, or such other persons as may be provided in the regulations made under this chapter, of the cancellation of said permit and no permit shall thereafter be issued to such person whose permit has been canceled within a period of one year from the date of cancellation of said permit. [C35,§1921-f33.]

45ExGA, ch 24, §26, editorially divided

1921.034 Presentation by unlawful holder. Whenever a permit shall be produced at a state-owned warehouse, store, or distributor as defined by this chapter by a person who is not the lawful holder thereof, or where any permit which has been suspended or canceled is produced at such warehouse or store, the vendor or official in charge of such warehouse or store shall retain such permit in his custody and forthwith notify the commission of such fact and the commission shall, unless such permit has been canceled, forthwith cancel the same; provided, however, that the proper holder of any permit lost, destroyed, or stolen may, upon satisfactory proof to the commission that he was not a party to such improper use, obtain a return of such permit and re-establish his rights thereunder. [C35,§1921-f34.]

1921.035 Revocation of permits. Without attempting or intending to limit the powers and duties of the commission in the matter of the revocation of permits for cause or for any good and sufficient reason, the commission, municipal and district court are hereby empowered to revoke the permit of any holder as defined in this chapter upon satisfactory proof of any of the following grounds or causes:

a. Drunkenness.
b. Simulation of drunkenness.
c. Nonsupport of family or dependents.
d. Desertion of family or dependents.
e. The commission of any misdemeanor or felony in which the use of alcoholic liquor was a contributing factor. [C35,§1921-f35.]

Referred to in §1921.049

1921.036 Manufacturer's license. Upon application in the prescribed form and accompanied by a fee of two hundred fifty dollars, the commission may in accordance with this chapter, and in accordance with the regulations, made thereunder, grant a license, good for a period of one year after date of issuance to a manufacturer which shall allow the manufacture, storage and wholesale disposition and sale of alcoholic liquors and wines to the commission and to customers outside of the state. [C35, §1921-f36.]

1921.037 Wholesaler's license. Upon application in the prescribed form and accompanied by a fee of one hundred dollars and subject to the provisions of this chapter and the rules and regulations of the commission, the commission shall grant a license good for a period of one year after date of issuance, to a wholesaler, which shall allow the wholesaler to purchase alcoholic liquor from distillers either within or without the state for the purpose of selling to the commission and customers of such wholesaler engaged in the sale of alcoholic liquor and wines at retail outside of the state. [C35,§1921-f37.]

1921.038 Conditions—bond. As a condition precedent to the approval and granting of any license to the manufacturer or wholesaler applying therefor, there shall be filed with the commission a statement under oath that the applicant is a bona fide manufacturer or wholesaler of alcoholic liquors, and that the said applicant will faithfully observe and comply with all rules and regulations of the commission then existing, or thereafter made, and that he will in all respects comply with the provisions of this chapter; together with a bond of five thousand dollars for a manufacturer and one thousand dollars for a wholesaler with a surety to be approved by the commission; said bond to be in favor of the state of Iowa for the benefit of the state in case of any violation of this chapter. [C35,§1921-f38.]

1921.039 Gift of liquors prohibited. No manufacturer or wholesaler shall give away any alcoholic liquor of any kind or description at any time in connection with his business except for testing or sampling purposes only. [C35, §1921-f39.]

1921.040 Interest in liquor business. No member or employee of the commission, directly or indirectly, individually, or as a member of a partnership or as a shareholder in a corporation shall have any interest whatsoever in dealing in or in the manufacture of alcoholic liquor nor receive any kind of profit whatsoever nor have any interest whatsoever in the purchases or sale by the persons authorized to purchase and sell alcoholic liquor except that no such provisions shall prevent any such commissioner or employee from purchasing and keeping in his possession for the personal use of himself, or his family, or his guests any liquors which may be lawfully purchased. [C35,§1921-f40.]

1921.041 Cash sales. No vendor of any state liquor store or special distributor shall sell any alcoholic liquor to any individual permit holder except for cash. [C35,§1921-f41.]

1921.042 Consumption in public places—intoxication. It is hereby made unlawful for any person to use or consume any alcoholic liquors upon the public streets or highways, or in any public place, and no person shall be intoxicated nor simulate intoxication in a public place; and any person violating any provisions of this section shall be fined not to exceed one hundred dollars or sentenced not to exceed thirty days in the county jail. [C35,§1921-f42.]

See also §1931

1921.043 Minors. Except in the case of liquor given or dispensed to a person under the age of twenty-one years by parent or guardian for beverage or medicinal purposes or as administered to him by either the physician or dentist for medicinal purposes no person shall sell, give, or otherwise supply liquor to any such person under the age of twenty-one years, or knowingly permit any person under that age to consume alcoholic liquors. [C35,§1921-f43.]

1921.044 Interdicted person. Except in the case of liquor supplied to an interdicted person upon the prescription of a physician or administered by either a physician or dentist for medicinal purposes, no person shall procure for

or sell or give to any interdicted person any alcoholic liquors, nor directly or indirectly, assist in procuring or supplying any alcoholic liquors to an interdicted person. [C35,§1921-f44.]

1921.045 New permit after cancellation. No person whose permit or license has been canceled shall within one year after date of such cancellation make application for or receive another permit or license. [C35,§1921-f45.]

1921.046 Miscellaneous prohibitions.

1. No person whose permit has been either suspended or canceled shall purchase or attempt to purchase any alcoholic liquors during the period of such suspension or cancellation.

2. No person shall apply for the purchase of any alcoholic liquors except in his own name.

3. No person shall sell, dispense, or give to any intoxicated person, or one simulating intoxication, any alcoholic liquors. [C35,§1921-f46.]

1921.047 Advertisements. Except as permitted by federal statute and regulations, there shall be no public advertisement or advertising of alcoholic liquors in any manner or form within the state.

1. No person shall publish, exhibit, or display or permit to be displayed any other advertisement or form of advertisement, or announcement, publication, or price list of, or concerning any alcoholic liquors, or where, or from whom the same may be purchased or obtained, unless permitted so to do by the regulations enacted by the commission and then only in strict accordance with such regulations.

2. This section of the chapter shall not apply, however:

a. To the liquor control commission.

b. To the correspondence, or telegrams, or general communications of the commission, or its agents, servants, and employees.

c. To the receipt or transmission of a telegram or telegraphic copy in the ordinary course of the business of such agents, servants, or employees of any telegraph company. [C35, §1921-f47.]

1921.048 Prohibited sale, etc. No person not expressly authorized by this chapter to deal in alcoholic liquors shall within the state keep for sale, or offer for sale anything which is either labelled or branded with the name of any kind of alcoholic liquor whether the same contains any alcoholic liquor or not. [C35,§1921-f48.]

1921.049 Orders of interdiction. Whenever it shall be established to the satisfaction of either the commission or the judge of any superior, municipal or district court that the holder of any permit defined under this chapter shall have been guilty of any of the grounds or causes for the revocation of a permit, as set forth in section 1921.035 of this chapter, or who shall by the excessive use of alcoholic liquors injure his health, impair, or endanger the welfare of his family, misspend, squander, or waste his estate, an order of interdiction may be made by either the commission or the judge of any superior, municipal or district court directing the suspension or cancellation of any permit and prohibiting the sale of alcoholic liquors to such persons until the further order of either the commission or the court making such an order. In the event such order is made by the court, a certified copy of the same shall be forthwith filed with the commission. The commission or the court may as a part of its order of interdiction in any such case provide and declare forfeited any alcoholic liquor in the possession of such permit holder or may take possession of and retain for such permit holder any alcoholic liquors until such order of interdiction may be satisfied, set aside, or modified by either the commission or the court entering such order.

Whenever by satisfactory proof it shall appear to either the commission or to the court making such an order of interdiction that the interdicted person has purged himself of the conduct, grounds, reasons, or causes for the suspension, cancellation, or order of interdiction, the commission or the court making such an order of interdiction may set aside or modify said order, and if deemed advisable, in any such case reinstate said interdicted person to his or her rights and privileges under this chapter. Whenever such order of interdiction has been made by or filed with the commission, the commission shall forthwith notify the vendors of such order of interdiction. [C35,§1921-f49.]

1921.050 Fund. For the purpose of enabling the commission to carry out the provisions of this chapter, there is hereby appropriated from the funds of the state treasury not otherwise appropriated the sum of five hundred thousand dollars and the state comptroller shall set aside from the appropriation the amount necessary to be used by the commission for the purchase of alcoholic liquors and payment of such other expenses as may be necessary to establish and operate state liquor stores and special distributors in accordance with the provisions of this chapter and to perform such other duties as are imposed upon it by this chapter.

All money hereafter received by the commission, including any money received under the appropriation herein made, shall constitute what shall hereafter be known as the liquor control act fund. Whenever said liquor control act fund shall have a balance in excess of the amount necessary to carry out the provisions of this chapter as determined and fixed from time to time by the comptroller, the comptroller shall transfer such excess to the general fund of the state treasury, which amount shall be used to reduce the general state tax levy against real estate. [C35,§1921-f50.]

1921.051 Fees—accounting. It shall be the duty of the commission or its authorized agents to issue individual permits, to remit to the commission all fees received by them from the issuance of individual permits and the commission shall upon receipt of such funds credit the same to the "liquor control act fund" herein

provided. The commission or authorized agents designated to sell individual permits, shall report the fees received and remit the same once each month, said report and remittances to be made on or before the tenth day of the month succeeding that for which the report is made. [C35,§1921-f51.]

1921.052 Drawing appropriation. The appropriation hereby made shall be paid by the treasurer of state upon the orders of the commission, in such amounts and at such times as in the discretion of the commission, may be necessary to carry on operations in accordance with the terms of this chapter. [C35,§1921-f52.]

1921.053 Annual report. It shall be the duty of the commission to make a report to the governor of the state, ending with June 30 of each year, showing fully the results of the operations of the commission covering the period since the last previous report, and which report shall show:

1. Amount of profit or loss, if any, on account of state liquor stores and special distributors.
2. Number of such liquor stores opened, the number closed, and the number thereof operating on last day included in report.
3. Number of such special distributors appointed and number of such appointments in force on last day shown in report.
4. Amount of fees received from such stores and amount of fees received from such distributors, separately and in gross.
5. The amount of said liquor control act fund then in the hands of the commission and also in the hands of the state treasurer.
6. All other funds on hand and the source from which derived.
7. The total quantity and particular kind of alcoholic liquor sold.
8. The increase or decrease of such liquor sales.
9. Number of arrests and/or convictions for violations of this chapter and/or any other law of this state pertaining to alcoholic liquors.

In order that the said commission may be provided with the necessary information to make out the report required by this chapter, it shall be the duty of every justice of the peace, police court, mayor's court and every clerk of a court of record in this state to forward to said commission during the month of July of each year a full and complete report of each case commenced in the court of such justice, police court, mayor's court, or any court of record, in which a violation of this chapter or any other law of this state pertaining to alcoholic liquors was charged, and the disposition of the same. [C35,§1921-f53.]

1921.054 State monopoly. There is hereby granted unto said commission the sole and exclusive right of importation, into the state, of all forms of alcoholic liquor, except as otherwise provided in this chapter, and no person, partnership, club, corporation, or association shall so import any such alcoholic liquor; and no distillery shall sell any such alcoholic liquor within the state to any person, partnership, club, corporation, or association but only to the commission, except as otherwise provided in this chapter, the intent hereof being to vest in said commission exclusive control within the state both as purchaser and vendor of all alcoholic liquor sold by such distilleries within the state or imported therein, except beer as referred to in chapter 93.2 and amendments thereto, and except as otherwise provided in this chapter. [C35,§1921-f54.]

1921.055 Saving clause. This chapter shall not impair or affect any act done, offense committed or right accruing, secured or acquired, or penalty, forfeiture or punishment incurred prior to the time this chapter takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this chapter had not been passed. [C35,§1921-f55.]

1921.056 Native wines. Notwithstanding anything in this chapter contained, but subject to any regulations or restrictions which the commission may impose, manufacturers of native wines from grapes, cherries, other fruit juices, or honey grown and produced in Iowa may sell, keep, or offer for sale and deliver the same in such quantities as may be permitted by the commission for consumption off the premises.

A manufacturer of native wines shall not sell such wines otherwise than as permitted by this section or allow any wine so sold, or any part thereof, to be drunk upon the premises of such manufacturer. Notwithstanding anything in this chapter contained, any person may manufacture native wine as herein defined for consumption on his own premises. [C35,§1921-f56.]

1921.057 Examination of accounts. The auditor of state shall cause the financial condition and transactions of all offices, departments, stores, warehouses, depots and liquor transactions of special distributors of the liquor control commission to be examined at least once each year by the state examiners of accounts and at shorter periods if requested by the commission, governor, or executive council. [C35, §1921-f57.]

1921.058 Auditing. All provisions of sections 113, 114, 116, 117, 120, 124, 126, and 130.2 of the code, relating to auditing of financial records of governmental subdivisions which are not inconsistent herewith are hereby made applicable to the liquor control commission, the liquor transactions of its special distributors and any of its offices, stores, warehouses and depots. [C35,§1921-f58.]

1921.059 "Bootlegger" defined. Any person who shall, by himself, or his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or leave in a place for another to secure, any alcoholic liquor as herein defined, with intent to sell or dispense of the same by gift or otherwise, or who shall, within this state, in

any manner, directly or indirectly, solicit, take or accept any order for the purchase, sale, shipment or delivery of such alcoholic liquors in violation of this chapter, or aid in the delivery and distribution of any alcoholic liquors so ordered or shipped, or who shall in any manner procure for, or sell or give any alcoholic liquors to any minor or interdicted person, for any purpose except as authorized and permitted in this chapter, shall be termed a bootlegger and upon conviction shall be sentenced to the county jail or the penitentiary, in the discretion of the court, for a period not exceeding one year. [C35, §1921-f59.]

Injunction against, §§1921.071, 2031; see also §1927

1921.060 Nuisances. The building, erection, or place, or the ground itself, in or upon which the unlawful manufacture or sale, or keeping with intent to sell, use or give away, any alcoholic liquors is carried on or continued or exists, and any vehicle or other means of conveyance used in transporting such liquor in violation of this chapter, and the furniture, fixtures, vessels and contents, kept or used in connection therewith, are declared a nuisance and shall be abated as in this chapter provided. [C35,§1921-f60.]

Referred to in §1921.061; see also §1929

1921.061 Penalty. Whoever shall erect, establish, continue or use any building, erection or place for any of the purposes prohibited in section 1921.060, is guilty of a nuisance and upon conviction shall be punished by a fine of not less than three hundred dollars, nor more than one thousand dollars, or imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment and shall stand committed until such fine imposed is paid. [C35,§1921-f61.]

1921.062 Injunction. Actions to enjoin nuisances shall be brought in equity in the name of the state by the county attorney who shall prosecute the same to judgment. [C35,§1921-f62.]

See also §2017 et seq.

1921.063 Temporary writ. In such action, the court or a judge in vacation, shall, upon the presentation of a petition therefor, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony or otherwise, that the nuisance complained of exists. [C35,§1921-f63.]

1921.064 Notice. Three days notice in writing shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course. [C35,§1921-f64.]

1921.065 Scope of injunction. When an injunction has been granted, it shall be binding upon the defendant throughout the state and any violation of the provisions of this chapter anywhere within the state shall be punished as a contempt, as herein provided. [C35,§1921-f65.]

1921.066 Trial of action. The action, when brought, shall be triable at the first term of court after due and timely service of notice of the commencement thereof has been given. [C35,§1921-f66.]

1921.067 General reputation. In all actions to enjoin a nuisance or to establish a violation of the injunction, evidence of the general reputation of the place described in the petition or information shall be admissible for the purpose of proving the existence of the nuisance or the violation of the injunction. [C35,§1921-f67.]

1921.068 Contempt. In the case of a violation of any injunction granted under the provisions of this chapter, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings shall be commenced by filing with the clerk of the court an information under oath setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue under which the defendant shall be arrested. [C35,§1921-f68.]

1921.069 Trial of contempt action. The trial shall be as in equity and may be had upon depositions, or either party may demand the production and oral examination of the witnesses. [C35,§1921-f69.]

Referred to in §1921.070

1921.070 Penalty for contempt. A party found guilty of contempt under the provisions of section 1921.069 shall be punished by a fine of not less than three hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail not less than six months, nor more than twelve months, or by both such fine and imprisonment. [C35,§1921-f70.]

1921.071 Injunction against bootlegger. A bootlegger as defined in this chapter may be restrained by injunction from doing or continuing to do any of the acts prohibited herein, and all the proceedings for injunctions, temporary and permanent, and for punishments for violation of the same as prescribed herein, shall be applicable to such person, company, or corporation, and the fact that an offender has no known or permanent place of business, or base of supplies, or quits the business after the commencement of an action, shall not prevent a temporary or permanent injunction, as the case may be, from issuing. [C35,§1921-f71.]

1921.072 Conditions. In no case shall a bootlegger injunction proceeding, as provided in this chapter, be maintained unless it be shown to the court that efforts in good faith have been made to discover the base of supplies or place where the defendant charged as a bootlegger conducts his unlawful business or receives or manufactures the alcoholic liquors, of which he is charged with bootlegging. [C35, §1921-f72.]

1921.073 Order of abatement. If the existence of the nuisance be established in a civil or criminal action, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the confiscation of the

alcoholic liquors by the state, and in case a vehicle or other means of conveyance is abated, the sale thereof as hereinafter provided, the removal from the building or place of all fixtures, furniture, vessels or movable property used in any way in conducting the unlawful business and sale thereof, in the manner provided for the sale of chattels under execution, and the effectual closing of the building, erection or place against its use for any purpose prohibited in this chapter, and so keeping it for a period of one year unless sooner released. [C35,§1921-f73.]

Execution sales, §11722 et seq.; see also §2032

1921.074 Use of abated premises. If anyone shall use a building or place so directed to be closed, he shall be punished as for contempt, as provided in this chapter. [C35,§1921-f74.]

1921.075 Fees. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court. [C35,§1921-f75.]

1921.076 Proceeds of sale. The proceeds of the sale of the personal property in abatement proceedings shall be applied first in payment of the costs of the action and abatement, and second to the satisfaction of any fine and costs adjudged against the proprietor of the premises and keeper of said nuisance, and the balance, if any, shall be paid to the defendant. [C35,§1921-f76.]

1921.077 Abatement of nuisance. If the owner appears and pays all costs of the proceeding and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or in vacation by the clerk, auditor and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or in vacation a judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner and the said order of abatement canceled, so far as same may relate to said property. [C35,§1921-f77.]

Referred to in §1921.079

1921.078 Abatement before judgment. If the proceedings be an action in equity and said bond be given and costs therein paid before judgment, and order of abatement, the action shall thereby be abated as to said building only. [C35,§1921-f78.]

Referred to in §1921.079

1921.079 Existing liens. The release of the property under the provisions of either section 1921.077 or 1921.078 shall not release it from any judgment lien, penalty or liability, to which it may be subject by law. [C35,§1921-f79.]

1921.080 Abatement bond a lien. Undertakings of bonds for abatement shall immediately after filing by the clerk of the district court be docketed and entered upon the lien index as required for judgments in civil cases, and from the time of such entries shall be liens upon real estate of the persons executing the same, with like effect as judgments in civil actions. [C35,§1921-f80.]

1921.081 Attested copies filed. Attested copies of such undertakings may be filed in the office of the clerk of the district court of the county in which the real estate is situated in the same manner and with like effect as attested copies of judgments, and shall be immediately docketed and indexed in the same manner. [C35,§1921-f81.]

1921.082 Forfeiture of bond. If the owner of a property who has filed such abatement bond as in this chapter provided fails to abate the said liquor nuisance on the premises covered by the bond, or fails to prevent the maintenance of any liquor nuisance on said premises at any time within the period of one year, the court must, after a hearing in which the said fact is established direct an entry of such violation of the terms of his said bond, to be made on the record and the undertaking of his bond thereupon forfeited. [C35,§1921-f82.]

1921.083 Procedure. A proceeding to forfeit an abatement bond shall be commenced by filing with the clerk of the court, by the county attorney of the county where the bond is filed, an application under oath to forfeit said bond, setting out the alleged facts constituting the violation of the terms of said bond, upon which the judge or court shall direct by order attached to said application that a notice be issued by the clerk of the district court directed to the principal and sureties on said bond to appear at a certain date fixed to show cause, if any they have, why the said bond should not be forfeited and judgment entered for the penalty therein fixed. [C35,§1921-f83.]

1921.084 Method of trial. The trial shall be to the court and as in equity, and be governed by the same rules as to evidence as in contempt proceedings. [C35,§1921-f84.]

How issues tried, §11429; contempt, §1921.069

1921.085 Judgment. If the court after hearing finds a liquor nuisance has been maintained on the premises covered by the abatement bond and that liquor has been sold or kept for sale on the premises contrary to law within one year from the date of the giving of said bond, then the court shall order the forfeiture of the bond and enter judgment for the full amount of said bond against the principal and sureties thereof, and the lien on the real estate heretofore created shall be decreed foreclosed and the court shall provide for a special and general execution for the enforcement of said decree and judgment. [C35,§1921-f85.]

1921.086 Appeal. Appeal may be taken as in equity cases and the cause be triable de novo except that if the state appeals it need not file an appeal or supersedeas bond. [C35,§1921-f86.]

Appeals generally, ch 555

1921.087 County attorney to prosecute. It shall be the duty of the county attorney to prosecute in the name of the state all forfeitures of abatement bonds and the foreclosures of same. [C35,§1921-f87.]

1921.088 Prompt service. It shall be a misdemeanor for any peace officer to delay service of original notices, writs of injunction, writs of abatement or warrants for contempt in any equity case filed for injunction or abatement by the state. [C35,§1921-f88.]

Punishment, §12894

1921.089 Evidence. On the issue whether a party knew or ought to have known of such nuisance, evidence of the general reputation of the place shall be admissible. [C35,§1921-f89.]

1921.090 Counts. Information or indictments under this chapter may allege any number of violations of its provisions by the same party, but the several charges must be set out in separate counts, and the accused may be convicted and punished upon each one as on separate informations or indictments, and a separate judgment shall be rendered on each count under which there is a finding of guilty. [C35,§1921-f90.]

1921.091 Penalties generally. Unless other penalties are herein provided, any person who violates any of the provisions of this chapter, or who makes a false statement concerning any material fact in submitting an application for a permit or license, shall be punished by a fine of not less than three hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than three months nor more than one year, or by both such fine and imprisonment. [C35,§1921-f91.]

1921.092 Violations by members and employees—acceptance of bribe. Any member, secretary, officer or employee of the commission who shall knowingly or wilfully violate any of the provisions of this chapter, or knowingly and willingly aid, assist or permit any such violation, shall be guilty of a misdemeanor and be punishable by fine of not to exceed one thousand dollars, nor less than three hundred dollars, or by imprisonment in the county jail for not less than three months, nor more than one year, or by both such fine and imprisonment.

Section 13293 is hereby made applicable to the members and employees of the liquor control commission. [C35,§1921-f92.]

Constitutionality, §1921-f93, code 1935; 45ExGA, ch 24, §86

1921.093 Duty of county attorney and peace officers. In every county the county attorney will constitute the head of the enforcement provision for the liquor control commission. The state department of public safety, the sheriff and his deputy or deputies, and the police department of every city, including the day and night marshal of any incorporated town, shall be supplementary aids to such county attorney.

Any neglect, misfeasance, or malfeasance shown by any peace officer included in this section will be sufficient cause for his removal as provided for by the statutes of the state. [C35, §1921-f94; 48GA, ch 79,§1; ch 120,§94.]

Removal from office, ch 56

1921.094 Saving clause as to permits. No repeal declared in this chapter shall be deemed to affect the validity or continued operation of any existing permit issued under chapters 100 to 104, inclusive, of the code, until said permits are formally terminated by the commission and the power to terminate is hereby vested in the commission. [C35,§1921-f95.]

CHAPTER 93.2

BEER AND MALT LIQUORS

Referred to in §§1921.003, 1921.019, 1921.054
Original act, 45GA, ch 37

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1921.095 Permit required. It shall be unlawful for any person to manufacture for sale or sell beer unless a permit is first obtained as provided for in this chapter. [C35,§1921-f96.]

1921.096 Definitions.

1. The term "person" as used in this chapter shall include corporation, firm, copartnership and association.

2. "Brewer" shall mean any person, firm or corporation who shall manufacture beer for the purpose of sale, barter, exchange or transportation.

3. "Permit board" shall mean the state permit board composed of the chairman of the state tax commission, the secretary of state, and the auditor of state.

4. "Wholesaler" shall mean any person, firm or corporation, other than a brewer or bottler, who shall sell, barter, exchange, offer for sale, have in possession with intent to sell, deal or traffic in, beer, provided, however, that no wholesaler shall be permitted to sell for consumption upon the premises.

5. "Retailer" shall mean any person, who shall sell, barter, exchange, offer for sale or have in possession with intent to sell any beer for consumption on the premises where sold.

6. The term "good moral character" shall not be construed to include the following: Any person, firm, or corporation who, preceding the making of an application for any permit under the provisions of this chapter, has been found guilty of violating any of the provisions of the beer act or any of the intoxicating liquor laws of the state or who has been convicted of a felony or an indictable misdemeanor.

7. "Permit" shall mean an authorization issued by the state tax commission or by the city or town council of any city or town or by the board of supervisors of any county.

8. "Application" shall mean a formal written request for the issuance of a permit supported by a verified statement of facts.

9. "Regulation" shall mean any reasonable rule or ordinance adopted by the council or board of any city, town or county and not in conflict with the provisions of any of the statutes of the state.

10. "Beer" for the purpose of this chapter shall mean any liquid capable of being used for beverage purposes made by the fermentation of an infusion in potable water of barley, malt and hops, with or without unmalted grains or decorticated and degerminated grains containing not more than four per centum of alcohol by weight.

No beer shall be sold in this state after July 1, 1934, unless made from sixty-six and two-thirds percent or more of barley malt. [C35, §1921-f97; 48GA, ch 80,§1.]

1921.097 Permits—classes of—state permit board. Permits for the manufacture and sale, or sale of beer shall be divided into three classes, and shall be known as either class "A", "B" or "C" permits, except as otherwise provided in this chapter. A class "A" permit shall allow the holder thereof to manufacture and/or sell at wholesale, beer as defined in this chapter; provided, however, that nothing herein contained shall prohibit the holder of a class "A" permit from manufacturing beer of a higher alcoholic content for shipment outside this state. A class "B" permit shall allow the holder thereof to sell at retail beer for consumption on or off the premises. A class "C" permit shall allow the holder thereof to sell at retail beer for consumption off the premises.

In order to promote uniform compliance with the provisions of this chapter there is hereby created a state permit board to be composed of the chairman of the state tax commission, the secretary of state, and the auditor of state, which board shall issue state permits and shall have the power to revoke the same upon hearing as provided in this chapter and to review actions of the city or town councils, including cities under special charter, and boards of supervisors, in refusing to revoke permits, as hereinafter provided. The permit board shall serve without additional compensation. The permit board shall meet on the first Monday in each month for a regular meeting, and upon call at any time. The majority of its members shall constitute a quorum but no final action shall be taken in the revocation of a permit without a majority vote. In the event it should be impossible for any of the officials designated as members of this board to be present at any meeting of the board, such official may designate a deputy or assistant in his department to attend such meeting or meetings and act for him and in his stead but at no meeting shall any final decision of the board be made unless at least two members thereof are present in person. [C35,§1921-f98; 48GA, ch 80,§2.]

1921.098 Duties and powers. The state permit board may review the action of any city or town council, including special charter cities, and boards of supervisors, in any case where a hearing has been had relative to the cancellation or revocation of a permit and it appears from the records of the hearing held by said city or town council or board of supervisors, that the permit has not been revoked or cancelled, and it appears from an investigation made by the state permit board that there is reasonable ground to believe that such permit holder has been guilty of violation of the provisions of this chapter, and upon such hearing the permit board shall make a finding, after hearing the facts with reference to the grounds for the revocation of such permit, and by a majority vote shall determine whether or not such permit shall be revoked and make an order accordingly, and said finding shall be final.

If the state permit board finds from investigation that a review of the action of any city or town council, including special charter cities and boards of supervisors, should be had, or that such governing bodies have failed to take action, the state permit board shall thereupon fix a date for the hearing thereof and shall notify the permit holder of such hearing by registered mail of the date fixed for hearing and the date set for the hearing shall not be less than seven days from the mailing of the notice. Such notice shall be mailed to the permittee at the post-office address where his place of business is conducted under his permit. All such hearings shall be held at the seat of government, at Des Moines.

In the preparation and conduct of the hearing the board shall have power to require by subpoena the testimony of witnesses and the production of papers or documents and any member of the board may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence. The fees and mileage of such witnesses shall be the same as prescribed by law in the trial of civil cases and the permittee in all such hearings shall have the opportunity to be heard in person and by counsel. All parties to any hearing before the board shall have the right to the attendance of witnesses at such hearings upon making request therefor to the board and designating the person or persons sought to be subpoenaed. In case of disobedience to a subpoena the board may invoke the aid of any court of competent jurisdiction in requiring the attendance and testimony of witnesses and the production of papers or documents and such court may issue an order requiring the persons to appear before the board and give evidence or to produce papers as the case may be, and any failure to obey such orders of the court may be punished by the court for contempt thereof. Testimony may be taken by deposition as in civil cases and any person may be compelled to appear and testify as in civil actions in the courts of this state. Any person who shall neglect and refuse to attend and testify or answer any lawful question or produce documentary evidence if it is in his power to do so, in obedience to a subpoena or lawful requirement by such board, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished in accordance with the provisions of section 12894.

Like hearings may also be had in cases where a verified petition signed by at least ten taxpayers has first been presented to the city or town council, including special charter cities or the boards of supervisors, as the case may be, or where the state permit board from its investigation asks that a hearing be had on the revocation of a permit, and in the event the city or town council, including special charter cities and boards of supervisors, neglects or refuses to have such hearing, the matter may be presented to the state permit board upon such verified petition in writing, signed by at least ten taxpayers of the jurisdiction for which the permit was granted, or the state permit board may upon its own motion conduct such hearing, and the same procedure as in this section provided shall apply with reference to notice of hearing witnesses, testimony and contempt proceedings for failure to appear, and the board shall make a finding in such cases, which finding shall be binding on the permit holder and also on the city or town councils, including special charter cities or boards of supervisors, as the case may be. [C35,§1921-g1.]

1921.099 Power to issue permits. Power is hereby granted to the state tax commission to issue the class "A" permit, provided for in this chapter, and to revoke the same for causes herein stated. Power is hereby granted to cities and towns, including cities under special charter to issue the class "B" permits and class "C" permits within their respective limits and to revoke same for the causes herein stated, or in the event the place of business of the permit holder is conducted in a disorderly manner. Power is hereby granted to boards of supervisors to issue, at their discretion, class "B" and "C" permits in their respective counties in villages platted prior to January 1, 1934, and to clubs as defined in section 1921.111 and to revoke same for causes herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner.

Each applicant applying for a class "B" or "C" permit, shall, in addition to procuring a permit from a city or town council, or board of supervisors, as provided in this chapter, obtain a state permit from the state permit board upon application made to the board and upon payment of a fee of three dollars. Such fees collected shall be placed in a special fund by the state tax commission to be used by the state permit board for the purpose of enforcing the provisions of this chapter.

Upon the issuance of a permit by a city or town council, or board of supervisors, such council or board shall forthwith certify to the state permit board the action so taken. The state permit board shall promptly issue a state permit to all applicants to whom a permit has been issued by a city or town council or by a board of supervisors, which shall expire at the same time as the permit issued by said council or board, and shall forthwith certify to such council or board as to the issuance of each permit.

Upon the revoking of a permit by any city or town council or board of supervisors, such council or board shall certify to the state permit board the action so taken, and thereupon the state permit board shall immediately cancel its permit to such permit holder, and such action of the state permit board and other granting authority shall be final. [C35,§1921-f99; 48GA, ch 80,§§3, 13.]

1921.100 Tenure—character of permittee. All permits provided for in this chapter shall expire at the end of one year from the date of issuance, and may be renewed for a like period upon application being made therefor to the proper authorities as in this chapter provided. Permits hereunder defined shall be issued only to persons who are citizens of the state of Iowa, who are of good moral character and repute, provided, however, that in the case of a corporation the word "citizen" as used in this section shall be construed to mean a corporation organized and existing or permitted and authorized to do business under the laws of this state. [C35,§1921-f100.]

1921.101 Tenure. All class "B" permits issued to golf or country clubs, shall expire on July 1 after the date of issuance. [C35, §1921-g2.]

1921.102 Prohibited interest. It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit. [C35,§1921-f101.]

1921.103 Class "A" application. A class "A" permit shall be issued by the authority so empowered in this chapter to any person who:

1. Submits a written application for a permit, which application shall state under oath:

a. The name and place of residence of the applicant and the length of time he has lived at such place of residence.

b. That he is a citizen of the state of Iowa.

c. The place of birth of the applicant, and if the applicant is a naturalized citizen, the time and place of such naturalization.

d. The location of the place or building where the applicant intends to operate.

e. The name of the owner of the building and if such owner is not the applicant, that such applicant is the actual lessee of the premises.

2. Establishes:

a. That he is a person of good moral character.

b. That the place or building where he intends to operate conforms to all laws, health and fire regulations, applicable thereto, and is a safe and proper place or building.

3. Furnishes a bond in the form prescribed and to be furnished by the state tax commission, with good and sufficient sureties to be approved by the state tax commission conditioned upon the faithful observance of this chapter, in the sum of five thousand dollars. [C35,§1921-f102; 48GA, ch 80,§4.]

1921.104 Class "B" application. Except as otherwise provided in this chapter a class "B" permit shall be issued by the authority so empowered in this chapter to any person who:

1. Submits a written application for a permit, which application shall state under oath:

a. The name and place of residence of the applicant, and the length of time he has lived at such place of residence.

b. That he is a citizen of the state of Iowa.

c. The place of birth of the applicant, and if the applicant is a naturalized citizen, the time and place of such naturalization.

d. The location of the place or building where the applicant intends to operate.

e. The name of the owner of the building and if such owner is not the applicant, that such applicant is the actual lessee of the premises.

f. That the place of business for which the permit is sought is and will continue to be equipped with sufficient tables and seats to accommodate twenty-five persons at one time, and is located within a business district or an area now or hereafter zoned as a business district.

2. Establishes:

a. That he is a person of good moral character.

b. That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto, and is a safe and proper place or building.

3. Furnishes a bond in the form prescribed and to be furnished by the state tax commission with good and sufficient sureties to be approved by the authorities to which application is submitted, conditioned upon the faithful observance of this chapter, in the sum of one thousand dollars. [C35,§1921-f103; 48GA, ch 80,§5.]

1921.105 Class "C" application. Except as otherwise provided in this chapter, a class "C" permit shall be issued by the authority so empowered in this chapter to any person who:

1. Submits a written application for a permit, which application shall state under oath:

a. The name and place of residence of the applicant and the length of time he has lived at such place of residence.

b. That he is a citizen of the state of Iowa.

c. The place of birth of the applicant and if the applicant is a naturalized citizen, the time and place of such naturalization.

d. The location of the place or building where the applicant intends to operate.

e. The name of the owner of the building and if such owner is not the applicant that such applicant is the actual lessee of the premises.

2. Establishes:

a. That he is a person of good moral character.

b. That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto and is a safe and proper place or building.

3. Furnishes a bond in the form prescribed and to be furnished by the state tax commission, with good and sufficient sureties to be approved by the authorities to which such application is submitted, conditioned upon the faithful observance of this chapter, in the sum of one thousand dollars. [C35,§1921-f104; 48GA, ch 80,§6.]

1921.106 Authority under class "A" permit. Any person holding a class "A" permit issued by the state tax commission, as in this chapter provided, shall be authorized to manufacture and sell, or sell at wholesale, beer for consumption off the premises, such sale or sales within the state to be made only to persons holding subsisting class "A", "B" or "C" permits issued in accordance with the provisions of this chapter. [C35,§1921-f105; 48GA, ch 80,§7.]

1921.107 Authority under class "B" permit. Subject to the provisions of this chapter, any person holding a class "B" permit, issued as herein provided, shall be authorized to sell beer for consumption on or off the premises; provided, however, that unless otherwise provided in this chapter, no sale of beer shall be made for consumption on the premises unless food is served and consumed therewith, and unless such place where such service is made is equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time. It shall be unlawful for any licensee hereunder to give away beer, or to promote the sale of beer by the gift of any lunch, meal, or articles of food except pretzels, cheese or crackers. [C35, §1921-f106.]

Referred to in §1921.119

1921.108 Authority under class "C" permit. Any person holding a class "C" permit issued

as herein provided, shall be allowed to sell beer for consumption off the premises, provided, however, that such sales when made shall be in original containers only and that no sale or delivery shall be made between the hours of one a.m. and six a.m., and no sale or delivery on Sunday. [C35,§1921-f107.]

1921.109 Sale on trains—bond. Subject to the provisions of this chapter, any dining car company, sleeping car company, railroad company or railway company may make application to the state tax commission for a special class "B" permit, and the state tax commission may issue a permit to any such company which shall authorize the holder thereof to keep for sale and sell on any dining car, sleeping car, buffet car or observation car operated by such applicant in, through or across the state, beer containing no greater content of alcohol by weight than is lawful under this chapter for consumption in such cars. The application for such permit shall be in such form and contain such information as may be required by the state tax commission. Each such permit shall be good throughout the state as a state permit. Only one such permit shall be required for all cars operated in this state by such applicant, but a duplicate of such permit issued, as herein provided, shall be posted in each car in which such beverages are sold; and no further permit shall be required or tax levied for the privilege of selling beverages for consumption in such cars. As a condition precedent to the issuing of any permit hereunder, the applicant shall give bond to the state tax commission, with good and sufficient sureties thereon to be approved by the state tax commission, conditioned upon the faithful performance of this chapter in the penal sum of one thousand dollars. [C35,§1921-f108; 48GA, ch 80,§8.]

Referred to in §§1921.119, 1921.127

1921.110 Permits to clubs. Cities and towns, including cities under special charter, shall upon proper application, issue to a club within their respective limits a class "B" permit for the sale of beer for consumption on the premises subject to the provisions of this chapter. The board of supervisors of any county shall issue class "B" permits to clubs located in such counties outside of the limits of cities and incorporated towns. [C35,§1921-f109.]

1921.111 Class "B" permits. No club shall be granted a class "B" permit under this chapter:

a. If the buildings occupied by such club are not wholly within the territorial limits of the city, town or special charter city to which such application is made; provided, however, that a golf or country club whose buildings are located outside the territorial limits of the city, town or special charter city, may be issued a class "B" permit by the local board of supervisors, and further provided, that all of the permit fees authorized under this paragraph shall be collected and retained by the county in which such golf or country club is located and credited to the general fund of said county and provided, further, that such golf or country club shall comply with the restrictions contained in the succeeding paragraphs of this section.

b. If it is a proprietary club, or operated for pecuniary profit.

c. Unless it is incorporated under the laws of the state of Iowa, and its charter is in full force and effect, and/or excepting regularly chartered branches of nationally incorporated organizations.

d. Unless such club has a permanent local membership of not less than fifty adult members.

e. Unless the application for such permit is approved by a majority of the bona fide members of such club who are present at a regular meeting, or a special meeting called to consider the same.

f. Unless it was in operation as a club on the first day of January, A. D., 1934, or being thereafter formed, was in continuous operation as a club for at least two years immediately prior to the date of its application for a class "B" permit. [C35,§1921-f110.]

Referred to in §§1921.099, 1921.130

1921.112 Application. Every club desirous of obtaining a class "B" permit shall make a written application therefor, executed by its president and attested by its secretary or other similar officers performing the duties usually performed by a president or secretary which application shall state under oath:

a. The name of the club and the location of the premises occupied by it.

b. The names of the officers of said club.

c. That the buildings occupied by said club are wholly within the corporate limits of the city or town to which such application is made.

d. The purposes for which such club was formed and is maintained, and the number of the bona fide members thereof regularly paying dues.

e. That the application for such permit was approved by a majority of the bona fide members of such club present at a regular meeting or at a special meeting called to consider the same. [C35,§1921-f111.]

1921.113 Bond. Every club making application for a class "B" permit shall furnish a bond with good and sufficient sureties to be approved by the authorities issuing the permit, conditioned upon the faithful observance of this chapter. Such bond shall be in the sum of one thousand dollars. [C35,§1921-f112.]

1921.114 Sales by hotels. Hotels holding class "B" permits may serve beer to their guests either in the dining room or dining rooms or to any guests duly registered at such hotel in the rooms of such guests. [C35,§1921-f113.]

1921.115 Prohibited sales and advertisements. No holder of a permit under the provisions of this chapter shall exhibit or display or permit to be exhibited or displayed on the premises any signs or posters containing the words "bar", "barrooms", "saloon" or words

of like import. No person, except parent or guardian, shall furnish to any minor under twenty-one years of age, by gift, sale or otherwise, any beer.

Nor shall any such beer be sold or delivered to any person between the hours of twelve o'clock midnight on Saturday and seven o'clock of the following Monday morning. [C35,§1921-f114.]

Referred to in §§1921.129, 1921.130

1921.116 Minors. Minors are prohibited from serving beer in the place of business of any permit holder in which the business of selling beer constitutes more than fifty percent of the gross business transacted therein. [C35, §1921-g3.]

1921.117 Brewers, etc.—prohibited interest. No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly pay for any such permit, nor directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter. [C35,§1921-f115.]

1921.118 *Investigation of applicant.* The authorities empowered by this chapter to issue permits shall make a thorough investigation to determine the fitness of the applicant and the truth of the statements made in and accompanying the application, and the decision of such authority on the application shall be rendered within thirty days after the application is received. [C35,§1921-f116.]

45ExGA, ch 25, §25, editorially divided

1921.119 Fees. The annual permit fee for a class "A" permit shall be two hundred fifty dollars. The annual permit fee for a class "B" permit, except class "B" permits issued to hotels and clubs as contemplated in this chapter, and golf or country clubs, shall be fixed by the authorities empowered by this chapter to issue permits, but the amount of said permit fee shall not be less than one hundred dollars, nor more than three hundred dollars. For a golf or country club, as defined in section 1921.107*, subsection a, the license may be granted for a period of six months, for which the license fee shall be fifty dollars. The class "B" permits to be issued under the provisions of this chapter to hotels, shall be as follows:

a. Hotels, having two hundred fifty guest rooms or more, shall pay an annual permit fee of two hundred fifty dollars.

b. Hotels, having more than one hundred and less than two hundred fifty guest rooms shall pay an annual permit fee of one hundred fifty dollars.

c. Hotels, having one hundred guest rooms or less shall pay an annual permit fee of one hundred dollars.

The permit fee for class "C" permits shall be twenty-five dollars. The annual permit fee for special class "B" permits, issued under section 1921.109, shall be one hundred dollars, and three dollars for each duplicate thereof, which fees shall be paid into the state tax commission. The state tax commission shall issue duplicates of such permits from time to time as applied for by each such company. [C35,§1921-f117; 48GA, ch 80,§9.]

*Section 1921.111 probably intended

1921.120 Barrel tax. In addition to the annual permit fee to be paid by all class "A" permittees, under the provisions of this chapter, there shall be levied and collected from such permittees on all beer manufactured for sale and/or sold in this state at wholesale and on all beer imported into this state for sale at wholesale and sold in this state at wholesale, a tax of one and twenty-four hundredths dollars for every barrel containing thirty-one gallons, and at a like rate for any other quantity or for the fractional parts of a barrel. Provided, however, no tax shall be levied or collected on beer shipped outside this state by a class "A" permittee or sold by one class "A" permittee to another class "A" permittee. [C35,§1921-f118.]

Referred to in §1921.127

1921.121 Report of barrel sales—penalty. Every person holding a class "A" permit shall on or before the tenth day of each calendar month commencing on the tenth day of the calendar month following the month in which such person is issued a permit, make a report under oath to the state tax commission upon forms to be furnished by it for such purpose showing the exact number of barrels of beer, or fractional parts thereof, sold by such permit holder during the preceding calendar month. Such report shall also state the name and address of the several purchasers of such beer and such other information as the state tax commission may require, and such permit holders shall at the time of filing said report pay to the state tax commission the amount of tax due at the rate fixed in accordance with the provisions of this chapter.

A penalty of ten percent of the amount of the tax shall be added thereto if the report is not filed and the tax paid to the commission by said tenth day of the calendar month. [C35, §1921-f119; 48GA, ch 80,§10.]

1921.122 Books of account required. Each class "A" permittee shall keep proper books of account and records showing the amount of beer sold by him, which books of account shall be at all times open to inspection by the state tax commission or its authorized representative. Each class "B" and class "C" permittee shall

keep proper books of account and records showing each purchase of beer made by him, and the date and the amount of each purchase and the name of the person from whom each purchase was made, which books of account and records shall be at all times open to inspection by the state tax commission or its authorized representative. [C35,§1921-f120; 48GA, ch 80,§11.]

1921.123 Separate locations — class "A". Every class "A" permittee having more than one place of business shall be required to have a separate license for each separate place of business maintained by such permittee wherein such beer is stored, warehoused, or sold. [C35,§1921-f121.]

1921.124 Separate locations—class "B" or "C". Every person holding a class "B" or class "C" permit having more than one place of business wherein such beer is sold shall be required to have a separate license for each separate place of business, except as otherwise herein provided. [C35,§1921-f122.]

1921.125 Mandatory revocation. If a permit holder under the provisions of this chapter, is convicted of a felony or is convicted of a sale of beer contrary to the provisions of this chapter or is convicted of bootlegging, or who is guilty of the sale or dispensing of wines or spirits in violation of the law, or who shall allow the mixing or adding of alcohol to beer or any other beverage on the premises of class "B" permittees or who shall be guilty of the violation of this chapter as amended, or of any ordinances enacted by any city or town as provided for in this chapter, his permit shall be revoked by the authorities issuing same, and he shall not again be allowed to secure a permit for the distribution or sale of beer nor shall he be an employee of any person engaged in the manufacture, distribution or sale of beer. [C35,§1921-f123.]

1921.126 Alcoholic content. No liquor for beverage purposes having an alcoholic content greater than four percent by weight, shall be used, or kept for any purpose in the place of business of class "B" permittees, or on the premises of such class "B" permittees, at any time. A violation of any provision of this section shall be grounds for revocation of the permit. This section shall not apply in any manner or in any way, to drug stores regularly and continuously employing a registered pharmacist, from having alcohol in stock for medicinal and compounding purposes. [C35,§1921-g4.]

1921.127 Purchase from nonpermit holder. It shall be unlawful for the holder of any class "B" or class "C" permit issued under the provisions of this chapter to sell beer, except beer purchased from a person holding a subsisting class "A" permit issued in accordance with the provisions of this chapter, and/or on which the tax provided in section 1921.120 has been paid.

Provided, however, the provisions of this section shall not apply to the holders of special class "B" permits issued under section 1921.109 for sales in cars engaged in interstate commerce.

It shall be unlawful for any person not holding a class "A" permit to import beer into this state for the purpose of sale or resale. [C35, §1921-f124.]

1921.128 Distribution of funds. The revenues obtained from permit fees and the barrel tax collected under the provisions of this chapter shall be distributed as follows:

a. All permit fees collected under the provisions of this chapter by any municipality shall be retained by such municipality and allocated to its general fund.

b. All license fees and taxes collected by the state tax commission shall accrue to the state sinking fund for public deposits as created in chapter 352.2. [C35,§1921-f125; 48GA, ch 80 §12.]

1921.129 Power of municipalities. It is expressly provided, any provision of this chapter to the contrary notwithstanding, that cities and towns, including cities under special charter, and boards of supervisors, shall have the power and authority to revoke any permit issued under their authority for a violation of any of the provisions of this chapter, or any ordinance adopted by a city or town under the provisions hereof, or any rule or regulation adopted by a board of supervisors, or for any cause which, in the judgment of the governing body, may be inimical to or prevent the carrying out of the intent and purposes of this chapter. Any permit revoked as in this chapter provided shall not be renewed or a new permit shall not be granted to the same person for a period of one year from the date of revocation; further, the governing body may refuse to issue a permit effective on the same premises to any other person for a period of one year from the date of revocation. Cities and towns, including cities under special charter, are hereby empowered to adopt ordinances for the enforcement of this chapter, and are further empowered to adopt ordinances providing for the limitation of class "B" permits, as follows:

Allowing only one class "B" permit to be issued upon application meeting the requirements of this chapter, for each five hundred population, or fractional part thereof, up to twenty-five hundred, and allowing only one additional permit for each seven hundred fifty population or fractional part thereof, over and above twenty-five hundred, provided, however, that in towns having a population of one thousand or less, two permits shall be allowed if proper application is made therefor in accordance with the requirements of the provisions of said chapter, and said city and town councils are further empowered to adopt ordinances, subject to the express provisions of section 1921.115, for the fixing of the hours during which beer may be sold and consumed in the places of business of class "B" permittees, and further providing that subject to the express provisions of said section 1921.115 no sale or consumption of beer shall be allowed on the premises of a

class "B" permittee, as above provided, between the hours of one a. m. and six a. m.; and for the location of the premises of class "B" permittees; and for the prohibiting or regulation of dancing in places where beer is sold; and are empowered to adopt ordinances, not in conflict with the provisions of this chapter, governing any other activities or matters which may affect the sale and distribution of beer under class "B" permits and the welfare and morals of the community involved.

In determining the number of permits to be issued under the provisions of this section, class "B" permits issued to clubs and hotels as contemplated in this chapter, shall be excluded from the limitation as to number, as in this section provided. [C35,§1921-f126.]

1921.130 Closing hours. Subject to the express provisions of section 1921.115, no beer shall be sold or consumed in the places of business of class "B" permittees located outside of a city or town between the hours of one a. m. and six a. m., except clubs as contemplated in section 1921.111. Boards of supervisors are authorized and empowered, subject to the above, to fix opening and closing hours and are further authorized and empowered to adopt rules and regulations for the prohibiting or regulation of dancing in places where beer is sold; and are empowered to adopt rules and regulations, not in conflict with the provisions of this chapter, governing any other activities or matters which may affect the sale and distribution of beer under class "B" permits and the welfare and morals of the community involved. [C35,§1921-g5.]

1921.131 Bottling beer. No person, firm or corporation shall bottle beer within the state of Iowa, except class "A" permittees who have complete equipment for bottling beer and who have received the approval of the local board of health as to sanitation, and it shall be the duty of local boards of health to inspect the premises and equipment of class "A" permittees who desire to bottle beer. [C35,§1921-g6.]

1921.132 Violations. Any person who violates any of the provisions of this chapter, or who manufactures for sale or sells beer without a permit as provided herein, or who makes a false statement concerning any material fact in submitting any application for a permit, or for a renewal of a permit, or in any hearing concerning the revocation thereof, shall be punished by a fine of not less than three hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail for not less than three months, nor more than one year, or by both such fine and imprisonment. It is hereby made unlawful for any person to use or consume beer upon the public streets or highways, or in automobiles or other vehicles on said streets or highways, and any person violating this provision of this chapter shall be fined not to exceed one hundred dollars or imprisonment in the county jail, not to exceed thirty days. [C35,§1921-f127.]

1921.133 Labels on bottles, barrels, etc.—conclusive evidence. All bottles, kegs, barrels or other original containers in which beer is sold in this state shall bear a label on the outside thereof, stating as follows: "This beer does not contain more than four per centum of alcohol by weight." The label on any bottle, keg, barrel or other container, in which beer is offered for sale in this state, representing the alcoholic content of such beer as being in excess of four per centum by weight shall be conclusive evidence as to the alcoholic content of the beer contained therein. [C35,§1921-f128.]

Constitutionality, §1921-f129, code 1935; 45ExGA, ch 25, §37

CHAPTER 94

GENERAL PROHIBITIONS

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1922 Interpretation. Courts and jurors shall construe this title so as to prevent evasion. [C51,§929; R60,§1581; C73,§1554; C97,§2431; C24, 27, 31, 35,§1922.]

1923 Definition. The word "liquor" or the phrase "intoxicating liquor" when used in this title, shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, wine, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever provided, however, that the words "liquor" or "intoxicating liquor" wherever used in this title of the code shall not be construed to include beer, ale, porter, stout, or any

other malt liquor containing not more than four percent of alcohol by weight. [R60,§1583; C73, §1555; C97,§2382; SS15,§2382; C24, 27, 31, 35, §1923.]

Additional definitions, §§1921.005, 1921.096

1924 General prohibition. No one, by himself, clerk, servant, employee, or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale, or have possession of any intoxicating liquor, except as provided in this title; or own, keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquor with intent to violate any provision of this title, or authorize or permit the same to be done; or manufacture, own, sell, or have possession of any manufactured or compounded article, mixture or substance, not in a liquid form, and containing alcohol which may be converted into a beverage by a process of pressing or straining the alcohol therefrom, or any instrument intended for use and capable of being used in the manufacture of intoxicating liquor; or own or have possession of any material used exclusively in the manufacture of intoxicating liquor; or use or have possession of any material with intent to use it in the manufacture of intoxicating liquors; provided, however, that alcohol may be manufactured for industrial and nonbeverage purposes, by persons, firms, or corporations who have qualified for that purpose as provided by the laws of the United States, and the laws of the state of Iowa. Such alcohol, so manufactured, may be denatured, transported, used, possessed, sold, and bartered and dispensed, subject to the limitations, prohibitions and restrictions imposed by the laws of the United States and the state of Iowa. [C51,§§924–928; R60,§§1559, 1563, 1583, 1587; C73,§§1523, 1540–1542, 1555; C97,§2382; SS15,§2382; C24, 27, 31, 35,§1924.]

Referred to in §1926
Permissible possession and use, §§1921.022 et seq., 1936, 1966.2, 13441.31, 13441.32; also chs 100–104
Sale of drugged liquors, §13240; to Indians, §13241

1925 Accessories. Any clerk, servant, employee, or agent engaged or aiding in any violation of this title shall be charged and convicted as principal. [C51,§928; R60,§§1559, 1562, 1587; C73,§§1523, 1540–1542; C97,§2382; SS15,§2382; C24, 27, 31, 35,§1925.]

Accessories in general, §12895

1926 First conviction. Whoever is found guilty of violating any of the provisions of section 1924, shall be punished as a bootlegger as provided in this chapter. [C51,§930; R60,§§1561–1563; C73,§§1525, 1540–1542; C97,§2383; S13, §2383; C24, 27, 31, 35,§1926.]

Second and subsequent conviction, §§1964, 1965

1926.1 Clerk to report. The clerk of the district court of any county shall within forty-eight hours after a judgment of conviction has been entered by the district court in his county against any person for any violation of the intoxicating liquor laws of this state, mail to the state bureau of investigation at Des Moines, a complete report thereof on forms to be furnished by said bureau. [C27, 31, 35,§1926-b1.]

1927 "Bootlegger" defined. Any person who shall, by himself, or his employee, servant, or agent, for himself or any person, company, or corporation, keep or carry around on his person, or in a vehicle, or leave in a place for another to secure, any intoxicating liquor as herein defined, with intent to sell or dispose of the same by gift or otherwise, or who shall within this state, in any manner, directly or indirectly, solicit, take, or accept any order for the purchase, sale, shipment, or delivery of intoxicating liquor, in violation of law, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or who shall in any manner procure for, or sell, or give any intoxicating liquors to any minor for any purpose, or give to or in any manner procure for or sell the same to any intoxicated person, or to one in the habit of becoming intoxicated, shall be termed a bootlegger, and shall be fined not less than three hundred dollars nor more than one thousand dollars and be imprisoned in the county jail not less than three months nor more than one year. [C51,§§924–928; R60,§§1559, 1562, 1563, 1583, 1587; C73,§§1523, 1540–1542, 1555; C97,§2382; SS15,§§2382, 2461-a; C24, 27, 31, 35,§1927.]

Injunction against, §2031
See also §1921.059

1928 Venue. In case of a sale in which a shipment or delivery of such liquors is made by a person or corporation, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent, or employee. [C24, 27, 31, 35,§1928.]

Venue, §1945.4

1929 Nuisance. The building, erection, or place, or the ground itself, in or upon which the unlawful manufacture or sale or keeping with intent to sell, use, or give away said liquors is carried on or continued or exists, and the furniture, fixtures, vessels and contents, are declared a nuisance, and in addition to all other penalties provided in this title, shall be abated as hereinafter provided. [C51,§935; R60,§1564; C73. §1543; C97,§2384; C24, 27, 31, 35,§1929.]

Judgment of abatement, §2032
See also §1921.060

1930 Penalty for nuisance. Whoever shall erect, establish, continue or use any building, erection, or place for any of the purposes herein prohibited, is guilty of a nuisance, and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and be imprisoned in the county jail for a period of not less than three months nor more than one year. [C51,§935; R60,§1564; C73,§1543; C97,§2384; C24, 27, 31, 35,§1930.]

Extent of imprisonment, §§13588, 13964

1931 Intoxication punished. If any person shall be found in a state of intoxication, any

peace officer shall, without a warrant, take him into custody and detain him in some suitable place until an information can be made before a magistrate and a warrant of arrest issued, under which he shall at once be taken before the magistrate issuing the same, or, if for any reason he cannot act, to the next nearest one, where he shall be tried, and, if found guilty, shall be fined in the sum of not less than five nor more than twenty-five dollars and costs of prosecution, or imprisoned in the county jail not more than thirty days. [R60,§§1568, 1586; C73,§1548; C97,§2402; C24, 27, 31, 35,§1931; 48GA, ch 81, §1.]

Referred to in §1932
See also §1921.042

1932 Penalty remitted. The penalty, or any portion of it, imposed under section 1931, may be remitted by the magistrate before whom the trial is had, and the accused discharged from custody, upon his giving information in writing and under oath, stating when, where, and of whom he purchased or received the liquor which produced the intoxication, and the kind and character of the liquor, and, in addition, giving bail for his appearance before any court to give evidence in any action or complaint to be commenced or preferred against such party for furnishing the same. [R60,§§1568, 1586; C73, §1548; C97,§2402; C24, 27, 31, 35,§1932.]

1933 Clubrooms. Every person who shall, directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist, or abet in keeping or maintaining, any clubroom or other place in which intoxicating liquors are received or kept for the purpose of use, gift, barter, or sale, or for distribution or division among the members of any club or association by any means whatever, and every person who shall use, barter, sell, or give away, or assist or abet another in bartering, selling, or giving away, any intoxicating liquors so received or kept, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months. [C97,§2404; C24, 27, 31, 35,§1933.]

1934 False statements. If any person, for the purpose of procuring the shipment, transportation, or conveyance of any intoxicating liquors within this state, shall make to any company, corporation, or common carrier, or to any agent thereof, or other person, any false statements as to the character or contents of any box, barrel, or other vessel or package containing such liquors; or shall refuse to give correct and truthful information as to the contents of any such box, barrel, or other vessel or package so sought to be transported or conveyed; or shall falsely mark, brand, or label such box, barrel, or other vessel or package in order to conceal the fact that the same contains intoxicating liquors, for the purposes aforesaid; or shall by any device or concealment procure or attempt to procure the conveyance or transportation of such liquors as herein prohibited, he shall be fined for each offense one hundred dollars and costs of prosecution, and the costs shall include a reasonable attorney fee to be taxed by the court, and be committed to the county jail until such fine and costs are paid. [C97,§2420; C24, 27, 31, 35, §1934.]

Referred to in §1936
Extent of imprisonment, §§13588, 13964

1935 Packages in transit. Any peace officer of the county under process or warrant to him directed shall have the right to open any box, barrel, or other vessel or package for examination, if he has reasonable ground for believing that it contains intoxicating liquors, either before or while the same is being so transported or conveyed. [C97,§2420; C24, 27, 31, 35,§1935.]

1936 Labeling shipments. It shall be unlawful for any common carrier or for any person to transport or convey by any means, whether for compensation or not, within this state, any intoxicating liquors, unless the vessel or other package containing such liquors shall be plainly and correctly labeled or marked, showing the quantity and kind of liquors contained therein, the name of the party to whom they are to be delivered, and the name of the shipper. No person shall be authorized to receive or keep such liquors unless the same be marked or labeled as herein required. The violation of any provision of this section by any common carrier, or any agent or employee of any carrier, or by any person, shall be punished the same as provided in section 1934. [C97,§2421; C24, 27, 31, 35,§1936.]

Referred to in §1938

1937 Carrying or drinking on trains. Any person who shall, upon any railway car, street or interurban car, in service, carry upon his person or in any hand baggage, suit case, or otherwise, for unlawful purposes, any intoxicating liquor, and any person who shall drink any such liquors as a beverage on any such car, shall be guilty of a misdemeanor. [S13,§2461-f; SS15,§2461-g1; C24, 27, 31, 35,§1937.]

Referred to in §1938
Punishment, §12894

1938 Illegally transported liquors. Liquors conveyed, carried, transported, or delivered in violation of either of sections 1936 or 1937, whether in the hands of the carrier or someone to whom they shall have been delivered, shall be subject to seizure and condemnation, as liquors kept for illegal sale. [C97,§2421; C24, 27, 31, 35,§1938.]

1939 Shipments unlawful — exception. It shall be unlawful for any person, firm, or corporation, or any agent or employee thereof, to carry any intoxicating liquor into the state or from one point to another within the state for the purpose of delivering, or to deliver same to any person, company, or corporation within the state, except for lawful purposes. [SS15,§2421-a; C24, 27, 31, 35,§1939.]

Transportation permitted, §1921.026

1940 Record of shipments. It shall be the duty of all common carriers, or corporations, or persons who shall for hire carry any intoxicating liquor into the state, or from one point to another within the state, for the purpose of de-

livery, and who shall deliver such intoxicating liquor to any person, company, or corporation, to keep, at each station or office where it employs an agent or other person to make delivery of freight and keep records relative thereto, a record book, wherein such carrier shall, promptly upon receipt and prior to delivery, enter in ink, in legible writing, in full, the name of the consignor of each shipment of intoxicating liquor to be delivered from or through such station, from where shipped, the date of arrival, the quantity and kind of liquor, so far as disclosed by lettering on the package or by the carrier's records, and to whom and where consigned, and the date delivered. [SS15,§2421-b; C24, 27, 31, 35,§1940.]

Referred to in §1941

1941 Inspection of shipping records. The record book required by section 1940 shall be kept in the said local office of such carrier and shall, during business hours, be open to inspection by any peace or law enforcing officer. It shall be a misdemeanor to refuse such inspection. [SS15,§§2421-c,-d; C24, 27, 31, 35,§1941.]

1942 Delivery conditional. No shipment billed in whole or in part as intoxicating liquor shall be delivered to the consignee until such consignee upon such record book enters in ink, in legible writing, his full name and residence or place of business, giving the name of the town or city, and the street name and number where there is such, and certifies that such liquor is for his own lawful purposes. [SS15, §2421-b; C24, 27, 31, 35,§1942.]

1943 Unlawful delivery. It shall be a misdemeanor for any corporation, common carrier, person, or any agent or employee thereof:

1. To deliver any intoxicating liquors to any person other than to the consignee.
2. To deliver any intoxicating liquors without having the same receipted for as heretofore provided.
3. To deliver any intoxicating liquors where there is reasonable ground to believe that such liquor is intended for unlawful use. [SS15, §2421-c; C24, 27, 31, 35,§1943.]

Punishment, §12894
Receipts required, §1940

1944 Immunity from damage. In no case shall any corporation, common carrier, person, or the agent thereof, be liable in damages for complying with any requirement of this title. [SS15,§2421-c; C24, 27, 31, 35,§1944.]

1945 Federal statutes. The requirements of this title relative to the shipment and delivery of intoxicating liquors and the records to be kept thereof shall be construed in harmony with federal statutes relating to interstate commerce in such liquors. [SS15,§2421-e; C24, 27, 31, 35,§1945.]

1945.1 Illegal transportation. Any person who unlawfully transports intoxicating liquor into this state shall be guilty of a felony and upon conviction thereof shall be punished as follows:

1. For the first offense by a fine not less than five hundred dollars, nor more than one thousand dollars or by imprisonment in the penitentiary not exceeding two years in the discretion of the court.
2. For the second and each subsequent offense by imprisonment in the penitentiary not more than three years. [C31, 35,§1945-d1.]

1945.2 Illegal transportation generally. Any person, firm, or corporation, and any agent or employee thereof, who engages in the transportation of intoxicating liquors shall for each act of transportation be fined in a sum not exceeding one thousand dollars or be imprisoned in the county jail not exceeding one year or be punished by both such fine and imprisonment and pay the cost of prosecution, including a reasonable attorney fee to be taxed by the court. [R60,§1580; C73,§1553; C97,§2419; C24,§2058; C27, 31, 35,§1945-a1.]

1945.3 Defenses. In any prosecution under this title for the unlawful transportation of intoxicating liquors it shall be a defense:

1. That the character and contents of the shipment or thing transported were not known to the accused or to his agent or employee, or
2. That the purchase and transportation of said liquors was authorized by a law of this state. [C97,§2419; C24,§2059; C27, 31, 35,§1945-a2.]

Authorized transportation, §§1921.026, 1936, 1966.2; also chs 100–104

1945.4 Venue. In any prosecution under this title for the unlawful transportation of intoxicating liquors, the offense shall be held to have been committed in any county in the state in which the liquors are received for transportation, through which they are transported, or in which they are delivered. [C97,§2419; C24, §2060; C27, 31, 35,§1945-a3.]

Venue, §1928

1945.5 Right to receive liquors. The consignee of intoxicating liquors shall, on demand of the carrier transporting such liquors, furnish the carrier, at the place of delivery, with legal proof of the consignee's legal right to receive such liquors at the time of delivery, and until such proof is furnished the carrier shall be under no legal obligation to make delivery nor be liable for failure to deliver. [C24,§2061; C27, 31, 35,§1945-a4.]

1945.6 Delivery to sheriff. If such proof be not furnished the carrier within ten days after demand, the carrier may deliver such liquors to the sheriff of the county embracing the place of delivery, and such delivery shall absolve said carrier from all liability pertaining to said liquors. [C24,§2062; C27, 31, 35, §1945-a5.]

Similar provision, §2152 et seq.

1945.7 Destruction. The sheriff shall, on receipt of such liquors from the carrier, report the receipt to the district court of his county or to a judge thereof, and the court or judge shall proceed to summarily enter an order for the destruction of said liquors. [C24,§2063; C27, 31, 35,§1945-a6.]

Destruction, §13441.31

CHAPTER 95

INDICTMENT, EVIDENCE, AND PRACTICE

1946 Peace officers to file information.
1947 Peace officer to investigate.
1948 Violation of duty.
1949 Services and expense.
1950 Duty of county attorney.
1951 Attorney fee.
1952 Unnecessary allegations.
1953 Counts.
1954 Former conviction.
1955 "Second conviction" defined.
1956 Record of conviction.
1957 Proof of sale.
1958 Purchaser as witness.
1959 Peace officer as witness.
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1961 Enforcement of lien.
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1964 Second and subsequent conviction.
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1965.1 Duty of county attorney.
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1946 Peace officers to file information. Peace officers shall see that all provisions of this title are faithfully executed within their respective jurisdictions, and when informed, or they have reason to believe, that the law has been violated, and that proof thereof can be had, they shall file an information to that effect against the offending party before a magistrate, who shall thereupon proceed according to law. [R60, §1578; C73,§1551; C97,§2428; S13,§2428; C24, 27, 31, 35,§1946.]

Referred to in §1948
S13,§2428, editorially divided

1947 Peace officer to investigate. Any peace officer shall, whenever directed in writing so to do by the county attorney, make special investigation of any alleged or supposed infraction of the law within his county, and report in writing with reference thereto within a reasonable time to such county attorney. [R60,§1578; C73, §1551; C97,§2428; S13,§2428; C24, 27, 31, 35, §1947.]

Referred to in §1948

1948 Violation of duty. Any peace officer failing to comply with any of the provisions of sections 1946 and 1947 shall pay a fine of not less than ten nor more than fifty dollars, and a conviction shall work a forfeiture of his office. [R60,§1578; C73,§1551; C97,§2428; S13,§2428; C24, 27, 31, 35,§1948.]

1949 Services and expense. The peace officer shall file with the county auditor a detailed, sworn statement of the services rendered and of his actual itemized expenses incurred in connection with said investigation, accompanied by the written order of the county attorney. If the officer be one who is receiving a definite and fixed salary, the board of supervisors shall audit and allow only so much of such expense account as it shall find reasonable and necessary. If the officer be one not receiving a fixed and definite salary, the board of supervisors shall allow such additional sum for services as it may deem reasonable and just, which allowance shall be final. [R60,§§1578, 4168; C73, §§1551, 3829; C97,§2428; S13,§2428; C24, 27, 31, 35,§1949.]

1950 Duty of county attorney. Upon trials of information for violations of this title, the county attorney shall appear for the state, unless some other attorney, selected by the peace officer who filed the information, shall have previously appeared. [R60,§1578; C73,§§1551, 3829; C97,§2428; S13,§2428; C24, 27, 31, 35, §1950.]

Referred to in §1951

1951 Attorney fee. The attorney selected by a peace officer in accordance with the provisions of section 1950, shall receive, for prosecuting such charge before a justice of the peace, five dollars, to be taxed as costs in the case. [R60,§1578; C73,§3829; C97,§2428; S13, §2428; C24, 27, 31, 35,§1951.]

1952 Unnecessary allegations. In any indictment or information under this title, it shall not be necessary:

1. To set out exactly the kind or quantity of intoxicating liquors manufactured, sold, given in evasion of the statute, or kept for sale.
2. To set out the exact time of manufacture, sale, gift, or keeping for sale.
3. To negative any exceptions contained in the enacting clause or elsewhere, which may be proper ground of defense.

But proof of the violation by the accused of any provision of this title, the substance of which violation is briefly set forth, within the time mentioned in said indictment or information, shall be sufficient to convict such person. [R60,§1569; C73,§1549; C97,§2424; C24, 27, 31, 35,§1952.]

Negativing exceptions, §§3169.18, 13732.22

1953 Counts. Informations or indictments under this title may allege any number of violations of its provisions by the same party, but the several charges must be set out in separate counts, and the accused may be convicted and punished upon each one as on separate informations or indictments, and a separate judgment shall be rendered on each count under which there is a finding of guilty. [C51,§931; R60,§1562; C73,§1540; C97,§2425; C24, 27, 31, 35,§1953.]

1954 Former conviction. In any prosecution for a second or subsequent offense, as provided in this title, it shall not be requisite to set forth in the indictment or information the record of a former conviction, but it shall be sufficient briefly to allege such conviction.

[R60,§1569; C73,§1549; C97,§2424; C24, 27, 31, 35,§1954.]

Subsequent offenses, §§1955, 1964

1955 "Second conviction" defined. The second or subsequent convictions provided for in this title shall be convictions on separate informations or indictments, and, unless shown in the information or indictment, the charge shall be held to be for a first offense. [R60, §1562; C73,§1540; C97,§2425; C24, 27, 31, 35, §1955.]

1956 Record of conviction. On the trial of any cause, wherein the accused is charged with a second or subsequent offense, a duly authenticated copy of the former judgment in any court in which such judgment was so had, shall be competent and prima facie evidence of such former judgment. [SS15,§2461-n; C24, 27, 31, 35,§1956.]

1957 Proof of sale. It shall not be necessary in every case to prove payment in order to prove a sale within the true meaning and intent of this title. [R60,§1569; C73,§1549; C97,§2424; C24, 27, 31, 35,§1957.]

1958 Purchaser as witness. The person purchasing any intoxicating liquor sold in violation of this title shall in all cases be a competent witness to prove such sale. [R60,§1569; C73, §1549; C97,§2424; C24, 27, 31, 35,§1958.]

1959 Peace officer as witness. Every peace officer shall give evidence, when called upon, of any facts within his knowledge tending to prove a violation of the provisions of this title. [R60,§1578; C73,§1551; C97,§2428; S13,§2428; C24, 27, 31, 35,§1959.]

1960 Judgment lien. For all fines and costs assessed or judgments rendered of any kind against any person for a violation of any provision of this title, or costs paid by the county on account of such violation, the personal and real property, whether exempt or not, except the homestead, as well as the premises and property, personal and real, occupied and used for the purpose, with the knowledge of the owner or his agent, by the person manufacturing, selling, or giving, contrary to the provisions of this title, or keeping with intent to sell intoxicating liquors contrary to law, shall be liable, and the same shall be a lien on such real estate until paid. [R60,§1579; C73,§§1552, 1558; C97,§2422; C24, 27, 31, 35,§1960.]

Referred to in §1962
Lien of judgment in general, §11602

1961 Enforcement of lien. Costs paid by the county for the prosecution of actions or proceedings, civil or criminal, under this title, as well as the fines inflicted or judgments recovered, may be enforced against the property upon which the lien attaches by execution, or by action against the owner of the property to subject it to the payment thereof. [C73,§1558; C97,§2422; C24, 27, 31, 35,§1961.]

Referred to in §1962
Equitable proceedings, §11815

1962 Evidence of owner's knowledge. In actions under sections 1960 and 1961, evidence of the general reputation of the place kept shall be admissible on the question of knowledge of the owner, and written notice given him or his agent by any citizen of the county shall be sufficient to charge him with the same. [C97,§2422; C24, 27, 31, 35,§1962.]

General reputation, §§2022, 2053, 13176

1963 Action to subject property. The county attorney in the name of the state, or any citizen of the county in his own name, may maintain an action to subject real property to the payment of the costs and fines aforesaid, and in all such actions, if successful, there shall be added to the judgment, as additional costs, in favor of the county attorney or citizen, as the case may be, a reasonable attorney fee to be fixed by the court. [C24, 27, 31, 35,§1963.]

1964 Second and subsequent conviction. Whoever has been convicted, or has entered a plea of guilty, in a criminal action, in any court of record, of a violation:

1. Of any provision of this title, or of the laws amendatory of, or supplementary to, this title, or

2. Of any provision of the prior laws of this state relating to intoxicating liquors which were in force prior to the enactment of this title, or

3. Of any provision of the laws of the United States or of any other state relating to intoxicating liquors,—and is thereafter convicted or enters a plea of guilty of a subsequent criminal offense against any provision of this title or of the laws amendatory of, or supplementary to, this title, shall be punished as follows:

a. For his second conviction, by a fine of not less than five hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for not less than six months nor more than one year.

b. For his third and each subsequent conviction, by imprisonment in the state penitentiary for not more than three years. [R60,§§1561, 1563, 1577; C73,§§1525, 1538, 1540, 1542, 1559; SS15,§2461-m; C24, 27, 31, 35,§1964.]

1965 Habitual violators. Any person who has been twice convicted of contempt either under the provisions of this title or under the provisions of any former law of this state relating to intoxicating liquors, or who has been once convicted of contempt under the provisions of this title and once convicted of contempt under said prior laws, or who has been once convicted of contempt under either this title or under said prior laws and once convicted of a criminal offense under either this title or under said prior laws, shall be deemed an habitual violator, and if such person is thereafter convicted in the district court under an indictment or trial information of a violation of this title, he shall be imprisoned in the penitentiary or men's or women's reformatory for a term of not exceeding three years. [C24, 27, 31, 35,§1965.]

Contempt, §2020

1965.1 Duty of county attorney. It is made the specific and special duty of the county attorney in all criminal prosecutions under this title and under statutes amendatory thereof, or supplementary thereto, to make diligent and careful inquiry, search, and investigation for former convictions in this state, of the accused, and equally the duty of the county attorney properly and adequately to plead in the indictment or trial information all former convictions of the accused of which he has acquired knowledge. [C31, 35,§1965-d1.]

1965.2 Duty of court. When an indictment or trial information contains an allegation of one or more former convictions of the accused, and a plea of guilt is entered to the main offense or offenses only, the court shall require proof of said allegations of former convictions and the same shall not be dismissed or ignored except on the sworn statement of the county attorney that he is unable to prove and establish the same. [C31, 35,§1965-d2.]

1966 Rep. by 45GA, ch 39

1966.1 Prima facie evidence. In all actions, prosecutions and proceedings, criminal or civil, under the provisions of this title, the finding of intoxicating liquors or of instruments or utensils used in the manufacture of intoxicating liquors, or materials which are being used, or are intended to be used in the manufacture of intoxicating liquors, in the possession of or under the control of any person, under and by authority of a search warrant or other process of law, and which shall have been finally adjudicated and declared forfeited by the court, shall be prima facie evidence, in any action, criminal or civil, of maintaining a nuisance or bootlegging, or of illegal transportation of intoxicating liquors, as the case may be, by such person. [C27, 31, 35,§1966-a1.]

Referred to in §1966.2
See code 1897, §2427

1966.2 Defense. The possessor of liquor may show in defense, that the liquor found in his possession was manufactured, transported, and sold to him legally, as the possessor of a permit issued according to the laws of the United States and the state of Iowa, or wine received from a minister authorized by the church of which he is a member to administer wine as a religious observance or that the liquor found in his possession was purchased from a pharmacist authorized to fill prescriptions for medical purposes, or lawfully furnished to him by a physician, and that the said liquor was owned and kept by him for medical purposes only.

Nothing in this and section 1966.1 shall prevent any peace officer, in the discharge of his duty, from having possession of, or from transporting intoxicating liquor. [C27, 31, 35, §1966-a2.]

See code 1897, §2427

1966.3 Attempt to destroy. The destruction of or attempt to destroy any liquid by any person while in the presence of peace officers or while a property is being searched by a peace officer, shall be prima facie evidence that such liquid is intoxicating liquor and intended for unlawful purposes. [C27, 31, 35,§1966-a3.]

CHAPTER 96

SEARCH WARRANTS

This chapter (§§1967 to 1999, inc.) repealed by 46GA, ch 125. See chapter 617.

CHAPTER 97

SEIZURE AND SALE OF CONVEYANCES

2000 "Conveyance" defined.
2001 Seizure under transportation.
2002 Replevin not available.
2003 Custody.
2004 Release.
2005 Information.
2006 Forfeiture.
2007 Optional procedure.
2008 Procedure as to conveyance.
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2010 Procedure.
2011 Duty of commissioner.
2012 Orders as to claims.
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2013.1 Requisition by department.
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2013.4 Other state departments.
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2014 Proceeds.
2015 School fund.
2016 Duplicate receipts.

2000 "Conveyance" defined. The term "conveyance" as used in this chapter shall embrace wagons, buggies, teams, automobiles, motor vehicles, water and air craft, and all other forms of conveyances except railway, street, and interurban cars. [C24, 27, 31, 35,§2000.]

2001 Seizure under transportation. A peace officer who discovers that intoxicating liquor has been or is being transported in violation of law, shall summarily arrest the offender and likewise seize said liquor and the conveyance used to effect said transportation. [C24, 27, 31, 35, §2001.]

Referred to in §2002

2002 Replevin not available. A conveyance seized under section 2001 shall not be subject to replevin. [C24, 27, 31, 35,§2002.]

2003 Custody. Said conveyance shall be turned over to the sheriff of the county in which the seizure was made, and shall be retained in

his custody until disposed of as hereinafter provided. [C24, 27, 31, 35,§2003.]

2004 Release. Said conveyance shall be returned to the owner upon execution by him of a good and valid bond with sufficient sureties in a sum double the value of the property, which said bond shall be approved by the sheriff of the county and shall be conditioned to pay the value of said conveyance, when seized, to said sheriff in case a judgment of forfeiture be entered against said conveyance. [C24, 27, 31, 35,§2004.]

2005 Information. The officer shall at once file an information against the accused before some court of the county other than the district court. In addition to the information, the officer shall also file with the said court a written return or statement setting forth a brief description of the conveyance, liquors, and vessels seized. [C24, 27, 31, 35,§2005.]

2006 Forfeiture. The court, upon conviction of a person so arrested, shall enter an order of forfeiture of the liquors, vessels, and conveyance seized and forthwith file with the clerk of the district court a certified transcript of such order. The district court or a judge thereof shall, on such notice as the court or judge may prescribe, proceed to adjudicate the legality and priority of all claims to and liens on said conveyance, and shall proceed against said liquors and vessels as in case of transcripts filed in search warrant proceedings. [C24, 27, 31, 35, §2006.]

Referred to in §§2007, 2008
Proceedings under search warrants, ch 617

2007 Optional procedure. In lieu of declaring a forfeiture, under section 2006, of said liquors and vessels, the said court may, in any case, proceed against the said liquors and vessels, in the manner in which it would proceed had said liquors been seized on a duly issued search warrant. [C24, 27, 31, 35,§2007.]

Procedure under search warrant, ch 617

2008 Procedure as to conveyance. In lieu of declaring a forfeiture, under section 2006, of said conveyance, the said court may, in any case, proceed as provided in section 2009. [C24, 27, 31, 35,§2008.]

2009 Information. An information, under oath, and in substantially the following form, shall be filed in the district court against a conveyance promptly upon the seizure thereof, to wit:

"State of Iowa
vs.
One certain automobile (or other conveyance as the case may be)
.....being duly sworn do say on oath that (here describe the conveyance with reasonable certainty) was, on the.....day of....., 19...., in the county of....., in the state of Iowa, employed in the transportation of intoxicating liquors in violation of law, and, because of such unlawful use, was at said time and place seized and is now in the custody of the sheriff of said county; that to the best knowledge and belief of this affiant said conveyance belongs to..... Wherefore it is asked that said conveyance be dealt with as provided by law." [C24, 27, 31, 35, §2009.]

Referred to in §2008

2010 Procedure. Upon the filing of said information, the procedure for the forfeiture of said conveyance shall be the same as is provided for the forfeiture of intoxicating liquors seized under search warrant, except in the following particulars:

1. *Service of notice.* The notice of hearing of forfeiture shall, in addition to the service provided in chapter 617, be published once a week for two weeks in some newspaper published in the city or county in which said conveyance was seized, and if the conveyance be a motor vehicle a copy of the aforesaid notice shall forthwith be mailed to the commissioner of public safety.

2. *Hearing.* Said notice shall fix the day of hearing at a time not less than thirty days after the notice is fully served.

3. *Right to contest.* The written claim of the owner or other claimant shall allege, under oath, that said conveyance was not being employed, when seized, in the unlawful transportation of intoxicating liquors, or that if it was being so employed such use was without the knowledge or consent, directly or indirectly, of said claimant.

4. *Presumption.* If it be made to appear that any intoxicating liquors were found in or on said conveyance when it was seized, it shall be presumed that the conveyance was, when seized, employed with the knowledge and consent of all claimants, in the unlawful transportation of such liquors.

5. *Trial.* The trial shall be by the court.

6. *Judgment.* A judgment of forfeiture shall direct that said conveyance be sold by the sheriff as chattels under execution, and a certified copy of such order shall constitute an execution. [C24, 27, 31, 35,§2010; 47GA, ch 134,§528; 48GA, ch 121,§21.]

2011 Duty of commissioner. The commissioner of public safety, upon receipt of the notice aforesaid, shall, if the owner appears of record in his office, notify such owner of the fact of seizure, and if not of record, said commissioner shall mail such description to the county treasurer of each county. [C24, 27, 31, 35,§2011; 47GA, ch 134,§529; 48GA, ch 120,§25a; ch 121, §22.]

2012 Orders as to claims. On the hearing the court shall determine whether any claim or lien shall be allowed. If allowed, he shall enter an order fixing therein the amount and priority of all such claims or liens allowed, and shall enter such further order for the protection of the claimants or lienholders as the evidence may warrant. [C24, 27, 31, 35,§2012.]

2013 Notice. Whenever a judgment of forfeiture has been entered by any court, directing the sale of a conveyance under the provisions of this chapter, the clerk of the district court shall immediately notify the state bureau of

investigation of such order, together with a full description of the conveyance, and if it be a motor vehicle, the name of the manufacturer thereof, the model, serial number, and description of the condition of said motor vehicle, before said conveyance shall be advertised for sale. [C24, 27, 31, 35,§2013.]

43GA, ch 60, §1, editorially divided

2013.1 Requisition by department. The state department of justice may, if the conveyance is such a one as may be used by said department in connection with its duties and the enforcement of the law, requisition said conveyance for said department and said requisition shall be delivered to the clerk of the district court of the county having jurisdiction of such conveyance, within ten days after the notice of judgment of forfeiture has been received by the bureau of investigation. If said conveyance is not so requisitioned within ten days after the clerk of the district court has notified the department of justice of the judgment of forfeiture, then the conveyance shall be sold by the sheriff as provided in this chapter. [C31, 35,§2013-c1.]

Referred to in §2013.5

2013.2 Order for delivery. When any such conveyance is requisitioned by the department of justice, the clerk of the district court shall immediately issue to the sheriff of the county or other officer having possession of said conveyance, an order directing that said conveyance be turned over to the state department of justice, or any of its duly commissioned agents directed by the attorney general to receive it. [C31, 35, §2013-c2.]

Referred to in §2013.5

2013.3 Costs. When any such conveyance is requisitioned by the state department of justice, said department shall pay to the clerk of the district court, the court costs and the expense incurred by the county or the sheriff in keeping said conveyance. [C31,35,§2013-c3.]

Referred to in §2013.5

2013.4 Other state departments. Any department of the state government needing a motor vehicle for official use in said department may make written application therefor to the executive council. The executive council shall, if it determines that said department should have such a motor vehicle, by written application request the department of justice to requisition a suitable motor vehicle for the applicant department whenever one is available, in the manner hereinbefore provided. Whenever any department receives a motor vehicle under the provisions hereof, the head thereof shall cause the court costs and all other costs incurred in connection with the confiscation and forfeiture of said motor vehicle to be paid to the clerk of the court or the sheriff of the proper county, as the case may be. [C31, 35,§2013-c4.]

Referred to in §2013.5

2013.5 Requisition by county or city. The board of supervisors of a county or the council of any city or town in such county, including cities under special charter, may apply to the department of justice that any motor vehicle seized in such county and requisitioned under sections 2013.1 to 2013.4, inclusive, be delivered to such board or council for use in performing official duties by officials and officers of the county or city or town. No officer of any county or city shall be allowed mileage for the performance of any official duty wherein he uses a publicly owned car. The department of justice may allow such application whereupon the automobile shall be delivered to the board of supervisors or to the council for use in accord with such application. Should the county and city or town both make application for the same vehicle and the applications be granted, the vehicle shall be delivered to the public body whose officers first seized the vehicle. [C31, 35,§2013-c5.]

2014 Proceeds. The sheriff shall apply the proceeds of a sale, or of the forfeited bond, in the following order:

1. Expense of keeping the conveyance.
2. Court costs.
3. Liens in the order established by the court.

[C24, 27, 31, 35,§2014.]

2015 School fund. Any balance of said proceeds shall be paid by the sheriff to the county treasurer who shall credit the same to the county school fund. [C24, 27, 31, 35,§2015.]

Temporary school fund, §4471

2016 Duplicate receipts. The sheriff, in paying a balance to the county treasurer, shall take duplicate receipts therefor and file one of said receipts with the county auditor. [C24, 27, 31, 35,§2016.]

CHAPTER 98

INJUNCTION AND ABATEMENT

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2017 Action to enjoin. Actions to enjoin nuisances may be brought in equity in the name of the state by the county attorney, who shall prosecute the same to judgment, or any citizen of the proper county may institute and maintain such a proceeding in his name. [R60,§1564; C73,§1543; C97,§§2405, 2406; S13,§2406; SS15, §2405; C24, 27, 31, 35,§2017.]

See also §1921.062 et seq.

2018 Temporary injunction. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the court or judge, by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the plaintiff may elect, unless the court or judge, by previous order, shall have directed the form and manner in which it shall be presented, that the nuisance complained of exists. [R60,§1564; C73,§1543; C97,§2405; SS15,§2405; C24, 27, 31, 35,§2018.]

2019 Notice. Three days notice **in writing** shall be given the defendant of the hearing of the application, and, if then continued at his instance, the writ as prayed shall be granted as a matter of course. [C97,§2405; SS15,§2405; C24, 27, 31, 35,§2019.]

2020 Scope of injunction. When an injunction has been granted, it shall be binding on the defendant throughout the state, and any violation of the provisions of this title anywhere within the state shall be punished as a contempt, as provided in this chapter. [C97,§2405; SS15,§2405; C24, 27, 31, 35,§2020.]

Contempt, §2027 et seq.

2021 Immediate trial. The action when brought shall be triable at the first term of court after due and timely service of notice of the commencement thereof has been given. [C97,§2406; S13,§2406; C24, 27, 31, 35,§2021.]

2022 General reputation. In all actions to enjoin a nuisance or to establish a violation of the injunction, evidence of the general reputation of the place described in the petition or information shall be admissible for the purpose of proving the existence of the nuisance or the violation of the injunction. [C97,§2406; S13, §2406; C24, 27, 31, 35,§2022.]

General reputation, §§1962, 2053, 13176

2023 Attorney fee. In each and every action in equity for injunction against a person charged with keeping an intoxicating liquor nuisance, and to abate the same, and on each and every action to enjoin and restrain a bootlegger as provided in this title, the court or judge before whom the same shall be heard and determined, shall, if the plaintiff be successful, allow the attorney prosecuting such cause an attorney's fee of twenty-five dollars, such fee to be assessed as cost in such cause, and paid by the defendant, and such fee is not to be paid by the county in which such action is brought. [C97,§§2406, 2429; S13,§2406; C24, 27, 31, 35, §2023.]

Referred to in §2023.2

2023.1 Limitation. In each and every proceeding in equity for a contempt for violating any injunction, temporary or permanent, issued or decreed therein, the court or judge before whom the same shall be heard and determined shall, if the plaintiff be successful, allow the attorney prosecuting such cause a reasonable attorney's fee, such fee to be assessed as costs in such cause, such fee to be paid by the defendant and not to be paid by the county but in no case where the defendant enters a plea of guilty shall the fee be more than twenty-five dollars. [C24,§2023; C27, 31, 35,§2023-a1.]

2023.2 Conditions of taxation. In no case shall an attorney fee be allowed in an intoxicating liquor nuisance injunction proceeding, as provided in section 2023, unless the property in which the nuisance is maintained, and the owner of such property, shall be made party defendants, and an order of abatement issued as a part of the judgment, unless the court or judge hearing the cause shall find from competent evidence that the nuisance has been abated in good faith prior to the hearing, and the costs of the action paid. [C27, 31, 35,§2023-a2.]

2024 Dismissal of action. Such action, when brought by a citizen, shall not be dismissed upon the motion of either the plaintiff or defendant until the county attorney shall have been notified in writing of the filing of such motion, and until such county attorney shall have made a personal investigation of the place of business sought to be enjoined, and of all matters set forth in said motion for dismissal, and shall have filed, in writing, a report of his findings in said cause, and his recommendation in reference to the disposition of the same. [C97,§2406; S13,§2406; C24, 27, 31, 35,§2024.]

2025 Delay in trial. If any such action by a citizen shall remain upon the docket for two terms of court, without trial, it shall be the duty of the judge of such court to order the plaintiff and his attorney or attorneys of record to appear in open court for examination as to the reasons why such cause has not been brought on for trial; and it shall be the duty of the

county attorney to conduct such examination, if the judge shall so order. [S13,§2406; C24, 27, 31, 35,§2025.]

2026 Bad faith in prosecution. Whenever the court shall have reason to believe that any such action to enjoin has not been brought or prosecuted in good faith, said court shall direct the grand jury to investigate all the facts and circumstances connected with the bringing and prosecution of the same. [S13,§2406; C24, 27, 31, 35,§2026.]

2027 Violation. In case of the violation of any injunction granted under the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. [C97,§2407; SS15, §2407; C24, 27, 31, 35,§2027.]

2028 Method of trial. The trial shall be as in equity and may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. [C97,§2407; SS15,§2407; C24, 27, 31, 35,§2028.]

Referred to in §2029
How issues tried, §11429

2029 First conviction. A party found guilty of contempt under the provisions of section 2028, shall for the first offense be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment. [C97, §2407; SS15,§2407; C24, 27, 31, 35,§2029.]

See also §1921.070

2030 Subsequent convictions. A party who has once been found guilty of contempt for violating the provisions of any such injunction, shall for each such subsequent violation be punished by a fine of not less than five hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not less than six months nor more than one year. [SS15, §2407; C24, 27, 31, 35,§2030.]

2031 Bootleggers. A bootlegger, as defined in this title, may be restrained by injunction from doing or continuing to do any of the acts prohibited by law, and all the proceedings for injunctions, temporary and permanent, and for fines and costs for violation of same, as defined by law, shall be applicable to such person, company or corporation, and the fact that an offender has no known or permanent place of business or base of supplies, or quits the business after the commencement of an action, shall not prevent a temporary or permanent injunction, as the case may be, from issuing. [S13,§2461-b; C24, 27, 31, 35,§2031.]

Bootleggers defined, §§1921.059, 1927; see also §1921.071

2031.1 Showing required. In no case shall a bootlegger injunction proceeding as provided in this title be maintained unless it be shown to the court that efforts in good faith have been made to discover the base of supplies or a place where the defendant charged as a bootlegger conducts his unlawful business or receives or manufactures the intoxicating liquors of which he is charged with bootlegging. [C27, 31, 35, §2031-a1.]

2032 Abatement. If the existence of the nuisance be established in a civil or criminal action, an order of abatement shall be entered as a part of the judgment in the case; which order shall direct the destruction of the liquor, the removal from the building or place of all fixtures, furniture, vessels, or movable property used in any way in conducting the unlawful business, and sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building, erection, or place against its use for any purpose prohibited in this title, and so keeping it for a period of one year, unless sooner released. [C51,§935; R60,§1559; C73,§§1523, 1543; C97,§2408; C24, 27, 31, 35,§2032.]

Sale of chattels, §11722 et seq.
See also §1921.073

2033 Use of premises. If anyone shall break or use a building or place so directed to be closed, he shall be punished as for contempt as provided in this title. [C97,§2408; C24, 27, 31, 35,§2033.]

Punishment, §§1921.070, 2029 et seq.

2034 Fees. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. [C97,§2408; C24, 27, 31, 35,§2034.]

Sheriff fees, §5191

2035 Proceeds. The proceeds of the sale of the personal property in abatement proceedings shall be applied, first, in payment of the costs of the action and abatement; second, to the satisfaction of any fine and costs adjudged against the proprietor of the premises and keeper of said nuisance, and the balance, if any, shall be paid to the defendant. [C97,§2409; C24, 27, 31, 35,§2035.]

2036 Abatement after judgment. If the owner appears and pays all costs of the proceedings, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, auditor, and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or, in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. [C97,§2410; S13,§2410; C24, 27, 31, 35,§2036.]

Referred to in §2038

2037 Abatement before judgment. If the proceeding be an action in equity, and said bond

be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. [C97,§2410; S13,§2410; C24, 27, 31, 35,§2037.]

Referred to in §2038

2038 Effect of release. The release of the property under the provisions of either of sections 2036 or 2037 shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. [C97,§2410; S13,§2410; C24, 27, 31, 35,§2038.]

2039 Abatement bonds. Undertakings of bond for abatement shall, immediately after filing by the clerk of the district court, be docketed and entered upon the lien index as required for judgments in civil cases, and, from the time of such entries, shall be liens upon real estate of the persons executing the same, with like effect as judgments in civil actions. [C24, 27, 31, 35, §2039.]

2040 Copies filed in proper counties. Attested copies of such undertakings may be filed in the office of the clerk of the district court of the county in which the real estate is situated, in the same manner and with like effect as attested copies of judgments, and shall be immediately docketed and indexed in the same manner. [C24, 27, 31, 35,§2040.]

2041 Forfeiture of bond. If the owner of the property who has filed said abatement bond as in this chapter provided, fails to abate the said liquor nuisance on the premises covered by the bond or fails to prevent the maintenance of any liquor nuisance on said premises at any time within the period of one year, the court must, after a hearing in which the said fact is established, direct an entry of such violation of the terms of his said bond, to be made on the record, and the undertaking of his bond is thereupon forfeited. [C24, 27, 31, 35,§2041.]

Abatement bond, §2036

2042 Procedure. The proceeding to forfeit said abatement bond shall be commenced by filing with the clerk of the court, by any citizen of the county where the bond is filed, an application, under oath, to forfeit said bond, setting out the alleged facts constituting the violation of the terms of said bond, upon which the judge or court shall direct by order attached to said application, that a notice be issued by the clerk of the district court, directed to the principal and sureties on said bond, to appear at a certain date fixed, to show cause, if any they have, why the said bond should not be forfeited and judgment entered for the penalty therein fixed. [C24, 27, 31, 35,§2042.]

2043 Method of trial. The trial shall be to the court and as in equity and be governed by the same rules as to evidence as in contempt proceedings. [C24, 27, 31, 35,§2043.]

How issues tried, §11429; contempt, §2028

2044 Judgment. If the court, after hearing, finds that a liquor nuisance has been maintained on the premises covered by the abatement bond and that liquor has been sold or kept for sale on the premises contrary to law, within one year from the date of the giving of said bond, then the court shall order the forfeiture of the bond and enter judgment for the full amount of said bond against the principal and sureties thereon and the lien on the real estate heretofore created shall be decreed foreclosed; and the court shall provide for a special and general execution for the enforcement of said decree and judgment. [C24, 27, 31, 35,§2044.]

2045 Appeal. Appeal may be taken as in any equity case and the cause be triable de novo, except that if applicant for forfeiture appeals, he need not file appeal or supersedeas bond. [C24, 27, 31, 35,§2045.]

Appeals generally, ch 555

2046 Limitation of actions. No application for forfeiture of abatement bond shall be considered or heard unless the same has been filed within one year after the termination of the one year period covered by the said bond; and after said period herein provided has fully elapsed, the bond shall be deemed absolutely void and the lien created thereby fully satisfied. [C24, 27, 31, 35, §2046.]

2047 County attorney. It shall be the duty of the county attorney to prosecute all forfeitures of abatement bonds and the foreclosure of the same. [C24, 27, 31, 35,§2047.]

2048 Advance payment of fees. In an action brought by a citizen to enjoin a nuisance, as defined in this title, no officer or witness shall be entitled to receive in advance fees for service or attendance. [C97,§2412; C24, 27, 31, 35,§2048.]

2049 Prompt service of papers. It shall be a misdemeanor for any peace officer to delay service of original notice, writ of injunction, writ of abatement, or warrant for contempt, in any equity case filed for injunction or abatement, either by the state or a private citizen, under this chapter. [C24, 27, 31, 35,§2049.]

Punishment, §12894

2050 Costs. If a prosecution brought by a citizen fails, the costs shall be taxed to the plaintiff and in no event shall the county pay any costs or attorney fees in such prosecution. [C97,§2412; C24, 27, 31, 35,§2050.]

Costs payable by county, §5191.1

2051 Mulct tax. When a permanent injunction shall issue against any person for maintaining a nuisance as herein defined or against any owner or agent of the building kept or used for the purposes prohibited by this title, a tax shall be imposed upon said building and upon the ground upon which the same is located, and against the persons maintaining said nuisance and against the owner or agent of said premises, when they knew, or ought in reason to have known, of said nuisance. [C97,§§2432–2447; S13,§§2433, 2437–2439, 2445; SS15,§2435; C24, 27, 31, 35,§2051.]

2052 Amount. Said tax shall be in the sum of six hundred dollars and shall be imposed in the same manner and with the same consequences as governs the imposition of a tax in injunction proceedings against places used for the purpose of lewdness, assignation, or prostitution. [C24, 27, 31, 35,§2052.]

Houses of prostitution, ch 79

2053 Evidence. On the issue whether a party knew or ought to have known of such nuisance, evidence of the general reputation of the place shall be admissible. [C24, 27, 31, 35,§2053.]

General reputation, §§1962, 2022, 13176

CHAPTER 99

CIVIL ACTIONS AND LIABILITY

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2054 Care of intoxicated person. Any person who shall, by the manufacture, sale, or giving away of intoxicating liquors contrary to the provisions of this title, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and five dollars per day in addition thereto for every day such intoxicated person shall be kept, in consequence of such intoxication, which sums may be recovered in a civil action before any court having jurisdiction thereof. [C73,§1556; C97,§2417; C24, 27, 31, 35,§2054.]

2055 Civil action. Every wife, child, parent, guardian, employer, or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person who shall, by selling or giving to another contrary to the provisions of this title any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages. [C73,§1557; C97,§2418; C24, 27, 31, 35,§2055.]

Referred to in §§2056, 2057
Liability of sureties, §2064

2056 Married women. A married woman shall have the same right, under section 2055, to bring suits, prosecute and control the same and the amount recovered, as a single woman. [C73, §1557; C97,§2418; C24, 27, 31, 35,§2056.]

Action by married woman, §10992

2057 Damages recovered by minor. All damages recovered by a minor under section 2055 shall be paid either to such minor or his parent, guardian, or next friend, as the court shall direct. [C73,§1557; C97,§2418; C24, 27, 31, 35,§2057.]

2058 to 2063, inc. Transferred. See §§1945.2 to 1945.7, inc.

2064 Principal and surety. Where anyone is required under the provisions of this title to give a bond, the principal and sureties shall be jointly and severally liable for all civil damages and costs which may be adjudged against the principal for any violation of any of the provisions of this title. [R60,§1579; C73,§§1552. 1558; C97,§2422; C24, 27, 31, 35,§2064.]

Similar provision, §2084

2065 Recovery of payments. All payments or compensation for intoxicating liquor sold in violation of this title, whether such payments or compensation be in money or anything else whatsoever, shall be held to have been received in violation of law, and to have been received upon a valid promise and agreement of the receiver to pay on demand to the person furnishing such consideration the amount of said money, or the just value of such other thing. [R60,§1571; C73,§1550; C97,§2423; C24, 27, 31, 35,§2065.]

Referred to in §2068

2066 Transactions invalidated. All sales, transfers, liens, and securities of every kind which, either in whole or in part, shall have been made for or on account of intoxicating liquors sold in violation of this title shall be null and void against all persons, and no rights of any kind shall be acquired thereby. [R60, §1571; C73,§1550; C97,§2423; C24, 27, 31, 35, §2066.]

Referred to in §2068

2067 Action prohibited. No action shall be maintained for intoxicating liquors or the value thereof, sold in any other state or country, contrary to the law of said state or country, or with intent to enable any person to violate any provision of this title; nor shall any action be maintained for the recovery or possession of any intoxicating liquor, or the value thereof, except in cases where persons owning or possessing such liquor with lawful intent may have been illegally deprived of the same. [R60,§1571; C73, §1550; C97,§2423; C24, 27, 31, 35,§2067.]

Referred to in §2068

2068 Good-faith holders. Nothing in sections 2065 to 2067, inclusive, shall affect in any way negotiable paper in the hands of holders thereof in good faith for valuable consideration, without notice of any illegality in its inception or transfer, or the holders of land or other prop-

erty who may have taken the same in good faith, without notice of any defect in the title of the person from whom the same was taken, growing out of a violation of the provisions of this title. [R60,§1571; C73,§1550; C97,§2423; C24, 27, 31, 35,§2068.]

Holders in due course, §9517

2069 Attempt to collect prohibited. The collection of payment, the solicitation of payment, and all attempts, directly or indirectly, to collect payment within this state for intoxicating liquor sold or shipped within or into this state to be used for illegal purposes within this state, is hereby prohibited and made illegal, and the violation hereof is hereby made a misdemeanor. [SS15,§2423-a; C24, 27, 31, 35,§2069.]

Referred to in §2070
Punishment, §12894

2070 Restraint of collection by injunction. Every person who for himself or for another violates any of the provisions of section 2069, may be restrained by injunction from continuing to do any of the acts therein prohibited, and all the proceedings for injunctions, temporary and permanent, and for fines and costs for violation of same, as defined by law, shall be applicable to such person. [SS15,§2423-b; C24, 27, 31, 35, §2070.]

Injunctions, ch 535

2071 Termination of lease. Upon a violation of any provision of this title committed upon real estate occupied by a tenant, his agent, servant, clerk, employee, or anyone claiming under him, the landlord of such premises, by himself or agent, may, in writing, notify such agent, tenant, or the person in possession of said leased premises, to the effect that he has terminated such lease and demands possession thereof within three days after the giving of such notice, and, after the expiration of said three days, may recover possession thereof in an action of forcible entry and detainer, without further notice to quit, upon proof of the violation of any provision of this title committed upon such real estate and of the giving of such notice. [C97,§2426; C24, 27, 31, 35, §2071.]

Forcible entry or detention, ch 519
Landlord and tenant, ch 442

CHAPTER 100

PERMITS TO LICENSED PHARMACISTS

Referred to in §§1921.094, 2159

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2072 Permits. A licensed pharmacist may, in the manner hereinafter provided, obtain a permit to buy, keep, and sell intoxicating liquors, for medical purposes. [R60,§1575; C73,§1526; C97,§2385; C24, 27, 31, 35,§2072.]

Permits under liquor control act, §1921.027; saving clause, §1921.094

2073 Petition. All applications for a permit to sell intoxicating liquors for the purpose allowed in this chapter shall be by petition, in which the applicant shall show:

1. His name.

2. His residence and business at the time of making the application and during the two preceding years.

3. That he is a citizen of the United States and of this state.

4. That he is a registered pharmacist and is operating and for the last six months has lawfully operated a regular prescription pharmacy or drug store in the town, city, or township in

which he proposes to engage in the business under the permit applied for, and that he owns not less than one-half interest in said pharmacy or drug store and desires a permit to buy, keep, and sell liquors for medicinal purposes only.

5. The place, particularly describing it, where the business is to be conducted.

6. That he has not been adjudged guilty of any violation of the law relating to intoxicating liquors and has never forfeited or surrendered a permit to sell intoxicating liquors in order to avoid a prosecution for a violation of the laws relating to intoxicating liquors.

7. That he is not the keeper of a hotel, eating house, saloon, restaurant, or place of public amusement, nor are any of said named businesses located in his said place of business or directly connected therewith.

8. That he is not addicted to the use of intoxicating liquors as a beverage, and that he will not, while holding a permit, employ or retain in his employment any person in his said business who is known to him to be so addicted. [R60,§1575; C73,§§1526, 1527; C97,§2387; C24, 27, 31, 35,§2073.]

Allowable sales, §§2089, 2093

2074 Verification. Said petition shall be signed and sworn to by the applicant, and filed in the office of the clerk of the district court of the county in which the buying and selling is to be carried on, at least ten days before the term at which the matter is to be for trial. [C97, §2387; C24, 27, 31, 35,§2074.]

2075 Notice. Notice of an application for a permit shall state the name of the applicant, with the firm name, if any, under which he is doing business, the purpose of the application, the particular location of the place where the proposed business is to be carried on; that the required petition is or will be on file in the clerk's office of the court, naming it, at least ten days before the first day of the term, naming it, when the application will be made. [C73,§1529; C97,§2388; S13,§2388; C24, 27, 31, 35,§2075.]

2076 Service. Said notice must be served in the following manner:

1. By publication thereof once each week for three consecutive weeks in a newspaper regularly published and printed in the English language, and of general circulation in the township, town, or city where the applicant proposes to conduct the business, or, if none be regularly published therein, then in one of the papers selected by the board of supervisors for the publication of its proceedings, the last publication of which shall be not less than ten nor more than twenty days before the first day of the term at which the hearing is to be had.

2. By serving a copy of said notice personally upon the county attorney in the same manner and for the same length of time as is required of original notices in said courts. [C73,§1529; C97,§2388; S13,§2388; C24, 27, 31, 35,§2076.]

Time and manner of service, §§11059, 11060

2077 Appearance. The county attorney shall appear in all cases, and any number of persons, not less than five, filing any remonstrance, may also appear in person or by counsel and resist the application. [C73,§1530; C97, §2389; C24, 27, 31, 35,§2077.]

2078 Hearing. All applications shall be tried at the first term after completed service has been made of the required notice, if the business of the court shall allow. [C97,§2389; C24, 27, 31, 35,§2078.]

2079 Vacation. If for any reason the application cannot be tried in term time, the same may be heard by the judge in vacation, at a time to be fixed by the court and made of record. [C97,§2389; C24, 27, 31, 35,§2079.]

2080 Consolidation. If more than one permit is applied for in the same locality, the applications shall be heard at the same time, unless for cause shown it be otherwise ordered. [C97, §2389; C24, 27, 31, 35,§2080.]

2081 Remonstrances. The county attorney, or one or more citizens of the county wherein the application is made, may file a written remonstrance against the granting of the permit. All remonstrances shall specifically state the reasons therefor, and be filed in the clerk's office by noon of the first day of the term, unless further time be given, and shall be so filed before the day fixed for the trial. [C73,§1530; C97,§2389; C24, 27, 31, 35,§2081.]

2082 Limitation. No permit shall be granted unless the court shall find from competent evidence that all the averments in the petition are true, that the reasonable convenience and necessities of the people, considering the population and all the surroundings, make the granting of the permit proper, and that the applicant is possessed of the character and qualifications required, worthy of the trust to be reposed in him, and likely to discharge the same with fidelity. Any licensed pharmacist who has been or is hereafter convicted of violating any provision of any statute relating to intoxicating liquors, or who for the purpose of avoiding a prosecution for such violation has surrendered or hereafter surrenders a permit issued under this chapter, shall be forever barred from securing a permit under this chapter. The court may grant or refuse any application. [C73, §1530; C97,§2389; C24, 27, 31, 35,§2082.]

2083 Bond. No permit shall issue until the applicant shall execute to the state a bond in the penal sum of one thousand dollars, with good and sufficient sureties to be approved by the clerk of the court, conditioned that he will well and truly observe and obey the laws of the state now or hereafter in force in relation to the sale of intoxicating liquors, that he will pay all fines, penalties, damages, and costs that may be assessed or recovered against him for a violation of such laws during the time for which the permit is granted. [R60,§1575; C73,§1528; C97, §2390; S13,§2390; C24, 27, 31, 35,§2083.]

Death of permit holder, §2128
Similar provision, §2167

2084 **Sureties.** The principal and sureties in said bond shall be liable thereon, jointly and severally, for all civil damages and costs that may be recovered against the principal in any action brought by a wife, child, parent, guardian, employer, or other person under the provisions of this title. [C73,§§1528, 1532; C97, §2390; S13,§2390; C24, 27, 31, 35,§2084.]

Similar provision, §2064

2085 **Custody of bond.** The bond, after being approved and recorded by the clerk, shall be deposited with the county auditor, and suit may be brought thereon at any time by the county attorney, or by any person for whose benefit the same is given. [C73,§§1528, 1532; C97,§2390; S13,§2390; C24, 27, 31, 35,§2085.]

2086 **New bond.** If at any time the sureties on the bond shall file with the court or clerk a written request for release, or become insolvent, or be deemed insufficient by the court granting the permit, or its clerk, such court or clerk shall require a new bond to be executed within a reasonable time to be fixed. If the permit holder fails or neglects to furnish a new bond within the time so fixed, the permit shall from that date become null and void. [C97,§2390; S13,§2390; C24, 27, 31, 35,§2086.]

2087 **Proceeds.** The clear proceeds of all money which may be collected by the state for breaches of the bond shall go to the school fund of the county. [C73,§§1528, 1532; C97,§2390; S13,§2390; C24, 27, 31, 35,§2087.]

Temporary school fund, §4471

2088 **Oath.** In addition to giving the bond required, the applicant shall take and subscribe the following oath, which shall be indorsed upon the bond: "I, ..., do solemnly swear (or affirm) that I will well and truly perform all and singular the conditions of the within bond, and keep and perform the trust confided in me to purchase, keep, and sell intoxicating liquors. I will not sell, give, or furnish to any person any intoxicating liquors otherwise than as provided by law, and especially I will not sell or furnish any intoxicating liquors to any person who is not known to me personally, or duly identified, nor to any intoxicated person, or persons who are in the habit of becoming intoxicated; and I will make true, full, and accurate reports as required by law; and said reports shall show every sale and delivery of such liquors made by me, or for me, during the months embraced therein, and all the intoxicating liquors sold or delivered to any and every person, as returned." [C97,§2391; C24, 27, 31, 35,§2088.]

2089 **Issuance.** Upon taking said oath, filing said bond, and paying the costs and fee herein provided, the clerk of the court shall issue a permit to the applicant authorizing him to buy, keep, and sell intoxicating liquors, not including malt liquors, for medical purposes, as hereinafter provided. [C97,§2392; S13,§2392; C24, 27, 31, 35,§2089.]

2090 **Location and tenure.** The permit so issued shall specify the building, giving the street and number or location, in which intoxicating liquors may be sold by virtue of the same, and the length of time, not exceeding five years, the same shall be in force, unless sooner revoked. [C73,§1531; C97,§2392; S13,§2392; C24, 27, 31, 35,§2090.]

2091 **Fee.** On and after January 1, 1925, each permit holder under this chapter shall, on the first day of January, April, July, and October of each year, pay into the county treasury, as a fee for the granting of such permit, all proceeds of all sales of intoxicating liquors in excess of two hundred percent of the wholesale price of such liquors. [C24, 27, 31, 35,§2091.]

2092 **Price lists.** The pharmacy examiners shall from time to time fix the fair and reasonable wholesale price of intoxicating liquors for all points in this state and furnish such price lists to permit holders. The fixing of said prices shall be for the sole purpose of furnishing a basis for the computation of said fee. [C24, 27, 31, 35,§2092.]

2093 **Limitation on sales.** A permit holder in making sales under his permit shall comply with the following:

1. Only spirituous and vinous liquor, the sale of which has been authorized by federal statutes or regulations and upon which the federal internal revenue tax has been paid, shall be sold.
2. Sales shall be made only on prescriptions which have been issued in accordance with federal and state statutes and regulations, and which have been issued by physicians licensed under the laws of this state and actually and in good faith engaged in this state in the general practice of their profession.
3. No permit holder shall sell or furnish, on any prescription, any vinous liquor that contains more than twenty-four percent of alcohol by volume, nor sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days.
4. No prescription for said liquors shall be filled if the permit holder has reason to believe that the physician issuing the same is prescribing for other than medical purposes or that a patient is securing, through one or more physicians, quantities of such liquors in excess of the amount necessary for medical purposes or in excess of the aggregate amount specified in paragraph 3 above.
5. No prescription for liquor shall be filled except by the permit holder himself or by a pharmacist licensed under the laws of this state and in the employ of such permit holder.
6. No prescription shall be filled more than once. [C24, 27, 31,35,§2093.]

2094 **Request.** Before selling or delivering any intoxicating liquors, a written request therefor must, after being fully, accurately, and legibly filled out in ink in the presence of the applicant and by the person making the sale, be signed by the applicant in his true name, and

attested by the holder of the permit. [C97, §2394; S13,§2394; C24, 27, 31, 35,§2094.]

2095 Form. Said written requests shall be in the following form:

Stub

No..... (Official Form.....
Series .....)

CERTIFIED REQUEST OF PURCHASERS

No....., Iowa, ..., 19..
To.....Reg. Phar. No.....
I hereby make request for the purchase of the following intoxicating liquors:

AMOUNT KIND

.....
.....,19... My true name is.....I am
Purchaser..... not a minor, and reside in.....
Address..... township (or town of.....)
Purchase..... at No....., in the county of
For Whom....., state of.....The
Address..... actual purpose for which this
Certifier..... request is made is to obtain said
Address..... liquor for....., residing at No....., township....., (or town of.....), county of ....., state of....., who is a member of my immediate family, (or a patient unable, because of illness, to call for the same) and the same is desired for medicinal use and is to fill a prescription issued to..... .....by Dr....., who offices at No....., township or town of ....., ... county, state of....., and the same was issued to me in strict compliance with federal statutes and not in evasion thereof, and neither myself nor the said.... ..... habitually use intoxicating liquors as a beverage, nor do we intend to use the above named liquor for that purpose.

.....
(Signature of purchaser)

(If the applicant is unknown to the permit holder, the blank below shall also be filled out and signed by a witness.)

I, ..., hereby certify that I am acquainted with..... ....., the applicant for the purchase of the foregoing described liquors and the said .....is not a minor and is not in the habit of using intoxicating liquors as a beverage, and is worthy of credit as to the truthfulness of the statements in the foregoing request and my residence is No..... street....., state of.....,

.....
(Signature of certifier)

Attested by.....
Registered Pharmacist No.....

[C97,§2394; S13,§2394; C24, 27, 31, 35,§2095.]

2096 Blanks. The blanks for such requests shall, with proper stubs, in all cases, be printed in book form and shall be furnished to the permit holder at cost by the county auditor of the county in which such permit is in force, and shall contain the facsimile signature of the county auditor; both stub and request shall be numbered consecutively. [S13,§2394; C24, 27, 31, 35,§2096.]

2097 Preservation and inspection. The permit holder shall preserve the stub in book form and shall keep them at all times, subject to the inspection of the pharmacy examiners, the county attorney, any grand jury, peace officer, or justice of the peace in the county in which the permit is in force. [S13,§2394; C24, 27, 31, 35,§2097.]

2098 Duty to refuse. The request shall be refused unless the permit holder has reason to believe the statements to be true, and in no case granted unless the permit holder filling it personally knows the person applying is not a minor, intoxicated, nor in the habit of using intoxicating liquors as a beverage. [C97,§2394; S13,§2394; C24, 27, 31, 35,§2098.]

2099 Identification. If the applicant is not so personally known, before filling the order or delivering the liquor, the permit holder shall require identification and the statement, in writing, of a reliable and trustworthy person, of good character and habit, known personally to him, that the applicant is not a minor nor in the habit of using intoxicating liquors as a beverage and is worthy of credit as to the truthfulness of the statements in the application. Said statement so made shall be legibly signed by the witness in his own name, stating his address correctly. [C97,§2394; S13,§2394; C24, 27, 31, 35,§2099.]

2100 Penalties. If any person shall make any false or fictitious signature, or sign any name other than his own, to any request for the purchase of intoxicating liquors as heretofore provided, or as may be hereinafter provided, or to any other paper required to be signed, or make any false statement in any paper or application or request signed to procure liquors, he shall be punished by a fine of not less than twenty dollars, nor more than one hundred dollars and costs of prosecution, and shall be committed until said fine and costs are paid, or shall be imprisoned not less than ten nor more than thirty days. [R60,§1577; C73, §1559; C97,§2395; C24, 27, 31, 35,§2100.]

Extent of imprisonment, §§13588, 13964

2101 Change in location. Upon the expiration of the lease or the destruction of the building where such business is conducted, or for other good and sufficient cause shown, consent in writing of the bondsmen having been obtained therefor, or a new bond given, the district court of the county which granted said permit, or a judge of said court, may change the place specified in said permit to some other place in the same city, town, or township upon

motion therefor. [C97,§2392; S13,§2392; C24, 27, 31, 35,§2101.]

Referred to in §2102

2102 County attorney. A copy of the application mentioned in section 2101, and notice of the time when and the place where the same will be heard, shall be given to the county attorney of the county where said place is situated, at least five days before said hearing. [S13,§2392; C24, 27, 31, 35,§2102.]

2103 Violations. If any holder of a permit shall sell, give, dispose of, or use intoxicating liquors in any manner or for any purpose other than for medical purposes as heretofore authorized, he shall be liable to all the penalties and proceedings provided for in this title. [C97, §2386; S13,§2386; C24, 27, 31, 35,§2103.]

2104 Prescriptions prohibited. No physician shall issue a prescription for vinous or spirituous liquors for other than medical purposes, or in excess of the amount reasonably necessary for such purposes or in excess of the quantity heretofore specified; nor shall he issue or deliver such prescription to a person when he has reasonable grounds for believing that such person will use the liquors obtained thereunder for beverage purposes. [C24, 27, 31, 35, §2104.]

Referred to in §2108
Permissible quantity, §2093

2105 Record of prescriptions. Every physician shall keep, in his own handwriting and in his office, a permanent record, legibly written in ink, of every prescription for intoxicating liquors issued by him. Said record shall be alphabetically arranged under the name of the patient and shall show:

1. The date of the prescription.
2. The amount and kind of liquors prescribed.
3. The name of the patient and his post-office address, including street number, if any.
4. The name of the person to whom the prescription was delivered and his post-office address, including street number, if any.
5. The purpose or ailment for which the liquors are prescribed.
6. The directions for the use of said liquors, including the amount and frequency of the dose. [C24, 27, 31, 35,§2105.]

Referred to in §§2106, 2108

2106 Reports filed. Every physician shall, on or before the twentieth day of January, April, July, and October, each year, file with the county auditor of the county of his residence an exact duplicate of the record provided for in section 2105. Each filing shall cover the three calendar months preceding the filing. [C24, 27, 31, 35,§2106.]

Referred to in §2108

2107 Oath. Said physician shall securely attach to each duplicate record so filed by him his oath in the following form:

"I, ..., do say on oath that the hereto attached record is an exact duplicate of the record of prescriptions kept by me in my office for the months of ....., ... and ....., 19....; that said record has been accurately prepared and kept by me and shows every prescription for intoxicating liquors issued and delivered by me during said month; that I have in no case issued a prescription for such liquors for other than medical purposes or for a quantity of such liquors in excess of the amount reasonably necessary for said purposes or for a quantity of such liquors in excess of the quantity permitted by state or federal statutes and regulations; nor have I issued such prescription to a person when I had reason to believe that such person would use the liquors obtained thereunder for beverage purposes." [C24, 27, 31, 35,§2107.]

Referred to in §2108

2108 Penalty. Upon conviction for a violation of any provision of sections 2104 to 2107, inclusive, the court, as a part of the judgment, shall order the certificate or license of such physician to practice his profession suspended for a period of not less than one year nor more than five years. [C24, 27, 31, 35,§2108.]

2109 Effect of suspension. During the period of such suspension such physician shall be wholly barred from the practice of his profession in this state, and the clerk of said court shall forthwith notify the state department of health of such suspension and the period thereof; and any physician practicing or attempting to practice his profession during the interim of such a suspension shall be guilty of a misdemeanor. [C24, 27, 31, 35,§2109.]

2110 Conviction in federal courts. When a physician or pharmacist, licensed under the laws of this state, is convicted in any federal court of this state of a violation of the federal statutes or regulations relating to intoxicating liquors, or to narcotics, and said judgment has become final, the county attorney of the county where said physician or pharmacist resides shall forthwith file in the office of the clerk of the district court of said county a duly certified copy of said judgment and thereupon said district court, or a judge thereof, shall, on such notice to the defendant in said judgment as the court or judge may prescribe, enter an order suspending for a period of not less than one year nor more than five years the license of such physician or pharmacist to practice his profession in this state. In such proceeding the county attorney shall appear on behalf of the state. [C24, 27, 31, 35,§2110.]

2111 Revocation of license. Upon proof of such violation by a licensed pharmacist, the court shall order his license revoked without the formality of a special proceeding for that purpose, as provided in title VIII dealing with the practice of certain professions affecting the public health. In such event the clerk shall notify the state department of health as provided in such title. [C73,§§1534, 1535; C97, §§2386, 2400; S13,§§2386, 2400; C24, 27, 31, 35, §2111.]

Revocation in general, §2492 et seq.

2112 Records. The clerk of the court shall preserve as a part of the record and files all papers, except bonds, pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. [C97,§2393; S13,§2393; C24, 27, 31, 35, §2112.]

2113 Costs. Whether said permit be granted or refused, the applicant shall pay the costs incurred in the case, and, when granted, he shall make payment before any permit issue, except the court may tax the cost of any witnesses summoned by private persons resisting said application, and the fees for serving such subpoenas, to such persons, when it is shown that such witnesses were summoned maliciously, or without probable cause to believe their evidence material. The fees shall be as provided in actions at law in the district court. [C97,§2393; S13,§2393; C24, 27, 31, 35,§2113.]

Costs generally, ch 497

2114 False oath. If any permit holder or his clerk shall make false oath touching any matter required to be sworn to, the person so offending shall be punished as provided by law for perjury. [R60,§1577; C73,§1559; C97, §2395; C24, 27, 31, 35,§2114.]

Perjury, §13165

2115 False return. If any person holding a permit under this chapter purchases or procures any intoxicating liquor otherwise than as herein authorized, or fails to make the reports to the county auditor in the time or form required, or makes any false return to the county auditor, or fills a prescription for intoxicating liquors more than once, he shall be guilty of a misdemeanor and punished accordingly. [C97,§2395; C24, 27, 31, 35,§2115.]

Punishment, §12894

2116 Civil and criminal liability. Every permit holder or his clerk, violating this chapter, shall be subject to all the penalties, forfeitures, and judgments, and may be prosecuted by all the proceedings and actions, criminal and civil, whether at law or in equity, provided for or authorized by this title, and the permit shall not shield any person who abuses the trust imposed by it or violates the law. [C73,§1538; C97, §2399; C24, 27, 31, 35,§2116.]

2117 Destruction of liquor. In case of conviction in any proceeding, civil or criminal, the liquors in possession of the permit holder shall by order of the court be destroyed. [C97, §2399; C24, 27, 31, 35,§2117.]

Destruction, §13441.31

2118 Evidence. On the trial of an action or proceeding against any person for manufacturing, selling, giving away, or keeping with intent to sell, intoxicating liquors in violation of law, or for any failure to comply with the conditions or duties imposed by law, the prescriptions for liquors, the returns made to the auditor, the quantity and kinds of liquors sold or kept, purchased or disposed of, the purpose for which liquors were obtained by or from him and for which they were used, and the character and habits of sobriety or otherwise of the purchasers, shall be competent evidence, and may be considered, so far as applicable to the particular case. [C97,§2399; C24, 27, 31, 35, §2118.]

2119 Production of books. In any suit, prosecution or proceeding under this chapter, the court shall compel the production in evidence of any books or papers required to be kept by either federal or state statutes. [C97, §2399; C24, 27, 31, 35,§2119.]

Similar provision, §11316 et seq.

2120 Revocation of permit. Permits shall be deemed trusts reposed in the recipients, and may be revoked, upon sufficient showing, by order of a court or judge. Complaint may be presented at any time to the district court or a judge thereof, which shall be in writing and signed and sworn to by three citizens of the county in which the permit was granted. [C73, §1535; C97,§2400; S13,§2400; C24, 27, 31, 35, §2120.]

2121 Service of complaint. A copy of the complaint shall, with a notice in writing of the time and place of hearing, be served on the accused five days before the hearing, and if the complaint is sufficient, and the accused appear and deny the same, the court or judge shall proceed without delay, unless continued for cause, to hear and determine the controversy. [C73,§1535; C97,§2400; S13,§2400; C24, 27, 31, 35,§2121.]

2122 Suspending permit. If continued or appealed at the instance of the permit holder, his permit may, in the discretion of the court, be suspended during the controversy. [C97, §2400; S13,§2400; C24, 27, 31, 35,§2122.]

2123 Trial and judgment. The complainant and accused may be heard in person or by counsel, or both, and proofs may be offered by the parties; and if it shall appear upon such hearing that the accused has in any way abused the trust, or that liquors are sold by the accused or his employees in violation of law, or dispensed unlawfully, or that he has in any proceeding, civil or criminal, been adjudged guilty of violating any of the provisions of this title, the court or judge shall revoke and set aside the permit. [C73,§1535; C97,§2400; S13,§2400; C24, 27, 31, 35,§2123.]

2124 Record. The papers and order in such case shall be immediately returned to and filed by the clerk of the court, and, if heard by a judge, the order shall be entered of record as if made in court. [C97,§2400; S13,§2400; C24, 27, 31, 35,§2124.]

2125 Automatic revocation. If for any cause a licensed pharmacist who holds a permit shall cease to hold a valid license, his permit shall be forfeited and be null and void. [C97, §2401; S13,§2401; C24, 27, 31, 35,§2125.]

2126 Clerks. The acts of clerks employed by a permit holder in conducting his business shall be considered the acts of the permit holder, who shall be liable therefor as if he had personally done them. [C97,§2401; S13,§2401; C24, 27, 31, 35,§2126.]

2127 Partners. A partner who is a licensed pharmacist, not holding a permit, shall have the same rights and be subject to the same restrictions as clerks, and for his acts the permit holder shall be held responsible the same in all respects as for his clerks. [C97,§2401; S13,§2401; C24, 27, 31, 35,§2127.]

2128 Death of permit holder. In case a permit holder shall die, his personal or legal representative may continue the business, subject to the provisions hereof, through the agency of any reputable licensed pharmacist, upon the approval of the court or judge thereof, granting such permit, and the giving of a bond as hereinbefore provided. [C97,§2401; S13,§2401; C24, 27, 31, 35,§2128.]

Bond, §2083

2129 Existing permits. All unexpired, uncanceled, and unrevoked permits to licensed pharmacists to sell and dispense intoxicating liquors, which have heretofore been issued under prior statutes, shall be deemed issued under and subject to the provisions of this chapter. [C24, 27, 31, 35,§2129.]

CHAPTER 101

PERMITS TO WHOLESALE DRUGGISTS

Referred to in §§1921.094, 2159

2130 Wholesale drug corporation.
2131 Application.
2132 Procedure.
2133 Name of pharmacist.
2134 Substitute authorized.
2135 Unlawful sales.
2136 Permit and authority.
2137 Good-faith practice.
2138 Interpretative clause.
2139 Limitation.
2140 Manner of sale.
2141 Form.
2142 Requests.
2143 Personal delivery.
2144 Reports.
2145 Special requirement.
2146 Return of requests.
2147 Oath.
2148 Manner of shipping.
2149 Transportation.
2150 Affiant.
2151 Delivery.
2152 Undelivered shipments.
2153 Effect of delivery.
2154 Order.
2155 Violations.
2156 Violations by purchasers.
2157 "Corporation" construed.

2130 Wholesale drug corporation. A corporation which is located and doing a wholesale drug business within this state may be granted a permit to purchase and sell intoxicating liquors, for the purpose hereinafter specified, and for use in the compounding and manufacture of patent and proprietary medicines, toilet articles, tinctures, extracts, and other like commodities, none of which is susceptible to use as a beverage but which requires as one of its ingredients alcohol or vinous liquor. [S13,§2401-a; C24, 27, 31, 35,§2130.]

Permits under liquor control act, §1921.027; saving clause, §1921.094

2131 Application. Application for such permit shall be by petition which shall show:

1. The name of the corporation, and that it is actually engaged within this state in the wholesale drug business.
2. The place, particularly describing it, where said business will be conducted and where sales will be made under the proposed permit.
3. That neither the applicant nor any member of the firm, or officers of the corporation has been convicted of any violation of the laws of this state with reference to the sale of intoxicating liquors within three years last passed, prior to the date of the said affidavit.
4. That one or more licensed pharmacists, specifically naming them, are financially interested in said corporation and actually engaged in the conduct of said business and will have personal charge of the sales of said liquors in case the permit is granted, and are not users of intoxicating liquors as a beverage.
5. Sworn verification by some managing officer of the corporation. [S13,§2401-a; C24, 27, 31, 35,§2131.]

2132 Procedure. The petition shall be filed in the district court and all laws pertaining to permits granted to individual licensed pharmacists, insofar as applicable and not herein otherwise provided, shall apply to said application by a wholesale druggist and to the permit issued thereon. [C24, 27, 31, 35,§2132.]

General procedure, ch 100

2133 Name of pharmacist. A permit to a wholesale drug corporation, in addition to all other requirements, shall specify the name of each licensed pharmacist who will have personal charge of sales under said permit. [C24, 27, 31, 35,§2133.]

2134 Substitute authorized. Should said pharmacist die or for any other reason terminate his connection with the permit holder, the district court or a judge thereof may, on written application by the permit holder, and on notice to the county attorney, order the substitution in said permit of the name of some other proper pharmacist. [C24, 27, 31, 35,§2134.]

2135 Unlawful sales. Sales of liquors not made under the personal supervision of a phar-

macist named in said permit shall be illegal and shall automatically cancel said permit. [C24, 27, 31, 35,§2135.]

2136 Permit and authority. The permit issued to a wholesale drug corporation shall authorize said corporation, under the limitations herein provided, to sell:

1. Alcohol for specified chemical and mechanical purposes to persons, firms, and corporations who have qualified, under federal and state statutes and regulations, to purchase and use alcohol for such purposes.
2. Alcohol and wine for the purpose of manufacturing patent and proprietary medicines and toilet articles and compounding medicines, tinctures, extracts, or other like commodities, none of which are susceptible of use as a beverage, to pharmacists who are registered under the laws of this state and who are actively engaged in this state in the retail drug business and in such compounding.
3. Alcohol and wine for the purpose of manufacturing patent and proprietary medicines and toilet articles and compounding medicines, tinctures, extracts, or other like commodities, none of which are susceptible of use as a beverage, to firms or corporations which are actively engaged in this state in the retail drug business and in compounding such medicines, tinctures, extracts, or other like commodities under the immediate supervision of a pharmacist licensed under the laws of this state.
4. Alcohol and wines for the purpose of manufacturing patent and proprietary medicines, tinctures, extracts, toilet articles, and perfume, or other like commodities, which require such liquors as an ingredient thereof, and which are not susceptible of use as a beverage, to persons, firms, and corporations who are holders of permits to so manufacture.
5. Intoxicating liquors to licensed pharmacists holding a permit to sell such liquors on prescription for medical purposes.
6. Intoxicating liquors to manufacturing and industrial establishments for the purpose of furnishing first-aid treatment to injured persons as defined by federal statutes and regulations.
7. Intoxicating liquors for medical purposes, to bona fide hospitals or sanatoriums engaged in the treatment of persons suffering from recognized diseases and ailments.
8. Intoxicating liquors for medical purposes to bona fide hospitals or sanatoriums engaged in the treatment of chronic alcoholism by the tapering-off method.
9. Intoxicating liquors to licensed physicians for the purpose of use by them in accordance with federal statutes or regulations or in accordance with state statutes, for compounding such preparations as are necessary for use in their professional practice, and for sterilization and laboratory purposes.
10. Intoxicating liquors to licensed dentists for the purpose of use by them in accordance with federal statutes or regulations or in accordance with the state statutes as are necessary for use in their professional practice and for sterilization and laboratory purposes.
11. Alcohol to licensed veterinarians for any legitimate nonbeverage purpose.
12. Alcohol and other intoxicating liquors to any person, firm, or corporation located and doing business in any foreign state and legally entitled to purchase and receive such liquors under the laws of such foreign state. [S13, §2401-a; C24, 27, 31, 35,§2136.]

Referred to in §§2137, 2141

2137 Good-faith practice. The term "licensed physician", "licensed dentist", or "licensed veterinarian" as employed in section 2136 shall be construed to embrace only those persons who are in good faith and actively engaged in the general practice of their respective professions. [C24, 27, 31, 35,§2137.]

2138 Interpretative clause. Nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form, or device, which may be used as a beverage, and which is intoxicating in its character. [C97,§2385; C24, 27, 31, 35,§2138.]

2139 Limitation. The authority granted to a wholesale druggist to sell intoxicating liquors shall in no case authorize a sale in a quantity in excess of that authorized by federal or state statutes and regulations. [C24, 27, 31, 35, §2139.]

2140 Manner of sale. Such sales shall be made only on the written signed request of the purchaser. Said request shall also be countersigned by the licensed pharmacist, who has charge of the sale, with his name, the number of his license, and the date the liquors are delivered for transportation. [S13,§2401-a; C24, 27, 31, 35,§2140.]

2141 Form. The form, contents, and requirements of said written requests shall be substantially as follows:

....., Iowa, ..., 19....

.....
(Name of permit holder)

.....hereby makes request for the
(Name of purchaser)

purchase of the following intoxicating liquors:

Amount	Kind
.....	.....
.....	.....

The purchaser named above:

(Here describe the business and state the purpose for which the liquors are desired, which description and statement of purpose must be in accordance with section 2136.)

.....

.....

.....
(Signature of purchaser)

I, ..., being the licensed pharmacist having personal supervision of the above sale, hereby countersign said request and certify that said liquors were, on the.....day

of....., 19...., delivered in the following manner, to wit:

.....

.....

.....

Licensed pharmacist.

No.....

[S13,§2401-a; C24, 27, 31, 35,§2141.]

2142 **Requests.** Requests for intoxicating liquors may be made out and signed by the applicant at his place of business and forwarded to the permit holder of whom request is made, and the permit holder may, by his own conveyance, personally deliver said liquors to the applicant, or cause such delivery to be made by a common carrier. [S13,§2401-b; C24, 27, 31,35,§2142.]

2143 **Personal delivery.** The applicant may personally present said written request for the purchase of such liquors to the permit holder and the permit holder may deliver said liquors directly to the applicant. [S13,§2401-b; C24, 27, 31, 35,§2143.]

2144 **Reports.** The permit holder in making the reports required herein shall specify the manner in which each sale of liquors was delivered, to wit: whether a delivery was made by his own conveyance, or by a common carrier, or by direct delivery to the applicant. [C24, 27, 31, 35,§2144.]

2145 **Special requirement.** No sale shall be made on a request unless such request is filled out with pen and ink. [C24, 27, 31, 35,§2145.]

2146 **Return of requests.** Said requests shall be preserved by the permit holder and filed with the county auditor at the time of the filing with the county auditor of the reports hereinafter provided for. [S13,§2401-b; C24, 27, 31, 35,§2146.]

Reports by permit holder, ch 102

2147 **Oath.** Requests filed with the county auditor shall be accompanied by an affidavit by the licensed pharmacist or pharmacists having personal charge of the sales, showing that said requests comprise all the requests filled by said wholesale druggist during the time covered by said requests. [C24, 27, 31, 35,§2147.]

2148 **Manner of shipping.** Intoxicating liquors shipped by a wholesale druggist under the aforesaid authorization shall not be inclosed in the same box, package, or carton with other drugs or merchandise. In all cases of such shipments the bill of lading shall set out the kind and amount of intoxicating liquors contained in the shipment, and one copy of the bill of lading shall be signed for the wholesale drug corporation by the licensed pharmacist having personal charge of the sale, or by an officer of such drug corporation. [S13,§2401-c; C24, 27, 31, 35,§2148.]

2149 **Transportation.** Common carriers shall transport the liquors purchased or sold by a wholesale drug corporation under the authority of the permit herein provided, whether such shipment be interstate or intrastate:

1. When the consignor files with the agent of the carrier, at the point of origin, an affidavit stating:

a. That the consignee is a person, firm, or corporation who has a legal right to make such purchase;

b. That the liquors are consigned to the station nearest to the consignee's place of business; and

c. That the consignor and consignee are in all respects acting lawfully in the transportation of said liquor.

2. When bill of lading is made out and signed as heretofore provided.

3. When carrier is furnished with copy of the permit held by the wholesale drug corporation and said copy is duly certified to be correct by the clerk of the court issuing the permit. [S13, §2401-d; C24, 27, 31, 35,§2149.]

Referred to in §2150

2150 **Affiant.** If the consignor is a corporation, the affidavit provided for in section 2149 shall be made by the pharmacist having charge of the sales of such liquors or by some managing officer of the corporation. [C24, 27, 31, 35,§2150.]

2151 **Delivery.** The carrier shall not make delivery of such liquors:

1. Until the consignee files with the carrier an affidavit by the consignee himself or by the president, vice president, secretary, or general manager or superintendent of the consignee, that said liquors are solely for the use and purposes specified in the written request for the purchase of such liquors, naming said purpose, and

2. Until the consignee personally signs the record book of intoxicating liquor shipments and deliveries required to be kept by common carriers. [S13,§2401-d; C24, 27, 31, 35,§2151.]

2152 **Undelivered shipments.** Should a consignee fail to comply with the law and obtain delivery of a shipment of intoxicating liquors within fifteen days after notice to him by mail, such carrier may make application to the district court, or to a judge thereof, of the county in which the liquors are being held, for an order for the delivery of said liquors by said carrier to the sheriff and for an order for the destruction thereof. [C24, 27, 31, 35,§2152.]

Similar provisions, §§1945.6, 1945.7

2153 **Effect of delivery.** A delivery of said liquors to the sheriff under an order of the court shall discharge the carrier from all civil liability for said liquors. [C24, 27, 31, 35,§2153.]

2154 **Order.** The court shall summarily hear said application and, upon proof of the truth thereof, shall enter an order for the delivery of said liquors to the sheriff and for the destruction of said liquors. [C24, 27, 31, 35,§2154.]

Destruction, §13441.31

2155 **Violations.** The failure of a permit holder hereunder to comply with any provision of this chapter shall render such holder subject to all the penalties, forfeitures, and proceedings, civil and criminal, provided in this title for the

unlawful sale and keeping for sale of intoxicating liquors. [S13,§2401-e; C24, 27, 31, 35,§2155.]

2156 Violations by purchasers. Any person, firm, or corporation, and the agents and officers thereof, who purchases or obtains any intoxicating liquors for any purpose authorized by this chapter or knows that such liquors have been so obtained, and uses or permits said liquors, or any part thereof, to be used for beverage purposes or for any purpose other than that for which it was purchased, or obtained, shall be fined in a sum not exceeding one thousand dollars and, in addition, if a person, be imprisoned in the county jail for a period not exceeding one year. [C24, 27, 31, 35,§2156.]

Nonpayment of fine, §§13588, 13964

2157 "Corporation" construed. The term "corporation" as used in this chapter shall be construed to include corporations, firms, and persons engaged in the general wholesale drug business within this state. [S13,§2401-f; C24, 27, 31, 35,§2157.]

2158 Omitted—obsolete.

CHAPTER 102

REPORTS BY PERMIT HOLDERS

Referred to in §1921.094

2159 Reports required.
2160 Form of reports.
2161 When filed.
2162 Return of requests.
2163 Oath.

2159 Reports required. A permit holder under either of chapters 100 or 101 shall make and file with the county auditor of the county in which the permit has been granted, the same reports covering all intoxicating liquors received, used, and sold as are required by federal statutes and regulations to be made and filed by said permit holder with the federal prohibition director. [C73,§§1533, 1537; C97,§§2397, 2398; C24, 27, 31, 35,§2159.]

Referred to in §2160

2160 Form of reports. A report under section 2159 may be in the form of an original draft made from the federal report, or it may consist of a carbon copy made at the time of the making of said federal report. Said blank forms may be exact reproductions of the blank forms furnished by the federal department. [C24, 27, 31, 35,§2160.]

2161 When filed. Said reports shall be filed with the county auditor within the time in which they are required to be filed with said director. [C24, 27, 31, 35,§2161.]

2162 Return of requests. On or before the fifteenth day of January, March, May, July, September, and November of each year, each permit holder other than a wholesale druggist shall, in addition to all other requirements of this chapter, make full returns to the county auditor, under oath, of all requests filled by him and his clerks during the two preceding months. [C97, §2397; C24, 27, 31, 35,§2162.]

Referred to in §2163

2163 Oath. The oath provided for in section 2162 shall be in the following form:

I, ..., being duly sworn, on oath state that the requests for liquors herewith returned are all that were received and filled at my pharmacy during the months of ....., A. D. .....; that I have carefully preserved the same, and that they were filled out, signed, and attested on the date shown thereon, as provided by law; that said requests were filled by delivering the quantity and kinds of liquors required, and that no liquors have been sold or dispensed under color of my permit during said months except as shown by the requests herewith returned, and that I have faithfully observed and complied with the conditions of my bond and oath taken by me thereon indorsed, and with all the laws relating to my duties in the premises. [C97,§2397; C24, 27, 31, 35,§2163.]

CHAPTER 103

PERMITS TO MANUFACTURERS

Permits under liquor control act, §1921.027; saving clause, §1921.094

2164 Patent and proprietary medicines.
2165 Application.
2166 Notice.
2167 Granting permit.
2168 Term.
2169 Record.
2169.1 Report.
2170 Violations.

2164 Patent and proprietary medicines. Patent and proprietary medicines, tinctures, extracts, toilet articles, and perfume, and other like commodities, none of which are susceptible of use as a beverage but which require as one of their ingredients alcohol or vinous liquors, may be manufactured within this state, provided a permit so to manufacture is first obtained as hereinafter provided. [C24, 27, 31, 35,§2164.]

2165 Application. Any person, firm, or corporation desiring such permit shall apply to the judge of the district court of the county in which the principal place of business is located

by filing with the clerk of said court the affidavit of the person, member of the firm, or secretary or other managing officer of the corporation, as the case may be, stating therein the following facts:

1. The name, place of business, and post-office address of the person, firm, or corporation desiring such permit.

2. The business in which said person, firm, or corporation is engaged and the articles manufactured by them which require in their manufacture the use of alcohol or vinous liquors, and approximately the amount required during a calendar month.

3. That neither the applicant nor any member of the firm nor officer of the corporation has been convicted of any violation of the laws of this state with reference to the sale of intoxicating liquors within three years last past prior to the date of said affidavit. [C24, 27, 31, 35, §2165.]

2166 Notice. Upon the filing of said affidavit, together with other proof submitted, if any, the clerk shall immediately notify the county attorney of such application, and the county attorney shall appear in said proceeding on behalf of the state. [C24, 27, 31, 35,§2166.]

2167 Granting permit. If, after a hearing, the judge is satisfied that the facts stated in said affidavit are true and that the applicant is a person fit and proper to be intrusted with the permit applied for, the same shall be issued upon the filing by the applicant of a bond in the sum of two thousand dollars, the sureties to be approved by the clerk, conditioned as the bond of licensed pharmacist permit holders. [C24, 27, 31, 35,§2167.]

Bond of pharmacist, §2083

2168 Term. A permit issued under this chapter, unless revoked for cause, shall remain in force for a period of five years from the date of its issuance. [C24, 27, 31, 35,§2168.]

2169 Record. It shall be the duty of said clerk to keep a record of permits issued hereunder and to give each permit holder a serial number. [C24, 27, 31, 35,§2169.]

2169.1 Report. It shall be the duty of any manufacturer holding a permit under the provisions of this chapter whenever such manufacturer shall purchase any intoxicating liquor from any person, firm, or corporation, to file an affidavit immediately upon receipt of the shipment of such liquor, with the county auditor of the county in which such manufacturer shall have its place of business, in the following form:

State of Iowa }
.....County } ss.

....., being first duly sworn on oath deposes and says that he is a managing officer of the ..... company or corporation engaged in the manufacture of patent medicines, proprietary medicines, tinctures, extracts, toilet articles, perfumes or other like commodities, and that the location of the said company or corporation is in the city of ....., ...county, Iowa.

That on the ..... day of ....., 19..., said company or corporation ordered from the ..... company or corporation of .....
(Number and street)
.....
(City and state)
the following liquors:
.....
(Kinds of liquors and amounts)
.....
.....
.....

That the said liquors were received by this manufacturer on the.....day of....., 19..., for a purpose and use authorized by the permit held by this manufacturer.

.....

Subscribed and sworn to before me on this .....day of....., 19....

.....
Notary public.

[C27, 31, 35,§2169-a1.]

2170 Violations. Any person, firm, or corporation violating any provision of this chapter shall be guilty of a misdemeanor and punished accordingly. [C24, 27, 31, 35,§2170.]

Punishment, §12894

CHAPTER 104

PERMITS TO CLERGYMEN

Referred to in §1921.094

2171 Permit.
2172 Application.
2173 County attorney.
2174 Permit record.
2175 Order in triplicate.
2176 Sacramental use.
2177 Shipment.
2178 Carriers may transport.
2179 Use for other purposes.
2180 Violation revokes permit.

2171 Permit. Any minister, priest, or rabbi of any church, sect, denomination, or creed which uses wines in its sacrificial ceremonies or sacraments, and who desires to purchase and have transported by either intrastate or interstate common carriers and have possession of such sacramental wines shall, before purchasing or transporting such sacramental wines, apply for and obtain a permit authorizing such sale or transportation as hereinafter provided. [C24, 27, 31, 35,§2171.]

2172 Application. Any such minister, priest, or rabbi desiring such permit shall apply to the judge of the district court of the county in which such minister, priest, or rabbi resides, by filing

with the clerk of the district court the affidavit of such minister, priest, or rabbi, as the case may be, stating therein the following facts:

1. The name and post-office address of the applicant and the location of the church, building, or synagogue where such minister, priest, or rabbi ministers or officiates.

2. The kind and character of the wine and approximately the amount required during the calendar month. [C24, 27, 31, 35,§2172.]

2173 County attorney. It shall be the duty of the county attorney to appear for and represent the petitioner without expense to the petitioner. If, after a hearing, the judge is satisfied that the facts stated in said affidavit are true the permit shall be issued accordingly, which permit, unless revoked for cause, shall remain in force for five years from the date of its issuance. [C24, 27, 31, 35,§2173.]

Referred to in §2175

2174 Permit record. It shall be the duty of the clerk to keep a record of permits issued under the provisions of this chapter, giving each permit holder a serial number; and at the time of the issuance of said permit, or afterwards, while the same remains in force, on application of the permit holder the clerk shall deliver to him certificates showing his authority to buy, transport, and use such sacramental wines as may be covered by said permit, which certificates shall be in triplicate and on red paper and in substantially the following form:

CLERGYMAN'S SHIPPING PERMIT

This is to certify that....., of....., county of.....and state of Iowa, is the holder of a clergyman's permit No....., which will expire on the....day of....., 19..., and that such permit holder is authorized to purchase and have transported to him sacramental wines of the kinds and amounts specified below, providing one duplicate of this certificate is firmly pasted or affixed to the exterior of the package and one duplicate hereof is attached to the bill of lading; and after the delivery of said wine to such permit holder, said duplicate with the date of the delivery indorsed or stamped thereon shall be by the delivering carriers promptly mailed to the undersigned.

Kinds of Wine	Amount and purpose for which to be used.
.....	.....
.....	.....

.....
Clerk of the District Court.
.....County, Iowa.

SHIPPING ORDER

.....
.....
Please ship to me via.....
(Here insert name of carrier)
the wine above specified.
[C24, 27, 31, 35,§2174.]

Referred to in §2175

2175 Order in triplicate. When the holder of any permit granted under section 2173 desires to purchase and have transported any wine provided for in this chapter, he shall make a written order in triplicate upon the blanks provided in section 2174, which shall be furnished to him by said clerk, setting forth the exact amount and kind of wine ordered, from whom and by what railway, express company, or other common carrier the said liquor is to be transported. One copy of this order shall be immediately filed with the clerk of the district court of the county in which the permit is issued, one copy shall be attached to the package in which shipment is made in a conspicuous place in such way that it cannot be removed without showing evidence of mutilation where the entire order is shipped in one package, and if the said order shall be contained and shipped in more than one package, then the consignor shall attach the original copy to one of said packages and a duplicate thereof to each additional package required to ship said order, and the third copy shall be attached at the original point of shipment to the waybill of the common carrier transporting such wine. This copy, when the holder of the permit or his authorized agent shall have receipted for said wine, shall be stamped with the date of delivery of such wine and immediately filed by the agent of the common carrier which has transported the said wine with the clerk of the district court of the county in which permit is granted. The clerk of the district court shall compare the copy of the order filed by the agent of the common carrier with the copy filed by the holder of the permit and, if any discrepancy exists, he shall report such fact to the county attorney. [C24, 27, 31, 35,§2175.]

2176 Sacramental use. It shall be lawful for any person, firm, or corporation holding a permit in the state of Iowa for the sale of alcohol, spirituous or vinous liquors to sell sacramental wines to holders of permits under this chapter, and to deliver the same to common carriers for transportation to such permit holders under the conditions as provided by this chapter, anything to the contrary in any other law notwithstanding. [C24, 27, 31, 35,§2176.]

2177 Shipment. It shall be the duty of any permit holder within this state or dealer without the state filling such order to paste or otherwise attach firmly one duplicate of such certificate to the exterior of such package, which shall be sufficient authority for the transportation and delivery to such permit holders of the package containing such wine. [C24, 27, 31, 35, §2177.]

2178 Carriers may transport. When the provisions of this chapter have been fully complied with, common carriers are authorized to transport to such permit holders wine described in this chapter, in the manner specified therein, and the permit holder is authorized to carry or convey such wine to his place of business, anything in any other law to the contrary notwithstanding. [C24, 27, 31, 35,§2178.]

2179 Use for other purposes. Any person receiving or having shipped any wine under the provisions of this chapter, and using or per-

mitting the same to be used for any purpose other than for sacramental purposes, or using or permitting the same to be used for beverage purposes shall be guilty of a misdemeanor and shall forfeit all his rights under any permit granted under the provisions of this chapter. [C24, 27, 31, 35,§2179.]

Punishment, §12894

2180 **Violation revokes permit.** Any person, firm, or corporation violating any of the provisions of this chapter shall be guilty of a misdemeanor and any violation of any of the liquor laws of this state by a permit holder shall automatically revoke any permit held by him. [C24, 27, 31, 35,§2180.]

Punishment, §12894

TITLE VII

PUBLIC HEALTH

Referred to in §§2492, 2799

CHAPTER 105

STATE DEPARTMENT OF HEALTH

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

2181 Definitions.
2182 Appointment.
2183 Disqualifications.
2184 Term of office.
2185 Vacancies.
2186 Assistants and employees.
2187 Bonds.
2188 Seal.
2189 Expenses.
2190 Office.
2191 Powers and duties.
2192 Plumbing code committee.
2193 Powers of committee.
2194 Compensation and expenses.
2195 Plumbing code fund.
2196 Mining camps.
2197 Permits for construction of new mining camps.
2198 Pollution of water.
2199 Time and place of hearing.
2200 Notice.
2201 Order.
2201.1 Limitation on expense.
2202 Reasonable time for compliance.
2203 Record.
2204 Appeal.
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2206 Trial term.
2207 Violation of order.
2208 Penalty.
2209 Adoption of rules.
2210 Time rules take effect.
2211 Publication and distribution.
2212 Refusal of board to enforce rules.
2213 Expenses for enforcing rules.
2214 Duty of peace officers.
2215 Interference with health officer.
2216 Biennial report.
2217 Penalty.
2217.1 Federal aid.

2181 Definitions. For the purposes of this title, unless otherwise defined:

1. "Commissioner" shall mean the commissioner of public health.
2. "State department" or "department" shall mean the state department of health.
3. "Health officer" shall mean the physician who is the health officer of the local board of health.
4. "Local board" shall mean the local board of health.
5. "Physician" shall mean a person licensed to practice medicine and surgery, osteopathy and surgery, osteopathy, or chiropractic under the laws of this state; but a person licensed as a physician and surgeon shall be designated as a "physician" or "surgeon", a person licensed as an osteopath and surgeon shall be designated as an "osteopathic physician" or "osteopathic surgeon", a person licensed as an osteopath shall be designated as an "osteopathic physician", and a person licensed as a chiropractor shall be designated as a "chiropractor".
6. "Rules" shall include regulations and orders.
7. "Sanitation officer" shall mean the policeman who is the permanent sanitation and quarantine officer and who is subject to the direction of the local board of health in the execution of health and quarantine regulations. [S13, §2583-b; C24,27,31, 35,§2181.]

2182 Appointment. The governor shall, within sixty days after the convening of the general assembly in 1925, and every four years thereafter, appoint, with the approval of two-thirds of the members of the senate in executive session, a commissioner of public health who shall be a physician specially trained in public hygiene and sanitation. [C97,§2564; S13,§2564; C24, 27, 31, 35,§2182.]

Confirmation procedure, §38.1

2183 Disqualifications. The commissioner shall not be an officer or member of the instructional staff of any of the state educational institutions nor of any college in which is taught any of the professions for which a license must be obtained from the department to practice the same in this state, nor shall the commissioner hold any other lucrative office of the state, elective or appointive, during his term, but he shall devote his entire time to the duties of his office. [C97,§2564; S13,§2564; C24, 27, 31, 35,§2183.]

2184 Term of office. The term of office of the commissioner shall be four years, commencing on July 1 of the year of appointment. [C97, §2564; S13,§2564; C24, 27, 31, 35,§2184.]

2185 Vacancies. All vacancies in the office of the commissioner of public health that may occur while the general assembly is not in session shall be filled by appointment by the governor,

which appointment shall expire at the end of thirty days from the date on which the general assembly next convenes. Prior to the expiration of said thirty days the governor shall transmit to the senate for its approval an appointment for the unexpired portion of the regular term. Vacancies occurring during a session of the general assembly shall be filled as regular appointments before the end of said session and for the unexpired portion of the regular term. [C97,§2564; S13,§2564; C24, 27, 31, 35,§2185.]

2186 Assistants and employees. The commissioner shall employ such assistants and employees as may be authorized by law, and the persons thus appointed shall perform such duties as may be assigned to them by the commissioner, but the head of the division of examinations and licenses shall not be a person who has been licensed to practice any of the professions for which a license must be obtained from the department to practice the same in this state. [C97, §2564; S13,§2564; C24, 27, 31, 35,§2186.]

2187 Bonds. The commissioner shall require every employee who collects fees or handles funds belonging to the state to give an official bond, properly conditioned and signed by sufficient sureties, in a sum to be fixed by the commissioner which bond shall be approved by him and filed in the office of the secretary of state. [C24, 27, 31, 35,§2187.]

2188 Seal. The state department of health shall have an official seal and every commission, license, order, or other paper executed by the department may be attested with its seal. [C24, 27, 31, 35,§2188.]

2189 Expenses. The commissioner, field and office assistants, inspectors, and employees shall, in addition to salary, receive their necessary traveling expenses by the nearest traveled and practicable route and their necessary and incidental expenses when engaged in the performance of official business. [C97,§2574; S13,§§2564, 2574; C24, 27, 31, 35,§2189.]

2190 Office. The state department of health shall be located at the seat of government. [C97, §2564; S13,§2564; C24, 27, 31, 35,§2190.]

2191 Powers and duties. The commissioner of public health shall be the head of the "State Department of Health", which shall:

1. Exercise general supervision over the public health, promote public hygiene and sanitation, and, unless otherwise provided, enforce the laws relating to the same.

2. Conduct campaigns for the education of the people in hygiene and sanitation.

3. Issue monthly health bulletins containing fundamental health principles and other health data deemed of public interest.

4. Make investigations and surveys in respect to the causes of disease and epidemics, and the effect of locality, employment, and living conditions upon the public health. For this purpose the department may use the services of the experts connected with the bacteriological and epidemiological laboratory at the state university.

Laboratory tests, §§3952, 3953

5. Make inspections of the sanitary conditions in the educational, charitable, correctional, and penal institutions in the state.

6. Make inspections of the sanitary conditions in any locality of the state upon written petition of five or more citizens from said locality, and issue directions for the improvement of the same, which shall be executed by the local board.

7. Make inspections of the public water supplies, sewer systems, sewage treatment plants, and garbage and refuse disposal plants throughout the state, and direct the method of installation and operation of the same.

8. Establish, publish, and enforce a code of rules governing the installation of plumbing in cities and towns and amend the same when deemed necessary in the manner prescribed in section 2192. Said rules and amendments shall be published in the same manner as other rules of the department.

Referred to in §2192

9. Exercise general supervision over the administration of the housing law and give aid to the local authorities in the enforcement of the same, and it shall institute in the name of the state such legal proceedings as may be necessary in the enforcement of said law.

10. Hear and determine all appeals from the order of any local board made in connection with the enforcement of the housing law, and enforce its orders therein.

11. Establish stations throughout the state for the distribution of antitoxins and vaccines to physicians, druggists, and other persons, at cost. All antitoxin and vaccine thus distributed shall be labeled "Iowa State Department of Health".

12. Exercise general supervision over the administration and enforcement of the venereal disease law, chapter 109.

13. Exercise sole jurisdiction over the disposal and transportation of the dead bodies of human beings and prescribe the methods to be used in preparing such bodies for disposal and transportation.

14. Exercise general supervision over the administration and enforcement of the vital statistics law, chapter 114.

15. Enforce the law relative to the "Practice of Certain Professions Affecting the Public Health", title VIII.

16. Establish and maintain such divisions in the department as are necessary for the proper enforcement of the laws administered by it, including a division of contagious and infectious diseases, a division of venereal diseases, a division of housing, a division of sanitary engineering, a division of vital statistics, and a division of examinations and licenses; but the various services of the department shall be so consolidated as to eliminate unnecessary personnel and make possible the carrying on of the functions of the department under the most economical methods.

17. Establish, publish, and enforce rules not inconsistent with law for the enforcement of the

provisions of this title and for the enforcement of the various laws, the administration and supervision of which are imposed upon the department.

1. [C97,§2565; C24, 27, 31, 35,§2191.]
2, 3. [C24, 27, 31, 35,§2191.]
4. [C97,§2565; C24, 27, 31, 35,§2191.]
5. [C24, 27, 31, 35,§2191.]
6. [S13,§2569-a; C24, 27, 31, 35,§2191.]
7. [C97,§2565; C24, 27, 31, 35,§2191.]
8, 9, 10. [C24, 27, 31, 35,§2191.]
11. [S13,§§2572-a,-b,-c; C24, 27, 31, 35,§2191.]
12. [C24, 27, 31, 35,§2191.]
13. [S13,§2575-a42; C24, 27, 31, 35,§2191.]
14. [C97,§2565; C24, 27, 31, 35,§2191.]
15, 16. [C24, 27, 31, 35,§2191.]
17. [C97,§2565; C24, 27, 31, 35,§2191.]

2192 Plumbing code committee. The code of rules governing the installation of plumbing provided for in section 2191 may be amended biennially as conditions may require. The necessary amendments shall be determined by a plumbing code committee which shall be appointed by the commissioner of public health on or before July 1, 1925, and every four years thereafter. Such committee shall consist of the engineer who is head of the division of sanitary engineering, the commissioner of health, the housing commissioner, one master plumber, and one journeyman plumber. The engineer member shall be chairman of the committee. [C24, 27, 31, 35,§2192.]

Referred to in §2191

2193 Powers of committee. The committee shall meet at the call of the chairman, which shall be issued during the month of December of each even-numbered year. It shall continue in session until it has agreed upon the amendments deemed necessary to the existing code governing the installation of plumbing. [C24, 27, 31, 35,§2193.]

Referred to in §2194

2194 Compensation and expenses. The members of the committee shall receive no compensation for their services, but they shall receive their necessary traveling and hotel expenses in discharging the duties prescribed in section 2193. [C24, 27, 31, 35,§2194.]

Referred to in §2195

2195 Plumbing code fund. Cities and towns licensing plumbers shall pay to the treasurer of state one dollar for each license issued and twenty-five cents for each renewal thereof. The fees so received shall be kept by the treasurer of the state in a separate fund to be known as the plumbing code fund. Such fund shall be used in paying the claims arising under section 2194 and in paying the cost of printing the code of rules governing the installation of plumbing, plumbers' license and application blanks. [C24, 27, 31, 35,§2195.]

2196 Mining camps. When the health conditions in any mining camp become a menace to the health of the inhabitants thereof, the department shall require compliance with the provisions of the housing law insofar as the same may be reasonably applicable in such camp. [C24, 27, 31, 35,§2196.]

Housing law, ch 323

2197 Permits for construction of new mining camps. No new mining camp shall be constructed of more than five houses until a written permit is secured from the department. Application for said permit shall be made in writing, accompanied by a plat of the proposed camp showing in detail the location, topography, character of the houses to be built, and the provisions to be made for drainage, sewage, outside toilets, and water supply. Within three weeks from the receipt of such application the department shall inspect the proposed camp and, if satisfied that the same will comply with the general provisions of the housing law as far as reasonably applicable, shall issue the permit requested. [C24, 27, 31, 35,§2197.]

Housing law, ch 323

2198 Pollution of water. The department may upon its own initiative investigate the alleged pollution or corruption of any stream or body of water which is rendering the same unwholesome or unfit for domestic use, or as a public water supply, or which is rendering it deleterious to fish life, and the department shall make such investigation upon the written petition of:

1. The council of any city or town.
2. Any local board of health.
3. The trustees of any township.
4. Twenty-five residents of the state.

The power vested by this section in the department shall not apply, however, to the lower five thousand feet of any stream flowing into a river at a place where such river forms a part of the boundary line of the state. [C24, 27, 31, 35,§2198.]

2199 Time and place of hearing. After a full and complete investigation including bacteriological and chemical analysis of the water and location of the source of contamination, the department shall make an order fixing the time and place for a hearing which shall not be less than ten days thereafter. Such hearing shall be public and shall be carried on as far as possible in the same manner as a court hearing and every alleged offender shall have the right to appear by counsel, present testimony, and examine witnesses. [C24, 27, 31, 35,§2199.]

2200 Notice. Notice of the time and place of hearing shall be served upon each alleged offender at least ten days before said hearing in the manner required for the service of notice of the commencement of an ordinary action in a court of record. [C24, 27, 31, 35,§2200.]

Manner of service, §11060

2201 Order. After such hearing the department may, if it believes the alleged offender is guilty of the charges, enter an order directing such person to desist in the practice found to be the cause of such pollution or corruption, or it may order a change in the method of passing

waste materials into the water so that the same will be rendered innocuous and harmless. [C24, 27, 31, 35,§2201.]

Referred to in §2201.1

2201.1 Limitation on expense. No order shall be issued under the provisions of section 2201 that will require the expenditure of more than five thousand dollars without the written approval of a majority of the members of the state executive council. [C27, 31, 35,§2201-a1.]

2202 Reasonable time for compliance. If any such change is ordered, unless such practice is rendering such water dangerous to the public health, a reasonable time shall be granted to the offender in which to put in use the method ordered. [C24, 27, 31, 35,§2202.]

2203 Record. The department shall keep a complete record of such proceeding, including all the evidence taken, and such record shall be open to public inspection. [C24, 27, 31, 35, §2203.]

2204 Appeal. An appeal may be taken by the aggrieved party from any order entered in such proceeding to the district court of the county in which the alleged offense was committed. Such appeal shall be perfected by serving a written notice on the commissioner of public health within thirty days of the entry of such order. [C24, 27, 31, 35,§2204.]

2205 Transcript. Within thirty days after an application for an appeal is filed with the commissioner, he shall make, certify, and file in the office of the clerk of the court to which the appeal is taken, a full and complete transcript of all documents and papers relating to the case. [C24, 27, 31, 35,§2205.]

2206 Trial term. The first term after the appeal is taken shall be the trial term, and if the appeal is taken during a pending term, it shall be triable during such term at any time after ten days from the date that the transcript is filed by the commissioner. The hearing on appeal shall be tried as a suit in equity and shall be de novo. [C24, 27, 31, 35,§2206.]

How issues tried, §11429

2207 Violation of order. Failure to obey any order made by the department with reference to matters pertaining to the pollution of streams shall constitute contempt. In such event the department may certify to the district court of the county in which such disobedience shall occur, or to the district court of Polk county, the fact of such failure. The district court shall then proceed to hear and determine the matter and to punish for contempt to the same extent as though such failure were in connection with an order made by the district court which is made punishable by contempt. [C24, 27, 31, 35,§2207.]

Referred to in §2208
Contempts, ch 536
40ExGA, HF 260, §16-a10, editorially divided

2208 Penalty. Any party found guilty of contempt under section 2207 shall be fined not to exceed one thousand dollars or be imprisoned for failure to pay such fine. The penalties provided in this section shall be considered as additional to any penalty which may be imposed under the law relative to nuisances or any other statute relating to the pollution of streams, and a conviction under section 2207 shall not be a bar to prosecution under any other penal statute. [C24, 27, 31, 35,§2208.]

Extent of imprisonment, §13964

2209 Adoption of rules. Immediately after the adoption of any rule the department shall forward a certified copy of such rule to the county auditor of each county and to each local board of health. When such rule shall be amended, notice of said amendment shall be given in the same manner. [S13,§2571-b; C24, 27, 31, 35,§2209.]

2210 Time rules take effect. The rules of the department shall take effect and be in force in the respective counties from and after the date stated in the certified copies of said rules which are forwarded to the county auditors. [C24, 27, 31, 35,§2210.]

2211 Publication and distribution. The department shall publish from time to time a sufficient number of its rules to supply the needs of the several counties. The county auditor shall annually forward to the department a certified list of the names and addresses of the clerks of all the local boards of health in his county. Upon receipt of said list the department shall forward to the local boards sufficient copies for distribution in each county; and the clerk of the local board shall upon request furnish a copy of said rules to any resident, physician, or citizen. [S13,§2571-b; C24, 27, 31, 35, §2211.]

2212 Refusal of board to enforce rules. If any local board shall fail to enforce the rules of the state department or carry out its lawful directions, the department may enforce the same within the territorial jurisdiction of such local board, and for that purpose it may exercise all of the powers given by statute to the local board, and may employ the necessary assistants to carry out its lawful directions. [C97,§2572; S13,§§2569-a, 2572; C24, 27, 31, 35,§2212.]

Powers of local board, ch 107

2213 Expenses for enforcing rules. All expenses incurred by the state department in determining whether its rules are enforced by a local board, and in enforcing the same when a local board has failed to do so, shall be paid in the same manner as the expenses of enforcing such rules when enforced by the local board. [S13,§2572; C24, 27, 31, 35,§2213.]

Payment enforced, §2240 et seq.

2214 Duty of peace officers. All peace officers of the state when called upon by the department shall enforce its rules and execute the lawful orders of the department within their respective jurisdictions. [C97,§2572; S13,§2572; C24, 27, 31, 35,§2214.]

2215 Interference with health officer. Any person resisting or interfering with the department, its employees, or authorized agents, in the discharge of any duty imposed by law shall be guilty of a misdemeanor. [C24, 27, 31, 35, §2215.]

Punishment, §12894

2216 Biennial report. The department shall make a report to the governor in each even-numbered year, at the time provided by law, which shall include all receipts and disbursements for the year, such information and statistics concerning the public health and enforcement of the several laws administered by it, and such instruction upon the subject of hygiene and sanitation as may be thought useful for dissemination among the people, with such suggestions as to legislation as may be deemed advisable. [C97,§2565; C24, 27, 31, 35,§2216.]

Time of making report, §246

2217 Penalty. Any person who knowingly violates any provision of this chapter, or of the rules of the department, or any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a misdemeanor. If said rules relate to the practice of cosmetology or barbering said misdemeanors shall be punished by a fine of not to exceed one hundred dollars or by imprisonment not to exceed thirty days. [C73,§419; C97,§2573; S13,§2575-a6; C24, 27, 31, 35,§2217; 47GA, ch 105,§1.]

Punishment, §12894

2217.1 Federal aid. The state department of health is hereby authorized to accept financial aid from the government of the United States for the purpose of assisting in carrying on public health work in the state of Iowa. [C31, 35,§2217-c1.]

CHAPTER 106

STATE BOARD OF HEALTH

2218 Composition of board.
2219 Appointment.
2220 Duties.
2221 Questions submitted.
2222 Meetings.
2223 Place.
2224 Officers.
2225 Supplies.
2226 Compensation and expenses.
2227 Publication of proceedings.

2218 Composition of board. The state board of health shall consist of:

1. The commissioner of public health.
2. The members of the executive council.
3. Five health officers to be appointed by the governor. [S13,§2564-a; C24, 27, 31, 35,§2218.]

Referred to in §2219

2219 Appointment. The governor shall appoint, prior to the second Tuesday in January, 1925, and every two years thereafter, the five health officers provided for in section 2218, who shall serve for a period of two years or until their successors are appointed and qualify. Not more than one of such health officers shall be appointed from any one congressional district. [C24, 27, 31, 35,§2219.]

2220 Duties. The state board of health shall be an advisory body to the state department of health and shall have the following powers and duties to:

1. Consider and study the entire field of legislation and administration concerning public health, hygiene, and sanitation.
2. Advise the department relative to:

a. The causes of disease and epidemics, and the effect of locality, employment, and living conditions upon the public health.

b. The sanitary conditions in the educational, charitable, correctional, and penal institutions in the state.

c. The public water supplies, sewer systems, sewage treatment plants, and garbage and refuse disposal plants, and the method of installing and operating the same.

d. Contagious and infectious diseases, quarantine and isolation, venereal diseases, antitoxins and vaccines, housing, and vital statistics.

3. Recommend policies and practices to the department relative to any duty imposed upon it by law, which recommendations shall be given due consideration by the department.
4. Appoint a committee, upon the request of the department, to advise with the department relative to any duty imposed upon it by law.
5. Investigate the conduct of the work of the department, and for this purpose it shall have access at any time to all books, papers, documents, and records of the department.
6. Advise or make recommendations to the governor and general assembly relative to public health, hygiene, and sanitation.
7. Adopt rules, not inconsistent with law, for its internal control and management, a copy of which rules shall be filed with the department.
8. Act by committee, or by a majority of the board.
9. Keep minutes of the transactions of each session, regular or special, which shall be public records and filed with the department. [C97, §2565; C24, 27, 31, 35,§2220.]

2221 Questions submitted. The department may lay before the board, or any committee thereof, at any regular or special meeting, any matter upon which it desires the advice or opinion of such body or committee. [C24, 27, 31, 35, §2221.]

2222 Meetings. The board shall meet semi-annually, on the second Tuesday in July and January of each year, and at such other times as may be deemed necessary by the commissioner of public health or the governor. The

officer calling a special meeting of the board shall give each member ten days written notice by mail of such meeting. A majority of the members of the board shall constitute a quorum. [C97,§2564; S13,§2564; C24, 27, 31, 35,§2222.]

2223 Place. The meetings of the board shall be held at the seat of government unless otherwise ordered by the board. The executive council shall furnish the board with suitable quarters in which to hold its meetings. [C97, §2564; S13,§2564; C24, 27, 31, 35,§2223.]

2224 Officers. At the meeting held in July of each year a president and secretary shall be elected from the board, who shall serve for a period of one year. At the request of the board the department shall furnish an executive clerk from the regular employees of the department to record the minutes of the meetings of the board. [C97,§2564; S13,§2564; C24, 27, 31, 35,§2224.]

2225 Supplies. The department shall furnish the board of health with all articles and supplies required for the public use and necessary to enable the board to perform the duties imposed upon it by law. Such articles and supplies shall be obtained by the department in the same manner in which the regular supplies for the department are obtained and the same shall be considered and accounted for as if obtained for the use of the department. [S13, §2564; C24, 27, 31, 35,§2225.]

2226 Compensation and expenses. The members of the board shall receive no compensation as such, but the traveling expenses of the members shall be paid from any funds in the state treasury not otherwise appropriated. [C97, §2574; S13,§§2564, 2574; C24, 27, 31, 35,§2226.]

2227 Publication of proceedings. Upon request of the board the department shall incorporate the proceedings of the board, or any part thereof, in its biennial report to the governor, and the same shall be published as a part of the official report of the department. [C24, 27, 31, 35,§2227.]

CHAPTER 107

LOCAL BOARD OF HEALTH

2228 Organization.
2229 Chairman—duties.
2230 Clerk—duties.
2231 Health officer.
2232 Sanitation and quarantine officer.
2233 Meetings.
2234 Duties.
2235 Publication of rules.
2236 General duties.
2237 Special duties.
2238 Additional duties.
2239 Right to enter premises.
2240 Abatement of nuisance.
2241 Closing of premises.
2242 Refusal of admittance.
2243 Costs for abating nuisance.
2244 Peace officers to enforce.
2245 Interference with officers.
2246 Penalty.

2228 Organization. The local board of health shall consist:

1. In cities and towns, of the mayor, health physician, and members of the city or town council.

2. In townships, of the members of the board of township trustees. [C73,§§393, 415; C97, §§574, 2568; C24, 27, 31, 35,§2228.]

2229 Chairman—duties. In cities and towns the mayor shall be chairman of the local board, and when said board is not in session he shall as mayor and as chairman of said board enforce the statutes of the state relative to public health and the rules of the state department and local board. In townships the trustees shall elect one of their number as chairman who shall have the same duties as the chairman of the local board in cities and towns. [C24, 27, 31, 35, §2229.]

2230 Clerk—duties. The town, city, or township clerk, as the case may be, shall be clerk of the local board, keep its records, and perform such other duties as may be prescribed by the local board. [C73,§418; C97,§2568; C24, 27, 31, 35,§2230.]

2231 Health officer. Each local board shall have a health officer who shall be a physician, or one specially trained in public hygiene and sanitation. In cities and towns the health physician shall be such health officer. In every other case the local board shall appoint said health officer who shall hold office during its pleasure. [C73,§418; C97,§2568; C24, 27, 31, 35,§2231.]

2232 Sanitation and quarantine officer. Upon request of the local board, the mayor in every city or town shall appoint a permanent sanitation and quarantine officer who shall be subject to the orders and directions of the local board and its health officer in the execution of health and quarantine regulations. [C24, 27, 31, 35,§2232.]

2233 Meetings. The local board shall meet for the transaction of business on the first Monday of April and November in each year and at such other times as it may deem necessary. [S13,§2571-b; C24, 27, 31, 35,§2233.]

2234 Duties. The duties of the local board shall be to:

1. Obey and enforce the rules and lawful orders of the state department.

2. Furnish the state department at the times and in the manner prescribed by the department, reports of its proceedings.

3. Establish, maintain, and terminate quarantines in all cases of quarantinable diseases as

may be required by law or by the rules of the state department.

4. Make such rules, not inconsistent with law or the rules of the state department as may be necessary for the enforcement of the various laws, the administration of which is imposed upon the local board.

5. Have, subject to the rules of the state department, charge of the burial or disposal of the dead, and of all cemeteries dedicated to public use not legally controlled by other trustees or persons.

6. Regulate all fees and charges of persons employed by it in the execution of health laws, its own rules, and those of the state department.

1. [C97,§2572; S13,§2572; C24, 27, 31, 35, §2234.]

2. [C97,§2571; S13,§2571-b; C24, 27, 31, 35, §2234.]

3, 4. [C73,§§415, 417, 418; C97,§2568; C24, 27, 31, 35,§2234.]

5. [C73,§393; C97,§§574, 2568; C24, 27, 31, 35, §2234.]

6. [C97,§2568; C24, 27, 31, 35,§2234.]

Brewery inspection, §1921.131
Disposal of dead bodies, ch 110
Duty as to diseases among animals, §§2659, 2704.4
Quarantinable diseases, §2247

2235 Publication of rules. All rules adopted by the local board shall take effect after publication in some newspaper of general circulation in the city, town, or township in which said board has jurisdiction, or after posting a copy of the same in five public places therein. [C97, §2571; S13,§2571-b; C24, 27, 31, 35,§2235.]

2236 General duties. The health officer shall:

1. Be the executive officer of the local board in all matters pertaining to the public health, the control of communicable diseases, disposal of refuse and night soil, and the pollution of wells and other sources of water supply.

2. Recommend to the local board the proper measures to be taken for the abatement of unhealthful conditions and for the preservation of the public health.

3. Receive reports of cases of reportable diseases, impose and terminate quarantine.

4. Keep a record of cases reported to him (name, age, sex, address, birthplace, occupation, school or place of employment of the person reported to be ill, the name of the person making the report, the date of receipt by him of the report, the date of transmission of the report to the state department of health, the date of quarantine, the date of release from quarantine, the termination of the case and source of infection if known) in a book kept for the purpose.

5. Forward reports of cases to the state department of health in accordance with its rules and regulations. [C24, 27, 31, 35,§2236.]

2237 Special duties. At least twice each year, and oftener if necessary, the health officer shall personally inspect, or cause to be inspected, the schools, public buildings, and public utilities within the jurisdiction of the local board, and he shall recommend to the local board the necessary measures to be taken by it for the maintenance of such schools, public buildings, and public utilities in a sanitary condition. In case of sickness where no physician is in attendance, the health officer shall investigate the character of such sickness and report his findings to the local board. [C24, 27, 31, 35,§2237.]

2238 Additional duties. In addition to his statutory duties the health officer shall perform such other duties as the local board may assign to him. [C24, 27, 31, 35,§2238.]

2239 Right to enter premises. The local board, health officer, or sanitation officer, may enter any building, vessel, or other place for the purpose of examining into, preventing, or removing any nuisance, source of filth, or cause of sickness. [C97,§2569; C24, 27, 31, 35,§2239.]

Referred to in §§2242, 2243

2240 Abatement of nuisance. The local board may order the owner, occupant, or person in charge of any property, building, or other place, to remove at his own expense any nuisance, source of filth, or cause of sickness found thereon, by serving on said person a written notice, stating some reasonable time within which such removal shall be made, and if such person fails to comply with said order, the local board may cause the same to be executed at the expense of the owner or occupant. [C73,§§415, 417; C97,§§2568, 2569; C24, 27, 31, 35,§2240.]

Referred to in §§2242, 2243

2241 Closing of premises. In such cases the local board may order the occupants of said place to move therefrom and fix some reasonable time for compliance therewith. If the order is not complied with, said board may forcibly remove the occupants and close the premises; and said place shall not be again occupied as a dwelling or place of business without the written permission of the local board. [C73, §§415, 417; C97,§2568; C24, 27, 31, 35,§2241.]

Referred to in §§2242, 2243

2242 Refusal of admittance. In case any member of the local board, the health officer, or the sanitation officer, in proceeding under the authority of sections 2239 to 2241, inclusive, shall be refused entry to any place, complaint may be made under oath to any magistrate of the county, whether a member of the local board or not, and said magistrate shall thereupon issue his warrant, directed to some peace officer of the county, commanding him between the hours of sunrise and sunset, accompanied by two or more members of said board, the health officer, or the sanitation officer, to prevent, remove, or destroy any nuisance, source of filth, or cause of sickness, found to exist in said place, which order shall be executed by said officer under the direction of the members of the local board, the health officer, or the sanitation officer. [C97,§2569; C24, 27, 31, 35,§2242.]

Referred to in §§2243, 2258

2243 Costs for abating nuisance. All expenses incurred by the local board in proceeding under sections 2239 to 2242, inclusive, may

be recovered by suit in the name of the local board, or said board may certify the amount of said expense, together with a description of the property, to the county auditor who shall enter the same upon the tax books as costs for removing a nuisance and said amount shall be collected as other taxes. [C24, 27, 31, 35,§2243.]

Collection of taxes, ch 346 et seq.

2244 Peace officers to enforce. Peace officers, when called upon by the local board, shall enforce its rules and execute the lawful orders of said board. [C97,§§2568, 2572; S13,§2572; C24, 27, 31, 35,§2244.]

2245 Interference with officers. No person shall interfere with the local board, or its officers, or authorized agents, in the discharge of any duty imposed by law, or the rules of the state department or the local board. [C24, 27, 31, 35,§2245.]

2246 Penalty. Any person who knowingly violates any provision of this chapter, or of the rules of the local board, or any lawful order, written or oral, of said board, or of its officers or authorized agents, shall be guilty of a misdemeanor. [C73,§419; C97,§2573; S13,§2575-a6; C24, 27, 31, 35,§2246.]

Punishment, §12894

CHAPTER 107.1

COUNTY BOARD OF HEALTH

2246.1 Adoption of plan.
2246.2 County board of health.
2246.3 Organization.
2246.4 Expenses.

2246.1 Adoption of plan. The county board of supervisors of any county in Iowa may, by their own resolution, or by mutual agreement with any local board or boards of health of their county, adopt the county health unit plan. [C31, 35,§2246-c1.]

2246.2 County board of health. When a county health unit plan is adopted, a county board of health shall be appointed by the county board of supervisors to guide and direct all public health activities within such county.

This board of health shall consist of not more than eleven members, three of which shall be members of the local county medical society, and the others, who may include representatives of local boards of health of incorporated cities or towns situated within the county, shall all be appointed by the county board of supervisors. All financial expenditures shall first be approved by the county board of supervisors, by budget or otherwise. The county board of health shall serve as such without pay. [C31, 35,§2246-c2.]

2246.3 Organization. The organization of a county health unit plan shall be made only after consultation and after advising with the state commissioner of health or his agent, who is hereby charged with the duty of the investigation of all activities in public health in operation within the county at the time and with the further duty of advising the county board of health and the county board of supervisors toward the correlation and coordination of all public health activities under the county health unit plan. The state board of health shall adopt rules of procedure for the organization of county boards of health, as such, and shall also specify their duties. [C31, 35,§2246-c3.]

2246.4 Expenses. The expense incurred by the county health unit shall be paid by the county board of supervisors upon their own motion from county funds legally available. Other organizations, including local boards or board of health, may unite with the county board of supervisors in defraying the necessary expense of such county health unit. [C31, 35, §2246-c4.]

CHAPTER 108

CONTAGIOUS AND INFECTIOUS DISEASES

Referred to in §§2327, 2831

2247 Definitions.
2248 Warning signs and reports.
2249 Quarantinable and placard diseases.
2250 Report to department.
2251 Communicable diseases.
2252 Quarantine.
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2254 Warning signs.
2255 Temporary quarantine.
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2247 Definitions. For the purposes of this chapter:

1. "Communicable disease" shall mean any infectious or contagious disease.
2. "Placard disease" shall mean whooping cough, measles, mumps, chickenpox, or any other disease designated as a placard disease by the state department.
3. "Quarantinable disease" shall mean scarlet fever (including scarlet rash and scarlatina), smallpox, diphtheria (including membranous croup), cholera, leprosy, cerebro-spinal meningitis, anterior poliomyelitis, Spanish influenza, bubonic plague, or any other disease designated as quarantinable by the state department.
4. "Quarantine" shall mean the complete detention of a person within his own residence or temporary place of abode and the exclusion of the public from said place for the purpose of safeguarding the public from a communicable disease.
5. "Isolation" shall mean the separation of persons or animals presumably or actually affected with disease, or are disease carriers, or have been exposed to communicable disease, in such places and under such conditions as will prevent the direct or indirect conveyance of the infectious agent to susceptible persons. [S13, §2571-a; SS15,§2571-1a; C24, 27, 31, 35,§2247.]

2248 Warning signs and reports. The form of quarantine, temporary quarantine, and warning signs shall be prescribed by the rules of the state department, and the forms for all reports required by this chapter shall be likewise prescribed. [C24, 27, 31, 35,§2248.]

2249 Quarantinable and placard diseases. The physician attending any person infected with a quarantinable disease or placard disease shall immediately report the same orally to the local board or to one of its officers and at once follow said report with a written report. The local board or officer thus informed shall report the same immediately to the post office where the quarantined family receives or dispatches mail. Such reports shall be made in accordance with the rules of the state department and the local board. In case there is no attending physician, the parents, guardian, school teacher, or the householder of the premises wherein such disease exists shall report the same. [SS15, §2571-1a; C24, 27, 31, 35,§2249.]

2250 Report to department. All quarantinable and placard diseases shall be reported by the local board to the state department as prescribed by the rules of the department. [C24, 27, 31, 35,§2250.]

2251 Communicable diseases. In case any person shall be infected with any communicable disease, dangerous to the public health, whether a resident or otherwise, the local board shall make such orders in regard to the care of said person as are necessary to protect the public health, and said orders shall be executed by the mayor, township clerk, health officer, or sanitation officer as the local board may direct or provide by its rules. [S13,§2571-a; C24, 27, 31, 35, §2251.]

2252 Quarantine. A quarantine shall be established in every case of a quarantinable disease, and in such cases the infected person may be removed and isolated in a separate house or hospital for detention and treatment. All quarantines and isolations ordered under the authority of this section shall be executed in accordance with the rules of both the state department and the local board. [C73,§§415, 418; C97,§2568; S13,§2571-a; C24, 27, 31, 35,§2252.]

2253 Placard diseases. A quarantine shall not be established in case of a placard disease, but a warning sign shall be posted which shall serve merely as a warning to the public. [SS15, §§2571-2a,-3a; C24, 27, 31, 35,§2253.]

2254 Warning signs. All quarantinable and placard diseases shall, as soon as possible, be definitely diagnosed and the proper warning sign placed in a conspicuous place on the house, dwelling, or place in which the quarantinable or placard disease exists. [C24, 27, 31, 35,§2254.]

2255 Temporary quarantine. When the type of the disease cannot be immediately determined or diagnosed, a temporary quarantine shall be established and all the requirements of quarantine shall be observed, but such temporary quarantine shall terminate within forty-eight hours after being established. [C24, 27, 31, 35,§2255.]

2256 Instructions to persons. Every official, when establishing a quarantine or removing an infected person for the purpose of isolation, shall furnish to said person printed instructions relative to the duties and restrictions imposed upon him by law and by the rules of the state department and local board. [S13,§2571-b; C24, 27, 31, 35,§2256.]

2257 Temporary isolation hospitals. When no detention hospital has been established by the county, the local board shall provide a suitable place, when necessary, for the isolation of persons infected with communicable diseases dangerous to the public health, and the expense incident thereto shall be paid by the county in the same manner as other expenses incurred under the provisions of this chapter. [S13, §2571-a; C24, 27, 31, 35,§2257.]

Payment of expense, §2274 et seq.

2258 Forcible removal. The forcible removal and isolation of any infected person shall be accomplished by an application to any civil magistrate in the manner provided in section 2242 for the removal and abatement of nuisances; and such magistrate shall issue the warrant, as directed in such cases, to remove such person to the place designated by the local board, and to take possession of the infected house, lodging room, premises, or effects until the same have been properly fumigated or disinfected. [S13,§2571-a; C24, 27, 31, 35,§2258.]

2259 Fees for removing. The officers designated by the magistrate shall be entitled to receive for their services such reasonable compensation as shall be determined by the local board. The amount so determined shall be certified and paid in the same manner as other expenses incurred under the provisions of this chapter. [S13,§2571-a; C24, 27, 31, 35,§2259.]

Payment of expense, §2274 et seq.

2260 Removal to another jurisdiction. No person known to be infected with any communicable disease dangerous to the public health shall move or be removed from the jurisdiction of one local board to the jurisdiction of another local board without the written permission of the local board from whose jurisdiction the infected person is to be removed, and if the removal is to another county, then the written permission of the local board into whose jurisdiction the infected person is to be removed shall also be secured. [S13,§2575-a3; C24, 27, 31, 35,§2260.]

Referred to in §2262

2261 Removal to residence. When the infected person resides not more than fifteen miles from the place at which it is determined that he is infected with a communicable disease dangerous to the public health and said person requests that he be removed to his place of residence, the local board shall grant permission for his immediate removal, unless in its judgment such removal would involve great danger to the infected person or the public health. [S13,§2575-a5; C24, 27, 31, 35,§2261.]

Referred to in §2262

2262 Method of removal. All removals of infected persons as provided in sections 2260 and 2261 shall be by private conveyance along the least frequented highways, under escort of the health officer or sanitation officer, and as thoroughly isolated as possible. [S13,§2575-a5; C24, 27, 31, 35,§2262.]

Referred to in §2263

2263 Payment of expenses. All expenses of removal under section 2262 shall be paid by the county in which the infected person has a legal settlement and all bills for said expenses shall be presented, allowed, and paid in the same manner as bills for quarantine and isolation. [S13,§§2575-a4,-a5; C24, 27, 31, 35,§2263.]

Payment of claims, §2274 et seq.

2264 Detention hospitals. The local board of the city or town which is allowed to maintain a detention hospital for patients infected with communicable diseases, outside the limits of said municipality, shall have exclusive jurisdiction and control of such detention hospital and grounds for the enforcement of all sanitary and health regulations. [S13,§2575-a2; C24, 27, 31, 35,§2264.]

2265 Location of detention hospitals. All controversies arising between local authorities respecting the location of detention hospitals and grounds for the treatment of communicable diseases, shall be referred to the state department, which shall give two days notice to the parties interested, and after investigating the matter make such order as the facts warrant, which action shall be final. [S13,§2575-a1; C24, 27, 31, 35,§2265.]

2266 Termination of quarantines. In the absence of the health officer, the quarantine or isolation authorized by this chapter may be terminated by the mayor, the township clerk or other officer acting under the directions of the health officer. [C73,§§415, 418; C97,§2568; C24, 27, 31, 35,§2266.]

2267 Rep. by 44GA, ch 45,§3

2268 Disinfection. In case of death from or the termination of any quarantinable disease, the person who was infected and the place of quarantine or isolation, with all persons, furniture, bedding, clothing, and all other articles contained therein, shall be disinfected in accordance with the rules of the state department and under the direction of the local board, which shall require the attending physician to superintend or perform the work. In case there be no attending physician, or in case the attending physician refuses to perform this duty, then the local board shall employ some other suitable person to perform such work. [S13,§2571-a; C24, 27, 31, 35,§2268.]

2269 Disinfection from other diseases. The undertaker or person in charge of the funeral of any person dying from any communicable disease which is not quarantinable shall within forty-eight hours after the death of such person report to one of the officers of the local board the name and residence of the deceased person, together with the cause of death. Upon receipt of said notice the officer receiving the same shall cause said premises to be disinfected in accordance with the rules of the state department. [S13,§2571-a; C24, 27, 31, 35,§2269.]

2270 Medical attendance and supplies. In case any person under quarantine or the persons liable for the support of such person shall, in the opinion of the local board, be financially unable to secure the proper care, provisions, or medical attendance, the local board shall furnish such supplies and services during the period of quarantine and may delegate such duty by its rules to one of its officers or to the health officer. [S13,§2571-a; C24, 27, 31, 35, §2270.]

2271 County liability for supplies. The local board shall provide the proper care, provisions and medical attendance for every person removed and isolated in a separate house or hospital for detention and treatment, and the same shall be paid for by the county in which the infected person has a legal settlement if patient or legal guardian is unable to pay same. [S13,§2571-a; C24, 27, 31, 35,§2271.]

2272 Rights of isolated persons. Any person removed and isolated in a separate house or hospital may employ, at his own expense, the physician or nurse of his choice, and may pro-

vide such supplies and commodities as he may require. [S13,§2571-a; C24, 27, 31, 35,§2272.]

2273 **Supplies and services.** All services and supplies furnished to individuals or families under the provisions of this chapter must be authorized by the local board or by one of its officers acting under the rules of said board, and a written order therefor designating the person or persons employed to furnish such services or supplies, issued before said services or supplies were actually furnished, shall be attached to the bill when the same is presented for audit and payment. [S13,§2571-a; C24, 27, 31, 35,§2273.]

2274 **Filing of bills.** All bills incurred in carrying out the provisions of this chapter in establishing, maintaining, and terminating quarantine and isolation, in providing a necessary house or hospital for isolation, and in making disinfections, shall be filed with the clerk of the local board. Said board at its next regular meeting or special meeting called for the purpose shall examine and audit the same and, if found correct, approve and certify the same to the county board of supervisors for payment. [S13,§2571-a; C24, 27, 31, 35,§2274.]

2275 **Allowing claims.** All bills for supplies furnished and services rendered for persons removed and isolated in a separate house or hospital, or for persons financially unable to provide their own sustenance and care during quarantine, shall be allowed and paid for only on a basis of the local market price for such provisions, services, and supplies in the locality in which the same shall have been furnished. No bill for disinfecting premises or effects shall be allowed unless it shall be found that the infected person or those liable for his support are financially unable to pay the same. [S13, §2571-a; C24, 27, 31, 35,§2275.]

2276 **Approval and payment of claims.** The board of supervisors shall not be bound by the action of the local board in approving such bills, but shall allow the same from the poor fund for a reasonable amount and within a reasonable time. [S13,§2571-a; C24, 27, 31, 35,§2276.]

2277 **Reimbursement from county.** If any person receives services or supplies under this chapter who does not have a legal settlement in the county in which such bills were incurred and paid, the amount so paid shall be certified to the board of supervisors of the county in which said person claims settlement or owns property and the board of supervisors of such county shall reimburse the county from which such claim is certified, in the full amount originally paid by it. [S13,§2571-a; C24, 27, 31, 35, §2277.]

Referred to in §3828.096

2278 **Exposing to contagious disease.** Any person who knowingly exposes another to infection from any communicable disease, or knowingly subjects another to the danger of contracting such disease from a child or other irresponsible person, shall be liable for all damages resulting therefrom, and be punished as provided in this chapter. [C73,§419; C97, §2573; C24, 27, 31, 35,§2278.]

2279 **Penalty.** Any person who knowingly violates any provision of this chapter, or of the rules of the state department or the local board, or any lawful order, written or oral, of said department or board, or of their officers or authorized agents, shall be guilty of a misdemeanor. [C73,§419; C97,§2573; S13,§2575-a6; C24, 27, 31, 35,§2279.]

Punishment, §12894

CHAPTER 109

VENEREAL DISEASES

Referred to in §2191

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2280 "Venereal disease" defined. For the purposes of this chapter "venereal disease" shall mean syphilis, gonorrhea, or chancroid. [C24, 27, 31, 35,§2280.]

2281 Reports. Immediately after the first examination or treatment of any person infected with any venereal disease, the physician giving the same shall mail to the state department of health a report stating the case number, age, sex, color, marital condition, occupation, name of the disease, probable source of infection, and duration of the disease, except when the case occurs in a jurisdiction of a full-time municipal or county health officer, in which instance such report shall be sent direct to such officer who shall immediately forward same to the state department of health. It shall be the duty of the state department of health to report the number of the case and the name of the venereal disease reported as occurring in its jurisdiction, to each local board of health each month. [C24, 27, 31, 35,§2281.]

Referred to in §2282

2281.1 Blood tests for pregnant women. Each physician attending a pregnant woman in this state during gestation shall, in the case of each woman so attended, take or cause to be taken a sample of blood of such woman within fourteen days of the first examination, and submit such sample for standard serological tests for syphilis to the state bacteriological laboratory of the state university of Iowa at Iowa City or such other laboratories cooperating with and approved by the state department of health. Every other person permitted by law to attend upon pregnant women in the state but not permitted by law to take blood tests, shall cause a sample of the blood of such pregnant woman to be taken by a duly licensed physician and submitted for standard serological tests for syphilis to the state bacteriological laboratory of the state university of Iowa at Iowa City or such other laboratories cooperating with and approved by the state department of health. Such laboratory tests as are required by this section shall be made on request without charge by the state department of health. If such person reacts positively to such test, then the husband and father, other children by the same mother, or person responsible for pregnancy shall be subjected to same blood test as herein provided. The result of all laboratory tests shall be reported on standard forms prescribed by the commissioner of public health. [48GA, ch 82,§1.]

2281.2 Reporting on birth certificate. In reporting every birth and stillbirth, physicians and others permitted to attend pregnancy cases and required to report births and stillbirths shall state on the birth certificate or stillbirth certificate, as the case may be, whether a blood test for syphilis has been made during such pregnancy upon a specimen of blood taken from the woman who bore the child for which a birth or stillbirth certificate is filed, and if made, the date when such test was made, and if not made, the reason why such test was not made. In no event shall the birth certificate state the result of the test. [48GA, ch 82,§1.]

Constitutionality, 48GA, ch 82, §3

2282 Information. Every physician who examines or treats a person infected with any venereal disease shall give said person at the time of the first examination or treatment a circular of information concerning venereal disease and a copy of the provisions of this chapter, and he shall include in the report required by section 2281 a statement that the requirements of this section have been complied with. [C24, 27, 31, 35,§2282.]

2283 Former physician. When a person applies for treatment of any venereal disease, the physician shall ascertain whether such person has previously consulted or employed some other physician for the same purpose, and if so, to

immediately notify the physician last consulted or employed that the infected person is now under his care and treatment. [C24, 27, 31, 35, §2283.]

2284 **False information.** Any person infected with a venereal disease who shall refuse to give or who falsely gives to a physician any information concerning prior treatment for the same, or relative to the name and address of the physician last consulted or employed, shall be punished as provided in this chapter. [C24, 27, 31, 35,§2284.]

2285 **Conditions.** After a person infected with any venereal disease has consulted or employed a physician and fails to report to said physician for treatment during a period of ten days, the physician shall report the name and address of said person to the state department of health unless he shall receive during said period of time a report from some other physician that the infected person is now under his care and treatment. It shall be the duty of the state department of health when such reports are received to report the name of the infected person to the local board of health of the jurisdiction wherein he resides. [C24, 27, 31, 35,§2285; 48GA, ch 83,§1.]

Referred to in §2287

2286 **Circulars of information.** All reports to the local board or by one physician to another concerning persons infected with venereal disease shall be made upon forms to be prescribed by the state department of health, and all circulars of information, copies of the venereal disease law, and forms for reports, which are required to be used or distributed by this chapter, shall be supplied by the department to the proper persons. [C24, 27, 31, 35,§2286.]

2287 **Power of local board.** When a local board of health has been officially notified by the state department of health, as provided in section 2285, that any person infected with any venereal disease is not under the care and treatment of a physician or has not reported to said physician for a period of ten days, or is not taking recognized precautionary measures to prevent the infection of others, said board shall take such measures as it is authorized to take to protect the public health in the case of other communicable diseases dangerous to the public health, except as otherwise provided in this chapter. [C24, 27, 31, 35,§2287; 48GA, ch 83,§3.]

Communicable diseases, ch 108

2288 **Quarantine procedure.** When in the judgment of the local board it is necessary for the protection of the public health that any person infected with any venereal disease be quarantined, the procedure shall be the same as for other communicable diseases, except that the name of the disease present may be omitted from the quarantine card and the unafflicted members of the household shall be unrestricted. The local board may isolate such person in the detention hospital provided for in this chapter and shall cause to be administered to said person a proper course of treatment. [C24, 27, 31, 35,§2288.]

2289 **Detention hospitals.** When in the judgment of the board of supervisors of any county, or when advised by the state department acting with the United States public health service, that it is necessary to provide a detention hospital in the county for the isolation of persons infected with venereal diseases, said board of supervisors may provide such hospital and shall have power to construct, purchase, or rent a suitable place for such purposes and to equip and maintain the same in accordance with plans and specifications provided in advance by the state department. [C24, 27, 31, 35,§2289.]

Referred to in §2290

2290 **Tax levy.** For the purposes of section 2289, including the purchase of real estate for hospital purposes, the board of supervisors shall have power to levy a special tax for a period not to exceed fifty years, but such levy shall not exceed one-half mill on the dollar in any one year. [C24, 27, 31, 35,§2290.]

Referred to in §2291

2291 **Bond issue.** Any county may anticipate the collection of the tax herein provided and may issue interest-bearing bonds at a rate of interest not to exceed five percent per annum, to be denominated hospital bonds. Said bonds and the interest thereon shall be secured by said tax, and shall be payable only out of the hospital fund provided for in section 2290. No bonds shall be issued in excess of taxes authorized to be levied. [C24, 27, 31, 35,§2291.]

2292 **Conditions of bonds.** Such bonds shall be issued and sold in accordance with the provisions of existing statutes relating to the issuance and sale of bonds by counties. In issuing such bonds the board of supervisors may cause portions of the same to become due at different definite periods, but no bonds so issued shall be due and payable in less than three or more than fifty years from date of issue. [C24, 27, 31, 35,§2292.]

Issuance and sale, chs 63, 266
Payment and maturity, ch 63.1

2293 **Physician and attendants.** The board of supervisors shall appoint and fix the compensation of a physician and such nurses and other attendants as may be necessary to provide proper treatment and care for persons isolated in such detention hospital. In case the board of supervisors shall fail to make such provision the chairman of the local board shall name a physician to render the necessary medical and surgical service, and shall provide such other attendants as may be required. [C24, 27, 31, 35, §2293.]

2294 **Rules for detention hospitals.** The state department shall prescribe the rules for the maintenance and operation of the detention hospitals provided for in this chapter. [C24, 27, 31, 35,§2294.]

2295 **Termination of isolation.** In case of isolation the local board shall not terminate said

isolation until the case has become noninfectious or until permission has been given by the state department. [C24, 27, 31, 35,§2295.]

2296 Test for infectiousness. In order to determine whether a venereal disease has become noninfectious an examination shall be made. Gonorrhea shall be deemed to be infectious until at least two successive smears, taken not less than forty-eight hours apart, fail to show gonococci upon a microscopic examination of the same. [C24, 27, 31, 35,§2296.]

2297 Examination. Any person, subjected to examination under this chapter, may demand that some other physician than the health officer or physician representing the local board shall also make an examination; said physician shall be appointed by the chairman of the local board. In case the health officer or physician representing the local board and said physician cannot agree upon the diagnosis they shall select a third physician to make an examination, and the decision of two of said physicians shall determine the diagnosis. [C24, 27, 31, 35,§2297.]

2298 Examination of women. In making examinations of women for the purpose of ascertaining the existence of any venereal disease, women physicians shall be appointed for said purpose, if practicable, when requested by the person to be examined. [C24, 27, 31, 35,§2298.]

2299 Fee. The compensation of physicians, other than health officers and those representing the local board, for making examinations under this chapter, shall be five dollars for each examination. [C24, 27, 31, 35,§2299.]

2300 Payment of expenses. The expenses incident to isolation under this chapter, including examinations, medical and surgical services, nursing and care, shall be paid as in cases of isolation for other diseases. [C24, 27, 31, 35, §2300.]

Payment, §2274 et seq.

2301 Release on bond. Any person, except a prostitute, infected with any venereal disease may be released from isolation upon bond. Written application for such release shall be made to the local board, under oath, and must state that the applicant is not a prostitute; and such written application shall be accompanied by a certificate to that effect signed by some peace officer, magistrate, township clerk, or trustee of the city, town, or township wherein the case occurs. [C24, 27, 31, 35,§2301.]

2302 Bond—conditions. If the application is approved the applicant shall file with the county auditor a bond in the penal sum of one thousand dollars conditioned that the applicant will not permit or perform any act which might expose to infection any other person, and will continue treatment until cured, and will faithfully observe the rules and other requirements of the state department, local board, and health officer. Said bond shall run to and for the benefit of the county wherein the venereal disease occurs, and shall be signed by one or more freeholders as sureties, to be approved by the county auditor; but a cash guaranty in a like amount may be accepted in lieu of such bond. [C24, 27, 31, 35,§2302.]

2303 Examination before release. Before any person is released from any such bond as cured, an examination shall be made in the manner provided in this chapter, and permission secured from the state department. [C24, 27, 31, 35,§2303.]

2304 Parents responsible. The parents of minors acquiring venereal diseases and living with said parents shall be legally responsible for the compliance of such minors with the provisions of this chapter. [C24, 27, 31, 35,§2304.]

2305 Confidential matters. The identity of persons infected with venereal disease shall be kept secret, and all information, records, and reports concerning the same shall be confidential and shall be inaccessible to the public, but said records and reports shall be open to inspection by law-enforcing officers and to persons who have contracted venereal diseases from infected persons, when an order for the same has been issued by any court of record, except as otherwise herein provided, and the alleged infected person shall have access to such records pertaining to himself without an order of court. [C24, 27, 31, 35,§2305; 48GA, ch 83,§2.]

2306 Druggists to keep record. Every pharmacist or person who sells any proprietary drug, preparation, or article of any kind used for the cure or treatment of any venereal disease, except on physician's order or prescription, shall keep a record of the name, address, and sex of each purchaser. A copy of said record shall be mailed each week to the state department of health, or to the full-time county or municipal health officer, if such exists within the county. [C24, 27, 31, 35,§2306.]

2307 Suppression of prostitution. The local board, health officer, sanitation officer, and all other officers enforcing the provisions of this chapter shall use all proper means of suppressing prostitution, and no certificate or other evidence of freedom from venereal disease shall be issued by said officers. [C24, 27, 31, 35,§2307.]

2308 Transmitting disease. Any person infected with any venereal disease who shall transmit the same to another person, or expose another to infection by intercourse, shall be punished as provided in this chapter, and in addition thereto shall be liable to the party injured for all damages sustained by reason of said injury. [C24, 27, 31, 35,§2308.]

2309 Failing to report. Any physician who fails to make or falsely makes any of the reports required by this chapter concerning persons infected with any venereal disease, or who discloses the identity of such person, except as herein provided, shall be punished as provided in this chapter. Failure to report any venereal

disease as specified in this chapter shall be cause for the refusal of a renewal of license as provided in section 2447. [C24, 27, 31, 35,§2309.]

2310 Inspection of cases. In all suspected cases of venereal disease in the infectious stages, the local board shall immediately use every available means to determine whether the person suspected is infected with said disease and if so, to ascertain the sources of such infection. [C24, 27, 31, 35,§2310.]

2311 Officer to make examinations. The health officer in each city, town, or township shall examine every person reasonably suspected of having any venereal disease in the infectious stages to ascertain if such person is so infected, but no person shall be subjected to such examination who is under the care and treatment of a physician and is taking recognized precautionary measures to prevent the infection of others. [C24, 27, 31, 35,§2311.]

2312 Temporary isolation. Persons reasonably suspected of being infected with any venereal disease may be temporarily isolated in the detention hospital provided for in this chapter by the local board until an examination can be made. [C24, 27, 31, 35,§2312.]

2313 Prophylactic treatment of eyes. Every physician shall immediately, upon the birth of an infant, instill into the eyes of such newly born infant a prophylactic solution approved by the state department. [C24, 27, 31, 35,§2313.]

Referred to in §§2314, 2315

2314 Detection of eye infection. Every physician who shall detect any inflammation, swelling, or redness in the eyes of any infant, or any unnatural discharge therefrom, within six months after its birth, shall immediately treat such child with the prophylactic solution prescribed in section 2313. Any other person having the care of such child who shall discover any such condition of the eyes, within said time, shall immediately report the same and the location of such infant to the local board. [C24, 27, 31, 35,§2314.]

Referred to in §2315

2315 Children exempted. Nothing in sections 2313 and 2314 shall be construed to require medical treatment for the minor child of any person who is a member of a well-recognized church or religious denomination, and whose religious convictions in accordance with the tenets or principles of his church or religious denomination are against medical treatment for disease. [C24, 27, 31, 35,§2315.]

2315.1 Religious scruples recognized. No provision of this chapter, as it now is or as the same may be amended, shall be construed to require or compel any person who is a member of a well-recognized church or religious denomination, and whose religious convictions in accordance with the tenets or principles of his or her church or religious denomination are opposed to medical treatment for disease, to take or follow a course of medical treatment prescribed by law, or a physician, providing such person shall submit to and comply with all rules and regulations regarding quarantine, detention and confinement that may be prescribed by the local board of health. [48GA, ch 82,§2; ch 83,§5.]

2316 Penalty. Any person violating any of the provisions of this chapter shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for a period not to exceed six months, or by both such fine and imprisonment. [C24, 27, 31, 35,§2316.]

2316.1 Penalty. Any person who knowingly violates any of the provisions of this act [48GA, ch 83] shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed thirty days. [48GA, ch 83,§4.]

Constitutionality, 48GA, ch 83, §6

CHAPTER 110

DISPOSAL OF DEAD BODIES

Referred to in §§2396, 2405, 2435, 5237

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2346 Indorsement and return of permit.
2347 Record of burials.
2348 No person in charge of cemetery.
2349 Forged papers.
2350 Penalty.

2317 Definitions. For the purpose of this chapter:

1. "Local registrar" shall mean the local registrar of vital statistics.
2. "State registrar" shall mean the state registrar of vital statistics.
3. "Registration district" or "district" shall mean the district established by law for the registration of vital statistics.
4. "Person" shall include firm and corporation.
5. "Dead body" shall mean the dead body of a human being. [C24, 27, 31, 35,§2317.]

Registration district for vital statistics, §§2385, 2386

2318 Certificate and burial permit. No person, without securing a proper death certificate and a burial or removal permit, shall:

1. Keep a dead body for more than seventy-two hours after death or discovery of the same.
2. Remove such body from or into any registration district in this state.
3. Bury or make other final disposition of such body in this state. [C24, 27, 31, 35,§2318.]

2319 Execution and filing. The undertaker or other person in charge of the funeral or disposition of the body of every person dying in this state shall be responsible for the proper execution of a death certificate, which shall be filled out in durable black ink, in a legible manner, and filed with the local registrar of the registration district in which the death occurred or the body was found. [SS15,§587-b; C24, 27, 31, 35,§2319.]

2320 Contents of certificate. The certificate of death shall be executed on the United States standard form, approved by the bureau of the census, and shall contain the following items:

PART I

CERTIFICATION OF PERSONAL PARTICULARS

1. *Place of death,* including state, county, township, town, city, or industrial camp. If in a city, the street and house number; if in a hospital or other institution, the name of the same shall be given in place of the street and house number.
2. *Full name.* If an unnamed child, the surname preceded by "unnamed".
3. *Residence.* Length of residence in city or town where death occurred, and in the United States, if of foreign birth.
4. *Sex.*
5. *Color or race,* as white, black, mulatto (or other Negro descent), Indian, Chinese, Japanese, or other race.
6. *Conjugal condition,* as single, married, widowed, or divorced.
7. *Date of birth,* including the year, month, and day.
8. *Age,* in years, months, and days. If less than one day, the hours or minutes.
9. *Occupation.* The occupation of every person, male or female, who had any remunerative employment, shall be reported stating:

a. Trade, profession, or particular kind of work.

b. General nature of industry, business, or establishment in which employed (or employer).

10. *Birthplace,* at least state or foreign country, if known.
11. *Name of father.*
12. *Birthplace of father,* at least state or foreign country, if known.
13. *Maiden name of mother.*
14. *Birthplace of mother,* at least state or foreign country, if known.
15. *Name and address of informant.*

PART II

CERTIFICATION OF DEATH AND LAST SICKNESS PARTICULARS

16. *Date of death,* year, month, day, and hour. Time last seen alive.
17. *Period of medical attendance.*
18. *Cause of death,* showing the course of disease or sequence of causes resulting in the death, giving first the name of the disease causing death (primary cause) and the contributory (secondary) cause, if any, and the duration of each, and whether attributable to dangerous or insanitary conditions of employment.

Causes of death which may be the result of either disease or violence shall be carefully defined; and if from violence, the means of injury

shall be stated, and whether (probably) accidental, suicidal, or homicidal.

Indefinite and unsatisfactory terms, denoting only symptoms of disease or conditions resulting from disease, will not be sufficient.

19. *For deaths in hospitals, institutions, or of nonresidents,* the length of residence at place of death and in the state, together with the place where disease was contracted, if not at place of death, and former or usual residence shall be given.

20. *Signature and address of physician,* or official making the certification of death and last sickness particulars.

PART III

CERTIFICATION OF BURIAL PARTICULARS

21. *Place of burial or removal.*

22. *Date of burial or removal.*

23. *Signature and address of undertaker,* or person acting as such.

PART IV

ATTESTATION

24. *Official signature of registrar,* with the date when certificate was filed, and registration number. [C24, 27, 31, 35,§2320.]

2321 Particulars. In the execution of a death certificate, the personal particulars shall be obtained from the person best qualified to supply them. The death and last sickness particulars shall be furnished by the attending physician, or in the absence of such person, or if there be no such person, by the coroner. The burial particulars shall be supplied by the undertaker or person acting as such. Each informant shall certify to the particulars supplied by him by signing his name below the list of items furnished. [C24, 27, 31, 35,§2321.]

2322 Deaths without medical attendance. In case of any death occurring without medical attendance, the undertaker, or person acting as such, shall promptly report the case to the coroner. In such cases the coroner shall furnish such information as may be required by the state registrar in order to classify the death. [C24, 27, 31, 35,§2322.]

Referred to in §2323

2323 Stillbirths. A certificate of death and a burial or removal permit shall be required for every stillborn child which has advanced to the fifth month of uterogestation. The cause of death in such certificate shall be stated as "stillborn", with the cause of the stillbirth, if known. If a premature birth, such fact shall be stated and the period of uterogestation, in months, if known. Stillbirth occurring without the attendance of a physician shall be treated as deaths without medical attendance as provided in section 2322. [C24, 27, 31, 35,§2323.]

2324 Issuance of burial permit. Upon receipt of a death certificate the local registrar shall:

1. If the certificate is properly executed and complete, issue a burial or removal permit, as may be desired, to the undertaker or other person filing the same.

2. If the certificate is incomplete or improperly executed, return such certificate to the undertaker or other person filing the same for immediate correction.

Any person supplying any of the particulars in such certificate shall complete or correct the same in accordance with the directions of the local registrar. [C24, 27, 31, 35,§2324.]

2325 Fee. No fee shall be charged by a local registrar for the issuance of a burial or removal permit. [C24, 27, 31, 35,§2325.]

2326 Completeness of certificate. No certificate of death shall be held complete and correct that does not supply all of the particulars called for in the United States standard form certificate, detailed in accordance with the rules of the state department of health, or satisfactorily account for their omission. [C24, 27, 31, 35,§2326.]

2327 Communicable diseases. In case a death occurs from some communicable disease, as defined in the chapter on contagious and infectious diseases, no permit for the removal or other disposition of the body shall be issued by the local registrar, except under such rules as may be prescribed by the state department. [C24, 27, 31, 35,§2327.]

Contagious and infectious diseases, ch 108

2328 Burial permit. The burial or removal permit shall be issued upon a form prescribed by the state department and shall state:

1. The name, age, sex, cause of death, and other necessary details required by the state department.

2. That a satisfactory certificate of death has been filed as required by law.

3. That permission is granted to inter, remove, or otherwise dispose of the body. [C24, 27, 31, 35,§2328.]

Certificate of death, §§2319, 2320

2329 Burial in foreign district. No burial permit shall be required from the local registrar of the district in which a burial is to be made, when a body is removed from one district to another district in this state, for purpose of final disposition. [C24, 27, 31, 35,§2329.]

2330 Transportation of bodies. No person or common carrier shall ship or receive for shipment within this state or to any point outside the state, by any public conveyance, a dead body unless the box containing the corpse shall have attached thereto an embalmer's certificate showing the name and official number of the embalmer by whom the body was prepared, and the method of preparation employed. [S13, §2575-a43; C24, 27, 31, 35,§2330.]

Referred to in §2331

2331 Papers to be carried by escort. In addition to the requirements of section 2330, the person accompanying the body shall have in his possession:

1. A copy of the physician's or coroner's certificate of cause of death.

2. A transit permit issued by the local board or local registrar. [S13,§2575-a43; C24, 27, 31, 35,§2331.]

2332 Shipment by express. When the body is shipped by express a copy of the certificate of cause of death and the transit permit shall be attached to the waybill and delivered with the body at destination. [C24, 27, 31, 35,§2332.]

2333 Shipping permit. All transit permits shall be issued by the local board or local registrar upon application of an embalmer and shall be signed by the local health officer or local registrar. No transit permit shall be issued to any embalmer who is not in good standing as shown by the records of the state department. [S13, §§2575-a39,-a43; C24, 27, 31, 35,§2333.]

2334 Importation of bodies. A body imported from outside the state shall be subject to the same rules as to transportation as bodies shipped from within the state. [C24, 27, 31, 35, §2334.]

2335 Permit for imported bodies. When a dead body is transported from outside this state into the state for final disposition, the transit or removal permit, issued in accordance with the law and health regulations of the place where the death occurred, shall be accepted by the local registrar of the district into which the body is transported, as a basis upon which to issue a local burial permit. The fact that such body was shipped into this state for burial and the actual place of death shall be noted on the face of the burial permit by the local registrar. [C24, 27, 31, 35,§2335.]

2336 Shipments for scientific purposes. The provisions of this chapter relating to the transportation and importation of dead bodies, shall not be applicable to the shipment within this state of dead bodies intended for use for scientific purposes when the same are so designated by the shipper. Such bodies shall be prepared and shipped under special rules provided for that purpose by the state department. [S13, §2575-a43; C24, 27, 31, 35,§2336.]

2337 Disinterment for reburial. No person shall disinter the dead body of a human being for removal from one grave to another in the same cemetery or for removal to another cemetery without obtaining from the state department a permit for that purpose, and the department may by rule entirely prohibit disinterments for such purpose of the bodies of persons who have died of extremely contagious diseases. A dead body, properly prepared by an embalmer and deposited in a receiving vault, however, shall not be considered as a buried body within the meaning of this section. [C24, 27, 31, 35,§2337.]

2338 Disinterment for autopsy. No person shall disinter the dead body of a human being for the purpose of holding an autopsy thereon in order to determine the cause of death without obtaining for that purpose either:

1. An order of the district court of the county in which the body is buried, or
2. A special permit from the state department of health. [C24, 27, 31, 35,§2338.]

2339 Application for disinterment. An application to the state department for a disinterment permit either for the purpose of reburial or for holding an autopsy shall be upon a form furnished by the department and shall state:

1. Name of person whose body is to be disinterred.
2. Date of death.
3. Age at death.
4. Cause of death.
5. Name and location of the cemetery (county and township) from which the body is to be removed, and the same items concerning the cemetery in which the body is to be reinterred.
6. Relation of the applicant to the deceased person.
7. Name of the embalmer who is to perform the disinterment.
8. Such other information as the department may require. [C24, 27, 31, 35,§2339.]

2340 Application for court order. An application for a court order for a disinterment for the purpose of holding an autopsy may be made by the county attorney, coroner, or any attorney representing any party in any criminal or civil proceedings. Such application shall contain substantially the items required in an application for a permit made to the state department of health, and such other information as the court may direct. [C24, 27, 31, 35,§2340.]

2341 Granting of application. No application for a permit to disinter for the purpose of holding an autopsy shall be granted by the court or state department except under circumstances such as to cause the belief that someone is criminally or civilly liable for such death. A proper showing shall be made in every case and due consideration shall be given to the public health, the dead, and the feelings of relatives and friends. The limitations of this section shall not apply when the application is made by the surviving spouse or next of kin. [C24, 27, 31, 35,§2341.]

2342 Authority under permit. No person who is granted a permit to disinter the dead body of a human being for the purpose of reburial shall open the casket containing such body or permit an autopsy thereon. Such acts may only be performed under a special permit granted by the state department or under an order of court as provided in this chapter. [C24, 27, 31, 35,§2342.]

2343 Method of making a disinterment. Every disinterment shall be made by an embalmer and shall be performed in accordance with the rules of the state department governing the same. [C24, 27, 31, 35,§2343.]

2344 Delivery of burial permit. The undertaker, or person acting as such, shall deliver the burial, removal, or disinterment permit to the

person in charge of the cemetery before interring, disposing of, or disinterring any body therein. [SS15,§587-b; C24, 27, 31, 35,§2344.]

2345 Duty of sexton. The person in charge of every cemetery shall see that all the requirements of this chapter relative to burial, removal, and disinterment permits have been complied with before any burial, disposal, or disinterment is made in said cemetery. [C24, 27, 31, 35,§2345.]

2346 Indorsement and return of permit. Such person shall indorse upon said permit the date of burial, disposal, or disinterment, over his signature, and shall return the same to the local registrar of the district in which the cemetery is located within ten days from the date of burial, or within the time fixed by the state department. In case reburial is made in another cemetery after disinterment, the disinterment permit shall accompany the body and shall be dealt with as an original burial permit. [C24, 27, 31, 35,§2346.]

2347 Record of burials. The record-keeping officer of every cemetery shall make and keep a permanent record of all burials, disposals, disinterments, or reburials made in such cemetery, which record shall at all times be open to public inspection. This record shall, in each case, state the name of each deceased person, place of death, date of burial, disposal, disinterment, or reburial, and name and address of the undertaker. [SS15,§§587,-a; C24, 27, 31, 35,§2347.]

2348 No person in charge of cemetery. In case there is no person in charge of the cemetery, the undertaker, or person acting as such, shall sign said permit, giving the date of burial, disposal, or disinterment, and shall write across the face of said permit the words "No person in charge", and file the same, within ten days, with the local registrar of the district in which the cemetery is located. [C24, 27, 31, 35, §2348.]

2349 Forged papers. Any person who shall issue a forged death certificate, burial, removal, disinterment, or transit permit, or who shall certify falsely as to the cause of death or the preparation of a dead body, shall be guilty of forgery and punished accordingly. [S13,§2575-a45; C24, 27, 31, 35,§2349.]

Forgery, §13139

2350 Penalty. Any person who shall violate any provision of this chapter shall be fined not less than five dollars nor more than one hundred dollars, or be imprisoned not more than thirty days in the county jail, or be punished by both such fine and imprisonment. [S13,§2575-a45; C24, 27, 31, 35,§2350.]

CHAPTER 111

DEAD BODIES FOR SCIENTIFIC PURPOSES

2351 Delivery of bodies.
2352 Furnished to physicians.
2353 Notification of state department.
2354 Surrender to relatives.
2355 Disposition after dissection.
2356 Record of receipt.
2357 Record and bodies.
2358 Purpose for which body used.
2359 Failure to deliver dead body.
2360 Use without proper record.
2361 Penalties.

2351 Delivery of bodies. The body of every person dying in a public asylum, hospital, county home, penitentiary, or reformatory in this state, or found dead within the state, and which is suitable for scientific purposes, shall be delivered to the medical college of the state university, or some osteopathic or chiropractic college or school located in this state, which has been approved under the law regulating the practice of osteopathy or chiropractic; but no such body shall be delivered to any such college or school if the deceased person expressed a desire during his last illness that his body should be buried or cremated, nor if such is the desire of his relatives or friends. Such bodies shall be equitably distributed among said colleges and schools in accordance with such rules as may be adopted by the state department of health, but the number so distributed shall be in proportion to the number of students matriculated at each college or school. The expense of transporting said bodies to such college or school shall be paid by the college or school receiving the same. [C73,§4018; C97,§4946; S13,§4946-b; C24, 27, 31, 35,§2351.]

Referred to in §§2352, 2353, 2585.02
Approval of osteopathic and chiropractic colleges, §§2554.06, 2558

2352 Furnished to physicians. When there are more dead bodies available for use under section 2351 than are desired by said colleges or schools, the same may be delivered to physicians in the state for scientific study under such rules as may be adopted by the state department. [S13,§4946-b; C24, 27, 31, 35,§2352.]

Referred to in §§2353, 2585.02, 2585.03

2353 Notification of state department. Every coroner, undertaker, and the managing officer of every public asylum, hospital, county home, penitentiary, or reformatory, as soon as any dead body shall come into his custody which may be used for scientific purposes as provided in sections 2351 and 2352, shall at once notify the nearest relative or friend of the deceased, if known, and the state department by telegram, and hold such body unburied for forty-eight hours. Upon receipt of such telegram the department shall telegraph instructions relative to the disposition to be made of said body. [S13, §4946-c; C24, 27, 31, 35,§2353.]

2354 Surrender to relatives. When any dead body which has been delivered under this chapter for scientific purposes is subsequently claimed by any relative or friend, it shall be at

once surrendered to such relative or friend for burial without public expense; and all bodies received under this chapter shall be held for a period of sixty days before being used. [C73, §4018; C97,§4946; S13,§§4946-c,-d; C24, 27, 31, 35,§2354.]

2355 Disposition after dissection. The remains of every body received for scientific purposes under this chapter shall be decently buried or cremated after it has been used for said purposes, and a failure to do so shall be a misdemeanor. [C73,§4019; C97,§4947; C24, 27, 31, 35,§2355.]

Referred to in §2585.02
Punishment, §12894

2356 Record of receipt. Any college, school, or physician receiving the dead body of any human being for scientific purposes shall keep a record showing:

1. The name of the person from whom, and the time and place, such body was received.
2. The description of the receptacle in which the body was received, including the shipping direction attached to the same.
3. The description of the body, including the length, weight, and sex, apparent age at time of death, color of hair and beard, if any, and all marks or scars which might be used to identify the same.
4. The condition of the body and whether mutilated so as to prevent identification. [C97, §4948; C24, 27, 31, 35,§2356.]

Referred to in §§2357, 2360

2357 Record and bodies. The record required by section 2356 and the dead body of every human being received under this chapter shall be subject to inspection by any peace officer, or relative of the deceased. [C97,§§4948, 4949; C24, 27, 31, 35,§2357.]

2358 Purpose for which body used. The dead bodies delivered under this chapter shall be used only within the limits of this state for the purpose of scientific, medical, and surgical study, and no person shall remove the same beyond the limits of this state or in any manner traffic therein. Any person who shall violate this section shall be punished by imprisonment for a term not exceeding one year in the county jail. [C73,§4020; C97,§4950; C24, 27, 31, 35, §2358.]

2359 Failure to deliver dead body. Any person having the custody of the dead body of any human being which is required to be delivered for scientific purposes by this chapter, who shall fail to notify the state department of the existence of such body, or fail to deliver the same in accordance with the instructions of the department, shall be punished by a fine not exceeding fifty dollars. [S13,§4946-e; C24, 27, 31, 35,§2359.]

2360 Use without proper record. Any physician or member of the instructional staff of any college or school who uses, or permits others under his charge to use the dead body of a human being for the purpose of medical or surgical study without the record required in section 2356 having been made, or who shall refuse to allow any peace officer or relative of the deceased to inspect said record or body, shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [C97,§4949; C24, 27, 31, 35,§2360.]

2361 Penalties. Any person who shall receive or deliver any dead body of a human being knowing that any of the provisions of this chapter have been violated, shall be imprisoned in the penitentiary not more than two years, or fined not exceeding twenty-five hundred dollars, or both. [S13,§4946-e; C24, 27, 31, 35,§2361.]

CHAPTER 112

PUBLIC HEALTH NURSES

2362 Authority to employ.
2363 Cooperation.
2364 Duties.

2362 Authority to employ. The board of supervisors of any county, the council of any city or town, or the school board of any school district may employ public health nurses at such periods each year and in such numbers as may be deemed advisable. The compensation and expenses thereof shall be paid out of the general fund of the political subdivision employing said nurses. [C24, 27, 31, 35,§2362.]

2363 Cooperation. The said boards and councils within any county may cooperate in the employment of public health nurses and may apportion the expenses therefor to the various political subdivisions represented by said authorities. [C24, 27, 31, 35,§2363.]

2364 Duties. The authorities employing any public health nurses shall prescribe their duties which in a general way shall be for the promotion and conservation of the public health. [C24, 27, 31, 35,§2364.]

CHAPTER 113

MATERNITY HOSPITALS

This chapter (§§2365 to 2383, inc.) repealed by 41GA, ch 79, and chapter 181.3 enacted in lieu thereof

CHAPTER 114

REGISTRATION OF VITAL STATISTICS

Referred to in §2191

2384 Definitions.
2385 Registration districts.
2386 Consolidation.
2387 State registrar.
2388 Quarters and equipment.
2389 Local registrars.
2390 Deputy registrar.
2391 Subregistrars.
2392 Removal.
2393 Duties of state registrar.
2394 Duties of local registrar.
2395 Duties of subregistrars.
2396 Regulation.
2397 Birth certificate.
2398 Contents of birth certificate.
2399 Person in attendance at birth.
2400 Reporting birth.
2401 Certificate of birth.
2402 Incomplete certificates.
2403 Interrogation of informants.
2404 Supplemental return.
2405 Stillborn children.
2406 Altering certificates.
2407 Records of personal particulars.
2408 Source of information.
2409 Time of making record.
2410 Physicians—undertakers—casket dealers.
2411 Casket sales.
2412 Report.
2413 Information to accompany caskets.
2414 Duty to furnish information.
2415 Private genealogical records.
2416 Certified copies.
2417 Fee.
2418 Fee for reporting no registration.
2419 No fee for registering physicians.
2420 Payment of local registrars.
2421 Record book of marriages and divorces.
2422 Contents of record book for marriages.
2423 Contents of record book for divorces.
2424 Source of entries.
2425 Marriages and divorces.
2426 Certified copies.
2427 Search of records—fee.
2428 Free certified copies.
2429 United States census bureau.
2430 Accounting for fees.
2431 Copies of record as evidence.
2432 System exclusive.
2433 Investigation.
2434 Duty of county attorney.
2435 Duty of attorney general.
2436 Penalty.
2437 Second offense.

2384 Definitions. For the purpose of this chapter:

1. "Local registrar" shall mean the local registrar of vital statistics.
2. "State registrar" shall mean the state registrar of vital statistics.
3. "Vital statistics" shall mean statistics concerning births, deaths, marriages, and divorces.
4. "Person" shall include firm and corporation. [C24, 27, 31, 35,§2384.]

2385 Registration districts. For the purpose of this chapter the following areas shall constitute a primary registration district:

1. Each city and town.
2. Each civil township having no city or town within, or partly within, its limits.
3. The portion of each civil township lying outside of any city or town located within, or partly within, such township. [C24, 27, 31, 35, §2385.]

Registration district defined, §2317

2386 Consolidation. The state department of health may combine two or more primary registration districts when necessary to facilitate registration. [C24, 27, 31, 35,§2386.]

2387 State registrar. The commissioner of public health shall be the state registrar. [C24, 27, 31, 35,§2387.]

2388 Quarters and equipment. Suitable quarters shall be provided by the executive council for the division of vital statistics at the seat of government, which shall be properly equipped with fireproof vault and filing cases for the permanent and safe preservation of all official records made and returned under this chapter. [C24, 27, 31, 35,§2388.]

2389 Local registrars. The board of supervisors in each county shall appoint a local registrar for each registration district in the county, except that such appointment shall be made by the local board of health in cities having a population of thirty-five thousand or more. The term of office of each local registrar shall be four years, and he shall serve until his successor has been appointed and has qualified. [C24, 27, 31, 35,§2389.]

2390 Deputy registrar. Each local registrar shall, immediately upon his acceptance of appointment as such, appoint a deputy, who shall act in his place in case of absence or disability; and such deputy shall, in writing, accept such appointment. [C24, 27, 31, 35,§2390.]

2391 Subregistrars. When it appears necessary for the convenience of the people in any rural district, the local registrar may, with the approval of the state department, appoint one

or more suitable persons to act as subregistrars, who shall be authorized to receive birth and death certificates and to issue burial or removal permits in and for such portions of the district as may be designated. [C24, 27, 31, 35,§2391.]

2392 Removal. Any local registrar, deputy registrar, or subregistrar, who in the judgment of the state department fails or neglects to make prompt and complete return of births and deaths, and otherwise efficiently discharge the duties of his office, shall be forthwith removed by the department. [C24, 27, 31, 35,§2392.]

2393 Duties of state registrar. The state registrar shall:

1. Have general supervision of the registration of vital statistics.
2. Have supervisory power over local registrars, deputy registrars, and subregistrars, and clerks of the district court in the enforcement of the law relative to the disposal of dead bodies and the registration of vital statistics.
3. Prepare and issue such detailed instructions as may be required to procure the uniform observance of the provisions of said law and the maintenance of a perfect system of registration.
4. Furnish blank certificates of births, deaths, and other forms and record books required by this chapter to all persons concerned with the administration of the same. No other blanks and records shall be used than those supplied by the state registrar.
5. Carefully examine the certificates received from the local registrars and clerks of the district court, and if any such are incomplete or unsatisfactory he shall require such further information to be supplied as may be necessary to make the record complete and satisfactory.
6. Systematically arrange, bind, and deposit in the state historical building at the seat of government, the original certificates of births, deaths, and marriages for the preceding calendar year.
7. Prepare and maintain a comprehensive and continuous card index of all births, deaths, marriages, and divorces reported. Said index shall be arranged alphabetically:

a. In the case of deaths, by the names of decedents.

b. In the case of births, by the names of fathers, mothers, and children.

c. In the case of marriages and divorces, by the names of both parties. [C24, 27, 31, 35,§2393.]

Disposal of dead bodies, ch 110

2394 Duties of local registrar. The local registrar shall, subject to the direction and supervision of the state registrar:

1. Strictly and thoroughly enforce the law relative to the disposal of dead bodies and the registration of births and deaths in his registration district.
2. Issue instructions to all physicians, undertakers, and the people in general in his district, concerning the registration of births and deaths.
3. Distribute to the proper persons all forms and blanks required for the registration of births and deaths, and for the making of other records incident thereto.
4. Distribute to every physician, undertaker, and retail casket dealer registered in his district, a copy of the law relative to the registration of vital statistics and the disposal of dead bodies, and of the rules of the state department pertaining thereto.
5. Carefully examine each certificate of birth or death when presented for record, in order to ascertain whether it has been made out in accordance with law and the instructions of the state registrar; and if any such certificate is incomplete or unsatisfactory, he shall have the same corrected.
6. Number consecutively the certificates of birth and death, in two separate series, beginning with number one for the first birth and the first death in each calendar year, and sign his name as registrar in attestation of the date of filing in his office.
7. Make a complete and accurate copy of each birth and death certificate registered by him in a record book supplied by the state registrar, to be preserved permanently in his office as the local record.
8. On the tenth day of each month, transmit to the state registrar, in a stamped return envelope furnished by the state registrar, all original certificates registered by him for the preceding month. If no births or deaths occur in any month, he shall on the tenth day of the following month report that fact to the state registrar, on a card provided for such purpose.
9. Make a return, within thirty days after the close of each calendar year, to the state registrar of all physicians, undertakers, or retail casket dealers, who have been registered in his district during the whole or any part of the preceding calendar year.
10. Make an immediate report to the state registrar of any violation of the law relative to registration of vital statistics and the disposal of dead bodies of which he has knowledge. [C24, 27, 31, 35,§2394.]

Disposal of dead bodies, ch 110

2395 Duties of subregistrars. Each subregistrar shall note on each certificate, over his signature, the date of filing, and shall forward all certificates to the local registrar of the district within ten days, and in all cases before the third day of the following month. [C24, 27, 31, 35,§2395.]

2396 Regulation. Every provision of this chapter, of the chapter relative to the disposal of dead bodies, and of the rules of the state department applicable to local registrars in the registration of births and deaths, and the issuance of burial permits, shall apply to deputy registrars and subregistrars. [C24, 27, 31, 35, §2396.]

Disposal of dead bodies, ch 110

2397 Birth certificate. Within ten days after each birth there shall be filed with the local

registrar of the district in which the birth occurred a certificate of such birth filled out with durable black ink in a legible manner. [C24, 27, 31, 35,§2397.]

2398 Contents of birth certificate. The certificate of birth shall be executed on the United States standard form, approved by the bureau of the census, and shall contain the following items:

1. *Place of birth,* including state, county, township, town, or city. If in the city, the street, and the house number; if in a hospital or other institution, the name of the same shall be given in place of the street and house number.

2. *Full name of child.* If the child dies without a name, before the certificate is filed, the words "died unnamed" shall be entered. If the living child has not yet been named at the date of filing certificate of birth, the space for "full name of child" shall be left blank, to be filled out by a supplemental report, as hereinafter provided.

3. *Sex of child.*

4. *Plurality of birth.* Whether a twin, triplet, or other plural birth; number of each child in order of birth. A separate certificate shall be required for each child in case of plural births.

5. *Legitimacy of birth,* whether legitimate or illegitimate.

6. *Date of birth,* including the year, month, and day.

7. *Full name of father.* If the child is illegitimate, the name of the putative father shall not be entered without his consent, unless the paternity of the child has been determined in a regular legal proceeding instituted for that purpose, but the other particulars relating to the putative father (items nine to twelve, inclusive) shall be entered, if known, otherwise, as "unknown".

8. *Residence of father.*

9. *Color or race of father.*

10. *Age of father at last birthday,* in years.

11. *Birthplace of father,* at least state or foreign country, if known.

12. *Occupation of father.* The occupation shall be reported if engaged in any remunerative employment, stating:

a. Trade, profession, or particular kind of work.

b. General nature of industry, business, or establishment in which employed (or employer).

13. *Maiden name of mother.*

14. *Residence of mother.*

15. *Color or race of mother.*

16. *Age of mother at last birthday,* in years.

17. *Birthplace of mother,* at least state or foreign country, if known.

18. *Occupation of mother.* The occupation shall be reported if engaged in any remunerative employment, stating:

a. Trade, profession, or particular kind of work.

b. General nature of industry, business, or establishment in which employed (or employer).

19. *Number of children born to the mother,* including present birth.

20. *Number of children of the mother living.*

21. *Certification of attendance at birth,* including:

a. Statement of year, month, day (as given in item six).

b. Hour of birth.

c. Whether the child was born alive or stillborn.

This certification shall be signed by the attending physician, with date of signature and address. If there is no physician in attendance, then by the father or mother of the child, householder, owner of the premises, or manager or superintendent of the public or private institution where the birth occurred, or other competent person.

22. *Exact date of filing in office of local registrar,* attested by his official signature, and registration number of birth. [C24, 27, 31, 35,§2398.]

2399 Person in attendance at birth. The attending physician, or person acting as midwife, shall be responsible for the proper execution and return of a certificate for each birth, in accordance with the provisions of this chapter. [C24, 27, 31, 35,§2399.]

2400 Reporting birth. In case there is no physician, or person acting as midwife, in attendance upon the birth, a report of the same shall be made within ten days thereafter to the local registrar of the district in which the birth occurred. It shall be the duty of the following persons, in the order named, to make such report:

1. The father or mother of the child.

2. The householder or owner of the premises where the birth occurred.

3. The manager or superintendent of the public or private institution in which the birth occurred. [C24, 27, 31, 35,§2400.]

Referred to in §2401

2401 Certificate of birth. When the report of a birth is received under section 2400, the local registrar shall secure from the person so reporting, or from any other person having the required knowledge, such information as will enable him to prepare the proper certificate of birth. [C24, 27, 31, 35,§2401.]

2402 Incomplete certificates. No certificate of birth shall be held complete and correct that does not supply all of the items of information called for in the United States standard form certificate, detailed in accordance with the rules of the state department, or satisfactorily account for their omission. If a certificate of birth is incomplete, the local registrar shall immediately notify the informant and require him to supply the missing items of information if they can be obtained, or he may obtain them from any other person having the required knowledge. [C24, 27, 31, 35,§2402.]

2403 Interrogation of informants. Every person making a return of a birth or reporting the same, or who may be interrogated in relation thereto, shall answer correctly, and to the best of his knowledge, all questions put to him by the

local registrar which may be calculated to elicit any information needed to make a complete record of the birth as provided in this chapter, and the informant, as to any statement made in accordance herewith, shall verify such statement by his signature, when requested to do so by the local registrar. [C24, 27, 31, 35,§2403.]

2404 Supplemental return. When any certificate of birth of a living child is presented without the statement of the given name, then the registrar shall make out and deliver to the parents of the child a special blank for the supplemental report of the given name of the child, which shall be filled out as directed and returned to the local registrar as soon as the child shall have been named. [C24, 27, 31, 35,§2404.]

2405 Stillborn children. A stillborn child shall be registered as a birth, and also as a death as provided in the chapter on "Disposal of Dead Bodies". A certificate of both the birth and death shall be filed with the local registrar, in the usual form and manner. The certificate of birth shall contain, in place of the name of the child, the word "stillbirth". Such certificate shall not be required for a child that has not advanced to the fifth month of uterogestation. [C24, 27, 31, 35,§2405.]

Disposal of dead bodies, §2323

2406 Altering certificates. No certificate of birth or death, after its acceptance for registration by the local registrar, and no other record made in pursuance of this chapter, shall be altered or changed in any respect except by amendments properly dated, signed, and witnessed. [C24, 27, 31, 35,§2406.]

2407 Records of personal particulars. Every superintendent in charge of any hospital, county home, jail, reformatory, penitentiary, or other institution, public or private, to which persons resort for treatment of diseases or for confinement, or are committed by process of law, shall keep a record, as directed by the state registrar, of all the personal particulars and data relative to each patient, inmate, or prisoner in such institution which are required in the United States standard forms of birth and death certificates. [C24, 27, 31, 35,§2407.]

Referred to in §2408

2408 Source of information. The personal particulars and data required by section 2407 shall be obtained from the individual himself if practicable to do so; and when not, the same shall be obtained in as complete a manner as possible from relatives, friends, or other persons acquainted with the facts. [C24, 27, 31, 35, §2408.]

2409 Time of making record. Such record shall be made for each patient, inmate, or prisoner at the time of his admittance; and in case of each person admitted or committed for treatment of disease, the physician in charge shall specify for entry in the record the nature of the disease, and where, in his opinion, it was contracted. [C24, 27, 31, 35,§2409.]

2410 Physicians—undertakers—casket dealers. Every physician, undertaker, and retail casket dealer, shall, not later than the first day of January of each year, register his name, address, and occupation with the local registrar of the district in which he resides. Such registration shall also be made immediately upon removing to another registration district. [C24, 27, 31, 35,§2410.]

2411 Casket sales. Every person selling a casket at retail shall keep a record, which shall be open at all times to the state and local registrar for inspection, showing:

1. Name of the purchaser.
2. Purchaser's post-office address.
3. Name of deceased.
4. Date and place of death of deceased.

This section shall not apply to any person selling caskets at wholesale to undertakers or other dealers. [C24, 27, 31, 35,§2411.]

2412 Report. On the first day of each month every person selling caskets at retail shall report to the state registrar each sale for the preceding month, on a blank provided for that purpose. Such reports shall not be required from undertakers when they have direct charge of the disposition of the dead body for which a casket is sold. [C24, 27, 31, 35,§2412.]

2413 Information to accompany caskets. Every person selling a casket at retail, and not having charge of the disposition of the body, shall inclose within the casket the following:

1. A notice furnished by the state registrar, calling attention to the requirements of the law relative to the disposal of dead bodies and the registration of vital statistics.
2. A blank certificate of death.
3. The rules and regulations of the state department concerning the disposal of dead bodies. [C24, 27, 31, 35,§2413.]

Disposal of dead bodies, ch 110

2414 Duty to furnish information. Upon demand of the state registrar in person, by mail, or through the local registrar, every physician, informant, undertaker, or other person having knowledge of the facts relative to any birth or death, shall supply such information as he may possess, upon a form provided by the state registrar or upon the original birth or death certificate. [C24, 27, 31, 35,§2414.]

2415 Private genealogical records. If any person, organization, company, society, or association is in possession of any record of births or deaths which may be of value in establishing the genealogy of any resident of this state, such person, company, society, or association may file such record, or a duly authenticated transcript thereof, with the state registrar. The state registrar shall preserve such record or transcript and make an index thereof in such form as to facilitate the finding of any information contained therein. Such record and index shall be open to public inspection, subject to such reasonable conditions as the state registrar may prescribe. [C24, 27, 31, 35,§2415.]

Referred to in §2416

2416 Certified copies. The state registrar shall, upon request, supply to any applicant for any proper purpose, a certified copy of any record filed under section 2415. For his services, the state registrar shall charge a fee of fifty cents for each hour or fractional part of an hour spent in making such copy, and twenty-five cents for attaching his certificate thereto. [C24, 27, 31, 35,§2416.]

2417 Fee. Each local registrar shall be paid twenty-five cents for each birth or death certificate properly executed, filed, recorded, and returned to the state registrar, as required by law. [C24, 27, 31, 35,§2417.]

2418 Fee for reporting no registration. In case no birth or death is registered during any month, the local registrar shall be paid the sum of twenty-five cents for a report to that effect, made within the time prescribed in this chapter. [C24, 27, 31, 35,§2418.]

2419 No fee for registering physicians. No fee or other compensation shall be charged by any local registrar to any physician, undertaker, or casket dealer for registering his name under this chapter or making return thereof to the state registrar. [C24, 27, 31, 35,§2419.]

2420 Payment of local registrars. All amounts payable to a registrar under the provisions of this chapter shall be paid by the county in which the registration district is located, immediately upon certification by the state registrar, in the manner in which other claims are paid by the county. The state registrar shall annually, or at such other times as he may deem expedient, certify to the auditor of each county the number of births and deaths properly registered in said county, with the name of each registrar and the amount due him as fees under the provisions of this chapter. [C24, 27, 31, 35,§2420.]

Manner of payment, §5124

2421 Record book of marriages and divorces. The clerk of the district court in each county shall keep a record book for marriages and a record book for divorces. The form of said books shall be uniform throughout the state and shall be prescribed by the state department. Said books shall be provided at the expense of the county. [C24, 27, 31, 35,§2421.]

2422 Contents of record book for marriages. The record book for marriages shall show the same items and personal particulars for each marriage solemnized in the county as are required in the return of a marriage as prescribed by the chapter on "Marriage" in the title on "Domestic Relations". [C24, 27, 31, 35,§2422.]

Marriage, ch 469

2423 Contents of record book for divorces. The record book for divorces shall show the following items for each divorce granted in the county:

1. Full name, color, age, nationality, and number of prior marriages of each of the parties.
2. Date of marriage.
3. Cause of divorce.
4. Date of divorce.
5. Person to whom divorce granted (husband or wife).
6. Such additional data respecting each divorce as the state department may prescribe. [C24, 27, 31, 35,§2423.]

2424 Source of entries. The items respecting each marriage shall be taken from the return thereof, and the items respecting each divorce shall be taken as far as possible from the court records. The other data necessary to complete the entries in the record book of divorces shall be supplied by the parties to the action or by their attorneys. [C24, 27, 31, 35,§2424.]

2425 Marriages and divorces. The clerk of the district court shall on or before the first day of February of each year transmit to the state registrar:

1. All the original returns of marriages filed in his office during the preceding calendar year.
2. A copy of the entries made in the record book for divorces for every divorce granted in the county during the preceding calendar year.
3. Such other data relative to marriages and divorces as the state registrar may prescribe. [C24, 27, 31, 35,§2425.]

2426 Certified copies. The state registrar shall, upon request, supply to any applicant for any proper purpose, a certified copy of the record of any birth, death, or marriage registered under the provisions of this chapter, for the making and certifying of which he shall charge a fee of fifty cents. [C24, 27, 31, 35,§2426.]

2427 Search of records—fee. In cases in which search of the files and records is made, but no certified copy is requested, or the requested record is not found, the state registrar shall charge a fee of fifty cents for each hour or fractional part of an hour spent in search. [C24, 27, 31, 35,§2427.]

2428 Free certified copies. Upon request of any parent or guardian, the state registrar shall supply, without charge, a certificate limited to a statement as to the date of birth of any child, when the same shall be necessary for admission to school or for the purpose of securing employment. [C24, 27, 31, 35,§2428.]

2429 United States census bureau. The United States census bureau shall have the privilege of making, at its own expense and without paying the legal fees, copies of all records and vital statistics provided for in this chapter. [C24, 27, 31, 35,§2429.]

2430 Accounting for fees. The state registrar shall keep a true and correct account of all fees received by him and turn the same over to the state treasurer as provided by law. [C24, 27, 31, 35,§2430.]

Payment to state treasurer, §143

2431 Copies of record as evidence. Any certified copy of the record of a birth, death, or marriage, made under this chapter, shall be pre-

sumptive evidence in all courts and places of the facts therein stated. [C24, 27, 31, 35,§2431.]

Similar provision, §11290

2432 System exclusive. No system for the registration of births, deaths, or marriages shall be maintained in the state or any of its political subdivisions other than the one provided for in this chapter. [C24, 27, 31, 35,§2432.]

2433 Investigation. The state department shall have authority to investigate cases of irregularity or violation of the law relative to the registration of vital statistics and the disposal of dead bodies, and all registrars shall aid the department in such investigation. [C24, 27, 31, 35,§2433.]

2434 Duty of county attorney. The state department shall report, when deemed necessary, cases of violation of said law to the proper county attorney, with a statement of the facts and circumstances; and when any such case is reported to such county attorney he shall forthwith initiate and promptly follow up the necessary court proceedings against the person responsible for the alleged violation of law. [C24, 27, 31, 35,§2434.]

2435 Duty of attorney general. Upon request of the state department, the attorney general shall assist in the enforcement of the provisions of this chapter and of the chapter relative to the disposal of dead bodies. [C24, 27, 31, 35,§2435.]

Disposal of dead bodies, ch 110

2436 Penalty. Any person violating any of the provisions of this chapter or of any rule of the state department relative thereto, or falsifying any certificate of birth or any record established by this chapter, shall be fined not less than five dollars nor more than one hundred dollars, or be imprisoned not more than thirty days in the county jail, or be punished by both such fine and imprisonment. [C24, 27, 31, 35, §2436.]

Referred to in §2437

2437 Second offense. If any person who has been convicted under section 2436 shall be again convicted of a violation of any of the provisions of this chapter or of any rule of the state department relative thereto, on a similar charge, he shall be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not to exceed sixty days, or by both such fine and imprisonment; and if a physician, he shall, in addition, have his license to practice his profession revoked; but such former conviction shall be referred to in the indictment or information, stating the court, date, and place that judgment was rendered. [C97,§2578; S13,§2578; C24, 27, 31, 35,§2437.]

Revocation in general, §2492 et seq.

CHAPTER 114.1

STATE BOARD OF EUGENICS

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2437.01 State board. A state board of eugenics is hereby created. Said board shall consist of the medical director of the state psychopathic hospital connected with the college of medicine of the state university at Iowa City, of the commissioner of public health, and of the superintendents of the following state institutions, to wit:

1. The Cherokee state hospital.
2. The Clarinda state hospital.
3. The Independence state hospital.
4. The Mount Pleasant state hospital.
5. The institution for feeble-minded children at Glenwood.
6. The hospital for epileptics and school for feeble-minded at Woodward.
7. The women's reformatory at Rockwell City.

[C31, 35,§2437-c1.]

2437.02 Quarterly reports of defective. Each member of said board, and the warden of the penitentiary and the warden of the men's reformatory, shall, annually, on the first day of January, April, July and October, report to the state board of eugenics the names of all persons, male or female, living in this state, of whom he or she may have knowledge, who are feeble-minded, insane, syphilitic, habitual criminals, moral degenerates, or sexual perverts and who are a menace to society. [C31, 35,§2437-c2.]

Referred to in §§2437.03, 2437.04

2437.03 Notice. Any person reported to the state board of eugenics, under the provisions of section 2437.02, must be served with a notice in writing of such report and fixing a time and place not less than ten days subsequent to such report for the time and place of examination and hearing before said board. Said notice shall be served as provided in section 2437.11. [C31, 35,§2437-c3.]

2437.04 Hearing. Any person reported to the state board of eugenics, as provided in section 2437.02, and who has been notified thereof, shall have the right to appear personally before said board and to be represented by counsel at such hearing. He shall have the right to have witnesses subpoenaed and to introduce such evidence in regard to the matter at issue as the board shall deem relevant, material and proper. [C31, 35,§2437-c4.]

2437.05 Examination and hearing. It shall be the duty of said board at the time and place named in the notice to the person reported upon, with such reasonable continuances from time to time and from place to place as the board may determine, to proceed to hear and consider the evidence offered and to examine into the innate traits, the mental and physical conditions, the personal records and family traits and history of the person reported upon and notified as in this chapter provided, insofar as the same can be ascertained. If the person reported upon is an inmate of any institution, the said board shall see to it that the inmate shall have opportunity and leave to attend the said examination and hearing in person, if desired by him or if requested by his guardian or person served with the notice as aforesaid. [C31, 35,§2437-c5.]

2437.06 Witnesses. To enable the board to discharge said duty, said board, or the chairman thereof, on the order of the board, shall have power and authority to issue subpoenas and to cause the same to be served. [C31, 35, §2437-c6.]

2437.07 Contempt. Should a witness be duly served with a subpoena and refuse to appear, or should a witness refuse to answer, the board shall report such refusal to the district court or judge thereof, of the county in which the refusal occurs, and the court, or judge thereof, shall proceed as though such refusal had occurred in a proceeding before said court or judge. [C31, 35,§2437-c7.]

2437.08 Oaths. Any member of said board shall have power to administer an oath to witnesses before it. [C31, 35,§2437-c8.]

2437.09 Order for sterilization. If in the judgment of a majority of said board procreation by such persons would produce a child or children having an inherited tendency to feeblemindedness, syphilis, insanity, epilepsy, criminality, or degeneracy, or who would probably become a social menace or ward of the state, and there is no probability that the condition of such person so investigated and examined will improve to such an extent as to avoid such consequences, then it shall be the duty of such board to make an order embodying its conclusions with reference to such person in said respects and specifying such a type of sterilization as may be deemed by said board best suited to the condition of said person and most likely to produce the beneficial results in the respects specified in this section, but nothing contained in this chapter shall be construed to authorize castration nor removal of sound organs from the body. [C31, 35,§2437-c9.]

2437.10 Findings. After fully inquiring into the condition of each of such persons, said board shall make separate written findings and conclusions for each of the persons into whose condition it has examined, including its findings, conclusions, and order thereon as herein provided, and the same shall be preserved in the records of said board and a copy thereof shall be furnished to the official who reported the case. [C31, 35,§2437-c10.]

2437.11 Service of order. If an operation is deemed necessary by said board for such person so investigated, then a copy of the order of said board recommending such operation shall be served forthwith on said person, or, in the case of an insane or feeble-minded person, upon his legal guardian, and if such person has no legal guardian, then upon his nearest known kin, or personal friend, within the state, and if such person has no known kin or personal friend within the state, then the board shall cause application to be made to the district court of the county in which such person resided or may be found for the appointment of some suitable person to act as guardian of the person reported upon during and for the purposes of the proceedings under this chapter, to defend the rights and interests of the said person, and the court shall, by proper order, appoint some suitable person to act as guardian for said purposes who shall be paid from any funds in the state treasury not otherwise appropriated, a fee, but not exceeding twenty-five dollars, as may be determined by the judge of said court, for his services under said appointment. Such guardian may be removed or discharged at any time by said court, or the judge thereof in vacation, and a new guardian appointed and substituted in his place. [C31, 35,§2437-c11.]

Referred to in §2437.03

2437.12 Purpose and objects sought. Said investigation, findings, and orders of said board shall be made with the purpose in view of securing a betterment of the physical, mental, neural or psychical condition of the person, to protect society from the acts of such person, or from the menace of procreation by such person, and not in any manner as a punitive measure. [C31, 35, §2437-c12.]

2437.13 Consent to operation. If any person whose condition has been examined and reported upon by said board, as hereinbefore provided, shall consent in writing to have the operation specified in the order of said board performed, such operation shall thereupon be performed upon said person by or under the direction of the superintendent of the institution in which he is confined, if such person be an inmate of any of the state institutions herein mentioned, or if he is not an inmate of any of said institutions, such operation shall be performed by or under the direction of the state board of eugenics. All such operations shall

be performed with due regard for the physical condition of the person upon whom it is performed and in a safe and humane manner. [C31, 35,§2437-c13.]

Referred to in §2437.14

2437.14 "Consent" defined. In case the person to be operated upon be feeble-minded or insane, the consent hereinbefore mentioned in section 2437.13 shall be construed to mean the written consent of such person's legal guardian, or if such person has no legal guardian, then the written consent of such person's nearest known kin or personal friend within the state of Iowa, or if such person be insane, or feeble-minded, and has neither legal guardian nor known kin or personal friend within the state of Iowa, then the written consent of the guardian appointed by the court for such person as provided in this chapter. [C31, 35,§2437-c14.]

2437.15 Absence of consent. If any such person shall not consent, within twenty days from the service of such order upon him, to the performance of such operation, said board of eugenics, through its secretary, or other officer having charge of its records and files, within fifteen days thereafter, or such further time as the court or judge thereof may allow, shall file a transcript of its proceedings and of its said findings, conclusions, and order with reference to said person with the clerk of the district court of the county in which such person resides or may be found. [C31, 35,§2437-c15.]

2437.16 Appearance. Upon the filing of such findings, conclusions, and order, the clerk of the district court shall issue a summons directed to such person and deliver the same to the sheriff, together with a copy of such order prepared and certified by him and it shall be the duty of said sheriff to forthwith serve said summons and copy of order upon said person therein named, who shall be required, within twenty days after such service upon him, to enter his appearance in writing with the clerk of the district court in such case or by appearing in person before said clerk, who shall thereupon enter the appearance of such person in such proceeding. If he be an insane or feeble-minded person such appearance may be made by his guardian, if he have one; if not, then by his nearest of kin or near friend. If he be confined in an institution, facility shall be furnished him for making such appearance. [C31, 35,§2437-c16.]

2437.17 Court procedure. The issue thereby raised shall be whether the findings and conclusions of said board shall be affirmed by the court, and shall be tried in the district court of such county, as a special proceeding, in the same manner as a civil action at law in which the state shall be the plaintiff and the person so summoned shall be the defendant. Each party shall have the same rights as to production of evidence and the case shall be tried in the same manner as any other civil action. In all such cases the county attorney of the county where such proceedings are tried shall appear and prosecute such action on behalf of the state. If the defendant has no attorney and he is unable to secure one, the court shall appoint an attorney from the membership of the bar of said county to conduct his defense, and appeal, if any be taken as hereinafter provided, and such attorney shall be compensated by the state, upon order of the court. Upon the request of either party to such proceeding all questions of fact shall be tried by a jury and the court in every instance shall have the testimony fully reported at the expense of the state. [C31, 35, §2437-c17.]

2437.18 Judgment. If the findings and conclusions of the state board of eugenics shall be affirmed by the court, the defendant shall be immediately placed in custody by the sheriff of said county, and may be admitted to bail by the court, who shall fix the amount of such bail, and if not so admitted to bail, shall be held until the operation provided in such findings be performed. [C31, 35,§2437-c18.]

2437.19 Appeal. Either party to said proceedings may take an appeal from the district court to the supreme court of this state in the same manner and within the same time and with like effect as appeals in other civil actions are taken, and such case shall be tried in the supreme court in the same manner as other appeals in actions at law. If the defendant be represented by an attorney appointed by the court, and, in the opinion of the court, is financially unable to meet his part of the expense of an appeal, the defendant's actual and necessary expense of such appeal and prosecution thereof to final decree by the supreme court shall be paid by the state upon order of said district court, same to be paid out of the general funds of the state not otherwise appropriated. [C31, 35,§2437-c19.]

2437.20 Expenses. The state shall be liable under this chapter, except as hereinabove provided for, only for the actual traveling expenses of the members of the board incurred in the performance of their duties, and the actual and necessary expense incident to the investigations of said board either on original case or an appeal therefrom. [C31, 35,§2437-c20.]

2437.21 Selection of physician. Nothing in this chapter shall be construed to empower or authorize the state board of eugenics or its representatives, or the state health officer, or his representatives, or the superintendent of any of the institutions mentioned, or his representatives, to interfere in any manner with the individual's right to select the physician of his choice; provided, that such physician is in the judgment of the state board of eugenics competent to perform such operation; nor to interfere with the practice of any person whose

religion treats or administers to the sick or suffering by purely spiritual means; provided that such practice, treatment or administration shall not in any way interfere with the operation of this chapter, and the carrying out of its purposes. [C31, 35,§2437-c21.]

2437.22 Fee. A physician or surgeon, who is not in the employ of the state, shall receive a reasonable compensation for an operation performed hereunder, which compensation shall be paid from any funds in the state treasury not otherwise appropriated. [C31, 35,§2437-c22.]

TITLE VIII

THE PRACTICE OF CERTAIN PROFESSIONS AFFECTING THE PUBLIC HEALTH

Referred to in §§2111, 2191

CHAPTER 114.2

BASIC SCIENCE LAW

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2437.23 Title. This chapter shall be known as the "Iowa Basic Science Law". [C35,§2437-g1.]

2437.24 Definitions.

1. The basic sciences shall mean the following subjects: anatomy; physiology; chemistry; pathology; bacteriology; hygiene.

2. The practice of the healing art shall mean holding one's self out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or mental condition and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or mental condition.

3. A license shall mean a certificate issued to a person licensed to practice certain professions affecting the public health as provided in this title. [C35,§2437-g2.]

2437.25 Board established. There is hereby established a board of examiners in the basic sciences of six members authorized and directed to conduct a written examination of all persons who shall hereafter apply for a license to practice medicine and surgery, osteopathy, osteopathy and surgery, chiropractic or any other system or method of healing that may hereafter be legalized in this state; said examination shall cover the six following basic sciences, viz: anatomy; physiology; chemistry; pathology; bacteriology; hygiene. [C35,§2437-g3.]

2437.26 Examination required. No person shall hereafter* be eligible for examination or be permitted to take an examination for a license to practice medicine and surgery, osteopathy, osteopathy and surgery, chiropractic or any other system or method of healing that may be hereafter legalized in this state or be granted any such license until he has presented to the licensing board empowered to issue a license, a certificate of proficiency in the basic sciences as provided in this chapter. This requirement shall be in addition to all other requirements now or hereafter in effect with respect to the issuance of such license or licenses. [C35, §2437-g4.]

*Act effective July 4, 1935

2437.27 Exceptions. Nothing in this chapter shall be construed to apply to persons holding licenses as physicians and surgeons, osteopaths, osteopaths and surgeons or chiropractors at the time this chapter takes effect*; nor shall this chapter, at any time, be construed to apply to dentists, dental hygienists, nurses, pharmacists, optometrists, embalmers, podiatrists, barbers or cosmetologists practicing within the limits of their respective licenses or Christian Scientists. This chapter shall not apply to students regularly registered, enrolled and in attendance as of July 1, 1936, in accredited schools of medicine, osteopathy or chiropractic in the state of Iowa. [C35,§2437-g5.]

*Effective July 4, 1935

2437.28 Appointment. The governor shall, with the approval of two-thirds of the senate in executive session, appoint a board of examiners in the basic sciences, hereinafter referred to as the "board", consisting of six members learned respectively in the basic sciences named herein from the faculties of the universities and four-year colleges accredited by the Iowa state board of educational examiners, who shall be appointed two for two years, two for four years and two for six years from the dates of their

respective appointments. On the expiration of the term of any member the governor shall, with the approval of two-thirds of the senate in executive session, fill the vacancy or vacancies by appointment for a term of six years; on the death, resignation or removal of any member the governor shall, with the approval of two-thirds of the senate in executive session, fill the vacancy by appointment for the unexpired portion of the term. No member of the board shall hold a degree in any of the healing arts. Not more than one member of the board shall be appointed from the faculties of any one of the universities or* four-year colleges described herein. [C35,§2437-g6.]

*"of" in enrolled act

2437.29 Meetings—powers. The board shall meet and organize, as soon as practicable, after appointment. It shall have power to elect officers from its members, to adopt a seal and to make such rules, in addition to the rules hereinafter specified, as it deems expedient to carry this chapter into effect. The board shall elect a chairman and secretary from its members. [C35,§2437-g7.]

2437.30 Duties of secretary. The secretary of the board shall keep a correct record of the proceedings of said board and the questions submitted in the examination of the applicant, and the applicant's answers thereto, and upon the granting of a certificate of proficiency in the basic sciences shall, at the time of granting said certificate, certify to the state department of health the application upon which such certificate was issued, together with the questions submitted in the examination of such applicant and the answers thereto and such secretary shall deposit with the department of health all records not needed for the current use of his examining board. [C35,§2437-g8.]

2437.31 Supplies. The state department of health shall furnish the board with all articles and supplies required for the public use and necessary to enable said board to perform the duties imposed upon it by law. Such articles and supplies shall be obtained by the departments in the same manner in which the regular supplies are obtained and the same shall be considered and accounted for as if obtained for the use of the department. [C35,§2437-g9.]

2437.32 Offices. The executive council shall furnish the board with a suitable office and quarters in which to conduct the examinations held by said board at the seat of government. [C35,§2437-g10.]

2437.33 Compensation and expenses. Each member of the board shall, in addition to necessary traveling and hotel expenses, receive ten dollars per day for each day actually engaged in the discharge of his duties, including compensation for the time spent in traveling to and from the place of conducting the examination, and for a reasonable number of days for the preparation of examination questions and the reading of papers, in addition to the time actually spent in conducting examinations. The compensation and expenses of the members and other expense of the board shall be paid out of the fees received from applicants. [C35,§2437-g11.]

2437.34 Fees. The fee for examination or any re-examination by the board shall be ten dollars. The fee for the issuing of a certificate by authority of reciprocity, as provided herein, shall be ten dollars. All fees shall be paid to the secretary of the board by the applicant at the time of filing application. The secretary shall pay all money received as fees into the state treasury to be placed in a special fund to the credit of the board. The state treasurer shall pay out of such fund the compensation and expense of the members and other expenses incurred by the board on vouchers signed by the president and secretary of the board. [C35, §2437-g12.]

2437.35 Applicants — qualifications. No person shall be eligible for examination for a certificate of proficiency in the basic sciences until he shall have furnished satisfactory evidence to the board that he has attained the age of twenty-one years, is of good moral character and is a graduate of an accredited high school or possesses the educational qualifications equivalent to those required for graduation by an accredited high school, to be determined by the board. [C35,§2437-g13.]

2437.36 Applications for examination. Any person desiring to take the examination for a certificate of proficiency in the basic sciences shall make application to the board, at least fifteen days before the examination, on a form provided by the board. Such application shall be accompanied by the examination fee and such affidavits as are necessary to show the eligibility of the candidate to take such examination. All applications shall be in accordance with the rules of the board and shall be signed and verified by the oath of the applicant. Provided, that said application shall not contain questions to be answered by said applicant which will disclose the professional school he may have attended or what system of treating the sick he intends to pursue. [C35,§2437-g14.]

2437.37 Examinations—notice of. The board shall give public notice of the time and place of all examinations to be held under this chapter and such notice shall be given in such manner as the board may deem expedient and in ample time to allow all candidates to comply with the provisions of this title. [C35,§2437-g15.]

2437.38 Examination—time—scope—passing grade. Said board shall meet at Des Moines and there conduct examinations in the basic sciences four times each year respectively, on the second Tuesday in January, April, July and October. The examination shall be conducted in writing in such manner that the applicant shall be known by number only until such examination papers are read and the proper grade

determined. The examination shall be of such a nature as to constitute a reasonable test as to whether the person so examined has such knowledge of the elementary principles of the basic sciences as might be acquired after the completion of a course of study of the following subjects for the number of hours specified:

Subject	Hours
Anatomy	400
Physiology	200
Chemistry	200
Pathology	160
Bacteriology	100
Hygiene	40

The board shall establish rules for conducting of all examinations, grading of examinations and passing upon the technical qualifications of applicants as shown by such examinations. An applicant to pass the examination must obtain a grade of not less than seventy percent in any one subject and a total average grade of seventy-five percent in all subjects. If an applicant fails to attain the required grade in one or more subjects, he may be re-examined in the subject or subjects in which he failed, at any examination within one year without further application or examination fee. No part in the preparation of questions, the actual giving of the examinations or the grading of papers can in any way be delegated to any person other than a member of the board, or otherwise performed by any person not then a member of such board. [C35, §2437-g16.]

Referred to in §2437.43

2437.39 Quorum. Three members of the board shall constitute a quorum for conducting examinations. [C35,§2437-g17.]

2437.40 Certificates. The board shall issue a certificate of proficiency in the basic sciences to each of the successful applicants after examination, as provided in this chapter. [C35, §2437-g18.]

2437.41 Form. Each certificate of proficiency in the basic sciences shall be in the form prescribed by the board, under the name and seal of the board and signed by its chairman and secretary. [C35,§2437-g19.]

2437.42 Waiver of examination. The board may, in its discretion, waive the examination and issue a certificate of proficiency in the basic sciences provided for herein and may accept in lieu of examination proof that the applicant has passed before a board of examiners in the basic sciences or by whatsoever name it may be known or before any examining or licensing board in the healing art of any state, territory or other jurisdiction under the United States, or of any foreign country, an examination in anatomy, physiology, chemistry, pathology, bacteriology and hygiene as comprehensive and as exhaustive as that required under authority of this chapter. [C35,§2437-g20.]

2437.43 Additional waivers. Upon presentation to said board of examiners of a certificate from any college or university accredited by the north central association of secondary schools and colleges that the person seeking a certificate of proficiency under the provisions of this chapter has completed a course of study in one or more of said basic sciences of the number of hours provided for in section 2437.38 of this chapter and has attained a grade of seventy-five percent in said subject or subjects the said board of examiners shall waive examination in said subject or subjects, and if said applicant shall have completed a course of study in all of said basic sciences of the number of hours provided for herein and has attained an average grade of seventy-five percent in each of said subjects the board of examiners shall upon receipt of a certificate to that effect setting forth the grades of the applicant in each of said subjects as hereinbefore provided issue to said applicant a certificate of proficiency in the basic sciences as provided for under the Iowa basic science law without further examination. [C35, §2437-g21.]

2437.44 Misdemeanors. Any person who shall practice the healing art without first having obtained a certificate of proficiency in the basic sciences or violate or participate in the violation of any provisions of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than one year or by both such fine and imprisonment. It shall be the duty of the attorney general and of the several county attorneys to prosecute violations of this chapter. [C35,§2437-g22.]

2437.45 Discretion of boards. No provision of this chapter shall be construed as repealing any statutory provision in force at the time of its passage with reference to the requirements governing the issuing of licenses to practice the healing art, or any branch thereof, but any board authorized to issue licenses to practice the healing art, or any branch thereof, may, in its discretion, accept certificates issued by the board of examiners in the basic sciences in lieu of examining applicants in such sciences, or may continue to examine applicants in such sciences as heretofore. [C35,§2437-g23.]

Constitutionality, §2437-g24, code 1935; 46GA, ch 17, §24

CHAPTER 115

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2438 Definitions. For the purpose of this and the following chapters of this title:

1. "Examining board" shall mean one of the boards appointed by the governor to give examinations to applicants for licenses.

2. "Licensed" when applied to a physician and surgeon, podiatrist, osteopath, osteopath and surgeon, chiropractor, nurse, dentist, dental hygienist, optometrist, pharmacist, practitioner of cosmetology, practitioner of barbering, or embalmer shall mean a person licensed under this title.

3. "Profession" shall mean medicine and surgery, podiatry, osteopathy, osteopathy and surgery, chiropractic, nursing, dentistry, dental hygiene, optometry, pharmacy, cosmetology, barbering, or embalming.

4. "Department" shall mean the state department of health. [C24, 27, 31, 35,§2438.]

LICENSES

2439 License required. No person shall engage in the practice of medicine and surgery, podiatry, osteopathy, osteopathy and surgery, chiropractic, nursing, dentistry, dental hygiene, optometry, pharmacy, cosmetology, barbering, or embalming as defined in the following chapters of this title, unless he shall have obtained from the state department of health a license for that purpose. [C97,§§2582, 2588; S13,§§2575-a28,-a31,-a36, 2582, 2583-a,-d,-r, 2600-o4; SS15,§2588; C24, 27, 31, 35,§2439.]

2440 Qualifications. No person shall be licensed to practice a profession under this title until he shall have furnished satisfactory evidence to the department that he has attained the age of twenty-one years and is of good moral character, except that women may be licensed as practitioners of cosmetology or dental hygienists, or men or women may be licensed as barbers, upon attaining the age of eighteen years. [S13,§§2575-a29,-a37, 2583-a,-l; C24, 27, 31, 35,§2440.]

2441 Grounds for refusing. The department may refuse to grant a license to practice a profession to any person otherwise qualified upon any of the grounds for which a license may be revoked by the district court. [C97,§2578; S13, §§2575-a33,-a41, 2578, 2583-c; C24, 27, 31, 35, §2441.]

Grounds for revocation, §§2492 et seq., 2576.1

2442 Form. Every license to practice a profession shall be in the form of a certificate under the seal of the department, signed by the commissioner of public health. Such license shall be issued in the name of the examining board which conducts examinations for that particular profession. The number of the book and page containing the entry of said license in the office of the department shall be noted on the face of the license. [C97,§§2576, 2577, 2591; S13, §§2575-a30,-a38, 2576, 2583-k, 2600-d; C24, 27, 31, 35,§2442.]

2443 Certificate presumptive evidence. Every license issued under this title shall be presumptive evidence of the right of the holder to practice in this state the profession therein specified. [C97,§2576; S13,§§2575-a30,-a38, 2576, 2583-k, 2600-d; C24, 27, 31, 35,§2443.]

2444 Display of license. Every person licensed under this title to practice a profession shall keep his license publicly displayed in the place in which he practices. [C97,§2591; S13, §2600-o1; C24, 27, 31, 35,§2444.]

2445 Record of licenses. The name, age, nativity, location, number of years of practice of the person to whom a license is issued to practice a profession, the number of the certificate, and the date of registration thereof shall be entered in a book kept in the office of the department to be known as the registry book, and the same shall be open to public inspection. [C97, §2591; S13,§§2575-a40, 2583-a,-k, 2600-d; C24, 27, 31, 35,§2445.]

2446 Change of residence. When any person licensed to practice a profession under this title changes his residence he shall notify the department and such change shall be noted in the registry book. [C97,§2591; C24, 27, 31, 35, §2446.]

2447 Renewal. Every license to practice a profession shall expire on the thirtieth day of June following the date of issuance of such license, and shall be renewed annually upon application by the licensee, without examination. Application for such renewal shall be made in writing to the department accompanied by the legal fee at least thirty days prior to the expiration of such license. Every renewal shall be displayed in connection with the original license. Every year the department shall notify each licensee by mail of the expiration of his license. This section and section 2448 shall not apply to dentists and dental hygienists. [C97,§2590; S13, §§2575-a39, 2589-d; C24, 27, 31, 35,§2447.]

Referred to in §§2309, 2448

2448 Reinstatement. Any licensee who allows his license to lapse by failing to renew the same, as provided in section 2447, may be reinstated without examination upon recommendation of the examining board for his profession and upon payment of the renewal fees then due. [C24, 27, 31, 35,§2448.]

Referred to in §2447

EXAMINING BOARDS

2449 Examining boards. For the purpose of giving examinations to applicants for licenses to practice the professions for which a license is required by this title, the governor shall appoint a board of examiners for each of said professions. [C97,§§2576, 2584; S13,§§2575-a29, -a37, 2576, 2583-a,-h, 2600-b; SS15,§2584; C24, 27, 31, 35,§2449.]

Referred to in §2450

2450 Designation of boards. The examining boards provided in section 2449 shall be designated as follows: For medicine and surgery, medical examiners; for podiatry, podiatry examiners; for osteopathy and osteopathy and

surgery, osteopathic examiners; for chiropractic, chiropractic examiners; for nursing, nurse examiners; for dentistry and dental hygiene, dental examiners; for optometry, optometry examiners; for cosmetology, cosmetology examiners; for barbering, barber examiners; for pharmacy, pharmacy examiners; for embalming, embalmer examiners. [C24, 27, 31, 35,§2450.]

2451 Composition of boards. Each examining board shall consist of three members, except the dental and nurse boards each of which shall consist of five members. [C97,§§2564, 2576, 2584; S13,§§2564, 2575-a29,-a37, 2576, 2583-a,-h, 2600-b; SS15,§2584; C24, 27, 31, 35,§2451.]

2452 Professional qualifications. Every medical, podiatry, chiropractic, nurse, optometry, pharmacy, cosmetology, barbering, and embalmer examiner shall be a person licensed to practice the profession for which the board, of which he is a member, conducts examinations for licenses to practice such profession. An osteopathic examiner shall be a licensed osteopath or an osteopath and surgeon, and a dental examiner shall be a licensed dentist. [C97, §§2564, 2576, 2584; S13,§§2564, 2575-a29,-a37, 2576, 2583-a,-h, 2600-b; SS15,§2584; C24, 27, 31, 35,§2452.]

2453 Practice requirement for examiners. Each examiner shall be actively engaged in the practice of his profession and shall have been so engaged in this state for a period of five years just preceding his appointment. [C97,§2584; S13,§§2583-a,-h, 2600-b; SS15,§2584; C24, 27, 31, 35,§2453.]

2454 Qualifications for medical examiners. In addition to the preceding requirements, each medical examiner shall be a graduate of some reputable school of medicine and not more than two of such examiners shall belong to the same school of medical practice. [C97,§§2564, 2576; S13,§§2564, 2576; C24, 27, 31, 35,§2454.]

2455 Disqualifications. No examiner shall be an officer or member of the instructional staff of any school in which any profession regulated by this title is taught, or be connected therewith in any manner, and no embalmer or optometry examiner shall be connected in any manner with any wholesale or jobbing house dealing in optical or embalming supplies, and no cosmetology examiner shall be connected with any wholesale or jobbing house dealing in supplies sold to practitioners of cosmetology, and no barber examiner shall be connected with any wholesale or jobbing house dealing in supplies sold to practitioners of barbering, providing, however, that the foregoing shall not apply to nurse examiners. [C97,§2564; S13,§§2564, 2583-a,-j, 2600-k; C24, 27, 31, 35,§2455.]

2456 Term. The members of each examining board shall be appointed for a term of three years, except the dental and nurse examiners who shall be appointed for a term of five years. The term of each examiner shall commence on July 1 in the year of appointment and the terms of the members of each board shall be rotated in such a manner that one examiner shall retire each year. [C97,§§2564, 2576, 2584; S13,§§2564, 2575-a29,-a37, 2576, 2583-a,-h, 2600-b; SS15,§2584; C24, 27, 31, 35,§2456.]

2457 Nomination of examiners. The regular state association or society or its managing board for each profession may submit each year to the governor a list of six persons of recognized ability in such profession, who have the qualifications prescribed for examiners for that particular profession.. If such list is submitted, the governor in making an appointment to the board of examiners for such profession shall select one of the persons so named. [S13, §§2583-a,-h, 2600-b; C24, 27, 31, 35,§2457.]

2458 Vacancies. Any vacancy in the membership of an examining board caused by death, resignation, removal, or otherwise, shall be filled for the period of the unexpired term in the same manner as original appointments. [C97, §§2564, 2576; S13,§§2564, 2576, 2583-h, 2600-b; C24, 27, 31, 35,§2458.]

2459 Officers. Each examining board shall organize annually and shall select a chairman and a secretary from its own membership. [C97, §§2576, 2585; S13,§§2576, 2583-i, 2585, 2600-c; C24, 27, 31, 35,§2459.]

Referred to in §§2532, 2537.1

2460 Transaction of business by mail. Each examining board shall, as far as practicable, provide by rule for the conducting of its business by mail, but all examinations shall be conducted in person by the board or by some representative of the board as provided in section 2476. Any official action or vote taken by mail shall be preserved by the secretary in the same manner as the minutes of regular meetings. [C24, 27, 31, 35,§2460.]

2461 Compensation. Each member of an examining board shall, in addition to necessary traveling and hotel expenses, receive ten dollars per day for each day actually engaged in the discharge of his duties, including compensation for the time spent in traveling to and from the place of conducting the examination and for a reasonable number of days for the preparation of examination questions and the reading of papers, in addition to the time actually spent in conducting examinations. [C97,§2574; S13, §§2574, 2575-a34,-a44, 2583-a,-p, 2600-g; C24, 27, 31, 35,§2461.]

2462 Appropriation. There is hereby annually appropriated out of any funds in the state treasury not otherwise appropriated a sum sufficient to pay the compensation and expenses of the members of each examining board, inspectors and clerical assistants for each such board. [S13,§§2575-a34,-a44, 2583-a,-n,-p, 2600-g; C24, 27, 31, 35,§2462.]

Referred to in §§2536, 2585.33

2463 Supplies. The department shall furnish each examining board with all articles and supplies required for the public use and neces-

sary to enable said board to perform the duties imposed upon it by law. Such articles and supplies shall be obtained by the department in the same manner in which the regular supplies for the department are obtained and the same shall be considered and accounted for as if obtained for the use of the department. When examinations are held at the state university, the necessary articles and supplies for conducting the same shall be furnished by the university authorities. [C97,§2583; S13,§§2575-a34,-a44, 2583, 2583-a,-p, 2600-g; C24, 27, 31, 35,§2463.]

Referred to in §2536

2464 Quarters. The executive council shall furnish each examining board with suitable quarters in which to conduct the examinations held by said board at the seat of government. When examinations are held at the state university, the superintendent of buildings and grounds shall furnish such quarters. [S13, §2583-a; C24, 27, 31, 35,§2464.]

2465 Rep. by 45GA, ch 44

2465.1 National organization. Each examining board may maintain a membership in the national organization of the state examining boards of its profession.

There is hereby annually appropriated out of the funds in the state treasury not otherwise appropriated a sum sufficient to pay the fees necessary for each such state examining board to maintain membership in its national organization, but such sum shall not exceed two hundred dollars for any year. The amount of said fees shall be certified to the state comptroller by the commissioner of public health, and the comptroller is hereby authorized to draw warrants and the treasurer of state to pay same for this purpose. [C27, 31, 35,§2465-b1.]

EXAMINATIONS

2466 Applications. Any person desiring to take the examination for a license to practice a profession shall make application to the state department of health at least fifteen days before the examination, on a form provided by the department. Such application shall be accompanied by the examination fee and such documents and affidavits as are necessary to show the eligibility of the candidate to take such examination. All applications shall be in accordance with the rules of the department and shall be signed and verified by the oath of the applicant. [S13,§2575-a37; C24, 27, 31, 35,§2466.]

Exceptions, §2529 et seq.

2467 Time and place of examinations. The department shall give public notice of the time and place of all examinations to be held under this title. Such notice shall be given in such manner as the department may deem expedient and in ample time to allow all candidates to comply with the provisions of this title. [S13, §2576; C24, 27, 31, 35,§2467.]

2468 Accredited high schools. The department shall prepare and keep up to date a list of accredited high schools and other secondary schools for the purpose of passing upon the qualifications of an applicant for an examination when such applicant is required by any provision of this title to be a graduate of such school. The secretary of the state board of education and the registrars of the state university, the state college of agriculture and mechanic arts, and the state teachers college shall supply the necessary data to the department for the preparation of said list. [C24, 27, 31, 35, §2468.]

2469 Accredited colleges. The state department of health shall prepare and keep up to date a list of accredited colleges in which are taught the professions which are regulated by this title. The examining board for each profession shall make recommendations relative thereto and shall approve the list for the profession for which it gives license examinations. No such school shall be accredited by the department unless it has been so recommended and approved by the proper examining board together with the commissioner of health. Such recommendations and approval shall be made at some regular session of the board held for the purpose of giving an examination. [C24, 27, 31, 35,§2469.]

2470 Professional schools. As a basis for such action on the part of the examining board, the registrar of the state university and the dean of the professional school of said institution which teaches the profession for which said board gives license examinations, shall supply such data relative to any such professional school as said board may request. [C24, 27, 31, 35,§2470.]

2471 Time of examination. Each examining board shall hold regular sessions for the purpose of giving examinations at such times as the department may fix, not to exceed four in any one year. The medical examiners, dental examiners, and pharmacy examiners shall hold a similar session at the state university at the close of each school year to give examinations to students of the medical, dental, and pharmacy colleges of said institution and to other applicants who are qualified to take the same. In case there are other schools located in the state at which any of the professions regulated by this title are taught, two of the examinations for the profession taught at any such school may be held each year at such institution, if the examining board for that profession so desires. All other sessions of the examining boards shall be held at the seat of government unless otherwise ordered by the department. [C97,§§2576, 2582, 2589, 2597; S13,§§2575-a29,-a37, 2576, 2582, 2583-a,-i,-k, 2589-a, 2600-c,-d; SS15,§2589-a; C24, 27, 31, 35,§2471.]

2472 Names of eligible candidates. Prior to each examination the department shall transmit to each examining board the list of candidates who are eligible to take the examination given by such board. In making up such list the department may call upon any examining board, or any member thereof, for information

relative to the eligibility of any applicant. [C24, 27, 31, 35,§2472.]

2473 Rules. Each examining board shall establish rules for:

1. The conducting of examinations.
2. The grading of examinations and passing upon the technical qualifications of applicants, as shown by such examinations. [C97,§2584; S13,§§2575-a38, 2583-a,-i, 2600-e; SS15,§2584; C24, 27, 31, 35,§2473.]

2474 Examinations in theory. All examinations in theory shall be in writing, and the identity of the person taking the same shall not be disclosed upon the examination papers in such a way as to enable the members of the examining board to know by whom written until after the papers have been passed upon. In examinations in practice the identity of the candidate shall also be concealed as far as possible. [C97,§2576; S13,§§2576, 2583-a; C24, 27, 31, 35,§2474.]

2475 Quorum and representation. Two members of each board, except the dental board, shall constitute a quorum for conducting examinations but in the case of the medical examiners a quorum shall consist of one member from each school of medical practice represented on said board. Three members of the dental board shall constitute a quorum for conducting examinations. [C97,§2576; S13,§§2575-a30,-a38, 2576, 2583-i, 2600-c; C24, 27, 31, 35,§2475.]

Composition of boards, §2451

2476 Clerk. Upon the request of any examining board, the department shall detail some employee to act as clerk of any examination given by said examining board. Such clerk shall have charge of the candidates during the examination and perform such other duties as the examining board may direct. If the duties of such clerk are performed away from the seat of government, he shall receive his necessary railroad and hotel expenses, which shall be paid from the appropriations to the department in the same manner in which other similar expenses are paid. [C24, 27, 31, 35,§2476.]

Referred to in §2460

2477 Certification of applicants. Every examination shall be passed upon in accordance with the established rules of the examining board and shall be satisfactory to at least a majority of the members of said board. After each examination, the examining board shall certify the names of the successful applicants to the state department of health in the manner prescribed by it. The department shall then issue the proper license and make the required entry in the registry book. [C97,§2576; S13, §§2575-a30,-a38, 2576, 2583-i, 2600-c; C24, 27, 31, 35,§2477.]

2478 Special examinations. Any examining board may give a partial examination for a license to practice a profession to any applicant who has completed a portion of his professional course. For such purpose said board shall establish by rule:

1. The portion of such course which shall be completed prior to such examination.
2. The subjects to be covered by such examination and the subjects to be covered by the final examination to be taken by such applicant after the completion of his professional course and prior to the issuance of his license, but the subjects covered in the partial and final examinations shall be the same as those specified in this title for the regular examination. [C24, 27, 31, 35,§2478.]

Referred to in §2479

2479 Rules relative to partial examinations. In case any examining board shall provide for partial examinations under section 2478, the department shall adopt rules establishing:

1. The portion of the license fee fixed in this chapter which shall be paid for a partial examination.
2. The credentials which shall be presented to the department by an applicant showing his qualifications to take such examination.
3. The method of certifying the list of the eligible applicants for such examination to the proper examining board.
4. The method of certifying back to the department the list of applicants who successfully pass such examination.
5. The method of keeping the records of such applicants for use at the time of completing the examination for a license.
6. The credentials which shall be presented to the department by such an applicant upon the completion of his professional course.
7. The method of certifying such applicant to the proper examining board for the remainder of his examination.
8. Such other matters of procedure as are necessary to carry into effect the preceding section. [C24, 27, 31, 35,§2479.]

2480 Preservation of records. All matters connected with each examination for a license shall be filed with the state department of health and preserved for five years as a part of the records of the department, during which time said records shall be open to public inspection. [C97,§2576; S13,§§2576, 2578-a, 2583-a; C24, 27, 31, 35,§2480.]

RECIPROCAL LICENSES

2481 Agreements. For the purpose of recognizing licenses which have been issued in other states to practice any profession for which a license is required by this title, the department shall enter into a reciprocal agreement with every state which is certified to it by the proper examining board under the provisions of section 2482 and with which this state does not have an existing agreement at the time of such certification. [C97,§2582; S13,§2582; C24, 27, 31, 35,§2481.]

2482 States entitled to reciprocal relations. The department shall at least once each year lay before the proper examining board the re-

quirements of the several states for a license to practice the profession for which such examining board conducts examinations for licenses in this state. Said examining board shall immediately examine such requirements and after making such other inquiries as it deems necessary, shall certify to the department the states having substantially equivalent requirements to those existing in this state for that particular profession and with which said examining board desires this state to enter into reciprocal relations. [S13,§§2575-a30,-a39, 2589-b, 2600-m; C24, 27, 31, 35,§2482.]

Referred to in §2481

2483 Reciprocal agreements. In negotiating any reciprocal agreement, the department shall be governed by the following regulations:

1. *Protection to licensees of this state.* When the laws of any state or the rules of the authorities of said state place any requirement or disability upon any person licensed in this state to practice any profession regulated by this title which affects the right of said person to be licensed or to practice his profession in said state, then the same requirement or disability shall be placed upon any person licensed in said state when applying for a license to practice in this state.

2. *Special conditions.* When any examining board has established by rule any special condition upon which reciprocal agreements shall be entered into, as provided in section 2484, such condition shall be incorporated into the reciprocal agreements negotiated with reference to licenses to practice the professions for which such examining board conducts examinations. [S13,§§2575-a30,-a39, 2582-a, 2589-b, 2600-m; C24, 27, 31, 35,§2483.]

2484 Special conditions. An examining board shall have power to provide by rule that no reciprocal relation shall be entered into by the department with any state with reference to licenses to practice the profession for which such examining board conducts examinations, unless every person licensed in another state when applying for a license to practice in this state shall comply with one or both of the following conditions:

1. Furnish satisfactory proof to the department that he has been actively engaged in the practice of his profession for a certain period of years to be fixed by such examining board.

2. Pass a practical examination in the practice of his particular profession as prescribed by such examining board. [S13,§2600-m; C24, 27, 31, 35,§2484.]

Referred to in §2483

2485 Termination of agreements. When the requirements for a license in any state with which this state has a reciprocal agreement are changed by any law or rule of the authorities therein so that such requirements are no longer substantially as high as those existing in this state, then such agreement shall be deemed terminated and licenses issued in such state shall not be recognized as a basis of granting a license in this state until a new agreement has been negotiated. The fact of such change shall be determined by the proper examining board and certified to the department for its guidance in enforcing the provisions of this section. [C24, 27, 31, 35,§2485.]

2486 License of another state. The department shall, upon presentation of a license to practice a profession issued by the duly constituted authority of another state, with which this state has established reciprocal relations, and subject to the rules of the examining board for such profession, license said applicant to practice in this state, unless under the rules of said examining board a practical examination is required in such cases. [C97,§2582; S13, §§2575-a30,-a39, 2582, 2583-l, 2589-b, 2600-m; C24, 27, 31, 35,§2486.]

2487 Practical examinations. If the rules of any examining board require an applicant for a license under a reciprocal agreement to pass a practical examination in the practice of his profession, then such applicant shall make application therefor to the department upon a form provided by it. [C24, 27, 31, 35,§2487.]

2488 Applicability of other provisions. All the provisions of this chapter relative to applications, transmittal of the names of eligible candidates, certification of successful applicants, and issuance of licenses thereto, in the case of regular examinations, shall apply as far as applicable to applicants for practical examinations. [C24, 27, 31, 35,§2488.]

2489 Reciprocity. When the laws of any state or the rules of the authorities of said state place any requirement or disability upon any person holding a diploma or certificate from any college in this state in which one of the professions regulated by this title is taught, which affects the right of said person to be licensed in said state, the same requirement or disability shall be placed upon any person holding a diploma from a similar college situated therein, when applying for a license to practice in this state. [S13,§2582-a; C24, 27, 31, 35,§2489.]

2490 Power to adopt rule. The department and each examining board shall have power to establish the necessary rules, not inconsistent with law, for carrying out the reciprocal relations with other states which are authorized by this chapter. [C24, 27, 31, 35,§2490.]

2491 Change of residence. Any licensee who is desirous of changing his residence to that of another state or territory shall upon application to the department, and payment of the legal fee, receive a certified statement that he is a duly licensed practitioner in this state. [S13,§2600-n; C24, 27, 31, 35,§2491.]

REVOCATION OF LICENSES

2492 Grounds. A license to practice a profession shall be revoked or suspended when the licensee is guilty of any of the following acts or offenses:

1. Fraud in procuring his license.
2. Incompetency in the practice of his profession.
3. Immoral, unprofessional, or dishonorable conduct.
4. Habitual intoxication or addiction to the use of drugs.
5. Conviction of an offense involving turpitude.
6. Fraud in representations as to skill or ability.
7. Use of untruthful or improbable statements in advertisements. This shall not be construed as permitting dentists or dental hygienists to advertise their services or products, contrary to the other provisions of this title relative thereto.
8. Distribution of intoxicating liquors or drugs for any other than lawful purposes.
9. Wilful or repeated violations of this title, the title on "Public Health", or the rules of the state department of health.
10. Continued practice while knowingly having an infectious or contagious disease.

1. [C97,§2578; S13,§§2575-a33,-a41, 2578, 2583-c, 2600-o5; C24, 27, 31, 35,§2492.]
2. [C97,§2578; S13,§§2578, 2583-c,-m; C24, 27, 31, 35,§2492.]
3. [C97,§2578; S13,§§2575-a33,-a41, 2578, 2583-m, 2600-o5; C24, 27, 31, 35,§2492.]
4. [C97,§2578; S13,§§2575-a41, 2578, 2583-c, -m, 2600-o5; C24, 27, 31, 35,§2492.]
5. [C97,§2578; S13,§§2578, 2583-c, 2600-o5; C24, 27, 31, 35,§2492.]
6. [C97,§2578; S13,§§2578, 2583-c; C24, 27, 31, 35,§2492.]
7. [C97,§2578; S13,§§2578, 2583-c, 2600-o5; C24, 27, 31, 35,§2492.]
8. [C73,§1535; C97,§§2386, 2400; S13,§§2386, 2400; C24, 27, 31, 35,§2492.]
9. [C97,§2596; S13,§§2575-a33,-a41; C24, 27, 31, 35,§2492.]
10. [S13,§2583-c; C24, 27, 31, 35,§2492.]

Referred to in §§2493, 2576.1, 2585.05

2493 Unprofessional conduct. For the purposes of section 2492 "unprofessional conduct" shall consist of any of the following acts:

1. Solicitation of professional patronage by agents or persons popularly known as "cappers" or "steerers", or profiting by the acts of those representing themselves to be agents of the licensee.
2. Receipt of fees on the assurance that a manifestly incurable disease can be permanently cured.
3. Acceptance of a fee for service as a witness, without the knowledge of the court, in addition to the fee allowed by the court.
4. Division of fees or agreeing to split or divide the fees received for professional services with any person for bringing or referring a patient or assisting in the care or treatment of a patient without the consent of said patient or his legal representative.
5. Advertisement of any medicine or means whereby the monthly periods of women can be regulated or the menses re-established if suppressed.
6. Procurement or aiding or abetting in the procurement of a criminal abortion.
7. Wilful betrayal of a professional secret.
8. Wilful neglect of a patient in a critical condition and as to dentists and dental hygienists "unprofessional conduct" shall also consist of any of the acts denominated as such in the other provisions of this title relating to dentists and dental hygienists. [C97,§2578; S13,§2578; C24, 27, 31, 35,§2493.]

2494 Dental hygienist and dentist. The practice of dentistry by a dental hygienist shall also be grounds for the revocation of her license, and the permitting of such practice by the dentist under whose supervision said dental hygienist is operating shall be grounds for revoking the license of said dentist. [S13,§2600-o5; C24, 27, 31, 35,§2494.]

2495 Jurisdiction of revocation. The district court of the county in which a licensee resides shall have jurisdiction of the proceeding to revoke or suspend his license. [C24, 27, 31, 35,§2495.]

2496 Petition for revocation. The petition for the revocation or suspension of a license may be filed by the attorney general in all cases. Said petition shall be filed in the office of the clerk of the district court having jurisdiction. [C24, 27, 31, 35,§2496.]

2497 Duty of department. The state department of health shall direct the attorney general to file such petition against any licensee upon its own motion, or it may give such direction upon the sworn information of some person who resides in the county wherein the licensee practices. [C97,§§2578, 2596; S13,§§2575-a33, -a41, 2578,-a, 2583-c,-m, 2600-o5; C24, 27, 31, 35, §2497.]

2498 Attorney general and county attorney. The attorney general shall comply with such direction of the department and prosecute such action on behalf of the state, but the county attorney, at the request of the attorney general, shall appear and prosecute such action when brought in his county. [C24, 27, 31, 35,§2498.]

2499 Rules governing petition. The following rules shall govern the petition in such cases:

1. The state shall be named as plaintiff and the licensee as defendant.
2. The charges against the licensee shall be stated in full.
3. Amendments may be made as in ordinary actions.
4. All allegations shall be deemed denied but the licensee may plead thereto if he desires. [C24, 27, 31, 35,§2499.]

Amendments allowed, §§11182, 11557

2500 Trial. Upon the presentation of the petition, or a copy thereof, to the court or judge, he shall make an order fixing the time and place for the hearing, which shall be not less than ten nor more than twenty days thereafter. [S13, §§2575-a33,-a41, 2578-a, 2583-c,-m, 2600-o5; C24, 27, 31, 35,§2500.]

2501 Notice. Notice of the filing of such petition and of the time and place of hearing shall be served upon the licensee at least ten days before said hearing in the manner required for the service of notice of the commencement of an ordinary action. [S13,§§2575-a33,-a41, 2578-a, 2583-c,-m, 2600-o5; C24, 27, 31, 35,§2501.]

Manner of service, §11060

2502 Nature of action. The proceeding shall be summary in its nature, triable as an equitable action, and may be heard either in vacation or term time. [S13,§§2575-a33,-a41, 2578-a, 2583-c,-m, 2600-o5; C24, 27, 31, 35,§2502.]

How issues tried, §11429

2503 Judgment. Judgment of revocation or suspension of the license shall be entered of record and the licensee shall not engage in the practice of his profession after his license is revoked or during the time for which it is suspended. The clerk of the court shall, upon the entry of such judgment, forthwith furnish the state department of health with a certified copy thereof. [C73,§1535; C97,§§2386, 2400; S13, §§2386, 2400, 2575-a33,-a41, 2578-a; C24, 27, 31, 35,§2503.]

2504 Default. In case the licensee fails to appear, either in person or by counsel at the time and place designated in said notice, the court, after receiving satisfactory evidence of the truth of the charges, shall order the license revoked or suspended. [S13,§§2575-a33,-a41, 2578-a; C24, 27, 31, 35,§2504.]

2505 Costs. If the judgment is adverse to the licensee the costs shall be taxed to him as in ordinary civil actions, but if the state is the unsuccessful party the costs shall be paid out of any money in the state treasury not otherwise appropriated. [C24, 27, 31, 35,§2505.]

Costs, ch 497

2506 Unpaid costs. All costs accrued at the instance of the state, when the successful party, which the attorney general certifies cannot be collected from the defendant, shall be paid out of any money in the state treasury not otherwise appropriated. [C24, 27, 31, 35,§2506.]

2507 Hearing on appeal. Both parties shall have the right of appeal, and in such event, the supreme court shall fix the time of hearing, and for filing abstracts and arguments. Said cause shall be advanced and take precedence over all other causes upon the court calendar, and shall be heard at the next term after the appeal is taken, provided the abstracts and arguments are filed in said court in time for said action to be heard. [S13,§§2578-b, 2600-o5; C24, 27, 31, 35, §2507.]

2508 Effect of appeal. The taking of an appeal by the defendant and the filing of a supersedeas bond shall not operate to stay the proceedings of the district court or judge, or restore the right of said defendant to practice his profession pending such appeal. [C24, 27, 31, 35,§2508.]

Supersedeas bond, §12858

USE OF TITLES AND DEGREES

2509 Professional titles and abbreviations. Any person licensed to practice a profession under this title may append to his name any recognized title or abbreviation, which he is entitled to use, to designate his particular profession, but no other person shall assume or use such title or abbreviation, and no licensee shall advertise himself in such a manner as to lead the public to believe that he is engaged in the practice of any other profession than the one which he is licensed to practice. [S13,§§2575-a28,-a31, 2583-q; C24, 27, 31, 35,§2509.]

Referred to in §2510

2510 Titles used by holder of degree. Nothing in section 2509 shall be construed:

1. As authorizing any person licensed to practice a profession under this title to use or assume any degree or abbreviation of the same unless such degree has been conferred upon said person by an institution of learning accredited by the appropriate board herein created, together with the commissioner of health, or by some recognized state or national accrediting agency.

2. As prohibiting any holder of a degree conferred by an institution of learning accredited by the appropriate board herein created, together with the commissioner of health, or by some recognized state or national accrediting agency, from using the title which such degree authorizes him to use, but he shall not use such degree or abbreviation in any manner which might mislead the public as to his qualifications to treat human ailments. [C24, 27, 31, 35,§2510.]

2510.1 False representation. Any person who falsely holds himself out by the use of any professional title or abbreviation, either in writing, cards, signs, circulars, or advertisements, to be a practitioner of a system of the healing arts other than the one under which he holds a license or who fails to use the following designations shall be guilty of a misdemeanor and shall be fined not less than twenty-five dollars, nor more than one hundred dollars, or be sentenced to thirty days in jail.

A physician or surgeon may precede his name with the title "Doctor", and shall add after his name the letters, "M. D."

An osteopath or osteopathic surgeon may use the prefix, "Doctor", but shall add after his name the letters, "D. O." or "O. S." as the case may be, or the words, "Osteopath" or "Osteopathic Surgeon".

A chiropractor may use the prefix, "Doctor", but shall add after his name the letters, "D. C." or the word, "Chiropractor".

A dentist may use the prefix "Doctor" but shall add after his name the letters "D. D. S." or the word "Dentist" or "Dental Surgeon".

A podiatrist may use the prefix "Dr." but shall add after his name the word "Podiatrist".

Any graduate of a school accredited on the board of optometric examiners may use the prefix "Doctor" but shall add after his name the letters "Opt." or "Optometrist".

No other practitioner licensed to practice his profession under any of the provisions of this

title shall be entitled to use the prefix "Dr." or "Doctor". [C31, 35,§2510-d1.]

ITINERANTS

2511 Defined. "Itinerant physician", "itinerant osteopath", "itinerant chiropractor", "itinerant optometrist", or "itinerant cosmetologist" as used in the following sections of this title shall mean any person engaged in the practice of medicine and surgery, osteopathy, osteopathy and surgery, chiropractic, optometry, or cosmetology, as defined in the chapter relative to the practice of said professions who, by himself, agent, or employee goes from place to place, or from house to house, or by circulars, letters, or advertisements, solicits persons to meet him for professional treatment at places other than his office maintained at the place of his residence. [C97,§2581; S13,§§2581, 2583-e; C24, 27, 31, 35, §2511.]

Referred to in §2514

2512 License required. Every itinerant physician, itinerant osteopath, itinerant chiropractor, itinerant optometrist, or itinerant cosmetologist shall, in addition to his regular license to practice his profession, procure from the state department of health a license to practice as an itinerant. [C97,§2581; S13,§§2581, 2583-e; C24, 27, 31, 35,§2512.]

Referred to in §2514

2513 Issuance. Upon receipt of an application from a licensed physician and surgeon, licensed osteopath, licensed osteopath and surgeon, licensed chiropractor, or licensed optometrist, for an itinerant's license, accompanied by the legal fee, the department shall issue to the applicant, when the provisions of this title have been complied with, a license to practice as an itinerant physician and surgeon, itinerant osteopath, itinerant osteopath and surgeon, itinerant chiropractor, itinerant optometrist, or itinerant cosmetologist, as the case may be, for a period of one year. [C97,§2581; S13,§§2581, 2583-e; C24, 27, 31, 35,§2513.]

Referred to in §2514

2514 Exception. Sections 2511 to 2513, inclusive, shall not be construed to prevent any physician and surgeon, osteopath, osteopath and surgeon, chiropractor, or optometrist, otherwise legally qualified, from attending patients in any part of the state to which he may be called in the regular course of business, or in consultation with other practitioners. [C97,§2581; S13, §2581; C24, 27, 31, 35,§2514.]

2515 Refusal and revocation. The department may, for satisfactory reasons, refuse to issue an itinerant's license or may revoke such license upon satisfactory evidence of incompetency or gross immorality. [C97,§2581; S13, §§2581, 2583-e; C24, 27, 31, 35,§2515.]

FEES

2516 License — examination — renewal fees. The following fees shall be collected by the state department of health:

1. For a license to practice medicine and surgery, osteopathy and surgery, and dentistry, issued upon the basis of an examination given by an examining board, twenty-five dollars.
2. For a license to practice any of the professions enumerated in the preceding paragraph issued under a reciprocal agreement, fifty dollars.
3. For a license to practice podiatry, osteopathy, chiropractic, and optometry, issued upon the basis of an examination given by an examining board, twenty dollars.
4. For a license to practice any of the professions enumerated in the preceding paragraph issued under a reciprocal agreement, forty dollars.
5. For a license to practice nursing, dental hygiene, pharmacy, cosmetology, barbering, and embalming, issued upon the basis of an examination given by an examining board, ten dollars.
6. For a license to practice any of the professions enumerated in the preceding paragraph issued under a reciprocal agreement, twenty dollars.
7. For the renewal of a license to practice any of the professions enumerated in the preceding paragraphs, one dollar; except the renewal fee of a license to practice barbering or cosmetology shall be three dollars.
8. For a license to practice as an itinerant physician and surgeon, itinerant osteopath, itinerant osteopath and surgeon, itinerant chiropractor, or itinerant optometrist, two hundred fifty dollars.
9. For a certified statement that a licensee is licensed in this state, five dollars.
10. For an examination to determine whether an applicant has the educational attainments of a high school graduate, five dollars.
11. For a license to conduct a school teaching cosmetology, an annual fee of one hundred dollars.
12. For a license to practice as an itinerant cosmetologist, in addition to any other fee required of cosmetologists, one hundred dollars.
13. For a permit to practice as an apprentice in cosmetology, one dollar.

1. [C97,§2576; S13,§§2576, 2583-a, 2600-d; C24, 27, 31, 35,§2516.]
2. [C97,§2582; S13,§§2582, 2583-a, 2600-m; C24, 27, 31, 35,§2516.]
3, 4. [S13,§§2583-a,-l,-n; C24, 27, 31, 35,§2516.]
5. [C97,§2590; S13,§§2575-a30,-a38, 2589-d; C24, 27, 31, 35,§2516.]
6. [S13,§§2575-a30,-a39, 2589-b; C24, 27, 31, 35,§2516.]
7. [C97,§§2590, 2591; S13,§§2575-a39, 2589-d; C24, 27, 31, 35,§2516.]
8. [C97,§2581; S13,§§2581, 2583-e; C24, 27, 31, 35,§2516.]
9. [S13,§2600-n; C24, 27, 31, 35,§2516.]
10. [S13,§2583-a; C24, 27, 31, 35,§2516.]
11, 12, 13. [C31, 35,§2516.]

Referred to in §2534.1

2517 Second examination. Any applicant for a license who fails in his examination shall be entitled to a second examination without further fee at any time within a period of

fourteen months after the first examination. [C97,§§2576, 2590; S13,§§2576, 2583-n, 2589-d; C24, 27, 31, 35,§2517.]

2518 Fees paid into treasury. All fees collected under this chapter shall be paid into the state treasury. [C97,§2583; S13,§§2575-a44, 2583,-a,-s; C24, 27, 31, 35,§2518.]

Exception, §2529 et seq.
Paying fees into state treasury, §143

VIOLATIONS—CRIMES—PUNISHMENT

2519 Injunction. Any person engaging in any business or in the practice of any profession for which a license is required by this title without such license may be restrained by permanent injunction. [C24, 27, 31, 35,§2519.]

Injunctions, ch 535

2520 Forgeries. Any person who shall file or attempt to file with the state department of health any false or forged diploma, or certificate or affidavit of identification or qualification, shall be guilty of forgery and punished accordingly. [C97,§§2580, 2595; S13,§2583-d; C24, 27, 31, 35,§2520.]

Forgery, ch 585

2521 Fraud. Any person who shall present to the department a diploma or certificate of which he is not the rightful owner, for the purpose of procuring a license, or who shall falsely personate anyone to whom a license has been issued by said department shall be punished as provided in section 2522. [C97,§§2580, 2581, 2595; S13,§§2575-a45, 2581, 2583-c,-d; C24, 27, 31, 35,§2521.]

2522 Penalties. Any person violating any provision of this or the following chapters of this title, except insofar as said provisions apply or relate to or affect the practice of pharmacy, of cosmetology, and of barbering, shall be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned in the county jail for not more than six months or by both such fine and imprisonment. [C97,§§2580, 2581, 2588, 2590, 2591, 2595; S13,§§2575-a35,-a45, 2581, 2583-d,-r, 2589-d, 2600-o4; SS15,§2588; C24, 27, 31, 35,§2522; 47GA, ch 105,§2.]

Referred to in §2521
Amendment No. 2 by 45ExGA, formerly a part of this section, transferred to §2585.24

ENFORCEMENT PROVISIONS

2523 Enforcement. The state department of health shall enforce the provisions of this and the following chapters of this title and for that purpose shall make necessary investigations relative thereto. Every licensee and member of an examining board shall furnish the department such evidence as he may have relative to any alleged violation which is being investigated. [C24, 27, 31, 35,§2523.]

Referred to in §§2530, 2537.5

2523.1 Department inspector and assistant. There is hereby created the position of health department inspector and assistant who shall be attached to the state department of health and who shall be appointed by the commissioner of health of the state of Iowa. The health department inspector's duties shall consist of investigating all violations of this title, securing all available evidence and reporting to the department of health. [C31, 35,§2523-c1.]

Referred to in §2537.5

2524 Report of violators. Every licensee and member of an examining board shall report, also, to the department the name of every person, without a license, that he has reason to believe is engaged in:

1. Practicing any profession for which a license is required.
2. Operating as an itinerant practitioner of such profession. [C24, 27, 31, 35,§2524.]

Referred to in §§2530, 2537.5

2525 Rules and forms. The state department of health shall establish the necessary rules and forms for carrying out the duties imposed upon it by the provisions of this and the following chapters of this title. [C24, 27, 31, 35,§2525.]

2526 Publications. The department shall have printed in pamphlet form for each profession the following matter which is pertinent to the particular profession for which such pamphlet is published:

1. The law regulating the practice of the profession.
2. The rules of the department relative to licenses.
3. The rules of the examining board relative to examinations.

Such pamphlet shall be supplied to any person applying for the same. [C24, 27, 31, 35,§2526.]

2527 Attorney general and county attorney. Upon request of the state department of health the attorney general shall institute in the name of the state the proper proceedings against any person charged by the department with violating any provision of this or the following chapters of this title and the county attorney, at the request of the attorney general, shall appear and prosecute such action when brought in his county. [S13,§2600-o7; C24, 27, 31, 35,§2527.]

2528 Prima facie evidence. The opening of an office or place of business for the practice of any profession for which a license is required by this title, the announcing to the public in any way the intention to practice any such profession, the use of any professional degree or designation, or of any sign, card, circular, device, or advertisement, as a practitioner of any such profession, or as a person skilled in the same, shall be prima facie evidence of engaging in the practice of such profession. [S13,§§2575-a28, -a31, 2600-o; C24, 27, 31, 35,§2528.]

EXCEPTIONS

2529 Pharmacists. The provisions of this chapter relative to the making of application for a license, the issuance of a license, the negotiation of reciprocal agreements for recognition of foreign licenses, the collection of license and renewal fees, and the preservation of records

shall not apply to the licensing of persons to practice pharmacy, but such licensing shall be governed by the following regulations:

1. Every application for a license to practice pharmacy shall be made direct to the secretary of the pharmacy examiners.
2. Such license and all renewals thereof shall be issued by said examiners.
3. Every reciprocal agreement for the recognition of any such license issued in another state shall be negotiated by said examiners.
4. All license and renewal fees exacted from persons licensed to practice pharmacy shall be paid to and collected by the secretary of the pharmacy examiners.
5. All records in connection with the licensing of pharmacists shall be kept by said secretary.

1. [C97,§2589; S13,§2589-b; SS15,§2589-a; C24, 27, 31, 35,§2529.]
2. [C97,§2590; S13,§2589-d; C24, 27, 31, 35, §2529.]
3. [S13,§2589-b; C24, 27, 31, 35,§2529.]
4. [C97,§2590; S13,§2589-d; C24, 27, 31, 35, §2529.]
5. [C97,§§2586, 2595; C24, 27, 31, 35,§2529.]

Referred to in §2531

2530 Enforcement. The provisions of this title insofar as they affect the practice of pharmacy shall be enforced by the pharmacy examiners and the provisions of sections 2523 and 2524 shall not apply to said profession. [C97,§2584; S13,§2596-c; SS15,§2584; C24, 27, 31, 35,§2530.]

Referred to in §2531

2531 Pharmacy examiners. In discharging the duties and exercising the powers provided for in sections 2529 and 2530, the pharmacy examiners and their secretary shall be governed by all the provisions of this chapter which govern the department of health when discharging a similar duty or exercising a similar power with reference to any of the professions regulated by this title. [C24, 27, 31, 35,§2531.]

2531.1 Penalties. Any person violating any provision of this or the following chapters of this title when said provisions apply or relate to or affect the practice of pharmacy shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned not more than thirty days in the county jail. [C35, §2531-g1.]

2532 Secretary of pharmacy examiners. The pharmacy examiners shall have the right to employ a full-time secretary, who shall not be a member of the examining board, at such compensation as may be fixed from time to time in the biennial salary act and the provisions of section 2459 providing for a secretary for each examining board shall not apply to the pharmacy examiners. [C97,§2585; S13,§2585; C24, 27, 31, 35,§2532.]

2533 Duties of secretary. The secretary of the pharmacy examiners shall, upon the direction of said examiners, make inspections of alleged violations of the provisions of this title relative to the practice of pharmacy and of chapters 155, 155.1, and 156. Said secretary shall be allowed his necessary traveling and hotel expenses in making such inspections. [C97, §2585; S13,§2585; C24, 27, 31, 35,§2533.]

2534 Renewal fee. The secretary of the pharmacy examiners shall annually add one dollar to the renewal fee provided in this chapter for a person licensed to practice pharmacy. Such additional amount shall be considered as a part of the regular renewal fee and payment of the same shall be a prerequisite to the renewal of his license. The funds derived from the additional renewal fee collected under this section shall be paid to the state pharmacy association upon the order of its treasurer and secretary. Said funds shall be used by such association in the advancement of the art and science of pharmacy. [C97, §2590; S13,§2589-d; C24, 27, 31, 35,§2534.]

2534.1 Association fee collected. The state department of health shall annually add four dollars to the renewal fee provided for in subsection 7 of section 2516, for one licensed to practice embalming, and such additional moneys shall be accepted as part of the regular renewal fee. The payment of the same shall be prerequisite to the renewal of such licenses. The funds derived by the state department of health from the additional renewal fees collected under this section in behalf of the profession of embalming shall be paid to the board of embalming examiners at such time as said board of embalming examiners or the Iowa funeral directors association conducts a state-wide educational meeting for its members, in such amounts as are necessary for such said meeting only and such funds so collected by the state department of health shall be used for the advancement of the arts and sciences of the embalming profession. [47GA, ch 106,§2.]

2535 Chiropractors and osteopaths. Notwithstanding the provisions of this title, every application for a license to practice chiropractic, osteopathy, or osteopathy and surgery, shall be made direct to the secretary of the examining board of such profession, and every reciprocal agreement for the recognition of any such license issued in another state shall be negotiated by the examining board for such profession, and all examination, license, and renewal fees received from such persons licensed to practice any of such professions shall be paid to and collected by the secretary of the examining board of such profession, which secretary shall turn the same over to the department of health on the first day of January, 1925, and quarterly thereafter. [S13, §2583-a; C24, 27, 31, 35,§2535.]

2536 Clerical help and supplies. Subject to the approval of the executive council, the examining boards for chiropractic, osteopathy, and osteopathy and surgery, may employ such clerical assistance as may be necessary to enable said boards to perform the duties imposed upon them by law. Payment for such assistance shall be made out of the appropriation provided for in section 2462. The executive council shall also furnish said boards with the necessary

quarters and all articles and supplies required for the public use, and the provisions of section 2463 shall not apply to said boards. [C24, 27, 31, 35,§2536.]

2537 Records. The secretary of each of said boards shall keep a correct record of the proceedings of said board, and upon the granting of any license to practice any of said professions the board shall, at the time of granting said license, certify to the department of health the application upon which such license was issued, together with the questions submitted in the examination of such applicant and the answers thereto, and such secretary shall deposit with the department of health all records not needed for the current use of his examining board. [S13,§2583-a; C24, 27, 31, 35,§2537.]

NURSE EXAMINERS

2537.1 Secretary. The board of nurse examiners is authorized to appoint a full-time secretary who shall not be a member of the board, and the provisions of section 2459 which provides for a secretary for each examining board shall not apply to this board. [C35,§2537-g1.]

Referred to in §§2537.3–2537.6, inc.

2537.2 Duties. All records which pertain to the licensing of nurses in this state shall be kept by the secretary who shall keep a record of all proceedings of the board of nurse examiners and perform such further duties as the board shall generally or specifically determine. [C35,§2537-g2.]

Referred to in §§2537.3–2537.6, inc.

2537.3 Applications — reciprocal agreements—fees. Every application for a license to practice nursing in this state shall be made direct to the secretary of the board of nurse examiners, and upon the granting of any such license the secretary shall certify to the department of health that such license has been granted. Every reciprocal agreement for the recognition of any such license issued in another state shall be negotiated by the board. All examination, license and renewal fees received from such persons licensed to practice nursing shall be paid to and collected by the secretary of the board, who shall remit to the treasurer of state quarterly all fees collected, and at the same time render to the state comptroller an itemized and verified report showing the source from which said fees were obtained. All such fees collected and remitted shall be placed in a special fund by the treasurer of state and the state comptroller to be known as the "Nurses' fund", to be used by the board to administer and enforce the laws relating to the practice of nursing, to elevate the standards of schools of nursing, and to promote the educational and professional standards of nurses and nursing in this state, and no part of such expense shall be paid out of the state treasury. Any remainder in said fund at the end of each fiscal year, after all expense in carrying out the provisions of sections 2537.1 to 2537.6, inclusive, have been paid, or a sum sufficient for payment thereof set apart, shall be paid into the general fund of the state. Said fund shall be subject at all times to the warrant of the state comptroller, drawn upon written requisition of the chairman of the board and attested by the secretary, for the payment of all salaries and other expenses necessary to carry out the provisions of said sections, but in no event shall the total expenses therefor exceed the total fees collected and deposited to the credit of said fund. [C35,§2537-g3.]

Referred to in §§2537.4–2537.6, inc.

2537.4 Assistants — payment. Subject to the approval of the commissioner of public health, the board may appoint such assistants and inspectors as may be necessary to properly administer and enforce the provisions of sections 2537.1 to 2537.6, inclusive. They shall perform such duties as the board shall assign to them. The amount of salary or compensation of the secretary and such appointees shall be fixed by the executive council. [C35,§2537-g4.]

Referred to in §§2537.3, 2537.5, 2537.6

2537.5 Enforcement — applicable statutes. The provisions of this title insofar as they affect the practice of nursing shall be enforced by the board of nurse examiners, and the provisions of sections 2523, 2523.1 and 2524 shall not apply to said profession. In discharging the duties and exercising the powers provided for in sections 2537.1 to 2537.6, inclusive, the board and its secretary shall be governed by all the provisions of law which govern the department of health when discharging a similar duty or exercising a similar power that pertains to the nursing profession. [C35,§2537-g5.]

Referred to in §§2537.3, 2537.4, 2537.6

2537.6 Interpretation. No provision of law in conflict with any provision of sections 2537.1 to 2537.5, inclusive, shall have any effect thereon or upon the rights of any person licensed under this title. [C35,§2537-g6.]

Referred to in §§2537.3, 2537.4, 2537.5

WOUNDS BY CRIMINAL VIOLENCE

2537.7 Report of treatment of wounds. Any person licensed under the provisions of this title, who shall administer any treatment to any person suffering an injury of violence, which appears to have been received in connection with the commission of a criminal offense, or to whom an application is made for treatment of any nature because of any such injury of violence, shall at once but not later than twelve hours thereafter, report said fact to the sheriff of the county in which said treatment was administered or an application therefor was made, stating therein the name of such person, his residence if ascertainable, and giving a brief description of the injury. Any provision of law or rule of evidence relative to confidential communications is suspended insofar as the provisions hereof are concerned. [C31, 35,§2537-d1.]

Referred to in §2537.8

2537.8 Report by sheriff. The sheriff of any county who has received any report required by this chapter and who has any reason to believe that the person injured was involved in the commission of any crime, either as perpetrator or victim, shall at once report said fact, giving all the details relative thereto to the chief of the bureau of investigation. No sheriff shall divulge any information received under the provisions of this section and section 2537.7 to any person other than a law enforcing officer, and then only in connection with the investigation of the alleged commission of a crime. [C31, 35,§2537-d2.]

2537.9 Violations. Any person failing to make the report required herein shall be guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars. [C31, 35,§2537-d3.]

CHAPTER 116

PRACTICE OF MEDICINE AND SURGERY

Referred to in §§2554.01, 2554.07
Enforcement, §§2523, 2525, 2527
Penalty, §2522

2538 Persons engaged in.
2539 Persons not engaged in.
2540 Requirements for license.
2541 Certificates of national board.

2538 Persons engaged in. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of medicine and surgery:

1. Persons who publicly profess to be physicians or surgeons or who publicly profess to assume the duties incident to the practice of medicine or surgery.
2. Persons who prescribe, or prescribe and furnish medicine for human ailments or treat the same by surgery.
3. Persons who act as representatives of any person in doing any of the things mentioned in this section. [C97,§2579; C24, 27, 31, 35,§2538.]

Referred to in §2539

2539 Persons not engaged in. Section 2538 shall not be construed to include the following classes of persons:

1. Persons who advertise or sell patent or proprietary medicines.
2. Persons who advertise, sell, or prescribe natural mineral waters flowing from wells or springs.
3. Students of medicine or surgery who have completed at least two years study in a medical school, approved by the medical examiners, and who prescribe medicine under the supervision of a licensed physician and surgeon, or who render gratuitous service to persons in case of emergency.
4. Licensed podiatrists, osteopaths, osteopaths and surgeons, chiropractors, nurses, dentists, optometrists, and pharmacists who are exclusively engaged in the practice of their respective professions.
5. Physicians and surgeons of the United States army, navy, or public health service when acting in the line of duty in this state, or to physicians and surgeons licensed in another state, when incidentally called into this state in consultation with a physician and surgeon licensed in this state. [C97,§§2579, 2581; S13,§2581; C24, 27, 31, 35,§2539.]

2540 Requirements for license. Each applicant for a license to practice medicine shall:

1. Present a diploma issued by a medical college approved by the medical examiners.
2. Pass an examination prescribed by the medical examiners in the subjects of anatomy, chemistry, physiology, materia medica and therapeutics, obstetrics, pathology, theory and practice, and surgery; but in the subjects of materia medica and therapeutics, and theory and practice, each applicant shall be examined in accordance with the teachings of the school of medicine which he desires to practice.
3. Present to the state department of health satisfactory evidence that applicant has completed one year of internship in a hospital approved by the state board of medical examiners. No hospital shall be approved which does not provide the internship without expense to the interne.

1. [C97,§2582; S13,§2582; C24, 27, 31, 35, §2540.]
2. [C97,§2576; S13,§2576; C24, 27, 31, 35, §2540.]
3. [C27, 31, 35,§2540.]

Referred to in §2541
Approved colleges, §2469
Basic science examination, §2487.38

2541 Certificates of national board. The state department of health may, with the approval of the medical examiners, accept in lieu of the examination prescribed in section 2540 a certificate of examination issued by the national board of medical examiners of the United States of America, but every applicant for a license upon the basis of such certificate shall be required to pay the fee prescribed for licenses issued under reciprocal agreements. [S13,§2582; C24, 27, 31, 35,§2541.]

CHAPTER 117

PRACTICE OF PODIATRY

Enforcement, §§2523, 2525, 2527
Penalty, §2522

2542 Persons engaged in practice.
2543 Persons not required to qualify.
2544 License.
2545 Approved school.
2546 Amputations—general anesthetics.
2547 Title or abbreviation.

2542 Persons engaged in practice. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of podiatry:

1. Persons who publicly profess to be podiatrists or who publicly profess to assume the duties incident to the practice of podiatry.

2. A podiatrist is one who examines or diagnoses or treats ailments of the human foot, medically or surgically. [C24, 27, 31, 35,§2542; 47GA, ch 104,§2.]

2543 Persons not required to qualify. This chapter shall not apply to the following:

1. Physicians and surgeons, or osteopaths, or osteopathic surgeons authorized to practice in this state.

2. Podiatrists licensed to practice in the state prior to the taking effect of this chapter*.

3. Nothing herein shall affect or alter the existing right now held by retailers, manufacturers or others to sell corrective shoes, arch supports, drugs or medicines for use on feet. [C24, 27, 31, 35,§2543; 47GA, ch 104,§3.]

*Effective July 4, 1937

2544 License. Every applicant for a license to practice podiatry shall:

1. Be a graduate of an accredited high school.

2. Present a diploma issued by a school of podiatry approved by the board of podiatry examiners.

3. Pass an examination in the subjects of anatomy, chemistry, dermatology, diagnosis, pharmacy and materia medica, pathology, physiology, histology, bacteriology, neurology, practical and clinical podiatry, foot orthopedics, and others, as prescribed by the board of podiatry examiners, and must obtain a general average of at least seventy-five percent and not less than seventy percent in any one subject.

4. In addition to the above requirements all applicants after January 1, 1938, shall present to the board of podiatry examiners satisfactory evidence of a completed internship of not less than eight months in a recognized school, hospital, clinic or office, approved by the board of podiatry examiners. [C24, 27, 31, 35,§2544; 47GA, ch 104,§4.]

2545 Approved school. No school of podiatry shall be approved by the board of podiatry examiners as a school of recognized standing unless said school:

1. Requires for graduation or the receipt of any podiatric degree the completion of a course of study covering a period of at least eight months in each of three calendar years.

2. After January 1, 1940, no school of podiatry and/or chiropody shall be approved by the board of podiatry examiners which does not have as an additional entrance requirement one year's study in a recognized college, junior college, university or academy. [C24, 27, 31, 35,§2545; 47GA, ch 104,§5.]

Approved schools, §2469

2546 Amputations—general anesthetics. A license to practice podiatry shall not authorize the licensee to amputate the human foot or perform any surgery on the human body at or above the ankle, or use any anesthetics other than local. [C24, 27, 31, 35,§2546; 47GA, ch 104,§6.]

2547 Title or abbreviation. Every licensee shall be designated as a registered podiatrist and shall not use any title or abbreviation without the designation "practice limited to the foot," nor mislead the public in any way as to the limited field or practice. [C24, 27, 31, 35, §2547; 47GA, ch 104,§7.]

Titles and degrees, §§2509, 2510

CHAPTER 118

PRACTICE OF OSTEOPATHY AND SURGERY

Enforcement, §§2523, 2525, 2527
Penalty, §2522

2554.01 Definitions.
2554.02 Persons engaged in.
2554.03 Persons not engaged in.
2554.04 Requirements—osteopathy.
2554.05 Requirements—osteopathy and surgery.
2554.06 Approved colleges.
2554.07 Scope of practice.
2554.08 Internal curative medicines—surgery.
2554.09 County physician.
2554.10 State patients.

2548 to 2554, inc. Rep. by 46GA, ch 23

2554.01 Definitions. For the purpose of this code, the following definitions are enacted:

1. Osteopathy is that school of healing art which teaches and practices scientific methods and modalities used in the prevention and treatment of human diseases, but whose basic concept, in contrast with all other schools, places paramount emphasis upon the normality of blood

circulation and all other body functions as a necessary prerequisite to health and holds that such normality is more certain of achievement by and through manual stimulation or inhibition of the nerve mechanism controlling such functions, or by the correction of anatomical maladjustments.

2. Osteopathic practice is that method of rehabilitating, restoring and maintaining body functions by and through manual stimulation or inhibition of nerve mechanism controlling such body functions, or by the correction of anatomical maladjustment, and/or by other therapeutic agents, methods and modalities used supplementary thereto; but such supplementary agents, methods or modalities shall be used only preliminary to, preparatory to and/or in conjunction with such manual treatment. Such osteopathic practice is hereby declared not to be the practice of medicine within the meaning of chapter 116, and is not subject to the provisions of said chapter. [C35,§2554-g1.]

Referred to in §2554.07

2554.02 Persons engaged in. For the purpose of this title:

1. The following classes of persons shall be deemed to be engaged in the practice of osteopathy:

Persons publicly professing to be osteopathic physicians or publicly professing to assume the duties incident to such practice of osteopathy.

Persons who treat human ailments by that school of healing art hereinbefore defined as osteopathy.

2. The following classes of persons shall be deemed to be engaged in the practice of osteopathy and surgery:

Persons publicly professing to be osteopathic physicians and surgeons, or publicly professing to assume the duties incident to such practice of osteopathic surgery.

Persons who treat human ailments according to that school of healing art hereinbefore defined as osteopathy, including the practice of major surgery. [C24, 27, 31,§2548; C35,§2554-g2.]

Referred to in §2554.03

2554.03 Persons not engaged in. Section 2554.02 shall not be so construed as to include the following classes of persons:

1. Licensed practitioners of medicine and surgery, podiatrists, chiropractors, nurses, and dentists, who are exclusively engaged in the practice of their respective professions.

2. Practitioners of medicine and surgery of the United States army, navy, or public health service when acting in the line of duty in this state, or to osteopathic physicians or osteopathic physicians and surgeons, licensed in another state, when incidentally called into this state in consultation with an osteopathic physician or osteopathic physician and surgeon, licensed in this state.

3. Students of osteopathy or of osteopathy and surgery who have completed at least two years study in a college of osteopathy approved by the osteopathic examiners and who render gratuitous service to persons in case of emergency. [C24, 27, 31,§2549; C35,§2554-g3.]

2554.04 Requirements—osteopathy. Every applicant for a license to practice osteopathy shall:

1. Present to the osteopathic examiners of Iowa satisfactory evidence that he has a preliminary education equal at least to the requirements for graduation from an accredited high school or other secondary school of equal or greater standards, and that prior to his matriculation in an osteopathic college he has also completed two years of college or university study consisting of at least sixty semester hours of collegiate work in an accredited college or university, during which college or university course he has had at least twelve semester hours of chemistry, eight semester hours of physics, eight semester hours of biology, six semester hours of English, twelve semester hours of nonscience subjects; provided, however, that this two years of collegiate preosteopathic work shall not be required of any applicant who has matriculated in an accredited college of osteopathy prior to March 1, 1935.

2. Present a diploma issued by an accredited college of osteopathy approved by the osteopathic examiners of Iowa.

3. Pass an examination in the science of osteopathy as herein defined and in the practice of the same, including minor surgery, as prescribed by the osteopathic examiners of Iowa. [S13, §2583-a; C24, 27, 31,§2550; C35,§2554-g4.]

Referred to in §2554.05

2554.05 Requirements — osteopathy and surgery. In addition to all the requirements of section 2554.04, every applicant for a license to practice osteopathy and surgery shall;

1. Present satisfactory evidence that he has completed either:

A two-year post-graduate course, of nine months each, in an accredited college of osteopathy approved by the osteopathic examiners of Iowa, involving a thorough and intensive study of the subject of surgery as prescribed by such osteopathic examiners, or

A one-year post-graduate course of nine months, as prescribed in the preceding paragraph, and, in addition thereto, has completed a one-year course of training as a surgical assistant in a hospital having at least twenty-five beds for patients and equipped for doing major surgical work.

2. Pass an examination as prescribed by the osteopathic examiners in the subject of surgery, which shall be of such character as to thoroughly test the qualifications of the applicant as a practitioner of major surgery. [S13, §2583-a; C24, 27, 31,§2551; C35,§2554-g5.]

Referred to in §2554.07
Basic science examination, §2437.38

2554.06 Approved colleges. No college of osteopathy shall be approved by the osteopathic examiners as an accredited college of recognized standing unless it has in all respects met the standards fixed and required by the bureau of professional education of the American Osteo-

pathic Association, and which requires completion of a scientific course of professional study, including all of the basic subjects and courses then being taught generally in approved medical schools, and covering a period of not less than four full school years of nine months each, in actual resident attendance. Such professional course shall require a specific and published schedule of study and clinical practice for the entire school period, and this schedule shall include a study of:

1. Such basic and fundamental subjects as anatomy (regional, dissection, applied, surgical and microscopic); histology; physiology; pathology; diagnosis (physical, differential and laboratory); chemistry, including bio-chemistry and toxicology; pharmaco-dynamics; bacteriology;

2. Surgery (major, minor, orificial and orthopedic);

3. Principles of osteopathy and comparative therapeutics;

4. Practice of osteopathy as applied to the diagnosis and treatment of human diseases, including clinical practice; neurology and psychiatry; obstetrics; pediatrics; eye, ear, nose and throat; urology; gynecology; proctology; dietetics; x-ray, both diagnostic and therapeutic; hygiene; dermatology; syphilology; and jurisprudence;

5. Supplemental therapeutics, including such subjects as hydrotherapy; electrotherapy; drugtherapy; biological therapy and psychotherapy. [S13,§2583-a; C24, 27, 31,§2553; C35,§2554-g6.]

2554.07 Scope of practice. One licensed as an osteopathic physician may practice osteopathy as defined in section 2554.01, including obstetrics and minor surgery. One specially licensed as an osteopathic physician and surgeon under section 2554.05 may also practice major surgery. Neither osteopathic physicians nor osteopathic physicians and surgeons licensed under this chapter shall be subject to the provisions of chapter 116. [C35,§2554-g7.]

2554.08 Internal curative medicines—surgery. A license to practice osteopathy or osteopathy and surgery shall not authorize the licensee to prescribe or give internal curative medicines and a license to practice osteopathy shall not authorize the licensee to engage in major operative surgery. The words "internal curative medicine", as used herein, shall be so construed as not to include antidotes, biologics, drugs necessary to the practice of minor surgery and obstetrics, or to the simpler remedies commonly given for temporary relief. [S13,§2583-b; C24, 27, 31,§2554; C35,§2554-g8.]

2554.09 County physician. The board of supervisors of any county may enter into contract with one licensed hereunder for the care and treatment of its indigent sick. [C35, §2554-g9.]

See also §3828.111

2554.10 State patients. One licensed hereunder shall have the right to examine applicants, recommend admissions and make reports in connection with the admission of patients to all state-owned institutions. [C35,§2554-g10.]

CHAPTER 119

PRACTICE OF CHIROPRACTIC

Enforcement, §§2523, 2525, 2527
Penalty, §2522

2555 "Chiropractic" defined.
2556 Persons not engaged in.
2557 License.
2558 Approved college.
2559 Operative surgery—drugs.
2560 Display of word "chiropractor".

2555 "Chiropractic" defined. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of chiropractic:

1. Persons publicly professing to be chiropractors or publicly professing to assume the duties incident to the practice of chiropractic.

2. Persons who treat human ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustments. [C24, 27, 31, 35,§2555.]

Referred to in §2556

2556 Persons not engaged in. Section 2555 shall not be construed to include the following classes of persons:

1. Licensed physicians and surgeons, licensed osteopaths, and licensed osteopaths and surgeons who are exclusively engaged in the practice of their respective professions.

2. Physicians and surgeons of the United States army, navy, or public health service when acting in the line of duty in this state, or to chiropractors licensed in another state, when incidentally called into this state in consultation with a chiropractor licensed in this state.

3. Students of chiropractic who have entered upon a regular course of study in a chiropractic college approved by the chiropractic examiners, who practice chiropractic under the direction of a licensed chiropractor and in accordance with the rules of said examiners. [C24, 27, 31, 35, §2556.]

2557 License. Every applicant for a license to practice chiropractic shall:

1. Present satisfactory evidence that he possesses a preliminary education equal to the requirements for graduation from an accredited high school or other secondary school.

2. Present a diploma issued by a college of chiropractic approved by the chiropractic examiners.

3. Pass an examination prescribed by the chiropractic examiners in the subjects of anat-

omy, physiology, symptomatology and diagnosis, hygiene and sanitation, chemistry, histology, pathology, and principles and practice of chiropractic, including a clinical demonstration of vertebral palpation, nerve tracing and adjusting. [C24, 27, 31, 35,§2557.]

Referred to in §2558
Basic science examination, §2437.38

2558 **Approved college.** No college of chiropractic shall be approved by the chiropractic examiners as a college of recognized standing unless said college:

1. Requires for graduation or for the receipt of any chiropractic degree the completion of a course of study covering a period of not less than three school years of six months each year in actual continuous attendance.

2. Gives an adequate course of study in the subjects enumerated in paragraph 3 of section 2557 and including practical clinical instruction.

3. Publishes in a regularly issued catalogue the requirements for graduation and degrees as herein specified. [C24, 27, 31, 35,§2558.]

Approved colleges, §2469

2559 **Operative surgery—drugs.** A license to practice chiropractic shall not authorize the licensee to practice operative surgery, osteopathy, nor administer or prescribe any drug or medicine included in materia medica. [C24, 27, 31, 35,§2559.]

2560 **Display of word "chiropractor".** Every licensee shall place upon all signs used by him, and display prominently in his office the word "chiropractor". [C24, 27, 31, 35,§2560.]

Titles and degrees, §§2509, 2510

CHAPTER 120

PRACTICE OF NURSING

Enforcement, §§2523, 2525, 2527
Penalty, §2522

2561 "Nursing" defined.
2562 Nurses exempted.
2563 License.
2564 Schools of good standing.

2561 **"Nursing" defined.** For the purpose of this title any person shall be deemed to be engaged in the practice of nursing who practices nursing as a graduate or registered nurse or publicly professes to be a graduate or registered nurse and to assume the duties incident to such profession. [S13,§2575-a32; C24, 27, 31, 35,§2561.]

Referred to in §2562

2562 **Nurses exempted.** Section 2561 shall not apply to any person nursing the sick with or without pay who does not in any way assume to be a registered or graduate nurse, but such person shall not use the abbreviations "R. N." or "G. N." [S13,§§2575-a28,-a31,-a32; C24, 27, 31, 35,§2562.]

Titles and degrees, §§2509, 2510

2563 **License.** Every applicant for a license to practice nursing shall:

1. Present a diploma issued by a nurses training school approved by the nurse examiners.

2. Pass an examination prescribed by the nurse examiners in the subjects of elementary hygiene, anatomy, physiology, materia medica, dietetics, practical nursing, medical and surgical nursing, obstetrics, nursing of children, the rules of the state department of health relating to communicable diseases, and quarantine, and other proper subjects.

1. [S13,§2575-a29; C24, 27, 31, 35,§2563.]
2. [S13,§2575-a30; C24, 27, 31, 35,§2563.]

Referred to in §2564

2564 **Schools of good standing.** No training school shall be approved by the nurse examiners as a school of recognized standing unless said school is attached to a general hospital and:

1. Requires for graduation or any degree the completion of a course of study covering a period of at least three years of actual attendance.

2. Gives an adequate course of study in the subjects enumerated in paragraph 2 of section 2563.

3. Publishes in a regularly issued catalogue the requirements for graduation and degrees as herein specified. [S13,§2575-a29; C24, 27, 31, 35,§2564.]

Approved schools, §2469

CHAPTER 121

PRACTICE OF DENTISTRY

Enforcement, §§2523, 2525, 2527
Penalty, §2522

2565 "Practice of dentistry" defined.
2566 Persons not engaged in.
2567 License.
2568 Names of employed dentists to be posted.
2569 Employment of unlicensed dentist.
2570 Practice under own name.
2571 "Practice of dental hygiene" defined.
2572 Dental hygienists.
2573 Approved hygiene school.
2573.01 Definition.
2573.02 Renewal of licenses.
2573.03 Time of renewal.
2573.04 Renewal and notice of expiration.
2573.05 Determining right to renewal.
2573.06 Record of hearing.
2573.07 Oaths of witnesses.
2573.08 Persons entitled to testify.
2573.09 Grounds for rejecting application.
2573.10 Record and notice of order.
2573.11 Appeal.
2573.12 Effect of appeal.
2573.13 Reinstatement of former licensee.
2573.14 Reinstatement of lapsed license.
2573.15 Revocation of license.
2573.16 Unprofessional conduct.
2573.17 Application.

2565 "Practice of dentistry" defined. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of dentistry:

1. Persons publicly professing to be dentists, dental surgeons, or skilled in the science of dentistry, or publicly professing to assume the duties incident to the practice of dentistry.

2. Persons who treat, or attempt to correct by any medicine, appliance, or method, any disorder, lesion, injury, deformity, or defect of the oral cavity, teeth, gums, or maxillary bones of the human being, or give prophylactic treatment to any of said organs. [S13,§2600-o; C24, 27, 31, 35,§2565.]

Referred to in §2566

2566 Persons not engaged in. Section 2565 shall not be construed to include the following classes:

1. Students of dentistry who practice dentistry upon patients at clinics in connection with their regular course of instruction at the state dental college.

2. Licensed "physicians and surgeons" or licensed "osteopaths and surgeons" who extract teeth or treat diseases of the oral cavity, gums, teeth, or maxillary bones as an incident to the general practice of their professions.

3. Persons who are members of an incorporated society and practice dentistry solely for and among the members of such incorporated society without charge.

4. Persons licensed to practice dental hygiene who are exclusively engaged in the practice of said profession.

1, 2. [S13,§§2600-l,-o; C24, 27, 31, 35,§2566.]
3. [S13,§2600-l; C24, 27, 31, 35,§2566.]
4. [C24, 27, 31, 35,§2566.]

2567 License. Every applicant for a license to practice dentistry shall:

1. Present a diploma issued by a dental college approved by the dental examiners.

2. Pass an examination prescribed by the dental examiners in the science of dentistry and the practice of dental surgery.

The state department of health, with the approval of the dental examiners, may accept in lieu of the requirements in paragraphs one and two of this section, certificate of satisfactory examination issued by the national board of dental examiners of the United States of America, but every applicant for a license, upon the basis of such certificate, shall be required to pay the prescribed fee for a license issued under reciprocal agreements. [S13,§2600-d; C24, 27, 31, 35,§2567.]

Approved colleges, §2469
License exception, §2447

2568 Names of employed dentists to be posted. Every person who owns, operates, or controls a dental office in which anyone other than himself is practicing dentistry shall display the name of such person in a conspicuous manner at the public entrance to said office. [S13,§2600-o1; C24, 27, 31, 35,§2568.]

2569 Employment of unlicensed dentist. No person owning or conducting any place where dental work of any kind is done or contracted for, shall employ or permit any unlicensed dentist to practice dentistry in said place, but persons who are not licensed dentists may perform laboratory work. [S13,§2600-o2; C24, 27, 31, 35, §2569.]

2570 Practice under own name. No person shall operate any place in which dentistry is practiced under any other name than his own, or display, in connection with his practice, on any advertising matter any other than his own name; but two or more licensed dentists who are associated in the practice may use all of their names, and a widow, heir, or any legal representative of a deceased dentist, may operate such office for a reasonable time for the purpose of disposing of the same. [C24, 27, 31, 35,§2570.]

2571 "Practice of dental hygiene" defined. Any woman may be licensed as a dental hygienist and such license shall authorize her to remove lime deposits, accretions, and stains upon the exposed surfaces of the teeth and directly beneath the free margins of the gums, but such practice must be carried on in a dental office, a public or private school, or in a public institution, and under the supervision of a licensed dentist. Dental hygienists shall not otherwise engage in the practice of dentistry. [C24, 27, 31, 35,§2571.]

2572 Dental hygienists. Every applicant for a license to practice dental hygiene shall:

1. Present satisfactory evidence of a preliminary education equivalent to two years in an accredited high school or other secondary school.
2. Present a diploma from a training school for dental hygiene approved by the dental examiners.
3. Pass an examination prescribed by the dental examiners in the subjects taught in the curriculum of an accredited training school for dental hygiene. [C24, 27, 31, 35,§2572.]

2573 Approved hygiene school. No training school for dental hygiene shall be approved by the dental examiners as a school of recognized standing unless said school:

1. Requires for graduation or any degree the completion of a course of study covering a period of not less than one year of at least nine months in actual continuous attendance.
2. Gives a suitable course covering the subject of dental hygiene.
3. Publishes in a regularly issued catalogue the requirements for graduation and degrees as specified herein. [C24, 27, 31, 35,§2573.]

Approved schools, §2469

2573.01 Definition. For the purpose of this chapter, "commissioner" shall mean the commissioner of public health or his deputy. [C35, §2573-g1.]

2573.02 Renewal of licenses. Every license to practice dentistry or dental hygiene shall expire on the thirtieth day of June following the date of issuance of such license. Application for renewal of such license shall be made in writing to the department at least sixty days prior to the expiration of such license, accompanied by the legal fee and the affidavit of the applicant, upon a form to be prescribed by said department, in which affidavit the applicant shall state in substance that he has not during the term of the license which he then holds or the last renewal thereof violated any of the provisions of this title or committed any of the acts of unprofessional conduct, naming them, as defined in this title. [C35,§2573-g2.]

2573.03 Time of renewal. Such renewal of license shall not be issued by the department prior to the fifteenth day of May of each year. [C35,§2573-g3.]

2573.04 Renewal and notice of expiration. Every year the department shall notify each licensee by mail of the expiration of his license, and subject to the provisions of this chapter the same shall be renewed upon application being made, without examination. [C35,§2573-g4.]

2573.05 Determining right to renewal. If, prior to the renewal of any such license, the commissioner is informed upon oath or affirmation lawfully administered, that any such applicant has during the term of his last license or the last renewal thereof violated any of the provisions of this title or committed any of the acts of unprofessional conduct as defined in this title, or if it is certified in writing to said department by the state board of dental examiners, or any member thereof, that said board of examiners, or any member thereof, is credibly informed that such violation of law or act of unprofessional conduct has been so committed by such applicant, then the department shall notify such applicant by registered letter, with postage prepaid, mailed to his address as shown by the records of said department that such information or certificate has come to the attention of the department, and that on a day named the applicant may appear before the commissioner at the office of the department and show cause why said license should be renewed. In such event the renewal of license shall not be made prior to the date so fixed and the making of such a showing by the applicant. [C35,§2573-g5.]

2573.06 Record of hearing. The time and place of such hearing before the commissioner shall be entered as part of the records of the department, and shall be open to public inspection. [C35,§2573-g6.]

2573.07 Oaths of witnesses. The commissioner is hereby empowered to and shall administer oaths to all persons offering testimony at such hearing. [C35,§2573-g7.]

2573.08 Persons entitled to testify. Upon such hearing being had any person having knowledge of the facts pertaining to the propriety of the renewal of such license may testify thereto. [C35,§2573-g8.]

2573.09 Grounds for rejecting application. If at said hearing, and if appeal is taken, then upon appeal as hereinafter provided, it shall be established that the applicant has theretofore failed to comply with all of the provisions of this title or has during the term of his license or the last renewal thereof committed any of the acts of unprofessional conduct as defined in this title, then the commissioner shall reject such application and said license shall not be renewed except as hereinafter provided. [C35, §2573-g9.]

Unprofessional conduct, §2573.16

2573.10 Record and notice of order. The minutes of all evidence heard by said commissioner or exhibits introduced, at said hearing for or against the granting of said application for a license, together with the order of the commission granting or rejecting such application for renewal of license, which shall be in writing, shall be and become a part of the records of said department and shall be open to public inspection. Written notice of said order shall be mailed to the applicant by the department. [C35,§2573-g10.]

2573.11 Appeal. If the commissioner should reject any such application, and refuse to renew any such license, the applicant may, within thirty days after the order of the commissioner, and not afterward, appeal therefrom by a writ*

* "Write" in enrolled act

of certiorari to the district court where upon such appeal the hearing shall be de novo and all legal evidence pertaining to the matter of whether or not such license should be renewed may be submitted, including new evidence not submitted to the commissioner. [C35,§2573-g11.]

2573.12 **Effect of appeal.** The order of the commissioner rejecting such application, and refusing to renew such license, shall remain in force and effect until such appeal is successfully prosecuted by the applicant and finally determined upon the merits and no new or temporary license shall be issued to the applicant pending such appeal. [C35,§2573-g12.]

2573.13 **Reinstatement of former licensee.** Any former licensee whose application for renewal of license has been rejected by the commissioner and who has not successfully prosecuted an appeal therefrom as herein provided shall not thereafter receive such a license or renewal thereof except upon the recommendation of the examining board of his profession, with the approval of the commissioner, and the payment of the renewal fees then due. Such examining board may require examination of the former licensee, in which case he shall pay the examination fees provided by law. [C35, §2573-g13.]

2573.14 **Reinstatement of lapsed license.** Any former licensee who has allowed his license to lapse by failing to file application for the renewal of the same as above provided may be reinstated with or without examination as the examining board of his profession may decide, but then only upon the recommendation of said examining board, with the approval of the commissioner, and upon payment of the renewal fees then due, and then only upon filing application and affidavit with the department in the manner and form above provided.

If examination shall be required by said examining board such former licensee shall pay the fees provided by law. [C35,§2573-g14.]

Application and affidavit, §2573.02

2573.15 **Revocation of license.** As to dentists and dental hygienists a license to practice either of such professions shall be revoked or suspended in the manner and upon the grounds elsewhere provided in this title, and also when the affidavit accompanying the application of such licensee for renewal of license filed with the department is not in all respects true. [C35,§2573-g15.]

Revocation of license, §2492

2573.16 **Unprofessional conduct.** As to dentists and dental hygienists "unprofessional conduct" shall consist of any of the acts denominated as such elsewhere in this title, and also any other of the following acts:

1. All advertising of any kind or character other than the carrying or publishing of a professional card or the display of a window or street sign at the licensee's place of business; which professional card or window or street sign shall display only the name, address, profession, office hours and telephone connections of the licensee.

2. Exploiting or advertising through the press, on the radio, or by the use of handbills, circulars or periodicals, other than professional cards stating only the name, address, profession, office hours and telephone connections of the licensee.

3. Employing or making use of advertising solicitors or publicity agents or soliciting employment personally or by representative. [C35,§2573-g16.]

Additional prohibitions, §2493

2573.17 **Application.** The provisions hereof shall not in any wise apply to acts done or violations of law committed prior to the enactment hereof. [C35,§2573-g17.]

Constitutionality, §2573-g18, code 1935; 46GA, ch 24, §5
Omnibus repeal, §2573-g19, code 1935; 46GA, ch 24, §6

CHAPTER 122

PRACTICE OF OPTOMETRY

Enforcement, §§2523, 2525, 2527
Penalty, §2522

2574 "Optometry" defined.
2575 Persons not engaged in.
2576 License.
2576.1 Revocation.
2577 Approved school.

2574 **"Optometry" defined.** For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of optometry:

1. Persons who employ any means other than drugs for the measurement of the powers of vision of the human eyes, and adapt lenses for aiding the same.

2. Persons who allow the public to use any mechanical device for such purpose.

3. Persons who publicly profess to be optometrists and to assume the duties incident to said profession. [S13,§2583-g; C24, 27, 31, 35, §2574.]

2575 **Persons not engaged in.** This chapter shall not be construed to include the following classes:

1. Merchants or dealers who sell glasses as merchandise in an established place of business and who do not profess to be optometrists or practice optometry as herein defined.

2. Licensed physicians and surgeons. [S13, §2583-q; C24, 27, 31, 35,§2575.]

2576 **License.** Every applicant for a license to practice optometry shall:

1. Present satisfactory evidence of a preliminary education equivalent to at least four

years study in an accredited high school or other secondary school.

2. Present a diploma from an accredited school of optometry.

3. Pass an examination prescribed by the optometry examiners in the subjects of physiology of the eye, optical physics, anatomy of the eye, ophthalmology, and practical optometry. [S13,§2583-1; C24, 27, 31, 35,§2576.]

Referred to in §2577
Accredited high schools, §2468

2576.1 Revocation. In addition to the grounds for revocation of license set forth in section 2492, any licensed optometrist who shall practice or advertise as practicing his profession, under a false or assumed name or shall by such advertisement mislead the public to believe that he is practicing for or on behalf of an unlicensed person, shall have his license revoked. [C35,§2576-e1.]

2577 Approved school. No school of optometry shall be approved by the optometry examiners as a school of recognized standing unless said school:

1. Requires for graduation or any degree the completion of a course of study covering a period of at least three school years of nine months each year of actual continuous attendance.

2. Gives an adequate course of study in which at least one hundred fifty hours of the instruction are devoted to each of the subjects enumerated in paragraph 3 of section 2576.

3. Publishes in a regularly issued catalogue the requirements for graduation and degrees as herein specified. [S13,§2583-1; C24, 27, 31, 35,§2577.]

Approved schools, §2469

CHAPTER 123

PRACTICE OF PHARMACY

Enforcement, §§2523, 2525, 2527, 2533
Penalty, §2531.1

2578 Persons engaged in.
2579 Persons not engaged in.
2580 Definitions.
2581 License.
2581.1 Applicants for license—requirements.
2582 Sales by unlicensed person.
2582.1 Display of certificate.
2582.2 Use of terms.
2583 Approved colleges.

2578 Persons engaged in. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of pharmacy:

1. Persons who engage in the business of selling, or offering or exposing for sale, drugs and medicines at retail.

2. Persons who compound or dispense drugs and medicines or fill the prescriptions of licensed physicians and surgeons, dentists, or veterinarians. [C97,§2588; SS15,§2588; C24, 27, 31, 35, §2578.]

Referred to in §2579

2579 Persons not engaged in. Neither section 2578 nor section 2582 shall be construed to include the following classes:

1. Persons who assist in the selling or dispensing of drugs and medicines under the supervision of a licensed pharmacist.

2. Persons who sell, offer or expose for sale, completely denatured alcohol or concentrated lye, insecticides or fungicides in original packages.

3. Persons licensed to practice medicine, dentistry, or veterinary medicine who dispense drugs and medicines as an incident to the practice of their professions.

4. Persons who sell, offer or expose for sale proprietary medicines or domestic remedies which are not in themselves poisonous or in violation of the law relative to intoxicating liquors. [C97,§2588; SS15,§2588; C24, 27, 31, 35, §2579.]

Intoxicating liquors, ch 93 1 et seq

2580 Definitions. For the purposes of this chapter:

1. "Drugs and medicines" shall include all medicinal substances and preparations for internal or external use recognized in the United States Pharmacopoeia or National Formulary, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animals.

2. "Pharmacy" shall mean a drug store in which drugs, and medicines are exposed for sale or sold at retail, or in which prescriptions of licensed physicians and surgeons, dentists or veterinarians are compounded and sold by a registered pharmacist. [S13,§4999-a33; C24, 27, 31, 35,§2580.]

2581 License. Every applicant for a license to practice pharmacy shall:

1. Present satisfactory evidence of possessing the qualifications enumerated in one of the following paragraphs:

a. The completion of two years work in an accredited college of pharmacy and at least two years of practical experience as a clerk under the supervision of a licensed pharmacist in a pharmacy.

b. The completion of three years work in an accredited college of pharmacy and at least one year of practical experience as specified in the preceding paragraph.

2. Pass an examination prescribed by the pharmacy examiners in the science and practice of pharmacy. This section shall apply to all

persons who prior to July 4, 1936, were actually in attendance in any recognized college of pharmacy, irrespective of the time when such persons apply for said license. [S13,§2589-b; C24, 27, 31, 35,§2581.]

Referred to in §2581.1

2581.1 Applicants for license — requirements. On and after July 4, 1936, every applicant for a license to practice pharmacy, except for those embraced in section 2581, shall:

1. Be not less than twenty-one years of age, and of good moral character, and of temperate habits.
2. Be a graduate of an accredited high school, or its equivalent.
3. Be a graduate of a school or college of pharmacy, or of a department of pharmacy of a university, recognized and approved by the board of pharmacy examiners.
4. File proof, satisfactory to the board, of a minimum of one year practical experience in a pharmacy, substantiated by proper affidavits; said experience to be under the supervision of a licensed pharmacist and not concurrent with time of college attendance.
5. Pass an examination prescribed by the board of pharmacy examiners in the science and practice of pharmacy. [C35,§2581-g1.]

2582 Sales by unlicensed person. No unlicensed person or licensed pharmacist shall allow anyone who is not a licensed pharmacist to sell, or dispense any drugs, or medicines or fill the prescriptions of licensed physicians, dentists and veterinarians, unless the same be done under the immediate personal supervision of a licensed pharmacist, and all drugs, and medicines sold, exposed, or offered for sale shall be under the immediate personal supervision of a registered pharmacist at all times except for temporary absence.

"Temporary absence" shall mean necessary absence for meals and business, or other necessary causes, while the pharmacy is open for business. [C97,§2588; SS15,§2588; C24, 27, 31, 35, §2582.]

Referred to in §2579
44GA, ch 54, §3, editorially divided

2582.1 Display of certificate. No person shall allow or permit the certificate of a licensed pharmacist to remain in or on display in his place of business, unless the licensed pharmacist owning said certificate is employed therein.

No licensed pharmacist shall allow or permit his certificate, as a licensed pharmacist, to remain in or on display at any place of business unless legally employed therein. [C31, 35,§2582-d1.]

2582.2 Use of terms. No person shall use the word or words: "drug", "druggist", "drug store", "pharmacy", "pharmacist", or "apothecary", on any sign, card, circular, device, or advertisement, unless his place of business is operated as a pharmacy as defined in this chapter. [C97,§2588; SS15,§2588; C31, 35,§2582-d2.]

2583 Approved colleges. No college of pharmacy shall be approved by the pharmacy examiners as a college of recognized standing unless the entrance and graduation requirements are equivalent to those prescribed by the American association of colleges of pharmacy. [S13, §2589-b; C24, 27, 31, 35,§2583.]

Approved colleges, §2469

CHAPTER 124

PRACTICE OF EMBALMING

This chapter (§§2584 and 2585) repealed by 43GA, ch 69, and chapter 124.1 enacted in lieu thereof

CHAPTER 124.1

PRACTICE OF EMBALMING

Enforcement, §§2523, 2525, 2527
Penalty, §2522

2585.01 "Embalming" defined.
2585.02 Interpretation.
2585.03 License.
2585.04 Studentship.
2585.05 Revocation of license.
2585.06 Inspection.
2585.07 Perpetual licenses.
2585.08 After death of licensee.
2585.09 Students excepted.

2585.01 "Embalming" defined. For the purposes of this chapter, the following classes shall be deemed to be engaged in the practice of embalming:

1. Any person, who prepares dead human bodies for burial, cremation or other final disposition; or who, in connection with the disposition or sale of any casket, vault or other burial receptacle, shall furnish any embalming or funeral service, directly or indirectly, by himself, or in conjunction with another; or who publicly professes to be an embalmer, funeral director, mortician, or any other title indicating that such person assumes the duties, or any part of the duties, incidental to the preparation, care, and final disposition of any human dead; or who, in connection with the preparation of dead human bodies for burial, cremation or other final disposition, furnishes funeral services.
2. Any person, who shall disinfect, preserve and make final disposition of dead human bodies, in whole or in part, or who shall attempt to do so, by the use or application of chemical substances, fluids or gases ordinarily used,

prepared or intended for such use, either by outward application of such chemical substances, fluids or gases on the body, or by the introduction of same into the body by vascular or hypodermic injection or by direct introduction into the organs or cavities, or by any other methods or processes. It is further provided that nothing in the provisions of this chapter shall apply to any person, firm, or legally established funeral home other than cooperative burial associations, except that each such legally established funeral home shall comply with the provisions of this chapter as to state control, licenses, and license fees, engaged in the undertaking business on July 4, 1935. [S13,§2575-a36; C24, 27,§2584; C31, 35,§2585-c1; 47GA, ch 106, §1.]

Referred to in §2585.02

2585.02 Interpretation. Section 2585.01 shall not be construed to include the following classes of persons:

1. Manufacturers, wholesalers and jobbers of caskets, vaults or other burial receptacles not engaged in the other functions of embalming or furnishing of funeral services as above defined.

2. Those who distribute or sell caskets, vaults, or any other burial receptacles and who do not furnish any embalming or funeral service, directly or indirectly, by himself or in conjunction with another, except a registered student under the personal direction of a licensed embalmer.

3. Those who use bodies for scientific purposes as defined in sections 2351, 2352 and 2355; or those who make scientific examination of dead bodies, or perform autopsies.

4. Physicians or institutions who preserve parts of human bodies either for scientific purposes or for use as evidence in prospective legal cases.

5. Persons burying their own dead under burial permit from the registrar of vital statistics. [C31, 35,§2585-c2.]

2585.03 License. No applicant shall be issued a license to practice embalming unless and until he shall:

1. File with the state department of health an application upon a form prepared by the department, presenting satisfactory proof that said applicant has completed an accredited high school course, or the equivalent thereof with evidence of one year's studentship under a regularly licensed embalmer in the state prior to entering an accredited school of embalming; together with such other information as may be deemed necessary.

2. Have taken and successfully completed, a course of training in an accredited school of embalming.

3. At the first regular examination held by the board after his graduation, pass the examination prescribed and may then receive a class "A" certificate of studentship and shall then complete one additional year of continuous studentship. The applicant shall during his studentship arterially embalm not less than twenty-five human bodies under the direct supervision of a licensed embalmer in good standing in the state.

4. Have passed a satisfactory examination prescribed by the board of embalmers examiners in such subjects as the board may prescribe, including the subjects of embalming, theory and practice, sanitary science, chemistry, anatomy, physiology, bacteriology, pathology, restorative art, transportation, the care, disinfection, preservation, funeral direction, burial or other disposition of dead human bodies, together with the laws, rules and regulations of the state department of health relating to communicable diseases, quarantine and cause of death.

5. Have demonstrated his proficiency as an embalmer, as directed by the board of embalmers examiners, by operation on a dead human body, which body shall be furnished by the state department of health, under the provisions of section 2352. This particular requirement shall apply to all applicants for a license by reciprocity, as well as by examination. [S13,§§2575-a37, -a38; C24, 27,§2585; C31, 35,§2585-c3.]

2585.04 Studentship. The board of embalmers examiners shall, by rule approved by the state department of health, provide for studentships in embalming, and shall regulate the registration and training thereof; and no applicant shall be eligible to take the embalmers examination who has not first been legally registered as a student. For such registration a fee of five dollars shall be collected from the applicant. [C31, 35,§2585-c4.]

2585.05 Revocation of license. For the purpose of revoking a license under the provisions of section 2492, "unprofessional conduct" on the part of an embalmer shall in addition to the provisions of said section consist of any one of the following acts:

1. Knowingly misrepresenting any material matter to a prospective purchaser of funeral merchandise, furnishings, or services.

2. Executing a death certificate or shipping paper for use of anyone except a licensed embalmer or a registered apprentice who is working under his immediate personal supervision.

3. Recommending to the board of embalmers examiners an applicant for a license who has not, to his personal knowledge, complied with the requirements of the law and the rules of the board of embalmers examiners. [C31, 35,§2585-c5.]

2585.06 Inspection. The commissioner of public health shall have power to inspect all places where dead human bodies are prepared, or held for burial, or entombment; and to prescribe and enforce such rules and regulations in connection therewith as may be necessary for the preservation of the public health. [C31, 35, §2585-c7.]

2585.07 Perpetual licenses. No person licensed to practice embalming in Iowa shall be

required to secure a new license under this chapter. [C31, 35,§2585-c8.]

2585.08 After death of licensee. Any heir or legal representative of a licensed embalmer may maintain a funeral home for a period of two years after the death of such licensed embalmer. A licensed embalmer shall be employed to operate such funeral home during said period and the state department of health shall be notified of such employment by the licensee. [47GA, ch 107,§1.]

2585.09 Students excepted. The provisions of this act* [46GA, ch 26] relating to the period of studentship shall not apply to any student now regularly registered as by law provided. [C35,§2585-g1.]

*Effective date July 4, 1935

CHAPTER 124.2

COSMETOLOGY

Enforcement, §§2523, 2525, 2527

2585.10 Definitions.
2585.11 Exceptions.
2585.12 License.
2585.13 Examination.
2585.14 Electrolysis.
2585.15 Rules—practice in home.
2585.16 Present practitioners.
2585.17 Assistants.
2585.18 Accredited schools.
2585.19 Conflicting statutes.
2585.20 Temporary permits.
2585.21 Managers—license required.
2585.22 Employment restricted.
2585.23 Fees.
2585.24 Penalty.

2585.10 Definitions. For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of cosmetology:

1. Persons who, for compensation, engage in or who hold themselves out to the public as being engaged in any one or any combination of the following practices: cutting, dressing, curling, waving, bleaching, coloring and similar work, on the hair of any woman or child by any means whatever.

2. Persons who, with hands or mechanical or electrical apparatus or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions, or creams, engage for compensation in any one or any combination of the following practices: massaging, cleansing, stimulating, manipulating, exercising, manicuring, beautifying, or similar work, the scalp, face, neck, hands, arms, bust or upper part of the body, or the removing of superfluous hair by the use of electricity or otherwise, on or about the body of any woman or child. [C27, 31, 35,§2585-b1.]

Referred to in §2585.11

2585.11 Exceptions. Section 2585.10 shall not be construed to include the following classes of persons:

1. Licensed physicians, surgeons, osteopaths, nurses, dentists, podiatrists, optometrists and chiropractors when exclusively engaged in the practice of their respective professions.

2. Barbers who do not practice cosmetology upon women or children in connection with their regular trade or profession; and nothing in this chapter shall be construed to prohibit barbers from cutting the hair, massaging the face and neck, or shampooing the head of any person.

3. Those who render like services in cases of emergency or occasionally administer same in the home. [C27, 31, 35,§2585-b2.]

2585.12 License. No applicant shall be issued a license to practice cosmetology unless and until he shall:

1. Present to the examiners the certificate of a medical physician, showing freedom from any infectious or contagious disease.

2. Pass an examination prescribed by the cosmetology examiners, which examination shall include both practical demonstrations and written or oral tests and shall not be confined to any specific system or method. [C27, 31, 35, §2585-b3.]

2585.13 Examination. No person shall be eligible to take the examination prescribed by the cosmetology examiners unless and until said person presents a diploma, or other like evidence, issued to the applicant by any school of cosmetology approved by the cosmetology examiners and licensed by the department, showing that said applicant has completed the course of study in said school prescribed by the board of cosmetology examiners. [C27, 31, 35,§2585-b4.]

2585.14 Electrolysis. If an applicant desires a license authorizing him to remove superfluous hair by the use of the electric needle, he shall present a diploma, as evidence, of having completed such a course in a school recognized by the board of cosmetology examiners which teaches a special course in the practice of the use of the electric needle. The board of cosmetology examiners shall give to such applicant an examination in the use of the electric needle for which the applicant shall pay a fee of ten dollars to the department. [C27, 31, 35,§2585-b5.]

2585.15 Rules—practice in home. The state department of health shall prescribe such sanitary rules for shops and schools as it may deem necessary, with particular reference to the conditions under which the practice of cosmetology shall be carried on and the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. Cosmetology may be practiced in the home providing a room, other than the living rooms, be fitted up for that purpose. The department of

health shall have power to enforce the provisions of this section and to make all necessary inspections in connection therewith. [C27, 31, 35,§2585-b6.]

2585.16 Present practitioners. All persons who, on April 9, 1927, are in the actual practice of cosmetology in the state of Iowa, as defined herein, shall be entitled to a license under this chapter, without examination, provided that application therefor, accompanied by the physician's certificate and the required annual license fee, is filed with the cosmetology examiners within ninety days after said date. [C27, 31, 35,§2585-b7.]

2585.17 Assistants. The commissioner of public health, with the approval of the cosmetology examiners, shall appoint such inspectors and clerical assistants and incur such other expense as may be necessary to properly administer and enforce the provisions of law relating to the practice of cosmetology. The amount of compensation of such appointees shall be fixed by the executive council. There is hereby annually appropriated out of the cosmetology fund in the state treasury a sum sufficient to pay the compensation and the expenses of said examiners, inspectors and clerical assistants, and, other necessary expense. Provided however that the entire cost of the administration and enforcement of the provisions of law relating to the practice of cosmetology shall not exceed in any one year, the receipts under such laws for such year together with the balance held by the treasurer of state in the cosmetology fund from preceding years. [C27, 31, 35,§2585-b9.]

Referred to in §2585.23

2585.18 Accredited schools. No school shall be approved by the board of cosmetology examiners unless and until such school shall have made a verified application to the department for a license to teach cosmetology. Such application shall be accompanied by the annual license fee, shall state the name and location of said school, and such other additional information as the board of cosmetology examiners may require. When such application shall have been approved by the board of cosmetology examiners the department shall issue to the applicant a license to conduct such school of cosmetology for one year. Subject to the approval of the board of cosmetology examiners any such license may be annually renewed upon the receipt of the annual license fee. [C31, 35, §2585-c9.]

2585.19 Conflicting statutes. No provision of law in conflict with any provision of this chapter shall have any effect thereon or upon the rights of any person licensed hereunder. [C27, 31, 35,§2585-b10.]

2585.20 Temporary permits. Any person having completed the prescribed course in, and having obtained a diploma from a school of cosmetology approved by the board of cosmetology examiners and licensed by the department, and having made application to take the next succeeding examination in cosmetology, shall be known as an apprentice and upon payment of the required fee to the department and the submission of evidence of his eligibility to the board of cosmetology examiners, shall be issued a permit by the department which shall entitle such person to work as a cosmetology operator from the date of such graduation to the date of the next succeeding state examination in cosmetology. Only one permit may be issued to any person. [C31, 35,§2585-c10.]

2585.21 Managers—license required. Managers of shops or other places where cosmetology is practiced, who directly or indirectly supervise the work of operators, shall be licensed cosmetologists. [C31, 35,§2585-c11.]

2585.22 Employment restricted. No person, firm or corporation shall employ, use or hire any person as a practitioner of cosmetology unless such person is a licensed cosmetologist, or an apprentice as defined by this act [43GA, ch 70]. [C31, 35,§2585-c12.]

2585.23 Fees. All fees provided for by this act [43GA, ch 70] and all other fees paid to the department by practitioners of cosmetology shall be paid by the department to and receipted for by the treasurer of state, who shall keep such fees in a separate fund to be known as the cosmetology fund. Such fund shall be continued from year to year and the treasurer shall keep a separate account thereof showing receipts and disbursements as authorized by section 2585.17, and the balance therein; and no part of such fund shall be used for any other purpose than the administration and enforcement of the laws relating to the practice of cosmetology. [C31, 35,§2585-c13.]

2585.24 Penalty. Any person found guilty of violating any of the provisions of this chapter or chapter 124.3 shall be fined not to exceed one hundred dollars or be imprisoned in the county jail for not more than thirty days. [C35,§2522; 47GA, ch 105,§3.]

CHAPTER 124.3

BARBERING

Referred to in §2585.24
Enforcement, §§2523, 2525, 2527
Penalty, §2585.24

2585.25 "Barbering" defined.
2585.26 Exceptions.
2585.27 License.
2585.28 Examinations.
2585.29 Charges prohibited.
2585.30 Closing shop.
2585.31 Sanitary rules.
2585.32 Board.
2585.33 Inspectors and assistants.
2585.34 Conflicting statutes.

2585.25 "Barbering" defined. For the purposes of this chapter all persons who, for compensation, engage in any one or any combination of the following practices performed upon the upper part of the human body for cosmetic purposes and not for the treatment of disease or physical or mental ailments, are engaged in the practice of barbering:

1. Shaving or trimming the beard or cutting the hair.
2. Giving facial or scalp massage or treatments with oils, creams, lotions or other preparations, either by hand or mechanical appliances.
3. Singeing, shampooing or dyeing the hair or applying hair tonic.
4. Applying cosmetic preparations, antiseptics, powders, oils, clays or lotions to scalp, face, neck or upper part of the body. [C27, 31, 35, §2585-b11.]

Referred to in §2585.26

2585.26 Exceptions. Section 2585.25 shall not be construed to include the following classes of persons:

1. Licensed physicians, surgeons, osteopaths, nurses, dentists, optometrists, chiropractors, cosmetologists or podiatrists.
2. Apprentices who are in good faith pursuing the study of barbering under the direct supervision and tutelage of a licensed practitioner of barbering, provided they are only assisting the licensed practitioner under whom they are pursuing such course of study or students attending schools approved by the barber examiners.
3. Those who, without compensation, render like services in cases of emergency or occasionally administer same in the home.

The provisions of this section shall not be construed as to permit any person other than a licensed barber or students in a barber school approved by the board of barber examiners or registered barber apprentice while pursuing a regular course of study of barbering to shave or trim the beard or cut the hair of any person for cosmetic purposes, except that licensed cosmetologists may cut the hair of any female person and of any male person under twelve years of age. [C27, 31, 35,§2585-b12.]

2585.27 License. No applicant shall be issued a license to practice barbering unless and until he shall:

1. Present to the examiners the certificate of a medical physician, showing freedom from any infectious or contagious disease.
2. Present a certificate showing that the applicant has successfully completed the eighth grade of the public schools, or furnish a satisfactory showing to the board that said applicant has the equivalent thereof.
3. Pass an examination prescribed by the barber examiners, which examination shall include both practical demonstrations and written or oral tests and shall not be confined to any specific system or method.
4. Present to the barber examiners satisfactory evidence that he is a citizen of the United States, or has made application for citizenship. [C27, 31, 35,§2585-b13.]

Referred to in §2585.28

2585.28 Examinations. Whenever any person has successfully completed a six months course both of theory and practice in any school of barbering approved by the barber examiners board, and has furnished the necessary certificates and complied with the requirements of section 2585.27, he may take an examination for registration as a barber's apprentice, said examination to be given by the board at the same time as the regular examination for barber's license. If any such applicant successfully passes the examination, he shall be given an apprentice's certificate which certificate will entitle him to pursue a clinic or practice course under the direct supervision and tutelage of a licensed practitioner of barbering for a period of eighteen months from the date of issuance thereof. At the end of said period of eighteen months, upon furnishing to the board satisfactory proof that he has faithfully pursued a course of study as apprentice under the supervision and tutelage of a licensed barber in this state for said period of time, he shall be permitted by said board to take the regular examination for a license to practice barbering. Provided, however, that any person who has practiced barbering in the state of Iowa for a period of more than five years prior to the taking effect of the barbers license law, or any person who has practiced barbering in any other state for a period of more than five years, shall, upon furnishing satisfactory proof thereof to the examining board, be permitted to take the examination for a license to practice barbering in this state. [C27, 31, 35,§2585-b14.]

Approved schools, §2469

2585.29 Charges prohibited. No barber school, nor any barber student therein shall be permitted to charge any fee to any patron or person for work done at said barber school or

college by a student during the first three months of his course. [C31, 35,§2585-d1.]

2585.30 Closing shop. If the proprietor or person in charge of any barber shop fails to comply with the sanitary rules prescribed by the state department of health as provided in the following section, or fails to maintain said barber shop as required by said rules, the state department of health may notify said person of such failure in writing, and if said rules and regulations are not complied with within five days after receiving such written notice, the department shall in writing order such shop closed and it shall remain closed until the department is satisfied that the rules have been or will be complied with. Any person who practices barbering in any shop while such shop is ordered closed, as herein provided, shall be guilty of a misdemeanor. It shall be the duty of the county attorney in each county to assist and aid the state department or any of its inspectors, in enforcing the provisions of this and section 2585.31. [C31, 35,§2585-c14.]

Punishment, §12894

2585.31 Sanitary rules. The state department of health shall prescribe such sanitary rules as it may deem necessary, with particular reference to the conditions under which the practice of barbering shall be carried on and the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. Barbering shall not be practiced in the living quarters of any person. The department of health shall have power to enforce the provisions of this section and to make all necessary inspections in connection therewith. [C27, 31, 35,§2585-b15.]

Referred to in §2585.30
Section 2585-b16, code 1935, omitted as obsolete

2585.32 Board. The board of barber examiners shall be appointed by the governor and shall be composed of three members. Each member shall serve for a term of three years and until his successor has been appointed and has qualified*.

Each member shall have been a practical barber, who has been a practical barber for at least five years prior to his appointment to the board, engaged in the practice in this state. [C27, 31, 35,§2585-b17.]

*Governor's first appointees' terms expired July 1, 1927, July 1, 1928, and July 1, 1929.

2585.33 Inspectors and assistants. The commissioner of public health, with the approval of the barber examiners, shall appoint such necessary inspectors and clerical assistants as may be necessary to properly administer and enforce the provisions of this chapter. The compensation of such inspectors and clerical assistants shall be paid from the appropriation made in section 2462, provided, however, that such appointments and the amount of compensation of such appointees shall be approved by the executive council, and provided further that the entire cost of the administration and enforcement of this chapter shall not exceed in any year the receipts by virtue of this chapter for such year. [C27, 31, 35,§2585-b18.]

2585.34 Conflicting statutes. No provision of law in conflict with any provision of this chapter shall have any effect thereon or upon the rights of any person licensed hereunder. [C27, 31, 35,§2585-b19.]

TITLE IX

AGRICULTURE, HORTICULTURE, AND ANIMAL INDUSTRY

CHAPTER 125

DEPARTMENT OF AGRICULTURE

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.
Bang's disease control, temporary act, 48GA, ch 87

2586 Definitions.
2587 Object of department.
2588 Cooperation.
2589 Location.
2590 Powers and duties.
2591 Additional duties.
2592 Notice of adoption of rules.
2593 Time rules take effect.
2594 Publication and distribution of rules.
2595 Iowa Year Book.
2596 Assessor.
2597 Returns by assessor.
2598 Seal.
2599 Bonds.
2600 Biennial report.
2601 Duty of peace officers.
2602 Interference with department.
2603 State farmers institute.
2603.01 Salary.

2586 Definitions. For the purposes of this title, unless otherwise provided:

1. "Secretary" shall mean the secretary of agriculture.

2. "Department" shall mean the Iowa department of agriculture and wherever such department is required or authorized to do an act, unless otherwise provided, it shall be construed as authorizing performance by an officer, regular assistant, or duly authorized agent of such department.

3. "Person" shall include an individual, a corporation, company, firm, society, or association; and the act, omission, or conduct of any officer, agent, or other person acting in a representative capacity shall be imputed to the organization or person represented, and the person acting in such capacity shall also be liable for violation of this title. [S13,§2341-f; C24, 27, 31, 35,§2586.]

2587 Object of department. The object of the department of agriculture shall be:

1. To encourage, promote, and advance the interests of agriculture, including horticulture, livestock industry, dairying, cheese making, poultry raising, beekeeping, production of wool, and other kindred and allied industries.

2. To promote and devise methods of conducting said industries with the view of increasing production and facilitating an adequate distribution of the same at the least cost to the producer.

3. To administer efficiently and impartially the inspection service of the state as is now or may hereafter be placed under its supervision. [S13,§§1657-b,-g; C24, 27, 31, 35,§2587.]

2588 Cooperation. The department of agriculture and the Iowa state college of agriculture and mechanic arts shall cooperate in all ways that may be beneficial to the agricultural interests of the state, but without duplicating research or educational work conducted by said college. Nothing herein contained shall be construed to subordinate either the department or the college in their several spheres of action.

The department of agriculture is hereby authorized to cooperate with the United States department of agriculture as the Iowa department may deem wise and just. [C97,§1677; S13, §1657-g; C24, 27, 31, 35,§2588.]

2589 Location. The department of agriculture shall be located at the seat of government. [C97,§1678; SS15,§2507; C24, 27, 31, 35,§2589.]

2590 Powers and duties. The secretary of agriculture shall be the head of the department of agriculture which shall:

1. Carry out the objects for which the department is created and maintained.

2. Establish and maintain such divisions in the department as are necessary for the proper enforcement of the laws administered by it.

3. Consolidate the inspection service of the state in respect to the laws administered by the department so as to eliminate duplication of inspection insofar as practicable.

4. Maintain a weather division which shall, in cooperation with the United States weather bureau, collect and disseminate weather and phenological statistics and meteorological data, and promote knowledge of meteorology, phenology and climatology of the state. Said division shall be in charge of a director who shall be appointed by the secretary of agriculture, and shall be an officer of the United States weather bureau, if one be detailed for that purpose by the federal government.

5. Establish volunteer weather stations in one or more places in each county, appoint observers thereat, supervise such stations, receive reports of meteorological events and tabulate the same for permanent record.

6. Issue weekly weather and crop bulletins from April 1 to October 1 of each year, and edit and cause to be published monthly weather reports, containing meteorological matter in its relationship to agriculture, transportation, commerce and the general public.

7. Maintain a division of agricultural statistics, which shall, in cooperation with the United States bureau of agricultural economics, gather, compile, and publish statistical information concerning the condition and progress of crops, the production of crops, livestock, livestock products, poultry, and other such related agricultural statistics, as will generally promote knowledge of the agricultural industry in the state of Iowa. Such statistics, when published, shall constitute official agricultural statistics for the state of Iowa. Said division shall be in charge of a director who shall be appointed by the secretary of agriculture and who shall be an officer of the United States bureau of agricultural economics, if one be detailed for that purpose by the federal government.

8. Inspect and supervise all cold storage plants and food producing or distributing establishments including the furniture, fixtures, utensils, machinery, and other equipment so as to prevent the production, preparation, packing, storage, or transportation of food in a manner detrimental to its character or quality.

9. Establish, publish, and enforce rules not inconsistent with law for the enforcement of the provisions of this title and for the enforcement of the various laws, the administration and supervision of which are imposed upon the department.

1. [C24, 27, 31, 35,§2590.]
2. [S13,§1657-g; C24, 27, 31, 35,§2590.]
3. [C24, 27, 31, 35,§2590.]
4. [C97,§§1677, 1678; C24, 27, 31, 35,§2590; 47 GA, ch 108,§1.]
5. [C97,§§1679, 1680; S13,§1679; C24, 27, 31, 35,§2590; 47GA, ch 108,§1.]
6. [C97,§1679; S13,§1679; C24,27,31,35,§2590; 47GA, ch 108,§1.]
7. [C97,§1680; S13,§1363; C24,27,31,35,§2590; 47GA, ch 108,§1.]
8. [S13,§§2528-d5, 4527-m; C24, 27, 31, 35, §2590.]
9. [S13,§2528-d10; C24, 27, 31, 35,§2590.]

Referred to in §2591

2591 Additional duties. In addition to the duties imposed by section 2590 the department shall enforce the law relative to:

1. Forest and fruit-tree reservations, chapter 126.
2. Registration of animals, chapter 127.
3. Infectious and contagious diseases among animals, chapter 128.
4. Eradication of bovine tuberculosis, chapter 129.
5. Hog-cholera virus and serum, chapter 130.
6. Use and disposal of dead animals, chapter 131.
7. Practice of veterinary medicine and surgery, chapter 132.
8. Hotels, restaurants, and food establishments, chapter 133.
9. Cold storage, chapter 134.
10. Regulation and inspection of foods, drugs, and other articles, title X, but chapters 155 and 156 of said title shall be enforced as therein provided.
11. State aid received by certain associations as provided in chapters 137 to 143, inclusive. [C24, 27, 31, 35,§2591.]

State aid, see biennial appropriation act

2592 Notice of adoption of rules. Immediately after the adoption of any rule, the department shall forward a certified copy thereof to the auditor of each county. When any rule is amended, notice of such amendment shall be given in the same manner. [C24, 27, 31, 35, §2592.]

2593 Time rules take effect. The rules of the department shall take effect and be in force in the respective counties from and after the date stated in the certified copies of said rules which are forwarded to the county auditors. [C24, 27, 31, 35,§2593.]

2594 Publication and distribution of rules. A sufficient number of the rules of the department shall be published from time to time to supply the various needs for the same. A copy of the rules shall be furnished to any resident of the state upon request. [C24, 27, 31, 35, §2594.]

2595 Iowa Year Book. The Iowa Year Book of Agriculture shall contain such information and data as in the discretion of the secretary concern the agricultural interests of the state, including data relative to or the reports of:

1. The state fair board, the county and district fair societies, the farmers institutes and short courses, and the farm aid associations.
2. The state horticultural society, the state dairy association, the beef cattle producers association, the corn and small grain growers association, and the poultry associations.
3. Other agricultural, horticultural, and livestock associations in the state organized for the promotion of agriculture.

Any section of such year book may, on the order of the secretary, be published in pamphlet or book form for separate distribution. [R60, §1703; C73,§1107; C97,§1656; S13,§1657-k; C24, 27, 31, 35,§2595.]

2596 Assessor. Agricultural statistics shall be collected each year by the township, town, and city assessors under the supervision of the department, which shall design and distribute blank forms and instructions therefor. [C97, §1363; S13,§1363; C24, 27, 31, 35,§2596.]

2597 Returns by assessor. The assessor shall require each person whose property is listed, to make answers to such inquiries as may be necessary to enable him to return the foregoing statistics, carefully footed and summarized, to the department on or before the

fifteenth day of April of each year. [C97,§1363; S13,§1363; C24, 27, 31, 35,§2597.]

2598 Seal. The department shall have an official seal, and every commission, license, order, or other paper executed by or under the authority of the department may be attested with such seal. [S13,§4999-a31b; C24, 27, 31, 35,§2598.]

2599 Bonds. The secretary shall require every inspector or employee who collects fees or handles funds belonging to the state to give an official bond, properly conditioned and signed by sufficient sureties, in a sum to be fixed by the secretary, which bond shall be approved by him and filed in the office of the secretary of state. This section shall not apply to the deputy secretary of agriculture. [C97,§2503; SS15, §§2503, 2514-p; C24, 27, 31, 35,§2599.]

Bond of deputy, §§430, 1069

2600 Biennial report. The secretary shall make a report to the governor in each even-numbered year, at the time provided by law, which shall include all receipts and disbursements for the year, and such information and statistics concerning the enforcement of the several laws administered by the department as may be thought useful, with such suggestions as to legislation as may be deemed advisable. [C97, §§1680, 2515; S13,§1657-g; SS15,§§2509-a, 2515; C24, 27, 31, 35,§2600.]

Time of making report, §246

2601 Duty of peace officers. All peace officers of the state when called upon by the secretary or any officer or authorized agent of the department shall enforce its rules and execute its lawful orders within their respective jurisdictions, and upon the request of the secretary such officers shall make such inspections as directed by the secretary and report the results thereof to him. [C24, 27, 31, 35,§2601.]

2602 Interference with department. Any person resisting or interfering with the department, its employees or authorized agents, in the discharge of any duty imposed by law shall be guilty of a misdemeanor. [C97,§2526; S13, §§2528-c,-f3, 4999-a25,-a39, 5077-a23; SS15, §3009-r; C24, 27, 31, 35,§2602.]

Punishment, §12894

2603 State farmers institute. In connection with the annual convention to elect members of the state fair board, either preceding or following the day on which the officers are elected, the secretary may hold a state farmers institute, for the discussion of practical and scientific topics relating to the various branches of agriculture, the substance of which may be published in the Iowa Year Book of Agriculture. [S13,§1657-f; C24, 27, 31, 35,§2603.]

2603.01 Salary. The salary of the secretary of agriculture shall be five thousand dollars per annum. [C31, 35,§2603-c1.]

CHAPTER 125.1

SOIL CONSERVATION

2603.02 Short title.
2603.03 Declaration of policy.
2603.04 Definitions.
2603.05 State soil conservation committee.
2603.06 Creation of soil conservation districts.
2603.07 Election of three supervisors for each district.
2603.08 Appointment, qualifications and tenure of supervisors.
2603.09 Powers of districts and supervisors.
2603.10 Cooperation between districts.
2603.11 State agencies to cooperate.
2603.12 Discontinuance of districts.

2603.02 Short title. This chapter may be known and cited as the "Soil Conservation Districts Law". [48GA, ch 92,§1.]

2603.03 Declaration of policy. It is hereby declared to be the policy of the legislature to provide for the restoration and conservation of the soil and soil resources of this state and for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist and maintain the navigability of rivers and harbors, preserve wildlife, protect the tax base, protect public lands and promote the health, safety and public welfare of the people of this state. [48GA, ch 92,§2.]

Referred to in §§2603.06, 2603.09

2603.04 Definitions. Wherever used or referred to in this chapter, unless a different meaning clearly appears from the context:

1. "District" or "soil conservation district" means a governmental subdivision of this state, and a public body corporate and politic, organized in accordance with the provisions of this chapter, for the purposes, with the powers, and subject to the restrictions hereinafter set forth.

2. "Supervisor" means one of the members of the governing body of a district, elected or appointed in accordance with the provisions of this chapter.

3. "Committee" or "state soil conservation committee" means the agency created in section 2603.05.

4. "Petition" means a petition filed under the provisions of subsection 1 of section 2603.06 for the creation of a district.

5. "Nominating petition" means a petition filed under the provisions of section 2603.07 to nominate candidates for the office of supervisor of a soil conservation district.

6. "State" means the state of Iowa.

7. "Agency of this state" includes the government of this state and any subdivision, agency, or instrumentality, corporate or otherwise, of the government of this state.

8. "United States" or "agencies of the United

States" includes the United States of America, the soil conservation service of the United States department of agriculture, and any other agency or instrumentality, corporate or otherwise, of the United States.

9. "Government" or "governmental" includes the government of this state, the government of the United States, and any subdivision, agency or instrumentality, corporate or otherwise, or either of them.

10. "Landowner" includes any person, firm, or corporation who shall hold title to any lands lying within a district organized under the provisions of this chapter.

11. "Qualified elector" shall mean any person who is a landowner as defined herein.

12. "Due notice" means notice published at least twice, with an interval of at least six days between the two publication dates, in a newspaper or other publication of general circulation within the appropriate area; or, if no such publication of general circulation be available, by posting at a reasonable number of conspicuous places within the appropriate area, such posting to include, where possible, posting at public places where it may be customary to post notices concerning county or municipal affairs generally. At any hearing held pursuant to such notice, at the time and place designated in such notice, adjournment may be made from time to time without the necessity of renewing such notice for such adjourned dates. [48GA, ch 92,§3.]

2603.05 State soil conservation committee.

1. There is hereby established, to serve as an agency of the state and to perform the functions conferred upon it in this chapter (together with such other functions as may be hereafter assigned to it from time to time by act of the legislature), the state soil conservation committee. The committee shall consist of a chairman and four members. The following shall serve as members of the committee: The director of the state agricultural extension service, the secretary of agriculture, or a member designated by him. Three members shall be appointed by the governor and confirmed by the senate. The three appointed members shall be bona fide farmers living on farms. The committee may invite the secretary of agriculture of the United States to appoint one person to serve with the above mentioned members, but in an advisory capacity only. The committee shall adopt a seal, which seal shall be judicially noticed, and may perform such acts, hold such public hearings, and promulgate such rules and regulations as may be necessary for the execution of its functions under this chapter.

2. The state soil conservation committee may employ an administrative officer and such other agents and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties and compensation. The committee may call upon the attorney general of the state for such legal services as it may require. It shall have authority to delegate to its chairman, to one or more of its members, or to one or more agents or employees, such powers and duties as it may deem proper. Upon request of the committee, for the purpose of carrying out any of its functions, the supervising officer of any state agency, or of any state institution of learning shall, insofar as may be possible under available appropriations, and having due regard to the needs of the agency to which the request is directed, assign or detail to the committee members of the staff or personnel of such agency or institution of learning, and make such special reports, surveys, or studies as the committee may request.

3. The committee shall designate its chairman, and may, from time to time, change such designation. The director of the state agricultural extension service shall hold office so long as he shall retain the office by virtue of which he shall be serving on the committee. The members appointed by the governor shall serve for a period of six years, except that those first appointed shall serve for terms of two, four and six years respectively, one member being appointed every two years thereafter. The member representing the secretary of agriculture shall serve until there is a change in the personnel of the secretary of agriculture. A majority of the committee shall constitute a quorum, and the concurrence of a majority in any matter within their duties shall be required for its determination. The chairman and members of the committee, not otherwise in the employ of the state, shall receive ten dollars per diem as compensation for their services in the discharge of their duties as members of the committee. Such per diem shall not exceed fifty days per year. They shall also be entitled to expenses, including traveling expenses, necessarily incurred in the discharge of their duties as members of such committee. The committee shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property, shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations, and orders issued or adopted, and shall provide for an annual audit of the accounts of receipts and disbursements.

4. In addition to the duties and powers hereinafter conferred upon the state soil conservation committee, it shall have the following duties and powers:

a. To offer such assistance as may be appropriate to the supervisors of soil conservation districts, organized as provided hereinafter, in the carrying out of any of their powers and programs.

b. To keep the supervisors of each of the several districts organized under the provisions of this chapter informed of the activities and experience of all other districts organized hereunder, and to facilitate an interchange of advice and experience between such districts and cooperation between them.

c. To coordinate the programs of the several soil conservation districts organized hereunder so far as this may be done by advice and consultation.

d. To secure the cooperation and assistance of the United States and any of its agencies, and of

agencies of this state, in the work of such districts.

e. To disseminate information throughout the state concerning the activities and program of the soil conservation districts organized hereunder, and to encourage the formation of such districts in areas where their organization is desirable. [48GA, ch 92,§4.]

Referred to in §2603.04

2603.06 Creation of soil conservation districts.

1. Any twenty-five owners, but in no case less than twenty percent of the owners of land lying within the limits of the territory proposed to be organized into a district may file a petition with the state soil conservation committee, asking that a soil conservation district be organized to function in the territory described in the petition. Such petition shall set forth:

a. The proposed name of said district;

b. That there is need, in the interest of health, safety and public welfare, for a soil conservation district to function in the territory described in the petition;

c. A description of the territory proposed to be organized as a district, which description shall not be required to be given by metes and bounds or by legal subdivisions, but shall be deemed sufficient if generally accurate;

d. A request that the state soil conservation committee duly define the boundaries for such district; that a referendum be held within the territory so defined on the question of the creation of a soil conservation district in such territory; and that the committee determine that such a district be created.

Where more than one petition is filed covering parts of the same territory, the state soil conservation committee may consolidate all or any such petitions.

2. Within ninety days after such petition has been formally accepted by the state soil conservation committee, it shall cause due notice by publication to be given of a proposed hearing upon the question of the desirability and necessity in the interest of health, safety and public welfare, of the creation of such district, on the question of the appropriate boundaries to be assigned to each district upon the propriety of the petition and other proceedings taken under this chapter and upon all questions relative to such inquiries.

All owners of land within the limits of the territory described in the petition and of lands within any territory considered for addition to such described territory and all other interested parties shall have the right to attend such hearings and to be heard. If it shall appear on the hearing that it shall be desirable to include within the proposed district territory outside the area within which due notice of the hearing has been given, the hearing shall be adjourned and due notice of further hearing shall be given through the entire area considered for inclusion in the district, and such further hearing held. After such hearing, if the committee shall determine, upon the facts presented at such hearing and upon such other relevant facts and information as may be available, that there is need in the interest of health, safety and public welfare, for a soil conservation district to function in the territory considered at the hearing, it shall make and record such determination, and shall define the boundaries of such district. In making such determination and in defining such boundaries, the committee shall give due weight and consideration to the topography of the area considered and of the state, the character of soils therein, the distribution of erosion, the prevailing land-use practices, the desirability and necessity of including within the boundaries the particular lands under consideration and the benefits which such lands may receive from being included within such boundaries, the relation of the proposed area to existing watersheds and agricultural regions, and to other soil conservation districts already organized or proposed for organization under the provisions of this chapter, and such other physical, geographical and economic factors as are relevant, having due regard to the legislative determinations set forth in section 2603.03. If the committee shall determine after such hearing, after due consideration of the said relevant facts, that there is no need for a soil conservation district to function in the territory considered at the hearing, it shall make and record such determination and shall deny the petition.

3. After the committee has made and recorded a determination that there is need, in the interest of health, safety, and public welfare, for the organization of a district in a particular territory and has defined the boundaries thereof, it shall consider the question whether the operation of a district within such boundaries with the powers conferred upon soil conservation districts in this chapter is administratively practicable and feasible. It shall be the duty of the committee to hold a referendum within the proposed district upon the question of the creation of the district, said referendum to be held within a reasonable time after finding that there is need for the organization of a district. The question shall be submitted by ballots upon which the words "For creation of a soil conservation district of the lands below described and lying in the county (ies) of....., and ....." and "Against creation of a soil conservation district of the lands below described and lying in the county (ies) of ....., ...and ....." shall be printed, with a square before each proposition, and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose creation of such district. The ballot shall set forth the boundaries of such proposed district as determined by the committee. Only owners of land lying within the boundaries of the territory as determined by the state soil conservation committee shall be eligible to vote in such referendum.

4. The committee shall pay all expenses for the issuance of such notices and the conduct of such hearings and referenda, and shall supervise and conduct such hearings and referenda. It shall issue appropriate regulations governing the

conduct of such hearings and referenda, and providing for the registration prior to the date of the referendum of all eligible voters, or prescribing some other appropriate procedure for the determination of those eligible as voters in such referendum. No informalities in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice thereof shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

5. The committee shall publish the result of such referendum and shall thereafter consider and determine whether the operation of the district within the defined boundaries is administratively practicable and feasible. If the committee shall determine that the operation of such district is not administratively practicable and feasible, it shall record such determination and shall deny the petition. If the committee shall determine that the operation of such district is administratively practicable and feasible, it shall record such determination and shall proceed with the organization of the district in the manner hereinafter provided. In making such determination the committee shall give due regard and weight to the attitudes of the owners of lands lying within the defined boundaries, and the number of landowners eligible to vote in such referendum who shall have voted, the proportion of the votes cast in such referendum in favor of the creation of the district to the total number of votes cast, the income of the landowners of the proposed district, the probable expense of carrying on erosion-control operations within such district, and such other economic and social factors as may be relevant to such determination, having due regard to the legislative determinations set forth in section 2603.03; provided, however, that the committee shall not have authority to determine that the operation of the proposed district within the defined boundaries is administratively practicable and feasible unless at least sixty-five percent of the landowners of the district vote in favor of the creation of such district.

6. If the committee shall determine that the operation of the proposed district within the defined boundaries is administratively practicable and feasible, it shall appoint two temporary supervisors to serve until such time as the three regular supervisors have been elected to act as the governing body of the district, as provided hereinafter. Such district shall be a body corporate upon the taking of the following proceedings:

The two temporary supervisors shall present to the secretary of state an application signed by them, which shall set forth (and such application need contain no detail other than the mere recitals): (1) that a petition for the creation of the district was approved by the state soil conservation committee pursuant to the provisions of this chapter, and that the state soil conservation committee has appointed them as supervisors; (2) the name and official residence of each of the supervisors, together with a certified copy of the appointments evidencing their right to office; (3) the name which is proposed for the district; and (4) the location of the proposed office of the supervisors of the district. The application shall be subscribed and sworn to by each of said supervisors before an officer authorized by the laws of this state to take and certify oaths. The application shall be accompanied by a statement by the state soil conservation committee, which shall certify that a petition was filed, notice issued, and hearing held as aforesaid; that the committee did duly determine that there is need, in the interest of health, safety, and public welfare, for a soil conservation district to function in the proposed territory and did define the boundaries thereof; that notice was given and a referendum held on the question of the creation of such district, and that the results of such referendum showed sixty-five percent of the votes cast in such referendum to be in favor of the creation of the district; that thereafter the committee did duly determine that the operation of the proposed district is administratively practicable and feasible. The said statement shall set forth the boundaries of the district as they have been defined by the committee.

The secretary of state shall examine the application and statement and, if he finds that the name proposed for the district is not identical with that of any other soil conservation district of this state or so nearly similar as to lead to confusion or uncertainty, he shall receive and file them and shall record them in an appropriate book of record in his office. If the secretary of state shall find that the name proposed for the district is identical with that of any other soil conservation district of this state, or so nearly similar as to lead to confusion and uncertainty, he shall certify such fact to the state soil conservation committee, which shall thereupon submit to the secretary of state a new name for the said district, which shall not be subject to such defects. Upon receipt of such new name, free of such defects, the secretary of state shall record the application and statement, with the name so modified, in an appropriate book of record in his office. When the application and statement have been made, filed and recorded, as herein provided, the district shall constitute a body corporate. The secretary of state shall make and issue to the said supervisors a certificate, under the seal of the state, of the due organization of the said district, and shall record such certificate with the application and statement. The boundaries of such district shall include the territory as determined by the state soil conservation committee as aforesaid, but in no event shall they include any area included within the boundaries of another soil conservation district organized under the provisions of this chapter.

7. After eighteen months shall have expired from the date of entry of a determination by the state soil conservation committee that operation of a proposed district is not administratively practicable and feasible, and denial of a petition pursuant to such determination, subsequent petitions may be filed as aforesaid, and action

taken thereon in accordance with the provisions of this chapter.

8. Petitions for including additional territory within an existing district may be filed with the state soil conservation committee, and the proceedings herein provided for in the case of petitions to organize a district shall be observed in the case of petitions for such inclusion. The committee shall prescribe the form for such petition, which shall be as nearly as may be in the form prescribed in this chapter for petitions to organize a district. Where the total number of landowners in the area proposed for inclusion shall be less than twenty-five, the petition may be filed when signed by seventy-five percent of the owners of such area, and in such case no referendum need be held. In referenda upon petitions for such inclusion, all owners of land within the proposed additional area shall be eligible to vote.

9. In any suit, action, or proceeding involving the validity or enforcement of, or relating to, any contract, proceeding, or action of the district, the district shall be deemed to have been established in accordance with the provisions of this chapter upon proof of the issuance of the aforesaid certificate by the secretary of state. A copy of such certificate duly certified by the secretary of state shall be admissible in evidence in any such suit, action or proceeding, and shall be proof of the filing and contents thereof. [48GA, ch 92,§5.]

Referred to in §2603.04

2603.07 Election of three supervisors for each district. Within thirty days after the date of issuance by the secretary of state of a certificate of organization of a soil conservation district, nominating petitions may be filed with the state soil conservation committee to nominate candidates for supervisors, who shall be residents of such district. The two supervisors appointed by the state soil conservation committee shall be eligible for such nomination. The committee shall have authority to extend the time within which nominating petitions may be filed. No such nominating petition shall be accepted by the committee unless it shall be subscribed by twenty-five or more qualified electors of such district. Such qualified electors may sign more than one such nominating petition to nominate more than one candidate for supervisors. The committee shall give due notice of an election to be held for the election of three supervisors for the district. The names of all nominees on behalf of whom such nominating petitions have been filed within the time herein designated, shall be printed, arranged in the alphabetical order of the surnames, upon ballots, with a square before each name and a direction to insert an X mark in the square before any three names to indicate the voter's preference. All qualified electors of the district shall be eligible to vote in such election. The three candidates who shall receive the largest number, respectively, of the votes cast in such election, shall be the elected supervisors for such district. The committee shall pay all the expenses of such election, shall supervise the conduct thereof, shall prescribe regulations governing the conduct of such election and the determination of the eligibility of voters therein, and shall publish the results thereof. [48GA, ch 92,§6.]

Referred to in §2603.04

2603.08 Appointment, qualifications and tenure of supervisors. The governing body of the district shall consist of three supervisors who shall be residents of the district.

The supervisors shall designate a chairman and may, from time to time, change such designation. The term of office of each supervisor shall be six years, except that the supervisors first elected shall serve for terms of two, four and six years respectively. A supervisor shall hold office until his successor has been elected and has qualified. Vacancies shall be filled for the unexpired term. The selection of successors to fill an unexpired term or for a full term shall be made in the same manner in which the retiring supervisors shall respectively have been selected; or, at the discretion of the state soil conservation committee, it may appoint a successor to fill the unexpired term of a supervisor. A supervisor shall receive compensation for his services at the rate of five dollars per day and expenses necessarily incurred in the discharge of his duties, but not to exceed fifty days to any one supervisor.

The supervisors may call upon the attorney general of the state for such legal services as they may require. The supervisors may delegate to their chairman, to one or more supervisors or to one or more agents, or employees, such powers and duties as they may deem proper. The supervisors shall furnish to the state soil conservation committee, upon request, copies of such ordinances, rules, regulations, orders, contracts, forms, and other documents as they shall adopt or employ, and such other information concerning their activities as it may require in the performance of its duties under this chapter.

The supervisors shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property; shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations, and orders issued or adopted; and shall provide for a biennial audit of the accounts of receipts and disbursements.

The supervisors may invite the legislative body of any municipality or county located near the territory comprised within the district to designate a representative to advise and consult with the supervisors of the district on all questions of program and policy which may affect the property, water supply, or other interests of such municipality or county. [48GA, ch 92,§7.]

2603.09 Powers of districts and supervisors. A soil conservation district organized under the provisions of this chapter shall have the following powers, in addition to others granted in other sections of this chapter:

1. To conduct surveys, investigations, and re-

search relating to the character of soil erosion and the preventive and control measures needed, to publish the results of such surveys, investigations or research, and to disseminate information concerning such preventive and control measures; provided, however, that in order to avoid duplication of research activities, no district shall initiate any research program except in cooperation with the Iowa agricultural experiment station located at Ames, Iowa, and pursuant to a cooperative agreement entered into between the Iowa agricultural experiment station and such district;

2. To conduct demonstrational projects within the district on lands owned or controlled by this state or any of its agencies, with the consent and cooperation of the agency administering and having jurisdiction thereof, and on any other lands within the district upon obtaining the consent of the owner of such lands or the necessary rights or interests in such lands, in order to demonstrate by example the means, methods, and measures by which soil and soil resources may be conserved, and soil erosion in the form of soil blowing and soil washing may be prevented and controlled; provided, however, that in order to avoid duplication of agricultural extension activities, no district shall initiate any demonstrational projects, except in cooperation with the Iowa agricultural extension service whose offices are located at Ames, Iowa, and pursuant to a cooperative agreement entered into between the Iowa agricultural extension service and such district;

3. To carry out preventive and central* measures within the district, including, but not limited to, crop rotations, engineering operations, methods of cultivation, the growing of vegetation, changes in use of land, and the measures listed in subsection C* of section 2603.03, on lands owned or controlled by this state or any of its agencies, with the consent and cooperation of the agency administering and having jurisdiction thereof, and on any other lands within the district, upon obtaining the consent of the owner of such lands or the necessary rights or interests in such lands;

*According to enrolled act

4. To cooperate, or enter into agreements with, and within the limits of appropriations duly made available to it by law, to furnish financial or other aid to any agency, governmental or otherwise, or any owner of lands within the district, in the carrying on of erosion-control and prevention operations within the district, subject to such conditions as the supervisors may deem necessary to advance the purposes of this chapter;

5. To obtain options upon and to acquire, by purchase, exchange, lease, gift, grant, bequest, devise or otherwise, any property, real or personal, or rights or interests therein; to maintain, administer, and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; and to sell, lease or otherwise dispose of any of its property or interests therein in furtherance of the purposes and provisions of this chapter;

6. To make available on such terms as it shall prescribe, to landowners within the district, agricultural and engineering machinery and equipment, fertilizer, lime, and such other material or equipment as will assist such landowners to carry on operations upon their lands for the conservation of soil resources and for the prevention and control of soil erosion;

7. To construct, improve, and maintain such structures as may be necessary or convenient for the performance of any of the operations authorized in this chapter;

8. To develop comprehensive plans for the conservation of soil resources and for the control and prevention of soil erosion within the district, which plans shall specify in such detail as may be possible, the acts, procedures, performances, and avoidances which are necessary or desirable for the effectuation of such plans, including the specification of engineering operations, methods of cultivation, the growing of vegetation, cropping programs, tillage practices, and changes in use of land; and to publish such plans and information and bring them to the attention of owners of lands within the district;

9. To sue and be sued in the name of the district; to have a seal, which seal shall be judicially noticed; to have perpetual succession unless terminated as hereinafter provided; to make and execute contracts and other instruments, necessary or convenient to the exercise of its powers; to make, and from time to time amend and repeal, rules and regulations not inconsistent with this chapter, to carry into effect its purposes and powers;

10. To accept donations, gifts, and contributions in money, services, materials, or otherwise, from the United States or any of its agencies, or from this state or any of its agencies, and to use or expend such moneys, services, materials, or other contributions in carrying on its operations;

11. As a condition to the extending of any benefits under this chapter to, or the performance of work upon, any lands not owned or controlled by this state or any of its agencies, the supervisors may require contributions in money, services, materials, or otherwise to any operations conferring such benefits, and may require landowners to enter into and perform such agreements or covenants as to the permanent use of such lands as will tend to prevent or control erosion thereon;

12. No provisions with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the legislature shall specifically so state;

13. After the formation of any district under the provisions of this chapter, all participation hereunder shall be purely voluntary, any provision herein contained on the contrary notwithstanding. [48GA, ch 92,§8.]

2603.10 Cooperation between districts. The supervisors of any two or more districts organ-

ized under the provisions of this chapter may cooperate with one another in the exercise of any or all powers conferred in this chapter. [48GA, ch 92,§9.]

2603.11 State agencies to cooperate. Agencies of this state which shall have jurisdiction over, or be charged with the administration of, any state-owned lands, and of any county, or other governmental subdivision of the state, which shall have jurisdiction over, or be charged with the administration of, any county-owned or other publicly owned lands, lying within the boundaries of any district organized hereunder, may cooperate to the fullest extent with the supervisors of such districts in the effectuation of programs and operations undertaken by the supervisors under the provisions of this chapter. [48GA, ch 92,§10.]

2603.12 Discontinuance of districts. At any time after five years after the organization of a district under the provisions of this chapter, any twenty-five owners of land lying within the boundaries of such district may file a petition with the state soil conservation committee praying that the operations of the district be terminated and the existence of the district discontinued. The committee may conduct such public meetings and public hearings upon such petition as may be necessary to assist in the consideration thereof. Within sixty days after such a petition has been received by the committee, it shall give due notice of the holding of a referendum, and shall supervise such referendum, and issue appropriate regulations governing the conduct thereof, the question to be submitted by ballots upon which the words "For terminating the existence of the..... (name of the soil conservation district to be here inserted)" and "Against terminating the existence of the..... (name of the soil conservation district to be here inserted)" shall be printed, with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose discontinuance of such district. All owners of lands lying within the boundaries of the district shall be eligible to vote in such referendum. Only such landowners shall be eligible to vote. No informalities in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice thereof shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

When sixty-five percent of the landowners vote to terminate the existence of such district, the state soil conservation committee shall advise the supervisors to terminate the affairs of the district. The supervisors shall dispose of all property belonging to the district at public auction and shall pay over the proceeds of such sale to be covered into the state treasury. The supervisors shall thereupon file an application, duly verified, with the secretary of state for the discontinuance of such district, and shall transmit with such application the certificate of the state soil conservation committee setting forth the determination of the committee that the continued operation of such district is not administratively practicable and feasible. The application shall recite that the property of the district has been disposed of and the proceeds paid over as in this section provided, and shall set forth a full accounting of such properties and proceeds of the sale. The secretary of state shall issue to the supervisors a certificate of dissolution and shall record such certificate in an appropriate book of record in his office.

Upon issuance of a certificate of dissolution under the provisions of this section, all ordinances and regulations theretofore adopted and in force within such districts shall be of no further force and effect. All contracts theretofore entered into, to which the district or supervisors are parties, shall remain in force and effect for the period provided in such contracts. The state soil conservation committee shall be substituted for the district or supervisors as party to such contracts. The committee shall be entitled to all benefits and subject to all liabilities under such contracts and shall have the same right and liability to perform, to require performance, and sue and be sued thereon, and to modify or terminate such contracts by mutual consent or otherwise, as the supervisors of the district would have had. Such dissolution shall not affect the lien of any judgment entered under the provisions of section 11 of this act*, nor the pendency of any action instituted under the provisions of such section, and the committee shall succeed to all the rights and obligations of the district or supervisors as to such liens and actions.

The state soil conservation committee shall not entertain petitions for the discontinuance of any district nor conduct referenda upon such petitions nor make determinations pursuant to such petitions in accordance with the provisions of this chapter, more often than once in five years. [48GA, ch 92,§11.]

*Section 11 of the bill as introduced was stricken; see Senate Journal, p. 1217, 48GA

Constitutionality, 48GA, ch 92,§18

Omnibus repeal, 48GA, ch 92,§14

Temporary enabling appropriation and report to governor, 48GA, ch 92,§12

CHAPTER 126

FRUIT-TREE AND FOREST RESERVATIONS

Referred to in §§2591, 7110

2605 Tax exemption.
2606 Reservations.
2607 Forest reservation.
2608 Removal of trees.
2609 Forest trees.
2610 Groves.
2611 Fruit-tree reservation.
2612 Fruit trees.
2613 Replacing trees.
2614 Restraint of livestock.
2615 Penalty.
2616 Assessor.
2617 County auditor.

2604 Rep. by 46GA, ch 13,§36

2605 Tax exemption. Any person who establishes a forest or fruit-tree reservation as provided in this chapter shall be entitled to the tax exemption provided by law. [C24, 27, 31, 35, §2605.]

Tax exemption, §7110

2606 Reservations. On any tract of land in the state of Iowa, the owner or owners may select a permanent forest reservation or reservations, each not less than two acres in continuous area, or a fruit-tree reservation or reservations, not less than one nor more than ten acres in total area, or both, and upon compliance with the provisions of this chapter, such owner or owners shall be entitled to the benefits provided by law. [S13,§1400-c; C24, 27, 31, 35,§2606.]

2607 Forest reservation. A forest reservation shall contain not less than two hundred growing forest trees on each acre. If the area selected is a forest containing the required number of growing forest trees, it shall be accepted as a forest reservation under the provisions of this chapter. If the area selected is a forest containing less than two hundred forest trees to the acre, or if it is a grove, the owner or owners thereof shall have planted, cultivated, and otherwise properly cared for the number of forest trees necessary to bring the total number of growing trees to not less than two hundred on each acre, during a period of not less than two years, before it can be accepted as a forest reservation within the meaning of this chapter. No ground upon which any farm buildings stand shall be recognized as part of any such reservation. [S13,§1400-d; C24, 27, 31, 35,§2607.]

2608 Removal of trees. Not more than one-fifth of the total number of trees in any forest reservation may be removed in any one year, excepting in cases where the trees die naturally. [S13,§1400-e; C24, 27, 31, 35,§2608.]

2609 Forest trees. The ash, black cherry, black walnut, butternut, catalpa, coffee tree, the elms, hackberry, the hickories, honey locust, Norway and Carolina poplars, mulberry, the oaks, sugar maple, European larch and other coniferous trees, and all other forest trees introduced into the state for experimental purposes, shall be considered forest trees within the meaning of this chapter. In forest reservations which are artificial groves, the willows, box elder, soft maple, cottonwood, and other poplars shall be included among forest trees for the purposes of this chapter when they are used as protecting borders not exceeding two rows in width around a forest reservation, or when they are used as nurse trees for forest trees in such forest reservation, the number of such nurse trees not to exceed one hundred on each acre; provided that only box elder and soft maple shall be used as nurse trees. [S13,§1400-f; C24, 27, 31, 35,§2609.]

2610 Groves. The trees of a forest reservation shall be in groves not less than four rods wide. [S13,§1400-g; C24, 27, 31, 35,§2610.]

2611 Fruit-tree reservation. A fruit-tree reservation shall contain on each acre, at least forty apple trees, or seventy other fruit trees, growing under proper care and annually pruned and sprayed. Such reservation may be claimed as such, under this chapter, for a period of eight years after planting. [S13,§1400-h; C24, 27, 31, 35,§2611.]

2612 Fruit trees. The cultivated varieties of apples, crabs, plums, cherries, peaches, and pears shall be considered fruit trees within the meaning of this chapter. [S13,§1400-i; C24, 27, 31, 35,§2612.]

2613 Replacing trees. When any tree or trees on a fruit-tree or forest reservation shall be removed or die, the owner or owners of such reservation shall, within one year, plant and care for other fruit or forest trees, in order that the number of such trees may not fall below that required by this chapter. [S13,§1400-j; C24, 27, 31, 35,§2613.]

2614 Restraint of livestock. Cattle, horses, mules, sheep, goats, and hogs shall not be permitted upon a fruit-tree or forest reservation. [S13,§1400-k; C24, 27, 31, 35,§2614.]

2615 Penalty. If the owner or owners of a fruit-tree or forest reservation violate any provision of this chapter within the two years preceding the making of an assessment, the assessor shall not list any tract belonging to such owner or owners, as a reservation within the meaning of this chapter, for the ensuing two years. [S13, §1400-m; C24, 27, 31, 35,§2615.]

2616 Assessor. It shall be the duty of the assessor to secure the facts relative to fruit-tree and forest reservations by taking the sworn

statement, or affirmation, of the owner or owners making application under this chapter; and to make special report to the county auditor of all reservations made in the county under the provisions of this chapter. [S13,§1400-n; C24, 27, 31, 35,§2616.]

Assessment of reservations, §7110

2617 County auditor. It shall be the duty of the county auditor in every county to keep a record of all forest and fruit-tree reservations within his county; and to make a report of the same to the state conservation commission on or before June 15 of each year. [S13,§1400-o; C24, 27, 31, 35,§2617.]

CHAPTER 127

REGISTRATION OF ANIMALS

Referred to in §2591

2618 Services of stallion.
2619 Services of jack.
2620 Registered animals.
2621 Unregistered jacks.
2622 Certificate for purebred.
2623 Certificate for grade jack.
2624 Animals subject to enrollment.
2625 Diseases which disqualify.
2626 Defects which do not disqualify.
2627 Certificate when animal defective.
2628 Issuance of certificate.
2629 Posting certificate.
2630 Examination on complaint.
2631 Department to appoint examiners.
2632 Decision of board.
2633 Revocation.
2634 Expense.
2635 Blindness.
2636 Certificate of soundness.
2637 Renewal without examination.
2638 Fee.
2639 Transfer of certificate.
2640 False affidavit.
2641 Violations.
2642 Prior certificates of soundness.

2618 Services of stallion. No person shall offer for public service any stallion unless he shall have had said animal enrolled with the department of agriculture as a registered animal, and shall have procured from the department a certificate of soundness. [S13,§2341-f; C24, 27, 31, 35,§2618.]

Last four lines of section 2618, code 1935, omitted as obsolete

2619 Services of jack. No person shall offer for public service any jack unless he has procured from the department a certificate of soundness. Such certificate shall state whether the animal is registered or unregistered. [S13, §2341-f; SS15,§2341-i; C24, 27, 31, 35,§2619.]

2620 Registered animals. No person shall offer for sale, transfer, or exchange any stallion or jack over two years old as registered unless he shall have had said animal enrolled with the department as a registered animal, and shall have procured from the department a certificate of soundness. [S13,§2341-f; C24, 27, 31, 35, §2620.]

2621 Unregistered jacks. No person shall offer for sale, transfer, or exchange for public service any unregistered jack over two years old unless he shall have procured from the department a certificate of soundness. [SS15, §2341-i; C24, 27, 31, 35,§2621.]

2622 Certificate for purebred. Every application for enrollment as a registered animal shall set forth, under oath, the name, age, color, and ownership of the animal, and be accompanied by a certificate of registry and an affidavit of an Iowa licensed veterinarian that such animal has been examined by him and is free from any unsoundness or any hereditary, infectious, or contagious disease. [S13,§2341-f; SS15,§2341-g; C24, 27, 31, 35,§2622.]

Referred to in §2623

2623 Certificate for grade jack. Every application for a certificate of soundness for an unregistered jack shall be made in the same manner and form, except as to the certificate of pedigree, as provided in section 2622. [SS15, §2341-g; C24, 27, 31, 35,§2623.]

2624 Animals subject to enrollment. No animal shall be subject to enrollment as a registered animal unless he has been recorded in some stud book recognized by the department. [S13,§2341-f; C24, 27, 31, 35,§2624.]

2625 Diseases which disqualify. No certificate of soundness shall be granted for an animal affected with glanders, farcy, maladie du coit (dourine), coital exanthema, urethral gleet, mange, melanosis, blindness, cataract or periodic ophthalmia (moon blindness). [SS15, §2341-h; C24, 27, 31, 35,§2625.]

2626 Defects which do not disqualify. A certificate of soundness may be granted when an animal is affected with any of the following defects, unless such defects appear to be aggravated, or in a serious form: Amaurosis, laryngeal hemiplegia (roaring or whistling), pulmonary emphysema (heaves, broken wind), bog spavin, bone spavin, ringbone, sidebone, navicular disease, curb, with curby formation of hock, chorea (St. Vitus' dance), crampiness, shivering, stringhalt. [SS15,§2341-h; C24, 27, 31, 35, §2626.]

Referred to in §2627

2627 Certificate when animal defective. Certificates of soundness issued under section 2626 shall distinctly specify the defect with which the animal is affected. All advertisements of an animal so affected shall enumerate in large type, or prominent writing, the defect with which the animal is affected. [SS15,§2341-h; C24, 27, 31, 35,§2627.]

2628 Issuance of certificate. Upon receipt of an application for enrollment as a registered animal, the department shall, if satisfied that the same is reliable and that the animal is purebred, make such enrollment and issue to the applicant a certificate of soundness. Upon receipt of an application for a certificate of soundness for an unregistered jack the department shall also issue the proper certificate. [C24, 27, 31, 35,§2628.]

2629 Posting certificate. Every certificate of soundness, or a true copy thereof, shall be kept posted upon the door or stall of the stable where the animal for which it was issued is usually kept, and, when such animal is advertised, each advertisement shall contain a copy of such certificate or the substance thereof. [SS15,§2341-i; C24, 27, 31, 35,§2629.]

2630 Examination on complaint. Complaint may be made to the department that a stallion or jack is diseased. The department shall determine whether an examination of said animal is reasonably necessary. If it is so determined the owner shall be notified accordingly, and an examination shall be made by a board of three licensed veterinarians, one member to be selected by the department, one member to be selected by the owner of the animal, and the third member to be selected by the other two members so selected. [S13,§2341-j; C24, 27, 31, 35,§2630.]

2631 Department to appoint examiners. If the owner neglects for ten days after being so notified to appoint a veterinarian to act for him, the department shall appoint such veterinarian, who shall proceed as though appointed by the owner. [C24, 27, 31, 35,§2631.]

2632 Decision of board. The board shall determine whether said animal is:

1. Affected with a disease which would prevent the issuance of a certificate of soundness.
2. Affected with any other disease or defect in such a serious or aggravated form as to render the animal unfit for breeding.
3. Transmitting any disease or defect enumerated in this chapter as not disqualifying him for a certificate of soundness.

A decision by a majority of the board shall be certified to the department and shall be final. [S13,§2341-j; SS15,§2341-h; C24, 27, 31, 35, §2632.]

Referred to in §2633
Defects which do not disqualify, §2626

2633 Revocation. If the decision is to the effect that such animal is affected as specified in section 2632, the department shall not issue a certificate of soundness, and if one has been issued the department shall immediately revoke the same and notify the owner accordingly. [S13, §2341-j; C24, 27, 31, 35,§2633.]

2634 Expense. If the board finds that said animal is eligible to receive or retain a certificate of soundness, the reasonable costs of the examination shall be paid from any funds in the state treasury not otherwise appropriated; otherwise such costs shall be collected from the owner. [S13,§2341-j; C24, 27, 31, 35,§2634.]

2635 Blindness. The owner of any blind stallion or jack otherwise entitled to a certificate of soundness may, upon application to the department, have the same examined at his own expense by a board of three licensed veterinarians, one member to be selected by the department, one member to be selected by the owner of the animal, and the third member to be selected by the two members so selected. If upon examination and proof furnished, a majority of said board declare that such blindness was caused by accident or disease not transmissible, then upon affidavit of a majority of said board, the department shall issue a state certificate of soundness. [S13,§2341-p; C24, 27, 31, 35,§2635.]

2636 Certificate of soundness. If an animal for which a certificate of soundness has been issued is retained for sale, transfer, or exchange, or for public service, such certificate shall be renewed between January 1 and April 1 of each year. Such renewal shall be obtained by presenting an affidavit of soundness to the department as hereinbefore provided. [SS15, §2341-g; C24, 27, 31, 35,§2636.]

Affidavit of soundness, §§2622, 2623

2637 Renewal without examination. The owner of every stallion or jack which has successfully passed the veterinary examination provided in this chapter for two consecutive years shall be entitled to a renewal of the certificate of soundness thereafter without further examination, provided application for such renewal is made in every year following the last examination. [SS15,§2341-o; C24, 27, 31, 35, §2637.]

2638 Fee. The department shall collect a fee of one dollar for each certificate of soundness and for each annual renewal thereof. [S13, §2341-f; C24, 27, 31, 35,§2638.]

2639 Transfer of certificate. When the holder of a certificate of soundness sells or otherwise transfers the title to such animal, he shall indorse on the certificate a transfer thereof to the new owner, and file the certificate, accompanied by a fee of fifty cents, with the department, which shall thereupon issue a certificate to the new owner. [SS15,§2341-k; C24, 27, 31, 35,§2639.]

2640 False affidavit. Any veterinarian who knowingly makes a false affidavit as to the disease or freedom from disease, or soundness or unsoundness, of any animal examined by him or who fails to file with the department a report of his findings in accordance with the provisions of this chapter, shall be guilty of a misdemeanor and punished accordingly and his license to practice shall be revoked. [SS15, §2341-g; C24, 27, 31, 35,§2640.]

Punishment, §12894
Revocation of licenses, §2799

2641 Violations. Any person who shall commit any of the following acts shall be punished

by a fine of not more than one hundred dollars, or by imprisonment in the county jail not exceeding thirty days:

1. Fraudulently represents any animal to be registered.

2. Fraudulently posts or publishes any false pedigree or certificate of soundness.

3. Uses any stallion or jack for public service, or sells any such animal over two years old, representing him to be registered, without first having obtained a certificate of soundness as provided in this chapter.

4. Violates any of the provisions of this chapter in any manner. [C97,§§2341, 2342; SS15, §2341-q; C24, 27, 31, 35,§2641.]

Certificate of soundness, §2618

2642 Prior certificates of soundness. Where a permanent certificate of soundness for a registered animal has heretofore been issued by the former state board of agriculture an additional state certificate shall not be required, but a renewal of the same shall be secured as herein provided. [SS15,§2341-i; C24, 27, 31, 35,§2642.]

CHAPTER 128

INFECTIOUS AND CONTAGIOUS DISEASES AMONG ANIMALS

Referred to in §2591

Bang's disease control, temporary act, 48GA, ch 87

2643 Powers of department.
2644 Infectious and contagious diseases.
2645 Veterinary assistants.
2646 Powers of assistants.
2647 Oaths.
2648 Adoption of rules.
2649 State and federal rules.
2650 Enforcement of rules.
2651 Division at Ames to assist.
2652 Quarantining or killing animals.
2653 Imported animals.
2654 Freedom from disease.
2655 Certificate attached to bill of lading.
2656 Intrastate shipments.
2657 Foot and mouth disease.
2658 Limitation on right to receive pay.
2659 Local boards of health.
2660 False representation.
2661 Sale or exposure of infected animals.
2662 Glanders.
2663 Penalties.
2664 Annual estimate.

2643 Powers of department. In the enforcement of this chapter the department of agriculture shall have power to:

1. Make all necessary rules for the suppression and prevention of infectious and contagious diseases among animals within the state.

2. Provide for quarantining animals affected with infectious or contagious diseases, or that have been exposed to such diseases, whether within or without the state.

3. Determine and employ the most efficient and practical means for the prevention, suppression, control, and eradication of contagious or infectious diseases among animals.

4. Establish, maintain, enforce, and regulate quarantine and other measures relating to the movements and care of diseased animals.

5. Provide for the disinfection of suspected yards, buildings, and articles, and the destruction of such animals as may be deemed necessary.

6. Enter any place where any animal is at the time located, or where it has been kept, or where the carcass of such animal may be, for the purpose of examining it in any way that may be necessary to determine whether it was or is infected with any contagious or infectious disease.

7. Regulate or prohibit the arrival in, departure from, and passage through the state, of animals infected with or exposed to any contagious disease; and in case of violation of any such regulation or prohibition, to detain any animal at the owner's cost.

8. Regulate or prohibit the bringing of animals into the state, which, in its opinion, for any reason, may be detrimental to the health of animals in the state.

9. Cooperate with and arrange for assistance from the United States department of agriculture in performing its duties under this chapter. [S13,§2538-s; C24, 27, 31, 35,§2643.]

2644 Infectious and contagious diseases. For the purpose of this chapter, infectious and contagious diseases shall be deemed to embrace glanders, farcy, maladie du coit (dourine), anthrax, foot and mouth disease, scabies, hog cholera, necrotic enteritis, tuberculosis, Bang's disease, or any other communicable disease so designated by the department. [C24, 27, 31, 35, §2644; 48GA, ch 88,§1.]

2645 Veterinary assistants. The department may appoint one or more licensed veterinarians in each county as assistant veterinarians. It may also appoint such special assistants as may be necessary in cases of emergency. [C24, 27, 31, 35,§2645.]

2646 Powers of assistants. Such assistant veterinarians shall have power, under the direction of the department, to perform all acts necessary to carry out the provisions of law relating to infectious and contagious diseases among animals, and shall be furnished by the department with the necessary supplies and materials which shall be paid for out of the appropriation for the eradication of infectious and contagious diseases among animals. [C24, 27, 31, 35,§2646.]

2647 Oaths. Such assistant veterinarians shall have power to administer oaths and affirmations to appraisers acting under this and the following chapters of this title. [C24, 27, 31, 35,§2647.]

Analogous provision, §1216

2648 Adoption of rules. All rules adopted by the department under this chapter, in addition to the other requirements concerning promulgation of rules by the department, shall be published at least one week prior to their taking effect in at least two daily papers of general circulation within the state, except in such cases as require immediate action. [S13,§2538-s; C24, 27, 31, 35,§2648.]

2649 State and federal rules. The rules adopted by the department regarding interstate shipments of animals shall not be in conflict with the rules of the federal department of agriculture, unless there is an outbreak of a malignant contagious disease in any locality, state, or territory, in which event the department shall have the right to place an embargo on such locality, state, or territory. [C24, 27, 31, 35,§2649.]

2650 Enforcement of rules. The assistant veterinarians appointed under this chapter shall enforce all rules of the department, and in so doing may call to their assistance any peace officer. [S13,§2538-s; C24, 27, 31, 35,§2650.]

2651 Division at Ames to assist. The dean of the veterinary division of the Iowa state college of agriculture and mechanic arts is authorized to use the equipment and facilities of the division in assisting the department in carrying out the provisions of this chapter. [C24, 27, 31, 35,§2651.]

2652 Quarantining or killing animals. The department may quarantine or condemn any animal which is infected with any contagious or infectious disease, but no cattle infected with tuberculosis shall be killed without the owner's consent, unless there shall be sufficient funds, to pay for such cattle, in the allotment made for that purpose from the appropriation for the eradication of infectious and contagious diseases among animals as provided in this chapter. [C24, 27, 31, 35,§2652.]

Allotment, §§2664, 2703

2653 Imported animals. No person shall bring into this state, except to public livestock markets where federal inspection of livestock is maintained, any animal for work, breeding, or dairy purposes, unless such animal has been examined and found free from all contagious or infectious diseases.

No person shall bring in any manner into this state any cattle for dairy or breeding purposes unless such cattle have been tested within thirty days prior to date of importation by the agglutination test for contagious abortion, or abortion disease, and shown to be free from such disease.

Animals for feeding purposes, however, may be brought into the state without inspection, under such regulations as the department may prescribe. [C24, 27, 31, 35,§2653.]

Referred to in §2654
Additional provision, §2704.5

2654 Freedom from disease. Freedom from disease as specified in section 2653 shall be established by a certificate of health signed by a veterinarian acting under either the authority of the federal department of agriculture, or of the state department of agriculture. [C24, 27, 31, 35,§2654.]

2655 Certificate attached to bill of lading. A copy of such certificate shall be attached to the waybill accompanying the shipment, and a copy thereof shall be mailed to the department. [C24, 27, 31, 35,§2655.]

2656 Intrastate shipments. All animals, except those intended for immediate slaughter, shall be inspected when required by the department, and accompanied by the aforesaid certificate when shipped from a public stockyard in this state to another point within the state where federal inspection is not maintained. [C24, 27, 31, 35,§2656.]

2657 Foot and mouth disease. Any animal killed on account of what is known as "foot and mouth disease" shall be appraised and paid for in the same manner as prescribed in chapter 129 for the appraisement and payment of animals killed on account of tuberculosis, except that the deduction of five percent of the appraised value of the animals tested as provided in said chapter shall not be made. There is appropriated from any funds in the state treasury not otherwise appropriated sufficient funds to carry out the provisions of this section. [SS15,§§2538-1a–8a; C24, 27, 31, 35,§2657.]

Referred to in §2658

2658 Limitation on right to receive pay. Unless an animal was examined at the time of importation into the state and found free from contagious or infectious diseases as provided in this chapter, no person importing the same and no transferee who receives such animal knowing that the provisions of this chapter have been violated shall receive any compensation under section 2657 for the destruction of such animal by the department. [C24, 27, 31, 35,§2658.]

Inspection of imported animals, §2653

2659 Local boards of health. All local boards of health shall assist the department in the prevention, suppression, control, and eradication of contagious and infectious diseases among animals, whenever requested to do so. [C24, 27, 31, 35,§2659.]

Local board of health, ch 107

2660 False representation. Any person who knowingly makes any false representation as to the purpose for which a shipment of animals is being or will be made, with intent to avoid or prevent an inspection of such animals for the purpose of determining whether the animals are free from disease, shall be guilty of a misdemeanor and punished as provided in this chapter. [C24, 27, 31, 35,§2660.]

2661 Sale or exposure of infected animals. No owner or person having charge of any animal, knowing the same to have any infectious or contagious disease, shall sell or barter the

same for breeding, dairy, work, or feeding purposes, or permit such animal to run at large or come in contact with any other animal. [C97, §5018; C24, 27, 31, 35,§2661.]

2662 Glanders. No owner or person having charge of any animal, knowing the same to be affected with glanders, shall permit such animal to be driven upon any highway, and no keeper of a public barn shall knowingly permit any animal having such disease to be stabled in such barn. [C24, 27, 31, 35,§2662.]

2663 Penalties. Any person who shall violate any provision of this chapter or any rule adopted thereunder by the department shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year. [C24, 27, 31, 35,§2663.]

2664 Annual estimate. The department of agriculture shall each year make an estimate of expenditures to be made from the annual appropriation for the eradication of contagious and infectious diseases among animals. Such estimate shall set aside:

1. A sufficient sum for the general administration of this chapter.

2. A sufficient sum for the inspection of herds for tuberculosis under the following chapter, except herds in counties which have been enrolled under the county area plan of eradication.

3. The remainder of said appropriation for allotment among the counties in accordance with the number of breeding cattle owned therein for the eradication of bovine tuberculosis in such counties. [C24, 27, 31, 35,§2664.]

CHAPTER 129

ERADICATION OF BOVINE TUBERCULOSIS

Referred to in §§2591, 2647, 2657, 2664
Bang's disease control, temporary act, 48GA, ch 87

2665 Cooperation.
2666 State as accredited area.
2668 Appraisal.
2669 Presence of tuberculosis.
2670 Nonright to receive compensation.
2671 Amount of indemnity.
2672 Pedigree.
2673 Right to receive pay.
2674 Preference in examinations.
2675 Examination by department.
2676 Records public.
2677 Tuberculosis-free herds.
2678 Tuberculin.
2679 Inspectors and assistants.
2680 Accredited veterinarian.
2681 Equipment for inspector.
2682 Compensation.
2686 Eradication fund.
2687 Collection.
2688 Report by auditor.
2689 Levy omitted.
2690 Availability of county fund.
2691 Exhaustion of state allotment.
2692 Exhaustion of county fund.
2693 Certification of claims.
2699 Permitting test.
2700 Penalty.
2701 Preventing test.
2702 Notice.
2703 Allotment of funds.
2704 Transfer of funds.
2704.1 Retest.
2704.2 Penalty.
2704.3 Duty to levy tax.
2704.4 Township animal board of health.
2704.5 Importation of cattle.

2665 Cooperation. The state department of agriculture is hereby authorized to cooperate with the federal department of agriculture for the purpose of eradicating tuberculosis from the dairy and beef breeds of cattle in the state. [C24, 27, 31, 35,§2665.]

2666 State as accredited area. The state of Iowa is hereby declared to be and is hereby established as an accredited area for the eradication of bovine tuberculosis from the dairy and breeding cattle of the state. It shall be the duty of the department of agriculture to eradicate bovine tuberculosis in all of the counties of the state in the manner provided by law as it appears in this chapter. Said department shall proceed with the examination, including the tuberculin test, of all such cattle as rapidly as practicable and as is consistent with efficient work, and as funds are available for paying the indemnities as provided by law.

It shall be the duty of each and every owner of dairy or breeding cattle in the state to conform to and abide by the rules laid down by the state and federal departments of agriculture and follow their instructions designed to suppress the disease, prevent its spread, and avoid reinfection of the herd. [C24, 27, 31, 35,§2666.]

2667 Rep. by 43GA, ch 75

2668 Appraisal. Before being tested, such animals shall be appraised at their cash value for breeding, dairy, or beef purposes by the owner and a representative of the state department of agriculture, or a representative of the federal department of agriculture, or by the owner and both of such representatives. If these parties cannot agree as to the amount of the appraisal, there shall be appointed three competent and disinterested persons, one by the state department of agriculture, one by the owner, and the third by the first two appointed, to appraise such animals, which appraisal shall be final. Every appraisal shall be under oath or affirmation and the expense of the same shall be paid by the state, except as provided in this chapter. [C24, 27, 31, 35,§2668.]

2669 Presence of tuberculosis. If, after such examination, tubercular animals are found,

the department shall have authority to order such disposition of them as it considers most desirable and economical. If the department deems that a due regard for the public health warrants it, it may enter into a written agreement with the owner, subject to such conditions as it may prescribe, for the separation and quarantine of such diseased animals. Subject to such conditions, the diseased animals may continue to be used for breeding purposes. [C24, 27, 31, 35,§2669.]

Referred to in §2670

2670 Nonright to receive compensation. Any animal retained, under section 2669, by the owner for ninety days after it has been adjudged infected with tuberculosis shall not be made the basis of any claim for compensation against the state. [C24, 27, 31, 35,§2670.]

2671 Amount of indemnity. When breeding animals are slaughtered following any test, there shall be deducted from their appraised value the proceeds from the sale of salvage. The owner shall be paid by the state one-third of the sum remaining after the above deduction is made, but the state shall in no case pay to such owner a sum in excess of seventy-five dollars for any registered purebred animal or fifty dollars for any grade animal. [C24, 27, 31, 35, §2671.]

2672 Pedigree. The pedigree of purebred cattle shall be proved by a certificate of registry from the herd books where registered. [C24, 27, 31, 35,§2672.]

2673 Right to receive pay. No compensation shall be paid to any person for an animal condemned for tuberculosis unless said animal, if produced in, or imported into, the state has been owned by such owner for at least six months prior to condemnation or was raised by such person. [C24, 27, 31, 35,§2673.]

2674 Preference in examinations. The department in making examinations of cattle shall give priority to applications by owners for the testing of dairy cattle from which are sold, or are offered for sale, in cities and towns, milk or milk products in liquid or condensed form. [C24, 27, 31, 35,§2674.]

2675 Examination by department. The department may at any time, on its own motion, make an examination of any herd, and in case animals are destroyed, the appraisement and payment shall be made as provided in this chapter. [C24, 27, 31, 35,§2675.]

2676 Records public. All records pertaining to animals infected with tuberculosis shall be open for public inspection and the department shall furnish such information relative thereto as may be requested. [C24, 27, 31, 35, §2676.]

2677 Tuberculosis-free herds. The department shall establish rules for determining when a herd of cattle, tested and maintained under the provisions of this chapter, the laws of the United States, and the rules of the state and federal departments of agriculture, shall be considered as tuberculosis-free. When any herd meets such requirements the owner shall be entitled to a certificate from the department showing that the herd is a tuberculosis-free accredited herd. Such certificate shall be revoked whenever the herd no longer meets the necessary requirements for an accredited herd, but the herd may be reinstated as an accredited herd upon subsequent compliance with such requirements. [C24, 27, 31, 35,§2677.]

2678 Tuberculin. The department shall have control of the sale, distribution, and use of all tuberculin in the state, and shall formulate rules for its distribution and use. Only a licensed veterinarian shall apply a tuberculin test to cattle within this state. [C24, 27, 31, 35, §2678.]

2679 Inspectors and assistants. The department may appoint one or more accredited veterinarians as inspectors for each county and one or more persons as assistants to such inspectors. Such inspectors, with the assistance of such person or persons, shall test the breeding cattle subject to test, as provided in this chapter, and shall be subject to the direction of the department in making such tests. [C24, 27, 31, 35, §2679.]

2680 Accredited veterinarian. An accredited veterinarian is one who has successfully passed an examination set by the state and federal departments of agriculture and is authorized to make tuberculin tests of accredited herds of cattle under the uniform methods and rules governing accredited herd work which are approved by the United States department of agriculture. [C24, 27, 31, 35,§2680.]

2681 Equipment for inspector. The department may furnish each inspector with the necessary tuberculin and other material, not including instruments and utensils, necessary to make the tests provided for in this chapter. [C24, 27, 31, 35,§2681.]

2682 Compensation. An inspector shall receive a compensation not to exceed ten dollars per diem and five cents for every mile traveled while engaged in such work. Unless such compensation is fixed in the biennial salary act it shall be approved by the committee on retrenchment and reform. [C24, 27, 31, 35,§2682.]

Committee on retrenchment and reform, §39 et seq.
See §1225.01 et seq.

2683 to 2685, inc. Rep. by 43GA, ch 75

2686 Eradication fund. In each county in the state, the board of supervisors shall each year when it makes the levy for taxes, levy a tax sufficient to provide a fund to pay the indemnity and other expenses provided in this chapter, except as provided herein, but such levy shall not exceed three-fourths mill in any year upon the taxable value of all the property in the county. [C24, 27, 31, 35,§2686.]

Time of levy, §7171
40ExGA, HF 68, §68, editorially divided

2687 Collection. Such levy shall be placed upon the tax list by the county auditor and collected by the county treasurer in the same manner and at the same time as other taxes of the county. The money derived from such levy shall be placed in a fund to be known as the county tuberculosis eradication fund, and the same shall only be used for the payment of claims as provided in this chapter. [C24, 27, 31, 35,§2687.]

Collection of taxes, ch 346 et seq.

2688 Report by auditor. The county auditor of each county shall, not later than July 15 of each year, certify to the secretary of agriculture a report showing the amount in the tuberculosis eradication fund on July 1 of each year. [C24, 27, 31, 35,§2688.]

2689 Levy omitted. Should it appear to the secretary of agriculture that the balance in such fund is sufficient, with the county's allotment of state and federal funds available, to carry on the work in such county for the ensuing year, he shall so certify to the county auditor and when such certification has been made the board shall make no levy for such tuberculosis eradication fund for such year. [C24, 27, 31, 35,§2689.]

2690 Availability of county fund. After the amount allotted in any year by the department to any county has been expended or contracted in said county, or at any time that there ceases to be available for such county any federal funds for the eradication of bovine tuberculosis, the county eradication fund provided in this chapter shall become available as a substitute for either or both such funds for the payment of materials, indemnities, inspectors, and assistants as herein provided. [C24, 27, 31, 35,§2690.]

Referred to in §2693
40ExGA, HF 68, §70, editorially divided

2691 Exhaustion of state allotment. As soon as the allotment to the county has been spent or contracted, the department shall certify such fact to the county auditor, which certificate shall be full authority for the board of supervisors to pay claims as presented to the board by the department of agriculture out of the county eradication fund. [C24, 27, 31, 35,§2691.]

2692 Exhaustion of county fund. Whenever the balance in such fund becomes less than twenty-five hundred dollars the county auditor shall notify the department in writing of such fact and no expense shall be incurred on such account in excess of the cash available in such fund. [C24, 27, 31, 35,§2692.]

2693 Certification of claims. All claims presented under section 2690 shall be certified by the department and filed with the county auditor who shall present them to the board of supervisors and such board shall allow and pay the same as other claims against the county. [C24, 27, 31, 35,§2693.]

Payment in general, §5124

2694 to 2698, inc. Rep. by 43GA, ch 75

2699 Permitting test. Every owner of dairy or breeding cattle in the state shall permit his cattle to be tested for tuberculosis as provided in this chapter, and shall confine his cattle in a proper place so that the examination and test can be applied. If he refuses to so confine his cattle the department may employ sufficient help to properly confine them and the expense of such help shall be paid by the owner or deducted from the indemnity if any is paid. Such owner shall comply with all the requirements for the establishment and maintenance of a tuberculosis-free accredited herd. [C24, 27, 31, 35,§2699.]

2700 Penalty. Any owner of dairy or breeding cattle in the state who prevents, hinders, obstructs or refuses to allow a veterinarian authorized by the department of agriculture to conduct such tests for tuberculosis on his cattle, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars, nor less than twenty-five dollars. [S13,§2538-s; C24, 27, 31, 35,§2700.]

Referred to in §2702

2701 Preventing test. The cattle owned by any owner who violates the provisions of this chapter, or which have reacted to the tuberculin test, shall be quarantined by the department until the law is complied with. When such quarantine is established no beef or dairy products shall be sold from cattle under quarantine until the test has been applied or the quarantine released.

The accredited veterinarians appointed under this chapter shall enforce this quarantine and all of the rules of the department of agriculture of the state of Iowa and of the provisions of this chapter, and in so doing may call to their assistance any peace officer of the state. [C24, 27, 31, 35,§2701.]

2702 Notice. Before any action is commenced under section 2700, upon request of the secretary of agriculture, the board of supervisors of any county shall cause such owner to be served with a written notice of the provisions of this chapter, at least fifteen days before the commencement of the action. [C24, 27, 31, 35, §2702.]

2703 Allotment of funds. The department shall allot, on or before November 1 of each year, among the counties of the state in proportion to the number of breeding cattle owned in each county as shown by the last assessors books, the amount of the state funds estimated to be available for the testing of cattle for tuberculosis. The department shall also attempt to secure a similar allotment each year of the available federal funds by the federal department of agriculture. [C24, 27, 31, 35,§2703.]

2704 Transfer of funds. The amount of state funds allotted to each county shall be expended therein, but the department, whenever such moneys are not needed in any county, may transfer the same to any other county. [C24, 27, 31, 35,§2704.]

2704.1 Retest. The secretary of agriculture may order a retest of any dairy or breeding

cattle at any time when, in his opinion, it is necessary to do so, and shall, once in three years, order the tuberculin testing of any cattle to conform to and comply with the regulations of the federal bureau of animal industry in any county where the percentage of bovine tuberculosis has been reduced to one-half of one percent or less, subject to the provisions of this chapter with reference to the disposition or slaughtering of animals found to be reactors when given a tuberculin test. Such county shall be a modified accredited county, and it shall be unlawful for any person to transport any dairy or breeding cattle into such county unless they have been examined for tuberculosis as provided in this chapter. [C27, 31, 35,§2704-b1.]

Referred to in §2704.2

2704.2 Penalty. Any person found guilty of violating the provisions of section 2704.1 shall be deemed guilty of a misdemeanor and punished by a fine of not to exceed one hundred dollars nor less than twenty-five dollars. [C31, 35,§2704-c1.]

2704.3 Duty to levy tax. The board of supervisors shall use whatever tuberculosis eradication funds may be on hand in said county, and shall levy the tax provided in this chapter, each year for the purpose of paying the expenses of such testing and the indemnities provided for herein if the state and federal funds are not sufficient to pay the cost thereof and the indemnities for such animals. [C27, 31, 35,§2704-b2.]

43GA, ch 75,§11, editorially divided

2704.4 Township animal board of health. The township trustees in such county are hereby constituted the animal board of health in their respective townships and they shall by April 1 of each year and at such other times as they shall deem advisable, make a survey and report to the state department of agriculture all breeding cattle brought into their respective townships from outside of the county. [C27, 31, 35,§2704-b3.]

2704.5 Importation of cattle. No dairy or breeding cattle shall be shipped, driven on foot, or transported, into the state of Iowa, except upon one of the following conditions:

1. That such cattle come from a herd which has been officially accredited as a tuberculosis-free accredited herd by the state from which such cattle come or by the department of agriculture of the United States; or

2. That such cattle come from an area officially declared as a modified accredited area by such state or the department of agriculture of the United States, and the herd from which they originate, if previously infected, has passed two tests free from tuberculosis; or

3. That such cattle are brought into the state of Iowa under quarantine to be tuberculin tested for tuberculosis and fully examined in not less than sixty days nor more than ninety days, such test to be applied by a veterinarian accredited by the department of agriculture of the state of Iowa and at the expense of the owners. Such cattle brought in under quarantine shall be accompanied by an official certificate issued by a veterinarian accredited by the state from which the cattle come or by the department of agriculture of the United States showing them to be free from tuberculosis. The quarantine thus provided for shall be established by the department of agriculture of the state of Iowa and shall not be released until the examination has been made and such cattle found free from tuberculosis. [C31, 35,§2704-c2.]

Additional provision, §2653

CHAPTER 130

HOG-CHOLERA VIRUS AND SERUM

Referred to in §2591

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2742 Compensation.
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2705 Definitions. When used in this chapter:

1. The words "biological products" shall include and be deemed to embrace only anti-hog-cholera serum and virus.

2. "Manufacturer" includes every person en-

gaged in the preparation, at any stage of the process, of biological products, except those engaged in such preparation in the biological laboratory in the Iowa state college of agriculture and mechanic arts, or in any other state or governmental institution.

3. "Dealer" includes every person who, for profit, sells, dispenses, or distributes, or offers to do so, either as principal or agent, biological products, except:

a. A manufacturer selling direct to any person licensed under this chapter to sell, dispense, or distribute such biological products.

b. A regularly licensed veterinarian who uses such biological products in his professional practice and does not use it for sale or distribution to any other person. [SS15,§2538-w12; C24, 27, 31, 35,§2705.]

2706 Rules. The department shall have power to make such rules governing the manufacture, sale, and distribution of biological products as it deems necessary to maintain their potency and purity. [SS15,§2538-w3; C24, 27, 31, 35,§2706.]

2707 Permit to manufacture or sell. Every person, before engaging as a manufacturer of, or dealer in, biological products shall obtain from the department of agriculture a permit for that purpose. [SS15,§2538-w3; C24, 27, 31, 35, §2707.]

2708 Application for permit. Every application for such a permit shall be made on a form provided by the department, which form shall call for such information as the department shall deem necessary, including the name and place of business of the applicant. [SS15, §2538-w3; C24, 27, 31, 35,§2708.]

2709 Manufacturer's permit. An application for a permit to manufacture biological products shall be accompanied by evidence satisfactory to the department that the applicant is the holder of a valid, unrevoked, United States department of agriculture license for the manufacture and sale of such biological products. [C24, 27, 31, 35,§2709.]

2710 Dealer's permit. An application for a permit to deal in biological products shall be accompanied by a bond, with sureties to be approved by the department, in the sum of five thousand dollars, which bond shall be conditioned:

1. To faithfully comply with all laws governing the warehousing, sale, and distribution of biological products, and with all the rules of the department relating to such biological products.

2. To indemnify any person who uses any such biological products sold by the principal and is damaged by the negligence of the principal, or any of his agents, in the warehousing, handling, sale, or distribution of such biological products.

3. To pay to the state all penalties which may be adjudged against the principal. [SS15,§2538-w3; C24, 27, 31, 35,§2710.]

2711 Liability on bond. The principal on such bond shall be liable to every person for any damage caused by the negligence of the principal or of his agents, notwithstanding the execution of the bond. [C24, 27, 31, 35,§2711.]

2712 New or additional bond. When judgment is rendered on such bond, the principal shall immediately execute and file with the department a new or additional bond, conditioned as the original bond, and in an amount to be fixed by the department, which will furnish the same amount of security that was furnished before the original bond was impaired. [C24, 27, 31, 35,§2712.]

2713 Liability of manufacturer. A manufacturer shall be liable to an injured person for all damages which occur:

1. By reason of the negligence of the manufacturer or his employees in the manufacture, warehousing, handling, or distribution of biological products.

2. By reason of the failure of the manufacturer, or his employees, to discharge any duty imposed by law, or by the rules of the department. [C24, 27, 31, 35,§2713.]

2714 Fees. Fees for permits shall be paid by the manufacturer or dealer to the department when the application for such permit is made and shall be:

1. In case of a manufacturer, twenty-five dollars for each plant at which it is proposed to manufacture biological products.

2. In case of a dealer, fifteen dollars for each warehouse or distributing agency of the dealer. [SS15,§2538-w3; C24, 27, 31, 35,§2714.]

2715 Inspection of premises. The premises upon which the business authorized by such permit is carried on shall be subject at all times to inspection by the department. Before issuing an original permit, the department may cause the proposed premises to be inspected, and shall make such requirements regarding the physical conditions and sanitation of said premises as it may deem necessary to secure and maintain the potency and purity of the biological products. If such requirements are not complied with and maintained, the permit shall be refused or revoked as the case may be. [SS15, §2538-w3; C24, 27, 31, 35,§2715.]

2716 Manufacturer's or dealer's permit. Every permit issued to a manufacturer or dealer shall expire one year from the date of issuance. A renewal of the same shall be subject to all the conditions, including fees, that are required in the case of an original permit. [SS15,§2538-w3; C24, 27, 31, 35,§2716.]

2717 Revocation of permit. Such a permit shall be automatically revoked:

1. In case of a dealer, by his failure to execute and file with the department a new and approved bond when required by law.

2. In case of a manufacturer, by his ceasing to be the holder of a United States department

of agriculture license for the manufacture and sale of biological products.

3. In case of either a manufacturer or dealer, for discrimination in the price at which such biological products are sold, and such permit shall not in such case be renewed for one year. [SS15,§2538-w3; C24, 27, 31, 35,§2717.]

2718 Revocation by department. Such a permit may also be revoked by the department at any time after a reasonable notice and hearing:

1. For violation of the terms, conditions, and requirements on which it was issued.

2. For violation of any law, or of any rule of the department, relating to the business authorized by such permit.

3. In case of a dealer's permit, when a judgment has been rendered on the bond, or when the security of such bond has become impaired in any other way and no new bond is given as required by the department. [SS15,§2538-w3; C24, 27, 31, 35,§2718.]

2719 Prohibited sales. No biological products shall be sold, offered for sale, distributed, or used, unless produced at a plant which, at the time of producing, held a United States department of agriculture license for the manufacture of such biological products. [SS15, §2538-w3; C24, 27, 31, 35,§2719.]

2720 Sales — limitation. No person shall sell, distribute, or offer to sell or distribute, virulent blood or virus from cholera infected hogs except to persons who are holders of valid, unrevoked, written permits to administer the same. [SS15,§2538-w5; C24, 27, 31, 35,§2720.]

2721 Permits to administer. No person shall administer hog-cholera virus unless he is the holder of a permit issued by the department for that purpose or is the holder of a license to practice veterinary medicine. [SS15,§2538-w5; C24, 27, 31, 35,§2721.]

2722 County school of instruction. Provision shall be made by the extension division of the state college of agriculture and mechanic arts for instruction in each county in the use of anti-hog-cholera serum and virus. Whenever there are ten applicants in any county for such instruction, said division shall make the necessary arrangements, including a sufficient number of competent instructors, at a convenient time and place, which shall be within thirty days after the filing of the requisite number of applications. [C24, 27, 31, 35,§2722.]

2723 Application for instruction. Applications for such school shall be made to the county agent, or in the event there is no county agent, to some other person appointed by the board of supervisors to receive such applications. When there are sufficient applications to authorize a school, said agent or person, shall forward the applications to the extension division. At the time and place such school is conducted said agent or person shall collect the sum of three dollars from each applicant, provided a total of not over thirty dollars is collected from the entire number attending. If over ten applicants attend, the total of thirty dollars collected shall be prorated equally among them. [C24, 27, 31, 35,§2723.]

2724 Instruction and examinations. Said school shall be conducted in one day and shall consist of necessary instruction in the use and administration of anti-hog-cholera serum and virus, and, if reasonably possible, of actual demonstrations. Examinations shall be conducted on the same day and in such manner as will, in the opinion of the instructor, best test the applicant's understanding of the instructions, and his ability to practically apply them. [C24, 27, 31, 35,§2724.]

2725 Report. The instructor shall within five days report to the extension division the names and post-office addresses of those persons who are found by him to be competent to use and administer hog-cholera virus. The names and addresses shall within ten days be certified by the extension division to the department of agriculture. [C24, 27, 31, 35,§2725.]

2726 Permits. Upon receipt of such names the department shall within five days issue and forward to each person a permit to administer hog-cholera virus. [SS15,§2538-w5; C24, 27, 31, 35,§2726.]

2727 Fees. The names of the successful and unsuccessful applicants for a permit from each county shall also be certified by the extension division to the county agent of their respective counties. In the event there is no county agent, such certification shall be made to the person appointed by the board of supervisors to receive the applications and fees for instruction. Upon receipt of such list the county agent, or the person in possession of such fees, shall forthwith forward the fees received from the successful applicants to the extension division and refund the fee received from each unsuccessful applicant to him. [C24, 27, 31, 35, §2727.]

2728 Duration of virus permit. A permit to administer hog-cholera virus shall continue in force until revoked by the department on a showing that the holder has become incompetent to administer such virus. [SS15,§2538-w5; C24, 27, 31, 35,§2728.]

2729 Right of holder of virus permit. The person to whom a permit to administer hog-cholera virus has been issued is authorized only to administer such virus to hogs owned by the holder of the permit, and the permit shall so state. [C24, 27, 31, 35,§2729.]

2730 Compensation and expenses. The compensation of the instructors and other expenses connected with the instruction of applicants for permits shall be paid as far as possible out of the fees collected from such applicants, and any surplus shall be paid into the state treasury on July 1 of each year. [C24, 27, 31, 35, §2730.]

2731 Schools of instruction at Ames. The state college of agriculture and mechanic arts may hold a school for the purpose of giving instruction in the method of administering anti-hog-cholera serum and virus at any time when there are at least ten applicants for such instruction. [C24, 27, 31, 35,§2731.]

2732 Conducting school. Schools of instruction held at said college shall be conducted substantially in the same manner as county schools. Permits to administer virus shall be issued to all applicants who are found to be competent upon the same condition and in the same manner as those taking instruction in county schools. [C24, 27, 31, 35,§2732.]

2733 Reports by manufacturers and dealers. A person holding a permit as manufacturer or dealer shall make such written reports to the department relative to biological products as it may from time to time require. [SS15,§2538-w5; C24, 27, 31, 35,§2733.]

2734 Reports by permit holder. Every holder of a permit to administer hog-cholera virus shall, upon request of the department, make a report to the department giving such information as the department may require. Such information shall be on a form furnished by the department. [C24, 27, 31, 35,§2734.]

Referred to in §2735

2735 Delivery of report. Within ten days after being requested in writing by the department such report shall be delivered or sent by registered mail to the department by the permit holder. The department may suspend the permit of any holder who fails to make such report until he has complied with section 2734. [C24, 27, 31, 35,§2735.]

2736 Lists of manufacturers and dealers. The department shall, without additional charge, and when it issues a permit to administer hog-cholera virus, inclose with such permit a complete list of every manufacturer and dealer licensed to manufacture or distribute biological products. A similar list shall also be sent to every county agent, and any necessary corrections or changes shall be sent to such agent at least once every three months. [C24, 27, 31, 35,§2736.]

2737 Lists of virus permit holders. The department shall also upon the request of any manufacturer, dealer, or other person furnish a complete list of the names and addresses of the holders of unrevoked permits to administer virus within ten days after the issuance of such permits. A sufficient charge shall be made for such list as will cover the cost of preparation and distribution. [C24, 27, 31, 35,§2737.]

2738 Seizure of samples. The department may seize, at any time or place, for examination, samples of biological products manufactured or kept for use or sale within the state. [S13,§2538-w6; C24, 27, 31, 35,§2738.]

2739 Condemnation and destruction. The department shall have power to condemn and destroy any biological products which it deems unsafe. [S13,§2538-w6; C24, 27, 31, 35,§2739.]

2740 Defacing labels. No person shall remove or deface any label upon the bottles or packages containing any biological products or change the contents from the original container except for immediate use. [SS15,§2538-w8; C24, 27, 31, 35,§2740.]

2741 Price of virus. Persons holding permits, either as manufacturers or dealers, shall sell all biological products at a uniform price to all persons to whom sales are made. No rebate on said price shall be given, either directly or indirectly, in any manner whatsoever. [C24, 27, 31, 35,§2741.]

2742 Compensation. No licensed veterinarian shall receive, directly or indirectly, any compensation of any kind for the handling, sale, or use of any biological products, other than his charges for administering the same, unless he makes known in writing the amount of such compensation, if requested to do so by the person using biological products. Any veterinarian violating this section shall forfeit his license to practice and the same shall not be renewed for a period of one year. [C24, 27, 31, 35,§2742.]

Revocation of license, §2799

2743 Violations. Any person who violates any provision of this chapter, or any rule of the department, or who shall hinder or attempt to hinder the department or any duly authorized agent or official thereof in the discharge of his duty, shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars. [S13,§2538-w7; C24, 27, 31, 35,§2743.]

CHAPTER 131

USE AND DISPOSAL OF DEAD ANIMALS

Referred to in §2591

2744 Scope.
2745 Disposal of dead animals.
2746 "Disposing" defined.
2747 Application for license.
2748 Inspection of place.
2749 License.
2750 Record of licenses.
2751 Inspection revealing unsuitable place.
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2753 Renewal of license.
2754 Disposal plants—specifications.
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2756 Rules.
2757 Annual inspection.
2758 Transportation of dead animals.
2759 Driving upon premises of another.
2760 Disinfecting outfit.
2761 Duty to dispose of dead bodies.
2762 Penalty.
2763 Appropriation.

2744 **Scope.** This chapter shall not apply to the disposal of the bodies of animals slaughtered for human food. [C24, 27, 31, 35,§2744.]

2745 **Disposal of dead animals.** No person shall engage in the business of disposing of the bodies of dead animals without first obtaining a license for that purpose from the department of agriculture. [C24, 27, 31, 35,§2745.]

2746 **"Disposing" defined.** Any person who shall receive from any other person the body of any dead animal for the purpose of obtaining the hide, skin, or grease from such animal, in any way whatsoever, shall be deemed to be engaged in the business of disposing of the bodies of dead animals, and must be the operator or employee of a licensed disposal plant. [C24, 27, 31, 35,§2746; 47GA, ch 109,§1.]

2747 **Application for license.** Application for such license shall be made to the department on forms provided by it, which application shall set forth the name and residence of the applicant, his proposed place of business, and the particular method which he intends to employ in disposing of such dead bodies, and such other information as the department may require. Said application shall be accompanied by a fee of one hundred dollars. [C24, 27, 31, 35,§2747; 47GA, ch 109,§2.]

2748 **Inspection of place.** On receipt of such application, the secretary of agriculture or some person appointed by him, shall at once inspect the building in which the applicant proposes to conduct such business. If the inspector finds that said building complies with the requirements of this chapter, and with the rules of the department, and that the applicant is a responsible and suitable person, he shall so certify in writing to such specific findings, and forward the same to the department. [C24, 27, 31, 35, §2748.]

2749 **License.** On the receipt of the foregoing certificate, and the additional payment of one hundred dollars, the department shall issue a license to the applicant to conduct such business, at the place specified in the application, for one calendar year, but the department shall not issue license for disposal plant not located within the boundaries of the state of Iowa. [C24, 27, 31, 35,§2749; 47GA, ch 109,§§3, 4.]

2750 **Record of licenses.** The department shall keep a record of all licenses applied for or issued, which shall show the date of application and by whom made, the cause of all rejections, the date of issue, to whom issued, the date of expiration, and the location of the licensed business. [C24, 27, 31, 35,§2750.]

2751 **Inspection revealing unsuitable place.** If the inspector find that said building does not comply with the requirements of this chapter or with the rules of the department, he shall notify the applicant wherein the same fails to so comply. If within a reasonable time thereafter, to be fixed by the inspector, the specified defects are remedied, the department shall make a second inspection, and proceed therewith as in case of an original inspection. Not more than two inspections need be made under one application. [C24, 27, 31, 35,§2751.]

2752 **Return of fee.** In case such applicant is refused a license, no part of the fees paid by him shall be refunded. [C24, 27, 31, 35,§2752.]

2753 **Renewal of license.** An original license shall be renewed for each subsequent calendar year on the payment of one hundred dollars, provided the holder, in the opinion of the department, remains responsible and suitable to carry on said business, and the place of business continues to comply with this chapter and the rules of the department, as they then exist. [C24, 27, 31, 35,§2753; 47GA, ch 109,§5.]

2754 **Disposal plants—specifications.** Each place for the carrying on of said business shall, to the satisfaction of the department, be provided with floors constructed of concrete, or some other nonabsorbent material, adequate drainage, be thoroughly sanitary, and adapted to carrying on the business. [C24, 27, 31, 35, §2754.]

2755 **Disposing of bodies.** The following requirements shall be observed in the disposal of such bodies:

1. Cooking vats or tanks shall be airtight, except proper escapes for live steam.
2. Steam shall be so disposed of as not to cause unnecessary annoyance or create a nuisance.
3. The skinning and dismembering of bodies shall be done within said building.
4. The building shall be so situated and arranged, and the business therein so conducted, as not to interfere with the comfortable enjoyment of life and property.
5. Such portions of bodies as are not entirely consumed by cooking or burning shall be disposed of by burying as hereafter provided, or in such manner as the department may direct.
6. In case of disposal by burying, the burial shall be to such depth that no part of such body shall be nearer than four feet to the natural surface of the ground, and every part of such body shall be covered with quicklime, and by at least four feet of earth.
7. All bodies shall be disposed of within twenty-four hours after death. [C24, 27, 31, 35, §2755.]

2756 **Rules.** The department shall make such reasonable rules for the carrying on and conducting of such business as it may deem advisable, and all persons engaging in such business shall comply therewith. [C24, 27, 31, 35,§2756.]

2757 **Annual inspection.** The department shall inspect each place licensed under this chapter at least once each year, and as often as it deems necessary, and shall see that the licensee conducts the business in conformity to this chapter and the rules made by the department. For a failure or refusal by any licensee

to obey the provisions of this chapter or said rules, the department shall suspend or revoke the license held by such licensee. [C24, 27, 31, 35,§2757.]

2758 Transportation of dead animals. Any person holding a license under the provisions of this chapter may haul and transport the carcasses of animals that have died from disease, except those prohibited by the department, in a covered wagon bed or tank which is watertight, and is so constructed that no drippings or seepings from such carcasses can escape from such wagon bed or tank, and said carcasses shall not be moved from said wagon bed or tank except at the place of final disposal. The department may prescribe additional requirements governing the construction of such vehicles and such transportation not inconsistent with the above. [C24, 27, 31, 35,§2758.]

2759 Driving upon premises of another. Vehicles when loaded with the carcass of an animal which has died of disease shall be driven directly to the place of disposal, except that the driver in so driving may stop on the highway for other like carcasses, but he shall not drive into the yard or upon the premises of any person unless he first obtains the permission of the person to do so. [C24, 27, 31, 35,§2759.]

2760 Disinfecting outfit. The driver or owner of a vehicle used in conveying animals which said driver or owner has reason to believe died of disease, shall, immediately after unloading said animals, cause the wagon box, tank, or other vehicle, the wheels thereof, all canvasing and covers, the feet of the animals drawing said conveyance, and the outer clothing of all persons who have handled said carcasses to be disinfected with a solution of at least one part of cresol dip to four parts of water, or with some other equally effective disinfectant. [C24, 27, 31, 35,§2760.]

2761 Duty to dispose of dead bodies. No person caring for or owning any animal that has died shall allow the carcass to lie about his premises. Such carcass shall be disposed of within twenty-four hours after death by cooking, burying, or burning, as provided in this chapter, or by disposing of it, within said time, to a person licensed to so dispose of it, but the carcass of an animal which has not died of a contagious disease may be fed to hogs. [C24, 27, 31, 35,§2761.]

2762 Penalty. The violation of any of the provisions of this chapter or any rule adopted thereunder by the department shall be punishable by a fine of not less than five dollars nor more than one hundred dollars or by imprisonment in the county jail not more than thirty days. [C97,§5019; C24, 27, 31, 35,§2762.]

2763 Appropriation. The expense attending the inspection provided for in this chapter shall be paid from any unappropriated funds in the state treasury. [C24, 27, 31, 35,§2763.]

CHAPTER 132

VETERINARY MEDICINE AND SURGERY

Referred to in §§2591, 2647, 10347.10

2764 Persons engaged in practice.
2765 Persons not engaged in practice.
2766 License.
2767 Form.
2768 Display.
2769 Renewal.
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2764 Persons engaged in practice. For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of veterinary medicine:

1. Persons practicing veterinary medicine, surgery, or dentistry, or any of the branches thereof.

2. Persons who profess to be veterinarians, or who profess to assume the duties incident to the practice of veterinary medicine.

3. Persons who make a practice of prescribing or who do prescribe and furnish medicine for the ailments of animals. [C24, 27, 31, 35, §2764.]

Referred to in §2765

2765 Persons not engaged in practice. Section 2764 shall not be construed to include the following classes of persons:

1. Veterinarians of the United States army, navy, or in the service of the federal department of agriculture, not engaged in private practice.
2. Persons who dehorn cattle or castrate animals.
3. Persons who treat diseased or injured animals gratuitously. [S13,§2538-m; C24, 27, 31, 35,§2765.]

2766 License. No person shall engage in the practice of veterinary medicine unless he shall have obtained from the department of agriculture a license for that purpose. [S13, §2538-a; C24, 27, 31, 35,§2766.]

2767 Form. Every license to practice veterinary medicine shall be in the form of a certificate under the seal of the department, and signed by the secretary. The number of the book and page containing the entry of the license in the office of the department shall be noted on the face of the license. [S13,§2538-i; C24, 27, 31, 35,§2767.]

2768 Display. Every person licensed under this chapter shall keep his license displayed in the place in which he maintains an office. [C24, 27, 31, 35,§2768.]

2769 Renewal. Every license issued under this chapter shall expire on the thirtieth day of June following the date of issuance, and shall be renewed annually upon application by the licensee, without examination. Application for such renewal shall be made in writing to the department of agriculture, accompanied by the legal fee, at least thirty days prior to the expiration of such license. The department shall notify each licensee by mail of the expiration of his license. Every renewal shall be displayed in connection with the original license. [S13, §2538-j; C24, 27, 31, 35,§2769.]

Referred to in §2769.1

2769.1 Reinstatement. Any licensee who has previously passed the examination for the practice of veterinary medicine, surgery, and dentistry and who has failed to renew his license as required by section 2769 may be reinstated and his license renewed provided he shall file with the department of agriculture a verified application for reinstatement, stating the reason for failure to renew his license and tendering therewith the amount of fees delinquent, plus an additional sum of five dollars. [C27, 31, 35,§2769-b1.]

2770 Prima facie evidence. The opening of an office or place of business for the practice of veterinary medicine, the use of a sign, card, device, or advertisement as a practitioner of veterinary medicine or as a person skilled in such practice, shall be prima facie evidence of engaging in the practice of veterinary medicine. [C24, 27, 31, 35,§2770.]

2771 Unlawful use of degree. No person shall use any veterinary degree or abbreviation for the same unless such degree has been conferred upon him by an institution of learning recognized by the state board of education. [S13, §2538-n; C24, 27, 31, 35,§2771.]

2772 Requirement for license. Each applicant for a license to practice veterinary medicine, surgery, and dentistry, shall:

1. Present satisfactory evidence that he is at least twenty-one years of age, and of good character.
2. Present a diploma showing that he is a graduate of a recognized school of veterinary medicine.
3. Pass satisfactorily an examination in veterinary medicine, surgery, and dentistry. [S13, §2538-i; C24, 27, 31, 35,§2772.]

2773 Fees. The following fees shall be collected by the department of agriculture:

1. For a license to practice veterinary medicine, issued upon an examination given by the examining board, twenty-five dollars, which shall be paid in advance to the department of agriculture.
2. For a license to practice veterinary medicine, issued upon the basis of a license issued in another state, fifty dollars.
3. For the renewal of a license to practice veterinary medicine, one dollar.
4. For a certified statement that a licensee is licensed in this state, five dollars.
5. For the issuance of a duplicate license in case the original has been lost or destroyed, five dollars. [S13,§§2538-h,-i,-j; C24, 27, 31, 35, §2773.]

2774 Re-examinations. In case an applicant fails in his examination, he shall be permitted to take a subsequent examination within any period not exceeding twelve months thereafter without paying any additional fee. After the expiration of twelve months such applicant shall pay the regular fee. [S13,§2538-o; C24, 27, 31, 35,§2774.]

2775 Record of licenses. The name, age, nativity, location, number of years of practice of the person to whom a license is issued, the number of the certificate, and the date of registration thereof shall be entered in a book kept in the office of the department of agriculture, to be known as the registry book, and the same shall be open to public inspection. [S13,§§2538-i,-j; C24, 27, 31, 35,§2775.]

2776 Change of residence. When any person licensed to practice under this chapter changes his residence, he shall notify the department of agriculture and such change shall be noted in the registry book. [C24, 27, 31, 35, §2776.]

2777 Examining board. For the purpose of giving examinations to applicants for license to

practice veterinary medicine, the department of agriculture shall appoint a board of three examiners, who shall be licensed veterinarians. [S13,§2538-t; C24, 27, 31, 35,§2777.]

Referred to in §§2799, 2799.1

2778 **Term.** The members of the examining board shall be appointed for a term of three years. The term of each examiner shall commence on July 1 in the year of appointment and the terms of the members of the board shall be rotated in such a manner that one examiner shall retire each year and a successor be appointed to take his place. [C24, 27, 31, 35,§2778.]

2779 **Vacancies.** Any vacancy in the membership of the examining board caused by death, resignation, removal, or otherwise, shall be filled for the period of the unexpired term in the same manner as original appointments. [C24, 27, 31, 35,§2779.]

2780 **Compensation.** Each member of the examining board shall receive ten dollars a day for each day actually engaged in the discharge of his duties, including compensation for a reasonable number of days for the preparation of examination questions and the reading of papers in addition to the time actually spent in conducting examinations, but if any member of the examining board is in the full-time employ of the department he shall not receive any compensation as a member of such board other than his regular salary. Each member of the board shall also receive five cents per mile for the number of miles actually traveled in the discharge of his duties. [C24, 27, 31, 35,§2780.]

2781 Rep. by 44GA, ch 23

44GA, ch 56, not applied because of the repeal

2782 **Supplies.** The department of agriculture shall furnish the examining board with all articles and supplies required for the public use and necessary to enable said board to perform the duties imposed upon it by law. Such articles and supplies shall be obtained by the department in the same manner in which the regular supplies for the department are obtained, and the same shall be considered and accounted for as if obtained for the use of said department. [C24, 27, 31, 35,§2782.]

2783 **Quarters.** The executive council shall furnish the examining board with suitable quarters in which to conduct the examinations held by said board. [C24, 27, 31, 35,§2783.]

2784 **Meetings.** The board shall meet at least once a year, and oftener if necessary, at the capitol, for the purpose of holding examinations. A majority shall constitute a quorum. [S13,§2538-f; C24, 27, 31, 35,§2784.]

2785 **Representation at national meetings.** The department may designate one of the members of the examining board to attend either:

1. The annual meeting of the regular national association or society of the veterinary profession, or

2. The annual meeting of the national organization of state examining boards for such profession. [C24, 27, 31, 35,§2785.]

2786 **Applications.** Any person desiring to take the examination for a license to practice veterinary medicine shall make application to the department of agriculture, on a form provided by the department, at least fifteen days before the examination. Such application shall be accompanied by the license fee and such documents and affidavits as are necessary to show the eligibility of the candidate to take such examination. All applications shall be in accordance with the rules of the department and shall be signed and verified by the oath of the applicant. [S13,§2538-e; C24, 27, 31, 35,§2786.]

2787 **Accredited colleges.** The department of agriculture shall prepare and keep up to date a list of accredited colleges in which is taught the science of veterinary medicine, surgery, and dentistry. [C24, 27, 31, 35,§2787.]

2788 **Professional schools.** As a basis for such action on the part of the department the registrar of the state college of agriculture and mechanic arts and the dean of the division of veterinary medicine of said college shall supply such data relative to any veterinary school as the department may request. [C24, 27, 31, 35, §2788.]

2789 **Eligible candidates.** Prior to each examination the department of agriculture shall transmit to the examining board the list of candidates who are eligible to take such examination. In making up such list, the department may call upon the examining board, or any member thereof, for information relative to the eligibility of any applicant. [C24, 27, 31, 35, §2789.]

2790 **Rules relative to examinations.** The examining board shall establish rules for:

1. The conducting of examinations.

2. The grading of examinations and passing upon the technical qualifications of applicants, as shown by such examinations. [S13,§2538-e; C24, 27, 31, 35,§2790.]

2791 **Examinations in theory.** All examinations shall be in writing, and the identity of the person taking the same shall not be disclosed upon the examination papers in such a way as to enable the members of the examining board to know by whom written until after the papers have been passed upon. [C24, 27, 31, 35,§2791.]

2792 **Successful applicants.** Every examination shall be passed upon in accordance with the established rules of the examining board and shall be satisfactory to at least a majority of the members of said board. After each examination, the examining board shall certify the names of the successful applicants to the department of agriculture, in the manner prescribed by said department, which shall issue the proper license and make the required entry in the registry book. [S13,§2538-f; C24, 27, 31, 35,§2792.]

2793 Records. All matters connected with each examination for license shall be filed with the department of agriculture and preserved for five years as a part of the records of the department, during which time said records shall be open to public inspection. [C24, 27, 31, 35, §2793.]

2794 Reciprocal agreements. For the purpose of recognizing licenses to practice veterinary medicine which have been issued in other states, the department of agriculture, upon recommendation of the examining board, is authorized to establish reciprocal relations with the duly constituted and proper authorities of such other states. [S13,§2538-i; C24, 27, 31, 35, §2794.]

2795 Reciprocal disabilities. When the laws of such other states or the rules of such authorities place any requirement or disability upon a person licensed under this chapter or on any person holding a diploma from the division of veterinary medicine of the college of agriculture and mechanic arts of this state which affects the rights of said persons to be licensed or to practice in said other states, then the same requirement or disability shall be placed upon any person licensed in said state or holding a diploma from any veterinary college situated therein, when applying for a license to practice in this state. [S13,§2538-i1; C24, 27, 31, 35, §2795.]

2796 Foreign licenses. After reciprocal relations are entered into, the department may, in lieu of the examination herein provided for, issue a license to practice veterinary medicine, on the basis of a certificate of registration or license issued by the duly constituted and proper authorities of another state with which such reciprocal relations exist, provided such certificate of registration or license has been issued by such other state on requirements substantially equivalent to those required in this state at the time of the issuance of such certificate of registration or license. [S13,§2538-i; C24, 27, 31, 35,§2796.]

2797 Termination of reciprocal agreements. When the requirements for a license in any state with which this state has a reciprocal agreement are changed by any law or rule of the authorities therein so that such requirements are no longer substantially as high as those existing in this state, then such agreement shall be deemed terminated and licenses issued in such state shall not be recognized as a basis for granting a license in this state until a new agreement has been negotiated. The fact of such change shall be determined by the examining board and certified to the department of agriculture for its guidance in enforcing the provisions of this section. [C24, 27, 31, 35, §2797.]

2798 Change of residence. Any licensee who is desirous of changing his residence to another state or territory shall, upon application to the department of agriculture and payment of the legal fee, receive a certified statement that he is a duly licensed practitioner in this state. [C24, 27, 31, 35,§2798.]

2799 Revocation of license. A license to practice under this chapter shall be revoked or suspended by the secretary of agriculture of the state of Iowa and the examining board provided for in section 2777, when the licensee is found guilty of any of the following acts or offenses:

1. Fraud in procuring the license.
2. Incompetency in the practice of the profession.
3. Immoral, unprofessional, or dishonorable conduct.
4. Habitual intoxication or addiction to the use of drugs.
5. Conviction of an offense involving turpitude.
6. Fraud in representations as to skill or ability.
7. Use of untruthful or improbable statements in advertisements, publicity material, or interviews.
8. Distribution of alcohol or drugs for any other than legitimate purposes.
9. Wilful or repeated violations of this title, the title on "Public Health", or the rules of the department of agriculture. [S13,§2538-e; C24, 27, 31, 35,§2799.]

Distribution of alcohol, ch 94 et seq.
Distribution of drugs, chs 155, 155.1, 156
Public health, ch 105 et seq.

2799.1 Proceeding by attorney general. The attorney general may, on his own motion, or when directed by the department of agriculture shall, file in the office of the department of agriculture a petition against any licensee to whom has been granted a license to practice veterinary medicine. The attorney general shall, on behalf of the state, prosecute said action before the secretary of agriculture and the examining board provided for in section 2777. At said hearing the secretary of agriculture shall act as chairman. [C31, 35,§2799-d1.]

2799.2 Petition. The following rules shall govern the petition in such cases:

1. The state shall be named as plaintiff and the licensee as defendant.
2. Charges against licensee shall be stated in full.
3. Amendments may be filed with the consent of the secretary of agriculture.
4. All allegations shall be deemed denied, but the licensee may plead thereto if he desires. [C31, 35,§2799-d2.]

2799.3 Hearing and order. Upon the presentation of the petition, the secretary of agriculture shall make an order fixing the time and place of hearing which shall not be less than ten nor more than ninety days thereafter. Said hearing shall be held at the office of the secretary of agriculture, but the secretary of agriculture may, if he deems best, hold said hearing at some suitable place in the county of the residence of the licensee. [C31, 35,§2799-d3.]

2799.4 Notice. Notice of the filing of such petition and of the time and place of hearing shall be served upon the licensee at least ten days before said hearing, in the manner required for the service of notice of the commencement of an ordinary action. [C31, 35,§2799-d4.]

Manner of service, §11060

2799.5 Power of secretary. The secretary of agriculture shall have power to subpoena witnesses, administer oaths to such witnesses, and compel witnesses to produce books, letters, documents, papers, and all other articles essential to the hearing. [C31, 35,§2799-d5.]

44GA, ch 56, §7, editorially divided

2799.6 Fees and costs. Witnesses attending said hearing shall receive the same fees and mileage as are allowed witnesses in the district court. Members of the examining board shall each receive ten dollars per day for each day actively engaged in said hearing. If the license is suspended or revoked, the cost of said hearing shall be paid by the licensee. If the license is not suspended or revoked, the cost of said hearing shall be paid by the state. [C31, 35,§2799-d6.]

Witness fees, §11326

2800 to 2802, inc. Rep. by 44GA, ch 56

2803 Forgeries. Any person who shall file or attempt to file with the department of agriculture any false or forged diploma, or certificate or affidavit of identification or qualification, shall be guilty of forgery and punished accordingly. [C24, 27, 31, 35,§2803.]

Forgery, §13139

2804 Fraud. Any person who shall present to the department of agriculture a diploma or certificate of which he is not the rightful owner, for the purpose of procuring a license, or who shall falsely personate anyone to whom a license has been granted by said department, shall be punished as provided in section 2805. [C24, 27, 31, 35,§2804.]

2805 Penalty. Any person who violates any provision of this chapter shall be guilty of a misdemeanor. [S13,§2538-l; C24, 27, 31, 35,§2805.]

Referred to in §2804
Punishment, §12894

2806 Enforcement. The department of agriculture shall enforce the provisions of this chapter and for that purpose shall make necessary investigations relative thereto. Every licensee and member of the examining board shall furnish said department such evidence as he may have relative to any alleged violation which is being investigated. [C24, 27, 31, 35,§2806.]

2807 Duty of county attorney. The county attorney of the county in which any violation of this chapter occurs shall conduct the necessary prosecution for such violation. [S13,§2538-l; C24, 27, 31, 35,§2807.]

CHAPTER 133

HOTELS, RESTAURANTS, AND FOOD ESTABLISHMENTS

Referred to in §2591

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2808 Definitions. For the purpose of this chapter:

1. "Hotel" shall mean any building or structure equipped, used, advertised as, or held out to the public to be an inn, hotel, or public lodging house or place where sleeping accommodations are furnished transient guests for hire, whether with or without meals.
2. "Guest room" shall mean office, parlor, dining room, kitchen, and sleeping apartment of a hotel, whether for transient or permanent guests.
3. "Sleeping apartment" shall mean bedroom or other sleeping quarters in a hotel.
4. "Restaurant" shall mean any building or structure equipped, used, advertised as, or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, except hotels and such places as are used by churches, fraternal societies, and civic organizations which do not regularly engage in the serving of food as a business.
5. "Food" shall include any article used by man for food, drink, confectionery, or condiment, or which enters into the composition of the same, whether simple, blended, mixed, or compound.
6. "Food establishment" shall include any building, room, basement, or other place, used as a bakery, confectionery, cannery, packinghouse, slaughterhouse, dairy, creamery, cheese factory, restaurant or hotel kitchen, retail grocery, meat market, or other place in which food is kept, produced, prepared, or distributed for commercial purposes.
7. "Slaughterhouse" shall mean a food establishment in which animals or poultry are killed or dressed for food.

1. [S13,§2514-h; C24, 27, 31, 35,§2808.]
2, 3, 4. [C24, 27, 31, 35,§2808.]
5, 6. [S13,§2527-a; C24, 27, 31, 35,§2808.]
7. [S13,§2527-i; C24, 27, 31, 35,§2808.]

LICENSES

2809 License required. No person shall maintain or conduct a hotel, restaurant, bakery, candy factory, ice cream factory, bottling works, canning factory, slaughterhouse, meat market, or place where fresh meats are sold at retail until he shall obtain a license from the department of agriculture. Each license shall expire one year from the date of issuance except a hotel or restaurant license which shall expire on the last day of December following the date of issuance. A hotel license shall be transferable upon the payment of a fee of one dollar to the department, but no other license shall be transferable. [S13,§2527-l; C24, 27, 31, 35, §2809.]

Referred to in §§2812.1, 5745

2810 Application for license. Every application for a license under this chapter shall be made upon a blank furnished by the department and shall contain the items required by it as to ownership, management, location, buildings, equipment, rates, and other data concerning the business for which a license is desired. An application for a license to operate an existing business shall be made at least thirty days before the expiration of the existing license. [S13, §2527-l; C24, 27, 31, 35,§2810.]

2811 Operation without license. After application has been made for a license, accompanied by the legal fee, as provided in this chapter, the applicant may operate his business without a license until his application has been denied. [C24, 27, 31, 35,§2811.]

2812 License fees. The department shall collect the following fees for licenses:

1. For a hotel containing fifteen guest rooms or less, four dollars.
2. For a hotel containing more than fifteen or less than thirty-one guest rooms, six dollars.
3. For a hotel containing more than thirty and less than seventy-six guest rooms, eight dollars.
4. For a hotel containing more than seventy-five and less than one hundred fifty guest rooms, ten dollars.
5. For a hotel containing one hundred fifty or more guest rooms, fifteen dollars.
6. For a restaurant, candy factory, ice cream factory, bottling works, bakery, canning factory, slaughterhouse, meat market, or place where fresh meats are sold at retail, three dollars.
7. For transient or movable lunch stands to be operated only at fairs, street fairs, and carnivals, three dollars for each location, or ten dollars per year, at the option of the applicant; provided, however, that no fee shall be required for any church or other charitable or nonprofit organizations. [S13,§2527-l; C24, 27, 31, 35, §2812; 47GA, ch 110,§1.]

Referred to in §2812.1

2812.1 Inspection fee. In addition to the annual license fee required by sections 2809 and 2812, each restaurant hereafter opened and each restaurant hereafter changing ownership shall, before it opens for business or before the new owner assumes the management and control of same, pay to the department an inspection fee of fifteen dollars. This section shall not apply to any temporary restaurant. [C35,§2812-f1.]

Referred to in §2812.2

2812.2 Restaurant fund. All inspection fees required by section 2812.1 shall upon receipt thereof by the department be paid to and receipted for by the treasurer of state and shall be kept by him in a separate fund to be known as the "restaurant fund". Such restaurant fund shall be continued from year to year and the treasurer shall keep a separate account thereof showing receipts and disbursements as authorized by law. No part of such fund shall be used for any other purpose than the administration and enforcement of the laws relating to restaurants; provided, however, if on July 1 of any year there is a balance remaining in said restaurant fund which, in the opinion of the secretary of agriculture, is greater than is necessary for the proper administration of such laws, the treasurer of state is hereby authorized, on the recommendation and

with the approval of the secretary of agriculture, to transfer to the general fund of the state such portion of said restaurant fund as the secretary of agriculture shall deem advisable to so transfer. [C35,§2812-f2.]

2813 Revocation. Any license issued under this chapter may be revoked by the department for violation by the licensee of any provision of this chapter or any rules of the department. [S13,§§2514-w, 2527-l; C24, 27, 31, 35,§2813.]

SANITARY CONSTRUCTION

2814 Plumbing in buildings. Every hotel, restaurant, or food establishment located in a city or town having a sewerage system, shall be constructed and drained according to an approved sanitary system and maintained in a sanitary condition free from any gas or offensive odors arising from any sewer, drain, privy, or other source within the control of the owner or person in charge. [S13,§§2514-m, 2527-a; C24, 27, 31, 35,§2814.]

Referred to in §2816

2815 Buildings not connected with sewers. Every hotel, restaurant, or food establishment located in a city or town not having a sewerage system shall be constructed and drained in the same manner and the drain shall be connected with an approved cesspool. Such cesspools shall be cleaned and disinfected as often as necessary to maintain them in an approved sanitary condition. [S13,§§2514-m, 2527-a; C24, 27, 31, 35,§2815.]

Referred to in §2816

2816 Restaurants exempted. Sections 2814 and 2815 shall not apply to restaurants temporary in character and location. [C24, 27, 31, 35, §2816.]

2817 Floors. The floors in every food establishment shall be made of some suitable nonabsorbent and impermeable material, approved by the department, which can be flushed and washed clean with water. All new slaughterhouses shall be constructed with cement, vitrified brick, tile, or other impervious material floors and killing beds. [S13,§§2527-c,-i; C24, 27, 31, 35,§2817.]

2818 Interior finish. The side walls and ceilings of every bakery, confectionery, creamery, cheese factory, slaughterhouse, and restaurant or hotel kitchen, shall be made of some suitable material approved by the department, and shall be either oil painted so that they can be washed clean, or they shall be kept well limewashed. [S13,§§2527-c,-i; C24, 27, 31, 35,§2818.]

2819 Screens. The doors, windows, and other openings of every hotel, restaurant, and food establishment during the fly season shall be fitted with self-closing screen doors and wire window screens of not coarser than fourteen mesh wire gauze. [S13,§§2527-d,-i; C24, 27, 31, 35,§2819.]

Referred to in §2820

2820 Places exempted. Section 2819 shall not apply to sheds used for husking corn, nor to warehouses or storerooms used for the storage or handling of the finished product when sealed in original packages. [S13,§2527-d; C24, 27, 31, 35,§2820.]

2821 Toilet rooms. Food establishments shall have convenient toilet rooms and urinals separate from other rooms with floors as prescribed for such establishments, with separate ventilating flues discharging into soil pipes, or on the outside of the building. [S13,§2527-e; C24, 27, 31, 35,§2821.]

2822 Lavatories. The lavatories in food establishments shall be adjacent to toilet rooms and shall be supplied with soap, running water, and clean towels, and shall be maintained in a sanitary condition. [S13,§2527-e; C24, 27, 31, 35,§2822.]

SANITATION IN CONDUCTING BUSINESS

2823 Lighting and ventilation. Every food establishment shall be properly lighted, ventilated, and conducted with strict regard to the influence of such conditions upon the food handled therein. [S13,§2527-a; C24, 27, 31, 35, §2823.]

2824 Sanitary regulations. The following sanitary regulations shall be complied with in every hotel, restaurant, and food establishment:

1. The floors, walls, ceilings, woodwork, utensils, machinery, and other equipment, and all vehicles and equipment used in the transportation of food shall be kept in a thoroughly clean condition.
2. Food shall be at all times adequately protected from flies, dirt, and contamination from any source.
3. Dirt, refuse, and waste products subject to decomposition or fermentation shall be removed daily.
4. The clothing of all persons employed shall be kept clean, and those who handle food shall keep themselves clean and wash their hands and arms before beginning work and after visiting the toilet. [S13,§§2527-b,-c,-e,-i,-k; C24, 27, 31, 35,§2824.]

Referred to in §2825

2825 Requirements for slaughterhouses. In addition to the requirements of section 2824 the following regulations shall also be complied with in the operation of slaughterhouses:

1. The building and yard shall be properly drained so as to prevent accumulations of water or mud.
2. The dressing room shall be supplied with pure and wholesome water.
3. In case a slaughterhouse is not in continuous use the refuse and waste products shall be removed within twenty-four hours after each using.
4. No blood pit, dung pit, offal pit, or privy well shall be maintained upon the premises, and refuse and waste products shall be burned or buried.
5. The premises shall be kept free from maggots and foul odors.

6. Swine shall not be kept or fed within fifty feet of the slaughterhouse.

7. Dead animals shall not be used for feeding purposes without first being thoroughly cooked.

8. Carcasses shall be covered with clean white cloths before being transported, and shall be kept only in sanitary refrigerators or storage rooms. [S13,§2527-i; C24, 27, 31, 35,§2825.]

2826 Towels. No roller or common towel shall be kept or used in the toilet room or wash room of any hotel, restaurant, or food establishment, but individual sanitary paper towels may be provided for use in said places. [C24, 27, 31, 35,§2826.]

2827 Drinking cup. No common drinking cup shall be kept or used in any place or room in any hotel, restaurant, or food establishment. [C24, 27, 31, 35,§2827.]

2828 Tableware. No soiled or insanitary tableware, tablecloths, napkins, or other table linen, shall be used in any hotel or restaurant. [C24, 27, 31, 35,§2828.]

2829 Expectorating. No person shall expectorate within any food establishment except into cuspidors which shall be provided when necessary. Said cuspidors shall be emptied and thoroughly washed daily with some disinfectant solution, five ounces of which shall be left in each cuspidor while in use. [S13,§2527-f; C24, 27, 31, 35,§2829.]

2830 Use as living room. No person shall be allowed to use as a dwelling, or sleep in, any workroom of any bakeshop, kitchen, or dining room where food is prepared for commercial purposes, confectionery, creamery, ice cream factory, cheese factory, cream station, meat market, or any other place where, in the opinion of the department, food will be contaminated thereby. [S13,§2527-g; C24, 27, 31, 35,§2830.]

2831 Employment of diseased persons. No person infected with any communicable disease as defined in chapter 108 shall work in any food establishment nor shall any employer permit any such person to work at any such establishment. [S13,§2527-h; C24, 27, 31, 35,§2831.]

2832 Street display of food. No person shall make any sidewalk or street display of any meat products; but other food products may be so displayed if they are inclosed in a show case or similar device which shall protect the same from flies, dust, or other contamination, and in such display the bottom of the display case shall be at least two feet above the surface of the sidewalk. [S13,§§2527-j,-k; C24, 27, 31, 35,§2832.]

2833 Polishing fruit. No person shall polish fruit or any other food product by any insanitary or unclean process. [S13,§2527-j; C24, 27, 31, 35,§2833.]

SPECIAL SANITATION PROVISIONS IN RE HOTELS

2834 Bedding. Every bed, bunk, cot, or other sleeping place in a hotel shall be supplied with white cotton or linen under sheets, top sheets, and pillow slips. The sheets shall be ninety-six inches in length and of sufficient width to completely cover the mattress and springs. The pillow slips and sheets after being used by any guest shall be washed and ironed, and a clean set furnished each succeeding guest. The other bedding shall be thoroughly aired and kept clean at all times. All mattresses, quilts, blankets, pillows, sheets, comforts, and other bedding which have become worn or insanitary so as to be unfit for use shall be condemned by the inspector, and shall not be again used after such condemnation. [S13,§2514-m; C24, 27, 31, 35,§2834.]

2835 Vermin. Every room or article in any hotel which has become infested with bedbugs or other vermin shall be renovated until the same are exterminated. [S13,§2514-m; C24, 27, 31, 35, §2835.]

2836 Towels. Individual towels shall be provided for the use of each guest in a hotel, so that two or more guests will not be required to use the same towel. [C24, 27, 31, 35,§2836.]

2837 Ventilation. Every hotel shall be properly ventilated and each sleeping apartment shall be provided with at least one window or ventilating skylight equal in area to at least one-eighth of the floor space of the room, and the same shall open onto the outside of the building or court. No room the floor of which is three feet below the average level of the ground shall be used as a sleeping apartment. Where storm windows are used the same shall be constructed so that proper ventilation may be had by the guest and hung in such a manner that they may be readily opened to insure safe exit in case of fire. [C24, 27, 31, 35,§2837.]

Referred to in §2838

2838 Sleeping apartments in new hotels. Every hotel hereafter constructed and every building remodeled for the purpose of use as a hotel, in addition to the requirements of section 2837 shall have sufficient ventilation in the door or doorway of each sleeping apartment, or some equivalent improvement. [C24, 27, 31, 35,§2838.]

2839 Free use of locked toilets. When a hotel is equipped with locked sanitary toilets accessible to guests, they shall be furnished with slugs for admittance to the same without expense. [C24, 27, 31, 35,§2839.]

2840 Outside water closets. Outside water closets for guests of a hotel shall be properly screened from flies and separated for the use of males and females and shall be cleaned and disinfected as often as necessary to maintain them in an approved sanitary condition. [S13, §2514-m; C24, 27, 31, 35,§2840.]

2841 List of rooms and rates to be posted. A complete list of rooms by number, together with the number of the floor and the rate per diem per person for each room, shall be kept continuously and conspicuously posted on the wall near the office in the lobby of every hotel in such a way as to be accessible to the public

without request to the management. The rate per diem per person for each room shall also be posted in the same manner in the respective rooms. No greater charge than the one thus posted shall be made. [C24, 27, 31, 35,§2841.]

Referred to in §2842

2842 Increase of rates. The rate posted under section 2841 shall not be increased until sixty days notice of the proposed increase has been given to the department. [C24, 27, 31, 35, §2842.]

FIRE PROTECTION IN HOTELS

2843 New hotels. Every new hotel constructed of three or more stories in height shall be provided with a hall on each floor above the ground floor, extending from one outside wall to another, and such hall shall be equipped at the end with fire escapes, as provided by law. But in hotels of approved fireproof construction the provisions with reference to the hall extending from one outside wall to another may be modified, with the approval of the labor commissioner, when such buildings are equipped with class A fire escapes. [SS15,§2514-o; C24, 27, 31, 35,§2843.]

Fire escapes, chs 80, 82; also §§6361–6372

2844 Inside courts and light wells. Every hotel, except those which are of approved fireproof construction, in which the sleeping apartments have no outside opening except into an inside court or light well which does not extend to the ground, shall have such court or light well supplied with a suitable runway, platform, or balcony, connecting the bottom of the court or light well with some easy way of egress to the fire escapes. Doors or windows interposed between said runway, platform, or balcony and the fire escapes shall not be fastened against exit. [SS15,§2514-n; C24, 27, 31, 35,§2844.]

2845 Construction required in certain cases. If the roof or covering at the bottom of the court or light well may be easily destroyed by fire, the runway, platform, or balcony shall be attached to the walls of the court or light well in the manner required by the department. [SS15, §2514-n; C24, 27, 31, 35,§2845.]

2846 Exits from ground courts. When a court or light well extends to the ground it shall be provided with some suitable means for exit to the outside in case of fire. [SS15,§2514-n; C24, 27, 31, 35,§2846.]

2847 Rope fire escapes. Every hotel of more than one story, except hotels which are of approved fireproof construction, in addition to other fire escapes required by law, shall have in each sleeping apartment a manila rope at least five-eighths of an inch in diameter and of sufficient length to reach the ground with knots or loops not more than fifteen inches apart, and the same shall have sufficient tensile strength to sustain a weight of at least five hundred pounds. Said rope shall be securely fastened to the building as near an outside window as practicable and shall not be covered by curtains or other obstructions but shall be kept coiled in plain sight at all times. In lieu of such rope some other appliance approved by the department may be provided. [SS15, §2514-i; C24, 27, 31, 35,§2847.]

Fire escapes, ch 82
Fireproof construction, §6361 et seq.

2848 Fire escape signs. In every hotel there shall be posted at the entrance to each hall, elevator shaft, or stairway, or in each sleeping apartment above the ground floor, signs printed in black ink on a white background with type not less than one inch in height stating the directions for reaching the fire escapes. There shall also be posted in each sleeping apartment a notice printed in large bold-face type calling attention and giving directions for the use of the rope fire escape or other appliance with which the room is equipped. [S13,§2514-j; C24, 27, 31, 35,§2848.]

2849 Fire extinguishers. Every hotel shall be provided with at least one efficient chemical fire extinguisher on each floor for every twenty-five hundred feet of floor space, placed and maintained in the hallway outside the sleeping apartments and kept in condition for immediate use. In lieu of such extinguisher a standpipe may be provided in the hall which shall not be less than one and one-fourth inches in diameter with hose always attached of sufficient length and supplied with the proper pressure of water to reach any and all parts of the interior of the building. [S13,§2514-k; C24, 27, 31, 35,§2849.]

2850 Elevator shafts. Every hotel, except those of approved fireproof construction which is equipped with an elevator shaft extending below the level of the first floor shall have the shaft inclosed, as nearly airtight as practicable, with iron or steel sheeting, wire glass, or other fireproof material. In lieu of such construction, the elevator shaft may be provided with an automatic floor trap at the first floor, which shall be constructed in the most approved manner for preventing the spread of fire. [S13, §2514-l; C24, 27, 31, 35,§2850.]

INSPECTION

2851 Annual inspection. The department shall cause to be inspected at least once each calendar year, every hotel, restaurant, and food establishment in the state, and any inspector of said department may enter any such place at any reasonable hour to make such inspection. The management shall afford free access to every part of the premises and render all aid and assistance necessary to enable the inspector to make a thorough and complete examination. [S13,§§2514-q, 2527-m, 2528-d5; C24, 27, 31, 35,§2851.]

2852 Inspection upon complaint. Upon receipt of a verified complaint, signed by any patron of any hotel, restaurant, or food estab-

lishment, stating facts showing such place to be in an insanitary condition, or that the fire escapes and appliances are not kept in accordance with law, the department shall cause an examination to be made. If the complaint is found to be justifiable, the actual expenses necessarily incurred in making such inspection shall be charged and collected from the person conducting such place; but if such complaint is found to be without reasonable grounds, the actual expense necessarily incurred in making such inspection shall be collected from the person or persons making the complaint. [SS15, §2514-s; C24, 27, 31, 35,§2852.]

2853 Report of violation. After each inspection the department shall report all infringements of the fire protection laws and regulations to the state fire marshal and local authorities, who shall take the necessary action to compel compliance with the same. [C24, 27, 31, 35,§2853; 48GA, ch 120,§75.]

Authority to enforce, §1632.1; also §6361 et seq.

ENFORCEMENT

2854 Penalty. Any person who shall violate any provision of this chapter shall be fined not exceeding one hundred dollars or imprisoned in the county jail not exceeding thirty days. [C97,§2527; S13,§§2514-w, 2527-m,-n; C24, 27, 31, 35,§2854.]

2855 Injunction. Any person conducting a hotel, restaurant, or food establishment, in violation of any provision of this chapter, may be restrained by injunction from operating such place of business. No injunction shall issue until after the defendant has had at least five days notice of the application therefor, and the time fixed for hearing thereon. [S13,§2514-x; C24, 27, 31, 35,§2855.]

Injunctions, ch 535

2856 Duty of county attorney. The county attorney in each county shall assist in the enforcement of the provisions of this chapter. [S13,§2514-x; C24, 27, 31, 35,§2856.]

CHAPTER 134

COLD STORAGE

Referred to in §§2591, 2872.05

2857 Definitions.
2858 License.
2859 Examination of plant.
2860 License fee.
2861 Receipt and withdrawal of food.
2862 Reports by licensee.
2863 Storing of impure food.
2864 Revocation of license.
2865 Food not intended for human consumption.
2866 Date of deposit and withdrawal.
2867 Period for storage.
2868 Application for extension of period.
2869 Report of extensions of storage period.
2870 Notice of sale of cold storage goods.
2871 Return of goods to cold storage.
2872 Penalties.

2857 Definitions. For the purposes of this chapter:

1. "Food" shall include any article used by man for food, drink, confectionery, or condiment, or which enters into the composition of the same whether simple, blended, mixed, or compound.

2. "Cold storage plant" shall mean a place artificially cooled to a temperature of forty degrees Fahrenheit or below, in which food is kept, but it shall not include a like place in a private home, hotel, or restaurant, or a refrigerator car.

3. "Cold stored" shall mean the keeping of articles of food in a cold storage plant or plants for a period exceeding thirty days, and food which has been so kept shall be deemed to be cold storage food, but this paragraph shall not be construed as applying to meat or meat products in the process of manufacture. [S13, §2528-d; C24, 27, 31, 35,§2857.]

2858 License. Every person engaged in the business of operating a cold storage plant and who charges a fee for the service rendered shall obtain a license from the department for each establishment at which said business is conducted. Applications for such licenses shall be made upon blanks furnished by the department and shall conform to the prescribed rules of the department. [S13,§2528-d1; C24, 27, 31, 35,§2858.]

License applicable to locker plants, §2872.05

2859 Examination of plant. Before issuing a license to operate a cold storage plant the department shall make an examination of the proposed plant to ascertain if the proper sanitary conditions and equipment have been provided. [S13,§2528-d1; C24, 27, 31, 35,§2859.]

2860 License fee. The license fee shall be twenty-five dollars per annum, and all licenses shall expire on December 31 following the date of issue. [S13,§2528-d1; C24, 27, 31, 35,§2860.]

2861 Receipt and withdrawal of food. Every licensee shall keep an accurate record of the receipt and the withdrawal of all food which is cold stored, and said record shall be open to inspection by the department at all reasonable times. [S13,§2528-d3; C24, 27, 31, 35,§2861.]

2862 Reports by licensee. Every licensee shall quarterly, or at such times as may be required by the department, report upon blanks furnished by the department in itemized particulars the quantity of food which is being cold stored in his plant. Quarterly reports shall be filed not later than the sixth day of January, April, July, and October of each year, and the reports so rendered shall show the conditions existing on the first day of the month in which the report is filed. [S13,§2528-d3; C24, 27, 31, 35,§2862.]

2863 Storing of impure food. No article of food shall be cold stored unless it is in a proper condition for storage and meets all the requirements of the pure food and food sanitation laws, and such rules as may be established by the department for the sanitary preparation of food products which are to be cold stored. [S13, §2528-d4; C24, 27, 31, 35,§2863.]

Pure food, chs 148, 149; food sanitation, ch 133

2864 Revocation of license. Every cold storage plant shall be maintained in a sanitary condition and conducted with strict regard to the influence of such condition upon the food handled therein. If any licensee under this chapter fails to comply with this section the department shall revoke his license. [S13,§2528-d2; C24, 27, 31, 35,§2864.]

2865 Food not intended for human consumption. Every article of food not intended for human consumption, before being placed in a cold storage plant shall be so marked by the owner in accordance with the rules established by the department. [S13,§2528-d4; C24, 27, 31, 35,§2865.]

2866 Date of deposit and withdrawal. Each article of food when deposited in a cold storage plant shall have marked upon the package, container, or article the date of deposit, and when removed said article shall be marked in like manner with the date of removal. Said markings shall be in accordance with the rules established by the department. [S13,§2528-d6; C24, 27, 31, 35,§2866.]

2867 Period for storage. No person shall keep in a cold storage plant any article of food for a longer period than twelve calendar months, except with the consent of the department. [S13, §2528-d7; C24, 27, 31, 35,§2867.]

2868 Application for extension of period. Upon application the department shall grant permission to extend the period of storage beyond twelve months for a particular consignment of goods, if the goods in question are found upon examination to be in proper condition for further storage at the end of twelve months. The length of time for which further storage is allowed shall be specified in the order granting such permission. [S13,§2528-d7; C24, 27, 31, 35,§2868.]

2869 Report of extensions of storage period. A report on each case in which such extension of storage is permitted, including the reason for such action, the kind and the amount of goods for which the storage period was extended, and the length of time for which the continuance was granted, shall be included in the annual report of the department. [S13,§2528-d7; C24, 27, 31, 35,§2869.]

2870 Notice of sale of cold storage goods. No person shall represent or advertise as fresh goods articles of food which have been cold stored, and every person who sells or offers or exposes for sale, uncooked articles of cold storage food shall display at all times in a conspicuous place a placard with only the words "Cold Storage Goods Sold Here" printed in black roman letters not less than three inches high and two inches wide upon a white card fifteen by twenty-five inches in dimensions. [S13,§2528-d8; C24, 27, 31, 35,§2870.]

2871 Return of goods to cold storage. No article of food which has once been cold stored and placed on the market for sale to consumers, shall again be placed in a cold storage plant, but transfers of goods from one cold storage plant to another may be made if not for the purpose of evading the provisions of this chapter. The operator of a cold storage plant shall label all goods with the date when stored,which date shall not be removed when goods are removed, and in determining whether goods are "cold stored" the time same have been stored in different plants shall be added together and the aggregate shall be the time stored and shall be so marked when sold. [S13,§2528-d9; C24, 27, 31, 35,§2871.]

2872 Penalties. Any person violating any of the provisions of this chapter shall be punished for the first offense by a fine of not less than twenty-five dollars nor more than one hundred dollars, and for the second offense by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment. [S13,§2528-d11; C24, 27, 31, 35,§2872.]

CHAPTER 134.1

COLD STORAGE LOCKER PLANTS

Lien, see ch 456.1

2872.01 Definitions.
2872.02 License.
2872.03 Examination of plant.
2872.04 License fee.
2872.05 Other license coverage.
2872.06 Storing of impure food.
2872.07 Revocation of license.
2872.08 Goods not intended for human consumption.
2872.09 Food must be sharp frozen before storage.
2872.10 Operators or owners not warehousemen.

2872.01 Definitions. For the purpose of this chapter:

1. "Food" shall include any article used by man for food, drink, confectionery or condiment, or which enters into the composition of the same whether simple, blended, mixed or compounded.

2. "Refrigerated locker plant" shall mean a location in which space in individual lockers is

rented to individuals for the storage of food and which is artificially cooled for the purpose of preserving such food.

3. "Sharp frozen" shall mean the freezing of food in a room in which the temperature is zero or below.

4. "Department" shall mean the department of agriculture. [48GA, ch 89,§1.]

2872.02 License. Every person engaged in the business of operating a refrigerated locker plant and who charges a fee for the service rendered shall obtain a license from the department for each establishment at which said business is operated and conducted. Application for such license or licenses shall be made upon forms furnished by the department and shall conform to the prescribed rules of the department. [48GA, ch 89,§2.]

2872.03 Examination of plant. Before issuing a license to operate a refrigerated locker plant, the department shall make an examination of the proposed plant to determine if sanitary conditions and equipment which, in the judgment of the department, are necessary for the proper operation of such refrigerator plant, have been provided. [48GA, ch 89,§3.]

2872.04 License fee. The license fee shall be ten dollars per annum for two hundred or less individual cold storage lockers with an additional two dollars per annum for every additional one hundred individual food lockers or major fraction thereof. [48GA, ch 89,§4.]

2872.05 Other license coverage. Individuals or corporations licensed exclusively under the provisions of chapter 134 shall not be required to pay the license fee provided herein. [48GA, ch 89,§5.]

2872.06 Storing of impure food. No article of food shall be stored in any refrigerated locker unless it is in a proper condition for storage and meets all the requirements of the pure food and food sanitation laws and such rules as may be established by the department for the sanitary preparation of food products which are to be stored. [48GA, ch 89,§6.]

2872.07 Revocation of license. Every refrigerated locker plant shall be maintained in a sanitary condition and conducted with strict regard to the influence of such conditions upon the food handled therein and any licensee under this chapter who fails to comply therewith shall suffer a revocation of his license. [48GA, ch 89, §7.]

2872.08 Goods not intended for human consumption. Goods not intended for human consumption shall not be stored in a refrigerated locker except such items of animal or vegetable matter which may have been inspected and approved by the United States government. [48GA, ch 89,§8.]

2872.09 Food must be sharp frozen before storage. All food must be sharp frozen before it shall be placed in a refrigerated locker, and shall be kept at a temperature of twelve degrees to fifteen degrees Fahrenheit during the period it is kept therein. [48GA, ch 89,§9.]

2872.10 Operators or owners not warehousemen. Persons who own or operate refrigerated locker plants shall not be construed to be warehousemen, nor shall receipts or other instruments issued by such persons in the ordinary conduct of their business be construed to be negotiable warehouse receipts. [48GA, ch 89, §10.]

Lien, see ch 456.1

CHAPTER 135

STATE FAIR AND EXPOSITION

2873 State fair board.
2874 Convention.
2875 Certification of state aid associations.
2876 Voting power.
2877 Elections to be made.
2878 Terms of office.
2879 Vacancies.
2880 Elective members—compensation.
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2889 Claims.
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2893 Annual report to governor.

2873 State fair board. The Iowa state fair board shall consist of:

1. The governor of the state, the state secretary of agriculture, and the president of the state college of agriculture and mechanic arts.

2. A president and vice president, and one director from each congressional district, to be elected at a convention as hereinafter provided.

3. A secretary and a treasurer to be elected by the state fair board. [S13,§1657-c; C24, 27, 31, 35,§2873.]

2874 Convention. A convention shall be held at the capitol, on the second Wednesday of December of each year, to elect members of the state fair board. The convention shall be composed of:

1. The members of the state fair board as then organized.

2. The president or secretary of each county or district agricultural society entitled to receive aid from the state, or a regularly elected delegate therefrom accredited in writing, who shall be a resident of the county.

3. One delegate, a resident of the county, to be appointed by the board of supervisors in each county where there is no such society, or

when such society fails to report to the state fair board in the manner provided by law as a basis for state aid. The board shall promptly report such failure to the county auditor.

4. The president, or an accredited representative, of each farmers institute organized under chapter 137 which is entitled to receive aid from the state.

5. The president, or an accredited representative, of the Iowa state horticultural society.

6. The president, or an accredited representative, of the Iowa state dairy association.

7. The president, or an accredited representative, of the Iowa beef cattle producers association.

8. The president, or an accredited representative, of the Iowa corn and small grain growers association. [R60,§§1701, 1704; C73,§§1103, 1112; C97,§§1653, 1661; S13,§1657-d; SS15, §1661-a; C24, 27, 31, 35,§2874.]

Referred to in §2875

2875 Certification of state aid associations. On or before November 15 of each year the secretary of agriculture shall certify to the secretary of the state fair board the names of the various associations and societies which have qualified for state aid under the provisions of chapters 137 to 143, inclusive, and which are entitled to representation in the convention as provided in section 2874. [C24, 27, 31, 35,§2875.]

State aid, see biennial appropriation act

2876 Voting power. On all questions arising for determination by the convention, each member present shall be entitled to but one vote, and no proxies shall be recognized by the convention. [S13,§1657-d; C24, 27, 31, 35,§2876.]

2877 Elections to be made. The convention shall elect:

1. A president and a vice president of the state fair board.

2. A successor to each congressional district director on the board whose term expires at noon on the day following the adjournment of the convention. [R60,§1700; C73,§1104; C97, §1654; S13,§1657-e; C24, 27, 31, 35,§2877.]

2878 Terms of office. The term of the president and vice president of the board shall be one year and that of a director two years. Such term shall begin at noon on the day following the adjournment of the convention at which such officer or director was elected and shall continue until a successor is elected and qualifies as provided in this chapter. [R60,§1700; C73,§1104; C97,§1654; S13,§1657-e; C24, 27, 31, 35,§2878.]

2879 Vacancies. If, after the adjournment of the convention, a vacancy occurs in the office of any member of the board elected by the convention the board shall fill the same, and the member so elected shall qualify at once and serve until noon of the day following the adjournment of the next convention. If, by that time, the member elected by the board will not have completed the full term for which his predecessor was elected, said convention shall elect a member to serve out the unexpired portion of such term. The member so elected shall qualify at the same time as other members elected by the convention. [S13,§1657-e; C24, 27, 31, 35,§2879.]

2880 Elective members—compensation. The members of the board elected at the annual convention shall be allowed ten dollars a day and necessary traveling and hotel expenses for attending the meetings of the board, and for services rendered in carrying on the state fair. [S13,§1657-p; C24, 27, 31, 35,§2880.]

2881 Secretary. The board shall elect a secretary who shall hold office for one year, and he shall:

1. Keep a complete record of the annual convention and of all meetings of the board.

2. Draw all warrants on the treasurer of the board and keep a correct account thereof.

3. Perform such other duties as the board may direct. [R60,§§1700, 1703; C73,§§1104, 1107; C97,§§1654, 1656; S13,§1657-k; C24, 27, 31, 35, §2881.]

2882 Salary of secretary. The secretary shall receive such compensation for his services as the board may fix, but said salary shall in no event be more than five thousand dollars a year. [S13,§1657-n; C24, 27, 31, 35,§2882.]

2883 Treasurer. The board shall elect a treasurer who shall hold office for one year, and he shall:

1. Keep a correct account of the receipts and disbursements of all moneys belonging to the board.

2. Make payments on all warrants signed by the president and secretary from any funds available for such purpose.

3. Execute and file with the secretary of the board a bond, to be approved by the board, for the faithful performance of his duties. [R60, §1700; C73,§1104; C97,§1654; S13,§1657-o; C24, 27, 31, 35,§2883.]

Power of auditor of state, §§101.5, 2891

2884 Salary of treasurer. The treasurer shall receive such compensation for his services as the board may fix, not to exceed two hundred fifty dollars a year, and necessary traveling and hotel expenses. [S13,§1657-o; C24, 27, 31, 35, §2884.]

2885 Executive committee—meetings. The president, vice president, and secretary shall constitute an executive committee, which shall transact such business as may be delegated to it by the board. The president may call meetings of the board or executive committee when the interests of the work require it. [R60,§1104; C73,§1700; C97,§1654; S13,§1657-h; C24, 27, 31, 35,§2885.]

2886 Powers and duties of board. The state fair board shall have the custody and control of the state fair grounds, including the buildings and equipment thereon belonging to the state, and shall have power to:

1. Erect and repair buildings on said grounds and make other necessary improvements thereon.

2. Regulate the construction of street railways within said grounds and determine the motive power by which the same shall be propelled.

3. Hold an annual fair and exposition on said grounds.

4. Prepare premium lists and establish rules of exhibition for such fair which shall be published by the board not later than the first day of June in each year.

5. Take and hold property by gift, devise, or bequest for fair purposes, and the president, secretary, and treasurer of the board shall have charge and control of the same, subject to the action of the board. Such officers shall give bonds as required in the case of executors, to be approved by the board and filed with the secretary of state.

6. The state fair board may grant a written permit to such persons as it deems proper to sell fruit, provisions and other articles not prohibited by law, under such regulations as the board may prescribe.

7. The president of the state fair board may appoint such number of special police as he may deem necessary and such officers are hereby vested with the powers and charged with the duties of peace officers.

8. Adopt all necessary rules in the discharge of its duties and in the exercise of the powers herein conferred. [R60,§1702; C73,§1106; C97, §1655; S13,§§1657-i,-j,-r; C24, 27, 31, 35,§2886.]

2887 **Management of state fair.** The board may delegate the management of the state fair to the executive committee and two or more additional members of the board; and in carrying on such fair it may employ such assistance as may be deemed necessary. [S13,§1657-i; C24, 27, 31, 35,§2887.]

2888 **Maintenance of state fair.** All expenses incurred in maintaining the state fair grounds and in conducting the annual fair thereon, including the compensation and expenses of the officers, members, and employees of the board, shall be recorded by the secretary and paid from the state fair receipts, unless a specific appropriation has been provided for such purpose, but in the absence of any such appropriation the state shall not be liable for any expenses or liabilities incurred by the board. [S13,§§1657-i,-t; C24, 27, 31, 35,§2888.]

2889 **Claims.** The board shall prescribe rules for the presentation and payment of claims out of the state fair receipts and other funds of the board and no claim shall be allowed which does not comply therewith. [C24, 27, 31, 35, §2889.]

2890 **Warrants.** No claim shall be paid by the treasurer except upon a warrant signed by the president and secretary of the board, but this section shall not apply to the payment of state fair premiums. [S13,§1657-o; C24, 27, 31, 35, §2890.]

2891 **Auditing of accounts.** Prior to the annual convention, the auditor of state shall examine and report to the executive council upon all financial affairs of the board. [S13, §1657-q; C24, 27, 31, 35,§2891.]

2892 **Report.** The board shall file each year with the department of agriculture, at such time as the department may specify, a report containing such information relative to the state fair and exposition and the district and county fairs as the department may require. [C24, 27, 31, 35, §2892.]

2893 **Annual report to governor.** The state fair board shall each year at the time provided by law make a report to the governor containing:

1. A complete account of the annual state fair and exposition.

2. The proceedings of the annual state agricultural convention.

3. The proceedings of the annual county and district fair managers convention. [R60,§1703; C73,§1107; C97,§1656; S13,§1657-k; C24, 27, 31, 35,§2893.]

Time of report, §247

CHAPTER 136

COUNTY AND DISTRICT FAIRS

Referred to in §2921

2894 Terms defined.
2895 Powers of society.
2896 Control of grounds.
2897 Permits to sell articles.
2898 Appointment of police.
2899 Removal of obstructions.
2900 Refusal to remove obstructions.
2901 Publication of financial statement.
2902 State aid.
2902.1 Appropriation—availability.
2903 Amount allowed as state aid.
2904 Payment of state aid.
2905 County aid.
2906 Additional county aid.
2907 Purchase and management.
2908 Termination of rights of society.
2909 Tax aid.
2910 Expenditure of fund.
2911 Report to supervisors.
2912 Fraudulent entries of horses.
2913 Violations—penalty.
2914 Entry under changed name.
2915 Class determined.

2894 **Terms defined.** For the purposes of this chapter:

1. "Fair" shall mean a bona fide exhibition of agricultural, dairy, and kindred products, livestock, and farm implements.

2. "Society" shall mean a county or district fair or agricultural society incorporated under the laws of this state for the purpose of holding such fair, and which owns or leases at least ten acres of ground and owns buildings and im-

provements situated on said ground of a value of at least eight thousand dollars, or any incorporated farm organization authorized to hold an agricultural fair which owns or leases buildings and grounds especially constructed for fair purposes of the value of fifty thousand dollars in a county where no other agricultural fair receiving state aid is held. [C24, 27, 31, 35, §2894.]

Referred to in §2902.1

2895 Powers of society. Each society may hold annually a fair to further interest in agriculture and to encourage the improvement of agricultural products, livestock, articles of domestic industry, implements, and other mechanical devices. It may offer and award such premiums as will induce general competition. [R60,§1697; C73,§1109; C97,§1658; S13,§1658; C24, 27, 31, 35,§2895.]

2896 Control of grounds. During the time a fair is being held, no ordinance or resolution of any city or town shall in any way impair the authority of the society, but it shall have sole and exclusive control over and management of such fair. [C73,§1116; C97,§1664; C24, 27, 31, 35,§2896.]

2897 Permits to sell articles. The president of any society may grant a written permit to such persons as he thinks proper, to sell fruit, provisions, and other articles not prohibited by law, under such regulations as the board of directors may prescribe. [C73,§1115; C97, §1663; C24, 27, 31, 35,§2897.]

2898 Appointment of police. The president of any society may appoint such number of special police as he may deem necessary. Such officers are hereby vested with the powers and charged with the duties of peace officers. [C97, §1664; C24, 27, 31, 35,§2898.]

2899 Removal of obstructions. All shows, swings, booths, tents, carriages, or any other thing that may obstruct the grounds of any society or the driveways thereof may be removed from the grounds on the order of the president. [C73,§1116; C97,§1664; C24, 27, 31, 35,§2899.]

2900 Refusal to remove obstructions. Any person owning, occupying, or using any such obstruction who shall refuse or fail to remove the same when ordered to do so by the president shall be liable to a fine of not less than five dollars nor more than one hundred dollars for each such offense. [C73,§1116; C97,§1664; C24, 27, 31, 35,§2900.]

2901 Publication of financial statement. Each society shall annually publish in one newspaper of the county a financial statement of receipts and disbursements for the current year. [R60,§1698; C73,§1110; C97,§1659; S13,§1659; C24, 27, 31, 35,§2901.]

2902 State aid. Each society shall be entitled to receive aid from the state if it files with the state fair board on or before November 1 of each year, a sworn statement which shall show:

1. The actual amount paid by it in cash premiums at its fair for the current year, which statement must correspond with its published offer of premiums.
2. That no part of said amount was paid for speed events, or to secure games or amusements.
3. A full and accurate statement of the receipts and expenditures of the society for the current year and other statistical data relative to exhibits and attendance for the year.
4. A copy of the published financial statement published as required by law, together with proof of such publication and a certified statement showing an itemized list of premiums awarded, and such other information as the state fair board may require. [R60,§§1698, 1704; C73,§§1110, 1112; C97,§§1659, 1661; S13, §1659; SS15,§1661-a; C24, 27, 31, 35,§2902.]

2902.1 Appropriation — availability. The appropriation which is made biennially for state aid to the foregoing societies shall be available and applicable to incorporated societies of a purely agricultural nature which were entitled to draw eight hundred fifty dollars or more state aid in 1926, or societies located in counties that have no other fair or agricultural society, and which were in existence and drew state aid in 1926. The provisions of section 2894 as to ownership of property shall not apply to societies under this section.

If there is but one society receiving said state aid in a county, no aid shall be given any other society in said county until it has filed proper annual reports with the secretary of the state fair board for three consecutive years showing compliance with all the provisions of law governing societies entitled to receive state aid. [R60,§§1698, 1704; C73,§§1110, 1112; C97,§1661; S13,§1659; SS15,§1661-a; C24, 27,§2902; C31, 35, §2902-d1.]

2903 Amount allowed as state aid. The amount allowed to any society as state aid shall be a sum equal to eighty percent of the first one thousand dollars, seventy percent of the second one thousand dollars, and sixty percent of the third one thousand dollars paid in cash by the society for premiums at its annual fair for the current year, but the total aid shall not in any one year exceed two thousand dollars to any one society. [R60,§1704; C73,§1112; C97, §1661; SS15,§1661-a; C24, 27, 31, 35,§2903.]

2904 Payment of state aid. The state comptroller shall issue his warrant to any society for the amount due as state aid, less one hundred dollars, provided the secretary of the state fair board certifies to the comptroller that such society has complied with the law relative thereto and that a named amount is due the society. The comptroller shall issue a like warrant for one hundred dollars provided the secretary of the state fair board certifies that such society had an accredited delegate in attendance at the annual convention for the election of members of the state fair board. [R60,§1698; C73,§1110; C97,§1659; S13,§1659; C24, 27, 31, 35,§2904.]

2905 County aid. The board of supervisors of the county in which any such society is located may levy a tax of not to exceed one-eighth mill upon all the taxable property of the county, the funds realized therefrom to be known as the fair ground fund, and to be used for the purpose of fitting up or purchasing fair grounds for the society, or for the purpose of aiding boys and girls 4-H Club work in connection with said fair, provided such society shall be the owner in fee simple, or the lessee of at least ten acres of land for fair ground purposes, and shall own buildings and improvements thereon of at least eight thousand dollars in value. [C73,§1111; C97,§1660; SS15,§1660; C24, 27, 31, 35,§2905.]

2906 Additional county aid. The board of supervisors may upon a petition signed by twenty-five percent of the qualified voters of the county as shown by the poll books of the last preceding general election, submit to the voters of the county, at a general election, the proposition to purchase or accept as a gift, for county or district fair purposes, real estate exceeding one thousand dollars in value. Notice of such election shall be published in the official newspapers of the county for four weeks previous to such election. [SS15,§1660; C24, 27, 31, 35,§2906.]

2907 Purchase and management. If a majority of the votes cast are in favor of such proposition, the board shall make the authorized purchase and pay for the same out of the general fund, or accept as a gift from the owner a county or district fair ground already in existence. Title shall be taken in the name of the county, but the board of supervisors shall place such real estate under the control and management of an incorporated county or district fair society. Such society is authorized to erect and maintain buildings and make such other improvements on the real estate as is necessary, but the county shall not be liable for such improvements nor the expenditures therefor. [SS15,§1660; C24, 27, 31, 35,§2907.]

2908 Termination of rights of society. The right of such society to the control and management of said real estate may be terminated by the board of supervisors whenever well conducted agricultural fairs are not annually held thereon by such society. [SS15,§1660; C24, 27, 31, 35,§2908.]

2909 Tax aid. The board of supervisors of any county which has acquired real estate for county or district fair purposes and which has a society using said real estate, may levy a tax of not to exceed one-eighth mill upon all the taxable property of the county, the funds realized therefrom to be known as the fair ground fund. [C24, 27, 31, 35,§2909.]

2910 Expenditure of fund. The fair ground fund shall be expended only for the erection and repair of buildings or other permanent improvements on said real estate, or for the payment of debts contracted in such erection or repair. [SS15,§1660; C24, 27, 31, 35,§2910.]

2911 Report to supervisors. Each society receiving an appropriation from the county shall, through its secretary, make to the board of supervisors a detailed statement, accompanied with vouchers, showing the legal disbursement of all moneys so received. [C73, §1113; C97,§1662; C24, 27, 31, 35,§2911.]

2912 Fraudulent entries of horses. No person, partnership, company, or corporation shall knowingly enter or cause to be entered any horse of any age or sex under an assumed name, or out of its proper class, to compete for any purse, prize, premium, stake, or sweepstake offered or given by any agricultural or other society, association, person, or persons in the state, or drive any such horse under an assumed name, or out of its proper class, where such prize, purse, premium, stake, or sweepstake is to be decided by a contest of speed. [C97,§1665; C24, 27, 31, 35,§2912.]

Referred to in §2913

2913 Violations—penalty. Any person convicted of a violation of section 2912 shall be imprisoned in the penitentiary for a period of not more than three years, or in the county jail for not more than one year, and be fined in a sum not exceeding one thousand dollars. [C97,§1666; C24, 27, 31, 35,§2913.]

2914 Entry under changed name. The name of any horse for the purpose of entry for competition in any contest of speed shall not be changed after having once contested for a prize, purse, premium, stake, or sweepstake, except as provided by the code of printed rules of the society or association under which the contest is advertised to be conducted, unless the former name is given. [C97,§1667; C24, 27, 31, 35,§2914.]

2915 Class determined. The class to which a horse belongs for the purpose of an entry in any contest of speed, as provided by the printed rules of the society or association under which such contest is to be made, shall be determined by the public record of said horse in any such former contest. [C97,§1668; C24, 27, 31, 35, §2915.]

CHAPTER 137

FARMERS INSTITUTES AND SHORT COURSES

Referred to in §§2591, 2874, 2875

2916 State aid to farmers institutes.
2917 Certification by department.
2918 Comptroller to draw warrant.
2919 Farmers institute fund.
2920 Division of fund.
2921 State aid for short courses in agriculture.
2922 Certification by department.
2923 Payment of state aid.

2916 State aid to farmers institutes. A farmers institute shall be entitled to state aid only under the following conditions:

1. The institute must be organized by at least forty farmers of the county and have a president, secretary, treasurer, and executive committee of not less than three members other than said officers.

2. It must hold, for not less than two days each year, an institute devoted to farm and kindred subjects.

3. The association shall notify the department of agriculture on or before the second Wednesday in December, of its intention of holding a farmers institute.

4. It must file with the department of agriculture on or before the first day of June of each year a sworn, itemized report of such institute, which report must show the organization of such institute, the fact that such institute was held, the purposes for which held and for which the money used by it was expended, and such other information as the department may require. [C97,§1675; S13,§§1657-d, 1675; C24, 27, 31, 35,§2916.]

State aid, see biennial appropriation act

2917 Certification by department. The department, on receipt of such report, if the same is sufficient and filed within the time named, shall certify to the state comptroller that all of said conditions have been complied with by such institute and that a named amount is due it as state aid. Such amount shall not exceed the amount shown to have been legally expended. [C97,§1675; S13,§1675; C24, 27, 31, 35,§2917.]

2918 Comptroller to draw warrant. The state comptroller, on receipt of such certificate, shall draw a warrant in favor of the president, secretary or treasurer of said organization for the amount specified in said certificate, but the amount drawn shall not in any case exceed seventy-five dollars for any one year. [C97, §1675; S13,§1675; C24, 27, 31, 35,§2918.]

2919 Farmers institute fund. Such money shall be kept by the county treasurer as a farmers institute fund, and no warrant shall be drawn thereon except on a written order signed by a majority of the members of the executive committee of said institute. No officer of any such institute shall receive any part of said fund as compensation for services as such officer. [C97,§§1675, 1676; S13,§1675; C24, 27, 31, 35, §2919.]

2920 Division of fund. If there be, in a county, two or more institutes claiming right to such fund under this chapter, the state aid available for the county shall be equally divided among such institutes as may be legally entitled thereto, but in no case shall more than three institutes be held in one year in any county under the provisions of this chapter. [C97,§1676; C24, 27, 31, 35,§2920.]

2921 State aid for short courses in agriculture. An organization for the purpose of holding a short course in agriculture and domestic science shall be entitled to state aid under the following conditions:

1. The organization must be formed by at least one hundred citizens of a county which has no county or district fair receiving state aid as provided in chapter 136 of this title, or in which a county fair is not held in the year in question.

2. The membership of the organization must be open to all citizens on an equal basis, with a minimum membership fee of twenty-five cents, or a maximum fee not exceeding one dollar.

3. The organization shall notify the department by November 1 of each year, of its intentions to hold such short course.

4. It must have a president, secretary, treasurer, and an executive committee of not less than five members.

5. It must hold a short course consisting of a session of two or more days at some place within the county and give a program designed to promote agriculture and domestic science.

6. It must, on or before June 1 of each year, through one of said named officers, file a sworn statement with the department of agriculture, setting forth the facts showing compliance with all the foregoing conditions, an itemized list of cash premiums paid by it at said short course, and such other information as the department may require. [S13,§1661-a1; C24, 27, 31, 35, §2921.]

Referred to in §§2922, 2923

2922 Certification by department. The department of agriculture, on receipt of such statement, shall, if it complies with section 2921, certify to the comptroller that said organization has fully complied with the required conditions and that a named amount is due it as state aid. [S13,§1661-a1; C24, 27, 31, 35,§2922.]

2923 Payment of state aid. The comptroller, on receipt of such certificate, shall draw a warrant in favor of the president, secretary, or treasurer of said organization for a sum equal to eighty percent of the amount paid in premiums by it, but in no case shall the amount exceed six hundred dollars in any county. In all counties where no regular farmers institute is held and where a short course is held, the money appropriated for such farmers institute shall be payable on account of such short course upon proof being made as provided in section 2921. [S13,§§1661-a1,-a2; C24, 27, 31, 35,§2923.]

CHAPTER 138

FARM AID ASSOCIATIONS

Referred to in §§2591, 2875

2924 Incorporation authorized.
2925 Method of incorporation.
2926 Articles of incorporation.
2926.1 Amendments to articles.
2927 Additional provisions.
2928 Private property exempt from debts—seal.
2929 Powers of association.
2930 Appropriation by board of supervisors.
2931 Limitation on aid.
2932 Funds advanced by federal government.
2933 Funds—how expended.
2934 Bond of treasurer.
2935 Compensation.
2936 Dividends—diversion of funds.
2937 False certificate.
2938 Annual reports.

2924 Incorporation authorized. For the purpose of improving and advancing agriculture, domestic science, animal husbandry, and horticulture, a body corporate may be organized in each county of the state. [SS15,§1683-a; C24, 27, 31, 35,§2924.]

2925 Method of incorporation. Such body corporate may be formed by the acknowledging and filing articles of incorporation with the county recorder, signed by at least ten farmers, landowners, or other business men of the county. [S13,§1683-b; C24, 27, 31, 35,§2925.]

2926 Articles of incorporation. Such articles of incorporation shall be substantially as follows:

We, the undersigned farmers, landowners, and business men of ..... county, Iowa, do hereby adopt the following articles of incorporation:

Article 1. The objects of this corporation shall be to advance and improve, in ..... county, Iowa, agriculture, domestic science, horticulture, animal husbandry, and the marketing of farm products.

Article 2. The name of this corporation shall be .....
.....(the name of the county of which the incorporators are residents shall appear as part of the name of the corporation).

Article 3. The affairs of this corporation shall be conducted by a president, a vice president, a secretary, and a treasurer, who shall perform the duties usually pertaining to such positions, and by a board of not less than nine directors, which shall include the president, vice president, secretary, and treasurer as members thereof.

Such officers and directors shall be elected by the members of the corporations at an annual meeting held on the third Monday in December of each year; their term of office shall begin on the first Monday in the next January after their election and they shall serve for a term of one year and until their successors are elected and have qualified. Not more than two of such directors shall be residents of the same township at the time of election.

We, the said incorporators, have elected the following provisional officers to hold their respective positions until their successors are elected at the annual meeting in the year.....:

President .....
Vice president .....
Secretary .....
Treasurer .....

Board of directors:
1 .....
2 .....
3 .....
4 .....
5 .....
6 .....
7 .....
8 .....
9 .....

Article 4. The yearly dues of the members of this corporation shall be not less than one dollar, payable at the time of applying for membership and on the first Monday in January of each year thereafter. No member having once paid his dues shall forfeit his membership until his subsequent dues are six months in arrears.

Article 5. Any citizen of the county and any nonresident owning land in the county shall have the right to become a member of the corporation by paying the annual dues and thereafter complying with the articles and bylaws of the corporation.

Article 6. This corporation shall endure until terminated by operation of law. [SS15,§1683-c; C24, 27, 31, 35,§2926.]

2926.1 Amendments to articles. The articles of incorporation of such farm aid associations may be amended to conform to the provisions of this act [43GA, ch 80] at any regular annual meeting, or at any special meeting of the members of such corporation called for that purpose. Notice of such meeting shall be sufficient if published in at least two regular issues of a daily or weekly newspaper of general circulation published in the county in which the meeting is to be held, or by notice mailed to each member at his last known address, at least five days prior to such meeting. [C27, 31, 35, §2926-b1.]

2927 Additional provisions. Such articles may include other provisions which are not inconsistent with the provisions of this chapter and shall be recorded by the county recorder without fee. [S13,§1683-f; C24, 27, 31, 35, §2927.]

2928 Private property exempt from debts—seal. Such association may sue and be sued, but the private property of the members shall be exempt from corporate debts. It may have a seal which it may alter at pleasure. [S13, §1683-d; C24, 27, 31, 35,§2928.]

2929 Powers of association. Such association shall have power to:

1. Establish and maintain a permanent agricultural school, in which agriculture, horticulture, animal industry, and domestic science shall be taught.
2. Employ one or more teachers, experts, or advisers to teach, advance, and improve agriculture, horticulture, animal industry, and domestic science, in the county, under such terms, conditions, and restrictions as may be deemed advisable by the board of directors.
3. Use part or all of the sum annually received as dues from its members in payment of prizes offered in any department of its work, including agricultural fairs, short courses, or farmers institutes.
4. Adopt bylaws.
5. Take by gift, purchase, devise, or bequest, real or personal property.
6. Do all things necessary, appropriate, and convenient for the successful carrying out of the objects of the association. [SS15,§1683-e; C24, 27, 31, 35,§2929.]

2930 Appropriation by board of supervisors. When articles of incorporation have been filed as provided by this chapter and the secretary and treasurer of the corporation have certified to the board of supervisors of such county that the organization has at least two hundred bona fide members, whose aggregate yearly membership dues and pledges to such organization, amount to not less than one thousand dollars, the board of supervisors shall appropriate to such organization from the general fund of the county a sum double the amount of the aggregate of such dues and pledges. Such sum shall not exceed, in any year, a total of five thousand dollars in counties with a population of twenty-five thousand or over, nor a total of three thousand dollars in counties with a smaller population; provided that in counties holding court in two cities and having a population greater than sixty thousand wherein two farm aid associations have been organized and shall have qualified under this law for the appropriations, the total appropriations in any one year shall not exceed seven thousand dollars. [C24, 27, 31, 35,§2930.]

Clause following semicolon was added to original section after the original section had been repealed. See 43GA, chs 79, 80

2931 Limitation on aid. The only farm improvement association which shall be entitled to receive such county aid shall be one organized to cooperate with the United States department of agriculture, the state department of agriculture, and the Iowa state college of agriculture and mechanic arts. [C24, 27, 31, 35,§2931.]

2932 Funds advanced by federal government. The president and the secretary of the association shall, prior to the time of advancing any funds, as herein provided, certify to the board of supervisors the amount, if any, advanced to the association by the government of the United States for the ensuing year in aid of the objects of the association. [S13,§1683-p; C24, 27, 31, 35,§2932.]

2933 Funds—how expended. The treasurer of the association shall receive all funds advanced or belonging to it and pay out the same only on bills allowed by the board of directors, such allowance to be certified to by the president or secretary. [S13,§1683-m; C24, 27, 31, 35,§2933.]

2934 Bond of treasurer. The treasurer of such association shall give a bond with proper sureties. The amount of such bond shall be fixed by the board of directors but shall not be less than five thousand dollars nor less than double the amount likely to come into his hands at any time. Such bond shall be filed with and approved by the county auditor and recorded without fee. [S13,§1683-i; C24, 27, 31, 35,§2934.]

2935 Compensation. No salary or compensation of any kind shall be paid to the president, vice president, treasurer, or to any director of the association. [S13,§1683-g; C24, 27, 31, 35, §2935.]

2936 Dividends—diversion of funds. No dividend shall ever be declared by the association and any diversion of the funds or property of such organization to any other purpose than that for which such organization was incorporated shall constitute larceny and be punished accordingly. [S13,§§1683-h,-o; C24, 27, 31, 35,§2936.]

Punishment, §13006

2937 False certificate. Any officer of the association making any certificate herein required, knowing the same to be false or incorrect in any particular, shall be guilty of a misdemeanor and punished accordingly. [S13,§1683-n; C24, 27, 31, 35,§2937.]

Punishment, §12894

2938 Annual reports. The outgoing president and treasurer shall, on the first Monday of January of each year, file with the county auditor full and detailed reports under oath of all receipts and expenditures of such association, showing from whom received and to whom paid and for what purpose. One duplicate of such report shall be forwarded to the Iowa state college of agriculture and mechanic arts, and one duplicate shall be forwarded to the department of agriculture, together with such additional information as they may require. The books, papers, and records of the association shall at all times be open to the inspection of the department and to the board of supervisors or anyone appointed by the board to make such inspection. [S13,§1683-j; C24, 27, 31, 35,§2938.]

CHAPTER 139

CORN AND SMALL GRAIN GROWERS ASSOCIATION

Referred to in §§2591, 2875

2939 Recognition of organization.
2940 Duties and objects of association.
2941 Executive committee.
2942 Employees of committee.
2943 Expenses of officers.

2939 Recognition of organization. The organization now existing in and incorporated under the laws of this state and known as the Iowa corn and small grain growers association, shall be entitled to the benefits of this chapter by filing each year with the department of agriculture verified proofs of its organization and of the names of its president, vice president, secretary, and treasurer, and that five hundred persons are bona fide members of the association, together with such other information as the department of agriculture may require. [C24, 27, 31, 35,§2939.]

State aid, see biennial appropriation act

2940 Duties and objects of association. The Iowa corn and small grain growers association shall:

1. Advance the interests of the farmers in securing better methods of selecting and caring for seed corn and small grain.
2. Improve and develop varieties of corn and small grain especially adapted to Iowa.
3. Encourage better and more thorough methods of production.
4. Hold an annual convention for instruction in corn and small grain growing at the same time as the farmers winter short course at the state college of agriculture and mechanic arts.
5. Issue certificates of qualification to experts in judging of corn and small grain.
6. Publish a seed directory which will indicate the places where good seed may be secured.
7. Help in disseminating good seed especially adapted to Iowa conditions.
8. Promote in such other ways as the association may think advisable the objects set out in this section.
9. Make an annual report of the proceedings and expenditures to the secretary of agriculture. [C24, 27, 31, 35,§2940.]

2941 Executive committee. The business of the association shall be transacted by an executive committee which shall consist of:

1. The president and the secretary of the association.
2. The dean of the division of agriculture of the Iowa state college of agriculture and mechanic arts.
3. A member of the faculty of said college engaged in the teaching of agronomy to be designated by said dean.
4. The secretary of agriculture. [C24, 27, 31, 35,§2941.]

2942 Employees of committee. The executive committee may employ one or more competent persons who shall devote their entire time, while employed by the association, to carrying out the provisions of this chapter. Such persons shall receive such compensation as the executive committee may fix and their necessary expenses incurred while engaged in such work. [C24, 27, 31, 35,§2942.]

2943 Expenses of officers. The officers of the association shall serve without compensation, but shall receive their necessary expenses while engaged in the business of the association. [C24, 27, 31, 35,§2943.]

CHAPTER 140

STATE DAIRY ASSOCIATION

Referred to in §§2591, 2875

2944 Recognition of organization.
2945 Duties and objects of association.
2946 Executive committee.
2947 Employees of committee.
2948 Expenses of officers.

2944 Recognition of organization. The organization known as the Iowa state dairy association shall be entitled to the benefits of this chapter by filing each year with the department of agriculture verified proofs of its organization, the names of its president, vice president, secretary, and treasurer, and that five hundred persons are bona fide members of said association, together with such other information as the department of agriculture may require. [C24, 27, 31, 35,§2944.]

State aid, see biennial appropriation act

2945 Duties and objects of association. The Iowa state dairy association shall:

1. Cause inspection to be made of dairy products, farms, cattle, barns, and other buildings, appliances, and methods used or employed in connection with the dairy industry of the state.
2. Promote dairy test associations, shows, and sales.
3. Publish a breeders directory.
4. Furnish such general instruction and assistance, either by institutes or otherwise, as it may deem proper, to advance the general interests of the dairy industry.
5. Make an annual report of the proceedings and expenditures to the secretary of agriculture. [C24, 27, 31, 35,§2945.]

2946 Executive committee. The association shall conduct its business through an executive committee which shall consist of:

1. The president and the secretary of the association.
2. The dean of the division of agriculture of the Iowa state college of agriculture and mechanic arts.
3. A member of the faculty of said college engaged in the teaching of dairying to be designated by said dean.
4. The secretary of agriculture. [C24, 27, 31, 35,§2946.]

2947 Employees of committee. The executive committee may employ two or more competent persons who shall devote their entire time, under the direction of the executive committee, in carrying out the provisions of this chapter. Such persons shall hold office at the pleasure of the committee, and each shall receive a salary of not to exceed three thousand dollars per annum, and their necessary expenses incurred while engaged in such work. [C24, 27, 31, 35, §2947.]

2948 Expenses of officers. The officers of the association shall serve without compensation, but shall receive their necessary expenses while engaged in the business of the association. [C24, 27, 31, 35,§2948.]

CHAPTER 140.1

DAIRY CALF CLUB EXPOSITION

Referred to in §§2591, 2875

2948.1 4-H dairy calf club exposition.
2948.2 "Exposition" defined.
2948.3 Statement of expenditures.
2948.4 Certification by department.
2948.5 Payment of state aid.

2948.1 4-H dairy calf club exposition. The Iowa state dairy association is hereby empowered, authorized and directed to hold annually at such time and place in Iowa as said association may select an exposition of 4-H dairy calves and contests. [C35,§2948-g1.]

2948.2 "Exposition" defined. For the purpose of this chapter, 4-H dairy calf club exposition is interpreted to include the exhibits of dairy club heifers and the holding of judging contests, demonstration contests, record book contests, and production contests for 4-H dairy club members. [C35,§2948-g2.]

2948.3 Statement of expenditures. After each exposition the president and secretary of said association shall file with the state secretary of agriculture a sworn statement of the actual amount of cash premiums paid at such exposition for the current season which must correspond with the published offer of premiums by said association. [C35,§2948-g3.]

Referred to in §2948.4

2948.4 Certification by department. The department of agriculture on receipt of such statement shall, if it complies with section 2948.3, certify to the state comptroller that a named amount is due said association as state aid. [C35,§2948-g4.]

State aid, see biennial appropriation act

2948.5 Payment of state aid. The state comptroller on receipt of such certificate shall draw a warrant in favor of the secretary or treasurer of said association for a sum equal to eighty percent of the amount paid in premiums by it, but in no case shall the amount exceed two thousand dollars in any one year. [C35,§2948-g5.]

CHAPTER 141

BEEF CATTLE PRODUCERS ASSOCIATION

Referred to in §§2591, 2875

2949 Recognition of organization.
2950 Duties and objects of association.
2951 Executive committee.
2952 Employees of committee.
2953 Expenses of officers.

2949 Recognition of organization. The Iowa beef cattle producers association now existing in and incorporated under the laws of this state shall be entitled to the benefits of this chapter by filing, each year, with the department of agriculture, verified proof of the names of its president, vice president, secretary, and treasurer, and that five hundred persons are bona fide members of said association, together with such other information as the department of agriculture may require. [C24, 27, 31, 35,§2949.]

State aid, see biennial appropriation act

2950 Duties and objects of association. The Iowa beef cattle producers association shall:

1. Aid in the promotion of the beef cattle industry of the state.
2. Provide for practical and scientific instruction in the breeding and raising of beef cattle.
3. Provide for the inspection of herds, premises, appliances, methods, and feedstuffs used in the raising of beef cattle.
4. Make demonstrations in the feeding of beef cattle and publish suggestions beneficial to such business.

5. Aid and promote beef cattle feeding contests, shows, and sales.
6. Publish a breeders directory.
7. Make an annual report of the proceedings and expenditures to the secretary of agriculture. [C24, 27, 31, 35,§2950.]

2951 Executive committee. The association shall act through an executive committee which shall consist of:

1. The president and the secretary of the association.
2. The dean of the division of agriculture of the Iowa state college of agriculture and mechanic arts.
3. A member of the faculty of said college engaged in the teaching of animal husbandry to be designated by said dean.
4. The secretary of agriculture. [C24, 27, 31, 35,§2951.]

2952 Employees of committee. The executive committee may employ two or more competent persons who shall devote their entire time, under the direction of the committee, in carrying out the provisions of this chapter. Such persons shall hold office at the pleasure of the committee and shall each receive a salary not to exceed three thousand dollars per annum, and their necessary expenses incurred while engaged in such work. [C24, 27, 31, 35,§2952.]

2953 Expenses of officers. The officers of the association shall serve without compensation, but shall receive their necessary expenses while engaged in the business of the association. [C24, 27, 31, 35,§2953.]

CHAPTER 141.1

IOWA HORSE AND MULE BREEDERS ASSOCIATION

Referred to in §§2591, 2875

2953.1 Recognition of organization.
2953.2 Duties and objects of the association.
2953.3 Executive committee.
2953.4 Expenses of officers.

2953.1 Recognition of organization. The organization known as the Iowa horse and mule breeders association shall be entitled to the benefits of this chapter by filing each year with the department of agriculture verified proofs of its organization, the names of its president, vice president, secretary, and treasurer, containing five hundred bona fide members, together with such other information as the department of agriculture may require. [C27, 31, 35,§2953-b1.]

State aid, see biennial appropriation act

2953.2 Duties and objects of the association. The Iowa horse and mule breeders association shall:

1. Aid in the promotion of the horse and mule industry of the state.
2. Provide for practical and scientific instruction in breeding, growing, and feeding of horses and mules.
3. Make demonstrations in the feeding and care of horses and mules and publish suggestions beneficial to such industry.
4. Aid and promote horse and mule contests and shows.
5. Publish a breeders directory.
6. Make an annual report of the proceedings and expenditures to the secretary of agriculture. [C27, 31, 35,§2953-b2.]

2953.3 Executive committee. The association shall act by and through an executive committee consisting of:

1. The president and the secretary of the association.
2. The dean of the college of agriculture and mechanic arts, and the head of the department of animal husbandry.
3. The secretary of agriculture. [C27, 31, 35, §2953-b3.]

2953.4 Expenses of officers. The officers of the association shall serve without compensation but shall receive their necessary expenses while transacting the business of the association. [C27, 31, 35,§2953-b4.]

CHAPTER 141.2

SWINE PRODUCERS ASSOCIATION

Referred to in §§2591, 2875

2953.5 Recognition of association.
2953.6 Duties and objects of association.
2953.7 Executive committee.
2953.8 Employees of committee.
2953.9 Expenses of officers.

2953.5 Recognition of association. The organization known as the Iowa swine producers association shall be entitled to the benefits of this chapter by filing each year with the department of agriculture verified proof of its organization, the names of its president, vice president, secretary and treasurer and that five hundred persons are bona fide members, together with such other information as the department of agriculture may require. [47GA, ch 111,§1.]

State aid, see biennial appropriation act

2953.6 Duties and objects of association. The duties and objects of the Iowa swine producers association shall be:

1. To promote the welfare of the swine industry in Iowa.

2. To aid in the orderly marketing of swine.
3. To carry on educational work to increase consumption and improve the processing of pork and its products.
4. To make an annual report of the proceedings and expenditures to the secretary of agriculture. [47GA, ch 111,§2.]

2953.7 Executive committee. The association shall act by and through an executive committee which shall consist of:
1. The president, the secretary and the treasurer of the association.
2. The dean of the division of agriculture of the Iowa state college of agriculture and mechanic arts, or a member of the faculty of said college engaged in the teaching of swine husbandry to be designated by said dean.
3. The secretary of agriculture of the state of Iowa. [47GA, ch 111,§3.]

2953.8 Employees of committee. The executive committee may employ one or more competent persons who shall devote their entire time, under the direction of the committee, in carrying out the provisions of this chapter. Such persons shall hold office at the pleasure of the committee. [47GA, ch 111,§4.]

2953.9 Expenses of officers. The officers of the association shall serve without compensation, but shall receive their necessary expenses while engaged in the business of the association. [47GA, ch 111,§5.]

CHAPTER 142

POULTRY ASSOCIATIONS

Referred to in §§2591, 2875

COUNTY SHOW
2954 State aid.
2955 Certification by department.
2956 Payment of state aid.
2957 Division of state aid.

STATE SHOW
2958 State-wide show—management.
2959 Location of state-wide poultry show.
2960 Statement of expenditures.
2960.1 Required income, etc.
2961 Certification by department.
2962 Payment of state aid.

DISTRICT SHOW
2962.1 Affiliated county associations.
2962.2 District show management.
2962.3 Showing required.
2962.4 State aid.

COUNTY SHOW

2954 State aid. Every poultry association which complies with the following conditions shall be entitled to the aid herein provided:
1. The association shall be composed of at least fifteen bona fide poultry raisers or dealers in poultry, residing in any one county.
2. The membership of the association must be open to all persons on an equal basis, with a minimum membership fee of twenty-five cents, or a maximum fee not exceeding one dollar.
3. The association shall have a president, vice president, secretary, treasurer, and a board of directors of at least three persons other than said officers.
4. The annual income in cash of the association, exclusive of state aid, shall be at least one hundred dollars, and the total expenditures in cash shall be one hundred dollars, in addition to the state aid.
5. The association shall hold a bona fide poultry show, each year, of not less than two working days.
6. The association shall notify the department on or before October 1 of its intention of holding a poultry show.
7. The association shall, on or before June 1 of each year, file with the department of agriculture a sworn statement showing compliance with the foregoing conditions, and, in detail, the manner in which its funds for the preceding twelve months have been expended, together with such other information as the department may require. [C24, 27, 31, 35,§2954.]

Referred to in §2955
State aid, see biennial appropriation act

2955 Certification by department. The department of agriculture shall on receipt of such statement, if it complies with section 2954, and the expenditures listed therein appear to be bona fide, certify to the state comptroller after the time for filing such statement has expired, that the association has complied with all conditions imposed by this chapter and is entitled to the state aid herein provided. [C24, 27, 31, 35,§2955.]

2956 Payment of state aid. The comptroller, on receipt of such statement, shall issue his warrant to the treasurer of such association for one hundred dollars. [C24, 27, 31, 35, §2956.]

2957 Division of state aid. If more than one such association from the same county is entitled to state aid, the one hundred dollars shall be equally divided among such associations and the comptroller shall draw the warrants accordingly. [C24, 27, 31, 35,§2957.]

STATE SHOW

2958 State-wide show — management. An annual state-wide poultry show is hereby authorized. Such show shall be conducted or managed by the officers of the local poultry association of the place at which such show is held. [C24, 27, 31, 35,§2958.]

2959 Location of state-wide poultry show. At each state poultry show, a convention shall be held to determine the place of holding the next state show, but such show shall not be held

oftener than once in three years in the same city or town. Each association that has complied with the provisions of this chapter, for state aid, shall be entitled to send one delegate, who shall have one vote on all questions that arise. The officers of the local association conducting the show shall officiate at the convention. [C24, 27, 31, 35,§2959.]

2960 Statement of expenditures. Such local poultry association, through its treasurer, shall, upon the adjournment of the state-wide poultry show, file with the department of agriculture a sworn statement which shall show the time and place of holding such show and an itemized statement of all expenditures on account thereof, and the specific purposes for which the same were expended, together with such other information as the department may require. [C24, 27, 31, 35,§2960.]

2960.1 Required income, etc. The annual income in cash, exclusive of state aid, shall be five hundred dollars, and the total expenditures in cash shall be five hundred dollars, in addition to the state aid. [C27, 31, 35,§2960-a1.]

2961 Certification by department. The department of agriculture, on receipt of such statement, if the same is, in its judgment, sufficient, and the expenditures bona fide, shall certify to the state comptroller that such state-wide poultry show has been held under the management of such local association. Said certificate shall show the amount of the bona fide expenditures on account of such convention. [C24, 27, 31, 35,§2961.]

2962 Payment of state aid. The comptroller, on receipt of such certificate, shall issue his warrant to the treasurer of such association for the amount of said expenditures, but in no case shall such warrant exceed five hundred dollars in any one year. [C24, 27, 31, 35,§2962.]

DISTRICT SHOW

2962.1 Affiliated county associations. Poultry associations in counties where no local poultry show is held, may affiliate with associations in adjacent counties and hold a district poultry show at some location that is mutually satisfactory. [C31, 35,§2962-d1.]

44GA, ch 61, §2, editorially divided

2962.2 District show management. Each county poultry association affiliating with a district show shall form a county association as set forth in this chapter, and notify the department, on or before October 1, of its intentions of affiliating with other counties in the holding of a district poultry show. The president, vice president, secretary and treasurer of such affiliating county poultry associations shall meet and elect officers who shall manage and conduct the district poultry show. [C31, 35,§2962-d2.]

2962.3 Showing required. The officers of a district poultry show shall, on or before June 1 of each year, file with the department of agriculture a sworn statement showing compliance with all of the foregoing conditions and in detail the manner in which its funds have been expended, together with such other information as the department may require. The annual income in cash, exclusive of state aid, shall be at least one hundred dollars per county that is affiliated with a district organization, and the total expenditures in cash shall be one hundred dollars per county affiliated, in addition to the state aid. The total amount of state aid which will be available for such district show shall be the amount that would otherwise be available to the respective county poultry associations. [C31, 35,§2962-d3.]

2962.4 State aid. Said state aid shall be payable to the treasurer of said district poultry show under substantially the same procedure as governs the payment of such aid in case of a state-wide poultry show. [C31, 35,§2962-d4.]

CHAPTER 143

STATE HORTICULTURAL SOCIETY

Referred to in §§2591, 2875

2963 Meetings and organization of society.
2964 Horticultural exposition.
2965 Affiliation with allied societies.
2966 Annual report.
2966.1 Appropriations.

2963 Meetings and organization of society. The state horticultural society shall hold meetings each year, at such times as it may fix, for the transaction of business. The officers and board of directors of the society shall be chosen as provided for in the constitution of the society, for the period and in the manner prescribed therein, but the secretary of agriculture shall be a member of the board of directors and of the executive committee. Any vacancy in the offices filled by the society may be filled by the executive committee for the unexpired portion of the term. [C73,§1117; C97,§1669; C24, 27, 31, 35,§2963.]

2964 Horticultural exposition. The society is authorized to hold, at such time and in such place in Iowa as it may select, a horticultural exposition, including honey products and manufactured plant products, with practical and scientific demonstrations of approved methods of crop production, grading, packing, marketing, and establishment of standard market grades pertaining to horticulture. It may delegate to its executive committee the duty and power to make and execute all plans for the holding of such an exposition. [C24, 27, 31, 35,§2964.]

2965 Affiliation with allied societies. The society shall encourage the affiliation with itself of societies organized for the purpose of furthering the horticultural, honey bee, or forestry interests of the state. [C73,§1118; C97,§1670; C24, 27, 31, 35,§2965.]

2966 Annual report. The secretary shall make an annual report to the department of agriculture at such time as the department may require. Such report shall contain the proceedings of the society, an account of the exposition, a summarized statement of the expenditures for the year, the general condition of horticultural, honey bee, and forestry interests throughout the state, together with such additional information as the department may require. [C73,§1119; C97,§1671; C24, 27, 31, 35,§2966.]

2966.1 Appropriations. All money appropriated by the state for the use of the state horticultural society shall be paid on the warrant of the state comptroller, upon the order of the president and secretary of said society, in such sums and at such times as may be for the interests of said society. All expenditures from state funds for the use of the state horticultural society are to be approved by the secretary of the state department of agriculture. [C27, 31, 35,§2966-a1.]

State aid, see biennial appropriation act

CHAPTER 144

LIEN FOR SERVICES OF ANIMALS

This chapter (§§2967 to 2975, inc.) transferred for more logical location. See chapter 457.1

CHAPTER 145

MARKING AND BRANDING OF ANIMALS

2976 Marks and brands.
2977 Record.
2978 Mark previously recorded.

2976 Marks and brands. The board of supervisors of each county shall procure, at the expense of the county, a book for each civil township, to be in the custody of the township clerk, in which to record the marks and brands of horses, sheep, hogs, and other animals. [C51, §920; R60,§1555; C73,§1479; C97,§2334; C24, 27, 31, 35,§2976.]

2977 Record. Any person wishing to mark or brand his domestic animals with any distinguishing mark may adopt his own mark, and have a description thereof recorded by the clerk of the township in which the owner lives, for which such clerk shall receive a fee of twenty-five cents. [C51,§§921, 923; R60,§§1556, 1558; C73,§§1480, 3809; C97,§2335; C24, 27, 31, 35, §2977.]

2978 Mark previously recorded. No person shall adopt a mark or brand previously recorded to another person residing in the same township, nor shall the clerk record the same one to two persons, unless on their joint application. [C51, §922; R60,§1557; C73,§1481; C97,§2336; C24, 27, 31, 35,§2978.]

CHAPTER 146

ESTRAYS AND TRESPASSING ANIMALS

2979 Definition of terms.
2980 Restraint of animals.
2981 Trespass on lawfully fenced land.
2982 Neglect to maintain partition fence.
2983 Trespass on unfenced land.
2984 Trespass on highway.
2985 Animals under control.
2986 Action in lieu of distraint.
2987 Action when stock is released or has escaped.
2988 Release on payment of ratable share.
2989 Procedure on distraint.
2990 Appointee in lieu of trustee.
2991 Tender.
2992 Assessment of damages.
2993 Failure to pay damages.
2994 Escape or release.
2995 Sale.
2996 Unknown owner.
2997 Appeal—time.
2998 Appeal bonds—amount.
2999 Appeal by claimant—effect.
3000 Release pending appeal.
3001 Appeal by owner—effect.
3002 Transcript—clerk to file.
3003 Unlawful release.
3004 Taking up estray.
3005 Procedure on taking up estray.
3006 Proof of service.
3007 Justice record.
3008 Record and posting by county auditor.
3009 Publication.
3010 Fees and expenses.
3011 Two or more estrays—procedure.
3012 Property vests when.
3013 Recovery by owner.
3014 Former owner—rights after vesting of title.
3015 Lawful use of estray.
3016 Unlawful use of estray.
3017 Nonliability of taker-up.
3018 Penalty against finder.
3019 Transfer of estrays.
3020 Sale of estrays.
3021 Notice.
3022 Assessment of damages and costs.
3023 Owner discovered.
3024 Penalty.
3025 Bond to release.
3026 Compensation and fees.
3027 Neglected animals.
3028 Disabled animals killed.

2979 Definition of terms. As used in this chapter:

1. "Owner" when used with reference to animals, means any person in possession or entitled to the present possession thereof, or having care or charge of them, or holding the legal title to them.

2. "Owner" when used with reference to lands, means the person having title thereto, or the lessee or occupant thereof.

3. "Animal" or "animals" when used in this chapter shall include and embrace horses, cattle, swine, sheep, goats, mules, and asses.

4. "Estray" shall mean any animal unlawfully running at large the ownership of which cannot, with reasonable inquiry in the neighborhood, be ascertained, or any animal which has been abandoned by its owner.

5. "Trespassing animals" means those unlawfully upon land, or running at large contrary to law or police regulations. [C97,§2311; C24, 27, 31, 35,§2979.]

2980 Restraint of animals. All animals shall be restrained by the owners thereof from running at large. [C51,§114; R60,§§250, 287, 1522; C73,§§309, 1446, 1447, 1457, 1461–1463; C97, §§444, 445, 2312, 2314; C24, 27, 31, 35,§2980.]

2981 Trespass on lawfully fenced land. Any animal trespassing upon land, fenced as provided by law, may be distrained by the owner of such land, and held for all damages done thereon by it, unless it escaped from adjoining land in consequence of the neglect of such landowner to maintain his part of a lawful partition fence. [C51,§§913, 914; R60,§§1548, 1549; C73,§§1448, 1449; C97,§2313; C24, 27, 31, 35, §2981.]

Fences, ch 88

2982 Neglect to maintain partition fence. The owner of the land from which such animal escaped shall also be liable for such damages if it escaped therefrom in consequence of his neglect to maintain his part of a lawful partition fence, or if the trespassing animal was not lawfully upon his land, and he had knowledge thereof. [C51,§§913, 914; R60,§§1548, 1549; C73,§§1446, 1448, 1449, 1452; C97,§§2313, 2314; C24, 27, 31, 35,§2982.]

Fences, ch 88

2983 Trespass on unfenced land. If there be no lawful partition fence, and the line thereof has not been assigned either by the fence viewers or by agreement of the parties, any animal trespassing across such partition line shall not be distrained, nor shall there be any liability therefor. [C97,§2313; C24, 27, 31, 35,§2983.]

2984 Trespass on highway. Animals which are unlawfully running at large on the highway may be distrained by the owner of the adjoining land and held for damages done by them and for the costs provided in this chapter. [R60, §287; C73,§§1446, 1448, 1452; C97,§2314; C24, 27, 31, 35,§2984.]

2985 Animals under control. An animal shall not be considered as running at large so long as it is under the reasonable care and control of the owner upon the public road for driving or travel thereon. [C97,§2314; C24, 27, 31, 35,§2985.]

2986 Action in lieu of distraint. Instead of distraining trespassing animals, the injured person may recover all damages caused thereby in an action against the owner thereof, and may join therein the owner of the land from which it escaped, if he is liable therefor, and all or any of the different owners of the animals who have not paid their proportion of the damages or costs. [C97,§§2315, 2316; C24, 27, 31, 35, §2986.]

2987 Action when stock is released or has escaped. If distrained animals escape or are released without the consent of the distraining party, he may recover his damages as above provided, with costs, and the costs of distraint made prior to such escape or release. [C97, §2315; C24, 27, 31, 35,§2987.]

2988 Release on payment of ratable share. If there is more than one owner of distrained animals, each may pay his ratable share of the damages and costs, and release his animals. [C73,§1447; C97,§§2312, 2316; C24, 27, 31, 35, §2988.]

2989 Procedure on distraint. The person distraining animals shall, within twenty-four hours after such distraint, Sunday not included, notify the owner of the animals of such distraint and of the actual amount of damages and costs caused by such animals. If the said owner fails to satisfy such damages and costs within twenty-four hours after such notification, the person distraining shall immediately notify the township trustees and demand that they appear upon the premises where the damages occurred and assess the damages. The trustees shall immediately fix a time for the assessment of such damages and notify the owner of the animal accordingly. [C51,§919; R60,§§1552, 1554; C73, §§1447, 1454; C97,§§2312, 2317; C24, 27, 31, 35, §2989.]

2990 Appointee in lieu of trustee. If for any reason one or more trustees shall be unable to act, the trustees present shall appoint one or more disinterested citizens in place of such trustees. [C51,§916; R60,§1551; C73,§1454; C97,§2317; C24, 27, 31, 35,§2990.]

2991 Tender. The owner of the animals may tender to the person suffering damage an amount less than that demanded by claimant, as damages and costs, and if such tender be refused, and the final assessment of damages be no more than such tender, then all costs, and compensation for keeping the animals accruing after such tender, shall be paid by the person distraining the animals. [C24, 27, 31, 35,§2991.]

Tender in general, ch 421

2992 Assessment of damages. The trustees, or a majority thereof, shall meet on the premises where the damages occurred at the time fixed

and assess the damages and costs and file their written report with the township clerk, who shall record the same. Said assessment shall be final unless appealed from. [C73,§§1454, 1455; C97,§§2317-2319; C24, 27, 31, 35,§2992.]

2993 Failure to pay damages. If the owner of the distrained animals neglects for two days after such assessment to pay the amount thereof, the township clerk shall at once post up in three conspicuous places in the township a notice of the time and place at which he will sell said animals, describing them. The place of sale shall be at the place of distraint. The sale shall be between the hours of one and three o'clock p. m. and on a day not less than five nor more than ten days after the posting. [C73, §1454; C97,§2317; C24, 27, 31, 35, §2993.]

2994 Escape or release. If any distrained animal escape, or is unlawfully released, the injured person may recapture the same. If the recapture is effected before the day of sale as already fixed in the notice, the sale shall proceed under such notice. If the recapture is effected after the day of sale has passed, the township clerk shall issue new notices of sale and proceed anew. [C97,§2319; C24, 27, 31, 35, §2994.]

2995 Sale. The clerk shall, at the time and place named in said notice, sell the animals at public sale to the highest bidder for cash, but only such number of animals shall be sold as is necessary to satisfy the damages and costs. Animals unsold shall be at once returned to the owner, and also the surplus remaining, if any, out of any sold. [C51,§918; R60,§1553; C73, §§1447, 1454; C97,§§2312, 2317; C24, 27, 31, 35, §2995.]

40ExGA, HF 71, §18, editorially divided

2996 Unknown owner. Should the owner of the surplus be unknown the same shall be paid to the county treasurer, who shall give duplicate receipts therefor, one of which shall be filed with the county auditor. The owner of said animal, on filing a claim therefor within twelve months after payment to the treasurer, shall be entitled to receive said surplus from the county. [C51,§918; R60,§1553; C73,§§1447, 1454; C97,§§2312, 2317; C24, 27, 31, 35,§2996.]

2997 Appeal—time. Any person aggrieved by the assessment made by the trustees may appeal to the district court by filing with the township clerk, within four days after the report of the trustees is filed with such clerk, an appeal bond with sureties to be approved by said clerk and conditioned to pay all damages and costs. [C73,§1455; C97,§2318; C24, 27, 31, 35,§2997.]

2998 Appeal bonds—amount. Appeal bonds shall be in the following amounts:

1. When the appeal is taken by the person distraining the animals, twice the value of the animals, as fixed by the clerk.
2. When the appeal is taken by the owner of the distrained animals, twice the value of the animals, so fixed, or twice the amount of damages and costs in those cases where the value of the animals exceeds the amount of the damages claimed. [C73,§1455; C97,§2318; C24, 27, 31, 35,§2998.]

2999 Appeal by claimant—effect. When an appeal is thus taken by the person distraining such animals the animals shall be held for the satisfaction of such judgment as may be rendered on appeal, except as provided in section 3000. [C97,§2318; C24, 27, 31, 35,§2999.]

3000 Release pending appeal. The owner of said animals may secure the release of the same at any time before judgment by filing with the township clerk before the appeal is certified, or with the clerk of the district court thereafter, a bond with sufficient sureties to be approved by the clerk with whom filed, conditioned to pay all damages and costs recovered in said cause on appeal. The clerk receiving such bond shall file the same, and forthwith certify the fact to the person having charge of the distrained animals, who shall thereupon release the same to the owner. [C97,§2318; C24, 27, 31, 35,§3000.]

Referred to in §2999

3001 Appeal by owner—effect. Where the owner appeals and files a bond, as herein provided, it shall operate as a supersedeas, and the distrained animals shall be released to him. [C73,§1455; C97,§2318; C24, 27, 31, 35,§3001.]

3002 Transcript—clerk to file. Within five days after the taking of the appeal, the township clerk shall make out a certified transcript of the record of the finding of the trustees, and file the same, together with the notice of appeal, if in writing, and the bond, with the clerk of the district court. [C97,§2318; C24, 27, 31, 35, §3002.]

3003 Unlawful release. Any person who releases any animal, distrained as provided in this chapter, without the consent of the person distraining the same, shall be guilty of a misdemeanor. [C97,§2320; C24, 27, 31, 35,§3003.]

Punishment, §12894

3004 Taking up estray. Any resident of a county may take up an estray when the same is on his premises. He may also take up an estray which is upon the premises of any other person when such other person had knowledge that such estray was on his premises and fails for five days to take up such estray. [R60, §§1511-1513; C73,§§1464, 1465; C97,§§2321, 2322; C24, 27, 31, 35,§3004.]

3005 Procedure on taking up estray. A person taking up an estray shall, within five days thereafter, post up, for ten days, a written notice in three of the most public places in the township, which notice shall be signed by him and shall embrace:

1. A full description of said animal.
2. The time and place of taking up such estray. [R60, §§1511-1513; C73, §1466; C97, §2323; C24, 27, 31, 35,§3005.]

3006 Proof of service. Immediately after the expiration of said ten days of posting, the

person taking up the estray shall, unless such estray has been previously claimed by the owner, file with a justice of the peace in the township in which the estray was taken up, or, in case there is no justice in the township, then with the next nearest justice in the county, his affidavit which shall show:

1. The time and place of taking up such estray.
2. The time and places of posting said notice, together with a copy of said notice.
3. That said animal remains unclaimed.
4. Whether the marks or brands of said animal have been altered to his knowledge, either before or after the same was taken up. [R60, §§1511–1513; C73,§§1465, 1466; C97,§§2322, 2323; C24, 27, 31, 35,§3006.]

3007 Justice record. The justice shall record such return in his docket and at once forward the same to the county auditor, together with the fees due to such auditor in order to enable him to perform his duty. [R60,§§1511–1513; C73,§§1465, 1466; C97,§2323; C24, 27, 31, 35,§3007.]

3008 Record and posting by county auditor. The county auditor shall record the affidavit in the estray book in his office and cause a copy thereof to be posted at the door of the courthouse. [R60,§§1511–1513; C73,§§1465, 1466; C97,§2323; C24, 27, 31, 35,§3008.]

3009 Publication. The auditor shall cause the affidavit to be published once each week for three weeks in some newspaper in the county. [R60,§§1511–1513; C73,§1468; C97,§2324; C24, 27, 31, 35,§3009.]

3010 Fees and expenses. The person taking up an estray shall pay to the justice of the peace, with whom the affidavit is filed, the legal fees due the said justice, and the legal fees due to the county auditor for entering said affidavit in the estray book, and posting and publishing the same, which amounts, together with the compensation provided by law, shall be refunded to the person taking up such estray by the owner thereof in case the animal is restored to the owner. [R60,§1520; C73,§§3822, 3823; C97, §2325; C24, 27, 31, 35,§3010.]

3011 Two or more estrays—procedure. If two or more estrays are taken up at the same time by the same person, they shall be included in one notice and affidavit and but one fee shall be paid therefor, and if fewer than the whole number of animals thus included are restored to the owner, a proportionate amount of such fees and expenses shall be refunded. [R60, §1520; C73,§§3822, 3823; C97,§2325; C24, 27, 31, 35,§3011.]

3012 Property vests when. If the estray be not claimed by the owner within six months from the time it is taken up, the property therein shall vest in the taker-up, if he has complied with the provisions of this chapter. [R60,§1515; C73, §§1471, 1472; C97,§2326; C24, 27, 31, 35,§3012.]

3013 Recovery by owner. At any time before the property in the estray vests in the person who has taken it up, the owner shall be entitled to recover possession of it on paying to the person who has taken it up:

1. The compensation to which he is entitled by law.
2. The fees and expenses which the taker-up has paid in advance.
3. Any reward which has been offered by the owner.
4. A reasonable allowance for the expenses of keeping such estray, taking into account the use which the person taking up has had of it, which latter allowance shall be made by the court before whom a proceeding to recover the animal shall be brought in the event the owner and the taker-up cannot agree with reference thereto. [C73, §1474; C97,§2327; C24, 27, 31, 35,§3013.]

Referred to in §3014

3014 Former owner—rights after vesting of title. At any time within six months after the property in an estray has vested in the taker-up, the former owner shall be entitled to receive from the taker-up, on demand, the value of the estray, not including any increased value which has accrued since it was taken up, after deducting therefrom the compensation, reward, fees, and expenses referred to in section 3013; or the taker-up may, at his option, elect to surrender the estray, if still in his possession, in which case the owner must pay such compensation, reward, fees, and expenses. [C73,§1475; C97, §2328; C24, 27, 31, 35,§3014.]

3015 Lawful use of estray. Any person legally taking up an estray may use or work it, if he does so with care and moderation, and does not abuse or injure it. Estrays adapted thereto may be milked by the taker-up. [C73,§1473; C97,§2329; C24, 27, 31, 35,§3015.]

3016 Unlawful use of estray. Any person who unlawfully takes up any estray, or takes up any estray and fails to comply with any of the provisions of this chapter, or uses or works it in any manner contrary to this chapter, or works it before having it appraised, or keeps it out of the county for more than five days at any one time before he acquires a title to it, shall be liable to the owner of the estray for double the amount of any injury to the estray. [C73, §1473; C97,§2329; C24, 27, 31, 35,§3016.]

3017 Nonliability of taker-up. If any estray, legally taken up, escape from the finder or die without any fault on his part, he shall not be liable for the loss. [C73,§1476; C97,§2330; C24, 27, 31, 35,§3017.]

3018 Penalty against finder. If any person shall sell, trade, or take out of the state any estray before the legal title shall have vested in him, he shall forfeit to the owner double its value, and shall also be guilty of a misdemeanor. [C73,§1477; C97,§2331; C24, 27, 31, 35,§3018.]

Punishment, §12894

3019 Transfer of estrays. The personal representatives of a taker-up shall succeed to all the rights of such taker-up. The county auditor may authorize the taker-up or his personal representative to transfer an estray to another

person who shall take the place of his predecessor. [C97,§2331; C24, 27, 31, 35,§3019.]

3020 Sale of estrays. When an estray has damaged property and is taken up by the owner of such property, such owner, instead of proceeding against said animal as an estray as hereinbefore provided, may proceed against it as provided for the distraint and sale of animals, the ownership of which is known. [C24, 27, 31, 35,§3020.]

Referred to in §3021

3021 Notice. In cases contemplated by section 3020, a notice of the taking up and the amount of the claim for damages shall be served on the unknown owner by two publications of a notice in at least two of the official newspapers of the county, which notice shall:

1. Be signed by the taker-up, with his post-office address.
2. Be addressed to the unknown owner.
3. Contain a full description of the animal, including all marks or brands thereon.
4. Specify the time and place of the taking up, and the amount of damages and costs claimed.
5. Notify the unknown owner that unless he appears within six months and pays said damages and all legal costs, said taker-up will apply to the township clerk for an assessment of damages caused by said animal and costs, and will take proceedings for the sale of such animal for the payment thereof. [C24, 27, 31, 35,§3021.]

3022 Assessment of damages and costs. At any time after six months from the date of the last publication, or at any time after the owner appears and fails to pay said damages and costs, the taker-up may apply to the township clerk for an assessment of his damages and costs, and all subsequent proceedings shall be as provided in case of distraint of animals, the ownership of which is known. The legal fees for publishing said notice shall be included in the assessment of costs. [C24, 27, 31, 35,§3022.]

Referred to in §3023
Fees for publication, §11106

3023 Owner discovered. Should the taker-up mentioned in section 3022 discover the owner of said animal prior to the expiration of said six months, he shall immediately serve written notice upon such owner of the taking up of said animal and of the amount of his said claim, and unless the owner discharges said claim within twenty-four hours such taker-up shall proceed in the same manner as provided in case of the distraint of animals the ownership of which is known. [C24, 27, 31, 35,§3023.]

3024 Penalty. Any officer who fails to perform the duties enjoined upon him in this chapter in relation to estrays, shall be fined not less than five dollars nor more than fifty dollars. [C73,§1478; C97,§2332; C24, 27, 31, 35,§3024.]

3025 Bond to release. Before any property held under this chapter is sold under distraint, or before the title to an estray vests in the taker-up, it may be released at once upon the owner giving to the distrainor or taker-up a bond, with sureties, to be approved by the township clerk, justice of the peace or county auditor, before whom the matter is then pending, conditioned to pay to the holder of the property, within twenty days after such approval, all costs, damages and compensation to which he is entitled. In case the obligee in said bond is compelled to begin action on such bond, the court may tax a reasonable attorney's fee in favor of such obligee. [C73,§1486; C97,§2333; C24, 27, 31, 35,§3025.]

3026 Compensation and fees. The compensation for services under this chapter shall be as follows:

1. For distraining all animals except as otherwise provided, fifty cents for each head not exceeding two, and twenty-five cents for each additional head taken on one distraint.
2. For distraining each stallion, jack, bull, boar, or buck, one dollar.
3. For keeping horses, cattle, mules, and asses, fifty cents a day, from the time the same is taken up.
4. For keeping any other animals, twenty-five cents a day from the time the same is taken up.
5. For posting notices and selling animals, the same fees as are allowed constables for like services upon execution.
6. For taking up as an estray one head, fifty cents, and twenty-five cents for each additional head at one time.
7. To the justice of the peace, for all services in each case of taking up estrays, fifty cents.
8. To the county auditor, for all services in each case of estrays, including posting and publishing notice, but not including the fee of the printer, fifty cents.
9. To the township clerk, for posting notices, twenty-five cents, and services not otherwise provided for, the same fees as are allowed in assessing damages done by trespassing animals, with ten cents mileage each way.
10. To the township clerk, ten cents per each hundred words entered of record, the same fees for a copy thereof, and in addition twenty-five cents for his certificate thereto, and fifty cents for filing and approving any bond. [C51,§893; R60,§1520; C73,§§3821, 3822; C97,§2349; C24, 27, 31, 35,§3026.]

Fees of constable, §10637

3027 Neglected animals. Any person may take charge of any animal when the owner fails to properly take care and provide for it, and may furnish the same with proper care, either on his own premises or on the premises of the owner, and shall have a lien on the animal for the same, and the reasonable value of such care may be collected by him from the said owner. [C73,§§1482, 1483; C97,§§2337, 2338; C24, 27, 31, 35,§3027.]

3028 Disabled animals killed. The sheriff, constable, peace officer, officer of any society for the prevention of cruelty to animals, or any magistrate, shall destroy any estray animal disabled and unfit for further use. [C73,§1484; C97,§2339; C24, 27, 31, 35,§3028.]

TITLE X

REGULATION AND INSPECTION OF FOODS, DRUGS, AND OTHER ARTICLES

Referred to in §2591

CHAPTER 147

GENERAL PROVISIONS

Referred to in §§3119, 3178, 3179, 3181, 3262, 3265, 3271, 3272

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3029 Definitions. For the purpose of this title:

1. "Article" shall include food, commercial feed, agricultural seed, commercial fertilizer, drug, insecticide, fungicide, paint, linseed oil, turpentine, and illuminating oil, in the sense in which they are defined in the various provisions of this title.

2. "Department" shall mean the department of agriculture, and, wherever said department is required or authorized to do an act, it shall be construed as authorizing performance by a regular assistant or a duly authorized agent of said department.

3. "Secretary" shall mean the secretary of agriculture.

4. "Package" or "container", unless otherwise defined, shall include wrapper, box, carton, case, basket, hamper, can, bottle, jar, tube, cask, vessel, tub, firkin, keg, jug, barrel, tank, tank car, and other receptacles of a like nature; and wherever the expression "offered or exposed for sale or sold in package or wrapped form" is used it shall mean the offering or exposing for sale, or selling of an article which is contained in a package or container as herein defined.

5. "Person" shall include a corporation, company, firm, society, or association; and the act, omission, or conduct of any officer, agent, or other person acting in a representative capacity shall be imputed to the organization or person represented, and the person acting in said capacity shall also be liable for violations of this title.

6. "Rules" shall include regulations and orders by the department of agriculture.

7. "United States Pharmacopoeia" or "National Formulary" shall mean the latest revision of said publications official at the time of any transaction which may be in question. [S13, §§2510-o, 3009-a; SS15,§4999-a31c; C24, 27, 31, 35,§3029.]

3030 Duties. The department of agriculture shall:

1. Execute and enforce the provisions of this title, except chapters 155, 155.1 and 156, which shall be executed and enforced by the pharmacy examiners.

2. Make and publish all necessary rules, not inconsistent with law, for enforcing the provisions of this title.

3. Provide such educational measures and exhibits, and conduct such educational campaigns as are deemed advisable in fostering and promoting the production and sale of the articles dealt with in this title in accordance with the regulations herein prescribed.

4. Issue from time to time, bulletins showing the results of inspections, analyses, and prosecutions under this title. These bulletins shall be printed in such numbers as may be approved by the state printing board and shall be distributed to the newspapers of the state and to all interested persons.

1. [C97,§2515; S13,§§2510-g,-t,-v4, 2528-f2, 3009-a, 4999-a31b, 5077-a22; SS15,§2515; C24, 27, 31, 35,§3030.]
2. [S13,§§4999-a18, 5077-a22; C24, 27, 31, 35, §3030.]
3. [C97,§2515; SS15,§2515; C24, 27, 31, 35, §3030.]
4. [S13,§§2510-g,-t,-v4, 2528-f2, 3009-s, 4999-a26,-a37, 5077-a11; C24, 27, 31, 35,§3030.]

Additional duties, chs 150.1, 150.2, 150.3, 151.1, 154.1, 161.1

INSPECTION—SAMPLES

3031 Procuring samples. The department shall, for the purpose of examination or analysis, procure from time to time, or whenever said department has occasion to believe any of the provisions of this title are being violated, samples of the articles dealt with in this title which have been shipped into this state, offered or exposed for sale, or sold in the state. [C97, §§2521, 2524; S13,§§2528-f2, 4999-a18, 5077-a11, -a22; C24, 27, 31, 35,§3031.]

3032 Access to factories and buildings. The department shall have full access to all places, factories, buildings, stands, or premises, and to all wagons, auto trucks, vehicles, or cars used in the preparation, production, distribution, transportation, offering or exposing for sale, or sale of any article dealt with in this title. [C97, §2505; S13,§§2528-a, 5077-a22; SS15,§§2505, 2510-4a, 3009-n; C24, 27, 31, 35,§3032.]

3033 Dealer to furnish samples. Upon request and tender of the selling price by the department any person who prepares, manufactures, offers or exposes for sale, or delivers to a purchaser any article dealt with in this title shall furnish, within business hours, a sample of the same, sufficient in quantity for a proper analysis or examination as shall be provided by the rules of the department. [S13,§§4999-a24, 5077-a11; C24, 27, 31, 35,§3033.]

3034 Taking of samples. The department may, without the consent of the owner, examine or open any package containing, or believed to contain, any article or product which it suspects may be prepared, manufactured, offered, or exposed for sale, sold, or held in possession in violation of the provisions of this title, in order to secure a sample for analysis or examination, and said sample and damage to container shall be paid for at the current market price out of the contingent fund of the department. [C97, §§2521, 2526; S13,§§2528-b,-f2, 5077-a11,-a22; C24, 27, 31, 35,§3034.]

3035 Preservation of sample. After the sample is taken it shall be carefully sealed with the seal of the department and labeled with the name or brand of the article, the name of the party from whose stock it was taken, and the date and place of taking such sample. Upon request a duplicate sample, sealed and labeled in the same manner, shall be delivered to the person from whose stock the sample was taken. The label and duplicate shall be signed by the person taking the same. The method of taking samples of particular articles may be prescribed by the rules of the department. [C97,§2521; S13, §§4999-a24, 5077-a11,-a22; C24, 27, 31, 35,§3035.]

3036 Witnesses. In the enforcement of the provisions of this title the department shall have power to issue subpoenas for witnesses, enforce their attendance, and examine them under oath. Such witnesses shall be allowed the same fees as witnesses in justice of the peace courts. Said fees shall be paid out of the contingent fund of the department. [C97, §2515; SS15,§2515; C24, 27, 31, 35,§3036.]

Contempts, ch 536
Witness fees, §11326 et seq.

LABELING—ADULTERATIONS

3037 Labeling. All articles in package or wrapped form which are required by this title to be labeled, unless otherwise provided, shall be conspicuously marked in the English language in legible letters of not less than eight-point heavy gothic caps on the principal label with the following items:

1. The true name, brand, or trademark of the article.
2. The quantity of the contents in terms of weight, measure, or numerical count. Under this requirement reasonable variations shall be permitted, and small packages shall be excepted in accordance with the rules of the department.
3. The name and place of business of the manufacturer, packer, importer, dispenser, distributor, or dealer.

The above items shall be printed in such a way that there shall be a distinct contrast between the color of the letters and the background upon which printed. [C73,§4042; C97, §§2517, 4989–4991, 5070; S13,§§2510-d,-q,-r,-v1, -v2, 2515-b–d, 2528-f, 4999-a35, 5070-a, 5077-a6; SS15,§4999-a31c; C24, 27, 31, 35,§3037.]

Referred to in §§3038, 3039, 3067, 3068, 3129, 3141, 3145, 3183, 3188, 3189, 3190, 3238
Agricultural seeds, §§3129, 3132, 3133
Bread, §3244.02
Commercial feeds, §§3114, 3116
Commercial fertilizer, §§3141, 3142
Drugs, §§3145, 3147
Foods, §§3067, 3068, 3070
Insecticides and fungicides, §§3183, 3184
Oils, §§3189, 3190; paints, §3188

3038 Packages excepted. In case the size of the package or container will not permit the use of the type specified in section 3037, the same may be reduced in size proportionately in accordance with the rules of the department. [S13, §4999-a35; C24, 27, 31, 35,§3038.]

Referred to in §§3067, 3068, 3129, 3141, 3145, 3183, 3188, 3190

3039 Labeling of mixtures. In addition to the requirements of section 3037, unless otherwise provided, articles which are mixtures, compounds, combinations, blends, or imitations shall be marked as such and immediately followed, without any intervening matter and in the same size and style of type, by the names of all the ingredients contained therein, beginning with the one present in the largest proportion. [S13,§§2510-d,-r,-v2, 5077-a7; SS15,§4999-a31c; C24, 27, 31, 35,§3039.]

Referred to in §§3040, 3067, 3068, 3141, 3183, 3188, 3190
Agricultural seeds, §§3130, 3131, 3133
Bread, §3244.02
Commercial feeds, §§3114, 3114.1, 3115, 3116
Commercial fertilizer, §3141
Drugs, §§3145, 3147
Foods, §§3067, 3068, 3070
Insecticides and fungicides, §§3183, 3184
Oils, §§3189, 3190
Paints, §3188

3040 Trade formulas. Nothing in section 3039 shall be construed as requiring the printing of a patented or proprietary trade formula on a label. [S13,§5077-a7; SS15,§4999-a31c; C24, 27, 31, 35,§3040.]

Referred to in §§3067, 3068, 3141, 3188, 3190

3041 False labels—defacement. No person shall use any label required by this title which bears any representations of any kind which are deceptive as to the true character of the article or the place of its production, or which has been carelessly printed or marked, nor shall any person erase or deface any label required by this title. [C73,§4042; C97,§§2517, 4989–4991; S13, §§2510-s,-v3, 2515-b–d, 4999-a35, 5077-a7; SS15, §4999-a31c; C24, 27, 31, 35,§3041.]

3042 Mislabeled articles. No person shall knowingly introduce into this state, solicit orders for, deliver, transport, or have in his possession with intent to sell, any article which is labeled in any other manner than that prescribed by this title for the label of said article when offered or exposed for sale, or sold in package or wrapped form in this state. [C73, §4042; C97,§§2516, 2517, 2519, 4989–4991, 5070; S13,§§2510-b,-q,-r,-v1,-v2, 2515-b–d, 2528-f, 4999 -a20, 5070-a; SS15,§4999-a32; C24, 27, 31, 35, §3042.]

3043 Adulterated articles. No person shall knowingly manufacture, introduce into the state, solicit orders for, sell, deliver, transport, have in his possession with the intent to sell, or offer or expose for sale, any article which is adulterated according to the provisions of this title. [C73,§§3901, 4042; C97,§§2508, 2516, 4989–4991; S13,§§2508, 2510-q,-r,-v1,-v2, 2515-b–d, 4999-a20; SS15,§4999-a32; C24, 27, 31, 35,§3043.]

3044 Possession. Any person having in his possession or under his control any article which is adulterated or which is improperly labeled according to the provisions of this title shall be presumed to know its true character and name, and such possession shall be prima facie evidence of having the same in possession with intent to violate the provisions of this title. [C97,§§2519, 2521; S13,§§4999-a24,-a40; C24, 27, 31, 35,§3044.]

LICENSES

3045 Licenses. The following regulations shall apply to all licenses issued or authorized under this title:

1. *Applications.* Applications for licenses shall be made upon blanks furnished by the department and shall conform to the prescribed rules of the department.

2. *Refusal and revocation.* For good and sufficient grounds the department may refuse to grant a license to any applicant; and it may revoke a license for a violation of any provision of this title, or for the refusal or failure of any licensee to obey the lawful directions of the department.

3. *Expiration.* Unless otherwise provided all licenses shall expire one year from the date of issue. [C97,§2525; S13,§2515-a; SS15,§§2515-f, 3009-m; C24, 27, 31, 35,§3045.]

3046 Injunction. Any person engaging in any business for which a license is required by this title, without obtaining such license, may be restrained by injunction, and shall pay all costs made necessary by such procedure. [C24, 27, 31, 35,§3046.]

Injunctions, ch 535

OFFENSES—PENALTIES

3047 Penalty. Unless otherwise provided, any person violating any provision of this title, or any rule made by the department and promulgated under the authority of said department, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not to exceed thirty days, and on a third conviction for the same offense may be restrained by injunction from operating such place of business. [C73, §§2068, 3901; C97,§§2508, 2527, 2592, 2594, 3029, 5070; S13,§§2508, 2510-2a,-h,-j,-u,-v5, 2515-g, 2522, 2528-c,-f3, 2596-b, 4989-b, 4999-a25,-a39, 5070-a, 5077-a23; SS15,§§2505, 2506, 3009-j,-r; C24, 27, 31, 35,§3047.]

Agricultural lime, §3142.08
Bread, §3244.03
Butter, §3100.06
Drugs, §3169.21
Livestock, §3244.09
Oleomargarine, §3100.17
Petroleum products, §3216
Poultry and domestic fowls, §3112.7

3048 May charge more than one offense. In any criminal proceeding brought for violation of this title an information or indictment may charge as many offenses as it appears have been committed and the defendant may be convicted of any or all of said offenses. [C24, 27, 31, 35, §3048.]

3049 Common carrier. None of the penalties provided in this title shall be imposed upon any common carrier for introducing into the state, or having in its possession, any article which is adulterated or improperly labeled according to the provisions of this title when the same was received by said carrier for transportation in the ordinary course of its business and without actual knowledge of its true character. [C97, §2516; S13,§4999-a20; SS15,§4999-a32; C24, 27, 31, 35,§3049.]

ENFORCEMENT

3050 Report of violations. When it shall appear that any of the provisions of this title have been violated, the department shall at once certify the facts to the proper county attorney, with a copy of the results of any analysis, examination, or inspection said department may have made, duly authenticated by the proper person under oath, and with any additional evidence which may be in possession of said department. [C97,§4998; S13,§4999-a19; C24, 27, 31, 35, §3050.]

3051 County attorney. The county attorney may at once institute the proper proceedings for the enforcement of the penalties provided in this

title for such violations. [C97,§4998; S13, §§2596-c, 4999-a19; C24, 27, 31, 35,§3051.]

3052 Refusal to act. If the county attorney refuses to act, the governor may, in his discretion, appoint an attorney to represent the state. [S13,§4999-a19; C24, 27, 31, 35,§3052.]

3053 Institution of proceedings. In any case when it appears that any of the provisions of this title have been violated, the inspector having the investigation in charge shall, when instructed by the department, file an information against the suspected party. [C24, 27, 31, 35, §3053.]

MISCELLANEOUS

3054 Goods for sale in other states. Any person may keep articles specifically set apart in his stock for sale in other states which do not comply with the provisions of this title as to standards, purity, or labeling. [S13,§§4999-a20, -a40; C24, 27, 31, 35,§3054.]

3055 Reports by dealers. Every person who deals in or manufactures any of the articles dealt with in this title shall make upon blanks furnished by the department such reports and furnish such statistics as may be required by said department and certify to the correctness of the same. [C97,§2522; S13,§2522; C24, 27, 31, 35,§3055.]

3056 Contracts invalid. No action shall be maintained in any of the courts of the state upon any contract or sale made in violation of or with the intent to violate any provision of this title by one who was knowingly a party thereto. [C97,§2520; C24, 27, 31, 35,§3056.]

3057 Fees paid into state treasury. All fees collected under the provisions of this title shall be paid into the state treasury. [C97,§2507; SS15,§§2507, 2515-f, 3009-m; C24, 27, 31, 35, §3057.]

Time of payment, §143

CHAPTER 148

ADULTERATION OF FOODS

General penalty, §3047

3058 Definitions and standards.
3059 Additional standards.
3060 Food adulterations.
3061 Adulterations of dairy products.
3062 Adulteration with fats and oils.
3063 Coloring imitation butter or cheese.
3064 Coloring vinegar.
3065 Adulteration of candies.
3066 Sale by false name.

3058 Definitions and standards. For the purpose of this chapter the following definitions and standards of food are established:

1. *Butter.* Butter is the clean, nonrancid product made by gathering in any manner the fat of fresh or ripened milk or cream into a mass, with or without the addition of salt, or harmless coloring matter, and containing at least eighty percent, by weight, of milk fat.

2. *Imitation butter.* Imitation butter is any product containing any fat other than that derived from milk or cream, as provided in paragraph 1 above, and made in the appearance of butter or designed to be used for any of the purposes for which butter is used.

3. *Renovated butter.* Renovated butter is butter produced by taking original packing stock butter, or other butter, or both, and melting the same so that the milk fat can be extracted, then by mixing the said milk fat with skimmed milk, milk, cream, or some milk product, and rechurning or reworking the said mixture; or butter made by any method which produces a product commonly known as boiled, processed, or renovated butter.

4. *Cheese—whole milk or cream.* Whole milk or cream cheese is the sound, ripened product made from milk or cream by coagulating the casein with rennet or lactic acid, with or without the addition of ripening ferments, seasonings, or color, and containing at least thirty percent of milk fat.

5. *Imitation cheese.* Imitation cheese is a product containing any substance other than that produced from milk or cream, as provided in paragraph 4 above, and made in the appearance of or designed to be used for any of the purposes for which cheese produced from milk or cream is used.

6. *Skimmed milk cheese.* Skimmed milk cheese is a product made from skimmed milk by one of the processes by which whole milk or cream cheese is made, and containing less than thirty percent of milk fat.

7. *Cream.* Cream is the fresh portion of milk containing at least sixteen percent of milk fat, which rises to the surface of milk on standing or is separated from it by centrifugal force.

8. *Flavoring extract.* A flavoring extract is a solution in ethyl alcohol or other suitable medium of the sapid and odorous principles derived from an aromatic plant, or parts of the plant, with or without its coloring matter, and conforms in name to the plant used in its preparation.

9. *Almond extract.* Almond extract is the flavoring extract prepared from oil of bitter almonds, free from hydrocyanic acid, and contains not less than one percent by volume of oil of bitter almonds.

10. *Anise extract.* Anise extract is the flavoring extract prepared from oil of anise, and contains not less than three percent by volume of oil of anise.

11. *Cassia extract.* Cassia extract is the flavoring extract prepared from oil of cassia, and contains not less than two percent by volume of oil of cassia.

12. *Celery seed extract.* Celery seed extract is the flavoring extract prepared from celery

seed or the oil of celery seed, or both, and contains not less than three-tenths percent by volume of oil of celery seed.

13. *Cinnamon extract.* Cinnamon extract is the flavoring extract prepared from oil of cinnamon, and contains not less than two percent by volume of oil of cinnamon.

14. *Clove extract.* Clove extract is the flavoring extract prepared from oil of cloves, and contains not less than two percent by volume of oil of cloves.

15. *Ginger extract.* Ginger extract is the flavoring extract prepared from ginger, and contains in each one hundred cubic centimeters the alcohol-soluble matters from not less than twenty grams of ginger.

16. *Lemon extract.* Lemon extract is the flavoring extract prepared from oil of lemon, or from lemon peel, or both, and contains not less than five percent by volume of oil of lemon.

17. *Terpeneless extract of lemon.* Terpeneless extract of lemon is the flavoring extract prepared by shaking oil of lemon with dilute alcohol, or other suitable medium, or by dissolving terpeneless oil of lemon in such medium, and contains not less than two-tenths percent by weight of citral derived from oil of lemon.

18. *Nutmeg extract.* Nutmeg extract is the flavoring extract prepared from oil of nutmeg, and contains not less than two percent by volume of oil of nutmeg.

19. *Orange extract.* Orange extract is the flavoring extract prepared from oil of orange, or from orange peel, or both, and contains not less than five percent by volume of oil of orange.

20. *Terpeneless extract of orange.* Terpeneless extract of orange is the flavoring extract prepared by shaking oil of orange with dilute alcohol, or other suitable medium, or by dissolving terpeneless oil of orange in such medium, and corresponds in flavoring strength to orange extract.

21. *Peppermint extract.* Peppermint extract is the flavoring extract prepared from oil of peppermint, or from peppermint, or both, and contains not less than three percent by volume of oil of peppermint.

22. *Rose extract.* Rose extract is the flavoring extract prepared from attar of roses, with or without red rose petals, and contains not less than four-tenths percent by volume of attar of roses.

23. *Savory extract.* Savory extract is the flavoring extract prepared from oil of savory, or from savory, or both, and contains not less than thirty-five hundredths percent by volume of oil of savory.

24. *Spearmint extract.* Spearmint extract is the flavoring extract prepared from oil of spearmint, or from spearmint, or both, and contains not less than three percent by volume of oil of spearmint.

25. *Star anise extract.* Star anise extract is the flavoring extract prepared from oil of star anise, and contains not less than three percent by volume of oil of star anise.

26. *Sweet basil extract.* Sweet basil extract is the flavoring extract prepared from oil of sweet basil, or from sweet basil, or both, and contains not less than one-tenth percent by volume of oil of sweet basil.

27. *Sweet marjoram extract.* Sweet marjoram extract is the flavoring extract prepared from the oil of marjoram, or from marjoram, or both, and contains not less than one percent by volume of oil of marjoram.

28. *Thyme extract.* Thyme extract is the flavoring extract prepared from oil of thyme, or from thyme, or both, and contains not less than two-tenths percent by volume of oil of thyme.

29. *Tonka extract.* Tonka extract is the flavoring extract prepared from tonka bean, with or without sugar or glycerin, and contains not less than one-tenth percent by weight of courmarin extracted from the tonka bean, together with a corresponding proportion of the other soluble matters thereof.

30. *Vanilla extract.* Vanilla extract is the flavoring extract prepared from vanilla bean, with or without sugar or glycerin, and contains in one hundred cubic centimeters the soluble matters from not less than ten grams of the vanilla bean, and contains not less than thirty percent by volume of absolute ethyl alcohol, or other suitable medium.

31. *Wintergreen extract.* Wintergreen extract is the flavoring extract prepared from oil of wintergreen, and contains not less than three percent by volume of oil of wintergreen.

32. *Food.* Food shall include any article used by man or domestic animals for food, drink, confectionery, or condiment, or which enters into the composition of the same, whether simple, blended, mixed, or compound. The term "blended" shall be construed to mean a mixture of like substances.

33. *Ice cream.* Ice cream is the frozen product made from pure sweet cream and sugar, with or without flavoring, or with the addition of not to exceed one percent by weight of a harmless thickener, and containing not less than twelve percent by weight of milk fat, with an acidity not to exceed three-tenths of one percent. A quart of ice cream in factory-filled packages shall weigh not less than eighteen ounces. The bacterial count at the factory shall not exceed two hundred fifty thousand to the cubic centimeter.

34. *Fruit ice cream.* Fruit ice cream is a similar product, consisting of the same ingredients with the addition of sound, clean, mature fruits, and containing not less than ten percent by weight of milk fat.

35. *Nut ice cream.* Nut ice cream is a frozen product, consisting of the same ingredients as ice cream with the addition of sound, nonrancid nuts, and containing not less than ten percent by weight of milk fat.

35-a. *Ice milk.* The term "ice milk", "imitation ice cream", or "frozen malted milk", shall include all frozen products other than milk sherbet and fruit ice made in semblance of ice cream and containing less than ten percent of butterfat. It shall be pasteurized at a temperature of one hundred forty-five degrees Fahrenheit for thirty minutes and shall not contain more than

two hundred fifty thousand bacteria per cubic centimeter in the manufacturer's package. It shall not contain added color nor fats other than butterfat.

"Ice milk", or "imitation ice cream", shall be sold only in the manufacturer's package or wrapper and shall be labeled in plain legible eight-point type with the words "ice milk", or "imitation ice cream". A sign shall be posted in every establishment where "ice milk", or "imitation ice cream" is sold, on a white card twelve by twenty-two inches in dimensions with letters not less than three inches in height and two inches in width containing the words, "Ice Milk Sold Here", or the words, "Imitation Ice Cream Sold Here".

35-b. *Milk sherbet.* Milk sherbet shall contain not less than two percent of butterfat and four percent of milk solids. Fruit ice shall contain not less than four-tenths of one percent of fruit acid.

36. *Milk.* Milk is the fresh lacteal secretion obtained by the complete milking of one or more cows, which contains at least three percent of milk fat and eleven and one-half percent of milk solids.

37. *Skimmed milk.* Skimmed milk is milk from which the cream has been removed or which is poor in fat, containing less than three percent of milk fat or less than eleven and one-half percent of milk solids.

38. *Oysters.* Oysters shall not contain ice, nor more than sixteen and two-thirds percent by weight of free liquid.

39. *Vinegar.* Vinegar is the product made by the alcoholic and subsequent fermentation of fruits, grain, vegetables, sugar, or syrups without the addition of any other substance and containing an acidity of not less than four percent by weight of absolute acetic acid. The product may be distilled, but when not distilled it shall not carry in solution any other substance except the extractive matter derived from the substances from which it was made.

40. *Cider or apple vinegar.* Cider or apple vinegar is a similar product made by the same process solely from the juice of apples. Such vinegar which during the course of manufacture has developed in excess of four percent acetic acid may be reduced to said strength.

41. *Corn sugar vinegar.* Corn sugar vinegar is a similar product made by the same process solely from solutions of starch sugar.

42. *Malt vinegar.* Malt vinegar is a similar product made by the same process solely from barley malt or cereals whose starch has been converted by malt.

43. *Sugar vinegar.* Sugar vinegar is a similar product made by the same process solely from sucrose. [C73,§4042; C97,§§2516, 2518, 4989–4991; S13,§§2515-b,-d; SS15,§§4999-a31, -a31c; C24, 27, 31, 35,§3058; 47GA, ch 112,§§1, 2.]

3059 Additional standards. The department may establish and publish standards for foods when such standards are not fixed by law, but the same shall conform with those proclaimed by the secretary of agriculture of the United States. [S13,§4999-a18; C24, 27, 31, 35,§3059.]

3060 Food adulterations. For the purposes of this chapter any food shall be deemed to be adulterated:

1. If any substance has been mixed or packed with it so as to reduce or injuriously affect its quality.
2. If any substance has been substituted to any extent.
3. If any valuable constituent has been removed to any extent.
4. If it has been mixed, colored, powdered, coated, or stained whereby damage or inferiority is concealed.
5. If it contains saccharine, formaldehyde, or boron compound, or any poisonous or other ingredient injurious to health.
6. If it consists to any extent of a diseased, filthy, or decomposed animal or vegetable substance, whether manufactured or otherwise.
7. If it consists to any extent of an animal that has died otherwise than by slaughter.
8. If it is the product of or obtained from a diseased or infected animal.
9. If it has been damaged by freezing.
10. If it does not conform to the standards established by law or by the department. [C73, §4042; C97,§§4989, 4990; S13,§§2515-b,-d; SS15, §4999-a31e; C24, 27, 31, 35,§3060.]

Referred to in §§3061, 3065, 3185

3061 Adulterations of dairy products. In addition to the adulterations enumerated in section 3060, milk, cream, or skimmed milk shall be deemed to be adulterated:

1. If it contains visible dirt or is kept or placed at any time in an unclean container.
2. If obtained from a cow within fifteen days before or five days after calving.
3. If obtained from a cow stabled in an unhealthful place, or fed upon any substance in a state of putrefaction or of unhealthful nature. [C97,§§4989, 4990; S13,§§2515-b,-d; C24, 27, 31, 35,§3061.]

3062 Adulteration with fats and oils. No milk, cream, skimmed milk, buttermilk, condensed or evaporated milk, powdered or desiccated milk, condensed skimmed milk, ice cream, or any fluid derivatives of any of them shall be made from or have added thereto any fat or oil other than milk fat, and no product so made or prepared shall be sold, offered or exposed for sale, or possessed with the intent to sell, under any trade name or other designation of any kind. [C24, 27, 31, 35,§3062.]

3063 Coloring imitation butter or cheese. No imitation butter or imitation cheese shall be colored with any substance and no such imitation product shall be made by mixing animal fats, vegetable oils, or other substances for the purpose or with the effect of imparting to the mixture the color of yellow butter or cheese. [C97,§2518; C24, 27, 31, 35,§3063.]

3064 Coloring vinegar. Vinegar shall not be colored with coloring matter and distilled

vinegar shall not have a brown color in imitation of cider vinegar. [SS15,§4999-a31; C24, 27, 31, 35,§3064.]

3065 Adulteration of candies. In addition to the adulterations enumerated in section 3060, candy shall be deemed to be adulterated if it contains terra alba, barytes, talc, paraffin, chrome yellow, or other mineral substance. [SS15,§4999-a31e; C24, 27, 31, 35,§3065.]

3066 Sale by false name. No person shall offer or expose for sale, sell, or deliver any article of food which is defined in this chapter under any other name than the one herein specified or offer or expose for sale, sell, or deliver any article of food which is not defined in this chapter under any other name than its true name, trade name, or trademark name. [C24, 27, 31, 35,§3066.]

CHAPTER 149

LABELING FOODS

General penalty, §3047

3067 Label requirements.
3068 Dairy products and imitations.
3069 Sale of imitation products.
3070 Baking powder and vinegar.

3067 Label requirements. All food offered or exposed for sale, or sold in package or wrapped form, shall be labeled on the package or container as prescribed in sections 3037 to 3040, inclusive, unless otherwise provided in this chapter. [C97,§§2517, 2519, 4989; S13, §§2515-b,-c; SS15,§4999-a31c; C24, 27, 31, 35, §3067.]

Referred to in §3114

3068 Dairy products and imitations. The products enumerated below shall be labeled on the side or top of the container or package in which placed, kept, offered or exposed for sale, or sold as prescribed in sections 3037 to 3040, inclusive, except that the label shall be printed in letters not less than three-quarters inch in height and one-half inch in width and subject to the following regulations:

1. *Skimmed milk.* Skimmed milk shall be labeled with the words "Skimmed Milk"; but if in bottles it shall be deemed properly marked if the required words are printed on the cap of each bottle in letters not smaller than twelve-point gothic caps.

2. *Renovated butter.* Renovated butter shall be labeled with the words "Renovated Butter", and if offered or exposed for sale or sold in prints or rolls the wrapper of each and the container as required above shall be so labeled. If such butter is offered or exposed for sale uncovered and not in a container or package, a placard containing the required label shall be attached to the mass so as to be easily seen by the purchaser.

3. *Imitation butter.* Imitation butter shall be labeled "Oleomargarine".

4. *Skimmed milk cheese.* Skimmed milk cheese shall be labeled with the words "Skimmed Milk Cheese" on the cheese and on the package.

5. *Imitation cheese.* Imitation cheese shall be labeled with the words "Imitation Cheese" on the cheese and on the package. [C97,§§2517, 4989; S13,§§2515-b,-c; C24, 27, 31, 35,§3068.]

3069 Sale of imitation products. Every person owning or in charge of any place where food or drink is sold who uses or serves therein imitation butter or cheese, as in this title defined, shall display at all times opposite each table or place of service a placard for each such imitation, with the words "Imitation..... .....served here", without other matter, printed in black roman letters not less than three inches in height and two inches in width, on a white card twelve by twenty-two inches in dimensions. The blank after the word "Imitation" in the above form shall be filled with the name of the product imitated. [C97,§2517; C24, 27, 31, 35,§3069.]

3070 Baking powder and vinegar. Baking powder and distilled vinegar shall show on the label the name of each ingredient from which made. Distilled vinegar shall be marked as such; and cider vinegar which, having been in excess of the standard of acidity, has been reduced to the standard, shall have that fact indicated on the label. [SS15,§§4999-a31,-a31c; C24, 27, 31, 35,§3070.]

CHAPTER 150

PRODUCTION AND SALE OF DAIRY PRODUCTS

General penalty, §3047

3071 Milk license.
3072 Exemptions.
3073 Fee.
3074 Contents of license.
3075 Milk wagons.
3076 Pasteurization.
3076.1 Defined.
3076.2 Record.
3076.3 Injunction.
3077 Purity.
3078 Sanitary regulations.
3079 Testing milk or cream.
3080 Examination.
3081 Supplying standard measures.
3082 Fees.
3083 Bottles and pipettes.
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3085 False tests.
3086 Tests by unlicensed person.
3087 Actions for purchase price—proof.
3088 State trademark.
3092.1 Iowa butter control board.
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3093 Imitation butter.
3093.1 Oleomargarine.
3094 Container.
3095 Milk bottles to be marked.
3096 Adoption of brand.
3097 Retention of marked container.
3098 Return of bottles.
3099 Stray containers.
3100 Registered mark.

3071 Milk license. Every person engaging in the sale of milk or cream at retail, in any city or town, shall obtain a milk dealer's license from the department. [C97,§2525; S13,§2515-a; C24, 27, 31, 35,§3071.]

Referred to in §3072

3072 Exemptions. Section 3071 shall not apply:

1. To persons who supply milk or cream to establishments engaged in the manufacture of dairy products.

2. To persons who do not sell milk or cream from a store or vehicle. [S13,§2515-a; C24, 27, 31, 35,§3072.]

3073 Fee. The fee for said license shall be one dollar for each place and for each vehicle from which sales are made. The license shall expire on July 4 after the date of issue and shall not be transferable. [C97,§2525; S13, §2515-a; C24, 27, 31, 35,§3073.]

3074 Contents of license. Such license shall be issued only to the person owning or leasing the vehicle or place from which sales are to be made; and each license shall contain the name, residence, and place of business of the licensee. [C97,§2525; S13,§2515-a; C24, 27, 31, 35,§3074.]

3075 Milk wagons. The name of the dairy or the name of the person to whom such license is issued shall appear on both sides of each vehicle from which sales are made, in letters not less than two inches in height and there shall be such contrast between the color of the letters and the background as shall render the letters plainly legible. [S13,§2515-a; C24, 27, 31, 35,§3075.]

3076 Pasteurization. Every owner, manager, or operator, of a creamery or ice cream factory shall before delivering to any person any skimmed milk, ice cream or buttermilk, cause such skimmed milk and the cream or milk from which such ice cream or buttermilk is derived to be pasteurized except that pasteurization shall not be required when ice cream, skimmed milk, or buttermilk is made from cream or milk procured from cows that have been tuberculin tested at least once a year and found free from tuberculosis and the production of which milk and cream has been supervised and certified to by the Iowa department of agriculture as having been produced and handled under proper sanitary conditions. [S13,§4989-a; C24, 27, 31, 35,§3076.]

Referred to in §§3076.1, 3076.3
41GA, ch 60, §1, and 42GA, ch 257, §1, editorially divided

3076.1 Defined. Pasteurization for the purpose of section 3076 shall be defined as follows:

1. Milk, skimmed milk, and cream shall be deemed to have been efficiently pasteurized by the "holding process" when it has been subjected to a temperature of one hundred forty-five degrees Fahrenheit, and held at that temperature not less than twenty-five minutes.

2. Milk, skimmed milk, and cream shall be deemed to have been efficiently pasteurized by the "flash heat process" when it has been subjected to a temperature of one hundred eighty-five degrees Fahrenheit. [S13,§4989-a; C24, §3076; C27, 31, 35,§3076-b1.]

Referred to in §3076.3

3076.2 Record. Every owner, manager or operator of a creamery or ice cream factory, shall equip each vat or pasteurizer used in pasteurizing cream with an accurate recording thermometer, and each temperature chart from such thermometer shall be dated and kept on file for inspection by the department, and it shall be unlawful to destroy any such chart without permission from the secretary of agriculture. [C27, 31, 35,§3076-b2.]

Referred to in §3076.3

3076.3 Injunction. Any owner, manager, or operator of a creamery, or ice cream factory, violating any of the provisions of sections 3076 to 3076.2, inclusive, may be restrained by injunction from operating any such business. No injunction shall issue until after the defendant

has had at least five days notice of the application therefor and the time fixed for hearing thereon. [C27, 31, 35,§3076-b3.]

Injunction, ch 535

3077 Purity. No wholesaler or retailer of milk or cream, except the producer, shall offer or expose for sale any milk or cream unless the same is produced from cows known to be free from tuberculosis, as evidenced by a certificate issued within one year by a licensed veterinarian, or unless the same shall have been pasteurized according to the established regulations of the department of agriculture. [C24, 27, 31, 35, §3077.]

3078 Sanitary regulations. Every person who deals in or manufactures dairy products or imitations thereof shall maintain his premises, utensils, wagons, and equipment in a clean and hygienic condition. [C97,§2522; S13,§2522; C24, 27, 31, 35,§3078.]

3079 Testing milk or cream. Every person testing cream or milk to determine the percent of milk fat as a basis for fixing the purchase price shall secure a milk tester's license from the department and shall make tests only by such process as has been approved by said department. [SS15,§2515-f; C24, 27, 31, 35,§3079.]

3080 Examination. Each applicant for such a license shall be required to submit to examination and by actual demonstration show that he is competent to test cream and milk according to an approved process. [SS15,§2515-f; C24, 27, 31, 35,§3080.]

3081 Supplying standard measures. The department shall furnish each licensee one standard test bottle and one standard pipette adapted to the use of the testing machine approved for the licensee. Said bottle and pipette shall be certified to by the department as standard and shall bear the official stamp of the department. Any person not a licensee may secure test bottles and pipettes from the department at the legal price. [C97,§2515; SS15,§2515; C24, 27, 31, 35, §3081.]

3082 Fees. The fee for each license shall be two dollars and fifty cents, and standard test bottles and pipettes shall be furnished at actual cost. [C97,§2515; SS15,§§2515,-f; C24, 27, 31, 35,§3082.]

3083 Bottles and pipettes. The standard bottle and pipette received from the department shall be used by the licensee in verifying test tubes and pipettes used by him in making tests; and the same shall be subject to inspection by the owner or vendor of the cream or milk which is the subject of the test. [C97,§2523; C24, 27, 31, 35,§3083.]

3084 Substitute tester. With the approval of the department any licensee may for valid reasons appoint a person to act for him, not to exceed a period of fourteen days. [SS15,§2515-f; C24, 27, 31, 35,§3084.]

3085 False tests. No person shall falsely manipulate or misread the Babcock test or any other milk or cream testing apparatus. The writing of a check or payment of money for cream or milk at any given test shall constitute prima facie evidence that such test was made. [S13,§2515-e; C24, 27, 31, 35,§3085.]

3086 Tests by unlicensed person. The testing of each lot of milk or cream by an unlicensed person shall constitute a separate offense. [SS15, §2515-f; C24, 27, 31, 35,§3086.]

3087 Actions for purchase price—proof. In an action by the vendor for the purchase price of cream or milk, sold on test to be made by the vendee, the burden of establishing the proper use of an approved test shall be upon the vendee. [C97,§2523; C24, 27, 31, 35,§3087.]

3088 State trademark. The Iowa trademark for butter manufactured in this state shall consist of the words "Iowa Butter" printed within an outline map of Iowa. Above said map shall be printed the words "First Quality, License No....." and below, the words "State Butter Control". Said map and printed matter shall be circumscribed by a double circle, the outer circle being printed with a heavier line than the inner circle. [SS15,§2515-f; C24, 27, 31, 35,§3088.]

3089 to 3092, inc. Rep. by 45ExGA, ch 33

3092.1 Iowa butter control board. There is hereby created the Iowa butter control board composed of the president of the Iowa state dairy association, the president of the Iowa state creamery operators association, the dean of agriculture of the Iowa state college of agriculture and mechanic arts, the head of the department of the dairy industry of the same institution, and the secretary of agriculture, which board shall see that the requirements of the law are met on all butter manufactured in the state of Iowa for sale under the Iowa butter trademark and that the standards required by law are maintained by all creameries desiring to be classified and known as an Iowa trademark creamery, and the board shall make rules and regulations for the enforcement of sections 3092.1 to 3092.7, inclusive. [SS15,§2515-f1; C24, 27, 31,§§3089, 3090; C35,§3092-f1.]

45ExGA, ch 33, §1, editorially divided

3092.2 Iowa trademark creameries. Any creamery meeting the standards and requirements fixed by law shall be entitled to be classified and known as an "Iowa trademark creamery" and no other creamery shall use said name. [SS15,§2515-f1; C24,27,31,§3091; C35,§3092-f2.]

Referred to in §3092.1

3092.3 Requirements. Any creamery desiring to be classified and known as an "Iowa trademark creamery" shall meet the requirements of the sanitary and dairy laws of Iowa and must comply with the Iowa state and federal standards as to butterfat and moisture contents.

All butter sold under said trademark shall be manufactured from cream containing not more

than two-tenths of one percent acidity and shall have been pasteurized in accordance with the pasteurization laws of Iowa.

All butter sold under the Iowa trademark must score at least ninety-three and be inspected at frequent intervals. All scoring and inspection is to be made by the Iowa butter control board or its duly authorized representatives. [SS15,§2515-f1; C24,27,31,§3091; C35,§3092-f3.]

Referred to in §3092.1

3092.4 Certification of qualification. Whenever a creamery qualifies as an Iowa trademark creamery the board shall issue to said creamery a certificate to that effect, which certificate shall be subject to revocation by the board for failure to maintain the standards and requirements fixed by law. [C35,§3092-f4.]

Referred to in §3092.1

3092.5 Membership in association. Any creamery holding the classification of an "Iowa trademark creamery" must become a member of the "Iowa trademark butter association", which shall be a nontrading, nonprofit-sharing association of the creameries classified as Iowa trademark creameries and which association shall own and regulate the use of the Iowa butter trademark. [C35,§3092-f5.]

Referred to in §3092.1

3092.6 Ownership of trademark. The ownership of the Iowa butter trademark is hereby vested and lodged in the Iowa trademark butter association and said association may own and hold said trademark for the benefit of its members. The Iowa butter control board shall retain all supervision and control over the manufacture and sale of all butter to be sold under said trademark. [SS15,§2215-f1; C24, 27, 31, §3092; C35,§3092-f6.]

Referred to in §3092.1

3092.7 Meetings. The Iowa butter control board shall hold regular semiannual meetings at the dairy industry building of the Iowa state college of agriculture and mechanic arts in conjunction with the executive committee of the Iowa trademark association, which latter body shall act as an advisory body only at said meetings. [C35,§3092-f7.]

Referred to in §3092.1

3093 Imitation butter. Imitation butter shall be sold only under the name of oleomargarine, and no person shall use in any way, in connection or association with the sale or exposure for sale or advertisement of any such product, the word "butter", "creamery", or "dairy", or the name or representation of any breed of dairy cattle, or any combination of such word or words and representation, or any other words or symbols or combination thereof commonly used in the sale of butter. [C97,§2517; C24, 27, 31, 35,§3093.]

3093.1 Oleomargarine. Oleomargarine, butterine, or other products made in the imitation or semblance of natural butter produced from milk or cream or both, shall not be used as a food in the college for the blind, the school for the deaf, or any state institution under the management of the board of control. [C27, 31, 35, §3093-a1.]

3094 Container. The term "container" used in the following sections of this chapter shall mean cans, bottles, casks, kegs, barrels, and other receptacles of like nature. [C24, 27, 31, 35, §3094.]

3095 Milk bottles to be marked. Bottles or jars used for the sale of milk shall have clearly blown or permanently marked in the side of the bottle, the capacity of the bottle, and on the bottom of the bottle the name, initials, or trademark of the manufacturer. The designating number shall be furnished by the department on request. [S13,§3009-k; C24, 27, 31, 35,§3095.]

3096 Adoption of brand. With the approval of the department any person who deals in or transports milk, cream, skimmed milk, buttermilk, or ice cream may adopt a distinctive mark or brand to be placed upon any container owned or used by him, and the same may be registered with the department. [C24, 27, 31, 35,§3096.]

3097 Retention of marked container. No person shall, without the consent of the owner, retain for a longer period than three days a container bearing a registered mark, and any person receiving such a container shall immediately return it to the owner by a common carrier. A receipt from a common carrier shall be prima facie evidence that such container was returned. [C24, 27, 31, 35,§3097.]

3098 Return of bottles. Milk and cream bottles bearing registered marks shall be returned by delivering them to the owner or his agent in person or by leaving them where they may be picked up by the owner. [C24, 27, 31, 35,§3098.]

3099 Stray containers. When any person comes into possession of a container bearing a registered mark which belongs to another whose name and address he does not know, he shall immediately notify the department in writing, giving the size, shape, and mark of the container. Upon receipt of shipping directions from the department he shall at once forward the container by a common carrier, collect, to the address furnished him. Milk or cream bottles need not be returned when the cost of return is greater than the market value of the bottles. [C24, 27, 31, 35,§3099.]

3100 Registered mark. No person shall for any purpose use any registered mark or any container bearing such mark, or remove or alter any such mark placed upon a container without the consent of the owner. [C24, 27, 31, 35,§3100.]

CHAPTER 150.1

OVERRUN IN MANUFACTURE OF BUTTER

3100.01 Defined.
3100.02 Limit.
3100.03 Records.
3100.04 Records not open to public inspection.
3100.05 Reports as evidence.
3100.06 Penalty.

3100.01 Defined. For the purpose of this chapter "overrun" is the difference between the weight of any given amount of pure butterfat and the weight of the butter manufactured therefrom, and this difference, ascertained in any case, divided by the given amount of pure butterfat in such case and multiplied by one hundred, is the "percentage of overrun", in the manufacture of butter. [C31, 35,§3100-c1.]

3100.02 Limit. It shall be and hereby is declared to be unlawful for any person to have or permit a percentage of overrun in excess of twenty-four and one-half percent in butter manufactured by him. [C31, 35,§3100-c2.]

3100.03 Records. Every person engaged in the purchase, manufacture or sale of dairy products, and all owners of skimming stations or other places engaged in the business of purchasing milk or cream, and operators of condenseries, creameries, milk factories and cheese factories, shall keep in proper books true and full records of all milk, cream, butterfat and other dairy products purchased, received, shipped, stored or handled by them, the amount of salted butter and unsalted butter manufactured therefrom, and the amounts of butterfat used in the form of cream, ice cream, milk, or any other products. [C31, 35, §3100-c3.]

Referred to in §3100.04

3100.04 Records not open to public inspection. The books and records, or a certified copy of same, of all persons, owners and operators coming within the provisions of section 3100.03 shall be kept within this state and shall be open for the inspection of the secretary of agriculture and his deputies or employees at all times, who shall make such examination thereof as is desired or deemed necessary by the secretary of agriculture. Any statement, report, or information required by this chapter to be made or furnished by any person, corporation, or association, shall be for the information of the secretary of agriculture, the attorney general, or any public official who may be interested in an official way in receiving such statement, report, or information, but such statement, report or information shall not be open to public inspection, nor shall it be published or used for private purposes, but may be used in an official, legitimate way in the enforcement of this chapter. [C31, 35,§3100-c4.]

3100.05 Reports as evidence. The reports required by law to be made and which are made to the secretary of agriculture by persons engaged in the manufacture of butter shall be competent evidence in any prosecution under this chapter against the person making the same, whenever such reports, received in evidence upon the trial, show that during a period of one month or more the person on trial and charged with a violation of this chapter, alleged to have been committed on a certain date within said period, has had or permitted an average percentage of overrun in excess of twenty-four and one-half percent in the salted butter manufactured by him during said period, such showing shall be a violation of this chapter by the person so charged, committed as to the date alleged. [C31, 35,§3100-c5.]

3100.06 Penalty. Any person violating any provision of this chapter shall be deemed guilty of a misdemeanor and shall be punished by fine of not less than twenty-five dollars nor more than one hundred dollars or imprisonment in the county jail not to exceed thirty days, and on third violation of the same may be restrained by injunction from operating such a business. [C31, 35,§3100-c6.]

CHAPTER 150.2

TAX ON OLEOMARGARINE

3100.07 Tax imposed.
3100.08 Federal regulations.
3100.09 Stamps affixed before disposal.
3100.10 Cancellation of stamps.
3100.11 Rules and regulations.
3100.12 Stamps—preparation—form.
3100.13 Delivery of stamps—accounts—sale.
3100.14 Spoiled stamps.
3100.15 Stamping by manufacturer.
3100.16 Unused stamps.
3100.17 Violations.
3100.18 Tax paid to general fund.
3100.19 Appropriation.

3100.07 Tax imposed. There is hereby imposed, levied, and assessed, an inspection fee and excise tax of five cents upon each pound of oleomargarine sold, offered or exposed for sale, or given or delivered to a consumer, said fee and tax to be paid to the secretary of agriculture prior to any such sale, gift, or delivery. [C31, 35,§3100-d1.]

3100.08 Federal regulations. All oleomargarine offered or exposed for sale, or for distribution in any manner in this state, shall be put up in packages or cartons in the manner required by the federal regulations relative thereto. [C31, 35,§3100-d2.]

44GA, ch 63, §2, editorially divided

3100.09 Stamps affixed before disposal. Before any such package or carton is broken or is offered or exposed for sale, gift or distribution to a consumer, there shall be securely affixed thereto, a suitable stamp or stamps denoting the fee thereon. [C31, 35,§3100-d3.]

3100.10 Cancellation of stamps. Stamp or stamps shall be properly canceled prior to the removal from said package or carton of any oleomargarine. [C31, 35,§3100-d4.]

3100.11 Rules and regulations. The secretary of agriculture shall prescribe rules and regulations relative to the handling, keeping, disposal and distribution of oleomargarine, and the affixing and cancellation of the stamps provided and required by this chapter. [C31, 35, §3100-d5.]

3100.12 Stamps—preparation—form. The state comptroller shall prepare and have suitable stamps for use on each package or carton as the secretary of agriculture shall prescribe, and there shall be sufficient space thereon for the insertion of the name and address of the manufacturer of the oleomargarine in the carton or package to which the stamp is to be affixed. [C31, 35, §3100-d6.]

44GA, ch 63, §3, editorially divided

3100.13 Delivery of stamps—accounts—sale. Upon requisition of the secretary of agriculture the state comptroller shall deliver to him the stamps designated in such requisition and shall charge the secretary of agriculture with the stamps so delivered, and shall keep an accurate record of all stamps coming into and leaving his hands. The secretary of agriculture shall sell the stamps to all persons applying therefor. [C31, 35,§3100-d7.]

3100.14 Spoiled stamps. Any spoiled or unused stamps in the hands of either the secretary of agriculture or state comptroller shall be destroyed upon joint certificate of the auditor of state, secretary of agriculture and state comptroller, setting forth the number, denomination and face value of the same. Such certificate shall relieve the accountable officer from accountability in the amount thereof. [C31, 35,§3100-d8.]

3100.15 Stamping by manufacturer. The payment of the inspection fee and tax and the stamping and cancellation of any carton or package of oleomargarine by the manufacturer or importer of any oleomargarine, shall exempt all other persons from the requirements of this chapter, relative to the stamping of, and cancellation of stamps on cartons and packages of oleomargarine. [C31, 35,§3100-d9.]

3100.16 Unused stamps. Upon written request of the original purchaser thereof and the return of any unused stamps the secretary of agriculture shall redeem such stamps and cause a refund to be made therefor. The secretary of agriculture shall prepare a voucher showing the amount of such refund due and the state comptroller shall draw a warrant on the treasurer of state for such amount. [C31, 35, §3100-d10.]

3100.17 Violations. Any person violating any of the provisions of the preceding sections of this chapter, or any rule or regulation prescribed by the secretary of agriculture, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment for not more than thirty days in the county jail. [C31, 35,§3100-d11.]

3100.18 Tax paid to general fund. The secretary of agriculture shall enforce the provisions of this chapter, and shall on the first day of each month, transfer and pay to the treasurer of state for use and benefit of the general fund of the state the funds collected under the provisions of this chapter and in his hands, on said dates. [C31, 35,§3100-d12.]

3100.19 Appropriation. There is hereby appropriated, annually, from any funds in the state treasury not otherwise appropriated, a sum sufficient to enforce the provisions of this chapter. [C31, 35,§3100-d13.]

CHAPTER 150.3

CREAM GRADING

3100.20 Title.
3100.21 Enforcement.
3100.22 Definitions.
3100.23 Basis of purchase.
3100.24 Price differential.
3100.25 Posting.
3100.26 Licensed graders.
3100.27 License granted.
3100.28 Tenure—fee.
3100.29 Duty of grader.
3100.30 Treatment of graded cream.
3100.31 Treatment of unlawful cream.
3100.32 Sediment test.
3100.33 Details of test.
3100.34 Operating license.
3100.35 Issuance of license.
3100.36 Tenure—fees.
3100.37 Posting.
3100.38 Revocation of license.
3100.39 Sanitation.
3100.40 Separate rooms.
3100.41 Transportation.
3100.42 Empty cans.
3100.43 Inspection.
3100.44 Samples.
3100.45 Prohibited acts.
3100.46 Penalties.

3100.20 Title. This chapter may be cited as "The Cream Grading Law" and is an amendment to this title. [C35,§3100-g1.]

3100.21 Enforcement. The secretary of agriculture shall enforce the provisions hereof, and to this end may adopt such rules and regu-

lations, not inconsistent herewith, as may appear necessary. [C35,§3100-g2.]

3100.22 Definitions. For the purposes of this chapter:

1. "Secretary" means the secretary of the department of agriculture.
2. "Person" includes individuals, partnerships, corporations, and associations.
3. "Creamery" means an establishment to which milk or cream of divers producers is delivered and where said products are manufactured into butter or cheese for commercial purposes.
4. "Cream station" means a place, other than a creamery, where deliveries of cream are weighed, sampled, graded or tested for purchase on a butterfat basis.
5. "Cream route" means any method used in gathering or transporting cream for hire from two or more producers to a cream station or creamery, except common carriers.
6. "Sweet cream" means cream that is clean to the taste and smell and the acidity of which does not exceed two-tenths of one percent calculated as lactic acid.
7. "First grade cream" means cream that is clean to the taste and smell, smooth, without objectionable flavors or odors, and having, at the time and place of purchase, an acidity not exceeding six-tenths of one percent, calculated as lactic acid.
8. "Second grade cream" means cream that has objectionable flavors and odors, or is too sour, or is too old to grade as first grade cream.
9. "Unlawful cream" means cream which contains dirt, filth, oil, or other foreign matter which renders it unfit for human consumption, or that is stale, cheesy, rancid, putrid, decomposed or actively foaming. [C35,§3100-g3.]

3100.23 Basis of purchase. All purchases of cream for butter-making purposes shall be made on the basis of sweet cream, first grade cream and second grade cream. [C35,§3100-g4.]

3100.24 Price differential. Every person owning or operating a creamery, or cream station, or cream vehicle route and engaged in the business of buying two or more grades of cream shall maintain a price differential between said grades of not less than one cent per pound of butterfat. [C35,§3100-g5.]

3100.25 Posting. Said differential and the price paid for the various grades of cream purchased, shall be continuously posted in a conspicuous place in each creamery, cream station and vehicle used in transporting purchased cream, controlled or managed by the party so purchasing. [C35,§3100-g6.]

3100.26 Licensed graders. A grader of cream, duly licensed as herein provided, shall, when cream is delivered or gathered for the manufacture of butter, be maintained in every creamery and cream station; also in every vehicle when cream is not gathered in individual containers. [C35,§3100-g7.]

3100.27 License granted. Such license shall be issued by the secretary to persons who shall have passed a satisfactory examination as to their qualifications to grade cream and who confirm their qualifications by an actual demonstration. Said license shall not be transferable. [C35,§3100-g8.]

3100.28 Tenure—fee. Each license shall, unless sooner revoked, be valid for one year from date of issuance. The fee therefor shall be one dollar which shall be paid before the license is issued. [C35,§3100-g9.]

3100.29 Duty of grader. Each licensed grader of cream shall immediately grade each lot of cream delivered to or received by him. Wherever a particular lot of cream is graded whether at the creamery, at the cream station, or at the vehicle used for transportation, the grader shall forthwith make and preserve a true record of said particular lot, which record shall show:

1. Name of the producer or owner.
2. Date of delivery.
3. Quantity delivered.
4. Grade or grades assigned.
5. Price paid.

[C35,§3100-g10.]

3100.30 Treatment of graded cream. As soon as cream is graded, it shall be placed forthwith in a clean container. Each container containing graded cream shall have a label or tag firmly attached thereto showing in a legible and conspicuous manner the grade of the cream therein and the date when said cream was graded. The grader of said cream shall see that this section is complied with. [C35,§3100-g11.]

3100.31 Treatment of unlawful cream. It is hereby made the duty of each licensed grader of cream to thoroughly mix with any unlawful cream whenever and wherever discovered by him such harmless coloring matter as will prevent such unlawful cream from being used for human consumption. [C35,§3100-g12.]

3100.32 Sediment test. A test for the purpose of determining the amount and nature of sediment in cream shall always be made by the grader on the first purchase of cream from a customer. If the test reveals no undue amount of sediment, no further sediment test need be made on the cream of such customer during the following month, but at least one test for sediment shall be made each month on the cream sold by each customer. But the grader shall make such test whenever he has reason to believe that such test is advisable. [C35,§3100-g13.]

3100.33 Details of test. Test for sediment shall be made with either two or four ounces of cream. When made with two ounces, the sediment pad shall be one and one-fourth inches in diameter and have a filtering surface of one inch. When made with four ounces, the sediment pad or cloth shall have a strand thickness of six-thousandths of an inch and at least one

hundred threads to the inch, and a filtering surface of not more than one and one-half inches in diameter. [C35,§3100-g14.]

3100.34 Operating license. No creamery or cream station or vehicle for the collection of cream shall be operated unless the owner or operator shall have first obtained from the secretary a license for each creamery, each cream station, and each vehicle so owned or operated. [C35,§3100-g15.]

3100.35 Issuance of license. The license to operate as aforesaid shall be issued by the secretary and shall specify the particular creamery or cream station, the operation of which is authorized; also, in a general way, the route over which the vehicle is authorized to operate. [C35, §3100-g16.]

3100.36 Tenure—fees. Such license, unless sooner revoked, shall be valid for one year from the date of issuance. The fee therefor, payable to the secretary before its issuance, shall be:

1. For each creamery, three dollars.
2. For each cream station, one dollar.
3. For each vehicle, one dollar.

[C35,§3100-g17.]

3100.37 Posting. The holder of said license shall keep said license continuously posted in some conspicuous place inside said creamery, or cream station, or inside the driver's compartment of the said vehicle, as the case may be. [C35,§3100-g18.]

3100.38 Revocation of license. Any license issued under this chapter may be revoked by the secretary for any violation of this chapter or for violation of any standard of sanitation prescribed by any other statute applicable to the holder of such license, but only after the holder of the license has been given reasonable notice of the intention to revoke the license and reasonable opportunity to be heard, provided that when a licensee is convicted of a wilful violation of any requirement of this chapter, the secretary shall summarily suspend said license for a period of thirty days and provided that upon a second such conviction the secretary shall summarily and permanently revoke said license. [C35,§3100-g19.]

3100.39 Sanitation. No creamery, or cream station or vehicle used on a route for the collection of cream shall be operated or permitted to be operated in an unclean or insanitary condition. [C35,§3100-g20.]

3100.40 Separate rooms. The owner or operator of a creamery or cream station shall maintain a separate room or rooms for the handling and sorting of cream and dairy products, which room or rooms shall be constructed and maintained in the same sanitary condition now required by statute for the construction and maintenance of creameries generally, be well lighted and ventilated, and be provided with proper cooling facilities and an adequate supply of hot and cold water. [C35,§3100-g21.]

3100.41 Transportation. Cream while being transported to a creamery or cream station, either by the producer or purchaser, shall be protected by wet blankets or by such other means as will keep said cream in a reasonably cool condition. [C35,§3100-g22.]

3100.42 Empty cans. Empty cream cans shall be thoroughly washed and kept in a sanitary condition, stored, and protected from the weather. [C35,§3100-g23.]

3100.43 Inspection. The secretary and all his authorized agents shall have access, at all reasonable times, to all creameries and cream stations and other places, including vehicles for transportation, where milk or cream is produced, received, tested, purchased, transported, or used for the manufacture of butter. [C35, §3100-g24.]

3100.44 Samples. The secretary, and all such authorized agents on showing their authority and upon paying or offering to pay the value thereof, may take from any producer, handler, receiver, or seller of milk or cream, or from any manufacturer of butter, whether principal, agent, or employee, samples of milk, cream or butter for purposes of inspection and analysis. [C35,§3100-g25.]

3100.45 Prohibited acts. The following acts or omissions are prohibited:

1. The purchase or receipt of cream for butter-making purposes except on the basis of grades as herein provided.
2. The failure to provide a price differential as herein provided.
3. The grading by an unlicensed grader of any lot of cream.
4. The improper or incorrect grading by a licensed grader of any lot of cream.
5. Knowingly offering or exposing for sale of unlawful cream for butter-making purposes or for any human consumption.
6. The purchase, possession or acceptance of unlawful cream for human consumption.
7. The failure of a licensed grader of cream to make and keep such records as are herein required of him.
8. The possession by the owner or operator of a creamery or of a cream station, or of a cream route vehicle of any graded cream which is unlabeled or falsely labeled.
9. The maintenance of a creamery or cream station or cream route vehicle in an insanitary condition.
10. The conducting or maintaining of a creamery, or cream station, or cream route vehicle in such a manner that cream may be contaminated.
11. The act of obstructing or hindering any official inspection by the secretary or by any of his authorized agents.
12. The removal or defacement of any tag or tags as herein required which have been attached to a receptacle containing cream.
13. The handling or transportation of cream contrary to the provisions of this chapter.
14. The operation of a creamery, or cream

station, or cream route vehicle without obtaining a license as herein provided.

This enumeration of prohibited acts shall not be construed to exempt the violator of any other provision of this chapter from criminal responsibility. [C35,§3100-g26.]

3100.46 Penalties. Any person who, by himself or by his agent or employee, wilfully violates any requirement of this chapter shall be fined not less than twenty-five dollars nor more than one hundred dollars. [C35,§3100-g27.]

Constitutionality, §3100-g28, code 1935; 46GA, ch 29, §28

CHAPTER 151

PRODUCTION AND SALE OF EGGS

General penalty, §3047

3101 License.
3102 Retailers exempted.
3103 Fee.
3104 Sale of eggs unfit for human food.
3105 Eggs unfit for human food.
3106 Equipment required of dealers.
3107 "Candling."
3108 Candling required.
3109 Candling records.
3110 Certificate.
3111 Rules.
3112 Deduction to be determined by candling.
3112.1 Grades.

3101 License. Every person engaged in the business of buying, selling, or dealing in eggs shall obtain a license from the department for each establishment at which said business is conducted. [C24, 27, 31, 35,§3101.]

3102 Retailers exempted. Retailers who buy direct from dealers licensed under this chapter and who do not sell in lots greater than one case shall not be required to procure a license. [C24, 27, 31, 35,§3102.]

3103 Fee. The license fee shall be one dollar per annum and each license shall expire on March 1 after the date of issue. [C24, 27, 31, 35,§3103.]

3104 Sale of eggs unfit for human food. No person shall sell, offer or expose for sale, or have in his possession any egg unfit for human food, unless the same is broken in shell and then denatured so that it cannot be used for human food. [C24, 27, 31, 35,§3104.]

3105 Eggs unfit for human food. For the purpose of this chapter, an egg shall be deemed unfit for human food:

1. If it is addled or moldy, containing black rot, white rot, or a blood ring.
2. If it has an adherent yolk, or a bloody or green white.
3. If it has been incubated beyond the blood ring stage.
4. If it consists to any extent of a filthy or decomposed substance. [C24, 27, 31, 35,§3105.]

3106 Equipment required of dealers. Every person engaged in the business of buying eggs intended for human food for resale shall maintain an adequate place for the proper candling and handling of the same. [C24, 27, 31, 35, §3106.]

3107 "Candling." The term "candling" as used in this chapter shall mean the careful examination, in a partially dark room or place, of the whole egg by means of a strong light, and the apparatus and method employed shall be approved by the department. [C24, 27, 31, 35, §3107.]

3108 Candling required. Every person buying eggs from the producer for resale shall candle all eggs offered to him and shall refuse to buy eggs unfit for human food as herein defined. Such candling shall be done in the presence of the producer if he so requests. [C24, 27, 31, 35,§3108.]

3109 Candling records. Each licensee shall keep such candling records as may be required by the department, which records shall be open at all reasonable times for examination by said department. [C24, 27, 31, 35,§3109.]

3110 Certificate. There shall be placed on the top layer of every case of candled eggs a certificate showing the date of candling, the name, initials, or number of the person doing the candling, the name of this state, and the license number of the person for whom the eggs were candled, which certificates shall be printed on sheets not smaller than two and three-eighths by four and one-fourth inches. [C24, 27, 31, 35,§3110.]

3111 Rules. The department shall determine the conditions under which eggs once candled shall be recandled in order to prevent the sale of eggs unfit for human food; and said department shall establish the necessary rules for carrying this section into effect. [C24, 27, 31, 35,§3111.]

3112 Deduction to be determined by candling. No person shall in buying or selling eggs take or give a greater or less deduction for eggs candled out as unfit for food than the actual loss which has been determined by the careful candling of the same. [C24, 27, 31, 35, §3112.]

3112.1 Grades. The following grades of eggs are hereby established:

Grade 1. The minimum requirements of this grade shall be eggs which are clean and sound, with an air space of two-eighths inch or less in depth, yolk only slightly visible, white firm and clear, and the germ not visible. Eggs shall weigh twenty-four ounces net per dozen, with a minimum rate of twenty-two ounces for indi-

vidual eggs. This grade would include eggs that would go as United States specials and United States extras.

Grade 2. The minimum requirements of this grade shall be eggs which are clean and sound, air cell of three-eighths inch or less in depth, yolk may be visible and mobile, white shall be reasonably firm, and germ may be slightly visible. Eggs shall weigh twenty-four ounces net per dozen, with a minimum rate of twenty-two ounces for individual eggs. This grade shall include eggs that would go as United States standards.

Grade 3. All edible eggs which do not meet the requirements of either of the preceding grades may be classed under this grade or may be further subdivided in conformity with federal grades into United States trades, United States dirties, or United States checks.

Fresh eggs. A fresh egg shall be considered such if not to exceed fourteen days old, shall be clean and sound, with an air cell of two-eighths of an inch or less in depth, yolk only slightly visible, white firm and clear, and the germ not visible.

Special grade 1. The minimum requirements of this grade shall be the same as of grade 1, and in addition thereto, when sold to the dealer, the eggs must have been laid within a period of seventy-two hours. [C27, 31, 35,§3112-b1.]

CHAPTER 151.1

POULTRY AND DOMESTIC FOWLS

3112.2 License.
3112.3 Fee.
3112.4 Record.
3112.5 Inspection of.
3112.6 Enforcement.
3112.7 Violations.

3112.2 License. Every person, partnership or corporation engaged in the business of buying for the market, poultry or domestic fowls from the producer thereof, shall obtain a license from the department of agriculture for each establishment at which said business is conducted.

The word "producer" as herein used shall include anyone not a licensed dealer who has acquired such poultry or domestic fowls other than through a licensed dealer. [C27, 31, 35, §3112-b2.]

3112.3 Fee. The license fee shall be one dollar per annum, and each license shall expire on March 1 after the date of issue. [C27, 31, 35, §3112-b3.]

3112.4 Record. Each licensee shall keep such records as the department of agriculture shall require, as to date of purchase, name and residence of seller and number and description of such poultry or domestic fowls purchased from the producer. [C27, 31, 35,§3112-b4.]

3112.5 Inspection of. Such records as are required by the department of agriculture to be kept by such licensee shall be open to inspection by any peace officer at any reasonable time. [C27, 31, 35,§3112-b5.]

3112.6 Enforcement. The department of agriculture shall be charged with the duty of the enforcement of this chapter. [C27, 31, 35, §3112-b6.]

3112.7 Violations. Any person who shall violate the provisions of this chapter shall, for each offense, be deemed guilty of a misdemeanor and punishable as such. [C27, 31, 35,§3112-b7.]

Punishment, §12894

CHAPTER 152

COMMERCIAL FEEDS

Referred to in §3177
General penalty, §3047

3113 Definitions.
3114 Labeling—analysis.
3114.1 Shells.
3114.2 Weeds prohibited.
3115 Stock tonic—labeling.
3116 Written labels permitted.
3117 Dealers to furnish samples.
3118 Inspection fee—report under oath.
3119 Fee for stock tonic.
3120 Feeds not subject to fee.
3121 Retailers exempted.
3124 Poisonous substances.
3126 Analyses of feeds—fee.

3113 Definitions. For the purpose of this chapter:

1. "Commercial feed" shall mean "food" as defined in the chapter relative to the adulteration of foods, except that it shall only include food in concentrated form, and mineral mixtures, intended for feeding to domestic animals, and it shall not include hay, straw, whole seeds, unmixed meals made from entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, or broom corn; nor shall it include wheat flour or other flours fit for human consumption.

2. "Stock tonic" shall mean a class of commercial feed such as medicated stock or poultry foods, including such preparations as are composed wholly of drugs which contain any substance claimed to possess medicinal, condimental, or nutritive properties. [S13,§5077-a8; C24, 27, 31, 35,§3113.]

Referred to in §3149.1
Adulteration of foods, ch 148

3114 Labeling—analysis. All manufacturers, importers, jobbers, firms, associations, corporations, or persons, before selling, offering or exposing for sale or distributing in this state any brand of commercial feed, shall have printed on, or attached to each bag, package, and/or carton, in a conspicuous place, or delivered with each bulk lot, a label which shall contain a legible statement, printed in the English language, clearly and truly setting out:

a. The net weight of the contents of the package, bag, carton or bulk lot;

b. The brand or trade name of the feed;

c. The name and principal address of the manufacturer or person responsible for placing the commodity on the market;

d. The minimum percentage of crude protein;

e. The minimum percentage of crude fat;

f. The maximum percentage of crude fiber;

g. The name of each ingredient used in its manufacture; provided that the official names of all materials which have been so defined by the association of American feed control officials, shall be used in the declaration of the names of ingredients;

h. The minimum percentage of phosphorus (P) and of iodine (I), and the maximum percentage of calcium (Ca) and of salt (NaCl), if the same be present in mixed feeds containing more than a total of five percent of one or more mineral ingredients, or other unmixed materials used as mineral supplements, and in mineral feeds, mixed or unmixed, which are manufactured, represented and sold for the primary purpose of supplying mineral elements in rations for animals, birds, or poultry and containing mineral elements generally regarded as dietary factors essential for normal nutrition; provided that if no nutritional properties other than those of a mineral nature be claimed for a mineral feed product, the per centums of crude protein, crude fat, and crude fiber may be omitted.

The methods of analysis shall be those in effect at the time by the association of official agricultural chemists of North America. [S13, §§5077-a6,-a7; C24, 27, 31, 35,§3114; 48GA, ch 91,§1.]

Referred to in §3115

3114.1 Shells. Poultry shells or poultry limestone shall be classified as commercial feed, and shall be labeled to show the kind of shells or ingredients of which they are composed and the percent of calcium carbonate. [C31, 35, §3114-d1.]

3114.2 Weeds prohibited. Any commercial feed containing noxious weed seed shall be prohibited from sale unless the feed is so finely ground, heated to a temperature, or otherwise treated, so that the weed seed will not germinate. [C31, 35,§3114-d2.]

3115 Stock tonic—labeling. In the case of stock tonic, in addition to the requirements of section 3114, the label shall state the English name of each drug and the total percentage of all drugs and the actual percentage of salt, charcoal, and sulphur, and the actual percentage and name of any other ingredient contained in such stock tonic. [S13,§5077-a7; C24, 27, 31, 35,§3115; 48GA, ch 91,§2.]

3116 Written labels permitted. Labels on packages or containers of commercial feeds may be written instead of being printed; but when written, the writing must be plain and legible. [S13,§5077-a6; C24, 27, 31, 35,§3116.]

3117 Dealers to furnish samples. Before any commercial feed is offered or exposed for sale, or sold, the person who desires to offer or expose it for sale, or sell it, shall pay the department annually a registration fee of fifty cents accompanied by an affidavit containing the items required by this chapter to be printed on the label of such feed. Said affidavit shall comply with the latest uniform registration form approved by the association of American feed control officials. Upon request a sealed container holding not less than one pound of said feed shall accompany the registration fee and affidavit. [S13,§5077-a9; C24, 27, 31, 35, §3117; 48GA, ch 91,§3.]

3118 Inspection fee—report under oath. For the purpose of defraying the expenses connected with the sampling, inspection and analysis of commercial feeds sold or offered for sale within this state and for other items incident to carrying out the provisions of this chapter, all corporations, firms or persons engaged in the manufacture of commercial feeds sold in this state shall on or before the fifteenth day of January and the fifteenth day of July of each year, make statement under oath, in due form of law, which shall be filed with the department and which shall set forth the number of net tons of such commercial feeds sold or distributed in this state during the six preceding calendar months; and upon such statement shall pay to the department the sum of ten cents per net ton of two thousand pounds. Each applicant for a certificate of registration shall include in such application a permit granting to the department permission to verify from applicant's records such applicant's statement of tonnage. [S13,§5077-a10; C24, 27, 31, 35,§3118; 48GA, ch 91,§4.]

Referred to in §3119

3119 Fee for stock tonic. Before any person shall solicit orders for, deliver, offer or expose for sale, or sell any stock tonic, he shall, in lieu of the inspection fee provided in section 3118, pay to the department, on or before the fifteenth day of July each year, a general inspection fee of six dollars per annum for each product manufactured. Inspections shall be made as provided in chapter 147. [S13, §5077-a10; C24, 27, 31, 35,§3119.]

3120 Feeds not subject to fee. Unadulterated wheat, rye, and buckwheat bran; wheat, rye, and buckwheat middlings; or wheat, rye, and buckwheat shorts manufactured in this state shall not be subject to any inspection fee required by this chapter. [S13,§5077-a10; C24, 27, 31, 35,§3120.]

3121 Retailers exempted. Payment of any inspection fee provided in this chapter by the manufacturer or importer of any commercial feed or stock tonic shall exempt all other persons from such payment upon said products. [S13,§5077-a10; C24, 27, 31, 35,§3121.]

3122, 3123 Rep. by 48GA, ch 91,§5

3124 Poisonous substances. No person shall sell in ground form wheat or rye screenings containing cockle or other poisonous or deleterious substances. [S13,§5077-a13; C24, 27, 31, 35,§3124.]

3125 Rep. by 48GA, ch 91,§5

3126 Analyses of feeds—fee. Any person purchasing any commercial feed in this state for his own use may submit fair samples of said feed to the department, accompanied by an analysis fee of one dollar for each sample, and a proper analysis of the same shall be made and furnished. [S13,§5077-a12; C24, 27, 31, 35, §3126.]

CHAPTER 153

AGRICULTURAL SEEDS

General penalty, §3047

3127 Definitions.
3128 Additional noxious weeds.
3129 Labeling agricultural seed.
3130 Labeling of certain mixed seed.
3131 Labeling other mixtures of seed.
3132 Written labels.
3133 Sales from bulk.
3134 Presumption.
3135 Analysis of seed—fee.
3136 Exemptions.
3137 Certain sales prohibited.
HYBRID SEED CORN
3137.1 Unlawful sale or marking.
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3137.3 Legislative declaration.
3137.4 Sales prohibited.
3137.5 Prohibitions.
3137.6 Enforcement.

3127 Definitions. For the purpose of this chapter:

1. "Agricultural seed" shall mean the seeds of Canada or Kentucky bluegrass, brome grass, fescues, millet, tall meadow oatgrass, orchard grass, redtop, Italian, perennial, or western rye grass, Kaffir corn, sorghum or cane, Sudan grass, timothy, alfalfa, alsike, crimson, mammoth or sapling, red, sweet, or white clover, Canada field peas, cowpeas, soy beans, vetches, and other grasses and forage plants, buckwheat, flax, rape, barley, field corn, oats, rye, wheat, and other cereals.

2. "Weed seed" shall mean the seeds of noxious weeds listed herein, and all seeds not listed above as agricultural seed.

3. "Noxious weeds" shall be divided into two classes, namely:

a. Primary noxious weeds which shall include:

(1) Quack grass—Agropyron repens
(2) Canada thistle—Cirsium arvense
(3) Perennial sow thistle—Sonchus arvensis and S. uliginosus
(4) Perennial pepper grass—Lepidium draba
(5) European morning glory—Convolvulus arvensis
(6) Horse nettle—Solanum carolinense
(7) Leafy spurge—Euphorbia esula and E. lucida
(8) Russian knapweed—Centaurea repens
(9) Buckhorn—Plantago lanceolata

b. Secondary noxious weeds which shall include:

(1) Wild carrot—Daucus carota
(2) Sour dock—Rumex crispus
(3) Smooth dock—Rumex altissimus
(4) Sheep sorrel—Rumex acetosella
(5) Wild oats—Avena fatua
(6) Wild mustard—Brassica arvensis.
(7) Indian mustard—Brassica juncea
(8) Black mustard—Brassica nigra
(9) Dodders—Cuscuta sp.

4. "Purity" of agricultural seed shall mean freedom from inert matter, and from other agricultural or weed seed distinguishable by their appearance. [S13,§§5077-a14–a17; C24, 27, 31, 35,§3127.]

Referred to in §3128
Weeds, ch 246.1

3128 Additional noxious weeds. Whenever it shall appear to the department that any plant, other than those specifically enumerated in section 3127, has become, or threatens to become, a menace to the agricultural industry of this state, the secretary of agriculture shall call a committee of three experts in plant life, one of whom shall be the botanist of the state college of agriculture and mechanic arts. If the said committee shall find that such plant has become, or threatens to become, a menace to the agricultural industry it shall so report to the department, which shall then declare the same to be a noxious weed. Notice of such declaration shall be given by posting same at the courthouse in each county of the state and the provisions of this chapter shall apply to such plant from and after thirty days from the posting of said notice. [C24, 27, 31, 35,§3128.]

3129 Labeling agricultural seed. All agricultural seed offered or exposed for sale, or sold in package or wrapped form, for seeding purposes and all such seeds transported into and delivered in this state and so offered or exposed for sale or so sold for seeding purposes shall be labeled on the package or container as provided in sections 3037 and 3038, and in addition thereto shall have printed on the label prescribed in said sections:

1. Variety of seed.

2. The approximate percentage by weight of the purity of the seed.
3. The approximate total percentage by weight of weed seed.
4. The name of each kind of seed or bulblet of noxious weeds which is present.
5. The approximate percentage of germination of such agricultural seed, together with the month and year said seed was tested, and year grown, and, if corn, the county and state where grown, and if clover of any variety or alfalfa, the state or country where grown. [S13, §§5077-a18,-a19,-a21; C24, 27, 31, 35,§3129.]

3130 Labeling of certain mixed seed. Mixtures of alsike and timothy, alsike and white clover, redtop and timothy, alsike and red clover, offered or exposed for sale, or sold as mixtures in package or wrapped form, for seeding purposes and in lots of ten pounds or more shall be labeled on the package or container as to the quantity, percentage of weed seed present, and name of vendor, in the manner prescribed for pure agricultural seed, and in addition the label shall contain the following specific items:
1. The statement that such seed is a mixture.
2. The name and approximate percentage by weight of each kind of agricultural seed present in such mixture in excess of five percent by weight of the total mixture.
3. The name of each kind of seed or bulblet of noxious weeds which is present singly or collectively in excess of one seed or bulblet in each fifteen grams (approximately three-fifths ounce) of such mixture.
4. The approximate percentage of germination of each kind of agricultural seed present in such mixture in excess of five percent by weight, together with the month and year said seed was tested, and year grown. [S13,§§5077-a18,-a19,-a21; C24, 27, 31, 35,§3130.]

Referred to in §3131

3131 Labeling other mixtures of seed. Special mixtures of agricultural seed except as provided in section 3130, offered or exposed for sale, or sold in package or wrapped form for seeding purposes, and in quantities of eight ounces or more, shall be labeled on the package or container as prescribed in section 3130, except that the percentage of germination need not be stated, but the label shall contain a statement showing the approximate percentage by weight of inert matter. [S13,§§5077-a18,-a19, -a21; C24, 27, 31, 35,§3131.]

3132 Written labels. The label on a package or container of agricultural seed may be written instead of being printed, but when written, the writing must be plain and legible. [S13, §5077-a6; C24, 27, 31, 35,§3132.]

3133 Sales from bulk. In case agricultural seed or mixtures of the same are offered or exposed for sale in bulk, or sold from bulk, there shall be conspicuously displayed in connection therewith a placard containing the items required on the label of such seed when offered or exposed for sale, or sold in package or wrapped form, or in lieu of this requirement the vendor may furnish the vendee with a printed or written statement containing the said items. [S13,§5077-a6; C24, 27, 31, 35,§3133.]

Referred to in §3134

3134 Presumption. In every sale of agricultural seed or mixture of the same it shall be presumed that the said seed is free from weed seed unless the label on the package or container specifies the presence of such weed seed or the purchaser is informed of the presence of the same in the manner provided in section 3133. [C24, 27, 31, 35,§3134.]

3135 Analysis of seed—fee. Any person purchasing any agricultural seed in this state for his own use may submit fair samples of said seed to the department, accompanied by an analysis fee of fifty cents for each sample and a proper analysis of the same shall be made and furnished. [S13,§5077-a12; C24, 27, 31, 35, §3135.]

3136 Exemptions. Agricultural seed or mixtures of same shall be exempt from the provisions of this title:
1. When possessed, exposed or offered for sale, or sold for food purposes only.
2. When sold or in store for the purpose of recleaning.
3. When sold by one farmer to another and delivered upon the vendor's premises; but if such seed is advertised for sale or is delivered through a common carrier, then the seed shall be subject to all the requirements of this title, but this exemption shall in no event be construed as permitting the sale of agricultural seed containing the seeds or bulblets of primary noxious weeds in violation of section 3137. [S13,§5077-a20; C24, 27, 31, 35,§3136.]

3137 Certain sales prohibited. No person shall sell, offer or expose for sale, or distribute, for seeding purposes any agricultural seed if the seed of any of the primary noxious weeds are present singly or collectively, as follows:
1. In excess of one seed or bulblet in each five grams of timothy, redtop, tall meadow oatgrass, orchard grass, crested dog's-tail, Canada or Kentucky bluegrass, fescues, brome grass, Italian, perennial or western rye grass, crimson, mammoth or sapling, red, white, alsike, or sweet clover, alfalfa, or any other grass or clover not otherwise classified.
2. One in twenty-five grams of millet, rape, flax, or other agricultural seed not specified in subsections 1 or 3 of this section.
3. One in one hundred grams of wheat, oats, rye, barley, buckwheat, vetches, or other agricultural seed as large or larger than wheat. [S13,§5077-a15; C24, 27, 31, 35,§3137.]

Referred to in §3136

HYBRID SEED CORN

3137.1 Unlawful sale or marking. It shall be unlawful for any person, firm, corporation or its agents or representatives to sell, offer or expose for sale, or falsely mark or tag, within the state of Iowa, any seed corn as hybrid unless it

represents the first generation of a cross between strains of different parentage and involving inbred lines of corn and/or their combinations. Any corn sold as hybrid shall have plainly printed or marked on the container in which such corn is sold the identifying symbols or numbers, with explanation thereof if necessary, clearly indicating the specific combination. The cross mentioned above shall be produced by cross fertilization, controlled, either by hand or by detasseling at the proper time. [C35,§3137-e1; 47GA, ch 113,§1.]

Referred to in §3137.2

3137.2 Misdemeanor. Every violation of the provisions of section 3137.1 shall be deemed a misdemeanor punishable by a fine of not more than one hundred dollars or imprisonment for thirty days in the county jail or both. The department of agriculture through its duly authorized agent or agents may institute proceedings in a court of competent jurisdiction to enforce this section and section 3137.1. [C35,§3137-e2.]

SEED POTATOES

3137.3 Legislative declaration. It is hereby established that the certification system is essential to a good seed potato supply for the state and that from long use by state authorities in states producing the great bulk of northern seed used in Iowa, blue tags attached to bags containing such certified seed have become identified in the minds of the public as evidence of official certification of such seed, and of the superior quality thereof. [C35,§3137-g1.]

3137.4 Sales prohibited. The sale of, the contracting for delivery, the exposure for sale of seed potatoes or potatoes sold to be used for seed bearing a tag either blue in color or prominently printed blue, or the word "certified" or similar printed or written claim or about which any such verbal claim has been made, unless in truth such seed has been certified by duly constituted state authority, are hereby forbidden within the state of Iowa, except that;

First crop grown from certified seed may bear a statement as follows: "These seed potatoes are not certified but are the first crop grown from certified seed"; provided, however, that the words "not certified", and "certified" shall be in type of equal size and weight of face, equally displayed and close together, and that such statement if put upon a tag, shall be on a tag not blue in color nor prominently printed in blue. The statements permitted under this section are a violation of this act [46GA, ch 30] if false in fact. [C35, §3137-g2.]

3137.5 Prohibitions. Any seed potatoes offered in violation of the terms of this act [46GA, ch 30] shall be confiscated and sold for the benefit of the school funds of this state. Any individual or the manager or agent of any firm or corporation violating the terms of this act shall be fined not less than ten dollars nor more than one hundred dollars. The sale of seed potatoes in violation of this act shall be judged grounds for civil damage of fifty cents per hundred pounds due the buyer from the seller, his salesman, agent or manager, the said fifty cents per hundred damage to be over and above any reduction in crop shown to have been sustained by the use of seed misrepresented to the buyer. [C35,§3137-g3.]

3137.6 Enforcement. It shall be the duty of the secretary of agriculture and his agents to enforce this act [46GA, ch 30] and of the county attorneys and of the attorney general of the state to cooperate with him in the enforcement of this act. The secretary of agriculture is empowered and directed to prescribe the color, form and wording of tags and labels used on seed potatoes. [C35,§3137-g4.]

CHAPTER 154

COMMERCIAL FERTILIZERS

General penalty, §3047

3138 License.
3139 Retailers exempted.
3140 Affidavit of items on label.
3141 Labeling.
3142 Bulk sales.

3138 License. Every person dealing in commercial fertilizers shall obtain a license from the department. The fee for said license shall be twenty dollars for each brand of fertilizer offered or exposed for sale, or sold, and such license shall expire on May 1 after the date of issue. [S13,§2528-f1; C24, 27, 31, 35,§3138.]

3139 Retailers exempted. Payment of said license fee by the manufacturer or importer shall exempt all other persons from such requirement. [S13,§2528-f1; C24, 27, 31, 35,§3139.]

3140 Affidavit of items on label. Before any commercial fertilizer is offered or exposed for sale, or sold, the person who desires to offer or expose it for sale, or sell it, shall file with the department a certificate containing the items required to be printed on the label by section 3141, accompanied by an affidavit that said items are true and correct. [S13,§2528-f1; C24, 27, 31, 35,§3140.]

3141 Labeling. Any commercial fertilizer, the price of which exceeds three dollars per ton, offered or exposed for sale, or sold in package or wrapped form, shall be labeled on the package or container as provided in sections 3037 to 3040, inclusive, and in addition thereto shall have printed on the label in the manner prescribed in said sections the chemical analysis, showing the minimum percentages of nitrogen in available form, of potassium soluble in water, of phosphorus in available form, soluble or re-

verted, and of insoluble phosphorus. [S13, §2528-f; C24, 27, 31, 35,§3141.]

Referred to in §§3140, 3142

3142 Bulk sales. In case of sales of commercial fertilizer from bulk or in bulk a certificate printed in the same manner as the label required by section 3141 may be delivered to the purchaser in fulfillment of the requirements of said section. [S13,§2528-f; C24, 27, 31, 35, §3142.]

CHAPTER 154.1

AGRICULTURAL LIME

3142.01 Percentage statement.
3142.02 "Delivery" defined.
3142.03 "Vendor" defined.
3142.04 Variation.
3142.05 Analyses.
3142.06 Special analyses.
3142.07 Presumption.
3142.08 Penalty.

3142.01 Percentage statement. The vendor of each sale or shipment of lime for agricultural purposes in this state shall deliver to the vendee at the time of sale or delivery, a written, signed statement which shall show in separate percentages the quantity of calcium carbonates and magnesium carbonates contained in said sale or shipment. [C27, 31, 35,§3142-b1.]

3142.02 "Delivery" defined. Delivery shall be deemed effected by delivering the statement personally to the vendee, or by attaching said statement with bill of lading. [C27, 31, 35, §3142-b2.]

3142.03 "Vendor" defined. For the purposes of this chapter the term "vendor" shall mean any person, firm, association or corporation who produces, manufactures or imports into this state for sale or use within this state, lime for agricultural purposes. [C27, 31, 35,§3142-b3.]

3142.04 Variation. The vendor shall be deemed guilty of a misdemeanor if the actual percentage of calcium carbonates or magnesium carbonates in said sale or shipment is ten or more percent less than as shown by the statement delivered as aforesaid. [C27, 31, 35,§3142-b4.]

Referred to in §3142.08

3142.05 Analyses. Any person may cause samples of agricultural lime to be submitted to the secretary of agriculture of this state and said secretary, upon the payment of one dollar for each sample, shall cause an analysis to be made of each such sample and shall certify to the correctness thereof. [C27, 31, 35,§3142-b5.]

3142.06 Special analyses. Upon request of a purchaser of agricultural lime sold in this state, and upon payment of a fee of three dollars the secretary of agriculture or his authorized agent shall procure from such shipment a composite sample or samples and cause an analysis thereof to be made; and shall certify to the correctness thereof, but such analysis shall be made and certified only of samples procured by said secretary or his authorized agent from a shipment which has not been removed from the car or conveyance in which it was loaded by the seller. [C27, 31, 35,§3142-b6.]

Referred to in §3142.07
Procuring samples, §3031

3142.07 Presumption. The certificate provided for in section 3142.06 shall be prima facie evidence in all proceedings as to the percentage of calcium carbonates and magnesium carbonates in said shipment. [C27, 31, 35,§3142-b7.]

3142.08 Penalty. A vendor who fails to make delivery of the said statement or who delivers a statement which is false within the meaning of section 3142.04 shall be fined in a sum not less than ten dollars nor more than one hundred dollars. [C27, 31, 35,§3142-b8.]

CHAPTER 154.2

COUNTY LIMESTONE QUARRIES

3142.09 Board may establish.
3142.10 Equipment to operate.
3142.11 Petition by farmers.
3142.12 Assessment lien.
3142.13 Interest on installments.
3142.14 Anticipatory warrants.
3142.15 Contents of warrants.
3142.16 Registration—call.
3142.17 Price of lime.
3142.18 Cost calculated.
3142.19 Relief labor.

3142.09 Board may establish. The board of supervisors of any county where there is no privately owned quarry, or when a privately owned quarry is unable to supply limestone in the same amount and at the same price and terms, shall have the jurisdiction, power and authority, at any regular, special or adjourned session to establish, locate, acquire by purchase, condemnation or lease for the county use, any limestone quarry not at that time being operated by private individuals, corporations or associations, suitable for agricultural purposes. Such quarry shall not be so established, located, acquired, or leased unless and until the board has determined by actual investigation that the county can produce by such method lime at less

cost than lime of the same quality may be purchased by the county and delivered in the county from other sources. [47GA, ch 150,§1.]

3142.10 Equipment to operate. The board of supervisors shall have the authority and power to acquire such equipment as it shall deem necessary for the operation of any limestone quarry acquired for the production of agricultural lime. [47GA, ch 150,§2.]

3142.11 Petition by farmers. When a petition signed by fifty or more owners of farms within the county requesting the board of supervisors to sell lime to them under this chapter is filed with the board of supervisors, or when a petition signed by any number of owners of farms within the county requesting the board of supervisors to sell to them under this chapter an amount of lime aggregating not less than five thousand ton, is filed with the board of supervisors, said board may provide for and sell, under the provisions of this chapter, such lime as is requested to the said farm owners signing the petition and to any others requesting such sale of lime. [47GA, ch 150,§3.]

3142.12 Assessment lien. The board shall have full power and authority to quarry, pulverize and sell or to purchase and resell to said farm owners in their respective counties, limestone for their use on their farms and may either sell same for cash, or on application of any farm owner in the county, written notice having been first given to the mortgage or lien holder and consent of said lien holders having been obtained in writing, which consent shall be filed in the office of the county auditor, provide agricultural lime, and deliver same to farm of applicant, payment for same to be provided for by a special assessment tax levy against the real estate so benefited in the amount of the sales value and transportation of said agricultural lime, which assessment shall be payable at the option of the owner of the farm or his legal heirs or assignees in its entirety on or before December 1 following the receipt of said lime or may be paid in five equal annual installments payable on March 1 of each succeeding year with the ordinary taxes until said special assessment is fully paid. The special assessment shall, by consent, be a lien prior to any lien or liens upon said real estate. [47GA, ch 150,§4.]

Referred to in §3142.13

3142.13 Interest on installments. All unpaid installments of the special assessment tax levied against the property described in section 3142.12 shall bear interest at the rate of six percent and all delinquent installments shall be subject to the same penalties as are now applied to delinquent general taxes. [47GA, ch 150,§5.]

3142.14 Anticipatory warrants. The board shall have the authority for the purpose of financing and carrying out the provisions of this chapter to issue anticipatory warrants drawn on the county, in denominations of one hundred dollars, five hundred dollars and one thousand dollars, which anticipatory warrants shall draw interest at not more than three and one-half percent per annum; and shall not be a general obligation on the county and be secured only by the special assessment tax levy as herein provided. [47GA, ch 150,§6.]

3142.15 Contents of warrants. All such anticipatory warrants shall be signed by the chairman of the board of supervisors and attested by the county auditor with his official seal attached thereto, and dated as of the date of sale, and shall not be sold for less than par value. Said bonds may be drawn and sold from time to time as the need for funds to carry out the purpose of this chapter arises. [47GA, ch 150,§7.]

3142.16 Registration—call. All anticipatory warrants drawn under the provisions of this chapter, shall be numbered consecutively, and be registered in the office of the county treasurer and be subject to call in numerical order at any time when sufficient money derived from the sale of such limestone or the payment of a special assessment levied therefor, is in the hands of the county treasurer to retire any of said warrants together with accrued interest thereon. [47GA, ch 150,§8.]

3142.17 Price of lime. The cost price of this agricultural lime shall be fixed by the board of supervisors, at not less than the actual cost of production at the quarry with ten percent added to provide for the cost of and depreciation on the equipment used in the production of said agricultural lime, together with any cost in transportation of the lime from the quarry to the farm of applicant. [47GA, ch 150,§9.]

Referred to in §3142.18

3142.18 Cost calculated. In calculating the cost price of the agricultural lime to the county as referred to in section 3142.17, all elements of the cost of the operations, including the amortization of the purchase price of any quarries, lands, or equipment over the period during which any bonds, warrants or other obligations incurred by the county therefor shall mature, cost of all labor, proportionate and actual administrative overhead of county officials and other county executive employees in administering said chapter and conducting said business, repairs to plant machinery and equipment, wages of all employees and all other costs of production shall be kept in a separate system of accounts, and all books and records with respect to the cost of said agricultural limestone and the methods of bookkeeping and all records in connection with the production, disposal and sale of said agricultural limestone shall be open to the inspection of the public at all times. [47GA, ch 150,§10.]

3142.19 Relief labor. The board is specifically authorized to use relief labor in the production of agricultural lime as provided for in this chapter, but shall pay the prevailing labor scale for that type of work, customary in that vicinity. [47GA, ch 150,§11.]

CHAPTER 155

ADULTERATION AND LABELING OF DRUGS

Referred to in §§2533, 2591, 3030, 3179, 3180, 3181. General penalty, §3047

3143 Defined.
3144 "Adulteration" defined.
3145 Labeling of drugs.
3146 Curative or therapeutic mislabeling.
3147 Certain drugs exempted.
3148 "Itinerant vendor of drugs" defined.
3149 License required of itinerant—fee.
3149.1 Commercial foods excepted.
3150 Pharmacopoeia and National Formulary.

3143 Defined. For the purposes of this chapter "drug" shall include all substances and preparations for internal or external use recognized in the United States Pharmacopoeia or National Formulary and any substances or mixture of substances intended to be used for the cure, mitigation, or prevention of diseases of either man or animal. [S13,§4999-a33; C24, 27, 31, 35,§3143.]

3144 "Adulteration" defined. For the purposes of this chapter a drug shall be deemed to be adulterated:

1. If it is sold by a name recognized in the United States Pharmacopoeia or National Formulary and it differs from the standard of strength, quality, or purity as determined by the test laid down therein.
2. If its strength, quality, or purity falls below the standard under which sold. [S13, §4999-a34; C24, 27, 31, 35,§3144.]

3145 Labeling of drugs. Every drug offered or exposed for sale, or sold in package or wrapped form, shall be labeled on the package or container as prescribed in sections 3037 and 3038, except that the quantity of the contents need not be stated; and in addition thereto shall have printed on the label the name and the exact quantity or proportion of any alcohol, morphine, opium, heroin, chloroform, cannabis indica, chloral hydrate, acetanilide, or any derivative or preparation of any such substances contained in said drug. In case the principal package or container is inclosed in an outside wrapper or carton, the same label prescribed by this section for the package or container shall also be printed upon said wrapper or carton. [S13,§4999-a35; C24, 27, 31, 35,§3145.]

Referred to in §§3146, 3147

3146 Curative or therapeutic mislabeling. In addition to the requirements of section 3145 a drug shall also be deemed to be improperly labeled if the package or container or printed matter accompanying it bears or contains any representation regarding the curative or therapeutic effect of such drug or any of the ingredients contained therein which is false and fraudulent. [S13,§4999-a35; C24, 27, 31, 35,§3146.]

3147 Certain drugs exempted. Nothing in section 3145 shall be construed to apply:

1. To any drug specified in the United States Pharmacopoeia or National Formulary, which is in accordance therewith, and which is sold under the name given therein.
2. To the filling of prescriptions furnished by licensed physicians, dentists, or veterinarians, the originals of which are retained and filed by the pharmacist filling the same.
3. To any drug or medicine personally dispensed by any licensed physician, dentist, or veterinarian in the course of his practice. [S13, §4999-a35; C24, 27, 31, 35,§3147.]

3148 "Itinerant vendor of drugs" defined. "Itinerant vendor of drugs" shall mean any person who goes from place to place, or from house to house, and sells, offers or exposes for sale any drug as defined in this chapter. [C97, §2594; S13,§2594; C24, 27, 31, 35,§3148.]

Referred to in §1225.30

3149 License required of itinerant — fee. Every itinerant vendor of drugs or medicines shall procure an annual license from the pharmacy examiners. The fee for such license shall be fifty dollars; such license may be transferred by the licensee upon the payment of a fee of one dollar to the pharmacy examiners. No license fee shall be required from any person who exclusively takes bona fide orders for transmission to the company and where such orders are shipped direct to the customer by or through a common carrier. [C97,§2594; S13,§2594; C24, 27, 31, 35,§3149.]

Referred to in §1225.30

3149.1 Commercial foods excepted. Nothing in this act [45GA, ch 49] shall be construed as applying to commercial foods so defined in subsection 1 of section 3113. [C35,§3149-e1.]

3150 Pharmacopoeia and National Formulary. There shall be kept in every place in which drugs or medicines are compounded, a copy of the latest revision of the United States Pharmacopoeia and the National Formulary, which books shall be subject at all times to the inspection of the pharmacy examiners. [C24, 27, 31, 35,§3150.]

3151 to 3169, inc. Rep. by 47GA, ch 114,§26.

CHAPTER 155.1

UNIFORM NARCOTIC DRUG ACT

Referred to in §3030

3169.01 Definitions.
3169.02 Acts prohibited.
3169.03 Manufacturers and wholesalers.
3169.04 Licenses—qualifications, denial, revocation.
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3169.06 Sales by pharmacists.
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3169.22 Effect of acquittal or conviction under federal narcotic laws.
3169.23 Interpretation.
3169.24 Name of act.

3151 to 3169, inc. Rep. by 47GA, ch 114,§26

3169.01 Definitions. The following words and phrases, as used in this chapter, shall have the following meanings, unless the context otherwise requires:

1. "Person" includes any corporation, association, copartnership, or one or more individuals.

2. "Physician" means a person authorized by law to practice medicine in this state and any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment.

3. "Dentist" means a person authorized by law to practice dentistry in this state.

4. "Veterinarian" means a person authorized by law to practice veterinary medicine in this state.

5. "Manufacturer" means a person who by compounding, mixing, cultivating, growing, or other process, produces or prepares narcotic drugs, but does not include a pharmacist who compounds narcotic drugs to be sold or dispensed on prescriptions.

6. "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced nor prepared, on official written orders, but not on prescriptions.

7. "Pharmacist" means a registered pharmacist of this state.

8. "Pharmacy owner" means the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a registered pharmacist; but nothing in this chapter contained shall be construed as conferring on a person who is not registered or licensed as a pharmacist any authority, right or privilege that is not granted to him by the pharmacy laws of this state.

9. "Hospital" means an institution for the care and treatment of sick and injured, approved by the Iowa pharmacy examiners as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist, or veterinarian.

10. "Laboratory" means a laboratory approved by the Iowa pharmacy examiners, as proper to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific and medical purposes and for purposes of instruction.

11. "Sale" includes barter, exchange, gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.

12. "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

13. "Opium" includes morphine, codeine and heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium.

14. "Cannabis" includes the following substances, (Indian hemp, American hemp, marihuana) under whatever names they may be designated: (a) the dried flowering or fruiting tops of the plant Cannabis Sativa L., from which the resin has not been extracted, (b) the resin extracted from such tops, and (c) every compound, manufacture, salt, derivative, mixture, or preparation of such resin, or of such tops from which the resin has not been extracted.

15. "Narcotic drugs" means coca leaves, opium, and cannabis.

16. "Federal narcotic laws" means the laws of the United States relating to opium, coca leaves, and other narcotic drugs.

17. "Official written order" means an order written on a form provided for that purpose by the United States commissioner of narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law.

18. "Dispense" includes "distribute", "leave with", "give away", "dispose of", or "deliver".

19. "Registry number" means the number assigned to each person registered under the federal narcotic laws. [C51,§2728; R60,§4374; C73,§4038; C97,§2593; S13,§§2593, 2596-a; C24, 27, 31, 35,§3151; 47GA, ch 114,§1.]

3169.02 Acts prohibited. It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug,

except as authorized in this chapter. [C51, §2728; R60,§4374; C73,§4038; C97,§2593; S13, §§2593, 2596-a; C24, 27, 31, 35,§3152; 47GA, ch 114,§2.]

3169.03 Manufacturers and wholesalers. No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a wholesaler shall supply the same, without having first obtained a license to do so from the Iowa pharmacy examiners. The fee for such license shall be five dollars. Every license shall expire on the thirtieth day of June following the date of issuance of such license and shall be renewed annually. The renewal fee shall be two dollars. Provided, however, that this section shall not apply to pharmacists, physicians, dentists, and veterinarians in the regular course of their legitimate professional activities. [47GA, ch 114,§3.]

Referred to in §3169.04

3169.04 Licenses — qualifications, denial, revocation. No license shall be issued under section 3169.03 unless and until the applicant therefor has furnished proof satisfactory to the Iowa pharmacy examiners:

1. That the applicant is of good moral character or, if the applicant be an association or corporation, that the managing officers are of good moral character;

2. That the applicant is equipped as to land, buildings, and paraphernalia properly to carry on the business described in his application.

No license shall be granted to any person who has within five years been convicted of a wilful violation of any law of the United States, or of any state, relating to opium, coca leaves, or other narcotic drugs, or to any person who is a narcotic drug addict.

The Iowa pharmacy examiners may suspend or revoke any license for cause. [47GA, ch 114, §4.]

3169.05 Sale on written orders.

1. A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons, but only on official written order:

a. To a manufacturer, wholesaler, pharmacist, or pharmacy owner;

b. To a physician, dentist, or veterinarian;

c. To a person in charge of a hospital, but only for use by or in that hospital;

d. To a person in charge of a laboratory, but only for use in that laboratory for scientific and medical purposes.

2. A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

a. On a special written order accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territorial, district, county, municipal, or insular government, purchasing, receiving, possessing, or dispensing narcotic drugs by reason of his official duties;

b. To a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, for the actual medical needs of persons on board such ship or aircraft, when not in port, or to a physician or surgeon duly licensed in some state, territory, or the District of Columbia to practice his profession, or to a retired commissioned medical officer of the United States army, navy, or public health service employed upon such ship or aircraft; provided, such narcotic drugs shall be sold to the master of such ship or person in charge of such aircraft or to the physician, surgeon, or retired commissioned medical officer of the United States army, navy, or public health service employed upon such ship or aircraft only in pursuance of a special order form approved by a commissioned medical officer or acting assistant surgeon of the United States public health service;

c. To a person in a foreign country if the provisions of the federal narcotic laws are complied with.

3. An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two years in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this chapter. It shall be deemed a compliance with this subsection if the parties to the transaction have complied with the federal narcotic laws respecting the requirements governing the use of order forms.

4. Possession of or control of narcotic drugs obtained as authorized by this section shall be lawful if obtained in the regular course of business, occupation, profession, employment, or duty of the possessor.

5. A person in charge of a hospital or of a laboratory, or in the employ of this state or of any other state, or of any political subdivision thereof, or a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, or a physician or surgeon duly licensed in some state, territory, or the District of Columbia to practice his profession, or a retired commissioned medical officer of the United States army, navy, or public health service employed upon such ship or aircraft who obtains narcotic drugs under the provisions of this section or otherwise, shall not administer nor dispense nor otherwise use such drugs, within this state, except within the scope of his employment or official duty and then only for scientific or medicinal purposes and subject to the provisions of this chapter. [C24, 27, 31, 35, §§3154, 3155; 47GA, ch 114,§5.]

Referred to in §3169.11

3169.06 Sales by pharmacists.

1. A pharmacist, in good faith, may sell and dispense narcotic drugs to any person upon a written prescription of a physician, dentist, or

veterinarian, provided it is properly executed, dated and signed in indelible pencil or ink by the person prescribing, on the day when issued or the following day, and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and the full name, address, and registry number under the federal narcotic laws of the person prescribing, if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. The person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this chapter. The prescription shall not be refilled.

2. The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, pharmacist, or pharmacy owner, but only on an official written order.

3. A pharmacist, only upon an official written order, may sell to a physician, dentist, or veterinarian, in quantities not exceeding one ounce at any one time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty percent of the complete solution, to be used for medical purposes. [47GA, ch 114,§6.]

3169.07 Professional use of narcotic drugs.

1. A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe on a written prescription, administer or dispense narcotic drugs or may cause the same to be administered by a nurse or interne under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the patient for whom the narcotic drug is prescribed, and the full name, address and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered.

2. A veterinarian, in good faith and in the course of his professional practice only, and not for use by a human being, may prescribe on a written prescription, administer or dispense narcotic drugs, and he may cause them to be administered by an assistant or orderly under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the owner of the animal, the species of the animal for which the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered.

3. Any person who has obtained from a physician, dentist, or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist or veterinarian, shall return to such physician, dentist or veterinarian any unused portion of such drug, when it is no longer required by the patient. [47GA, ch 114,§7.]

3169.08 Preparations exempted. Except as otherwise in this chapter specifically provided, this chapter shall not apply to the following cases:

1. Prescribing, administering, compounding, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce, (a) not more than two grains of opium, (b) not more than one-quarter of a grain of morphine or of any of its salts, (c) not more than one grain of codeine or of any of its salts, (d) not more than one-eighth of a grain of heroin or of any of its salts, (e) not more than one grain of extract of cannabis nor more than one grain of any more potent derivative or preparation of cannabis.

2. Prescribing, administering, compounding, dispensing, or selling at retail of liniments, ointments and other preparations that are susceptible of external use only and that contain narcotic drugs in such combinations as prevent their being readily extracted from such liniments, ointments, or preparations, except that this chapter shall apply to all liniments, ointments and other preparations that contain coca leaves in any quantity or combination.

The exemptions authorized by this section shall be subject to the following conditions:

The medicinal preparation, or the liniment, ointment or other preparation susceptible of external use only, prescribed, administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone. Such preparation shall be prescribed, administered, compounded, dispensed, and sold in good faith as a medicine, and not for the purpose of evading the provisions of this chapter.

Nothing in this section shall be construed to limit the kind and quantity of any narcotic drug that may be prescribed, administered, compounded, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, compounded, dispensed, or sold in compliance with the general provisions of this chapter.

Nothing in this section shall be construed to permit any person to prescribe, administer, compound, dispense, or sell any of the preparations included herein, except those persons duly qualified under this chapter to engage in the distribution of narcotics. [47GA, ch 114,§8.]

Referred to in §§3169.09, 3169.17

3169.09 Record to be kept.

1. Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him and a record of all such drugs administered, dispensed, or pro-

fessionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this subsection if any such person using small quantities of solutions or other preparations of such drugs for local application shall keep a record of the quantity, character and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

2. Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them in accordance with the provisions of subsection 5 of this section.

3. Pharmacists and pharmacy owners shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of subsection 5 of this section.

4. Every person who purchases for resale, or who sells narcotic drug preparations exempted by section 3169.08, shall keep a record showing the quantities and kinds thereof received and sold, or disposed of otherwise, in accordance with the provisions of subsection 5 of this section.

5. The record of narcotic drugs received shall in every case show the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture; and the record shall in every case show the proportion of morphine, cocaine, or ecgonine contained in or producible from crude opium or coca leaves received or produced, and the proportion of resin contained in or producible from the dried flowering or fruiting tops of the plant Cannabis Sativa L., from which the resin has not been extracted, received or produced. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered, or dispensed, and the kind and quantity of drugs. Every record shall be kept for a period of two years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws, containing substantially the same information as is specified above, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed or stolen, if any; the kind and quantity of such drugs and the date of the discovery of such loss, destruction or theft.

6. Written orders shall not be required for the sale at wholesale of cannabis or any of the medicinal preparations exempted by section 3169.08, but manufacturers and wholesalers of cannabis or said medicinal preparations shall be required to render, with every sale thereof, an invoice, whether such sale be for cash or on credit; and such invoice shall contain the date of such sale, the name and address of the purchaser, and the amount of cannabis or said medicinal preparation so sold. Every purchaser of cannabis or said medicinal preparation from a manufacturer or wholesaler shall be required to keep the invoice rendered with such purchase for a period of two years. [47GA, ch 114,§9.]

3169.10 Labels.

1. Whenever a manufacturer sells or dispenses a narcotic drug, and whenever a wholesaler sells or dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind and form of narcotic drug contained therein. No person, except a pharmacist for the purpose of filling a prescription under this chapter, shall alter, deface, or remove any label so affixed.

2. Whenever a pharmacist or pharmacy owner sells or dispenses any narcotic drug on a prescription issued by a physician, dentist or veterinarian, he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address and registry number, or the name, address and registry number of the pharmacist for whom he is lawfully acting; the name and address of the patient or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address, and registry number of the physician, dentist, or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface or remove any label so affixed as long as any of the original contents remain. [47GA, ch 114,§10.]

3169.11 Authorized possession of narcotic drugs by individuals. A person to whom or for whose use any narcotic drug has been prescribed, sold or dispensed, by a physician, dentist or pharmacist or other person authorized under the provisions of section 3169.05, and the owner of any animal for which any such drug has been prescribed, sold, or dispensed by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same. [47GA, ch 114,§11.]

3169.12 Persons and corporations exempted. The provisions of this chapter restricting the possession and control of narcotic drugs shall not apply to common carriers or to warehousemen, while engaged in lawfully transporting or storing such drugs, or to any employee of the same acting within the scope of his employment; or to public officers or employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in

performing their official duties. [C24, 27, 31, 35,§3155; 47GA, ch 114,§12.]

3169.13 Common nuisances. Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such common nuisance. [C97, §5003; C24, 27, 31, 35,§§3161, 3163; 47GA, ch 114,§13.]

3169.14 Narcotic drugs to be delivered to state officials, etc. All narcotic drugs, the lawful possession of which is not established or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited and disposed of as follows:

1. Except as in this section otherwise provided, the court or magistrate having jurisdiction shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place, and manner of destruction, shall be kept and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States commissioner of narcotics, by the officer who destroyed them.

2. Upon written application by the state commissioner of health, the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of any of them, except heroin and its salts and derivatives, to said state commissioner of health, for distribution or destruction, as hereinafter provided.

3. Upon application by any hospital within this state, not operated for private gain, the state commissioner of health may in his discretion deliver any narcotic drugs that have come into his custody by authority of this section to the applicant for medicinal use. The state commissioner of health may from time to time deliver excess stocks of such narcotic drugs to the United States commissioner of narcotics, or may destroy the same.

4. The state commissioner of health shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities, and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered, and destroyed; and the dates of the receipt, disposal or destruction; which record shall be open to inspection by all federal or state officers charged with the enforcement of federal and state narcotic laws. [47GA, ch 114,§14.]

3169.15 Notice of conviction to be sent to licensing board. On the conviction of any person of the violation of any provision of this chapter, a copy of the judgment and sentence, and of the opinion of the court or magistrate, if any opinion be filed, shall be sent by the clerk of the court, or by the magistrate, to the board or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. On the conviction of any such person, the court may, in its discretion, suspend or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business. On the application of any person whose license or registration has been suspended or revoked, and upon proper showing and for good cause, said board or officer may reinstate such license or registration. [47GA, ch 114,§15.]

3169.16 Records confidential. Prescriptions, orders, and records, required by this chapter, and stocks of narcotic drugs, shall be open for inspection only to federal, state, county and municipal officers whose duty it is to enforce the laws of this state or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party. [47GA, ch 114,§16.]

3169.17 Fraud or deceit.

1. No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

2. Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

3. No person shall wilfully make a false statement in any prescription, order, report, or record, required by this chapter.

4. No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, pharmacy owner, physician, dentist, veterinarian, or other authorized person.

5. No person shall make or utter any false or forged prescription or written order.

6. No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

7. The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of section 3169.08, in the same way as they apply to transactions under all other sections. [47GA, ch 114,§17.]

3169.18 Burden of proof. In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provisions of this chapter, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this chapter, and the burden of proof of any such exception, excuse,

proviso, or exemption shall be upon the defendant. [C24, 27, 31, 35,§3156; 47GA, ch 114,§18.]

3169.19 Enforcement and cooperation. It is hereby made the duty of the Iowa pharmacy examiners, its officers, agents, inspectors and representatives, and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this chapter, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states, relating to narcotic drugs. [47GA, ch 114,§19.]

See also §2533

3169.20 Search warrant. Any narcotic drugs kept, manufactured or dispensed in violation of the laws of the United States or of this chapter, or any instrument, container, or other equipment used or intended to be used in manufacturing, keeping or dispensing such drug, may be seized, confiscated and disposed of under a search warrant proceeding and the procedure shall be the same as provided under chapter 617. [C24, 27, 31, 35,§§3159, 3162; 47GA, ch 114,§20.]

3169.21 Penalties. Any person violating any provision of this chapter shall upon conviction be punished, for the first offense, by a fine not exceeding one thousand dollars, or by imprisonment in jail for not exceeding two years, or by both such fine and imprisonment; and for any subsequent offense, by a fine not exceeding two thousand dollars, or by imprisonment for not exceeding ten years, or by both such fine and imprisonment. [C97, §5003; C24, 27, 31, 35,§§3168, 3169; 47GA, ch 114,§21.]

3169.22 Effect of acquittal or conviction under federal narcotic laws. No person shall be prosecuted for a violation of any provision of this chapter if such person has been acquitted or convicted under the federal narcotic laws of the same act or omission which, it is alleged, constitutes a violation of this chapter. [47GA, ch 114,§22.]

Constitutionality, 47GA, ch 114,§23

3169.23 Interpretation. This chapter shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those states which enact it. [C24, 27, 31, 35, §3167; 47GA, ch 114,§24.]

3169.24 Name of act. This chapter may be cited as the "Uniform Narcotic Drug Act." [47GA, ch 114,§25.]

CHAPTER 156

SALE AND DISTRIBUTION OF POISONS

Referred to in §§2533, 2591, 3030. General penalty, §3047

3170 Sale of abortifacients.
3171 Exception.
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3177 Certain sales excepted.
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3170 Sale of abortifacients. No person shall sell, offer or expose for sale, deliver, give away, or have in his possession with intent to sell, except upon the original written prescription of a licensed physician, dentist, or veterinarian, any cotton root, ergot, oil of tansy, oil of savin, or derivatives of any of said drugs. [C51,§2728; R60,§4374; C73,§4038; C97,§2593; S13,§§2593, 2596-a; C24, 27, 31, 35,§3170.]

Referred to in §3171

3171 Exception. The requirements of section 3170 that certain drugs shall be furnished only upon written prescription, shall not apply to the sale of such drugs to persons who wholesale or retail the same, nor to any licensed physician, dentist, or veterinarian for use in the practice of his profession. [S13,§2596-a; C24, 27, 31, 35, §3171.]

3172 Prescriptions. No person shall fill any prescriptions calling for any of the drugs required by this chapter to be furnished only upon written prescription unless the same be for medical, dental, or veterinary purposes only, and unless the physician, dentist, or veterinarian prescribing the same be personally known to such person, and no such prescription shall be refilled. [S13,§2596-a; C24, 27, 31, 35,§3172.]

3173 Wood or denatured alcohol. No person shall have in his possession or dispose of in any manner any article intended for use of man or domestic animals, for internal or external use, for cosmetic purposes, for inhalation, or for perfumes, which contains methyl (wood) alcohol, crude or refined, or completely denatured alcohol. Nothing in this section shall be construed to apply to specially denatured alcohols the formula of which has been approved and the manufacture and use regulated by the federal government. [S13,§4999-a36; C24, 27, 31, 35,§3173.]

3174 Regulations as to sales of certain poisons. It shall be unlawful for any person except a licensed pharmacist to sell at retail any of the poisons enumerated in this section: ammoniated mercury, mercury bichloride, red mercuric iodide, and other poisonous salts and compounds of mercury; salts and compounds of arsenic; salts of antimony; salts of barium except the sulphate; salts of thallium; hydrocyanic acid and its salts; chromic, glacial acetic, and picric acids; chloral hydrate, croton oil, cresol, chloroform, dinitrophenol, ether, oil of bitter almonds, phenol, phosphorus and sodium fluoride; aconitine, arecoline, atrophine, brucine, homatropine, hyoscyamine, nicotine, strychnine,

and the salts of these alkaloids; aconite, belladonna, cantharides, digitalis, nux vomica, veratrum, and the preparations of these poisonous drugs. [C51,§2728; R60,§4374; C73,§4038; C97,§2593; S13,§2593; C24, 27, 31, 35,§3174; 47GA, ch 115,§§1, 2.]

Referred to in §§3175, 3176, 3177, 3177.1, 3178, 3184

3175 Poison register. It shall be unlawful for any pharmacist to sell at retail any of the poisons enumerated in section 3174 unless he ascertains that the purchaser is aware of the character of the drug and the purchaser represents that it is to be used for a proper purpose and every sale of any poison enumerated in section 3174 shall be entered in a book kept for that purpose, to be known as a "Poison Register" and the same shall show the date of the sale, the name and address of the purchaser, the name of the poison, the purpose for which it was represented to be purchased, and the name of the natural person making the sale, which book or books shall be open for inspection by the pharmacy examiners, or any magistrate or peace officer of this state, and preserved for at least five years after the date of the last sale therein recorded. [C97,§2593; S13,§2593; C24, 27, 31, 35,§3175; 47GA, ch 115,§§1, 3.]

Referred to in §§3177, 3177.1

3176 Labeling poisons. Except as otherwise provided, it shall be unlawful to vend, sell, dispense, or give away any poison enumerated in section 3174, or/and sodium chlorate or/and crude carbolic acid, or any other potent poisons, without affixing to the bottle, box, vessel, or package containing the same, a label containing the name of the poison either printed or plainly written, and the word "Poison" printed in red ink, and the name and place of business of the distributor, manufacturer, wholesaler or dealer; and every package or container which contains ammonia water, concentrated lye, denatured alcohol, formaldehyde, commercial hydrochloric, nitric, sulphuric or oxalic acids, shall be labeled with the name of the poison, which label shall bear the name and place of business of the distributor, manufacturer, wholesaler, or dealer, the most available antidote and the word "Poison" printed in red ink in a conspicuous place thereon. [C51,§2728; R60,§4374; C73,§4038; C97,§§2588, 2593, 4976; S13,§2593; SS15,§2588; C24, 27, 31, 35,§3176; 47GA, ch 115,§§1, 4.]

Referred to in §3177

3177 Certain sales excepted. Nothing in sections 3174 to 3176, inclusive, shall apply:

1. To proprietary medicines, provided they are not in themselves poisonous and are sold in original unbroken packages;

2. To the filling of prescriptions from or the sale to licensed physicians, dentists, or veterinarians or sales to another pharmacist or to hospitals; or to drugs dispensed by licensed physicians, dentists, or veterinarians, as an incident to the practice of their professions;

3. To insecticides and fungicides as defined in chapter 157 and commercial feeds as defined in chapter 152, provided same be labeled in accordance with said chapter and sold in original unbroken packages, provided, however, that stock dips and fly sprays may be sold in bulk or otherwise and the vessel or container need not have printed on the label the most available antidote;

4. To any proprietary preparation intended for use in destroying mice, rats, gophers or other lower animals, provided same is sold in original unbroken packages and bears the word "Poison", the most available antidote, and the name of the manufacturer. [C97,§2593; S13, §§2593,-a; C24, 27, 31, 35,§3177; 47GA, ch 115, §§1, 5.]

3177.1 Prohibited sales. It shall be unlawful for any person in this state to sell or deliver any poison to any person known to be of unsound mind or under the influence of intoxicants, and it shall likewise be unlawful for any person in this state to sell or deliver any poison enumerated in section 3174 to any minor under sixteen years of age except upon a written order signed by some responsible person known to the person selling or delivering the same, which said written order shall contain all of the information required to be entered in the poison register under the provisions of section 3175. [C27, 31, 35,§3177-b1; 47GA, ch 115,§§1, 6.]

3178 False representations. Any person who obtains any poison enumerated in section 3174 under a false name or statement shall be guilty of a misdemeanor and punished as provided in chapter 147. [C51,§2728; R60,§4374; C73,§4038; C97,§2593; S13,§2593; C24, 27, 31, 35,§3178.]

General penalty, §8047

3179 Enforcement. The provisions of this chapter and chapter 155 shall be administered and enforced by the pharmacy examiners. In discharging any duty or exercising any power under said chapters, the pharmacy examiners shall be governed by all the provisions of chapter 147, which govern the department of agriculture when discharging a similar duty or exercising a similar power with reference to any of the articles dealt with in this title. [C24, 27, 31, 35, §3179.]

3180 Chemical analysis of drugs. Any chemical analysis deemed necessary by the pharmacy examiners in the enforcement of this chapter and chapter 155 shall be made by the department of agriculture when requested by said examiners. [C24, 27, 31, 35,§3180.]

3181 Applicability of other statutes. Insofar as applicable the provisions of chapter 147, shall apply to the articles dealt with in this chapter and chapter 155. The powers vested in the department of agriculture by said chapter shall be deemed for the purpose of this chapter and chapter 155 to be vested in the pharmacy examiners. [C24, 27, 31, 35,§3181.]

CHAPTER 157

INSECTICIDES AND FUNGICIDES

General penalty, §3047
Referred to in §3177

3182 Definitions.
3183 Labeling.
3184 Special requirements.
3185 Adulteration.
3186 Lime and sulphur liquid.

3182 Definitions. For the purpose of this chapter:

1. "Insecticide" shall include paris green, lead arsenate, and any other substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any insect which may infest vegetation, man, animals, households, or other environment.

2. "Paris green" shall include the product sold in commerce as paris green and chemically known as aceto-arsenite of copper.

3. "Lead arsenate" shall include the product sold in commerce as lead arsenate and consisting chemically of products derived from arsenic acid (H_3AsO_4) by replacing one or more hydrogen atoms by lead.

4. "Fungicide" shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any and all fungi which may infest vegetation or be present in any environment. [C24, 27, 31, 35,§3182.]

3183 Labeling. All insecticides and fungicides offered or exposed for sale, or sold in package or wrapped form, shall be labeled on each package or container as provided in sections 3037 to 3039, inclusive. [C24, 27, 31, 35, §3183.]

Referred to in §3184

3184 Special requirements. In addition to the requirement of section 3183, the following regulations shall also govern in labeling insecticides and fungicides:

1. When composed of any poison enumerated in section 3174, the word "poison" and its antidote shall appear on the label in a conspicuous manner.

2. When composed of arsenic in combination or elemental form, the total amount of arsenic present and the amount of arsenic in water-soluble form—both expressed in percent of metallic arsenic—shall also be stated on the label in the same manner prescribed for other items.

3. When composed partially or completely of an inert substance which does not effectively prevent, destroy, repel, or mitigate insects or fungi, the names and percentage amounts of each inert ingredient and the fact that they are inert, or the names and percentage amounts of each ingredient of the insecticide or fungicide having insecticidal or fungicidal properties without mention of the inert ingredients, except to state the total percentage of inert ingredients present, shall also appear upon the label in the same manner prescribed for other items.

4. Spray solution known as a lime and sulphur liquid shall also have stated on the label the strength of the solution and its gravity test, showing a guaranteed strength of lime and sulphur combined in solution as sulphates and sulphides, and the label shall contain a direction as to the proportions of water to be used to produce a mixture containing a four percent solution by weight of lime and sulphur combined as sulphates and sulphides. The printing of said label shall be in black-faced type, in letters not less than one-half inch in height. [C97,§2588; SS15,§2588; C24, 27, 31, 35,§3184.]

3185 Adulteration. In addition to the adulterations specified in paragraphs 1 to 3, inclusive, of section 3060 the following products shall be deemed to be adulterated:

1. In the case of paris green—

a. If it does not contain at least fifty percent of arsenious oxide.

b. If it contains arsenic in water-soluble forms equivalent to more than three and one-half percent of arsenious oxide.

2. In the case of lead arsenate—

a. If it contains more than fifty percent of water.

b. If it contains total arsenic equivalent to less than twelve and one-half percent of arsenic oxide (As_2O_5).

c. If it contains arsenic in water-soluble forms equivalent to more than seventy-five one-hundredths of one percent arsenic oxide (As_2O_5).

3. In the case of an insecticide or fungicide other than paris green and lead arsenate—

a. If its strength or purity falls below the professed standard or quality under which it is sold.

b. If it is intended for use on vegetation and contains any substance which, although preventing, destroying, repelling, or mitigating insects or fungi, shall be injurious to such vegetation when used as recommended by the manufacturer. [C24, 27, 31, 35,§3185.]

3186 Lime and sulphur liquid. Spray solution known as a lime and sulphur liquid shall be not less than seventy percent by weight of sulphur. [C24, 27, 31, 35,§3186.]

CHAPTER 158

PAINTS AND OILS

General penalty, §3047

3187 Definitions and standards.
3188 Labeling paints.
3189 Labeling oils.
3190 Labeling substitutes.

3187 Definitions and standards. For the purposes of this chapter:

Raw linseed oil. "Raw linseed oil" shall be obtained wholly from the seeds of the flax plant (linum usitatissimum) and shall comply with all the requirements of the United States Pharmacopoeia.

Boiled linseed oil. "Boiled linseed oil" or "boiled oil" shall be prepared by heating pure raw linseed oil to a temperature of at least one hundred seven degrees centigrade, and if desired incorporating not to exceed three percent by weight of dryer, and it shall fulfill the following requirements:

1. Its specific gravity at 20/20 degrees centigrade must be not less than nine hundred thirty-five thousandths and not greater than nine hundred forty-five thousandths.
2. Its saponification number must not be less than one hundred eighty-six.
3. Its iodine absorption number must not be less than one hundred sixty.
4. Its acid value must not exceed ten.
5. The volatile matter expelled at one hundred degrees centigrade must not exceed one-half of one percent.
6. No mineral oil shall be present, and the amount of unsaponifiable matter as determined by standard methods, must not exceed two percent.
7. The film left after flowing the oil over glass and allowing it to drain in a vertical position, must dry free from tackiness in not to exceed twenty hours, at a temperature of about twenty degrees centigrade.

Oil of turpentine. "Oil of turpentine", "spirits of turpentine", "turpentine", or "turps" shall consist wholly of the volatile portion obtained by distillation of the oleoresinous exudation from various species of coniferous trees and shall fulfill the following requirements:

1. Its specific gravity at 20/20 degrees centigrade must be not less than eight hundred sixty thousandths and not greater than eight hundred seventy-five thousandths.
2. Its index of refraction at twenty degrees centigrade must not be less than one and four hundred sixty-eight thousandths and not greater than one and four thousand seven hundred twenty-five ten thousandths.
3. Its iodine absorption number must not be less than three hundred forty.
4. The undissolved (unpolymerized) residue on treatment of ten cubic centimeters with forty cubic centimeters of a sulphuric acid containing twenty percent of the fuming acid must not exceed ten percent by volume of the sample.
5. The initial boiling point must not be lower than one hundred fifty degrees centigrade under ordinary atmospheric pressure, and ninety-five percent by volume must distill below one hundred sixty-six degrees centigrade.
6. The residue left after evaporation over a steam bath must not exceed two percent.
7. Mineral oil must not be present.

Paint. "Paint" shall include white lead in oil or any compound intended for the same use, paste or semipaste, and liquid or mixed paint ready for use, or any compound intended for the same purpose. [S13,§§2510-c,-n,-p,-v; C24, 27, 31, 35,§3187.]

3188 Labeling paints. All paint, including paint transported into and delivered in this state, offered or exposed for sale or sold in package or wrapped form shall be labeled on each package or container as provided in sections 3037 to 3040, inclusive, except that in listing the ingredients and the percentage of each in the total contents of any paint, all substances other than coloring matter may be treated as one hundred percent in which case the description or trade name of such coloring matter, with its chemical analysis, shall appear on the label in the same manner as provided in said sections. [S13,§§2510-b,-d; C24, 27, 31, 35,§3188.]

3189 Labeling oils. All linseed oil or oil of turpentine offered or exposed for sale or sold in package or wrapped form shall be labeled on each package or container as provided in section 3037, except that the label shall be printed with ordinary bold-faced type in capital letters not less than five-line pica in size. [S13,§§2510-q, -v1; C24, 27, 31, 35,§3189.]

3190 Labeling substitutes. Any compound or mixture consisting of linseed oil (raw or boiled) and any other product, or any compound or mixture consisting of oil of turpentine and any other product, or any product which is intended to be used as a substitute for linseed oil (raw or boiled) or for oil of turpentine, which is offered or exposed for sale or sold in package or wrapped form shall be labeled on each package or container as provided in sections 3037 to 3040, inclusive, except that the label shall be printed with ordinary bold-faced type in capital letters not less than five-line pica in size and the words "substitute for linseed oil" or "substitute for oil of turpentine", as the case may be, shall also appear upon the label in the same manner prescribed for other items. Every storage receptacle containing any such product shall be labeled in the manner herein prescribed for the labeling of the package or container in which such product is offered or exposed for sale, or sold. [S13,§§2510-r,-v2; C24, 27, 31, 35, §3190.]

CHAPTER 159

PETROLEUM PRODUCTS

General penalty, §3047

3191 Definitions.
3192 Labeling.
3193 Inspection.
3194 Gasoline containers.
3195 Storage tanks.
3196 Wrongful use of containers.
3197 Illuminating oil.
3198 Method of making inspection.
3199 Branding.
3200 Brand on empty containers.
3201 Adulteration of illuminating oil.
3202 General standard.
3203 Exceptions.
3204 Standard for use on trains and boats.
3205 Lamps for lighter petroleum products.
3206 Cancellation of approvals.
3207 Notification.
3208 Notification of uninspected oils.
3209 Dealer to report receipts of illuminating oils.
3210 Inspection fee.
3211 Reduction of fee.
3212 Increase of fee.
3213 Sales outside the state.
3214 Rebate.
3215 Record of inspections.
3216 False branding—punishment.
3217 False branding.
3218 Civil liability.

3191 Definitions. For the purpose of this chapter:

1. "Container" shall include can, cask, barrel, tank, vessel, and other receptacles of like nature.
2. "Illuminating oil" shall mean any product of petroleum which is used or intended to be used for illuminating purposes. [C24, 27, 31, 35, §3191.]

3192 Labeling. Gasoline, benzine, or naphtha, offered or exposed for sale, or sold in containers within this state, shall be conspicuously marked in the English language with figures showing the Baume gravity test at a temperature of sixty degrees Fahrenheit. If such products are sold from a tank wagon, the person selling or delivering the same shall indicate on each sale ticket said gravity test. [S13,§§2510-1a, -2a; C24, 27, 31, 35,§3192.]

3193 Inspection. The department shall, upon complaint, and may at other times when deemed advisable, cause to be inspected any gasoline, benzine, or naphtha for the purpose of determining whether the same is up to the specifications adopted by the United States Department of Interior. [S13,§2510-3a; C24, 27, 31, 35, §3193.]

3194 Gasoline containers. No person shall keep, sell, or deliver in this state any gasoline except in a container painted bright red and plainly marked "gasoline" in the manner prescribed by the department. [C97,§2505; S13, §2510-j; SS15,§2505; C24, 27, 31, 35,§3194.]

Referred to in §§3195, 3196

3195 Storage tanks. The requirements of section 3194 shall not apply to storage tanks having a capacity of not less than ten gallons from which gasoline is used for manufacturing or mechanical purposes. [S13,§2510-k; C24, 27, 31, 35,§3195.]

3196 Wrongful use of containers. No person shall keep, sell, or deliver any kerosene in a container painted or marked as prescribed in section 3194. [S13,§2510-j; C24, 27, 31, 35,§3196.]

3197 Illuminating oil. No person shall offer or expose for sale, or sell, any illuminating oil unless the same shall have been inspected and branded as provided in this chapter. [C73, §3901; C97,§2508; S13,§2508; C24, 27, 31, 35, §3197.]

3198 Method of making inspection. All inspections of illuminating oils shall be made in accordance with the rules of the department of agriculture and said department shall prescribe the instruments and apparatus to be used, and the same shall have inscribed thereon the words, "Department of Agriculture". [C97,§2504; S13, §2504; C24, 27, 31, 35,§3198.]

3199 Branding. After each inspection of an illuminating oil the container shall be branded by the inspector with the result of the inspection, and the person for whom it was made shall be given a certificate of inspection. The form of brands and certificates of inspection shall be prescribed by the rules of the department. [C97,§2505; SS15,§2505; C24, 27, 31, 35,§3199.]

3200 Brand on empty containers. No person, except as otherwise provided by the rules of the department, shall buy, use, sell, offer or expose for sale, or otherwise dispose of any empty container upon which there is a state oil inspection brand unless the same shall have been completely destroyed. [C97,§2508; S13, §2508; C24, 27, 31, 35,§3200.]

3201 Adulteration of illuminating oil. An illuminating oil shall be deemed to be adulterated if mixed with any substance in such a manner as to render it dangerous or impair its efficiency for use for illuminating purposes. [C73,§3901; C97,§2508; S13,§2508; C24, 27, 31, 35,§3201.]

3202 General standard. No person shall use, offer or expose for sale, or sell any illuminating oil, except as provided in sections 3203 and 3204, which will emit a combustible vapor at a temperature of less than one hundred degrees Fahrenheit, when tested by the flash test as prescribed by the rules of the department. [C73,§3901; C97,§2505; SS15,§2505; C24, 27, 31, 35,§3202.]

Referred to in §3203

3203 Exceptions. Section 3202 shall not apply to illuminating oil when used or sold for use under the following conditions:

1. When said oil is stored in closed reservoirs outside the building which is lighted by gas generated from the same.
2. When said oil is burned in a lamp or apparatus approved by the department for the lighter products of petroleum.
3. When said oil is burned in street lamps. [C97,§2508; S13,§2508; C24, 27, 31, 35,§3203.]

Referred to in §3202

3204 Standard for use on trains and boats. No person shall use, burn, or carry for use on any railway passenger car, baggage, mail, or express car, street railway car, boat, or other means of public conveyance, any illuminating oil or other fluid composed to any extent of petroleum or its products which will ignite and burn at a temperature below three hundred one degrees Fahrenheit, when tested by the igniting and burning test as prescribed by the rules of the department. [C97,§2508; S13,§2508; C24, 27, 31, 35,§3204.]

Referred to in §3202

3205 Lamps for lighter petroleum products. The department shall examine the particular design, mechanism, and workmanship of any lamp or apparatus for burning the lighter products of petroleum for illuminating purposes, which may be presented to it for approval, and after testing the same, if it finds such lamp or apparatus to be safe, it shall enter the findings in the records of said department. No person shall sell or use any such lamp or apparatus unless the same has been approved as provided in this section. [S13,§2508-a; C24, 27, 31, 35, §3205.]

3206 Cancellation of approvals. If the department ascertains that any lamp or apparatus which it has approved as safe, because of change of design, the use of unsuitable material, poor workmanship in construction, or for any other cause, is unsafe as then manufactured, and dangerous to public safety, it shall cancel its approval of such lamp or apparatus, and no person shall sell or use the same in burning the lighter products of petroleum for illuminating purposes. [S13,§2508-a; C24, 27, 31, 35,§3206.]

3207 Notification. The department shall notify by registered letter each of its inspectors of any approval or disapproval of any lamp or apparatus. [S13,§2508-a; C24, 27, 31, 35,§3207.]

3208 Notification of uninspected oils. Every person who receives illuminating oils for use or sale which have not been inspected as provided in this chapter shall, within five days after the receipt thereof, notify the department or one of its inspectors that the same is in his possession. [SS15,§2505; C24, 27, 31, 35,§3208.]

3209 Dealer to report receipts of illuminating oils. Every person receiving any illuminating oil, subject to inspection under this chapter, shall file with the department before the tenth day of each month a duly verified certificate in the form prescribed by said department showing every receipt of illuminating oil during the preceding month. Said report shall contain the following items:

1. The number of tanks or barrels received.
2. The tank number, if in tanks, of each product inspected by the state.
3. The amount of fees paid for such inspection.
4. The person to whom the fees were paid. [C97,§2506; SS15,§2506; C24, 27, 31, 35,§3209.]

3210 Inspection fee. A charge of seven cents per barrel shall be collected from the person for whom any illuminating oil is inspected, fifty-five gallons for this purpose constituting a barrel, and said charge shall be a lien upon the oil inspected and be collected by the inspector making the same. All fees collected under this chapter shall be turned over to the department. [C97,§2505; SS15,§2505; C24, 27, 31, 35,§3210.]

Accounting, §143

3211 Reduction of fee. On the first day of July of each year the department shall ascertain the total receipts and expenses for the inspection of illuminating oil during the preceding year and if the receipts exceed the total expenses of inspection by the sum of four thousand dollars, it shall reduce the inspection fee for the ensuing year to such sum per barrel as will approximately yield revenue equal to the expenses during the preceding year, plus the sum of four thousand dollars. [SS15,§2505; C24, 27, 31, 35,§3211.]

3212 Increase of fee. If in any year such reduced inspection fee proves insufficient to meet the total expenses for the inspection of petroleum products for said year, the department shall increase said inspection fee in an amount sufficient to pay the entire expenses of such inspection, but not to exceed the sum of seven cents per barrel. [SS15,§2505; C24, 27, 31, 35,§3212.]

3213 Sales outside the state. The department shall adopt rules for granting rebates upon oils sold outside the state, but no refund of charges paid for inspection shall be made except upon a duly verified certificate of the owner that the goods for which the refund is asked have been disposed of outside of the state. [SS15,§2505; C24, 27, 31, 35,§3213.]

3214 Rebate. The amount of such rebate per barrel allowed during any fiscal year, shall be determined by the department during the month of July of each year and shall equal approximately the net proceeds per barrel from the inspection service of the state during the preceding fiscal year. [SS15,§2505; C24, 27, 31, 35,§3214.]

3215 Record of inspections. The department shall keep an accurate record of all illuminating oils inspected and branded, the number of gallons, the number and kind of containers, the date and number of gallons approved, the

number rejected, the name of the person for whom inspection was made, the amount of money received therefor, and the necessary traveling expenses incurred, and the expense incurred in prosecutions, which record shall be open at all reasonable times to public inspection. [C97,§2506; SS15,§2506; C24, 27, 31, 35, §3215.]

3216 False branding — punishment. Any person who shall knowingly alter or deface a state inspection brand upon any container of illuminating oil, before the same is emptied, or who shall falsely brand any container of illuminating oil in imitation of a state inspection brand, shall be guilty of forgery and punished accordingly. [C97,§2508; S13,§2508; C24, 27, 31, 35,§3216.]

Forgery, §13139

3217 False branding. Any inspector who shall be guilty of any of the following acts shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars and shall be liable in a civil action for all damages resulting from said act:

1. Falsely branding any container of illuminating oil.
2. Practicing any fraud or deceit in the discharge of his duties.
3. Official misconduct or culpable negligence to the injury of another.
4. Dealing in or having pecuniary interest, directly or indirectly, in the sale of any illuminating oils. [C97,§2508; S13,§2508; C24, 27, 31, 35,§3217.]

3218 Civil liability. Any person violating any of the provisions of this chapter shall be liable in a civil action for all damages resulting from such violation. [C73,§3901; C97,§2508; S13,§2508; C24, 27, 31, 35,§3218.]

CHAPTER 160

MATTRESSES AND COMFORTS

General penalty, §3047

3219 Definitions.
3220 Materials used.
3221 Labeling.
3222 Form of label.
3223 Registration of manufacturers.
3224 Factory inspection—fees.
3225 Prima facie evidence.
3226 Exceptions—remade mattresses.

3219 Definitions. For the purpose of this chapter:

1. A mattress shall include what is commonly known as a bed mattress, and also any other article for use as a bed pad, consisting of an outer covering of cloth, ticking, or other fabric, and stuffed or filled with hair, wool, moss, cotton, excelsior, or any other material.
2. A comfort shall include what is commonly known as a bed comfort, and also any other article for use as a bed cover, consisting of an outer covering of cloth, or any other fabric, with wool, cotton, or other material between. [C24, 27, 31, 35,§3219.]

3220 Materials used. No person shall knowingly manufacture, introduce into the state, solicit orders for, sell, deliver, transport, have in possession with the intent to sell, or offer or expose for sale any mattress or comfort which is made from any infectious, insanitary, or unhealthful material, or any material which has been previously used, except sterilized feathers. [C24, 27, 31, 35,§3220.]

3221 Labeling. Every mattress and comfort offered or exposed for sale shall have attached upon the outside thereof, a cloth, or cloth-lined, label not less than two by three inches in size, upon which shall be legibly written or printed, in the English language, in letters not less than one-eighth of an inch in height, a description of the materials used in the filling, with the name and address of the maker of such mattress or comfort. The sewing of one edge of said label securely to said article shall be sufficient. [C24, 27, 31, 35,§3221.]

Referred to in §3222

3222 Form of label. The label provided in section 3221 shall be in substantially the following form, but may contain thereon additional statements or information:

OFFICIAL STATEMENT

Manufactured of New Material.

(Here describe kind and character of filling.)

This article is made in compliance with chapter 160 of the code of Iowa.

(Here state manufacturer's name and address)

Factory Number.....

[C24, 27, 31, 35,§3222.]

Referred to in §3223

3223 Registration of manufacturers. Every manufacturer of mattresses or comforts shall register with the department of agriculture and be assigned by it a factory number, which shall show on each label as required by section 3222. [C24, 27, 31, 35,§3223.]

3224 Factory inspection—fees. Each factory in the state, where mattresses or comforts are made, shall be inspected at least once each year, for which inspection a fee of ten dollars shall be paid to the state by the owner of the factory inspected, but no owner shall be required to pay fees in excess of twenty dollars for any one calendar year. [C24, 27, 31, 35,§3224.]

3225 Prima facie evidence. The finding of any infectious, insanitary, unhealthful, or second-hand material in that part of any factory devoted to the manufacture of mattresses or comforts shall be prima facie evidence that such material has been and is being used in violation of this chapter. [C24, 27, 31, 35,§3225.]

3226 Exceptions—remade mattresses. This chapter shall not apply to any mattress or comfort made by any person for his individual or family use, nor to the remaking of any mattress or comfort not thereafter to be sold or offered for sale.

A remade mattress or comfort shall have attached thereto a label of the kind hereinbefore provided, except that such label shall bear the words "Remade from Used Material" in lieu of the words "Manufactured of New Material". [C24, 27, 31, 35,§3226.]

CHAPTER 161

STANDARD WEIGHTS AND MEASURES

General penalty, §3047

3227 Standard established.
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3230 Weight.
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3234 Sales of dry commodities.
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3237 Sale of fruits, vegetables by dry measure.
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BREAD
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3227 Standard established. The weights and measures which have been presented by the department to the federal bureau of standards and approved, standardized, and certified by said bureau in accordance with the laws of the congress of the United States shall be the standard weights and measures throughout the state. [C51,§937; R60,§1775; C73,§2037; C97,§3009; S13,§3009-c; C24, 27, 31, 35,§3227.]

Referred to in §§3228, 3230, 3231, 3232

3228 Length and surface measure. The unit or standard measure of length and surface from which all other measures of extension shall be derived and ascertained, whether they be lineal, superficial, or solid, shall be the standard yard secured in accordance with the provisions of section 3227. It shall be divided into three equal parts called feet, and each foot into twelve equal parts called inches, and for the measure of cloth and other commodities commonly sold by the yard it may be divided into halves, quarters, eighths, and sixteenths. The rod, pole, or perch shall contain five and one-half such yards, and the mile, one thousand seven hundred sixty such yards. [C51,§937; R60,§1775; C73,§§2038–2040; C97,§3010; S13,§3009-d; C24, 27, 31, 35, §3228.]

3229 Land measure. The acre for land measure shall be measured horizontally and contain ten square chains and be equivalent in area to a rectangle sixteen rods in length and ten rods in breadth, six hundred and forty such acres being contained in a square mile. The chain for measuring land shall be twenty-two yards long, and be divided into one hundred equal parts, called links. [C73,§2041; C97,§3011; S13,§3009-d; C24, 27, 31, 35,§3229.]

3230 Weight. The units or standards of weight from which all other weights shall be derived and ascertained shall be the standard avoirdupois and troy weights secured in accordance with the provisions of section 3227. The avoirdupois pound, which bears to the troy pound the ratio of seven thousand to five thousand seven hundred sixty, shall be divided into sixteen equal parts called ounces; the hundredweight shall consist of one hundred avoirdupois pounds, and twenty hundredweight shall constitute a ton. The troy ounce shall be equal to the twelfth part of a troy pound. [C51,§938; R60, §1776; C73,§§2042, 2043; C97,§3012; S13, §3009-e; C24, 27, 31, 35,§3230.]

3231 Liquids. The unit or standard measure of capacity for liquids from which all other measures of liquids shall be derived and ascertained shall be the standard gallon secured in accordance with the provisions of section 3227. The gallon shall be divided by continual division by the number two so as to make half-gallons, quarts, pints, half-pints, and gills. The barrel shall consist of thirty-one and one-half gallons, and two barrels shall constitute a hogshead. [C73,§§2044, 2045; C97,§3013; S13,§3009-g; C24, 27, 31, 35,§3231.]

3232 Dry measure. The unit or standard measure of capacity for substances not liquids from which all other measures of such substances shall be derived and ascertained shall be the standard half-bushel secured in accordance with the provisions of section 3227. The peck, half-peck, quarter-peck, quart, pint, and half-pint measures for measuring commodities which are not liquids, shall be derived from the half-bushel by successively dividing the cubic inch capacity of that measure by two. [C73,§§2046, 2047; C97,§3014; S13,§3009-f; C24, 27, 31, 35, §3232.]

3233 Bottomless measure. Bottomless dry measures shall not be used unless they conform in shape to the United States standard dry measures. [SS15,§3009-j; C24, 27, 31, 35,§3233.]

3234 Sales of dry commodities. All dry commodities unless bought or sold in package or wrapped form shall be bought or sold only by the standard weight or measure herein established, or by numerical count, unless the parties otherwise agree in writing, except as provided in sections 3235 to 3238, inclusive. [SS15,§3009-j; C24, 27, 31, 35,§3234.]

Referred to in §3235

3235 Drugs and section comb honey exempted. The requirements of section 3234 shall not apply to drugs or section comb honey. [SS15, §3009-j; C24, 27, 31, 35,§3235.]

Referred to in §3234

3236 Bushel measure. When any of the commodities enumerated in this section shall be sold by the bushel or fractional part thereof, except when sold in a United States standard container or as provided in sections 3237 and 3238, the measure shall be determined by avoirdupois weight and shall be computed as follows:

Commodities	*Pounds*
Apples	48
Apples, dried	24
Alfalfa seed	60
Barley	48
Beans, green, unshelled	56
Beans, dried	60
Beans, lima	56
Beets	56
Blue grass seed	14
Bran	20
Bromus inermis	14
Broom corn seed	50
Buckwheat	48
Carrots	50
Castor beans, shelled	50
Charcoal	20
Cherries	40
Clover seed	60
Coal	80
Coke	40
Corn on the cob (field)	70
Corn in the ear, unhusked (field)	75
Corn, shelled (field)	56
Corn meal	48
Cucumbers	48
Emmer	40
Flaxseed	56
Grapefruit	48
Grapes, with stems	40
Hempseed	44
Hickory nuts, hulled	50
Hungarian grass seed	50
Kaffir corn	56
Lemons	48
Lime	80
Millet seed	50
Oats	32
Onions	52
Onion top sets	28
Onion bottom sets	32
Oranges	48
Orchard grass seed	14
Osage orange seed	32
Parsnips	45
Peaches	48
Peaches, dried	33
Peanuts	22
Pears	45
Peas, green, unshelled	50
Peas, dried	60
Plums	48
Popcorn, on the cob	70
Popcorn, shelled	56
Potatoes	60
Quinces	48
Rape seed	50
Redtop seed	14
Rutabagas	60
Rye	56
Salt	80
Sand	130
Shorts	20
Sorghum saccharatum seed	50
Spelt	40
Sweet corn	50
Sweet potatoes	50
Timothy seed	45
Tomatoes	50
Turnips	55
Walnuts, hulled	50
Wheat	60
All root crops not specified above	50

[C51,§940; R60,§§1778, 1781–1784; C73,§2049; C97,§3016; S13,§3009-h; C24, 27, 31, 35,§3236.]

Referred to in §3234

3237 Sale of fruits, vegetables by dry measure. Blackberries, blueberries, cranberries, currants, gooseberries, raspberries, cherries, strawberries, and similar berries, also onion sets in quantities of one peck or less, may be sold by the quart, pint, or half-pint, dry measure. [SS15,§3009-i; C24, 27, 31, 35,§3237.]

Referred to in §§3234, 3236

3238 Sale of fruits and vegetables in baskets. Grapes, other fruits, and vegetables may be sold in climax baskets; but when said commodities are sold in such manner and the containers are labeled with the net weight of the contents in accordance with the provisions of section 3037, all the provisions of the chapter relative to labeling foods shall be deemed to have been complied with. [C24, 27, 31, 35, §3238.]

Referred to in §§3234, 3236

3239 Berry boxes and climax baskets. Berry boxes sold, used, or offered or exposed for sale shall have an interior capacity of one quart, pint, or half-pint dry measure. Climax baskets sold, used, or offered or exposed for sale shall be of the standard size fixed below:

1. Two-quart basket: length of bottom piece, nine and one-half inches; width of bottom piece, three and one-half inches; thickness of bottom piece, three-eighths of an inch; height of basket, three and seven-eighths inches, outside measurement; top of basket, length eleven inches, and width five inches, outside measurement; basket to have a cover five by eleven inches, when a cover is used.

2. Four-quart basket: length of bottom piece, twelve inches; width of bottom piece, four and one-half inches; thickness of bottom piece,

three-eighths of an inch; height of basket, four and eleven-sixteenths inches, outside measurement; top of basket, length fourteen inches, width six and one-fourth inches, outside measurement; basket to have cover six and one-fourth inches by fourteen inches, when cover is used.

3. Twelve-quart basket: length of bottom piece, sixteen inches; width of bottom piece, six and one-half inches; thickness of bottom piece, seven-sixteenths of an inch, outside measurement; top of basket, length nineteen inches, height of basket, seven and one-sixteenth inches, width nine inches, outside measurement; basket to have cover nine inches by nineteen inches, when cover is used. [SS15,§3009-i; C24, 27, 31, 35,§3239.]

3240 Hop boxes. The standard box used in packing hops shall be thirty-six inches long, eighteen inches wide, and twenty-three and one-fourth inches deep, inside measurement. [C73, §2051; C97,§3018; C24, 27, 31, 35,§3240.]

3241 Milk bottles. The standard bottle used for the sale of milk and cream shall be of a capacity of one-half gallon, three pints, one quart, one pint, one-half pint, one gill, filled full to the bottom of the lip. [S13,§3009-k; C24, 27, 31, 35, §3241.]

3242 Flour. A barrel of flour shall consist of one hundred ninety-six pounds avoirdupois, and one-fourth barrel consisting of forty-nine pounds shall be a sack of flour.

No barrel or sack of flour shall be sold which contains less than the amount herein specified. [C24, 27, 31, 35,§3242.]

3243 Mason work or stone. The perch of mason work or stone shall consist of twenty-five feet, cubic measure. [C51,§939; R60,§1777; C73,§2050; C97,§3017; C24, 27, 31, 35,§3243.]

3244 Sales to be by standard weight or measure. All commodities bought or sold by weight or measure shall be bought or sold only by the standards established by this chapter, unless the vendor and vendee otherwise agree. Sales by weight shall be by avoirdupois weight unless troy weight is agreed upon by the vendor and vendee. [SS15,§3009-j; C24, 27, 31, 35, §3244.]

BREAD

3244.01 Standard weight. The standard loaf of bread shall weigh one pound, avoirdupois weight. All bread manufactured, procured, made or kept for the purpose of sale, offered or exposed for sale, or sold in the form of loaves, shall be one of the following standard weights and no other, namely: three-quarters pound, one pound, one and one-quarter pound, one and one-half pound, or multiples of one pound, avoirdupois weight; and provided further, that the provisions of this section shall not apply to biscuits, buns, crackers, rolls or to what is commonly known as "stale" bread and sold as such, in case the seller shall, at the time of sale, expressly state to the buyer that the bread so sold is "stale" bread. In case of twin or multiple loaves, the weights specified in this section shall apply to the combined weight of the two units. [C27, 31, 35,§3244-b1.]

Referred to in §§3244.03, 3244.05, 3244.06

3244.02 Wrapper. There shall be printed upon the wrapper of each loaf of bread in plain conspicuous type, the name and address of the manufacturer and the weight of the loaf in terms of one of the standard weights herein specified. [C27, 31, 35,§3244-b2.]

Referred to in §§3244.03, 3244.05, 3244.06

3244.03 Violations. It shall be unlawful for any person to manufacture, procure, or keep for the purpose of sale, offer or expose for sale, or sell bread in the form of loaves which are not of one of the weights specified in section 3244.01 or violate the rules of the secretary of agriculture pertaining thereto. Any person who, by himself or by his servant, or agent, or as the servant or agent of another, shall violate any of the provisions of sections 3244.01 to 3244.07, inclusive, shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than one hundred dollars upon conviction in any court of competent jurisdiction, or by imprisonment for not more than thirty days, in the discretion of the court. [C27, 31, 35,§3244-b3.]

Referred to in §§3244.04–3244.06, inc.

3244.04 "Person" defined. The word "person" as used in section 3244.03 shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. [C27, 31, 35,§3244-b4.]

Referred to in §§3244.03, 3244.05, 3244.06

3244.05 Exception. Any woman engaged in home baking is exempt from the provisions of sections 3244.01 to 3244.04, inclusive. [C27, 31, 35,§3244-b5.]

Referred to in §§3244.03, 3244.06

3244.06 Enforcement — rules and regulations. The secretary of agriculture shall enforce the provisions of sections 3244.01 to 3244.07, inclusive. He shall make rules and regulations for the enforcement of the provisions of said sections not inconsistent therewith, and such rules and regulations shall include reasonable variations and tolerances. [C27, 31, 35, §3244-b6.]

Referred to in §3244.03

3244.07 Weighing. Bread when weighed for inspection shall be weighed in the manufacturer's plant when said bread is wrapped ready for delivery, and bread coming into the state from an adjoining state when weighed for inspection shall be weighed in the packages, containers, vehicles or trucks of the manufacturer at the time when said bread crosses the state line, or at the first point of stop for sale or delivery of said bread after crossing the Iowa state line, and that the weight shall be determined by averaging the weight of not less than fifteen loaves picked at random from any given lot. [C35,§3244-f1.]

Referred to in §§3244.03, 3244.06

CHAPTER 161.1

SALE OF LIVESTOCK

3244.08 Report as to purchase.
3244.09 Violations.

3244.08 Report as to purchase. Any person or corporation engaged in the business of buying livestock for the market or for slaughter shall keep such records regarding time of purchase, name and residence of seller and description of the livestock purchased, as may be determined by the department of agriculture. Such records shall be open to inspection of peace officers at reasonable times. [C31, 35,§3244-d1.]

3244.09 Violations. Any person or corporation failing to keep such record or refusing to offer the same for inspection when requested at a reasonable time by the peace officer, shall be guilty of a misdemeanor and punished by a fine not exceeding one hundred dollars. [C31, 35, §3244-d2.]

CHAPTER 162

SALES OF CERTAIN COMMODITIES FROM BULK

General penalty, §3047

3245 Coal, charcoal, and coke.
3246 Delivery tickets required.
3247 Disposition of delivery tickets.
3248 Sales without delivery.
3249 Hay or straw by bale.
3250 Inspection of vehicles.

3245 Coal, charcoal, and coke. No person shall sell, offer or expose for sale any coal, charcoal, or coke in any other manner than by weight, or represent any of said commodities as being the product of any county, state, or territory, except that in which mined or produced, or represent that said commodities contain more British thermal units than are present therein. [S13,§3009-l; C24, 27, 31, 35,§3245.]

3246 Delivery tickets required. No person shall deliver any of said commodities without each such delivery being accompanied by duplicate delivery tickets, on each of which shall be written in ink or other indelible substance, distinctly expressed in pounds, the gross weight of the load, the tare of the delivery vehicle, and the net amount in weight of the commodity, with the names of the purchaser and the dealer from whom purchased. [S13,§3009-l; C24, 27, 31, 35, §3246.]

3247 Disposition of delivery tickets. One of said duplicate tickets shall be delivered to the vendee and the other one shall be returned to the vendor. Upon demand of the department the person in charge of the load shall surrender one of said duplicate tickets to the person making such demand. If said ticket is retained an official weight slip shall be delivered by said department to the vendee or his agent. [S13, §3009-l; C24, 27, 31, 35,§3247.]

3248 Sales without delivery. When the vendee carries away the commodity purchased, a delivery ticket, showing the actual number of pounds received by him, shall be issued to him by the vendor. [S13,§3009-l; C24, 27, 31, 35, §3248.]

3249 Hay or straw by bale. No person shall sell, offer or expose for sale any bales of hay or straw without first attaching thereto a plain and conspicuous statement of the minimum net weight contained in such bales; but nothing in this section shall be construed to require a statement of weight on each bale where hay or straw is sold by the ton and a ticket showing the gross, tare, and net weight accompanies the delivery. [C24, 27, 31, 35,§3249.]

3250 Inspection of vehicles. The department may stop any wagon, auto truck, or other vehicle loaded with any commodity being bought, offered or exposed for sale, or sold, and compel the person having charge of the same to bring the load to a scale designated by said department and weighed for the purpose of determining the true net weight of the commodity. [S13,§3009-l; SS15,§3009-n; C24, 27, 31, 35, §3250.]

CHAPTER 163

STATE AND CITY SEALERS

General penalty, §3047

3251 State sealer.
3252 Preservation of standards.
3253 Testing weights and measures.
3254 Sealing milk bottles.
3255 Sealer for cities and towns.
3256 Duties.
3257 Expenses.

3251 State sealer. The department shall designate one of its assistants to act as state sealer of weights and measures. All weights and measures sealed by him shall be impressed with the word "Iowa". [C73,§§2053–2055; C97, §3020; S13,§3009-b; C24, 27, 31, 35,§3251.]

3252 Preservation of standards. The department shall maintain the state standards in good order, shall take all necessary precautions for their safekeeping, and shall submit them once in ten years to the national bureau of standards for certification. [C73,§§2053, 2054; C97,§3020; S13,§3009-b; C24, 27, 31, 35,§3252.]

3253 Testing weights and measures. Upon written request of any citizen, firm, or corporation, city, town, or county, or educational institution of the state made to the department, a test or calibration of any weights, measures, weighing or measuring devices, and instruments or apparatus to be used as standards shall be made. [S13,§3009-b; C24, 27, 31, 35,§3253.]

3254 Sealing milk bottles. The state sealer shall not be required to seal bottles for milk or cream, but they shall be inspected from time to time in order to ascertain whether they are standard. [S13,§3009-k; C24, 27, 31, 35,§3254.]

3255 Sealer for cities and towns. A sealer of weights and measures may be appointed in any city or town by the council, who shall hold his office during its pleasure, and may obtain from the department such standard weights and measures as the council may deem necessary. [C73,§§2059, 2060; C97,§3023; C24, 27, 31, 35, §3255.]

3256 Duties. Each sealer in cities and towns shall take charge of and provide for the safekeeping of the town or city standards, and see that the weights, measures, and all apparatus used for determining the quantity of commodities used throughout the town or city, agree with the standards in his possession. [C73, §§2059, 2060; C97,§3023; C24, 27, 31, 35, §3256.]

3257 Expenses. All expenses directly incurred in furnishing the several cities and towns with standards, or in comparing those that may be in their possession, shall be borne by said cities and towns. [C73,§2061; C97,§3024; C24, 27, 31, 35,§3257.]

CHAPTER 164

PUBLIC SCALES AND GASOLINE PUMPS

General penalty, §3047

3258 Definitions.
3259 License.
3260 Fee.
3261 Form of license.
3262 License to be displayed.
3263 Oath of weighmasters.
3264 Registers.
3265 Penalty.

3258 Definitions. For the purpose of this chapter:

1. "Public scale" shall mean any scale or weighing device for the use of which a charge is made or compensation is derived.

2. "Gasoline pump" shall mean any pump, meter, or similar measuring device used for measuring gasoline. [C73,§2065; C97,§3027; SS15,§3009-m; C24, 27, 31, 35,§3258.]

3259 License. Every person who shall use or display for use any public scale or gasoline pump shall secure a license for said scale or pump from the department. [SS15,§3009-m; C24, 27, 31, 35,§3259.]

3260 Fee. The license fee shall be three dollars per annum and each license for a public scale shall expire on December 31 and for a gasoline pump on June 30 of each year. [SS15, §3009-m; C24, 27, 31, 35,§3260.]

3261 Form of license. The license shall be in the form of a metal plate bearing the words "Licensed by the State of Iowa, No....." Each plate shall be numbered consecutively and bear the year for which the license is granted. [SS15,§3009-m; C24, 27, 31, 35,§3261.]

3262 License to be displayed. The license plate shall be displayed prominently on the front of the scale or pump, and the defacing or wrongful removal of such plate shall be punished as provided in chapter 147. Absence of license plate shall be prima facie evidence that the weighing or measuring device is being operated contrary to law. [SS15,§3009-m; C24, 27, 31, 35,§3262.]

3263 Oath of weighmasters. All persons keeping public scales, before entering upon their duties as weighmasters, shall be sworn before some person having authority to administer oaths, to keep their scales correctly balanced, to make true weights, and to render a correct account to the person having weighing done. [C73, §2065; C97,§3027; C24, 27, 31, 35,§3263.]

Referred to in §3265

3264 Registers. Weighmasters are required to make true weights and keep a correct register of all weighing done by them, giving the amount of each weight, date thereof, and the name of the person or persons for whom done, and give, upon demand, to any person having weighing done, a certificate showing the weight, date, and for whom weighed. [C73,§§2066, 2067; C97, §3028; C24, 27, 31, 35,§3264.]

Referred to in §3265

3265 Penalty. Any weighmaster violating any of the provisions of sections 3263 and 3264, shall be guilty of a misdemeanor, and punished as provided in chapter 147 and be liable to the person injured for all damages sustained. [C73, §2068; C97,§3029; C24, 27, 31, 35,§3265.]

CHAPTER 165

INSPECTION OF WEIGHTS AND MEASURES

General penalty, §3047

3266 Duty to inspect.
3267 Fees.
3268 Payment by party complaining.
3269 Limitation on inspections.
3270 Confiscation of scales.
3271 False weights or measures.
3272 Transactions by false weights or measures.
3273 Reasonable variations.
3274 Power of cities and towns limited.

3266 Duty to inspect. The department shall make an inspection of all weights and measures wherever the same are kept for use in connection with the sale of any commodity sold by weight or measurement, or where the price to be paid for producing any commodity is based upon the weight or measurement thereof; and when complaint is made to the department that any false or incorrect weights or measures are being made under said conditions, said department shall have the same inspected. [S13, §3009-o; SS15,§3009-n; C24, 27, 31, 35,§3266.]

3267 Fees. An inspection fee shall be charged the person owning or operating the scale so inspected in accordance with the following schedule: Scales with a thousand pounds capacity and up, not including railroad track scales, three dollars each; railroad track scales, ten dollars each; and all hopper or automatic scales, three dollars each. [SS15,§3009-n; C24, 27, 31, 35,§3267.]

3268 Payment by party complaining. When such inspection shall be made upon the complaint of any person other than the owner of the scale, and upon examination the scale is found by the department to be accurate for weighing, the inspection fee for such inspection shall be paid by the person making complaint. [SS15,§3009-n; C24, 27, 31, 35,§3268.]

3269 Limitation on inspections. No person shall be required to pay more than two inspection fees for any one scale in any one year unless additional inspections are made at the request of the owner of said scale. [SS15, §3009-n; C24, 27, 31, 35,§3269.]

3270 Confiscation of scales. The department may seize without warrant and confiscate any incorrect scales, weights, or measures, or any weighing apparatus or part thereof which do not conform to the state standards or upon which the license fee has not been paid. If any weighing or measuring apparatus or part thereof be found out of order the same may be tagged by the department "Condemned until repaired", which tag shall not be altered or removed until said apparatus is properly repaired. [S13,§3009-q; C24, 27, 31, 35,§3270.]

3271 False weights or measures. If any person engaged in the purchase or sale of any commodity by weight or measurement, or in the employment of labor where the price thereof is to be determined by weight or measurement of the articles upon which such labor is bestowed, has in his possession any inaccurate scales, weights, or measures, or other apparatus for determining the quantity of any commodity, which do not conform to the standard weights and measures, he shall be punished as provided in chapter 147. [SS15,§3009-p; C24, 27, 31, 35, §3271.]

3272 Transactions by false weights or measures. Any person shall be deemed to have violated the provisions of this chapter and shall be punished as provided in chapter 147:

1. If such person sell, trade, deliver, charge for or claim to have delivered to a purchaser an amount of any commodity which is less in weight or measure than that which is asked for, agreed upon, claimed to have been delivered, or noted on the delivery ticket.

2. If such person make settlement for or enter credit, based upon any false weight or measurement, for any commodity purchased.

3. If such person make settlement for or enter credit, based upon any false weight or measurement, for any labor where the price of producing or mining is determined by weight or measure.

4. If such person record a false weight or measurement upon the weight ticket or book. [SS15,§3009-j; C24, 27, 31, 35,§3272.]

Referred to in §3273

3273 Reasonable variations. In enforcing the provisions of section 3272 reasonable variations shall be permitted and exemptions as to small packages shall be established by rules of the department. [SS15,§3009-j; C24, 27, 31, 35, §3273.]

3274 Power of cities and towns limited. Commodities weighed upon any scale bearing the inspection card, issued by the department, shall not be required to be reweighed by any ordinance of any city or town or city under special charter or under the commission form of government, nor shall their sale, at the weights so ascertained, and because thereof, be, by such ordinance, prohibited or restricted. [SS15,§3009-m; C24, 27, 31, 35,§3274.]

CHAPTER 165.1

PRISON-MADE GOODS

3274.1 Branding, labeling and marking.
3274.2 Penalty—effectiveness of act.

3274.1 Branding, labeling and marking. Beginning January 19, 1934, all goods, wares and merchandise made by convict labor in any penitentiary, prison, reformatory or other establishment in which convict labor is employed in the state, and all such goods, wares and merchandise so made by convict labor in any penitentiary, prison, reformatory or any institution outside the state of Iowa in which convict labor is so employed, and which is imported, brought or introduced into this state shall, before being exposed for sale, be branded, labeled or marked as herein provided, and shall not be exposed for sale in this state without such brand, label or mark. Such brand, label or mark shall contain at the head or top thereof the words, "prison-made" followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering, of the style and size known as great primer roman condensed capitals. The brand or mark shall in all cases, where the nature of the article will permit, be placed upon the same, and only where such branding or marking is impossible shall a label be used, and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the box, crate or other covering in which such goods, wares or merchandise may be packed, shipped or exposed for sale. Said brand, mark or label shall be placed upon the outside of and upon the most conspicuous part of the finished article and its box, crate or covering. [C35,§3274-e1.]

3274.2 Penalty — effectiveness of act. A person knowingly having in his possession for the purpose of sale or offering for sale any prison-made goods, wares or merchandise manufactured in any state without the brand, mark or label required by law, or who removes or defaces such brand, mark or label shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars. Provided, however, that the provision of this chapter shall not be effective unless and until the Hawes-Cooper act* [49 USC,§60] becomes effective. [C35,§3274-e2.]

*Effective January 19, 1934

TITLE XI

SOCIAL WELFARE AND REHABILITATION

CHAPTER 166

BOARD OF CONTROL OF STATE INSTITUTIONS

Identification and use of publicly owned automobiles, etc., §18316.1 et seq.

3275 How constituted—tenure.
3276 Appointment.
3277 Vacancies.
3278 Removal.
3279 Political activity.
3280 Disqualification.
3281 Organization.
3282 Official seal.
3283 Expenses.
3284 Trips to other states.
3285 Biennial report.
3286 Books of accounts.

3275 How constituted—tenure. The board of control of state institutions shall be composed of three electors of the state, not more than two of whom shall belong to the same political party, and no two of whom shall, at the time of appointment, reside in the same congressional district. Each member shall devote his entire time to the duties of his office, and hold office for a period of six years, commencing on July 1 of the year of appointment. The term of office of one member shall expire in each odd-numbered year. [S13, §2727-a1; C24, 27, 31, 35,§3275.]

3276 Appointment. The governor shall, within sixty days following the organization of each regular session of the general assembly, appoint, with the approval of two-thirds of the members of the senate in executive session, a successor to the member on said board whose term of office will expire on July 1 following. [S13,§2727-a1; C24, 27, 31, 35,§3276.]

Confirmation procedure, §38.1

3277 Vacancies. Vacancies on said board that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes. Prior to the expiration of said thirty days the governor shall transmit to the senate for its confirmation an appointment for the unexpired portion of the regular term.

Vacancies occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session, and for the unexpired portion of the regular term. [S13,§2727-a1; C24, 27, 31, 35, §3277.]

3278 Removal. The governor may, with the approval of the senate, during a session of the general assembly, remove any member of the board for malfeasance or nonfeasance in office, or for any cause that renders him ineligible to appointment, or incapable or unfit to discharge the duties of his office, and his removal when so made shall be final. [S13,§2727-a1; C24, 27, 31, 35,§3278.]

Removal by court or executive council, §§1091, 1114

3279 Political activity. No member, officer, or employee of the board, or of any of the institutions under the control of the board, shall, directly or indirectly, exert his influence to induce other officers or employees of the state to adopt his political views, or to favor any particular candidate for office, nor shall such member, officer, or employee contribute in any manner, money or other thing of value to any person for election purposes. Any person violating this section shall be removed from his office or position. [S13,§2727-a35; C24, 27, 31, 35,§3279.]

3280 Disqualification. No member of the board shall be eligible to any other lucrative office, elective or appointive, in the state during his term of service. [S13,§2727-a2; C24, 27, 31, 35,§3280.]

3281 Organization. The member whose term first expires shall be the chairman of the board for each biennial period. The board shall employ a competent secretary and such other assistants as may be necessary. In the absence or disability of the secretary, the board may, by order entered of record, appoint a member of the board as acting secretary during such absence or disability, who shall at such time have the powers of the secretary of the board. No additional compensation shall be paid because of the service of such acting secretary. [S13,§2727-a1; SS15,§2727-a3; C24, 27, 31, 35,§3281.]

3282 Official seal. The board shall have an official seal, and every commission, order, or other paper executed by the board may, under its direction, be attested with its seal. [S13, §2727-a7; C24, 27, 31, 35,§3282.]

3283 Expenses. The members of said board, its secretary, and employees, shall, in addition to salary, receive their necessary traveling expenses by the nearest traveled and practicable route, when engaged in the state in the perform-

ance of official business. [S13,§2727-a5; C24, 27, 31, 35,§3283.]

3284 Trips to other states. No authority shall be granted to any person to make a trip to another state at the expense of the state, except by resolution, which shall state the purpose of the trip and why the same is necessary, adopted by the board, entered of record, and approved in writing by the governor prior to the making of such trip. [S13,§2727-a5; C24, 27, 31, 35,§3284.]

Referred to in §84.13

3285 Biennial report. The board shall, in each even-numbered year, at the time provided by law, make a report to the governor and general assembly, and cover therein the biennial period ending with June 30 preceding, which report shall embrace:

1. An itemized statement of its expenditures concerning each institution under its control.
2. A detailed statement of the management of all said institutions.
3. A statement of all visits made to said institutions and when and by whom made.
4. The observations and conclusions of the board relative to said institutions.
5. Such recommendations as to changes in the laws relative to such institutions as the board may deem advisable.
6. The name and salary of every officer or employee of said board, and of the various institutions controlled by the board.
7. The annual reports made to the board by the executive officers of the several institutions.
8. Such other matters as the governor may direct. [S13,§§2727-a9,-a12,-a16,-a34; SS15, §2727-a3; C24, 27, 31, 35,§3285.]

Time of report, §246

3286 Books of accounts. The board shall keep at its office a complete system of books and accounts with each institution under its control. Said books shall show every expenditure authorized and made at said institution and shall exhibit an account of each extraordinary or special appropriation made by the legislature, with every item of expenditure thereof. [S13,§2727-a13; C24, 27, 31, 35,§3286.]

Requirement of auditor of state, §101.5

CHAPTER 167

GOVERNMENT OF INSTITUTIONS

Referred to in §3398

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3287 Institutions controlled. The board of control shall have full power to contract for, manage, control, and govern, subject only to the limitations imposed by law, the following institutions:

1. Soldiers Home.

2. Glenwood State School.
3. State Sanatorium.
4. Hospital for Epileptics and School for Feeble-minded.
5. Cherokee State Hospital.
6. Clarinda State Hospital.
7. Independence State Hospital.
8. Mount Pleasant State Hospital.
9. Training School for Boys.
10. Training School for Girls.
11. Juvenile Home.
12. Soldiers' Orphans Home.
13. Women's Reformatory.
14. Men's Reformatory.
15. State Penitentiary.

[S13,§§2727-a8,-a77; SS15,§§2713-n2, 2727-a96; C24, 27, 31, 35,§3287; 48GA, ch 93,§11.]

Referred to in §3288

3288 Powers of governor. Nothing contained in section 3287 shall limit the general supervisory or examining powers vested in the governor by the laws or constitution of the state, or legally vested by him in any committee appointed by him. [S13,§2727-a9; C24, 27, 31, 35,§3288.]

3289 Report of abuses. The board shall report, in writing, to the governor any abuses found to exist in any of the said institutions. [S13,§2727-a18; C24, 27, 31, 35,§3289.]

3290 Rules—fire—additional duties. The board shall prescribe such rules, not inconsistent with law, as it may deem necessary for the discharge of its duties, the management of each of said institutions, the admission of inmates thereto, and the treatment, care, custody, education, and discharge of inmates. It is made the particular duty of the board to establish rules by which danger to life and property from fire will be minimized. In the discharge of its duties and in the enforcement of its rules it may require any of its appointees to perform duties in addition to those required by statute. [S13, §§2727-a30,-a48, 5718-a3; SS15,§§2727-a50,-a96; C24, 27, 31, 35,§3290.]

3290.1 Fire protection contracts. The board of control shall have power to enter into contracts with the governing body of any city, town, or other municipal corporation for the protection from fire of any property under the control of the board, located in any such municipal corporation or in territory contiguous thereto, upon such terms as may be agreed upon. [C31, 35,§3290-d1.]

3291 Rep. by 45GA, ch 4,§§6, 11

3291.1 Business managers. The governor may appoint a business manager for each of the institutions operating under the board of control and such appointed person shall hold no other office and shall act in no other capacity at the institution to which he has been appointed, nor shall he be eligible to any other lucrative office, elective or appointive, in the state during his term of service but he shall devote his time entirely to his duties as business manager of the institution to which he is appointed. He shall receive such salary and compensation as shall be designated by the board of control, which salary and compensation shall not exceed the sum of eighteen hundred dollars in cash and six hundred dollars in value of support and maintenance furnished, and shall hold such office for a term of four years or until removed therefrom by the executive council for malfeasance or nonfeasance in office, or for any cause that renders him ineligible to appointment, or incapable or unfit to discharge the duties of his office, but such removal shall be made only after an opportunity is given such person to be heard before the executive council, upon preferred written charges. Such removal, when made, shall be final. [48GA, ch 93,§16.]

3291.2 Accounting and reports. The business manager shall be responsible to the board of control and shall file such accounting and other statistical reports and statements with the auditor of state, as the auditor may designate by written request to the secretary of the board of control, at such times and periods as the auditor might require. [48GA, ch 93,§17.]

3291.3 Duties and prohibitions. Subject to the orders and direction of the board of control and to the written requests of the auditor of state to the secretary of the board of control, such business manager shall have the following powers, duties and responsibilities:

1. He shall be the general business manager of the institution to which he has been appointed and shall have complete charge and supervision over all business matters and financial affairs relating to such institution, including the general institution, farms and gardens and all industries engaged in at such institution.
2. He shall replace the steward at the institution and shall have all the powers and be charged with all the duties and responsibilities vested in the steward as provided for in section 3322.
3. Under the direction and supervision of the secretary of the board of control, he shall have complete charge of all of the accounting and all other statistical records and keep same in a manner and as directed by the secretary of the board of control which manner, method, system and form shall be approved by the auditor of state.
4. He shall have complete control and be charged with the full accountability of all property and moneys of the institution to which he has been appointed.
5. He shall have complete charge and supervision over the condition and repair of all buildings, improvements, equipment and/or property of such institution to which he has been appointed, subject however, to the approval of the superintendent in instances where such equipment is used directly in the medical, mental, moral and/or therapeutic treatment or care of the patients or inmates.
6. He shall have charge and be accountable for all of the livestock at the institution to which he has been appointed, but he shall not

be permitted to exhibit any such livestock at state and county fairs or livestock shows.

7. He shall have the power to appoint, direct and discharge all employees excepting doctors, nurses, ward attendants, laboratory technicians or assistants and all other personnel charged with the medical, mental or therapeutical treatment and/or care of any patient or inmate of said institution, which personnel shall be appointed, directed and discharged by the superintendent. However, he shall be charged with the keeping of all records relating to the entire personnel of the institution as provided for in section 3293.

8. He shall exercise no control or direction whatsoever over the medical, mental, moral or therapeutical care or treatment of any patient or inmate of said institution, or over the doctors, orderlies, nurses, ward attendants, laboratory technicians and all other personnel directly charged with the medical, mental or therapeutical care or treatment of any patient or inmate, employed by the superintendent, but will report all violations to the superintendent. Likewise, the control and direction of employees, by the superintendent, is hereby confined to the doctors, orderlies, nurses, ward attendants, laboratory and all other personnel directly charged with the medical, mental, moral or therapeutical care or treatment of any patient or inmate of said institution. [48GA, ch 93,§18.]

3292 Executive officers—tenure — removal. The board shall appoint a superintendent, warden, or other chief executive officer of each institution under its control who shall have the immediate custody and control, subject to the orders of the board, of all property used in connection with the institution, except as provided in this chapter. The tenure of office of said officers shall be four years from the date of their appointment, but they may be removed by the board for inability or refusal to properly perform the duties of the office, but such removal shall be had only after an opportunity is given such person to be heard before such board upon preferred written charges. Such removal, when made, shall be final. [S13,§2727-a24; C24, 27, 31, 35,§3292; 48GA, ch 93,§1.]

See also §3384.07

3293 Subordinate officers and employees. The board shall determine the number and compensation of subordinate officers and employees for each institution. Subject to the provisions of this chapter, such officers and employees shall be appointed and discharged by the chief executive officer or business manager. Such officer shall keep, in the record of each subordinate officer and employee, the date of employment, the compensation, and the date of each discharge, and the reasons therefor. All of these employees, except physicians and surgeons, shall be bona fide residents and citizens of the state of Iowa at the time of employment. An exception to this provision of residence may be granted by the board for the sole purpose of securing professional and/or scientific services which are unavailable from among the citizens of the state of Iowa. [S13,§2727-a37; SS15, §§2713-n2, 2727-a96; C24, 27, 31, 35,§3293; 47GA, ch 116,§1; 48GA, ch 93,§2.]

Referred to in §3291.3

3294 Influence in appointments. Any member of the board, and any officer thereof, who, by solicitation or otherwise, exerts any influence on the chief executive officer of any institution under the control of said board in the selection of any employee for such institution, shall be guilty of a misdemeanor. [S13,§2727-a37; C24, 27, 31, 35,§3294.]

Punishment, §12894

3295 Bonds. The board shall require its secretary and each officer and employee of said board, and of every institution under its control who may be charged with the custody or control of any money or property belonging to the state, to give an official bond, properly conditioned, and signed by sufficient sureties, in a sum to be fixed by the board, which bond shall be approved by the board, and filed in the office of secretary of state. It may require bonds of other officers and employees not enumerated above. [S13,§2727-a31; C24, 27, 31, 35,§3295.]

3296 Salaries. The board shall, annually, with the written approval of the governor, fix the annual or monthly salaries of all officers and employees for the year beginning July 1 of said year, except such salaries as are fixed by the general assembly. The board shall classify the officers and employees into grades and the salary and wages to be paid in each grade shall be uniform in similar institutions. [S13, §2727-a38; C24, 27, 31, 35,§3296.]

3297 Dwelling house and provisions. The board shall furnish the executive head of each of said institutions, in addition to salary, with a dwelling house or with appropriate quarters in lieu thereof, and, from supplies purchased for the institution, the necessary household provisions for himself, wife, and minor children. [S13,§2727-a38; SS15,§§2713-n2, 2727-a96; C24, 27, 31, 35,§3297.]

Referred to in §3384.09

3298 Salaries—how paid. The salaries and wages shall be included in the monthly pay rolls and paid in the same manner as other expenses of the several institutions. [S13, §2727-a38; C24, 27, 31, 35,§3298.]

3299 Vacations. Each officer and employee of each of said institutions shall be granted an annual vacation, on full pay, as follows:

1. Seven days to those who have been in the service of the state one continuous year.
2. Ten days to those who have been in such service two continuous years.
3. Fourteen days to those who have been in such service three or more continuous years. [S13,§§2727-a74c,-a74e; C24, 27, 31, 35,§3299.]

3300 Authority for vacation. Such vacations shall only be taken at such times as the executive officer or the business manager in charge of said officer or employee, as the case

may be, may direct, and only after written authorization by him, and for the number of days specified therein. A copy of such permit shall be attached to the pay roll of the institution for the month during which the vacation was taken, and the pay roll shall show the number of days the person was absent under the permit. [S13, §§2727-a74c,-a74d; C24, 27, 31, 35, §3300; 48GA, ch 93,§3.]

3301 Record of employees and inmates. The board shall require the proper officer of each institution to keep in a book prepared for the purpose, a record, to be made each day, of the number of hours of service of each employee. The monthly pay roll shall be made from such time book, and shall be in accord therewith. When an appropriation is based on the number of inmates in or persons at an institution the board shall require a daily record to be kept of the persons actually residing at and domiciled in such institution. [S13, §2727-a34; C24, 27, 31, 35,§3301.]

3302 Districts. The board shall, from time to time, divide the state into districts from which the several institutions may receive inmates. It shall promptly notify the proper county or judicial officers of all changes in such districts. [S13,§2727-a21; C24, 27, 31, 35,§3302.]

3303 Place of commitments — transfers. Commitments, unless otherwise permitted by the board, shall be to the institution located in the district embracing the county from which the commitment is issued. The board may, at the expense of the state, transfer an inmate of one institution to another like institution. [S13, §2727-a26; C24, 27, 31, 35, §3303.]

Power of the board to transfer inmates, §§3429, 3456, 3472, 3477, 3482, 3512, 3522, 3526, 3527, 3648, 3701, 3710, 3732, 3733.1, 3751, 3752, 3753, 3755

Transfers for medical treatment, §3828.159

3304 Record of inmates. The board shall, as to every person committed to any of said institutions, keep the following record: Name, residence, sex, age, nativity, occupation, civil condition, date of entrance or commitment, date of discharge, whether a discharge was final, condition of the person when discharged, the name of the institutions from which and to which such person has been transferred, and, if dead, the date, and cause of death. [S13,§2727-a22; C24, 27, 31, 35,§3304.]

Referred to in §3305

3305 Record privileged. Except with the consent of the board, or on an order of a judge or court of record, the record provided in section 3304 shall be accessible only to the members, secretary, and proper clerks of the board. [S13, §2727-a22; C24, 27, 31, 35,§3305.]

3306 Reports to board. The managing officer of each institution shall, within ten days after the commitment or entrance of a person to the institution, cause a true copy of his entrance record to be made and forwarded to the board. When a patient or inmate leaves, or is discharged, or transferred, or dies in any institution, the superintendent or person in charge shall within ten days thereafter send such information to the office of the board on forms which the board may prescribe. [S13,§2727-a22; C24, 27, 31, 35,§3306.]

3307 Questionable commitment. The superintendent is required to immediately notify the board if there is any question as to the propriety of the commitment or detention of any person received at such institution, and said board, upon such notification, shall inquire into the matter presented, and take such action as may be deemed proper in the premises. [S13,§2727 -a29; C24, 27, 31, 35,§3307.]

3308 Religious beliefs. The chief executive officer, receiving a person committed to any of said institutions, shall inquire of such person as to his religious preference and enter the same in the book kept for the purpose, and cause said person to sign the same. [S13,§5718-a1; C24, 27, 31, 35,§3308.]

3309 Religious worship. Any such inmate, during the time of his detention, shall be allowed, for at least one hour on each Sunday and in times of extreme sickness, and at such other suitable and reasonable times as is consistent with proper discipline in said institution, to receive spiritual advice, instruction, and ministration from any recognized clergyman of the church or denomination which represents his religious belief. [S13,§§5718-a1,-a2; C24, 27, 31, 35,§3309.]

3310 Religious belief of minors. In case such inmate is a minor and has formed no choice, his preference may, at any time, be expressed by himself with the approval of parents or guardian, if he has any such. [S13,§5718-a3; C24, 27, 31, 35,§3310.]

3311 Investigation. The board, or a committee thereof, shall visit, and minutely examine, at least once in six months, and oftener if necessary or required by law, the institutions named, and the financial condition and management thereof. [S13,§§2727-a10,-a19; C24, 27, 31, 35,§3311.]

3312 Scope of investigation. The board shall, during such investigation and as far as possible, see every inmate of each institution, especially those admitted since the preceding visit, and shall give such inmates as may require it, suitable opportunity to converse with them apart from the officers and attendants. [S13,§2727-a19; C24, 27, 31, 35,§3312.]

3313 Investigation of other institutions. Said board, or any member thereof, may investigate charges of abuse, neglect, or mismanagement on the part of any officer or employee of any county home in which insane persons are kept, and of any private institution which is subject to the supervision of said board. [S13, §2727-a74b; C24, 27, 31, 35,§3313.]

3314 Witnesses. In aid of any investigation the board shall have the power to summon

and compel the attendance of witnesses; to examine the same under oath, which any member thereof shall have power to administer; to have access to all books, papers, and property material to such investigation, and to order the production of any other books or papers material thereto. Witnesses other than those in the employ of the state shall be entitled to the same fees as in civil cases in the district court. [S13, §2727-a10; C24, 27, 31, 35,§3314.]

Referred to in §3315
Witness fees, §11326 et seq.

3315 **Contempt.** Any person failing or refusing to obey the orders of the board issued under section 3314, or to give or produce evidence when required, shall be reported by the board to the district court in the county where the offense occurs or any judge thereof, and shall be dealt with by the court or judge as for contempt of court. [S13,§2727-a10; C24, 27, 31, 35, §3315.]

Contempts, ch 536

3316 **Transcript of testimony.** The board shall cause the testimony taken at such investigation to be transcribed and filed in its office at the seat of government within ten days after the same is taken, or as soon thereafter as practicable, and when so filed the same shall be open for the inspection of any person. [S13,§2727-a10; C24, 27, 31, 35,§3316.]

3317 **State agents.** The board may appoint, and discharge at its pleasure, such number of persons as may be authorized by law to act as state agents for the soldiers' orphans home, the two training schools, the juvenile home, and the women's reformatory. [SS15,§2692-a; C24, 27, 31, 35,§3317.]

3318 **Rooms and supplies.** The board shall furnish such agents office rooms and all necessary supplies in the same manner supplies are furnished other officers of the board. Such agents, while stopping at any of said institutions, may be furnished with rooms, board, and facilities therein, free of cost. [SS15,§2692-a; C24, 27, 31, 35,§3318.]

3319 **Duties of agents.** Said agents shall:

1. Perform such duties as may be required by law or by said board.
2. Find suitable homes and employment for inmates of said institutions who are to be or who have been released.
3. Inspect such homes.
4. Exercise supervision over such discharged or released persons and examine into their conduct and environment.
5. Return to the institution from which released, all inmates who have been conditionally released and whose conduct has been bad, or in violation of their release.
6. Obtain new homes or new employment for released inmates when their environment is bad.
7. Keep records of their acts as agents and make all reports called for by the board. [S13, §2692-b; C24, 27, 31, 35,§3319.]

3320 **Advancing expense fund.** The board of control may cause to be advanced to each agent, from time to time, from the funds appropriated for such purpose, sums to be used in defraying the official expenses of such agent. The aggregate amount of money so advanced and not expended at any time shall not exceed the sum of two hundred fifty dollars. The agent shall give security, to be approved by the board, for the proper use and accounting each month of all money so advanced. [SS15,§2692-c; C24, 27, 31, 35,§3320.]

3321 **Expenses.** Said agents shall receive their actual and necessary expenses incurred in the discharge of their duties. [SS15,§2692-c; C24, 27, 31, 35,§3321.]

3322 **Receiving officers—duties.** The stewards of the hospitals for the insane, the clerks of the prisons, and the proper officers, who shall be designated by the board, of the other institutions, shall each:

1. Have charge of and be accountable for all supplies and stores of such institution and be chargeable therewith, at their invoice value.
2. Issue stores and supplies upon requisition approved by the superintendent or other officer designated by the board, which requisition shall be his voucher therefor.
3. Present, monthly, to the board an abstract of all expenditures, together with the accounts and pay rolls for the preceding month.
4. Examine and register all goods delivered, as to their amount and quality, and certify to the correctness of the bills therefor, if the goods correspond to the samples, are in good order, and correct in prices.
5. Take an invoice, quarterly, of the subsistence supplies and stock in his possession and control, and transmit a copy thereof, duly verified by him, to the board.
6. Make to the board, at the close of the biennial period, a consolidated report of all purchases and transactions of his department.
7. Pay into the state treasury, from time to time, such amount as the board may determine is necessary to reimburse the state for his negligent loss of such stores or supplies, and shall so do within sixty days of such determination by the board. If default be made in such payment, he shall be discharged and suit shall be brought on his bond. [S13,§2727-a46; C24, 27, 31, 35,§3322.]

Referred to in §3291.3

3323 **Services required.** Inmates of said institutions subject to the provisions hereinafter provided, may be required to render any proper and reasonable service either in the institutions proper or in the industries established in connection therewith. [S13,§2727-a51; SS15, §5718-a11; C24, 27, 31, 35,§3323.]

3324 **Custody.** When an inmate of an institution is so working outside the institution proper, he shall be deemed at all times in the actual custody of the head of the institution. [SS15,§5718-a11; C24, 27, 31, 35,§3324.]

3325 **Wages of inmates.** When an inmate performs services for the state at an institution,

the board of control may, when it deems such course practicable, pay such inmate such wage as it deems proper in view of the circumstances, and in view of the cost attending the maintenance of such inmate. In no case shall such wage exceed the amount paid to free labor for a like service or its equivalent. [SS15,§5718-a11a; C24, 27, 31, 35,§3325.]

3326 Deduction to pay court costs. If such wage be paid, the board may deduct therefrom an amount sufficient to pay all or a part of the costs taxed to such inmate by reason of his commitment to said institution. In such case the amount so deducted shall be forwarded to the clerk of the district court or proper official. [SS15,§5718-a11a; C24, 27, 31, 35,§3326.]

3327 Wages paid to dependent—deposits. If such wage be paid, the board may pay all or any part of the same directly to any dependent of such inmate, or may deposit such wage to the account of such inmate, or may so deposit part thereof and allow the inmate a portion for his own personal use. All deposits shall be on the best attainable terms. [SS15,§5718-a11a; C24, 27, 31, 35,§3327.]

3328 Conferences. Quarterly conferences of the chief executive officers of said institutions shall be held with the board at Des Moines, for the consideration of all matters relative to the management of said institutions. Full minutes of such meetings shall be preserved in the records of the board. The board may cause papers to be prepared and read, at such conferences, on appropriate subjects. [S13,§2727-a20; C24, 27, 31, 35,§3328.]

3329 Scientific investigation. The board shall encourage the scientific investigation, on the part of the executive heads and medical staffs of the various institutions, as to the most successful methods of managing such institutions and treating the persons committed thereto, shall procure and furnish to such heads and staffs information relative to such management and treatment, and, from time to time, publish bulletins and reports of scientific and clinical work done in said institutions. [S13,§2727-a27; C24, 27, 31, 35,§3329.]

3330 Monthly report. The chief executive officer of each institution, or business manager of institutions having the same, shall, on the first day of each month, account to the board for all state funds received during the preceding month, and, at said time, remit the same to the treasurer of state. [S13,§2727-a40; C24, 27, 31, 35,§3330; 48GA, ch 93,§4.]

3331 Annual reports. The executive head or business manager of each institution shall make an annual report to the board and embrace therein a minute and accurate inventory of the stock and supplies on hand, and the amount and value thereof, under the following heads: Livestock, farm produce on hand, vehicles, agricultural implements, machinery, mechanical fixtures, real estate, furniture, and bedding in inmates' department, state property in superintendent's department, clothing, dry goods, provisions and groceries, drugs and medicine, fuel, library, and all other state property under appropriate heads to be determined by the board. [S13,§§2705-b, 2727-a32; C24, 27, 31, 35,§3331; 48GA, ch 93,§5.]

3332 Contingent fund. The board may permit the executive head, which shall include the business manager as provided in this chapter, of each institution to retain a stated amount of funds in his possession as a contingent fund for the payment of freight, postage, commodities purchased on authority of the board on a cash basis, salaries, and bills granting discount for cash. [SS15,§2727-a44; C24, 27, 31, 35,§3332; 48GA, ch 93,§6.]

3333 Requisition for contingent fund. If necessary, the board shall make proper requisition upon the state comptroller for a warrant on the state treasurer to secure the said contingent fund for each institution. [SS15,§2727-a44; C24, 27, 31, 35,§3333.]

3334 Monthly reports of contingent fund. A full, minute, and itemized statement of every expenditure made during the month from such contingent fund shall be submitted by the proper officer of said institution to the board under such rules as said board may establish. [SS15,§2727-a44; C24, 27, 31, 35,§3334.]

3335 Supplies — competition. The board shall, in the purchase of supplies, afford all reasonable opportunity for competition, and shall give preference to local dealers and Iowa producers when such can be done without loss to the state. [S13,§2727-a46; SS15,§2727-a50; C24, 27, 31, 35,§3335.]

Preference to Iowa products, §1171.01

3336 Dealers may file addresses. Jobbers or others desirous of selling supplies shall, by filing with the board a memorandum showing their address and business, be afforded an opportunity to compete for the furnishing of supplies, under such rules as the board may prescribe. [SS15,§2727-a50; C24, 27, 31, 35,§3336.]

3337 Samples preserved. When purchases are made by sample, the same shall be properly marked and retained for six months after the delivery of such purchase. [SS15,§2727-a50; C24, 27, 31, 35,§3337.]

3338 Purchase from an institution. The board may purchase supplies of any institution under its control, for use in any other such institution, and reasonable payment therefor shall be made as in case of other purchases. [S13, §2727-a47; C24, 27, 31, 35,§3338.]

3339 Purchase of supplies. The board shall, from time to time, adopt and make of record, rules and regulations governing the pur-

chase of all articles and supplies needed at the various institutions, and the form, verification, and audit of vouchers for such purchases. [S13, §§2727-a41,-a42,-a49; C24, 27, 31, 35,§3339.]

3340 to 3343, inc. Omitted—obsolete. 45 GA, ch 4,§11

3344 Combining appropriations. The state comptroller is authorized to combine the balances carried in all specific appropriations into a special account for each institution under the control of the board of control, except that the support fund for each institution shall be carried as a separate account. [S13,§2727-a43; C24, 27, 31, 35,§3344.]

3345 State architect. Said board may employ a competent architect, and such draftsmen as may be authorized by law. Said architect shall, in addition to salary, be reimbursed for his actual and necessary expenses within the state while engaged in official business. In cases of sufficient magnitude the board may secure the advice of a consulting architect, or may secure plans and specifications from other architects, at a cost not exceeding one thousand five hundred dollars in any year. [S13,§2727-a23; C24, 27, 31, 35,§3345.]

3346 Plans and specifications. Said board shall cause plans and specifications to be prepared for all improvements authorized and costing over one thousand dollars. No appropriation for any improvement shall be expended until the adoption of suitable plans and specifications, prepared by a competent architect, and accompanied by a detailed statement of the amount, quality, and description of all material and labor required for the completion of such improvement.

No plans shall be adopted, and no improvement shall be constructed, which contemplates an expenditure of money in excess of the appropriation. [S13,§2727-a17; C24, 27, 31, 35,§3346.]

3347 Letting of contracts. The board shall, in writing, let all contracts for authorized improvements costing in excess of three hundred dollars to the lowest responsible bidder, after such advertisement for bids as the board may deem proper in order to secure full competition. The board may reject all bids and re-advertise. [S13,§2727-a51; C24, 27, 31, 35,§3347.]

3348 Preliminary deposit. A preliminary deposit of money, or certified check upon a solvent bank in such amount as the board may prescribe, shall be required as an evidence of good faith, upon all proposals for the construction of said improvements, which deposit or certified check shall be held under the direction of the board. [S13,§2727-a51; C24, 27, 31, 35, §3348.]

3349 Improvements by day labor. Authorized improvements costing three hundred dollars or less may, under authorization of the board, be made by the executive head of any institution by day labor. [S13,§2727-a51; C24, 27, 31, 35,§3349.]

3350 Improvements at institutions. The requirement that contracts in excess of three hundred dollars shall be let under contract shall not be mandatory as to improvements at any institution where the labor of inmates may be utilized on the particular work to be done, to the advantage of the inmates or of the state. [S13,§2727-a51; C24, 27, 31, 35,§3350.]

3351 Payment for improvements. No payment shall be authorized for construction purposes until satisfactory proof has been furnished to the board of control, by the proper officer or supervising architect, that the contract has been complied with by the parties; and all payments shall be made in a manner similar to that in which the current expenses of the several institutions are paid. [S13,§2727-a51; C24, 27, 31, 35,§3351.]

3352 Property of deceased inmate. The chief executive officer or business manager of each institution shall, upon the death of any inmate or patient, immediately take possession of all property of the deceased left at said institution, and deliver the same to the duly appointed and qualified representative of the deceased. [S13,§2727-a72; C24, 27, 31, 35,§3352; 48GA, ch 93,§7.]

3353 Property of small value. If administration be not granted within one year from the date of the death of the decedent, and the value of the estate of decedent is so small as to make the granting of administration inadvisable, then delivery of the money and other property left by the decedent may be made to the surviving spouse and heirs of the decedent. [S13, §2727-a72; C24, 27, 31, 35,§3353.]

3354 When no administration granted. If administration be not granted within one year from the death of decedent, and no surviving spouse or heir is known, said executive officer may convert all said property into money and in so doing he shall have the powers possessed by a general administrator. [S13,§2727-a72; C24, 27, 31, 35,§3354.]

3355 Money deposited with treasurer of state. Said money shall be transmitted to the treasurer of state as soon after one year after the death of the intestate as practicable, and be credited to the support fund of the institution of which the intestate was an inmate. [S13, §2727-a72; C24, 27, 31, 35,§3355.]

3356 Permanent record. A complete permanent record of the money so sent, showing by whom and with whom it was left, its amount, the date of the death of the owner, his reputed place of residence before he became an inmate of the institution, the date on which it was sent to the state treasurer and any other facts which may tend to identify the intestate and explain the case, shall be kept by the chief executive officer of the institution or business manager, as the case may be, and a transcript thereof

shall be sent to, and kept by, the treasurer of state. [S13,§2727-a72; C24, 27, 31, 35,§3356; 48GA, ch 93,§8.]

3357 Payment to party entitled. Said money shall be paid, at any time within ten years from the death of the intestate, to any person who is shown to be entitled thereto. Payment shall be made from the state treasury out of the support fund of such institution in the manner provided for the payment of other claims from that fund. [S13,§§2727-a73,-a74; C24, 27, 31, 35, §3357.]

3358 Special policemen. The board may, by order entered of record, commission one or more of the employees at each of said institutions as special police. Such police shall, on the premises of the institution of which they are employees, and in taking an inmate into custody, have and exercise the powers of regular peace officers. No additional salary shall be granted by reason of such appointment. [S13,§2727-a71; C24, 27, 31, 35, §3358.]

Powers, ch 620 et seq.

3359 Temporary quarters in emergency. In case the buildings at any institution under the management of the board of control are destroyed or rendered unfit for habitation by reason of fire, storms, or other like causes, to such an extent that the inmates cannot be there confined and cared for, said board shall make temporary provision for the confinement and care of the inmates at some other place in the state. Like provision may be made in case any pestilence breaks out among the inmates. The reasonable cost of the change, including transfer of inmates, shall be paid from any money in the state treasury not otherwise appropriated. [C51, §3143; R60,§5156; C73,§4795; C97,§5693; SS15, §2713-n18; C24, 27, 31, 35,§3359.]

3360 Industries. The board may establish such industries as it may deem advisable at or in connection with any of said institutions. [SS15,§5718-a11; C24, 27, 31,35,§3360.]

3361 to 3365, inc. Rep. by 43GA, ch 66. See chapter 114.1

CHAPTER 168

SOLDIERS HOME

This chapter (§§3366 to 3384, inc.) repealed by 48GA, ch 94 and chapter 168.1 enacted in lieu thereof

CHAPTER 168.1

SOLDIERS HOME

3384.01 For whom maintained.
3384.02 Right to admission.
3384.03 Eligibility rules.
3384.04 Married couples.
3384.05 Widows of veterans.
3384.06 Certificate of eligibility.
3384.07 Commandant.
3384.08 Qualifications of commandant.
3384.09 Salary.
3384.10 Officers.
3384.11 Employees' and officers' compensation.
3384.12 House and supplies.
3384.13 Insane and intemperate persons.
3384.14 Contributing to own support.
3384.15 Payment to dependents.
3384.16 Conditional admittance.
3384.17 Remittance to treasurer.
3384.18 Rules enforced—power to dismiss.
3384.19 Dual conviction—probation.
3384.20 Assignment of deposit.
3384.21 Report by board of control.
3384.22 Present members excepted.

3384.01 For whom maintained. The Iowa soldiers home, located in Marshalltown, shall be maintained for honorably discharged soldiers, sailors, marines and nurses who have served the United States in any of its wars and who do not have sufficient means or ability to support themselves, and for the dependent widows and wives of such soldiers, sailors or marines. [C97, §§2601, 2602, 2606; S13,§§2601, 2602, 2606; SS15, §2606; C24, 27, 31, 35,§§3366, 3367; 48GA, ch 94, §2.]

Referred to in §3384.02

3384.02 Right to admission. All persons named in section 3384.01 who do not have sufficient means for their own support, or who are disabled by disease, wounds, old age or otherwise, or who are unable to earn a livelihood, and who have been residents and citizens of the state of Iowa for the three years immediately preceding the date of the application and who are residents of the state of Iowa at the time of the application, may be admitted to the home as members thereof under such rules and regulations as may be adopted by the board of control. [C97,§2602; S13,§§2602, 2606; SS15,§2606; C24, 27, 31, 35, §3366; 48GA, ch 94,§3.]

3384.03 Eligibility rules. The board of control shall have power to determine the eligibility of applicants for admission to the home in accordance with the provision of this chapter, and shall adopt all the necessary rules and regulations for the preservation of order and enforcement of discipline, the promotion of health and well-being of all the members and for the man-

agement and control of the home and the grounds thereof. [C97,§2602; C24, 27, 31, 35,§3367; 48 GA, ch 94,§4.]

3384.04 Married couples. When a married man is or becomes a member of the home, his wife, if she has been married to him for ten years and is otherwise eligible under this chapter, may be admitted as a member of the home subject to all the rules and regulations of said home. Husband and wife may be permitted to occupy, together, cottages or other quarters on the grounds of the home. [C97,§2606; S13,§2606; SS15,§2606; C24, 27, 31, 35,§§3366, 3368; 48GA, ch 94,§5.]

3384.05 Widows of veterans. If any deceased soldier, sailor or marine, who would be entitled to admission to the home if he were living, has left a widow surviving him, such widow shall be entitled to admission to the home with the same rights, privileges and benefits as though her soldier, sailor or marine husband were living and a member of the home, provided, however, that such widow has reached the age of fifty years or is found by the commandant to be totally and permanently disabled and she does not have sufficient means or is unable to support and maintain herself, and provided further that she has been for the ten years preceding the date of her application, a resident of the state of Iowa, and that she has not married at any time since the death of her veteran husband except to a member of the home. [C97,§2606; S13,§2606; C24, 27, 31, 35,§3366; 48GA, ch 94,§6.]

3384.06 Certificate of eligibility. Before admission, each applicant shall file with the commandant an affidavit signed by two members of the soldiers relief commission of the county in which such person resides, stating that such person to the best of their knowledge and belief is a resident of such county as required under this chapter and that such person is unable to earn a livelihood and his income is less than six hundred dollars per annum exclusive of pension, compensation, and/or war risk insurance payments. Such affidavit shall be conclusive evidence of the residence of such persons and prima facie only in all other matters affecting the eligibilty of the applicant and the liability of the county with respect to the expense of any such person for which the county may be liable. All records of admission shall show the residence of the applicant. [C97,§2602; S13,§2602; C24, 27, 31, 35,§3369; 48GA, ch 94,§7.]

3384.07 Commandant. The board of control shall appoint a commandant who shall serve as the chief executive of the home and who shall have the immediate custody and control, subject to the orders of the board, of all property used in connection with the home. [C97,§2604; S13, §2604; SS15,§2604; 48GA, ch 94,§8.]

See also §3292

3384.08 Qualifications of commandant. The commandant shall be a resident of the state of Iowa who has an honorable discharge from the United States army, navy or marine corps and who has served in the military or naval forces of the United States in any war. [C97,§2604; S13,§2604; SS15,§2604; C24, 27, 31, 35,§3374; 48 GA, ch 94,§9.]

3384.09 Salary. The commandant shall receive an annual salary of two thousand eight hundred dollars. In addition to said salary, the board of control shall furnish said commandant with a dwelling house or with appropriate quarters in lieu thereof and such additional allowances as are provided in section 3297 for executive heads of state institutions. [C97,§2604; S13,§2604; SS15,§2604; C24, 27, 31, 35,§3373; 48 GA, ch 94,§10.]

3384.10 Officers. The commandant, subject to the approval of the board, shall appoint an adjutant, a quartermaster, a chief surgeon, and a chaplain, each of whom shall have the same qualifications as the commandant. [C97,§2604; SS15,§2604; C24, 27, 31, 35,§3375; 48GA, ch 94, §11.]

3384.11 Employees' and officers' compensation. The board shall determine the number and fix the compensation of all subordinate officers and employees. The employees shall be appointed by the commandant who shall keep in the record of each officer and employee, the date of employment, the compensation, and the date of discharge and the reasons therefor. The commandant shall have the power to discharge any officer or employee for insubordination or neglect of duty or other good cause and his acts and decisions shall be reviewable only by the board of control whose decision shall be final. [C97,§2604; S13,§2604; SS15,§2604; 48GA, ch 94, §12.]

3384.12 House and supplies. The adjutant, quartermaster, chief surgeon and chaplain shall be furnished, without charge, the use of the houses erected by the state and now occupied by such officers, together with electricity, heat, fuel and water. [S13,§2604; SS15,§2604; C24, 27, 31, 35,§3376; 48GA, ch 94,§13.]

3384.13 Insane and intemperate persons. No person shall be received or retained in the home who is insane, is an inebriate, or is addicted to the use of drugs. When a member of the home is discharged therefrom, or voluntarily leaves the home, or is adjudged insane after admittance, his or her residence shall be that of the county in which he or she was residing at the time of his or her admittance to the home. [C97, §2605; C24, 27, 31, 35,§3370; 48GA, ch 94,§14.]

3384.14 Contributing to own support. Every member of the home who receives pension, compensation or gratuity from the United States government, or income from any source, shall contribute to his or her maintenance or support while a member of the home. The amount of such contribution shall be determined by the board of control but in no case to exceed the actual cost of keeping and maintaining such person in said home. The board may require every member of the home to render such assistance in the care of the home and grounds

as the physical condition of any such member will permit. [S13,§§2602-a, 2606-a; C24, 27, 31, 35,§3377; 48GA, ch 94,§15.]

3384.15 Payment to dependents. Each member of the home who receives a pension or compensation and who has a dependent wife or minor children shall deposit with the commandant forthwith on receipt of his pension or compensation check one-half of the amount thereof, which shall be sent at once to the wife if she be dependent upon her own labor or others for support, or, if there be no wife, to the guardian of the minor children if dependent upon others for support. The commandant, if satisfied that the wife has deserted her husband, or is of bad character, or is not dependent upon others for support, may pay the money deposited as herein provided to the guardian of the dependent minor children. [S13,§2606-c; C24, 27, 31, 35, §§3379, 3384; 48GA, ch 94,§16.]

Referred to in §3384.20

3384.16 Conditional admittance. The board may, if there is room for all dependent applicants and members, admit and allow to remain in the home, persons who have sufficient means for their own support, but are otherwise eligible to become members of the home, on payment of the cost of their support, which cost shall be fixed from time to time by the board of control. [S13,§2606-a; C24, 27, 31, 35,§3371; 48GA, ch 94, §17.]

3384.17 Remittance to treasurer. All sums paid to and received by the commandant, under this chapter, for the support of members in the home, shall be paid quarterly by him to the treasurer of the state and credited to the support fund of the home. [S13,§2602-a; C24, 27, 31, 35,§3372; 48GA, ch 94,§18.]

3384.18 Rules enforced—power to dismiss. The commandant shall administer and enforce all rules and regulations adopted by the board of control, including rules of discipline, and shall have power to dismiss any member from the home for infraction of such rules and regulations subject to the approval of the board. [48GA, ch 94,§19.]

3384.19 Dual conviction — probation. Any person who, while a member of the home, is twice convicted of an offense against the statutes of the state, or twice found guilty by the commandant or a court martial of intoxication or other infraction of the rules of the home, shall be required to deposit all of his pension money with the commandant immediately upon receipt of his pension check or warrant. In lieu of trial by the commandant the member may demand a court martial. Such pension money shall be deposited by the commandant in a separate account for and in behalf of such pensioner and the commandant shall, under such rules as the board of control may provide, pay the same out with the consent of the pensioner in such manner and for such purposes as the board of control may approve. If, after a period of six months, the pensioner shall conduct himself in an orderly and sober manner, said deposit shall be returned to him. If the pensioner be discharged from the home the balance of such deposit shall be paid to said pensioner within thirty days after his discharge. [S13,§2606-b; C24, 27, 31, 35,§§3378, 3380, 3381, 3382; 48GA, ch 94,§20.]

Referred to in §3384.20

3384.20 Assignment of deposit. Pension money deposited with the commandant shall not be assignable for any purpose except as provided in sections 3384.15 and 3384.19. [S13,§2606-b; C24, 27, 31, 35,§3383; 48GA, ch 94,§21.]

Assignments in general, ch 422
Exemption of pension money, §11761

3384.21 Report by board of control. The board of control shall, biennially, on or before October 1, prior to the meeting of the general assembly, make a full and detailed report to the governor showing the condition of the home, the number of members in the home, the order and discipline enforced, and the needs of the home financially and otherwise, together with an itemized statement of all receipts and disbursements and any and all other matters of importance in the management and control of the home. [48 GA, ch 94,§23.]

3384.22 Present members excepted. The provisions of this chapter relating to eligibility for admission shall not apply to the present* members of the home. [48GA, ch 94,§22.]

*Chapter effective July 4, 1939
Constitutionality, 48GA, ch 94,§24

CHAPTER 169

STATE SANATORIUM

3385 Designation.
3386 Object and purposes.
3387 Qualifications of superintendent.
3388 Salary.
3389 Duties.
3390 Admission.
3391 Additional showing.
3392 Waiting list.
3393 Department for advanced stages.
3394 Transfers.
3395 Indigent patients.
3396 Advancing transportation expense.
3397 Certificates as to number of inmates.
3398 Certificate of monthly allowance.
3399 Liability of county.
3400 Liability of patients and others.
3401 Patients and others liable.

3385 Designation. The state sanatorium for the treatment of tuberculosis shall hereafter be known as the state sanatorium. [S13,§2727-a75; C24, 27, 31, 35,§3385.]

3386 Object and purposes. The state sanatorium shall be devoted solely to the care and treatment of pulmonary tuberculosis, both in its incipient and advanced stages, of residents of

this state. [S13,§2727-a75; C24, 27, 31, 35, §3386.]

3387 Qualifications of superintendent. The superintendent shall be a well-educated physician of at least five years experience in the practice of medicine. He shall reside at the sanatorium. [S13,§§2727-a76,-a81; C24, 27, 31, 35,§3387.]

3388 Salary. The annual salary of the superintendent shall be fixed by the board of control at an amount not exceeding twenty-five hundred dollars. [S13,§2727-a76; C24, 27, 31, 35,§3388.]

3389 Duties. Said superintendent shall:

1. Perform such duties as may be provided by law or by said board.
2. Oversee and secure the individual treatment and professional care of each patient.
3. Prescribe rules, subject to the approval of said board, for the application, examination, reception, discharge, and government of patients.
4. Keep a full record of the condition of each patient.
5. Encourage and assist in the establishment of hospitals throughout the state, especially in cities, for the treatment of tuberculosis.
6. Furnish to each applicant for admission proper blanks on which to make the application. [S13,§2727-a81; C24, 27, 31, 35,§3389.]

3390 Admission. An applicant for admission to the sanatorium shall first secure a thorough examination of his condition by a physician licensed to practice medicine in this state, for the purpose of determining whether said applicant is afflicted with pulmonary tuberculosis. Said examining physician shall, as accurately as possible, fill out the blanks furnished for that purpose, and at once mail the same to the superintendent. [S13,§2727-a82; C24, 27, 31, 35,§3390.]

3391 Additional showing. The superintendent, in addition to the record of said examination, may demand of the applicant further showing as to his eligibility for admission. In case of doubt, the superintendent shall personally examine said applicant in case the applicant presents himself at the institution. If the applicant appears to be a bona fide resident of this state and is otherwise eligible for admission, he shall be received at the institution, provided there is room for him. [S13,§2727-a82; C24, 27, 31, 35,§3391.]

3392 Waiting list. If, at the time admission is granted, the applicant cannot, for any reason, be then received, his name shall be regularly entered on a waiting list and applicants shall be admitted in that order. [S13,§2727-a82; C24, 27, 31, 35,§3392.]

3393 Department for advanced stages. The superintendent shall create a separate department for persons afflicted with pulmonary tuberculosis in advanced stages. If it be impossible to receive all such patients, preference shall be given to those most in need of treatment, and those whose condition is most dangerous to the public. [S13,§2727-a91; C24, 27, 31, 35, §3393.]

3394 Transfers. Patients may be transferred from the department for incipient cases to the department for advanced cases and vice versa. [S13,§2727-a91; C24, 27, 31, 35,§3394.]

3395 Indigent patients. The state shall, on certificate of the business manager approved by the board of control, pay, out of any money in the state treasury not otherwise appropriated, the actual and necessary expense attending the transportation of an accepted applicant for admission, to and from the sanatorium, and the expense of treating said applicant at said institution, if said applicant is unable to pay the same and such fact is certified to by the board of health of the city, town, or township, as the case may be, depending on the residence of said applicant. [S13,§2727-a84; C24, 27, 31, 35, §3395; 48GA, ch 93,§9.]

Referred to in §3396

3396 Advancing transportation expense. In cases contemplated by section 3395, the business manager shall certify an itemized estimate of the expense attending such transportation, which certificate when approved by the board of control shall be filed with the state comptroller who shall thereupon issue his warrant to the business manager for said amount. Within thirty days thereafter the business manager shall file with said comptroller, an itemized and verified statement, approved by the board, of the actual and necessary expense attending said transportation, together with the receipt of the treasurer of state for any part of said warrant not expended. If said warrant prove insufficient, said certificate shall show the amount of such deficiency, and the comptroller shall at once issue his warrant therefor. [C24, 27, 31, 35,§3396; 48GA, ch 93,§9.]

3397 Certificates as to number of inmates. The superintendent, on the first day of each month, shall certify to the board the average number of inmates supported by the state in said institution for the preceding month. [S13,§2727-a85; C24, 27, 31, 35,§3397.]

3398 Certificate of monthly allowance. Upon receipt of such certificate, the board shall, on the basis of the per capita allowance as fixed by it, certify to the comptroller and treasurer of state the total amount payable for the care, treatment, and maintenance of the patients supported by the state for the preceding month, and the comptroller and treasurer of state shall credit said institution with said amount. The amount so credited shall be drawn from the state treasury in the manner provided in chapter 167.* [S13,§2727-a85; C24, 27, 31, 35,§3398.]

*See 45GA, ch 4, §11

3399 Liability of county. Each county shall be liable to the state for the support of all patients from that county in the state sanatorium.

The amounts due shall be certified by the superintendent to the state comptroller, who shall collect the same from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of insane patients. [S13,§2727-a86; C24, 27, 31, 35,§3399.]

Manner of collection, §3600 et seq.

3400 Liability of patients and others. Patients in the sanatorium and persons legally bound for their support shall be liable for the maintenance of patients in the sanatorium. [S13, §2727-a86; C24, 27, 31, 35,§3400.]

3401 Patients and others liable. The provisions of law for the collection by boards of supervisors of amounts paid by their respective counties from the estates of insane patients and from persons legally bound for their support shall apply in cases of patients cared for in the sanatorium. [S13,§2727-a86; C24, 27, 31, 35, §3401.]

Statutes applicable, §3595 et seq.

CHAPTER 170

GLENWOOD STATE SCHOOL

3402 Objects.
3403 Salary.
3404 Departments.
3405 Admission and discharge.
3406 Clothing.
3407 Certificate to state comptroller.
3408 Duplicate receipts.
3409 Liability of inmate.
3410 Release from liability.

3402 Objects. The Glenwood state school shall be maintained for the training, instruction, care, and support of feeble-minded residents of the state. [C97,§§2693, 2695, 2699; S13,§§2695-a,-c; C24, 27, 31, 35,§3402; 48GA, ch 93,§12.]

3403 Salary. The superintendent shall receive a salary of three thousand dollars per year. [S13,§2727-3a; C24, 27, 31, 35,§3403.]

3404 Departments. The board of control shall, as far as possible, create separate departments for separate classes of inmates. [C97, §2699; C24, 27, 31, 35,§3404.]

3405 Admission and discharge. Admission to said institution may be either voluntary, by parents, guardian, or county attorney, under such rules as the board may prescribe, or by commitments under chapter 171 of this title. The board may at any time return any inmate to its parent or guardian, even though committed by a court. [C97,§§2693, 2696, 2698; C24, 27, 31, 35, §3405.]

3406 Clothing. The business manager shall supply all inmates with clothing when not otherwise supplied. The actual cost thereof, together with the cost of transporting said inmate, shall be certified by the business manager to the auditor of the county of the inmate's residence, and the board of supervisors shall allow the same and cause the amount to be remitted to the treasurer of state. Said certificate shall be presumed to be correct. [C97,§2697; C24, 27, 31, 35,§3406; 48GA, ch 93,§9.]

3407 Certificate to state comptroller. A duplicate of said certificate shall be forwarded to the state comptroller who shall charge the county accordingly, and the treasurer and comptroller shall credit the home with the same amount. [C97,§2697; C24, 27, 31, 35,§3407.]

3408 Duplicate receipts. The treasurer of state, on receipt of payment from the county, shall forward duplicate receipts to the county auditor who shall in return forward one of said receipts to the state comptroller. [C24, 27, 31, 35,§3408.]

3409 Liability of inmate. Said inmate and those legally liable for his support shall be liable to the county for all clothing aforesaid and for all costs of transporting said inmate. [C97, §2697; C24, 27, 31, 35,§3409.]

Referred to in §3410

3410 Release from liability. The board of supervisors, on proper showing of the financial condition of the parties named in section 3409, may release any of said parties from said liability. [C97,§2697; C24, 27, 31, 35,§3410.]

CHAPTER 171

GUARDIANSHIP AND CUSTODY OF FEEBLE-MINDED

Referred to in §3405

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3411 "Feeble-minded" defined. The words "feeble-minded person" in this chapter shall be construed to mean any person afflicted with mental defectiveness from birth or from an early age, so pronounced that he is incapable of controlling himself and his affairs and requires supervision, control, and care for his own welfare, or for the welfare of others, or for the welfare of the community, and who is not classifiable as an "insane person" within the meaning of the provisions of the chapters of this title relating to the insane. [C97,§2699; C24, 27, 31, 35,§3411.]

3412 Duty of county attorney. The county attorney shall, if requested, appear on behalf of any petitioner for the appointment of a guardian or commitment of an alleged feeble-minded person, under this chapter, and on behalf of all public officials and superintendents in all matters pertaining to the duties herein imposed upon them. [C24, 27, 31, 35,§3412.]

3413 Petition. A petition for the adjudication of the feeble-mindedness of a person within the meaning of this chapter may, with the permission of the court, or judge, be filed, without fee, against such person, with the clerk of the district, superior, or municipal court of the county or city in which such alleged feeble-minded person resides or is found, by any relative of such person, or by his or her guardian, or by any reputable citizen of the county of such residence or of such place of finding. [C24, 27, 31, 35,§3413.]

3414 Sufficiency of petition. Said petition shall be verified by affidavit, may be on information or belief, and shall state:

1. That such person is feeble-minded within the meaning of this chapter.
2. That it is dangerous to the welfare of the community for such person to be at large without care or control and the facts tending to show such danger.
3. The name and residence of all persons, so far as known, supervising, caring for, or supporting such person, or assuming, or under obligations, to do so.
4. The name and residence, if known, of the parents of such person, and of all other persons legally chargeable with the supervision, care, or support of such person.
5. Whether such person has been examined by a qualified physician with a view of determining his mental conditon. [C24, 27, 31, 35,§3414.]

3415 Names of witnesses. There shall be indorsed on the petition the names of all obtainable witnesses known to the petitioner by which the allegations of the petition may be established. [C24, 27, 31, 35,§3415.]

3416 Additional parties. The following persons, in addition to the alleged feeble-minded person, shall be made party defendants if they reside in this state and their names and residences are known:

1. The parent or parents of said principal defendant.
2. The person with whom said principal defendant is living.
3. The person or persons assuming to give the principal defendant care and attention.
4. The guardian, if there be such, of the person or property of the principal defendant. [C24, 27, 31, 35,§3416.]

3417 Notice. Notice of the pendency of said petition and of the time and place of hearing thereon shall be served upon all defendants who are residents of the county in which the petition is filed, in the manner in which original notices are served. The court or judge shall, by written order, direct the manner and time of service on all other parties. No notice need be served on those who are personally before the court. Said notice shall require the defendants to bring said alleged feeble-minded person into court at the time and place named. [C24, 27, 31, 35,§3417.]

Manner of service, §11060

3418 Time of appearance. The time of appearance shall not be less than five days after completed service, unless the court or judge orders otherwise. [C24, 27, 31, 35,§3418.]

3419 Hearing—default. The hearing may be had in term time or in vacation. The petition shall be taken as confessed by all defendants, except the principal defendant, who are duly served and who do not appear at the time required by the notice. [C24, 27, 31, 35,§3419.]

3420 Custody pending hearing. Pending final hearing, the court may, at any time after the filing of the petition, and on satisfactory showing that it is for the best interest of the alleged feeble-minded person and of the community that such person be at once taken into custody, or that service of notice will be ineffectual if he is not taken into custody, issue a warrant for the immediate production of such person before the court. In such case the court or judge may make any proper order for the custody or confinement of such person as will protect the defendant and the community and insure the presence of such person at the hearing. Such person shall not be confined with those accused or convicted of crime. [C24, 27, 31, 35, §3420.]

3421 Interrogatories. The court may require the petitioner to answer under oath such interrogatories as may be propounded by the board of control on forms provided by said board. [C24, 27, 31, 35,§3421.]

3422 Pleadings—trial. Answers need not be, but may be, filed. The hearing on the allegations of the petition shall be as in equitable proceedings. [C24, 27, 31, 35,§3422.]

How issues tried, §11429 et seq.

3423 Trial. Trials shall be public, unless otherwise requested by the parent, guardian, or other person having the custody of the feeble-minded person. [C24, 27, 31, 35,§3423.]

3424 Commission to examine. The court shall, at or prior to the final hearing, appoint a commission of two qualified physicians, or of one qualified physician and one qualified psychologist, each of whom shall be residents of the county, who shall make a personal examination of the alleged feeble-minded person for the purpose of determining his mental condition. [C24, 27, 31, 35,§3424.]

3425 Report of commission. Said commission shall report in writing to the court the facts attending the mental condition of said person and its conclusion based thereon and its recommendations concerning such person. It shall also report to the court sworn answers to such questions as may be required on forms to be prepared and furnished by the board of control. Such reports shall be filed with the clerk of the court. [C24, 27, 31, 35,§3425.]

3426 Ruling on report. No objections or exceptions need be made to said report. The court may set the report aside, and may order a new examination by the same or by a new commission, or may make such findings of fact in lieu of said report as may be justified by the evidence before the court. [C24, 27, 31, 35, §3426.]

3427 Commission omitted. No commission need be appointed in those cases where the feeble-mindedness of the person is manifest to the court or judge. [C24, 27, 31, 35,§3427.]

3428 Guardianship or commitment. If it be found that said person is feeble-minded, and that it will be conducive to the welfare of such person and to the community to place such person under guardianship, or to commit such person to some proper institution for treatment, the court or judge shall, by proper order:

1. Appoint a guardian of the person of such person, provided no such guardian has already been appointed.
2. Commit such person to any state institution for the feeble-minded.
3. Commit such person to a private institution of this state, duly incorporated for the care of such persons, and approved by the board of control, provided such institution is willing to receive such person. [C24, 27, 31, 35,§3428.]

3429 Jurisdiction over commitment. The person committed to any private institution shall remain under the jurisdiction of the court and the order of commitment may at any time be set aside or modified by changing the place of or terminating the commitment, and appointing a guardian in lieu thereof; but this section shall not deprive the board of power to transfer committed patients from one institution to another. [C24, 27, 31, 35,§3429.]

Power to transfer, §3303

3430 Powers of guardian. A guardian appointed hereunder shall have the same power over the person of his ward as possessed by a parent over a minor child, but shall be subordinate to any duly appointed guardian of the property of such ward. [C24, 27, 31, 35,§3430.]

Guardianship generally, ch 589

3431 Jurisdiction of court—removal. Guardianship proceedings shall remain under the jurisdiction of the court. The court or judge may at any time, on application of any reputable person, terminate such guardianship, or remove the guardian and appoint a new guardian, or may order that such feeble-minded person be removed from the custody of the guardian and

committed to an institution of the class heretofore specified. [C24, 27, 31, 35,§3431.]

3432 **Modification of order.** No order shall be made discharging or varying a prior order placing the feeble-minded person under guardianship without giving one or more of the relatives or a friend of the feeble-minded person, his guardian, or the board of control, notice and an opportunity to be heard. [C24, 27, 31, 35, §3432.]

3433 **Inability to receive patient.** If the state institution is unable forthwith to receive such person, the superintendent shall notify the court or judge of the time when such person will be received and in the meantime the said person shall be restrained and cared for under such order as the court may enter. [C24, 27, 31, 35,§3433.]

3434 **Warrant of commitment.** Upon the entry of an order of commitment, the clerk shall deliver to any suitable person designated by the court or judge, a warrant of commitment, and a duplicate thereof, commanding such person forthwith to deliver the committed person to the institution designated by the court. [C24, 27, 31, 35,§3434.]

3435 **Assistants.** The judge may, for the purpose of committing said person, direct the clerk to authorize the employment of one or more assistants. No feeble-minded female shall be taken to the institution by any male person not her husband, father, brother, or son, without the attendance of some woman of good character and mature age. [C24, 27, 31, 35,§3435.]

3436 **Receipt for patient.** The superintendent shall, on the warrant of commitment, receipt for said person. The duplicate warrant shall be left with the superintendent and shall be his sufficient authority to restrain and care for said committed person. [C24, 27, 31, 35,§3436.]

3437 **Return on warrant.** The person executing said warrant shall make due return thereon of his doings and forthwith file the same with the clerk. [C24, 27, 31, 35,§3437.]

3438 **Discharge — habeas corpus.** No person committed hereunder shall be discharged from the institution except as herein provided, except that nothing herein shall abridge the right of petition for a writ of habeas corpus. [C24, 27, 31, 35,§3438.]

Constitutional provision, Art. I, §13
Habeas corpus, ch 534

3439 **Petition for discharge.** A petition for the discharge of a person who has been committed to an institution under this chapter, or to vary such order of commitment, may at any time after six months from the date of such commitment be filed by the person committed or by any reputable person. If the commitment be to a private institution, the petition shall be filed with the court or judge ordering such commitment. If the commitment be to a state institution, the petition shall be filed in the proper court of the county where the institution is situated. [C24, 27, 31, 35,§3439.]

3440 **Discharge — modifications of orders.** Discharges and modifications of orders may be made on any of the following grounds:

1. That the person adjudged to be feeble-minded is not feeble-minded.
2. That said person has so far improved as to be capable of caring for himself.
3. That the relatives or friends of the feeble-minded person are able and willing to support and care for him and request his discharge, and in the judgment of the superintendent of the institution having the person in charge, no evil consequences are likely to follow such discharge.
4. That, for any other cause, said discharge should be made or such modification should be entered. [C24, 27, 31, 35,§3440.]

3441 **Notice of application.** Notice of the hearing shall be served on the superintendent of the institution and on such parties as the court or judge may find from the record are interested. [C24, 27, 31, 35,§3441.]

3442 **Discharge or modification of order.** On the hearing, the court may discharge the feeble-minded person from all supervision, control, and care, or may place him under guardianship, or may transfer him from a public institution to a private institution, or vice versa, as the court thinks fit under all the circumstances. [C24, 27, 31, 35,§3442.]

3443 **Adjudication.** The denial of one petition for discharge or modification shall be no bar to another on the same or different grounds within a reasonable time thereafter, such reasonable time to be determined by the court. [C24, 27, 31, 35,§3443.]

3444 **Examination of patient.** When a person is committed to an institution, the superintendent, under regulations of the board of control, shall cause the person to be examined, touching his mental condition, and if, on such examination, it is found that the person is not feeble-minded, it shall be the duty of the superintendent to petition the court immediately for his discharge or a modification of the order sending such person to the institution. [C24, 27, 31, 35,§3444.]

3445 **Communications.** Persons admitted to any such institution shall have all reasonable opportunity and facility for communication with their friends. They shall be permitted to write and send letters, provided they contain nothing of an offensive character. Letters written by any inmate to any member of the board of control, or to any state or county official, shall be forwarded unopened. [C24, 27, 31, 35,§3445.]

3446 **Leave of absence.** No leave of absence from any such institution shall be granted to any inmate except for good cause to be determined and approved by the board of control, who shall take appropriate measures to secure for the feeble-minded person proper supervi-

sion, control, and care during such leave of absence. [C24, 27, 31, 35,§3446.]

3447 Inquest. In the event of a sudden or mysterious death of an inmate of any public or private institution for the feeble-minded, a coroner's inquest shall be held. Notice of the death of such person, and the cause thereof, shall in all cases be sent to the judge of the court having jurisdiction over such person, and the fact of the death, with the time, place, and alleged cause shall be entered upon the docket. [C24, 27, 31, 35,§3447.]

3448 Penalties. Any person who shall seek to have any person adjudged feeble-minded, knowing that such person is not feeble-minded, shall be fined not exceeding one thousand dollars, or imprisoned not exceeding one year in the county jail. [C24, 27, 31, 35,§3448.]

3449 Witness fees. The fees for attendance of witnesses and execution of legal process shall be the same as are allowed by law for similar service in other cases. For service as commissioner, the sum of five dollars a day and the actual and necessary traveling expenses shall be allowed. [C24, 27, 31, 35,§3449.]

Fees, §§5191, 11326

3450 Costs. The costs of proceedings shall be defrayed from the county treasury, unless otherwise ordered by the court. When the person alleged to be feeble-minded is found not to be feeble-minded, the court may render judgment against the person filing the petition, except when the petition is filed by order of court. [C24, 27, 31, 35,§3450.]

3451 Foreign county liable. When the proceedings are instituted in a county in which the alleged feeble-minded person was found, but of which he is not a resident, and the costs are not taxed to the petitioner, the county of which such feeble-minded person is a resident shall, on presentation of a properly itemized bill for such costs, repay the same to the former county. [C24, 27, 31, 35,§3451.]

3452 Persons liable for costs and maintenance. Costs incident to guardianship and to the trial and commitment of a feeble-minded person to such institution, including the cost of maintenance therein, may be collected of such feeble-minded person and of all persons legally chargeable with the support of such feeble-minded person. [C24, 27, 31, 35,§3452.]

3453 Juvenile court — delinquent child. When in proceedings against an alleged delinquent or dependent child, the court or judge is satisfied from any evidence that such child is probably feeble-minded, the court or judge may order a continuance of such proceeding, and may direct an officer of court or other proper person to file a petition against said child under this chapter, and, pending hearing, may, by order, provide proper custody for such child. [C24, 27, 31, 35,§3453.]

Referred to in §§3454, 3455

3454 Suspending criminal proceeding. If, on the conviction in the district, superior, or municipal court of any person for any crime, or for any violation of any municipal ordinance, or if, on the conviction in said courts of a child for dependency or delinquency, it appears to the court or judge before sentence, from any evidence, that such convicted person is probably feeble-minded within the meaning of this chapter, the court or judge may suspend sentence or order, and may order any officer of the court or other proper person to file a petition under this chapter against said person and pending hearing thereon shall provide for the custody of said person as directed in section 3453. [C24, 27, 31, 35,§3454.]

Referred to in §3455

3455 Passing sentence. Should it be found, under sections 3453 and 3454, that said person is not feeble-minded, the court shall proceed with the original proceedings as though no petition had been filed. [C24, 27, 31, 35,§3455.]

3456 Transfers. The board of control may at any time transfer any patient from the institution for the feeble-minded to the hospitals for the insane, and vice versa. [C24, 27, 31, 35, §3456.]

3457 Inquest as to sanity. If it appears at any time that a person has been, under the provisions of this chapter, placed under guardianship or committed to a private institution and ought to be committed to a hospital for the insane, he may be proceeded against under the chapters relating to the insane. [C24, 27, 31, 35,§3457.]

Commitment of insane, ch 177

3458 Inmates in private asylums. When the mental condition of a person in a private institution for the insane is found to be such that such patient ought to be transferred to an institution for the feeble-minded, or placed under guardianship, such person may be proceeded against under this chapter. [C24, 27, 31, 35, §3458.]

3459 Clothing and money on discharge. All persons discharged from a state institution for the feeble-minded shall, unless otherwise supplied, be furnished at state expense with suitable clothing and money, not exceeding twenty dollars, sufficient to defray his expenses home. Said expense shall be charged to the county of the person's residence and collected as in case of clothing furnished to inmates while in the custody of the institution. [C24, 27, 31, 35,§3459.]

Collection of expense, §3406 et seq.

3460 Escape. If any feeble-minded person shall escape from an institution for the feeble-minded, or is removed therefrom without the written order of the board of control, it shall be the duty of the superintendent of the institution and his assistants, and all peace officers of any county in which such inmate may be found, to take and detain him without a warrant and at once report such detention to the superintendent, who shall immediately provide for the re-

turn of said inmate to the institution. [C24, 27, 31, 35,§3460.]

3461 Expense of capture. All actual and necessary expenses incurred in the capture, restraint, and return of the inmates to the hospital shall be paid on itemized vouchers, sworn to by the claimants and approved by the superintendent and the board of control, from any money in the state treasury not otherwise appropriated. [C24, 27, 31, 35,§3461.]

3462 Court docket. Each court having jurisdiction under this chapter shall keep a separate docket of proceedings in which shall be made such entries as will, together with the papers filed, preserve a complete and perfect record of each case. The original petitions, writs, and returns made thereto and the reports of commissions shall be filed with the clerk of the court. [C24, 27, 31, 35,§3462.]

3463 Record by board of control. The board of control shall keep a record of all persons adjudged to be feeble-minded, and of the orders respecting them by the courts throughout the state, copies of which orders shall be furnished by the clerk of the court without the board's application therefor. [C24, 27, 31, 35,§3463.]

3464 Admission of voluntary patients. Nothing in this chapter shall be construed to prevent the reception at the institution for the feeble-minded, or at the hospital for epileptics and school for feeble-minded, of voluntary patients under such rules as the board of control may prescribe. [C24, 27, 31, 35,§3464.]

CHAPTER 172

HOSPITAL FOR EPILEPTICS AND SCHOOL FOR FEEBLE-MINDED

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3465 Objects. The hospital for epileptics and school for feeble-minded, hereinafter in this chapter referred to as "hospital", shall be maintained for the purpose of securing humane, curative, and scientific care and treatment of epileptics, and for the training, instruction, care, and support of feeble-minded residents of this state. [S13,§2727-a93; SS15,§§2727-a93, -a96; C24, 27, 31, 35,§3465.]

3466 Qualifications of superintendent—salary. The superintendent shall be a well-educated physician with at least five years experience in the actual practice of medicine, and shall receive a salary not exceeding three thousand dollars per annum. [SS15,§2727-a96; C24, 27, 31, 35,§3466.]

3467 Duties. The superintendent shall:

1. Perform all duties required by law, and by the board of control, not inconsistent with law.
2. Oversee and secure the individual treatment and professional care of each patient in the hospital.
3. Keep a full and complete record of the condition of each patient.
4. Have the custody of, and restrain and discipline all patients in such manner as he may deem best, subject to the regulations of the board. [SS15,§2727-a96; C24, 27, 31, 35,§3467; 48GA, ch 93,§10.]

3468 Admission. All adults afflicted with epilepsy who have been residents of Iowa for at least one year preceding the application for admission, and all children so afflicted whose parents or guardians have been residents of Iowa for a like period, shall be eligible for admission. [S13,§2727-a95; C24, 27, 31, 35,§3468.]

3469 Compensation for private patients. The board shall fix and enforce the rate of compensation to be paid in said hospital by private patients so afflicted. All money paid under the provisions of this section shall be received by the chief executive officer of the institution and remitted each month to the treasurer of state and placed to the credit of the general fund of the state. [SS15,§2727-a96; C24, 27, 31, 35, §3469.]

Referred to in §3477.2

3470 Voluntary patients rendered custodial patients. When a sane patient has voluntarily entered said hospital, either through his own action or through the action of the parent or guardian, and afterward, while in the hospital, becomes violent or insane, the board of control, on written complaint, may, after due hearing, commit said patient to said hospital as an insane epileptic. Such order of commitment shall be noted upon the records of the hospital, and shall have the same force and effect as an order of commitment by the commissioners of insanity, and with the same right of appeal. [SS15, §2727-a96; C24, 27, 31, 35,§3470.]

3471 Statutes applicable. All laws relating to the commitment of insane persons to the hospitals for the insane, insofar as applicable, shall apply to commitments of epileptics to said

hospital and school. [SS15,§2727-a96; C24, 27, 31, 35,§3471.]

Commitment of insane, ch 177

3472 Transfer of inmates. The board shall have power to transfer epileptics from any other institution under its control to said hospital and school, to transfer insane epileptics from the said hospital for epileptics to other state institutions, and to retransfer such epileptics if deemed expedient. [SS15,§2727-a96; C24, 27, 31, 35,§3472.]

3473 Discharge. Any person who has voluntarily entered said hospital as an epileptic patient and is sane, may at any time obtain his discharge by giving at least ten days written notice of his desire for discharge. The parent or guardian of a minor child, which child has been voluntarily placed in said hospital as an epileptic patient and who is sane, may obtain the discharge of such child by giving such notice. A patient discharged under this section may not be again admitted except under a warrant of commitment. [SS15,§2727-a96; C24, 27, 31, 35,§3473.]

3474 Rep. by 48GA, ch 95,§1. See §3477.1

3475 Feeble-minded. Feeble-minded residents of this state may be admitted to said hospital and school and shall be clothed, maintained, and supported in the manner provided in the chapter relating to the Glenwood state school. [C24, 27, 31, 35,§3475; 48GA, ch 93,§13.]

Glenwood state school, ch 170

3476 Districting state. At its discretion the board of control shall district the state into two districts and in such manner that the Glenwood state school and the hospital for epileptics and school for feeble-minded at Woodward shall each be located within one of such districts. Such districts may from time to time be changed. After such districts have been established, the board of control shall notify all county attorneys and all committing officers of its action, and thereafter, unless for good cause the board otherwise orders, all commitments of feeble-minded from a district shall be to the institution located within such district. Until the state is so districted, commitments shall be made to either of said institutions as the board of control may direct. [C24, 27, 31, 35, §3476; 48GA, ch 93,§14.]

3477 Transfers. Inmates of the Glenwood state school may be transferred by the board to the hospital and school at Woodward or from the latter institution to the former. [C24, 27, 31, 35,§3477; 48GA, ch 93,§15.]

3477.1 Clothing. The superintendent shall supply all patients with clothing when not otherwise supplied. The actual cost thereof together with the necessary and legal costs and expenses attending the care, investigation, commitment, and support in the hospital shall be paid:

1. By the county in which the patient has a legal settlement provided that for the purpose of this chapter a minor child must have physically resided in the county at least one year for same to be deemed the county of his settlement.

2. By the state when such person has no legal settlement in the state or when his settlement is unknown. The residence of any patient shall be that existing at the time of admission. [C24, 27, 31, 35,§3474; 48GA, ch 95,§2.]

3477.2 Approval of voluntary commitments. Voluntary commitments or admissions to the hospital must be with the approval of the board of supervisors of the county of legal settlement, except those private patients received under section 3469. [48GA, ch 95,§3.]

3477.3 Liability of county for support. Each county shall be liable to the state for the support of all patients from that county in the hospital. The amounts due shall be certified by the superintendent to the state comptroller who shall collect the same from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of inmates of hospitals for the insane. [48GA, ch 95,§4.]

Collection, §3600 et seq.

3477.4 Payment of charges. Sections 3601 and 3602 are hereby made applicable to this chapter and shall apply to the payment of charges for the support of patients in this hospital. [48 GA, ch 95,§5.]

3477.5 Support statutes applicable. All laws now existing, or hereafter made, creating liability, providing for the collection of amounts paid by counties from patients in the hospital for the insane and those legally bound for their support, and those defining persons legally bound for support, shall apply to this chapter. A patient in this hospital and those legally bound for his support shall be liable to the county to the same degree and in the same manner as though such patient were an inmate of a hospital for the insane. [48GA, ch 95,§6.]

Support of insane, ch 178

3477.6 Compromise by board. The board of supervisors is empowered to compromise any liability to the county created hereby when such compromise is deemed for the best interests of the county. [48GA, ch 95,§7.]

3477.7 Inclusion in levy. Section 3603 shall apply to this chapter and when making the levy therein provided the board of supervisors shall include in their estimate the amount necessary to meet the costs of commitment, transportation and support of patients in this hospital. All such costs shall be paid from the fund raised under section 3603, or, if such fund be not sufficient, then from the general county fund. [48GA, ch 95,§8.]

Sections 3477.1 to 3477.7, inclusive, effective January 1, 1940; 48GA, ch 95,§9

CHAPTER 173

DRUG ADDICTS

3478 Commitment.
3479 Statutes applicable.
3480 Term of commitment—parole.
3481 Places of commitment.
3482 Insanity of narcotic addicts.

3478 Commitment. Persons addicted to the excessive use of intoxicating liquors, morphine, cocaine, or other narcotic drugs may be committed by the commissioners of insanity of each county to such institutions as the board of control may designate. [S13,§§2310-a6–a8,-a10–a22,-a24,-a28–a36; SS15,§2310-a37; C24, 27, 31, 35,§3478.]

Referred to in §3480

3479 Statutes applicable. All statutes governing the commitment, custody, treatment, and maintenance of the insane shall, so far as applicable, govern the commitment, custody, treatment, and maintenance of those addicted to the excessive use of such drugs and intoxicating liquors. [S13,§§2310-a6–a8,-a10–a22,-a24,-a28–a36; SS15,§2310-a37; C24, 27, 31, 35,§3479.]

Referred to in §3480
Commitment of insane, ch 176 et seq.

3480 Term of commitment—parole. Persons committed under sections 3478 and 3479 shall be retained in custody until cured, except that such inmates may be paroled under such conditions as the board of control may prescribe. [S13,§§2310-a6–a8,-a10–a22,-a24,-a28–a36; SS15, §2310-a37; C24, 27, 31, 35,§3480.]

3481 Places of commitment. The board of control shall designate the institutions to which commitments may be made under this chapter, and to that end may divide the state into districts, and shall promptly notify each clerk of the district court of such designation and all changes therein. [S13,§§2310-a6–a8,-a10–a22,-a24,-a28–a36; SS15,§2310-a37; C24, 27, 31, 35,§3481.]

3482 Insanity of narcotic addicts. Should a person, committed because of his excessive use of narcotic drugs or intoxicating liquors, become insane, the board of control, on complaint of the superintendent having the custody of such person, and on due hearing, may order such person committed to a hospital for the insane. Such order shall have the same force and effect as though entered by the commissioners of insanity of the county of the patient's residence, and such person may appeal from such order in the same manner in which appeals are allowed from the orders of the commissioners of insanity. [S13,§§2310-a6–a8,-a10–a22,-a24,-a28–a36; SS15, §2310-a37; C24, 27, 31, 35,§3482.]

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CHAPTER 173.1

PSYCHOPATHIC HOSPITAL

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GENERAL PROVISIONS

3482.01 Establishment. There shall be established a state psychopathic hospital, especially designed, kept, and administered for the care, observation, and treatment of those persons who are afflicted with abnormal mental conditions. [C24, 27, 31, 35,§3954.]

3482.02 Name—location. It shall be known as the state psychopathic hospital, and shall be located at Iowa City, and integrated with the

college of medicine and hospital of the state university of Iowa. [C24, 27, 31, 35,§3955.]

Section 3956, code 1927, repealed by 44GA, ch 81

3482.03 Under control state board of education. The state board of education shall have full power to manage, control, and govern the said hospital the same as other institutions already under its control. [C24, 27, 31, 35,§3957.]

3482.04 Medical director. The state board of education shall appoint a medical director of the said hospital, who shall serve as professor of psychiatry in the college of medicine of the state university. [C24, 27, 31, 35,§3958.]

3482.05 Cooperation of hospitals. The medical director of the said hospital shall seek to bring about systematic cooperation between the several state hospitals for the insane and the said state psychopathic hospital. [C24, 27, 31, 35, §3959.]

38GA, ch 235, §6, editorially divided

3482.06 Duties of director. He shall be the director and in sole charge of the clinical and pathological work of the said hospital. He shall, from time to time, visit the state hospitals for the insane, upon the request of the superintendents thereof, or upon the request of the board of control of state institutions, and may advise the medical officers of such state hospitals for the insane, or the said board of control, in subjects relating to the phenomena of insanity. [C24, 27, 31, 35,§3960.]

3482.07 Classes of patients. Patients admitted to the said state psychopathic hospital shall be divided into four classes:

1. Voluntary private patients.
2. Committed private patients.
3. Voluntary public patients.
4. Committed public patients. [C24, 27, 31, 35,§3961.]

38GA, ch 235, §7, editorially divided

3482.08 Maintenance. All voluntary private patients and committed private patients shall be kept and maintained without expense to the state, and the voluntary public patients and committed public patients shall be kept and maintained by the state. [C24, 27, 31, 35,§3962.]

3482.09 Voluntary private patients. Voluntary private patients may be admitted in accordance with the regulations to be established by the state board of education; and their care, nursing, observation, treatment, medicine, and maintenance shall be without expense to the state. However, the charge for such care, nursing, observation, treatment, medicine, and maintenance shall not exceed the cost of the same to the state. [C24, 27, 31, 35,§3963.]

3482.10 Application for admission. Persons suffering from mental diseases may be admitted as committed public patients as follows: Any physician authorized to practice his profession in the state of Iowa or any citizen of the state may file information with any district or superior court of the state or with any judge thereof, alleging that the person named therein is suffering from some abnormal mental condition that can probably be remedied by observation, treatment, and hospital care; and that he is, of himself or through those legally responsible for him, unable to provide the means for such observation and hospital care. [C24, 27, 31, 35, §3964.]

38GA, ch 235, §9, editorially divided

3482.11 Medical examiner. Said judge of the district or superior court may, upon his own motion or upon the information contained in such report filed as aforesaid, appoint some physician who shall personally examine said person with respect to his mental condition. [C24, 27, 31, 35,§3965.]

3482.12 Examination and report. Said physician shall make a written report to the said judge, giving such a history of the case as will be likely to aid in the observation, treatment, and hospital care of said person and describing the same, all in detail, and stating whether or not, in his opinion, the said person would probably be helped by observation, treatment, and hospital care in said state psychopathic hospital. Such report shall be made within such time as may be fixed by the court. [C24, 27, 31, 35,§3966.]

Referred to in §3482.16

3482.13 Financial condition. It shall be the duty of the said judge to have a thorough investigation made by the county attorney of the county in which the said person resides, regarding his financial condition and the financial condition of those legally responsible for him. [C24, 27, 31, 35,§3967.]

3482.14 Notice—trial and order. Upon the filing of such report or reports, said judge of the district or superior court as aforesaid shall fix a day for the hearing upon the complaint and shall cause the person or those legally responsible for him to be served with a notice of the hearing; and he shall also notify the county attorney, who shall appear and conduct the proceedings, and upon such complaint evidence may be introduced. Upon such hearing the person against whom the complaint is made shall be entitled to a trial by jury. If the judge or jury finds that the said person is suffering from an abnormal mental condition which can probably be remedied by observation, medical or surgical treatment, and hospital care, and that he, or those legally responsible for him, are unable to pay the expenses thereof, said judge shall enter an order directing that the said person shall be sent to the state psychopathic hospital at the state university for observation, treatment, and hospital care as a committed public patient. [C24, 27, 31, 35,§3968.]

Referred to in §§3482.16, 3482.17

3482.15 Examination and treatment. When the patient arrives at said hospital it shall be the duty of the director, or of some physician acting for him, to examine the said patient and determine whether or not, in his judgment, he is

a fit subject for such observation, treatment, and hospital care. If, upon said examination, he decides that such patient should be admitted to the said hospital, the medical director shall provide him with a proper bed in said hospital; and the physician or surgeon who shall have charge of said patient shall proceed with such observation, medical or surgical treatment, and hospital care as in his judgment are proper and necessary.

A proper and competent nurse shall also be assigned to look after and care for such patient during such observation, treatment, and care as aforesaid. [C24, 27, 31, 35,§3969.]

Referred to in §§3482.16, 8482.17, 8482.36

3482.16 Voluntary public patients—commitment. If the said judge of the district or superior court, as aforesaid, finds from the physician's report which was filed under the provisions of section 3482.12, that the said person is suffering from an abnormal mental condition which can probably be remedied by observation, medical or surgical treatment, and hospital care, and the report of the county attorney shows that he, or those legally responsible for him, are unable to pay the expenses thereof, said judge shall enter an order directing that the said person shall be sent to the state psychopathic hospital at the state university for observation, treatment, and hospital care as a voluntary public patient; provided that the said person, or those legally responsible for him, request the said court or judge to commit said person without the hearing which is required under the provisions of section 3482.14.

When the said patient arrives at the said hospital, he shall receive the same treatment as is provided for committed public patients in section 3482.15. [C24, 27, 31, 35,§3970.]

3482.17 Committed private patients—treatment. If the said judge of the district or superior court, as aforesaid, finds in the hearing as provided for under the provisions of section 3482.14 that the said person is suffering from an abnormal mental condition which can probably be remedied by observation, medical or surgical treatment, and hospital care, and that he, or those legally responsible for him, are able to pay the expenses thereof, said judge shall enter an order directing that the said person shall be sent to the state psychopathic hospital at the state university for observation, treatment, and hospital care as a committed private patient.

When the said patient arrives at the said hospital, he shall receive the same treatment as is provided for committed public patients in section 3482.15. [C24, 27, 31, 35,§3971.]

Sections 3972, 3973, code 1927, repealed by 44GA, ch 81

3482.18 Attendants. The court may, in his discretion, appoint some person to accompany said committed public patient or said voluntary public patient or said committed private patient from the place where he may be to the state psychopathic hospital of the state university at Iowa City, or to accompany such patient from the said hospital to such place as may be designated by the court. If the patient be a female, the person appointed to accompany her must be a woman. [C24, 27, 31, 35,§3974.]

38GA, ch 235, §15, editorially divided

3482.19 Compensation for attendant. Any person appointed by the court or judge to accompany said person to or from the hospital or to make an investigation and report on any question involved in the complaint, other than the physician making the examination, shall receive the sum of three dollars per day for the time actually spent in making such investigation (except in cases where the person appointed therefor receives a fixed salary or compensation) and his actual necessary expenses incurred in making such investigation or trip. [C24, 27, 31, 35,§3975.]

3482.20 Compensation for physician. The physician appointed to make the examination and report shall receive the sum of five dollars for each and every examination and report so made, and his actual necessary expenses incurred in making such investigation, in conformity with the requirements of this chapter. [C24, 27, 31, 35,§3976.]

3482.21 Vouchers. The person making claim to such compensation shall present to the court or judge an itemized sworn statement thereof, and when such claim for compensation has been approved by the court or judge, the same shall be filed in the office of the county auditor and shall be allowed by the board of supervisors and paid out of the funds of the county collected for the relief of the poor. [C24, 27, 31, 35,§3977.]

Referred to in §3482.24

3482.22 Liability of private patients — payment. Every committed private patient, if he has an estate sufficient for that purpose, or if those legally responsible for his support are financially able, shall be liable to the county and state for all expenses paid by them in behalf of such patient. All bills for the care, nursing, observation, treatment, medicine, and maintenance of such patients shall be paid by the state comptroller in the same manner as those of committed and voluntary public patients as hereinafter provided, unless said patient or those legally responsible for him make such settlement with the medical director of said state psychopathic hospital. [C24, 27, 31, 35, §3978.]

38GA, ch 235, §16, editorially divided

3482.23 Collection for treatment. If the bills for such patient are paid by the state, it shall be the duty of the medical director of the said state psychopathic hospital to file a certified copy of the claim which has been so paid, with the auditor of the proper county, who shall proceed to collect the same by action, if necessary, in the name of the state psychopathic hospital, and when collected pay the same to the state comptroller. The said medical director shall also, at the same time, forward a duplicate of

the account to the state comptroller. [C24, 27, 31, 35,§3979.]

Referred to in §3482.35

3482.24 Collection of preliminary expense. Unless said committed private patient or those legally responsible for him offer to make such settlement, it shall also be the duty of the county auditor of the proper county as aforesaid to proceed to collect, by action if necessary, in the name of the said county, the amount of all claims for per diem and expenses that have been approved by the said court or judge and paid by the county treasurer of said county as provided for under the provisions of section 3482.21, and when collected to pay the same into the county treasury. [C24, 27, 31, 35,§3980.]

Referred to in §3482.35

3482.25 Commitment of private patient as public. If any patient be admitted to the state psychopathic hospital and thereafter an order of commitment of said patient as a public patient be made by the court or judge having jurisdiction thereof, the expense of keeping and maintaining said patient from the date of the filing of the information upon which said order is made shall be paid by the state. [C24, 27, 31, 35,§3981.]

3482.26 Private patients—disposition of funds. All moneys collected from private patients shall be used for the support of the said hospital. [C24, 27, 31, 35,§3982.]

3482.27 Discharge — transfer. The medical director of the state psychopathic hospital may, at any time, discharge any patient as recovered, as improved, or as not likely to be benefited by further treatment, and upon said discharge said director shall notify the committing judge or court thereof; and the said court or judge shall appoint some person to accompany said discharged patient from the said state psychopathic hospital to such place as he may designate, or authorize the said medical director to appoint such attendant. [C24, 27, 31, 35, §3983.]

3482.28 Appropriation. The state shall pay to the state psychopathic hospital, out of any money in the state treasury not otherwise appropriated, all expenses for the administration of said hospital, and for the care, treatment, and maintenance of committed and voluntary public patients therein, including their clothing and all other expenses of said hospital for said public patients. The bills for said expenses shall be rendered monthly in accordance with rules agreed upon by the state comptroller and the finance committee of the state board of education. [C24, 27, 31, 35,§3984.]

Referred to in §3482.34
38GA, ch 235, §19, editorially divided

3482.29 Minimum appropriation. Until such time as the said hospital is actually treating and caring for one hundred patients, the sum of nine thousand dollars per month, or as much thereof as may be necessary, is hereby appropriated, out of any money in the state treasury not otherwise appropriated, for the support and maintenance of said hospital. [C24, 27, 31, 35, §3985.]

3482.30 Blanks — audit. The medical faculty of the hospital of the college of medicine of the state university shall prepare blanks containing such questions and requiring such information as may be necessary and proper to be obtained by the physician who examines the patient under order of court; and such blanks shall be printed by the state and a supply thereof shall be sent to the clerk of each district and superior court of the state. The state comptroller shall audit, allow, and pay the cost of the blanks as other bills for public printing are allowed and paid. [C24, 27, 31, 35,§3986.]

38GA, ch 235, §20, editorially divided

3482.31 Duplicate reports by physician. The physician making such examination shall make his report to the court in duplicate on said blanks, answering the questions contained therein and setting forth the information required thereby. [C24, 27, 31, 35,§3987.]

3482.32 Report and order to accompany patient. One of said duplicate reports shall be sent to the state psychopathic hospital with the patient, together with a certified copy of the order of the court. [C24, 27, 31, 35,§3988.]

3482.33 Death of patient — disposal of body. In the event that a committed public patient or a voluntary public patient or a committed private patient should die while at the state psychopathic hospital or at the general hospital of the college of medicine of the state university, the medical director of the said state psychopathic hospital is hereby authorized and directed to have the body prepared for shipment in accordance with the rules and regulations prescribed by the state board of health for shipping such bodies; and it shall be the duty of the state board of education to make arrangements for the embalming and such other preparation as may be necessary to comply with said rules and regulations, and for the purchase of suitable caskets. [C24, 27, 31, 35,§3989.]

Disposal of dead bodies, ch 110
39GA, ch 245, §6, editorially divided

3482.34 Appropriation. The state shall pay, to the state psychopathic hospital, out of any money in the state treasury not otherwise appropriated, the cost of the casket, the embalming, and all other expenses incurred in preparing the body for shipment, and, in addition thereto, the cost of transportation from Iowa City to the place where the said patient lived at the time when he was committed or taken to the said state psychopathic hospital; said expenses to be paid in accordance with the provisions of section 3482.28. [C24, 27, 31, 35,§3990.]

3482.35 Expense collected. In the event that the said person is a committed private patient, it shall be the duty of the county auditor of the proper county to proceed to collect all of such expenses, in accordance with the provisions of

sections 3482.23 and 3482.24. [C24, 27, 31, 35, §3991.]

TRANSFER OF INCURABLES

3482.36 Application for commitment to insane hospital. If, upon the examination provided for in section 3482.15, or at any time thereafter, the medical director, or, in his absence, the assistant medical director, shall be of the opinion that such patient, or any patient in said state psychopathic hospital, is a fit subject for care, observation, and treatment in a state hospital for the insane, he shall file an application, substantially as provided in section 3544, with the commission of insanity hereinafter created. [C24, 27, 31, 35,§3992.]

39GA, ch 245, §1, editorially divided

3482.37 Special commission. The medical director, the assistant medical director, and one other member of the medical staff of the state psychopathic hospital shall constitute a commission of insanity; and said commission is hereby vested with all the rights, powers, duties, and obligations of the commission of insanity as now constituted by law, except as herein provided, with full power to receive and act upon all applications filed hereunder, as fully as the commission of insanity is empowered and authorized by law to do. The procedure of the commission hereby created shall be the same as now provided by law, except as herein modified. [C24, 27, 31, 35,§3993.]

County commission of insanity, chs 176, 177

3482.38 Secretary — records — certification. Said board shall elect one of its members secretary, who shall keep a record, in a book provided for that purpose, of all the proceedings of said board and certify a copy thereof forthwith to the clerk of the district court of the county of the legal residence of the person against whom said proceedings were had. Said clerk of the district court shall file and record said proceedings in the records of his office the same as if said proceedings had been before the commission of insanity of said county. [C24, 27, 31, 35, §3994.]

3482.39 Appeal —procedure—custody of patient. Any person found to be insane under the provisions herein authorized may appeal from such finding to the district court of the county of the legal residence of such person. Said appeal and proceedings thereon shall be the same as if said finding appealed from had been made by the commission of insanity of said county; except that a copy of the notice of appeal served, or to be served, upon the clerk of said district court shall be served on a member of the commission of insanity hereby created, and if, at the time the copy of said notice of appeal is served on a member of said board, the patient is still in the actual custody of said board and not en route to a hospital for the insane, the said board hereby created shall cause said patient to be conducted, by its appointee or appointees, to the county of the legal residence of said patient in which said appeal was taken and delivered to the custody of the sheriff of said county, and thereafter the said patient shall be cared for and disposed of as if the proceedings appealed from had been had by the commission of insanity of said county. [C24, 27, 31, 35,§3995.]

Appeals in proceedings in insanity, §§3560, 3561

3482.40 Jurisdiction of board after appeal. In the case of an appeal as herein provided, the jurisdiction of the commission hereby created shall immediately cease, except as herein otherwise specially provided. [C24, 27, 31, 35,§3996.]

3482.41 Accompanying patients — payment. Whenever the commission hereby created shall designate any person, or persons, to accompany any patient from said state psychopathic hospital to any state hospital for the insane, or to the county of the legal residence of the patient, the pay of such person, or persons, for performing such duty shall not exceed three dollars per day for the time thus necessarily employed, and the actual, reasonable, and necessary expenses incurred in accompanying said patient and in returning home therefrom. Said per diem and expenses shall be itemized, verified, presented, and allowed in connection with the bills for maintenance as herein provided. If the party accompanying said patient is a parent or other relative, or an officer or employee receiving other compensation, the said person shall receive no per diem, but only his actual, reasonable, and necessary traveling expenses. [C24, 27, 31, 35, §3997.]

3482.42 Special officers—female patients. All duties imposed by law upon the sheriff, or his deputy, relating to the attendance and commitment of insane patients may, by order of said commission hereby created, be performed by such person or persons as said commission may designate. If the patient be a female, she shall be accompanied to the state hospital for the insane, or to the county of her legal residence, as the case may be, by at least one woman. [C24, 27, 31, 35,§3998.]

CHAPTER 174

STATE HOSPITALS FOR INSANE

Referred to in §§3578, 3579

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3515 Notice to commissioners.
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3483 Official designation. The hospitals for the insane shall be designated as follows:

1. Mount Pleasant state hospital.
2. Independence state hospital.
3. Clarinda state hospital.
4. Cherokee state hospital.

[R60,§1471; C73,§1383; C97,§2253; S13, §2253-a; C24, 27, 31, 35,§3483.]

3484 Qualifications of superintendent. The superintendent of each hospital shall be a physician of acknowledged skill and ability in his profession and authorized to practice medicine in this state. The same person shall not hold the office of superintendent and steward. [R60, §§1430, 1474; C73,§§1386, 1391; C97,§§2255, 2258; C24, 27, 31, 35,§3484.]

3485 Assistant physicians. The assistant physicians shall be of such character and qualifications as to be able to perform the ordinary duties of the superintendent during his absence or inability to act. [R60,§1432; C73,§1394; C97, §2260; C24, 27, 31, 35,§3485.]

3486 Salary of superintendent. The salary of the superintendent of each hospital shall not exceed three thousand dollars per annum. [R60, §§1469, 1496; C97,§2258; C24, 27, 31, 35,§3486.]

3487 Superintendent as witness. The superintendents and assistant physicians of said hospitals, when called as witnesses in any court, shall be paid the same mileage which other witnesses are paid and in addition thereto shall be paid a fee of twenty-five dollars per day, said fee to revert to the support fund of the hospital he serves. [C73,§1429; C97,§2293; C24, 27, 31, 35, §3487.]

Mileage, §11326

3488 Duties of superintendent. The superintendent shall:

1. Have the entire control of the medical, mental, moral, and dietetic treatment of the patients in his custody.
2. Require all subordinate officers and employees to perform their respective duties.
3. Have an official seal with the name of the hospital and the word "Iowa" thereon and affix the same to all notices, orders of discharge, or other papers required to be given by him.
4. Keep proper books in which shall be entered all moneys and supplies received on account of any patient and a detailed account of the disposition of the same.
5. Report, in December of each year, to each county, the mental and physical condition of each patient from said county and the probable safety of removing any such patient to the county hospital. [R60,§§1430, 1431; C73,§§1391, 1393, 1430; C97,§§2258, 2294; C24, 27, 31, 35, §3488.]

3489 Order of receiving patients. Preference in the reception of patients into said hospitals shall be exercised in the following order:

1. Cases of less duration than one year.
2. Chronic cases, where the disease is of more than one year's duration, presenting the most favorable prospect for recovery.
3. Those for whom application has been longest on file, other things being equal.

Where cases are equally meritorious in all other respects, the indigent shall have the preference. [R60,§1438; C73,§1422; C97,§2286; C24, 27, 31, 35,§3489.]

3490 Idiots not receivable. No idiot shall be admitted to a state hospital for the insane. The term "idiot" is restricted to persons foolish from birth, supposed to be naturally without mind. [R60,§§1468, 1491; C73,§1434; C97,§2298; C24, 27, 31, 35,§3490.]

3491 Custody of patient. The superintendent, upon the receipt of a duly executed warrant of commitment of a patient into the hospital for the insane, accompanied by the physician's certificate provided by law, shall take such patient into custody and restrain him as provided by law and the rules of the board of control, without liability on the part of such superintendent and all other officers of the hospital to prosecution of any kind on account thereof, but no person shall be detained in the

hospital who is found by the superintendent to be sane. [C73,§1411; C97,§2278; C24, 27, 31, 35, §3491.]

Warrant of commitment, §3553

3492 Equal treatment. The several patients, according to their different conditions of mind and body, and their respective needs, shall be provided for and treated with equal care. [C73,§1420; C97,§2284; C24, 27, 31, 35,§3492.]

3493 Special care permitted. Patients may have such special care as may be agreed upon with the superintendent, if the friends or relatives of the patient will pay the expense thereof. Charges for such special care and attendance shall be paid quarterly in advance. [C73,§§1420, 1421; C97,§§2284, 2285; C24, 27, 31, 35,§3493.]

3494 Monthly visitation—women inspectors. The board or its secretary shall make monthly and thorough examinations of each hospital. It may appoint a woman to make examinations of any hospital and to make written report thereof to the board. Such woman inspector shall be paid four dollars for each day actually employed in the discharge of her duties and in addition her necessary traveling expenses. Such compensation and expenses shall be paid from the funds of the institution in the manner provided for the payment of current expenses. [C73, §§1435, 1441; C97,§2299; SS15,§2727-a11; C24, 27, 31, 35,§3494.]

3495 Inmates allowed to write. The names of the members of the board and their post-office addresses shall be kept posted in every ward in each hospital. Every inmate shall be allowed to write once a week what he pleases to said board and to any other person. The superintendent may send letters addressed to other parties to the board of control for inspection before forwarding them to the individual addressed. [C73, §1436; C97,§2300; C24, 27, 31, 35,§3495.]

3496 Writing material. Every inmate shall be furnished by the superintendent or party having charge of such person, at least once in each week, with suitable materials for writing, inclosing, sealing, and mailing letters, if he requests and uses the same. [C73,§1437; C97,§2301; C24, 27, 31, 35,§3496.]

3497 Letters to members of board. The superintendent or other officer in charge of an inmate shall, without reading the same, receive all letters addressed to members of the board, if so requested, and shall properly mail the same, and deliver to such inmate all letters or other writings addressed to him. Letters written to the person so confined may be examined by the superintendent, and if, in his opinion, the delivery of such letters would be injurious to the person so confined, he shall return the letters to the writer with his reasons for not delivering them. [C73,§1438; C97,§2302; C24, 27, 31, 35, §3497.]

3498 Escape and recapture. It shall be the duty of the superintendent and of all other officers and employees of any of said hospitals, in case of the escape of any patient, to exercise all due diligence to recapture and return said patient to the hospital. A notification by the superintendent of such escape to any peace officer of the state or to any private person shall be sufficient authority to such officer or person to take and return such patient to the hospital. [R60,§1445; C73,§1423; C97,§2287; S13,§2287; C24, 27, 31, 35,§3498.]

3499 Expense attending recapture. All actual and necessary expenses incurred in the capture, restraint, and return to the hospital of the patient shall be paid on itemized vouchers, sworn to by the claimants and approved by the business manager and the board of control, from any money in the state treasury not otherwise appropriated. [R60,§1445; C73,§1423; C97, §2287; S13,§2287; C24, 27, 31, 35,§3499; 48GA, ch 93,§9.]

3500 Investigation as to sanity. The board may investigate the mental condition of any inmate and shall discharge any person, if, in its opinion, such person is not insane, or can be cared for after such discharge without danger to others, and with benefit to the patient; but in determining whether such patient shall be discharged, the recommendation of the superintendent shall be secured. The power to investigate the mental condition of an inmate is merely permissive, and does not repeal or alter any statute respecting the discharge or commitment of inmates of the state hospitals. [S13, §2727-a25; C24, 27, 31, 35,§3500.]

3501 Discharge—certificate. All patients shall be discharged immediately on regaining their sanity, and the superintendent shall issue duplicate certificates of full recovery, one of which he shall deliver to the recovered patient, and the other of which he shall forward to the clerk of the district court of the county from which the patient was committed. [R60,§1485; C73,§1424; C97,§2288; C24, 27, 31, 35,§3501.]

Referred to in §10445.1

3502 Duty of clerk. The said clerk shall, immediately on receipt of such certificate, record the same at length in the record of the proceedings against said party as an insane person. [C97,§2288; C24, 27, 31, 35,§3502.]

3503 Certificate and record as evidence. Either of said certificates or the record thereof shall be presumptive evidence of the recovery of such person, and shall restore him to all his civil rights. [C97,§2288; C24, 27, 31, 35,§3503.]

3504 Clothing furnished. Upon such discharge the business manager shall furnish such person, unless otherwise supplied, with suitable clothing and a sum of money not exceeding twenty dollars, which shall be charged with the other expenses of such patient in the hospital. [R60,§1485; C73,§1424; C97,§2288; C24, 27, 31, 35,§3504; 48GA, ch 93,§9.]

3505 Harmless incurables. The relatives of any patient not susceptible of cure by remedial treatment in the hospital, and not dangerous to

be at large, shall have the right to take charge of and remove him with the consent of the board of control. [C73,§1424; C97,§2288; C24, 27, 31, 35,§3505.]

3506 Certificate covering subsequent recovery. When a patient is discharged at a time when he has not fully recovered his sanity, he may at any time, under such rules as the board of control may prescribe, apply to the superintendent of the hospital where he was confined for a certificate of recovery. The superintendent, under like rules, shall examine such person or cause such examination to be made and if satisfied that such person has regained his sanity, shall issue duplicate certificates showing such recovery. [C24, 27, 31, 35,§3506.]

Referred to in §§3507, 10445.1

3507 Certificate and effect thereof. The duplicate certificates mentioned in section 3506 shall be delivered as in case of a discharge when cured, and the same record shall be made with the same effect. [C24, 27, 31, 35,§3507.]

3508 Dangerous incurables. The board of control, on the recommendation of the superintendent, and on the application of the relatives or friends of a patient who is not cured and who cannot be safely allowed to go at liberty, may release such patient when fully satisfied that such relatives or friends will provide and maintain all necessary supervision, care, and restraint over such patient. [R60,§1482; C73,§1408; C97,§2276; C24, 27, 31, 35,§3508.]

3509 Patient accused of crime. When an inmate of any state hospital who was committed to such hospital at a time when he was formally accused of crime in any county of the state, regains his reason, the superintendent shall thereupon issue his warrant for the return of such person to the jail of the county in which such charge is pending and notify the sheriff of such county accordingly who shall proceed to such hospital and execute such warrant. [R60,§1460; C73,§1413; C97,§2280; C24, 27, 31, 35,§3509.]

3510 Return by sheriff. The sheriff shall in writing make his return of service on said warrant and deliver such warrant and return to the clerk of the district court of his county. Said clerk shall forthwith make a copy of the warrant and return and mail the same to the said superintendent who shall file and preserve it. [C97, §2280; C24, 27, 31, 35,§3510.]

3511 Discharge of criminal insane. No patient who may be under criminal charge or conviction shall be discharged without the order of the district court or judge, and notice to the county attorney of the proper county. [R60, §1482; C73,§1408; C97,§2276; C24, 27, 31, 35, §3511.]

3512 Transfer of dangerous inmates. When an inmate of any hospital for insane becomes incorrigible, and unmanageable to such an extent that he is dangerous to the safety of others in the hospital, the board may apply in writing to the district court or to any judge thereof, of the county in which such hospital is situated, for an order to transfer said inmate to the department for the insane in the men's reformatory and if such order be granted such inmate shall be so transferred. The county attorney of said county shall appear in support of such application on behalf of the board. [C24, 27, 31, 35,§3512.]

Referred to in §3513

3513 Examination by court—notice. Before granting the order authorized in section 3512 the court or judge shall investigate the allegations of the petition and before proceeding to a hearing thereon shall require notice to be served on any relative, friend, or guardian of the person in question of the filing of said application. On such hearing the court or judge shall appoint a guardian ad litem for said person, if it deems such action necessary to protect the rights of such person. [C24, 27, 31, 35,§3513.]

3514 Overcrowded conditions. The board shall order the discharge or removal from the hospital of incurable and harmless patients whenever it is necessary to make room for recent cases. [R60,§1483; C73,§1425; C97,§2289; C24, 27, 31, 35,§3514.]

3515 Notice to commissioners. When a patient who has not fully recovered is discharged from the hospital without application therefor, notice of the order shall at once be sent to the commissioners of insanity of the county of which the patient is a resident, and the commissioners shall forthwith cause the patient to be removed, and shall at once provide for his care in the county as in other cases. [R60,§1484; C73,§1426; C97,§2290; C24, 27, 31, 35,§3515.]

3516 Inquest. A coroner's inquest shall be held in those cases where a death shall occur suddenly and without apparent cause, or a patient die and his relatives so request, but in the latter case the relatives making the request shall be liable for the expense of the same, and payment therefor may be required in advance. [C73, §1439; C97,§2303; C24, 27, 31, 35,§3516.]

CHAPTER 175

COUNTY AND PRIVATE HOSPITALS FOR INSANE

Referred to in §§3578, 3579

3517 Supervision.
3518 Inspection.
3519 Patients to have hearing.
3520 Compensation of inspectors.
3521 Rules.
3522 Removal of patients.
3523 Cost—collection from county.
3524 Notification to guardians.
3525 Investigating sanity.
3526 Transfers from county or private institutions.
3527 Transfers from state hospitals.
3529 Difference of opinion.
3530 Discharge of transferred patient.
3531 Caring for insane of other counties.
3532 Authority of private asylums.

3517 Supervision. All county and private institutions wherein insane persons are kept shall be under the supervision of the board of control of state institutions. [S13,§2727-a58; C24, 27, 31, 35,§3517.]

3518 Inspection. Said board shall make, or cause to be made, at least two inspections each year of every private and county institution wherein insane persons are kept. Such inspection shall be made by the members of the board or by some competent and disinterested person appointed by it. Written report as to such inspections shall be filed with the board and shall embrace:

1. The capacity of said institution for the care of patients.
2. The number and sex of the inmates kept therein.
3. The arrangement, method of construction, and adaptability of buildings for the purposes intended.
4. The condition of buildings as to sewerage, ventilation, light, heat, cleanliness, means of water supply, fire escapes, and fire protection.
5. The care of patients, their food, clothing, medical treatment, and employment.
6. The number, kind, sex, duties, and salaries of all employees.
7. The cost to the state or county of maintaining insane patients therein, separate from the cost of maintaining sane paupers.
8. Such other matters as the board of control may require. [S13,§2727-a59; C24, 27, 31, 35, §3518.]

3519 Patients to have hearing. The inspector shall see all patients in the institutions and give each an opportunity to converse with him out of the hearing of any officer or employee of the institution, and shall fully investigate all complaints and report the result thereof in writing to said board. The board before acting on said report adversely to the institution, shall give the persons in charge thereof a copy of such report and an opportunity to be heard. [S13, §2727-a60; C24, 27, 31, 35,§3519.]

3520 Compensation of inspectors. Inspectors under appointment by the board shall receive a salary of not to exceed six dollars per day for the time actually and necessarily employed in making the inspection and in going to and from the place of inspection, and actual expenses as an employee of the board. [S13, §2727-a61; C24, 27, 31, 35,§3520.]

3521 Rules. The board of control shall, from time to time, adopt reasonable rules touching the care and treatment of, and make orders in relation to, such insane patients as may be kept in said institutions, which rules shall not interfere with the medical treatment given to private patients by competent physicians. Copies of such rules, when adopted, shall be mailed to the chief executive officer of each private institution, and to the clerk of the district court, the chairman of the board of supervisors, and the officer in charge of the institution in all counties having county institutions caring for insane persons. [S13,§2727-a62; C24, 27, 31, 35, §3521.]

3522 Removal of patients. Said board, in case of failure to comply with such rules, is authorized to remove all said insane persons kept in such institutions at public expense, to the proper state hospital, or to some private or county institution or hospital for the care of the insane that has complied with the rules prescribed by said board, such removal of patients, if to a state hospital, to be made by an attendant or attendants sent from the state hospital. If a female is removed under the provisions of this section, at least one attendant shall be a female. [S13,§2727-a63; C24, 27, 31, 35,§3522.]

3523 Cost—collection from county. The cost of such removal, including all expenses of said attendant, shall be certified by the superintendent of the hospital receiving the patient, to the state comptroller, who shall draw his warrant upon the treasurer of state for said sum, which shall be credited to the support fund of said hospital and charged against the general revenues of the state and collected by the comptroller from the county which sent said patient to said institution. [S13,§2727-a63; C24, 27, 31, 35,§3523.]

Referred to in §3526

3524 Notification to guardians. The board of control shall notify the guardian, or one or more of the relatives, of patients kept at private expense, of all violations of said rules by said private or county institutions, and of the action of the board as to all other patients. [S13, §2727-a63; C24, 27, 31, 35,§3524.]

3525 Investigating sanity. Should the board believe that any person in any such county or private institution is sane, or illegally restrained of liberty, it shall institute and prosecute pro-

ceedings in the name of the state, before the proper officer, board, or court, for the discharge of such person. [S13,§2727-a63; C24, 27, 31, 35, §3525.]

3526 Transfers from county or private institutions. Patients who are suffering from acute insanity, and who are violent, and confined at public expense in any such institution, may be removed by the board of control to the proper state hospital for the insane when, on competent medical testimony, the board finds that said patient can be better cared for and with better hope of recovery in the state hospital. Such removal shall be at the expense of the proper county. Said expense shall be recovered as provided in section 3523. [S13,§2727-a64; C24, 27, 31, 35,§3526.]

3527 Transfers from state hospitals. A county chargeable with the expense of a patient in a state hospital for the insane shall remove such patient to a county or private institution for the insane which has complied with the aforesaid rules when the board so orders on a finding that said patient is suffering from chronic insanity and will receive equal benefit by being so transferred. A county shall remove to its county home any patient in a state hospital for the insane upon a finding by a commission, consisting of the superintendent of the state hospital in which the patient is confined, the commissioners of insanity and the chairman of the board of supervisors of the county of the patient's residence, that such patient can be properly cared for in the county home and the finding of the commission, after its approval by the local board of supervisors, shall be complete authority for such removal. In no case shall a patient, the relative or guardian of whom pays the expense of his keep in a state hospital, be thus transferred except upon the written consent of such relative or guardian. [S13, §2727-a64; C24, 27, 31, 35,§§3527, 3528; 48GA, ch 96, §1.]

3528 Rep. by 48GA, ch 96,§2

3529 Difference of opinion. When a difference of opinion exists between the board of control and the authorities in charge of any private or county asylum in regard to the removal of a patient or patients as herein provided, the matter shall be submitted to the district court, or judge thereof, of the county in which such asylum is situated and shall be summarily tried as an equitable action, and the judgment of the district court or judge shall be final. [S13, §2727-a68; C24, 27, 31, 35,§3529.]

How issues tried, §11429 et seq.

3530 Discharge of transferred patient. Patients transferred from a state hospital to such county or private institutions shall not be discharged, when not cured, without the consent of the board of control. [S13,§2727-a64; C24, 27, 31, 35,§3530.]

3531 Caring for insane of other counties. Boards of supervisors of counties having no proper facilities for caring for the insane, may, with the consent of the board of control, provide for such care at the expense of the county in any convenient and proper county or private institution for the insane which is willing to receive them. [S13,§2727-a65; C24, 27, 31, 35,§3531.]

3532 Authority of private asylums. No person shall be confined and restrained in any private institution or hospital for the care or treatment of the insane, except upon the certificate of the commission of insanity of the county in which such person resides, or of two reputable physicians, at least one of whom shall be a bona fide resident of this state, who shall certify that such person is a fit subject for treatment and restraint in said institution or hospital, which certificate shall be the authority of the owners and officers of said hospital or institution for receiving and confining said patient or person therein. [S13,§2727-a66; C24, 27, 31, 35,§3532.]

CHAPTER 176

COMMISSION OF INSANITY

Referred to in §§3578, 3579, 13909

3533 Number of members.
3534 Personnel of commission.
3535 Appointment and term.
3536 Organization.
3537 Temporary vacancy.
3538 Duty of clerk.
3539 Service of notice—reports.
3540 Jurisdiction—holding under criminal charge.
3541 Compensation and expenses.
3542 Costs—how paid.
3543 Transportation expenses.

3533 Number of members. In each county there shall be a commission of insanity which shall be composed of three members. In counties having two places where district court is held there shall be one such commission at each place. [C73,§1395; C97,§2261; C24, 27, 31, 35, §3533.]

3534 Personnel of commission. Said commission shall consist of the clerk of the district court, one reputable physician in actual practice, and one reputable attorney in actual practice. Said two latter members shall reside as near as may be convenient to the place where the district court is held. In the absence or inability of the clerk to act in any case, his deputy may act. [C73,§1395; C97,§2261; C24, 27, 31, 35,§3534.]

3535 Appointment and term. Said commission shall be appointed by the district court or judges thereof. If made in vacation the appointment shall be by written order, signed by the judges and recorded by the clerk. Appoint-

ments shall be for two years and be so arranged that the term of one member shall expire each year. The appointment of successors may be made at any time within three months prior to the expiration of the term of the incumbent. [C73,§1395; C97,§2261; C24, 27, 31, 35,§3535.]

3536 Organization. The members shall organize by choosing one of their number president. The clerk of the district court or his deputy shall be clerk of the commission. The commission shall hold its meetings at the office of the clerk, unless for good reasons it shall fix on some other place, and shall also meet on notice from the clerk or his deputy. [C73, §1396; C97,§2261; C24, 27, 31, 35,§3536.]

3537 Temporary vacancy. In the temporary absence or inability of two members to act, the member present may call to his aid, temporarily, a person possessed of the qualifications required for a member, who, after qualifying as in other cases, may act in the same capacity. If one of the absent members is a clerk, his deputy shall act. The record in such cases must show the facts. [C73,§1395; C97,§2261; C24, 27, 31, 35, §3537.]

3538 Duty of clerk. The clerk of said commission shall:

1. Issue all processes required to be given by the commission, and affix thereto his seal as clerk of the court.
2. File and preserve in his office all papers and records connected with any inquest by the commission.
3. Keep separate books of the proceedings of the commission with entries sufficiently full to show, with the papers filed, a complete record of its findings, orders, and proceedings. [C73, §1397; C97,§2262; C24, 27, 31, 35,§3538.]

3539 Service of notice—reports. The notices, reports, and communications required to be given or made by said commission may be sent by mail, unless otherwise expressed, and the facts and date of such sending and their reception must be noted on the proper record. [C73,§1397; C97,§2262; C24, 27, 31, 35,§3539.]

3540 Jurisdiction—holding under criminal charge. Said commission shall, except as otherwise provided, have jurisdiction of all applications for the commitment to the state hospitals for the insane, or for the otherwise safekeeping, of insane persons within its county, unless the application is filed with the commission at a time when the alleged insane person is being held in custody under an indictment returned by the grand jury or under a trial information filed by the county attorney. [R60,§§1458, 1459; C73,§§1398, 1412; C97, §§2263, 2279; C24, 27, 31, 35,§3540.]

Drug addicts, ch 173

3541 Compensation and expenses. Compensation and expenses shall be allowed as follows:

1. To each member of the commission three dollars for each day actually employed in the duties of his office as such member and necessary and actual expenses, not including charges for board.
2. To the clerk, in addition to compensation as a member, one-half as much more for making the required record entries in all cases of inquest and of meetings of the commission, and twenty-five cents for each process issued under seal.
3. To the examining physician, when not a member of the commission, the same fees as a member and in addition mileage of five cents per mile each way.
4. To witnesses, the same fees as witnesses in the district court.
5. Fees on appeal shall be the same as in ordinary actions. [C73,§§1410, 3825; C97,§2309; C24, 27, 31, 35,§3541.]

Fees and costs, §11326 et seq.; ch 497

3542 Costs—how paid. The compensation and expenses provided for above, and the fees of the sheriff provided for in such cases, shall be allowed and paid out of the county treasury in the usual manner. [C73,§§1410, 3825; C97, §2309; C24, 27, 31, 35,§3542.]

Sheriff's fees, §5191

3543 Transportation expenses. When funds to pay the expenses of transporting a patient to a hospital are needed in advance, the commission shall estimate the probable expense, including the necessary assistance, and not including the compensation allowed the sheriff, and on such estimate, certified by the clerk, the auditor of the county shall issue a county warrant for the amount, as estimated, in favor of the sheriff or other person intrusted with the execution of such warrant of commitment. The sheriff or other person executing such warrant shall accompany his return with a statement of the expenses incurred, and the excess or deficiency may be deducted from or added to his compensation, as the case may be. If funds are not so advanced, such expenses shall be certified and paid in the manner above prescribed on the return of the warrant. When the commission orders the return of a patient, compensation and expenses shall be in like manner allowed. [C73,§§1410, 3825; C97,§2309; C24, 27, 31, 35,§3543.]

CHAPTER 177

COMMITMENT AND DISCHARGE OF INSANE

Referred to in §13909

3544 Form of information.
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3546 Subpoenas and oaths.
3547 Hearings.
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3550 Answers to interrogatories.
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3556 Appointment in lieu of sheriff.
3557 Assistants—females.
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3570 Discharge from custody.
3571 Commission of inquiry.
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3573 Hearing.
3574 Finding and order filed.
3575 Compensation—payment.
3576 Limitation on proceedings.
3577 Habeas corpus.
3578 Cruelty or official misconduct.
3579 Failure to furnish writing material.
3580 "Insane" defined.

3544 Form of information. Applications for admission to the hospitals for the insane shall be by sworn information which shall allege and show:

1. That the person in whose behalf the application is made is believed to be insane, and a fit subject for custody and treatment in the hospital.
2. That such person has been found in the county.
3. The place of residence of such person or where it is believed to be, or that such residence is not known. [R60,§1480; C73,§1399; C97, §2264; C24, 27, 31, 35,§3544.]

Referred to in §3482 36

3545 Hearing—custody. On the filing of such information, the commission, if satisfied that there is reasonable cause therefor, may require the alleged insane person to be brought before it and, to this end, may issue its warrant to any peace officer of the county. The commission may provide for the custody of such person until its investigation is concluded. [R60,§1480; C73,§1400; C97,§2265; C24, 27, 31, 35,§3545.]

3546 Subpoenas and oaths. The commission shall have power to issue subpoenas. Each member of the commission shall have power to administer oaths to witnesses. In case a witness fails to appear or refuses to testify, the commission shall, in writing, report such refusal to the district court or to a judge thereof, and said court or judge shall proceed as though such refusal occurred in a legal proceeding before said court or judge. [C73,§1398; C97,§2263; C24, 27, 31, 35,§3546.]

Contempts, ch 536

3547 Hearings. Hearings shall be had in the presence of such person unless the commission finds that such course would probably be injurious to such person or attended with no advantage. [R60,§1480; C73,§1400; C97,§2265; C24, 27, 31, 35,§3547.]

3548 Appearance. Appearance on behalf of such alleged insane person may be made by any citizen of the county, or by any relative, either in person or by counsel. [C73,§1400; C97,§2265; C24, 27, 31, 35,§3548.]

3549 Examining physician. The commission shall, in all cases, appoint, either from, or outside, its own membership, some regular practicing physician of the county to make a personal examination of the person in question for the purpose of determining his mental and physical condition. Said physician shall certify to the commission whether said person is sane or insane. [C73,§1400; C97,§2265; C24, 27, 31, 35, §3549.]

3550 Answers to interrogatories. The examining physician shall accompany his certificate with correct answers to the following questions so far as correct answers can be obtained:

1. Name of patient? Age? Married or single?
2. Number of children? Age of youngest child?
3. Place of birth?
4. Residence?
5. Past occupation?
6. Present occupation?
7. Is this the first attack?
8. If there were other attacks when did they occur?
9. Duration of other attacks?
10. When were the first symptoms of the present attack manifested? In what way were they manifested?
11. Is disease increasing, decreasing, or stationary?
12. Is the disease variable?
13. Are there rational intervals?
14. Do rational intervals occur at regular periods?
15. State fully on what subjects or in what way is derangement now manifested?
16. Disposition to injure others?

17. Has suicide ever been attempted? If so, in what way? Is the propensity to suicide now active?
18. Is there a disposition to filthy habits, destruction of clothing, breaking of glass, etc.?
19. What relatives, including grandparents and cousins, have been insane?
20. Did the patient manifest any peculiarities of temper, habits, disposition, or pursuits before the accession of the disease? Any predominant passion, religious impressions, etc.?
21. Was the patient ever addicted to intemperance in any form?
22. Has the patient been subject to epilepsy? Suppressed eruptions? Discharge of sores?
23. Other bodily diseases suffered by patient? If so, name them?
24. Has patient ever had any injury of the head? If so, explain nature of injury?
25. Has restraint or confinement been employed? If so, what kind, and how long?
26. What is supposed to be the cause of the disease?
27. What treatment has been pursued for the relief of the patient? Mention particulars and effects.
28. State any other matter supposed to have a bearing on the case. [R60,§1490; C73,§1407; C97,§2275; C24, 27, 31, 35,§3550.]

3551 Correction of answers. If the commission on further examination after the answers are given finds that any of said answers are incorrect, it shall correct the same. [C73, §1407; C97,§2275; C24, 27, 31, 35,§3551.]

3552 Findings and order. If the commission finds from the evidence that said person is insane and a fit subject for custody and treatment in the state hospital, it shall order his commitment to the hospital in the district in which the county is situated, and in connection with such finding and order shall determine and enter of record the county which is the legal settlement of such person. If such settlement is unknown the record shall show such fact. [R60,§1479; C73,§1401; C97,§2266; C24, 27, 31, 35,§3552.]

3553 Warrant. Unless an appeal is taken, the commission shall forthwith issue its warrant of commitment and a duplicate thereof, stating such finding, with the settlement of the person, if found, and, if not found, its information, if any, in regard thereto, authorizing the superintendent of the hospital to receive and keep him as a patient therein. [C73,§1401; C97,§2266; C24, 27, 31, 35,§3553.]

3554 Service. Said warrant and duplicate, with the certificate and finding of the physician, shall be delivered to the sheriff, who shall execute the same by conveying such person to the hospital, and delivering him, with such duplicate and physician's certificate and finding, to the superintendent, who shall, over his official signature, acknowledge such delivery on the original warrant, which the sheriff shall return to the clerk of the commission, with his costs and expenses indorsed thereon. [R60,§§1458, 1459, 1479; C73, §§1401, 1412; C97,§§2266, 2279; C24, 27, 31, 35, 3554.]

3555 Record and commitment of one accused. If, after the commission has acquired jurisdiction over a person under a charge of insanity, the district court also acquires jurisdiction over such person under a formal charge of crime, the findings of the commission and the warrant of commitment, if any, shall state the fact of jurisdiction in the district court, and the name of the criminal charge. [R60,§1459; C73,§1412; C97,§2279; C24, 27, 31, 35,§3555.]

3556 Appointment in lieu of sheriff. If the sheriff and his deputies are otherwise engaged, the commission may appoint some other suitable person to execute the warrant, who shall take and subscribe an oath faithfully to discharge his duty, and shall be entitled to the same fees as the sheriff. [C73,§1401; C97,§2266; C24, 27, 31, 35,§3556.]

Fees, §5191

3557 Assistants—females. The sheriff, or any person appointed, may call to his aid such assistants as he may need to execute such warrant; but no female shall thus be taken to the hospital without the attendance of some other female or some relative. The superintendent, in his acknowledgment of delivery, must state whether there was any such person in attendance, and give the name or names, if any. [C73,§1401; C97,§2266; C24, 27, 31, 35,§3557.]

3558 Preference in executing warrant. If any relative or immediate friend of the patient, who is a suitable person, shall so request, he shall have the privilege of executing such warrant, in preference to the sheriff or any other person, without taking such oath, and for so doing shall be entitled to his necessary expenses, but no fees. [C73,§1401; C97,§2266; C24, 27, 31, 35,§3558.]

3559 Confinement of insane—females. No person who shall be found to be insane shall, during investigation or after such finding, and pending commitment to the hospital, or when on the way there, be confined in any jail, prison, or place of solitary confinement, except in cases of extreme violence, when it may be necessary for the safety of such person or of the public; and if such person be so confined, there shall, at all times during its continuance, be some suitable person or persons in attendance in charge of such person; but at no time shall any female be placed in such confinement without at least one female attendant remaining in charge of her. [C97,§2266; C24, 27, 31, 35,§3559.]

3560 Appeal. Any person found to be insane, or his next friend, may appeal from such finding to the district court by giving the clerk thereof, within ten days after such finding has been made, notice in writing that an appeal is taken, which may be signed by the party, his agent, next friend, guardian, or attorney, and, when thus appealed, it shall stand for trial anew. Upon appeal it shall be the duty of the county at-

torney, without additional compensation, to prosecute the action on behalf of the informant. [C97,§2267; S13,§2267; C24, 27, 31, 35,§3560.]

3561 Custody pending appeal. The appellant, pending the appeal, shall be discharged from custody, unless the commission finds that he cannot with safety be allowed to go at large, in which case it shall require him to be suitably provided for in the manner hereinafter specified. [C97,§2268; C24, 27, 31, 35,§3561.]

3562 Final order. If, upon the trial of the appeal, such person is found insane, and a fit subject for custody and treatment in the hospital, an order of commitment shall be entered, and the clerk shall issue a warrant therefor, and the proceedings thereunder shall be as provided in cases before the commission. [C97,§2269; C24, 27, 31, 35,§3562.]

Warrant of commitment, §3553

3562.1 Beneficiaries of the veterans bureau. Where a veteran of any war, military occupation or expedition, including those women who served as army nurses under contract between April 21, 1898, and February 2, 1901, who was not dishonorably discharged, is adjudged mentally incompetent by a board of county commissioners of insanity, the board is hereby authorized to communicate with the nearest office of the United States veterans bureau within the state of Iowa with reference to the eligibility of such veteran to hospitalization in a veterans bureau hospital. If the board is notified by the said office of the United States veterans bureau that the veteran is entitled to hospitalization and the veteran is acceptable for the same, and bureau hospital facilities within the state of Iowa are available, the board may direct the veteran's commitment to any United States veterans bureau hospital within the state of Iowa and such veteran upon admission shall be subject to the rules and regulations of the hospital and United States veterans bureau hospital authorities are invested with the same powers granted to superintendents of state hospitals for insane with reference to retention and custody of patients so committed. [C27, 31, 35,§3562-b1.]

3562.2 Transfer from state hospital. A veteran of any war committed to any state hospital may, with the approval of the board of control, be transferred to and placed in the custody of any hospital maintained for war veterans within the state of Iowa on being notified by the authorities of such veterans hospital that the veteran is acceptable for hospitalization, provided no charge for his care and support is made against the state of Iowa or the county from which committed. [48GA, ch 97,§1.]

3562.3 Commitment continues. The transfer of a veteran from one hospital to another shall in no way invalidate the original commitment and such commitment together with all such laws and rules of the board of control pertaining to parole or discharge shall remain in full force and effect as the original commitment. [48GA, ch 97,§1.]

3563 Blanks. The board of control shall furnish the commissions of insanity of the counties with such forms for blanks for warrants, certificates, and other papers as will enable them with regularity and facility to comply with the provisions of this chapter, and also with copies of the regulations of the hospital, when printed. [C73,§1431; C97,§2295; C24, 27, 31, 35, §3563.]

3564 Temporary custody in certain cases. If any person found to be insane cannot at once be admitted to the hospital, or, in case of appeal from the finding of the commission, if such person cannot with safety be allowed to go at liberty, the commission of insanity shall require that such person shall be suitably provided for otherwise until such admission can be had, or until the occasion therefor no longer exists. [R60,§1436; C73,§1403; C97,§2271; S13, §2271; C24, 27, 31, 35,§3564.]

3565 Care by relatives or friends. Such patients may be cared for as private patients when relatives or friends will obligate themselves to provide such care without public charge. In such case the commission shall in writing appoint some suitable person special custodian who shall have authority and shall in all suitable ways restrain, protect, and care for such patient, in such manner as to best secure his safety and comfort, and to best protect the persons and property of others. [C73. §1403; C97,§2271; S13,§2271; C24, 27, 31, 35, §3565.]

Referred to in §3566

3566 Care by county. If care and custody of the patient is not provided as authorized in section 3565 the commission shall require that he be restrained and cared for by the board of supervisors, at the expense of the county, at the county home or some other suitable place, and the commission of insanity shall issue its mandate to the board of supervisors, which shall forthwith comply therewith. [R60,§1436; C73, §1403; C97,§2271; S13,§2271; C24, 27, 31, 35, §3566.]

3567 Custody outside state hospitals. The commission of insanity may grant applications, made in substantially the form provided in this title, for the restraint, protection and care, within the county and outside the state hospitals, of alleged insane persons, either as public or private patients, but all patients so cared for shall be reported to the board of control. [R60,§1437; C73,§1404; C97,§2272; C24, 27, 31, 35,§3567.]

3568 Neglected insane. On information laid before the commission of insanity of any county that an insane person in the county is suffering for want of proper care, it shall forthwith inquire into the matter, and, if it finds that such information is true, it shall make all needful provisions for the care of such person as provided in other cases. [R60,§1467; C73,§1405; C97,§2273; C24, 27, 31, 35,§3568.]

3569 Transfers from county and private asylums. Insane persons who have been under care, either as public or private patients, outside of the hospital, by authority of the commission of insanity may, on application, be transferred to the state hospital, whenever they can be admitted thereto. Such admission may be had without another inquest, at any time within six months after the inquest already had, unless the commission shall think further inquest advisable. [C73,§1406; C97,§2274; C24, 27, 31, 35,§3569.]

3570 Discharge from custody. When it shall be shown to the satisfaction of the commission of insanity that cause no longer exists for the care within the county of any person as an insane patient, it shall, with the approval of the board of control, order his immediate discharge, and shall find if such person is sane or insane at the time of such discharge, which finding shall be entered of record by the clerk of the commission of insanity. [C73,§1409; C97,§2277; C24, 27, 31, 35,§3570.]

3571 Commission of inquiry. A sworn complaint, alleging that a named person is not insane and is unjustly deprived of his liberty in any hospital in the state, may be filed by any person with the clerk of the district court of the county in which such named person is so confined, or of the county in which such named person has a legal settlement, and thereupon a judge of said court shall appoint a commission of not more than three persons to inquire into the truth of said allegations. One of said commissioners shall be a physician and if additional commissioners are appointed, one of such commissioners shall be a lawyer. [C73,§1442; C97,§2304; C24, 27, 31, 35,§3571.]

Referred to in §3576

3572 Duty of commission. Said commission shall at once proceed to the place where said person is confined and make a thorough and discreet examination for the purpose of determining the truth of said allegations and shall promptly report its findings to said judge in writing. Said report shall be accompanied by a written statement of the case signed by the superintendent. [C73,§1442; C97,§2304; C24, 27, 31, 35,§3572.]

Referred to in §3576

3573 Hearing. If, on such report and statement, and the hearing of testimony if any is offered, the judge shall find that such person is sane, he shall order his discharge; if the contrary, he shall so state, and authorize his continued detention. [C73,§1442; C97,§2304; C24, 27, 31, 35,§3573.]

Referred to in §3576

3574 Finding and order filed. The finding and order of the judge, with the report and other papers, shall be filed in the office of the clerk of the court where the complaint was filed. Said clerk shall enter a memorandum thereof on his record, and forthwith notify the superintendent of the hospital of the finding and order of the judge, and the superintendent shall carry out the order. [C73,§1442; C97, §2304; C24, 27, 31, 35,§3574.]

Referred to in §3576

3575 Compensation—payment. Said commissioners shall be entitled to their necessary expenses and a reasonable compensation, to be allowed by the judge, who shall certify the same to the state comptroller who shall thereupon draw the proper warrants on any funds in the state treasury not otherwise appropriated. The applicant shall pay said costs and expenses if the judge shall so order on a finding that the complaint was filed without probable cause. [C73,§1442; C97,§2304; C24, 27, 31, 35,§3575.]

Referred to in §3576

3576 Limitation on proceedings. The proceeding authorized in sections 3571 to 3575, inclusive, shall not be had oftener than once in six months regarding the same person; nor regarding any patient within six months after his admission to the hospital. [C73,§1443; C97, §2305; C24, 27, 31, 35,§3576.]

3577 Habeas corpus. All persons confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing. If the judge shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person has been restored to reason. [R60,§1441; C73,§1444; C97,§2306; C24, 27, 31, 35,§3577.]

Constitutional provision, Art. I, §13
Habeas corpus, ch 534

3578 Cruelty or official misconduct. If any person having the care of an insane person, and restraining him, whether in a hospital or elsewhere, with or without authority, shall treat him with unnecessary severity, harshness, or cruelty, or in any way abuse him, or if any officer required by the provisions of this and chapters 174 to 176, inclusive, to perform any act shall wilfully refuse or neglect to perform the same, he shall, unless otherwise provided, be fined not to exceed five hundred dollars, or be imprisoned in the county jail not to exceed three months, and pay the costs of prosecution, or be both fined and imprisoned at the discretion of the court. [C73,§§1415, 1416, 1440, 1445; C97,§2307; C24, 27, 31, 35,§3578.]

3579 Failure to furnish writing material. If any member of the visiting committee, superintendent of the hospital, or other person in charge of an insane person confined in the hospital, shall knowingly and wilfully violate any provision of this and chapters 174 to 176, inclusive, by failing and refusing to furnish material for writing, failing or refusing to allow a party to write letters, to mail letters written,

to receive and deliver letters written as provided herein to such person so confined, or in any other way, he shall be guilty of a misdemeanor. [C97,§2307; C24, 27, 31, 35,§3579.]

Punishment, §12894

3580 "Insane" defined. The term "insane" as used in this chapter includes every species of insanity or mental derangement. [R60,§1468; C73,§1434; C97,§2298; C24, 27, 31, 35,§3580.]

CHAPTER 178

SUPPORT OF INSANE

Referred to in §13909

Applicable to epileptics and feeble-minded, see §8477.5

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3581 Liability of county and state. The necessary and legal costs and expenses attending the arrest, care, investigation, commitment, and support of an insane person committed to a state hospital shall be paid:

1. By the county in which such person has a legal settlement, or
2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

The residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto. [C73, §1402; C97,§2270; S13,§2270; C24, 27, 31, 35, §3581.]

3582 Finding of legal settlement. The commission of insanity shall, when a person is found to be insane, or as soon thereafter as it obtains the proper information, determine and enter of record whether the legal settlement of said person is:

1. In the county of the residence of said commissioners;
2. In some other county of the state;
3. In some foreign state or country; or
4. Unknown.

[C24, 27, 31, 35,§3582.]

3583 Certification of settlement. If such legal settlement is found to be in another county of this state, the commission shall, as soon as said determination is made, certify such finding to the superintendent of the hospital to which said patient is committed, and thereupon said superintendent shall charge the expenses already incurred and unadjusted, and all future expenses of such patient, to the county so certified until said settlement shall be otherwise determined as hereinafter provided. [C73,§1417; C97,§2281; C24, 27, 31, 35,§3583.]

3584 Certification to debtor county. Said finding of legal settlement shall also be certified by the commission to the county auditor of the county of such legal settlement. Such auditor shall lay such notification before the board of supervisors of his county, and it shall be conclusively presumed that such person has a legal settlement in said notified county unless said county shall, within six months, in writing filed with the commission of insanity giving said notice, dispute such legal settlement. [C73, §1402; C97,§2270; S13,§2270; C24, 27, 31, 35, §3584.]

3585 Nonresidents. If such legal settlement is found by the commission to be in some foreign state or country, or unknown, it shall, without entering an order of commitment to the state hospital, immediately notify the board of control of such finding and furnish the board of control with a copy of the evidence taken on the question of legal settlement, and hold said patient for investigation by said board of control. [C73,§1402; C97,§2270; S13,§§2270, 2727-a28a; C24, 27, 31, 35,§3585.]

3586 Determination by board. The board of control shall immediately investigate the legal settlement of said patient and proceed as follows:

1. If the board of control finds that the decision of the commission of insanity as to legal settlement is correct, the board of control shall cause said patient either to be transferred to a state hospital for the insane and there maintained at the expense of the state, or to be transferred to the place of foreign settlement.
2. If the board of control finds that the decision of the commission of insanity is not correct, the board of control shall order said patient transferred to a state hospital for the insane

and there maintained at the expense of the county of legal settlement in this state. [S13, §2727-a28a; C24, 27, 31,35,§3586.]

Expenses certified to counties, §3600

3587 Removal of nonresidents. If at any time the board of control discovers that an insane patient in a state hospital was, at the time of commitment, a nonresident of this state, it may cause said patient to be conveyed to his place of residence if his condition permits of such transfer and other reasons do not render such transfer inadvisable. [C73,§1419; C97, §2283; S13,§§2283, 2727-a28a; C24, 27, 31, 35, §3587.]

3588 Transfers of insane persons—expenses. The transfer to state hospitals or to the places of their legal settlement of insane persons who have no legal settlement in this state or whose legal settlement is unknown, shall be made according to the directions of the board of control, and when practicable by employees of state hospitals, and the actual and necessary expenses of such transfers shall be paid on itemized vouchers sworn to by the claimants and approved by the board of control, from any funds in the state treasury not otherwise appropriated. [S13, §§2308-a, 2727-a28b; C24, 27, 31, 35,§3588.]

3589 Subsequent discovery of residence. If, after a patient has been received into a state hospital for the insane as a patient whose legal settlement is supposed to be outside this state or unknown, the board of control finds that the legal settlement of said patient was, at the time of commitment, in a county of this state, said board shall charge all legal costs and expenses pertaining to the commitment and support of said patient to the county of such legal settlement, and the same shall be collected as provided by law in other cases. [S13,§2727-a28a; C24, 27, 31, 35,§3589.]

Collection, §3600 et seq.

3590 Preliminary payment of costs. All legal costs and expenses attending the arrest, care, investigation, and commitment of a person to a state hospital for the insane under a finding that such person has a legal settlement in another county of this state, shall, in the first instance, be paid by the county of commitment. The county of such legal settlement shall reimburse the county so paying for all such payments, with interest. [S13,§2308-a; C24, 27, 31, 35,§3590.]

3591 Recovery of costs from state. Costs and expenses attending the arrest, care, and investigation of a person who has been committed to a state hospital for the insane and who has no legal settlement in this state or whose legal settlement is unknown, including cost of commitment, if any, shall be paid out of any money in the state treasury not otherwise appropriated, on itemized vouchers executed by the auditor of the county which has paid them, and approved by the board of control. [S13,§2308-a; C24, 27, 31, 35,§3591.]

3592 Action to determine legal settlement. When a dispute arises between different counties or between the board of control and a county as to the legal settlement of a person committed to a state hospital for the insane, the attorney general, at the request of the board of control, shall, without the advancement of fees, cause an action to be brought in the district court of any county where such dispute exists, to determine such legal settlement. Said action may be brought at any time when it appears that said dispute cannot be amicably settled. All counties which may be the place of such legal settlement, so far as known, shall be made defendants and the allegation of such settlement may be in the alternative. Said action shall be tried as in equity. [C73,§1418; C97,§§2270, 2282; S13, §2270; C24, 27, 31, 35,§3592.]

How issues tried, §11429 et seq.

3593 Judgment when settlement found within state. The court shall determine whether the legal settlement of said insane person, at the time of the commitment, was in one of the defendant counties. If the court so find, judgment shall be entered against the county of such settlement in favor of any other county for all legal costs and expenses arising out of said proceedings in insanity, and paid by said other county. If any such costs have not been paid, judgment shall be rendered against the county of settlement in favor of the parties, including the state, to whom said costs or expenses may be due. [C73,§1418; C97,§2282; S13,§2308-a; C24, 27, 31, 35,§3593.]

3594 Order when nonresidence or unknown settlement appears. If the court finds that the legal settlement of said insane person, at the time of commitment, was in a foreign state or country, or was unknown, an order shall be entered that said insane person shall be maintained in the hospital for the insane at the expense of the state. In such case the state shall refund to any county, with interest, all legal costs and expenses arising out of said proceedings in insanity and paid by said county. Any decision by the court shall be final. [C73, §1402; C97,§2270; S13,§2270; C24, 27, 31, 35, §3594.]

3595 Personal liability. Insane persons and persons legally liable for their support shall remain liable for the support of such insane. Persons legally liable for the support of an insane or idiotic person shall include the spouse, father, mother, and adult children of such insane or idiotic person, and any person, firm, or corporation bound by contract hereafter made for support. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county. [R60,§1488; C73, §1433; C97,§2297; C24, 27, 31, 35,§3595; 48GA, ch 98,§1.]

Referred to in §3596
Statute made applicable, §3401

3596 Presumption. In actions to enforce the liability imposed by section 3595, the certificate

from the superintendent to the county auditor stating the sums charged in such cases, shall be presumptively correct. [R60,§1488; C73,§1433; C97,§2297; C24, 27, 31, 35,§3596; 47GA, ch 117, §1.]

3597 Board may compromise lien. The board of supervisors is hereby empowered to compromise any and all liabilities to the county, created by this chapter, when such compromise is deemed to be for the best interests of the county. [C73,§1433; C97,§2297; C24, 27, 31, 35, §3597; 48GA, ch 98,§2.]

3598 Expense in county or private hospitals. The estates of insane or idiotic persons who may be treated or confined in any county asylum or home, or in any private hospital or sanatorium, and the estates of persons legally bound for their support, shall be liable to the county for the reasonable cost of such support. [R60,§1488; C73,§1433; C97,§2297; C24, 27, 31, 35,§3598; 48GA, ch 98,§3.]

3599 Nonresidents liable to state—presumption. The estates of all nonresident patients provided for and treated in state hospitals for the insane in this state, and all persons legally bound for the support of such patients, shall be liable to the state for the reasonable value of the care, maintenance, and treatment of such patients while in such hospitals. The certificate of the superintendent of the state hospital in which any nonresident is or has been a patient, showing the amounts drawn from the state treasury or due therefrom as provided by law on account of such nonresident patient, shall be presumptive evidence of the reasonable value of the care, maintenance, and treatment furnished such patient. [S13,§2297-a; C24, 27, 31, 35,§3599.]

3600 Expenses certified to counties. Each superintendent of a state hospital where insane patients are cared for shall certify to the state comptroller on the first days of January, April, July, and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the comptroller shall thereupon charge the same to the county so owing. A duplicate certificate shall also be mailed to the auditor of each county having patients chargeable thereto. This section shall apply to all superintendents of all institutions having patients chargeable to counties. [R60,§1487; C73,§1428; C97,§2292; S13,§2292; C24, 27, 31, 35,§3600.]

3601 Duty of county auditor and treasurer. The county auditor, upon receipt of such certificate, shall thereupon enter the same to the credit of the state in his ledger of state accounts, and at once issue a notice to his county treasurer, authorizing him to transfer the amount from the insane or county fund to the general state revenue, which notice shall be filed by the treasurer as his authority for making such transfer, and shall include the amount so transferred in his next remittance of state taxes to the treasurer of state, designating the fund to which it belongs. [R60,§1487; C73,§1428; C97,§2292; S13,§2292; C24, 27, 31, 35,§3601.]

Referred to in §3477.4

3602 Penalty. Should any county fail to pay these bills within sixty days from the date of certificate from the superintendent, the state comptroller shall charge the delinquent county the penalty of one percent per month on and after sixty days from date of certificate until paid. [C97,§2292; S13,§2292; C24, 27, 31, 35, §3602.]

Referred to in §3477.4

3603 Hospital support fund. The board of supervisors shall at the time of levying other taxes estimate the amount necessary to meet said expense the coming year, including cost of commitment and transportation of patients, and shall levy a tax therefor. Said fund shall not be diverted to any other purpose. Should any county fail to levy a tax sufficient to meet this expense, the deficiency shall be paid from the general county fund. [C97,§2292; S13,§2292; C24, 27, 31, 35,§3603.]

Referred to in §3477.7

3604 County fund for insane. The board of supervisors shall, annually, levy a tax of three-eighths mill or less, as may be necessary, for the purpose of raising a fund for the support of such insane persons as are cared for and supported by the county in the insane ward of the county home, or elsewhere outside of any state hospital for the insane, which shall be known as the county fund for the insane, and shall be used for no other purpose than the support of such insane persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the county home. [C97,§2308; S13,§2308; C24, 27, 31, 35,§3604; 48GA, ch 96,§3.]

3604.1 Lien of assistance. Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution or owned by either the husband or the wife of such person. [48GA, ch 98,§4.]

48GA, ch 98, §4, editorially divided

3604.2 Auditor to keep record. The auditor of each county shall keep an accurate account of the cost of the maintenance of any patient kept in any institution as provided for in this chapter and keep an index of the names of the persons committed from such county and the indexing and the record of the account of such patient in the office of the county auditor shall constitute notice of such lien. [48GA, ch 98,§4.]

3604.3 Board and county attorney to collect. It shall be the duty of the board of supervisors to collect said claims and direct the county attorney to proceed with the collection of said claims as a part of the duties of his office. [48GA, ch 98,§4.]

3604.4 Closing estates—homestead. In the case of the death of either the husband or wife the estate of the deceased shall not be settled

or the homestead sold until the surviving spouse shall die or cease to occupy the homestead as such or while it is occupied by the minor children of such persons. Provided however no lien shall be enforced against any homestead so long as it be occupied by such person, his or her spouse or minor children. [48GA, ch 98,§4.]

3604.5 Releasing lien. The board of supervisors of the county shall release liens accruing under the provisions of this chapter when fully paid or when compromised and settled by the board of supervisors or when the estate of which the real estate affected by this chapter is a part has been probated and the proceeds allowable have been applied on such liens. [48GA, ch 98,§4.]

3604.6 Claim against estate. On the death of a person receiving or who has received assistance under the provisions of this chapter, the total amount paid for their care shall be allowed as a claim of the second class against the estate of such decedent. [48GA, ch 98,§4.]

CHAPTER 179

JUVENILE COURT

3605 Jurisdiction.
3606 How constituted.
3607 Designation of judge.
3608 Effect.
3609 Courts always open.
3610 Records of court.
3611 Clerk.
3612 Probation officers—salary.
3613 Physicians and nurses.
3614 Powers and duties—office and supplies.
3615 Duties of clerk.
3616 Salaries—expenses—how paid.
3616.1 Salaries and expenses in certain counties.

3605 Jurisdiction. There is hereby established in each county a juvenile court, which, and the judges thereof, shall have and exercise the jurisdiction and powers provided by law. [S13,§254-a13; C24, 27, 31, 35,§3605.]

3606 How constituted. The juvenile court of each county shall be constituted as follows:

1. Of the judges of the district court.
2. In counties wherein there is a superior or municipal court, of the judges thereof, respectively, when designated as judges of the juvenile court by the judges of the district court. [S13, §254-a13; C24, 27, 31, 35,§3606.]

3607 Designation of judge. The judges of the district court may designate one of their number to act as judge of the juvenile court in any county or counties, and may designate a superior or municipal court judge to act as judge of the juvenile court in cases arising in any city in which any such court is organized and in cases arising in any part of any county convenient thereto. In counties having a population of one hundred thousand or over, unless said district judges designate a superior or municipal court judge to act as juvenile judge, they shall after each election, designate one of their number to act as juvenile judge for the ensuing four years. [C24, 27, 31, 35,§3607.]

3608 Effect. The designation of any judge to hold the juvenile court shall not deprive him of other judicial functions, nor the other judges of the power to act as judges of the juvenile court during the absence, inability to act, or upon request, of the regularly designated juvenile judge. [C24, 27, 31, 35,§3608.]

3609 Courts always open. Juvenile courts shall always be open for the transaction of business, but the hearing of any matter requiring notice shall be had only at such time and place as the judge may fix. [S13,§254-a13; C24, 27, 31, 35,§3609.]

3610 Records of court. The juvenile court shall be a court of record, and the proceedings, orders, findings, and decisions thereof shall be entered in books kept for that purpose and designated as the juvenile court records. [S13, §254-a13; C24, 27, 31, 35,§3610.]

3611 Clerk. The clerk of the court whose judge acts as the juvenile court shall act as clerk of the juvenile court. [C24, 27, 31, 35,§3611.]

3612 Probation officers—salary. The judge designated as juvenile judge in each county, or in cases where there is more than one such judge in any county the judges so designated acting jointly, shall appoint probation officers, one of whom, if more than one is appointed, shall be a woman, as follows:

1. In and for any county having a population of less than thirty thousand, not more than four probation officers, who shall serve without pay.
2. In counties which contain an educational institution under the control of the state board of education with a student enrollment of at least six thousand and in counties having a population of more than thirty thousand and less than fifty thousand, a chief probation officer at a salary of not more than fifteen hundred dollars per year; and the court may also appoint one deputy at a salary of not more than twelve hundred per year.
3. In counties having a population of more than fifty thousand and less than one hundred twenty-five thousand, a chief probation officer at a salary of not more than two thousand dollars per year; and the court may appoint two deputies at a salary of not more than fifteen hundred dollars each per year.
4. In counties having a population in excess of one hundred twenty-five thousand, one chief probation officer at a salary not to exceed three thousand dollars per year, and not to exceed ten deputy probation officers. Three of such deputy probation officers may be paid a salary not to

exceed twenty-two hundred dollars per year each, and the remainder of such deputy probation officers so employed may be paid a salary not to exceed eighteen hundred dollars per year each. [S13,§254-a18; C24, 27, 31, 35,§3612.]

3613 Physicians and nurses. In any county having a population of one hundred twenty-five thousand or more, the judge or judges of the juvenile court may appoint a competent physician at a salary of not more than fifty dollars per month, and a visiting nurse, who shall be a trained graduate, at a salary of not more than one hundred dollars per month, and prescribe their duties. [C24, 27, 31, 35,§3613.]

3614 Powers and duties—office and supplies. Probation officers, in the discharge of their duties as such, shall possess the powers of peace officers. They shall be furnished by the county with a proper office and all necessary blanks, books, and stationery. It shall be the duty of said probation officers to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require, and to take such charge of any child before and after trial as may be directed by the court. [S13,§254-a18; C24, 27, 31, 35,§3614.]

3615 Duties of clerk. The clerk of court shall, if practicable, notify a convenient probation officer in advance when any child is to be brought before the said court. [S13,§254-a18; C24, 27, 31, 35,§3615.]

3616 Salaries—expenses—how paid. The judges making the appointments shall fix the salaries of all appointees at not exceeding the amount authorized by law. All appointees shall serve during the pleasure of such judges, and in addition to salaries shall receive their necessary and actual expenses incurred while performing their duties. All salaries and expenses shall be paid by the county. [S13,§254-a18; C24, 27, 31, 35,§3616.]

3616.1 Salaries and expenses in certain counties. The salaries and expenses of probation officers and deputies in counties which contain an educational institution under the control of the state board of education with a student enrollment of at least forty-two hundred, may be paid either from the general county fund or from the court expense fund. [C27, 31, 35,§3616-b1.]

CHAPTER 180

CARE OF NEGLECTED, DEPENDENT, AND DELINQUENT CHILDREN

Referred to in §§3658, 3661.103, 3666, 3689, 3699, 3709, 5036.01

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3617 Applicable to certain children. This chapter shall not apply to any child who is accused of an offense which is punishable by life imprisonment or death, but shall otherwise apply to all children who are not feeble-minded and who are under eighteen years of age and who are not inmates of any state institution or of any institution incorporated under the laws of this state. [S13,§254-a14; C24, 27, 31, 35, §3617.]

3618 "Dependent and neglected child" defined. The term "dependent child" or "neglected child" shall mean any child who, for any reason:

1. Is destitute, or homeless, or abandoned.
2. Is dependent upon the public for support.
3. Is without proper parental care or guardianship, or habitually begs or receives alms.
4. If under ten years of age, is engaged in giving any public entertainment in public places for pecuniary gain for himself or for another, or who accompanies, or is used in aid of, any person so doing.
5. Is found living in any house of ill fame, or with any vicious or disreputable person.
6. Is living in a home which is unfit for such child; or is living in a home wherein because

of carelessness or neglect of a person or persons having a transmissible disease of a serious nature as determined by the local board of health, local health officer or the state department of health, the health of said child may be in danger.

7. Is living under such other unfit surroundings as bring such child, in the opinion of the court, within the spirit of this chapter. [S13, §254-a14; C24, 27, 31, 35,§3618.]

Referred to in §§3658, 3661.001

3619 "Delinquent child" defined. The term "delinquent child" means any child:

1. Who habitually violates any law of this state, or any town or city ordinance.
2. Who is incorrigible.
3. Who knowingly associates with thieves, or vicious or immoral persons.
4. Who is growing up in idleness or crime.
5. Who knowingly frequents a house of ill fame.
6. Who patronizes any policy shop or place where any gaming device is located.
7. Who habitually wanders about any railroad yards or tracks, gets upon any moving train, or enters any car or engine without lawful authority. [S13,§254-a14; C24, 27, 31, 35,§3619.]

3620 "Child", "parent", and "institution" defined. The word "child" or "children" may mean one or more children, and shall include any person under eighteen years of age. The word "parent" or "parents" may mean one or both parents when consistent with the intent of this chapter. The word "institution" shall include any corporation which includes in its purposes the care or disposition of children coming within the meaning of this chapter. [S13,§254-a14; C24, 27, 31, 35,§3620.]

3621 Petitions—prior investigation. Petitions, sworn to on information and belief, setting forth the facts which render a child, found in the county, dependent, neglected, or delinquent within the meaning of this chapter, may be filed, without payment of filing fee, with the clerk of the juvenile court, by any reputable resident of the county, provided, however, that prior to the filing of such petition, the probation officer or the county attorney shall make such investigation as he may deem necessary, and no petition shall be filed without the approval of such probation officer, or county attorney, except by order of the judge of the juvenile court. [SS15,§254-a15; C24, 27, 31, 35,§3621; 48GA, ch 99,§1.]

Feeble-mindedness—effect, §3453 et seq.

3622 Petition may embrace several children. Complaint with reference to more than one child may be embraced in one count of the petition, subject to being later divided on order of the juvenile court if such order appears advisable. [C24, 27, 31, 35,§3622.]

3623 Time and place of hearing—notice. Upon the filing of the petition, the court or judge shall fix a time for the hearing and a place within the district convenient to the parties, and cause notice to issue as hereinafter provided. [SS15,§254-a16; C24, 27, 31, 35,§3623.]

3624 Notice. Said notice shall apprise all parties entitled to notice of the filing of said petition, and of the time and place of hearing thereon, and shall require the custodian of said child to appear with said child at said time and place. A copy of the petition shall be attached to said notice. [SS15,§254-a16; C24, 27, 31, 35, §3624.]

3625 Manner of service. The court or judge may, in all cases, specify the particular manner in which said notice shall be served. [C24, 27, 31, 35,§3625.]

3626 Service of notice. Said notice shall be served on the custodian of said child or on the person with whom such child is living, and on all other persons entitled to notice, at least five days before the day of hearing. No further service shall be required than on the parent when the parent is the custodian or guardian of said child or children. If the said custodian is not the parent or guardian, then additional service shall be made in the following order:

1. On the parents if their residence in this state is known.
2. On the guardian if his residence in this state is known.
3. On some relative if his residence in this state is known. [SS15,§254-a16; C24, 27, 31, 35, §3626.]

3627 Refusal to surrender child. If the person summoned as herein provided shall fail to appear or bring the child, without reasonable cause, and abide the order of the court, he may be proceeded against as in case of contempt of court in addition to any criminal proceedings authorized by law. [SS15,§254-a16; C24, 27, 31, 35,§3627.]

Contempts, ch 536

3628 Warrant of arrest. In case the notice cannot be served, or the party served fails to obey the same, or when it shall be made to appear to the court that such notice will be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or custodian, or against the child himself. [SS15, §254-a16; C24, 27, 31, 35,§3628.]

Approval of warrant and expenses, §§1225.04, 1225.05

3629 Hearing—continuance. On the day set for hearing, the court shall, if the required notice has been given, or at any time if the parties entitled to such notice are in court, proceed to try the cause in equity unless a continuance appears advisable in the interest of justice. [SS15,§254-a16; C24, 27, 31, 35,§3629.]

How issues tried, §11429 et seq.

3630 Custody of child. When, in the opinion of the court, an emergency exists, temporary provision may be made for the custody of the child pending further hearing. [SS15,§254-a16; C24, 27, 31, 35,§3630.]

3631 Appointment to represent child. The court may, at any time after the filing of the petition, appoint an attorney or other suitable person to represent and appear for said child. [SS15,§254-a16; C24, 27, 31, 35,§3631.]

3632 Information charging crime. In any case after an investigation of the facts and circumstances, the court may, in its discretion, cause the child to be charged with either:

1. An indictable offense, in which case the court shall proceed to hold a preliminary examination, and shall exercise the powers of other magistrates; or

2. An offense not triable on indictment, in which case the court may order any peace officer to file forthwith an information against such child and proceed to try the case before a jury of twelve.

When no regular jury is in attendance at the district, superior, or municipal court, as the case may be, the judge shall cause to be issued by the clerk and served by any peace officer a summons for such number of persons qualified to act as jurors as in his judgment are necessary to secure an impartial jury, allowing to the state and the defendant, each, three peremptory challenges. [SS15,§254-a16; C24, 27, 31, 35,§3632.]

3633 Commitment of child. If a child is unable to furnish a required bail pending the final disposition of the case, he may be committed to the care of a probation or peace officer, or other person, who shall keep such child in some suitable place provided by the city or county, outside the inclosure of any jail or police station. No child shall be confined in the same yard or inclosure with adult convicts. [S13, §254-a24; SS15,§254-a16; C24, 27, 31, 35,§3633.]

3634 Prosecutions transferred. Any child, taken before any justice of the peace or police court, charged with a public offense shall, together with the case, be at once transferred by said court to the juvenile court. [S13,§254-a24; C24, 27, 31, 35,§3634.]

3635 Exclusion from courtroom. The judge of the juvenile court shall fix a time and place for the hearing of cases transferred thereto, which shall be disposed of in the same manner as cases originally brought before said court. During his examination into or trial of the case as a court of equity, the court may exclude from the courtroom any and all persons who, in his opinion, are not necessary for the hearing of the case. [S13,§254-a19; C24, 27, 31, 35,§3635.]

3636 Conviction of crime—alternative procedure. When there is a conviction in the district court of any delinquent child of an indictable offense, the district court may enter judgment thereon, or, if the punishment be not imprisonment for life, or death, it may transfer the cause to the juvenile court. The juvenile court shall have power to proceed with such child under the alternative or mandatory commitments provided in this chapter; but if the results, in the opinion of the court, be not conducive to the public interest and the welfare of the child, it may at any time revoke such orders of commitment and enter such judgment of conviction as the district court might have entered. [S13,§254-a17; C24, 27, 31, 35,§3636.]

3637 Alternative commitments. The juvenile court, in the case of any neglected, dependent, or delinquent child, may:

1. Continue the proceedings from time to time and commit said child to the care and custody of a probation officer or other discreet person.

2. Commit said child to some suitable family home or allow it to remain in its own home.

3. Commit said child to any institution in the state, incorporated and maintained for the purpose of caring for such children.

4. Cause the child to be placed in a public or state hospital for treatment or special care, or in a private hospital which will receive it for such purpose, when such course seems necessary for the welfare of the child. [S13,§§254-a20, -a23; C24, 27, 31, 35,§3637.]

Referred to in §3639
Authorized institutions, §3661.103

3638 Guardianship and adoption. In case the court commits said child to the custody of some proper person or institution, such person or institution shall, by virtue of such custody, be the legal guardian of the person of such child and may be made a party to any proceeding for the legal adoption of such child, but any such adoption shall be approved by the court. [S13, §254-a21; C24, 27, 31, 35,§3638.]

Adoption in general, ch 473

3639 Conditions attending commitment. In any case contemplated by section 3637, the court may, from time to time, incorporate in its order such conditions and restrictions as it may deem advisable for the welfare of the child, and the jurisdiction of the court over said proceedings and said child shall continue until the child is legally adopted, or until the child is committed to a state institution. [S13,§254-a23; C24, 27, 31, 35,§3639.]

3640 Religious belief. The court, in committing children, shall place them, as far as practicable, in the care and custody of some individual holding the same religious belief as the parents of said child, or with some institution which is controlled by persons of like religious faith with the parents of said child. [S13,§§254-a27, 3260-g; C24, 27, 31, 35,§3640.]

3641 Aid to widow in care of child. If the juvenile court finds of record that the mother of a neglected or dependent child is and has been a resident of the county for one year preceding the filing of the application, and is a widow and a proper guardian, but, by reason of indigency, is unable to properly care for such child, and that the welfare of said child will be promoted by remaining in its own home, it may, on ten days written notice to the chairman of the board of supervisors, of said application, by proper order determine the amount of money, not exceeding two dollars and fifty cents per week, necessary to enable said mother to properly care

for said child. The board of supervisors shall cause said amount to be paid from the county treasury as provided in said order. Such order may, at any time, be modified or vacated by the court. No payment shall be made after said child reaches the age of sixteen years, or after the mother has remarried, or after she has acquired a legal residence in another county, or after she has become a nonresident of the state.

No person on whom the notice to depart provided for in chapter 189.4 shall have been served within one year prior to the time of making the application, shall be considered a resident so as to be allowed the aid provided for in this section. [S13,§254-a20; C24, 27, 31, 35,§3641.]

Referred to in §§3641.1, 3642, 3643

3641.1 Levy in certain counties. In counties having a population of sixty thousand or more the board of supervisors may levy annually a tax not to exceed one-fourth mill to carry out the provisions of section 3641. [C24, 27, 31, 35, §3641-b1.]

Temporary increase of one-fourth mill for 1939, 1940, 48GA, ch 100, §1

3642 Duration of order. Orders entered under section 3641 shall, unless sooner terminated by the court, automatically terminate two years from the date thereof, but may be renewed under a new application. [C24, 27, 31, 35,§3642.]

3643 Who considered widow. Any mother whose husband is an inmate of any institution under the care of the board of control, shall, for the purposes of section 3641, be considered a widow, but only while such husband is so confined. [S13,§254-a20a; C24, 27, 31, 35,§3643.]

3644 Compelling support by parent. The court, in any proceeding hereunder relative to a neglected or dependent child, shall have jurisdiction, on reasonable notice to the parents of said child, to inquire into the ability of said parents to support said child and make all proper orders in reference thereto. The court may require such parent to enter into a bond, with or without surety, and in a reasonable sum, conditioned for the proper care, support, and supervision of such child. If it finds that the parent is able to support such child in any reasonable degree, it may require such parent to pay a reasonable amount of money into court at such times as it may provide, which sum shall be applied to the care of said child. All orders for the payment of money shall be enforced by execution and in such case the parent ordered to make payment shall not be entitled to hold any property as exempt from such execution. All other orders may be enforced by process of contempt until such orders are complied with. [S13, §§254-a25,-a31–a45,-a47; C24, 27, 31, 35,§3644.]

Referred to in §3645
Contempt, ch 536
Enforcement of judgment and orders, §11648
Similar provision, §11765

3645 Action on bond. In case of the breach of a bond given as required in section 3644, the amount thereof shall be deemed liquidated damages, which, when collected, shall, under the orders of the court, be applied to the care of said child. The county attorney shall, on the order of the court, prosecute all actions on such bonds. [S13,§§254-a25,-a31–a45,-a47; C24, 27, 31, 35, §3645.]

3646 Mandatory commitments. If commitment of any child is not made under the foregoing provisions of this chapter, or if made thereunder and the results, in the opinion of the court, are not conducive to the welfare of the child, the court shall proceed as follows:

1. If the child is neglected or dependent and not delinquent, it shall be committed either to the soldiers' orphans home or to the state juvenile home.
2. If the child is delinquent and under the age of ten years, it shall be committed to the state juvenile home.
3. If the child is over the age of ten years and, in the opinion of the court or judge is seriously delinquent or so disposed, it shall be committed to the state training school for boys or for girls, as the case may be; but married women, prostitutes, and girls who are pregnant shall not be committed to the training school.
4. If the child is over the age of ten years and, in the opinion of the court or judge, is not seriously delinquent nor so disposed, it shall be committed to the state juvenile home. [C73, §§1653–1659; C97,§§2708, 2709; S13,§§254-a20, -a23, 2708, 2709; C24, 27, 31, 35,§3646.]

Referred to in §3647

3647 Interpretative clause. It is the intent of section 3646 to so classify commitments that the merely neglected and dependent child will not be associated with the delinquent, and that delinquent children will be so segregated that the least delinquent will not suffer by association with those of greater delinquency. [C24, 27, 31, 35,§3647.]

3648 Right to transfer. The board of control, at any time, for the purpose of effecting, as nearly as practicable, the declared intent of this chapter, may transfer an inmate of any of said three state institutions to any other of said institutions. It may also transfer any feeble-minded child from said institutions to the institution for feeble-minded or to the hospital for epileptics and school for feeble-minded. The expense of such transfers shall be charged to the support fund of the institution from which the transfers are made. [C24, 27, 31, 35,§3648.]

3649 Term of commitment—warrant. Commitments shall be until the child attains the age of twenty-one years, but the board of control may release or discharge the child at any time after it has attained the age of eighteen years if such action will, in the judgment of the board, be best for the child.

A warrant of commitment shall consist of a copy of the order of commitment, certified to by the clerk, and shall be in duplicate, one of which shall be delivered to the executive head of the receiving institution and shall constitute sufficient authority to hold in custody the party

committed. [C73,§§1653-1658; C97,§2708; S13, §§254-a23, 2708; C24, 27, 31, 35,§3649.]

3650 Notice of discharge. When application, written or otherwise, is made to the board of control for the final discharge of any delinquent child under twenty-one years of age who has been committed by a juvenile court to any state institution, such board shall at once, by letter, give written notice of such application to the county attorney of the county from which commitment was made, and such child shall not be finally discharged in less than thirty days after such notice has been given. [C24, 27, 31, 35,§3650.]

Referred to in §3650.1

3650.1 Exceptions. The provisions of section 3650 requiring notice shall not apply to any case where it is proposed simply to parole any such delinquent child; and the board of control may at any time parole such a delinquent or cause him to be removed from any state institution and placed in the custody of a reputable citizen of the state whom the board may believe to be qualified to have such custody. [C27, 31, 35,§3650-a1.]

3651 Record of discharge. The board shall keep a full record of the discharge by it of all delinquent children which record shall among other matters show the reasons therefor and whether the discharge was on application or on the motion of the board. [C24, 27, 31, 35,§3651.]

3652 Statement to superintendent. In case of a commitment to a state institution, the judge shall forward to the superintendent a statement of the nature of the complaint, and such other particulars as he may be able to ascertain, including the date of birth of the child, its habits and environments, the number of times it has been arrested and the cause therefor, the influence of the parent or custodian on such child, and the substance of the evidence introduced on the hearing. [C73,§1657; C97,§2708; S13,§2708; C24, 27, 31, 35,§3652.]

3653 Detention home and school in certain counties. In counties having a population of more than forty thousand, the board of supervisors shall, and in counties of over thirty thousand, said board may provide and maintain, separate, apart, and outside the inclosure of any jail or police station, a suitable detention home and school for dependent, neglected, and delinquent children. [S13,§254-a29; C24, 27, 31, 35, §3653; 48GA, ch 101,§1.]

3654 Tax. The board of supervisors may annually levy a tax of not to exceed one-fourth mill for the purpose of maintaining such home, and paying the salaries and expenses of all appointees authorized by this chapter. [S13, §254-a30; C24, 27, 31, 35,§3654.]

3655 Approval of institutions. The state board of social welfare shall designate and approve the institutions to which such children may be legally committed and shall have supervision and right of visitation and inspection at all times over all such institutions. [S13, §§254-a20,-a26; C24, 27, 31, 35,§3655; 47GA, ch 118,§10; 48GA, ch 84,§7.]

3656 Reports by court and institutions. The juvenile court, and all institutions receiving such children, shall, between the first and fifteenth day of January of each year, make report to the state board of social welfare. The report shall embrace the number of children of each sex brought before the court during the past year, the number for whom homes have been provided, the number sent to state institutions, and the number in charge of each institution. [S13,§254-a26; C24, 27, 31, 35,§3656; 47GA, ch 118,§10; 48GA, ch 84,§7.]

3657 Statutes construed liberally. This chapter shall be liberally construed to the end that its purpose may be carried out. [S13,§254 -a28; C24, 27, 31, 35,§3657.]

CHAPTER 181

CONTRIBUTING TO JUVENILE DELINQUENCY

3658 Contributing to delinquency.
3659 Penalty—bar.
3660 Suspension of sentence.
3661 Preliminary examination.
3661.001 Interpretative clause.

3658 Contributing to delinquency. It shall be unlawful to:

1. Encourage any child under eighteen years of age to commit any act of delinquency defined in chapter 180 of this title.

2. Send, or cause to be sent, any such child to a house of prostitution or to any place where intoxicating liquors are unlawfully sold or unlawfully kept for sale, or to any policy shop, or to any gambling place, or to any public poolroom, or to induce any such child to go to any such places, knowing them to be such.

3. Knowingly encourage, contribute, or in any manner cause such child to violate any law of this state, or any ordinance of any city or town.

4. Knowingly permit, encourage, or cause such child to be guilty of any vicious or immoral conduct.

5. Knowingly contribute to the dependency of a child as defined in section 3618.

[C24, 27, 31, 35,§3658.]

Referred to in §3659
See §3661.001

3659 Penalty—bar. A violation of section 3658 shall be punishable by a fine of not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment. Said conviction shall not bar a prosecution of such con-

victed person for an indictable offense when the acts which caused or contributed to the delinquency or dependency of such child are indictable. [C24, 27, 31, 35,§3659.]

See §8661.001

3660 Suspension of sentence. Upon said conviction being had, the court may, for a period not exceeding two years, suspend sentence under such conditions as to good behavior as it may prescribe. Should said conditions be fulfilled, the court may at any time enter an order setting said conviction aside and wholly releasing the defendant therefrom. Should said condition be not fulfilled to the satisfaction of the court, an order of sentence may at any time be entered which shall be effective from the date thereof. [C24, 27, 31, 35,§3660.]

3661 Preliminary examination. If, in proceedings in juvenile court, it appears probable that an indictable offense has been committed and that the commission thereof caused, or contributed to, the delinquency or dependency of such a child, said court may order the issuance of a warrant for the arrest of such suspected person, and on the appearance of such person said court may proceed to hold a preliminary examination, and in so doing shall exercise all the powers of a committing magistrate. [C24, 27, 31, 35,§3661.]

Approval of warrant and expenses, §§1225.04, 1225.05

3661.001 Interpretative clause. For the purposes of this act [43GA, ch 90] the word "dependency" shall mean all the conditions as enumerated in section 3618. [C31, 35,§3661-c1.]

CHAPTER 181.1

SOCIAL WELFARE DEPARTMENT

Referred to in §3828.001

Aid for the blind, see ch 182.1; Child-placing agencies, see ch 181.5; Child welfare, see ch 181.2; Children's boarding homes, see ch 181.4; Emergency relief administration, see ch 189.3; Maternity hospitals, see ch 181.3; Old-age assistance, see ch 189.1; Private institutions for neglected, dependent and delinquent children, see ch 182

3661.002 Definitions.
3661.003 State department of social welfare.
3661.004 State board of social welfare.
3661.005 Vacancies.
3661.006 Removal—compensation.
3661.007 Powers and duties of the state board.
3661.008 Secretary.
3661.009 State board employees.
3661.010 County board of social welfare.
3661.011 Compensation of county board members.
3661.012 Duties of the county board.
3661.013 County board employees.
3661.014 Compensation of county board employees.
3661.015 Federal grants.

3661.002 Definitions. As used in this chapter: "state department" means the state department of social welfare; "state board" means the state board of social welfare; "county board" means the county board of social welfare. [47GA, ch 151,§1.]

Referred to in §§3661.016, 3684.01

3661.003 State department of social welfare. There is hereby created a state department of social welfare which shall consist of a state board of social welfare, and such other officers and employees as may be hereafter provided. [47GA, ch 151,§2.]

3661.004 State board of social welfare. The state board of social welfare shall consist of three members, one of whom shall be a woman, not more than two of whom shall be from the same political party, to be appointed by the governor with the approval of a two-thirds vote of the members of the senate in executive session.

The members of the board shall devote their full time to the board's work and shall hold no other private or public position or office.

Each member shall serve for a term of six years, or until his successor is appointed and qualifies.

Within sixty days after the convening of the general assembly, the governor shall appoint a successor to the member whose term expires on the following June 30. [47GA, ch 151,§3; 48GA, ch 139,§1.]

48GA, ch 139, §1 editorially divided

Terms of first appointees expire June 30, 1941, 1943, 1945; 48GA, ch 139, §1

3661.005 Vacancies. Vacancies occurring while the general assembly is in session shall be filled for the unexpired portion of the term in the same manner as full-term appointments are made. Vacancies occurring while the general assembly is not in session shall be filled by the governor and shall be approved by the executive council, but such appointments shall terminate at the end of thirty days after the convening of the next general assembly. [47GA, ch 151, §4.]

3661.006 Removal—compensation. Members of the board may be removed by the governor with the approval of the executive council and shall receive as compensation the sum of four thousand dollars per annum, payable monthly.

No member shall be removed without cause being assigned for removal and without a public hearing before the executive council. [47GA, ch 151,§5; 48GA, ch 139,§1.]

3661.007 Powers and duties of the state board. The state board shall be vested with the authority to administer old-age assistance, aid to the blind, aid to dependent children, child welfare, and emergency relief, and any other

form of public welfare assistance that may hereafter be placed under its administration. It shall perform such duties, formulate and make such rules and regulations as may be necessary; shall outline such policies, dictate such procedure and delegate such powers as may be necessary for competent and efficient administration. It shall have power to abolish, alter, consolidate or establish divisions and may abolish or change offices created in connection therewith. It may employ necessary personnel and fix their compensation. It may allocate or reallocate functions and duties among any divisions now existing or hereafter established by the state board. It may promulgate rules and regulations relating to the employment of investigators and the allocation of their functions and duties among the various divisions as competent and efficient administration may require.

The state board shall:

1. Within ninety days after the close of each fiscal year, prepare and print for said year a report to the governor which shall include a full account of the operation of the acts under its control, adequate and complete statistical reports by counties and for the state as a whole concerning all payments made under its administration, and such other information as it may deem advisable, or which may be requested by the governor or by the general assembly.

2. Cooperate with the federal social security board created by title VII of the social security act, public No. 271, enacted by the 74th congress of the United States and approved August 14, 1935, or other agency of the federal government for public welfare assistance, in such reasonable manner as may be necessary to qualify for federal aid, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as such federal social security board, from time to time, may find necessary to assure the correctness and verification of such reports.

3. Exercise general supervision over the county boards of social welfare and their employees.

4. Furnish information to acquaint the public generally with the operation of the acts under the jurisdiction of the state board. [47GA, ch 151,§6; 48GA, ch 84,§1.]

3661.008 Secretary. The state board shall appoint a secretary who shall serve at its pleasure and shall perform such duties as it may require. He shall receive a salary not in excess of three thousand dollars per year. [47GA, ch 151,§7.]

3661.009 State board employees. All employees of the state board shall have been residents of the state of Iowa for at least two years immediately preceding their employment and shall be selected from among those who have successfully qualified in an examination given by the state board or under its direction, covering character, general training, and experience. Such examinations shall be open to all persons, and persons taking such examinations, upon successfully qualifying, shall be classified according to the fields of work for which said persons are fitted, all in accordance with rules and regulations of the state board adopted and published by the state board. [47GA, ch 151,§8.]

Assistant attorney general assigned, §151.2

3661.010 County board of social welfare. The board of supervisors of each county shall appoint a county board of social welfare, which shall consist of three members in counties of less than thirty-three thousand population, not more than two of whom shall belong to the same political party, and at least one of whom shall be a woman; and which shall consist of five members in counties of more than thirty-three thousand population, not more than three of whom shall belong to the same political party, and at least one of whom shall be a woman. At the discretion of the board of supervisors one or more of said members may be chosen from the membership of said board of supervisors. Within thirty days after the effective date of this chapter* the board of supervisors shall appoint the members of the county board, which members shall serve until their successors are appointed as hereinafter provided. Commencing with the year 1938, and annually thereafter, the board of supervisors shall appoint the members of the county board who shall serve for one year and until their successors are appointed. If a vacancy shall occur in the membership of the county board, other than by the expiration of a term, a member shall be appointed to fill such vacancy for the unexpired term. All appointments, made as herein provided, shall be made a part of the regular proceedings of the board of supervisors and shall be filed with the county auditor and with the secretary of the state board. [47GA, ch 151,§10.]

*Effective date, May 28, 1937

3661.011 Compensation of county board members. All members of the county board shall be reimbursed for the actual and necessary expenses incurred by them in the discharge of their duties. They shall also receive compensation for services at the rate of three dollars per diem, but such compensation shall not exceed a total of ninety dollars in any one year in counties of less than thirty-three thousand population, or one hundred twenty dollars in counties of more than thirty-three thousand population. The expenses and compensation of county board members shall be paid from the general fund of the county; provided, however, that members of the board of supervisors serving on said county board of social welfare shall not be paid compensation as members of said county board of social welfare for any day on which they are paid for their official work as members of the board of supervisors. [47GA, ch 151,§11.]

3661.012 Duties of the county board. The county board shall be vested with the authority to direct in the county old-age assistance, aid to the blind, aid to dependent children and

emergency relief with only such powers and duties as are prescribed in the laws relating thereto. [47GA, ch 151,§12.]

3661.013 County board employees. The county board shall employ a county director and such other personnel as is necessary for the performance of its duties. The number of employees shall be subject to the approval of the state board. The county director and all employees shall be selected solely on the basis of the fitness for the work to be performed, with due regard to experience and training, but graduation from college shall not be made a prerequisite of any such appointment. It shall be a prerequisite to obtaining an appointment that the applicant shall have been a legal resident of Iowa for at least two years prior to the time of making said application.

Any appointment made by the county board, other than clerical or stenographic help, shall be subject to review by the state board in this respect, that if any appointee is not properly carrying out the duties for which he is appointed, or if any appointee is not qualified or capable of handling the duties for which he is appointed, and the state board so finds, it shall certify a copy of such finding to the county board and the county board shall then discharge the said employee and shall fill the vacancy. [47GA, ch 151,§13.]

Referred to in §3684.04

3661.014 Compensation of county board employees. The compensation of county board employees shall be fixed by the county board of social welfare and shall be paid by the state board from funds made available for that purpose. However, the compensation of all employees shall be subject to the approval of the state board and the county board of supervisors. [47GA, ch 151,§14.]

3661.015 Federal grants. The state treasurer is hereby authorized to receive such federal funds as may be made available for carrying out any of the activities and functions of the state department, and all such funds are hereby appropriated for expenditure upon authorization of the state board. [47GA, ch 151,§15.]

CHAPTER 181.2

CHILD WELFARE

Chapter 181-A1, code 1935, repealed by 47GA, ch 118, §1
Social welfare department, see ch 181.1

3661.016 Definitions.
3661.017 Powers and duties of state department.
3661.018 Powers and duties of state board.
3661.019 Duties of county departments.
3661.020 Licenses.
3661.021 Short title.

3661.016 Definitions. The terms "state department", "state board", "county department" and "county board" are used in this and chapters 181.3, 181.4, and 181.5 as said terms are defined in section 3661.002.

"Child welfare services" means social welfare services for the protection and care of children who are homeless, dependent or neglected, or in danger of becoming delinquent. [47GA, ch 118,§2; 48GA, ch 84,§2.]

3661.017 Powers and duties of state department. The state department, in addition to all other powers and duties given it by law, shall:

1. Administer and enforce the provisions of this chapter.
2. Join and cooperate with the government of the United States through its appropriate agency or instrumentality or with any other officer or agency of the federal government in planning, establishing, extending and strengthening public and private child welfare services within the state.
3. Make such investigations and to obtain such information as will permit the state board to determine the need for public child welfare services within the state and within the several county departments thereof.
4. Apply for and receive any funds which are or may be allotted to the state by the United States or any agency thereof for the purpose of developing child welfare services.
5. Make such reports and budget estimates to the governor and to the general assembly as are required by law or such as are necessary and proper to obtain the appropriation of state funds for child welfare services within the state and for all the purposes of this chapter.
6. Cooperate with the several county departments within the state, and all county boards of supervisors and other public or private agencies charged with the protection and care of children, in the development of child welfare services.
7. Aid in the enforcement of all laws of the state for the protection and care of children.
8. Cooperate with the juvenile courts of the state, and with the board of control of state institutions in its management and control of state institutions and the inmates thereof. [47GA, ch 118,§4; 48GA, ch 84,§4.]

3661.018 Powers and duties of state board. The state board shall:

1. Plan and supervise all public child welfare services and activities within the state as provided by this chapter.
2. Make such reports and obtain and furnish such information from time to time as may be necessary to permit cooperation by the state department with the United States children's bureau, the social security board, or any other federal agency which is now or may hereafter be charged with any duty regarding child care or child welfare services.
3. Make such rules and regulations as may be necessary or advisable for the supervision of the private child-caring agencies or officers

thereof which the state board is empowered to license, inspect and supervise, which rules and regulations shall provide that in dealing with any child, any officer, employee or agency so dealing shall take into consideration the religious faith or affiliations of the child or its parents, and that in placing such child it shall be, as far as practicable, placed in the home or the care and custody of some person holding the same religious faith as the parents of such child, or with or through some agency or institution controlled by persons of like religious faith with the parents of said child.

4. Supervise and inspect private institutions for the care of dependent, neglected and delinquent children, and to make reports regarding the same.

5. Designate and approve the private and county institutions within the state to which neglected, dependent and delinquent children may be legally committed and to have supervision of the care of children committed thereto, and the right of visitation and inspection of said institutions at all times.

6. Receive and keep on file annual reports from the juvenile courts of the state, and from all institutions to which neglected, dependent and delinquent children are committed; compile statistics regarding juvenile delinquency, make reports regarding the same and study prevention and cure of juvenile delinquency.

7. Require and receive from the clerks of the courts of record within the state duplicates of the findings of the courts upon petitions for adoption, and keep records and compile statistics regarding adoptions.

8. License and inspect maternity hospitals, private boarding homes for children, and private child-placing agencies; make reports regarding the same and revoke such licenses. [C27, 31, 35,§§3661-a1,-a2; 47GA, ch 118,§5; 48 GA, ch 84,§5.]

3661.019 Duties of county departments. County departments are hereby charged with the duty of cooperating with the state department in carrying out the provisions of this chapter. They shall, upon request, make to the state department such reports regarding child welfare services, or the need thereof, within the respective counties. They shall also, when requested by the state department, make reports upon maternity hospitals, private boarding homes for children, private child-placing agencies and private institutions for the care of neglected, dependent or delinquent children which are located within the respective counties. For this purpose they shall act, if so designated, as agents of the state department. [C27, 31, 35,§3661-a1; 47GA, ch 118,§6; 48GA, ch 84, §6.]

3661.020 Licenses. Licenses issued to maternity hospitals, private boarding homes for children, and private child-placing agencies by the state board of control of state institutions, shall remain in effect for the period for which issued, unless sooner revoked according to law. Thereafter it shall be the duty of each of such agencies to apply to the state board of social welfare for a new license, and to submit to such rules regarding the same as the state board may prescribe. [47GA, ch 118,§12; 48GA, ch 84,§8.]

Constitutionality, 47GA, ch 118, §13

3661.021 Short title. This chapter shall be known and may be cited as "The Child Welfare Act of 1937." [47GA, ch 118,§14.]

CHAPTER 181.3

MATERNITY HOSPITALS

Referred to in §3661.016. Social welfare department, see ch 181.1

3661.022 "Person" defined.
3661.023 "Maternity hospital" defined.
3661.024 Prohibited location.
3661.025 License required.
3661.026 Power to license.
3661.027 Conditions to granting license.
3661.028 Unlicensed hospital nuisance.
3661.029 Applications for license.
3661.030 Removal of hospital—inspection.
3661.031 Fees.
3661.032 Renewal of license.
3661.033 Exceptions.
3661.034 Tenure of license.
3661.035 Tenure of license.
3661.036 Rules and regulations.
3661.037 Form of license.
3661.038 Posting of license.
3661.039 Prohibited acts.
3661.040 Record of licenses.
3661.041 Notice of license.
3661.042 Revocation of license.
3661.043 Child placements by maternity hospitals.
3661.044 Attending physician.
3661.045 Reports as to births.
3661.046 Reports as to deaths.
3661.047 Inspection of reports.
3661.048 Records and inspection.
3661.049 Reports and information confidential.
3661.050 Inspections.
3661.051 Minimum inspection.
3661.052 Sanitary inspection.
3661.053 Licensee to grant assistance.
3661.054 Burden of proof.
3661.055 Penalty.

3661.022 "Person" defined. The word "person" where used in this chapter shall include individuals, partnerships, voluntary associations, and corporations. [C27, 31, 35,§3661-a8.]

41GA, ch 79, §1, editorially divided

3661.023 "Maternity hospital" defined. Any person who receives for care and treatment during pregnancy or during delivery or within ten days after delivery more than one woman within a period of six months, except women related to him by blood or marriage, shall be deemed to maintain a maternity hospital. This definition shall not be construed to include nurses who care for women during confinement in the homes of the patients, nor any institution under the management of the state board of education or state board of control, nor any general

hospital. [S13,§2575-a20; C24,§§2365, 2366; C27, 31, 35,§3661-a9.]

3661.024 Prohibited location. No maternity hospital shall be operated within two hundred feet of any church building, school, educational institution, or public park, or in a building situated within fifty feet of building owned by another. [S13,§2575-a20; C24,§2368; C27, 31, 35,§3661-a10.]

3661.025 License required. No maternity hospital shall receive a woman for care therein or solicit or receive money for its maintenance unless it has an unrevoked license issued by the state board of social welfare in accordance with this chapter within the preceding twelve months to conduct such hospital. [S13,§2575-a20; C24, §2367; C27, 31, 35,§3661-a11; 47GA, ch 118,§7; 48GA, ch 84,§7.]

41GA, ch 79, §3, editorially divided

3661.026 Power to license. The state board of social welfare is hereby empowered to grant a license for one year for the conduct of any maternity hospital that is for the public good, that is legally located, that is conducted by a reputable and responsible person, and whose staff and equipment are adequate for the work which it undertakes. [S13,§2575-a22; C24, §2370; C27, 31, 35,§3661-a12; 47GA, ch 118,§7; 48GA, ch 84,§7.]

3661.027 Conditions to granting license. No such license shall be issued unless the premises shall have been inspected and such license approved by the state department of health. [S13, §2575-a22; C24,§2371; C27, 31, 35,§3661-a13.]

3661.028 Unlicensed hospital nuisance. Any maternity hospital operated in violation of the terms of this chapter shall be deemed a nuisance and may be abated by injunction proceedings. [S13,§2575-a27; C24,§2382; C27, 31, 35,§3661 -a14.]

Injunctions, ch 535

3661.029 Applications for license. Every application for a license to operate a maternity hospital shall be made in writing to the state board of social welfare, accompanied by the legal inspection fee, and said application shall contain the name and address of the person to whom the license is to be issued, and a description of the location of the place to be used. [S13,§2575-a22; C24,§2369; C27, 31, 35,§3661-a15; 47GA, ch 118,§7; 48GA, ch 84,§7.]

41GA, ch 79, §4, editorially divided

3661.030 Removal of hospital—inspection. When the hospital desires to remove to a new location no new license fee shall be required; only the inspection fee of five dollars shall be charged. [C27, 31, 35,§3661-a16.]

3661.031 Fees. The initial inspection fee for a proposed maternity hospital shall be five dollars, and the license fee for operating such hospital shall be twenty-five dollars. [S13, §2575-a22; C24,§2373; C27, 31, 35,§3661-a17.]

Referred to in §3661.033
41GA, ch 79, §5, editorially divided

3661.032 Renewal of license. The state board of social welfare may renew any license upon payment of a renewal fee of five dollars if the licensee continues to be eligible. [S13,§2575-a22; C24,§2373; C27, 31, 35,§3661-a18; 47GA, ch 118,§7; 48GA, ch 84,§7.]

Referred to in §3661.033

3661.033 Exceptions. No fee provided for in sections 3661.031 and 3661.032 shall be required of any charitable institution operating a maternity hospital. [S13,§2575-a22; C24, §2373; C27, 31, 35,§3661-a19.]

3661.034 Tenure of license. Each license shall expire one year from the date of issue unless sooner revoked. [S13,§2575-a22; C24, §2373; C27, 31, 35,§3661-a20.]

3661.035 Tenure of license. Licenses granted under this chapter shall be valid for one year from the date of issuance thereof unless revoked in accordance with the provisions of this chapter. [S13,§2575-a22; C24, §2373; C27, 31, 35,§3661-a21.]

41GA, ch 79, §8, editorially divided

3661.036 Rules and regulations. It shall be the duty of the state board of social welfare to satisfy itself as to compliance with the conditions required for the issuance of such license and to prescribe such general regulations and rules as to licenses and for the conduct of all such hospitals as shall be necessary to effect the purposes of this chapter and of all other laws of the state relating to children so far as the same are applicable and to safeguard the well-being of all infants born therein and the health, morality, and best interests of the women and children who are inmates therein. [C27, 31, 35, §3661-a22; 47GA, ch 118,§7; 48GA, ch 84,§7.]

3661.037 Form of license. The license shall state the name of the licensee and designate the premises in which the business may be carried on, and the number of women that may properly be treated or cared for therein at any one time. [S13,§§2575-a21,-a22; C24,§2372; C27, 31, 35,§3661-a23.]

41GA, ch 79, §7, editorially divided

3661.038 Posting of license. Such license shall be kept posted in a conspicuous place on the licensed premises. [C27, 31, 35,§3661-a24.]

3661.039 Prohibited acts. No greater number of women shall be kept at any one time on the premises for which the license is issued than is authorized by the license and no woman shall be kept in a building not designated in the license. [C27, 31, 35,§3661-a25.]

3661.040 Record of licenses. A record of the licenses so issued shall be kept by the state board of social welfare. [C27, 31, 35,§3661-a26; 47GA, ch 118,§7; 48GA, ch 84,§7.]

3661.041 Notice of license. The state board of social welfare shall forthwith give notice to the state department of health and to the local board of health of the city, village, or town in which the licensee resides of the granting of

such license and the conditions thereof. [C27, 31, 35,§3661-a27; 47GA, ch 118,§7; 48GA, ch 84, §7.]

3661.042 Revocation of license. The state board of social welfare may revoke any such license under the conditions and by the procedure specified for the revocation of licenses of child-placing agencies. [S13,§2575-a26; C24, §2374; C27, 31, 35,§3661-a28; 47GA, ch 118,§7; 48GA, ch 84,§7.]

Procedure, §§3661.081–3661.086

3661.043 Child placements by maternity hospitals. No person, as an inducement to a woman to go to any maternity hospital during confinement, shall in any way offer to dispose of any child or advertise that he will give children for adoption or hold himself out as being able to dispose of children in any manner. [C27, 31, 35, §3661-a29.]

3661.044 Attending physician. Every birth occurring in a maternity hospital shall be attended by a legally qualified physician. [C27, 31, 35,§3661-a30.]

41GA, ch 79, §10, editorially divided

3661.045 Reports as to births. The licensee owning or conducting such hospital shall (in addition to the report required to be filed with the registrar of vital statistics) within twenty-four hours after a birth occurs therein, make a written report thereof, to the state board of social welfare, giving the information required in the official birth report and such additional information as shall be within the knowledge of the licensee and as may be required by the state board. [S13,§§2575-a23,-a24; C24,§§2375, 2376; C27, 31, 35,§3661-a31; 47GA, ch 118,§7; 48GA, ch 84,§7.]

Referred to in §3661.047
Birth certificate, §2898

3661.046 Reports as to deaths. The licensee owning or conducting any such hospital shall immediately after the death in a maternity hospital of a woman or an infant born therein or brought thereto, cause notice thereof to be given to the state board of social welfare with such details as the state board may require. [S13,§§2575-a23,-a24; C24,§§2375, 2376; C27, 31, 35,§3661-a32; 47GA, ch 118,§7; 48GA, ch 84, §7.]

Referred to in §3661.047

3661.047 Inspection of reports. All reports received by the state department under sections 3661.045 and 3661.046 shall be kept of record and shall be accessible to the state board of social welfare and authorized employees thereof, the attorney general, and any county attorney, but said reports shall not be accessible to any other person except on the order of a court of record. [S13,§2575-a23; C24,§2378; C27, 31, 35, §3661-a33; 47GA, ch 118,§7; 48GA, ch 84,§7.]

3661.048 Records and inspection. The state board of social welfare shall have the same right and duties with respect to maternity hospitals relative to prescribing record forms, requiring reports, and making inspections as are provided in connection with the licensing of child-placing agencies. [C27, 31, 35,§3661-a34; 47GA, ch 118,§7; 48GA, ch 84,§7.]

Forms prescribed, §3661.088
41GA, ch 79, §12, editorially divided

3661.049 Reports and information confidential. Reports and information acquired through the operation of this chapter shall be confidential under the same conditions provided by law in connection with child-placing agencies. [S13, §2575-a23; C24,§2378; C27, 31, 35,§3661-a35.]

Information confidential—conditions, §3661.095

3661.050 Inspections. Officers and authorized agents of the state board of social welfare may inspect the premises and conditions of such agencies at any time and examine every part thereof, and interview the inmates, and may inquire into all matters concerning such hospitals and the women and children in the care thereof. [S13,§2575-a25; C24,§2380; C27, 31, 35,§3661-a36; 47GA, ch 118,§7; 48GA, ch 84,§7.]

3661.051 Minimum inspection. Said officers or authorized agents of the state board of social welfare shall visit and inspect the premises of licensed maternity hospitals at least once every six months and preserve written reports of the conditions found therein. [C27, 31, 35,§3661-a37; 47GA, ch 118,§7; 48GA, ch 84,§7.]

3661.052 Sanitary inspection. Officers and authorized agents of the state department of health and local board of health in the city, village, or town where a licensed maternity hospital is located may make sanitary inspections at any time. [S13,§2575-a25; C24,§§2380, 2381; C27, 31, 35,§3661-a38.]

3661.053 Licensee to grant assistance. The licensee shall give all reasonable information to such inspectors and afford them every reasonable facility for the performance of the duties mentioned. [C27, 31, 35,§3661-a39.]

3661.054 Burden of proof. In a prosecution under the provisions of this law or any penal law relating thereto a defendant who relies for defense upon the relationship of any woman or infant to himself shall have the burden of proof. [C27, 31, 35,§3661-a40.]

3661.055 Penalty. Every person who violates any of the provisions of this chapter or who shall intentionally make any false statements or reports to the state board of social welfare with reference to the matters contained herein, shall be guilty of a misdemeanor and upon conviction shall be fined not to exceed three hundred dollars or imprisoned for a term not to exceed one year. [S13,§2575-a27; C24, §2383; C27, 31, 35,§3661-a41; 47GA, ch 118,§7; 48GA, ch 84,§7.]

CHAPTER 181.4

CHILDREN'S BOARDING HOMES

Referred to in §3661.016. Social welfare department, see ch 181.1

3661.056 "Person" or "agency" defined.
3661.057 "Children's boarding home" defined.
3661.058 Power to license.
3661.059 Conditions to granting.
3661.060 Form of license.
3661.061 Record of license.
3661.062 Notice of granting.
3661.063 License essential.
3661.064 Prohibited acts.
3661.065 Posting of license.
3661.066 Rules and regulations.
3661.067 Tenure of license.
3661.068 Revocation of license.
3661.069 Records and inspection.
3661.070 Burden of proof.
3661.071 Penalty.

3661.056 "Person" or "agency" defined. The words "person" or "agency" where used in this chapter shall include individuals, institutions, partnerships, voluntary associations, and corporations other than institutions under the management of the state board of control or its officers or agents. [C27, 31, 35,§3661-a42.]

41GA, ch 78, §1, editorially divided

3661.057 "Children's boarding home" defined. Any person who receives for care and treatment or has in his custody at any one time more than two children under the age of fourteen years unattended by parent or guardian, for the purpose of providing them with food, care, and lodging, except children related to him by blood or marriage, and except children received by him with the intent of adopting them into his own family, shall be deemed to maintain a children's boarding home. This definition shall not include any person who, without compensation, is caring for children for a temporary period. [C27, 31, 35,§3661-a43.]

3661.058 Power to license. The state board of social welfare is hereby empowered to grant a license for one year for the conduct of any children's boarding home that is for the public good that has adequate equipment for the work which it undertakes, and that is conducted by a reputable and responsible person. [C27, 31, 35,§3661-a44; 47GA, ch 118,§8; 48GA, ch 84,§7.]

41GA, ch 78, §2, editorially divided

3661.059 Conditions to granting. No such license shall be issued unless the premises are in a fit sanitary condition, and the application for such license shall have been approved by the state department of health. [C27, 31, 35,§3661-a45.]

3661.060 Form of license. The license shall state the name of the licensee, the particular premises in which the business may be carried on, and the number of children that may be properly boarded or cared for therein at any one time. [C27, 31, 35,§3661-a46.]

3661.061 Record of license. A record of the licenses so issued shall be kept by the state board of social welfare. [C27, 31, 35,§3661-a47; 47GA, ch 118,§8; 48GA, ch 84,§7.]

3661.062 Notice of granting. The state board of social welfare shall forthwith give notice to the state department of health and to the local board of health of the city, village, or town in which the licensed premises are located of the granting of such license and the conditions thereof. [C27, 31, 35,§3661-a48; 47GA, ch 118,§8; 48GA, ch 84,§7.]

3661.063 License essential. No person shall receive a child for care in any such home or solicit or receive funds for its support unless it* has an unrevoked license issued by the state board of social welfare within twelve months preceding to conduct such home. [C27, 31, 35, §3661-a49; 47GA, ch 118,§8; 48GA, ch 84,§7.]

* According to enrolled act.

3661.064 Prohibited acts. No greater number of children shall be kept at any one time on the licensed premises than is authorized by the license and no child shall be kept in a building or place not designated in the license. [C27, 31, 35,§3661-a50.]

3661.065 Posting of license. Such license shall be kept posted in a conspicuous place on the licensed premises. [C27, 31, 35,§3661-a51.]

3661.066 Rules and regulations. It shall be the duty of the state board of social welfare to provide such general regulations and rules for the conduct of all such homes as shall be necessary to effect the purpose of this and of all other laws of the state relating to children so far as the same are applicable, and to safeguard the well-being of all children kept therein. [C27, 31, 35,§3661-a52; 47GA, ch 118,§8; 48GA, ch 84, §7.]

3661.067 Tenure of license. Licenses granted under this chapter shall be valid for one year from the date of issuance thereof unless revoked in accordance with the provisions of this chapter. [C27, 31, 35,§3661-a53.]

41GA, ch 78, §3, editorially divided

3661.068 Revocation of license. The state board of social welfare may revoke any such license under the conditions and by the procedure specified for the revocation of licenses of child-placing agencies. [C27, 31, 35,§3661-a54; 47GA, ch 118,§8; 48GA, ch 84,§7.]

Procedure, §§3661.081–3661.086

3661.069 Records and inspection. The state board of social welfare shall have the same rights and duties relative to records, reports, and inspections of children's boarding homes as are provided for in connection with maternity hospitals. [C27, 31, 35,§3661-a55; 47GA, ch 118, §8; 48GA, ch 84,§7.]

Records, reports, inspections, §§3661.048, 3661.088

3661.070 Burden of proof. In a prosecution under the provisions of this law or any penal law relating thereto a defendant who relies for defense upon the relationship of any child to himself shall have the burden of proof. [C27, 31, 35,§3661-a56.]

3661.071 Penalty. Every person who violates any of the provisions of this chapter or who intentionally shall make any false statements or reports to the state board of social welfare with reference to the matters contained herein, shall be guilty of a misdemeanor. [C27, 31, 35,§3661-a57; 47GA, ch 118,§8; 48GA, ch 84, §7.]

Punishment, §12894

CHAPTER 181.5

CHILD-PLACING AGENCIES

Referred to in §§3661.016, 10501.1. Social welfare department, see ch 181.1

3661.072 "Person" and "agency" defined.
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3661.110 Exportation of children.
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3661.072 "Person" and "agency" defined. The words "person" or "agency" where used in this chapter shall include individuals, institutions, partnerships, voluntary associations, and corporations, other than institutions under the management of the board of control or its officers or agents. [C27, 31, 35,§3661-a58.]

41GA, ch 80, §1, editorially divided

3661.073 "Child-placing agency" defined. Any agency, public, semipublic, or private, which represents itself as placing children permanently or temporarily in private family homes or as receiving children for such placement, or which actually engages, for gain or otherwise, in such placement, shall be deemed to operate a child-placing agency. [C27, 31, 35,§3661-a59.]

3661.074 Power to license. The state board of social welfare is hereby empowered to grant a license for one year for the conduct of any child-placing agency that is for the public good, and is conducted by a reputable and responsible person. [C27, 31, 35,§3661-a60; 47GA, ch 118, §9; 48GA, ch 84,§7.]

41GA, ch 80, §2, editorially divided

3661.075 Granting of license conditional. No such license shall be issued unless the person applying shall have shown that he and his agents are properly equipped by training and experience to find and select suitable temporary or permanent homes for children and to supervise such homes when children are placed in them, to the end that the health, morality, and general well-being of children placed by them shall be properly safeguarded. [C27, 31, 35, §3661-a61.]

3661.076 License required. No person shall conduct a child-placing agency or solicit or receive funds for its support without an unrevoked license issued by the state board of social welfare within the twelve months preceding to conduct such agency. [C27, 31, 35,§3661-a62; 47GA, ch 118,§9; 48GA, ch 84,§7.]

3661.077 Form of license. The license shall state the name of the licensee and the particular premises in which the business may be carried on. [C27, 31, 35,§3661-a63.]

3661.078 Posting of license. Such license shall be kept posted in a conspicuous place on the licensed premises. [C27, 31, 35,§3661-a64.]

3661.079 Record of license. A record of the licenses so issued shall be kept by the state board of social welfare. [C27, 31, 35,§3661-a65; 47GA, ch 118,§9; 48GA, ch 84,§7.]

3661.080 Tenure of license. Licenses granted under this chapter shall be valid for one year from the date of issuance thereof unless revoked in accordance with the provisions hereof. [C27, 31, 35,§3661-a66.]

41GA, ch 80, §3, editorially divided

3661.081 Revocation of license. The state board of social welfare may, after due notice and hearing, revoke the license:

1. In case the person to whom the same is issued violates any provision of this chapter.

2. When in the opinion of the* state board such agency is maintained in such a way as to waste or misuse funds contributed by the public or without due regard to sanitation or hygiene or to the health, comfort, or well-being of the child cared for or placed by the agency.

3. In case of violation by the licensee or his agents of any law of the state in a manner disclosing moral turpitude or unfitness to maintain such agency.

4. In case any such agency is conducted by a person of ill repute or bad moral character.

5. In case said agency operates in persistent violation of the reasonable regulations of the state board governing such agencies. [S13, §3260-k; C24,§3663; C27, 31, 35,§3661-a67; 47GA, ch 118,§9; 48GA, ch 84,§7.]

* Word "the" inserted editorially.

3661.082 Written charges—findings—notice. Written charges against the licensee shall be served upon him at least ten days before hearing shall be had thereon and a written copy of the findings and decisions of the state board of social welfare upon hearing shall be served upon the licensee in the manner prescribed for the service of original notice in civil actions. [C27, 31, 35,§3661-a68; 47GA, ch 118,§9; 48GA, ch 84, §7.]

Service of notice, §11060

3661.083 Appeal. Any licensee feeling himself aggrieved by any decision of the state board of social welfare revoking his license may appeal to the district court by serving on the state board and filing with the clerk of the district court in the county where his agency is situated, within ten days after written notice of such decision, a written notice of appeal specifying the grounds upon which the appeal is taken. [C27, 31, 35,§3661-a69; 47GA, ch 118, §9; 48GA, ch 84,§7.]

3661.084 Pleadings on appeal. The written notice and decisions shall be treated as the pleadings in the case and may be amended in the discretion of the court. [C27, 31, 35,§3661-a70.]

3661.085 Hearing on appeal. The appeal may be brought on for hearing in a summary manner by either party by an order obtained from the court to show cause why the decision of the state board of social welfare should not be confirmed, amended, or set aside. [C27, 31, 35,§3661-a71; 47GA, ch 118,§9; 48GA, ch 84,§7.]

3661.086 Trial on appeal. The issues shall be tried anew by the court as an equitable proceeding and decree rendered. [C27, 31, 35,§3661-a72.]

How issues tried, §11429 et seq.

3661.087 Rules and regulations. It shall be the duty of the state board of social welfare to provide such general regulations and rules for the conduct of all such agencies as shall be necessary to effect the purposes of this chapter and of all other laws of the state relating to children so far as the same are applicable, and to safeguard the well-being of children placed or cared for by such agencies. [C27, 31, 35,§3661-a73; 47GA, ch 118,§9; 48GA, ch 84,§7.]

3661.088 Forms for registration and record. The state board of social welfare shall prescribe forms for the registration and record of persons cared for by any child-placing agency licensed under this chapter and for reports required by said state board from the agencies. [C27, 31, 35,§3661-a74; 47GA, ch 118,§9; 48GA, ch 84,§7.]

Referred to in §3661.095
41GA, ch 80, §4, editorially divided

3661.089 Duty of licensee. The licensee shall keep a record and make reports in the form to be prescribed by said state board. [C27, 31, 35, §3661-a75; 47GA, ch 118,§9; 48GA, ch 84,§7.]

Referred to in §3661.095

3661.090 Inspection generally. Officers and authorized agents of the state board of social welfare may inspect the premises and conditions of such agency at any time and examine every part thereof; and may inquire into all matters concerning such agencies and the children in the care thereof. [S13,§3260-j; C24,§§3669, 3684; C27, 31, 35,§3661-a76; 47GA, ch 118,§9; 48GA, ch 84,§7.]

Referred to in §3661.095
41GA, ch 80, §6, editorially divided

3661.091 Minimum inspection—record. Said officers and authorized agents of the state board of social welfare shall visit and inspect the premises of licensed child-placing agencies at least once every six months and make and preserve written reports of the conditions found. [C27, 31, 35,§3661-a77; 47GA, ch 118,§9; 48GA, ch 84,§7.]

Referred to in §3661.095

3661.092 Other inspecting agencies. Authorized agents of the state department of health and of the local board of health of the city, village, or town in which a licensed child-placing agency is located may make inspection of the premises. [C27, 31, 35,§3661-a78.]

Referred to in §3661.095

3661.093 Licensee to aid inspection. The licensees shall give all reasonable information to such inspectors and afford them every reasonable facility for obtaining pertinent information. [C27, 31, 35,§3661-a79.]

Referred to in §3661.095

3661.094 Annual report. Every such agency shall file with the state board of social welfare, during the month of January of each year, an annual written or printed report, which shall show:

1. The number of children cared for during the preceding year.
2. The number of children received for the first time and the number returned from families.
3. The number placed in homes.
4. The number deceased.
5. The number placed in state institutions.
6. The number returned to friends.
7. The number and names and number of months of each of those attending school.

8. A statement showing the receipts and disbursements of such agency.

9. The amount expended for salaries and other expenses, specifying the same.

10. The amount expended for lands, buildings, and other investments.

11. Such other information as the state board may require. [S13,§3260-j; C24,§3670; C27, 31, 35,§3661-a80; 47GA, ch 118,§9; 48GA, ch 84,§7.]

Referred to in §3661.095

3661.095 Information confidential. No individual who acquires through the operation of the provisions of sections 3661.088 to 3661.094, inclusive, of this chapter, or from the records provided for in this chapter, information relative to any agency or relative to any person cared for by such agency or relative to any relative of any such person, shall directly or indirectly disclose such information except upon inquiry before a court of law, in a coroner's inquest, or before some other tribunal, or for the information of the governor, general assembly, state board of social welfare, state department of health, or the local board of health where such agency is located.

Nothing herein shall prohibit the state board from disclosing such facts to such proper persons as may be in the interest of a child cared for by such agency or in the interest of the child's parents or foster parents and not inimical to the child, or as may be necessary to protect the interests of the child's prospective foster parents.

Nothing herein shall prohibit the statistical analysis by duly authorized persons of data collected by virtue of this chapter or the publication of the results of such analysis in such manner as will not disclose confidential information. [C27, 31, 35,§3661-a81; 47GA, ch 118,§9; 48GA, ch 84, §7.]

3661.096 Assumption of care and custody. No person other than the parents or relatives of the child within the fourth degree may assume the permanent care and custody of a child under fourteen years of age except in accordance with the provisions of this chapter. [C27, 31, 35, §3661-a82.]

Adoption, ch 473
41GA, ch 80, §8, editorially divided

3661.097 Relinquishment of rights and duties. No person may assign, relinquish, or otherwise transfer to another his rights, or duties with respect to the permanent care or custody of a child under fourteen years of age unless specifically authorized or required so to do by an order or decree of court, or unless the parent or parents sign a written release attested by two witnesses, of the permanent care and custody of the child to an agency licensed by the state board of social welfare. [S13,§3260-c; C24,§3665; C27, 31, 35,§3661-a83; 47GA, ch 118, §9; 48GA, ch 84,§7.]

3661.098 Relinquishment by one parent. Neither parent may sign such release without the written consent of the other unless the other is dead or hopelessly insane, or for one year immediately preceding has been under indictment for abandoning the family, or is imprisoned for crime, or is an inmate or keeper of a house of ill fame, or has been deprived of the custody of the child by judicial procedure because of unfitness to be its guardian, or unless the parents are not married to each other. [S13,§3260-c; C24,§3665; C27, 31, 35,§3661-a84.]

3661.099 Relinquishment, parents not married. If the parents are not married to each other, the parent having the care and providing for the wants of the child may sign the release. [S13,§3260-c; C24,§3665; C27, 31, 35,§3661-a85.]

3661.100 Recovery after relinquishment. Children so surrendered may not be recovered by the parents except through decree of court based upon proof that the child is neglected by its foster parent, guardian, or custodian, as neglect is defined by the statute relating to neglected children. [C27, 31, 35,§3661-a86.]

Neglected child defined, §3618

3661.101 Reports as to placements. Every month every child-placing agency licensed by the state board of social welfare shall report to the state board the names of all children placed out by the agency since its preceding monthly report, together with the name and address of the person with whom each child has been placed, and such other information regarding the child and its foster home as may be required by the state board. [C27, 31, 35,§3661-a87; 47GA, ch 118,§9; 48GA, ch 84,§7.]

41GA, ch 80, §9, editorially divided

3661.102 Inspection of foster homes. The state board of social welfare shall satisfy itself that each licensed child-placing agency is maintaining proper standards in its work, and said state board may at any time cause the child and home in which he has been placed to be visited by its agents for the purpose of ascertaining whether the home is a suitable one for the child, and may continue to visit and inspect the foster home and the conditions therein as they affect said child. [C27, 31, 35,§3661-a88; 47GA, ch 118, §9; 48GA, ch 84,§7.]

3661.103 Authority to agencies. Any institution incorporated under the laws of this state or maintained for the purpose of caring for, placing out for adoption, or otherwise improving the condition of unfortunate children may, under the conditions specified in this chapter and when licensed in accordance with the provisions of this chapter:

1. Receive neglected, dependent, or delinquent children who are under eighteen years of age, under commitment from the juvenile court, and control and dispose of them subject to the provisions of chapter 180.

2. Receive neglected, dependent, and delinquent children under twenty-one and over eighteen years of age, under commitment from the juvenile court, and control and dispose of them as in this chapter provided.

3. Receive, control, and dispose of all minor children voluntarily surrendered to such institutions. [S13,§§254-a22, 3260-b; C24,§3662; C27, 31, 35,§3661-a89.]

Referred to in §3666
Commitment of adults, §3677
Juvenile commitments, §§3637, 3666

3661.104 Importation of children. No agency shall bring into the state any child for the purpose of placing him out or procuring his adoption without first obtaining the consent of the state board of social welfare, and such agency shall conform to the rules of the state board. [S13, §3260-l; C24,§3672; C27, 31, 35,§3661-a90; 47GA, ch 118,§9; 48GA, ch 84,§7.]

Referred to in §3661.110
41GA, ch 80, §11, editorially divided

3661.105 Bond—conditions. It shall file with the state board of social welfare a bond to the state, approved by the state board, in the penal sum of one thousand dollars, conditioned that it will not knowingly send or bring into the state any child who has a contagious or incurable disease or who is deformed, feeble-minded, or of vicious character; that it will remove any such child who, in the opinion of the state board, becomes a public charge, or who, in the opinion of the state board, becomes a menace to the community prior to his adoption or within five years after being brought into the state, or who, in the opinion of the state board, has been placed in an unsuitable home; that it will place the child under a written contract approved by the state board that the person with whom the child is placed shall be responsible for his proper care and training. [S13,§3260-l; C24,§§3672, 3673; C27, 31, 35,§3661-a91; 47GA, ch 118,§9; 48GA, ch 84,§7.]

3661.106 Liquidated damages. In the case of a breach of said bond a conclusive presumption shall prevail that the amount of said bond was intended to constitute liquidated damages. [C24,§3674; C27, 31, 35,§3661-a92.]

3661.107 Notice of intent to import child. Before any child shall be brought or sent into the state for the purpose of placing him in a foster home, the agency so bringing or sending such child shall first notify the state board of social welfare of its intention so to do, which notification shall state the name, age, and personal description of the child and the name and address of the person with whom the child is to be placed, and such other information as may be required by the state board. [S13,§3260-l; C24, §3672; C27, 31, 35,§3661-a93; 47GA, ch 118,§9; 48GA, ch 84,§7.]

Referred to in §3661.110

3661.108 Reports as to imported child. The person bringing or sending the child into the state shall report at least once a year and at such other times as the state board of social welfare shall direct, as to the location and well-being of the child so long as he shall remain within the state and until he shall have reached the age of eighteen or shall have been legally adopted. [C27, 31, 35,§3661-a94; 47GA, ch 118, §9; 48GA, ch 84,§7.]

3661.109 Exception. Nothing herein shall be deemed to prohibit a resident of this state from bringing into the state a child for adoption into his own family. [S13,§3260-l; C24, §3675; C27, 31, 35,§3661-a95.]

3661.110 Exportation of children. Before any child is taken out or sent out of the state for the purpose of placing him in a foster home, otherwise than by parent or guardian, the person or agency so taking or sending him shall give the state board of social welfare such notice and information and procure such consent as is specified in sections 3661.104 and 3661.107, and thereafter shall report to the state board at least once each year, and at such other times as the state board shall direct, as to the location and well-being of the child until he shall have reached the age of eighteen years or shall have been legally adopted. [C27, 31, 35,§3661-a96; 47GA, ch 118,§9; 48GA, ch 84,§7.]

3661.111 Agreement in child placements. Every agency placing a child in a foster home shall enter into a written agreement with the person taking the child, which agreement shall provide that the agency placing the child shall have access at all reasonable times to such child and to the home in which he is living, and for the return of the child by the person taking him whenever, in the opinion of the agency placing such child, or in the opinion of the state board of social welfare, the best interests of the child shall require it. [C27, 31, 35,§3661-a97; 47GA, ch 118, §9; 48GA, ch 84,§7.]

Referred to in §3661.112
41GA, ch 80, §13, editorially divided

3661.112 Exceptions. The provisions of section 3661.111 shall not apply to children who have been legally adopted. [C27, 31, 35,§3661-a98.]

3661.113 Burden of proof. In a prosecution under the provisions of this chapter or any penal law relating thereto, a defendant who relies for defense upon the relationship of any woman or child to himself shall have the burden of proof. [C27, 31, 35,§3661-a99.]

3661.114 Penalty. Every person who violates any of the provisions of this chapter or who intentionally shall make any false statements or reports to the state board of social welfare with reference to the matters contained herein, shall be guilty of a misdemeanor and upon conviction shall be punished accordingly. [C27, 31, 35,§3661-a100; 47GA, ch 118,§9; 48GA, ch 84,§7.]

Punishment, §12894

CHAPTER 182

PRIVATE INSTITUTIONS FOR NEGLECTED, DEPENDENT, AND DELINQUENT CHILDREN

Social welfare department, see ch 181.1

3666 Children under eighteen years old.
3667 School facilities.
3668 Revocation of commitment.
3671 Commitments prohibited.
3676 Monthly allowance.
3677 Commitments in lieu of jail sentence.
3678 Commitment subsequent to sentence.
3679 Surrender of female.
3680 Release on bond.
3681 Custody and control—labor.
3682 "Institution" defined.
3683 Supervision.

3662 to 3665, inc. Rep. by 41GA, ch 80

3666 Children under eighteen years old. Any reputable citizen of the county may file a petition with the juvenile court as provided in chapter 180, against any neglected, dependent, or delinquent minor child who is under the age of eighteen years and therein ask that said child be committed to any institution named in section 3661.103, or otherwise dealt with as may appear best for the welfare of said child, and in such case the procedure shall, so far as applicable, be as provided in said chapter, except that such child shall not be committed thereunder to any state institution. [C24, 27, 31, 35, §3666; 47GA, ch 118,§9.]

3667 School facilities. All children in such institutions, over seven years and under fourteen years of age, shall be kept in school during the school sessions of the district in which such child is kept, or in some parochial school for a like period. [S13,§3260-d; C24, 27, 31, 35,§3667.]

3668 Revocation of commitment. The juvenile court of the county in which an institution is located may at any time revoke a commitment to such institution when it is made to appear that the trust imposed has been abused, or that the welfare of the child requires such revocation. [S13,§3260-k; C24, 27, 31, 35,§3668.]

3669, 3670 Rep. by 41GA, ch 80

3671 Commitments prohibited. No child shall be committed to the care of any such institution which shall fail to file with the state board of social welfare a satisfactory report for the calendar year last preceding, unless it be an institution organized within the current year. [S13,§3260-j; C24, 27, 31, 35,§3671; 47GA, ch 118,§10; 48GA, ch 84,§7.]

3672 to 3675, inc. Rep. by 41GA, ch 80

3676 Monthly allowance. The institution receiving and caring for a child under eighteen years of age and under commitment from the juvenile court, shall receive, from the county of the legal settlement of such child, a monthly allowance of not to exceed sixteen dollars. [S13, §2713-3a; C24, 27, 31, 35,§3676.]

3677 Commitments in lieu of jail sentence. When any court may pronounce sentence committing any female to any jail, such female may be committed to any institution as herein provided, if such institution is willing to receive her, without expense to the state, but such commitment shall not exceed the maximum jail sentence. [S13,§5442-a; C24, 27, 31, 35,§3677.]

Referred to in §3682

3678 Commitment subsequent to sentence. If the court has already committed such female to a jail and thereafter it appears that any such institution is willing to receive her under a commitment, and under the conditions herein imposed, the court may make an additional order, releasing her from such jail and ordering her committed to such institution for the unexpired time of the original commitment. [S13, §5442-a; C24, 27, 31, 35,§3678.]

Referred to in §3682

3679 Surrender of female. Any such female may be surrendered at any time to the court, judge, or presiding magistrate making the original order, which court, judge, or magistrate may make a further order committing the accused to a proper jail for the unexpired term of the original commitment. [S13,§5442-a; C24, 27, 31, 35,§3679.]

Referred to in §3682

3680 Release on bond. If, after any female is so committed to such institution, a bond is given under which such female is entitled to a release from such commitment, such female shall be released by an order issued by the officer approving said bond. [S13,§5442-b; C24, 27, 31, 35,§3680.]

Referred to in §3682

3681 Custody and control—labor. Any such female committed to an institution as herein provided shall be in the legal custody and control of the immediate managing head, and such female, whether the commitment so provides or not, shall, while being held under such commitment, perform such reasonable, fit, and proper labor as such managing head may direct, which labor shall be the sole compensation to such institution for the keep of such female. [S13,§5442-c; C24, 27, 31, 35,§3681.]

Referred to in §3682

3682 "Institution" defined. The term "institution" as used in sections 3677 to 3681, inclusive, shall embrace any institution having for its object, in whole or in part, the furnishing of relief, care, and assistance to the poor, destitute, needy, or unfortunate, or any other charitable or benevolent object. [S13,§5442-c; C24, 27, 31, 35,§3682.]

3683 Supervision. Any institution having any such female in its custody shall be subject to supervision and inspection by the state board of social welfare to the same extent as the other institutions named in this chapter. [S13,§5442-d; C24, 27, 31, 35,§3683; 47GA, ch 118,§10; 48GA, ch 84,§7.]

3684 Rep. by 41GA, ch 80

CHAPTER 182.1

AID FOR THE BLIND

Commission for blind, see ch 76.1. Social welfare department, see ch 181.1

3684.01 Definitions.
3684.02 Eligibility for assistance to the needy blind.
3684.03 Amount of assistance.
3684.04 Powers and duties of state board.
3684.05 Duties of the county boards.
3684.06 Application for assistance.
3684.07 Investigation of applications.
3684.08 Examination by ophthalmologist.
3684.09 Granting of assistance.
3684.10 Assistance not assignable.
3684.11 Appeal to the state board.
3684.12 Periodic reconsideration — changes in amount of assistance.
3684.13 Re-examination as to eyesight.
3684.14 Expenses for treatment.
3684.15 Guardianship.
3684.16 Recovery from recipient.
3684.17 Funeral expenses.
3684.18 Reimbursement from estate.
3684.19 Misdemeanor.
3684.20 County appropriation.
3684.21 Fund for aid to the blind—reimbursement to state.
3684.22 Removal to another county.
3684.23 Other dependents.
3684.24 Short title.

3684.01 Definitions. The terms "state board", and "county board", are used in this chapter as said terms are defined in section 3661.002; and as used in this chapter:

"Applicant" means a person who has applied for assistance under this chapter;

"Recipient" means a person who has received assistance under this chapter;

"Assistance" means money payments to blind persons in need;

A "blind person" within the meaning of this chapter shall be one who has no vision, or whose vision with corrective glasses is so defective as to prevent the performance of ordinary activities for which eyesight is essential. [47GA, ch 144,§2.]

3684.02 Eligibility for assistance to the needy blind. Assistance shall be granted under the provisions of this chapter to any blind person who:

1. Is eighteen years of age or over;
2. Is a citizen of the United States, or has made application for citizenship;
3. Has resided in the state of Iowa for at least five years during the nine years immediately preceding the date of the application for assistance under the provisions of this chapter, and has resided therein one year immediately preceding the application for assistance. If, however, such person has become blind while a resident of the state or is blind and a resident of the state at the time of the passage of this chapter, he is eligible even though he has not resided for five years within the state;
4. Is not an inmate of a public institution. An inmate of such an institution may, however, make application for such assistance, but the assistance, if granted, shall not begin until after he ceases to be an inmate;
5. Is not soliciting alms in any part of the state;
6. Is not receiving old-age assistance;
7. Has not made an assignment or transfer of property for the purpose of rendering himself eligible for assistance under this chapter;
8. Has not sufficient income or other resources to provide a reasonable subsistence consistent with decency and health. [SS15,§§2722-i,-j,-k; C24, 27, 31, 35,§5379; 47GA, ch 144,§3.]

3684.03 Amount of assistance. The amount of assistance which any person shall receive shall be determined with due regard to the resources and necessary expenditures of the individual and the conditions existing in such case, and in accordance with the rules and regulations made by the state board, and shall be sufficient, when added to all other income and support of the recipient, to provide such person with a reasonable subsistence consistent with decency and health, but in no event shall the amount of said assistance exceed thirty dollars per month.

In determining the amount of said assistance, the personal earnings of any blind person to the amount of thirty dollars per month shall be disregarded.

In the event federal participation shall be granted in excess of fifteen dollars per month per recipient, the state maximum may be increased to such amount as will qualify the state for full federal participation. [SS15,§2722-j; C24, 27, 31, 35,§5379; 47GA, ch 144,§4; 48GA, ch 144,§1.]

3684.04 Powers and duties of state board. The state board shall:

1. Be the responsible authority for the efficient and impartial administration of this chapter. To this end the state board shall formulate and establish such rules and regulations, outline such policies, prescribe such procedure, and delegate such powers as may be necessary to carry out the provisions and purposes of this chapter;
2. Prescribe, for the guidance of county boards, the qualifications and capabilities required of county board employees, consistent with the provisions of section 3661.013;
3. Designate the procedure to be followed in securing a competent examination for the purpose of determining blindness and the cause of blindness in the individual applicant for assistance; designate a suitable number of ophthalmologists to examine applicants and recipients of assistance to the blind; fix the fees to be paid to ophthalmologists for examination of applicants, such fees to be paid from administration funds;
4. Cooperate with the federal social security board, created under title VII of the social se-

curity act, approved August 14, 1935, or any other agency of the federal government, in any reasonable manner as may be necessary to qualify for federal aid and assistance to the needy blind and in conformity with the provisions of this chapter; including the making of such reports in such form and containing such information as the federal social security board, or any other agency of the federal government, may from time to time find necessary to assure the correctness and verification of such reports;

5. Cooperate with other agencies in developing measures for the prevention of blindness, the restoration of eyesight and the vocational adjustment of blind persons. [47GA, ch 144,§5.]

3684.05 Duties of the county boards. The county boards shall:

1. Perform such services and duties as are prescribed by this chapter and by the rules and regulations of the state board;

2. Report to the state board at such time and in such manner and form as the state board may from time to time direct;

3. Submit to the county board of supervisors, after approval by the state board, a budget containing an estimate and supporting data, setting forth the amount of money needed to carry out the provisions of this chapter in the county. [47GA, ch 144,§6.]

3684.06 Application for assistance. Application for assistance under this chapter shall be filed with the county board of the county in which the applicant resides. The application shall be in writing upon the form prescribed by the state board. Such application shall contain a statement of the amount of property, both personal and real, in which the applicant has an interest and of all sources and amounts of income which he may have, either in existence or expectancy, at the time of the filing of the application, and such other information as may be required by the state board. [SS15,§2722-n; C24, 27, 31, 35,§5382; 47GA, ch 144,§7.]

3684.07 Investigation of applications. Whenever the county board receives an application for assistance under this chapter, an investigation and record shall promptly be made of the circumstances of the applicant in order to ascertain the facts supporting the application and in order to obtain such other information as may be required by the rules of the state board. [47GA, ch 144,§8.]

3684.08 Examination by ophthalmologist. No application shall be approved until the applicant has been examined by an ophthalmologist designated or approved by the state board to make such examinations. The examining ophthalmologist shall certify to the county board in writing upon forms provided by the state board the findings of the examination, which findings shall be transmitted to the state board. [SS15,§§2722-l,-m; C24, 27, 31, 35,§§5380, 5381; 47GA, ch 144, §9.]

Referred to in §3684.14

3684.09 Granting of assistance. Upon the completion of such investigation the county board shall make findings of fact as to the eligibility of the applicant for assistance under the provisions of this chapter and shall recommend in accordance with the rules and regulations of the state board the amount of assistance which should be granted. This report, together with a copy of the report of the ophthalmologist, shall be forwarded to the state board. The state board may make such further investigation as it may deem desirable and, upon the basis of such reports and investigation, shall determine whether the applicant is eligible for assistance under the terms of this chapter, and, if eligible, the amount of such assistance and the date on which such assistance shall begin. The state board shall notify the county board of its decision, and the county board shall promptly notify the applicant thereof. Such assistance shall be paid monthly to the applicant upon the order of the state board, from the fund for the aid of the blind established by this chapter. [SS15,§2722-p; C24, 27, 31, 35,§5384; 47GA, ch 144,§10.]

3684.10 Assistance not assignable. Assistance granted under this chapter shall not be transferable or assignable at law or in equity, and none of the money paid or payable under this chapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. [47GA, ch 144, §11.]

3684.11 Appeal to the state board. If an application is not acted upon by the county board within a reasonable time after the filing of the application, or is denied in whole or in part, or if any award of assistance is modified or canceled under any provision of this chapter, the applicant or recipient may appeal to the state board in the manner of form prescribed by the state board. The state board shall, upon receipt of such an appeal, give the applicant or recipient reasonable notice and opportunity for a fair hearing before the state board or its duly authorized representative or representatives. [47GA, ch 144,§12; 48GA, ch 84,§9.]

3684.12 Periodic reconsideration — changes in amount of assistance. All assistance grants made under this chapter shall be reconsidered by the county board as frequently as may be required by the rules of the state board. After such further investigation as the county board may deem necessary or the state board may require, the county board shall make further report to the state board and the amount of assistance may be changed or assistance may be entirely withdrawn if the state board finds that the recipient's circumstances have altered sufficiently to warrant such action. [47GA, ch 144,§13.]

3684.13 Re-examination as to eyesight. A recipient shall submit to a re-examination as to his eyesight when required to do so by the county board or state board. He shall also furnish any information required by the county board or the state board. [47GA, ch 144,§14.]

3684.14 Expenses for treatment. On the basis of the finding of the ophthalmologist's examination as provided in section 3684.08, supplementary services may be provided by the state board to any applicant or recipient who is in need of treatment either to prevent blindness or to restore his eyesight, whether or not he is a blind person as defined in this chapter, if he is otherwise qualified for assistance under this chapter. The supplementary services may include necessary traveling and other expenses to receive treatment from a hospital or clinic designated by the state board. [47GA, ch 144, §15.]

3684.15 Guardianship. When in the opinion of the county board the recipient of assistance under the provisions of this chapter is for any cause unable to use the assistance judiciously, the county board shall request the district court to appoint a guardian to administer such assistance for the benefit of the recipient. [C24, 27, 31, 35,§5384; 47GA, ch 144,§16.]

3684.16 Recovery from recipient. If at any time during the continuance of assistance the recipient thereof becomes possessed of any property or income in excess of the amount stated in the application provided for in this chapter, it shall be the duty of the recipient immediately to notify the county board of the receipt or possession of such property or income and the county board shall, if in its judgment the circumstances so require, recommend to the state board the immediate suspension of assistance payments and, after investigation, shall recommend to the state board that such assistance be continued, modified, or canceled, as the circumstances may require. Any assistance paid after the recipient has come into possession of such property or income in excess of his need shall be recoverable by the state as a debt due, and upon recovery the state shall repay to the county that portion of the amount so recovered which is equal to the amount paid by the county for such assistance. [47GA, ch 144,§17.]

3684.17 Funeral expenses. On the death of any person receiving aid under the provisions of this chapter, the reasonable funeral expenses for his burial may be paid by the state board; provided, such expenses do not exceed one hundred dollars and the estate of the deceased or any life insurance or death or funeral benefit association or society payment, made by reason of the death of such person, payable to his estate or the spouse or any relative responsible under sections 3828.074, 3828.077, and 10501.6, is insufficient to defray the same. The person to whom such funeral expense is paid as above provided is hereby prohibited from soliciting, accepting or contracting to receive any further compensation for services rendered in connection with such burial except on written approval of the county board and subject to such rules and regulations as the state board shall prescribe. [47GA, ch 144,§18.]

3684.18 Reimbursement from estate. Whenever it appears, after the death of any person who has received aid under the provisions of this chapter, that his estate, after deducting the exemptions now allowed by law, has property over and above a sufficient amount to pay the expenses of his burial and last sickness, such property shall be charged with the amount paid under this chapter to such person during his lifetime, or for his burial. The amount so paid shall be allowed as a claim against his estate in favor of the state, and upon recovery the state shall repay to the county its proportionate share of the amount paid for such assistance and funeral expenses. An action may be brought in the name of the state to recover the same at any time within five years after the death of the person receiving aid as above provided. [C27, 31, 35,§5384-a1; 47GA, ch 144,§19.]

3684.19 Misdemeanor. Any person who shall obtain aid under this chapter by misrepresentation or failure with fraudulent intent, to bring forth all the facts required of an applicant for aid under the provisions of this chapter, or any person who shall knowingly make false statements concerning the applicant's eligibility for aid under the provisions of this chapter, shall be guilty of a misdemeanor, punishable as such. [47GA, ch 144,§20.]

Punishment, §12894

3684.20 County appropriation. The county board of supervisors in each county in this state shall appropriate annually, and pay in the manner hereinafter specified from the county poor fund, such sum as will result in the payment by such county of one-fourth of all administrative expenses within the county incident to aid to the blind, as determined and certified by the state board, other than compensation of members of the county board and their expenses, and one-fourth of all assistance and benefits payable to blind persons resident within the county under this chapter, and shall include in the tax levy for such county the sum or sums so appropriated for that purpose. The sums necessary as above provided shall be determined upon the basis of an annual budget prepared by the county board and approved by the state board. Should the sum so appropriated, however, be expended or exhausted during the year for which it was appropriated, such additional sums shall be appropriated by the board of supervisors from the county poor fund as shall be sufficient to meet the obligation of the county to pay one-fourth of all assistance and benefits to the blind within the county and one-fourth of the administrative expenses as above provided. The tax levy provided for in this section shall not exceed statutory tax limitations now or hereafter provided. [47GA, ch 144,§21.]

3684.21 Fund for aid to the blind—reimbursement to state. There is hereby established in the state treasury a fund to be known as the "fund for aid to the blind" to which shall be credited all funds appropriated by the state for the payment of administrative expenses, assistance, and benefits under this chapter, all moneys received from the federal government for

such purpose and all funds paid by the counties to the state board as provided by this section. All assistance and benefits under this chapter, and the administrative expenses incident thereto, so far as the same are payable by the state board, shall be paid from said fund. The state board shall report to the county board each month the total amount of assistance and benefits paid during the preceding month to recipients residing within the county, and the amount of the administrative expenses paid by the state which are incident thereto. The county board shall promptly report the same to the county board of supervisors which shall then order paid to the state board from the county poor fund an amount equal to twenty-five percent of the total, which payment shall be credited to the fund for aid to the blind. [47GA, ch 144, §22.]

3684.22 Removal to another county. When any recipient moves to another county he shall be entitled to continue to receive assistance which shall be chargeable to the county from which he has removed, for a period of six months and shall thereafter be charged to the county in which he then resides. [47GA, ch 144, §23.]

3684.23 Other dependents. This chapter shall not be so construed as to exclude the spouse, minor children or other dependents of a recipient under the provisions of this chapter from receiving other forms of relief, aid or assistance, paid through any agency of the state or any of its political subdivisions. [47GA, ch 144,§24.]

Constitutionality, 47 GA, ch 144, §25

3684.24 Short title. This chapter may be cited as "Aid to the Needy Blind Act of 1937". [47GA, ch 144,§26.]

CHAPTER 183

TRAINING SCHOOLS

3685 Official designation.
3686 Superintendent—powers and duties.
3687 Salary.
3688 Instruction and employment.
3689 Procedure to commit.
3690 Conviction for crime.
3691 Placing in families.
3692 Articles of agreement.
3693 Resuming custody of child.
3694 Unlawful interference.
3695 County attorney to appear for child.
3696 Discharge or parole.
3697 Binding out or discharge.

3685 Official designation. The state training school at Eldora shall be known as the "Iowa Training School for Boys". The state training school at Mitchellville shall be known as the "Iowa Training School for Girls". [S13, §2701-a; C24, 27, 31, 35,§3685.]

3686 Superintendent — powers and duties. The superintendent shall have charge and custody of the inmates of the school. He shall discipline, govern, instruct, employ, and use his best endeavors to reform the pupils in his care, so that, while preserving their health, he may promote, as far as possible, moral, religious, and industrious habits, and regular, thorough, and progressive improvement in their studies, trade, and employment. [C73,§§1651, 1652; C97,§2707; S13,§2707; C24, 27, 31, 35, §3686.]

3687 Salary. The salary of the superintendent of the state training school for boys shall be twenty-five hundred dollars per year, and the salary of the superintendent of the state training school for girls shall be two thousand dollars per year. [S13,§2727-3a; C24, 27, 31, 35, §3687.]

3688 Instruction and employment. The board of control shall cause the boys and girls in said schools to be instructed in piety and morality, in such instruction on the constitutions of the United States and of this state as is required in the common schools, and in such branches of useful knowledge as are adapted to their age and capacity, including the effect of alcoholic liquors, stimulants, and narcotics on the human system, and in some regular course of labor, either mechanical, agricultural, or manufactural, as is best suited to their age, strength, disposition, capacity, reformation, and well-being. [C73,§1648; C97,§2706; C24, 27, 31, 35,§3688.]

3689 Procedure to commit. The procedure for the commitment of children to the state training school, except as otherwise provided, shall be the same as provided in chapter 180. [C73,§§1653-1659; C97,§§2708, 2709; S13, §§2708, 2709; C24, 27, 31, 35,§3689.]

3690 Conviction for crime. When a boy or girl over ten and under eighteen years of age, of sound mind, is found guilty in the district court of any crime except murder, the court may order the child sent to the state training school for boys, or for girls, as the case may be. [C73, §§1653, 1654; C97,§2708; S13,§2708; C24, 27, 31, 35,§3690.]

3691 Placing in families. All children committed to and received in the training schools may, with the written approval of the board of control, be placed by the superintendent with any persons or in families of good standing and character where they will be properly cared for and educated. [C73,§1649; C97,§2704; S13, §2704; C24, 27, 31, 35,§3691.]

Referred to in §3695

3692 Articles of agreement. Such children shall be so placed under articles of agreement, approved by the board of control and signed by

the person or persons taking them and by the superintendent. Said articles shall provide for the custody, care, education, maintenance, and earnings of said children for a time to be fixed in said articles, which shall not extend beyond the time when the persons bound shall attain the age of twenty-one years. [C73,§1649; C97,§2704; S13,§2704; C24, 27, 31, 35,§3692.]

Referred to in §3695

3693 Resuming custody of child. In case a child so placed be not given the care, education, treatment, and maintenance required by such agreement, the board of control may cause the child to be taken from the person with whom placed and returned to the institution, or may replace, release, or finally discharge him as may seem best. [C73,§1649; C97,§2704; S13,§2704; C24, 27, 31, 35,§3693.]

Referred to in §3695

3694 Unlawful interference. It shall be unlawful for any parent or other person not a party to such placing of a child to interfere in any manner or assume or exercise any control over such child or his earnings. Said earnings shall be used, held, or otherwise applied for the exclusive benefit of such child. [S13,§2704; C24, 27, 31, 35,§3694.]

Referred to in §3695

3695 County attorney to appear for child. In case legal proceedings are necessary to enforce any right conferred on any child by sections 3691 to 3694, inclusive, the county attorney of the county in which such proceedings should be instituted shall, on request of the superintendent, approved by the board of control, institute and carry on, in the name of the superintendent, the proceedings in behalf of the superintendent. [S13,§2704; C24, 27, 31, 35,§3695.]

3696 Discharge or parole. The board of control may at any time after one year's service order the discharge or parole of any inmate as a reward for good conduct, and may, in exceptional cases, discharge or parole inmates without regard to the length of their service or conduct, when satisfied that the reasons therefor are urgent and sufficient. If paroled upon satisfactory evidence of reformation, the order may remain in effect or terminate under such rules as the board may prescribe. [C73,§§1660, 1661; C97, §2711; S13,§2711; C24, 27, 31, 35,§3696.]

3697 Binding out or discharge. The binding out or the discharge of an inmate as reformed, or having arrived at the age of twenty-one years, shall be a complete release from all penalties incurred by the conviction for the offense upon which the child was committed to the school. [C73,§1661; C97,§2711; S13,§2711; C24, 27, 31, 35,§3697.]

CHAPTER 184

IOWA JUVENILE HOME

3698 Objects.
3699 Procedure for commitment.
3700 Voluntary applications.
3701 Transfers.
3702 Adoption or placing under contract.
3703 Counties liable for support.

3698 Objects. The Iowa juvenile home shall be maintained for the care, custody, and education of children therein, who shall be wards of the state. Such education shall embrace instruction in the common school branches, in such other higher branches as may be practical, and in such manual training, as shall best fit and develop such children and render them self-sustaining. Instruction may also be given in elementary military tactics. [C24, 27, 31, 35,§3698.]

3699 Procedure for commitment. The procedure for the commitment of such children to said home shall be the same as provided in chapter 180. [C24, 27, 31, 35,§3699.]

3700 Voluntary applications. Children of the class which might be admitted to said home by the juvenile court may be admitted to said home on voluntary application signed by the legal custodian of such children, and approved in writing by the board of supervisors of the county where such child has a legal residence. Such application shall be subject to the approval of the board of control and shall be in such form as it may prescribe. [C24, 27, 31, 35,§3700.]

3701 Transfers. Transfers to and from the juvenile home may be made as provided in the chapter relating to the soldiers' orphans home. [C24, 27, 31, 35,§3701.]

Transfers authorized, §3710

3702 Adoption or placing under contract. Children in the juvenile home may be adopted under chapter 473, or placed with other persons under contract, and repossessed by the board for other disposition, in the same manner and with the same effect as provided in the chapter relating to the soldiers' orphans home. The provisions of said chapter which prohibit interference with said children while under contract shall also apply to children committed to or received in the juvenile home. [C24, 27, 31, 35, §3702.]

Placement, §§3716, 3719

3703 Counties liable for support. Each county shall be liable for sums paid by the home in support of all children committed or received from said county to the extent of one-half of the per capita cost per month for each child, and when the average number of children is less than two hundred ninety-two in any month, each

county shall be liable for its just proportion for each child of the amount credited to the home for that month. The sum for which each county is so liable shall be charged to the county, and collected as a part of the taxes due the state, and paid by the county at the same time state taxes are paid. [C24, 27, 31, 35,§3703.]

3704, 3705 Rep. by 41GA, ch 69

CHAPTER 185

IOWA SOLDIERS' ORPHANS HOME

3706 Objects.
3707 Salary.
3708 Admissions.
3709 Procedure.
3710 Transfers.
3711 Profits and earnings.
3712 Regulations.
3713 Enumeration of soldiers' orphans.
3715.1 Adoption.
3716 Placing child under contract.
3717 Recovery of possession.
3718 Recovery of child—duty of county attorney.
3719 Interference with child.
3720 Counties liable.

3706 Objects. The Iowa soldiers' orphans home shall be maintained for the purpose of providing for children therein a common school education and such useful and regular employment and training as will enable them to be self-sustaining. The board of control and superintendent of the home shall assist all discharged children in securing suitable homes and proper employment. [C97,§2689; C24, 27, 31, 35,§3706.]

3707 Salary. The salary of the superintendent of said home shall be twenty-four hundred dollars per year. [S13,§2727-3a; C24, 27, 31, 35,§3707.]

3708 Admissions. Admission to said home shall be granted to resident children of the state under eighteen years of age, as follows, giving preference in the order named:

1. Destitute children, and orphans unable to care for themselves, of soldiers, sailors, or marines.
2. Neglected or dependent children committed thereto by the juvenile court.
3. Other destitute children. [C97,§2685; S13, §2685; C24, 27, 31, 35,§3708.]

3709 Procedure. The procedure for commitment to said home shall be the same as provided by chapter 180, but admission may be granted on voluntary applications signed by the legal custodian of the child and approved by a judge of a court of record, or by the board of supervisors, of the county of the child's residence. Such applications shall be subject to the approval of the board of control and shall be in such form as it may prescribe. [C97,§2685; S13, §2685; C24, 27, 31, 35,§3709.]

3710 Transfers. The board of control may transfer to the home minor wards of the state from any institution under its charge; but no person shall be so transferred who is not mentally normal, or who is incorrigible, or has any vicious habits, or whose presence in the home would be inimical to the moral or physical welfare of normal children therein, and any such child in the home may be transferred to the proper state institution. [C24, 27, 31, 35,§3710.]

3711 Profits and earnings. Any profits arising from labor at the home shall be placed at interest in some savings bank, and each child paid, when discharged, in proportion as his labor contributed to the fund. The earnings of a child who is placed with others under contract shall be used, held, or otherwise applied for the exclusive benefit of said child. [C97,§2689; S13, §2690-d; C24, 27, 31, 35,§3711.]

3712 Regulations. All children admitted or committed to the home shall be wards of the state and subject to the rules of the home. Subject to the approval of the board, any child received under voluntary application may be expelled by the superintendent for disobedience and refusal to submit to proper discipline. Children shall be discharged upon arriving at the age of eighteen years, or sooner if possessed of sufficient means to provide for themselves. [C73,§1634; C97,§§2685, 2688; S13,§§2685, 2688, 2690-b; C24, 27, 31, 35,§3712.]

3713 Enumeration of soldiers' orphans. The assessor in each odd-numbered year shall take an enumeration of the children of deceased soldiers who were in the military service of the government, naming the company or organization to which the soldiers belonged, with the age and sex of the children. The auditors of the several counties shall furnish the assessors with the proper blanks for taking such lists. The lists so returned shall be revised from time to time, as may be necessary, by the board of supervisors, and a record made of such action. [C73,§§1635–1637; C97,§2686; C24, 27, 31, 35,§3713.]

3714, 3715 Rep. by 46GA, ch 32,§1

3715.1 Adoption. Children in said home may be adopted as provided in chapter 473. [C73, §1634; C97,§2690; S13,§2690-a; C24, 27, 31, §§3714, 3715; C35,§3715-g1.]

3716 Placing child under contract. Any child received in said home, unless adopted, may, under written contract approved by the board, be placed by the superintendent in the custody and care of any proper person or family. Such contract shall provide for the custody, care, education, maintenance, and earnings of the child for a fixed time which shall not extend beyond the age of majority. Such contract shall be signed by the superintendent and by the person taking the child. [S13,§2690-b; C24, 27, 31, 35, §3716.]

3717 Recovery of possession. In case of a violation of the terms of such contract, the board may cause the child to be taken from the person or persons with whom placed, and may

make such other disposition of him as shall seem to be for his best interests. [S13,§2690-c; C24, 27, 31, 35,§3717.]

3718 Recovery of child — duty of county attorney. In case legal proceedings are necessary to recover the possession of such child, they may be instituted and carried on in the name of the superintendent, and the county attorney of the county in which the child is placed shall, if requested by the superintendent, act as his attorney in the proceedings. [S13,§2690-c; C24, 27, 31, 35,§3718.]

3719 Interference with child. It shall be unlawful for any parent or other person not a party to the placing of a child for a term of years, to interfere in any manner with or to assume or exercise any control over such child or his earnings while such contract is in force. [S13,§2690-d; C24, 27, 31, 35,§3719.]

3720 Counties liable. Each county shall be liable for sums paid by the home in support of all its children, other than the children of soldiers, to the extent of a sum equal to one-half of the net cost of the support and maintenance of its children. The sums for which each county is so liable shall be charged to the county and collected as a part of the taxes due the state, and paid by the county at the same time state taxes are paid. [C97,§2692; SS15, §2692; C24, 27, 31, 35,§3720.]

Similar provisions, §§3600, 3601

3721, 3722 Rep. by 41GA, ch 69

CHAPTER 186

WOMEN'S REFORMATORY

3723 Objects.
3724 Superintendent—salary.
3725 Service required.
3726 Commitments generally.
3727 Optional commitments for life.
3728 Commitment on appeal.
3729 Term of commitments.
3730 Manner of committing females.
3731 Costs of commitment.
3732 Transfer of inmates—costs.
3733 Effect of transfer.
3733.1 Transfer of insane.
3736 Employment for discharged inmate.
3737 Clothing, transportation, and money.
3738 Escape.
3739 Costs of returning inmate.

3723 Objects. The women's reformatory shall be maintained for the purpose of preparing the inmates to lead orderly and virtuous lives and to become self-supporting and useful members of society, and to this end to instruct them in the common school and other branches of learning, in morality, physical culture, domestic science, mechanical arts, and such other branches of industry as may be practicable. [SS15,§§2713-n1,-n11; C24, 27, 31, 35,§3723.]

3724 Superintendent — salary. The superintendent of the women's reformatory shall be a female and shall receive a salary of not to exceed two thousand dollars per year. [SS15, §2713-n2; C24, 27, 31, 35,§3724.]

3725 Service required. The superintendent may, with the approval of the board of control, require any inmate to perform any service suited to her strength and attainments and which may be needed for the benefit of the reformatory or for the welfare of such inmate. [SS15,§2713-n11; C24, 27, 31, 35,§3725.]

3726 Commitments generally. All females over eighteen years of age, and married females under eighteen years of age, who are convicted in the district court of offenses punishable by imprisonment in excess of thirty days, shall, if imprisonment be imposed, be committed to the women's reformatory. [S13,§5718-a27; C24, 27, 31, 35,§3726.]

3727 Optional commitments for life. Any unmarried female over ten and under eighteen years of age convicted of an offense punishable by life imprisonment may be committed either to the Iowa training school for girls or to the women's reformatory. [SS15,§2713-n7; C24, 27, 31, 35,§3727.]

3728 Commitment on appeal. A female over eighteen years of age, convicted on appeal from a conviction of a nonindictable offense, may, if imprisonment be imposed, be committed to the women's reformatory for an indeterminate period not exceeding ninety days. [SS15, §2713-n8; C24, 27, 31, 35,§3728.]

3729 Term of commitments. A female convicted of a felony shall not be detained in said reformatory under one commitment for a period longer than the maximum term of imprisonment provided by law for said felony. A female convicted of a crime less than felony shall not be detained therein longer than five years under one commitment. [SS15,§2713-n12; C24, 27, 31, 35,§3729.]

3730 Manner of committing females. Females committed to said reformatory shall be taken thereto by some woman, or by some peace officer accompanied by some woman, appointed by the court. [SS15,§2713-n9; C24, 27, 31, 35, §3730.]

3731 Costs of commitment. The costs and expenses allowed for taking females to the reformatory shall be the same as those allowed by law for taking girls to the training school, and shall be audited and paid in like manner by the counties from which they are sent. [SS15, §2713-n9; C24, 27, 31, 35,§3731.]

Costs of commitment, §5191

3732 Transfer of inmates — costs. The board of control may transfer inmates from the said reformatory to the training school for girls, and from such training school to such

reformatory, whenever such course will be conducive to the welfare of the institution or of the other inmates therein, or of the inmates so transferred. The costs of such transfer shall be paid from the funds of the institution from which the transfer is made. [SS15,§2713-n10; C24, 27, 31, 35,§3732.]

Referred to in §3733

3733 Effect of transfer. After a transfer to either institution is made, under section 3732, the person transferred shall be subject to all the provisions of law and regulations of the institution to which she is transferred the same as though she had originally been committed thereto. [SS15,§2713-n10; C24, 27, 31, 35, §3733.]

3733.1 Transfer of insane. The said board may cause any woman committed to said reformatory and suspected of being insane to be examined in the manner in which convicts in the penitentiary are examined in similar cases, and if such woman is found to be insane, said board may order such woman transferred to a state hospital for the insane where she shall thereafter be maintained and treated at the expense of the state until such time as she regains her sanity when she shall be returned to said reformatory. The cost of such transfer and return shall be paid as heretofore provided for other transfers. [C27, 31, 35,§3733-b1.]

Examination, §3755

3734, 3735 Rep. by 41GA, ch 67

3736 Employment for discharged inmate. It shall be the duty of the superintendent, so far as is practicable, to obtain for each inmate before she is paroled or discharged a home and suitable employment if they are not otherwise provided. [SS15,§2713-n14; C24, 27, 31, 35, §3736.]

3737 Clothing, transportation, and money. The superintendent may, with the consent of the board, furnish a discharged or paroled inmate with proper clothing, and a receptacle therefor, and transportation to her place of employment, or home, or other place not more distant than the place of commitment, and a sum of money not exceeding twenty-five dollars. [SS15, §2713-n14; C24, 27, 31, 35,§3737.]

3738 Escape. Any inmate of said reformatory who shall escape therefrom may be arrested and returned to said reformatory, by an officer or employee thereof without any other authority than this chapter, and by any peace officer or other person on the request in writing of the superintendent or board of control. [SS15, §2713-n15; C24, 27, 31, 35,§3738.]

3739 Costs of returning inmate. The costs attending the return of escaped or paroled inmates shall be paid from the funds of the institution. [SS15,§2713-n15; C24, 27, 31, 35,§3739.]

CHAPTER 187

PENITENTIARY AND MEN'S REFORMATORY

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3740 Duty of wardens. The wardens of the penitentiary and of the men's reformatory shall live within the precincts of said institutions, respectively, and shall devote their entire time to the duties of their positions. [C51,§3128; R60,§5142; C73,§4748; C97,§5663; S13,§5663; C24, 27, 31, 35,§3740.]

3741 Maximum salaries. Monthly salaries in the penitentiary and the men's reformatory shall not exceed the following sums:

1. Warden, two hundred fifty dollars.
2. Deputy warden, one hundred fifty dollars.
3. Assistant deputy warden, one hundred twenty-five dollars.

4. Clerk, one hundred fifty dollars.
5. Chaplain, one hundred twenty-five dollars.
6. Additional chaplain, twenty-five dollars.
7. Physician, one hundred twenty-five dollars.
8. Storekeeper, one hundred twenty-five dollars.
9. Record clerk, receiving officer, and captain of the night guards, each, one hundred ten dollars. [R60,§§5190, 5191, 5193; C73,§§4783, 4784; C97,§5716; SS15,§5716; C24, 27, 31, 35,§3741.]

3742 **Salary of guards.** Turnkeys and guards shall receive the following monthly salaries:
1. Of the first class, one hundred ten dollars.
2. Of the second class, one hundred dollars.
3. Of the third class, ninety dollars. [R60, §5192; C73,§4783; C97,§5716; SS15,§5716; C24, 27, 31, 35,§3742.]

3743 **Eight-hour day.** Eight hours shall constitute a day's work for the receiving clerk, record clerk, all captains, turnkeys, and guards, and all necessary time in excess thereof shall be paid for at not less than pro rata pay. [C24, 27, 31, 35,§3743.]

3744 **How salaries paid.** All salaries shall be paid out of any money in the state treasury not otherwise appropriated. [R60,§§5190–5193; C73,§§4783, 4784; C97,§5716; SS15,§5716; C24, 27, 31, 35,§3744.]

3745 **Household and domestic service.** The wardens of the penitentiary and the men's reformatory shall be entitled to receive the labor of prisoners, not exceeding three at one time, for household and domestic service in their own families. [R60,§5168; C73,§4767; C97,§5717; SS15,§5717; C24, 27, 31, 35,§3745.]

3746 **Dwellings.** Each deputy warden shall be furnished with a dwelling house by the board of control, or house rent, and also furnished with water, heat, ice, and lights, and domestic service in his family by not more than one prisoner at one time. [SS15,§5717; C24, 27, 31, 35, §3746.]

3747 **Punishment and records thereof.** Disobedience by the convicts of the disciplinary rules of the institution shall be punished by the infliction of such penalties as are provided by law and the rules which are prescribed for the government of said institution. The warden shall keep a register of all punishments inflicted on any convict, and the cause for which they were inflicted. [R60,§5179; C73,§4751; C97, §5666; C24, 27, 31, 35,§3747.]

3748 **According prohibited privileges.** If any officer or other person employed in either of said institutions or its precincts, negligently suffer any convict confined therein to be at large without its precincts, or out of the cell or apartment assigned to him, or to be conversed with, relieved, or comforted contrary to law or the rules of the institution, he shall be punished by a fine not exceeding five hundred dollars. [C51, §3144; R60,§5157; C73,§4796; C97,§5694; C24, 27, 31, 35,§3748.]

3749 **Failure to perform duty.** Any person required to perform any duty relative to either of said institutions who wilfully fails to perform the same, shall be punished by a fine not exceeding one thousand dollars, and shall forfeit his office. Should such failure result in the escape of any of the convicts, or in loss of any of the funds appropriated to the use and benefit of the said institution, exceeding twenty dollars, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than ten years. [R60,§5196; C73,§4805; C97, §5701; C24, 27, 31, 35,§3749.]

3750 **Federal prisoners.** Convicts sentenced for any term at hard labor by any court of the United States may be received by the warden into the penitentiary or the men's reformatory and there kept in pursuance of their sentences. [C51,§3119; R60,§5138; C73,§4771; C97,§5676; C24, 27, 31, 35,§3750.]

3751 **Transfers from penitentiary.** The board of control may transfer first term and promising prisoners from the penitentiary to unoccupied rooms in the men's reformatory whenever the number of inmates in the penitentiary exceeds the number of cells therein. It may also transfer to the men's reformatory other prisoners when satisfied that such transfer will be to the best interest of the institutions and of the prisoners. [S13,§5718-a10; C24, 27, 31, 35, §3751.]

3752 **Permissive transfers.** The board of control may transfer prisoners from the men's reformatory to the penitentiary:
1. When the prisoner has been guilty of insubordination or of repeated violations of the rules of the reformatory.
2. When the prisoner is not a hopeful subject for reformatory treatment. [S13,§5718-a7; C24, 27, 31, 35,§3752.]

3753 **Mandatory transfers.** Said board shall transfer a prisoner from the men's reformatory to the penitentiary when, after his commitment to the reformatory, it is discovered that he is over thirty years of age, or that he has, prior to his last conviction, been convicted in any court of any felony; but such transfer shall not be made unless there are suitable accommodations at the penitentiary to care for such prisoner. [S13,§5718-a8; C24, 27, 31, 35,§3753.]

3754 **Department for insane.** There shall be maintained in the men's reformatory a department in which all insane convicts shall be confined and treated. [SS15,§5709-a; C24, 27, 31, 35,§3754.]

3755 **Transfer of insane.** When the said board has cause to believe that a prisoner in the penitentiary is insane, it shall cause such prisoner to be examined by one of the superintendents of the hospitals for the insane and if such prisoner be found to be insane, said board shall cause him to be transferred to the department for insane at the men's reformatory, where he shall be confined until the expiration of his

sentence, or until pronounced sane, in which latter event he shall be returned to the penitentiary, or held in the reformatory until the expiration of his sentence. [SS15,§§5709-b,-e; C24, 27, 31, 35,§3755.]

3756 Discharge of insane. When the board has reason to believe that a prisoner in the penitentiary or said reformatory, whose sentence has expired, is insane, it shall cause examination to be made of such prisoner by competent physicians who shall certify to the board whether such prisoner is sane or insane. The board may make further investigation and if satisfied that he is insane, it may cause him to be transferred to one of the hospitals for the insane, or may order him to be confined in the department for the insane at the reformatory. [C97,§5710; C24, 27, 31, 35,§3756.]

3757 Employment of prisoners. Prisoners in the penitentiary or men's reformatory shall be employed only on state account in the maintenance of the institutions, in the erection, repair, or operation of buildings and works used in connection with said institutions, and in such industries as may be established and maintained in connection therewith by the board of control.

Prisoners classed as trusties may be employed under proper supervision in the repair and construction of bridges and primary roads and in the repair and construction of walks and driveways within state parks.

The employment of prisoners on work of any character which the state contracts to do for any person, firm, or corporation on state premises, where the work and prisoners employed thereon are both under the supervision, direction, and control of the board of control and the warden, shall not be construed as contracting or leasing the labor of prisoners to such person, firm, or corporation.

The board shall not permit such services to be rendered to a private party at a less wage than is paid free labor for like service or its equivalent, taking into consideration all the elements that enter into the value of prison labor, and the decision of the board of control in that respect shall be final, after approval by the appeal board provided for by chapter 22. [S13,§5702-a; SS15, §5718-a11; C24, 27, 31, 35,§3757.]

3758 Erections or repairs at other institutions. The board may temporarily detail, under proper surveillance, trustworthy prisoners to perform services in the construction or repair of any work imposed on the board at any institution under their control. [C24, 27, 31, 35,§3758.]

3759 Prices of labor. The board of control shall fix and determine the price which shall be paid to the said board by the various public bodies to which convict labor may be furnished. [C24, 27, 31, 35,§3759.]

3760 Price lists to public officials. The board of control shall, from time to time, prepare classified and itemized price lists of articles and things manufactured at the state institutions controlled by it, and furnish such lists to all boards of supervisors, boards of school directors, city and town councils and commissions, township trustees, and all other departments and officials of the state, county, cities, and towns empowered to make purchase of supplies for public purposes. [C24, 27, 31, 35,§3760.]

3761 Application for material. The township trustees of any township or the board of supervisors of any county may make application to the board of control for such road building material, and other appliances, as may be needed or required by them for the construction, improvement, or repairing of the township, county, or state roads in their respective districts. [C24, 27, 31, 35,§3761.]

3762 Purchase mandatory. No articles or supplies so listed, except in case of emergency, shall be purchased for public use by the aforesaid public officials, bodies, and departments from any private source unless the board of control is unable to promptly furnish such articles or supplies. Any public officer who wilfully refuses or wilfully neglects to comply with this section shall be punished by a fine of not more than one hundred dollars. [C24, 27, 31, 35,§3762.]

3763 Selling price. Such supplies, material, and articles manufactured by convict labor within the state shall be furnished by the board of control to the state, its institutions and political subdivisions, and the road districts of the state at a price not greater than that obtaining for similar products in the open market. [C24, 27, 31, 35,§3763.]

3764 Limitation on contract. The board of control or the warden of the state penitentiary or the warden of the reformatory shall not, nor shall any other person employed by the state, make any contract by which the labor or time of any prisoner or inmate in such penitentiary or reformatory shall be contracted, let, farmed out, given, or sold to any person, firm, association, or corporation. [S13,§§2727-a51, 5718-a28a; C24, 27, 31, 35,§3764.]

3764.1 Industry revolving funds. There shall be created and established at the state penitentiary at Fort Madison and also at the state reformatory at Anamosa, respectively, an establishing and maintaining industries revolving fund, which fund shall be permanent and composed of the receipts from the sales of articles and products manufactured and produced, from the sale of obsolete and discarded property belonging to the various industrial departments, and from the funds now in the establishing and maintaining industry funds for each of said institutions. [C27, 31, 35,§3764-b1.]

Referred to in §§3764.2, 3764.3

3764.2 Use of funds. The funds created and described in section 3764.1 shall be used only for establishing and maintaining industries for the employment of the inmates at the respective institutions named, and payments from said funds shall be made in the same manner as are payments from the appropriations, salaries,

support and maintenance of the institutions under the jurisdiction of the board of control. [C27, 31, 35,§3764-b2.]

Referred to in §3764.3

3764.3 Funds permanent. The funds provided in sections 3764.1 and 3764.2 shall not revert to the general fund at the end of any annual or biennial period. [C27, 31, 35,§3764-b3.]

3765 Road work. The board of control shall certify to the board of supervisors of any county, upon request, the number of persons in the penitentiary and reformatory whom the warden may recommend to be used for road work. The state highway commission, boards of supervisors, and township trustees may use such persons in the building or repairing of public roads, whenever, in their judgment, it is practicable to do so. [S13,§§5707, 5718-a28a; C24, 27, 31, 35,§3765.]

3766 Supervision of work. The work herein provided for shall be under the direction and supervision of the board of supervisors, but all the persons taken from said penitentiary and reformatory shall be under jurisdiction of the state board of control. [S13,§5718-a28c; C24, 27, 31, 35,§3766.]

3767 Hard labor and solitary imprisonment. All commitments to either of said institutions must be at hard labor. Solitary imprisonment of prisoners shall not be employed except for the purpose of discipline. [C51,§3118; R60,§5137; C73,§4770; C97,§5675; C24, 27, 31, 35,§3767.]

3768 Enforcing obedience to orders. Any officer of said institutions and his assistants shall, in case a prisoner resists his lawful authority, or refuses to obey his lawful command, enforce immediate obedience by the use of such weapons or other aids as may be effectual, and if, in so doing, such convict is wounded or killed, such officer and his assistants shall be justified. [C51,§3145; R60,§5158; C73,§4797; C97,§5695; C24, 27, 31, 35,§3768.]

3769 Insurrection. Every officer and citizen of the state within reach shall, by every means within their power, suppress and aid in suppressing any insurrection among the convicts in said institutions, and prevent and aid in preventing the escape or rescue of any convict therefrom, or from any legal confinement, or from any person in whose custody a convict may be. If in the performance of this duty or in arresting or assisting to arrest a convict who has escaped or been rescued, such officer or person wound or kill the convict, or a person aiding or assisting him, the same shall be held justifiable. [C51,§3146; R60,§5159; C73,§4798; C97,§5696; C24, 27, 31, 35,§3769.]

3770 Escape of prisoner. If a convict escapes from the penitentiary or the men's reformatory, the warden shall take all proper measures for his apprehension; and for that purpose he may offer a reward, not exceeding fifty dollars, to be paid by the state, for the apprehension and delivery of such convict. [C51, §3147; R60,§5160; C73,§4776; C97,§5681; C24, 27, 31, 35,§3770.]

3770.1 Payment of reward—appropriation. The state comptroller shall issue warrants in payment of such reward upon filing of vouchers. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated, a sum suffcient for the payment of such claims. [C27, 31, 35,§3770-a1.]

3771 Classification of prisoners. The wardens shall, so far as practicable, prevent prisoners under eighteen years of age from associating with other prisoners. [C97,§5693; C24, 27, 31, 35,§3771.]

3772 Property of convict. The warden shall receive and care for any property any convict may have on his person upon entering, and, if convenient, place the same, if money, at interest for the owner's use, keeping an account thereof, and on the discharge of the convict, return, and if money, repay the same with the interest so earned, to him or his legal representatives, unless in the meantime it has been previously disposed of according to law. [C51, §3149; R60,§5162; C73,§4778; C97,§5683; C24, 27, 31, 35,§3772.]

3773 Time to be served. No convict shall be discharged from the penitentiary or the men's reformatory until he has served the full term for which he was sentenced, less good time earned and not forfeited, unless he be pardoned or otherwise legally released. He shall be deemed to be serving his sentence from the day on which he is received into the institution, but not while in solitary confinement for violation of the rules of the institution. [C51,§3148; R60,§5161; C73,§4777; C97,§5682; C24, 27, 31, 35,§3773.]

3774 Reduction of sentence. Each prisoner who shall have no infraction of the rules of discipline of the penitentiary or the men's or women's reformatory or laws of the state, recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to a reduction of sentence as follows, and if the sentence be for less than a year, then the pro rata part thereof:

1. On the first year, one month.
2. On the second year, two months.
3. On the third year, three months.
4. On the fourth year, four months.
5. On the fifth year, five months.
6. On each year subsequent to the fifth year, six months. [C97,§5703; C24, 27, 31, 35,§3774.]

3775 Records of prisoners. The board of control shall cause to be kept at each of said institutions the following permanent records:

1. A record of each infraction, by a prisoner, of the published rules of discipline.
2. Such other records for the use of the board of parole as may be approved by the executive council. [C97,§5703; S13,§5718-a12; C24, 27, 31, 35,§3775.]

3776 Forfeiture of reduction. A prisoner who violates any of such rules shall forfeit the reduction of sentence earned by him, as follows:

1. For the first violation, two days.
2. For the second violation, four days.
3. For the third violation, eight days.
4. For the fourth violation, sixteen days and, in addition, whatever number of days more than one that he is in punishment.
5. For the fifth and each subsequent violation, or for an escape, or attempt to escape, the warden shall have the power, with the approval of the board of control, to deprive the prisoner of any portion or all of the good time that the convict may have earned, but not less than as provided for the fourth offense. [C97,§5704; C24, 27, 31, 35,§3776.]

3777 Separate sentences. When a convict is committed under several convictions with separate sentences, they shall be construed as one continuous sentence in the granting or forfeiting of good time. [C97,§5705; C24, 27, 31, 35,§3777.]

3778 Special reduction. Any prisoner in either of said institutions who may be employed in any service outside the walls of the institution, or who may be listed as a trusty, may, with the approval of the board of control, be granted a special reduction of sentence, in addition to the reduction heretofore authorized, at the rate of ten days for each month so served. [SS15, §5718-a11b; C24, 27, 31, 35,§3778.]

3779 Discharge — transportation, clothing, and money. When a prisoner is discharged the warden shall furnish him, at the expense of the state, with a railroad ticket to the point in the state nearest his home or to any point of a like distance without the state, a suit of common clothing, and not more than twenty-five dollars, an account of which shall be kept by the warden. [C51,§3150; R60,§5163; C73,§4779; C97,§5684; C24, 27, 31, 35,§3779.]

Analogous provision, §3796

3780 Visitors—admission fee. The wardens shall charge each adult visitor to the institution an admission fee of twenty-five cents, of which he shall render an account each month to the board of control. The board shall cause said fund to be expended for the benefit of the prisoners in the purchase of furnishings for a library, reading matter therein, and musical instruments and entertainments for the prisoners. This section shall not apply to state officers, and others exempt by law, nor to relatives of a prisoner. [C51,§3151; R60,§5164; C73,§4780; C97,§5685; S13,§5685-a; C24, 27, 31, 35,§3780.]

3781 Who may visit. The following persons are authorized to visit said institutions at pleasure: The governor, secretary of state, auditor of state, treasurer of state, secretary of agriculture, members of the general assembly, judges of the supreme, district, superior, and municipal courts, county attorneys, and all regular officiating ministers of the gospel. No other person shall be granted admission except by permission of the warden. [C51,§3152; R60, §5165; C73,§4781; C97,§5686; C24, 27, 31, 35, §3781.]

CHAPTER 188

PAROLES

Referred to in §3812

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3782 Qualifications — term — vacancy — chairman. The board of parole shall consist of three electors of the state. Not more than two members shall belong to the same political party. One member shall be a practicing attorney at law at the time of his appointment. Each member shall serve for six years from July 1 of the year of his appointment, except appointees to fill vacancies who shall serve for the balance of the unexpired term. The chairman of the board shall be the member whose term first expires. [S13,§5718-a14; C24, 27, 31, 35,§3782.]

3783 Appointment—vacancies. The governor shall, during each regular session of the general assembly and within sixty days after the convening thereof, appoint, with the approval of the senate, a successor to that member of the board whose term will expire on

July 1 following. Appointments may be made when the general assembly is not in session, to fill vacancies, but such appointments shall be subject to the approval of the senate when next in session. Vacancies occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session, and for the unexpired portion of the regular term. [S13,§5718-a14; C24, 27, 31, 35,§3783.]

Confirmation, §38.1

3784 **Expenses.** Each member of the board, the secretary, and all other employees shall, in addition to salary, be entitled to receive their necessary traveling expenses by the nearest traveled route while engaged in official business. [S13,§5718-a16; C24, 27, 31,35,§3784.]

3785 **Trips to other states.** No traveling expenses to other states shall be allowed unless the trip is authorized by the board by a written resolution which shall state the purpose and declare the necessity for the trip prior to the actual making thereof, but emergency trips may be made on written order of the chairman which shall be reported to the board at its next meeting. [S13,§5718-a16; C24, 27, 31, 35,§3785.]

3786 **Power to parole after commitment.** The board of parole shall, except as to prisoners serving life terms, or under sentence of death, or infected with venereal disease in communicable stage, have power to parole persons convicted of crime and committed to either the penitentiary or the men's or women's reformatory.

The parole may be to a place outside the state when the board of parole shall determine it to be to the best interest of the state and the prisoner, under such rules and regulations as the board of parole may impose. [S13,§5718-a18; C24, 27, 31, 35,§3786.]

3787 **Rules.** Said board shall have power to establish and enforce the rules and conditions under which paroles may be granted. [S13,§5718-a18; C24, 27, 31, 35,§3787.]

3788 **Parole before commitment.** Said board may, on the recommendation of the trial judge and prosecuting attorney, and when it appears that the good of society will not suffer thereby, parole, after sentence for less than life imprisonment and before commitment, prisoners who have not been previously convicted of a felony. [S13,§5718-a18; C24, 27, 31, 35,§3788.]

3789 **Employment for paroled prisoners.** No person shall be released on parole until the board of parole shall have satisfactory evidence that arrangements have been made for his employment or maintenance for at least six months. Said board may render assistance to prisoners about to be paroled in procuring employment and the necessary expense incident thereto shall be paid as other expenses of the board are paid. [S13,§§5718-a18,-a26; C24, 27, 31, 35,§3789.]

3790 **Legal custody of paroled prisoners.** All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of said board, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled. [S13,§5718-a18; C24, 27, 31, 35,§3790.]

3790.1 **Reciprocal agreements with other states.** The governor of the state of Iowa is hereby authorized and empowered to enter into compacts and agreements with other states, through their duly constituted authorities, in reference to reciprocal supervision of persons on parole or probation and for the reciprocal return of such persons to the contracting states for violation of the terms of their parole or probation. [47GA, ch 85,§1.]

3791 **Order for recommitment—fees.** The written order of said board, certified to by the secretary of said board, that a prisoner on parole shall be taken into custody and returned to the institution from which paroled, shall be served by any peace officer or other person to whom it may be delivered for service, and such officer or person shall receive the same fees for serving such order as sheriffs receive for like service. [S13,§5718-a18; C24, 27, 31, 35,§3791.]

Fees, §5191

3792 **Parole time not counted.** The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole be violated. [S13,§5718-a18; C24, 27, 31, 35,§3792.]

3793 **Investigations.** Said board shall have power to make any investigation which it may deem necessary in order to determine the facts relative to matters coming before it, but shall not receive, unsolicited by them, any petition or communication or argument in regard to application for parole, pardon, or discharge unless provided for in their adopted rules. Every public officer to whom inquiry may be addressed by the board of parole concerning any prisoner shall give said board all information possessed by or accessible to him which may throw light upon the question of the fitness of a prisoner to receive the benefits of parole. [S13,§§5718-a19, -a26; C24, 27, 31, 35,§3793.]

3794 **Duty of clerk of district court.** The clerk of the district court shall, as to each commitment to said institutions, furnish the board of parole with a copy of the indictment, the minutes of testimony attached thereto, the name and residence of the trial judge, of the prosecuting attorneys, and of the jurors and witnesses sworn at the trial. [S13,§5718-a25; C24, 27, 31, 35,§3794.]

3795 **Duty of trial judge and prosecutor.** The trial judge and the prosecuting attorney shall, when requested by the board, furnish it with a full statement of the facts and circumstances attending the commission of the offense so far as known or believed by them. [S13,§5718-a25; C24, 27, 31, 35,§3795.]

3796 Clothing, transportation, and money. When a prisoner is paroled, he shall be furnished, by the warden, with such clothing, transportation, and money as is provided for prisoners when discharged at the termination of their sentence, but no further allowance shall be made if final discharge is granted while on parole. [S13,§5718-a22; C24, 27, 31, 35,§3796.]

Analogous provision, §3779

3797 Parole relief fund. There is hereby established, from any unappropriated funds in the state treasury, a fund of twelve hundred fifty dollars which shall be known as the parole relief fund. The treasurer of state shall continue to maintain said fund in said amount. [C24, 27, 31, 35,§3797.]

3798 Disbursement and repayment. Said fund may be used for the relief of paroled prisoners who are in distress because of illness, loss of employment, or conditions creating personal need. In no instance shall the total amount advanced to a prisoner exceed twenty-five dollars. The prisoner, at the time of receiving an advancement, shall execute and deliver to the board his written obligation to repay the same during the period of the parole. When so paid, the amount shall be deposited with the treasurer of state and credited to the fund from which drawn. [C24, 27, 31, 35,§3798.]

3799 Vouchers. Said fund shall be drawn on vouchers executed by the chairman and secretary of the board in favor of said needy person. Each voucher shall show that the advancement was ordered by said board. [C24, 27, 31, 35, §3799.]

3800 Parole by court. The trial court before which a person has been convicted of any crime except treason, murder, rape, robbery, arson, second or subsequent violation of any provision of title VI, or of the laws amendatory thereof, may, by record entry, suspend the sentence and parole said person during good behavior:

1. If said person has not previously been convicted of a felony.
2. If said person is shown to be free from venereal disease.
3. If said person, if an adult and able to labor, has obtained apparently permanent employment for a reasonable time. [S13,§5447-a; C24, 27, 31, 35,§3800.]

Referred to in §3801

3801 Custody of court parolee. When a parole is granted under section 3800, the court shall order said person committed to the custody, care, and supervision:

1. Of any suitable resident of this state; or
2. Of the board of parole. [S13,§5447-a; C24, 27, 31, 35,§3801.]

3802 Powers of board. The board of parole shall have and exercise over said parolee all the powers possessed by said board over prisoners paroled by it. [C24, 27, 31, 35,§3802.]

3803 Expense. Any necessary expense contracted by the board in the care of a person committed to it under a parole by the court shall be paid from the appropriation for the general expenditures of said board. [C24, 27, 31, 35, §3803.]

3803.1 Parole agent as peace officer. Any agent or investigator appointed by the board of parole for the purpose of making investigations and of apprehending and returning paroled persons under the jurisdiction of the board to any institution, shall, while engaged in such duty or work, have all the powers of peace officers. [C31, 35,§3803-c1.]

3804 Report by custodian. The person having the custody of such paroled person under order of court, shall, each thirty days, or oftener if required by the court, make written report to the judge as to the conduct of such paroled person. [S13,§5447-a; C24, 27, 31, 35,§3804.]

3805 Revocation of parole. A suspension of a sentence by the court as herein provided may be revoked at any time, without notice, by the court or judge, and the defendant committed in obedience to such judgment. [S13,§5447-b; C24, 27, 31, 35,§3805.]

3806 Violation of court parole. If the suspended sentence be an order for commitment to the training school, the fact that the defendant* first violated his or her parole after reaching the age of eighteen years, and before reaching the age of twenty-one years, shall not prevent the enforcement of such sentence. [C24, 27, 31, 35,§3806.]

*"dependent" in enrolled act

3807 Violation of board parole. Whoever, while on parole, shall violate any condition of his parole, or any rule or regulation of the board granting the parole, shall be deemed guilty of a felony, and shall be punished by imprisonment in the institution from which he had been paroled, for a term of not more than five years, his sentence under such conviction to take effect upon the completion of his previous sentence. [C24, 27, 31, 35,§3807.]

3808 Criminal statistics. The clerk of the district court shall, on or before July 15 each year, report to the board of parole:

1. The number of convictions of all offenses in that court, in his county, for the year ending June 30 preceding, the character of each offense, the sentence imposed, occupation of the offender, and whether such offender can read or write.
2. Number of acquittals.
3. Number of dismissals by the court without trial, and the nature of the charges so dismissed.
4. The expenses of the county for criminal prosecutions during said year. [C51,§148; R60, §349; C73,§203; C97,§293; S13,§293; C24, 27, 31, 35,§3808.]

Referred to in §3809

3809 Itemization of statistics. The fourth item required by section 3808 shall be itemized as follows:

1. Jury fees in criminal cases.
2. Meals for jurors in criminal cases.
3. Bailiff's fee for service while attending criminal cases.
4. Expense of taking prisoners to prison.
5. Attorney fees under appointment to defend.
6. Grand jury fees.
7. Witness fees paid in criminal cases.
8. Reporters' fees for reporting and transcripting testimony in criminal cases at expense of county.
9. Grand jury witness fees paid.
10. Compensation to clerk of grand jury.
11. Compensation to bailiff of grand jury.
12. Fees and expenses paid sheriff and other officers by the county in connection with the grand jury.
13. Expense of jail, not including board of prisoners.
14. Board of prisoners.
15. Compensation and expense of county attorney and his assistants in criminal cases.
16. All jurors' fees, jurors' meals, witness fees, constable's fees, and justice fees paid by the county in all criminal cases before a justice of the peace, magistrate, or police court. [C51, §148; R60,§349; C73,§203; C97,§293; S13,§293; C24, 27, 31, 35,§3809.]

3810 Auditor to report statistics to clerk. The county auditor shall report to the clerk of the district court, on or before July 5 of each year, the expenses of the county in criminal prosecutions during the year ending June 30 preceding, including but distinguishing the compensation of the county attorney. Such report shall include all the items of criminal expenses which appear in the records of his office and which are required to be reported by the clerk of the district court to the board of parole. The clerk of the district court shall furnish to the auditor the blanks to be used in making such report. [C97,§475; S13,§475; C24, 27, 31, 35, §3810.]

3811 Biennial report. The board of parole shall, biennially, at the time provided by law, report to the governor a summary of paroles granted and releases recommended, the names of all prisoners who have violated their paroles, and such other information concerning its operation as may be deemed advisable, including an abstract for each year of the returns relative to criminal matters. [C24, 27, 31, 35,§3811.]

Time of filing report, §246

CHAPTER 189

PARDONS, COMMUTATIONS, REMISSION OF FINES AND FORFEITURES, AND RESTORATION TO CITIZENSHIP

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3812 Reprieves and pardons. Nothing in chapter 188 shall be construed as impairing the power of the governor under the constitution, to grant a reprieve, pardon, or commutation of sentence in any case. [S13,§5718-a21; C24, 27, 31,35,§3812.]

3813 Pardon. A person whose sentence has been suspended may be pardoned by the governor at any time after such suspension on such conditions as he may think proper. [S13,§5447-a; C24, 27, 31, 35,§3813.]

3814 Recommendation for pardon. The board of parole shall recommend to the governor the discharge or pardon of such prisoners committed to the penitentiary or the men's or women's reformatory as have acceptably served not less than twelve months of their parole and who have, by their conduct, given satisfactory evidence that they will continue to be law-abiding citizens. [S13,§5718-a20; C24, 27, 31, 35, §3814.]

3815 Soldiers, sailors, and marines. Said board may also recommend to the governor the pardon of a paroled prisoner who, during parole, and during the war with the central powers of Europe, entered the army or navy of the United States or of any of the countries with which the United States was allied, or who, during said war, was employed upon or in public works, by or for the immediate benefit of the United States, and who has been honorably discharged from such army or navy. [C24, 27, 31, 35,§3815.]

3816 Record. All recommendations of the board shall be entered in the proper records of the board. [S13,§5718-a20; C24, 27, 31, 35, §3816.]

3817 Conditions prerequisite to a pardon. After conviction for a felony, no pardon or commutation of sentence shall be granted by the governor until he shall have presented the matter to, and obtained the advice of, the board of parole, but he may commute a death sentence to

imprisonment in the penitentiary for life, without making such reference or obtaining such advice. [C51,§§3278, 3281; R60,§5116; C73,§4712; C97,§5626; S13,§5626; C24, 27, 31, 35,§3817.]

3818 Publication. Before presenting an application for pardon to the board for its action, where the sentence is death or imprisonment for life, the governor shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, once each week for four successive weeks, the last publication to be at least twenty days prior to the time of presenting such application to such board. [C73,§4712; C97,§5626; S13,§5626; C24, 27, 31, 35,§3818.]

3819 Investigation. The board shall, under the direction of the governor, take charge of all correspondence in reference to the pardon of persons convicted of crimes and carefully investigate each application, and file its recommendation with the governor with its reasons for the same. [S13,§5718-a23; C24, 27, 31, 35, §3819.]

3820 Information relative to applications. When an application is made to the governor for a pardon, reprieve, or commutation, or for the remission of a fine or forfeiture, he may require the judge of the court, or the county attorney or attorney general by whom the action was prosecuted, or the clerk of such court, to furnish him without delay a copy of the minutes of the evidence taken on the trial, and of any other facts having reference to the propriety of his exercise of his powers in the premises. [R60,§5120; C73, §4713; C97,§5627; C24, 27, 31, 35,§3820.]

3821 Governor may take testimony. The governor may also take such testimony, bearing upon applications, as he may deem advisable. Any person who, in giving such testimony, swears falsely, and any person who shall knowingly and corruptly make any false statements in an affidavit intended to be used in connection with an application for pardon, or for remission of fine or forfeiture, shall be guilty of perjury, and be punished accordingly. [R60,§5120; C73, §4713; C97,§5627; C24, 27, 31, 35,§3821.]

Perjury, §13165

3822 Files in matters of pardon. All papers and documents relating to the pardon of any person shall, upon the granting of such pardon, become a part of the files of the governor's office. [S13,§5718-a20; C24, 27, 31, 35,§3822.]

3823 Restoration to citizenship. The governor shall have the right to grant any convict, whom he shall think worthy thereof, a certificate of restoration to all his rights of citizenship. The warden or superintendent, upon request of the governor, shall, in case of application for such restoration, furnish him with a statement of the convict's deportment during his imprisonment, and may at all times make such recommendations to the governor as he shall think proper respecting such restoration. [C97,§5706; C24, 27, 31, 35,§3823.]

3824 Fines and forfeitures. The governor shall have power to remit fines and forfeitures upon such conditions as he may think proper. [C51,§3280; R60,§5116; C73,§4712; C97,§5626; S13,§5626; C24, 27, 31, 35,§3824.]

3825 Copies of pardons, reprieves, and other papers. Pardons, commutations of sentences, remissions of fines and forfeitures, and restorations of rights of citizenship shall, when issued, be in duplicate. Reprieves shall be in triplicate. [C24, 27, 31, 35,§3825.]

3826 Copies when accused in custody. Pardons, reprieves, and commutations of sentences shall be forwarded to the officer having custody of the party in question. Said officer shall retain one copy and make record in the books of his office, and act in accordance therewith. On one copy, said officer shall make such written return as the governor may require, and forward said copy and return to the clerk of the court wherein the judgment is of record. In case of reprieves, the third copy shall, in all cases, be delivered to the person whose sentence is reprieved. [C51, §3279; R60,§5121; C73,§4714; C97,§5628; S13, §5718-a20; C24, 27, 31, 35,§3826.]

3827 Copies when accused not in custody. In case the party in question is not in custody, and in case of remissions of fines and forfeitures and restorations of rights of citizenship, one copy shall be delivered to said party and one copy to the clerk aforesaid. [C51,§3279; R60, §5121; C73,§4714; C97,§5628; S13,§5718-a20; C24, 27, 31, 35,§3827.]

3828 Duty of clerk. Said clerk shall, upon receipt of any of said executive instruments, immediately file and preserve the same in his office and note such filing on the judgment docket of the case in question, except that remissions of fines and forfeitures shall be spread at length on the record books of the court, and indexed in the same manner as the original case. [C51, §3279; R60,§5121; C73,§4714; C97,§5628; C24, 27, 31, 35,§3828.]

CHAPTER 189.1

OLD-AGE ASSISTANCE

Referred to in §1216. Social welfare department, see ch 181.1

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3828.001 Definitions. When used herein:

1. The term "state department" shall mean the state department of social welfare created by chapter 181.1.

2. The term "state board" shall mean the state board of social welfare created by chapter 181.1.

3. The term "board" and "county board" shall mean the county board of social welfare created by chapter 181.1.

4. The term "division" shall mean the division of old-age assistance.

5. The term "superintendent" shall mean the old-age assistance superintendent.

6. The term "investigator" shall mean the employee of the county board of social welfare assigned to perform the duties specified under the provisions of this chapter.

7. The term "domicile" shall mean the fixed permanent residence of the applicant or recipient of old-age assistance, to which, when absent, he has the intention of returning.

8. The term "residence" shall mean the place of dwelling of the applicant or recipient of old-age assistance, whether permanent or temporary, and such dwelling place may or may not be the domicile of such person.

9. The term "income" shall mean that gain, or recurrent benefit, or both, accruing to the applicant for or the recipient of old-age assistance because of his own labor, business or property or because of the reasonable legal or contractual liability of another person, trustee, or legal entity, or gratuity received from whatever source, whether in the form of money, goods or services of whatever nature and from whatever source, upon which a monetary value can be placed.

10. The term "property" shall mean those things in which a person has legal title or owns, whether in lands, goods, investments, stocks, bonds, securities, notes, money or money on deposit, insurance on his life, or intangible rights such as patents, copyrights, or anything of value which may be alienated.

11. The singular shall include the plural and the masculine shall include the feminine. [C35, §5296-f1; 47GA, ch 137,§1; 48GA, ch 140,§7.]

3828.002 Division created. There is hereby created a division under the administrative jurisdiction of the state board of social welfare to be known as the division of old-age assistance. [C35,§5296-f2; 47GA, ch 137,§2.]

3828.003 Powers and duties of the state board. The state board shall be the responsible authority for the efficient and impartial administration of this chapter. To this end the state board shall formulate and make such rules and regulations, outline such policies, dictate such procedures and delegate such powers as may be necessary to carry out the provisions and purposes of this chapter.

The state board shall:

1. Require the superintendent, within ninety days after the close of each fiscal year, to report to the state board for the preceding year, stating:

a. The total number of recipients.
b. The amount paid in cash.
c. Cash receipts and disbursements.
d. The total number of applications.
e. The number granted.
f. The number denied.
g. The number canceled during that year.
h. Such other information as the state board may deem advisable.

2. Cooperate with the federal social security

board, created by title VII of the social security act, Public No. 271, enacted by the 74th congress of the United States and approved August 14, 1935, in such reasonable manner as may be necessary to qualify for federal aid for old-age assistance, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as said federal social security board, from time to time, may find necessary to assure the correctness and verification of such reports.

3. Furnish information to acquaint aged persons and the public generally with the old-age assistance system of this state.

4. Fix the salaries for the personnel of the department. [C35,§§5296-f4,-f36; 47GA, ch 137, §§4, 6.]

3828.004 Party officials barred. No person who is a precinct, county or state committeeman of any political party shall be eligible to be appointed to any office or to hold any position provided for under any of the provisions of this chapter during the time he shall hold such office, and any person appointed or employed under the provisions of this chapter who becomes a precinct, county or state committeeman of any political party shall be disqualified from the further holding of any position created under the provisions of this chapter and shall be forthwith removed from such position. [47GA, ch 137,§18a.]

3828.005 Superintendent. The state board shall appoint a superintendent of the division of old-age assistance who shall be qualified by character, training and experience. The superintendent, with the approval of the state board, shall appoint the necessary personnel to carry out the provisions of this chapter. [C35,§5296-f3; 47GA, ch 137,§3; 48GA, ch 140,§8.]

Sections 5296-f4 to 5296-f6, inc., code 1935, repealed by 47GA, ch 137, §§4, 5

3828.006 Old-age assistance investigators. The county board shall employ one or more old-age assistance investigators whose duty shall be to make such investigations or reinvestigations as are necessary to furnish the information required by the county board and the division, and in such manner and form as may be prescribed in the rules and regulations of the state board relating to this division. [C35,§5296-f7; 47GA, ch 137,§5.]

Section 5296-f8, code 1935, repealed by 47GA, ch 137, §5

3828.007 Persons entitled to assistance. Subject to the provisions and under the restrictions contained in this chapter, every aged person who has not an income of three hundred dollars a year, while residing in the state, shall be entitled to assistance in old age. [C35,§5296-f9.]

3828.008 To whom granted. Old-age assistance may be granted and paid only to a person who at the time of application and during the continuance of a certificate of assistance:

1. Has residence or domicile in the state of Iowa.

2. Has attained the age of sixty-five years.

3. Is a citizen of the United States or has been a continuous resident of the United States for at least twenty-five years.

4. Has a domicile in this state and has had such domicile continuously for at least nine years immediately preceding the date of application, but such domicile shall not be deemed continuous if interrupted by periods of absence totaling more than four years, except as otherwise provided elsewhere in this chapter; or has had at least five years residence in the state during the nine years immediately preceding the date of application, one of said five years having been continuous and immediately preceding such date. Furthermore, absence from the state in the service of the state or the United States shall not be deemed to have interrupted such continuous residence, if domicile has not been acquired outside the state.

5. Is not at the date of making* claim or receiving assistance, an inmate of any prison, jail, insane asylum, or any other public reform or correctional institution.

6. Has not deserted his wife, if a husband, or, without just cause failed to support her and his children under the age of fifteen years, for a period of six months or more during the ten years preceding the date of application; has not deserted her husband, if a wife, or without just cause failed to support such of her children as were under the age of fifteen years, during the period set out above.

7. Has no spouse, child, other person, municipality, association, society or corporation legally or contractually responsible under the law of this state and found by the division able to support him.

8. Is found by the division to be unable regularly to earn an income of at least three hundred dollars a year, on account of age, infirmity or inability to procure suitable employment.

9. Is not, because of physical or mental condition, in need of continued institutional care, and such care is reasonably available to him in one of the institutions provided by the United States, the state of Iowa, or one of its political subdivisions. [C35,§5296-f12; 47GA, ch 137,§§9, 38; 48GA, ch 140,§2, 10.]

Referred to in §3828.028
Child's liability, §§3828.029, 3828.030
*Word "making" repeated in amendment, 48GA, ch 140, §2

3828.009 Amount of assistance. The amount of assistance shall be fixed with due regard to the condition of the individual, household situation and community in each instance, subject to the rules, regulations and standards adopted by the state board, but in no instance shall it be an amount which, when added to the income of the applicant from all other sources, exclusive of the exemptions hereinafter provided, shall exceed a total of twenty-five dollars a month. However, a further allowance not to exceed five dollars per month may be allowed, when essential, to meet additional expenses due to the individual's mental and/or physical condition. [C35,§5296-f10; 47GA, ch 137,§7; 48GA, ch 140,§1.]

3828.010 Income considered. The income of the applicant shall be his income for the twelve

months preceding the date on which his application is made; provided that, if the applicant shows to the division's satisfaction a decrease of income, the amount of such decrease may be deducted from the income of the preceding twelve months in determining the amount of assistance to be allowed. However, in calculating the income of the claimant, occasional gifts, or earnings through personal labor, not to exceed one hundred twenty dollars in the aforesaid twelve-month period may be disregarded. [C35,§5296-f11; 47GA, ch 137,§§8, 38; 48GA, ch 84,§11; ch 140,§9.]

3828.011 Income from property. If the applicant or spouse owns any real estate which said applicant occupies as a home, or any other real estate which does not produce a reasonable income, the value to him of such occupancy or net income, for the purpose of arriving at the amount of assistance to which said applicant is entitled, shall be computed at five percent of the assessed value of said real estate less a proper allowance for taxes, insurance, upkeep, interest on encumbrances, and a reasonable amount for amortization of said encumbrances.

The annual income of any personal property, including moneys and credits, which does not produce a reasonable income, shall be computed at five percent of the actual value of such property as determined by the board and reported to the division; provided, however, that the value of household goods and/or heirlooms shall be exempted to the amount of five hundred dollars in such computation. [C35, §5296-f14; 47GA, ch 137,§§11, 38.]

3828.012 Property exclusions. No person shall receive old-age assistance if the assessed value of his real property, less recorded liens, exceeds two thousand dollars, or if married and not separated from the spouse, if the net assessed value of his real property together with that of such spouse, less recorded liens, exceeds three thousand dollars.

No person shall receive old-age assistance if he has more than three hundred dollars, or if married and not separated from the spouse, if he and his spouse have more than four hundred fifty dollars in cash, on deposit in a bank, in postal savings, or if the immediate cash value, as determined by the board and subject to review by the division, of his holdings of bonds, stocks, mortgages, other securities or investments, except real estate, exceeds three hundred dollars, or if married and not separated from the spouse, if he and his spouse have more than four hundred fifty dollars. At the discretion of the division, however, where such immediate sale, for cash, of such securities or investments necessitates an undue financial sacrifice, the applicant, when in immediate need of assistance, shall assign such securities and investments to the state to be held in trust by the state board to reimburse the old-age assistance revolving fund for the amount paid from the old-age assistance fund and the old-age assistance revolving fund in assistance or other benefits in behalf of said applicant.

No person shall be allowed assistance if the claimant has deprived himself, directly or indirectly, of any property for the purpose of qualifying for old-age assistance, or if the claimant or the husband or wife conveys or encumbers any real estate or other property owned by them or by either of them for the purpose of preventing the state from reimbursing itself for assistance granted or to be granted hereunder.

A sworn statement by both the vendor and vendee of the reasons and/or considerations of any transfer of real and/or personal property within the five years immediately preceding the date of application for old-age assistance may be required by the board or division to be made in such manner and on such forms as the state board may direct; provided, however, that no sworn statement need be made for any transfer prior to January 1, 1934, unless the division so directs. [C35,§5296-f13; 47GA, ch 137,§§10, 38.]

3828.013 Applicants. An applicant for assistance shall deliver his claim, in writing, to the board of the county in which he resides, in the manner and form prescribed by the state board.

All statements in the application shall be sworn to or affirmed by the applicant setting forth that all facts are true in every material point. [C35,§5296-f17; 47GA, ch 137,§38.]

3828.014 Procedure with application. When an application is made for old-age assistance, the county board shall promptly send it to the division. Within sixty days, the county board shall make an investigation of the applicant's claim through an investigator, and make, in addition, such direct investigation as it deems advisable. After hearing the applicant, if he so requests, if it approves the claim, the county board shall make a recommendation of the amount of assistance to be allowed; or, if it disapprove, make a recommendation that no assistance be allowed. Within ninety days from the date of the application, the county board shall send its recommendation and the reason for such recommendation to the division with such supporting papers as the state board may require, unless for reasons beyond the county board's control which reasons shall be reported.

Upon receipt of the application and supporting papers, the division may make such additional investigation as it deems necessary. Should the division disagree with the county board in the latter's recommendation regarding eligibility it shall neither approve nor disapprove said application without a further review to clarify the points of disagreement between the county board and division. In any event, the division shall make its decision within sixty days of the receipt of the supporting papers, properly prepared and executed, and either approve and fix an amount of assistance or reject the claim of the applicant; and shall give written notice to the applicant as to the action taken.

Any applicant or recipient aggrieved by any order or determination of the division, or by the failure of the division or county board to so act,

may make application for a review by the state board upon a prescribed form furnished by the county board. Such application shall be sent by registered mail to the superintendent within thirty days of the notice of such rejection or order or within thirty days after the time hereinbefore prescribed for the county board or division to act. Upon receipt of such application for review, the state board shall give at least ten days notice to said applicant by registered mail of the time and place of a hearing to be held within the county of residence of the applicant. A fair hearing and full review of said claim shall then be had before said state board or such person or persons designated by the chairman, from the membership of the state board or the division. Following such hearing the state board shall take its final action and notify the applicant in writing within ninety days.

An applicant whose application for assistance has been rejected, or a recipient whose certificate for assistance has been canceled, after a review hearing hereinabove provided, within thirty days after notice of such action is given, may appeal from the decision of the state board to the district court of the county in which the applicant or recipient resides, by serving a ten days notice of such appeal upon the superintendent or upon any member of the state board, in the manner required for the service of an original notice in any civil action. Upon the service of such notice, the state board shall furnish the applicant with a copy of the application and all supporting papers, a transcript of the testimony taken in a hearing, if any, and a copy of its decision.

The district court shall act as an appellate court to review the decision of the state board to determine whether or not it has therein committed fraud or abused its discretion. The costs may be taxed to appellant where the appeal is affirmed or may be remitted.

In any event, an applicant whose application for assistance has been rejected may not reapply for assistance until the expiration of twelve months from the date of the previous application, except for good cause shown by said applicant which good cause shall be determined by the county board. [C35,§5296-f18; 47GA, ch 137,§15; 48GA, ch 140,§§19, 26.]

Referred to in §3828.019
Service of original notice, §11060

3828.015 Witnesses. For the purpose of any such investigation, the state board and the county board shall have the power to compel, by subpoena, the attendance and testimony of witnesses and the production of books and papers. All witnesses shall be examined on oath, and any member of the state board or of the county board may administer said oath. The costs incurred in connection with any such hearing or examination shall be paid by the state board or county board, whichever issues the subpoenas; and the witnesses shall be entitled to claim a two-dollar fee and mileage expense at a rate of five cents per mile, except that responsible relatives as defined in sections 3828.074, 3828.077 and 10501.6 shall not be entitled to claim witness fees and mileage expense. [C35, §5296-f19; 47GA, ch 137,§38; 48GA, ch 140,§22.]

3828.016 Assistance certificate. The division shall issue to each applicant to whom assistance is allowed a certificate for two years, stating the amount of each installment, which may be monthly or quarterly, as the division may decide; and, on written order of the division, the state comptroller shall issue his warrant, or warrant check to be forwarded by the division of old-age assistance, to such recipient in payment of each installment. The amount of assistance granted under this chapter shall be subject to review at any time by the division and the amount received by the recipient may be increased, decreased, or discontinued and in such case a written order stating the reason therefor shall be filed as a part of the record of said application and an explanation of such order increasing, decreasing or discontinuing said assistance shall be mailed to the recipient of said assistance. [C35,§5296-f20; 47GA, ch 137,§§16, 38; 48GA, ch 141,§1.]

3828.017 Fingerprint indorsement. Whenever the payee of an old-age assistance warrant is unable to indorse said warrant in writing as his name appears on the face of said warrant, the indorsement shall be made by the payee's fingerprint, which act shall be witnessed by at least two persons who shall sign as witnesses, also giving their address. [48GA, ch 140,§20.]

3828.018 Renewal of certificate. A renewal certificate of assistance shall be required for each biennium, to be issued by the division in such form, in such manner and following such investigation as the state board shall direct.

The general provisions as to the eligibility of applicants for assistance shall apply to recipients whose certificates are subject to review for the issuance of renewal certificates of assistance, with the following exceptions as to residence:

Provided, that he does not establish a domicile outside this state, a person may, while receiving assistance and with the approval of the division, retain his rights under the provisions of this chapter and section, even though he takes up residence outside the state for reasons of the infirmities of age, health or economic necessity:

1. In any privately supported charitable, benevolent or fraternal institution;
2. In any privately supported hospital or sanitarium, except institutions for the feeble-minded and insane;
3. In the household of a relative or friend. [C35,§5296-f21; 47GA, ch 137,§38.]

3828.019 Assistance certificate improperly obtained. If at any time the division has reason to believe that an assistance certificate has been improperly obtained, it shall cause special inquiry to be made by the board, and may suspend payment of any installment pending the inquiry. It shall also notify the board

of such suspension and it shall also promptly notify the recipient in writing of such suspension stating in such notice the reason for such suspension and such recipient shall be entitled to a hearing, as provided by section 3828.014, to show cause why such suspension should not be made permanent. If on inquiry it appears that the certificate was improperly obtained, it shall be canceled by the division, but if it appears that the certificate was properly obtained, the suspended installments shall be payable in due course. [C35,§5296-f30; 47GA, ch 137, §§27, 38.]

3828.020 When assistance commences. The assistance, if allowed, shall commence on the date named in the certificate, which shall be the day fixed by the state board for payments to recipients in the county from which the applicant applied and within the calendar month following that on which the application is approved by the division. [C35,§5296-f22; 47GA, ch 137,§§17, 38.]

Section 5296-g3, code 1935, repealed by 47GA, ch 137, §18

3828.021 Funeral expenses. On the death of any person to whom a certificate of old-age assistance has been issued and has not been canceled, such reasonable funeral expenses shall be paid from the old-age assistance fund to such person as the county board directs, in an amount of not to exceed one hundred dollars; provided:

1. That the total expense of such funeral does not exceed two hundred dollars.

2. That the decedent does not leave an estate which may be probated, subject to the provisions of section 3828.022, with sufficient proceeds to allow a funeral claim of at least two hundred dollars, as provided by section 11969.

3. That no payment in an amount equal to two hundred dollars is due the decedent's estate, spouse, children, father, mother, brother or sister, by reason of the liability of any life insurance or death or funeral benefit company, association, or society, to be made in the event of the death of such decedent who is a recipient of old-age assistance.

4. That in the event the total funeral expenses for a recipient of old-age assistance exceed the division's liability of one hundred dollars, as provided under 1, 2 and 3 above, the additional expenses shall accrue only when made necessary by the transportation of the body for a distance of more than twenty miles from the place of death, when the purchase price of the burial lot exceeds twenty dollars, when it is necessary to secure a non-standard casket because of the excess size or deformity of the body of the decedent, or when the family or next best friend of the decedent specify the use of a steel or concrete, outside, burial vault.

Any funeral expenses thus paid by the division shall become a part of the claim for assistance paid the individual recipient of old-age assistance and shall be collectible under the provisions of sections 3828.022 and 3828.023.

When no claim is filed, or, whenever a claim is filed and disallowed, for the payment of funeral expenses, as provided for by this chapter and section, and the person furnishing such services and merchandise, in connection with the funeral of a deceased recipient of old-age assistance, files a claim against the decedent's estate, as provided for by chapter 507, such claim shall not be allowed in an amount exceeding two hundred dollars. [C35,§5296-f25; 47GA, ch 137,§§21, 38; 48GA, ch 142,§1.]

Referred to in §3828.026

3828.022 Deduction from estate. On the death of a person receiving or who has received assistance under this chapter or of the survivor of a married couple, either or both of whom were so assisted, the total amount paid as assistance, shall be allowed as a lien against the real estate in the estate of the decedent and as a claim of the second class against the personal estate of such decedent, in the event the estate is admitted to probate. Neither the homestead nor the proceeds therefrom of such decedent or his survivor, shall be exempt from the payment of said lien or claim, any act or statute to the contrary notwithstanding. The filing of its claim against the estate shall not constitute a waiver of the right of the state board, in behalf of the state, to maintain an action by equitable proceedings to foreclose upon its lien against a homestead left by the deceased as well as any other real estate situated within the state of Iowa, and belonging to the estate of the deceased. The proceeds of such claim shall be paid into the old-age assistance revolving fund. In case of the death of either husband or wife, either or both of whom have been receiving or have received assistance under this chapter, the estate of deceased shall not be settled or the homestead sold until the surviving spouse shall die or cease to occupy the homestead as such. Furthermore, no such claim shall be enforced against any real estate of the recipient, or the real estate of a person who has been a recipient, while it is occupied by the recipient's surviving spouse, if the latter, at the time of marriage to the recipient, was not more than fifteen years younger than the recipient, and does not marry again. [C35,§5296-f15; 47GA, ch 137,§12; 48GA, ch 140,§§24, 25.]

Referred to in §§3828.021, 3828.023, 3828.024, 8981

3828.023 Transfer of property to the state. In any event, the assistance furnished under this chapter shall be and constitute a lien on any real estate owned either by the husband or wife for assistance furnished to either of such persons. Whenever an order is made for such assistance to any person, a copy of such order shall be indexed and recorded in the manner provided for the indexing of real-estate mortgages in the office of the county recorder of the county in which the recipient lives and in which the real estate belonging to the recipient or the spouse of such recipient is situated, and such recording and indexing shall constitute notice of such lien. The county recorder shall not charge a fee for such recording and indexing.

Assistance furnished under this chapter shall not constitute a lien on any real estate owned by the Indian tribes residing in this state. This is the sole exception to the provisions of this and section 3828.022.

Any action to enforce an old-age assistance lien shall be by equitable proceedings.

The statute of limitations shall not begin to run against any lien or cause of action, belonging to the state under the provisions of this section or chapter, until the death of the recipient, former recipient, or the surviving spouse, if any.

The state board shall release liens, accruing under the provisions of this section and chapter, when fully paid, when compromised and settled, or when the estate, of which real estate affected by this chapter is a part, has been probated and the proceeds allowable have been applied on such liens.

If the state board deems it necessary to protect the interest of the state, it may require, as a condition to the grant of assistance, the absolute conveyance of all, or any part, of the property of an applicant for assistance to the state; upon the taking of such deed the division shall pay any delinquent taxes against said property and said deed shall reserve to the grantor and his spouse a life estate in said property and an option to the grantor and his heirs to purchase said property by repayment of the total amount paid for the benefit of the recipient. Said option insofar as the heirs are concerned shall be for two years from the date of the death of the grantor or the grantor's surviving spouse, if any, and shall include an interest charge of three and one-half percent during the period of the option to the heirs.

Such property shall be managed by the division which shall credit the net income to the account of the person or persons entitled thereto. The state board shall have power to sell, lease, or transfer such property or defend and prosecute all suits concerning it, and to pay all just claims against it, and to do all other things necessary for the protection, preservation and management of the property.

Upon the death of the recipient, or person who has received assistance, and the surviving spouse of such person, which spouse meets the requirements set out in section 3828.022, and the expiration of the option to the heirs, the property shall be disposed of and so much of the proceeds as is necessary for the repayment of the amount of assistance and other benefits paid to the grantor and/or his spouse and repayment of amount expended for the preservation of the property shall be transferred to the old-age assistance revolving fund. The balance, if any, shall be paid through the old-age assistance revolving fund to the heirs.

The sale for any general or special taxes of any property, against which a lien has been filed under the provisions of this section and section 3828.022, shall not affect said lien or its enforcement; and the state board and division shall be entitled to an assignment of the certificate of tax sale of said property upon tender to the holder or to the county auditor of the amount to which the holder of the tax sale certificate would be entitled in case of redemption.

The attorney general, at the request of the state board, shall take the necessary proceedings, and represent and advise the state board in respect to any matters arising under this section. [C35,§5296-f16; 47GA, ch 137,§§13, 38.]

Referred to in §§3828.021, 3828.024, 8981

3828.024 Executor responsible. Any transfer of any property or interest therein made by an applicant or recipient of old-age assistance to any person without adequate consideration therefor or with intent to deprive the state of its interest therein shall be void.

All administrators, executors, referees and trustees of estates subject to liens provided for by this chapter shall when such lien as provided in sections 3828.022 and 3828.023, is filed or a claim is filed in the estate or against said estate or established by other legal proceedings as provided by law, pay said lien or claim when so ordered by the court. [C35,§5296-g1; 47GA, ch 137,§14.]

3828.025 Compromise by state. The state board and division, when considering a compromise settlement of the state's interest in any property or the estate of a recipient and/or the recipient's spouse, may recognize such equitable interest as may be established by another person or legal entity. [48GA, ch 140,§16.]

3828.026 Assignment of insurance. Any person, who has been granted a certificate of old-age assistance and is receiving payments of assistance from the old-age pension fund, may petition the state board to accept an assignment of any assignable death benefits, loan value, or cash surrender value, of any life insurance policy, death or funeral benefit of any association, society or organization, requiring further payment of premiums or assessments which such person believes he is unable to pay. The state board may accept such assignment if it deems such action advisable and in the best interests of such person and the state. Upon the payment of such death benefit, the division shall first deduct the amount of the funeral expenses, incurred under the provisions of section 3828.021, the amount of the premiums or assessments paid by the division to keep the insurance or benefit in force, and the amount of assistance paid to such person, all of which shall accrue to the old-age assistance revolving fund, and pay the balance received, if any, to such person as was the beneficiary last specified upon the policy.

Any recipient of old-age assistance may assign any such insurance policy or benefit for the purpose stated in this section, and when such assignment has been received by the company, association, society, or other organization, issuing same, the state board and division shall have a vested interest therein for the purpose and to the extent as is contemplated in this section, and the contract so made between such insured person and the state board and division, shall be

valid, and binding upon such insured person, company, association, society or other organization, any other statute to the contrary notwithstanding.

When proceeds are received from any insurance policy which was not assigned to the state board and which states the beneficiary to be the administrator, or legal representatives or estate of the insured, such proceeds shall be subject to the claim against said estate for any old-age assistance payments to or on behalf of such insured person or for any funeral claims paid and said claim shall be prior to the claim of the heirs thereto. [C35,§5296-g2; 47GA, ch 137,§§14a, 38; 48GA, ch 140,§§11, 23.]

3828.027 To notify board of increase of property or income. If at any time during the currency or continuance of an old-age assistance certificate the recipient, or the wife or husband of the recipient, becomes possessed of any property or income in excess of the amount allowed by this chapter in respect of the amount of assistance granted, it shall be the duty of the recipient immediately to notify the board of the receipt and possession of any such property or income. The board shall inform the division of such change and make its recommendation for further action by the division. The division thereupon shall cancel the certificate or lower the amount of assistance for the remaining period of the certificate and notify the recipient of the reason for such change. Any excess assistance paid shall be returned to the state, and recoverable as a debt due the state. [C35,§5296-f23; 47GA, ch 137,§§19, 38; 48GA, ch 140,§3.]

Referred to in §3828.038

3828.028 Recovery from responsible relatives. If at any time under this chapter the state board and division or county board finds that any person, municipality, association, society or corporation, as specified under subsection 7 of section 3828.008, is or was at the time any assistance was paid reasonably able to contribute to the necessary care and support of any recipient without undue hardship, during the continuance of any certificate of assistance, and such person, municipality, association, society or corporation fails or has failed or refused to do so, then, after notice to such person, municipality, association, society, or corporation, there shall exist a cause of action against such person, municipality, association, society or corporation for the recovery by the state board and division, for the state, of double such amount of assistance furnished as was or is in excess of the amount allowed by this chapter. [47GA, ch 137,§28; 48GA, ch 140,§13.]

3828.029 When child's liability begins. The state board or the court in determining the responsibility of a child for the support of a claimant or recipient, shall deem liability to begin when said child is receiving a net income from whatever source, commensurate with that upon which he would make an income tax payment to this state. In no event shall assistance be granted when the contribution made by or required of responsible relatives attains the equivalent of the maximum assistance payable under this chapter. [48GA, ch 140,§17.]

3828.030 County attorney's duties—equity action. It shall be the duty of the county attorney of each and every county, upon application of the state board of social welfare, to institute and conduct the prosecution of any suit for the support of an applicant for or recipient of assistance by any person or legal entity legally or contractually liable therefor, and any action brought for the violation of any of the provisions of this chapter, within the county.

In the event that a child or other responsible relative neglects or refuses to contribute to the support of a claimant or recipient, an action in equity may be commenced in the district court of the county in which a responsible relative resides and there may be joined as defendants in said action any or all other responsible relatives. The court may decree the amount of contribution, if any, to be made by each child or other responsible relative with due regard to their separate incomes, financial ability and obligations. [48GA, ch 140,§18.]

3828.031 Cancellation when county evades responsibility. The state board may cancel the certificate of any recipient who is found by the state board to be acting in agreement with the authorities of any county charged with the duty of providing for the support of the poor if it shall appear to the state board that such agreement is with the intent to shift or would have the effect of shifting the responsibility of any such county or to evade the provisions of sections 3828.032 and 3828.037. [48GA, ch 140,§27.]

3828.032 Recipient not to receive other assistance. No person receiving assistance under this chapter shall at the same time receive any other assistance from the state, or from any political subdivision thereof, except for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance, and hospitalization.

This section shall not be construed to exclude the spouse, minor children or other dependents of the recipient of old-age assistance, or the members of the same family or household as said recipient from receiving relief, assistance or pensions handled or paid through the state or any of its political subdivisions. In administering old-age assistance or relief, the officials of this state and its political subdivisions shall assume old-age assistance payments to be made for the sole benefit of the aged person to whom the certificate of assistance has been issued. [C35,§5296-f27; 47GA, ch 137,§23; 48GA, ch 140, §4.]

Referred to in §3828.031

3828.033 No assistance during imprisonment. If any person receiving assistance is convicted of any crime or offense and punished by imprisonment for one month or longer, the board shall direct that payments shall not be made during the period of imprisonment. [C35, §5296-f33.]

3828.034 Resident in institution. Any recipient who is a resident in any charitable, benev-

olent, or fraternal institution, not tax-supported, may expend a part of the assistance paid him under the provisions of this chapter toward defraying the actual expenses of his residence in such institution, provided, that the state board has approved and that it and its agents are permitted freely to visit and inspect such institution and, provided, the charge shall not be so much as to deprive said recipient and inmate of such cash as he needs for necessities and incidentals not furnished by said institution. [C35,§5296-f26; 47GA, ch 137,§22.]

3828.035 Incapacity of applicant or recipient. If the person applying for or receiving assistance, on the testimony of reputable witnesses, is thought to be incapable of taking care of himself or his money, the board shall complete the investigation, as provided elsewhere in this chapter, and send such application, investigation, and supporting papers to the division. When notified by the division of the conditional approval of said application or the renewal or continuance of a certificate, contingent upon the appointment of a legal guardian, the board shall direct the county attorney to petition the court for such appointment and shall forward the court record to the division as notice of the person to whom assistance payments shall be made.

The application of a person who has been adjudged an incompetent shall be honored only when made by a legally appointed guardian as provided for under the provisions of section 12614. Upon subsequent investigations all affidavits shall be affirmed by said legal guardian and the person or persons supplying the required information in behalf of said incompetent person.

All guardianship proceedings in the case of an applicant or recipient shall be carried out without fee or other expense when, in the opinion of the court, the aged person is unable to assume said expense. At the discretion of the court, such a guardian may serve without bond. [C35,§5296-f28; 47GA, ch 137,§24.]

3828.036 Unlawful to charge for cashing warrant. It shall be unlawful for any person, firm or corporation to charge a fee, service charge or exchange for the cashing of a warrant issued on the old-age assistance fund, or to discount or pay less than the face value of any warrant drawn on the old-age assistance fund when cashing the same or accepting it in the payment of the purchase price of goods or merchandise, services, rent, taxes, or indebtedness. [C35,§5296-g4; 47GA, ch 137,§26.]

3828.037 Assistance to be inalienable. All rights to old-age assistance shall be absolutely inalienable by any assignment, sale, execution or otherwise, and, in the case of bankruptcy, the assistance shall not pass to or through any trustees or other persons acting on behalf of creditors. [C35,§5296-f29.]

Referred to in §3828.031

3828.038 Recovery of excess assistance. When it is found that any person who is receiving or has received old-age assistance has failed to notify the board, as provided in section 3828.027, that he is or was possessed of property or income in excess of the amount allowed by this chapter, then his certificate shall be canceled and double the amount of assistance paid, in excess of that to which the recipient was entitled, may be recovered from him, while living, as a debt due the state; upon his death as a preferred claim against his estate. The amount so received shall be transferred to the old-age assistance revolving fund of the state. [C35, §5296-f24; 47GA, ch 137,§20.]

3828.039 Assistance fund created. There is hereby created a fund to be known as the old-age assistance fund to be administered by the state board and division, the proceeds of which shall be used to pay the expenditures incurred under this chapter. To provide money for said fund, there is hereby levied on all persons residing in this state and who are citizens of the United States and of twenty-one years of age and upwards, except inmates of state and county institutions, an annual tax of two dollars, to and including December 31, 1936. From the list certified to the county treasurer under the provisions of section 5296-f35 [code 1935], it shall be the duty of such county treasurer to place the names of all persons subject to said tax on a tax list as specified by the auditor of state, and the said annual tax levied by the provisions of this section and chapter shall be collected in 1935, and 1936, by the county treasurer as of January 1, with a delinquency date of July 1, after which latter date a penalty of one percent for each month or fractional month of delinquency, and the county treasurer shall make remittance thereof to the treasurer of state who shall credit same to the old-age assistance fund. In any subsequent year to that in which any tax is due and payable, the county treasurer shall charge any unpaid tax and/or penalty against the property owned by the person by whom said tax is payable; or said county treasurer, when such delinquent person is not the owner of real estate, shall cause to be served a notice, which shall be served in the same manner as an original notice, upon the delinquent taxpayer's spouse or employer, if either, of the amount of the tax and penalties due and costs of collection and said spouse or employer shall pay the same, and thereupon the employer may subsequently withhold the amount thus paid in tax, penalty and cost of collection from any wages or salary then or in the future due said employee but costs of collection shall not be chargeable unless the tax and penalties are collected.

Any person, firm, association or corporation, including municipal corporations and special charter cities, having in their employ continuously for a period of thirty days or more any resident of this state and who is a citizen of the United States, and to whom this chapter applies and who has not paid the tax provided for in this section, shall deduct said tax from the earnings of such employee and deliver to such employee a receipt for said collection and remit

same to the treasurer of state, together with a report showing the amount and name of the person from whom collected; and the treasurer of state shall credit said tax as other taxes provided for in this section and chapter, and report to the county treasurer of the county from which such remittance was received, giving the name of the employee and the amount of such tax collected; and when said report has been received by the county treasurer, he shall credit such person on his books with said payment. Any employer failing to collect and so report said tax shall be liable therefor. As a condition for obtaining assistance under this chapter and from this fund, satisfactory proof shall be furnished to the board or division that the applicant has paid all taxes due to said fund.

The officer of each department, division, or bureau of the state government, including state educational institutions, whose duty it is to make out a pay roll and to certify the same, shall be liable, personally and under his bond, for the failure of any state employee, under his jurisdiction, to pay the per capita tax levied under the provisions of this section. Such officer is hereby authorized to act in the same manner in withholding the tax from the salary or wages of a state employee as is granted a private employer and a municipal employer under the provisions of this section and chapter.

The penalties accruing under the provisions of this section shall accompany the tax and be credited to the old-age assistance fund.

All taxes collected under the provisions of this section and chapter shall be deposited to the credit of the old-age assistance fund, and shall be kept separate from the general fund of the state. On receipt of written order from the division, the state comptroller shall draw warrants, and/or warrant checks against the old-age assistance fund for any and all old-age assistance payments and other expenditures provided for in this chapter. [C35,§5296-f34; 47GA, ch 137,§§30, 38; ch 139,§1; 48GA, ch 140, §5.]

Referred to in §3828.042

Section 5296-f35, code 1935, omitted as temporary by amendment of 47GA, ch 139, §2

Section 5296-f36, code 1935, repealed by 47GA, ch 137,§36

3828.040 Refund of tax. Whenever any tax, as provided for in section 3828.039, has been erroneously paid or has been paid or collected more than once for the same year, the taxpayer by whom the tax was erroneously paid shall have the amount of said tax or duplicated tax refunded to him upon application to the county treasurer and the submission of satisfactory proof that the tax has been erroneously paid or paid more than once for any year. Such refund shall be from any old-age assistance funds then in the hands of such county treasurer. [C35,§5296-g5; 47GA, ch 137,§31.]

3828.041 Mandamus proceedings. In the event that any county auditor or treasurer, or both, of any county fails to do his or their duty in the matter of listing taxable persons, or the collection of the taxes levied, or the proper recording of said collections, or the making of a proper and timely return of the money so collected to the treasurer of state, or to otherwise comply with the provisions of this chapter, mandamus shall lie and proceedings shall be instituted by the auditor of state and the state board against such county auditor or treasurer or both, to comply therewith. [47GA, ch 137,§35.]

3828.042 Revolving fund created. There is hereby created a fund, to be known as the "old-age assistance revolving fund," to be used for the purpose of protecting the interests of the recipients of old-age assistance and such interests of the state and the old-age assistance fund as arise under the provisions of this chapter.

To establish the old-age assistance revolving fund, there is hereby appropriated out of any funds in the state treasury, not otherwise appropriated, the sum of twenty-five thousand dollars. The state comptroller shall set aside from the appropriation, herein made, the amount necessary to be used by the state board and division. Upon orders by the state board or division the comptroller shall draw warrants from this fund, if he so approve, for the purposes herein described.

All moneys received or recovered by the state board and division, from whatever source, except those specifically appropriated to the old-age assistance fund, shall be credited to the old-age assistance revolving fund, which together with the appropriation made hereunder, shall constitute said fund. Whenever said fund shall have a balance in excess of the amount necessary to carry out the provisions for which it is created, the state comptroller shall transfer such excess to the old-age assistance fund and shall notify the state board and division of such transfer. [C35,§5296-g7; 47GA, ch 137, §§33, 38; 48GA, ch 140,§14.]

3828.043 Authority to accept gifts. The state board and division are authorized to accept in behalf of the state any gifts, deeds, or bequests of money or property the proceeds of which shall accrue to the benefit of the old-age assistance revolving fund. In the making of such gifts or contributions the donor shall attach no conditions, whatsoever. The management and disposition of any property so received will be in the division but such management and disposition shall be subject to the approval of the state board. [C35,§5296-g6; 47GA, ch 137,§§32, 38.]

3828.044 Cancellation of warrants. The state comptroller, as of January, April, July and October 1 of each year, shall stop payment on and issue duplicates of all old-age assistance warrants or checks which have been outstanding and unredeemed by the state treasurer for six months or longer. No bond of indemnity shall be required for the issuance of such duplicate warrants which shall be canceled immediately by the state comptroller. Should the original warrants subsequently be presented for payment, warrants in lieu thereof shall be issued

by the state comptroller at the discretion of and certification by the division. [47GA, ch 137, §37; 48GA, ch 140,§15.]

3828.045 Payments to the United States. Whenever any amount shall be recovered from any source for assistance furnished under the provisions of this chapter and paid into the old-age assistance revolving fund, upon order of the state board and division the state comptroller shall pay from said fund to the United States the amount which shall be required under the terms of title I of the federal social security act. [47GA, ch 137,§34.]

3828.046 Receipts and disbursements. There shall be kept on file in the state comptroller's office an itemized record of all receipts and disbursements showing the money received from each county and the assistance granted to each county. A summary of the said record shall be compiled and published at the end of the tax year. [C35,§5296-f37.]

Section 5296-f38, code 1935, repealed by 47GA, ch 137, §37

3828.047 Confidential records. All applications and records shall be confidential and shall be open to inspection only by persons authorized by the state or the United States in connection with their official duties, or when produced in response to a subpoena issued by a court of competent jurisdiction, or except as required for use in conducting hearings as provided for in this chapter.

Any list or lists of names of applicants and/or recipients of old-age assistance or other lists compiled by the old-age assistance commission or its successors are hereby declared to be the personal property of the state of Iowa; and no employee of the state of Iowa, or any other person, shall give, sell or furnish such list or lists to any person or persons for any purpose except for use in the administration of this chapter, and as otherwise herein provided. No person shall buy, give, furnish, sell or use such list or lists or any addressograph or addressograph plates belonging to or used for the old-age assistance division of the state of Iowa for any commercial or political purpose, and the violation of any of the provisions hereof is hereby made a misdemeanor, punishable by a fine of not to exceed one thousand dollars, or by imprisonment in the county jail not to exceed one year, or by both such fine and imprisonment. [47GA, ch 137,§25; 48GA, ch 140,§12.]

3828.048 Assistance subject to future statute. Every assistance granted under the provisions of this chapter shall be deemed to be granted and shall be held subject to the provisions of any amending or repealing act that may hereafter be passed, and no recipient under this chapter shall have any claims for compensation, or otherwise, by reason of his assistance being affected in any way by such amending or repealing act. [C35,§5296-f39.]

3828.049 Violations. Any person who by means of a wilfully false statement or representation or by impersonation or other fraudulent device obtains, or attempts to obtain, or aids or abets any person to obtain:

1. An assistance certificate to which he is not entitled; or
2. A larger amount of assistance than that to which he is justly entitled; or
3. Payment of any forfeited installment grant; or
4. Who aids or abets in the selling or buying, or in any way disposing of the property of any recipient, or his spouse, or both, with intent to defraud the state of Iowa; or
5. Who aids or abets in the selling or buying, or in any way disposing of or concealing the property of any person or his spouse, or both, for the purpose of qualifying or attempting to qualify such person or persons for old-age assistance, with intent to defraud the state of Iowa,

shall be guilty of a misdemeanor and the person guilty thereof, in addition to the punishment for his misdemeanor, shall be liable for double that part of the assistance paid which is in excess of the amount allowed by this chapter. [C35,§5296-f31; 47GA, ch 137,§29.]

3828.050 Penalty. Any person who violates any provision of this chapter for which no penalty is specifically provided shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days, or both. Where a person receiving assistance is convicted of an offense under this section the division shall cancel the certificate. [C35,§5296-f32; 47GA, ch 137,§38.]

Citation of amendatory act, 47GA, ch 137, §42
Constitutionality, §5296-f40, code 1935; 45ExGA, ch 19, §41; 47GA, ch 137, §41; 48GA, ch 140, §28
Rules of construction, §5296-f40, code 1935; 45ExGA, ch 19, §41; 48GA, ch 140, §6

CHAPTER 189.2

RELIEF FOR SOLDIERS, SAILORS, AND MARINES

3828.051 Tax.
3828.052 Control of fund.
3828.053 Relief commission.
3828.054 Appointment—vacancies.
3828.055 Compensation.
3828.056 Qualification—organization.
3828.057 Meetings—report—levy.
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3828.061 Burial—expenses.
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3828.063 Expenses and audit thereof.
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3828.065 Maintenance of graves.
3828.066 Payment—how made.

3828.051 Tax. A tax not exceeding one-fourth mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors, marines, and nurses who served in the military or naval forces of the United States in any war and their indigent wives, widows, and minor children, not over fourteen years of age if boys, nor sixteen if girls, having a legal residence in the county. [C97,§430; SS15,§430; C24, 27, 31, 35,§5385.]

Referred to in §3828 055

3828.052 Control of fund. Said fund shall be expended for the purposes aforesaid by the joint action and control of the board of supervisors and the relief commission hereinafter provided for. [SS15,§430; C24, 27, 31, 35,§5386.]

3828.053 Relief commission. Said fund shall be disbursed by the soldiers relief commission, which shall consist of three persons, all of whom shall be honorably discharged soldiers, sailors, marines, or nurses of the United States who served in the military or naval forces of the United States in any war. Said membership shall at all times, as near as possible, be equally divided between the soldiers, sailors, marines, and nurses of the civil war, Spanish-American war, and world war. [C97,§431; C24, 27, 31, 35, §5387.]

40ExGA, HF 144, §3, editorially divided

3828.054 Appointment — vacancies. Members of said commission shall be appointed by said board at the regular meeting in June, and the first appointees shall hold their office for one, two, and three years, respectively, and until their successors shall be appointed and qualify, and thereafter one shall be appointed each year for a term of three years. Any appointee may be removed at any time by said board for neglect of duty or maladministration. Vacancies shall be filled by appointment by the board. [C97, §431; C24, 27, 31, 35,§5388.]

3828.055 Compensation. The members of said commission shall be paid for their services the sum of two dollars per day for each day actually employed in the work of said commission, and also the same mileage that is paid to the members of the board of supervisors. Said per diem and mileage shall be paid out of the taxes raised under the provisions of section 3828.051. [C27, 31, 35,§5388-b1.]

Mileage, §5125

3828.056 Qualification—organization. They shall qualify by taking the usual oath of office, and give bond in the sum of five hundred dollars each, conditioned for the faithful discharge of their duties with sureties to be approved by the county auditor. The commission shall organize by the selection of one of their number as chairman, and one as secretary. [C97,§431; C24, 27, 31, 35,§5389.]

Oath, §1054

3828.057 Meetings — report — levy. The commission shall meet annually at the county auditor's office on the second Monday in June, and at such other times as may be necessary. At the annual meeting it shall determine who are entitled to relief and the probable amount required to be expended therefor, which sum it shall certify to the board, together with a list of those found to be entitled to relief, and the sum to be paid in each case. The board at its regular June meeting shall levy a sufficient tax to raise such amount. [C97,§432; S13,§432; C24, 27, 31, 35,§5390.]

3828.058 Names certified—relief changed—report. Upon the filing of the list with the board of supervisors, the county auditor shall, within twenty days thereafter, transmit to the township clerks in the county the names of those, if any, to whom relief has been awarded, and the amount. The amount awarded to any person may be increased, decreased, or discontinued by the commission at any regular meeting. New names may be added and certified thereat, and it shall, at the close of each year, make annual detailed reports to the board of its work, which shall be accompanied with the proper vouchers for all moneys disbursed by it. [C97,§432; S13, §432; C24, 27, 31, 35,§5391.]

3828.059 Disbursements. On the first Monday of each month after the fund is ready for distribution, the auditor shall issue his warrant to the commission for the sums thus awarded, and it shall proceed to disburse the same to the parties named in the list, or disbursements may be made in any other manner the commission may direct. Receipts shall be taken for all payments. [C97,§432; S13,§432; C24, 27, 31, 35, §5392.]

3828.060 Data furnished bonus board. The soldiers relief commission of each county shall obtain for and transmit to the state bonus board, created by chapter 32.1, at such time and in such manner as the board shall specify, such information as said board may request concerning any

person having or claiming to have any right to award from the additional bonus and disability fund created by said chapter. [C27, 31, 35,§5392-b1.]

3828.061 Burial — expenses. The board shall designate some suitable person in each township to cause to be decently interred in a suitable cemetery and not in any cemetery or part thereof used exclusively for the burial of the pauper dead, the body of any honorably discharged soldier, sailor, marine, or nurse of the United States, who served in the military or naval forces of the United States during any war, or his wife, widow, or child, if any such person has died without leaving sufficient means to defray the funeral expenses. The commission shall pay such expenses in a sum not exceeding one hundred dollars in any case. [C97,§433; S13,§433; C24, 27, 31, 35,§5393.]

3828.062 Headstone. The grave of each soldier, sailor, marine, or nurse shall be marked by a headstone, showing his name and the organization to which he belonged or in which he served. The headstone shall be of such design and material as may be approved by the board of supervisors, and shall cost not more than fifteen dollars. If, however, a headstone of the above general description shall be provided by the national government or if a tombstone shall be furnished by private persons for such grave, the headstone herein provided for need not be provided at county expense. [C97,§434; C24, 27, 31, 35,§5394.]

3828.063 Expenses and audit thereof. The expenses of such burial and headstone shall be paid by the county in which such person died. If such person is a resident of a different county at the time of death, the latter county shall reimburse the county wherein he died for the cost of such burial and headstone. In either case, the board of supervisors of such respective counties shall audit the account and pay the same from the funds provided for in this chapter in such manner as other claims are audited and paid. [C97,§434; C24, 27, 31, 35,§5395.]

3828.064 Markers for graves. The soldiers relief commission in any county shall, upon the petition of five reputable freeholders of any township or municipality in their county, procure for and furnish to said petitioners some suitable and appropriate metal marker, at a cost not exceeding one dollar each, for the grave of each honorably discharged soldier, sailor, marine, or nurse of the United States, who served in the military or naval forces of the United States during any war, who is buried within the limits of said township or municipality, to be placed at his grave to permanently mark and designate said grave for memorial purposes. The expenses thereof shall be paid from any funds raised as provided in this chapter. [SS15, §434-a; C24, 27, 31, 35,§5396.]

3828.065 Maintenance of graves. The board of supervisors of the several counties in this state shall each year, out of the general fund of their respective counties, appropriate and pay to the owners of, or to the public board or officers having control of cemeteries within the state in which any deceased soldier or sailor of the United States is buried, a sum sufficient to pay for the care and maintenance of the lots on which they are so buried, in any and all cases in which provision for such care is not otherwise made. [C27, 31, 35,§5396-a1; 48GA, ch 145,§1.]

41GA, ch 94, §1, editorially divided

3828.066 Payment—how made. Such payment shall be made at the rate charged for like care and maintenance of other lots of similar size in the same cemetery, upon the affidavit of the superintendent or other person in charge of such cemetery, that the same has not been otherwise paid or provided for. [C27, 31, 35,§5396-a2.]

CHAPTER 189.3

EMERGENCY RELIEF ADMINISTRATION

Social welfare department, see ch 181.1

3828.067 Administration of emergency relief.
3828.068 Powers and duties.
3828.069 Grants from state funds to counties.
3828.070 Duties of the county board of social welfare.
3828.071 County supervisors to determine relief and work projects.
3828.072 County directors to act as executive officers.

3828.067 Administration of emergency relief. The state department of social welfare, in addition to all other powers and duties given it by law, shall be charged with the supervision and administration of all funds coming into the hands of the state now or hereafter provided for emergency relief. [48GA, ch 86,§1.]

3828.068 Powers and duties. The state board shall have the power to:

1. Appoint such personnel as may be necessary for the efficient discharge of the duties imposed upon it in the administration of emergency relief, and to make such rules and regulations as it deems necessary or advisable covering its activities and those of the county boards.

2. Join and cooperate with the government of the United States, or any of its appropriate agencies or instrumentalities, in any proper relief activity.

3. Make such reports of budget estimates to the governor and to the general assembly as are* required by law, or are necessary and proper to obtain appropriations of funds necessary for relief purposes and for all the purposes of this chapter.

*Verb singular in enrolled act.

4. Determine the need for funds in the various counties of the state basing such determination upon the amount of money needed in the various counties to provide adequate relief, and upon

the counties' financial inability to provide such relief from county funds. The state board may administer said funds belonging to the state within the various counties of the state to supplement local funds as needed.

5. Make such reports, obtain and furnish such information from time to time as may be required by the governor, by the general assembly, or by any other proper office or agency, state or federal, and make an annual report of its activities. [48GA, ch 86,§2.]

3828.069 Grants from state funds to counties. The state department shall have the authority to require as a condition of making available state assistance to counties for emergency relief purposes, that the county boards of supervisors shall make maximum tax levies for relief and establish such budgets as are needed in respect to the relief situation in the counties. The state department shall also have the authority to require as a condition of grants of state aid to the counties that the county board of supervisors shall make no transfers from the county poor fund or charges against the county poor fund for purposes other than that for which the county poor fund is established by law, and it is hereby made mandatory upon the county board of supervisors, that taxes levied and collected for the county poor fund shall be expended only for the purposes levied. [48GA, ch 86,§3.]

3828.070 Duties of the county board of social welfare. The county board, in addition to all of the powers and duties given it by law, shall have the following duties:

1. Cooperate with the county board of supervisors in all matters pertaining to administration of relief.

2. At the request of the county board of supervisors, prepare requests for grants of state funds.

3. At the request of the county board of supervisors, administer county relief funds.

4. In counties receiving grants of state funds upon approval of the comptroller, administer both state and county relief funds.

5. Perform such other duties as may be prescribed by the state board and the county board of supervisors. [48GA, ch 86,§4.]

3828.071 County supervisors to determine relief and work projects. The local county board of supervisors shall ascertain all necessary details concerning those seeking relief, shall determine the minimum amount of relief required for each such person or family, and shall ascertain which of such persons are employable.

The board of supervisors may require that all employables contribute as many hours of his or her labor as that employable's requirements, as estimated by the board, will buy at the prevailing rate of compensation for that class of labor in that community.

The board of supervisors may determine on what projects of county-wide or community-wide nature such relief labor may be used. It may, however, delegate to its political subdivisions such authority as it deems advisable for administrative expediency.

To the board of supervisors is reserved all authority not expressly otherwise set out previously. [48GA, ch 86,§5.]

3828.072 County directors to act as executive officers. The county director shall be the executive officer of the county board in all matters pertaining to relief. [48GA, ch 86,§6.]

CHAPTER 189.4

SUPPORT OF THE POOR

Referred to in §3641

3828.073 "Poor person" defined.
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3828.075 Putative father.
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3828.109 Appeal to supervisors.
3828.110 Contracts for support.
3828.111 Medical and dental service.
3828.112 Supervision.
3828.113 Employment.
3828.114 Poor tax.

3828.073 "Poor person" defined. The words "poor" and "poor person" as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not

be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public. [C97,§2252; C24, 27, 31, 35,§5297.]

3828.074 Parents and children liable. The father, mother, and children of any poor person, who is unable to maintain himself or herself by labor, shall jointly or severally relieve or maintain such person in such manner as, upon application to the township trustees of the township where such person has a residence or may be, they may direct. [C51,§787; R60,§1355; C73, §1330; C97,§2216; C24, 27, 31, 35,§5298.]

Referred to in §§3684.17, 3828.015

3828.075 Putative father. The word "father" in this chapter includes the putative father of an illegitimate child, and the question of parentage may be tried in any proceeding to recover for or compel the support of such a child, and like proceedings may be prosecuted against the mother independently of or jointly with the alleged father. [C51,§788; R60,§1356; C73,§1332; C97,§2250; C24, 27, 31, 35,§5299.]

Obligation of parent, ch 544.1

3828.076 Who deemed trustee. The word "trustees" in this chapter shall be construed to include and mean any person or officer of any county or city charged with the oversight of the poor. [C51,§789; R60,§1357; C73,§1333; C97, §2251; C24, 27, 31, 35,§5300.]

3828.077 Remote relatives. In the absence or inability of nearer relatives, the same liability shall extend to grandparents, if of ability without personal labor, and to the male grandchildren who are of ability by personal labor or otherwise. [C51,§787; R60,§1355; C73,§1331; C97,§2217; C24, 27, 31, 35,§5301.]

Referred to in §§3684.17, 3828.015

3828.078 Enforcement of liability. Upon the failure of such relatives so to relieve or maintain a poor person who has made application for relief, the township trustees, county social welfare board, or state division of old-age assistance may apply to the district court of the county where such poor person resides or may be, for an order to compel the same. [C51,§789; R60,§1357; C73,§1333; C97,§2218; C24, 27, 31, 35,§5302; 47GA, ch 137,§39.]

3828.079 Notice—hearing. At least ten days notice in writing of the application shall be given to the parties sought to be charged, service thereof to be made as of an original notice, in which proceedings the county shall be plaintiff and the parties served defendants. No order shall be made affecting a person not served, but, as to such, notice may be given at any stage of the proceedings. The court may proceed in a summary manner to hear all the allegations and proofs of the parties, and order any one or more of the relatives who shall be able, to relieve or maintain him or her, charging them as far as practicable in the order above named, and for that purpose may bring in new parties when necessary. [C51,§§790–792; R60, §§1358–1360; C73,§§1334–1336; C97,§2219; C24, 27, 31, 35,§5303.]

Manner of service, §11060

3828.080 Scope of order. The order may be for the entire or partial support of the applicant, may be for the payment of money or the taking of the applicant to a relative's house, or may assign him or her for a certain time to one and for another period to another, as may be just and right, taking into view the means of the several relatives liable, but no such assignment shall be made to one who is willing to pay the amount necessary for support. If the order be for relief in any other form than money, it shall state the extent and value thereof per week, and the time such relief shall continue; or the order may make the time of continuance indefinite, and it may be varied from time to time by a new order, as circumstances may require, upon application to the court by the trustees, the poor person, or the relative affected, ten days notice thereof being given to the party or parties concerned. [C51,§§793–795; R60,§§1361–1363; C73, §§1337–1339; C97,§2219; C24, 27, 31, 35,§5304.]

3828.081 Judgment—appeal. When money is ordered to be paid, it shall be paid to such person as the court may direct. If support be not rendered as ordered, the court upon such fact being shown by the affidavit of one or more of the proper trustees, may render judgment and order execution for the amount due, rating any support ordered in kind at the valuation previously made. An appeal may be taken from the judgment rendered to the supreme court. Support for later periods under the same order may be, as it becomes due, applied for and obtained in the same manner. [C51,§§796–798; R60,§§1364–1366; C73,§§1340–1342; C97,§2219; C24, 27, 31, 35,§5305.]

3828.082 Abandonment—order as to property. When father or mother abandons any child, husband his wife, or wife her husband, leaving them a public charge or likely to become such, the trustees of the township, upon application to them, may make complaint to the district court or judge thereof in the county in which such abandoned person resides, or in which any property of such father, mother, husband, or wife is situated, for an order to seize such property, and, upon proof of the necessary facts, the court or judge shall issue an order, directed to the sheriff of the county, to take and hold possession of said property, subject to the further orders of the court, which order shall be executed by taking possession of chattel property wherever found, and shall entitle the officer serving the same to collect and hold the rents accruing upon real property. [C51,§§799, 800; R60,§§1367, 1368; C73,§§1343, 1344; C97, §2220; C24, 27, 31, 35,§5306.]

3828.083 Preservation and release of lien. Statement of the issuance of the order and a description of any real estate sought to be affected thereby, shall be entered in the incum-

brance book, and from the date thereof shall be superior in right to any conveyance or lien created by the owner thereafter, and return shall be made of said order to the proper court, where the order of seizure, upon investigation, may be discharged or continued; if continued, the entire matter shall be subject to the control of the court, and it shall from time to time make such orders as to the disposition of the personal property seized, and the application of it or the proceeds thereof, as it may deem proper, and of the disposition of the rents and profits of the real estate. Should the party against whom the order issued thereafter resume his or her support of the person abandoned, or give bond with sureties, to be approved by the clerk, conditioned that such person shall not become chargeable to the county, the order shall be by the clerk discharged and the property remaining restored. [C51,§§801–804; R60,§§1369–1372; C73,§§1345–1348; C97,§2220; C24, 27, 31, 35,§5307.]

3828.084 **Trial by jury.** In all cases the party sought to be charged with the support of another may demand a jury trial upon the question of his obligation and ability to render such support, the alleged abandonment, and the liability of the person abandoned to become a public charge; such trial to be had upon demand, which may be made at the time of the hearing of the application for the order, or at such other time as may be directed by the court, upon notice to the defendant. [C51,§805; R60,§1373; C73, §1349; C97,§2221; C24, 27, 31, 35,§5308.]

3828.085 **Recovery by county.** Any county having expended any money for the relief or support of a poor person, under the provisions of this chapter, may recover the same from any of his kindred mentioned herein, from such poor person should he become able, or from his estate; from relatives by action brought within two years from the payment of such expenses, from such poor person by action brought within two years after becoming able, and from such person's estate by filing the claim as provided by law. [C51,§806; R60,§1374; C73,§1350; C97, §2222; C24, 27, 31, 35,§5309.]

Referred to in §3828.086
Claims against estate, §11957 et seq.

3828.086 **Homestead—when liable.** When expenditures have been made for and on behalf of a poor person and his family, as contemplated by section 3828.085, the homestead of such poor person is liable for such expenditures when such poor person dies without leaving a surviving husband or wife, or minor children. [C31, 35, §5309-c1.]

3828.087 **Recovery by relative.** A more distant relation, who may have been compelled to aid a poor person, may recover from any one or more of the nearer relatives, and one so compelled to aid may recover contribution from others in the same degree, and a recovery may be had against the poor person or his estate, if, after such aid or support has been given, the person aided or supported becomes able to repay the same; but proceedings to recover therefor must be brought within two years from the time a cause of action accrues. [C51,§807; R60, §1375; C73,§1351; C97,§2223; C24, 27, 31, 35, §5310.]

3828.088 **Settlement—how acquired.** A legal settlement in this state may be acquired as follows:

1. Any person continuously residing in any one county of this state for a period of one year without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of one year from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county.

2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year without being warned to depart as provided in this chapter.

3. Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county.

4. A married woman has the settlement of her husband, if he has one in this state; if not, or if she lives apart from or is abandoned by him, she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state.

5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother.

6. Illegitimate children take the settlement of their mother, or, if she has none, then that of their putative father. [C51,§808; R60,§1376; C73,§1352; C97,§2224; C24, 27, 31, 35,§5311.]

3828.089 **Settlement continues.** A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state. [C51,§809; R60, §1377; C73,§1353; C97,§2224; C24, 27, 31, 35, §5312.]

3828.090 **Foreign paupers.**

1. Any person who is a county charge or likely to become such, coming from another state and not having acquired a settlement in any county of this state or any such person having acquired a settlement in any county of this state who removes to another county, may be

removed from this state or from the county into which such person has moved, as the case may be, at the expense of the county wherein said person is found, upon the petition of said county to the district or superior court of that county.

2. The court or judge shall fix the time and place of hearing on said petition and prescribe the time and manner of service of the notice of such hearing.

3. If upon the hearing on said petition such person shall be ordered to remove from the state or county and fails to do so, he shall be deemed and declared in contempt of court and may be punished accordingly. [C51,§811; R60, §1379; C73,§1354; C97,§2225; C24, 27, 31, 35, §5313.]

Contempts, ch 536

3828.091 Importation prohibited. If any person knowingly bring within this state or any county from another county in this state any pauper or poor person, with the intent of making him a charge on any of the townships or counties therein, he shall be fined not exceeding five hundred dollars, and be charged with his support. [C51,§2736; R60,§4379; C73,§4045; C97,§5009; C24, 27, 31, 35,§5314.]

3828.092 Notice to depart. Persons coming into the state, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township, or city in which such persons are found warning them to depart therefrom. After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning. [C51,§812; R60, §1380; C73,§1355; C97,§2226; C24, 27, 31, 35, §5315.]

3828.093 Service of notice. Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors, which, if not made by a sworn officer, must be verified by affidavit.

In the event such person cannot be found within the county, any person attempting to make such service shall file with the board of supervisors an affidavit that diligent search has been made and that such persons cannot be found within the county and the same shall constitute sufficient service of warning as provided herein. [C51,§813; R60,§1381; C73,§1356; C97,§2227; C24, 27, 31, 35,§5316.]

3828.094 Contest between counties. When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice, such auditor shall inform the auditor of the county granting relief if the claim of settlement is disputed. If it is not, the poor person, if able, may be removed to the county of his settlement, or, at the request of the auditor or board of supervisors of the county of his settlement, he may be maintained where he then is at the expense of such county, and without affecting his legal settlement. [C51, §§814, 816, 817; R60,§§1382, 1384, 1385; C73, §§1357, 1359, 1360; C97,§2228; C24, 27, 31, 35, §5317.]

3828.095 Trial. If the alleged settlement is disputed, then, within thirty days after notice thereof as above provided, a copy of the notices sent and received shall be filed in the office of the clerk of the district court of the county against which claim is made, and a cause docketed without other pleadings, and tried as an ordinary action, in which the county affording the relief shall be plaintiff, and the other defendant, and the burden of proof shall be upon the county granting the relief or making the removal. [C51, §§816, 817; R60,§§1384, 1385; C73,§§1359, 1360; C97,§2228; C24, 27, 31, 35,§5318.]

3828.096 County of settlement liable. The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person, and for the charges of removal and expenses of support incurred.

When relief as herein provided is furnished by any governmental agency of the county, township or city, such relief shall be deemed to have been furnished by the county in which such agency is located and the agency furnishing such relief shall certify the correctness of the costs of such relief to the board of supervisors of said county and said county shall collect from the county of such person's settlement. The amounts herein collected by said county shall be paid to the agency furnishing such relief. This statute as herein amended shall apply to services and supplies furnished as provided in section 2277. [C51,§815; R60,§1383; C73,§1358; C97,§2229; C24, 27, 31, 35,§5319.]

3828.097 Relief by trustees. The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county home. [C73,§1361; C97,§2230; S13,§2230; C24, 27, 31, 35,§5320.]

Referred to in §3828.103

3828.098 Overseer of poor. The board of supervisors in any county in the state may appoint an overseer of the poor for any part, or all of the county, who shall have within said county, or any part thereof, all the powers and duties conferred by this chapter on the township trustees. Said overseer shall receive as compensation an amount to be determined by the county board and may be paid either from the general or poor fund of the county. [C73,§1361; C97,§2230; S13,§2230; C24, 27, 31, 35,§5321.]

Referred to in §3828.103

3828.099 Form of relief—condition. The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance,

or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways. [C73,§1361; C97,§2230; S13,§2230; C24, 27, 31, 35,§5322.]

Referred to in §3828.103

3828.100 Medical services. When medical services are rendered by order of the trustees or overseers of the poor, no more shall be charged or paid therefor than is usually charged for like services in the neighborhood where such services are rendered. [C73,§1361; C97,§2230; S13, §2230; C24, 27, 31, 35,§5323.]

Referred to in §3828.103
40ExGA, HF 140, §12, editorially divided

3828.101 Interest prohibited. No supervisor, trustee, or employee of the county, shall be directly or indirectly interested in any supplies furnished the poor. [C97,§2230; S13,§2230; C24, 27, 31, 35,§5324.]

Referred to in §3828.103
Similar provisions, §§180, 275, 3922, 4685, 4686.14, 4755.10, 5361, 5673, 5828, 6534, 6710, 13324, 13327

3828.102 Special privileges to soldiers and others. No person who has served in the army or navy of the United States, or their widows or families, requiring public relief shall be sent to the county home when they can and prefer to be relieved to the extent above provided, and other persons and families may, at the discretion of the board, also be so relieved. [C73,§1362; C97, §2231; S13,§2231; C24, 27, 31, 35,§5325.]

Referred to in §3828.103

3828.103 County expense. All moneys expended as contemplated in sections 3828.097 to 3828.102, inclusive, shall be paid out of the county treasury, after the proper account rendered thereof shall have been approved by the boards of the respective counties, and in all cases the necessary appropriations therefor shall be made by the respective counties. But the board may limit the amount thus to be furnished. [C73,§1363; C97,§2232; C24, 27, 31, 35, §5326.]

3828.104 Township trustees—duty. The trustees in each township, in counties where there is no county home, have the oversight and care of all poor persons in their township, and shall see that they receive proper care until provided for by the board of supervisors. [C51,§819; R60, §1387; C73,§1364; C97,§2233; S13,§2233; C24, 27, 31, 35,§5327.]

3828.105 Application for relief. The poor may make application for relief to a member of the board of supervisors, or to the overseer of the poor, or to the trustees of the township where they may be. If application be made to the township trustees and they are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such temporary relief, subject to the approval of the board of supervisors, as the necessities of the person require and shall report the case forthwith to the board of supervisors, who may continue or deny relief, as they find cause. [C51,§820; R60,§1388; C73,§1365; C97, §2234; S13,§2234; C24, 27, 31, 35,§5328.]

Referred to in §3828.106

3828.106 Allowance by board. The board of supervisors may examine into all claims, including claims for medical attendance, allowed by the township trustees for the support of the poor, and if they find the amount allowed by said trustees to be unreasonable, exorbitant, or for any goods or services other than for the necessaries of life, they may reject or diminish the claim as in their judgment would be right and just. This section shall apply to all counties in the state, whether there are county homes established in the same or not. This and section 3828.105 shall apply to acts of overseers of poor in cities as well as to township trustees. [C51, §820; R60,§1388; C73,§1365; C97,§2234; S13, §2234; C24, 27, 31, 35,§5329.]

3828.107 Payment of claims. All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall be paid out of the county treasury. [C51,§821; R60,§1389; C73,§1366; C97,§2235; C24, 27, 31, 35,§5330.]

3828.108 Annual allowance. If a poor person of mature years and sound mind is likely to become a charge, the board may pay him such an annual allowance as will not exceed the cost of maintenance in the ordinary way. [C51,§822; R60,§1390; C73,§1367; C97,§2236; C24, 27, 31, 35,§5332.]

3828.109 Appeal to supervisors. If any poor person, on application to the trustees, be refused the required relief, he may apply to the board of supervisors, who, upon examination into the matter, may direct the trustees to afford relief, or it may direct specific relief. [C51, §823; R60,§1391; C73,§1368; C97,§2237; C24, 27, 31, 35,§5333.]

3828.110 Contracts for support. The board of supervisors may make contracts with the lowest responsible bidder for furnishing any or all supplies required for the poor, for a term not exceeding one year, or it may enter into a contract with the lowest responsible bidder, through proposals opened and examined at a regular session of the board, for the support of any or all the poor of the county for one year at a time, and may make all requisite orders to that effect, and shall require all such contractors to give bonds in such sum as it believes sufficient to secure the faithful performance of the same. [C51,§825; R60,§1393; C73,§1369; C97,§2238; C24, 27, 31, 35,§5334.]

3828.111 Medical and dental service. The board of supervisors may make contracts with any reputable and responsible person licensed to practice medicine or dentistry in this state to furnish medical or dental attendance or services required for the poor, for any term not exceeding one year, and shall require all such contractors to give bonds in a company authorized to do business in this state in such sum as it believes sufficient to secure the faithful performance of such contracts. [C31, 35,§5334-c1.]

See also §2554.09

3828.112 Supervision. When a contract is made for the support of any or all the poor, the board shall, from time to time, appoint some person to examine and report upon the manner the poor are kept and treated, which shall be done without notice to the person contracting for their support, and if upon due notice and inquiry the board find that the poor are not reasonably and properly supported and cared for, it may, at a regular or special session, set aside the contract, making proper allowances for the time it has been in force. [C51,§826; R60, §1394; C73,§1370; C97,§2239; C24, 27, 31, 35, §5335.]

3828.113 Employment. Any such contractor may employ a poor person in any work for which he is physically able, subject to the control of the board of supervisors, who may place said contractor under the supervision of the township trustees. [C51,§827; R60,§1395; C73,§1371; C97,§2240; C24, 27, 31, 35,§5336.]

3828.114 Poor tax. The expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements for county purposes; and in case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy a poor tax, not exceeding one and one-half mills on the dollar, to be entered on the tax list and collected as the ordinary county tax. [C51,§844; R60,§1412; C73,§1381; C97,§2247; S13,§2247; C24, 27, 31, 35,§5337.]

Excess expenditures legalized, 45GA, ch 170
One and one-ha'f mills added for years 1939, 1940; 48GA, ch 4,§2
Transfers to poor fund, §388

CHAPTER 189.5

COUNTY HOMES

3828.115 Establishment—submission to vote.
3828.116 Management.
3828.117 Annual published report.
3828.118 Steward.
3828.119 Admission—labor required.
3828.120 Order for admission.
3828.121 Discharge.
3828.122 Visitation and inspection.
3828.123 Education of children.
3828.124 Letting out.

3828.115 Establishment — submission to vote. The board of supervisors of each county may order the establishment of a county home in such county whenever it is deemed advisable, and may make the requisite contracts and carry such order into effect, provided the cost of said county home, if in excess of fifteen thousand dollars, shall be first estimated by said board and approved by vote of the people. [C51,§828; R60,§1396; C73,§1372; C97,§2241; SS15,§2241; C24, 27, 31, 35,§5338.]

Submission of question, §5261

3828.116 Management. The board of supervisors, or any committee appointed by it for that purpose, may make all contracts and purchases requisite for the county farm and home and may prescribe rules or regulations for the management and government of the same, and for the sobriety, morality, and industry of its occupants. [C51,§833; R60,§1401; C73,§1373; C97, §2242; S13,§2242; C24, 27, 31, 35,§5339.]

3828.117 Annual published report. The board of supervisors shall, during the month of January of each year, publish in the official papers of the county as part of its proceedings, a financial statement of the receipts of the county home, or county farm, itemizing the same and stating the source thereof, which report shall also set forth the total expenditures thereof and the value of the property on hand on January 1 of the year for which the report is made and a comparison with the inventory of the previous year. [C24, 27, 31, 35,§5340.]

3828.118 Steward. The board may appoint a steward of the county home, who shall be governed in all respects by the rules and regulations of the board and its committees, and may be removed by the board at pleasure, and who shall receive such compensation, perform such duties, and give such security for his faithful performance as the board may direct. [C51, §834; R60,§1402; C73,§1374; C97,§2243; S13, §2243; C24, 27, 31, 35,§5341.]

Removal under preference law, §1163

3828.119 Admission—labor required. The steward shall receive into the county home any person producing an order as hereafter provided, and enter in a book to be kept for that purpose, the name, age, and date of his reception, and may require of persons so admitted such reasonable and moderate labor as may be suited to their ages and bodily strength, the proceeds of which, together with the receipts of the poor farm, shall be appropriated to the use of the county home in such manner as the board may determine. [C51,§§835, 836; R60,§§1403, 1404; C73,§§1375, 1376; C97,§2244; S13,§2244; C24, 27, 31, 35,§5342.]

3828.120 Order for admission. No person shall be admitted to the county home except upon the written order of a township trustee or member of the board of supervisors, and relief shall be furnished in the county home only, when the person is able to be taken there, except as hereinbefore otherwise provided. [C51,§837; R60, §1405; C73,§1377; C97,§2244; S13,§2244; C24, 27, 31, 35,§5343.]

3828.121 Discharge. When any inmate of the county home becomes able to support himself, the board must order his discharge. [C51,§840; R60,§1408; C73,§1379; C97,§2245; S13,§2245; C24, 27, 31, 35,§5344.]

3828.122 Visitation and inspection. The board shall cause the county home to be visited at least once a month by one of its body, who shall carefully examine the condition of the inmates and the manner in which they are fed and clothed and otherwise provided for and treated, ascertain what labor they are required to perform, inspect the books and accounts of the steward, and look into all matters pertaining to the county home and its inmates, and report to the board. [C51,§842; R60,§1410; C73,§1380; C97,§2246; S13,§2246; C24, 27, 31, 35,§5345.]

3828.123 Education of children. Poor children, when cared for at the county home, shall attend the district school for the district in which such home is situated, and a ratable proportion of the cost of the school, based upon the attendance of such poor children to the total number of days attendance thereat, shall be paid by the county into the treasury of such school district, and charged as part of the expense of supporting the county home. [C51,§844; R60, §1412; C73,§1381; C97,§2249; S13,§2249; C24, 27, 31, 35,§5346.]

3828.124 Letting out. The board is invested with authority to let out the support of the poor, with the use and occupancy of the county home and farm, for a period not exceeding three years. [C51,§847; R60,§1415; C73,§1382; C97, §2248; S13,§2248; C24, 27, 31, 35,§5347.]

CHAPTER 189.6

INDIGENT TUBERCULAR PATIENTS

3828.125 Care and treatment.
3828.126 Separate buildings.
3828.127 Appropriation for construction.
3828.128 Allowance for support.
3828.129 Inspection by board of control.
3828.130 Refractory tubercular patients.
3828.131 Segregation and forcible detention.

3828.125 Care and treatment. The board of supervisors of each county shall provide suitable care and treatment for indigent persons suffering from tuberculosis, and where no other suitable provision has been made, they may contract for such care and treatment with the board of trustees of any hospital, not maintained for pecuniary profit. [S13,§409-s; SS15,§409-t2; C24, 27, 31, 35,§5369.]

3828.126 Separate buildings. Said board of supervisors may construct, or otherwise provide, and equip suitable buildings in connection with any hospital in the county for the segregation, care, and treatment of patients afflicted with tuberculosis.

No institution, hospital, or building for the care and treatment of persons afflicted with tuberculosis shall be established at any county home. [SS15,§409-t3; C24, 27, 31, 35,§5370.]

3828.127 Appropriation for construction. The board may, in counties having a population of over fifteen thousand and under sixty-seven thousand, appropriate a sum not exceeding five thousand dollars, and in counties of less than fifteen thousand, a sum not to exceed two thousand dollars for acquiring, constructing, and equipping sites and buildings, without submitting the question to a vote. [SS15,§409-t4; C24, 27, 31, 35,§5371.]

3828.128 Allowance for support. The board of supervisors may allow, from the poor fund of the county, for the care and support of each tuberculous patient cared for in any such institution, a sum not exceeding twenty dollars per week. [SS15,§409-t4; C24, 27, 31, 35,§5372.]

3828.129 Inspection by board of control. Any such department shall be inspected and approved by the board of control, which board shall have the power to require alterations in buildings and equipment, and such changes in treatment as may be necessary in order to make the institution and treatment conform to modern and accepted methods for the treatment of tuberculosis. [SS15,§409-t3; C24, 27, 31, 35,§5373.]

3828.130 Refractory tubercular patients. Any person suffering from tuberculosis, who shall persistently refuse to obey or comply with the rules of any institution for the care of tuberculous patients, may, by order of the district court of the county in which such institution is located, be committed to the state sanatorium, subject to the rules of admission at said institution, or to any county sanatorium or other institution where tuberculous patients are treated. [C24, 27, 31, 35,§5374.]

3828.131 Segregation and forcible detention. If any patient being treated for tuberculosis at the state sanatorium, or any county sanatorium or other institution where tuberculosis is cared for, shall refuse to comply with the laws of the state or rules for the government of the institutions named herein, and shall persistently, or carelessly, or maliciously violate such laws or rules so as to menace the welfare of said institution or to interfere with the administration, order, or peace of said institution, then upon complaint of the superintendent of any institution herein designated, such person may, by order of the district court, be segregated and forcibly detained in a ward or room, for such purpose, and for such period of time as may be deemed advisable by the court, to the end that such person may be properly treated, and the population of such institution may be protected and the decorum maintained. [S13,§409-q; C24, 27, 31, 35,§5375.]

CHAPTER 189.7

MEDICAL AND SURGICAL TREATMENT OF INDIGENT PERSONS

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3828.157 Expenses—how paid—action to reimburse county.
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3828.159 Transfer of patients from state institutions.

3828.132 Complaint. Any adult resident of the state may file a complaint in the office of the clerk of any juvenile court, charging that any legal resident of Iowa residing in the county where the complaint is filed is pregnant or is suffering from some malady or deformity that can probably be improved or cured or advantageously treated by medical or surgical treatment or hospital care, and that neither such person nor persons legally chargeable with his support are able to pay therefor. [SS15,§254-b; C24, 27, 31, 35,§4005.]

3828.133 Duty of public officers and others. It shall be the duty of physicians, public health nurses, members of boards of supervisors and township trustees, overseers of the poor, sheriffs, policemen, and public school teachers, having knowledge of persons suffering from any such malady or deformity, to file or cause such complaint to be filed. [SS15,§254-b; C24, 27, 31, 35,§4006.]

3828.134 "Patient" defined. The word "patient" as used in this chapter means the person against whom the complaint is filed. [C24, 27, 31, 35,§4007.]

3828.135 Examination by physician. Upon the filing of such complaint, the clerk shall docket the same and shall appoint a competent physician and surgeon, living in the vicinity of the patient, who shall personally examine the patient with respect to said pregnancy, malady or deformity. [SS15,§254-b; C24, 27, 31, 35, §4008.]

3828.136 Report by physician. Such physician shall make a report in duplicate on blanks furnished as hereinafter provided, answering the questions contained therein and setting forth the information required thereby, giving such history of the case as will be likely to aid the medical or surgical treatment or hospital care of such patient, describing the pregnancy, deformity or malady in detail, and stating whether or not in his opinion the same can probably be improved or cured or advantageously treated, which report shall be filed in the office of the clerk within such time as the clerk may fix. [SS15,§§254-b,-j; C24, 27, 31, 35,§4009.]

3828.137 Investigation and report. When such complaint is filed, the clerk shall furnish the county attorney and board of supervisors with a copy thereof and said board shall, by the overseer of the poor or such other agent as it may select, make a thorough investigation of facts as to the legal residence of the patient, and the ability of the patient or others chargeable with his support to pay the expense of such treatment and care; and shall file a report of such investigation in the office of the clerk, at or before the time of hearing. [SS15,§254-b; C24, 27, 31, 35,§4010.]

3828.138 Notice of hearing—duty of county attorney. When the physician's report has been filed, the clerk shall, with the consent of the court or judge, fix a time and place for hearing of the matter by the court, and the county attorney shall cause such patient and the parent or parents, guardian, or person having the legal custody of said patient, if under legal disability, to be served with such notice of the time and place of the hearing as the judge or clerk may prescribe. [SS15,§254-c; C24, 27, 31, 35,§4011.]

3828.139 Hearing—order—emergency cases—cancellation of commitments. The county attorney and the overseer of the poor, or other agent of the board of supervisors of the county where the hearing is held, shall appear thereat. The complainant, the county attorney, the overseer of the poor or other agent of the board of supervisors, and the patient, or any person representing him, or her, may introduce evidence and be heard. If the court finds that said patient is a legal resident of Iowa and is pregnant or is suffering from a malady or deformity which can probably be improved or cured or advantageously treated by medical or surgical treatment or hospital care, and that neither the patient nor any person legally chargeable with his or her support is able to pay the expenses thereof, then the clerk of court, except in obstetrical cases and cases of crippled children, shall immediately ascertain from the admitting physician at the university hospital whether such person can be received as a patient within a period of thirty days, and if the patient can be so received, the court shall then enter an order directing that said patient be sent to the

university hospital for proper medical and surgical treatment and hospital care. If the court ascertain, excepting in obstetrical cases and orthopedic cases, that a person of the age or sex of the patient, or afflicted by the complaint, disease or deformity with which such person is affected cannot be received as a patient at the said university hospital within the period of thirty days, then he shall enter an order directing the board of supervisors of the county to provide adequate treatment at county expense for said patient at home or in a hospital. Obstetrical cases and orthopedic cases may be committed to the university hospital without regard to the limiting period of thirty days hereinbefore stated.

In any case of emergency the court without previous inquiry may at its discretion order the patient to be immediately taken to and accepted by the university hospital for the necessary care as provided in section 3828.142, but if such a patient cannot be immediately accepted at the university hospital as ascertained by telephone if necessary, the court may enter an order as in certain cases above set forth directing the board of supervisors to provide adequate treatment at county expense for the said patient at home or in a hospital.

On the date this act [45ExGA, ch 38] becomes effective the commitments of all persons then waiting for treatment at the university hospital are hereby canceled. Should commitments be applied for on behalf of any of those said patients within six months thereafter, they may be committed without regard to the thirty-day provision of the preceding paragraph and they shall have preference as to sixty percent of the beds of the university hospital available for the use of indigent patients. [SS15,§254-c; C24, 27, 31, 35,§4012.]

Referred to in §§3828.140, 3828.145

3828.140 Treatment for infant. Whenever a woman who is pregnant is committed to the hospital under the provisions of section 3828.139, the said commitment shall authorize the hospital to provide proper medical or surgical treatment and hospital care for the infant. [C31, 35,§4012-d1.]

3828.141 Religious belief—denial of order. The court in its discretion may refuse to make such order in any case where the court finds the patient or his parent, parents, or guardian are members of a religious denomination whose tenets preclude dependence on the practice of medicine or surgery and desire in good faith to rely upon the practice of their religion for relief from disease or disorder. [C24, 27, 31, 35, §4013.]

3828.142 Order in case of emergency. In cases of great emergency, when the court or judge is satisfied that delay would be seriously injurious to the patient, he may make such order with the consent of the patient, if adult, or of the parent or parents, guardian, or person having the legal custody of said patient, if a minor or incompetent, without examination, report, notice, or hearing. [SS15,§254-c; C24, 27, 31, 35,§4014.]

Referred to in §3828.139

3828.143 Certified copy of order. The clerk shall prepare a certified copy of said order, which, together with a copy of the physician's report, shall be delivered to the admitting physician of said hospital at or before the time of the reception of the patient into the hospital. [SS15,§254-j; C24, 27, 31, 35,§4015.]

3828.144 Attendant—physician—compensation. If the physician appointed to examine the patient shall certify that an attendant to accompany the patient to the said hospital is necessary, and the university hospital attendant and ambulance service is not available, then the court or judge may appoint an attendant who shall receive not exceeding two dollars per day for the time thus necessarily employed and actual necessary traveling expenses by the most feasible route to said hospital whether by ambulance, train or automobile; but if such appointee is a relative of the patient or a member of his immediate family, or receives a salary or other compensation from the public for his services, no such per diem compensation shall be paid him. The physician appointed by the court to make the examination and report shall receive therefor three dollars for each examination and report so made and his actual necessary expenses incurred in making such examination, but if said physician receives a salary or other compensation from the public for his full-time services, then no such examination fee shall be paid. The actual, necessary expenses of transporting and caring for the patient shall be paid as hereinafter provided. [SS15,§254-h; C24, 27, 31, 35,§4016.]

Referred to in §3828.145

3828.145 Expenses—how paid. An itemized, verified statement of all charges provided for in section 3828.139 and in section 3828.144, in cases where the patient is admitted or accepted for treatment at the university hospital shall be filed with the superintendent of the university hospital, and upon his recommendation when approved by the judge under whose order the same were incurred, they shall be charged on the regular bill for the maintenance, transportation and treatment of the patient, and be audited and paid in the manner as hereinafter provided. [SS15,§254-h; C24, 27, 31, 35,§4017.]

3828.146 Duty of admitting physician at hospital. The authorities in control of the medical college shall designate some physician to pass upon the admission of such patient, and it shall be his duty to receive such patient into the hospital and to provide for him, if available, a cot, bed, or room in said hospital, and to assign him to the appropriate clinic and for treatment by the proper physician, unless, in his judgment, the presence of the patient in the hospital would be dangerous to other patients, or there is no reasonable probability that he may be benefited by the proposed treatment or hospital care.

If the admitting physician shall deny admission to the patient, he shall make a report in duplicate of his reasons therefor. [SS15,§254-d; C24, 27, 31, 35,§4018.]

Referred to in §3828.149

3828.147 County quotas. Subject to subsequent qualifications in this section, there shall be treated at the university hospital during each fiscal year a number of committed indigent patients from each county which shall bear the same relation to the total number of committed indigent patients admitted during the year as the population of such county shall bear to the total population of the state according to the last preceding official census. This standard shall apply to indigent patients, the expenses of whose commitment, transportation, care and treatment shall be borne by appropriated funds and shall not govern the admission of either obstetrical or orthopedic patients. If the number of patients admitted from any county shall exceed by more than ten percent the county quota as fixed and ascertained under the first sentence of this section, the charges and expenses of the care and treatment of such patients in excess of ten percent of the quota shall be paid from the funds of such county at actual cost; but if the number of excess patients from any county shall not exceed ten percent, all costs, expenses, and charges incurred in their behalf shall be paid from the appropriation for the support of the hospital. [C35,§4018-f1.]

3828.148 Report of physician in charge of clinic. If the physician or surgeon in charge of said clinic, or to whom such patient has been assigned for treatment, declines to treat such patient, he shall make a report in duplicate of his examination of such patient, and state therein his reasons for declining such treatment. [SS15,§254-d; C24, 27, 31, 35,§4019.]

Referred to in §3828.149

3828.149 Reports. One duplicate of each of the reports named in sections 3828.146 and 3828.148 shall be preserved in the records of said hospital, and the other transmitted to the clerk of the court where said order committing the patient to said hospital was entered, and by the clerk filed and preserved among the records in the cause. [SS15,§254-d; C24, 27, 31, 35, §4020.]

3828.150 Treatment of other patients. The university hospital authorities may at their discretion receive into the hospital for medical, obstetrical or surgical treatment or hospital care, patients not committed thereto under the provisions of this chapter; but the treatment or care of such patients shall not in any way interfere with the proper medical or surgical treatment or hospital care of committed patients.

All of the provisions of this chapter except as to commitment of patients shall apply to such patients. The university hospital authorities shall collect from the person or persons liable for the support of such patients reasonable charges for hospital care and service and deposit the same with the treasurer of the university for the use and benefit of the university hospital. Earnings of the hospital whether from private patients, cost patients, or indigents shall be administered so as to increase as much as possible, the service available for indigents. [C24, 27, 31, 35,§4021.]

3828.151 Hospital treatment. When any patient has been admitted to the hospital for treatment, the physician or surgeon in charge of the case shall proceed with due care and diligence to perform such operation or bestow such treatment upon such patient as in his judgment shall be necessary and proper. Adequate nursing and hospital care shall be provided for said patient during such treatment. [SS15,§254-d; C24, 27, 31, 35,§4022.]

3828.152 Treatment outside hospital—attendant. If, in the judgment of the physician or surgeon to whom the patient has been assigned for treatment, continuous residence of the patient in the hospital is unnecessary, such patient may, by the hospital authorities, be sent to his home or other appropriate place, and be required to return to the hospital when and for such length of time as may be for his benefit. The hospital authorities may, if necessary, appoint an attendant to accompany such patient and discharged patients, whose compensation shall be the same and whose expenses shall be audited and paid as provided for an attendant appointed by the court. [SS15,§§254-h,-i; C24, 27, 31, 35,§4023.]

3828.153 Treatment authorized. No minor or incompetent person shall be treated for any malady or deformity except such as is reasonably well described in the order of court or the report of the examining physician, unless permission for such treatment is provided for in the order of court, or is granted by his parents or guardian; but the physician in charge may administer such treatment or perform such surgical operations as are usually required in cases of emergency. [SS15,§254-l; C24, 27, 31, 35, §4024.]

3828.154 Treatment gratuitous—exception. No physician, surgeon, or nurse who shall treat or care for such patient shall charge or receive any compensation therefor except the salary or compensation fixed by the state board of education to be paid from the hospital funds. If the physician, surgeon or nurse is not in the regular employ of the state board of education, his or her compensation shall be paid by the county upon approval of the board of supervisors. [SS15,§254-e; C24, 27, 31, 35,§4025.]

3828.155 Record and report of expenses. The superintendent of said hospital shall keep a correct account of all medicine, care, and maintenance furnished to said patients, and shall make and file with the state comptroller an itemized, sworn statement of all expenses thereof incurred in said hospital. But he shall render separate bills showing the actual cost of all

appliances, instruments, x-ray and other special services used in connection with such treatment, commitments, and transportation to and from the said university hospital, including the expenses of attendants and escorts.

All purchases of materials, appliances, instruments and supplies by said university hospital, in cases where more than one hundred dollars is to be expended, and where the price of the commodity or commodities to be purchased are subject to competition, shall be upon open competitive quotations, and all contracts therefor shall be subject to the provisions of chapter 62. [SS15,§254-f; C24, 27, 31, 35,§4026.]

3828.156 Audit of accounts of hospital. To arrive at a proper basis for the payment of said bills for treatment, care, and maintenance, the state board of education shall cause to be made annually an audit of the accounts of the university hospital, and determine the average cost per day for the care and maintenance of each patient therein, exclusive of the salaries of the members of the faculty of said university college of medicine, and said bills shall be allowed at such average cost. All accounts shall be so adjusted and paid as to reimburse the funds of the hospital used for the purposes of this chapter. [C24, 27, 31, 35,§4027.]

Referred to in §3828.157

3828.157 Expenses—how paid—action to reimburse county. Warrants issued under section 3828.156 shall be promptly drawn on the treasurer of state and forwarded by the state comptroller to the treasurer of the state university, and the same shall be by him placed to the credit of the funds which are set aside for the support of said hospital. The superintendent of the said university hospital shall certify to the auditor of state on the first day of January, April, July and October of each year, the amount as herein provided not previously certified by him due the state from the several counties having patients chargeable thereto, and the auditor of state shall thereupon charge the same to the county so owing. A duplicate certificate shall also be mailed to the auditor of each county having patients chargeable thereto.

The county auditor, upon receipt of such certificate, shall thereupon enter the same to the credit of the state in his ledger of state accounts, and at once issue a notice to his county treasurer authorizing him to transfer the amount from the poor or county fund to the general state revenue, which notice shall be filed by the treasurer as his authority for making such transfer; and he shall include the amount so transferred in his next remittance of state taxes to the treasurer of state, to accrue to the credit of the university hospital fund.

The state auditor shall certify the total cost of commitment, transportation and caring for each indigent patient under the terms of this statute to the county auditor of such patient's legal residence, and such certificate shall be preserved by the county auditor and shall be a debt due from the patient or the persons legally responsible for his or her care, maintenance or support; and whenever in the judgment of the board of supervisors the same or any part thereof shall be collectible, the said board may in its own name collect the same and is hereby authorized to institute suits for such purpose; and after deducting the county's share of such cost shall cause the balance to be paid into the state treasury to reimburse the university hospital fund. [SS15,§254-g; C24, 27, 31, 35,§4028.]

3828.158 Faculty to prepare blanks—printing. The medical faculty of the state university hospital shall from time to time prepare blanks containing such questions and requiring such information as may, in its judgment, be necessary and proper to be obtained by the physician who examines such patient under order of court. Such blanks shall be printed by the state, and a sufficient supply thereof shall be furnished by the state board of printing to the clerk of each juvenile court in the state. The cost of printing said blanks shall be audited, allowed, and paid in the same manner as other bills for public printing. [SS15,§254-j; C24, 27, 31, 35,§4029.]

3828.159 Transfer of patients from state institutions. The board of control of state institutions, and the board in control of the school for the blind, the school for the deaf, the soldiers' orphans home, and the juvenile home, may, respectively, send any inmate of any of said institutions, or any person committed or applying for admission thereto, to the hospital of the medical college of the state university for treatment and care as provided in this chapter, without securing the order of court required in other cases. Said boards shall respectively pay the traveling expenses of any patient thus committed, and when necessary the traveling expenses of an attendant for such patient, out of funds appropriated for the use of the institution from which he is sent. [SS15,§254-k; C24, 27, 31, 35,§4030.]

CHAPTER 189.8

DETENTION HOSPITAL FOR CONTAGIOUS DISEASES

3828.160 Establishment.
3828.161 Bonds—tax levy.
3828.162 Management and control.

3828.160 Establishment. When the board of supervisors of any county shall be presented with a petition signed by three hundred resident freeholders of the county, of whom two hundred shall be residents of the city, town, or village where it is proposed to establish and equip a hospital for the detention of persons suffering from any infectious or contagious disease, the board, when authorized by the vote of the people at an election called and held as provided in the chapter relating to county public hospitals, shall order the erection and equipment of such hospital, at a cost of not more than the amount voted, which shall in no event exceed the sum of forty thousand dollars. [C24, 27, 31, 35,§5376.]

County public hospitals, ch 269
Vote required to authorize bonds, §1171.18

3828.161 Bonds—tax levy. The board of supervisors shall issue the bonds of the county covering the cost of the erection and equipment of said hospital, which bonds shall be payable at the option of the county at any time within fifteen years, and shall draw interest at the rate of not more than five percent per annum, payable annually. The board shall make such levy as will pay the said bonds and interest thereon as they become due. Such funds shall be used for no other purpose. [C24, 27, 31, 35,§5377.]

Payment and maturity, ch 63.1

3828.162 Management and control. The establishment, maintenance, and control of such hospital shall be in accordance with the provisions of the chapter relating to county public hospitals, so far as applicable. [C24, 27, 31, 35, §5378.]

County public hospitals, ch 269

TITLE XII

EDUCATION

CHAPTER 190

SUPERINTENDENT OF PUBLIC INSTRUCTION

3829 Qualifications.
3830 Office.
3831 General powers.
3832 Duties.
3832.1 Uniform financial records.
3832.2 Printing—sale.
3834 Reports from school officers—delinquency.
3835 Deputy—chief clerk—inspectors.
3836 Expenses.

3829 Qualifications. The superintendent of public instruction shall be a graduate of an accredited university or college, or of a four-year course above high school grade in an accredited normal school, and shall have had at least five years experience as a teacher or school superintendent. [S13,§2627-b; C24, 27, 31, 35,§3829.]

3830 Office. The office of the superintendent of public instruction shall be in the capitol and be known as the department of public instruction. [C51,§1078; C73,§1578; C97,§2621; S13,§§2627-c,-d; C24, 27, 31, 35,§3830.]

3831 General powers. He shall have general supervision and control over the rural, graded, and high schools of the state, and over such other state and public schools as are not under the control of the state board of education or board of control of state institutions. [C51,§1081; C73,§1577; C97,§2622; S13,§2627-c; C24, 27, 31, 35,§3831.]

3832 Duties. The superintendent of public instruction shall:

1. *Filing and preserving reports.* File and preserve all reports, documents, and correspondence that may be of a permanent value, which shall be open for inspection under reasonable conditions by any citizen of the state.

2. *General record.* Keep a record of the business transacted by him.

3. *Inspection.* Ascertain, so far as practicable, by inspection or otherwise, the condition, needs, and progress of the schools under the supervision and control of his department.

4. *Recommendations.* Suggest, through public addresses, pamphlets, bulletins, and by meetings and conferences with school officers, teachers, parents, and the public generally, such changes and improvements relating to educational matters as he may think desirable, and publish and distribute such views and information as he may deem important.

5. *Promotion of interest in education.* Endeavor to promote among the people of the state an interest in education, including industrial and commercial education, agriculture, manual and vocational training, domestic science, and continuation work.

6. *Days for special observance.* Publish and distribute from time to time leaflets and circulars relative to such days and occasions as he may deem worthy of special observance in the public schools.

7. *Classification.* Classify and define the various schools under the supervision and control of his department, formulate suitable courses of study therefor, and publish and distribute such classifications and courses of study.

8. *Outline for teaching American citizenship.* Prepare and distribute to all elementary schools lists of books and texts and an outline of American citizenship for all grades from one to eight, inclusive.

9. *Distribution of outline of courses of study.* Distribute to all high schools, academies, and institutions ranking as secondary schools, lists of books and texts and an outline of a course of study in American history, civics of the state and nation, social problems, and economics, prepared under his direction.

10. *Manual on health training.* Prepare, or approve, and distribute a manual on practical health training for the aid of teachers.

11. *Officers and teachers reports — forms.* Prescribe the reports, both regular and special, which shall be made by public school officers, superintendents, teachers, and other persons and officers having custody and control of public school funds or property, and prepare suitable forms and furnish blanks for such reports.

12. *Report to comptroller.* Report to the state comptroller on the first day of January of each year the number of persons of school age in each county.

13. *Report to governor.* Report biennially to the governor, at the time provided by law, the condition of the schools under his supervision, including the number and kinds of school districts, the number of schools of each kind, the number and value of schoolhouses, the enrollment and attendance in each county for the previous year, any measures proposed or plans matured for the improvement of the public schools, such financial and statistical information as may be of public importance, and such general information relating to educational affairs and condi-

tions within the state or elsewhere as he may deem beneficial.

Other reports, §§246, 3849, 3853, 3857, 3897

14. *Institutes.* Appoint at least one and not more than two county educational meetings or institutes to be held in each county each year and designate the time and place for holding them. The program therefor, and the instructors and lecturers therein, shall be subject to his approval.

15. *Examinations.* Prepare and supply questions for the examination of applicants for teachers' certificates and pupils completing the eighth grade in the rural schools, and fix the times of such examinations.

16. *Plans and specifications for buildings.* When deemed necessary, cause to be prepared and published a pamphlet containing suitable plans and specifications for public school buildings, including the most approved means and methods of heating, lighting, and ventilating the same, together with information and suggestions for the proper and economical construction thereof.

17. *Printing of school laws.* During the months of June and July in the year 1925, and every four years thereafter, if deemed necessary, cause to be printed in book form all school laws then in force, with such forms, rulings, and decisions, and such notes and suggestions as may aid school officers in the proper discharge of their duties. A sufficient number shall be furnished to the county superintendent of each county to supply therein school officers, directors, superintendents, and to others in such numbers as may be reasonably requested.

18. *Printing of changes in school laws.* Cause to be printed in pamphlet form after each session of the general assembly, any amendments or changes in the school laws with necessary notes and suggestions to be distributed as above prescribed.

19. *Appeals.* Examine and determine all appeals taken to him, according to law, prescribe rules of practice therefor not inconsistent with law, and render written opinions upon questions submitted by school officers pertaining to their duties.

1, 2. [C51,§1078; C73,§1578; C97,§2621; S13, §2627-d; C24, 27, 31, 35,§3832.]

3. [S13,§2627-c; C24, 27, 31, 35,§3832.]

4. [C51,§1081; C73,§1577; C97,§2622; S13, §2627-c; C24, 27, 31, 35,§3832.]

5, 6, 7. [S13,§2627-c; C24, 27, 31, 35,§3832.]

8, 9, 10. [C24, 27, 31, 35,§3832.]

11. [S13,§2627-c; C24, 27, 31, 35,§3832.]

12. [C73,§1583; C97,§2625; S13,§2627-c; C24, 27, 31, 35,§3832.]

13. [C51,§1086; C73,§1583; C97,§2625; S13, §2627-c; C24, 27, 31, 35,§3832.]

14. [C73,§1577; C97,§2622; S13,§2627-c; C24, 27, 31, 35,§3832.]

15, 16. [S13,§2627-c; C24, 27, 31, 35,§3832.]

17. [C51,§§1083, 1085; C73,§1579; C97,§2624; S13,§§2627-e, 2823-j; C24, 27, 31, 35,§3832.]

18. [C73,§1579; C97,§2624; S13,§2627-e; C24, 27, 31, 35,§3832.]

19. [C73,§1577; C97,§2623; S13,§2627-c; C24, 27, 31, 35,§3832.]

3832.1 Uniform financial records. For the purpose of establishing a uniform cost accounting and financial record system in the public schools of the state, and to facilitate auditing the financial transactions of all school districts, the superintendent of public instruction shall prepare a system of financial records that designates the uniform classification headings under which all receipts and disbursements in public school funds shall be recorded, which system, when prepared, shall be used in all public schools on and after such date as the superintendent of public instruction shall designate, provided that no district shall be required to displace a system already in use if such system, in the discretion of the state superintendent of public instruction, records receipts and disbursements under the same classification headings and in at least the detail provided for in the state system. [C35,§3832-e1.]

Referred to in §3832.2

3832.2 Printing—sale. The system provided for in section 3832.1 may, when prepared by the superintendent of public instruction, be printed by the state printing board as prepared and sold to the schools at cost. [C35,§3832-e2.]

3833 Rep. by 44GA, ch 78

3834 Reports from school officers — delinquency. The superintendent of public instruction may require from time to time reports under oath from all officers and persons who have any authority over, or who have any duties in connection with, public school affairs, or who have, or who have lately had, the custody or control of any public school funds or property. He shall furnish the proper blanks for such reports, and any such officer or person who unreasonably neglects or refuses to make a report required by him shall be deemed guilty of a misdemeanor. [S13,§2627-f; C24, 27, 31, 35, §3834.]

Punishment, §12894

3835 Deputy—chief clerk—inspectors. He may appoint a deputy, whose appointment must be approved by the governor. The qualifications of the deputy shall be the same as required for the superintendent. The deputy shall, in the absence or inability of the superintendent, perform the duties of the office. The superintendent of public instruction shall also appoint a chief clerk and such regular inspectors of the public schools of the state, including rural, graded, and high schools, as he may deem necessary, not exceeding three. [C73,§§766, 767, 770; C97,§2621; S13,§2627-g; C24, 27, 31, 35, §3835.]

3836 Expenses. The superintendent of public instruction, his deputy, and the regular inspectors in his department shall receive their actual necessary traveling expenses incurred in the performance of their official duties. [C51, §1087; C73,§§1580, 3760; C97,§2627; S13, §2627-h; C24, 27, 31, 35,§3836.]

CHAPTER 191

VOCATIONAL EDUCATION

3837 Federal act accepted.
3838 State board for vocational education.
3839 Executive officer—assistants.
3840 Duties of board.
3841 Federal aid—conditions.
3842 Definitions.
3843 Advisory committee—qualifications—tenure—meetings.
3844 State aid to equal federal aid.
3845 Local advisory committee.
3846 Powers of district boards.
3847 Salary and expenses.
3848 Custodian of funds—reports.
3849 Biennial report.

3837 Federal act accepted. The provisions of the act of congress entitled, "An act to provide for the promotion of vocational education; to provide for cooperation with the states in the promotion of such education in agriculture and in the trades and industries; to provide for cooperation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure", approved February 23, 1917, and the benefit of all funds appropriated under said act, are accepted. [C24, 27, 31, 35,§3837.]

3838 State board for vocational education. The superintendent of public instruction, the president of the state board of education, and the labor commissioner shall constitute the state board for vocational education. [C24, 27, 31, 35,§3838.]

3839 Executive officer—assistants. The superintendent shall be chairman of the board and its executive officer, and shall, with its approval, appoint such assistants as may be necessary to carry out the provisions of this chapter. [C24, 27, 31, 35,§3839.]

3840 Duties of board. The board shall:

1. Cooperate with the federal board for vocational education in the administration of said act of congress.
2. Provide for making studies and investigations relating to prevocational and vocational training in agricultural, industrial, and commercial subjects, and home economics.
3. Promote and aid in the establishment in local communities and public schools of departments and classes giving instruction in such subjects.
4. Cooperate with local communities in the maintenance of such schools, departments, and classes.
5. Establish standards for teachers of such subjects in approved schools, departments, and classes.
6. Cooperate in the maintenance of teachers training schools, departments, and classes, supported and controlled by the public, for the training of teachers and supervisors of such subjects.
7. Establish standards for, and annually inspect as a basis of approval, all schools, departments, and classes, and all teachers training schools, departments, and classes, applying for federal and state moneys under the provisions of this chapter. [C24, 27, 31, 35,§3840.]

Part-time schools, ch 218

3841 Federal aid — conditions. Approved schools, departments, and classes, and approved teachers training schools, departments, and classes shall be entitled to federal and state moneys so long as they are approved by such board as to site, plant, equipment, number and qualification of teachers, employment of teachers, admission and number of pupils, courses of study, methods of instruction, and expenditure of money. [C24, 27, 31, 35,§3841.]

40ExGA, HF 87,§5, editorially divided

3842 Definitions. "Approved school, department, or class" shall mean a school, department, or class approved by said board as entitled under the provisions of this chapter to federal moneys for the salaries of teachers of vocational subjects. "Approved teachers training school, department, or class" shall mean a school, department, or class approved by the board as entitled under the provisions of this chapter to federal moneys for the training of teachers of vocational subjects. [C24, 27, 31, 35,§3842.]

3843 Advisory committee — qualifications—tenure—meetings. The board shall appoint a state advisory committee for vocational education, consisting of nine members. The term of each member shall be for three years. The terms of three members shall expire on the first day of July each year. The committee shall consist of three educators, one member experienced in agriculture, one an employer, one a representative of labor, one experienced in business and commerce, one experienced in social work, and one woman experienced in women's work. The committee shall meet in conference with the board at least twice a year, and at such other times as the board shall deem advisable. [C24, 27, 31, 35,§3843.]

3844 State aid to equal federal aid. For each dollar of federal money expended for the salaries of teachers in approved schools, departments, and classes, the local community must expend an amount equal to the amount of federal money which it receives for the same purpose for the same year. [C24, 27, 31, 35,§3844.]

3845 Local advisory committee. The board of directors of any school district having a population of more than five thousand persons, maintaining a school, department, or class receiving the benefit of federal moneys under the provisions of this chapter shall, as a condition of approval by such state board as herein provided, appoint a local advisory committee for

vocational education, consisting of persons of experience in agriculture, industry, home economics, and business, to give advice and assistance to such board of directors in the establishment and maintenance of such schools, departments, and classes. The state board may require the board of directors of any school district that maintains an approved school, department, or class, to appoint such an advisory committee. Members of such advisory committee shall serve without compensation. [C24, 27, 31, 35,§3845.]

3846 Powers of district boards. The board of directors of any school district is authorized to carry on prevocational and vocational instruction in subjects relating to agriculture, commerce, industry, and home economics, and to pay the expense of such instruction in the same way as the expenses for other subjects in the public schools are now paid. [C24, 27, 31, 35,§3846.]

3847 Salary and expenses. The board is authorized to make such expenditures for salaries of assistants, actual expenses of the board and the state advisory committee incurred in the discharge of their duties, and such other expenses as in the judgment of the board are necessary to the proper administration of this chapter. [C24, 27, 31, 35,§3847.]

3848 Custodian of funds — reports. The treasurer of state shall be custodian of the funds paid to the state from the appropriations made under said act of congress, and shall disburse the same on vouchers audited as provided by law. He shall report the receipts and disbursements of said funds to the general assembly at each biennial session. [C24, 27, 31, 35, §3848.]

3849 Biennial report. The superintendent of public instruction shall embrace in his biennial report a full report of all receipts and expenditures under this chapter, together with such observations relative to vocational education as may be deemed of value. [C24, 27, 31, 35,§3849.]

Biennial report, §§246, 3832, 3853, 3857

CHAPTER 192

VOCATIONAL REHABILITATION

3850 Acceptance of federal act.
3851 Custodian of funds.
3852 State agency.
3853 Duties of state board.
3854 Plan of cooperation.
3855 Gifts and donations.
3856 Fund.
3857 Report of gifts.

3850 Acceptance of federal act. The state of Iowa does hereby, through its legislative authority, accept the provisions and benefits of the act of congress, entitled "An act to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment", approved June 2, 1920 (Pub. No. 236, 66th Congress) [29 USC,§§31 to 44, inc.], and will observe and comply with all the requirements of such act. [C24, 27, 31, 35,§3850.]

3851 Custodian of funds. The treasurer of state is hereby designated and appointed custodian of all moneys received by the state from appropriations made by the congress of the United States for the vocational rehabilitation of persons disabled in industry or otherwise, and is authorized to receive and provide for the proper custody of the same and to make disbursement therefrom upon the requisition of the state board for vocational education. [C24, 27, 31, 35,§3851.]

3852 State agency. The board heretofore designated or created as the state board for vocational education to cooperate with the federal board for vocational education in the administration of the provisions of the vocational education act, approved February 23, 1917, is hereby designated as the state board for the purpose of cooperating with the said federal board in carrying out the provisions and the purposes of said federal act providing for the vocational rehabilitation of persons disabled in industry or otherwise. [C24, 27, 31, 35,§3852.]

3853 Duties of state board. The state board for vocational education is hereby empowered and directed to:

1. Cooperate with the federal board for vocational education in the administration of said act of congress.
2. Administer any legislation pursuant thereto enacted by this state, and direct the disbursement and administer the use of all funds provided by the federal government and this state for the vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment.
3. Appoint such assistants as may be necessary to administer the provisions of this chapter and said act of congress in this state and fix the compensation of such persons.
4. Study and make investigations relating to the vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment and to formulate plans for the vocational rehabilitation of such persons.
5. Make such surveys with the cooperation of the state commissioner of labor and the state industrial commissioner as will assist in the vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment.
6. Maintain a record of all such persons together with all measures taken for their rehabilitation.

7. Utilize in the rehabilitation of persons disabled in industry or otherwise such existing educational facilities of the state as may be advisable and practicable, including public and private educational institutions, public or private establishments, plants, factories, and the services of individuals specially qualified for the instruction of physically handicapped persons.

8. Promote the establishment and assist in the development of training agencies for the vocational rehabilitation of persons disabled in industry or otherwise.

9. Supervise the training of such persons and confer with their relatives and others concerning their vocational rehabilitation.

10. Make every possible endeavor looking to the placement of vocationally rehabilitated persons in suitable remunerative occupations, including supervision for a reasonable time after return to civil employment.

11. Utilize the facilities of such agencies, both public and private, as may be practicable in securing employment for such persons; and any such public agency is hereby authorized and directed to cooperate with the state board for vocational education for the purpose stated.

12. Cooperate with any agency of the federal government or of the state, or of any county or other municipal authority within the state, or any other agency, public or private, in carrying out the purposes of this chapter.

13. Make such rules and regulations as may be necessary for the administration of this chapter and said act of congress within this state.

14. Do all things necessary to secure the rehabilitation of those entitled to the benefits of this chapter.

15. Report on call or biennially to the governor the conditions of vocational rehabilitation within the state, such report to designate the educational institutions, establishments, plants, factories, etc., in which training is being given, and to contain a detailed statement of the expenditures of the state and federal funds in the rehabilitation of persons disabled in industry or otherwise. [C24, 27, 31, 35,§3853.]

Biennial report, §§246, 3832, 3849, 3857

3854 Plan of cooperation. It shall be the duty of the state board for vocational education and the state labor commissioner and the state industrial commissioner as administrator of the workmen's compensation law to formulate a plan of cooperation in accordance with the provisions of this chapter and said act of congress, such plan to become effective when approved by the governor of the state. [C24, 27, 31, 35,§3854.]

3855 Gifts and donations. The state board for vocational education is hereby authorized and empowered to receive such gifts and donations from either public or private sources as may be offered unconditionally or under such conditions related to the vocational rehabilitation of persons disabled in industry or otherwise as in the judgment of the said state board are proper and consistent with the provisions of this chapter. [C24, 27, 31, 35,§3855.]

Referred to in §6943.041
39GA, ch 14,§6, editorially divided

3856 Fund. All the moneys received as gifts or donations shall be deposited in the state treasury and shall constitute a permanent fund to be called the special fund for the vocational rehabilitation of disabled persons, to be used by the said board in carrying out the provisions of this chapter or for purposes related thereto. [C24, 27, 31, 35,§3856.]

3857 Report of gifts. A full report of all gifts and donations offered and accepted, together with the names of the donors and the respective amounts contributed by each, and all disbursements therefrom shall be submitted at call or biennially to the governor of the state by said state board. [C24, 27, 31, 35,§3857.]

CHAPTER 193

BOARD OF EDUCATIONAL EXAMINERS

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3858 Members. The board of educational examiners shall consist of:

1. The superintendent of public instruction who shall be president and executive officer of the board and four additional members to be appointed by the governor under the limitations provided in subsections 2, 3, 4, and 5.
2. The president of one of the three state institutions of higher learning.
3. The president of one of the privately endowed institutions of higher learning in the state that maintain teacher training courses.
4. A county superintendent of schools.
5. A city superintendent of schools.

Each appointee shall hold office for a term of four years and until his successor is appointed and qualified. The term of office of each appointee shall begin July 1. [C97,§2628; C24, 27, 31, 35,§3858.]

3858.1 Powers. The board of educational examiners shall have authority to issue certificates to applicants who are eighteen years of age or over, physically competent and morally fit to teach, and who have the qualifications and training hereinafter prescribed. [C97,§2629; S13,§2629; C24, 27, 31,§3863; C35,§3858-e1.]

3859 Secretary—assistants. The board shall employ a secretary, and prescribe his duties. He shall receive his actual necessary expenses while engaged in the performance of his duties at places other than the capitol. The board may employ such persons as are necessary to assist in examinations and in reading answer papers. [C97,§2634; S13,§2634-a; SS15,§2634-a; C24, 27, 31, 35,§3859.]

3860 Meetings. The board shall meet for the transaction of business at such times and places as the president may direct, and shall annually hold at least two public examinations of teachers, to be conducted by a member or the secretary of the board, or by such qualified person or persons as the board may select. [C97, §2629; S13,§2629; C24, 27, 31, 35,§3860.]

3861 Examinations. All examinations shall be conducted in accordance with rules adopted by the board, not inconsistent with the laws of the state, and a record shall be kept of all its proceedings. [C97,§2629; S13,§2629; C24, 27, 31, 35,§3861.]

3862 to 3872, inc. Rep. by 45GA, ch 51

3872.01 Definition of fields. For the purposes of this act [45GA, ch 51] the elementary school field shall be construed to include the kindergarten and grades one to eight, inclusive; the secondary school field shall be construed to include the junior high school, the senior high school, and the four-year high school; and the administrative and supervisory field shall be construed to include all administrative and supervisory positions in the public schools. [C35,§3872-e1.]

3872.02 Classes of certificates. The board of educational examiners is hereby authorized to issue four classes of regular certificates as follows:

1. Elementary teachers' certificates.
2. Secondary teachers' certificates.
3. Administrative and supervisory teachers' certificates.
4. Special teachers' certificates. [C97,§2630; S13,§2630-b; C24, 27, 31,§3865; C35,§3872-e2.]

3872.03 Elementary certificates. The elementary teachers' certificates shall include the advanced elementary certificate and the standard elementary certificate and shall specify the division or divisions of the elementary school field for which the holders are especially trained.

1. *Advanced.* The advanced elementary certificate shall be issued to the holder of a diploma granted by an Iowa college accredited by the board of educational examiners certifying to the completion of a four-year course including such specific and professional training for teaching in some division of the elementary school field as the board shall prescribe. It shall be valid for teaching in the elementary school field and, when so designated on the certificate, in the ninth grade.

2. *Standard.* The standard elementary certificate shall be issued to the holder of a diploma or an official statement from an Iowa college accredited by the board of educational examiners certifying to the completion of a two-year course including such specific and professional training for teaching in some division of the elementary school field as the board shall prescribe. It shall be valid for teaching in the elementary school field and, when so designated on the certificate, in the ninth grade. [C35, §3872-e3.]

3872.04 Secondary certificates. The secondary teachers' certificates shall include the advanced secondary certificate and the standard secondary certificate and shall specify the subjects or subject groups in the secondary school field for which the holders are especially trained.

1. *Advanced.* The advanced secondary certificate shall be issued to an applicant who has met the requirements for a standard secondary certificate and who is the holder of a standard master's degree. It shall be valid for teaching in the seventh and eighth grades, in a high school, and in a public junior college.

2. *Standard.* The standard secondary certificate shall be issued to the holder of a diploma granted by an Iowa college accredited by the board of educational examiners certifying to the completion of a four-year course including such specific and professional training for teaching two or more secondary school subjects as the board shall prescribe. It shall be valid for teaching in the seventh and eighth grades and in a high school. [C35,§3872-e4.]

3872.05 Administrative and supervisory certificates. The administrative and supervisory certificates shall include the superintendent's

certificate, the principals' certificates, and the supervisor's certificate.

1. *Superintendent's certificate.* The superintendent's certificate shall be issued to an applicant who has met the requirements for an advanced elementary certificate or an advanced or a standard secondary certificate and who has in addition such other qualifications with reference to special training and experience as the board of educational examiners shall from time to time prescribe. It shall be valid for service as county superintendent, or as superintendent, principal, or teacher in any elementary or secondary school.

2. *Principal's certificate.* The principals' certificates shall include the secondary principal's certificate and the elementary principal's certificate.

a. The secondary principal's certificate shall be issued to an applicant who has met the requirements for an advanced or a standard secondary certificate and who has in addition such other qualifications with reference to special training and experience as the board of educational examiners shall from time to time prescribe. It shall be valid for service as principal or teacher in a high school.

b. The elementary principal's certificate shall be issued to an applicant who has met the requirements for an advanced or a standard elementary certificate and who has in addition such other qualifications with reference to special training and experience as the board of educational examiners shall from time to time prescribe. It shall be valid for service as principal or teacher in an elementary school and, when so designated on the certificate, in a junior high school.

3. *Supervisor's certificate.* The supervisor's certificate shall be issued to an applicant who has met the requirements for a standard elementary or a standard secondary certificate valid for teaching the subject or subjects over which supervision is to be exercised by the applicant and who has in addition such other qualifications with reference to special training and experience as the board of educational examiners shall from time to time prescribe. It shall be valid for teaching and for supervision of instruction in the subjects specified on the certificate in the elementary or the secondary school fields, or, when so designated on the certificate, in both the elementary and the secondary school fields. [C35,§3872-e5.]

3872.06 Certificate to foreign applicant. The board of educational examiners may, at its discretion, issue any teacher's certificate provided for in this act [45GA, ch 51] to an applicant from another state who files with the board evidence of the possession of the required qualifications or the equivalent thereof. [S13, §2634-f1; C24, 27, 31,§3867; C35,§3872-e6.]

3872.07 Tenure of certificates. The superintendent's certificate, the principals' certificates, the supervisor's certificate, the advanced secondary certificate, the standard secondary certificate, the advanced elementary certificate, and the standard elementary certificate shall be valid for terms of five years. The special certificates shall be valid for terms of one to five years at the discretion of the board of educational examiners. [S13,§2634-g; C24, 27, 31, §3868; C35,§3872-e7.]

3872.08 Renewal of certificates. Certificates authorized by this act [45GA, ch 51] shall be subject to renewal for term as follows:

1. *Five-year certificates.* Any five-year certificate issued under this act shall be subject to renewal at expiration for a term of five years upon the filing with the board of educational examiners of such evidence as the board may require, showing professional spirit, physical and moral fitness for work in the schools, and successful experience in administration, supervision, or teaching for at least nine months during the term for which the certificate was issued. The board of educational examiners may, at its discretion, accept credit earned in an approved college or graduate school in lieu of the teaching experience required for the renewal of five-year certificates.

2. *Special certificates.* The special certificate shall be subject to renewal under such conditions as the board of educational examiners shall prescribe. [C35,§3872-e8.]

3872.09 Renewal for life. Any five-year certificate issued under this act [45GA, ch 51] may be renewed for life upon the filing with the board of educational examiners of such evidence as the board may require, showing professional spirit, physical and moral fitness for work in the schools, and five years of successful experience in administration, supervision, or teaching; provided that two years of this experience shall have immediately preceded the date of application for renewal for life. A certificate renewed for life shall lapse if the holder thereof shall cease to be employed in school work for any period of five consecutive years. [S13,§§2634-h,-h1,-h2; C24, 27, 31,§§3870-3872; C35,§3872-e9.]

3872.10 Fees for renewal. The fee for the issuance or the term renewal of any five-year or special certificate shall be two dollars. The fee for life renewal shall be five dollars. [S13, §2634-h1; C24, 27, 31,§3871; C35,§3872-e10.]

3872.11 Applications—disbursement of fees. Applications for the issuance or for the renewal of all special and five-year certificates shall be made to the president of the board of educational examiners. All fees for the issuance, renewal, or exchange of such certificates shall be paid to the president of the board of educational examiners who shall deposit the fees received from these sources in a state trust fund to be used to carry on the work of the board of educational examiners, including preparation and printing of courses of study to be used in teacher training and the supervision of such training. [C35,§3872-e11.]

3872.12 Interpretative clause. No provision of this act [45GA, ch 51] shall affect or impair

the validity of any certificate in force or renewable June 30, 1933. [C35,§3872-e12.]

3873 Examinations in counties. On the last Friday, and Wednesday and Thursday preceding, in the months of January, June, and October and on the first Friday in August and the Wednesday and Thursday preceding, the county superintendent shall meet and, with such assistance as may be necessary, examine all applicants for teachers' certificates. The questions used in such examinations shall be furnished by the superintendent of public instruction, who shall cause the same to be printed, and the examinations shall be conducted strictly under the rules prescribed by the board. [C51,§1148; R60, §§2066, 2068, 2073; C73,§§1766, 1774; C97, §2735; SS15,§2734-c; C24, 27, 31, 35,§3873.]

Referred to in §3880

3874 Rep. by 44GA, ch 79

3875 Record kept. A record shall be kept by the county superintendent of all examinations taken within his county, with the name, age, and residence of each applicant and the date of examination. [R60.§2067; C73,§1768; C97,§2736; S13,§2734-f; C24, 27, 31, 35,§3875.]

3876 First grade uniform county certificate. The examination for the first grade uniform county certificate shall include competency in and ability to teach reading, handwriting, spelling, arithmetic, geography, grammar, history of the United States, elementary civics including constitution and government of the United States and of Iowa, elementary school music, physiology and hygiene including special reference to the effects of alcohol, stimulants and narcotics upon the human system, home economics or manual training, agriculture, rural school management, elementary algebra, elementary school methods, general science, and English composition.

The first grade uniform county certificate may also be issued to an applicant who is a resident of the state on a record of two years of college work together with ten semester hours in education as prescribed by the board of educational examiners, the complete record having been approved for that certificate by the board of educational examiners. [C51,§1148; R60, §2066; C73,§1766; S13,§2734-d; C24, 27, 31, 35, §3876.]

3877 College work in lieu of examination. Applicants who have graduated from a four-year course in an approved high school may submit, in lieu of the examination in any one or more of the subjects of elementary algebra, general science, English composition, rural school management, elementary school methods, a showing that the applicant has done work and earned satisfactory grades in any one or more of these subjects in any collegiate institution approved by the state board of educational examiners for such purpose; but the study and work done in each subject must be of college grade and cover a course of not less than five hours per week for twelve weeks. [C24, 27, 31, 35, §3877.]

3878 Special certificates. The special certificate shall be issued to any applicant meeting the requirements prescribed by the board of educational examiners. It shall be valid for teaching the subject or subjects specified in the field or fields designated on the certificate and, when so designated on the certificate, for supervision of instruction in these subjects. [S13, §§2630-b, 2734-e; C24, 27, 31,35,§3878.]

3879 First grade certificate—renewal. Applicants who have taught successfully for at least thirty-six weeks and whose examination entitles them to the first grade certificate, shall receive the same for a term of three years from the date thereof, and such certificates shall be renewable without examination provided the applicants shall show by testimonials from superintendents or principals who had immediate supervision of their professional study that at least one line of professional inquiry has been successfully conducted during the life of the certificate, it being made the duty of the board to forward with each certificate subject to renewal, outlines setting forth various lines of professional study. It is provided further that each application for renewal shall be accompanied by such proof of successful experience and professional spirit as the board of educational examiners may require. [C97,§2737; S13, §2734-g; C24, 27, 31, 35,§3879.]

3880 Second grade certificate — renewal. Applicants whose examination entitles them to second grade certificates only, shall receive the same for not to exceed two years with the privilege of renewal of the same without further examination under the same conditions as govern the renewal of first grade certificates. The holder of a second grade certificate may, at any of the examinations provided for in section 3873, take an examination in any one or more of the additional branches required for the issue of a first grade certificate, or he may at any such time be re-examined in any branch or branches in which he desires to raise his grade, and in each case the new percent shall be placed on his certificate, and when he has thus successfully passed in all the branches required for the issue of a first grade certificate, such certificate shall then be issued to him, provided he has had at least thirty-six weeks successful experience in teaching; if not, then at the conclusion of such experience. In like manner third grade certificates may be changed into those of the second or first grade, and in all cases whether the certificate be of the first, second, or third grade, credit shall be given for all examinations taken under the auspices of the board, it being the intention of the law that an examination once taken shall be final unless the certificate holder desires to be re-examined in any one or more branches with a view of raising his percent in such branches or his general average. [S13, §2734-h; C24, 27, 31, 35,§3880.]

3881 Third grade certificate—renewal. Applicants whose examination entitles them to third grade certificates only, shall receive the same for one year, at the end of which time, upon proof of successful teaching and the payment of a fee of two dollars, one renewal shall be granted. [S13,§2734-i; C24, 27, 31, 35,§3881; 47GA, ch 119,§1.]

3882 Applicants without experience. Applicants who have had no experience in teaching, but whose examinations entitle them to the first grade, shall receive a second grade certificate for two years; provided that when they have taught successfully under such certificate for not less than thirty-six weeks they shall be entitled to receive a first grade certificate on the conditions herein provided for a renewal of a certificate. [S13,§2734-j; C24, 27, 31, 35,§3882.]

3883 Fees. Each applicant for a certificate shall pay a fee of two dollars, one-half of which shall be paid into the state treasury on or before the first day of the succeeding month, and one-half shall be paid into the county institute fund. [S13,§2734-p; C24, 27, 31, 35,§3883; 47GA, ch 119,§2.]

3884 Normal training required. All applicants for teachers' certificates shall have completed an approved four-year high school course or its equivalent and shall have had before receiving a certificate to teach, at least twelve weeks of normal training as approved by the state board of educational examiners, and shall furnish a certificate from the institution where such training has been received, which certificate shall have printed thereon the subjects taken and the standing in each subject; but the examination in all subjects other than didactics may be taken at any regular examination prior to, or after, the term of normal training has been taken; the examination shall not be complete until the normal training has been certified as herein provided. [S13,§2734-p; C24, 27, 31, 35,§3884.]

Referred to in §§3885, 3887

3885 Exceptions. Section 3884 shall not apply to the regular graduates of the state university, state teachers college, state college of agriculture and mechanic arts, any accredited college of the state, or any school of like character outside the state. [S13,§2734-p; C24, 27, 31, 35,§3885.]

Referred to in §§3886, 3887

3886 Didactic grades accepted. In the cases of graduates of four-year courses in approved or accredited high schools, the grades made in didactics in an approved normal training course in any of the institutions mentioned in section 3885 may be accepted by the state board of educational examiners and by the county superintendent in lieu of the examination in didactics. [C24, 27, 31, 35,§3886.]

Referred to in §3887

3887 Experience as qualification. The provisions of sections 3884 to 3886, inclusive, shall in no way bar any teacher who can furnish evidence of at least six months successful teaching experience; provided such experience is not obtained on a provisional certificate. [S13, §2734-p1; C24, 27, 31, 35,§3887.]

3888 Registration of certificates and diplomas. All diplomas and certificates shall be valid in any county when registered therein, and no person shall teach in any public school whose certificate has not been registered with the county superintendent of the county in which the school is located. [S13,§§2734-q,-t; C24, 27, 31, 35,§3888.]

3889 Third grade certificates not registered. In case a sufficient number of life diplomas, state certificates, first grade certificates, special certificates, and second grade certificates are held in any county to supply the schools thereof, it shall not be incumbent on the county superintendent to register third grade certificates. [S13,§2734-r; C24, 27, 31, 35,§3889.]

3890 Provisional certificates. When a sufficient number of licensed teachers cannot be secured to fill the schools of any county, the board of examiners may, upon the request of the county superintendent, appoint a special examination for such county to be conducted in all respects as a regular examination and the answer papers to be forwarded to the president of the board as required in regular examinations, and thereupon provisional certificates, valid for the remainder of the school year, may be issued by the board of educational examiners. [S13, §§2734-s,-t; C24, 27, 31, 35,§3890.]

3891 Certificates—where valid. All certificates issued as provided by law shall be valid in any county within the state, when registered in such county, but a provisional certificate shall be valid, upon registration, only in the county in which it is issued, and shall be issued for the same time and subject to the same extension as a third grade certificate, but no person shall be entitled to receive more than one provisional certificate, except upon the approval of the county superintendent. [R60,§2070; C73,§1771; C97,§2737; S13,§2734-t; C24, 27, 31, 35,§3891.]

3892 Revocation by board. Any diploma or certificate issued by the board may be revoked by it for any cause which would have authorized or required a refusal to grant the same, and the holder shall have ten days notice by registered mail and be allowed to be present and make defense. [C97,§2631; S13,§2734-t; C24, 27, 31, 35, §3892.]

3893 Revocation by county superintendent. When in the judgment of the county superintendent there is probable cause for the revocation of a certificate or diploma held by any teacher employed in his county, or when complaint is filed, supported by affidavits, charging incompetency, immorality, intemperance, cruelty, or general neglect of the business of the school, the county superintendent shall within ten days transmit to such person a written statement of the charges preferred and set

the time, not less than ten days thereafter, and place for the hearing of the same at which trial the teacher may be present and make defense. [R60,§2070; C73,§1771; C97,§2737; S13,§2734-u; C24, 27, 31, 35,§3893.]

3894 Trial—order. The trial and making and preservation of the record shall be, so far as applicable, in conformity with the provisions of the law relating to the trial of civil actions in the district court. If upon the trial it appears to the county superintendent that there is sufficient ground for the revocation of the diploma or certificate, he shall at once issue in triplicate an order revoking the diploma or certificate, and the same shall become effective, unless an appeal is taken, fifteen days thereafter. One copy of the order shall be filed and recorded in his office, one mailed to the superintendent of public instruction, and the other sent by registered mail to the holder of the certificate. [S13,§2734-u; C24, 27, 31, 35,§3894.]

3895 Appeal. The person aggrieved by such order shall have the right of appeal to the superintendent of public instruction within ten days from the date of such mailing, and in case of appeal the revocation shall not be effective until the same is affirmed, after full hearing, by the superintendent of public instruction. In the case of life state certificates the revocation shall not be effective until affirmed by the board of educational examiners after full hearing and review by said board. [S13,§2734-u; C24, 27, 31, 35,§3895.]

3896 Expenditures. All expenditures authorized to be made by the board of educational examiners and by the county superintendents in connection with examinations and applications for certificates, shall be certified by the superintendent of public instruction to the state comptroller, and if found correct, he shall approve the same and draw warrants therefor upon the treasurer of state, but not to exceed the fees paid into the treasury by the board and county superintendents. [C97,§2634; S13, §2734-o; SS15,§2634-a; C24, 27, 31, 35,§3896.]

3897 Accounts. The board shall keep an accurate and detailed account of all money received and expended, which, with a list of those receiving certificates or diplomas, shall be published by the superintendent of public instruction in his annual report. [C97,§§2630, 2631, 2633; S13,§§2630-b, 2631, 2734-p; C24, 27, 31, 35, §3897.]

3898 Printing. The board of educational examiners shall have authority to obtain all the necessary printing for the performance of their duties, as required by law, in the same manner as the printing is provided for state officers. [S13,§2634-a1; C24, 27, 31, 35,§3898.]

CHAPTER 194

NORMAL TRAINING OF TEACHERS

Referred to in §4185

3899 Training of teachers—normal courses.
3900 Conditions.
3901 Private and denominational schools.
3902 State aid.
3903 Report required.
3904 Warrant.
3905 Admission and graduation.
3906 Examination for graduation.
3907 Additional examination.
3908 Fees.
3909 Distribution of fees.
3910 Certificate—license to teach—renewal.
3911 Record of students.

3899 Training of teachers—normal courses. For the purpose of increasing the facilities for training teachers for the rural schools by requiring a review of such common branches as may be deemed essential by the superintendent of public instruction, and for instruction in elementary pedagogy and the art of teaching elementary agriculture and home economics, provision is hereby made for normal courses of study and training in such four-year high schools, or as a fifth year in such high school, as the superintendent of public instruction may designate, provided that such high schools shall be selected and distributed with regard to their usefulness in supplying trained teachers for the rural schools of all portions of the state, and with regard to the number of teachers required for rural schools in each portion of the state. Provided further, that credits earned by a student completing the fifth year course in such high school shall be accepted by the state institutions of higher learning as meeting the requirements of the first year in regular teacher training courses maintained in such institutions. It is further provided that where a township high school or a consolidated school organized in accordance with the provisions of chapter 209, can meet the requirements of the superintendent of public instruction, it shall be given preference over a city high school. [S13, §2634-b1; C24, 27, 31, 35,§3899.]

3900 Conditions. No high schools shall be approved as entitled to state aid unless a class of ten or more shall have been organized, maintained, and instructed during the preceding semester in accordance with the provisions of this chapter and the regulations of the superintendent of public instruction. [S13,§2634-b3; C24, 27, 31, 35,§3900.]

S13,§2634-b3, editorially divided

3901 Private and denominational schools. Private and denominational schools are eligible to the provisions of this chapter, except as to receiving state aid. [S13,§2634-b2; C24, 27, 31, 35,§3901.]

3902 State aid. Each high school approved under the provisions of this chapter shall receive state aid to the amount of seven hundred fifty dollars per annum, payable in two equal installments at the close of each semester as hereinafter provided. [S13,§2634-b3; C24, 27, 31, 35,§3902.]

3903 Report required. The superintendent of each approved training school shall at the close of each semester file such report with the superintendent of public instruction as said officer may require. [S13,§2634-b3; C24, 27, 31, 35,§3903.]

3904 Warrant. Upon receipt of a satisfactory report, the superintendent of public instruction shall issue a requisition upon the state comptroller for the amount due the school corporation of said high school for said semester, whereupon the comptroller shall draw a warrant on the state treasury payable to said school corporation for the amount of said requisition and forward the same to the secretary of said school corporation. [S13,§2634-b3; C24, 27, 31, 35,§3904.]

3905 Admission and graduation. The superintendent of public instruction shall prescribe the conditions of admission to the normal training classes, the course of instruction, the rules and regulations under which such instruction shall be given, and the requirements for graduation, subject to the provisions of this chapter. [S13,§2634-b5; C24, 27, 31, 35,§3905.]

3906 Examination for graduation. On the third Friday in January and the Wednesday and Thursday immediately preceding and on the third Friday in May and the Wednesday and Thursday immediately preceding, each year, in each high school, and private or denominational school, approved under this chapter, an examination for graduation from the normal course shall be conducted under such rules as the state board of examiners shall prescribe, but the county superintendent of the county in which an approved high school, and private or denominational school may be located shall be designated as the conductor of said examination. [SS15,§2634-b6; C24, 27, 31, 35,§3906.]

SS15,§2634-b6, editorially divided

3907 Additional examination. Candidates for a certificate of graduation from the normal course, failing in the examination in one or more subjects, may be permitted to enter the above examinations or the regular July teachers examination under such regulations as the superintendent of public instruction shall prescribe. [SS15,§2634-b6; C24, 27, 31, 35,§3907.]

3908 Fees. Each applicant for a certificate of graduation from the normal course in a county shall pay a fee of two dollars, which shall entitle him to one examination in each subject required; provided, however, that applicants rewriting the examination in one or more subjects at the July teachers examination as herein provided shall pay an additional fee of one dollar. [SS15,§2634-b6; C24, 27, 31, 35,§3908; 47GA, ch 119,§3.]

3909 Distribution of fees. One-half of the fees from the normal training examinations shall be paid into the state treasury on or before the first day of the succeeding month, and the remaining one-half shall be paid into the county institute fund of the county wherein the examination is held. [SS15,§2634-b6; C24, 27, 31, 35, §3909.]

3910 Certificate—license to teach—renewal. A certificate of graduation from the normal training course provided for in this chapter shall be issued by the superintendent of public instruction, and shall be a valid license to teach in any public school in the state for a term of two years, subject to registration as provided for other teachers' certificates. At the expiration of said certificate the superintendent of public instruction is authorized to renew it for a period of three years under the same conditions that apply to the renewal of first grade uniform county certificates. [S13,§2634-b7; C24, 27, 31, 35,§3910.]

3911 Record of students. At the close of each school year, the principal or superintendent of each accredited school shall file with the board of examiners a sworn statement, showing the name, age, post-office address, studies, and attendance of each of the students in his school taking the prescribed teachers course. [S13, §2634-e; C24, 27, 31, 35,§3911.]

CHAPTER 195

STATE BOARD OF EDUCATION

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

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3944.1 Fire protection contracts.
3945 Improvements—advertisement for bids.

3912 Membership. The state board of education shall consist of nine members, who shall be selected from the state at large solely with regard to their qualifications and fitness to discharge the duties of the office. Not more than five members shall be of the same political party. Not more than one alumnus of each of the institutions of higher learning, the state university, the college of agriculture and mechanic arts, and the Iowa state teachers college, shall be members of said board at one time. [S13,§§2682-c,-d; C24, 27, 31, 35,§3912.]

3913 Term of office. The term of each member of said board shall be for six years. The terms of three members of the board shall expire on the first day of July of each odd-numbered year. [S13,§2682-d; C24, 27, 31, 35,§3913.]

3914 Appointment. During each regular session of the legislature, the governor shall appoint, with the approval of two-thirds of the members of the senate in executive session, three members of said board to succeed those whose terms expire on the first day of July next thereafter. [S13,§2682-d; C24, 27, 31, 35,§3914.]

Confirmation, §38.1

3915 Rep. by 42GA, ch 9

3916 Removals. The governor, with the approval of a majority of the senate during a session of the general assembly, may remove any member of the board for malfeasance in office, or for any cause which would render him ineligible for appointment or incapable or unfit to discharge the duties of his office, and his removal, when so made, shall be final. [S13, §2682-d; C24, 27, 31, 35,§3916.]

3917 Suspension. When the general assembly is not in session, the governor may suspend any member so disqualified and shall appoint another to fill the vacancy thus created, subject to the approval of the senate when next in session. [S13,§2682-d; C24, 27, 31, 35,§3917.]

3918 Vacancies. All vacancies on said board which may occur when the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days after the general assembly next convenes. Vacancies occurring during a session of the general assembly shall be filled before the end of said session in the same manner in which regular appointments are required to be made. [S13,§2682-d; C24, 27, 31, 35,§3918.]

3919 Institutions governed. The state board of education shall govern the following institutions:

DORMITORIES

3945.1 Dormitories at state educational institutions.
3945.2 Purchase or condemnation of property.
3945.3 Title to property.
3945.4 Borrowing money and mortgaging property.
3945.5 Nature of obligation—discharge.
3945.6 Limitation on discharging obligations.
3945.7 Exemption from taxation.
3945.8 Limitation on funds.

1. The state university of Iowa.
2. The college of agriculture and mechanic arts, including the agricultural experiment station.
3. The Iowa state teachers college.
4. The state school for the blind.
5. The state school for the deaf. [R60,§§2157, 2158; C73,§§1685, 1686; C97,§2723; S13,§2682-c; C24, 27, 31, 35,§3919.]

3920 Meetings. The board shall meet four times a year. Special meetings may be called by the board, by the president of the board, or by the secretary of the board upon written request of any five members thereof. [S13,§2682-e; C24, 27, 31, 35,§3920.]

3921 Powers and duties. The board shall:

1. Each even-numbered year elect, from its members, a president of the board, who shall serve for two years and until his successor is elected and qualified.
2. Elect a president of each of said institutions of higher learning; a superintendent of each of said other institutions; a treasurer and a secretarial officer for each institution annually; professors, instructors, officers, and employees; and fix their compensation.
3. Make rules for admission to and for the government of said institutions, not inconsistent with law.
4. Manage and control the property, both real and personal, belonging to said institutions.
5. With the approval of the executive council, acquire real estate for the proper uses of said institutions, and dispose of real estate belonging to said institutions when not necessary for their purposes.
6. Accept and administer trusts deemed by it beneficial to and perform obligations of the institutions.
7. Direct the expenditure of all appropriations made to said institutions, and of any other moneys belonging thereto, but in no event shall the perpetual funds of the state college of agriculture and mechanic arts, nor the permanent funds of the university derived under acts of congress, be diminished.
8. Collect the highest rate of interest, consistent with safety, obtainable on daily balances in the hands of the treasurer of each institution.
9. With the approval of the executive council, publish, from time to time, and distribute, such circulars, pamphlets, bulletins, and reports as may be in its judgment for the best interests of the institutions under its control, the expense of which shall be paid out of any

funds in the treasury not otherwise appropriated.

10. With consent of the inventor and in the discretion of the board, secure letters patent or copyright on inventions of students, instructors and officials, or take assignment of such letters patent or copyright and may make all necessary expenditures in regard thereto. That the letters patent or copyright on inventions when so secured shall be the property of the state, and the royalties and earnings thereon shall be credited to the funds of the institution in which such patent or copyright originated.

11. Perform all other acts necessary and proper for the execution of the powers and duties conferred by law upon it and the finance committee.

1. [S13,§2682-f; C24, 27, 31, 35,§3921.]
2. [R60,§§1739, 2157, 2158, 2162; C73,§§1614, 1685, 1686, 1690; C97,§§2654, 2676, 2723; S13, §2682-f; C24, 27, 31, 35,§3921.]
3. [C97,§2676; S13,§2682-f; C24, 27, 31, 35, §3921.]
4, 5, 6. [S13,§2682-f; C24, 27, 31, 35,§3921.]
7. [C51,§§1017, 1018; R60,§1938; C73,§§1599, 1617; C97,§§2638, 2666; S13,§2682-f; C24, 27, 31, 35,§3921.]
8. [C24, 27, 31, 35,§3921.]
9. [S13,§2682-j; C24, 27, 31, 35,§3921.]
10. [C35,§3921.]
11. [S13,§2682-f; C24, 27, 31, 35,§3921.]

3922 Purchases—prohibitions. No sale or purchase of real estate shall be made save upon the order of the board, made at a regular meeting, or one called for that purpose, and then in such manner and under such terms as the board may prescribe and only with the approval of the executive council. No member of the board or finance committee nor any officer of any institution, shall be directly or indirectly interested in such purchase or sale. [C24, 27, 31, 35, §3922.]

Similar provisions, §§180, 275, 3828.101, 4685, 4686.14, 4755.10, 5361, 5673, 5828, 6534, 6710, 13324, 13327

3923 Record. All acts of the board relating to the management, purchase, disposition, or use of lands and other property of said institutions shall be entered of record, which shall show the members present, and how each voted upon each proposition. [S13,§2682-h; C24, 27, 31, 35,§3923.]

3924 Finance committee — organization — duties. The board shall appoint a finance committee of three from outside its membership and shall designate one of such committee as chairman and one as secretary. Not more than two of its members shall be of the same political party, and its members shall hold office for a term of three years, unless sooner removed by a vote of two-thirds of the members of the board. In addition to the duties imposed upon the finance committee by law, the committee and members thereof shall make such investigations and reports and perform such ministerial duties as the board by resolution may direct, and the committee may make such recommendations to the board as it may deem proper. [S13,§2682-h; C24, 27, 31, 35,§3924.]

3925 Secretary of board and committee—duties. The secretary shall be secretary of the board and of the committee, and shall separately keep and carefully preserve complete files of documents and records of the proceedings of the board and the committee. [S13,§2682-h; C24, 27, 31, 35,§3925.]

3926 Loans—conditions. The finance committee may loan funds belonging to said institutions, subject to the following regulations:

1. Each loan shall be secured by a mortgage paramount to all other liens upon approved farm lands in this state, accompanied by abstract showing merchantable title in the borrower. The loan shall not exceed fifty percent of the cash value of the land, exclusive of buildings.

2. Each such loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board, payable annually provided, however, that the rate of interest be not less than four percent per annum, and the borrower shall have the privilege of paying one hundred dollars or any multiple thereof on any interest pay day.

3. Any portion of said funds may be invested by the finance committee on order of the board in bonds of the United States, or this state, or some county thereof, the rate of interest to be determined by the state board of education.

4. Any gift accepted by the Iowa state board of education for the use and benefit of any institution under its control may be invested in securities designated by the donor, but whenever such gifts are accepted and the money invested according to the request of the said donor, neither the state, the Iowa state board of education, the finance committee, nor any member thereof, shall be liable therefor or on account thereof.

5. A register containing a complete abstract of each loan and investment, and showing its actual condition, shall be kept by the secretary of said committee, and be at all times open to inspection.

1. [C51,§1018; R60,§1938; C73,§1599; C97, §2638; S13,§2682-s; C24, 27, 31, 35,§3926.]
2. [S13,§2682-s; C24, 27, 31, 35,§3926.]
3. [R60,§1938; C73,§§1599, 1617; C97,§§2638, 2666; C24, 27, 31, 35,§3926.]
4. [C31, 35,§3926.]
5. [S13,§2682-s; C24, 27, 31, 35,§3926.]

3927 Foreclosures and collections. The finance committee shall have charge of the foreclosure of all mortgages and of all collections from delinquent debtors to said institutions. All actions shall be in the name of the state board of education, for the use and benefit of the appropriate institution. [SS15,§2682-t; C24, 27, 31, 35,§3927.]

3928 Satisfaction of mortgages. When loans are paid, the finance committee shall release mortgages securing the same as follows:

1. By a satisfaction piece signed and acknowledged by the chairman or secretary of said

committee, which shall be recorded in the office of the recorder of the county where said mortgage is of record; or

2. By entering a satisfaction thereof on the margin of the record of said mortgage, dated, and signed by the chairman or secretary of the committee. [SS15,§2682-t; C24, 27, 31, 35,§3928.]

3929 Bidding in property. In case of a sale upon execution, the premises may be bid off in the name of the board of education, for the benefit of the institution to which the loan belongs. [SS15,§2682-t; C24, 27, 31, 35,§3929.]

3930 Deeds in trust. Deeds for premises so acquired shall be held for the benefit of the appropriate institution and such lands shall be subject to lease or sale the same as other lands. [SS15,§2682-t; C24, 27, 31, 35,§3930.]

3931 Actions not barred. No lapse of time shall be a bar to any action to recover on any loan made on behalf of any institution. [C97, §2637; C24, 27, 31, 35,§3931.]

3932 Business offices—visitation. A business office shall be maintained at each of the institutions of higher learning. The committee shall, once each month, attend each of the institutions for the purpose of transacting any business that may properly come before it, and the performance of its duties. [S13,§2682-k; C24, 27, 31, 35,§3932.]

3933 Expenses — official residences. The members of the finance committee shall devote their entire time to the work of said institutions. The members of the finance committee and other employees shall maintain their official residences at the places designated by the board, and shall be entitled to their necessary traveling expenses therefrom by the nearest traveled and practicable route incurred in visiting the different institutions and other places and returning therefrom when on official business, and such other expenses as are actually and necessarily incurred in the performance of their official duties. [S13,§2682-m; C24, 27, 31, 35, §3933.]

3934 Comptroller's report. The state comptroller shall include in his report to the governor the amount paid for such services and expenses and to whom paid. [S13,§2682-q; C24, 27, 31, 35,§3934.]

3935 Duties of treasurer. The treasurer of each of said institutions shall:

1. Receive all appropriations made by the general assembly for said institution, and all other funds from all other sources, belonging to said institution.

2. Pay out said funds only on order of the board of education, or of the finance committee, on bills duly audited in accordance with the rules prescribed by said board.

3. Retain all bills, so paid by him, with receipts for their payment as his vouchers.

4. Keep an accurate account of all revenue and expenditures of said institution, so that the receipts and disbursements of each of its several departments shall be apparent at all times.

5. Annually, and at such other times as the board may require, report to it said receipts and disbursements in detail. [R60,§§1739, 1937; C73,§§1593, 1614; C97,§§2637, 2654; C24, 27, 31, 35,§3935.]

3936 Reports of executive officers. The executive officer of each of said institutions shall, on or before the first day of August of each even-numbered year, make a report to the board, setting forth such observations and recommendations as in his judgment are for the benefit of the institution, and also his recommendations of a budget for the several colleges and departments of the institution, in detail, and estimates of the amount of funds required therefor for the ensuing biennium. [R60,§§1939, 2149, 2161; C73,§§1600, 1601, 1677, 1694; C97,§§2641, 2717, 2725; S13,§§2641, 2717; C24, 27, 31, 35,§3936.]

3937 Reports of secretarial officers. The secretarial officer shall, for the institution of which he acts as secretary, on or before August 1 of each year, report to the board in such detail and form as it may prescribe:

1. The funds available each fiscal year from all sources for the erection, equipment, improvement, and repair of buildings.

2. Interest on endowment and other funds, tuition, state appropriations, laboratory and janitor fees, donations, rents, and income from all sources affecting the annual income of the support funds of said institution.

3. How the funds so received were expended, giving under separate heads the cost of instruction, administration, maintenance and equipment of departments, and the general expense of the institution.

4. The number of professors, instructors, fellows, and tutors, and the number of students enrolled in each course during each year, stating separately the number of students attending short courses.

5. The amount of unexpended balances of departments remaining in the hands of the treasurer, and the amounts undrawn from the state treasury on June 30 of each year.

The report for the state college of agriculture and mechanic arts shall also show the receipts of the experiment station from all sources for each fiscal year, and how the same were expended. [S13,§2682-b; C24, 27, 31, 35,§3937.]

3938 Report of board. The board shall, biennially, at the time provided by law, report to the governor and the legislature such facts, observations, and conclusions respecting each of such institutions as in the judgment of the board should be considered by the legislature. Such report shall contain an itemized account of the receipts and expenditures of the board and finance committee, and also the reports made to the board by the executive officers of the several institutions or a summary thereof, and shall submit budgets for biennial appropriations deemed necessary and proper to be made for the support of the several institutions

and for the extraordinary and special expenditures for buildings, betterments, and other improvements. [R60,§1939; C73,§§1600, 1601; C97,§§2641, 2680; S13,§§2641, 2680, 2682-u; C24, 27, 31, 35,§3938.]

Time of report, §246

3939 Colonel of cadets. The commandant and instructor of military science and tactics at each of the institutions for higher learning is given the rank of colonel of cadets, and the governor shall issue such commission upon the request of the president of such institution. [S13,§2644-c; C24, 27, 31, 35,§3939.]

3940 Appropriations — in monthly installments. All appropriations made payable annually to each of the institutions under the control of the board of education shall be paid in twelve equal monthly installments on the last day of each month on order of said board. [S13,§2682-y; C24, 27, 31, 35,§3940.]

3941 Expenses—filing and audit. All claims for the actual necessary expenses of the board and of the finance committee and of their assistants shall be filed with and allowed by the state comptroller in the same manner as may now or hereafter be required in the case of claims for similar expenses by state officers. [S13,§2682-l; C24, 27, 31, 35,§3941.]

3942 Contracts for training teachers. The board of directors of any school district in the state of Iowa may enter into contract with the state board of education for furnishing instruction to pupils of such school district, and for training teachers for the schools of the state in such particular lines of demonstration and instruction as are deemed necessary for the efficiency of the Iowa state teachers college, state university of Iowa, and college of agriculture and mechanic arts as training schools for teachers. [C24, 27, 31, 35,§3942.]

3943 Payment. The contract for such instruction shall authorize the payment for such service furnished the school district or for such service furnished the state, the amount to be agreed upon by the state board of education and the board of the school district thus cooperating. [C24, 27, 31, 35,§3943.]

3944 Contract—time limit. Such contracts shall be in writing and shall extend over a period of not to exceed two years, and a copy thereof shall be filed in the office of the superintendent of schools of the county. [C24, 27, 31, 35,§3944.]

3944.1 Fire protection contracts. The state board of education shall have power to enter into contracts with the governing body of any city, town, or other municipal corporation for the protection from fire of any property under the control of the board, located in any such municipal corporation or in territory contiguous thereto, upon such terms as may be agreed upon. [C31, 35,§3944-d1.]

3945 Improvements — advertisement for bids. When the estimated cost of construction, repairs, or improvement of buildings or grounds under charge of the state board of education shall exceed ten thousand dollars, the said board shall advertise for bids for the contemplated improvement or construction and shall let the work to the lowest responsible bidder; provided, however, if in the judgment of the board bids received be not acceptable, the said board may reject all bids and proceed with the construction, repair, or improvement by such method as the board may determine. All plans and specifications for repairs or construction, together with bids thereon, shall be filed by the board and be open for public inspection. All bids submitted under the provisions of this section shall be accompanied by a deposit of money or a certified check in such amount as the board may prescribe. [C24, 27, 31,35,§3945.]

DORMITORIES

3945.1 Dormitories at state educational institutions. The state board of education is authorized to:

1. Erect from time to time at any of the institutions under its control such dormitories as may be required for the good of the institutions.
2. Rent the rooms in such dormitories to the students, officers, guests, and employees of said institutions at such rates as will insure a reasonable return upon the investment.
3. Exercise full control and complete management over such dormitories. [C27, 31, 35, §3945-a1.]

3945.2 Purchase or condemnation of property. The erection of such dormitories is a public necessity and said board is vested with full power to purchase or condemn at said institutions, or convenient thereto, all real estate necessary to carry out the powers herein granted. [C27, 31, 35,§3945-a2.]

3945.3 Title to property. The title to all real estate so acquired and the improvements erected thereon shall be taken and held in the name of the state of Iowa. [C27, 31, 35, §3945-a3.]

3945.4 Borrowing money and mortgaging property. In carrying out the above powers, said board may:

1. Borrow money.
2. Mortgage any real estate so acquired and the improvements erected thereon in order to secure necessary loans.
3. Pledge the rents, profits, and income received from any such property for the discharge of mortgages so executed. [C27, 31, 35,§3945-a4.]

3945.5 Nature of obligation — discharge. No obligation created hereunder shall ever be or become a charge against the state of Iowa but all such obligations, including principal and interest, shall be payable solely:

1. From the net rents, profits, and income arising from the property so pledged or mortgaged,
2. From the net rents, profits, and income which has not been pledged for other purposes

arising from any other dormitory or like improvement under the control and management of said board, or

3. From the income derived from gifts and bequests made to the institutions under the control of said board for dormitory purposes. [C27, 31, 35,§3945-a5.]

Referred to in §3945.6

3945.6 Limitation on discharging obligations. In discharging obligations under section 3945.5 the dormitories at each of said institutions shall be considered as a unit and the rents, profits, and income available for dormitory purposes at one institution shall not be used to discharge obligations created for dormitories at another institution. [C27, 31, 35,§3945-a6.]

3945.7 Exemption from taxation. All obligations created hereunder shall be exempt from taxation. [C27, 31, 35,§3945-a7.]

3945.8 Limitation on funds. No state funds shall be loaned or used for this purpose. This shall not apply to funds derived from the net earnings of dormitories now or hereafter owned by the state of Iowa. [C27, 31, 35,§3945-a8.]

CHAPTER 196

STATE UNIVERSITY

3946 Objects—departments.
3947 Degrees.
3948 Cabinet of natural history.
3949 Homeopathic materia medica and therapeutics.
3950 Iowa child welfare research station.
3951 Management.
3952 Bacteriological laboratory—investigations.
3953 Reports—tests.

3946 Objects—departments. The university shall never be under the control of any religious denomination. Its object shall be to provide the best and most efficient means of imparting to men and women, upon equal terms, a liberal education and thorough knowledge of the different branches of literature and the arts and sciences, with their varied applications. It shall include colleges of liberal arts, law, medicine, and such other colleges and departments, with such courses of instruction and elective studies as the state board of education may determine from time to time. If a teachers training course is established by the board it shall include the subject of physical education. Instruction in the liberal arts college shall begin, so far as practicable, at the points where the same is completed in high schools. [C51, §1020; R60,§§1927, 1930, 1933; C73,§§1585, 1586, 1589; C97,§2640; C24, 27, 31, 35,§3946.]

3947 Degrees. No one shall be admitted to courses of instruction in the university who has not completed the elementary instruction in such branches as are taught in the common schools throughout the state. Graduates shall receive degrees or diplomas, or other evidences of distinction such as are usually conferred and granted by universities and are authorized by the state board of education. [R60,§1933; C73, §§1585, 1589; C97,§2640; C24, 27, 31, 35,§3947.]

3948 Cabinet of natural history. For the purpose of supplying a cabinet of natural history, all geological and mineralogical specimens which are collected by the state geologists, or by others appointed by the state to investigate its natural history and physical resources, shall belong to and be the property of the university, under the charge of the professors of those departments. [R60,§§1931, 1935; C73,§§1597, 1598; C97,§2639; C24, 27, 31, 35,§3948.]

3949 Homeopathic materia medica and therapeutics. The state board of education is hereby authorized and directed to establish and maintain a department of homeopathic materia medica and therapeutics in the college of medicine of the state university of Iowa, with suitable and sufficient hours and rooms for said department. The use of the university homeopathic hospital shall be left to the discretion of the board. [S13,§2640-a; C24, 27, 31, 35,§3949.]

3950 Iowa child welfare research station. The state board of education is hereby authorized to establish and maintain at Iowa City as an integral part of the state university the Iowa child welfare research station, having as its objects the investigation of the best scientific methods of conserving and developing the normal child, the dissemination of the information acquired by such investigation, and the training of students for work in such fields. [C24, 27, 31, 35,§3950.]

3951 Management. The management and control of such station shall be vested in a director appointed by the said board of education and an advisory board of seven members to be appointed by the president of the university from the faculty of the graduate college of said university. [C24, 27, 31, 35,§3951.]

3952 Bacteriological laboratory—investigations. The bacteriological laboratory shall be a permanent part of the medical college of the university. It shall make or cause to be made bacteriological and chemical examinations of water, and necessary investigations by both laboratory and field work to determine the source of epidemics of disease, and to suggest methods of overcoming and preventing the recurrence of the same, whenever requested to do so by any state institution or by any citizen, school, or municipality when in the judgment of the local board of health the same is necessary in the interests of the public health and for the purpose of preventing epidemics of disease. [S13,§2575-a8; SS15,§2575-a7; C24, 27, 31, 35,§3952.]

3953 Reports — tests. Such examination shall be made without charge, except for transportation and actual cost of examination, not to exceed two dollars for each. A copy of the report of each epidemiological examination and investigation shall be promptly sent to the state department of health.

In addition to its regular work, the laboratory shall perform all bacteriological, serological, and epidemiological examinations and investigations which may be required by the state department of health, and said department shall establish rules therefor. [S13,§2575-a8; SS15, §§2575-a7,-a9; C24, 27, 31, 35,§3953.]

Duties of department of health, §2191

CHAPTER 196.1

PERPETUATION OF COLLEGE CREDITS

3953.1 Mandatory transfer of record of credits.
3953.2 Central depository.
3953.3 Duty of depository.
3953.4 Transcripts.
3953.5 Fees.
3953.6 Penalty.
3953.7 Records of prior defunct institutions.

3953.1 Mandatory transfer of record of credits. The trustees or officers of any institution of higher learning, whether incorporated or not, upon going out of existence or ceasing to function as an educational institution must transfer to the office of the registrar of the state university of Iowa complete records of all grades attained by its students. [C35,§3953-e1.]

3953.2 Central depository. The office of the registrar of the state university is hereby designated the central depository for the scholastic records of those educational institutions in this state which may hereafter cease to exist. [C35, §3953-e2.]

3953.3 Duty of depository. The office of the registrar of the state university shall proceed to collect the scholastic records of those educational institutions which may become extinct, and he shall have the supervision, care, custody and control of said records. [C35,§3953-e3.]

3953.4 Transcripts. The registrar of the state university shall prepare transcripts of such scholastic records and when requested to do so he must furnish a copy of the said transcript to a former student. Whenever such transcript is made and after it has been compared with the original it shall be certified by the registrar of the state university, and thereafter it shall be considered and accepted as evidence for all purposes the same as the original would be. [C35,§3953-e4.]

3953.5 Fees. For the preparation of each of such transcripts the state university may charge a nominal fee, not to exceed five dollars, to compensate the institution for the actual labor of recording the credits, preparing a transcript, postage, etc. [C35,§3953-e5.]

3953.6 Penalty. The members of the board of trustees and the officers of an institution of higher learning who do not file, in accordance with the provisions of this chapter, the record of grades in the office of the registrar of the state university within twelve months after the said institution has been closed or has ceased to function as an educational institution, may be fined an amount not to exceed five hundred dollars. [C35,§3953-e6.]

3953.7 Records of prior defunct institutions. The office of the registrar of the state university is hereby designated the central depository for the records of any institution of higher learning which prior to the passage of this chapter may have ceased to exist, provided the custodian of the said records or former officials of the institution may wish to take advantage of the provisions of this chapter. [C35. §3953-e7.]

CHAPTER 197

PSYCHOPATHIC HOSPITAL

Sections 3954 to 3998, inc., transferred to chapter 173.1. See §§3482.01 to 3482.42, inc.

CHAPTER 198

FEDERAL MATERNITY AND INFANCY ACT

3999 Sheppard-Towner act accepted.
4000 Funds accepted.
4001 State agency.
4002 Custodian of funds.
4003 Reports.
4004 Rights of parents.

3999 Sheppard-Towner act accepted. The state of Iowa, through its legislature, hereby accepts the provisions of the act of congress, enacted by the sixty-seventh congress, approved November 23, 1921, and entitled, "An act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes", otherwise known as Public, No. 97, sixty-seventh

congress (S. 1039) [42 USCA,§§162 to 173, inc.]. [C24, 27, 31, 35,§3999.]

4000 Funds accepted. The benefits of all funds appropriated under the provisions of such act are hereby accepted as provided in such act. [C24, 27, 31, 35,§4000.]

4001 State agency. The state board of education is hereby designated as the state agency, provided in such act; and the said state board of education is charged with the duty and responsibility of cooperating with the children's bureau of the United States department of labor in the administration of such act; and is given all power necessary to such cooperation. The state university shall be in actual charge of the work done under this chapter. [C24, 27, 31, 35,§4001.]

4002 Custodian of funds. The state treasurer is hereby appointed as custodian of funds for the promotion of the welfare and hygiene of maternity and infancy as provided in such act; and he is charged with the duty and responsibility of receiving and providing for the proper custody and disbursement on vouchers drawn by such state board of education, of moneys paid to the state from the appropriations made under the provisions of such act, and of such funds as are appropriated by the state to secure such appropriations from the federal government. [C24, 27, 31, 35,§4002.]

4003 Reports. The state treasurer, as custodian of funds for the promotion of the welfare and hygiene of maternity and infancy, shall make to the general assembly, at each biennial session thereof, a report of the receipts and disbursements of moneys received by him under the provisions of such act; and such state board of education shall make to the general assembly, at each biennial session thereof, a report of its administration of such act. [C24, 27, 31, 35, §4003.]

Time of report, §246

4004 Rights of parents. No official, agent, or representative of the division of maternity and infant hygiene shall by virtue of this chapter have any right to enter any home over the objection of the owner thereof, or to take charge of any child over the objection of the parents, or either of them, or of the person standing in loco parentis or having custody of such child. Nothing in this chapter shall be construed as limiting the power of a parent or guardian or person standing in loco parentis to determine what treatment or correction shall be provided for a child or the agency or agencies to be employed for such purpose. [C24, 27, 31, 35,§4004.]

CHAPTER 199

MEDICAL AND SURGICAL TREATMENT OF INDIGENT PERSONS

Sections 4005 to 4030, inc., transferred to chapter 189.7. See §§3828.132 to 3828.159, inc.

CHAPTER 200

STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS

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GENERAL PROVISIONS

4031 Grants accepted. Legislative assent is given to the purposes of the various congressional grants to the state for the endowment and support of a college of agriculture and mechanic arts, and an agricultural experiment station as a department thereof, upon the terms, conditions, and restrictions contained in all acts of congress relating thereto, and the state assumes the duties, obligations, and responsibilities thereby imposed. All moneys appropriated by the state because of the obligations thus assumed, and all funds arising from said congressional grants, shall be invested or expended in accordance with the provision of such grant, for the use and support of said college located at Ames. [R60,§1714; C73,§1604; C97,§2645; C24, 27, 31, 35,§4031.]

4032 Courses of study. There shall be adopted and taught at said college practical courses of study, embracing in their leading branches such as relate to agriculture and mechanic arts, mines and mining, and ceramics, and such other branches as are best calculated to educate thoroughly the agricultural and industrial classes in the several pursuits and professions of life, including military tactics. If a teachers training course is established it shall include the subject of physical education. [R60, §1728; C73,§1621; C97,§2648; S13,§2674-d; C24, 27, 31, 35,§4032.]

4033 Investigation of mineral resources. The said college shall provide, as a part of its engineering experiment station work, for the investigation of clays, cement materials, fuels, and other mineral resources of the state with especial reference to their economic uses, and for the publication and dissemination of information useful to such industries, and for the testing of the products thereof. [S13,§2674-e; C24, 27, 31, 35,§4033.]

4034 Cooperative agricultural extension work. The assent of the legislature of the state of Iowa is hereby given to the provisions and requirements of an act of congress approved May 8, 1914, providing for cooperative agricultural extension work between the agricultural colleges in the several states receiving the benefits of the act of congress approved July 2, 1862, and amendments thereto. [SS15,§2682-y1; C24, 27, 31, 35,§4034.]

SS15,§2682-y1, editorially divided

4035 State agency. The state board of education is hereby authorized and empowered to receive the grants of money appropriated under said act and to organize and conduct agricultural and home economics extension work, which shall be carried on in connection with the state college of agriculture and mechanic arts in accordance with the terms and conditions expressed in the act of congress aforesaid. [SS15,§2682-y1; C24, 27, 31, 35,§4035.]

4035.1 Purnell act. The assent of the legislature of the state of Iowa is hereby given to the provisions and requirements of the congressional act approved February 24, 1925, commonly known as the Purnell act; and that, in accordance with the requirements thereof, the state agrees to devote the moneys thus received to the more complete endowment and maintenance of the agricultural experiment station of the Iowa state college of agriculture and mechanic arts as provided in said act. [C27, 31, 35,§4035-b1.]

4035.2 Receiving agent. The treasurer of the Iowa state college of agriculture and mechanic arts is hereby authorized and empowered to receive the grants of money appropriated under the said act. [C27, 31, 35,§4035-b2.]

STATE APIARIST

4036 Appointment—tenure. The state board of education is authorized and directed to appoint a state apiarist, who shall work in connection with and under the supervision of the director of agricultural extension of the state college of agriculture and mechanic arts, the term of said state apiarist to continue during the pleasure of said state board of education. [C24, 27, 31, 35,§4036.]

4037 Duties. It shall be the duty of the said apiarist to give lectures and demonstrations in the state on the production of honey, the care of the apiary, the marketing of honey, and upon other kindred subjects relative to the care of bees and the profitable production of honey. [C24, 27, 31, 35,§4037.]

Referred to in §4039.7
37GA, ch 289, §2, editorially divided

4037.1 Right to enter premises. In the performance of his duties, the state apiarist or his assistants shall have the right to enter any premises, inclosure, or buildings containing bees or bee supplies. [C27, 31, 35,§4037-a1.]

Referred to in §4039.7

4038 Examinations. Upon the written request of one or more beekeepers in any county of the state, said apiarist shall examine the bees in that locality suspected of being affected with foulbrood or any other contagious or infectious disease common to bees. [C24, 27, 31, 35,§4038.]

Referred to in §4039.7

4039 Instructions. If upon examination the said apiarist finds said bees to be diseased, he shall furnish the owner or person in charge of said apiary with full written instructions as to the nature of the disease and the best methods of treating same, which information shall be furnished without cost to the owner. [C24, 27, 31, 35,§4039.]

Referred to in §4039.7

4039.1 Notice to treat or destroy. A notice shall be issued by the state apiarist in writing to any owner of bees or bee supplies to complete treatment or destruction within ten days. [C27, 31, 35,§4039-a1.]

Referred to in §4039.7
41GA, ch 63, §2, editorially divided

4039.2 Apiarist to treat or destroy—costs. If the owner fails to comply with said notice, the state apiarist or his assistants shall carry out such treatment or destruction, and shall keep an account of the cost thereof. [C27, 31, 35,§4039-a2.]

Referred to in §4039.7

4039.3 Costs certified—collected as tax. He shall certify the amount of such cost to the owner and if the same is not paid to him within sixty days, the amount shall be certified to the county auditor of the county in which the premises are located, who shall spread the same upon the tax books which shall be a lien upon the property of the bee owner and be collected as other taxes are collected. [C27, 31, 35,§4039-a3.]

Referred to in §4039.7
Collection of taxes, ch 346

4039.4 Regulations authorized. The state apiarist shall issue regulations prohibiting the transportation without his permit of any bees, combs, or used beekeeping appliances, into any area in which clean-up work is being conducted or which has been declared free of any diseases of bees. [C27, 31, 35,§4039-a4.]

Referred to in §4039.7

4039.5 Prohibitory orders. When any area is found to be infected with diseases of bees, he shall issue an order prohibiting the movement of bees and used beekeeping appliances out of such area, but shall except from the order bees shipped without honey or feed containing honey and honey sold in tight containers for commercial purposes other than with bees or as food for bees. [C27, 31, 35,§4039-a5.]

Referred to in §4039.7

4039.6 Effect of regulations and orders. Said regulations and orders shall have the full effect of law. [C27, 31, 35,§4039-a6.]

Referred to in §4039.7

4039.7 Duty of county treasurer. The county treasurer shall turn said money over to the state treasurer to become a part of the fund for the enforcement of sections 4037 to 4039.6, inclusive. [C27, 31, 35,§4039-a7.]

4040 Annual report. Said apiarist shall also make an annual report to the governor, stating the number of apiaries visited, number of demonstrations held, number of lectures given, the number of examinations made upon request of the beekeepers, together with such other matters of general interest concerning the business of beekeeping as in his judgment shall be of value to the public. [C24, 27, 31, 35, §4040.]

Time of report, §247

4041 Sale or disposition of diseased bees. Anyone who knowingly sells, barters, or gives away, moves or allows to be moved, a diseased colony or colonies of bees, without the consent of the state apiarist, or exposes any infected honey or infected appliances to the bees, or who wilfully fails or neglects to give proper treatment to diseased colonies, or who interferes with the state apiarist or his assistants in the performance of their duties or who refuses to permit the examination of bees or their destruction as provided in this act [41GA, ch 63] or violates any other provision of the act shall be deemed guilty of a misdemeanor, and upon conviction thereof before any justice of the peace of the county shall be fined not exceeding the sum of fifty dollars or imprisoned in the county jail not exceeding thirty days. [C24, 27, 31, 35, §4041.]

4041.1 Appropriation by county. The board of supervisors of any county, when petitioned by not less than fifteen beekeepers of that county, may appropriate funds not to exceed six hundred dollars per annum from the general fund for the purpose of eradicating diseases among bees. Such work of eradication shall be done in such county under the supervision of the state apiarist. [C31, 35,§4041-c1.]

HOG-CHOLERA SERUM LABORATORY

4042 Directors — assistants — salary. The state board of education is hereby authorized to maintain at Ames, in connection with the state college of agriculture and mechanic arts, a laboratory for the manufacture and distribution of hog-cholera serum, toxines, vaccines, and biological products and for such other work as the said state board of education may, from time to time, deem advisable in the veterinary division, and to provide the necessary equipment therefor. The president of said college shall appoint the director of said laboratory and such assistants as are deemed necessary to efficiently carry on said work; and he shall, with the approval of said board, fix the salaries of said assistants. [SS15,§2538-w; C24, 27, 31, 35,§4042.]

General regulations, ch 130

4043 Sale of serum. The director of said laboratory may, when an emergency is declared to exist by the state board of education, furnish said serum to any person, together with specific instructions for the use of same, at the approximate cost of manufacture, and such cost shall be stated on the package. The director of the serum laboratory is authorized to purchase serum or other biological products which he deems reliable, and he may sell the same at approximate cost in the same manner as products of the laboratory are sold. [SS15,§2538-w1; C24, 27, 31, 35,§4043.]

4044 Receipts — how deposited — expenses. The director shall deposit all funds with the treasurer of the college, which treasurer shall be responsible on his bond for the same. Upon receipt of said moneys, the said treasurer shall issue duplicate receipts therefor, one of which he shall deliver to the director and the other to the secretary of the state board of education. Said moneys shall be kept by said treasurer in a separate fund to be known as the serum fund; and he shall pay out from said fund, as other college funds are expended, but only for expenses directly connected with the maintenance and development of said laboratory and for grounds and buildings. Said grounds and buildings shall be used, when so authorized by the board of education, for any purpose in connection with the study, control, or treatment of animal diseases. [SS15,§2538-w2; C24, 27, 31, 35,§4044.]

CAPPER-KETCHAM ACT

4044.1 Act accepted. The assent of the legislature of the state of Iowa is hereby given to the provisions and requirements of the congressional act approved May 22, 1928, commonly known as the Capper-Ketcham act. [C31, 35,§4044-c1.]

4044.2 Receipt of funds—work authorized. The Iowa state board of education is hereby authorized and empowered to receive the grants of money appropriated under the said act; and to organize and conduct agricultural extension work which shall be carried on in connection with the Iowa state college of agriculture and mechanic arts, in accordance with the terms and conditions expressed in the act of congress aforesaid. [C31, 35,§4044-c2.]

CHAPTER 201

STATE ENTOMOLOGIST

This chapter (§§4045 to 4062, inc.) repealed by 42GA, ch 68

CHAPTER 201.1

IOWA CROP PEST ACT

4062.01 Short title.
4062.02 Definitions.
4062.03 State entomologist.
4062.04 Employees—expenses.
4062.05 Duties—public nuisances.
4062.06 Rules and regulations.
4062.07 Infection—eradication—notice.
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4062.13 Quarantines—seizure and destruction.
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4062.15 Right to hearing.
4062.16 Violations.
4062.17 Duty of owner—assessment of costs.
4062.18 Violations.
4062.19 Harmful barberry.
4062.20 Liability of principal.
4062.21 Party plaintiff.
4062.22 Construction.

4062.01 Short title. This chapter shall be known by the short title of "The Iowa Crop Pest Act." [C27, 31, 35,§4062-b1.]

4062.02 Definitions. For the purposes of this chapter, the following terms shall be construed, respectively, to mean:

"Insect pests and diseases." Insect pests and diseases injurious to plants and plant products, including any of the stages of development of such insect pests and diseases.

"Plants and plant products." Trees, shrubs, vines, berry plants, greenhouse plants and all other nursery plants; forage and cereal plants, and all other parts of plants; cuttings, grafts, scions, buds, and all other parts of plants; and fruit, vegetables, roots, bulbs, seeds, wood, lumber, and all other plant products.

"Places." Vessels, cars, boats, trucks, automobiles, aircraft, wagons and other vehicles or carriers, whether air, land or water, buildings, docks, nurseries, greenhouses, orchards, fields, gardens, and other premises or any container where plants and plant products are grown, kept or handled. [C27, 31, 35,§4062-b2.]

Diseased hop roots, ch 600

4062.03 State entomologist. There is hereby created and established within the department of agriculture the office of state entomologist. The entomologist of the Iowa agricultural experiment station is hereby constituted the state entomologist who is the executive officer of this chapter. The state entomologist shall be responsible to and under the authority of the secretary of agriculture in the issuance of all rules, regulations, the establishment of quarantines and other official acts. He shall be provided with a suitable office at the college of agriculture and mechanic arts, where his records shall be kept. [S13,§2575-a47; C24,§4045; C27, 31, 35,§4062-b3.]

4062.04 Employees—expenses. For the purpose of carrying out the provisions of this chapter, the state entomologist with the approval of the secretary of agriculture shall employ, prescribe the duties of, and fix the compensation of, such inspectors, and other employees as needed and incur such expenses as may be necessary, within the limits of appropriations made by law. He shall cooperate with other departments, boards and officers of the state and of the United States as far as practicable. [S13,§2575-a47; C24,§4046; C27, 31, 35,§4062-b4.]

4062.05 Duties — public nuisances. The state entomologist shall keep himself informed as to known species and varieties of insect pests and diseases, the origin, locality, nature and appearance thereof, the manner in which they are disseminated, and approved methods of treatment and eradication. In the rules and regulations made pursuant to this chapter the state entomologist shall list the dangerously injurious insect pests and diseases which he shall find should be prevented from being introduced into, or disseminated within, this state in order to safeguard the plants and plant products likely to become infested or infected with such insect pests and diseases. Every such insect pest and disease listed, and every plant product infested or infected therewith, is hereby declared to be a public nuisance. Every person who has knowledge of the presence in or upon any place of any insect pest or disease so listed, shall immediately report the fact and location to the state entomologist, or the assistant state entomologist, giving such detailed information relative thereto as he may have. Every person who deals in or engages in the sale of plants and plant products shall furnish to the state entomologist or his inspectors, when requested, a statement of the names and addresses of the persons from whom and the local-

ities where he purchased or obtained such plants and plant products. [S13,§2575-a47; C24, §4047; C27, 31, 35,§4062-b5.]

Referred to in §4062.19

4062.06 Rules and regulations. The state entomologist shall, from time to time, make rules and regulations for carrying out the provisions and requirements of this chapter, including rules and regulations under which the inspectors and other employees shall:

1. Inspect places, plants and plant products, and things and substances used or connected therewith,
2. Investigate, control, eradicate and prevent the dissemination of insect pests and diseases, and
3. Supervise or cause the treatment, cutting and destruction of plants and plant products infested or infected therewith.

The state entomologist, his inspectors, employees, or other authorized agents shall have authority to enforce these rules and regulations which shall be published in the same manner as are the other rules and regulations of the department of agriculture. [S13,§2575-a48; C24, §§4050, 4051, 4054; C27, 31, 35,§4062-b6.]

Referred to in §4062.19

4062.07 Infection — eradication — notice. Whenever inspection discloses that any places, or plants or plant products, or things and substances used or connected therewith, are infested or infected with any dangerously injurious insect pest or disease listed as a public nuisance, written notice thereof shall be given the owner or person in possession or control of the place where found, who shall proceed to control, eradicate or prevent the dissemination of such insect pest or disease, and to remove, cut or destroy infested and infected plants and plant products, or things and substances used or connected therewith, as prescribed in the notice or the rules and regulations. Whenever such owner or person in possession cannot be found, or shall fail, neglect or refuse to obey the requirements of the notice and the rules and regulations, such requirements shall be carried out by the state entomologist, as required by section 4062.17. [S13,§2575-a48; C24,§§4050, 4052, 4053, 4055; C27, 31, 35,§4062-b7.]

Referred to in §4062.19

4062.08 Importation—regulations. It shall be unlawful for any person to bring or cause to be brought into this state any plant or plant product listed in the rules and regulations, unless there be plainly and legibly marked thereon or affixed thereto, or on or to the carrier, or the bundle, package, or container, in a conspicuous place, a statement or tag or device showing the names and addresses of the consignors or shippers and the consignees or persons to whom shipped, the general nature and quantity of the contents, and the name of the locality where grown, together with a certificate of inspection of the proper official of the state, territory, district, or country from which it was brought or shipped, showing that such plant or plant product was found or believed to be free from dangerously injurious insect pests and diseases, and giving any other information required by the state entomologist. [S13,§2575-a50; C24,§4058; C27, 31, 35,§4062-b8.]

Referred to in §§4062.09, 4062.10, 4062.19

4062.09 Inspection — certificate — fees. It shall be unlawful for any person to sell, give away, carry, ship, or deliver for carriage or shipment, within this state, any plants or plant products listed in the rules and regulations, unless such plants or plant products have been officially inspected and a certificate issued by an inspector of the state entomologist's office stating that such plants or plant products have been inspected and found to be apparently free from dangerously injurious insect pests and diseases, and giving any other facts provided for in the rules and regulations. For the issuance of such certificate, the state entomologist may require the payment of a reasonable fee to cover the expense of such inspection and certification. Provided, that if such plants or plant products were brought into this state in compliance with section 4062.08, the certificate required by that section may be accepted in lieu of the inspection and certificate required by this section, in such cases as shall be provided for in the rules and regulations. If it shall be found at any time that a certificate of inspection, issued or accepted under the provisions of this section, is being used in connection with plants and plant products which are infested or infected with dangerously injurious insect pests or diseases or in connection with uninspected plants, its further use may be prohibited, subject to such inspection and disposition of the plants and plant products involved as may be provided for by the state entomologist. All moneys collected under the provisions of this chapter shall be turned over to the secretary who shall deposit them in the state treasury.

A fee of not less than five dollars nor more than sixty-five dollars per annum, according to the amount of stock inspected, shall be paid at the time of inspection or before a certificate is granted. Such certificate shall be valid for one year from date of issue, unless sooner revoked by the state entomologist. The inspection of nurseries shall take place between May 1 and October 30 of each year and at such other times as may be necessary to make effective the provisions of this chapter and the rules and regulations made pursuant thereto. [S13,§§2575-a47,-a49; C24,§§4047, 4048, 4057; C27, 31, 35, §4062-b9.]

Referred to in §§4062.10, 4062.19

4062.10 Report of violations. Any person who receives from without the state any plant or plant product without section 4062.08 having been complied with, or who receives any plant or plant product sold, given away, carried, shipped, or delivered for carriage or shipment within this state without section 4062.09 having been complied with, shall immediately inform the state entomologist or one of his inspectors of such facts and isolate and hold the plant or

plant product unopened or unused, subject to such inspection and disposition as may be provided for by the state entomologist. [S13,§2575-a49; C24,§4057; C27, 31, 35,§4062-b10.]

Referred to in §4062.19

4062.11 Quarantine—general powers. Whenever the state entomologist shall find that there exists outside of this state any insect pest or disease, and that its introduction into this state should be prevented in order to safeguard plants and plant products in this state, the state entomologist is authorized to quarantine and promulgate quarantine restrictions covering areas within the states affected by the pest and may adopt, issue, and enforce rules and regulations supplemental to such quarantines for the control of the pest. Under such quarantines, the state entomologist or his authorized agents may prohibit and prevent the movement within the state without inspection, or the shipment or transportation within the state, of* any agricultural or horticultural product, or any other material of any character whatsoever, capable of carrying any dangerously injurious insect pest or disease in any living state of* its development; and, in the enforcement of such quarantine, may intercept, stop, and detain for official inspection any person, car, vessel, boat, truck, automobile, aircraft, wagon, vehicles or carriers or any container, material, or substance believed or known to be carrying the insect pest or plant disease in any living state of its development in violation of said quarantines or of the rules or regulations issued supplemental thereto, and may seize, possess, and destroy any agricultural or horticultural product or other material of any character whatsoever, moved, shipped, or transported in violation of such quarantines or the rules and regulations. [S13, §2575-a48; C24,§4049; C27, 31, 35,§4062-b11.]

Referred to in §4062.19
*"or" in enrolled act

4062.12 Federal quarantine—seizures.

1. Until the secretary of agriculture of the United States shall have made a determination that a federal quarantine is necessary, and has duly established the same with reference to any dangerous plant disease or insect infestation, the state entomologist of this state is authorized to promulgate and enforce quarantine regulations prohibiting or restricting the transportation of any class of plant material or product or article into this state from any state, territory or district of the United States, when he shall have information that a dangerous plant disease or insect infestation exists in such state, territory, district, or portion thereof.

2. The state entomologist, his inspectors or duly authorized agents are authorized to seize, destroy, or return to the point of origin any material received in this state in violation of any state quarantine established under the authority of subsection 1 hereof, or in violation of any federal quarantine established under the authority of the act of August 20, 1912, [37 Stat. L. ch 308] or any amendment thereto. [C27, 31, 35,§4062-b12.]

Referred to in §4062.19

4062.13 Quarantines—seizure and destruction. Whenever the state entomologist shall find that there exists in this state, or any part thereof, any dangerously injurious insect pest or plant disease, and that its dissemination should be controlled or prevented, he may institute quarantines and promulgate quarantine restrictions covering areas within the state affected by such pest or disease, and may adopt, issue and enforce rules and regulations supplemental to such quarantines for the control of this pest. Under such quarantines, the state entomologist, his inspectors or authorized agents may prohibit and prevent the movement within the state without inspection or the shipment or transportation within this state, of* any agricultural or horticultural product, or any other material of any character whatsoever, capable of carrying any dangerously injurious insect pest or disease in any living state of its development; and, in the enforcement of such quarantine, may intercept, stop, and detain for official inspection any person, car, vessel, boat, truck, automobile, aircraft, wagon, or other vehicles or carriers of any kind or character, whether air, land or water, or any container or material believed or known to be carrying such insect pest or plant disease in any living state of its development or any such material, in violation of said quarantine or of the rules or regulations issued supplemental thereto, and may seize, possess, and destroy any agricultural or horticultural product or other material of any character whatsoever, moved, shipped, or transported in violation of such quarantines or the said rules and regulations.

The state entomologist shall give public notice of such quarantines, specifying the plants and plant products infested or infected, or likely to become infested or infected; and the movement, planting or other use of any such plant or plant product, or other thing or substance specified in such notice as likely to carry and disseminate such insect pest or disease, except under such conditions as shall be prescribed as to inspection, treatment and disposition, shall be prohibited within such area as he may designate. When the state entomologist shall find that the danger of the dissemination of such insect pest or disease has ceased to exist, he shall give public notice that the quarantine is raised. [S13,§2575-a48; C24,§4049; C27, 31, 35,§4062-b13.]

Referred to in §4062.19
*"or" in enrolled act

4062.14 Right of access. The state entomologist and his authorized inspectors, employees, and agents shall have free access within reasonable hours to any farm, field, orchard, nursery, greenhouse, garden, elevator, seedhouse, warehouse, building, cellar, freight or express office or car, freight yard, truck, automobile, aircraft, wagon, vehicle, carrier, vessel, boat, container or any place which it may be necessary or desirable for such authorized agents to enter in carrying out the provisions of this chapter. It shall be unlawful to deny such access to such authorized agents or to hinder,

thwart, or defeat such inspection or entrance by misrepresentation or concealment of facts or conditions, or otherwise. [S13,§2575-a48; C24, §4049; C27, 31, 35,§4062-b14.]

Referred to in §4062.19

4062.15 Right to hearing. Any person affected by any rule or regulation made or notice given may have a review thereof by the secretary of agriculture for the purpose of having such rule, regulation or notice modified, suspended or withdrawn. [C27, 31, 35,§4062-b15.]

Referred to in §4062.19

4062.16 Violations. Any person, copartnership, association or corporation, or any combination of individuals, violating any provision of a quarantine promulgated under the authority of this chapter, or of any rules and regulations issued supplemental thereto, shall be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment in the county jail not exceeding thirty days or by a fine of not less than twenty-five dollars nor more than one hundred dollars for each offense. [S13,§2575-a50; C24,§4059; C27, 31, 35,§4062-b16.]

Referred to in §4062.19

4062.17 Duty of owner — assessment of costs. Whenever treatment or destruction of any agricultural or horticultural plant or product, in field, feed lot, place of assemblage or storage, or elsewhere, or whenever any special type of plowing or any other agricultural or horticultural operation is required under the rules and regulations, the owner or person having charge of such plants, plant products or places, upon due notice from the state entomologist or his authorized agents, shall take the action required within the time and in the manner designated by such notice. In case the owner or person in charge shall refuse or neglect to obey the notice, the secretary of agriculture, or his authorized agents, may do what is required, and the expense thereof the secretary shall assess to the owner after giving him legal notice and a hearing. Provided that no expense other than such as is incidental to normal and usual farm operations shall be so assessed. If the assessment is not paid, the secretary shall certify it to the treasurer of the proper county who shall enter it on the tax books and collect it as ordinary taxes are collected and remit it to the secretary.

The said secretary is hereby authorized to refund to the federal department of agriculture all moneys so assessed and collected which represent expenditures made on such premises by the United States in accordance with the provisions of the act of congress enacted by the sixty-ninth congress, approved February 23, 1927, and entitled, "An act to provide for the eradication or control of the European corn borer." [S13,§2575-a48; C24,§§4055, 4056; C27, 31, 35,§4062-b17.]

Referred to in §§4062.07, 4062.19

4062.18 Violations. Any person who shall violate any provision or requirement of this chapter, or of the rules and regulations made or of any notice given pursuant thereto, or who shall forge, counterfeit, deface, destroy or wrongfully use, any certificate provided for in this chapter, or in the rules and regulations made pursuant thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars or by imprisonment for not more than thirty days. [S13, §2575-a50; C24,§4059; C27, 31, 35,§4062-b18.]

Referred to in §4062.19

4062.19 Harmful barberry.

1. No person, firm, or corporation shall receive, ship, accept for shipment, transport, sell, offer for sale, give away, deliver, plant, or permit to exist on his or its premises any plant of the harmful barberry, or any plant of a species that shall be designated by the state entomologist in published regulations to be a host or carrier of a dangerous plant disease or insect pest.

2. The state entomologist and his inspectors, and his authorized agents, are hereby empowered to eradicate any such plant found growing in the state. If the owner shall refuse or neglect to eradicate such plants within ten days after receiving a written notice, the expense of such eradication shall be assessed, collected, and enforced against the premises upon which such expense was incurred as taxes are assessed, collected and enforced.

3. The term "harmful barberry" shall be interpreted to consist of any species of Berberis or Mahonia susceptible to infection by Puccinia graminis, commonly called black stem rust of grain, but not including Japanese barberry, (B. thunbergii) which does not propagate the rust.

4. The penalties provided in section 4062.17 and all other applicable provisions of sections 4062.05 to 4062.18, inclusive, shall govern and apply to the enforcement of this section. [C24, §4053; C27, 31, 35,§4062-b19.]

4062.20 Liability of principal. In construing and enforcing the provisions of this chapter, the act, omission or failure of any official, agent or other person acting for or employed by an association, partnership or corporation within the scope of his authority shall, in every case, also be deemed the act, omission or failure of such association, partnership, or corporation as well as that of the person. [C27, 31, 35,§4062-b20.]

4062.21 Party plaintiff. The secretary of agriculture, the state entomologist, or any of their inspectors or authorized agents shall be a proper party plaintiff in any action in any court of equity brought for the purpose of carrying out any of the provisions of this chapter. [C27, 31, 35,§4062-b21.]

4062.22 Construction. This chapter shall not be so construed or enforced as to conflict in any way with any act of congress regulating the movement of plants and plant products in interstate or foreign commerce. [C27, 31, 35,§4062-b22.]

Constitutionality, §4062-b23, code 1935; 42GA, ch 68, §23
Omnibus repeal, §4062-b24, code 1935; 42GA, ch 68, §24

CHAPTER 202

IOWA STATE TEACHERS COLLEGE

4063 Official designation.
4064 Branches of study.
4065 Contract with school districts.

4063 Official designation. The normal school at Cedar Falls, for the special instruction and training of teachers for the common schools, shall be officially designated and known as the "Iowa State Teachers College". [C97,§2675; S13,§2675; C24, 27, 31, 35,§4063.]

4064 Branches of study. Physical education, including physiology and hygiene, shall be included in the branches of study regularly taught to and studied by all pupils in the college, and special reference shall be made to the effect of alcoholic drinks, stimulants, and narcotics upon the human system. [C97,§2677; C24, 27, 31, 35,§4064.]

4065 Contract with school districts. The state board of education may contract in writing with the board of directors of the school district in which the college is situated and those contiguous thereto, for a period not exceeding two years at a time, to receive the pupils thereof into the state teachers college and furnish them with instruction; and payment thereof shall be made out of the general funds of such districts, but shall not exceed fifty cents per week for each pupil. A copy of such contract shall be filed with the county superintendent, and all reports required by law to be made to the board of directors of such townships or schools and the county superintendent by the teachers thereof shall be made by the president of the college. All sums received for tuition shall be placed to the credit of the general fund of the college. [C97,§§2678, 2679; C24, 27, 31, 35,§4065.]

CHAPTER 203

SCHOOL FOR THE BLIND

4066 Admission.
4067 Expenses—residence of indigents.

4066 Admission. All blind persons and persons whose vision is so defective that they cannot be properly instructed in the common schools, who are residents of the state and of suitable age and capacity, shall be entitled to an education in the school for the blind at the expense of the state. Nonresidents also may be admitted to the school for the blind if their presence would not be prejudicial to the interests of residents, upon such terms as may be fixed by the state board of education. [R60, §§2147, 2148; C73,§§1672, 1680; C97, §2715; S13, §2715; C24, 27, 31, 35,§4066.]

Report as to blind, §4106, par. 13

4067 Expenses—residence of indigents. The provisions of sections 4071 to 4075, inclusive, are hereby made applicable to the school for the blind. [C73,§1678; C97,§2716; C24, 27, 31, 35, §4067.]

CHAPTER 204

SCHOOL FOR THE DEAF

4068 Superintendent.
4069 Labor of pupils.
4070 Admission.
4071 Clothing and transportation.
4072 Certification to state comptroller.
4073 Certification to auditor—collection.
4074 Payment by county.
4075 Residence during vacation.

4068 Superintendent. The superintendent of the school for the deaf shall be a trained and experienced educator of the deaf. His salary may include residence in the institution and board from the funds or supplies thereof, but no such allowance shall be made except by express contract in advance. [C97,§2723; S13, §2727-3a; C24, 27, 31, 35,§4068.]

40GA, ch 242, §1, editorially divided

4069 Labor of pupils. The board may utilize the labor of any pupil of the institution on the farm, in the workshops, in erection of buildings for the institution, or in domestic service, so far as practicable, without interference with their proper education. [C97,§2723; C24, 27, 31, 35,§4069.]

4070 Admission. Every resident of the state who is not less than five nor more than twenty-one years of age, who is deaf and dumb, or so deaf as to be unable to acquire an education in the common schools, and every such person who is over twenty-one and under thirty-five years of age who has the consent of the state board of education, shall be entitled to receive an education in the institution at the expense of the state, and nonresidents similarly situated may be entitled to an education therein upon such terms as may be fixed by the state board of

education. The fee for nonresidents shall be not less than the average expense of resident pupils and shall be paid in advance. [R60, §§2156, 2160; C73,§§1688, 1689; C97,§2724; S13, §2724; C24, 27, 31, 35,§4070.]

Report as to deaf, §4106, par. 13

4071 Clothing and transportation. When pupils are not supplied with clothing, or transportation, it shall be furnished by the superintendent, who shall make out an account therefor against the parent or guardian, if the pupil be a minor, and against the pupil if he have no parent or guardian, or has attained the age of majority, which bill shall be certified by him to be correct, and shall be presumptive evidence thereof in all courts. [C73,§1695; C97,§2726; S13,§2726; C24, 27, 31, 35,§4071.]

Referred to in §4067
S13,§2726, editorially divided

4072 Certification to state comptroller. The superintendent shall, on the first days of June and December of each year, certify to the state comptroller the amounts due from the several counties, and the comptroller shall thereupon pass the same to the credit of the institution, and charge the amount to the proper county. [C73,§1695; C97,§2726; S13,§2726; C24, 27, 31, 35,§4072.]

Referred to in §4067

4073 Certification to auditor — collection. The superintendent shall, at the time of sending certificate to the state comptroller, send a duplicate copy to the auditor of the county of the pupil's residence, who shall, when ordered by the board of supervisors, proceed to collect the same by action if necessary, in the name of the county, and when so collected, shall pay the same into the county treasury. [C73,§1695; C97,§2726; S13,§2726; C24, 27, 31, 35,§4073.]

Referred to in §4067

4074 Payment by county. The county auditor shall, upon receipt of said certificate, pass the same to the credit of the state, and thereupon issue a notice to the county treasurer authorizing him to transfer the amount from the general county fund to the general state revenue, which shall be filed by the treasurer as his authority for making such transfer, and shall include the amount in his next remittance of state taxes to the treasurer of state, designating the fund to which it belongs. [C73, §1695; C97,§2726; S13,§2726; C24, 27, 31, 35, §4074.]

Referred to in §4067

4075 Residence during vacation. The residence of indigent or homeless children may, by order of the state board of education, be continued during vacation months. [S13,§2727-a; C24, 27, 31, 35,§4075.]

Referred to in §4067

CHAPTER 205

COUNTY HIGH SCHOOLS

This chapter (§§4076 to 4095, inc.) repealed by 45GA, ch 63

CHAPTER 206

COUNTY SUPERINTENDENT

4096 Term of office.
4097 Qualifications.
4098 Election by convention.
4099 Representatives at convention.
4100 Calling convention.
4101 Convention—quorum.
4102 Committee to elect.
4103 Vacancies.
4104 Mileage.
4105 Certificate of election.
4106 Duties.
4107 Penalty.

4096 Term of office. There shall be a county superintendent of schools of each county in the state, whose term of office shall be for three years, from the first secular day of September following his election and until his successor is elected and qualified. A regular term began in 1918. [R60,§2063; C73,§589; C97,§1072; S13, §§1072, 2734-b1; C24, 27, 31, 35,§4096.]

4097 Qualifications. The county superintendent may be of either sex, shall be the holder of a superintendent's certificate and shall have had at least five years experience in administrative or supervisory work or in teaching, but anyone serving as county superintendent at the time of the passage of this act [45GA, ch 51] shall be deemed eligible to re-election. [C97, §2734; SS15,§2734-b; C24, 27, 31, 35,§4097.]

4098 Election by convention. The county superintendent shall be elected by a convention held on the second Tuesday in May preceding the expiration of his regular term of office, composed of representatives of school districts organized in the county as follows: One for each school township, one for all the rural independent districts in each civil township, one for each city, town, or village independent district, and one for each consolidated district. Each representative shall be entitled to one vote. All representatives to such convention shall serve until a county superintendent is elected and qualified. [R60, §2063; C73,§589; C97,§1072; S13,§1072; C24, 27, 31, 35,§4098.]

4099 Representatives at convention. Each school corporation except rural independent dis-

tricts shall be represented at the convention by the president of the school board, or, in his absence or inability to act, by some member of such board to be selected by the board. When such selection is made, the secretary of the board shall at once notify the county auditor thereof. Rural independent districts shall be represented by some person selected by the presidents of the boards of such districts at a meeting to be held at such time and place as the county auditor shall fix in the call for the convention, and the secretary of the meeting shall notify the county auditor of the person so selected. [S13,§1072; C24, 27, 31, 35,§4099.]

4100 Calling convention. Such convention shall be called by the county auditor by mailing a written notice to the president and secretary of each school corporation and by the publication of such notice in the official newspapers published in the county at least ten days prior to the date of such convention. Such notice shall also fix the time and place of the meeting of the presidents of rural independent districts in the several townships for the election of representatives to the convention. [S13,§1072; C24, 27, 31, 35,§4100.]

4101 Convention—quorum. At the time and place fixed, the county auditor shall call the convention to order, shall submit a list of school corporations entitled to participate in such convention and of the representatives, and shall be secretary of the convention. The convention shall be the judge of the qualifications of its own members and a majority of the legal representatives shall constitute a quorum. Said convention shall select a chairman, and when so organized shall elect a county superintendent of schools. [S13,§1072; C24, 27, 31, 35,§4101.]

4102 Committee to elect. The convention may, by a majority vote, elect a committee of five members who shall investigate the various candidates for the office and report to said convention at a date to which the convention may adjourn; or the convention may, by a three-fourths vote, authorize said committee to elect a county superintendent, and file its election with the county auditor, and thereupon said person shall be deemed duly elected. [S13, §1072; C24, 27, 31, 35,§4102.]

4103 Vacancies. Vacancies in the office of county superintendent shall be filled at special conventions called and held in the same manner as regular conventions. [S13,§2734-b1; C24, 27, 31, 35,§4103.]

4104 Mileage. Each representative shall be paid from the county treasury ten cents per mile one way for the distance necessarily traveled in attending the convention. [S13,§1072; C24, 27, 31, 35,§4104.]

4105 Certificate of election. Whenever a county superintendent is elected and has qualified, the county auditor shall forward to the superintendent of public instruction a certificate thereof. [C73,§1783; C97,§2809; S13,§2809; C24, 27, 31, 35,§4105.]

4106 Duties. The county superintendent shall:

1. *Means of communication.* Under the direction of the superintendent of public instruction, serve as a means of communication between the department of public instruction and the various officers and instructors in the county, and transmit or deliver to them all books, papers, circulars, and communications designed for them.

2. *Visiting schools.* Visit each public school in the county at least once during each school year; and when requested so to do by a majority of the directors of any school corporation, visit the schools therein.

3. *Special visit and report upon schools.* At the request of the superintendent of public instruction, visit and report upon such school as may be designated.

4. *Enforcement of school laws.* See that all provisions of the school law, so far as it relates to the schools or school officers within his county, are observed and enforced, especially those relating to the fencing of schoolhouse grounds with barbed wire, the introduction and teaching of such divisions of physiology and hygiene as relate to the effects of alcohol, stimulants, and narcotics upon the human system, those relating to compulsory attendance of pupils, and those relating to the exclusive use of the English language as the medium of instruction in the schools, and to this end he may require the assistance of the county attorney, who shall at his request bring any action necessary to enforce the law or recover penalties incurred.

School closed, §4233.2

5. *Conduct examinations—assistants.* Conduct, in accordance with the regulations of the board of educational examiners, examinations for teachers' certificates, and as soon as the examination is completed, forward to the president of the board of educational examiners a list of all applicants examined, with the standing of each in didactics and oral reading, and his estimate of each applicant's personality and general fitness other than scholarship for the work of teaching. He shall, at the same time, forward to the president of the board of educational examiners the answer papers written, with the exception of those in didactics. Such examinations shall be held at the county seat, in a suitable room provided by the board of supervisors, but the county superintendent may, in his discretion, cause examinations to be held at the same time in some other place in the county. The county superintendent may employ such assistants as may be necessary for this purpose and the bills for their services and expenses shall be verified and filed with the county auditor.

6. *Requirements of proof of good character.* Before admitting anyone to the examination, be satisfied that the person seeking a certificate is of good moral character, of which fact he may require proof, and is in all respects other than in scholarship possessed of the necessary qualifications as an instructor.

7. *Uncertificated teaching may be enjoined.* Order to be closed any public school or schoolroom taught by any teacher not certificated as required by law. If his order is not immediately obeyed, he may enforce the same against the teacher and the school board by the procurement of an injunction from any court of competent jurisdiction.

8. *Record of examinations.* Keep a record of all examinations taken within his county, with the name, age, and residence of each applicant and the date of examination.

9. *Report of applicants for teachers' certificates.* Report monthly to the county auditor the names of all applicants for teachers' certificates.

10. *Appointment of school directors.* When any school corporation is organized or reorganized according to law, and no director has been elected, or any director elected has not qualified, or has qualified and resigned, so that the matter of the completion of the organization or reorganization of such school corporation is prevented, and the objects of its organization are thereby defeated, appoint a director or board of directors of such corporation, who shall act as such until their successors have been elected and qualified, and designate which term or terms each director appointed shall fill. In consolidated districts such appointments shall be made by the county superintendent of the county in which the petition was filed.

11. *Report to superintendent of public instruction.* Annually, on the last Tuesday in August, report to the superintendent of public instruction, giving a full abstract of the several reports made to him by the secretaries and treasurers of school boards, stating the manner in and extent to which the requirements of the law regarding instruction in physiology and hygiene are observed, and such other matters as he may be directed by the state superintendent to include therein, or he may think important in showing the actual condition of the schools in his county. He shall file a duplicate of such report with the county board of education.

12. *Report of persons of school age.* Annually, on the last Tuesday in August, file with the county auditor a statement of the number of persons of school age in each school township and independent district in the county.

13. *Reports.* Report on or before August 1 each year, to the superintendent of the college for the blind, the name, age, residence, and post-office address of every person resident of the county, without regard to age, so blind as to be unable to acquire an education in the common schools; to the superintendent of the school for the deaf with the same detail persons under age thirty-five, whose faculties with respect to speech and hearing are so deficient as to prevent them from obtaining an education in the common schools; and to the institution for the feeble-minded all persons of school age who, because of mental defects, are entitled to admission therein.

14. *Transmission of fees.* On the first secular day of each month, transmit to the county treasurer and the state treasurer each one-half of all moneys received for examination fees; and to the county treasurer the state appropriation for institutes when received.

15. *Annual report of financial transactions.* Report to the board of supervisors on the first day of January annually a summary of his official financial transactions for the previous year.

16. *Administration of oaths.* Have power to administer the oath of office to any school officer.

Oath of office, §1054

1. [R60,§2073; C73,§1774; C97,§2735; SS15, §2734-b; C24, 27, 31, 35,§4106.]
2. [C73,§§1770, 1774; C97,§§2734, 2735; SS15, §2734-b; C24, 27, 31, 35,§4106.]
3. [C97,§2735; SS15,§2734-b; C24, 27, 31, 35, §4106.]
4. [C97,§2740; C24, 27, 31, 35,§4106.]
5. [C51,§1148; R60,§§2066, 2068; C73,§1766; C97,§2735; S13,§2734-m; SS15,§2734-c; C24, 27, 31, 35,§4106.]
6. [R60,§2067; C73,§1767; C97,§2737; S13, §2734-l; C24, 27, 31, 35,§4106.]
7. [C24, 27, 31, 35,§4106.]
8. [R60,§2067; C73,§1768; C97,§2736; S13, §2734-f; C24, 27, 31, 35,§4106.]
9. [C97,§2738; S13,§2738; C24, 27, 31, 35, §4106.]
10. [C24, 27, 31, 35,§4106.]
11, 12. [R60,§2071; C73,§§1772, 1775; C97, §2739; S13,§2739; C24, 27, 31, 35,§4106.]
13. [C73,§1775; C97,§2739; S13,§2739; C24, 27, 31, 35,§4106.]
14. [C97,§2738; S13,§§2734-p, 2738; C24, 27, 31, 35,§4106.]
15. [S13,§2738; C24, 27, 31, 35,§4106.]
16. [C24, 27, 31, 35,§4106.]

4107 Penalty. Should he fail to make any report required of him by law to the superintendent of public instruction or the county auditor, he shall forfeit to the school fund of his county the sum of fifty dollars, to be recovered in an action brought by the county for the use of the school fund, and in addition shall be liable for all damages occasioned thereby. [R60,§2072; C73,§1773; C97,§2741; C24, 27, 31, 35,§4107.]

4108 to 4118, inc. Rep. by 44GA, ch 85

CHAPTER 206.1

PROFESSIONAL TEACHERS MEETINGS, DEMONSTRATION TEACHING, AND FIELD WORK

4118.1 Improvement of instruction.
4118.2 Plans approved by state superintendent.
4118.3 Adjournment of schools.
4118.4 Certificate of attendance.
4118.5 Funds.
4118.6 Use of fund.
4118.7 Disbursement requirements.
4118.8 Itemized account of funds.

4118.1 Improvement of instruction. The county superintendent shall arrange for such professional teachers meetings, demonstration teaching or other field work for the improvement of instruction as may best fit the needs of the public schools in his county and as directed by the superintendent of public instruction. [C31, 35,§4118-d1.]

4118.2 Plans approved by state superintendent. All arrangements concerning plans for said improvement of instruction shall be subject to the final approval by the superintendent of public instruction. [C31, 35,§4118-d2.]

4118.3 Adjournment of schools. The school board of every school district shall allow its teachers to attend said meetings or to participate in such work for not more than one day in each school year without loss of salary. [C31, 35,§4118-d3.]

4118.4 Certificate of attendance. The county superintendent shall notify the secretary of the school boards as to the cooperation and attendance of its teachers in said meetings and any teacher failing to attend when requested by the county superintendent to do so, shall forfeit his average daily salary for that day of non-attendance, except when excused by the county superintendent for physical disability to perform his duties in the schoolroom. [C31, 35, §4118-d4.]

4118.5 Funds. The fund for carrying out the purpose of this chapter shall consist of:

1. Fifty dollars annually, which is hereby appropriated.
2. One-half of all examination fees collected in the county.
3. One hundred fifty dollars from the general county fund in any county having a population of thirty thousand or less, which amount shall be appropriated by the board of supervisors of such county at the January session of each year. Two hundred dollars from the general county fund in any county having a population of over thirty thousand, to be appropriated by the board of supervisors in like manner.
4. Such reasonable sum as may be appropriated by the board from the general fund of any city independent district. [C31, 35,§4118-d5.]

4118.6 Use of fund. No part of this improvement of instruction fund may be used for any other purpose than to pay the expenses of the plans formed and approved for this work. [C31, 35,§4118-d6.]

4118.7 Disbursement requirements. All disbursements from the fund provided by this chapter shall be by warrants drawn by the county auditor upon the written order of the county superintendent, and said written order must be accompanied by an itemized bill for services rendered or expenses incurred in connection therewith, which bill must be signed and sworn to by the party in whose favor the order is made and must be verified by the county superintendent. All said orders and bills shall be kept on file in the auditor's office until the final settlement of the county superintendent with the board of supervisors at the close of his term of office. No warrant shall be drawn by the auditor in excess of the amount then in the county treasury. [C31, 35,§4118-d7.]

4118.8 Itemized account of funds. The county superintendent shall furnish to the county board of supervisors a certified itemized account of all receipts and disbursements for the improvement of instruction. They shall examine and audit the account and publish a summary thereof with the proceedings of the regular June meeting of the board. The county superintendent shall also make such reports to the superintendent of public instruction as required by him. [C31, 35,§4118-d8.]

CHAPTER 207

COUNTY BOARD OF EDUCATION

4119 Membership—election.
4120 Oaths.
4121 Meetings—chairman—records.
4122 Duties.
4122.1 Federal cooperation.

4119 Membership — election. The county board of education shall consist of the county superintendent ex officio, and six reputable citizens of the county, of either sex, of good educational qualifications, no two of whom shall be from the same school corporation. Each regular convention held for the election of county superintendent shall elect three members of said board, whose terms of office shall begin on the following Tuesday and shall be for six years, and until their successors are elected and qualified. Vacancies in the board may be filled by

the board until the next regular convention, when the same shall be filled by the convention. A majority of said board shall constitute a quorum. If the membership be reduced below a quorum, a special convention shall be called to fill the vacancies. [R60,§2063; C73,§589; C97, §1072; S13,§1072; C24, 27, 31, 35,§4119.]

4120 Oaths. The members of said board shall take the oath of office required of county officers, and, except the county superintendent, shall serve without pay; but shall be allowed their actual, necessary expenses in performing their duties, not to exceed forty dollars each annually, to be audited by the board of supervisors and paid out of the general fund. [C24, 27, 31, 35,§4120.]

Oath of office, §1054

4121 Meetings—chairman—records. Meetings of the board shall be held on the second Monday of August and February in each year at the office of the county superintendent, and at such other times as may be fixed by the county superintendent, or by written request of three members filed with him. The county superintendent shall in all cases be chairman of the county board of education and a full and complete record shall be kept of their proceedings in a book kept for that purpose in the office of the county superintendent. [C97,§2833; C24, 27, 31, 35,§4121.]

C97,§2833, editorially divided

4122 Duties. The board shall perform all duties imposed upon it by law, and shall act in an advisory capacity upon all matters referred to it by the county superintendent, and cooperate with him in formulating plans and regulations for the advancement and welfare of the schools under his supervision. [C24, 27, 31, 35, §4122.]

4122.1 Federal cooperation. The county board of education or a school board in a county wherein is located an Indian reservation shall have power to enter into a contract with the United States government to operate and maintain a school or schools to be operated as a public school approved as provided for by the laws of this state for the purpose of educating Indian children. The expense of such operation and maintenance shall be paid by the United States government. [C31, 35,§4122-c1.]

CHAPTER 208

SCHOOL DISTRICTS IN GENERAL

4123 Powers and jurisdiction.
4123.1 General applicability.
4123.2 Minimum size of school districts.
4123.3 Action to test legal incorporation—limitation.
4123.4 When corporation deemed organized.
4124 Names.
4125 Directors.
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4127 Plat and record—filing.
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4139 Taxes to effect equalization.
4140 Plats of school districts.
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4142 Vote by ballot—separate ballot boxes.
4143 Subdistrict into independent district.
4144 When district deemed formed.
4144.1 Additions and extensions—separate vote.
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4144.3 Tenure of ex officio officers.
4145 Offices abolished—officers of districts outside.
4146 Contracts of employment not affected.
4147 Election expenses.
4148 New board and treasurer.
4149 Taxes certified and levied.
4150 School township divided.
4151 Rural independent districts united.
4152 Subdivision of independent districts.
4153 Uniting independent districts.

4123 Powers and jurisdiction. Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained. [C51,§1108; R60,§§2022, 2026; C73,§§1713, 1716; C97,§2743; C24, 27, 31, 35,§4123.]

Right to bid under execution sale, §10247

4123.1 General applicability. The provisions of law relative to common schools shall apply alike to all districts, except when otherwise clearly stated, and the powers given to one form of corporation, or to a board in one kind of corporation, shall be exercised by the other in the same manner, as nearly as practicable. But school boards shall not incur original indebtedness by the issuance of bonds until authorized by the voters of the school corporation. [C97, §2823; C24, 27, 31, 35,§4190.]

Vote required to authorize bonds, see §1171.18

4123.2 Minimum size of school districts. No new school district shall be formed, nor shall the boundary lines of any existing school district be so changed as to make it contain an area less than four government sections of land; but nothing herein shall be construed to prevent the boundary lines of an existing school district from being changed so that it shall be included in and consolidated with other districts, or joined to another district to form a single school district, nor shall it be construed to permit the formation of a consolidated district with an area of less than sixteen government sections of land

or to permit the reduction of an existing consolidated district below an area of sixteen government sections of land. [C35,§4123-g1.]

Referred to in §4152

4123.3 Action to test legal incorporation—limitation. No action shall be brought questioning the legality of the organization of any school district in this state after the exercise of the franchises and privileges of a district for the term of six months. [C24, 27, 31, 35,§4192.]

Referred to in §4123.4

4123.4 When corporation deemed organized. Every school corporation shall, for the purpose of section 4123.3, be deemed duly organized and to have commenced the exercise of its franchises and privileges when the president of the board of directors has been elected; and the record book of such corporation duly certified by the acting secretary thereof, showing such election and the time thereof, shall be prima facie evidence of such facts. [C24, 27, 31, 35,§4193.]

4124 Names. School corporations composed of subdistricts shall be called school townships, and shall be designated as the school township of (naming civil township), in the county of (naming county), state of Iowa.

If there are two or more school corporations composed of subdistricts in any civil township, in addition to the foregoing they should be designated by number.

Other school corporations shall be designated as follows: The independent school district of (naming city, town, township, or village, and if there are two or more districts therein, including some appropriate name or number), in the county of (naming county), state of Iowa; or, the rural independent school district of (some appropriate name or number), township of (naming township), in the county of (naming county), state of Iowa; or, the consolidated school district of (some appropriate name or number), in the county of (naming county), state of Iowa. [C51,§1108; R60,§2026; C73, §1716; C97,§2744; S13,§2744; C24, 27, 31, 35, §4124.]

4125 Directors. The affairs of each school corporation shall be conducted by a board of directors, the members of which in all independent school districts shall be chosen for a term of three years, except that in independent school districts which embrace a city and which have a population of one hundred twenty-five thousand or more, the term of directors shall be six years, and in all subdistricts of school townships for a term of one year. [C97,§2745; C24, 27, 31, 35,§4125.]

Similar provision, §4216.24

4126 Division of school township — alterations. The board of any school township may, by a vote of a majority of all the members thereof, at the regular meeting in July, or at any special meeting called thereafter for that purpose, divide the school township into subdistricts such as justice, equity, and the interests of the people require, and may make such alterations of the boundaries of subdistricts heretofore formed as may be deemed necessary. [R60,§2038; C73,§§1725, 1738, 1796; C97,§2801; S13,§2801; C24, 27, 31, 35,§4126.]

Referred to in §4129
S13,§2801, editorially divided

4127 Plat and record — filing. The board shall designate such subdistricts and all subsequent alterations in a distinct and legible manner upon a plat of the school township provided for that purpose, and shall cause a written description of the same to be recorded in the records of the school township, a copy of which shall be delivered by the secretary to the county treasurer and also to the county auditor, who shall record the same in his office. [C73,§1796; C97,§2801; S13,§2801; C24, 27, 31, 35,§4127.]

Referred to in §4129
Additional provision, §4140

4128 Boundaries. The boundaries of subdistricts shall conform to the lines of congressional divisions of land. [C73,§1796; C97, §2801; S13,§2801; C24, 27, 31, 35,§4128.]

Referred to in §4129

4129 Order—when effective. The formation or alteration of subdistricts as contemplated in sections 4126 to 4128, inclusive, shall not take effect until the next regular election thereafter, at which time a director shall be elected for any subdistrict newly formed. [C73,§1796; C97, §2801; S13,§2801; C24, 27, 31, 35,§4129.]

4130 New township — election — notice. When a new civil township is formed, the same shall constitute a school township, which shall go into effect at the next regular election following the completed organization of the civil township. The notices of the first election shall be given by the county superintendent, and at such election a board of three directors shall be chosen. [R60,§2022; C73,§1713; C97,§2790; C24, 27, 31, 35,§4130.]

4131 Attaching territory to adjoining corporation. In any case where, by reason of natural obstacles, any portion of the inhabitants of any school corporation in the opinion of the county superintendent cannot with reasonable facility attend school in their own corporation, he shall, by a written order, in duplicate, attach the part thus affected to an adjoining school corporation, the board of the same consenting thereto, one copy of which order shall be at once transmitted to the secretary of each corporation affected thereby, who shall record the same and make the proper designation on the plat of the corporation. Township or county lines shall not be a bar to the operation of this section. [C73, §1797; C97,§2791; C24, 27, 31, 35,§4131.]

Referred to in §4132

4132 Restoration. When the natural obstacles by reason of which territory has been set off by the county superintendent from one school district and attached to another in the same or an adjoining county, as provided in section 4131, have been removed, such territory may, upon the concurrence of the respective boards,

be restored to the school district from which set off and shall be so restored by said boards upon the written application of two-thirds of the electors residing upon the territory so set off together with the concurrence of the county superintendent and the board of the school district from which such territory was originally set off by the county superintendent. [C24, 27, 31, 35, §4132.]

4133 Boundary lines changed — consolidation. The boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings thereafter, called for that purpose. The corporation from which territory is detached shall, after the change, contain not less than four government sections of land, and its boundary lines must conform to the lines of congressional divisions of land. In the same manner, the boundary lines of contiguous school corporations may be so changed that one corporation shall be included in and consolidated with the other as a single corporation. [C97,§2793; S13,§2793; C24, 27, 31, 35,§4133.]

Referred to in §4134

4134 Board in new district — settlement. When boundary lines are changed by concurrent action, school districts affected thereby shall not be required to elect new boards of directors, and the boards then in office may make final settlement of all assets and liabilities as provided in sections 4137 and 4138 and in case of a consolidation of districts under this and section 4133 the officers and members of the board of directors of the independent district having the larger number of inhabitants shall continue to be the officers and directors of the independent district as consolidated for the period for which such officers and directors were elected. [C24, 27, 31, 35,§4134.]

4135 Rep. by 46GA, ch 35,§4

4136 Board in new district—organization. Whenever any new school corporation has been established, such corporation shall organize according to sections 4144, 4144.2, and 4144.3, or 4148, and if such new board is elected, it shall organize as provided in chapter 213 except that such organization shall be effected at any time prior to the second day of July following the election of the directors. Upon the election and organization of the new boards, the old boards shall cease to exist except for the purpose specified in sections 4137 and 4138. [C73,§1715; C97,§2802; S13,§2802; SS15,§2794-a; C24, 27, 31, 35,§4136.]

Referred to in §4188

4137 Division of assets and distribution of liabilities. Within twenty days after the organization of the new boards, they shall meet jointly with the several boards of directors whose districts have been affected by the organization of the new corporation or corporations and all of said boards acting jointly shall recommend to the several boards an equitable division of the assets of the several school corporations or parts thereof and an equitable distribution of the liabilities of such school corporations or parts thereof among the new school corporations. [C73, §1715; C97,§2802; S13,§§2802, 2820-g; C24, 27, 31, 35,§4137.]

Referred to in §§4134, 4136

4138 Arbitration. If the boards cannot agree on such division and distribution, the matters on which they differ shall be decided by disinterested arbitrators, one selected by each board having an interest therein, and if the number thus selected is even, then one shall be added by the county superintendent. The decision of the arbitrators shall be made in writing and filed with the secretary of the new corporation, and any party to the proceedings may appeal therefrom to the district court by serving notice thereof on such secretary within twenty days after the decision is filed. Such appeal shall be tried in equity and a decree entered determining the entire matter, including the levy, collection, and distribution of any necessary taxes. [C73,§1715; C97,§2802; S13,§§2802, 2820-g; C24, 27, 31, 35,§4138.]

Referred to in §§4134, 4136
How issues tried, §11429 et seq.

4139 Taxes to effect equalization. If necessary to equalize such division and distribution, the new board or boards may provide for the levy of additional taxes upon the property of any corporation or part of corporation and for the distribution of the same so as to effect such equalization. [C24, 27, 31, 35,§4139.]

4140 Plats of school districts. The board of directors of each school corporation shall file in the office of the county superintendent a plat showing the boundaries of the district, and, in school townships, indicating the boundaries of the subdistricts. Any change thereafter made in the boundaries of any school district or subdistrict shall be reported to the county superintendent by the secretary of the board of the district affected thereby, and all changes shall be indicated by the county superintendent on the plats. Said superintendent shall furnish each the county auditor and the treasurer with a copy of said plat and of any changes therein when made. [C24, 27, 31, 35,§4140.]

Additional provision, §4127

4141 Formation of independent district. Upon the written petition of any ten voters of a city, town, or village of over one hundred residents, to the board of the school corporation in which the portion of the city or town having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district, including therein all of the city, town, or village, and also such contiguous territory as is authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district, in subdivisions not smaller than the smallest tract as made by the government survey in the same or any adjoining school corporations, as may best subserve the convenience of the

people for school purposes, and shall give the same notices of an election as required in other cases. [R60,§§2097, 2105; C73,§§1800, 1801; C97,§2794; S13,§§2820-e,-f; SS15,§2794; C24, 27, 31, 35,§4141.]

Referred to in §4143

4142 Vote by ballot—separate ballot boxes. At the election all voters upon the territory included within the contemplated independent district shall be allowed to vote by ballot for or against such independent organization. When it is proposed to include territory outside the city, town, or village, the voters residing upon such outside territory shall vote separately upon the proposition for the formation of such new district. If a majority of the votes so cast is against including such outside territory, then the proposed independent district shall not be formed. When such territory is included in an independent district, adequate school facilities shall be provided for the increased attendance. [R60,§§2097, 2105; C73,§§1800, 1801; C97, §2794; SS15,§2794; C24, 27, 31, 35,§4142.]

Referred to in §4143
Separate vote, §§4144.1, 4166, 4167

4143 Subdistrict into independent district. A subdistrict containing a village with a population of seventy-five or more may, under the provisions of sections 4141 and 4142, organize into an independent school district. [R60,§2105; C73,§§1800, 1801; C97,§2794; SS15,§2794; C24, 27, 31, 35,§4143.]

4144 When district deemed formed. If a majority of the votes cast at such election is in favor of the proposition, the formation of said independent district shall be deemed effected. [S13,§2820-f; C24, 27, 31, 35,§4144.]

Referred to in §4136

4144.1 Additions and extensions — separate vote. Whenever it is proposed to extend the limits of, or add territory to, an existing independent city, town, or consolidated district, the voters residing within the proposed extension or addition and outside the existing independent district, shall vote separately upon the proposition. The proposition must be approved by a majority of the voters voting thereon in each of such territories. [C97,§2794; SS15,§2794; C24, 27, 31, 35,§4191.]

Separate vote, §§4142, 4166, 4167

4144.2 Ex officio officers. The board of directors and other officers of the school corporation then holding office in the district affected having the largest population, shall be, ex officio, the officers of said new district in all cases where the population, outside said major district and within the newly formed district, does not exceed twenty-five percent of the population of said major district. [S13,§2820-f; C24, §4144; C27, 31, 35,§4144-a1.]

Referred to in §§4136, 4148

4144.3 Tenure of ex officio officers. Said ex officio officers shall serve until the expiration of the time for which they were originally elected. [S13,§2820-f; C24,§4144; C27, 31, 35,§4144-a2.]

Referred to in §4136

4145 Offices abolished—officers of districts outside. The terms of office of all other directors, treasurers, and officers of boards in territory lying wholly within said new district shall terminate; but in districts lying partly without the new district, the directors, officers, and treasurers shall continue to have authority over the territory lying within their districts and without the new district. [S13,§2820-f; C24, 27, 31, 35,§4145.]

4146 Contracts of employment not affected. The terms of employment of superintendents, principals, and teachers for any current school year shall not be affected by the formation of the new district. [S13,§2820-f; C24, 27, 31, 35, §4146.]

4147 Election expenses. The expense of such election shall be borne by the independent district, in case such district shall be formed, otherwise by the separate districts in proportion to the assessed valuation thereof within the proposed independent district. [S13,§2820-h; C24, 27, 31, 35,§4147.]

4148 New board and treasurer. If the population of the newly formed district, outside the major district specified in section 4144.2, does exceed twenty-five percent of the population of such major district, the board of directors of said latter district shall give the usual notice of an election to choose a board of directors, and a treasurer in case such treasurer is required to be elected by the voters. [R60,§§2099, 2100, 2106; C73,§1802; C97,§2795; C24, 27, 31, 35, §4148.]

Referred to in §4136

4149 Taxes certified and levied. The organization of such independent district shall be effected on or before the first day of August of the year in which it is attempted, and, when completed, all taxes certified for the school township or townships of which the independent district formed a part shall be void so far as the property within the limits of the independent district is concerned, and the board of such independent district shall fix the amount of all necessary taxes for school purposes, including schoolhouse taxes, at a meeting called for such purpose at any time before the third Monday of August, which shall be certified to the board of supervisors on or before the first Monday of September, and it shall levy said tax at the same time and in the same manner that other school taxes are required to be levied. [C73, §1804; C97,§2796; C24, 27, 31, 35,§4149.]

School taxes, ch 227

4150 School township divided. At any time before the first day of August, upon the written request of one-third of the legal voters in each subdistrict of any school township, the board shall call an election in the subdistricts, giving at least thirty days notice thereof by posting

three notices in each subdistrict in each school township, at which election the voters shall vote by ballot for or against rural independent district organization. If a majority of the votes cast in each subdistrict shall be favorable to such independent organization, then each subdistrict shall become a rural independent district, and the board of the school township shall then call an election in each rural independent district for the choice of three directors, to serve one, two, and three years, respectively, and the organization of the said rural independent district shall be completed. [C97,§2797; C24, 27, 31, 35,§4150.]

4151 Rural independent districts united. A township which has been divided into rural independent districts may be erected into a school township by a vote of the electors, to be taken upon the written request of one-third of the legal voters residing in such civil township.

Upon presentation of such written request to the county superintendent, he shall call a special election at the usual place or places of holding the township election, upon giving at least ten days notice thereof by posting three written notices in each rural independent district in the township, and by publication in a newspaper, if one be published in such township, at which election the said electors shall vote by ballot for or against a school township organization.

If a majority of the votes cast at such election be in favor of such organization, each rural independent district shall become a subdistrict of the school township, and within thirty days thereafter shall hold a special election in the manner and for the purpose provided by law for regular subdistrict elections in school townships divided into an even or an odd number of subdistricts as the case may be, except that the required notices shall be posted by the secretary of each of the rural independent districts. The officers first elected shall qualify on or before their organization as a board of directors of the school township, which organization shall be within thirty days next following their election and shall serve until the third Monday in March.

The board of each of the rural independent districts with its secretary and treasurer shall meet at the time of the organization of the newly elected school township board, examine the books of and settle with its secretary and treasurer, turn over the assets and liabilities of the district to the school township board and make such reports as are required by law; for these purposes they shall continue to serve until the organization of the school township board at which time their terms of office shall terminate. Thereafter all elections shall be as provided in chapter 211.1 and the organization of the board shall be as provided in section 4220. [C73, §§1815–1820; C97,§2800; S13,§2800; C24, 27, 31, 35,§4151.]

4152 Subdivision of independent districts. Independent districts may subdivide for the purpose of forming two or more independent districts, the board of directors of the original independent district to establish the boundary lines of the districts thus formed, but no such new district shall be organized except on a majority vote of the electors of each proposed district nor with territory less than that required by section 4123.2. [C97,§2798; C24, 27, 31, 35, §4152.]

Formation of independent district, §4141

4153 Uniting independent districts. Independent districts located contiguous to each other may unite and form one and the same independent district in the manner following: At the written request of any ten legal voters residing in each of said independent districts, or, if there be not ten, then a majority of such voters, their respective boards of directors shall require their secretaries to give at least ten days notice of the time and place of an election in each of such districts, by posting written notices in at least five public places in each of said districts, at which election the electors shall vote by ballot for or against a consolidated organization of said independent districts, and, if a majority of the votes cast at the election in each district shall be in favor of uniting said districts, the secretaries shall give similar notice of an election as provided for by law for the organization of independent districts, including cities and towns. [C73,§1811; C97, §2799; C24, 27, 31, 35,§4153.]

CHAPTER 209

CONSOLIDATED SCHOOL DISTRICTS

Referred to in §3899

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4154 Consolidated corporations. Consolidated school corporations containing an area of not less than sixteen government sections of contiguous territory in one or more counties may be organized as independent districts for the purpose of maintaining a consolidated school, in the manner hereinafter provided. [SS15,§2794-a; C24, 27, 31, 35,§4154.]

4155 Petition. A petition describing the boundaries of the territory and asking for the establishment of boundaries for a proposed school corporation, signed by one-third of the voters residing within the limits of the territory described, shall be filed with the county superintendent of the county in which the greater number of the qualified electors reside. [SS15, §2794-a; C24, 27, 31, 35,§4155.]

4156 Affidavit—presumption. Such petition shall be accompanied by an affidavit showing the number of qualified electors living in the territory described in the petition and signed by a qualified elector residing in the territory, and if parts of the territory described in the petition are situated in different counties, the affidavit shall show separately as to each county, the number of qualified electors in the part of the county included in the territory described. The affidavit shall be taken as true unless objections to it are filed on or before the time fixed for filing objections as provided in section 4157. [C24, 27, 31, 35,§4156.]

Referred to in §4188

4157 Objections — time of filing — notice. Within ten days after the petition is filed, the county superintendent shall fix a final date for filing objections to the petition in the office of the county superintendent, and give notice for at least ten days, by one publication in a newspaper published within the territory described in the petition, or if none be published therein, in the next nearest town or city in any county in which any part of the territory described in the petition is situated. Objections shall be in writing in the form of an affidavit and may be made by any person residing or owning land within the territory described in the petition, or who would be injuriously affected by the formation of such new corporation, and shall be on file not later than twelve o'clock noon of the final day fixed for filing objections. [C24, 27, 31, 35,§4157.]

Referred to in §§4156, 4188

4158 Hearing — decision — publication of order. On the final date fixed for filing objections, interested parties may present evidence and arguments, and the county superintendent shall review the matter on its merits and within five days after the conclusion of any hearing, shall rule on the objections and shall enter an order fixing such boundaries for the proposed school corporation as will in his judgment be for the best interests of all parties concerned, having due regard for the welfare of adjoining districts; or dismiss the petition. The county superintendent shall at once publish this order in the same newspaper in which the original notice was published. [C24, 27, 31, 35,§4158.]

4159 Appeal. Within ten days after the publication of such order, any petitioner, or any person who filed objections, or any person residing upon or owning land included in or excluded from the district by any change in the boundary lines from those proposed in the petition, may appeal from the decision of the county superintendent to the county board of education by serving written notice on the county superintendent. [C24, 27, 31, 35,§4159.]

Referred to in §4188
40ExGA, ch 16, §20, editorially divided

4160 Filing papers—time of hearing—notice. Within five days after the time for appeal has expired, the county superintendent shall file with the county board of education all the original papers together with his decision and fix a time and place for hearing such appeal, and give notice to each appellant by registered letter. If more than one person has signed the same notice of appeal, notice to the first three persons whose names appear thereon shall be

deemed notice to all. The time fixed for such hearing shall not be less than five nor more than ten days after the time for appeal expires. [C24, 27, 31, 35,§4160.]

Referred to in §4188

4161 Appeal when territory in one county. If the territory described in the petition for the proposed corporation lies wholly in one county, the county board of education in the said county shall hear the said objections at the time and place fixed by the county superintendent, and within five days after submission thereof shall determine and fix such boundaries for the proposed school corporation as in its judgment will be for the best interests of all concerned, without regard to existing district lines. If such boundaries are neither those petitioned for nor those fixed by the county superintendent, the hearing shall be adjourned, and notice of such adjourned hearing shall be given as for the hearing before the county superintendent, and upon the final hearing the board of education shall fix the boundaries, or dismiss the petition, which shall be final. [C24, 27, 31, 35, §4161.]

Referred to in §§4162, 4188

4162 Appeal when territory in different counties. If the territory described in the petition for the proposed corporation lies in more than one county, the county superintendent with whom the petition is filed shall fix the time and place and call a joint meeting of the members of all the county boards of education of the counties in which any territory of the proposed school corporation lies, to act as a single board for the hearing of the said objections, and a majority of all the members of the county boards of education of the different counties in which any part of the proposed corporation lies, shall constitute a quorum and it shall determine and fix boundaries for the proposed corporation, as provided in section 4161, or dismiss the petition, which shall be final. [C24, 27, 31, 35,§4162.]

Referred to in §4188

4163 Interested parties as judges. No member of a county board of education who lives or owns land within the proposed district or within any existing district affected by the proposed change in boundaries, or who has filed objection to the establishment of the new school corporation, shall take any part in determining any matter concerning the establishment or dissolution of such school corporation, which may come before the county board or a joint meeting for a hearing. [C24, 27, 31, 35,§4163.]

4164 Special election called—time. When the boundaries of the territory to be included in a proposed school corporation have been determined as herein provided, the county superintendent with whom such petition is filed shall call a special election in such proposed school corporation within thirty days from the date of the final determination of such boundaries, by giving notice by one publication in the same newspaper as previous notices concerning it have been published, which publication shall be not less than ten nor more than fifteen days prior to the election. No notice for an election shall be published until the time for appeal has expired; and in the event of an appeal, not until the same has been disposed of. [SS15,§2794-a; C24, 27, 31, 35,§4164.]

Referred to in §4188

4165 Judges of election. The county superintendent shall appoint the judges of such election and such judges shall be qualified electors of the territory of the proposed school corporation as determined by the county superintendent or board of education, and they shall serve without pay. If any judge fails to appear at the proper time, his place shall be filled by the judge or judges present, or if no judge appears, any three qualified electors may organize the election board. [C24, 27, 31, 35,§4165.]

Referred to in §4188

4166 Separate vote in urban territory. When it is proposed to include in such district a school corporation containing a city, town, or village with a population of two hundred or more inhabitants, the voters residing upon the territory outside the limits of such school corporation shall vote separately upon the proposition to create such new corporation. [SS15,§2794-a; C24, 27, 31, 35,§4166.]

Separate vote, §§4142, 4144.1, 4167

4167 Separate vote in large territory. When it is proposed to include in such district a school corporation which contains an area of more than sixteen sections and which maintains a central school, the voters residing in the territory within the limits of said school corporation shall vote separately upon the proposition to create such new corporation. [C24, 27, 31, 35, §4167.]

Separate vote, §§4142, 4144.1, 4166

4168 Separate ballot boxes. The judges of election shall provide separate ballot boxes in which shall be deposited the votes cast by the qualified electors from their respective territories. [SS15,§2794-a; C24, 27, 31, 35,§4168.]

4169 Canvass and return. The judges of election shall count the ballots, make return to and deposit the ballots with the county superintendent, who shall enter the return of record in his office. If the majority of the votes cast by the qualified electors are in favor of the proposition, a new school corporation shall be organized, except that in cases where separate ballot boxes are required by law, a majority of the votes cast by the qualified electors from their respective territories shall be required. [SS15,§2794-a; C24, 27, 31, 35,§4169.]

4170 Contest of election. An election to establish or dissolve a school corporation may be contested in the manner provided by law for contesting other elections, so far as practicable. [C24, 27, 31, 35,§4170.]

Contesting elections, ch 47 et seq.

4171 Election of directors. If the proposition to establish a new corporation carries, a

special election shall be called by the county superintendent, by giving notice by one publication in the same newspaper in which the former notices were published, and he shall appoint judges, who shall serve without pay. At such election, two directors shall be elected to serve until the next regular election, two until the second, and one until the third regular election thereafter, and until such time as their successors are elected and qualified. The judges of election shall make return to the county superintendent, who shall enter the return of record in his office and notify the persons who are elected directors and shall set the date for the organization of the school board. [SS15,§2794-a; C24, 27, 31, 35,§4171.]

4172 **Payment of expenses.** If the district is established it shall pay all expenses incurred by the superintendent and the board of education in connection with the proceedings, including the election of the first board of directors. If it is not established all expenses shall be apportioned among the several districts in proportion to the assessed valuation of the property therein.

If the proposed district embraces territory in more than one county such expenses shall be certified to and, if necessary, apportioned among the several districts by the joint board of education. If in only one county the certification shall be made by the county superintendent.

The respective boards to which such expenses are certified shall audit and order the same to be paid from the general fund. [C24, 27, 31, 35, §4172.]

Referred to in §4188

4173 **Minimum territory.** A consolidated school corporation, maintaining an approved central school, shall not be reduced to less than sixteen government sections, unless dissolved as provided by law. No remaining portion of any school corporation from which territory is taken to form a new district shall contain an area of less than four government sections which shall be so situated as to form a suitable corporation. [SS15,§2794-a; C24, 27, 31, 35,§4173.]

4174 **Organization of remaining territory.** Where, after the formation of a consolidated corporation, one or more parts of the territory of a school township is left outstanding, each piece shall constitute a rural independent school corporation and be organized as such unless two or more contiguous subdistricts are left, in which event each of such remaining portions of territory shall constitute a school township. It shall be the duty of the county superintendent of the county in which the territory is situated to call an election, by giving proper notice, in each of such remaining pieces of territory, for the purpose of electing school officers in the manner provided by law for electing officers in rural independent districts or school townships, as the case may be, and fix the date for the first meeting and organization of the new school board in each district. [C24, 27, 31, 35,§4174.]

4175 **Taxes.** After the organization of the board in newly organized school districts, all taxes previously certified to but not levied by the board of supervisors, shall be void so far as the property within the limits of the new school corporation is concerned. [S13,§2820-g; SS15, §2794-a; C24, 27, 31, 35,§4175.]

4176 **Schools pending appeal.** During the pendency of an appeal or litigation concerning the organization or dissolution of any consolidated district, the respective boards of the old districts shall maintain the schools in their respective districts, if such appeal or litigation is commenced before the new board is elected and qualified. [C24, 27, 31, 35,§4176.]

4177 **School buildings — tax levy — special fund.** The board of each school corporation organized for the purpose of establishing a consolidated school shall provide a suitable building for such school in that district, and may at the regular or a special meeting call a special election to submit to the qualified electors of the district the question of voting a tax or authorizing the board to issue bonds, or both, for any or all of the following purposes:

1. To secure a site, build or equip a schoolhouse.
2. To build a superintendent's or teacher's house.
3. To repair or improve any school building or grounds, when the cost will exceed two thousand dollars.

All moneys received for such purposes shall be placed in the schoolhouse fund of said corporation and shall be used only for the purposes for which voted. [SS15,§2794-a; C24, 27, 31, 35, §4177.]

Vote required to authorize bonds, see §1171.18

4178 **Location of school building.** In locating a school site, the board shall take into consideration the geographical position, number, and conveniences of the pupils, and may submit the question of location to the voters of the district at any regular election, or at a special election called for that purpose. [SS15,§2794-a; C24, 27, 31, 35,§4178.]

4179 **Transportation.** The board of every consolidated school corporation shall provide suitable transportation to and from school for every child of school age living within said corporation and more than a mile from such school, but the board shall not be required to cause the vehicle of transportation to leave any public highway to receive or discharge pupils, or to provide transportation for any pupil residing within the limits of any city, town, or village within which said school is situated. [SS15, §2794-a; C24, 27, 31, 35,§4179.]

Requirements of busses, §5032.02 et seq.

4179.1 **Extra curricular use.** Boards in their discretion may permit busses owned by the school district for the purpose of transporting pupils to and from school to be used to transport pupils participating in extra curricular activities sponsored by the school to and from such extra cur-

ricular activities, when accompanied by a member of the faculty of said school, and when such activities are made a part of the regular school program by the board. [47GA, ch 120,§1.]

4180 Transportation routes—suspension of service. The board shall designate the routes to be traveled by each conveyance in transporting children to and from school. The board shall have the right on account of inclemency of the weather to suspend the transportation on any route upon any day or days when in its judgment it would be a hardship on the children, or when the roads to be traveled are unfit or impassable. [SS15,§2794-a; C24, 27, 31, 35,§4180.]

4181 By parent — instruction in another school. The school board may require that children living an unreasonable distance from school shall be transported by the parent or guardian a distance of not more than two miles to connect with any vehicle of transportation to and from school or may contract with an adjoining school corporation for the instruction of any child living an unreasonable distance from school. It shall allow a reasonable compensation for the transportation of children to and from their homes to connect with such vehicle of transportation, or for transporting them to an adjoining district. In determining what an unreasonable distance would be, consideration shall be given to the number and age of the children, the condition of the roads, and the number of miles to be traveled in going to and from school. [SS15,§2794-a; C24, 27, 31, 35, §4181.]

4182 Contracts for transportation — rules. The school board of any school corporation maintaining a consolidated school shall contract with as many suitable persons as it deems necessary for the transportation of children of school age to and from school. Such contract shall be in writing and shall state the route, the length of time contracted for, the compensation to be allowed per week of five school days, or per month of four school weeks, and may provide that two weeks salary be retained by the board pending full compliance therewith by the party contracted with, and shall always provide that any party or parties to said contract, and every person in charge of a vehicle conveying children to and from school, shall be at all times subject to any rules said board shall adopt for the protection of the children, or to govern the conduct of the person in charge of said conveyance. [SS15,§2794-a; C24, 27, 31, 35,§4182.]

4183 Violation of rules. Any person driving, managing, or in charge of any vehicle used in transporting children to and from school, who shall be found guilty of violating any of the rules adopted by the board of said school for the guidance of such person shall be guilty of a misdemeanor, and for the first offense shall be fined not less than five dollars nor more than ten dollars, and for a subsequent offense shall be fined not less than twenty-five dollars nor more than fifty dollars and shall be dismissed from the service. [SS15,§2794-a; C24, 27, 31, 35,§4183.]

4184 State aid. All consolidated schools in districts with an area of sixteen or more government sections maintained with suitable grounds and the necessary departments and equipment for teaching agriculture, home economics and manual training, or other industrial and vocational subjects, and employing teachers holding certificates showing their qualifications to teach said subjects, and which said subjects are taught as a part of the regular course in such schools, subject to the approval of the superintendent of public instruction, shall be paid from the state treasury, from moneys not otherwise appropriated, as follows:

1. Two-room schools, two hundred fifty dollars for equipment and two hundred dollars additional annually.
2. Three-room schools, three hundred fifty dollars for equipment and five hundred dollars additional annually.
3. Schools having four or more rooms, five hundred dollars for equipment and seven hundred fifty dollars additional annually. [S13, §§2794-b,-c,-d; SS15,§2794-g; C24, 27, 31, 35, §4184.]

Referred to in §4185

4185 Limitation. No consolidated school shall receive state aid under section 4184 and also additional aid for maintaining a normal training course in high schools as provided in chapter 194. But every consolidated school may maintain a normal training course, in which case it shall receive state aid therefor in the same amount and upon the same terms, conditions, and regulations as other schools which maintain such a course. [C24, 27, 31, 35,§4185.]

4186 Report — requisition — warrant. The secretary of each consolidated school corporation or the superintendent of such school, shall, at the close of each school year, report to the superintendent of public instruction as said officer may require, who, upon receipt of a satisfactory report, shall issue a requisition upon the state comptroller for the amount due such school corporation for said year. Thereupon the comptroller shall draw a warrant on the state treasury, payable to such school corporation, for the amount of said requisition and forward the same to the secretary of such school corporation. [S13, §2794-e; C24, 27, 31, 35,§4186.]

4187 Rep. by 41GA, ch 218

4188 Dissolution of corporation. A school corporation organized for the purpose of maintaining a consolidated school may be dissolved in the following manner:

1. *Petition.* A petition describing the boundaries of the districts, of which none shall be less than four government sections of land, except where a district was composed of less than four government sections prior to its merger in the consolidated district the former boundaries of such district may be used, into which it is proposed to divide the school corporation, and

signed by a majority of the qualified voters residing within the corporation, shall be filed with the county superintendent of the county in which the greater number of qualified electors reside.

2. *Petition and affidavit.* The petition and affidavit shall conform to the requirements of section 4156.

3. *Objections.* The proceedings required by section 4157 shall be followed, except that an objector shall be any person residing or owning land within the corporation proposed to be dissolved, who would be injured by such dissolution and the formation of new school corporations.

4. *Hearing—order—publication.* On the final day fixed for filing objections, the interested parties may present evidence and arguments to the county superintendent, and the county superintendent shall review the matter on its merits and within five days after the conclusion of any hearing, shall rule on any objections and enter an order of approval or dismiss said petition, and shall at once publish this order in some newspaper in which the original notice was published. Where such district for which petition for dissolution has been filed has not issued bonds, or built a school building, the county superintendent shall at once approve such petition.

5. *Appeal.* Any person living or owning land within the school corporation may appeal, and such appeal shall be dealt with as provided by sections 4159 and 4160, provided that where no central schoolhouse has been built and no bonds issued, no appeal shall be allowed except on the question of the sufficiency of the petition.

6. *Appeal—order.* The board or joint board of education shall proceed, so far as applicable, as provided in sections 4161 and 4162, and shall approve or enter an order dismissing the petition as in its judgment will be for the best interests of all concerned, which decision shall be final.

7. *Election.* If the petition for dissolution is approved, an election shall be called and held as provided in sections 4164 and 4165.

8. *Separate ballot boxes.* If such district includes a city, town, or village having a population of two hundred or more inhabitants, separate ballot boxes shall be provided for the voters therein and outside thereof, and a majority of the votes cast both within and without said city, town, or village shall be required to effect a dissolution of the district.

9. *Canvass and return of vote—expense.* The judges of election shall count the ballots, make return to and deposit the ballots with the county superintendent, who shall enter the return of record in his office. If the majority of the votes cast are in favor of the proposition, the school district shall be dissolved, and a new school corporation or corporations shall be organized in the same manner in which other new corporations are organized under section 4136, and expenses incurred by the county superintendent shall be paid as provided by section 4172. [SS15, §2794-a; C24, 27, 31, 35,§4188.]

4189 Omitted—obsolete. 40ExGA, ch 16, §48

CHAPTER 210

REGULATIONS APPLICABLE TO ALL DISTRICTS

4190 Transferred. Now §4123.1

4191 Transferred. Now §4144.1

4192 Transferred. Now §4123.3

4193 Transferred. Now §4123.4

CHAPTER 211

SCHOOL ELECTIONS

This chapter (§§4194 to 4216, inc.) and chapter 211-B1, code 1927 (§§4216-b1 to 4216-b8, inc.), repealed by 43GA, ch 100, and chapter 211.1 enacted in lieu thereof

CHAPTER 211.1

SCHOOL ELECTIONS

Referred to in §4151

4216.01 Regular election.
4216.02 Special election.
4216.03 Notice of election.
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4216.01 Regular election. The regular election shall be held annually on the second Monday in March in each school corporation and in each subdistrict for the purpose of submitting to the voters thereof any matter authorized by law, except that in all independent school districts which embrace a city and which have a population of one hundred twenty-five thousand or more such election shall be held biennially on the second Monday in March of odd-numbered years. [C51,§§1111, 1114; R60,§§2027, 2030, 2031; C73,§§1717–1719; C97,§§2746, 2751; C24,§§4194, 4211; C27,§§4194, 4211, 4216-b1; C31, 35,§4216-c1.]

4216.02 Special election. The board of directors in any school corporation may call a special election at which election the voters shall have the powers exercised at the regular election with reference to the sale of school property and the application to be made of the proceeds, the authorization of a schoolhouse tax or indebtedness, as provided by law, for the purchase of a site and the construction of a necessary schoolhouse, and for obtaining roads thereto. [C97,§2750; S13,§2750; C24, 27,§4197; C31, 35, §4216-c2.]

4216.03 Notice of election. There shall be a written notice of all regular or special elections, which notice shall be given not less than ten days next preceding the day of the election, except as otherwise provided in this section, and shall contain the date, the polling place, the hours during which the polls will be open, the number of directors or officers to be elected and the terms thereof, and such propositions as will be submitted to and be determined by the voters.

In those corporations where registration is not required and in which only one voting precinct has been established said notice shall be posted by the secretary of the board in five public places in the corporation.

In those corporations in which registration of voters is required or in which more than one voting precinct has been established the secretary shall post the notice in each precinct, and also publish it once each week for two consecutive weeks preceding the election in some newspaper published in the county and of general circulation in the corporation.

In subdistricts said notice shall be posted by the subdirector in three public places within the subdistrict, one of which shall be on the front of the school building. If the subdirector fails to post the required notice not less than ten days next preceding the day of the election, or if there be no subdirector, then any other voter in the subdistrict may secure from the county superintendent the proper form for the required number of notices filled out in the manner provided in this section and such notices, if signed by the county superintendent and said voter and posted as required in this section not less than five days next preceding the day of the election, shall constitute due and legal notice of said election. [C51,§1110; R60, §§2027,2030; C73,§§1718,1719; C97,§§2746,2750, 2751, 2755; S13,§§2750, 2755; C24,§§4195, 4197, 4208; C27,§§4195, 4197, 4208, 4211-b1, 4216-b3; C31, 35,§4216-c3.]

4216.04 Nominations required. Nomination papers for all candidates for election to office in each independent city, town, or consolidated district shall be filed with the secretary of the school board not earlier than thirty days nor later than noon of the tenth day prior to said election. Each candidate shall be nominated by a petition signed by not less than ten qualified electors of the district, except that in city independent districts where the regular election is held biennially such petition shall be signed by not less than fifty qualified electors of the district. To each such petition shall be attached the affidavit of a qualified elector of the district that all the signers thereof are electors of such district and that the signatures thereto are genuine. [S13,§2754; C24,§4201; C27,§§4201, 4216-b4,-b5; C31, 35,§4216-c4.]

4216.05 Precincts for voting. School corporations other than city, town, or village independent districts shall constitute a voting precinct, but the voting precincts at all school elections in corporations in whole or in part in cities, towns, and villages shall be the same as for the last general state election except that the board may consolidate two or more such precincts into one unless there shall be filed with the secretary of the board at least twenty days before the election, a petition signed by twenty-five or more electors of any precinct requesting that such precinct shall not be consolidated with any other precinct. To such petition shall be attached the affidavit of a qualified elector of the precinct that all the signers thereof are electors of such precinct, and that the signatures thereon are genuine.

In subdistrict elections the subdistrict shall constitute a single voting precinct. [C97,§2755; S13,§2755; C24,§4205; C27,§§4205, 4216-b2; C31, 35,§4216-c5.]

4216.06 Territory outside city or town. If there is within a school corporation any territory not within the limits of a city or town the board may divide the territory which lies outside the city but within the school district into additional precincts, or may attach the various parts thereof to such contiguous city precincts as will best serve the convenience of the electors of said outside territory in voting on school matters, but the voters within such territory shall not be required to register. [C24,§§4205, 4207; C27,§§4205, 4207, 4216-b2; C31, 35,§4216-c6.]

4216.07 Polling place. In all school corporations the board shall determine a suitable poll-

ing place in each precinct, which polling place shall be, when practicable, the same place used by the last city or state election.

In subdistricts a suitable polling place shall be selected by the person authorized by law to post the notices of such elections. [C97,§2755; S13,§2755; C24, 27,§4205; C31, 35,§4216-c7.]

4216.08 Printed ballots required. In school corporations where nomination of candidates for election to office is required the secretary shall cause to be printed and delivered at the several polling places a sufficient number of ballots printed on plain, substantial paper of uniform quality, with no party designation or mark thereon. Such ballots shall contain in alphabetical order the names of all candidates for each office, filed as provided by law, and a blank line for each such officer to be elected. There shall be at the left of each name and each blank line a square, and there shall also be a direction to the voter as to the number of candidates to be voted for at said school election. [S13,§2754; C24, 27,§4203; C31, 35,§4216-c8.]

4216.09 Opening polls. In all school corporations in which registration of voters is required the polls shall open at seven o'clock a. m. and close at seven o'clock p. m.; in school corporations where registration of voters is not required composed in whole or in part of cities, towns, or in consolidated school districts, the polls shall open at twelve o'clock m. and close at seven o'clock p. m., except that in districts where the board has combined voting precincts the board may order the polls to open at seven o'clock a. m. and to close at seven o'clock p. m.; in all other independent school districts and school townships the polls shall open at one o'clock p. m. and remain open not less than two hours; in subdistricts the polls shall open not earlier than nine o'clock a. m. nor later than seven o'clock p. m., but shall remain open not less than two hours. [C97,§§2751, 2754, 2756; S13,§§2754, 2756; C24, 27,§§4202, 4211; C31, 35, §4216-c9.]

4216.10 Judges of election. In corporations consisting of one voting precinct the president and the secretary of the board, with one of the directors shall act as judges of the election. If any such judge of election is absent or refuses to serve, the voters present at the polls shall appoint one of their number to act in his stead.

In corporations consisting of more than one precinct the board in such district shall appoint three voters of the precinct as judges of the election and one voter of the precinct as clerk thereof. Not more than one member of the board shall act as such judge at any one voting precinct. If any person so appointed is absent or fails to qualify the judge or judges attending shall fill the place by appointment of any voter present. Should all of the appointees fail to qualify their places shall be filled by the voters from those in attendance.

In subdistrict elections the judges shall consist of the subdirector and two qualified electors selected by the voters present at the polling place. If the subdirector is absent or refuses to serve as such judge, or if an elector selected as judge refuses to serve, the voters present shall select a judge to take his place. [C51,§1111; R60,§§2027, 2030, 2031; C73,§§1717, 1719; C97, §§2746, 2751, 2756; S13,§2756; C24,§§4195, 4209, 4211; C27,§§4195, 4209, 4211-b2; C31, 35, §4216-c10.]

4216.11 Oath required of judges and clerks. All judges or clerks of election shall qualify before opening of polls by taking the oath as provided for in sections 792 and 793. [C97, §2756; S13,§2756; C24, 27,§4209; C31, 35, §4216-c11.]

4216.12 Right to vote. To have the right to vote at a school election a person shall have the same qualifications as for voting at a general election and must have been for ten days prior to such school election an actual resident of the corporation and precinct or subdistrict in which he offers to vote. [C97,§2747; C24, 27, §4196; C31, 35, §4216-c12.]

4216.13 Method of voting. Voting at all school elections shall be by ballot or by voting machines. [C73,§1808; C97,§2754; S13,§2754; C24, 27,§4198; C31, 35,§4216-c13.]

4216.14 Ballot box — voting machines — poll books. The board shall provide the necessary ballot box or voting machine and poll books for each precinct. [C97,§2756; S13,§2756; C24, 27,§4209; C31, 35,§4216-c14.]

4216.15 Voting machines. Voting machines may be used for all school elections in all precincts where the same are in use at general elections and the names of the candidates and the propositions to be voted upon shall be arranged thereon as by law provided. The state and county, or either, as the case may be, shall without charge permit the use for school elections of voting machines used at the general elections, and the same shall be used according to the general election law so far as applicable. [S13,§2754; C24, 27,§4203; C31, 35,§4216-c15.]

4216.16 Precincts for registration. In corporations where registration is required, except in those corporations where permanent registration is otherwise provided for by statute, the board may consolidate precincts into registration districts as provided by law applicable to registration for general elections and shall designate suitable and convenient places for such registration. [C97,§2755; S13,§2755; C24, 27,§4206; C31, 35,§4216-c16.]

4216.17 Registrars appointed. The board of directors of school corporations where registration is required at general elections, except where permanent registration is required, shall, not less than ten days prior to the school election, appoint two registrars in each of the registration districts of such school corporation for the registration of voters therein who shall have the same qualifications as registrars appointed for general elections and shall qualify in the

same manner and receive the same compensation to be paid by the school corporation. The person in custody of the registration books, records, and poll books for the general election shall furnish the same to the board of directors which shall distribute them to the proper registrars and judges and they shall be used for registration for school elections the same as the general elections, and shall, within ten days after the school election, be returned to the proper custodian. [C97,§§2755, 2756; S13,§2755; C24, 27,§4207; C31, 35,§4216-c17.]

Permanent registration, see ch 39.1

4216.18 Registration days. The registrars shall meet and remain in session on election day only and during the time the polls are open. In all respects except as in this chapter provided the general registration laws shall apply to registration for school elections wherein registration is required for general elections, except that administrative and clerical duties imposed thereby on the mayor and city clerk shall be performed by the president and secretary of the board respectively. [C97,§2756; S13, §§2755, 2756; C24, 27,§4207; C31, 35,§4216-c18.]

4216.19 Canvassing the votes. In school corporations consisting of one precinct the judges of election shall canvass the vote and shall issue certificates to all officers elected and make a record of the propositions adopted.

In corporations consisting of more than one precinct the judges shall canvass the vote and make and certify a return to the secretary of the corporation of the votes cast for officers and upon each question submitted.

In a subdistrict the judges shall canvass the vote for subdirector and issue a certificate of election to the person receiving the highest number of votes, and shall immediately notify the secretary in writing of the subdirector elected and the votes for and against all propositions voted upon. They shall also canvass the vote for director-at-large in those subdistricts where a director-at-large is voted for and forthwith make certified returns thereof in a sealed envelope to the secretary of the school township.

In all school corporations it shall be the duty of the secretary to cause a permanent record to be made of the vote on each officer and on each proposition submitted to the electors. [C51,§1111; R60,§2031; C73,§§1719, 1720; C97, §§2746, 2751, 2756; S13,§§2752, 2756; C24,§§ 4195, 4209, 4211; C27,§§4195, 4209, 4211-b4,-b5; C31, 35,§4216-c19.]

4216.20 Canvassing returns. On the next Monday after the election in each corporation consisting of more than one precinct and in each school township having an even number of subdistricts the board shall canvass the returns made to the secretary, ascertain the result of the voting with regard to every matter voted upon, declare the same, cause a record to be made thereof, and at once issue a certificate to each person elected. [C97,§2756; S13,§2756; C24, §4210; C27,§§4210, 4211-b6; C31, 35,§4216-c20.]

4216.21 Tie vote. If there is a tie vote for any elective school office in any school corporation or subdistrict the judges of election or the board canvassing the returns, as the case may be, shall decide the election by lot substantially as provided in section 883. [C97,§2754; S13, §2754; C24,§4204; C27,§§4204, 4211-b8; C31, 35, §4216-c21.]

4216.22 Contested elections. School elections may be contested as provided by law for the contesting of other elections. [C24, 27, §4209; C31, 35,§4216-c22.]

Contesting elections, ch 47 et seq.

4216.23 Directors—number. In any district including all or part of a city of the first class or a city under special charter the board shall consist of seven members; in all other independent city or town districts, in consolidated districts, and in rural and village independent districts having a population of over five hundred. the board shall consist of five members; in all other rural and village independent districts having a population of five hundred or less and in school townships not divided into subdistricts the board shall consist of three members; in school townships divided into subdistricts the board shall consist of one subdirector from each subdistrict with a director-at-large in those school townships that are divided into an even number of subdistricts. [C51,§1112; R60,§§2031, 2035, 2075; C73,§§1720, 1721, 1808; C97,§§2752, 2754; S13,§§2752, 2754; C24,§§4198, 4212; C27,§§4198, 4211-b3,-b5; C31, 35,§4216-c23.]

4216.24 Term of office. Members of the board in all independent districts and undivided school townships shall be chosen at the regular election for a term of three years to succeed those whose terms expire at the organization of the board the third Monday in March immediately following and shall hold office for the term for which elected and until their successors are elected or appointed and qualified, except that in those independent districts which embrace a city and which have a population of one hundred and twenty-five thousand or more the term shall be six years. In school townships divided into subdistricts the subdirector and the director-at-large where one is required shall be elected at the regular election for a term of one year and until his successor is elected, or appointed, and qualified.

In all school corporations and subdistricts the term of office shall begin at the organization of the board on the third Monday of March. [C51,§1112; R60,§§2030, 2075; C73,§§1721, 1808; C97,§2754; S13,§2754; C24,§§4198, 4212; C27,§§4198, 4211-b7; C31, 35,§4216-c24.]

Similar provision, §4125

4216.25 Directors in new districts. At the first election in newly organized districts the directors shall be elected as follows:

1. In districts having three directors, one director shall be elected for one year, one for two years, and one for three years.

2. In districts having five directors, one shall be elected for one year, two for two years, and two for three years.

3. In districts having seven directors, three shall be elected for one year, two for two years, and two for three years. [C73,§1802; C97,§2754; S13,§2754; C24, 27,§4199; C31, 35,§4216-c25.]

4216.26 Treasurer. In districts composed in whole or in part of cities or towns a treasurer shall be chosen at the regular election. He shall serve without pay and his term shall begin on the first secular day of July and continue for two years and until his successor is elected or appointed and qualified. [C97,§2754; S13,§2754; C24, 27,§4200; C31, 35,§4216-c26.]

4216.27 Qualification. A school officer or member of the board shall, at the time of election or appointment, be a qualified voter of the corporation or subdistrict. [C97,§2748; C24, 27, §4213; C31, 35,§4216-c27.]

4216.28 Oath required. Each director or subdirector elected at a regular district or subdistrict election, as the case may be, shall qualify by taking the oath of office on or before the time set for the organization meeting of the board the third Monday in March, and his election and qualification entered of record by the secretary. The oath may be administered by any qualified member of the board, the secretary of the board, or the county superintendent of schools, and may be taken in substantially the following form:

"Do you solemnly swear that you will support the constitution of the United States and the constitution of the state of Iowa and that you will faithfully and impartially to the best of your ability discharge the duties of the office of..... (naming the office) in..... (naming the district) as now or hereafter required by law?"

If the oath of office is taken elsewhere than in the presence of the board in session it may be administered by any officer listed in sections 1215 and 1216 and shall be subscribed to by the person taking it in substantially the following form:

"I, ..., do solemnly swear that I will support the constitution of the United States and the constitution of the state of Iowa and that I will faithfully and impartially to the best of my ability discharge the duties of the office of..... (naming the office) in ..... (naming the district) as now or hereafter required by law."

Such oath shall be properly verified by the administering officer and filed with the secretary of the board.

The treasurer elected at a regular election in city and town districts shall qualify by taking the oath of office in the manner herein required and filing a bond as required by section 4305 within ten days after the first secular day in July following his election. [C51,§§1113, 1120; R60,§§2032, 2079; C73,§§1752, 1790; C97,§2758; S13,§2758; C24, 27,§4214; C31, 35,§4216-c28.]

Referred to in §§4222, 4223.2, 4223.3

4216.29 Vacancies. Failure to elect at the proper election or to appoint within the time fixed by law or the failure of the officer elected or appointed to qualify within the time prescribed by law; the incumbent ceasing to be a resident of the district or subdistrict; the resignation or death of incumbent or of the officer-elect; the removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant; the conviction of incumbent of an infamous crime or of any public offense involving the violation of his oath of office, shall constitute a vacancy. [C31, 35,§4216-c29.]

See §1146 as to vacancies in office

4216.30 Vacancies filled by election. When vacancies are to be filled at a regular election, the election shall be for the number of years required to fill the vacancy and until a successor is elected, or appointed, and qualified. [C73, §1802; C97,§2754; S13,§2754; C24, 27,§4199; C31, 35,§4216-c30.]

4216.31 Surrendering office. Each school officer or member of the board upon the termination of his term of office shall immediately surrender to his successor all books, papers, and moneys pertaining or belonging to the office, taking a receipt therefor. [R60,§2080; C73, §1791; C97,§2770; C24, 27,§4215; C31, 35,§4216-c31.]

4216.32 Penalties. Any school officer wilfully violating any law relative to common schools, or wilfully failing or refusing to perform any duty imposed by law, shall forfeit and pay into the treasury of the particular school corporation in which the violation occurs the sum of twenty-five dollars, action to recover which shall be brought in the name of the proper school corporation, and be applied to the use of the schools therein. [C51,§1137; R60,§§2047, 2081; C73,§§1746, 1786; C97,§2822; C24, 27, §4216; C31, 35,§4216-c32.]

4216.33 Application of general election laws. So far as applicable all laws relating to the conduct of general elections and voting thereat and the violation of such laws shall, except as otherwise in this chapter provided, apply to and govern all school elections. [C97,§2754; S13,§2754; C24, 27,§4204; C31, 35,§4216-c33.]

4216.34 Absent voters law. In the application of the absent voters law as provided for in section 927 the secretary of the board shall perform the duties therein imposed upon the county auditor or clerk of the city or town. In independent districts in cities of the first class the board shall have power to appoint such deputies as are necessary to enable him properly to perform the duties imposed by this section. [S13, §2754; C24, 27,§4204; C31, 35,§4216-c34.]

CHAPTER 212

POWERS OF ELECTORS

4217 Enumeration.
4218 Submission of proposition.
4219 Special subdistrict schoolhouse tax.

4217 Enumeration. The voters at the regular election shall have power to:

1. Direct a change of textbooks regularly adopted.
2. Direct the sale, lease, or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof.
3. Determine upon additional branches that shall be taught.
4. Instruct the board that school buildings may or may not be used for meetings of public interest.
5. Direct the transfer of any surplus in the schoolhouse fund to the general fund.
6. Authorize the board to obtain, at the expense of the corporation, roads for proper access to its schoolhouses.
7. Vote a schoolhouse tax, not exceeding two and one-half mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses.
8. Authorize the establishment and maintenance in each district of one or more schools of a higher order than an approved four-year high school course. [C51,§1115; R60,§§2028, 2033; C73,§§1717, 1807; C97,§2749; C24, 27, 31, 35, §4217.]

Referred to in §4385.4

4218 Submission of proposition. The board may, and upon the written request of five voters of any school township or rural independent or consolidated district, or of twenty-five voters of any city or town independent district having a population of five thousand or less, or of fifty voters of any other city independent district or of any district in which registration of any of the voters is required, shall provide in the notice for the regular election for submitting any proposition authorized by law to the voters. All propositions shall be voted upon by ballot, or by voting machine where required, in substantially the form indicated in sections 763 and 765; and the voter shall indicate his vote in the manner designated in section 764, or indicate it on the voting machine, as the case may be. [R60,§2028; C97,§2749; C24, 27, 31, 35,§4218.]

4219 Special subdistrict schoolhouse tax. At the regular subdistrict election or at a special subdistrict election called for that purpose, the voters may vote to raise a greater amount of schoolhouse tax than that voted by the voters of the school township, ten days previous notice having been given, but the amount so voted, including the amount voted by the school township, shall not exceed in the aggregate the sum of three and three-fourths mills on the dollar. The sum thus voted shall be certified forthwith by the secretary of said subdistrict election to the secretary of the school township, and shall be levied by the board of supervisors only on the property within the subdistrict. [R60,§§2033, 2034, 2037, 2088; C73,§1778; C97,§2753; C24, 27, 31, 35,§4219.]

CHAPTER 213

DIRECTORS—POWERS AND DUTIES

Referred to in §4136

4220 Organization.
4221 Special meetings.
4222 Appointment of secretary and treasurer.
4223 Quorum.
4223.1 Temporary officers.
4223.2 Vacancies filled by board—qualification—tenure.
4223.3 Vacancies filled by special election—qualification—tenure.
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4227 Number of schools—attendance—terms.
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4229 Contracts with teachers.
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4242 Financial statement—publication.
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4245 Employment of counsel.
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4248 Shade trees.
4249 Bird day.

4220 Organization. The board of directors of each school corporation shall meet and organize at two o'clock p. m., or at seven-thirty o'clock p. m., if so ordered by the president of the board,

on the third Monday in March each year at some suitable place to be designated by the secretary. Notice of the place and hour of such meeting shall be given by the secretary to each member and each member-elect of the board.

Such organization shall be effected by the election of a president from the members of the board, who shall be entitled to vote as a member. [C51,§1119; R60,§2036; C73,§§1721, 1722; C97, §2757; SS15,§2757; C24, 27, 31, 35,§4220.]

Referred to in §4151
40ExGA, SF 101, §17, editorially divided

4221 Special meetings. Such special meetings may be held as may be determined by the board, or called by the president, or by the secretary upon the written request of a majority of the members of the board, upon notice specifying the time and place, delivered to each member in person, or by registered letter, but attendance shall be a waiver of notice. [C51, §1121; R60,§2036; C73,§1722; C97,§2757; SS15, §2757; C24, 27, 31, 35,§4221.]

4222 Appointment of secretary and treasurer. At the meeting of the board the first secular day in July the board shall appoint a secretary who shall not be a teacher or other employee of the board. It shall also, except in districts composed in whole or in part of a city or town, appoint a treasurer. Such officers shall be appointed from outside the membership of the board for terms of one year beginning with the first secular day in July which appointment and qualification shall be entered of record in the minutes of the secretary. They shall qualify within ten days following their appointment by taking the oath of office in the manner required by section 4216.28 and filing a bond as required by section 4305 and shall hold office until their successors are appointed and qualified. [C51, §1119; R60,§2035; C73,§1721; C97,§2757; SS15, §2757; C24, 27, 31, 35,§4222.]

4223 Quorum. A majority of the board of directors of any school corporation shall constitute a quorum for the transaction of business, but a less number may adjourn from time to time. [C51,§1120; R60,§§2037, 2038, 2079; C73, §§1730, 1738; C97,§§2758, 2771, 2772; S13,§§2758, 2771, 2772; C24, 27, 31, 35,§4223.]

42GA, ch 87, §1, editorially divided

4223.1 Temporary officers. The board shall appoint a temporary president or secretary, in the absence of the regular officers. [C51,§1120; R60,§§2037, 2038, 2079; C73,§§1730, 1738; C97, §§2758, 2771, 2772; S13,§§2758, 2771, 2772; C24, §4223; C27, 31, 35,§4223-a1.]

4223.2 Vacancies filled by board—qualification—tenure. Vacancies occurring among the officers or members of a school board shall be filled by the board by appointment. A person so appointed to fill a vacancy in an elective office shall hold until the organization of the board the third Monday in March immediately following the next regular election and until his successor is elected and qualified. A person appointed to fill a vacancy in an appointive office shall hold such office for the residue of the unexpired term and until his successor is appointed and qualified. Any person so appointed shall qualify within ten days thereafter in the manner required by section 4216.28. [C51,§1120; R60,§§2037, 2038, 2079; C73,§§1730, 1738; C97, §§2758, 2771, 2772; S13,§§2758, 2771, 2772; C24, §4223; C27, 31, 35,§4223-a2.]

4223.3 Vacancies filled by special election—qualification—tenure. In any case where a vacancy or vacancies occur among the elective officers or members of a school board and the remaining members of such board have not filled such vacancy within ten days after the occurrence thereof, or when the board is reduced below a quorum for any cause, the secretary of the board, or if there be no secretary, the county superintendent of schools shall call a special election in the district, subdistrict, or subdistricts, as the case may be, to fill such vacancy or vacancies, giving the notices required by law for such special elections, which election shall be held not sooner than ten days nor later than fourteen days thereafter. In any case where the secretary fails for more than three days to call such election, the county superintendent shall call it by giving the notices required by law for special elections.

Any appointment by the board to fill any vacancy in an elective office on or after the day notice has been given for a special election to fill such vacancy as provided herein shall be null and void.

In any case of a special election as provided herein to fill a vacancy occurring among the elective officers or members of a school board before the expiration of a full term, the person so elected shall qualify within ten days thereafter in the manner required by section 4216.28 and shall hold office for the residue of the unexpired term and until his successor is elected, or appointed, and qualified. [C51, §1120; R60,§§2037, 2038, 2079; C73,§§1730, 1738; C97,§§2758, 2771, 2772; S13,§§2758, 2771, 2772; C24,§4223; C27, 31, 35,§4223-b1.]

4224 General rules. The board shall make rules for its own government and that of the directors, officers, teachers, and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules. [R60,§2037; C97,§2772; S13, §2772; C24, 27, 31, 35,§4224.]

40ExGA, SF 101, §21, editorially divided

4225 Use of tobacco. Such rules shall prohibit the use of tobacco and other narcotics in any form by any student of such schools and the board may suspend or expel any student for any violation of such rule. [S13,§2772; C24, 27, 31, 35,§4225.]

4226 School year. The school year shall begin on the first of July and each school regularly established shall continue for at least thirty-six weeks of five school days each and

may be maintained during the entire calendar year. [R60,§§2023, 2037; C73,§§1724, 1727; C97, §2773; S13,§2773; C24, 27, 31, 35,§4226; 48GA, ch 102,§1.]

4227 Number of schools — attendance — terms. The board of directors shall determine the number of schools to be taught, divide the corporation into such wards or other divisions for school purposes as may be proper, determine the particular school which each child shall attend, and designate the period each school shall be held beyond the time required by law. [R60,§§2023, 2037; C73,§§1724, 1727; C97,§2773; S13,§2773; C24, 27, 31, 35,§4227.]

4228 Contracts—election of teachers. The board shall carry into effect any instruction from the regular election upon matters within the control of the voters, and shall elect all teachers and make all contracts necessary or proper for exercising the powers granted and performing the duties required by law, but the board may authorize any subdirector to employ teachers for the school in his subdistrict; but no such employment by a subdirector shall authorize a contract, the entire period of which is wholly beyond his term of office. [C73,§§1723, 1757; C97,§2778; SS15,§2778; C24, 27, 31, 35, §4228.]

4229 Contracts with teachers. Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five days, or month of four weeks, and that the same shall be invalid if the teacher is under contract with another board of directors in the state of Iowa to teach covering the same period of time, until such contract shall have been released, and such other matters as may be agreed upon, which may include employment for a term not exceeding the ensuing school year, except as otherwise authorized, and payment by the calendar or school month, signed by the president and teacher, and shall be filed with the secretary before the teacher enters upon performance of the contract but no such contract shall be entered into with any teacher for the ensuing year or any part thereof until after the organization of the board. [R60,§2055; C73,§1757; C97,§2778; SS15,§2778; C24, 27, 31, 35,§4229.]

4230 Superintendent—term. The board of directors of any independent school district or school township where there is a township high school shall have power to employ a superintendent of schools for one year. After serving at least seven months, he may be employed for a term of not to exceed three years, but such reelection or re-employment shall not be prior to the organization of the board of the year during which an existing contract expires. He shall be the executive officer of the board and have such powers and duties as may be prescribed by rules adopted by the board or by law. Boards of directors may jointly exercise the powers conferred by this section. [R60,§2037; C73,§1726; C97, §2776; SS15,§2778; C24, 27, 31, 35,§4230.]

4231 Nonemployment of teacher — when. No contract shall be entered into with any teacher to teach an elementary school when the average daily attendance of elementary pupils in such school the last preceding term therein was less than five such pupils of school age, resident of the district or subdistrict, as the case may be, nor shall any contract be entered into with any teacher to teach an elementary school for the next ensuing term when it is apparent that the average daily attendance of elementary pupils in such school will be less than five or the enrollment less than six such pupils of school age, resident of the district or subdistrict, as the case may be, regardless of the average daily attendance in such school during the last preceding term, unless the parents or guardians of seven or more such elementary children subscribe to a written statement sworn to before the county superintendent or a notary public certifying that such children will enroll in and will attend such elementary school if opened and secure from the county superintendent written permission authorizing the board to contract with a teacher for such school for a stated period of time not to exceed three months.

When natural obstacles to transportation of pupils to another school in the same or in another corporation or other conditions make it clearly inadvisable that such elementary school be closed, the county superintendent may authorize the board in writing to contract with a teacher for such school for a stated period of time not to exceed three months.

Any contract with any teacher which is made in violation of the provisions of this section shall be null and void from its inception and no compensation shall be due or paid to any teacher who enters into a contract in violation of the provisions of this section. [C24, 27, 31, 35,§4231.]

4232, 4233 Rep. by 45GA, ch 60,§7

4233.1 School privileges when school closed. If a school is closed for lack of pupils, the board of such corporation shall provide for the instruction of the pupils of the corporation by sending them to other schools of the corporation or by contracting for such facilities in another school corporation if a school in such other corporation is nearer to them than any public school of the corporation of their residence and such pupils are over two miles from any public school in their resident corporation. Immediately upon the closing of any school, the board shall notify the patrons of the school where their children are to attend; provided that when the school in a subdistrict of a school township has been closed, the residents of such subdistrict may, if they prefer, send their children to the public school of their choice outside the school township, provided the cost to the school township for each of such children will not exceed the pro rata cost in the entire school township during the school year immediately preceding. [C24, 27, 31,§4232; C35,§4233-e1.]

Referred to in §4233.2

4233.2 County superintendent — duties. Where a school has been closed and the board has failed to arrange for school facilities, as provided in section 4233.1, at least twenty days before the time the school would otherwise begin, it shall be the duty of the county superintendent to notify the president of the board of such corporation of such failure, and if the board does not arrange for school facilities within ten days thereafter, it shall then become the duty of the county superintendent to make such arrangements. [C35,§4233-e2.]

4233.3 Tuition. The tuition cost to be mutually agreed upon by the respective boards shall be paid by the home district except that the rate shall not be in excess of six dollars per month. [C35,§4233-e3.]

4233.4 Transportation. When children enrolled in an elementary school other than in a consolidated district live two and one-half miles or more from the school in their district or subdistrict or when the school in their district or subdistrict has been closed and they are thereby placed more than two miles from the school designated for their attendance, the board shall arrange with any person outside the board for the transportation of such children to and from school and the cost of such transportation shall be paid from the general fund, but the board may provide transportation for a less distance. The board of any school district maintaining a public high school within a city having a population of seventy-five thousand or more may provide transportation for any pupil enrolled in said high school and residing more than three miles therefrom. [C24, 27, 31,§4233; C35, §4233-e4; 48GA, ch 103,§1.]

Transportation, §4179 et seq.

4233.5 Distance—how measured. Distance to school shall in all cases be measured on the public highway only and by the most practicable route, starting on the roadway opposite the private entrance to the residence of the pupil and ending on the roadway opposite the entrance to the school grounds. [C35,§4233-e5.]

4234 Delegating authority to subdirector. The board of directors of a school township may authorize the director of each subdistrict, subject to its regulations, to make contracts for the purchase of fuel, the repairing or furnishing of schoolhouses, and all other matters necessary for the convenience and prosperity of the schools in his subdistrict. Such contracts shall be binding upon the school township only when approved by the president of the board, and must be reported to the board. The powers specified in this section cannot be exercised by individual directors of independent districts. [C51,§1142; R60,§2053; C73,§1753; C97,§2785; S13,§2785; C24, 27, 31, 35,§4234.]

S13,§2785, editorially divided

4235 School census. Each subdirector shall, between the first and fifteenth days of June in each even-numbered year, make a list, on blanks prepared for that purpose by the superintendent of public instruction, showing, as of June 1, the following:

1. The name and post-office address of parents and guardians in his subdistrict with the name, sex, and age of all children or wards residing in the subdistrict who are between five and twenty-one years of age;
2. The name, age, and post-office address of every person resident of the subdistrict without regard to age so blind as to be unable to acquire an education in the common schools;
3. The name, age, and post-office address of every person between the ages of five and thirty-five whose faculties with respect to speech and hearing are so deficient as to prevent him from obtaining an education in the common schools; and
4. The name, sex, age, and disability of every physically handicapped or feeble-minded person of school age, with the name and post-office address of the parent or guardian.

By the twentieth day of said month, the subdirector shall send this list to the secretary of the school township who shall make full record thereof as required by law. [C51,§1142; R60, §2052; C73,§§1754, 1755; C97,§2785; S13,§2785; C24, 27, 31, 35,§4235; 47GA, ch 121,§1.]

4236 Visiting schools. The board shall provide for visiting the schools of the district by one or more of its members and aid the teachers in the government thereof, and in enforcing the rules and regulations of the board. [C51,§1147; R60,§2037; C73,§1734; C97,§2782; C24, 27, 31, 35,§4236.]

C97,§2782, editorially divided

4237 Discharge of teacher. The board may, by a majority vote, discharge any teacher for incompetency, inattention to duty, partiality, or any good cause, after a full and fair investigation made at a meeting of the board held for that purpose, at which the teacher shall be permitted to be present and make defense, allowing him a reasonable time therefor. [C73,§1734; C97, §2782; C24, 27, 31, 35,§4237.]

4238 Insurance — supplies — textbooks. It may provide and pay out of the general fund to insure school property such sum as may be necessary, and may purchase dictionaries, library books, including books for the purpose of teaching vocal music, maps, charts, and apparatus for the use of the schools thereof to an amount not exceeding two hundred dollars in any one year for each school building under its charge; and may furnish schoolbooks to indigent children when they are likely to be deprived of the proper benefits of the school unless so aided. [C73,§1729; C97,§2783; S13, §2783; C24, 27, 31, 35,§4238; 47GA, ch 124,§5.]

4239 Claims. The board shall audit and allow all just claims against the corporation, and no order shall be drawn upon the treasury until the claim therefor has been audited and allowed. [C51,§§1146, 1149; R60,§§2037, 2038; C73,§§1732, 1733, 1738, 1813; C97,§2780; S13, §2780; C24, 27, 31, 35,§4239.]

Exceptions, §126

4239.1 Exceptions. Each warrant shall be made payable to the person entitled to receive such money. The board of directors of any school district may, however, by resolution of record authorize the secretary to issue warrants when said board of directors is not in session in payment of freight, drayage, express, postage, printing, water, light, and telephone rents, but only upon duly verified bills for same filed with the secretary, and for the payment of salaries pursuant to the terms of a written contract and said secretary shall either deliver in person or mail said warrants to the payee. Each such warrant shall be made payable only to the person performing the service or furnishing the supplies for which said warrant makes payment, and shall state the purpose for which said warrant is issued. All bills and salaries for which warrants are issued prior to audit and allowance by the board as provided herein shall be passed upon by the board of directors at the first meeting thereafter and shall be entered of record in the regular minutes of the secretary. [C35,§4239-g1.]

4239.2 Settlement with treasurer. The board shall from time to time examine the accounts of the treasurer and make settlements with him. [C51,§§1146, 1149; R60,§§2037, 2038; C73,§§1732, 1733, 1738, 1813; C97,§2780; S13, §2780; C24,§4239; C27, 31, 35,§4239-a1.]

4239.3 Compensation of officers. The board shall fix the compensation to be paid the secretary. No member of the board or treasurer shall receive compensation for official services, except that in school townships, rural or village independent districts, and in consolidated districts that contain a city or town having a population less than one thousand, the board may pay a legally qualified school treasurer a reasonable compensation. [C51,§§1146, 1149; R60,§§2037, 2038; C73,§§1732, 1733, 1738, 1813; C97,§2780; S13,§2780; C24,§4239; C27, 31, 35,§4239-a3; 47 GA, ch 122,§1.]

4240 Annual settlements. On the first secular day in July, the board of each school township and with it the members of the board who retired in the preceding March, and the board of each independent school corporation, shall meet, examine the books of and settle with the secretary and treasurer for the year ending on the thirtieth day of June preceding, and transact such other business as may properly come before it. The treasurer at the time of such settlement shall furnish the board with a sworn statement from each depository showing the balance then on deposit in such depository. Should the secretary or treasurer fail to make proper reports for such settlement, the board shall take action to secure the same. [SS15,§2757; C24, 27, 31, 35,§4240.]

40ExGA, SF 101, §18, editorially divided

4241 Transfer of funds. If after the annual settlement it shall appear that there is a surplus in the general fund, the board may, in its discretion, transfer any or all of such surplus to the schoolhouse fund. [C24, 27, 31, 35,§4241.]

4242 Financial statement—publication. In each consolidated district and in each independent city or town school district, the board shall, during the first week of July of each year, publish by one insertion in at least one newspaper, if there is a newspaper published in said district, a summarized statement verified by affidavit of the secretary of the board showing the receipts and disbursements of all funds for the preceding school year, the statement of disbursements to show the names of the persons, firms, or corporations, and the total amount paid to each during the school year. [C51,§1146; R60,§2037; C73,§1732; C97,§2781; C24, 27, 31, 35,§4242.]

4242.1 Other districts — filing statement. In every other school district, and in every school district wherein no newspaper is published, the president and secretary of the board of directors thereof shall file the above statement with the county superintendent of schools during the first week of July of each year and shall post copies thereof in three conspicuous places in the district. [C27, 31, 35,§4242-b1.]

4243, 4244 Rep. by 42GA, ch 89

4245 Employment of counsel. In all cases where actions may be instituted by or against any school officer to enforce any provision of law, the board may employ counsel, for which the school corporation shall be liable. [R60, §2040; C73,§1740; C97,§2759; C24, 27, 31, 35, §4245.]

C97,§2759, editorially divided

4246 Industrial exposition. The board of any school corporation, or the director of any subdistrict deeming it expedient, may, under the direction of the county superintendent, hold and maintain an industrial exposition in connection with the schools of such district, such exposition to consist in the exhibit of useful articles invented, made, or raised by the pupils, by sample or otherwise, in any of the departments of mechanics, manufacture, art, science, agriculture, and the kitchen, such exposition to be held in the schoolroom, on a school day, as often as once during a term, and not oftener than once a month, at which the pupils participating therein shall be required to explain, demonstrate, or present the kind and plan of the article exhibited, or give its method of culture; and work in these several departments shall be encouraged, and patrons of the school invited to be present at each exhibition. [C97,§2786; C24, 27, 31, 35,§4246.]

4247 Water closets. It shall give special attention to the matter of convenient water closets or privies, and provide on every schoolhouse site, not within an independent city or town district, two separate buildings located at the farthest point from the main entrance to the schoolhouse, and as far from each other as may be, and keep them in wholesome condition and good repair. In independent city or town districts, where it is inconvenient or undesirable to erect two separate outhouses, several closets may be included under one roof, and

if outside the schoolhouse each shall be separated from the other by a brick wall, double partition, or other solid or continuous barrier, extending from the roof to the bottom of the vault below, and the approaches to the outside doors for the two sexes shall be separated by a substantial close fence not less than seven feet high and thirty feet in length. [C97,§2784; C24, 27, 31, 35,§4247.]

4248 **Shade trees.** The board of each school corporation shall cause to be set out and properly protected twelve or more shade trees on each schoolhouse site where such trees are not growing. The county superintendent, in visiting the several schools of his county, shall call the attention of any board neglecting to comply with the requirements of this section to any failure to carry out its provisions. [C97,§2787; C24, 27, 31, 35,§4248.]

4249 **Bird day.** The twenty-first day of March of each year is hereby set apart and designated as bird day. It shall be the duty of all public schools to observe said day by devoting a part thereof to a special study of birds, their habits, usefulness, and the best means of protection. Should such date fall on other than a school day, such day shall be observed on the next regular school day. [C24, 27, 31, 35,§4249.]

CHAPTER 214

COURSES OF STUDY

4250 Right to prescribe.
4251 Definitions.
4252 Common school studies.
4253 Display of United States flag.
4254 Medium of instruction.
4255 American citizenship.
4256 Constitution of United States and state.
4257 American history and civics.
4258 Bible.
4259 Stimulants, narcotics, and poisons.
4260 Dental clinics.
4262 Music.
4263 Physical education.
4264 Length of course.
4265 In teacher-training courses.
4266 Kindergarten department.
4267 Higher and graded schools.
4267.1 Junior colleges.

4250 **Right to prescribe.** The board shall prescribe courses of study for the schools of the corporation. [R60,§2037; C97,§2772; S13, §2772; C24, 27, 31, 35,§4250.]

4251 **Definitions.** The expression "public school" means any school maintained in whole or in part by taxation; the expression "private school" means any other school. [C24, 27, 31, 35,§4251.]

4252 **Common school studies.** Reading, writing, spelling, arithmetic, grammar, geography, physiology, United States history, history of Iowa, and the principles of American government shall be taught in all such schools. [S13, §2823-a; C24, 27, 31, 35,§4252.]

40ExGA, SF 111, §1, editorially divided

4253 **Display of United States flag.** The board of directors of each public school corporation and the authorities in charge of each private school shall provide and maintain a suitable flagstaff on each school site under its control, and a suitable United States flag therefor, which shall be raised on all school days when weather conditions are suitable. [S13, §§2804-a,-b; C24, 27, 31, 35,§4253.]

Display of flag on public buildings, §470

4254 **Medium of instruction.** The medium of instruction in all secular subjects taught in all of the schools, public and private, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; but nothing herein shall prohibit the teaching and studying of foreign languages, as such, as a part of the regular school course in any such school. Any person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than one hundred dollars. [C24, 27, 31, 35,§4254.]

4255 **American citizenship.** Each public and private school located within the state shall be required to teach the subject of American citizenship in all grades. [C24, 27, 31, 35,§4255.]

4256 **Constitution of United States and state.** In all public and private schools located within the state there shall be given regular courses of instruction in the constitution of the United States and in the constitution of the state of Iowa. Such instruction shall begin not later than the opening of the eighth grade, and shall continue in the high school course to an extent to be determined by the superintendent of public instruction. [C24, 27, 31, 35,§4256.]

4257 **American history and civics.** Public and private high schools, academies, and other institutions ranking as secondary schools which maintain three-year or longer courses of instruction shall offer, and all students shall be required to take, a minimum of instruction in American history and civics of the state and nation to the extent of two semesters, and schools of this class which have four-year or longer courses shall offer in addition one semester in social problems and economics. [C24, 27, 31, 35,§4257.]

4258 **Bible.** The bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian. [R60,§2119; C73,§1764; C97,§2805; C24, 27, 31, 35,§4258.]

4259 **Stimulants, narcotics, and poisons.** The board shall require all teachers to give and

all scholars to receive instruction in physiology and hygiene, which study in every division of the subject shall include the effects upon the human system of alcoholic stimulants, narcotics, and poisonous substances. The instruction in this branch shall of its kind be as direct and specific as that given in other essential branches, and each scholar shall be required to complete the part of such study in his class or grade before being advanced to the next higher, and before being credited with having completed the study of the subject. [C97,§2775; C24, 27, 31, 35,§4259.]

4260 Dental clinics. Boards of school directors in all school districts containing one thousand or more inhabitants are hereby authorized to establish and maintain in connection with the schools of such districts, a dental clinic for children attending such schools, and to offer courses of instruction on mouth hygiene. Said boards are hereby empowered to employ such legally qualified dentists and dental hygienists as may be necessary to accomplish the purpose of this section, and pay the expense of the same out of the general fund. [C24, 27, 31, 35,§4260.]

4261 Rep. by 45GA, ch 55,§1

4262 Music. The elements of vocal music, including, when practical, the singing of simple music by note, shall be taught in all of the public schools, and all teachers teaching in schools where such instruction is not given by special teachers shall be required to satisfy the county superintendent of their ability to teach the elements of vocal music in a proper manner; provided, however, that no teacher shall be refused a certificate or have the grade of his or her certificate lowered on account of lack of ability to sing. [S13,§2823-s; C24, 27, 31, 35,§4262.]

4263 Physical education. The teaching of physical education exclusive of interscholastic athletics, including effective health supervision and health instruction, of both sexes, shall be required in every public elementary and secondary school of the state. Modified courses of instruction shall be provided for those pupils physically or mentally unable to take the courses provided for normal children. Said subject shall be taught in the manner prescribed by the state superintendent of public instruction. [C24, 27, 31, 35,§4263.]

4264 Length of course. The course of physical education shall occupy periods each week totaling not less than fifty minutes, exclusive of recesses, throughout each school term. The conduct and attainment of the pupils in such course shall be marked as in other subjects and it shall form part of the requirements for promotion or graduation of every pupil in attendance, but no pupil shall be required to take such instruction whose parents or guardian shall file a written statement with the school principal or teacher that such course conflicts with his religious belief. [C24, 27, 31, 35,§4264.]

4265 In teacher-training courses. Every high school, state college, university, or normal school giving teacher-training courses shall provide a course or courses in physical education. [C24, 27, 31, 35,§4265.]

4266 Kindergarten department. The board of any independent school district upon the petition of the parents or guardians of twenty-five or more children of kindergarten age, may establish and maintain such a kindergarten in said district. No petition shall be effective unless the school in connection with which such kindergarten is desired is named in the petition and all persons who shall be qualified to sign such petitions shall be residents of the section or neighborhood served by that school. The board of education shall be the judge of the sufficiency of the petition. Any kindergarten teacher shall hold a certificate certifying that the holder thereof has been examined upon kindergarten principles and methods, and is qualified to teach in kindergartens. [C97,§2777; C24, 27, 31, 35,§4266.]

4267 Higher and graded schools. The board may establish graded and high schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the superintendent of public instruction. Whenever the board in a school township establishes a high school, such high school can be discontinued only by an affirmative vote of a majority of the votes cast for and against such proposition at an election which may be called by the county superintendent of schools upon a petition for such election being presented signed by twenty-five percent of the electors in such township. [R60,§2037; C73, §1726; C97,§2776; C24, 27, 31, 35,§4267.]

4267.1 Junior colleges. The board, upon approval of the state superintendent of public instruction, and when duly authorized by the voters, shall have power to establish and maintain in each district one or more schools of higher order than an approved four-year high school course. Said schools of higher order shall be known as public junior colleges and may include courses of study covering one or two years of work in advance of that offered by an accredited four-year high school. The state superintendent of public instruction shall prepare and publish from time to time standards for junior colleges, provide adequate inspection for junior colleges, and recommend for accrediting such courses of study offered by junior colleges as may meet the standards determined.

No public junior college shall be established in any school district having a population of less than twenty thousand.

Nothing in this section shall prohibit any school district that now has a junior college from temporarily discontinuing the same and starting it again at some future time. [C27, 31, 35,§4267-b1.]

CHAPTER 215

SCHOOL ATTENDANCE AND TUITION

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4268 School age — nonresidents. Persons between five and twenty-one years of age shall be of school age. A board may establish and maintain evening schools for all residents of the corporation regardless of age and for which no tuition need be charged. Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine. [C73,§1795; C97,§2804; C24, 27, 31, 35,§4268.]

Evening schools, §4288
C97,§2804, editorially divided

4269 Offsetting tax. The parent or guardian whose child or ward attends school in any independent district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid. [C97, §2804; C24, 27, 31, 35,§4269.]

4270 Right to exclude pupil. The board may exclude from school children under the age of six years when in its judgment such children are not sufficiently mature to be benefited by attendance, or any incorrigible child or any child who in its judgment is so abnormal that his attendance at school will be of no substantial benefit to him, or any child whose presence in school may be injurious to the health or morals of other pupils or to the welfare of such school. [C97,§2782; C24, 27, 31, 35,§4270.]

4271 Majority vote—suspension. The board may, by a majority vote, expel any scholar from school for immorality, or for a violation of the regulations or rules established by the board, or when the presence of the scholar is detrimental to the best interests of the school; and it may confer upon any teacher, principal, or superintendent the power temporarily to dismiss a scholar, notice of such dismissal being at once given in writing to the president of the board. [C73,§§1735, 1756; C97,§2782; C24, 27, 31, 35, §4271.]

4272 Re-admission of pupil. When a scholar is dismissed by the teacher, principal, or superintendent, as above provided, he may be readmitted by such teacher, principal, or superintendent, but when expelled by the board he may be re-admitted only by the board or in the manner prescribed by it. [R60,§2054; C73,§§1735, 1756; C97,§2782; C24, 27, 31, 35,§4272.]

4273 Tuition. Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, and to resident honorably discharged soldiers, sailors, and marines, as many months after becoming twenty-one years of age as they have spent in the military or naval service of the United States before they became twenty-one. Every person, however, who shall attend any school after graduation from a four-year course in an approved high school or its equivalent shall be charged a sufficient tuition fee to cover the cost of the instruction received by such person. [C73, §§1724, 1727; C97,§2773; S13,§2773; C24, 27, 31, 35,§4273.]

4274 Attending in another corporation — payment. A child residing in one corporation may attend school in another in the same or adjoining county if the two boards so agree. In case no such agreement is made, the county superintendent of the county in which the child resides and the board of such adjoining corporation may consent to such attendance, if the child resides nearer a schoolhouse in the adjoining corporation or nearer to a regularly established transportation route to a consolidated school and two miles or more from any public school in the corporation of his residence. Before granting such consent the county superintendent shall give notice to the board where the child resides and hear objections, if any. In case such consent is given, the board of the district of the child's residence shall be notified thereof in writing, and shall pay to the other district the average tuition per week for the school or room thereof in which such child attends. If payment is refused or neglected, the board of the creditor corporation shall file an account thereof certified by its president with the auditor of the county of the child's residence, who shall transmit to the county treasurer an order directing him to transfer the amount of such account from the funds of the debtor corporation to the creditor corporation, who shall pay the same accordingly. [C51,§1143; R60, §2024; C73,§1793; C97,§2803; C24, 27, 31, 35, §4274.]

4274.01 Attending school outside state. Any person under twenty-one years of age residing in any school district or portion thereof in this state which district or portion thereof does not

maintain a high school and is severed from the balance of the state or the school district by a navigable stream, who has successfully completed the eighth grade, may with the consent of a majority of the school board of his residence district, expressed at a meeting thereof, attend any high school in any adjoining state willing to admit him, which high school is nearer to his place of residence than any duly established high school in Iowa, the distances being measured by the usual traveled routes. [C31, 35, §4274-c1.]

4274.02 Tuition. Any tuition charged by the district so attended shall be paid by the school district in which such person resides; but such tuition shall not be more than such district charges nonresident pupils residing in such state if any such tuition is charged, and if no tuition is charged for nonresident pupils of said state, then such tuition shall not exceed the sum of ten dollars per month. The person so attending high school in another state shall continue to be treated as a pupil of the district of his residence in apportionment of the current school fund and the payment of state aid. [C31, 35, §4274-c2.]

4274.03 Contract for school privileges. For the purposes of furnishing elementary school facilities to the children of school age within the district, the board of one or more such districts may enter into a contract for such facilities, jointly or individually, with the board of one or more school districts where such facilities up to and including the eighth grade are approved by the superintendent of public instruction; provided that such schools are the most conveniently located with respect to the children to be accommodated. [C35,§4274-e1.]

Referred to in §4274.09

4274.04 Terms of contract. Such contract may cover a period not exceeding three years; it shall be in writing and shall state the monthly tuition rate, the period during which the contract is to run, and such other matters not in conflict with law as may be mutually agreed upon. [C35,§4274-e2.]

Referred to in §4274.09

4274.05 Transportation — two-mile limit. When a board contracts for such facilities, it shall also contract for suitable transportation to such school for all children of school age from kindergarten to eighth grade, inclusive, living two miles or more from such school. When a board contracts to furnish its school facilities to the children of another district, as provided herein, it may also contract to furnish transportation to such children, provided it is reimbursed to the extent of the pro rata cost of such transportation and has adequate and suitable transportation facilities. [C35,§4274-e3.]

Referred to in §4274.09

4274.06 Transportation generally. The board may permit pupils enrolled in the secondary grades or any other pupils that are not entitled to free transportation to avail themselves of the transportation facilities provided their parents pay the pro rata cost of such transportation. [C35,§4274-e4.]

Referred to in §4274.09

4274.07 Cooperative transportation. The board of two or more districts contracting with the same school for elementary school facilities, as provided herein, may purchase, jointly or individually, a suitable transportation bus or busses to be used in transporting children to such school and contract for a suitable bus driver or drivers, the cost of the bus and the bus driver to be distributed among the districts authorizing the same on such equitable terms as may be mutually agreed upon, which agreement shall be in the form of a written contract. [C35, §4274-e5.]

Referred to in §4274.09
Safety glass required, §5034.53
School busses, regulation, §5032.02 et seq.

4274.08 Distance—how measured. Distance to school shall, in all cases, be measured on the public highway only and by the most practicable route, starting on the roadway opposite the private entrance to the residence of the pupil and ending on the roadway opposite the entrance to the school grounds. [C35,§4274-e6.]

Referred to in §4274.09

4274.09 Effect of contract. A contract entered into as provided in sections 4274.03 to 4274.08, inclusive, shall not be construed as in any way impairing the corporate identity of the contracting districts nor as affecting the legal powers of the respective boards except as specifically set out in said sections, nor as entitling any person to a right of reversion in any schoolhouse site. [C35,§4274-e7.]

4275 High school outside home district. Any person of school age who is a resident of a school corporation which does not offer a four-year high school course, and who has completed the course as approved by the department of public instruction for such corporation, shall be permitted to attend any public high school in the state approved in like manner that will receive him, or may attend any public high school of equivalent standing in an adjoining state, if said school in the adjoining state be nearer to the pupil's residence than any approved public high school in the state of Iowa, but no board shall pay tuition to a high school outside the state for pupils whose actual residence is nearer to an approved high school in Iowa when measured by the nearest traveled public road. [SS15,§2733-1a; C24, 27, 31, 35, §4275; 48GA, ch 105,§1.]

Referred to in §4276

4275.1 Children from charitable institution. Children who are residents of a charitable institution organized under the laws of this state and who have completed a course of study for the eighth grade as required by section 4276 shall be permitted to enter any approved public high school in Iowa that will receive them and the tuition shall be paid by the treasurer of state from any money in his hands not otherwise ap-

propriated and upon warrants drawn and signed by the state comptroller on requisition issued by the superintendent of public instruction. The superintendent of public instruction is hereby empowered to require such reports, from such institution and from the high school such pupils attend, as are necessary properly to carry out the provisions of this section. [48GA, ch 104,§1.]

Omnibus repeal, 48GA, ch 104,§2

4276 Requirements for admission. Any person applying for admission to any high school under the provisions of section 4275 shall present to the officials thereof the affidavit of his parent or guardian, or if he have neither, his next friend, that such applicant is entitled to attend the public schools, and a resident of a school district of this state, specifying the district. He shall also present a certificate signed by the county superintendent showing proficiency in the common school branches, reading, orthography, arithmetic, physiology, grammar, civics of Iowa, geography, United States history, penmanship, and music.

No such certificate or affidavit shall be required for admission to the high school in any school corporation when he has finished the common school branches in the same corporation. [SS15,§2733-1a; C24, 27, 31, 35,§4276.]

Referred to in §4275.1

4277 Tuition fees—payment. The school corporation in which such student resides shall pay from the general fund to the secretary of the corporation in which he shall be permitted to enter a tuition fee of not to exceed nine dollars per month during the time he so attends, not exceeding a total period of four school years. The tuition rate chargeable to the home district of such nonresident high school pupil shall not exceed the pro rata cost and shall be computed solely upon the basis of the average daily attendance of all resident and nonresident pupils enrolled in such high school, but it shall not include the cost of transportation to high school or any part thereof, unless the actual pro rata cost of such tuition is less than the maximum rate authorized by law, in which case the board of the district that is responsible for the payment of such tuition may, by resolution, authorize the payment of such portion of transportation costs as does not exceed the difference between the actual pro rata cost of high school tuition and the maximum rate authorized by law, provided the creditor district collects any balance of such transportation cost from the parents whose children are transported. Transportation costs shall, in all cases, be based upon the pro rata cost of all pupils transported to school in such district.

It shall be unlawful for any school district maintaining a high school course of instruction to provide nonresident high school pupils with transportation to high school or normal college unless the district is fully reimbursed therefor, as provided in this section, or to rebate to such pupils or their parents, directly or indirectly, any portion of the high school tuition collected or to be collected from the home district of such pupils, or to authorize or permit such pupils to receive at the expense of the district, directly or indirectly, any special compensation, benefit, privilege, or other thing of value that is not and cannot legally be made available to all other pupils enrolled in such high school. Any superintendent or board members responsible for such unlawful act shall each be personally liable to a fine of not to exceed one hundred dollars. Action to recover such penalty or action to enjoin such unlawful act may be instituted by the board of any school district or by a taxpayer in any school district.

On or before February 15 and June 15 of each year the secretary of the creditor district shall deliver to the secretary of the debtor district an itemized statement of such tuition fees. [SS15,§2733-1a; C24, 27, 31, 35,§4277.]

4278 Collection of tuition fees. If payment is not made, the board of the creditor corporation shall file with the auditor of the county of the pupil's residence a statement certified by its president specifying the amount due for tuition, and the time for which the same is claimed. The auditor shall transmit to the county treasurer an order directing him to transfer the amount of such account from the funds of the debtor corporation to the creditor corporation, and he shall pay the same accordingly. [SS15,§2733-1a; C24, 27, 31, 35,§4278.]

4279 Rep. by 41GA, ch 87

4280 to 4282, inc. Rep. by 45GA, ch 63,§1

4283 Tuition in charitable institutions. When any child is cared for in any charitable institution in this state which does not maintain a school providing secular instruction, and which institution is organized and operating under the laws of Iowa, and the domicile of the child is in another school district than that wherein the institution is situated, then such child shall be entitled to attend school in the district where such institution is located. In such case, the district which provides schooling for such child shall be entitled to receive tuition not exceeding the average cost thereof in the department of the school in which schooling is given, and not exceeding eight dollars per month for tuition in schools below the high school grade, and not exceeding twelve dollars per month for tuition in high school grades. Such tuition shall be paid by the county of the domicile of such child. Any county so paying tuition shall be entitled to recover the amount paid therefor from the parent of such child. This section shall not apply to charitable institutions which are maintained at state expense. [C24, 27, 31, 35,§4283.]

4283.01 Tuition when in boarding home. When any child of school age has become a public charge and is being cared for in a children's boarding home licensed by the state, and the domicile of such child at the time it became a public charge was in another school district than the one wherein such boarding home is lo-

cated, then, such child shall be entitled to attend public school in the school district in which such boarding home is located, or if such district does not maintain a school offering instruction in the grade in which such child is properly classified, then such child may attend upon such instruction in any approved public school in the state that will receive it. The tuition of such a child, at the rates established by law, shall be paid by the treasurer of state from any funds in the state treasury not otherwise appropriated, and upon warrants drawn by the state comptroller upon the requisition of the superintendent of public instruction. If such child was in the district at the time the regular biennial school census was taken, the semiannual apportionments shall be deducted from the tuition due the district under the provisions of this section. The superintendent of public instruction is hereby empowered to require such reports as are necessary properly to carry out the provisions of this section. [47GA, ch 123,§1.]

CHAPTER 215.1

DISTRIBUTION OF FEDERAL FUNDS

4283.02 Definitions.
4283.03 Duty of superintendent.
4283.04 Fund created.
4283.05 Apportionment.
4283.06 Requisition on fund.
4283.07 Warrants drawn.
4283.08 Deposit of funds.
4283.09 Refund on nonresident tuition.
4283.10 Rules and regulations.

4283.02 Definitions. The following terms shall, for the purpose of this chapter, have the following meanings:

1. "Aggregate attendance" means the sum determined by adding together the total number of school days during which each pupil in the grades in question attended a regular day school conducted by the particular public school corporation during the regular school year, excluding summer school.

2. "Average daily attendance" means the quotient arising from dividing aggregate attendance by the total number of days school was in session during the regular school year, excluding summer school. Said quotient shall be carried to such number of decimal places, fixed by the superintendent, as is reasonably necessary to secure equitable distribution.

3. "Superintendent" means the superintendent of public instruction of the state of Iowa. [47GA, ch 126,§1.]

4283.03 Duty of superintendent. It shall be the duty of the superintendent to keep such records and accounts, to cause such audits to be made, and to make such applications and reports to the United States commissioner of education, or other authorized federal officer, as shall be necessary to qualify this state to receive, and to continue to receive, such federal funds as may be allotted to this state under and by virtue of an act of the seventy-fifth congress of the United States, first session, now or hereafter enacted, entitled "A bill to promote the general welfare through the appropriation of funds to assist the states and territories in providing more effective programs of public education", and such other acts of congress, now or hereafter enacted, as may make federal funds available to this state for the purpose of providing more effective programs of general public education. For such purposes, the superintendent is hereby designated as the "chief educational authority" to represent this state. [47GA, ch 126,§2.]

Referred to in §4283.04

4283.04 Fund created. There is hereby created in the treasury of the state of Iowa a special fund, to which shall be credited such federal funds as are received pursuant to the acts of congress designated in section 4283.03. The treasurer of state shall keep such accounts and records of the expenditure of such funds as may be prescribed by the United States commissioner of education, or other federal officer, pursuant to the law authorizing such distribution of federal funds. [47GA, ch 126,§3.]

Referred to in §4283.06

4283.05 Apportionment. The funds credited to such special fund shall be distributed each school year, in October and April, to the several public school corporations of the state in the proportion which the total number of teacher units for each such school corporation for the preceding school year bears to the total number of teacher units for the state for such school year. Such teacher units shall be determined for each public school corporation in the following manner:

1. Teacher units in grades one to eight inclusive, and kindergarten, shall be fixed as follows: (a) For each school in which only one teacher is employed, one teacher unit; and (b) if the total average daily attendance does not exceed forty in all schools in which more than one teacher is employed, two additional teacher units; or (c) if the total average daily attendance exceeds forty in all such schools, one additional teacher unit for the first fifteen and one additional teacher unit for each additional twenty-seven, or major fraction thereof, in average daily attendance; provided that the teacher units so determined for each school corporation shall not exceed the actual number of teachers employed in grades one to eight inclusive, and kindergarten.

2. Teacher units in grades nine to twelve inclusive shall be determined by allowing one and one-half teacher units for each high school unit, determined as follows: (a) If the total average daily attendance in grades nine to twelve in all

schools is less than sixteen, one high school unit; or (b) if such total average daily attendance is more than fifteen and less than twenty-six, two high school units; or (c) if such total average daily attendance is more than twenty-five and less than forty-one, three high school units; or (d) if such total average daily attendance is more than forty, three high school units for the first forty and one additional high school unit for each additional twenty-two, or major fraction thereof, in average daily attendance; provided that the high school units so determined for each school corporation shall not exceed the actual number of teachers employed in teaching grades nine to twelve inclusive.

3. Both resident and nonresident pupils shall be included in determining the number of teacher units allowed to each school corporation. [47GA, ch 126,§4.]

4283.06 Requisition on fund. The treasurer shall, upon request, certify to the superintendent at any time the amount in the special fund created in section 4283.04. On the first day of October and the first day of April of each year, or as soon thereafter as possible, the superintendent shall determine the amount due each of the several school corporations in the state under the provisions of this chapter, and shall file with the state comptroller a requisition on which shall appear the amounts due each of such school corporations. [47GA, ch 126,§5.]

4283.07 Warrants drawn. The state comptroller, upon receipt of such requisition from the superintendent of public instruction, shall draw a warrant or warrants on the treasurer of state, payable to the school corporations entitled thereto in accordance with said requisition, and shall deliver said warrant or warrants to the superintendent of public instruction, who shall make a record thereof and transmit the same to the secretary of each of said school corporations. [47GA, ch 126,§6.]

4283.08 Deposit of funds. Upon receipt of any such warrant, the secretary of the school corporation shall cause it to be deposited to the credit of the general fund of the said school corporation. [47GA, ch 126,§7.]

4283.09 Refund on nonresident tuition. Each public school corporation in the state which, pursuant to statutory requirements, receives tuition from another public school corporation for nonresident pupils shall, within thirty days after receiving such warrant on the treasurer of state, refund to the public school corporation paying such tuition an amount for each such nonresident pupil determined as follows:

1. The amount so received from the treasurer of state for teacher units in grades one to eight inclusive, and kindergarten, shall be divided by the total average daily attendance in such grades for the school year for which such teacher units were fixed. The result so obtained shall constitute the amount of refund for each pupil in such grades for whom tuition was received for such school year.

2. The amount so received from the treasurer of state for teacher units in grades nine to twelve inclusive shall be divided by the total average daily attendance in such grades for the school year for which such teacher units were fixed. The result so obtained shall constitute the amount of refund for each pupil in such grades for whom tuition was received for such school year.

3. Provided that if tuition was paid for any such pupil for less than the full school year the amount of refund shall bear the same proportion to the amount so determined as the period for which tuition was paid bears to the full school year. [47GA, ch 126,§8.]

4283.10 Rules and regulations. The superintendent of public instruction is hereby authorized to adopt such rules and regulations, consistent with the provisions of this chapter, as are necessary and proper for the administration thereof. [47GA, ch 126,§9.]

Constitutionality, 47GA, ch 126,§10

CHAPTER 215.2

REIMBURSEMENT OF SCHOOL DISTRICTS FOR LOSS OF TAXES

4283.11 Reimbursement—by whom computed.
4283.12 Basis of computation—limitation.
4283.13 Certification of amount.
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4283.17 Commission to prepare forms.

4283.11 Reimbursement — by whom computed. When unplatted lands within the boundaries of a school district are owned by the government of the United States, by the state, by a county, or by a municipal corporation located wholly outside said school district, and such lands have been removed from taxation for school purposes, said school district shall be reimbursed, as hereinafter provided, in an amount which shall be computed by the county board of supervisors in the county in which such lands are located. [C31,§4283-c9; C35, §4283-e1.]

Referred to in §§4283.12, 4283.13

4283.12 Basis of computation—limitation. The computation provided for in section 4283.11 shall be made on the basis of the proportion that the assessable value of the total number of acres owned by the government of the United States, by the state, by the county, or by the municipal corporation, as the case may be, in such school

district bears to the assessable value of the total number of acres in said school district. The average assessable value per acre of the lands so owned within the school district shall, for the purposes of the computation provided for in this chapter, not exceed the average assessable value per acre of the taxable lands in said district. [C31,§4283-c10; C35,§4283-e2.]

Referred to in §4283.13

4283.13 Certification of amount. When the county board of supervisors shall have computed the amount due a school district, as provided in sections 4283.11 and 4283.12, it shall forthwith certify the same to the county auditor of the proper county or to the secretary of the executive council, if the lands upon which computed belong to the government of the United States or to the state, or to the council of the proper municipal corporation, if they belong to a municipal corporation. [C35,§4283-e3.]

Referred to in §4283.14

4283.14 Payment to district. Upon receipt of the certificate provided for in section 4283.13, it shall become the duty of the council of such municipal corporation or the county auditor of such county, as the case may be, to cause a warrant in said amount to be drawn on the general fund of such county or such municipal corporation and delivered to the secretary of said school district.

When the computed amount is based upon lands belonging to the state or to the government of the United States, as provided herein, it shall then become the duty of the secretary of the executive council of the state to certify the amount to the state comptroller, who shall draw his warrant to the secretary of said school district and the treasurer of state shall pay the same from any funds of the state not otherwise appropriated.

If the computed reimbursement to a school district on state or government owned land within the district is not sufficient to cover the tuition such district is required to pay because of children of employees of the state or federal government who reside on such land and attend a public school outside the district in which such land is located, then the county board of supervisors shall add to the computed reimbursement to such district the difference between the computed reimbursement and the tuition such district is required by law to pay because of the children of such employees, and certify the total to the secretary of the executive council for payment by the state as provided by law. [C31,§§4283-c3,-c12; C35,§4283-e4.]

4283.15 Secretary to file statement. It shall be the duty of the secretary of said school district when certifying the taxes to file a certified statement with the county auditor of the proper county showing the amount of such tax-free land, its description, and the branch of government by which owned.

It shall also be the duty of the secretary of such school district at the time of certifying the taxes to file with the county auditor a certified statement showing the names of employees of the state or federal government who live on state or government owned land within the district whose children attend a public school outside the home district as provided by law, by whom employed, the capacity of their employment, the names of their children for whom tuition is to be paid, the name of the outside school district in which their children attend, the total period of attendance, and the amount of tuition the district is required to pay for each of such children. [C31,§4283-c3; C35, §4283-e5.]

4283.16 Auditor to deduct reimbursement. When levying the school tax certified by the secretary of the school board against the taxable property of such school district, the county auditor shall deduct therefrom the amount computed by the county board of supervisors and levy the remainder against the taxable property of said district. [C31,§4283-c11; C35,§4283-e6.]

4283.17 Commission to prepare forms. The forms necessary for carrying out the purposes of this chapter shall be prepared by the state tax commission. [C35,§4283-e7; 48GA, ch 106, §1.]

CHAPTER 216

SOCIETIES AND FRATERNITIES

4284 Secret societies and fraternities.
4285 Enforcement.
4286 Suspension or dismissal.
4287 "Rushing" prohibited.

4284 Secret societies and fraternities. It shall be unlawful for any pupil, registered as such, and attending any public high school, district, primary, or graded school, which is partially or wholly maintained by public funds, to join, become a member of, or to solicit any other pupil of any such school to join, or become a member of, any fraternity or society wholly or partially formed from the membership of pupils attending any such schools, or to take part in the organization or formation of any such fraternity or society, except such societies or associations as are sanctioned by the directors of such schools. [S13,§2782-a; C24, 27, 31, 35,§4284.]

Referred to in §§4285, 4286

4285 Enforcement. The directors of all schools shall enforce the provisions of section 4284 and shall have full power and authority to make, adopt, and modify all rules and regulations which, in their judgment and discretion, may be necessary for the proper governing of

such schools and enforcing all the provisions of section 4284. [S13,§2782-b; C24, 27, 31, 35, §4285.]

4286 Suspension or dismissal. The directors of such schools shall have full power and authority, pursuant to the adoption of such rules and regulations made and adopted by them, to suspend or dismiss any pupil or pupils of such schools therefrom, or to prevent them, or any of them, from graduating or participating in school honors when, after investigation, in the judgment of such directors, or a majority of them, such pupil or pupils are guilty of violating any of the provisions of section 4284, or are guilty of violating any rule, rules, or regulations adopted by such directors for the purpose of governing such schools or enforcing said section. [S13,§2782-c; C24, 27, 31, 35,§4286.]

4287 "Rushing" prohibited. No person shall go upon school grounds or enter any school building for the purpose of "rushing" or soliciting, while there, any pupil of such school to join any fraternity, society, or organization outside of said school. Persons violating the provisions of this section shall be fined not less than two dollars nor more than ten dollars, and on failure to pay such fine shall be imprisoned in the county jail for not more than ten days. Fines collected shall be paid to the county treasurer, and be by him added to the school fund of the district in which the offense was committed. [S13,§2782-d; C24, 27, 31, 35,§4287.]

CHAPTER 217

EVENING SCHOOLS

4288 Evening schools authorized.
4289 When establishment mandatory.
4290 Supervision—who admitted.

4288 Evening schools authorized. The board of any school corporation may establish and maintain public evening schools as a branch of the public schools when deemed advisable for the public convenience and welfare. [C24, 27, 31, 35,§4288.]

Additional provision, §4268

4289 When establishment mandatory. When ten or more persons over sixteen years of age residing in any school corporation shall, in writing, express a desire for instruction in the common branches at an evening school, the school board shall establish and maintain an evening school for such instruction for not less than two hours each evening for at least two evenings each week during the period of not less than three months of each school year. [C24, 27, 31, 35,§4289.]

4290 Supervision—who admitted. If such evening school is a branch of a city or town school, the same shall be under the supervision of the superintendent of such city or town school; if not, the same shall be under the supervision of the county superintendent. Such evening school shall be available to all persons over sixteen years of age who for any cause are unable to attend the public day schools of such school corporation. [C24, 27, 31, 35,§4290.]

CHAPTER 218

PART-TIME SCHOOLS

4291 Authorization.
4292 Support.
4293 Standards—time of instruction.
4294 District reimbursed.
4295 Powers state vocational board.
4296 Violations.
4297 Enforcement.

4291 Authorization. The board of directors in any independent school district situated in whole or in part in any city having a population of twelve thousand or over, in which there shall reside or be employed, or both, fifteen or more children over fourteen years of age and under sixteen years of age, who are not in regular attendance in a full-time day school and who have not graduated from a four-year approved high school, shall establish and maintain part-time schools, departments, or classes for such children. In districts situated in whole or in part in cities having less than twelve thousand population, the board may establish and maintain such schools. When such part-time schools have been established, all persons having custody of such children shall cause them to attend the same. [C24, 27, 31, 35,§4291.]

4292 Support. The board of directors may raise and expend money for the support of such part-time schools, departments, or classes in the same manner in which it is authorized to raise and expend funds for other school purposes [C24, 27, 31, 35,§4292.]

4293 Standards—time of instruction. Such part-time schools, departments, or classes, for the attendance of children over fourteen and under sixteen years of age, shall be organized in accordance with standards established by the state board for vocational education, and shall provide for not less than eight hours of instruction per week during the length of term for which public schools are established in the district. Such part-time schools, departments, or classes shall be held between the hours of

eight o'clock a. m. and six o'clock p. m. [C24, 27, 31, 35,§4293.]

Board vocational education, ch 191

4294 District reimbursed. Whenever any such part-time school or class shall have been approved by the state board for vocational education, the board of directors shall be entitled to reimbursement on account of expenditure made for the salaries of teachers in such part-time schools, departments, or classes from any federal and state funds appropriated in aid of vocational education, as provided in the statutes governing such appropriations. [C24, 27, 31, 35, §4294.]

4295 Powers state vocational board. The state board for vocational education is hereby authorized to fix standards for the establishment of part-time schools, departments, or classes; to fix the requirements of teachers, and to approve courses of study for such part-time schools, departments, or classes. [C24, 27, 31, 35, §4295.]

4296 Violations. When such part-time school shall have been established, any parent or person in charge of such minor as defined in this chapter who shall violate the provisions of this chapter, shall be punished by a fine of not less than ten dollars nor more than fifty dollars, or any person unlawfully employing any such minor shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars, or be imprisoned in the county jail not to exceed thirty days. [C24, 27, 31, 35,§4296.]

4297 Enforcement. The enforcement of this chapter shall rest with the school board in the district in which such part-time school, department, or class shall have been established, and the state department of public instruction through its inspectors and the state board of vocational education through its supervisors of vocational education, in conjunction with the county superintendent of schools, are empowered to require enforcement of the same on the part of school boards. [C24, 27, 31, 35,§4297.]

CHAPTER 219

APPEAL FROM DECISIONS OF BOARDS OF DIRECTORS

4298 Appeal to county superintendent.
4299 Notice—transcript—hearing.
4300 Hearing—shorthand reporter—decision.
4301 Witnesses—fees—collection.
4302 Appeal to state superintendent.
4303 Money judgment.

4298 Appeal to county superintendent. Any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may, within thirty days after the rendition of such decision or the making of such order, appeal therefrom to the county superintendent of the proper county; the basis of the proceedings shall be an affidavit filed with the county superintendent by the party aggrieved within the time for taking the appeal, which affidavit shall set forth any error complained of in a plain and concise manner. [R60, §§2133–2135; C73,§§1829–1831; C97,§2818; C24, 27, 31, 35,§4298.]

4299 Notice — transcript — hearing. The county superintendent shall, within five days after the filing of such affidavit in his office, notify the secretary of the proper school corporation in writing of the taking of such appeal, who shall, within ten days after being thus notified, file in the office of the county superintendent a complete certified transcript of the record and proceedings relating to the decision appealed from. Thereupon, the county superintendent shall notify in writing all persons adversely interested of the time when and place where the matter of appeal will be heard by him. [R60,§§2136, 2137; C73,§§1832–1834; C97,§2819; C24, 27, 31, 35,§4299.]

4300 Hearing — shorthand reporter — decision. At the time fixed for the hearing, he shall hear testimony for either party, and may cause the same to be taken down and transcribed by a shorthand reporter, whose fees shall be fixed by the county superintendent and be taxed as a part of the costs in the case, and he shall make such decision as may be just and equitable, which shall be final unless appealed from as hereinafter provided. [C97,§2819; C24, 27, 31, 35,§4300.]

4301 Witnesses — fees — collection. The county superintendent in all matters triable before him shall have power to issue subpoenas for witnesses, which may be served by any peace officer, compel the attendance of those thus served, and the giving of evidence by them, in the same manner and to the same extent as the district court may do, and such witnesses and officers may be allowed the same compensation as is paid for like attendance or service in such court, which shall be paid out of the general fund of the proper school corporation, upon the certificate of the superintendent to and warrant of the secretary upon the treasurer; but if the superintendent is of the opinion that the proceedings were instituted without reasonable cause therefor, or if, in case of an appeal, it shall not be sustained, he shall enter such findings in the record, and tax all costs to the party responsible therefor. A transcript thereof shall be filed in the office of the clerk of the district court and a judgment entered thereon by him, which shall be collected as other judgments. [C97,§2821; C24, 27, 31, 35,§4301.]

Contempts, ch 536
Fees for serving subpoenas, §§5191, 10637
Witnesses, §11326 et seq.

4302 Appeal to state superintendent. An appeal may be taken from the decision of the county superintendent to the superintendent of public instruction in the same manner as provided in this chapter for taking appeals from

the board of a school corporation to the county superintendent, as nearly as applicable, except that thirty days notice of the appeal shall be given by the appellant to the county superintendent, and also to the adverse party. The decision when made shall be final. [R60,§2139; C73,§1835; C97,§2820; C24, 27, 31, 35,§4302.]

C97,§2820, editorially divided

4303 Money judgment. Nothing in this chapter shall be so construed as to authorize either the county or state superintendent to render judgment for money; neither shall they be allowed any other compensation than is now allowed by law. All necessary postage must first be paid by the party aggrieved. [R60,§2140; C73,§1836; C97,§2820; C24, 27, 31, 35,§4303.]

CHAPTER 220

PRESIDENT, SECRETARY, AND TREASURER

4304 President—duties.
4305 Bonds of secretary and treasurer.
4305.1 Cost of bond.
4306 Oath.
4307 Action on bond.
4308 Duties of secretary.
4309 Monthly receipts, disbursements, and balances.
4310 Warrants.
4312 School census.
4313 Reports by secretary.
4314 Officers reported.
4316 Duties of treasurer—payment of warrants.
4317 General and schoolhouse funds.
4320 Financial statement.
4321 Annual report.

4304 President—duties. The president of the board of directors shall preside at all of its meetings, sign all warrants and drafts, respectively, drawn upon the county treasurer for money apportioned and taxes collected and belonging to his school corporation, and all orders on the treasurer drawn as provided by law, sign all contracts made by the board, and appear in behalf of his corporation in all actions brought by or against it, unless individually a party, in which case this duty shall be performed by the secretary. [C51,§§1122, 1123, 1125; R60,§§2039, 2040; C73,§§1739, 1740; C97,§2759; C24, 27, 31, 35,§4304.]

4305 Bonds of secretary and treasurer. The secretary and treasurer shall each give bond to the school corporation in such penalty as the board may require, and with sureties to be approved by it, which bond shall be filed with the president, conditioned for the faithful performance of his official duties, but in no case less than five hundred dollars. [C51,§1144; R60, §2037; C73,§1731; C97,§2760; C24, 27, 31, 35, §4305.]

Referred to in §§4216.28, 4222
C97,§2760, editorially divided

4305.1 Cost of bond. If the bond of an association or corporation as surety is furnished, the reasonable cost of such bond may be paid by the school corporation. [C27, 31, 35,§4305-a1.]

4306 Oath. Each shall take the oath required of civil officers, which shall be indorsed upon the bond, and shall complete his qualification within ten days. [C97,§2760; C24, 27, 31, 35,§4306.]

Oath of office, §1054

4307 Action on bond. In case of a breach of the bond, the president shall bring action thereon in the name of the school corporation. [C51,§1144; R60,§2037; C73,§1731; C97,§2760; C24, 27, 31, 35,§4307.]

4308 Duties of secretary. The secretary shall:

1. *Preservation of records.* File and preserve copies of all reports made to the county superintendent, and all papers transmitted to him pertaining to the business of the corporation.

2. *Minutes.* Keep a complete record of all the proceedings of the meetings of the board and of all regular or special elections in the corporation in separate books.

3. *Account with treasurer.* Keep an accurate, separate account of each fund with the treasurer, charge him with all warrants and drafts drawn in his favor, and credit him with all orders drawn on each fund.

4. *Claims.* Keep an accurate account of all expenses incurred by the corporation, and present the same to the board for audit and payment.

5. *Poll book.* Record at all school elections, in a book provided for that purpose, the names of all persons voting thereat, the number of votes cast for each candidate, and for and against each proposition submitted. [C51,§§1126, 1128; R60,§§2041, 2042; C73,§§1741, 1743; C97, §2761; S13,§2761; C24, 27, 31, 35,§4308.]

S13,§2761, editorially divided

4309 Monthly receipts, disbursements, and balances. The secretary of each independent town or city district shall file monthly, on or before the tenth day of each month, with the board of directors, a complete statement of all receipts and disbursements from the various funds during the preceding month, and also the balance remaining on hand in the various funds at the close of the period covered by said statement, which monthly statements shall be open to public inspection. [S13,§2761; C24, 27, 31, 35,§4309.]

4310 Warrants. He shall countersign all warrants and drafts upon the county treasurer drawn or signed by the president; draw each order on the treasurer, specify the fund on which it is drawn and the use for which the money is appropriated; countersign and keep a register of the same, showing the number, date, to whom drawn, the fund upon which it is drawn, the purpose and the amount; and at each regu-

lar annual meeting furnish the board with a copy of the same. [C51,§§1122, 1123, 1126; R60, §§2039, 2041, 2061; C73,§§1739, 1741, 1782; C97, §2762; S13,§2762; C24, 27, 31, 35,§4310.]

4311 Rep. by 45GA, ch 53,§34

4312 School census. He shall, between the first day of June and the first day of July of each even-numbered year, enter in a book prepared by the superintendent of public instruction for that purpose the following, taken as of June 1:

1. The name and post-office address of parents and guardians in his district with the name, sex, and age of all children or wards residing in the district who are between five and twenty-one years of age;
2. The name, age, and post-office address of every person resident of the district without regard to age so blind as to be unable to acquire an education in the common schools;
3. The name, age, and post-office address of every person between the ages of five and thirty-five whose faculties with respect to speech and hearing are so deficient as to prevent him from obtaining an education in the common schools; and
4. The name, sex, age, and disability of every physically handicapped or feeble-minded person of school age, with the name and post-office address of the parent or guardian. [C97,§2764; S13,§2764; C24, 27, 31, 35,§4312; 47GA, ch 121, §2.]

4313 Reports by secretary. He shall notify the county superintendent when each school is to begin and its length of term, and, ten days after the regular July meeting in each year, file with the county superintendent a report, on blanks prepared for that purpose by the superintendent of public instruction, showing:

1. The number, as shown by the last preceding school census, of persons of school age in the corporation, distinguishing the sexes.
2. The number of schools and branches taught.
3. The number of scholars enrolled and the average attendance in each school.
4. The number of teachers employed and the average compensation paid per month, distinguishing the sexes.
5. The length of school in days.
6. The average cost of tuition per month for each scholar.
7. The textbooks used.
8. The number of volumes in library.
9. The value of apparatus belonging to the corporation.
10. The number of schoolhouses and their estimated value.
11. The name, age, and post-office address of each person resident of the corporation, without regard to age, so blind as to be unable to acquire an education in the common schools, and of each person between the ages of five and thirty-five whose faculties with respect to speech and hearing are so deficient as to prevent him from obtaining an education in the common schools, and the name, sex, age, and disability of every physically handicapped or feeble-minded person of school age, with the name and post-office address of the parent or guardian. [C51,§1127; R60,§2046; C73, §§1744, 1745; C97,§2765; S13,§2765; C24, 27, 31, 35, §4313; 47GA, ch 121,§3.]

4314 Officers reported. He shall report to the county superintendent, auditor, and treasurer the name and post-office address of the president, treasurer, and secretary of the board as soon as practicable after the qualification of each. [C73,§1736; C97,§2766; C24, 27, 31, 35, §4314.]

4315 Rep. by 45GA, ch 12,§4

4316 Duties of treasurer—payment of warrants. The treasurer shall receive all moneys belonging to the corporation, pay the same out only upon the order of the president countersigned by the secretary, keeping an accurate account of all receipts and expenditures in a book provided for that purpose. He shall register all orders drawn and reported to him by the secretary, showing the number, date, to whom drawn, the fund upon which drawn, the purpose and amount. [C51,§§1138–1140; R60, §§2048–2050; C73,§§1747–1750; C97,§2768; S13, §2768; C24, 27, 31, 35,§4316.]

4317 General and schoolhouse funds. The money collected by a tax authorized by the electors or the proceeds of the sale of bonds authorized by law or the proceeds of a tax estimated and certified by the board for the purpose of paying interest and principal on lawful bonded indebtedness or for the purchase of sites as authorized by law, shall be called the schoolhouse fund and, except when authorized by the electors, may be used only for the purpose for which originally authorized or certified. All other moneys received for any other purpose shall be called the general fund. The treasurer shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied. [C51,§1139; R60,§2049; C73, §1748; C97,§2768; C24, 27, 31, 35,§4317.]

Deposits in general, ch 352.1
Library fund, §4322

4318 Rep. by 45ExGA, ch 6

See §1171.11 et seq.

4319 Rep. by 44GA, ch 2

4320 Financial statement. He shall render a statement of the finances of the corporation whenever required by the board, and his books shall always be open for inspection. [C51, §1141; R60,§2051; C73,§1751; C97,§2769; S13, §2769; C24, 27, 31, 35,§4320.]

S13,§2769, editorially divided

4321 Annual report. He shall make an annual report to the board at its regular July meeting, which shall show the amount of the general fund and the schoolhouse fund held over, received, paid out, and on hand, the several funds to be separately stated, and he shall immediately file a copy of this report with the county superintendent. [C97,§2769; S13,§2769; C24, 27, 31, 35,§4321.]

CHAPTER 221

COMMON SCHOOL LIBRARIES

4322 Library fund.
4323 Purchase of books—distribution.
4323.1 Closed schools—funds used.
4324 Lists of books.
4325 Record of books.
4326 Librarian.
4327 Custody of library.
4328 Board to supervise.

4322 Library fund. The auditor of each county in this state shall withhold annually from the money received from the apportionment for the several school districts, fifteen cents for each person of school age residing in each school corporation, as shown by the annual report of the secretary, for the purchase of books, as hereinafter provided. [S13,§2823-n; C24, 27, 31, 35,§4322.]

Referred to in §§4323, 4323.1

4323 Purchase of books—distribution. Between the first Monday of July and the first day of October in each year, the county board of education shall expend all money withheld by the auditor, as provided in section 4322, in the purchase of books for the use of the school district, and shall distribute the books thus selected to the librarians among the several school districts in the proportion that the number of persons of school age living in the school district bears to the number of such persons living in the county. Directors of said school districts shall upon approval by the county superintendent be permitted to make temporary and permanent exchanges of books between such school districts. [S13,§2823-o; C24, 27, 31, 35, §4323; 48GA, ch 107,§1.]

4323.1 Closed schools—funds used. The county board of education is hereby authorized and empowered to expend any or all of the library fund created by section 4322, to be apportioned to schools that have been or may be closed hereafter for library books to be loaned to the schools of the county that remain open as directed by the county board of education. The county superintendent of schools shall be the custodian of such books and shall keep a record of them in a book provided for that purpose. [48GA, ch 107,§2.]

4324 Lists of books. The state board of educational examiners shall prepare annually lists of books suitable for use in school district libraries, and furnish copies of such lists to each county superintendent and to each member of each county board of education. [S13,§2823-p; C24, 27, 31, 35,§4324.]

4325 Record of books. It shall be the duty of each secretary to keep in a record book, furnished by the board of directors, a complete record of the books purchased and distributed by him. [S13,§2823-q; C24, 27, 31, 35,§4325.]

4326 Librarian. Unless the board of directors shall elect some other person, the secretary in independent districts and director in subdistricts in school townships shall act as librarian and shall receive and have the care and custody of the books, and shall loan them to teachers, pupils, and other residents of the district, in accordance with the rules and regulations prescribed by the state board of educational examiners and board of directors. Each librarian shall keep a complete record of the books in a record book furnished by the board of directors. [S13,§2823-r; C24, 27, 31, 35,§4326.]

S13,§2823-r, editorially divided

4327 Custody of library. During the periods that the school is in session the library shall be placed in the schoolhouse, and the teacher shall be responsible to the district for its proper care and protection. [S13,§2823-r; C24, 27, 31, 35,§4327.]

4328 Board to supervise. The board of directors shall have supervision of all books, and shall make an equitable distribution thereof among the schools of the corporation. [S13, §2823-r; C24, 27, 31, 35,§4328.]

CHAPTER 222

STANDARDIZATION AND STATE AID

4329 Standard schools—maintenance.
4330 Minimum requirements.
4331 County superintendent—reports.
4332 State aid.
4333 Minimum standard.
4334 Door plate.
4335 State aid—how obtained and expended.

4329 Standard schools—maintenance. Any school located in a district, other than a city independent or consolidated district, not maintaining a high school, which has complied with the provisions of this chapter, shall be known as a standard school. Every standard school, before it may be designated as such, shall have been maintained for eight school months during

the previous year. It shall during the previous school year:

1. Have a suitable schoolhouse, grounds, and outbuildings in proper condition and repair.
2. Be equipped with needful apparatus, textbooks, supplies, and an adequate system of heating and ventilation.
3. Have done efficient work.
4. Have complied with such requirements as shall be specified by the superintendent of public instruction. [C24, 27, 31, 35,§4329.]

4330 Minimum requirements. The superintendent of public instruction shall prescribe for standard schools the minimum requirements of teaching, general equipment, heating, ventilation, lighting, seating, water supply, library, care of grounds, fire protection, and such other requirements as he may deem necessary. [C24, 27, 31, 35,§4330.]

Experience in teaching recognized, §4337

4331 County superintendent—reports. On or before June 30 of each year, and at such other times as the superintendent of public instruction may direct, the county superintendent of schools shall make reports and furnish such other data in regard to said schools as the department of public instruction may desire on blanks to be furnished by the superintendent of public instruction. [C24, 27, 31, 35,§4331.]

4332 State aid. State aid shall be given to rural districts maintaining one or more standard schools to the amount of six dollars for each pupil who has attended said schools in said district at least six months of the previous year. [C24, 27, 31, 35,§4332.]

4333 Minimum standard. No school shall be deemed a standard school unless the teacher is the holder of a first-class county certificate or its equivalent, has contracted for the entire school year, and unless such school shall have maintained an average daily attendance of at least ten pupils, during the previous school year. [C24, 27, 31, 35,§4333.]

Experience of teacher recognized, §4337

4334 Door plate. Each standard school shall be furnished by the superintendent of public instruction with a suitable door plate or mark of identification, and the expense of the same shall be paid from the fund created for the promotion of standard schools. [C24, 27, 31, 35, §4334.]

4335 State aid—how obtained and expended. Upon receiving from the county superintendent a satisfactory report showing that any rural school has fulfilled the requirements of a standard school, the superintendent of public instruction shall issue a requisition upon the state comptroller for the amount due any rural school district entitled to state aid for the school year just past; whereupon the comptroller shall draw a warrant on the treasurer of state payable to the secretary of the school corporation entitled thereto and forward to the secretary of said school corporation, who shall cause the same to be deposited with the other funds of the district. The money shall be expended in the district or districts maintaining standard schools in amounts proportionate to the number of pupils upon which state aid was granted. The money shall be expended with the approval of the county superintendent in making improvements and in purchasing necessary apparatus, but no part thereof shall be paid to any teacher for compensation. [C24, 27, 31, 35,§4335.]

CHAPTER 223

TEACHERS

4336 Qualifications—compensation prohibited.
4337 Experience in teaching recognized.
4338 State aid and tuition.
4339 Daily register.
4340 Reports.
4341 Minimum teachers' wage.
4341.1 Temporary suspension.
4345 Pension system.
4346 Fund.
4347 Management.

4336 Qualifications — compensation prohibited. No person shall be employed as a teacher in a common school which is to receive its distributive share of the school fund without having a certificate of qualification given by the county superintendent of the county in which the school is situated, or a certificate or diploma issued by some other officer duly authorized by law.

No compensation shall be recovered by a teacher for services rendered while without such certificate or diploma. [R60,§2062; C73,§1758; C97,§2788; C24, 27, 31, 35,§4336.]

4337 Experience in teaching recognized. No regulations or orders by the state superintendent of public instruction or the board of educational examiners with reference to the qualifications of teachers, in regard to having taken certain high school or collegiate courses or teachers training courses, shall be retroactive so as to apply to any teacher who has had at least three years successful experience in teaching; and no teacher once approved for teaching in any kind of school shall be prevented by such regulations or orders from continuing to teach in the same kind of school for which he has previously been approved; provided, however, that this section shall not be construed as limiting the duties or powers of any school board in the selection of teachers, or in the dismissal of teachers for inefficiency or for any legal cause. [C24, 27, 31, 35,§4337.]

Referred to in §4338

4338 State aid and tuition. No school shall be deprived of its right to be approved for state aid or approved for tuition by reason of the

employment of any teacher as authorized under section 4337. [C24, 27, 31, 35,§4338.]

4339 Daily register. Each teacher shall keep a daily register which shall correctly exhibit the name or number of the school, the district and county in which it is located, the day of the week, month, year, and the name, age, and attendance of each scholar, and the branches taught; and when scholars reside in different districts separate registers shall be kept for each district, and a certified copy of the register shall, immediately at the close of the school, be filed by the teacher in the office of the secretary of the board. [R60,§2062; C73,§§1759, 1760; C97,2789; C24, 27, 31, 35,§4339.]

C97, §2789, editorially divided

4340 Reports. The teacher shall file with the county superintendent such reports and in such manner as he may require. [C97,§2789; C24, 27, 31, 35,§4340.]

4341 Minimum teachers' wage. All teachers in the public schools of this state shall be paid for their services a minimum wage of not less than fifty dollars per month; provided, that nothing herein shall be construed as limiting the right of a school board to make a contract for a higher wage than herein specified as a minimum. [S13,§2778-a; C24, 27, 31, 35, §4341.]

4341.1 Temporary suspension. The county board of education may temporarily suspend the provisions hereof if, in its judgment, the financial conditions in any district warrant such action. [C35,§4341-e1.]

4342 to 4344, inc. Rep. by 45GA, ch 65,§3

4345 Pension system. Any independent school district located in whole or in part within a city having a population of twenty-five thousand one hundred or more may establish a pension and annuity retirement system for the public school teachers of such district provided said system, in cities having a population less than seventy-five thousand, be ratified by a vote of the people at a general election. [C24, 27, 31, 35,§4345.]

4346 Fund. The fund for such retirement system shall be created from the following sources:

1. From the proceeds of an assessment of teachers in the school district not exceeding one percent of their salaries in a given school year, or such greater percentage as the board of directors of such school district may authorize and a majority of such teachers shall, at the time of such authorization by the board, agree to pay;

2. From the proceeds of an annual tax levy, not exceeding the amount produced in the current school year by the assessment of teachers as provided in the preceding paragraph of this section;

3. From the interest on any permanent fund which may be created by gift, bequest, or otherwise. [C24, 27, 31, 35,§4346.]

4347 Management. The board of directors of the independent school district shall constitute the board of trustees and shall formulate the plan of the retirement; and shall make all necessary rules and regulations for the operation of said retirement system. [C24, 27, 31, 35, §4347.]

CHAPTER 224

INSTRUCTION OF DEAF

4348 Instructors authorized.
4349 State aid—amount.
4350 State board of education to supervise.
4351 State aid—payment.
4352 Appropriation.

4348 Instructors authorized. Any school corporation within the state having residing therein deaf children of school age may provide one or more special instructors for such deaf children, the instruction given under such special instructors to be substantially equivalent to that given other children of corresponding age in the graded schools. [C24, 27, 31, 35, §4348.]

4349 State aid—amount. To any school corporation providing such instruction and complying with all of the provisions of this chapter there shall be granted and paid as hereinafter provided state aid in an amount to be computed at twenty dollars for each month that each child not more than sixteen years of age is instructed under the provisions of this chapter.

No child more than sixteen years of age shall be admitted to such instruction. [C24, 27, 31, 35, §4349.]

4350 State board of education to supervise. When any school corporation shall elect to proceed under the provisions of this chapter, it shall, through its proper officers, communicate that fact to the state board of education, and the state board of education shall have general supervision of all matters arising under this chapter, and no instructor shall be appointed hereunder and no courses or methods of instruction shall be installed hereunder without the approval of such state board of education. [C24, 27, 31, 35,§4350.]

4351 State aid—payment. The state aid herein provided for shall be paid annually at the end of the school year upon properly authenti-

cated and verified claim in form as may be required by the state board of education, and when such claim is approved by the state board of education the state comptroller shall draw warrant accordingly. [C24, 27, 31, 35,§4351.]

4352 Appropriation. For the purpose of paying the state aid granted under this chapter there is hereby appropriated out of any funds in the state treasury not otherwise appropriated a sum sufficient therefor. [C24, 27, 31, 35,§4352.]

CHAPTER 225

INDEBTEDNESS OF SCHOOL DISTRICTS

Referred to in §6251

4353 Indebtedness authorized.
4354 Petition for election.
4355 Election called.
4356 Notice—ballots.
4357 Date of election.
4358 Bonds.

4353 Indebtedness authorized. Any school corporation shall be allowed to become indebted for the purpose of building and furnishing a schoolhouse or schoolhouses and additions thereto, gymnasium, teachers' or superintendent's home or homes, and procuring a site or sites therefor, or for the purpose of purchasing land to add to a site already owned, to an amount not to exceed in the aggregate, including all other indebtedness, five percent of the actual value of the taxable property within such school corporation, such value to be ascertained by the last county tax list previous to the incurring of such indebtedness, anything contained in section 6238 to the contrary notwithstanding. [S13,§2820-d1; C24, 27, 31, 35,§4353.]

4354 Petition for election. Before such indebtedness can be contracted in excess of one and one-quarter percent of the actual value of the taxable property, a petition signed by a number equal to twenty-five percent of those voting at the last regular school election shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued and the purpose for which the indebtedness is to be created, and that the necessary schoolhouse or schoolhouses cannot be built and equipped, or that sufficient land cannot be purchased to add to a site already owned, within the limit of one and one-quarter percent of the valuation. [S13, §2820-d2; C24, 27, 31, 35,§4354.]

4355. Election called. The president of the board of directors on receipt of such petition shall, within ten days, call a meeting of the board which shall call such election, fixing the time and place thereof, which may be at the time and place of holding the regular school election. [S13,§2820-d3; C24, 27, 31, 35,§4355.]

4356 Notice—ballots. Notice of such election shall be given by publication once each week for four weeks in some newspaper published in the district, or, if there is none, in some newspaper published in the county and of general circulation in the district. The notice shall state the date of the election, the hours of opening and closing the polls and the exact location thereof, and the questions to be submitted, and shall be in lieu of any other notice, any other statute to the contrary notwithstanding. At such election the ballot shall be prepared and used in substantially the form for submitting special questions at general elections. [S13, §2820-d3; C24, 27, 31, 35,§4356.]

Form of ballot, §761 et seq.; also §5265

4357 Date of election. The election shall be held on a day not less than five nor more than twenty days after the last publication of notice. [C24, 27, 31, 35,§4357.]

4358 Bonds. If a majority of the qualified voters voting at such election vote in favor of the issuance of such bonds, the board of directors shall issue the same and make provision for the payment thereof. [S13,§2820-d4; C24, 27, 31, 35,§4358.]

Vote required to authorize bonds, §1171.18

CHAPTER 226

SCHOOLHOUSES AND SCHOOLHOUSE SITES

Public square transferred for school purposes, §§6308, 6309

4359 Location.
4360 Two-acre limitation.
4361 Five-acre limitation.
4362 Ten-acre limitation.
4363 Tax.
4364 Condemnation.
4370 Erection or repair of schoolhouse.
4370.1 Emergency repairs.
4371 Uses for other than school purposes.
4372 Compensation.
4373 Use forbidden.
4374 Renting schoolroom.
4377 Fence around schoolhouse sites.
4378 Barbed wire.
4379 Reversion of schoolhouse site.
4380 Appraisers.
4381 Notice.
4382 Appraisement.
4383 Public sale.
4384 Sale of improvements.
4385 Sale of unnecessary schoolhouse sites.
SALE OR LEASE IN CERTAIN DISTRICTS
4385.1 Power to sell or lease.
4385.2 Advertisement for bids.
4385.3 Acceptance of bids.
4385.4 Rule of construction.

4359 Location. The board of each school corporation may fix the site for each schoolhouse, which shall be upon some public highway already established or procured by such board and not in any public park, and except in cities, towns, and villages, not less than thirty rods from the residence of any landowner who objects thereto.

In fixing such site, the board shall take into consideration the number of scholars residing in the various portions of the school corporation and the geographical location and convenience of any proposed site. [R60,§2037; C73,§§1724, 1825, 1826; C97,§§2773, 2814; S13, §§2773, 2814; C24, 27, 31, 35,§4359.]

4360 Two-acre limitation. Except as hereinafter provided, any school corporation may take and hold so much real estate as may be required for such site, for the location or construction thereon of schoolhouses, and the convenient use thereof, but not to exceed two acres exclusive of public highway. [C73,§1825; C97, §2814; S13,§2814; C24, 27, 31, 35,§4360.]

4361 Five-acre limitation. Any school corporation including a city, town, village, or city under special charter, may take and hold an area equal to two blocks exclusive of the street or highway, for a schoolhouse site, and not exceeding five acres for school playground or other purposes for each such site. [C97,§2814; S13,§2814; C24, 27, 31, 35,§4361.]

4362 Ten-acre limitation. Consolidated districts may take and hold not to exceed ten acres for any one site, and any school corporation may acquire additional ground by donation. [S13, §2814; C24, 27, 31, 35,§4362.]

4363 Tax. The directors in any independent district whose territory is composed wholly or in part of territory occupied by any city or city under special charter may, at their regular meeting in July, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in August, certify an amount not exceeding one mill to the board of supervisors, who shall levy the amount so certified, and the tax so levied shall be placed in the schoolhouse fund and used only for the purchase of sites in and for said school district. [C24, 27, 31, 35,§4363.]

4364 Condemnation. If the owner of real estate desired for any purpose for which any school may be authorized to take and hold real estate refuses to convey the same, or is dead or unknown or cannot be found, or if in the judgment of the board of directors of the corporation they cannot agree with such owner as to the price to be paid therefor, such real estate may be taken under condemnation proceedings in accordance with the provisions of chapter 366. [C73,§1827; C97,§2815; C24, 27, 31, 35,§4364; 48GA, ch 108,§1.]

4365 to 4369, inc. Rep. by 48GA, ch 108,§3
Pending litigation excepted, 48GA, ch 108, §4

4370 Erection or repair of schoolhouse. Before erecting a schoolhouse, the board of directors shall consult with the county superintendent as to the most approved plan for such building, and secure his approval of the plan submitted. Before any one-room schoolhouse shall be erected or repaired at a cost exceeding five hundred dollars, or before any schoolhouse containing more than one room shall be erected or repaired at a cost exceeding one thousand dollars, proposals therefor shall be invited by advertisement published once each week for two consecutive weeks in some newspaper published in the county in which the work is to be done, and the contract shall be let to the lowest responsible bidder but the board may reject any and all bids and advertise for new bids. After any bid is accepted, a written contract shall be entered into, and the contractor shall furnish bonds with sureties for the faithful performance of the contract. [R60,§2037; C73,§1723; C97,§2779; C24, 27, 31, 35,§4370.]

4370.1 Emergency repairs. When emergency repairs costing more than one thousand dollars are necessary in order to prevent the closing of any school, the provisions of the act with reference to advertising for bids shall not apply, and in that event the board may contract for such emergency repairs without advertising for bids; provided, however, that before such emergency repairs can be made to any schoolhouse, it shall be necessary to procure a certifi-

cate from the county superintendent that such emergency repairs are necessary to prevent the closing of such school. [C31, 35,§4370-c1.]

See §4370

4371 **Uses for other than school purposes.** The board of directors of any school corporation may authorize the use of any schoolhouse and its grounds within such corporation for the purpose of meetings of granges, lodges, agricultural societies, and similar rural secret orders and societies, and for election purposes, and for other meetings of public interest; provided that such use shall in no way interfere with school activities; such use to be for such compensation and upon such terms and conditions as may be fixed by said board for the proper protection of the schoolhouse and the property belonging therein, including that of pupils. [C24, 27, 31, 35,§4371.]

Schoolhouses as polling places, §742
37GA, ch 229, §1, editorially divided

4372 **Compensation.** Any compensation for such use shall be paid into the general fund and be expended in the upkeep and repair of such school property, and in purchasing supplies therefor. [C24, 27, 31, 35,§4372.]

4373 **Use forbidden.** If at any time the voters of such corporation at a regular election forbid such use of any such schoolhouse or grounds, the board shall not thereafter permit such use until the said action of such voters shall have been rescinded by the voters at a regular election, or at a special election called for that purpose. [C24, 27, 31, 35,§4373.]

4374 **Renting schoolroom.** The board may, when necessary, rent a room and employ a teacher, where there are ten children for whose accommodation there is no schoolhouse. [C73, §1725; C97,§2774; C24, 27, 31, 35,§4374.]

4375, 4376 Rep. by 45GA, ch 60,§7

4377 **Fence around schoolhouse sites.** Each board of directors in school districts where the school grounds adjoin cultivated or improved lands shall build and maintain a lawful fence between said grounds and cultivated or improved lands, and the owner of lands adjoining any such site shall have the right to connect the fence on his land with the fence around the school grounds, but he shall not be liable to contribute to the maintenance of such fence. [S13,§§2745-a,-b; C24, 27, 31, 35,§4377.]

Referred to in §4378
Lawful fence, §1846

4378 **Barbed wire.** No fence provided for in section 4377 shall be constructed of barbed wire, nor shall any barbed wire fence be placed within ten feet of any school grounds. Any person violating the provisions of this section shall be punished by a fine not exceeding twenty-five dollars. [C97,§2817; C24, 27, 31, 35,§4378.]

4379 **Reversion of schoolhouse site.** Any real estate owned by a school corporation, situated wholly outside of a city or town, and not adjacent thereto, and heretofore used as a schoolhouse site, and which, for a period of two years continuously has not been used for any school purpose, shall revert to the then owner of the tract from which the same was taken, provided that said owner of the tract last aforesaid shall, within the time hereinafter prescribed, pay the value thereof to such school corporation. [C73, §1828; C97,§2816; S13,§2816; C24, 27, 31, 35, §4379.]

Referred to in §4385
39GA, ch 183, §1, editorially divided

4380 **Appraisers.** In case the school corporation and said owner of the tract from which such school site was taken, do not agree as to the value of such site, the county superintendent of the county in which the greater part of such school corporation is situated, shall, on the written application of either party, appoint three disinterested voters of the county to appraise said site. [C97,§2816; S13,§2816; C24, 27, 31, 35, §4380.]

Referred to in §4385

4381 **Notice.** The county superintendent shall give notice to both parties of the time and place of making such appraisement, which notice shall be served in the same manner and for the same time as for the commencement of action in the district court. [C24, 27, 31, 35, §4381.]

Referred to in §4385
Time and manner of service, §§11059, 11060

4382 **Appraisement.** Such appraisers shall inspect the premises and, at the time and place designated in the notice, appraise said site in writing, which appraisement, after being duly verified, shall be filed with the county superintendent. [C24, 27, 31, 35,§4382.]

Referred to in §4385

4383 **Public sale.** If the owner of the tract from which said site was taken fails to pay the amount of such appraisement to such school corporation within twenty days after the filing of same with the county superintendent, the school corporation may sell said site to any other person at the appraised value, or may sell the same at public sale to the highest bidder. [C24, 27, 31, 35,§4383.]

Referred to in §4385

4384 **Sale of improvements.** If there are improvements on said site, the improvements may, at the request of either party, be appraised and sold separately. [C97,§2816; S13,§2816; C24, 27, 31, 35,§4384.]

Referred to in §4385

4385 **Sale of unnecessary schoolhouse sites.** Schoolhouses and school sites no longer necessary for school purposes, because of being located in consolidated school districts, may be sold immediately after the organization of such consolidated school districts, in the manner above provided.

During the use of such premises, no person owning a right of reversion shall have any interest in or control over the premises.

This and sections 4379 to 4384, inclusive, shall not apply to cases where schools have been temporarily closed by law on account of small attendance. [C73,§1828; C97,2816; S13,§2816; C24, 27, 31, 35,§4385.]

SALE OR LEASE IN CERTAIN DISTRICTS

4385.1 **Power to sell or lease.** The board of directors of an independent district composed wholly or in part of a city acting under a special charter and having a population of fifty thousand or more may lease, or by a unanimous vote pass a resolution to sell any schoolhouse, school site, or other property acquired for school purposes when in the opinion of said board such sale is for the benefit of the district. [C27, 31, 35,§4385-a1.]

Referred to in §4385.4

4385.2 **Advertisement for bids.** Before making a sale, the board shall advertise for bids for said property. Such advertisement shall definitely describe said property and be published by at least one insertion each week for two consecutive weeks in some newspaper having general circulation in the district. [C27, 31, 35,§4385-a2.]

Referred to in §4385.4

4385.3 **Acceptance of bids.** The board shall not, prior to two weeks after the said second publication, nor later than six months after said second publication, accept any bid. The board may accept only the best bid received prior to acceptance. The board may decline to sell if all the bids received are deemed inadequate. [C27, 31, 35,§4385-a3.]

Referred to in §4385.4

4385.4 **Rule of construction.** Sections 4385.1 to 4385.3, inclusive, shall be construed as independent of the power vested in the electors by section 4217, and as additional thereto. [C27, 31, 35,§4385-a4.]

CHAPTER 227

SCHOOL TAXES AND BONDS

4386 School taxes.
4387 Additional taxes.
4388 Transportation fund—tax for free textbooks.
4389 Taxes estimated in mills.
4390 Apportionment of taxes.
4391 Contract for use of library.
4393 Levy by board of supervisors.
4394 Special levies.
4395 General school levy.
4396 Apportionment of school funds.
4397 County auditor to report.
4398 Monthly payment of taxes.
4399 Schoolhouse tax.
4400 Payment of judgment.
4401 Judgment tax.
4402 Judgment levy.
4403 Bond tax.
4404 Levy.
4405 Funding or refunding bonds.
4406 School bonds.
4407 Form—rate of interest—where registered.
4408 Redemption.
4409 Record of bond buyers.

4386 **School taxes.** The board of each school corporation shall at its regular meeting in July, or at a special meeting called between the time for the regular meeting and the twenty-fifth day of July, estimate the amount required for the general fund. The amount so estimated shall not exceed the following sum for each person of school age:

1. In consolidated districts maintaining an approved high school course, one hundred dollars.

2. In school corporations having a school enumeration of ten thousand or more, seventy dollars.

3. In all other school corporations, eighty dollars; provided that corporations not maintaining an approved high school and which have tuition pupils attending high school in other districts may levy such an additional amount above the said eighty dollars as will be necessary to pay the cost of tuition for such pupils. [C51,§1152; R60,§§2033, 2034, 2037, 2038, 2044, 2088; C73,§§1777, 1778; C97,§2806; S13,§2806; SS15,§2794-a; C24, 27, 31, 35,§4386.]

Referred to in §4388

4387 **Additional taxes.** If the amount so estimated in any school corporation does not equal one thousand dollars for each school thereof, the corporation may estimate not to exceed one thousand dollars for each school in the corporation. [C73,§§1777, 1778; C97,§2806; S13,§2806; C24, 27, 31, 35,§4387.]

Referred to in §4388

4388 **Transportation fund — tax for free textbooks.** In addition to the amounts authorized by sections 4386 and 4387, school boards may include in their estimates not to exceed five dollars for each person of school age for transporting children to and from school, when authorized by law; also the additional sum authorized by section 4448. [C97,§2806; S13, §2806; C24, 27, 31, 35,§4388.]

4389 **Taxes estimated in mills.** School corporations containing territory in adjoining counties may vote and estimate all taxes for school purposes in mills. [C97,§2806; S13,§2806; C24, 27, 31, 35,§4389.]

4390 **Apportionment of taxes.** The boards of school townships shall apportion any tax voted by the electors for schoolhouse fund among the several subdistricts in such a manner as justice and equity may require, taking as the basis of such apportionment the respective amounts previously levied upon said subdistricts for the use of said fund. [R60,§2037; C73,§1778; C97,§2806; S13,§2806; C24, 27, 31, 35, §4390.]

4391 Contract for use of library. The board of directors of any school corporation in which there is no free public library may contract with any free public library for the free use of such library by the residents of such school district, and pay such library the amount agreed therefor as provided by law. During the existence of such contract, the board shall certify annually a tax sufficient to pay such library the consideration agreed upon, not exceeding one-fourth mill on the dollar of the taxable property of such district. During the existence of such contract, the school corporation shall be relieved from the requirement that the school treasurer withhold funds for library purposes. This section shall not apply in townships where a contract for other library facilities is in existence. [S13, §2806; C24, 27, 31, 35,§4391.]

Withholding funds, ch 221

4392 Rep. by 45GA, ch 12,§4

4393 Levy by board of supervisors. The board of supervisors shall at the time of levying taxes for county purposes levy the taxes necessary to raise the various funds authorized by law and certified to it by law, but if the amount certified for any such fund is in excess of the amount authorized by law, it shall levy only so much thereof as is authorized by law. [R60, §2059; C73,§§1779, 1780; C97,§2807; SS15,§1303; C24, 27, 31, 35,§4393.]

SS15, §1303, editorially divided

4394 Special levies. If a schoolhouse tax is voted at a special election and certified to said board after the regular levy is made, it shall at its next regular meeting levy such tax and cause the same to be forthwith entered upon the tax list to be collected as other school taxes. [C97, §2807; SS15,§1303; C24, 27, 31, 35,§4394.]

4395 General school levy. The board shall also levy a tax for the support of the schools within the county of not less than one-fourth nor more than three-fourths mill on the dollar on the assessed value of all the taxable property within the county. [R60,§2059; C73,§1779; C97,§2807; SS15,§1303; C24, 27, 31, 35,§4395.]

4396 Apportionment of school funds. The county auditor shall, on the first Monday in April and the first Monday in October of each year, apportion the school tax, together with the interest of the permanent school fund and rents on unsold school lands to which the county is entitled as shown in notice from the state comptroller, and all other money in the hands of the county treasurer belonging in common to the schools of the county and not included in any previous apportionment, among the several corporations therein, in proportion to the number of persons of school age, as shown by the report of the county superintendent filed with him for the year immediately preceding.

He shall immediately notify the county treasurer of such apportionment and of the amount due thereby to each corporation.

The county treasurer shall thereupon give notice to the president of each corporation, and shall pay out such apportionment moneys in the same manner that he is authorized to pay other school moneys to the treasurers of the several school districts. [R60,§§1966, 2060, 2061; C73,§§1781, 1782, 1841; C97,§2808; S13, §2808; C24, 27, 31, 35,§4396.]

4397 County auditor to report. On the first day of January of each year the county auditor shall report to the state comptroller in such form as he may prescribe, giving the amount of permanent school funds held by the county, and the amount of interest due prior to January 1, still remaining unpaid. [C73,§1783; C97,§2809; S13,§2809; C24, 27, 31, 35,§4397.]

4398 Monthly payment of taxes. Before the fifteenth day of each month in each year, the county treasurer shall give notice to the president of the board of each school corporation in the county of the amount collected for each fund to the first day of such month, and the president of each board shall draw his draft therefor, countersigned by the secretary, upon the county treasurer, who shall pay such taxes to the treasurers of the several school boards only on such draft. [C73,§§1784, 1785; C97,§2810; C24, 27, 31, 35,§4398.]

C97,§2810, editorially divided

4399 Schoolhouse tax. He shall also keep the amount of tax levied for schoolhouse purposes separate in each subdistrict where such levy has been made directly upon the property of the subdistrict, and shall pay over the same monthly to the treasurer of the school township for the benefit of such subdistrict. [C73,§1784; C97,§2810; C24, 27, 31, 35,§4399.]

4400 Payment of judgment. When a judgment shall be obtained against a school corporation, its board shall order the payment thereof out of the proper fund by an order on the treasurer, not in excess, however, of the funds available for that purpose. [R60,§2095; C73,§1787; C97,§2811; C24, 27, 31, 35,§4400.]

C97,§2811, editorially divided

4401 Judgment tax. If the proper fund is not sufficient, then, unless its board has provided by the issuance of bonds for raising the amount necessary to pay such judgment, the voters thereof shall at their regular election vote a sufficient tax for the purpose. [R60,§2095; C73, §1787; C97,§2811; C24, 27, 31, 35,§4401.]

4402 Judgment levy. In case of failure or neglect to vote such tax, the school board shall certify the amount required to the board of supervisors, who shall levy a tax on the property of the corporation for the same. [C97,§2811; C24, 27, 31, 35,§4402.]

4403 Bond tax. The board of each school corporation shall, when estimating and certifying the amount of money required for general purposes, estimate and certify to the board of supervisors of the proper county for the schoolhouse fund the amount required to pay interest due or that may become due for the year beginning January 1 thereafter, upon lawful bonded

indebtedness, and in addition thereto such amount as the board may deem necessary to apply on the principal.

The amount estimated and certified to apply on principal and interest for any one year shall not exceed seven mills on the dollar of the actual valuation of the taxable property of the school corporation. Provided that when because of reduced valuation a seven-mill tax is not sufficient to produce the amount required to pay the interest and one-twentieth of the principal of the original issue of bonds legally issued prior to the year 1934, the board may certify such amount and the county auditor shall compute and apply such tax rate for such purposes as may be necessary to raise the amount so certified and the funds so raised shall be used only for the purpose of paying interest and principal on such bonds and shall not be subject to transfer.

Provided further that the tax limitation contained in this section shall not operate to restrict or prevent a school district in the issuance of refunding bonds to pay interest or principal of bonds outstanding on March 31, 1934. [C73,§1823; C97,§2813; S13,§2813; C24, 27, 31, 35,§4403.]

Referred to in §4404
Payment and maturity of bonds, ch 63.1

4404 Levy. The board of supervisors of the county to which the certificate is addressed within the contemplation of section 4403 shall levy the necessary tax to raise the amount estimated, or so much thereof as may be lawful and within the limitation of section 4403 which levy shall be made as other taxes for school purposes. [S13,§2813-a; C24, 27, 31, 35,§4404.]

4405 Funding or refunding bonds. For the purpose of providing for the payment of any indebtedness of any school corporation represented by judgments or bonds, the board of directors of such school corporation, at any time or times, may provide by resolution for the issuance of bonds of such school corporation, to be known as funding or refunding bonds. The proceeds derived from the negotiation of such funding or refunding bonds shall be applied in payment of such indebtedness; or said funding bonds or refunding bonds may be issued in exchange for the evidences of such indebtedness, par for par. [S13,§2812-c; C24, 27, 31, 35,§4405.]

4406 School bonds. The board of directors of any school corporation when authorized by the voters at the regular election or at a special election called for that purpose, may issue the negotiable, interest-bearing school bonds of said corporation for borrowing money for any or all of the following purposes:

1. To acquire sites for school purposes.
2. To erect, complete, or improve buildings authorized for school purposes.
3. To acquire equipment for schools, sites, and buildings. [S13,§2812-d; C24, 27, 31, 35, §4406.]

Vote required to authorize bonds, §1171.18

4407 Form—rate of interest—where registered. All of said bonds shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the action of the board providing therefor; shall run not more than twenty years, and may be sooner paid if so nominated in the bond; be in denomination of not more than one thousand dollars or less than one hundred dollars each; bear a rate of interest not exceeding five percent per annum, payable semiannually; be signed by the president and countersigned by the secretary of the board of directors; and shall not be disposed of for less than par value, nor issued for other purposes than this chapter provides.

All of said bonds shall be registered in the office of the county auditor.

The expenses of engraving and printing of bonds may be paid out of the general fund. [SS15,§2812-e; C24, 27, 31, 35,§4407.]

Form of county bonds, §5277

4408 Redemption. Whenever the amount in the hands of the treasurer, belonging to the funds set aside to pay bonds, is sufficient to redeem one or more of the bonds which by their terms are subject to redemption, he shall give the owner of said bonds thirty days written notice of the readiness of the district to pay and the amount it desires to pay. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease and the amount due thereon shall be set aside for its payment whenever it is presented. [S13,§2812-f; C24, 27, 31, 35,§4408.]

S13,§2812-f, editorially divided

4409 Record of bond buyers. All redemptions shall be made in the order of their numbers. The treasurer shall keep a record of the parties to whom the bonds are sold, together with their post-office addresses, and notice mailed to the address as shown by such record shall be sufficient. [S13,§2812-f; C24, 27, 31, 35, §4409.]

CHAPTER 228

COMPULSORY EDUCATION

4410 Attendance requirement.
4411 Exceptions.
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4413 Reports as to private instruction.
4414 Proof of abnormality.
4415 Violations.
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4427 Education—state school.
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4429 Order.
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4410 Attendance requirement. Any person having control of any child over seven and under sixteen years of age, in proper physical and mental condition to attend school, shall cause said child to attend some public or private school for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date, which date shall not be later than the first Monday in December.

The board may, by resolution, require attendance for the entire time when the schools are in session in any school year.

In lieu of such attendance such child may attend upon equivalent instruction by a competent teacher elsewhere than at school. [S13, §2823-a; C24, 27, 31, 35,§4410.]

Referred to in §§4411, 4415

4411 Exceptions. Section 4410 shall not apply to any child:

1. Who is over the age of fourteen and is regularly employed.
2. Whose educational qualifications are equal to those of pupils who have completed the eighth grade.
3. Who is excused for sufficient reason by any court of record or judge.
4. While attending religious services or receiving religious instructions. [S13,§2823-a; C24, 27, 31, 35,§4411.]

Referred to in §4415

4412 Reports from private schools. Within ten days from receipt of notice from the secretary of the school corporation within which any private school is conducted, the principal of such school shall, once during each school year, and at any time when requested in individual cases, furnish to such secretary a certificate and report in duplicate of the names, ages, and number of days attendance of each pupil of such school over seven and under sixteen years of age, the course of study pursued by each such child, the texts used, and the names of the teachers, during the preceding year and from the time of the last preceding report to the time at which a report is required. The secretary shall retain one of the reports and file the other in the office of the county superintendent. [S13, §2823-b; C24, 27, 31, 35,§4412.]

Referred to in §4415

4413 Reports as to private instruction. Any person having the control of any child over seven and under sixteen years of age, who shall place such child under private instruction, not in a regularly conducted school, upon receiving notice from the secretary of the school corporation, shall furnish a certificate stating the name and age of such child, the period of time during which such child has been under said private instruction, the details of such instruction, and the name of the instructor. [S13,§2823-b; C24, 27, 31, 35,§4413.]

Referred to in §4415

4414 Proof of abnormality. Any person having the control of any child over seven and under sixteen years of age, who is physically or mentally unable to attend school, shall furnish proofs by affidavit as to the physical or mental condition of such child. [S13,§2823-b; C24, 27, 31, 35,§4414.]

Referred to in §4415

4415 Violations. Any person who shall violate any of the provisions of sections 4410 to 4414, inclusive, shall be fined not less than five dollars nor more than twenty dollars for each offense. [S13,§2823-a; C24, 27, 31, 35,§4415.]

4416 Custody of records. All such certificates, reports, and proofs shall be filed and preserved in the office of the secretary of the school corporation as a part of the records of his office, and he shall furnish certified copies thereof to any person requesting the same. [S13,§§2823-b,-c; C24, 27, 31, 35,§4416.]

4417 "Truant" defined. Any child over seven and under sixteen years of age, in proper physical and mental condition to attend school, who fails to attend school regularly as provided in this chapter, without reasonable excuse for his absence, shall be deemed to be a truant. [S13, §2823-e; C24, 27, 31, 35,§4417.]

4418 Truant schools—rules for punishment. The board of directors may provide for the confinement, maintenance, and instruction of truant children and may for that purpose establish truant schools or set apart separate rooms in any public school building; and it shall prescribe reasonable rules for the punishment of truants. [S13,§§2823-d,-h; C24, 27, 31, 35,§4418.]

4419 Truancy officers—appointment—compensation. The board of each school corpora-

tion may, and in school corporations having a population of twenty thousand shall, appoint a truancy officer who may be the school nurse.

In districts having therein a city or town, the board may appoint a member of the police force or marshal as such officer, and other districts may appoint a constable or other suitable person.

Such officers shall be paid a reasonable compensation by the board, but where a police officer of a city under twenty thousand or a town is employed, he shall be paid not to exceed five dollars per month for his services. [S13, §2823-e; C24, 27, 31, 35,§4419.]

4420 Duties of truancy officer. The truancy officer shall take into custody without warrant any apparently truant child and place him in the charge of the teacher in charge of the public school designated by the board of directors of the school corporation in which said child resides, or of any private school designated by the person having legal control of the child; but if it is other than a public school, the instruction and maintenance of the child therein shall be without expense to the school corporation.

The truancy officer shall promptly institute criminal proceedings against any person violating any of the provisions of the truancy law. [S13,§§2823-e,-f; C24, 27, 31, 35,§4420.]

4421 Neglect by truancy officer. Any truancy officer or any director neglecting his duty to enforce the truancy law after written notice so to do served upon him by any citizen of the county or by the county superintendent shall be liable to a fine not exceeding twenty-five dollars and be removed from such office. The county attorney shall prosecute such persons upon request of the county superintendent. [S13, §2823-f; C24, 27, 31, 35,§4421.]

4422 Incorrigibles. If the child is placed in a school other than a public school and does not properly conduct himself, the board may cause his removal to a public or to a truant school. If a truant placed in a public school fails to attend or properly conduct himself, he may be placed in a truant school, or the person in charge of the school may file information in the juvenile court, which may commit said child to a suitable state institution. [S13,§§2823-d,-e; C24, 27, 31, 35,§4422.]

4423 Discharge from truant school. Any child placed in a truant school may be discharged therefrom at the discretion of the board under such rules as it may prescribe. [S13, §2823-g; C24, 27, 31, 35,§4423.]

4424 Reports by school officers and employees. All school officers and employees shall promptly report to the secretary of the school corporation any violations of the truancy law of which they have knowledge, and he shall inform the president of the board of directors who shall, if necessary, call a meeting of the board to take such action thereon as the facts justify. [S13,§2823-g; C24, 27, 31, 35,§4424.]

4425 Census by school officer. All school officers empowered to take the school census shall ascertain the number of children over seven and under sixteen years of age, in their respective districts, the number of such children who do not attend school, and so far as possible the cause of the failure to attend. [S13,§2823-i; C24, 27, 31, 35,§4425.]

4426 Blind and deaf children—assessor to record. The assessor shall, at the time of making assessments, record on suitable blanks furnished for that purpose by the secretary of the state board of education to the county auditor, the names, ages, sex and post-office addresses of all deaf or blind persons within the assessment district.

The county auditor shall forward to the secretary of the state board of education such returns of the assessor within thirty days after the same are filed in his office. [S13,§§1354-a–c; C24, 27, 31, 35,§4426.]

4427 Education — state school. Children over seven and under nineteen years of age who are so deaf or blind as to be unable to obtain an education in the common schools shall be sent to the proper state school therefor, unless exempted, and any person having such a child under his control or custody shall see that such child attends such school during the scholastic year. [S13,§2718-c; C24, 27, 31, 35,§4427.]

Referred to in §§4428, 4429

4428 Proceeding against parent. Upon the failure of any person having the custody and control of such child to require its attendance as provided in section 4427, the state board of education may make application to the district court or the juvenile court of the county in which such person resides for an order requiring such person to compel the attendance of such child at the proper state institution. [S13, §§2718-d,-e; C24, 27, 31, 35,§4428.]

Referred to in §4429

4429 Order. Upon the filing of the application mentioned in section 4428, the time of hearing shall be determined by the juvenile court or the district court. If, upon hearing, the court determines that the person required to appear has the custody and control of a child who should be required to attend a state school under section 4427, the court shall make an order requiring such person to keep such child in attendance at such school. [C24, 27, 31, 35, §4429.]

4430 Contempt. A failure to comply with the order of the court shall subject the person against whom the order is made to punishment the same as in ordinary contempt cases. [C24, 27, 31, 35,§4430.]

Contempts, ch 536

4431 When deaf and blind children excused. Attendance at the state institution may be excused when the superintendent thereof is satisfied:

1. That the child is in such bodily or mental condition as to prevent or render futile attendance at the school.

2. That the child is so diseased or possesses such habits as to render his presence a menace to the health or morals of other pupils.

3. That the child is efficiently taught for the scholastic year in a private or other school devoted to such instruction or by a private tutor, in the branches taught in public schools. [S13, §2718-f; C24, 27, 31, 35,§4431.]

4432 Agent of state board of education. The state board of education may employ an agent to aid in the enforcement of law relative to the education of deaf and blind children. The agent shall seek out children who should be in attendance at the state schools but who are not, and require such attendance. He shall institute proceedings against persons who violate the provisions of said law. The agent shall be allowed compensation at a rate fixed by the board of education, and his necessary traveling and hotel expenses while away from home in the performance of his duty. [C24, 27, 31, 35, §4432.]

CHAPTER 229

PUBLIC RECREATION AND PLAYGROUNDS

4433 Establishment—maintenance—supervision.
4434 Tax levy—petition—submission.
4435 Levy—collection—limitation.
4436 Duties of school treasurer.
4437 Annual levy.
4438 Discontinuance of levy.
4439 Appropriation by city.

4433 Establishment—maintenance—supervision. Boards of school directors in school districts containing or contained in cities of the first or second class, cities under special charter, or cities under the commission plan of government, are hereby authorized to establish and maintain for children in the public school buildings and on the public school grounds under the custody and management of such boards, public recreation places and playgrounds and necessary accommodations for same, without charge to the residents of said school district; also to cooperate with the commissioners or boards having the custody and management in such cities of public parks and public buildings and grounds of whatever sort, and, by making arrangements satisfactory to such boards controlling public parks and grounds, to provide for the supervision, instruction, and oversight necessary to carry on public educational and recreational activities, as described in this section in buildings and upon grounds in the custody and under the management of such commissioners or boards having charge of public parks and public buildings on grounds of whatever sort, in such cities of the first or second class, cities under special charter, or cities under commission plan of government. [S13, §2823-u; C24, 27, 31, 35,§4433.]

Referred to in §§4438, 4439

4434 Tax levy—petition—submission. The board of directors of any school district containing, or contained in, any city of the first or second class, city under special charter, or city under the commission plan of government, may, and upon petition to that effect signed by legally qualified voters aggregating not less than twenty-five percent of the number voting at the last preceding school election, shall, submit to the electors of such school district the question of levying a tax as provided in section 4435; and if a majority of the votes cast upon such proposition be in favor thereof, then the board of school directors shall proceed to organize the work as authorized in this chapter, and levy a tax therefor at the time and in the manner provided in section 4435. If at the time of filing said petition it shall be more than three months till the next regular school election, then the board of school directors shall submit said question at a special election within sixty days. [S13,§2823-u1; C24, 27, 31, 35,§4434.]

Referred to in §§4438, 4439

4435 Levy—collection—limitation. Boards of school directors in such districts shall fix and certify to the board of supervisors on or before the first Monday of September the amount of money required for the next fiscal year for the support of the aforementioned activities, in the same manner as the amount of necessary taxes for other school purposes is certified, and said board of supervisors shall levy and collect a tax upon all the property subject to taxation in said school district at the same time and in the same manner as other taxes are levied and collected by law, which shall be equal to the amount of money so required for such purposes by the said board of school directors; provided that the tax so levied upon each dollar of the assessed valuation of all property, real and personal, in said district, subject to taxation, shall not in any one year exceed one-half mill for the purpose of the activities hereinbefore mentioned. The said tax shall not be used or appropriated directly or indirectly for any other purpose than provided in this chapter. [S13,§2823-u2; C24, 27, 31, 35,§4435.]

Referred to in §§4434, 4436, 4438, 4439

4436 Duties of school treasurer. All moneys received by or raised in such city for the aforementioned purpose shall be paid over to the treasurer of the school district, to be disbursed by him on orders of such board of school directors in such district in the same manner as other funds of said district are disbursed by him, but the tax provided in section 4435 shall not be levied or collected nor shall the board have authority to certify the amount of taxes necessary for this purpose until after the question of the levy of such tax shall have been authorized by a majority vote at a regular or

special election. [S13,§2823-u3; C24, 27, 31, 35, §4436.]

Referred to in §§4438, 4439

4437 Annual levy. After the question of the levy of such special tax has been submitted to and approved by the voters, the authority shall remain, and such tax shall be levied and collected annually until such time as the voters of the school district of such city shall by majority vote order the discontinuance of the levy and collection of such tax. [S13,§2823-u4; C24, 27, 31, 35,§4437.]

Referred to in §§4438, 4439

4438 Discontinuance of levy. The board of school directors in any district governed by sections 4433 to 4437, inclusive, of this chapter may, and on petition to that effect signed by legally qualified voters aggregating not less than twenty-five percent of the number voting at the last preceding school election, shall, submit to the electors of such school district the question of discontinuing the levying of such tax as may have been previously authorized under the said provisions, and if a majority of the votes cast upon such proposition be in favor thereof, then the levying of such tax shall be discontinued and shall not be resumed unless again authorized under the provisions of section 4434. [S13, §2823-u5; C24, 27, 31, 35,§4438.]

Referred to in §4439

4439 Appropriation by city. The board of school directors in any district governed by sections 4433 to 4438, inclusive, of this chapter is also empowered to receive and expend for the purpose thereof any sums of money appropriated and turned over to them by the city council or commissioners of such city for such purposes; and the city council, or commissioners of such city, shall have authority to appropriate and turn over to the board of school directors of the school district containing or contained in such city any reasonable sums of money which the said council or commissioners may desire to appropriate out of the general funds of such city and turn over to the said board of school directors for the purposes herein set forth. [S13,§2823-u6; C24, 27, 31, 35, §4439.]

CHAPTER 230

SCHOOL GARDENS OR FARMS

This chapter (§§4440 to 4445, inc.) repealed by 46GA, ch 41

CHAPTER 231

TEXTBOOKS

DISTRICT UNIFORMITY

4446 Adoption—purchase and sale.
4447 Custodian—bond.
4447.1 Annual settlement by board of directors.
4448 Payment—additional tax.
4449 Purchase—exchange.
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4451 Bids—advertisement.
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COUNTY UNIFORMITY

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FREE TEXTBOOKS

4464 Petition—election.
4465 Loaning books.
4466 General regulations.
4467 Discontinuance of loaning.
4468 Officers as agents.

DISTRICT UNIFORMITY

4446 Adoption—purchase and sale. The board of directors of each and every school corporation is hereby authorized and empowered to adopt textbooks for the teaching of all branches that are now or may hereafter be authorized to be taught in the public schools of the state, and to contract for and buy said books and any and all other necessary school supplies at said contract prices, and to sell the same to the pupils of their respective districts at cost, loan such textbooks to such pupils free, or rent them to such pupils at such reasonable fee as the board shall fix, and said money so received shall be returned to the general fund. [C97,§2824; C24, 27, 31, 35,§4446; 47GA, ch 124,§1.]

Referred to in §4460.3
C97,§2824, editorially divided

4447 Custodian—bond. The books and supplies so purchased shall be under the charge of the board, who may select one or more persons within the county to keep said books and supplies as the depository agent of the board under such rules and regulations as the board shall adopt. The board shall require of each person so appointed a bond in such sum as may seem to the board to be desirable, the reasonable cost of which, if a bond of an association or corpo-

ration as surety is furnished, shall be paid by the district. The board shall adopt rules and regulations to provide that no textbook in any branch determined by the board to be taught in the schools under its charge, shall be sold or rented by such depository agent to the pupils in such schools as a textbook other than those textbooks authorized by said board for use by the pupils in such schools; to provide that no such textbook shall be sold or rented by such depository agent at a price or fee higher than that fixed by the said board; and to provide such other measures not in conflict with law as are necessary properly to govern said depository agents and safeguard the said books and moneys. [C97, §2824; C24, 27, 31, 35,§4447; 47GA, ch 124,§2.]

Referred to in §4460.3

4447.1 **Annual settlement by board of directors.** At the close of each school year the board of directors in each school corporation shall cause a complete settlement to be made with each depository agent. A complete inventory of the textbooks on hand, with a statement itemized to show the expenses authorized and paid by the board, and the amount of money collected from each such depository agent during the year from the sale or rental of textbooks, shall be made in duplicate, signed by the secretary of the board and the depository agent and one copy filed with the secretary and one with the depository agent. [47GA, ch 124,§2.]

Referred to in §4460.3

4448 **Payment—additional tax.** All the books and other supplies purchased under the provisions of this chapter shall be paid for out of the general fund, and the board of directors shall annually certify to the board of supervisors the additional amount necessary to levy for the general fund of said district to pay for such books and supplies. Such additional amount shall not exceed in any one year the sum of one dollar and fifty cents for each pupil residing in the school corporation, and the amount so levied shall be paid out on warrants drawn for the payment of books and supplies only, but the district shall contract no debt for that purpose. [C97,§2825; C24, 27, 31, 35, §4448.]

Referred to in §4388

4449 **Purchase—exchange.** In the purchasing of textbooks it shall be the duty of the board of directors or the county board of education to take into consideration the books then in use in the respective districts, and they may buy such additional number of said books as may from time to time become necessary to supply their schools, and they may arrange on equitable terms for exchange of books in use for new books adopted. [C97,§2826; C24, 27, 31, 35, §4449.]

4450 **Suit on bond.** If at any time the publishers of such books as shall have been adopted by any board of directors or county board of education shall neglect or refuse to furnish such books when ordered by said board in accordance with the provisions of this chapter, at the very lowest price, either contract or wholesale, that such books are furnished any other district or state board, then said board of directors or county board of education may and it is hereby made their duty to bring suit upon the bond given them by the contracting publisher. [C97, §2827; C24, 27, 31, 35,§4450.]

Referred to in §4453

4451 **Bids—advertisement.** Before purchasing textbooks under the provisions of this chapter, it shall be the duty of the board of directors, or county board of education, to advertise, by publishing a notice once each week for two consecutive weeks in one or more newspapers published in the county; said notice shall state the time up to which all bids will be received, the classes and grades for which textbooks and other necessary supplies are to be bought, and the approximate quantity needed. [C97,§2828; S13,§2828; C24, 27, 31, 35,§4451.]

S13, §2828, editorially divided

4452 **Awarding contract.** Said board shall award the contract for said textbooks and supplies to any responsible bidder or bidders offering suitable textbooks and supplies at the lowest prices, taking into consideration the quality of material used, illustrations, binding, and all other things that go to make up a desirable textbook; and may, to the end that they may be fully advised, consult with the county superintendent, or, in case of city independent districts, with the city superintendent or other competent person, with reference to the selection of textbooks. The board may reject any and all bids, or any part thereof, and re-advertise therefor as above provided. [C97,§2828; S13,§2828; C24, 27, 31, 35,§4452.]

4453 **Change—election.** It shall be unlawful for any board of directors or county board of education, except as provided in section 4450, to displace or change any textbook that has been regularly adopted or re-adopted under the provisions of this chapter, before the expiration of five years from the date of such adoption or re-adoption, unless authorized to do so by a majority of the electors present and voting at the regular election, due notice of said proposition to change or displace said textbooks having been included in the notice for the said regular election. [C73,§1728; C97,§2829; C24, 27, 31, 35,§4453.]

4454 **Samples and lists.** Any person or firm desiring to furnish books or supplies under this chapter in any county shall, at or before the time of filing his bid hereunder, deposit in the office of the county superintendent samples of all textbooks included in his bid, accompanied with lists giving the lowest wholesale and contract prices for the same. Said samples and lists shall remain in the county superintendent's office, and shall be delivered by him to his successor in office and shall be kept by him in such safe and convenient manner as to be open at all times to the inspection of such school officers, school patrons, and school teachers as may desire to examine the same and compare them with

others, for the purpose of use in the public schools. [C97,§2830; C24, 27, 31, 35,§4454.]

C97,§2830, editorially divided

4455 Bond. The board of directors and county board of education mentioned shall require any person or persons with whom they contract for furnishing any books or supplies to enter into a good and sufficient bond, in such sum and with such conditions and sureties as may be required by such board of directors or county board of education, for the faithful performance of any such contract. Bonds of surety companies duly authorized under the laws of Iowa shall be accepted. [C97,§2830; C24, 27, 31, 35,§4455.]

COUNTY UNIFORMITY

4456 Petition — election. When petitions shall have been signed by one-third the school directors in any county, other than those in cities and towns, and filed in the office of the county superintendent of such county at least thirty days before the regular school elections, asking for a uniform series of textbooks in the county, then such county superintendent shall immediately notify the other members of the county board of education in writing, and within fifteen days after the filing of the petitions said board of education shall meet and provide for submitting to the electors at the next regular election the question of county uniformity of school textbooks. [C97,§2831; S13,§2831; C24, 27, 31, 35,§4456.]

Referred to in §4463

4457 Election and canvass. The boards of school officers, who are hereby made the judges of the school elections, shall certify to the board of supervisors the full returns of the votes cast at said elections the next day after the holding of said elections, who shall, at their next regular meeting, proceed to canvass said votes and declare the result. [C97,§2832; S13,§2832; C24, 27, 31, 35,§4457.]

Referred to in §4463
S13,§2832, editorially divided

4458 Selection of books. Should a majority of the electors voting at such elections favor a uniform series of textbooks for use in said county, then the county board of education shall meet and select the school textbooks for the entire county, and contract for the same under such rules and regulations as the said board of education may adopt. [C97,§2832; S13,§2832; C24, 27, 31, 35,§4458.]

Referred to in §4463

4459 Use mandatory. When a list of textbooks has been so selected they shall be used by all the public schools of said county, except as hereinafter provided, and the board of education may arrange for such depositories as it may deem best. [C97,§2832; S13,§2832; C24, 27, 31, 35,§4459.]

Referred to in §§4460.1, 4463

4459.1 Bond—sale of books. The county board of education shall require of each such depository agent so appointed, a bond in such sum as may appear to said board to be sufficient, the reasonable cost of which, if the bond of an association or corporation as surety is furnished, shall be paid by the county superintendent and deducted from the amount to be returned to the county funds as hereinafter provided. The county board of education shall also adopt rules and regulations to provide that no textbook in any branch determined by the board of any school district to be taught in the schools under its charge, shall be sold by such depository agent to the pupils in such school districts as a textbook other than those textbooks authorized by the said county board of education for use by the pupils in such county; to provide that no such textbooks shall be sold by such depository agent at a price or fee higher than that fixed by the said county board of education; and to provide such other measures not in conflict with law as are necessary properly to govern said depository agents and safeguard the said books and moneys. [47GA, ch 124,§3.]

Referred to in §§4460.1, 4463

4460 Rep. by 47GA, ch 124,§4, and §§4460.1 to 4460.4, inclusive, enacted in lieu thereof.

4460.1 Purchase and sale. The county board of supervisors upon requisition by the county board of education and the presentation of properly attested invoices shall pay for said textbooks out of the county funds, and the county board of education shall sell them to the pupils of the district through depositories established as provided in sections 4459 and 4459.1. The money received from such sales shall be collected from such depositories by the county superintendent at such times as the county board of education shall direct, but not less frequently than three times during the school year. The money collected shall be returned to the county funds after deducting the actual expenses authorized by the county board of education, with a complete inventory of the books on hand and a statement itemized to show the amount received from the sale of books, the actual expenses, and a receipt signed by the depository agent for his compensation. [C97, S13,§2832; C24, 27, 31, 35,§4460; 47GA, ch 124,§4.]

Referred to in §4463

4460.2 Annual settlement by county board of education. At the close of each school year it shall be the duty of the county board of education in each county where county uniformity of textbooks has been authorized as provided in this chapter, to cause a complete settlement to be made with each depository agent appointed by said board. A complete inventory of the textbooks on hand, and a statement showing the amount of money collected from each such depository agent during the year shall be made in duplicate and signed by the county superintendent and the depository agent, one copy to be filed with the county superintendent and one with the depository agent. [47GA, ch 124,§4.]

Referred to in §4463

4460.3 Rental or free textbooks under county uniformity. The board of directors of each and

every school corporation that is under county uniformity of textbooks as provided in this chapter shall have authority to purchase through the county board of education at the regular contract price textbooks adopted by the county board of education and pay for the same from the general fund of the school district and loan them free or rent such textbooks to the pupils of their respective schools in the manner provided in sections 4446, 4447, and 4447.1. The money so received shall be returned to the general fund of such district at the end of each calendar month. [47GA, ch 124,§4.]

Referred to in §4463

4460.4 **Responsibility of pupils and parents —rules and regulations.** The board of directors in any school district that has adopted the plan provided herein for renting textbooks to the pupils of the district or loaning them free shall hold the pupils and their parents responsible for the loss of or failure to return any textbooks so loaned or furnished and for any damage other than regular depreciation of such textbooks and shall make such rules and regulations as are necessary properly to safeguard such textbooks. [47GA, ch 124,§4.]

Referred to in §4463
Contracts in force July 4, 1937, unaffected. See 47GA, ch 124, §6

4461 **Custody and accounting.** Unless otherwise ordered by the board of education, the county superintendent shall have charge of such textbooks and of the distribution thereof among the depositories selected by the board; he shall render to the board at each meeting thereof itemized accounts of his doings, and shall be liable on his official bond therefor. [S13,§2832; C24, 27, 31, 35,§4461.]

Referred to in §4463

4462 **Reports required.** A list of textbooks so selected, with their contract prices, shall be reported to the state superintendent with the regular annual report of the county superintendent. [C97,§2833; C24, 27, 31, 35,§4462.]

Referred to in §4463

4463 **City schools.** The provisions of sections 4456 to 4462, inclusive, shall not apply to schools located within cities or towns, nor shall the electors of said cities or towns vote upon the question of county uniformity; but nothing herein shall be so construed as to prevent such schools in said cities and towns from adopting and buying the books adopted by the county board of education at the prices fixed by them, if by a vote of the electors they shall so decide. [C97,§2835; C24, 27, 31, 35,§4463.]

FREE TEXTBOOKS

4464 **Petition—election.** Whenever a petition signed by ten percent of the qualified voters, to be determined by the school board of any school corporation, shall be filed with the secretary thirty days or more before the regular election, asking that the question of providing free textbooks for the use of pupils in the public schools thereof be submitted to the voters at the next regular election, he shall cause notice of such proposition to be given in the notice of such election. [C97,§2836; C24, 27, 31, 35,§4464.]

Referred to in §4467

4465 **Loaning books.** If, at such election, a majority of the legal voters present and voting by ballot thereon shall authorize the board of directors of said school corporation to loan textbooks to the pupils free of charge, then the board shall procure such books as shall be needed, in the manner provided by law for the purchase of textbooks, and loan them to the pupils. [C97,§2837; C24, 27, 31, 35,§4465.]

C97,§2837, editorially divided

4466 **General regulations.** The board shall hold pupils responsible for any damage to, loss of, or failure to return any such books, and shall adopt such rules and regulations as may be reasonable and necessary for the keeping and preservation thereof. Any pupil shall be allowed to purchase any textbook used in the school at cost. No pupil already supplied with textbooks shall be supplied with others without charge until needed. [C97,§2837; C24, 27, 31, 35,§4466.]

4467 **Discontinuance of loaning.** The electors may, at any election called as provided in section 4464, direct the board to discontinue the loaning of textbooks to pupils. [C97,§2837; C24, 27, 31, 35,§4467.]

4468 **Officers as agents.** It shall be unlawful for any school director, teacher, or member of the county board of education to act as agent for any school textbooks or school supplies during such term of office or employment, and any school director, officer, teacher, or member of the county board of education who shall act as agent or dealer in school textbooks or school supplies, during the term of such office or employment, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than ten dollars nor more than one hundred dollars, and pay the costs of prosecution. [C97,§2834; C24, 27, 31, 35,§4468.]

CHAPTER 232

SCHOOL FUNDS

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4469 Permanent fund. The permanent school fund, the interest of which only can be appropriated for school purposes, shall consist of:

1. Five percent of the net proceeds of the public lands of the state, which shall be paid to the state treasurer and be apportioned by the state comptroller among the several counties, taking into consideration the amount of the permanent school fund already in possession of and constantly loaned in said county.

2. The proceeds of the sale of the five hundred thousand acres of land granted the state under the eighth section of an act of congress passed September 4, 1841, entitled: "An act to appropriate the proceeds of all sales of public lands, and to grant preemption rights".

3. The proceeds of all intestate estates escheated to the state.

4. The proceeds of the sales of the sixteenth section in each township, or lands selected in lieu thereof. [R60,§§1962, 1964; C73,§§1837, 1839; C97,§2838; C24, 27, 31, 35,§4469.]

C97,§2838, editorially divided
Escheat, §12C35 et seq.

4470 Lands and escheats. The proceeds of all lands sold, and all sums due from escheats, shall be payable to the treasurer of the county in which the lands or escheated estates are situated or found. [R60,§1965; C73,§1840; C97, §2838; C24, 27, 31, 35,§4470.]

4471 Temporary fund. The temporary school fund, which shall be received and appropriated annually in the same manner as the interest of the permanent fund, shall consist of:

1. All forfeitures which are authorized to be made for the benefit of the school fund.

2. The proceeds of all fines collected for violation of the penal laws, and for the nonperformance of military duty.

3. The proceeds of the sale of lost goods and estrays.

These several funds shall be payable to the county treasurer of the several counties in which they arise, accounted for to the board of supervisors, and apportioned by it among the several school townships and independent districts of the county as provided by law. [R60, §§1963, 1966; C73,§§1838, 1841; C97,§2839; C24, 27, 31, 35,§4471.]

4472 Division and appraisement. The board of supervisors may, at such time as it may fix, and as preliminary to a sale, authorize the trustees of any township, where the sixteenth section or land selected in lieu thereof has not been sold, to lay out the same into such tracts as in their judgment will be for the best interests of the school fund, conforming, as far as the interests of said fund will permit, to the legal subdivisions of the United States surveys, and appraise each tract at what they believe to be its true value, and certify to said board the divisions and appraisements made by them. Said division and appraisement shall be approved or disapproved by said board at its first meeting after such report, and in case it disapproves the same it may at once order another division and appraisement. If the board of supervisors approves, the county auditor shall make and keep a record of such division, appraisement, and approval; but no school lands of any kind shall be sold for less than the appraised value per acre, except as hereinafter provided; nor shall any member of the board of supervisors, county auditor, township trustee, or any person who was engaged in the division and appraisement of said land, be directly or indirectly interested in the purchase thereof; and any sale made, where such parties or any of them are so interested, shall be void. [R60, §§1970, 1971; C73,§§1845–1847; C97,§2840; C24, 27, 31, 35,§4472.]

4473 Notice—sale. When the board of supervisors shall offer for sale the sixteenth section

or lands selected in lieu thereof, or any portion of the same, or any part of the five-hundred-thousand-acre grant, the county auditor shall give at least forty days notice, by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated, and also publish a notice of said sale once each week for two weeks preceding the same in a newspaper published in the county, describing the land to be sold and the time and place of such sale. At such time and place, or at such other time and place as the sale may be adjourned to, he shall offer to the highest bidder, subject to the provisions of this chapter, and sell, either for cash or one-third cash and the balance on a credit not exceeding ten years, with interest on the same at the rate of not less than four percent per annum, to be paid at the office of the county treasurer of said county on the first day of January in each year, delinquent interest to bear the same rate as the principal. [R60,§1971; C73,§1846; C97,§2841; S13,§2841; C24, 27, 31, 35,§4473; 48GA, ch 110, §1.]

4474 **Sale without appraisement.** When the board of supervisors of any county has once offered for sale any school lands in compliance with the requirements of this chapter, and they remain unsold, and it is unable to obtain therefor the appraised value thereof, and in the opinion of said board it is for the best interests of the school fund that the same be sold for a less price, it may instruct the auditor to transmit to the secretary of state a certified copy of its proceedings in relation to the order of sale thereof and subsequent proceedings in relation thereto, including the action of the township trustees, and the price per acre at which the land had been appraised, which transcript the secretary of state shall submit to the executive council; and if it approves of a sale at a less sum it shall certify such approval to the auditor of the county from which said transcript came, which certificate shall be transcribed in the minute book of the board of supervisors, and thereupon said land may again be offered and sold to the highest bidder, after notice given as in case of sales in the first instance, without being again appraised. [C73,§1849; C97,§2842; C24, 27, 31, 35,§4474.]

4475 **Sale on credit—taxation—waste.** When lands are sold upon a partial credit, the contract therefor shall be at once reduced to writing, signed by the proper parties, recorded in the county where the land is situated, and immediately thereafter filed in the office of the county auditor. Any purchaser or his assigns may at any time pay the full amount for lands with accrued interest, and receive from the county auditor a certificate of purchase, which shall be at once transmitted to the secretary of state and will entitle the holder to a patent for the lands, to be issued by the secretary of state and the governor. All school lands sold in pursuance of law shall be subject to taxation from and after the execution and delivery of a contract of purchase. All sales made, where the full price is not paid, shall be subject to the law relative to the prevention or punishment of waste, and in all such cases the township trustees in each township are charged with the duty of preventing the commission of waste upon any school lands lying in their township, and, if attempted, they shall apply by petition for an injunction to stay the same, and if granted the writ shall issue without bond, and the court issuing it may make such order in the premises as shall be equitable and best calculated to prevent threatened injury, and may adjudge damages for any injury done, the costs to abide the event of the action, and the damages adjudged shall be paid to the county treasurer and become a part of the permanent school fund. [R60,§§1972, 1973, 1976–1978; C73,§§1851, 1852, 1856–1858; C97,§2843; C24, 27, 31, 35,§4475.]

4476 **Sale of lands bid in.** When lands have been sold and bid in by the state in behalf of the school fund upon a judgment in favor of such fund, the land may be sold in like manner as other school lands, and when lands have been conveyed to the counties in which they are situated for the use of the school fund, instead of to the state, such conveyance shall be valid and binding, and upon proper certificates of sales patents shall issue in like manner as in cases where the conveyances were properly made to the state. [C73,§1850; C97,§2844; C24, 27, 31, 35,§4476.]

4477 **Cash or collateral security.** When, in the judgment of the board of supervisors, any school lands are of such a character that a sale upon partial credit would be unsafe or incompatible with the interest of the school fund, and especially in the case of timbered lands, the board of supervisors may in its discretion exact the whole of the purchase money in advance; or if it sells such land upon a partial credit, as hereinbefore prescribed, it shall require good collateral security for the payment of the part upon which credit is given. [R60,§1974; C73, §1853; C97,§2845; C24, 27, 31, 35,§4477.]

4478 **Uniform interest date.** In all cases where money is due to the school fund, either for loans or deferred payments of the purchase price of land sold, the interest shall be made payable on the first day of January each year, and if the debtor fails to pay the interest within six months thereafter, the entire amount of both principal and interest shall become due, and the county auditor shall make a report thereof to the county attorney, who shall immediately commence action for the collection of the amount reported to him as due, and this section is hereby declared to be a part of any contract made by virtue of this chapter, whether expressed therein or not. [R60,§§1975, 1979; C73,§§1854, 1855; C97,§2846; C24, 27, 31, 35,§4478.]

4479 **School fund accounts—audit of losses.** The state comptroller shall keep the school fund accounts in books provided for that purpose, separate and distinct from the revenue books. The auditor of state shall audit all losses to

the permanent school or university fund which shall have been occasioned by the defalcation, mismanagement, or fraud of the agents or officers controlling and managing the same, and for this purpose shall prescribe such regulations for those officers as may be necessary to ascertain such losses. [R60,§1969; C73,§1842; C97, §2847; C24, 27, 31, 35,§4479.]

C97, §2847, editorially divided

4480 **Bonds to cover losses.** When any sum not less than one thousand dollars shall be so audited and so become a debt of the state to the fund, as provided by the constitution, the auditor of state shall issue the bond or bonds of the state in favor of the fund, bearing six percent interest, payable semiannually on the first day of January and July after issuance, and the amount to pay the interest as it becomes due is appropriated out of any funds in the state treasury. [C73,§1843; C97,§2847; C24, 27, 31, 35, §4480.]

Constitution, Art. VII, §3

4481 **Notice of apportionment—deficiency.** Immediately after making the apportionment of the interest of the permanent school fund, the state comptroller shall notify the auditor of each county of the sum to which his county is entitled, and, if a county has less thereof than it is entitled to under the apportionment, the comptroller shall forward to the county auditor a warrant for the amount of the deficiency. [R60,§1969; C73,§1844; C97,§2847; C24, 27, 31, 35,§4481.]

4482 **Apportionment—excess.** If the county has an excess of such interest above the amount apportioned to it, the county auditor shall forthwith draw and forward to the state comptroller a warrant on the proper fund of his county for the amount of the excess. [R60,§1969; C73, §1844; C97,§2847; C24, 27, 31, 35,§4482.]

4483 **Management.** The board of supervisors shall hold and manage the securities given to the school fund in its county, and all judgments and lands belonging to said fund. It may have any part of the school lands surveyed when necessary, and employ a competent surveyor therefor, who shall be paid out of the county treasury upon proof made of the request and performance of the service. [R60,§1980; C73,§§1859, 1860; C97,§2848; C24, 27, 31, 35, §4483.]

C97,§2848, editorially divided

4484 **Actions.** All actions for and in behalf of said fund may be brought in the name of the county for the use of the school fund, by the county attorney or such other attorney as the board may select. [C73,§1860; C97,§2848; C24, 27, 31, 35,§4484.]

4485 **Liability of county.** Each county shall be liable for all losses upon loans of the school fund, principal or interest, made in such county, unless the loss was not occasioned by reason of any default of its officers or by taking insufficient or imperfect securities, or from a failure to bid at an execution sale the full amount of the judgment and costs. [C73,§1860; C97,§2848; C24, 27, 31, 35,§4485.]

4486 **Exemption of county.** All claims for exemption from liability on account of losses shall be examined into and adjusted by the state comptroller, upon proof submitted to him in writing in behalf of the county within three months after the county auditor shall be advised by the comptroller of his readiness to receive the proof. In the absence of evidence, or if that submitted is insufficient, the loss may be charged against the county and be conclusive, but if found sufficient, the comptroller shall present the facts in his report to the next general assembly. [C73,§1860; C97,§2848; C24, 27, 31, 35,§4486.]

4487 **Loans—officers may not borrow.** The permanent school fund shall be loaned out by the county auditor, as it comes into the hands of the county treasurer, in sums of five thousand dollars or less to one person or company, in case it is found impracticable to keep the whole amount of funds loaned in sums of five hundred dollars or less to one person or company. In the event it can be kept loaned out in sums of five hundred dollars or less to one person or company, then no loan shall exceed five hundred dollars, nor shall a loan of said fund be made to or be carried by the county auditor, the treasurer, or a member of the board of supervisors. [R60,§1981; C73,§1861; C97,§2849; S13,§2849; C24, 27, 31, 35,§4487.]

S13,§2849, editorially divided

4487.1 **Investment in state and municipal bonds.** When any county has on hand permanent school funds which in the opinion of its board of supervisors cannot be safely invested in real estate mortgages as provided by law, its board of supervisors may invest such funds in bonds of the state of Iowa or any political subdivision thereof at the prevailing rate of interest, provided such bonds are a general obligation of and to be paid by a general tax levy of the state or political subdivision issuing the same, and said bonds shall be registered in the name of the county purchasing said bonds.

The interest chargeable to the county so investing any such funds by the comptroller shall not exceed on said funds the rate of interest collected on the bonds purchased as herein provided, notwithstanding the provisions of section 4507. [48GA, ch 111,§1.]

4488 **Terms — appraisement — fee.** Each loan shall be made for at least one and not more than five years, evidenced by promissory notes bearing not less than four percent per annum, payable annually, and delinquent interest to draw the same rate, to be secured by a mortgage on unincumbered real estate situated in the county in which the loan is made, and appraised, as hereinafter provided, for at least double the sum borrowed; the appraisement to be made by three persons under oath, selected by the county auditor, who shall not in making the valuation take into consideration the buildings upon the

lands; for such service each shall be allowed fifty cents, to be paid by the borrower, who shall also pay for recording the mortgage. [R60, §§1981–1983; C73,§§1861–1863; C97,§2849; S13, §2849; C24, 27, 31, 35,§4488; 47GA, ch 125,§1.]

4489 **Application for loan.** All applications to borrow from the permanent school fund shall be made to the auditor of the county in which the land is situated which it is proposed to mortgage as security, who shall cause the proper appraisement to be made, and, if satisfactory, shall examine any abstract of title which the proposed borrower may submit, or he may cause an abstract to be prepared at such proposed borrower's expense. If the title is found to be perfect, and the lands unincumbered, he shall certify this fact and submit the application and all the papers connected therewith to the board of supervisors at its next meeting, regular or called, at which meeting the loan shall be approved or disapproved. [R60,§1984; C73,§1864; C97,§2850; SS15,§2850; C24, 27, 31, 35,§4489.]

SS15,§2850, editorially divided

4490 **Duty of auditor.** If the application is accepted, the auditor shall complete the contract by taking a note payable to the county, and a mortgage upon the lands securing the same, and certify the same to the treasurer, who shall pay over to the borrower the amount named in the note, less a fee of two dollars to be paid to the auditor for his services. The board may reject the application for any good cause. [R60,§1984; C73,§§1864, 1875; C97,§2850; SS15,§2850; C24, 27, 31, 35,§4490.]

4491 **Redemption of prior lien — assignments.** If it shall happen that a loan is made upon real estate which is in fact incumbered other than for taxes, the board of supervisors may, when necessary for the safety of the loan, appropriate out of any school fund on hand, if such incumbrance does not exceed one-half of the real value of the lands, so much as may be needed to take up and purchase the same, and may also at any meeting, by resolution, assign without recourse, upon payment of the amount due, any school fund note and mortgage to one holding a subsequent lien upon the mortgaged real estate. [C73,§§1868, 1869; C97,§2850; SS15, §2850; C24, 27, 31, 35,§4491.]

4492 **Loans reported — examination.** Each loan made, when fully completed, shall be by the auditor reported to the board of supervisors, and a minute of such report shall be entered upon its records, and from time to time, and at least once a year, all loans, with the security given, shall be carefully examined and report made to the board, which examination shall be conducted by a member thereof, or some competent person selected by it. [R60,§1985; C73, §§1866, 1870; C97,§2851; C24, 27, 31, 35,§4492.]

C97, §2851, editorially divided

4493 **Additional security.** When a report shows that the security in a given case has for any cause depreciated so that it is no longer sufficient, or it appears that there was a prior incumbrance thereon which materially affects the value of the security, the board shall order the debtor to furnish additional security, and fix a reasonable time within which the same shall be given, and if the party so ordered fails to comply therewith for thirty days after service upon him of a copy of the order, the entire debt shall become due, and an action may be brought to enforce the collection thereof, and these provisions shall enter into and form a part of all contracts of loans, whether incorporated therein in words or not. [R60,§1985; C73,§1866; C97,§2851; C24, 27, 31, 35,§4493.]

4494 **Renewal.** When a loan has been made and the borrower desires to renew the same for one or more years, it may be done in the same manner as the loan was made in the first instance, but no new abstract, except a continuation of the same down to the time, nor examination of title prior to the original loan, nor new mortgage, need be given, unless the mortgage is to be given upon other lands. The time of payment, without further security, may be extended in writing, to be recorded as the original security was, and before maturity of the claim, when the board of supervisors for cause shall so order; but such extension of time shall not operate to release any security held. [R60,§1993; C73,§§1871, 1879; C97,§2852; C24, 27, 31, 35,§4494.]

C97, §2852, editorially divided

4495 **Statute of limitation.** Lapse of time shall in no case be a bar to any action to recover any part of the school fund, nor shall it prevent the introduction of evidence in such an action, any provision in this code to the contrary notwithstanding. [C73,§§1880, 2542; C97,§2852; C24, 27, 31, 35,§4495.]

4496 **Payments.** All payments to the school fund upon contracts, or loans of any other nature, shall be made to the treasurer of the county upon a certificate from the auditor showing the amount due. [R60,§1986; C73,§1867; C97,§2853; C24, 27, 31, 35,§4496.]

C97, §2853, editorially divided

4497 **Release of mortgage.** The auditor shall, when the debt is paid, release any mortgage or issue a certificate of purchase, as the case may be, and report the same to the board of supervisors at its next meeting, which report shall be carried into the records of the board. [R60, §1986; C73,§1867; C97,§2853; C24, 27, 31, 35, §4497.]

4498 **School fund account—settlement.** The auditor shall also keep in his office, in books to be provided for that purpose, an account to be known as the school fund account, in which a memorandum of all notes, mortgages, bonds, money, and assets of every kind and description which may come into his hands and those of the treasurer shall be entered, and separate accounts of principal and interest be kept; and the county treasurer shall keep a like account and record of all school funds coming into his hands. Settlements of such account shall be made with

the board of supervisors at its January and June sessions, which settlements shall be recorded with the proceedings of the board. [R60,§§1990, 1991; C73,§§1876, 1877; C97,§2853; C24, 27, 31, 35,§4498.]

4499 **Notice of default.** When outstanding contracts for the sale of school lands or notes for money of the school fund loaned, or interest thereon, are due, the auditor shall by mail at once notify the debtor to make payment thereof within three months. [C73,§§1872, 1873; C97, §2854; C24, 27, 31, 35,§4499.]

C97, §2854, editorially divided

4500 **Suit—attorney fee.** If such debtor shall neglect to comply with such notice, the auditor shall report the same to the county attorney, who shall bring an action to recover the same, and an injunction may issue for cause, without bond when so prayed, and there shall be allowed in the judgment, entered and taxed as a part of the costs in the case, a reasonable sum as compensation to plaintiff's attorney, not exceeding the amount as provided by law for attorneys' fees. [C73,§1873; C97,§2854; C24, 27, 31, 35,§4500.]

Attorney fees, §11644

4501 **Bid at execution sale.** Upon a sale of lands under an execution founded upon a school fund claim or right, the auditor shall bid such sum as the interests of the fund require, and, if struck off to the state, it shall be thereafter treated in all respects the same as other lands belonging to said fund. [C73,§1874; C97, §2854; C24, 27, 31, 35,§4501.]

4502 **Sheriff's deed to state.** When lands have been bid in by the county for the state under foreclosure of school fund mortgages and the time for redemption has expired, a sheriff's deed shall be issued to the state for the use and benefit of the permanent school fund. The county auditor shall file the said deed for record in the office of the county recorder who shall record the same without fee and return the same when recorded to the county auditor who shall then forward the same to the secretary of state. The secretary of state shall record the said deed in his records and then file the same with the state comptroller. [C73,§1881; C97, §2855; S13,§2855; C24, 27, 31, 35,§4502.]

4503 **Resale by state.** All lands now acquired under permanent school fund foreclosure proceedings shall be resold within ten years from January 1, 1939, and lands acquired after such date shall be resold within six years from date of foreclosure. Such land shall be appraised, advertised, and sold in the manner provided for the appraisement, advertisement, sale and conveyance of the sixteenth section or lands selected in lieu thereof. [S13,§2855; C24, 27, 31, 35,§4503; 48GA, ch 112,§1.]

Appraisement, §4472

4504 **Proceeds on resale.** When a resale is made, the county auditor shall notify the state comptroller, who shall thereupon charge the county with the full amount of the resale, except that when the lands are sold for more than the unpaid portion of the principal, the excess shall be applied to reimburse the county for the costs of foreclosure and the interest paid by the county to the state by reason of default of payment of same by the makers of the notes, previous to the time when the right of redemption has expired, not to exceed three years. [C73, §§1881, 1882; C97,§2855; S13,§2855; C24, 27, 31, 35,§4504.]

4505 **Excess—loss borne by county.** Any excess over the amount of the unpaid portion of the principal, costs of foreclosure, and interest on the principal as above provided, shall inure to the county and be credited to the general county fund. If the lands shall be sold for a less amount than the unpaid portion of the principal, the loss shall be sustained by the county, and the board of supervisors shall at once order the amount of such loss transferred from the general fund or temporary school fund of the county to the permanent school fund account. [C73,§1881; C97,§2855; S13,§2855; C24, 27, 31, 35,§4505; 48GA, ch 112,§2.]

4506 **Report as to sales—interest.** County auditors shall, on or before the first day of January of each year, report to the state comptroller the amount of all sales and resales made during the year previous, of the sixteenth section, five-hundred-thousand-acre grant, escheat estates, and lands taken under foreclosure of school fund mortgages, and the comptroller shall charge the same to the counties with interest from the date of such sale or resale to January 1, at the rate of three and one-half percent per annum. [C73,§1881; C97,§2855; S13,§2855; C24, 27, 31, 35,§4506; 47GA, ch 125, §2.]

4507 **Interest charged to counties.** The state comptroller shall also, on the first day of January, charge to each county having permanent school funds under its control, interest thereon at the rate of three and one-half percent per annum for the preceding year, or such part thereof as such funds shall have been in the control of the county, which shall be taken as the whole amount of interest due from such county. All interest collected above the three and one-half percent charged by the state shall be transferred to the general county fund. [C73, §1882; C97,§2855; S13,§2855; C24, 27, 31, 35, §4507; 47GA, ch 125,§§3, 4.]

Referred to in §4487.1

4508 **Uncollected interest.** If any county fails or refuses to collect the amount of interest due the state, the deficiency shall be paid to the state from the general county fund. Any county delinquent in the payment of interest due the state shall be charged one percent per month on the amount delinquent until paid. [C73,§1882; C97,§2855; S13,§2855; C24, 27, 31, 35,§4508.]

4509 **Report as to rents.** County auditors shall, upon the first day of January of each year, report to the state comptroller the amount of rents collected during the preceding year on

unsold school lands and lands taken under foreclosure of school fund mortgages then in the hands of the county treasurer, and the comptroller shall include the amount so reported in his semiannual apportionment of interest. [C73, §1884; C97,§2855; S13,§2855; C24, 27, 31, 35, §4509.]

4510 Transfer of unloaned funds. When there are funds belonging to the permanent school fund in any county, amounting to one thousand dollars, that cannot be loaned, the county auditor may certify the fact to the state comptroller, who shall order a transfer thereof to some other county or counties, where in his opinion it can be loaned. Upon such transfer being made, he shall give the county making the transfer credit for the amount, and shall charge the county or counties to which the transfer is made with the amount transferred, and shall afterwards charge interest on the actual amount in possession of each county. [C73,§1883; C97, §2856; C24, 27, 31, 35,§4510.]

4511 Penalty against county auditor. Any county auditor failing or neglecting to perform any of the duties which are required of him by the provisions of this chapter, shall be liable to a penalty of not less than one hundred nor more than five hundred dollars, to be recovered in an action brought in the district court by the board of supervisors, the judgment to be entered against the party and his bondsmen, and the proceeds to go to the school fund. [R60,§1992; C73, §1878; C97,§2857; C24, 27, 31,35,§4511.]

CHAPTER 233

STATE LIBRARY AND HISTORICAL DEPARTMENT

This chapter (§§4512 to 4531, inc.) repealed by 48GA, ch 113,§15, and chapter 234.1 enacted in lieu thereof. Section 4532 repealed by 42GA, ch 96

CHAPTER 234

LIBRARY COMMISSION AND TRAVELING LIBRARIES

This chapter (§§4533 to 4541, inc.) repealed by 48GA, ch 113,§15, and chapter 234.1 enacted in lieu thereof

CHAPTER 234.1

LAW, MEDICAL, AND TRAVELING LIBRARIES AND HISTORICAL DEPARTMENT

4541.01 State libraries—historical and archives department.
4541.02 Board of trustees.
4541.03 Powers and duties of the board.
4541.04 Acceptance and use of money grants.
4541.05 Duties of the state law librarian.
4541.06 Duties of the curator of the department of history and archives.
4541.07 Gifts.
4541.08 Investments.
4541.09 Archives.
4541.10 Records delivered.
4541.11 Removal of original.
4541.12 Certified copies—fees.
4541.13 Duties of the state medical librarian.
4541.14 Duties of the librarian of the state traveling library.
4541.15 Public libraries not affected.

4541.01 State libraries—historical and archives department. There is established:

1. The Iowa state traveling library.
2. The Iowa state department of history and archives.
3. The Iowa state law library.
4. The Iowa state medical library. [S13, §2888-d; C24, 27, 31, 35,§§4512, 4513, 4535; 48GA, ch 113,§1.]

4541.02 Board of trustees. The Iowa state traveling library, the Iowa state department of history and archives, the Iowa state law library, and the Iowa state medical library shall be under the control of a board of trustees consisting of the governor, a member of the supreme court to be designated from time to time by the court, and the superintendent of public instruction. [C51,§§445, 447, 452; R60,§§690, 692, 703; C73,§§1885, 1886, 1890; C97,§2858; S13,§§2881-a, 2888-a; C24, 27, 31, 35,§§4514, 4533; 48GA, ch 113,§2.]

4541.03 Powers and duties of the board. The board of trustees shall:

1. Make and enforce rules for the keeping of the records and for the management and care of the property of the Iowa state traveling library, the Iowa state department of history and archives, the Iowa state law library, and the Iowa state medical library.
2. Appoint a qualified curator of the Iowa state department of history and archives whose regular term of office shall be for six years and who may be removed only for cause* by a two-thirds vote of the board of trustees. Such appointment shall be made solely upon merit and with no consideration given to the political affiliations of the person appointed.
3. Appoint a state law librarian who shall be a graduate of an approved law school and who shall have special competence in the organization and administration of a law library and training in the science of bill drafting.

*"Causes" in enrolled act

Such appointment shall be made for a term of six years and the state law librarian shall be removed only for cause by a two-thirds vote of the board of trustees. Such appointment shall be made solely upon merit and with no consideration given to the political affiliations of the person appointed.

4. Appoint a librarian of the state traveling library who shall be a graduate of an accredited library school or an experienced librarian who has had ten years of successful library administration, and who shall be appointed for a term of six years and who shall be removed only for cause by a two-thirds vote of the board of trustees. Such appointment shall be made solely upon merit and with no consideration given to the political affiliations of the person appointed.

5. Appoint a state medical librarian, who shall be a graduate of a recognized school of medicine and who shall have special competence in the organization and administration of a medical library. Such appointment shall be made for a term of six years and the state medical librarian shall be removed only for cause upon a two-thirds vote of the board of trustees. Such appointment shall be made solely upon merit and with no consideration given to the political affiliations of the person appointed.

6. Appoint, after consultation with the curator, the librarian of the state traveling library, the state law librarian, and the state medical librarian, such qualified assistants as the board may deem necessary to carry on the work of the department of history and archives, the state traveling library, the state law library, and the state medical library.

7. Meet at least three times during the year at the call of the chairman of the board of trustees, who shall be elected from among their own number.

8. Have control of the historical building and assign space therein to be occupied by the department of history and archives, the Iowa state traveling library, and the Iowa state medical library.

9. Adopt rules providing for the loaning of books in the Iowa state law library, the Iowa state traveling library, and the Iowa state medical library.

10. Adopt reasonable rules providing penalties for injuring, defacing, destroying, or losing books in the Iowa state law library, the Iowa state traveling library, and the Iowa state medical library. All fines, penalties, and forfeitures imposed by the rules of the board for any violation may be recovered in an action in the name of the state and applied to the use of the libraries, under the direction of the board.

11. It may develop and adopt plans to provide more adequate library service for all residents of the state.

12. Operate traveling libraries and circulate books under their control or subsequently acquired within the state to libraries, schools, colleges, universities, library associations, farmers institutes, granges, study clubs, charitable and penal institutions, and individuals, free of cost except for transportation.

13. Report in writing to the governor semiannually all matters pertaining to the Iowa state law library, the Iowa state traveling library, the Iowa state department of history and archives, and the Iowa state medical library. [C51,§§445, 451, 452; R60,§§690, 695, 696, 702, 703, 707; C73,§§1886–1888, 1890, 1895, 1896; C97,§§2858–2860, 2864, 2865, 2875; S13,§§2881-a,-b,-d, 2888-d,-e; C24, 27, 31, 35,§§4515–4517, 4521–4524, 4535–4537; 48GA, ch 113,§3.]

Transfer of books, etc., a temporary paragraph, omitted; 48GA, ch 113,§3

4541.04 Acceptance and use of money grants. The board of trustees is hereby authorized and empowered to receive, accept, and administer any money or moneys appropriated or granted to it, separate and apart from the general library fund, for providing and equalizing public library service in Iowa:

1. By the federal government, and

2. By any other agencies, private and/or otherwise.

The fund herein provided for shall be administered by the board of trustees, which body shall frame bylaws, rules, and regulations for the allocation and administration of this fund.

The fund shall be used to increase, improve, stimulate, and equalize library service to the people of the whole state, and for adult education and shall be allocated among the cities, counties, and regions of the state, taking into consideration local needs, area and population to be served, local interest as evidenced by local appropriations, and such other facts as may affect the state program of library service.

Any gift or grant from the federal government or other sources shall become a part of said fund, to be used as part of the state fund, or may be invested in such securities in which the state sinking fund may be invested as in the discretion of the board of trustees may be deemed advisable, the income to be used for the promotion of libraries aforesaid. [48GA, ch 113,§4.]

State sinking fund, ch 352.2

4541.05 Duties of the state law librarian. The state law librarian shall:

1. Have general charge of the Iowa state law library, which shall be maintained in the capitol or elsewhere in rooms convenient to the supreme court and which shall always be available for free use by the residents of Iowa under such reasonable rules as the board may adopt.

2. Organize as an integral part of the Iowa state law library a legislative reference bureau in which he shall provide the reports of the various officers and boards of this state, and as far as may be, of the other states, and such other material, periodicals, or books as will furnish the fullest information practicable upon all matters pertaining to current or proposed legislation and to legislative and administrative problems, prepare and submit digests of such information and material upon the request of any legislative committee, member of the general assembly, or head of any department of state government.

3. Arrange to make exchanges of all printed material published by the several states and the government of the United States.

4. Report in writing to the board semiannually, or oftener if required, all matters pertaining to the state law library.

5. Perform such other duties as may be imposed upon him by law or by the rules of the board. [S13,§2881-b; C24, 27, 31, 35,§§4518, 4520; 48GA, ch 113,§5.]

Exchange of legal publications, §240

4541.06 Duties of the curator of the department of history and archives. The curator shall:

1. *Custody of historical building.* Under the direction of the board, be custodian of the historical building and collections therein, and shall keep the rooms assigned to the department and the collections open for inspection by the public during such hours of each day as the board may direct, but the curator shall cause the same to be kept open on Sunday afternoons during the sessions of the general assembly.

2. *Custody, display, and publication of material.* Under the direction of the board, collect, preserve, organize, arrange, and classify works of art, books, maps, charts, public documents, manuscripts, newspapers, and other objects and materials illustrative of the natural and political history of the territory and state and of the central west, and of the traditions and history of the Indian tribes and prior occupants of the region, and publish such matter and display such material as may be of value and interest to the public.

3. *Collection of memorials and mementos.* With the approval of the board, collect memorials and mementos of the pioneers of Iowa and the soldiers of all our wars, including portraits, specimens of arms, clothing, army letters, commissions of officers, and other military papers and documents.

4. *Ethnology and archaeology.* Receive and arrange in cases, objects illustrative of the ethnology and prehistoric archaeology of this and surrounding states.

5. *Inventory of property.* As soon as practicable, prepare a classified index and inventory of all the property belonging to the museum or in its custody, and determine through the aid of experts the money value thereof, so far as practicable, and when done a summary of the same shall be included in his report, and thereafter such reports shall set forth all additions thereto with their money value, if any, and give a list of items lost or dropped from the collections. His report shall also contain a separate statement of materials obtained by gift and by purchase during each biennium.

6. *Newspapers.* The curator shall subscribe for such newspapers as in his judgment are necessary to preserve for historical purposes. The list of papers so selected shall be submitted to the board of trustees for its approval. The curator shall bind every two years such newspapers as are received for historical purposes.

7. *Custodian of works of art.* Except as otherwise specifically provided, be custodian of and care for and preserve the monuments, memorials, and works of art on the grounds and in the buildings at the seat of government, and report from time to time to the proper officer or board the condition and his recommendations in respect thereto.

8. *Report to board.* Report to the board semiannually or oftener as required, all matters pertaining to the condition of the Iowa state memorial museum of art and history.

9. *Other duties.* Perform such other duties as may be imposed upon him by law or prescribed by the rules of the board. [C97,§§2875–2878; S13,§2881-b; C24, 27, 31, 35,§4525; 48GA, ch 113, §6.]

4541.07 Gifts. The curator is hereby authorized and empowered, as trustee for the state, to accept gifts of property, real, personal, or mixed, for the benefit or endowment of the Iowa state department of history and archives, or for the commemoration of the lives of worthy citizens, or for the purpose of perpetuating records of historic events, or for scientific purposes. Any gift accepted shall be immediately reported to the board of trustees; but any gift imposing unusual monetary obligations on the department shall be approved by the board before acceptance. [C24, 27, 31, 35,§4526; 48GA, ch 113,§7.]

Referred to in §4541.08

4541.08 Investments. The curator and the board of trustees shall have authority and power to invest, in accordance with the provisions of the trust, any such gifts or endowments, and establish and enforce rules for the purpose of governing and maintaining such endowments or memorials as may be created or established under and pursuant to section 4541.07. [C24, 27, 31, 35,§4527; 48GA, ch 113,§8.]

4541.09 Archives. The curator shall be the trustee and custodian of the archives of Iowa and of such county and municipal archives as are voluntarily deposited. The term "archives" shall mean those manuscripts and materials originating under or passing through the hands of public officials in the regular course and performance of their duties, over ten years old, and not in current use; but the executive council shall have power and authority to order the transfer of such archives or any part thereof at any time prior to the expiration of the ten years, or cause them to be retained in the respective offices beyond such limit if in its judgment the public interests or convenience shall require it. [SS15,§2881-p; C24, 27, 31, 35,§4528; 48GA, ch 113,§9.]

Referred to in §4541.10

4541.10 Records delivered. The several state, executive, and administrative departments, officers or offices, councils, boards, bureaus, and commissioners, are hereby authorized and directed to transfer and deliver to the Iowa state department of history and archives such of the public archives as are designated in section 4541.09, except such as in the judgment of the executive council should be retained longer in the respective offices, and the curator is au-

thorized to receive the same. [SS15,§§2881-q,-r; C24, 27, 31, 35,§4529; 48GA, ch 113,§10.]

4541.11 **Removal of original.** After any public archives have been received into the division of public archives by the curator, they shall not be removed from his custody without his consent except in obedience to a subpoena of a court of record or a written order of the officer from whose office they were received.

The curator shall annually submit to the trustees a list of papers and documents which have no further value, and upon approval of said trustees such items may be destroyed. [SS15, §2881-t; C24, 27, 31, 35,§4530; 48GA, ch 113,§11.]

4541.12 **Certified copies—fees.** Upon request of any person, the curator shall make a certified copy of any document contained in said archives, and when such copy is properly authenticated by him it shall have the same legal effect as though certified by the officer from whose office it was obtained or by the secretary of state. Said curator shall charge and collect for* such copies the fees allowed by law to the official in whose office the document originates for such certified copies, and all such fees shall be turned into the state treasury. [SS15, §2881-t; C24, 27, 31, 35,§4531; 48GA, ch 113,§12.]

*"From" in enrolled act

4541.13 **Duties of the state medical librarian.** The state medical librarian shall:

1. Have general charge of the state medical library which shall always be available for free use by the residents of Iowa under such reasonable rules as the board may adopt.

2. Report to the board in writing semiannually, or oftener if required, all matters pertaining to the state medical library.

3. Give no preference to any school of medicine and shall secure books, periodicals, and pamphlets for every legally recognized school without discrimination.

4. Perform such other duties as may be imposed upon him by law or prescribed by the rules of the board. [C24, 27, 31, 35,§§4518, 4519; 48GA, ch 113,§13.]

4541.14 **Duties of the librarian of the state traveling library.** The librarian of the state traveling library shall:

1. Give advice and counsel to all free and other public libraries, and all communities which may propose to establish them, as to the best means of establishing and maintaining such libraries.

2. Act under the direction of the board of trustees in supervising the work.

3. Report in writing to the board semiannually, or oftener if required, all matters pertaining to the state traveling library.

4. Obtain from all free public libraries reports showing the condition, growth, development, and manner of conducting such libraries and shall furnish annually to the superintendent of printing such information for publication in the Iowa official register as may be deemed of public interest. [S13,§§2888-c,-d,-f,-g; C24, 27, 31, 35,§§4534, 4535, 4539, 4540; 48GA, ch 113,§14.]

4541.15 **Public libraries not affected.** Nothing contained in this chapter shall be construed as repealing or superseding chapter 299, or any section of said chapter. [48GA, ch 113. §16.]

CHAPTER 235

STATE HISTORICAL SOCIETY

4542 Objects and purposes.
4543 Board of curators—meetings.
4544 Members.
4545 Officers—compensation.
4546 President.
4547 Executive board.
4548 Reports and documents furnished.

4542 **Objects and purposes.** The state historical society shall be maintained in connection with and under the auspices of the state university, for carrying out the work of collecting and preserving materials relating to the history of Iowa and illustrative of the progress and development of the state; for maintaining a library and collections, and conducting historical studies and researches; for issuing publications, and for providing public lectures of historical character, and otherwise disseminating a knowledge of the history of Iowa among the people of the state. [R60,§1959; C73,§1900; C97,§2882; S13,§2882-a; C24, 27, 31, 35,§4542.]

4543 **Board of curators — meetings.** The board of curators of the society shall consist of eighteen persons, nine of whom shall be appointed by the governor, and nine elected by members of the society. Their term of office shall be two years, and they shall receive no compensation. The governor shall make his appointments on or before the last Wednesday in June in each even-numbered year, and the terms of the persons appointed shall commence on that day; and, at the annual meeting of the society in each odd-numbered year, the others shall be elected by ballot from the members of the society, for the term next ensuing, which annual meeting shall be held at Iowa City on the Monday preceding the last Wednesday in June. [C73, §§1901, 1903; C97,§2883; C24, 27, 31, 35,§4543.]

4544 **Members.** Members may be admitted to the society at any time under such rules as may be adopted by the board of curators. [C73, §1902; C97,§2884; C24, 27, 31, 35,§4544.]

4545 **Officers — compensation.** The board shall appoint annually, or oftener if need be, a corresponding secretary, recording secretary, treasurer, and librarian from the members of

the society outside of their own number, who shall hold office for one year, unless sooner removed by a majority vote of the board. Said officers shall hold the same position in the society as upon the board of curators, and their respective duties shall be determined by said board. No officer of the society or board shall receive any compensation from the state appropriation thereto. [C73,§1904; C97,§2885; C24, 27, 31, 35,§4545.]

4546 President. It shall also appoint from its members a president, who shall be the executive head of the board, and hold office for one year and until his successor is elected. [C73, §1905; C97,§2886; C24, 27, 31, 35,§4546.]

4547 Executive board. The curators, a majority of whom shall reside in the vicinity of the university, and five of whom shall constitute a quorum, shall be the executive board of the society, and have full power to manage its affairs. It shall keep a full and complete account of all of its doings, and of the receipt and expenditure of all funds collected or granted for the purposes of the society, and shall biennially report the same to the governor. [R60,§1960; C73,§1906; C97,§2887; C24, 27, 31, 35,§4547.]

Time of filing report and period covered, §246

4548 Reports and documents furnished. Five copies of the reports of the supreme court and twenty copies of all other books and documents published by the state or upon its order shall be delivered to the society for the purpose of effecting exchanges with similar societies in other states and countries, and for preservation in its library, or other purposes of the society. [R60,§1961; C73,§1907; C97,§2888; C24, 27, 31, 35,§4548.]

CHAPTER 236

GEOLOGICAL SURVEY

4549 Board.
4550 State geologist and assistants.
4551 Survey.
4552 Investigations—collection.
4553 Authority to enter lands.
4554 Detailed reports.
4555 Annual report.
4556 Cooperation.
4557 Publication of reports.
4558 Distribution and sale of reports.
4559 Expenses.

4549 Board. The geological survey of the state shall be under the direction of the geological board, consisting of the governor, the auditor of state, and the presidents of the agricultural college, the state university, and the Iowa academy of science. [C97,§2497; C24, 27, 31, 35,§4549.]

4550 State geologist and assistants. Such board shall appoint and fix the salaries of a state geologist, and such expert assistants and other employees, recommended by him, as may be necessary. [R60,§§180, 181; C97,§2498; C24, 27, 31, 35,§4550.]

4551 Survey. The state geologist shall be director of the survey and shall make a complete survey of the natural resources of the state in all their economic and scientific aspects, including the determination of the order, arrangement, dip, and comparative magnitude of the various formations; the discovery and examination of all useful deposits, including their richness in mineral contents and their fossils; and the investigation of the position, formation, and arrangement of the different ores, coals, clays, building stones, glass sands, marls, peats, mineral oils, natural gases, mineral and artesian waters, and such other minerals or other materials as may be useful, with particular regard to the value thereof for commercial purposes and their accessibility. [R60,§182; C97,§2499; C24, 27, 31, 35,§4551.]

4552 Investigations — collection. The state geologist shall investigate the characters of the various soils and their capacities for agricultural purposes; the growth of timber, the animal and plant life of the state, the streams and water power, and other scientific and natural history matters that may be of practical importance and interest. A complete cabinet collection may, at the option of the board, be made to illustrate the natural products of the state, and the board may also furnish suites of materials, rocks, and fossils for colleges and public museums within the state, if it can be done without impairing the general state collection. [R60,§§182, 185, 187; C97,§2499; C24, 27, 31, 35, §4552.]

4553 Authority to enter lands. For the purpose of carrying on the aforesaid investigations the state geologist and his assistants and employees shall have authority to enter and cross all lands within the state; provided that in so doing no damage is done to private property. [C24, 27, 31, 35,§4553.]

4554 Detailed reports. The state geologist and his assistants shall make detailed maps and reports of counties and districts as fast as the work is completed, which reports shall embrace such geological, mineralogical, topographical, and scientific details as are necessary to make complete records thereof, which may include the necessary illustrations, maps, charts, and diagrams. [R60,§184; C97,§2500; S13,§2500; C24, 27, 31, 35,§4554.]

40ExGA, HF 116, §6, editorially divided

4555 Annual report. The state geologist shall, annually, at the time provided by law, make to the governor a full report, approved by the board, of the work in the preceding year, which report shall be accompanied by such other

reports and papers as may be considered desirable for publication. [R60,§184; C97,§§2498, 2500; S13,§2500; C24, 27, 31, 35,§4555.]

Time of filing report and period covered, §247

4556 **Cooperation.** The state geologist shall cooperate with the United States geological survey, with other federal and state organizations, and with adjoining state surveys in the making of topographic maps and the study of geologic problems of the state when, in the opinion of the geological board, such cooperation will result in profit to the state. [S13,§2500; C24, 27, 31, 35,§4556.]

4557 **Publication of reports.** The board may direct the preparation and publication of special reports and bulletins of educational and scientific value or containing information of immediate use to the people. [C97,§2501; S13, §2501; C24, 27, 31, 35,§4557.]

4558 **Distribution and sale of reports.** All publications of the geological survey shall be distributed by the state as are other published reports of state officers when no special provision is made. When such distribution has been made the board shall retain a sufficient number of copies to supply probable future demands and any copies in excess of such number shall be sold to persons making application therefor at the cost price of publication, the money thus accruing to be turned into the treasury of the state. [C97,§2501; S13,§2501; C24, 27, 31, 35, §4558.]

4559 **Expenses.** The members of the board shall serve without compensation, but the state geologist and such board and its assistants shall be allowed their actual and necessary expenses incurred in the performance of their duties. [C97, S13,§2502; C24, 27, 31, 35,§4559.]

TITLE XIII

HIGHWAYS

CHAPTER 237

ESTABLISHMENT, ALTERATION, AND VACATION OF HIGHWAYS

Chapter not applicable to primary roads or farm-to-market roads, §§4686.23, 4755.23

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4560 Jurisdiction.
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VACATION OR ABANDONMENT OF SECONDARY ROADS

4621.1 Duty to close and protect.
4621.2 Violation.
4621.3 Liability.
4621.4 Removal of barrier.
4621.5 Expense.

GENERAL PROVISIONS

4560 Jurisdiction. The board of supervisors has the general supervision of the secondary roads in the county, with power to establish, vacate, and change them as herein provided, and to see that the laws in relation to them are carried into effect. [C51,§514; R60,§819; C73, §920; C97,§1482; C24, 27, 31, 35,§4560.]

4561 Width. Roads hereafter established, unless otherwise fixed by the board, shall be at least sixty-six feet wide, and in no case less than forty; within these limits they may be increased or diminished in width, altered in direction, or vacated, by pursuing the course prescribed in this chapter. [C51,§§515, 516; R60, §§820, 821; C73,§921; C97,§1483; S13,§1483; C24, 27, 31, 35,§4561.]

Width of bridges and culverts, §4667

4562 Petition. Any person desiring the establishment, vacation, or alteration of a road shall file in the auditor's office of the proper county a petition, in substance as follows:

To the board of supervisors of ..... county:

The undersigned asks that a road commencing at ..... and running thence ..... and terminating at ..... be established, vacated, or altered (as the case may be). [C73, §922; C97,§1484; C24, 27, 31, 35,§4562.]

4563 Bond. Before filing such petition, the auditor shall require the petitioner to give a bond, with sureties to be approved by him, conditioned that all expenses growing out of the application will be paid by the obligors, in case the contemplated road is not finally established, altered, or vacated, as asked in the petition. [C51,§521; R60,§826; C73,§923; C97,§1485; C24, 27, 31, 35,§4563.]

4564 Commissioner. When the foregoing requirements have been complied with, the auditor shall appoint some suitable and disinterested elector of the county as commissioner, to examine into the expediency of the proposed establishment, alteration, or vacation, and report accordingly. [C51,§523; R60,§828; C73, §924; C97,§1486; C24, 27, 31, 35,§4564.]

4565 Substituting other road. The commissioner shall not be confined to the precise matter of the petition, but may inquire and determine whether that or any road in the vicinity, answering the same purpose and in substance the same, be required. [C51,§525; R60,§830; C73,§925; C97,§1487; C24, 27, 31, 35,§4565.]

4566 Property exempt. No road shall be established through any cemetery. No road shall, without the owner's consent, be established through any orchard, or ornamental grounds contiguous to any dwelling house, or so as to cause the removal of any dwelling house or other substantial, permanent, and valuable building. [C51,§525; R60,§830; C73,§925; C97, §1487; SS15,§1527-r4; C24, 27, 31, 35,§4566.]

4567 Report. In forming his judgment, he must take into account the public and private convenience, and the expense of the proposed road, and, if he thinks the public convenience requires it, shall proceed at once to lay the same out, if the circumstances are such as to enable him to do so without having the same surveyed; but if, in his judgment, such road should not be established, or the alteration or vacation made, he shall proceed no further, and in either case shall, within thirty days after the day of his appointment, file his report in the auditor's office. [C51,§§526–528, 535, 536; R60,§§831–833, 840, 841; C73,§§926–928, 934; C97,§1488; C24, 27, 31, 35,§4567.]

4568 Survey made — commissioner sworn. If the precise location of the road cannot otherwise be given, he must cause the line thereof to be surveyed and plainly marked out, and, if he is a person other than the county engineer, must be sworn to faithfully and impartially discharge his duty, and, after thus qualifying, he shall have authority to swear any assistants employed to faithfully and impartially perform their duties in aiding him in laying out or altering the road. [C51,§§529, 530; R60,§§834, 835; C73,§§929, 930; C97,§1489; C24, 27, 31, 35, §4568.]

4569 Mileposts and stakes. Mileposts must be set up at the end of every mile, and the distance marked thereon, and stakes must be set at each change of direction, on which shall be marked the bearings of the new course. Stakes must also be set at the crossing of fences and streams, and at intervals in the prairie not exceeding a quarter of a mile each; in the timber the course must be indicated by trees suitably blazed. [C51,§531; R60,§836; C73,§931; C97, §1490; C24, 27, 31, 35,§4569.]

4570 Bearing trees—monuments. Bearing trees must, when convenient, be established at each angle and milepost, and the position of the road relative to the corners of sections, the junction of streams, or any other natural or artificial monument or conspicuous object, must, as far as convenient, be stated in the field notes and shown on the plat. [C51,§532; R60,§837; C73,§932; C97,§1491; C24, 27, 31, 35,§4570.]

4571 Plat and field notes. A correct plat of the road or alteration, together with a copy of the field notes of the surveyor, if one has been employed, must be filed as a part of the commissioner's report. [C51,§533; R60,§838; C73,§933; C97,§1492; C24, 27, 31, 35,§4571.]

4572 Bridges. If the commissioner's report is in favor of the establishment, alteration, or vacation of the road, it shall show the number of bridges required, and the probable cost thereof. [C97,§1493; C24, 27, 31, 35,§4572.]

Referred to in §4574
C97,§1493, editorially divided

4573 Hearing—objections—claims for damages. The auditor shall appoint a day, not less than sixty nor more than ninety days from such time, when the petition and report will be acted upon, on or before which day all objections to the establishment, alteration, or vacation of the road, and all claims for damages by reason of its establishment or alteration, must be filed in the auditor's office. [C51,§§535, 536; R60,§§840, 841; C73,§934; C97,§1493; C24, 27, 31, 35, §4573.]

Referred to in §§4574, 4575

4574 Day fixed. The time for the commissioner to commence the examination shall be fixed by the auditor, and if he fails to so commence, or so report as prescribed in sections 4572 and 4573, the auditor may fix another day, or extend the time for making such report, or may appoint another commissioner. [C51,§524; R60,§829; C73,§935; C97,§1494; C24, 27, 31, 35, §4574.]

Referred to in §4575

4575 Notice served. Within twenty days after the day is fixed by the auditor as above provided, a notice shall be served on each owner of land lying in the proposed road, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, in the manner provided for the service of original notices. If the owner of the land as thus shown does not reside in the county, similar notice shall be served upon any person who is in the

actual occupancy of such land. In any case, notice shall be published, once each week, for four weeks in some newspaper printed in the county. [C51,§519; R60,§824; C73,§936; C97, §1495; S13,§1495; C24, 27, 31, 35,§4575.]

Referred to in §4577
Manner of service, §11060
S13,§1495, editorially divided

4576 **Form of notice.** The notice may be in the following form:

To all whom it may concern: The commissioner appointed to locate, vacate, or alter (as the case may be) a road commencing at..... .....in.....county, running thence (describe in general terms all the points as in the commissioner's report, giving the names of the owners of the land through which the proposed road passes as they appear upon the transfer books of the auditor's office) and terminating at....., has reported in favor of the establishment, vacation, or alteration thereof, and all objections thereto, or claims for damages, must be filed in the auditor's office on or before noon of the..... day of....., A. D....., or such road will be established, vacated, or altered without reference thereto.

.....,
County Auditor.

[C73,§936; C97,§1495; S13,§1495; C24, 27, 31, 35,§4576.]

Referred to in §4577

4577 **Auditor may establish, alter, or vacate.** If no objections or claims for damages are filed on or before noon of the day fixed therefor, and the auditor is satisfied the provisions of sections 4575 and 4576 have been complied with, he shall proceed to establish, alter, or vacate such road as recommended by the commissioner, upon the payment of costs. [C73,§937; C97,§1496; C24, 27, 31, 35,§4577.]

C97, §1496, editorially divided

4578 **Failure to pay costs.** If such costs are not paid within ten days, the auditor shall report his action in the premises to the board of supervisors at its next session, who may affirm the action of the auditor, or establish such road at the expense of the county. [C73,§937; C97,§1496; C24, 27, 31, 35,§4578.]

4579 **New notice given.** If the auditor is satisfied that the notice has not been given, he shall appoint another day, and cause such notice to be served or published as required in the first instance, and thereafter proceed as provided above. [C73,§938; C97,§1497; C24, 27, 31, 35,§4579.]

4580 **Objections or claims.** If objections to the establishment of the road or claims for damages are filed, the further hearing of the application shall stand continued to the next session of the board of supervisors held after the commissioners appointed to assess the damages have reported. All claims for damages and objections to the establishment, alteration, or vacation of the road must be in writing, and the statements in the application for damages shall be considered denied in all subsequent proceedings. [C51,§537; R60,§842; C73,§§939, 941; C97,§1498; C24, 27, 31, 35,§4580.]

4581 **Appraisers appointed — vacancies — qualification.** Upon the expiration of the time for filing claims for damages, if any are filed, the auditor shall appoint three disinterested electors of the county as appraisers, to assess the amount of damages any claimants may sustain by reason of the establishment or alteration of such road, and shall give them notice of their appointment, and fix a day and hour at which they shall meet at his office, or that of some justice of the peace, to qualify; and if they do not all appear at the time and place named, or within one hour thereafter, the auditor or justice, as the case may be, shall fill any vacancies by the appointment of others, and swear such appraisers to faithfully and impartially assess the damages claimed. [C51,§§538–541; R60,§§843–846; C73,§§940, 942, 943; C97, §1499; C24, 27, 31, 35,§4581.]

C97, §1499, editorially divided

4582 **Report.** Such appraisers shall proceed at once to perform their duties, and, after assessing the damages sustained by the claimants, respectively, shall report the amount sustained by each, in writing, to the auditor, within thirty days from the date of their appointment. [C51,§542; R60,§847; C73,§940; C97,§1499; C24, 27, 31, 35,§4582.]

4583 **Postponement — new appointment.** Should the report not be filed in time, or should any good cause for delay exist, the auditor may postpone the time for final action on the subject, and may, if necessary, appoint other appraisers. [C51,§543; R60,§848; C73,§944; C97,§1500; C24, 27, 31, 35,§4583.]

C97, §1500, editorially divided

4584 **Costs.** Should no damages be awarded the applicants therefor, all the costs growing out of their claims shall be paid by them. [C51, §545; R60,§850; C73,§945; C97,§1500; C24, 27, 31, 35,§4584.]

4585 **Final action.** When the time for final action arrives, the board may hear testimony, receive petitions for and remonstrances against the establishment, vacation, or alteration, as the case may be, of such road, and may establish, vacate, or alter, or refuse to do so, as in their judgment, founded on the testimony, the public good may require. [C51,§546; R60,§851; C73,§946; C97,§1501; C24, 27, 31, 35,§4585.]

C97, §1501, editorially divided

4586 **Damages — conditional order.** Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment, vacation, or alteration conditioned upon the payment, in whole or in part, of the damages awarded, or expenses in relation thereto. All damages for such establishment,

vacation or alteration which must be paid by the county shall be payable from the secondary road construction fund. [C51,§546; R60,§851; C73,§946; C97,§1501; C24, 27, 31, 35,§4586.]

4587 **Unconditional order.** In the latter case, a day shall be fixed for the performance of the condition, which must be before the next session of the board, and, if the same is not performed by that day, it shall at such session make some final and unconditional order in the premises. [C51,§547; R60,§852; C73,§947; C97, §1502; C24, 27, 31, 35,§4587.]

4588 **Record.** Any order made or action taken in the establishment, alteration, or vacation of a road shall be entered in the road record, distinguishing between those made or taken by the auditor and those by the board of supervisors. [C73,§948; C97,§1503; C24, 27, 31, 35, §4588.]

4589 **Plat and field notes.** After a road has been finally established or altered, the plat and field notes must be recorded by the auditor. [C51,§550; R60,§855; C73,§949; C97,§1504; C24, 27, 31, 35,§4589.]

4590 **Opening and working.** Secondary roads shall be opened and worked by the board of supervisors. [C51,§550; R60,§855; C73,§949; C97,§§427, 1504; C24, 27, 31, 35,§4590.]

4591 **Fences — crops.** A reasonable time must be allowed to enable the owners of land to erect the necessary fences adjoining the new road; and when crops have been planted or sowed before the road is finally established, the opening thereof shall be delayed until the crop is harvested. [C51,§§551, 552; R60,§§856, 857; C73,§950; C97,§1505; C24, 27, 31, 35,§4591.]

4592 **Minors — insane persons.** The rights and interests of minors and insane persons in relation to the establishment, vacation, and alteration of roads, and all matters connected therewith, are under the control of their guardians. [C51,§555; R60,§860; C73,§951; C97, §1506; C24, 27, 31, 35,§4592.]

4593 **Establishment through state lands.** The state board of education or board of control of the institutions belonging to the state may vacate, alter, change, or establish public highways through the lands belonging to the state, and for the use of such institutions, as the said board of education or board of control may deem for the best interests of the state and the public, subject, however, to the approval of the board of supervisors of the county, or the city council of the city, wherein such lands are situated. [C73,§954; C97,§1509; S13,§1509; C24, 27, 31, 35,§4593.]

4594 **County line roads.** The establishment, vacation, or alteration of a road, either along or across a county line, may be effected by the concurrent action of the respective boards of supervisors in the manner above prescribed. The commissioners in such cases must act in concert, and the road shall not be established, vacated, or altered in either county until it is so ordered in both. [C51,§556; R60,§861; C73, §955; C97,§1510; C24, 27, 31, 35,§4594.]

4595 **General control — concurrent action.** All roads, whether established by the board of control of state institutions or by the state board of education under the statute or by the county authorities, are subject to the provisions of this chapter, and those established by the joint action of boards of supervisors of two or more counties can be altered or discontinued only by the joint action of the boards of the counties in which situated. Subject to these provisions, they shall be in all other respects treated, managed, and controlled as provided in this title. The term "road" as used in this code means any public highway, unless otherwise specified. [R60,§879; C73,§956; C97,§1511; C24, 27, 31, 35,§4595.]

4596 **Consent highways.** Roads may be established without the appointment of a commissioner, if the written consent of all the owners of the land to be used for that purpose be first filed in the auditor's office; and the board, if satisfied that the proposed road is of sufficient public importance to be opened and worked by the public, shall make an order establishing the same. If a survey is necessary, the board, before ordering the same, may require the parties asking such establishment to pay or secure the payment of the expenses thereof. [C51,§§553, 554; R60,§§858, 859; C73,§§957, 958; C97,§1512; C24, 27, 31, 35,§4596.]

4597 **Appeal by damage claimant.** Any applicant for damages caused by the establishment or alteration of any road may appeal from the final decision of the board to the district court of the county in which the land lies, notice of which appeal must be served on the county auditor within twenty days after the decision is made. If the road has been established or altered on condition that the petitioners therefor pay the damages, such notice shall be served on the four persons first named in the petition, if there be that many residing in the county, in the manner in which an original notice may be served. [R60,§873; C73,§959; C97,§1513; C24, 27, 31, 35,§4597.]

Manner of service, §11060

4598 **Appeal by petitioner.** An appeal may be taken by the petitioner as to amount of damages, if the establishment or alteration has been made conditional upon paying the damages, by serving notice thereof on the county auditor and applicant for damages, in the manner in which original notices are served, and within twenty days after the decision of the board, and filing a bond in the office of such auditor, with sureties to be approved by him, conditioned for the payment of all costs occasioned by such appeal, if the appellant fails to recover a more favorable judgment in the district court than was allowed

him by such board. [R60,§874; C73,§960; C97, §1514; C24, 27, 31, 35,§4598.]

Manner of service, §11060
Presumption of approval of bond, §12759.1

4599 Transcript on appeal. When an appeal has been taken the auditor shall within ten days thereafter make out and file in the office of the clerk of said court a transcript of the papers on file in his office, and proceedings of the board of supervisors in relation to such damages. The claimant for damages shall be plaintiff and the petitioners defendants, unless the damages have been ordered paid out of the county treasury, in which case the county shall be defendant. [R60,§873; C73,§961; C97,§1515; C24, 27, 31, 35,§4599.]

4600 Trial on appeal. The amount of damages the claimant is entitled to shall be ascertained by the court in the same manner as in actions by ordinary proceedings, and the amount ascertained shall be entered of record, but no judgment rendered therefor. The amount thus ascertained shall be certified by the clerk to the board of supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. [C73,§962; C97,§1516; C24, 27, 31, 35,§4600.]

How issues tried, §11429

4601 Costs. If the appeal be taken by the petitioners, they shall pay the costs, unless the claimant recovers a less amount than was allowed him by the board. In all other cases the taxing of the costs shall rest in the discretion of the court. [R60,§873; C73,§963; C97,§1517; C24, 27, 31, 35,§4601.]

4602 Lost field notes — resurvey. When, by reason of the loss or destruction of the field notes of the original survey, or of defective surveys or record, or of numerous alterations since the original survey, the location of any road cannot be accurately determined, the board of the proper county may cause it to be resurveyed, platted, and recorded, as hereinafter provided. [R60,§913; C73,§964; C97,§1518; C24, 27, 31, 35,§4602.]

Referred to in §4603

4603 Plat and field notes filed — notice given. A copy of the field notes, together with the plat of any road surveyed under the provisions of section 4602, shall be filed in the office of the county auditor, and thereupon he shall give notice in some newspaper published within the county, that at some term of the board therein named, not less than twenty days from the publication, it will, unless good cause be shown against so doing, approve of such survey and plat, and order them to be recorded as in cases of the original establishment of a public road. [R60,§914; C73,§965; C97,§1519; C24, 27, 31, 35,§4603.]

4604 Proceedings—record. In case objection shall be made by any person claiming to be injured by the survey so made, the board shall have power to hear and determine the matter, and may, if thought advisable, order a change to be made in the survey. If, upon the final determination, the board shall find said survey is correct, it shall approve the same, and cause the field notes and plat thereof to be recorded as in case of the establishment or alteration of roads, and thereafter such records shall be received by all courts as conclusive proof of its establishment according to such survey and plat. [R60,§915; C73,§966; C97,§1520; C24, 27, 31, 35,§4604.]

4605 Road plat book. If the same has not been heretofore done, the county auditor shall cause every road in his county, the legal existence of which is shown by the records and files in his office, to be platted in a book to be obtained and kept for that purpose and known as the "road plat book". Each township shall be platted separately, on a scale of not less than four inches to the mile, and such auditor shall have all changes in or additions to the roads legally established immediately entered upon said plat book, with appropriate references to the files in which the papers relating to the same may be found. [R60,§889; C73,§§967, 968; C97,§1521; C24, 27, 31, 35,§4605.]

4606 Laying out public highways — fees. The following fees shall be paid persons engaged in laying out and changing roads:

1. Commissioners, such sum as shall be fixed by the board of supervisors, not to exceed three dollars for each day, together with ten cents per mile for the distance traveled in going to and returning from the location of the road under consideration.
2. Surveyor, for each day, four dollars.
3. Chain carriers, markers, and other assistants, for each day, one dollar and fifty cents.

If the road extends into more than one county, such expenses when so adjudged shall be paid by the several counties in proportion to the length of time occupied on the road in each county. [C51,§534; R60,§§839, 872, 877; C73, §3824; C97,§1527; C24, 27, 31, 35,§4606.]

CHANGES IN ROADS, STREAMS, OR DRY RUNS

4607 Changes for safety, economy, and utility. Boards of supervisors on their own motion may change the course of any part of any secondary road or stream, watercourse, or dry run, within any county in order to avoid the construction and maintenance of bridges, or to avoid grades, or railroad crossings, or to straighten any secondary road, or to cut off dangerous corners, turns, or intersections on the highway, or to widen any secondary road above statutory width, or for the purpose of preventing the encroachment of a stream, watercourse, or dry run upon such highway. [C97,§427; SS15,§1527-r1; C24, 27, 31, 35,§4607.]

Referred to in §4608

4608 Costs. The cost entailed by a change in a highway as provided in section 4607 shall be paid from the secondary road funds. [C97, §427; SS15,§§1527-r1,-r3; C24, 27, 31, 35,§4608.]

4609 Report and survey. Unless the action of the board is based on the recommendations of the engineer, accompanied by a report on the proposed change, and a plat and survey of the proposed change, the board shall order an engineer to make such report and survey and return the same on or before a day fixed. In making the survey, the engineer shall have the right to enter upon any premises affected by the proposed change. [SS15,§1527-r1; C24, 27, 31, 35,§4609.]

4610 Appraisers. If the board is unable, by agreement with the owner, to acquire the necessary right-of-way to effect such change, three freeholders shall be selected to appraise the damages consequent on the taking of the right-of-way. The board of supervisors shall select one of said appraisers. The owner or owners of the land sought to be taken shall select one of said appraisers. The two appraisers so selected shall choose the third appraiser. In case the owners do not exercise their said right or in case they are unable to agree as to an appraiser, or in case their appointee fails to appear and qualify, the said board of supervisors shall appoint two appraisers and said two appointees shall choose the third appraiser.

If the two appraisers selected shall fail within ten days to select a third, or the third appraiser so selected shall fail to serve, then the board of supervisors shall select the third appraiser. [SS15,§§1527-r1,-r2; C24, 27, 31, 35,§4610.]

4611 Notice. The county auditor shall cause the following notice to be served on the individual owner of each tract or parcel of land to be taken for such right-of-way, as shown by the transfer books in the office of such county auditor, and upon each person owning or holding a mortgage, or lease, upon such land as shown by the county records, and upon the actual occupant of such land if other than the owner thereof:

To whom it may concern: Notice is given that the board of supervisors of..... county, Iowa, propose to condemn for road purposes the following described real estate in said county: (Here describe the right-of-way, and the tract or tracts from which such right-of-way will be taken.) The damages caused by said condemnation will be assessed by three appraisers. Notice is hereby given that the owner or owners of said real estate may, on or before the..... day of ....., appoint one of said appraisers and that in case such right be not exercised, or if exercised and the said appointee fails to appear and qualify, the said three appraisers will be otherwise appointed as provided by law. All parties interested are further notified that said three appraisers will, when duly appointed, proceed to appraise said damages, will report said appraisement to the said board of supervisors and that said latter board will pass thereon as provided by law, and that at all such times and places you may be present if you be so minded. You are further notified that at said hearing before the said supervisors you may file objections to the use of said land for road purposes and that all such objections not so made will be deemed waived.

.....
County Auditor.

[SS15,§§1527-r2,-r3,-r6; C24, 27, 31, 35,§4611.]

4612 Service of notice. Owners, occupants, and mortgagees of record who are residents of the county shall be personally served in the manner in which and for the time original notices in the district court are required to be served.

Owners and mortgagees of record who do not reside in the county and owners and mortgagees of record who do reside in the county when the officer returns that they cannot be found in the county, shall be served by publishing the notice in one of the official newspapers of the county, once each week for two weeks, and also by mailing by registered mail a copy of such notice to such owner and mortgagee of record addressed to his last known address, and the county auditor shall furnish to the board of supervisors his affidavit that such notice has been sent, which affidavit shall be conclusive evidence of the mailing of such notice.

Personal service outside the county but within the state shall take the place of service by publication.

No service need be had on one who has exercised his right to select an appraiser. [SS15, §§1527-r2,-r3; C24, 27, 31, 35,§4612.]

Time and manner of service, §§11059, 11060

4613 Qualification and assessment. Upon the appointment of three appraisers, the county auditor shall cause them to appear before him and to take oath that they will faithfully and impartially assess the damages claimed. Said appraisers shall forthwith proceed to the assessment of said damages and make written report thereof to the board of supervisors. [SS15,§1527-r2; C24, 27, 31, 35,§4613.]

4614 Hearing — adjournment. The board shall proceed to a hearing on the objections or assessment of damages of any owner, mortgagee of record, and the actual occupant of such land if any of whom it has acquired jurisdiction, or if there be owners, mortgagee of record, and the actual occupant of such land if any over whom jurisdiction has not been acquired, the board may adjourn such hearing until a date when jurisdiction will be complete as to all owners. [SS15,§1527-r3; C24, 27, 31, 35,§4614.]

4615 Hearing on objections. The board shall, at the final hearing, first pass on the objections to the proposed change. If objections be sustained the proceedings shall be dis-

missed unless the board finds that the objections may be avoided by a change of plans, and to this end an adjournment may be ordered, if necessary, in order to secure service on additional parties. [SS15,§1527-r3; C24, 27, 31, 35,§4615.]

4616 Hearing on claims for damages. When objections to the proposed change are overruled, the board shall proceed to determine the damages to be awarded to each claimant. If the damages finally awarded are, in the opinion of the board, excessive, the proceedings shall be dismissed; if not excessive, the board may, by proper order, establish such proposed change. [SS15,§1527-r3; C24, 27, 31, 35,§4616.]

4617 Appeals. Claimants for damages may appeal to the district court from the award of damages in the manner and time for taking appeals from the orders establishing highways generally. [C97,§428; SS15,§1527-r3; C24, 27, 31, 35,§4617.]

4618 Damages on appeal — rescission of order. If the damages as finally determined on appeal be, in the opinion of the board, excessive, the board may rescind its order establishing such change. [SS15,§1527-r3; C24, 27, 31, 35,§4618.]

4619 Record of change. The board shall cause a full and detailed record to be made in the road book of all plats and surveys and all other proceedings pertaining to changes hereinbefore authorized. [C24, 27, 31, 35,§4619.]

4620 Tender of damages. No appeal from an award of damages shall delay the prosecution of the work when the amount of the award is tendered in writing to the claimant and such tender is kept good. An order to the auditor to issue warrants to claimants for damages shall constitute a valid tender, if funds are available to promptly meet such warrants. Acceptance of the amount of such tender bars an appeal. Should possession of the condemned premises be taken pending appeal and the final award be not paid, the county shall be liable for all damages caused during such possession. [SS15, §1527-r3; C24, 27, 31, 35,§4620.]

4621 Abandonment of highway—notice to owner affected. The foregoing provision with reference to changes in the highway shall not be construed as compelling the board to abandon any part of a highway already established, but if it be proposed to abandon any part of a highway already established, notice shall be served, as herein provided, upon the said record owners as aforesaid through which or abutting upon which said highway so proposed to be abandoned, extends. [SS15,§1527-r7; C24, 27, 31, 35,§4621.]

VACATION OR ABANDONMENT OF SECONDARY ROADS

4621.1 Duty to close and protect. When a secondary road is formally vacated or affirmatively abandoned by the board of supervisors, it shall be the duty of said board, and of the members thereof, immediately to close or cause to be closed said vacated or abandoned road against ordinary vehicular travel. The work of said closing may be assigned by said board to one or more members of said board or to the county engineer. Said closing shall be effected by the erection of some effective and substantial barrier at all places at which public vehicular travel has theretofore had authorized access to said vacated or abandoned road. [C35, §4621-f1.]

4621.2 Violation. If any member of said board or the county engineer negligently fails to perform the duty herein imposed upon him, he shall be guilty of a misdemeanor and upon conviction, shall be fined not to exceed the sum of twenty-five dollars. [C35,§4621-f2.]

4621.3 Liability. When a road has been adequately and effectively closed as heretofore provided, neither the members of the board nor the county engineer shall thereafter be under any liability to maintain said closing. [C35, §4621-f3.]

4621.4 Removal of barrier. Any person who shall remove any barrier which has been erected hereunder in order to close a vacated or abandoned road, shall be guilty of a misdemeanor and in addition shall be liable for all damages proximately resulting from such removal. [C35, §4621-f4.]

Punishment, §12894

4621.5 Expense. The expense attending the closing of a vacated or abandoned road shall be deemed a road construction or maintenance and paid accordingly. [C35,§4621-f5.]

CHAPTER 238

STATE HIGHWAY COMMISSION

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

4622 Members—qualifications—term—location.
4623 Appointments.
4624 Vacancies.
4625 Compensation.
4626 Duties.
4626.1 Federal donations.
4626.2 Federal appropriations.
4630 Counsel.
4630.1 Special counsel.

4622 Members — qualifications — term — location. The state highway commission shall be composed of five appointive members, not more than three of whom shall be from the same political party, and each commissioner shall serve for four years from July 1 of the year of his appointment. The office of said commission shall be located in the city of Ames, Iowa. [SS15, §1527-s; C24, 27, 31, 35,§4622.]

4623 Appointments. Within sixty days after the convening of the general assembly in regular session in 1929, and each two years thereafter, the governor shall appoint, with the approval of two-thirds of the senate in executive session, a successor or successors to the member or members of said commission whose terms expire on July 1 following. [SS15,§1527-s; C24, 27, 31, 35, §4623.]

Confirmation by senate, §38.1

4624 Vacancies. Vacancies occurring while the general assembly is in session shall be filled for the unexpired portion of the term as full-term appointments are filled. Vacancies occurring while the general assembly is not in session shall be filled by the governor, but such appointments shall terminate at the end of thirty days after the convening of the next general assembly. Vacancies shall be filled from the same political party from which the vacancy occurs. [SS15, §1527-s; C24, 27, 31, 35,§4624.]

4625 Compensation. Each member of the state highway commission shall receive a salary of four thousand dollars per annum for necessary service. Each member shall receive his actual necessary expenses incurred in the performance of his duties. [SS15,§1527-s1; C24, 27, 31, 35,§4625.]

4626 Duties. Said commission shall:

1. Devise and adopt standard plans of highway construction and maintenance, and furnish the same to the counties.
2. Furnish information and instruction to, answer inquiries of, and advise with, highway officers on matters of highway construction and maintenance and the reasonable cost thereof.
3. Appoint all assistants necessary to carry on the work of the commission, define their duties, fix their compensation, and provide for necessary bonds and the amounts thereof. The term of employment of all such assistants may be terminated by the commission, at any time and for any cause.
4. Investigate highway conditions in any county, and report all violations of duty to the attorney general.
5. Make surveys, plans, and estimates of cost, for the elimination of danger at railroad crossings on highways, and confer with local, and railroad officials, and with the Iowa state commerce commission with reference to such elimination.
6. Assist the board of supervisors and the attorney general in the defense of suits wherein infringement of patents, relative to highway construction, is alleged.
7. Make surveys for the improvement of highways upon or adjacent to state property when requested by the board in control of said lands.
8. Record all important operations of said commission and, at the time provided by law, report the same to the governor.
9. Incur no expense to the state by sending out road lecturers.
10. Order the removal or alteration of any lights or light-reflecting devices, whether on public or private property, other than railroad signals or crossing lights, located adjacent to a primary road and within three hundred feet of a railroad crossing at grade, which in any way interfere with the vision of or may be confusing to a person operating a motor vehicle on such highway in observing the approach of trains or in observing signs erected for the purpose of giving warning of such railroad crossing.
11. Order the removal or alteration of any lights or light-reflecting devices, whether on public or private property, located adjacent to a primary road and within three hundred feet of an intersection with another primary road, which in any way interfere with the vision of or may be confusing to a person operating a motor vehicle on such highway in observing the approach of other vehicles or signs erected for the purpose of giving warning of such intersection. [SS15,§§1527-s1,-s2; C24, 27, 31, 35,§4626; 47GA, ch 205; 48GA, ch 114,§1.]

Analogous provision, §7874.1
Restricting weight of vehicles on highways, §5035.23
Time of filing report and period covered, §252
40ExGA, SF 119, §6, editorially divided

4626.1 Federal donations. Should the government of the United States provide for free distribution among the states of machinery or other equipment, suitable for use in road improvement, the state highway commission is empowered to receive and receipt for such machinery and equipment, and to take such action as will secure to the state the benefit of any such tenders by the federal authorities. Said commission is further authorized, in the event of such distribution to the states by the federal authorities, to make such apportionment of said machinery or other equipment among the counties of the state as in its judgment will best facilitate work in progress or contemplated by any county or counties, but the title and right of possession of such property so received from the federal government shall at all times rest in the state highway commission for the use and benefit of the state. [C24,§4739; C27, 31, 35,§4626-a1.]

4626.2 Federal appropriations. Where funds have been allotted or appropriated or may hereafter be allotted or appropriated by the government of the United States for the improvement of streets and highways in this state, and the federal statutes or the rules and regulations of the federal government provide or contemplate that such work shall be under the supervision of the state highway commission, said commission is hereby authorized and empowered to let the necessary contracts for such construction work, to supervise and direct such construction work, to comply with the federal statutes, rules and regulations, and to cooperate

with the federal government in the expenditures of said federal funds.

In order to avoid delays, payment for such street and highway projects or improvements constructed in cooperation with the federal government may be advanced from the primary road fund. When payments on said projects or improvements are received by the state from the federal government, the funds so received shall be credited to the primary road fund. [C35, §4626-f1.]

4627 Rep. by 47GA, ch 134,§534. See §5019.01

4628, 4629 Rep. by 44GA, ch 100,§5

4630 Counsel. The attorney general shall act as attorney for said commission on all matters pertaining to their duties, and take such action as may be deemed advisable by him in order to correct violations of the laws relative to highway matters. [SS15,§§1527-s,-s2; C24, 27, 31, 35,§4630.]

4630.1 Special counsel. The highway commission may request of the attorney general, the assistance of a special attorney to look after the legal work of the highway commission, and in such event, the attorney general shall appoint a special assistant attorney general who shall be satisfactory to the commission. The salary of such special assistant attorney general shall be fixed at forty-five hundred dollars per annum, which, together with his necessary traveling expenses shall be paid from the primary road fund. The commission shall provide and furnish a suitable office for such special assistant attorney general upon request of the attorney general. [C31, 35,§4630-c1; 48GA, ch 183,§3.]

CHAPTER 239

ROADS ON STATE LANDS

4631 Separate districts.
4631.1 Alteration or abandonment.
4632 Supervisor.
4633 Maintenance and improvement.
4634 Improvement by city or county.

4631 Separate districts. Highways on lands of the state and highways on which such lands abut shall constitute a separate road district for each state institution, or state park, in connection with which such lands are used, and shall be under the jurisdiction of the board in control thereof. [C97,§1532; S13,§1532; C24, 27, 31, 35,§4631.]

4631.1 Alteration or abandonment. The conservation commission shall have the power to alter, change, relocate or abandon any public highway or road through or on any of the public lands subject to and under the jurisdiction of said commission. [C35,§4631-e1.]

4632 Supervisor. The chief engineer of the state highway commission shall be ex officio general supervisor of said several road districts, and be under the direction of the board in control thereof, and shall have general charge of the maintenance and improvement of said roads, and perform such other duties and make such reports in reference thereto as may be required by said board. Said board may appoint a local supervisor for each district. [S13,§1532; C24, 27, 31, 35,§4632.]

4633 Maintenance and improvement. The roads, bridges and culverts within or adjacent to any such district shall be maintained, repaired, and improved under the direction of the board which is in control of said lands, provided said board shall not pave or hard surface such roads unless authorized so to do by the executive council. The costs shall be paid only after certificate of detailed amount due shall have been filed by the said board with the state comptroller, and duly audited as provided by law. This section shall not be construed as preventing the paving or hard surfacing of any such roads under any other proceeding authorized by law. [S13,§1532; C24, 27, 31, 35,§4633.]

4634 Improvement by city or county. When a city, town, special charter city, or county shall drain, oil, pave, or hard surface a road which extends through or abuts upon lands owned by the state, the state, through the executive council, shall pay such portion of the cost of making said improvement through or along such lands as would be legally assessable against said lands were said lands privately owned, which amount shall be determined by said council, or board. [S13,§170-k; C24, 27, 31, 35,§4634.]

CHAPTER 240

SECONDARY ROADS

SECONDARY ROAD AND BRIDGE SYSTEMS IN GENERAL

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SECONDARY ROAD AND BRIDGE SYSTEMS IN GENERAL

4635 to 4644, inc. Rep. by 43GA, ch 20,§88

4644.01 Construction, repair, and maintenance. The duty to construct, repair, and maintain the secondary road and bridge systems of a county is hereby imposed on the board of supervisors. [C24, 27,§§4635–4677, 4780–4812; C31, 35,§4644-c1.]

4644.02 Secondary road system. The secondary road system of a county shall embrace all public highways within the county except primary roads, state roads, and highways within cities and towns. [C24, 27,§4636; C31, 35, §4644-c2.]

4644.03 Secondary bridge system. The secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county except on primary roads and on highways within cities which control their own bridge levies, except that culverts which are thirty-six inches or less in diameter shall be constructed and maintained by the city or town in which they are located. [C24, 27,§§4664, 4665; C31, 35,§4644-c3.]

4644.04 Designation of roads. The roads which are now designated as county roads by the plans and records now on file in the office of the county auditor of each county and in the office of the state highway commission shall

hereafter be known as county trunk roads. All other roads of said secondary system shall be known as local county roads. [C24, 27,§§4636, 4780; C31, 35,§4644-c4.]

4644.05 Modification of trunk roads. The mileage of the present county trunk roads shall not be materially increased until the construction work thereon is substantially completed except that the board may modify, relocate or make additions to said roads. All increases, additions, modifications or relocations shall be subject to the approval of the state highway commission. [C24, 27,§4637; C31, 35,§4644-c5.]

4644.06 Levy—secondary roads. The board of supervisors may, annually, at the September session of the board, levy, for secondary road construction purposes, a tax of not to exceed one-half mill on the dollar on all the taxable property in the county, except on property within cities which control their own bridge levies. [C24, 27,§§4635, 4795; C31, 35,§4644-c6.]

4644.07 Levy—construction purposes. The board may, also, levy, for construction purposes, a tax of not to exceed five-eighths mill on the dollar on all taxable property in the county except on property within cities and towns. [C24, 27,§4635; C31, 35,§4644-c7.]

4644.08 Secondary road construction fund. The secondary road construction fund shall consist of:

1. All funds derived from the aforesaid construction levies, and
2. All funds allotted to the county from the state tax on motor vehicle fuel, and
3. All funds received by the county from the state as refunds for bridges, culverts, and rights-of-way on primary roads, not already anticipated by the county, and
4. All other funds which may be dedicated by law to said fund, and shall be used and employed as herein provided. [C24, 27,§4635; C31, 35, §4644-c8.]

4644.09 Pledge to local roads. Thirty-five percent of the yearly secondary road construction fund is hereby pledged to the improvement of, and shall be expended on, those local county roads which the board finds are of the greatest utility to the people of the various townships. [C24, 27,§4795; C31, 35,§4644-c9.]

4644.10 General pledge. The balance of said secondary road construction fund shall be used for any or all of the following purposes at the option of the board of supervisors to:

1. The payment of the cost of constructing the roads embraced in the existing county trunk road system.
2. The payment of the outstanding county road bonds of the county authorized and issued under chapter 242, to the extent heretofore pledged.
3. The payment of legally outstanding bridge or road bonds of the county (not including primary road bonds), when construction work on the county trunk system of the county is complete.
4. The discharge of any legal obligation or contract which, under the provisions of this chapter, is required to be taken over and assumed by the county.
5. The payment of all or any part of special drainage assessments which may have been, or may hereafter be, levied on account of benefits to secondary roads.
6. The payment of the cost of constructing local county roads and expenditures pertaining thereto, but only when the construction work on the county trunk roads has been fully completed, and when the board deems it inadvisable to make additions to said trunk roads.
7. The payment of county road bonds authorized under chapter 242, code of 1924, or 1927, prior to July 4, 1929. [C24,§§4635, 4795, 4797, 4800; C27,§§4635, 4795, 4795-b1, 4797, 4800; C31, 35,§4644-c10.]

4644.11 Optional maintenance levies. The board of supervisors may, annually, at the September session of the board, levy, for secondary road maintenance purposes, the following taxes:

1. A tax of not to exceed one and one-fourth mills on the dollar on all taxable property in the county, except on property within cities which control their own bridge levies, and
2. A tax of not to exceed three mills on the dollar on all taxable property in the county, except on property within cities and towns. [C24, 27,§§4635, 4795; C31, 35,§4644-c11.]

See 45GA, ch 121, §§21, 88

4644.12 Secondary road maintenance fund. The secondary road maintenance fund shall consist of:

1. All funds derived from the aforesaid maintenance levies, and
2. All funds allotted to the county from the state tax on motor vehicle carriers, and shall be used and employed as herein provided. [C24, 27, §§4635, 4797; C31, 35,§4644-c13.]

4644.13 Pledge of maintenance fund. The secondary road maintenance fund is hereby pledged:

1. To the payment of the cost of maintaining the secondary roads according to their needs.
2. To the payment of the cost of bridge repairs, culvert material, machinery, tools and other equipment.
3. To the payment of all or any part of special drainage assessments which may have been, or which may hereafter be, levied on account of benefits to secondary roads. [C24, 27,§§4635, 4797, 4798, 4800; C31, 35,§4644-c14.]

4644.14 Optional levy. The board of supervisors may, annually, at the September session of the board, levy not to exceed five-eighths mill on the dollar on all taxable property of the county, the same to be pledged either to the construction fund or the maintenance fund as the board may direct. [C24, 27,§§4635, 4795; C31, 35,§4644-c15.]

4644.15 Transfers generally. The board may make a permanent or temporary transfer of funds from the secondary road construction fund to the secondary road maintenance fund, or from the latter fund to the former fund. [C24, §4801; C27,§§4635-b1, 4801; C31, 35,§4644-c17.]

4644.16 Duty of highway commission. The state highway commission shall when requested by the board of supervisors advise with said board as to the manner of constructing and maintaining the secondary roads. [C31, 35, §4644-c18.]

COUNTY ENGINEER

4644.17 Engineer — term. The board of supervisors shall employ one or more registered civil engineers who shall be known as county engineers. The board shall fix their term of employment which shall not exceed three years, but the tenure of office may be terminated at any time by the board. [C24, 27,§4641; C31, 35, §4644-c19.]

4644.18 Compensation. The board shall fix the compensation of said engineer or engineers, and pay the same, together with all engineering costs, from the general county fund, or from the secondary road construction fund or from the secondary road maintenance fund, or from any or all of said funds. [C24, 27,§4641; C31, 35, §4644-c20.]

4644.19 Duties — bonds. Said engineers shall, in the performance of their duties, work under the directions of said board and shall give bonds for the faithful performance of their duties in a sum not less than two thousand nor more than five thousand dollars, to be approved by the board. [C24, 27,§4641; C31, 35,§4644-c21.]

4644.20 Engineers—itemized account. All county engineers and their assistants shall, for all work done or expenses made, file an itemized and verified account, with the board of supervisors, stating the time actually employed each day, the place where such work was done, the character of the work done, and also file with such account vouchers for any expense. In computing the said expense, mileage at the rate of five cents per mile for distance actually traveled may be included. [C24, 27,§4642; C31, 35, §4644-c22.]

4644.21 Supervision of construction and maintenance work. All construction and maintenance work shall be performed under the direct and immediate supervision of the county engineer who shall be deemed responsible for the efficient, economical and good faith performance of said work. [C31, 35,§4644-c23.]

CONSTRUCTION PROGRAM

4644.22 Construction program or project. Before proceeding with any construction work on the secondary road system for any year or years, the board of supervisors shall, subject to the approval of the state highway commission, adopt a comprehensive program or project based upon the construction funds estimated to be available for such year or years, not exceeding three years. [C31, 35,§4644-c24.]

4644.23 Scope of program. In the selection of the local county roads as a part of said program or project, the board shall instruct the county auditor to notify the board of trustees of each township not later than January 1, to prepare a tentative plan of improvement for roads in their township, setting out in that plan the road or roads which, in their estimation, should be improved first, and shall also name those which should be thereafter improved and file such plan with the county auditor not later than February 1 of each year.

After such plans have been filed by the several boards of trustees, the board of supervisors shall, together with the county engineer, proceed to plan a program of construction of both county trunk and local county roads, always observing the plans filed by the boards of trustees. [C31, 35,§4644-c25.]

4644.24 Uniform and unified plan required. Said program or project shall be planned on the basis of one general, uniform, and unified plan for the complete and permanent construction of the roads embraced therein as to bridge, culvert, tile, and grading or other improvements. [C31, 35,§4644-c26.]

4644.25 Material considerations for farm-to-market roads. In planning and in adopting said program or project by the board of supervisors, said board and the county engineer shall give due and careful consideration, (1) to the location of primary roads, and of roads heretofore improved as county roads, (2) to the market centers and main roads leading thereto, and (3) to rural mail and school bus routes, it being the intent of this chapter that said program or project will, when finally executed, afford the highest possible systematic, intracounty and intercounty connections of all roads of the county. [C31, 35,§4644-c27.]

Farm-to-market roads, ch 240.1

4644.26 Provisional selection of roads. The board after due consultation with the county engineer, shall first select in a provisional way the roads which they then consider advisable to embrace in said program, and direct said engineer to make a reconnoissance survey and estimate of all said roads, or of such part thereof as, in view of the public necessity and convenience, present the most urgent need and necessity for early construction. [C24, 27, §4643; C31, 35,§4644-c28.]

4644.27 Report of engineer. In addition to the foregoing, the engineer, when so ordered by the board, shall make written report to the board and shall designate therein in their order of importance the roads which, in his judgment, are most urgently in need of construction. [C24, 27,§4643; C31, 35,§4644-c29.]

4644.28 Recommendations. The engineer may in his report recommend that certain definitely described roads or parts thereof be

omitted from the provisional program or project, or that certain definitely described roads or parts thereof be added thereto, and in such case he shall clearly enter on his report the reasons therefor. [C31, 35,§4644-c30.]

4644.29 Map required. A map of the county showing the location of the proposed program or project shall accompany the report of the engineer. [C24, 27,§4644; C31, 35,§4644-c31.]

4644.30 Additional estimates. Additional reconnoissance surveys and estimates may be ordered by the board when it deems the same necessary or advisable. [C31, 35,§4644-c32.]

4644.31 Provisional determination and hearing. Upon the filing of said report the board shall together with a representative from each township, who shall be named by the board of trustees at their January meeting, convene as a board of approval.

The township representatives shall receive the same per diem and mileage for attendance at said meeting as received by the members of the board of supervisors and shall be paid from the construction fund. [C31, 35,§4644-c33.]

4644.32 Board's action final. At this meeting this board of approval shall proceed to the final adoption of the program as it pertains to the local county roads to be paid for from the thirty-five percent of the secondary road construction fund which is dedicated to local county roads.

The proposed program or project may be approved without change or may be amended and approved but the action of this board shall be final except as it applies to the sixty-five percent of the secondary road construction fund to be expended under the direction of the board of supervisors.

The board of approval in planning said construction program shall distribute the improvements in such manner as will give to each township, as soon as may be, an equitable mileage of improved roads, and those townships which have heretofore improved their township roads shall not be discriminated against in this new improvement program.

The board of supervisors of any county may provide that the work of maintaining the local county roads of a township shall be performed by the township trustees, subject to the supervision of the county highway engineer. In such case the township trustees shall retain their road equipment, and the board of supervisors shall set aside in the county treasury a sum from the secondary road maintenance fund, which shall be said township's proportionate share of the maintenance funds for said county devoted to local county roads. In determining the amount thus set aside for use in any township the board shall use as a basis the relative mileage of local county roads in the township as compared to the entire mileage of local county roads in the county. [C31, 35,§4644-c34.]

4644.33 County trunk roads. The board of supervisors shall, immediately after the adoption of the local county road program, meet and adopt a program of county trunk roads. [C31, 35,§4644-c35.]

4644.34 Record required. After the construction program or project is finally determined, the county auditor shall record the same at length in a county road book. [C24, 27,§4646; C31, 35,§4644-c36.]

4644.35 Surveys required. Before proceeding to the construction of any road or roads included in said program where the grading and draining is estimated to cost over one thousand dollars per mile, the county engineer shall cause detailed surveys and plans for said road or roads to be prepared. [C24, 27,§4643; C31, 35, §4644-c37.]

4644.36 Nature of survey. The engineer's survey shall be on the basis of the permanent improvement of said roads, as to bridge, culvert, tile, and road work. [C24, 27,§4644; C31, 35, §4644-c38.]

4644.37 Details of survey. Said survey shall show:

1. A division into sections of all of the roads embraced in said provisional program, a designation of each section by some appropriate number, name, or letter, the starting point and terminus of each section, and the mileage of each section.
2. An accurate plan and profile of the roads surveyed, showing (a) cuts and fills, (b) outline of grades, (c) all existing permanent bridges, culverts and grades, and (d) proper bench marks on each bridge and culvert.
3. The drainage, both surface and subdrainage, necessary to prepare said roads for complete construction.
4. The location of all lines of tile and size thereof.
5. All necessary bridges and culverts, their length, height, and width and foundation soundings.
6. An estimate of the watershed having relation to each bridge and culvert.
7. An estimate of the construction cost of said roads on the basis of permanent bridges, culverts, tile and road work. [C24, 27,§4644; C31, 35,§4644-c39.]

4644.38 Existing surveys. The engineer may adopt any existing survey of any road or part thereof which is embraced in said program or project, provided such existing survey substantially complies, or is made to comply, with the requirements of this chapter. [C31, 35,§4644-c40.]

Additional provision as to surveys and reports, §4645

4644.39 Contracts and specifications. The various contracts for the carrying out of said construction program or project in the most efficient, practicable and economical manner shall, as far as possible, be accompanied by standard specifications, and no traveled roadway

shall be less than twenty-two feet from shoulder to shoulder.

Each bidder on secondary road construction work shall file with the board, statements showing his financial standing, his equipment and his experience in the execution of construction work. Said statements shall be on standard forms prepared by the state highway commission.

In the award of contracts, due consideration shall be given not only to the prices bid, but also to the financial standing of the contractor, his equipment, and his experience in the performance of like or similar contracts as shown by such statements. [C31, 35,§4644-c41.]

4644.40 Advertisement and letting. All contracts for road or bridge construction work and materials therefor of which the engineer's estimate exceeds fifteen hundred dollars, except surfacing materials obtained from local pits or quarries, shall be advertised and let at a public letting. The board may reject all bids, in which event it may re-advertise, or may let the work privately at a cost not exceeding the lowest bid received, or build by day labor. [C24, 27,§4647; C31, 35,§4644-c42.]

Referred to in §4644.41

4644.41 Optional advertisement and letting. Contracts not embraced within the provisions of section 4644.40 may be advertised and let at a public letting, or may be let privately at a cost not to exceed the engineer's estimate, or may be built by day labor. [C24, 27,§4648; C31, 35,§4644-c43.]

4644.42 Approval of road contracts. Contracts for road construction work which, according to the engineer's estimate, involve a cost of two thousand dollars or more per mile, or more than five thousand dollars in the aggregate shall be first approved by the state highway commission before the same shall be effective as a contract. [C31, 35,§4644-c44.]

4644.43 Record of bids. All bids received shall be publicly opened, at the time and place specified in the advertisement, and shall be recorded in detail, in the road book, by the county auditor; and the county engineer shall in all instances of day labor, private or public contracts, file a detailed cost accounting sheet with the county auditor; said book and cost sheets shall at all times be open to public inspection. [C24, 27,§4649; C31, 35,§4644-c45.]

4644.44 Trees—ingress or egress—drainage. Officers, employees, and contractors in charge of said construction and maintenance work shall not cut down or injure any tree growing by the wayside which does not obstruct the road, or tile drains, or any tree which does not materially obstruct the highway or materially interfere with the improvement of the road and which stands in front of any town lot, farmyard, orchard or feed lot, or any ground reserved for any public use, or destroy or injure reasonable ingress or egress to any property, or turn the natural drainage of the surface water to the injury of adjoining owners; but it shall be their duty to use strict diligence in draining the surface water from the public road in its natural channel, and to this end they may enter upon the adjoining lands for the purpose of removing obstructions from such natural channel that impede the flow of such water. [C24, 27,§4791; C31, 35,§4644-c46.]

4644.45 County trunk roads in cities and towns. The board of supervisors may, subject to the approval of the council of any city or town, purchase or condemn right-of-way therefor or eliminate danger at railroad crossings, and shall grade, drain, bridge, gravel or maintain any road or street which is a continuation of the county trunk highway system, or a continuation of a county local road which is built to grade and surfaced or about to be built to grade and surfaced, and which is (1) within, or partly within and located along the corporate limits of, any town, or (2) within or partly within and located along the corporate limits of, any city, including cities under special charter, having a population of less than twenty-five hundred or (3) within that part of any city, including cities acting under special charter, where the houses or business houses average not less than two hundred feet apart. The location of such extensions shall be determined by the board of supervisors. The council's approval shall extend only to the consideration of such improvements in their relationship to municipal improvements such as sewers, water lines, change of established street grades, sidewalks or other municipal improvements. [C31, 35,§4644-c47.]

Applicable to special charter cities, §6753.1

ANTICIPATION OF FUNDS

4644.46 Construction fund anticipated. The board before issuing anticipatory certificates shall seek the advice of the state highway commission and issue said certificates to an amount not exceeding fifty percent of the estimated funds which will accrue to the secondary road construction fund during any stated period of from one to two years. [C31, 35,§4644-c48.]

4644.47 Anticipatory resolution. Such certificates shall be authorized by a duly adopted resolution which shall specify:

1. The secondary road construction funds, specifying the year or years, which are to be anticipated.
2. The amount of certificates authorized.
3. The denomination of each certificate.
4. The rate of interest which each certificate shall bear which shall not exceed five percent per annum, payable annually.
5. The authorization of the chairman of the board of supervisors and of the county auditor, respectively, to sign and countersign such certificates. [C31, 35,§4644-c49.]

4644.48 Recitals. Each certificate shall recite:

1. The annual accruing secondary road construction funds (naming the year) of which the certificate is anticipatory.

2. That said certificate shall be payable on or before December 31 of said year.

3. That said certificate is payable solely from said accruing secondary road construction funds. [C31, 35,§4644-c50.]

4644.49 Consecutive numbering and payment. The series of certificates which anticipate the accruing of funds during a given year shall be numbered consecutively and paid in the order of said numbering. [C31, 35,§4644-c51.]

4644.50 Execution. Upon the signing of each of said certificates by the chairman of the board, said certificates shall be delivered to the county auditor, who shall countersign the same, charge the county treasurer with the amount thereof, and deliver the same to such latter officer, who shall be responsible therefor on his bond. [C31, 35,§4644-c52.]

4644.51 Taxation. Said certificates shall be exempt from taxation. [C31, 35,§4644-c53.]

4644.52 Duty of treasurer. The treasurer shall sell said certificates in accordance with the provisions of chapter 63, and shall credit the amount received to said construction fund, or if unable to sell said certificates for par plus accrued interest, the treasurer may apply said certificates at par plus accrued interest in payment of any warrants duly authorized and issued for secondary road construction work. [C31, 35,§4644-c54.]

4644.53 Registration of certificate holders. The county treasurer shall enter on a record to be kept by him the name and post-office address of all persons to whom any of said certificates are issued, with a particular designation of the certificates delivered to each person. [C31, 35, §4644-c55.]

4644.54 Registration of new holder. Any subsequent holder may present his certificates to the county treasurer and cause his name and post-office address to be entered in lieu of that of such former holder. [C31, 35,§4644-c56.]

4644.55 Terminating interest. When the accruing funds in the hands of the county treasurer, for a year covered by anticipatory certificates, are sufficient to pay the first retireable certificate or certificates, the county treasurer shall, by mail, as shown by his records, promptly notify the holder of such certificate of such fact, and thirty days from and after the mailing of such letter all interest on such certificate shall cease. [C31, 35,§4644-c57.]

Sections 4644-c58 to 4644-e7, inc., code 1935, rep. by 47GA, ch 129

MISCELLANEOUS PROVISIONS

4645 Surveys and reports. The survey and report of each section, as soon as completed and approved by the board of supervisors, shall be submitted to the state highway commission, and the board of supervisors may designate to the said commission what sections, in their estimation, should be first passed upon by said state highway commission. The said commission shall pass on such reports and plans, and in so doing, shall take into consideration the thoroughness, feasibility, and practicability of such plans, and may approve or modify the same. [SS15,§§1527-s8,-s21a; C24, 27, 31, 35,§4645.]

4646 to 4650, inc. Rep. by 43GA, ch 20,§88

4651 Bonds—conditions. The board of supervisors shall require all contractors to give a bond for the faithful performance of the contract, in a sum not less than seventy-five percent of the contract price. The surety on any bond given to guarantee the faithful performance and execution of any work shall be deemed and held, any contract to the contrary notwithstanding, to consent without notice:

1. To any extension of time to the contractor in which to perform the contract when each particular extension does not exceed sixty days.

2. To any change in the plans, specifications, or contract when such change does not involve an increase of more than twenty percent of the total contract price. If a change involves an increase in the total contract price in excess of twenty percent the surety shall be released only as to such excess. [S13,§1527-s18; C24, 27, 31, 35,§4651.]

4652 Action on bond—limitation. No provision in a contract shall be valid which seeks to limit the time to less than five years in which an action may be brought upon the bond covering concrete work nor to less than one year upon the bond covering other work. [S13,§1527-s18; C24, 27, 31, 35,§4652.]

4653 Itemized and certified bills. All bills for road work, tile and tiling, culvert, and bridge construction, or for repairs designated by the engineer, shall be filed in itemized form and certified to by the engineer before being allowed or warrants drawn therefor. Before any claim shall be allowed by the board of supervisors on the construction or maintenance funds, in payment for any work or construction, except for dragging, maintenance, or repairs not designated by the engineer, it must secure on the bill the certificate of the engineer employed by it, that such improvement has been made in accordance with the plans and specifications as herein provided.

If said engineer makes said certificate when said work has not been done in accordance with the plans and specifications, and said work be not promptly made good without additional cost, the full cost of making said work good may be recovered upon said engineer's bond.

A violation of this section by any member of the board shall render him liable on his bond for the amount of said claim. [SS15,§1527-s10; C24, 27, 31, 35,§4653.]

4654 Partial payments. Partial payments may be allowed by the board on contract work on the basis of the engineer's certified estimates and the percentages specified in the standard specifications of the state highway commission. [SS15,§1527-s10; C24, 27, 31, 35,§4654.]

4655 Advance payment of pay rolls. The board of supervisors may authorize the county auditor to draw warrants for the amount of pay rolls for labor furnished under the day labor system, when said pay rolls are certified to by the engineer in charge of the work. Said bills shall be passed on by the board at the first meeting following said payment. [SS15,§1527-s11; C24, 27, 31, 35,§4655.]

4656 Witness corners. Whenever it may become necessary in grading the highways to make a cut which will disturb or destroy, or a fill which will cover up, a government or other established corner, it shall be the duty of the engineer to establish permanent witness corners, and make a record of the same, which shall show the distance and direction the witness corner is from the corner disturbed or covered up. When said construction work is completed the engineer shall permanently re-establish said corner. A failure to perform said duties shall subject the engineer to a fine of not less than ten dollars nor more than fifty dollars to be collected on his bond. [S13,§1527-s7; C24, 27, 31, 35,§4656.]

4657 Gravel beds. The board of supervisors of any county may, within the limits of such county and without the limits of any city or town, purchase or condemn any lands for the purpose of obtaining gravel or other suitable material with which to improve the secondary highways of such county, including a sufficient roadway to such land by the most reasonable route, or the board may purchase such material outside the limits of their county, and in either case pay for the same out of the secondary road funds. [S13,§4024-i; C24, 27, 31, 35,§4657.]

4658 Procedure. The procedure for the condemnation of land in the establishment of highways shall be followed in the condemnation of land in order to obtain gravel beds and a road thereto. [C24, 27, 31, 35,§4658.]

Procedure, ch 237

4658.1 Right to prospect. The board of supervisors, county engineer, or other persons employed by the board, may, when it is necessary for the public welfare or use, for the purpose of determining whether gravel in sufficient quantities exists to warrant the purchase or condemnation of a particular piece of land for the taking of gravel, after giving written notice to the owner and the person in possession, enter upon the land and run a survey, making excavations or borings upon such land, and any damage caused thereby shall be paid by the county to anyone so damaged, and the amount of damages shall be determined in the manner provided for the awarding of damages in condemnation of land for the establishment of highways. No such prospecting shall be done within twenty rods of the dwelling house or buildings on said land without written consent of the owner. [C27, 31, 35,§4658-a1.]

Procedure, ch 237

4659 Use of gravel beds. The board of supervisors may permit private parties or municipal corporations to take materials from such acquired lands in order to improve any street or highway in the county, but it shall be a misdemeanor for any person to use or for the board of supervisors to dispose of any such material for any purpose other than for the improvement of such streets or highways. [S13,§§2024-i1,-i2; C24, 27, 31, 35,§4659.]

Punishment, §12894

4660 Repair and dragging. The county board of supervisors and the engineer are charged with the duty of causing the secondary road system to be so repaired and dragged as to keep same in proper condition, and shall adopt such methods as are necessary to maintain continuously, in the best condition practicable, the entire mileage of said system. [S13,§1527-s15; C24, 27, 31, 35,§4660.]

Duty to remove obstructions, ch 248

4661 Intercounty highways. Boards of supervisors of adjoining counties in this state shall, subject to the approval of the state highway commission:

1. Make proper connections between roads which cross county lines and which afford continuous lines of travel.

2. Adopt plans and specifications for road, bridge, and culvert construction, reconstruction, and repairs upon highways along and across county boundary lines, and make an equitable division between said counties of the cost and work attending the execution of such plans and specifications. [C24, 27, 31, 35,§4661.]

4662 Enforcement of duty. In case such boards fail to perform such duty, the state highway commission may, on its own motion, or in case said boards are unable to agree and one of said boards appeals to said commission, said commission shall notify the auditors of the interested counties that it will, on a day not less than ten days hence, at a named time and place within any of said counties, hold a hearing to determine all matters relating to such duty. At said hearing the commission shall fully investigate all questions pertaining to said matters, and shall, as soon as practicable, certify its decision to the different boards, which decision shall be final, and said boards shall forthwith comply with said order in the same manner as though such work was located wholly within the county. [C24, 27, 31, 35,§4662.]

4662.1 Construction by commission. If the said boards or either of them, should, for a period of sixty days, fail to comply with said decision, the said commission shall proceed to locate, construct, alter, or improve said road, bridge, or culvert in accordance with said decision. [C27, 31, 35,§4662-a1.]

4662.2 Payment. If said road be a secondary road or if the improvement be a bridge or culvert on a secondary road bills therefor duly audited by said commission in accordance with said decision shall be forwarded to the auditors

of the respective counties, and said auditors shall forthwith draw warrants for the amounts so audited, and the county treasurers shall pay the same as other county warrants. [C27, 31, 35,§4662-a3.]

4663 Interstate highways. The state highway commission and the board of supervisors of any county bordering on a state line are authorized jointly to confer and agree with the highway authorities of such border state, on proper connections for interstate roads, and on proper plans for the construction, improvement, maintenance, and apportionment of work and cost of roads, bridges, and culverts on or across the state line. [S13,§1570-a; SS15,§1527-s3; C24, 27, 31, 35,§4663.]

4664, 4665 Rep. by 43GA, ch 20,§88

4666 Bridges and culverts on city boundary line. Bridges and culverts on highways or on parts thereof, which are located along the corporate limits of cities which control their own bridge funds and which are partly within and partly without such limits and which highways are in whole or in part secondary roads, shall be constructed under plans and specifications, jointly agreed on by the city council and board of supervisors, and approved by the highway commission. The city and county shall share equally in the cost. All matters in dispute between such city and county relative to such bridges and culverts shall be referred to the highway commission and its decision shall be final and binding on both the city and county. [SS15,§1527-s3; C24, 27, 31, 35,§4666.]

Cities controlling bridge levy, §§5875, 6209, 6858

4667 Width of bridges and culverts. All culverts shall have a clear width of roadway of at least twenty feet. Bridges shall have a clear width of roadway of at least sixteen feet. [C51, §517; R60,§822; C73,§1001; C97,§1572; S13, §1527-s7; C24, 27, 31, 35,§4667.]

Width of roads, §4561

4668 Definitions. The term "culvert" shall include all waterway structures having a total clear span of twelve feet or less, except that such term shall not include tile crossing the road, or intakes thereto, where such tile are a part of a tile line or system designed to aid subsurface drainage.

The term "bridge" shall include all waterway structures having a clear span in excess of twelve feet. [C24, 27, 31, 35,§4668.]

4669 Intracounty bridge. The board of supervisors may, without authorization from the voters, appropriate, for the substructure, superstructure, and approaches of any one bridge within the county, a sum not exceeding fifty thousand dollars. [C73,§303; C97,§424; C24, 27, 31, 35,§4669.]

Referred to in §4670.1

4670 Intercounty and state bridge. The board of supervisors of any county may, without authorization from the voters, appropriate, for the substructure, superstructure, and approaches of any one bridge on a road between such county and another county of this state or on a road between such county and another state, a sum not exceeding twenty-five thousand dollars. [C73,§303; C97,§424; C24, 27, 31, 35, §4670.]

Referred to in §4670.1

4670.1 Election required. No appropriation for a bridge in excess of the authorization contained in sections 4669 and 4670 shall be made until the question of making such appropriation is first submitted to the electors. Such submission shall be made as provided in chapter 265. [C27, 31, 35,§4670-b1.]

4671 Bridge specifications. Standard specifications for all bridges and culverts, railroad overhead crossings, or subways, shall be furnished without cost to the counties and railroad companies by the state highway commission, and work shall be done in accordance therewith. [SS15,§1527-s11; C24, 27, 31, 35,§4671.]

4672 Approval of contract. Any proposed contract which shall exceed the sum of two thousand dollars for any one bridge or culvert, or repairs thereon, shall be first approved by the state highway commission before the same shall be effective as a contract. [SS15,§1527-s11; C24, 27, 31, 35,§4672.]

4673 Record of plans. Before beginning the construction of any permanent bridge or culvert by day labor or by contract, the plans, specifications, estimate of drainage area, estimates of cost, and specific designation of the location of the bridge or culvert shall be filed in the county auditor's office by the engineer. [SS15,§1527-s11; C24, 27, 31, 35,§4673.]

4674 Record of final cost. On completion of any bridge or culvert, a detailed statement of cost, and of any additions or alterations to the plans shall be filed by the engineer and recorded by the auditor in connection with the records of bids, all of which shall be retained in the county auditor's office as permanent records, and when said work is completed and approved, a duplicate statement of the costs thereof shall be filed with the state highway commission by the county auditor. [SS15,§1527-s11; C24, 27, 31, 35,§4674.]

4675 Rep. by 43GA, ch 20,§88

4676 Bridges over ditches. Bridges erected over drainage ditches shall when necessary be so constructed as to allow the superstructure to be removed for cleaning said ditches with as little damage to the removable and permanent parts of said bridge as possible. [SS15,§1527-s11; C24, 27, 31, 35,§4676.]

4677 Bridges on county line roads. Bridges on county line roads may, under joint agreement between the boards of the adjoining counties, be located, constructed, and maintained wholly within one county in order to secure a proper

site or in order to avoid unnecessary expense. The resulting work and expense shall be carried on and shared in such proportion as said boards may determine. [C97,§426; C24, 27, 31, 35, §4677.]

4678 Bridges over state boundary line streams. Ten percent of the legal voters, as shown by the returns of the last general election, of any county bordering upon a stream of water which forms the boundary line of this state, may petition the board of supervisors to submit to the voters the question whether such county shall be authorized to construct and maintain a foot and wagon bridge extending from such county across such boundary line river. Said petition shall state the amount to be expended for said purpose. [S13,§§424-a,-b; C24, 27, 31, 35,§4678.]

4679 Submission of question. The board shall submit such question at the first general election occurring not less than sixty days after the filing of said petition. [S13,§424-b; C24, 27, 31, 35,§4679.]

4680 Notice. Notice of the submission of such question shall be published for two consecutive weeks in at least three newspapers published and of general circulation in the county, except in counties having less than three newspapers, said notices shall be published in all of the newspapers, the last of which publications shall be at least three days and not more than ten days before the holding of such election. [S13, §424-b; C24, 27, 31, 35,§4680.]

4681 Construction and maintenance. If a majority of the voters vote in favor of such authorization, the board shall have authority to construct and maintain said bridge, and may agree with the adjoining state, or with any other municipal division thereof, as to what part of said bridge said county will construct and maintain, or as to what percentage of the cost of construction and maintenance said county shall pay, and such county shall be under no greater liability than as evidenced by such agreement. [S13,§§424-b,-c; C24, 27, 31, 35,§4681.]

4682 Levy—bond. In order to build and maintain such bridge, the board may, from year to year and on all the property in the county, levy an annual tax of not to exceed one-fourth mill. The board may, in the manner provided for funding outstanding county indebtedness, issue the bonds of the county in the amount of the authorized expenditure. The maturity of such bonds may be distributed through a period of twenty years. In case bonds are so issued, the board shall maintain sufficient levies to meet the principal and interest as in other cases of bonds issued for outstanding county indebtedness. [S13,§424-b; C24, 27, 31, 35,§4682.]

County funding bonds, ch 266
Payment and maturity of bonds, ch 63.1
Sale of bonds, ch 63

4683 Use by public utilities. Street and interurban railways, telephone, telegraph, and electric transmission lines, may be permitted to use such bridge on such terms and conditions as the governing bodies jointly erecting and maintaining such bridge may jointly determine. No discrimination shall be made in the use of said bridge as between such railways, or between other utilities, provided that any such railway desiring to use existing tracks thereon shall have the right to do so and shall bear its reasonable share of the cost of the construction and maintenance of such tracks. Joint use of telephone, telegraph, and electric transmission lines may not be required. No grant to any public utility to use such bridge shall in any way interfere with the use thereof by the public. [S13,§424-e; C24, 27, 31, 35,§4683.]

4684 Maintenance. Where there is a contract for joint maintenance of the entire structure, the county's liability for such maintenance shall only extend to that part or portion which is within the boundary line of this state. [S13, §424-d; C24, 27, 31, 35,§4684.]

4685 Interest in contracts. No member of the highway commission, their deputies, or assistants, or any other person in the employ of the commission, no county supervisor, township trustee, county engineer, road superintendent, or any person in their employ or one holding an appointment under them, shall be, directly or indirectly, interested in any contract for the construction or building of any bridge or bridges, culvert or culverts, or any improvement of any road or part thereof. [S13,§1527-s15; C24, 27, 31, 35,§4685.]

Similar provisions, §§180, 275, 3828.101, 3922, 4686.14, 4755.10, 5361, 5673, 5828, 6534, 6710, 13324, 13327

4686 Rep. by 44GA, ch 100,§7

Sections 4686-c1 and 4686-c2, code 1935, rep. by 47GA, ch 134, §§535, 536. See §§5035.20, 5035.21, 5036.01

CHAPTER 240.1

FARM-TO-MARKET ROADS

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4686.01 Definitions. As used in this chapter, the following words, terms or phrases shall be construed or defined as follows:

1. "Secondary road" shall mean any public highway except primary roads, state roads, and highways within cities and towns.

2. "Farm-to-market roads" shall mean any secondary road designated for improvement under this chapter.

3. "County's allotment of motor vehicle fuel license fees" or "allotment of motor vehicle fuel license fees" shall mean that part or portion of the motor vehicle fuel license fees which are or may be allotted to any county under the provisions of section 5093.35 or as said section may be amended, to be credited to the secondary road fund of said county.

4. "Federal aid" or "federal aid secondary road fund" shall mean funds allotted to the state of Iowa by the federal government to aid in the construction of secondary roads and which funds must be matched with funds under the control of the state highway commission. [48GA, ch 117,§1.]

4686.02 Supervisors agreement. The county board of supervisors of any county is empowered, on behalf of the county, to enter into any arrangement or agreement with or required by the duly constituted federal or state authorities in order to secure the full cooperation of the government of the United States and of the state of Iowa, and the benefit of all present and future federal or state allotments in aid of secondary road construction, reconstruction or improvement. [48GA, ch 117,§2.]

4686.03 Funds. There is hereby created a fund which shall be known as the farm-to-market road fund which shall be made up as follows:

1. All federal aid secondary road funds received by the state.

2. All other funds which may, under the provisions of this chapter or any other law, be credited or appropriated for the use of the farm-to-market road fund. [48GA, ch 117,§3.]

4686.04 Use of fund. Said farm-to-market road fund is hereby appropriated for and shall be used in the establishment, construction, reconstruction or improvement of the farm-to-market road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination, protection, or improvement of railroad crossings the acquiring of additional right-of-way and all other expenses incurred in the construction, reconstruction or improvement of said farm-to-market road system under this chapter. [48GA, ch 117,§4.]

4686.05 Allotment of fund. The state highway commission shall allot among all the counties of the state that portion of the farm-to-market road fund which comes from any source except the counties' portion of the motor vehicle fuel license fees. Said allotment to each county shall be in the ratio that the area of the county bears to the total area of the state. Each county's allotment of the farm-to-market road fund shall be used, as in this chapter provided, for the construction, reconstruction and improvement of the farm-to-market roads of that county. [48GA, ch 117,§5.]

Referred to in §§4686.27, 4686.33

4686.06 Accounts by highway commission. The state highway commission shall keep accounts in relation to the farm-to-market road fund and each county's allotment thereof, crediting each fund with all amounts by law creditable thereto, and charging each with all duly and finally approved vouchers for claims properly chargeable thereto. [48GA, ch 117,§6.]

4686.07 Treasurer's monthly statement. The account of the farm-to-market road fund, kept by the state comptroller and the state treasurer, shall deal with said fund as a single fund with all credits thereto and disbursements therefrom. The treasurer of state shall, each month, certify to the state highway commission the amount or amounts which he has received and credited to the farm-to-market road fund from: (1) the federal government as federal secondary road aid, (2) the motor vehicle fuel tax fund allotted to any county, and (3) any other source. [48GA, ch 117,§7.]

4686.08 Quarterly statement to county engineer. The state highway commission shall,

quarterly, advise each county engineer of the condition of said county's allotment of the farm-to-market road fund. Said statement shall show the balance in said county's allotment at the beginning of said period, the amount or amounts allotted to said county during said period, the amount disbursed from said county's allotment during said period, and the balance in said county's allotment at the end of said period. Said statement shall also show the estimated outstanding obligations against the said county's allotment at the date of said statement. [48GA, ch 117,§8.]

4686.09 Projects approved by commission. Before any project shall be approved by the state highway commission for farm-to-market road construction in any county under this chapter, the commission shall satisfy itself that said county is financially able and suitably equipped and organized to properly maintain said road, and that the county engineer's office in said county is suitably organized, equipped and financed to discharge to the satisfaction of the commission, the duties herein required; and said county, through its board of supervisors, shall recommend a system of secondary roads (not exceeding ten percent of the total highway mileage of the county) on which projects constructed under this chapter shall be located. Provided, that if in any county more than ten percent of the highway mileage has already been built to finished grade, bridged and surfaced with gravel or other suitable surfacing, then the board may recommend a secondary road mileage which includes any or all the secondary roads of said county which have been built to finished grade, bridged and surfaced with gravel or other suitable surfacing, plus an additional mileage which is not more than ten percent of the highway mileage of the county. [48GA, ch 117,§9.]

4686.10 System designated—additions. The state highway commission shall have authority to approve in whole or in part or to modify the system of secondary roads recommended by the board of supervisors of any county. In considering said system the commission shall take into account the relative amount of the present traffic on the various secondary roads of the county, and the probable future traffic on such roads.

The system of roads as finally designated shall be known as the farm-to-market road system.

Said road system may, subject to the consent of the board of supervisors, be changed or modified by the state highway commission from time to time to meet unforeseen or better understood conditions. Whenever it may appear that all the roads included in said farm-to-market road system in any county have been built to proper grade, drained, bridged and surfaced in a manner suited to the traffic on said roads, additional roads may be added to said system in the manner herein provided for the original designation of said road system. [48GA, ch 117, §10.]

4686.11 Nonparticipating county—funds reserved. Any county having complied with the provisions of this chapter and desiring to avail itself of the benefits thereof, may, by its board of supervisors, submit to the state highway commission project statements for the construction, reconstruction or improvement of farm-to-market roads, in said county. Should the board of supervisors of any county elect to submit no project statement to the state highway commission under this chapter, then none of said county's allotment of gasoline tax funds shall be taken or used under the provision of this chapter. [48GA, ch 117,§11.]

4686.12 Approval in advance. The state highway commission may approve projects submitted by the board of supervisors prior to the approval of the farm-to-market road system herein provided for, if it may reasonably anticipate that the roads on which such projects are located, will become a part of such system. [48GA, ch 117,§12.]

4686.13 Surveys, plans and estimates. If the state highway commission approves a project submitted by the board of supervisors, the county engineer shall proceed to make or cause to be made, the surveys, plans and estimates for said project, and submit the same to the board of supervisors and the highway commission for approval. The construction work on said project shall be done in accordance with said approved plans, except insofar as the same may be modified to meet unforeseen or better understood conditions, and no such modification shall be deemed an invalidating matter. [48GA, ch 117,§13.]

4686.14 Bids—awards to officials prohibited. When the approved plans and specifications for any farm-to-market road project are filed with the state highway commission, it shall, if the estimated cost exceeds one thousand dollars, proceed to advertise for bids and make recommended award of contract. Said recommended award of contract shall be submitted to the board of supervisors of the county in which said project is located for its concurrence. Upon receiving the concurrence of the county board on said recommended contract award, the state highway commission shall take final action awarding said contract. No contract shall be let to any state official, elective or appointive nor a member of the state highway commission, nor to any partnership or corporation in which a member of the state highway commission, or any other state officer or employee, is financially interested. The letting of a contract in violation of the foregoing provisions shall invalidate the contract, and such violation shall be a complete defense to any action to recover any consideration due or earned under the contract, at the time of its termination. [48GA, ch 117,§14.]

Similar provisions, §§180, 275 3828.101, 3922, 4685, 4755.10, 5361, 5673, 5828, 6534, 6710, 13324, 13327

4686.15 Consideration of bids—bonds. In the award of contracts, due consideration shall be given not only to prices bid, but also the mechanical or other equipment and the financial responsibility of the bidder, and his ability and experience in the performance of like or similar

contracts. The commission may reject any or all bids and may re-advertise for bids, or may let a private contract, at a cost not to exceed the lowest bid received, or if the estimated cost of the work does not exceed the sum of five thousand dollars, may proceed to the construction of the work by day labor. All contracts shall be in writing and shall be secured by a bond for the faithful performance thereof as provided by law. [48GA, ch 117,§15.]

4686.16 Claims charged to county allotment. All claims for improving farm-to-market roads hereunder shall be paid from the farm-to-market road fund and charged to the allotment of said fund for the county in which said project is located. [48GA, ch 117,§16.]

4686.17 Claims audited and paid. All claims shall be itemized on voucher forms prepared for that purpose, sworn to by the claimants, certified to by the engineer in charge, approved by the board of supervisors and then forwarded to the state highway commission for final audit and approval. Upon approval by the state highway commission, of vouchers which are payable from the farm-to-market road fund, such vouchers shall be forwarded to the state comptroller, who shall draw warrants therefor, and said warrants shall be paid by the treasurer of state from the farm-to-market road fund. [48GA, ch 117,§17.]

4686.18 Partial payments during construction. Partial payments may be made on the work during the progress thereof, but no such partial payment shall be deemed final acceptance of the work nor a waiver of any defect therein. The approval of any claims by the board of supervisors or by the state highway commission may be evidenced by the signature of the chairman of said board or commission, or a majority of the members of the board or commission, on the individual claims or on the abstract of a number of claims with the individual claims attached to said abstract. [48GA, ch 117,§18.]

4686.19 Supervision and inspection of work. The county engineer is charged with the duty of supervision, inspection and direction of the work of construction of farm-to-market road projects under this chapter. In such capacity, the county engineer shall be under the supervision of the commission. The highway commission shall make general inspection of the work during the progress thereof and may refuse to approve claims for any work which does not conform to the plans and specifications. [48GA, ch 117,§19.]

4686.20 Supervisors resolution to state treasurer. Any county may, in any year, by resolution of its board of supervisors, make available for improvement or construction of farm-to-market roads within the county an amount of not to exceed twenty-five percent of its allotment of motor fuel license fees. Upon certification of such a resolution, the state treasurer shall place in the county's allotment of the farm-to-market road fund the amount authorized by such resolution. [48GA, ch 117,§20.]

4686.21 Extensions in cities and towns. A farm-to-market road project under this chapter may, subject to the approval of the council, include the purchase or condemnation of right-of-way therefor, and grading, draining, bridging, elimination of danger at railroad crossings, the graveling or hard surfacing of any road or street which is a continuation of the farm-to-market road system and which is (1) within any town, or (2) within any city, including cities under special charter having a population of less than twenty-five hundred, or (3) within that part of any city including cities acting under special charter, where the houses or business houses average not less than two hundred feet apart.

The phrase "subject to the approval of the council" as it appears in this section, shall be construed as authorizing the council to consider said proposed improvement only in its relationship to municipal improvements such as sewers, water lines, establishing grades, change of established street grades, sidewalks and other public improvements. The locations of such farm-to-market road extensions shall be determined by the board of supervisors. [48GA, ch 117,§21.]

4686.22 Right-of-way—how acquired. Right-of-way for farm-to-market road projects under this chapter may be acquired by the county. However, the county board may request the state highway commission to acquire such right-of-way and in such event such right-of-way shall be paid for out of the county's allotment of the farm-to-market road fund. [48GA, ch 117,§22.]

4686.23 Eminent domain applicable. In the maintenance, relocation, establishment or improvement of farm-to-market roads, including extension of secondary roads within cities and towns, the state highway commission shall have authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right-of-way therefor and for the condemnation of land, including a sufficient roadway to such land by the most reasonable route for the purpose of obtaining gravel or other suitable material with which to improve such roads.

All the provisions of the law relating to the condemnation of land for public state purposes, shall apply to the provisions hereof.

The provisions of chapter 237 shall not apply to the establishment, vacation, alteration or improvement of secondary roads under this section.

No such roads shall be established through any cemetery or burying ground without the consent of all the parties affected by the same. [48GA, ch 117,§23.]

Eminent domain, chs 365, 366

4686.24 Project completed—plat filed. Upon the completion of a farm-to-market road project under this chapter, the county engineer shall file with the auditor and with the recorder of the county a complete right-of-way map of said proj-

ect. Said right-of-way maps shall be filed by the auditor and recorder and shall become a part of the permanent record of such offices. [48GA, ch 117,§24.]

4686.25 Roads bordering on cities and towns. Whenever any public highway located along the corporate line of any town or any city, including cities under special charter, is an extension of the farm-to-market road system, it may be included in said farm-to-market road system and may be improved as a part of the said road system under this chapter. [48GA, ch 117,§25.]

4686.26 Deficiencies and excesses in funds. Should the completed cost of any farm-to-market road project under this chapter be greater than the estimate on which the county's contribution to said project was based, the state treasurer shall, on certificate of such excess cost by the state highway commission, credit one-half of excess amount to the farm-to-market road fund from the said county's allotment of the motor vehicle fuel license fees.

Should the completed cost of any farm-to-market road project under this chapter be less than the estimate on which the county's contribution to the said project was based, the state highway commission shall take said fact into account when computing the county's contribution to the next project approved under this chapter for construction in said county. Said county's contribution to the said succeeding project shall be reduced in an amount equal to the unexpended portion of said county's contribution to the former project. [48GA, ch 117,§26.]

4686.27 Period of allocation — reversion. The farm-to-market road fund allotted to any county as provided in this chapter shall remain available for expenditure in said county for one year after the close of the calendar year during which said sums respectively were allocated. Any sum remaining unexpended at the end of the period during which it is available for expenditure, shall be reapportioned among all the counties as provided in section 4686.05 for original allocations.

For the purposes of this section, any sums of the farm-to-market road fund allotted to any county shall be presumed to have been "expended" when a contract shall have been let by the state highway commission obligating said sums. [48GA, ch 117,§27.]

4686.28 Engineering and other expense. Engineering, inspection and administration expense in connection with any farm-to-market road project may be paid from said county's allotment of the farm-to-market road fund. Any such expense incurred by the state highway commission may in the first instance be advanced out of the commission's support fund or out of the primary road fund, said amounts later being reimbursed to said funds out of the farm-to-market road fund.

Provided, that no part of the salary or expense of the county engineer, any member of the county board of supervisors, any member of the state highway commission, the chief engineer, or any department head or district engineer of the commission shall be paid out of the farm-to-market road fund. [48GA, ch 117,§28.]

4686.29 Maintenance by county. Any farm-to-market road constructed under the provisions of this chapter shall be maintained by the county in a manner satisfactory to the federal authorities and to the state highway commission. Should any county fail to so maintain any such road, the state highway commission shall give the board of supervisors notice of that fact. If within sixty days after receipt of such notice the said highway has not been placed in proper condition of maintenance the commission shall proceed immediately to have such highway placed in proper condition of maintenance and charge the cost thereof against said county's allotment of the farm-to-market road fund. The amount so expended for maintenance work by the highway commission shall be reimbursed to said county's allotment of the farm-to-market road fund, from said county's secondary road maintenance fund, before any more farm-to-market road projects in said county are approved by the commission. [48GA, ch 117,§29.]

4686.30 Preference on motor fuel fees. The use of any county's allotment of the motor vehicle fuel license fees, or any portion thereof, for the purpose of this chapter, shall, subject to the approval of the county board of supervisors, take precedence over any other use of said funds specified by law. [48GA, ch 117,§30.]

4686.31 Primary road fund transferred. The state highway commission shall transfer from the primary road fund to the farm-to-market road fund, on or before June 30, 1941, and on or before June 30 of each year thereafter, all moneys in excess of the sum of sixteen million dollars received in the primary road fund from state sources, exclusive, however, of funds received from the sale of primary road bonds. [48GA, ch 117,§31.]

Transfer of funds for years 1938, 1939, and 1940, see 48GA, ch 117, §31

4686.32 Widening roads—prohibition. The highway commission shall not compel the widening of any of the farm-to-market roads in any county over sixty-six feet without the consent of the county board of supervisors. [48GA, ch 117,§32.]

4686.33 Apportionment of excess allocation. That portion of the primary road fund going to the farm-to-market road fund not required to match federal aid shall be allocated to the secondary road construction fund of each county for construction purposes only, in the same ratio as provided by section 4686.05. [48GA, ch 117, §33.]

CHAPTER 241

FINANCING PRIMARY AND SECONDARY ROADS

Referred to in §4773.4

Sections 4687 to 4744, inc., code 1924, either repealed by 42GA, ch 101, or rearranged in this chapter

4745 "Secondary road system" defined.
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4753.15 Authorization and issuance of bonds.
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4753.17 Limitation on indebtedness.
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4753.19 Refunding bonds—proceeds—management.

4745 "Secondary road system" defined. The secondary road system shall embrace the following classes of roads: (1) County roads which now exist of record, or which may hereafter exist of record by additions from the township roads, exclusive of all roads of the primary road system, and (2) township roads, which shall embrace all other roads not included within cities and towns. The county road cash fund, under the jurisdiction of the board of supervisors, and the township road funds, under the jurisdiction of the township trustees, are hereby wholly dedicated and pledged to the county and township roads respectively as provided by law. [C24, 27, 31, 35,§4745.]

4745.1 Streets as extensions of secondary roads. Whenever in any city or town having a population of thirty-five hundred or less there is a road or street which is a continuation or an extension of a secondary road adjacent to lands used for agricultural or horticultural purposes as described in section 6210, which the board of supervisors is desirous of improving by hard surfacing or graveling under the law governing the improvement of secondary roads, the council of such city or town and the county board of supervisors are hereby authorized to include by resolution within such secondary road project such portion of such road in said city or town as may be located as provided herein, and to assess such lands within the zone of benefit assessments upon the same basis and in the same manner as provided by law relating to the levy of benefit assessments upon the secondary road system outside the limits of cities and towns. [C24,§4754; C27, 31, 35,§4745-a1.]

Applicable to certain special charter cities, §6754

4746 Assessment districts—survey and report—notice—hearing. In order to provide for the graveling, oiling, or other suitable surfacing of roads of the secondary system, the board of supervisors shall have power, on petition therefor, to establish road assessment districts. Said petition shall intelligently describe the lands within said proposed district, and the road or roads therein which the petitioners desire improved, and the general nature of the improvement proposed on each of said roads. Improvements may be proposed in the alternative. Said petitions shall be signed by thirty-five percent of the owners of the lands within the proposed district who are residents of the county or where none of the landowners within the proposed district are residents of the county, by thirty-five percent of such nonresident owners.

Said petition shall be filed with the county auditor, whereupon the board of supervisors shall cause the county engineer to personally examine all the roads within such proposed district and to determine the relation of such roads to the lands within such proposed district, and the relation of such roads to any of the roads of the primary road system, and the necessity, if any, for further grading or draining of such roads.

The engineer shall embody his finding in a report to said board. He may recommend the establishment of the district as requested, or with such modifications as, in his judgment, are advisable, including a recommendation as to an increase or decrease of the size of the district as proposed by the petitioners. The engineer's report shall include a plat showing, in accordance with his recommendations, the highways to be improved and benefited.

Upon the filing of said report by the engineer, the board of supervisors shall fix a time for hearing thereon, and shall cause the county auditor to serve notice by publication, as hereinafter provided, of the pendency of said petition on all owners of said land lying within said proposed district, as recommended by the engineer.

Said notice shall contain the time and place of hearing on said petition, an intelligent de-

scription of all of the lands lying within said district, and the ownership thereof, as shown by the transfer books in the auditor's office, and shall be published for two consecutive weeks in some newspaper published in the English language within the proposed district, if there be such newspaper, and if there be no such newspaper within such district, then the said notice shall be so published in some such newspaper in the county as near as practicable to said district. Proof of such publication shall be made by the publisher by affidavit duly filed with the county auditor.

Hearings on said petition may be adjourned from time to time without loss of jurisdiction on the part of the board. On the final hearing, the board shall proceed to a determination of said matter. It may reject the proposal or it may approve the same and establish the district as petitioned for. It may modify the petition either by excluding lands therefrom or by adding lands thereto, or otherwise modify the same, or the board may withhold final order in such matter until such roads, or any designated part thereof, are drained or graded to their satisfaction. No lack of definiteness, either in the petition or in the engineer's report, shall be deemed a jurisdictional defect, and the final order of the board of supervisors establishing the district shall be final. In establishing a district, the board of supervisors shall determine and enter of record the general nature of the improvement to be constructed on the different roads within the district, or may determine such improvements in the alternative and may determine on one class of improvement for some roads and a different class for other roads.

Whenever it is desired to improve any such road, which road is on the county line between two or more counties, an improvement district may be established in the same manner as hereinbefore provided, by the joint action of the boards of supervisors of the counties concerned. Whenever any such a joint project is entered into, the engineers of each county shall work together upon such project and shall file their joint report with their respective boards. Thereafter the procedure shall be followed as hereinbefore provided and each county shall proceed with the establishment of an assessment district in its county for the payment of the cost of improving the joint highway, and each county shall proceed to pay its share of said cost in the same manner as though the entire project were located in that county. [C24, 27, 31, 35,§4746; 47GA, ch 130,§1.]

4747 Commission furnished copy of plat. Upon the establishment of a district on said secondary road system, the board of supervisors shall file with the state highway commission a copy of the order establishing the district and a copy of the engineer's plat. [C24, 27, 31, 35,§4747.]

4748 Plans—bids. Upon the establishment of a district in such secondary road system, the county engineer shall prepare the plans for the improvements contemplated by the order of the board establishing the district, which plans shall be accompanied by the standard specifications of the state highway commission for the class of improvements contemplated. Upon the filing of said plans and specifications, and upon receiving the agreement of the township or townships to pay their portion of the improvement of township roads, if any, the board shall, in accordance with their order relative to the class or classes of improvements, proceed to advertise for bids, and shall proceed as provided in section 4700 provided that contracts involving less than five thousand dollars need not be approved by the state highway commission.

Where petitions for the improvement of township roads shall be signed by a majority of the owners of the lands within the proposed district who are residents of the county, and who represent at least fifty percent of the lands within the proposed district, the board of supervisors may proceed as hereinbefore provided without receiving the agreement of the trustees of said township or townships. [C24, 27, 31, 35,§4748.]

Section 4700 repealed by 42GA, ch 101

4749 Inspection of work. It shall be the specific duty of the board of supervisors to see that all contracts on said secondary roads are faithfully executed. The county engineer shall maintain competent inspection of the work during the progress thereof, and in the certification of bills and the issuance of warrants the engineer and the county auditor shall rest under the same responsibility as now attends such acts relative to road work, and tile, tiling, culvert, and bridge construction. [C24, 27, 31, 35,§4749.]

See §4653

4750 Payment for county road improvements. The total cost of improving a county road in said secondary system within said district, by oiling, graveling, or other suitable surfacing, shall be apportioned and paid in the proportion of seventy-five percent from the county road fund and twenty-five percent from assessments on benefited lands, or may, by agreement between the board of supervisors and all of the trustees of the township in which the road is located when the petition requests such method of payment, be paid as provided in the next succeeding section. [C24, 27, 31, 35, §4750.]

4751 Payment for township secondary roads —maintenance. The total cost of so improving a township road within said district shall be apportioned and paid in the proportion of twenty-five percent from the county road fund, fifty percent from the township road funds of the township or townships embracing said township road (according to their relative mileage), and twenty-five percent from the special assessments on benefited lands.

A county road, after it is so improved, shall be maintained by the board of supervisors from the county road fund. A township road, after it is so improved, shall be maintained by the township trustees from township funds, unless the improvement is of so substantial and perma-

nent a nature as that the board of supervisors shall by resolution add such road to the county road system, to be maintained as such. [C24, 27, 31, 35,§4751.]

Referred to in §4750

4752 Advancing costs and reimbursement of funds. The total cost of such improvements on said secondary roads shall in the first instance be paid from the county road fund, or jointly from such fund and from the proceeds of all special assessments and road certificates issued against special assessments on lands within the district, or by direct application of such certificates to such cost.

In case of the improvement of a county road, the said county road fund shall be reimbursed for amounts advanced in excess of its legal contribution, from the proceeds of all assessments on benefited property, and from the proceeds of all road certificates which represent such special assessments.

In case of the improvement of a township road, said fund shall be reimbursed to the extent of twenty-five percent of the total cost of the improvements from said special assessments and road certificates, and fifty percent from the township road fund, or the township drag fund, or from the township drainage fund, or from any or all of said funds. The trustees are authorized to transfer to the county from any or all of such township funds the amount sufficient to effect such reimbursement.

Should the trustees neglect to make such transfers, the county treasurer, on order from the board, shall withhold from such township sufficient of its tax funds as will effect such reimbursement, and transfer such amount to the county road fund, or the board of supervisors may levy such direct tax against the property within said delinquent township as will effect such reimbursement.

If the district as finally established, embraces and contemplates the improvement of a township road, the board of supervisors shall proceed no further as to such township road until the township which embraces such road shall agree in writing, signed by a majority of its trustees, to pay its portion, as herein required, of the total cost of said improvement. Said written agreement shall be deemed the financial obligation of the township and not of the trustees individually. If such township road is on a township line, such agreement shall be executed by both townships, and one-half of that portion of the cost payable from township funds shall be borne by each township. [C24, 27, 31, 35, §4752.]

4753 Special assessments. Special assessments shall be levied upon the lands within districts embracing secondary roads, in the aggregate amounts hereinbefore provided, and such amount shall be apportioned and levied within said district in the manner hereafter provided in case of improvements within primary road districts, it being the intent of this section that the appointment of apportioners, the apportioning of benefits, the notice thereof and hearing thereon, and all procedure in connection therewith which leads to and culminates in the final collection and payment of such benefits, including the issuance of road certificates, shall be governed by the provisions of this chapter applicable thereto, except that no additional lands shall be included within the district after same is established by the board of supervisors. [C24, 27, 31, 35,§4753.]

4753.01 Board of apportionment—report—notice and hearing — fees of appraisers. A board of apportionment of three resident freeholders of the county shall be appointed by the board of supervisors to apportion all special benefits to real estate within each district, but the same board of apportionment may act for more than one district. No person shall serve on such board if he lives or owns real estate within the district for which he is to act.

Whenever the total expense of such improvement within said district has been approximately determined, said board of apportionment shall, with all reasonable dispatch, personally inspect and classify in some uniform manner, and under some intelligent description, and in a graduated scale of benefits, all real estate within said districts. Said classification, when finally established, shall remain as a basis for all future assessments to cover deficiencies, if any, unless the board of supervisors, for good cause, shall authorize a revision thereof.

Said board of apportionment shall, among other relevant and material matters, if any, give due consideration to the fair market value per acre of each of the different tracts of real estate, to their relative location and productivity, and to their relative proximity and accessibility to the said improvement.

They shall, in writing, and to the different described tracts of real estate within said district, make an approximately equitable apportionment of twelve and one-half percent of the total expense of said improvement.

In making said apportionment, real estate owned by the state or any county shall be treated as other real estate, but no other publicly owned real estate shall be included, and in apportioning benefits to real estate owned by the county or state no consideration shall be given to the buildings thereon.

Said apportionment report shall specify each tract of real estate by some intelligent description, the amount apportioned thereto, and the ownership thereof, as the same appears on the transfer books in the auditor's office, and shall be filed with the county auditor. Said apportionment shall carry the presumption, in the absence of a contrary showing, that the same is fair, just, equitable, and in proportion to benefits and not in excess thereof.

Upon receipt of said apportionment, the county auditor shall fix a day for hearing before the board of supervisors, and cause notice to be served by publication as hereinafter provided upon each person whose name appears in said apportionment report, or in any recommendation accompanying the same, as owner, and also upon the person or persons in actual occupancy of any

such real estate, which notice shall state the amount of special assessments apportioned to each tract, the day set for hearing before the board of supervisors, that at said hearing any apportionment may be increased without further notice, that (if such be the case) the board of apportionment has recommended that specified additional tracts of real estate should be included within said district, and that specified sums should be apportioned thereto to defray the cost of said improvement, and that all objections to said report, or any part thereof, by reason of any irregularity in prior proceedings, or by reason of any irregularity, illegality, or inequality in making such apportionment, must be specifically made in writing and filed with the county auditor on or before noon of the day set for such hearing, and that a failure to so make and file such objections will be deemed a conclusive waiver of all such objections.

The county auditor shall cause such notice to be served by having the same published in a newspaper of the county having a general circulation in the district affected by the improvement once each week for two consecutive weeks, the last of which publications shall be not less than five days prior to the day set for said hearing. Proof of such service shall be made by affidavit of the publisher and be filed with the county auditor.

Omission to serve any party with notice herein provided shall work no loss of jurisdiction on the part of the board over such proceeding, and such omission shall only affect the persons upon whom service has not been had, and if, before or after the board has entered its final order in apportionment proceedings, it be discovered that service of said notice has not been had on any necessary person as herein provided, the board shall fix a time for hearing as to such omitted parties and shall cause such service to be then made upon them, either by publication as in this section provided or by personal service in the time and manner required for service of original notices in the district court, and after such hearing shall proceed as to such person as though such service had been originally complete.

The appearance of any interested party, either in writing or personally, or by authorized agent, either before the board of supervisors or before the state highway commission at any stage of a pending proceeding for the hard surfacing of the highways of a district, shall be deemed a full appearance. Only interested parties shall have the right to appear before the board of supervisors in proceedings provided for in this chapter, and all persons so appearing shall be required to state for whom they appear, and the clerk of the board shall make definite entry accordingly in the minutes of the board.

The state highway commission shall prescribe standard forms for apportionment reports and notice of hearings thereon.

Each member of the board of apportionment shall be paid in full for all services, at the rate of six dollars per day of actual service, and ten cents per mile for each mile necessarily traveled in the performance of his duties, and bills therefor, duly sworn to and itemized, shall be returned to the board of supervisors with the report of the apportioners. [C24,§4707; C27, 31, 35,§4753-a1.]

See note under §4753.02

4753.02 Report in re omitted lands. Should the board of apportionment be satisfied from its investigation, that certain tracts of real estate have been omitted from said district, and that such omitted tracts ought to bear an equitable portion of the expense of such improvement, and are, as to any part thereof, within four hundred eighty rods of said improvement, and not embraced within any other primary road district, they shall proceed in the following manner, to wit:

First, they shall make and return their apportionment report to the board of supervisors, on the presumption that no real estate will be ultimately assessed, except the real estate which is embraced within the district as then constituted and established.

Second, they shall accompany their apportionment report with a definite list of the heretofore mentioned tracts of real estate, which ought, in their judgment, to be within said district, but which have been omitted therefrom, and shall definitely state the amount which, in their judgment, each such omitted and described tract ought to equitably bear toward the cost of the improvement. The board of supervisors on the final hearing of said apportionment report, shall pass on said recommendation, and may wholly reject or wholly approve the same, or may reject in part and approve in part, or may approve wholly or in part, with modification. If the recommendation be approved and adopted in any part, the board shall enter an order changing the boundaries of the district accordingly, and notify the state highway commission of said change, and shall adjust the final apportionment in accordance therewith. [C24, §4709; C27, 31, 35,§4753-a2.]

Above section not specifically repealed, but its applicability to secondary roads may be questionable in view of the exception in the last clause of §4753

4753.03 Hearing — levy of assessments — payment. The final hearing on said apportionment report may be adjourned from time to time without loss of jurisdiction on the part of the board. On such final hearing the board shall hear and determine all objections filed, and may increase, diminish, annul, or affirm the apportionment made in said report, or any part thereof, as may appear to the board to be just and equitable.

On the final determination, the board shall levy such apportionment and all installments thereof upon the real estate within said district, as finally established, and said assessment and all installments thereof shall be then due and payable, and bear interest at six percent per annum commencing twenty days from the date of said levy; provided that if any owner, other than the state or county, of any of said tracts of land shall, within twenty days from the date of said assessment agree, in writing filed in the

office of the county auditor, that in consideration of his having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to said assessment upon his said real estate, and will pay the same with six percent interest thereon, then and in that case, said assessment shall be payable as follows: In ten equal installments, the first of which shall mature and be payable on the date of such agreement, and the other installments, with interest on the whole amount unpaid, annually thereafter, at the same time and in the same manner as the March semiannual payment of ordinary taxes.

Where no such agreement is executed, then the whole of such special assessment so levied shall mature at one time and be due and payable with interest, and shall be collected at the next succeeding March semiannual payment of ordinary taxes.

All such taxes shall become delinquent on the first day of March next after their maturity, shall bear the same interest, the same penalties, and be attended with the same rights and remedies for collection, as ordinary taxes.

An owner of land who has availed himself of said ten-year option may at any time discharge his assessment by paying the balance then due on all unpaid installments, with interest on the entire amount for thirty days in advance.

Assessments against lands owned by the state or county shall be due and payable from the date of levy by the board of supervisors, or in the case of any appeal, from the date of final confirmation of the levy by the court.

In case of assessment on lands owned by the county, the same shall be paid from the county general fund. In case of assessments on lands owned by the state, the same shall be represented by a voucher, duly audited as heretofore provided, and the state comptroller shall draw warrant therefor and make the same payable out of any funds in the state treasury not otherwise appropriated. [C24,§4710; C27, 31, 35,§4753-a3.]

4753.04 Reassessments to meet deficit. In case an assessment as originally made should later be found to be insufficient to pay one-eighth of the total cost of the improvement, an additional assessment may be made in the same relative ratio as the original assessment to meet the deficiency. In case an assessment appears to be invalid or, in the judgment of the board, seriously defective, the board of supervisors may proceed to the making of a new assessment as though no assessment had ever been made. [C24,§4711; C27, 31, 35,§4753-a4.]

4753.05 Appeals—power of court—duty of clerk. Any owner of land may appeal to the district court from the order of the board of supervisors in levying the assessment against his real estate, by filing with the county auditor within fifteen days from the date of such levy, a bond conditioned to pay all costs in case the appeal is not sustained, and a written notice of appeal wherein he shall, with particularity, point out the specific objection which he desires to lodge against such levy. The appearance term shall be the trial term, and said appeal shall have precedence over all other business of the term except criminal matters. The appeal shall be heard as in equity, and the court may raise or lower the assessment in question and make an equitable assessment in the judgment of the court. The clerk of the district court shall, upon the entry of the final order of the court, certify such final order to the county auditor, and the board of supervisors shall at once so adjust the assessments as to comply with such final order. [C24,§4713; C27, 31, 35,§4753-a5.]

Presumption of approval of bond, §12759.1

4753.06 Appeal—procedure When an appeal is taken, the county auditor shall at once make a transcript of the notice of appeal and appeal bond, and transmit the same to the clerk of the district court. The appellant shall, on or before the first day of the first term of the court, after taking said appeal, docket said appeal and file a petition setting forth the order or decision of the board of supervisors appealed from and his specific objections thereto. A failure to comply with either of these requirements shall be deemed a conclusive waiver of the appeal, and in such case, the court shall dismiss the same. Appellee need not file answer, but may do so. [C24,§4714; C27, 31, 35,§4753-a6.]

4753.07 Certifying assessments and levy—lien. When the board of supervisors has entered its final order as to the amounts of all special assessments on a given improvement, the county auditor shall at once certify a list of such assessments and a list of the real estate upon which each assessment has been levied, with the specific designation of the district embracing such real estate, to the county treasurer, who shall enter each assessment upon the tax books and continue such entry until such assessment is paid.

Each special assessment and all installments thereof shall be a lien upon the real estate upon which it is levied from the date of such certification by the county auditor, to the same extent and in the same manner as taxes levied for state and county purposes. Changes in the amount of any special assessment by reason of any ruling of the district court on appeals, shall be likewise certified and the county treasurer shall make the proper corrections on his books. [C24, §4715; C27, 31, 35,§4753-a7.]

4753.08 Account for each district. Each assessment district shall be considered a unit and all funds received by the county treasurer for and on behalf of the hard surfacing of such unit shall be carried as a distinct and separate account and under the same specific name as that used by the board in establishing such unit. [C24,§4716; C27, 31, 35,§4753-a8.]

4753.09 Road certificates — requirements — payment—termination of interest. In order to render immediately available that amount of the cost of an improvement which has been specially assessed, the board may issue road certificates in the name of the county in an aggregate amount not exceeding the then unpaid amount

of the special assessment levied in said district. Each issue of certificates shall be under, and in accordance with, a duly adopted resolution of the board which shall be entered at large in the minutes of the proceedings of the board, and which shall recite: (1), the name or designation of the road district on account of which the certificates are issued; (2), that a stated amount (naming the amount) has been specially assessed against the lands within said district; (3), that a stated amount of said aggregate special assessment has not yet been paid (naming said unpaid amount); (4), that it is necessary to render said unpaid amount immediately available; (5), the number of road certificates authorized and the specific amount of each certificate; (6), the specific numbering or designation of each certificate; (7), the rate of interest which each certificate shall bear from date, to wit, not to exceed six percent per annum; (8), the fact that said certificates are payable solely from the proceeds of the special assessments which have been levied on the lands within said district; (9), that each certificate shall be payable on or before the first day of January of the first year following the maturity of the last installment of said special assessments, and that interest thereon shall be paid annually; (10), the authorization to the chairman of the board, and to the county auditor, respectively, to sign and countersign each of said certificates.

Upon the signing of each of said certificates by the chairman of the board, said certificates shall be delivered to the county auditor, who shall countersign the same, charge the county treasurer with the amount thereof, and deliver the same to such latter officer, who shall be responsible therefor on his bond. The treasurer may apply said certificates in payment of any warrants duly authorized and issued for hard surfacing the roads within said district, or he may sell the same for the best attainable price and for not less than par, plus accrued interest, and apply the proceeds in payment of such authorized warrants. Said certificates shall be retired in the order of the consecutive numbering thereof.

The county treasurer shall, on or in connection with the road account for said district, clearly enter the name and post-office address of all persons to whom any of said certificates are issued, with a particular designation of the certificates delivered to each person. Any subsequent holder may present his certificates to the county treasurer and cause his name and post-office address to be entered in lieu of that of such former holder. Whenever the fund for such particular district has money sufficient to pay the first retireable certificate or certificates, the county treasurer shall, by mail, as shown by his records, promptly notify the holder of such certificate of such fact, and from and after the mailing of such letter all interest on such certificate shall cease. [C24,§4717; C27, 31, 35,§4753-a9.]

4753.10 Election in re bonds—notice—form of proposition—canvass—procedure to test legality. If any county desires to hasten the drainage and grading or the hard surfacing of the primary roads of its county at a more rapid rate than would be accomplished by merely employing each year its allotted portion of the primary road fund for said year, it may proceed as follows: The board may submit, or, upon petition of a number of the qualified voters of the county equal to twenty percent of the total vote cast in said county at the last preceding general election, presented to the board in writing so to do, must submit to the voters of the county at a general election, or at a special election called by the board for such purpose, the question of issuing bonds for the purpose of raising funds to meet the cost of such work, and to provide for the retirement of such bonds and interest thereon.

Notice of such election shall be given by publication once each week for two successive weeks in all the official newspapers of the county, stating the time when such election will be held, and substantially the proposition that will be submitted; the last publication to be at least five days prior to the day such election is to be held.

Special elections shall be conducted in the same manner as general elections are conducted. Said question shall be set forth on the ballots substantially as follows: "Shall the board of supervisors be authorized to issue bonds from year to year, in the aggregate amount not exceeding.....dollars, for the purpose of providing the funds for hard surfacing the primary roads of the county, and to levy a tax on all the property in the county from year to year not exceeding.....mills in any one year, for the payment of the principal and interest of said bonds, provided, however, that the annual allotments to the county of the primary road fund shall be used to retire said bonds as they mature, and only such portion of said tax shall be levied from year to year as may be necessary (1) to pay the interest annually, and (2) to meet any deficiency, if any, between the amount of the principal of the bonds and the said allotments from the primary road fund, together with assessments on benefited property provided by law." Immediately to the right of said proposition shall appear two squares of appropriate size, one above the other. Immediately after the first square shall appear the word "yes". Immediately after the other square shall appear the word "no". The voter shall indicate his vote by a cross in the appropriate square.

The returns of said elections shall be canvassed by the board, and its findings shall be entered at large in the minutes of its proceedings. No proceedings to test or review the legality or correctness of said election shall be maintainable unless instituted within thirty days after the findings of the board have been entered upon the record. The fact of each authorization of bonds by a county shall be at once certified by the county auditor to the state highway commission, with such data relative thereto as the commission may demand. [C24, §4720; C27, 31, 35,§4753-a10.]

4753.11 Bonds — form — denomination — interest—payment. If a majority of the votes be in favor of such issue of bonds and tax levy, the board shall from time to time, as necessary to meet the construction cost and expenses incidental thereto, not provided for by funds immediately available from the primary road fund, or from proceeds of special benefit assessments heretofore provided for, issue serial bonds in denominations of five hundred dollars or one thousand dollars each, and at a rate of interest, payable annually, not exceeding five percent per annum. Bonds and annual interest thereon shall mature on the first day of May. Each bond shall provide that the same shall be payable at the option of the county, on any interest payment date on or after five years from the date of the bond. No bonds shall be sold for less than par value, plus accrued interest. No bonds shall be issued with maturity date postponed more than fifteen years. [C24,§4721; C27, 31, 35,§4753-a11.]

Vote required to authorize bonds, §1171.18

4753.12 Bond levy. If a majority of the voters be in favor of such bond issue and tax levy, the board of supervisors shall, each year thereafter during the life of the bonds, levy on all the property of the county such part of such authorized tax as will clearly meet (1) the matured or maturing interest for the ensuing year on all such outstanding bonds, and (2) any amount of maturing principal of bonds, provided, however, that only so much of said tax shall be levied in any year for principal of said bonds, if any, as cannot be met (a) by the county's allotment of the primary road fund available for such ensuing year, and (b) by the proceeds of special assessments on benefited property. [C24,§4722; C27, 31, 35,§4753-a12.]

4753.13 Bonds—issuance—sale—retirement —terminating interest—exemption from taxation. All bonds issued under the provisions of this chapter shall be issued in serial form. Each issue shall be authorized by a duly adopted resolution of the board, which resolution shall be entered at large in the minutes of the board. Such resolution shall clearly specify the number of bonds authorized, the amount of each bond, the number or designation of each bond, the rate of interest which each bond shall bear from date, which interest shall not exceed five percent per annum, payable annually, the date of maturity of each bond, and the authorization to the chairman of the board to sign, and to the county auditor to countersign, the same. When signed and countersigned, the county auditor shall charge the county treasurer with the amount of same and deliver the same to the county treasurer, who shall be responsible therefor on his bond.

The county treasurer shall, when so directed by the board, apply any part or all of said bonds in payment of any warrants duly authorized and issued for the particular purpose for which such bonds are issued, provided the same are applied, for at least par of such bonds plus all accrued interest, or the county treasurer shall, when so directed by the board, advertise and sell any part or all of said bonds for the best attainable price, and for not less than par, plus all accrued interest, and apply the proceeds wholly for a like purpose. Said advertisement shall be inserted once a week for at least two weeks in one official county paper in the county, and for a like period in at least one newspaper of general circulation throughout the state, and may include one or more periodicals devoted to the interest of investors.

Bonds of each series shall be retired in the order of the issuance of each series. The county treasurer shall, in disposing of said bonds, keep an accurate record of the name and post-office address of all persons to whom any of said bonds are issued, with a particular designation and description of the bonds delivered to each person. Any subsequent holder of any of such bonds may present the same to the county treasurer and cause his name and post-office address to be entered in lieu of such former holder. Whenever the fund from which such bonds are payable is sufficient to pay the legally retireable series of any issue of bonds, the county treasurer shall, by mail, as shown by his records, promptly notify the record holder thereof of such fact, and from and after the expiration of twenty days from the mailing of such notice, all interest on such bonds shall cease. If bonds are presented and paid prior to the expiration of such time, interest shall be computed only to the time of such presentation and payment. Bonds, and road certificates (whether issued in anticipation of special assessments or in anticipation of annual allotments of the primary road fund), shall not be taxed. [C24,§4723; C27, 31, 35,§4753-a13.]

Referred to in §4753.14

4753.14 Nature of bonds—refunding. The bonds authorized by section 4753.13 are general obligations of the county.

The board of supervisors may refund at any time at a less rate of interest primary road bonds upon which payment has become optional or unmatured primary road bonds with the consent of the owner.

Should the funds on hand not be sufficient to retire said bonds on the date of maturity thereof, the board of supervisors shall refund the same through the issuance of county funding bonds, as provided in sections 5275 to 5277, inclusive, 5287, and 5288.

Any refunding bonds and the interest accruing thereon shall be payable from the same funds from which the original bonds and the interest thereon were payable. [C24.§4724; C27, 31, 35,§4753-a14.]

4753.15 Authorization and issuance of bonds. The county auditor shall certify to the state highway commission a correct copy of each resolution which authorizes the issuance of bonds or road certificates which are anticipatory either of special assessments or annual allotments, and from time to time a like certificate as to the actual issuance of bonds or road certificates, under such resolution, together with

such data relative thereto as the commission may demand. [C24,§4725; C27, 31, 35,§4753-a15.]

4753.16 Retirement of immature bonds. Whenever available funds created under this chapter are not needed for pending or contemplated improvements, the board of supervisors may, with the consent of any holder of immatured bonds, retire the same by purchase at a price not exceeding par and accrued interest. [C24,§4726; C27, 31, 35,§4753-a16.]

4753.17 Limitation on indebtedness. The amount of bonds issued under this chapter by any county to pay for primary road construction, or bonds issued to refund county primary road bonds, shall not, when added to all other indebtedness of the county, exceed in the aggregate four and one-half percent on the actual value of the taxable property within such county to be ascertained by the last state and county tax list previous to the incurring of such indebtedness, any other statute to the contrary notwithstanding.

The amount of bonds issued for secondary road construction when added to all other indebtedness of the county shall not exceed in the aggregate three percent on the actual value of the taxable property within such county to be ascertained as above specified. [C24,§4742; C27, 31, 35,§4753-a17.]

4753.18 Penalty for violations. Any member of the board of supervisors, or other county officer, who authorizes or issues, or permits to be issued, any certificate or bond in violation of the requirements herein specified, or who diverts any authorized certificate or bond, or the proceeds derived therefrom, or any part thereof, to any other purpose than the purpose herein specified, shall be deemed guilty of embezzlement and punished accordingly. [C24,§4740; C27, 31, 35,§4753-a18.]

Embezzlement, ch 578

4753.19 Refunding bonds—proceeds—management. Any county which has primary road bonded indebtedness outstanding is hereby authorized to issue and sell primary road refunding bonds, notwithstanding that at the time of such issuance and sale the indebtedness of such county may be in excess of its legal limitations. The proceeds of such primary road refunding bonds, together with all other funds from time to time coming into the possession or control of a county treasurer for the purpose of paying interest on or principal of primary road bonded indebtedness shall be by such county treasurer converted into a separate account, and any of same as may be deposited in an otherwise qualified county depository shall, when so deposited, be designated and held by such depository without interest as a special trust fund deposit. When funds in any such separate account and/or special trust fund deposit shall be held for the retirement of certain designated bonds, then such funds shall be regarded as sinking funds and shall be computed as an offset against the indebtedness of said county represented by such particularly designated bonds.

The issuance of primary road refunding bonds by any county and the conversion of the proceeds thereof into a separate account and/or special trust fund deposit shall not be regarded as the incurring of indebtedness by such county within the meaning of any constitutional or statutory limitation. No withdrawal shall be made from said separate account or said special trust fund deposit except in payment for interest on or principal of primary road bonds or bonds issued to refund primary road bonds of such county. All laws in conflict herewith are to the extent of such conflict hereby repealed. [C35,§4753-g1.]

4754 Transferred. See §4745.1

4755 Rep. by 42GA, ch 101

CHAPTER 241.1

IMPROVEMENT OF PRIMARY ROADS

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4755.01 Federal and state cooperation. The state highway commission is empowered on behalf of the state to enter into any arrangement or contract with and required by the duly constituted federal authorities, in order to secure the full cooperation of the government of the United States, and the benefit of all present and future federal allotments in aid of highway construction, reconstruction, improvement or maintenance. The good faith of the state is hereby pledged to cause to be made available each year, sufficient funds to equal the total of any sums now or hereafter apportioned to the state for road purposes by the United States government for such year, and to maintain the roads constructed with said funds. [C24,§4688; C27, 31, 35,§4755-b1.]

4755.02 "Road systems" defined. The highways of the state are, for the purposes of this chapter divided into two systems, to wit: the primary road system and the secondary road system. The primary road system shall embrace those main market roads (not including roads within cities and towns) which connect all county seat towns and cities and main market centers, and which have already been designated as primary roads under chapter 241, code of 1924; provided, that the said designation of roads shall be, with the consent of the federal authorities, subject to revision by the state highway commission. Any portion of said primary system so eliminated by any changes shall revert to and become a part of the system from which originally taken. The state highway commission may, for the purpose of affording access to cities, towns or state parks, or for the purpose of shortening the direct line of travel on important routes or to effect connections with interstate roads at the state line, add such road or roads to the primary road system, but no other increase shall be made in the mileage of the primary roads until the present primary road mileage has been completed as this chapter provides. [C24,§4689; C27, 31, 35,§4755-b2.]

4755.03 Primary road fund. There is hereby created a fund which shall be known as the primary road fund, which shall embrace all federal aid road funds, all funds derived from year to year by the state under acts regulatory of motor vehicles (except such portion of such motor vehicle fees as may by law be set aside for the state highway commission support fund, the motor vehicle department support fund, the refund account, and the reimbursement of county treasurers for collecting the motor fees) all gasoline tax funds devoted to the primary road system, and all other funds that may by law be appropriated for the use of the primary road fund. [C24,§4690; C27, 31, 35,§4755-b3.]

4755.04 Disbursement of fund. Said primary road fund is hereby appropriated for and shall be used in the establishment, construction and maintenance of the primary road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination or improvement of railroad crossings, the acquiring of additional right-of-way, the payment of interest and redemption of any bonds issued in anticipation of said primary road fund, and all other expense incurred in the construction and maintenance of said primary road system, the costs of issuance and redemption of any bonds issued in anticipation of said primary road fund, the maintenance and housing of the state highway commission, and the refund of special assessments for paving. [C24,§4690; C27, 31, 35,§4755-b4; 48GA, ch 183,§7.]

Referred to in §4755.05

4755.05 Biennial appropriation — budget. After June 30, 1939, expenditures by the state highway commission under section 4755.04 for the support of the commission and for engineering, inspection and administration of highway work and maintenance of the primary road system shall be only on authorization by the general assembly.

The highway commission shall biennially on or before September 1 of even-numbered years submit to the comptroller for transmission to the general assembly a detailed estimate of the amount required by the highway commission during the succeeding biennium for the support of the commission and for engineering, inspection, and administration of highway work and maintenance of the primary road system. Such estimate shall be in the same general form and detail as may be required by law in estimates submitted by other state departments.

Any unexpended balance at the end of any year in the amount so authorized for said year shall revert to the primary road fund. If the amount authorized by the general assembly for any year shall prove to be not sufficient to meet the commission's needs during said year, the executive council may on proper showing by the commission authorize such additional amount for said year as may appear to the council necessary to meet the commission's needs for the remainder of said year. [48GA, ch 118,§1.]

See biennial appropriation act

4755.06 Accounts and records required. The state highway commission shall keep accounts in relation to the primary road fund and each primary road bond fund, crediting each fund with all amounts by law creditable thereto and charging each with the amount of all duly and finally approved vouchers for claims properly chargeable thereto. Said highway commission's accounts shall also show the amount of each separate authorization of primary road bonds, and the amount, number, date, maturity, and interest rate of each series of bonds actually issued. [C24,§4692; C27, 31, 35,§4755-b6.]

4755.07 Monthly certification of funds. The account of the primary road fund kept by the state comptroller and the state treasurer shall show the amount of the primary road fund with all credits thereto and disbursements therefrom. The treasurer of state shall each month certify to the state highway commission the gross amount of motor registration fees collected during the preceding month, the amounts of said registration fees as accredited by law provided to funds other than the primary road fund, and the amount of said registration fees accredited to the primary road fund. Said treasurer shall also each month certify to the said commission as to such amounts as are received (a) from the federal government, (b) from the gasoline tax, or (c) from other sources, and credited to the primary road fund. [C24,§4693; C27, 31, 35,§4755-b7; 47GA, ch 134,§530.]

4755.08 Improvement of primary system. The state highway commission shall proceed with the improvement of the primary road system as rapidly as the funds become available therefor, until the entire mileage of the primary road system is graded, drained, bridged, and surfaced with gravel, pavement, or other surfacing approved by the commission as adequate for carrying the traffic thereon. It shall incur no indebtedness on account of such work, except as herein specifically provided, but shall let the necessary contracts and supervise the expenditure of funds derived from primary road bonds and other sources. No road shall be surfaced until it has been brought to finished grade and drained. In proceeding with the improvement of primary roads hereunder, the highway commission shall give preference to grading and bridging projects. Such work shall be completed at the earliest practical date, and not more than thirty percent of the primary road fund available for construction work in any year may be expended for paving until the entire mileage of the primary road system has been graded, drained and bridged and that the said highway commission is hereby prohibited from purchasing right-of-way, grading, bridging or surfacing a new system of diagonal highways radiating from any city within this state with a population of over one hundred thousand.

Improvement shall be made and carried on in such manner as to equalize the work in all sections of the state, as nearly as possible, giving special attention to bringing the sections of the state, where improvements have been retarded, to an equality and on the same basis with the more advanced sections. [C27, 31, 35, §4755-b8.]

4755.09 Surveys, plans, and specifications. Before proceeding with the improvement of any primary road, the commission shall cause suitable surveys, plans and specifications for said proposed work to be prepared and filed in its office, and the work shall be done in accordance therewith, except insofar as the same may be modified to meet unforeseen or better understood conditions, and no such modification shall be deemed an invalidating matter. [C24,§4699; C27, 31, 35,§4755-b9.]

4755.10 Bids — contracts prohibited. As soon as the approved plans and specifications for any primary road construction project are filed with the state highway commission, it shall, if the estimated cost exceeds one thousand dollars, proceed to advertise for bids for the construction of said improvement. No contract shall be let to any state official, elective or appointive, nor to any relative within the third degree, of a member of the state highway commission, nor to any partnership or corporation in which a member of the highway commission is financially interested. The letting of a contract in violation of the foregoing provisions shall invalidate the contract, and such violation in case of such termination, shall be a complete defense to any action to recover any consideration due or earned under the contract at the time of such termination. [C24,§4700; C27, 31, 35,§4755-b10.]

Similar provisions, §§180, 275, 3828.101, 3922, 4685, 4686.14, 5361, 5673, 5828, 6534, 6710, 13324, 13327

4755.11 Award of contracts—bond. In the award of contracts, due consideration shall be given not only to prices bid but also to the mechanical and other equipment and the financial responsibility of the bidder, and his ability and experience in the performance of like or similar contracts. The commission may reject any or all bids and may re-advertise for bids, or may let by private contract, at a cost not to exceed the lowest bid received, or if the estimated cost of the work proposed does not exceed the sum of five thousand dollars may proceed to the construction of the same by day labor. All contracts shall be in writing and shall be secured by a bond for the faithful performance thereof, as provided by law. [C24,§4700; C27, 31, 35,§4755-b11.]

4755.12 Supervision and inspection. The state highway commission is expressly charged with the duty of supervision, inspection and direction of the work of construction of primary roads on behalf of the state, and of supervising the expenditure of all funds paid on account of such work by the state or the county on the primary system and it shall do and perform all other matters and things necessary to the faithful completion of the work herein authorized. [C24,§4701; C27, 31, 35,§4755-b12.]

4755.13 Engineers—bonds. All engineers having responsible charge of any improvements, shall give bonds for the faithful performance of their duties and for like accounting for all property entrusted to their custody. All bonds given by such engineers in the employ of the state highway commission shall be deemed to embrace any and all improvements of which they may be in charge. [C24,§4701; C27, 31, 35, §4755-b13.]

4755.14 Claims. All claims for improving and maintaining the primary road system shall be paid from the primary road fund provided,

however, that when bonds have been issued for improving the primary roads, construction claims may be paid from such bond fund. [C24, §4702; C27, 31, 35,§4755-b14.]

4755.15 Vouchers — payment. All claims shall be itemized upon voucher forms prepared for that purpose, sworn to by the claimants, certified to by the engineer in charge, and then forwarded to the state highway commission for audit and approval. Upon the approval, by the state highway commission, of vouchers which are payable from the primary road fund, such vouchers shall be forwarded to the state comptroller, who shall draw warrants therefor, and said warrants shall be paid by the treasurer of state from the primary road fund. [C24,§4702; C27, 31, 35,§4755-b15.]

4755.16 Partial payments — approval of claims. Partial payments may be made on the work during the progress thereof, but no such partial payment shall be deemed final acceptance of the work nor a waiver of any defect therein. The approval of any claims by the state highway commission may be evidenced by the signature of the chairman of said commission or of a majority of the commissioners on the individual claims or on the abstract of a number of such claims with the individual claims attached to said abstract. [C24,§4702; C27, 31, 35,§4755-b16.]

4755.17 Contingent fund. The state treasurer is hereby directed to set aside from the primary road fund the sum of three hundred thousand dollars to be known as the primary road contingent fund. [C24,§4703; C27, 31, 35, §4755-b17.]

4755.18 Use of contingent fund. When claims for labor, freight, or other items which must be paid promptly and which are payable from the primary road fund or from the state highway commission maintenance fund, are presented to the said commission for payment, the said commission may direct that warrants in payment of said claims be drawn on said primary road contingent fund. Such warrants when so drawn and signed by the auditor of the state highway commission, shall be honored by the state treasurer for payment from said contingent fund. [C24,§4704; C27, 31, 35,§4755-b18.]

4755.19 Audit of contingent claims. The claims in payment of which warrants are drawn on the primary road contingent fund, shall be audited in the usual manner prescribed by law and shall have noted thereon that warrants in payment thereof have been drawn on the said contingent fund. After the final audit of such claims, the state comptroller shall draw warrants therefor payable to the treasurer of state and forward the same to the state highway commission for record. When such warrants have been recorded in the office of the said commission, they shall be forwarded to the state treasurer who shall redeem the same, charge them to the proper fund and credit the primary road contingent fund with the amount thereof. [C24, §4705; C27, 31, 35,§4755-b19.]

4755.20 Auditor — appointment — bond — duties. The state comptroller shall appoint the auditor of the state highway commission who shall give bond in the sum of fifty thousand dollars for the faithful performance of his duties. The premium on said bond shall be paid by the state highway commission from its support fund. Said auditor shall check and audit all claims against the commission before such claims are approved by the commission, and shall keep all records and accounts relating to the expenditures of the commission. He shall, in the checking and auditing of claims against the commission, and keeping the records and accounts of the commission, be under the direction and supervision of the comptroller, and act as an agent of said comptroller. The state highway commission shall furnish said auditor with such help and assistants as may be necessary to properly perform the duties herein specified. The said auditor may be removed by the state comptroller. [C24,§4706; C27, 31, 35,§4755-b20; 48GA, ch 119,§1.]

4755.21 Improvements in cities and towns. The state highway commission is hereby given authority, subject to the approval of the council, to construct, reconstruct, improve and maintain extensions of the primary road system within any city or town, including cities under special charter, provided that such improvement shall not exceed in width that of the primary road system and the amount of funds expended in any one year shall not exceed twenty-five percent of the primary road construction fund.

The phrase "subject to approval of the council", as it appears in this section, shall be construed as authorizing the council to consider said proposed improvements in its relationship to municipal improvements (such as sewers, water lines, sidewalks and other public improvements, and the establishment or re-establishment of street grades). The location of said primary road extensions shall be determined by the state highway commission. [C24,§4731; C27, 31, 35,§4755-b26; 47GA, ch 154,§1.]

Referred to in §§4755.23, 4755.25

4755.22 Separated cities or towns. The state highway commission shall designate the street or streets which shall constitute the primary road extensions in any city or town of the state, which city or town is separated from the remainder of the state by a river more than five hundred feet in width from bank to bank. The laws of this state relating to the construction, reconstruction or maintenance of the extensions of primary roads in cities and towns, and to the purchase or condemnation of right-of-way therefor, and to the expenditure of primary road funds thereon, shall apply to the roads or streets designated hereunder, the same as though said community were not so separated from the rest of the state. [47GA, ch 128,§1.]

4755.23 Jurisdiction to establish. In the maintenance, relocation, establishment or im-

provement of roads hereunder, including extensions of primary roads within cities and towns as provided in section 4755.21, the state highway commission shall have the authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right-of-way therefor and for the condemnation of land, including a sufficient roadway to such land by the most reasonable route, for the purpose of obtaining gravel or other suitable material with which to improve such roads.

All the provisions of the law relating to the condemnation of lands for public state purposes, shall apply to the provisions hereof.

The provisions of chapter 237 shall not apply to the establishment, vacation, alteration or improvement of primary roads.

No such roads shall be established through any cemetery or burying ground without the consent of all of the parties affected by the same, nor shall any ground be taken for the rounding of a corner where the dwelling house, lawn and ornamental trees connected therewith are located at such corner, except by consent of the owner thereof. [C24,§4732; C27, 31, 35, §4755-b27.]

Condemnation procedure, ch 366
43GA, ch 21, §1, editorially divided

4755.24 Right-of-way map. Upon the completion of a primary road paving project, or upon the completion of a grading project on a primary road that is not to be paved, the state highway commission shall file with the auditor and with the recorder of the county in which such project is located, a complete right-of-way map of said project. Said right-of-way maps shall be filed by the auditor and recorder and shall become a part of the permanent records of such offices. [C31, 35,§4755-c1.]

4755.25 Bridges, viaducts, etc., on municipal primary extensions. In addition to the construction work and expenditures of primary road funds authorized in section 4755.21 and in sections 6044 to 6049, inclusive, on extensions of primary roads in cities and towns, the state highway commission may construct, or aid in the construction of bridges, viaducts, and railroad grade crossing eliminations on those portions of the extensions of primary roads within cities having a population of twenty-five hundred or more, where the houses or business houses average less than two hundred feet apart. In connection with such improvements, the primary road fund shall in no event be charged with a greater amount than would, in the judgment of the commission, be necessary to provide for the primary road traffic if such improvement were located outside of a city or town. [C31, 35,§4755-d1.]

4755.26 Corporate line highway. Whenever any public highway located along the corporate line of any town or any city, including cities under special charter, is an extension of the primary road system, it may be included in said primary road system and may be improved and maintained as a part of the primary road system under this chapter. [C24,§4735; C27, 31, 35,§4755-b28.]

4755.27 Maintenance. Primary roads outside of cities and towns and along the corporate lines of cities and towns shall be maintained by the state highway commission under the patrol system, and the cost of said work paid from the primary road fund. Extensions of primary roads within any town or within any city having a population less than twenty-five hundred, or within that part of any city, including cities under special charter, where the houses or business houses average not less than two hundred feet apart, may be maintained by the state highway commission and the cost thereof paid out of the primary road fund.

On extensions of primary roads within that part of any city having a population over twenty-five hundred, including cities under special charter, where the houses or business houses average less than two hundred feet apart, the state highway commission may make payment to the city from the primary road fund for maintenance work performed after this chapter becomes effective, in no event exceeding an average of three hundred fifty dollars per year per mile of such primary road extension. [C24,§4736; C27, 31, 35,§4755-b29.]

4755.28 Road equipment. The state highway commission is authorized to purchase road material or road machinery required in the improvement or maintenance of the primary roads, after receiving competitive bids, and to pay for the same out of the primary road fund, and is directed to purchase, rent or lease any machinery or other articles necessary for the use and most economical operation of the field engineering work, the testing of materials, the preparation of plans, and for all allied purposes, in order to enable the commission to carry out the provisions of this chapter. [C24,§4738; C27, 31, 35,§4755-b30.]

Section 4755-b31, code 1935, repealed by 48GA, ch 183, §2

4755.29 Completing improvement programs. When any county has voted a bond issue for improvement of primary roads, such improvement program shall be completed as authorized by the voters of said county. Provided, all county primary road improvement programs and the amount of bonds to be issued therefor must be approved by the highway commission. [C27, 31, 35,§4755-b32.]

4755.30 Allotments to counties—payment. All allotments made by the state highway commission to counties voting bond issues for the purpose of hard surfacing, or otherwise improving any portion of the primary road system, shall be paid for within the biennium so as not to create an obligation against the state. [C27, 31, 35,§4755-b33.]

4755.31 Limitation on authority. The highway commission or the highway engineers shall not enter into an agreement, oral or written, with the citizens or officers of any county, to the effect that any amount of money will be fur-

nished from the primary fund for the purpose of supplementing funds to be raised by the sale of county road bonds. [C27, 31, 35,§4755-b34.]

4755.32 Special charter cities. The provisions of this chapter, insofar as they pertain to cities and towns, shall apply to cities acting under special charter. [C27, 31, 35,§4755-b35.]

4755.33 Transfer of powers and duties. The powers and duties of the board of supervisors with respect to the construction and maintenance of primary roads are hereby transferred to the state highway commission. [C27, 31, 35, §4755-b36.]

MARKINGS FOR MUNICIPALITIES

4755.34 Lateral or detour routes in cities and towns. Any city or town located on the primary road system and in which the primary road extension as officially designated does not pass through the main part or business district of such city or town, may designate and mark a lateral or detour route in order to facilitate such primary road traffic as may desire to get into and out of such business district. [C31, 35, §4755-c2.]

4755.35 Standard markings required. Such lateral or detour routes shall be marked with standard markings adopted by the state highway commission therefor, which markings shall clearly indicate that such lateral route is not the official primary road extension but is in fact a lateral or detour extending to the business district. [C31, 35,§4755-c3.]

4755.36 Cost. The cost of such markings shall be without expense to the state. [C31, 35, §4755-c4.]

VACATION OF PRIMARY ROADS

4755.37 Power to vacate. If in the improvement of any primary road, a relocation or change in location is made which removes the primary road from any previously established road or part thereof, or from any railroad crossing, leaving such road, part thereof, or railroad crossing in such manner that in the judgment of the state highway commission the use thereof for public travel is unnecessary, the state highway commission shall have power to vacate and close such road, part thereof, or railroad crossing as a public road or crossing. [C31, 35,§4755-d2.]

4755.38 Hearing—place and date. In proceeding to the vacation of such road, part thereof, or crossing, the state highway commission shall fix a date for hearing thereon in the county where such road, part thereof, or crossing is located, and if located in more than one county, then in a county wherein any part is located. [C31, 35,§4755-d3.]

4755.39 Notice—service. Notice of such hearing shall be published in some newspaper of general circulation in such county, at least twenty days previous to the date of the hearing. The board of supervisors of such county shall be notified of such hearing by registered letter addressed to the county auditor. [C31,35, §4755-d4.]

4755.40 Notice—requirements. Such notice shall state the time and place of such hearing, the location of the particular road, part thereof, or crossing the vacation or closing of which is to be considered, and such other data as may be deemed pertinent. [C31, 35,§4755-d5.]

4755.41 Objections—claim for damages. At such hearing, the board of supervisors and/or any interested person or corporation may appear and object and be heard. Any person owning land abutting a road which it is proposed to vacate shall have the right to file a claim for damages at any time on or before the date fixed for hearing. [C31, 35,§4755-d6.]

4755.42 Final order. After such hearing the state highway commission shall enter its order, which order thus entered shall be final except as to the amount of damages. It may vacate such road, part thereof, or crossing, or it may dismiss the proceedings. Copy of such order shall be filed with the auditor of the county in which the road, part thereof, or crossing is located. [C31, 35,§4755-d7.]

4755.43 Damages — payment — appeal. All damages allowed shall be paid from the primary road fund. Any claimant, may, by service of written notice upon the state highway commission within thirty days after the award of damages, appeal to the district court of the county in which the land is located. [C31, 35,§4755-d8.]

SALE OF UNUSED RIGHT-OF-WAY

4755.44 Sale authorized. The executive council of the state may, upon the written application and recommendation of the state highway commission, sell for cash such tracts, parcels, and pieces of land, or parts thereof, when title thereto has been, or is hereafter, acquired by the state in or for the improvement of its primary highways, when in its judgment, said tract, parcel or piece of land, or part thereof, is not now, and will not hereafter, be needed or required in connection with or for the improvement, maintenance, or use of any primary highway of the state of Iowa. [C35.§4755-f1.]

4755.45 Notice—preference in sale. Notice of intention to sell such tracts, parcels, pieces of land or part thereof, must, not less than ten days prior to sale thereof, be sent by registered mail by the highway commission to the last known address of the present owner of adjacent land from which said tract, parcels, pieces of land or parts thereof were originally bought or condemned for highway improvement purposes.

Said notice shall give opportunity to the present owner of adjacent property to be heard and to make offers for the parts, parcels or parts thereof to be sold, and if such offer is equal to or exceeds in amount other offers, it shall be given preference by the highway commission and executive council.

Neglect or failure for any reason of the owner to comply with the provisions of said notice

shall in no way prevent the giving of a clear title to the purchaser of such tracts, parcels, pieces of land or parts thereof. [C35,§4755-f2.]

4755.46 Conditions. Any sale made, as herein authorized, shall be upon the conditions that the tract, parcel or piece of land, or part thereof, so sold, shall not be used in any manner as will interfere with the use of the primary highway by the public or endanger public safety in the use thereof, or to the material damage of adjacent property. [C35,§4755-f3.]

4755.47 Execution of conveyance. Where a sale has been authorized, as herein provided, written conveyances containing the conditions prescribed by the executive council shall be made in the name of the state and signed by the governor and secretary of state and the great seal of the state of Iowa attached thereto. [C35, §4755-f4.]

4755.48 Proceeds of sale. The proceeds of such sales shall become a part of the primary road fund. [C35,§4755-f5.]

CHAPTER 241.2

FINANCING PRIMARY ROAD BONDS

4755.49 Plan provided.
4755.50 Counties to refund.
4755.51 Payment of matured bonds.
4755.52 Plan exclusive.
4755.53 Conflicting chapters.

4755.49 Plan provided. The state highway commission shall prepare and adopt a comprehensive plan for the financing of county primary road bonded indebtedness outstanding November 1, 1933, including primary road bonds and bonds issued to refund primary road bonds. Said financing plan shall provide for the issuance and sale by the counties of such refunding bonds as are found necessary to re-adjust the amounts required for interest and principal payments on such bonds to not less than eight million dollars in any year. [C35,§4755-f6.]

Referred to in §4755.51

4755.50 Counties to refund. The commission shall advise the board of supervisors of each county that issued primary road bonds previous to February 1, 1933, as to any refunding of bonds in said county required by said financing plan. The said board shall proceed forthwith to refund such bonds as required by such plan. [C35,§4755-f7.]

4755.51 Payment of matured bonds. Whenever in any county any of the bonds referred to in this chapter, or interest on such bonds are about to mature or accrue, the state highway commission shall prepare a voucher in:

1. The amount of all interest and principal accruing and maturing in said county during said year on the bonds referred to in section 4755.49, if the county has complied with the financing plan adopted under this chapter; or

2. The estimated amount of the interest and principal payments for said year, in said county, as shown by the financing plan adopted by the state highway commission on the bonds referred to in section 4755.49, if the county has not complied with the said financing plan; and

3. The amount of the interest and principal accruing and maturing in said year on primary road bonds issued by said county after November 1, 1933, and on bonds issued to refund such primary road bonds.

Said voucher shall be forwarded to the state comptroller who shall draw his warrant therefor, payable out of the primary road fund. Such warrant shall be forwarded to the treasurer of said county. The funds so received by the county treasurer shall be used to pay the maturing principal and interest on such bonds and for no other purpose. [C35,§4755-f8.]

4755.52 Plan exclusive. The method provided in this chapter for the use of primary road funds in the payment of interest and principal of county primary road bonds and bonds issued to refund such primary road bonds, shall be in lieu of the method heretofore provided in the statutes for the use of primary road funds for the payment of such bonds and interest. [C35, §4755-f9.]

4755.53 Conflicting chapters. Laws or parts of laws relating to use of primary road funds for the payment of interest and principal of primary road bonds and bonds issued to refund primary road bonds, and which laws are in conflict with this chapter shall not apply to the use of such funds in the payment of principal and interest of the bonds referred to in this chapter. [C35,§4755-f10.]

CHAPTER 242

IMPROVEMENT OF COUNTY AND PRIMARY ROADS

Referred to in §§4644.10, 4773.4

4756 Bonds and taxes.
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4756 Bonds and taxes. In addition to other methods provided by law for the improvement of roads, any county having a population of more than seventy thousand may issue bonds for the purpose of raising funds to pay the cost of draining, grading, bridging, paving and/or graveling, and completing the construction of the primary and county roads and may levy taxes for the payment of such portions of said bonds and the interest thereon as are not paid by the primary road fund or the county road, drainage, and bridge and culvert funds, when authorized by a vote of the people, by proceeding as hereinafter provided. [C24, 27, 31, 35,§4756.]

4757 Proposed plan. The board of supervisors may by resolution or upon petition of at least ten percent of the legal voters, residents of the county, as shown by the poll books of the last preceding election, shall propose a program of highway improvement, specifying the portions of primary and/or county roads proposed to be improved, the general nature of the improvements, the time within which it is proposed to complete said improvements, and the estimated cost of each of the roads included in said program. [C24, 27, 31, 35,§4757.]

4758 Approval of plan. The proposed program of improvement on primary roads shall be subject to the same approval by the highway commission as is required in other improvements on the primary roads. [C24, 27, 31, 35, §4758.]

4759 Notice of hearing. The board of supervisors shall fix a time for hearing upon said proposed program of improvement and the county auditor shall cause to be published in two newspapers of general circulation in the county once each week for two weeks, a notice of such hearing and a description of the roads proposed to be improved, the general nature of the proposed improvements, and an estimate of the cost of each road proposed to be improved. At such hearing any citizen may appear and object and be heard. After the hearing the board may dismiss the proceedings or shall adopt a program for road improvements substantially as proposed. [C24, 27, 31, 35,§4759.]

4760 Submission of plan. The board may, or upon petition of a number of qualified electors of the county equal to ten percent of the total number of votes cast for governor in said county at the last preceding general election, must submit a program to the voters of the county at a general election or at a special election called for that purpose, the questions of issuing bonds from year to year to be designated as primary road bonds or county road bonds, as the case may be, and of raising funds with which to pay said bonds and the interest thereon as the same may become due. [C24, 27, 31, 35, §4760.]

4761 Form of submission. The form of the ballot shall be substantially as follows:

"1. Shall the board of supervisors be authorized to issue from year to year, serial bonds to be known as primary road bonds, in the aggregate amount not exceeding ..... dollars, to provide funds in the following amounts and for the following purposes:

a. .....dollars ($.....) for draining, grading, bridging, hard surfacing and completing the construction of primary roads described as follows: (Here set forth the location of the primary roads to be graded, drained, bridged, and hard surfaced, the length and estimated cost of each portion thereof.)

b. .....dollars ($.....) for draining, grading, bridging and completing construction without surfacing primary roads described as follows: (Here set forth the location of the primary roads to be drained, graded and construction work completed without surfacing, the length and estimated cost of each portion thereof.)

c. .....dollars ($.....) for surfacing with gravel primary roads described as follows: (Here set forth the location of the primary roads to be surfaced with gravel, and the length and estimated cost of each portion thereof.)

2. And shall the county's allotment of the primary road fund, except such portion as is required for the maintenance of the primary road system, miscellaneous expenditures, and the payment of outstanding indebtedness (if any) against the primary road fund, be appropriated and used for the payment of said primary road bonds and interest thereon.

3. Shall the board of supervisors be authorized to issue from year to year, serial bonds to be known as county road bonds, in the aggregate amount not exceeding.....dollars, to provide funds for the following purposes:

a. .....dollars ($.....) for draining, grading, bridging, and completing construction without surfacing, the county roads described as follows: (Here set forth the location of the county roads to be drained, graded and construction completed without surfacing, the length and estimated cost of each portion thereof.)

b. .....dollars ($.....) for surfacing with gravel county roads described as follows: (Here set forth the location of the county roads to be surfaced with gravel, the length and estimated cost of each portion thereof.)

4. And shall all the county road, drainage, and bridge funds coming into the county treasury from taxes and all other sources, except such as are required for the maintenance of such roads, the construction of bridges and miscel-

laneous expenditures, be appropriated and used for the payment of said county road bonds and interest thereon.

5. And shall the board of supervisors of the county be authorized to levy and collect taxes on all the taxable property of the county from year to year, in amounts sufficient to pay any part of the principal and the interest on said bonds of both classes, as the same mature, which funds so appropriated are insufficient to pay.

YES ☐ NO ☐"

[C24, 27, 31, 35,§4761.]

4762 Combining or separating proposition. The propositions for the improvement of primary roads and of county roads may be submitted by the board as a single proposition or separately. [C24, 27, 31, 35,§4762.]

4763 Bonds—maturity—interest. All bonds issued hereunder for grading, draining, bridging, or paving, shall mature in not more than fifteen years from date of issue. All bonds issued hereunder for graveling shall mature in not more than seven years from date of issue. Each bond shall show on its face the date of its maturity and shall be payable on said date. The interest rate shall not exceed five percent per annum payable semiannually. No bond shall be sold for less than par, plus accrued interest. [C24, 27, 31, 35,§4763.]

4764 Apportionment of primary allotment. If at said election, the said proposition as to primary roads or as to the primary and county roads carries, the state highway commission shall on or before September 1 each year during the life of said primary road bonds, set aside from said county's allotment of the primary road fund:

1. A sufficient amount to maintain the primary road system of said county during the ensuing year.
2. A sufficient amount to pay the maturing principal and interest of primary road bonds and/or certificates (if any) heretofore issued under other provisions of law.
3. A sufficient amount to meet any unavoidable miscellaneous necessary expenditures on the primary road system not properly chargeable to maintenance.

The amount remaining in said county's allotment of the primary road fund after said funds have been set aside for each year during the life of said bonds, is, insofar as necessary, hereby appropriated, dedicated, and pledged to the payment of the principal and interest of primary road bonds issued hereunder, and shall be used for no other purpose. [C24, 27, 31, 35, §4764.]

4765 Limitation on bonds. The maximum aggregate amount of bonds to be issued serially which any county shall be authorized to issue for improving the roads in the county road system shall not be, including interest, more than one-half of the sum which might be realized by the levies allowed by law in that county for the county road, county road building, county drainage, county bridge and culvert funds during the period of years over which said bonds extend. Such maximum amount shall be determined from the millage allowed by law computed upon the assessed valuation of the real and personal property (exclusive of moneys and credits) in the county for the year last preceding the issuance of such bonds. The total sum of bonds issued for the purpose of improving primary roads by grading, draining, completing construction and graveling, shall not exceed sixty-five percent of the estimated receipts from the primary road fund for the period for which such bonds are issued. Such estimate shall be based upon the receipts in such fund in the county for the year last preceding the issuance of such bonds. [C24, 27, 31, 35,§4765.]

See §7109

4766 Refunding to meet deficiency. If the funds so set apart for the payment of said bonds and interest are at the time of the maturity thereof insufficient to pay the same, refunding bonds may be issued for the payment of such deficiency. Such refunding bonds shall be issued on the same terms and conditions and be payable in the same manner as the original bonds. [C24, 27, 31, 35,§4766.]

4767 Budget required. If at said election the said proposition as to county roads or as to both county and primary roads, carries, the board of supervisors shall make a budget of the county road, the county road drainage and the county bridge and culvert funds separately and shall set aside funds for each of said purposes sufficient for the maintenance and drainage of the county roads and the building of necessary county bridges and culverts. [C24, 27, 31, 35,§4767.]

4768 Funds provided. The board of supervisors shall levy and collect from year to year a sufficient amount of taxes which, together with said appropriated funds, shall be sufficient to pay the bonds herein authorized to be issued, and the interest thereon as the same mature, for primary or county roads or both, as the case may be, and none of said funds so to be appropriated or taxes to be levied and collected shall be used for any other purpose than the payment of said bonds and interest until the same are fully paid. [C24, 27, 31, 35,§4768.]

4769 Limitation on tax. No amount of additional taxes herein authorized for the payment of primary or county road bonds and/or interest thereon, shall be levied unless and until all the funds and maximum tax levies herein pledged respectively for such purposes have been exhausted. [C24, 27, 31, 35,§4769.]

4770 Limitation on expenditures. The aggregate cost of improving each kind of road described in the questions submitted. shall not be more than ten percent in excess of the estimated cost thereof. [C24, 27, 31, 35,§4770.]

4771 Statutes applicable. All the provisions of law with reference to voting primary road

bonds and the issuance and sale thereof shall apply to bonds issued hereunder, and all provisions of the primary and county road laws, respectively, shall apply to highway improvements made hereunder, all except as herein otherwise provided. [C24, 27, 31, 35,§4771.]

4772 **Maintenance funds—use.** The funds herein authorized to be set aside for maintaining the primary and county roads, respectively, shall be sufficient, insofar as existing sources of revenue will permit, to maintain said roads continuously in a good state of repair. Consideration shall be given to the maintenance of completed roads, to the end that investment therein shall be protected and preserved. The funds so set aside for maintenance shall be used only for such purpose, and any taxpayer of the county may enforce the provisions of this section by appropriate action at law or in equity in any court of competent jurisdiction. [C24, 27, 31, 35,§4772.]

4773 **Optional procedure.** Any county having a population of seventy thousand or less may adopt the additional method herein provided for the improvement of the roads of such county, but in any such county separate ballot boxes must be provided for the voters residing in cities and towns, and for the voters residing outside of cities and towns. The proposition submitted shall not be deemed to be carried in any such county unless a majority vote cast is in favor thereof both in the incorporated and unincorporated territory. [C24, 27, 31, 35,§4773.]

4773.1 **Issue of bonds legalized.** In any county where either under the provisions of chapter 242, code, 1924, or 1927, county road bonds have been authorized by a vote of the people, the board of supervisors is hereby authorized to issue and sell the same to the extent and in the amount authorized but not issued, said bonds to be issued and sold subject to the maximum debt limitation of three percent of the actual value of taxable property within such county when added to all other indebtedness of the county except primary road bond indebtedness, and to the total maximum limitation of indebtedness for both primary and county road bond purposes of four and one-half percent when added to all other indebtedness of the county. [C31, 35,§4773-d1.]

4773.2 **Payment authorized.** Principal and interest of said bonds may be paid from that part of the secondary road construction fund not pledged to local county roads, and the board of supervisors shall levy and collect from year to year a sufficient amount of taxes which, together with the amount the board has appropriated from the unpledged portion of said construction fund, shall be sufficient to pay said bonds and interest thereon as the same mature. [C31, 35,§4773-d2.]

4773.3 **Unissued bonds in certain counties.** Any county which, prior to January 1, 1926, and any county which according to the 1930 federal census had a population in excess of forty thousand and which since January 1, 1929, by an election authorized the issuance of primary road bonds for the purpose of improving the primary roads of said county and has an unissued portion of such bonds, is hereby authorized to issue such portion of such bonds, with the consent of the highway commission, for the purpose of improving any road in such county designated as a primary road at the time of such issuance. [48GA, ch 115,§1.]

4773.4 **New bond election proscribed.** Any county which, under the provisions of either chapter 241 or chapter 242, has or shall have, by a vote of the electors, authorized the issuance of county primary road bonds, shall have no authority prior to the year 1950, by a vote of its electors, to authorize another or additional county primary road bond issue. [48GA, ch 116,§1.]

Referred to in §4773.5

4773.5 **Exception as to unissued bonds.** Nothing in this section or section 4773.4 shall be so construed as to prevent or affect the issuance and sale of county primary road bonds voted by any county previous to the time when this and section 4773.4 become effective*, nor to prevent or affect the voting of an initial county primary road bond issue in any county which has not previously authorized such a bond issue, nor in any way change, alter, limit, or modify any provision of any law of this state relating to the payment of county primary road bonds or the interest on such bonds. [48GA, ch 116, §2.]

*Effective date, July 4, 1939

CHAPTER 243

ROAD MAINTENANCE PATROL

4774 Road patrolmen.
4775 Tenure and salary.
4776 Bonds.
4777 Tools.
4778 Duties.
4779 Additional authority—badge—oath.

4774 **Road patrolmen.** The board of supervisors shall cause all highways under their jurisdiction to be patrolled, throughout each road-working season, and at such other times as they may direct, and to this end shall appoint such number of patrolmen as may be necessary to perform such duty. [C24, 27, 31, 35,§4774.]

4775 **Tenure and salary.** Such patrolmen shall receive such compensation as the board may determine, shall be subject to the orders of the board, and shall hold their positions at the pleasure of the board. [C24, 27, 31, 35,§4775.]

4776 **Bonds.** Said patrolmen shall give bond for the faithful performance of their duties, and

in such sum as the board may order. Said bonds shall be approved by the board. [C24, 27, 31, 35,§4776.]

4777 **Tools.** The said board shall supply said patrolmen with all necessary tools and equipment, and the patrolmen shall be responsible upon their bond for the care of the same. [C24, 27, 31, 35,§4777.]

4778 **Duties.** Each road patrolman shall:

1. Devote his entire time to his duties.
2. Personally inspect, at least once each week, and oftener if notified of defect in roads or bridges, all roads assigned to him.
3. Seasonably drag, or cause to be dragged, after each rain, and at such other times as may be necessary, all roads assigned to him.
4. Keep all sluices, culverts, and bridges and the openings thereof and all side ditches of the road free from obstructions.
5. Provide such side ditches with ample outlets.
6. Remove loose stones and other impediments from the traveled part of the highway.
7. Fill depressions and keep the road free from ruts, water pockets, and mud holes.
8. Repair the approaches to bridges and culverts and keep such approaches smooth and free from obstruction.
9. Perform such other duties as the board may direct. [C24, 27, 31, 35,§4778.]

4779 **Additional authority — badge — oath.** The road patrolmen appointed by the board of supervisors of any county may in addition to their other duties, enforce the provisions of the law relating to travel on the primary roads of the county outside of cities and towns. Each such patrolman shall while on duty wear an official badge, such that he may be clearly distinguished as an officer of the law by all persons using the public highways, said badge to be furnished by the board of supervisors of the county. Each such patrolman shall take the same oath as any peace officer and shall have the authority of a peace officer. [C24, 27, 31, 35, §4779.]

Law of road, §§5017.01–5038.14

CHAPTER 244

TOWNSHIP ROAD SYSTEM

This chapter (§§4780 to 4812, inc.) repealed by 43GA, ch 20; see chapter 240

CHAPTER 245

ROAD POLL TAX

This chapter (§§4813 to 4816, inc.) repealed by 43GA, ch 20; and the substitute repealed by 47GA, ch 129

CHAPTER 246

WEEDS

This chapter (§§4817 to 4829, inc.) repealed by 47GA, ch 131; see chapter 246.1

CHAPTER 246.1

WEEDS

4829.01 Noxious weeds.
4829.02 State botanist.
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4829.04 Direction and control.
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4829.06 Notice to owner.
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4829.18 Order for destruction on roads.
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4829.01 Noxious weeds. The following weeds are hereby declared to be noxious and shall be divided into two classes, namely:

1. Primary noxious weeds, which shall include quack grass (Agropyron repens), perennial sow thistle (Sonchus arvensis), Canada thistle (Cirsium arvense), European morning glory or field bindweed (Convolvulus arvensis), horse nettle (Solanum carolinense), leafy spurge (Euphorbia esula), perennial peppergrass (Lepidium draba), Russian knapweed (Centaurea repens).
2. Secondary noxious weeds, which shall include butterprint (Abutilon theophrasti) annual, cocklebur (Xanthium commune), annual, wild mustard (Brassica arvensis) annual, wild carrot (Daucus carota) biennial, buckhorn (Plantago lanceolata) perennial, sheep sorrel (Rumex acetosella) perennial, sour dock (Rumex crispus)

perennial, smooth dock (Rumex altissimus) perennial, puncture vine (Tribulus terrestris) annual. [S13,§1565-b; C24, 27, 31, 35,§4818; 47GA, ch 131.]

See also §3127

4829.02 State botanist. The secretary of agriculture shall appoint as state botanist the head of the botany and plant pathology section of the Iowa agricultural experiment station whose duty shall be to cooperate in developing a constructive weed eradication program. [47GA, ch 131.]

4829.03 Weed commissioner. The board of supervisors of each county shall appoint either a county weed commissioner or one township weed commissioner for each township, whose term or terms of office shall not exceed one year. In incorporated towns and cities each council may appoint a municipal weed commissioner, whose term of office shall not exceed one year. The name of the person or persons so appointed and the date of appointment shall be certified to the county auditor. The board of supervisors shall fix the compensation for said county commissioner or township commissioners. Subject to the approval of the board of supervisors of the county, the town or city council shall fix the compensation for the town or city commissioners. Said compensation shall be paid from the county general fund, but a reasonable portion thereof may be assessed as part of the cost of destruction pursuant to section 4829.19. [S13,§§1565-c,-d,-f; C24, 27,§4817; C31, 35, §§4817, 4817-d1; 47GA, ch 131.]

4829.04 Direction and control. Whenever, in this chapter, powers and duties are imposed upon a "commissioner", or "commissioners", such powers and duties shall apply, insofar as applicable, to the county, township, town, and city weed commissioners within their respective jurisdictions. Each commissioner shall, subject to direction and control by the county board of supervisors, have supervision over the control and the destruction of all noxious weeds in his jurisdiction, and of any other weeds growing along streets and highways unless otherwise provided, and shall hire the labor and equipment necessary for the performance of his duties subject to the approval of the board of supervisors, which shall be paid for in the same manner as the weed commissioner's compensation. [S13, §§1565-c,-d,-f; C24, 27, 31, 35,§4817; 47GA, ch 131.]

4829.05 Entering land—limitation. In the event it becomes necessary for a weed commissioner to enter upon any land within his jurisdiction to destroy or keep from seeding any noxious weeds growing thereon, he shall apply the best known methods and use the utmost diligence in eradicating such weeds, but he shall not expend in labor and materials more than twenty-five dollars on any one infested tract, without the advice and consent in writing of the board of supervisors. [S13,§§1565-c,-d,-f; C24, 27, 31, 35,§4817; 47GA, ch 131.]

4829.06 Notice to owner. Said weed commissioner, or commissioners, and all employees acting under his or their directions, due notice having been given to the landowners ten days previous, shall have full power and authority to enter upon any land within his jurisdiction upon which is growing any of the noxious weeds for the purpose of destroying said weeds. [C27, 31, 35,§4823-b1; 47GA, ch 131.]

4829.07 Report to board. Each weed commissioner shall for the territory under his jurisdiction on or before the first day of November of each year make a written report to the board of supervisors. Said report shall state:

1. The name and location of all primary noxious weeds, and any new weed which appears to be a serious pest.
2. A detailed statement of the treatment used, and future plans, for eradication of weeds on each infested tract on which he has attempted to exterminate weeds, together with the costs and results obtained.
3. A summary of the weed situation within his jurisdiction, together with suggestions and recommendations which may be proper and useful, a copy of which shall be forwarded to the state secretary of agriculture. [S13,§§1565-c, -d,-f; C24, 27, 31, 35,§4817; 47GA, ch 131.]

4829.08 Duty of secretary of agriculture. The secretary of agriculture shall be vested with the following duties, powers and responsibilities:

1. He shall serve as state weed commissioner, and shall cooperate with all boards of supervisors and weed commissioners, and shall furnish blank forms for reports made by the supervisors and commissioners.
2. He may, upon recommendation of the state botanist, temporarily declare noxious any new weed which possesses the characteristics of a serious pest, and following such declaration, the board of supervisors shall cause such weeds to be destroyed, the cost to be borne by the county.
3. He shall aid the supervisors in the interpretation of the weed law, and make suggestions to promote extermination of noxious weeds. [S13,§§1565-c,-d,-f; C24, 27, 31, 35,§4817; 47GA, ch 131.]

4829.09 Duty of board to enforce. The responsibility for the enforcement of the provisions of this chapter shall be vested in the board of supervisors as to all farm lands, railroad lands, state lands and state parks, primary and secondary roads; roads, streets and other lands within cities and towns unless otherwise provided. [S13,§§1565-c,-d,-f; C24, 27, 31, 35,§4817; 47GA, ch 131.]

4829.10 Duty of owner or tenant. Each owner and each person in the possession or control of any lands shall cut, burn or otherwise destroy, in whatever manner may be prescribed by the board of supervisors, all noxious weeds thereon as defined in this chapter at such times in each year and in such manner as shall prevent said weeds from blooming or coming to maturity, and shall keep said lands free from

such growth of any other weeds, as shall render the streets or highways adjoining said land unsafe for public travel. [SS15,§1565-a; C24, 27, 31, 35,§4819; 47GA, ch 131.]

4829.11 Weeds on roads or highways. The board of supervisors shall destroy primary noxious weeds growing in county, trunk, and local county roads, and the highway commission shall destroy primary noxious weeds growing on primary roads. Nothing herein shall prevent the landowner from harvesting, in proper season, the grass grown on the road along his land. [S13,§§1565-c,-d,-f; SS15,§1565-a; C24, 27, 31, 35,§§4817, 4819; 47GA, ch 131.]

4829.12 Weeds on railroad or public lands. All noxious weeds on railroad lands, public lands and within incorporated cities and towns shall be treated in such manner, approved by the board of supervisors, as shall prevent seed production and either destroy or prevent the spread of primary noxious weeds to adjoining lands. Gravel pits infested with primary noxious weeds shall not be used as sources of gravel for public highways without previous treatment approved by board of supervisors. [S13,§§1565-c,-d,-f; SS15,§1565-a; C24, 27, 31, 35,§§4817, 4819; 47GA, ch 131.]

4829.13 Program of control. The board of supervisors of each county shall each year, upon recommendation of the county weed commissioner, or township commissioners, by resolution prescribe* and order a program of weed destruction to be followed by landowners or tenants or both, which in five years may be expected to destroy and immediately keep under control any areas infested with any primary noxious weeds on farm land, and shall designate the cutting dates to prevent seed production of all other varieties of noxious weeds. Quack grass in pasture land, rough timbered land or on the highways, railway rights-of-way and public lands, when acting as soil binder, may be exempt from such order if approved by the supervisors. [S13,§§1565-c,-d; C24, 27, 31, 35, §4821; 47GA, ch 131.]

Referred to in §4829.14
*"prescribed" in enrolled act

4829.14 Notice of program. Notice of any order made pursuant to section 4829.13 shall be given by one publication in the official newspapers of the county and shall be directed to all property owners. In cases where the cost appears likely to exceed twenty-five dollars, notice to property owners shall be by registered letters. Provided, however, that where any railroad company has filed a written instrument in the county auditor's office, designating the name and address of its agent, the county auditor shall send, by registered mail, a copy of said notice to such agent.

Said notice shall state:

1. The time for destruction.
2. The manner of destruction, if other than cutting above the surface of the ground.
3. That unless said order is complied with the weed commissioner shall cause said weeds to be destroyed and the cost thereof to be taxed to the owner of the property. [S13,§§1565-c,-d; C24, 27, 31, 35,§4822; 47GA, ch 131.]

4829.15 Loss or damage to crops. The loss or damage to crops or property incurred by reason of such destruction shall be borne by the titleholder of said real estate, unless said real estate shall be sold under contract whereby possession has been delivered to the purchaser, in which event such purchaser shall bear such loss or damage, excepting where a contract has been entered into providing a different adjustment for such loss or damage. [S13,§§1565-c, -d; C24, 27, 31, 35,§4822; 47GA, ch 131.]

4829.16 Failure to comply. In case of a substantial failure to comply with such order, the weed commissioner, or commissioners, shall forthwith cause such weeds to be destroyed, and the expense of such destruction and the costs of any special meetings, if any, shall be paid from the county general fund, and recovered later by an assessment against the property owner, as provided in section 4829.19. [S13, §§1565-c,-d; C24, 27, 31, 35,§4823; 47GA, ch 131.]

Referred to in §4829.19

4829.17 Additional noxious weeds. The board of supervisors shall order the weed commissioner, or commissioners, to destroy or cause to be destroyed any new weeds declared to be* noxious by the secretary of agriculture, the cost of which shall be borne by the county. [47GA, ch 131.]

Referred to in §4829.19
*"be" not in enrolled act

4829.18 Order for destruction on roads. The board of supervisors shall order all weeds other than primary noxious weeds, on all county trunk and local county roads and between the fence lines thereof to be mowed to prevent seed production thereof, either upon its own motion or upon receipt of written notice requesting such action from any residents of the township in which such roads are located, or any person regularly using said roads. Said order shall define the roads along which said weeds are required to be cut and shall require said weeds to be cut within thirty days after the publication of said order in the official newspapers of said county. If the adjoining owner fails to cut said weeds as required in said order the county or township commissioner shall have same cut and the cost thereof shall be paid from the general county fund, and recovered later by an assessment against the adjoining property owners as provided in section 4829.19. [47GA, ch 131.]

4829.19 Cost of such destruction. When the commissioner, or commissioners, destroy any weeds under the authority of sections 4829.16 or 4829.17, after failure of the landowner responsible therefor to destroy such weeds pursuant to the order of the board of supervisors, the cost of such destruction shall be assessed against and collected from the landowner responsible in the following manner:

1. On or before December 31 of the year, the board of supervisors shall assess all of said

costs for the calendar year, including a reasonable part of the compensation of the commissioner in charge, against the said land and the owner thereof by a special tax, which shall be certified to the county auditor and county treasurer by the clerk of the board of supervisors, and shall be placed upon the tax books, and collected, together with interest and penalty after due, in the same manner as other unpaid taxes. Such tax shall be due on March 1 after such assessment, and shall be delinquent after March 31. When collected, said funds shall be paid into the fund from which said costs were originally paid.

2. Before making any such assessment, the board of supervisors shall prepare a plat or schedule showing the several lots, tracts of land or parcels of ground to be assessed and the amount proposed to be assessed against each of the same for destroying or controlling weeds during the calendar year.

3. Such board shall thereupon fix a time for the hearing on such proposed assessments, and at least twenty days prior to the time thus fixed for such hearing shall give notice thereof to all concerned that such plat or schedule is on file, and that the amounts as shown therein will be assessed against the several lots, tracts of land or parcels of ground described in said plat or schedule at the time fixed for such hearing, unless objection is made thereto. Notice of such hearing shall be given by one publication in official county newspapers in the county in which the property to be assessed is situated; or by posting a copy of such notice on the premises affected and by mailing a copy by registered mail to the last known address of the person owning or controlling said premises. At such time and place the owner of said premises or anyone liable to pay such assessment, may appear with the same rights given by law before boards of review, in reference to assessments for general taxation. [S13,§§1565-c,-d; C24, 27, 31, 35,§§4824, 4825; C31, 35,§§4825-c1,-c2; 47GA, ch 131.]

Referred to in §§4829.03, 4829.16, 4829.18

4829.20 Duty of highway maintenance men. It shall be the duty of all officers directly responsible for the care of public highways to make complaint to the weed commissioners or board of supervisors, whenever it shall appear that the provisions of this chapter may not be complied with in time to prevent the blooming and maturity of noxious weeds or the unlawful growth of weeds, whether in the streets or highways for which they are responsible or upon lands adjacent to the same. [S13,§§1565-c,-e; C24, 27, 31, 35,§4826; 47GA, ch 131.]

4829.21 Duty of county attorney. It shall be the duty of the county attorney upon complaint of any citizen that any officer charged with the enforcement of the provisions of this chapter has neglected or failed to perform his duty, to enforce the performance of such duty. [C24, 27, 31, 35,§4828; 47GA, ch 131.]

4829.22 Punishment of officer. Any officer referred to in this chapter who neglects or fails to perform the duties incumbent upon him under the provisions of this chapter shall be punished by a fine not exceeding one hundred dollars. [S13,§1565-i; C24, 27, 31, 35,§4829; 47GA, ch 131.]

Constitutionality, 47GA, ch 131

CHAPTER 247

HEDGES ALONG HIGHWAYS

4830 Hedges and windbreaks—trimming.
4831 Destruction by supervisors—tax.
4831.1 Expenses.
4832 Sale of wood—costs—balance.
4833 Exceptions.

4830 Hedges and windbreaks—trimming. The owners of osage orange and hedges of shrubbery other than trees along the public highway shall keep the same trimmed by cutting back within five feet of the ground at least once in every two years, and burn or remove the trimmings from off the road. With the exception of osage orange hedge fences, no trees or shrubbery, except as hereinafter provided, shall be permitted on the line or within the limits of the highway, unless the same shall be used as a windbreak for residences, orchards or feed lot, and no windbreak shall exceed forty rods in length, such forty rods to be determined by the owner within one day when requested by the board of supervisors; and in case he neglect or refuse to designate the forty rods of windbreak he desires, the board of supervisors shall select such forty rods of hedge. [C73,§999; C97,§1570; S13,§1570; C24, 27, 31, 35,§4830.]

4831 Destruction by supervisors—tax. The board of supervisors shall have the authority to enforce the provisions of this chapter and destroy or cut back the hedges or trees, as specified above, upon the failure of any owner of the hedge or fence so to do. The board of supervisors shall cause notice in writing to be served upon any owner of any hedge or trees described above, to destroy or trim the same, and upon complaint of any resident of the county the board of supervisors must serve such notice and destroy said trees or trim said hedge; and if the owner of the hedge or trees shall fail to destroy or cut back and trim them as herein required, within sixty days after receiving notice so to do, the board of supervisors shall cause the destruction or trimming of such hedge or trees to be done, as herein provided, and the cost thereof shall be certified by the said board to the county auditor and the same shall be assessed as taxes

against the land upon which the said hedge or trees were destroyed or trimmed, which tax shall be collected by the county treasurer in the manner other taxes are collected. [C73,§999; C97, §1570; S13,§1570; C24, 27, 31, 35,§4831.]

4831.1 Expenses. The expense of such destruction including costs of serving said notice and the costs if any of any special meetings may be advanced from the secondary road funds, which fund shall be reimbursed when the tax aforesaid is collected. [C27, 31, 35,§4831-b1.]

4832 Sale of wood—costs—balance. In case the wood left from the cutting or trimming of said hedge or trees shall, in the judgment of the board of supervisors, more than pay for the cost of advertising and selling the same, the same shall be sold at public auction after giving ten days notice thereof in the local newspaper nearest the hedge or trees destroyed, and the proceeds of the sale above the cost of trimming, cutting or destroying, selling and advertising for sale, shall be turned over to the owner of the hedge or trees. [C24, 27, 31, 35,§4832.]

4833 Exceptions. This chapter shall not apply to evergreen trees, walnut trees, oak or maple trees, or other hardwood trees which in the judgment of the board of supervisors should be let stand, nor shall it apply to trees along the highway which are a part of a grove or forest that extends more than five rods from the road line; nor to any single tree or group of trees (not exceeding ten in number) which by reason of their age or beauty the board of supervisors in its judgment believes should not be cut down. [C24, 27, 31, 35,§4833.]

CHAPTER 248

OBSTRUCTIONS IN HIGHWAYS

4834 Removal.
4835 Fences and electric transmission poles.
4836 Notice.
4837 Refusal to remove.
4838 New lines.
4839 Cost of removal—liability.
4840 Duty of road officers.
4841 Nuisance.
4842 Injunction to restrain obstructions.
4844 Billboards and signs.
4845 Enforcement.
4846 Billboards and signs prohibited.
4847 Right and duty to remove.

4834 Removal. The state highway commission and the board of supervisors shall cause all obstructions in highways, under their respective jurisdictions, to be removed. [C51, §594; R60,§905; C73,§993; C97,§1560; S13, §§1527-s17, 1560; C24, 27, 31, 35,§4834.]

4835 Fences and electric transmission poles. Poles used for telephone, telegraph, or other transmission purposes, shall not be removed until notice, in writing, of not less than thirty days, has been given to the owner or company operating such lines, and in case of fences, notice in writing of not less than sixty days has been given to the owner, occupant, or agent of the land inclosed by said fence. [C51,§594; R60,§905; C73,§993; C97,§1560; S13,§§1527-s17, 1560; C24, 27, 31, 35,§4835.]

4836 Notice. Said notice shall, with reasonable certainty, specify the line to which such fences or poles shall be removed, and shall be served in the same manner that original notices are required to be served. [S13,§1527-s17; C24, 27, 31, 35,§4836.]

Manner of service, §11060

4837 Refusal to remove. All such fences and poles shall, within the time named, be removed to such line on the highway as the state highway engineer or county engineer may designate, as the case may be. If there be no county engineer, the board of supervisors, in case of secondary roads, shall designate said line. If not so removed, the public authorities may forthwith remove them. [S13,§1527; C24. 27, 31, 35, §4837.]

4838 New lines. New lines, or parts of lines hereafter constructed, shall, in case of secondary roads, be located by the county engineer upon written application filed with the county auditor, and in case of primary roads, by the state highway engineer upon written application filed with the state highway commission, and shall thereafter be removable according to the provisions of this chapter. If there be no county engineer, the board of supervisors, in case of secondary roads, shall designate said location. [S13,§1527-s17; C24, 27, 31, 35,§4838.]

4839 Cost of removal—liability. Any removal made in compliance with the foregoing sections shall be at the expense of the owners of said fences or poles. All removals shall be without liability on the part of any officer ordering or effecting such removal. [S13,§1527-s17; C24, 27, 31, 35,§4839.]

4840 Duty of road officers. It shall be the duty of all officers responsible for the care of public highways, outside cities and towns, to remove from the traveled portion of the highways within their several jurisdictions, all open ditches, water breaks, and like obstructions, and to employ labor for this purpose in the same manner as for the repair of highways. [S13, §§1560-b,-e; C24, 27, 31, 35,§4840.]

Referred to in §4841

4841 Nuisance. Any person, partnership or corporation who makes, or causes to be made, any obstruction mentioned in section 4840, in such traveled way, and any officer responsible for the care of such highway who knowingly fails to remove said obstructions, shall be

deemed to have created a public nuisance and be punished accordingly. [S13,§§1560-a,-c; C24, 27, 31, 35,§4841.]

Nuisances in general, ch 528

4842 Injunction to restrain obstructions. The state highway commission, and the board of supervisors may, as to roads under their respective jurisdictions, maintain suits in equity aided by injunction to restrain obstruction in such highways, and, in such actions, may cause the legal boundary lines of such highway to be adjudicated provided all interested parties are impleaded. [C24, 27, 31, 35,§4842.]

4843 Rep. by 44GA, ch 100,§14

4844 Billboards and signs. Billboards and advertising signs, whether on public or private property, which so obstruct the view of any portion of a public highway or of a railway track as to render dangerous the use of a public highway are public nuisances and may be abated, and the person or persons responsible for the erection and maintenance may be punished, as provided in the chapter on nuisances. [C24, 27, 31, 35,§4844.]

Referred to in §4845
Nuisances in general, ch 528

4845 Enforcement. Boards of supervisors and county attorneys as to secondary roads, and the state highway commission and the attorney general as to primary roads, shall enforce section 4844 by appropriate civil or criminal proceeding or by both such proceedings. [C24, 27, 31, 35,§4845.]

4846 Billboards and signs prohibited. Billboards and advertising signs shall not hereafter be placed or erected within the boundary lines of the public highways. [C24, 27, 31, 35,§4846.]

4847 Right and duty to remove. All billboards and advertising signs now placed or erected within the boundary lines of public highways shall, without liability in damages, be removable:

1. By the state highway commission, in case of primary roads.
2. By the board of supervisors, in case of secondary roads. [C24, 27, 31, 35,§4847.]

CHAPTER 249

REGISTRATION OF HIGHWAY ROUTES

4848 Application for registration.
4849 Form—fee.
4850 Certificate.
4851 Infringement prohibited.
4852 Injury or defacement of signs.
4853 Cancellation—reassignment.
4854 Fees covered into state treasury.
4855 Violation constitutes misdemeanor.

4848 Application for registration. Any association organized to promote the improvement of any continuous highway not less than twenty-five miles in length may, by making application to the state highway commission, register in the office of said commission the name, detailed route, color combination, and design used in marking said route. The highway commission shall have power to determine priority of right in the use of said name, color combination, and designs. [S13,§1527-s22; C24, 27, 31, 35,§4848.]

4849 Form—fee. The application shall be in the form prescribed by the commission upon blanks furnished by it, and shall be properly acknowledged by the president and secretary of the association before a notary. Said application shall be accompanied by a registration fee of five dollars, which fee shall be returned to the association if the application be not granted. [S13,§1527-s23; C24, 27, 31, 35,§4849.]

4850 Certificate. If the state highway commission shall, after investigation, adjudge the application meritorious and the route to be worthy of the protection of this chapter, it shall issue to the association a certificate which shall designate in detail the name, the starting and the terminal points, the color combination, and designs used in marking the route; all of which facts shall be recorded as a part of the permanent records of the commission in a book kept for that purpose. [S13,§1527-s24; C24, 27, 31, 35,§4850.]

4851 Infringement prohibited. It shall be unlawful for any person or association of persons to use for similar purposes the name, or any recorded color combination, and designs herein referred to. [S13,§1527-s25; C24, 27, 31, 35, §4851.]

4852 Injury or defacement of signs. Any person who shall injure or deface any signboard, design, or other markings designating routes, shall be subject to the provisions of section 13097. [S13,§1527-s26; C24, 27, 31, 35,§4852.]

4853 Cancellation—reassignment. When any such highway association ceases to exist or when the interest in the route, name, and markings has ceased, the state highway commission may, after proper investigation, cancel the records and registration herein referred to and reassign the name, color combination, designs or other markings to any association making application for their use. [S13,§1527-s27; C24, 27, 31, 35,§4853.]

4854 Fees covered into state treasury. All fees received by the state highway commission under this chapter shall be turned into the state treasury. [S13,§1527-s28; C24, 27, 31, 35,§4854.]

4855 Violation constitutes misdemeanor. Any person or officer of any association violating any of the provisions of this chapter shall be guilty of a misdemeanor. [S13,§1527-s29; C24, 27, 31, 35,§4855.]

Punishment, §12894

CHAPTER 250

USE OF HIGHWAYS

4857.1 Construction of sidewalks.
4857.2 Assessment of costs.
4857.3 Repairs.
4858 Water and gas mains, sidewalks, and cattleways.
4859 Term of grant.
4860 Conditions—damages.
4861 Failure to maintain.
4862 Penalty.

4856, 4857 Rep. by 44GA, ch 100,§17

4857.1 Construction of sidewalks. Where an independent school district has within its limits a city of one hundred twenty-five thousand population or more, and has a schoolhouse located outside the city limits of such city and outside the limits of any city or town, the board of supervisors of the county in which such school district is located shall upon the filing of a petition signed by the owners of at least seventy-five percent of the property which will be assessed, order the construction or reconstruction of a permanent sidewalk not less than four feet in width along the highway adjacent to the property described and leading to such schoolhouse. [C27, 31, 35,§4857-b1.]

42GA, ch 95, §1, editorially divided

4857.2 Assessment of costs. Said work shall be undertaken and consummated and the cost thereof assessed to the abutting property in the manner and method and with the same effect as provided for the construction of sidewalks and the assessment of the costs thereof against benefited property by city councils within the limits of a city or town. [C27, 31, 35,§4857-b2.]

4857.3 Repairs. After the construction of such sidewalk the board of supervisors shall keep the same in repair and assess and certify the cost thereof in the same manner and to the same extent in which like repairs are assessed and certified by city councils. [C27, 31, 35, §4857-b3.]

4858 Water and gas mains, sidewalks, and cattleways. The state highway commission in case of primary roads, and the board of supervisors in case of secondary roads, on written application designating the particular highway and part thereof, the use of which is desired, may grant permission:

1. To lay gas and water mains in highways outside cities and towns to local municipal distributing plants or companies, but not to pipeline companies. This section shall not apply to or include pipe-line companies required to obtain a license from the Iowa state commerce commission.

2. To construct and maintain cattleways over or under such highways.

3. To construct sidewalks on and along such highways. [C97,§1524; S13,§1527-e; SS15, §1527-b; C24, 27, 31, 35,§4858; 47GA, ch 205.]

4859 Term of grant. Such grants shall be on such reasonable conditions as the board may exact, and on such as the general assembly may hereafter prescribe. Grants for gas or water mains shall not exceed twenty years. [C97, §1524; S13,§1527-e; C24, 27, 31, 35,§4859.]

4860 Conditions — damages. Such mains, pipes, and cattleways shall be so erected and maintained as not to interfere with public travel or with the future improvement of the highway. The owner of such mains, pipes, and cattleways shall be responsible for all damages arising from the laying, maintenance, or erection of the same or from the same not being kept in a proper state of repair.

The location of such mains or pipes shall be changed, on reasonable notice, when such change shall be necessary in the improvement or maintenance of the highway. [C97,§1524; S13,§1527-e; SS15,§1527-b; C24, 27, 31, 35, §4860.]

4861 Failure to maintain. Failure of the grantee to comply with the terms of the grant shall be ground for forfeiture of the grant. [C24, 27, 31, 35,§4861.]

4862 Penalty. Failure to comply with any of the conditions of said grant, whether made such by statute or by agreement, or the laying of any such mains, or the constructing of any such cattleways, without having secured the grant of permission as provided by law shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars. It shall be the duty of the state highway commission and of the board of supervisors, as regards the highways under their respective jurisdictions, to enforce the provisions of this section and the laws relating thereto. [S13, §1527-d; C24, 27, 31, 35,§4862.]

CHAPTER 251

MOTOR VEHICLES AND LAW OF ROAD

This chapter (§§4863 to 5093-c1, inc.) repealed by 47GA, ch 134. See chapter 251.1

CHAPTER 251.1

MOTOR VEHICLES AND LAW OF ROAD

Referred to in §1225.32

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4863 to 5000, inc. Rep. by 47GA. See note under chapter 251

DEPARTMENT OF MOTOR VEHICLES

5000.01 Definitions of words and phrases. The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

1. "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

2. "Motor vehicle" means every vehicle which is self-propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails. The terms "car" or "automobile" shall be synonymous with the term "motor vehicle".

3. "Motorcycle" means every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground but excluding a tractor.

4. "Motor truck" means every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers.

5. "Truck tractor" means every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

6. "Farm tractor" means every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

7. "Road tractor" means every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of a vehicle or load so drawn.

8. "Trailer" means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.

9. "Semitrailer" means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle.

Wherever the word "trailer" is used in this chapter, same shall be construed to also include "semitrailer".

A "semitrailer" shall be considered in this chapter separately from its power unit.

10. "Specially constructed vehicle" means every vehicle of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from its original construction.

11. "Reconstructed vehicle" means every vehicle of a type required to be registered hereunder materially altered from its original construction by the removal, addition, or substitution of essential parts, new or used.

12. "Essential parts" mean all integral and body parts of a vehicle of a type required to be registered hereunder, the removal, alteration, or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.

13. "Foreign vehicle" means every vehicle of a type required to be registered hereunder brought into this state from another state, territory, or country other than in the ordinary course of business by or through a manufacturer or dealer and not registered in this state.

14. "Implement of husbandry" means every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations.

15. "Special mobile equipment" means every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including road construction or maintenance machinery, ditch-digging apparatus and well-boring apparatus. The foregoing enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this paragraph; provided that nothing contained in this section shall be construed to include portable mills or cornshellers mounted upon a motor vehicle or semitrailer.

16. "Pneumatic tire" means every tire in which compressed air is designed to support the load.

17. "Solid tire" means every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

18. "Metal tire" means every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, nonresilient material.

19. "Where a vehicle is kept" shall refer to the county of residence of the owner or to the county where the vehicle is mainly kept if it be different from that of the residence of the owner.

20. "Garage" means every place of business where motor vehicles are received for housing, storage, or repair, for compensation.

21. "Combination" or "combination of vehicles" shall be construed to mean a group consisting of two or more motor vehicles, or a group consisting of a motor vehicle and one or more trailers, semitrailers or vehicles, which

are coupled or fastened together for the purpose of being moved on the highways as a unit.

22. "Gross weight" shall mean the empty weight of a vehicle plus the maximum load to be carried thereon. The maximum load to be carried by a passenger-carrying vehicle shall be determined by multiplying one hundred fifty pounds by the number of passenger seats carried by such vehicle.

22-a. "Combined gross weight" shall mean the gross weight of a motor vehicle plus the gross weight of a trailer or semitrailer to be drawn thereby.

23. "Authorized emergency vehicle" means vehicles of the fire department, police vehicles, and such ambulances and emergency vehicles of municipal departments as are designated or authorized by the commissioner.

24. "School bus" means every vehicle operated for the transportation of children to or from school, except privately owned vehicles, not operated for compensation, or used exclusively in the transportation of the children in the immediate family of the driver.

25. "Railroad" means a carrier of persons or property upon cars, other than street cars, operated upon stationary rails.

26. "Railroad train" means a steam engine, electric or other motor, with or without cars coupled thereto, operated upon rails, except streetcars.

27. "Streetcar" means a car other than a railroad train for transporting persons or property and operated upon rails principally within a municipality.

28. "Explosives" mean any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that on ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contiguous objects or of destroying life or limb.

29. "Flammable liquid" means any liquid which has a flash point of seventy degrees F. or less, as determined by a tagliabue or equivalent closed cup test device.

30. "Commissioner" means the commissioner of public safety of the state.

31. "Department" means the motor vehicle department under the commissioner of public safety.

32. "Person" means every natural person, firm, copartnership, association, or corporation. Where the term "person" is used in connection with the registration of a motor vehicle, it shall include any corporation, association, copartnership, company, firm, or other aggregation of individuals which owns or controls such motor vehicle as actual owner, or for the purpose of sale or for renting, whether as agent, salesman, or otherwise.

33. "Owner" means a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter.

34. "Nonresident" means every person who is not a resident of this state.

35. "Dealer" means every person engaged in the business of buying, selling or exchanging vehicles of a type required to be registered hereunder and who has an established place of business for such purpose in this state.

36. "Transporter" means every person engaged in the business of delivering vehicles of a type required to be registered hereunder from a manufacturing, assembling, or distributing plant to dealers or sales agents of a manufacturer.

37. "Manufacturer" means every person engaged in the business of constructing or assembling vehicles of a type required to be registered hereunder at an established place of business in this state.

38. "Established place of business" means the place actually occupied either continuously or at regular periods by a dealer or manufacturer where his books and records are kept and a large share of his business is transacted.

39. "Operator" means every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway.

40. "Chauffeur" means any person who operates a motor vehicle in the transportation of persons or freight, except school children, and who receives any compensation for such service in wages, commission or otherwise, paid directly or indirectly, or who as owner or employee operates a motor vehicle carrying passengers for hire or freight for hire, commission or resale, including drivers of ambulances, passenger cars, trucks, light delivery, and similar conveyances except when such operation by the owner or operator is occasional and merely incidental to his principal business.

41. "Driver" means every person who drives or is in actual physical control of a vehicle.

42. "Peace officer" means every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations in addition to its meaning in section 13405.

43. "Local authorities" mean every county, municipal, and other local board or body having authority to adopt local police regulations under the constitution and laws of this state.

44. "Pedestrian" means any person afoot.

45. "Street or highway" means the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic.

46. "Private road or driveway" means every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons.

47. "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular travel.

48. "Sidewalk" means that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians.

49. "Laned highway" means a highway the roadway of which is divided into three or more clearly marked lanes for vehicular traffic.

50. "Through (or thru) highway" means every highway or portion thereof at the entrances to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same and when stop signs are erected as provided in this chapter or such entrances are controlled by a police officer or traffic-control signal. The term "arterial" shall be synonymous with "through" or "thru" when applied to highways of this state.

51. "Intersection" means the area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

52. "Crosswalk" means that portion of a roadway ordinarily included within the prolongation or connection of the lateral lines of sidewalks at intersections, or,

Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface.

53. "Safety zone" means the area or space officially set apart within a roadway for the exclusive use of pedestrians and which is protected or so marked or indicated by adequate signs as to be plainly visible at all times while set apart as a safety zone.

54. "Business district" means the territory contiguous to and including a highway when fifty percent or more of the frontage thereon for a distance of three hundred feet or more is occupied by buildings in use for business.

55. "Residence district" means the territory within a city or town contiguous to and including a highway, not comprising a business, suburban or school district, where forty percent or more of the frontage on such highway for a distance of three hundred feet or more is occupied by dwellings or by dwellings and buildings in use for business.

56. "School district" means the territory contiguous to and including a highway for a distance of two hundred feet in either direction from a schoolhouse in a city or town.

56-a. "Suburban district" means all other parts of a city or town not included in the business, school or residence districts.

56-b. The linear measure of the plot of ground upon which the building is located abutting upon the highway shall be deemed "frontage occupied by the building", and the phrase "frontage on such highway for a distance of three hundred feet or more" shall mean the total frontage on both sides of the highway for such distance.

57. "Official traffic control devices" mean all signs, signals, markings, and devices not inconsistent with this chapter placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic.

58. "Official traffic control signal" means any device, whether manually, electrically or mechanically operated, by which traffic is alternately directed to stop and to proceed.

59. "Railroad sign or signal" means any sign, signal, or device erected by authority of a public body or official or by a railroad and intended to give notice of the presence of railroad tracks or the approach of a railroad train.

60. "Traffic" means pedestrians, ridden or herded animals, vehicles, streetcars, and other conveyances either singly or together while using any highway for purposes of travel.

61. "Right-of-way" means the privilege of the immediate use of the highway. [S13,§§1571-m1, -m20; C24, 27, 31, 35,§§4863, 5030, 13012; C31, 35,§4960-d1; 47GA, ch 134,§1; 48GA, ch 120, §§32, 33; ch 121,§§2, 3, 26; ch 127,§1; ch 128,§1; ch 135,§§1, 9a.]

5000.02 What constitutes department. The department of public safety, under the commissioner thereof, shall constitute the motor vehicle department for the administration and enforcement of this chapter. [C24, 27, 31, 35, §4863; 47GA, ch 134,§2; 48GA, ch 121,§7.]

5000.03 Powers and duties of commissioner. The commissioner is hereby vested with the power and is charged with the duty of observing, administering, and enforcing the provisions of this chapter. [47GA, ch 134,§16; 48GA, ch 120, §36; ch 121,§8.]

5000.04 Rules and regulations. The commissioner is hereby authorized to adopt and enforce such departmental rules and regulations governing procedure as may be necessary to carry out the provisions of this chapter; also to carry out any other laws the enforcement of which is vested in the department. [C24, 27, 31, 35,§5004; 47GA, ch 134,§17; 48GA, ch 121,§9.]

5000.05 Duty to obey. All local officials charged with the administration and enforcement of this chapter shall be governed in their official acts by the rules promulgated by the department. [C24, 27, 31, 35,§5005; 47GA, ch 134, §18.]

5000.06 Reciprocal enforcement — patrol beats in towns. There shall be reciprocal cooperation between the members of the state department of public safety and local authorities in the enforcing of local and state traffic laws and in making inspections, although this shall not be construed to give the state department of

public safety any right to establish regular patrol beats inside municipal limits unless requested for a special occasion or emergency by the mayor of such city or town or the sheriff of the county. [C24, 27, 31, 35,§5017; 47GA, ch 134,§37; 48GA, ch 120,§§40, 77.]

5000.07 Seal of department. The department may adopt an official seal. [47GA, ch 134,§19; 48GA, ch 121,§10.]

5000.08 Commissioner to prescribe forms. The commissioner shall prescribe and provide suitable forms of applications, registration cards, and all other forms requisite or deemed necessary to carry out the provisions of this chapter and any other laws, the enforcement and administration of which are vested in the department. [47GA, ch 134,§20; 48GA, ch 120, §37.]

5000.09 Authority to administer oaths. Officers and employees of the department designated by the commissioner are, for the purpose of administering the motor vehicle laws, authorized to administer oaths and acknowledge signatures, and shall do so without fee. [47GA, ch 134,§21.]

5000.10 Certified copies of records. The commissioner and such officers of the department as he may designate are hereby authorized to prepare under the seal of the department and deliver upon request a certified copy of any record of the department, charging a fee of fifty cents for each document so authenticated, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof. [47GA, ch 134,§22.]

5000.11 Records of department. All records of the department, other than those declared by law to be confidential for the use of the department, shall be open to public inspection during office hours. [47GA, ch 134,§23.]

5000.12 Obsolete records destroyed. The commissioner may destroy any records of the department which have been maintained on file for three years which he may deem obsolete and of no further service in carrying out the powers and duties of the department. [47GA, ch 134, §24.]

5000.13 Authority to grant or refuse applications. The department shall examine and determine the genuineness, regularity, and legality of every application lawfully made to the department, and may in all cases make investigation as may be deemed necessary or require additional information, and shall reject any such application if not satisfied of the genuineness, regularity, or legality thereof or the truth of any statement contained therein, or for any other reason, when authorized by law. [47GA, ch 134,§25; 48GA, ch 120,§38.]

5000.14 Seizure of documents and plates. The department is hereby authorized to take possession of any registration card, permit, or registration plate upon expiration, revocation, cancellation, or suspension thereof, or which is fictitious, or which has been unlawfully or erroneously issued. [47GA, ch 134,§26; 48GA, ch 120,§39.]

5000.15 Publication of law. The department shall issue such parts of this chapter in pamphlet form, together with such rules, instructions, and explanatory matter as may seem advisable. Copies of such pamphlet shall be given as wide distribution as the department shall determine and a supply shall be furnished each county treasurer. [C24, 27, 31, 35,§5018; 47GA, ch 134,§27.]

5000.16 Giving of notices. Whenever the department is authorized or required to give any notice under this chapter or other law regulating the operation of vehicles, unless a different method of giving such notices is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by registered mail addressed to such person at his address as shown by the records of the department. Return acknowledgment is required to prove such latter service.

Proof of the giving of notice by personal service may be made by the certificate of any officer or employee of the department or affidavit of any person over eighteen years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof. [47GA, ch 134,§29.]

5001 Rep. by 42GA, ch 101

ORIGINAL AND RENEWAL OF REGISTRATION

5001.01 Misdemeanor to violate registration provisions. It is a misdemeanor punishable as provided in section 5036.01, for any person to drive or move or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered hereunder which is not registered, or for which the appropriate fee has not been paid when and as required hereunder. [C24, 27, 31, 35,§5085; 47GA, ch 134,§48.]

5001.02 Vehicles subject to registration—exception. Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:

1. Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, or nonresidents as contemplated by section 5003.01, or under a temporary registration permit issued by the department as hereinafter authorized;
2. Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another;
3. Any implement of husbandry;
4. Any special mobile equipment as herein defined;
5. Any vehicle which is used exclusively for interplant purposes, in the operation of an in-

dustrial or manufacturing plant, consisting of a single unit comprising a group of buildings separated by streets, alleys, or railroad tracks, and which vehicle is used solely to transport materials from one part of the plant to another or from an adjacent railroad track to the plant and in so doing incidentally using said streets or alleys for not more than one thousand feet. [C24, 27, 31, 35,§4864; 47GA, ch 134,§49; 48GA, ch 126,§1.]

5001.03 General exemptions. All motor vehicles owned by the government and used in the transaction of official business by the representatives of foreign powers or by officers, boards, or departments of the government of the United States, and by the state of Iowa, counties, municipalities and other subdivisions of government, and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure or business nor for the transportation of freight, and all fire trucks, providing they are not owned and operated for a pecuniary profit, are hereby exempted from the payment of the fees in this chapter prescribed, but shall not be exempt from the penalties herein provided. The department shall furnish, on application, free of charge, distinguishing plates for motor vehicles thus exempted, which plates shall bear the word "official", and the department shall keep a separate record thereof. Provided that the executive council may order the issuance of regular registration plates, for any such exempted vehicle, upon a showing of need and necessity therefor. [C24, 27, 31, 35,§§4867, 4922; 47GA, ch 134,§50; 48GA, ch 125,§1.]

5001.04 Application for registration. Every owner of a vehicle subject to registration hereunder shall make application to the county treasurer, of the county of his residence, for the registration thereof upon the appropriate form or forms furnished by the department and every such application shall bear the signature of the owner written with pen and ink and said signature shall be acknowledged by the owner before a person authorized to administer oaths and said application shall contain:

1. The name, bona fide residence and mail address of the owner or business address of the owner if a firm, association or corporation;
2. A description of the vehicle including, insofar as the hereinafter specified data may exist with respect to a given vehicle, the make, model, type of body, the number of cylinders, the serial number of the vehicle, the engine or other number of the vehicle and whether new or used and if a new vehicle the date of sale by the manufacturer or dealer to the person intending to operate such vehicle;
3. Such further information as may reasonably be required by the department. [S13, SS15, §1571-m2; C24, 27, 31, 35,§§4869, 5008, 5009; 47GA, ch 134,§51.]

Referred to in §5001.13

5001.05 Registration by treasurer. Upon receipt of the application and registration fee for a motor vehicle or trailer, as provided in this chapter, the county treasurer shall file such application in his office and register such motor vehicle or trailer with the name, post-office address and business address of the owner, together with the facts stated in such application, in a book or index to be kept for the purpose, under the distinctive number assigned to such motor vehicle or trailer. [S13,§1571-m4; C24, 27, 31, 35,§4871; 47GA, ch 134,§52.]

5001.06 Public inspection. Said book or index shall be open to public inspection during reasonable business hours. [S13,§1574-m4; C24, 27, 31, 35,§4872; 47GA, ch 134,§53.]

5001.07 Specially constructed, reconstructed, or foreign vehicles.

1. In the event the vehicle to be registered is a specially constructed, reconstructed, or foreign vehicle, such fact shall be stated in the application and with reference to every foreign vehicle which has been registered heretofore outside of this state the owner shall surrender to the treasurer all registration plates, registration cards, and certificates of title or other evidence of such foreign registration as may be in his possession or under his control except as provided in subdivision 2 hereof.
2. Where in the course of interstate operation of a vehicle registered in another state it is desirable to retain registration of said vehicle in such other state, such applicant need not surrender but shall submit for inspection said evidence of such foreign registration and the treasurer upon a proper showing shall register said vehicle in this state. [47GA, ch 134,§54.]

5001.08 Quadruple receipts. Upon receipt of a registration fee for a motor vehicle or trailer, the county treasurer shall issue quadruple receipts therefor, one of which shall be delivered to the registrant, two of which shall be forwarded to the department not later than the tenth day of the month following their issuance, and one of which the treasurer shall retain in the records of his office. [C24, 27, 31, 35,§4873; 47GA, ch 134,§55.]

Referred to in §5010.08

5001.09 "Registration applied for" cards. Upon the sale of a motor vehicle by a manufacturer or dealer, the vendee shall at once make application by mail or otherwise, for registration thereof, after which he may operate the same upon the public highway without its individual number plate thereon for a period of not more than five days, provided that during such period the motor vehicle shall have attached thereto, in accordance with the provisions hereof, both on the front and rear of such vehicle, pasteboard cards bearing the words, "registration applied for" and the registration number of the dealer from whom the vehicle was purchased together with the date of purchase plainly stamped or stenciled thereon. [S13, §1571-m10; C24, 27, 31, 35,§4880; 47GA, ch 134, §56.]

5001.10 Card issued conditionally. No manufacturer or dealer shall permit the use of such

card until an application for a registration has been made, as herein provided, by the person to whom it is issued. [S13,§1571-m10; C24, 27, 31, 35,§4881; 47GA, ch 134,§57.]

5001.11 Cards furnished. The department shall, upon the application of any manufacturer or dealer furnish "registration applied for" cards free of charge. No cards shall be used except those furnished by the department. [C24, 27, 31, 35,§4885; 47GA, ch 134,§58.]

5001.12 Failure to register. The treasurer shall withhold the registration of any motor vehicle the owner of which shall have failed to register the same under the provisions of this chapter, for any previous period or periods for which it appears that registration should have been made, until the fee for such previous period or periods shall be paid. [C24, 27, 31, 35,§4870; 47GA, ch 134,§59.]

5001.13 Renewal not permitted. Any motor vehicle once registered in the state and by removal no longer subject to registration in this state, shall upon being returned to this state and subject to registration be again registered in accordance with section 5001.04. [C24, 27, 31, 35,§4876; 47GA, ch 134,§60.]

5001.14 Grounds for refusing registration. The treasurer shall refuse registration or any transfer of registration upon any of the following grounds:

1. That the application contains any false or fraudulent statement or that the applicant has failed to furnish required information or reasonable additional information requested by the department or that the applicant is not entitled to registration of the vehicle under this chapter;
2. That the vehicle is mechanically unfit or unsafe to be operated or moved upon the highways, providing such condition is revealed by a member of this department, or any peace officer;
3. That the treasurer has reasonable ground to believe that the vehicle is a stolen or embezzled vehicle or that the granting of registration would constitute a fraud against the rightful owner;
4. That the registration of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this state;
5. That the required fee has not been paid;
6. That the required sales tax has not been paid. [47GA, ch 134,§61.]

5001.15 Files required. The department shall install and maintain a numerical and a motor number file, using for such files the duplicate registration receipts, which shall contain the following information, viz: name and address of owner, previous registration number, make, factory number, model, style, engine number, date of purchase, registration certificate number, rated load-carrying capacity, weight, list price or value of the vehicle as fixed by the department, fees paid and date of payment. [S13,§1571-m2; C24, 27, 31, 35,§5010; 47GA, ch 134,§62; 48GA, ch 123,§1.]

5001.16 Registration card signed, carried, and exhibited. Every owner upon receipt of a registration card shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers and shall be displayed in the container furnished by the department. Such certificate container shall be attached to the vehicle in the driver's compartment so that same may be plainly seen without entering the car. [S13,§1571-m11; C24, 27, 31, 35,§4879; 47GA, ch 134,§63.]

5001.17 Exception. The provisions requiring that a registration card be carried in the vehicle to which it refers shall not apply when such card is used for the purpose of making application for renewal of registration or upon a transfer of registration of said vehicle. [47GA, ch 134,§64.]

5001.18 Plates furnished. The county treasurer upon receiving application, accompanied by proper fee, for registration of a vehicle shall issue to the owner one registration plate for a motorcycle, trailer, or semitrailer and two registration plates for every other motor vehicle. [SS15,§1571-m5; C24, 27, 31, 35,§4874; 47GA, ch 134,§65.]

5001.19 Numbers on plates. Every registration plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, also the name of this state, which may be abbreviated, and the year number for which it is issued or the date of expiration thereof. [S13,§§1571-m12,-m13; C24, 27, 31, 35, §4978; 47GA, ch 134,§66.]

5001.20 Size of numbers. Such registration plate and the required letters and numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of one hundred feet during daylight. [S13,§§1571-m12,-m13; C24, 27, 31, 35, §4978; 47GA, ch 134,§67.]

5001.21 Display of plates. Registration plates issued for a motor vehicle other than a motorcycle shall be attached thereto, one in the front and the other in the rear. The registration plate issued for a motorcycle or other vehicle required to be registered hereunder shall be attached to the rear thereof. [S13,§1571-m11; C24, 27, 31, 35,§4877; 47GA, ch 134,§68.]

Referred to in §5004.01

5001.22 Plates, method of attaching. Every registration plate shall at all times be securely fastened in a horizontal position to the vehicle for which it is issued so as to prevent the plate from swinging and at a height of not less than twelve inches from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible and shall be maintained free from foreign materials and in a condition to be clearly legible. [S13,§1571-m11; C24, 27, 31, 35, §4877; 47GA, ch 134,§69.]

Referred to in §5004.01

5001.23 Expiration of registration. Every vehicle registration under this chapter and every registration card and registration plate issued hereunder shall expire at midnight on the thirty-first day of December of each year. [S13, §1571-m16; C24, 27, 31, 35,§4868; 47GA, ch 134, §70.]

5001.24 Application for renewal. Application for renewal of a vehicle registration shall be made on or after December 1 of the year for which it is registered by the owner upon proper application and by payment of the registration fee for such vehicle, as provided by law. [S13, §1571-m6; C24, 27, 31, 35,§4875; 47GA, ch 134, §71.]

5001.25 Change of address or name. Whenever any person after making application for or obtaining the registration of a vehicle shall move from the address named in the application or shown upon a registration card such person shall within ten days thereafter notify the department in writing of his old and new addresses.

Whenever the name of any person who has made application for or obtained the registration of a vehicle is thereafter changed by marriage or otherwise such person shall within ten days notify the department of such former and new name. [47GA, ch 134,§72.]

5001.26 Lost or damaged certificates, cards, and plates. In the event any registration card or registration plate is lost, mutilated, or becomes illegible the owner shall immediately make application for and may obtain a duplicate upon the applicant furnishing information satisfactory to the department together with the payment of a fee of fifty cents for each such plate or registration card. [SS15,§1571-m5; C24, 27, 31, 35,§4886; 47GA, ch 134,§73.]

5001.27 New identifying numbers. The department is authorized to assign a distinguishing number to a motor vehicle whenever the serial number thereon is destroyed or obliterated and to issue to the owner a special plate bearing such distinguishing number which shall be affixed to the vehicle in a position to be determined by the commissioner. Such motor vehicle shall be registered under such distinguishing number in lieu of the former serial number. [C27, 31, 35,§5083-b4; 47GA, ch 134, §74.]

5001.28 Regulations governing change of motors. The commissioner is authorized to adopt and enforce such registration rules and regulations as may be deemed necessary and compatible with the public interest with respect to the change or substitution of one engine in place of another in any motor vehicle. [47GA, ch 134,§75.]

5002 Rep. by 47GA. See note under chapter 251

TRANSFERS OF TITLE OR INTEREST

5002.01 Notice. Upon the transfer of ownership of any registered motor vehicle, the owner shall immediately give notice to the county treasurer, upon the form on the reverse side of the certificate of registration, stating the date of such transfer, the name and post-office address, with street number if in a city, of the person to whom transferred, the registration number, and such other information as the department may require. [S13,§1571-m9; C24, 27. 31, 35,§4961; 47GA, ch 134,§76.]

Referred to in §5008.22

5002.02 Duty of purchaser. The purchaser of the motor vehicle shall join in the notice of transfer to the county treasurer and shall at the same time make application for the transfer of the motor vehicle and for a new certificate of registration. No transfer shall be made on presentation of a delinquent registration certificate. [S13,§1571-m9; C24, 27, 31, 35,§4962; 47GA, ch 134,§77.]

5002.03 Registration and fee. Upon filing the application for transfer, the applicant shall pay a fee of fifty cents for the transfer, thereupon the county treasurer, if satisfied of the genuineness and regularity of such transfer, shall register said motor vehicle in the name of the transferee and issue a new certificate of registration as provided in this chapter. [S13, §1571-m9; C24, 27, 31, 35,§4963; 47GA, ch 134, §78.]

5002.04 Department notified—record. The county treasurer shall forthwith notify the department of the transfer and upon receipt of the notification, the department shall file such statement and note upon the registration book or index, said change of ownership. [C24, 27, 31, 35,§4965; 47GA, ch 134,§79.]

5002.05 Dealer transfers. The provisions provided for herein for the transfer of motor vehicles shall apply to the sale and transfer of all motor vehicles by or to manufacturers or dealers. [C24, 27, 31, 35,§4966; 47GA, ch 134, §80.]

5002.06 Penalty. If a transfer of ownership of a motor vehicle is not completed as herein provided within five days of the actual change of possession, a penalty of five dollars shall accrue against said vehicle, and no certificate of registration therefor shall thereafter issue until said penalty is paid. [C24, 27, 31, 35,§4967; 47GA, ch 134,§81.]

5002.07 Owner after transfer not liable for negligent operation. The owner of a motor vehicle who has made a bona fide sale or transfer of his title or interest and who has delivered possession of such vehicle to the purchaser or transferee shall not be liable for any damages thereafter resulting from negligent operation of such vehicle by another. [C24, 27, 31, 35, §4964; 47GA, ch 134,§82.]

5002.08 Surrender of plates. When a motor vehicle is permanently dismantled and can no longer be used on the public highway or when same is sold outside the state, the owner thereof shall detach the registration plates and certifi-

cate of registration and surrender them to the county treasurer who shall cancel the registration of record and report such cancellation forthwith to the department upon blanks provided for that purpose. Such registration plates shall be destroyed by the county treasurer who shall so advise the department. [C24, 27, 31, 35,§4887; 47GA, ch 134,§83.]

5003 Rep. by 47GA. See note under chapter 251

PERMITS TO NONRESIDENT OWNERS

5003.01 Nonresident owners exempt. A nonresident owner, except as otherwise provided in sections 5003.02 and 5003.03, owning any foreign vehicle of a type otherwise subject to registration may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner. [S13,§1571-m16; C24, 27, 31, 35, §4865; 47GA, ch 134,§84.]

Referred to in §§5001.02, 5003.04

5003.02 Nonresident carriers. Nonresident owners of foreign vehicles operated within this state for the intrastate transportation of persons or property for compensation or for the intrastate transportation of merchandise, shall register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state. [47GA, ch 134,§85.]

Referred to in §5003.01

5003.03 Nonresidents employed in state. Every nonresident, including any foreign corporation, engaged in remunerative employment or carrying on business within this state and owning and operating any motor vehicle, trailer, or semitrailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state. [47GA, ch 134,§86.]

Referred to in §5003.01

5003.04 Scope of exemption. The provisions of section 5003.01 shall be operative as to a motor vehicle owned by a nonresident of this state to the extent that under the laws of the foreign country, state, territory, or federal district of his residence like exemptions and privileges are granted to motor vehicles duly registered under the laws, and owned by the residents of this state.

Nonresident cars shall be listed within ten days after entering the state, with the county treasurer or department who will issue a permit for the period of exemption. [S13,§1571-m16; C24, 27, 31, 35,§4866; 47GA, ch 134,§87.]

5004 Rep. by 47GA. See note under chapter 251

SPECIAL PLATES TO MANUFACTURERS, TRANSPORTERS, AND DEALERS

5004.01 Operation under special plates. A manufacturer or dealer owning any vehicle of a type otherwise required to be registered hereunder may operate or move the same upon the highways solely for purposes of transporting, testing, demonstrating, or use in the ordinary course and conduct of his business as a dealer or manufacturer, or selling the same without registering each such vehicle upon condition that any such vehicle display thereon in the manner prescribed in sections 5001.21 and 5001.22 a special plate or plates issued to such owner as provided in sections 5004.02 to 5004.06, inclusive.

Also a transporter may operate or move any vehicle of like type upon the highways solely for the purpose of delivery upon likewise displaying thereon like plates issued to him as provided in these sections.

The provisions of this section and sections 5004.02 to 5004.06, inclusive, shall not apply to work or service vehicles owned by a manufacturer, transporter, or dealer. [SS15,§1571-m14; C24, 27, 31, 35,§§4888, 4894, 4895; 47GA, ch 134, §88.]

Referred to in §§5005.03, 5024.13

5004.02 Application. Any manufacturer, transporter, or dealer may, upon payment of a fee of twenty-five dollars, make application to the department upon the appropriate form for a certificate containing a general distinguishing number and for one or more pairs of special plates or single special plates as appropriate to various types of vehicles subject to registration hereunder. The applicant shall also submit proof of his status as a bona fide manufacturer, transporter, or dealer as may reasonably be required by the department. Dealers in new vehicles shall furnish satisfactory evidence of a valid franchise with the manufacturer of such vehicles authorizing such dealership. [SS15, §1571-m14; C24, 27, 31, 35,§4888; 47GA, ch 134, §89.]

Referred to in §§5004.01, 5024.13

5004.03 Issuance of certificate. The department, upon granting any such application, shall issue to the applicant a certificate containing the applicant's name and address and the general distinguishing number assigned to the applicant. [SS15,§1571-m14; C24, 27, 31, 35,§§4890, 4891; 47GA, ch 134,§90.]

Referred to in §5004.01

5004.04 Issuance of plates. The department shall also issue special plates as applied for, which shall have displayed thereon the general distinguishing number assigned to the applicant. Each plate or pair of plates so issued shall also contain a number or symbol identifying the same from every other plate or pair of plates bearing the same general distinguishing number. The fee for each pair of special plates shall be three dollars. [SS15,§1571-m14; C24, 27, 31, 35,§4892; 47GA, ch 134,§91.]

Referred to in §5004.01

5004.05 Expiration of special plates. Every special plate issued hereunder shall expire at midnight on the thirty-first day of December of each year, and a new plate or plates for the ensuing year may be obtained by the person to whom any such expired plate or plates was issued upon application to the department and payment of the fee provided by law. [S13, §1571-m16; C24, 27, 31, 35,§4868; 47GA, ch 134, §92.]

Referred to in §5004.01

5004.06 Records required. Every manufacturer, transporter, or dealer shall keep a written record of the vehicles upon which such special plates are used, which record shall be open to inspection by any police officer or any officer or employee of the department. [47GA, ch 134, §93.]

Referred to in §5004.01

5004.07 Different places of business. If a manufacturer, transporter, or dealer has an established place of business in more than one city or town, he shall secure a separate and distinct certificate of registration and number plates for each such place of business. [SS15, §1571-m14; C24, 27, 31, 35,§4889; 47GA, ch 134, §94.]

5004.08 Scope of registration. The foregoing provision relative to the right of a manufacturer, transporter, or dealer to have a general registration of all motor vehicles owned or controlled by him shall not apply to a motor vehicle operated by him for private use or hire, but said vehicle shall be individually registered as provided in this chapter. [SS15,§1571-m14; C24, 27, 31, 35,§4893; 47GA, ch 134,§95.]

5004.09 Garage record. Every person or corporation operating a public garage shall keep for public inspection a record of the registration number and engine or factory serial number of every motor vehicle offered for sale or taken in for repairs in said garage. [C24, 27, §§4988–4990; C31, 35,§4990-c1; 47GA, ch 134,§96.]

5004.10 Duty to hold vehicles. The proprietor of a garage and his employees upon discovering that the engine number of a motor vehicle has been altered or obliterated shall immediately notify some member of the state department of public safety or peace officer of the county in which the garage is located, and hold said vehicle for a period of twenty-four hours or until investigation shall have been made by such peace officer. [C24, 27, 31, 35,§4991; 47GA, ch 134,§97; 48GA, ch 120,§76.]

5005 Rep. by 47GA. See note under chapter 251

USED MOTOR VEHICLES

5005.01 Purchase or sale—relative duties. It shall be unlawful for any person or agent except as provided in section 5005.02 to buy any second-hand or used motor vehicle, without requiring and receiving from the vendor thereof, a certificate of registration, certificate of title if required in state of its registration, and transfer from the officer whose duty it is to register motor vehicles in the state in which said motor vehicle is registered, showing the factory number, registration number, description, and ownership of said motor vehicle or to sell or offer for sale any second-hand or used motor vehicle without furnishing to the vendee of said motor vehicle, a certificate of registration, and transfer from the officer whose duty it is to register motor vehicles in the state in which said motor vehicle is registered, showing the factory number, description, registration number, and ownership of said motor vehicle. [C24, 27, 31, 35,§4898; 47GA, ch 134,§98.]

5005.02 Sale in bulk. It shall be unlawful for any dealer in this state to sell and transfer his stock of used motor vehicles in bulk unless he complies with the following requirements:

1. The vendor shall:

a. File with the county treasurer and the department, duplicate inventories of all used motor vehicles proposed to be transferred, giving the factory number, last registration number, if any, and description of each such used motor vehicle and the name and address of proposed vendee.

b. File with the county treasurer and department duplicate bills of sale setting forth the fact that such sale has been completed.

2. The vendee shall, if he has not already secured a dealer's registration, immediately secure such registration from the department.

3. The vendor and vendee shall join in the transfer of each used motor vehicle in said stock and shall file with the county treasurer a transfer of registration and shall pay a transfer fee of fifty cents for each such used motor vehicle.

Upon the completion of such requirements the department shall certify to the county treasurer that such used motor vehicles are, from and after a date to be set by the department, the property of the vendee. [C24, 27, 31, 35,§4899; 47GA, ch 134,§99.]

Referred to in §5005.01

5005.03 Right to operate. Registered car dealers having on hand February 1 of any year for sale or trade, used motor vehicles upon which registration in Iowa for the previous year has been paid, as hereinafter provided, may operate such motor vehicles as provided by section 5004.01. [C24, 27, 31, 35,§4900; 47GA, ch 134, §100.]

5005.04 Dealer to list vehicles. Dealers registered under the provisions of this chapter must, on or before February 5 of each year, furnish the county treasurer and department with a list of all used motor vehicles held by them for sale or trade, and upon which the registration fee for the current year is not paid, giving registration number, initials of state issuing registration plates, the year, together with the factory number, description, and previous ownership at the time such motor vehicle was transferred to the dealer. [C24, 27, 31, 35, §4901; 47GA, ch 134,§101.]

Referred to in §§5005.05, 5009.04

5005.05 Listing of foreign cars. All motor vehicles owned or controlled by a registered manufacturer or dealer, and acquired from other states must be listed with the county treasurer and department as provided in section 5005.04, such listing to be made within forty-eight hours after said motor vehicle comes within the border of the state. [C24, 27, 31, 35,§4902; 47GA, ch 134,§102.]

5006 Rep. by 47GA. See note under chapter 251

SPECIAL ANTITHEFT LAW

5006.01 Report of stolen and recovered motor vehicles. Every sheriff, chief of police, or peace officer upon receiving reliable information that any vehicle registered hereunder has been stolen shall immediately report such theft to the department unless prior thereto information has been received of the recovery of such vehicle. Any said officer upon receiving information that any vehicle, which he has previously reported as stolen, has been recovered, shall immediately report the fact of such recovery to the local sheriff's office or police department and to the department. [C27, 31, 35,§13417-a1; 47GA, ch 134,§§103, 551.]

5006.02 Reports by owners. The owner, or person having a lien or incumbrance upon a registered vehicle which has been stolen or embezzled, may notify the department of such theft or embezzlement, but in the event of an embezzlement may make such report only after having procured the issuance of a warrant for the arrest of the person charged with such embezzlement.

Every owner or other person who has given any such notice must notify the department of a recovery of such vehicle. [47GA, ch 134,§104.]

5006.03 Action by department. The department upon receiving a report of a stolen or embezzled vehicle as hereinbefore provided shall file and appropriately index the same and shall immediately suspend the registration of the vehicle so reported and shall not transfer the registration of the same until such time as it is notified in writing that such vehicle has been recovered. [47GA, ch 134,§105.]

5006.04 Bulletin of stolen vehicles. The department shall at least once each week compile and publish a list of motor vehicles reported stolen and all motor vehicles recovered, and shall send a copy thereof to each chief of police and sheriff in the state, and to the motor vehicle departments of each of the several states and also maintain at its headquarters office a list of all vehicles which have been stolen or embezzled or recovered as reported to it during the preceding week and such lists shall be open to inspection by any peace officer or other person interested in any such vehicle. [C27, 31, 35, §13417-a2; 47GA, ch 134,§§106, 551.]

5006.05 Operating without consent. If any chauffeur or other person shall without the consent of the owner take, or cause to be taken, any automobile or motor vehicle, and operate or drive, or cause the same to be operated or driven, he shall be imprisoned in the penitentiary not to exceed one year, or be imprisoned in the county jail not to exceed six months, or be fined not to exceed five hundred dollars. [S13,§4823; C24, 27, 31, 35,§13092; 47GA, ch 134,§§108, 549.]

5006.06 Receiving or transferring stolen vehicle. Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives, or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony and shall be punished as provided in section 5036 02. [C24, 27, 31, 35,§5092; 47GA, ch 134,§109.]

Referred to in §5039.06

5006.07 Injuring or tampering with vehicle. Any person who either individually or in association with one or more other persons wilfully injures or tampers with any vehicle or breaks or removes any part or parts of or from a vehicle without the consent of the owner is guilty of a misdemeanor punishable as provided in section 5036.01. [47GA, ch 134,§110.]

Referred to in §5039.06

5006.08 Intent to injure. Any person who with intent to commit any malicious mischief, injury, or other crime climbs into or upon a vehicle whether it is in motion or at rest or with like intent attempts to manipulate any of the levers, starting mechanism, brakes, or other mechanism or device of a vehicle while the same is at rest and unattended or with like intent sets in motion any vehicle while the same is at rest and unattended is guilty of a misdemeanor punishable as provided in section 5036.01. [47GA, ch 134,§111.]

5006.09 Vehicles without manufacturers' numbers. Any person who knowingly buys, receives, disposes of, sells, offers for sale, or has in his possession any motor vehicle, or engine removed from a motor vehicle, from which the manufacturer's serial or engine number or other distinguishing number or identification mark or number placed thereon under assignment from the department has been removed, defaced, covered, altered, or destroyed for the purpose of concealing or misrepresenting the identity of said motor vehicle or engine is guilty of a misdemeanor punishable as provided in section 5036.01. [SS15,§1571-m12a; C24, 27, 31, 35, §5080; 47GA, ch 134,§112.]

Referred to in §5039.06

5006.10 Presumptive evidence. Whoever shall conceal, barter, sell, or dispose of any motor vehicle which has been stolen, or shall disguise, alter, or change such motor vehicle or the factory or serial number thereof, or remove or change the registration plate thereon, or do any act designed to prevent identification of

such motor vehicle, shall be presumed to have knowledge that such motor vehicle had been stolen. [C24,27,31,35,§5093; 47GA, ch 134,§113.]

Referred to in §5039.06

5006.11 Larceny of motor vehicle. If any person steal, take and carry away, irrespective of value, any motor vehicle, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine of not more than one thousand dollars, or by both such fine and imprisonment. [C24, 27, 31, 35,§13011; 47GA, ch 134,§§114, 548.]

5006.12 Jurisdiction. Jurisdiction of such offense may be in the county where such motor vehicle was stolen, or through or into which it was taken, carried, or transported by the person or persons who committed the theft, or by any person or persons confederated with him or them in such theft. [C24, 27, 31, 35, §13013; 47GA, ch 134,§§115, 548.]

5006.13 Seizure of vehicles. It shall be the duty of any peace officer who finds a motor vehicle, the serial or engine number of which has been altered, defaced, or tampered with, and who has reasonable cause to believe that the possessor of such motor vehicle wrongfully holds the same, to forthwith seize the same, either with or without warrant, and deliver the same to the sheriff of the county in which it is seized. [C27,31,35,§5083-b1; 47GA, ch 134,§116.]

Referred to in §5006.14

5006.14 Stolen or abandoned vehicles. Whenever any motor vehicle is seized under section 5006.13 or whenever any motor vehicle is stolen, or embezzled, and is not claimed by the owner before the date on which the person charged with the stealing or embezzling of same is convicted, or if the motor vehicle be abandoned and is not claimed by the owner within three days, then the officer having same in his custody must, on such date by registered mail, notify the department that he has such a motor vehicle in his possession, giving a full and complete description of same, including all marks of identification, factory and serial numbers. [C24,§12222; C27, 31, 35,§§5083-b2, 12222; 47GA, ch 134,§§117, 547.]

5006.15 Notice by commissioner. The commissioner shall, if the owner appears of record in his office, notify such owner of the fact that such motor vehicle is in the custody of such officer, and if not of record in his office, said commissioner shall mail such description to the county treasurer of each county. [C24, 27, 31, 35,§12223; 47GA, ch 134,§§118, 547; 48GA, ch 120,§25d; ch 121,§12.]

5006.16 Delivery to owner. If, within forty days thereafter, the owner of such motor vehicle appears and properly identifies same, the officer having said motor vehicle in his custody shall deliver same to such owner upon payment by him of the costs incurred incident to the apprehension of said motor vehicle and the location of such owner. [C24,§12224; C27, 31, 35, §§5083-b3, 12224; 47GA, ch 134,§§119, 547.]

5006.17 Advertisement. If the owner does not appear within that time, the officer having possession of same shall advertise said motor vehicle for sale in a newspaper published within the county at least once each week for two consecutive weeks. [C24,§12225; C27, 31, 35,§§5083-b3, 12225; 47GA, ch 134,§§120, 547.]

Referred to in §5006.18

5006.18 Sale. Said motor vehicle shall be sold at public auction to the highest cash bidder therefor and said sale must be held within one week following the date of the last publication of the notice as provided in section 5006.17. [C24,§12226; C27, 31, 35,§§5083-b3, 12226; 47GA, ch 134,§§121, 547.]

5006.19 Proceeds—costs. After deducting the costs incident thereto, such officer shall pay all remaining money to the treasurer of state, of the county, or of the municipality, under which authority the vehicle was seized and sold for the use and benefit of the general fund. [C24, §12227; C27, 31, 35,§§5083-b3, 12227; 47GA, ch 134,§§122, 547.]

5006.20 Reimbursement after sale. If, within six months from the date of sale, the owner of any motor vehicle sold under the provisions hereof makes a showing satisfactory to the executive council, board of supervisors, or municipal governing authority having control of said fund that he is the owner of such motor vehicle, then said council, board, or authority may direct the drawing of a warrant payable to such owner for the amount such vehicle was sold for, less costs, and direct the treasurer to pay same out of the general fund. [C24, 27, 31, 35,§12228; 47GA, ch 134,§§123, 547.]

5006.21 Altering or changing numbers. No person shall with fraudulent intent deface, destroy, or alter the manufacturer's serial or engine number or other distinguishing number or identification mark of a motor vehicle nor shall any person place or stamp any serial, engine, or other number or mark upon a motor vehicle, except one assigned thereto by the department. Any violation of this provision is a felony punishable as provided in section 5036.02.

This section shall not prohibit the restoration by an owner of an original serial, engine, or other number or mark when such restoration is made under permit issued by the department, nor prevent any manufacturer from placing in the ordinary course of business numbers or marks upon motor vehicles or parts thereof. [SS15,§1571-m12a; C24, 27, 31, 35,§5080; 47GA, ch 134,§124.]

Referred to in §5039.06

5006.22 Defense. Under a charge of possessing a motor vehicle, the serial or engine number of which is defaced, altered, or tampered with, it shall be a complete defense that the accused at the time of such possession had in his possession a certificate of registration and transfer from the officer whose duty it is to

register motor vehicles in the state in which said motor vehicle is registered, showing good and sufficient reason why numbers are defaced, changed, or tampered with, the original serial or engine number, and the ownership of said motor vehicle. [C24, 27, 31, 35,§5083; 47GA, ch 134,§125.]

5006.23 Test to determine true number. Where it appears that a factory, serial or motor number has been altered, defaced or tampered with, any sheriff, state agent or peace officer of the department of justice, or inspector employed by the motor vehicle department, or any other person acting under their direction, may apply any recognized process or test to the part containing such number for the purpose of determining the true number. [C27, 31, 35,§5083-b5; 47GA, ch 134,§126.]

5006.24 Right of inspection. Peace officers and examiners employed in the department are hereby given authority to inspect any motor vehicle found upon the public highway or in any public garage or inclosure in which motor vehicles are kept for sale, storage, hire or repair and for that purpose may enter any such public garage or inclosure. [C27, 31, 35,§5083-b6; 47GA, ch 134,§127; 48GA, ch 121,§13.]

5006.25 Prohibited plates — certificates — badges. No person shall display or cause or permit to be displayed, or have in his possession, any canceled, revoked, altered, or fictitious registration number plates, registration certificate, chauffeur's license certificate, or chauffeur's badge, as the same are respectively provided for in this chapter. [C24, 27, 31, 35,§5084; 47GA, ch 134,§128.]

5007 Rep. by 47GA. See note under chapter 251

OFFENSES AGAINST REGISTRATION LAWS AND SUSPENSION OR REVOCATION OF REGISTRATION

5007.01 Fraudulent applications. Any person who fraudulently uses a false or fictitious name in any application for the registration of a vehicle or knowingly makes a false statement or knowingly conceals a material fact or otherwise commits a fraud in any such application, shall upon conviction be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year or both. [S13,§1571-m26; C24, 27, 31, 35,§5088; 47GA, ch 134,§129.]

Referred to in §5039.06

5007.02 Operation without registration. No person shall operate, nor shall an owner knowingly permit to be operated upon any highway any vehicle required to be registered hereunder unless there shall be attached thereto and displayed thereon when and as required by this chapter a valid registration card and registration plate or plates issued therefor for the current registration year except as otherwise expressly permitted in this chapter. Any violation of this section is a misdemeanor punishable as provided in section 5036.01. [C24, 27, 31, 35,§5085; 47GA, ch 134,§130.]

Referred to in §5039.06

5007.03 Improper use of registration. No person shall lend to another any registration card, registration plate, special plate, or permit issued to him if the person desiring to borrow the same would not be entitled to the use thereof, nor shall any person knowingly permit the use of any of the same by one not entitled thereto, nor shall any person display upon a vehicle any registration card, registration plate or permit not issued for such vehicle or not otherwise lawfully used thereon under this chapter. Any violation of this section is a misdemeanor punishable as provided in section 5036.01. [SS15,§1571-m12a; C24, 27, 31, 35, §§4878, 5080; 47GA, ch 134,§131.]

Referred to in §5039.06

5007.04 False evidences of registration. It is a felony, punishable as provided in section 5036.02, for any person to commit any of the following acts:

1. To alter with a fraudulent intent any registration card, registration plate, or permit issued by the department;
2. To forge or counterfeit any such document or plate purporting to have been issued by the department;
3. To hold or use any such document or plate knowing the same to have been so altered, forged or falsified. [SS15,§1571-m12a; C24, 27, 31, 35,§5080; 47GA, ch 134,§132.]

Referred to in §5039.06

5007.05 Suspension or revocation of registration. The department is hereby authorized to suspend or revoke the registration of a vehicle, registration card, registration plate, or any nonresident or other permit in any of the following events:

1. When the department is satisfied that such registration card, plate, or permit was fraudulently or erroneously issued;
2. When the department determines that a registered vehicle is mechanically unfit or unsafe to be operated or moved upon the highways;
3. When a registered vehicle has been dismantled or wrecked;
4. When the department determines that the required fee has not been paid and the same is not paid upon reasonable notice and demand;
5. When a registration card, registration plate, or permit is knowingly displayed upon a vehicle other than the one for which issued;
6. When the department determines that the owner has committed any offense under this chapter involving the registration card, plate, or permit to be suspended or revoked; or,
7. When the department is so authorized under any other provision of law. [C24, 27, 31, 35,§5090; 47GA, ch 134,§133.]

5007.06 Suspending or revoking special registration. The department is also authorized to suspend or revoke a certificate or the special plates issued to a manufacturer, transporter, or

dealer upon determining that any said person is not lawfully entitled thereto or has made or knowingly permitted any illegal use of such plates or has committed fraud in the registration of vehicles or failed to give notices of transfer when and as required by this chapter. [47GA, ch 134,§134.]

5007.07 Owner to return evidences of registration. Whenever the department as authorized hereunder cancels, suspends, or revokes the registration of a vehicle or registration card, or registration plate or plates, or any nonresident or other permit or the registration of any dealer, the owner or person in possession of the same shall immediately return the evidences of registration, or plates so canceled, suspended, or revoked to the department. [47GA, ch 134, §135.]

5007.08 Operation while certificate revoked. Any person who operates any motor vehicle while a certificate of registration of a motor vehicle issued to him is suspended or revoked, shall be guilty of a misdemeanor and punished as provided in section 5036.01. [S13,§1571-m24; C24, 27, 31, 35,§5086; 47GA, ch 134,§136.]

5008 Rep. by 47GA. See note under chapter 251

REGISTRATION FEES

5008.01 Annual fee required. An annual registration fee shall be paid for each motor vehicle or trailer operated upon the public highways of this state unless said vehicle is specifically exempted under the provisions of this chapter.

Said registration fee shall be paid to the county treasurer at the same time the application is made for the registration or re-registration of said motor vehicle or trailer. [SS15, §1571-m7; C24, 27, 31, 35,§4904; 47GA, ch 134, §137.]

Referred to in §6610.58

5008.02 Fractional part of year. Where there is no delinquency and the registration is made in February or in succeeding months to and including November, the fees shall be computed on the basis of one-twelfth of the annual registration fee as provided herein multiplied by the number of the unexpired months of the year. Whenever any such fee so computed contains a fractional part of a dollar, it shall be computed as of the nearest fractional quarter dollar thereto, and said amount shall be the fee which shall be collected.

No fee shall be required for the month of December for a new car in good faith delivered during that month. [SS15,§1571-m7; C24, 27, 31, 35,§4905; 47GA, ch 134,§138.]

5008.03 Sworn statement. Such reduction in the registration fee shall not be allowed until the applicant first file with the county treasurer an affidavit stating the date on which the motor vehicle first came into his possession or control in connection with his purchase or prospective purchase thereof, and the name and address of the party from whom purchased. [C24, 27, 31, 35,§4906; 47GA, ch 134,§139.]

5008.04 Perjury. Any person who shall wilfully make a false statement in such affidavit shall be deemed guilty of perjury and punished accordingly. [C24, 27, 31, 35,§4907; 47GA, ch 134,§140.]

Punishment, §13165

5008.05 Motor vehicle fee. The annual fee for all motor vehicles except motor trucks, hearses, motorcycles, and motor bicycles, shall be equal to one percent of the value as fixed by the department plus forty cents for each one hundred pounds or fraction thereof of weight of vehicle, as fixed by the department. [C24, 27, 31, 35,§4908; 47GA, ch 134,§141.]

Referred to in §§5008.06, 6610.58

5008.06 Rejecting fractional dollars. When the registration fee, computed according to section 5008.05, totals a fraction over a certain number of dollars the fraction of a dollar shall not be computed in arriving at the fee. [C27, 31, 35,§4908-a1; 47GA, ch 134,§142.]

5008.07 Conversion of car—effect. Any motor vehicle originally registered as a passenger car and thereafter converted into a truck with a loading capacity of less than one thousand pounds, shall be registered as a passenger car. [C35,§4908-g1; 47GA, ch 134,§143.]

5008.08 Minimum motor vehicle fee. No motor vehicle, regardless of age, except as provided in section 5008.11 shall be registered for a full year for less than seven dollars. [C24, 27, 31, 35,§4909; 47GA, ch 134,§144.]

5008.09 Automatic reduction. After said motor vehicle has been registered three times, that part of the registration fee which is based on the value of said vehicle shall be:

Seventy-five percent of the rate as fixed when new;

After four times, fifty percent;

After five times, twenty-five percent;

After six times, that part of the registration fee based on the value of said vehicle shall be eliminated. [SS15,§1571-m7; C24, 27, 31, 35, §4910; 47GA, ch 134,§145.]

5008.10 Proof of registration. The sworn statement of the registrant as to the number of times such motor vehicle has been registered shall be conclusive evidence of that fact. [C24, 27, 31, 35,§4911; 47GA, ch 134,§146.]

5008.11 Antiquated vehicles. Any motor vehicle fifteen years old, or older, whose owner desires to use said motor vehicle exclusively for exhibition or educational purposes at state or county fairs, or other places where said motor vehicle may be exhibited for entertainment or educational purposes, shall be given a registration permitting the driving of said motor vehicle upon the public roads to and from said fair or other place of entertainment or education for a registration fee of one dollar per annum. [C35,§4911-f1; 47GA, ch 134,§147.]

Referred to in §5008.08

5008.12 Electric automobiles. For all electric motor vehicles the annual fee shall be twenty-five dollars. When any electric motor vehicle has been registered five times the annual registration fee shall be fifteen dollars. [C27, 31, 35,§4911-b1; 47GA, ch 134,§148.]

Referred to in §6610.58

5008.13 Motorcycle and hearse fees. For all motorcycles the annual fee shall be five dollars. When said motorcycle has been registered five times, the annual registration fee shall be one-half the rate when new. The annual registration fee for hearses shall be fifteen dollars. Passenger car plates shall be issued for hearses. [C24, 27, 31, 35,§4912; 47GA, ch 134,§149.]

5008.14 Cornshellers and feed grinders. For trucks on which a cornsheller is mounted the annual registration fee shall be fifteen dollars. For trucks on which a portable mill is mounted the annual registration fee shall be twenty-five dollars. The payment of the registration fee herein shall exempt the truck from property tax. [48GA, ch 128,§2.]

5008.15 Trucks with pneumatic tires. For motor trucks equipped with all pneumatic tires, the annual registration fee shall be:

For a gross weight of three tons or less, fifteen dollars per annum.

For gross weights exceeding three and not exceeding five tons, twenty-five dollars per annum.

For gross weights exceeding five and not exceeding six tons, sixty dollars per annum.

For gross weights exceeding six and not exceeding seven tons, eighty dollars per annum.

For gross weights exceeding seven and not exceeding eight tons, one hundred dollars per annum.

For gross weights exceeding eight and not exceeding nine tons, one hundred thirty dollars per annum.

For gross weights exceeding nine and not exceeding ten tons, one hundred sixty dollars per annum.

For gross weights exceeding ten and not exceeding eleven tons, one hundred ninety dollars per annum.

For gross weights exceeding eleven and not exceeding twelve tons, two hundred twenty-five dollars per annum. [C24, 27, 31, 35,§4913; 47GA, ch 134,§150; 48GA, ch 135,§2.]

Referred to in §§5008.16, 5009.02, 6610.58

For sections as amended effective December 31, 1939. 48GA, ch 135, §22

5008.16 Trucks with solid rubber tires. For motor trucks equipped with two or more solid rubber tires, the annual registration fee shall be the fee provided in section 5008.15 plus twenty-five percent thereof. [C24, 27, 31, 35,§4914; 47GA, ch 134,§151; 48GA, ch 135,§3.]

Referred to in §§5009.02, 6610.58

5008.17 Trucks exceeding twelve tons gross weight. The registration fee on all trucks of gross weight in excess of twelve tons shall be the fee for twelve tons and in addition thereto twenty dollars for each ton over twelve tons. [C24, 27, 31, 35,§4916; 47GA, ch 134,§152; 48GA, ch 135,§4.]

Referred to in §§5509.02, 6610.58

5008.18 Truck tractors, road tractors, and semitrailers.

1. For a truck tractor or for a road tractor the annual registration fee shall be:

For each truck tractor or road tractor drawing a trailer having a combined gross weight of six tons or less, thirty dollars per annum.

For each truck tractor or road tractor drawing a trailer having a combined gross weight exceeding six tons and not exceeding eight tons, seventy dollars per annum.

For each truck tractor or road tractor drawing a trailer having a combined gross weight exceeding eight tons and not exceeding ten tons, one hundred thirty dollars per annum.

For each truck tractor or road tractor drawing a trailer having a combined gross weight exceeding ten tons and not exceeding twelve tons, one hundred ninety-five dollars per annum.

The registration fee for a truck tractor or road tractor drawing a trailer with a combined gross weight of exceeding twelve tons shall be the fee for twelve tons and in addition thereto twenty dollars for each ton over twelve tons.

Nothing herein shall be construed to require a license for the operation of a rubber-tired farm tractor not for hire upon the public highways.

2. For semitrailers the annual registration fee shall be:

For each semitrailer drawn by a truck, road tractor or truck tractor, with a combined gross weight of twelve tons or less, thirty dollars per annum.

For each semitrailer drawn by a truck, road tractor or truck tractor, with a combined gross weight exceeding twelve tons, sixty dollars per annum. [C31, 35,§4919-d1; 47GA, ch 134,§153; 48GA, ch 135,§5.]

Referred to in §5009.02

5008.19 Trailers. All trailers except those defined as semitrailers shall be subject to a registration fee to be fixed in accordance with the following schedule:

1. When equipped with pneumatic tires:

Wagon box trailers used by a farmer in connection with the operation of his farm, one dollar.

Trailers with a gross weight of one thousand pounds or less, one dollar.

Trailers with a gross weight exceeding one thousand pounds and not exceeding two thousand pounds, three dollars.

Trailers with a gross weight exceeding one ton and not exceeding two tons, ten dollars.

Trailers with a gross weight exceeding two tons and not exceeding four tons, twenty-five dollars.

Trailers with a gross weight exceeding four tons and not exceeding six tons, thirty dollars.

Trailers with a gross weight exceeding six tons and not exceeding eight tons, thirty-five dollars.

Trailers with a gross weight exceeding eight tons and not exceeding ten tons, forty dollars.

Trailers with a gross weight exceeding ten tons and not exceeding twelve tons, fifty dollars.

Trailers with a gross weight exceeding twelve tons and not exceeding fourteen tons, sixty dollars.

2. When equipped with two or more solid rubber tires:

Trailers with a gross weight exceeding one ton and not exceeding two tons, twenty dollars.

Trailers with a gross weight exceeding two tons and not exceeding four tons, thirty dollars.

Trailers with a gross weight exceeding four tons and not exceeding six tons, thirty-five dollars.

Trailers with a gross weight exceeding six tons and not exceeding eight tons, fifty dollars.

Trailers with a gross weight exceeding eight tons and not exceeding ten tons, sixty dollars.

Trailers with a gross weight exceeding ten tons and not exceeding twelve tons, seventy dollars.

Trailers with a gross weight exceeding twelve tons and not exceeding fourteen tons, eighty dollars. [C24, 27, 31, 35,§4920; 47GA, ch 134,§154; 48GA, ch 135,§6.]

Referred to in §5009.02

5008.20 Well-drilling equipment. A trailer equipped with solid rubber or pneumatic tires, upon which is mounted well-drilling equipment, and not exceeding in combined weight ten thousand pounds shall be registered at an annual rate of ten dollars, such combination when in excess of above weight or of the motor vehicle laws relating to length and width shall be permitted to operate upon the highways of the state only upon issuance of a special permit by the department. [C35,§4920-e1; 47GA, ch 134,§155; 48GA, ch 121,§14.]

5008.21 Effect of exemption. The exemption of a motor vehicle from a registration fee shall not exempt the operator of such vehicle from the performance of any other duty imposed on him by this chapter. [C24, 27, 31, 35,§4923; 47GA, ch 134,§156.]

5008.22 Refunds of fees. If during the year for which a motor vehicle was registered and the required registration fee paid therefor:

1. Such vehicle is destroyed by fire or accident, or junked and its identity as a motor vehicle entirely eliminated or removed and continuously used beyond the boundaries of the state, then the owner in whose name it was registered at the time of such destruction, dismantling or removal from the state, shall return the plates to the county treasurer within ten days and make affidavit of such destruction, dismantling or removal and make claim for refund;

2. Such vehicle is sold to a person, either individual, firm or corporation, whose residence or place of business is without the state, the owner who made the sale and gave notice in accordance with the provisions of section 5002.01 shall return the plates to the county treasurer within ten days and make affidavit of such sale and make claim for refund;

3. Such vehicle is stolen the owner shall give notice of such theft to the county treasurer within five days, who in turn shall notify the department, and if it be not recovered by the owner before December 1 of the year for which the registration fee was paid he shall make affidavit of such theft and make claim for refund. [C24, 27, 31, 35,§4924; 47GA, ch 134,§157.]

Referred to in §5008.25

5008.23 Amount of refund. For December and each succeeding month the refund shall be computed on the basis of one-fourth of the annual registration fee multiplied by the number of remaining quarters of the year, computed to the nearest quarter dollar. The department shall make refund on or before the fifteenth day of the quarter following the quarter in which the refund is asked. [C24, 27, 31, 35,§4924; 47 GA, ch 134,§157-a.]

5008.24 Payment authorized. The department is hereby authorized to make such payments according to the above provisions, when sufficient proof of such destruction by accident, or the junking and entire elimination of identity as a motor vehicle, theft, or removal for continuous use beyond the boundaries of the state, is properly certified, approved by the county treasurer, and filed with the department.

The decision of the department shall be final. [C24, 27, 31, 35,§4925; 47GA, ch 134,§158; 48GA, ch 121,§15.]

Referred to in §5008.25

5008.25 Reimbursement fund. The county treasurer shall remit to the department one percent of all fees and penalties collected each year, to be used as a fund to cover refunds of motor vehicle fees as provided in sections 5008.22 and 5008.24. [C24, 27, 31, 35,§4926; 47GA, ch 134,§159.]

5008.26 Fees in lieu of taxes. The registration fees imposed by this chapter upon private passenger motor vehicles shall be in lieu of all taxes, general or local, to which motor vehicles may be subject, and if a motor vehicle shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle shall have been in storage continuously as an unregistered motor vehicle during the preceding registration year. [S13,§1571-m8; C24, 27, 31, 35,§4927; 47GA, ch 134,§160; 48GA, ch 124,§1.]

5008.27 Lien of fee. All registration or other fees provided for in this chapter shall be and continue a lien against the motor vehicle for which said fees are payable until such time as they are paid as provided by law, with any accrued penalties. [S13,§1571-m21; SS15,§1571-m7; C24, 27, 31, 35,§4928; 47GA, ch 134,§161.]

5008.28 When lien attaches. The lien of the original registration fee shall attach, at the time the same is first payable, as provided by law, and the lien of all renewals of registration shall attach on January 1 of each year thereafter. [C24, 27, 31, 35,§4929; 47GA, ch 134,§162.]

5009 Rep. by 47GA. See note under chapter 251

PENALTIES, COSTS, AND COLLECTIONS

5009.01 Methods of collection. The collection of all fees and penalties may be enforced against any motor vehicle or they may be collected by suit against the owner who shall remain personally liable therefor until such time as the transfer thereof shall be reported to the county treasurer and the department or until such time as said vehicle ceases to be in use and all fees and penalties to such date shall be paid. [S13,§1571-m21; C24, 27, 31, 35,§4930; 47GA, ch 134,§163.]

5009.02 Monthly penalty. On February 1 of each year, a penalty of five percent of the annual registration fee shall be added to all fees not paid by that date, and five percent of the annual registration fee shall be added to such fees on the first of each month thereafter that the same remains unpaid, until paid, provided that said penalty in no case shall be less than one dollar, and provided that the owner of a motor vehicle who, on or before February 1 of any year, surrenders all registration plates for said vehicle to the county treasurer of the county in which said plates are of record, shall have the right to register said vehicle at any later period of said year by paying the full yearly registration fee without said penalty. Provided, however, that the annual registration fee for trucks, truck tractors, road tractors, trailers and semitrailers, as provided in sections 5008.15 to 5008.19, inclusive, may be payable in two equal semiannual installments.

The penalties provided in the preceding paragraph shall be computed on the amount of the first installment only, and on August 1 of each year and on the first day of each month thereafter the same rate of penalty shall be added to the amount of the second installment, until the same is paid. [SS15,§1571-m7; C24, 27, 31, 35, §4931; 47GA, ch 134,§164; 48GA, ch 135,§8.]

5009.03 When fees delinquent. Such delinquencies shall begin and penalty accrue the first of the month following the purchase of a new vehicle, and the first of the month following the date cars are brought into the state, except as herein otherwise provided. [C24, 27, 31, 35, §4932; 47GA, ch 134,§165.]

5009.04 List of delinquents. In the first week in March of each year the county treasurer shall cause to be made a list of all motor vehicles owned within his county upon which the registration fee was not paid before March 1 of that year, except motor vehicles held by registered dealers and listed by them with the county treasurer and department, as provided in section 5005.04 and except those motor vehicles the plates of which have been surrendered to said treasurer on or prior to February 1 of said year. Such list shall show the factory number, engine number, make and model of such vehicle, together with the name and post-office address of the owner thereof, as shown by the records of his office, and the amount of registration fee and penalties due against said vehicle as of March 1. [S13,§1571-m15; C24, 27, 31, 35,§4933; 47GA, ch 134,§166.]

5009.05 Sheriff furnished list. The county treasurer shall on or before March 15 thereafter deliver to the sheriff of his county a certified copy of said list of such delinquents as shown. [C24, 27, 31, 35,§4936; 47GA, ch 134,§167.]

5009.06 Collection by sheriff. The sheriff shall forthwith proceed to the collection of the unpaid fees and penalties, as certified to him by the county treasurer, by taking possession of the motor vehicle described in said certified list and proceed to advertise and sell same for the purpose of collecting fees, penalties, and costs. Said certified list shall for all purposes be a sufficient warrant therefor. [SS15,§1571-m7; C24, 27, 31, 35,§4937; 47GA, ch 134,§168.]

5009.07 Notice. The sheriff shall give ten days notice of the time, place, and hour of said sale:

1. By publishing said notice in one issue of one of the official newspapers of the county, and
2. By posting written notice thereof, in three places in the county, one of said places shall be at a main entrance door of the courthouse, one at some other public place in the county, and one at or as near as practicable to the place where said vehicle was seized. [C24, 27, 31, 35, §4938; 47GA, ch 134,§169.]

5009.08 Warrant to foreign county. Should a motor vehicle on which the fee is delinquent be removed from the county in which it was originally registered, either by transfer or removal by owner to another county, without having notified the county treasurer or department of such removal, the sheriff may forward the warrant to the sheriff of the county where such motor vehicle is at that time and said latter sheriff shall proceed to collect the same as though the vehicle had been originally registered in his county, and make return to the county treasurer of the county from which he received the warrant. [C24, 27, 31, 35,§4939; 47GA, ch 134,§170.]

5009.09 Fees and mileage. The sheriff shall be entitled to receive as costs the sum of two dollars for serving the writ or warrant of seizure and five cents for each mile actually traveled by him in collecting the fee and penalties, which shall be collected from the owner of such delinquent motor vehicle, and shall be retained by him in full for his services. He shall also collect from said owner the sum of fifty cents per day for care of the motor vehicle while in his possession which sum shall be accounted for by the sheriff as fees are accounted for, as provided in chapter 263. [C24, 27, 31, 35,§4940; 47GA, ch 134,§171.]

5009.10 Remittance — issuance of plates. When the fee and penalties have been collected the same shall forthwith be returned to the county treasurer, together with a report showing the name and address of the owner and description of car upon which such fee was col-

lected. Thereupon the county treasurer may issue to the owner number plates and a receipt showing payment of fees and penalties. [C24, 27, 31, 35,§4941; 47GA, ch 134,§172.]

5009.11 Balance of proceeds. The sheriff, after deducting from the total receipts of the sale all fees, penalties, and costs, shall pay any balance to the owner of the vehicle. [C24, 27, 31, 35,§4942; 47GA, ch 134,§173.]

5009.12 Junking in lieu of sale. In the event the vehicle is in such condition that, in the opinion of the sheriff, it cannot be sold for enough to pay the fees and penalties and defray the cost of the procedure hereinabove provided, and the owner waives the right to said sale, then it may be scrapped, dismantled, or otherwise destroyed by said owner, so that it can no longer be used upon the highways, and no registration shall thereafter be issued for such vehicle. [47GA, ch 134,§174.]

5010 Rep. by 47GA. See note under chapter 251

FUNDS

5010.01 Disposition. The money, except fines and forfeitures, and except operator's and chauffeur's license fees, collected pursuant to the provisions of this chapter shall be credited by the treasurer of state to the following funds:

1. Three percent of the gross fees and penalties thereon, to the general fund of the state.
2. The balance of said money, less the collection fee of fifty cents retained by the county treasurer on each registration, and less the one percent received by the department as a reimbursement fund from which to pay refunds, to the primary road fund. [SS15,§1571-m32; C24, 27, 31, 35,§4999; 47GA, ch 134,§175; 48GA, ch 183,§4.]

Referred to in §§5010.03, 6610.58
Unexpended balances transferred, 48GA, ch 121, §§5, 6

5010.02 Unexpended balances. The treasurer of state shall at the end of said fiscal year ascertain the cost of maintenance of the motor vehicle department and transfer to the primary road fund the ascertained difference between the amount retained in the general fund under the provision of this chapter and the maintenance cost of said department, together with any unexpended balance in the reimbursement fund. [SS15,§1571-m32; C24, 27, 31, 35,§5002; 47GA, ch 134,§177; 48GA, ch 183,§6.]

5010.03 Cash balance. The treasurer of state shall maintain in the state treasury, of the money collected as in this chapter provided, a cash balance sufficient to pay the anticipated expenditures by the highway commission for the ensuing month, exclusive of the amount in the funds provided for in subsections 1 and 2 of section 5010.01. When necessary to restore the cash balance in the state treasury, he shall draw upon the treasurer of each county of the state in proportion to the amounts in their possession, respectively, a sum sufficient in the aggregate to restore said cash balance. Such drafts shall be honored by the treasurer of each county upon presentation. [C24, 27, 31, 35, §5003; 47GA, ch 134,§178.]

5010.04 Monthly estimate. The auditor of the state highway commission shall, on the first day of each month, furnish an estimate in writing to the treasurer of state of the amount of expenditures to be made by the highway commission during that month. [C31, 35,§5003-c1; 47GA, ch 134,§179.]

5010.05 Blanks. The department shall not later than November 15 of each year prepare and furnish the treasurer of each county all blank books, blank forms, and all supplies required for the administration of this chapter, including applications for registration and transfer of vehicles, quadruple receipts, and original remittance sheets to be used in remitting fees to the department, in such form as the department may prescribe. Contracts for such blank books, blank forms, and supplies shall be awarded, by the state printing board to persons, firms, partnerships or corporations engaged in the business of printing in Iowa unless, and through them, such persons, firms, partnerships or corporations cannot provide the required printing set forth in this section. In lieu of purchasing under competitive bids the state printing board shall have authority to arrange with the board of control to furnish such supplies as can be made in the state institutions. [S13, §1571-m2; C24, 27, 31, 35,§5006; 47GA, ch 134, §180.]

5010.06 Time limit. Blanks or forms for listing used motor vehicles shall be placed in the hands of county treasurers not later than December 15 of any year. [C24, 27, 31, 35,§5007; 47GA, ch 134,§181.]

5010.07 Duty and liability of treasurer. The county treasurer shall collect the registration fee and penalties on each motor vehicle registered by him and shall be responsible on his bond for such amount. He shall remit such amount to the treasurer of state as herein provided. [C24, 27, 31, 35,§5011; 47GA, ch 134, §182.]

5010.08 Fee for county. Each county treasurer shall be allowed to retain, for the use and benefit of the county general fund, fifty cents for each motor vehicle registration issued by him out of money collected in each year for the registration of such motor vehicles, the same to be deducted, and reported to the department, when the county treasurer transfers the money collected under the provisions of this chapter; provided, however, that no such deduction shall be lawful unless the county treasurer has complied with the provisions of sections 5001.08 and 5010.09. [C24, 27, 31, 35,§5012; 47GA, ch 134,§183.]

5010.09 Treasurer's report to department. The county treasurer shall on the tenth day of each month report under oath to the department, on forms furnished by it, giving a full and com-

plete statement of all fees and penalties so received by him during the preceding calendar month, and shall forward to the treasurer of state a duplicate of such report. [C24, 27, 31, 35, §5013; 47GA, ch 134,§184; 48GA, ch 121,§16.]

Referred to in §5010.08

5010.10 Reports by department. The department, immediately upon receiving said report, shall also report to the treasurer of state the amount so collected by such county treasurer. [C24, 27, 31, 35,§5014; 47GA, ch 134,§185.]

5010.11 Duty of treasurer of state. The treasurer of state shall keep proper books of account for the purposes specified herein and shall report to the department each remittance from the county treasurer, when said remittance is received. [C24, 27, 31, 35,§5015; 47GA, ch 134, §186.]

5010.12 Audit by department. The department shall check and audit all fees and penalties collected, and shall effect a settlement with the county treasurer annually. [C24, 27, 31, 35, §5016; 47GA, ch 134,§187.]

5011 Rep. by 47GA. See note under chapter 251

VALUE AND WEIGHT OF VEHICLES

5011.01 Schedule of prices and weights. Every manufacturer of a motor vehicle sold or offered for sale within this state, either by the manufacturer, distributor, dealer, or any other person, shall, on or before the first day of August, annually, file in the office of the department a sworn statement showing the various models manufactured by him, and the retail list price and weight of each model as of August 1 of that year. He shall also make the same report on subsequent new models manufactured prior to August 1 of the following year. [C24, 27, 31, 35, §4968; 47GA, ch 134,§188.]

5011.02 Registration dependent on schedule. No motor vehicle shall be registered in this state unless the manufacturer thereof has furnished to the department the sworn statement herein provided, giving the list price and weight of the model of the motor vehicle that is offered for registration, except as provided in section 5011.03. [C24, 27, 31, 35,§4970; 47GA, ch 134, §189.]

5011.03 Exceptional cases. The department shall have the power to fix the registration fee on all makes and models of cars which are not now being furnished or upon which the statement from the factory cannot be obtained. [C24, 27, 31, 35,§4971; 47GA, ch 134,§190.]

Referred to in §5011.02

5011.04 Department to prepare statement. The department shall prepare, annually, a statement showing all the different makes and models of motor vehicles previously registered in the department, and all the different makes and models of motor vehicles, statements of which have been filed in the office by the manufacturers as heretofore provided, together with the retail list price and weight of the same.

The statement prepared by the department shall also include the load capacities of the various makes and models of motor trucks and trailers and the proper fee to be paid for the registration.

Copies of such statement shall be furnished each county treasurer and additional copies may be sold by the department to other persons, at a price to be set by the department, covering the approximate cost of same and service involved. All funds received shall be forwarded by the department to the treasurer of state. [C24, 27, 31, 35,§4972; 47GA, ch 134,§191; 48GA, ch 121, §17.]

5011.05 Department to fix values and weight. The department shall, on or before the first day of August, annually, and at such other times as new makes or models of motor vehicles are offered for sale or sold in this state, fix the value and weight of each of the different makes and models of motor vehicles which are sold or offered for sale within the state. [C24, 27, 31, 35, §4973; 47GA, ch 134,§192.]

5011.06 Method of fixing value and weight. The value shall be fixed at the next even one hundred dollars above the retail list price f. o. b. the factory, and the weight shall be fixed at the next even one hundred pounds above the manufacturers shipping weight or the actual weight of the vehicle fully equipped. [C24, 27, 31, 35, §4974; 47GA, ch 134,§193.]

5012 Rep. by 47GA. See note under chapter 251

PLATES, CONTAINERS, AND SUPPLIES

5012.01 Contracts for plates. The commissioner shall, subject to the approval of the executive council, purchase all number plates, containers, and other supplies required by this chapter, except printing and except expenditures of less than one hundred dollars, after receiving competitive bids under open specifications. The bidders shall be required to furnish samples of such supplies and in awarding the contract the commissioner may consider the quality and suitability of the samples submitted as well as the price quoted. A record of all bids submitted shall be kept and the samples submitted shall be preserved until the next subsequent letting. [SS15,§1571-m5; C24, 27, 31, 35,§4975; 47GA, ch 134,§194.]

5012.02 Bond. The successful bidder shall be required to execute to the state a good and sufficient bond in such amount as the commissioner shall require, conditioned upon the plates furnished being in accordance with the samples and specifications, and providing for liquidated damages for failure to deliver plates at the time specified in the contract. [SS15,§1571-m5; C24, 27, 31, 35,§4976; 47GA, ch 134,§195.]

5012.03 Manufacture by state. In lieu of purchasing under competitive bids the commissioner shall have authority to arrange with the

board of control to furnish such supplies as may be made at the state institutions. [C24, 27, 31, 35,§4977; 47GA, ch 134,§196.]

5012.04 Specifications. Such number plates shall be of metal, and of a size not to exceed six inches in width by fifteen inches in length, on which there shall be the word "Iowa", and numerals indicating the year for which it is issued. They shall be of a distinctively different color each year. There shall be at all times a marked contrast between the colors of the number plates and of the numerals or letters thereon, said colors to be designated by the department.

Number plates for vehicles on which the annual registration fee is payable in two installments shall prior to the payment of the second installment be of a distinctively different color than the plates used for other motor vehicles during the same year.

The distinctive number assigned to the vehicle shall be set forth in numerals which shall not exceed a length of four inches nor a stroke exceeding five-eighths of an inch in width.

In case of a motor vehicle registered by a manufacturer or dealer, there shall be on such plate, in addition to the foregoing, the letter "D", each stroke of such letter to be not to exceed four inches long and not to exceed five-eighths of an inch in width.

The number plates for use on a motor bicycle or a motorcycle shall be substantially one-half the dimensions above stated. [S13,§§1571-m12, -m13; C24, 27, 31, 35,§4978; 47GA, ch 134,§197; 48GA, ch 135,§9.]

5012.05 Delivery of plates. On or before the first day of December of each year, the department shall deliver or cause to be delivered to the county treasurer of each county, approximately as many duplicate number plates and certificate containers as there are motor vehicles registered in such county during the preceding year, the plates so delivered to each county treasurer to be in numerical sequence. [C24, 27, 31, 35,§4979; 47GA, ch 134,§198.]

5012.06 Additional deliveries. Thereafter, during the year, the department, upon requisition of the county treasurer, shall deliver additional number plates and certificate containers. [C24, 27, 31, 35,§4980; 47GA, ch 134,§199.]

5012.07 Account of plates. The department shall keep an accurate record of all number plates issued to each county, and shall also keep a record showing the assignment thereof by the county treasurer to motor vehicles. [C24, 27, 31, 35, §4981; 47GA, ch 134,§200.]

5012.08 Plates for exempt vehicles. The department shall furnish, on application, free of charge, distinguishing plates for motor vehicles exempted from a registration fee and shall keep a separate record thereof. [C24, 27, 31, 35, §4982; 47GA, ch 134,§201.]

5012.09 Title of plates. All number plates issued shall be and remain the property of the state. [C24, 27, 31, 35,§4983; 47GA, ch 134,§202.]

5012.10 Certificate containers. The commissioner shall approve devices for holding and displaying the certificate of registration, and may require such devices so to receive and hold such certificate that when the certificate is removed from the holder the certificate will be destroyed or mutilated so it cannot be used on other vehicles. [C24, 27, 31, 35,§4984; 47GA, ch 134,§203.]

5012.11 When fees returnable. Whenever any application to the department is accompanied by any fee as required by law and such application is refused or rejected said fee shall be returned to said applicant.

Whenever the department through error collects any fee not required to be paid hereunder the same shall be refunded, from the refund account, to the person paying the same upon application therefor made within six months after the date of such payment. [47GA, ch 134, §204.]

5013 Rep. by 47GA. See note under chapter 251

OPERATORS' AND CHAUFFEURS' LICENSES
ISSUANCE OF LICENSES, EXPIRATION, AND RENEWAL

5013.01 Operators and chauffeurs licensed. No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur issued by the department of public safety. No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license. [C31, 35,§4960-d2; 47GA, ch 134,§205; 48GA, ch 120, §41.]

Referred to in §5022.03

5013.02 Chauffeurs exempted as operators. Any person holding a valid chauffeur's license hereunder need not procure an operator's license. [C31, 35,§4960-d21; 47GA, ch 134,§206.]

5013.03 Persons exempt. The following persons are exempt from license hereunder:

1. Any person while operating a motor vehicle in the service of the army, navy, or marine corps of the United States;
2. Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;
3. A nonresident who is at least sixteen years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country may operate a motor vehicle in this state only as an operator;
4. A nonresident who is at least eighteen years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this state either as an operator or chauffeur except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this state;
5. Any nonresident who is at least eighteen years of age, whose home state or country does

not require the licensing of operators, may operate a motor vehicle as an operator only, for a period of not more than ninety days in any calendar year, if the motor vehicle so operated is duly registered in the home state or country of such nonresident. [C31, 35,§§4960-d3,-d4; 47GA, ch 134,§207.]

5013.04 Persons not to be licensed. The department shall not issue any license hereunder:

1. To any person, as an operator, who is under the age of sixteen years, except that the department may issue a restricted license as provided in section 5013.19 to any person who is at least fourteen years of age;
2. To any person, as a chauffeur, who is under the age of eighteen years;
3. To any person, as an operator or chauffeur whose license or driving privilege has been suspended during such suspension or to any person whose license, or driving privilege, has been revoked, until the expiration of one year after such revocation;
4. To any person, as an operator or chauffeur, who is an habitual drunkard, or is addicted to the use of narcotic drugs;
5. To any person, as an operator or chauffeur, who has previously been adjudged to be afflicted with or suffering from any mental disability or disease and who has not at the time of application been restored to competency by the methods provided by law;
6. To any person, as an operator or chauffeur, who is required by this chapter to take an examination, unless such person shall have successfully passed such examination;
7. To any person when the commissioner has good cause to believe that such person by reason of physical or mental disability would not be able to operate a motor vehicle with safety upon the highways. [C31, 35,§§4960-d5–4960-d9; 47GA, ch 134,§208; 48GA, ch 121,§27.]

5013.05 Special restrictions on chauffeurs. No person who is under the age of twenty-one years shall drive any motor vehicle while in use as a carrier of flammables or combustibles, or as a public or common carrier of persons, except a school bus. [C31, 35,§4960-d10; 47GA, ch 134,§209; 48GA, ch 121,§28.]

School bus drivers, §5032.04

5013.06 Instruction permits. Any person who, except for his lack of instructions in operating a motor vehicle, would otherwise be qualified to obtain an operator's license under this chapter, may apply for a temporary instruction permit, and the department shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of sixty days, but, except when operating a motorcycle, such person must be accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver. [C31, 35,§4960-d23; 47GA, ch 134,§210.]

5013.07 Temporary permit. The department may, in its discretion, issue a temporary driver's permit to an applicant for an operator's license permitting him to operate a motor vehicle while the department is completing its investigation and determination of all facts relative to such applicant's right to receive an operator's license. Such permit must be in his immediate possession while operating a motor vehicle, and it shall be invalid when the applicant's license has been issued or for good cause has been refused. [47GA, ch 134,§211.]

5013.08 Application for license or permit. Every application for an instruction permit or for an operator's or chauffeur's license shall be made upon a form furnished by the department and shall be verified by the applicant before a person authorized to administer oaths, and officers and employees of the department are hereby authorized to administer such oaths without charge. [C31, 35,§4960-d12; 47GA, ch 134,§212.]

5013.09 Contents of application. Every said application shall state the full name, age, sex, and residence address of the applicant, and briefly describe the applicant, and shall state whether the applicant has theretofore been licensed as an operator or chauffeur, and, if so, when and by what state or country, and whether any such license has ever been suspended or revoked, or whether an application has ever been refused, and, if so, the date of and reason for such suspension, revocation, or refusal. [C31, 35,§4960-d12; 47GA, ch 134, §213.]

5013.10 Applications of minors. The application of any person under the age of eighteen years for an instruction permit or operator's license shall be signed and verified before a person authorized to administer oaths by both the father and mother of the applicant, if both are living and have custody of him, or in the event neither parent is living then by the person or guardian having such custody or by an employer of such minor. [C31, 35,§4960-d13; 47GA, ch 134,§214.]

5013.11 Death of person signing application —effect. The department upon receipt of satisfactory evidence of the death of the persons who signed the application of a minor for a license shall cancel such license and shall not issue a new license until such time as a new application, duly signed and verified, is made as required by this chapter. This provision shall not apply in the event the minor has attained the age of eighteen years. [47GA, ch 134,§217.]

5013.12 Examination of new or incompetent operators. The department may examine every new applicant for an operator's or chauffeur's license or any person holding a valid operator's or chauffeur's license when the department has reason to believe that such person may be physically or mentally incompetent to operate a motor vehicle. Such examinations shall be held in every county within periods not to exceed fifteen days. It shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and

directing traffic, his knowledge of the traffic laws of this state, and shall include an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle and such further physical and mental examinations as the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways. [C31, 35,§4960-d14; 47GA, ch 134,§218; 48GA, ch 121,§29.]

5013.13 Appointment of examiners. The department is hereby authorized to appoint persons from the highway patrol or may designate the county sheriff for the purpose of examining applicants for operators' and chauffeurs' licenses. It shall be the duty of any such person so appointed to conduct examinations of applicants for operators' and chauffeurs' licenses under the provisions of this chapter to make a written report of findings and recommendations upon such examination to the department. Examiners appointed by the department shall have the authority of peace officers for the purpose of enforcing the laws relating to motor vehicles and the operation thereof, and when on duty shall wear a uniform and proper identifying badge or badges as prescribed by the commissioner which shall be purchased by the department and paid for from the department maintenance fund. [C31, 35, §4960-d17; 47GA, ch 134,§219; 48GA, ch 120, §42.]

5013.14 Licenses issued. The department shall upon payment of the required fee, issue to every applicant qualifying therefor an operator's or chauffeur's license as applied for, which license shall bear thereon a distinguishing number assigned to the licensee the full name, age, residence address and a brief description of the licensee, and spaces upon which the licensee shall write his usual signature with pen and ink immediately upon receipt of the license. No license shall be valid until it has been so signed by the licensee.

The department shall issue with every chauffeur's license a chauffeur's badge of metal with a plainly readable distinguishing number assigned to the licensee stamped thereon and every chauffeur shall display such chauffeur's badge in plain sight upon the band of his cap or upon the lapel of his outer coat while operating a motor vehicle as a public or common carrier of persons or property. [C31, 35,§§4960-d19,-d20,-d22,-d28; 47GA, ch 134,§220.]

5013.15 Carried and exhibited. Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a justice of peace, a peace officer, or a field deputy or examiner of the department. However, no person charged with violating this section shall be convicted if he produces in court, within a reasonable time, an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest. [C31, 35,§4960-d29; 47GA, ch 134, §221.]

5013.16 Fee. The fee for an operator's license shall be fifty cents. The fee for a chauffeur's license shall be two dollars. [C31, 35, §4960-d26; 47GA, ch 134,§222.]

5013.17 Disposal of fees. Such license fees shall be forwarded by the department to the treasurer of state who shall place same in the general fund of the state, provided that for each operator's license issued by a county sheriff for which a license fee is paid, the sheriff issuing the same shall be entitled to retain the sum of fifteen cents and for each chauffeur's license, the sum of fifty cents, which shall be credited to the county general fund. [C31, 35,§4960-d25; 47GA, ch 134,§223; 48GA, ch 120,§43.]

5013.18 Restricted licenses. The department upon issuing an operator's or chauffeur's license shall have authority whenever good cause appears to impose restrictions suitable to the licensee's driving ability with respect to the type of vehicle or special mechanical control devices required on a motor vehicle which the licensee may operate or such other restrictions applicable to the licensee, including licenses issued under section 5013.19, as the department may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee.

The department may either issue a special restricted license or may set forth such restrictions upon the usual license form.

The department may upon receiving satisfactory evidence of any violation of the restrictions of such license suspend or revoke the same but the licensee shall be entitled to a hearing as upon a suspension or revocation under this chapter.

It is a misdemeanor, punishable as provided in section 5036.01, for any person to operate a motor vehicle in any manner in violation of the restrictions imposed in a restricted license issued to him. [47GA, ch 134,§224; 48GA, ch 121, §30.]

5013.19 Minors. Upon a written request of a parent or guardian, a restricted license may be issued to any person between the ages of fourteen and sixteen years, to be valid only in going to and from school. [C31, 35,§4960-d5; 47GA, ch 134,§225.]

Referred to in §§5013.04, 5013.18

5013.20 Duplicate certificates and badges. In the event that an instruction permit or operator's or chauffeur's license or chauffeur's badge issued under the provisions of this chapter is lost or destroyed, the person to whom the same was issued may upon payment of a fee of fifty cents for a chauffeur's license or badge or twenty-five cents for an operator's license, obtain a duplicate, or substitute thereof, upon furnishing proof satisfactory to the department that such permit, license, or badge has been lost or destroyed. [C31, 35,§4960-d27; 47GA, ch 134, §226.]

5013.21 Expiration of operator's license. Every operator's license shall expire on July 5 of each odd-numbered calendar year and shall be renewed upon its expiration upon application, and examination, and payment of the license fee specified herein, provided that persons holding licenses previously issued and upon which no notation appears of a traffic violation, against whom no accident has been reported, or from which no stub has been detached for any reason shall be issued an operator's license without examination. [C31, 35, §§4960-d15,-d30; 47GA, ch 133,§1; ch 134,§227.]

5013.22 Expiration of chauffeur's license. Every chauffeur's license issued hereunder shall expire December 31 each year and shall be renewed annually upon application and examination, and payment of the fees required by law, provided that the department in its discretion may waive the examination of any such applicant previously licensed as a chauffeur under this chapter. [C31, 35,§4960-d31; 47GA, ch 134, §228.]

5013.23 Records. The department shall file every application for a license received by it and shall maintain suitable indexes containing, in alphabetical order:

1. All applications denied and on each thereof note the reasons for such denial;
2. All applications granted; and
3. The name of every licensee whose license has been suspended or revoked by the department and after each such name note the reasons for such action. [C31, 35,§4960-d18; 47GA, ch 134,§230.]

5013.24 Conviction and accident file. The department shall also file all accident reports and abstracts of court records of convictions received by it under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the department upon any application for renewal of license and at other suitable times. [47GA, ch 134,§231.]

5014 Rep. by 47GA. See note under chapter 251

CANCELLATION, SUSPENSION OR REVOCATION OF LICENSES

5014.01 Authority to cancel license. The department is hereby authorized to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder or that said licensee failed to give the required or correct information in his application or committed any fraud in making such application. [C31, 35,§4960-d33; 47GA, ch 134,§232.]

5014.02 Surrender of license and badge. Upon such cancellation, the licensee must surrender the license so canceled and any chauffeur's badge to the department. [47GA, ch 134,§233.]

5014.03 Suspending privileges of nonresidents. The privilege of driving a motor vehicle on the highways of this state given to a nonresident hereunder shall be subject to suspension or revocation by the department in like manner and for like cause as an operator's or chauffeur's license issued hereunder may be suspended or revoked. [C31, 35,§4960-d37; 47GA, ch 134,§234.]

5014.04 Certification of conviction. The department is further authorized, upon receiving a record of the conviction in this state of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws of this state, to forward a certified copy of such record to the motor vehicle administrator in the state wherein the person so convicted is a resident. [C31. 35,§4960-d41; 47GA, ch 134,§235.]

5014.05 Conviction in another state. The department is authorized to suspend or revoke the license of any resident of this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur. [C31, 35,§4960-d39; 47GA, ch 134,§236.]

5014.06 Surrender of license—duty of court. Whenever any person is convicted of any offense for which this chapter makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted and the court shall thereupon forward the same together with a record of such conviction to the department. [C31, 35,§4960-d32; 47GA, ch 134, §237.]

5014.07 Record forwarded. Every court having jurisdiction over offenses committed under this chapter, or any other law of this state regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted, and the department shall thereupon consider and act upon such recommendation in such manner as may seem to it best. Upon conviction in all cases where recommendation of suspension or revocation is not made or is not mandatory, every court shall detach one stub of the license of such operator or chauffeur and forward same to the department. [C31, 35,§4960-d32; 47GA, ch 134,§238.]

5014.08 "Conviction" defined. For the purpose of this chapter the term "conviction" shall mean a final conviction. Also for the purposes of this chapter a forfeiture of bail or collateral deposited to secure a defendant's appearance in

court, which forfeiture has not been vacated, shall be equivalent to a conviction. [47GA, ch 134,§239.]

5014.09 Mandatory revocation. The department shall forthwith revoke the license of any operator or chauffeur, or driving privilege, upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

1. Manslaughter resulting from the operation of a motor vehicle;
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;
3. Any felony in the commission of which a motor vehicle is used;
4. Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or personal injury of another;
5. Perjury or the making of a false affidavit or statement under oath to the department under this chapter or under any other law relating to the ownership or operation of motor vehicles;
6. Conviction, or forfeiture of bail not vacated, upon three charges of reckless driving committed within a period of twelve months. [C31, 35,§§4960-d33, 5027-d1; 47GA, ch 134,§240; 48GA, ch 121,§31.]

Referred to in §5022.03

5014.10 Authority to suspend. The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;
2. Is an habitually reckless or negligent driver of a motor vehicle;
3. Is an habitual violator of the traffic laws;
4. Is incompetent to drive a motor vehicle;
5. Has permitted an unlawful or fraudulent use of such license; or
6. Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation. [C31, 35, §4960-d35; 47GA, ch 134,§241.]

5014.11 Notice and hearing. Upon suspending the license of any person as hereinbefore authorized the department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing before the commissioner or his duly authorized agent as early as practical within not to exceed twenty days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county. Upon such hearing the commissioner or his duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a re-examination of the licensee. Upon such hearing the department shall either rescind its order of suspension or, good cause appearing therefor, may extend the suspension of such license or revoke such license. [C31, 35,§4960-d36; 47GA, ch 134,§242.]

5014.12 Period of suspension or revocation. The department shall not suspend a license for a period of more than one year and upon revoking a license shall not in any event grant application for a new license until the expiration of one year after such revocation. [C31, 35,§§4960-d40,-d45; 47GA, ch 134, §243.]

5014.13 Surrender of license and badge. The department upon suspending or revoking a license shall require that such license and the badge of any chauffeur whose license is suspended or revoked shall be surrendered to and be retained by the department except that at the end of the period of suspension such license and any chauffeur's badge so surrendered shall be returned to the licensee. [C31, 35,§4960-d42; 47GA, ch 134,§244.]

5014.14 No operation under foreign license. Any resident or nonresident whose operator's or chauffeur's license or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this chapter shall not operate a motor vehicle in this state under a license, permit, or registration certificate issued by any other state or country or otherwise during such suspension or after such revocation until a new license is obtained when and as permitted under this chapter. [C31, 35,§4960-d38; 47GA, ch 134,§245; 48GA, ch 121,§32.]

5014.15 Appeal. Any person denied a license or whose license has been canceled, suspended, or revoked by the department except where such cancellation or revocation is mandatory under the provisions of this chapter shall have the right to file a petition within thirty days thereafter for a hearing in the matter in a court of record in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon thirty days written notice to the commissioner, and thereupon the court shall hear and determine the matter as an original proceeding upon a transcript of all the proceedings before the commissioner, and upon additional evidence and other pleadings as the court may require. The decision of the court shall be final. [C31, 35,§§4960-d43,-d44; 47GA, ch 134,§246.]

5015 Rep. by 47GA. See note under chapter 251

VIOLATION OF LICENSE PROVISIONS

5015.01 Unlawful use of license. It is a misdemeanor, punishable as provided in section 5036.01 unless another punishment is otherwise provided, for any person:

1. To display or cause or permit to be displayed or have in his possession any canceled, revoked, suspended, fictitious or fraudulently altered operator's or chauffeur's license;
2. To lend his operator's or chauffeur's license to any other person or knowingly permit the use thereof by another;

3. To display or represent as one's own any operator's or chauffeur's license not issued to him;

4. To fail or refuse to surrender to the department upon its lawful demand any operator's or chauffeur's license which has been suspended, revoked, or canceled;

5. To use a false or fictitious name in any application for an operator's or chauffeur's license or to knowingly make a false statement or to knowingly conceal a material fact or otherwise commit a fraud in any such application;

6. To permit any unlawful use of an operator's or chauffeur's license issued to him. [C31, 35, §§4960-d46,-d52; 47GA, ch 134,§247.]

5015.02 Perjury. Any person who makes any false affidavit, or knowingly swears or affirms falsely to any matter or thing required by the terms of this chapter to be sworn to or affirmed, is guilty of perjury and upon conviction shall be punishable by fine or imprisonment as other persons committing perjury are punishable. [C31, 35,§4960-d47; 47GA, ch 134,§248.]

Perjury, §13165

5015.03 Driving while license denied, suspended, or revoked. Any person whose operator's or chauffeur's license, or driving privilege, has been denied, canceled, suspended or revoked as provided in this chapter, and who drives any motor vehicle upon the highways of this state while such license or privilege is denied, canceled, suspended, or revoked, is guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than two days or more than thirty days. The sentence imposed under this section shall not be suspended by the court, notwithstanding the provisions of section 3800 or any other provision of statute. [C31, 35,§§4960-d34,-d51; 47GA, ch 134,§249.]

5015.04 Permitting unauthorized minor to drive. No person shall cause or knowingly permit his child or ward under the age of eighteen years to drive a motor vehicle upon any highway when such minor is not authorized hereunder or in violation of any of the provisions of this chapter. [C31, 35,§4960-d48; 47GA, ch 134,§250.]

5015.05 Permitting unauthorized person to drive. No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized hereunder or in violation of any of the provisions of this chapter. [C31, 35,§4960-d50; 47GA, ch 134,§251.]

5015.06 Employing unlicensed chauffeur. No person shall employ as a chauffeur of a motor vehicle any person not then licensed as provided in this chapter. [C31, 35,§4960-d49; 47GA, ch 134,§252.]

5015.07 Renting motor vehicle to another. No person shall rent a motor vehicle to any other person unless the latter person is then duly licensed hereunder or, in the case of a nonresident, then duly licensed under the laws of the state or country of his residence except a nonresident whose home state or country does not require that an operator be licensed. [47GA, ch 134,§253.]

5015.08 License inspected. No person shall rent a motor vehicle to another until he has inspected the operator's or chauffeur's license of the person to whom the vehicle is to be rented and compared and verified the signature thereon with the signature of such person written in his presence. [47GA, ch 134,§254.]

5015.09 Record kept. Every person renting a motor vehicle to another shall keep a record of the registration number of the motor vehicle so rented, the name and address of the person to whom the vehicle is rented, the number of the license of said latter person and the date and place when and where said license was issued. Such record shall be open to inspection by any police officer or officer or employee of the department. [47GA, ch 134,§255.]

5016 Rep. by 47GA. See note under chapter 251

HOURS OF OPERATION

5016.01 Maximum mechanical operation. No person shall operate a commercial vehicle for hire for more than a period of twelve hours out of any period of twenty-four hours upon the highways of this state without being relieved from duty for ten consecutive hours and where a driver puts in twelve hours of driving out of any period of twenty-four hours, though not consecutive he must be given at least eight hours off duty. [C31, 35,§5079-d8; 47GA, ch 134, §256.]

Referred to in §§5016.02, 5016.03

5016.02 Maximum operation by employee. No person, firm, partnership, association or corporation shall require or permit any employee or person to drive or operate any commercial motor vehicle upon the public highways of this state in violation of the provisions of section 5016.01. [C31, 35,§5079-d9; 47GA, ch 134,§257.]

Referred to in §5016.03

5016.03 Violations. Any person, firm, partnership, association or corporation violating any of the provisions of sections 5016.01 and 5016.02 shall be guilty of a misdemeanor and, upon conviction, may be fined not less than twenty-five dollars, nor more than one hundred dollars. [C31, 35,§5079-d10; 47GA, ch 134,§258.]

5017 Rep. by 47GA. See note under chapter 251

LAW OF THE ROAD

OBEDIENCE TO AND EFFECT OF TRAFFIC LAWS

5017.01 Provisions refer to highways—exceptions. The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:

1. Where a different place is specifically referred to in a given section.

2. The provisions of sections 5020.01 to 5020.14, inclusive, and sections 5022.01 to 5022.05, inclusive, shall apply upon highways and

elsewhere throughout the state. [47GA, ch 134, §259.]

5017.02 Obedience to police officers. No person shall wilfully fail or refuse to comply with any lawful order or direction of any peace officer invested by law with authority to direct, control, or regulate traffic. [S13,§1571-m18; C24, 27, 31, 35,§5064; 47GA, ch 134,§260.]

5017.03 Public officers not exempt. The provisions of this chapter applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this state or any county, city, town, district, or any other political subdivision of the state, subject to such specific exceptions as are set forth in this chapter with reference to authorized emergency vehicles. [47GA, ch 134,§261.]

5017.04 Emergency vehicles. The driver of any authorized emergency vehicle when responding to an emergency call upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety but may proceed cautiously past such red or stop sign or signal. At other times drivers of authorized emergency vehicles shall stop in obedience to a stop sign or signal. [47GA, ch 134,§262.]

See also §5026.06

5017.05 Special privilege restricted. No driver of any authorized emergency vehicle shall assume any special privilege under this chapter except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law. [47GA, ch 134,§263.]

5017.06 Road workers exempted. The provisions of this chapter shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work. [47GA, ch 134,§264.]

5017.07 Bicycles or animal-drawn vehicles. Every person riding a bicycle or an animal or driving any animal drawing a vehicle upon a roadway shall be subject to the provisions of this chapter applicable to the driver of a vehicle, except those provisions of this chapter which by their nature can have no application. [47GA, ch 134,§265.]

5017.08 Provisions uniform. The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this chapter. [47GA, ch 134, §266.]

5018 Rep. by 47GA. See note under chapter 251

Highway patrol, see ch 67.1

POWERS OF LOCAL AUTHORITIES

5018.01 Powers of local authorities. Local authorities shall have no power to enact, enforce, or maintain any ordinance, rule or regulation in any way in conflict with, contrary to or inconsistent with the provisions of this chapter, and no such ordinance, rule or regulation of said local authorities heretofore or hereafter enacted shall have any force or effect, however the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

1. Regulating the standing or parking of vehicles;
2. Regulating traffic by means of police officers or traffic-control signals;
3. Regulating or prohibiting processions or assemblages on the highways;
4. Designating particular highways as one way highways and requiring that all vehicles thereon be moved in one specific direction;
5. Regulating the speed of vehicles in public parks;
6. Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersections;
7. License and regulate the operation of vehicles offered to the public for hire and used principally in intracity operation;
8. Restricting the use of highways as authorized in sections 5035.20 to 5035.22, inclusive. [S13,§§1571-m18,-m20; C24, 27, 31, 35,§§4992, 4995, 4997; 47GA, ch 134,§267.]

Referred to in §5018.02

5018.02 Posting signs. No ordinance or regulation enacted under subsections 4, 5, 6 or 8 of section 5018.01 shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate and shall be erected at the expense of such municipality. [47GA, ch 134, §268.]

5018.03 Testing stations. All cities and towns shall have the power to acquire, establish, erect, equip, operate and maintain motor vehicle testing stations therein and to pay for the same out of the proceeds of the collection of fees charged for testing motor vehicles, including trucks. [C35,§4992; 47GA, ch 134,§269.]

5018.04 Fees. They shall have the power to fix the amount of fees, not exceeding fifty cents per test and not more than one dollar per year, for the inspection of any motor vehicle or truck for any defect prohibited by law upon any motor vehicle operated upon the streets, alleys or thoroughfares of cities and towns. They shall have additional power to set aside all fees so collected in a separate fund out of which all costs and expenses in connection with or growing out of the construction, establishment,

equipment, operation and maintenance of said station shall be paid. Any surplus remaining in said fund shall be paid into a fund for traffic regulation and enforcement. [C35,§4992; 47GA, ch 134,§270.]

5018.05 Compliance. The right to use the streets, alleys and thoroughfares of any city or town so passing any such ordinance shall be dependent upon compliance with the terms of any such ordinance and with the laws of the state relating to motor vehicles and the parking or use thereof on the streets, roads, or public highways of such city or town. [C35,§4992; 47GA, ch 134,§271.]

5018.06 Stickers. The department of public safety shall prescribe the shape, size, color and inscription of a sticker to be placed, by any such city or town so operating a motor vehicle testing station hereunder, upon the windshield of any motor vehicle so passing the tests herein provided. Said city or town shall insert the name thereof and the date said sticker was issued.

Said sticker when so prepared, issued and placed shall exempt the owner and driver of the automobile so passing said test from any other tests hereunder at any place in the state for the period for which said sticker was issued. [C35, §4992; 47GA, ch 134,§272; 48GA, ch 120,§44.]

5018.07 Traffic council. Any city which has set up a traffic safety council, or other body, by ordinance, for the construction, operation and maintenance of any such testing station, shall continue to so operate, maintain, supervise, and control said station through said traffic safety council. [C35,§4992; 47GA, ch 134,§273.]

5018.08 Penalty. Cities and towns shall have the power to enforce any such ordinance by fine, not exceeding twenty-five dollars, or imprisonment, not exceeding seven days, in default of payment, which said fine or imprisonment may be imposed upon either the owner or operator of any such vehicle. [C35.§4992; 47GA, ch 134, §274.]

5018.09 Scope. Cities and towns may provide for the inspection of motor vehicles and trucks operated upon the streets, alleys or thoroughfares thereof when owned or operated by residents, or by persons gainfully employed, in any such city or town where so operated. [C35, §4992; 47GA, ch 134,§275.]

5018.10 Control by department. The department of public safety shall have supervision and control over the type of tests and the facilities therefor in any such motor vehicle testing station, and any such city or town desiring to establish any such station shall first procure the approval thereof by the department of public safety. [C35,§4992; 47GA, ch 134,§276; 48GA, ch 120,§45.]

5018.11 Payment from earnings. Cities and towns shall have additional powers to pay for any such testing station or stations and the equipment, maintenance and operation thereof out of past or future earnings of said station or stations or out of the general fund, and cities and towns may issue revenue bonds for the acquisition, erection, establishment, equipment, operation and maintenance of any such station or stations, which said bonds shall be payable solely from the earnings, of said station or stations. [C35,§4992; 47GA, ch 134,§277.]

5018.12 Ordinances. All ordinances, rules and regulations which may have been or which may be hereafter enacted in pursuance of the above enumerated powers, shall remain in full force and effect. [S13,§1571-m20; C24, 27, 31, 35,§4993; 47GA, ch 134,§278.]

5018.13 Parks and cemeteries. Local authorities may by general rule, ordinance, or regulation exclude vehicles from any cemetery or ground used for the burial of the dead, or exclude vehicles used solely or principally for commercial purposes, from any park or part of a park system where such general rule, ordinance, or regulation is applicable equally and generally to all other vehicles used for the same purpose, if, at the entrance, or at each entrance if there be more than one, to such cemetery or park from which vehicles are so excluded, there shall have been posted a sign plainly legible from the middle of the public highway on which such cemetery or park opens, plainly indicating such exclusion and prohibition. [S13,§1571-m20; C24, 27, 31, 35,§4994; 47GA, ch 134,§279.]

5018.14 School zones. Cities and towns shall have the power to establish school zones and provide for the stopping of all motor vehicles approaching said zones, when movable stop signs have been placed in the streets at the limits of the zones, this notwithstanding the provisions of any statute to the contrary. [C31, 35,§4997-d1; 47GA, ch 134,§280.]

5018.15 Discriminations. When the local authorities of other states shall, by the adoption of rules and regulations or otherwise, prohibit motor vehicles registered under the laws of this state from operating upon highways in any subdivision of such other state, the local authorities of this state may, by ordinance or otherwise, require the motor vehicles of the subdivisions of such other state while operating by their own power in this state to be registered under the laws of this state. [C24, 27, 31, 35,§4998; 47GA, ch 134,§281.]

5018.16 Rights of owners of real property. Nothing in this chapter shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner and not as matter of right from prohibiting such use, or from requiring other or different or additional conditions than those specified in this chapter, or otherwise regulating such use as may seem best to such owner. [47GA, ch 134,§282.]

5019 Rep. by 47GA. See note under chapter 251

TRAFFIC SIGNS, SIGNALS, AND MARKINGS

5019.01 Highway commission to adopt sign manual. The state highway commission shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this chapter for use upon highways within this state. Such uniform system shall correlate with and so far as possible conform to the system then current as approved by the American association of state highway officials. [C24, 27,§4627; C31, 35,§§4627, 5079-d7; 47GA, ch 134,§§283, 534.]

5019.02 Highway commission to erect signs. The state highway commission shall place and maintain such traffic-control devices, conforming to its manual and specifications, upon all primary highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic. Whenever practical, said devices or signs shall be purchased from the board of control. [C24, 27,§4627; C31, 35,§§4627, 5079-d7; 47GA, ch 134, §§284, 534.]

Analogous provision, §5029.05

5019.03 Local authorities restricted. No local authority shall place or maintain any traffic-control device upon any highway under the jurisdiction of the state highway commission except by the latter's permission. [47GA, ch 134,§285.]

5019.04 Local traffic-control devices. Local authorities in their respective jurisdiction shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected shall conform to the state manual and specifications. [47GA, ch 134,§286.]

5019.05 Obedience to official traffic-control devices. No driver of a vehicle or motorman of a streetcar shall disobey the instructions of any official traffic-control device placed in accordance with the provisions of this chapter, unless at the time otherwise directed by a police officer. [47GA, ch 134,§287.]

5019.06 Traffic-control signal legend. Whenever traffic is controlled by traffic-control signals exhibiting the words "Go", "Caution" or "Stop" or exhibiting different colored lights successively one at a time the following colors only shall be used and said terms and lights shall indicate as follows:

1. *Green alone or "Go".*

Vehicular traffic facing the signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. But vehicular traffic shall yield the right-of-way to other vehicles and to pedestrians lawfully within the intersection at the time such signal is exhibited.

Pedestrians facing the signal may proceed across the roadway within any marked or unmarked crosswalk.

2. *Yellow alone or "Caution"* when shown following the green or "Go" signal.

Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection, but if such stop cannot be made in safety a vehicle may be driven cautiously through the intersection.

Pedestrians facing such signal are thereby advised that there is insufficient time to cross the roadway, and any pedestrian then starting to cross shall yield the right-of-way to all vehicles.

3. *Red alone or "Stop".*

Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at an intersection or at such other point as may be indicated by a clearly visible line and shall remain standing until green or "Go" is shown alone.

No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicular traffic.

4. *Red with green arrow.*

Vehicular traffic facing such signal may cautiously enter the intersection only to make the movement indicated by such arrow but shall not interfere with other traffic or endanger pedestrians lawfully within a crosswalk.

No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicular traffic.

The motorman of any streetcar shall obey all the above signals as applicable to vehicles. [47GA, ch 134,§288.]

5019.07 Flashing signals. Whenever flashing red or yellow signals are used they shall require obedience by vehicular traffic as follows:

1. *Flashing red* (Stop signal). When a red lens is illuminated by rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked and the right to proceed shall be subject to the rules applicable after making a stop at a stop sign.

2. *Flashing yellow* (Caution signal). When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or past such signal only with caution. [47GA, ch 134,§289.]

5019.08 Unauthorized signs, signals, or markings. No person shall place, maintain, or display upon or in view of any highway any unauthorized sign, signal, marking, or device which purports to be or is an imitation of or resembles an official parking sign, curb or other marking, traffic-control device or railroad sign or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any official traffic-control device or any railroad sign or signal, and no person shall place or maintain nor shall any public authority permit upon any highway any traffic sign or signal bearing thereon any commercial advertising. This shall not be deemed to prohibit the erection upon private property adjacent to highways of signs giving

useful directional information of a type that cannot be mistaken for official signs.

Every such prohibited sign, signal, or marking is hereby declared to be a public nuisance and the authority having jurisdiction over the highway is hereby empowered to remove the same or cause it to be removed without notice. [47GA, ch 134,§290.]

5019.09 Interference with devices, signs, or signals. No person shall without lawful authority attempt to or in fact alter, deface, injure, knock down, or remove any official traffic-control device or any railroad sign or signal or any inscription, shield, or insignia thereon, or any other part thereof. [47GA, ch 134,§291.]

5020 Rep. by 47GA. See note under chapter 251

ACCIDENTS

5020.01 Death or personal injuries. The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 5020.03. Every such stop shall be made without obstructing traffic more than is necessary.

Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment for not less than thirty days nor more than one year or by fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment.

The commissioner shall revoke the operator's or chauffeur's license of the person so convicted. [S13,§1571-m23; C24, 27, 31, 35,§§5072, 5074; 47 GA, ch 134,§292.]

Referred to in §5017.01

5020.02 Damage to vehicle. The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of section 5020.03. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop or comply with said requirements under such circumstances shall be guilty of a misdemeanor and punished as provided in section 5036.01. [S13,§1571-m23; C24, 27, 31, 35,§5079; 47GA, ch 134,§293.]

Referred to in §5017.01

5020.03 Information and aid. The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address, and the registration number of the vehicle he is driving and shall upon request and if available exhibit his operator's or chauffeur's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person. [S13,§1571-m23; C24, 27, 31, 35,§§5072, 5079; 47GA, ch 134,§294.]

Referred to in §§5017.01, 5020.01, 5020.02

5020.04 Striking unattended vehicle. The driver of any vehicle which collides with any vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the name and address of the driver and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck a written notice giving the name and address of the driver and of the owner of the vehicle doing the striking and a statement of the circumstances thereof. [C24, 27, 31, 35,§5079; 47GA, ch 134,§295.]

Referred to in §5017.01

5020.05 Striking fixtures upon a highway. The driver of any vehicle involved in an accident resulting only in damage to property legally upon or adjacent to a highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of his name and address and of the registration number of the vehicle he is driving and shall upon request and if available exhibit his operator's or chauffeur's license and shall make report of such accident when and as required in section 5020.06. [C24, 27, 31, 35,§5079; 47GA, ch 134,§296.]

Referred to in §5017.01

5020.06 Reporting accidents. The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of twenty-five dollars or more shall, immediately after such accident, report the accident, together with the said information, at the office of some peace officer as near as practicable to the place of injury or to the county attorney or sheriff of the county in which said injury took place. A report shall be made by the peace officer to whom a report of an accident is made on duplicate forms furnished by the department, one of which shall be immediately forwarded by said peace officer to the department, in containers furnished and postage paid by the department. The parent or personal guardian of a minor driver may, if present at the accident, make the report required by this section. [S13,§1571-m23; C24, §§5073, 5075, 5104; C27, 31, 35,§§5073, 5075, 5105-a35, 5105-c21; 47GA, ch 134,§§297, 540, 544.]

Referred to in §§5017.01, 5020.05, 5020.07

5020.07 Supplemental reports. The department may require any driver of a vehicle involved

in an accident of which report must be made as provided in section 5020.06 to file supplemental reports whenever the original report is insufficient in the opinion of the department and may require witnesses of accidents to render reports to the department. [47GA, ch 134,§298.]

Referred to in §5017.01

5020.08 Driver unable to report. Whenever the driver of a vehicle is physically incapable of making a required accident report and there was another occupant in the vehicle at the time of the accident capable of making a report, such occupant shall make or cause to be made said report. [47GA, ch 134,§299.]

Referred to in §5017.01

5020.09 Accident report forms. The department shall prepare and upon request supply to police departments, coroners, sheriffs, and other suitable agencies or individuals, forms for accident reports required hereunder, which reports shall call for sufficiently detailed information to disclose with reference to a traffic accident the cause, condition then existing, and the persons and vehicles involved.

Every required accident report shall be made on a form approved by the department if said form is available. [47GA, ch 134,§300.]

Referred to in §5017.01

5020.10 Coroners to report. Every coroner or other official performing like functions shall on or before the tenth day of each month report in writing to the department the death of any person within his jurisdiction during the preceding calendar month as the result of an accident involving a motor vehicle and the circumstances of such accident. [47GA, ch 134,§301.]

Referred to in §5017.01

5020.11 Reports confidential—without prejudice. All accident reports shall be in writing and the written report shall be without prejudice to the individual so reporting and shall be for the confidential use of the department, except that upon the request of any person involved in an accident, or the attorney for such person, the department shall disclose the identity of the person involved in the accident and his address. A written report filed with the department shall not be admissible in or used in evidence in any civil case arising out of the facts on which the report is based. [47GA, ch 134,§302; 48GA, ch 123,§2.]

Referred to in §§5017.01, 5020.13

5020.12 Tabulation of reports. The department shall tabulate and may analyze all accident reports and shall publish annually or at more frequent intervals statistical information based thereon as to the number and circumstances of traffic accidents. [47GA, ch 134,§303.]

Referred to in §5017.01

5020.13 City may require reports. Any incorporated city, town, or other municipality may by ordinance require that the driver of a vehicle involved in an accident shall also file with a designated city department a report of such accident or a copy of any report herein required to be filed with the department. All such reports shall be for the confidential use of the city department and subject to the provisions of section 5020.11. [47GA, ch 134,§304.]

Referred to in §5017.01

5020.14 Accidents in first class cities. When the accident occurs within the corporate limits of any city of the first class, the accident and all information in connection therewith, as required in this chapter, shall be reported at the office of the chief of police and when reported elsewhere shall not constitute a compliance with the provisions of this section. [S13,§1571-m23; C24, 27, 31, 35,§5073; 47GA, ch 134,§305.]

Referred to in §5017.01

5021 Rep. by 47GA. See note under chapter 251

ACCIDENT LIABILITY

5021.01 Suspension of licenses. Whenever a final judgment is recovered in any court of record of this state in an action for damages for injury to or death of a person or for injury to property caused by the operation or ownership of any motor vehicle on the highways of the state, and such judgment shall remain unsatisfied and unstayed for a period of sixty days after the entry thereof, a transcript of such judgment duly authenticated may be filed with the commissioner and thereupon the commissioner shall forthwith suspend the license, if any, of the judgment debtor or debtors, as the case may be, to operate a motor vehicle on the highways of the state and shall forthwith suspend the registration of any and every motor vehicle registered in the name of such judgment debtor or debtors, and the commissioner shall forthwith notify such owner or owners by registered mail of such cancellation and the owner or owners so notified shall immediately upon receipt of such notice surrender to the county treasurer all registration plates so suspended, and such suspension shall not be removed nor such registration plates returned by the county treasurer nor shall a license to operate a motor vehicle thereafter be issued to such judgment debtor or debtors, nor shall a motor vehicle be registered in the name of such judgment debtor or debtors until proof that such judgment has been stayed, satisfied or otherwise discharged of record shall be filed with the county treasurer. [C31, 35, §5079-c4; 47GA, ch 134,§306.]

Referred to in §5021.05

5021.02 Satisfaction of judgment. When five thousand dollars has been credited upon any judgment or judgments, rendered in excess of that amount for personal injury to or the death of one person as the result of any one accident, or, when subject to the limit of five thousand dollars for each person, the sum of ten thousand dollars has been credited upon any judgments rendered in excess of that amount for personal injury to or the death of more than one person as a result of any one accident, or, when one thousand dollars has been credited upon any judgment or judgments, rendered in excess of that amount for damage to property as the result

of any one accident, resulting from the ownership or operation of a motor vehicle by such judgment debtor, or with his permission express or implied, then and in such event such payments or payment shall be deemed a satisfaction of such judgment or judgments for the purposes of this section only. [C31, 35,§5079-c4; 47GA, ch 134,§307.]

Referred to in §5021.05

5021.03 Judgment—when final. No judgment shall be deemed final after an appeal from such judgment is perfected and a supersedeas bond is executed, filed and approved as provided in section 12858. [C31, 35,§5079-c5; 47GA, ch 134,§308.]

See §5021.01

5021.04 Registration reinstated. If after registration has been suspended a judgment is satisfied or otherwise stayed or rendered nonfinal by the perfecting of an appeal and by the execution, filing, and approval of a supersedeas bond, the county treasurer shall reinstate and re-register such registrations so suspended, and shall forthwith return such registration plates so surrendered, and the department shall return the operator's or chauffeur's license so suspended. [C31, 35,§5079-c6; 47GA, ch 134,§309.]

5021.05 Operation during suspension. The operation of a motor vehicle on the highways of this state during the period of such suspension by any person whose privilege to operate a motor vehicle in this state shall have been suspended under the provisions of sections 5021.01 and 5021.02 shall constitute a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than one hundred dollars. [C31, 35,§5079-c7; 47GA, ch 134,§310; 48GA, ch 121,§33.]

5022 Rep. by 47GA. See note under chapter 251

DRIVING WHILE INTOXICATED AND RECKLESS DRIVING

5022.01 Assaults and homicide. A conviction of the violation of any of the provisions of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating motor vehicles. [S13, §1571-m30; C24, 27, 31, 35,§5091; 47GA, ch 134, §311.]

Referred to in §5017.01

5022.02 Operating while intoxicated. Whoever, while in an intoxicated condition or under influence of narcotic drugs, operates a motor vehicle upon the public highways of this state, shall, upon conviction or a plea of guilty, be punished, for the first offense by a fine of not less than three hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not to exceed one year, or by both such fine and imprisonment; for the second offense by a fine of not less than five hundred dollars, nor more than one thousand dollars, or by imprisonment in the penitentiary for a period of not to exceed one year, or by both such fine and imprisonment; and for a third offense by imprisonment in the penitentiary for a period not to exceed three years. [S13,§1571-m23; C24, 27, 31, 35,§5027; 47GA, ch 134,§312.]

Referred to in §5017.01

5022.03 Violations. If any person who has been convicted or pleaded guilty to driving or operating a motor vehicle upon the public highways of this state while in an intoxicated condition is found driving or operating any motor vehicle in violation of the provisions of sections 5013.01 and 5014.09 he shall, without regard to any other punishment provided by law, be imprisoned in the county jail for a period of not to exceed thirty days. [C31, 35,§5027-d2; 47GA, ch 134,§313.]

Referred to in §5017.01

5022.04 Reckless driving. Any person who drives any vehicle in such manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving. [C73,§4071; C97,§5039; S13,§1571-m19; C24, 27, 31, 35,§5028; 47GA, ch 134,§314.]

Referred to in §5017.01

5022.05 Punishment. Every person convicted of reckless driving shall be punished upon a conviction by imprisonment for a period of not more than thirty days, or by fine of not less than twenty-five dollars, nor more than one hundred dollars. [C73,§4071; C97,§5039; S13,§1571-m19; C24, 27, 31, 35,§5028; 47GA, ch 134,§315.]

Referred to in §5017.01

5023 Rep. by 47GA. See note under chapter 251

SPEED RESTRICTIONS

5023.01 Speed restrictions. Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.

The following shall be the lawful speed except as hereinbefore or hereinafter modified, and any speed in excess thereof shall be unlawful:

1. Twenty miles per hour in any business or school district.
2. Twenty-five miles per hour in any residence district.
3. Thirty-five miles per hour for any motor vehicle drawing another vehicle.
4. Forty-five miles per hour in any suburban district. [S13,§§1571-m19,-m20; C24, 27, 31, 35, §§5029, 5030; 47GA, ch 134,§316; 48GA, ch 127, §2.]

Referred to in §§5023.07, 5023.08, 5023.09

5023.02 Truck speed limits. It shall be unlawful for the driver of a freight-carrying vehicle, with a gross weight of over five thou-

sand pounds, to drive the same at a speed exceeding the following:

1. Forty miles per hour for any freight-carrying vehicle which is equipped with pneumatic tires.

2. Twenty miles per hour for any freight-carrying vehicle equipped with solid rubber tires, if the weight of the vehicle and load is less than six tons, and twelve miles per hour for any freight-carrying vehicle equipped with solid rubber tires, if the weight of the vehicle and load is more than six tons. [S13,§§1571-m19, -m20; C24, 27, 31, 35,§5029; 47GA, ch 134,§317.]

Referred to in §§5023.07, 5023.08

5023.03 Bus speed limits. No passenger-carrying motor vehicle used as a common carrier, except school busses, shall be driven upon the highways at a greater rate of speed than forty-five miles per hour. No school bus shall be operated in violation of section 5032.06. [C24, §5104; C27, 31, 35,§5105-a34; 47GA, ch 134, §§318, 539.]

Referred to in §§5023.07, 5023.08

5023.04 Control of vehicle. The person operating a motor vehicle or motorcycle shall have the same under control and shall reduce the speed to a reasonable and proper rate:

1. When approaching and passing a person walking in the traveled portion of the public highway.

2. When approaching and passing an animal which is being led, ridden, or driven upon a public highway.

3. When approaching and traversing a crossing or intersection of public highways, or a bridge, or a sharp turn, or a curve, or a steep descent, in a public highway. [S13,§1571-m18; C24, 27, 31, 35,§5031; 47GA, ch 134,§319.]

5023.05 Speed signs—duty to install. The state highway commission shall furnish and place on primary roads or on extensions of primary roads within any city or town suitable standard signs showing the points at which the rate of speed changes and the maximum rate of speed in the district which the vehicle is entering. On all other main highways the city or town shall furnish and erect suitable signs giving similar information to traffic on such highways. [S13,§1571-m20; C24,§5030; C27, 31, 35,§5030-b2; 47GA, ch 134,§320.]

5023.06 Special restrictions. Whenever the state highway commission shall determine upon the basis of an engineering and traffic investigation that any speed limit hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway. [47GA, ch 134, §321.]

5023.07 Information or notice. In every charge of violation of sections 5023.01 to 5023.03, inclusive, the information, also the notice to appear, shall specify the speed at which the defendant is alleged to have driven, also the speed limit applicable within the district or at the location. [47GA, ch 134,§322.]

5023.08 Civil action unaffected. The foregoing provisions of sections 5023.01 to 5023.03, inclusive, shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident. [47GA, ch 134,§323.]

5023.09 Local authorities may alter limits. Local authorities in their respective jurisdiction may in their discretion authorize by ordinance higher speeds than those stated in section 5023.01 upon through highways or upon highways or portions thereof where stop signs have been erected at the entrances thereto provided signs are erected giving notice of the authorized speed, but local authorities shall not have authority to authorize by ordinance a speed in excess of fifty-five miles per hour. [47GA, ch 134,§324.]

5023.10 Minimum speed regulation. No person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law. Peace officers are hereby authorized to enforce this provision by directions to drivers, and in the event of apparent wilful disobedience to this provision and refusal to comply with direction of an officer in accordance herewith the continued slow operation by a driver shall be a misdemeanor, and be punished as provided in section 5036.01. [C31, 35,§5021-c1; 47GA, ch 134,§325.]

5023.11 Limitation on elevated structures. No person shall drive a vehicle over any bridge or other elevated structure constituting a part of a highway at a speed which is greater than the maximum speed which can be maintained with safety to such bridge or structure, when such structure is sign-posted as provided in this section.

The state highway commission upon request from any local authority shall, or upon its own initiative may, conduct an investigation of any bridge or other elevated structure constituting a part of a highway, and if it shall thereupon find that such structure cannot with safety to itself withstand vehicles traveling at the speed otherwise permissible under this chapter, the commission shall determine and declare the maximum speed of vehicles which such structure can withstand, and shall cause or permit suitable signs stating such maximum speed to be erected and maintained at a distance of two hundred feet before each end of such structure.

Upon the trial of any person charged with a violation of this section, proof of said determination of the maximum speed by said commission and the existence of said signs shall constitute conclusive evidence of the maximum speed

which can be maintained with safety to such bridge or structure. [47GA, ch 134,§326.]

5023.12 Emergency vehicles — speed. The speed limitations set forth in this chapter shall not apply to authorized emergency vehicles when responding to emergency calls and the drivers thereof sound audible signal by bell, siren, or exhaust whistle. This provision shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the streets, nor shall it protect the driver of any such vehicle from the consequence of his negligence. [47GA, ch 134,§327.]

5024 Rep. by 47GA. See note under chapter 251

DRIVING ON RIGHT SIDE OF ROADWAY—OVERTAKING AND PASSING, ETC.

5024.01 Traveling on right-hand side. The operator of a motor vehicle, in cities and towns, shall at all times travel on the right-hand side of the center of the street. [S13,§1571-m18; C24, 27, 31, 35,§5019; 47GA, ch 134,§328.]

5024.02 Meeting and turning to right. Persons on horseback, or in vehicles, including motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right.[R60,§908; C73,§1000; C97,§1569; S13,§1569; C24, 27, 31, 35,§5020; 47GA, ch 134,§329.]

5024.03 Overtaking a vehicle. The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions, and special rules hereinafter stated:

The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle. [S13, §§1569, 1571-m18; C24, 27, 31, 35,§§5021, 5022; 47GA, ch 134,§330.]

5024.04 Failure to recognize signal. Any driver of a vehicle that is overtaken by a faster moving vehicle who fails to heed the signal of the overtaking vehicle when it is given under such circumstances that he could, by the exercise of ordinary care and observation and precaution, hear such signal and who fails to yield that part of the traveled way as herein provided, shall be guilty of a misdemeanor punishable as provided in section 5036.01. [C24, 27, 31, 35, §5023; 47GA, ch 134,§331.]

Referred to in §5024.05

5024.05 Burden of proof. Upon proof that a signal was given as contemplated by section 5024.04, the burden shall rest upon the accused to prove that he did not hear said signal. [C24, 27, 31, 35,§5024; 47GA, ch 134,§332.]

5024.06 Overtaking on the right. The driver of a vehicle may overtake and pass upon the right of another vehicle which is making or about to make a left turn.

The driver of a vehicle may overtake and, allowing sufficient clearance, pass another vehicle proceeding in the same direction either upon the left or upon the right on a roadway with unobstructed pavement of sufficient width for four or more lines of moving traffic when such movement can be made in safety. No person shall drive off the pavement or upon the shoulder of the roadway in overtaking or passing on the right. [47GA, ch 134,§333.]

5024.07 Limitations on overtaking on the left. No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction. [47GA, ch 134,§334.]

5024.08 Prohibited passing. No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions:

1. When approaching the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed for a distance of approximately seven hundred feet;
2. When approaching within one hundred feet of any narrow bridge, viaduct, or tunnel, when so sign-posted, or when approaching within one hundred feet of or traversing any intersection or railroad grade crossing;
3. Where official signs are in place directing that traffic keep to the right or a distinctive center line is marked, which distinctive line also so directs traffic as declared in the sign manual adopted by the state highway commission. [C35, §5024-e1; 47GA, ch 134,§335.]

5024.09 One-way roadways and rotary traffic islands. Upon a roadway designated and sign-posted for one-way traffic a vehicle shall be driven only in the direction designated.

A vehicle passing around a rotary traffic island shall be driven only to the right of such island. [47GA, ch 134,§336.]

5024.10 Roadways laned for traffic. Whenever any roadway has been divided into three or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

A vehicle shall be driven as nearly as practical entirely within a single lane and shall not

be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Upon a roadway which is divided into three lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is sign-posted to give notice of such allocation.

Official signs may be erected directing slow-moving traffic to use a designated lane or allocating specified lanes to traffic moving in the same direction and drivers of vehicles shall obey the directions of every such sign. [47GA, ch 134,§337.]

5024.11 Following too closely. The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. [47GA, ch 134,§338.]

5024.12 Towed vehicles—distance requirements. The driver of any motor truck, or of a motor vehicle drawing another vehicle, when traveling upon a roadway, outside of a business or residence district shall not follow within three hundred feet of another motor truck, or of a motor vehicle drawing another vehicle. The provisions of this section shall not be construed to prevent overtaking and passing nor shall the same apply upon any lane specially designated for use by motor trucks. [C31, 35,§5067-d9; 47GA, ch 134,§339.]

5024.13 Towing—convoys — drawbars. No person shall pull or tow by motor vehicle another motor vehicle over any highway outside the limits of any incorporated city or town, except in case of temporary movement for repair or other emergency, unless such person has complied with the provisions of sections 5004.01 and 5004.02. Provided, however, if such person is a nonresident of the state of Iowa and has complied with the laws of the state of his residence governing licensing and registration as a transporter of motor vehicles he shall not be required to pay the fee provided in section 5004.02 but only to submit proof of his status as a bona fide manufacturer or transporter as may reasonably be required by the department.

Every person pulling or towing by motor vehicle another motor vehicle in convoy or caravan shall maintain a distance of at least five hundred feet between the units of said convoy or caravan.

The drawbar or towing arm between a motor vehicle pulling or towing another motor vehicle shall be of a type approved by the commissioner. [C31, 35,§5067-d9; 47GA, ch 134,§339-a1.]

47GA, ch 134,§339-a1, editorially divided

5024.14 Four-wheel trailers behind trucks prohibited. No truck shall, after January 1, 1939, pull or tow any four-wheeled trailer, and no semitrailer shall pull or tow any additional trailer over any of the highways in this state, except in case of temporary movement for repair or emergency, and then only to the nearest town or city where the necessary repairs may be made. [47GA, ch 134,§339-a1.]

5025 Rep. by 47GA. See note under ch 251

TURNING AND STARTING AND SIGNALS ON STOPPING AND TURNING

5025.01 Turning at intersections. The driver of a vehicle intending to turn at an intersection shall do so as follows:

Both the approach for a right turn and right turn shall be made as close as practical to the right-hand curb or edge of the roadway.

Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to depart from the intersection to the right of the center line of the roadway being entered.

Approach for a left turn from a two-way street into a one-way street shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection. A left turn from a one-way street into a two-way street shall be made by passing to the right of the center line of the street being entered upon leaving the intersection.

Local authorities in their respective jurisdictions may cause markers, buttons, or signs to be placed within or adjacent to intersections and thereby require and direct that a different course from that specified in this section be traveled by vehicles turning at an intersection, and when markers, buttons, or signs are so placed no driver of a vehicle shall turn a vehicle at an intersection other than as directed and required by such markers, buttons, or signs. [S13,§1571-m18; C24, 27, 31, 35,§5033; 47GA, ch 134,§340.]

5025.02 Turning on curve or crest of grade. No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to, or near the crest of a grade or hill, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within five hundred feet. [47GA, ch 134,§341.]

5025.03 Starting parked vehicle. No person shall start a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety. [47GA, ch 134, §342.]

5025.04 When signal required. No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement. [S13,§1571-m18; C24, 27, 31, 35,§5032; 47GA, ch 134,§343.]

5025.05 Signal continuous. A signal of intention to turn right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning. [47GA, ch 134,§344.]

5025.06 Stopping. No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal. [S13,§1571-m18; C24, 27, 31, 35,§5032; 47GA, ch 134,§345.]

5025.07 Signals by hand and arm or signal device. The signals herein required may be given either by means of the hand and arm or other proper signal or signal device of a type approved by the department, provided, however, that no motor vehicle complying with the laws of the state shall be required to display an electrically operated directional signal lamp. [S13, §1571-m18; C24, 27, 31, 35,§5032; 47GA, ch 134, §346; 48GA, ch 122,§1.]

5025.08 Method of giving hand and arm signals. All signals herein required which may be given by hand and arm shall when so given be given from the left side of the vehicle and the following manner and interpretation thereof is suggested:

1. Left turn.—Hand and arm extended horizontally.
2. Right turn.—Hand and arm extended upward.
3. Stop or decrease of speed.—Hand and arm extended downward. [47GA, ch 134,§347.]

5026 Rep. by 47GA. See note under chapter 251

RIGHT-OF-WAY

5026.01 Approaching or entering intersections. The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway.

When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

The foregoing rules are modified at through highways and otherwise as hereinafter stated in this chapter. [S13,§1571-m18; C24, 27, 31, 35, §5035; 47GA, ch 134,§348.]

5026.02 Turning left at intersection. The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver, having so yielded and having given a signal when and as required by this chapter, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right-of-way to the vehicle making the left turn. [S13,§1571-m18; C24, 27, 31, 35, §5035; 47GA, ch 134,§349.]

5026.03 Entering through highways. The driver of a vehicle shall stop as required by this chapter at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute a hazard, but said driver having so yielded may proceed cautiously and with due care enter said through highway. [C27,§§5079-b2,-b3; C31, 35, §§5079-b2,-b3,-d2,-d3; 47GA, ch 134,§350.]

5026.04 Entering stop intersection. The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute a hazard, but may then proceed. [C27,§§5079-b2,-b3; C31, 35,§§5079-b2,-b3,-d2,-d3; 47GA, ch 134,§351.]

5026.05 Entering from private driveway. The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway. [S13,§1571-m18; C24, 27, 31, 35,§5035; 47GA, ch 134,§352.]

5026.06 Operation on approach of emergency vehicles. Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust whistle, or bell, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

Upon the approach of an authorized emergency vehicle, as above stated, the motorman of every streetcar shall immediately stop such car clear of any intersection and keep it in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway. [47GA, ch 134, §353.]

See also §§5017.04, 5017.05

5027 Rep. by 47GA. See note under chapter 251

PEDESTRIANS' RIGHTS AND DUTIES

5027.01 Pedestrians subject to signals. Pedestrians shall be subject to traffic-control signals at intersections as heretofore declared in this chapter, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in sections 5027.03 to 5027.07, inclusive. [47GA, ch 134,§354.]

5027.02 Pedestrians on left. Pedestrians shall at all times when walking on or along a

highway, walk on the left side of such highway. [47GA, ch 134,§354-a.]

5027.03 Pedestrians' right-of-way. Where traffic-control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter. [47GA, ch 134,§355.]

Referred to in §5027.01

5027.04 Crossing at other than crosswalk. Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.

Where traffic-control signals are in operation at any place not an intersection pedestrians shall not cross at any place except in a marked crosswalk. [47GA, ch 134,§356.]

Referred to in §§5027.01, 5027.05

5027.05 Duty of driver. Notwithstanding the provisions of section 5027.04 every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise due care upon observing any child or any confused or incapacitated person upon a roadway. [47GA, ch 134,§357.]

Referred to in §5027.01

5027.06 Use of crosswalks. Pedestrians shall move, whenever practicable, upon the right half of crosswalks. [47GA, ch 134,§358.]

Referred to in §5027.01

5027.07 Pedestrians soliciting rides. No person shall stand in a roadway for the purpose of soliciting a ride from the driver of any private vehicle.

Nothing in this section or this chapter shall be construed so as to prevent any pedestrian from standing on that portion of the highway or roadway, not ordinarily used for vehicular traffic, for the purpose of soliciting a ride from the driver of any vehicle. [47GA, ch 134,§359.]

Referred to in §5027.01

5028 Rep. by 47GA. See note under chapter 251

STREETCARS AND SAFETY ZONES

5028.01 Passing streetcar on left. The driver of a vehicle shall not overtake and pass upon the left nor drive upon the left side of any streetcar proceeding in the same direction, whether such streetcar is actually in motion or temporarily at rest, except:

1. When so directed by a police officer;
2. When upon a one-way street; or
3. When upon a street where the tracks are so located as to prevent compliance with this section. [S13,§§1569, 1571-m18; C24, 27, 31, 35, §5022; 47GA, ch 134,§360.]

5028.02 Caution when passing. The driver of any vehicle when permitted to overtake and pass upon the left of a streetcar which has stopped for the purpose of receiving or discharging any passenger shall reduce speed and may proceed only upon exercising due caution for pedestrians and shall accord pedestrians the right-of-way when required by other sections of this chapter. [47GA, ch 134,§361.]

5028.03 Stopping at streetcars. The driver of a vehicle overtaking upon the right any streetcar stopped or about to stop for the purpose of receiving or discharging any passenger shall stop such vehicle at least five feet to the rear of the nearest running board or door of such streetcar and thereupon remain standing until all passengers have boarded such car or upon alighting have reached a place of safety, except that where a safety zone has been established a vehicle need not be brought to a stop before passing any such streetcar but may proceed past such car at a speed not greater than is reasonable and proper and with due caution for the safety of pedestrians. [S13,§1571-m18; C24, 27, 31, 35,§5037; 47GA, ch 134,§362.]

5028.04 Driving on streetcar tracks. The driver of any vehicle proceeding upon any streetcar track in front of a streetcar upon a street shall remove such vehicle from the track as soon as practical after signal from the operator of said streetcar. [47GA, ch 134,§363.]

5028.05 Driving in front of streetcar. When a streetcar has started to cross an intersection, no driver of a vehicle shall drive upon or cross the car tracks within the intersection in front of the streetcar. [47GA, ch 134,§364.]

5028.06 Driving through safety zone. No vehicle shall at any time be driven through or within a safety zone. [47GA, ch 134,§365.]

5029 Rep. by 47GA. See note under chapter 251

SPECIAL STOPS REQUIRED

5029.01 Obedience to signal of train. Whenever any person driving a vehicle approaches a railroad grade crossing and warning is given by automatic signal or crossing gates or a flagman or otherwise of the immediate approach of a train, the driver of such vehicle shall stop within fifty feet but not less than ten feet from the nearest track of such railroad and shall not proceed until he can do so safely.

The driver of a vehicle shall stop and remain standing and not traverse such a grade crossing when a crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a train. [47GA, ch 134,§366.]

5029.02 Stop at certain railroad crossings. The state highway commission is hereby authorized to designate particularly dangerous highway grade crossings of railroads and to erect

stop signs thereat. When such stop signs are erected the driver of any vehicle shall stop within fifty feet but not less than ten feet from the nearest track of such grade crossing and shall proceed only upon exercising due care. [47GA, ch 134,§367.]

5029.03 Certain vehicles must stop. The driver of any motor vehicle carrying passengers for hire, or of any school bus carrying any school child, or of any vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within fifty feet but not less than ten feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely.

No stop need be made at any such crossing where a police officer or a traffic-control signal directs traffic to proceed.

This section shall not apply at street railway grade crossings within a business or residence district. [C27, 31, 35,§5105-a33; 47GA, ch 134, §§368, 538.]

5029.04 Heavy equipment at crossing. No person shall operate or move any caterpillar tractor, steam shovel, derrick, roller, or any equipment or structure having a normal operating speed of six or less miles per hour or a vertical body or load clearance of less than nine inches above the level surface of a roadway upon or across any tracks at a railroad grade crossing without first complying with this section.

Notice of any such intended crossing shall be given to a superintendent of such railroad and a reasonable time be given to such railroad to provide proper protection at such crossing.

Before making any such crossing the person operating or moving any such vehicle or equipment shall first stop the same not less than ten feet nor more than fifty feet from the nearest rail of such railway and while so stopped shall listen and look in both directions along such track for any approaching train and for signals indicating the approach of a train, and shall not proceed until the crossing can be made safely.

No such crossing shall be made when warning is given by automatic signal or crossing gates or a flagman or otherwise of the immediate approach of a railroad train or car. [47GA, ch 134,§369.]

5029.05 Stop at through highways. The state highway commission with reference to primary highways, and local authorities with reference to other highways under their jurisdiction may designate through highways and erect stop signs at specified entrances thereto or may designate any intersection as a stop intersection and erect like signs at one or more entrances to such intersection.

Every said sign shall bear the word "Stop" in letters not less than six inches in height. Every stop sign shall be located as near as practical at the property line of the highway at the entrance to which the stop must be made, or at the nearest line of the crosswalk thereat, or, if none, at the nearest line of the roadway.

Every driver of a vehicle and every motorman of a streetcar shall stop at such sign or at a clearly marked stop line before entering an intersection except when directed to proceed by a police officer or traffic-control signal. [C27, §§5079-b3,-b4; C31, 35,§§5079-b3,-b4,-d3,-d4; 47GA, ch 134,§370.]

Analogous provision, §5019.02

5029.06 Cost of signs. The cost of such signs on primary highways shall be paid out of the primary road fund. The cost of such signs on county trunk highways shall be paid out of the county trunk road maintenance or construction fund. [C27,§§5079-b4; C31, 35,§§5079-b4, -d4; 47GA, ch 134,§371.]

5029.07 Exceptions. Provided that at intersections of such through highways with boulevards or heavy traffic streets in cities and towns, the council, subject to the approval of the state highway commission, may determine that the through highway traffic shall come to a stop, or may erect traffic-control signals, or may adopt such other means of handling the traffic as may be deemed practical and proper. [C31, 35,§5079-c1; 47GA, ch 134,§372.]

Referred to in §5029.09

5029.08 Limitations on cities and towns. It shall be unlawful for any city or town to close or obstruct any street or highway which is used as the extension of a primary road within such city or town, except at times of fires or for the purpose of doing construction or repair work on such street or highway, or for other reasons with the consent of the highway commission, and it shall also be unlawful for any city or town to erect or cause to be erected or maintained any traffic sign or signal inconsistent with the provisions of this chapter. [C31, 35, §5079-c2; 47GA, ch 134,§373.]

Referred to in §5029.09

5029.09 Exceptions. The provisions of sections 5029.07 and 5029.08 as concerns the erection and maintenance of stop and go signals shall not apply to cities with a population of four thousand or over where said signals are situated within business districts of said city. [C31, 35,§5079-c3; 47GA, ch 134,§374.]

5029.10 Primary roads as through highways. Primary roads, and extensions of primary roads within cities and towns are hereby designated as through highways. [C27, 31, 35,§5079-b1; 47 GA, ch 134,§375.]

5029.11 County trunk roads as through highways. County trunk roads outside of cities and towns are hereby designated as through highways. [C31, 35,§5079-d1; 47GA, ch 134,§376.]

5029.12 Additional signs—cost. The county board of supervisors shall, at places deemed by them unusually dangerous on the local county roads, furnish and erect suitable warning signs.

The cost of such signs shall be paid out of the county road maintenance or construction fund. [C31, 35,§5079-d5; 47GA, ch 134,§377.]

5029.13 Emerging from alley or private driveway. The driver of a vehicle within a business or residence district emerging from an alley, driveway, or building shall stop such vehicle immediately prior to driving onto a sidewalk or into the sidewalk area extending across any alleyway or private driveway. [S13,§1571-m18; C24, 27, 31, 35,§5035; 47GA, ch 134,§378.]

5030 Rep. by 47GA. See note under chapter 251

STOPPING, STANDING, AND PARKING

5030.01 Stopping on traveled way. Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least twenty feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of two hundred feet in each direction upon such highway. [C24, 27, 31, 35,§5066; 47GA, ch 134,§379.]

Referred to in §§5030.02, 5030.03

5030.02 Disabled vehicle. Section 5030.01 shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position. [47GA, ch 134,§380.]

Referred to in §5030 03

5030.03 Officers authorized to remove. Whenever any peace officer finds a vehicle standing upon a highway in violation of any of the foregoing provisions of sections 5030.01 and 5030.02 such officer is hereby authorized to move such vehicle, or require the driver or other person in charge of the vehicle to move the same, to a position off the paved or improved or main traveled part of such highway. [47GA, ch 134, §381.]

5030.04 Removed from bridge. Whenever any peace officer finds a vehicle unattended upon any bridge or causeway or in any tunnel where such vehicle constitutes an obstruction to traffic, such officer is hereby authorized to provide for the removal of such vehicle to the nearest garage or other place of safety. [47GA, ch 134, §382.]

5030.05 Stopping, standing, or parking. No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic-control device, in any of the following places:

1. On a sidewalk;
2. In front of a public or private driveway;
3. Within an intersection;
4. Within five feet of a fire hydrant;
5. On a crosswalk;
6. Within ten feet upon the approach to any flashing beacon, stop sign, or traffic-control signal located at the side of a roadway;
7. Between a safety zone and the adjacent curb or within ten feet of points on the curb immediately opposite the ends of a safety zone, unless any city or town indicates a different length by signs or markings;
8. Within fifty feet of the nearest rail of a railroad crossing, except when parked parallel with such rail and not exhibiting a red light;
9. Within twenty feet of the driveway entrance to any fire station and on the side of a street opposite the entrance to any fire station within seventy-five feet of said entrance when properly sign-posted;
10. Alongside or opposite any street excavation or obstruction when such stopping, standing, or parking would obstruct traffic;
11. On the roadway side of any vehicle stopped or parked at the edge or curb of a street;
12. Upon any bridge or other elevated structure upon a highway outside of cities or towns or within a highway tunnel;
13. At any place where official signs prohibit stopping, or parking. [S13,§1571-m18; C24, 27, 31, 35,§§5057, 5058, 5060; 47GA, ch 134,§383.]

5030.06 Moving other vehicle. No person shall move a vehicle not owned by such person into any such prohibited area or away from a curb such distance as is unlawful. [47GA, ch 134,§384.]

5030.07 Theaters, hotels and auditoriums. A space of twenty-five feet is hereby reserved at the side of the street in front of any theater, auditorium, hotel having more than twenty-five sleeping rooms, or other buildings where large assemblages of people are being held, within which space, when clearly marked as such, no motor vehicle shall be left standing, parked, or stopped except in taking on or discharging passengers or freight, and then only for such length of time as is necessary for such purpose. [S13, §1571-m18; C24, 27, 31, 35,§5059; 47GA, ch 134, §385.]

5030.08 Parking at right-hand curb. Except where angle or center parking is permitted by local ordinance every vehicle stopped or parked upon a roadway where there is an adjacent curb shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within eighteen inches of the right-hand curb. [S13,§1571-m18; C24, 27, 31, 35, §§4997, 5056; 47GA, ch 134,§386.]

5031 Rep. by 47GA. See note under chapter 251

MISCELLANEOUS RULES

5031.01 Unattended motor vehicle. No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway. [S13,§1571-m18; C24, 27, 31, 35,§5038; 47GA, ch 134,§387.]

5031.02 Obstruction to driver's view. No person shall drive a vehicle when it is so loaded, or when there are in the front seat such number of persons, exceeding three, as to obstruct the view of the driver to the front or sides of the vehicle or as to interfere with the driver's control over the driving mechanism of the vehicle.

No passenger in a vehicle shall ride in such position as to interfere with the driver's view ahead or to the sides, or to interfere with his control over the driving mechanism of the vehicle. [47GA, ch 134,§388.]

5031.03 Control of vehicle—signals. The driver of a motor vehicle traveling through defiles or on approaching the crest of a hill or grade shall have such motor vehicle under control and on the right-hand side of the roadway and, upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway, shall give audible warning with the horn of such motor vehicle. [S13,§1571-m18; C24, 27, 31, 35,§§5031, 5043; 47 GA, ch 134,§389.]

5031.04 Coasting prohibited. The driver of any motor vehicle when traveling upon a downgrade shall not coast with the gears of such vehicle in neutral. [47GA, ch 134,§390.]

5031.05 Disengaging clutch. The driver of a commercial motor vehicle when traveling upon a downgrade shall not coast with the clutch disengaged. [47GA, ch 134,§391.]

5031.06 Following fire apparatus. The driver of any vehicle other than one on official business shall not follow any fire apparatus traveling in response to a fire alarm closer than five hundred feet or drive into or park such vehicle within the block where fire apparatus has stopped in answer to a fire alarm. [47GA, ch 134, §392.]

5031.07 Crossing fire hose. No vehicle shall be driven over any unprotected hose of a fire department when laid down on any street, private driveway, or streetcar track, to be used at any fire or alarm of fire, without the consent of the fire department official in command. [47GA, ch 134,§393.]

5031.08 Putting glass, etc., on highway. No person shall throw or deposit upon any highway any glass bottle, glass, nails, tacks, wire, cans, or any other substance likely to injure any person, animal, or vehicle upon such highway. [S13,§§4808-a,-b; C24, 27, 31, 35,§13118; 47GA, ch 134,§§394, 550.]

5031.09 Removing injurious material. Any person who drops, or permits to be dropped or thrown, upon any highway any destructive or injurious material shall immediately remove the same or cause it to be removed. [47GA, ch134, §395.]

5031.10 Clearing up wrecks. Any person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicle. [47GA, ch 134,§396.]

5032 Rep. by 47GA. See note under chapter 251

SCHOOL BUSSES

5032.01 Overtaking and passing school bus. The driver of a vehicle upon a highway outside of a business or residence district upon meeting or overtaking any school bus which has stopped on the highway shall come to a complete stop and then may proceed with due caution for the safety of any children and in no event in excess of ten miles per hour in passing such school bus. [C31, 35,§5079-c8; 47GA, ch 134,§397.]

5032.02 Required construction. Every school bus, except private passenger vehicles used as school busses, shall after September 1, 1939,* be constructed and equipped as follows:

1. It shall be painted a lemon-yellow color for the body, with the fenders in black.
2. There shall be but one compartment.
3. A door or doors at least twenty-four inches wide and forty-eight inches high, the lower panels of which shall be composed of safety glass, shall be placed at the front, right-hand side opposite the driver.
4. The front door or doors shall be under the control of and operated by the driver.
5. There shall be an emergency door in the rear, at least twenty inches wide and forty-eight inches high, provided with an easily operated safety-catch not controlled from the driver's seat but protected from accidental release.
6. There shall be ample windows on both sides and ends.
7. There shall be ample roof ventilators.
8. It shall be heated either with hot water radiator heaters or hot air heaters. The hot air heaters to be iron pipes with all screw connections and guarded by one-half inch meshing wire, three-fourths inches from the heating element which is located in bus body.
9. There shall be a comfortable seat for each pupil.
10. The fuel tank shall be located, filled, drained, and vented outside of the bus body.
11. Bumpers both front and rear shall be fastened directly to the chassis.
12. Every school bus shall bear thereon, both front and rear, a sign with the words "School Bus" in black letters at least six inches high, on a lemon-yellow background. After September 1, 1941, all school busses shall be equipped with an additional stop signal with the word "Stop" printed on both sides in black

letters at least five inches high on a lemon-yellow background. Such signal shall be at least twenty inches long and shall be manually controlled by the operator of the school bus so as to be clearly visible from both front and rear when extended from the left of the body of the bus and shall be displayed only when passengers are being received or discharged from the bus. When such vehicle is not in use as a school bus, the signs with the words "School Bus" shall be removed or covered.

When passenger cars are used as school busses, the same will apply except that it is not necessary for them to be equipped with the manually controlled "Stop" signal. [C31, 35, §§5079-c9,-c10,-c11; 47GA, ch 134,§§398, 399; 48GA, ch 132,§§1, 2.]

Referred to in §§5032.07, 5032.08, 5032.09

*Time extended to September 1, 1941, provided that one-half or more of the busses used by any school district for the transportation of children to and from school on September 1, 1939, are constructed and equipped as required. 48GA, ch 132, §8

5032.03 Front entrance used. All pupils shall be received and discharged from the front, right-hand entrance of every school bus, and if necessary for said pupils to cross the highway, they shall be required by the driver to pass in front of the bus and stop and look in both directions before so crossing and the driver shall not start the vehicle until he has seen that such pupils have safely crossed the highway. [C31, 35,§§5079-c10,-c11; 47GA, ch 134,§400.]

Referred to in §§5032.07, 5032.09

5032.04 Drivers. No person under sixteen years of age or who is physically or mentally incompetent shall be employed to drive a school bus, nor shall any person be so employed whose personal habits or moral conduct would be detrimental to the best interests, safety, and welfare of the children transported. Use of alcoholic beverages or immoral conduct on the part of a driver shall automatically cancel his contract and his re-employment for the remainder of the school year is hereby prohibited. Any school board may contract with the driver of any school bus for a period of three years. [C31, 35,§4960-d10; 47GA, ch 134,§401.]

Referred to in §§5032.07, 5032.09

5032.05 License and written permission. The driver of every motor vehicle in use as a school bus shall have a regular chauffeur's license issued by the department of public safety and, in addition thereto, each such driver shall secure permission in writing signed by the president and secretary of the board of the school district for which he serves, and made a part of the minutes of said board; except that in the case of a driver under the age of eighteen only a limited chauffeur's license may be issued, which limited license shall be valid for the purpose only of operating a motor vehicle to transport pupils to and from school. Such limited license shall be valid for the school year beginning July 1 and ending June 30, and shall be issued under the same requirements, except as to age, as apply to the issuance of regular chauffeur's licenses to those eighteen years of age or over. [47GA, ch 134,§402; 48GA, ch 120,§46.]

Referred to in §§5032.07, 5032.09

5032.06 Speed. No motor vehicle in use as a school bus shall be operated at a speed in excess of thirty-five miles per hour. Any violation of this section, by a driver, shall be deemed sufficient cause for canceling his contract. [47GA, ch 134,§403.]

Referred to in §§5023.03, 5032.07, 5032.09

5032.07 Applicability. The provisions of sections 5032.02 to 5032.09, inclusive, shall apply to any and all types of school districts where children are transported to and from public schools. [47GA, ch 134,§404.]

Referred to in §5032.09

5032.08 Violations. No school board, individual, or organization shall purchase, construct, or contract for use, to transport pupils to or from school, any school bus which does not comply with the minimum requirements of section 5032.02 and any individual, or any member or officer of such board or organization who authorizes, the purchase, construction, or contract for any such bus not complying with these minimum requirements shall be guilty of a misdemeanor punishable as provided in section 5036.01. [C31, 35,§§5079-c9,-c10,-c11; 47GA, ch 134,§405.]

Referred to in §§5032.07, 5032.09

5032.09 Enforcement. It shall be the duty of all peace officers and of the highway safety patrol to enforce the provisions of sections 5032.02 to 5032.08, inclusive. [47GA, ch 134, §406.]

Referred to in §5032.07

5033 Rep. by 47GA. See note under chapter 251

EQUIPMENT

5033.01 Scope and effect of regulations. It is a misdemeanor, punishable as provided in section 5036.01, for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this chapter, or which is equipped in any manner in violation of this chapter. [47GA,ch 134,§407.]

47GA, ch 134, §407, editorially divided

5033.02 Upgrade pulls—minimum speed. No motor vehicle or combination of vehicles, which cannot proceed up a three percent grade, on dry concrete pavement, at a minimum speed of twenty miles per hour, shall be operated, after January 1, 1938, upon the highways of this state. [47GA, ch 134,§407.]

5033.03 Exceptions. The provisions of this chapter with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors

except as herein made applicable. [47GA, ch 134,§408.]

Referred to in §5034.07

5033.04 When lighted lamps required.

1. Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred feet ahead shall display lighted lamps and illuminating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles as hereinafter stated.

2. Whenever requirement is hereinafter declared as to the distance from which certain lamps and devices shall render objects visible or within which such lamps or devices shall be visible, said provisions shall apply during the times stated in subsection 1 of this section upon a straight level unlighted highway under normal atmospheric conditions unless a different time or condition is expressly stated. [S13, §1571-m17; C24, 27, 31, 35,§5044; 47GA, ch 134, §409.]

Referred to in §§5034.01, 5034.03, 5034.04, 5034.06, 5034.07, 5034.14, 5034.24, 5034.27, 5034.28

5033.05 Head lamps on motor vehicles. Every motor vehicle other than a motorcycle shall be equipped with at least two head lamps with at least one on each side of the front of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in this chapter. [S13,§1571-m17; C24, 27, 31, 35, §5044; 47GA, ch 134,§410.]

5033.06 Head lamps on motorcycles. Every motorcycle shall be equipped with at least one and not more than two head lamps which shall comply with the requirements and limitations of this chapter. [S13,§1571-m17; C24, 27, 31, 35, §5047; 47GA, ch 134,§411.]

5033.07 Rear lamps and reflectors. Every motor vehicle and every vehicle which is being drawn at the end of a train of vehicles shall be equipped with a lighted rear lamp, exhibiting a red light plainly visible from a distance of five hundred feet to the rear. [S13,§1571-m17; C24, 27, 31, 35,§§5045, 5046; 47GA, ch 134,§412.]

5033.08 Illuminating plates. Either such rear lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of fifty feet to the rear. When the rear license plate is illuminated by an electric lamp other than the required rear lamp, said two lamps shall be turned on or off only by the same control switch at all times whenever head lamps are lighted. [S13,§1571-m17; C24, 27, 31, 35,§5045; 47GA, ch 134,§413.]

5033.09 Reflectors additional. Every new motor vehicle, trailer, or semitrailer hereafter sold and every commercial vehicle hereafter operated on a highway shall also carry at the rear, either as a part of the rear lamp or separately, a red reflector meeting the requirements of this chapter. [47GA, ch 134,§414.]

5033.10 Reflector requirements. Whenever a red reflector is required or permitted to be used in substitution of lamps upon a vehicle under any one of the provisions of this chapter, such reflector shall be mounted upon the vehicle at a height not to exceed forty-two inches nor less than twenty-four inches above the ground upon which the vehicle stands, and every such reflector shall be so designed and maintained as to be visible at night from all distances within five hundred feet to fifty feet from such vehicle when directly in front of a motor vehicle displaying lawfully lighted head lamps as provided in section 5034.19. [C31, 35,§4863; 47GA, ch 134,§415.]

5033.11 Approval of reflectors. No reflector as required by this chapter shall be used except of a type approved by the department and the department is hereby authorized to approve or disapprove types of reflectors submitted and to publish a list of such approved types by trade name or otherwise. [47GA, ch 134,§416.]

5034 Rep. by 47GA. See note under chapter 251

CLEARANCE AND IDENTIFICATION LIGHTS

5034.01 Kinds and placement of lights. Every motor truck, and every trailer or semitrailer of over three thousand pounds gross weight, shall be equipped with the following lighting devices and reflectors in addition to other requirements of this chapter, and such devices shall be lighted at the times mentioned in section 5033.04.

1. Every motor truck, whatever its size shall have the following:

On each side, one reflector, at or near the rear; and

On the rear, two reflectors, one at each side.

2. Every motor truck, eighty inches or more in width shall have the following in addition to the requirements of subsection 1:

a. If thirty feet or less in over-all length—

On the front, two clearance lamps, one at each side; and

On the rear, two clearance lamps, one at each side;

b. If more than thirty feet in over-all length—

On the front, two clearance lamps, one at each side;

On each side, two side-marker lamps, one at or near the front, and one at or near the rear, and an additional reflector at or near the front; and

On the rear, two clearance lamps, one at each side.

3. Every truck tractor or road tractor shall have the following:

On the front, two clearance lamps one at each side if the tractor cab is as wide as, or wider than, the widest part of the vehicle or vehicles towed;

On each side, one side-marker lamp at or near the front; and

On the rear, one tail lamp.

4. Every trailer or semitrailer having a gross weight in excess of three thousand pounds shall have the following:

On the front, two clearance lamps, one at each side, if the trailer is wider in its widest part than the cab of the vehicle towing it;

On each side, one side-marker lamp at or near the rear; two reflectors, one at or near the front and one at or near the rear; and

On the rear, two clearance lamps, one at each side; one stop light; one tail lamp; and two reflectors, one at each side.

5. Every motor truck or combination of motor truck and trailer having a length in excess of thirty feet or a width in excess of eighty inches shall be equipped with three identification lights on both front and rear. Each such group shall be evenly spaced not less than six nor more than twelve inches apart along a horizontal line near the top of the vehicle. [C31, 35,§§5044-d1,-d2, 5105-c19; 47GA, ch 134,§§417, 542.]

5034.02 Color and mounting. No lighting device or reflector, when mounted on or near the front of any motor truck or trailer, shall display any other color than white, yellow, or amber; provided that installations heretofore in place and otherwise complying with the law may display a green light until replacements are made.

No lighting device or reflector, when mounted on or near the rear of any motor truck or trailer, shall display any other color than red, except that the stop light may be red, yellow, or amber.

Clearance lamps shall be mounted on the permanent structure of the vehicle in such manner as to indicate the extreme width of the vehicle or its load. [47GA, ch 134,§418.]

5034.03 Lamp or flag on projecting load. Whenever the load upon any vehicle extends to the rear four feet or more beyond the bed or body of such vehicle there shall be displayed at the extreme rear end of the load, at the times specified in section 5033.04, a red light or lantern plainly visible from a distance of at least five hundred feet to the sides and rear. The red light or lantern required under this section shall be in addition to the red rear light required upon every vehicle. At any other time there shall be displayed at the extreme rear end of such load a red flag or cloth not less than sixteen inches square. [47GA, ch 134,§419.]

5034.04 Lamps on parked vehicles. Whenever a vehicle is parked or stopped upon a roadway or shoulder adjacent thereto, outside of a business district whether attended or unattended during the times mentioned in section 5033.04, such vehicle shall be equipped with one or more lamps which shall exhibit a white light on the roadway side visible from a distance of five hundred feet to the front of such vehicle and a red light visible from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance or resolution that no lights need be displayed upon any such vehicle when stopped or parked in accordance with local parking regulations upon a highway where there is sufficient light to reveal any person or object within a distance of five hundred feet upon such highway. Any lighted head lamps upon a parked vehicle shall be depressed or dimmed. [C24, 27, 31, 35,§5054; 47GA, ch 134, §420.]

Referred to in §§5034.05, 5034.57

5034.05 Exception. Section 5034.04 shall not apply when an accident extinguishes said light and renders a vehicle incapable of use, and when the person in control of the vehicle erects, at the earliest opportunity after the accident, such proper light at or near the vehicle as will give warning of the presence of said vehicle. [C24, 27, 31, 35,§5055; 47GA, ch 134,§421.]

5034.06 Lamps on bicycles. Every bicycle shall be equipped with a lamp on the front exhibiting a white light, at the times specified in section 5033.04 visible from a distance of at least three hundred feet to the front and with a lamp on the rear exhibiting a red light visible from a distance of three hundred feet to the rear; except that a red reflector meeting the requirements of this chapter may be used in lieu of a rear light. [C31, 35,§5045-d1; 47GA, ch 134,§422.]

5034.07 Lamps on other vehicles and equipment. All vehicles, including animal-drawn vehicles and including those referred to in section 5033.03 not hereinbefore specifically required to be equipped with lamps, shall at the times specified in section 5033.04 be equipped with at least one lighted lamp or lantern exhibiting a white light visible from a distance of five hundred feet to the front of such vehicle and with a lamp or lantern exhibiting a red light visible from a distance of five hundred feet to the rear. [C31, 35, §5045-d1; 47GA, ch 134,§423.]

5034.08 Road machinery—lights required. No tractor, road grader, road drag, or other piece of road machinery operated by motor fuel, kerosene, or coal shall be used upon any public highway in this state which is open to traffic by the public, unless there is carried at least two red danger signal lanterns or lights, each capable of remaining continuously lighted for at least sixteen hours. [C27, 31, 35,§5055-b1; 47GA, ch 134,§424.]

Referred to in §§5034.09, 5034.10

5034.09 Number of lights—duty to maintain. It shall be the duty of each person charged with the operation of any tractor, road grader, road drag, or other piece of road machinery which is required by section 5034.08 to carry red danger signal lights, to place and maintain in a lighted condition at least one signal light upon the front and one upon the rear of any such tractor, grader, drag, or other piece of road machinery from the time the sun sets until the time the sun rises the following day, whenever the same is being operated or stationed upon any public highway open to traffic by the public. [C27, 31, 35,§5055-b2; 47GA, ch 134,§425.]

Referred to in §5034.10

5034.10 Duty to enforce. It shall be the duty of the highway commission, the board of supervisors of each county, and each road patrolman to enforce the provisions of sections 5034.08 and 5034.09 as to any such tractor, grader, drag or other piece of road machinery under their direction and control, respectively. [C27, 31, 35,§5055-b3; 47GA, ch 134,§426.]

5034.11 Spot lamps. Any motor vehicle, except a private passenger vehicle, may be equipped with not to exceed one spot lamp and every lighted spot lamp shall be so aimed and used upon approaching another vehicle that no part of the high-intensity portion of the beam will be directed to the left of the prolongation of the extreme left side of the vehicle nor more than one hundred feet ahead of the vehicle. [C24, 27, 31, 35,§5051; 47GA, ch 134,§427.]

5034.12 Auxiliary driving lamps. Any motor vehicle may be equipped with not to exceed three auxiliary driving lamps mounted on the front at a height not less than twelve inches nor more than forty-two inches above the level surface upon which the vehicle stands, and every such auxiliary driving lamp or lamps shall meet the requirements and limitations set forth in this chapter. [C24, 27, 31, 35,§5050; 47GA, ch 134,§428.]

5034.13 Signal lamps and signal devices. Every motor vehicle shall be equipped with a signal lamp or signal device which is so constructed and located on the vehicle as to give a signal of intention to stop, which shall be red or yellow in color, which signal shall be plainly visible and understandable in normal sunlight and at night from a distance of one hundred feet to the rear but shall not project a glaring or dazzling light. [47GA, ch 134,§429; 48GA, ch 122,§2.]

5034.14 Self-illumination. All mechanical signal devices shall be self-illuminated when in use at the times mentioned in section 5033.04. [47GA, ch 134,§430.]

5034.15 Cowl lamps. Any motor vehicle may be equipped with not more than two side cowl or fender lamps which shall emit an amber or white light without glare. [C24, 27, 31, 35, §5050; 47GA, ch 134,§431.]

5034.16 Courtesy lamps. Any motor vehicle may be equipped with not more than one running board courtesy lamp on each side thereof which shall emit a white or amber light without glare. [C24, 27, 31, 35,§5050; 47GA, ch 134,§432.]

5034.17 Back-up lamps. Any motor vehicle may be equipped with a back-up lamp either separately or in combination with another lamp; except that no such back-up lamp shall be continuously lighted when the motor vehicle is in forward motion. [C24, 27, 31,35,§5050; 47GA, ch 134,§433.]

5034.18 Multiple-beam road-lighting equipment. Except as hereinafter provided, the head lamps, or the auxiliary driving lamps, or combinations thereof, on motor vehicles shall be so arranged that the driver may select at will between distributions of light projected to different elevations, subject to the requirements and limitations of sections 5034.19 to 5034.23, inclusive. [47GA, ch 134,§434.]

Referred to in §5034.27

5034.19 High lights. There shall be an uppermost distribution of light, or composite beam, so aimed and of such intensity as to reveal persons and vehicles at a distance of at least three hundred fifty feet ahead for all conditions of loading. The maximum intensity of this uppermost distribution of light or composite beam one degree of arc or more above the horizontal level of the lamps when the vehicle is not loaded shall not exceed eight thousand apparent candlepower, and at no other point of the distribution of light or composite beam shall there be an intensity of more than seventy-five thousand apparent candlepower. [C24, 27, 31, 35,§5052; 47GA, ch 134,§435.]

Referred to in §§5033.10, 5034.18, 5034.27

5034.20 Low lights. There shall be a lowermost distribution of light, or composite beam, so aimed that:

1. When the vehicle is not loaded, none of the high-intensity portion of the light which is directed to the left of the prolongation of the extreme left side of the vehicle shall, at a distance of twenty-five feet ahead, project higher than a level of ten inches below the level of the center of the lamp from which it comes. This requirement shall be deemed to avoid glare at all times regardless of road conditions and loading.

2. When the vehicle is not loaded, none of the high-intensity portion of the light which is directed to the right of the prolongation of the extreme left side of the vehicle shall, at a distance of twenty-five feet ahead, project higher than a level of five inches below the level of the center of the lamp from which it comes.

3. In no event shall any of the high-intensity of such lowermost distribution of light or composite beam project higher than a level of forty-two inches above the level on which the vehicle stands at a distance of seventy-five or more feet ahead. [C24, 27, 31, 35,§§5049, 5052; 47GA, ch 134,§436.]

Referred to in §§5034.18, 5034.21, 5034.23, 5034.27

5034.21 Intermediate lights. Where one intermediate beam is provided, the beam on the left side of the road shall be in conformity with subsection 1 of section 5034.20 except when arranged in accordance with the practice specified in section 5034.23. [47GA, ch 134,§437.]

Referred to in §§5034.18, 5034.27

5034.22 Mandatory requirement. All road-lighting beams shall be so aimed and of sufficient intensity to reveal a person or vehicle at a distance of at least one hundred feet ahead. [47GA, ch 134,§438.]

Referred to in §§5034.18, 5034.27

5034.23 Indicator lights. All road-lighting equipment manufactured and installed on and

after January 1, 1938, shall be so arranged that whenever any beam is used which is not in conformity with subsection 1 of section 5034.20, two white or yellow lights, one on each side of the vehicle, visible to an oncoming driver and to the driver of said vehicle shall be lighted, except that other suitable alternate means may be provided for indicating to the driver behind the light when such beams are on. Indicator lights shall not be connected otherwise than as required in this section. Beam indicator lights and front parking lights shall be so connected that neither of said lights shall be lighted when a beam is in use which conforms with subsection 1 of section 5034.20. [47GA, ch 134,§439.]

Referred to in §§5034.18, 5034.21, 5034.27

5034.24 Use of multiple-beam road-lighting equipment. Whenever a motor vehicle is being operated on a roadway or shoulder adjacent thereto, during the times specified in section 5033.04, the driver shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity to reveal persons or vehicles at a safe distance in advance of the vehicle, subject to requirements and limitations of section 5034.25. [47GA, ch 134,§440.]

5034.25 Duty to lower lights. Whenever the driver of a vehicle approaches an oncoming vehicle within five hundred feet, such driver shall use a distribution of light or composite beam so aimed that the glaring rays are not projected into the eyes of the oncoming driver, and in no case shall the high-intensity portion which is projected to the left of the prolongation of the extreme left side of the vehicle be aimed higher than the center of the lamp from which it comes at a distance of twenty-five feet, ahead, and in no case higher than a level of forty-two inches above the level upon which the vehicle stands at a distance of seventy-five feet ahead. [47GA, ch 134,§441.]

Referred to in §5034.24

5034.26 Single-beam road-lighting equipment. Head lamps arranged to provide a single distribution of light not supplemented by auxiliary driving lamps shall be permitted on motor vehicles manufactured and sold prior to July 1, 1938, in lieu of multiple-beam road-lighting equipment herein specified if the single distribution of light complies with the following requirements and limitations.

The head lamps shall be so aimed that when the vehicle is not loaded none of the high-intensity portion of the light shall at a distance of twenty-five feet ahead project higher than a level of five inches below the level of the center of the lamp from which it comes, and in no case higher than forty-two inches above the level on which the vehicle stands at a distance of seventy-five feet ahead.

The intensity shall be sufficient to reveal persons and vehicles at a distance of at least two hundred feet. [C24, 27, 31, 35,§5049; 47GA, ch 134,§442.]

Referred to in §5034.27

5034.27 Alternate road-lighting equipment. Any motor vehicle may be operated under the conditions specified in section 5033.04 when equipped with two lighted lamps upon the front thereof capable of revealing persons and objects seventy-five feet ahead in lieu of lamps required in sections 5034.18 to 5034.23, inclusive, or section 5034.26, provided, however, that at no time shall it be operated at a speed in excess of twenty miles per hour. [47GA, ch 134,§443.]

5034.28 Number of driving lamps required or permitted. At all times specified in section 5033.04 at least two lighted lamps shall be displayed, one on each side at the front of every motor vehicle except when such vehicle is parked subject to the regulations governing lights on parked vehicles. [47GA, ch 134,§444.]

5034.29 Number of lamps lighted. Whenever a motor vehicle equipped with head lamps as herein required is also equipped with any auxiliary lamps or a spot lamp or any other lamp on the front thereof projecting a beam of an intensity greater than three hundred candlepower, not more than a total of four of any such lamps on the front of a vehicle shall be lighted at any one time when upon a highway. [47GA, ch 134,§445.]

5034.30 Special restrictions on lamps. Any lighted lamp or illuminating device upon a motor vehicle other than head lamps, spot lamps, or auxiliary driving lamps which projects a beam of light of an intensity greater than three hundred candlepower shall be so directed that no part of the beam will strike the level of the roadway on which the vehicle stands at a distance of more than seventy-five feet from the vehicle. [47GA, ch 134,§446.]

5034.31 Red light in front. No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red light visible from directly in front thereof. This section shall not apply to authorized emergency vehicles. No person shall display any color of light other than red on the rear of any vehicle, except that stop lights may be red, yellow, or amber. [47GA, ch 134,§447.]

5034.32 Flashing lights. Flashing lights are prohibited on motor vehicles, except as a means for indicating a right or left turn, or intention of stopping. [47GA, ch 134,§448.]

5034.33 Selling or using lamps or devices. No person shall have for sale, sell or offer for sale for use upon or as a part of the equipment of a motor vehicle, trailer or semitrailer or use upon such vehicle any head lamp, auxiliary driving lamp, rear lamp, signal lamp or reflector which reflector is required hereunder, or parts of any of the foregoing, which tend to change the original design or performance, unless of a type which has been submitted to the commissioner and approved by him. [C24, 27, 31, 35, §4986; 47GA, ch 134,§449.]

Referred to in §§5034.35, 5034.36

5034.34 Selling or offering unsafe vehicles. No person shall have for sale, sell or offer for sale any motor vehicle, trailer, or semitrailer which is in such unsafe condition as to endanger any person or which does not contain those parts or is not at all times equipped with such lamps and brakes and other equipment in proper condition and adjustment as required in this chapter, or which is equipped in any manner in violation of this chapter. [C24, 27, 31, 35,§5087; 48GA, ch 121,§34.]

5034.35 Trademark intact. No person shall have for sale, sell or offer for sale for use upon or as a part of the equipment of a motor vehicle, trailer or semitrailer any lamp or device mentioned in section 5034.33 which has been approved by the commissioner unless such lamp or device bears thereon the trademark or name under which it is approved so as to be legible when installed. [47GA, ch 134,§450.]

5034.36 Bulbs focused. No person shall use upon any motor vehicle, trailer or semitrailer any lamps mentioned in section 5034.33 unless said lamps are equipped with bulbs of a rated candlepower and are mounted and adjusted as to focus and aim in accordance with instructions of the commissioner. [47GA, ch 134,§451.]

5034.37 Authority of commissioner.

1. The commissioner is hereby authorized to approve or disapprove lighting devices.
2. The commissioner is hereby required to approve or disapprove any lighting device, of a type on which approval is specifically required in this chapter, within a reasonable time after such device has been submitted.
3. The commissioner is further authorized to set up the procedure which shall be followed when any device is submitted for approval.
4. The commissioner upon approving any such lamp or device shall issue to the applicant a certificate of approval together with any instructions determined by him.
5. The commissioner shall publish lists of all such lamps and devices by name and type which comply with the requirements of this chapter, together with instructions as to the permissible candlepower rating of the bulbs which he has determined for use therein and such other instructions as to adjustment as the commissioner may deem necessary. [C24, 27, 31, 35,§§4985, 4987; 47GA, ch 134,§452.]

5034.38 Revocation of certificate. When the commissioner has reason to believe that an approved device as being sold commercially does not comply with the requirements of this chapter, he may, after giving thirty days previous notice to the person holding the certificate of approval for such device in this state, conduct a hearing upon the question of compliance of said approved device. After said hearing the commissioner shall determine whether said approved device meets the requirements of this chapter. If said device does not meet the requirements of this chapter he shall give notice to the person holding the certificate of approval for such device in this state.

If at the expiration of ninety days after such notice the person holding the certificate of approval for such device has failed to satisfy the commissioner that said approved device as thereafter to be sold meets the requirements of this chapter, the commissioner shall suspend or revoke the approval issued therefor until or unless such device is resubmitted to and retested by an authorized testing agency and is found to meet the requirements of this chapter, and may require that all said devices sold since the notification following the hearing be replaced with devices that do comply with the requirements of this chapter. The commissioner may at the time of the retest purchase in the open market and submit to the testing agency one or more sets of such approved devices, and if such device upon such retest fails to meet the requirements of this chapter, the commissioner may refuse to renew the certificate of approval of such device. [47GA, ch 134,§453.]

5034.39 Brake equipment.

1. Every motor vehicle, other than a motorcycle, when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels.
2. Every motorcycle, and bicycle with motor attached, when operated upon a highway shall be equipped with at least one brake, which may be operated by hand or foot.
3. Every trailer or semitrailer of a gross weight of three thousand pounds or more, and every trailer coach intended for use for human habitation, shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, and so designed as to be applied by the driver of the towing motor vehicle from its cab, and said brakes shall, after January 1, 1939, be so designed and connected that in case of an accidental breakaway of the towed vehicle the brakes shall be automatically applied. Every semitrailer of a gross weight of three thousand pounds or more shall be equipped with a separate, auxiliary means of applying the brakes on the semitrailer from the cab of the towing vehicle.
4. Every new motor vehicle, trailer, or semitrailer hereafter sold in this state and operated upon the highways shall be equipped with service brakes upon all wheels of every such vehicle, except any motorcycle, and except that any trailer or semitrailer of less than three thousand pounds gross weight need not be equipped with brakes. [S13,§1571-m17; C24, 27, 31, 35, §5039; 47GA, ch 134,§454.]

Referred to in §5035.18

5034.40 Performance ability.

1. The service brakes upon any motor vehicle or combination of motor vehicles, when upon dry asphalt or concrete pavement surface free from loose material where the grade does not exceed one percent, when traveling twenty miles an hour shall be adequate:

a. To stop such vehicle or vehicles having a gross weight of less than five thousand pounds within a distance of thirty feet.

b. To stop such vehicle or vehicles having a gross weight in excess of five thousand pounds within a distance of forty-five feet.

2. Under the above conditions the hand brake shall be adequate to hold such vehicle or vehicles stationary on any grade upon which operated.

3. Under the above conditions the service brakes upon a motor vehicle equipped with two-wheel brakes only, and when permitted hereunder, shall be adequate to stop the vehicle within a distance of forty-five feet and the hand brake adequate to stop the vehicle within a distance of fifty-five feet.

4. All braking distances specified in this section shall apply to all vehicles mentioned, whether such vehicles are not loaded or are loaded to the maximum capacity permitted under this chapter.

5. All brakes shall be maintained in good working order and shall be so adjusted as to operate as equally as practicable with respect to the wheels on opposite sides of the vehicle. [S13, §1571-m17; C24, 27, 31, 35,§5039; 47GA, ch 134, §455.]

Referred to in §5035.13

5034.41 Horns and warning devices. Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than two hundred feet, but no horn or other warning device shall emit an unreasonably loud or harsh sound or a whistle. The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway. [S13,§1571-m17; C24, 27, 31, 35,§§5040, 5041; 47GA, ch 134,§456.]

5034.42 Sirens and bells prohibited. No vehicle shall be equipped with nor shall any person use upon a vehicle any siren, whistle, or bell, except as otherwise permitted in this section. It is permissible but not required that any commercial vehicle be equipped with a theft alarm signal device which is so arranged that it cannot be used by the driver as an ordinary warning signal. Any authorized emergency vehicle may be equipped with a siren, whistle, or bell, capable of emitting sound audible under normal conditions from a distance of not less than five hundred feet and of a type approved by the department, but such siren shall not be used except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, in which said latter events the driver of such vehicle shall sound said siren when necessary to warn pedestrians and other drivers of the approach thereof. [47GA, ch 134,§457.]

5034.43 Bicycle sirens or whistles. No bicycle shall be equipped with nor shall any person use upon a bicycle any siren or whistle. [47GA, ch 134,§458.]

5034.44 Loud signaling at night. Loud signaling devices shall not be used during the period of from one hour after sunset to one hour before sunrise, unless absolutely necessary to avoid accidents. [C24, 27, 31, 35,§5042; 47GA, ch 134,§459.]

5034.45 Mufflers, prevention of noise. Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cutout, bypass or similar device upon a motor vehicle on a highway. [S13,§1571-m18; C24, 27, 31, 35,§§5061–5063; 47GA, ch 134,§460.]

5034.46 Mirrors. Every motor vehicle shall be equipped with a mirror so located as to reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle. Any motor vehicle so loaded, or towing another vehicle in such manner, as to obstruct the view in a rear view mirror located in the driver's compartment shall be equipped with a side mirror so located that the view to the rear will not be obstructed. [C31, 35,§5105-c20; 47GA, ch 134,§§461, 543.]

5034.47 Windshields unobstructed. No person shall drive any motor vehicle equipped with a windshield which does not permit clear vision, or with any sign, poster or other nontransparent material upon the front windshield of such vehicle other than a certificate or other paper required to be so displayed by law, which shall be displayed in the upper right-hand corner. [47GA, ch 134,§462; 48GA, ch 121,§35.]

5034.48 Windshield wipers. The windshield on every motor vehicle shall be equipped with a device for cleaning rain, snow or other moisture from the windshield, which device shall be so constructed as to be controlled or operated by the driver of the vehicle. [47GA, ch 134,§463.]

5034.49 Restrictions as to tire equipment. Every solid rubber tire on a vehicle shall have rubber on its entire traction surface at least one inch thick above the edge of the flange of the entire periphery. No pneumatic tire shall be used on a motor vehicle when such tire is worn to the extent that more than two layers of fabric or cords are exposed on the entire traction surface. [C31, 35,§5065-c1; 47GA, ch 134,§464.]

5034.50 Metal tires prohibited. No person shall operate or move on any highway any motor vehicle, trailer, or semitrailer having any metal tire in contact with the roadway. [C24, 27, 31, 35,§§4918, 4919; 47GA, ch 134,§465.]

5034.51 Projections on wheels. No tire on a vehicle moved on a highway shall have on its

periphery any block, stud, flange, cleat, or spike or any other protuberances of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use farm machinery with tires having protuberances which will not injure the highway, and except also that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice, or other conditions tending to cause a vehicle to skid. [S13,§1571-1a; C24, 27, 31, 35,§§5068, 5070; 47GA, ch 134,§466.]

5034.52 Exceptions. The state highway commission and local authorities in their respective jurisdictions may, in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with transverse corrugations upon the periphery of such movable tracks or farm tractors or other farm machinery, the operation of which upon a highway would otherwise be prohibited under this chapter. [C24, 27, 31, 35,§5069; 47GA, ch 134,§467.]

5034.53 Safety glass. No person shall sell any new motor vehicle nor shall any motor vehicle, manufactured since July 1, 1935, be registered, or operated unless such vehicle is equipped with safety glass wherever glass is used in doors, windows, and windshields. Replacements of glass in doors, windows, or windshields shall be of safety glass. [C35,§§4991-f1, -f2; 47GA, ch 134,§468.]

Referred to in §5034.55

5034.54 Definition. The term "safety glass" shall mean any product composed of glass, so manufactured, fabricated, or treated as substantially to prevent shattering and flying of the glass when struck or broken or such other or similar product as may be approved by the commissioner. [C35,§4991-f3; 47GA, ch 134, §469.]

Referred to in §5034.55

5034.55 List approved. The commissioner shall compile and publish a list of types of glass by name approved by him as meeting the requirements of section 5034.54, and the commissioner shall not register any motor vehicle which is subject to the provisions of section 5034.53 unless it is equipped with an approved type of safety glass, and he shall suspend the registration of any motor vehicle so subject to said section which he finds is not so equipped until it is made to conform to the requirements of said section. [C35,§4991-f4; 47GA, ch 134,§470.]

5034.56 Trucks to carry flares. No person shall operate any motor truck upon a highway outside of a business or residence district at any time from a half hour after sunset to a half hour before sunrise unless there shall be carried in such vehicle a sufficient number of flares, not less than three, or electric lanterns or other signals capable of continuously producing three warning lights each visible from a distance of at least five hundred feet for a period of at least eight hours, except that a motor vehicle transporting flammables may carry red reflectors in place of the other signals above mentioned.

Every such flare, lantern, signal, or reflector shall be of a type approved by the commissioner and he shall publish lists of those devices which he has approved as adequate for the purposes of this section. [C35,§5067-e1; 47GA, ch 134,§471.]

5034.57 Display of flares. Whenever a motor truck is stopped upon or immediately adjacent to the main traveled portion of a highway outside of a business or residence district, during the times when lighted lamps must be displayed, then the driver or other person in charge of such vehicle shall, in addition to the requirements of section 5034.04, cause a lighted fusee to be immediately placed on the roadway at the traffic side of such vehicle; as soon thereafter as possible, and in any case within the burning period of the fusee, three lighted flares shall be placed on the roadway, one at a distance of not less than one hundred feet in advance of such vehicle, one at a distance of not less than one hundred feet to the rear of such vehicle and the third upon the traffic side of such vehicle; provided that if such vehicle is stopped within three hundred feet of a curve, crest of a hill, or other obstruction to view, the flare in that direction shall be so placed as to afford ample warning to other users of the highway, but in no case less than one hundred feet from such vehicle. When such flares are taken up, during the times when lighted lamps must be displayed, a lighted fusee shall be placed at the traffic side of such vehicle.

In the event such vehicle is used in the transportation of flammable liquids or gases, whether loaded or empty, no open burning flares or fusees shall be used and red electric lanterns shall be used in lieu thereof.

During the times lighted lamps are not required, red flags shall be used in place of flares or electric lanterns, provided that if such parking continues into the period when lighted lamps are required, flares or electric lanterns shall be placed as above provided. [C35,§5067-e1; 47GA, ch 134,§472.]

Referred to in §5034.58

5034.58 Explosives. No person shall at any time operate a motor truck transporting explosives as a cargo or part of a cargo upon a highway unless it carries flares or electric lanterns as herein required, but such flares or electric lanterns must be capable of producing a red light and shall be displayed upon the roadway when and as required in section 5034.57. [47GA, ch 134,§473.]

5034.59 Vehicles transporting explosives. Any person operating any vehicle transporting any explosive as a cargo or part of a cargo upon a highway shall at all times comply with the provisions of this section.

Said vehicle shall be marked or placarded on each side and the rear with the word "Explosives" in letters not less than eight inches high, or there shall be displayed on the rear of such vehicle a red flag not less than twenty-four

inches square marked with the word "Danger" in white letters six inches high.

Every said vehicle shall be equipped with not less than two fire extinguishers, filled and ready for immediate use, and placed at a convenient point on the vehicle so used. [47GA, ch 134, §474.]

5035 Rep. by 47GA. See note under chapter 251

SIZE, WEIGHT, AND LOAD

5035.01 Scope and effect. It is a misdemeanor, punishable as provided in section 5036.01, for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this chapter, and the maximum size and weight of vehicles herein specified shall be lawful throughout this state, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this chapter. [47GA, ch 134,§475.]

5035.02 Exceptions. The provisions of this chapter governing size, weight, and load shall not apply to fire apparatus, road machinery, or to implements of husbandry temporarily moved upon a highway, or to a vehicle operated under the terms of a special permit issued as provided in sections 5035.16 to 5035.19, inclusive. [47GA, ch 134,§476.]

5035.03 Width of vehicles. The total outside width of any vehicle or the load thereon, except loose hay or straw, shall not exceed eight feet. [C24,§§5067, 5104; C27,§§5067, 5105-a32; C31, 35,§§5067, 5105-a32, 5105-c18; 47GA, ch 134, §§477, 537, 541.]

5035.04 Projecting loads on passenger vehicles. No passenger-type vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof. [C31, 35, §5067-d1; 47GA, ch 134,§478.]

5035.05 Height of vehicles. No vehicle unladen or with load shall exceed a height of twelve feet. [C31, 35,§5067-d2; 47GA, ch 134, §479.]

5035.06 Maximum length. No motor vehicle, trailer, semitrailer or vehicle, except fire fighting apparatus, which exceeds thirty-three feet in length over all, nor any combination of such vehicles coupled together, which exceeds forty-five feet in length over all, shall be operated on the highways of this state. [C31, 35,§5067-d4; 47GA, ch 134,§480.]

5035.07 Loading beyond front. The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle if it is equipped with such a bumper. [47GA, ch 134,§482.]

5035.08 Dual axle requirement. No motor vehicle, trailer, or semitrailer having axles less than forty inches apart center to center, shall be operated on the highways of this state. [C31, 35,§5067-d3; 47GA, ch 134,§483.]

5035.09 Spilling loads on highways. No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway. [47GA, ch 134,§484.]

5035.10 Trailers and towed vehicles. When one vehicle is towing another the drawbar or other connection shall not exceed fifteen feet from one vehicle to the other except the connection between any two vehicles transporting poles, pipe, machinery or other objects of structural nature which cannot readily be dismembered. [47GA, ch 134,§485.]

5035.11 Drawbars and safety chains. When one vehicle is towing or pulling another vehicle the drawbar or other connection shall be of sufficient strength to pull all weight towed thereby and shall be fastened to the frame of the towing vehicle in such manner as to prevent sidesway, and in addition to such principal connection there shall be a safety chain which shall be so fastened as to be capable of holding the towed vehicle should the principal connection for any reason fail.

The connection between a truck tractor and a semitrailer with a gross weight of three thousand pounds or more shall be of a type approved by the commissioner, and the commissioner is hereby given authority to approve or disapprove such types of connection submitted to him. [47GA, ch 134,§486.]

5035.12 Maximum load. The total maximum load on any one wheel of any vehicle, including the weight of the vehicle and the load it carries, shall be four tons for vehicles equipped with pneumatic tires or three and one-half tons for vehicles equipped with solid rubber tires, provided the total maximum weight of any vehicle or combination of vehicles and load shall not in any event exceed twelve tons plus four hundred fifty pounds for each foot, or fraction thereof, of distance between the front and rear axles of the vehicle or first and last axles of a combination of vehicles. Two or more wheels on the same end of a given axle shall be considered as one wheel. [C24, 27, 31, 35,§5065; 47GA, ch 134, §487.]

5035.13 Investigation as to safety. The commissioner upon registering any vehicle under the laws of this state which vehicle is designed and used primarily for the transportation of property or for the transportation of ten or more persons, may require such information and may

make such investigation or test as necessary to enable him to determine whether such vehicle may safely be operated upon the highways in compliance with all the provisions of this chapter. He shall register every such vehicle for a permissible gross weight not exceeding the limitations set forth in this chapter. Every such vehicle shall meet the following requirements:

1. It shall be equipped with brakes as required in sections 5034.39 and 5034.40.

2. Every motor vehicle to be operated outside of business and residence districts shall have motive power adequate to propel at a reasonable speed such vehicle and any load thereon or to be drawn thereby. [47GA, ch 134,§488.]

5035.14 Weighing vehicles and removal of excess. Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to require the driver to stop and submit to a weighing of the same either by means of portable or stationary scales and may require that such vehicle be driven to the nearest public scales.

Whenever an officer upon weighing a vehicle and load, as above provided, determines that the weight is unlawful, such officer may require the driver to stop the vehicle in a suitable place and remain standing until such portion of the load is removed as may be necessary to reduce the gross weight of such vehicle to such limit as permitted under this chapter. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator.

Any driver of a vehicle who fails or refuses to stop and submit the vehicle and load to a weighing, or who fails or refuses when directed by an officer upon a weighing of the vehicle to stop the vehicle and otherwise comply with the provisions of this section, shall be guilty of a misdemeanor and punished as provided in section 5036.01. [C31, 35,§4921-d1; 47GA, ch 134, §489.]

5035.15 Loading capacity. An increased gross weight registration may be obtained for any vehicle by payment of the difference between the annual fee for the higher gross weight and the amount of the fee for the gross weight at which it is registered. It shall be unlawful for any person to operate a motor truck, trailer, truck tractor, road tractor, semitrailer or combination thereof, on the public highways with a gross weight exceeding that for which it is registered by more than five percent of the gross weight for which it is registered, provided, however, that any vehicle or vehicle combination referred to herein, while carrying a load of raw farm products, soil fertilizers, including ground limestone, raw dairy products or livestock, live poultry, eggs, may be operated with a gross weight of twenty-five percent in excess of the gross weight for which it is registered. [C24, 27,§4921; C31, 35,§§4921,-c1,-c2; 47GA, ch 134,§490; 48GA, ch 135,§7.]

Section as amended effective December 31, 1939, 48GA, ch 135,§22

5035.16 Permits for excess size and weight. The state highway commission with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move for a distance not exceeding twenty-five miles a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in this chapter or otherwise not in conformity with the provisions of this chapter upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible, provided, however, that the state highway commission or such local authorities may in their discretion issue a special permit for the movement of road construction machinery and equipment for a distance exceeding twenty-five miles if such machinery and equipment is to be used upon construction projects within the state of Iowa, or is manufactured within the state of Iowa, and the weight of such machinery and equipment so moved, exclusive of vehicle, does not exceed forty thousand pounds. [C31, 35,§§5067-d7,-d8; 47GA, ch 134,§491; 48GA, ch 129,§1.]

Referred to in §5035.02

5035.17 Application. The application for any such permit shall specifically describe the vehicle or vehicles and load to be operated or moved and the particular highways for which permit to operate is requested, and whether such permit is requested for a single trip or for continuous operation. [47GA, ch 134,§492.]

Referred to in §5035.02

5035.18 Issuance. The state highway commission or local authority is authorized to issue or withhold such permit at its discretion; or, if such permit is issued, to limit the number of trips, or to establish seasonal or other time limitations within which the vehicles described may be operated on the highways indicated, or otherwise to limit or prescribe conditions of operation of such vehicle or vehicles, when necessary to assure against undue damage to the road foundations, surfaces or structures, and may require such undertaking or other security as may be deemed necessary to compensate for any injury to any roadway or road structure. [47GA, ch 134,§493.]

Referred to in §5035.02

5035.19 Carried in vehicle. Every such permit shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any peace officer or authorized agent of any authority granting such permit, and no person shall violate any of the terms or conditions of such special permit. [47GA, ch 134,§494.]

Referred to in §5035.02

5035.20 Local authorities may restrict. Local authorities with respect to highways under their jurisdiction may by* ordinance or

resolution prohibit the operation of vehicles upon any such highway or impose restrictions as to the weight of vehicles to be operated upon any such highway, for a total period of not to exceed ninety days in any one calendar year, whenever any said highway by reason of deterioration, rain, snow, or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced. [C24, 27, §4996; C31, 35,§§4686-c1, 4996; 47GA, ch 134, §§495, 535.]

Referred to in §5018.01

*"Be" in enrolled act.

5035.21 Signs posted. The local authority enacting any such ordinance or resolution shall erect or cause to be erected and maintained signs designating the provisions of the ordinance or resolution at each end of that portion of any highway affected thereby, and the ordinance or resolution shall not be effective unless and until such signs are erected and maintained. [C31, 35,§4686-c1; 47GA, ch 134,§§496, 535.]

Referred to in §5018.01

5035.22 Limiting trucks. Local authorities with respect to highways under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways. [47GA, ch 134,§497.]

Referred to in §5018.01

5035.23 Highway commission may restrict. The state highway commission shall likewise have authority as hereinabove granted to local authorities to determine by resolution and to impose restrictions as to the weight of vehicles operated upon any highway under the jurisdiction of said commission and such restrictions shall be effective when signs giving notice thereof are erected upon the highway or portion of any highway affected by such resolution. [C24, 27, 31, 35,§5066; 47GA, ch 134,§498.]

5035.24 Liability for damage. Any person driving any vehicle, object, or contrivance upon any highway or highway structure shall be liable for all damage which said highway or structure may sustain as a result of any illegal operation, driving, or moving of such vehicle, object, or contrivance, or as a result of operation, driving, or moving any vehicle, object, or contrivance weighing in excess of the maximum weight in this chapter but authorized by a special permit issued as provided in this chapter.

Whenever such driver is not the owner of such vehicle, object, or contrivance, but is so operating, driving, or moving the same with the express or implied permission of said owner, then said owner and driver shall be jointly and severally liable for any such damage.

Such damage may be recovered in a civil action brought by the authorities in control of such highway or highway structure. [47GA, ch 134,§499.]

5036 Rep. by 47GA. See note under chapter 251

PENALTIES

5036.01 Penalties for misdemeanor. It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this state declared to be a felony. Chapter 180 shall have no application in the prosecution of offenses committed in violation of this chapter.

Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days. [S13,§§1569, 1571-2a, -m21,-m22,-m26,-m27,-m29, 4808-b; SS15,§1571-m12a; C24,§§4903, 5081,5089,13119; C27,§§4903, 5055-b4, 5081, 5089, 13119; C31,§§4686-c2, 4903, 5055-b4, 5079-d6, 5081, 5089, 13119; C35,§§4686-c2, 4903, 4991-f5, 5024-e3, 5055-b4, 5067-e2, 5079-d6, 5081, 5089, 13119; 47GA, ch 134,§§500, 550.]

Referred to in §§5001.01, 5006 07, 5006.08, 5006.09, 5007 02, 5007.03, 5007.08, 5013.18, 5015.01, 5020.02, 5023.10, 5024.04, 5032.08, 5033.01, 5035 01, 5035.14, 5037.04

5036.02 Penalty for felony. Any person who is convicted of a violation of any of the provisions of this chapter herein declared to constitute a felony, and for which another punishment is not otherwise provided, shall be punished by imprisonment for a term of not more than five years, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment. [C24, 27, 31, 35,§5081; 47GA, ch 134,§501.]

Referred to in §§5006.06, 5006.21, 5007.04

5037 Rep. by 47GA. See note under chapter 251

PARTIES, PROCEDURE UPON ARREST, AND REPORTS IN CRIMINAL CASES

5037.01 Offenses by owners. It is unlawful for the owner, or any other person, employing or otherwise directing the driver of any vehicle to require or knowingly to permit the operation of such vehicle upon a highway in any manner contrary to law. [C24, 27, 31, 35,§5085; 47GA, ch 134,§503.]

5037.02 Notice to appear. Whenever a person is arrested for any violation of this chapter punishable as a misdemeanor, such person may be immediately taken before a magistrate, or the arresting officer may prepare in duplicate written notice to appear in court containing the name and address of such person, the registration number of his vehicle, if any, the offense charged, and the time when and place where such person shall appear in court. The place specified in said notice to appear must be before a magistrate within the township or county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense. [C24, 27, 31, 35,§5082; 47GA, ch 134, §504.]

Referred to in §5037.03

5037.03 Promise to appear. Before the arrested person may be released, as provided in section 5037.02, he must give his written promise so to appear in court by signing in duplicate the written notice prepared by the arresting officer. The original of said notice shall be retained by said officer and the copy thereof delivered to the person arrested. Thereupon, said officer may release the person arrested from custody. [47GA, ch 134,§505.]

5037.04 Violation of promise to appear. Any person wilfully violating his written promise to appear in court, given as provided in this chapter, is guilty of a misdemeanor, punishable as provided in section 5036.01 regardless of the disposition of the charge upon which he was originally arrested.

A written promise to appear in court may be complied with by an appearance by counsel. [47GA, ch 134,§506.]

5037.05 Procedure not exclusive. The foregoing provisions of this chapter shall govern all peace officers in making arrests without a warrant for violations of this chapter for offenses committed in their presence, but the procedure prescribed herein shall not be exclusive of any other method prescribed by law for the arrest and prosecution of a person. [47GA, ch 134,§507.]

5037.06 Record inadmissible in a civil action. No record of the conviction of any person for any violation of this chapter shall be admissible as evidence in any court in any civil action. [47GA, ch 134,§508.]

5037.07 Conviction not to affect credibility. The conviction of a person upon a charge of violating any provision of this chapter or other traffic regulation less than a felony shall not affect or impair the credibility of such person as a witness in any civil or criminal proceeding. [47GA, ch 134,§509.]

5037.08 Convictions to be reported. Every magistrate or judge of a court not of record and every clerk of a court of record shall keep a full record of every case in which a person is charged with any violation of this chapter or of any other law regulating the operation of vehicles on highways.

Within ten days after the conviction or forfeiture of bail of a person upon a charge of violating any provision of this chapter or other law regulating the operation of vehicles on highways every said magistrate of the court or clerk of the court of record in which such conviction was had or bail was forfeited shall prepare and immediately forward to the department an abstract of the record of said court covering the case in which said person was so convicted or forfeited bail, which abstract must be certified by the person so required to prepare the same to be true and correct.

Said abstract must be made upon a form furnished by the department and shall include the name and address of the party charged, the registration number of the vehicle involved, the nature of the offense, the date of hearing, the plea, the judgment, or whether bail forfeited and the amount of the fine or forfeiture as the case may be.

Every clerk of a court of record shall also forward a like report to the department upon the conviction of any person of manslaughter or other felony in the commission of which a vehicle was used.

The failure, refusal, or neglect of any such officer to comply with any of the requirements of this section shall constitute misconduct in office and shall be ground for removal therefrom.

The department shall keep all abstracts received hereunder at its main office and the same shall be open to public inspection during reasonable business hours. [S13,§1571-m23; C24, 27, 31, 35,§§5076–5078; 47GA, ch 134,§510.]

5037.09 Liability for damages. In all cases where damage is done by any car by reason of negligence of the driver, and driven with the consent of the owner, the owner of the car shall be liable for such damage. [C24, 27, 31, 35, §5026; 47GA, ch 134,§511.]

5037.10 Guest statute. The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle. [C27, 31, 35,§5026-b1; 47GA, ch 134,§512.]

5038 Rep. by 47GA. See note under chapter 251

ACTIONS AGAINST NONRESIDENTS

5038.01 Legal effect of use and operation. The use and operation of a motor vehicle in this state on the public highways thereof by a person who is a nonresident of this state shall be deemed:

1. An agreement by him that he shall be subject to the jurisdiction of the district court of this state over all civil actions and proceedings against him for damages to person or property growing or arising out of such use and operation, and

2. An appointment by such nonresident of the commissioner of the public safety department of this state as his lawful attorney upon whom may be served all original notices of suit pertaining to such actions and proceedings, and

3. An agreement by such nonresident that any original notice of suit so served shall be of the same legal force and validity as if personally served on him in this state. [C31, 35,§5079-d11; 47GA, ch 134,§513; 48GA, ch 121,§18.]

Referred to in §5038.02

5038.02 "Person" defined. The term "person", as used in section 5038.01 shall mean:

1. The owner of the vehicle whether it is being used and operated personally by said owner, or by his agent.

2. An agent using and operating the vehicle for his principal.

3. Any person who is in charge of the vehicle and of the use and operation thereof with the express or implied consent of the owner. [C31, 35,§5079-d12; 47GA, ch 134,§514.]

5038.03 Original notice—form. The original notice of suit filed with the commissioner shall be in form and substance the same as now provided in suits against residents of this state, except that that part of said notice pertaining to the return day shall be in substantially the following form, to wit:

"and unless you appear thereto and defend in the district court of Iowa in and for ..... county at the courthouse in ..... Iowa before noon of the sixtieth day following the filing of this notice with the commissioner of the public safety department of this state, default will be entered and judgment rendered against you by the court if then in session in said county, and if the court is not then in session said default will be entered and judgment rendered by the court on the first day of the first succeeding term or as soon thereafter as the same may be reached." [C31, 35,§5079-d13; 47GA, ch 134,§515; 48GA, ch 121,§19.]

5038.04 Manner of service. Plaintiff in any such action shall cause the original notice of suit to be served as follows:

1. By filing a copy of said original notice of suit with said commissioner, together with a fee of two dollars, and

2. By mailing to the defendant, and to each of the defendants if more than one, within ten days after said filing with the commissioner, by restricted registered mail addressed to the defendant at his last known residence or place of abode, a notification of the said filing with the commissioner. [C31, 35,§5079-d14; 47GA, ch 134,§516.]

Referred to in §5038.05

5038.05 Notification to nonresident—form. The notification, provided for in section 5038.04, shall be in substantially the following form, to wit:

"To ..... (Here insert the name of each defendant and his residence or last known place of abode as definitely as known.)

You will take notice that an original notice of suit against you, a copy of which is hereto attached, was duly served upon you at Des Moines, Iowa, by filing a copy of said notice on the ..... day of....., 19...., with the commissioner of the public safety department of the state of Iowa.

Dated at ....., Iowa, this ..... day of....., 19.....

.....
Plaintiff.

By .....
Attorney for plaintiff."

[C31, 35,§5079-d15; 47GA, ch 134,§517; 48GA, ch 121,§20.]

5038.06 "Restricted registered mail" defined. The term "restricted registered mail" means mail which carries on the face thereof, in a conspicuous place where it will not be obliterated, the indorsement, "Deliver to addressee only", and which also requires a return receipt. [C31, 35,§5079-d16; 47GA, ch 134,§518.]

5038.07 Optional notification. In lieu of mailing said notification to the defendant in a foreign state, plaintiff may cause said notification to be personally served in the foreign state on the defendant by any adult person not a party to the suit, by delivering said notification to the defendant or by offering to make such delivery in case defendant refuses to accept delivery. [C31, 35,§5079-d17; 47GA, ch 134, §519.]

5038.08 Proof of service. Proof of the filing of a copy of said original notice of suit with the commissioner, and proof of the mailing or personal delivery of said notification to said nonresident shall be made by affidavit of the party doing said acts. All affidavits of service shall be indorsed upon or attached to the originals of the papers to which they relate. All proofs of service, including the return registry receipt, shall be forthwith filed with the clerk of the district court. [C31, 35,§5079-d18; 47GA, ch 134,§520.]

5038.09 Actual service within this state. The foregoing provisions relative to service of original notice of suit on nonresidents shall not be deemed to prevent actual personal service in this state upon the nonresident in the time, manner, form and under the conditions provided for service on residents. [C31, 35,§5079-d19; 47GA, ch 134,§521.]

5038.10 Venue of actions. Actions against nonresidents as contemplated by this law may be brought in the county of which plaintiff is a resident, or in the county in which the injury was received, or damage done. [C31, 35,§5079-d20; 47GA, ch 134,§522.]

5038.11 Continuances. The court in which such action is pending shall grant such continuances to a nonresident defendant as may be necessary to afford him reasonable opportunity to defend said action. [C31, 35,§5079-d21; 47GA, ch 134,§523.]

5038.12 Duty of commissioner. The commissioner shall keep a record of all notices of suit filed with him, shall not permit said filed notices to be taken from his office except on an order of court, and shall, on request, and without fee, furnish any defendant with a certified copy of the notice in which he is defendant. [C31, 35,§5079-d22; 47GA, ch 134,§524.]

5038.13 Expenses and attorney fees. If judgment is rendered against the plaintiff, upon the trial of said action, said judgment shall include the reasonable expenses incurred by the defendant and his attorney in appearing to and defending against said action, provided that in the judgment of the trial court said action was commenced maliciously or without probable cause. [C31, 35,§5079-d23; 47GA, ch 134,§525.]

5038.14 Dismissal—effect. The dismissal of an action after the nonresident has appeared under the substituted service herein authorized, shall bar the recommencement of the same action against the same defendant unless said recommenced action is accompanied by actual personal service of the original notice of suit on said defendant in this state. [C31, 35,§5079-d24; 47GA, ch 134,§526.]

Constitutionality, 47GA, ch 134, §553

5039 Rep. by 47GA. See note under chapter 251

CHAPTER 251.2

MOTOR VEHICLE DEALERS

5039.01 Administration.
5039.02 Definitions.
5039.03 Prohibited acts.
5039.04 Application for license as a motor vehicle dealer.
5039.05 License fee of motor vehicle dealer.
5039.06 Denial of license.
5039.07 License of motor vehicle dealer.
5039.08 Supplemental statements.
5039.09 Revocation of license.
5039.10 Appeals.
5039.11 Injunctions.
5039.12 Motor vehicle dealers license fee fund.
5039.13 Rules and regulations.
5039.14 Penalties.
5039.15 Liberal construction.
5039.16 Short title.

5039.01 Administration. The administration of this chapter shall be vested in the commissioner of public safety. The commissioner may employ such employees as are necessary for the administration of this chapter, provided the amount expended in any one year shall not exceed the revenue derived from the provisions of this chapter. [47GA, ch 135,§1; 48GA, ch 121, §24.]

5039.02 Definitions. As used in this chapter and unless a different meaning appears from the context:

1. "Person" includes any individual, firm, corporation, copartnership, joint adventure or association, and the plural as well as the singular number.
2. "Department" means the department of public safety.
3. "Selling" includes bartering, exchanging or otherwise dealing in.
4. "At retail" means to dispose of a motor vehicle to a person who may devote it to a consumer use.
5. "Place of business" means a designated location wherein proper and adequate facilities shall be maintained for displaying either new or used cars. [47GA, ch 135,§2; 48GA, ch 121, §25; ch 130,§1.]

5039.03 Prohibited acts.

1. No person shall engage in this state in the business of selling at retail new motor vehicles of any make or represent or advertise that he is engaged or intends to engage in such business in this state unless he is authorized by a contract in writing between himself and the manufacturer or distributor of such make of new motor vehicles to so dispose thereof in this state and unless the department has licensed the person as a motor vehicle dealer in this state in motor vehicles of such make and has issued to the person a license in writing as in this chapter provided.

2. No person, other than a licensed dealer in new motor vehicles, shall engage in this state in the business of selling at retail used motor vehicles or represent or advertise that he is engaged or intends to engage in such business in this state unless and until the department has licensed such person as a used motor vehicle dealer in the state and has issued to the person a license in writing as in this chapter provided.

3. Nothing contained in subsections 1 and 2 hereof shall be construed as requiring the separate licensing of persons employed as salesmen of motor vehicles by a licensee hereunder, but the department is hereby authorized and empowered to make, publish and promulgate such reasonable rules and regulations as it may deem necessary for the proper identification of persons so employed as salesmen by any such licensee.

4. No person, who is engaged in the business of selling at retail motor vehicles, shall enter into any contract, agreement or understanding, express or implied, with any manufacturer or distributor of any such motor vehicles that he will sell, assign or transfer any retail installment contracts arising from the retail installment sale of such motor vehicles or any one or more thereof only to a designated person or class of persons. Any such condition, agreement, or understanding between any manufacturer or distributor and a motor vehicle dealer in this state is hereby declared to be against the public policy of this state and to be unlawful and void.

5. No manufacturer or distributor of motor vehicles or any agent of such manufacturer or distributor, shall terminate or threaten to terminate any contract, agreement or understanding for the sale of new motor vehicles to any motor vehicle dealer in this state, before the expiration date of said contract, agreement or understanding, without just, reasonable and lawful cause therefor or because such motor vehicle dealer failed to sell, assign or transfer any retail installment contract arising from the retail sale of such motor vehicles or any one or more of them to a person or a class of persons designated by such manufacturer or distributor.

6. Nothing contained herein shall be construed to require the licensing of persons selling motor vehicles at retail solely for the purpose of disposing of motor vehicles acquired or repossessed by them in exercise of powers or rights

granted by lien or title-retention instruments or contracts given as security for loans or purchase money obligations, provided such persons are otherwise authorized to do business in this state. [47GA, ch 135,§3; 48GA, ch 130,§2.]

Referred to in §5039.14

5039.04 Application for license as a motor vehicle dealer. Each person before engaging in this state in the business of selling at retail motor vehicles or representing or advertising that he is engaged or intends to engage in such business in this state shall file in the office of the department an application for license as a motor vehicle dealer in the state in such form as the department may prescribe, duly verified by oath, which application shall include the following:

1. The name of the applicant and his principal place of business wherever situated.

a. If the applicant is an individual—the name or style under which he intends to engage in such business.

b. If the applicant is a copartnership—the name or style under which such copartnership intends to engage in such business and the name and post-office address of each partner.

c. If the applicant is a corporation—the state of incorporation and the name and post-office address of each officer and director thereof.

2. The make or makes of new motor vehicles, if any which the applicant will offer for sale to retail in this state.

3. The location of each place of business within this state to be used by the applicant for the conduct of his business.

4. If the applicant is a party to any contract or agreement or understanding with any manufacturer or distributor of motor vehicles or is about to become a party to such a contract, agreement or understanding, the applicant shall state the name of each such manufacturer and distributor and the make or makes of new motor vehicles, if any, which are the subject matter of each such contract.

5. A statement of the previous history, record and association of the applicant and if the applicant is a copartnership, of each partner thereof and if the applicant is a corporation, of each officer and director thereof, which statement shall be sufficient to establish to the department the reputation in business of the applicant.

6. A description of the general plan and method of doing business in this state, which the applicant will follow if the license applied for in such application is granted.

7. A financial statement of the applicant showing his true financial condition as of a date not more than six months prior to the date of such application.

8. Such other information touching the business of the applicant as the department may require.

For the purpose of investigating the matters contained in such application the department may withhold the granting of a license for a period not exceeding thirty days. [47GA, ch 135,§4; 48GA, ch 130,§3.]

5039.05 License fee of motor vehicle dealer. The license fee for a motor vehicle dealer for each calendar year or part thereof shall be the sum of five dollars, to be paid to the department at the time a license is applied for. In case the application is denied, the department shall refund the amount of such fee to the applicant. [47GA, ch 135,§5.]

5039.06 Denial of license. The department shall deny the application of any person for a license as a motor vehicle dealer and refuse to issue a license to him as such, if, after reasonable notice and a hearing, the department determines that such applicant:

1. Has made a material false statement in his application for the license; or

2. Has not complied with the provisions of this chapter; or

3. Is of bad business repute; or

4. Has been guilty of a fraudulent act in connection with selling, bartering or otherwise dealing in motor vehicles; or

5. Is about to engage in any practice in connection with the sale, barter or otherwise dealing in motor vehicles, which is fraudulent or in violation of the law; or

6. Has entered into contract or agreement or is about to enter into a contract or agreement with any manufacturer or distributor of motor vehicles which is contrary to any provision of this chapter; or

7. Has a contract or agreement with any manufacturer or distributor of motor vehicles or is about to enter into a contract or agreement with any manufacturer or distributor of motor vehicles, who without just, reasonable and lawful cause therefor, has terminated within ninety days from the date of application a contract or agreement with a motor vehicle dealer in any county of the state in which the applicant proposes to engage in business;

8. Does not have a place of business within the meaning of this chapter;

9. Has violated any of the provisions of sections 5006 06, 5006.07, 5006.09, 5006.10, 5006.21, 5007.01, 5007.02. 5007.03, and 5007.04.

It shall be sufficient cause for refusal or revocation of a license as a motor vehicle dealer in the case of a partnership or corporation if any member of the partnership or any officer or director of the corporation has committed any act or omission which would be cause for refusing or revoking a license to such person as an individual.

In considering whether or not a contract or agreement between a motor vehicle dealer and a manufacturer or distributor of motor vehicles has been terminated by such manufacturer or distributor without just and reasonable cause therefor, the department shall take into consideration the circumstances existing at the time of such termination, including the amount of business transacted by the motor vehicle dealer pursuant to the contract or agreement and prior to such termination; the investment necessarily made and the obligation necessarily incurred

by the motor vehicle dealer in the performance of his part of such contract; the permanency of such investment; the reasons for such termination by such manufacturer or distributor and the fact that it is injurious to the public welfare for the business of a motor vehicle dealer to be disrupted by termination of such contract without just and reasonable cause.

Whenever the department determines to deny the application of any person for a license as a motor vehicle dealer and refuses to issue a license to him as such, the department shall enter a final order thereof with its findings relating thereto within thirty days from the date of the hearing thereon. [47GA, ch 135,§6; 48GA, ch 130,§4.]

Referred to in §5039.09

5039.07 License of motor vehicle dealer.

1. If the department grants the application of any person for a license as a motor vehicle dealer, it shall evidence the granting thereof by a final order and shall issue to the person a license in such form as may be prescribed by the department, which license shall include the following:

a. The name of the person licensed.

b. If the applicant is an individual or a copartnership—the name or style under which the licensee will engage in such business and if a copartnership, the name and address of each partner.

c. The principal place of business of the licensee and location therein of each place wherein the licensee is licensed to carry on such business.

d. The make or makes of new motor vehicles which the licensee is licensed to sell.

2. The instrument evidencing the license or a certified copy thereof provided by the department shall be kept posted conspicuously in the principal office of the licensee and in each place of business maintained and operated by the applicant pursuant to the license in this state.

3. The license of a motor vehicle dealer shall expire and terminate, unless sooner revoked or suspended, at the end of the calendar year in which it is granted.

4. The license provided for in this chapter shall be renewed annually in the same manner and on payment of the same fee as in the case of the original license. Such renewal shall take effect on the first day of January of each year. [47GA, ch 135,§7.]

5039.08 Supplemental statements. Each licensee shall promptly file with the department from time to time during the period of the license, statements supplemental to the statements contained in his application for license whenever any change shall occur in his personnel or in his plan or method of doing business or in the location of his place or places of business, so that the statements made in the application do, after such change, properly disclose the licensee's status and method and plan of doing business. The supplemental statement shall be in the form prescribed by the department and shall disclose such information as would have been required by this chapter if such changes had occurred prior to the licensee making application for a license.

If the department finds that the changes set forth in the supplemental statement do not violate the provisions of this chapter and it grants to the licensee the privilege of doing business in the manner set forth therein, it shall upon surrender to it of the license of the motor vehicle dealer, issue to him a new license appropriate to the dealer's original application as modified by such supplemental statement. [47GA, ch 135,§8.]

5039.09 Revocation of license. The department is hereby authorized to revoke or suspend the license of any licensee if, after notice and hearing, it finds that such licensee has been guilty of any act which would have been a ground for the denial of a license under section 5039.06. [47GA, ch 135,§9; 48GA, ch 130,§5.]

5039.10 Appeals.

1. An appeal may be taken by any person interested from any final order of the department to the district court of the county in which he resides or in which his principal place of business is located, within thirty days after he shall have received notice from the department of such order.

2. The appeal shall be taken by a written notice to the department and served as an original notice. When said notice is so served it shall, with the return thereon, be filed in the office of the clerk of said district court, and docketed as other cases, with the appellant as plaintiff and the department as defendant. The plaintiff shall file with such clerk a bond for the use of the defendant, with sureties approved by such clerk and in an amount fixed by him, provided in no case shall the bond be less than fifty dollars, conditioned that the plaintiff shall perform the orders of the court.

3. The court shall hear the appeal in equity, determine anew all questions submitted to it on appeal from the order of the department, and render its decree thereon. An appeal to the supreme court of this state may be taken as in other equitable actions. [47GA, ch 135,§10.]

5039.11 Injunctions. Whenever the department shall believe from evidence satisfactory to it that any person has or is now violating any provision of this chapter, the department may, in addition to any other remedy, bring an action in the name and on behalf of the state of Iowa against such person and any other person concerned in or in any way participating in or about to participate in practices or acts in violation of this chapter, to enjoin such person and said other person from continuing the same. In any such action, the department may apply for and on due showing be entitled to have issued the court's subpoena, requiring forthwith the appearance of any defendant, his agent and employees and the production of documents, books and records as may appear necessary for the hearing of such petition to testify and give evidence concerning the acts or conduct or practices or things complained of in such application for injunction. In said action an order or judg-

ment may be entered, awarding such preliminary or final injunctions as may be proper. [47GA, ch 135,§11.]

5039.12 Motor vehicle dealers license fee fund. All fees and funds of whatever character accruing from the administration of this chapter shall be accounted for and paid by the department into the state treasury monthly and shall constitute a separate and distinct fund which shall be known as the "motor vehicle dealers license fee fund". All expenses incurred and all compensation paid by the department in the administration of this chapter shall be paid out of said fund in the same manner as other state expenses and compensation are paid. Any amount in such fund in excess of ten thousand dollars at the end of any fiscal year shall be credited to the state general fund.

In connection with the enforcement of this chapter, it is hereby made the duty of the attorney general of the state of Iowa to render all necessary assistance to the department upon its request in the enforcement thereof and to that end, the attorney general shall employ such additional legal counsel as shall be necessary to adequately and fully perform such service under the direction of the department as the demands of such department shall require and any expenses so incurred by the attorney general for additional legal counsel as aforesaid shall be chargeable against and paid out of the fund herein provided. [47GA, ch 135,§12.]

5039.13 Rules and regulations.

1. The department shall have full authority to prescribe reasonable rules and regulations for the administration and enforcement of this chapter, in addition hereto and not inconsistent herewith. All rules and regulations shall be filed and entered by the department in its office in an indexed, permanent book or record, with the effective date thereof suitably indicated, and such book or record shall be a public document. Whenever a new rule or regulation is adopted by the department, a copy of the same shall be mailed by it to each licensee hereunder, and published in an Iowa newspaper having a general circulation in this state.

2. The department shall have power to prescribe the forms to be used in connection with the licensing of motor vehicle dealers as herein provided. [47GA, ch 135,§13.]

5039.14 Penalties. Any person violating any of the provisions of this chapter where a penalty is not specifically provided for shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or thirty days in jail.

1. Any person violating any provision of subsections 1, 2, and 4 of section 5039.03, by a fine in any sum not exceeding one hundred dollars or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment.

2. For the violation of any provision of subsection 5 of section 5039.03, by a fine in any sum not exceeding five thousand dollars or by imprisonment in the county jail for any determinate period not exceeding one year, or by both such fine and imprisonment. [47GA, ch 135, §14; 48GA, ch 130,§6.]

5039.15 Liberal construction. All provisions of this chapter shall be liberally construed to the end that the practice or commission of fraud in the sale, barter or disposition of motor vehicles at retail in this state may be prohibited and prevented, and irresponsible, unreliable or dishonest persons may be prevented from engaging in the business of selling, bartering or otherwise dealing in motor vehicles at retail in this state and reliable persons may be encouraged to engage in the business of selling, bartering and otherwise dealing in motor vehicles at retail in this state. [47GA, ch 135,§15.]

Section 16 of enrolled act omitted as a repetition of section 49 of the code

Constitutionality, 47GA, ch 135, §17

5039.16 Short title. This chapter may be cited as the "Motor Vehicle Dealers Licensing Act." [47GA, ch 135,§18.]

5040 to 5093, inc. Rep. by 47GA. See note under chapter 251

CHAPTER 251.3

MOTOR VEHICLE FUEL TAX

Referred to in §6943.083
Former legislation legalized, 45GA, ch 69

5093.01 Purpose.
5093.02 Definition of terms.
5093.03 Tax imposed.
5093.04 Tax payable by whom.
5093.05 Licensing of distributors.
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5093.07 Security required of distributor before license issued.
5093.08 Records required to be kept by distributor.
5093.09 Monthly reports of distributors.
5093.10 Cancellation of distributor's license.
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5093.13 Lien of license fees.
5093.14 Permits to sell fuel oil tax-free.
5093.15 Fuel oil distributors.
5093.16 Exemption certificates.
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5093.19 Motor vehicle transport licenses.
5093.20 Penalty for operating transport without license.
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5093.29 Refund.
5093.30 Permits for refunds.
5093.31 Certain acts made unlawful.
5093.32 Duties imposed on peace officers.
5093.33 Treasurer to employ necessary help.
5093.34 Other remedies available.
5093.35 Distribution of proceeds.
5093.36 Approval of forms.
5093.37 Construction of chapter.
5093.38 Pending actions.
5093.39 Title of chapter.

5093.01 Purpose. It is the intent and purpose of this chapter to amend, revise, codify and supplement the existing laws of the state of Iowa relating to the collection of license fees on motor vehicle fuel, and to continue the policy of collecting for highway purposes an excise tax or license fee on all motor vehicle fuel used to propel motor vehicles on the highways of this state, and to provide such regulations as will prevent the evasion of the payment of such license fees and to insure the collection thereof and to that end to collect the license fee on all motor vehicle fuel in the state and from the first person receiving the same in this state for sale or use in this state and to require such person, and all subsequent sellers to collect such license fee from purchasers to whom the same is sold for use or resale in this state so that said license fees shall be ultimately paid by the person using said motor vehicle fuel in this state and to refund to such user such license fees so paid by him on all motor vehicle fuel not used in connection with the operation of motor vehicles on the public highway. [C35,§5093-f1.]

5093.02 Definition of terms. The following words, terms and phrases, for the purpose of this chapter, are defined as follows:

1. The term "distributor" shall mean any person who receives from outside the state or who produces, refines, manufactures, compounds, or blends within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of within the state for use in the state.

Provided, however, a person coming into the state traveling by motor vehicle may transport, for his own use, in the ordinary motor vehicle fuel tank attached to and forming a part of such motor vehicle, not more than twenty gallons of motor vehicle fuel in passenger automobiles, and not more than fifty gallons in trucks and busses without being considered a distributor.

2. The term "person" shall mean any individual, firm, partnership, joint stock company, association, trust, estate, joint adventure, and/or corporation, and any group or combination acting as a unit, and the plural as well as the singular number. The term "person" shall also mean any receiver, trustee, conservator or representative appointed by any state or federal court.

3. The term "treasurer" shall mean the treasurer of the state of Iowa.

4. The term "motor vehicle fuel" shall mean any petroleum product or other substance which alone or in combination with any other petroleum product or other substance is capable of being used to operate by combustion any internal combustion engine of the type used in automobiles, trucks, airplanes, motorboats, tractors, or other mechanical contrivances which are propelled by their own power and which is practicable for use for such purpose, including the products commonly known as gasoline, kerosene, naphtha, distillate, gas oil, tractor fuel, benzine and benzol.

5. The term "motor fuel" shall mean those motor vehicle fuels which alone and without being combined with other petroleum products or other substances are capable of successfully operating by combustion an internal combustion engine of the type used in automobiles and trucks such as gasoline or other petroleum products or other substances having similar qualities, which have a flash point less than one hundred degrees Fahrenheit as determined by the Tagliabue closed cup test, or has an initial boiling point of less than three hundred degrees Fahrenheit as determined by the method of the American society of testing materials or has a ninety-five percent distillation point at less than four hundred sixty-four degrees

Fahrenheit as determined by the method of the American society of testing materials.

6. The term "fuel oil" shall mean those motor vehicle fuels not within the above specification for motor fuel which either alone or when combined with other petroleum products or other substances are capable of being used as a fuel to propel motor vehicles upon the public highways such as ordinary kerosene, distillate, Diesel fuel and gas oil or other petroleum products or other substances having similar qualities.

7. The treasurer of the state is authorized and directed to issue and have published, from time to time, regulations in conformity with the provisions of this chapter, which shall provide more particular descriptions and specifications of the various kinds of fuel which come within the classifications provided for in subsections 4, 5, and 6 of this section.

8. The term "service station" shall mean any place where motor vehicle fuel is sold and delivered into the fuel tanks of motor vehicles.

9. The term "highway" shall mean any way or place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel.

10. The term "motor vehicle" shall mean any mechanical contrivance propelled on the highways by an internal combustion engine, including those contrivances used to transport passengers or freight and those used for the purpose of constructing or repairing said highway.

11. The term "license fee" shall mean "excise tax or license fee."

12. The term "fuel oil dealer" shall mean a person engaged in selling fuel oil at retail for use for such purposes as shall allow the purchaser to obtain the same tax-free under the provisions of this chapter.

13. The term "fuel oil distributor" shall mean any person who receives fuel oil from outside the state or who produces or manufactures fuel oil within the state to be used or resold within the state for such purposes as shall allow the purchaser to obtain the same tax-free under the provisions of this chapter.

14. The term "tax-free" when used in connection with the sale of fuel oil shall mean a sale or purchase without the payment of the motor vehicle fuel license fees imposed by the provisions of this chapter.

15. The term "certificate of purchase" shall mean a certificate in such form as the treasurer shall prescribe or approve, issued by a fuel oil dealer to a distributor or fuel oil distributor, covering the purchase by said fuel oil dealer showing the kind and quantity of fuel oil purchased, from whom purchased, and such other information as the treasurer shall prescribe and in such certificate the maker shall state and agree that he will not use or sell for use any of the products covered by such certificate either alone or in combination with other petroleum products as fuel for motor vehicles.

16. The term "certificate of exemption" shall mean a certificate in such form as the treasurer may prescribe or approve, covering the sale by a fuel oil dealer to the user of fuel oil and shall be signed by the user and shall show the kind and quantity of fuel oil purchased, from whom purchased, and the purpose for which it is to be used and in such certificate the maker thereof shall state and agree that he will not use or sell or permit to be used any of the fuel oil covered by said certificate, either alone or in combination with other petroleum products or substances as fuel for motor vehicles. [C27, 31, §5093-a2; C35,§5093-f2; 48GA, ch 133,§1.]

5093.03 Tax imposed. A license fee of three cents per gallon or a fraction of a gallon is hereby imposed on the sale or use of all motor vehicle fuel sold or used in this state for any purpose whatsoever, except that no license fee shall be imposed on motor vehicle fuel sold and exported from the state, or on motor vehicle fuel sold to the United States or any of its instrumentalities or agencies, unless now or hereafter permitted by the constitution and laws of the United States; provided, however, that no license fee shall be imposed on the motor vehicle fuel brought into this state in the ordinary fuel tanks attached to and forming a part of a motor vehicle operating upon the highways where such amount does not exceed twenty gallons in the ordinary automobile and fifty gallons in busses and trucks. Said license fee shall be paid to the state but once on any particular gallonage of motor vehicle fuel. Any person selling, using or otherwise disposing of, motor vehicle fuel within the state shall be liable for the license fees herein provided for, unless the same shall have been previously paid. Said license fee shall be advanced, remitted, collected and paid by the persons and at the time and in the manner hereinafter provided. The said license fees when paid shall be disposed of in the manner hereinafter provided. [C27, 31,§§4755-b38, 5093-a1; C35,§5093-f3.]

5093.04 Tax payable by whom. Said tax shall be paid to the state of Iowa by the distributor, or other person who imports or first receives said motor vehicle fuel in this state, or who manufactures, compounds, or blends motor vehicle fuel in this state, at the times and in the manner hereinafter provided, except that no tax need be paid with respect to motor vehicle fuel refined at a refinery in this state and stored thereat, nor with respect to motor vehicle fuel imported into this state by boat, barge or pipe line and stored at a marine or pipe-line terminal, so long as the same remains in storage at such refinery, marine or pipe-line terminal, but except as hereinafter provided as to fuel oil, such tax shall be paid by such distributor or other person, with respect to all motor vehicle fuel taken from such refinery, marine or pipe-line terminal storage for sale or use in this state or for transportation or shipment to points within this state; and provided further that the operator of such refinery, marine or pipe-line terminal shall be required to keep, subject to inspection at any time by the state treasurer,

such records, and to render to the state treasurer monthly such reports as the state treasurer may require to insure proper enforcement of the provisions of this chapter. Such distributor or other person having paid said tax, or being liable for its payment shall collect the amount thereof from any person to whom said motor vehicle fuel is sold in this state along with the selling price thereof.

Every distributor and other person selling motor vehicle fuel or fuel oil in this state, at wholesale or at retail, shall keep posted in a conspicuous place most accessible to the public at their place or places of business, including bulk plants, service stations, garages and motor vehicle transports, a placard showing in words and/or figures of the same height and size but not less than one inch in height or size, the price per gallon of each grade of motor vehicle fuel and fuel oil offered for sale, the amount of state license fee per gallon thereon, the federal excise tax per gallon thereon, and the total thereof. If any rebate, discount, commission or other concession is granted by distributors or persons engaged in the sale of motor vehicle fuel or fuel oil of such nature as will reduce the cost or price to any purchaser or consumer of such products, the conditions, quantity and amount of such rebate, discount, commission or other concession shall be posted as a part of the posted price. Provided, however, at all places making wholesale sales only and upon motor vehicle transports, the words or figures shall be of such size as to be plainly legible to the public and as approved by the treasurer. All price placards shall be subject to the approval of the treasurer. Any distributor or person failing to post or keep posted the placard required by this section, or who posts placards not approved by the treasurer as provided in this section, or who sells any motor vehicle fuel or fuel oil at a price which directly or indirectly, by any means or device, deviates from the posted price set forth on the price placard approved by the treasurer, shall be guilty of a misdemeanor and shall be punished by a fine of one hundred dollars or imprisonment in the county jail for thirty days. Nothing contained herein shall prohibit or restrict the distribution of earnings to the members of any distributor or person, nor to the distribution to consumers of road maps, publicity and other advertising media carrying the name of the distributor, person or produce. Each day the required placard remains unposted or an unauthorized placard remains posted, or each deviation from the posted price, shall be considered a separate offense. In the event of a third conviction for the violation of any of the provisions of this section, the state treasurer may revoke the license of such distributor or person so convicted. [C27, 31,§5093-a3; C35,§5093-f4; 47GA, ch 136, §1; 48GA, ch 133,§2.]

5093.05 Licensing of distributors. It shall be unlawful for any person to engage in business as a distributor in this state without first having procured a distributor's license as provided in this chapter. A person who has filed a proper application with the treasurer and has complied with the provisions and met the requirements of this chapter and has shown to the satisfaction of the treasurer that he is a person of good moral character and desires honestly to engage in business as a distributor, shall be granted a distributor's license by the treasurer, authorizing said person to engage in business in this state as a distributor, unless it appears to said treasurer from any source of information available to him that said person has failed to pay motor vehicle fuel license fees due from him to the state, or that a distributor's license previously issued to said person has been canceled and said person cannot now be depended upon to honestly and in good faith make and keep the records and reports required of distributors, and pay the motor vehicle fuel license fees which he would be required to pay under the provisions of this chapter.

A fee of one dollar shall be collected by the treasurer from each person to whom a distributor's license is issued. [C27, 31,§5093-a4; C35,§5093-f5.]

5093.06 Application for distributor's license. Every person desiring to engage in business as a distributor shall file a duly verified application with the treasurer on forms provided by the treasurer, which shall contain the name under which the business of distributor is to be transacted within the state and the place of such business. If such applicant is a firm or copartnership, the application shall also contain the names and addresses of the several persons constituting the same and if a corporation or municipal subdivision, the correct name under which it is authorized to transact business, the name of its principal officers, resident agent or managing agent and attorney in fact.

Said applicant must further state and agree in such application that he will faithfully and honestly keep and preserve all the records which the provisions of this chapter or the regulations of the treasurer require him to keep and that he will report to the treasurer of state all the matters required by this chapter and that he will pay to the state all license fees on motor vehicle fuel due from him to the state in accordance with the provisions of this chapter. Said application shall also contain such other information as the treasurer shall demand or the forms prepared by him require. [C31,§5093-c2; C35,§5093-f6.]

5093.07 Security required of distributor before license issued. Each applicant for a distributor's license, except agencies of the state and municipal corporations in the state or other governmental subdivisions of the state shall, before the license is issued to him, file with the treasurer of state a bond payable to the state in the sum of one thousand dollars and such additional sum or satisfactory property statement as the treasurer of state shall determine, which bond or property statement is to be approved by the treasurer of state. [C31,§5093-c2; C35, §5093-f7.]

5093.08 Records required to be kept by distributor. Each distributor must keep a true and accurate record on such form as the treasurer of state may approve or prescribe of each consignment of motor vehicle fuel received by him, showing the person from whom received, the method of transportation employed in delivering the same to the distributor and the identification of the tank car, and of the truck if delivered by truck, the character of the product and the disposition made thereof. Such distributor must also preserve all invoices, bills of lading and other pertinent papers in connection with the purchase and receipt of motor vehicle fuel and all sales tickets, invoices and other pertinent papers in connection with the sale of motor vehicle fuel, and to keep such records of purchases and sales as the treasurer of state shall prescribe. Said distributor must likewise keep a record of his receipts and sales of motor vehicle fuel on such form as the treasurer of state may approve or prescribe and must make and transmit to the treasurer of state an inventory of all petroleum products on hand upon call of the treasurer of state, and each distributor must upon demand of the treasurer of state, furnish a statement under oath reflecting the contents of any records to be kept under the provisions of this chapter. The records required by this section must be preserved by the distributor for a period of three years after the making thereof and all such records must be available at all times for the inspection of the treasurer of state or his representatives. [C27, 31,§5093-a5; C35,§5093-f8.]

5093.09 Monthly reports of distributors. On or before the twentieth day of each calendar month, each distributor of motor vehicle fuel shall file in the office of the treasurer of state at Des Moines, a report, duly verified under oath, on forms prescribed and furnished by said treasurer, showing:

1. The total number of gallons of motor vehicle fuel received by him from outside the state during the preceding calendar month, the person from whom received, the date of receipt, unloading point, tank car identification and invoiced gallonage of each tank car or other receptacle in which motor vehicle fuel is imported into the state. If said motor vehicle fuel was imported by truck, said report shall show the name of person from whom received, date of receipt, the unloading point, the invoiced gallonage of each truck load, the name of the manufacturer of the truck, the name of the owner, the name of the person in charge of the truck when delivery was made, and motor vehicle transport license number of the truck, and number of the manifest covering each shipment, or load, and (a) the total number of gallons thereof imported by boat, barge or pipe line and stored at a marine or pipe-line terminal and (b) the total number of gallons thereof taken from such marine or pipe-line terminal storage during the preceding calendar month for sale or use in this state or for transportation or shipment to points within this state.

2. The total number of gallons of motor vehicle fuel produced, refined, manufactured, blended or compounded, and the date thereof, and the place where such processing occurred and the materials used therein and the source from which obtained, and (a) the total number of gallons thereof refined at a refinery in this state and stored at such refinery and (b) the total number of gallons thereof taken from such refinery storage for sale or use in this state or for transportation or shipment to points within this state.

3. The total number of gallons of motor vehicle fuel received by him from points within the state during the preceding calendar month, the name of the person from whom received, the date of receipt, unloading point, tank car identification and invoiced gallonage of each tank car or other receptacle in which received. And if received by truck, said report shall show the name of the person from whom received, the date of receipt, unloading point, invoiced gallonage of each truck load, the name of the manufacturer of the truck, the name of the owner, the name of the person in charge of the truck when delivery was made, and motor vehicle transport license number of the truck. Said report shall also show whether the price paid for such motor vehicle fuel included the license fee payable under the provisions of this chapter. All such information as to gallonage received from points within the state shall be only for the use and guidance of the treasurer, if the license fee has been previously paid on such gallonage and such gallonage shall not be included in the gallonage on which the license fees are payable by said distributor unless the license fees thereon have not been previously paid to the state.

4. The total number of gallons exported from the state, the date of export, name of person to whom exported, destination, tank car identification and railroad handling shipment, if by rail, and if shipped by truck, name of manufacturer of truck, name of owner, name of person in charge of truck, manifest number and motor vehicle transport license number of truck.

5. The total number of gallons of motor vehicle fuel sold to the United States or its agencies on which the collection of a license fee is not permitted by the constitution or laws of the United States, and the name of the officer or particular agency of the United States to whom sold.

6. If said distributor holds a permit to sell, or use fuel oil as provided by this chapter without the collection or payment of a tax thereon, such report shall also show, the amount of fuel oil received during the preceding calendar month and the amount disposed of and the purpose for which it was used or sold for use, and such other information in connection therewith as the treasurer may require. Said report shall also be accompanied by the certificates of exemption covering the fuel oil sold for use in pursuance of said permit, and certificates of purchase covering fuel oil sold to fuel oil distributors for resale, and the gallonage thus sold

or used shall not be included in the gallonage on which the license fees are payable.

A distributor handling fuel oil may, if he desires, make his report as to fuel oil on an inventory basis, by giving the treasurer thirty days notice of an intention to so report. In that event he may deduct the fuel oil on hand at the end of each month to determine the gallonage on which the tax is to be computed. In such case, he must show on his monthly report the gallonage on hand at the commencement of each month, and so make his report on forms prescribed by the treasurer as to show the amount of fuel oil sold or used during the month, and the amount thereof covered by purchase certificates or exemption certificates and pay the tax on any balance.

A distributor may with the approval of the treasurer, in connection with his fuel oil report, merely list the exemption certificates and certificates of purchase held by him covering fuel oil used or sold by him during the preceding calendar month, and such certificates so listed may be retained by the distributor subject to be inspected by the treasurer or his representative.

7. Said report shall contain such other information as the treasurer may demand or may be called for by the forms prepared by him.

If no motor vehicle fuel be received or produced during the preceding calendar month, a report shall be made to that effect on the forms prescribed herein, and in the same manner. At the same time he shall remit to the treasurer the amount of the license fee on motor vehicle fuel produced or received by said distributor for sale or use within the state during the preceding calendar month on which a license fee is payable under the provisions of this chapter; provided, however, that in computing said amount a deduction of three percent of the invoiced gallonage received from outside the state or produced, manufactured, compounded or blended within the state, and which remained within the state may be made for evaporation and loss.

If, after the prescribed license fees are so remitted and paid, any motor vehicle fuel in the possession of a licensed distributor is destroyed by fire, lightning, storm or accident not caused by the fault of such distributor or any employee thereof, before being sold or used by him, upon proper application therefor and proof of such destruction or loss satisfactory to the treasurer of state, the said treasurer is authorized to certify to the amount of the license fees so paid thereon to the comptroller of state as a refund. The comptroller of state shall issue his warrant drawn on the motor vehicle fuel fund in payment thereof and the same shall be paid in the same manner and from the same fund as those refunds authorized in section 5093.29 of this chapter. But no such claim for refund shall be paid unless the treasurer was notified of said loss within ten days after the same occurred and the claim was filed within thirty days after such loss.

If any distributor of motor vehicle fuel shall fail to remit on or before the twentieth of each month to the treasurer of state to cover the license fees due on that date as shown by his report, a penalty of ten percent of the amount thereof shall immediately accrue and become due and payable when such license fees are paid or collected. [C27, 31,§§5093-a5,-b1; C35,§5093-f9; 48GA, ch 133,§3.]

5093.10 Cancellation of distributor's license. The treasurer may revoke any distributor's license issued under the provisions of this chapter, where it appears to the satisfaction of the treasurer, that the distributor holding such license has failed to accurately or correctly make the reports, or keep the records required by this chapter, or has refused to give to the treasurer or his representatives free access to his books and records, or has failed to pay the license fees shown to be due by his reports, or determined to be due by the treasurer in accordance with the provisions of this chapter, provided, however, that if said distributor disputes the correctness of the treasurer's finding as to the amount of tax due, he may pay the amount demanded by the treasurer, under protest and avoid a cancellation of his license on that account until the matter has been determined by the court. And should the court determine in the manner provided by this chapter that the amount thus paid is in excess of the amount actually owing by said distributor at said time, the excess shall be repaid to said distributor.

Before the treasurer shall cancel any distributor's license he shall advise the distributor of the charges against him, and shall give the distributor an opportunity to be heard and to be represented by counsel and to show cause why the license should not be canceled. Such notice of the charges and opportunity to show cause may be furnished to the distributor by registered mail, addressed to him at his place of business and must be mailed or served at least five days before the day fixed by the treasurer for the hearing. [C27, 31,§5093-a5; C35,§5093-f10.]

5093.11 Treasurer may assess amount of license fees due. If the treasurer of state should at any time receive complaints or reports from any source that any licensed distributor is suspected of evading the payment of the license fees provided by this chapter or is failing to report all of the motor vehicle fuel received by him and sold, used or otherwise disposed of by him in this state, or should receive complaints or reports from any source that some person is suspected of acting as a distributor without a license and without the payment of the license fees imposed by this chapter upon distributors, the treasurer of state may, upon five days notice to such distributor or other person of the time and place of hearing and the nature thereof, proceed to hold a hearing and to determine the amount of license fee, if any, due from such licensed distributor or other person on motor vehicle fuel not reported to the treasurer as provided by this chapter, and said treasurer may adjourn said hearing from time to time until the completion thereof. Said treasurer of state may use any information available to him to deter-

mine what amount, if any, of license fees are owing by said distributor or other person. And he shall immediately assess the license fees in the amount found due together with a penalty of one hundred percent of such amount. The findings of the said treasurer as to the amount of license fees due, if any, shall be presumed to be the correct amount; and in any litigation which may follow over the amount of said license fees due, the certificate of the treasurer assessing the motor vehicle fuel license fees and penalty shall be admitted in evidence and shall constitute a prima facie case, and the burden shall be upon the distributor or other person to show the error in the treasurer's finding and the extent of such error. In any litigation involving the amount of motor vehicle fuel license fees due the state, it shall be presumed that the distributor or other person receiving motor vehicle fuel from outside of this state, sold or used or otherwise disposed of the same within this state, unless such distributor or other person can show a different disposition of the product and it will be presumed that all petroleum products capable of being blended with other petroleum products to produce motor vehicle fuel were so blended unless the contrary appears by clear and satisfactory evidence.

The treasurer of state may remit in whole or in part the penalty herein provided for, if convinced that there was no intent to evade the payment of the motor vehicle fuel license fees. And said penalty in all events shall be considered as cumulative and shall not relieve the person against whom it is assessed from the penal provisions of this chapter. [C35,§5093-f11.]

5093.12 Hearings before treasurer. Hearings before the treasurer authorized under the provisions of this chapter may be held at the seat of government in Des Moines or elsewhere in the state as the treasurer may direct. Any power granted to the treasurer in this chapter may also be exercised by his deputy, and the treasurer is hereby authorized to appoint special deputies for the purpose of conducting said hearings. The treasurer or his deputy shall have the power to issue subpoenas, including subpoenas duces tecum, and to require the attendance of witnesses and the production of books, records and papers. In the event any person shall refuse to obey such subpoena, or after appearing refuses to testify, the treasurer shall certify the name of such person or persons to the district court of the county where said hearing is being held or any judge thereof, and the court or any judge thereof shall proceed with said witness in the same manner as if said refusal had occurred in a proceedings in open court. [C35,§5093-f12.]

5093.13 Lien of license fees. The certificate of the treasurer assessing the amount of motor vehicle fuel license fees and penalty due from a distributor or other person ascertained in accordance with the provisions of this chapter, or from a distributor ascertained from the report of such distributor, may be filed in the office of the clerk of the district court of the county in which the place of business of such distributor or other person is located. The clerk of the district court upon receipt of the certificate shall, without requiring the payment of any fee, file and index the same in the manner now provided for judgments. And said treasurer may in like manner, file a duplicate of said certificate in any other county where the same shall in like manner be indexed. And the claim of the state as shown by said certificate or duplicate so filed shall be a lien on the real estate of the person named therein as owing motor vehicle fuel license fees, located in the county where said certificate or a duplicate thereof is recorded for the amount shown by said certificate to be due, including penalty and interest from the date of said filing to the same extent as a mortgage lien. Said lien may be foreclosed in the same manner as real estate mortgage liens are foreclosed, and the court in said proceedings shall enter judgment against such distributor or other person for the amount found by the court in the manner provided by this chapter to be due to the state, with interest and the penalty as assessed by the treasurer, and may in the same proceedings foreclose on any security which it may hold for the payment of said license fees, and may in the same proceedings entertain suit on any bond which it may hold as security for the payment of said fees.

The treasurer may give notice of the amount of motor vehicle fuel license fees and penalty due as ascertained by him by registered mail to all persons having in their possession or under their control any credits or other personal property belonging to such distributor or other person or to any person owing any debts to such distributor or other person. And thereafter such person so notified shall neither transfer nor make any other disposition of such credit or other personal property or debts until thirty days shall have elapsed from and after the receipt of such notice unless the treasurer of state shall have given his consent to a previous transfer or other disposition. At the expiration of said thirty-day period said property shall be released, unless in the meantime it shall have been attached by process of court or the holder thereof garnished. All persons so notified, must, within five days after receipt of such notice, advise the treasurer of state, of any and all such credits or personal property or debts in their possession or under their control, or owing by them as the case may be.

The amount of the license fees imposed by this chapter, including interest and penalty and costs that may accrue, shall be a lien in favor of the state upon all franchises, property and rights to property, whether real or personal, then belonging to or thereafter acquired by the person liable for the payment of such license fees from the date such taxes are due and payable as provided in this chapter and remaining until the amount of the lien is paid or the property sold in payment thereof. Such lien shall have priority over any lien or incumbrance whatsoever except the lien of other state taxes having

priority by law, and except that such lien shall not have priority over any bona fide mortgagee, pledgee, attaching creditor or purchaser whose right shall have attached prior to the time the treasurer shall have filed his certificate in the office of the clerk of the court as provided in this section. [C35,§5093-f13.]

5093.14 Permits to sell fuel oil tax-free. Every person desiring to engage in business as a fuel oil dealer shall apply to the treasurer for a fuel oil dealer's permit, which permit shall be in a form prescribed by the treasurer and shall entitle the holder thereof to purchase fuel oil tax-free from a distributor or a fuel oil distributor in this state by issuing to the seller a certificate of purchase therefor. But no such permit shall be issued until the applicant therefor files with the treasurer a verified application on forms prepared and furnished by the treasurer, stating the purpose for which the permit is desired, the use the holder desires to make of it and the nature of the business in which the applicant is engaged. In said application the applicant must also agree not to use said fuel oils either alone or in combination with other substances as fuel for motor vehicles or sell any of said products for such use or to sell said products for resale and to report to the treasurer of state promptly any sales which may have been made where the amounts involved or the circumstances are such as to arouse suspicion that said products have been purchased for use as fuel for motor vehicles either alone or in combination with other substances. Said application must have indorsed thereon the affidavit of a freeholder of the state as to the good moral character of the applicant, if an individual or a group of individuals, and the officers of the corporation, if a corporation. The treasurer, if convinced by the showing made in the application or from any investigation he desires to make that the applicant is of good moral character and is actually engaged, or about to engage, in business as a fuel oil dealer, shall issue a permit as herein provided. The holder of a fuel oil permit may purchase fuel oil tax-free only from distributors or fuel oil distributors within this state and shall sell only for the purpose or use otherwise than as fuel for motor vehicles, and shall sell only to such persons as furnish to him a certificate of exemption covering said sale; provided, however, that tax-free sales of fuel oil may be made by fuel oil dealers or fuel oil distributors for the purpose of operating tractors used for agricultural purposes to persons holding refund permits issued under the provisions of this chapter, but in such event the purchaser must sign the exemption certificate stating the purpose for which such fuel is to be used, and indorse thereon his refund permit number.

Every holder of such fuel oil permit shall keep all certificates of exemption for a period of three years, and shall keep a record of all purchases and receipts of fuel oil and of all sales and deliveries thereof, which record is to be kept in the manner and form prescribed by the treasurer or approved by the treasurer or his representative and said certificates of exemption and record are to be at all reasonable times open to the inspection of the treasurer or his representatives. Should any dealer be unable to produce certificates of exemption covering all fuel oil sold or used by him, the difference shall be presumed to have been sold or used as motor vehicle fuel. [C27, 31,§5093-a8; C35,§5093-f14.]

5093.15 Fuel oil distributors. Every person desiring to engage in business as a fuel oil distributor, except those who already hold a distributor's license, shall apply to the treasurer for a fuel oil distributor's license on forms to be prescribed and furnished by the treasurer. The treasurer shall, if satisfied that the applicant desires to honestly and in good faith engage in distributing fuel oil, issue to such applicant a fuel oil distributor's license in a form prescribed by the treasurer. The holder of a fuel oil distributor's license may receive fuel oil from outside the state or manufacture or compound fuel oil within the state either for sale or use, but may sell only to fuel oil dealers holding fuel oil permits and then only upon receipt of a certificate of purchase covering said sale.

Each fuel oil distributor shall keep his fuel oil purchase certificates for a period of three years, and shall keep a record on such form as the treasurer shall prescribe or approve of all purchases and sales of fuel oil, and said purchase certificates and record shall at all reasonable times be open to the inspection of the treasurer or his representatives. Should any distributor be unable to produce certificates of purchase covering all fuel oil sold or used by him, the difference shall be presumed to have been sold or used as motor vehicle fuel.

A fee of one dollar shall be collected by the treasurer for each fuel oil distributor's license. [C35, §5093-f15.]

5093.16 Exemption certificates. Should a fuel oil dealer or a fuel oil distributor be a user of fuel oil, he may make out exemption certificates, or certificates of purchase as the case may be, and file them with other such certificates, when said fuel oil is withdrawn from stock. [C35,§5093-f16.]

5093.17 Revocation of fuel oil permits. Any fuel oil permit or fuel oil distributor's license issued under the provisions of this chapter may be revoked by the treasurer upon five days notice to the holder to show cause why it should not be revoked, when the treasurer is convinced from any information available to him that the holder thereof, has violated the undertaking in his application or has issued or knowingly received any false exemption certificates or certificates of purchase and is knowingly either directly or indirectly, a party to the use of the fuel oil received by him as fuel for motor vehicles, or has violated any of the provisions of this chapter. [C27, 31,§5093-a8; C35,§5093-f17.]

5093.18 Treasurer may issue specifications. The treasurer is hereby authorized in regulations promulgated and published by him to fix tests and specifications by end points and flash points or otherwise for products which may be sold as fuel oil, and to change and modify such tests and specifications from time to time as conditions may in his judgment require. [C35,§5093-f18.]

5093.19 Motor vehicle transport licenses. Every person desiring to operate any conveyance for the purpose of hauling, transporting or delivering motor vehicle fuel in bulk, shall, before entering upon the public highways of this state with such conveyance, apply for the registration thereof with the treasurer on such forms as he shall provide and the treasurer, if satisfied that such applicant is of good moral character and desires to honestly engage in the lawful and legitimate transportation of motor vehicle fuels on the public highways, shall upon the payment by said applicant of a motor vehicle fuel transport license fee in the sum of one dollar for each conveyance, assign a license number to such person and shall issue separate license cards for each conveyance to be operated over the highways of this state. Said card shall show the license number assigned, the motor number, if any, of the conveyance, and such other information as the treasurer may prescribe and shall be conspicuously displayed on the conveyance at all times during its operation on the public highways of this state. The treasurer shall also furnish to the licensee duplicate license plates for such conveyance so operated, containing the number assigned to the licensee and the words "Iowa motor vehicle fuel transport license" or any abbreviation thereof authorized by the treasurer. The authorized number plate shall be attached conspicuously on the front and rear of such conveyance and in such manner that they can be plainly seen and read at all times. It shall be the duty of each holder of the motor vehicle fuel transport license to secure from the treasurer under such conditions as the treasurer may require, new number plates to replace any such plates which may have been damaged to such an extent that the figures thereon cannot be plainly read. The treasurer shall charge and collect from each licensee a sum of one dollar for each set of two license plates and seventy-five cents for each single plate assigned as replacement of the damaged plate. Nothing contained in this section shall be construed as relieving the owner or operator of such conveyance from complying with any and all other provisions of the existing law, including the law with reference to motor vehicles and trucks.

Each person operating such a conveyance must carry a manifest record in permanent form to be designed and prescribed by the treasurer of state, in which he shall enter under a separate number the following information as to each cargo of motor vehicle fuel moved in said conveyance, the date and place of loading, the date and place of unloading, the person from whom the motor vehicle fuel was received and the person to whom delivered, the nature and kind of product, and the amount thereof and such other information as the treasurer may in the forms prescribed by him, require. Said record shall be kept for a period of three years, provided, however, that the record of the manifest of past cargoes need not be carried on the conveyance but must be preserved for the inspection of the treasurer or his representatives at all reasonable times.

All such persons must have and possess during the entire time they are hauling or transporting motor vehicle fuel upon the highways of this state an invoice, bill of sale, or other statement showing the true name and address of the seller or consignor, the name of the purchaser or consignee, or if said motor vehicle has not been sold, a statement of the consignor of the purpose for which said motor vehicle fuel is to be used and the number of gallons, and shall, at the request of any sheriff, deputy sheriff, constable or any other representative of the treasurer or other person authorized by law to inquire into or investigate said matters, produce and offer for inspection said invoice, bill of sale or other statement and shall permit such officer to inspect and measure the contents of the vehicle. If any such person fails to produce said invoice, bill of sale or other statement or if, when produced, it fails to disclose the aforesaid information, then the said officer or other person authorized to make said inquiry shall take and impound the motor vehicle fuel together with the conveying equipment until the license fees on said motor vehicle fuel together with penalty amounting to one hundred percent of said license fees have been paid. In case the license fees, and penalty are not paid within forty-eight hours after the taking of said property, the treasurer may proceed to sell the same in the mode and manner provided by law for the sale of personal property by the sheriff under execution.

Where a distributor desires to license more than one conveyance he may apply for the licensing of all such conveyances in one application on forms prescribed by the treasurer. But separate licenses shall be issued for each conveyance. [C35,§5093-f19.]

Referred to in §5093.20

5093.20 Penalty for operating transport without license. It shall be unlawful for any person to operate a conveyance transporting motor vehicle fuel in bulk upon the highways of this state without the transport license provided by section 5093.19 and any person found guilty of such unlawful act shall be fined not to exceed one hundred dollars or imprisoned in the county jail not more than thirty days, and each cargo transported shall be considered a separate offense. The penalty herein provided shall be in addition to any penalties which may have been suffered under the provisions of section 5093.19.

Persons transporting for their own use, not to exceed one hundred sixty-five gallons in bar-

rels or drums, shall not be regarded as transporting in bulk. [C35,§5093-f20.]

5093.21 Service station license. Every person desiring to operate a service station in this state shall apply to the treasurer for a service station license on such forms as the treasurer may prescribe and the treasurer shall, if satisfied that the applicant will faithfully comply with all the provisions of the law with reference to motor vehicle fuels, issue to such person a service station license. No person shall operate a service station in this state without such license and shall keep said license conspicuously posted at such service station and such license must be obtained for each service station operated. Each license issued by the treasurer shall be assigned a number.

Each service station shall keep a record on forms prescribed by the treasurer of state of all motor vehicle fuel received at said service station and the kind and character of the product, that is whether distillate, kerosene, gasoline, etc., and the amount thereof and the date of receipt and shall keep a record of the sales of all motor vehicle fuel, provided, however, that the record of sales through the regular pumps through which motor vehicle fuel is conveyed to the fuel tanks of motor vehicles need not be shown in detail but the total of such sales for each kind of motor vehicle fuel must be shown by days, and a detailed record must be kept of sales made in any other manner than through said pumps.

Each service station shall keep such additional records as the treasurer shall require and in such form as the treasurer shall prescribe, and shall make and transmit to the treasurer whenever the treasurer shall so demand a report reflecting the contents of such records or any part thereof.

Where one person operates more than one service station, he may apply for the licensing of all in one application on forms prescribed and furnished by the treasurer. But separate licenses shall be issued for each service station. [C35,§5093-f21.]

5093.22 Revocation of service station license. A service station license may be revoked by the treasurer upon five days notice to the holder to show cause why the same should not be revoked if the treasurer finds the holder thereof is not making the records or reports required of him, or is attempting to engage in business as a distributor without a license to conduct said business, or is in any other way directly or indirectly evading the laws of the state with reference to motor vehicle fuel license fees or is aiding or encouraging others in such evasion. [C35,§5093-f22.]

5093.23 Penalty for operating service station without license. It shall be unlawful for any person to operate a service station in this state without a service station license and any person convicted of such violation of the law shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned in the county jail not less than thirty days. And each day such person so operates without a license may be considered a separate offense. [C35,§5093-f23.]

5093.24 Trust funds. Every sale of motor vehicle fuel in this state, except the sale of fuel oil by the holder of a fuel oil permit where a certificate of purchase or certificate of exemption was received in connection with such sale, shall be presumed to include as a part of the purchase price the license fee due the state under the provisions of this chapter. And every distributor or other person selling motor vehicle fuel in this state and collecting the license fees thereon as a part of the purchase price, shall hold said license fees in trust for the state unless the license fees on said motor vehicle fuel have been previously paid to the state. And any person so receiving said license fees in trust and failing to remit them to the treasurer of state on or before the twentieth of the following month shall be guilty of embezzlement and upon conviction shall be subjected to the penalty provided by law for such offense. [C35,§5093-f24.]

Embezzlement, ch 578

5093.25 Report by carriers. Every railroad company, pipe line, water transportation company and every operator of a truck or other conveyance transporting motor vehicle fuel and every carrier transporting motor vehicle fuel in bulk to a point in the state from any point outside of the state shall, through its local agent or agents, if a railroad company, or water transportation company or pipe line and through the operator of the conveyance, if operating upon the public highway, on or before the tenth of each calendar month, forward to the treasurer of state a report on forms furnished by him, showing the name of the railroad or other carrier, the date of unloading, the identification of each tank car or other conveyance, the place where said motor fuel was delivered, the character or kind of product, the name of the consignor, the name of the consignee and the number of gallons of motor vehicle fuel thus transported and delivered during the preceding calendar month.

Any carrier or operator of a conveyance transporting motor vehicle fuel on the highways who violates the provisions of this chapter shall upon conviction be fined not less than one hundred dollars nor more than two thousand dollars or be imprisoned in the county jail not less than thirty days nor more than six months. [C27, 31, §5093-b1; C35,§5093-f25.]

5093.26 Records open to inspection of treasurer. All books and records required to be kept under the provisions of this chapter or which the treasurer is authorized to require under the provisions of this chapter, whether by the distributor, a service station operator, a motor vehicle transport license holder or a railroad company or other carrier, shall at all times be open to the inspection of the treasurer of state or his duly authorized representatives, and it shall be lawful for the treasurer of state or his representatives or agents, or employees, to enter upon the premises where the business of any such

person is conducted, or wherever said records may be found for the purpose of examining the same or any other records relating to the payment or the liability for payment of any motor vehicle fuel license fees due the state and remain as long as necessary to complete said inspection and examination. It shall be lawful also for said treasurer or his agents, employees, or representatives, to examine all of the equipment used by any of said persons in the transaction of such business and to enter upon the premises of any such persons for that purpose and they may examine the storage tanks, and the connections and the facilities for transferring motor vehicle fuel from one tank to another and the facilities that exist, if any, for the mixing or blending of such fuels and may measure the capacity and contents of all tanks or other receptacles containing motor vehicle fuel or capable of containing motor vehicle fuel on the premises of any such person or being used by any such person. [C27, 31, §5093-a6; C35,§5093-f26.]

5093.27 Information confidential — penalty. All information obtained by the treasurer or his representatives, agents or employees from the examination of the records required to be kept under the provisions of this chapter shall be treated as confidential and shall not be divulged except to a representative of the state having some responsibility in connection with the collection of motor vehicle license fees, or in proceedings brought to determine or collect motor vehicle fuel license fees, or other proceedings brought under the provisions of this chapter; provided, however, that the treasurer shall make available for public information on or before the last day of the month following the month in which the tax is required to be paid the names of the distributors and the amount of the tax paid by each and the amount due, if any, from each of said distributors. The treasurer, upon request of officials entrusted with enforcement of the motor vehicle fuel tax laws of any other state, may forward to such officials any information which he may have relative to the exportation of motor vehicle fuel and fuel oil from this state to such other state, provided said officials of such other state furnish to the treasurer like information.

Any person violating the provisions of this section, and disclosing the contents of any records or reports required to be kept or made under the provisions of this chapter, except as hereinabove provided shall upon conviction be fined not less than one hundred dollars nor more than one thousand dollars or be confined in the county jail not less than thirty days nor more than six months. [C27, 31,§5093-a6; C35,§5093-f27.]

5093.28 Rewards. The treasurer is hereby authorized to pay out of the funds collected under this chapter to any person other than a state officer or employee receiving a regular salary, who brings to his attention any evasion of the license fees imposed by this chapter, such sum as he may deem proper not exceeding twenty-five percent of the amount of license fees due the state under this chapter and the payment of which has been evaded, but such reward shall not be paid hereunder until the collection of the license fees, the evasion of which has been reported, has been made or the person convicted of such evasion. [C35,§5093-f28.]

5093.29 Refund. Any person who shall use any motor vehicle fuel for the purpose of operating or propelling stationary gas engines, farm tractors, aircrafts or boats or for cleaning or dyeing purposes or for any other purpose except in motor vehicles operated or intended to be operated upon the public highways of the state and who shall have paid the license fees for such motor vehicle fuel imposed by this chapter, either directly to the treasurer or indirectly by having the same added to the price of such fuel, and who shall have obtained a permit therefor as provided in this chapter, shall be reimbursed and repaid the amount of such license fees so paid, upon presenting to the treasurer a claim for refund, which claim shall be in a form prescribed by the treasurer and shall be verified by the oath of the claimant and shall have attached thereto the original invoice or invoices showing the purchase of the motor vehicle fuel on which a refund is claimed, and shall state the name of the person from whom the motor vehicle fuel was purchased, the date of purchase, the total amount of such motor vehicle fuel, that the purchase price thereof has been paid and that said price included the motor vehicle fuel license fee payable to the state under the provisions of this chapter, that such fuel was used by the claimant otherwise than in motor vehicles operated or intended to be operated upon the public highways of this state, the manner in which said motor vehicle fuel was used and the equipment in which used. Said claim shall also show whether or not the claimant used fuel for motor vehicle operated upon the public highway from the same tanks or other receptacles from which the motor vehicle fuel on which a refund is claimed was kept or withdrawn.

No refund shall be made on claims for motor vehicle fuel purchased more than ninety days prior to the filing of the claim for refund.

If the gross receipts from or the use of any stationary engine, tractor, boat, aircraft, or other type of power driven machinery constituting with the engine one unit, are subject to the tax imposed by division IV of chapter 329.3 or chapter 329.4, no refund for motor vehicle fuel used in operating or propelling such machinery shall be made until the person claiming such refund has established to the satisfaction of the commission* that such tax for such machinery has been paid.

The treasurer shall have the right in order to establish the validity of any claim for refund of motor vehicle fuel license fees, to require the claimant to furnish such additional proof of the validity of the claim as the treasurer may determine and by himself or through his representatives, employees or agents to examine the books and records of the claimant for such purpose and the failure of the claimant to furnish such books and/or records for examination, shall constitute a waiver of all rights to the refund on account of the transaction questioned.

*State tax commission

When motor vehicle fuel is sold to a person who shall claim to be entitled to a refund of the motor vehicle fuel license fees herein imposed, the seller of such motor vehicle fuel, shall make out separate invoices for each purchase on forms which shall be approved by the treasurer showing the name and address of the seller and the name and address of the purchaser, the number of gallons of motor vehicle fuel so sold, written in words and figures, and the nature and kind of fuel so sold, and the date of purchase, and shall state that the purchase price includes the motor vehicle fuel license fee payable to the state; such invoice shall be legibly written and shall not be the basis of a refund, if any corrections or erasures appear upon the face thereof.

No tax refund shall be paid to any person, firm, or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid for from public funds, but this provision shall not be construed as requiring payment of the tax herein imposed with respect to the sale or use of fuel oil so used unless the same is used as a fuel to propel motor vehicles operated upon the public highways for purposes of transportation.

The right of any person to a refund under this chapter shall not be assignable and the application for a refund shall be made by the same person who purchased the motor vehicle fuel as shown in the invoice by the person selling the same and by no other person and the proceeds or amount of such refund, as determined by the treasurer, shall be paid to the person whose name appears on the seller's invoice and to no other person. [C27, 31,§5093-a8; C35,§5093-f29; 47GA, ch 198,§25; 48GA, ch 133,§4; ch 175,§19.]

Referred to in §§5093.09, 5093.31

5093.30 Permits for refunds. All applicants claiming a refund under the provisions of this chapter, except distributors applying for refund on motor vehicle fuel destroyed by accident before the use or sale thereof, shall obtain a permit from the treasurer by application therefor on such form as he shall prescribe, which application therefor shall be made under oath and shall contain among other things, the name, address and occupation of the applicant and the nature of the business and a sufficient description for identification of the machines and/or equipment in which the motor fuel is to be used, for which refund may be claimed under such permit. The permit shall bear a permit number and all applications for refund shall bear the number of the permit under which it is claimed. It is the duty of the treasurer to keep a permanent record of all permits issued and a cumulative record of the amount of refund claimed and paid thereunder. Such permit shall be obtained before or at the time that the first application for refund is made under the provisions of this chapter. [C27, 31,§5093-a8; C35, §5093-f30.]

Referred to in §5093.31

5093.31 Certain acts made unlawful. It shall be unlawful:

1. For any seller to issue or any purchaser to receive and retain incorrect or false invoice or sales ticket in connection with the purchase or sale of motor vehicle fuel, or fuel oil.

2. For any claimant to make any false statement in a claim for refund or to alter any invoices or sales tickets, whether said invoice or sales ticket is to be used to support a claim for refund or not.

3. For any holder of a distributor's license, a service station license, a fuel oil license, or motor vehicle transport license to make any false, incorrect, or materially incomplete records or reports required to be kept or made under the provisions of this chapter, or to refuse to report to the treasurer as required by this chapter, or to refuse to offer his books and records to the treasurer or his representatives for inspection on demand.

4. For any person to display or attempt to use any license issued under this chapter after the same has been revoked.

5. For any person to receive in this state from outside the state any motor vehicle fuel for sale or use in this state, without reporting the same to the treasurer and paying the motor vehicle fuel license fees thereon before the twentieth of the calendar month following the calendar month in which it was received in this state.

6. For any person holding a fuel oil permit, to sell by virtue of said permit any fuel oil for use either alone or in combination with other substances as motor vehicle fuel, or to issue any invoices or sales tickets which do not have indorsed thereon the statement in substance "motor vehicle fuel license fees not included".

7. For any fuel oil dealer or permit holder to sell fuel oil for any purpose except for use for purposes other than as fuel for motor vehicles or to sell said fuel without obtaining a certificate of exemption from the purchaser covering said sale.

8. For any fuel oil distributor to receive in this state from outside the state any motor vehicle fuel, except those fuels which classify as fuel oil under the provisions of this chapter or to sell fuel oils except to the holders of fuel oil dealers' permits where a certificate of purchase is obtained from the purchaser, but nothing herein contained shall be construed to prevent a person being both a fuel oil distributor and a fuel oil dealer.

9. For any person to engage in business as a fuel oil dealer or a fuel oil distributor without the permit or license provided for in this chapter.

10. For any distributor or person to change or alter the price placard until the same shall have been posted for a period of twenty-four hours except to meet a posted competitive price in that community.

11. For any person employed or engaged in the sale or distribution of motor vehicle fuel, either directly or indirectly, to prepare or notarize, for or on behalf of purchasers of motor vehicle fuel, any application for a permit for refunds, as provided in section 5093.30, or for

any claim for refund of motor vehicle fuel tax, as provided in section 5093.29.

Any person found guilty of any of the foregoing illegal acts shall be fined not less than one hundred dollars nor more than one thousand dollars or shall be imprisoned in the county jail not less than thirty days nor more than six months. [C27, 31,§§5093-a4,-a6,-a7,-a8; C35, §5093-f31; 47GA, ch 136,§§2, 3; 48GA, ch 134, §1.]

5093.32 Duties imposed on peace officers. It is hereby made the duty of all sheriffs, deputy sheriffs, constables and other peace officers to see that the provisions of this chapter are not violated, and to respond to the call of the treasurer to make investigations in their respective counties and report to the treasurer or his representatives and said officers are authorized to stop conveyances suspected of transporting motor vehicle fuel on the highways, and to investigate the cargo for that purpose and to seize and impound said cargo and conveyance where it appears that said conveyance is being operated in violation of the provisions of this chapter. [C35,§5093-f32.]

5093.33 Treasurer to employ necessary help. The treasurer is hereby empowered to employ such inspectors, auditors and other help as he may deem necessary for the effective enforcement of this chapter, the number and compensation of such employees to be fixed by the executive council.

There is hereby appropriated out of the money received under the provisions of this chapter sufficient funds to pay for help employed by the treasurer in enforcing the chapter and for making such refunds and paying such rewards as are provided for herein, and to pay the cost of postage, equipment, supplies and printing, used by the department. [C27, 31,§5093-a11; C35,§5093-f33.]

5093.34 Other remedies available. The special remedies provided under the provisions of this chapter to enable the state to collect motor vehicle fuel license fees shall not be construed as depriving the state of any other remedy it might have either at law or in equity independent of this chapter. And the state shall have the right to maintain an action at law for the collection of said license fees and in connection therewith shall be entitled to a writ of attachment without bond. [C35,§5093-f34.]

5093.35 Distribution of proceeds. The net proceeds of all license fees and penalties collected under the provisions of this chapter shall be distributed as follows:

Four-ninths thereof shall be credited to the secondary road construction fund of the several counties of the state. The treasurer shall apportion said four-ninths portion among the counties of the state in the ratio that the area of each county bears to the total area of the state and shall on the first day of each month remit to the treasurer of each county the amount apportioned to the secondary road construction fund of the county.

Three-ninths of said net proceeds shall be placed to the credit of the state highway commission and such amount thereof as may be required for said purpose shall be paid by the highway commission to the counties of the state each year to reimburse said counties for expenditures made by them for bridges, culverts, and right-of-way on primary roads under the direction of the highway commission and paid for out of county road fund or county bridge fund. Said payments are to be made at the times and in the manner and under the circumstances prescribed by section 4755-b5*, code of 1931. The amount of said three-ninths portion not required for such purpose, shall be credited to the primary road funds of the state.

Two-ninths of said net proceeds shall be credited to the primary road fund of the state. [C27, 31,§5093-a5; C35,§5093-f35.]

Referred to in §4686.01
*Omitted as obsolete

5093.36 Approval of forms. Wherever in this chapter the treasurer is authorized to prescribe the form of records to be kept, he may in lieu thereof approve the form of record being kept, and shall so approve such form of record where it furnishes in accessible form the information which the treasurer desires, and substantially complies with the prescribed form. [C35,§5093-f36.]

5093.37 Construction of chapter. This chapter shall not be construed or applied as to interfere with interstate commerce, or to impose a license fee on any motor vehicle fuel before it comes to rest in this state. [C35,§5093-f37.]

Constitutionality, §5093-f38, code 1935; 45ExGA, ch 56, §38

5093.38 Pending actions. The repeal effected by the adoption of this chapter shall not be construed as relieving any person whatsoever from the payment of any motor vehicle license fee penalty or interest due or owing to the state under any law hereby repealed, or to affect or terminate any prosecutions or other proceedings pending under such laws or to prevent the commencement or prosecution of any proceedings, legal or equitable, civil or criminal, for a violation of any such laws or for the collection of any motor vehicle fuel license fees with interest and penalty or for the obtaining of any refund or the enforcement of any other right accruing under the law as it existed prior to the taking effect of this chapter. [C35,§5093-f39.]

5093.39 Title of chapter. This chapter may be cited as and shall be known as the "Iowa Motor Vehicle Fuel Tax Law." [C35,§5093-f40.]

5094, 5095 Rep. by 41GA. See note under chapter 252

CHAPTER 251.4

MOTOR VEHICLE FUEL

5095.01 Definitions.
5095.02 Tests and standards.
5095.03 False representations.
5095.04 Interstate shipments.
5095.05 Sales slip on demand.
5095.06 Department tests—fee.
5095.07 Department inspection—samples tested.
5095.08 Prohibition.
5095.09 Poster showing analysis.
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5095.11 Violations.
5095.12 Industrial petroleum—permits.
5095.13 Chemists—employment of.
5095.14 Appropriation.

5095.01 Definitions. The following definitions shall apply to the various terms used in this chapter:

1. "Motor vehicle fuel" shall mean and include any substance or combination of substances which is intended to be or is capable of being used for the purpose of propelling or running by combustion any internal combustion engine and kept for sale or sold for that purpose. The products commonly known as kerosene and/or distillate or petroleum products of lower gravity (Baume scale) when not used to propel a motor vehicle or for compounding or combining with any motor vehicle fuel, shall be exempt from the provisions of this chapter.

2. "Department" wherever used throughout this chapter shall be construed to mean the department of agriculture.

3. "Retail dealer" shall mean and include any person, firm, partnership, association, or corporation who operates, maintains, or conducts, either by himself or itself, or by any agent, employee or servant, any place of business, filling station, pump station, or tank wagon, from which any motor vehicle fuel, as defined herein, is sold or offered for sale, at retail, or to the final or ultimate consumer.

4. "Wholesale dealer" shall mean and include any person, firm, partnership, association, or corporation, other than retail dealers as defined in subsection 3 of this section, who sells, keeps, or holds, for sale, or purchase for the purpose of sale within this state, any motor vehicle fuel. [C31, 35,§5093-d1.]

5095.02 Tests and standards. Motor vehicle fuel shall conform to the following tests and specifications:

1. Motor vehicle fuel shall be free from water and suspended matter.

2. Corrosion test. Method 530.22. A clean copper strip shall not show more than extremely slight discoloration when submerged in the motor vehicle fuel for three hours at one hundred twenty-two degrees Fahrenheit.

3. Distillation range. This test shall be made by Method 100.13 as set out in the specification adopted by the federal specifications board, appearing in technical paper 323B, issued by the department of commerce, bureau of mines; or by such other similar method as may be adopted hereafter by said specifications board for distillation tests for U. S. government motor vehicle fuel.

When ten percent has been recovered in the receiver, the thermometer shall not reach more than 80 degrees C. (176 degrees F.) nor less than 50 degrees C. (122 degrees F.); provided that, for each percent distillation loss less than four percent, obtained in the A. S. T. M. distillation, the minimum ten percent temperature requirements shall be lowered 3 degrees C. (5.4 degrees F.).

When fifty percent has been recovered in the receiver, the thermometer shall not read more than 140 degrees C. (284 degrees F.).

When ninety percent has been recovered in the receiver, the thermometer shall not read more than 200 degrees C. (392 degrees F.).

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

At least ninety-five percent shall be recovered as distillate in the receiver from the distillation.

4. Sulphur, Method 520.11. Sulphur shall not exceed one-tenth of one percent, except when containing a benzol blend and then shall not exceed two-tenths of one percent. [C31, 35, §5093-d2.]

Referred to in §§5095.04, 5095.06, 5095.07, 5095.09

5095.03 False representations. No person for purposes of selling shall falsely represent the quality or kind of any motor vehicle fuel or add coloring matter thereto for the purpose of misleading the public as to its quality. [C31, 35,§5093-d3.]

5095.04 Interstate shipments. No wholesale dealer or retail dealer shall receive or sell or hold for sale, any motor vehicle fuel within this state, unless he first secures from the refiner or producer of such motor vehicle fuel, a statement, verified by the oath of a competent chemist, employed by or representing such refiner or producer, showing the true standards and tests of such motor vehicle fuel, obtained by the methods referred to in section 5095.02 hereof. Such verified tests shall be required and must accompany the bill of lading or shipping documents representing the shipment of such motor vehicle fuel into this state before such shipment can be received and unloaded. [C31, 35, §5093-d4.]

5095.05 Sales slip on demand. Each wholesale dealer or retail dealer in this state shall, when making a sale of motor vehicle fuel, give to each purchaser upon demand a sales slip upon which must be printed the words "This motor vehicle fuel conforms to the standard of specifications required by the state of Iowa." [C31, 35, §5093-d5.]

5095.06 Department tests—fee. Any wholesale dealer or retail dealer may, at his option, forward to the department for testing a sample

taken in the manner here prescribed. He shall draw from such original container, in the presence of some reputable person, into a clean receptacle, suitable for shipping, a sample of such motor vehicle fuel, not less than eight fluid ounces, and shall carefully seal such receptacle and affix thereto a written label showing the car number or other identifying marks upon such original container from which such sample was taken, all in the presence of such reputable person, and such wholesale dealer or retail dealer and such reputable person shall make a statement, under oath, that such sample was taken in the manner provided for herein, referring to the identifying marks upon such label. At the same time such sworn statement, together with a fee of two dollars for the making of such test, shall be forwarded to the department. The department shall test such sample by the methods provided for in section 5095.02 and shall forward to such wholesale dealer or retail dealer a certified copy of the results of such test. [C31, 35,§5093-d6.]

5095.07 Department inspection — samples tested. The department of agriculture, its agents or employees, shall, from time to time, make or cause to be made tests of any motor vehicle fuel which is being sold, or held or offered for sale within this state, and for such purposes such inspectors shall have the right to enter upon the premises of any wholesale dealer or retail dealer in motor vehicle fuels within this state, and to take from any container a sample of such motor vehicle fuel, not to exceed eight fluid ounces, which sample shall be sealed and appropriately marked or labeled by such inspector and delivered to the department. The department shall make, or cause to be made, complete analyses or tests of such motor vehicle fuel by the methods specified in section 5095.02, and shall furnish to such wholesale dealer or retail dealer a certified copy of the results of such tests. [C31, 35,§5093-d7.]

5095.08 Prohibition. No retail or wholesale dealer defined in this chapter shall sell any motor vehicle fuel in the state of Iowa that fails to meet the standards and specifications set out in this chapter. [C31, 35,§5093-d8.]

5095.09 Poster showing analysis. Any retail dealer who sells or holds for sale motor vehicle fuel, as defined in section 5095.02 hereof, may post upon any container or pump from which such motor vehicle fuel is being sold, a statement or notice in form to be prescribed by the department, showing the results of the tests of such motor vehicle fuel then being sold from such pumps or other containers. [C31, 35, §5093-d9.]

5095.10 Transfer pipes. No wholesale dealer, retail dealer or other person shall, within this state, use the same pipe line, for transferring motor vehicle fuel from one container to another, as that used for transferring kerosene or other inflammable product used for open flame illuminating or heating purposes. [C31, 35,§5093-d10.]

5095.11 Violations. Any person violating the provisions of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not to exceed one hundred dollars or imprisonment in the county jail for a period of not to exceed thirty days. [C31, 35,§5093-d11.]

5095.12 Industrial petroleum—permits. Any wholesale dealer as herein defined may apply to the department for a permit to make importations of petroleum products for industrial use only and not intended to be used for internal combustion engines, on a form to be supplied by the department, and upon receiving such permission may make importations of petroleum products for industrial use only, exempt from the specifications of this chapter. [C31, 35, §5093-d12.]

5095.13 Chemists—employment of. The secretary of agriculture shall, subject to the approval of the executive council, employ one or more chemists and incur such other expense as shall be necessary for the purpose of carrying into effect the provisions of this chapter. [C31, 35,§5093-d13.]

5095.14 Appropriation. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated funds sufficient to pay the expenses incurred as authorized by this chapter. [C31, 35,§5093-d14.]

CHAPTER 252

MOTOR VEHICLE CARRIERS

This chapter (§§5094 to 5105, inc.) repealed by 41GA, ch 4, and chapters 252.1 and 252.2 enacted in lieu thereof

CHAPTER 252.1

MOTOR VEHICLE CERTIFICATED CARRIERS

5100.01 Definitions.
5100.02 Special powers of commission.
5100.03 General powers.
5100.04 Statutes applicable.
5100.05 Rates.
5100.06 Certificate of convenience and necessity.
5100.07 When certificate to be issued.
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5100.15 Objections to application.
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5100.18 Granting application.
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5100.26 Liability bond.
5100.27 Powers of cities and towns.
5100.28 Safe and sanitary condition of vehicle.
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5100.31 Distinctive markings on vehicle.
5100.32 Additional rules.
5100.33 Cancellation of certificate.
5100.34 Misdemeanor—penalty.

5096 to 5100, inc. Rep. by 41GA. See note under chapter 252

5100.01 Definitions. When used in this chapter:

1. The term "motor vehicle", shall mean any automobile, automobile truck, motorbus, or other self-propelled vehicle, including any trailer, semitrailer or other device used in connection therewith not operated upon fixed rails or track, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route, even though there may be occasional, periodic or irregular departures from such termini or route; except those owned by school corporations or used exclusively in conveying school children to and from schools.

2. The term "motor carrier" shall mean any person operating any motor vehicle upon any highway in this state.

3. The term "highway" shall mean every street, road, bridge, or thoroughfare of any kind in this state.

4. The term "commission" shall mean the Iowa state commerce commission. [C24,§5094; C27, 31, 35,§5105-a1; 47GA, ch 205,§1.]

5100.02 Special powers of commission. The commission is hereby vested with power and authority, and it shall be its duty to:

1. Fix or approve the rates, fares, charges, classifications, and rules and regulations pertaining thereto, of each motor carrier.

2. Regulate and supervise the accounts, schedules, and service of each motor carrier.

3. Prescribe a uniform system and classification of accounts to be used, which among other things shall provide for the setting up of adequate depreciation charges, and after such accounting system shall have been promulgated, motor carriers shall use no other.

4. Require the filing of annual and other reports.

5. Supervise and regulate motor carriers in all other matters affecting the relationship between such carriers and the traveling and shipping public. [C24,§5095; C27, 31, 35,§5105-a2; 48GA, ch 120,§79.]

41GA, ch 5, §2, editorially divided

5100.03 General powers. The commission shall also have power and authority by general order or otherwise to prescribe rules and regulations applicable to any and all motor carriers. The state department of public safety is hereby authorized and empowered to prescribe and enforce safety regulations in the operation of motor carriers, require a periodic inspection of the equipment of every motor carrier from the standpoint of enforcement of safety regulations, and such equipment shall be at all times subject to inspection by properly authorized representatives of the department of public safety. [C24, §§5095, 5104; C27, 31, 35,§5105-a3; 48GA, ch 120, §78.]

5100.04 Statutes applicable. All control, power, and authority over railroads and railroad companies now vested in the commission, insofar as the same is applicable, are hereby specifically extended to include motor carriers. [C27, 31, 35,§5105-a4.]

Powers of commerce commission, ch 368 et seq.

5100.05 Rates. All charges made by any motor carrier for any service rendered or to be rendered in the public transportation of passengers or property, or in connection therewith, shall be just, reasonable and nondiscriminating, and every unjust, unreasonable, or discriminating charge for such service or any part thereof is prohibited and declared unlawful. [C24, §5096; C27, 31, 35,§5105-a5.]

5100.06 Certificate of convenience and necessity. It is hereby declared unlawful for any motor carrier to operate or furnish public service within this state without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. [C24,§5097; C27, 31, 35, §5105-a6.]

5100.07 When certificate to be issued. Before a certificate shall be issued, the commission shall, after a public hearing, make a finding that the service proposed to be rendered will promote the public convenience and necessity. If such finding be made, it shall be its duty to issue a certificate. [C24,§5097; C27, 31, 35,§5105-a7.]

41GA, ch 5, §5, editorially divided

5100.08 Financial ability of applicant. No certificate of convenience and necessity shall be issued until the applicant has made a satisfactory showing as to his financial ability to carry out the terms and conditions imposed. [C27, 31, 35,§5105-a8.]

5100.09 Conditions. When the certificate is granted, the commission may attach to the exercise of the rights therein conferred such terms and conditions as in its judgment the public convenience and necessity may require, which shall include the right and duty to transport newspapers. [C24,§5097; C27, 31, 35,§5105-a9.]

5100.10 Amendment or revocation. For just cause, the commission may at any time alter, amend, or revoke any certificate issued. [C24, §5097; C27, 31, 35,§5105-a10.]

5100.11 Rules of procedure. The commission shall adopt rules governing the procedure to be followed in the filing of applications and in the conduct of hearings. [C24,§5097; C27, 31, 35,§5105-a11.]

41GA, ch 5, §6, editorially divided

5100.12 Application for certificate. All applications shall be in writing and, in addition to the other information required, shall contain the following:

1. The name of the individual, firm, or corporation making the application.
2. The principal office or place of business of applicant.
3. A complete description of the route over which the applicant proposes to operate.
4. A schedule setting forth in detail the service which the applicant proposes to furnish.
5. A complete description of the equipment which the applicant proposes to use in furnishing the service.
6. A financial statement from which the commission can determine whether or not the applicant is able to engage in the undertaking proposed in the application. [C24,§5097; C27, 31, 35,§5105-a12.]

5100.13 Time of hearing—notice. Upon the filing of the application, the commission shall fix a date for hearing thereon and cause a notice addressed to the citizens of each county through or in which the proposed service will be rendered, to be published in some newspaper of general circulation in each county, once each week for two consecutive weeks. [C24,§5097; C27, 31, 35,§5105-a13.]

41GA, ch 5, §7, editorially divided

5100.14 Service of notice—place of hearing. Said hearing shall not be held less than ten days from the date of the last publication and at the office of the commission unless a different place is specified in the notice. [C24,§5097; C27, 31, 35,§5105-a14.]

5100.15 Objections to application. Any person, firm, corporation, city, town, or county whose rights or interests may be affected shall have the right to make written objections to the proposed application. [C27, 31, 35,§5105-a15.]

41GA, ch 5, §8, editorially divided

5100.16 Filing of objections. All such objections shall be on file with the commission at least five days before the date fixed for said hearing. The commission may permit objections to be filed later, in which event the applicant shall be given reasonable time to meet such objections. [C27, 31, 35,§5105-a16.]

5100.17 Testimony receivable. It shall consider the application and any objections filed thereto and may hear testimony to aid it in determining the propriety of granting the application. [C27, 31, 35,§5105-a17.]

5100.18 Granting application. It may grant the application in whole or in part upon such terms, conditions, and restrictions and with such modifications as to schedule and route as may seem to it just and proper. The actual operation of such motor vehicles or vehicle shall not begin without a written statement of approval from the department of public safety to the effect that the safety provisions have been complied with. [C24,§5097; C27, 31, 35,§5105-a18; 48GA, ch 120,§80.]

5100.19 Expense of hearing. The applicant shall pay all the costs and expenses of the hearing and necessary preliminary investigation in connection therewith before his application shall be granted. [C27, 31, 35,§5105-a19.]

41GA, ch 5, §9, editorially divided

5100.20 Deposit to cover expense. The commission shall have the right to require the applicant to deposit with it at the time the application is filed, an amount of money to be determined by the commission to secure the payment of the said costs and expenses. [C27, 31, 35, §5105-a20.]

5100.21 Appeal. Appeal may be taken from the decision of the commission by the applicant or any party who appeared in opposition to the application, to the district court of any county in which is located any portion of the route proposed in the application, within thirty days from the time the decision was rendered, by giving at least ten days notice to the commission to be served on its chairman or secretary in the same manner as original notices are now served, and by filing with the clerk of the district court a bond for costs in the sum of not less than five hundred dollars. [C24,§5098; C27, 31, 35,§5105-a21.]

Manner of service, §11060
Presumption of approval of bond, §12759.1
41GA, ch 5, §10, editorially divided

5100.22 Transcript on appeal. Upon appeal being taken, the secretary of the commission shall make and certify a transcript of all papers, records, and proceedings in connection with such application and hearing and file the same with the clerk of said court on or before the first day of the next term thereof following the taking of such appeal. [C24,§5098; C27, 31, 35, §5105-a22.]

5100.23 Trial on appeal. The appeal shall be submitted upon the transcript of the evidence and the record made before the commission and the district court shall either affirm or reverse the order of the commission. [C24,§5098; C27, 31, 35,§5105-a23.]

5100.24 Appeal to supreme court. An appeal may be taken from the judgment of the district court to the supreme court as from other judgments. [C24,§5098; C27, 31, 35,§5105-a24.]

Appeals generally, ch 555

5100.25 Transfer of certificate. No certificate of convenience and necessity shall be sold, transferred, leased, or assigned until the motor carrier shall have operated thereunder for at least ninety days continuous service, nor shall any contract or agreement with reference to or affecting any such certificate be made except with the written approval of the commission. Nor shall any person be permitted to take over any such certificate unless he or it shall possess all the qualifications of and meet all the requirements and assume all the obligations imposed upon an original applicant. [C24,§5099; C27, 31, 35,§5105-a25.]

5100.26 Liability bond. No certificate shall be issued until and after the applicant shall have filed with the commission an insurance policy, policies or surety bond, in form to be approved by the commission, issued by some company, association, reciprocal or interinsurance exchange or other insurer authorized to do business in this state, in such penal sum as the commission may deem necessary to protect the interests of the public with due regard to the number of persons and amount of property involved, which insurance policy, policies or surety bond shall bind the obligors thereunder to make compensation for injuries to persons and loss of or damage to property resulting from the operation of such motor carrier and for which such motor carrier would be legally liable. Such insurance policy, policies or surety bond shall also provide that any person, firm, association or corporation having a right of action against such motor carrier for injuries to persons or loss of or damage to property, when service cannot be obtained on the motor carrier within this state, may bring action for recovery directly upon such insurance policy, policies or surety bond and against such insurance company, association, reciprocal or interinsurance exchange or other insurer or bonding company. No other or additional policies or bonds shall be required of any motor carrier by any city, town or other agency of the state. [C24,§5103; C27, 31, 35,§5105-a26.]

Similar section, §5105.15

5100.27 Powers of cities and towns. Cities and towns shall have power by ordinance to adopt general rules of operation, and to designate the streets or routes over which motor carriers shall travel; provided, however, that the exercise of the power granted in this section shall be reasonable and fair. Nothing in this chapter shall be construed as repealing chapter 306, nor section 6769. Motor vehicles operating or proposing to operate between cities and towns, the corporate limits of which are not more than one mile apart, shall be considered as coming within the purview of the chapter referred to in this section. [C24,§5101; C27, 31, 35,§5105-a28.]

Applicable to special charter cities, §6755

5100.28 Safe and sanitary condition of vehicle. Every motor vehicle and all parts thereof shall be maintained in a safe and sanitary condition at all times, and shall be at all times, subject to inspection by the members of the department of public safety. [C24,§5104; C27, 31, 35,§5105-a29; 48GA, ch 120,§81.]

41GA, ch 5, §15, editorially divided

5100.29 Driver of vehicle. Every driver employed by a motor carrier shall be at least twenty-one years of age; in good physical condition; of good moral character; shall be fully competent to operate the motor vehicle under his charge, and shall hold a regular chauffeur's license from the department of public safety. [C24,§5104; C27, 31, 35,§5105-a30; 48GA, ch 120,§82.]

5100.30 Riding on running board, etc. On passenger-carrying motor vehicles passengers shall not be permitted to ride on the running boards, fenders, or on any other outside part of the vehicle. [C24,§5104; C27, 31, 35,§5105-a31.]

Sections 5105-a32 to 5105-a35, inc., repealed by 47GA, ch 134, §§537, 538, 539, 540

5100.31 Distinctive markings on vehicle. There shall be attached to each motor vehicle such distinctive markings or tags as shall be prescribed by the commission. [C24,§5104; C27, 31, 35,§5105-a36.]

5100.32 Additional rules. The commission shall promulgate such other safety rules and regulations as it may deem necessary to govern and control the operation of motor vehicles upon the highways and the maintenance and inspection thereof. [C24,§5104; C27, 31, 35,§5105-a37.]

5100.33 Cancellation of certificate. For violation of any provision of this chapter or of any rule or regulation promulgated thereunder by any motor carrier, the commission may, in addition to other penalties herein provided, revoke and cancel the certificate of such motor carrier. In the event of any flagrant and persistent violation of safety regulations by the holder of a certificate or his agent, upon the request of the commissioner of public safety the state commerce commission shall suspend such certificate of necessity until the safety regulations prescribed by the department of public safety are complied with or the commission may revoke the certificate at its discretion. [C24,§5104; C27, 31, 35, §5105-a38; 48GA, ch 120,§83.]

5100.34 Misdemeanor — penalty. Every owner, officer, agent, or employee of any motor carrier, and every other person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provision of this chapter, or who fails to obey, observe, or comply

with any order, decision, rule or regulation, direction, demand, or requirement or any part or provision thereof, of the commission, or who procures, aids, or abets any corporation or person in his failure to obey, observe, or comply with any such order, decision, rule, direction, demand, or regulation or any part or provision thereof, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail for a period of not to exceed thirty days. [C24,§5105; C27, 31, 35, §5105-a39.]

5101 to 5103, inc. Rep. by 41GA. See note under chapter 252

CHAPTER 252.2

TAXATION OF MOTOR VEHICLE CERTIFICATED CARRIERS

5103.01 Definitions.
5103.02 Compensation tax.
5103.03 Payment of tax.
5103.04 Penalties.
5103.05 Rebate—fractional tax.
5103.06 Plates.
5103.07 Lien.
5103.08 Sale of property.
5103.09 Duty to collect—procedure.
5103.10 Travel orders.
5103.11 Accounting by commission.
5103.12 Distribution of proceeds.
5103.13 Payment to counties.

5103.01 Definitions. When used in this chapter:

1. The term "motor vehicle" shall mean any automobile, automobile truck, motorbus, or other self-propelled vehicle, not operated upon fixed rails or track, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route, even though there may be occasional, periodic or irregular departures from such termini or route; except those busses owned by school corporations and used exclusively in conveying school children to and from schools.

2. The term "motor carrier" shall mean any person operating any motor vehicle upon any highway in this state.

3. The term "highway" shall mean every street, road, bridge, or thoroughfare of any kind in this state.

4. The term "commission" shall mean the Iowa state commerce commission. [C24,§5094; C27, 31, 35,§5105-a40; 47GA, ch 205,§1.]

Sections 5105-a41 to 5105-a57 inc., code 1935, repealed by 48GA, ch 135, §9b; see §§5103.02 to 5103.13, inc.

5103.02 Compensation tax. In addition to the regular license* fees or taxes imposed upon motor vehicles, there shall be assessed against and collected from every motor carrier the following tax as compensation for the use of the highways to carry on business and for the repair and maintenance of the highways:

For each motor vehicle or combination of tractor and semitrailer or trailer with a gross weight in excess of sixteen tons, two hundred fifty dollars.

For each motor vehicle or combination of tractor and semitrailer or trailer with a gross weight in excess of twelve tons and not to exceed sixteen tons, two hundred dollars.

For each motor vehicle or combination of tractor and semitrailer or trailer with a gross weight in excess of eight tons and not to exceed twelve tons, one hundred fifty dollars.

For each motor vehicle or combination of tractor and semitrailer or trailer with a gross weight of eight tons or less, seventy-five dollars.

"Gross weight" shall mean the registered weight of a vehicle or combination of trailer and semitrailer or trailer except in the case of motor vehicles registered outside of this state. The gross weight shall mean the empty weight of the vehicle plus the actual weight of the load carried thereon. [C24,§5102; C27, 31, 35, §5105-a41; 47GA, ch 134,§531; 48GA, ch 135, §10.]

Referred to in §§5103.10, 6610.58
Section as amended effective December 31, 1939, 48GA, ch 135,§22
*"Registration" probably intended. See 47GA, ch 134, §531

5103.03 Payment of tax. The annual compensation tax shall be paid on or before the first day of January in each year; provided, however, the same may be paid in equal quarterly installments which shall be due on the first day of January, April, July and October of each year. [C24,§5102; C27, 31, 35,§5105-a48; 48GA, ch 135, §11.]

Referred to in §5103.05

5103.04 Penalties. If payment of compensation tax is not made within thirty days after the date upon which it is due, it shall become delinquent and there shall be added as a penalty a sum equal to one-tenth of the amount of the original tax for each month or fraction thereof that the tax remains delinquent. [C24,§5102; C27, 31, 35,§5105-a49; 48GA, ch 135,§12.]

5103.05 Rebate—fractional tax. If during any year a motor vehicle ceases to be used for compensation the operator thereof, upon satisfactory proof to the commission of cessation of such use, shall be exempted from the payment of the quarterly installments of the annual tax thereafter and shall be entitled to a refund of any subsequent quarterly installments previously paid. The tax to be assessed on any motor vehicle placed in service for compensation after February 1 shall be computed on the basis of one-twelfth of the annual tax multiplied by the number of unexpired months in the current quarter, and in succeeding quarters shall be computed on the basis of the regular quarterly payment as provided in section 5103.03. [48GA, ch 135,§13.]

5103.06 Plates. The commission shall issue distinguishing identification plates for each motor vehicle upon the payment of the taxes herein assessed, which plates shall be affixed to

each such vehicle in a conspicuous place. [48GA, ch 135,§14.]

5103.07 Lien. Taxes and penalties imposed by this chapter shall be a first lien upon all property of the carrier. [C24,§5102; C27, 31, 35, §5105-a50; 48GA, ch 135,§15.]

5103.08 Sale of property. If payment is not made on or before sixty days after the date when the tax became delinquent, the property of the motor vehicle carrier, or so much thereof as may be necessary, may be sold to satisfy the said taxes and penalties, interest and costs of sale. [C24,§5102; C27, 31, 35,§5105-a51; 48GA, ch 135, §16.]

5103.09 Duty to collect — procedure. All taxes and penalties imposed by this chapter shall be paid to the commission, and it shall be the duty of the commission to enforce the collection of all taxes and penalties, and notice of sale, and procedure thereunder shall, so far as may be, accord with the provisions of the law for the collection of taxes upon general property. [C24, §5102; C27, 31, 35,§5105-a52; 48GA, ch 135,§17.]

Collection of taxes, ch 346

5103.10 Travel orders. Nonresident owners and resident owners of motor vehicles registered outside of this state, subject to tax under section 5103.02 and operated within this state only occasionally or on specified trips into or across the state for the interstate transportation of persons or property for compensation shall be exempt from the annual compensation tax imposed by this chapter upon obtaining from the commission an order for each such trip any such vehicle is so operated into or across the state. The commission shall issue such orders upon application therefor, giving a description of such vehicle, and upon the payment to the commission of the sum of five dollars for each order for motor vehicles with a gross weight in excess of thirty-four thousand pounds and three dollars for each order for motor vehicles with a gross weight of thirty-four thousand pounds or less. Such order shall be conspicuously displayed on such vehicle at all times while such vehicle is being operated upon the highways of this state in the manner prescribed by the commission. [48GA, ch 135, §18.]

5103.11 Accounting by commission. The commission shall remit to the treasurer of state all moneys collected under this chapter. [C27, 31, 35,§5105-a53; 48GA, ch 135,§19.]

5103.12 Distribution of proceeds. All of the moneys received under the provisions of this chapter shall be distributed as follows:

1. One-half shall be allocated by the commission to the various counties in the proportion that the area of the respective county bears to the total area of the state, to be used by the county board of supervisors for the maintenance of secondary roads.

2. One-half shall be placed in the primary road fund of the state. [C24,§5102; C27, 31, 35, §5105-a54; 48GA, ch 135,§20.]

5103.13 Payment to counties. The commission shall certify the amount due to each county to the state comptroller, who shall draw warrants upon the treasurer of state to be transmitted to the respective county treasurers. [C24, §5102; C27, 31, 35,§5105-a55; 48GA, ch 135,§21.]

Chapter as amended effective December 31, 1939; 48GA, ch 135, §22

5104, 5105 Rep. by 41GA. See note under chapter 252

CHAPTER 252.3

MOTOR VEHICLE TRUCK OPERATORS

5105.01 Definitions.
5105.02 Jurisdiction.
5105.03 Rules and regulations.
5105.04 Powers.
5105.05 Charges.
5105.06 Permit.
5105.07 Application.
5105.08 Issuance.
5105.09 Fee.
5105.10 Nonresidents—reciprocal waiver of fee.
5105.11 Payment of fee.
5105.12 Accounting.
5105.13 Expenditure of funds.
5105.14 Permit—nature of.
5105.15 Insurance or bond.
5105.16 Revocation of permit.
5105.17 Equipment—inspection.
5105.18 Drivers—conditions.
5105.19 Required marking.
5105.20 Rules for operation.
5105.21 Violations—effect.
5105.22 Violations—punishment.

5105.01 Definitions. When used in this chapter:

1. The term "motor truck" shall mean any automobile, automobile truck, or other self-propelled vehicle, including any trailer, semitrailer or other device used in connection therewith, not operated upon fixed rails or track, used for the public transportation of freight for compensation, not operating between fixed termini, nor over a regular route.

2. The term "truck operator" shall mean any person operating any motor truck or motor trucks upon any highway in this state.

3. The term "highway" shall mean every street, road, bridge, or thoroughfare of any kind in this state.

4. The term "commission" shall mean the Iowa state commerce commission. [C31, 35, §5105-c1; 47GA, ch 205,§1.]

5105.02 Jurisdiction. The commission is hereby vested with power and authority and it shall be its duty to:

1. Fix or approve the rates, charges, classifications, and rules and regulations pertaining thereto, of each truck operator, after complaint

has been filed in accordance with rules established by the commission.

2. Regulate and supervise the service of each truck operator, provided that only the department of public safety shall prescribe and enforce safety regulations which it is hereby empowered to do.

3. Require the filing of annual and such other reports as it may deem necessary.

4. Supervise and regulate truck operators in all other matters affecting the relationship between such truck operators and the traveling and shipping public. [C31, 35,§5105-c2; 48GA, ch 120,§§84, 85.]

5105.03 Rules and regulations. The commission shall also have power and authority by general or special order to prescribe rules and regulations applicable to any and all truck operators, provided that only the department of public safety shall prescribe and enforce safety regulations. [C31, 35,§5105-c3; 48GA, ch 120, §86.]

5105.04 Powers. All control, power, and authority over railroads and railroad companies, motor vehicles and motor carriers now vested in the commission, insofar as the same are applicable, are hereby specifically extended to include truck operators. [C31, 35,§5105-c4.]

5105.05 Charges. All charges made by any truck operator for any service rendered or to be rendered in the public transportation of property, or in connection therewith, shall be just, reasonable and nondiscriminating, and every unjust, unreasonable, or discriminating charge for such service or any part thereof is prohibited and declared unlawful. [C31, 35,§5105-c5.]

5105.06 Permit. It is hereby declared unlawful for any truck operator to operate or furnish public service within this state without first having obtained from the commission a permit as hereinafter defined. [C31, 35,§5105-c6.]

5105.07 Application. Before a permit shall be issued, the person seeking the same shall file an application therefor. All such applications shall be in writing, and in addition to other information required, shall contain the following:

1. The name of the individual, firm or corporation making the application.

2. The principal office or place of business of the applicant.

3. A general description of the territory in which the applicant proposes to operate and a general description of the service proposed to be rendered.

4. A complete description of the equipment which the applicant proposes to use in furnishing the service. [C31, 35,§5105-c7.]

5105.08 Issuance. Upon the filing of the application and if the applicant shall otherwise comply with the terms and conditions of this chapter, the commission shall issue to the applicant a permit as herein defined. The actual operation of such motor vehicle or vehicles shall not begin without the written approval of the state department of public safety, stating that the applicant has complied with the prescribed safety regulations. [C31, 35,§5105-c8; 48GA, ch 120,§87.]

5105.09 Fee. No permit shall be issued nor continued in force until the holder thereof shall have paid to the commission for the administration of this chapter an annual permit fee for each motor truck operated thereunder in the amount of five dollars. [C31, 35,§5105-c9.]

Referred to in §5105.10

5105.10 Nonresidents—reciprocal waiver of fee. The Iowa state commerce commission shall be empowered to waive the fee provided for in section 5105.09, provided said motor truck is owned by a nonresident of this state and is operated upon the highways thereof only in the conduct of business in interstate commerce and provided further that the owner of said motor truck has complied with the registration requirements of the state of his or its residence, and said commission shall do all things necessary or required to negotiate and perfect reciprocal agreements between the various states and the state of Iowa, waiving the fee provided for in section 5105.09 for the purpose of securing exemptions and privileges for citizens of this state operating motor vehicles in other states. [48GA, ch 136,§1.]

5105.11 Payment of fee. It shall be the duty of the commission to collect all permit fees provided in this chapter, and failure to pay any such permit fee within thirty days after the time the same shall become due shall be cause for revocation of the permit of the truck operator in arrears. [C31, 35,§5105-c10.]

5105.12 Accounting. The commission shall, on the last day of each month, remit to the treasurer of state all moneys collected under this chapter during such month. [C31, 35,§5105-c11.]

5105.13 Expenditure of funds. All moneys received under the provisions of this chapter or so much thereof as may be necessary shall be used for the administration and enforcement of the provisions of this chapter and the regulation of truck operators, and shall be paid to the commission by warrant drawn from time to time by the state comptroller upon the treasurer of state. Unexpended balances on June 30 of each year shall be credited to the general fund of the state by December 31 following. [C31, 35, §5105-c12.]

5105.14 Permit—nature of. Permits issued hereunder shall be personal property and may be sold, transferred, leased or assigned under such reasonable rules and regulations as may be fixed by the commission. [C31, 35,§5105-c13.]

5105.15 Insurance or bond. No permit shall be issued until and after the applicant shall have filed with the commission an insurance policy, policies or surety bond, in form to be approved by the commission issued by some in-

surance carrier or bonding company authorized to do business in this state, in such amount as the commission may deem necessary to protect the interests of the public with due regard to the number of persons and amount of property involved, which insurance policy, policies or surety bond shall bind the obligors thereunder to make compensation for injuries to persons and loss of or damage to property resulting from the operation of such motor truck and for which such truck operator would be legally liable. Such insurance policy, policies or surety bond shall also provide that any person, firm, association or corporation having a right of action against such truck operator for injuries to persons or loss of or damage to property, may bring action for recovery directly upon such insurance policy, policies or surety bond against such insurance carrier or bonding company when service cannot be obtained on the truck operator within this state. No other or additional policies or bond shall be required of any truck operator by any city, town or other agency in the state. [C31, 35,§5105-c14.]

Similar section, §5100.26

5105.16 Revocation of permit. For just cause, after due hearing, the commission may at any time alter, amend or revoke any permit issued. If the holder of the permit or his agent persists in a violation of any safety regulation prescribed by the department of public safety, the latter may recommend to the commission revocation of said permit and such violation shall be grounds for such revocation. [C31, 35,§5105-c15; 48GA, ch 120,§88.]

5105.17 Equipment — inspection. Every motor truck and all parts thereof shall be maintained in a safe and sanitary condition at all times, and shall be at all times, subject to inspection by the department of public safety. [C31, 35,§5105-c16; 48GA, ch 120,§89.]

5105.18 Drivers—conditions. Every person driving a motor truck as defined in this chapter shall be at least eighteen years of age; in good physical condition; of good moral character; shall be fully competent to operate the motor truck under his charge and shall hold a regular chauffeur's license from the department of public safety. [C31, 35,§5105-c17; 47GA, ch 134, §532; 48GA, ch 120,§90.]

Sections 5105-c18 to 5105-c21, inc., code 1935, repealed by 47GA, ch 134, §§541, 542, 543, 544

5105.19 Required marking. There shall be attached to each motor truck such distinctive markings or tags as shall be prescribed by the commission. [C31, 35,§5105-c22.]

5105.20 Rules for operation. The commissioner of public safety shall promulgate such other safety rules and regulations as he may deem necessary to govern and control the operation of motor trucks upon the highways and the maintenance and inspection thereof. [C31, 35, §5105-c23; 48GA, ch 120,§91.]

5105.21 Violations—effect. For violation by any truck operator of any provision of this chapter or of any rule or regulation promulgated thereunder, the commission may, in addition to other penalties herein provided, suspend or revoke and cancel the permit of such truck operator. [C31, 35,§5105-c24.]

5105.22 Violations — punishment. Every owner, officer, agent, or employee of any truck operator, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule or regulation, direction, demand, or requirement or any part or provision thereof, of the commission, or the commissioner of public safety, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand, or regulation or any part or provision thereof, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail for a period of not to exceed thirty days. [C31, 35,§5105-c25; 48GA, ch 120,§92.]

Constitutionality, §5105-c26, code 1935; 43GA, ch 129, §27

TITLE XIV

COUNTY AND TOWNSHIP GOVERNMENT

CHAPTER 253

BOARD OF SUPERVISORS

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

5106 Number of members.
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5106 Number of members. The board of supervisors in each county shall consist of three persons, except where the number has been or may hereafter be increased in the manner provided by this chapter. They shall be qualified electors, and be elected by the qualified voters of their respective counties, and shall hold their office for three years. [R60,§303; C73,§§294, 299; C97,§410; SS15,§410; C24, 27, 31, 35,§5106.]

5107 Number increased by vote. When petitioned to do so by one-tenth of the qualified electors of said county, the board of supervisors shall submit to the qualified electors of the county, at any regular election, one of the following propositions as may be requested in said petition, or the board may, on its own motion, by resolution, submit either of said propositions:

1. Shall the proposition to increase the number of supervisors to five be adopted?
2. Shall the proposition to increase the number of supervisors to seven be adopted?

If the majority of the votes cast shall be for the proposition so submitted, then at the next general election the requisite additional supervisors shall be elected, and one-half of the additional supervisors shall hold office for three years and one-half for two years.

The length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot. [R60,§303; C73,§§294, 299; C97,§410; SS15,§410; C24, 27, 31, 35,§5107.]

5108 Number reduced by vote. In any county where the number of supervisors has been increased to five or seven, the board of supervisors, on the petition of one-tenth of the qualified electors of the county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as the same may be requested in such petition:

1. Shall the proposition to reduce the number of supervisors to five be adopted?
2. Shall the proposition to reduce the number of supervisors to three be adopted?

If a majority of the votes cast shall be for the decrease, then the number of supervisors shall be reduced to the number indicated by such vote. [C73,§299; C97,§410; SS15,§410; C24, 27, 31, 35, §5108.]

5108.1 Petition in certain counties. In counties where there is a city operating under the commission form of government, with a population of more than seventy-five thousand people, the petition shall contain ten percent of the qualified electors residing in the county and outside of the city, and then ten percent of the qualified electors residing in the city. [C35, §5108-e1.]

5108.2 Vote in certain counties. When the proposition is voted upon, the qualified electors residing in the county and outside of the city, shall vote separately upon the proposition, and there shall be cast a majority vote of such electors outside of the city, and a majority vote of the qualified electors of the city, before such change shall be effective. [C35,§5108-e2.]

5109 When reduction takes effect. If the proposition to reduce the number of members of the board carries, the board shall consist of the same number of members as at the time the proposition to reduce was submitted, until the second secular day in January following the next general election, at which time the terms of all members of the board shall expire. [C73, §299; C97,§410; SS15,§410; C24, 27, 31, 35, §5109.]

5110 Election of new members. At the next general election following the one at which the proposition to reduce the number of members of the board was carried there shall be elected the number of members required by such proposition.

Where such proposition reduces the board to five members, two persons shall be elected as members of the board for two years, two for three years, and one for four years.

In counties where the proposition reduces the board to three members, one person shall be elected as member of the board for two years, one for three years, and one for four years.

The length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot. [SS15,§410; C24, 27, 31, 35,§5110.]

5111 Supervisor districts. The board of supervisors may, at its regular meeting in January in any even-numbered year, divide its county by townships into a number of supervisor districts corresponding to the number of supervisors in such county; or, at such regular meeting, it may abolish such supervisor districts, and provide for electing supervisors for the county at large. [C97,§416; S13,§416; C24, 27, 31, 35,§5111.]

Referred to in §5114

5112 How formed. Such districts shall be as nearly equal in population as possible, and shall each embrace townships as nearly contiguous as practicable, each of which said districts shall be entitled to one member of such board, to be elected by the electors of said district. [C97,§417; C24, 27, 31, 35,§5112.]

Referred to in §5114

5113 One member for each district. In case such division or any subsequent division shall be found to leave any district or districts without a member of such board of supervisors, then, at the next ensuing general election, a supervisor shall be elected by and from such district having no member of such board; and if there be two such districts or more, then the new member or members of said board shall be elected by and from the district or districts having the greater population according to the last state census, and so on, until each of said districts shall have one member of such board. [C97,§418; C24, 27, 31, 35,§5113.]

Referred to in §5114

5114 Redistricting — term of office. Any county may be redistricted, as provided by sections 5111 to 5113, inclusive, once in every two years, and not oftener, and nothing herein contained shall be so construed as to have the effect of lengthening or diminishing the term of office of any member of such board. [C97,§419; C24, 27, 31, 35,§5114.]

5115 Absence from county—vacancy. The absence of any supervisor from the county for six months in succession shall be treated as a resignation of his office, and the board shall, at its next meeting thereafter, by resolution regularly adopted and spread upon its records, declare his seat vacant. [C73,§298; C97,§414; C24, 27, 31, 35,§5115.]

5116 Organization. The board of supervisors, at its first meeting in each year, shall organize by choosing one of its members as chairman, who shall preside at all of its meetings during the year. [R60,§308; C73,§300; C97,§415; C24, 27, 31, 35,§5116.]

5117 Quorum. A majority of the board of supervisors shall constitute a quorum to transact business, but should a division take place on any question when only two members of the board are in attendance, the question shall be continued until there is a full board. [R60, §308; C73,§297; C97,§413; C24, 27, 31, 35,§5117.]

5118 Meetings. The members of the board of supervisors shall meet at the county seat of their respective counties on the second secular day in January and on the first Monday in April and the second Monday in June, September, and November in each year, and shall hold such special meetings as are provided by law, but in the event a quorum of said board fails to appear on a day set for a regular or an adjourned meeting the auditor of said county shall adjourn said meeting from day to day until a quorum is present. [R60,§307; C73,§296; C97, §412; S13,§412; C24, 27, 31, 35,§5118.]

5119 Special sessions. Special sessions of the board of supervisors shall be held only when requested by the chairman or a majority of the board, which request shall be in writing addressed to the county auditor, shall fix the date of meeting and shall specify the objects thereof, which may include the doing of any act not required by law to be done at a regular meeting. [R60,§309; C73,§301; C97,§420; C24, 27, 31, 35,§5119.]

5120 Notice. The auditor shall immediately give notice in writing or by telephone to each of the supervisors personally, or by leaving notice thereof at his residence, at least six days before the date set for such meeting, stating the time and place where the meeting will be held and the objects thereof as stated in the written request. No business shall be transacted at such session, except that stated in the request and notice. [R60,§309; C73,§301; C97,§420; C24, 27, 31, 35,§5120.]

5121 Acts requiring majority. No tax shall be levied, no contract for the erection of any public buildings entered into, no settlement with the county officers made, no real estate purchased or sold, no new site designated for any county buildings, no change made in the boundaries of townships, and no money appropriated to aid in the construction of highways and bridges, without a majority of the whole board of supervisors voting therefor and consenting thereto. [R60,§313; C73,§305; C97,§440; C24, 27, 31, 35,§5121.]

5122 **Books to be kept.** The board is authorized and required to keep the following books:

1. *Minute book.* A book to be known as the "minute book", in which shall be recorded all orders and decisions made by it except those relating to highways and drainage districts, and in which book, or in a separate book kept for that purpose, there shall be an alphabetical index of the proceedings of said board as shown by the minutes.

2. *Highway record.* A book to be known as the "highway record", in which shall be recorded all proceedings and adjudications relating to the establishment, change, or discontinuance of highways.

3. *Bridge book.* A book to be known as the "bridge book", where a record of bridges shall be kept in a numerical order in each congressional township, commencing in section one, and numbering each bridge; give location in fractional parts of sections; name the kind of material used for substructure and superstructure; give length and cost of bridge, and, when repaired, to keep a record of repairs and charge it to the bridge; and warrants drawn in payment for erection or repairs of bridges shall indicate the number of the bridge for which issued in payment.

4. *Warrant book.* A book to be known as the "warrant book", in which shall be entered, in the order of its issuance, the number, date, amount, name of drawee of each warrant drawn on the treasury, and the number of warrants, as directed in relation to the minute book.

5. *Claim register.* A book to be known as a "claim register", in which shall be entered a minute of all claims filed for allowance of money from the county treasury. [R60,§318; C73,§308; C97,§442; C24, 27, 31, 35,§5122.]

5123 **Claims generally.** Claims filed shall be numbered consecutively in the order of filing, and shall be entered on the claim register alphabetically, so as to show the date of filing, the number of the claim and its general nature, the name of the claimant and the action of the board thereon, stating, if allowed, the fund upon which allowance is made. A record of the allowance of claims at each session of the board shall be entered on the minute book by reference to the numbers of the claims as entered on the claim register. [C24, 27, 31, 35,§5123.]

5124 **Unliquidated claims.** All unliquidated claims against counties and all claims for fees or compensation, except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected. [C73,§§2610, 3843; C97,§§1300, 3528; C24, 27, 31, 35,§5124.]

5125 **Compensation of supervisors.** The members of the board of supervisors shall each receive five dollars per day for each day actually in session, and five dollars per day exclusive of mileage when not in session but employed on committee service, and five cents for every mile traveled in going to and from the regular, special, and adjourned sessions thereof, and in going to and from the place of performing committee service.

When the board is in continuous session, mileage for only one trip in going to and from the session shall be allowed. [R60,§317; C73,§3791; C97,§469; S13,§469; C24, 27, 31, 35,§5125.]

Additional provisions in re mileage, ch 67

5126 **Maximum session pay.** Except as provided in section 5127, members of such board shall not receive compensation for a greater number of days of session service each year than specified in the following schedule.

In counties having a population of:

1. Ten thousand or less, thirty days.
2. More than ten thousand and less than twenty-three thousand, forty-five days.
3. Twenty-three thousand and less than forty thousand, fifty-five days.
4. Forty thousand and less than sixty thousand, sixty-five days.
5. Sixty thousand and less than eighty thousand, seventy-five days.
6. Eighty thousand and less than ninety thousand, ninety days.
7. Ninety thousand and over, one hundred days. [R60,§317; C73,§3791; C97,§469; S13, §469; C24, 27, 31, 35,§5126.]

5127 **Drainage session pay.** The time spent by the board of supervisors as a ditch or drainage board and in considering drainage matters as a single board, or jointly with one or more other boards, shall not be counted in computing the number of days which any board has been in session, but the members of the board shall be entitled to compensation at the same rate for the time spent in ditch and drainage matters, except the drainage of highways, in addition to the compensation allowed as hereinbefore set forth, but in no case shall said board be allowed more than fifty days additional time in any year for time spent in drainage matters.

If on the same day, the board considers matters involving two or more drainage districts, their per diem shall be equitably apportioned by them among such districts.

If on the same day the board acts both as a county board and also for the purpose of considering drainage matters, the board shall be paid for one day only, and from the general fund or drainage fund as the board may order. [S13, §469; C24, 27, 31, 35,§5127.]

Referred to in §5126

CHAPTER 254

POWERS AND DUTIES OF BOARD OF SUPERVISORS

5128 Body corporate.
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5130 General powers.
5130.1 Veterans' newsstands.
5131 Contracts and bids required.
5132 Bids—plans and specifications.
5133 Offices furnished.
5134 Supplies.
5135 Insurance money.
5136 Compromise authorized.
5137 Conditions of compromise.
5138 Disposition of funds.
5139 Useless documents.
5140 Neglect of duty.

5128 Body corporate. Each county is a body corporate for civil and political purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management, and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law. [C51,§93; R60,§221; C73,§279; C97, §394; C24, 27, 31, 35,§5128.]

Right to bid under execution sale, ch 449

5129 Concurrent jurisdiction. Counties bounded by a stream or other water have concurrent jurisdiction over the whole of the waters lying between them. [C51,§95; R60,§223; C73, §280; C97,§395; C24, 27, 31, 35,§5129.]

5130 General powers. The board of supervisors at any regular meeting shall have power:

1. To appoint one of its number chairman in the absence of the regular chairman, and a clerk, in the absence of the auditor and his deputy.

2. To make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order.

3. To adjourn from time to time, as occasion may require.

4. To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with law.

5. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law.

Settlement with treasurer, §7408 et seq.

6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.

7. To manage and control the school fund of its county, as provided by law.

School fund, ch 232

8. To require any county officer to make a report to it, under oath, on any subject connected with the duties of his office and to give such bonds as shall be necessary for the faithful performance of his duties.

9. To remove from office by a majority vote any officer who shall refuse or neglect to make any report or give any bond mentioned in the preceding subsection, within twenty days after being required so to do.

Removal from office, ch 56

10. To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same.

11. To cause the county buildings to be insured in the name of the county, or otherwise, for its benefit, and in case there are no county buildings, to provide suitable rooms for county purposes.

12. To purchase, for the use of the county, any real estate necessary for county purposes; to change the site of, or designate a new site for any building required to be at the county seat, when such site shall not be beyond the limits of the city or town at which the county seat is located at the time of such change; and to change the site of and designate a new site for the erection of any building for the care and support of the poor.

13. When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to sell the same at a fair valuation.

14. To make appropriations not exceeding three hundred dollars in any one year for the growing, under the direction of the board, of experimental crops on lands owned by the county.

15. To build, equip, and keep in repair the necessary buildings for the use of the county and of the courts.

16. To permit any person to use any portion of the lands owned by the county for ornamental purposes, or for the erection of any monument or fountain under such restrictions as the board may from time to time enact, when such use will not interfere with the use for which such real estate was originally acquired by the county.

17. To lease or sell to school districts, real estate owned by the county and not needed for county purposes.

18. To own and operate automobiles used or needed by the county sheriff and used in the performance of the duties of that office; to operate a service garage for the purpose of servicing automobiles or other motor vehicles owned and operated by the county in the performance of its duties, and the board may own and service all motorcycles used by the county sheriff in the performance of the duties of that office. The board of supervisors may also make such contracts with the employees of the sheriff's office who use automobiles in the performance of their duties in connection with the use of such automobiles as in their judgment shall be advantageous to the county.

19. To establish, publish, and enforce rules regulating and restricting the use by the public of all county buildings and grounds. Such rules when established shall be posted in conspicuous places about said buildings and grounds. Any

person violating any such rule shall be guilty of a misdemeanor and upon conviction be punished by a fine of not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days.

1–12. [R60,§312; C73,§303; C97,§422; SS15, §422; C24, 27, 31, 35,§5130.]

13. [C24, 27, 31, 35,§5130.]

14. [SS15,§422; C24, 27, 31, 35,§5130.]

15. [R60,§312; C73,§303; C97,§422; SS15, §422; C24, 27, 31, 35,§5130.]

16. [SS15,§422; C24, 27, 31, 35,§5130.]

17. [C24, 27, 31, 35,§5130.]

18, 19. [C31, 35,§5130.]

5130.1 Veterans' newsstands. The board of supervisors of any county shall, on the application of any honorably discharged soldier, sailor, marine, or nurse of the army or navy of the United States in the late civil war, Spanish-American war, Philippine insurrection, China relief expedition, or war with Germany, who was disabled in said war, cause to be reserved in the courthouse of the county a reasonable amount of space in the lobby of said courthouse to be used by such applicant rent-free as a stand for the sale of news, tobaccos, and candies. Should there be more than one applicant for such reserved space, the board of supervisors shall award the same to the person in their opinion most deserving of the same. The supervisors shall prescribe the regulations by which the stands shall be operated. [47GA, ch 153,§1.]

Veteran's newsstand in state capitol, §295.1

5131 Contracts and bids required. No building shall be erected or repaired when the probable cost thereof will exceed two thousand dollars except under an express written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done. [R60,§312; C73,§303; C97,§422; SS15, §422; C24, 27, 31, 35,§5131.]

Referred to in §5132.

5132 Bids—plans and specifications. Contracts for buildings and repairs specified by section 5131 shall be let to the lowest responsible bidder at a time and place which shall be distinctly stated in the advertisement. The board may on the day fixed for letting such contract adjourn the hearing to some later date and place, of which all parties shall take notice. The board may reject any and all bids and advertise for new ones. The detailed plans and specifications for such improvements shall be on file and open to public inspection in the office of the auditor of the county in which the work is to be done before advertisement for bids. [SS15, §422; C24, 27, 31, 35,§5132.]

5133 Offices furnished. The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney, county superintendent, and county surveyor or engineer, with offices at the county seat, but in no case shall any such officer, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney. [C73,§3844; C97,§468; C24, 27, 31, 35, §5133.]

5134 Supplies. The board of supervisors shall also furnish each of said officers with fuel, lights, blanks, books, and stationery necessary and proper to enable them to discharge the duties of their respective offices, but nothing herein shall be construed to require said board to furnish any county attorney with law books or library. [C73,§3844; C97,§468; C24, 27, 31, 35,§5134.]

5135 Insurance money. In any county in this state where any of the public buildings thereof have been or may hereafter be destroyed by fire, wind, or lightning, the board of supervisors of such county, for the purpose of reconstructing the same, may appropriate and use, in addition to the amount now authorized by law, the amount received by way of insurance on such building or buildings so destroyed. [C97,§425; C24, 27, 31, 35,§5135.]

5136 Compromise authorized. Where judgment has been or may hereafter be rendered against any county treasurer or other county officer and the sureties on his official bond, in favor of any county in this state, and remains unsatisfied, and the board of supervisors of such county are satisfied that the full amount thereof cannot be collected, such board of supervisors shall have power to compromise the said judgment, and to enter full satisfaction thereof under the terms of said compromise. [C97,§437; C24, 27, 31, 35,§5136.]

Referred to in §§5137, 5138

5137 Conditions of compromise. In all cases referred to in section 5136, if the principal debtor and each of the sureties on his official bond shall execute a written consent to a compromise with any one or more of said sureties, and to a release of said surety or sureties, and in such writing shall agree that such compromise or release shall not release any of the sureties who shall not compromise and be released from the payment of the unpaid judgment, then in that case, upon the filing of such written consent with the auditor of such county, the board of supervisors of such county shall have full power, and are hereby authorized, to compromise with any one or more of such sureties, and to release such surety or sureties upon the terms which may be agreed upon in such compromise. [C97,§438; C24, 27, 31, 35,§5137.]

Referred to in §5138

5138 Disposition of funds. In case of any compromise as provided in sections 5136 and 5137 being made, the money received by the county thereon shall be paid to the various funds of the county, in proportion to the amount that each fund is in default, as such default existed at the time the judgment was rendered, as nearly as the same can be ascertained, so that each fund shall receive its pro rata share, as the same shall be determined by the board of supervisors. [C97,§439; C24, 27, 31, 35,§5138.]

5139 Useless documents. The board of supervisors is authorized to order the county auditor to destroy all duplicate tax receipts, poll tax receipts, and hunting license applications which have been on file in the office of the county treasurer or auditor for more than five years.

The board is also authorized to order the county auditor to destroy all assessors' books, assessment rolls, county vouchers and canceled county warrants which have been on file in the office of the county auditor for more than ten years. [C24, 27, 31, 35,§5139.]

5140 Neglect of duty. If any supervisor shall neglect or refuse to perform any of the duties which are or shall be required of him by law as a member of the board of supervisors, without just cause therefor, he shall, for each offense, forfeit one hundred dollars. [R60,§311; C73,§302; C97,§421; C24, 27, 31, 35,§5140.]

CHAPTER 255

COUNTY AUDITOR

5141 Duties.
5142 Issuance of warrants.
5143 Issuance of warrants without audit.
5144 Issuance of warrants prior to audit.
5145 Audit by board.
5146 Form of warrants.
5147 Erroneous certificates—liability.
5148 Duty as to school fund.
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5150 List of county officers—report.
5151 Financial report.
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5153 Additional matter.
5154 Printing and distribution.
5155 Fees to be collected.

5141 Duties. The county auditor shall:

1. Record all the proceedings of the board in proper books provided for that purpose.
2. Make full entries of all its resolutions and decisions on all questions concerning the raising of money, and for the payment of money from the county treasury.
3. Record the vote of each supervisor on any question submitted to the board, if required by any member present.
4. Sign all orders issued by the board for the payment of money, and record, in a book provided for the purpose, the reports of the county treasurer of the receipts and disbursements of the county.
5. Preserve and file all accounts acted upon by the board, with its action thereon, and perform such special duties as are or may be required of him by law.
6. Designate upon every account, on which any sum shall be allowed by the board, the amount so allowed, and the charges for which the same was allowed.
7. Deliver to any person who may demand it a certified copy of any record or account in his office, on payment of his legal fees therefor.
8. Have the general custody and control of the courthouse in each county, respectively, subject to the direction of the board of supervisors. [R60,§§319, 320; C73,§§320, 323; C97, §§470, 473; C24, 27, 31, 35,§5141.]

Duty as to forest and fruit-tree reservations, §2617

5142 Issuance of warrants. Except as otherwise provided, the auditor shall not sign or issue any county warrant, unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount, and the number of the same, and the name of the person to whom issued, shall be entered in a book to be kept in his office for that purpose. [R60,§321; C73,§321; C97,§471; C24, 27, 31, 35, §5142.]

Referred to in §5145

5143 Issuance of warrants without audit. The county auditor is hereby authorized to issue warrants as follows before bills for same have been passed upon by the board of supervisors:

1. For jury fees and mileage on certificate of the clerk of the court upon which they were in attendance, which certificate shall be issued when the juror entitled thereto shall have been discharged or excused by the court.
2. For witness fees and mileage for attendance before the grand jury upon certificate of the county attorney and foreman of such jury.
3. For witness fees before the district court of trial jury therein in criminal cases, when such fees are payable by the county, upon certificate of the clerk of the court upon which they were in attendance.
4. The per diem of the shorthand reporter of the district court upon certificate of the judge holding said court.
5. For expense of the grand jury upon order of the judge of the district court. [R60,§321; C73,§321; C97,§471; C24, 27, 31, 35,§5143.]

Referred to in §§5145, 10670.1
Judicially allowed claims, §10840
Witnesses before county attorney, §13665

5144 Issuance of warrants prior to audit. The board of supervisors may, by resolution, authorize the county auditor to issue warrants when said board is not in session for the following named purposes:

1. For such fixed charges as freight, express, postage, water, light, and telephone rents, upon filing duly verified bills for same with the county auditor.
2. For salaries and pay rolls where such compensation shall have been previously fixed by the board of supervisors, upon certificate of the officer or foreman under whom such compensation shall have been earned. [C24, 27, 31, 35, §5144.]

Referred to in §5145

5145 Audit by board. All bills paid under the provisions of sections 5142 to 5144, inclusive, shall be passed upon by the board of su-

pervisors at the first meeting following such payment and shall be entered on the minutes as other claims allowed by the board. [C24, 27, 31, 35,§5145.]

5146 Form of warrants. Each warrant issued by the auditor shall be made payable to the person performing the service or furnishing the supplies for which said warrant makes payment, and shall state the purpose for which said warrant was issued. [C24, 27, 31, 35,§5146.]

5147 Erroneous certificates—liability. Any officer making an erroneous certificate shall be liable on his official bond for any loss to the county thereby. [C24, 27, 31, 35,§5147.]

5148 Duty as to school fund. When the auditor of any county shall receive from the state comptroller notice of the apportionment of school moneys to be distributed in the county, he shall file the same in his office, and transmit a certified copy thereof to the county treasurer, and he shall also lay a certified copy thereof before the board at its next regular meeting. [R60,§322; C73,§322; C97,§472; C24, 27, 31, 35, §5148.]

School funds, ch 232

5149 Collection of moneys. The county auditor is hereby authorized to collect and receive all money due his county, except when otherwise provided by law, and shall be responsible for all public funds received or collected by him. [C73,§323; C97,§473; C24, 27, 31, 35, §5149.]

5150 List of county officers—report. The county auditor shall report to the secretary of state the name, office, and term of office of every county officer elected or appointed, within ten days after their election and qualification, and the secretary of state shall record the same in a book to be kept for that purpose in his office. [R60,§§291, 292; C73,§324; C97,§474; C24, 27, 31, 35,§5150.]

5151 Financial report. The county auditor shall, during the month of January of each year, compile and prepare a financial report, which shall contain schedules showing:

1. The amount of the various classes of warrants drawn on the county fund, except for court expenses, during the preceding year, including therein, among other items, the total amount paid each county officer, also their deputies and extra help, also other employees of the county, and amounts paid for rent and various other expenses, including printing and stationery, furniture and fixtures, publishing proceedings of the board of supervisors, postage allowed each county official, complete election expenses, including printing of ballots, expenses of registration, and items of like nature.

2. The amount of warrants drawn on the county fund for various court expenses, which shall include among other items the salary paid the county attorney and the amounts received by him as commission on fines and from other sources, and the amount paid to assistant counsel.

3. The amount paid jurors, witnesses and bailiffs, respectively, in district court, amount paid for shorthand reporting, amount paid for printing and stationery, amount paid for attorney fees for defending criminals, amount paid for meals for jurors, and items of like nature.

4. The expenses of the grand jury, stating amounts paid grand jurors, bailiffs, witnesses, and items of like nature.

5. The expenses of the coroner's court, stating amount paid coroner, coroner's clerk, constable fees, witness fees, and items of like nature.

6. The expenses of justice courts, stating amounts paid various justices, constables, total amount paid witnesses, jurors, attorney fees, for printing, and items of like nature.

7. The amount drawn by each member of the board of supervisors from the several funds of the county for services during the preceding year.

8. A recapitulation of the total amount of warrants drawn on the county fund, with a comparison with the amount of warrants drawn on the county fund each year for the last five years.

9. The various classes of warrants drawn on the poor fund for the preceding year, with a comparison with the total amount of warrants drawn on such fund each year for the last five years.

10. The amount of warrants drawn on the fund for the support of the insane for the preceding year, including the amounts received by each commissioner as fees and expenses, fees of witnesses, sheriff's fees and expenses, the cost of transportation, and items of like nature.

11. The total cost of maintenance of insane at county asylum, with number confined therein, and total paid the various state hospitals for the insane, with the number of patients from the county confined in such hospitals.

12. The amount paid the various state institutions during the preceding year.

13. The amounts paid the sheriff for boarding prisoners during the preceding year, together with the amount paid the sheriff as jail expenses, with a comparison with the amounts paid for boarding prisoners, and for jail expenses each year during the last five years.

14. The amounts paid for the condemning of intoxicating liquors during the preceding year, also cost of convictions, both in justice courts and in the district court, for the violation of the laws relating to the sale of intoxicating liquors, together with the amount of fines collected for such violation and the amounts received as mulct tax, if any.

15. The amount of warrants drawn on each of the various funds of the county. [S13,§480-a; C24, 27, 31, 35,§5151.]

Referred to in §5152

5152 Comparisons. The comparisons with preceding years provided for in section 5151 shall be as follows:

1. The first year, comparison only with the preceding year.
2. The second year, with the two preceding years.
3. The third year, with the three preceding years.
4. The fourth year, with the four preceding years.
5. The fifth year, with the five preceding years.
6. Thereafter in the same order and manner for each five-year period. [S13,§480-a; C24, 27, 31, 35,§5152.]

5153 Additional matter. Said financial report shall also contain the following:
1. The report of the county auditor as required by law to be made to the superintendent of public instruction, relating to school funds and property.
2. The various reports as required by law to be made to the county board of supervisors of magistrates and other officers, including forfeited recognizances in their offices, fines, penalties, forfeitures imposed in their respective courts, and forfeited appearance bonds in criminal cases, all of which by law go into the county treasury for the benefit of the school fund.
3. The various reports made during the preceding year, by the county treasurer, auditor, recorder, sheriff, clerk of the district court, and the soldiers relief commission, as required by law.
4. The reports of the various committees that may be appointed by the board of supervisors to examine the affairs and accounts of the various county officials and employees.
5. Such other and further matters and information as the board of supervisors may direct or the auditor may deem advisable. [S13,§480-a; C24, 27, 31, 35,§5153.]

5154 Printing and distribution. Said financial report shall be ordered printed by the board of supervisors in pamphlet form in such numbers as the board may direct, for distribution among the taxpayers of the county. The county auditor of each county shall, on or before April 1 of each year, furnish to the auditor of state the information contained in such financial report and any other information relative to the financial affairs of the county which he may require, upon blank forms provided by the auditor of state for this purpose. [S13,§480-b; C24, 27, 31, 35,§5154.]

5155 Fees to be collected. The county auditor shall be entitled to charge and receive the following fees:
1. For transfers made in the transfer books, for each deed, or transfer of title certified by clerks of district courts, twenty-five cents.
2. For issuing certificate of redemption of land sold for taxes, twenty-five cents.
3. For each certificate issued by the treasurer for lands sold for nonpayment of taxes, fifteen cents. [C73,§3797; C97,§478; C24, 27, 31, 35, §5155.]

CHAPTER 256

COUNTY TREASURER

5156 Duties.
5157 Official seal.
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5162 Warrants partially paid.
5163 Warrant book.
5164 Cancellation of warrants.
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5169.07 Default—remedy.
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5156 Duties. The treasurer shall receive all money payable to the county, and disburse the same on warrants drawn and signed by the county auditor and sealed with the county seal, and not otherwise, and shall keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the board of supervisors. [C51,§152; R60,§360; C73, §327; C97,§482; C24, 27, 31, 35,§5156.]

Authorized deposits, §7412
Restrictions, §§7401, 7402
Settlement with treasurer, §7408 et seq.

5157 Official seal. The county treasurer shall be provided with an impression seal on the face of which shall appear the name of the county, the word "county", either in full or abbreviated; the word "treasurer", either in full or abbreviated; and the word "Iowa", and the impression of said seal shall be placed upon each motor vehicle registration certificate signed by the county treasurer. [C24, 27, 31, 35,§5157.]

5158 Warrants — indorsement. The treasurer of every county, when he shall receive any warrant, scrip, or other evidence of its indebtedness, shall indorse thereon the date of its receipt, from whom received, and what amount he paid thereon. [R60,§2187; C73,§557; C97, §597; C24, 27, 31, 35,§5158.]

Referred to in §5159
Applicable to cities and towns, §5643

5159 Breach of duty. Any county treasurer, or any deputy or employee of such officer, who violates any of the provisions of section 5158, shall be guilty of a misdemeanor, and fined not less than one hundred dollars, nor more than

five hundred dollars, for each offense. [R60, §2188; C73,§558; C97,§598; C24, 27, 31, 35, §5159.]

Applicable to cities and towns, §5643

5160, 5161 Rep. by 45ExGA, ch 6

See §1171.11 et seq.

5162 Warrants partially paid. When a person wishing to make a payment into the treasury presents a warrant of an amount greater than such payment, or presents for payment a warrant in excess of the funds in the treasury, the treasurer shall cancel the same and give the holder a certificate of the overplus, upon the presentation of which to the county auditor he shall file it, and issue a new warrant of that amount, and charge the treasurer therewith; and such certificate is transferable by delivery, and will entitle the holder to the new warrant, payable to his order, and containing reference to the original warrant. [C51,§§154, 490; R60, §§362, 755; C73,§329; C97,§485; C24, 27, 31, 35, §5162.]

5163 Warrant book. The treasurer shall keep a record of all warrants drawn on him by the auditor and presented, in a book so ruled as to show in separate columns, as to each warrant, the number, date, principal, name of drawee, when paid, to whom paid, and amount of interest paid. [C51,§155; R60,§363; C73, §330; C97,§486; C24, 27, 31, 35,§5163.]

5164 Cancellation of warrants. The warrants returned by the treasurer shall be compared with the warrant book, and the word "canceled" be written over the minute of the proper numbers in the warrant book, and the original warrant be preserved for at least two years, and he shall make weekly returns to the auditor of the number, date, drawee's name, when paid, to whom paid, original amount, and interest. [C51,§§159, 160; R60,§§365, 366; C73, §§332, 333; C97,§488; C24, 27, 31, 35,§5164.]

Analogous provisions, §§137, 5649

5165 Funds—separate account. The treasurer shall, for each term of his office, keep a separate account of the several taxes for state, county, school, highway, or other purposes, and of all other funds created by law, whether regular, temporary, or special, and no moneys in any such fund shall be paid out or used for any other purpose, except as specially authorized by law. The treasurer shall charge himself with the amount of the tax or other fund and credit himself with the amounts disbursed on each and with the amount of delinquent taxes, when authorized to do so. [C51,§§156, 161; R60,§§364, 367; C73,§§331, 334; C97,§§487, 489; C24, 27, 31, 35,§5165.]

5166 State funds. The treasurer of each county shall, on or before the fifteenth day of each month, prepare sworn statements of the amount of money in his hands on the last day of the preceding month belonging to the state treasury, not including primary road funds or motor vehicle funds, and forward by mail one such statement to the state comptroller, and one such statement to the treasurer of state. [R60, §799; C73,§914; C97,§1459; C24, 27, 31, 35, §5166.]

5167 Payment to state treasurer. The treasurer of each county shall also, at any time when directed by the treasurer of state as provided in section 142, forthwith pay into state treasury any or all of the said money due the state and remaining in his hands. The treasurer of state is hereby required to receive on all such payments the same kind of money and notes which the county treasurer is authorized and required by law to receive in payment of taxes. [R60, §799; C73,§914; C97,§1459; C24, 27, 31, 35, §5167.]

County responsible to state, §7398

5168 Penalty. In case the treasurer of any county shall fail to prepare and forward the aforesaid statement, or shall fail to promptly honor any draft by the treasurer of state as provided in section 142, he shall forfeit and pay for each and every failure a sum not less than one hundred dollars or more than five hundred dollars, to be recovered in an action on the treasurer's bond, brought in the name of the state comptroller or the treasurer of state. [R60, §799; C73,§914; C97,§1459; C24, 27, 31, 35, §5168.]

5169 Unclaimed money. In any county of this state where any special levy has been made to pay any claim, bond, or other indebtedness, and the same shall have remained in the treasury of the county, uncalled for, for a period of three years, the board of supervisors of such county may authorize such unclaimed fund to be transferred to the general county fund. [C97,§456; C24, 27, 31, 35,§5169.]

REPLACEMENT OF LOSSES

5169.01 Losses. All losses of funds in the legal custody of a county treasurer, resulting from any act of omission or commission for which the said treasurer is legally responsible, except losses to the amount of the treasurer's bond, and except losses which are or may be occasioned by depositing said funds in authorized depositories, shall be replaced by the several counties of the state as hereinafter directed. [C27, 31, 35,§5169-a1.]

5169.02 Auditor to determine loss. The amount of the loss which is to be replaced shall be determined by the auditor of state from a full and detailed examination made by him, or under his authority, of the accounts of the treasurer in question, which examination shall be reduced to writing and filed with the state comptroller. [C27, 31, 35,§5169-a2.]

Referred to in §5169.10

5169.03 Loss to be apportioned. When the loss which is to be replaced has been determined by said auditor, the state comptroller shall, in writing filed in his office, apportion the same to each county of the state, including the county suffering the loss, in the proportion which the

taxable property of each county bears to the total taxable property of all the counties of the state. [C27, 31, 35,§5169-a3.]

Referred to in §5169.10

5169.04 Certification. The state comptroller shall forthwith certify to each county treasurer of the state the amount apportioned to the various counties. [C27, 31, 35,§5169-a4.]

Referred to in §§5169.05, 5169.10

5169.05 Counties to remit. Upon receipt of the certificate aforesaid, the county treasurer, except of the county suffering the loss, shall forthwith charge the general fund of his county with the amount apportioned to his county and forthwith remit said amount with interest, if any, to the state comptroller. [C27, 31, 35, §5169-a5.]

Referred to in §5169.10

5169.06 Interest. The amount apportioned to a county shall draw interest at the rate of one percent per month on and after thirty days from the time the treasurer is notified of the amount apportioned to his county. [C27, 31, 35, §5169-a6.]

Referred to in §5169.10

5169.07 Default — remedy. Should the amount apportioned to a county be not paid, the default shall be reported by the state comptroller to the state tax commission, and the said commission shall forthwith levy upon all the taxable property of the delinquent county, except moneys and credits, a tax sufficient to raise said apportionment together with a penalty of twenty-five percent thereon, and all interest. Said levy shall be transmitted to the county auditor of the delinquent county who shall enter said levy on the first ensuing tax list of the county, and said tax shall be collected and remitted to the state comptroller. [C27, 31, 35,§5169-a7; 48GA, ch 137,§1.]

Referred to in §5169.10

5169.08 Separate fund. The funds received for the purpose of reimbursing a county shall be carried by the treasurer of state as a separate fund. [C27, 31, 35,§5169-a8.]

Referred to in §5169.10

5169.09 Comptroller to issue warrant. The state comptroller shall, from time to time, issue his warrant on the various reimbursement funds in favor of the county suffering the loss. [C27, 31, 35,§5169-a9.]

Referred to in §5169.10

5169.10 Limitation. Nothing in sections 5169.02 to 5169.09, inclusive, shall be construed to relieve any existing surety from any liability accruing prior to January 1, 1926. [C27, 31, 35, §5169-a10.]

CHAPTER 257

COUNTY RECORDER

5170 Auditor as temporary recorder.
5171 General duties.
5172 Error in recording—correction.
5173 Military discharge.
5174 Alphabetical index.
5175 Free copies.
5176 Federal tax liens.
5176.1 Social security number.
5176.2 Index.
5177 Fees.
5178 Exact time of filing.

5170 Auditor as temporary recorder. In case of vacancy occurring in the office of recorder, by death or otherwise, the auditor shall discharge the duties pertaining to said office until such vacancy is filled by appointment by the board of supervisors. [C97,§497; C24, 27, 31, 35,§5170.]

5171 General duties. The recorder shall keep his office at the county seat, and shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law. [C51,§150; R60,§358; C73,§335; C97,§494; S13,§494; C24, 27, 31, 35,§5171.]

Recording articles of incorporation, §8342
Recording duplicate warehouse certificate, §9752.36
S13, §494, editorially divided

5172 Error in recording — correction. If, in the recording of any such instrument heretofore recorded or hereafter to be filed for record, the recording fee for which has once been paid, the recorder shall commit an error in making the record thereof, it shall be his duty to re-record such instrument upon the presentation of the original by the owner thereof, without further compensation; and he shall also enter upon the margin of the new record a reference to the original record, and upon the margin of the original record a reference to the new record, giving the book and page thereof. When an error has been made in indexing any instrument, it shall be the duty of the recorder to re-index the same without further compensation. [S13,§494; C24, 27, 31, 35,§5172.]

5173 Military discharge. The county recorder of each county in this state shall maintain in his office a special book in which he shall, upon request, record the final discharge of any soldier, sailor, or marine of the United States. No recording fee shall be collected when the soldier, sailor, or marine requesting such record shall be an actual resident of said county or shall have been such at the time of his entrance into the service of the United States. In all other cases the legal fee shall be charged. [C24, 27, 31, 35,§5173.]

5174 Alphabetical index. There shall be kept in connection with such record an alphabetical index referring to the name of the soldier, sailor, or marine, whose name appears

in each discharge paper so recorded. [C24, 27, 31, 35,§5174.]

5175 Free copies. When a certified copy or copies of any public record in the state are required to perfect the claim of any soldier, sailor, or marine, in service or honorably discharged, or any dependent of such soldier, sailor, or marine, for a United States pension, or other claim upon the government of the United States, they shall, upon request, be furnished by the custodian of such records, without requiring any fee or compensation therefor. [C24, 27, 31, 35,§5175.]

5176 Federal tax liens. The notice of a lien for any tax in favor of the government of the United States, or any release of such lien, may be filed and recorded in the office of the county recorder in any county within which the property subject to the lien is situated. Such county recorder shall file, record, and index any such notice of lien or any release of the same without fee. [C24, 27, 31, 35,§5176.]

5176.1 Social security number. Any person who is registered under the Federal Social Security Act may have such record permanently recorded in the office of the county recorder, upon payment of a fee of twenty-five cents. [47GA, ch 138,§1.]

5176.2 Index. There shall be kept in connection with such record an alphabetical index, referring to the name of the person so registered under the Federal Social Security Act. [47GA, ch 138,§1.]

5177 Fees. The recorder shall charge and collect the following fees:

1. For recording each instrument containing four hundred words or less, fifty cents.
2. For every additional hundred words or fraction thereof, ten cents.
3. For every marginal assignment or release (except those made by the clerk of the district court) twenty-five cents. [C51,§2534; R60, §4143; C73,§3792; C97,§498; S13,§498; C24, 27, 31, 35,§5177.]

Referred to in §§6943.058, 6943.132
Similar provision, §10031

5178 Exact time of filing. In addition to the other requirements of the law the recorder shall enter in his fee book the date of filing each instrument, the number and character thereof and the names of the grantors and grantees therein. In numbering said instruments, he shall start with number one, immediately after the date of his settlement with the board of supervisors each year, and continue to number them consecutively till his next settlement with said board. Where not otherwise already required by law the recorder shall also enter in the index book the exact time of the filing of each instrument. [C51,§2534; R60,§4143; C73,§3792; C97,§498; S13,§498; C24, 27, 31, 35,§5178.]

CHAPTER 258

COUNTY ATTORNEY

5179 Qualifications.
5180 Duties.
5180.1 Absence of county attorney — substitute — compensation.
5180.2 Substitute—notice before appointment.
5180.3 County attorney—prohibitions—disqualified assistants.

5179 Qualifications. County attorneys shall be qualified electors of their respective counties, duly admitted to practice as attorneys and counselors in the courts of this state as provided by law. No person shall be qualified for such office while his license to practice remains revoked or suspended. [S13,§308-b; C24, 27, 31, 35, §5179.]

5180 Duties. It shall be the duty of the county attorney to:

1. Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the state of Iowa, or by him as county attorney, except as otherwise specially provided.
2. Appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, except cases brought on change of venue from another county, and to appear in the supreme court in all cases in which the county is a party, and also in all cases transferred on change of venue to another county, in which his county or the state is a party.
3. Appear and prosecute all preliminary hearings before justices of the peace upon charges triable upon indictment.
4. Appear and prosecute misdemeanors before justices of the peace whenever he is not otherwise engaged in the performance of official duties.
5. Enforce all forfeited bonds and recognizances, and to prosecute all proceedings necessary for the recovery of debts, revenues, moneys, fines, penalties, and forfeitures accruing to the state or his county, or to any school district or road district in his county; also to prosecute all suits in his county against public service corporations, which are brought in the name of the state of Iowa.
6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.
7. Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county, school, or township is

interested, or relating to the duty of the board or officer in which the state, county, school, or township may have an interest; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested.

8. Attend the grand jury whenever necessary for the purpose of examining witnesses before it, or of giving it legal advice, or to procure subpoenas or other process for witnesses, to prepare all informations and bills of indictment.

9. Give a receipt to all persons from whom he shall receive money in his official capacity, and file a duplicate thereof with the county auditor.

10. Make reports relating to the duties and the administration of his office to the governor or the attorney general whenever called upon by the governor or the attorney general so to do.

11. Perform other duties enjoined upon him by law. [C97,§301; SS15,§301; C24, 27, 31, 35, §5180.]

Liquor law enforcement, §1921.093

5180.1 Absence of county attorney—substitute—compensation. In case of absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, and in which there may be business requiring his attention, may appoint an attorney to act as county attorney, by order to be entered upon the records of the court, and he shall receive out of the compensation allowed to the county attorney, when such appearance is before a justice of the peace, such sum as the board of supervisors shall determine to be reasonable for the services rendered, and, when it is before a court of record, such sum as the judge shall determine to be a reasonable compensation, and, while acting under said appointment, he shall have all the authority and be subject to all the responsibilities herein conferred upon county attorneys. [C97,§304; C24, §13675; C27, 31, 35,§5180-a1.]

5180.2 Substitute—notice before appointment. In criminal cases less than a felony, a justice of the peace or magistrate cannot appoint an attorney at the expense of the county or county attorney; and no justice of the peace shall appoint an attorney to act as county attorney in any case wherein a felony is charged, unless reasonable notice in writing has been given the county attorney that his services will be required before such justice at a time therein named, and he has failed to appear in response thereto. [C97,§304; C24,§13676; C27, 31, 35, §5180-a2.]

5180.3 County attorney—prohibitions—disqualified assistants. No county attorney shall accept any fee or reward from or on behalf of anyone for services rendered in any prosecution or the conduct of any official business, nor shall he, or any member of a firm with which he may be connected, be directly or indirectly engaged as an attorney or otherwise for any party other than the state or county in any action or proceeding pending or arising in his county, based upon substantially the same facts upon which a prosecution or proceeding has been commenced or prosecuted by him in the name of the county or state; nor shall any attorney be allowed to assist the county attorney in any criminal action, where such attorney is interested in any civil action brought or to be commenced, in which a recovery is or may be asked upon the matters and things involved in such criminal prosecution. [C97,§305; C24, §13677; C27, 31, 35,§5180-a3.]

CHAPTER 259

SHERIFF

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

5182 Authority to summon aid.
5182.1 School of instruction.
5183 Execution and return of writs.
5184 Investigation on order of county attorney.
5185 Not relieved from duties.
5186 Disobedience punished.
5187 Bailiffs—appointment—duties.
5188 Execution of process.
5189 Delivery to successor.
5190 Successor may execute process.
5191 Fees.
5191.1 Costs—when payable by county.
5191.2 Contract in lieu of mileage.
5192 Fees in addition to salary.
5193 Condemnation funds.
5194 Unadjudicated condemnation funds.
5195 Duty and liability of treasurer.
5196 Record of funds.
5197 Liability of sheriff.

5181 Rep. by 42GA, ch 122

5182 Authority to summon aid. The sheriff, by himself or deputy, may call any person to his aid to keep the peace or prevent crime, or to arrest any person liable thereto, or to execute process of law; and when necessary, the sheriff may summon the power of the county. The sheriffs may use the services of the state department of public safety in the apprehension of criminals and detection of crime. [C51,§173; R60,§386; C73,§340; C97,§502; S13,§499-a; C24, 27, 31, 35,§5182; 48GA, ch 120,§9.]

Referred to in §5185

5182.1 School of instruction. The sheriff of each county may, with the cooperation of the commissioner of public safety, annually hold a conference and school of instruction for all peace officers, including regularly organized vigilantes under his jurisdiction, within his county, at which time instruction may be given

in all matters relating to the duties of peace officers. [C31, 35,§5182-d1; 48GA, ch 120,§25b.]

5183 Execution and return of writs. The sheriff shall, by himself or deputy, execute and return all writs and other legal process issued by legal authority to him directed. [C51,§170; R60,§383; C73,§337; C97,§499; S13,§499-b; C24, 27, 31, 35,§5183.]

Referred to in §5185

5184 Investigation on order of county attorney. The sheriff shall, whenever directed so to do in writing by the county attorney, make special investigation of any alleged infraction of the law within his county, and report with reference thereto within a reasonable time to such county attorney. When such investigation is made the sheriff shall file with the county auditor a detailed, sworn statement of his expenses, accompanied by the written order of the county attorney, and the board shall audit and allow only so much thereof as it shall find reasonable and necessary. [S13,§499-c; C24, 27, 31, 35,§5184.]

Referred to in §5185

5185 Not relieved from duties. Nothing in sections 5182, 5183, and 5184 shall be so construed as to relieve any peace officer from the full and faithful discharge of all the duties now or hereafter enjoined upon him by law. [S13,§499-d; C24, 27, 31, 35,§5185.]

5186 Disobedience punished. His disobedience of the command of any such process is a contempt of the court from which it issued, and may be punished by the same accordingly, and he is further liable to action by any person injured thereby. [C51,§171; R60,§384; C73,§338; C97,§500; C24, 27, 31, 35,§5186.]

Contempts, ch 536

5187 Bailiffs — appointment — duties. The sheriff shall attend upon the district court of his county, and while it remains in session he shall be allowed the assistance of such number of bailiffs as the judge may direct. They shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible. [C51,§174; R60, §387; C73,§341; C97,§503; C24, 27, 31, 35,§5187.]

5188 Execution of process. Sheriffs and their deputies may execute any process which may be in their hands at the expiration of their office, and, in case of a vacancy occurring in the office of sheriff from any cause, his deputies shall be under the same obligation to execute legal process then in his or their hands, and to return the same, as if the sheriff had continued in office, and he and they will remain liable therefor, under the provisions of law, as in other cases. [C51,§177; R60,§390; C73,§344; C97,§504; C24, 27, 31, 35,§5188.]

Referred to in §5189

5189 Delivery to successor. When a sheriff goes out of office, he shall deliver to his successor all books and papers pertaining to the office, and property attached and levied upon, except as provided in section 5188, and all prisoners in the jail, and take his receipts specifying the same, and such receipt shall be sufficient indemnity to the person taking it. [C51,§178; R60,§391; C73,§345; C97,§505; C24, 27, 31, 35, §5189.]

5190 Successor may execute process. If the sheriff die or go out of office before the return of any process then in his hands, his successor, or other officer authorized to discharge the duties of the office, may proceed to execute and return the same in the same manner as the outgoing sheriff should have done; but nothing in this section shall be construed to exempt the outgoing sheriff and his deputies from the duty imposed on them to execute and return all process in their hands at the time the vacancy in the office of sheriff occurs. [R60,§3264; C73, §346; C97,§506; C24, 27, 31, 35,§5190.]

5191 Fees. The sheriff shall charge and be entitled to collect the following fees:

1. For serving a notice and making return thereof, for the first person served, fifty cents, and each additional person, twenty-five cents.

2. For each warrant served, two dollars, and the repayment of necessary expenses incurred, in executing such warrant, as sworn to by the sheriff; if service of the warrant cannot be made, the repayment of all necessary expenses actually incurred by the sheriff while attempting in good faith to serve such warrant.

3. For serving and returning a subpoena, for each person served, twenty cents, and the necessary expenses incurred while serving subpoenas in criminal cases or insane process.

4. For summoning a grand or trial jury, all necessary and actual expenses incurred by him.

5. For summoning a jury to assess the damages to the owners of lands taken for works of internal improvement, and attending them, five dollars per day, and necessary expenses incurred. This subsection shall not be so construed as to allow a sheriff to make separate charges for different assessments, which can be made by the same jury and completed in one day of ten hours.

6. For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court, and making return thereof, two dollars.

7. For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property sold, one dollar.

8. For the time necessarily employed in making an inventory of personal property attached or levied upon, fifty cents per hour.

9. For a copy of any paper required by law, made by him, for each one hundred words or fraction thereof, ten cents.

10. Mileage in all cases required by law, going and returning, seven and one-half cents per mile, provided that this subsection shall not apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip. In case the sheriff transports by auto, one or more persons to any state institution or any other destination required by law he shall receive five cents per mile for that

portion of the trip outside of the county; or in case one or more legal papers are served on the same trip, he shall be entitled to but one mileage at the rate prescribed herein, the mileage cost thereof to be prorated to the respective persons transported and also in the case of separate papers served. Provided, however, that in the serving of original notices in civil cases the sheriff shall be allowed mileage at the rate of seven and one-half cents per mile in each action wherein such original notices are served, and, he may refuse to serve original notices in civil cases until the statutory fees and mileage for service have been paid.

When mileage nontaxable, §2013.5

11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging. But the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for any calendar year. In counties where district court is held in two places and jails are maintained in two places the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for each of said jails for any calendar year.

12. For waiting on and washing for prisoners, the sum of five cents per prisoner per day.

13. For attending sale of property, for each day, one dollar.

14. For conveying one or more persons to any state, county, or private institution by order of court, or commission, he shall be allowed his necessary expenses, for himself and such person or persons, and in addition thereto, forty cents per hour for the time necessarily employed in going to and from such institution, same to be charged and accounted for as fees. Should the sheriff need any assistance in taking any person to any such institution, the same shall be furnished at the expense of the county.

15. For serving any warrant for the seizure of intoxicating liquors, one dollar; for the removal and custody of such liquor, actual and reasonable expenses; for the destruction of such liquor under the order of the court, one dollar and his actual and reasonable expenses; for posting and leaving notices in such cases, one dollar and his actual expenses. [C51,§2536; R60,§§1570, 4145; C73,§§3788, 3789, 3807; C97,§511; S13,§511; C24, 27, 31, 35,§5191.]

Referred to in §5197.12
Approval of warrant and expenses, §§1225.04, 1225.05

5191.1 Costs—when payable by county. In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as their knowledge extends, and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury. [C51,§2537; R60, §4146; C73,§3790; C97,§512; C24, 27,§13967; C31, 35,§5191-a.]

Similar provision, §10638
The above section, in all codes prior to code, 1924, immediately followed the section relating to the fees of the sheriff. In the codes of 1924, 1927 said section was inadvertently misplaced and appeared as section 13967. The error is here corrected. It seems the section never had any application except to the sheriff, and then only where the sheriff received a salary based on fees. See Red v. Polk Co., 56 Iowa, 98; Newman & Blake v. Des Moines Co., 85 Iowa, 89

5191.2 Contract in lieu of mileage. In counties having a population of one hundred thousand or over, the board of supervisors may contract with the sheriff for the use of an automobile on a monthly basis in lieu of the payment of mileage, in the service of criminal processes. [C27, 31, 35,§5191-a1.]

5192 Fees in addition to salary. The amounts allowed by law for mileage and for actual, necessary expenses paid by him, and for board, washing, and care of prisoners, may be retained by him in addition to his salary. [C51, §2536; R60,§4145; C73,§§3788, 3807; C97,§511; S13,§511; C24, 27, 31, 35,§5192.]

Referred to in §5197.12

5193 Condemnation funds. On or before the first day of January in each year the sheriff of each county having any condemnation funds in his possession shall make a detailed report under oath of all funds in his possession received from condemnation proceedings of any kind that have been finally adjudicated, reciting therein the names of the parties to whom said funds belong, when received, and describing the property condemned, which report shall be filed with the county treasurer, and the sum so shown due from such sheriff paid over to the county treasurer, who shall make a detailed receipt therefor. [C24, 27, 31, 35,§5193.]

Referred to in §§5194, 5196, 5197

5194 Unadjudicated condemnation funds. Every sheriff having any condemnation funds in his possession in cases not finally adjudicated, shall make a further report of funds received by him in such cases, in detail as called for in section 5193, and file the same with the county auditor for examination and checking by the board of supervisors, and where any sheriff's term is expiring he shall pay such condemnation funds in cases not finally adjudicated to his successor in office, taking his receipt therefor. [C24, 27, 31, 35,§5194.]

Referred to in §§5196, 5197

5195 Duty and liability of treasurer. The county treasurer receiving such funds shall enter the same in detail in a book kept for that purpose, listing the names of the parties to whom such funds are due, description of property condemned, and amount of each item so due, and the same shall be paid out by him to the parties to whom the same is due, upon warrants ordered by the board of supervisors and issued by the county auditor, drawn upon said condemnation fund, and shall not be payable out of any other fund. Such county treasurer and his sureties

shall be liable for such funds the same as for other funds received in his official capacity. [C24, 27, 31, 35,§5195.]

Referred to in §5197

5196 Record of funds. Any sheriff receiving funds as provided in section 5194 shall list the same in detail in a book kept for that purpose, and pay the same to the parties entitled thereto, upon final adjudication of such cases, or if held, after final adjudication until the end of the calendar year to the county treasurer as provided in section 5193. [C24, 27, 31, 35,§5196.]

Referred to in §5197

5197 Liability of sheriff. Nothing contained in sections 5193 to 5196, inclusive, shall be construed as relieving such sheriffs or the sureties on their bonds from liability for such funds so received by them until such payment has been made to the county treasurer or successor in office as herein provided. [C24, 27, 31, 35, §5197.]

CHAPTER 259.1

CARE OF PRISONERS IN CERTAIN COUNTIES

5197.01 Prisoners—duty of sheriff.
5197.02 Purchase of supplies.
5197.03 Inspection.
5197.04 Cook and assistants.
5197.05 Salaries.
5197.06 Use of trusties.
5197.07 Duty of cooks and assistants.
5197.08 Washing.
5197.09 Federal prisoners.
5197.10 Wrongful use of supplies.
5197.11 Series of acts.
5197.12 Nonapplicability of statutes.

5197.01 Prisoners — duty of sheriff. The duty of the sheriff to board, lodge, wait on, wash for and care for prisoners in his custody in the county jail in counties having a population in excess of eighty thousand shall be performed by the sheriff without compensation, reimbursement or allowance therefor except his salary as fixed by law. [C31, 35,§5197-d1.]

5197.02 Purchase of supplies. The board of supervisors in such counties shall, in such manner and under such regulations as it may deem fit, furnish to the sheriff at the county jail and at the expense of the county all supplies, wholesome provisions, and utensils, including gas, fuel, electricity and water which in its judgment are necessary to enable the sheriff to discharge said duty. [C31, 35,§5197-d2.]

5197.03 Inspection. The board shall (at all reasonable hours) have the right to full access to said jail and to said supplies in order to inspect the same and determine whether said supplies are being used for the sole purpose herein contemplated. [C31, 35,§5197-d3.]

5197.04 Cook and assistants. The sheriff may with the approval of the board of supervisors appoint a competent cook for each of the county jails of his county; also such assistants at each of said jails as said board may deem necessary. One or more of said assistants may be women. Said appointments shall be made by the board of supervisors when the sheriff fails to make them. [C31, 35,§5197-d4.]

5197.05 Salaries. Said board shall fix the salaries of said cook or cooks and assistants, which salaries shall be paid as other salaries in general are paid. Said salaries may include board and lodging in the jail. [C31. 35,§5197-d5.]

5197.06 Use of trusties. It shall be the duty of the sheriff of said counties to cooperate with said board in reducing the number of assistants to the minimum, and to this end the sheriff shall assign any of the work, made necessary by this chapter, inside the jail, to such prisoners as in the judgment of the sheriff can be trusted. [C31, 35,§5197-d6.]

5197.07 Duty of cooks and assistants. It shall be the duty of said cook or cooks, and of said assistants properly to prepare and serve, three times each day, the food for said prisoners, properly and adequately to wait on and care for said prisoners, and to wash the clothing of said prisoners as herein provided. When not so engaged they shall perform such work as the sheriff may direct. [C31, 35,§5197-d7.]

5197.08 Washing. The shirts and other underclothing of each prisoner, and the bed sheets and pillow cases shall be washed at least once each week, and oftener if necessary to avoid an insanitary condition. All other wearing apparel, and all other bedding shall be washed at such times as may be necessary to avoid an insanitary condition. [C31, 35,§5197-d8.]

5197.09 Federal prisoners. The sheriff of the counties embraced within this chapter shall account to the board of supervisors for all fees due or collected for the boarding, lodging, waiting on, washing for, and care of, every prisoner in his custody under an order of a court of the United States. [C31, 35,§5197-d9.]

5197.10 Wrongful use of supplies. Any person who wilfully uses any supplies furnished by the board hereunder, for a purpose not herein authorized or contemplated, shall be guilty of a misdemeanor, but this provision shall not prevent the state from prosecuting an offender for larceny or embezzlement if the facts constitute either of such offenses. [C31, 35,§5197-d10.]

Referred to in §5197.11

5197.11 Series of acts. In a prosecution for larceny or embezzlement as contemplated by section 5197.10, if the property is stolen, em-

bezzled or converted by one and the same person by a series of acts, the total value of the property so embezzled, converted or stolen shall be considered as embezzled, converted or stolen in one act, and the offender shall be punished accordingly. [C31, 35,§5197-d11.]

Larceny, ch 577; embezzlement, ch 578

5197.12 Nonapplicability of statutes. Subsections 11 and 12 of section 5191, also section 5192 insofar as it refers to boarding, washing for, and care of prisoners, shall not be applicable to counties embraced in this chapter. [C31, 35,§5197-d12.]

Applicability of chapter, §5197.01

CHAPTER 260

CORONER

5198 Coroner as sheriff.
5199 Temporary sheriff or coroner.
5200 Inquest—jury.
5201 Person killed in mine.
5202 Warrant.
5203 Service and return.
5204 Filling vacancies—oath.
5205 Witnesses and jurors.
5206 Shorthand reporter.
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5210 Arrest.
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5212 Proceedings.
5213 Contents and effect of warrant.
5214 Reports.
5214.1 Violent deaths.
5215 Disposition of body—expenses.
5216 Disposition of property.
5217 Acting coroner.
5218 Physician employed—fees.
5219 Compensation of witnesses and jurors.

5198 Coroner as sheriff. The coroner shall perform all the duties of sheriff, when that office is vacant; where it appears from the papers that the sheriff is a party to an action or proceeding in a court of record; where, in any action commenced or about to be commenced, an affidavit is filed with the clerk of the court, showing the absence of the sheriff and his deputy from the county, and that they are not expected to return in time to perform the service needed, or showing partiality, prejudice, consanguinity, or interest upon his part, in which case the clerk shall direct process to the coroner, indorsing thereon the reason therefor, which he shall execute in the same manner as if he were sheriff. [C51,§§183, 184; R60,§§393, 394; C73,§§349, 350; C97,§513; C24, 27, 31, 35,§5198.]

5199 Temporary sheriff or coroner. When there is no sheriff, deputy sheriff, or coroner qualified to serve legal process, the court, or, if not in session, the clerk, may, by writing, under his hand and the seal of the court, certifying the above fact, appoint any suitable person specially in each case to execute such process, who shall be sworn, but need not give bond, and his return shall be entitled to the same credit as the sheriff's, when the appointment is attached thereto. [C51,§185; R60,§395; C73,§351; C97,§514; C24, 27, 31, 35,§5199.]

5200 Inquest—jury. The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means, and in such other cases as are required by law. When he has notice of the dead body of a person, supposed to have died by unlawful means found or being in his county, he is required to issue his warrant to a constable of his county, requiring him to summon forthwith three electors of the county to appear before him at the time and place named in the warrant. [C51,§186; R60,§396; C73,§352; C97,§515; C24, 27, 31, 35,§5200.]

Sudden death of state inmate, §§3447, 3516

5201 Person killed in mine. When a person shall come to his death by accident or otherwise, in any manner connected with the working of, or in, any mine, or by any explosion therein, an inquest shall be held, and the coroner shall make careful inquiry into the cause thereof, and return a copy of the verdict in said proceeding, with the minutes of all testimony taken thereat, to the state inspector of mines; and no person shall be qualified to serve as a juror at said inquest who has a personal interest in, or is employed in or about, the mine in which or at which the deceased came to his death, or by any of its proprietors. [C97,§516; C24, 27, 31, 35, §5201.]

Fee, §5237, subsection 7

5202 Warrant. The warrant may be, in substance, as follows:

State of Iowa, }
.....County. }

To any peace officer of said county:—In the name of the state of Iowa, you are hereby required to summon forthwith three electors of your county to appear before me at (name the place), at (name the day and hour, or say forthwith), then and there to hold an inquest upon the dead body of....., there lying, and find by what means he died. Witness my hand this.....day of ....., A. D.....

A.....B.....
Coroner of.....County.

[C51,§187; R60,§397; C73,§353; C97,§517; C24, 27, 31, 35,§5202.]

Approval of warrant and expenses, §§1225.04, 1225.05

5203 Service and return. The officer to whom it is delivered shall execute the warrant, and make return thereof at the time and place named. [C51,§188; R60.§398; C73,§354; C97, §518; C24, 27, 31, 35,§5203.]

5204 Filling vacancies—oath. If any juror fails to appear, the coroner shall cause the proper number to be summoned or returned

from the bystanders immediately, and proceed to impanel them, and administer the following oath, in substance: "You do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, when, how, and by what means the person whose body lies here dead came to his death, according to your knowledge and the evidence given you." [C51,§189; R60, §399; C73,§355; C97,§519; C24, 27, 31, 35, §5204.]

5205 Witnesses and jurors. The coroner shall issue subpoenas for such witnesses as have knowledge touching the manner of the death of the person whose inquest is being held, returnable at such time and place as he may direct. They shall be sworn as in other cases, and their evidence reduced to writing under the direction of the coroner, subscribed by them, and returned to the district court, with the verdict and all other papers in the case. The coroner may enforce the attendance of witnesses and jurors, and punish them for contempt in disobeying his process, in like manner as a justice of the peace may do in criminal proceedings before him. In the absence of any officer authorized to serve subpoenas or other process, the coroner may deputize some suitable person to serve the same or may himself perform such duties. [C51,§§190–192, 199; R60,§§400–402, 409; C73,§§356–358, 365; C97,§520; S13,§520; C24, 27, 31, 35,§5205.]

Contempts, ch 536

5206 Shorthand reporter. For the purpose of preserving the testimony of such witnesses, and all the acts and doings of the coroner and jury, the coroner may appoint a shorthand reporter who shall, before entering upon his duties as such reporter, take an oath to be administered by the coroner, that he will faithfully take down in shorthand the evidence as it is given by the witnesses at such inquest or investigation, and that he will correctly extend the same into longhand. [S13,§520; C24, 27, 31, 35,§5206.]

5207 Compensation. Such reporter shall receive compensation not to exceed fifty cents per hour for time actually employed in any inquest or investigation, and for extending the notes, and when such shorthand report is extended into longhand by the said shorthand reporter and certified to by the coroner and reporter to the effect that it contains a full, true, and complete report of all proceedings, and filed, it shall be the official record of the said inquest or investigation. [S13,§520; C24, 27, 31, 35,§5207.]

5208 Verdict. The jurors, having inspected the body, heard the testimony and made all needful inquiries, shall return to the coroner their verdict in writing, under their hands, in substance as follows, stating the matters in the following form suggested, as far as found:

State of Iowa, }
.....County. } ss.

An inquisition holden at....., in .....county, on the.....day of....., A. D. 19...., before ....., coroner of the said county, upon the body of ..... (or person unknown), there lying dead, by the jurors whose names are hereto subscribed.

The said jurors upon their oaths do say (here state when, how, by what person, means, weapon, or accident he came to his death, and whether feloniously).

In testimony whereof, the said jurors have hereunto set their hands, the day and year aforesaid (which shall be attested by the coroner). [C51,§193; R60,§403; C73,§359; C97, §521; C24, 27, 31, 35,§5208.]

5209 Verdict kept secret. If the jurors find that a crime has been committed on the deceased and name the person who they believe has committed it, the verdict shall not be made public until after the arrest of the person. [C51, §194; R60,§404; C73,§360; C97,§522; C24, 27, 31, 35,§5209.]

5210 Arrest. If the person charged be present, the coroner may order his arrest by an officer or any other person present, and shall then make a warrant requiring the officer or other person to take him before a justice of the peace. [C51,§195; R60,§405; C73,§361; C97, §523; C24, 27, 31, 35,§5210.]

Approval of warrant and expenses, §§1225.04, 1225.05

5211 Warrant. If the person charged be not present, and the coroner believes he can be taken, he may issue a warrant to the sheriff and constables of the county, requiring them to arrest the person and take him before a justice of the peace. [C51,§196; R60,§406; C73,§362; C97,§524; C24, 27, 31, 35,§5211.]

5212 Proceedings. The warrant of the coroner in the above case shall be of equal authority with that of a justice of the peace, and when the person charged is brought before the justice, such justice shall cause an information to be filed against him, and the same proceedings shall be had as in other cases under information, and he shall be dealt with as a person held under an information in the usual form. [C51, §197; R60,§407; C73,§363; C97,§525; C24, 27, 31, 35,§5212.]

5213 Contents and effect of warrant. The warrant of the coroner shall recite substantially the transactions before him, and the verdict of the jury of inquest leading to the arrest, and such warrant shall be a sufficient foundation for the proceeding of the justice instead of an information. [C51,§198; R60,§408; C73,§364; C97, §526; C24, 27, 31, 35,§5213.]

40GA, ch 249, §6, editorially divided

5214 Reports. The coroner shall report to the clerk of the district court all cases of death which may call for the exercise of his jurisdiction; with the cause or mode of death, in accordance with forms furnished by the state department of health. [C97,§526; C24, 27, 31, 35,§5214.]

5214.1 Violent deaths. The coroner shall also immediately report to the state bureau of investigation, all deaths coming within his jurisdiction due to accidental or violent means, and said report shall be upon such forms as shall be prescribed and furnished by the state bureau of investigation. [C31, 35,§5214-c1.]

5215 Disposition of body—expenses. The coroner, except as otherwise provided by law, shall cause the body of the deceased person which he is called to view to be delivered to his friends, if any there be, but if not, he shall cause him to be decently buried, and the expense to be paid from any property found with the body, or, if there be none, from the county treasury, by certifying an account of the expenses; which, being presented to the board of supervisors, shall be allowed by them, in a reasonable amount and paid as other claims on the county. [C51,§200; R60,§410; C73,§366; C97, §527; C24, 27, 31, 35,§5215.]

5216 Disposition of property. Any property or money found with or upon the person of deceased, if there be no person authorized to receive the same, shall forthwith be turned over by the coroner to the clerk of the district court, to be held until disposed of according to law. A failure to comply with this section shall be a misdemeanor. [C97,§§532, 533; C24, 27, 31, 35,§5216.]

Punishment, §12894

5217 Acting coroner. When there is no coroner, or in case of his absence or inability to act, any justice of the peace or municipal judge of the same county is authorized to perform the duties of coroner in relation to dead bodies. [C51,§201; R60,§411; C73,§367; C97,§528; C24, 27, 31, 35,§5217.]

5218 Physician employed—fees. In the inquisition by a coroner or by an acting coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees, shall receive a reasonable compensation to be allowed by the board of supervisors. If the coroner is also a physician he may make such scientific examination, and shall receive therefor the same compensation as that paid other physicians, but in no such case shall he receive any witness fee. [C51,§202; R60,§412; C73,§368; C97,§529; C24, 27, 31, 35,§5218.]

5219 Compensation of witnesses and jurors. Witnesses and jurors shall receive for each day's service or attendance, two dollars; and for each mile traveled from residence to the place of holding the inquest the sum of ten cents. [C51,§190; R60,§400; C73,§356; C97,§530; C24, 27, 31, 35,§5219.]

CHAPTER 261

COMPENSATION OF COUNTY OFFICERS, DEPUTIES, AND CLERKS

5220 County auditor.
5221 Deputy auditor and clerks.
5222 County treasurer.
5223 Deputy treasurer and clerks.
5224 County recorder.
5225 Deputy recorder and clerks.
5226 Sheriff.
5227 Deputy sheriff.
5228 County attorney.
5229 Assistant county attorney.
5230 Clerk of district court.
5231 Deputy clerk.
5232 County superintendent.
5233 Expenses of county superintendent.
5234 Deputy county superintendent.
5235 Salaries—general fund.
5235.1 Exception.
5236 Dual county seats.
5237 Coroner—fees.

5220 County auditor. Each county auditor shall receive for his annual salary in counties having a population of:

1. Less than ten thousand, seventeen hundred dollars.
2. Ten thousand and less than fifteen thousand, eighteen hundred dollars.
3. Fifteen thousand and less than twenty thousand, nineteen hundred dollars.
4. Twenty thousand and less than twenty-five thousand, two thousand dollars.
5. Twenty-five thousand and less than thirty thousand, twenty-one hundred dollars.
6. Thirty thousand and less than thirty-five thousand, twenty-two hundred dollars.
7. Thirty-five thousand and less than forty thousand, twenty-four hundred dollars.
8. Forty thousand and less than fifty thousand, twenty-eight hundred dollars.
9. Fifty thousand and less than fifty-seven thousand, three thousand fifty dollars.
10. Fifty-seven thousand and less than sixty-five thousand, thirty-three hundred dollars.
11. Sixty-five thousand or over, thirty-four hundred dollars.
12. In counties over fifty thousand population, having two places at which the district court is held, five hundred dollars additional. In counties of over twenty-five thousand, having a special charter city, where the county auditor prepares and makes up the city tax books for such special charter city, he may receive not to exceed three hundred dollars additional compensation. [C73,§3798; C97,§479; SS15,§479; C24, 27, 31, 35,§5220.]

5221 Deputy auditor and clerks. Each deputy auditor shall receive as his annual salary in counties having a population of:

1. Less than fifty thousand, one-half the amount of the salary of the auditor, but if that amount is less than fifteen hundred dollars, the

board of supervisors may allow an additional amount to make an aggregate not to exceed said sum.

2. Fifty thousand or over, one deputy to be designated by the auditor as chief deputy shall receive one-half the amount of the salary of the auditor, but if that amount is less than seventeen hundred and fifty dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum, and each additional deputy shall receive one-half the amount of the salary of the auditor unless said amount exceeds fifteen hundred dollars, in which event the salary shall not exceed said last named sum.

3. In any county having within its limits a city with a population of thirty-six thousand or over, the salaries of the chief deputy and one to be designated by the auditor as second deputy shall each be sixty-five percent of the amount of the salary of the auditor, and each additional deputy shall receive one-half the amount of the salary of the auditor. If more than four deputies are required, or additional clerks, the board of supervisors shall fix the amount of their compensation. [R60,§648; C73,§771; C97,§481; SS15,§481; C24, 27, 31, 35,§5221.]

Dual county seats—salary, §5236

5222 County treasurer. Each county treasurer shall receive for his annual salary in counties having a population of:

1. Less than ten thousand, seventeen hundred dollars.
2. Ten thousand and less than fifteen thousand, eighteen hundred dollars.
3. Fifteen thousand and less than twenty thousand, nineteen hundred dollars.
4. Twenty thousand and less than twenty-five thousand, two thousand dollars.
5. Twenty-five thousand and less than thirty thousand, twenty-one hundred dollars.
6. Thirty thousand and less than thirty-five thousand, twenty-two hundred dollars.
7. Thirty-five thousand and less than forty thousand, twenty-four hundred dollars.
8. Forty thousand and less than fifty thousand, twenty-eight hundred dollars.
9. Fifty thousand and less than fifty-seven thousand, three thousand fifty dollars.
10. Fifty-seven thousand and less than sixty-five thousand, thirty-three hundred dollars.
11. Sixty-five thousand and over, thirty-four hundred dollars.
12. Forty thousand or over, in which there is a city of the first class, of any form of government, the board of supervisors may allow additional compensation to the county treasurer not to exceed fifty dollars per annum for each five thousand population of such cities. When such county has a city with a population of seventy-five thousand or over, the board of supervisors shall allow additional compensation in an amount not less than twenty-five dollars nor more than fifty dollars for each five thousand population of such cities, provided, however, that in no case shall such allowance exceed five hundred dollars.

In counties over fifty thousand population, where the district court is held at two different places the county treasurer shall receive five hundred dollars in addition to the compensation as fixed by the above schedule in this section. In counties with a population of over twenty-five thousand, having a special charter city, where the taxes are collected by the county treasurer for such special charter city, he may receive not to exceed three hundred dollars additional compensation. [C51,§211; R60,§422; C73,§3793; C97,§490; SS15,§§490, 490-a; C24, 27, 31, 35, §5222.]

5223 Deputy treasurer and clerks. Each deputy treasurer shall receive as his annual salary in counties having a population of:

1. Less than fifty thousand, one-half the amount of the salary of the treasurer, but if that amount is less than fifteen hundred dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum.

2. Fifty thousand or over, one deputy to be designated by the treasurer as chief deputy shall receive one-half the amount of the salary of the treasurer, but if that amount is less than seventeen hundred fifty dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum, and each additional deputy shall receive one-half the amount of the salary of the treasurer unless said amount exceeds fifteen hundred dollars, in which event the salary shall not exceed said last named sum.

3. Fifty-three thousand or over, in which there exists a city, not the county seat, having a population of six thousand or over, the treasurer may appoint a resident deputy collector of taxes for such city and vicinity under bond as provided for other deputies, and his compensation shall be the same as a deputy in a county with a population of less than fifty thousand. The treasurer in such case shall prepare the necessary books and records for such deputy each year.

4. In any county having within its limits a city with a population of thirty-six thousand or over, the salaries of the chief deputy and one to be designated by the treasurer as second deputy shall each be sixty-five percent of the amount of the salary of the treasurer, and each additional deputy shall receive one-half the amount of the salary of the treasurer. If more than four deputies are required, or additional clerks, the board of supervisors shall fix the amount of their compensation. [C51,§417; R60,§648; C73, §§771, 3793; C97,§491; SS15,§491; C24, 27, 31, 35,§5223.]

Dual county seats—salary, §5236

5224 County recorder. Each county recorder shall receive for his annual salary in counties having a population of:

1. Less than fifteen thousand, sixteen hundred dollars.
2. Fifteen thousand and less than twenty thousand, seventeen hundred dollars.
3. Twenty thousand and less than twenty-five thousand, eighteen hundred dollars.

4. Twenty-five thousand and less than thirty thousand, nineteen hundred dollars.
5. Thirty thousand and less than thirty-five thousand, two thousand dollars.
6. Thirty-five thousand and less than forty thousand, twenty-one hundred dollars.
7. Forty thousand and less than fifty thousand, twenty-two hundred dollars.
8. Fifty thousand and less than fifty-seven thousand, twenty-three hundred dollars.
9. Fifty-seven thousand and less than sixty-five thousand, twenty-four hundred dollars.
10. Sixty-five thousand and less than ninety thousand, twenty-eight hundred dollars.
11. Ninety thousand and over, thirty-one hundred dollars.

In counties over fifty thousand population, where a recorder's office is kept in two different places, the recorder shall receive five hundred dollars in addition to the compensation as fixed by the above schedule. [C51,§§211, 213; R60, §§422, 424; C73,§3792; C97,§495; SS15,§495; C24, 27, 31, 35,§5224.]

5225 Deputy recorder and clerks. Each deputy recorder shall receive as his annual salary in counties having a population of:

1. Less than fifty thousand, one-half the amount of the salary of the recorder, but if that amount is less than fifteen hundred dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum.
2. Fifty thousand or over, one deputy to be designated by the recorder as chief deputy shall receive one-half the amount of the salary of the recorder, but if that amount is less than seventeen hundred fifty dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum, and each additional deputy shall receive one-half the amount of the salary of the recorder unless said amount exceeds fifteen hundred dollars, in which event the salary shall not exceed said last named sum.
3. In any county having within its limits a city with a population of forty-five thousand or over, the salaries of the chief deputy and one to be designated by the recorder as second deputy shall each be sixty-five percent of the amount of the salary of the recorder and each additional deputy shall receive one-half the amount of the salary of the recorder. If more than four deputies are required, or additional clerks, the board of supervisors shall fix the amount of their compensation. [C51,§417; R60, §648; C73,§771; C97,§496; S13,§496; C24, 27, 31, 35,§5225.]

Dual county seats—salary, §5236

5226 Sheriff. Each sheriff shall receive for his annual salary in counties having a population of:

1. Less than fifteen thousand, seventeen hundred dollars.
2. Fifteen thousand and less than twenty thousand, eighteen hundred dollars.
3. Twenty thousand and less than twenty-five thousand, nineteen hundred dollars.
4. Twenty-five thousand and less than thirty-five thousand, two thousand dollars.
5. Thirty-five thousand and less than forty thousand, twenty-one hundred dollars.
6. Forty thousand and less than fifty thousand, twenty-two hundred dollars.
7. Fifty thousand and less than fifty-seven thousand, twenty-four hundred dollars.
8. Fifty-seven thousand and less than sixty-five thousand, twenty-six hundred dollars.
9. Sixty-five thousand and less than eighty thousand, twenty-eight hundred dollars.
10. Eighty thousand and less than one hundred twenty-five thousand, thirty-five hundred dollars, and in counties over one hundred twenty-five thousand, five thousand dollars.
11. In counties of fifty thousand population, in which district court is held in two places, three hundred dollars per annum in addition to the foregoing schedule.
12. In any county where the sheriff is not furnished a residence by the county, an additional sum of three hundred dollars per annum. [C51,§2536; R60,§4145; C73,§§3788, 3789; C97, §509; SS15,§§510-a,-c; C24, 27, 31, 35,§5226.]

5227 Deputy sheriff. Each deputy sheriff shall receive as his annual salary in counties having a population of:

1. Less than fifty thousand, and in any county where district court is held in but one place, not to exceed fifteen hundred dollars, fixed by the board of supervisors.
2. Fifty thousand or over, sixty-five percent of the amount of salary of the sheriff to be paid to the one designated by the sheriff as chief deputy, but in the event such amount exceeds eighteen hundred dollars, then to be reduced to said sum.
3. In any county where district court is held in two places, for the chief deputy and for any deputy other than the chief deputy in charge of the office where such court is held outside the county seat, sixty-five percent of the amount of the salary of the sheriff. [C51,§417; R60, §648; C73,§771; C97,§510; SS15,§510-b; C24, 27, 31, 35,§5227.]

5228 County attorney. Each county attorney shall receive as his annual salary in counties having a population of:

1. Less than fifteen thousand, twelve hundred dollars.
2. Fifteen thousand and under twenty thousand, fifteen hundred dollars.
3. Twenty thousand and under twenty-five thousand, seventeen hundred dollars.
4. Twenty-five thousand and under thirty-five thousand, two thousand dollars.
5. Thirty-five thousand and under forty-five thousand, twenty-five hundred dollars.
6. Forty-five thousand and under fifty-five thousand, twenty-six hundred fifty dollars.
7. Fifty-five thousand and under sixty thousand, three thousand dollars.
8. Sixty thousand and under eighty thousand, thirty-five hundred dollars.
9. Eighty thousand and under one hundred thousand, four thousand dollars.

10. One hundred thousand and over, five thousand dollars.

Except in counties having a population of sixty thousand or over according to the latest federal or state census, in addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise, and school fund mortgages foreclosed, and attorney fees allowed in criminal cases.

In counties having a population of sixty thousand or over by the latest federal or state census, the annual salaries as herein provided shall be the full and only compensation of the county attorney, and all fees and commissions in this chapter or elsewhere by law provided which may be lawfully taxed in favor of county attorneys shall if and when taxed and collected be paid by the county attorney to the county for the benefit of the court expense fund.

In counties over fifty thousand population where district court is held in two places, he shall receive an additional sum of five hundred dollars.

The county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county. [C51, §169; R60, §§380, 381; C73,§3775; C97,§308; SS15,§308; C24, 27, 31, 35,§5228.]

5229 Assistant county attorney. Assistant county attorneys shall receive as their annual salary in counties having a population of:

1. Less than thirty-six thousand, no compensation.
2. Thirty-six thousand and less than forty-five thousand, sixteen hundred dollars.
3. Forty-five thousand and less than fifty-seven thousand, seventeen hundred dollars.
4. Fifty-seven thousand and less than one hundred forty thousand, two thousand dollars.
5. One hundred forty thousand and over, twenty-five hundred dollars.
6. In counties having a population of fifty-seven thousand or over, in which counties there is a city of the second class other than the county seat of said county, which city of the second class has a population of six thousand or over, the board of supervisors may fix the salary of an assistant county attorney residing in such city, not the county seat, making said salary in any sum which the board of supervisors may determine, not in excess of two thousand dollars per annum. [C97,§303; S13,§303-a; C24, 27, 31, 35,§5229.]

5230 Clerk of district court. Each clerk of the district court shall receive as his annual salary in counties having a population of:

1. Less than ten thousand, seventeen hundred dollars.
2. Ten thousand and less than fifteen thousand, eighteen hundred dollars.
3. Fifteen thousand and less than twenty thousand, nineteen hundred dollars.
4. Twenty thousand and less than twenty-five thousand, two thousand dollars.
5. Twenty-five thousand and less than thirty thousand, twenty-one hundred dollars.
6. Thirty thousand and less than thirty-five thousand, twenty-two hundred dollars.
7. Thirty-five thousand and less than forty thousand, twenty-four hundred dollars.
8. Forty thousand and less than fifty thousand, twenty-eight hundred dollars.
9. Fifty thousand and less than fifty-seven thousand, three thousand fifty dollars.
10. Fifty-seven thousand and less than sixty-five thousand, thirty-three hundred dollars.
11. Sixty-five thousand and over, thirty-four hundred dollars.
12. In counties over fifty thousand population, where the district court is held in two places four hundred dollars additional. [C51, §211; R60,§422; C73,§3784; C97,§297; S13,§297; C24, 27, 31, 35,§5230.]

Referred to in §5235.1
See §10841

5231 Deputy clerk. Each deputy clerk shall receive as his annual salary in counties having a population of:

1. Less than fifty thousand, one-half the amount of the salary of the clerk, but if that amount is less than fifteen hundred dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum.
2. Fifty thousand or over, one deputy to be designated by the clerk as chief deputy shall receive one-half the amount of the salary of the clerk, but if that amount is less than seventeen hundred fifty dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum, and each additional deputy shall receive one-half the amount of the salary of the clerk unless said amount exceeds fifteen hundred dollars, in which event the salary shall not exceed said last named sum.
3. In any county having within its limits a city with a population of thirty-six thousand or over, the salaries of the chief deputy and one to be designated by the clerk as second deputy shall each be sixty-five percent of the amount of the salary of the clerk, and each additional deputy shall receive one-half the amount of the salary of the clerk. If more than four deputies are required, or additional clerks, the board of supervisors shall fix the amount of the compensation.

In counties over fifty thousand population in which the district court is held in two places, the deputy having charge of the office where said court is held outside the county seat, shall receive one-half the amount of the salary of the clerk. [C51,§417; R60,§648; C73,§771; C97,§298; SS15,§§298, 298-a; C24, 27, 31, 35,§5231.]

Referred to in §5235.1
Dual county seats—salary, §5236

5232 County superintendent. Each county superintendent of schools shall receive an an-

nual salary of not less than eighteen hundred dollars, and such additional compensation as may be allowed by the board of supervisors in each particular county, but in no case to exceed three thousand dollars. [R60,§2074; C73, §1776; C97,§2742; S13,§2742; C24, 27, 31, 35, §5232.]

5233 Expenses of county superintendent. The county superintendent shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duties within his county and such expenses shall be allowed by the county board of supervisors and paid out of the county fund, as other expenses of the county, but the total amount so paid in any one year for traveling expenses of the superintendent shall not exceed the sum of four hundred dollars, unless approved by the board of supervisors. In determining the actual and necessary expenses incurred under this section, mileage at the rate of five cents per mile for distance actually traveled may be included. [C73,§1776; C97,§2742; S13,§2742; SS15,§2734-b; C24, 27, 31, 35,§5233.]

5234 Deputy county superintendent. Each deputy county superintendent shall receive such annual salary as shall be allowed by the county board of education, and which said board shall fix each year in accordance with the provisions of the teachers minimum wage law. [C51,§417; R60,§648; C73,§771; SS15,§2734-b; C24, 27, 31, 35,§5234.]

Minimum wage law, §4341 et seq.

5235 Salaries—general fund. The salaries fixed by the foregoing sections of this chapter shall be paid out of the general fund of the county. [C97,§308; SS15,§308; C24, 27, 31, 35, §5235.]

Manner of payment, §1218

5235.1 Exception. The salaries fixed by sections 5230 and 5231 may be paid from the court expense fund. [C27, 31, 35,§5235-a1.]

Court expense fund, §7172

5236 Dual county seats. In any county having two county seats and where the district court is held in two places, the first deputy county auditor, county treasurer, county clerk, and county recorder, or the deputy in charge of such office, shall receive sixty-five percent of the amount of the salary of his principal. [C24, 27, 31, 35,§5236.]

5237 Coroner—fees. The coroner is entitled to charge and receive as his compensation the following fees, which shall be paid out of the county treasury, and the county shall be permitted to file and collect a claim against the estate of said decedent for said fees.

1. For examining each dead body upon which no inquest is held, where there is no medical attendant at death and where such examination is necessary to comply with chapter 110, the sum of five dollars.

2. For examining each dead body upon which an inquest is held or where the death occurred under such suspicious circumstances as to make advisable prompt investigation of the facts and the preservation of weapons and fingerprints, including investigating, preserving weapons, fingerprints and evidence of crime and tragic death and making a permanent memoranda of any important identification marks, evidence, conditions, suspicious circumstances and other significant facts observed by the coroner in viewing the dead body and the location where found, the sum of ten dollars.

3. For issuing each subpoena, warrant, or order for a jury, twenty-five cents.

4. For docketing each case, one dollar.

5. For each mile traveled to and returning from an examination or inquest, five cents.

6. For taking down in writing the evidence of witnesses, when no stenographer is employed as hereinbefore provided, ten cents per one hundred words.

7. For returning a copy of the verdict with minutes of the testimony to the state inspector of mines, as provided by law, three dollars.

8. For all other services, the same fees as are allowed sheriffs in similar cases, to be paid in like manner. [C51,§2539; R60,§4148; C73, §3799; C97,§531; C24, 27, 31, 35,§5237.]

Appointment of stenographer, §5206
Death in mine, §5201
Other fees, §5191

CHAPTER 262

DEPUTY OFFICERS, ASSISTANTS, AND CLERKS

5238 Appointment.
5239 Certificate of appointment.
5240 Revocation of appointment.
5241 Qualifications.
5241.1 Bond or liability policy.
5242 Powers and duties.
5243 Temporary assistance for county attorney.
5244 Temporary assistance for county auditor.

5238 Appointment. Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, coroner, and county superintendent of schools, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board. [C51,§§411, 415; R60,§§642, 646, 2069; C73,§§766, 769, 1770;

C97,§§298, 303, 481, 491, 496, 510, 2734; S13,§303-a; SS15,§§298, 481, 491, 510-b, 2734-b; C24, 27, 31, 35,§5238.]

Deputy state officers, §430

5239 Certificate of appointment. When any such appointment has been approved by the board of supervisors, the officer making such appointment shall issue in writing a certificate of such appointment, and file the same in the office of the auditor where it shall be kept. [C51,§411; R60,§642; C73,§766; C97,§§298, 303, 481, 491, 496, 510; S13,§§303-a, 496; SS15,§§298, 481, 491, 510-b; C24, 27, 31, 35,§5239.]

5240 Revocation of appointment. Any certificate of appointment may be revoked in writing at any time by the officer making the appointment, which revocation shall be filed and kept in the office of the auditor. [C51,§411; R60,§642; C73,§766; C97,§§298, 481, 491, 496, 510; S13, §496; SS15,§§298, 481, 491, 510-b; C24, 27, 31, 35,§5240.]

5241 Qualifications. Each deputy shall be required to give a bond in an amount to be fixed by the officer having the approval of the bond of his principal, with sureties to be approved by such officer. Such bond when approved shall be filed and kept in the office of the auditor. Each deputy shall take the same oath as his principal, which shall be indorsed on the certificate of appointment. [C51,§§411, 416; R60,§§642, 647; C73,§§766, 770; C97,§§298, 481, 491, 496, 510; S13,§496; SS15,§§298, 481, 491, 496, 510-b; C24, 27, 31, 35,§5241.]

Approval of bond, oath, §§1054, 1073

5241.1 Bond or liability policy. The bond of sheriffs' deputies shall be either a bond or liability policy as may be required by the sheriff with the approval of the board of supervisors. [C31, 35,§5241-d1.]

5242 Powers and duties. Each deputy, assistant, and clerk shall perform such duties as may be assigned to him or her by the officer making the appointment, and during the absence or disability of his principal, the deputy or deputies shall perform the duties of such principal, except a deputy superintendent of schools shall not perform the duties of his or her principal in visiting schools or hearing appeals. [C51, §412; R60,§643; C73,§767; C97,§§298, 481, 491, 496; S13,§496; SS15,§§298, 481, 491; C24, 27, 31, 35,§5242.]

5243 Temporary assistance for county attorney. The county attorney may with the approval of a judge of the district court procure such assistants in the trial of a person charged with felony as he shall deem necessary and for such assistants upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the services rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors, but nothing in this chapter shall prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested. [C97,§303; S13, §303-a; C24, 27, 31, 35,§5243.]

5244 Temporary assistance for county auditor. In case no deputy shall be appointed, but on account of the pressure of business in his office the auditor is compelled temporarily to employ assistants, he shall file the bill for such services with the board of supervisors at their next regular meeting and it shall make a reasonable allowance therefor. [C97,§481; SS15,§481; C24, 27, 31, 35,§5244.]

CHAPTER 263

COLLECTION AND ACCOUNTING OF FEES

Referred to in §5009.09

5245 Fees belong to county.
5246 Record of fees.
5247 Quarterly reports and payments.

5245 Fees belong to county. Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county. [R60, §431; C73,§3785; C97,§§299, 508; S13,§508; SS15,§§479-a, 490-a; C24, 27, 31, 35,§5245.]

5246 Record of fees. Each such officer shall keep a record to be known as the "fee book" of the office to which it relates and shall be kept in such office as a part of the permanent county records. It shall be ruled in appropriate columns for the date, kind of service, for whom rendered, and the amount of fee collected, and when the charge is for recording an instrument, the names of the parties thereto. All said items shall be entered upon said record at the time the service is rendered. [C51,§212; R60,§423; C73, §3796; C97,§§480, 492; S13,§498; C24, 27, 31, 35,§5246.]

5247 Quarterly reports and payments. Each of such officers shall make itemized and verified reports quarterly to the board of supervisors showing in detail the fees collected during the preceding quarter. Each such officer shall quarterly pay into the county treasury all fees collected during the preceding quarter, take duplicate receipts therefor and file one of such receipts in the office of the auditor. Each such officer shall also enter upon the fee book of his office the date and amount of each payment into the county treasury. [R60,§431; C73,§§3785, 3796; C97,§§299, 480, 492, 495, 508; S13,§§508, 550-c; SS15,§495; C24, 27, 31, 35,§5247.]

5248 Rep. by 42GA, ch 129

CHAPTER 264

GENERAL DUTIES OF COUNTY OFFICERS

5249 Officers to furnish information.
5250 Agent or attorney.
5251 Acting as counsel.
5252 Purchase of property.
5253 Examination of accounts—expense.
5254 Violations.
5255 Purchase of warrants.
5256 Money for sectarian purposes.
5257 Violations.
5258 Expenditures confined to receipts.
5259 Exceptions.
5260 Unallowable claims.

5249 Officers to furnish information. It is the duty of each county officer, whenever called upon by the governor or either house of the general assembly, to communicate to the governor or such house any information that may be in his possession as such officer, and to furnish any statistics at his command, when thus called upon. [C97,§544; C24, 27, 31, 35,§5249.]

Referred to in §5254

5250 Agent or attorney. No county officer shall appear as agent, attorney, or solicitor for another, in any matter pending before the board of supervisors. [C73,§326; C97,§545; C24, 27, 31, 35,§5250.]

Referred to in §5254

5251 Acting as counsel. No sheriff, deputy sheriff, coroner, or constable shall appear in any court as attorney or counsel for any party, nor make any writing or process to commence any action or proceeding, or to be in any manner used in the same; and such writing or process made by any of them shall be rejected. [C51, §175; R60,§388; C73,§342; C97,§546; C24, 27, 31, 35,§5251.]

Referred to in §5254

5252 Purchase of property. No sheriff, deputy sheriff, coroner, or constable shall become the purchaser, either directly or indirectly, of any property by him exposed to sale under any process of law; and every such purchase shall be void. [C51,§176; R60,§389; C73,§343; C97, §547; C24, 27, 31, 35,§5252.]

Referred to in §5254

5253 Examination of accounts—expense. If any officer required by law to report the fees collected by him to the board of supervisors shall neglect or refuse to make such report, it shall be the duty of the board to employ an expert accountant to examine the books, papers, and accounts of such officer, and to make said report, the expense of which shall be charged to such delinquent officer, and shall be collectible upon his official bond. [C97,§548; C24, 27, 31, 35, §5253.]

Referred to in §5254

5254 Violations. Failure on the part of any officer to perform any duty required of him by sections 5249 to 5253, inclusive, of this chapter shall render him liable to prosecution and punishment for a misdemeanor. [C97,§550; C24, 27, 31, 35,§5254.]

Punishment, §12894

5255 Purchase of warrants. No officer of any county, nor any deputy or employee of such officer, shall, directly or indirectly, be permitted to take, purchase, or receive in payment, exchange, or in any way whatever, any warrant, scrip, or other evidence of its indebtedness or any demand against it, for a less amount than that expressed on the face of the warrant, scrip, or other evidence of indebtedness or demand, with accrued interest thereon. [R60,§2186; C73, §556; C97,§596; C24, 27, 31, 35,§5255.]

Referred to in §5257
Applicable to cities and towns, §5643

5256 Money for sectarian purposes. Public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control. [C73,§552; C97,§593; C24, 27, 31, 35, §5256.]

Referred to in §5257
Applicable to cities and towns, §5643

5257 Violations. Any officer of any county, or any deputy or employee of such officer, who violates any of the provisions of sections 5255 and 5256, shall be guilty of a misdemeanor, and fined not less than one hundred dollars, nor more than five hundred dollars, for each offense. [R60,§2188; C73,§558; C97,§598; C24, 27, 31, 35, §5257.]

Applicable to cities and towns, §5643

5258 Expenditures confined to receipts. It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract. [C24, 27, 31, 35,§5258.]

Referred to in §§5259, 5260.11, 5293
Analogous provision, §1168

5259 Exceptions. Section 5258 shall not apply to:

1. Expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty.
2. Expenses incurred in connection with the operation of the courts.
3. Expenditures for bridges which are made necessary in any year by the construction of a public drainage improvement.

4. Expenditures for the benefit of any person entitled to receive help from public funds.
5. Expenditures authorized by vote of the electors.
6. Expenditures contracted prior to July 4, 1923, for and on account of county activities authorized by law.
7. Expenditures contracted prior to July 4, 1923, of every kind and character for the funding and refunding of legal obligations or indebtedness of the county by bonding or otherwise as provided by law.
8. Expenditures from the county funds which are to be refunded from the primary road fund.
9. Expenditures from the county general fund legally payable from that fund and contracted prior to January 1, 1924. [C24, 27, 31, 35,§5259.]

Referred to in §§380, 5260.11, 5293

5260 Unallowable claims. No claim shall be allowed or warrant issued or paid for the expense incurred by any county officer in attending any convention of county officials. [C24, 27, 31, 35,§5260.]

CHAPTER 264.1

COUNTY BUDGET

5260.01 Annual itemized estimates.
5260.02 Appropriation.
5260.03 Contingent fund.
5260.04 Form of resolution—limitation.
5260.05 Contents of resolution.
5260.06 Supplemental appropriation.
5260.07 Report of unexpended balances.
5260.08 Transfer of funds.
5260.09 Transfers from other departments.
5260.10 Expenditures exceeding appropriation.
5260.11 Scope of statute.

5260.01 Annual itemized estimates. On or before the thirty-first day of December of each year, each elective or appointive officer of any county having charge of any county office or department shall prepare and submit to the board of supervisors a detailed estimate itemized in the same manner that the various expenditures of such office or department are itemized on the records of the county auditor, showing the proposed expenditures of his office or department for the following calendar year. If the estimated expenditures show an increase over those for the current year, a statement in writing of the reason for such estimated increase must also be submitted. [C31, 35, §5260-c1.]

5260.02 Appropriation. On or before the thirty-first of January of every year, the board of supervisors shall appropriate, by resolution, such amounts as are deemed necessary for each of the different county officers and departments during the ensuing year, and shall specify from which of the different county funds created by law the appropriated sums shall be derived. The appropriations to each separate county office or department shall be itemized in the same manner that the accounts are itemized on the records of the county auditor. [C31, 35,§5260-c2.]

5260.03 Contingent fund. The board of supervisors may also appropriate to a contingent account for one or each of the county funds, a sum which may be spent for purposes which cannot be anticipated at the beginning of the year, but said contingent appropriation together with other appropriations shall not exceed the anticipated revenues. [C31, 35, §5260-c3.]

5260.04 Form of resolution — limitation. Such resolution of appropriation also shall list, in three separate columns and opposite each separate appropriation item, the itemized expenditures of each county office or department for each of the two preceding years. The total amount appropriated from any county fund shall not exceed the anticipated receipts of that fund. [C31, 35,§5260-c4.]

5260.05 Contents of resolution. Such resolution of appropriation shall also contain an itemized statement of the anticipated receipts to each separate county fund for the current year, together with a statement of any balance carried over in any of the county funds from the preceding year. Such resolution of appropriation shall also contain in two columns and opposite each item of anticipated receipts, the actual receipts collected during each of the two preceding years. [C31, 35,§5260-c5.]

5260.06 Supplemental appropriation. If it shall have been determined during the course of any year that the actual receipts to any of the different county funds will be larger than were anticipated in the original resolution of appropriation, the board of supervisors may make a supplementary appropriation by resolution at any regular meeting, appropriating the sums in excess of the estimated receipts from any county fund augmented by larger revenues than were anticipated, to any county office or offices supported by said fund or funds. No such supplementary appropriation shall be made to any such county office or offices unless it shall be shown that a specific need therefor exists. Such supplementary appropriation shall clearly state the amount collected into such augmented county fund in excess of the amount estimated in the general resolution of appropriation. [C31, 35,§5260-c6.]

5260.07 Report of unexpended balances. On the fifteenth of April, July, and October of each year, the county auditor shall furnish to each county office or department, a statement showing the various original appropriations to each office or department, expenditures of the office or department from its different appropriation accounts during the expired portion of the year, together with a statement of the balance of the

appropriations for said office remaining unexpended. [C31, 35,§5260-c7.]

5260.08 Transfer of funds. In the event that any office has exceeded, or may find it necessary to exceed, the amount of its appropriation in any particular account, the board of supervisors, by resolution, may authorize a transfer from one or more of the other appropriation accounts of said office, any portion of such unexpended appropriation balance, to any other appropriation account of said office. [C31, 35, §5260-c8.]

5260.09 Transfers from other departments. In the event it shall be found necessary for any office or department to spend an amount in excess of the total of its original appropriations, the board of supervisors at a regular or special meeting may by resolution authorize a transfer of a portion of the appropriation balance of one office or department or contingent account to the account of another office or department, provided that the funds transferred are derived from the same tax fund and that the transfer does not violate existing statutes. [C31, 35, §5260-c9.]

5260.10 Expenditures exceeding appropriation. It shall be unlawful for any county official, the expenditures of whose office comes under the provisions of this chapter, to authorize the expenditure of a sum for his department larger than the amount which has been appropriated by the county board of supervisors.

Any county official in charge of any department or office who violates this law shall be guilty of a misdemeanor and punished accordingly. [C31, 35,§5260-c10.]

Punishment, §12894

5260.11 Scope of statute. Nothing in this chapter shall be construed as affecting the provisions of section 5259, and provisions of this chapter with reference to the penalty, shall be in addition to the provisions of section 5258. [C31, 35,§5260-c11.]

CHAPTER 265

SUBMISSION OF QUESTIONS TO VOTERS

Referred to in §4670.1

5261 Expenditures—when vote necessary.
5262 Exceptions.
5262.1 Improvements authorized.
5263 Questions submitted to voters.
5264 Depreciated warrants—tax.
5265 Manner of submitting questions.
5266 Voting of tax—when required.
5267 Rate of tax.
5268 Bonds—maturity—tax.
5269 Tax for successive years.
5270 Result published.
5271 Rescission by subsequent vote.
5272 Board must submit questions.
5273 Regularity presumed.
5274 Surplus of tax.

5261 Expenditures—when vote necessary. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections. [R60,§312; C73,§303; C97,§423; SS15,§423; C24, 27, 31, 35,§5261.]

Referred to in §10771
Bridges, §4670.1
Funds derived from insurance, §5135
Submission of question of county home, §3828.115

5262 Exceptions. Where a courthouse has been destroyed by fire and not less than one hundred thousand dollars has been donated to the county for the purpose of erecting a courthouse, the board of supervisors may, without authorization from the voters, use the amount so donated for the construction of the courthouse and in addition thereto may appropriate from the general fund for such purpose a sum not exceeding one-half of the amount donated, provided there is in the general fund, unappropriated for other purposes, an amount sufficient to pay such appropriation. [C24, 27, 31, 35,§5262.]

5262.1 Improvements authorized. The board of supervisors in any county having a population of sixty-five thousand or over, may also make necessary additions to such courthouse, jail, or county home where the funds are available in the general fund, unappropriated for other purposes, without additional tax levy and without submitting the proposition to the voters of such county, provided the cost thereof does not exceed twenty-five thousand dollars. [C31, 35,§5262-c1.]

5263 Questions submitted to voters. The board of supervisors may submit to the people of the county at any regular election, or at any special election called for that purpose, the question whether money may be borrowed to aid in the erection and equipment or the building of additions or extensions to, the remodeling or the reconstruction of any public buildings, or the procuring of a site or grounds for such public buildings, or for both such site and buildings, and either or both of said propositions and other local or police regulations may be submitted at the same general or special election. [C51,§114;

R60,§250; C73,§309; C97,§443; C24, 27, 31, 35, §5263.]

5264 Depreciated warrants—tax. When the warrants of a county are at a depreciated value, it may, in like manner, submit the question whether a tax of a higher rate than that provided by law shall be levied. [C51,§114; R60, §250; C73,§309; C97,§443; C24, 27, 31, 35, §5264.]

5265 Manner of submitting questions. The mode of submitting questions to the people shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty for its violation if there be one, shall be embraced in a notice of the election and shall be published once each week for at least four weeks in some newspaper published in the county. Such notice shall name the time when such question will be voted upon, and the form in which the question shall be submitted, and a copy of the question to be submitted shall be posted at each polling place during the day of election. [C51,§115; R60,§251; C73,§310; C97,§446; S13,§446; C24, 27, 31, 35, §5265.]

5266 Voting of tax—when required. When any question submitted involves the borrowing or the expenditure of money, the same must be accompanied by a provision to levy a tax for the payment thereof, in addition to other taxes, as directed in section 5267, and no vote adopting the question proposed will be of effect unless it adopt the tax also. [C51,§116; R60,§252; C73, §311; C97,§447; C24, 27, 31, 35,§5266.]

5267 Rate of tax. The rate of such tax shall in no case be more than one-fourth of one percent on the county valuation in any one year. When the object is to borrow money for the erection and equipment of public buildings, or for the procuring of sites or grounds therefor, or for both, the rate shall be such as to pay the debt in a period not exceeding ten years; but in counties having a population of twenty-five thousand or over, or in any county where one hundred thousand dollars or more has been or is proposed to be expended, the rate of levy shall be such as to pay the debt in not exceeding twenty-five years. [C51,§117; R60,§253; C73,§312; C97, §448; SS15,§448; C24, 27, 31, 35,§5267.]

Referred to in §5266

5268 Bonds — maturity — tax. In issuing bonds for such indebtedness, no bond shall be issued with a maturity date deferred more than twenty-five years from date thereof. Such bonds shall be consecutively numbered and issued and paid in the order of such numbering. The interest and principal of such bonds shall be paid as rapidly as funds for such payment are collected. When the object is to construct, or to aid in constructing, any highway or bridge, the annual rate shall not be less than one-fourth mill on the dollar of the assessed valuation; and any of the above taxes becoming delinquent shall draw the same interest as ordinary taxes. [C51, §117; R60,§253; C73,§312; C97,§448; SS15, §448; C24, 27, 31, 35,§5268.]

Payment and maturity of bonds, ch 63.1

5269 Tax for successive years. When it is apparent that the levy of one year will not pay the entire amount, the proposition and the vote must be to continue the levy at the same rate from year to year until the amount is paid. [C51, §118; R60,§254; C73,§313; C97,§449; C24, 27, 31, 35,§5269.]

5270 Result published. The board of supervisors, on finding from a canvass of the returns that a majority of the votes were cast in favor of the proposition, shall cause the result of the vote to be entered at large in the minute book, and the proposition shall take effect and be in force thereafter. Notice of such adoption shall be published for the same time and in the same manner as above provided for publishing the notice of election. [C51,§119; R60,§255; C73,§314; C97,§450; C24, 27, 31, 35,§5270.]

Vote required to authorize bonds, §1171.18

5271 Rescission by subsequent vote. Propositions thus adopted may be rescinded in like manner and upon like notice, by a subsequent vote taken thereon, but neither contracts made under them, nor taxes voted for carrying them into effect, can be rescinded. [C51,§120; R60, §256; C73,§315; C97,§451; C24, 27, 31, 35, §5271.]

5272 Board must submit questions. The board shall submit the question of the adoption or rescission of such a measure when petitioned by one-fourth of the legal voters of the county, or by such different number as may be prescribed by law in any special case. [C51,§121; R60,§257; C73,§316; C97,§452; C24, 27, 31, 35, §5272.]

5273 Regularity presumed. The record of the adoption or rescission of any such measure shall be presumptive evidence that all the proceedings necessary to give the vote validity have been regularly conducted. [C51,§122; R60, §258; C73,§317; C97,§453; C24, 27, 31, 35,§5273.]

5274 Surplus of tax. In case the amount produced by the rate of tax proposed and levied exceeds the amount required for the specific object, it shall not for that reason be held invalid, but the excess shall go into the general county fund. [C51,§123; R60,§259; C73,§318; C97,§454; C24, 27, 31, 35,§5274.]

CHAPTER 266

COUNTY BONDS

5275 Funding and refunding bonds.
5276 Refunding bridge bonds.
5277 Rate of interest—form of bond.
5278 Provisions applicable.
5279 Bonds—negotiation of—duties of treasurer.
5280 Proceeds—how applied.
5281 Record of bonds sold and transferred.
5282 Treasurer to report bonds sold.
5283 Unconstitutional issue.
5284 Tax for bonded indebtedness.
5285 Levy to pay interest and principal.
5286 Bond fund—separate account.
5287 Redemption—notice—interest.
5288 Balance to particular fund.
5289 Balance to general fund.
5290 Registry with state tax commission.
5291 State tax levied—payment.
5292 Additional tax to pay interest.
5293 Statutes applicable.
5294 County not to become stockholder.
5295 Actions on bonds—estoppel.
5296 Violations.

5275 Funding and refunding bonds. When the outstanding indebtedness of any county on the first day of January, April, June, or September in any year exceeds the sum of five thousand dollars, the board of supervisors, by a two-thirds vote of all its members, may fund or refund the same, and issue the bonds of the county therefor in sums not less than one hundred dollars nor more than one thousand dollars each, payable at a time stated, not more than twenty years from their date. [C73,§289; C97,§403; S13,§403; C24, 27, 31, 35,§5275.]

Referred to in §§4753.14, 5277
Payment and maturity of bonds, ch 63.1

5276 Refunding bridge bonds. Indebtedness incurred by any county in making and repairing bridges may be refunded whenever such outstanding indebtedness equals or exceeds the sum of five thousand dollars, and the tax to pay such bonds and interest shall be levied as hereinafter provided, except that no part of said tax shall be levied on property within any city which is authorized by law to levy its own bridge tax. [S13, §403; C24, 27, 31, 35,§5276.]

Referred to in §§4753.14, 5277
Cities controlling bridge levy, §§5875, 6209

5277 Rate of interest—form of bond. Said bonds shall bear interest not exceeding five percent per annum, payable semiannually, and be substantially in the following form, but subject to changes that will conform them to the resolution of said board, to wit:

No... ....., Iowa,.....

The county of....., in the state of Iowa, for value received, promises to pay to bearer..... dollars, lawful money of the United States of America, on ....., with interest on said sum from the date hereof until paid at the rate of .....percent per annum, payable.....annually on the first days of..... and ..... in each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest payable at .....

This bond is issued by the board of supervisors of said county pursuant to the provisions of sections 5275 to 5277, inclusive, of the code of Iowa, and in conformity to a resolution of said board duly passed.

And it is hereby certified and recited that all acts, conditions, and things required by the laws and constitution of the state of Iowa to be done precedent to and in the issue of this bond have been properly done, happened and been performed in regular and due form, as required by law, and that the total indebtedness of said county, including this bond, does not exceed the constitutional or statutory limitations.

In testimony whereof, said county, by its board of supervisors, has caused this bond to be signed by the chairman of the board and attested by the auditor, with the county seal attached, this.....day of.....

.....
Chairman Board of Supervisors.

Attest:

.....
County Auditor, ...County, Iowa.

(Form of Coupon)

The treasurer of.....county, Iowa, will pay to bearer.....dollars, on ...., at....., for ..... annual interest on its ..... bond, dated .....

No..... .....
County Auditor.

[C73,§289; C97,§403; S13,§403; C24, 27, 31, 35, §5277.]

Referred to in §§4753.14, 6155

5278 Provisions applicable. In making sale of such county bonds the county treasurer shall comply with and be governed by all the provisions of chapter 63. [C24, 27, 31, 35,§5278.]

5279 Bonds—negotiation of—duties of treasurer. When bonds issued under this chapter shall be executed, numbered consecutively, and sealed, they shall be delivered to the county treasurer and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell the same, or exchange them, on the best available terms, for any legal indebtedness of the county outstanding on the first day of January, April, June, or September next preceding the resolution of the board authorizing their issue, but in neither case for a less sum than the face value of the bonds and all interest accrued on them at the date of such sale or exchange. [C73,§290; C97,§404; S13,§404; C24, 27, 31, 35,§5279.]

5280 Proceeds—how applied. If any portion of said bonds are sold for money, the proceeds thereof shall be applied exclusively for the payment of liabilities existing against the county at and before the date above named. When they are exchanged for warrants and other legal evidences of county indebtedness, the treasurer shall at once proceed to cancel such evidences of indebtedness by indorsing on

the face thereof the amount for which they were received, the word "canceled" and date of cancellation. [C73,§290; C97,§404; S13,§404; C24, 27, 31, 35,§5280.]

5281 Record of bonds sold and transferred. He shall also keep a record of bonds sold or exchanged by him by number, date of sale, amount, date of maturity, and the name and post-office address of purchasers, and, if exchanged, what evidences of indebtedness were received therefor, which record shall be open at all times for inspection by the public. Whenever the holder of any bond shall sell or transfer it, the purchaser shall notify the treasurer of such purchase, giving at the same time the number of the bond transferred and his post-office address, and every such transfer shall be noted on the records. [C73,§290; C97,§404; S13,§404; C24, 27, 31, 35,§5281.]

5282 Treasurer to report bonds sold. The treasurer shall also report under oath to the board, at each regular session, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange; and, when exchanged, a list or description of the county indebtedness exchanged therefor, and the amount of accrued interest received by him on such sale or exchange, which latter sum shall be charged to him as money received on bond fund, and so entered by him on his books; but such bonds shall not be exchanged for any indebtedness of the county except by the approval of the board of supervisors of said county. [C73,§290; C97,§404; S13,§404; C24, 27, 31, 35,§5282.]

5283 Unconstitutional issue. Any member of a board of supervisors who shall vote to order an issue of bonds under the provisions of this chapter in excess of the constitutional limit, shall be held personally liable for the excess of such issue. [C97,§405; C24, 27, 31, 35,§5283.]

Constitutional provision, Art. XI, §8

5284 Tax for bonded indebtedness. The board of supervisors shall not in any one year levy a tax of more than three-fourths mill on the dollar for the payment of bonded indebtedness or judgments rendered therefor, except as provided in this chapter, unless the vote authorizing the issuance of the bonds provided for a higher rate. [C73,§840; C97,§1384; C24, 27, 31, 35,§5284.]

5285 Levy to pay interest and principal. The board of supervisors shall cause to be assessed and levied each year upon the taxable property in the county, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds issued in conformity with the provisions of this chapter, accruing before the next annual levy, and such proportion of the principal that, at the end of eight years, the sum raised from such levies shall equal at least fifteen percent of the amount of bonds issued; at the end of ten years, at least thirty percent of the amount; and at or before the date of maturity of the bonds, shall be equal to the whole amount of the principal and interest. [C73,§291; C97,§406; C24, 27, 31, 35,§5285.]

Payment and maturity of bonds, ch 63.1

5286 Bond fund — separate account. The money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer shall open and keep in his books a separate account thereof, which shall at all times show the exact condition of said bond fund. [C73,§291; C97, §406; C24, 27, 31, 35,§5286.]

5287 Redemption—notice—interest. When the amount in the hands of the treasurer belonging to the bond fund, after setting aside the sum required to pay interest maturing before the next levy, is sufficient to redeem one or more bonds, which by their terms are subject to redemption, he shall notify the owner of such bond or bonds, in the manner hereinbefore prescribed, that he is prepared to pay the same, with all the interest accrued thereon. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bond or bonds shall cease, and the amount due thereon shall be set aside for its payment whenever presented. All redemptions shall be made in the order of their numbers. [C73,§292; C97,§407; S13,§407; C24, 27, 31, 35,§5287.]

Referred to in §4753.14

5288 Balance to particular fund. If after the payment of all bonds and interest as hereinbefore provided, there remains any money in said bond fund, the board of supervisors may by resolution transfer said funds to the particular fund or funds on account of which the indebtedness arose for which said bonds were issued. [S13,§407; C24, 27, 31, 35,§5288.]

Referred to in §4753.14

5289 Balance to general fund. The board of supervisors may, by resolution, transfer to the general fund any excess remaining from the proceeds of a county bond issue voted by the people, after the full completion of the purposes thereof. [C24, 27, 31, 35,§5289.]

5290 Registry with state tax commission. If the board of supervisors of any county which has issued bonds under the provisions of this chapter shall fail to make the levy necessary to pay such bonds or interest coupons at maturity, and the same shall have been presented to the county treasurer and the payment thereof refused, the owner may file the bond, together with all unpaid coupons, with the state tax commission, taking its receipt therefor, and the same shall be registered in the office of said commission. [C73,§293; C97,§408; C24, 27, 31, 35,§5290; 48GA, ch 138,§1.]

5291 State tax levied—payment. The state tax commission shall at its next session as a board of equalization, and at each annual equalization thereafter, add to the state tax to be levied in said county a sufficient rate to realize the amount of principal or interest past due and

to become due prior to the next levy upon any such registered bonds, and the same shall be levied and collected as a part of the state tax, and paid into the state treasury, and passed to the credit of such county as bond tax, and shall be paid by warrant, as the payments mature, to the holder of such registered obligations, as shown by the register in the office of the said commission, until the same shall be fully satisfied and discharged; any balance then remaining being passed to the general account and credit of said county; but nothing in this chapter shall be construed to limit or postpone the right of any holder of any such bonds to resort to any other remedy which such holder might otherwise have. [C73,§293; C97,§408; C24, 27, 31, 35,§5291; 48GA, ch 138,§2.]

Similar provision, §7181

5292 **Additional tax to pay interest.** In any county wherein county bonds are issued in pursuance of a vote of the people to obtain money for the erection of any public building and wherein the annual tax named in the proposition so submitted for the purpose of paying the annual interest accruing upon such bonds is insufficient to pay the same as it matures, the board of supervisors is authorized to levy for said purpose, a tax, not exceeding one-fourth mill on the dollar, until said bonds are paid; but this provision shall not prevent the levy of a greater tax than above mentioned, if any such proposition authorized such higher levy. [C97, §409; C24, 27, 31, 35,§5292.]

5293 **Statutes applicable.** The provisions of this chapter shall not be so construed as to limit in any way the application of the provisions of sections 5258 and 5259. [C24, 27, 31, 35, §5293.]

5294 **County not to become stockholder.** No county shall, in its corporate capacity, or by its supervisors or officers, directly or indirectly, subscribe for stock, or become interested as a partner, shareholder, or otherwise, in any banking institution, plank road, turnpike, railway, or work of internal improvement; nor shall it issue any bonds, bills of credit, scrip, or other evidence of indebtedness, for any such purposes; and all such evidences of indebtedness for said purposes are hereby declared void, and no assignment of the same shall give them validity; but this section shall not be so construed as to prevent counties from lawfully erecting their necessary public buildings and bridges, laying off highways, streets, alleys, and public grounds, or other local works in which such counties may be interested. [R60,§§1345, 1346; C73,§§553, 554; C97,§594; C24, 27, 31, 35,§5294.]

Referred to in §5296

5295 **Actions on bonds—estoppel.** In all actions now pending, or hereafter brought, in any court in this state, on any bond or coupon issued, or purporting to be issued, by any county for the purposes prohibited in this chapter, a former recovery against such corporation on any one or more or any part of such bonds or coupons shall not bar or estop such corporation from setting up any defense it has made, or could have made, to such bonds or coupons, in the action in which such former recovery was had, but the county may allege and prove any matter of defense in such action to the same extent, and with the same effect, as though no former action had been brought, or former recovery had. [C73,§555; C97,§595; C24, 27, 31, 35,§5295.]

Referred to in §5296

5296 **Violations.** Any officer of any county, or any deputy or employee of such officer, who violates any of the provisions of sections 5294 and 5295, shall be guilty of a misdemeanor, and fined not less than one hundred dollars, nor more than five hundred dollars, for each offense. [R60,§2128; C73,§558; C97,§598; C24, 27, 31, 35, §5296.]

Chapter 266-F1, code, 1935, transferred. Now chapter 189.1

CHAPTER 267

SUPPORT OF THE POOR

This chapter (§§5297 to 5337, inc.) transferred to chapter 189.4, §§3828.073 to 3828.114, inc.

CHAPTER 268

COUNTY HOMES

This chapter (§§5338 to 5347, inc.) transferred to chapter 189.5, §§3828.115 to 3828.124, inc.

CHAPTER 269

COUNTY PUBLIC HOSPITALS

See §§3828.160, 3828.162

5348 Petition—requirements.
5348.1 Bond election for addition.
5349 Submission at general election.
5350 Submission at special election.
5351 Bonds.
5352 Vote required at special election.
5353 Tax levy.
5354 Sale of bonds.
5355 Trustees—appointment—terms of office.
5356 Vacancies.
5357 Organization—meetings—quorum.
5358 County treasurer.
5359 Powers and duties.
5360 Optional powers and duties.
5361 Pecuniary interest prohibited.
5362 Hospital benefits—terms.
5363 Accounts—collection.
5364 Discrimination.
5365 Compensation—expenses.
5366 Municipal jurisdiction.
5367 County wards in public or private hospitals—levy.
5368 Occupancy of county wards.

5348 Petition—requirements. When it is proposed to establish in any county a county public hospital, a petition shall be presented to the board of supervisors, signed by two hundred or more resident freeholders of such county, at least one hundred fifty of whom shall not be residents of the city, town, or village where it is proposed to locate such hospital, requesting said board to submit to the electors the proposition to issue bonds for the purpose of procuring a site, and erecting, equipping, and maintaining such hospital, and specifying the amount of bonds proposed to be issued for such purpose, which shall not exceed one hundred thousand dollars. [S13,§§409-a,-f; C24, 27, 31, 35,§5348.]

5348.1 Bond election for addition. The board of supervisors of any county having a population of one hundred thirty-five thousand inhabitants or more in which there is already an established county public hospital, when requested by a petition therefor signed by qualified electors of the county equal in number to five percent of the votes cast at the last general election, and which petition shall have been approved by the board of hospital trustees, shall submit to the voters at the next general election or at a special election called therefor, the proposition of issuing county public hospital bonds for the purpose of erecting and equipping hospital buildings and additions thereto, which proposition shall state the maximum amount of bonds to be issued and the annual rate of tax to be levied for the payment of said bonds. Should the proposition carry at such election by a majority equal to at least sixty percent of all the votes cast for or against such proposition, the board of supervisors shall proceed to issue the bonds in the form provided in section 5351, in such an amount within the total amount voted, and at such time, as the board of hospital trustees shall request, and upon the issue of such bonds the board of supervisors shall make provision for the payment of the principal and interest of the bonds out of the county public hospital fund by the levy of a tax within the limitations provided for in section 5353. [48GA, ch 143,§1.]

5349 Submission at general election. Upon the presentation of such petition, the board of supervisors shall submit to the voters of the county at the next general election the question of issuing bonds and levying a tax for such hospital in the form and manner required for the submission of public measures in the title on elections. [S13,§§409-a,-b; C24, 27, 31, 35,§5349.]

Submission procedure, §761 et seq.; also ch 265

5350 Submission at special election. Should said petition so request, and the board of supervisors unanimously so order, said proposition may be submitted at a special election to be called by said board in the manner provided by law for submitting propositions at special elections. [S13,§§409-a,-b; C24, 27, 31, 35,§5350.]

Submission procedure, §761 et seq.; also ch 265

5351 Bonds. Should a majority of all the votes cast upon the proposition at a general election be in favor of establishing such hospital, the board of supervisors shall proceed to issue bonds of the county not to exceed the amount specified in said proposition, in denominations of not less than one hundred dollars nor more than one thousand dollars, drawing interest at a rate not to exceed five percent per annum, payable annually or semiannually. Said bonds shall be due and payable in twenty years from date of issuance, but at the option of the county payable at any time after five years from such date, and shall be substantially in the form provided for county bonds, and shall show on their face that they are county public hospital bonds payable only from the county public hospital fund as provided for in section 5353. [S13, §§409-a,-b,-f; C24, 27, 31, 35,§5351.]

Referred to in §5348.1
Payment and maturity of bonds, ch 63.1

5352 Vote required at special election. Said proposition when presented at a special election shall not be deemed carried unless said proposition receives not less than sixty percent of the total vote cast at said election. [S13, §§409-a,-b; C24, 27, 31, 35,§5352; 47GA, ch 140.]

5353 Tax levy. If the hospital be established, the board of supervisors, at the time of levying ordinary taxes, shall levy a tax at the rate voted not to exceed one-half mill in any one year for the erection and equipment thereof, and also a tax not to exceed one mill for the improvement, maintenance, and replacements of the hospital, as certified by the board of hospital trustees; provided, however, in counties having

a population of one hundred thirty-five thousand inhabitants or over, the levy for improvements and maintenance of the hospital shall not exceed two mills in any one year. The proceeds of such taxes shall constitute the county public hospital fund. [S13,§§409-b-j; C24, 27, 31, 35,§5353; 47 GA, ch 141,§1; 48GA, ch 143,§2.]

Referred to in §§5348.1, 5351, 5368.5
Levy under consolidation, §5368.5

5354 Sale of bonds. The county treasurer shall dispose of the bonds in the same manner as other county bonds, and the same shall not be sold for less than par with accrued interest. [S13,§409-f; C24, 27, 31, 35,§5354.]

Disposal of bonds, chs 63, 266

5355 Trustees — appointment — terms of office. When it has been determined by the voters of a county to establish a county public hospital, the board shall appoint seven trustees chosen from among the resident citizens of the county with reference to their fitness for such office, three of whom may be women, and not more than four of such trustees shall be residents of the city, town, or village at which such hospital is located. Such trustees shall hold office until the following general election, at which time their successors shall be elected, two for a term of two years, two for four years, and three for six years, and they shall determine by lot their respective terms, and thereafter their successors shall be elected for regular terms of six years each, none of whom shall be physicians or licensed practitioners. [S13,§409-c; C24, 27, 31, 35,§5355.]

5356 Vacancies. Vacancies in the board of trustees shall be filled in the same manner as original appointments, such appointees to hold office until the following general election. [S13, §409-e; C24, 27, 31, 35,§5356.]

5357 Organization — meetings — quorum. Said trustees shall, within ten days after their appointment or election, qualify by taking the usual oath of office, but no bond shall be required of them, and organize by the election of one of their number as chairman and one as secretary. Said board shall meet at least once each month. Four members of said board shall constitute a quorum for the transaction of business. The secretary shall keep a complete record of its proceedings. [S13,§409-d; C24, 27, 31, 35,§5357.]

Oath of office, §1054

5358 County treasurer. The county treasurer shall receive and disburse all funds under the control of said board of trustees, the same to be paid out only upon warrants drawn by the county auditor by direction of the board of supervisors after the claim for which the same is drawn has been certified to be correct by the said board of trustees. [S13,§409-d; C24, 27, 31, 35,§5358.]

5359 Powers and duties. Said board of hospital trustees shall:

1. Purchase, condemn, or lease a site for such public hospital, and provide and equip suitable hospital buildings.

2. Cause plans and specifications to be made and adopted for all hospital buildings and equipment, and advertise for bids, as required by law for other county buildings, before making any contract for the construction of any such building or the purchase of such equipment.

3. Have general supervision and care of such grounds and buildings.

4. Employ a superintendent, a matron, and necessary assistants and employees, and fix their compensation.

5. Have control and supervision over the physicians, nurses, attendants, and patients in the hospital.

6. Cause one of its members to visit and examine said hospital at least twice each month.

7. Provide a suitable room for detention and examination of persons brought before the commissioners of insanity of the county, if such hospital is located at the county seat.

8. Determine whether or not any applicant is indigent and entitled to free treatment therein, and to fix the price to be paid by other patients admitted to such hospital for their care and treatment therein.

9. Fix at its regular August meeting in each year, the amount necessary for the improvement and maintenance of the hospital during the ensuing year, and cause the president and the secretary to certify the same to the county auditor before September 1 of each year.

10. File with the board of supervisors during the first week in January of each year, a report covering their proceedings with reference to such hospital, and a statement of all receipts and expenditures during the preceding calendar year.

11. Accept property by gift, devise, bequest, or otherwise; and, if said board deems it advisable, may, at public sale, sell or exchange any property so accepted upon a concurring vote of a majority of all members of the board of hospital trustees, and apply the proceeds thereof, or property received in exchange therefor, to the purposes enumerated in subsection 12 hereof or for equipment.

12. Submit to the voters at any regular or special election a proposition to sell or lease any sites and buildings, excepting those described in subsection 11 hereof, and upon such proposition being carried by a majority of the total number of votes cast at such election, may proceed to sell such property at either public or private sale, and apply the proceeds only for:

a. Retirement of bonds issued and outstanding in connection with the purchase of said property so sold;

b. Further permanent improvements as the board of hospital trustees may determine. [S13, §§409-d,-g,-h,-j,-l,-m,-p,-r; C24, 27, 31, 35,§5359; 47GA, ch 142,§§1, 2.]

Advertisement for bids, §5131
Powers under consolidation, §5368.2

5360 Optional powers and duties. The board of hospital trustees may:

1. Adopt bylaws and rules for its own guidance and for the government of the hospital.

2. Establish and maintain in connection with said hospital a training school for nurses.

3. Establish as a department in connection with said hospital a suitable building for the isolation and detention of persons afflicted with contagious diseases subject to quarantine.

4. Determine whether or not, and if so upon what terms, it will extend the privileges of the hospital to nonresidents of the county.

5. Adopt some suitable name other than county public hospital for hospitals either operating now, in process of construction, or to be established hereafter.

6. Operate said hospital as a tuberculosis sanatorium or provide as a department of such hospital suitable accommodation and means for the care of persons afflicted with tuberculosis.

7. Formulate rules and regulations for the government of tuberculosis patients and for the protection of other patients, nurses, and attendants from infection. [S13,§§409-d,-k,-o,-q; C24, 27, 31, 35,§5360.]

5361 Pecuniary interest prohibited. No trustee shall have, directly or indirectly, any pecuniary interest in the purchase or sale of any commodities or supplies procured for or disposed of by said hospital. [S13,§409-d; C24, 27, 31, 35,§5361.]

Similar provisions, §§180, 275, 3828.101, 3922, 4685, 4686.14, 4755.10, 5673, 5828, 6534, 6710, 13324, 13327

5362 Hospital benefits — terms. Any resident of the county who is sick or injured shall be entitled to the benefits of such hospital, but every such person, except such as may have been found to be indigent and entitled to free care and treatment, shall pay to the board of hospital trustees reasonable compensation for care and treatment according to the rules and regulations established by the board.

To be entitled to hospital benefits, patient must at all times observe the rules of conduct prescribed by the board of hospital trustees. [S13,§409-k; C24, 27, 31, 35,§5362.]

5363 Accounts—collection. It shall be the duty of the trustees either by themselves or through the superintendent to make collections of all accounts for hospital services rendered for others than indigent patients. Such account shall be payable on presentation to the person liable therefor of an itemized statement and if not paid or secured within sixty days after such presentation the said trustees shall proceed to enforce collections by such legal proceedings as they may deem necessary.

All legal services for such purpose shall be performed by the county attorney without additional compensation. [C24, 27, 31, 35,§5363.]

5364 Discrimination. In the management of such hospital, no discrimination shall be made against the practitioners of any recognized school of medicine; and each patient shall have the right to employ at his expense any physician of his choice; and any such physician, when so employed by the patient, shall have exclusive charge of the care and treatment of the patient; and attending nurses shall be subject to the direction of such physician. [S13,§409-n; C24, 27, 31, 35,§5364.]

5365 Compensation—expenses. No trustee shall receive any compensation for his services performed under this chapter, but he shall be reimbursed for any cash expenditures actually made for personal expenses incurred in the performance of his duties. An itemized statement of such expenses, verified by the oath of each such trustee, shall be filed with the secretary, and the same shall only be allowed by an affirmative vote of all trustees present at the meeting of the board. [S13,§409-d; C24, 27, 31, 35, §5365.]

5366 Municipal jurisdiction. When such hospital is located on land outside of, but adjacent to a city or town, the ordinances of such city or town relating to fire and police protection and control, sanitary regulations, and public utility service, shall be in force upon and over such hospital and grounds, and such city or town shall have jurisdiction to enforce such ordinances. [S13,§409-i; C24, 27, 31, 35,§5366.]

5367 County wards in public or private hospitals—levy. The board of supervisors of any county in which no county hospital has been established may, in its discretion, establish one or more wards in any public or private hospital situated in the county for the use of the county under such regulations as may be agreed upon with the board having such hospital in charge. For such purpose the board of supervisors may levy a tax not to exceed one-eighth mill. [C24, 27, 31, 35,§5367.]

5368 Occupancy of county wards. All questions as to the character of patients who shall occupy said wards so established and all rules regulating the occupancy thereof shall be determined by the board of supervisors in the same manner and with the same force and effect as in the case of patients assigned to the county hospital in counties having such. [C24, 27, 31, 35,§5368.]

CHAPTER 269.1

CONSOLIDATION OF HOSPITAL SERVICE

5368.1 Consolidation and powers.
5368.2 Consolidation—powers of trustees.
5368.3 Discrimination prohibited.
5368.4 Sale of property after consolidation.
5368.5 Cancellation of authority.

5368.1 Consolidation and powers. The purpose of this chapter is to grant to hospital trustees additional powers, and to consolidate and combine under one management all of the public hospital service of the counties and cities coming within its provisions. [C27, 31, 35, §5368-a1.]

5368.2 Consolidation—powers of trustees. In all counties of the state having a population of one hundred thirty-five thousand inhabitants or over, and in which there is located a city containing one hundred twenty-five thousand population or over, and consolidation of hospital service has been completed as contemplated in this chapter, said board of hospital trustees shall:

1. Have general supervision and care of all grounds and buildings in said county and city occupied and used for public hospital purposes.
2. Have control and supervision over the physicians, nurses, attendants, and patients in all such hospitals.
3. Establish, maintain, and supervise, at a convenient place in such city located in said county, an emergency station for the treatment of emergency cases, including such venereal treatment as may be necessary for the protection of the public.
4. Establish, as early as funds are available, as a department in connection with said hospital, a suitable building or place for the isolation and detention of persons afflicted with contagious diseases subject to quarantine. [C27, 31, 35,§5368-a2.]

5368.3 Discrimination prohibited. In the management and control of hospitals coming within the provisions of this chapter, no distinction or discrimination shall be made between city and county patients. [C27, 31, 35,§5368-a3.]

5368.4 Sale of property after consolidation. In all cities containing a population of one hundred twenty-five thousand inhabitants or over, located in counties in which both a public county and city hospital are being conducted under separate supervision and management, such cities are hereby authorized and directed, when consolidation is completed under this chapter and upon the recommendation of the board of hospital trustees, to sell the property now owned and used by such cities for hospital purposes, both real and personal, at public or private sale, the proceeds of such sale to be used, first, for the retirement and payment of any outstanding bonds issued in connection with the purchase of such hospital property, and the remainder, if any, shall be turned into the county public hospital fund. [C27, 31, 35, §5368-a4.]

5368.5 Cancellation of authority. Immediately upon the completion of the consolidation of public hospital service as herein authorized, in the counties of this state coming within the provisions of this chapter, and upon certification by the board of hospital trustees to the board of supervisors of an increased levy as provided for in section 5353 for improvement and maintenance of such combined hospital, the authority of cities coming within the terms and provisions of this chapter to make the levies provided for in subsections 26 and 27 of section 6211, and to use any part of its general fund for hospital purposes, shall cease. [C27, 31, 35, §5368-a5; 47GA, ch 143,§1.]

CHAPTER 270

INDIGENT TUBERCULAR PATIENTS

This chapter (§§5369 to 5375, inc.) transferred to chapter 189.6, §§3828.125 to 3828.131, inc.

CHAPTER 271

DETENTION HOSPITAL FOR CONTAGIOUS DISEASES

This chapter (§§5376 to 5378, inc.) transferred to chapter 189.8, §§3828.160 to 3828.162, inc.

CHAPTER 272

COUNTY AID FOR THE BLIND

This chapter (§§5379 to 5384-a1, inc.) repealed by 47GA, ch 144,§1, and chapter 182.1, §§3684.01 to 3684.24, inc., enacted in lieu thereof.

CHAPTER 273

RELIEF FOR SOLDIERS, SAILORS, AND MARINES

This chapter (§§5385 to 5396-a2, inc.) transferred to chapter 189.2, §§3828.051 to 3828.066, inc.

CHAPTER 274

OFFICIAL NEWSPAPERS

5397 Time of selection.
5398 Source of selection.
5399 Number.
5400 Application—contest.
5401 Contest—verified statements.
5402 Determination of contest—evidence.
5402.1 Subscribers—how determined.
5403 Tie lists.
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5405 New date fixed if all rejected.
5406 Appeal.
5407 Transcript.
5408 Trial of appeal.
5409 Publication pending contest.
5410 Division of compensation.
5411 What published.
5412 Cost.
5412.1 Supervisors' proceedings—each payee listed —publication.

5397 Time of selection. The board of supervisors shall, at the January session each year, select the newspapers in which the official proceedings shall be published for the ensuing year. [R60,§314; C73,§307; C97,§441; SS15, §441; C24, 27, 31, 35,§5397.]

5398 Source of selection. Such selection shall be from newspapers published, and having the largest number of bona fide yearly subscribers, within the county. When counties are divided into two divisions for district court purposes, each division shall be regarded as a county. [C73,§307; C97,§441; SS15,§441; C24, 27, 31, 35,§5398; 47GA, ch 145,§2.]

5399 Number. The number of such newspapers to be selected shall be as follows:

1. In counties having a population of less than fifteen thousand, two such newspapers, or one, if there be but one published therein.
2. In counties having a population of more than fifty thousand, divided into two divisions for court purposes, three such newspapers in each such division, not more than two of which shall be published in the same city or town.
3. In counties having a population of less than fifty thousand, divided into two divisions for court purposes, two such newspapers in each such division.
4. In all other counties, three such newspapers, not more than two of which shall be published in the same city or town. [C73,§307; C97, §441; SS15,§441; C24, 27, 31, 35,§5399; 47GA, ch 145,§3.]

5400 Application—contest. Any publisher who desires that his newspaper be so selected may make written application therefor to the board of supervisors at any time prior to the making of the selection. If more applications are filed than there are newspapers to be selected, a contest shall exist. [C24, 27, 31, 35,§5400.]

5401 Contest—verified statements. In case of a contest, each applicant shall deposit with the county auditor, in a sealed envelope, a statement, verified by him, showing the names of his bona fide yearly subscribers living within the county and the place at which each such subscriber receives such newspaper, and the manner of its delivery. [C97,§441; SS15,§441; C24, 27, 31, 35,§5401.]

5402 Determination of contest — evidence. The county auditor shall, on the direction of the board while it is in session, open said envelopes. The board may receive other evidence of circulation. In counties in which two newspapers are to be selected, the two newspapers showing the largest number of bona fide yearly subscribers living within the county shall be selected as such official newspapers. In counties in which three newspapers are to be selected, the three showing the largest number of such subscribers shall be selected except when such three newspapers are all published in the same city or town, in which case the two newspapers in such city or town having the largest lists of such subscribers and the newspaper having the next largest list of such subscribers and published outside such city or town, shall be selected as such official newspapers. [C97,§441; SS15,§441; C24, 27, 31, 35,§5402.]

5402.1 Subscribers—how determined. The board of supervisors shall determine the bona fide yearly subscribers of a newspaper within the county, as follows:

1. Those subscribers listed by the publisher whose papers are delivered, by or for him, by mail or otherwise, upon an order or subscription for same by the subscriber, and in accordance with the postal laws and regulations, and who have been subscribers at least six consecutive months prior to date of application.
2. Those subscribers, defined as in subsection 1, whose papers are delivered by carrier regularly, or purchased from the publisher for resale and delivery by independent carriers, said independent carriers having filed with the publisher a list of their subscribers. [47GA, ch 145,§1; 48GA, ch 146,§1.]

5403 Tie lists. When newspapers are, by equality of circulation, equally entitled to such selection, the board shall, in the presence of the contestants, determine the question by lot. [C24, 27, 31, 35,§5403.]

5404 Fraudulent lists. No newspaper shall be selected as an official newspaper when it is

made to appear that the verified list deposited by the applicant contains the names of persons who are not bona fide subscribers within the county and that such names were knowingly and wilfully entered on such list by the applicant, or at his instance, with intent to deceive the board. [SS15,§441; C24, 27, 31, 35,§5404.]

Referred to in §5405

5405 New date fixed if all rejected. If all certified statements are rejected under the provisions of section 5404, the board shall fix a new date for the selection of official newspapers and nothing herein shall be construed to prevent the applicants so rejected from filing new certified statements. [SS15,§441; C24, 27, 31, 35, §5405.]

5406 Appeal. Any applicant may, within twenty days after the selection of official newspapers, appeal to the district court from the decision of the board of supervisors as to the selection of any or all newspapers so selected by filing in the office of the county auditor a bond for costs, in a sum and with sureties to be approved by said auditor, and by serving upon each applicant, whose selection he desires to contest, and the county auditor, a notice of appeal. [SS15,§441; C24, 27, 31, 35,§5406.]

Presumption of approval of bond, §12759.1

5407 Transcript. The auditor shall forthwith file with the clerk of the district court a transcript of all the proceedings before the board, together with all papers filed in connection with said matter. [SS15,§441; C24, 27, 31, 35,§5407.]

5408 Trial of appeal. Said appeal shall be for trial de novo as an equitable action without formal pleadings at the first term following the filing of such transcript. [SS15,§441; C24, 27, 31, 35,§5408.]

Trial on appeal, §11433

5409 Publication pending contest. After the selection by the board of supervisors of official newspapers, no publisher shall receive pay for publishing official proceedings until the contest is finally determined, insofar as he is concerned. [C97,§441; SS15,§441; C24, 27, 31, 35, §5409.]

5410 Division of compensation. If in any county the publishers of two or more newspapers, at least one of which by reason of its location and circulation is entitled to be selected as a county official newspaper, have entered into an agreement to publish the official proceedings or have united in a request to have their publication selected for such purposes, and such agreement or request has been filed with the board of supervisors prior to the naming of the official newspapers, the board of supervisors shall designate each of them a county official newspaper, but the combined compensation of the newspapers so requesting or agreeing, added to that of the other official newspaper or newspapers, if any, shall not exceed the combined compensation allowed by law to two official newspapers in counties having a population below fifteen thousand or to three official newspapers in counties having a population of fifteen thousand or more. [SS15,§441; C24, 27, 31, 35,§5410.]

5411 What published. There shall be published in each of said official newspapers at the expense of the county during the ensuing year:

1. The proceedings of the board of supervisors, excluding from the publication of said proceedings, its canvass of the various elections, as provided by law; witness fees of witnesses before the grand jury and in the district court in criminal cases; the transcripts of justices of the peace, including their proceedings and cost; the county superintendent's report.
2. The schedule of bills allowed by said board.
3. The reports of the county treasurer, including a schedule of the receipts and expenditures of the county.
4. A synopsis of the expenditures of township trustees for road purposes as provided by law. [R60,§313; C73,§304; C97,§441; SS15,§441; C24, 27, 31, 35,§5411.]

Referred to in §5412

5412 Cost. The cost of official publications provided for in section 5411 shall not exceed thirty-three and one-third cents for each ten lines of brevier type or its equivalent for each insertion. No such official publication shall be printed in type smaller than five-point. [C73, §307; C97,§441; SS15,§441; C24, 27, 31, 35, §5412; 48GA, ch 147,§1.]

5412.1 Supervisors' proceedings—each payee listed—publication. All proceedings of each regular, adjourned or special meeting of boards of supervisors, including the schedule of bills allowed, shall be published immediately after the adjournment of such meeting of said boards, and the publication of the schedule of the bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon. The county auditor shall furnish a copy of such proceedings to be published, within one week following the adjournment of the board. [C27, 31, 35,§5412-a1.]

CHAPTER 275

BOUNTIES ON WILD ANIMALS

5413 Certain animals.
5414 Optional bounties.
5415 Additional bounties.
5416 Filing claims—proofs.
5417 Showing required.
5418 Auditor to destroy proofs.
5419 False claim.

5413 Certain animals. The board of supervisors of each county shall allow and pay from the county treasury bounties for wild animals caught and killed within the county as follows:

For each adult wolf, five dollars.

For each cub wolf, two dollars.

For each lynx, fifty cents.

For each wildcat, fifty cents.

For each pocket gopher, five cents. [R60, §2193; C73,§1487; C97,§2348; S13,§§2348,-a; C24, 27, 31, 35,§5413; 47GA, ch 146,§1; 48GA, ch 148,§1.]

Referred to in §5415

5414 Optional bounties. The board may by resolution adopted and entered of record authorize the payment of bounties as follows:

For each crow, ten cents.

For each groundhog, twenty-five cents.

For each rattlesnake, fifty cents.

For each European starling, five cents.

For each pocket gopher, an additional bounty of five cents. [S13,§§2348-d,-g,-j; C24, 27, 31, 35,§5414; 47GA, ch 146,§2; 48GA, ch 148,§§1, 2.]

Referred to in §5415

5415 Additional bounties. The board may determine what bounties, in addition to those named in sections 5413 and 5414, if any, shall be offered and paid by the county on the scalps of such wild animals taken and killed within the county as it may deem it expedient to exterminate, but no such bounty shall exceed five dollars. [C73,§303; C97,§422; SS15,§422; C24, 27, 31, 35,§5415.]

5416 Filing claims—proofs. All claims for bounties shall be verified by the claimant, and filed with the county auditor, with such other proof as may be required by the board. [R60, §2195; C73,§1487; C97,§2348; S13,§§2348,-b,-e; C24, 27, 31, 35,§5416.]

5417 Showing required. The verified claim shall show that each animal for which bounty is claimed was caught and killed within the county within thirty days next prior to the filing of the claim, and the claimant shall exhibit before the county auditor:

1. The whole skin of each wolf, lynx, or wildcat.
2. Both front feet and claws of each gopher.
3. The head and feet of each crow.
4. The head or scalp of each groundhog.
5. Two inches of the tail, with rattles attached, of each rattlesnake. [R60,§2194; C73, §1488; C97,§2348; S13,§§2348,-a,-f,-h,-i,-k; C24, 27, 31, 35,§5417.]

5418 Auditor to destroy proofs. The auditor shall:

1. Destroy or deface the skin of each wolf, lynx, and wildcat so as to prevent their use in obtaining another bounty, and may return to the owner any such defaced skins, and the rattles of any rattlesnake.
2. Destroy the heads, scalps, feet, claws, and other portions required to be exhibited of such animals. [R60,§2194; C73,§1488; C97,§2348; S13,§§2348,-f-l; C24, 27, 31, 35,§5418.]

5419 False claim. Any person who shall claim or attempt to procure any bounty provided for in this chapter upon any animal killed in another state or county, or upon any animal which has been domesticated, or who shall attempt to obtain any bounty by presenting any false claim or spurious exhibit, shall be fined not more than one hundred dollars nor less than fifty dollars for each offense. [C97,§2348; S13, §2348; C24, 27, 31, 35,§5419.]

CHAPTER 276

DOGS AND LICENSING THEREOF

5420 Annual license.
5421 "Owner" defined.
5422 Application by owner.
5423 Subsequent application.
5424 Form of application.
5425 Fee.
5426 Tag.
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5448 Right and duty to kill unlicensed dog.
5449 Right to kill licensed dog.
5450 Liability for damages.
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5420 Annual license. The owners of all dogs three months old or over, except dogs kept in kennels and not allowed to run at large, shall annually obtain license therefor, as herein provided. [C97,§458; S13,§458; C24, 27, 31, 35, §5420.]

5421 "Owner" defined. The term "owner" shall, in addition to its ordinary meaning, include any person who keeps or harbors a dog. [C97,§457; C24, 27, 31, 35,§5421.]

5422 Application by owner. The owner of a dog for which a license is required shall, on or before the first day of January of each year, apply to the auditor of the county in which he resides for a license for each dog owned by him. [C24, 27, 31, 35,§5422.]

5423 Subsequent application. Such application for license may be made after January 1 and at any time for a dog which has come into the possession or ownership of the applicant, or which has reached the age of three months after said date. [C24, 27, 31, 35,§5423.]

5424 Form of application. Such applications shall be in writing on blanks provided by the county auditor and shall state the breed, sex, age, color, markings, and name, if any, of the dog, and address of the owner and be signed by him. [C24, 27, 31, 35,§5424.]

5425 Fee. The annual license fee shall be one dollar for each male, and three dollars for each female dog. Should it appear that said fees will not produce sufficient funds to pay the claims on the domestic animal fund, the board of supervisors shall have power, except as to dogs owned in cities and towns which exact a license fee on dogs, to increase the said fees to a sum not exceeding three dollars for each male, and not exceeding five dollars for each female dog. A spayed female dog shall be deemed a male. Said fee shall be sent with the application. [C97, §458; S13,§458; C24, 27, 31, 35,§5425.]

5426 Tag. The county auditor shall, upon receipt of said application, deliver or mail to the applicant a license which shall be in the form of a metal tag stamped as follows:

1. The year in which issued.
2. Name of county issuing it.
3. Serial number as shown by the record book in the office of the county auditor. [C24, 27, 31, 35,§5426.]

5427 Use of tag. Said tag shall be attached by the owner to a substantial collar and, during the term of the license, shall be at all times kept on the dog for which the license is issued. Upon the expiration of the license the owner shall remove said tag from the dog. [C24, 27, 31, 35, §5427.]

5428 Duration of license. All licenses shall expire on January 1 of the year following the date of issuance. [C24, 27, 31, 35,§5428.]

5429 Transfer on change of ownership. When the permanent ownership of a dog is transferred, the license may be transferred by the auditor by notation on the license record, giving name and address of the new owner. [C24, 27, 31, 35,§5429.]

5430 Transfer on change of residence. When a dog license in one county is permanently transferred to another county, the owner shall surrender the original license tag to the auditor of the county to which the dog is removed. The auditor shall preserve the surrendered tag, and, without license fee, issue a new license tag. The auditor shall note on the license record the fact that the newly issued license tag is issued to effect a transfer of, and is in lieu of, such surrendered license tag. [C24, 27, 31, 35,§5430.]

5431 Fee on transfer. The auditor, on making any transfer, shall collect a fee of twenty-five cents. [C24, 27, 31, 35,§5431.]

5432 Tag not transferable. A license tag issued for one dog shall not be transferable to another dog. [C24, 27, 31, 35,§5432.]

5433 Duplicate tag. Upon the filing of an affidavit that the license tag has been lost or destroyed, the owner may obtain another tag on the payment of twenty-five cents. The auditor shall enter in the license record the new number assigned. [C24, 27, 31, 35,§5433.]

5434 Assessors to list dogs — fees. Each assessor shall, at the time of listing property for assessment, list and return to the county auditor

the names of all persons who own or harbor dogs, and indicate on such list whether the dogs be male, female, or spayed, and the number thereof. For such service the assessor shall receive, from the domestic animal fund, and in addition to any and all other fees or compensation allowed to him by law, the sum of ten cents for each dog reported, which fee shall be paid in full when return is made. [C97,§457; C24, 27, 31, 35,§5434.]

5434.1 Payment to assessor. If the owner of any dog upon which a license fee is due so desires, he may pay such fee to the assessor and the assessor shall give his receipt therefor, showing the name of the owner, the number of dogs owned upon which the fee is paid, the sex of each such dog, and the amount of the fee for each such dog. The assessor shall forthwith pay said fees collected by him to the auditor and shall make a full report to said auditor showing the name and address of the owner, the number of dogs and the sex of each owned by him, and the fee paid on each such dog. The auditor shall forthwith mail to said owner the proper license tag or tags. [C27, 31, 35,§5434-b1.]

5435 Delinquency. All license fees shall become delinquent on the first day of April of the year in which they are due and payable and a penalty of one dollar shall be added to each unpaid license on and after said date. [C24, 27, 31, 35,§5435.]

5436 to 5439, inc. Rep. by 42GA, ch 136

5440 Certification of list. Immediately following said April 1, the auditor shall certify to the county treasurer:

1. The name of the owner of each unlicensed dog.
2. The number of dogs so owned by said person and the sex thereof.
3. The amount of the unpaid license fee, plus a penalty of one dollar for each dog. [C24, 27, 31, 35,§5440.]

5441 Entry of tax. On receipt of said certificate, the treasurer shall at once enter, as a tax, against each person the amount therein indicated as owing by him, and said tax shall be attended with the same consequences, and be collected in the same manner, as ordinary taxes. [C24, 27, 31, 35,§5441.]

Collection of taxes, ch 346 et seq.

5442 Penalties. The violation of any of the foregoing provisions of this chapter, or the removal of a license tag from a dog prior to the expiration of the license, by any person who is not the owner thereof or the agent of such owner, shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days. [C24, 27, 31, 35,§5442.]

5443 Duty to account. Each assessor shall promptly pay all license fees collected by him to the auditor. The auditor shall make prompt payment to the county treasurer of all funds received hereunder. The treasurer shall keep said funds, together with all tax collections as herein provided, as the domestic animal fund. [C97,§459; S13,§458-b; C24, 27, 31, 35,§5443.]

5444 Record book. The county auditor shall keep a book to be known as the record of licenses which shall show:

1. The serial number and date of each application for a license.
2. The description of dog as specified in the application, together with the name of the owner of said dog.
3. The date when each license tag is issued and the serial number of such tag.
4. The amount of all fees, licenses, penalties, and costs paid to him.
5. Such other data as the law may require. [C24, 27, 31, 35,§5444.]

5445 Forms. All forms for blanks and tags, including proper columns in the assessors' books in which to note the ownership of dogs, shall be prepared by the auditor. All such blanks and tags shall be furnished by the county. [S13, §458-a; C24, 27, 31, 35,§5445.]

5446 Taxation of dogs — municipal license. Dogs kept in kennels and not allowed to run at large shall be taxed as personal property. Dogs licensed as herein provided shall not be so taxed. Cities and towns may license dogs in addition to the license herein required. [C24, 27, 31, 35, §5446.]

Powers and limitations of cities and towns, §5745

5447 Dog as property. All dogs under three months of age, and all dogs over said age and wearing a collar with a valid license tag attached thereto, shall be deemed property. Dogs not so provided with license tag shall not be deemed property. [C24, 27, 31, 35,§5447.]

5448 Right and duty to kill unlicensed dog. It shall be lawful for any person, and the duty of all peace officers within their respective jurisdictions, to kill any dog for which a license is required, when such dog is not wearing a collar with license tag attached as herein provided. [C24, 27, 31, 35,§5448.]

5449 Right to kill licensed dog. It shall be lawful for any person to kill a dog, licensed and wearing a collar with license tag attached, when such dog is caught in the act of worrying, chasing, maiming, or killing any domestic animal or fowl, or when such dog is attacking or attempting to bite a person. [C73,§1485; C97,§2340; S13,§2340; C24, 27, 31, 35,§5449.]

5450 Liability for damages. The owner of any dog, whether licensed or unlicensed, shall be liable to the party injured for all damages done by said dog, except when the party damaged is doing an unlawful act, directly contributing to said injury. This section shall not apply to any damage done by a dog affected with hydrophobia unless the owner of such dog had reasonable grounds to know that such dog was

afflicted with said malady, and by reasonable effort might have prevented the injury. [C73, §1485; C97,§2340; S13,§2340; C24, 27, 31, 35, §5450.]

5451 **Construction clause.** A holding that one or more sections hereof are unconstitutional shall not be held to invalidate the remaining sections. [C24, 27, 31, 35,§5451.]

CHAPTER 277

DOMESTIC ANIMAL FUND

5452 Claims.
5453 Forms of claims.
5454 Allowance of claims.
5455 Warrants and payment.
5456 Certified list of warrants.
5457 Transfer of funds.

5452 **Claims.** Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage. [S13,§458-c; C24, 27, 31, 35, §5452.]

5453 **Forms of claims.** Claims aforesaid shall state the amount of damages, a detailed statement of the facts attending the killing or injury and be verified by affidavit of at least two disinterested persons not related to claimant. [S13,§458-c; C24, 27, 31, 35,§5453.]

5454 **Allowance of claims.** The board shall act on such claims within a reasonable time, and allow such part thereof as it may deem just. When a claim is allowed, the value of each animal or fowl killed or injured shall be entered of record. [S13,§458-c; C24, 27, 31, 35,§5454.]

5455 **Warrants and payment.** Warrants for allowed claims shall be payable January 1 following their issuance and only from the domestic animal fund. [S13,§458-c; C24, 27, 31, 35, §5455.]

5456 **Certified list of warrants.** The auditor shall, on January 1 of each year, certify to the treasurer an itemized list of all warrants issued during the preceding year on the domestic animal fund, except warrants issued to pay fees of assessors. If said fund be sufficient, the treasurer shall pay said warrants on presentation. If said fund be not sufficient, said warrants shall be paid pro rata. [S13,§458-d; C24, 27, 31, 35,§5456.]

5457 **Transfer of funds.** When the balance in the said fund, after paying the warrants aforesaid, exceeds five hundred dollars, the board of supervisors may order the excess transferred to the general fund of the county, or the board of supervisors may authorize the use of said excess or any part thereof in payment of the claim or claims of duly organized societies for the prevention of cruelty to animals within the county for the care, keep and maintenance of abandoned or injured domestic animals or fowls. If within five years following such transfer, the amount in the domestic animal fund proves insufficient in any one year to pay all duly allowed claims thereon, the board shall transfer from said general fund to the domestic animal fund an amount, not exceeding the amount originally transferred, sufficient to pay the unpaid part of said warrants. [S13,§458-d; C24, 27, 31, 35,§5457; 47GA, ch 147,§1.]

CHAPTER 278

RELOCATION OF COUNTY SEATS

5458 Time of application—limitation.
5459 Petition.
5460 Hearing.
5461 Notice.
5462 Remonstrances—filing.
5463 Objections—evidence.
5464 Rejection of petition or remonstrance.
5465 Canvass.
5466 Election.
5467 Submission of question.
5468 Notice.
5469 Conduct of election—form of proposition.
5470 Vote necessary.
5471 Removal in certain cases.
5472 Removal of records postponed.
5473 Proof of service.

5458 **Time of application — limitation.** Petitions for the relocation of a county seat shall be made to the board of supervisors at its regular June session and not oftener than once in five years. [R60,§231; C73,§§281, 288; C97,§396; C24, 27, 31, 35,§5458.]

5459 **Petition.** Said petition may be in different parts and shall be filed with the county auditor at least sixty days before said June session, and shall:

1. Designate the city or town at which the petitioners desire to have the county seat relocated.

2. Be signed by none but legal voters of the county.

3. Contain the section, township, and range on which, or the town, precinct, or ward if in a city, in which the petitioner resides.

4. Give the age and time of residence in the county of such petitioner.

5. Be accompanied at the time of filing by affidavits of one or more residents of the county, stating:

a. That the signers of the petition were, at the time of signing, legal voters of said county.

b. The number of signers to the petition at

the time the affidavit is made. [R60,§§232, 233; C73,§282; C97,§397; C24, 27, 31, 35,§5459.]

5460 Hearing. Upon the filing of the petition, the county auditor shall fix a time for the hearing thereon before the board of supervisors, which time shall not be less than sixty nor more than ninety days after the first publication, or after the completed posting, of the notice hereinafter provided for. [C24, 27, 31, 35,§5460.]

5461 Notice. The county auditor shall forthwith cause a notice of the filing of such petition and of the time of hearing thereon, to be published once in a newspaper published in the county; if there be no newspaper published in the county, the auditor shall cause said notice to be posted in a public place in each township in the county, and also on the door of the courthouse. [R60,§235; C73,§284; C97,§399; S13, §399; C24, 27, 31, 35,§5461.]

5462 Remonstrances—filing. Remonstrances against such relocation, signed by voters with like qualifications, and in all respects as required of petitioners, and verified in the same manner, may be filed with the auditor ten days prior to the date of hearing as stated in said notice. [R60,§239; C73,§283; C97,§398; C24, 27, 31, 35,§5462.]

5463 Objections — evidence. Objections to the legal sufficiency of either the petition or remonstrance, or any part thereof, may be filed at any time before the hearing commences. The reception of such objections during the hearing shall be at the discretion of the board. The board may disregard any objection which is not specific, or may require it to be made specific. The board may receive evidence with reference to any material fact. [C24, 27, 31, 35,§5463.]

5464 Rejection of petition or remonstrance. A petition which fails to distinctly state the city or town at which the petitioners desire to have the county seat relocated shall be rejected without further investigation; likewise a petition or remonstrance which is not accompanied by the required affidavits. [C24, 27, 31, 35,§5464.]

Referred to in §5465

5465 Canvass. If the petition be found to be sufficient as provided in section 5464, the board shall proceed to canvass the same, and also the remonstrance if it be found to be sufficient. In such canvass the board shall proceed as follows:

1. It shall strike from both the petition and the remonstrance all names which do not appear therein in the form required by this chapter.
2. It shall strike from both the petition and the remonstrance the names of all persons shown not to have been legal voters of the county at the time of signing.
3. It shall also strike from the petition and remonstrance all names not placed thereon within sixty days next preceding the filing of the petition or remonstrance.
4. It shall, after the foregoing has been determined, strike from the petition all names that appear on both petition and remonstrance. [C73, §285; C97,§400; S13,§400; C24, 27, 31, 35,§5465.]

5466 Election. If the petition shows, after all names have been stricken as hereinbefore required, that it has been signed by legal voters equal to at least one-half of all legal voters of the county as shown by the last state or federal census, and that such number of voters so signing exceeds the number of voters who have, after all names have been stricken as required, signed the remonstrance, then the board shall order the proposition submitted to a vote of the people. [R60,§234; C73,§285; C97,§400; S13,§400; C24, 27, 31, 35,§5466.]

5467 Submission of question. The proposal to relocate a county seat shall be submitted at the general election held in the year in which the order is made, if there be sufficient time in which to give the notice hereinafter required. If there be not sufficient time, and in those cases where no general election is held in the year in which the order is made, the board shall submit such proposition at a special election to be called by the board. [R60,§234; C73,§285; C97,§400; S13, §400; C24, 27, 31, 35,§5467.]

5468 Notice. The county auditor shall cause notice of such election to be posted in three public places in each township, at least fifty days before the day of election, and shall also cause said notice to be published in some newspaper published in the county and of general circulation therein, if there be one published in the county, once each week for two consecutive weeks, the last of which publications shall be at least twenty days before said election. [R60,§234; C73,§285; C97,§400; S13, §400; C24, 27, 31, 35,§5468.]

5469 Conduct of election—form of proposition. The election shall be conducted as elections for county officers are conducted. The question shall be submitted in the following form: Shall the proposition to change the county seat to (naming the town or city to which the change is proposed) be adopted? ☐ Yes ☐ No [R60,§§236, 237; C73,§286; C97,§401; C24, 27, 31, 35,§5469.]

5470 Vote necessary. The board shall make a record of the total vote cast for and against the proposition. If a majority of all the votes cast be in favor of the proposition, the board shall, except as declared in section 5471, declare the county seat removed accordingly, and, shall, as soon as practicable, proceed to remove the county records to the new location. [R60,§238; C73,§287; C97,§402; S13,§402; C24, 27, 31, 35, §5470.]

5471 Removal in certain cases. Where a county seat has been located continuously in one city or town for forty years or more, and the proposal is to relocate such county seat in another city or town, the corporate limits of which are more than a mile from the corporate limits of the present county seat, such proposition shall not be deemed carried, and the county rec-

ords shall not be removed to the new county seat unless two-thirds of all the votes cast be in favor of such proposed removal. [S13,§§400, 402; C24, 27, 31, 35,§5471.]

Referred to in §5470

5472 **Removal of records postponed.** If the proposition to relocate be carried, the board of supervisors may permit the county records to remain at the old county seat, and the district court may continue to hold its sessions thereat until such time as a new courthouse is built and equipped at the new county seat. [C24, 27, 31, 35,§5472.]

5473 **Proof of service.** Proof of the giving of notices required by this chapter shall be made as provided in case of original notices. [C24, 27, 31, 35,§5473.]

Proof of service, §§11085, 11349, 11350

CHAPTER 279

CHANGING NAMES OF VILLAGES

Changing names of cities or towns, §5619 et seq.
Villages defined, §5623

5474 Change authorized.
5475 Petition.
5476 Notice.
5477 Hearing.
5478 Order.
5479 When order effective.
5480 Notice of change—proof.
5481 Costs.

5474 **Change authorized.** The board of supervisors may change the names of villages within their respective counties in the manner herein prescribed. [C97,§460; C24, 27, 31, 35, §5474.]

5475 **Petition.** There shall be filed in the office of the auditor of the county in which such village or the major portion thereof is situated, a petition for that purpose, which must be signed by at least two-thirds of the qualified electors of said village, setting forth its name and location and giving the name by which they desire it to be known. [C97,§461; C24, 27, 31, 35, §5475.]

5476 **Notice.** Notice of the filing and object of the petition and the time and place of hearing on the same shall be given by publication for at least four successive weeks in one of the official newspapers of the county, and the last publication shall be at least ten days prior to the regular meeting of the board at which the same is to be considered; or by posting a copy of the petition in at least three public places in the village, and on the front door of the courthouse, for at least four weeks before such meeting. [C97,§462; C24, 27, 31, 35,§5476.]

5477 **Hearing.** At the first regular meeting of said board after publication of notice is completed, it shall consider any remonstrances against the proposed change, and shall hear and determine said petition, unless the same is for good cause continued until the next meeting. [C97,§463; C24, 27, 31, 35,§5477.]

5478 **Order.** If on the hearing it shall appear that two-thirds of the qualified electors of said village have in good faith signed said petition for change of name, then the said board shall order said name to be changed as prayed for. [C97,§464; C24, 27, 31, 35,§5478.]

5479 **When order effective.** The order of the board shall thereupon be entered of record, giving the name of said village as set forth in said petition, the new name given, the time when the change shall take effect, which shall not be less than thirty days thereafter. [C97,§465; C24, 27, 31, 35,§5479.]

5480 **Notice of change—proof.** Notice of said change shall be published in at least one newspaper of general circulation published in the county at least ten days prior to the date fixed for the change to take effect. Proof of such publication, by the affidavit of the publisher, shall be filed in the office of the auditor and entered of record, whereupon the change shall be complete. [C97,§§465, 466; C24, 27, 31, 35,§5480.]

5481 **Costs.** In cases arising under the provisions of this chapter, where there is no opposition to said petition, the petitioners shall pay all costs; in all other cases costs shall abide the result of the proceeding, and be taxed to either party, in the discretion of the board, or divided equitably between the parties. [C97,§467; C24, 27, 31, 35,§5481.]

CHAPTER 280

LAND SURVEYS

5482 County surveyor—appointment and duties.
5483 Field notes of original survey.
5484 Corners.
5485 Rules to be followed.
5486 Record furnished—presumptive evidence.
5487 Record book.
5488 Record.
5489 Chainmen.
5490 Witnesses—fees.
5491 Right to enter upon land.
5492 Damages—procedure.
5493 Tender.
5494 Costs.
5495 Federal surveys—defacement.
5496 Fees.

5482 **County surveyor — appointment and duties.** A county surveyor may be appointed by the board of supervisors and shall hold office during the pleasure of said board. Said surveyor shall make all surveys of land within his county which he may be called upon to make, and the field notes and plats made by him shall be transcribed into a well bound book, under his supervision, at the expense of the person requesting the survey, which book shall be kept in the county auditor's office, and his surveys shall be held as presumptively correct. [C51,§§203, 204; R60,§§413, 414; C73,§§369, 370; C97,§534; SS15,§422; C24, 27, 31, 35,§5482.]

5483 **Field notes of original survey.** Previous to making any survey, he shall procure a copy of the field notes of the original survey of the same land, if there be any in his office or in that of the auditor, and his survey shall be made in accordance therewith. [C51,§205; R60,§415; C73,§371; C97,§535; C24, 27, 31, 35,§5483.]

5484 **Corners.** He is required to establish the corners by taking bearing trees, and noting particularly their course and distance, but if there be no trees within reasonable distance, the corners are to be marked by stones or other permanent monuments placed firmly in the earth. [C51,§206; R60,§416; C73,§372; C97,§536; C24, 27, 31, 35,§5484.]

5485 **Rules to be followed.** In the resurvey and subdivision of land by county surveyors, their deputies or other persons, the rules prescribed by the acts of congress, and the instructions of the secretary of the interior, copies of which shall be furnished him by the county, shall be in all respects followed. [C73,§373; C97, §537; C24, 27, 31, 35,§5485.]

5486 **Record furnished — presumptive evidence.** The county surveyor shall, when requested, furnish the person for whom the survey is made with a copy of the field notes and plat of the survey, and such copy, certified by him, and also a copy from the record, certified by the county auditor with the seal, shall be presumptive evidence of the survey and of the facts herein required to be set forth, and which are stated accordingly, between those persons who join in requesting it.

Such field notes and plat of survey shall not, however, be presumptive evidence in any action in court as opposed to the field notes and plat of survey made by any other competent surveyor at the instance of any party not joining in the request for the survey by the county surveyor. [C51,§207; R60,§417; C73,§374; C97, §538; C24, 27, 31, 35,§5486.]

5487 **Record book.** The board of supervisors is required to furnish a substantial, well bound book, in which the field notes and plats made by the county surveyor shall be recorded. [C51,§208; R60,§418; C73,§375; C97,§539; C24, 27, 31, 35,§5487.]

5488 **Record.** The plat and record shall show distinctly of what piece of land it is a survey, at whose personal request it was made, the names of the chainmen, and that they were approved and sworn by the surveyor, and the date of the survey; and the courses shall be taken according to the true meridian, and the variation of the magnetic from the true meridian stated. The surveyor shall determine the correct variation by an observation on the polestar, or some other approved method, at least once each year, and enter the same, with the date, and description of the method used, in his record. [C51,§209; R60,§419; C73,§376; C97, §540; C24, 27, 31, 35,§5488.]

5489 **Chainmen.** The necessary chainmen and other persons must be employed by the person requiring the survey done, unless otherwise agreed; but the chainmen must be disinterested persons, and approved by the surveyor, and sworn by him to measure justly and impartially, to the best of their knowledge and ability. [C51,§210; R60,§420; C73,§377; C97, §541; C24, 27, 31, 35,§5489.]

5490 **Witnesses — fees.** County surveyors, when engaged in the performance of official duties, may issue subpoenas for witnesses and administer oaths to them, and all fees for services of officers and attendance of witnesses shall be the same as in proceedings before justices of the peace. [C73,§378; C97,§542; C24, 27, 31, 35,§5490.]

Service and witness fees, §§10637, 11326

5491 **Right to enter upon land.** Any person employed in the execution of any survey authorized by the congress of the United States may enter upon lands within this state for the purpose of exploring, triangulating, leveling, surveying, and of doing any work which may be necessary to carry out the objects of then existing laws relative to surveys, and may establish permanent station marks, and erect the necessary signals and temporary observatories, doing no unnecessary injury thereby. [C24, 27, 31, 35, §5491.]

5492 **Damages—procedure.** If the parties interested cannot agree upon the amount to be paid for damages caused thereby, either of them may petition the district court in the county in which the land is situated, which court shall appoint a time for a hearing as soon as may be, and order at least twenty days notice to be given to all parties interested, and, with or without a view of the premises, as the court may determine, hear the parties and their witnesses and assess damages. [C24, 27, 31, 35,§5492.]

5493 **Tender.** The person so entering upon land may tender to the injured party damages therefor, and if, in case of petition or complaint to the court, the damages finally assessed do not exceed the amount tendered, the person entering shall recover costs; otherwise, the prevailing party shall recover costs. [C24, 27, 31, 35,§5493.]

5494 **Costs.** The costs to be allowed in all such cases shall be the same as allowed accord-

ing to the rules of the court and provisions of law relating thereto. [C24, 27, 31, 35,§5494.]

Costs generally, ch 497

5495 Federal surveys—defacement. If any person shall wilfully deface, injure or remove any signal, monument, building or other property of the United States coast and geodetic survey or the United States geological survey, constructed or used under or by virtue of the act of congress aforesaid, he shall forfeit a sum not exceeding fifty dollars for each offense, and shall be liable for damages sustained by the United States in consequence of such defacing, injury or removal, to be recovered in a civil action in any court of competent jurisdiction. [C24, 27, 31, 35,§5495.]

5496 Fees. The county surveyor is entitled to charge and receive the following fees:

1. For each day's service actually performed in traveling to and from the place where any survey is to be made, and for making the same, and return thereof, four dollars.
2. For making up the record of any survey, and the plat and field notes thereof, one dollar per page.
3. For certified copy of the plat or field notes, fifty cents. [C51,§2546; R60,§4155; C73,§3800; C97,§543; C24, 27, 31, 35,§5496.]

CHAPTER 281

JAILS

Referred to in §13387

5497 How used.
5498 Duty.
5499 Minors separately confined.
5500 Females.
5501 Keeper's duty.
5502 Sheriff's duty.
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5504 Removal.
5505 Ex officio inspectors.
5506 Visitation.
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5508 Right to inspect.
5509 Officers examined.
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5511 Expenses.
5512 Hard labor.
5513 Labor on public works.
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5515 Rules—labor not to be leased.
5516 Violation of city ordinance.
5517 Control and punishment.
5518 Credit for labor.
5519 Cruel treatment.
5520 Protecting prisoners.
5521 Annoyance of prisoner.

5497 How used. The jails in the several counties in the state shall be in charge of the respective sheriffs and used as prisons:

1. For the detention of persons charged with an offense and committed for trial or examination.
2. For the detention of persons who may be committed to secure their attendance as witnesses on the trial of a criminal cause.
3. For the confinement of persons under sentence, upon conviction for any offense, and of all other persons committed for any cause authorized by law.

The provisions of this section extend to persons detained or committed by authority of the courts of the United States as well as of this state. [C51,§3103; R60,§5122; C73,§4723; C97, §5637; C24, 27, 31, 35,§5497.]

5498 Duty. The sheriff shall have charge and custody of the prisoners in the jail or other prisons of his county, and shall receive those lawfully committed, and keep them until discharged by law. [C51,§172; R60,§385; C73, §339; C97,§501; C24, 27, 31, 35,§5498.]

5499 Minors separately confined. Any sheriff, city marshal, or chief of police, having in his care or custody any prisoner under the age of eighteen years, shall keep such prisoner separate and apart, and prevent communication by such prisoner with prisoners above that age, while such prisoners are not under the personal supervision of such officer, if suitable buildings or jails are provided for that purpose, unless such prisoner is likely to or does exercise an immoral influence over other minors with whom he may be imprisoned. Any officer having charge of prisoners who without just cause or excuse neglects or refuses to perform the duties imposed on him by this section may be suspended or removed from office therefor. [C97,§5638; C24, 27, 31, 35,§5499.]

5500 Females. All jails shall be equipped with a separate apartment for females, who shall be detained only in such apartment, and males and females shall not at the same time be allowed in the same apartment. [C97,§5639; C24, 27, 31, 35,§5500.]

5501 Keeper's duty. The keeper of each jail shall:

1. See that the jail is kept in a clean and healthful condition.
2. Furnish each prisoner with necessary bedding, clothing, towels, fuel, and medical aid.
3. Serve each prisoner three times each day with an ample quantity of wholesome food.
4. Furnish each prisoner sufficient clean, fresh water for drinking purposes and for personal use.
5. Keep an accurate account of the items furnished each prisoner. [C51,§§3104, 3108; R60,§§5123, 5127; C73,§§4724, 4727; C97,§§5640, 5643; C24, 27, 31, 35,§5501.]

5502 Sheriff's duty. The sheriff must keep an accurate calendar of each prisoner committed to his care, which shall contain his name, place of abode, the day and hour of commitment

and discharge, the cause and term of commitment, the authority that committed him, and a description of his person, a statement of his occupation, education, and general habits. When any prisoner is discharged, such calendar must show the day and hour when and the authority by which it took place, and if a person escapes, it must state particularly the time and manner thereof. [C51,§3105; R60,§5124; C73,§4725; C97,§5641; C24, 27, 31, 35,§5502.]

5503 Calendar returned. At the opening of each term of the district court within his county, the sheriff must return a copy of such calendar to the judge thereof. If a sheriff neglects or refuses so to do, he shall be punished by fine not exceeding one hundred dollars. [C51, §3106; R60,§5125; C73,§4726; C97,§5642; C24, 27, 31, 35,§5503.]

5504 Removal. When a jail or any building contiguous or near thereto is on fire, and there is reason to apprehend that the prisoners therein may be injured thereby, the sheriff or keeper must remove such prisoners to some safe and convenient place, and there confine them so long as it may be necessary to avoid such danger. [C51,§3109; R60,§5128; C73,§4728; C97,§5644; C24, 27, 31, 35,§5504.]

5505 Ex officio inspectors. The clerk of the district court and county attorney are inspectors of the jails, and have power from time to time to visit and inspect the same and inquire into all matters connected with the government, discipline, and police thereof. [C51,§3110; R60, §5129; C73,§4729; C97,§5645; C24, 27, 31, 35, §5505.]

5506 Visitation. Such inspectors shall visit and examine such prisons twice each year, and at the next term of the district court held in their county present to such court, on the first day of its sitting, a detailed report of the condition of such prisons at the time of such inspection. [C51,§3111; R60,§5130; C73,§4730; C97, §5646; C24, 27, 31, 35,§5506.]

5507 Report. Such report must state the number of persons confined, for what cause, the number usually confined in one room, the distinction, if any, observed in the treatment of prisoners, the evils found to exist in such prisons, and particularly whether any provision of this chapter has been violated or neglected, and in what respects. [C51,§3112; R60,§5131; C73, §4731; C97,§5647; C24, 27, 31, 35,§5507.]

5508 Right to inspect. The keepers of prisons shall admit the inspectors or either of them into any part thereof, exhibit to them, upon demand, all the books, papers, documents, and accounts pertaining thereto, or to the prisoners confined therein, and render them every facility in their power to enable them to discharge their duties. [C51,§3113; R60,§5132; C73,§4732; C97, §5648; C24, 27, 31, 35,§5508.]

5509 Officers examined. For the purpose of obtaining the necessary information to make the reports above required, the inspectors have power to examine, upon oath to be administered by either of them, any of the officers of the prison, or prisoners therein. [C51,§3114; R60, §5133; C73,§4733; C97,§5649; C24, 27, 31, 35, §5509.]

5510 Refractory prisoners. If any person confined in a jail is refractory or disorderly, or wilfully destroys or injures any part thereof or of its contents, the sheriff may chain or secure such person, or cause him to be kept in solitary confinement, not more than ten days for any one offense, during which time he may be fed with bread and water only, unless other food is necessary for the preservation of his health. [C51,§3115; R60,§5134; C73,§4734; C97,§5650; C24, 27, 31, 35,§5510.]

5511 Expenses. All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county. [C51,§3116; R60,§5135; C73,§4735; C97,§5651; C24, 27, 31, 35,§5511.]

5512 Hard labor. Able-bodied male persons over the age of sixteen, confined in any jail under the judgment of any tribunal authorized to imprison for the violation of any law, ordinance, bylaw or police regulation, may be required to labor during the whole or part of the time of his sentence, as hereinafter provided, and such tribunal, when passing final judgment of imprisonment, whether for nonpayment of fine or otherwise, shall have the power to and shall determine whether such imprisonment shall be at hard labor or not. [C51,§3107; R60,§5126; C73,§4736; C97,§5652; S13,§5652; C24, 27, 31, 35,§5512.]

5513 Labor on public works. Such labor may be on the streets or public roads, on or about public buildings or grounds, or at such other places in the county where confined, and during such reasonable time of the day as the person having charge of the prisoners may direct, not exceeding eight hours each day. [C73, §4737; C97,§5653; C24, 27, 31, 35,§5513.]

5514 Supervision. If the sentence be for the violation of any of the statutes of the state, the sheriff of the county shall superintend the performance of the labor, and furnish the tools and materials, if necessary, to work with, at the expense of the county in which the convict is confined, and such county shall be entitled to his earnings. [C51,§3107; R60,§5126; C73,§4738; C97,§5654; C24, 27, 31, 35,§5514.]

5515 Rules—labor not to be leased. Such labor shall be performed in accordance with such rules as may be made by resolution of the board of supervisors, not inconsistent with the provisions of this chapter, and such labor shall not be leased. [C97,§5654; C24, 27, 31, 35,§5515.]

5516 Violation of city ordinance. When the imprisonment is under the judgment of any court, police court, police magistrate, mayor, or

other tribunal of a city or town, for the violation of any ordinance, bylaw, or other regulation thereof, the marshal shall superintend the labor, and furnish the tools and materials, if necessary, at the expense of the city or town requiring the labor, and such city or town shall be entitled to the earnings of its convicts. [C73,§4739; C97,§5655; C24, 27, 31, 35,§5516.]

5517 Control and punishment. The officer having charge of any prisoner may use such means as are necessary to prevent his escape, and if the prisoner attempts to escape or if, being convicted, he refuses to labor, the officer having him in charge may, to secure his person or cause him to labor, deal with him as with other disorderly or refractory prisoners. Such punishment shall be inflicted within the jail or jail enclosure, and the time of such solitary confinement shall not be considered as any part of the time for which the prisoner is sentenced. [C73,§4740; C97,§5656; C24, 27, 31, 35,§5517.]

5518 Credit for labor. For every day's labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him the sum of one dollar and fifty cents. [C73,§4741; C97,§5657; C24, 27, 31, 35,§5518.]

5519 Cruel treatment. If any officer or other person treat any prisoner in a cruel or inhuman manner, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding twelve months, or by both such fine and imprisonment. [C73,§4742; C97,§5658; C24, 27, 31, 35,§5519.]

5520 Protecting prisoners. The officer having a prisoner in charge shall protect him from insult and annoyance and communication with others while at labor, and in going to and returning from the same, and may use such means as are necessary and proper therefor. [C73, §4743; C97,§5659; C24, 27, 31, 35,§5520.]

5521 Annoyance of prisoner. Any person persisting in insulting or annoying or communicating with any prisoner, after being commanded by such officer to desist, shall be punished by a fine not exceeding ten dollars, or by imprisonment not exceeding three days. [C73,§4743; C97,§5659; C24, 27, 31, 35,§5521.]

CHAPTER 282

BENEFITED WATER DISTRICTS

This chapter (§§5522 to 5526, inc.) repealed by 47GA, ch 148,§1, and chapter 282.1 enacted in lieu thereof

CHAPTER 282.1

BENEFITED WATER DISTRICTS

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5526.01 Petition. The board of supervisors of any county shall, on the petition of twenty-five percent of the resident property owners in any proposed benefited water district, grant a hearing relative to the establishment of such proposed water district; such petition shall set out the following and any other pertinent facts:

1. The need of a public water supply;
2. The approximate district to be served;
3. The approximate number of families in the district;
4. The proposed source of supply;
5. The type of service desired, whether domestic only or for fire protection and other uses.

The board of supervisors may, at its option, require a bond of the petitioners as provided in section 7430. [C24, 27, 31, 35,§5523; 47GA, ch 148,§1.]

5526.02 Territory included. The benefited water district may include part or all of any incorporated city or town, or cities and towns, together with or without surrounding territory including cemeteries and all publicly owned land. [47GA, ch 148,§2.]

5526.03 Scope of assessment. The special assessment hereinafter provided for may be used to cover the costs of installing all the

necessary elements of a water system, for both production and distribution. [C24, 27, 31, 35, §5522; 47GA, ch 148,§3.]

5526.04 Public hearing. When the board of supervisors receives a petition for the establishment of a benefited water district, a public hearing shall be held within twenty days of the presentation of the petition. Notice of such hearing shall be given by posting bills in three public places within the district, or by publication in two successive issues of any paper of general circulation within the district. The last publication or posting shall be not less than one week before the proposed hearing. [C24, 27, 31, 35,§5523; 47GA, ch 148,§4.]

5526.05 Decision at hearing. On the day fixed for such hearing, the board of supervisors shall by resolution establish the benefited water district or disallow the petition. For adequate reasons the board of supervisors may defer action on such petition for not to exceed ten days after the day first set for a hearing. [C24, 27, 31, 35,§5523; 47GA, ch 148,§5.]

5526.06 Examination by engineer. When the board of supervisors shall have established the benefited water district, they shall appoint a competent disinterested civil engineer and instruct him to examine the proposed improvement, make preliminary designs in sufficient detail to make an accurate estimate of the cost of the proposed water system. He shall also report as to the suitability of the proposed source of water supply. [47GA, ch 148,§6.]

5526.07 Water source without district. When in any proposed benefited water district, it is anticipated that the source of supply will be without the district, and not under its control, the board of supervisors shall instruct the engineer who is appointed to make the preliminary design and dummy assessment, to also obtain from the corporation or municipality which controls the proposed source of supply, a statement in writing, outlining the terms upon which water will be furnished to the district, or to the individuals within the district and on what terms in either case.

This preliminary proposal from the governing body of the source of supply shall be binding, and shall be in the nature of an option to purchase water by the district, or the individual within the same, if and when the proposed benefited water district shall have completed its construction, and is ready to use water. This proposal shall accompany and be a part of the engineer's preliminary report to the board of supervisors. [47GA, ch 148,§7.]

5526.08 Plat. The said engineer shall prepare a preliminary plat showing the proper design in general outline, the size and location of the water mains, the general location of hydrants, if such are included in said petition, valves and other appurtenances, and shall show the lots and parcels of land within the proposed district as they appear on the county auditor's plat books, together with the names of the owners and the amount which it is estimated that such lot or parcel will be assessed. [47GA, ch 148,§8.]

5526.09 Compensation of engineer. The compensation of such engineer on the preliminary investigation shall be determined by the board of supervisors and may be by percentage or per diem. [47GA, ch 148,§9.]

5526.10 Filing of report and plat. The engineer's report, together with the dummy plat showing the tentative design and assessment, shall be filed with the county auditor within thirty days of such engineer's appointment, unless for adequate reasons it is impossible for him to do so, in which case the board of supervisors may extend the time therefor. [47GA, ch 148, §10.]

5526.11 Hearing on report. On receipt of the engineer's report, the board of supervisors shall give notice in the same manner as before, of a hearing on the engineer's tentative design and dummy plat. On the day set, or within ten days thereafter, the board of supervisors shall approve or disapprove the engineer's plan and proposed assessment. If it shall appear advisable, the board of supervisors may make changes in the design and assessment, as they appear on the dummy plat. [47GA, ch 148,§11.]

5526.12 Election. When the preliminary design and assessment have been approved by the board of supervisors, a date not more than thirty days after such approval shall be set for an election within the district to determine whether or not the proposed improvement shall be constructed and to choose candidates for the offices of trustee within the district. Notice of the election, including the time and place of holding the same, shall be given in the same manner as for the public hearing heretofore provided for. The vote shall be by ballot which shall state clearly the proposition to be voted upon, and any legal voter residing within the district at the time of the election shall be entitled to vote. Judges will be appointed to serve without pay, by the board of supervisors from among the qualified voters of the district who will have charge of the election. The proposition shall be deemed to have carried if a majority of those voting thereon vote in favor of the same. [C24, 27, 31, 35,§5524; 47GA, ch 148,§12.]

Referred to in §5526.13

5526.13 Trustees—terms. At the election provided for in section 5526.12, the names of the trustees shall be written by the voter on blank ballots without formal nomination and the board of supervisors shall appoint three from among the five receiving the highest number of votes as trustees for the district, one to serve for one year, one for two years, and one for three years, which trustees and their successors shall give bond in the amount the board of supervisors may require, the premium of which shall be paid by the district said trustees represent. Vacancies may thereafter be filled by election, or by appointment by the board of supervisors, at the option of the remaining trustees. The term of

succeeding trustees shall be for three years. [C24, 27, 31, 35,§5524; 47GA, ch 148,§13.]

5526.14 Bids for construction. If the result of said election be in favor of said improvement, the board of supervisors shall instruct the engineer to complete the plans and specifications, ready for receiving bids for construction of the project, which he shall do within thirty days of receiving notice to do so, unless for adequate reason the board shall extend the time.

When the completed plans and specifications are on file with the county auditor, the board of supervisors shall advertise for bids and shall cause notice to be given by publication once each week for two consecutive weeks in some newspaper published in the county wherein the improvement is to be constructed, setting forth the location and nature of the improvement and the date and place where bids will be received by the board. The last published notice to bidders shall be at least seven days before the time set for receiving bids. Bidders will be required to submit certified checks for five percent of the amount of the bid. [C24, 27, 31, 35,§5524; 47 GA, ch 148,§14.]

5526.15 Inadequate assessment. When bids have been received, if it is apparent that the final assessment will need to be increased more than ten percent over the preliminary assessment, the board of supervisors shall, at its option, reject bids and re-advertise for bids as provided herein, or reject bids and revise the dummy assessment. If the dummy assessment is revised, another election shall be held within the district in the same manner and with the same notices as the first, except that the candidates for trustees shall not be voted for. [47GA, ch 148,§15.]

5526.16 Second election. If the majority of the votes cast at said second election be in favor of said improvement, the board of supervisors shall again advertise for bids in the same manner as before. If the bids at the second letting will not necessitate raising the second preliminary assessment more than ten percent, the board may let the contract to the lowest responsible bidder. [C24, 27, 31, 35,§5524; 47GA, ch 148,§16.]

5526.17 Bond of contractor. The successful bidder, when awarded a contract, shall be required to give an approved surety bond for one hundred percent of the contract price, guaranteeing completion of the work in accordance with the plans and specifications, and for maintenance, including backfilling, for one year after the final acceptance of the work.

If the contractor shall fail to complete the work as provided in his contract, or shall abandon the same, or fail to proceed in a reasonable manner toward its final completion, the board may proceed against the contractor and bondsman as provided in sections 7535 and 7536. [47GA, ch 148,§17.]

5526.18 Acceptance of work. When in the opinion of the engineer in charge, the construction in any benefited water district has been completed in accordance with the plans, specifications, and contract, he shall certify this fact to the board of supervisors, and recommend the acceptance of the work by the said board. The board of supervisors shall proceed in accordance with sections 7532 and 7533. [47GA, ch 148,§18.]

5526.19 Completing assessment. After the final acceptance of the work by the board of supervisors, the engineer shall complete the final assessment, which shall be made on all the property within the district, whether abutting or not, for an amount approximately ten percent greater than the total cost of the project. The assessment shall be made according to benefits and shall take into consideration the location and value of the property assessed. The final assessment on any lot or parcel of land shall not exceed the final preliminary assessment by more than ten percent, and shall in no case exceed twenty-five percent of the actual value of the property. The board of supervisors may alter an assessment to increase or decrease it within the limits outlined above, and must approve by resolution the final assessment as made. [C24, 27, 31, 35,§5522; 47GA, ch 148,§19.]

5526.20 Due date—bonds. Assessments of less than ten dollars will come due at the first tax paying date after the approval of the final assessment, and assessments of ten dollars or more may be paid in twenty annual installments with interest at six percent on the unpaid balance. The board of supervisors shall issue bonds against the completed assessment in an amount equal to the total cost of the project, so that the amount of the assessment will be approximately ten percent greater than the amount of the bonds. [C24, 27, 31, 35,§5522; 47GA, ch 148, §20.]

5526.21 Substance of bonds. Each of such bonds shall be numbered, and have printed upon its face that it is a benefited water district bond, stating the county and the number of the district for which it is issued, and the date of maturity; that it is in pursuance of a resolution of the board of supervisors, and that it is to be paid for only from special assessment theretofore levied and taxes levied as hereinafter provided for that purpose within the said district for which the bond is issued. The provisions of sections 7505 and 7508 shall govern the issuance of these bonds except that the contractor will not be paid anything on the work until its completion and final acceptance. [47GA, ch 148,§21.]

5526.22 Lien of assessments—tax. When the assessment has been completed and the bonds sold and the schedule of assessment shall be turned over to the county auditor, the installments due thereon shall be collected in the same manner as ordinary taxes and shall constitute a lien on the property against which they are made. If the treasurer does not receive sufficient funds to enable him to pay the interest and retire the bonds as they become due, he shall levy a one-half mill annual tax on all property within the district to pay such deficiency, and the county treasurer shall apply the proceeds of such levy to the payment of the bonds and the interest on the same so long as the bonds are

in arrears on either interest or principal. [C24, 27, 31, 35,§5525; 47GA, ch 148,§22.]

5526.23 Surplus. The board of supervisors shall be required to levy such one-half mill annual tax so long as the bonds are in arrears. When the bonds are all retired any surplus remaining with the county treasurer shall be turned back and prorated among those property owners who have not caused such deficiency by their failure to pay the taxes assessed against their property. [47GA, ch 148,§23.]

5526.24 Fee of engineer. The fee for engineering services shall be fixed by the board of supervisors and he may be paid either a percentage or a per diem, from proceeds of the bond sale or by cash from the contractor, if the contractor takes bonds in settlement for his work under his contract. [47GA, ch 148,§24.]

5526.25 Management by trustees. When the construction, assessment, and bond sale in any district have been completed, and final settlement made with the contractor, the management of the utility shall automatically go to the three trustees previously appointed by the board of supervisors. The trustees shall have power to levy an annual tax not to exceed one-half mill, on the district, for the maintenance of the system. This levy shall be optional with the trustees. The trustees may purchase material and employ labor to properly maintain and operate the utility. The trustees shall be allowed necessary expenses in the discharge of their duties, but shall not receive any salary. [C24, 27, 31, 35,§5526; 47GA, ch 148,§25.]

5526.26 Duties of trustees. It is anticipated that this law will usually be utilized to finance a distribution system where the source of supply is without the district, and not under its control, and that individuals within the district will pay water rent to a municipality or corporation without the district. It is intended that the trustees may so operate the utility as will best serve the users, and they are expressly authorized to buy and sell water, to fix the rates to consumers and make all contracts reasonable or necessary to accomplish the purpose of this chapter and to carry on all the operations incident to maintaining and operating said utility and to the procuring and furnishing of water to the consumers therein. If the development of a source of supply is within the means of the district, the trustees may install wells, tanks, meters and any other equipment properly pertaining to operate it. [47GA, ch 148,§26.]

5526.27 Public property in district. Whenever property of the state of Iowa, or any political subdivision thereof, shall be included either wholly or in part within such water district and shall own facilities which may be used as a part of such water system, the executive council, board of supervisors, city or town council, as the case may be, may permit such use of said facilities for such consideration and on such terms as may be agreed upon with the board of trustees. [47GA, ch 148,§27.]

5526.28 Private mains. Any person or persons within any water district, who may, after the initial installation of the improvement in any such district, desire to construct additional mains, and who have been assessed on the original assessment, may with the consent of the trustees, connect such lateral mains as they desire with the original system to serve property within the district which has been assessed, provided that the entire cost thereof shall be borne by the parties so interested. [47GA, ch 148,§28.]

5526.29 Subdistricts. If the cost of the desired extensions will be as much as five thousand dollars, the interested parties may petition the board of supervisors to organize a subdistrict, and in such case the board shall proceed in the same manner as for a new district, and may take in territory not originally assessed.

The board of supervisors shall have power at any time to alter the boundaries of any district prior to the time of posting or publishing notice of the election within the district. [C24, 27, 31, 35,§5522; 47GA, ch 148,§29.]

5526.30 Additional territory. When the district is under the control of trustees, they are empowered to deal with parties without the district who desire to be taken into the district or to obtain water from the district. The trustees shall have power in such cases to make agreements for the district, and may, with the consent of the board of supervisors, alter the district boundaries to take in additional territory. No lot or parcel of land shall be put out of a district without the consent of the owner, after it has paid any assessment to the district. [C24, 27, 31, 35,§5522; 47GA, ch 148,§30.]

5526.31 Right-of-way. The board of supervisors shall have power to condemn, in the same manner as provided for the condemnation of land, right-of-way through private property, sufficient for the construction and maintenance of water mains. The cost of such right-of-way shall constitute a part of the expense of the improvement and shall be covered by the special assessment. [47GA, ch 148,§31.]

5526.32 Record book. The board of supervisors shall provide a record book which shall be in the custody of the auditor, in which shall be kept a full and complete record of the proceedings relative to water districts, so arranged and indexed, as to enable any proceedings relative to any district to be readily examined. [C24, 27, 31, 35,§5524; 47GA, ch 148,§32.]

5526.33 Appeal procedure. Any person aggrieved, may appeal from any final action of the board of supervisors in relation to any matter involving his rights, to the district court of the county in which the district is located. The procedure in such appeals shall be governed by the provisions of sections 7515 to 7530, inclusive, provided that whenever in the above sections the words "drainage district" occur, the words "benefited water district" shall be substituted. [47GA, ch 148,§33.]

CHAPTER 283

TOWNSHIPS AND TOWNSHIP OFFICERS

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DIVISION, BOUNDARIES, AND CHANGE OF NAMES

5527 Division authorized. The board of supervisors shall divide the county into townships, as convenience may require, defining the boundaries thereof, and may, from time to time, make such alterations in the number and boundaries of the townships as it may deem proper. [C51,§219; R60,§441; C73,§379; C97,§551; C24, 27, 31, 35,§5527.]

5528 School townships not disturbed. The board shall not change the lines of any civil township so as to divide any school township or district, unless a majority of the voters of said school township or district shall petition therefor, except in cases where such boundary lines are changed to conform to congressional township lines. [C51,§219; R60,§441; C73,§§379, 1799; C97,§551; C24, 27, 31, 35,§5528.]

5529 Boundaries conterminous with city. Where the boundaries of any city have been changed, the board of supervisors of the county in which the same is situated shall have power to change the boundary lines of townships so as to make them conform to the boundaries of the city, and to make such other changes in township lines, and the number of townships, as it may deem necessary; but no action shall be taken affecting the boundaries or existing conditions of school districts. [C97,§552; C24, 27, 31, 35,§5529.]

5530 Record. The description of the boundaries of each township, and all alterations in them, and of all new townships, shall be recorded in full in the records of the board of supervisors, and of the township. [C51,§220; R60,§442; C73,§381; C97,§553; C24, 27, 31, 35, §5530.]

5531 Divisions where city included. When any township has within its limits a city or town with a population exceeding fifteen hundred, the electors of such township residing without the limits of such city or town may, at any regular session of the board of supervisors of the county, petition to have such township divided into two townships; the one to embrace the territory without, and the other the territory within such corporate limits. [C73,§382; C97, §554; C24, 27, 31, 35,§5531.]

5532 Petition — remonstrance. Such petition shall be accompanied by the affidavit of three electors, to the effect that all the signatures to such petition are genuine, and that the signers thereof are all legal voters of said township, residing outside said corporate limits. Remonstrances signed by such legal voters may also be presented at the hearing before the board of supervisors hereinafter provided for, and if the same persons petition and remonstrate, they shall be counted on the remonstrance only. [C73,§382; C97,§554; C24, 27, 31, 35,§5532.]

5533 Notice. Notice of the time when such petition will be heard shall be given by posting in five public places in the township, two of which shall be without, and three within such corporate limits, at least ten days prior to such hearing. [C73,§383; C97,§555; S13,§555; C24, 27, 31, 35,§5533.]

5534 Division—effect. If such petition is signed by a majority of the electors of the township residing without the corporate limits of such city or town, the board of supervisors shall divide such township into two townships, as prayed; but, except for election purposes, including the appointment of all judges and clerks of election rendered necessary by the change, such division shall not take effect until the second secular day of January following the next general election. [C73,§384; C97,§556; C24, 27, 31, 35,§5534.]

5535 Restoration to former township. When the citizens of any township so set off desire to dissolve their township organization and return again to the township from which they were taken, they may do so by the same proceedings as provided for the division thereof, except that said petition shall be signed by a majority of the electors of both townships. [C97,§556; C24, 27, 31, 35,§5535.]

5536 New township—first election. When a new township is formed, in which township officers are to be elected, the board of supervisors shall call the first township election, to be held at such place as it may designate, on the day of the next general election. If at any time a new township has been created in a year in which no general election is held, the board may call a special election for the election of the township officers of the new township, who shall continue in office until their successors are elected and qualified. [C51,§231; R60,§453; C73,§385; C97,§557; S13,§1074-a; C24, 27, 31, 35,§5536.]

5537 Officers to be elected. At said election there shall be elected one trustee for a term of two years, one trustee for a term of three years, and one trustee for a term of four years, and other officers as provided by law. [S13,§1074-a; C24, 27, 31, 35,§5537.]

5538 Order for election. The auditor shall issue an order for such first election, stating the time and place of the same, the officers to be elected, and any other business to be transacted; and no business not named in such order shall be transacted at such election. [C51,§232; R60,§454; C73,§386; C97,§558; C24, 27, 31, 35, §5538.]

5539 Service and return. Such order may be directed to any constable of the county, or to any citizen of the same township, by name, and shall be served by posting copies thereof, in three of the most public places in the township, fifteen days before the day of the election; the original order shall be returned to the presiding officer of the election, to be returned to the clerk when elected, with a return thereon of the manner of service, verified by oath, if served by any other than an officer. [C51,§233; R60,§455; C73, §387; C97,§559; C24, 27, 31, 35,§5539.]

5540 Changing name—petition—notice. Any township desirous of changing its name may petition the board of supervisors and, if it shall appear to said board that a majority of the actual resident voters of such township are in favor of such change, such board shall cause notices, attested by the auditor, to be posted in three of the most public places of such township, for at least thirty days previous to the next regular session of said board, which notice shall state the fact that a petition has been presented to said board by the citizens of said township, praying for a change of the name of the same and recite the name prayed for in said petition, and that, unless those interested in the change of such name shall appear at the next regular session of said board and show cause why said name shall not be changed, there will be an order made granting such change. [C73,§412; C97,§580; C24, 27, 31, 35,§5540.]

5541 Hearing—order. If, at the time fixed for the hearing of said petition, the board be satisfied that there is a majority in favor of such change of name, it shall make an order granting the same, which shall be attested by the auditor, and recorded in the office of the recorder of the county. [C73,§413; C97,§581; C24, 27, 31, 35, §5541.]

5542 Petition dismissed. If it appears to said board that a majority of the citizens of such township are opposed to such change, such petition shall be dismissed. The cost of the proceeding in all cases shall be taxed against the petitioners. [C73,§414; C97,§582; C24, 27, 31, 35,§5542.]

TRUSTEES

5543 Trustees—duties—meetings. The board of township trustees in each township shall consist of three qualified electors of the township. The trustees shall act as overseers of the poor, fence viewers, the local board of health, and shall constitute the township board of equalization. The board of trustees shall meet on the first Monday in February, April, and November in each year. [C51,§§221, 224; R60,§§443, 446; C73,§§389, 393, 969; C97,§§574, 1074, 1538; S13, §§1074, 1528; C24, 27, 31, 35,§5543.]

Board of review, ch 343
Estrays and trespassing animals, ch 146
Fences, ch 88
Local board of health, ch 107
Support of the poor, ch 189.4

5544 County attorney as counsel. In counties having a population of less than twenty-five thousand, where the trustees institute, or are made parties to, litigation in connection with the performance of their duties, as provided in this chapter, the county attorney, as a part of his official duties, shall appear in behalf of the township trustees, except in cases in which the interests of the county and those of the trustees are adverse. [S13,§564; C24, 27, 31, 35,§5544.]

Referred to in §5545

5545 Employment of counsel. When litigation shall arise in any case not covered by section 5544, involving the right or duty of township trustees with reference to any matter within their jurisdiction, and the trustees become or are made parties to such litigation, they shall have authority to employ attorneys in behalf of

said township, and to levy the necessary tax to pay for their services, and to defray the expenses of such litigation. [C97,§564; S13,§564; C24, 27, 31, 35,§5545.]

CLERK

5546 Clerk to keep record. The township clerk shall keep a record of all the proceedings and orders of the trustees, and of all acts done by him, including the filing of certificates of official oaths having been taken before other officers, and perform such other acts as may be required of him by law. [C51,§§223, 226, 227; R60,§§445, 448, 449; C73,§§392, 395, 396; C97, §576; S13,§576; C24, 27, 31, 35,§5546.]

Branding of animals, duties, §2977
Clerk local board of health, §2230
Estrays and trespassing animals, ch 146

5547 Custody of funds. Each township clerk shall receive, collect, and disburse, under the orders of the township trustees, all funds belonging to his township, including the cemetery fund, and those which are now or may hereafter be by law created or authorized. No claim shall be paid until it has been duly audited by the trustees. [S13,§576; C24, 27, 31, 35,§5547.]

Deposits in general, §§7420.01, 9193

5548, 5549 Rep. by 44GA, ch 2

5550 Rep. by 41GA, ch 173

5551 Notify auditor of elections. The clerk, immediately after the election of officers in his township, shall send a written notice thereof to the county auditor, stating the names of the persons elected, and to what offices, and the time of the election, and shall enter the time of the election of each officer in the township record. [C51, §228; R60,§450; C73,§397; C97,§577; C24, 27, 31, 35,§5551.]

5552 Receipts and expenditures. Each township clerk, on the morning of the day of the general election and before the hour for opening the polls, shall post, at the place where such election is to be held in his township, a statement in writing, showing all receipts of money and disbursements in his office for the preceding two years, which shall be certified as correct by the trustees of the township. [C97,§578; SS15,§578; C24, 27, 31, 35,§5552.]

OFFICES ABOLISHED

5553 Clerk and trustees abolished. Where a town or a city, not acting under a special charter, constitutes one or more civil townships the boundary lines of which coincide throughout with the boundary lines of the town or city, the offices of township clerk and trustee are abolished. [C97,§560; S13,§560; C24, 27, 31, 35, §5553.]

Referred to in §5556

5554 Clerk and council to act. The duties required by law of the township clerk in such cities shall be performed by the city clerk, and those required of the board of trustees shall be performed by the city council. [C97,§561; C24, 27, 31, 35,§5554.]

Referred to in §5556

5555 Transfer of funds. The moneys and assets belonging to such civil township shall become the moneys and assets of the city or town in which said civil township is situated; and the township clerks shall turn such moneys and assets over to the city or town treasurer, to be disbursed by such city or town in the same manner and for the same purposes as required by law for the disposition of township funds, and such cities or towns shall assume all liabilities of a civil township to which the provisions of this section shall apply. [C97,§562; C24, 27, 31, 35,§5555.]

Referred to in §5556

5556 Payment of funds. County treasurers are hereby authorized to pay over to the city or town treasurers which come under the provisions of sections 5553, 5554 and 5555 all funds which would otherwise be paid over to the township clerks of such townships. [C97,§563; C24, 27, 31, 35,§5556.]

5557 Rep. by 44GA, ch 141

CEMETERIES

5558 Cemeteries—condemnation. The township trustees are hereby empowered to condemn, or purchase and pay for out of the general fund, and enter upon and take, any lands within the territorial limits of such township for the use of cemeteries, in the same manner as is now provided for cities and towns. [C97,§585; S13, §585; C24, 27, 31, 35,§5558.]

Procedure, §6203; also ch 366
S13,§585, editorially divided

5559 Gifts and donations. Civil townships are hereby authorized and empowered to receive by gift, devise, or bequest, money or property for the purpose of establishing and maintaining libraries, township halls, cemeteries, or for any other public purpose. All such gifts, devises, or bequests shall be effectual only when accepted by resolution of the board of trustees of such township. [S13,§585; C24, 27, 31, 35,§5559.]

Referred to in §5560

5560 Cemetery and park tax. They shall, at the regular meeting in April, levy a tax sufficient to pay for any lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established, and for the necessary improvement and maintenance of public parks acquired by gift, devise, or bequest under section 5559, or for the maintenance and improvement of cemeteries so established in adjoining townships, in case they deem such action advisable. [C97,§586; SS15,§586; C24, 27, 31, 35,§5560.]

Referred to in §5563

5561 Power and control. They shall control any such cemeteries, or appoint trustees for the same, or sell the same to any private corporation for cemetery purposes. [C97,§586; SS15,§586; C24, 27, 31, 35,§5561.]

40ExGA, SF 151, §20, editorially divided

5561.1 Sale of lots—gifts. They shall have authority to provide for the sale of lots or por-

tions thereof, in any cemetery under their control, and make rules and regulations in regard thereto, and may provide for perpetual upkeep by the establishment of a perpetual upkeep fund from the proceeds of sale of lots, and may accept gifts, devise or bequest, made to them for that purpose. [48GA, ch 150,§1.]

5562 Tax for nonowned cemetery. They may levy a tax not to exceed one-fourth mill to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use. [C97,§586; SS15,§586; C24, 27, 31, 35,§5562.]

Referred to in §5563

5563 Scope of levy. The levy authorized in sections 5560 and 5562 may be extended to property within the limits of any city or town so far as same is situated within the township, unless such city or town is already maintaining a cemetery, or has levied a tax in support thereof. The said tax may be so expended for the support and maintenance of any such cemetery after the same has been abandoned and is no longer used for the purpose of interring the dead. [SS15, §586; C24, 27, 31, 35,§5563.]

5564 Cemetery funds—use. Cemetery tax funds of a township may be used for the maintenance and support of cemeteries in adjoining counties and townships and in cities and towns, if such cemeteries are utilized for burial purposes by the people of the township. [C24, 27, 31, 35,§5564.]

5565 Joint boards. A city or town council and the trustees of a township may join in the common purpose of improving, maintaining, and supporting a township cemetery. In such case the two official bodies shall constitute a joint cemetery board and shall have equal voting power. [C24, 27, 31, 35,§5565.]

5566 Regulations. The trustees, board of directors, or other officers having the custody and control of any cemetery in this state, shall have power, subject to the bylaws and regulations of such cemetery, to inclose, improve, and adorn the ground of such cemetery; to construct avenues in the same; to erect proper buildings for the use of said cemetery; to prescribe rules for the improving or adorning the lots therein, or for the erection of monuments or other memorials of the dead upon such lots; and to prohibit any use, division, improvement or adornment of a lot which they may deem improper. [C97,§587; SS15,§587; C24, 27, 31, 35, §5566.]

5567 Watchmen appointed. Such trustees, directors, or other officers may appoint as many day and night watchmen of their grounds as they may think expedient, and such watchmen, and also all their sextons, superintendents, gardeners, and agents, stationed upon or near said grounds are hereby authorized to take and subscribe, before any mayor of a city or justice of the peace of the township where such cemetery is situated, an oath of office, similar to that required by law of constables. [C97,§589; C24, 27, 31, 35,§5567.]

Oath, §1054

5568 Ex officio police officers. Upon the taking of such oath, such watchmen, sextons, superintendents, gardeners, and agents shall have and exercise all powers of police officers within and adjacent to the cemetery grounds and each shall have power to arrest any and all persons engaged in violating the laws of this state, and to bring such person so offending before any justice of the peace within such township, to be dealt with according to law. [C97,§589; C24, 27, 31, 35,§5568.]

Powers, §§5657, 5658; also ch 621 et seq.

5569 Cemeteries — plats — records. Where there is located in any township one or more cemeteries, the owner of the same, or any party owning an interest therein, may cause the same to be surveyed, platted, and laid out into subdivisions and lots, numbering the same by progressive numbers, giving the length and breadth, also the location with reference to known or permanent monuments to be made. The plat shall accurately describe all the subdivisions of the tract of land used, or designed to be used as a cemetery, and shall be recorded in the office of the county recorder, and filed with and recorded by the township clerk, and preserved by him among the records of his office. [C97,§583; C24, 27, 31, 35,§5569.]

5570 Conveyance of lots. All conveyances of subdivisions or lots of a cemetery thus platted shall be by deed from the proper owner, which deed shall be recorded with the township clerk in a book kept by him for that purpose, for the recording of which the said clerk shall be entitled to a fee of fifty cents for each instrument recorded, to be paid by the party desiring the record made. [C97,§584; C24, 27, 31, 35,§5570.]

FIRE EQUIPMENT

5570.1 Authorization. The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires in said township, independently or jointly with any adjoining township or townships, likewise authorized as herein provided, or with any city or town. [C31, 35, §5570-c1; 48GA, ch 149,§1.]

Referred to in §5570.2

5570.2 Levy. The township trustees may levy an annual tax not exceeding one mill on the taxable property in the township for the purpose of exercising the powers granted in section 5570.1, when so authorized by an affirmative vote equal to at least sixty percent of the total vote cast in the township at the last preceding general election. [C31, 35,§5570-c2; 48GA, ch 149,§1.]

Referred to in §§5570.3, 5570.4

5570.3 Election. Such proposal to levy the tax provided for in section 5570.2 may be submitted by the township trustees at any regular

election held in the township, or at a special election called for the purpose, and such township trustees shall submit the proposition when petitioned therefor by twenty-five percent of the qualified electors of said township. Notice of said election shall be given by posting in three public places in said township, not less than ten days before the time of such election. [C31, 35, §5570-c3; 48GA, ch 149,§1.]

Referred to in §5570.4

5570.4 Anticipatory bonds. Townships may anticipate the collection of taxes authorized by sections 5570.2 and 5570.3, and for such purposes may issue bonds payable in not more than ten equal annual installments and at a rate of interest not exceeding five percent per annum and payable at such place and be in such form as the board of trustees shall designate by resolution. Sections 363 to 367, inclusive, and chapter 320, so far as applicable, shall apply to such bonds. [48GA, ch 149,§1.]

COMPENSATION

5571 Compensation of trustees. Township trustees shall receive:

1. For each day's service of eight hours necessarily engaged in official business, to be paid out of the county treasury, four dollars each. In townships embraced entirely within the limits of special charter cities, the compensation of township trustees shall be four dollars per day.
2. For each day engaged in assessing damages done by trespassing animals, one dollar each, to be paid as other costs are in such cases.
3. When acting as fence viewers, or viewing or locating any ditch or drain, or in any other case where provision is made for their payment otherwise, they shall not be paid out of such treasury, but in all such cases their fees shall be paid in the first instance by the party requiring their services, and they shall append to the report of their proceedings a statement thereof, and therein shall direct who shall pay said fees, and in what sums respectively; and the party having so advanced any such fees may have his action therefor against the party so directed to pay the same, unless, within ten days after demand by the party entitled thereto, he shall be reimbursed therefor. [C51,§2548; R60, §4156; C73,§3808; C97,§590; S13,§590; C24, 27, 31, 35,§5571.]

5572 Compensation of clerk. The township clerk shall receive:

1. For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, four dollars.
2. For all money coming into his hands by virtue of his office, except from his predecessor in office, unless otherwise provided by law, one percent.
3. For filing each application for a drain or ditch, fifty cents.
4. For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation as the board of supervisors may allow. [C51,§2548; R60,§§909, 911; C73,§3809; C97,§591; S13,§591; C24, 27, 31, 35,§5572.]

Compensation on township hall funds, §5575

5573 Compensation of assessor. Each township assessor shall receive in full for all services required of him by law, a sum to be paid out of the county treasury, and fixed annually by the board of supervisors at its January session, for the current year, on the basis of four dollars for each day of eight hours which said board determines may necessarily be required in the discharge of all official duties of such assessor.

In townships having a population of thirty thousand or over and situated entirely within the limits of a city acting under special charter, such compensation shall be four dollars per day. [R60,§730; C73,§3810; C97,§592; S13, §592; C24, 27, 31, 35,§5573.]

CHAPTER 284

TOWNSHIP HALLS

5574 Election.
5575 Tax.
5576 Transfer of fund.
5577 Location.
5578 Construction.
5579 Custodian.
5580 Bond.
5581 Tax for repairs.

5574 Election. The trustees, on a petition of a majority of the resident freeholders of any civil township, shall submit the question of building a public hall to the electors thereof, by posting notices of such election in four conspicuous places in the township, thirty days before election, and the form of the proposition shall be: "Shall the proposition to levy a tax of.....mills on the dollar for the erection of a public hall be adopted?" [C97, §567; C24, 27, 31, 35,§5574; 48GA, ch 151,§1.]

5575 Tax. If a majority of the votes cast are in favor of the tax, the trustees shall certify such fact to the board of supervisors, and they shall thereupon levy a tax not to exceed the rate voted and not to exceed three-fourths mill on the dollar each year for a period not exceeding five years on the taxable property of the township; and when such tax is collected by the treasurer, it shall be paid to the township clerk; but said clerk shall not receive to exceed one percent for handling said money. [C97,§568; C24, 27, 31, 35,§5575.]

5576 Transfer of fund. When there are funds in the hands of any township clerk, raised under the provisions of this chapter, when same

is not desired for the purposes for which it was raised, then said fund may be transferred to the school fund of any school district or districts pro rata wherein same was raised, when a petition is presented to the trustees, signed by a majority of the electors of said township that voted at the last regular election prior to the signing of said petition, as shown by the poll books of said township, said transfer of funds to be made by the township clerk upon order of the trustees after the filing of said petition with said clerk. [S13,§592-b; C24, 27, 31, 35, §5576.]

5577 Location. Any public hall built under the provisions of this chapter shall be located by the township trustees so as to accommodate the greatest number of the resident taxpayers, and for such purpose the trustees may purchase land not to exceed in value five hundred dollars. They shall also have the power to join with the city or town authorities of any city or town within their borders and build and equip said building as a public hall under such terms and conditions as may be mutually agreed upon. [C97,§569; C24, 27, 31, 35,§5577.]

Referred to in §5579

5578 Construction. The township trustees or in case of joint ownership, in conjunction with the city or town authorities shall have charge of the building of such hall, shall receive bids, and shall let the building of the same to the lowest responsible bidder, and the township clerk shall pay out of the funds collected, only on the order of the trustees of said township for the township's share of the cost thereof. [C97,§570; C24, 27, 31, 35,§5578.]

5579 Custodian. The township clerk, under the direction of the trustees, shall be the custodian of the building, and the use thereof may be permitted by the township trustees to citizens of the township for any lawful purpose; and, for the purposes of this chapter, the township clerk is hereby clothed with all the powers and duties of a constable of the township, to maintain order within and about the premises, protect the property, and enforce orders of the township trustees with respect thereto. In case of joint ownership by the township and town, the duties herein enumerated shall devolve jointly upon the township trustees and the town authorities or they may purchase a building already built with the same limitations as in said section 5577. A copy of this section shall be at all times kept posted in a conspicuous place in said hall. [C97,§571; C24, 27, 31, 35, §5579.]

5580 Bond. When a tax is voted as provided in this chapter, the township clerk shall, before drawing any of said tax from the treasury of the county, execute a bond, with penalty double the amount of said tax, which bond shall be approved by the board of supervisors. [C97,§572; C24, 27, 31, 35,§5580.]

5581 Tax for repairs. The trustees of any township where such building has been erected are hereby authorized to certify to the board of supervisors that a tax of not exceeding in any one year, one-eighth mill on the dollar, on the taxable property of the township, should be levied, to be used in keeping such building in repair, to furnish same with necessary furniture, and provide for the care thereof. When such certificate is filed in the auditor's office, the board of supervisors shall levy such tax. [C97,§573; C24, 27, 31, 35,§5581.]

CHAPTER 285

TOWNSHIP LICENSES

5582 License required.
5582.1 "Roadhouse" defined.
5583 Limitations and conditions.
5584 Record.
5585 Revocation.
5586 Appeal.
5587 Violations.

5582 License required. No person shall, for himself or for any other person, firm, or corporation, keep or operate for hire or for profit any theater, moving picture show, pool or billiard room or table, dance hall, skating rink, club house, roadhouse, amusement park, or bowling alley, outside the limits of cities and towns without first procuring a license therefor from the township trustees.

This section shall not apply to baseball games or county fairs. [C24, 27, 31, 35,§5582.]

Referred to in §5582.1

5582.1 "Roadhouse" defined. A roadhouse, for the purposes of section 5582, shall be construed to mean any building or establishment open to the public and located on or accessible to a road or public highway outside the limits of an incorporated town or city where entertainment, prepared food or drink is furnished to the public generally for hire, sale or profit. [C31, 35,§5582-c1.]

5583 Limitations and conditions. The granting of a license shall be discretionary with the trustees; provided, however, that a license to operate a theater or moving picture show shall not be denied in any unincorporated village having a population of one thousand or more except for good cause. Licenses shall not be granted for a less period than six months nor for a longer period than one year, shall specify the place where the business may be carried on, the date of expiration of the license, and be signed by the chairman of the board and its clerk. [C24, 27, 31, 35,§5583.]

5584 Record. When a license is granted, the terms and conditions on which the place

shall be operated shall be entered of record in the minutes of the board and the licensee shall stand charged with notice thereof and shall, on demand, be furnished with a copy of such terms and conditions on payment of the sum of fifty cents. Said terms and conditions shall be reasonably uniform for different licensees under like circumstances and conditions. [C24, 27, 31, 35,§5584.]

5585 **Revocation.** The trustees may at any time, in their discretion, revoke any license issued. In case a license is revoked the licensee shall be repaid a pro rata part of the license fee. All license fees shall be paid to the township clerk who shall in return pay the same to the county treasurer who shall issue duplicate receipts therefor, one of which shall be filed with the county auditor. Said fees shall be credited to the secondary road maintenance fund. [C24, 27, 31, 35,§5585.]

5586 **Appeal.** Any person aggrieved by the action of the trustees in revoking a license may appeal therefrom to the district court of the county by serving a notice on the chairman of the board of trustees within twenty days after the final decision of said board. Such appeal shall be tried de novo and in equity. [C24, 27, 31, 35,§5586.]

5587 **Violations.** Any person who violates any of the foregoing provisions of this chapter, or who violates any of the terms or conditions under which he is permitted to operate under a license, shall be fined any sum not exceeding twenty-five dollars. [C24, 27, 31, 35,§5587.]

TITLE XV

CITY AND TOWN GOVERNMENT

CHAPTER 286

INCORPORATION

Referred to in §§6731, 6940. Certain provisions made applicable to special charter cities, §6756

GENERAL PROVISIONS

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GENERAL PROVISIONS

5588 **How effected.** When the inhabitants of part of any county, or of two or more counties lying contiguous to each other, not embraced within the limits of any city or town, desire to become incorporated as a town, they may apply to the district court of the proper county, by a petition in writing signed by not less than twenty-five of the qualified electors of the territory proposed to be embraced in such town, which petition shall describe said territory, and contain or have annexed thereto an accurate plat thereof, and shall state the name proposed for such town. [R60,§1031; C73,§421; C97,§599; C24, 27, 31, 35,§5588.]

C97,§599, editorially divided

5589 **Proof required.** Proof of the residence and qualification of the petitioners as electors shall be made by affidavit or otherwise, as directed by the court. [C73,§421; C97,§599; C24, 27, 31, 35,§5589.]

5590 **Jurisdiction.** If the territory embraced within the limits of said proposed town lies in more than one county, the district court of either of said counties shall have jurisdiction of such proceedings, but that in which the petition for incorporation is first filed shall have exclusive jurisdiction thereafter. [C97,§599; C24, 27, 31, 35,§5590.]

5591 **Change in territorial limits.** The court is vested with power to change or limit the territory proposed to be incorporated, before appointing the commissioners as herein provided. [C97,§600; S13,§600; C24, 27, 31, 35, §5591.]

S13,§600, editorially divided

5592 **Commissioners — notice of election.** Upon compliance with the foregoing provisions of this chapter, the court shall at once appoint five commissioners, who shall at once give notice of an election for incorporation, for not less than three successive weeks preceding the same, by posting notices in three public places within the limits of the proposed town, and by publication, once each week, for three consecutive weeks in one or more newspapers published in the county where the court is held; which notice shall state the time and place of holding the election, and a description of the limits of the proposed town, and that a plat and description thereof is on file in the office of the clerk of the district court. [R60,§1032; C73,§422; C97, §600; S13,§600; C24, 27, 31, 35,§5592.]

5593 **Election—ballots—canvass.** The commissioners shall act as judges and clerks of the election, and shall qualify as required by law, and the proposition to be submitted thereat shall be: "Shall the proposition for incorporation be

adopted?" and the commissioners shall have charge of the printing of the ballots, and shall cause the proposition to be placed upon them, and the elector shall designate his vote in the same manner provided with respect to like or similar propositions in the title on elections. The commissioners shall promptly report the result of the election to the court, or judge thereof, which may be confirmed and approved, or set aside, by said court, or judge in vacation. If it is set aside, the court or judge thereof may order a new election with the same or other commissioners. [R60,§1032; C73,§422; C97, §601; C24, 27, 31, 35,§5593.]

Designating vote, §764; oath, §792

5594 **Election of officers.** If a majority of the ballots cast at such election be in favor of the incorporation and the result has been confirmed and approved, the court, or in vacation a judge thereof, shall order the election of a mayor, treasurer, assessor, and council. The commissioners shall give notice for two consecutive weeks of the time and place of holding the election, by publication once each week in a newspaper published and of general circulation in the county where the court is held, and by posting the same in five public places within the limits of such town. At said election the qualified voters residing within the limits of the town shall elect the officers. The election shall be conducted, so far as practicable, in the manner of municipal elections, and the commissioners shall act as judges and clerks of election. [R60,§1037; C73,§§423, 425; C97,§602; S13, §602; C24, 27, 31, 35,§5594.]

Conduct of election, ch 40

5595 **Report—judgment.** The commissioners shall promptly report the results of the election to the court, and it, or in vacation a judge thereof, may confirm and approve the election and report, or set the same aside and order a new election with the same or other commissioners. Upon the confirmation of the election and report, a judgment shall be entered of record, declaring the town duly incorporated and confirming and approving the first election of officers.

Should any officer fail to qualify, the court or judge shall declare the office vacant and appoint some other person to fill the vacancy. [C97, §603; C24, 27, 31, 35,§5595.]

5596 **Record—costs.** The clerk of the court shall enter the proceedings in the matter of the incorporation and election of officers in the complete record book and file a certified copy of the entry in the office of the secretary of state and in the office of the recorder, who shall record the same. The costs of all the proceedings for the incorporation shall be paid by the town if established, otherwise they shall be paid by the petitioners, and judgment shall be entered accordingly. [C97,§603; C24, 27, 31, 35,§5596.]

5597 **Terms of officers.** The officers elected shall hold office until their successors are elected at the general city election held in the second March thereafter, and have qualified, but the term of the assessor shall begin on the first day of January succeeding his election. [R60,§1037; C73,§§390, 425; C97,§§603, 650; S13,§602; C24, 27, 31, 35,§5597.]

DISCONTINUANCE

5598 **How effected.** Upon a petition of the voters equaling twenty-five percent of the number voting at the last preceding municipal election, to the district court of the county wherein a municipal corporation is situated, for the discontinuance of the same, the court shall, thirty days prior to the next regular city or town election, cause notice to be given, that the question of discontinuing such corporation will be submitted to the legal voters thereof at the said election, by publication once a week for two weeks in a newspaper published in said city or town; if none be so published, then in one published in the county or counties in which said city or town is situated, and by posting the same in five public places therein. The proposition submitted shall be: "Shall the proposition to discontinue the corporation of (inserting name) be adopted?" The clerk of the city or town shall cause the proposition to be printed on the ballots. [C73,§§447, 448; C97,§604; C24, 27, 31, 35, §5598.]

5599 **Canvass—judgment.** The vote shall be taken and canvassed in the same manner as other municipal elections, and returns thereof made to the district court. If it finds that a majority of the legal votes cast were for the discontinuance of the incorporation, then a judgment shall be entered discontinuing the same, and, upon the entry of said judgment, its corporate powers shall cease. [C73,§§449, 450; C97,§605; C24, 27, 31, 35,§5599.]

Conduct of election and canvass, ch 40 et seq.
C97,§605, editorially divided

5600 **Indebtedness determined.** The court shall cause notice to be given, in a manner to be prescribed by it, requiring all claims against the corporation to be filed in said court within a time fixed in the notice, not exceeding six months, and all claims not so filed shall be forever barred. At the expiration of the time so fixed, the court shall adjudicate said claims, which shall be treated as denied. Any citizen of such town or city at the time the vote was taken may appear and defend against any claim so filed, or the court may, in its discretion, appoint some person for this purpose, in which event the proceedings shall conform as near as may be, to those prescribed for the prosecution of actions by ordinary proceedings. [C73,§449; C97,§605; C24, 27, 31, 35,§5600.]

5601 **Indebtedness paid—surplus.** The court shall have full power to wind up the affairs of the corporation, to dispose of its property, and to make provision for the payment of all indebtedness thereof, and for the performance of its contracts and obligations, and shall order such taxes levied from time to time as may be requisite therefor, which the board of supervisors shall levy against the property within the corporation. Said taxes shall be collected

by the county treasurer like other taxes, and paid out under the orders of the court, and any surplus shall be paid into the temporary school fund of the district or districts where the same is levied. [C73,§§449, 453; C97,§606; C24, 27, 31, 35,§5601.]

Collection of taxes, ch 346 et seq.

5602 Records deposited. The books, documents, records, papers, and corporate seal of any city or town so discontinued shall be deposited with the county auditor of the county in which the council last held its sessions, for safekeeping and reference in future. All court records of any mayor or other officer shall be deposited with the nearest justice in the township in the county where the office of mayor or other officer is situated, who shall have authority to execute and complete all unfinished business standing on the same. [C73,§451; C97, §607; C24, 27, 31, 35,§5602.]

5603 Notice of discontinuance. When the incorporation of any city or town shall have been discontinued, the clerk of the court shall cause a notice thereof to be published, once each week, for four consecutive weeks in a newspaper published in the county where the court is held, and shall also certify the fact to the secretary of state and to the recorder of the county. [C73, §452; C97,§608; S13,§608; C24, 27, 31, 35,§5603.]

5604 Expenses. All expenses of the election and of winding up the affairs of the corporation shall be paid by it. [C73,§450; C97,§609; C24, 27, 31, 35,§5604.]

CONSOLIDATION

5605 How effected. When any city or town desires to be annexed to another contiguous city or town, the council of each shall appoint three commissioners who shall meet and fix the terms upon which the proposed annexation shall be made, and make report thereof to their respective councils. If both councils approve the proposed terms, they shall by identical ordinances so declare, and therein determine whether the question shall be voted upon at a special election, fixing the date thereof, or at the next regular city election. Thereupon a copy of the ordinances, together with a statement that both councils have adopted the same, shall be published once in a newspaper, if any be published in either of said cities or towns, but when none be so published in one or both of said cities or towns, then in a newspaper published in the county or counties in which said city or town is situated and of general circulation in both cities or towns, and be posted in five public places therein, at least ten days prior to the election specified in the ordinance. [R60,§1044; C73,§432; C97,§612; C24, 27, 31, 35,§5605.]

5606 Election—record. The proposition to be submitted at the election shall be: "Shall the proposition for the annexation of (naming the city or town) to (naming the city or town) be adopted?" If a majority of the votes cast in each city or town is in favor of annexation, the council of each shall, by ordinance, so declare. A certified copy of the whole proceedings for the annexation shall be filed with the clerk of the city or town to which such annexation is made, who shall file a certified copy thereof with the secretary of state, and in the recorder's office of the county, who shall record the same. [R60, §1044; C73,§432; C97,§612; C24, 27, 31, 35, §5606.]

5607 Consolidation complete. When certified copies of the proceedings are so filed, the annexation shall be complete, and the city or town to which the annexation is made shall have the power, and it shall be its duty, to pass such ordinance as will carry into effect such annexation, and thereafter the city or town annexed shall be a part of the city or town to which the annexation is made. [R60,§1045; C73,§433; C97,§613; C24, 27, 31, 35,§5607.]

C97,§613, editorially divided

5608 Enforcement of duty. Any citizen of the annexed town or city may maintain legal proceedings to compel the city or town, and the council thereof, to which annexation is made, to execute such terms and conditions, but such annexation shall not affect or impair any rights or liabilities then existing for or against either of such cities or towns, and they may be enforced as hereinafter provided. [C97,§613; C24, 27, 31, 35,§5608.]

5609 Debts of annexing city. All present indebtedness of the city to which annexation is made shall be paid by such city by a tax to be levied exclusively upon the property subject to taxation within the limits of the same as it existed prior to such annexation, and none of the real estate or property embraced within the limits of the annexed city or town shall ever be subjected, in any way, to the payment of any part of said indebtedness. [C97,§614; C24, 27, 31, 35,§5609.]

C97,§614, editorially divided

5610 Debts of annexed city. The indebtedness of the city or town annexed shall be paid by such city or town; and the council of the city as it exists after annexation is authorized, and it is made its duty, to provide for the payment of such indebtedness by the levy of taxes upon the property subject to taxation within the limits of such city or town so annexed, and to continue such tax from year to year so long as the same shall be necessary; but if such city or town owns any real estate, the fair market value thereof at the time of its annexation shall be credited upon its said indebtedness, and the amount of such credit shall be assumed and paid by such city as it exists after annexation, and such property shall become the property of such city as enlarged. [C97,§614; C24, 27, 31, 35,§5610.]

5611 Actions. Suits to enforce claims or demands existing at the time of annexation against the city or town annexed may be prosecuted or brought against the city or town to which annexation is made, and judgments obtained shall be paid as hereinbefore provided

for the payment of the indebtedness of such annexed city or town. [C97,§614; C24, 27, 31, 35, §5611.]

ANNEXATION OR SEVERANCE

5612 Platted territory. Platted territory adjoining any city or town may be annexed thereto and become a part thereof by proceeding as follows:

1. The council of the city or town desiring to annex adjoining territory may so provide by resolution, therein describing the territory proposed to be annexed and directing the mayor to institute therefor a suit in equity against the owners of such property.

2. The petition shall contain:

a. A description of the entire property proposed to be annexed and of that portion thereof owned by each defendant.

b. The facts constituting the desirability of such annexation.

c. A plat of such territory showing its relation to the corporate limits.

3. If the court finds in favor of the annexation of such territory or any part thereof, it shall enter a decree accordingly, and if not, the petition shall be dismissed. No costs shall be taxed against any defendant who fails to make defense. [C73,§431; C97,§611; C24, 27, 31, 35,§5612.]

Referred to in §§5613, 5616, 5617

5612.1 Notice. Notice of the filing of the petition shall be served by publication in one daily or weekly newspaper published in the city or town once each week for four consecutive weeks and by posting in five public places in the territory desired to be annexed for four weeks; or, if no newspaper is published in the city or town, such reasonable notice shall be given as the court may direct. [C27, 31, 35, §5612-b1.]

Referred to in §§5613, 5616, 5617

5613 Unplatted territory. Territory, not platted, adjoining any city or town may be annexed thereto and become a part thereof by proceeding as follows:

1. The council may provide by resolution adopted at least one month before any regular election, for the annexation of territory described therein.

2. The proposition shall be submitted to the voters at said election in the following form:

"Shall the proposition to annex the territory described in the resolution adopted by the council of the city (or town) of..... on the ..... day of..... be approved?" Notice of the submission of said proposition shall be given by publication in a newspaper of general circulation in said city or town once each week for four consecutive weeks preceding said election.

3. If the proposition is adopted by a majority of those voting thereon, the council shall cause to be filed in the district court a suit in equity against the owners of the property proposed to be annexed describing in the petition such property and attaching thereto a plat thereof showing its location in reference to the limits of such city or town. In case a proposition to annex to any city or town both platted and unplatted territory has heretofore been, or shall hereafter be adopted, both classes of territory may be included in the same suit.

4. Like proceedings shall be had as provided in sections 5612 and 5612.1. [R60,§1043; C73, §430; C97,§§610, 615; S13,§615; C24, 27, 31, 35. §5613.]

5614 Annexation by resolution. In case any territory adjoining any city or town has been platted into tracts of less than ten acres and has been substantially built up and the inhabitants thereof are enabled to secure the benefits of the city or town government in the way of police and fire protection, or may be furnished with light and water by said city or town or under a franchise granted thereby, the council of the city or town may by resolution incorporate such territory into the city or town. [C24, 27, 31, 35, §5614.]

5615 Application for annexation. All the owners of any territory adjoining any city or town may make application, in writing, to the council of such city or town, attaching thereto a plat of such territory showing the situation thereof with reference to the existing limits of such city or town, and if the council thereof, by resolution, assent thereto, such territory shall thereafter be and become a part of such city or town. [R60,§1038; C73,§426; C97,§§617, 621; C24, 27, 31, 35,§5615.]

5616 Petition for annexation. Ten percent of the inhabitants of any platted territory adjoining any city or town may petition the council thereof to have such territory annexed thereto. The council may consent to such annexation or submit the matter to the voters of said city or town, and if the council consent or the proposition carries at the election the proceedings shall be the same as provided in sections 5612 and 5612.1, except that the petitioners shall be plaintiffs and the city or town and all the owners of property in the territory, other than the petitioners, shall be defendants. [R60,§1038; C73, §426; C97,§§617, 621; C24, 27, 31, 35,§5616.]

5617 Severance of territory. Territory may be severed from any city or town by proceeding as follows:

1. A majority of the resident property owners of such territory or the city or town may bring suit in equity in the district court therefor and the proceedings shall so far as applicable be the same as provided in sections 5612 and 5612.1. Notice of suit shall be such as the court may direct.

2. If the court finds that such territory, or any part thereof, shall be severed from any city or town, it shall thereupon appoint three disinterested persons as commissioners to examine into the matter and the equitable distribution of the assets, and equitable distribution and assumption of the liabilities of such city or town which have accrued during the time such territory has been a part thereof, as between such city or town and the severed territory.

3. The commissioners shall receive evidence on the question from the parties interested and submit their findings to the court at the next term thereof and any interested party may file objections thereto and the court shall determine the matter by trial de novo and enter a decree in accordance with the very right of the matter. [R60,§§1048–1052; C73,§§440–444; C97,§§622–626; S13,§622; C24, 27, 31, 35,§5617.]

5618 Filing of records. When any territory has been annexed to or severed from any city or town the clerk thereof shall make and certify a transcript of such part of the records of such city or town as shows the final action of the council and shall file the same for record in the office of the recorder of the county in which the city or town is located and also in the office of the secretary of state. And in like manner the clerk of the district court shall make and file a certified copy of the record of the final action of the court on such proceedings and when such certified copies have been filed the annexation or severance, as the case may be, shall be complete and all persons shall be bound to take notice thereof. [R60,§§1053, 1054; C73,§§445, 446; C97,§627; C24, 27, 31, 35,§5618.]

CHANGE IN NAME

5619 Resolution — notice. The corporate name of any city or town may be changed as follows: The council may, by resolution, propose such change of name, setting forth therein the proposed new name, which shall not be the same as that of any city, town, or post office, existing in the state at the time of the passage of such resolution. The question shall then be submitted to a vote of the qualified electors at the next regular city or town election, or at a special election, as the council may provide. Notice that a change of name is to be voted on at any election shall be published in a newspaper published in said city or town; if none be so published, then in one published in the county or counties in which said city or town is situated. [C97,§628; C24, 27, 31, 35,§5619.]

Village name changes, ch 279

5620 Election. The proposition to be submitted at such election shall be: "Shall the proposition to change the name of (here insert the name of the city or town) to (here insert the proposed name) be adopted?" and the proposition shall be printed and placed upon the ballots, and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the title on elections. [C97,§629; C24, 27, 31, 35,§5620.]

Election procedure, §762 et seq.
C97,§629, editorially divided

5621 Record filed. If a majority of the votes cast is in favor of the proposed change, the clerk of the city or town shall enter upon the records thereof the result of such election, and set forth in such record the new name adopted, as well as the original name thereof, and shall cause to be filed for record a certified copy of the entry so made in the office of the recorder of the county or counties in which such city or town is situated, and in the office of the secretary of state. [C97,§629; C24, 27, 31, 35, §5621.]

Referred to in §5622

5622 Change complete. When certified copies are made and filed as required by section 5621, the change of name shall be complete, and the new name adopted shall be judicially recognized in all subsequent proceedings wherein said city or town may be interested. [C97,§630; C24, 27, 31, 35,§5622.]

CHAPTER 287

ORGANIZATION AND OFFICERS

Certain provisions applicable to special charter cities, §§6717, 6718, 6719, 6757
Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

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5623 Classes of cities—towns—villages. The municipal corporations referred to in this title shall be divided into cities of the first class, cities of the second class, and towns.

1. *First class.* Every municipal corporation now organized as a city of the first class, or having a population of fifteen thousand or over, shall be a city of the first class.

2. *Second class.* Every municipal corporation now organized as a city of the second class, or having a population of two thousand, but not exceeding fifteen thousand, shall be a city of the second class.

3. *Towns.* Every municipal corporation having a population of less than two thousand shall be deemed a town.

4. *Villages.* Town sites platted and unincorporated shall be known as villages. [R60, §§1077, 1078; C73,§§507, 508; C97,§638; C24, 27, 31, 35,§5623.]

5624 Change of class—loss of population. Within six months after the publication of any state or federal census, the executive council shall cause a statement and list of each city or town affected thereby in its class as a corporation to be published in some newspaper at the seat of government and in each city or town, the class of which is changed. No city shall be affected in its classification by a subsequent loss of population, unless, in a city of the second class, it shall have dropped below fifteen hundred, or in a city of the first class, below ten thousand. [R60,§1079; C73,§509; C97,§639; S13, §639; C24, 27, 31, 35,§5624.]

5625 Change of class—ordinances—wards. Before the next election in a city or town after a change of class, the council shall make and publish such ordinances as may be necessary to perfect such organization in respect to the election, duties, and compensation of officers. All assets and property of the corporation shall be held and administered as provided by law for its new class as a corporation. Upon the change of a town to a city, the council shall, for the purpose of holding the first election, divide the same into wards. [R60,§§1079, 1080; C73,§§509, 510; C97,§640; C24, 27, 31, 35,§5625.]

5626 Wards. Cities may be, by the council thereof, divided into wards, new ones created, or the boundaries changed, but in all cases, whether it be the creation of wards or the changing of the boundaries thereof, the same shall be laid off, as nearly as may be, in a rectangular form, conforming the lines to the center of the streets or alleys, and giving to each ward, as far as practicable, an equal population; but in cities of the second class, the number shall not be increased beyond five nor decreased to less than two. [R60,§1092; C73, §520; C97,§641; S13,§641; C24, 27, 31, 35,§5626.]

5627 Elections. Regular city and town elections shall be held on the last Monday in March, and elective officers shall be chosen biennially to succeed officers whose terms expire. The vot-

ing places shall be fixed by the council, at least one polling place for each precinct or ward as the case may be, and the election shall be conducted in the manner provided by law for general elections. [R60,§1130; C73,§501; C97, §642; S13,§646; C24, 27, 31, 35,§5627.]

Duty as to elections, §734

5628 Residence in precinct — exception. Each qualified elector may vote at said election, who, for ten days has been a resident of the precinct in which he offers to vote. Electors who are registered and otherwise qualified and who change residence from the precinct where registered to another precinct within ten days preceding the election, may vote in the precinct where registered except at elections when councilmen are to be elected by the voters of a ward or district. [R60,§1130; C73,§501; C97,§642; C24, 27, 31, 35,§5628.]

Referred to in §727

5629 Tie votes—contesting elections. A tie vote for any city or town office shall be determined as provided in the title on elections. The election of any person to a city or town office may be contested on the same grounds and in the same manner provided for contesting elections to county offices, so far as applicable. The mayor shall be the presiding officer of the court, but if his election is contested, the council shall select one of its members to act in his place. [C97,§§678, 679; C24, 27, 31, 35,§5629.]

Tie vote, §883; contest, ch 47 et seq.

5630 Qualifications of officers. Every officer elected or appointed in a city or town shall be a qualified voter thereof, and every officer elected by any ward or district of a city or town shall reside within the limits of said ward or district. [R60,§§1091, 1093; C73,§§511, 518, 521; C97,§§643, 644; C24, 27, 31, 35,§5630.]

5631 Council — how composed — election. Councils shall be composed in towns, of five councilmen at large, and in cities, except as otherwise provided, of two councilmen at large and one councilman from each ward; but if any city embraces within its limits the whole or part of two or more townships, two of which parts contain one thousand or more electors, only one councilman at large shall be chosen from any one township. [R60,§§1081, 1093; C73,§§511, 521; C97,§§645, 646; S13,§§645, 646; C24, 27, 31, 35,§5631.]

5632 Officers elected at large. In all cities and towns, the mayor, treasurer, and assessor, shall be elected by the entire electorate, and in cities of the first class, where there is no municipal or superior court, the city council by ordinance may provide that a police judge shall be elected by the entire electorate. The mayor, treasurer, and other elected officials except assessors shall take office at twelve o'clock noon on the first Monday after their election. [R60,§§1081, 1084, 1090, 1106; C73,§§390, 511, 514, 517, 532, 535; C97,§§647-649; S13,§§647-649; C24, 27, 31, 35, §5632; 48GA, ch 152,§1.]

44GA, ch 144, §1, editorially divided
Assessor, time of taking office, §7106

5633 Officers appointed by council. In all cities and towns, the council at its first meeting after the biennial election shall appoint a clerk and may appoint a city solicitor, a city engineer, and an auditor. [R60,§§1086, 1093, 1103, 1105; C73,§§515, 522, 532, 534; C97,§651; S13,§651; C24, 27, 31, 35,§5633.]

5633.1 Optional election or appointment. In cities having a population of forty thousand or over and not organized under either chapter 326 or 328, the council may provide by ordinance for the election, by the entire electorate, of the city auditor, solicitor, or engineer. In such cities the council may appoint a police judge if there is no municipal or superior court in the city. [C31, 35,§5633-d1.]

5634 Officers appointed by the mayor. The officers to be appointed by the mayor shall be:

1. A marshal, and such police and other officers as may be provided by ordinance; and in emergencies such special policemen as he may think proper, reporting such appointments to the council at its next regular meeting. Such special appointments shall continue in force until such meeting, unless sooner terminated by the mayor.
2. A health physician.
3. A street commissioner.
4. In cities of the first class, when necessary, a wharfmaster. [R60,§§1086, 1103, 1105, 1106; C73,§§515, 532, 534, 535; C97,§652; S13,§652; C24, 27, 31, 35,§5634.]

5635 Police matrons — appointment — number. In cities having a population of twenty-five thousand, and less than sixty thousand, for each station house provided therein for the detention or imprisonment of women or children under arrest, the mayor may appoint one or more women, residents of the city, as police matrons, who shall be over thirty years of age. The appointees shall be, so far as applicable, subject to the same regulations and restrictions as policemen, and hold their positions during good behavior, unless by reason of age or infirmity they become incapacitated to perform the duties of the position. In cities having a population of sixty thousand or more, and, in cities operating under the manager plan with a population of not less than twenty thousand, there shall be appointed from the civil service list one or more women as police matrons, who shall be over thirty years of age. Such appointees shall be, so far as applicable, subject to the same regulations and restrictions as policemen. [C97,§654; S13,§654; C24, 27, 31, 35, §5635.]

Applicable to special charter cities, §6756.1; see also §6701
Duties, §5659

5636 Other officers. Cities and towns may, by general ordinance, provide for the appointment, by the mayor, of such additional officers, as they may deem necessary, including superintendent of markets, harbor masters, and port wardens, usual and proper for the regulation and control of navigation, trade, or commerce, or needful and proper for the good government of the city

or town, or the due exercise of its corporate powers, and fix their term of office. [R60,§§1095, 1098; C73,§§524, 528; C97,§655; S13,§655; C24, 27, 31, 35,§5636.]

5637 Clerk of police court. The council may provide, by ordinance, for the appointment of a clerk of the police court by the judge thereof, who shall hold his office subject to removal; the appointment or removal, when made, to be entered in the records of the court. [R60, §1116; C73,§542; C97,§656; C24, 27, 31, 35, §5637.]

5638 Removal of officers. All persons appointed to office in any city or town may be removed by the officer or body making the appointment, but every such removal shall be by written order, which shall give the reasons therefor and be filed with the city clerk. [C97,§657; S13,§657; C24, 27, 31, 35,§5638.]

Removal of officers, ch 56; also §§6532, 6539 et seq.

5639 Mayor—powers and duties. In cities and towns, the mayor shall have powers and perform duties as follows:

1. *Executive officer—magistrate.* He shall be a conservator of the peace, and, within the limits of the same, shall have all the powers conferred upon sheriffs to suppress disorders. He shall be the chief executive officer thereof, and it shall be his duty to enforce all regulations and ordinances; he may, upon view, arrest anyone guilty of a violation thereof, or of any crime under the laws of the state, and shall, upon information supported by affidavit, issue process for the arrest of any person charged with violating any ordinance of the city; shall supervise the conduct of all corporate officers, examine into the grounds of complaint made against them, and cause all neglect or violation of duty to be corrected, or report the same to the proper tribunal, that they may be dealt with as provided by law.

2. *Office.* He shall keep an office at some convenient place in the city or town, to be provided by the council, and keep the corporate seal thereof in his charge.

3. *Signature.* He shall sign all commissions, licenses, and permits granted by the authority of the council, and do such other acts as by law or ordinance may require his signature or certificate.

4. *Other duties.* He shall also perform such other duties compatible with the nature of his office as the council may from time to time require.

5. *Presiding officer—vote.* He shall be the presiding officer of the council with the right to vote only in case of a tie.

6. *Report.* He shall, at the first regular meeting of the newly elected council in April, and at such other times as he may deem expedient, report to it concerning the municipal affairs of the city or town, and recommend such measures as to him may seem advisable.

7. *Hold police court.* Until a police judge or judge of superior court shall be elected or appointed and qualifies in cities entitled to elect or appoint such officer, the mayor shall have all the powers and jurisdiction and shall hold the police court in such manner as is required of such judge.

8. *Station houses for women.* In all cities containing a population of twenty-five thousand or more, he shall designate one or more station houses within such city for the detention or imprisonment of all women and children under arrest in said city, and see that provisions are made by which the rooms or cells set apart for them shall be separate from and out of sight of the rooms or cells in which male prisoners are imprisoned. [R60,§§1082, 1085, 1091, 1102, 1105, 1121; C73,§§506, 512, 518, 519, 531, 534, 537, 547; C97,§658; S13,§658; C24, 27, 31, 35,§5639.]

Approval of warrant and expenses, §§1225.04, 1225.05
Enforcement of motor vehicle law, see §5000.06

5640 Clerk—duties. In all cities and towns the clerk shall perform the following duties:

1. Attend all meetings of the council, but in no event have the right to vote on any question before it.

2. Make an accurate record of all proceedings had, rules and ordinances adopted by the council, and the same shall at all times be open to the public.

3. Supply the treasurer with a statement of all warrants issued after each meeting, giving the number and amounts of each.

4. Have the custody of all bylaws and ordinances of the city or town.

5. Perform such duties as may be required by ordinance. [R60,§§1082, 1093; C73,§§512, 522; C97,§659; C24, 27, 31, 35,§5640.]

Clerk local board of health, §2230

5641 Warrants—how drawn. The auditor, clerk, or other officer of cities and towns whose duty it is to draw the warrants thereof, shall not draw any such warrant except upon the vote of the council. [C97,§900; C24, 27, 31, 35,§5641.]

C97,§900, editorially divided. See §7209

5642 List of warrants. The officer drawing such warrants shall, on the first Monday of each month, furnish the council a sworn and complete list of all warrants, and the amount thereof, drawn by him during the preceding month, which list shall state on whose account and the object and purpose for which each warrant was drawn. [C97,§901; C24, 27, 31, 35,§5642.]

Applicable to special charter cities, §6717

5643 Prohibitions as to warrants. All the provisions of sections 5158, 5159, 5255 to 5257, inclusive, shall be applicable to cities and towns, their officers and employees, subject only to such modifications as may be necessary therefor. [C97,§903; C24, 27, 31, 35,§5643.]

5644 Treasurer—general duties. The treasurer of the city or town shall receive all money payable to the city or town, and disburse the same only on warrants drawn and signed by the proper officer, sealed with the city seal, and perform such other duties as may be prescribed by law or ordinance. He shall keep in a book provided by the town a register and description of

all warrants reported to him by the clerk. [R60, §§1103, 1106; C73,§§532, 535; C97,§660; C24, 27, 31, 35,§5644.]

5645 to 5648, inc. Rep. by 45ExGA, ch 6
See §1171.11 et seq.

5649 Monthly returns. He shall make returns monthly, or oftener if required by the council, to the officer drawing such warrants, showing the warrants paid and the amount of principal and interest paid. [C97,§660; C24, 27, 31, 35,§5649.]

5650 Report of financial condition. He shall make a written report under oath to the council at its first regular meeting in each month, showing the financial condition of the city. [C97, §660; C24, 27, 31, 35,§5650.]

5651 Rep. by 44GA, ch 2

5652 Rep. by 41GA, ch 173

5653 Rep. by 44GA, ch 2

5654 Private use of funds. No treasurer shall loan or in any manner use for private purposes any funds coming into his hands as treasurer. [S13,§660-c; C24, 27, 31, 35,§5654.]
Violation—effect, §12893

5654.1 Bond—amount. The bond of the city treasurer shall be in the sum of not to exceed ten thousand dollars. [C35,§5654-g1.]

5655 Expense of bond. If the treasurer request it, the city or town shall pay the reasonable expense of procuring the bond for the city treasurer, at a premium not exceeding one percent per annum of the amount thereof. [S13, §660-d; C24, 27, 31, 35,§5655.]

5656 Assessor—duties—deputies—returns. All assessors elected by cities and towns shall perform the same duties as township assessors. They may appoint such number of deputies as the council shall authorize. In cities of the first class having a population of sixty thousand or over, the board of supervisors of the county shall furnish the assessor with supplies and an office; and said assessor shall appoint such number of deputies as the board of supervisors may authorize, such appointments to be approved by said board. If any city or town is situated in two or more counties, the assessor shall make returns of the assessment to the proper county. [C73,§390; C97,§661; S13,§661; C24, 27, 31, 35, §5656.]

5657 Marshal—duties. The marshal shall be ex officio chief of police and may appoint one or more deputy marshals, who may perform his duties, and who, in cities of the first class, shall be members of the police force. He shall have the supervision and general direction of the police force, and shall be the ministerial officer of the corporation. He shall attend upon the sittings of the mayor's and police court, execute within the county and return all writs and other process directed to him from the mayor's and police court, suppress all riots, disturbances, and breaches of the peace, arrest all disorderly persons in the city or town and all persons committing any offense against the ordinances thereof, and forthwith bring such persons before the proper court for examination or trial. He shall pursue and arrest any person fleeing from justice, and shall diligently enforce all laws, ordinances, and regulations for the preservation of the public welfare and good order, and shall have the same powers and duties as constables in similar cases. [R60,§§1086, 1104, 1106, 1107; C73,§§515, 533, 536, 537; C97,§§653, 662, 663; S13,§652; C24, 27, 31, 35,§5657.]
Approval of warrant and expenses, §§1225.04, 1225.05
Duty as peace officer, §13405.1
Power of constable, §§10629, 10630

5658 Policemen—powers and duties. The officers and members of the police force shall have such powers and perform such duties as may be provided by law or ordinance, and shall have the same powers as marshals to make arrests and suppress riots, disturbances, and breaches of the peace. [R60,§§1096, 1108; C73, §§525, 537; C97,§664; C24, 27, 31, 35,§5658.]

5659 Police matrons. Police matrons shall have charge of all the women and children under arrest, accompanying to court such as may require such aid. They shall be subject to the authority of the marshal and the rules and regulations prescribed by his authority, and in stations, when on duty, shall be subject to the authority of the officers in command. In cities where workhouses are established for the detention of women, or where there are houses of detention, they shall have at all times the right of entering such establishments, and shall visit them whenever in their judgment such visits may be necessary. A suitable place shall be provided for the police matrons, when not on duty, for rest and refreshment. [C97,§665; C24, 27, 31, 35,§5659.]

5660 Other officers. The solicitor, engineer, auditor, physician, superintendent of markets, street commissioner, wharfmaster, harbor master, port warden, and such additional officers as may be provided for, shall have such powers and perform such duties as are prescribed by law or ordinance. [R60.§§1103, 1106; C73,§§532, 535; C97,§666; C24, 27, 31, 35,§5660.]

5661 Statement of supplies. In all cities, each officer or board in charge of any department shall furnish and file in the city clerk's office, thirty days before the beginning of each fiscal year, a sworn detailed statement of the supplies necessary for his or its department during the next fiscal year. [C97,§667; C24, 27, 31, 35,§5661.]
Fiscal year, §5676.1

5662 Executive and legislative functions. All legislative and other powers granted to cities and towns shall be exercised by the councils, except those conferred upon some officer by law or ordinance. All executive functions and powers shall be exercised by the mayor and other of-

ficers and boards, and neither the council nor the members thereof shall exercise any executive function unless expressly conferred by law. [R60,§§1081, 1090, 1091, 1095; C73,§511; C97, §668; S13,§§668, 879-p; C24, 27, 31, 35,§5662.]

5663 City and town councils. City and town councils shall:

1. *Organization—quorum.* On the first Monday after their election, assemble at 12 o'clock noon and organize. A majority of the whole number of members to which the corporation is entitled shall be necessary to constitute a quorum.

2. *Meetings.* Determine the time and place of holding their meetings which shall at all times be open to the public, and in the absence of the mayor or clerk appoint a temporary chairman or clerk, as the case may be, from their own number, which appointment shall be entered of record.

3. *Special meetings.* Hold special meetings when called by the mayor or any three members of the council. Notice thereof shall be given personally or left at the usual place of residence of each member of the council, and a record of the service of notice made by the clerk.

4. *Rules—journal.* Determine the rules of their own proceedings, and cause to be kept a journal thereof which shall be open to public inspection.

5. *Attendance of members.* Have power to compel the attendance of absent members in such manner and under such penalties as they may prescribe.

6. *Seal.* Cause to be provided a seal in the center of which shall be the name of the city or town, and around the margin the words "city seal" or "town seal", as the case may be, which shall be affixed to all transcripts, orders, or certificates which it may be necessary or proper to authenticate.

7. *Election of officers.* Make, viva voce, all appointments or elections of officers, except for the purpose of filling vacancies in offices not filled by election by the council, and a concurrence of a majority of the whole number of members of the council shall be required. On the vote resulting in an election or appointment the name of each member and for whom he voted shall be recorded.

8. *Election for filling vacancies.* Elect by ballot persons to fill vacancies in offices not filled by election by the council, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill the vacancy.

9. *Terms of officers.* Fix by ordinance the terms of service, which shall not exceed two years, of all officers whose terms are not prescribed by law.

10. *Powers of officers.* Prescribe by ordinance the powers to be exercised and duties performed by officers insofar as such powers and duties are not defined by law.

11. *Police force.* Have power to establish a police force and organize the same under the general supervision of the marshal, and to provide one or more station houses.

12. *Custody of women and children.* Appropriate annually in cities having a population of twenty-five thousand inhabitants or more, such sums as may be necessary to secure separate care and confinement in station houses of all women and children under arrest, and for the appointment, salaries, and maintenance of police matrons.

13. *Community civic congress.* In any city or town erecting a soldiers, sailors, and marines memorial building, appoint a community civic congress to serve without compensation, composed of three residents especially fitted for and interested in community work, who may cooperate with the council in all matters pertaining to community improvement, child welfare, social and recreational activities. Such congress may be appointed in any city or town.

14. *Control of finances.* Provide for the management and control of the finances and of the property, real and personal, belonging to the city or town.

15. *Advertise for supplies.* In cities, advertise in at least two newspapers published and of general circulation in the city for two weeks by one insertion in each newspaper per week, for bids for furnishing all supplies for the several departments of the city. The last publication of said advertisement shall be two weeks before the beginning of the fiscal year.

Fiscal year, §5676.1

16. *Appropriations.* Make separate appropriations in cities for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be unlawful for it or any officer, agent, or employee of the city to issue any warrant, enter into any contract, or appropriate any money in excess of the amount thus appropriated during the year for which the appropriation is made. No city shall appropriate in the aggregate an amount in excess of its annual legally authorized revenue, but cities may anticipate their revenues for the year for which appropriation is made, or bond or refund their outstanding indebtedness.

17. *Limitation on appropriations.* In cities over seventy-five thousand population, the city council, at the beginning of the fiscal year, shall compute the amounts to be appropriated from tax funds as follows: No larger amount shall be appropriated by the council for expenditure during the ensuing year out of any tax fund, than ninety-five percent of the amount of taxes levied in each fund including each fund's pro rata share of the moneys and credits tax plus other sources of income as provided in the estimate made in section 370, and plus actual unincumbered balances from the preceding fiscal year. But such total appropriation shall not exceed the amount proposed to be expended in subsection 3 of section 370. Nothing herein shall be construed as limiting the payment of lawful charges for interest and principal on bonds.

1. [R60,§§1081, 1093; C73,§§511, 522; C97, §668; S13,§668; C24, 27, 31, 35,§5663.]

2, 3. [R60,§1095; C73,§524; C97,§668; S13, §668; C24, 27, 31, 35,§5663.]
4, 5. [R60,§1093; C73,§522; C97,§668; S13, §668; C24, 27, 31, 35,§5663.]
6. [R60,§§1047, 1094; C73,§§454, 523; C97, §668; S13,§668; C24, 27, 31, 35,§5663.]
7. [R60,§1134; C73,§493; C97,§668; S13, §668; C24, 27, 31, 35,§5663.]
8. [R60,§1101; C73,§§514, 524; C97,§668; S13,§668; C24, 27, 31, 35,§5663.]
9, 10. [R60,§1095; C73,§524; C97,§668; S13, §668; C24, 27, 31, 35,§5663.]
11. [R60,§1096; C73,§525; C97,§668; S13, §668; C24, 27, 31, 35,§5663.]
12. [C97,§668; S13,§668; C24, 27, 31, 35, §5663.]
13. [C24, 27, 31, 35,§5663.]
14. [R60,§1122; C73,§490; C97,§668; S13, §668; C24, 27, 31, 35,§5663.]
15, 16. [C97,§668; S13,§668; C24, 27, 31, 35, §5663.]
17. [47GA, ch 92,§2.]

Referred to in §5663.1
Council acts as local board of health, ch 107

5663.1 Removal from office for violation. Violation of subsection 17 of section 5663 shall be grounds for removal from office of any councilman who votes for any city expenditure contrary to the provisions of this section and such act shall be punishable as a misdemeanor. [47GA, ch 92,§3.]

Punishment, §12894

5664 Compensation of councilmen. Councilmen in cities of the first class shall be paid an amount prescribed by ordinance, not in excess of two hundred fifty dollars per annum, which shall be in full compensation of all services of such councilmen of every character connected with their official duties, except when acting as members of the board of review, for which service they shall receive not more than two dollars a day for each day when acting as a board of review, to be paid out of the county treasury; and in all other cities and towns they shall receive not to exceed one dollar each for every regular or special meeting, and in the aggregate not exceeding fifty dollars in any one year; but in such cities and towns the members shall be paid in addition to the foregoing, for services as members of the board of review, an amount not exceeding one dollar for each session of not less than three hours, and the compensation for services as members of the board of review shall be paid out of the county treasury. [R60, §1095; C73,§505; C97,§669; S13,§669; C24, 27, 31, 35,§5664.]

5665 Fees of mayor. Mayors of cities and towns, where no salary is provided by ordinance in lieu of fees, shall receive, for holding a mayor's or police court, or discharging the duties of a justice of the peace, the compensation allowed by law for similar services for such officers, to be paid in the same manner. [R60, §§1091, 1121; C73,§§519, 547; C97,§670; C24, 27, 31, 35,§5665.]

Fees of justice, §§10636, 10638

5666 Fees of police judge. The police judge shall be entitled, in all criminal cases prosecuted before him in behalf of the state, to the same fees, to be collected in the same manner, as a justice of the peace in like cases; in prosecutions before him in behalf of the city, to such fees, not exceeding those for services of like nature in state prosecutions, as the council may by ordinance prescribe. [R60,§1118; C73,§544; C97,§671; C24, 27, 31, 35,§5666.]

Fees of justice, §§10636, 10638

5667 Compensation of matrons. Police matrons shall receive not less in any case than the minimum salary paid to policemen in the city in which they are appointed. [C97,§672; C24, 27, 31, 35,§5667.]

5668 Fees of marshal and deputy. The marshal shall receive, in criminal cases arising under ordinances, the same fees as constables receive for similar services, payable from the treasury of the city or town; and in criminal cases arising under the state law, the same fees as constables receive for similar services, payable from the county treasury. In civil proceedings he shall receive the same fees as constables receive for similar services payable in the same way. The deputy marshal shall receive the same fees for services performed as the marshal. [R60,§§1086, 1104, 1107; C73, §§515, 533, 536; C97,§673; C24, 27, 31, 35,§5668.]

Fees of constable, §§10637, 10638

5669 Compensation of assessors and deputies. Town assessors and assessors in cities of the second class, and their deputies, shall receive the same compensation as township assessors, which shall be determined in the same manner and payable from the county treasury.

In cities of the first class having a population of more than twenty-five thousand and less than forty-five thousand the compensation of the assessor shall be eighteen hundred dollars per annum and in those of less population not more than eighteen hundred dollars per annum, or not less than five dollars per day for the time actually employed, to be fixed by the board of supervisors; and that of the deputies not more than five dollars or less than three dollars and fifty cents per calendar day, Sunday excepted, for the time actually employed, to be fixed by the board of supervisors.

In cities under the commission form of government having a population of more than forty-five thousand, and in cities acting under special charter having a population of more than forty-five thousand, the board of supervisors shall fix the compensation of the assessor at twenty-five hundred dollars per annum, and the compensation of not more than two head deputy assessors at eighteen hundred dollars per annum.

In cities under the commission form of government, having a population of more than one hundred twenty-five thousand, the city assessor may appoint six full-time deputies, which appointment shall be approved by the city council and the city council and board of supervisors shall fix the annual compensation of the city

assessor and such deputies, which compensation shall be paid by the county from its general fund.

In cities where extra or special services are to be performed by the assessor, the board of supervisors may by special contract with the assessor determine the compensation to be paid. [C97,§674; S13,§674; C24, 27, 31, 35,§5669.]

Referred to in §6652
Compensation of township assessor, §5573

5670 Salaries in lieu of fees. It may be provided by ordinance that any city or town officer elected or appointed shall receive a salary in lieu of all other compensation; and in such case such officer shall not receive for his own use any fees or other compensation for his services as such officer, but shall collect the fees authorized by law or ordinance, and pay the same as collected, or as prescribed by ordinance, into the city or county treasury, as the case may be. [C97,§675; C24, 27, 31, 35,§5670.]

5671 Compensation of other officers. All officers in any city or town, whose compensation is not fixed by law, shall receive as compensation the fees of the office, or a salary, or both the fees and a salary, as the council shall prescribe.

For all attested certificates and transcripts, other than those ordered by the council, the clerk shall be paid the same fees as are allowed to county officers for like services. [R60,§§1094, 1095, 1098; C73,§§523, 524, 528; C97,§676; C24, 27, 31, 35,§5671.]

5672 Ineligibility—change of compensation. No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, nor shall the emoluments of any city or town officer be changed during the term for which he has been elected or appointed, unless the office be abolished. No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected or appointed, when, during the time, the emoluments of the office have been increased. [R60,§§1091, 1122; C73, §§490, 491, 519; C97, §§668, 677; S13,§668; C24, 27, 31, 35,§5672.]

Similar provision, Constitution, Art. V, §9

5673 Interest in contracts. No officer, including members of the city council, shall be interested, directly or indirectly, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town. [S13,§§668, 879-q; C24, 27, 31, 35, §5673.]

Referred to in §5674
Similar provisions §§180, 275, 3828.101, 3922, 4685, 4686.14, 4755.10, 5361, 5828 6531, 6710, 13324, 13327
S13,§879-q, editorially divided

5674 Free passes or franks. No such officer shall accept or receive, directly or indirectly, from any person, firm, or corporation operating within the said city or town any railway, interurban railway, street railway, gasworks, waterworks, electric light or power plants, telegraph line, or telephone exchange, or other business using a public franchise, any frank, free pass, or ticket, or other service upon terms more favorable than is granted to the public generally, except where, by franchise granted by the municipality to any such person or corporation, any officers of said municipality are granted such privileges as part of such franchise, and except that members of the police and fire departments of any city or town shall be carried without charge. Any violation of the provisions of this or section 5673 shall be a misdemeanor. [S13, §879-q; C24, 27, 31, 35,§5674.]

Punishment, §12894

5675 Accounts. All cities and towns shall establish and keep their accounts so the same shall exhibit a true and detailed statement of all public funds collected, received, and expended on account of such municipality for any purpose whatever, by any and all public officers, employees, or other persons. Such accounts shall show the receipt, use, and disposition of all public property, and the income, if any, derived therefrom, and of all sources of public income and the amount due and received from each source. All receipts, vouchers, and other documents kept, or that may be required to be kept, necessary to prove the validity of every transaction and the identity of every person having any beneficial relation thereto, shall be filed and preserved in the office of the clerk or recorder as the case may be. [S13,§741-a; C24, 27, 31, 35, §5675.]

Applicable to special charter cities, §6719

5676 Separate accounts. Separate accounts shall be kept for every appropriation, showing date and manner of each payment made out of the funds provided by such appropriation, the name and address of each person or corporation to whom paid, and for what purpose paid.

Separate accounts shall be kept for each department, public improvement, or undertaking, and for each public utility owned or operated by the said municipality.

Said separate accounts for each public utility shall show the true and entire cost of the said utility and operation thereof, the amount collected annually by general or special taxation for the services rendered to the public, and the amount and character of the service rendered therefor, and the amount collected annually from private users, if any, for the services rendered to them, and the amount and character of the services rendered therefor. [S13,§741-b; C24, 27, 31, 35,§5676.]

Applicable to special charter cities, §6719

5676.1 Fiscal year. The fiscal year for all cities and towns, and for all departments, boards, and commissions thereof shall begin on the first day of April each year and end on March 31 following. [S13,§1056-a7; C24,§5678; C27, 31, 35,§5676-a1.]

Applicable to special charter cities, §6718

5676.2 Accounting officers—reports. All accounting officers of all boards, commissions,

departments, and offices within the municipality receiving or disbursing public funds shall file with the auditor or clerk within thirty days from the expiration of the municipal fiscal year, a detailed report in writing showing the receipts and disbursements of all funds in the department, board, or commission in question for said fiscal year. [S13,§1056-a7; C24,§5678; C27, 31, 35,§5676-a2.]

Applicable to special charter cities, §6718

5676.3 Penalty. The failure to make the said report shall constitute a misdemeanor. [S13,§1056-a7; C24,§5678; C27, 31, 35,§5676-a3.]

Applicable to special charter cities, §6718
Punishment, §12894

5677 Annual report. Each city or town shall, through its chief accounting and warrant issuing officer, make an annual public report which shall contain an accurate statement in summarized form of all collections made or receipts of the municipality from all sources, all accounts due the public but not collected, and all expenditures for every purpose, and, except as otherwise provided by law, a statement in detail of the cost of operation and income of each public utility operated or owned by the municipality. It shall show in detail the entire public debt of the municipality and the amount of debt which it may under the law contract for the year in which report is made. [S13, §§741-c, 1056-a7; C24, 27, 31, 35,§5677.]

Applicable to special charter cities, §6718

5677.1 Enforcement of duty. The auditor or clerk may institute legal proceedings to enforce the making of said reports. [S13,§1056-a7; C24,§5678; C27, 31, 35,§5677-a1.]

Applicable to special charter cities, §6718

5678 Rep. by 41GA, ch 128

5679 Publication. The annual report shall be published in two newspapers of general circulation in the city or town, or in one if no other is published therein, and if none be published, by posting a copy in three public places within the city or town. [S13,§741-c; C24, 27, 31, 35,§5679.]

Applicable to special charter cities, §6718
Cost of publication, §11106

5680 Report—failure to make. On or before the first day of May of each year, the official making the report for each city or town shall forward to the auditor of state a certified copy of the annual report. If such official fails to file his report with the auditor of state within the time prescribed, the auditor may send an examiner or examiners to make the report and the expenses thereof shall be charged against the delinquent city or town. [S13,§1056-a9; C24, 27, 31, 35,§5680.]

Applicable to special charter cities, §6718

5681 Report—by whom made. It shall be the duty of the auditor or clerk who served in the capacity during the time covered by the report, to prepare and file the same, and if said official has retired from office, the council shall allow him such compensation for preparing the report as may be deemed proper, not to exceed five dollars per day for the days actually employed in such service. [S13,§1056-a9; C24, 27, 31, 35,§5681.]

Applicable to special charter cities, §6718

5682 Publication by state auditor. The auditor of state shall prepare said reports for publication in a separate volume. Said reports shall show under appropriate schedules the total receipts and expenditures, assets and indebtedness, and related data of all cities and towns in the state, together with comments and recommendations respecting desirable changes in the law governing financial administration in municipalities. [S13,§1056-a9; C24, 27, 31, 35, §5682.]

5683 League of municipalities. Cities and towns, including cities under special charter, may pay, out of the general fund, annual dues tc the league of Iowa municipalities, not to exceed the following amounts: Municipalities of less than two hundred population, ten dollars; from two hundred to five hundred population, fifteen dollars; from five hundred to one thousand population, twenty dollars; from one thousand to two thousand population, twenty-five dollars; from two thousand to five thousand population, thirty dollars; from five thousand to ten thousand population, forty dollars; from ten thousand to twenty thousand population, fifty dollars; from twenty thousand to thirty thousand population, sixty dollars; from thirty thousand to forty thousand population, seventy dollars; from forty thousand to fifty thousand population, eighty dollars; from fifty thousand to eighty thousand population, ninety dollars; from eighty thousand to one hundred thousand population, one hundred dollars; and for all over one hundred thousand population, one hundred fifty dollars. In addition they may pay, out of the general fund, the actual expenses of delegates to the annual convention of the league as follows: Less than two thousand population, two delegates; from two thousand to five thousand population, three delegates; from five thousand to twenty thousand population, four delegates; over twenty thousand population, five delegates. [S13, §694-b; C24, 27, 31, 35,§5683; 47GA, ch 155,§1.]

Referred to in §6757

5683.1 Expense of delegate. In no event shall the expense of such delegates exceed five cents a mile, under the limitations now provided by law, and five dollars a day for actual days in attendance and going to and returning from such meeting. [S13,§694-b; C24, 27, 31, 35, §5683; 47GA, ch 155,§2.]

Referred to in §6757

5684 Accounting—reports. The league shall keep and make such accounts and reports as shall be required by the state municipal accounting department, and the same shall be annually checked by said department and published in the volume of municipal accounts. [S13,§694-c; C24, 27, 31, 35,§5684.]

Referred to in §6757

CHAPTER 288

DEPARTMENT OF PUBLICITY, DEVELOPMENT, AND GENERAL WELFARE

5685 Department authorized.
5686 Objects.
5687 Election.
5688 Expenses—funds available.

5685 Department authorized. Any city in this state shall have power to establish by ordinance, upon the terms and conditions hereinafter prescribed, a department under control of the city council, said department to be known as the department of publicity, development, and general welfare, and the mayor, with the approval of the council, shall have power to appoint a superintendent of such department, and may employ such assistants as may be necessary to perform the work of said department, at such compensation as may be fixed by resolution of such city council. [S13,§679-m; C24, 27, 31, 35, §5685.]

5686 Objects. Said department shall be for the purpose of collecting and distributing, by correspondence, advertising, and other means, information relating to the industrial, commercial, manufacturing, residential, educational, and other advantages and resources of such city; and for the purpose of encouraging and promoting the establishment and development of industries and manufacturing, commercial, and other interests in such cities and the increase of population thereof; and for the purpose of investigating, promoting, and doing such things as may be for the general welfare of such city and the inhabitants thereof; provided, however, nothing in this chapter shall be construed as authorizing cities to invest any funds raised by taxation in private enterprises or to pay from such funds any bonuses for same. The duties of the superintendent and other employees of said department shall be such as may be prescribed from time to time by the city council, and they shall be at all times under the supervision and control of the mayor in performing said duties. [S13,§679-n; C24, 27, 31, 35,§5686.]

5687 Election. The said department can only be established upon the approval of sixty percent of the legal voters of said city who shall vote on said question, and such question may be submitted by the council of such city at any general, city, or special election for such purpose, at which election the question submitted shall be: "Shall the city of (naming it) establish a department of publicity, development, and general welfare?" If said question shall be answered in the affirmative by not less than sixty percent of the voters voting thereon, the said department may be established for a period of not to exceed five years from the date of such election. Within one year of the end of such period or at any time thereafter the question may be resubmitted and said department re-established for a like period, provided that not less than sixty percent of the voters thereon vote in favor thereof. [S13,§679-o; C24, 27, 31, 35,§5687.]

5688 Expenses—funds available. The expenses of said department may be defrayed out of any and all funds received by such city from fines and penalties and out of any funds that may be in the treasury of said city, not derived from general taxation nor from special taxes levied for other purposes. [S13,§679-p; C24, 27, 31, 35,§5688.]

Disposal of certain fines, Constitution, Art. IX (2nd div.),§4; §4471

CHAPTER 289

CIVIL SERVICE

Certain provisions applicable to special charter cities, §6758

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5689 Appointment of commission. In cities having a population of eight thousand or over, having a paid fire department or a paid police department, the mayor, with the approval of the council, shall appoint three civil service commissioners who shall hold office, one until the first Monday in April of the second year, one until the first Monday in April of the fourth year, and one until the first Monday in April of the sixth year after such appointment, whose

successors shall be appointed for a term of six years. [SS15,§1056-a32; C24, 27, 31, 35,§5689; 47GA, ch 156,§1.]

40ExGA, SF 155, §1, editorially divided

5690 Qualifications. The commissioners must be citizens of Iowa and residents of the city for more than five years next preceding their appointment, and shall serve without compensation. No person while on said commission, shall hold or be a candidate for any office of public trust. [SS15,§1056-a32; C24, 27, 31, 35,§5690.]

5691 Optional appointment of commission. In cities having a population of less than eight thousand, the city council may, by ordinance, adopt the provisions of this chapter in which case it shall either appoint such commission or provide, by ordinance, for the exercise of the powers and performance of the duties of the commission by the council. Where the city council exercises the powers of the commission the term "commission" as used in this chapter shall mean the city council. [SS15,§1056-a32; C24, 27, 31, 35,§5691; 47GA, ch 156,§2.]

5692 Chairman—clerk—records. The chairman of the commission for each biennial period shall be the member whose term first expires. In cities having a population of more than seventy-five thousand the commission shall appoint an employee in the city clerk's office who is employed under the provisions of this chapter to be clerk of the commission and his duties as such clerk shall have precedence over any additional duties of his regular employment. In all other cities the city clerk shall be clerk of the commission.

The civil service commission shall keep a record of all its meetings and also a complete individual service record of each civil service employee which record shall be permanent and kept up to date.

When duly certified by the clerk of the commission copies of all records and entries or papers pertaining to said record shall be admissible in evidence with the same force and effect as the originals. [SS15,§1056-a32; C24, 27, 31, 35,§5692; 47GA, ch 156,§3.]

5693 Rooms and supplies. The council shall provide suitable rooms in which the commission may hold its meetings and supply the commission with all necessary equipment and a qualified shorthand reporter to enable it properly to perform its duties. [SS15,§1056-a32; C24, 27, 31, 35,§5693; 47GA, ch 156,§4.]

5694 Applicability—exceptions.

1. The provisions of this chapter shall apply to all appointive officers and employees, including deputy clerks and deputy bailiffs of the municipal court, in cities under any form of government having a population of more than fifteen thousand except:

a. City clerk, city solicitor, assistant solicitor, assessor, treasurer, auditor, civil engineer, health physician, chief of police, market master.

b. Laborers whose occupation requires no special skill or fitness.

c. Election officials.

d. Secretary to the mayor or to any commissioner.

e. Commissioners of any kind.

f. Casual employees.

2. In all other cities under any form of government, the provisions of this chapter shall apply only to members of the police and fire departments, except the following persons connected with such departments:

a. Chiefs of police.

b. Janitors, clerks, stenographers, secretaries.

c. Casual employees. [SS15,§1056-a32; C24, 27, 31, 35,§5694; 47GA, ch 156,§5.]

5695 Preference by service. Any person regularly serving in or holding any position in the police or fire department, or a nonsupervisory position in any other department, which is within the scope of this chapter on the date this act [47GA, ch 156] becomes effective* in any city, who has then five years of service in a position or positions within the scope of this chapter, shall retain his position and have full civil service rights therein.

Persons in nonsupervisory positions, appointed without competitive examination, who have served less than five years in such position or positions on said date, shall submit to examination by the commission and if successful in passing such examination they shall retain their positions in preference to all other applicants and shall have full civil service rights therein, but if they fail to pass such examination they shall be replaced by successful applicants.

Provided, that persons who have heretofore been certified by the commission as eligible for appointment to any position in which they are regularly serving on said date, and persons regularly serving on said date in any position with civil service rights by reason of long and efficient service rendered prior to October, 1924, shall retain such position and shall have full civil service rights therein without further examination. Other persons regularly serving in supervisory positions in departments other than police or fire on the date this act [47GA, ch 156] becomes effective shall be eligible for appointment to said positions after qualifying in competitive examination.

Provided, further, however, that nothing in this section shall apply to any person temporarily acting in a position regularly held by another, or in a vacancy, except to establish his rights in his own regular position. [SS15, §1056-a32; C24, 27, 31, 35,§5695; 47GA, ch 156. §6.]

*Effective date, April 16, 1937

5696 Original entrance examination — appointments. The commission shall, during the month of April of each year, and at such other times as shall be found necessary under such rules, including minimum and maximum age limits, as shall be prescribed and published in advance by the commission and posted in the city hall, hold examinations for the purpose of

determining the qualifications of applicants for positions under civil service, other than promotions, which examinations shall be practical in character and shall relate to such matters as will fairly test the mental and physical ability of the applicant to discharge the duties of the position to which he seeks appointment. Provided, however, that such physical examination of applicants for appointment to the positions of policeman, policewoman, police matron or fireman shall be held under the direction of and as specified by the boards of trustees of the fire or police retirement systems established by section 6326.07.

All appointments to such positions shall be conditional upon a probation period of not to exceed six months, during which time the appointee may be removed or discharged from such position by the appointing person or body without the right of appeal to the commission. Continuance in the position after the expiration of such probationary period shall constitute a permanent appointment. [SS15,§1056-a32; C24, 27, 31, 35,§5696; 47GA, ch 156,§7.]

5696.1 Promotional examinations — promotions. The commission shall, during the month of April of each second year, and at such other times as shall be found necessary, under such rules as shall be prescribed and published in advance by the commission, and posted in the city hall, hold competitive promotional examinations for the purpose of determining the qualifications of applicants for promotion to a higher grade under civil service, which examinations shall be practical in character, and shall relate to such matters as will fairly test the ability of the applicant to discharge the duties of the position to which he seeks promotion.

Hereafter, all vacancies in the civil service grades above the lowest in each department shall be filled by promotion of subordinates when such subordinates qualify as eligible, and when so promoted, they shall hold such position with full civil service rights therein. [C31, 35, §5696-d1; 47GA, ch 156,§8.]

5697 Preferences. In all examinations and appointments under the provisions of this chapter, honorably discharged soldiers, sailors, or marines of the regular or volunteer army or navy of the United States shall be given the preference, if otherwise qualified. [SS15, §1056-a32; C24, 27, 31, 35,§5697.]

Soldiers preference law, ch 60

5698 Names certified—temporary appointment. The commission shall, within ninety days after the beginning of each competitive examination for original appointment or for promotion, certify to the city council a list of the names of the ten persons who qualify with the highest standing as a result of each examination for the position they seek to fill, or such number as may have qualified if less than ten, in the order of their standing, and all newly created offices or other vacancies in positions under civil service which shall occur before the beginning of the next examination for such positions shall be filled from said lists, or from the preferred list existing as provided for in case of diminution of employees, within thirty days. Preference for temporary service in civil service positions shall be given those on such lists.

Except where such preferred list exists, persons on the certified eligible list for promotion shall hold preference for promotion until the beginning of a new examination, but in no case shall such preference continue longer than two years following the date of certification, after which said lists shall be canceled and no promotion to such grade shall be made until a new list has been certified eligible for promotion.

When there is no such preferred list or certified eligible list, or when the eligible list shall be exhausted, the person or body having the appointing power may temporarily fill a newly created office or other vacancy only until an examination can be held and the names of qualified persons be certified by the commission, and such temporary appointments are hereby limited to ninety days for any one person in the same vacancy, but such limitation shall not apply to persons temporarily acting in positions regularly held by another. Any person temporarily filling a vacancy in a position of higher grade for twenty days or more, shall receive the salary paid in such higher grade. [SS15,§1056-a32; C24, 27, 31, 35,§5698; 47GA, ch 156,§9.]

5698.1 Seniority. For the purpose of determining the seniority rights of civil service employees, seniority shall be computed, beginning with the date of appointment to or employment in any positions for which they were certified or otherwise qualified and established as provided in this chapter, but shall not include any period of time exceeding sixty days in any one year during which they were absent from the service except for disability.

In the event that a civil service employee has more than one classification or grade, the length of his seniority rights shall date in the respective classifications or grades from and after the time he was appointed to or began his employment in each classification or grade. In the event that an employee has been promoted from one classification or grade to another, his civil service seniority rights shall be continuous in any department grade or classification that he formerly held.

A list of all civil service employees shall be prepared and posted in the city hall by the civil service commission on or before July 1 of each year, indicating the civil service standing of each employee as to his seniority. [47GA, ch 156,§10.]

Referred to in §§5699, 5712

5699 Chief of police and chief of fire department. The chief of the fire department shall be appointed from the chief's civil service eligible list and shall hold full civil service rights as chief, and the chief of the police department shall be appointed from the active members of the department who hold civil service seniority rights as patrolmen and have had five years service in the department, but this shall not apply to any person holding the office of chief of police

in any city on the date this act becomes effective in such city during his term of office as chief which may include successive reappointments thereto. Any such chief of police, having ten or more years service, shall be entitled to civil service rights as patrolman for the period of such service as chief with continuing seniority determined as provided in section 5698.1.

In cities under the commission plan of government the superintendent of public safety, with the approval of the city council, shall appoint the chief of the fire department and the chief of the police department. In cities under the city manager plan the city manager shall make such appointments, and in all other cities such appointments shall be made by the mayor. [C24, 27, 31, 35,§5699; 47GA, ch 156,§11.]

5699.1 Civil service status of chief of police. A police officer under civil service may be appointed chief of police without losing his civil service status, and shall retain, while holding the office of chief, the same civil service rights he may have had immediately previous to his appointment as chief, but nothing herein shall be deemed to extend to such individual any civil service right upon which he may retain the position of chief. [C27, 31, 35,§5699-a1.]

5699.2 Appointing powers. All appointments or promotions to positions within the scope of this chapter other than those of chief of police and chief of fire department shall be made:

In cities under the commission form of government, by the superintendents of the respective departments, with the approval of the city council; in cities under the city manager plan, by the city manager; in all other cities with the approval of the city council, and in the police and fire departments by the chiefs of the respective departments; and in the case of deputy clerks or deputy bailiffs of the municipal court, such appointments shall be made by the clerk or bailiff thereof, respectively.

All such appointments or promotions shall promptly be reported to the clerk of the commission by the appointing officer. [SS15,§1056-a32; C24, 27, 31, 35,§5698; 47GA, ch 156,§12.]

5700 Qualifications. All appointive officers and employees of cities shall be selected with reference to their qualifications and fitness and for the good of the public service, and without reference to their political faith or party allegiance. [SS15,§1056-a32; C24, 27, 31, 35,§5700.]

5701 Employees under civil service—qualifications. Except as otherwise provided, no person shall be appointed or employed in any capacity in the fire or police department, or any department which is governed by the civil service, until such person shall have passed a civil service examination as provided in this chapter, and has been certified to the city council as being eligible for such appointment; provided, however, that in cases of emergency, in which the peace and order of the city is threatened by reason of fire, flood, storm, or mob violence, making additional protection of life and property necessary, in which case the person having the appointing power may deputize additional persons, without examination, to act as peace officers until such emergency shall have passed. In no case shall any person be appointed or employed in any capacity in the fire or police department, or any department which is governed by civil service, unless such person:

1. Is a citizen of the United States and has been a resident of the city for more than one year, but such residence in the city shall not be a necessary qualification for appointment as chief of fire department.
2. Is of good moral character.
3. Is able to read and write the English language.
4. Is not a liquor or drug addict.
5. Has not been convicted of a felony.
6. Has not borne arms against the United States government.
7. Has not claimed exemption from military service on account of being a conscientious objector. [SS15,§1056-a32; C24, 27, 31, 35,§5701; 47GA, ch 156,§13.]

5702 Removal, demotion, or suspension. No person holding civil service rights as provided in this chapter shall be removed, demoted, or suspended arbitrarily, except as otherwise provided in this chapter, but may be removed, demoted, or suspended after a hearing by a majority vote of the civil service commission, for neglect of duty, disobedience, misconduct, or failure to properly perform his duties. [SS15, §1056-a32; C24, 27, 31, 35,§5702; 47GA, ch 156, §14.]

5703 Removal or discharge of subordinates. The person having the appointing power as provided in this chapter, or the chief of police and the chief of the fire department may peremptorily suspend, demote, or discharge any subordinate then under his direction, for neglect of duty, disobedience of orders, misconduct or failure to properly perform his duties.

Chiefs of police and fire departments of cities under the commission plan shall report suspensions, demotions, or discharges made by them to the superintendent of public safety within twenty-four hours thereafter.

In cities under the manager plan, such report shall be made to the manager, unless the suspension, demotion, or discharge is made by him, in which case he shall report the same to the city council.

In other cities, the report shall be made to the mayor.

Such report shall be in writing, stating the reasons for such suspension, demotion, or discharge, and a copy thereof shall promptly be given to the clerk of the commission. The person or body to whom the report is made shall affirm or revoke such suspension, demotion, or discharge, according to the facts and merits of the case. [SS15,§1056-a32; C24, 27, 31, 35,§5703; 47GA, ch 156,§15.]

5704 Appeal. If there is an affirmance of the suspension, demotion or discharge of any person

holding civil service rights, he may, within twenty days thereafter, appeal therefrom to the civil service commission. If the suspension, demotion, or discharge is not affirmed within five days the person who suspended, demoted, or discharged such officer or employee may in like manner appeal. [SS15,§1056-a32; C24, 27, 31, 35,§5704; 47GA, ch 156,§16.]

5705 Notice of appeal. If the appeal be taken by the person suspended, demoted, or discharged, notice thereof, signed by the appellant and specifying the ruling appealed from, shall be filed with the clerk of commission; if by the person making such suspension, demotion, or discharge, such notice shall also be served upon the person suspended, demoted, or discharged. [SS15,§1056-a32; C24, 27, 31, 35,§5705; 47GA, ch 156,§17.]

5706 Charges. Within five days from the service of such notice of appeal, the person or body making the ruling appealed from shall file with the body to which the appeal is taken a written specification of the charges and grounds upon which the ruling was based. If such charges are not so filed the person suspended or discharged may present the matter to the body to whom the appeal is to be taken by affidavit, setting forth the facts, and such body shall forthwith enter an order reinstating the person suspended or discharged for want of prosecution. [SS15,§1056-a32; C24, 27, 31, 35,§5706.]

5707 Time and place of hearing. Within ten days after such specifications are filed, the commission shall fix the time, which shall be not less than five nor more than twenty days thereafter, and place for hearing the appeal and shall notify the parties in writing of the time and place so fixed, and the notice shall contain a copy of the specifications so filed. [SS15,§1056-a32; C24, 27, 31, 35,§5707; 47GA, ch 156,§18.]

5708 Oaths—books and papers. The presiding officer of the commission or the council, as the case may be, shall have power to administer oaths in the same manner and with like effect and under the same penalties as in the case of magistrates exercising criminal or civil jurisdiction. The council or commission shall cause subpoenas to be issued for such witnesses and the production of such books and papers as either party may designate. The subpoenas shall be signed by the chairman of the commission or mayor, as the case may be. [SS15,§1056-a32; C24, 27, 31, 35,§5708.]

5709 Contempt. In case a witness is duly subpoenaed and refuses to attend, or in case a witness appears and refuses to testify or to produce required books or papers, the official body hearing the appeal shall, in writing, report such refusal to the district court of the county or to any judge thereof, and said court or judge shall proceed with said person or witness as though said refusal had occurred in a proceeding legally pending before said court or judge. [C24, 27, 31, 35,§5709.]

Contempts, ch 536

5710 Public trial. The trial of all appeals shall be public, and the parties may be represented by counsel. [SS15,§1056-a32; C24, 27, 31, 35,§5710.]

5711 Jurisdiction—attorney—decision. The civil service commission shall have jurisdiction to hear and determine all matters involving the rights of civil service employees, and may affirm, modify, or reverse any case on its merits.

The city attorney or solicitor shall be the attorney for the commission or when requested by the commission shall present any matters concerning civil service employees to the commission.

If the appeal is taken by a suspended, demoted, or discharged employee and reversed, he shall be reinstated as of the date of his suspension, demotion, or discharge, and shall be entitled to such compensation as the body having jurisdiction may determine. [SS15,§1056-a32; C24, 27, 31, 35,§5711; 47GA, ch 156,§19.]

5712 Employees—number diminished. Whenever the public interests may require a diminution of employees in any classification or grade under civil service, the city council, by resolution and acting in good faith, and after notifying the commission of such action, may either:

1. Abolish the office and remove the employee from his classification or grade thereunder, or

2. Reduce the number of employees in any classification or grade by suspending the necessary number.

In case it thus becomes necessary to so remove or suspend any such employees, the persons so removed or suspended shall be those having seniority of the shortest duration in the classifications or grades affected, and such seniority shall be computed as provided in section 5698.1 for all persons holding seniority in the classification or grade affected, regardless of their seniority in any other classification or grade, but any such employee so removed from any classification or grade shall revert to his seniority in the next lower grade or classification; if such seniority is equal, then the one less efficient and competent as determined by the person or body having the appointing power shall be the one affected.

In case of such removal or suspension, the civil service commission shall issue to each person so affected a certificate showing his comparative seniority or length of service in each classification or grade from which he is so removed and the fact that he has been honorably so removed, and his name shall be carried for a period of not less than three years after such suspension or removal, on a preferred list and all appointments or promotions made during said period to his former duties in such classification or grade shall be made in the order of greater seniority from such preferred lists. [S13,§679-h; C24, 27, 31, 35,§5712; 47GA, ch 156, §20.]

Section 5712-d1, code 1935, repealed by 47GA, ch 156, §21

5713 Campaign contributions. No officer or employee under civil service shall, directly or indirectly, contribute any money or anything of value, to any candidate for nomination or election to any office, or to any campaign or political committee, or take any active part in any political campaign except to cast his vote and to express his personal opinion privately, nor shall any such candidate or committee solicit such contribution or active political support from any such officer or employee. Any person violating any provision of this section shall pay a fine of not less than twenty-five dollars or more than one hundred dollars, or be imprisoned in the county jail not to exceed thirty days. [SS15,§1056-a32; C24, 27, 31, 35, §5713; 47GA, ch 156,§22.]

5713.1 Penalty. The provisions of this chapter shall be strictly carried out by each person or body having powers or duties thereunder, and any act or failure to act tending to avoid or defeat the purposes of such provisions is hereby prohibited, and shall be punishable as a misdemeanor. [47GA, ch 156,§23.]

Punishment, §12894
Constitutionality, 47GA, ch 156, §24

CHAPTER 290

ORDINANCES

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5714 Power to pass. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days. [R60, §§1071–1073; C73,§482; C97,§680; C24, 27, 31, 35,§5714.]

Referred to in §5926
Imprisonment, §5737
Similar section, §6720

5715 General requirements. No ordinance shall contain more than one subject, which shall be clearly expressed in its title. An ordinance revising or amending an ordinance or section thereof shall specifically repeal the ordinance or section amended or revised, and set forth in full the ordinance or section as amended or revised. When a city or town shall make a complete revision of its ordinances by rearrangement and grouping of the same under appropriate titles, parts, chapters, and sections, the enactment of said revision of ordinances, as so rearranged and grouped, shall be considered a sufficient compliance with the provisions of this section. [R60,§1122; C73,§489; C97,§681; C24, 27, 31, 35,§5715.]

Similar provision, Constitution, Art. III, §29

5716 Reading. Ordinances of a general or permanent nature and those for the appropriation of money shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rule. [R60, §1122; C73,§489; C97,§682; C24, 27, 31, 35, §5716.]

5717 Majority vote. No resolution or ordinance for any of the purposes hereinafter set forth, except as specifically provided by law, shall be adopted without a concurrence of a majority of the whole number of members elected to the council, by call of the yeas and nays which shall be recorded:

1. To pass or adopt any bylaw or ordinance.
2. To pass or adopt any resolution or order to enter into a contract.
3. To pass or adopt any ordinance or resolution for the appropriation or payment of money. In cities all money shall be appropriated by ordinance, but in towns it may be appropriated by resolution.
4. To direct the opening, straightening, or widening of any street, avenue, highway, or alley.
5. To direct the making of any improvement which will require proceedings to condemn private property.
6. To direct the repair of any street improvement or sewer, the cost of which is to be assessed upon property or against the owners thereof. [R60,§§1122, 1134, 1135; C73,§§466, 489, 493, 494; C97,§§683, 684, 793; S13,§§683, 693; C24, 27, 31, 35,§5717.]

5718 Signing — passing over veto. The mayor shall sign every ordinance or resolution passed by the council before the same shall be in force, and, if he refuses to sign any such ordinance or resolution, he shall call a meeting of the council within fourteen days thereafter and return the same, with his reasons therefor. If he fails to call the meeting within the time fixed above, or fails to return the ordinance or resolution with his reasons as herein required, such ordinance or resolution shall become operative without such signature, and the clerk shall record it in the ordinance book, with a minute of the facts making it operative. Upon the

return of any such ordinance or resolution by the mayor to the council, it may pass the same over his objections, upon a call of the yeas and nays, by not less than a two-thirds vote of the council, and the clerk shall certify on said ordinance or resolution that the same was passed by a two-thirds vote of the council, and sign it officially as clerk. [C97,§685; C24, 27, 31, 35, §5718.]

Similar provision, Constitution, Art. III, §16

5719 **Recording.** All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be authenticated by the signatures of the presiding officer of the council and the clerk. Immediately following the record of every ordinance, the clerk shall append a certificate, stating therein the time and manner of publication thereof, which certificate shall be presumptive evidence of the facts therein stated. [R60,§1133; C73,§492; C97,§686; C24, 27, 31, 35,§5719.]

5720 **Publication.** All ordinances of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published in some newspaper published and of general circulation in the city or town; but if there be no such newspaper, such ordinances may be published in a newspaper designated by the council and having a general circulation in such city or town, or by posting copies thereof in three public places therein, one of which shall be at the mayor's office. When the ordinance is published in a newspaper it shall take effect from and after its publication; when published by posting, it shall take effect ten days thereafter. It shall be a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture, to show that no such publication was made. [R60,§1133; C73,§492; C97,§686; C24, 27, 31, 35,§5720.]

Referred to in §5721

5721 **Book form.** When any city or town shall cause or has heretofore caused its ordinances to be published in book or pamphlet form, such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the dates mentioned or provided for therein, in all courts and places, without further proof. When the ordinances are so published, it shall not be necessary to publish them in the manner provided for in section 5720. [C97,§687; C24, 27, 31, 35,§5721.]

5721.1 **Notice of revision.** When a town revises its ordinances, it shall file a typewritten copy of the revision in the office of the town clerk and publish a notice once each week for three consecutive weeks in a newspaper published in the town, stating that its ordinances have been revised and that a copy of the revision is on file in the clerk's office for public inspection. The notice shall give the number and title of each ordinance. In case no newspaper is published in the town, the town clerk shall post the notice in three public places within the town. [C27, 31, 35,§5721-a1.]

5722 **Proceedings published or posted.** Immediately following a regular or special meeting of the city or town council, the clerk shall prepare a condensed statement of the proceedings of said council, including the list of claims allowed and from what funds appropriated, and cause the same to be published in one or more newspapers of general circulation, published in said city or town; provided, however, that in cities and towns in which no newspaper is published, such statement and list of claims shall be posted in at least three public places on the business streets of said city or town. [SS15,§687-a; C24, 27, 31, 35,§5722.]

5723 **Cost of publishing.** The compensation allowed each newspaper for such publication shall not exceed one-half of the legal fee provided by statute for the publication of legal notices. [S13,§687-b; C24, 27, 31, 35,§5723.]

Fees for publication, §11106

5724 **Certification to county recorder.** Immediately after the passage by the city council of an ordinance or resolution establishing any restricted district, building lines, or fire limits, the city clerk shall certify such ordinance or resolution and plat of said district to the county recorder of the county in which the city is situated. [C24, 27, 31, 35,§5724.]

Referred to in §5726
Applicable to special charter cities, §6722

5725 **Recordation.** Whenever such ordinance or resolution shall have been certified to the county recorder, then he shall record the same in the miscellaneous record or other book provided for special records. [C24, 27, 31, 35,§5725.]

Applicable to special charter cities, §6722

5726 **Index.** The county recorder shall index, in the appropriate records, the said ordinance or resolution and the plat filed in accordance with the provisions of section 5724. [C24, 27, 31, 35,§5726.]

Applicable to special charter cities, §6722

5727 **Fees.** In no case shall it be the duty of the county recorder to make the records herein designated except and until the usual and customary fees for such work have been paid into his hands. [C24, 27, 31, 35,§5727.]

Applicable to special charter cities, §6722

CHAPTER 291

MAYORS' AND POLICE COURTS

5728 Police court.
5729 Clerk as counsel.
5730 Jurors.
5731 Jurisdiction of courts.
5732 Jurisdiction of mayor.
5733 Jurisdiction of justice of peace.
5734 Transfer of case—fees.
5735 Procedure—appeal—judicial notice.
5736 Fines recovered by action.
5737 Commitment.

5728 Police court. In cities of the first class wherein there is no municipal or superior court there shall be a police court which in all criminal actions shall have the jurisdiction of a justice of the peace court and a mayor's court. It shall be a court of record, and have a seal to be provided by the council, with the name of the state in the center and the style of the court around the margin. It shall be held in suitable rooms to be provided by the city, and shall always be open for business. [R60,§§1116, 1117, 1119; C73,§§543, 545; C97,§688; C24, 27, 31, 35, §5728.]

5729 Clerk as counsel. The clerk of the police court shall not be in any way concerned as counsel or agent in the prosecution or defense of any person before such court. [R60,§1116; C73,§542; C97,§689; C24, 27, 31, 35,§5729.]

5730 Jurors. Provisions shall be made by ordinance for selecting, summoning, and impaneling jurors in the police court, who shall have the qualifications of jurors as provided by law, and for all other matters touching said court that may tend to make it efficient. [R60,§§1116, 1119; C73,§§542, 545; C97,§690; C24, 27, 31, 35,§5730.]

Qualifications, §10842

5731 Jurisdiction of courts. In cities having a superior, municipal, or police court, such court shall have exclusive jurisdiction of all actions or prosecutions for violation of city ordinances. [C97,§691; S13,§691; C24, 27, 31, 35,§5731.]

40GA, ch 257, §2, editorially divided

5732 Jurisdiction of mayor. In other cities and towns, the mayor shall have exclusive jurisdiction of all actions or prosecutions for violations of city or town ordinances, and shall have, in criminal matters, the jurisdiction of a justice of the peace, coextensive with the county, and in civil cases, the jurisdiction within the city or town that a justice of the peace has within the township. [R60,§§1085, 1102, 1105; C73,§506; C97,§691; S13,§691; C24, 27, 31, 35,§5732.]

5733 Jurisdiction of justice of peace. If the mayor or judge of the superior, municipal, or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold court in criminal cases, and receive the statutory fees, to be paid by the city or county as the case may be. [C97,§691; S13,§691; C24, 27, 31, 35,§5733.]

Justice fees, §10636

5734 Transfer of case—fees. When an information is filed before the mayor for the violation of an ordinance of the city or town, he may, upon his own motion only, at any time before trial, transfer the case for further proceedings to any justice of the peace court within such city or town, and such justice of the peace shall have jurisdiction thereof to the same extent and with the same power as the mayor. The fees taxable after the transfer of the case, fixed by ordinance, shall be paid by the city or town to such justice. [R60,§1105; C73,§544; C97,§691; S13,§691; C24, 27, 31, 35,§5734.]

5735 Procedure — appeal — judicial notice. The proceedings before a mayor or a police court shall be, as far as applicable, in accordance with the law regulating similar proceedings before a justice of the peace, unless otherwise provided; but there shall be no change of venue in actions or prosecutions under ordinances, and the trial shall be by the court without a jury, except on appeal; appeals and writs of error shall be taken from the mayor or the police court in the same time and manner, and subject to the same restrictions. If a city or town is situated in two or more counties, the appeal or writ of error shall be taken to or in the district court of the county in which the mayor's court or police court is held. On the hearing of such appeal, or writ of error, the court shall take judicial notice of the ordinances of the city or town. [R60,§§1085, 1102, 1105, 1120, 5105; C73, §§506, 546, 4707; C97,§692; C24, 27, 31, 35, §5735.]

Civil procedure in general, ch 474
Criminal procedure in general, ch 620 et seq.

5736 Fines recovered by action. Fines and penalties may in all cases, and in addition to any other mode provided, be recovered by action before a justice of the peace or other court of competent jurisdiction, in the name of the proper municipal corporation, for its use. In any such action, where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title and the date of its adoption or passage, and showing as near as may be, the facts of the alleged violation. [R60,§1074; C73,§483; C97,§693; C24, 27, 31, 35, §5736.]

5737 Commitment. Whenever a fine and costs imposed for the violation of any ordinance are not paid, the person convicted may, by the court having jurisdiction of the case, be committed to jail until the fine and costs are paid, not to exceed thirty days. [R60,§1100; C73, §484; C97,§694; C24, 27, 31, 35,§5737.]

CHAPTER 292

GENERAL POWERS

Chapter applicable to special charter cities, §6759

5738 Bodies corporate—name—authority.
5739 Nuisances—action to abate.
5740 Inflammable junk.
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5742 Power to regulate.
5743 Power to regulate and license.
5744 Power to restrain and prohibit.
5745 Power to regulate, license, or prohibit.
5746 Power to establish and regulate.
5747 Dairy herds and milk.
5748 Tuberculin test.
5749 Conflict with state law.
5750 Burials—cemeteries—crematories.
5751 Filling or draining lots.
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5753 Pawnbrokers and junk dealers.
5754 Penalty—personal liability.
5755 Numbering of buildings.
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5757 Building lines.
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5760 Fires—electric apparatus—fire limits.
5761 Electric installation.
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5764 Gunpowder—combustibles.
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5766 Fire department.
5766.1 Jurisdiction outside limits—petition.
5766.2 Joint maintenance.
5766.3 Fire schools—delegates—expenses.
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5768.1 Market charges.
5769 Wharves, docks, and piers.
5770 Ferries.
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5772 Jail—station house.
5773 City hall.
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5779 Board—when not necessary.
5780 Expenses—compensation.
5781 Examinations—license—fee.
5782 Term of license.
5783 Definition of terms.
5784 Sanitary toilets.
5785 Action by local board of health.
5786 Special assessment.

5738 Bodies corporate — name — authority. Cities and towns are bodies politic and corporate, under such name and style as may be selected at the time of their organization, with the authority vested in the mayor and a common council, together with such officers as are in this title mentioned or may be created under its authority, and shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein, and they may sue and be sued, contract and be contracted with, acquire and hold real and personal property, and have a common seal. [C51,§664; R60,§§1047, 1056, 1057, 1090, 1094, 1095; C73,§§454–456, 517, 523, 524; C97,§695; C24, 27, 31, 35,§5738.]

Right to bid under execution sale, ch 449

5739 Nuisances—action to abate. They shall have power to prevent injury or annoyance from anything dangerous, offensive, or unhealthful; to cause any nuisance to be abated, and to provide for the assessment of the cost thereof to the property. They may prohibit any public or private nuisance, and may maintain actions in equity to restrain and abate any nuisance. [R60,§§1057, 1096; C73,§§456, 526; C97,§696; S13,§§696, 713-b; C24, 27, 31, 35,§5739.]

Nuisances in general, ch 528

5740 Inflammable junk. The depositing or storing of inflammable junk, such as old rags, rope, cordage, rubber, bones, and paper, by dealers in such articles, within the fire limits of any city, unless it be in a building of fireproof construction, is a public nuisance. [C24, 27, 31, 35, §5740.]

5741 Smoke. The emission of dense smoke in cities of fifteen thousand inhabitants or over is a nuisance and such cities may provide the necessary rules for smoke inspection. [S13, §§713-a,-b; C24, 27, 31, 35,§5741.]

5742 Power to regulate. They shall have power to regulate:

1. *Slaughterhouses.* The operation of packing houses and slaughterhouses, renderies, tallow chandleries, soap factories, bone factories, tanneries, and manufactories of fertilizers and chemicals.

State regulation, chs 131, 133

2. *Parades.* Parades, by providing that before any association, company, society, order, exhibition, or aggregation of persons shall parade or march upon their streets, they shall first obtain from the mayor a permit, to be issued without charge, which shall state the time, manner, and condition of such parade or march.

1. [R60,§§1057, 1096; C73,§456; C97,§696; S13,§696; C24, 27, 31, 35,§5742.]

2. [R60,§1057; C73,§456; C97,§705; C24, 27, 31, 35,§5742.]

5743 Power to regulate and license. They shall have power to regulate and license:

1. *Hotels.* Hotels, restaurants, and eating houses.

State regulation, ch 133

2. *Engineers.* Engineers of stationary engines, and provide for their examination.

3. *Peddlers.* Peddlers, house movers, billposters, itinerant doctors, itinerant physicians and surgeons, junk dealers, scavengers, pawn-

brokers, and persons receiving actual possession of personal property as security for loans, with or without a mortgage or bill of sale thereon.

State regulation of itinerant physicians, §2511 et seq.
State regulation of chattel loans, ch 419.1

4. *Billboards.* The construction, location, and maintenance of billboards.

State regulation, §4844 et seq.

5. *Sales.* Sales of auctioneers, bankrupt and dollar stores, and the like, and those of transient merchants, and to define by ordinance who shall be considered transient merchants; but the exercise of such power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or any other person required by law to sell real or personal property.

1. [R60,§1063; C73,§463; C97,§700; S13,§700; C24, 27, 31, 35,§5743.]
2. [S13,§700; C24, 27, 31, 35,§5743.]
3. [C73,§462; C97,§700; S13,§700; C24, 27, 31, 35,§5743.]
4. [S13,§700-b; C24, 27, 31, 35,§5743.]
5. [R60,§1063; C73,§§462, 463; C97,§700; S13, §700; C24, 27, 31, 35,§5743.]

5744 **Power to restrain and prohibit.** They shall have power to restrain and prohibit:

1. *Barbed wire.* The use of barbed wire to inclose land within the corporation, and provide for the removal of such wire.

2. *Tainted provisions.* The sale of tainted or unsound meat or other provisions, and to provide for the immediate seizure and destruction thereof.

3. *Refuse, junk.* The deposit and removal of refuse, junk, offensive materials and substances and those engendering offensive odors and sights, so as to protect the public against the same.

4. *Pawnbrokers.* The purchasing or receiving by pawnbrokers and junk or second-hand dealers, of any property from minors, without the written consent of their parents or guardians, and to provide for the examination of the premises of such persons for the purpose of discovering stolen property.

5. *Animals running at large.* The running at large of cattle, horses, swine, sheep, and other animals, or fowl, within the limits of the corporation, and to authorize the distraining, impounding, and sale of the same, for the penalty incurred and the costs of the proceeding.

6. *Begging.* Begging in and on the streets and other public places.

7. *Riots.* Riots, noise, disturbance, and disorderly assemblies, and to punish any person engaged in riotous, noisy, or disorderly conduct.

8. *Gambling.* All gambling games or devices; to authorize the destruction of all instruments or devices used for the purpose of gaming or gambling.

9. *Gambling houses.* Gambling houses, bawdy houses, disorderly houses, houses of ill-fame, roadhouses where lewdness is carried on, opium or hop joints or places resorted to for the use of opium or hasheesh, and places where intoxicating liquor is illegally kept, sold, or given away, and to punish the keepers and inmates thereof, and persons resorting thereto, and persons who, knowing the character or reputation of such places, transport others to or from any of the above described places.

1. [C97,§741; C24, 27, 31, 35,§5744.]
2. [R60,§§1057, 1096; C73,§§456, 526; C97, §696; S13,§696; C24, 27, 31, 35,§5744.]
3. [R60,§1057; C73,§456; C97,§696; S13,§696; C24, 27, 31, 35,§5744.]
4. [C97,§701; C24, 27, 31, 35,§5744.]
5. [R60,§1061; C73,§459; C97,§706; C24, 27, 31, 35, §5744.]
6. [C24, 27, 31, 35,§5744.]
7. [R60,§1057; C73,§456; C97,§705; C24, 27, 31, 35,§5744.]
8. [R60,§1057; C73,§456; C97,§702; C24, 27, 31, 35,§5744.]
9. [R60,§1057; C73,§456; C97,§704; S13,§704; C24, 27, 31, 35,§5744.]

5745 **Power to regulate, license, or prohibit.** They shall have power to limit the number of, regulate, license, or prohibit:

1. *Public dance halls.* Public dance halls, skating rinks, swimming pools, fortune tellers, palmists, and clairvoyants. Any place open to the public where dancing is allowed shall, under this section, be considered a public dance hall notwithstanding the fact that food is served and a restaurant license held under section 2809.

2. *Billiard halls.* Billiard halls, billiard tables, pool tables, and all other tables kept for hire, bowling alleys, and shooting galleries or places.

3. *Circuses.* Circuses, menageries, theaters, theatrical exhibitions, shows, and exhibitions of all kinds; but lectures on scientific, historical, or literary subjects shall not come within this provision.

4. *Dogs.* The running at large of dogs within their limits, and to require them to be kept upon the premises of the owners thereof unless licensed to run at large, and to provide for the destruction thereof when found at large contrary to and in violation of the provisions of any ordinance passed pursuant to the power herein granted.

5. *Sales at auction.* Sales at auction in streets, highways, avenues, alleys, and public places.

6. *Gasoline curb pumps.* Gasoline curb pumps in streets, highways, avenues, alleys and public places.

1. [S13,§700-a; C24, 27, 31, 35,§5745.]
2. [R60,§1057; C73,§456; C97,§702; C24, 27, 31, 35,§5745.]
3. [R60,§1062; C73,§460; C97,§703; C24, 27, 31, 35,§5745.]
4. [R60,§1061; C73,§459; C97,§707; C24, 27, 31, 35,§5745.]
5. [R60,§1063; C73,§463; C97,§708; C24, 27, 31, 35, §5745.]
6. [C31, 35,§5745.]

5746 **Power to establish and regulate.** They shall have power to establish and regulate:

1. *Slaughterhouses.* Slaughterhouses, and in cities having five thousand or more inhabitants, to build and control the same.

2. *Sanitary districts.* Sanitary districts for the collection and disposal of garbage and other such waste material as may become dangerous to the public health or detrimental to the best interests of the community, and to adopt rules necessary for the administration thereof.

3. *Garbage disposal plants.* Garbage disposal plants, and erect or purchase the same.

4. *Swimming pools.* Swimming pools and to build or to purchase the same.

1. [R60,§1057; C73,§456; C97,§696; S13,§696; C24, 27, 31, 35,§5746.]

2. [SS15,§696-b; C24, 27, 31, 35,§5746.]

3. [SS15,§696-b; C24, 27, 31, 35,§5746.]

4. [C31, 35,§5746.]

5747 **Dairy herds and milk.** Cities and towns, in addition to powers already granted, shall have within their corporate limits the power by ordinance to:

1. Provide for the inspection of milk, skimmed milk, buttermilk, and cream, for domestic or potable use.

2. Establish and enforce sanitary requirements for the production, handling, and distribution of milk, skimmed milk, buttermilk, and cream for domestic or potable use.

3. Compel the tuberculin test by an accredited veterinarian for dairy cattle supplying milk for human consumption.

4. Provide for the pasteurization of milk, skimmed milk, and cream, except that produced from a cow or herd of cows which has been placed and maintained under state or federal supervision for the eradication of tuberculosis, provided that, a cow or herd of cows shall be considered under such supervision when there is on file in the office of the secretary of agriculture an application for such supervision, and except that produced from a cow or herd of cows which has been tested and found free of tuberculosis by an accredited practicing veterinarian. [C24, 27, 31, 35,§5747.]

Referred to in §§5748, 5749
Provisions relative to tuberculosis-free herds, ch 129

5748 **Tuberculin test.** Any ordinance requiring a tuberculin test of a cow or herd of cows, whose milk is or shall be sold within the corporate limits of any city or town, as provided in section 5747, shall further provide that if such test has not been previously made, it may be applied at any time within six months from the date of the passage of such ordinance, and the provisions thereof shall apply only after the expiration of said period. [C24, 27, 31, 35, §5748.]

Referred to in §5749

5749 **Conflict with state law.** Nothing in sections 5747 and 5748 shall be construed as giving to such cities and towns authority to adopt ordinances in conflict with the state law, or to abrogate the authority vested in the secretary of agriculture. [C24, 27, 31, 35,§5749.]

State regulation, chs 129, 148, 150, 150.3

5750 **Burials — cemeteries — crematories.** They shall have power to regulate the burial of the dead; to provide, without the limits of the corporation, places for the interment of the dead; to cause any body interred contrary to such regulations to be taken up and buried in accordance therewith; to exercise over all cemeteries within their limits, and those without their limits established by their authority, the powers conferred upon township trustees with reference to cemeteries; or they may, by ordinance, transfer such duties and the general management of such cemeteries to a board of trustees; and to authorize the establishment of crematories for the cremation of the dead, within or without the limits of such corporation, and to regulate the same. [R60,§1060; C73,§458; C97,§697; C24, 27, 31, 35,§5750.]

Power of township trustees, §5558 et seq.
State regulation, ch 110

5751 **Filling or draining lots.** They shall have power to cause any lot of land within their limits, on which water at any time becomes stagnant, to be filled up or drained in such manner and within such time as may be directed by resolution of the council. Service of a copy of said resolution shall be made upon the owner of such lot, if residing in the county where the same is situated; otherwise publication of such notice shall be made once each week for two consecutive weeks in a daily or weekly newspaper published within such city or town, or, if there be no such newspaper, then by publication of the same in a newspaper published in said county. On the failure of such owner to comply with such directions within the time fixed, it may be done by said city or town and the costs and expenses thereof assessed against said lot, which shall be a debt due to said corporation from the owner of said lot and shall, moreover, from the time of the adoption of such resolution, be a lien thereon as provided in case of special assessments. [R60,§1070; C73,§480; C97,§698; C24, 27, 31, 35,§5751.]

Referred to in §5752
Lien generally, §6008

5752 **Drainage preserved.** They shall have power to require the owner or lessee of any lot or tract of ground within their limits, extending into, across, or bordering upon any hollow or ravine which constitutes a drain for surface water, or a watercourse of any kind, who shall, by grading or filling such lot or tract of ground, obstruct the flow of water through such watercourse, to construct through such lot or land a sufficient drain or passageway for water, within such time as the council may designate, notice of which action shall be given as in section 5751. Upon the failure of such owner or lessee to construct such drain or passageway within the time so fixed, the city or town may construct the same and assess the costs and expenses thereof on such lot or tract of ground, and the same shall be a lien thereon as provided in case of special assessments. [C97,§699; C24, 27, 31, 35,§5752.]

Lien generally, §6008

5753 **Pawnbrokers and junk dealers.** Every pawnbroker, junk dealer, or dealer in secondhand goods conducting business in any city of

ten thousand or more population, who shall purchase or receive from any person any tool or implement such as is commonly used by carpenters, bricklayers, plasterers, plumbers, or other mechanics in the construction or erection of buildings, shall, within twenty-four hours after the purchase or receipt of such tool or implement, give notice to the chief of police, captain of police, or police sergeant at a police station in the city where said tool or implement was purchased or received, stating the date on which said tool or implement was purchased or received, and the name of the person from whom same was purchased or received; and the pawnbroker, junk dealer, or dealer in second-hand goods so purchasing or receiving such tool or implement shall not sell or dispose of same for a period of forty-eight hours after the notice is given as above specified, and until the expiration of such time shall keep said tool or implement in his store, shop, or place of business in such place that same can be readily seen and examined. [SS15,§701-a; C24, 27, 31, 35,§5753.]

Referred to in §5754

5754 Penalty—personal liability. Any person violating the provisions of section 5753 shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment for not more than thirty days or a fine of not to exceed one hundred dollars; and in addition thereto, if it should be proven that such tool or implement was stolen before the sale or delivery to said pawnbroker, junk dealer, or dealer in second-hand goods, and the provisions of said section have not been complied with by the person purchasing or receiving same, then said pawnbroker, junk dealer, or dealer in second-hand goods shall be liable to the owner of said tool or implement for its full value, same to be recovered in a suit at law. [SS15,§701-b; C24, 27, 31, 35, §5754.]

5755 Numbering of buildings. They shall have power to require all buildings to be numbered by the owners or lessees thereof, and, in case of failure to comply with such requirement, to cause the same to be done, and to assess the cost thereof against the property or premises numbered. [C97,§709; C24, 27, 31, 35,§5755.]

5756 Building code. Cities and towns, including cities under the commission form of government, shall have the power to adopt by ordinance a building code, providing for the districting of such cities into one or more districts, establishing reasonable rules and regulations for the erection, reconstruction, and inspection of buildings of all kinds within their limits and for a fee for such inspection, and providing penalties for violation thereof. [S13, §709-a; C24, 27, 31, 35,§5756.]

Fire escapes, ch 82; housing law, ch 323
Municipal zoning, ch 324

5757 Building lines. All cities of the first and second class, including cities under commission form of government, may establish, by ordinance, building lines on private or public property at such distance back from the street or highway line as may be determined necessary or proper by the city council to promote the public health, safety, order, and general welfare. After the establishment of any such building line, no building, other structure, or addition thereto shall be erected between said line and the street or highway line. [C24, 27, 31, 35,§5757.]

Referred to in §5758
Certification of building-line ordinance, §5724 et seq.

5758 Resolution. Whenever the council of any such city shall deem it advisable or necessary for the benefit of the city as a whole to establish a building line as authorized in section 5757, it shall, in a proposed resolution, which shall be published for two consecutive days in some newspaper of general circulation in the city, the last publication to be not less than five days before the time set for the hearing, declare such advisability or necessity, stating the street or highway adjacent to which the line is to be established, location thereof and the time when and the place where all objections to the establishment of the same will be heard. At such hearing the ordinance may be amended but it shall not be adopted until the next regular council meeting. [C24, 27, 31, 35,§5758.]

5759 Dangerous structures. Cities and towns shall have the power to provide for the repair, removal, or destruction of any building, structure, or inclosure which is dangerous or liable to fall, and to levy and collect a special tax against the property and the owner for the expense thereof, as other special taxes are levied and collected. [C97,§§710, 712; C24, 27, 31, 35,§5759.]

5760 Fires—electric apparatus—fire limits. Cities, including cities acting under commission form of government, and towns shall have power to make regulations for protection against fire and electrical apparatus, to establish fire limits, to prohibit within such limits the erection of all buildings and structures of every kind, additions thereto, substantial alterations thereof involving partial rebuilding, not constructed of fireproof materials, in whole or in part, as prescribed by ordinance, and to remove or take down any building or structure or part thereof erected contrary to such ordinances and to collect the cost thereof from the owner. [R60,§1058; C73,§457; C97,§711; S13, §711; C24, 27, 31, 35,§5760.]

Referred to in §5762
Certification of fire-limit ordinance, §5724 et seq.

5761 Electric installation. Cities and towns shall have the power to prescribe rules for the installation of electric light and power wiring, electrical fixtures and appliances, and electrical work and materials; to provide for the inspection of such work, materials, and the manner of installation; to compel the removal of dangerous electric light and power wiring, electrical fixtures and appliances, and electrical work installed in violation of the manner prescribed. This section shall not apply to substations, central power stations, and the installations

therein belonging to and operated by public utility corporations operating under state charters and franchises. [SS15,§711-a; C24, 27, 31, 35,§5761.]

5762 Fire protection. They shall have power to regulate and control the building, construction, and erection of chimneys, stacks, flues, fireplaces, hearths, stovepipes, ovens, boilers, and all apparatus used for heating purposes, and the use of lights in stables, shops, and other places; to regulate or prohibit bonfires and the use of fireworks, firecrackers, torpedoes, Roman candles, skyrockets, and other pyrotechnic displays; to prevent the deposit of ashes and combustible matter in unsafe places, and to provide for the collection of the costs and expenses incurred in any of the matters provided for in this section and in section 5760, in the manner authorized for the collection of special assessments. [C97,§712; C24, 27, 31, 35, §5762.]

Special assessments, ch 308
See also §§1828.08, 12959, 13245.08 to 13245.10, inc.

5763 Steam boilers and magazines. They shall have power to provide for the inspection of steam boilers, and all places used for the storage of explosives or inflammable substances or materials, and to prescribe the necessary means and regulations to secure the public against accidents and injuries therefrom, to provide for the collection of fees for such inspection and penalties therefor, and to assess the costs and expenses of such proceedings against the property and owners thereof in the manner provided for special assessments. [C97,§713; C24, 27, 31, 35,§5763.]

Special assessments, ch 308

5764 Gunpowder—combustibles. They shall have power to regulate the transportation and keeping of gunpowder, inflammable oils, or other combustibles, and to provide or license magazines for storing the same, and prohibit their location or maintenance within a given distance of the corporate limits of such cities or towns. [R60, §1057; C73,§456; C97,§714; C24, 27, 31, 35, §5764.]

5765 Wood or lumber yards. They shall have power to prohibit or regulate the piling or depositing of any kind of wood, lumber, or timber upon any lot or property within the city limits within a distance of one hundred yards of any dwelling house. [C97,§715; C24, 27, 31, 35, §5765.]

5766 Fire department. They shall have power to organize, keep, and maintain a fire department and fire companies; to purchase or lease necessary ground and construct or lease buildings therefor; provide engines, apparatus, and such other instruments as may be necessary; pay for services rendered by members of the fire department at any fire; and cities having a population of five thousand or more may maintain a paid fire department. [R60,§1096; C73, §525; C97,§716; C24, 27, 31, 35,§5766.]

5766.1 Jurisdiction outside limits—petition. On petition of a corporation, organization, institution, or other municipality, situated without the corporate limits of a city or town to such city or town council, and the acceptance of the petition by such council on terms and conditions prescribed by it, the jurisdiction of the city or town for fire purposes shall thereby be extended to such corporation, organization, institution or other municipality. Firemen operating equipment used on fires without the corporate limits of a city or town shall be entitled to all the rights and privileges as provided by chapters 322 and 322.1. [48GA, ch 153,§1.]

5766.2 Joint maintenance. They shall have the power, when authorized by a majority vote of the electors thereof at a regular or special election called for that purpose, upon notice as now required by law, to own jointly with any other city, town or township, fire apparatus or equipment and to pay out of the tax as authorized by law for the purchase or maintenance of such equipment and services. [C31, 35,§5766-c1.]

5766.3 Fire schools — delegates — expenses. Any city or town, including those acting under special charter, maintaining a paid or volunteer fire department may pay the expenses of such number of firemen as it may desire to send to any gatherings of firemen for the purpose of instruction or study of fire prevention, fire extinguishment, or other allied subjects, including attendance of such firemen at the annual and regional fire schools conducted or sponsored by the Iowa state college. [47GA, ch 182,§1.]

5767 Levy — percentage — maturity. Such cities and towns shall have the power, after the purchase of the property and equipment, by ordinance or resolution to levy at any one time the whole or any part of the cost of such property and equipment upon such taxable property and determine the percentage of tax, not exceeding three-eighths mill, to be paid each year, and the number of years, not exceeding ten, given for the maturity of each installment thereof. Certificates of such levy shall be filed with the auditor of the county in which said city is located, setting forth the amount of percentage and maturity of said tax or each installment thereof, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax lists of the proper county or counties, and collected as other taxes. [S13,§716-c; C24, 27, 31, 35,§5767; 48GA, ch 154,§1.]

5767.1 Insurance on volunteer firemen. Any city or town, including those acting under special charter, and under the city manager form of government, now or hereafter maintaining a volunteer fire department may for the benefit of each member of such department or his dependents, except such members as shall be entitled to receive the benefits of firemen's pensions or retirement allowances as provided by law, procure and pay the premiums on a policy or policies of insurance conditioned as hereinafter provided.

Such policies of insurance may be individual policies covering each regularly appointed and registered active member of such department

separately or may be in the form of blanket or group policies covering all such members of such department as a group and shall provide for the payment to each such member who shall receive any injury causing disability which shall prevent him from pursuing his usual vocation, provided such injury was caused by or arose out of the duties of such member as a fireman, of a weekly indemnity. Such payments shall continue during the period of such disability, unless such disability continues for a period of time exceeding fifty-two weeks. Every such policy of insurance shall provide for the payment of a sum of money to the dependent or dependents of any such fireman in the event of the death of such fireman while engaged in the performance of his duties as such. [C35,§5767-f1.]

Pensions, ch 322

5768 Markets. They shall have power to establish and regulate markets and scales, to build market houses, and establish and regulate the same; to provide for the measuring or weighing of merchandise offered for sale, to prevent forestalling, and regulate or prohibit huckstering in the markets; to prescribe the kind and description of articles which may be sold in the markets, and the stands or places to be occupied by the vendors; to authorize the immediate arrest of any person violating its regulations, and the seizure and removal from the market of any article of produce in his possession.

No charge or assessment of any kind shall be made or levied on any wagon or other vehicle, or the horses attached thereto, or the owner thereof, bringing produce or provisions to any of the markets in the city. [R60,§§1057, 1096; C73, §§456, 526; C97,§717; C24, 27, 31, 35,§5768.]

5768.1 Market charges. They may, by ordinance, fix reasonable charges to be paid by those occupying spaces in market places and provide for the collection of such charges. Charges so collected shall be used solely for the purpose of improving market places and to defray the actual expense of the city in conducting the same. [C27, 31, 35,§5768-a1.]

5769 Wharves, docks, and piers. They shall have power to establish, construct, and regulate landing places, wharves, docks, piers, and basins; to use for such purposes any public building or any property belonging to or under the control of the city, and the shore or bank of any lake or river not the property of individuals, to the extent and in any manner that the state can grant such use or control, and fix the rates for landing, wharfage, and dockage. [R60, §1098; C73,§528; C97,§718; C24, 27, 31, 35, §5769.]

5770 Ferries. They shall have the exclusive power to establish, regulate, and license ferries from any landing place in such city; to impose reasonable terms and restrictions in relation to the keeping thereof, the time, manner, and rates of the carriage and transportation of persons and property thereon; to provide for the revocation of any license, and for the punishment by fines and penalties of the violation of any ordinance prohibiting unlicensed ferries, or regulating those established and licensed. [R60,§1099; C73,§529; C97,§719; C24. 27, 31, 35,§5770.]

Referred to in §6831

5771 Infirmary — outdoor relief. Cities of the first class shall have the power to establish and maintain, either within or without the limits of the city, an infirmary for the accommodation of the poor of the city, and to provide for the distribution of outdoor relief. [R60,§1111; C73,§538; C97,§733; C24, 27, 31, 35,§5771.]

5772 Jail—station house. Cities and towns may erect, establish, and maintain a jail, which shall be in the keeping of the marshal under such rules as the council shall provide, and the provisions of the chapter on county jails shall apply, so far as applicable, to such jails and the persons in charge thereof. Any city or town shall have the right to use the jail of the county for the confinement of such persons as may be subject to imprisonment under the ordinances of such city or town, but it shall pay the county the cost of keeping such prisoners. Cities of the first class shall have power to erect, lease, establish, and maintain station houses for the detention of persons arrested, which shall be under the control of the marshal. [R60,§1116; C73,§§485, 542; C97,§§735, 5660; C24, 27, 31, 35, §5772.]

County jails, ch 281

5773 City hall. Any city or town may, when authorized by the voters, erect, purchase, or remodel a city or town hall to be used for general community and municipal purposes, including assembly hall, auditorium, public hall, armory, council chamber and offices, waterworks offices, fire or police station, or for any one or more of such purposes. The council may prescribe rules whereby such building may be used for other than municipal purposes, and fix the compensation to be paid therefor. The said city or town may under the terms and conditions set out in this section, join with the township authorities in building said building and equipping the same, and under such terms and conditions as may be mutually agreed upon. [SS15,§§741-d,-g; C24, 27, 31, 35,§5773.]

Referred to in §5813

5774 Public works—protection of subcontractors. Cities and towns shall have power to provide by ordinance, or by provisions in contracts for any work of public improvement, that the contractor shall, before receiving certificates or payment therefor, furnish the council vouchers showing that all subcontractors and workmen who have furnished materials for or performed labor upon such improvement have been fully paid for such materials or labor. [C97,§736; C24, 27, 31, 35,§5774.]

Labor and material on public improvements, ch 452

5775 Plumbing—inspector. They shall have power by ordinance to prescribe rules and regu-

lations for all plumbing connecting any building with sewers, cesspools, vaults, water mains, and gas pipes; and may prescribe the kind and size of materials to be used in such plumbing, and the manner in which the same shall be done; and to appoint an inspector thereof, and define his duties and powers; and to provide for the assessment of the cost of such inspection and replacing of the pavement to the property; and to prescribe penalties for the violation of such ordinance. Nothing herein shall be construed as authorizing the annulment of any rules or regulations relating to such plumbing made by the local or state board of health, but such ordinance shall conform to and enforce the same. [C97,§737; S13,§737; C24, 27, 31, 35,§5775.]

5776 **License—board of examiners.** Cities having a population of less than six thousand and towns shall have power to regulate and license plumbers, to create a board of examiners to determine the qualifications thereof, to prescribe rules for the installation of plumbing work and materials, to provide for the inspection of such work, materials, and installation, and to compel the removal of plumbing installed in violation thereof. [S13,§737-a; C24, 27, 31, 35,§5776.]

5777 **Regulations.** All cities having a population of six thousand or more shall adopt and enforce ordinances regulating the business of plumbing, and prescribe rules not inconsistent with law for the installation and inspection of plumbing, and prescribe the grade of material to be used and compel the removal of plumbing installed in violation of such rules. [C24, 27, 31, 35,§5777.]

5778 **Examiners.** In such cities the council shall appoint a board of examiners, consisting of three members, one of whom shall be a practical journeyman plumber, one a member of the local board of health, and one a practical master plumber, two of whom shall constitute a quorum for the transaction of business. [C24, 27, 31, 35,§5778.]

5779 **Board—when not necessary.** If there is no resident practical journeyman plumber or practical master plumber in the city, the council shall not be required to appoint a board of examiners, and every city not having a board of examiners shall require every person engaged as a master or employing plumber, or journeyman plumber, to have a certificate or license from some examining board within the state. [C24, 27, 31, 35,§5779.]

5780 **Expenses—compensation.** The council shall provide suitable rooms in which the board of examiners may hold its meetings, and shall provide for the payment of the necessary incidental expenses incurred by the board, and may also provide a per diem compensation for the members of said board not exceeding ten dollars per day for the time actually spent in performing their duties. [C24, 27, 31, 35,§5780.]

5781 **Examinations — license — fee.** The board shall, when so directed by the council, and under such rules as the council shall prescribe, hold examinations of applicants for licenses to work either as master or employing plumber or journeyman plumber, and if satisfied as to the competency of the applicant shall issue to such plumber a license. The amount of the fee for such examination shall not exceed ten dollars for a master or employing plumber, and shall not exceed five dollars for a journeyman plumber. Fees for the renewal of a master or employing plumber's certificate shall not be more than two dollars, and for a journeyman plumber's license, shall not be more than one dollar. [C24, 27, 31, 35,§5781.]

5782 **Term of license.** A plumber's license shall be valid and recognized throughout the state for a period of one year, and may be renewed from year to year upon payment of the renewal fee. Such license shall not be transferable, and shall expire on the thirty-first day of December of each year. Any license may be revoked by a board of examiners for repeated violations of plumbing ordinances. [C24, 27, 31, 35,§5782.]

5783 **Definition of terms.** The term "journeyman plumber" shall mean a person who does any plumbing work which is by law, ordinance, or rule subject to official inspection. The term "master or employing plumber" shall include any person, firm, or corporation other than a journeyman plumber engaged in the business of installing plumbing. The term "plumbing" shall mean any receptacle or appliance installed or used to receive waste water, house soil, slops, or sewage. [C24, 27, 31, 35,§5783.]

5784 **Sanitary toilets.** Cities and towns, including cities under the commission plan, shall have the power to compel the removal, abandonment, and disuse of all outside water closets, privies, and privy vaults where there is a sanitary sewer in the street or alley or where a sanitary sewer may hereafter be placed in a street or alley abutting upon property that has an outside water closet, privy, or privy vault, and shall have the power to compel and cause to be installed sanitary toilet and toilet facilities to be connected with the sanitary sewer. [C24, 27, 31, 35,§5784.]

5785 **Action by local board of health.** The board of health of any city or town, whenever it deems it necessary that any outside water closet, privy, or privy vault be abandoned and removed where there is a sanitary sewer in the street or alley or where a sanitary sewer may hereafter be placed in a street or alley abutting upon property upon which an outside water closet, privy, or privy vault is located, may order that said outside water closet, privy, or privy vault be abandoned and removed and that a sanitary toilet and toilet facilities be installed and connected with the sanitary sewer. [C24, 27, 31, 35,§5785.]

5786 Special assessment. In any case where the board of health of any city or town shall order the removal and disuse of any outside water closet, privy, or privy vault and shall order that a sanitary toilet and toilet facilities be installed and connected with the sanitary sewer, and the city council or board of commissioners shall determine that any property owner or owners are unable to pay for the installing of the sanitary toilet and toilet facilities and for connecting them to the sanitary sewer, then the city council or board of commissioners may have the necessary toilet installed and assess the cost against the property and the cost shall be a special assessment against the property. The assessment and collection of this cost shall be made according to the provisions in chapter 308. [C24, 27, 31, 35, §5786.]

CHAPTER 292.1

PERSONAL SERVICE TRADES

Applicable to special charter cities, §6759.1

5786.1 Emergency and purpose declared.
5786.2 Application—"service trades" defined.
5786.3 Application for ordinance.
5786.4 Violations.
5786.5 Application—contents.
5786.6 Approval, rejection, or repeal.
5786.7 Emergency re-declared.

5786.1 Emergency and purpose declared. A state and national emergency productive of widespread unemployment and disorganization of trade which burdens commerce and affects the public welfare, is hereby declared to exist, causing an emergency which injuriously affects the morale and standard of living and threatens to affect the industrial peace and safety and health of the people of the state. Among the trades particularly affected are those in which services are rendered upon a person or persons without necessarily involving the sale of merchandise. In such trades there is ruinous price-cutting, widespread unemployment and economic distress, and for the purpose of ameliorating such conditions, it is necessary and desirable to authorize the adoption of ordinances providing for fair competition applicable to such trades in the various cities and towns of the state, as provided in this chapter. [C35, §5786-g1.]

Partially invalidated, see Duncan v. Des Moines, 222 Iowa 218; 268 N.W. 547

5786.2 Application — "service trades" defined. This chapter applies only to those trades where personal services are rendered upon a person or persons without the sale of merchandise as such, which are herein referred to as service trades. The fact that title to personal property may pass as an incident to rendering such service or services, does not prevent the trade in which this happens from being a service trade provided however that no provisions in this chapter shall apply to any trade school. [C35,§5786-g2.]

5786.3 Application for ordinance. In all cities or towns under twenty-five hundred population, the owners, operators, or managers of not less than sixty-five percent, and in all cities or towns of twenty-five hundred population or over, the owners, operators, or managers of not less than seventy percent of the business establishments in any such service trade in any city or town may apply to the governing body of such city or town for the enactment of an ordinance providing for fair competition for such trade within such city or town. The councils of the cities and towns shall have jurisdiction within such cities and towns to carry out within their respective jurisdictions the provisions of this chapter. [C35,§5786-g3.]

5786.4 Violations. The violation of any provision of any ordinance adopted under the provisions* of this chapter shall constitute a misdemeanor. Each and every day's continuance of such violation shall constitute a separate offense, and each offense is punishable by a fine of not more than one hundred dollars or imprisonment for not more than thirty days. [C35,§5786-g4.]

* "provision" in enrolled act

5786.5 Application — contents. The application for an ordinance providing for fair competition shall state the number of business establishments in the city or town engaged in the trade petitioning for such ordinance, and signature of only one person respectively signing on behalf of a business establishment, shall be counted in determining the percentage of establishments making application. The application shall set forth the provisions of the requested ordinance. Such ordinance may contain any other fair trade practice provisions which are not unlawful. [C35,§5786-g5.]

5786.6 Approval, rejection, or repeal. At any meeting after receiving such application, the governing body of a city or town may reject or approve, in whole or in part, the application for such ordinance. The rejection of an application shall not prejudice the filing of a new application. The governing body, may enact, in whole or in part, the provisions of such ordinance, and thereafter such adopted ordinance shall regulate as to matter contained therein the conduct of every person engaged in such service trade within its jurisdiction. The governing body of a city or town may repeal in whole or in part such ordinance as provided for in this section. [C35,§5786-g6.]

Constitutionality, §5786-g7, code 1935; 46GA, ch 61, §8

5786.7 Emergency re-declared. This chapter is hereby declared to be an emergency measure necessary for the immediate preservation of public health, peace, safety, and economic security within the state. [C35,§5786-g8.]

CHAPTER 293

PARK COMMISSIONERS

Referred to in §§6578.2, 6669, 6683. Chapter applicable to special charter cities, §6760

5787 Election—appointment.
5788 Residence requirement.
5789 Qualification—organization.
5790 Treasurer.
5791 Compensation.
5792 Tax levy.
5793 Additional tax levy.
5794 Certification and collection.
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5798 General powers.
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5800 Bonds.
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5803 Form and maturity of bonds.
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5806 Defacement of trees.
5807 Rules and regulations.
5808 City engineer—poles and wires.
5809 Condemnation of property.
5810 Appropriation.
5811 How expended.
5812 Existing contracts and bonds.
5813 City halls, memorial halls and monuments—location.

5787 Election — appointment. There shall be elected at the regular municipal election in each city containing a population of forty thousand or over, and all other cities and towns may, by ordinance, provide for the election of three park commissioners whose terms of office shall be six years, one to be elected at each regular municipal election, but at the first election three shall be elected and hold their offices respectively for two, four, and six years, their respective terms to be decided by lot and their successors shall be elected for the full term of six years.

Provided, however, that in all cities and towns not now having park commissioners the ordinance establishing such park commissioners shall not be in force until it has been submitted to the voters at a special or regular municipal election and approved by a majority of the votes cast at such election. In the event that such ordinance is approved by a majority of the votes cast at such election, the city council shall have the power to appoint three park commissioners to hold such office until the next regular city election. [C97,§850; S13,§850-a; C24, 27, 31, 35,§5787.]

5788 Residence requirement. Where any such city contains more than one organized township, at least one commissioner shall be a resident of each of said townships. [C97,§858; S13,§850-j; C24, 27, 31, 35,§5788.]

S13,§850-j, editorially divided

5789 Qualification—organization. The commissioners shall, within ten days after their election, qualify by taking the oath of office and organize as a board by the election of one of their number as chairman and one as secretary, but each commissioner, before he enters upon the duties of his office, shall give a bond with sureties to be approved by the council, in the penal sum of one thousand dollars, conditioned for the faithful discharge of his office. Park commissioners in cities of the second class and towns shall not be required to give bond. [C97,§§851, 861; S13,§850-b; C24, 27, 31, 35, §5789; 48GA, ch 155,§1.]

S13,§850-b, editorially divided

5790 Treasurer. The city treasurer shall be the treasurer of said board and pay out all moneys under the control of the board on orders signed by the chairman and secretary, but shall receive no compensation for his services as such treasurer. [C97,§§851, 861; S13,§850-b; C24, 27, 31, 35,§5790.]

5791 Compensation. Each of the commissioners shall receive such salary as shall be fixed by the city council, not to exceed in the aggregate annually ten dollars for each thousand population or fraction thereof according to the last state or federal census, said compensation to be paid out of the park fund. [C97, §§851, 861; S13,§850-b; C24, 27, 31, 35,§5791.]

5792 Tax levy. The board shall, on or before the first day of August of each year, determine and fix the amount or rate not exceeding five-eighths mill on the dollar in all cities and towns on the taxable valuation of such city or town, to be levied, collected, and appropriated for the ensuing year for general park purposes, and shall cause the same to be certified to the city council, which shall levy such tax or so much thereof as it may deem necessary to promote park interests, and certify the percent thereof to the county auditor with the other taxes for said year; provided however that in cities of the second class and having a population in excess of seven thousand, having two hundred or more acres devoted to and set apart for park purposes, said board may in the manner herein provided, determine and fix an additional amount or rate for general park purposes not exceeding three-eighths of a mill on the dollar to be levied, collected, and appropriated for the ensuing year for general park purposes and the said city council, upon certification thereto by said board, may levy such additional tax or so much thereof as it may deem necessary to promote park interests and certify the total percent thereof as hereinbefore provided. [C97,§§852, 860; S13, §850-c; C24, 27, 31, 35,§5792; 48GA, ch 156,§1.]

Referred to in §§5801, 5804

For additional and special tax levies which are temporary (and therefore omitted) see:

1. 36GA, ch 155 (SS15,§850-p), as amended by 38GA, ch 58, and 39GA, ch 26; 40 GA, ch 121
2. 38GA, ch 312, §1, as amended by 39GA, ch 125, §1
3. 40GA, ch 119

5793 Additional tax levy. In cities having a population of over twenty-five hundred, said board is further authorized to submit to the electors of any such city voting at a city election or a special election called for that purpose, the question of the levy of a further additional tax for park purposes, not to exceed one and one-fourth mills on the dollar on all taxable property of the city over any term of years not exceeding thirty, to be used for the sole and only purpose of purchasing and paying for real estate and permanently improving the same and lands theretofore acquired for park purposes. [C97, §852; S13,§850-c; C24, 27, 31, 35,§5793.]

Referred to in §§5801, 5804

5794 Certification and collection. When a majority of the electors of said city at any such election shall have declared in favor thereof, said board shall certify to the county auditor in each year and cause to be collected such additional tax during all of the years for which the same has been approved and ordered by the voters. [C97,§852; S13,§850-c; C24, 27, 31, 35, §5794.]

Referred to in §§5801, 5804

5795 Anticipation of taxes. The board may anticipate the collection of said additional tax authorized to be levied for the purchase of real estate for park purposes and permanently improving the same and lands theretofore acquired and for that purpose may issue park certificates or bonds with interest coupons, and the provisions of chapter 320 shall be operative as to such certificates, bonds, and coupons, insofar as they may be applicable. The proceeds of such tax shall be kept as a separate fund and shall be used for the purpose of such acquisition of real estate and the permanent improvement thereof and lands theretofore acquired for park purposes and for no other purpose whatsoever. [C97, §852; S13,§850-c; C24, 27, 31, 35,§5795.]

Referred to in §§5801, 5804

5796 Park fund—how expended. No money of this fund shall be appropriated or expended for any purpose except as provided in this chapter and when any annual tax or part thereof has been pledged for the payment of any bonds or the interest thereon, such tax or part thereof shall be devoted to no other purpose. Such fund may be used:

1. In purchasing or acquiring real estate for park purposes, including streets or highways to connect one park with another, or to connect a park with streets or highways, or for other purposes necessary and incident to the establishment and maintenance of parks and paving streets adjacent thereto.

2. For the purpose of improving and maintaining the same and defraying the necessary expenses connected therewith, including the compensation of the board, its officers, and employees.

3. For the payment of one or more park policemen to be recommended by the board and appointed by the mayor.

4. For the purpose of paying for the necessary lights as fixed by the park board and paying for such water supply as may be necessary in such parks. [C97,§852; S13,§850-d; C24, 27, 31, 35, §5796.]

Referred to in §6215

5797 Acquisition of real estate. Said park board may acquire real estate within or without the city for park purposes by donation, purchase, or condemnation, and take the title to the same in the name of the board in trust for the public and hold the same exempt from taxation. [C97,§853; S13,§850-e; C24, 27, 31, 35,§5797.]

S13,§850-e, editorially divided

5798 General powers. It may sell, subject to the approval of the city council, exchange, or lease any real estate acquired by it which shall be found unfit or not desirable for park purposes; shall keep a report of all transactions; except as otherwise provided in this chapter it shall have exclusive control of all parks and pleasure grounds acquired by it or of any other ground owned by the city and set apart for like purposes; and may make contracts, sue and be sued, but shall incur no indebtedness in excess of the amount of taxes already levied and available for the payment thereof, except bonds hereby authorized. [C97,§853; S13,§850-e; C24, 27, 31, 35,§5798.]

5798.1 Leasing to organizations. Park boards shall also have authority to lease under reasonable rules and requirements a particular park or portion thereof, under their jurisdiction, for a period not in excess of ten days, to charitable, fraternal and patriotic organizations, for the purpose of permitting such organizations to conduct celebrations, anniversaries and entertainments. [47GA, ch 159,§1.]

5799 Annual report. It shall make an annual detailed report to the council immediately after the close of each municipal fiscal year of the amounts of money expended and the purposes for which used, and such annual statement shall be published as part of the annual municipal report. [C97,§853; S13,§850-e; C24, 27, 31, 35,§5799.]

Fiscal year, §5676.1

5800 Bonds. For the purpose of paying for real estate it may issue bonds in amounts needed, notwithstanding the limitation of section 6238; provided, however, that the annual interest on the aggregate of such bonds outstanding shall not be in excess of sums as follows:

1. For towns and cities of less than twenty-five thousand population, a sum equal to the proceeds of a tax of five-sixteenths mill on the dollar of the aggregate taxable value of property therein subject to taxation.

2. For cities of twenty-five thousand population or more, a sum equal to the proceeds of a tax of seven-sixteenths mill on the dollar of the aggregate taxable value of property therein subject to taxation. [C97,§853; S13,§850-e; C24, 27, 31, 35,§5800.]

5801 Lien of bonds. Bonds issued under the provisions of sections 5792 to 5795, inclusive, shall be a lien upon all of the real estate acquired by the commissioners therewith or with the proceeds thereof, and such bonds or proceeds shall be used for the purchase of real estate or the permanent betterment and improvement thereof. [C97,§855; S13,§850-f; C24, 27, 31, 35,§5801.]

38GA, ch 312, §2, editorially divided

5802 Mortgages. The board shall have the power to mortgage any real estate purchased or controlled by it for park purposes to a trustee for the purpose of securing the payment of said bonds, and after the issuance there shall be pledged for the payment of the interest thereon such amount of the annual tax levied by virtue of said sections as shall be necessary to make such payment, and the residue of said tax may be used by the board for the payment of such bonds, for the purchase of real estate, or the permanent improvement of the park and pleasure grounds of the city. [C97,§855; S13,§850-f; C24, 27, 31, 35,§5802.]

5803 Form and maturity of bonds. Such bonds to be issued by the board shall mature in not less than five nor more than thirty years from date and may be made payable in annual series; shall be in sums of not less than one hundred dollars nor more than one thousand dollars, bearing interest at a rate not exceeding five percent per annum, payable annually or semiannually. [C97,§854; C24, 27, 31, 35,§5803.]

See ch 63.1

5804 Payment of bonds. Said board, after the issuance of any such bonds, shall annually, in the year of the serial maturity of each thereof, set aside a sufficient sum to pay such annual serial maturity out of the tax levied by it under the provisions of sections 5792 to 5795, inclusive, which sum shall be applied in payment of the principal of said serially maturing bonds respectively and not otherwise. [C97,§854; S13, §850-f; C24, 27, 31, 35,§5804.]

5805 Jurisdiction. The jurisdiction of such board shall extend over all lands used for parks within or without the corporate limits, and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such parks. [C97,§862; S13,§850-g; C24, 27, 31, 35,§5805.]

S13,§850-g, editorially divided

5806 Defacement of trees. Any person who shall, except by the authority of such commissioners, cut, break, or deface any tree or shrub growing in such park or parks, or any avenue thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [C97,§862; S13,§850-g; C24, 27, 31, 35,§5806.]

5807 Rules and regulations. The board may in writing prescribe rules and regulations for the government of the parks or public grounds under their control and persons resorting thereto, which rules and regulations shall be in force when entered in the record of the proceedings of the board, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such park or public grounds, and a wilful violation thereof shall be a misdemeanor, punishable by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [C97,§856; S13,§850-h; C24, 27, 31, 35,§5807.]

5808 City engineer—poles and wires. The board shall be entitled to the services of the city engineer, when requested, without expense to it. It shall have the power to regulate or forbid the erection of poles or the stretching of wire for electric light, street railway, or other corporations or persons in such parks or in or along streets or highways or over public places laid out or controlled by it. [C97,§857; S13, §850-i; C24, 27, 31, 35,§5808.]

5809 Condemnation of property. If said board and the owners of any property desired by it for park purposes cannot agree as to the price to be paid therefor, it may cause the same to be condemned in the manner provided for taking land for municipal purposes. [C97,§858; S13, §850-j; C24, 27, 31, 35,§5809.]

Procedure, §6203; also ch 366

5810 Appropriation. In cities and towns not having a park board the council may appropriate each year not exceeding five percent of the general fund for the improvement and maintenance of public parks. [S13,§850-k; C24, 27, 31, 35,§5810.]

5811 How expended. Said fund so appropriated shall be expended under the direction of a committee of three persons, consisting of the mayor, one member of the council appointed by the council, and one resident property owner of such city or town appointed by the council, which committee shall receive no compensation for their services. [S13,§850-l; C24, 27, 31, 35, §5811.]

5812 Existing contracts and bonds. Nothing in this chapter shall be construed to affect any contracts heretofore entered into by any park board or any bonds issued by such boards but all such contracts shall be carried out and all such bonds shall be paid under the terms thereof. [S13,§850-m; C24, 27, 31, 35,§5812.]

5813 City halls, memorial halls and monuments—location. Cities and towns, including cities under the commission form of government, when authorized by the voters under the provisions of section 5773, to erect a city or town hall for general community and municipal purposes for any one or more of the purposes as set out in said section 5773 may locate and erect such city or town hall in any public park, public square or public grounds belonging to the city or town, and the park commission shall grant permission therefor whether or not said grounds, park or square is unfit or not desirable

for park purposes. Cities and towns, all forms, may by ordinance permit soldiers monuments or memorial halls, which may be erected under the provisions of chapter 33, to be located and erected in any public park or public grounds of the city or town. This section shall not apply to cities having a population of one hundred twenty-five thousand or more. [SS15,§850-o; C24, 27, 31, 35,§5813.]

CHAPTER 293.1

PERMANENT PARK BOARDS

5813.1 Applicability of chapter.
5813.2 Establishment of board.
5813.3 Membership.
5813.4 Vacancies.
5813.5 Term of office—compensation.
5813.6 Powers and duties.
5813.7 Organization and officers.
5813.8 Annual report.
5813.9 Repeal.

5813.1 Applicability of chapter. This chapter shall apply only to cities now or hereafter having a population of one hundred twenty-five thousand or more according to the last or subsequent state or federal census. [C31, 35, §5813-d1.]

5813.2 Establishment of board. Within sixty days after the taking effect of this chapter, in all cities now having a population of one hundred twenty-five thousand or more according to the last state or federal census, there shall be established in accordance with the terms of this chapter, a permanent park board for such city. [C31, 35,§5813-d2.]

5813.3 Membership. Such park board shall consist of ten members. One member of the city council shall at all times be a member of such board, and if any member of the city council of such city is at the head of a department of the city government having supervision of the parks of the city, such member shall by authority of his office be the councilman who shall also be a member of said board. The other nine members of said board shall not be members of the city council. The nine members, other than the councilman, shall be appointed by the mayor of the city from a list of eighteen names of which six shall be submitted or nominated by each of the following organizations:

1. Library board,
2. School board,
3. City planning commission. [C31, 35,§5813-d3.]

44GA, ch 149, §3, editorially divided

5813.4 Vacancies. Vacancies occurring thereafter shall be filled by the mayor from a list of twelve names, of whom four shall be nominated by each of the organizations above designated. Whenever there shall be a vacancy or vacancies on the board, the mayor shall request nominations from said three organizations and such nominations shall be certified to the mayor within fifteen days thereafter. [C31, 35,§5813-d4.]

5813.5 Term of office—compensation. In the first instance, three members shall be appointed for two years, three members shall be appointed for four years, and three members shall be appointed for six years. Thereafter, the term of office of the members of said board, other than the ex officio member, shall be six years and until their successors are appointed and qualified. The members of said board shall serve without compensation and shall be chosen solely because of their character and fitness. [C31, 35,§5813-d5.]

5813.6 Powers and duties. It shall be the duty of such board to plan the city's parks and cemeteries and to administer, improve, develop, conduct and supervise the cemeteries and parks of the city. It shall control the expenditure of all funds appropriated by the city council for cemetery and park purposes and none of the funds appropriated by the city council for said purposes shall be expended except pursuant to a resolution regularly adopted by said board. In the expenditure of funds, said board shall be governed by the ordinances of the city applicable thereto. [C31, 35,§5813-d6.]

5813.7 Organization and officers. When a park board is established in the first instance, the members shall be notified of their appointment by the city clerk who shall in said notice fix the time and place for holding the first meeting; the board shall thereupon meet at said time and organize by electing one of the members thereof as president, and such other officers as the board deems advisable. The board shall adopt its own rules and regulations for the transaction of its business. It may create such committees of its members as it deems conducive to the proper performance of its duties. The president shall be elected for a term of two years. The secretary of the board shall serve during the pleasure of the board. All meetings of the board shall be open to the public. [C31, 35,§5813-d7.]

5813.8 Annual report. Said board shall make an annual report to the city council, which report shall contain an accurate statement of its activities during the preceding year and such recommendations as the board may see fit to make. [C31, 35,§5813-d8.]

5813.9 Repeal. All laws or parts of laws inconsistent with the provisions of this chapter are hereby repealed, but nothing herein shall be deemed to be inconsistent with chapters 294.1 and 298. [C31, 35,§5813-d9.]

CHAPTER 294

RIVER-FRONT IMPROVEMENT COMMISSION

Referred to in §6596. Chapter applicable to special charter cities, §6826

5814 Cities affected.
5815 Petition.
5816 Election.
5817 Vacancies.
5818 Organization—secretary—treasurer—bond.
5819 Title to bed of meandered streams — lost boundary lines.
5819.1 Streams not meandered—survey.
5820 Powers.
5821 Profiles and specifications—approval.
5822 Additional powers—annual report—tax.
5823 Bonds—mortgages.
5824 Cities may aid.
5825 Rules and regulations.
5826 Police protection—water supply—poles.
5827 Wharves—landing places.
5828 What prohibited.
5829 Soldiers monuments.

5814 Cities affected. The provisions of this chapter shall apply only to cities of the first class acting under the general incorporation laws, to cities of the second class having a population in excess of seven thousand, and cities acting under the commission form of government having a population of less than twenty-five thousand; provided, however, that the increase in population of any city subsequent to the establishment or appointment of a river-front improvement commission therein shall in no manner invalidate or affect the title, standing, or authority of such commission. [S13, §879-o; C24, 27, 31, 35,§5814.]

5815 Petition. Whenever five hundred electors of any city whose corporate limits are divided by a meandered stream, or by a stream that is not meandered, shall, in writing, petition the governor of this state for the appointment of a commission, as provided for by this chapter, he shall, within one month thereafter, appoint three electors, residents of the city of the said electors so petitioning, who shall constitute a body corporate, to be known as the river-front improvement commission of .... inserting in said blank the name of the city of the said electors so applying. [S13,§879-a; C24, 27, 31, 35,§5815; 47GA, ch 160,§1.]

5816 Election. One commissioner shall be elected at each biennial city election to succeed one of the commissioners so appointed, whose term shall expire when his successor is elected and qualified. [S13,§879-b; C24, 27, 31, 35, §5816.]

5817 Vacancies. In case vacancy arises in the commission, the governor of the state shall fill such vacancy by appointment for the unexpired portion of the term, or until the next election, as the case may be. [S13,§879-n; C24, 27, 31, 35,§5817.]

5818 Organization—secretary—treasurer—bond. The commissioners shall, within ten days after their appointment, qualify by taking the oath of office, determine by lot the order of the expiration of their terms, and organize by the election of one of their number as chairman; they shall also elect a secretary, not one of their number; the city treasurer shall be the treasurer of said commission, but shall receive no compensation for his services. Each of the commissioners shall be reimbursed for the actual expenses incurred or money paid out by him in connection with the discharge of his official duties, but shall receive no compensation for his services. An itemized statement of all expenses and moneys received and paid out shall be made under oath and filed with the secretary and allowed by the commission. [S13, §879-c; C24, 27, 31, 35,§5818.]

5819 Title to bed of meandered streams—lost boundary lines. When said commissioners have been so appointed and qualified, the fee simple title to the bed of the meandered stream, separating the corporate limits of the city for which they are appointed, shall immediately vest in the commission in trust for the public, and the same while held by the commission shall be exempt from taxation; but the fee title to the channel or bed of the stream to be located and preserved as hereinafter provided shall remain in the state; and the vested rights of riparian owners and owners of water powers shall not be injuriously affected by this chapter. Where the original boundary lines separating the land under the control of said commission from the land of the state or of any adjoining landowner, or the monuments marking the same have been lost, destroyed, or in dispute, said commissioners may proceed to have said boundary lines established as disputed corners and boundaries are established. [S13,§879-d; C24, 27, 31, 35, §5819.]

Disputed corners and boundaries, ch 521

5819.1 Streams not meandered — survey. When any stream that is not meandered divides or traverses the corporate limits of a city in which such river-front improvement commission has been appointed and qualified, said commission may acquire the title in fee simple to such portion of the channel or bed thereof lying within the corporate limits of the city as it may deem advisable, by donation or purchase, or by condemnation for the public uses authorized in this chapter, in the manner provided by law for the taking of private property for public use, and shall take the title to such property in the name of the commission and its successors, in trust for the public, and shall hold the same exempt from taxation. For the purposes of this section, the limits of the channel of any such stream shall be determined and fixed by a survey made by the city engineer of such city at the request of such commission. Wherever in sections 5820 to 5829, the terms "stream", "such stream", or "such river" or like terms are used,

such terms are intended to, and do, refer to a stream whose bed or channel is acquired pursuant to this section, as well as to meandered streams. [47GA, ch 160,§2.]

Referred to in §§5821, 5822, 5823

5820 **Powers.** Said commission may redeem lands between the meandered lines of any such meandered stream; redeem lands acquired by it in the channel of any stream that is not meandered; construct, regulate, and maintain dams across such stream; provide for and protect, by secure walls or banks, a channel adequate to carry flood waters of a volume equal to all reasonable expectations, based on past experience and the area drained by such stream, according to expert authority; beautify such walls or banks, and park so much thereof as public interest may require; where circumstances permit, make any part of the area redeemed and acquired suitable for sites for public buildings; and may erect thereon an armory, coliseum, city hall, fire department buildings and/or other public buildings and furnish and equip the same and finance the construction and furnishing of same under the provisions of this chapter, with full power and authority to do all things necessary and incidental thereto. The acts of said commission so far as the same may affect city parks theretofore under the jurisdiction of the park commissioners or additions acquired thereto, shall be subject to the approval of the board of park commissioners. [S13,§879-e; C24, 27, 31, 35,§5820; 47GA, ch 160,§3.]

Referred to in §5819.1

5821 **Profiles and specifications—approval.** Said commission may adopt plans, profiles, and specifications for the improvement of the said river channel and banks, and the reclaiming of lands between the meandered lines of any such meandered stream within such city, or within the channel of any stream that is acquired by the commission pursuant to section 5819.1, and the construction of dams; but before the beginning of the execution of the same, such plans, profiles, and specifications shall be approved by the executive council. [S13,§879-f; C24, 27, 31, 35,§5821; 47GA, ch 160,§4.]

Referred to in §5819.1

5822 **Additional powers — annual report — tax.** Said commission may acquire real estate and riparian and other rights within such city in the vicinity of such stream by donation or purchase, or by condemnation for the public uses herein authorized in the manner provided by law for the taking of private property for public use, and shall take the title to property in the name of the commission and its successors, in trust for the public, and hold the same exempt from taxation. It may sell and convey or lease or exchange any property acquired by it, by virtue of this chapter and otherwise. It shall have exclusive control of all the lands acquired by it, and of the banks and waters of such stream for carrying out the purposes of this chapter; may make contracts, and sue and be sued. It shall keep a record of all its transactions, which shall during ordinary business hours be open to inspection by the public, and shall, immediately after the close of each municipal fiscal year, make an annual report of all moneys received and expended by it and for what general purposes, and of all moneys owing to it and by it and for what general purposes, to the city council at the regular November meeting, and publish such report in some newspaper in the city. The commission shall, subject to the approval of the city council, in each year determine and fix the amount or rate, not exceeding three-quarters of one mill on the dollar, on the taxable value of the taxable property of such city, to be levied, collected, and appropriated for the ensuing year for the purpose of paying for real estate, including the channel or bed of any stream acquired by the commission pursuant to section 5819.1, riparian and other rights, for improvements, and for accomplishing the purposes of the creation of said commission, and to provide for the payment of interest upon bonds and to retire such bonds, if any, and to meet the necessary expenses incident to the business of said commission. Said commission shall, on or before the first Monday in September of each year, certify to the county auditor the amount or rate of taxes so fixed, to be known as river-front improvement fund, and when collected, the same is to be paid over to the city treasurer, and by him paid out on its orders, and the board of supervisors of the county in which said city is situated shall levy said tax as fixed by said commission. [S13, §879-g; C24, 27, 31, 35,§5822; 47GA, ch 160,§5.]

Referred to in §5819.1
Condemnation procedure, ch 366
Fiscal year, §5676.1

5823 **Bonds—mortgages.** For the purpose of paying for real estate, including the channel or bed of any stream acquired by the commission pursuant to section 5819.1, and improvements and accomplishing the purposes of its creation, said commission may issue bonds in such amounts as it may deem necessary, and may execute trust deeds or mortgages upon its property acquired by virtue of this chapter and otherwise or any part thereof to secure the payment of said bonds and interest thereon. [S13, §879-h; C24, 27, 31, 35,§5823; 47GA, ch 160,§6.]

Referred to in §5819.1

5824 **Cities may aid.** Such city shall not be liable for any indebtedness incurred by said commission or for any bond issued by said commission. Such cities are hereby authorized to aid in making the improvements specified in this chapter by appropriating money from its general fund or from the surplus remaining at the end of the fiscal year in any special fund, except in cases where such diversion of moneys is especially prohibited by statute, and may appropriate in aid of the improvements herein provided for, the reasonable saving effected in the building of bridges and otherwise by reason of said improvements. [S13,§879-i; C24, 27, 31, 35,§5824.]

Referred to in §5819.1

5825 Rules and regulations. Said commission may, in writing, prescribe rules and regulations for the government of the public grounds under their control and persons resorting thereto, which rules and regulations shall be enforced when entered in the record of the proceeding of the commission, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such public grounds, and a wilful violation thereof shall be a misdemeanor, punishable by fine not exceeding twenty-five dollars. Anyone who shall cut, break, or deface any tree or shrub growing in such public grounds, without authority, shall be guilty of a misdemeanor and be punished by fine not exceeding one hundred dollars or by imprisonment not exceeding thirty days in jail. Any magistrate in the city shall have jurisdiction to try such offenses. [S13,§879-j; C24,27, 31, 35,§5825.]

Referred to in §5819.1

5826 Police protection — water supply — poles. The mayor, on written request of the commission, shall furnish adequate police protection for such public grounds and the city shall furnish such water supply as may be necessary therefor, and properly light the same at its expense. The commission shall be entitled to the services of the city engineer, when requested, without expense to it. It shall have the power to permit or forbid the erection of poles or the stretching of wires for electric light, street railway, or other purposes by persons or corporations, in such public grounds or in or along streets or highways or over public places laid out or controlled by it. [S13,§879-k; C24, 27, 31, 35,§5826.]

Referred to in §5819.1

5827 Wharves—landing places. Said commission shall have power, in and over the bed and banks of such river as specified, to construct and regulate the use of wharves, landing places, bathhouses, boathouses, and other suitable structures and shall have exclusive jurisdiction over the water of such stream, within the corporate limits of such city and may maintain said stream in a suitable condition for boating, skating, and other public amusements and purposes. [S13, §879-l; C24, 27, 31, 35,§5827.]

Referred to in §5819.1

5828 What prohibited. No member of the commission shall, during the time for which he has been appointed or elected, or for one year thereafter, be appointed to any office in the gift of the commission which shall be created, or the emolument of which shall be increased, during the term for which he was elected, nor shall he be interested directly or indirectly in any contract for work or service to be performed for the commission or in the purchase or sale of any property sold to or by the commission. [S13, §879-m; C24, 27, 31, 35,§5828.]

Referred to in §5819.1
Similar provisions, §§180, 275, 3828.101, 3922, 4685, 4686.14, 4755.10, 5361, 5673, 6534, 6710, 13324, 13327

5829 Soldiers monuments. Any river-front improvement commission elected under the provisions of this chapter, may, by contract or by resolution duly entered of record, authorize and permit the location and erection of any soldiers monument or memorial hall which may be erected under the provisions of chapter 33, to be located and erected upon grounds held in trust by such commission. [SS15,§879-o1; C24, 27, 31, 35,§5829.]

Referred to in §5819.1

CHAPTER 294.1

CITY PLAN COMMISSION

Referred to in §5813.9

5829.01 Appointment.
5829.02 Tenure.
5829.03 Vacancies.
5829.04 Compensation—expenses.
5829.05 Organization.
5829.06 Rules and regulations.
5829.07 Annual report.
5829.08 Assistants.
5829.09 Powers.
5829.10 Recommendations as to improvements.
5829.11 Exceptions.
5829.12 Approval of plats.
5829.13 Approval of street or park improvement.
5829.14 Appropriation of funds.
5829.15 Expenditure of funds.
5829.16 Gifts.
5829.17 Debt-contracting powers.
5829.18 Plan—adoption—conditions.
5829.19 Hearings.
5829.20 Amendment of plan.

5829.01 Appointment. The council of each city and town, including commission governed cities and special charter cities, may by ordinance provide for the establishment of a city plan commission for such municipality, consisting of not less than seven members, who shall be citizens of such municipality and who shall be qualified by knowledge or experience to act in matters pertaining to development of a city plan and who shall not hold any elective office in the municipal government and who shall be appointed by the mayor, subject to the approval of the council. [C27, 31, 35,§5829-a1.]

5829.02 Tenure. The term of office of said members shall be five years, except that the members first named shall hold office for such terms, not exceeding five years, that the terms of not more than one-third of the membership will expire in any one year. [C27, 31, 35,§5829-a2.]

41GA, ch 117, §2, editorially divided

5829.03 Vacancies. If any vacancy shall exist on said commission caused by resignation, or otherwise, the mayor shall appoint a successor for the residue of said term. [C27, 31, 35, §5829-a3.]

5829.04 Compensation—expenses. All members of the commission shall serve without compensation except their actual expenses, which shall be subject to the approval of the council. [C27, 31, 35,§5829-a4.]

5829.05 Organization. Such city plan commission shall choose, annually, at its first regular meeting, one of its members to act as chairman of the commission, and another of its members as vice chairman, who shall perform all the duties of the chairman during his absence or disability. [C27, 31, 35,§5829-a5.]

41GA, ch 117, §3, editorially divided

5829.06 Rules and regulations. The commission shall adopt such rules and regulations governing its organization and procedure as may be deemed necessary. [C27, 31, 35,§5829-a6.]

5829.07 Annual report. The commission each year shall make a report to the mayor and council of its proceedings with a full statement of its receipts, disbursements, and the progress of its work for the preceding fiscal year. [C27, 31, 35,§5829-a7.]

Annual fiscal report, §§5676.1, 5676.2

5829.08 Assistants. Subject to the limitations contained in this chapter as to the expenditure of funds, it may appoint such assistants as it may deem necessary and prescribe and define their respective duties and fix and regulate the compensation to be paid to the several persons employed by it. [C27, 31, 35,§5829-a8.]

5829.09 Powers. Such city plan commission shall have full power and authority to make or cause to be made such surveys, studies, maps, plans, or charts of the whole or any portion of such municipality and of any land outside thereof which in the opinion of such commission bears relation to a comprehensive plan, and shall bring to the attention of the council and may publish its studies and recommendations. [C27, 31, 35,§5829-a9.]

5829.10 Recommendations as to improvements. No statuary, memorial, or work of art in a public place, and no public building, bridge, viaduct, street fixture, public structure or appurtenance, shall be located or erected, or site therefor obtained, nor shall any permit be issued by any department of the municipal government for the erection or location thereof, until and unless the design and proposed location of any such improvement shall have been submitted to the city plan commission and its recommendations thereon obtained. [C27, 31, 35,§5829-a10.]

41GA, ch 117, §5, editorially divided

5829.11 Exceptions. Such requirement for recommendations shall not act as a stay upon action for any such improvement where such commission after thirty days written notice requesting such recommendations shall have failed to file same.

Said recommendations shall not be necessary as to statuary, memorials, or works of art in municipalities where municipal art commissions have been established. [C27, 31, 35,§5829-a11.]

5829.12 Approval of plats. Where such city plan commission exists all plans, plats, or replats of subdivisions or re-subdivisions of land embraced in said municipality or adjacent thereto, laid out in lots or plats with the streets, alleys, or other portions of the same intended to be dedicated to the public in such municipality and all proposals for the vacation or partial vacation of a street, alley or public ground shall first be submitted to the city plan commission and its recommendation obtained before approval by the city council. [C27, 31, 35, §5829-a12.]

5829.13 Approval of street or park improvement. No plan for any street, park, parkway, boulevard, traffic-way, river-front, or other public improvement affecting the city plan shall be finally approved by the municipality, or the character or location thereof determined, unless such proposal shall first have been submitted to the city plan commission and the latter shall have had thirty days within which to file its recommendations thereon. [C27, 31, 35,§5829-a13.]

5829.14 Appropriation of funds. The council of any such municipality, when it shall have passed an ordinance creating a city plan commission, may annually appropriate a sum of money from the general funds for the payment of the expense of such commission. [C27, 31, 35,§5829-a14.]

41GA, ch 117, §8, editorially divided

5829.15 Expenditure of funds. The said commission shall have full, complete, and exclusive authority to expend for and on behalf of such municipality all sums of money so appropriated. [C27, 31, 35,§5829-a15.]

5829.16 Gifts. All gifts, donations, or payment whatsoever which are received by such municipality for city plan purposes shall be placed in the city plan commission fund, to be used by the said commission in the same manner as hereinbefore stated. [C27, 31, 35,§5829-a16.]

5829.17 Debt-contracting powers. The said commission shall have no power to contract debts beyond the amount of its income for the current year. [C27, 31, 35,§5829-a17.]

5829.18 Plan — adoption — conditions. For the purpose of making a comprehensive plan for the physical development of the municipality, the city plan commission shall make careful and comprehensive studies of present conditions and future growth of the municipality and with due regard to its relation to neighboring territory. The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals,

order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development. [C27, 31, 35,§5829-b1.]

Referred to in §5829.19

5829.19 Hearings. Before adopting the said comprehensive plan, or any part of it, or any substantial amendment thereof, the commission shall hold at least one public hearing thereon, notice of the time of which shall be given by one publication in a newspaper of general circulation in the municipality, not less than ten nor more than twenty days before the date of hearing. The adoption of the plan or part or amendment thereof shall be by resolution of the commission carried by the affirmative vote of not less than two-thirds of the members of the commission. After adoption of said plan by the commission, an attested copy thereof shall be certified to the council of said municipality and the council may approve the same, and when said plan or any modification or amendment thereof shall receive the approval of the council, the said plan until subsequently modified or amended as authorized by this section and sections 5829.18 and 5829.20 shall constitute the official city plan of the said municipality. [C27, 31, 35,§5829-b2; 48GA, ch 157,§1.]

5829.20 Amendment of plan. When such comprehensive plan has been adopted as above provided for, no substantial amendment or modification thereof shall be made without such proposed change being first referred to the city plan commission for its recommendation. If the city plan commission disapproves the proposed change, it may be adopted by the city council only by the affirmative vote of at least three-fourths of all the membership of such council. [C27, 31, 35,§5829-b3.]

Referred to in §5829.19

CHAPTER 295

COMMUNITY CENTER HOUSES AND RECREATION GROUNDS

5830 Community center houses authorized.
5831 Community center districts.
5832 Managing board—superintendent—salaries.
5833 Rules and regulations.
5834 Maintenance in connection with school premises.

5830 Community center houses authorized. All cities having a population of fifty thousand or over shall have power to provide for the several districts in said city, or for any one of such districts, as hereinafter defined, a community center house with recreation grounds adjacent for the use, recreation, and instruction of the residents of said district, and to submit to the electors of any such district at a regular city election, or special election called for that purpose, the question of the establishment of such improvement and of the issuance of district bonds to provide the same. And in cities where buildings and grounds suitable for community center activities are owned and maintained by the city, the city council may, by resolution, establish such buildings or grounds as community centers without submitting the question of the establishment thereof to the electors. [C24, 27, 31, 35,§5830.]

Vote required, §1171.18

5831 Community center districts. The city council shall, for the purpose herein contemplated, have power to divide the city into community center districts and to determine the area to be benefited and define the boundary of such districts, having regard to existing natural community centers and the probable development thereof in the future growth of the city, the intention being to provide for such outlying districts within the city as by reason of distance, means of communication, or other causes, have or are likely to develop a distinct community life, a community center house and grounds for recreation, community meetings, instruction and entertainment, and for the general betterment and development of the life of the district affected. [C24, 27, 31, 35,§5831.]

5832 Managing board — superintendent — salaries. The city council shall have charge of community centers or the council may appoint from the residents of the district, three persons specially fitted and interested in such work, who shall be known as the community center board. After its appointment, such board shall have charge of the community center improvement, subject to such direction, rules, and regulations as the city council may deem necessary; and said board shall make a report in writing to the city council immediately after the close of each municipal fiscal year as to the operation of said community center, including the expense thereof, for the preceding year.

Subject to the approval of the city council, the said community center board shall have authority to determine the character of the activities of said community center, and said board or a majority thereof shall, promptly on their appointment, recommend to the city council the name of some person peculiarly fitted for such work, who shall be known as the community center superintendent, who shall be placed in charge of such community center and shall have such powers and perform such duties in that connection as may be directed by the board, acting under the city council. The members of said community center board shall serve without compensation, and the superintendent shall be elected for such term and upon such salary as may be fixed by the city council. The said community center board may (but only with the consent of the city council) employ such additional help as may prove necessary. All salaries shall be paid monthly. Such salaries and all other expenses incurred in the maintenance of such community center shall be paid out of the community center fund for said district, but only

after being allowed and ordered paid by the city council. [C24, 27, 31, 35,§5832.]

Fiscal year, §5676.1

5833 Rules and regulations. The city council shall request suggestions for rules and regulations to be adopted for the government and operation of such community center improvement from the community center board and superintendent, and from such public-spirited citizens as are interested in such development and particularly in the child welfare of such city, and shall carefully consider all such suggestions, and shall thereafter determine and promulgate the rules and regulations which shall govern in the operation and management of such community center. Such rules and regulations may thereafter be modified and changed from time to time by the city council. [C24, 27, 31, 35, §5833.]

5834 Maintenance in connection with school premises. The name that may be adopted for said community center district, and the location of the improvements, shall be determined by the city council; and in this connection said city council is authorized, if it shall deem it advisable, and with the consent of the school board, to locate such community center improvement in connection with, adjacent to, or as a part of public school buildings and grounds erected or to be erected and maintained within said community center district, and to cooperate with the boards having the custody and management of public school buildings or grounds within said district, and, by making arrangements satisfactory to such boards, to provide for the supervision, instruction, and oversight necessary to carry on public educational and recreational activities, and for a division between the school board and the community center district of the cost of buildings, recreation grounds, and equipment to be used in connection with such school as a community center, and of the expense of operation thereof; provided further that in case such community center shall be established or maintained in connection with a public school operated within said community center district, the city council shall have authority to arrange as it may deem best with the school board for the necessary personal supervision of such community center, other than that contemplated herein where such center is operated independently. [C24, 27, 31, 35,§5834.]

CHAPTER 296

MUNICIPAL BANDS

Chapter applicable to certain special charter cities, §6761

5835 Levy.
5836 Petition.
5837 Election.
5838 Duty to levy tax.
5839 Revocation of authority.
5840 Disposition of funds.

5835 Levy. Cities having a population of not over forty thousand and towns may, when authorized as hereinafter provided, levy each year a tax of not to exceed one-half mill for the purpose of providing a fund for the maintenance or employment of a band for musical purposes; provided, however, that when there is so maintained or employed in such city or town a band incorporated not for profit under chapter 394 for educational purposes throughout the entire year, which, as a part of such educational program, trains and maintains throughout the entire year subsidiary units of such band whereby the youth of the city or town receive instruction and training in band music, an additional tax of not to exceed one-half mill may be levied for such educational purposes without further authorization by an election.

Cities having a population of over forty thousand and not more than one hundred twenty-five thousand may, when authorized as hereinafter provided, levy each year a tax of not to exceed one-eighth mill for the purpose of providing for the maintenance or employment of a band for musical purposes. [C24, 27, 31, 35, §5835; 47GA, ch 161,§1.]

Referred to in §5840

5836 Petition. Said authority shall be initiated by a petition signed by ten percent of the legal voters of the city or town, as shown by the last regular municipal election. Said petition shall be filed with the council or commission and shall request that the following question be submitted to the voters, to wit: "Shall a tax of not exceeding (here insert number) mills be levied each year for the purpose of furnishing a band fund?" [C24, 27, 31, 35, §5836.]

5837 Election. When such petition is filed, the council or commission shall cause said question to be submitted to the voters at the first following general municipal election. [C24, 27, 31, 35,§5837.]

5838 Duty to levy tax. Said levy shall be deemed authorized if a majority of the votes cast at said election be in favor of said proposition, and the council or commission shall then levy a tax sufficient to support or employ such band, not to exceed one-half mill on the assessed valuation of such municipality. [C24, 27, 31, 35,§5838.]

5839 Revocation of authority. A like petition may at any time be presented to the council or commission asking that the following proposition be submitted, to wit: "Shall the power to levy a tax for the maintenance or employment of a band be canceled?" Said submission shall be made at any general municipal election as

heretofore provided, and if a majority of the votes cast be in favor of said question, no further levy for said purpose shall be made. [C24, 27, 31, 35,§5839.]

5840 Disposition of funds. All funds derived from said levy shall be expended as set out in section 5835 by the council or commission. [C24, 27, 31, 35,§5840.]

CHAPTER 297

COMFORT STATIONS

5841 Number.
5842 Requirements.
5843 Management.
5843.1 Report.

5841 Number. Any town of one thousand or more inhabitants and any city of less than twenty-five thousand inhabitants may establish and maintain one public comfort station. Any city of more than twenty-five thousand inhabitants and less than fifty thousand may establish and maintain two public comfort stations, and any city of over fifty thousand inhabitants may establish and maintain three public comfort stations. [C24, 27, 31, 35,§5841.]

5842 Requirements. All public comfort stations shall have one room for men and one room for women. Such stations shall be so located within the principal business parts of the city as will best accommodate the public, and shall be of sufficient size to accommodate the patrons of such stations. They shall be furnished with suitable, adequate, and sanitary toilets and lavatories, and shall be at all times kept clean, sanitary, and properly heated during cold weather. [C24, 27, 31, 35,§5842.]

5843 Management. Each city maintaining public comfort stations shall establish and maintain a commission consisting of three persons, at least one of whom shall be a woman, appointed by the mayor, which commission shall have complete supervision over all comfort stations in that city. The members of the commission shall serve without compensation. This commission shall have power to handle all funds and employ such help as may be necessary to properly conduct such stations. [C24, 27, 31, 35, §5843.]

5843.1 Report. Said commission shall, immediately after the close of each municipal fiscal year, make a detailed report in writing to the council of all money received and disbursed by it. [C27, 31, 35,§5843-a1.]

Fiscal year, §5676.1

CHAPTER 298

JUVENILE PLAYGROUNDS

Referred to in §5813.9. Chapter applicable to special charter cities, §6762

5844 Authorization.
5845 Commission—appointment and duties.
5846 Joint maintenance.
5847 Superintendents—assistants—maintenance.
5848 Cooperation—rules.

5844 Authorization. Cities may, when authorized by the voters, provide one or more playgrounds and recreation centers, either on lands to be acquired, or on lands already owned or to be leased by the city. The number and location thereof shall be determined by the city council. [SS15,§879-r; C24, 27, 31, 35,§5844.]

5845 Commission—appointment and duties. The council of any city which establishes any playground as provided by law, may by ordinance create a playground commission consisting of not less than five nor more than nine members who shall be appointed by the mayor with the approval of the council, and all of whom shall be qualified electors of such city and shall serve without compensation. The full term of office of each member of the commission shall be three years, but those first appointed may be for shorter periods. The council may confer on such commission all or any part of its powers in relation to the equipment, maintenance, and conduct of playgrounds. [C24, 27, 31, 35,§5845.]

5846 Joint maintenance. Cities shall, so far as possible, cooperate with the school boards within said cities in providing for joint operation and maintenance of all public playgrounds within said cities. [C24, 27, 31, 35,§5846.]

5847 Superintendents—assistants—maintenance. The council, or commission where one exists, shall appoint a suitable superintendent and all necessary assistants for each playground and fix their term of employment, salaries, and duties. The superintendent shall have control of the children while playing on such grounds. All salaries and expenses incurred in the maintenance of such grounds shall be paid from the playground maintenance fund. [SS15,§879-v; C24, 27, 31, 35,§5847.]

5848 Cooperation—rules. The council or commission shall cooperate with the board of education, the superintendent of schools, and with public-spirited citizens interested in child welfare in the government and operation of playgrounds and to that end it may, from time to time, adopt and enforce such rules as it may deem advisable. [SS15,§879-w; C24, 27, 31, 35, §5848.]

CHAPTER 299

PUBLIC LIBRARIES

Referred to in §4541.15. Chapter applicable to special charter cities, §6764

5849 Formation—maintenance.
5850 Donations.
5851 Library trustees.
5852 Term of office.
5853 Qualifications.
5854 Vacancies.
5855 "Vacancy" defined.
5856 Compensation.
5857 Joint libraries.
5858 Powers.
5859 Power to contract.
5860 Method of use.
5861 Rate of tax.
5862 Township tax.
5863 County tax.
5864 Uniting with historical associations.
5865 Fund—treasurer.
5866 Report.

5849 Formation—maintenance. Cities and towns may provide for the formation and maintenance of free public libraries open to the use of all inhabitants under proper regulations, and may purchase, erect, or rent buildings or rooms suitable for this purpose and provide for the compensation of necessary employees. [C73, §461; C97,§727; S13,§727; C24, 27, 31, 35,§5849.]

40ExGA, HF 165, §1, editorially divided

5850 Donations. They may receive, hold, and dispose of all gifts, donations, devises, and bequests that may be made to them for the purpose of establishing, increasing, or improving any library; and when the conditions thereof have been accepted by the city, their performance may be enforced by the library board by an action of mandamus against the council or by other proper action. The council may apply the profits accruing therefrom to best promote the prosperity and utility of the library. [C73,§461; C97,§727; S13,§727; C24, 27, 31, 35, §5850.]

5851 Library trustees. In any city or town in which a free library has been established, there shall be a board of library trustees, consisting of five, seven, or nine members, to be appointed by the mayor, by and with the approval of the city council, which shall also establish by ordinance the number to be appointed. [C97,§728; SS15,§728; C24, 27, 31, 35, §5851.]

89GA, ch 265, §1, editorially divided

5852 Term of office. Of said trustees so appointed on boards to consist of nine members, three shall hold office for two years, three for four years, and three for six years; on boards to consist of seven members, two shall hold office for two years, two for four years, and three for six years; and on boards to consist of five members, one shall hold office for two years, two for four years and two for six years, from the first day of July following their appointment in each case, and at their first meeting they shall cast lots for their respective terms, reporting the result of such lot to the council. All subsequent appointments, whatever the size of the board, shall be for terms of six years each, except to fill vacancies. [C97,§728; SS15,§728; C24, 27, 31, 35,§5852.]

5853 Qualifications. Bona fide citizens and residents of the city or town, male or female, over the age of twenty-one years, are alone eligible to membership. [C97,§728; SS15,§728; C24, 27, 31, 35,§5853.]

5854 Vacancies. Vacancies in the board shall be filled by appointment by the mayor, by and with approval of the city council, such appointees to fill out the unexpired term for which the appointment is made. [C97,§728; SS15,§728; C24, 27, 31, 35,§5854.]

5855 "Vacancy" defined. The removal of any trustee permanently from the city, or his absence from six consecutive regular meetings of the board, except in case of sickness or temporary absence from the city, without due explanation of absence, shall render his office as trustee vacant. [C97,§728; SS15,§728; C24, 27, 31, 35,§5855.]

5856 Compensation. Members of said board shall receive no compensation for their services. [C97,§728; SS15,§728; C24, 27, 31, 35,§5856.]

5857 Joint libraries. In cities and incorporated towns where a college or university is located, it shall be lawful for the city or town and such institution of learning to jointly establish and maintain a public library for their mutual benefit upon such terms and conditions as regards maintenance, control, appointment of library trustees, and other incidents of joint control as may in any lawful manner be mutually agreed upon between them; but no city or town may undertake to contribute toward the maintenance more than the amount produced by a rate of taxation therefor allowed by law, and no person shall be appointed or confirmed as library trustee other than such having the qualifications required by law. [C97,§728; SS15,§728; C24, 27, 31, 35,§5857.]

Taxation authorized, §6211, par. 19

5858 Powers. Said board of library trustees shall have and exercise the following powers:

1. To meet and organize by the election of one of their number as president of the board, and by the election of a secretary and such other officers as the board may deem necessary.
2. To have charge, control, and supervision of the public library, its appurtenances and fixtures, and rooms containing the same, directing and controlling all the affairs of such library.
3. To employ a librarian, such assistants and employees as may be necessary for the proper management of said library, and fix their compensation; but, prior to such employment, the

compensation of such librarian, assistants, and employees shall be fixed for the term of employment by a majority of the members of said board voting in favor thereof.

4. To remove such librarian, assistants, or employees by a vote of two-thirds of such board for misdemeanor, incompetency, or inattention to the duties of such employment.

5. To select and make purchases of books, pamphlets, magazines, periodicals, papers, maps, journals, furniture, fixtures, stationery, and supplies for such library.

6. To authorize the use of such libraries by nonresidents of such cities and towns and to fix charges therefor.

7. To make and adopt, amend, modify, or repeal bylaws, rules, and regulations, not inconsistent with law, for the care, use, government, and management of such library and the business of said board, fixing and enforcing penalties for the violation thereof.

8. To have exclusive control of the expenditures of all taxes levied for library purposes as provided by law, and of the expenditure of all moneys available by gift or otherwise for the erection of library buildings, and of all other moneys belonging to the library fund, including fines and rentals collected under the rules of the board of trustees.

Said board shall keep a record of its proceedings. [C97,§729; S13,§729; C24, 27, 31, 35, §5858; 47GA, ch 162,§1.]

5859 Power to contract. Contracts may be made between the board of trustees of any free public library and any city, town, school corporation, township, or county for its use by their respective residents. Townships and counties may enter into such contracts, but may only contract for the residents outside of cities and towns. Such contract by a county shall supersede all contracts between the library trustees and townships or school corporations outside of cities and towns. [S13,§§592-a, 729-a; C24, 27, 31, 35,§5859.]

5860 Method of use. Such use shall be accomplished by one or more of the following methods in whole or in part:

1. By lending the books of such library to such residents on the same terms and conditions as to residents of the city or town in which said library is situated.

2. By the establishment of depositories of books of such library to be loaned to such residents at stated times and places.

3. By the transportation of books of such library by wagon or other conveyance for lending the same to such residents at stated times and places.

4. By the establishment of branch libraries for lending books to such residents. [S13, §729-a; C24, 27, 31, 35,§5860.]

5861 Rate of tax. Such contracts shall provide for the rate of tax to be levied during the period thereof, and shall remain in force until terminated by a majority vote of the electors of such school corporation, civil township, county, city, or town voting on the proposition at such election. [S13,§729-a; C24, 27, 31, 35,§5861.]

5862 Township tax. The board of trustees of any township which has entered into such a contract shall at the April meeting levy a tax not exceeding one-fourth mill on the dollar on all taxable property in the township to create a fund to fulfill its obligation under the contract. [S13,§592-a; C24, 27, 31, 35,§5862.]

5863 County tax. The board of supervisors, after it makes such contract, shall levy annually on the taxable property of the county outside of cities and towns, a tax of not more than one-fourth mill to create a fund to fulfill its obligation under the contract. [SS15,§422; C24, 27, 31, 35,§5863.]

5864 Uniting with historical associations. Whenever a local county historical association shall be formed in any county having a free public library, the trustees of such library are hereby authorized to unite with such historical association and to set apart the necessary room and to care for such articles as may come into the possession of said association; said trustees are also authorized to purchase necessary receptacles and materials for the preservation and protection of such articles as are in their judgment of a historical and educational nature and pay for the same out of the library fund. [S13, §729-e; C24, 27, 31, 35,§5864.]

5865 Fund—treasurer. All moneys received and set apart for the maintenance of such library shall be deposited in the treasury of such city or town to the credit of the library fund, and shall be kept bv the treasurer separate and apart from all other moneys, and paid out upon the orders of the board of trustees, signed by its president and secretary.

Provided that in any city or incorporated town where a free public library is maintained jointly by the city or town and an institution of learning, for the support and maintenance of which both the city and the institution of learning contribute, the library trustees may elect a library treasurer therefor, and it shall be the duty of the city treasurer to pay over to said library treasurer any and all library taxes that may be collected by him monthly. [C97,§730; S13,§730; C24, 27, 31, 35,§5865.]

5866 Report. The board of trustees shall, immediately after the close of each municipal fiscal year, make to the council a report containing a statement of the condition of the library, the number of books added thereto, the number circulated, the number not returned or lost, the amount of fines collected, and the amount of money expended in the maintenance thereof during such year, together with such further information as it may deem important. [C97, §731; C24, 27, 31, 35,§5866.]

Fiscal year, §5676.1

CHAPTER 299.1

MUNICIPAL ART GALLERIES

5866.01 Authorization.
5866.02 Board of trustees.
5866.03 Tenure.
5866.04 Casting lots for term.
5866.05 Regular appointees—tenure.
5866.06 Qualification.
5866.07 Automatic vacancy.
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5866.12 Record of proceedings.
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5866.01 Authorization. Cities having a population of twenty thousand or more, including cities acting under special charter, may provide for the establishment and maintenance of a municipal art gallery which, under proper regulations, shall be open to the use of the public, and may purchase, erect, or rent buildings or rooms or use any available property belonging to such city, suitable for this purpose, and provide for the compensation of necessary employees. [C27, 31, 35,§5866-a1.]

5866.02 Board of trustees. In any city in which a municipal art gallery has been established, there shall be a board of art trustees consisting of five, seven, or nine members to be appointed by the mayor, by and with the approval of the city council, which shall also establish by ordinance the number to be appointed. [C27, 31, 35,§5866-a2.]

5866.03 Tenure. Of such trustees so appointed on boards to consist of nine members, three shall hold office for two years, three for four years, and three for six years; on boards to consist of seven members, two shall hold office for two years, two for four years, and three for six years; and on boards to consist of five members, one shall hold office for two years, two for four years and two for six years, from the first day of July following their appointment in each case. [C27, 31, 35,§5866-a3.]

41GA, ch 119, §8, editorially divided

5866.04 Casting lots for term. At their first meeting they shall cast lots for their respective terms and report the result of such lot to the council. [C27, 31, 35,§5866-a4.]

5866.05 Regular appointees — tenure. All subsequent appointments, whatever the size of the board, shall be for terms of six years each, except to fill vacancies. [C27, 31, 35,§5866-a5.]

5866.06 Qualification. Only bona fide citizens and residents of the city or town, male or female, over the age of twenty-one years, shall be eligible to membership. [C27, 31, 35,§5866-a6.]

5866.07 Automatic vacancy. The removal of any trustee permanently from the city, or his absence from six consecutive regular meetings of the board, except in case of sickness or temporary absence from the city, without due explanation of absence, shall render his office as trustee vacant. [C27, 31, 35,§5866-a7.]

5866.08 Filling vacancy. Vacancies in the board shall be filled by appointment by the mayor, by and with approval of the city council, such appointees to fill out the unexpired term for which the appointment is made. [C27, 31, 35,§5866-a8.]

5866.09 Compensation. Members of said board shall receive no compensation for their services. [C27, 31, 35,§5866-a9.]

5866.10 Use of art galleries. In any such city where there is an art institute or art school or other organization whose purpose is the teaching of art or the promotion and development of public interest in art, the board of trustees may make any contracts with such institutions for the special use of such art gallery or for the joint care of same as may in any lawful manner be mutually agreed upon between them; but no such city shall contribute any money for the support of any such private institution and no officer or employee of such private institution shall be a member of such board. [C27, 31, 35, §5866-a10.]

5866.11 Powers of board. Such board of art trustees shall have and exercise the following powers:

1. To meet and organize by the election of one of their number as president of the board, and by the election of a secretary and such other officers and committees as the board may deem necessary.
2. To have charge, control, and supervision of the public art gallery, its works of art, appurtenances, fixtures, and buildings or rooms containing the same, directing and controlling all the affairs of such art gallery.
3. To employ a director and such assistants and employees as may be necessary for the management of said art gallery and fix their compensation; but, prior to such employment, the compensation of such supervisor, assistants, and employees shall be fixed for the term of employment by a majority vote of such board of art trustees and such compensation shall not be increased during such period of employment.
4. To remove such director, assistants, or employees by a vote of two-thirds of such boards for misdemeanor, incompetency, or inattention to the duties of such employment.
5. To accept on behalf of the city, gifts or works of art; to select and make purchases of pictures, portraits, paintings, statuary and relics, and other objects of art, in the original and in replicas or copies, books, periodicals,

papers, and journals on the subject of art, furniture, fixtures, stationery, and supplies for such art gallery.

6. To receive, hold, and dispose of all gifts, donations, devises, and bequests that may be made to the city for the purpose of establishing, increasing, or improving such art gallery; but when any such gift, donation, devise, or bequest shall be conditioned upon any act of the city, the city council must first determine whether such condition can or shall be complied with.

7. To make and adopt, amend, modify, or repeal bylaws, rules, regulations, not inconsistent with law, for the care, use, government, and management of such art gallery and the business of said board, fixing and enforcing penalties for the violation thereof.

8. To have exclusive control of the expenditures of all taxes levied for the purposes, as provided by law, and of the expenditure of all moneys available by gift, or otherwise for the erection of art buildings or for the promotion of such art galleries and of all other money belonging to the art gallery fund. [C27, 31, 35, §5866-a11.]

41GA, ch 121, §9, editorially divided

5866.12 Record of proceedings. Said board shall keep a record of all of its proceedings. [C27, 31, 35,§5866-a12.]

5866.13 Appropriation. The city council may appropriate each year not to exceed five percent of the general fund for the purpose of maintaining and enlarging such art gallery and for defraying the necessary expenses connected therewith, including the maintenance of the building in which such gallery is housed, water, light, heat and power, and the salary of the director and his assistants. [C27, 31, 35,§5866-a13.]

5866.14 Separate fund kept — disbursement. All moneys received and set apart for the maintenance of such art gallery shall be deposited in the treasury of such city to the credit of the art gallery fund and shall be kept by the treasurer separate and apart from all other moneys and paid out upon the orders of the board of art trustees signed by its president. [C27, 31, 35,§5866-a14.]

5866.15 Annual report. Immediately after the close of each municipal fiscal year, said board shall file with the council a written report which shall cover the last preceding fiscal year and contain a statement of the condition of the art gallery, the number of pictures, portraits, paintings, statuary, or relics contained in the gallery, and all additions thereto, the amounts of fines collected, the amount of donations, devises, and bequests received during the year and the amount of money expended in the maintenance of such art gallery, together with such further information as may be deemed important. [C27, 31, 35,§5866-a15.]

Fiscal year, §5676.1

CHAPTER 300

MUNICIPAL HOSPITALS

5867 Trustees.
5867.1 Trustees in certain cities.
5868 Organization.
5869 Treasurer.
5870 Compensation—expenses.
5871 Management.
5872 Jurisdiction.
5873 Appropriation.

IN CERTAIN CITIES

5873.1 Construction by pledge of net earnings of light and power plants—certificates of indebtedness.
5873.2 Election.
5873.3 Form of submission.

5867 Trustees. Cities may by ordinance provide for the election, at a general, city, or special election, of three hospital trustees, whose terms of office shall be six years; but at the first election, three shall be elected and hold their office, respectively, for two, four, and six years, and they shall by lot determine their respective terms. [S13,§741-o; C24, 27, 31, 35,§5867.]

5867.1 Trustees in certain cities. Cities having a population of fifty thousand or over which have a hospital board of trustees consisting of three members may by ordinance increase the number of members to five and provide for the appointment of one of the additional members until the next succeeding general or city election, and for the appointment of the other additional member until the second succeeding general or city election. Thereafter, the terms of office of such additional members shall be six years. [C27, 31, 35,§5867-a1.]

5868 Organization. The said trustees shall within ten days after their election qualify by taking the oath of office, and organize as a hospital board by the election of one of their number as chairman and one as secretary, but no bond shall be required of them. [S13,§741-p; C24, 27, 31, 35,§5868.]

S13,§741-p, editorially divided

5869 Treasurer. The city treasurer shall be the treasurer of said board of trustees, and shall receive and disburse all funds under the control of said board as ordered by it, but shall receive no additional compensation for his services. Such treasurer shall give bond in such form and amount as may be determined by the board in its discretion in addition to the bond required of him by section 5654.1. [S13,§741-p; C24, 27, 31, 35,§5869; 47GA, ch 163,§1.]

5870 Compensation—expenses. No trustee shall receive any compensation for his services

performed, but he may receive reimbursement for any cash expenses actually made for personal expenses incurred as such trustee, but an itemized statement of all such expenses and moneys paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of the full board. [S13,§741-p; C24, 27, 31, 35, §5870.]

5871 **Management.** Said board of trustees shall be vested with authority to provide for the management, control, and government of such city hospital and shall provide all needed rules and regulations for the economic conduct thereof. In the management of said hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of the state. [S13,§741-p; C24, 27, 31, 35,§5871.]

5872 **Jurisdiction.** The jurisdiction of such cities and towns shall extend over all lands used for hospital purposes without the corporate limits if so located, and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such hospitals. [S13,§741-t; C24, 27, 31, 35,§5872.]

5873 **Appropriation.** In a city maintaining a hospital the council may appropriate each year not exceeding five percent of the general fund for its improvement and maintenance. [S13,§741-u; C24, 27, 31, 35,§5873.]

IN CERTAIN CITIES

5873.1 **Construction by pledge of net earnings of light and power plants—certificates of indebtedness.** Any city of the second class having a population of five thousand and not more than six thousand, owning and operating an electric light and power plant that is wholly paid for, and that is producing an annual income from the sale of electric current in excess of all expense of operation and reasonable depreciation charges against said plant, may, for the purpose of paying the cost of the construction of a municipal hospital, borrow money, and may, for the repayment of said loan and interest thereon, pledge for a period not exceeding fifteen years, not to exceed fifty percent of the net earnings each year of said plant.

In exercising the power herein conferred, the council may issue interest-bearing certificates of indebtedness which shall be payable solely from the earnings pledged, and the certificates shall so state; and said city may bind said city to maintain said plant and to charge and collect such rates for the products of said plant as will, under said pledge, discharge said loan as it matures. [C35,§5873-e1.]

Referred to in §5873.2

5873.2 **Election.** The power granted in section 5873.1 to issue certificates and to pledge said earnings for the payment thereof shall not be exercised unless a majority of the legal electors of the city voting thereon vote in favor of the exercise of such power. The council may, on its own motion, submit such question either at a general election or at a special election called for that purpose.

Upon the filing with the mayor of a petition requesting the submission of such question, signed by twenty-five legal electors of each voting precinct in the city, the mayor shall submit such question at the first general election following the filing of said petition, providing said general election occurs not less than forty nor more than ninety days after said filing. If said question cannot be submitted at a general election, as herein provided, the mayor shall submit such question at a special election which he shall forthwith call for such date as will permit the giving of the notice herein provided. Notice of said election shall be given as provided by section 6133. [C35,§5873-e2.]

5873.3 **Form of submission.** The question shall be submitted in substantially the following form:

"Shall the city of....., Iowa, construct a municipal hospital, and for the payment of such construction pledge, for a period not exceeding fifteen (15) years, not to exceed fifty percent (50%) of the net earnings each year of the municipal light and power plant and issue interest-bearing certificates of indebtedness not exceeding.....dollars, as evidence of said indebtedness?" [C35,§5873-e3.]

CHAPTER 301

BRIDGES

Chapter applicable to special charter cities, §6765

5874 Construction and repair.
5875 Cities controlling bridge fund.
5876 Levy authorized.
5877 Limitation—certification of levy.
5878 Certificates or bonds.
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5882 Aiding county bridge.
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5885 Certification of tax.
5886 Tax levied.
5887 Collection—payment.
5888 Forfeiture.
5889 Contract for use of bridge.
5890 Tax to purchase.
5891 Question submitted.
5892 Bonds or warrants—tolls.
5893 Tax in cities after annexation.

5874 **Construction and repair.** Cities shall have the care, supervision, and control of all public bridges and culverts, viaducts, underpasses, grade crossing separations and approaches thereto, not constructed or maintained by any railroad company under the provisions of

chapter 305, within their corporate limits; shall cause the same to be kept open and free from nuisance, and shall construct and keep in repair all public culverts within the limits of said corporations.

They may aid in the construction of county bridges within the limits of the city, or of any bridge contiguous thereto on a highway leading to the city, or of any bridge across any unnavigable river which divides the county in which the city is located from another state by appropriating a sum not exceeding ten dollars per linear foot therefor. [R60,§1097; C73,§527; C97,§757; C24, 27, 31, 35,§5874; 48GA, ch 158, §1.]

5875 **Cities controlling bridge fund.** Cities of the second class having a population of two thousand or over, which border on or are traversed by a stream two hundred feet or more in width from shore line to shore line, and cities which have a population of forty-five hundred and not exceeding six thousand, and which are traversed by a river and in which there are, within the corporate limits, at least twelve bridges used for general traffic and cities of the first class, shall have full control of the city bridge fund levied and collected therein, and shall use the same for the construction and repair of bridges, culverts, and approaches thereto, and payment of bridge bonds, and interest thereon, issued by such city, and shall be liable for the defective construction thereof and for failure to maintain the same in safe condition. They may use the bridge fund for the construction, reconstruction, maintenance or repair of viaducts, underpasses or grade crossing separations, and approaches thereto, except those constructed and wholly maintained by any railroad company under the provisions of chapter 305. [C97,§758; SS15,§758; C24, 27, 31, 35, §5875; 48GA, ch 158,§2.]

Cities controlling bridge fund, §§6209, 6858

5876 **Levy authorized.** When the whole or any part of the cost of the building or reconstruction of any bridge, viaducts, underpasses, grade crossing separations and approaches thereto, except those constructed or reconstructed under the provisions of chapter 305, by such city shall be ordered paid from the city bridge fund, it may by resolution levy at one time the whole or any part of the cost of such improvement upon all the taxable property within the city and determine the whole percentage of tax necessary to pay the same and the percentage to be paid each year, not exceeding two-thirds of the maximum annual limit of the tax such city may levy for a bridge fund; and the number of years, not exceeding twenty-five, given for the maturity of each installment thereof. [SS15,§758-a; C24, 27, 31, 35,§5876; 48GA, ch 158,§3.]

5877 **Limitation—certification of levy.** No part of such costs shall be levied against the property owned by the city, county, state, or the United States. Certificates of such levy shall be filed with the auditor of the county or counties in which the city is located, setting forth the amount or percentage and maturity of said tax or each installment thereof, upon the assessed valuation of all the property in said city, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax lists of the proper county or counties. [SS15, §758-a; C24, 27, 31, 35,§5877.]

Referred to in §6576

5878 **Certificates or bonds.** Any such city may anticipate the collection of taxes authorized to be levied for a city bridge fund and for that purpose may issue bridge certificates or bonds with interest coupons, and the provisions of chapter 320 shall be operative as to such certificates, bonds, and coupons insofar as they may be applicable. [S13,§758-b; C24, 27, 31, 35, §5878.]

Referred to in §6576

5879 **How paid.** Said certificates, bonds, and interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds derived from such levies and pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such city to collect such funds, with interest thereon, and to hold the same separate and apart in trust for the payment of said certificates, bonds, and interest and to apply the proceeds of said funds pledged for that purpose to the payment of said certificates, bonds, and interest. [S13,§758-c; C24, 27, 31, 35,§5879.]

Referred to in §6576

5880 **Bonds for construction.** Cities of the first class, and also cities of the second class having a population of five thousand or over and which are traversed by a stream two hundred feet or more in width from shore line to shore line, are hereby authorized to contract indebtedness and to issue bonds for the purpose of constructing bridges, viaducts, underpasses, grade crossing separations and approaches thereto, but not including those constructed under the provisions of chapter 305. Such bonds shall be payable in not exceeding twenty annual installments and bear interest at not exceeding five percent per annum, and shall be made payable at such place and be of such form as the city council shall by ordinance designate. But no city shall become indebted in excess of five percent of the actual value of the taxable property of said city as shown by the last preceding assessment roll. [SS15,§758-d; C24, 27, 31, 35,§5880; 48GA, ch 158,§4.]

Referred to in §5881
See ch 63.1

5881 **Additional power.** Section 5880 shall be construed as granting additional power without limiting the power already existing in cities of the first class, and also cities of the second class having a population of five thousand or over and which are traversed by a stream two hundred feet or more in width from shore line

to shore line. [SS15,§758-e; C24, 27, 31, 35, §5881.]

5882 **Aiding county bridge.** Cities and towns may vote to aid in the construction of any county bridge, when the estimated cost of the same is not less than ten thousand dollars, to the extent of one-half the estimated cost thereof as fixed by the board of supervisors.

A city having a population of five thousand or more may vote a tax, not to exceed one-half of one* percent of the assessed value of the taxable property in such city, to construct, or aid any company which is or may be incorporated under the laws of this state in the construction of, a highway or combination bridge across any navigable boundary river of this state, commencing or terminating in such city, suitable for use as highway, or for both highway and railway and street railway purposes. [C97,§759; C24, 27, 31, 35,§5882.]

Referred to in §5883

*"Two" percent in C31 changed by code editor, under authority of 45GA, ch 121, §88, to "one-half of one" percent

5883 **Question submitted.** Whenever a petition shall be presented to the council, signed by a majority of the resident freehold taxpayers thereof, asking that the question of constructing or aiding in the construction of a bridge as provided in section 5882 be submitted to the qualified electors, it shall be its duty to immediately give notice of a special election, by publication in some newspaper published therein, and also by posting copies of such notice in five public places therein, at least ten days before such election. [C97,§760; C24, 27, 31, 35,§5883.]

Referred to in §§5891, 5896, 6856

5884 **Notice—conditions.** Such notice shall specify the time and place of holding the election, the proposed location of the bridge to be aided, the rate percent of tax to be levied, the amount which the board of supervisors is authorized to cause to be collected each year, and all the conditions in the petition.

In case of proposed aid to a private corporation, the notice shall also state its name, the amount of work required to be done on such bridge, and any other conditions which are to be performed before said tax or any part thereof shall become due and payable. Such notice may also contain terms and conditions to be performed by said corporation receiving such aid after the completion of such bridge, which terms and conditions shall be obligatory and binding upon it, its successors and assigns. [C97,§761; C24, 27, 31, 35,§5884.]

Referred to in §§5891, 5896

5885 **Certification of tax.** At such election the question of taxation shall be submitted to the electors thereof. If a majority of the votes be for taxation, the clerk of such city or town shall forthwith certify to the county auditor of the proper county the result, the rate percent of the tax voted, the year or years during which the same is to be collected, the amount to be collected each year, the terms and conditions upon which the same when collected is to be paid, and, if aid is voted to a private corporation, its name, together with a copy of the notice under which the election was held. The certificate shall be filed with the county auditor, who shall cause the same to be recorded in the office of the recorder of deeds. The expenses of the giving of the notice and holding the election shall be audited and paid out of the county treasury as other claims against the county. [C97,§762; C24, 27, 31, 35,§5885.]

Referred to in §§5891, 5896

5886 **Tax levied.** After such certificate shall have been filed and recorded, the board of supervisors shall, at the time of levying the ordinary taxes, levy each year on the taxable property of such city or town the taxes voted as shown by said certificate. [C97,§763; C24, 27, 31, 35, §5886.]

Referred to in §§5891, 5896

5887 **Collection—payment.** Said taxes shall be collected in the same manner, subject to the same penalties for nonpayment after delinquent, and to the same laws after they are collected or collectible, as other taxes, in conformity with the terms and conditions of the notice of election; when collected they shall be paid by the county treasurer, on the order of the board of supervisors, specifying the special bridge fund from which each order is payable; but in no case shall said board make such order until the conditions specified in the petition and notice have been complied with. Such taxes, when payable to the city or town, shall be paid over as other city or town taxes. When payable to a private corporation, they shall be paid over by the county treasurer to such corporation, upon the order of the president or a majority of the directors thereof, after said council shall have certified to the county treasurer that the conditions required, as set forth in the notice for the special election at which the tax was voted, have been complied with, and the council, or a majority of its members, shall make such certificate whenever such conditions shall have been so performed. [C97, §764; C24, 27, 31, 35,§5887.]

Referred to in §§5891, 5896

Collection of taxes, ch 346 et seq.

5888 **Forfeiture.** Should any taxes levied under the provisions of the foregoing sections remain in the county treasury more than one year after the same shall have been collected, the right to them shall be forfeited and they shall be refunded to the taxpayers; and the board of supervisors shall cause any remaining levy to be canceled and stricken from the tax books, which cancellation shall remove all liens created thereby, and it shall make no further levies under said certificate. [C97,§765; C24, 27, 31, 35,§5888.]

5889 **Contract for use of bridge.** Cities situated on a river wholly in the state, or one forming its boundary line, and from which to the opposite shore a bridge has been or may be constructed by any railroad company, corporation, or person, shall have power to contract with the railroad company, corporation, or person owning

such bridge for the use of the same as a public highway; which contract may be for the joint use of such bridge, or for the sole use of such portion thereof as may be devoted or adapted to highway travel; and may assume the sole liability, or any portion thereof, for damages to persons or property by reason of their being on any portion of said bridge or approach to either end thereof, caused by the running of cars or locomotives thereon by any corporation, company, or person entitled to its use, whether the damage results from the negligence of the person engaged in running said cars or locomotives or otherwise, and to indemnify the owners of said bridge, and all others entitled to use the same, from liability for damage so caused, to the extent or proportion thereof assumed in the said contract; and the city may thereafter, and during the continuance of said contract, manage and control said bridge so far as necessary to regulate the highway travel thereon, and may regulate the same as a free or toll bridge, and prescribe such rates of toll as to it from time to time shall seem proper, and make all necessary police regulations for the government of the highway travel thereon, and levy the necessary tax, not exceeding in any one year two and one-half mills on the dollar, for the purpose of carrying out the terms of such contract. [C97, §766; C24, 27, 31, 35, §5889.]

5890 **Tax to purchase.** Any city in this state which has voted aid to any company for the construction of a highway or combination bridge across any navigable boundary river of this state, a condition of which vote, or the granting or acceptance of such aid, was that the city should have the right to purchase such bridge from the company so aided, its successors or assigns, may, at any time after such taxes voted in aid are collected, vote an additional tax of not exceeding one and one-fourth* percent of the assessed value of the taxable property of such city for the purpose of securing the funds necessary to enable it to make such purchase. Such taxes shall be payable in such annual installments, not less than ten, as the electors may determine. [S13, §766-a; C24, 27, 31, 35, §5890.]

Referred to in §5893

*"Five" percent in C31 changed by code editor, under authority of 45GA, ch 121, §88, to "one and one-fourth" percent

5891 **Question submitted.** The question of whether or not such additional taxes shall be voted shall be submitted to the electors of such city before the city elects to make such purchase, and the submission thereof shall be governed in all respects by sections 5883 to 5887, inclusive, so far as the same are applicable. [S13, §766-b; C24, 27, 31, 35, §5891.]

Referred to in §5893

5892 **Bonds or warrants—tolls.** After such taxes are voted the city may issue its bonds, warrants, or other certificates drawing such interest not exceeding five percent per annum as the city council may determine, payable from such taxes as they are collected, and from no other source, and pledging them for their payment. Such taxes shall be used for no other purpose and such bonds, warrants, or certificates shall not be sold for less than their par or face value with accrued interest. The city council shall fix the rate of tolls or charges for passing over the bridge, and such tolls shall be large enough to pay the interest upon the bonds, warrants, or certificates issued for its purchase together with the expense of maintaining and operating it. [S13, §766-c; C24, 27, 31, 35, §5892.]

Referred to in §5893
See ch 63.1

5893 **Tax in cities after annexation.** In any case where aid has been extended and bridges erected in two separate cities, and subsequent thereto one of such cities has been annexed to the other, the electors residing in the territory which comprised either of the separate cities before annexation, may vote taxes upon the property in such territory for the purchase of such bridge, and the proceedings in such case shall be the same as provided in sections 5890, 5891, and 5892, except that the petition to the city council shall be signed by a majority of the resident freehold taxpayers of the territory in which the vote is to be had, and the taxes, when voted and properly certified, shall be levied only upon the property in such territory. [S13, §766-d; C24, 27, 31, 35, §5893.]

CHAPTER 302

INTERSTATE BRIDGES

Chapter applicable to special charter cities, §6766

5894 Purchase of bridges.
5895 Proceedings attending purchase.
5896 Form of submission.
5897 Appraisers—fees.
5898 Tolls.
5899 Management and maintenance.

5894 **Purchase of bridges.** Any city in this state, including cities under the commission plan, where a tax upon the property of said city has been voted and paid to aid any company in the construction of a highway or combination bridge across any navigable river forming part of the boundary of this state, whether it was a condition of the vote or acceptance of such tax that said city had a right to buy said bridge from the company so aided, its successors or assigns, or not, or whether the time within which by the terms of the vote by which such option to purchase was granted to said city has expired or not, at any time after the taxes so voted in aid of such construction of such bridge have been paid over to said company,

may vote an additional tax not exceeding one and one-fourth percent upon the taxable property of said city for the purpose of procuring funds with which to enable such city to purchase said bridge, such taxes to be payable in such annual installments as the electors of said city may determine, such determination by the electors to be at an election called for that purpose, and the notice submitting such question shall state the price to be paid for such bridge, including its approaches. [C24, 27, 31, 35,§5894.]

5895 **Proceedings attending purchase.** The mayor and city council of such city shall have power to enter into a contract with the corporation or company owning such bridge for the purchase thereof together with its franchises at a price to be agreed upon, which price shall not be greater than the value of such bridge or the cost thereof, with the taxes so voted and paid over by the authorities of said city deducted therefrom.

Unless there is an appraisement as hereinafter provided the original cost of construction shall be considered the value thereof.

No such contract shall become binding upon said city until the same has been submitted to the electors of said city and approved by them by the affirmative vote of a majority of the electors voting for or against the same; the question of the levy of such tax shall be submitted to such electors at the same election, the affirmative vote of a majority of all electors voting for or against the same being necessary to make the contract binding on said city.

If at such election the proposition to make such purchase upon the terms and at the price named in the question submitted and the proposition to vote such tax shall either of them be defeated by not receiving the affirmative vote of a majority of all electors voting for or against the same, such contract shall be considered at an end and said tax defeated. [C24, 27, 31, 35, §5895.]

5896 **Form of submission.** The questions as to whether the said contracts shall become binding upon the said city, and the taxes levied or bonds issued by the city authorities, shall, when submitted to the electors of said city, be submitted in the form and manner provided by sections 5883 to 5887, inclusive, so far as the same are applicable thereto. [C24, 27, 31, 35, §5896.]

5897 **Appraisers—fees.** In case a majority of the members of the city council of such city shall by resolution declare their wish to have the said city purchase said bridge, its approaches and franchises, and be unable to agree with the owner of such bridge upon the value thereof, such value shall be ascertained by three appraisers named by the governor of Iowa, no one of whom shall be an officer, employee, or stockholder of* such owner of said bridge, or a taxpayer or voter in the city proposing to make such purchase or in the county of the state opposite and adjoining said bridge. Such appraisers shall be paid fifteen dollars per day for the time necessarily and actually employed in making such appraisement, together with their actual and necessary traveling expenses, the same to be paid by the city. [C24, 27, 31, 35, §5897.]

*"or" in enrolled act

5898 **Tolls.** If any such city shall thus become the owner of any such bridge, the city council shall have power from time to time to fix the rates of toll or charges for passing over the bridge, which tolls shall be large enough to pay for the maintenance and operating expenses, interest upon any bonds issued for its purchase, and sufficient after five years to provide a sinking fund of at least five percent of such outstanding bonds, and for their payment at maturity. [C24, 27, 31, 35,§5898.]

5899 **Management and maintenance.** If any such city shall thus become the owner of any such bridge, it shall operate the same by officers or employees selected by the mayor and approved by the city council of said city, who shall have police powers and shall maintain order upon said bridge. One of such officers shall be superintendent and authorized to make proper inspection of the structure, see that the same is at all times kept in repair and safe for the traveling public, and that the navigation laws and regulations of the United States are observed.

The said city shall have power to prescribe and enforce proper regulations respecting the passing of stock in droves, and persons and vehicles over said bridge.

Such bridge shall be kept open for travel at all hours of the day or night unless some unavoidable accident shall make such travel for the time unsafe.

The rates of toll and copies of such regulations shall be kept posted at each end of such bridge. [C24, 27, 31, 35,§5899.]

CHAPTER 302.1

INTERSTATE BRIDGES (ADDITIONAL ACT)

Chapter applicable to special charter cities, §6766

5899.01 Principal grant of power.
5899.02 Joint power.
5899.03 Utility franchises for use of bridge.
5899.04 Conveyance of bridge.
5899.05 Power to assign rights.
5899.06 Existing bridge—purchase, lease or sublease.
5899.07 Existing bridge—condemnation.
5899.08 Preliminary expense—tax—bonds.
5899.09 Power to issue bonds.
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5899.14 Bridge commission.
5899.15 Additional powers of commission.
5899.16 Record, reports, auditing, removal of members—general provisions.
5899.17 Acquisition of property by purchase by commission.
5899.18 Condemnation of property by commission.
5899.19 Removal of obstructions.
5899.20 Damage to property.
5899.21 Restoration of public ways and works.
5899.22 Dissolution of commission.
5899.23 Joint bridge commission.
5899.24 Joint purchase.
5899.25 Joint condemnation.
5899.26 Joint construction.
5899.27 Power of foreign cities.
5899.28 Submission to the electors.
5899.29 Supplementary powers granted—saving clause.
5899.30 Additional powers.

5899.01 Principal grant of power. Any city in this state, including cities under the commission plan, is hereby authorized and empowered to acquire by purchase, condemnation, bargain and sale, lease, sublease, gift or otherwise, any existing bridge, including approaches and avenues, rights-of-way or easements of access to approaches, necessary real and personal property incident thereto and franchises, special privileges, leases and contracts in connection with such bridges, and to so acquire any bridge and aforesaid facilities; and is also authorized and empowered to construct and contract for the construction of, and to acquire by purchase, lease, sublease, gift or otherwise, bridges, including all of aforesaid appurtenances, facilities and property; and is also authorized and empowered thereafter to repair, maintain, extend, renew, reconstruct, replace or enlarge and to mortgage or lease and to use and operate any such bridges as toll or free bridges, either or both from time to time, for public use and travel of all kinds by railroads, street railways, bus lines, vehicles and pedestrians and other uses, any or all as may be determined by the governing body of the city, and to use same for public utility purposes, and to fix the rates of toll or the charges for the use of same, and to grant nonexclusive franchises for use of same for public utility purposes upon such terms and conditions as may be prescribed by ordinance, and to exercise all such powers within the city limits and five miles outside thereof within the state of Iowa, and any adjoining state, but only across any navigable or nonnavigable stream forming the boundary between such states, after having obtained any authority which may be necessary from such states and the United States, and to exercise such powers either directly through the governing body of the city or any committee thereof or through a bridge commission created as in this chapter provided, or part any one and part any other. [C31, 35, §5899-c1.]

5899.02 Joint power. Any power in this chapter granted to the city may be exercised by the city independently or in cooperation with or aid of similar action by any other city or any county in Iowa, or any city or county in an adjoining state, or the state of Iowa or any adjoining state or states, or the government of the United States where such other political unit has been authorized by law to exercise the necessary powers. Such joint action may be directly by the governing body of the city or through the medium of a joint bridge commission subject to the same conditions provided in this chapter for independent action. [C31, 35, §5899-c2.]

Referred to in §§5899.24, 5899.25, 5899.26

5899.03 Utility franchises for use of bridge. The cities specified in this chapter through the governing bodies thereof are authorized and empowered to grant franchises for the nonexclusive use of the bridges acquired under this chapter to public utilities upon such terms, conditions and for such consideration as such cities may impose whether incident to or part of the purchase of an existing bridge and rights of utilities in connection therewith, or otherwise, and thereafter to extend the duration or to amend the terms and conditions thereof. Any such grant shall be made by the city council by ordinance and no vote of the electors of the city shall be required. In no case shall such a grant be made by any bridge commission. [C31, 35, §5899-c3.]

5899.04 Conveyance of bridge. In the event that the state of Iowa, an adjoining state, the government of the United States, either, any or all of them should agree to take over any bridge acquired by the city under this chapter and thereafter maintain and operate same as a free public bridge at its or their expense, then such city is authorized to convey such bridge on such conditions to such party or parties. [C31, 35, §5899-c4.]

5899.05 Power to assign rights. Any such city may grant the exclusive right to purchase an existing bridge or to construct a new bridge and to maintain any such bridge within a dis-

tance not exceeding one mile on each side of the bridge to be so purchased or constructed, for the period necessary to reimburse cost plus not exceeding eight percent thereof for financing charges, together with interest upon said cost and charges, but in no event to exceed ten years, subject to the conditions that at the termination of which period, such bridge shall become the sole property of the public and thereafter be maintained and operated by the city as a toll or free bridge as such city may determine from time to time in harmony with the other provisions of this chapter and the laws of the United States. Such grant shall be made in the manner and subject to the same conditions as may be provided by law for the granting of franchises. Any such grant or assignment shall by operation of law be subject to the following conditions; the number of officers and employees and the salaries, wages or compensation thereof shall be reasonable; no person shall be permitted free use of the bridge or use at discriminatory tolls; tolls shall be both adequate to hasten payment for the bridge and reasonable to the public; financing costs shall be reasonable and the city may impose requirements and safeguards as to the conservation of funds and insurance of property; complete statements of operations and finances shall be filed with the city clerk on bond interest dates upon completion of the bridge and upon delivery of same to the city; and the city shall have power to require or itself perform audits and examine the books and call for any reports at any time. The city may enforce these obligations in any court of competent jurisdiction. In any such assignment, same shall by operation of law be subject to the conditions that the plans and specifications, the location, size, type and method of construction, the boundaries and approaches and the estimates of cost of construction and acquisition shall be first submitted to the governing body of the city and receive its approval before any construction shall be commenced or any contract for construction or for financing construction shall be entered into. [C31, 35,§5899-c5.]

5899.06 Existing bridge—purchase, lease or sublease. If any such city shall desire to purchase, lease, or sublease any existing bridge, and shall have received any such authority as may be necessary from the government of the United States, the governing body thereof may determine the fair value thereof, including all interests of every nature therein, and may by written resolution tentatively offer the owners thereof jointly the price so determined, and if all such owners, within ninety days thereafter, shall file with the city clerk of such city a duly authorized and properly executed written tentative acceptance of such offer, binding themselves to accept same and assign such lease or sublease or convey good and complete title by warranty deed when and if the electors of said city shall authorize such purchase and the necessary funds shall be provided therefor, then upon the filing of such acceptance, the governing body of the city may submit to the electors thereof, at a special election called for that purpose or at any general or city election, within one hundred twenty days after the filing of such acceptance, the question whether such purchase shall be made at the price stated on the ballot and the governing body of the city be authorized to issue bonds of the kind or kinds stated in the proposition and in any such amount as may be required to provide the necessary funds, and the proposition so submitted shall be carried if the majority of the electors voting on such proposition shall vote in favor thereof, and the tentative acceptance of the owners of such bridge shall then become final and binding upon them and may be enforced in any court of competent jurisdiction. Title to and possession of the bridge shall pass upon payment of the consideration therefor. Such purchase may also be made subject to existing mortgages and the assumption of outstanding bonds. If repairing, reconditioning and reconstruction shall be necessary to place any bridge so purchased or to be purchased in safe, efficient or convenient condition, the governing body of the city may cause the estimated cost thereof to be included as a part of the cost of such bridge in submitting the proposition of purchase to the electors, or without submitting such additional cost shall, when the purchase has been authorized by the electors, be empowered to issue additional bonds to provide funds for that purpose in an amount not to exceed fifteen percent of the purchase price of the bridge. If within ninety days after this chapter shall have become effective, the governing body of any such city shall not have made any offer to purchase an existing bridge, or shall have made an offer which shall have been rejected by the owners of such bridge, then the owners thereof shall be authorized to submit to the city an offer for the sale, lease or sublease thereof, and such offer shall within ninety days after its filing with the city clerk and approval by the corporation counsel or city attorney, be submitted by the governing body of the city to the electors of the city at a general or city election, held within that period, or at a special election called for that purpose, provided that the owners of the bridge shall agree to pay all of the costs of such submission to the electors and shall adequately secure such payment at the time of the filing the offer with the city clerk. The form of such offer and execution thereof shall be subject to the approval of the corporation counsel or city attorney of the city who shall also prepare the proposition to be submitted to the electors in proper legal form. The proposition submitted to the electors shall include all necessary provisions for financing such purchase, lease or sublease, and the governing body of the city may itself determine the method of such financing and the kind of bonds to be issued in connection therewith and provide for same in the proposition to be submitted, or the governing body of the city may submit to the electors the question as to which

kind of bonds shall be issued for that purpose. Such offer of the owners of such bridge shall be binding upon them, their successors and assigns and all parties in interest unless and until same has been rejected by the electors at the election herein provided for. Any question submitted at such election shall be carried if the majority of the electors voting on such question shall vote in favor thereof. Title to the bridge and the right to the possession thereof shall vest in the city upon proper legal tender of payment in accordance with the offer so submitted and authority granted by the electors. The acceptance of such offer by the electors shall carry with it the authority hereinbefore provided in this section for the provision of funds for repairs, reconditioning or reconstruction. At any time during the period of thirty days after the form of any such offer shall have been approved by the corporation counsel or city attorney of the city, the governing body of such city shall have the right to make a counter offer to the owners of such bridge, and if within that period such offer shall be accepted as hereinafter provided in this section then the offer made by the owners of the bridge and proceedings pursuant thereto herein provided for, shall be abandoned; but if such counter offer shall not be accepted, then the governing body of the city shall proceed with the submission of the offer of the owners of the bridge. During the period of ninety days after the filing of an offer by the owners of the bridge and the approval of the form thereof, the governing body of the city is authorized to hold such public hearings as it may deem advisable, and is empowered to require the disclosure of complete information by the owners of the bridge, and to require the attendance of witnesses and take testimony under oath, and to employ experts and to investigate all matters which may assist the governing body or the electors in determining the questions presented by or growing out of the offer so made. Upon approval by the corporation counsel or city attorney of the form of offer made by the owners of the bridge, such offer shall be published by the city in an official newspaper published in said city, upon three consecutive days. After the corporation counsel or city attorney and the governing body of the city shall have approved the final form in which the offer and proposition is to be submitted to the electors, the city shall cause such proposition to be published on three consecutive days in an official newspaper published in said city to be completed not less than ten days before the date of the election. At the same election at which an offer to sell an existing bridge made by the owners thereof shall be submitted, the governing body of the city is also authorized to submit at the expense of the owners of the bridge an alternative proposition to authorize the construction of a new bridge at an estimated cost to be stated in the proposition and the financing thereof as elsewhere provided for in this chapter for new bridges. The governing body of the city may also submit independent propositions for the construction of one or more new bridges as well as the purchase of an existing bridge at the same election and at the expense of the owners of the existing bridge. The governing body of the city may also, at the same election and at the cost of the owners of the bridge offered for sale, submit the proposition so that the construction of a new bridge shall be authorized only in the event the purchase of the existing bridge shall not be authorized by the electors or the delivery of title and possession shall be unreasonably delayed for any cause. The offer by the owners of the bridge as herein provided for may also be made in any city authorized by the act independently or jointly to such city and any other legally empowered political subdivision in this or an adjoining state, but in such event the time periods provided for in this section to govern the procedure for submission to the electors shall not so run, nor shall the obligation to submit the offer to the electors accrue unless and until the political subdivisions shall have entered into joint contract governing the conditions of purchase and subsequent control and operation in the event the offer shall be legally accepted in the manner provided by the law applicable in each such political subdivisions. The acceptance by the electors of any offer of the owners of the bridge shall by operation of law authorize the governing body of the city in its discretion to subsequently enter into contract with another properly authorized political subdivision in this or an adjoining state to share the cost and the title and control of the bridge so acquired. The owners of a bridge for which an offer is made or by whom an offer is made shall be required to disclose full information as to title and all interest therein, and in the event of the purchase of any such bridge shall be required to deliver good title by warranty deed. [C31, 35,§5899-c6.]

5899.07 Existing bridge—condemnation. If any such city shall desire to acquire any existing bridge or lease thereof or all interest therein by the exercise of the power of eminent domain, and shall have received any such authority as may be necessary from the government of the United States, it may exercise such power in the following manner, or in such manner as congress may require. The governing body of the city shall in a proposed resolution declare such desire and purpose and request the appointment of commissioners of condemnation as herein provided and shall fix the time for consideration of the proposed resolution, at which time any person interested may appear and be heard or may file written objections to the passage of the resolution. The governing body of the city shall cause notice of the time when said resolution will be considered by it for passage to be given by two publications in some newspaper published in the city, the last of which shall be not less than two weeks nor more than four weeks prior to the day fixed for its consideration. Upon the passage of such resolution, a certified copy thereof shall be filed with the chief justice of the supreme court of

the state and said chief justice shall, within ten days thereafter, fix a time for action upon said resolution and give notice to the city and the parties in possession of said bridge, by registered mail, specifying the time and place of hearing fixed by the said chief justice. When the time for hearing shall have arrived the chief justice shall proceed and appoint three competent and disinterested appraisers, at least two of whom must be residents of the state, said appraisers to act as a commission of condemnation, and shall enter an order requiring said commissioners to attend as such commission of condemnation, at the county seat of the county in which said city is located, within ten days after their appointment. Said commissioners of condemnation shall qualify by filing with the clerk of the district court in and for the county in which they are to act, a written oath that they will to the best of their ability, perform faithfully and impartially all the duties required of them by this chapter. Said commission, when it meets to organize pursuant to the order of the said chief justice or at any time during the proceedings, which may be adjourned from time to time for any purpose, may fix the time for the appearance of any person or persons that any party to the proceedings desires to have joined in the proceedings and whom the commission deems necessary. The time for appearance shall be sufficiently remote to serve notice upon such parties, but if the time for appearance occurs after the proceedings are begun such proceedings may be reviewed by the commission to give all parties a full opportunity to be heard. Persons not voluntarily appearing, but having any right, title or interest in or to the property which is the subject of condemnation, or any part thereof, who are to be made parties to the proceedings shall be served with notice thereof and of the time and place of meeting of said commission in the manner and for the same length of time as for the service of original notice, either by personal service or by service by publication, the time so set, being the time at which the parties so served are required to appear, and actual personal service of the notice within or without the state shall supersede the necessity for publication. The commission of condemnation appointed hereunder shall have power to summon and swear witnesses, take evidence, order the taking of depositions, require the production of books and papers and may appoint a shorthand reporter. The commission of condemnation shall select some suitable person to act as clerk and the records kept by such clerk shall constitute the official records of the commission. In the event of a vacancy on the commission of condemnation such vacancy shall be filled in the manner in which the original appointments were made and when necessary, by reason of such vacancy, the commission may review any evidence in its record. All acts, including final report shall be by a majority of such commission. Such commission of condemnation authorized hereby shall determine the value of such bridge, the rights thereunder sought to be appropriated, and make its report in writing, presenting its findings, within one hundred twenty days after its organization, and which report shall be filed with the clerk of the district court of the county in which such city is located. Within ninety days after the filing of the report by said commission if the said city elects to proceed further, the governing body of the city shall introduce an ordinance providing for the submission to the electors of the city the question whether such award shall be confirmed and the property be taken and bonds of the kind or kinds determined by the governing body of the city and stated upon the ballot shall be issued in the amount of said award, such proposition to be submitted within ninety days after said ordinance becomes effective at a special election called for that purpose or at any general or city election, and shall be carried if a majority of the electors voting thereon shall vote in favor thereof. If such proposition is carried, title to the property to be appropriated shall at once vest in said city, and the right to possession shall vest in said city as soon as money in the amount of said award is on deposit with the city treasurer and warrants for the disbursement thereof are available and the interested parties have been notified to that effect provided there exists no actual or legal obstacle to immediate payment. In the event of an appeal, the sum representing the award or awards involved in such appeal or appeals, shall not be paid but shall be invested by the city treasurer in bonds of the United States government or in securities designated by the owner of the property taken, at their own risk, and which shall be held in trust until the final disposition of the appeal, the interest on such bonds to be in lieu of interest upon the award. The governing body of the city is authorized, without a further vote of the electors to issue additional bonds in the amount necessary to pay interest on the award and all costs of the proceedings and any increased interest and costs upon appeal. If the proposition so submitted at the election has been carried, any or all of the persons whose property or interest has been taken may appeal from the finding of value and award within twenty days after the canvass of the election to the district court of the county in which such city is located, by the filing of a petition for appeal with the clerk of said court and by the filing of a bond with said clerk to be approved by him, conditioned for the payment of all costs which may be incurred on any such appeal. The clerk of the district court shall immediately docket said cause and the parties shall proceed in all respects in the trial of said cause in the manner as though said action had been originally instituted in said district court. The party appealing, shall, within such time as the district court shall order, file with the clerk of said court a complete transcript of all of the proceedings had before the commission of condemnation and either party may use, in the trial of said cause, any portion or all of said transcript. The costs of the proceedings before the commission of condemnation, including com-

pensation or fees of the commissioners shall be paid by the city. In the event of an appeal from the award on condemnation the costs shall be taxed and paid as the court may order. The district court of the county in which the proceedings are had shall have jurisdiction upon application by the commissioners to fix the amount of their compensation. Upon such appeal the court may increase or decrease the amount of the award. No such appeal shall delay the passage of the title or right of the city to possession of the property condemned. In the event the amount of such award is increased upon appeal, the amount of such increase shall be paid with interest thereon at the rate of six percent per annum from the date the city took possession of the property until paid. The governing body of the city is authorized without a further vote of the electors to issue such additional bonds as may be necessary to pay interest on the awards, costs on appeal, and any amount by which the award may be increased upon appeal. [C31, 35,§5899-c7.]

Referred to in §5899.25

5899.08 Preliminary expense—tax—bonds. Cities may levy a tax of not to exceed one-fourth* mill on the dollar on the taxable valuation of such city, to be levied, collected and appropriated solely to finance preliminary work, including investigation, soundings, employment of engineers and architects, securing of estimates and any other useful work, or appropriate expense in connection with the proposed acquisition, or construction or purchase of any bridge or bridges and the preliminary financing thereof, and notwithstanding any limitation now or hereafter imposed by law upon the limit of indebtedness, except constitutional limitation, may anticipate such tax and issue bonds with interest coupons maturing in not less than five years, and the provisions of chapter 320 shall be operative as to such bonds and coupons, insofar as they may be applicable and except as set forth in this section. The amount of such bonds may be included as a part of the cost of the bridge and may be repaid out of the proceeds of any bonds issued for permanent financing. [C31, 35,§5899-c8.]

*"One" mill, in C31, changed by code editor, under authority of 45GA, ch 121, §88, to "one-fourth" mill

5899.09 Power to issue bonds. To finance any of the purposes or powers provided for in this chapter, the city council or governing body of any such city shall in the first instance determine whether any purchase, condemnation or construction authorized by this chapter shall be financed by bonds which are general obligations of the city and which may also be supported by a lien or mortgage on the bridge itself or upon the tolls to be derived therefrom, or both, or by revenue bonds as provided for in this chapter and which are charges solely against the revenue to be derived from such bridge through the collection of tolls, or part one kind of bonds and part the other, but shall not have authority to purchase, condemn nor construct any bridge, nor to issue any bonds, except preliminary bonds specially authorized by this chapter, until first authorized by the majority vote of the electors voting on such proposition, which proposition shall indicate the method of acquiring the bridge and the kind or kinds of bonds, at a special election called for that purpose or at any general or city election. This grant of power to issue bonds is in addition to any other which may now have been or hereafter may be conferred upon such city, and shall be free from the restrictions now imposed on cities upon the issuance of bonds and incurring of indebtedness, and subject only to the provisions of the constitution of Iowa. At such election the proposition shall be separate as to each bridge to be acquired or constructed and the amount of bonds may be either a specific amount equal to the estimated total cost of every nature plus not to exceed twenty-five percent, or may be general and authorize the issuance of bonds in such amount as may be found necessary from time to time to complete the acquisition, construction and equipment of the bridge and all costs incident thereto, or may be part one and part the other. For all purposes of financing, the total cost of any improvement authorized by this chapter may include every item of expense in connection with the project, and among other items shall also include the cost of acquiring every interest of every nature and of every person in any existing bridge, the cost of constructing the superstructure, roadway and substructure of any bridge, the approaches, and avenues or rights-of-way of access thereto and necessary real estate in connection therewith, toll houses and equipment thereof and of the bridge, franchises, easements, rights or damages incident to or consequent upon the complete project, expenses preliminary to construction, including investigation and expenses incident thereto, and prior to and during construction the proper traffic estimates, interest upon bonds and all such other expenses as after the beginning of operation would be properly chargeable as cost of operation, maintenance and repairs. [C31, 35,§5899-c9.]

5899.10 Revenue bonds. Cities, including cities under the commission plan are hereby authorized to provide funds for the purposes of this chapter by the issuance of revenue bonds of such cities, the principal and interest of which bonds shall be payable solely from the special funds herein provided for such payment and as to which, as shall be recited therein, the city shall incur no indebtedness of any kind or nature and to support which the city shall not pledge its credit nor its taxing power nor any part thereof. Such revenue bonds shall bear interest at not more than six percent per annum, payable semiannually, and shall mature in not more than twenty years from their date or dates and may be made redeemable at the option of the city issuing the same at not more than the par value thereof plus a premium of five percent under such terms and conditions as the governing body of the city may fix prior to the issuance of such bonds. The governing body of the city shall provide the form of such bonds, including cou-

pons to be attached thereto to evidence interest payments, which bonds shall be signed by the mayor and countersigned and registered by the city treasurer, under the city's seal, and which coupons shall bear the facsimile signatures of said mayor and the city clerk, and shall fix the denomination or denominations of such bonds and the place or places of payment of principal and interest thereof, which may be at the office of the city treasurer and/or any bank or trust company in the state of Iowa, or in the city of New York, state of New York. The governing body of the city may provide for the registration of such bonds in the name of the owner as to the principal alone or as to both principal and interest. Such bonds may be sold in such manner as the governing body of the city may determine to be for the best interests of the city, taking into consideration the financial responsibility of the purchaser and the terms and conditions of the purchase and the availability of the proceeds of the bonds when required for the payment of the cost, such sale to be at not less than ninety-two cents on the dollar and accrued interest. The proceeds of such bonds shall be deposited in the first instance, with the city treasurer and thereafter with such depositories as the bridge commission shall direct and the governing body of the city shall approve, and shall be secured in such manner and to such extent as the governing body of the city and the bridge commission shall require, and shall be used solely for the payment of the cost of the bridge or bridges and costs incident thereto as provided for in this chapter, and be drawn upon over the signatures of the chairman or vice chairman of the bridge commission and the secretary and treasurer thereof, and under such further restrictions, if any, as the governing body of the city may provide. If the face amount of such bonds, less any discount on the sale thereof, shall exceed such cost, the surplus shall be paid into the fund hereinafter provided for payment of the principal and interest of such bonds. The governing body of the city shall have the right to purchase for investment of other funds, and the bridge commission and the governing body of the city shall have the right to purchase for retirement and cancellation any of such bonds that may be outstanding at the market price, but at not exceeding one hundred and five and accrued interest nor exceeding the price, if any, at which the same shall in the same year be redeemable, but all bonds redeemed or purchased out of funds provided by the sale of bridge bonds provided for in this chapter shall forthwith be canceled and shall not again be issued. Prior to the preparation of definitive bonds the governing body of the city may, under like restrictions, issue temporary bonds with or without coupons, exchangeable for definitive bonds upon the issuance of the latter. The governing body of the city may enter into an agreement with any competent trust company as trustee for the holders of such bonds, setting forth the duties of the city and the bridge commission in respect to the construction, maintenance, operation and insurance of any such bridge, the conservation and application of all funds, the insurance of moneys on hand or on deposit and the rights and remedies of said trustee and the holders of such bonds, and restricting the individual right of action of bondholders as is customary in trust agreements respecting bonds of corporations. Said trust agreement may contain such provisions for protecting and enforcing the rights and remedies of the trustee and the bondholders as may be reasonable and proper, and also a provision for approval by the original bond purchasers of the appointment of consulting engineers and of the security given by the bridge contractors and by any bank or trust company in which the proceeds of bonds or bridge tolls or other moneys of the bridge commission shall be deposited, and may provide that no contract for construction shall be made without the approval of the consulting engineers. No such bonds shall be issued unless and until the issuance of same shall have been submitted by the governing body of the city to the electors thereof and authorized by the vote of the majority voting on such proposition at a special election called for that purpose or at any general or city election. At such election the proposition shall be separate as to the bonds for each bridge to be acquired or constructed and the amount of bonds may be either a specific amount equal to the estimated total cost of every nature plus not to exceed twenty-five percent, or may be general and authorize the issuance of bonds in such amount as may be found necessary from time to time to complete the acquisition, construction and equipment of the bridge and all costs incident thereto, or may be part one and part the other. The bonds authorized by this section may, at the option of the governing body of the city, be supported by mortgage and deed of trust. [C31, 35,§5899-c10.]

5899.11 Revenue refunding bonds. Any city which has heretofore or shall hereafter issue revenue bonds under the provisions of this chapter, is hereby authorized to provide for the issuance of revenue refunding bonds of the city for the purpose of refunding any such revenue bonds then outstanding. It shall not be necessary to submit the proposition of issuing such revenue refunding bonds to the electors of the city. In all other respects, the issuance of such revenue refunding bonds, the maturities and other details thereof, the rights of the holders thereof, and the duties of the city and of the bridge commission, if any, in respect to the same, shall be governed by the provisions of this chapter insofar as the same may be applicable, and by the following provisions:

1. No revenue refunding bonds shall be issued, unless issued to refund revenue bonds which have matured or will mature within three months, or unless the interest rate of the revenue refunding bonds shall be at least one-fourth of one per centum less than the interest rate borne by the revenue bonds to be refunded, in which event the entire bond issue may be refunded.

2. No revenue refunding bonds shall be delivered, unless delivered in exchange for rev-

enue bonds to be refunded thereby, except in the amount necessary to provide for the payment of matured or redeemable revenue bonds or revenue bonds maturing or redeemable within three months, including any redemption premium thereon, or all revenue bonds refunded for a lower interest rate as provided in subsection 1.

3. The rates of tolls to be charged for the use of the bridge acquired or constructed from the proceeds of the revenue bonds to be refunded, shall be so fixed and adjusted as to provide a fund sufficient to pay the interest on and the principal of such revenue refunding bonds as the same shall become due, and to provide an additional fund to pay the cost of maintaining, repairing and operating the bridge. And such tolls shall be continued until such revenue refunding bonds and the interest thereon shall be paid or provision made for their payment.

4. Notice of refunding of said bonds shall be given to the public for at least three consecutive weeks prior thereto in at least one local newspaper of general circulation in one of the communities or cities adjacent to and served by said bridge. [47GA, ch 164,§1.]

5899.12 Protection of bondholders. Neither the state of Iowa, nor any political subdivision thereof shall limit or restrict the rights and powers granted in this chapter to the detriment of owners of outstanding bonds authorized hereby, nor shall such state or political subdivision authorize the construction or itself construct any competing bridge within a distance of less than one mile on either side of any bridge acquired under this chapter unless and until all of such bonds, together with the interest thereon have been fully paid and canceled, unless other adequate provision shall have been made for the protection and guaranty thereof. [C31, 35,§5899-c11.]

5899.13 Tolls. The rates of tolls to be charged for the use of any bridge acquired or constructed under the provisions of this chapter shall be fixed and adjusted as may be required by any law of the United States now in force or hereafter to be enacted, and shall be so fixed and adjusted as to provide a fund sufficient to pay the interest and principal of any bonds issued under this chapter, and to provide an additional fund to pay the cost of maintaining, repairing and operating such bridge, and may also provide a reserve fund reasonably sufficient to provide for the cost of the continued operation, supervision, maintenance and repair of said bridge or bridges for a period not to exceed twenty-five years after the removal of toll charges. After the provisions of said funds have been completed, such bridge or bridges shall thereafter be maintained and operated free of toll unless or until the charging of reasonable tolls may be continued or resumed by the governing body of the city or its commission in order to finance reconstruction, extension, enlargement, replacement or renewal of that particular bridge or in aid of the acquisition, construction, reconstruction, extension, enlargement, replacement or renewal of any other bridge owned in whole or in part by said city. The owners of outstanding bonds issued to finance the bridge, or the authorized trustee therefor, shall have the right to compel the fixing of adequate tolls by application to any court of competent jurisdiction. In case the city is at the same time providing for the payment of more than one bridge through the collection of tolls, the tolls upon such bridges may be maintained and adjusted so that each bridge shall assist the financing of the other. [C31, 35,§5899-c12.]

5899.14 Bridge commission. When it has been determined by the city council or the governing body of any such city, by resolution or ordinance in the exercise of its discretion, that in the exercise of the powers conferred by this chapter, it is expedient to create a bridge commission, the mayor of such city, with the approval of the governing body of the city, shall appoint four persons, who with the mayor, ex officio, shall constitute a bridge commission which shall be a police body corporate and politic under the name of (insert name of city) bridge commission and shall have power to contract, to sue and be sued and to adopt a seal and alter same at pleasure, but shall not have power to pledge the credit or taxing power of the city. No officer or employee of said city, except the mayor thereof whether holding a paid or unpaid office shall be eligible to hold an appointment on said commission. Such appointees shall be originally appointed for terms of four years. Upon the expiration of such terms, appointments shall be made in like manner for terms of four years. Not more than two of such appointees shall be members of the same political party. Vacancies shall be filled for any unexpired term in the same manner as the original appointment. Said commission shall elect a chairman and a vice chairman from its members and a secretary and treasurer who need not be a member of such commission. The members of the commission shall receive no compensation, and shall give such bond as may be required from time to time by the governing body of the city. The commission shall fix the compensation of the secretary and treasurer in its discretion. The commission shall have power to establish bylaws, rules and regulations for its own government and to make and enter into all contracts or agreements necessary or incidental to the performance of its duties and the execution of its powers under this chapter. The commission may employ engineering, architectural and construction experts and inspectors and attorneys, and such other employees as may be necessary in its opinion, and fix their compensation, all of whom shall do such work as the commission shall direct. All salaries and compensation shall be obligations against and be paid from funds provided under the authority of this chapter. The office, records, books and accounts of the bridge commission shall always be maintained in the city which the commission represents. Such commission may be charged by the governing body of the city with the construction of new bridges or the

operation, maintenance, repair, renewal, reconstruction, replacement, extension or enlargement of existing bridges, or bridges hereafter constructed. [C31, 35,§5899-c13.]

5899.15 Additional powers of commission. The commission if and when created is hereby authorized to prepare the necessary and proper plans and specifications for the construction of such bridges as may be designated by the governing body of the city, to select the location for same, determine the size, type and method of construction thereof, to plan and fix their boundaries and approaches, to make the necessary estimates of the probable cost of construction and the acquisition of the land and rights for the sites of the abutments and the approaches and avenues or easements of access to the bridges in a manner hereinafter provided, to enter into the necessary contracts, to build and equip the entire bridges and the approaches and accesses or easements of access thereto, to build the superstructure and substructures and all parts thereof, to obtain and exercise such consent or authority as may be necessary from the government of the United States and the approval of the secretary of war and chief of engineers, and to cause a survey and map to be made of all lands, structures, rights-of-way, franchises, easements or other interests in lands, including lands under water and riparian rights owned by any person, corporation or municipality, the acquisition of which may be deemed necessary for the construction of such bridges and to cause such map and survey to be filed in its office. The members of the commission, or its agents and employees, may enter upon such lands and structures and upon lands under water notwithstanding any interests in such lands or structures, for the purpose of making such surveys and maps; provided, however, that the commission shall not proceed to exercise or carry out any authority or power herein given it to bind said commission beyond the extent to which money has been provided under the authority of this chapter. No contract or agreement for the acquisition, construction, reconstruction, repair, enlargement, extension, renewal, replacement or equipment of such bridges exceeding in amount the sum of twenty-five hundred dollars shall be made without advertisement for bids, which bids shall be opened publicly and an award made to the best bidder, with power in the commission to reject any or all bids. The plans and specifications, the location, size, type and method of construction, the boundaries and approaches, and the estimates of cost of construction and acquisition, hereinbefore provided for in this section, shall be first submitted to the governing body of the city and receive its approval before final adoption by the commission, which shall have no power to proceed further unless and until such approval has been had. No contract for acquisition, construction, or incidents thereto, and no liabilities in connection therewith, shall be entered into or incurred unless and until bonds to finance the project have been authorized by the electors of the city in the method provided in this chapter. The commission shall operate, manage and control the bridges under its charge in their entirety, fix the rate of tolls, establish bylaws and rules and regulations for the use and operation of said bridges, provide for the lighting and policing thereof, and select such employees as it deems necessary and fix their compensation, and if and when authorized by the governing body of the city shall have power to renew, replace, reconstruct, extend and enlarge bridges, but shall not have power to create liens upon or to mortgage any property unless first authorized by the governing body of the city. [C31, 35, §5899-c14.]

5899.16 Record, reports, auditing, removal of members—general provisions. The bridge commission shall keep an accurate record of all its acts, the property entrusted to it, the cost of the bridge or bridges and incidents thereto, the expenditures for maintaining, repairing and operating same and the daily tolls collected, which records shall be public records and property of the city. A semiannual statement shall be published on each bond interest date in the official newspaper of the city. The governing body of the city shall have power to examine the accounts at any time, to call for any reports at any time in its discretion, and to require the commission and its employees to appear before it to report or testify at any time. The governing body of the city after reasonable notice and hearing may at any time remove any member of the commission or discharge any employee for good cause shown, but not arbitrarily nor for political reasons. The accounts and statements of the commission shall be audited by or under the direction of the city auditor semiannually and finally upon the completion of the work of the commission and at such other times as may be directed by the governing body of the city, the cost thereof to be charged against the funds provided for in this chapter. The governing body of the city, and in the absence of action by it, the bridge commission, shall have power to require bonds of officers and employees, to require guarantees of deposited moneys, and to insure the bridges and all property connected therewith against every manner of loss or injury. Funds under control of the commission may be invested in certificates of deposit in national banks or in bonds or other evidences of indebtedness which are general obligations of the United States, state of Iowa, or other states, or the city or the cities cooperating as in this chapter provided, but only in such manner as to be immediately available or recaptured when needed for use for the purposes authorized in this chapter. [C31, 35,§5899-c15.]

5899.17 Acquisition of property by purchase by commission. The commission is hereby authorized to purchase in the state of Iowa and in any adjoining state when authorized by such state, if such authority be necessary, or the government of the United States, solely from funds provided under the authority of this chapter, such lands, structures, rights-of-way, franchises, easements or other interests in lands, including

lands under water and riparian rights of any person, railroad, or other or public or private corporation, necessary or convenient for the acquisition, construction, extension or enlargement of said bridges and approaches thereto upon such terms, prices or consideration as may be considered by it to be reasonable, and can be agreed upon between it and the owner or owners, title thereto to be taken in the name of and to vest in the city. [C31, 35,§5899-c16.]

5899.18 Condemnation of property by commission. Whenever it shall be necessary to condemn property in the state of Iowa for the purpose of constructing, extending or enlarging any portion of said bridges or the approaches thereto, or securing avenues of access or rights-of-way leading to said approaches, the commission may condemn any interests, franchises, easements, rights or privileges, land or improvements which may, in its opinion, be necessary for the purpose of constructing said bridges or the approaches thereto, or necessary for rights-of-way or avenues of access leading to said approaches. Condemnations shall be certified to the governing body of the city for its action, and the method thereof shall be the same as that provided by statute for the condemnation for similar or appropriate municipal purposes by cities. The commission is and shall be further empowered to exercise in any adjoining state such powers of eminent domain as may be conferred upon the commission by any act of the congress of the United States now in force or which may hereafter be enacted, or as may be authorized by the law of that state. No payments of award in any condemnation proceedings or for the cost of such proceedings or the expense thereof, shall be made except from funds provided under authority of this chapter. Title to property condemned shall be taken in the name of and vest in the city. [C31, 35, §5899-c17.]

5899.19 Removal of obstructions. All individuals or corporations having buildings, structures, works, conduits, mains, sewers, wires, tracks, or other physical obstructions in, over, upon or adjacent to the public streets, lanes, alleys, highways or in, under, over or adjacent to the river over which the bridges are to be constructed, and which shall interfere with or impede the progress of said bridges and approaches when in progress of construction and establishment, shall upon reasonable notice from the commission temporarily so shift, adjust, accommodate or remove the same as fully to meet the exigencies occasioning such action. Upon completion of such construction, the actual cost thereof, if reasonable, otherwise the reasonable cost thereof and other incidental damage, shall be promptly paid to such person by the commission. In case of disagreement as to reasonable cost, either party may appeal to the governing body of the city which after reasonable notice shall hear all parties and determine the proper amount and order same paid at once by the commission out of funds provided for in this chapter, persons aggrieved by such determination may appeal within twenty days thereafter by filing a petition in the district court of Iowa in and for the county in which such city is located. Similar powers may be exercised in an adjoining state if and in the manner authorized by an act of congress or the law of that state. [C31, 35,§5899-c18.]

5899.20 Damage to property. The governing body of the city shall have power to appraise damages to property by reason of the construction and operation of the complete bridge property and appurtenances and to pay same out of funds provided for in this chapter. Any person whose property is damaged may file claim with the governing body of the city, which after reasonable notice shall hear all interested parties, determine the amount of damage and order the same paid by the commission out of funds provided for in this chapter. Persons aggrieved by such determination may appeal within twenty days thereafter by filing a petition in the district court of Iowa in and for the county in which such city is located. Similar powers may be exercised in an adjoining state if and in the manner authorized by an act of congress or the law of that state. [C31, 35,§5899-c19.]

5899.21 Restoration of public ways and works. Any local public ways or public works, including those of quasi-public utilities, damaged or destroyed by reason of the building of such bridges or approaches shall be restored or repaired by or at the expense of the commission and placed in their original condition as near as practicable, or at the option of the owners of such property, the same may be repaired or restored by the owner and the commission shall reimburse the owner for the reasonable cost thereof out of funds provided for in this chapter. [C31, 35,§5899-c20.]

5899.22 Dissolution of commission. Any local bridge commission provided for in this chapter may be dissolved by the governing body of the city at any time after the acquisition, construction and equipment of the complete bridge or bridges within its care have been completed and all the costs thereof have been paid from the funds provided by the bond issues provided for in this chapter, and thereupon the governing body of the city shall assume the further duties in connection with such bridge, including the operation, maintenance and repair thereof, the administration of funds, the collection of tolls and all other necessary or proper acts, or at any time thereafter may create a new bridge commission to effect any of the purposes or objects authorized by this chapter. [C31, 35,§5899-c21.]

5899.23 Joint bridge commission. In case the governing body of any city designated in this chapter, having been authorized by the electors as required by this chapter, shall at any stage of the proceedings determine to cooperate with any properly authorized political subdivision in this or an adjoining state in the joint acquisition and operation of a bridge or bridges, a joint commission shall be created. Such joint commission shall be created and the members

selected by the action of each political unit cooperating, in the same manner provided for the creation of a local commission, by the law applicable to each political unit, and, upon which representation may be proportioned to the respective contribution of funds by the political units cooperating for the purposes of such acquisition, provided that the total membership shall not exceed ten. The commission shall select a chairman and vice chairman to represent each political subdivision cooperating in the enterprise, and shall maintain a single office at the place selected by the commission, but for legal purposes shall be domiciled within the jurisdiction of each political unit cooperating, and shall have power to sue and be sued. This commission shall constitute a public body corporate and politic, shall select and adopt its own name, and shall be vested with such powers and subject to such conditions as may be conferred and imposed by the government of the United States and/or such powers and conditions in the state of Iowa, as are conferred and imposed in this chapter upon a local bridge commission, and such powers and subject to such conditions in an adjoining state as may be conferred and imposed by the laws of such state. The plans and specifications, the location, size, type and the method of construction, the boundaries and approaches, and the estimates of costs of construction, acquisition of property, and financing, shall be first submitted to the governing bodies of the political units cooperating and receive their approval by resolution before final adoption by the commission, which shall not enter into contracts and shall have no power to proceed further unless and until such approval has been had. If such joint commission is created after any work has been done, any funds provided or any liabilities incurred by the governing body of the city, or by a local commission, such joint commission shall take over, succeed to, assume and be liable therefor. The cities specified in this chapter are authorized and empowered to authorize or require said joint commission to conduct and to complete the sale of bonds provided for in this chapter at the same time and to the same purchaser, under the best conditions obtainable, together with the bonds of the political subdivision with which it is cooperating, so that the benefits of a joint offering and sale may be obtained. The funds derived from the sale of the bonds of all political subdivisions cooperating may be mingled and shall be administered and expended by the joint commission as one common fund. As near as may be, and subject to any rules and regulations which may be adopted by the commission for that purpose, the fund shall be deposited and maintained in equitable proportions within the territory of each political subdivision, and applied to the purchase or redemption of the separate bond issues in an equitable manner. All contracts, evidences of indebtedness and payment vouchers shall be signed by the treasurer and countersigned by each vice chairman. Title to all real and personal property and to the completed bridge and all its appurtenances and incidents shall vest in the political subdivisions cooperating as tenants in common in the same proportions as the contributions made to the joint fund. In the event of the inability of the governing bodies of the political subdivisions cooperating or their joint commission to agree, the specific controversy may be submitted to arbitration in such manner as may be agreed upon. [C31, 35,§5899-c22.]

Referred to in §5899.26

5899.24 Joint purchase. Any city specified in this chapter desiring to exercise the power as granted in section 5899.02 to jointly purchase by bargain and sale any existing bridge, may do so either when the electors have authorized such joint purchase or have authorized an independent purchase of such bridge. The governing body of the city is authorized to enter into joint contract with the other political unit as to all the conditions of the purchase and the conditions of subsequent reconditioning, operation, toll charges authorized by this chapter, repair, maintenance, renewal, replacement, enlargement and extension of such bridge. Title to the bridge shall vest in the political units cooperating as tenants in common and operation shall be by the joint commission provided for in this chapter and subject to the conditions provided with reference to such commission. [C31, 35, §5899-c23.]

Referred to in §5899.2b

5899.25 Joint condemnation. Any city specified in this chapter may acquire an existing bridge by entering into joint condemnation proceedings with other political units as authorized in section 5899.02. Where the property to be condemned is situated within the jurisdiction of more than one political unit or partly in the state of Iowa and partly in an adjoining state, the political units cooperating shall first enter into contract electing in what jurisdiction and in which state a single joint proceeding to condemn the property as an entirety shall be instituted and the proceeding shall be conducted subject to the law of and in the manner provided for that jurisdiction, or such proceedings may be conducted subject to the law and in the manner provided by any act of congress governing the power of condemnation where the property to be acquired is situated in more than one state. For this purpose, cities in this state and specified in this chapter are authorized to become parties to a single proceeding in an adjoining state and to subject themselves to the laws of that state governing such proceedings. In the event of such joint proceedings in this state the method of proceedings provided in section 5899.07 shall govern but shall be modified to the extent of requiring the board of appraisers to be created by the designation of three appraisers for each political unit cooperating and by releasing the restriction as to residents within the state. The contract heretofore in this section provided for shall be similar to the contract provided for in section 5899.24 and also fix the proportionate contribution to be made by each political unit cooperating, and shall also provide

for the creation of a joint commission to take over the operation of the property if and in the event of its acquisition subject to the conditions provided in this chapter with reference to such joint commission. Title to the property condemned shall vest in the political units cooperating as tenants in common when, if and as the approval of the electors has been had as provided in section 5899.07. [C31, 35,§5899-c24.]

5899.26 Joint construction. Whenever the electors of any city specified in this chapter shall have authorized the construction of a bridge as provided in this chapter, the governing body of the city shall have power to construct such bridge independently or jointly with any state or political unit as authorized in section 5899.02. Such cities are authorized to enter into any contract which may be necessary to effectuate this purpose. The title to all property acquired shall vest in the political units cooperating as tenants in common. The actual control of all construction and subsequent operation, including all property necessary to the completed bridge, and of maintenance and repair thereof, and of funds and the collection and custody of tolls shall vest in a joint bridge commission as provided in section 5899.23, which commission and its control shall not be terminated until such tenancy in common shall be terminated. [C31, 35,§5899-c25.]

5899.27 Power of foreign cities. Any city in an adjoining state which has been properly authorized by the law of that state, and/or the United States may exercise in the state of Iowa any and all powers granted in this chapter to cities in Iowa, subject to the conditions and requirements of this chapter. [C31, 35,§5899-c26.]

5899.28 Submission to the electors. Any proposition or propositions arising in connection with the exercise of any of the powers granted by this chapter, may be submitted by the governing body of the city to the electors thereof at any general or city election or at any special election called for that purpose, and any proposition shall be carried if the majority of the electors voting thereon vote in favor thereof. No bridge shall be finally or irrevocably acquired, whether by purchase or by condemnation or by construction, unless and until such action and the necessary financing shall have been approved by the majority of the electors voting on the proposition at a general or city election or at a special election called for that purpose. Two or more propositions or questions may be submitted at the same election and on the same ballot provided each is so presented that the electors may vote separately upon each proposition. A vote of the electors authorizing independent action shall by operation of law be held to also authorize joint action for the purpose so authorized, but a vote on a proposition of joint action shall not be held to authorize independent action. The governing body of the city is hereby authorized to determine what shall be included in the proposition to be stated in notices of election and upon the ballots in its full discretion except that any proposition must indicate whether the bridge shall be acquired by the purchase or by the condemnation of an existing bridge or by the construction of a new bridge and the kind of bonds to be issued to finance the same, and the amount of such bonds may be set forth in any manner authorized in this chapter. [C31, 35,§5899-c27.]

5899.29 Supplementary powers granted—saving clause. The powers hereby conferred are to be exercised without any restriction or limitation under the laws of the state except the provisions of the constitution of the state, and are supplementary and additional to powers which have been or may hereafter be conferred upon the city by law of the state. All powers granted to or provided to be conferred upon the bridge commission authorized by this chapter, are likewise granted to and conferred upon and may be exercised by the governing body of the city and the governing body of the city may delegate any or all of the powers conferred upon it by this chapter to such commissions. The sections and provisions, and parts thereof, of this chapter are separable and are not matters of mutual essential inducement, and it is the intention to confer the whole or any part of the powers herein provided for, and if any of the sections or provisions, or parts thereof, are for any reason illegal, it is the intention that the remaining sections and provisions or parts thereof shall remain in full force and effect. [C31, 35,§5899-c28.]

5899.30 Additional powers. The powers conferred by this chapter are in addition to the powers elsewhere granted by law or any other chapter in respect to interstate bridges. [C31, 35,§5899-c29.]

CHAPTER 303

DOCKS

Chapter applicable to special charter cities, §6767

5900 Department of public docks—election.
5901 Commissioners — appointment — qualifications —terms—organization—removal—vacancies.
5902 Powers and duties.
5903 Regulations applicable—control by state officers.

5900 Department of public docks—election. The city council or board of commissioners in any incorporated town or city, including cities under commission plan situated on any natural or artificial navigable waterway within or bordering upon the state of Iowa, may, when in their judgment deemed expedient, create a department known as the department of public

docks, providing that before said commission may go into operation, the question shall be submitted to the qualified electors of said city or town at a regular election or a special election called for that purpose; and provided further, that a majority of those voting at said election shall vote in favor of the creation of such department of public docks. [S13,§741-w; C24, 27, 31, 35,§5900.]

5901 Commissioners—appointment—qualifications — terms — organization — removal — vacancies. The department of public docks shall be administered by a dock board consisting of three members to be known as commissioners of public docks. Within three months, or as soon as possible after the time when this chapter shall go into effect, the council of the municipality shall appoint as members of the dock board, three commissioners of public docks, who have been residents of the municipality in which they are appointed for a period of not less than five years, and who shall not at the time of their appointment or during their term of office be interested in or be employed by any common carrier, and said board shall act without compensation. Said commissioners when first appointed shall hold office for a term of one, two, and three years respectively, and shall determine by lot among themselves which commissioners shall hold the said respective terms. Thereafter, one commissioner with the said qualifications shall be appointed annually by the council and the term of office of such commissioner shall be three years. The members of the board shall qualify by taking oath for the faithful performance of their duties. Within ten days after their appointment the commissioners shall meet and organize the dock board by the election from among their number of a president and a secretary of said board, and shall from time to time adopt rules and regulations for the government of their department and to govern their proceedings, which shall be adopted by resolution recorded in a book kept by the board and known as the book of rules and regulations, and said rules and regulations shall be in force after publication in some newspaper published and circulated in the municipality. The dock board shall maintain an office and keep a record of all of its proceedings and acts, and books of account showing all of its financial transactions, which records and books of accounts shall at all times be open to public inspection. If any commissioner shall at any time during his said incumbency cease to have the qualifications required by this section for his appointment, or shall wilfully violate any of his duties under the law, such commissioner shall be removed by the council after written charges have been preferred against him and a due hearing of such charges has been had by the council upon reasonable notice to such commissioner. Vacancies occuring in the board through resignation or otherwise shall be filled by the council for the unexpired term. [S13, §741-w1; C24, 27, 31, 35,§5901.]

5902 Powers and duties. The board shall have power and it shall be its duty for and in behalf of the city or town, hereinafter called the municipality, for which it is organized:

1. *General plan.* To prepare or cause to be prepared a comprehensive general plan for the improvement of its harbor and water front, making provision for the needs of commerce and shipping, and providing for the construction of such docks, basins, piers, quay walls, wharves, warehouses, tunnels, belt railway connecting with all railway lines within the municipality, and such cranes, dock apparatus, and machinery equipment as it may deem necessary for the convenient and economical accommodation and handling of watercraft of all kinds and of freight and passengers, and the free interchange of traffic between the waterway and the railways and the railways and the waterway; which plan shall be filed in the office of the board and be open to public inspection, and which may from time to time be changed, altered, or amended by the board, as the requirements of shipping and commerce and the advance of knowledge and information on the subject may suggest.

2. *Purchase and condemnation of property.* To purchase or acquire by condemnation or other lawful means, such personal property, lands, or rights or interest therein, including easements, as may be necessary for use in the provision and in the construction of any publicly owned harbor, dock, basin, pier, slip, quay wall, wharf, warehouse, or other structure, and in the construction of a belt railway and railway switches, and appurtenances as provided for in such plan as may be adopted by the board. If the board shall deem it proper and expedient that the municipality shall acquire possession of such wharf property, lands, or rights or interests therein, including easements, and no price can be agreed upon between the board and the owner or owners thereof, the board may direct the municipal corporation attorney to take legal proceedings to acquire same for the municipality in manner as is or may be provided by the general laws of the state in the case of corporations having the right of eminent domain. The title of all lands, property, and rights acquired by the board shall be taken in the name of the municipality it represents.

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3. *Control of property.* The board shall have exclusive charge and control of the wharf property belonging to the municipality including belt railway located in whole or in part therein, all the wharves, piers, quay walls, bulkheads, and structures thereon and waters adjacent thereto, and all the slips, basins, docks, water fronts, the structures thereon, and the appurtenances, easements, uses, reversions, and rights belonging thereto, which are now owned or possessed by the municipality, or to which the municipality is or may become entitled, or which the municipality may acquire under the provisions hereof or otherwise. The board shall

have the exclusive charge and control of the building, rebuilding, alteration, repairing, operation, and leasing of said property and every part thereof, and of the cleaning, grading, paving, sewering, dredging, and deepening necessary in and about the same.

4. *Abutting property—jurisdiction and improvement.* The board is hereby vested with jurisdiction and authority over that part of the streets and alleys and public grounds of the municipality which abut upon or intersect its navigable waters, lying between the harbor line and the first intersecting street measuring backward from high-water mark, to the extent only that may be necessary or requisite in carrying out the powers vested in it by this chapter; and it is hereby declared that such jurisdiction and authority shall include the right to build retaining or quay walls, docks, levees, wharves, piers, warehouses, or other constructions, including belt railway and railway switches, across and upon such streets and alleys and public grounds, and to grade, fill, and pave the same to conform to the general level of the wharf, or for suitable approaches thereto; provided that such improvements shall be paid for out of funds in the hands of the board and not by assessments against abutting property, but in case the city council deems it necessary or advisable to construct street improvements or sewers on such streets and alleys, and abutting and adjacent property will receive special benefits therefrom, such improvements or sewers may be ordered constructed by said council and the cost thereof may be assessed by said council, to the extent of such benefits, and as provided in chapter 308, upon and against all lots or parcels of real estate, whether publicly or privately owned, as may be specially benefited thereby, provided that the plans and specifications of the city council for such improvements or sewers be first approved by the dock board.

5. *Control consistent with navigation laws—collect tolls.* The board is also vested with exclusive government and control of the harbor and water front consistent with the laws of the United States governing navigation, and of all wharf property, belt railway, wharves, piers, quay walls, bulkheads, docks, structures, and equipment thereon, and all the slips, basins, waters adjacent thereto, and submerged lands and appurtenances belonging to the municipality, and may make reasonable rules and regulations governing the traffic thereon and the use thereof, with the right to collect reasonable dockage, wharfage, sheddage, storage, cranage fees, and tolls thereon, as hereinafter provided.

Obedience to such rules and regulations may be enforced in the name of the city or town, by a fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days, provided the council of such city or town shall first adopt the same, in ordinance form, as ordinances of the municipality.

6. *Rules and regulations—specifications—ordinances—publication.* The board shall have power to make general rules and regulations for the carrying out of the plans prepared and adopted by it for the building, rebuilding, repairing, alteration, maintenance, and operation of all structures, erections, or artificial constructions upon or adjacent to the water front of the municipality, whether the same shall be done by the board or by others; and except as provided by the general rules of the board, no new structures or repairs upon or along said water front shall be undertaken, except upon application to the board and under permit by it and in accordance with the general plans of the board and in pursuance of specifications submitted to the board and approved by it upon such application. The general rules and regulations of the board, whenever adopted by it, shall be embodied in the form of ordinances and certified copies thereof shall, forthwith upon their passage, be transmitted to the clerk of the municipality who shall cause the same to be transcribed at length in a book kept for that purpose and the same shall be included in any compilation or publication of the ordinances of the municipality. Upon filing any such certified copy of any such ordinances, the said clerk shall forthwith cause the same to be published once in some newspaper of general circulation published in the municipality, or if none is there published, then in the next nearest newspaper published in this state, and the said ordinance shall be in force and effect from and after the date of said publication. Provided, however, that if the said ordinances are included in any book or pamphlet of ordinances published by said municipality, no other publication shall be required, and they shall be in force and effect from the date said book or pamphlet is published. The said ordinances of the board shall not be considered or construed as ordinances of said municipality except as they may be adopted as ordinances of said municipality, and the provisions of the code and statutes of the state now or hereafter enacted relative to ordinances of cities and towns shall not apply to ordinances passed by said board unless express reference be made thereto in said statutes.

7. *Tolls and charges—regulations.* The board shall have the power to fix and regulate and from time to time to alter the tolls, fees, dockage, wharfage, cranage, sheddage, storage, and other charges for all publicly owned docks, levees, belt railway, piers, quay walls, slips, basins, wharves, and their equipment, or the use of any portion of the water front of the municipality, which charges and rates shall be collectible by the board and shall be reasonable with a view only of defraying the necessary annual expenses of the board in constructing and operating the improvements and works herein authorized; a schedule of such charges and regulations shall be enacted by the board in the form of ordinances and a certified copy thereof shall be transmitted to the clerk of the municipality in like manner as other ordinances of the board before the same shall go into or be in effect, and a copy of same shall be kept posted in a conspicuous place in the office of the board.

8. *Assistants — officers — ordinances.* The

board shall have power to employ such assistants, employees, clerks, workmen, and laborers as may be necessary in the efficient and economical performance of the work authorized by this chapter. All officers, places, and employments in the permanent service of the board shall be provided for by ordinance duly passed by the board and the same shall be transmitted to the clerk of the municipality as provided for other ordinances of the board.

9. *Construction work plans—approval—public inspection—bids—exceptions—emergencies.* In the construction of docks, levees, wharves, and their appurtenances, or in contracting for the construction of any work or structures authorized by this chapter, the board shall proceed only after full and complete plans (approved by the board) and specifications for said work have been prepared and submitted and filed with the board by its engineer for public inspection, and after public notice asking for bids for the construction of such work, based upon such plans and specifications, has been published in some newspaper of general circulation published within the municipality, or if none so published, then in the nearest newspaper published in this state, which publication shall be made at least thirty days before the time fixed for the opening of said bids and contracting for such work; and such contract may then be made with the lowest responsible bidder therefor, unless the board deems the bids excessive or unsuitable, in which event it may proceed to re-advertise for bids, or the board may do the work directly, purchasing such materials and contracting for such labor as may be necessary without further notice or proposals for bids; except that it shall make no purchase of materials in amounts exceeding five hundred dollars except by public letting upon ten days notice, published as aforesaid, specifying the materials proposed to be purchased; provided, however, that said public letting shall not be required in case no satisfactory bids are received, or in case of an emergency where the delay of advertising and public letting might cause serious loss or injury to the work. The board shall, in all cases, have the right to reject any and all bids, and may either re-advertise therefor, contract with others at a figure not exceeding the lowest bidder without further advertising, or do the work directly as hereinbefore provided.

10. *Tax levy—dock fund.* To defray the expense of exercising the powers conferred by this chapter, or any portion of such expense in excess of the income from the aforesaid rates and charges to be collected by the board, the council of the municipality shall levy a special tax upon the taxable property in the municipality, not exceeding one-half mill on the dollar. The board shall annually make to the council a report of the receipts and disbursements made by or on account of said board, and shall file with the council an estimate of the amounts necessary to be raised by taxation to defray the expenses of the board. The council shall at the time of levying annual taxes levy a sufficient tax not exceeding said one-half mill to meet the said estimate and which shall be collected as other taxes and paid over to the treasurer of the municipality and by him credited to the fund to be known as the dock fund.

11. *Bonds—limitation.* Whenever said dock board shall deem it necessary or advisable to issue bonds for the purpose of constructing any of the works or improvements herein authorized or purchasing property for said purpose, the said board shall petition the council of the municipality to issue such bonds stating the purpose for which said bonds are requested and thereupon the council shall issue the said bonds and annually thereafter levy a special tax upon the taxable property in the municipality to pay the same, if the municipality is not thereby indebted in excess of the limit imposed by section 3 of article XI of the constitution of the state of Iowa; or if the council does not deem it advisable to issue said bonds, if the same would not be in excess of said limitation, the council shall submit the question of issuing said bonds to the voters of said municipality, and if a majority of said voters voting at a special election or general election vote in favor thereof, said bonds shall be issued. The proceeds of said bonds when issued shall be paid to the municipal treasurer and credited to the dock fund. If the municipality is already indebted beyond the said limitation the council may, if it deem it advisable, levy a special tax not exceeding one-half* mill on the dollar per annum for the purpose of paying bonds and which may be levied for a period not exceeding ten years or the term of the bonds; and in anticipation of the collection of the said tax, bonds may be issued for the said purpose designated in said petition, and which bonds shall be payable only out of the proceeds of said special tax already levied at the time of their issuance, and the municipality shall not be indebted on said bonds or any further obligated than to collect and apply the proceeds of said tax to the liquidation of said bonds.

Vote required to authorize bonds, §1171.18

12. *Funds, how disbursed—books audited.* All funds collected by the dock board, or by the municipality for dock purposes from the proceeds of taxes, bonds, or otherwise, shall be deposited with the treasurer of the municipality and disbursed by him only upon warrants or orders duly signed by the president and countersigned by the secretary of the dock board and which shall state distinctly the consideration for which same are drawn, and a permanent record shall be kept by the board of all warrants or orders so drawn, showing the date, amount, consideration, and to whom payable. When paid the same shall be canceled and kept on file by the treasurer of the municipality. The books of the board shall from time to time be audited by the municipal auditor under the direction of the mayor, in such manner and at such times as he may direct or prescribe, and all of said books and records of the board shall at all times be open to public inspection.

13. *Additional tax.* In cities having a population of less than thirty thousand the council shall have power to levy an additional annual special tax upon the taxable property in the municipality, of not to exceed one-half* mill on the dollar, to defray the expense of exercising the powers conferred by this chapter, or any portion of such expense in excess of the income from the rates and charges to be collected by the dock board. [S13,§741-w2; C24, 27, 31, 35,§5902.]

*"Two" mills in C31, changed by code editor, under authority of 45GA, ch 121,§88, to "one-half" mill

5903 Regulations applicable — control by state officers. All state regulations for the control and operation of railroads, common carriers, and public utilities shall apply to and have full force and effect in regard to all powers, duties, and actions of the department of public docks and the same shall be subject to and under the control of the Iowa state commerce commission or the public utility commission now or hereafter established by law. [S13, §741-w4; C24, 27, 31, 35,§5903; 47GA, ch 205,§1.]

CHAPTER 303.1

AIRPORTS

Chapter applicable to special charter cities, §6767.1

5903.01 Definition.
5903.02 Powers.
5903.03 Acquisition.
5903.04 Improvements.
5903.05 Expenditures—levy of tax.
5903.06 Certificates or bonds.
5903.07 Plans and specifications.
5903.08 Costs.
5903.09 Ordinances and rules.
5903.10 Charges.
5903.11 Deemed as public use.

5903.01 Definition. The word "airport" as used in this chapter, shall include landing field, airdrome, aviation field, or other similar term used in connection with aerial traffic. [C31, 35, §5903-c1.]

5903.02 Powers. Cities and towns shall have the right to acquire, establish, improve, maintain and operate airports, either within or without their corporate limits. [C31, 35,§5903-c2.]

5903.03 Acquisition. Any such city or town is hereby authorized and empowered to acquire by purchase, gift, condemnation, lease or otherwise, either within or without its corporate limits, real estate and personal property for airport purposes. [C31, 35,§5903-c3.]

5903.04 Improvements. Any such city or town may erect on any land so acquired, or owned by it, such buildings and equipment, and make such improvements as may be necessary for the purpose of adapting such property to the use of aerial traffic. [C31, 35,§5903-c4.]

5903.05 Expenditures—levy of tax. The cost of acquiring, improving, equipping, operating or maintaining any airport by any such city or town may be paid from the general fund of such city or town, and/or such city or town may levy annually a special tax, in addition to all other taxes wherewith to pay all or any part of such cost. In all cities having a population of more than thirty thousand such special tax shall not exceed one-fourth mill. In all cities having a population of more than ten thousand and not exceeding thirty thousand such special tax shall not exceed three-fourths mill. In all cities having a population of ten thousand or less, and in towns, such special tax shall not exceed one and one-fourth mills. The special tax authorized by this chapter shall not be levied by any city or town until approved by the electors of such city or town, in accordance with the provisions of chapter 319. [C31, 35,§5903-c5.]

Referred to in §5903.08

5903.06 Certificates or bonds. Any such city or town may anticipate the collection of the special tax authorized to be levied under this chapter for a period of not more than twenty years, and for such purpose may issue "airport certificates or bonds", with interest coupons, and the provisions of chapter 320 shall apply to such certificates, bonds and coupons, with such changes only as are necessary to adapt them thereto.

Such certificates or bonds and interest coupons, shall be secured by said levy and shall be payable only out of the funds derived therefrom and pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of any such city or town to collect such funds with interest thereon and to hold the same separate and apart in trust for the payment of said certificates, bonds and interest, and to apply the proceeds of such funds, pledged for that purpose, to the payment of such certificates, bonds and interest. [C31, 35,§5903-c6.]

5903.07 Plans and specifications. Before an airport is acquired by any such city or town the plans and specifications therefor shall be submitted to the Iowa state commerce commission which shall require that they show:

The legal description and plat of the site; distance from the nearest post office and railroad station; location and type of highways; location and type of obstructions on and near the site; kind of soil and subsoil; costs and details of grading and draining; location of proposed runways, hangars, buildings and other structures.

And they shall furthermore require that the plans and specifications be in substantial ac-

cord with the regulations of the U. S. department of commerce or other department of the federal government having general supervision of air navigation as it relates to plans and specifications for airports. And if so found they shall approve such plans and specifications. [C31, 35,§5903-c7; 47GA, ch 205.]

5903.08 Costs. The cost of preparing the plans and specifications shall be paid from any of the funds provided in section 5903.05. [C31, 35,§5903-c8.]

5903.09 Ordinances and rules. Such cities and towns shall have the power to make and enforce ordinances, rules and regulations for control, supervision and operation of airports, and for control of aircraft and airmen. This power shall extend to the space above the lands and waters included within the limits of any city or town, and to any airport owned, controlled, maintained or operated by any city or town outside its limits, and to the space above the same. Provided, however, that no such ordinance, rule or regulation, shall be in conflict with state law or regulation, or in conflict with federal law or regulation. [C31, 35,§5903-c9.]

5903.10 Charges. Any such city or town may from time to time fix, establish and collect a schedule of charges for the use of such property or any part thereof, which charges shall be used in connection with the maintenance and operation of such airport. When the public needs will not be injured thereby, any such city or town may lease all or any portion of such property, for a period of years not exceeding twenty or sell any equipment no longer required. Real estate may be sold only by unanimous vote of all members of the council. [C31, 35,§5903-c10.]

5903.11 Deemed as public use. Any property acquired, owned, controlled or occupied for the purposes enumerated in this chapter, shall be and is hereby declared to be acquired, owned, controlled and occupied for a public purpose and as a matter of public need, and the liability of any city or town in connection therewith shall be no greater than that imposed upon municipalities in the maintenance and operation of public parks. [C31, 35,§5903-c11.]

CHAPTER 303.2

ARMORIES

5903.12 Power granted.
5903.13 Applicable statutes.
5903.14 Fees.
5903.15 Payment from earnings—bonds.
5903.16 Pledge of property.
5903.17 Mandatory income.

5903.12 Power granted. As an emergency measure to be financed only through the Federal Emergency Administration of Public Works, cities and towns shall have power to purchase, establish, construct, maintain and operate armories, for which fees are charged, and pay for the same solely and only out of the earnings thereof. [C35,§5903-f1.]

Additional powers, §6606

5903.13 Applicable statutes. Chapter 23 of the code, except sections 363 to 367, inclusive, shall be applicable to contracts for the improvement herein provided for. [C35,§5903-f2.]

5903.14 Fees. Such municipalities may by ordinance provide for fees to be charged for the use of the armory and may pay the cost of purchasing, establishing, constructing, maintaining and operating the same out of the earnings thereof. [C35,§5903-f3.]

5903.15 Payment from earnings — bonds. Nothing in this chapter contained shall be so construed as to authorize or permit any municipality to make any contract or to incur any obligation of any kind or nature except such as shall be payable solely out of the funds provided under this chapter. Cities and towns are authorized to borrow money from the Federal Emergency Administration of Public Works, created by the "National Industrial Recovery Act", [15USC,§§701-712] enacted by the congress of the United States for the purpose of constructing the improvement referred to in this chapter. As evidence of such indebtedness, such city or town may issue its bonds payable solely and only from the revenues derived from such improvement. Such bonds may be issued in such amounts as may be necessary to provide sufficient funds to pay all the costs of construction and operation of such improvement, including engineering and other expenses, together with interest to a date six months subsequent to the estimated date of completion. Bonds issued under the provisions of this chapter are declared to be negotiable instruments, shall be executed by the mayor and clerk of the municipality, and shall be sealed with the corporate seal of the municipality. The principal and interest of said bonds shall be payable solely and only from the special fund herein provided for such payments, and said bonds shall not in any respect be a general obligation of such municipality, nor shall they be payable in any manner by taxation. All details pertaining to the issuance of such bonds and the terms and conditions thereof shall be determined by ordinance of the municipality. [C35,§5903-f4.]

Assumption of indebtedness, §6607.1
Bonds, ch 320
Negotiable instruments, ch 424

5903.16 Pledge of property. The council of the municipality by ordinance may pledge the property purchased and the net earnings of the armory to the payment of said bonds and the

interest thereon, and provide that the net earnings thereof shall be set apart as a sinking fund for that purpose. [C35,§5903-f5.]

5903.17 Mandatory income. Such municipality is authorized and directed to charge the users of said armory at a rate which, at all times, shall be sufficient to pay the principal and interest on the bonds issued under the provisions of this chapter and the cost of operation and maintenance, and to provide an adequate depreciation fund. [C35,§5903-f6.]

CHAPTER 304

ELECTRIC UTILITIES AND MOTORBUS LINES

Referred to in §6555

5904 Regulations.
5904.1 Motorbus lines.
5905 Franchise—election.
5906 Notice.
5907 Time of election.
5908 Ballots—procedure.
5909 Costs.

5904 Regulations. Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway, and other electric wires, and the poles and other supports thereof, by general and uniform regulation, and to provide the manner in which, and places where, the same shall be placed upon, along, or under the streets, roads, avenues, alleys, and public places of such city or town, and may divide the city into districts for that purpose. [C97,§775; C24, 27, 31, 35,§5904.]

Referred to in §5905
Similar power, §6817

5904.1 Motorbus lines. Cities and towns may grant franchises to operate and maintain on and over their streets bus and motor transportation lines to carry passengers for hire on a plan similar to street railways. Such franchises may be granted to individuals or private corporations and shall not be exclusive, nor shall they extend for a longer period than ten years. Provided, however, that in cities or towns in which a street railway is established and operated, before the question of granting such franchise is submitted to the electorate, the proposed franchise must first be offered to the owner of the existing street railway, and if said owner shall agree in writing within thirty days from the time said proposed franchise is offered to accept said franchise and operate a bus or motor transportation line under the terms of said franchise, the question shall be submitted to the electorate of the granting of said franchise to the owner of the street railway. If the owner of said street railway fails to agree in writing within said thirty-day period to accept said franchise and operate the bus or motor transportation line therein provided for, the city or town council may then offer said franchise to another person, firm or corporation, and may submit to the electorate the question of the granting of the franchise to said person, firm or corporation.

No such franchise shall be granted, extended or renewed unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or town, or special election called for that purpose.

The provisions of this act [47GA, ch 165] shall be applicable to cities acting under special charter.

The granting of such franchise shall not preclude cities and towns from licensing jitney busses and motor vehicles carrying passengers for hire under the provisions of chapter 306.

The provisions of sections 5927 to 5934, inclusive, shall apply to busses and motor transportation lines operating under franchises granted pursuant to the provisions of this section. [C31, 35,§5904-c1; 47GA, ch 165,§1.]

Referred to in §5905

5905 Franchise — election. No franchise shall be granted, renewed, or extended by any city or town for the use of its streets, highways, avenues, alleys, or public places, for any of the purposes named in sections 5904 and 5904.1 unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or town, or special election. The council may order the question of the granting, renewal, or extension of any such franchise so submitted; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each voting precinct in a city, or fifty property owners in any town. [C97,§776; S13,§776; C24, 27, 31, 35,§5905.]

Referred to in §6663

5906 Notice. Notice of such election shall be given by publication once each week for four consecutive weeks in some newspaper published in the city or town, or if none be published therein, in a newspaper published in the county and of general circulation in the city or town. [C97,§776; S13,§776; C24, 27, 31, 35,§5906.]

Referred to in §6663
40ExGA, HF 168,§5, editorially divided

5907 Time of election. The election shall be held on a date not less than five nor more than twenty days after the last publication of said notice. [C97,§776; S13,§776; C24, 27, 31, 35,§5907.]

Referred to in §6663

5908 Ballots — procedure. The clerk shall prepare the ballots, and the proposition shall be submitted as provided for in the title on elections. [C97,§776; S13,§776; C24, 27, 31, 35, §5908.]

Referred to in §6663
Form of ballot, §§763–765

5909 Costs. The party applying for the franchise, or a renewal or extension thereof, shall pay all expenses incurred in holding the election. [C97,§776; S13,§776; C24, 27, 31, 35, §5909.]

Referred to in §6663

CHAPTER 305

VIADUCTS

Referred to in §§5874, 5875, 5876, 5880, 6209
Chapter applicable to special charter cities, §6768

5910 Authorization.
5911 Limitations.
5912 Damages.
5913 Procedure.
5914 Payment.
5915 Tax permissible.
5916 Specifications.
5917 Apportionment of cost.
5918 Hearing.
5919 Notice.
5920 Service.
5921 Use and compensation.
5922 Repair fund.
5923 Apportionment of repairs.
5924 Mandamus.
5925 Contempt—optional procedure.

5910 Authorization. Cities having a population of five thousand or over shall have power to require any railroad company, owning or operating any railroad tracks upon or across any public streets of such city, to erect, construct, reconstruct, complete, and maintain, to the extent hereinafter provided, any viaduct upon or along such streets, and over or under such tracks, including the approaches thereto, as may be declared by ordinances of such city necessary for the safety and protection of the public. [C97, §770; C24, 27, 31, 35,§5910.]

C97,§770, editorially divided

5911 Limitations. The approaches to any such viaduct shall not exceed a total distance of eight hundred feet, but no such viaduct shall be required on more than every fourth street running in the same direction, and no railroad company shall be required to build or contribute to the building of more than one such viaduct, with its approaches, in any one year; nor shall any viaduct be required until the Iowa state commerce commission shall, after examination, determine the same to be necessary for the public safety and convenience, and the plans of said viaduct, prepared as hereinafter provided, shall have been approved by said commission. [C97,§770; C24, 27, 31, 35,§5911; 47GA, ch 205, §1.]

5912 Damages. When a viaduct shall be by ordinance declared necessary for the safety and protection of the public, the council shall provide for appraising, assessing, and determining the damages which may be caused to any property by reason of the construction of the same and its approaches. [C97,§771; S13,§771; C24, 27, 31, 35,§5912.]

S13,§771, editorially divided

5913 Procedure. The proceedings for such purpose shall be the same as are provided in case of taking private property for works of internal improvement. [C97,§771; S13,§771; C24, 27, 31, 35,§5913.]

Procedure, ch 366

5914 Payment. The damages assessed shall be paid by the city out of the general bridge fund, or in cities having a population of twelve thousand or over from any other fund or funds legally available therefor. [C97,§771; S13,§771; C24, 27, 31, 35,§5914.]

5915 Tax permissible. In cities having a population of twelve thousand or over, where a viaduct is required to be constructed and the plans therefor have been approved and there are no available funds in the general bridge fund, or any fund or funds of said city which may be legally used for the payment of such damages, such city may levy an annual tax not exceeding one-half mill on the dollar for the purpose of creating a fund to be known as a viaduct fund for the payment of damages caused to property by reason of the construction of such viaduct and approaches thereto. [S13, §771-a; C24, 27, 31, 35,§5915.]

5916 Specifications. The width, height, and strength of any viaduct and the approaches thereto, and the material and manner of construction thereof, shall be such as may be required by the council. [C97,§772; C24, 27, 31, 35,§5916.]

5917 Apportionment of cost. When two or more railroad companies own or operate separate lines of track to be crossed by a viaduct, the proportion thereof and the approaches thereto to be constructed by each, or the cost to be borne by each, shall be determined by the council. [C97,§773; S13,§773; C24, 27, 31, 35, §5917.]

S13,§773, editorially divided

5918 Hearing. The council shall fix a time and place where it will consider such matters and any objections that may be made to the construction of such viaduct and the approaches thereto. [S13,§773; C24, 27, 31, 35, §5918.]

5919 Notice. Not less than twenty days written notice of such hearing shall be given to the company or companies owning or operating the track or tracks over or under which it is proposed to construct such viaduct. [S13, §773; C24, 27, 31, 35,§5919.]

5920 Service. Said notice may be served in the same manner and upon the same persons or officers as in the case of an original notice. [S13, §773; C24, 27, 31, 35,§5920.]

Manner of service, §11060; persons served, §11072 et seq.

5921 Use and compensation. Such cities shall have power to regulate the use of such viaducts and to authorize or forbid the use thereof by street railway companies and to require the payment of compensation for such use. [S13,§773; C24, 27, 31, 35,§5921.]

5922 Repair fund. After the completion thereof, any revenue derived therefrom by the crossing thereon of street railway lines shall constitute a special fund, and shall be applied in making repairs to such viaduct. [C97,§773; S13,§773; C24, 27, 31, 35,§5922.]

5923 Apportionment of repairs. One-half of all ordinary repairs to such viaduct or its approaches shall be paid out of such fund, or be borne by the city, and the remaining half by the railroad company; and if the track of more than one company is crossed, the costs of such repairs shall be borne by such companies in the same proportion as was the original cost of construction. [C97,§773; S13,§773; C24, 27, 31, 35, §5923.]

5924 Mandamus. If any railroad company neglects or refuses, for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions of this chapter, the city may enforce the construction, maintenance, or repair of such viaduct and approaches by proceedings in mandamus, and the court shall require the issues to be made up at the first term to which such action is brought and shall give the same precedence over other civil business. [C97,§774; S13,§774; C24, 27, 31, 35,§5924.]

Mandamus, ch 532
S13,§774, editorially divided

5925 Contempt — optional procedure. Refusals to comply with, or violations of, the orders of the court in such proceedings may be punished as contempts, by fine and imprisonment as provided in section 7884; or the city may construct or repair the viaduct or approaches, or any portion thereof, which such railroad company was required to construct or maintain, and recover the cost thereof from such company. [S13,§774; C24, 27, 31, 35,§5925.]

CHAPTER 306

JITNEY BUSSES

Referred to in §§5100.27, 5904.1. Chapter applicable to special charter cities, §6769

5926 Regulation and license.
5927 Excluding from streets.
5928 Use of street.
5929 Terminus—resulting right.
5930 Bond.
5931 Beneficiary.
5932 Amount of bond.
5933 General insurance policy.
5934 Filing and fee.
5935 Application for license.
5936 Granting or rejecting.
5937 Violations.

5926 Regulation and license. Cities and towns, including cities acting under the commission form of government, and cities acting under the city manager plan of government, shall have power, under the restrictions and conditions hereinafter named, to regulate and license so-called jitney busses and all motor vehicles operating upon the streets and avenues of such cities and towns and engaged in carrying passengers for hire on a plan similar to that followed by street railway companies; to require such vehicles to be operated over reasonable routes and upon reasonable schedules; to impose penalties within the limits of section 5714 for the violation of any ordinance enacted hereunder, not inconsistent and in conflict with this chapter. [SS15,§754-a; C24, 27, 31, 35,§5926.]

Additional powers, §5970

5927 Excluding from streets. The city or town council may prohibit any such jitney bus or motor vehicle from operating on that part of any such street or avenue on which there is operated a streetcar line or lines when such streetcar line is maintained and operated under a franchise granted by any such city or town. [SS15, §754-a; C24, 27, 31, 35,§5927.]

Referred to in §5904.1
39GA, ch 115,§2, editorially divided

5928 Use of street. Such jitney or motor bus may cross such street or avenue at right angles with said streetcar line or lines, and in addition thereto said jitney or motor busses may travel over such streets and avenues so far only as is necessary to cross bridges. [C24, 27, 31, 35,§5928.]

Referred to in §5904.1

5929 Terminus — resulting right. Said busses and vehicles may have a terminus in the business district of such city or town, and for the purpose of going to and from such terminus said busses and vehicles may travel over such portion only of said prohibited streets and alleys as is necessary to connect directly with the licensed route of said busses and vehicles over the streets and alleys on which there are no streetcar line or lines. [C24, 27, 31, 35,§5929.]

Referred to in §5904.1

5930 Bond. No such license shall be granted by any such city or town unless and until the applicant therefor shall file in the office of the clerk of the district court of the county in which said city or town may be located, an indemnity bond with sureties to be approved by the clerk of said district court, which said sureties shall qualify as provided in chapter 551. [SS15, §754-a; C24, 27, 31, 35,§5930.]

Referred to in §5904.1
39GA, ch 115,§3, editorially divided

5931 Beneficiary. The said bond shall inure to the benefit of the estate of any passenger killed and to the benefit of any passenger who may suffer bodily injury or property damage by reason of negligence or misconduct on the part of the driver, owner, or operator of any such jitney bus or motor vehicle. [SS15,§754-a; C24, 27, 31, 35,§5931.]

Referred to in §5904.1

5932 Amount of bond. The said bond shall be in the following penal sums, to wit: If there is carried in such jitney bus or motor vehicle less than ten passengers, at least five thousand dollars; and if there is carried therein ten passengers or more, at least ten thousand dollars. [C24, 27, 31, 35,§5932.]

Referred to in §5904.1

5933 General insurance policy. In lieu of such bond there may be filed in such office a liability insurance policy issued by a company authorized to do business in the state in like amounts for a single claim as for the bonds above provided, and conditioned that the same shall inure to the benefit of any passenger upon such vehicle or vehicles in the same manner and way as the bonds above provided. [C24, 27, 31, 35,§5933.]

Referred to in §5904.1

5934 Filing and fee. When said bond or policy is approved by said clerk he shall file the same in his office for the purpose herein expressed and shall receive for filing and approving the same a fee of one dollar. [C24, 27, 31, 35, §5934.]

Referred to in §5904.1

5935 Application for license. No such license shall be granted by any such city or town unless and until the applicant therefor shall, after the said bond or liability insurance policy is thus approved, file in the office of the clerk of such city or town an application for such license stating:

1. The type of motorcar or jitney bus to be used.
2. The horsepower and the factory number thereof.
3. The state license number thereof.
4. The seating capacity thereof according to its trade rating.
5. The street or streets upon which it is intended to operate.
6. The age, name, and residence of the person to be in the immediate charge thereof as driver and a statement showing that such driver has attained the age of at least eighteen full years, and if more than one person is to be in the immediate charge of such jitney or motor bus, then there must be given the name, age, and residence of each said persons and a statement showing that each of said persons has attained the age of eighteen full years.
7. The qualifications and experience of the person who is to be the driver of such jitney or motor bus, and if more than one person is to drive the same, then a statement of qualification of each such person.
8. The name of the owner or owners of the bus or busses proposed to be operated.
9. That the said bond hereinabove named has been filed and approved as hereinabove provided. [C24, 27, 31, 35,§5935.]

5936 Granting or rejecting. The city or town council may grant or reject the said application, and if the said application is rejected other applications may be made, and likewise the city or town council may grant or reject the same. [SS15,§754-a; C24, 27, 31, 35,§5936.]

5937 Violations. It shall be unlawful for any such jitney or motor bus to thus operate upon any such streets or avenues without said license; and any person, corporation, or copartnership who shall operate any such jitney or motor bus without such license shall be held guilty of a misdemeanor and punished by a fine of not less than fifty dollars nor more than three hundred dollars, or shall stand committed to the county jail for a period not exceeding sixty days. [SS15, §754-a; C24, 27, 31, 35,§5937.]

CHAPTER 307

STREETS AND PUBLIC GROUNDS

This chapter, except §§5949.1, 5949.2, applicable to special charter cities, §6770

GENERAL POWERS

5938 Establishment—improvement.
5939 Acceptance of dedication.
5940 Optional payments.
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5938 Establishment—improvement. Cities and towns shall have power to establish, lay off, open, widen, straighten, narrow, vacate, extend, improve, and repair streets, highways, avenues, alleys, public grounds, parks and playgrounds, wharves, landings and market places within their limits. [R60,§§1064, 1097; C73, §§464, 465, 527; C97,§751; SS15,§751; C24, 27, 31, 35,§5938.]

Referred to in §5942.1
40ExGA, HF 168, §1, editorially divided

5939 Acceptance of dedication. No street, avenue, highway, or alley dedicated to public use by the proprietor of the ground in any municipal corporation shall be deemed a public street, avenue, highway, or alley, or be under the use or control of such municipality, unless the dedication shall be accepted and confirmed by a resolution specially passed for such purpose. [R60,§1097; C73,§§465, 527; C97,§751; SS15,§751; C24, 27, 31, 35,§5939.]

5940 Optional payments. The expenses of such extension, repairs, and improvements may be paid from the general fund, the grading fund, or from the highway or poll taxes of such cities or towns, or partly from each of such funds, or by assessing all or any portion of the cost thereof on abutting and adjacent property according to the benefits derived from such extension, repairs, and improvements as provided in chapter 308. [R60,§1064; C73,§§465, 466; C97,§§751, 818; SS15,§751; C24, 27, 31, 35,§5940.]

Referred to in §5943
40ExGA, HF 168, §2, editorially divided

5941 Term of assessments. Such assessments may be made to extend over a period not to exceed twenty years, payable in equal annual installments, and certificates or bonds may be issued in anticipation thereof. [C24, 27, 31, 35, §5941.]

Referred to in §5943

5942 Rep. by 42GA, ch 151

5942.1 Acquisition of lands. Whenever the cost and expense of an improvement authorized in section 5938 is to be assessed on the property specially benefited thereby, the council shall, by resolution, designate and determine the several tracts or parcels of ground necessary to be acquired for such improvement, which acquisition may be by condemnation proceedings or otherwise. [SS15,§751; C24,§5942; C27, 31, 35,§5942-b1.]

Referred to in §§5942.5, 5943

5942.2 Plat and schedule — resolution of necessity. When the cost of such acquisition shall have been ascertained, either by private negotiation or condemnation proceedings, the plat and schedule provided for in section 5993 shall be filed with the city clerk, and the council shall, in a proposed resolution, as provided by section 5991, declare the necessity for such improvement; and, in such resolution of necessity the property specially benefited by such improvement shall be determined and designated and the boundary lines of the benefited district established. [SS15,§751; C24,§5942; C27, 31, 35,§5942-b2.]

Referred to in §§5942.5, 5943

5942.3 Levy—certificates or bonds. Following the adoption of the resolution of necessity, the council may by resolution order the improvement; and, in order to obtain funds with which to pay the cost of acquiring the property necessary to make such improvement and the expense incident thereto, and without waiting for such improvement to be completed, levy, in

accordance with section 6021 upon and against the several lots and parcels of land situated within such benefited district, the amount of such cost and expense, and issue and sell street improvement certificates or bonds in anticipation of the collection of such assessments, the proceeds from the sale of which certificates or bonds shall be used for the payment of such cost and expense and for no other purpose. [C27, 31, 35,§5942-b3.]

Referred to in §§5942.4, 5942.5, 5943

5942.4 Increased award — assessment. If upon appeal any award shall be raised and the cost and expense of acquiring such property thereby increased, the amount of such increased cost may also be assessed upon and against the property situated within such benefited district, and if the council so elects, there may be also assessed against the property in such benefited district the cost and expense of clearing and grading the ground so acquired; and street improvement certificates or bonds issued in like manner as provided in section 5942.3. If two assessments are made and two sets of certificates or bonds are issued, the first of such certificates or bonds shall be designated as "Series A" and the second as "Series B". The aggregate amount of both such assessments shall not exceed twenty-five percent of the value of the property assessed. [C27, 31, 35,§5942-b4.]

Referred to in §§5942.5, 5943

5942.5 Applicable provisions. The provisions of chapter 308 relating to street improvements and special assessments, and chapter 311 relating to street improvement certificates or bonds shall be applicable hereto, insofar as the same may be necessary for the carrying out of this and sections 5942.1 to 5942.4, inclusive. [C27, 31, 35,§5942-b5.]

Referred to in §5943

5943 Interpretation. Nothing in sections 5940 to 5942.5, inclusive, shall be construed as changing the manner of assessing abutting and adjacent property for the cost of paving, guttering, curbing, or macadamizing streets and alleys. [SS15,§751; C24, 27, 31, 35,§5943.]

5944 Width of street. They shall have power to provide that the width of all streets, highways, avenues, and alleys of all additions to any city or town shall conform to the width of the existing streets, highways, avenues, and alleys of such cities and towns. [C97,§752; C24, 27, 31, 35,§5944.]

5945 Duty to supervise. They shall have the care, supervision, and control of all public highways, streets, avenues, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances. [R60,§1097; C73,§527; C97,§753; C24, 27, 31, 35,§5945.]

Notice to person liable over, §6735

5946 Duty to drag. The councils of cities and towns, respectively, shall cause the main-traveled roads within the corporate limits leading into the city or town to be dragged at the times and in the manner provided by law for the dragging of roads outside such corporate limits. [S13,§1570-b4; C24, 27, 31, 35,§5946.]

Time and manner of dragging, §§4660, 4778

5947 "Roads" as streets. Such portions of all roads as lie within the limits of any city or town shall conform to the direction and grade and be subject to all regulations of other streets in such town or city. [R60,§916; C73,§953; C97, §1508; C24, 27, 31, 35,§5947.]

5948 Embankments and fills. Cities of the first class shall have power to construct embankments where streets cross ravines, or where it is necessary that fills should be made for the purpose of retaining the street at grade to the full width of the remaining portions thereof. Such cities may purchase or condemn lands suitable for such purposes in the manner provided for condemning land by cities; but when the abutting property shall be brought to grade, such city shall reconvey the land so taken to the owner from whom the same was taken, or his grantees, upon the payment by him or them of the price originally paid by said city at the time said property was purchased or condemned. [C97,§784; C24, 27, 31, 35,§5948.]

Condemnation procedure, §6203; also ch 366

5949 Lighting. They shall have power to light streets, avenues, alleys, highways, public places, grounds, buildings, landings, market places, and wharves. [R60,§1064; C73,§464; C97,§756; C24, 27, 31, 35,§5949.]

5949.1 Lighting districts. In any city of the first class, where streets are now or may hereafter be lighted by electroliers or similar devices, the city council of such city may by ordinance divide such city into two districts for lighting purposes; one to be known as the "Metropolitan Lighting District", to embrace all of the property abutting upon streets lighted by electroliers or similar lighting devices, and the other to be known as the "General Lighting District", to embrace all of the area of such city not included in such metropolitan lighting district. [C27, 31, 35,§5949-a1.]

5949.2 Special lighting tax. When any such city has been so divided into lighting districts, the city council of such city may levy a special tax upon the property embraced in such metropolitan lighting district, in addition to all other taxes provided by law, not to exceed one-half mill to defray the expense in connection with the lighting of such district; such special tax to be paid at the same time and in the same manner as general taxes. [C27, 31, 35,§5949-a2.]

5950 Snow and ice. They shall have power to remove snow, ice, or accumulations from abutting property from the sidewalk, without notice to the property owner, if the same has remained upon the walk for the period of ten hours, and assess the expenses thereof on the property from the front of which such snow, ice, or accumulations shall be removed; but the expense shall not exceed one and one-half cents

per front foot of any lot, and the same shall be certified and collected as other special taxes. [C97,§781; C24, 27, 31, 35,§5950.]

Certification of tax, §§6227, 7162 et seq.

GRADE OF STREETS

5951 Grades and grading. They shall have power to establish grades and provide for the grading of any street, highway, avenue, alley, public ground, wharf, landing, or market place, the expense thereof to be paid from the general or grading fund, or from the highway or poll taxes of such city or town, or partly from each such funds. [C73,§465; C97,§782; C24, 27, 31, 35,§5951.]

5952 Uniformity. They shall have power to provide that the grading of all streets, highways, avenues, alleys, public grounds, wharves, landings, or market places of all additions to any city or town shall be done in the same manner, and conform to existing streets, avenues, highways, and alleys thereof. [C97,§783; C24, 27, 31, 35,§5952.]

5953 Change. When any city or town shall have established the grade of any street or alley, and any person shall have made improvements on the same, or lots abutting thereon, according to the established grade thereof, and such grade shall thereafter be altered in such a manner as to damage, injure, or diminish the value of such property so improved, said city or town shall pay to the owner of such property the amount of such damage or injury. [C73,§469; C97,§785; C24, 27, 31, 35,§5953.]

5954 Appraisers. The amount of such damage or injury shall be determined and assessed by three disinterested freeholders, one of whom shall be selected by the mayor, one by the owner of the property, and one by the two so appointed; or, in case of their disagreement, by the council. If the owner fails to select an appraiser within ten days from the time of receiving notice to select same, then the council shall select all such appraisers. [C73,§469; C97,§786; C24, 27, 31, 35,§5954.]

5955 Notice. The appraisers shall take an oath to faithfully and impartially discharge their duties. They shall give ten days notice in writing to the owner of the property affected of the time and place of their meeting to view the premises and make their assessment, if such owner resides in the county; which notice shall be served in the same manner as original notices in the district court. If the owner resides outside of the county, or his residence is unknown, notice shall be given by publication once a week for three weeks in some newspaper published in the city or town where the property is located. [C73,§469; C97,§787; C24, 27, 31, 35,§5955.]

Manner of service, §11060

5956 Assessment. The appraisers shall view the premises, and, in their discretion, receive evidence, and may adjourn from day to day. When the appraisement is completed, the appraisers shall sign and return the same to the council, which shall be done within thirty days from the date of their selection. [C73,§469; C97,§788; C24, 27, 31, 35,§5956.]

5957 Confirmation or annulment. The council may, in its discretion, confirm or annul the appraisement, and, if annulled, all proceedings shall be void and of no effect; but, if confirmed, an order of confirmation shall be entered by the clerk in the record of the proceedings of the council. [C73,§469; C97,§789; C24, 27, 31, 35, §5957.]

C97,§789, editorially divided

5958 Limitation. No alteration of grade shall be made until the damages assessed shall have been paid or tendered to the owner of the property so injured or damaged. [C73,§469; C97,§789; C24, 27, 31, 35,§5958.]

5959 Appeal. Any person interested may appeal from the order of confirmation to the district court of the county in which such property is located, by giving written notice thereof to the mayor, within twenty days after the order of confirmation is entered. [C73,§469; C97,§790; C24, 27, 31, 35,§5959.]

C97,§790, editorially divided

5960 Trial. On the trial of the appeal, all questions involved in the proceedings, including the amount of damages, shall be open to investigation, and the burden of proof shall, in all cases, be upon the city or town to show that the proceedings are in accord with the provisions of this chapter. [C73,§469; C97,§790; C24, 27, 31, 35,§5960.]

5961 Costs. The cost of such proceedings, incurred prior to the order of confirmation or annulment of the appraisement, shall in all cases be paid by the city or town. If the person appealing recovers more damages than were awarded by the appraisers, he shall recover the costs of the appeal; if he recovers the same or less than the award, the costs of the appeal shall be taxed to him. [C73,§469; C97,§790; C24, 27, 31, 35,§5961.]

SIDEWALKS

5962 Permanent sidewalks. Cities and towns shall have power to provide for the construction, reconstruction, and repair of permanent sidewalks upon any street, highway, avenue, public ground, wharf, landing, or market place within the limits of such city or town; and to assess the cost thereof on the lots or parcels of land in front of which the same shall be constructed; but the construction of permanent sidewalks shall not be made until the bed of the same shall have been graded so that, when completed, such sidewalks will be at the established grade.

Unless the owners of a majority of the linear feet of the property fronting on said improvements petition the council therefor, the same shall not be made unless three-fourths of all the members of the council shall by vote order the making thereof. [C73,§466; C97,§779; S13,§779; C24, 27, 31, 35,§5962.]

Grade for streets, etc., §5976

5963 Objections. All objections to the cost of construction of permanent sidewalks, as provided by the code, against the lots or parcels of land in front of which the same are constructed, and all objections to the prior proceedings, on account of errors, irregularities, or inequalities, must be made in writing and filed with the city clerk prior to the date fixed for said assessment; and all objections not so made shall be deemed waived, except where fraud is shown. [S13, §791-a; C24, 27, 31, 35,§5963.]

Similar provisions, §§5992, 6029, 6092

5964 Payment under waiver. Unless the owner of any lot or parcel of land against which an assessment for permanent sidewalk is made shall within thirty days from the date of assessment file written objections to the legality or regularity of the assessment or levy of such tax upon and against his property, such owner shall be deemed to have waived objections on these grounds, and shall have the right to pay said assessment with interest thereon not exceeding six percent per annum in seven equal annual installments, the first of which shall mature and be payable on the date of said assessment and the others, with interest on the whole amount unpaid, annually thereafter, at the same time and in the same manner as the March semi-annual payment of ordinary taxes, provided that if the aggregate of all assessments against the property of an owner is twenty-five dollars or less, such assessments shall be paid in one installment and within thirty days following the levy. [S13,§791-b; C24, 27, 31, 35,§5964.]

5965 Delinquent tax. Each installment of such taxes, with interest, shall become delinquent on the first day of March next after its maturity and shall bear the same rate of interest, with same penalties as ordinary taxes. [S13, §791-b; C24, 27, 31, 35,§5965.]

Interest and penalties, §7214

5966 Certificates of levy—lien. A certificate of levy of such special assessment, fixing the number of installments and the time when payable, certified as correct by the city clerk, shall be filed with the auditor of the county, or each of the counties, in which the city is situated and thereupon said special assessment, as shown therein, shall be placed on the tax list of the proper county and said taxes and special assessment, with all interest and penalties thereon, shall become and remain a lien upon such lot or parcel of land until the same is paid; and said lien shall have precedence over all other liens, except ordinary taxes. [S13,§791-c; C24, 27, 31, 35,§5966.]

5967 Certificates—effect. Such certificate shall be the same as certificates of the levy of special assessments for street improvements, and shall create the same rights and liabilities and the same procedure shall apply thereto. [S13,§§791-d–g; C24, 27, 31, 35,§5967.]

Certification to auditor, §6007

5968 Temporary sidewalks. They shall have power to provide for the laying, relaying, and repairing of temporary sidewalks upon any street, avenue, public ground, wharf, landing, or market place within the limits of such city or town, at a cost not exceeding sixty cents a linear foot, to prescribe a uniform width thereof, and to regulate the grade of the same, and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid. [C73,§468; C97,§777; S13,§777; C24, 27, 31, 35,§5968.]

5969 Repair. Cities and towns shall have power to repair sidewalks without notice to the property owner, and assess the expense thereof on the property in front of which such repairs are made, and the same shall be certified and collected as other taxes. [C73,§467; C97,§780; C24, 27, 31, 35,§5969.]

USE OF STREETS

5970 Conveyances — transportation. They shall have power:

1. To regulate, license, and tax all carts, wagons, street sprinklers, drays, coaches, hacks, omnibuses, and every description of conveyance kept for hire.
2. To fix the rate and prices for the transportation of persons and property from one part of the city to another in the vehicles above named, and to require such persons to keep exposed to view, in or upon such vehicle, a printed table of the rates and prices so fixed.
3. To establish stands for hackney coaches, cabs, omnibuses, drays, and express wagons, and to enforce the observance and use thereof.
4. To prescribe the width of the tires of all vehicles habitually used in the transportation of persons or articles from one part of the city to another.
5. To require vehicles and bicycles to carry lamps giving sufficient light. [R60,§1063; C73, §§463, 537; C97,§754; C24, 27, 31, 35,§5970.]

Jitney busses, ch 306
Taxation of motor vehicles, §5008.26

5971 Driving or riding. Cities and towns shall have power to restrain and regulate the riding and driving of horses, livestock, vehicles, and bicycles within the limits of the corporation, and prevent and punish fast or immoderate riding or driving within such limits. [R60,§1057; C73,§456; C97,§755; C24, 27, 31, 35,§5971.]

5972 Flagmen and gates. Cities and towns shall have power to compel railroad companies to place flagmen, or to erect, construct, maintain, and operate suitable mechanical signal devices or gates, upon public streets at railroad crossings, under such regulations as may from time to time be made by the council; provided that in cases where a controversy arises between the railroad company and the council as to the necessity for such flagmen, signal devices, or gates, the matter shall be determined by the

Iowa state commerce commission. [C97,§769; C24, 27, 31, 35,§5972; 47GA, ch 205,§1.]

39GA, ch 152, §1, editorially divided

5973 Speed of trains. Cities and towns, subject to the approval of the Iowa state commerce commission, shall have power to regulate the speed of trains and locomotives on railways running over the streets or through the limits of the city or town. [C73,§456; C97,§769; C24, 27, 31, 35,§5973; 47GA, ch 205,§1.]

CHAPTER 308

STREET IMPROVEMENTS, SEWERS, AND SPECIAL ASSESSMENTS

Referred to in §§5786, 5902, par. 4, 5940, 5942.5, 6066.05, 6066.06, 6077, 6079, 6610
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5974 Definitions. The following words as used in this chapter shall have the meanings as stated:

1. The word "cities" shall include towns.
2. The word "repair" shall include reconstruct and resurface.
3. The word "street" shall include highway, avenue, alley, and public place.
4. The word "lot" shall include tract or parcel of land.
5. The word "sewer" shall include structures designed to control streams and surface waters flowing into sewers.
6. The words "cost of construction of sewers" shall include the cost of acquisition of lands and easements for the control of such waters flowing into sewers.
7. The word "oil" shall include any asphaltic or bituminous liquids suitable for road building purposes and the word "gravel" shall include

gravel, crushed rock, cinders, shale or similar material suitable for road building purposes. [C97,§779; S13,§§779, 792-f; C24, 27, 31, 35, §5974.]

5975 Street improvements. Cities shall have power:

1. To improve any street by grading, parking, curbing, paving, oiling, oiling and graveling, chloriding, graveling, macadamizing, use of shale or other surfacing material, or guttering the same or any part thereof, or by constructing electric light fixtures along same, and to repair such improvements.

2. To establish districts, the boundaries of which may be changed as may be just and equitable, for the improvement or repair, by paving or graveling, of such streets within the corporation as in the judgment of the council constitute main-traveled ways into and out of such cities.

1. [R60,§1097; C73,§§466, 527; C97,§§779, 792; S13,§§779, 792, 792-f; C24, 27, 31, 35,§5975.]

2. [SS15,§§840-h,-i; C24, 27, 31, 35,§5975.]

Referred to in §6044

5976 Grading required. The construction of permanent parking, curbing, paving, graveling, macadamizing, or guttering shall not be done until the bed therefor shall have been graded, so that such improvement, when fully completed, will bring the street up to the established grade. [C97,§792; S13,§792; SS15,§840-q; C24, 27, 31, 35,§5976.]

Grade for permanent sidewalks, §5962
40ExGA, SF 169, §2, editorially divided

5977 Grading cost assessable. Only so much of the cost of the removal of the earth and other material as lies between the subgrade and the established grade shall be assessed to private property. [C97,§792; S13,§792; C24, 27, 31, 35, §5977.]

5978 Preparing for oiling—cost. The cost of preparing a street to receive oil, oil and gravel, shale or chloride shall be paid by the city, except that portion between the rails of any railway or street railway, and one foot outside thereof. [C24, 27, 31, 35,§5978.]

5979 Use of old material. Upon repaving, they may use the old material for such repair and dispose of the waste material and salvage from the old pavement as the council may by resolution direct. The value of the salvage so used or the proceeds derived from the sale thereof shall be equitably applied upon the cost of the new improvement. [S13,§§792, 792-f; C24, 27, 31, 35,§5979.]

40ExGA, SF 169, §3, editorially divided

5980 Sale of salvage. No salvage may be sold until the owner of property assessed for the original construction of the paving shall have been given ten days notice in writing requiring him to elect whether he desires such salvage, which notice shall be personally served on the owner or his agent, or, if neither be found, by posting in a conspicuous place on the property. The election, if made, shall be in writing and filed with the clerk. No owner electing to take salvage shall be entitled to a pro rata distribution derived from the proceeds of sale of salvage. [C24, 27, 31, 35,§5980.]

5981 Gas, water, and other connections. They shall have power to require the connections from gas, water, and steam-heating pipes, sewers, and underground electric construction, to the curb line of adjacent property, to be made before the permanent improvement of the street and, if such improvements have already been made, to regulate the making of such connections, fix the charges therefor, and make all needful rules in relation thereto, and the use thereof. If the owners of property on such streets fail to make such connections in the manner and within the time fixed by the council, it may cause the same to be made, and assess the cost thereof against the property for which they are made. [C97,§§779, 809; S13,§§779, 792-f; C24, 27, 31, 35,§5981.]

5982 Street improvements—waterworks connections required—notice. When any city having a board of waterworks trustees has ordered any street permanently improved by paving, graveling, or macadamizing, the council shall at once notify the board of the passage of the resolution of necessity. The board shall report to the council the lots and names of the owners and the requirements in respect to connections from any water mains or pipes to the curb line of the abutting and adjacent property. Thereupon the council shall pass a resolution requiring the respective owners of the said abutting or adjacent property to make said connections in the manner required by the rules of the board, and fixing a time therefor. Notice thereof shall be given by one publication in some newspaper published in such city, which shall be at least ten days prior to the time fixed in said resolution. [C97,§809; S13,§§779, 792-f; C24, 27, 31, 35,§5982.]

5983 Installation—cost. If the owner fail to put in the said water connections before the time fixed or within such additional time, not exceeding thirty days, as may be granted by the council, the board of waterworks trustees shall put in said connections and certify the actual cost thereof to the council. The council shall assess the same to the respective lots in the manner in which other special assessments are made. [C97,§809; S13,§§779, 792-f; C24, 27, 31, 35,§5983.]

Assessment procedure, §6026 et seq.

5984 Sewers. Cities shall have the power to construct and repair sewers and catch basins in any street within their limits. Any city may by ordinance be divided into such sewer districts as the council may determine, numbering them consecutively, or the entire city may be included in one district. [C73,§465; C97,§§791, 794; S13,§840-a; C24, 27, 31, 35,§5984.]

Referred to in §6066.15

5985 Outlets and purifying plants. They may construct outlets and purifying plants in

connection with or as additions to sanitary sewers, and such outlets and plants may be considered as a part of the sewer system, and the cost thereof may be assessed against property benefited thereby. [SS15,§840-g; C24, 27, 31, 35, §5985.]

5986 **Main sewer assessments.** In addition to other powers, cities having a population of less than forty-seven thousand and cities having a population in excess of one hundred twenty-five thousand shall have power to assess the whole or any part of the cost of the construction of any main sewer or system of main sewers to the respective lots as adjacent property which are included within a district to be fixed by the council, which may include all territory within the drainage area of such main sewer or main sewer system. [S13,§840-d; C24, 27, 31, 35, §5986.]

40ExGA, SF 169, §9, editorially divided

5987 **Adjacent property and main sewer.** All such lots which may be furnished with sewer connections or drained by such main sewer or sewer system, shall be considered as adjacent property.

A main sewer shall be held to mean any sewer that is commonly referred to by any one of the following terms: "intercepting sewer", "outfall sewer", or "trunk sewer". [S13,§§840-c,-d; C24, 27, 31, 35,§5987.]

5988 **State building.** Any city in which any state building may be situated shall permit the officers in charge thereof and the persons constructing or improving the same, to construct sewers therefor through or under any of its streets, or to connect the same with its sewer system under the same regulations that are provided for private property owners. [C97,§794; C24, 27, 31, 35,§5988.]

5989 **Condemnation.** Cities shall have power to condemn, in the manner provided for the condemnation of land for their needs, right-of-way through private property sufficient for the construction and maintenance of sewers. The cost of such right-of-way shall constitute a part of the expense of sewers and be assessed accordingly. [C97,§§791, 795; S13,§840-a; C24, 27, 31, 35,§5989.]

Condemnation, chs 316, 366

5990 **Cross sewers.** They shall have power to provide the terms and conditions on which cross and lateral sewers may be connected with main sewers. In cases where sewers have been paid for in whole or in part by special assessment, they may pay to the parties to whom the benefits have been assessed an equitable proportion of the money collected for the purpose of connecting such cross or lateral sewers. [C97, §§791, 796; S13,§840-a; C24, 27, 31, 35,§5990.]

5991 **Resolution of necessity — contents.** When the council shall deem it necessary to construct, reconstruct, or resurface any street improvement or to construct or reconstruct any sewer, it shall, in a proposed resolution, declare such necessity, stating the kinds of material proposed to be used and method of construction, whether private property will be assessed, and, in case of sewers, the kinds and size, and what adjacent property is proposed to be assessed therefor, and in both cases designate the location and terminal points thereof. That the plat and schedule are on file in the office of the clerk shall be stated in the resolution. [C73,§§465, 466; C97,§§791, 810; SS15,§§810, 840-j; C24, 27, 31, 35,§5991.]

Referred to in §§5942.2, 5992, 6610.16
40ExGA, SF 169, §13, editorially divided

5992 **Additional contents.** The council may, in addition to the requirements of section 5991, incorporate in the resolution of necessity notice of its intention to issue certificates or bonds as the case may be, as provided in section 6109, and may also provide that unless property owners at the time of the final consideration of said resolution have on file with the clerk objections to the amount of the proposed assessment, they shall be deemed to have waived all objections thereto. [C24, 27, 31, 35,§5992.]

Objections §§5963, 6029, 6092
40ExGA, SF 169, §13-a1, editorially divided

5993 **Plat and schedule.** Before the resolution of necessity is introduced, the council shall prepare and file with the clerk a plat and schedule showing:

1. The boundaries of the district, if any.
2. The streets to be improved.
3. The width of such improvement.
4. Each lot proposed to be assessed together with a valuation fixed by the council.
5. An estimate of the cost of the proposed improvement, stating the same for each different type of construction and kind of material to be used.
6. In each case the amount thereof which is estimated to be assessed against each lot. [SS15, §840-k; C24, 27, 31, 35,§5993.]

Referred to in §§5942.2, 6066.07
40ExGA, SF 169, §14, editorially divided

5994 **Cost of schedule.** The cost of making the plat and schedule shall be paid from the improvement fund. [C24, 27, 31, 35,§5994.]

5995 **Time of hearing—objections permitted.** The council shall fix the time for the consideration of the proposed resolution of necessity, at which time the owners of property subject to assessment for the proposed improvement or sewer may appear and make objection to the boundaries of the proposed district, to the cost of improvement, to the amount proposed to be assessed against any lot, and to the passage of the proposed resolution. [C97,§810; SS15,§§810, 840-m; C24, 27, 31, 35,§5995.]

Objections, §§5963, 5992, 6029, 6092
40ExGA, SF 169, §13, editorially divided

5996 **Remonstrance—vote required—amendment.** No resolution providing for the improvement of streets by paving shall be passed except by unanimous vote of the entire council, if, at the time set for its consideration, a remonstrance shall have been filed with the council signed by sixty percent of the property owners

and by the owners of property subject to pay seventy-five percent of the assessable cost of the proposed improvement. At the hearing the resolution may be amended and passed, or passed as proposed. [C73,§466; C97,§810; SS15,§§810, 840-m; C24, 27, 31, 35,§5996.]

5997 Notice. It shall cause notice of the time when said resolution will be considered by it for passage to be given by two publications in some newspaper published in the city, the last of which shall be not less than two nor more than four weeks prior to the day fixed for its consideration; but if there be no such newspaper, such notice shall be given by posting copies thereof in three public places within the limits of the city. [C97,§810; S13,§840-a; SS15,§§810, 840-l; C24, 27, 31, 35,§5997.]

5998 Improvement ordered. After the passage of the resolution of necessity, the council by another resolution may order the construction, reconstruction, or resurfacing of the improvement or the construction or reconstruction of the sewer. [C97,§§794, 811; SS15,§840-n; C24, 27, 31, 35,§5998.]

40ExGA, SF 169, §16, editorially divided

5999 Record—vote required. The record shall show whether the improvement or sewer was petitioned for or made on motion of the council. If the improvement or sewer is made on the motion of the council, such resolution of necessity shall require for passage the vote of three-fourths of all the members of the council, or, in cities under the commission form of government having but three members of the council, the vote of two members; but if petitioned for by a majority of the resident owners of property to be assessed for the construction thereof, the resolution of necessity may be passed by a majority vote of the council. [C97,§§793, 794, 811; S13,§§792-b, 793; C24, 27, 31, 35,§5999.]

6000 Yeas and nays. The final vote on the resolution of necessity and the vote on the resolution ordering the improvement or sewer shall be by yeas and nays and entered of record. [C97, §811; SS15,§840-n; C24, 27, 31, 35,§6000.]

6001 Contract. When the construction or repair of any such street improvement or sewer is ordered, the council shall contract for furnishing labor and material and for the construction or repair, either of the entire work in one contract, or for parts thereof in separate and specified sections; but no work shall be done under any such contract until a properly signed contract and a duly executed and approved contractor's bond shall be filed in the office of the clerk. [C97,§§791, 812; S13,§840-a; C24, 27, 31, 35,§6001.]

Referred to in §6190.06
40ExGA, SF 169, §17, editorially divided

6002 Exception as to oiling. The city may oil, oil and gravel, shale or chloride the streets without letting a contract therefor. [C24, 27, 31, 35,§6002.]

Referred to in §6190.06

6003 Agreement to repair—exception. All contracts for the construction or repair of street improvements (except graveling, oiling, oiling and graveling, shaling, chloriding, or repairs other than reconstruction or resurfacing) or sewers, shall contain a provision obligating the contractor and his bondsmen from the time of acceptance by the city to keep in good repair such street improvement for not less than four years or such sewer for not less than two years provided, that in any contract for the construction or repair of any street improvements or sewers where the cost of materials only is to be assessed and the materials to be used and the improvements when completed are to be approved and accepted by a representative of the city, such provision for keeping such improvement in good repair shall not be required. [C97, §814; S13,§814; C24, 27, 31, 35,§6003; 48GA, ch 159,§1.]

Referred to in §6190.06

6004 Bids—notice. All contracts for the construction or repair of street improvements and for sewers shall be let in the name of the city to the lowest bidder by sealed proposals, upon giving notice by two publications in a newspaper published in said city, the first of which shall be not less than fifteen days before the date set for receiving bids, which notice shall state as nearly as practicable the extent of the work, the kinds of materials for which bids will be received, when the work shall be done, the terms of payment fixed, that each bidder must deposit with his bid a certified check in an amount equal to ten percent of his bid drawn on, and certified to, by a bank in Iowa, payable to and at the office of the treasurer of the municipality, and the time the proposals will be acted upon. If there be no such newspaper, such notice shall be given by posting the same in three public places within the limits of such city. [C97,§813; SS15,§813; C24, 27, 31, 35, §6004.]

Referred to in §6190.06

6005 Deposit—rejection of bids. All bids must be accompanied, in a separate envelope, by a check on an Iowa bank, certified by such bank and payable to the order of the treasurer, at his office, in a sum to be named in the notice for bids, as security that the bidder will enter into a contract for the doing of the work and will give bond as required in section 6006. Such checks shall be returned to the respective bidders whose bids have not been accepted. All bids may be rejected and new bids ordered. [C97, §813; SS15,§813; C24, 27, 31, 35,§6005.]

Referred to in §6190.06

6006 Bond. Each contractor for street improvements or sewers shall give bond to the city, with sureties to be approved by the council, for the faithful performance of the contract, in a sum equal to the contract price and suit on such bond may be brought in the county in which the council may hold its sessions. [C97, §815; S13,§840-a; C24, 27, 31, 35,§6006.]

Referred to in §§6005, 6190.06

6007 Certification to county auditor—record book. After a contract has been made by any city for the construction or repair of any street improvement or sewer, the clerk shall certify as correct and file with the auditor of each county in which said city is situated, a copy of the resolution directing the construction or repair of said improvement or sewer, and a copy of the plat and schedule referred to in the resolution of necessity and on file in his office. In all counties where taxes are collected in two or more places, they shall be filed in the office of the auditor in the place where said special taxes are collected, and be preserved by him as a part of the records of his office. The auditor shall keep a book properly ruled for the purpose and enter thereon opposite each lot number the amount of the estimated assessment against the same. [C97,§816; S13,§816; C24, 27, 31, 35, §6007.]

Auditor's special assessment book, see §7193.01 et seq.

6008 Lien generally. Thereupon all special taxes for the cost thereof, or any part of said cost, which are to be assessed and levied against real property, or any railway or street railway, together with all interest and penalties on all of said assessments, shall become and remain a lien on such property from the date of the filing of said papers with the county auditor until paid, and such liens shall have precedence over all other liens except ordinary taxes, and shall not be divested by any judicial sale. [C97, §816; S13,§§792-f, 816; C24, 27, 31, 35,§6008.]

40ExGA, SF 169, §23, editorially divided

6009 Assessment first lien. Any such assessment against a railway or street railway shall be a first and paramount lien upon the track thereof within the limits of the city. [C97, §816; S13,§§792-f, 816; C24, 27, 31, 35,§6009.]

6010 Payment to release lien. No part of the line of any railway or street railway shall be released from the lien for any part of any unpaid assessment which has been made against it for street improvements, until the whole assessment shall have been paid. [C97,§828; SS15,§840-r; C24, 27, 31, 35,§6010.]

Referred to in §6090
40ExGA, SF 169, §44, editorially divided

6011 Cost at intersection. Except for that part for which railways or street railways are liable, the whole or any part of the cost of any street improvement or sewer at the crossings of streets may be assessed against privately owned property not exceeding one-half of such cost at spaces opposite streets intersecting but not crossing, and at spaces opposite property owned by the city or the United States, may be assessed against privately owned property. In the case of sewers, such cost may be paid from the sewer fund or district sewer fund, or the general fund, as provided in section 6015. In case of street improvements, such cost may be paid from the improvement fund. [C97,§817; S13,§792-f; C24, 27, 31, 35,§6011.]

Referred to in §§6012, 6015, 6899

6012 Cost of improvements. The cost of construction, reconstruction, or resurfacing of any street improvement, except as provided in section 6011, and except for that part for which railways or street railways are liable, shall be assessed as a special tax against all lots according to area, so as to include one-half of the privately owned property between the street improved and the next street, whether such privately owned property abut upon said street or not. In no case except where the district method of assessment is used, shall property situated more than three hundred feet from the street so improved be so assessed. Such assessment for improvements upon an alley shall be confined to privately owned property within the block or blocks improved, and if not platted into blocks, to property not more than one hundred fifty feet from the improved alley. [C73,§466; C97,§§779, 792, 818; S13,§§779, 792; SS15,§792-g; C24, 27, 31, 35,§6012.]

6013 Railroad right-of-way. The right-of-way of any railroad company shall be subject to special assessment for sidewalks and street improvements as is other private property, and such assessment shall constitute a debt due personally from the railroad company owning or leasing such right-of-way. [S13,§791-i; C24, 27, 31, 35,§6013.]

6014 Cost of paved roadway. Not more than one-half of the cost of the construction of a roadway within an assessment district may be paid by the city, and the part of the cost not so paid shall be assessed against the lots embraced in the paving district established therefor. [SS15,§§840-i,-o,-p; C24, 27, 31, 35,§6014.]

6015 Cost of sewers. The cost, or any part thereof, of the construction, reconstruction, or repairing of sewers, including that provided for in section 6011, may be paid from the district sewer fund of the sewer district in which the same is situated or from the sewer fund, or for main sewers from the main sewer fund or from the general fund; and the portion thereof not so paid, and not in excess of three dollars per linear foot of sewer, shall be assessed against the property abutting on such sewer in proportion to the number of linear front feet of each lot thereof, and upon adjacent property in proportion to the benefit thereto; but in estimating the benefits to result therefrom to adjacent property, each lot shall be considered as wholly unimproved. Said methods of assessment may be combined. [C97,§819; S13,§§840-a,-d; C24, 27, 31, 35,§6015.]

Referred to in §6011

6016 Cost of repairs. The cost, or any part thereof, of the repair of any street improvement may be paid from the improvement fund or the general fund. The cost, or any part thereof, of the repair of any sewer may be paid from the sewer fund or district sewer fund, or for main sewers from the main sewer fund or the general fund, or part from each of said

funds. [C73,§465; C97,§§779, 791, 832; S13, §§779, 792-f, 840-a,-d; SS15,§840-r; C24, 27, 31, 35,§6016.]

6017 Deficiencies — nonassessable property. If the special assessment which may be levied against any lot shall be insufficient to pay its proportion of the cost of constructing or repairing a street improvement or sewer, the deficiency, if for a street improvement, may be paid out of the general fund or the improvement fund, and if for a sewer, may be paid out of the general fund or the sewer fund. If there be property against which no special assessment can be levied, the proportion of the cost of the improvement or sewer which might otherwise be assessed against such property shall be paid in like manner. [S13,§792-b; C24, 27, 31, 35, §6017.]

6018 Assessment. When the construction or repair of any street improvement or sewer, or such part thereof as under the contract is to be paid for when done, shall have been completed, the council shall within thirty days thereafter accept or reject the work, and after acceptance of the work shall, within thirty days, ascertain the cost thereof, including the cost of the estimates, notices, inspection, and preparing the assessment and plat, and shall also ascertain what the proportion of such cost shall be, by law or the resolution of the council under which such improvement was made or sewer constructed, assessable upon private property, and shall within said time assess such portions upon and against such private property. [C97,§820; S13,§§779, 820, 840-a; SS15,§840-r; C24, 27, 31, 35,§6018.]

6019 "Privately owned property" defined. All property except streets, property owned by the United States, and property owned by the city, shall be deemed privately owned property. [SS15,§792-g; C24, 27, 31, 35,§6019.]

State-owned lands, §4634

6020 Exemption. The council may exempt the homestead of any honorably discharged soldier or sailor of the Mexican war or the war of the rebellion or his unmarried widow from any charge or claim on account of such special assessment, if such person is not the owner of sufficient nonexempt property to pay the special assessment. If such exemption is made, the special assessment shall be paid from the general fund. [C24, 27, 31, 35,§6020.]

6021 Assessment — rate. When any city council levies any special assessment for any public improvement against any lot, such special assessment shall be in proportion to the special benefits conferred upon the property thereby and not in excess of such benefits. Such assessment shall not exceed twenty-five percent of the actual value of the lot at the time of levy, and the last preceding assessment roll shall be taken as prima facie evidence of such value. [S13,§§792-a,-f; SS15,§§840-a,-j,-r; C24, 27, 31, 35,§6021.]

Referred to in §§5942.3, 6099, 6190.10
Similar provision, §6089

6022 Additional limitation. No special assessment against any lot shall be more than ten percent in excess of the estimated cost. [C24, 27, 31, 35,§6022.]

Referred to in §6190.10

6023 Plat and schedule. In assessing that part of the cost of the construction or repair of any street improvement or sewer, or completed part thereof, which is assessable against private property, the council shall cause to be prepared a plat of the streets or the parts thereof on which the same shall have been constructed or repaired, showing the separate lots, or specified portion thereof, subject to assessment for such improvement, the names of the owners thereof so far as practicable, and the amount to be assessed against each lot, and against any railway or street railway, and shall file said plat and schedule in the office of the clerk, which shall be subject to public inspection. [C97,§821; S13,§792-f; SS15,§840-r; C24, 27, 31, 35,§6023.]

Referred to in §§6190.10, 6901

6024 Cost of oiling streets. Upon the completion of the oiling, oiling and graveling, shaling or chloriding of a street, the officer designated by the council to have charge thereof shall, within thirty days, file with the clerk a statement of the amount due, if the work was done by contract; or if done by the municipality, an itemized, verified statement of expenditures for materials and labor used in making such improvement. [C24, 27, 31, 35,§6024.]

Referred to in §6190.10

6025 City engineer—duties. The city engineer, or other person employed by the council to discharge the duties of such office, shall, under its direction, make or assist in making all estimates for street improvements and sewers, furnish the necessary grades and lines, see that the work conforms thereto and is in accordance with the resolution of the council, and make or assist in making each required assessment, plat, and schedule. [C97,§822; S13, §§792-f, 840-a; C24, 27, 31, 35,§6025.]

Referred to in §6190.10

6026 Notice of assessment. After filing the plat and schedule for street improvements or sewers, or the report of cost of oiling, oiling and graveling, or shaling streets, the council shall give notice by two publications in each of two newspapers published in the city, if there be that number, otherwise in one, and by handbills posted in conspicuous places along the line of such street improvement or sewer; but if no such newspaper is published within the limits of such city, then such notice shall be given by posting copies thereof in three public places within its limits. Said notice shall state that said plat and schedule or report are on file in the office of the clerk, and that within twenty days after the first publication all objections thereto, or to the prior proceedings, on account of errors, irregularities, or inequalities, must be made in writing and filed with the clerk. [C97,

§823; S13,§823; SS15,§840-r; C24, 27, 31, 35, §6026.]

Referred to in §§6029, 6190.10
40ExGA, SF 169, §37, editorially divided

6027 Notice to common carrier. When any common carrier or railway, not including street railways, owning any land or property affected by any proposed assessment for public improvement in any city or county, shall have filed in the office of the clerk of said city, or with the auditor of said county, as the case may be, wherein such improvement is proposed, an instrument in writing giving a complete description of such land and designating the name and post-office address of its agent in said state upon whom service of notice may be made, the clerk of said city, or the county auditor of said county, shall, not less than ten days prior to the date set for the levying of assessments covering such improvement, mail a notice thereof in a registered letter addressed to such person or agent so designated. Failure to give such notice shall not delay or invalidate the proceedings or assessment. [C24, 27, 31, 35,§6027.]

Referred to in §6190.10
Similar provision, §7442

6028 Hearing and decision. The council having heard such objections and made the necessary corrections, shall then make the special assessments as shown in said plat and schedule, as corrected and approved. [C97,§823; S13,§823; C24, 27, 31, 35,§6028.]

Referred to in §6190.10

6029 Objections waived. All objections to errors, irregularities, or inequalities in the making of said special assessments, or in any of the prior proceedings or notices, not made before the council at the time and in the manner provided in section 6026, shall be waived except where fraud is shown. [C97,§824; SS15,§840-r; C24, 27, 31, 35,§6029.]

Referred to in §6190.10
Similar provisions, §§5963, 5992, 6092

6030 Levy. The special assessments in said plat and schedule, as corrected and approved, shall be levied at one time, by resolution, against the property affected thereby. [C97,§825; S13, §825; SS15,§840-r; C24, 27, 31, 35,§6030.]

Referred to in §§6090, 6190.10
40ExGA, SF 169, §40, editorially divided

6031 Maturity when no waiver made. Special assessments when levied and certified shall be payable at the office of the county treasurer within thirty days after the date of such levy, with interest at the rate of six percent per annum from the acceptance of the work until paid. [C97,§825; S13,§825; C24, 27, 31, 35, §6031.]

Referred to in §§6090, 6190.10

6032 Maturity under implied waiver. Unless the owner of any lot or railway or street railway, the assessment against which is embraced in any bond or certificate provided for by law, shall, within thirty days from the date of such assessment, file written objections to the legality or regularity of the assessment or levy of such tax upon and against his property, such owner shall be deemed to have waived objection on these grounds and shall have the right to pay said assessment, with interest thereon not exceeding six percent per annum, in ten equal annual installments. In no case shall the owner of any lot be liable for more than the value of the property included in such assessment. The cost of oiling, oiling and graveling, shaling or chloriding the streets may not be paid in installments, except when the assessment exceeds ten dollars, in which event the same shall be automatically waived and paid in three annual installments. [C97,§825; S13,§825; SS15, §840-r; C24, 27, 31, 35,§6032.]

Referred to in §§6066, 6090, 6190.10
Payment after appeal or objection, §6066

6033 Installments — payment—delinquency. The first installment, or total amount of assessment, if less than ten dollars, with interest on the whole assessment from date of levy by the council, shall mature and be payable thirty days from the date of such levy, and the others, with interest on the whole amount unpaid, annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes.

Any or all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment.

All such taxes with interest shall become delinquent on the first day of March next after their maturity, and shall bear the same interest with the same penalties as ordinary taxes, and when collected the said interest and penalties shall be credited to the same fund as the said special assessment.

Upon the payment of any installment, there shall be computed and collected interest on the whole assessment remaining unpaid up to the first day of April following. [C97,§§825, 827; S13,§§825, 840-a; SS15,§840-r; C24, 27, 31, 35, §6033.]

Referred to in §§6090, 6190.10
Interest and penalties, §7214

6034 Certification of levy. A certificate of levy of such special assessment, stating the number of installments, the rate of interest, and time when payable, certified as correct by the clerk, shall be filed with the auditor of the county, or of each of the counties, in which such city is located, and thereupon said special assessment as shown therein shall be placed on the tax list of the proper county. [C97,§826; SS15, §840-r; C24, 27, 31, 35,§6034.]

Referred to in §§6090, 6190.10
Auditor's special assessment book, §7193.01

6035 Right of payment. The owner of any property against which a street improvement or sewer assessment has been levied, shall have the right to pay the same, or the unpaid installments thereof, with all interest, as the case may be, up to the time of said payment, with any penalties and the cost of any proceedings for the sale of the property for such special assessment or installments. [C97,§828; SS15,§840-r; C24, 27, 31, 35,§6035.]

Referred to in §6090
Right to pay after appeal or objection, §6066

6036 Division of property. If any owner of property subject to special assessment shall divide the same into two or more lots and if such plan of division is accepted or approved by the council, he may discharge the lien upon any one or more of them by payment of the amount unpaid, calculated by the ratio of square feet in area of such lot or lots to the area of the whole lot. [C97,§828; SS15,§840-r; C24, 27, 31, 35, §6036.]

Referred to in §6090

6037 Tax sale. Property against which a special assessment has been levied for street improvements or sewers may be sold for any sum of principal or interest due and delinquent at any regular or adjourned tax sale, in the same manner, with the same forfeitures, penalties, and right of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect, as in case of sales for the nonpayment of ordinary taxes. [C97,§829; SS15,§840-r; C24, 27, 31, 35,§6037.]

Referred to in §6090
40ExGA, SF 169, §45, editorially divided

6038 Right of purchaser. The purchaser at such sale shall take the property charged with the lien of the remaining unpaid installments and interest. [C97,§829; SS15,§840-r; C24, 27, 31, 35,§6038.]

Referred to in §6090

6039 City as purchaser. At any such sale, where bonds have been issued in anticipation of such special taxes and interest, the city may be a purchaser, and be entitled to all the rights of purchasers at tax sales. [C97,§829; SS15, §840-r; C24, 27, 31, 35,§6039.]

Referred to in §6090
Additional provisions, ch 449

6040 Sales by city—fund credited. The proceeds subsequently realized from sales of any property so purchased by a city shall be covered into the improvement fund. [C97,§829; SS15, §840-r; C24, 27, 31, 35,§6040.]

Referred to in §6090

6041 Assignment of certificate. Any holder of any special assessment certificate against a lot or parcel of ground, or any holder of a bond payable in whole or in part out of a special assessment against any lot or parcel of ground, or any city or town within which such lot or parcel of ground is situated, which lot or parcel of ground has been sold for taxes, either general or special, shall be entitled to an assignment of any certificate of tax sale of said property for any general taxes or special taxes thereon, upon tender to the holder or to the county auditor of the amount to which the holder of the tax sale certificate would be entitled in case of redemption. [C97,§816; S13,§§792-f, 816; C24, 27, 31, 35,§6041.]

Referred to in §7255.3

6042 Improvement fund. When the whole or any part of the cost of the construction or repair of any street improvement shall be ordered paid from the improvement fund, the city shall have the power, after the completion of the work, by resolution to levy at one time such cost upon all the taxable property within such city, and determine the whole percentage of tax necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years, not exceeding ten, given for the maturity of each installment thereof. [C97,§830; C24, 27, 31, 35,§6042.]

6043 Roadway district fund. When part of the cost of constructing or repairing a roadway within an assessment district is to be paid by the city, it may levy an annual tax for such purpose upon all the taxable property in such city, except moneys and credits, but the aggregate of all such levies shall not exceed two and one-half mills; except that in cities having a population of fifty thousand or more, such levies shall not exceed three and three-fourths mills in the aggregate. [SS15,§840-o; C24, 27, 31, 35, §6043.]

6044 Payment from primary road fund. If, in any city, extensions of primary roads are being improved or to be improved, under the provisions of subsection 2 of section 5975, any or all of that portion of the improvement not specially assessable on the property within the assessment district and which would under the law have to be met by a tax on the city as a whole, may be paid from the primary road fund allotted to the county in which such city is located. [C24, 27, 31, 35,§6044.]

Referred to in §§4755.25, 6049

6045 Application for payment. Before proceeding with such improvement for which it is proposed to make part payment from the primary road fund, the city council shall by resolution make application to the board of supervisors therefor. This resolution shall specifically state:

1. The location of the improvement proposed, giving the starting point and terminus thereof.
2. The approximate length thereof.
3. The width or widths of paving proposed.
4. An estimate of the cost of the proposed improvement.
5. An estimate of the amount that can be specially assessed against the property within the proposed district.
6. A statement of the amount to be borne by the city.
7. A statement of the amount proposed to be paid from the primary road fund.

The resolution shall be accompanied by a plat on which are indicated the road or street to be improved, the primary road connecting therewith, the location of other streets or roads in the vicinity, and the approximate boundaries of the assessment district which it is proposed to establish. [C24, 27, 31, 35,§6045.]

Referred to in §§4755.25, 6049
Primary road act, ch 241.1

6046 Decision by supervisors. The board of supervisors shall examine said application and shall, within thirty days after the filing

thereof with the county auditor, take action thereon. The board may approve said application in whole or in part or may wholly reject the same, whereupon the resolution, together with a record of the board's action thereon, shall be forwarded to the state highway commission foi final review. [C24, 27, 31, 35,§6046.]

Referred to in §§4755.25, 6049
40ExGA, SF 169, §51, editorially divided

6047 Review by commission. The said commission shall examine said resolution and the action of the board thereon, and shall within thirty days make final determination thereof. It may approve the application in whole or in part or may wholly reject the same. If the application be approved in any part, the commission shall make an appropriation in aid of said improvement from the primary road fund allotted said county.

The city council and the board of supervisors shall be immediately notified of the action taken. [C24, 27, 31, 35,§6047.]

Referred to in §§4755.25, 6049

6048 Approval of plans — estimates — payment. The plans and specifications for the improvement shall receive the approval of the state highway commission before the contract is let, or before it becomes effective. When the work or any substantial portion thereof is completed to the satisfaction of the state highway commission, payment of the pro rata share thereof, payable out of the primary road fund, may be made. The estimates payable from the said fund shall be prepared, approved, and paid in the usual manner for primary road bills generally, except that said bills shall be approved by the city council instead of the board of supervisors. [C24, 27, 31, 35,§6048.]

Referred to in §§4755.25, 6049

6049 Election not required—limitation. The provisions of section 4694 relative to voting on the question of hard surfacing the primary roads shall not apply to improvements made under sections 6044 to 6048, inclusive; but in counties which have not authorized the hard surfacing of the primary roads, and in which the said primary roads have not all been built to finished grade and drained, the state highway commission shall give preference to such grading and draining projects, and not to exceed twenty percent of the annual allotment of the primary road funds may be spent under the provisions of sections 6044 to 6048, inclusive. [C24, 27, 31, 35,§6049.]

Referred to in §4755.25
Section 4694 repealed by 42GA, ch 101

6050 Sewer fund. When the whole or any part of the cost of constructing or repairing any sewer shall be ordered paid from the sewer fund of any sewer district or from the sewer fund or from the main sewer fund, the council may, after the completion of the work, by resolution levy at one time the whole or any part of such cost upon all the taxable real property within such sewer district or within the city, as the case may be, and determine the whole percentage of tax necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years, not exceeding ten, given for the maturity of each installment thereof. [C97,§831; S13, §§840-a,-d; C24, 27, 31, 35,§6050.]

6051 Certification to county auditor. Certificates of such levies shall be filed with the auditor of the county or counties in which the city is located, setting forth the amount or percentage and maturity of the tax, or each installment thereof, designating by reasonable description the real property upon which the tax is to be levied, certified as correct by the clerk, and thereupon the tax shall be placed upon the tax list of the proper county or counties. [C97, §§830, 831; SS15,§840-r; C24, 27, 31, 35,§6051.]

6051.1 Improvements by street railways. Street railway companies operating upon the streets, avenues and public places of cities and towns, including cities under special charter, shall provide a suitable foundation for the track of a width equal to their ties, but in no case less than the width comprised between lines lying one foot outside of each rail of the track, and shall be assessed for the construction or reconstruction of paving between the rails of their track or tracks, and for one foot outside of each rail thereof, in the amount that the cost of such pavement per yard of area exceeds the cost per yard of the remainder of the paving upon such street. In the making of assessments for paving upon streets, avenues, or public places of cities and towns, including cities acting under special charter, along or upon which a street railway track or tracks are located, in the event that the track or tracks also are to be paved or repaved; the engineer shall make an estimate of the cost of building such improvement, and he shall, also, make an estimate of the cost of building such an improvement upon said street, avenue or public place as it would be in the event that the streetcar tracks did not there exist; and the street railway company shall be charged with the difference in said estimates of cost and shall pay the same as other special assessments are paid.

Separate bids shall be taken in case of single track upon that portion of the street between the rails and one foot outside of each rail and in case of double track upon the entire portion of the street included between lines parallel to and one foot outside of the outer rail of each track. The street railway company shall be permitted to bid upon this portion of the pavement and, if the lowest bidder thereupon shall be awarded the contract therefor. One-third of the remaining cost of the improvement for the area between the rails of the tracks of the street railway company and one foot outside thereof shall be assessed against the street railway company, one-third thereof shall be assessed against the abutting property and the owner thereof, and one-third thereof shall be paid for by the city either out of the improvement fund or general fund of the city.

All repairs or maintenance between and one foot outside the rails made necessary by the operation of the street railway and any other

repairs or maintenance made necessary by the operation of the street railway shall be made by the street railway company and if not so made, the city shall have the power to make such repairs and assess the cost thereof to such company. All construction assessments herein provided for shall be made in the manner provided for the assessment of such costs against abutting property and the owner thereof. [C31, 35,§6051-c1.]

Referred to in §6051.2
Applicable to special charter cities, §6770.1
Amendment by 48GA, ch 160, appears as §6610.54

6051.2 "Paving" defined. The word "paving" as used in section 6051.1 shall include any kind of hard surfacing, gravel or macadamizing together with the necessary paving base. [C31, 35,§6051-c2.]

Applicable to special charter cities, §6770.1

6052 Improvements by railways. All railway companies shall be required to construct and repair all street improvements between the rails of their tracks, and one foot outside thereof, at their own expense, unless by ordinance of the city, or by virtue of the provisions or conditions of any ordinance of the city under which said railway may have been constructed or may be maintained, it may be required to improve other portions of said street, and in that case said railway shall construct and repair the improvement of that part of the street specified by such ordinance; and such improvement, or repair thereof, shall be of the material and character ordered by said city, and shall be done at the time the remainder of said improvement is constructed or repaired. [C97,§834; SS15,§840-r; C24, 27, 31, 35,§6052.]

Referred to in §6577

6053 Maintenance by railways. When an improvement is made, said companies shall lay, in the best approved manner, such rail as the council may require. They shall keep the part of the improvement they are liable to construct or maintain up to grade. [C97,§834; SS15, §840-r; C24, 27, 31, 35,§6053.]

Referred to in §6577

6054 Construction and assessment by city. If the owner of said railway shall fail or refuse to comply with the order of the council to construct or repair an improvement, such work may be done by the city, and the expense thereof shall be assessed upon the real estate and personal property of said railway company within said city, and against such railway company, in the manner hereinbefore provided for the assessment of such cost against private property and the owners thereof. [C97,§834; SS15,§840-r; C24, 27, 31, 35,§6054.]

Referred to in §6577

6055 Enforcing railway assessment. Any special assessment made under this chapter against any railway or street railway shall be a debt due personally from such railway. Such special assessments and each installment thereof, and certificates issued therefor when due, may be collected by action at law, in the name of the city against such railway or street railway, or the lien thereof enforced against the property of such railway or street railway, on or against which the same has been levied, by action in equity, at the election of the plaintiff; and in any action at law where pleadings are required, it shall be sufficient to declare generally for work and labor done, or materials furnished, on the particular street, the levy of the tax and nonpayment of the same; and in any action in equity, it shall be sufficient to aver the same matters, together with a description of the property, or parts thereof, against which such lien is sought to be enforced. [R60,§1068; C73,§478; C97,§840; S13,§791-i; C24, 27, 31, 35,§6055.]

6056 Action by city. Such action may be maintained by the city for the use of any person entitled thereto or any part thereof, upon filing a bond conditioned to pay all costs adjudged against the plaintiff and protect it from all liability therefrom or damages growing out of the same; the amount of the bond to be fixed by the court, or a judge thereof in vacation, and the sureties thereon to be approved by the clerk of said court. [R60,§1068; C73,§478; C97,§840; S13,§791-i; C24, 27, 31, 35,§6056.]

6057, 6058 Rep. by 43GA, ch 182

6059 Relevy. When by reason of nonconformity to any law or resolution, or by reason of any omission, informality, or irregularity, any special tax or assessment levied is invalid or is adjudged illegal, the council shall have power to correct the same by resolution, and may reassess and relevy the same, with the same force and effect as if done at the proper time and in the manner provided by law or by the resolution relating thereto. [C97,§836; S13,§840-a; SS15, §§836, 840-r; C24, 27, 31, 35,§6059.]

Referred to in §6062

6060 Reassessment in certain cases. Whenever any such special tax or assessment, upon property not by law exempt therefrom, shall be adjudged void for any jurisdictional defect, or other reason, and the city adjudged liable to pay the same, the council shall as to such property have power, by resolution, to cause to be prepared a schedule and proposed reassessment in proportion to and not in excess of benefits, and to cause notice thereof to be given, and to hear objections thereto and make necessary corrections, and thereupon the council shall reassess and relevy such special tax or special assessment as so corrected with the same force and effect as if jurisdiction had been acquired in the first instance and all subsequent proceedings had been regularly and legally had. [SS15,§§836, 840-r; C24, 27, 31, 35,§6060.]

Referred to in §6062

6061 Correction of assessments. When, in making any special assessment, any property is assessed too little or too much, the same may be corrected and a reassessment and relevy made in conformity therewith; and any tax collected in excess of the proper amount shall be refunded to the person paying the same. Such corrected assessments shall be a lien on the lots the same

as the original, and shall be certified by the clerk to the county auditor in the same manner, and shall, so far as practicable, be collected in the same installments, draw interest at the same rate, and be enforced in the same manner as the original assessment. [C97,§837; SS15,§840-r; C24, 27, 31, 35,§6061.]

Referred to in §6062

6062 "Time" or "order" — interpretation. Any provision of law, resolution, or ordinance specifying a time when or the order in which acts shall be done in a proceeding which may result in a special assessment, shall be taken to be subject to the qualifications of sections 6059, 6060, and 6061. [C97,§838; SS15,§840-r; C24, 27, 31, 35,§6062.]

6063 Appeal on assessment. Any person affected by the levy of any special assessment for street improvements or sewers may appeal therefrom to the district court. The person appealing shall be designated as plaintiff and the city or town as defendant. [C97,§839; S13, §§792-c,-f, 840-a; SS15,§840-r; C24, 27, 31, 35, §6063.]

6064 Perfecting appeal. Said appeal must be perfected:

1. By serving upon the mayor or clerk, in the manner in which original notices in ordinary actions are served, within fifteen days from the date of said levy, a written notice of appeal, signed by the plaintiff or by his agent or attorney, directed to the defendant, and designating with reasonable certainty the assessment appealed from and the property of plaintiff affected thereby, and

2. By filing within said fifteen days in the office of the clerk of the district court, an appeal bond, approved by the clerk of said court, in an amount equal to five percent of plaintiff's assessment appealed from and in no event less than two hundred fifty dollars, conditioned for the payment of all costs which may be adjudged against plaintiff, and

3. By filing in the office of the clerk of the said court on or before noon of the second day of the first term of said court convening after the serving of said notice, a petition which shall briefly state the grounds of complaint against said assessment. [C97,§839; C24, 27, 31, 35, §6064.]

Manner of service, §11060
Presumption of approval of bond, §12759.1

6065 Trial, judgment, and costs. Upon appeal, all questions touching the validity of said assessment or the amount thereof, and not waived, shall be heard and determined in equity. The court may make such assessment as should have been made, or may direct the making of such assessment by the council. Costs shall be taxed as in other actions. [C97,§839; C24, 27, 31, 35,§6065.]

Costs generally, ch 497

6066 Payment after appeal or objection. When any special assessment has been reduced on appeal, the property owner may, within twenty days after final determination of the appeal, pay an amount equal to the installments which would have matured under the revised assessment had objections not been filed, together with interest on the entire revised assessment from the date of the original levy and shall be entitled to pay the remaining installments as provided in section 6032.

In case objections are filed but no appeal is taken, if such objection be withdrawn within thirty days from the date of the assessment or if said objection be overruled by the council at a hearing as in this chapter provided for, the property owner may pay the special assessment in the same manner as in this section provided in case of successful appeal. [C24, 27, 31, 35, §6066.]

6066.01 Storm sewers. Any city having a population of not less than forty-two thousand nor more than forty-five thousand and having a total area of not less than fifteen square miles shall have power to construct storm sewers, and to levy annually a tax not exceeding four mills for the storm sewer fund, which shall be used only to pay all or any part of the cost of construction, reconstruction, maintenance, extension, repair, and outlet either within or without the city limits, of storm sewers, and may condemn property for such purposes. [C35,§6066-g1.]

Referred to in §6066.02

6066.02 Bonds. Said tax may be anticipated and bonds may be issued under the authority of a resolution of the city council; such bonds shall mature serially within twenty years from their date, shall bear interest at a rate not exceeding five percent per annum, shall be payable at the office of the city treasurer and shall be in such form as the council shall designate by resolution. Said bonds shall not be general obligations of the city but shall be secured by the pledge of the tax authorized in section 6066.01 and shall be payable only out of the storm sewer fund which shall consist of the proceeds of said tax. It shall be the duty of the city to hold said funds separate and apart, in trust, for the payment of said bonds and interest and to apply said fund to the payment of said bonds and the interest thereon. The provisions of section 6264 shall apply to said bonds. [C35, §6066-g2.]

CHAPTER 308.1

JOINT USE OF MUNICIPAL SEWERS

Applicable to special charter cities over 50,000, §6770.2

6066.03 Authorization.
6066.04 Construction—assessment.
6066.05 Assessments.
6066.06 Nonapplicable statutes.
6066.07 Nonapplicable statute.
6066.08 Assessment—description of property.
6066.09 Hearing.
6066.10 Form of notice.
6066.11 Publication or posting of notice.
6066.12 Appearance and protest.
6066.13 Issuance of certificates or bonds.
6066.14 Annual charge—how payable.

6066.03 Authorization. When the boundary limits of cities or towns join and such cities or towns are located upon or adjacent to a river or stream which furnishes drainage for such cities or towns, or either of them, and is also the source of water supply for the inhabitants of either or all of said cities or towns, such cities or towns are authorized to contract with each other for the joint use of the sanitary sewer system of either of such cities or towns for the purpose of furnishing a joint outlet therefor and to make provision therein for the payment of an agreed consideration for such joint use including an annual charge for the same. [C27, 31, 35,§6066-a1.]

6066.04 Construction — assessment. When any two such cities or towns shall have so contracted with each other for the joint use of such sanitary sewer system for outletting purposes, the city or town obligating itself to pay a consideration for the use of the sanitary sewer system of the other city or town shall have the authority to build the necessary line or lines of sanitary sewer to connect the sanitary sewer system of such city or town with the sanitary sewer system of such other city or town and may levy a special assessment against all of the property in said city or town which abuts upon any line of sanitary sewer therein, or which is adjacent thereto, for the payment of the cost of constructing such connecting line or lines of sewer and the amount agreed to be paid for the use of the sanitary sewer system of such other city or town as an outlet, except the annual charge agreed upon. [C27, 31, 35,§6066-a2.]

41GA, ch 120, §2, editorially divided

6066.05 Assessments. Said special assessments shall be in proportion to the benefits received by such property and such assessments shall be made in the same manner as provided for in chapter 308 and amendments thereto. [C27, 31, 35,§6066-a3.]

6066.06 Nonapplicable statutes. The provisions of said chapter 308 as to the adoption of a resolution of necessity and the letting of contracts for street improvements or sewers shall not apply to the making of the contract for the joint use of such sanitary system for outletting purposes. [C27, 31, 35,§6066-a4.]

6066.07 Nonapplicable statute. The provisions of section 5993 relative to preliminary plat and schedule shall not apply to this chapter. [C27, 31, 35,§6066-a5.]

41GA, ch 120, §3, editorially divided

6066.08 Assessment — description of property. Before the preparation of the plat and schedule for the levying of the special assessments authorized herein, the city or town council shall by resolution describe the property abutting upon any line of sanitary sewer in such city or town, or adjacent thereto, which it is contemplated to assess for the cost and expense of constructing such connecting line or lines of sewer and the amount agreed upon to be paid for the use of the sanitary sewer system of such other city or town, except the annual charge agreed upon. [C27, 31, 35,§6066-a6.]

6066.09 Hearing. Hearing shall be had upon such resolution at a date fixed by the city council. Said hearing shall be not less than twenty days after the date of the first publication of said notice. [C27, 31, 35,§6066-a7.]

6066.10 Form of notice. Said notice shall describe the property proposed to be assessed. [C27, 31, 35,§6066-a8.]

6066.11 Publication or posting of notice. Notice of said hearing shall be given by two publications in each of two newspapers published in said city or town, if there be that number, otherwise in one and by handbills posted in conspicuous places along the line or lines of such sanitary sewers in said city or town. [C27, 31, 35,§6066-a9.]

6066.12 Appearance and protest. Any property owner whose property it is contemplated to assess may appear and protest against the passage of said resolution. [C27, 31, 35, §6066-a10.]

6066.13 Issuance of certificates or bonds. Sewer certificates or sewer bonds may be issued in anticipation of the special assessments authorized by this chapter and the same negotiated, as provided for in chapter 311. [C27, 31, 35, §6066-a11.]

6066.14 Annual charge—how payable. The annual charge agreed upon by said cities or towns in such contract may be paid from either the proceeds of the sewer fund tax or the sewer outlet and purifying plant tax provided for in subsections 5 and 7 of section 6211. [C27, 31, 35,§6066-a12.]

CHAPTER 308.2

SEWER RENTALS

Applicable to special charter cities over 50,000, §6770.2

6066.15 Rentals authorized.
6066.16 Rate.
6066.17 Lien.
6066.18 Change of rates.
6066.19 Collection.
6066.20 Metering of water supply.
6066.21 Rentals supplanting taxes.
6066.22 Sewer rental fund—accounting.
6066.23 Limitation on expenditure.

6066.15 Rentals authorized. The city or town council of any city or town which has installed or is installing sewerage, a system of sewerage, sewage pumping stations, or sewage treatment or purification works, any and all of which are hereinafter termed sanitary utilities, for public use, and which has by ordinance established one or more sewer districts in compliance with section 5984, may by ordinance establish just and equitable rates or charges or rentals to be paid to such city or town for the use of such sanitary utilities by every person, firm or corporation whose premises are served by a connection to such sanitary utilities directly or indirectly. [C31, 35,§6066-d1.]

44GA, ch 157, §1, editorially divided

6066.16 Rate. Such charges shall be as nearly as may be in the judgment of the council, equitable and in proportion to the service rendered and taking into consideration only in the case of each such premises, the quantity of sewage therein or thereby produced and its concentration, strength, or river pollution qualities in general. [C31, 35,§6066-d2.]

6066.17 Lien. Such charges shall constitute a lien upon the property served by such sanitary utility and if not paid when due as by said ordinance provided, shall be collected in the same manner as other taxes. [C31, 35,§6066-d3.]

6066.18 Change of rates. The council may change the rates or charges or rentals from time to time as may seem advisable. The council may provide in said ordinance for the management of said sanitary utility and the collection of said rates, rentals or charges. [C31, 35, §6066-d4.]

6066.19 Collection. Said charges may be collected at the same time, place, and in conjunction with the water rentals in any city or town owning and operating the municipal water supply and distribution system. [C31, 35,§6066-d5.]

6066.20 Metering of water supply. Said ordinance may provide for the metering of private water supplies produced or operated on premises served by such sanitary utility. [C31, 35,§6066-d6.]

6066.21 Rentals supplanting taxes. Said sewer rentals, charges, or rates may supplant or replace in whole or in part millage levy taxes which may have been authorized by resolution of any city or town council to meet interest, and/or principal payments on bonds legally authorized for the financing of such sanitary utilities, and when such sewer rental ordinance has been duly passed and put into effect, such prior ordinances or resolutions providing for millage taxes against real and personal property for such purpose, or the portion thereof thus replaced, may be rescinded, repealed, or rendered inactive. [C31, 35,§6066-d7.]

6066.22 Sewer rental fund — accounting. Any and all funds, fees, rentals, charges or rates collected under the provisions of this section shall be remitted or turned over to the city treasurer by the officer charged with their collection at least once each month, and all such collections shall be kept in a separate and distinct fund to be known as the sewer rental fund, and disbursed only upon resolution of the council and used only for the purpose of paying the cost of financing the operation, maintenance, and/or construction of the sanitary utility herein defined. [C31, 35,§6066-d8.]

6066.23 Limitation on expenditure. In no case shall such sewer charges, rentals, or rates or the funds accruing from the collection thereof be used to meet the cost of construction, maintenance, or operation of lateral sewers serving purely local territory, or the portion of the cost of sanitary utilities as herein defined, which have been financed by special assessment against benefited properties. [C31, 35,§6066-d9.]

CHAPTER 308.3

SELF-LIQUIDATING IMPROVEMENTS

6066.24 Sewage treatment plants—acquisition—bonds.
6066.25 Wharves, docks or piers.
6066.26 Supervision and control.
6066.27 Applicable statutes.
6066.28 Garbage disposal plants—fees.
6066.29 Self-liquidating contracts—bonds.
6066.30 Previous proceedings—other funds.
6066.31 Pledge of net earnings.
6066.32 Self-liquidating rates—lien on premises.

6066.24 Sewage treatment plants—acquisition—bonds. Cities and towns are hereby authorized and empowered to own, acquire, construct, equip, operate and maintain within and/or without the corporate limits of such city or town, a sewage treatment plant or plants,

with all appurtenances necessary, useful and convenient for the collection, treatment, purification and disposal in a sanitary manner of the liquid and solid waste, sewage, and industrial waste of any such city or town, also swimming pools and/or golf courses, and shall have authority to acquire by gift, grant, purchase, or condemnation, or otherwise, all necessary lands, rights-of-way, and property therefor, within or without the said city or town, and, to issue revenue bonds to pay all or any part of the costs of such improvement. [C35,§6066-f1; 48 GA, ch 161,§1.]

45ExGA, ch 71, §1, editorially divided

6066.25 Wharves, docks or piers. Cities and towns are also hereby authorized and empowered to own, acquire, construct, equip, operate and maintain within and/or without the corporate limits of such city or town, wharves, docks and/or piers when the same are authorized by a majority of voters after the proposition of such project shall have been submitted to an election to be called and conducted as required by the statutes regulating elections relating to the authorization and issuance of bonds by cities and towns for similar purposes, provided, however, no election shall be necessary unless demanded by a petition signed by fifteen percent of the voters at the last preceding municipal election filed within sixty days following the publication of an ordinance adopted for the issuance of such bonds, and to issue revenue bonds to pay all or any part of the costs of such improvement. [C35,§6066-f2; 48GA, ch 161,§2.]

See §1171.18

6066.26 Supervision and control. The construction, acquisition, improvement, equipment, custody, operation and maintenance of any such works for the collection, treatment or disposal of sewage, swimming pools, golf courses, wharves, docks or piers, and the collection of revenues therefrom, for the service rendered thereby, shall be under the supervision and control of the city or town; and the work of construction shall be done by hand labor so far as is practicable. [C35,§6066-f3.]

6066.27 Applicable statutes. Chapter 23 of the code, except sections 363 to 367, inclusive, shall be applicable to contracts for the improvements herein provided for. [C35,§6066-f4.]

6066.28 Garbage disposal plants — fees. Cities and towns may by ordinance provide a schedule of fees to be charged for the collection and disposal of garbage and may pay the cost of construction, extending, repairing, maintaining and operating garbage disposal plants and/or incinerating plants out of the earnings of such plant; revenue bonds, payable solely and only out of the earnings of such plant may be issued in the manner provided in this chapter. [C35,§6066-f5.]

6066.29 Self-liquidating contracts — bonds. Cities and towns are authorized to borrow money from the federal government or an agency thereof for the purpose of constructing and operating the improvements referred to in this chapter, or such cities and towns may borrow money by issuing revenue bonds, payable as hereinafter provided, and to deliver such bonds to the contractor or contractors in payment for the construction of any improvements referred to in this chapter; or such cities and towns may sell such bonds at a public sale upon the same conditions provided by chapter 63, and may use the proceeds from the sale of such bonds to pay all or any part of the cost of construction of said improvements. As evidence of such loan, such city or town may issue its bonds payable solely and only from the revenues derived from such improvement. Such bonds may be issued in such amounts as may be necessary to provide sufficient funds to pay all the costs of construction, including engineering, legal and other expenses, together with interest to a date six months subsequent to the estimated date of completion. Bonds issued under the provisions of this chapter are declared to be negotiable instruments, shall be executed by the mayor and clerk of the municipality and shall be sealed with the corporate seal of the municipality. The principal and interest of said bonds shall be payable solely and only from the special fund herein provided for such payment, and said bonds shall not, in any respect, be a general obligation of such city or town, nor shall they be payable in any manner by taxation, nor shall the municipality be in any manner liable by reason of the earnings being insufficient to pay said bonds. All the details pertaining to the issuance of such bonds and the terms and conditions thereof, shall be determined by ordinance of the municipality. [C35,§6066-f6; 48GA, ch 161,§3.]

Negotiable instruments, ch 424

6066.30 Previous proceedings—other funds. This chapter shall be deemed to apply to all proceedings heretofore taken by cities and towns for the construction of any improvement provided for herein, notwithstanding that a portion of the funds for the construction of any such improvement shall have been derived from sources other than the issuance of bonds hereunder. [48GA, ch 161,§4.]

6066.31 Pledge of net earnings. Before the issuance of any such bonds, the council of the municipality by ordinance shall pledge the net earnings of the works to the payment of said bonds and the interest thereon, and shall provide that the same shall be set apart as a sinking fund for that purpose. [C35,§6066-f7.]

6066.32 Self-liquidating rates — lien on premises. The city or town council shall have power by ordinance, to establish and maintain just and equitable rates or charges for the use of and the service rendered by such works, to be paid by the owner of each and every lot, parcel of real estate, or building that is connected with and uses such works, by or through any part of the sewage system of the city or town, or that in any way uses or is served by such works, and may change and readjust such

rates or charges from time to time and to charge and collect proper rates and charges for landing, wharfage, dockage, swimming, and golfing. Such rates or charges shall be sufficient in each year for the payment of the proper and reasonable expenses of operation, repair, replacements and maintenance of the works, and for the payment of the sums herein required to be paid into a sinking fund, which said fund shall be sufficient to meet the principal and interest and other charges, except rates or charges for the use of swimming pools and golf courses, of the bonded indebtedness provided for herein. All such rates or charges if not paid as by the ordinance provided, when due, shall constitute a lien upon the premises served by such works, and shall be collected in the same manner as taxes. [C35,§6066-f8; 48GA, ch 161,§5.]

CHAPTER 309

JOINT MUNICIPAL IMPROVEMENT OF HIGHWAYS

6067 Authorization.
6068 Joint board created.
6069 Resolution of necessity.
6070 Notice—objections.
6071 Substituted service.
6072 Duty of separate boards.
6073 Benefited districts—assessments.
6074 Construction—record.
6075 Levy.
6076 Limitations.
6077 Anticipation of levy.
6078 Levy pledged.
6079 Additional power.

6067 Authorization. In all counties in which there is located a permanent federal or state institution within a distance of five miles from the corporate limits of the county seat, to which institution there is a main-traveled thoroughfare leading from said county seat to said institution through another city or town in the county, such counties, cities, or towns shall have the power to improve said thoroughfare to said institution by grading, paving, and curbing the same by the joint action of said counties, cities, and towns, and shall have the power and authority to maintain and keep said thoroughfare in repair. [C24, 27, 31, 35,§6067.]

6068 Joint board created. Whenever such city or town located as above indicated desires joint action in the improvement, maintenance, and repair of any such thoroughfare, the council of such city or town shall fix the time and place for a joint meeting of the board of supervisors and the councils of any city or town through which any such thoroughfare runs, and give ten days written notice of such meeting. [C24, 27, 31, 35,§6068.]

38GA, ch 315, §2, editorially divided

6069 Resolution of necessity. On the day fixed for such joint meeting the several bodies above referred to shall organize themselves into a joint board with the mayor of the city initiating the proceedings presiding, and shall then by resolution determine the necessity for the grading, paving, and curbing of such thoroughfare, the character and extent thereof, the method of construction, the one or more kinds and size thereof, the property to be assessed therefor, the location and terminal points thereof, and the percentage of the total cost thereof to be borne by the county, and by said city and town, or each of them if there be more than one. [C24, 27, 31, 35,§6069.]

6070 Notice—objections. Said joint board shall cause twenty days notice of the time when said resolution will be considered by such joint board for passage to be given by two publications in each of said cities and towns in some newspaper of general circulation published therein, the last of which shall be not less than two nor more than four weeks prior to the time fixed for its consideration, at which time the owners of the property subject to assessment for the same may appear and make objection to the contemplated improvement and the passage of said proposed resolution, at which hearing the same may be amended and passed, or passed as proposed. [C24, 27, 31, 35,§6070.]

6071 Substituted service. If within the limits of either of such corporations no such newspaper is published, then such notice may be given by posting copies thereof in three public places within the limits of the corporation in which no such newspaper is published, two of which places shall be the post office and the mayor's office of such city or town. [C24, 27, 31, 35,§6071.]

6072 Duty of separate boards. After the adoption of the resolution of necessity herein provided for by the joint board, then the board of supervisors and the council of each of said cities and towns shall proceed to carry out the terms thereof by initiating and prosecuting to a completion the necessary proceedings in each of said corporations, except that the proposals for bids and the making of the contract for the improvement shall be left with the city or town initiating the proceedings. [C24, 27, 31, 35, §6072.]

6073 Benefited districts—assessments. Such counties, cities, and towns shall have power to establish benefited districts to embrace all or such portions of said counties, cities, and towns as in the judgment of the board of supervisors and the city council thereof will receive special benefits from the grading, paving, and curbing of such thoroughfare, to change the boundaries of same from time to time as may become in the judgment of such board of supervisors and city council just and equitable, and to assess so much of the cost of such grading, paving, and curbing against all lots or tracts of land contained in the benefited district within which

such improvements are made as shall equal and be in proportion to the special benefits conferred by said improvement and not in excess thereof. In no case shall such assessment exceed twenty-five percent of the actual value of said lots or tracts at the time of levy thereof. [C24, 27, 31, 35,§6073.]

6074 Construction — record. Whenever the resolution of necessity hereinabove provided for has been adopted and the provisions of the preceding sections of this chapter complied with, the council initiating the proceedings hereunder may by ordinance or resolution order the construction of said grading, paving, and curbing upon a yea and nay vote entered of record, which record shall also show whether such improvement was petitioned for or made on the motion of the council, and whether the improvement was the result of the joint action of the counties, cities, and towns interested. [C24, 27, 31, 35,§6074.]

6075 Levy. Such counties, cities, or towns, as the case may be, shall have power, after the completion of any improvement contemplated in this chapter, to levy upon all taxable property, excepting moneys and credits, in said counties, cities, and towns, an annual tax for the purpose of paying that portion of the cost of such improvement not borne by the special assessments levied against the lots or tracts of land embraced in the improvement district established therefor, but such levy shall not exceed one-fourth mill for any one year. [C24, 27, 31, 35,§6075.]

Referred to in §§6076, 6077

6076 Limitations. In no event shall such counties, cities, or towns, as the case may be, be authorized and empowered to pay more than fifty percent of the total cost of any improvement contemplated in this chapter out of the fund raised by the levy provided for in section 6075, nor out of any other county, city, or town fund. [C24, 27, 31, 35,§6076.]

38GA, ch 315, §6, editorially divided

6077 Anticipation of levy. Any such county, city, or town may anticipate the collection of taxes authorized to be levied by section 6075, and for that purpose may issue paving certificates or bonds with interest coupons, and the provisions of chapters 308 and 320 shall be operative as to such certificates, bonds, and coupons insofar as they may be applicable. [C24, 27, 31, 35,§6077.]

6078 Levy pledged. Said certificates, bonds, and interest thereon shall be secured by said levy and shall be payable only out of the funds derived therefrom and pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such counties, cities, and towns to collect such funds with interest thereon and to hold the same separate and apart in trust for the payment of said certificates, bonds, and interest, and to apply the proceeds of said funds pledged for that purpose to the payment of said certificates, bonds, and interest. [C24, 27, 31, 35,§6078.]

6079 Additional power. This chapter shall be construed as granting additional power without limiting the power already existing in counties, cities, and towns, and all the provisions of chapters 308 and 320, so far as the same are additional and not in conflict with this chapter and applicable thereto, shall be and remain in full force and effect and may be resorted to whenever necessary to carry out the spirit and purpose of this chapter. [C24, 27, 31, 35,§6079.]

CHAPTER 310

PROTECTION FROM FLOODS

Referred to in §6574. Chapter applicable to special charter cities, §6771

6080 Authorization.
6080.1 Condemnation.
6081 Petition—plat and schedule.
6082 Resolution of necessity.
6083 Notice—objections—amendment.
6084 Bids—contract.
6085 Notice—sealed proposals.
6086 Deposit with bid.
6087 Bond to maintain.
6088 Bond to perform.
6089 Assessment.
6090 Statutes governing.
6091 Appeal—waiver.
6092 Objections waived.
6093 Notice to railway companies.
6094 Duty to construct.
6095 Construction by city.
6096 Condemnation.
6097 Streets extended.
6098 Filling abandoned channel.
6099 Assessments exceeding one-fourth value.
6100 Levy for deficiency.
6101 Certification to county auditor.
6102 Assessments and levies pledged.
6103 Bonds—indebtedness.

6080 Authorization. Cities and towns may, in accordance with the provisions of this chapter, deepen, widen, straighten, alter, change, divert, or otherwise improve watercourses within their limits, by constructing levees, embankments, or conduits therefor, and improve, widen, and establish streets, alleys, and boulevards across and adjacent to the abandoned or new channel or conduit and may levy special assessments against all property in said city or town, which is in any way benefited by said improvement and levy other taxes to defray the expense of such improvement and issue bonds and certificates in anticipation of such special assess-

ments and taxes. [SS15,§849-a; C24, 27, 31, 35, §6080.]

Referred to in §6081

6080.1 Condemnation. Cities and towns may purchase or condemn, and appropriate, private property, outside of the limits of such cities and towns, including right to cross railroad right-of-way and property, so as not to impair the previous public use, as may be necessary to carry into effect the provisions of this chapter, and to provide an outlet for the watercourses, either natural or artificial, which may be deepened, widened, straightened, altered, changed, diverted or otherwise improved under the provisions of this chapter, and the cost of such property shall be included in the cost of the improvement. [C27, 31, 35,§6080-b1.]

6081 Petition—plat and schedule. Upon the filing of a petition requesting the exercise of the powers mentioned in section 6080, signed by one hundred resident taxpayers of the city or town, the council may, or on its own motion it may, direct the city engineer or other competent person to make necessary surveys, to prepare plans and specifications for doing the work, to furnish the council with an estimate of the cost, including an estimate of the damages to property, if any, and a map or plat showing the boundaries of the district which will be specially benefited by such improvement, and all property which will, in any way, be specially benefited by such improvement may be included within the boundaries of the district, a schedule showing, as nearly as may be, the ownership and value of each lot or parcel of land or other property therein as shown by the last assessment roll, and an estimate of the benefit to each lot or parcel of land and to any railway or street railway within such improvement district. The plans, specifications, estimates, maps, plats, and schedule so prepared shall be filed with the clerk. [S13,§849-b; C24, 27, 31, 35,§6081.]

6082 Resolution of necessity. If the council upon receiving the said plans, specifications, estimates, maps, plats, and schedules, shall approve, or modify and approve, the same, it shall in a proposed resolution, of which the plat and schedule is made a part by reference, declare the necessity and advisability of such improvement, describing the same in general terms, stating the estimated cost thereof, and fixing the boundaries of the territory or district specially benefited. [S13,§849-c; C24, 27, 31, 35, §6082.]

38GA, ch 285, §4, editorially divided

6083 Notice—objections—amendment. The council shall cause fourteen days notice of the time when said resolution will be considered for passage to be given by two publications in some newspaper of general circulation published in the city, the last of which shall be not less than two nor more than four weeks prior to the time fixed for its consideration, at which time the owners of the property affected by such improvement may appear and make objections in writing to the contemplated improvement, to the assessment district, or to their assessments, as shown by the plat and schedule, or to the passage of such proposed resolution, at which hearing the district or the assessments may be changed, and the resolution be amended and passed, or passed as proposed. [S13,§849-c; C24, 27, 31, 35,§6083.]

6084 Bids—contract. When the making of any such improvement is ordered, the council shall advertise for bids and may enter into a contract or contracts for furnishing the labor and materials for doing the work. [S13,§849-d; C24, 27, 31, 35,§6084.]

6085 Notice—sealed proposals. All contracts for such improvement shall be let in the name of the city to the lowest bidder, by sealed proposals, upon giving notice for at least ten days by two publications in a newspaper published in said city, which notice shall state as nearly as practicable the extent of the work, the one or more kinds of material for which bids will be received, when the work shall be done, the terms of payment, and whether a maintenance fund shall be required, and the time the proposals will be received and acted upon. All bids may be rejected and new bids invited. [S13,§849-d; C24, 27, 31, 35,§6085.]

38GA, ch 285, §6, editorially divided

6086 Deposit with bid. All bids must be accompanied, in a separate envelope, with a certified check payable to the order of the city treasurer, in the sum named in the notice for bids, as security that the bidder will, if his bid is accepted, enter into a contract for the doing of the work, and will give bond as required by this chapter. All such checks, where the bid has not been accepted, shall be returned to the respective bidders. [S13,§849-d; C24, 27, 31, 35. §6086.]

6087 Bond to maintain. All contracts for making such improvement may contain a provision obligating the contractor and his bondsmen to keep the improvement in good repair for one year after the acceptance of the same by the city, and bond shall be so conditioned as to conform to such provision. [S13,§849-d; C24, 27, 31, 35,§6087.]

6088 Bond to perform. Each contractor for such improvement, or part thereof, shall give bond to the city, with sureties to be approved by the council, for the faithful performance of the contract, and suit on such bond may be brought in the county in which the council holds its sessions. [S13,§849-d; C24, 27, 31, 35,§6088.]

6089 Assessment. When the work is contracted for, the council shall assess the lands and other property included within the improvement district for such part of the cost of the improvement as shall be equal and in proportion to the benefit conferred by the improvement, but not in excess of twenty-five percent of the value of said lands and other property after the improvement shall have been made. [S13, §849-e; C24, 27, 31, 35,§6089.]

Similar provision, §6021

6090 Statutes governing. The levy of the assessment, the filing of the certificate of assessment, the payment of interest on installments, the payment of the installments of assessment, and the sale of property for unpaid assessments shall all be in conformity with sections 6010, and 6030 to 6040, inclusive. [S13,§849-e; C24, 27, 31, 35,§6090.]

6091 Appeal — waiver. Any person aggrieved by the action of the council in making any of the assessments herein provided for, may appeal therefrom to the district court of the county in which it is made, within twenty days of the date of the assessment, and have the right to review the action of the council in the said court, in the manner now provided by law. [C24, 27, 31, 35,§6091.]

38GA, ch 285, §11, editorially divided

6092 Objections waived. All objections to errors, irregularities, or inequalities in the making of said special assessments, or in any of the prior proceedings or notices not made before the council at the time and in the manner herein provided, shall be waived. [C24, 27, 31, 35,§6092.]

Similar provisions, §§5963, 5992, 6029

6093 Notice to railway companies. If the improvement contracted for is to cross the right-of-way of a railroad or street railway company, the city clerk shall cause to be served upon such company, in the manner for the service of original notices, a notice in writing stating the nature of the improvement, the place where it will cross the right-of-way of such company, and full requirements for its complete construction across such right-of-way as shown by the plans, specifications, maps, and plats of the engineer, and directing such company to construct, within a time fixed by the city council, not exceeding six months from the date of the service of the notice, in such manner as not to interfere with the construction of the diverted channel, and in such manner as not to obstruct, impede, or interfere with the free flow of water, the necessary bridge, or bridges, where the diverted channel crosses the right-of-way. [C24, 27, 31, 35, §6093.]

38GA, ch 285, §12, editorially divided

6094 Duty to construct. Upon receiving such notice it shall be the duty of such railroad or street railway company, to provide the necessary temporary structure to carry its tracks during the constructing of the channel, and to construct the necessary permanent bridge, or bridges, within the time specified in said notice. [C24, 27, 31, 35,§6094.]

6095 Construction by city. If such company shall fail, neglect, or refuse to comply with the notice within the time fixed, the temporary structure may be provided, and the bridge, or bridges, may be built, under the supervision of the engineer in charge of the channel improvement, and such railroad or street railway company, shall be liable for the cost of the construction of such structures, in addition to its liability for assessment for special benefits as other property is assessed, and the cost of such structures may be collected by the city from the company in any court having jurisdiction. [C24, 27, 31, 35,§6095.]

6096 Condemnation. Such cities may purchase or condemn, and appropriate, such private property, including railroad right-of-way and property, as may be necessary to carry into effect the provisions of this chapter, and the costs of such property shall be included in the cost of the improvement. [S13,§849-g; C24, 27, 31, 35,§6096.]

Condemnation, chs 316, 366

6097 Streets extended. A street or alley intersecting the stream or old channel may be projected across it so as to make a continuous street or alley, and the expense of filling all such streets or alleys shall be included in and paid as a part of the costs of such improvements. [S13, §849-f; C24, 27, 31, 35,§6097.]

6098 Filling abandoned channel. There may be included as a part of the improvement the work of filling the old channel at other places than at the intersection of the same by a street or alley and, if included, the city engineer shall be required to furnish plans and specifications, estimates, plats, and schedules, and the ownership and value of each lot or parcel of land in the old channel; and, when the improvement is completed, the council shall assess the cost of such filling against the lots and land or parts of lots or land in the channel wholly or partly filled. [C24, 27, 31, 35,§6098.]

40GA, ch 128, §2, editorially divided

6099 Assessments exceeding one-fourth value. The limitation in section 6021, relative to twenty-five percent of the value, shall not be applicable in the assessment of the cost of said work of filling, provided, however, that such cost shall not exceed the benefits conferred on the tract so filled. [C24, 27, 31, 35,§6099.]

6100 Levy for deficiency. After the contract or contracts for making such improvement have been entered into, the council shall ascertain the cost of the work, including the cost of property purchased or condemned and appropriated, and the cost of filling the old channel as ordered by the council, and the cost of surveys, plans and specifications, estimates, notices, inspection, and supervision, and the preparing of plats and schedules of assessments, and shall thereupon by resolution levy the whole of the said cost remaining, after deducting the amount of the special assessments for benefits conferred upon the lands and other property within the improvement district, at one time as a special tax. Such tax shall be levied upon all the taxable property of the city except moneys and credits, and the levy shall not exceed in the aggregate one and one-fourth mills per year for all improvements made. [S13,§849-e; C24, 27, 31, 35,§6100.]

Referred to in §6574

6101 Certification to county auditor. A certificate of such levies and of the special assessments for benefits conferred upon lands and property within the improvement district shall then be filed by the clerk with the auditor of the county or counties in which the city is located, and thereupon such taxes and assessments shall be placed upon the tax lists. [S13,§849-e; C24, 27, 31, 35,§6101.]

6102 Assessments and levies pledged. The entire cost of constructing any improvement authorized by this chapter, and any bonds or certificates issued in anticipation thereof, shall be paid out of the special taxes and special assessments authorized by this chapter; and no part of said cost, and no part of any such bonds or certificates, shall ever be a charge upon or paid out of any other fund or the proceeds of any other assessment, tax, or levy. [S13,§849-i; C24, 27, 31, 35,§6102.]

6103 Bonds — indebtedness. Cities having twenty-five thousand population or more may contract indebtedness and issue bonds for the purpose of paying for improvements contemplated by this chapter. Such bonds shall be payable in not to exceed twenty-five equal annual installments, shall bear interest not to exceed five percent per annum, payable semiannually, and shall be made payable at such place and be of such form as the council may by resolution designate. For the purpose of this chapter a city may become so indebted in an amount which with all other municipal indebtedness for general purposes may equal, but not exceed, five percent of the actual value of the taxable property of said city as shown by the last preceding assessment roll. [S13,§849-j; C24, 27, 31, 35,§6103.]

Referred to in §6574
Payment and maturity, ch 63.1

CHAPTER 311

BONDS AND CERTIFICATES FOR STREET IMPROVEMENTS AND SEWERS

Referred to in §§5942.5, 6066.13, 6114, 6220, 6610.58, 6903
Certain provisions applicable to special charter cities, §6931

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6104 Certificates authorized. The council may provide by resolution for the issuance of street improvement and sewer certificates payable to the bearer or to the contractors who have constructed any street improvement or sewer or completed part thereof, in payment or part payment therefor and may negotiate the same. [C97,§841; C24, 27, 31, 35,§6104.]

40ExGA, SF 171, §1, editorially divided

6105 Requirements. Each of said certificates shall state the amount of one or more assessments or the part thereof made against the property designated therein, including railways and street railways, and the owners thereof liable to assessment for the cost of the same. Said certificates shall bear interest at a rate not exceeding six percent per annum, payable annually or semiannually, as fixed by the council. [C97,§841; C24, 27, 31, 35,§6105.]

6106 Payment. Said certificates may be paid by the taxpayer to the county treasurer, who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. [C97,§841; C24, 27, 31, 35,§6106.]

6107 Rights of bearer. Such certificate shall transfer to the bearer all of the rights and interest of the city or town in every such assessment or part thereof, described therein, and shall authorize the bearer to collect and receive every assessment embraced in the certificate by or through any of the methods provided by law for their collection as the same may mature. [C97,§841; C24, 27, 31, 35,§6107.]

40ExGA, SF 171, §2, editorially divided

6108 Limitation on sale. No certificate shall be issued or negotiated by the city or town for less than its par value with accrued interest up to the date of the delivery thereof. [C97,§841; C24, 27, 31, 35,§6108.]

6109 Bonds authorized. For the purpose of providing for the payment of the assessed cost of any street improvement or sewer which is to be or has been assessed upon property subject to assessment therefor, including railways and street railways liable for the payment thereof,

the council may by resolution provide for the execution and delivery of bonds for the amount of the assessed cost or any part thereof in anticipation of the deferred payment of assessments levied therefor. [C97,§842; C24, 27, 31, 35,§6109.]

Referred to in §5992
40ExGA, SF 171, §3, editorially divided

6110 Designation — amount. Such bonds shall be called street improvement bonds or sewer bonds and be issued in amounts of one hundred dollars or multiples thereof, not exceeding one thousand dollars, except that one bond, which shall not exceed one thousand dollars, may be issued for the amount necessary to make up the exact amount of such cost. [C97, §842; C24, 27, 31, 35,§6110.]

6111 Bonds kept separate. Street improvement bonds shall not include any sewer assessments, nor sewer bonds any street improvement assessments. [C97,§842; C24, 27, 31, 35,§6111.]

6112 Bonds—series. Street improvement and sewer bonds, respectively, issued for any one levy shall all bear the same date and be divided into as many series as there are installment payments of said special assessment, and each series shall be as nearly equal in amount as practicable. [C97,§843; C24, 27, 31, 35,§6112.]

40ExGA, SF 171, §4, editorially divided

6113 Maturity — name of street — interest. Each series of bonds shall mature on the first day of either April, May, or June, as may be determined by the council, in the years in which the installments of said special taxes come due, shall bear the name of the street, avenue, highway, alley, or district in which said street improvement or sewer is located, and shall bear interest at a rate not exceeding five percent per annum, payable annually or semiannually, and coupons for said interest shall be attached thereto. [C97,§843; C24, 27, 31, 35,§6113.]

6114 Form. Said bonds shall be signed by the mayor, countersigned by the clerk, and sealed with the corporate seal, and coupons shall be attested by the signature of the clerk, and shall be substantially in the following form, but subject to changes that will conform them to the resolution of the council, to wit:

The city (or town) of....., in the state of Iowa, promises to pay as hereinafter stated, to the bearer hereof, on the ..... day of ....., the sum of ..... dollars, with interest thereon at the rate of .....percent per annum, payable..... annually, on the presentation and surrender of the interest coupons hereto attached. Both principal and interest of this bond are payable at the ..... bank in the city (or town) of....., state of..... This bond is issued by the city (or town) of ..... under and by virtue of chapter 311 of the code of Iowa and the resolution of said city, (or town) duly passed on the..... day of ....., 1.....

This bond is one of a series of bonds of like tenor, date, and amount, numbered from..... to..... and issued for the purpose of defraying the cost of improving, curbing, and paving a portion of ..... street or alley (or constructing a sewer on.....street or alley), as described in said resolution, in said city (or town) which cost is payable by the abutting and adjacent property along said improvements, and is made by law a lien on all said property. It is payable in..... equal annual installments, with interest on all deferred payments at the rate of five percent per annum, but only out of the..... .....fund created by the collection of said special tax, and said fund can be used for no other purpose.

It is hereby certified and recited that all the acts, conditions, and things required to be done, precedent to and in issuing this series of bonds, have been done, happened, and performed, in regular and due form, as required by law and said resolution, and for the assessment, collection, and payment hereon of said special tax, the full faith and diligence of said city (or town) of.....are hereby irrevocably pledged.

In testimony whereof, the city (or town) of ....., by its council, has caused this bond to be signed by its mayor and countersigned by its city (or town) clerk, and the seal of said city (or town) to be thereto affixed, this.....day of ....., 1.....

....
City (or Town) Clerk. Mayor.

No.....

On the.....day of....., the city (or town) of....., Iowa, promises to pay to bearer, as provided in said bond, the sum of .....dollars, at the.....bank, in the city (or town) of....., being .....months interest due that day on its improvement bond No....., dated ....., 1.....

Attested.

.....
City (or Town) Clerk.

[C97,§843; C24, 27, 31, 35,§6114.]

6115 Registration and delivery. When such bonds have been issued they shall be delivered to the clerk, who shall register them in a book or books to be kept for that purpose, countersign them, and then deliver the same to the city treasurer or some bank selected by the council. [C97,§844; C24, 27, 31, 35,§6115.]

C97,§844, editorially divided

6116 Security and reports. The council may require of the treasurer or bank such security or such additional security as it may think necessary to secure the payment in full of the proceeds thereof. The city treasurer shall report to the clerk the number of bonds delivered by him, and the amount received therefor, or for which credit has been given by the contractor. [C97,§844; C24, 27, 31, 35,§6116.]

6117 Sale. The bonds shall be sold at public sale in the manner provided for by chapter 63 or by any other law in force relative to the sale of such bonds, but shall not be sold or negotiated for less than their par value with accrued interest from date to the time of delivery thereof. [C97, §845; C24, 27, 31, 35,§6117.]

C97,§845, editorially divided

6118 Proceeds pledged. All the proceeds of bonds and of certificates negotiated shall be paid to the city treasurer, and shall be used only to pay for the cost of street improvements or sewers included in the assessment or assessments pledged to the payment thereof. [C97, §845; C24, 27, 31, 35,§6118.]

6119 Accounts required. All money received by said treasurer as proceeds of said bonds or certificates shall be kept in the same manner and subject to all the regulations regarding other money of the city, except that he shall keep an account of each levy of such special assessments, and all interest received and paid shall be credited and charged to such fund. [C97,§845; C24, 27, 31, 35,§6119.]

6120 Payment regulated. No money received by the city treasurer from the sale of street improvement and sewer bonds or certificates shall be paid out, nor shall any certificate be issued to the contractor or sold, except upon the resolution of the council ordering the same; and no such resolution for the delivery of any bonds or certificates, or the payment of any of the proceeds of said bonds or certificates, shall be made until the certificate of the city engineer or other competent person selected has been filed, stating that the work contracted for or a completed part thereof, as the case may be, has been completed according to the terms and stipulations of the contract. [C97,§846; C24, 27, 31, 35,§6120.]

6121 Payment from special fund. Such street improvement and sewer certificates, bonds, and coupons shall be payable out of funds derived from the special taxes and interest thereon pledged to the payment of the same. [C97,§847; C24, 27, 31, 35,§6121.]

C97,§847, editorially divided

6122 Limitation on issue. Such certificates or bonds shall not be delivered in excess of the special taxes levied. [C97,§847; C24, 27, 31, 35, §6122.]

6123 Liability of city. Such certificates, bonds, and coupons shall not make the city liable in any way, except for the proper application of said special taxes. [C97,§847; C24, 27, 31, 35, §6123.]

6124 Interest—temporary loan. If any interest shall become due on any of said bonds when there is no fund from which to pay the same, the council may make a temporary loan for the payment thereof, which loan shall be repaid from the special taxes and interest pledged to secure said bonds, but in case of purchase by the city at tax sale of the property on which such tax is levied, it shall then be repaid from the city improvement fund. [C97, §847; C24, 27, 31, 35,§6124.]

6125 Sewer bonds authorized—form. Cities and towns, including cities operating under the commission form of government, are hereby authorized to contract indebtedness and to issue bonds for the purpose of building and constructing sewers, sewer outlets and/or purifying plants. Said bonds shall be payable in not more than twenty annual installments and at interest not exceeding five percent per annum, and shall be made payable at such place and be of such form as the council shall by ordinance designate; but no city or town shall become indebted in excess of five percent of the actual value of the taxable property of said city or town as shown by the last preceding assessment roll. The indebtedness so incurred for building or constructing sewers, sewer outlets and/or purifying plants shall not be considered an indebtedness incurred for general or ordinary purposes. [C24, 27, 31, 35,§6125.]

Referred to in §6126

6126 Interpretation. Section 6125 shall be construed as granting additional power, without limiting the power already existing, in cities and towns, including cities operating under the commission form of government. [C24, 27, 31, 35, §6126.]

REFUNDING BONDS

6126.1 Issuance—interest. Cities and towns may issue refunding bonds to pay off and take up bonds issued in payment for street improvements and sewers, or to refund any part thereof. No such refunding bonds shall bear an interest rate in excess of that of the bonds refunded. [C27, 31, 35,§6126-a1.]

6126.2 Form and amount. Bonds thus issued shall substantially conform to the provisions of this chapter, and the face amount thereof shall be limited to the amount of the unpaid special assessments with the interest thereof of the particular issue of bonds sought to be refunded. [C27, 31, 35,§6126-a2.]

6126.3 Limitation on proceeds. Said refunding bonds or their proceeds shall be used only to pay street improvement or sewer bonds so taken up. [C27, 31, 35,§6126-a3.]

6126.4 Expense. The expense of such refunding bonds shall be paid out of the city improvement funds. [C27, 31, 35,§6126-a4.]

6126.5 Retirement. When refunding bonds shall be issued to pay street improvement or sewer bonds, all special assessments and sinking funds applicable to the payment of such bonds previously issued shall be applicable in the same manner and to the same extent to the payment of the refunding bonds issued hereunder, and all the powers and duties to levy and carry special assessments and taxes, to create liens upon property, and to establish sinking funds in re-

spect to the bonds previously issued shall continue until refunding bonds shall be paid. [C27, 31, 35,§6126-a5.]

6126.6 Liability of city or town. The city or town shall collect the special assessments out of which the said bonds are payable and hold the same special and apart in trust for the payment of said refunding bonds, but it shall be in no way liable except for the proper application of said assessment. [C27, 31, 35,§6126-a6.]

CHAPTER 312

HEATING PLANTS, WATER OR GAS WORKS, AND ELECTRIC PLANTS

Referred to in §§6153, 6162, 6669, 6943.007
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6127 Cities and towns may purchase. Cities and towns shall have the power to purchase, establish, erect, maintain, and operate within or without their corporate limits, heating plants, waterworks, gasworks, or electric light or power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants, and lease or sell the same. [C73,§§471-473; C97,§720; S13, §720; C24, 27, 31, 35,§6127.]

Referred to in §6132
Similar power, §6789
40ExGA, HF 172, §1, editorially divided

6128 Franchise may be granted. They may grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend, or extend the terms of the grant; but no exclusive franchise shall be granted, amended, extended, or renewed. [C73,§473; C97,§720; S13,§720; C24, 27, 31, 35, §6128.]

Referred to in §6132

6129 Utilization of waste. Cities with a population of less than ten thousand may utilize the steam and excess power of such works or plants in the manufacture of artificial ice, and may install machinery and equipment therefor. [C24, 27, 31, 35,§6129.]

Referred to in §6132
Applicable to special charter cities, §6788

6130 Purchase of utility products. They may enter into contracts with persons, corporations, or municipalities for the purchase of heat, gas, water, or electric current for either light or power purposes, for the purpose of selling the same either to residents of the municipality or to others, including corporations, and shall have power to erect and maintain the necessary transmission lines therefor, either within or without their corporate limits, to the same extent, in the same manner, and under the same regulations, and with the same power to establish rates and collect rents, as is provided by law for cities having municipally owned plants. [C73,§471; C97,§720; S13,§720; C24, 27, 31, 35, §6130.]

Referred to in §§6131, 6132

6131 Election required. No such works or plants shall be authorized, established, erected, purchased, leased, or sold, or franchise granted, extended, renewed, or amended, or contract of purchase provided for in section 6130 shall be entered into unless a majority of the legal electors voting thereon vote in favor of the same.

[C73,§471; C97,§720; S13,§720; C24, 27, 31, 35, §6131.]

Referred to in §§6132, 6134.07

6132 Question submitted. The council may order any of the questions provided for in sections 6127 to 6131, inclusive, submitted to a vote at a general or municipal election or at one specially called for that purpose, or the mayor shall submit said question to such a vote upon the petition of twenty-five property owners of each voting precinct in a city, or of fifty property owners of any incorporated town. [C97, §721; S13,§721; C24, 27, 31, 35,§6132.]

40ExGA, HF 172, §4, editorially divided

6133 Notice—time of election—costs. Notice of the election shall be given by publication once each week for four consecutive weeks in some newspaper published in the county and of general circulation in the city or town. The election shall be held on a day not less than five nor more than twenty days after the last publication of notice. The person asking for the granting, renewal, or extension of a franchise shall pay the costs incurred in holding the election. [C97,§721; S13,§721; C24, 27, 31, 35,§6133.]

Referred to in §5873.2

6134 General powers granted. They shall have power:

1. *Condemnation.* To condemn and appropriate so much private property as may be necessary for the construction and operation of said works or plants, and for the purpose of constructing and maintaining dams across the nonnavigable waters and watercourses of the state in forming reservoirs and sources of water to supply such waterworks and plants, as provided for the condemnation of land for city purposes.

2. *Bonds.* To issue bonds for the payment of the cost of establishing the same, including the cost of land condemned on which to locate them.

3. *Delegated power.* To confer by ordinance the power to appropriate and condemn private property for such purpose upon any individual or corporation authorized to construct and operate such works or plants. [C73,§474; C97,§722; S13,§722; C24, 27, 31, 35,§6134.]

Applicable to special charter cities, §6788
Condemnation procedure, chs 316, 366

PAYMENT FROM EARNINGS

Applicable to special charter cities, §6788

6134.01 Contract authorized. They shall have power to pay for any such plant, improvement or extension thereof out of the past earnings of the plant and/or out of the future earnings and/or may contract for the payment of all or part of the cost of such plant, improvement or extension out of the future earnings from such plant, and may secure such contract by the pledge of the property purchased and the net earnings of the plant. [C31, 35,§6134-d1.]

Referred to in §§6134.07, 6134.08
44GA, ch 158, §1, editorially divided

6134.02 Bonds. For the purpose of defraying the cost of any such plant, improvement or extension thereof, any such city or town is hereby authorized to issue negotiable, interest-bearing revenue bonds payable from and secured by the net earnings of the plant, and may also be secured by the pledge of the property purchased, which bonds shall not constitute a general obligation of such city or town or be enforceable in any manner by taxation. Such revenue bonds may be delivered to the contractor or contractors in payment for such improvement or they may be sold by the municipality and the proceeds used to pay for such improvement; and/or such bonds may be used as collateral security for money borrowed to pay the cost of such improvement, such loan to be repaid only out of the net earnings of the plant. [C35, §6134-f1.]

Referred to in §6134.07

6134.03 Refunding bonds. Cities and towns* shall have power to refund bonds or obligations issued for the cost of any heating plants, waterworks, gasworks, or electric light or power plants, or for any improvement or extension of any such plants, when such bonds or obligations are payable from and secured by the net earnings of any such plant and which bonds or obligations do not constitute a general obligation of such city or town, and shall have the power so to refund any such bonds or obligations when the same become due and payable, or prior thereto in any case where such bonds or obligations reserve the right to prepay the same prior to the date fixed therein.

All such refunding bonds or obligations issued as authorized in this section, shall conform to the provisions of this chapter, shall be payable only from the net earnings of the plant, and shall not constitute a general obligation of any such city or town or be enforceable in any manner by taxation.

Such refunding bonds or obligations may be exchanged for outstanding bonds or obligations issued to pay for any such plant, or for any improvement or extension of any such plant; or such refunding bonds or obligations may be sold and the proceeds used only in payment of outstanding bonds or obligations issued to pay for any such plant, or for any improvement or extension of such plant. [47GA, ch 166,§1.]

Referred to in §6134.07
*Phrase "including cities under special charter" omitted; see §6788

6134.04 Form of bonds. Such revenue bonds shall be substantially in the following form, to wit:

The city (or town) of..... in the state of Iowa, for value received promises to pay to bearer, in the manner hereinafter specified, the sum of .....dollars, lawful money of the United States of America, on the.....day of....., with interest on said sum from..... until paid at the rate of.....percent per annum, payable.....annually on the..... day of..... and..... in each year, on presentation and surrender of the interest coupons hereto attached; both principal and interest payable at.....

This bond is issued by the city (or town) of ....., pursuant to the provisions of

.....of the code of Iowa and in conformity to a resolution of the (council or board of trustees of.....) of said city (or town), duly passed on the..... day of.....

This bond is one of a series of bonds of like tenor and date, numbered from.....to....., is issued for the purpose of defraying the cost of.....; and is not a general obligation, but is payable solely and only out of the future earnings of said.....; said property purchased and the net earnings of.....are pledged to the payment hereof. This bond is not payable in any manner by taxation, and under no circumstances shall the city (or town) be in any manner liable by reason of the failure of the said net earnings to be sufficient for the payment hereof.

In testimony whereof said city (or town) by its council (or board of.....trustees) has caused this bond to be signed by its mayor and attested by its clerk (or by the chairman of said board of.....trustees and attested by the clerk of said board), with the seal of said city (or town or board of..... trustees) attached, this.....day of..... Attest:.....

(Form of Coupon.)

The treasurer of the city (or town) of..... ....., Iowa, will pay to bearer out of the future earnings of....., ...dollars on ....., at..... for .....annual interest on its.....revenue bond, number....., dated..... Attest:

(Facsimile signature.)

.....

Clerk of the city (or town, or of the board of trustees).

(When such revenue bonds are offered for sale to the public, there shall be printed in bold face type across the face of the bond the following provision:

"This bond is not a general obligation bond nor payable in any manner by taxation, but is payable only from the net earnings of the..... .....plant of....., Iowa.") [C35,§6134-f2.]

Referred to in §6134.07

6134.05 Sale of bonds—interest. Such revenue bonds shall not be sold for less than par, plus accrued interest, and shall not be negotiated on a basis to yield more than six percent per annum, computed to maturity according to the standard tables of bond values. [C35, §6134-f3.]

Referred to in §6134.07

6134.06 Nature and requirements of contract. Such contract shall not constitute a general obligation or be payable in any manner by taxation. Such contract shall specify the maximum rate that may be charged the consumers, including the municipality, and the city shall not increase or fix any rate beyond such maximum. Under no circumstances shall the city be in any manner liable by reason of the failure of the net earnings being sufficient for the payments provided in the contract. Such contract shall also specify the rate of interest to be charged. [C31, 35,§6134-d2.]

Referred to in §6134.07

6134.07 Interpretative clause—election requirement. Nothing contained in sections 6134.01 to 6134.06, inclusive, shall be construed as authorizing an establishment of a plant without an election as required by section 6131. And such proposition when submitted to an election shall state the maximum amount which may be expended for the establishment, construction, or acquisition of such plant. [C31, 35,§6134-d3.]

6134.08 Notice of proposed contract—publication. Before any municipality shall enter into any such contract as provided in section 6134.01, for the establishment of a plant, or for the extension or improvement of an existing plant, to cost five thousand dollars or more, the governing body proposing to make such contract shall give thirty days notice of its intention to adopt proposed plans and specifications and proposed form of contract therefor, by publication once each week for two consecutive weeks in some newspaper of general circulation in the municipality and also in some newspaper of general circulation in the state of Iowa, the first publication of which shall be at least thirty days prior to the time of hearing fixed in said notice. [C31, 35,§6134-d4.]

6134.09 Contents of notice. Such notice shall state as nearly as practicable the extent of the work; the kind of materials for which bids will be received; when the work shall be done; the time when the proposals will be acted upon; and shall also provide for competitive bids for the furnishing of electrical energy, gas, water or heat. [C31, 35,§6134-d5.]

6134.10 Execution of contract. Pursuant to said notice and at such time and place as is fixed therein the governing body shall consider the said plans and specifications, form of contract, and offers and propositions submitted in connection therewith, also any bids for the furnishing of electrical energy, gas, water, or heat, together with any objections thereto by an interested party, and at such hearing or any adjournment thereof, shall have the power to adopt such offer or offers, propositions, or bids, and enter into such contract or contracts, as they shall deem to be to the best interest of the municipality. [C31, 35,§6134-d6.]

6134.11 Record of proceedings. The clerk or recorder of said municipality shall keep a written record of the proceedings which shall contain a record of the bids or propositions offered, the names of the persons submitting the same, and names of any person or persons appearing as objectors thereto, with a brief statement of such objections, and a record of all actions of the governing body with relation to such proceedings. [C31, 35,§6134-d7.]

Pending litigation, see 44GA, ch 158

CONDEMNATION OF EXISTING PLANTS

Applicable to special charter cities, §6788

6135 Special condemnation proceedings — limitation. When any city or town shall have voted at an election to purchase, establish, erect, maintain, and operate heating plants, waterworks, gasworks, or electric light or power plants, or when it has voted to contract an indebtedness and issue bonds therefor, and in such city or town there shall then exist any such utility, or incomplete parts thereof or more than one, not publicly owned, and the contract or franchise of the owner of which utility has expired or been surrendered, and such owner and the city or town cannot agree upon terms of purchase, it may, by resolution, proceed to acquire by condemnation any one or more of such utilities or incomplete parts thereof. When so acquired it may apply the proceeds of the bonds in payment therefor and in making extensions and improvements to such works or plants so acquired, but not more than one utility may be so acquired when such municipality is indebted in excess of the statutory limitation of indebtedness for such purposes for any such acquired property. [C73,§474; C97,§722; S13,§722; C24, 27, 31, 35,§6135.]

Referred to in §6136

6136 Court of condemnation. Upon the passage of the resolution as provided in section 6135 and the presentation of a certified copy thereof to the supreme court while in session, or to the chief justice of the supreme court, the said court or chief justice shall within five days thereafter appoint as a court of condemnation three district court judges from three judicial districts, of whom one shall be from the district wherein the city or town is located, if not a resident of the city or town, and shall enter an order requiring said judges to attend as such court of condemnation at the county seat of the county in which said city or town is located within ten days thereafter, and the said district court judges shall so attend and shall constitute a court of condemnation. [SS15,§722-a; C24, 27, 31, 35,§6136.]

6137 Procedure. Said court when it meets to organize or at any time during the proceedings, which may be adjourned from time to time for any purpose, may fix the time for the appearance of any person or persons that any party desires to have joined in the proceedings, and whom the court deems necessary. The time for appearance shall be sufficiently remote to serve notice upon such parties, but if the time for appearance occur after the proceedings are begun, such proceedings may be reviewed by the court to give all parties a full opportunity to be heard. [SS15,§722-a; C24, 27, 31, 35,§6137.]

6138 Notice—service. Persons not voluntarily appearing, but having any right, title, or interest in or to the property which is the subject of condemnation, or any part thereof, including all leaseholders, mortgagees, and trustees of bondholders, who are to be made parties to the proceedings shall be served with notice thereof and of the time and place of meeting of said court in the same manner and for the same length of time as for the service of original notice, either by personal service, or by service by publication, the time so set being the time at which the parties so served are required to appear, and actual personal service of the notice within or without the state shall supersede the necessity for publication. [SS15,§722-a; C24, 27, 31, 35,§6138.]

Time and manner of service, §§11059, 11060, 11081

6139 Powers of court—duty of clerk—vacancy. The court of condemnation shall have power to summon and swear witnesses, take evidence, order the taking of depositions, require the production of any books or papers, and may appoint a shorthand reporter. It shall perform all the duties of commissioners in the condemnation of property. Such duties and the method of procedure and condemnation, including provisions for appeal, shall, except as herein otherwise specifically provided, be, as nearly as may be, as provided for the taking of private property for works of internal improvement. The clerk of the district court of the county where the city or town is located shall perform all of the duties required of the sheriff in such condemnation; and in case of a vacancy in the court, such vacancy shall be filled in the manner in which the original appointment was made. When necessary by reason of such vacancy, the court may review any evidence in its record. [SS15,§722-a; C24, 27, 31, 35,§6139.]

Procedure in general, ch 366

6140 Costs—expenses. The costs of said proceedings shall be the same and paid in the same manner as in proceedings in the district court, and the said district court judges of said court of condemnation shall receive, while engaged in such service, their actual expenses, which expenses shall be taxed as costs in the case. [S13,§722-b; C24, 27, 31, 35,§6140.]

Costs generally, ch 497

JURISDICTION, SALE OF PRODUCTS, AND RATES

Applicable to special charter cities, §6788

6141 Jurisdiction of city. For the purpose of maintaining and protecting such works or plants from injury, and protecting the water of such waterworks from pollution, the jurisdiction of such city or town shall extend over the territory occupied by such works, and all reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants used in or necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken. [C73,§472; C97,§723; C24, 27, 31, 35,§6141.]

6142 Sale of products — rates — taxes — equipment. They may sell the products of municipal heating plants, waterworks, gasworks, or electric light or power plants to any municipality, individual, or corporation outside the city or town limits, as well as to individuals or corpora-

tions within its limits, and may with the consent of the board having jurisdiction thereof erect in the public highway the necessary poles upon which to construct transmission lines; and shall, from time to time in such manner as they deem equitable, assess upon each tenement or other place supplied with heat, water, gas, light, or power, reasonable rents or rates fixed by ordinance, and shall levy a tax as provided by law to pay or aid in paying the expenses of running, operating, renewing, and extending such works, and the interest on any bonds issued to pay all or any part of their construction. [C73,§475; C97,§724; S13,§724; C24, 27, 31, 35,§6142.]

Referred to in §6190

6143 Regulation of rates and service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light, or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light, or power for other necessary public purposes and to regulate and fix the rent or rate for water, gas, heat, light, or power; to regulate and fix the rents or rates of water, gas, heat, and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution, or contract. [C73,§§473, 475; C97,§725; S13,§725; C24, 27, 31, 35,§6143.]

Referred to in §6190

MANAGEMENT BY TRUSTEES

6144 Management by board of trustees. The council of any city or town, including cities of the first class under the commission form of government having a population of less than fifty thousand which owns or may hereafter acquire waterworks, heating plant, gasworks, or electric light or electric power plant, may, and upon petition of ten percent of the qualified electors of such city or town shall, at any general election, or at a special election called for that purpose, submit the question as to whether the management and control of such waterworks, heating plant, gasworks, or electric light or electric power plant shall be placed in the hands of a board of trustees. [C24, 27, 31, 35,§6144.]

6145 Notice of election. Notice of such election shall be given by publication in one newspaper published in said city or town once each week for not less than three consecutive weeks, and the election shall be held not less than seven nor more than ten days after the completion of such publication. If no newspaper is published in such city or town, notice may be given by posting notices for three weeks in five public places in such city or town. [C24, 27, 31, 35, §6145.]

38GA, ch 85, §2, editorially divided

6146 Form of submission. The question to be submitted shall be in the following form:

"Shall the city (or town) of..... place the management and control of its waterworks (or heating plant, or gasworks, or electric light or electric power plant) in the hands of a board of trustees?" [C24, 27, 31, 35, §6146.]

6147 Trustees — terms — compensation — vacancies. If a majority of the votes cast at such election are in favor of placing the management and control of any or all of the said utilities in the hands of trustees, the mayor shall, within ten days after such election, appoint a board of three trustees, which appointment shall be approved and confirmed by the council. The first appointees shall hold office, one for two years, one for four years, and one for six years, and their successors shall be appointed for a term of six years. All vacancies occurring on said board shall be filled in the manner original appointments are made. The compensation of each trustee shall be not more than one hundred dollars per year, and each trustee shall execute and furnish to the city an official bond in the sum of twenty-five hundred dollars to be approved by the mayor and filed with the city clerk. [C24, 27, 31, 35,§6147.]

6148 Compensation in certain cities. In cities operating under the commission plan and having a population of less than fifty thousand the compensation of said trustees shall be not to exceed three hundred dollars per year to each member of said board. [C24, 27, 31, 35,§6148.]

6149 Powers of trustees. The board of trustees shall have all the power and authority in the management and control of the utilities mentioned in the question submitted to the voters at such election as is conferred upon waterworks trustees appointed as provided in chapter 313. [C24, 27, 31, 35,§6149.]

6149.1 Bonds. In cities having a population in excess of twenty-five thousand and less than seventy-five thousand and which have no outstanding general city bonds issued for the purpose of purchasing or constructing heating plants, water or gas works and electric plants or which have a sinking fund sufficient to retire such general bonds as may be outstanding, and having a board of trustees as provided by this chapter, such board of trustees may, upon resolution, issue bonds at a rate of interest not to exceed five percent per annum for the purpose of extending or improving such heating plant, water or gas works or electric plant. Bonds issued under this section shall be first mortgage bonds against the said utility, and not general bonds of the city. No bonds shall be issued in this manner in excess of twenty-five percent of the book value of the plant as shown by the books of the city. The interest and the principal of such bonds must be paid from the net earnings of the utility against which they are issued. Bonds issued under this provision shall not be for a longer period than twenty years

and shall be retired serially in equal amounts beginning not later than the third year after issuance. [C31, 35,§6149-d1.]

SUPPLYING MILITARY RESERVATIONS

6150 Water for military reservations. All individuals or private corporations to which any city in this state has granted authority to erect and maintain waterworks with all the necessary reservoirs, mains, filters, pipes, and other appurtenances in such city shall, whenever the United States has, or may hereafter establish a military reservation within a distance of five miles from either of the boundaries of such city, be authorized to use said waterworks plant in said city and the mains now or hereafter laid in the highways of said city for the purpose of furnishing water to such military reservation, such authority to continue so long as under franchises now held or hereafter granted such individuals or corporations shall be authorized to maintain and operate such waterworks plant in such city. [S13,§742-d; C24, 27, 31, 35,§6150.]

6151 Mains in highways. The board of supervisors of any county in which such military reservation is or may hereafter be located shall have the power to authorize any such individual or corporation to lay its mains in any of the highways of the county for the purpose of extending the same to any such military reservation. [S13,§742-e; C24, 27, 31, 35,§6151.]

SURPLUS EARNINGS

6151.1 Transfer of surplus earnings. Where waterworks, gasworks, heating plants, or electric plants have been purchased or erected by any city or town, including cities under special charter, and the original purchase bonds or bonds issued for the improvement thereof are paid, or where an adequate sinking fund has been provided for the payment of such bonds, such city or town may, upon the approval of the state comptroller, appropriate and transfer any surplus earnings in excess of the amount required for the retirement of all bonds and interest due in the current year and the succeeding year, from any municipal heating plant, waterworks, gasworks, or electric plant, for the purpose of retiring existing bonded indebtedness of said city or town which is payable by general taxation or for the purpose of making any municipal improvement authorized by law and ordered by the city council. [C27, 31, 35, §6151-b1.]

Referred to in §§6151.3, 6151.4

6151.2 General transfer. Any city or town, including cities under special charter, having a surplus earned from the operation of a municipal heating plant, waterworks, gasworks, or electric plant, and which has no bonded indebtedness against any such plant or which has sufficient funds on hand to provide for the current year's interest and principal and the succeeding year's interest and principal may on approval of the state comptroller transfer the surplus earnings of such utilities to any other fund of the municipality. [C27, 31, 35,§6151-b2.]

Referred to in §§6151.3, 6151.4

6151.3 Exceptions. In all cities having a population of five thousand or less and in all towns, the transfer of funds as provided in sections 6151.1 and 6151.2 may be made without the approval of the state comptroller, on condition the amount transferred in any one fiscal year does not exceed fifty percent of the surplus in that fund at the beginning of that fiscal year, if the transfer is made upon the three-fourths vote of all the members of the council of such city or town. [C31, 35,§6151-c1.]

Referred to in §6151.4

6151.4 Applicability of statute. Sections 6151.1 to 6151.3, inclusive, shall not apply to boards of waterworks trustees, or other boards of trustees, unless said board of trustees shall by resolution concur in said appropriation or transfer. [C27, 31, 35,§6151-b3.]

6151.5 Acquiring property and building thereon. Any city having a population of over forty thousand and less than fifty thousand and having a board of waterworks trustees, and having a surplus earned from the operation of a municipal waterworks plant, may, by action of and under the supervision of such board of waterworks trustees, purchase, acquire, or accept possession of the necessary property, and may erect thereon such building or buildings as may be necessary for the proper maintenance of the business of said waterworks department, and it may erect from such surplus such additional building space for use of such other city departments as it may deem advisable, and until such time as the board may desire or need such additional space for its own uses it may rent such space to other city departments for their uses. [C31, 35,§6151-d1.]

CHAPTER 313

PURCHASE AND CONSTRUCTION OF WATERWORKS IN CERTAIN CITIES

Referred to in §§6149, 6669, 6943.007. Chapter applicable to special charter cities, §6787

6152 Tax—sinking fund.
6153 Use of fund.
6153.1 Investment of funds.
6153.2 Sale of securities.
6154 Authority granted.
6155 Contracts—bonds—purchase of waterworks.
6156 Election—powers of council.
6157 Trustees—appointment—bond—removal.
6158 Powers—waterworks fund—how disbursed.
6159 Fixing rates.
6159.1 Annual report.
6160 Additional powers.

6152 Tax—sinking fund. Cities of the first class, and cities of the second class having a population of over ten thousand, shall have power to levy, in addition to the regular water tax authorized by law, a tax of one-half mill upon the dollar upon all the property within the corporate limits of said cities, excepting lots greater than ten acres in area used for horticultural or agricultural purposes, for the purpose of creating a sinking fund to be used as provided in this chapter for the purchase or erection of waterworks in such cities, or for the payment of any indebtedness incurred by such cities for waterworks now owned by the same. The proceeds of such one-half mill levy, together with such other surplus funds as may be set aside as a sinking fund by the board of waterworks trustees, shall be deposited in one or more solvent banks or trust companies of the city making such levy, at a rate of interest not less than three percent per annum, compounded semiannually, and payable, principal and interest, on demand, after sixty days notice in writing. The city treasurer depositing the proceeds of such tax shall exact from the bank or trust company wherein such money is deposited a satisfactory bond, payable to the city, to be approved by the treasurer and mayor of such city, and to be filed in the office of the city treasurer. [C97,§742; S13,§742; C24, 27, 31, 35, §6152.]

Referred to in §6153

6153 Use of fund. Any city in which a sinking fund has been accumulated as provided in section 6152, in which waterworks have not been purchased under this chapter, may apply such sinking fund and all accumulations thereof upon the payment of the cost of waterworks purchased or erected under the provisions of chapter 312. [S13,§742-a1; C24, 27, 31, 35,§6153.]

6153.1 Investment of funds. Where waterworks have been purchased or erected, and the original purchase bonds or any part thereof or bonds issued for improvement of existing waterworks are outstanding, and have not matured, the sinking fund, together with such other surplus funds as they may appropriate for that purpose, may be invested by the board of waterworks trustees in registered bonds of the United States and of the state of Iowa, county road bonds issued by any county in the state of Iowa, and United States treasury certificates, to the amount of and not exceeding the outstanding bonds. [C27, 31, 35,§6153-a1.]

41GA, ch 187, §2, editorially divided

6153.2 Sale of securities. The authority hereby vested in the board of waterworks trustees to purchase the securities herein designated shall include the authority to dispose of such securities at such times and in such amounts as the outstanding obligations of the waterworks may become due. [C27, 31, 35, §6153-a2.]

6154 Authority granted. Cities of the first class, and cities of the second class having a population of over ten thousand, are hereby authorized to purchase or erect waterworks, under the provisions of this chapter, for the purpose of supplying said cities and the inhabitants thereof with water, and are authorized to continue the levy of the one-half mill tax herein provided for until the purchase price, principal and interest, or the cost incurred in the erection of said works, or the indebtedness heretofore incurred for and on account of such works, is fully paid and discharged. [C97,§744; S13, §744; C24, 27, 31, 35,§6154.]

6155 Contracts—bonds—purchase of waterworks. Cities levying such sinking fund tax are hereby authorized to let a contract or contracts for the purchase or erection of waterworks, and, upon the approval and adoption of such contract or contracts as hereinafter provided, to apply such sinking fund upon the cost thereof, and cities so purchasing or constructing and those now owning such waterworks are authorized to pledge the proceeds of the continuing one-half mill levy provided for in this chapter, and the regular water levy, and the net revenues derived from the operation of the waterworks, and shall have the right to mortgage or bond such works, to secure the payment of the purchase price or the cost of constructing such waterworks, or the cost of making necessary extensions and improvements of such waterworks; and such cities shall have the right to execute additional mortgage or mortgages or bonds upon such works for the purposes above set forth. Provided that said additional mortgage or mortgages or bonds shall bear not more than six percent interest per annum; but no part of the general fund of such city shall be applied upon such contracts, bonds, or mortgages. In the payment thereof, the city and holders of said contracts, bonds, or mortgages shall be restricted to the proceeds of the said taxes and the net revenues of the said waterworks, as hereinbefore provided; and such contract, contracts, or bonds shall not bear a higher rate of interest than five percent per annum, payable semiannually. Cities of the

first class, and cities of the second class having a population of over ten thousand, which have adopted or may adopt an ordinance availing themselves of the privileges conferred herein, shall in addition thereto have and possess the following powers:

1. In addition to mortgage on the water plant to secure the bonds hereinbefore authorized, the said city may, in addition to the security of said mortgage and as a part thereof, grant a franchise to maintain and operate said plant on foreclosure sale under said mortgage, said franchise to become effective only on the passing of title under the said foreclosure sale and to continue for a period of not exceeding twenty-five years thereafter; providing that the granting of such franchise shall be approved by a majority of the electors of said city voting at an election thereon, which election shall be held as provided in section 6156.

2. They shall have power to issue the general bonds of the city creating an indebtedness of said city to an amount which, with its other existing indebtedness, shall not exceed five percent of the actual value of the taxable property of said city as shown by the last preceding assessment, the said bonds or proceeds of sale thereof to be used in the purchase or construction of a water plant, as herein provided; provided, however, that such bonds can be issued by order of the city council of said city only after a contract for the purchase or construction of a water plant and providing for the issuance of such bonds has been approved by the majority of the electors of said city voting at an election thereon to be held in accordance with the provisions of the following section. Neither the said bonds nor the proceeds thereof shall be diverted to another purpose than as herein provided. Said cities may purchase or contract a water plant and pay for the same partly out of the water bonds and partly out of the general bonds herein provided, or wholly out of either class of bonds or proceeds thereof, as such city may determine. The general bonds of the city herein provided shall bear interest at not exceeding five percent per annum, payable semi-annually, and shall be payable not more than twenty years after date and be in the general form of bonds provided by section 5277, with such changes as may be necessary to conform the same to this statute and the ordinances or contract of the city under which they are issued. [C97,§745; S13,§745; C24, 27, 31, 35,§6155.]

Referred to in §6251

6156 Election — powers of council. Said contract or contracts shall not be binding upon said city until the same shall have been approved by the city council at a regular meeting, or a special meeting called for such purpose, and shall have been adopted by a majority of the electors of said city voting at a city or special election, which shall have been duly called after thirty days notice by said city. The proposition to be submitted at said election, and the form of ballot, shall be: "Shall the contract or contracts approved by the city council in relation to the waterworks be adopted?" The proposition shall be printed and placed on the ballots, and the voter shall designate his choice, and the election shall be conducted, in the manner provided in the title on elections. When a majority of the electors of said city at any election shall have declared in favor of the purchase or erection of any waterworks, or shall have authorized the incurring of indebtedness or issuance of bonds for waterworks, the city council may provide by contract or otherwise without submission of same to the electors, for surveys, examinations, appraisements, estimates, plans, specifications, advertisements for bids, and all other necessary work preliminary to the making of such contract or contracts for purchase or erection of waterworks, and pay for the same and the expense of said election out of said sinking fund. [C97, §746; S13,§746; C24, 27, 31, 35,§6156.]

Referred to in §6155

6157 Trustees — appointment — bond — removal. The waterworks owned by such cities shall be managed and operated by a board of waterworks trustees, which shall be composed of three resident electors, appointed for the term of six years by the mayor of said city. Upon the approval of the contract for the purchase or erection of waterworks by cities as herein provided, the mayor thereof shall, within ten days, appoint such board, the first appointees thereto to hold office, one for two years, one for four years, and one for six years. All vacancies occurring on said board shall be filled in the same manner that original appointments are made. Each trustee shall receive a compensation of not to exceed three hundred dollars per year, and shall execute and furnish to the city an official bond in the sum of five thousand dollars to be approved by the mayor and filed with the city clerk. [C97,§747; S13,§§747-a,-b; C24, 27, 31, 35,§6157.]

Referred to in §6816

6158 Powers—waterworks fund—how disbursed. The said board of trustees shall have the power to carry into execution the contract or contracts for the purchase or erection of such waterworks, and to employ a superintendent and such other employees as may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employees as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duty, such bonds to run in the name of the city and to be filed with the city treasurer and kept in his office. All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund. The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such

treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof. [C97,§748; S13,§748; C24, 27, 31, 35,§6158.]

6159 Fixing rates. The board of trustees shall from time to time fix the water rentals or rates to be charged for the furnishing of water, and such rates, with the proceeds of the one and one-fourth mill water levy and the sinking fund levy of one-half mill, shall be sufficient for the maintenance and operation of such works and the proper and necessary extension thereof, for all repairs, and for the payment of the purchase price or cost, principal and interest, incurred in the purchase or erection of such works, as the same falls due, according to the tenor of the mortgage and bonds given to secure the payment of such purchase price or cost. The board shall make quarterly statements giving full and complete reports of the receipts and disbursements of the board. Said reports shall be filed in the office of the city clerk on the second Monday in January, July, and October, for the quarters preceding the first day of said months. The reports shall be audited by the city council. [C97,§749; C24, 27, 31, 35,§6159.]

6159.1 Annual report. Said trustees shall, immediately after the close of each municipal fiscal year, file with the city clerk, a detailed written report of all money received and disbursed by said board for said fiscal year. [C27, 31, 35,§6159-a1.]

Fiscal year, §5676.1

6160 Additional powers. The powers conferred by this chapter are in addition to the powers elsewhere granted in this code in respect to waterworks. [C97,§750; C24, 27, 31, 35,§6160.]

CHAPTER 314

PURCHASE OF WATERWORKS BY CITIES OF FIFTY THOUSAND OR OVER

Referred to in §§6190.13, 6943.007. Chapter applicable to special charter cities, §6787

6161 Authorization—election.
6161.1 Sale or lease of real estate.
6162 Purchase—condemnation.
6163 Power to bond.
6164 Power to tax.
6165 Power to incur debt.
6166 Anticipation of tax.
6167 Terms of bonds.
6168 Trust fund.
6169 Certificates authorized.
6170 Trustees must recommend.
6171 Liability of city.
6172 Sinking fund.
6173 Trustees—election—number—term.
6174 Chairman—eligibility to office.
6175 Bond.
6176 Power and duties.
6177 Rules—records—accounts—financial statement.
6177.1 Audit of accounts.
6178 Rates.
6179 Rates for city.
6180 Rates generally.
6181 Tax authorized.
6182 Payment by city.
6183 Mortgage—restriction—interest.
6184 Free or discriminatory rates.
6185 Extension of mains.
6186 Notice to install mains.
6187 Duty to install.
6188 Lease—limitation.
6189 Political activity forbidden.
6190 Construction of chapter.

6161 Authorization — election. All cities now or hereafter having a population of fifty thousand inhabitants or over, including cities acting under the commission plan of government, shall have the power to own, construct, erect, establish, acquire, purchase, maintain, and operate a waterworks within their corporate limits, and extensions thereto for not more than ten miles beyond such limits, with all of the necessary appurtenances, real estate, buildings, galleries, mains, pipes, power plants, or systems, and lease as lessor or sell the same or any part thereof; and such city shall also have power to acquire, own, and sell the negotiable bonds or other evidences of indebtedness of such waterworks; provided, however, no such waterworks shall be constructed or purchased, nor when once acquired be leased or sold, until the construction, purchase, leasing, or selling of such waterworks shall have been approved by a majority of the legal voters of such city voting thereon at a general election, city election, or at a special election called for that purpose, and in no event shall such waterworks when once acquired be leased by such city, as lessor, for a period longer than twenty-five years. [C24, 27, 31, 35,§6161.]

Referred to in §6162

6161.1 Sale or lease of real estate. The board of waterworks trustees, hereinafter provided for, may with the consent and approval of the city council of such city, lease or sell any real estate owned and held as a part of the waterworks plant when the same is no longer needed or necessary in the operation of said waterworks plant. [C27, 31, 35,§6161-a1.]

6162 Purchase—condemnation. In the exercise of any of the powers herein granted, any such city may acquire and hold any or all necessary property of the character specified in section 6161, including existing franchises or contracts, either by purchase or condemnation proceedings. If by condemnation proceedings, the value of the property shall be determined by a court of condemnation as provided in chapter 312. [C24, 27, 31, 35,§6162.]

6163 Power to bond. For the purpose of acquiring such waterworks either by purchase, condemnation, or construction, and from time to time making permanent extensions thereof, additions to and betterments of the same and of the power plants and equipment, including the acquisition of additional real estate, any such city may borrow money and may issue its negotiable bonds therefor. [C24, 27, 31, 35,§6163.]

38GA, ch 288, §3, editorially divided

6164 Power to tax. It shall have the power to levy upon all the taxable property within the corporate limits of said city for said purposes in addition to all other taxes now provided by law a special tax not exceeding in any one year one and one-fourth mills on the dollar, for a period of years not exceeding fifty. [C24, 27, 31, 35, §6164.]

Referred to in §6166

6165 Power to incur debt. Such cities may for the purpose of purchasing, erecting, maintaining, and operating waterworks incur an indebtedness not exceeding in the aggregate added to all other indebtedness five percent of the actual value of the taxable property within such city, the amount of such taxable property to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness. [C24, 27, 31, 35,§6165.]

Payment and maturity of bonds, ch 63.1

6166 Anticipation of tax. Any such city desiring to own, construct, erect, acquire, purchase, establish, and maintain such waterworks may issue bonds in anticipation of the special tax authorized in section 6164. Such bonds shall be known as public service bonds, and said bonds and interest thereon shall be secured by said assessment and levy and (unless otherwise paid out of the surplus income derived from the operation of the waterworks) shall be payable only out of the proceeds thereof pledged to the payment of the same, and shall be issued and sold in accordance with the provisions of chapter 320, except as herein otherwise provided. [C24, 27, 31, 35, §6166.]

38GA, ch 288, §4, editorially divided

6167 Terms of bonds. In issuing such bonds. the city council may cause portions of the same to become due at different definite periods, but none of such bonds so issued shall be payable more than fifty years from their date.

Said bonds shall be issued in sums of not less than one hundred dollars nor more than one thousand dollars, each running not more than fifty years, and bearing interest not exceeding five percent per annum, payable semiannually. [C24, 27, 31, 35,§6167.]

6168 Trust fund. It shall be the duty of the city treasurer to collect and receive said tax and to hold the same separate and apart in trust for the payment of said bonds and interest, and to apply the proceeds of said tax pledged for that purpose to the payment of said bonds and interest. [C24, 27, 31, 35,§6168.]

6169 Certificates authorized. Every such city may issue interest-bearing public service certificates to provide for the acquisition, extension, or improvement of any waterworks property or equipment. Such certificates may be issued as aforesaid to an amount ten percent in excess of the cost of any such extensions, improvements, waterworks property, or equipment, on account of which such certificates are issued. [C24, 27, 31, 35,§6169.]

38GA, ch 288, §5, editorially divided

6170 Trustees must recommend. No ordinance providing for the issuance of such certificates shall be effective until there be filed with the city clerk, prior to the adoption of such ordinance, the recommendation of the waterworks trustees for the issuance of such certificates. [C24, 27, 31, 35,§6170.]

6171 *Liability of city.* Such certificates shall in no case become an obligation of the city or be payable out of any general fund, but shall be payable solely out of a sinking fund representing a specific portion of the income derived from the waterworks on account of which they were issued. [C24, 27, 31, 35,§6171.]

6172 Sinking fund. Every such city shall have the additional power to provide, by ordinance, for a sinking fund to be derived from the earnings of any waterworks acquired by it pursuant to the terms of any ordinance, contract, or other regulation. [C24, 27, 31, 35,§6172.]

6173 Trustees — election — number — term. Whenever any such city becomes the owner of waterworks, the council shall, unless a board of trustees exists, forthwith elect, from nominations made by the mayor, trustees for such waterworks. The board of trustees shall consist of five resident voters, who shall hold office, one until the first Monday in April of the second year after his appointment, two until the first Monday in April of the fourth year after appointment, and two until the first Monday in April of the sixth year after appointment. Subsequent appointments shall be for a term of six years. Vacancies shall be filled as original appointments are made. If the waterworks are leased or sold, the term of office of each member of the board shall be held to have expired. [C24, 27, 31, 35,§6173.]

6174 Chairman—eligibility to office. The chairman of the board shall be selected by a majority vote of the members thereof, for such term as the board may determine. No person shall be eligible for appointment on the board while he holds or is a candidate for, or has within one year held, any other salaried civil, federal, state, county, or city office or position. [C24, 27, 31, 35,§6174.]

6175 Bond. A bond in the sum of five thousand dollars shall be required of each member of the board before entering upon the duties of his office, conditioned as provided by law, with sureties to be approved by the council. When so approved, said bond shall be filed in the office of the city clerk. [C24, 27, 31, 35,§6175.]

Conditions of bond, §1059

6176 Power and duties. The board of waterworks trustees shall have supervision over and be responsible for all details of administration and operation of said waterworks, the board to determine all questions of engineering, mechanical, and operating details, extensions of mains, except as otherwise specifically provided, and other improvements and betterments of said waterworks; and report to the council at such stated periods as the council may determine, all information necessary for its guidance in the issuance of bonds and the performance of such other duties as may be required of it under this chapter as amended, it being the intent and purpose of this section to give such board of waterworks trustees complete management and control of said waterworks, together with all land and property now or heretofore held and used in connection therewith, with the right to make all necessary contracts pertaining to the operation, maintenance, extensions, and improvements of the same, as well as the right to sue and be sued. [C24, 27, 31, 35,§6176.]

6177 Rules—records—accounts—financial statement. The board shall immediately after its organization make and prescribe all the necessary rules for the government of the waterworks, and prescribe the form of records and the kind of accounts to be made and kept in the operation of such waterworks. It shall institute and require the keeping of a uniform and perfected system of accounts and requisitions showing the purchase, storing, and use of materials for operation, construction, and other purposes. Said accounts shall be kept distinct and separate from other city accounts, and in such manner as to show the true and complete financial results of the operation of said waterworks. The board shall at least once a year cause to be prepared and printed for public distribution a full and complete financial report covering the last preceding municipal fiscal year. [C24, 27, 31, 35,§6177.]

Fiscal year, §5676.1

6177.1 Audit of accounts. The books and accounts of such waterworks shall be audited at least once a year by a public accountant selected by the city council, and a copy of said audit shall be filed with the auditor of state. [C31, 35, §6177-c1.]

6178 Rates. The board of waterworks trustees, in all such cities owning and operating a waterworks under this chapter, shall determine the rates to be charged for water. [C24, 27, 31, 35,§6178.]

40GA, ch 130, §2, editorially divided

6179 Rates for city. In fixing the rate to be paid by the city for water for public uses the board shall take into consideration the quantity used and fix the rate accordingly, but in no event shall such rate exceed an annual rental or rate of three hundred fifty dollars for each mile of main pipe laid and in operation, including hydrant connections, and not including more than one line of pipe on the same street, and not including any pipe less than six inches in diameter laid since August 17, 1896. [C24, 27, 31, 35, §6179.]

6180 Rates generally. Rates to private consumers and to the city shall be so fixed as to produce an amount which with other revenues collectible shall be sufficient to cover:

1. Interest on the entire outstanding indebtedness of said waterworks, including that portion that is a general obligation against the city.
2. The cost of all operating expenses, including insurance against legal liability and payment of judgment resulting from such liability.
3. A sufficient sum by way of a depreciation fund to cover such repairs and replacement as may properly be charged against such fund.
4. A sufficient annual provision for a sinking fund to fully pay at maturity all bonds and certificates which by their terms are payable out of the special tax provided for in this chapter, or out of the earnings of the property purchased under the powers herein granted and to pay special assessments for street improvements lawfully assessed against the waterworks property or any part thereof, and to pay for necessary extensions, improvements and additional lands in cases where bonds have not been issued therefor.
5. A surplus in addition to the requirements set out in the last four preceding subsections to be used as a working capital of not to exceed one hundred twenty-five thousand dollars; provided, however, that the board may absorb all surplus in excess of fifty thousand dollars by reducing water rates to consumers and must so absorb all such surplus in excess of one hundred twenty-five thousand dollars. [C24, 27, 31, 35,§6180.]

6181 Tax authorized. If necessary to procure funds, the city is hereby authorized to levy a sufficient tax as provided in subsection 17 of section 6211 and section 6212 to provide funds to pay for the water used by such city for public uses. [C24, 27, 31, 35,§6181.]

6182 Payment by city. The sums payable by the city for water furnished as herein provided shall hereafter be paid by the city in May of each year for the last six months of the preceding year, and in November of each year for the first six months of that current year. [C24, 27, 31, 35,§6182.]

6183 Mortgage—restriction—interest. In addition to all the powers hereinbefore granted, such cities shall have the right to mortgage or bond such waterworks and pledge the net revenues thereof to secure the payment of the purchase price, and the extension and improvement thereof, but no part of the general fund of such cities shall be applied upon such contracts, bonds, or mortgages. In the payment of the securities authorized to be issued by this section the city and holders thereof shall be restricted to the property mortgaged and the net revenues thereof, and such contract or bonds and all other bonds or certificates issued under this chapter shall not bear a higher rate of

interest than five percent per annum, payable semiannually. [C24, 27, 31, 35,§6183.]

6184 Free or discriminatory rates. It shall be unlawful for the board or any person or corporation to give or receive free water service, or to give or receive water service at a more favorable rate than that accorded to the general public except as herein provided. Any person or persons violating, either directly or indirectly, the provisions of this section shall upon conviction be punished by a fine of not less than three hundred dollars or sixty days in jail for each and every offense. [C24, 27, 31, 35,§6184.]

6185 Extension of mains. The board of waterworks trustees shall establish such rules regarding the extension of mains as in its belief will inure to the greatest benefit of the city, and shall avoid granting special favors in the extension of mains by requiring property owners when necessary to make certain guarantees or to pay certain sums to cover the cost of unprofitable extensions. [C24, 27, 31, 35,§6185.]

38GA, ch 288, §14, editorially divided

6186 Notice to install mains. It shall be the duty of the city council, immediately after the passage of any ordinance or resolution ordering any street improvement or sewer upon any street or streets in which a water main should be laid or extended prior to such improvement as indicated by a majority vote of the council, to give notice in writing to the board of waterworks trustees of such action, and to forward to said board a copy of such resolution or ordinance ordering the said improvement. [C24, 27, 31, 35,§6186.]

40GA, ch 130, §4, editorially divided

6187 Duty to install. On receipt of said notice, the board shall proceed without unnecessary delay to cause mains to be laid or extended in those streets affected by the resolution or ordinance. [C24, 27, 31, 35,§6187.]

6188 Lease—limitation. The power to lease the waterworks or any part thereof shall be exercised by the city council only upon approval of the board of waterworks trustees. [C24, 27, 31, 35,§6188.]

6189 Political activity forbidden. Any member of said board of waterworks trustees or any employee of such city who is employed in any of the departments of said waterworks who, by solicitation or otherwise, shall exert his influence, directly or indirectly, to influence other officers or employees of such city to adopt his political views or to favor any particular person or candidate for office, or who shall in any manner contribute money, time, labor, or other valuable thing to any person for election purposes, and any member of the city council who shall, by solicitation or otherwise, exert his influence directly or indirectly to influence said board or any member thereof in the hiring or discharging of any employee or employees of said waterworks, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months. [C24, 27, 31, 35,§6189.]

6190 Construction of chapter. Nothing herein shall be held to repeal sections 6142 and 6143. Said sections, however, so far as the rate making power is concerned, shall not apply to the operation of waterworks constructed or purchased under the provisions of this chapter. In all other respects this chapter shall be construed as granting additional power without limiting the power already existing in cities of the first class with a population of one hundred thousand or over. [C24, 27, 31, 35,§6190.]

CHAPTER 314.1

EXTENSION OF WATER MAINS

Referred to in §6943.007. Chapter applicable to special charter cities, §6771.1

6190.01 Power to extend—assessment.
6190.02 Petition for extension.
6190.03 Jurisdiction over petition.
6190.04 Certification by board—order.
6190.05 Contract and execution thereof.
6190.06 When contract required.
6190.07 When contract optional.
6190.08 Limitation on assessment.
6190.09 Certification of cost.
6190.10 Assessments—how made.
6190.11 Rebates.
6190.12 Unplatted land—repayment.
6190.13 Applicability of statute.

6190.01 Power to extend—assessment. Cities and towns which own and operate waterworks may extend the water mains and assess the cost of such extension to abutting property as provided in this chapter. [C27, 31, 35,§6190-a1.]

6190.02 Petition for extension. Such extensions and assessments for the cost thereof, may be ordered only when such extensions have been petitioned for by at least seventy-five percent of the owners of property subject to such assessment who are residents of the city wherein such petition for extensions is presented. [C27, 31, 35,§6190-a2.]

6190.03 Jurisdiction over petition. The petition shall be presented to the board of waterworks trustees when such board exists, and, in such case, said board shall have exclusive jurisdiction of such petition. In other cases the petition shall be presented to the council which shall have such jurisdiction. [C27, 31, 35,§6190-a3.]

6190.04 Certification by board — order. If the proposed extension is approved by the board of waterworks trustees, it shall certify said petition, together with its written approval, to the council, and the council shall then in a

resolution declare the necessity for such extension, designating the streets upon which it is proposed to make the extension and the terminal points thereof, and the fact that private abutting property will be assessed for the cost thereof, and the council shall in such resolution of necessity fix the time for the consideration of the resolution, at which time the owners of property subject to assessment may appear and make objection, if they so elect to do, to the passage of the resolution; before final action upon the resolution, the council shall cause notice of the time when said resolution will be considered by it for passage to be given by two weekly publications in some newspaper published in the city or in case no newspaper is published therein in one of general circulation therein the last of which shall be not less than two weeks, nor more than four weeks, prior to the day fixed for its consideration; if objections are filed by any property owners to the passage of the resolution, final action shall not be taken upon same by the council until notice of such objection has been given to the board of waterworks trustees when such board exists, giving it an opportunity to appear before the council in support of its approval of the petition. If such resolution is finally adopted by the council, the extension shall be made as hereinafter provided in this chapter. The city or town clerk shall certify to the board of waterworks trustees the expense of publication and same shall be included as a part of the cost of the extension. [C27, 31, 35, §6190-a4.]

6190.05 Contract and execution thereof. Contracts for such extensions shall be let by and executed under the supervision of the board of waterworks trustees when such board exists, otherwise by and under the supervision of the council. [C27, 31, 35,§6190-a5.]

6190.06 When contract required. If the estimated cost of such extension, not including cost of material, exceeds twenty-five hundred dollars the work shall be done under contract which shall be entered into and performed as provided in sections 6001 to 6006, inclusive, insofar as applicable. [C27, 31, 35,§6190-a6.]

6190.07 When contract optional. If the estimated cost of such extension, not including cost of material, is twenty-five hundred dollars or less, the construction may be under contract as heretofore provided or by day labor. If the work is done by day labor, such work shall be under the control and supervision of the said board of trustees or council, as the case may be. [C27, 31, 35,§6190-a7.]

6190.08 Limitation on assessment. Where a pipe in excess of six inches in diameter is used, the assessment against the abutting property shall be limited to what would have been the cost of a six-inch pipe; and the difference between the cost of the pipe used and what would have been the cost of a pipe six inches in diameter shall be paid by the water department in cities and towns having a board of waterworks trustees, and in other cities such difference in cost shall be paid out of the water funds, and if such funds are not sufficient then out of the general funds. [C27, 31, 35,§6190-a8.]

6190.09 Certification of cost. If said extension is made by or under the supervision of said board of trustees, it shall, after the work is completed, certify the cost thereof to the council, and the council shall levy the special assessments in the manner provided in this chapter. [C27, 31, 35,§6190-a9.]

6190.10 Assessments—how made. Special assessments shall be made and collected in accordance with sections 6021 to 6034, inclusive, insofar as applicable. [C27, 31, 35,§6190-a10.]

6190.11 Rebates. Each city or town may provide by ordinance that the owner of property so assessed shall be rebated annually at the rate of ten percent each year of such assessment and interest, from water dues payable by such property so assessed, until such time as the amount of such rebates equals the amount of said assessment and interest paid by such owner, provided that after fifteen years from date of assessment all rebate rights shall be automatically canceled and any assessments not then repaid by such rebates shall not be subject to repayment; provided, however, that in any city where the waterworks is operated under a board of waterworks trustees such an ordinance shall not be adopted unless it shall be asked for and approved by the board of waterworks trustees.

The council of any city having a population in excess of seventy-five thousand shall adopt such ordinance before extending mains and assessing costs thereof as provided in this chapter. [C27, 31, 35,§6190-a11.]

6190.12 Unplatted land—repayment. When an extension is carried one thousand feet or more across unplatted lands, repayment of the amount of the assessment and interest shall be made to the owner at the end of ten years from the date of the assessment, unless such owner has made connection and used the water from such mains, in which event repayment shall be made by rebates of water dues, as heretofore provided. [C27, 31, 35,§6190-a12.]

6190.13 Applicability of statute. This chapter shall not apply to cities operating waterworks under chapter 314. [C27, 31, 35,§6190-a13.]

CHAPTER 315

STREET RAILWAY REGULATIONS

Chapter applicable to special charter cities, §6785

6191 General powers.
6192 Condition precedent.
6193 Vestibules—brakes—transparent shields.
6194 Penalty.

6191 General powers. Cities and towns shall have the power to authorize or forbid the construction of street railways within their limits, and may define the motive power by which the cars thereon shall be propelled; and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys, and public places. [R60,§1064; C73,§464; C97,§767; C24, 27, 31, 35,§6191.]

C97,§767, editorially divided

6192 Condition precedent. No railway track can thus be located and laid down until after the injury to property abutting upon the street, alley, or public place upon which such railway track is proposed to be located and laid down has been ascertained and compensated for in the manner provided with reference to taking private property for works of internal improvement. [C73,§464; C97,§767; C24, 27, 31, 35, §6192.]

Condemnation procedure, ch 366

6193 Vestibules — brakes — transparent shields. Every person, partnership, company, or corporation owning or operating a street railway in this state shall:

1. *Transparent shield.* Provide and maintain upon all motorcars, except trailers, used for the transportation of passengers, not required by law to have an inclosed vestibule, a transparent shield extending the full width of each car and so constructed that it will afford protection to the motormen and passengers on the platform from inclement weather.

2. *Vestibules.* From November 1 of each year to April 1 following, provide all cars used for the transportation of passengers with vestibules inclosing the front and rear platforms on all sides for the protection of employees operating such cars when, in the performance of their duties, the employees are required to remain on said vestibule the major portion of their time. Each vestibule shall be heated and shall contain a seat for the use of the motorman or conductor.

3. *Brakes.* Equip all its double truck passenger cars and single truck passenger cars over thirty-two feet in length with power brakes other than hand brakes capable of bringing such cars to a stop within a reasonable distance, together with equipment for sanding the rails. Said brake and sand equipment shall be so constructed as to be operated by the motorman on the car operated by him.

4. *Toilets.* Provide and maintain toilet facilities for the use of employees at some suitable location upon such line or run, and the running schedule of said cars and the operating thereof shall be such as will permit said employees to use said toilet facilities.

1. [S13,§768-a; C24, 27, 31, 35,§6193.]
2. [C97,§768; S13,§768; SS15,§768-h; C24, 27, 31, 35,§6193.]
3. [S13,§§768-c,-e,-f; C24, 27, 31, 35,§6193.]
4. [SS15,§768-i; C24, 27, 31, 35,§6193.]

Referred to in §6194

6194 Penalty. A violation of any of the provisions of section 6193 shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars for each offense. Every day's failure to comply with any of the provisions of said section shall be deemed a separate offense. [C97,§768; S13,§§768,-b,-d,-g; SS15,§768-j; C24, 27, 31, 35,§6194.]

CHAPTER 316

CONDEMNATION, PURCHASE, AND DISPOSAL OF LANDS

CONDEMNATION

6195 Purposes.
6196 Gravel pits.
6197 Libraries.
6198 Lands for railway purposes.
6199 Election required.
6200 Purchase—payment of damages.
6201 Streets—conditions prescribed.
6202 Limitations.
6203 Proceedings for condemnation.

PURCHASE AND DISPOSAL

6204 Purchase at execution sale.
6205 Disposal of unsuitable lands.
6206 Disposal of lands and streets.

CONDEMNATION

6195 Purposes. Cities and towns shall have power to purchase or provide for the condemnation of, pay for out of the general fund or the specific fund, as may be provided, enter upon and take any lands within or without the territorial limits of the city or town, for the following purposes:

1. For parks, commons, cemeteries, crematories, or hospital grounds, including buildings thereon to be used for hospitals.

2. For sites for city halls, community centers, and juvenile playgrounds.

3. For establishing, laying off, widening, straightening, narrowing, extending, and lighting streets, avenues, highways, alleys, wharves, landing places, public squares, public grounds, public markets and market places, and public slaughterhouses.

4. For garbage disposal plants and dump grounds.

5. For the control of streams and surface waters flowing into sewers within the city or

town, or necessary for sewer outlets, or sewage disposal plants. They may also condemn easements in lands for the same purposes.

6. For any other purpose provided in this title, and in all cases where such purchase or condemnation may be authorized.

1. [C97,§880; S13,§741-s; SS15,§880; C24, 27, 31, 35,§6195; 47GA, ch 167,§1.]

2. [SS15,§§741-d, 879-t; C24, 27, 31, 35,§6195.]

3. [R60,§1064; C73,§§464, 470; C97,§880; SS15,§880; C24, 27, 31, 35,§6195.]

4, 5. [C97,§881; SS15,§881; C24, 27, 31, 35, §6195.]

6. [R60,§1064; C73,§§464, 470; C97,§880; SS15,§880; C24, 27, 31, 35,§6195.]

6196 Gravel pits. They shall have the power to purchase or provide for the condemnation of, pay for out of the general fund, the grading fund, or the highway or poll taxes of said city or town, or partly from each of said funds, lands within or without the territorial limits of the city or town, including a suitable roadway thereto by the most reasonable route, for the purpose of obtaining gravel, stone, or other suitable material with which to improve the streets and alleys of said city or town. [S13,§2024-j; C24, 27, 31, 35,§6196.]

6197 Libraries. In any city or town in which a free library has been established, the board of library trustees may condemn real estate in the name of the city or town for the location of library buildings and branch libraries, and for the purpose of enlarging the grounds thereof. [S13,§729-b; C24, 27, 31, 35,§6197.]

6198 Lands for railway purposes. They shall have power to acquire by purchase or condemnation, for the purpose of donating and to donate to any railway company owning a line of railroad in operation or in process of construction in such city or town, sufficient land for depot grounds, engine houses, and machine shops for the construction and repair of engines, cars, and other machinery necessary to the convenient use and operation of said railroad. [C97,§885; C24, 27, 31, 35,§6198.]

6199 Election required. Such donation or appropriation of funds to procure lands therefor can only be made upon a petition to the council, signed by a majority of the resident freehold taxpayers of the city or town, asking the same and fixing the sum which shall be thus appropriated. Upon the presentation of the petition, the council shall call a special election, at which the question of the proposed donation shall be submitted to the voters. The clerk shall prepare the ballots and the election shall be held in the manner provided for in the title on elections. [C97, §886; C24, 27, 31, 35,§6199.]

Referred to in §6202
C97,§886, editorially divided

6200 Purchase — payment of damages. If there shall be a two-thirds majority in favor of the donation, the council shall determine the lands to be donated by metes and bounds, the amount to be appropriated for procuring the same, not exceeding the sum named in the petition, and in the name of the city or town may acquire the same by purchase, or by the payment of the estimated damages in case the same or any part thereof shall be taken in the name of the railway corporation under condemnation proceedings as authorized by law. [C97,§886; C24, 27, 31, 35,§6200.]

Referred to in §6202

6201 Streets—conditions prescribed. The council may also vacate and convey all streets and alleys within the boundaries of such site, and prescribe the terms and conditions upon which the grant is made, which shall be binding upon the company accepting it. [C97,§886; C24, 27, 31, 35,§6201.]

Referred to in §6202

6202 Limitations. Land set apart as a public park, square, or levee shall not be thus donated, nor shall lands occupied with buildings used for business purposes or private residences be appropriated under the provisions of sections 6199, 6200, and 6201 without the consent of the owner or owners being first obtained. [C97, §886; C24, 27, 31, 35,§6202.]

6203 Proceedings for condemnation. Proceedings for the condemnation of land as contemplated in this title shall be in accordance with the provisions relating to eminent domain and the taking of private property for public use, except that the jurors shall have the additional qualification of being freeholders of the city or town. [R60,§§1065, 1066; C73,§§469, 476, 477; C97,§884; S13,§§729-c, 2024-b; C24, 27, 31, 35,§6203.]

Condemnation procedure, ch 366

PURCHASE AND DISPOSAL

6204 Purchase at execution sale. They shall have power to acquire real estate, or an interest therein, as a purchaser at an execution sale, when judgment is entered in favor of such city or town or it is otherwise interested in the proceedings. [C97,§882; C24, 27, 31, 35,§6204.]

Municipal corporation as bidder, ch 449; §6736

6205 Disposal of unsuitable lands. They shall have power to dispose of and convey lands unsuitable or insufficient for the purpose for which they were originally acquired; but when such lands are so disposed of, enough thereof shall be reserved for streets to accommodate adjoining property owners. Conveyances executed in accordance with this section shall extinguish all the rights and claims of the city or town existing prior thereto. [C73,§470; C97,§883; C24, 27, 31, 35,§6205.]

C97,§883, editorially divided

6206 Disposal of lands and streets. They shall have power also to dispose of the title or interest of such corporation in any real estate, or any lien thereon, or sheriff's certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, in such manner and upon such terms as the council shall direct. [C73, §470; C97,§883; C24, 27, 31, 35,§6206.]

CHAPTER 317

TAXATION

6207 General fund.
6208 Road dragging fund.
6209 City bridge fund.
6210 Agricultural lands.
6211 Taxes for particular purposes.
6212 Limitation of certain taxes.
6213 Main sewer fund.
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6225 Question submitted.
6226 Limit on aid.
6227 Certification of taxes and assessments—collection.
6228 Tax sales.
6229 Taxes paid over.
6230 Diversion of funds.

6207 General fund. The council of each city or town shall levy a tax for the year then ensuing, for the purpose of defraying its general and incidental expenses, which shall not exceed two and one-half mills on the dollar. [R60, §1124; C73,§496; C97,§887; C24, 27, 31, 35, §6207.]

6208 Road dragging fund. Any city having a population of less than eight thousand, and any town, may levy annually a tax of not more than one-fourth mill which shall be used only for dragging streets and roads. [SS15,§887-a; C24, 27, 31, 35,§6208.]

6209 City bridge fund. Cities may levy annually a tax, which shall be used only for bridge purposes, and for the construction, reconstruction, maintenance and repair of viaducts, underpasses, grade crossing separations and approaches thereto, except those constructed or maintained by any railroad company under the provisions of chapter 305, as follows:

1. Any city with a population of more than thirty-five thousand and with a meandered stream dividing its corporate limits, not exceeding one mill.
2. Other cities of the first class, not exceeding three-fourths mill.
3. Cities of the second class with a population of more than five thousand and traversed by a stream two hundred or more feet in width from shore line to shore line, not exceeding one and one-fourth mills.
4. Cities which have a population of forty-five hundred and not exceeding six thousand, and which are traversed by a river and in which there are, within the corporate limits, at least twelve bridges used for general traffic, not exceeding one and one-fourth mills. [R60,§710; C73,§796; C97,§§758, 888, 1303; SS15,§§758, 1303; C24, 27, 31, 35,§6209; 48GA, ch 162,§1.]

Applicable to special charter cities, §6858

6210 Agricultural lands. No land included within the limits of any city or town which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands shall be liable to taxation for city and town road purposes, at not exceeding one and one-fourth mills, and for library purposes. [C97,§§616, 890; S13,§616; C24, 27, 31, 35,§6210.]

Referred to in §4745.1
Applicable to special charter cities, §6859

6211 Taxes for particular purposes. Any city or town shall have power to levy annually the following special taxes:

1. *Grading fund.* Not exceeding three-fourths mill, which shall be used only for the purpose of opening, widening, extending, dragging, and grading any street, highway, avenue, alley, public ground, or market place.
2. *Water fund.* Not exceeding one and one-fourth mills, which shall be used only to pay the amount due or to become due for water supplied under any contract. In cities of the first class, if the maximum tax is insufficient to pay such amount, the deficiency shall be paid out of the general fund.

Referred to in §6212

3. *Improvement fund.* Not exceeding one and one-fourth mills, which shall be used only to pay for deficiencies in assessments and for plats and schedules as provided by law, and for the construction, reconstruction, and repair of any street improvement at the intersections of streets, highways, avenues, and alleys, and for one-half of the cost of such improvement at the intersections of streets, highways, avenues, and alleys not crossing, and for spaces opposite property owned by the city or town and by the United States, and for the purchase price of property purchased by the city at tax sale and subsequent taxes assessed against such property.
4. *Drainage tax.* Such number of mills as will pay any special assessment with interest, or any installment thereof with interest, levied against any street, alley, highway, public way, or park by the board of supervisors for drainage purposes.
5. *Sewer fund.* If the city or town comprises one sewer district, not exceeding one and one-fourth mills, which shall be used only to pay for deficiencies in assessments as provided by law, and for the construction, reconstruction, and repair of any sewer at the intersection of

streets, highways, avenues, alleys, and for one-half the cost of such sewer at the intersections of streets, highways, avenues, and alleys not crossing, and for spaces opposite property owned by the city or town and by the United States, and for the whole or any part of the construction, reconstruction, or repair of any sewer within the limits of said city or town, and for the construction, reconstruction, repair, maintenance and operation of any sewage disposal plant serving or to serve said sewer district.

Referred to in §6066.14

6. *District sewer fund.* Within a sewer district, not exceeding one and one-fourth mills, which shall be used only to pay all or any part of the cost of construction, reconstruction, or repair of any sewer located and laid in that particular district, and to maintain and operate any sewage disposal plant serving such district. The funds created by this and the preceding subsection may be used to secure control of streams and surface waters flowing into sewers, sewer outlets, and disposal plants.

7. *Sewer outlet, purifying plant, and dump ground fund.* Not exceeding one and one-fourth mills, which shall be used only to construct sewer outlets and sewage purifying plants and to purchase dump grounds. The levy made under this subsection shall not be considered a part of the levy for sewer funds under the two preceding subsections.

Referred to in §6066.14

8. *Fire fund.* Not exceeding three-eighths mill, which shall be used only to acquire property for the use of the fire department and to equip the same. No part of the general fund shall be used for equipping the fire department.

Applicable to special charter cities, §6860

9. *Fire department maintenance fund.* Regardless of the form of government thereof, any city with a population of more than eight thousand, not exceeding three and one-half mills; any city with a population of less than eight thousand, not exceeding one and three-fourths mills; and any town not exceeding three-fourths of one mill. The foregoing levies shall be used only to maintain a fire department, except that any such city with a population under three thousand, and any such town may also use such funds for the purchase of fire equipment.

Applicable to special charter cities, §6860

10. *Gas light, electric light, heat, or power funds.* Any city with a population of more than five thousand, not exceeding one and one-fourth mills, and any city with a population of less than five thousand and any town, not exceeding one and three-fourths mills, which shall be used only to pay the amount due or to become due under any contract for gas light, electric light, heat, or power, including expenses of inspection.

Referred to in §6212

11. *Bond fund.* Such number of mills as will pay the interest accruing before the next annual levy on funding or refunding bonds outstanding, and such proportion of the principal that at the end of five years the sum raised shall equal at least twenty percent of the amount of the bonds issued; at the end of ten years at least forty percent of said amount; at the end of fifteen years at least sixty-five percent of said amount; and at or before the date of the maturity of said bonds a sum equal to the whole amount of the unpaid interest and principal. Said funds shall be used only to meet such obligations.

Tax levy mandatory, §6260; ch 63.1

12. *Water or gas works or electric plant bond fund.* Such number of mills as will pay for waterworks, gasworks, electric light and power plants in the periods and proportions set forth in the preceding subsection, which shall be used only to pay the principal of bonds issued for the construction or purchase of such plants.

Referred to in §6212

13. *Cemetery purchase fund.* Not exceeding one-fourth mill, which shall be used only to pay for land acquired for cemetery purposes, and the interest accruing on the cost thereof.

14. *Cemetery fund.* Any city, not to exceed one-fourth mill, and any town, not to exceed three-fourths mill, which shall be used only for the care, preservation, and adornment of any cemetery owned or controlled by the city or town, or owned and controlled by any private or incorporated cemetery association, township, or other municipality, even though situated in an adjoining county, if actually utilized for burial purposes by the people of the city or town. Said tax may be so expended for the support and maintenance of any such cemetery after it is no longer used for the purpose of interring the dead.

15. *Comfort station fund.* When authorized to maintain comfort stations, not exceeding one-eighth mill, which shall be used only to defray the expense of establishing and maintaining comfort stations, or such expenses may be paid from the general fund.

16. *Garbage disposal and street cleaning fund.* Within any sanitary district, not exceeding one-half mill, which shall be used only to pay the cost of the collection and disposal of garbage and such other material as may become dangerous to the public health, and for the oiling and sprinkling, flushing and cleaning of streets therein.

Applicable to special charter cities, §6861

17. *Waterworks fund.* If the authorized water rates or rentals are insufficient to meet the expense of running, operating, and repairing the waterworks owned or operated by the city or town and the interest on any bonds issued to pay for the construction, reconstruction, repair, or extension of such works, not exceeding one and one-fourth mills, which shall be used only to pay the deficiency.

Referred to in §§6181, 6212

18. *Gas or electric fund.* If the authorized rates or rentals are insufficient to meet the expense of running, operating, and repairing gas or electric light or power plants owned by the city or town, and the interest on any bonds issued to pay for the construction of such works or plants, not exceeding one and one-fourth mills, which shall be used only to pay the deficiency.

Referred to in §6212

19. *Library fund.* When a free public library has been established, not exceeding one and one-fourth mills, which shall be used only for its maintenance. Provided that said maintenance levy may be not to exceed two and one-half mills in any city of more than ten thousand population and less than seventy-five thousand population and having situated therein a state-owned educational institution with a regular attendance of more than three thousand students, and also a state commission regularly employing more than one hundred heads of families. The rate of levy for this and the fund created by the following subsection shall be determined and certified to the council by the board of library trustees before the first day of August in each year. The council shall make such levies accordingly. Any moneys appropriated to the library fund and not expended during the fiscal year shall remain part of the library fund for the ensuing year, without reappropriation, and will be available for expenditure by the board of library trustees.

Referred to in §6856

20. *Library building fund.* When the establishment of a public library has been authorized, not exceeding three-fourths mill, which shall be used only to purchase real estate and to erect thereon a building or buildings for a public library or to pay the interest on any indebtedness incurred for that purpose and to create a sinking fund for the extinguishment of such indebtedness. Provided the levy for said purposes may be not to exceed one and one-half mills in any city of more than ten thousand population and less than seventy-five thousand population, and having situated therein a state-owned educational institution with a regular attendance of more than three thousand students, and also a state commission regularly employing more than one hundred heads of families. When a library building has been fully completed and paid for, no further levy shall be made for that purpose, but may be made for the purpose of providing funds for improvements and repairs and to pay rental for space leased by the board of library trustees for the establishment and operation of branch libraries and stations in districts where no branch library buildings have been acquired or erected by said municipality. Any balance remaining in the building fund may be transferred to the maintenance fund.

Referred to in §6856

21. *Library contract fund.* When a public library has not been established, not exceeding one-fourth mill, which shall be used only to secure for the inhabitants of the city or town the free use of a public library. When a majority of the resident taxpayers petition the council in writing to secure such privilege, the council shall offer to contract therefor with the designated library.

22. *Community center establishment fund.* When a community center district has been established, within such district, not exceeding three-fourths mill for not more than twenty years, which shall be used only to purchase real estate for use as a community center and to construct thereon buildings with proper equipment.

23. *Community center improvement and maintenance fund.* Within such community center district, not exceeding one and one-fourth mills, which shall be used only for the development, improvement, maintenance, and operation of the community center.

24. *Juvenile playground and swimming pool fund.* When any juvenile playground or swimming pool has been established, such number of mills as will liquidate, at maturity, bonds issued for its acquirement.

25. *Playground or swimming pool maintenance fund.* Not exceeding one-half mill, which shall be used for the maintenance, operation, and improvement of such playground or swimming pool.

26. *Hospital fund.* When a municipal hospital has been established, not exceeding three-fourths mill in cities having a population of more than twenty-two thousand, and in other cities not exceeding one and one-fourth mills. Such levies shall not extend for a longer period than twenty years and shall be used only for the purpose of purchasing sites for hospitals or sites with building or buildings thereon which may be acquired for hospital purposes and constructing or reconstructing buildings to be used for hospitals, and for the retirement of bonds issued in payment thereof.

Cities having a population of not less than four thousand and not more than five thousand, in which a municipal hospital has been established, may levy, under the provisions of this section, not to exceed two and one-half mills, for rebuilding, remodeling or enlarging such hospital.

Referred to in §5368.5

27. *Hospital maintenance fund.* Not to exceed one and one-half mills, which shall be used only to improve, operate, and maintain such hospital.

Referred to in §5368.5

28. *City hall fund.* Any city with a population of more than four thousand, not exceeding one-half mill for not more than twenty years, and any city with a population less than four thousand and any town, not exceeding one and one-fourth mills for the same period, which in each case shall be used only to build, purchase, or remodel a city hall and to purchase a site therefor.

29. *Art fund.* Any city having a population of one hundred thousand or more, not exceeding one-fourth mill, which shall be used for the purchase, construction, maintenance, and operation of a place for the exhibition of works of art and for the purchase of works of art.

30. *Electric light plant fund.* Not exceeding one and one-fourth mills in cities and towns with a population of more than five thousand owning and operating an electric light plant and not exceeding one and three-fourths mills in any city or town with a population of less than five thousand, which shall be used only to pay for electricity, for street lighting and other public purposes, and which shall be paid and credited to the electric lighting plant fund.

31. *Snow removal fund.* In cities having a population of less than one hundred twenty-five thousand, not exceeding one-half mill annually, which shall be used only for the purpose of

causing the removal of snow and ice from the streets of such cities and towns.

Applicable to special charter cities, §6861.1

32. *Police department maintenance fund.* Any city having a population of twelve thousand or over, regardless of the form of government, not exceeding three and one-half mills. The foregoing levy shall be used only to maintain a police department. Any city establishing a police department maintenance fund as herein provided shall reduce the millage levied for the general fund or the millage levied for any other fund for the city out of which the cost of the maintenance of the police department has heretofore been paid in an amount equal to the millage levied for the police department maintenance fund herein provided for. This subsection shall not be construed to permit any city establishing a police department maintenance fund to increase the total millage which any city may levy.

1. [C97,§894; SS15,§894; C24, 27, 31, 35, §6211.]
2. [C73,§475; C97,§894; SS15,§894; C24, 27, 31, 35,§6211.]
3. [C97,§894; S13,§792-f; SS15,§894; C24, 27, 31, 35,§6211.]
4. [C24, 27, 31, 35,§6211.]
5. [C97,§894; S13,§§840-a, 894; C24, 27, 31, 35,§6211.]
6. [C97,§§881, 894; S13,§§840-a, 894; SS15, §881; C24, 27, 31, 35,§6211.]
7. [SS15,§840-g; C24, 27, 31, 35,§6211.]
8. [S13,§716-b; C24, 27, 31, 35,§6211.]
9. [S13,§716-a; C24, 27, 31, 35,§6211.]
10. [C97,§894; SS15,§894; C24, 27, 31, 35, §6211.]
11, 12. [C97,§894; SS15,§894; C24, 27, 31, 35, §6211.]
13. [C97,§880; SS15,§880; C24, 27, 31, 35, §6211.]
14. [C97,§894; SS15,§894; C24, 27, 31, 35, §6211.]
15. [C24, 27, 31, 35,§6211.]
16. [SS15,§696-b; C24, 27, 31, 35,§6211.]
17. [C73,§475; C97,§894; SS15,§894; C24, 27, 31, 35,§6211.]
18. [C97,§894; SS15,§894; C24, 27, 31, 35, §6211.]
19. [C97,§§732, 894; S13,§732; SS15,§894; C24, 27, 31, 35,§6211; 47GA, ch 168,§1; ch 171, §1.]
20. [C97,§§732, 894; S13,§732; SS15,§894; C24, 27, 31, 35,§6211; 47GA, ch 171,§2.]
21. [S13,§741-n; C24, 27, 31, 35,§6211.]
22, 23. [C24, 27, 31, 35,§6211.]
24. [SS15,§879-s; C24, 27, 31, 35, §6211.]
25. [SS15,§879-u; C24, 27, 31, 35,§6211.]
26. [S13,§§741-q,-r; C24, 27, 31, 35,§6211; 47 GA, ch 167,§2.]
27. [S13,§741-u; C24, 27, 31, 35,§6211.]
28. [SS15,§741-e; C24. 27, 31, 35,§6211.]
29, 30. [C27, 31, 35,§6211.]
31. [47GA, ch 170,§1.]
32. [48GA, ch 163,§§1, 2.]

Referred to in §6066.14

6212 Limitation of certain taxes. No tax authorized in subsections 2, 10, 12, 17, and 18 of section 6211 shall be levied against property lying wholly without the limits of the benefit of the works or plants therein mentioned, which limits shall be fixed by the city council. [C97, §894; SS15,§894; C24, 27, 31, 35,§6212.]

Referred to in §6181

6213 Main sewer fund. Any city of the first class shall have power to levy annually not exceeding one and one-fourth mills, which shall be used only to pay for the construction, reconstruction, or repair of any main sewer within the city; but the aggregate tax levied by such city in any one year for a sewer fund, district sewer fund, and main sewer fund shall not exceed two mills. [S13,§§840-b,-f; C24, 27, 31, 35, §6213.]

6214 Park tax. Cities having a population of eighty-five thousand or more shall have power to levy annually, in addition to all other taxes for park purposes, not exceeding one-eighth mill, which shall be used only to purchase real estate for park, art, or memorial purposes. [C24, 27, 31, 35,§6214.]

Applicable to special charter cities, §6857

6215 Transfer of funds. Cities having a population of eight thousand eight hundred or less, and towns, may make either temporary or permanent transfers from the grading fund, improvement fund, sewer fund, the waterworks fund, gas or electric plant fund, water fund, gas or electric light or power fund, to any of said funds or to the park fund for park purposes as provided by section 5796, by resolution concurred in by a unanimous vote of the council, if approved by a judge of the district court in the county wherein such city or town is located at a hearing had on a day to be fixed by said judge. [C24, 27, 31, 35,§6215.]

Transfer of funds, §387 et seq.

6216 Notice of hearing—limitation. Not less than five days before the date of said hearing, notice thereof shall be given by publication in one or more newspapers published in the city or town of general circulation therein. If there be no such newspaper published in such city or town, then the said publication may be in a newspaper of general circulation within the city or town. The notice shall be addressed generally to the taxpayers of the city or town, and shall recite the substance of the resolution adopted by the council, and set forth specifically the funds from and to which the transfer is to be made, the amount of money involved, and the time when objections to the proposed transfer may be filed. Proof of publication shall be made as for the publication of original notices, and the order of the judge shall be indorsed on the original resolution and entered in the record book of the municipality as a part of the resolution. In no case shall the transfer of funds be made where as a result of the transfer, more money is placed in any one fund than would have been placed in such fund by the levy of the maximum millage provided therefor. [C24, 27, 31, 35,§6216.]

Proof of publication, §11085

6217 Consolidated tax levy. In lieu of any or all of the separate annual levies for the general fund, the grading fund, the improvement fund, the city or town sewer fund, the water fund, and the gas or electric light or power fund, cities and towns may levy one tax which shall not in the aggregate exceed the total amount of taxes which such municipality might have levied therefor. The city or town making such consolidated levy shall, prior to the first day of April thereafter, appropriate the estimated revenue from such consolidated levy, in such ratio as the council may determine, for any purpose for which such funds might have been used, but no part thereof shall be used for any other purpose. [C24, 27, 31, 35,§6217.]

Referred to in §§6218, 6219
Applicable to special charter cities, §6771.2

6218 Budget — publication — objections. Whenever the power granted in section 6217 is exercised by any city or town, it shall be the duty of the council prior to the first day of April each year to make up and prepare an annual budget on the basis of estimates of the expenses of the several departments of such city or town. Such estimates shall show not only the purpose for which the consolidated levy authorized in section 6217 is to be used, but in addition thereto the purpose for which all other levies authorized to be made by said city or town are to be used, so that said budget when so made up will show all of the proposed expenditures for the ensuing year. Such budget of proposed expenditures shall be published in one or more newspapers of general circulation published in such city or town, but where no newspaper is published in such town then by posting in three public places, the publication to be at least two weeks before said budget is finally adopted by the council, and the time when such budget will be considered by the council for final adoption shall be stated in said publication. On the day thus fixed for considering said budget, full opportunity shall be given for hearing any objections or protests which any taxpayer of the city or town may desire to make to any item or items in such budget or to any omissions therefrom. [C24, 27, 31, 35,§6218.]

Referred to in §6219

6219 How construed. Nothing in sections 6217 and 6218 shall be construed to affect or repeal any of the existing statutes authorizing tax levies in cities and towns. [C24, 27, 31, 35, §6219.]

6220 Levy for park purposes. The board of supervisors shall, at the time of levying county taxes, levy on all property within the city the tax certified to them by the park commissioners for said city. If such commissioners fail to certify a tax or a sufficient tax for the purpose of paying the interest on bonds issued by the commissioners for park purposes that may be due or will mature within the fiscal year next ensuing, the board of supervisors shall levy such tax as shall be necessary to pay such interest; and if such commissioners each year for fifteen years before the maturity of bonds issued by them, as provided in chapter 311, fail to certify a tax equal to one-fifteenth of the principal of such bonds over and above the amount necessary for the interest on the same, the board shall annually levy such tax as may be equal to one-fifteenth of the principal thereof, which tax shall be set aside by the commissioners in the same manner and for the same purpose as directed in chapter 311. [C97,§895; C24, 27, 31, 35, §6220.]

6221 Bridge tax. The board of supervisors of the county in which a city or town is situated shall levy a special tax on the assessable property in such city or town to aid in the construction of highway or combination bridges, when such tax shall have been voted by the city or town. [C97,§896; C24, 27, 31, 35,§6221.]

6222 Surplus of tax. When a tax has been levied by any city or town to pay off a judgment against such municipality, or by any city or town or by the state tax commission to pay the principal and interest, or either of them, of funding or refunding bonds issued by such municipality, such tax shall not be held invalid if the rate of tax levied raises a sum in excess of the amount sought for such specific object, but the excess shall go into the general city or town funds. Money so raised is especially appropriated for such purposes, and constitutes a distinct fund in the hands of the treasurer until the obligation assumed is discharged. [C51,§§123, 124; R60,§§259, 260; C73,§§318, 319; C97,§897; C24, 27, 31, 35,§6222; 48GA, ch 164,§1.]

6223 Anticipation of revenue. Loans may be negotiated or warrants issued by any municipal corporation in anticipation of its revenues for the fiscal year in which such loans are negotiated or warrants issued, but the aggregate amount of such loans and warrants shall not exceed the estimated revenue of such corporations for the fund or purpose for which the taxes are to be collected for such fiscal year. [R60, §1129; C73,§500; C97,§898; C24, 27, 31, 35, §6223.]

6224 Aiding outside highway. When a petition shall be presented to the council of any city or town, signed by one-third of the resident taxpayers thereof, asking that the question of aiding in the construction or repair of any highway leading thereto be submitted to the voters thereof, the council shall immediately give notice of a special election by posting a notice in five public places in said city or town at least ten days before said election, which shall give the time and place of holding the election, the particular highway proposed to be aided, and the proportion of the highway tax then levied and not expended, or next thereafter to be levied, to be appropriated. [C73,§488; C97,§899; C24, 27, 31, 35,§6224.]

Applicable to special charter cities, §6772
C97,§899, editorially divided

6225 Question submitted. At this election a proposition for an appropriation of a portion of the highway tax to aid in the construction or

repair of the particular highway, and the proportion of such tax proposed to be so appropriated, shall be submitted to the voters of such city or town, and the clerk shall cause the proposition to be printed and placed upon the ballots and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the title on elections. [C73,§488; C97,§899; C24, 27, 31, 35, §6225.]

Applicable to special charter cities, §6772
Election procedure, §761 et seq.

6226 Limit on aid. If a majority of the votes polled be for adoption of the proposition, then the council may aid in the construction or repair of said highway to the extent of said appropriation, which shall not exceed fifty percent of such tax, in the same manner as they otherwise would were said highway within the corporate limits of said city or town. No part of such tax shall be used or expended more than five miles from the limits of such city or town, and not more than twenty-five percent thereof more than two miles from such limits. [C73,§488; C97,§899; C24, 27, 31, 35,§6226.]

Applicable to special charter cities, §6772

6227 Certification of taxes and assessments —collection. All assessments and taxes of every kind and nature levied by the council, except as otherwise provided by law, shall be certified by the clerk on or before the first day of September to the county auditor, and by him placed upon the tax list for the current year, and the county treasurer shall collect all assessments and taxes so levied in the same manner as other taxes, and when delinquent they shall draw the same interest and penalties. [R60,§§1123, 1126; C73,§§495, 498; C97,§902; S13,§902; C24, 27, 31, 35,§6227.]

Referred to in §6871

6228 Tax sales. Sales for such assessments and taxes when delinquent shall be made at the same time and in the same manner as such sales are made for other taxes, and should there be other delinquent taxes or assessments due from the same person, and collectible by the county treasurer, the sale shall be for all such delinquent assessments and taxes, and all the provisions of law relating to the sale of property for delinquent taxes shall be applicable so far as may be to such sales. [R60,§§1123, 1126; C73,§§495, 498; C97,§902; S13,§902; C24, 27, 31, 35,§6228.]

Referred to in §6871

6229 Taxes paid over. Before the third Monday of each month, the county treasurer shall give written notice to the mayor of each municipality in the county of the amount collected for each fund up to the first day of that month, including the amounts collected to pay bonds issued to pay the costs of public improvements for which special assessments have been levied and certified, and the mayor of each municipality shall draw an order therefor in favor of the city treasurer, countersigned by the clerk or auditor of the municipality, upon the county treasurer, who shall pay such taxes to the treasurers of the several municipalities only on such order. [R60,§§1123, 1126; C73,§§495, 498; C97, §902; S13,§902; C24, 27, 31, 35,§6229.]

Referred to in §6871

6230 Diversion of funds. Any councilman or officer of a city or town who shall participate in, advise, consent, or allow any tax or assessment levied by such city or town or by other lawful authority for city or town purposes to be diverted to any other purpose than the one for which it was levied and assessed, or who shall in any way become a party to such diversion, shall be guilty of embezzlement. [C97, §§743, 833, 894, 904; S13,§§716-a, 741-q; SS15, §§879-u, 894; C24, 27, 31, 35,§6230.]

Applicable to special charter cities, §6864
Embezzlement, ch 578

CHAPTER 318

ROAD POLL TAX

Chapter applicable to special charter cities, §6897

6231 Tax authorized.
6232 Collection—exemption.
6233 Action to recover.
6234 Exemptions.
6235 Expenditure.
6236 Certification of unpaid tax.
6237 Action.

6231 Tax authorized. Any city or town shall have the power to provide that all able-bodied male residents of the corporation, including the male officers and employees of any state institution situated within such city or town, but not including any committed inmate of such institution, between the ages of twenty-one and forty-five shall, between the first day of February and the first day of October of each year, and within fifteen days after receipt of the demand for payment by the clerk, pay in money to the street commissioner or city or town clerk a sum to be fixed by the city or town council on or before February 1 of each year, not exceeding five dollars. [C73,§487; C97,§891; S13,§891; C24, 27, 31, 35,§6231.]

Referred to in §§6232, 6233
39GA, ch 191, §1, editorially divided

6232 Collection—exemption. It shall be the duty of the said clerk to make demand upon said resident for the payment of said poll tax, and said demand shall be made by serving a personal notice or by sending notice through the mails. Any person claiming to be exempt under the provisions of section 6231 shall furnish the mayor or other proper officer with an affidavit showing the extent and nature of the disabilities entitling him to such exemption,

and if said affidavit is approved by the city or town council then said affiant will be relieved from payment of said tax. [C73,§487; C97, §891; S13,§891; C24, 27, 31, 35,§6232.]

Exemption of members of fire companies, §1656

6233 Action to recover. In case of failure to pay said sum of money as provided in section 6231 said corporation may recover same, and penalty of not more than two dollars, by action brought in the name of such city or town in any court having jurisdiction over the subject matter of the action. [C73,§487; C97,§892; S13, §892; C24, 27, 31, 35,§6233.]

6234 Exemptions. No property or wages belonging to said person shall be exempt to the defendant on an execution issued upon said judgment. [C97,§892; S13,§892; C24, 27, 31, 35, §6234.]

6235 Expenditure. The tax and money so collected shall be expended upon the streets, avenues, highways, alleys, or public grounds of said corporation. [C97,§892; S13,§892; C24, 27, 31, 35,§6235.]

6236 Certification of unpaid tax. All of said tax remaining unpaid on the fifteenth day of November in each year shall be certified to the county auditor at any time before the following first day of December and shall be entered by him upon the tax list of said county and treated and collected as ordinary county taxes, and shall be a lien upon all the real property of the delinquent. [C73,§487; C97,§892; S13,§892; C24, 27, 31, 35,§6236.]

Collection of taxes, ch 346 et seq.

6237 Action. The entry of such tax and penalty upon the tax list shall not prevent the bringing of an action therefor as authorized by law. Such action must be commenced within one year from the first day of October following the giving of notice for the payment of said tax. When judgment has been rendered therefor and paid in whole or in part after the same has been certified to the county auditor, the court receiving such payment shall execute duplicate receipts, exclusive of costs, if so requested, and upon filing such receipt or duplicate with the county auditor he shall make the proper entries on the tax lists, showing the full payment of such tax and penalty, or part thereof as the case may be. [C73,§487; C97,§893; C24, 27, 31, 35,§6237.]

CHAPTER 319

INDEBTEDNESS

Referred to in §§5903.05, 6261.2

6238 Limitation.
6239 Purposes.
6240 Application of limitation.
6241 Election required.
6242 Initiation of proceedings.
6243 Election called.
6244 Notice.
6245 Questions submitted—manner of submission.
6246 Majorities required.
6247 Limitation.
6248 Issuance of bonds.
6249 Maturity of bonds—interest.
6250 Payment of bonds.
6251 Construction.

6238 Limitation. No county or other political or municipal corporation shall become indebted in any manner for its general or ordinary purposes to an amount exceeding in the aggregate one and one-fourth percent of the actual value of the taxable property within such corporation. The value of such property shall be ascertained by the last tax list previous to the incurring of the indebtedness. Indebtedness heretofore or hereafter incurred by a county for poor relief purposes shall not be construed or regarded as having been incurred for its general or ordinary purposes insofar as said indebtedness may be incurred solely for poor relief purposes. [S13,§1306-b; C24, 27, 31, 35,§6238.]

Referred to in §§4353, 5800
Applicable to certain special charter cities, §6775
Constitutional limitation, Art. XI, §3

6239 Purposes. Cities and towns when authorized to acquire the following named public utilities and other improvements may incur indebtedness for the purpose of:

1. Purchasing, erecting, extending, reconstructing, or maintaining and operating waterworks, gasworks, electric light and power plants, or the necessary transmission lines therefor, and heating plants.

2. Purchasing or erecting garbage disposal plants.

3. Erecting and equipping community center houses and recreation grounds.

4. Acquiring lands and establishing juvenile playgrounds, swimming pools, and recreation centers thereon or on lands already owned or to be leased by the city or town.

5. Constructing city and town halls.

6. Erecting a building or buildings for a public library.

7. Purchasing sites for hospitals or sites with a building or buildings and constructing or reconstructing buildings to be used for hospitals.

8. Purchasing or constructing dams across streams for any proper municipal purpose.

1. [S13,§1306-b; C24, 27, 31, 35,§6239.]
2. [SS15,§696-b; C24, 27, 31, 35,§6239.]
3. [C24, 27, 31, 35,§6239.]
4. [SS15,§879-s; C24, 27, 31, 35,§6239.]
5. [SS15,§741-f; C24, 27, 31, 35,§6239.]
6. [C97,§732; S13,§732; C24, 27, 31, 35,§6239.]
7. [S13,§741-r; C24, 27, 31, 35,§6239; 47GA, ch 167,§3.]
8. [C27, 31, 35,§6239.]

Referred to in §§6240, 6242, 6245
Applicability of certain provisions to special charter cities, §§6762, 6763, 6764, 6774, 6775

6240 Application of limitation. No indebtedness for the extraordinary purposes mentioned in section 6239 shall be charged against or counted as a part of the one and one-fourth percent available for general ordinary purposes until the other three and three-fourths percent of the five percent of indebtedness permitted by the constitution has been exhausted. [S13, §1306-b; C24, 27, 31, 35,§6240.]

Applicable to certain special charter cities, §6775
Constitutional provision, Art. XI, §3

6241 Election required. No such indebtedness shall be incurred until authorized by an election. [C73,§461; C97,§727; S13,§§727, 741-r; SS15,§§696-b, 741-g, 879-r; C24, 27, 31, 35,§6241.]

Applicable to special charter cities, §6776

6242 Initiation of proceedings. The proceedings to call such an election may be instituted by the council, except that before an election may be called for any of the following purposes a petition shall be filed with the council, requesting that such action be taken:

1. For any of the purposes mentioned in subsections 1, 4, and 7 of section 6239, the petitions shall be signed by qualified electors of the city or town equal in number to twenty-five percent of those who voted at the last regular municipal election.

2. For the establishment of community center houses and recreation grounds, it shall be signed by fifteen percent of the resident freeholders of the district within which the same is to be constructed.

1. [S13,§§741-v, 1306-c; SS15,§879-r; C24, 27, 31, 35,§6242.]

2. [C24, 27, 31, 35,§6242.]

6243 Election called. The council on receipt of any such petition shall at the next regular meeting call a special election, fixing the time and place thereof, or may submit the proposition as a special question at the next regular municipal election. The council may reject a petition for a community center, or change the area of any district petitioned for. [S13,§1306-d; C24, 27, 31, 35,§6243.]

6244 Notice. It shall give notice of any election held under the provisions of this chapter by publication once each week for three consecutive weeks in some newspaper published in the city or town, or if none be published therein, in a newspaper published in the county and of general circulation in the city or town. The election shall be held on a day not less than five nor more than twenty days after the last publication of notice. [S13,§1306-d; SS15, §741-h; C24, 27, 31, 35,§6244.]

6245 Questions submitted—manner of submission. Each proposition mentioned in section 6239 shall be submitted on a separate ballot, but more than one of such propositions may be so submitted at the same election, and as a part of each proposition so submitted there shall be stated on the ballot: The amount of indebtedness to be contracted, if any; the amount of bonds to be issued, if any; the annual rate of tax to be levied, if any, for the payment of such bonds and interest thereon. The form of the ballot shall be substantially as follows:

Shall (Here name city or town.) (Here state the particular proposition to be voted upon.) and contract indebtedness for such purpose not exceeding $.....and issue bonds for such purpose not exceeding $..... and levy tax annually upon the taxable property in (Here name of city or town), not exceeding..... mills per annum for the payment of such bonds and the interest thereon?

YES ☐

NO ☐

[S13,§1306-d; SS15,§§741-h, 879-r; C24, 27, 31, 35,§6245.]

6246 Majorities required. A majority of all the legal votes cast on the particular question at the election shall be sufficient to authorize the municipality to contract the indebtedness, except that if the question submitted is one in connection with waterworks, gasworks, electric light or power plants, heating plants, or the establishment of a hospital, the affirmative vote shall also be as large as a majority of all the legal votes cast at the preceding municipal election. [C97,§727; S13,§§727, 741-q,-v, 1306-e; SS15,§§696-b, 741-g, 879-r; C24, 27, 31, 35, §6246.]

Applicable to special charter cities, §6776
Vote required to authorize bonds, §1171.18

6247 Limitation. If a question for the establishment of community center houses or juvenile playgrounds fails to secure the requisite majority it shall not again be submitted at an election for two years. [SS15,§879-r; C24, 27, 31, 35,§6247.]

6248 Issuance of bonds. If the municipality is authorized to incur the indebtedness, the council shall issue bonds and make provisions for the payment thereof with interest. [S13, §§741-r,-v; SS15,§§696-b, 741-f, 879-s; C24, 27, 31, 35,§6248.]

6249 Maturity of bonds—interest. Bonds issued under the provisions of this chapter shall bear interest at the rate of not more than five percent per annum and shall become due in not more than twenty years after issuance and may be issued serially. [C97,§726; S13,§§741-r, 1306-e; SS15,§726; C24, 27, 31, 35,§6249.]

Applicable to special charter cities, §6777
Payment and maturity, ch 63.1

6250 Payment of bonds. Bonds for garbage disposal plants shall be paid from the general fund of the city or town, but other bonds shall be paid from the particular fund created therefor. [C97,§881; S13,§741-q; SS15,§881; C24, 27, 31, 35,§6250.]

6251 Construction. Nothing in this chapter shall be construed to repeal chapter 225 or as being applicable to bonds issued under section 6155. [S13,§1306-f; C24, 27, 31, 35,§6251.]

CHAPTER 320

BONDS

Referred to in §§5570.4, 5795, 5878, 5899.08, 5903.06, 6077, 6079, 6166, 6579.1, 6590, 6594, 6607, 6607.1, 10693
Chapter applicable to special charter cities, §6778

6252 Funding.
6253 Form.
6254 Signing.
6255 Resolution required.
6256 Registration.
6257 Monthly reports.
6258 Sale or exchange.
6259 Delivery—cancellation—sale—proceeds.
6260 Taxes to pay.
6261 Anticipation of special taxes.
6261.1 Notice—hearing—appeal.
6261.2 Appeal inapplicable following election.
6262 How denominated.
6263 Assessments and levies pledged.
6264 Limitation of action.
6265 Maturity of municipal bonds.

6252 Funding. Cities and towns may settle, adjust, renew, or extend the legal indebtedness they may have, or any part thereof, in the sum of one thousand dollars or upwards, whether evidenced by bonds, warrants, or judgments, and may fund or refund the same and issue coupon bonds therefor; but no bonds shall be issued under this section for any other purpose than is above authorized. [C97,§905; C24, 27, 31, 35, §6252.]

Payment and maturity, ch 63.1

6253 Form. Such bonds shall be issued in sums of not less than one hundred dollars nor more than one thousand dollars each, running not more than twenty years, bearing interest not exceeding five percent per annum payable annually or semiannually, and shall be substantially in the following form, but subject to changes that will conform them to the resolution of the council, to wit:

The city (or town) of ..... in the state of Iowa, for value received promises to pay to bearer ..... dollars, lawful money of the United States of America, on ....., with interest on said sum from the date hereof until paid at the rate of.....percent per annum, payable ..... annually on the first day of ..... and ..... in each year, on presentation and surrender of the interest coupons hereto attached; both principal and interest payable at .....

This bond is issued by the city (or town) of ....., pursuant to the provisions of section ....., chapter ....., of the code of Iowa, and in conformity to a resolution of the council of said city (or town) duly passed, on the ..... day of ....., ... And it is hereby represented and certified that all things requisite according to the laws and constitution of the state of Iowa to be done precedent to the lawful issue of this bond have been performed as required by law, and that the total indebtedness of said city, including this bond, does not exceed the constitutional or statutory limitations.

In testimony whereof said city (or town) by its council has caused this bond to be signed by its mayor and attested by its auditor (or clerk), with the seal of said city (or town) attached, this ..... day of .....

.....
Mayor of the city (or town)
of .....

Attest:

.....
Clerk of the city (or town) of.....

(Form of Coupon.)

The treasurer of the city (or town) of ....., Iowa, will pay to bearer ..... dollars, on ....., at ....., for ..... annual interest on its ..... bond, dated ..... No.....

Attest:

.....
Clerk of the city (or town) of .....

[C97,§906; C24, 27, 31, 35,§6253.]

Referred to in §6825

6254 Signing. Said bonds shall be numbered consecutively, signed by the mayor, and attested by the auditor or clerk as the case may be, with the seal of the city (or town) affixed. The interest coupons attached thereto shall be attested by the signature of the clerk, or a facsimile thereof. [C97,§907; C24, 27, 31, 35,§6254.]

6255 Resolution required. All bonds issued under the provisions of this chapter shall be issued pursuant to, and in conformity with, a resolution adopted by the council of said city or town, which shall specify the amount authorized to be issued, the purpose for which issued, the rate of interest they shall bear, and whether payable annually or semiannually, the place where the principal and interest shall be payable, and when to become due, and such other provisions, not inconsistent with law, in reference thereto, as the council shall think proper, which resolution shall be entered of record upon the minutes of the proceedings of the council, and when so entered shall constitute a contract between the city or town and the purchasers or holders of said bonds. [C97,§908; C24, 27, 31, 35,§6255.]

6256 Registration. When bonds have been executed as aforesaid, they shall be delivered to the treasurer of the city or town, and his receipt taken therefor, who shall register the same in a book provided for that purpose, which shall show the number of each bond, its date, date of sale, amount, date of maturity, and the name and address of the purchaser, and, if exchanged, what evidences of debt were received therefor, which record shall at all times be open to the inspection of the citizens of said city or town. The treasurer shall thereupon certify upon the back of each bond as follows: "This bond duly

and properly registered in my office this .....
day of .....

.....

Treasurer of the city (or town) of....."
and shall stand charged on his official bond with all bonds so delivered to him, and the proceeds thereof. [C97,§909; C24, 27, 31, 35,§6256.]

C97,§909, editorially divided

6257 Monthly reports. The treasurer shall report under oath to the council of said city or town, at each first regular session thereof in each month, a statement of all such bonds sold or exchanged by him since his last report, and the date of such sale or exchange, and, when exchanged, a description of the indebtedness for which exchanged. [C97,§909; C24, 27, 31, 35, §6257.]

6258 Sale or exchange. The council may provide by resolution for the exchange of such bonds or any part thereof, for legal indebtedness of the city or town evidenced by bonds, warrants, or judgments which were outstanding when the resolution authorizing such bonds was passed; or said council may by resolution order said bonds sold as provided by law for the sale of public bonds. [C97,§910; C24, 27, 31, 35,§6258.]

6259 Delivery — cancellation — sale — proceeds. After registration, the treasurer shall deliver bonds to the purchasers thereof upon payment therefor. When bonds are exchanged for indebtedness, he shall at once cancel the warrants or bonds or secure proper credits therefor on judgments and the cancellation of such judgments as are paid. Bonds shall not be exchanged for less than par plus accrued interest. The proceeds of the sale of such bonds shall be used only for the purpose for which such bonds were issued. [C97, §910; C24, 27, 31, 35,§6259.]

6260 Taxes to pay. Cities and towns issuing bonds under this chapter shall levy taxes for the payment of the principal and interest thereof, in accordance with the provisions of the chapter relating to taxation. [C97,§911; C24, 27, 31, 35, §6260.]

Bond fund, §6211, subsection 11; ch 63.1
Taxation, ch 317

6261 Anticipation of special taxes. Any city or town may anticipate the collection of taxes authorized to be levied for the cemetery purchase fund, dump grounds purchasing fund, grading fund, city improvement fund, district sewer fund, city sewer fund, the fund for equipping fire departments, the fund for the construction of sewer outlet and purifying plants, the fund for paving roadways, and the fund for flood protection, and cities of the first class may so anticipate the taxes used for the fund for the construction of main sewers and for the construction and maintenance of interception sewers and disposal works and for that purpose may issue certificates or bonds with interest coupons.

If bonds are issued said bonds shall be payable in not more than twenty annual installments and at interest not exceeding five percent per annum, and shall be payable at such place and be in such form as the council shall designate by resolution or ordinance. [C97,§912; S13,§§716-d, 840-e, 849-h, 912-a; SS15,§§840-g,-p; C24, 27, 31, 35,§6261.]

Referred to in §§6578.1, 6610

6261.1 Notice—hearing—appeal.

1. No certificates or bonds for such improvements shall be issued unless such city or town shall have given fifteen days notice by publication of a fixed time for the hearing upon such proposed issuing of bonds or certificates, at which hearing the taxpayers of the city or town and any other interested persons for or against such proposal may be given an opportunity to be heard.

2. Within fifteen days after the decision of the city or town council, or board of commissioners, if such decision is in favor of the issuance of such bonds or certificates as provided for in this chapter, then an appeal may be taken by a number of persons in such municipality equal to one-fourth of one percent of those voting for the office of governor at the last general election in such municipality, but in no event less than ten persons who are affected by the proposed issuance of such bonds or certificates; such appeal to be perfected by filing the same with the clerk of the city, town, or municipal government which is proposing to authorize the issuance of such bonds or certificates, on a written protest setting forth their objections to the issuance of such bonds or certificates and the grounds for such objections; provided that at least three of such persons shall have appeared at such hearing and made objection, either general or specific, to the issuance of such bonds or certificates.

Upon the filing of any such protest the said clerk shall immediately prepare a true and complete copy of said written protest, together with a full statement describing the proposed improvement, and bonds or certificates to be issued in anticipation of taxes therefor, and to which objections are made, and shall transmit the same forthwith to the state appeal board; and all of the provisions applicable thereto, as contained in sections 390.1 to 390.7, inclusive, shall thereafter govern the proceedings with reference to said appeal. Such appeal shall be heard and determined within twenty days from the receipt by the state appeal board of such protest, and at least three of the number of persons signing such protest and the proper officers of the municipality shall be given five days notice of the time and place set for the hearing on said appeal; that the state appeal board is and shall be required to render its decision upon said protest within ten days after such hearing is held. [48GA, ch 165,§1.]

Referred to in §§6261.2, 6578.1

6261.2 Appeal inapplicable following election. Subsection 2 of section 6261.1 shall not be applicable if the question of the proposed improvement and the issuance of such bonds and certificates, has been approved by a vote of the people at an election called and held in the manner provided by chapter 319, so far as

applicable, and which election has been carried by such percentage of the total vote cast at said election as provided for in section 1171.18. [48GA, ch 165,§2.]

Referred to in §6578.1

6262 How denominated. Such certificates and bonds shall be respectively denominated city grading certificates or bonds, city improvement certificates or bonds, district sewer certificates or bonds of the particular sewer district, city sewer certificates or bonds of said city, fire department equipment certificates or bonds, sewer outlet and purifying plant certificates or bonds, paved roadway certificates or bonds, flood protection certificates or bonds, and main sewer certificates or bonds, and all the provisions of this chapter shall apply to such certificates, bonds, and coupons, with such changes only as are necessary to adapt them thereto. [C97,§912; S13,§840-e; C24, 27, 31, 35,§6262.]

Referred to in §6578.1

6263 Assessments and levies pledged. Said certificates or bonds and interest thereon shall be secured by said assessments and levies, and shall be payable only out of the respective funds named, pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of said city to collect said several funds with interest thereon, and to hold the same separate and apart, in trust, for the payment of said certificates or bonds and interest, and to apply the proceeds of said funds pledged for that purpose to the payment of said certificates or bonds and interest. [C97,§912; S13,§§716-a,-e; SS15,§840-g; C24, 27, 31, 35,§6263.]

Referred to in §6578.1

6264 Limitation of action. No action shall be brought questioning the legality of any of the bonds authorized by this chapter, waterworks bonds, gasworks bonds, or electric light or power plant bonds, from and after three months from the time the same are ordered issued by the proper authority. [C97,§913; C24, 27, 31, 35, §6264.]

Referred to in §§6066.02, 6578.1
Similar provisions, §§6779, 6932, 7673, 7714.23

6265 Maturity of municipal bonds. Cities of the first class, including cities under commission form of government, when issuing bonds for the purchase of real estate for park and other municipal purposes, are hereby authorized to cause portions of said bonds to become due at different definite periods, but none of such bonds so issued shall be due and payable in more than fifty years from date. [C24, 27, 31, 35,§6265.]

See ch 63.1

CHAPTER 321

PLATS

Chapter applicable to special charter cities, §6780

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6266 Subdivisions or additions. Every original proprietor of any tract or parcel of land, who has subdivided, or shall hereafter subdivide the same into three or more parts, for the purpose of laying out a town or city, or addition thereto, or part thereof, or suburban lots, shall cause a plat of such subdivisions, with references to known or permanent monuments, to be made, giving the bearing and distance from some corner of a lot or block in said town or city to some corner of the congressional division of which said town, city, or addition is a part, which shall accurately describe all the subdivisions thereof, numbering the same by progressive numbers, giving their dimensions by length and breadth, and the breadth and courses

of all the streets and alleys established therein. [C73,§559; C97,§914; C24, 27, 31, 35,§6266.]

Referred to in §6267
C97,§914, editorially divided

6267 Covenant of warranty. The duty to file for record a plat as provided in section 6266 shall attach as a covenant of warranty, in all conveyances of any part or parcel of such subdivisions, by the original proprietors against any and all assessments, costs, and damages paid, lost, or incurred by any grantee or person claiming under him, in consequence of the omission on the part of said proprietor to file such plat. [C73,§559; C97,§914; C24, 27, 31, 35, §6267.]

6268 Conveyances according to plat. Description of lots or parcels of land in such subdivisions according to the number and designation thereof on said plat, in conveyances or for the purposes of taxation, shall be valid. [C73,§559; C97,§914; C24, 27, 31, 35,§6268.]

6269 Streets and blocks. The plat of any addition to any city or town or subdivision of any part or parcel of lands lying within or adjacent to any city or town shall be divided by streets into blocks, and such blocks and streets shall conform as nearly as practicable to the size of blocks and the widths of streets therein, and shall be extensions of the existing system of streets. [C73,§559; C97,§916; S13,§916; C24, 27, 31, 35,§6269.]

Referred to in §6272
40ExGA, ch 78, §1, editorially divided

6270 Grade of streets. The council may require the owner of the land to bring all streets to a grade acceptable to the council before the plat is approved. [C24, 27, 31, 35,§6270.]

Referred to in §6272

6271 Alleys. It may require alleys to be platted separating abutting lots and if so platted, the alleys shall conform as nearly as practicable to the width of alleys in the city or town and shall be extensions of the existing system of alleys. [S13,§916; C24, 27, 31, 35, §6271.]

Referred to in §6272

6272 Filing—approval. All such plats, except subdivisions of less than one block, shall be filed with the clerk of the city or town and when so filed the council within a reasonable time shall consider the same, and shall, if it is found to conform to the provisions of sections 6269, 6270, and 6271, by resolution approve the plat and direct the mayor and clerk to certify the resolution which shall be affixed to the plat. [C97,§916; S13,§916; C24, 27, 31, 35,§6272.]

Referred to in §6278.1

6273 Acknowledgment. Each plat shall be accompanied by a correct description of the land or parcel of land subdivided and by a statement to the effect that the subdivision as it appears on the plat is with the free consent and in accordance with the desire of the proprietor, signed and acknowledged by such proprietor and his spouse, if any, before some officer authorized to take the acknowledgment of deeds. [C73,§560; C97,§915; S13,§915; C24, 27, 31, 35, §6273.]

6274 Abstract of title — opinion — certificates. Every plat shall have attached thereto a complete abstract of title accompanied by an opinion from an attorney at law showing that the fee title is in the proprietor and that the land platted is free from incumbrance, or is free from incumbrance other than that secured by the bond provided for in section 6276, and a certified statement from the treasurer of the county in which the land lies that it is free from taxes, and from the clerk of the district court that it is free from all judgments, attachments, mechanics' or other liens as appears by the record in his office, and from the recorder of the county that the title in fee is in such proprietor and that it is free from incumbrance or free from incumbrance other than that secured by the bond provided for in section 6276, as shown by the records of his office. [C97,§915; S13,§915; C24, 27, 31, 35,§6274.]

6275 Incumbrances — payment — creditor's refusal. If the land so platted is incumbered with a debt certain in amount and which the creditor will not accept with accrued interest to the date of proffered payment if it draws interest, or with a rebate of six percent per annum if it draws no interest, or if the creditor cannot be found, then such proprietor, and if a corporation, its proper officer or agent, may make an affidavit stating either that the proprietor offered to pay the creditor the full amount of his debt, or the debt with the rebate, as the case may be, and that he would not accept the same, or that he cannot be found. [C97,§915; S13, §915; C24, 27, 31, 35,§6275.]

6276 Incumbrance—bond. The proprietor shall then execute and file with the recorder a bond in double the amount of the incumbrance, which bond shall be approved by the recorder and clerk of the district court. The bond shall run to the county and be for the benefit of purchasers of land subdivided by the plat and shall be conditioned for the payment of the incumbrance, and the cancellation thereof, of record as soon as practicable after the same becomes due and to hold all purchasers and those claiming under them forever harmless from such incumbrance. [C97,§915; S13,§915; C24, 27, 31, 35,§6276.]

Referred to in §6274

6277 Record—filing. The signed and acknowledged plat, the abstract, and the attorney's opinion, together with the certificates of the clerk, recorder, and treasurer, and the affidavit and bond, if any, together with the certificate of approval of the council, shall be entered of record in the proper record books in the office of the county recorder. When so entered, the plat only shall be entered of record in the office of the county auditor and shall be of no validity until so filed, in both offices. [C51,§§635, 636; R60,

§§1019, 1020; C73,§560; C97,§§915, 917; S13, §915; C24, 27, 31, 35,§6277.]

40ExGA, ch 78, §7, editorially divided

6278 Effect of record. Such acknowledgment and recording shall be equivalent to a deed in fee simple of such portion of the premises platted as is set apart for streets or other public use, or as is dedicated to charitable, religious, or educational purposes. [C51,§637; R60,§1021; C73,§561; C97,§917; C24, 27, 31, 35,§6278.]

6278.1 Approval condition to filing and recording. No county auditor or recorder shall hereafter file or record, nor permit to be filed or recorded, any plat purporting to lay out or subdivide any tract of land into lots and blocks and to dedicate any part thereof for streets and other public use within any city having a population by the latest state census of twenty-five thousand or over, or, except as hereinafter provided, within one mile of the limits of such city, unless such plat has been first filed with and approved by the council of such city as provided in section 6272, and by the city plan commission as required by law in cities where such commission exists.

If in any case the limits of any such city are at any place less than two miles distant from the limits of any other city, then at such place jurisdiction to approve plats shall extend to a line equidistant between the limits of said cities.

For the information of the city council and the city plan commission, where such exists, and to facilitate action on proposed plats, the city council shall have authority by ordinance to prescribe reasonable rules and regulations governing the form of said plats and require such data and information to accompany same on presentation for approval as may be deemed necessary by the said council.

Said plats shall be examined by such city council, and city plan commission where such exists, with a view to ascertaining whether the same conform to the statutes relating to plats within the city and within the limits prescribed by this section, and whether streets, alleys, boulevards, parks and public places shall conform to the general plat of the city and conduce to an orderly development thereof, and not conflict or interfere with rights-of-way or extensions of streets or alleys already established, or otherwise interfere with the carrying out of the comprehensive city plan, in case such has been adopted by such city. If such plats shall conform to the statutes of the state and ordinances of such city, and if they shall fall within the general plan for such city and the extensions thereof, regard being had for public streets, alleys, parks, sewer connections, water service, and service of other utilities, then it shall be the duty of said council and commission to indorse their approval upon the plat submitted to it; provided that the city council may as to plats of land lying within the corporate limits require as a condition of approval of such plats that the owner of the land bring all streets to a grade acceptable to the council, and comply with such other reasonable requirements in regard to installation of public utilities, or other improvements, as the council may deem requisite for the protection of the public interest.

The approval of the city council shall be deemed an acceptance of the proposed dedication for public use, and owners and purchasers shall be deemed to have notice of the public plans, maps and reports of the council and city plan commission, if any, having charge of the design, construction and maintenance of the city streets affecting such property within the jurisdiction of such cities.

If any such plat of land is tendered for recording in the office of the county recorder or county auditor of any county in which any city of the above class may be situated, it shall be the duty of such county recorder and auditor to examine such plat, to ascertain whether the indorsement of approval by the city council, as herein provided for, shall appear thereon. If it shall, and the plat otherwise conforms to the provisions of law, said officers shall accept same for recording. If such indorsement does not appear thereon said officers shall refuse and decline to accept such plat, and any filing thereof shall be void. Any failure to observe the provisions of this section on the part of any county recorder or county auditor shall constitute a misdemeanor in office. [C27, 31, 35,§6278-b1.]

Referred to in §6278.3

6278.2 Disapproval—appeal. In case, on application for such approval of any plat, the city council shall fail to either approve or reject the same within sixty days from date of application, the person proposing said plat shall have the right to file the same with the county recorder and auditor. If said plat is disapproved by the council such disapproval shall point out wherein said proposed plat is objectionable. From the action of the council refusing to approve any such plat, the applicant shall have the right to appeal to the district court within twenty days after such rejection by filing written notice of appeal with the city clerk, such appeal to be docketed in the district court at the next term following service of such notice and heard de novo as an equity proceeding. [C27, 31, 35,§6278-b2.]

Referred to in §6278.3

6278.3 Void plat—action to annul. In case any plat shall be filed and recorded in violation of sections 6278.1 and 6278.2, the same shall be void, and the mayor of any city who shall be authorized so to do by resolution of the council having authority to approve such plat, may institute a suit in equity in the district court in which suit the court may order such plat expunged from the records. [C27, 31, 35,§6278-b3.]

6279 Change of name of street. Cities and towns shall have authority to change by ordinance the name of a platted street. The mayor and city or town clerk shall certify and file the ordinance, after its passage, with the county recorder and county auditor in the county where the said city or town is located, which shall be entered of record in the recorder's office and a reference made on the margin of the original

plat referring to the record of such change of name. [S13,§917-a; C24, 27, 31, 35,§6279.]

6280 Vacation by proprietor before sale. Any such plat may be vacated by the proprietor thereof, at any time before the sale of any lots, by a written instrument declaring the same to be vacated, executed, acknowledged, and recorded in the same office with the plat to be vacated, and the execution and recording of such writing shall operate to annul the plat so vacated, and to divest all public rights in the streets, alleys, and public grounds described therein. In cases where any lots have been sold, the plat may be vacated as in this chapter provided by all the owners of lots joining in the execution of the writing aforesaid. [C73,§563; C97,§918; C24, 27, 31, 35,§6280.]

6281 Partial vacation by proprietor. Any part of a plat may be thus vacated, provided it does not abridge or destroy any right or privilege of any proprietor in said plat, but nothing contained in this section shall authorize the closing or obstruction of highways. [C73,§564; C97,§919; C24, 27, 31, 35,§6281.]

C97,§919, editorially divided

6282 Streets, alleys, and public grounds. When any part of a plat is vacated, the proprietors of the lots may inclose the streets, alleys, and public ground adjoining them in equal proportion, except as provided in sections 6286 and 6287. [C73,§565; C97,§919; C24, 27, 31, 35, §6282.]

6283 Correction of plat. The recorder in whose office the plats are recorded shall write across that part of the plat so vacated the word "vacated", and make a reference on the same to the volume and page in which the instrument is recorded. [C73,§566; C97,§919; C24, 27, 31, 35, §6283.]

6284 Vacation by lot owners — petition — notice. Whenever the owners of any tract of land which has been platted into town lots, and the plat of which has been recorded, shall desire to vacate the plat or a part thereof, a petition, signed by all the owners of it or the part to be vacated, shall be filed in the office of the clerk of the district court of the county in which the land is situated, returnable at the ensuing term, and notice thereof given at least four weeks, by posting notices in three conspicuous places in the town where the vacation is prayed, and one upon the door of the courthouse of the county. [C97,§920; C24, 27, 31, 35,§6284.]

C97,§920, editorially divided

6285 Time of hearing—notice. At the term of court next following the filing of the petition and notice, the court shall fix a time for hearing the petition, and notice of the day so fixed shall be given by the clerk in some newspaper published in the county at least one week before the day appointed for the hearing. [C97,§920; C24, 27, 31, 35,§6285.]

6286 Decree. At the hearing of the petition, if it shall appear that all the owners of lots in the plat or part thereof to be vacated desire the vacation, and there is no valid objection thereto, a decree shall be entered vacating such portion of the plat, and the streets, alleys, and avenues therein, and for all purposes of assessment such portion of the town shall be as if it had never been platted into lots; but if any street as laid out on the plat shall be needed for public use, it shall be excepted from the order of vacation and shall remain a public highway. [C97,§920; C24, 27, 31, 35,§6286.]

Referred to in §6282

6287 Public lands. Vacations made under this chapter shall not be construed to affect any lands lying within any city or town which have been dedicated or deeded to the public for parks or other public purposes. [C97,§920; C24, 27, 31, 35,§6287.]

Referred to in §6282

6288 Replatting. The owner of any lots in a plat vacated may cause the same and a proportionate part of the adjacent streets and public grounds to be replatted and numbered by the county surveyor in the same manner as is required for platting in the first instance, and when such plat is acknowledged by such owner, and is recorded in the recorder's office of the county, such lots may be conveyed and assessed by the numbers given them on such plat. [C73, §567; C97,§921; C24, 27, 31, 35,§6288.]

6289 Plat by auditor. Whenever the original proprietor of any subdivision of land has sold or conveyed any part thereof, or invested the public with any rights therein, and has failed and neglected to execute and file for record a plat as provided in this chapter, the county auditor shall by mail or otherwise notify some or all of such owners, and demand its execution. If such owners, whether so notified or not, fail and neglect for thirty days after the issuance of such notice to execute and file said plat for record, the auditor shall cause one to be made, making any survey necessary therefor. [C73, §568; C97,§922; S13,§922; C24, 27, 31, 35,§6289.]

Referred to in §6293

6290 Execution and filing—effect. Said plat shall be signed and acknowledged by the auditor, who shall certify that he executed it by reason of the failure of the owners named to do so, and file it for record in his office and in the office of the county recorder, and when so filed it shall have the same effect as if executed, acknowledged, and recorded by the owners. [C73,§568; C97,§922; S13,§922; C24, 27, 31, 35,§6290.]

Referred to in §6293

6291 Costs and expenses. A correct statement of the costs and expenses of such plat, survey, and record, verified by oath, shall be by the auditor laid before the board of supervisors, which shall allow the same. [C73,§568; C97,§922; S13,§922; C24, 27, 31, 35,§6291.]

Referred to in §6293

6292 Collection or assessment of costs. The auditor shall at the same time assess the amount

pro rata upon the several subdivisions of said tract, lot, or parcel so subdivided, and it shall be collected in the same manner as general taxes, and shall go to the general county fund; or said board may direct suit to be brought in the name of the county to recover from the original proprietor such cost and expense. [C73, §568; C97,§922; S13,§922; C24, 27, 31, 35,§6292.]

Referred to in §6293

6293 Platting for assessment and taxation. Whenever a congressional subdivision of land of one hundred sixty acres or less, or any lot or subdivision, is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, he shall cause to be made and recorded in his office and the office of the county recorder a plat of such tract or lot with its several subdivisions, including and replatting in such plat such other plats or parts thereof included within the same lot or congressional subdivision of land as may seem to him to be required in accordance with the provisions of this chapter, proceeding as directed in sections 6289 to 6292, inclusive, and all of their provisions shall govern. [C73,§569; C97,§923; S13,§923; C24, 27, 31, 35,§6293.]

Referred to in §6298

6294 Appeal. The owners of said land shall have the same right of appeal to the board of supervisors as is provided in sections 6296 and 6297 in the case of warranty deeds, and under the same conditions as to notice and hearing; provided, however, that parties aggrieved shall have sixty days within which to appeal. [C24, 27, 31, 35,§6294.]

6295 Insufficiency of description—plat ordered. Every conveyance of land in this state shall be deemed to be a warranty that the description therein contained is sufficiently definite and accurate to enable the auditor to enter the same on the plat book required to be kept; and when there is presented for entry on the transfer book any conveyance in which the description is not sufficiently definite and accurate, the auditor shall note such fact on the deed, with that of the entry for transfer, and shall notify the person presenting it that the land therein is not sufficiently described, and must be platted within thirty days thereafter. [C73,§570; C97,§924; S13,§924; C24, 27, 31, 35,§6295.]

S13,§924, editorially divided

6296 Appeal. Any person aggrieved by the opinion of the auditor may within said thirty days appeal therefrom to the board of supervisors, by giving notice thereof in writing, and thereupon no further proceeding shall be taken by the auditor. [C73,§570; C97,§924; S13,§924; C24, 27, 31, 35,§6296.]

Referred to in §6294

6297 Hearing. At its next session the board of supervisors shall determine said matter and direct whether the plat shall be executed and filed, and within what time. [C73,§570; C97, §924; S13,§924; C24, 27, 31, 35,§6297.]

Referred to in §6294

6298 Auditor to prepare plat. If the grantor in such conveyance shall neglect for thirty days thereafter to file for record a plat thereof, and of the appropriate congressional subdivision in which the same is found, duly executed and acknowledged as required by the auditor, or, in case of appeal, as directed by the board of supervisors, then the auditor shall proceed as is provided in this chapter, and cause such plat to be made and recorded in his office and the office of the county recorder, and thereupon the same result shall follow as provided in section 6293. [C73,§570; C97,§924; S13,§924; C24, 27, 31, 35, §6298.]

6299 Requirements. Such plat shall describe said tract and any other subdivisions of the smallest congressional subdivision of which the same is part, numbering them by progressive numbers, setting forth the courses and distances, the number of acres, and such other memoranda as is necessary; and descriptions of such lots or subdivisions according to the number and designation thereof on said plat shall be deemed sufficient for all purposes. [C73, §570; C97,§924; S13,§924; C24, 27, 31, 35, §6299.]

6300 Resurvey of town plats. In all cases where the original plat of any city, town, or village, or any addition thereto, has been or may be lost or destroyed after the sale and conveyance of any subdivision, block or lot thereof by the original proprietor and before the same shall have been recorded, or the property so platted has been indefinitely located or the plat is materially defective, any three persons owning real property within the limits of such plat may have the same resurveyed and replatted, and such plat recorded as hereinafter directed. [C97,§925; C24, 27, 31, 35,§6300.]

40ExGA, ch 78, §12, editorially divided

6301 Conditions—jurisdiction. In no case shall such plat or replat be made and recorded as hereinafter directed, without the consent in writing, indorsed thereon, of the original proprietor, if he be alive and known, nor before an order has been entered by the district court upon application of the parties desiring a replat to be made, that such replat is necessary. The court shall have jurisdiction of the matter upon proof of publication of notice of the application for at least two weeks in some newspaper of general circulation in the city or town. [C97,§925; C24, 27, 31, 35,§6301.]

6302 How resurvey made. The county surveyor of any county in which is situated any city, town, village, or addition thereto, as contemplated in this chapter, may, and upon payment of his legal fees by any person desiring the same must, make a resurvey of such city, town, village, or addition, or any portion, and plat thereof, which plat shall conform as near

as may be with the original lines of the parcel or tract so resurveyed, and be made in all respects in accordance with the provisions of this chapter. [C97,§926; S13,§926; C24, 27, 31, 35, §6302.]

S13,§926, editorially divided

6303 Power of surveyor. In making a resurvey and plat, the surveyor may summon witnesses, administer oaths, and take and hear evidence touching the original plat lines and subdivisions, whether the original proprietor is dead, and any other matter which may assist in arriving at and establishing the true lines and boundaries. [C97,§926; S13,§926; C24, 27, 31, 35,§6303.]

6304 Notice of resurvey. No resurvey shall be made except upon notice to be given by the surveyor by a publication of the contemplated resurvey once each week for two consecutive weeks in some newspaper printed in the county. [C97,§926; S13,§926; C24, 27, 31, 35,§6304.]

6305 Plat certified and filed—effect. When the surveyor has completed the plat, he shall attach his certificate thereto, to the effect that it is a just, true, and accurate plat of said city, town, village, or addition so surveyed by him; which shall be filed for record in the office of the recorder of the proper county, and from the date of such filing it shall be treated in all courts of this state as though the same had been made by the original proprietor thereof. [C97,§927; C24, 27, 31, 35,§6305.]

6306 Contest—decree. Any person may at any time within six months from the date of its filing for record, commence an action in equity against the persons employing the surveyor, setting up his cause of complaint and asking that such record be canceled. If it appears on the trial that the city, town, village, or addition was originally laid out and platted; that the original proprietor had sold any or all of the lots thereof; that he intended to dedicate to the public the streets, alleys, or public squares therein; that the plat thereof has never been recorded, but is lost; that the plat was indefinitely located or materially defective; that the proprietor is dead or his place of residence unknown; and that the resurvey and plat for record is a substantially accurate survey and plat of the original plat of such city, town, village, or addition, then the action shall be dismissed at the cost of the complainants; otherwise the court shall set aside said plat and cancel the same of record at the cost of the defendant. [C97,§925; C24, 27, 31, 35,§6306.]

6307 Sale or lease without plat. Any person who shall dispose of or offer for sale or lease any lots in any town, or addition to any town or city, until the plat thereof has been acknowledged and recorded as provided in this chapter, shall forfeit and pay fifty dollars for each lot and part of lot sold or disposed of, leased, or offered for sale. [R60,§1027; C73,§572; C97, §930; C24, 27, 31, 35,§6307.]

6308 Public squares transferred for school purposes. The people of any town located wholly within an independent school district, wherein is situated a public square or plat of ground deeded or dedicated to the town or public, may transfer or rededicate to said school district such square or plat for the purposes of a public school lot, to be used for the erection thereon of a public schoolhouse, or for playgrounds in connection with such schoolhouse. [C97,§931; C24, 27, 31, 35,§6308.]

Referred to in §6309

6309 Manner of transfer. When a plat or lot of the character described in section 6308 is located in such town, and one-half of the resident voters thereof, according to the last census, shall petition the mayor and council, asking them to submit to the voters of the town, at a general or special election, the question whether or not such public plat or lot shall be transferred to such independent district and dedicated and used for school purposes, they shall submit the question to the voters of the town, in accordance with the prayer of said petition, after giving ten days notice in writing or printing thereof, in which the proposition submitted shall be clearly set forth and signed by the mayor, three of which notices shall be posted in public and conspicuous places in the town, and one published in the last two issues preceding such election of a weekly newspaper published therein, or, if there be none, then in the weekly newspaper published elsewhere in the county, having the largest circulation in said town. The notice shall also state the manner of voting, which shall be by ballot. The ballot shall contain the words: "Shall the proposition to transfer lot (or block, or square, as the case may be, describing it), for the purposes of a public schoolhouse lot, be adopted?" Such election shall be conducted as ordinary town elections are, under the supervision of the town authorities, who shall canvass the vote as provided in other cases. If it shall appear that two-thirds of the votes cast at such election are in favor thereof, then such transfer shall be complete, and the lot, block, or square may be appropriated and used for the purposes indicated by said vote, and shall be no longer held for any other purpose.

In the event that any such town shall have discontinued its organization or shall have failed to exercise its municipal powers and elect officers for a period of more than ten years, then the petition hereinbefore provided for may be presented to the board of directors within such school corporation, whereupon, if signed by one-third of the resident electors thereof, it shall be the duty of said board within ten days after the filing of the same to call an election in said district for which they shall give the same notices as required in sections 4195* and 4197*, at which election the proposition submitted shall be in the same form as in the instance of a submission of such proposition in the case of a town election, and such election shall be held as provided for the holding of other school elections. If it shall appear that

*Repealed. See ch 211.1

a majority of the votes cast at such election are in favor of such proposition, then a transfer of such public square or plat of ground shall be complete and such lot, plat, block, or square may be appropriated and used for the purposes indicated by said vote and shall be no longer held for any other purpose. [C97,§932; SS15, §932; C24, 27, 31, 35,§6309.]

CHAPTER 322

DISABLED AND RETIRED FIREMEN AND POLICEMEN

Referred to in §5766.1

Chapter applicable to cities under city manager plan, §6684; to special charter cities, §6781

6310 Pension funds.
6311 Boards of trustees—officers.
6312 Investment of surplus.
6313 Gifts, devises, or bequests.
6314 Membership fee—assessments.
6315 Who entitled to pension—conditions.
6315.1 Soldiers and sailors.
6316 Disability—how contracted.
6317 Retired members assigned for light duty.
6318 Pensions—widow—children—dependents.
6319 Exemption.
6320 Volunteer or call firemen.
6321 Re-examination of retired members.
6322 Decision of board.
6323 Guarantee of pension benefits.
6324 Moneys drawn—how paid—report.
6325 City marshal.
6326 Hospital expense.

HOURS OF SERVICE

6326.01 Hours on duty limited.
6326.02 Exceptions.

6310 Pension funds. Any city or town having an organized fire department may, and all cities having an organized police department or a paid fire department shall, levy annually a tax not to exceed one-eighth mill for each such department, for the purpose of creating firemen's and policemen's pension funds.

Provided that cities having a population of more than seventeen thousand may annually levy a tax of not more than one-half mill for each such department for such purpose. Provided, further, that cities, in which a police and/or fire retirement system based upon actuarial tables shall be established by law, shall levy for the police and/or fire pension funds a tax sufficient in amount to meet all necessary obligations and expenditures; and said obligations and expenditures shall be direct liabilities of said cities.

Whenever there is a sufficient balance in both of said funds to meet any proper or legitimate charges that may be made against the same, such city shall not be required to levy a tax for this purpose.

All moneys derived from each tax so levied, and all moneys received as membership fees and dues, and all moneys received from grants, donations, and devises for the benefit of each fund shall constitute separate funds, to be known and designated as a policemen's pension fund and a firemen's pension fund. [S13,§§932-a,-j; C24, 27, 31, 35,§6310.]

6311 Boards of trustees—officers. The chief officer of each department, with the city treasurer and the city solicitor or attorney of such cities or towns, shall be ex officio members of and shall constitute separate boards of trustees for the management of each fund. The chief officer of the department shall be president and the city treasurer treasurer of such boards, and the faithful performance of the duties of the treasurer shall be secured by his official bond as city treasurer. Such trustees shall not receive any compensation for their services as members of said boards. Provided, however, that in any city where contributory fire and/or police retirement systems based upon actuarial tables shall be established by this act [45ExGA, ch 75] for the benefit of policemen and/or firemen appointed to the force after the establishment of same, the board of trustees of each such system, respectively, shall also constitute the board of trustees for the management of each fund under this section as a separate and distinct fund in itself. [S13, §§932-a,-b,-j,-k; C24, 27, 31, 35,§6311.]

6312 Investment of surplus. The boards shall have power to invest any surplus left in such funds, respectively, at the end of the fiscal year, but no part of the funds realized from any tax levy shall be used for any purpose other than the payment of pensions. Investments shall be limited to interest-bearing bonds of the United States, of the state of Iowa, of any county, township, or municipal corporation of the state of Iowa. All such securities shall be deposited with the treasurer of the boards of trustees for safekeeping. [S13,§932-l; SS15, §932-c; C24, 27, 31, 35,§6312.]

6313 Gifts, devises, or bequests. Each board may take by gift, grant, devise, or bequest, any money or property, real or personal, or other thing of value for the benefit of said funds. All rewards in moneys, fees, gifts, or emoluments of every kind or nature that may be paid or given to any police or fire department or to any member thereof, except when allowed to be retained or given to endow a medal or other permanent or competitive reward on account of extraordinary services rendered by said departments or any member thereof, and all fines and penalties imposed upon members, shall be paid into the said pension fund and become a part thereof. [S13, §§932-d,-m; C24, 27, 31, 35,§6313.]

6314 Membership fee—assessments. Every member of said departments shall be required to pay to the treasurer of said funds a membership fee to be fixed by the board of trustees,

not exceeding five dollars, and shall also be assessed and required to pay annually an amount equal to one percent per annum upon the amount of the annual salary paid to him, which assessment shall be deducted and retained in equal monthly installments out of such salary. [S13,§§932-d,-m; C24, 27, 31, 35, §6314.]

6315 Who entitled to pension—conditions. Any member of said departments who shall have served twenty-two years or more in such department, and shall have reached the age of fifty years; or who shall while a member of such department become mentally or physically permanently disabled from discharging his duties, shall be entitled to be retired, and upon retirement shall be paid out of the pension fund of such department a monthly pension equal to one-half the amount of salary received by him monthly at the date he actually retires from said department. If any member shall have served twenty-two years in said department, but shall not have reached the age of fifty years, he shall be entitled to retirement, but no pension shall be paid while he lives until he reaches the age of fifty years. [S13,§§932-e,-n; C24, 27, 31, 35,§6315.]

6315.1 Soldiers and sailors. Any member of the fire or police department, who resigned therefrom to serve in the army, navy or marine reserve, or marine corps, of the United States, or as a member of the United States army and navy reserve, the Spanish-American war, or in the world war 1917-1918, and has returned with an honorable discharge from such service, to the fire or police department, shall have the period of such service included as part of his period of service in the department. [C27, 31, 35,§6315-b1.]

6316 Disability—how contracted. No member who has not served five years or more in said department shall be entitled to be retired and paid a pension under the provisions of this chapter, unless such disability was contracted while engaged in the performance of his duties, or by reason of following such occupation. The question of disability shall be determined by the trustees upon the concurring report of at least two out of three physicians designated by the board of trustees to make a complete physical examination of the member. After any member shall become entitled to be retired, such right shall not be lost or forfeited by discharge or for any other reason except conviction for felony. [S13,§§932-e,-n; C24, 27, 31, 35, §6316.]

6317 Retired members assigned for light duty. The chief of the police department and the chief of the fire department of such city may assign any member of such departments, respectively, retired or drawing pensions under the provisions of this chapter, to the performance of light duties in such department. [S13, §§932-e,-n; C24, 27, 31, 35,§6317.]

6318 Pensions—widow—children—dependents. Upon the death of any acting or retired member of such departments, leaving a widow or minor children, or dependent father or mother surviving him, there shall be paid out of said fund as follows:

1. To the surviving widow, so long as she remains unmarried and of good moral character, thirty dollars per month.
2. If there be no surviving widow, or upon the death or remarriage of such widow, then to his dependent father and mother, if both survive, or to either dependent parent, if one survives, thirty dollars per month.
3. To the guardian of each surviving child under sixteen years of age, eight dollars per month.

The aggregate of all such payments shall not exceed one-half of the amount of the salary of such member at the time of his death or retirement. Provided, however, that the benefits provided by this section shall be subject to the following definitions: The term "widow" shall mean only such surviving spouse of a marriage contracted prior to retirement of a deceased member from active service, or of a marriage of a retired member contracted prior to the date this act [45ExGA, ch 75] takes effect. The terms "child" and "children" shall mean only the surviving issue of a deceased active or retired member, or the child or children legally adopted by a deceased member prior to his retirement from active service, or by a member now retired prior to the date this act takes effect.* [S13, §§932-e,-n; C24, 27, 31, 35,§6318.]

*Effective date March 2, 1934

6319 Exemption. All pensions paid under the provisions of this chapter shall be exempt from liability for debts of the person to or on account of whom the same is paid, and shall not be subject to seizure upon execution or other process. [S13,§§932-e,-n; C24, 27, 31, 35,§6319.]

6320 Volunteer or call firemen. The provisions of this chapter shall apply to volunteer or call members of a paid fire department, but the amount of pension to be paid to such members shall be determined by the board of trustees. [S13,§932-e; C24, 27, 31, 35,§6320.]

6321 Re-examination of retired members. The board of trustees of each department shall have power, at any time, to cause any member of such department retired by reason of physical or mental disability to be brought before it and again examined by three competent physicians appointed by the board of trustees to discover whether such disability yet continues and can be improved and whether such retired member should be continued on the pension roll, and shall have power to examine witnesses for the same purpose. The question of continued disability or ability to perform regular or light duty in the police or fire department shall be determined by the concurring report of at least two of the three examining physicians. Such member shall be entitled to reasonable notice that such examination will be made,

and to be present at the time of the taking of any testimony, shall have the right to examine the witnesses brought before the board and to introduce evidence in his own behalf. All witnesses shall be examined under oath, which may be administered by any member of such board. [S13,§§932-g,-p; C24, 27, 31, 35,§6321.]

6322 Decision of board. The decision of such board upon such matters shall be final and conclusive, in the absence of fraud, and no appeal shall be allowed therefrom. Such disabled member shall remain upon the pension roll unless and until reinstated in such department by reason of such examination. [S13,§§932-g,-p; C24, 27, 31, 35,§6322.]

6323 Guarantee of pension benefits. Each city, in which contributory fire and/or police retirement systems based upon actuarial tables, shall be established by this act [45ExGA, ch 75] for the benefit of firemen and/or policemen appointed to either force after the establishment of the same, is hereby bound and obligated to carry out, and authorized to enter into a written agreement evidencing the same, with each person, on retired or active service, who has heretofore contributed, or, at the time of the taking effect of this act, is contributing to the pension system now in effect in said city, in consideration of his past and/or his future payments to the pension fund of the system to which he is, or has been contributing, the present and prospective benefits provided by the pension system to which he is or has been contributing, guaranteeing that the present rate of payment by such person to said pension fund shall not be increased, also guaranteeing that the present and prospective rights and benefits provided for by said systems shall not be abridged nor lessened, and guaranteeing to all such persons so contributing all of the rights and benefits present and prospective provided in such pension system. The obligation of each such city for said rights and benefits shall be a direct charge on said city. [S13,§§932-h,-q; C24, 27, 31, 35,§6323.]

6324 Moneys drawn—how paid—report. All pensions paid and all moneys drawn from the pension fund under the provisions of this chapter shall be upon warrants signed by the appropriate board of trustees, which warrants shall designate the name of the person and the purpose for which payment is made. The treasurer's annual report shall show the receipts and expenditures of each fund for the preceding fiscal year, the money on hand, and how invested. [S13,§§932-i,-r; C24, 27, 31, 35,§6324.]

Fiscal year, §5676.1

6325 City marshal. Service by any member of the police department as city marshal shall not deprive him of any rights under this chapter. In any matter in which said city marshal shall be individually interested and which requires the action of the board of trustees of the policemen's pension fund, he shall not act as a member of said board, but the mayor of the city shall act with the other two trustees of the board with respect thereto. Upon the termination of his term as city marshal, he shall regain the rank he held in the police department at the time of his appointment as city marshal. [C24, 27, 31, 35,§6325.]

6326 Hospital expense. Cities and towns are hereby authorized and empowered to provide hospital, nursing, and medical attention for the members of the police and fire departments of such cities, when injured while in the performance of their duties as members of such department, and the cost of such hospital, nursing, and medical attention shall be paid out of the appropriation for the department to which such injured person belongs; provided that any amounts received by such injured person under the workmen's compensation law of the state, or from any other source for such specific purposes, shall be deducted from the amount paid by such city or town under the provisions of this section. [C24, 27, 31, 35,§6326.]

HOURS OF SERVICE

6326.01 Hours on duty limited. Firemen employed in the fire department of cities of first class including cities under special charter, shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of twelve hours per day, and no single period of time, or shift, shall exceed twenty-four hours in length, provided that in cases of serious emergencies such firemen may be required to remain on duty until such emergency has passed, when so ordered by the chief of the department or person acting in his place. [C27, 31, 35,§6326-a1; 47GA, ch 172,§1.]

Referred to in §6326.02

6326.02 Exceptions. The provisions of section 6326.01 shall not apply to the chief, or other persons when in command of a fire department, nor to firemen who are employed subject to call only. [C27, 31, 35,§6326-a2.]

CHAPTER 322.1

RETIREMENT SYSTEMS FOR POLICEMEN AND FIREMEN

Creating retirement systems for policemen and firemen appointed as such after the effective date of this chapter.

Effective date, March 2, 1934
Referred to in §5766.1. Applicable to special charter cities, §6781.1

6326.03 Definitions controlling.
6326.04 Name and date of establishment.
6326.05 Membership.
6326.06 Service creditable.
6326.07 Administration.
6326.08 Benefits.
6326.09 Management of funds.
6326.10 Method of financing.
6326.11 Contributions by the city.
6326.12 Guaranty.
6326.13 Exemption from tax and execution.
6326.14 Protection against fraud.

6326.03 Definitions controlling. The following words and phrases as used in this chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

1. "Retirement system" shall mean either the fire or the police retirement system of the said cities as defined in section 6326.04.

2. "Policeman" or "policemen" shall mean only the members of a police department who have passed a regular mental and physical civil service examination for policeman, policewoman, or matron, and who shall have been duly appointed to such positions. Such members shall include patrolmen, patrolwomen, probationary patrolmen, matrons, sergeants, lieutenants, captains, detectives and other senior officers who are so employed for police duty.

3. "Fireman" or "firemen" shall mean only the members of a fire department who have passed a regular mental and physical civil service examination for fireman and who shall have been duly appointed to such position. Such members shall include firemen, probationary firemen, lieutenants, captains, and other senior officers who have been so employed for the duty of fighting fires.

4. "Member" shall mean a member of either the police or fire retirement systems as defined by section 6326.05.

5. "He", "his", and all other terms in the masculine gender shall be considered to include the feminine gender.

6. "Board of fire trustees" and "board of police trustees" shall mean the boards provided in section 6326.07 to administer the fire retirement system and the police retirement system respectively.

7. "Medical board" shall mean the board of physicians provided for in section 6326.07.

8. "Membership service" shall mean service as policemen or firemen rendered since last becoming a member, or, where membership is regained as provided in this chapter, all of such service.

9. "Beneficiary" shall mean any person receiving a pension, an annuity, a retirement allowance or other benefit as provided by this chapter.

10. "Widow" shall mean only such surviving spouse of a marriage consummated prior to retirement of a deceased member from active service.

11. "Child" or "children" shall mean only surviving issue of a deceased active or retired member, or the child or children legally adopted by a deceased member prior to his retirement.

12. "Regular interest" shall mean interest at the rate of four per centum per annum, compounded annually.

13. "Accumulated contributions" shall mean the sum of all amounts deducted from the compensation of a member and credited to his individual account in the annuity savings fund together with regular interest thereon as provided in section 6326.10.

14. "Earnable compensation" or "compensation earnable" shall mean the regular compensation which a member would earn during one year on the basis of the stated compensation for his rank or position.

15. "Amount earned" shall mean the amount of money actually earned by a beneficiary in some definite period of time.

16. "Average final compensation" shall mean the average earnable compensation of the member during his last five years of service as a policeman or fireman, or if he has had less than five years of such service, then the average earnable compensation of his entire period of service.

17. "Annuity" shall mean annual payments for life derived from the accumulated contributions of a member. All annuities shall be payable in monthly installments.

18. "Pensions" shall mean annual payments for life derived from appropriations provided by the said cities. All pensions shall be paid in equal monthly installments.

19. "Retirement allowance" shall mean the sum of the annuity and the pension, or any benefits in lieu thereof granted to a member upon retirement.

20. "Annuity reserve" shall mean the present value of all payments to be made on account of an annuity, or benefit in lieu of an annuity, granted under the provisions of this chapter, upon the basis of such mortality tables as shall be adopted by the boards of trustees, and regular interest.

See mortality tables following general statutes

21. "Pension reserve" shall mean the present value of all payments to be made on account of any pension, or benefit in lieu of a pension, granted under the provisions of this chapter, upon the basis of such mortality tables as shall be adopted by the boards of trustees, and regular interest.

22. "Actuarial equivalent" shall mean a benefit of equal value, when computed upon the basis of mortality tables adopted by the boards of trustees, and regular interest.

23. "City" and/or "cities" shall mean any city or cities in which fire and/or police retirement systems are established by this chapter, including special charter cities* and cities under the city manager form of government.

24. "Superintendent of public safety" shall mean any elected city official who has direct jurisdiction over the fire and/or police department, or the city manager in cities under the city manager form of government. [C35,§6326-f1.]

Acts of special charter cities legalized, 48GA, ch 290
*See §6781.1

6326.04 Name and date of establishment. In any city in which the firemen and/or policemen are or shall be appointed under the civil service law of this state, there are hereby created and established two separate retirement or pension systems for the purpose of providing retirement allowances only for firemen and/or policemen of said cities who shall be so appointed after the date this chapter takes effect, or benefits to their dependents. Each such system shall be under the management of a board of trustees hereinafter described, and shall be known as the "fire retirement system of..... .....(name of city)", and the "police retirement system.....(name of city)", and by such names all of their business shall be transacted, all funds invested, and all cash and securities and other property held. The retirement systems so created shall begin operation as of the first day of the month in which said systems are there established by this chapter. [C35,§6326-f2.]

Referred to in §6326.03

6326.05 Membership.

1. All persons who become policemen or firemen after the date such retirement systems are established by this chapter, shall become members thereof as a condition of their employment. Such members shall not be required to make contributions under any other pension or retirement system of city, county, or state of Iowa, anything to the contrary notwithstanding.

2. Should any member in any period of five consecutive years after last becoming a member, be absent from service for more than four years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member. [C35,§6326-f3.]

Referred to in §6326.03

6326.06 Service creditable. The board of trustees shall fix and determine by proper rules and regulations how much service in any year shall be equivalent to one year of service, but in no case shall more than one year of service be creditable for all service in one calendar year, nor shall the board of trustees allow credit as service for any period of more than one month duration during which the member was absent without pay. [C35,§6326-f4.]

6326.07 Administration.

1. *Boards.* The general administration and the responsibility for the proper operation of the retirement systems and for making effective the provisions of this chapter are hereby vested in a board of fire trustees to administer the system relating to firemen and a board of police trustees to administer the system relating to policemen. The said boards shall be constituted as follows:

a. The chief officer of the fire department, the city treasurer, the city solicitor or attorney, two firemen elected by ballot by the members of said department who are entitled to participate in a firemen's pension fund established by law, and two citizens who do not hold any other public office, who shall be appointed by the mayor with the approval of the city council, shall constitute the members of the board of trustees of the fire retirement system.

b. The chief officer of the police department, the city treasurer, the city solicitor or attorney, two policemen elected by ballot by the members of said department who are entitled to participate in a policemen's pension fund established by law, and two citizens who do not hold any other public office, who shall be appointed by the mayor with the approval of the city council, shall constitute the members of the board of trustees of the police retirement system.

c. The two citizens appointed by the mayor shall serve on both of said boards.

d. Upon the taking effect of this chapter, such members of each said department in said cities shall elect by ballot two active members of each such department to serve as members of said respective boards; one of whom shall serve until the first Monday in April of the second year, and one until the first Monday in April of the fourth year. Thereafter each such department shall, every second year, on such date and in such manner as shall be prescribed by said board of trustees, elect by ballot one such member to serve for a term of four years.

e. Upon the taking effect of this chapter, the mayor, with the approval of the city council, shall appoint two citizens who do not hold any other public office, to serve as members of said boards of trustees; one of whom shall serve until the first Monday in April of the second year, and one until the first Monday in April of the fourth year. Thereafter, every second year, one such citizen shall be so appointed for a four-year term.

f. If a vacancy occurs in the office of trustee, the vacancy shall be filled for the unexpired term in the same manner as the office was previously filled.

2. *Voting.* Each trustee shall be entitled to one vote on each board. Four concurring votes shall

be necessary for a decision by the trustees at any meeting of either board.

3. *Compensation.* The trustees shall serve as such without compensation, but they shall be reimbursed from the expense fund for all necessary expenses which they may incur through service on the board.

4. *Rules.* Subject to the limitations of this chapter, each board of trustees shall, from time to time, establish rules and regulations for the administration of funds created by this chapter and for the transaction of its business.

5. *Employees.* Each board of trustees shall elect from its membership a chairman, and shall, by majority vote of its members, appoint a secretary, who may, but need not be, one of its members. It shall engage such actuarial and other services as shall be required to transact the business of the retirement system. The compensation of all persons engaged by each board of trustees, and all other expenses of each board necessary for the operation of the retirement system, shall be paid at such rates and in such amounts as each board of trustees shall approve.

6. *Data.* Each board of trustees shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the retirement system and for checking the experience of the system.

7. *Records—reports.* Each board of trustees shall keep a record of all its proceedings, which record shall be open to public inspection. It shall annually make a report to the city council showing the fiscal transactions of the retirement system for the preceding fiscal year, the amount of the accumulated cash and securities of the system, and the last balance sheet showing the financial condition of the system by means of an actuarial valuation of the assets and liabilities of the retirement system.

8. *Legal advisor.* The city attorney or solicitor of the said cities shall be the legal advisor of the boards of trustees.

9. *Medical board.* The board of fire trustees and the board of police trustees jointly shall designate a medical board to be composed of three physicians who shall arrange for and pass upon all medical examinations required under the provisions of this chapter and shall report in writing to each board of trustees, respectively, its conclusions and recommendations upon all matters duly referred to it.

10. *Duties of actuary.* The actuary shall be the technical advisor of the boards of trustees on matters regarding the operation of the funds created by the provisions of this chapter and shall perform such other duties as are required in connection therewith.

11. *Tables—rates.* Immediately after the establishment of each retirement system, the actuary shall make such investigation of the mortality, service and compensation experience of the members of the system as he shall recommend and the board of trustees shall authorize, and on the basis of such investigation he shall recommend for adoption by the board of trustees such tables and such rates as are required in subsection 12 of this section. The board of trustees shall adopt tables and certify rates of contribution to be used by the system.

12. *Actuarial investigation.* In the year 1938, and at least once in each five-year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the retirement system and shall make a valuation of the assets and liabilities of the funds of the system, and taking into account the results of such investigation and valuation, the board of trustees shall:

a. Adopt for the retirement system such mortality and other tables as shall be deemed necessary;

b. Certify the rates of contribution payable by the members under the provisions of this chapter; and

c. Certify the rates of contribution payable by the said cities in accordance with section 6326.10 of this chapter.

13. *Valuation.* On the basis of such tables as the boards of trustees shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the funds of the retirement systems created by this chapter. [C35,§6326-f5.]

Referred to in §§5696, 6326.03

6326.08 Benefits.

1. *Service retirement benefit.* Retirement of a member on a service retirement allowance shall be made by each board of trustees as follows:

a. Any member in service may retire upon his written application to the board of police or fire trustees as the case may be, setting forth at what time, not less than thirty nor more than ninety days subsequent to the execution and filing therefor, he desires to be retired, provided, that the said member at the time so specified for his retirement shall have attained the age of sixty, or of fifty-five if he has duly exercised the option of retirement at age fifty-five as provided in this chapter, and notwithstanding that, during such period of notification, he may have separated from the service.

b. Any member in service who has attained the age of seventy years, shall be retired forthwith, provided, that upon the request of the superintendent of public safety, the respective board of trustees may permit such member to remain in service for periods not to exceed one year from the date of the last request from the superintendent of public safety.

2. *Allowance on service retirement.* Upon retirement for service, a member shall receive a service retirement allowance which shall consist of:

a. An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

b. A pension given by the city in addition to his annuity which shall equal 1/140 of his average final compensation multiplied by the number of years of his membership service.

3. *Ordinary disability retirement benefit.* Upon the application of a member in service or of the chief of the police or fire departments, respectively, any member who has had ten or more years of membership service shall be re-

tired by the respective board of trustees, not less than thirty and not more than ninety days next following the date of filing such application, on an ordinary disability retirement allowance, provided, that the medical board after a medical examination of such member shall certify that said member is mentally or physically incapacitated for further performance of duty, that such incapacity is likely to be permanent and that such member should be retired.

4. *Allowance on ordinary disability retirement.* Upon retirement for ordinary disability a member shall receive a service retirement allowance if he has attained the age of sixty, otherwise he shall receive an ordinary disability retirement allowance which shall consist of:

a. An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of retirement; and

b. A pension which together with his annuity shall make a total retirement allowance equal to ninety per centum of 1/70 of his average final compensation multiplied by the number of years of membership service, if such retirement allowance exceeds 1/4 of his average final compensation, otherwise a pension which together with his annuity shall provide a total retirement allowance equal to 1/4 of his average final compensation; provided, however, that no such allowance shall exceed ninety per centum of 1/70 of his average final compensation multiplied by the number of years which would be creditable to him were his service to continue until the attainment of age sixty.

5. *Accidental disability benefit.* Upon application of a member in service or of the chief of the police or fire departments, respectively, any member who has become totally and permanently incapacitated for duty as the natural and proximate result of an accident or exposure occurring while in the actual performance of duty at some definite time and place shall be retired by the respective board of trustees, provided, that the medical board shall certify that such member is mentally or physically incapacitated for further performance of duty, that such incapacity is likely to be permanent and that such member should be retired.

6. *Retirement after accident.* Upon retirement for accidental disability a member shall receive a service retirement allowance if he has attained the age of sixty, otherwise he shall receive an accidental disability retirement allowance which shall consist of:

a. An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

b. A pension, in addition to the annuity, of 66 2/3 per centum of his average final compensation.

7. *Re-examination of beneficiaries retired on account of disability.* Once each year during the first five years following the retirement of a member on a disability retirement allowance, and once in every three-year period thereafter, the respective board of trustees may, and upon his application shall, require any disability beneficiary who has not yet attained age sixty to undergo a medical examination at a place designated by the medical board. Such examination shall be made by the medical board or in special cases, by an additional physician or physicians designated by such board. Should any disability beneficiary who has not attained the age of sixty refuse to submit to such medical examination, his allowance may be discontinued until his withdrawal of such refusal, and should his refusal continue for one year all rights in and to his pension may be revoked by the respective board of trustees.

a. Should any beneficiary for disability not incurred in line of duty, be engaged in a gainful occupation paying more than the difference between his retirement allowance and his average final compensation, then the amount of his pension shall be reduced to an amount which together with his annuity and the amount earned by him shall equal the amount of his average final compensation. Should his earning capacity be later changed, the amount of his pension may be further modified, provided, that the new pension shall not exceed the amount of the pension originally granted nor an amount which, when added to the amount earned by the beneficiary together with his annuity, equals the amount of his average final compensation. A beneficiary restored to active service at a salary less than the average final compensation upon the basis of which he was retired at age fifty-five or greater, shall not again become a member of the retirement system and shall have his retirement allowance suspended while in active service.

b. Should a disability beneficiary under age fifty-five be restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member and he shall contribute thereafter at the same rate he paid prior to disability, and any former service on the basis of which his service was computed at the time of his retirement shall be restored to full force and effect and upon his subsequent retirement he shall be credited with all his service as a member.

c. The chief of the fire department or the chief of the police department of such city may, subject to approval of the medical board, assign any former member of such department who is retired and drawing a pension for disability under the provisions of this chapter, to the performance of light duties in such department.

8. *Ordinary death benefit.* Upon the receipt of proper proofs of the death of a member in service, there shall be paid to such person having an insurable interest in his life as he shall have nominated by written designation duly executed and filed with the respective board of trustees:

a. His accumulated contributions and, if the member has had one or more years of membership service and no pension is payable under the provisions of subsection 9 of this section, in addition thereto—

b. An amount equal to fifty per centum of the compensation earnable by him during the year immediately preceding his death; or

If there be no such nomination of beneficiary,

the benefits provided in paragraphs (*a*) and (*b*) shall be paid to his estate; or in lieu thereof, at the option of the following beneficiaries, respectively, even though nominated as such, there shall be paid a pension which, together with the actuarial equivalent of his accumulated contributions, shall be equal to one-fourth of the average final compensation of such member, but in no instance less than thirty dollars per month;

c. To his widow to continue during her widowhood; or

d. If there be no widow, or if the widow dies or remarries before any child of such deceased member shall have attained the age of sixteen years, then to the guardian of his child or children under said age, divided in such manner as the board of trustees in its discretion shall determine, to continue as a joint and survivor pension until every such child dies or attains the age of sixteen; or

e. If there be no surviving widow or child under age sixteen, then to his dependent father and/or mother, as the board of trustees in its discretion shall determine, to continue until remarriage or death.

9. *Accidental death benefit.* If, upon the receipt of evidence and proof that the death of a member was the natural and proximate result of an accident or exposure occurring at some definite time and place while the member was in the actual performance of duty, the board of trustees shall decide that death was so caused in the performance of duty there shall be paid, in lieu of the ordinary death benefit provided in subsection 8 of this section, to his estate or to such person having an insurable interest in his life as he shall have nominated by written designation duly executed and filed with the respective board of trustees:

a. His accumulated contributions; and in addition thereto—

b. A pension equal to one-half of the average final compensation of such member shall be paid to his widow, children or dependent parents as provided in paragraphs (*c*), (*d*), and (*e*) of subsection 8 of this section.

c. If there be no widow, children under the age of sixteen years or dependent parent surviving such deceased member, the death shall be treated as an ordinary death case and the benefit payable in accordance with the provisions of subsection 8, paragraph (*b*), in lieu of the pension provided in paragraph (*b*) of this subsection 9, shall be paid to his estate.

10. *Return of accumulated contributions.* Should a member cease to be a policeman or fireman except by death or retirement, he shall be paid on demand the amount of his accumulated contributions standing to the credit of his individual account in the annuity savings fund.

11. *Optional allowance.* With the provision that no optional selection shall be effective in case a beneficiary dies within thirty days after retirement, in which event such a beneficiary shall be considered as an active member at the time of death; until the first payment on account of any benefit becomes normally due, any beneficiary may elect to receive his benefit in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent at that time of his retirement allowance in a lesser retirement allowance payable throughout life with the provision that an amount in money not exceeding the amount of his accumulated contributions shall be immediately paid in cash to such member or some other benefit or benefits shall be paid either to the member or to such person or persons as he shall nominate, provided such cash payment or other benefit or benefits, together with the lesser retirement allowance, shall be certified by the actuary to be of equivalent actuarial value to his retirement allowance and shall be approved by the board of trustees; provided, that a cash payment to such member or beneficiary at the time of retirement of an amount not exceeding fifty percent of his accumulated contributions shall be made by the board of trustees upon said member's or beneficiary's election.

12. *Pensions offset by compensation benefits.* Any amounts which may be paid or payable by the said cities under the provisions of any workmen's compensation or similar law to a member or to the dependents of a member on account of any disability or death, shall be offset against and payable in lieu of any benefits payable out of funds provided by the said cities under the provisions of this chapter on account of the same disability or death. In case the present value of the total commuted benefits under said workmen's compensation or similar law is less than the pension reserve on the benefits otherwise payable from funds provided by the said cities under this chapter, then the present value of the commuted payments shall be deducted from the pension reserve and such benefits as may be provided by the pension reserve so reduced shall be payable under the provisions of this chapter.

13. *Pension to widow and children of deceased pensioned member.* In the event of the death of any member receiving a retirement allowance under the provisions of subsections 2, 4, and/or 6 of this section there shall be paid a pension:

a. To his widow to continue during her widowhood, equal to one-half the amount received by such deceased beneficiary, but in no instance less than thirty dollars per month, and in addition thereto the sum of ten dollars per month for each child under sixteen years of age; or

b. In the event of the death of the wife either prior or subsequent to the death of the member, to the guardian of each surviving child under sixteen years of age, in the sum of ten dollars per month for the support of such child. [C35, §6326-f6; 47GA, ch 173,§1.]

Workmen's compensation, ch 70

6326.09 Management of funds.

1. The respective boards of trustees shall be the trustees of the several funds created by this chapter as provided in section 6326.10 and shall have full power to invest and reinvest such funds subject to the terms, conditions, limitations and restrictions imposed by subsection 2 of this section, and subject to like terms, conditions,

limitations and restrictions said trustees shall have full power to hold, purchase, sell, assign, transfer or dispose of any of the securities and investments in which any of the funds created herein shall have been invested, as well as of the proceeds of said investments and any moneys belonging to said funds.

2. The investments of the several funds created by this chapter, are hereby limited to interest-bearing bonds issued by the United States, by the state of Iowa, and those issued by counties, school districts and/or general obligation or limited levy bonds issued by municipal corporations in this state as authorized by law.

3. Each board of trustees annually shall allow regular interest on the mean amount for the preceding year in each of the funds with the exception of the expense fund. The amount so allowed shall be due and payable to said funds and shall be annually credited thereto by the respective board of trustees from interest and other earnings on the moneys and other assets of the retirement systems. Any additional amount required to meet the interest on the funds of the retirement system shall be paid by the cities and any excess of earnings over such amount required shall be deductible from the amounts to be contributed by the said cities.

4. The treasurer of the said cities shall be the custodian of the several funds. All payments from said funds shall be made by him only upon vouchers signed by two persons designated by the respective board of trustees. A duly attested copy of the resolution of the respective board of trustees designating such persons and bearing on its face specimen signatures of such persons shall be filed with the treasurer as his authority for making payments upon such vouchers. No voucher shall be drawn unless it shall previously have been allowed by resolution of the respective board of trustees.

5. For the purpose of meeting disbursements for pensions, annuities, and other payments, there may be kept available cash not exceeding ten per centum of the total amount in the several funds of the retirement system on deposit in one or more banks or trust companies in said cities, organized under the laws of the state of Iowa, or of the United States, provided, that the amount on deposit in any one bank or trust company shall not exceed twenty-five per centum of the paid-up capital and surplus of such bank or trust company.

6. No trustee and no employee of either board shall have any direct interest in the gains or profits of any investment made by the respective boards of trustees. No trustee shall receive any pay or emolument for his services except as secretary. No trustee or employee of either board of trustees shall directly or indirectly for himself or as an agent in any manner use the assets of the retirement system except to make such current and necessary payments as are authorized by the board of trustees, nor shall any trustee or employee of the boards become an indorser or surety or become in any manner an obligor for moneys loaned by or borrowed from the respective board of trustees. [C35,§6326-f7.]

6326.10 Method of financing. All the assets of each retirement system created and established by this chapter shall be credited according to the purpose for which they are held to one of five funds, namely, the annuity savings fund, the annuity reserve fund, the pension accumulation fund, the pension reserve fund and the expense fund.

1. *Annuity savings fund.*

a. The annuity savings fund shall be the fund in which shall be accumulated contributions from the compensation of the members to provide for their annuities. Upon the basis of such tables as the respective boards of trustees shall adopt, and regular interest, the actuary of the retirement system shall determine for each member the proportions of compensation which when deducted from each payment of his prospective annual earnable compensation prior to his attainment of age fifty-five and of age sixty and accumulated at regular interest until his attainment of such ages, shall be computed to provide at either of those times an annuity equal to the pension to which he would be entitled at age sixty on account of his membership service. Such proportions of compensation shall be computed to remain constant. Each member shall, within one year after first attaining membership, file with the board of trustees his written election as to which of such retirement ages his rate of contribution shall be based upon, and pay into the fund a sum sufficient to make his contributions prior to such election conform to such rate. Subject to the provisions of this chapter as to the certification of rates of contribution payable by members, until the first valuation the rates of contribution payable by members according to their ages when becoming members shall be as follows:

Age when becoming a member	Rate of contribution, to retire at age 60	Rate of contribution, to retire at age 55
20	3.91%	5.68%
21	3.97%	5.79%
22	4.04%	5.92%
23	4.11%	6.04%
24	4.18%	6.17%
25	4.26%	6.30%
26	4.33%	6.44%
27	4.41%	6.58%
28	4.48%	6.73%
29	4.56%	6.89%
30	4.64%	7.05%
31	4.72%	7.21%
32	4.80%	7.39%
33	4.88%	7.57%
34	4.97%	7.77%
35	5.05%	7.97%
36	5.14%	8.19%
37	5.22%	8.42%
38	5.31%	8.67%
39	5.40%	8.94%
40	5.50%	9.23%

b. The proportions so computed for a person at age forty shall be applied to a member who attains a greater age before he becomes a mem-

ber. The respective boards of trustees shall certify to the superintendent of public safety and the superintendent of public safety shall cause to be deducted from the salary of each member on each and every payroll for each and every pay period, the proportion of the compensation of each member so computed for the retirement age elected by the member. No member shall be required to increase his rate of contribution as a result of any valuation or revision of members contribution rates after the first valuation by the actuary. In determining the amount earnable by a member in any payroll period, the respective board of trustees may consider the rate of annual compensation payable to such member on the first day of the payroll period as continuing throughout such payroll period, and it may omit deduction from compensation for any period less than a full payroll period if the policeman or fireman was not a member on the first day of the payroll period, and to facilitate the making of the deductions it may modify the deduction required of any member by such amount as shall not exceed one-tenth of one per centum of the compensation upon the basis of which such deduction was made.

c. The deductions provided for herein shall be made notwithstanding that the minimum compensation provided by law for any member shall be reduced thereby. Every member shall be deemed to consent to the deductions made and provided for herein, and shall receipt for his full salary or compensation, and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for services rendered during the period covered by the payment except as to benefits provided by this chapter. The superintendent of public safety shall certify to the respective boards of trustees on each and every payroll, or in such other manner as the said boards of trustees shall prescribe, the amount deducted from each member's salary, and such amounts shall be paid into the respective annuity savings fund and shall be credited together with regular interest thereon to the individual account of the member from whose compensation said deduction was made.

d. In addition to the contributions deducted from compensation as hereinbefore provided, any member may redeposit in the annuity savings fund by a single payment or by an increased rate of contribution an amount equal to the total amount he previously withdrew therefrom as provided in this chapter or any part thereof, or any member may deposit therein by a single payment or by an increased rate of contribution an amount computed to be sufficient to purchase an additional annuity which together with his prospective retirement allowance at age fifty-five or at age sixty shall provide for him a total retirement allowance of not to exceed one-half of his average final compensation at either age fifty-five or age sixty. Such additional amounts so contributed shall become a part of his accumulated contributions except in the case of ordinary disability retirement when they shall be treated as excess contributions returnable to the member with regular interest in cash or as an annuity of equivalent actuarial value. The accumulated contributions of a member withdrawn by him or paid to his estate or designated beneficiary in the event of his death shall be paid from the annuity savings fund. Upon the retirement of a member his accumulated contributions shall be transferred from the annuity savings fund to the annuity reserve fund.

2. *Annuity reserve fund.* The annuity reserve fund shall be the fund from which shall be paid all annuities and all benefits in lieu of annuities payable as provided in this chapter. Should a beneficiary retired on account of disability be restored to active service and again become a member of the retirement system, his annuity reserve shall be transferred from the annuity reserve fund to the annuity savings fund and credited to his individual account therein.

3. *Pension accumulation fund.* The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by the said cities and from which shall be paid the lump sum death benefits for all members payable from the said contributions. Contributions to and payments from the pension accumulation fund shall be as follows:

a. On account of each member there shall be paid annually into the pension accumulation fund by the said cities an amount equal to a certain percentage of the earnable compensation of the member to be known as the "normal contribution". The rate per centum of such contribution shall be fixed on the basis of the liabilities of the retirement system as shown by actuarial valuations. Until the first valuation the normal contribution shall be 7.9 per centum.

b. On the basis of regular interest and of such mortality and other tables as shall be adopted by the boards of trustees, the actuary engaged by the said boards to make each valuation required by this chapter, shall immediately after making such valuation, determine the uniform and constant percentage of the earnable compensation of the average new entrant, which, if contributed throughout his entire period of active service, would be sufficient to provide for the payment of any death benefit or pension payable on this account. The rate per centum so determined shall be known as the "normal contribution rate". The normal contribution rate shall be the rate per centum of the earnable compensation of all members obtained by deducting from the total liabilities of the fund the amount of the funds in hand to the credit of the fund and dividing the remainder by one per centum of the present value of the prospective future compensation of all members as computed on the basis of mortality and service tables adopted by the boards of trustees and regular interest. The normal rate of contribution shall be determined by the actuary after each valuation.

c. The total amount payable in each year to the pension accumulation fund shall be not less than the rate per centum known as the normal contribution rate of the total compensation earnable by all members during the year, provided, however, that the aggregate payment by the said cities shall be sufficient when combined with the amount in the fund to provide the pensions and other benefits payable out of the fund during the then current year.

d. All lump-sum death benefits on account of death in active service payable from contributions of the said cities shall be paid from the pension accumulation fund.

e. Upon the retirement or death of a member an amount equal to the pension reserve on any pension payable to him or on account of his death shall be transferred from the pension accumulation fund to the pension reserve fund.

4. *Pension reserve fund.* The pension reserve fund shall be the fund in which shall be held the reserves on all pensions granted to members or to their beneficiaries and from which such pensions and benefits in lieu thereof shall be paid. Should a beneficiary retired on account of disability be restored to active service and again become a member of the retirement system, his pension reserve shall be transferred from the pension reserve fund to the pension accumulation fund. Should the pension of a disability beneficiary be reduced as a result of an increase in his amount earned, the amount of the annual reduction in his pension shall be paid annually into the pension accumulation fund during the period of such reduction.

5. *Expense fund.* The expense fund shall be the fund to which shall be credited all money provided by the said cities to pay the administration expenses of the retirement system and from which shall be paid all the expenses necessary in connection with the administration and operation of the system. Annually the boards of trustees shall estimate the amount of money necessary to be paid into the expense fund during the ensuing year to provide for the expense of operation of the retirement system. [C35, §6326-f8.]

Referred to in §§6326.03, 6326.07, 6326.09

6326.11 Contributions by the city.

1. On or before the first day of July in each year the respective boards of trustees shall certify to the superintendent of public safety the amounts which will become due and payable during the year next following to the pension accumulation fund and the expense fund. The amounts so certified shall be included by the superintendent of public safety in his annual budget estimate. The amounts so certified shall be appropriated by the said cities and transferred to the retirement system for the ensuing year. Said cities shall annually levy a tax sufficient in amount to cover such appropriations.

2. To cover the requirements of the respective retirement systems for the period prior to the date when the first regular appropriation is due as provided in subsection 1 of this section, such amounts as shall be necessary to cover the needs of the retirement system shall be paid into the pension accumulation fund and expense fund by special appropriations to the retirement system. [C35,§6326-f9; 47GA, ch 173,§2.]

6326.12 Guaranty. Regular interest charges payable, the creation and maintenance of reserves in the pension accumulation fund and the maintenance of annuity reserves and pension reserves as provided for the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this chapter and all expenses in connection with the administration and operation of the retirement systems are hereby made direct liability obligations of the said cities. All income, interest and dividends derived from deposits and investments authorized by this chapter shall be used for the payment of the said obligations of the said cities. Any amounts derived therefrom, which, when combined with regular appropriations made under the provisions of this chapter, exceed the amount required to provide for the discharge of such obligations, shall be used to reduce the regular appropriations otherwise required. [C35,§6326-f10.]

6326.13 Exemption from tax and execution. The right of any person to a pension, annuity or retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or death benefit, any other right accrued or accruing to any person under the provisions of this chapter, and the moneys in the various funds created under this chapter, are hereby exempt from any tax of the state and shall not be subject to execution, garnishment, attachment or any other process whatsoever, and shall be unassignable except as in this chapter specifically provided. [C35,§6326-f11.]

6326.14 Protection against fraud. Any person who shall knowingly make any false statement, or shall falsify or permit to be falsified any record or records of such retirement system in any attempt to defraud such system as a result of such act, shall be guilty of a misdemeanor, and shall be punishable therefor under the laws of this state. Should any change or errors in records result in any member or beneficiary receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, the respective board of trustees shall correct such error, and as far as practicable, shall adjust the payments in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled, shall be paid. [C35,§6326-f12.]

Constitutionality, §6326-f13, code 1935; 45ExGA, ch 75, §20
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CHAPTER 323

HOUSING LAW

Chapter applicable to certain special charter cities, §6818

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GENERAL PROVISIONS

6327 Applicability. This chapter shall be known as the housing law and shall apply to every city of the first class and cities under commission form of government which, by the last state or federal census, had a population of fifteen thousand or more, and to every city as its population shall reach fifteen thousand thereafter by any state or federal census. [C24, 27, 31, 35,§6327.]

38GA, ch 123, §1, editorially divided

6328 Cities and towns—authority. In all other cities having a population of less than fifteen thousand, and in incorporated towns, the council may adopt ordinances for the regulation and control of any or all matters covered by the provisions of this chapter, insofar as same may be reasonably applicable, and fix penalties for the violation thereof; and fix rules and regulations not inconsistent with those provided in this chapter for the enforcement of said ordinances. [C24, 27, 31, 35,§6328.]

6329 Definitions. Certain words in this chapter are defined for the purposes thereof as follows: Words used in the present tense include the future; words in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular; the word "person" includes a corporation as well as a natural person.

1. *Dwelling.* A "dwelling" is any house or building or portion thereof which is occupied in whole or in part as the home or residence of one or more human beings, either permanently or transiently.

2. *Classes of dwellings.* For the purposes of this chapter dwellings are divided into the following classes: "Private dwellings", "two-family dwellings", and "multiple dwellings".

a. A private dwelling is a dwelling occupied by but one family alone.

b. A two-family dwelling is a dwelling occupied by but two families alone.

c. A multiple dwelling is a dwelling occupied by more than two families.

3. *Classes of multiple dwellings.* All multiple dwellings are for the purposes of this chapter divided into classes, viz: class A and class B.

Class A. Multiple dwellings of class A are dwellings which are occupied more or less permanently for residence purposes by several families and in which the rooms are occupied in apartments, suites, or groups. This class includes tenement houses, flats, apartment houses, apartment hotels, bachelor apartments, studio apartments, kitchenette apartments, and all other dwellings similarly occupied whether specifically enumerated or not.

Class B. Multiple dwellings of class B are dwellings which are occupied, as a rule transiently, as the more or less temporary abiding place of individuals who are lodged, with or without meals, and in which as a rule the rooms are occupied singly. This class includes hotels, lodging houses, boarding houses, furnished room houses, club houses, asylums, boarding schools, convents, hospitals, jails, and all other dwellings similarly occupied whether specifically enumerated herein or not.

4. *Hotel.* A "hotel" is a multiple dwelling of class B in which persons are lodged for hire and in which there are more than twenty-five sleeping rooms.

5. *Family occupancy.* For the purposes of this chapter, a "family" is a group of persons living together, whether related to each other by birth or not, and may consist of one or more persons.

6. *Mixed occupancy.* In cases of mixed occupancy where a building is occupied only in part as a dwelling, the part so occupied shall be deemed a dwelling for the purposes of this chapter.

7. *Yards.* A "rear yard" is an open unoccupied space on the same lot with a dwelling, between the extreme rear line of the lot and the extreme rear line of the house. A yard between the front line of the house and the front line of the lot is a "front yard". A yard between the side line of the house and the side line of the lot which extends from the front line or front yard to the rear yard is a "side yard".

8. *Courts.* A "court" is an open unoccupied space, other than a yard, on the same lot with a dwelling. A court not extending to the street or front or rear yard is an inner court. A court extending to the street or front yard or rear yard is an outer court.

9. *Corner and interior lots.* A "corner lot" is a lot of which at least two adjacent sides abut upon a street. A lot other than a corner lot is an "interior lot". The word "lot" is any deeded parcel of land whether a full platted lot or not.

10. *Front, rear, and depth of lot.* The front of a lot is that boundary line which borders on the street. In case of a corner lot the owner may elect by statement on his plans either street boundary line as the front. The rear of a lot is the side opposite to the front. The depth of a lot is the dimension measured from the front of the lot to the extreme rear line of the lot. In case of irregular shaped lots the mean depth shall be taken.

11. *Public hall.* A "public hall" is a hall, corridor, or passageway not within the exclusive control of one family.

12. *Stair hall.* A "stair hall" is a public hall and includes the stairs, stair landings, and those portions of the building through which it is necessary to pass in going between the entrance floor and the roof.

13. *Basement, cellar, attic.* A "basement" is a story partly underground but having at least one-half of its height above the curb level, and also one-half of its height above the highest level of the adjoining ground. A basement shall be counted as a story.

A "cellar" is a story having more than one-half of its height below the curb level, or below the highest level of the adjoining ground. A cellar shall not be counted as a story for purposes of height measurement. If any part of a story is in that part the equivalent of a base-

ment or cellar, the provisions of this chapter relative to basements and cellars shall apply to such part of said story.

In the case of private dwellings and two-family dwellings an "attic", or space in a sloping roof, if not occupied for living purposes, shall not be counted as a story; in the case of multiple dwellings an attic room shall be counted as a story if used for living purposes.

14. *Height.* The "height" of a dwelling is the perpendicular distance measured in a straight line from the curb level to the highest point of the roof beams in the case of flat roofs, and to the average of the height of the gable in the case of pitched roofs; the measurements in all cases to be taken through the center of the front of the house. Where a dwelling is situated on a terrace above the curb level such height shall be measured from the level of the adjoining ground. Where a dwelling is on a corner lot and there is more than one grade or level, the measurements shall be taken from the mean elevation.

15. *Curb level.* The "curb level" is the level of the established curb in front of the building measured at the center of such front. Where no curb has been established the city engineer shall establish such curb level or its equivalent for the purposes of this chapter.

16. *Occupied spaces.* Outside stairways, fire towers, porches, platforms, balconies, boiler flues, and other projections shall be considered as part of the building and not as a part of the yards or courts or unoccupied spaces. This provision shall not apply to uninclosed outside porches not exceeding two stories in height which do not extend into the front or rear yard a greater distance than ten feet from the front or rear walls of the building, nor to any such porch which does not extend into the side yard a greater distance than twelve feet from the side wall of the building nor exceed twelve feet in its other horizontal dimension, nor to an inclosed rear porch or attached garage with or without sleeping porch above and not exceeding twelve by twenty feet, nor to cornices or eaves not exceeding eighteen inches in width.

17. *Fire-resistive constructed dwelling.* A dwelling of fire-resistive construction is one with brick, stone, or concrete walls and with brick, tile, concrete, or terra cotta floors and roof. Floor and roof supports to be of brick, concrete, or metal with all metal protected by tile, concrete, or similar fire-resistant material. But this definition shall not be construed as prohibiting the use of wooden flooring on top of the fireproof floors or the use of wooden sleepers, nor as prohibiting wooden handrails or treads of hardwood not less than one inch thick.

18. *Wooden buildings.* A "wooden building" is a building of which the exterior walls or a portion thereof are of wood. Court walls are exterior walls.

19. *Nuisance.* The word "nuisance" shall be held to embrace nuisance as known at common law or in equity jurisprudence; and whatever is dangerous to human life or detrimental to health, whatever dwelling is overcrowded with occupants or is not provided with adequate ingress or egress to or from the same, or is not sufficiently supported, ventilated, sewered, drained, cleaned, or lighted, in reference to its intended or actual use, and whatever renders the air or human food or drink unwholesome, are also severally, in contemplation of this chapter, nuisances, and all such nuisances are hereby declared illegal.

20. *Construction of certain words.* The word "shall" is always mandatory and not directory, and denotes that the dwelling shall be maintained in all respects according to the mandate as long as it continues to be a dwelling. Wherever the words "charter", "ordinances", "regulations", "superintendent of buildings", "health department", "the board of health", "health officer", "commissioner of public safety", "commissioner of public health", "department charged with the enforcement of this chapter", "corporation counsel", "mayor", "city treasury", or "fire limits" occur in this chapter they shall be construed as if followed by the words "of the city in which the dwelling is situated".

Wherever the words "health department", "health officer", or "duly authorized assistant", or "board of health", "commissioner of public safety", or "commissioner of public health" are employed in this chapter, such words shall be deemed and construed to mean the official or officials in any city to whom is committed the charge of safeguarding the public health. The terms "superintendent of buildings", "building department", and "inspector of buildings" shall embrace the department and the executive head thereof specially charged with the execution of laws and ordinances relating to the construction of buildings. Wherever the words "occupied" or "used" are employed in this chapter such words shall be construed as if followed by the words "or is intended, arranged, designed, built, altered, converted to, rented, leased, let or hired out, to be occupied or used".

Wherever the words "dwelling", "two-family dwelling", "multiple dwelling", "building", "house", "premises" or "lot" are used in this chapter, they shall be construed as if followed by the words "or any part thereof". Wherever the words "city water" are used in this chapter, they shall be construed as meaning any public supply of water through street mains; and wherever the words "public sewer" are used in this chapter they shall be construed as meaning any part of a system of sewers that is used by the public or by concerted action of several users, whether or not such part was constructed at the public expense. Wherever the word "street" is used in this chapter it shall be construed as including for the purpose hereinafter stated any public alley sixteen feet or more in width, namely, for the sole purpose of determining the required open space around and the allowable height of any building abutting thereon.

"Approved fire-resistive material" means as set forth by ordinances, or if not so determined, as approved by the superintendent of buildings. [C24, 27, 31, 35, §6329.]

6330 Alteration—change of class. A building not a dwelling, if hereafter converted or altered to such use, shall thereupon become subject to such provisions of this chapter relative to dwellings hereafter erected as the board of health may require. A dwelling of one class if hereafter altered or converted to another class shall thereupon become subject to such provisions of this chapter relative to such latter class as the board of health may require. [C24, 27, 31, 35,§6330.]

6331 Unlawful alteration. No dwelling hereafter erected shall at any time be altered so as to be in violation of any provision of this chapter.

No dwelling erected prior to the passage of this chapter shall at any time be altered so as to be in violation of those provisions of this chapter applicable to such dwelling.

If any dwelling or any part thereof is occupied by more families than provided in this chapter, or is erected, altered, or occupied contrary to law, such dwelling shall be deemed an unlawful structure and the health officer may cause such dwelling to be vacated. Any such dwelling shall not again be occupied until it, or its occupation, as the case may be, has been made to conform to the law. [C24, 27, 31, 35, §6331.]

6332 Dwelling rebuilt. If a dwelling be damaged by fire or other cause to the extent of sixty-five percent or more of its original value, exclusive of the value of the foundations, such dwelling shall not be repaired or rebuilt except in conformity with the provisions of this chapter relative to dwellings hereafter erected; provided, however, the owner shall be permitted to rebuild a building of the same size as before, subject to such reasonable provisions regarding light, ventilation, and sanitation as the board of health may prescribe. [C24, 27, 31, 35,§6332.]

6333 Dwelling moved. If any dwelling be hereafter moved from one lot to another it shall thereupon be made to conform to all the provisions of this chapter relative to dwellings hereafter erected, unless the board of health shall in a written permit for such removal certify that such dwelling is reasonably safe and sanitary. [C24, 27, 31, 35,§6333.]

6334 Sewer connections—water supply. The provisions of this chapter with reference to sewer connections and water supply shall be deemed to apply only where connection with a public sewer and with public water mains is or becomes reasonably accessible. All questions of the practicability of such sewer and water connections shall be decided by the health officer or such other official as the board of health may direct. [C24, 27, 31, 35,§6334.]

Referred to in §§6357, 6393

6335 Minimum requirements — power of cities. The provisions of this chapter shall be held to be the minimum requirements adopted for the protection of health, welfare, and safety of the community. Nothing herein contained shall be deemed to invalidate existing ordinances or regulations of any city imposing requirements higher than the minimum requirements laid down in this chapter relative to light, ventilation, sanitation, fire prevention, egress, occupancy, maintenance, and uses for dwellings; nor be deemed to prevent any city subject to this chapter from enacting and putting in force from time to time ordinances and regulations imposing requirements higher than the minimum requirements laid down in this chapter; nor shall anything herein contained be deemed to prevent such cities from prescribing for the enforcement of such ordinances and regulations, remedies and penalties similar or additional to those prescribed herein. Every city subject to this chapter is empowered to enact such ordinances and regulations and to prescribe for their enforcement; and to enact such other ordinances pertaining to the housing of the people, not in conflict with the provisions of this chapter, as shall be deemed advisable by the city council. No ordinance, regulation, ruling, or decision of any municipal body, officer, or authority shall repeal, amend, modify, or dispense with any of the said minimum requirements laid down in this chapter, except as specifically provided herein. [C24, 27, 31, 35,§6335.]

Referred to in §6448

6336 Improvements. All improvements specifically required by this chapter upon dwellings erected prior to the date of its passage shall be made within one year from said date, unless time is extended by the health department. [C24, 27, 31, 35,§6336.]

6337 Application of provisions. All the provisions of this chapter shall apply to all classes of dwellings, except that in sections where specific reference is made to one or more specific classes of dwellings such provisions shall apply only to those specific classes to which reference is made. [C24, 27, 31, 35,§6337.]

LIGHT AND VENTILATION

6338 Height of buildings. No dwelling hereafter erected shall exceed in height one and one-half times the width of the widest street upon which it abuts, nor in any case shall it exceed one hundred feet in height. Such width of street shall be determined by measuring from the front line of the building as constructed to the street line of the opposite side of the street. The provisions of this section shall not apply to hotels. [C24, 27, 31, 35,§6338.]

6339 Rear yards. Immediately behind every single and two-family dwelling hereafter erected there shall be, except as hereinafter provided, a rear yard extending across the lot, for a distance equal to at least the width of the dwelling. Such yard shall be open and unobstructed from the ground to the sky. Every part of such yard shall be directly accessible from every other part thereof. The depth of said yard shall be measured at right angles from the rear lot line to the extreme rear part

of the dwelling. Such rear yard space shall in no case be less than ten feet deep, and two feet additional for each story of the dwelling on said lot above the first.

An irregular shaped lot, or lot subject to building line restrictions, may be occupied by a dwelling without complying with the provisions of this section, if the total yard space equals that required by this section.

The provisions of this section shall not apply to hotels. [C24, 27, 31, 35, §6339.]

Referred to in §§6345, 6373

6340 Building to side line of lot—side yards. Dwellings hereafter erected may be built up to the side lot line, if the side wall is without windows, or if with windows the air and light required by this chapter are provided otherwise than by windows on the lot line, or if the side lot line abuts on a street or alley. If, however, any side yard is left, it shall be open and unobstructed from the ground to the sky, and its width shall be proportionate to the height of the dwelling, and no side yard shall be less in width in any part than as follows:

1. *Multiple dwellings.* In the case of all multiple dwellings hereafter erected, one story in height and having a side yard, the width of the side yard measured to the side lot line shall be at least four feet, and such side yard shall be increased in width by one foot for each additional story above the first.

2. *Private dwellings and two-family dwellings.* In the case of private dwellings and two-family dwellings hereafter erected, one story or two stories in height, the width of the side yard measured to the side lot line shall be at least four feet; such side yard shall be increased in width one foot for each additional story above the second.

3. *Distance between buildings on same lot.* Where more than one dwelling is erected upon the same lot, the distance between them shall not be less than eight feet in the case of dwellings of one or two stories in height, this distance to be increased two feet for each additional story above the second. [C24, 27, 31, 35, §6340.]

Referred to in §§6345, 6373, 6412

6341 Courts—size of. The size of all courts in dwellings hereafter erected shall be proportionate to the height of the dwelling. No court shall be less in any part than the minimum sizes prescribed in this section. The minimum width of an outer court for a one-story dwelling shall be five feet, for a two-story dwelling six feet, for a three-story dwelling seven feet, and shall increase one foot for each additional story above three stories. The least dimension of an inner court shall never be less than twice the minimum width prescribed by this section for an outer court. The width of all courts adjoining the lot line shall be measured to the lot line and not to an opposite building. [C24, 27, 31, 35, §6341.]

Referred to in §6412

6342 Covered courts. No court of a dwelling hereafter erected shall be covered by a roof or skylight. Every such court shall be at every point open from the ground to the sky unobstructed; except that in the case of hotels, courts may start on the floor level of the lowest bedroom story, and in the case of other multiple dwellings where there are stores or shops on the lower story or stories, courts may start on the top of such lower story or stories. [C24, 27, 31, 35, §6342.]

6343 Air intake. In all dwellings hereafter erected every inner court extending through more than one story shall be provided with a horizontal air intake at the bottom. [C24, 27, 31, 35, §6343.]

6344 Corners of courts. Nothing contained in the foregoing sections concerning courts shall be construed as preventing the cutting off of the corners of said courts. [C24, 27, 31, 35, §6344.]

6345 Other buildings on same lot. If any building is hereafter placed on the same lot with a dwelling, there shall always be maintained between the said buildings an open and unoccupied space extending upwards from the ground. If such buildings are placed at the side of each other the space between them shall conform to the provisions of section 6340 relating to side yards, but shall be twice the minimum therein required. If such buildings are placed one at the rear of the other the space between them shall be the same as that prescribed in section 6339 for rear yards. In all cases the height of the highest building on the lot shall regulate the dimensions.

No building of any kind shall be hereafter placed upon the same lot with a dwelling so as to decrease the minimum sizes of courts or yards hereinbefore prescribed, except that, in case of a lot less than seventy-five feet deep, a one-story garage, not more than twenty-five feet deep, measured lengthwise of the lot, nor more than twenty-five feet in the other dimension, or other one-story building, of like dimensions, used exclusively for domestic purposes and not as a dwelling or for the shelter or habitation of animals or fowls of any kind, may occupy one-third of the depth of the open space in this section prescribed.

If any dwelling is hereafter erected upon any lot upon which there is already another building, it shall comply with all the provisions of this chapter, and, in addition, the space between the said building and the said dwelling shall be of such size and arranged in such manner as is herein prescribed, the height of the highest building on the lot to regulate the dimensions. [C24, 27, 31, 35, §6345.]

6346 Windows. In every dwelling hereafter erected every room shall have at least one window opening directly upon the street or a public alley or other public space at least sixteen feet in width, or upon a yard or court of the dimensions specified in this chapter, and located on the same lot, and such window shall be so located as to properly light all portions of such rooms. This provision shall not, however, apply to rooms used as art galleries, swimming pools,

gymnasiums, squash courts, or for similar purposes, provided such rooms are adequately lighted and ventilated. [C24, 27, 31, 35,§6346.]

Referred to in §6385

6347 Window area. In every dwelling hereafter erected the total window area in each room shall be at least one-eighth of the superficial floor area of the room, and the total minimum window area shall be made so as to open in all its parts. [C24, 27, 31, 35,§6347.]

Referred to in §6385

6348 Living and bed rooms. In every dwelling hereafter erected all living rooms and bed rooms shall be of the following minimum sizes: Every such room shall contain at least eighty square feet of floor area, except that kitchenettes may be forty square feet in area; no such room, except kitchenette, shall be in any part less than seven feet wide. In multiple dwellings of class A, in each apartment, group, or suite of rooms there shall be at least one room containing not less than one hundred twenty square feet of floor area. [C24, 27, 31, 35,§6348.]

6349 Height of rooms. No room in a private dwelling hereafter erected shall be in any part less than eight feet three inches high from the finished floor to the finished ceiling downstairs and seven feet six inches upstairs; except that an attic room used for living purposes in such private dwelling need be seven feet six inches in but one-half of its area.

No room in a two-family dwelling or multiple dwelling hereafter erected shall be in any part less than eight feet three inches high from the finished floor to the finished ceiling, except that in a two-family dwelling constructed so as to be occupied on two floors by one family, the height of the rooms on the second floor shall be the same as herein provided for a private dwelling. [C24, 27, 31, 35,§6349.]

6350 Partitions. In every dwelling hereafter erected an alcove in any room intended or used for separate occupancy shall be separately lighted and ventilated as provided for rooms in the foregoing sections. No part of any room in a dwelling hereafter erected shall be inclosed or subdivided at any time, wholly or in part, by a fixed partition for permanent separate occupancy, unless such part of the room so inclosed or subdivided shall be separately lighted and ventilated as provided for rooms in the foregoing sections. [C24, 27, 31, 35,§6350.]

Referred to in §6385

6351 Windows in bathrooms. In every dwelling hereafter erected every water closet compartment and every bathroom shall have an aggregate window area of at least four square feet between stop beads opening directly upon the street, or upon a yard or court of the dimensions specified in this chapter. Every such window shall be made so as to open in all its parts. Nothing in this section contained shall be construed so as to prohibit a general toilet room containing several water closet compartments separated from each other by dwarf partitions, provided such toilet room is adequately lighted and ventilated to the outer air as above provided, and that such water closets are supplemental to the water closet accommodations required by the provisions of section 6358.

The above provision shall not apply to hotels or dwellings that have a system of forced ventilation so constructed as entirely to change the air in every bathroom, toilet room, or water closet compartment every seven minutes. [C24, 27, 31, 35,§6351.]

Referred to in §§6358, 6381

6352 Lighting and ventilation of halls. Every multiple dwelling, every public hall, and stair hall shall have adequate lighting and ventilation as the board of health may require. [C24, 27, 31, 35,§6352.]

SANITATION

6353 Cellar rooms. In dwellings hereafter erected no room in the cellar shall be occupied for living purposes. [C24, 27, 31, 35,§6353.]

6354 Basement rooms. In dwellings hereafter erected no room in the basement shall be occupied for living purposes, unless in addition to the other requirements of this chapter such room shall have sufficient light and ventilation, shall be well drained and dry, and shall, in the opinion of the board of health, be fit for human habitation. [C24, 27, 31, 35,§6354.]

6355 Basement or cellar under entrance floor. Every dwelling hereafter erected shall have a basement, cellar, or excavated space under the entire entrance floor, at least three feet in depth, or shall be elevated above the ground so that there will be a clear air space of at least eighteen inches between the top of the ground and the floor joists so as to insure ventilation and protection from dampness; provided, however, that cement floors may be laid on the ground level if desired. [C24, 27, 31, 35,§6355.]

6356 Courts and yards graded and drained. In every dwelling hereafter erected all courts, areas, and yards shall be properly graded and drained, and when required by the health officer the courts shall be properly concreted in whole or in part as may be necessary. [C24, 27, 31, 35, §6356.]

6357 Sinks and washbowls. In every dwelling hereafter erected and not exempted in section 6334, there shall be a proper sink and washbowl with running water, exclusive of any sink in the cellar. In two-family dwellings and in multiple dwellings of class A there shall be such a sink or washbowl in each apartment, suite, or group of rooms. [C24, 27, 31, 35,§6357.]

6358 Water closets. In every dwelling hereafter erected there shall be a separate water closet. Each such water closet shall be placed in a compartment completely separated from every other water closet; such compartment shall be not less than thirty inches wide, and shall be inclosed with partitions which shall extend to the ceiling. Every such compartment shall have a window opening directly upon the street or upon

a yard or court of the minimum sizes prescribed by this chapter and located upon the same lot. Nothing in this section contained shall be construed so as to prohibit a general toilet room containing several water closet compartments separated from each other by dwarf partitions, provided such toilet room is adequately lighted and ventilated to the outer air as above provided and that such water closets are supplemental to the water closet accommodations required by other provisions of this section for the occupants of said house. No water closet fixture shall be incased with any woodwork. No water closet shall be placed in a cellar of a multiple dwelling except with written permit from the health officer. In two-family dwellings and in multiple dwellings of class A hereafter erected there shall be for each family a separate water closet constructed and arranged as above provided and located within each apartment, suite, or group of rooms. In multiple dwellings of class B hereafter erected there shall be provided at least one water closet for every twenty occupants or fraction thereof. Every water closet compartment hereafter placed in any dwelling shall be provided with proper means of lighting the same at night. The provisions of this section regarding windows in water closet compartments shall not apply to dwellings that have a system of forced ventilation as provided in section 6351. [C24, 27, 31, 35,§6358.]

Referred to in §§6351, 6381

6359 Accessibility to city water and sewers. No multiple dwelling shall hereafter be erected unless there is accessible city water and a public sewer, or a private sewer connected directly with a public sewer. No cesspool or similar means of sewage disposal shall be used in connection with any dwelling where connection with a public sewer is practicable. [C24, 27, 31, 35,§6359.]

6360 Plumbing fixtures. In every dwelling hereafter erected no plumbing fixture shall be incased, but the space underneath shall be left entirely open. Plumbing pipes shall be exposed, when so required by the health officer. All plumbing work shall be sanitary in every particular and, except as otherwise specified in this chapter, shall be in accordance with the plumbing regulations of said city. All fixtures shall be trapped. Pan, plunger, and long hopper closets will not be permitted. Wooden sinks will not be permitted. [C24, 27, 31, 35,§6360.]

Referred to in §6381

FIRE PROTECTION

6361 Dwellings — fire-resistive materials. No dwelling shall hereafter be erected exceeding four stories in height, unless it shall be of fire-resistive material; the building, however, may step up to follow the street grade, provided no part of it is over four stories in height. [C24, 27, 31, 35,§6361.]

Referred to in §6447

6362 Egress from multiple dwellings. Every multiple dwelling hereafter erected exceeding two stories in height shall have at least two independent ways of egress, each of which shall extend from the ground floor to the roof, and shall be located remote from each other, and each shall be arranged as provided elsewhere in this chapter. One of such ways of egress shall be a flight of stairs constructed and arranged as provided in sections 6365 to 6368, inclusive. In multiple dwellings of class A the second way of egress shall be directly accessible to each apartment, group, or suite of rooms without having to pass through the first way of egress. In multiple dwellings of class B the second way of egress shall be directly accessible from a public hall. The second way of egress may be any one of the following, as the owner may select:

1. A system of outside balcony fire escapes constructed and arranged so as to comply with the state fire laws.
2. An additional flight of stairs, either inside or outside, constructed and arranged as provided in sections 6364 to 6367, inclusive.
3. A fire tower located, constructed, and arranged as may be required by the superintendent of buildings. [C24, 27, 31, 35,§6362.]

Referred to in §§6415, 6447

6363 Flat-roofed multiple dwellings. Every flat-roofed multiple dwelling hereafter erected exceeding one story in height shall have in the roof a bulkhead or a scuttle not less than two feet by three feet in size. Such scuttle or bulkhead shall be fireproof or covered with metal on the outside and shall be provided with stairs leading thereto and easily accessible to all occupants of the building. No scuttle or bulkhead shall be located in a closet or room, but shall be located in the ceiling of the public hall on the top floor, and access through the same shall be direct and uninterrupted. [C24, 27, 31, 35,§6363.]

Referred to in §6447

6364 Stairs in two-story multiple dwellings. Every multiple dwelling two stories or more in height hereafter erected shall have at least one flight of stairs extending from the entrance floor to the roof; and the stairs and public halls therein shall each be at least four feet wide in the clear. All stairs shall be constructed with a rise of not more than eight inches and with treads not less than ten inches wide and not less than four feet long in the clear. Winding stairs will not be permitted. [C24, 27, 31, 35, §6364.]

Referred to in §§6362, 6379, 6447

6365 Stairs in multiple dwellings. In multiple dwellings hereafter erected which exceed two stories in height, the stair halls shall be constructed of fire-resistive material throughout. The risers, strings, and balusters shall be of metal, concrete, or stone. The treads shall be of metal, slate, concrete, or stone, or of hardwood not less than two inches thick. Wooden handrails will be permitted if constructed of hardwood. The floors of all such stair halls shall be constructed of iron, steel, or concrete beams and fireproof filling, and no wooden flooring or sleepers shall be permitted. In multiple dwellings hereafter erected which exceed two stories in height, at least one flight

of stairs shall be inclosed in fireproof walls from the cellar to the roof. [C24, 27, 31, 35,§6365.]

Referred to in §§6362, 6447

6366 Stair halls in such dwellings. In all multiple dwellings hereafter erected which exceed two stories in height, all stair halls shall be inclosed on all sides with walls of brick or other fire-resistive material not less than eight inches thick. The doors opening from such stair halls shall be fire-resistive and self-closing fire doors of the swinging type. There shall be no transom or sash or similar opening from such stair hall to any other part of the building occupied for living purposes. [C24, 27, 31, 35,§6366.]

Referred to in §§6362, 6447

6367 Multiple dwelling of less than five stories. In multiple dwellings hereafter erected less than five stories high, where there is but one stairway, the entrance hall shall be not less than five feet wide in the clear; and in multiple dwellings five or more stories high, the width shall be not less than six feet and the entrance hall shall have an additional width of two feet for each additional stairway served. In every multiple dwelling hereafter erected, access shall be had from the street or alley to the yard, either in a direct line or through a court. [C24, 27, 31, 35,§6367.]

Referred to in §§6362, 6379, 6447

6368 Dumb-waiters, chutes, and shafts. In multiple dwellings hereafter erected all dumb-waiters, chutes, ventilating and miscellaneous shafts shall be inclosed in an inclosure of fire-resistive material with self-closing fire doors at all entrances into same, including cellar entrances.

In multiple dwellings hereafter erected which shall exceed two stories in height or which are occupied by more than two families above the grade floor, elevators, if provided, shall not be permitted in well holes or in the same shaft as the stairs, but shall be in a separate shaft or inclosure of fire-resistive material such as brick not less than eight inches in thickness, reinforced concrete not less than four inches in thickness, well burned tile or terra cotta not less than six inches in thickness.

All entrances into elevator shafts shall be protected by fire doors either self-closing or closed inside by elevator operator. [C24, 27, 31, 35, §6368.]

Referred to in §§6362, 6447

6369 Inside cellar stairs. In multiple dwellings hereafter erected inside cellar stairs shall be in an inclosure constructed of fire-resistive walls and shall have a fire-resistive self-closing door of the swinging type at the bottom. [C24, 27, 31, 35,§6369.]

Referred to in §6447

6370 Closets in multiple dwellings. In multiple dwellings hereafter erected no closet of any kind shall be constructed under any staircase leading from the entrance story to the upper stories, but such space shall be left entirely open and kept clear and free from incumbrance. [C24, 27, 31, 35,§6370.]

Referred to in §6447

6371 Cellar entrance. In every multiple dwelling hereafter erected there shall be an entrance to the cellar or other lowest story from the outside of said building. [C24, 27, 31, 35, §6371.]

Referred to in §6447

6372 Wooden multiple dwellings. No wooden multiple dwelling shall hereafter be erected exceeding two stories in height and no wooden building not now used as a multiple dwelling shall hereafter be altered into a multiple dwelling exceeding two stories in height. [C24, 27, 31, 35,§6372.]

Referred to in §6447

ALTERATIONS

6373 Enlargement of dwellings. No dwelling shall hereafter be enlarged or its lot diminished, or other building placed on the lot, so that the rear yard or side yard shall be less in size than the minimum sizes prescribed in sections 6339 and 6340 for dwellings hereafter erected. [C24, 27, 31, 35,§6373.]

6374 Inner courts. An inner court hereafter constructed in a dwelling erected prior to the passage of this chapter, if extending only through one or two stories, shall be not less than six feet by eight feet in size; and if it extends through more than two stories, it shall be not less than eight feet by ten feet in size. All inner courts shall be opened to the sky, without skylight, or roof of any kind. [C24, 27, 31, 35,§6374.]

6375 Additional halls or rooms. Any additional room or hall that is hereafter constructed or created in a dwelling shall comply in all respects with the provisions of this chapter with reference to dwellings hereafter erected, except that it may be of the same height as the other rooms of the same story of the dwelling. [C24, 27, 31, 35,§6375.]

6376 Light and ventilation. No dwelling shall be so altered or its lot diminished that any room or public hall or stairs shall have its light or ventilation diminished in any way not approved by the health officer. [C24, 27, 31, 35, §6376.]

6377 Stairs. No stairs leading to the roof in any multiple dwelling shall be removed or be replaced with a ladder. [C24, 27, 31, 35,§6377.]

6378 Bulkheads. Every bulkhead hereafter constructed in a multiple dwelling shall be constructed of fire-resistive material or covered with metal. [C24, 27, 31, 35,§6378.]

6379 Public halls or stairs. No public hall or stairs in a multiple dwelling shall be reduced in width so as to be less than the minimum width prescribed in sections 6364 and 6367. [C24, 27, 31, 35,§6379.]

6380 Dumb-waiter and elevator shafts. All dumb-waiters and elevators hereafter constructed in multiple dwellings shall be in inclosures constructed of fire-resistive material with fire-resistive doors at all openings at each story, including the cellar. In the case of dumb-waiter shafts such doors shall be self-closing; and such shafts shall be completely separated from the stairs by walls of approved fire-resistive material inclosing the same.

This section does not apply to dumb-waiter shafts or elevator shafts which are already in existence, but only to those which may be installed after this chapter takes effect. [C24, 27, 31, 35,§6380.]

6381 Water closets. Any water closet hereafter placed in a dwelling, except one provided to replace a defective or insanitary fixture in the same location, shall comply with the provisions of sections 6351, 6358, and 6360, relative to water closets in dwellings hereafter erected. [C24, 27, 31, 35,§6381.]

6382 Height of dwellings. No dwelling shall be increased in height so that it exceeds one and one-half times the width of the widest street on which it abuts nor in any case exceeds one hundred feet. [C24, 27, 31, 35,§6382.]

6383 General rule as to alterations. Except as specified above, no dwelling shall be so altered nor shall its lot be so diminished, nor shall any building be so placed on the same lot, as to cause the dwelling to be in violation of the requirements of this chapter for dwellings hereafter erected; nor shall any room, public hall, or stairs have its light or ventilation diminished in any way not approved by the health officer. [C24, 27, 31, 35,§6383.]

6384 Skylights—ventilators. All new skylights hereafter placed in a multiple dwelling shall be provided with ventilators having a minimum opening of forty square inches and also with either fixed or movable louvers or with movable sashes, and shall be of such size as may be determined to be practicable by the health officer. [C24, 27, 31, 35,§6384.]

6385 Divided rooms—window. No part of any room in a dwelling shall hereafter be inclosed or subdivided for separate occupancy, wholly or in part by a fixed partition, unless such part of a room so inclosed or subdivided shall contain a window as required by sections 6346, 6347, and 6350 and have a floor area of not less than eighty square feet. [C24, 27, 31, 35,§6385.]

MAINTENANCE

6386 Lights. In every multiple dwelling a proper light shall be kept burning by the owner in the public hallways near the stairs upon each floor every night from sunset to sunrise throughout the year if so required by the health officer. [C24, 27, 31, 35,§6386.]

6387 Water closets. No water closet shall be maintained in the cellar of any dwelling without a permit in writing from the health officer, who shall have power to make rules and regulations governing the maintenance of such closets. Under no circumstances shall the general water closet accommodations of any multiple dwelling be permitted in the cellar or basement thereof; this provision, however, shall not be construed so as to prohibit a general toilet room containing several water closets, provided such water closets are supplementary to those required by law. [C24, 27, 31, 35,§6387.]

6388 Number of water closets. In every dwelling existing prior to the passage of this chapter, there shall be provided at least one water closet for every two apartments, groups, or suites of rooms, or fraction thereof, except that in multiple dwellings of class B there shall be provided at least one water closet for every twenty occupants or fraction thereof. [C24, 27, 31, 35,§6388.]

Referred to in §6412

6389 Cellar or basement rooms. No room in the cellar of any dwelling erected prior to the passage of this chapter shall be occupied for living purposes. And no room in the basement of any such dwelling shall be so occupied without a written permit from the health officer. No such room shall hereafter be occupied unless all the following conditions are complied with:

1. Such room shall be at least seven feet high in every part from the floor to the ceiling.
2. The ceiling of such room shall be in every part at least three feet six inches above the surface of the street or ground outside of or adjoining the same.
3. There shall be appurtenant to such room the use of a water closet.
4. At least one of the rooms of the apartment of which such room is an integral part shall have a window or windows opening directly to the street or yard, with an aggregate of at least twelve square feet in size clear of the sash frame, and which shall open readily for purposes of ventilation.
5. The lowest floor shall be water proof and damp proof.
6. Such room shall have sufficient light and ventilation, shall be well drained and dry, and shall be fit for human habitation. [C24, 27, 31, 35,§6389.]

6390 Color cellar walls. The cellar walls and cellar ceilings of every multiple dwelling shall by the owner be thoroughly whitewashed or painted a light color and shall be so maintained by him when required by the health officer. [C24, 27, 31, 35,§6390.]

6391 Floor beneath water closets. In all two-family dwellings and multiple dwellings the floor or other surface beneath and around water closets and sinks shall be maintained in good order and repair and if of wood shall be kept well painted. [C24, 27, 31, 35,§6391.]

6392 Repair of dwelling. Every dwelling and all the parts thereof shall be kept in good repair by the owner, and the roof shall be kept so as not to leak, and all rain water shall be

so drained and conveyed therefrom as not to cause dampness in the walls or ceilings. [C24, 27, 31, 35,§6392.]

6393 Water supply—sinks. Every dwelling not exempted in section 6334 shall have within the dwelling at least one proper sink with running water furnished in sufficient quantity at one or more places exclusive of the cellar. In two-family dwellings and multiple dwellings of class A there shall be at least one sink on every floor, accessible to each family on the floor occupied by said family without passing through any other apartment. Where city water is not available the owner shall provide proper and suitable tanks, pumps, or other appliances to receive and to distribute an adequate and sufficient supply of water at each floor in the said dwelling at all times of the year, during all hours of the day and night. But a failure in the general supply of city water shall not be construed to be a failure on the part of such owner, provided proper and suitable appliances to receive and distribute such water have been provided in said dwelling. [C24, 27, 31, 35,§6393.]

6394 Catch basins. In the case of dwellings where, because of lack of city water supply or sewers, sinks with running water are not provided inside the dwellings, one or more catch basins or some other approved convenience for the disposal of waste water, if necessary in the opinion of the health officer, shall be provided in the yard or court, level with the surface thereof and at a point easy of access to the occupants of such dwelling. [C24, 27, 31, 35,§6394.]

6395 Accumulations of dirt. Every dwelling and every part thereof shall be kept clean and shall also be kept free from any accumulation of dirt, filth, rubbish, garbage, or other matter in or on the same, or in the yards, courts, passages, areas, or alleys connected with or belonging to the same. The owner of every dwelling and in the case of a private dwelling the occupant thereof, shall thoroughly cleanse or cause to be cleansed all the rooms, passages, stairs, floors, windows, doors, walls, ceilings, privies, water closets, cesspools, drains, halls, cellars, roofs, and all other parts of the said dwelling, or part of the dwelling of which he is the owner or in case of a private dwelling the occupant, to the satisfaction of the health officer, shall keep the said parts of the said dwelling in a clean condition at all times. [C24, 27, 31, 35,§6395.]

6396 Color of walls of courts. In multiple dwellings the walls of all courts, unless built of a light color brick or stone, shall be thoroughly whitewashed by the owner or shall be painted a light color by him, and shall be so maintained. Such whitewash or paint shall be renewed whenever necessary, as may be required by the health officer. [C24, 27, 31, 35, §6396.]

6397 Color of walls of other rooms. In all multiple dwellings erected prior to this chapter, the health officer may require the walls and ceilings of every room that does not open directly on the street to be calcimined or painted so as to furnish adequate lighting of such room and may require this to be renewed as often as may be necessary. [C24, 27, 31, 35,§6397.]

6398 Garbage receptacles. The owner of every dwelling and in the case of a private dwelling the occupant shall provide for said dwelling, keep clean and in place, proper covered receptacles of nonabsorbent material for holding garbage, refuse, rubbish, and other waste matter. Garbage chutes are prohibited. [C24, 27, 31, 35,§6398.]

6399 Animals. No horse, cow, calf, swine, sheep, goat, chickens, geese, or ducks shall be kept in any dwelling or part thereof. Nor shall any such animal be kept on the same lot or premises with a dwelling except under such conditions as may be prescribed by the health officer. No such animal, except a horse, shall under any circumstances be kept on the same lot or premises with a multiple dwelling. No dwelling or the lot or premises thereof shall be used for the storage or handling of rags or junk. [C24, 27, 31, 35, §6399.]

6400 Articles dangerous to life or health. No dwelling nor any part thereof, nor of the lot upon which it is situated, shall be used as a place of storage, keeping, or handling of any article dangerous or detrimental to life or health; nor of any combustible article except under such conditions as may be prescribed by the fire commissioner, or the proper official, under authority of a written permit issued by him. [C24, 27, 31, 35,§6400.]

6401 Openings where paint or oil is stored. There shall be no transom, window, or door opening into a public hall from any part of a multiple dwelling where paint, oil, gasoline, or drugs are stored or kept for the purpose of sale or otherwise. This provision shall not apply to hotels. [C24, 27, 31, 35,§6401.]

6402 Janitors. In any multiple dwelling in which the owner thereof does not reside, there shall be a janitor, housekeeper, or other responsible person who shall have charge of the same, if the health officer shall so require. [C24, 27, 31, 35,§6402.]

6403 Overcrowding of rooms. If any room in a dwelling is overcrowded the health officer may order the number of persons sleeping or living in said room to be so reduced that there shall be not less than four hundred cubic feet of air to each adult and two hundred cubic feet of air to each child under twelve years of age occupying such room. [C24, 27, 31, 35,§6403.]

6404 Subletting of lodgings—eviction. The health officer may prohibit in any multiple dwelling the letting of lodgings therein by any of the tenants occupying such multiple dwelling, and may prescribe conditions under which lodgers or boarders may be taken in multiple dwellings. It shall be the duty of the owner in the case of multiple dwellings to see that the requirements of the health officer in this regard are at all

times complied with, and a failure to so comply on the part of any tenant, after due and proper notice from said owner or from the health officer, shall be deemed sufficient cause for the summary eviction of such tenant and the cancellation of his lease. The provisions of this section may be extended to private dwellings and two-family dwellings, as may be found necessary by the health officer. [C24, 27, 31, 35,§6404.]

6405 Dwellings unfit for habitation—eviction. Whenever it shall be certified by an inspector or officer of the health department that a dwelling is infected with contagious disease or that it is unfit for human habitation, or dangerous to life or health by reason of want of repair, or of defects in the drainage, plumbing, lighting, ventilation, or the construction of the same, or by reason of the existence on the premises of a nuisance likely to cause sickness among the occupants of said dwelling, the health officer may issue an order requiring all persons therein to show cause why they should not be required to vacate such house within a time to be set by him, for the reasons to be mentioned in said order. In case such order is not complied with within the time specified, the health officer may cause said dwelling to be vacated. The health officer, whenever he is satisfied that the danger from said dwelling has ceased to exist, or that it is fit for human habitation, may revoke said order or may extend the time within which to comply with the same. [C24, 27, 31, 35,§6405.]

6406 Nuisances. Whenever any dwelling or any building, structure, excavation, business pursuit, matter, or thing, in or about a dwelling, or the lot on which it is situated, or the plumbing, sewerage, drainage, light, or ventilation thereof, is in the opinion of the health officer in a condition or in effect dangerous or detrimental to life or health, the health officer may after notice and failure to correct, declare that the same to the extent he may specify is a public nuisance, and may order the same to be removed, abated, suspended, altered, or otherwise improved or purified as the order shall specify. [C24, 27, 31, 35, §6406.]

6407 Fire escapes. The owner of every multiple dwelling on which there are fire escapes shall keep them in good order and repair, and whenever rusty shall have them properly painted with two coats of paint. No person shall at any time place an obstruction of any kind before or upon such fire escape. [C24, 27, 31, 35,§6407.]

6408 Scuttles and bulkheads. In all multiple dwellings where there are scuttles or bulkheads, they and all stairs or ladders leading thereto shall be easily accessible to all occupants of the building and shall be kept free from obstruction and ready for use at all times. No scuttle and no bulkhead door shall at any time be locked with a key, but may be fastened on the inside by movable bolts or hooks. [C24, 27, 31, 35,§6408.]

IMPROVEMENTS

6409 Windows. No room in a dwelling erected prior to the passage of this chapter shall hereafter be occupied for living purposes unless it shall have a window of an area of not less than eight square feet opening directly upon the street, or upon a rear yard not less than four feet deep, or above the roof of an adjoining building, or upon a court or side yard of not less than twenty-five square feet in area open to the sky without roof or skylight, unless such room is located on the top floor and is adequately lighted and ventilated by a skylight, opening directly to the outer air; except that a room which cannot be made to comply with the above provisions may be occupied if provided with a sash window of not less than fifteen square feet in area, opening into an adjoining room in the same apartment group or suite of rooms, which latter room opens directly on the street or on a rear yard of the above dimensions. Said sash window shall be a vertically sliding pulley-hung sash not less than three feet by five feet between stop beads, both halves shall be made so as to readily open, and the lower half shall be glazed with translucent glass, and so far as possible it shall be in line with windows in the said outer room opening on the street or rear yard so as to afford a maximum of light and ventilation. [C24, 27, 31, 35,§6409.]

6410 Light and ventilation. In all multiple dwellings erected prior to the passage of this chapter the public halls and stairs shall be provided with as much light and ventilation to the outer air as may be deemed practicable by the board of health who may order the cutting in of windows and skylights and such other improvements and alterations in said dwellings as in its judgment may be necessary and appropriate to accomplish this result. All new skylights hereafter placed in such dwellings shall be of such size as may be determined to be practicable by said board of health. [C24, 27, 31, 35,§6410.]

6411 Sinks and water closets. In all multiple dwellings erected prior to the passage of this chapter the woodwork incasing sinks except sinks in butler's pantries, and water closets shall be removed and the space underneath said fixtures shall be left open. The floor and wall surfaces beneath and around the said fixtures shall be put in good order and repair, and if of wood shall be kept well painted. Defective and insanitary water closet fixtures shall be replaced by proper fixtures, as defined by this chapter. [C24, 27, 31, 35,§6411.]

6412 Sewer connections. Whenever a connection with a sewer is possible, all privy vaults, range closets, cesspools, or other similar receptacles used to receive fecal matter, urine, or sewerage, shall, before July 1, 1920, with their contents, be completely removed and the place where they were located properly disinfected under the direction of the health officer. Such appliances shall be replaced by individual water closets of durable nonabsorbent material, properly sewer-connected, and with individual traps and properly connected flush tanks providing an ample flush of water to thoroughly cleanse the bowl. Each such water closet shall be located inside the dwelling or other building in connec-

tion with which it is to be used in a compartment completely separated from every other water closet, and such compartment shall contain a window of not less than four square feet in area opening directly to the street or rear yard or on a side yard or court of the minimum size prescribed in sections 6340 and 6341. Such water closets shall be provided in such numbers as required by section 6388. Such water closets and all plumbing in connection therewith shall be sanitary in every respect and, except as in this chapter otherwise provided, shall be in accordance with the local ordinances and regulations in relation to plumbing and drainage. Pan, plunger, and long hopper closets will not be permitted except upon written permit of the health officer. No water closet shall be placed out-of-doors. [C24, 27, 31, 35,§6412.]

6413 Freedom from dampness. The floor of the cellar or lowest floor of every dwelling shall be free from dampness, and, when necessary in the judgment of the health officer, shall be concreted with not less than two inches of concrete of good quality and with a finished surface. [C24, 27, 31, 35,§6413.]

6414 Access to shaft or court. In every dwelling where there is a court or shaft of any kind, there shall be at the bottom of every such shaft and court a door giving sufficient access to such shaft or court to enable it to be properly cleaned out; provided that where there is already a window giving proper access it shall be deemed sufficient. [C24, 27, 31, 35,§6414.]

6415 Ways of egress. Every multiple dwelling exceeding two stories in height shall have at least two independent ways of egress constructed and arranged as provided in section 6362. In the case of multiple dwellings erected prior to the passage of this chapter, where it is not practicable in the judgment of the building inspector to comply in all respects with the provisions of that section, said building inspector shall make such requirements as may be appropriate to secure proper means of egress from such multiple dwellings for all the occupants thereof. No existing fire escape shall be deemed a sufficient means of egress unless the following conditions are complied with:

1. All parts of it shall be of iron, cement, or stone.
2. The fire escape shall consist of outside balconies which shall be properly connected with each other by adequate stairs or stationary ladders, with openings not less than twenty-four by twenty-eight inches.
3. All fire escapes shall have proper drop ladders or stairways from the lowest balcony of sufficient length to reach a safe landing place beneath.
4. All fire escapes not on the street shall have a safe and adequate means of egress from the yard or court to the street or alley or to the adjoining premises.
5. Prompt and ready access shall be had to all fire escapes, which shall not be obstructed by bathtubs, water closets, sinks, or other fixtures, or in any other way. [C24, 27, 31, 35, §6415.]

Referred to in §6447
Fire escapes, ch 82

6416 Additional egress. Whenever any multiple dwelling is not provided with sufficient means of egress in case of fire, the building inspector shall order such additional means of egress as may be necessary. [C24, 27, 31, 35, §6416.]

Referred to in §6447

6417 Skylight—access to roof. Unless there is a bulkhead in the roof there shall be over every inside stairway used by more than one family, a skylight or scuttle not less than two feet by three feet in size. Every flat roof multiple dwelling, exceeding one story in height, shall have at least one convenient and permanent means of access to the roof located in a public part of the building and not in a room or closet. [C24, 27, 31, 35,§6417.]

Referred to in §6447

REQUIREMENTS AND REMEDIES

6418 Plans, plat, and specifications required. Before the construction or alteration of a dwelling, or the alteration or conversion of a building for use as a dwelling is commenced and before the construction or alteration of any building or structure on the same lot with a dwelling, the owner, or his agent or architect, shall submit to the board of health a detailed statement in writing, certified by the affidavit of the person making the same, of the specifications for such dwelling or building, upon blanks or forms to be furnished by such board of health, and also full and complete copies of the plans of such work. With such statement there shall be submitted a plat of the lot showing the dimensions of the same, the location of the proposed building and all other buildings on the lot. [C24, 27, 31, 35, §6418.]

Referred to in §6430
38GA, ch 123, §92, editorially divided

6419 Detailed requirements. Such statement shall give in full the name and residence, by street and number, of the owner or owners of such dwelling or building and the purposes for which such dwelling or building will be used. If such construction, alteration, or conversion is proposed to be made by any other person than the owner of the land in fee, such statement shall contain the full name and residence, by street and number, not only of the owner of the land, but of every person interested in such dwelling, either as owner, lessee, or in any representative capacity. Said affidavit shall allege that said specifications and plans are true and contain a correct description of such dwelling, building, structure, lot, and proposed work. [C24, 27, 31, 35,§6419.]

Referred to in §6430

6420 By whom made. The statements and affidavits herein provided for may be made by the owner, his agent or architect, or by the person who proposes to make the construction,

alteration, or conversion, or by the agent or architect of such person. [C24, 27, 31, 35,§6420.]

Referred to in §6430

6421 Who deemed agent. No one, however, shall be recognized as the agent of the owner or of such person unless he shall file with said health officer a written instrument signed by such owner or person, as the case may be, designating him as such agent. [C24, 27, 31, 35, §6421.]

Referred to in §6430

6422 Perjury. Any intentional false oath in a material point in any such affidavit shall be deemed perjury. [C24, 27, 31, 35,§6422.]

Referred to in §6430

6423 Filing and preservation. Such specifications, plans, and statements shall be filed in said health department and shall be deemed public records, but no such specifications, plans, or statements shall be removed from said health department. [C24, 27, 31, 35,§6423.]

Referred to in §6430

6424 Approval. The health officer shall cause all such plans and specifications to be examined. If such plans and specifications conform to the provisions of this chapter they shall within five days be approved by the health officer or his duly authorized assistant, and a written certificate to that effect shall be issued by him to the person submitting the same. The health officer shall, from time to time, approve changes in any plans and specifications previously approved by him, provided the plans and specifications when so changed shall be in conformity with law. [C24, 27, 31, 35,§6424.]

Referred to in §6430

6425 Construction prohibited. The construction, alteration, or conversion of such dwelling, building, or structure, or any part thereof, shall not be commenced until the filing of such specifications, plans, and statements, and the approval thereof, as above provided. [C24, 27, 31, 35, §6425.]

Referred to in §6430

6426 Certificate of health officer. No permit shall be granted and no plan approved by the department of buildings, where such exists, for the construction or alteration of a dwelling or for the alteration or conversion of any building for use as a dwelling until there has been filed in the office of the department of buildings a certificate of the health officer issued as above provided to the effect that such dwelling conforms to the provisions of this chapter. [C24, 27, 31, 35,§6426.]

Referred to in §6430

6427 Construction authorized. The construction, alteration, or conversion of such dwelling, building, or structure shall be in accordance with such approved specifications and plans. [C24, 27, 31, 35,§6427.]

Referred to in §6430

6428 Permit automatically canceled. Any permit or approval which may be issued by the health officer, but under which no work has been done above the foundation walls within one year from the time of the issuance of such permit or approval, shall expire by limitation. [C24, 27, 31, 35,§6428.]

Referred to in §6430

6429 Revocation of permit. The health officer or his duly authorized assistant shall have power to revoke or cancel any permit or approval in case of any failure or neglect to comply with any of the provisions of this chapter, or in case any false statement or representation is made in any specifications, plans, or statements submitted or filed for such permit or approval. [C24, 27, 31, 35,§6429.]

Referred to in §6430

6430 Enforcement in certain cities. In cities of more than one hundred thousand population, as shown by the last state or federal census, having a department or division of building inspection in charge of a person devoting his entire time to the supervision of building construction and to the enforcement of laws and ordinances relating to building construction, repair, alteration, removal, and to related matters, the city council may by ordinance provide that said person shall be charged with the powers and duties charged in sections 6418 to 6429, inclusive, to the board of health and to the health officer, and that all plans, specifications, affidavits, forms, and statements, in said sections prescribed to be filed with the health officer shall be filed with such person; and that said person may issue valid permits, certificates, and orders providing, without the certificate of the health officer hereinbefore provided to be filed in the office of the department of buildings. [C24, 27, 31, 35,§6430.]

Applicable to certain special charter cities, §6819

6431 New or altered buildings—habitation. No part of a building hereafter constructed as or altered into a dwelling shall be occupied in whole or in part for human habitation until the issuance of a certificate by the health officer that such part of said dwelling conforms to the requirements of this chapter relative to dwellings hereafter erected. Such certificate shall be issued within three days after written application therefor if said dwelling at the date of such application shall be entitled thereto. [C24, 27, 31, 35,§6431.]

Referred to in §6432

6432 Rents uncollectible. If any building hereafter constructed as, or altered into, a dwelling be occupied in whole or in part for human habitation in violation of section 6431, during such unlawful occupation no rent shall be recoverable by the owner or lessee of such premises for said period, and no action or special proceeding shall be maintained therefor or for possession of said premises for nonpayment of said rent, and said premises shall be deemed unfit for human habitation and the health officer may cause them to be vacated accordingly. [C24, 27, 31, 35,§6432.]

6433 Violations. Every person who shall violate or assist in the violation of any provision of this chapter shall be guilty of a misdemeanor punishable by a fine of not less than ten dollars or more than one hundred dollars, and in default in payment thereof, by imprisonment in the county jail for not more than thirty days. [C24, 27, 31, 35,§6433.]

38GA, ch 123, §95, editorially divided

6434 Civil liability. The owner of any dwelling, or of any building or structure upon the same lot with a dwelling, or of the said lot, where any violation of this chapter, or a nuisance as herein defined, exists who has been guilty of such violation or of creating or knowingly permitting the existence of such nuisance, and any person who shall violate or assist in violating any provision of this chapter, shall also jointly and severally for each such violation and each such nuisance be subject to a civil penalty of fifty dollars to be recovered for the use of the health department in civil action brought in the name of the municipality by the health officer. Such persons and also said premises shall also be liable in such case for all costs, expenses, and disbursements paid or incurred by the health department, by any of the officers, agents, or employees thereof in the removal of any such nuisance or violation. [C24, 27, 31, 35,§6434.]

6435 Additional liability. Any person who having been served with a notice or order to remove any such nuisance or violation shall fail to proceed in good faith to comply with said notice or order within five days after such service, or shall continue to violate any provisions or requirements of this chapter in the respect named in said notice or order, shall also be subject to a civil penalty of fifty dollars. [C24, 27, 31, 35,§6435.]

6436 Recovery. For the recovery of any such penalties, costs, expenses, or disbursements, an action may be brought in any court of competent civil jurisdiction. [C24, 27, 31, 35, §6436.]

6437 Lien on property. The existence of a nuisance in or upon such dwelling, structure on the same lot with a dwelling, or on such lot, which the owner thereof has created or permitted to exist and any violation of this chapter as to such dwelling, structure, and lot of which the owner has been guilty shall in such proceeding subject such dwelling, structure, and lot respectively to a penalty of fifty dollars, which shall be a lien thereon until paid; and any violation of an order made or a notice given by the health officer, permitted or committed by the owner of a dwelling, structure on the same lot with a dwelling, or such lot, shall in such proceeding subject the dwelling, structure, and lot respectively to a penalty of fifty dollars, which penalty shall be a lien thereon until paid. [C24, 27, 31, 35,§6437.]

6438 Practice and procedure generally. Except as herein otherwise specified, the procedure for the prevention of violations of this chapter or for the vacation of premises unlawfully occupied, or for other abatement of nuisances, or for the bringing of action therefor, shall be in accordance with the existing practice and procedure. [C24, 27, 31, 35,§6438.]

38GA, ch 123, §96, editorially divided

6439 Action to enjoin. In case any dwelling, building, or structure is constructed, altered, converted, or maintained in violation of any provision of this chapter, or of any order or notice of the health officer, or in case a nuisance exists in any such dwelling, building, or structure or upon the lot on which it is situated, said health officer may institute any appropriate action or proceeding to prevent such unlawful construction, alteration, conversion, or maintenance, to restrain, correct, or abate such violation or nuisance, to prevent the occupation of said dwelling, building, or structure, or to prevent any illegal act, conduct, or business in or about such dwelling or lot. [C24, 27, 31, 35, §6439.]

6440 Injunction. In any such action or proceeding said health officer may by petition duly verified, setting forth the facts, apply to the district, superior, or municipal court, or to any judge thereof in term time or vacation, for an order granting the relief for which said action or proceeding is brought, or for an order enjoining all persons from doing or permitting to be done any work in or about such dwelling, building, structure, or lot, or from occupying or using the same for any purpose until the entry of final judgment or order. [C24, 27, 31, 35, §6440.]

Referred to in §6442
Injunctions, ch 535

6441 Authority to execute. In case any notice or order issued by said health officer is not complied with, said health officer may apply to the district, superior, or municipal court or to any judge thereof in term time or vacation for an order authorizing him to execute and carry out the provisions of said notice or order, to correct any violation specified in said notice or order, or to abate any nuisance in or about such dwelling, building, or structure or the lot upon which it is situated. [C24, 27, 31, 35,§6441.]

Referred to in §6442

6442 Orders authorized. The court or any judge thereof is hereby authorized to make any order specified in sections 6440 and 6441. [C24, 27, 31, 35,§6442.]

6443 Eviction. If the occupant of a dwelling shall fail to comply with the provisions of this chapter after due and proper notice from the health officer, such failure to comply shall be deemed sufficient cause for the eviction of such tenant by the owner and the cancellation of his lease. [C24, 27, 31, 35,§6443.]

6444 Name and address of agent filed. Every owner, agent, or lessee of a dwelling may file in the health department a notice containing the name and address of an agent of such dwell-

ing, for the purpose of receiving service of all notices required by this chapter, and also a description of the property by street number or otherwise as the case may be, in such manner as will enable the health department easily to find the same. The name of the owner or lessee may be filed as agent for this purpose. [C24, 27, 31, 35,§6444.]

Referred to in §§6445, 6446

6445 Notices generally. Every notice or order required by this chapter shall be served at least ten days before the time for doing the thing in relation to which it shall have been issued, unless otherwise herein provided. The posting of a copy of such notice or order in a conspicuous place in the dwelling, together with the mailing of a copy thereof on the same day that it is posted, to the owner and lessee of the dwelling affected thereby, and each person, if any, whose name has been filed with the health department in accordance with the provisions of section 6444 at his address as filed, shall be sufficient service thereof. [C24, 27, 31, 35,§6445.]

6446 Notice of actions. In any action brought by the health officer in relation to a dwelling for injunction, vacation of the premises, or abatement of nuisance, or to establish a lien thereon, or to recover a civil penalty, service of notices shall be in the manner provided by law for the service of original notices; provided that if the address of any agent whose name and address have been filed in accordance with the provisions of section 6444 is in the county in which the dwelling is situated, then such notice may be served upon such agent. [C24, 27, 31, 35, §6446.]

Manner of service, §11060

6447 Enforcement generally. The provisions of this chapter shall be enforced in each city by the health officer, except that the department of buildings, where such department exists in a city, shall enforce the provisions contained in sections 6361 to 6372, inclusive, and 6415 to 6417, inclusive. [C24, 27, 31, 35,§6447.]

6448 Construction. The powers conferred by this chapter upon the public officials heretofore in this chapter mentioned shall be in addition to the powers already conferred upon said officers, and shall not be construed as in any way limiting their powers except as provided in section 6335. [C24, 27, 31, 35,§6448.]

6449 Inspection of multiple dwellings. The health officer or such other appropriate public official as the mayor may designate, shall cause an inspection to be made of every multiple dwelling at least once a year. Such inspection shall include thorough examination of all parts of such multiple dwelling and the premises connected therewith. The health officer or such other official so designated is also hereby empowered to make similar inspections of all dwellings as frequently as may be necessary; and shall make inspection at any time on complaint of the owner, tenant, or other person concerned. [C24, 27, 31, 35,§6449.]

6450 Entrance and survey of buildings. The health officer and all inspectors, officers, and employees of the board of health, and such other persons as may be authorized by the health officer, may without fee or hindrance enter, examine, make necessary records, and survey all premises, grounds, erections, structures, apartments, dwellings, buildings, and every part thereof in the city. The owner or his agent or representative and the lessee and occupant of every dwelling and every person having the care and management thereof shall at all reasonable times when required by any such officers or persons give them free access to such dwellings and premises. The owner of a dwelling and his agents and employees shall have right of access to such dwelling at reasonable times for the purpose of bringing about compliance with the provisions of this chapter or any order issued thereunder. [C24, 27, 31, 35,§6450.]

6451 Ordinances. All charter provisions, regulations, and ordinances of cities are hereby superseded insofar as they do not impose requirements other than the minimum requirements of this chapter, and except in case of such higher local requirements, this chapter shall in all cases govern. [C24, 27, 31, 35,§6451.]

CHAPTER 324

MUNICIPAL ZONING

Chapter applicable to special charter cities, §6820

6452 Building restrictions—powers granted.
6453 Districts.
6454 Basis of regulations.
6455 Regulations and boundaries.
6456 Changes—hearing—notice.
6457 Zoning commission.
6458 Board of adjustment.
6459 Membership.
6460 Rules—meetings—general procedure.
6461 Appeals.
6462 Effect of appeal.
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6464 Decision on appeal.
6465 Vote required.
6466 Petition for certiorari.
6467 Writ—restraining order.
6468 Return.
6469 Trial—judgment—costs.
6470 Preference in trial.
6471 Actions to correct violations.
6472 Conflicting rules, ordinances, and statutes.
6473 Restricted residence districts.

6452 Building restrictions—powers granted. For the purpose of promoting the health, safety, morals, or the general welfare of the community, any city or town, including cities acting under the commission plan of government, is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. [C24, 27, 31, 35,§6452.]

6453 Districts. For any or all of said purposes the local legislative body, hereinafter referred to as the council, may divide the city or town into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations and restrictions shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts. [C24, 27, 31, 35,§6453.]

Certification of restricted residence district ordinance, §5724
Restricted residence districts, ch 325

6454 Basis of regulations. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

Such regulations shall be made with reasonable consideration, among other things, as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city or town. [C24, 27, 31, 35,§6454.]

6455 Regulations and boundaries. The council of such city or town shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days notice of the time and place of such hearing shall be published in a paper of general circulation in such city or town. [C24, 27, 31, 35,§6455.]

Referred to in §6456

6456 Changes—hearing—notice. Such regulations, restrictions, and boundaries may, from time to time, be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change signed by the owners of twenty percent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred feet therefrom, or of those directly opposite thereto, extending the depth of one lot or not to exceed two hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of at least three-fourths of all the members of the council. The provisions of section 6455 relative to public hearings and official notice shall apply equally to all changes or amendments. [C24, 27, 31, 35,§6456.]

6457 Zoning commission. In order to avail itself of the powers conferred by this chapter, the council shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein. Where a city plan commission already exists, it may be appointed as the zoning commission. Such commission shall, with due diligence, prepare a preliminary report and hold public hearings thereon before submitting its final report; and such council shall not hold its public hearings or take action until it has received the final report of such commission. After the adoption of such regulations, restrictions, and boundaries of districts, the zoning commission may, from time to time, recommend to the council amendments, supplements, changes, or modifications. [C24, 27, 31, 35,§6457.]

6458 Board of adjustment. The council shall provide for the appointment of a board of adjustment and in the regulations and restrictions adopted pursuant to the authority of this chapter shall provide that the said board of adjustment may in appropriate cases and subject to appropriate conditions and safeguards make special exceptions to the terms of the ordinances in harmony with its general purpose and intent and in accordance with general or specific rules therein contained and provide that any property owner aggrieved by the action of the council in the adoption of such regulations and restrictions may petition the said board of adjustment direct to modify regulations and restrictions as applied to such property owners. [C24, 27, 31, 35,§6458.]

40GA, ch 134, §7, editorially divided

6459 Membership. The board of adjustment shall consist of five members each to be appointed for a term of five years, excepting that when the board shall first be created one member shall be appointed for a term of five years, one for a term of four years, one for a term of three years, one for a term of two years, and one for a term of one year. Members shall be removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. [C24, 27, 31, 35,§6459.]

6460 Rules—meetings—general procedure. The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this chapter. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence, the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record. [C24, 27, 31, 35,§6460.]

6461 Appeals. Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time as provided by the rules of the board by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. [C24, 27, 31, 35,§6461.]

6462 Effect of appeal. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would in his opinion cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown. [C24, 27, 31, 35,§6462.]

6463 Powers. The board of adjustment shall have the following powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant thereto.
2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done. [C24, 27, 31, 35,§6463.]

6464 Decision on appeal. In exercising the above-mentioned powers such board may, in conformity with the provisions of this chapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken. [C24, 27, 31, 35,§6464.]

6465 Vote required. The concurring vote of three members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance or to effect any variation in such ordinance. [C24, 27, 31, 35,§6465.]

6466 Petition for certiorari. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment under the provisions of this chapter, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board. [C24, 27, 31, 35,§6466.]

6467 Writ — restraining order. Upon the presentation of such petition, the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein

the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order. [C24, 27, 31, 35,§6467.]

6468 Return. The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified. [C24, 27, 31, 35,§6468.]

6469 Trial—judgment—costs. If upon the hearing which shall be tried de novo it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board, unless it shall appear to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from. [C24, 27, 31, 35,§6469.]

6470 Preference in trial. All issues in any proceedings under the foregoing sections shall have preference over all other civil actions and proceedings. [C24, 27, 31, 35,§6470.]

6471 Actions to correct violations. In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained; or any building, structure, or land is used in violation of this chapter or of any ordinance or other regulation made under authority conferred thereby, the council, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises. [C24, 27, 31, 35,§6471.]

6472 Conflicting rules, ordinances, and statutes. Wherever the regulations made under authority of this chapter require a greater width or size of yards, courts or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this chapter shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this chapter, the provisions of such statute or local ordinance or regulation shall govern. [C24, 27, 31, 35, §6472.]

6473 Restricted residence districts. When any city or town shall have taken advantage of and proceeded under the provisions of this chapter, then chapter 325 shall be no longer operative as to such city or town. [C24, 27, 31, 35,§6473.]

CHAPTER 325

RESTRICTED RESIDENCE DISTRICTS

Referred to in §6473. Chapter applicable to special charter cities, §6821

6474 Petition.
6475 Ordinance—scope.
6476 Ordinance—violations.

6474 Petition. Cities of the first and second class, including cities under commission form of government, and towns, may, and upon petition of sixty percent of the owners of the real estate in the district sought to be affected residing in such city or town shall, designate and establish, by appropriate proceedings, restricted residence districts within its limits. [C24, 27, 31, 35,§6474; 48GA, ch 167,§1.]

Referred to in §6476
Certification of restricted residence district ordinance, §5724
Municipal zoning, ch 324

6475 Ordinance—scope. In the ordinance designating and establishing such restricted residence district, every such city or town is hereby empowered to provide and establish reasonable rules and regulations for the erection, reconstruction, altering, and repairing of buildings of all kinds, within said district, as well as the use and occupancy of such buildings; and to provide that no building or other structure, except residences, schoolhouses, churches, and other similar structures, shall thereafter be erected, altered, or repaired, or occupied with-

out first securing from the city or town council of such city* a permit therefor, such permit to be issued under such reasonable rules and regulations as may in said ordinance be provided. [C24, 27, 31, 35,§6475; 48GA, ch 167,§2.]

Referred to in §6476
*Words "or town" omitted from enrolled act

6476 Ordinance—violations. Any building or structure erected, altered, repaired, or used in violation of any ordinance passed under the authority of sections 6474 and 6475, shall be deemed a nuisance, and every such city or town is hereby empowered to provide by ordinance for the abatement of such nuisance, either by fine or imprisonment, or by action in the district or municipal court of the county in which such city or town is located, or by both; such action to be prosecuted in the name of the city or town. [C24, 27, 31, 35,§6476; 48GA, ch 167,§3.]

CHAPTER 326

GOVERNMENT OF CITIES BY COMMISSION

Referred to in §§5633.1, 6610.03, 6615, 6782

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GENERAL PROVISIONS

6477 Terms defined. In the construction of this chapter the following rules shall be observed, unless such construction would be inconsistent with the manifest intent, or repugnant to, the context of the statute.

1. The words "councilman" or "alderman" shall be construed to mean "councilmen" when applied to cities under this chapter.

2. When an office or officer is named in any law referred to in this chapter, it shall, when applied to cities under this chapter, be construed to mean the office or officer having the same functions or duties under the provisions of this chapter, or under ordinances passed under authority thereof.

3. The word "franchise" shall include every special privilege in the streets, highways, and public places of the city, whether granted by the state or city, which does not belong to citizens generally by common right.

4. The word "electors" shall be construed to mean persons qualified to vote for elective officers at regular municipal elections. [S13, §1056-a35; C24, 27, 31, 35,§6477.]

6478 Petitions. Petitions provided for in this chapter shall be signed by none but legal voters of the city. Each petition shall contain, in addition to the names of the petitioners, the street and house number in which the petitioner resides, his age, and length of residence in the city. It shall also be accompanied by the affidavit of one or more legal voters of the city stating that the signers thereof were, at the time of signing, legal voters of said city, and the number of signers at the time the affidavit was made. [S13,§1056-a40; C24, 27, 31, 35,§6478.]

ADOPTION OF PLAN

6479 Cities affected. Any city having by the last preceding state or national census a population of two thousand or over, may become organized as a city under the provisions of this chapter by proceeding as hereinafter provided. [S13,§1056-a17; C24, 27, 31, 35,§6479.]

6480 Reduction in population—effect. Whenever any city shall have been or may be hereafter organized on the commission plan under the provisions of this chapter, no reduction or increase of the population of such city, shown by a subsequent census shall have any effect upon the organization, number of councilmen, duties and obligations of such city or any of its officers, but the same shall continue, remain and be as in this chapter prescribed for cities of the population such city had at the time its electors voted to adopt such plan of government, as shown by the then preceding census. [S13, §1056-a17a; C24, 27, 31, 35,§6480.]

6481 Population — how determined. The population in this chapter referred to shall be the population as shown by the last preceding state or national census excepting where such census of any such city shows a less population than at the time the voters of such city adopted the plan of government in this chapter provided for, in which case the population shown by the census immediately preceding such adoption shall govern. [C24, 27, 31, 35,§6481.]

6482 Petition. Upon petition of electors equal in number to twenty-five percent of the votes cast for all candidates for mayor at the last preceding city election of any such city, the mayor shall, not less than thirty days prior to the election to be held as herein provided, by proclamation submit the question of organizing as a city under this chapter at a special election to be held at a time specified therein, and within two months after said petition is filed; provided, however, that in case not less than ten percent of the qualified electors of any city reside in each of two or more townships, said petition shall be signed by not less than ten percent of the qualified electors of said city residing in each of said townships. [S13,§1056-a18; C24,27,31,35,§6482.]

S13,§1056-a18, editorially divided

6483 Question submitted. At such election, the proposition to be submitted shall be, "Shall the proposition to organize the city of (name the city), under chapter 326 of the code be adopted?" and the election thereupon shall be conducted, the vote canvassed, and the result declared in the same manner as provided by law in respect to other city elections. [S13,§1056-a18; C24, 27, 31, 35,§6483.]

6484 Officers elected. If the majority of the votes cast shall be in favor thereof, cities having a population of twenty-five thousand and over shall thereupon proceed to the election of a mayor and four councilmen, and cities having a population of two thousand and less than twenty-five thousand shall proceed to the election of a mayor and two councilmen, as hereinafter provided. [S13,§1056-a18; C24, 27, 31, 35, §6484.]

6485 First election. At the next regular city election after the adoption of such proposition there shall be elected a mayor and councilmen. In the event, however, that the next regular city election does not occur within one year after such special election the mayor shall, within ten days after such special election, by proclamation call a special election for the election of a mayor and councilmen, sixty days notice thereof being given in such call, such election in either case to be conducted as hereinafter provided. [S13,§1056-a18; C24, 27, 31, 35,§6485.]

6486 Certification of adoption. Immediately after such proposition is adopted, the mayor shall transmit to the governor, to the secretary of state, and to the county auditor, each a certificate stating that such proposition was adopted. [S13,§1056-a18; C24, 27, 31, 35,§6486.]

6487 Resubmission of question. If said plan is not adopted at the special election called, the question of adopting said plan shall not be resubmitted to the voters of said city for adoption within two years thereafter, and then the question to adopt shall be resubmitted upon the presentation of a petition signed by electors as hereinbefore provided, equal in number to twenty-five percent of the votes cast for all candidates for mayor at the last preceding general city election. [S13,§1056-a18; C24, 27, 31, 35,§6487.]

THE COUNCIL

6488 Membership. In every city having a population of twenty-five thousand and over there shall be elected at the regular biennial municipal election a mayor and four councilmen, and in every city having a population of two thousand and less than twenty-five thousand, there shall be elected at such election a mayor and two councilmen. [S13,§1056-a20; C24, 27, 31, 35,§6488.]

S13,§1056-a20, editorially divided

6489 Nomination — election — terms. Said officers shall be nominated and elected at large. Said officers shall qualify and their terms of office shall begin on the first Monday after their election. [S13,§1056-a20; C24, 27, 31, 35,§6489.]

6490 Vacancies. If any vacancy occurs in any such office the remaining members of said council shall appoint a person to fill such vacancy during the balance of the unexpired term. [S13,§1056-a20; C24, 27, 31, 35,§6490.]

6491 Termination of terms. The terms of office of the mayor and councilmen or aldermen in such city in office at the beginning of the terms of office of the mayor and councilmen first elected under the provisions of this chapter shall then cease and determine, and the terms of office of all other appointive officers in force in such city, except as hereinafter provided, shall cease and determine as soon as the council shall by resolution declare. [S13,§1056-a20; C24, 27, 31, 35,§6491.]

6492 Nomination by primary. Candidates to be voted for at all general municipal elections at which a mayor and councilmen are to be elected under the provisions of this chapter shall be nominated by a primary election, and no other names shall be placed upon the general municipal ballot except those selected in the manner hereinafter prescribed. [S13,§1056-a21; C24, 27, 31, 35,§6492.]

6493 Time, place, and manner of conducting. The primary election for such nomination shall be held on the second Tuesday preceding the general municipal election. It shall be held at the same places, so far as possible, and the polls shall be opened and closed at the same hours, as are required for said general municipal election. [S13,§1056-a21; C24, 27, 31, 35,§6493.]

6494 Judges and clerks. The judges and clerks of election appointed for the general municipal election shall be the judges and clerks of the primary election. [C24, 27, 31, 35,§6494.]

6495 Affidavit of candidacy. Any person desiring to become a candidate for mayor or councilman shall, at least ten days prior to said primary election, file with the city clerk a statement of such candidacy, in substantially the following form:

State of Iowa, }ss.
.....County.}

I, ..., being first duly sworn, say that I reside at.....street, city of....., county of ....., state of Iowa; that I am a qualified voter therein; that I am a candidate for nomination to the office of (here specify the office of mayor, or the particular department or departments, as the case may be), to be voted upon at the primary election to be held on..... Tuesday of ..... 19.... and I

hereby request that my name be printed upon the official primary ballot for nomination by such primary election for such office.

(Signed).....

Subscribed and sworn to (or affirmed) before me by ..... on this.....day of....., 19....

.....

(Official signature of officer administering oath.) [S13,§1056-a21; C24, 27, 31, 35,§6495.]

Referred to in §6544

6496 Nominating petition. The candidate shall, at the time of filing his statement of candidacy, file therewith a petition of at least one hundred qualified voters requesting such candidacy. [S13,§1056-a21; C24, 27, 31, 35, §6496.]

6497 Form of petition. Said petition shall be in substantially the following form:

PETITION ACCOMPANYING NOMINATING STATEMENT

The undersigned, duly qualified electors of the city of....., and residing at the places set opposite our respective names hereto, do hereby request that the name of (name of candidate) be placed on the ballot as a candidate for nomination for (here specify the office of mayor or the particular department or departments, as the case may be) at the primary election to be held in such city on the..... Tuesday of....., 19....

We further state that we know him to be a qualified elector of said city and a man of good moral character and qualified in our judgment for the duties of such office.

Name of Qualified Electors.	Street Residence No.	City of Residence.
.....	.....	.....

[S13,§1056-a21; C24, 27, 31, 35,§6497.]

Referred to in §6544

6498 Verification. The affidavit of one or more electors of the city, as to the qualifications and residence, with street number, of each signer of the petition, shall be indorsed on or attached to each petition. [S13,§1056-a21; C24, 27, 31, 35,§6498.]

6499 Publication of ballot. Immediately upon the expiration of the time of filing the statements and petitions for candidacies, the said city clerk shall cause to be published for one day in all the daily newspapers published in the city, in proper form, the names of the persons as they are to appear upon the primary ballot, in the first of the precincts as arranged by him, and if there be no daily newspaper, then in two issues of any other newspapers that may be published in said city. [S13,§1056-a21; C24, 27, 31, 35,§6499.]

6500 Preparation of ballots. The city clerk shall cause the primary ballots to be printed upon plain, substantial white paper, and to be authenticated by a facsimile of his signature. No ballot shall have any party designation thereon. [S13,§1056-a21; C24, 27, 31, 35,§6500.]

6501 Form of ballot in major cities. The ballots in all cities having a population of twenty-five thousand or over shall be in substantially the following form:

OFFICIAL PRIMARY BALLOT

CANDIDATES FOR NOMINATION FOR MAYOR AND COUNCILMEN OF (Name of City) AT THE PRIMARY ELECTION

(Place a cross in the square preceding the name of the person for whom you wish to vote)

FOR MAYOR
(Vote for one)
☐ Name of candidate
☐ Name of candidate

FOR SUPERINTENDENT OF ACCOUNTS AND FINANCES
(Vote for one)
☐ Name of candidate
☐ Name of candidate

FOR SUPERINTENDENT OF PUBLIC SAFETY
(Vote for one)
☐ Name of candidate
☐ Name of candidate

FOR SUPERINTENDENT OF STREETS AND PUBLIC IMPROVEMENTS
(Vote for one)
☐ Name of candidate
☐ Name of candidate

FOR SUPERINTENDENT OF PARKS AND PUBLIC PROPERTY
(Vote for one)
☐ Name of candidate
☐ Name of candidate

Attest: OFFICIAL BALLOT
(Signature)
.....
City Clerk.

[S13,§1056-a21; C24, 27, 31, 35,§6501.]

6502 Combination of offices. In cities having a population of two thousand and not over twenty-five thousand the two councilmen shall be nominated and elected as follows:

1. One councilman to preside over the departments of "accounts and finances" and "public safety".

2. One councilman to preside over the departments of "parks and public property" and "streets and public improvements". [C24, 27, 31, 35,§6502.]

6503 Form of ballot in minor cities. The ballot in all cities having a population of two thousand and less than twenty-five thousand shall be in substantially the following form:

OFFICIAL PRIMARY BALLOT

CANDIDATES FOR NOMINATION FOR MAYOR AND COUNCILMEN OF (Name of City) AT THE PRIMARY ELECTION

(Place a cross in the square preceding the name of the person for whom you wish to vote)

FOR MAYOR
(Vote for one)
☐ Name of candidate
☐ Name of candidate

FOR SUPERINTENDENT OF ACCOUNTS, FINANCES AND PUBLIC SAFETY
(Vote for one)
☐ Name of candidate
☐ Name of candidate
FOR SUPERINTENDENT OF PARKS AND PUBLIC PROPERTY, STREETS AND PUBLIC IMPROVEMENTS
(Vote for one)
☐ Name of candidate
☐ Name of candidate
Attest: OFFICIAL BALLOT
(Signature)
.....
City Clerk.
[S13,§1056-a21; C24, 27, 31, 35,§6503.]

6504 Arrangement of names. The names of the candidates shall be arranged and printed upon the primary election ballots in the following manner, to wit: The city clerk shall prepare a list of the election precincts of his city, by arranging the various wards or precincts of such city in numerical order. He shall then arrange the surnames of all candidates for such offices alphabetically for the respective offices for the first precinct in the list; thereafter, for each succeeding precinct, the name or names appearing first for the respective offices in the last precinct should be placed last, so that the names that were second before the change shall be first after the change. [C24, 27, 31, 35,§6504.]

6505 Number of ballots. The city clerk shall cause to be delivered at each polling place a number of said ballots equal to twice the number of votes cast in such polling precinct at the last general municipal election for mayor. [S13, §1056-a21; C24, 27, 31, 35,§6505.]

6506 Qualification of electors—challenges. Persons who are qualified to vote at the general municipal election shall be qualified to vote at such primary election. Challenges can be made by not more than two persons, to be appointed at the time of opening the polls by the judges of election; and the law applicable to challenges at a general municipal election shall be applicable to challenges made at such primary election. [S13,§1056-a21; C24, 27, 31, 35,§6506.]

6507 Canvass of votes—return. Judges of election shall, immediately upon the closing of the polls, count the ballots and ascertain the number of votes cast in such precinct for each of the candidates, and make return thereof to the city clerk, upon proper blanks to be furnished by the said city clerk, within six hours after the closing of the polls. [S13,§1056-a21; C24, 27, 31, 35,§6507.]

6508 Canvass of returns — report. On the day following the primary election, the city clerk shall publicly canvass said returns so received from the polling precincts, and shall report to the city council the result thereof. [S13,§1056-a21; C24, 27, 31, 35,§6508.]

6509 General municipal ballot. The ballot at such general municipal election shall be in the same general form as for such primary election, so far as applicable. [S13,§1056-a21; C24, 27, 31, 35,§6509.]

6510 Ballot with dual candidates. The city clerk in preparing the ballots for the ensuing general municipal election shall cause to be printed under the caption for a particular office, or combination of offices if any, the names of the two candidates who received the highest number of votes at the primary for said particular office, or combination of offices. [S13,§1056-a21; C24, 27, 31, 35,§6510.]

6511 Ballot with one candidate. If there be but one candidate, at the primary election, for a particular office, or combination of offices, his name shall be printed upon the general municipal ballot as a candidate for said particular office, or combination of offices, as the case may be. [C24, 27, 31, 35,§6511.]

6512 Arrangement and rotation of names. The names of the candidates shall be arranged and printed upon the general municipal election ballot in the same manner in which they are arranged and printed on the municipal primary ballot. [S13,§1056-a21; C24, 27, 31, 35,§6512.]

6513 Qualification of electors. All electors of cities under this chapter, who by the laws governing cities of the first and second class would be entitled to vote for the election of officers at any general municipal election in such cities, shall be qualified to vote at all elections under this chapter. [S13,§1056-a21; C24, 27, 31, 35,§6513.]

6514 General municipal election statutes. In all elections in such cities, the election precincts, voting places, method of conducting election, canvassing the vote, and announcing the result shall be the same as by law provided for election of officers in cities of the first or second class, so far as the same are applicable and not inconsistent with the provisions of this chapter. [S13,§1056-a21; C24, 27, 31, 35,§6514.]

6515 Services for hire. Any person who shall agree to perform any services in the interest of any candidate for any office provided in this chapter, in consideration of any money or other valuable thing for such services performed in the interest of any candidate, shall be punished by a fine not exceeding three hundred dollars, or be imprisoned in the county jail not exceeding thirty days. [S13,§1056-a22; C24, 27, 31, 35,§6515.]

Referred to in §6644

6516 Bribery and illegal voting. Any person offering to give a bribe, either in money or other consideration, to any elector for the purpose of influencing his vote at any election provided in this chapter, or any elector entitled to vote at any such election receiving and accepting such bribe or other consideration; any person making false answer to any of the provisions of this chapter relative to his qualifications to vote at said election; any person wilfully voting

or offering to vote at such election who has not been a resident of this state for six months next preceding said election, or who is not twenty-one years of age, or is not a citizen of the United States, or knowing himself not to be a qualified elector of such precinct where he offers to vote; and any person knowingly procuring, aiding, or abetting any violation hereof shall be deemed guilty of a misdemeanor and upon conviction shall be fined a sum not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than ten nor more than ninety days. [S13,§1056-a23; C24, 27, 31, 35, §6516.]

Referred to in §6644

6517 Salaries. The mayor and councilmen shall have an office in the city hall, and their total compensation shall be as follows:

1. In cities having by the last preceding state or national census a population of less than twenty-five thousand, the mayor and councilmen shall receive as their annual salaries the amount to be fixed by ordinance, as follows: For the mayor, not to exceed the sum of one hundred fifty dollars per annum for each one thousand of population, or major portion thereof, in such city, and for each councilman in such city, not to exceed the sum of one hundred twenty dollars per annum for each one thousand population, or major portion thereof; provided, however, that in such city no mayor shall receive a salary greater than the sum of twenty-five hundred dollars per annum, nor in such city shall a councilman receive as his annual salary an amount greater than two thousand dollars per annum; and provided, further, that during the first term of office under the provisions of this chapter, the mayor and councilmen shall by ordinance fix their compensation as herein provided for their term of office; but thereafter the salary of any such officer shall not be increased or decreased during the term for which he shall have been elected or appointed.

2. In cities having by such census a population of twenty-five thousand and less than forty thousand, the mayor's annual salary shall be twenty-five hundred dollars, and that of each councilman, eighteen hundred dollars.

3. In cities having by such census a population of forty thousand and less than sixty thousand, the mayor's annual salary shall be three thousand dollars, and that of each councilman twenty-five hundred dollars.

4. In cities having by such census a population of sixty thousand or more, the mayor's annual salary shall be thirty-five hundred dollars, and that of each councilman, three thousand dollars.

Such salaries shall be payable in equal monthly installments. [S13,§1056-a28; C24, 27, 31, 35,§6517.]

S13,§1056-a28, editorially divided

6518 Increase in salary. Any increase in salary occasioned under the provisions of this scale by increase in population in any city shall commence with the month next after the official publication of the census showing such increase therein. [S13,§1056-a28; C24, 27, 31, 35,§6518.]

6519 Salaries of minor officers. Every other officer or assistant, and members of the fire department and police department, shall receive such salary or compensation as the council shall by ordinance provide, payable in equal monthly or semimonthly installments. The salary or compensation of all other employees of such city shall be fixed by the council and shall be payable monthly or at such shorter periods as the council shall determine. [S13,§1056-a28; C24, 27, 31, 35,§6519; 48GA, ch 168,§1.]

Assessors, §5669

6520 Governing body. Every city having a population of twenty-five thousand and over shall be governed by a council consisting of the mayor and four councilmen, and every city having a population of two thousand and less than twenty-five thousand shall be governed by a council consisting of the mayor and two councilmen, chosen as provided in this chapter, each of whom shall have the right to vote on all questions coming before the council. [S13, §1056-a24; C24, 27, 31, 35,§6520.]

S13,§1056-a24, editorially divided

6521 Quorum. In cities having four councilmen three members of the council shall constitute a quorum, and in cities having two councilmen, two members of the council shall constitute a quorum. [S13,§1056-a24; C24, 27, 31, 35,§6521.]

6522 Affirmative vote required. In cities having four councilmen the affirmative vote of three members, and in cities having two councilmen the affirmative vote of two members shall be necessary to adopt any motion, resolution, or ordinance, or pass any measure, unless a greater number is provided for in this chapter. [S13, §1056-a24; C24, 27, 31, 35,§6522.]

6523 Yeas and nays — writings — reading. Upon every vote the yeas and nays shall be called and recorded, and every motion, resolution, or ordinance shall be reduced to writing and read before the vote is taken thereon. [S13, §1056-a24; C24, 27, 31, 35,§6523.]

6524 Presiding officer. The mayor shall preside at all meetings of the council. He shall have no power to veto any measure. [S13, §1056-a24; C24, 27, 31, 35,§6524.]

6525 Meetings. Regular meetings of the council shall be held on the first Monday after the election of councilmen, and thereafter at least once each month. The council shall provide by ordinance for the time of holding regular meetings, and special meetings may be called from time to time by the mayor or two councilmen. All meetings of the council, whether regular or special, at which any person not a city officer is admitted, shall be open to the public. [S13,§1056-a29; C24, 27, 31, 35,§6525.]

S13,§1056-a29, editorially divided

6526 President. The mayor shall be president of the council and preside at its meetings, and shall supervise all departments and report to the council for its action all matters requiring attention in either. [S13,§1056-a29; C24, 27, 31, 35,§6526.]

6527 Vice president. The superintendent of the department of accounts and finances shall be vice president of the council, and in case of vacancy in the office of mayor, or the absence or inability of the mayor, shall perform the duties of mayor. [S13,§1056-a29; C24, 27, 31, 35,§6527.]

6528 Minor officers and assistants. The council shall, at the first regular meeting after election, or as soon as practical thereafter, elect by majority vote the following city officers: clerk, solicitor, assessor, treasurer, auditor, civil engineer, health physician, marshal, market master, street commissioner, and such other officers and assistants as shall be provided by ordinance, and are necessary for the proper and efficient conduct of the affairs of the city. [SS15,§1056-a26; C24, 27, 31, 35,§6528.]

6529 Officers in certain cities. In cities having a population of less than twenty-five thousand such only of the above-named officers shall be appointed as may, in the judgment of the mayor and councilmen, be necessary for the proper and efficient transaction of the affairs of the city. [SS15,§1056-a26; C24, 27, 31, 35, §6529.]

6530 Police judge. In those cities of the first class not having a superior court, the council shall appoint a police judge. [SS15,§1056-a26; C24, 27, 31, 35,§6530.]

6531 In cities of second class. In cities of the second class not having a superior court the mayor shall hold police court, as now provided by law. [SS15,§1056-a26; C24, 27, 31, 35, §6531.]

6532 Removal of officers. Any officer or assistant elected or appointed by the council may be removed from office at any time by vote of a majority of the members of the council, except as otherwise provided for in this chapter. [SS15, §1056-a26; C24, 27, 31, 35,§6532.]

Removal of city officers, §§1091, 1117, 5638, 6539 et seq.

6533 Create and discontinue offices. The council shall have power from time to time to create, fill, and discontinue offices and employments other than herein prescribed, according to their judgment of the needs of the city; and may by majority vote of all the members remove any such officer or employee, except as otherwise provided for in this chapter; and may by resolution or otherwise prescribe, limit, or change the compensation of such officers or employees. [S13,§1056-a27; C24, 27, 31, 35,§6533.]

6534 Interest in contracts. No officer or employee elected or appointed in any such city shall be interested, directly or indirectly, in any contract or job for work or materials, or the profits thereof, or services to be furnished or performed for the city; and no such officer or employee shall be interested, directly or indirectly, in any contract or job for work or materials, or the profits thereof, or services to be furnished or performed for any person, firm, or corporation operating interurban railway, street railway, gasworks, waterworks, electric light or power plant, heating plant, telegraph line, telephone exchange, or other public utility within the territorial limits of said city. [S13,§1056-a31; C24, 27, 31, 35,§6534.]

Referred to in §§6536, 6656
Similar provisions, §§180, 275, 3828.101, 3922, 4685, 4686.14, 4755.10, 5361, 5673, 5828, 6710, 13324, 13327
S13,§1056-a31, editorially divided

6535 Free passes—services. No such officer or employee shall accept, or receive, directly or indirectly, from any person, firm, or corporation operating within the territorial limits of said city, any interurban railway, street railway, gasworks, waterworks, electric light or power plant, heating plant, telegraph line or telephone exchange, or other business using or operating under a public franchise, any frank, free pass, free ticket or free service, or accept or receive, directly or indirectly, from any such person, firm, or corporation, any other service upon terms more favorable than is granted to the public generally. [S13,§1056-a31; C24, 27, 31, 35,§6535.]

Referred to in §§6536, 6537, 6656

6536 Violations. Any violation of the provisions of sections 6534 and 6535 shall be a misdemeanor, and every such contract or agreement shall be void. [S13,§1056-a31; C24, 27, 31, 35, §6536.]

Referred to in §6656
Punishment, §12894

6537 Exceptions. Such prohibition of free transportation shall not apply to policemen or firemen in uniform; nor shall any free service to city officials heretofore provided by any franchise or ordinance be affected by section 6535. [S13,§1056-a31; C24, 27, 31, 35,§6537.]

Referred to in §6656

6538 Political activity. Any officer or employee of such city who, by solicitation or otherwise, shall exert his influence directly or indirectly to influence other officers or employees of such city to adopt his political views or to favor any particular person or candidate for office, or who shall in any manner contribute money, labor, or other valuable thing to any person for election purposes, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding three hundred dollars or by imprisonment in the county jail not exceeding thirty days. [S13,§1056-a31; C24, 27, 31, 35,§6538.]

Referred to in §6656

REMOVAL FROM OFFICE

6539 Removal by electors — petition. The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent. The procedure to effect the removal of an incumbent of an

elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five percent of the entire vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the city clerk, which petition shall contain a general statement of the grounds for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths that the statements therein made are true as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be. [S13,§1056-a36; C24, 27, 31, 35,§6539.]

Referred to in §§6549, 6556
S13,§1056-a36, editorially divided

6540 Examination. Within ten days from the date of filing such petition the city clerk shall examine and from the voters register ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow him extra help for that purpose; and he shall attach to said petition his certificate, showing the result of said examination. [S13,§1056-a36; C24, 27, 31, 35,§6540.]

Referred to in §§6549, 6556

6541 Amendment. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same, without prejudice, however, to the filing of a new petition to the same effect. [S13,§1056-a36; C24, 27, 31, 35,§6541.]

Referred to in §§6549, 6556

6542 Election called. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the council without delay. If the petition shall be found to be sufficient, the council shall order and fix a date for holding the said election, not less than thirty days or more than forty days from the date of the clerk's certificate to the council that a sufficient petition is filed. [S13,§1056-a36; C24, 27, 31, 35,§6542.]

Referred to in §§6549, 6556

6543 Notice of election — procedure. The council shall make or cause to be made publication of notice and all arrangements for holding such election, and the same shall be conducted, returned, and the result thereof declared, in all respects as are other city elections. [S13, §1056-a36; C24, 27, 31, 35,§6543.]

Referred to in §§6549, 6556

6544 Nominations. So far as applicable, except as otherwise herein provided, nominations hereunder shall be made without the intervention of a primary election by filing with the clerk, at least ten days prior to said special election, a statement of candidacy accompanied by a petition signed by electors entitled to vote at said special election equal in number to at least ten percent of the entire vote for all candidates for the office of mayor at the last preceding general municipal election, which said statement of candidacy and petition shall be substantially in the form set out in sections 6495 and 6497, so far as the same are applicable, substituting the word "special" for the word "primary" in such statement and petition, and stating therein that such person is a candidate for election instead of nomination. [S13,§1056-a36; C24, 27, 31, 35,§6544.]

6545 Incumbent as candidate. Any person sought to be removed may be a candidate to succeed himself, and unless he requests otherwise in writing, the clerk shall place his name on the official ballot without nomination. [S13, §1056-a36; C24, 27, 31, 35,§6545.]

6546 Form of ballot. The ballot for such special election shall be in substantially the following form:

OFFICIAL BALLOT
Special election for the balance of the unexpired term
of ..... as .....
for .....
(Vote for one only)
(Names of Candidates)
☐.....
☐.....
(Name of present incumbent)
Official ballot attest:
(Signature) .....
City Clerk.

[S13,§1056-a36; C24, 27, 31, 35,§6546.]

6547 Result—removal—tenure. In any such removal election, the candidate receiving the highest number of votes shall be declared elected. At such election if some other person than the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor. In case the party who receives the highest number of votes should fail to qualify within ten days after receiving notification of election, the office shall be deemed vacant.

The successor of any officer so removed shall hold office during the unexpired term of his predecessor. [S13,§1056-a36; C24, 27, 31, 35, §6547.]

6548 Failure to remove—cumulative remedy. If the incumbent receives the highest number of votes, he shall continue in office. The said method of removal shall be cumulative and additional to the methods heretofore provided by law. [S13,§1056-a36; C24, 27, 31, 35,§6548.]

Removal from office, ch 56

ABANDONMENT OF PLAN

6549 Procedure. Any city which shall have operated for more than six years under the provisions of this chapter may abandon such organization hereunder, and accept the provisions of the general law of the state then applicable to cities of its population, or if now organized under special charter may resume said special charter by proceeding as follows: Upon the petition of not less than twenty-five percent of the electors of such city a special election shall be called, at which the following proposition only shall be submitted:

"Shall the city of (name of city) abandon its organization under chapter 326 of the code, and become a city under the general law governing cities, or if now organized under special charter, resume said special charter?"

If the majority of the votes cast at such special election be in favor of such proposition, the officers elected at the next succeeding biennial election shall be those then prescribed by the general law of the state for cities of like population, and upon the qualification of such officers such city shall become a city under such general law of the state; but such change shall not in any manner or degree affect the property, rights, or liabilities of any nature of such city, but shall merely extend to such change in its form of government. The sufficiency of such petition shall be determined, the election ordered and conducted, and the results declared, generally as provided by sections 6539 to 6543, inclusive, insofar as the provisions thereof are applicable. [S13,§1056-a39; C24, 27, 31, 35,§6549.]

ORDINANCES AND RESOLUTIONS

6550 When effective. No ordinance passed by the council, except when otherwise required by the general laws of the state or by the provisions of this chapter, except an ordinance for the immediate preservation of the public peace, health, or safety, which contains a statement of its urgency and is passed by a two-thirds vote of the council, shall go into effect before ten days from the time of its final passage. [S13, §1056-a38; C24, 27, 31, 35,§6550.]

S13,§1056-a38, editorially divided

6551 Petition of protest. If during said ten days a petition signed by electors of the city equal in number to at least twenty-five percent of the entire vote cast for all candidates for mayor at the last preceding general municipal election at which a mayor was elected, protesting against the passage of such ordinance, be presented to the council, the same shall thereupon be suspended from going into operation, and it shall be the duty of the council to reconsider such ordinance; and if the same is not entirely repealed, the council shall submit the ordinance, as is provided by section 6557 to the vote of the electors of the city, either at the general election or at a special municipal election to be called for that purpose; and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof. [S13,§1056-a38; C24, 27, 31, 35,§6551.]

6552 Petition — examination and certification. Said petition shall be in all respects in accordance with the provisions of said section except as to the percentage of signers, and be examined and certified to by the clerk in all respects as is provided in section 6556. [S13, §1056-a38; C24, 27, 31, 35,§6552.]

6553 Time limit on enactment. Every ordinance or resolution appropriating money or ordering any street improvement or sewer, or making or authorizing the making of any contract, or granting any franchise or right to occupy or use the streets, highways, bridges, or public places in the city for any purpose, shall be complete in the form in which it is finally passed, and remain on file with the city clerk for public inspection at least one week before the final passage or adoption thereof. [S13,§1056-a30; C24, 27, 31, 35,§6553.]

S13,§1056-a30, editorially divided

6554 Signing and recording. Every resolution or ordinance passed by the council must be signed by the mayor, or by two councilmen, and be recorded, before the same shall be in force. [S13,§1056-a24; C24, 27, 31, 35,§6554.]

6555 Franchises. No franchise or right to occupy or use the streets, highways, bridges, or public places in any such city shall be granted, renewed, or extended, except by ordinance, and every franchise or grant for interurban or street railways, gas or water works, electric light or power plants, heating plants, telegraph or telephone systems, or other public service utilities within said city, must be authorized or approved by a majority of the electors voting thereon at a general or special election as provided in chapter 304. [S13,§1056-a30; C24, 27, 31, 35,§6555.]

6556 Petitions for ordinances. Any proposed ordinance may be submitted to the council by petition signed by electors of the city equal in number to the percentage hereinafter required. The signatures, verification, authentication, inspection, certification, amendment, and submission of such petition shall be the same as provided for petitions under sections 6539 to 6543, inclusive. [S13,§1056-a37; C24, 27, 31, 35, §6556.]

Referred to in §§6552, 6560, 6660
S13,§1056-a37, editorially divided

6557 Ordinance passed or election called. If the petition accompanying the proposed ordinance is signed by electors equal in number to twenty-five percent of the votes cast for all candidates for mayor at the last preceding general election, and contains a request that the said ordinance be submitted to a vote of the people if not passed by the council, such council shall either (a) pass said ordinance without alteration within twenty days after attachment of the clerk's certificate to the accompanying petition, or (b) forthwith after the clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the council shall call a

special election, unless a general municipal election is fixed within ninety days thereafter, and at such special or general municipal election, if one is so fixed, such ordinance shall be submitted without alteration to the vote of the electors of said city. [S13,§1056-a37; C24, 27, 31, 35,§6557.]

Referred to in §§6551, 6560, 6659

6558 Ordinance passed or election had. If the petition is signed by not less than ten nor more than twenty-five percent of the electors, as above defined, then the council shall, within twenty days, pass said ordinance without change, or submit the same at the next general city election occurring not more than thirty days after the clerk's certificate of sufficiency is attached to said petition. [S13,§1056-a37; C24, 27, 31, 35,§6558.]

Referred to in §6560

6559 Form of ballot. The ballots used when voting upon said ordinance shall contain these words: "For the ordinance" (stating the nature of the proposed ordinance), and "Against the ordinance" (stating the nature of the proposed ordinance). [S13,§1056-a37; C24, 27, 31, 35,§6559.]

Referred to in §6560

6560 Multiple submission—limitation. Any number of proposed ordinances may be voted upon at the same election, in accordance with the provisions of sections 6556 to 6559, inclusive; but there shall not be more than one special election in any period of six months for such purpose. [S13,§1056-a37; C24, 27, 31, 35, §6560.]

6561 Adoption by electors — status. If a majority of the qualified electors voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people. [S13,§1056-a37; C24, 27, 31, 35,§6561.]

6562 Amendments. The council may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general city election; and should such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall thereby be repealed or amended accordingly. [S13,§1056-a37; C24, 27, 31, 35,§6562.]

6563 Publications. Whenever any ordinance or proposition is required by this chapter to be submitted to the voters of the city at any election, the city clerk shall cause such ordinance or proposition to be published once in each of the daily newspapers published in said city, such publication to be not more than twenty nor less than five days before the submission of such proposition or ordinance to be voted on. [S13, §1056-a37; C24, 27, 31, 35,§6563.]

GENERAL POWERS AND DUTIES

6564 The council. The council shall have and possess, and the council and its members shall exercise, all executive, legislative, and judicial powers and duties now had, possessed, and exercised by the mayor, city council, solicitor, assessor, treasurer, auditor, city engineer, and other executive and administrative officers in cities of the first and second class, and in cities under special charter, and shall also possess and exercise all executive, legislative, and judicial powers and duties now had and exercised by the park commissioners, the board of police and fire commissioners, and board of waterworks trustees, in all cities wherein park commissioners, board of police and fire commissioners, and board of waterworks trustees now exist or may be hereafter created except as such powers and duties may be changed or modified by subsequent sections of this chapter. [S13,§1056-a25; C24, 27, 31, 35.§6564; 47GA, ch 174,§1.]

S13, §1056-a25, editorially divided

6564.1 Public buildings — sites. The city council, in cities having a population of one hundred twenty-five thousand or more, may, with the concurrence of the park board of said city, if any such exists, have the right to consent to and provide a site in any park or public grounds of said city, for the location of buildings to be used for a public library, public art gallery or art museum, or for a library, art gallery or art museum to be erected, owned and kept by individuals, associations or corporations for public use and not for private profit. [47GA, ch 175,§1.]

6565 Departments. The executive and administrative powers, authority, and duties in such cities shall be distributed into and among five departments, as follows:

1. Department of public affairs.
2. Department of accounts and finances.
3. Department of public safety.
4. Department of streets and public improvements.
5. Department of parks and public property.

[S13,§1056-a25; C24, 27, 31, 35,§6565.]

6566 Department superintendents. The mayor shall be superintendent of the department of public affairs and each councilman shall be superintendent of the particular department or combination of departments to which he was elected, as the case may be. [SS15,§1056-a26; C24, 27, 31, 35,§6566.]

6567 Statutes applicable. All laws governing cities of the first and second class and not inconsistent with the provisions of this chapter, and sections 6735, 6736, 6779, 6786, 6789 to 6793, inclusive, 6817, 6823 to 6825, inclusive, and 6932, now applicable to special charter cities and not inconsistent with the provisions of this chapter, shall apply to and govern cities organized under this chapter. [S13,§1056-a19; C24, 27, 31, 35, §6567.]

S13, §1056-a19, editorially divided

6568 Existing ordinances. All bylaws, ordinances, and resolutions lawfully passed and in force in any such city under its former organization shall remain in force until altered or repealed by the council elected under the provisions of this chapter. [S13,§1056-a19; C24, 27, 31, 35,§6568.]

6569 Existing limits, rights, property. The territorial limits of such city shall remain the same as under its former organization, and all rights and property of every description which were vested in any such city under its former organization shall vest in the same under the organization herein contemplated, and no right or liability either in favor of or against it, existing at the time, and no suit or prosecution of any kind, shall be affected by such change, unless otherwise provided for in this chapter. [S13,§1056-a19; C24, 27, 31, 35,§6569.]

6570 Revision of appropriations. If, at the beginning of the term of office of the first council elected in such city under the provisions of this chapter, the appropriations for the expenditures of the city government for the current fiscal year have been made, said council shall have power, by ordinance, to revise, repeal, or change said appropriations and to make additional appropriations. [S13,§1056-a34; C24, 27, 31, 35,§6570.]

6571 Discretionary powers. The council shall determine the powers and duties to be performed by, and assign them to, the appropriate department; shall prescribe the powers and duties of officers and employees; may assign particular officers and employees to one or more of the departments; may require an officer or employee to perform duties in two or more departments; and may make such other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the city. [S13,§1056-a25; C24, 27, 31, 35, §6571.]

6572 Library trustees. The board of library trustees in all cities organized under the commission form of government shall consist of five members (except in cities which have heretofore maintained a library under lease or contract fixing a different number of trustees) and said board shall have and exercise all the powers possessed by library boards in cities not organized and acting under this chapter. [S13,§1056-a26a; C24, 27, 31, 35,§6572.]

6573 How selected—terms. The said board of five trustees shall be selected as follows: At the first meeting of the council, or as soon as practicable thereafter, the mayor shall appoint, by and with the approval of the council, five library trustees, one to serve for the period of five years, one for four years, one for three years, one for two years, and one for one year, and until their successors are elected and qualify. Upon the election of said five trustees the term of the existing board of nine trustees heretofore acting under the general law shall cease. Annually thereafter there shall be elected in like manner one trustee to serve for five years and to take the place of the trustee whose term first expires. [S13,§1056-a26b; C24, 27, 31, 35, §6573.]

6574 Flood protection—division of work—levy. Whenever in any such city proceedings have been or shall be begun for the purpose of providing flood protection under the provisions of chapter 310, the council shall have power, after the election in said chapter provided for has been had, and without again submitting the matter at an election, to divide the work into parts, sections, or districts, and determine what property would be benefited by the work or improvement in each part, section, or district; to omit parts of said work or any part, section, or district; and to contract for any part, section, or district separately and proceed therewith the same as if the entire work or improvement was contracted for, done, or made. Whenever in any such city the tax provided for in said chapter has not been levied beginning on the date fixed in the resolution of necessity and in the proposition submitted to a vote of the electors, and a part of the period in which such levy is authorized to be made by such vote has expired without such levy having been made, and no certificates or bonds have been issued or sold for the payment of the improvement as provided in said chapter, the council shall have the power to continue the levy provided for in said chapter and in the proposition theretofore submitted to a vote of the electors, for a period not exceeding twenty years, including the several years, if any, for which such tax has heretofore been levied; and it is hereby made the duty of the council to make the levy in the manner provided in section 6100, and to appropriate and apply the proceeds collected after January 1, 1914, from such tax so levied to the payment of flood protection bonds issued by such city under section 6103 if any such there be. [S13,§1056-a41; C24, 27, 31, 35,§6574.]

6575 Special assessments. In all cases where special assessments are authorized and no other mode of proceeding is provided by law, the assessment shall be made as nearly as practicable in the manner provided for assessing the cost of street improvements and sewers. [S13, §1056-a42; C24, 27, 31, 35,§6575.]

Special assessments, ch 308

6576 Certificate for repair of bridges. Any such city shall have power to issue certificates as provided in sections 5877 to 5879, inclusive, for the whole or any part of the expense of repairing bridges. [S13,§1056-a43; C24, 27, 31, 35,§6576.]

6577 Repairs by street railway companies. In every such city the owner of any street railway occupying or using any bridge shall construct, reconstruct, and repair the paving or flooring on said bridge three and one-half feet each way from the center line of the space between the rails of its tracks, the same to be ordered, done, assessed, and paid for in the manner provided for paving in sections 6052

to 6054, inclusive, 6057* and 6058*. [S13, §1056-a44; C24, 27, 31, 35, §6577.]

*Repealed by 43GA, ch 182

6578 Parks and cemeteries. In addition to the taxes now or hereafter authorized by law, every such city shall have the power to levy annually upon all taxable property therein a tax of not more than five-eighths mill on the dollar for the purpose of caring for and improving the parks of said city, or any cemetery owned by such city, or both such parks and cemetery. [S13, §1056-a45; C24, 27, 31, 35, §6578.]

6578.1 Anticipating tax. The collection of such tax or part thereof may be anticipated for a period of not to exceed ten years, and the provisions of sections 6261 to 6264, inclusive, shall apply so far as applicable. [C27, 31, 35, §6578-b1; 47GA, ch 176, §1.]

6578.2 Parks and park commissioners. The provisions of chapter 293, relating to parks and park commissioners, shall be applicable to and be in force in cities and towns organized under the provisions of this chapter to the same extent and effect that such provisions are applicable to and in force in cities and towns of the same class organized under the general laws of the state. The board of park commissioners shall have and may exercise all powers conferred upon them by the provisions of said chapter. [47GA, ch 174, §2.]

6579 Fund for cemeteries. Every such city shall have power to create a fund from tax levies heretofore or hereafter authorized for cemeteries or from the sale of lots in cemeteries, or from other sources, including bequests or donations for the permanent maintenance of cemeteries, and the fund thus created shall not be used for any other purpose; and the city council shall have authority to cause such accumulations to be invested in bonds of the United States, or in municipal bonds or certificates, or other evidence of indebtedness issued by authority of and according to law of this or any other state, when such bonds are at or above par. [S13, §1056-a46; C24, 27, 31, 35, §6579.]

6579.1 Police stations and jails. Any such city, having not less than fifty thousand and not more than sixty thousand inhabitants, shall have the power to purchase property and to erect or construct thereon all necessary buildings required and necessary for proper police stations and/or jails, or to erect or construct all such buildings for such purposes on any property owned by it and available therefor, and shall have the power to levy a special tax to pay for the same on all the taxable property in such city, not to exceed one-fourth mill on the dollar in any one year. Such city may anticipate the collection of such taxes, and for that purpose, may issue bonds with interest coupons attached thereto and the provisions of chapter 320, shall be applicable thereto. [C35, §6579-f1.]

6580 Lease of city property. Any such city, by a two-thirds vote of its council, shall have authority to lease any city property for a term of not exceeding one year from the date of leasing the same, where, in the judgment of the council expressed by a two-thirds vote thereof, any such property may not be needed for the immediate use of such city.

In cities acting under the commission form of government where in the judgment of two-thirds of the city council, any city property is not likely to be sooner needed for city purposes, such property may be leased for a period of not exceeding twenty-five years for such purposes as the city council shall deem for the public benefit and at such rental as may be fixed by a two-thirds vote of a city council, but before any such lease for a longer period than one year shall be executed by the city council, a notice of the intention to lease such property for the period contemplated shall be published in a newspaper published in such city, or if none there, in the nearest newspaper, for a period of two weeks. If objections to such contemplated lease are made in writing within said two weeks, and signed by not less than ten percent of the voters of such city voting at the last general or city election, then before executing such lease, said council shall fix a time for hearing such objections and shall have a hearing thereon, and shall determine such objections and file such decision with the city clerk. If such objections are sustained, such lease shall not be executed, but if same are overruled, the said objectors or not less than twenty-five percent of them, may take an appeal to the district court by giving written notice of such appeal to the mayor of such city within ten days of the filing of the decision of said council with the city clerk, and by filing a bond for two hundred dollars with the city clerk for payment of the costs of such appeal if unsuccessful. In event such appeal is taken, said appeal shall be docketed in said court within five days from the taking of such appeal, and shall be tried as a suit in equity. [S13, §1056-a47; C24, 27, 31, 35, §6580; 47GA, ch 177, §1; 48GA, ch 169, §1.]

Referred to in §6679.1
Applicable to special charter cities, §6781.2
Presumption of approval of bond, §12759.1

6581 Itemized statements. In cities organized under the provisions of this chapter having less than fifty thousand population, the council shall publish itemized statements once each quarter of all receipts and disbursements of the city, and a summary of the council proceedings immediately after each regular or special meeting, said statements and summary to be published in one or more newspapers of general circulation in said city; provided, however, that in cities organized under the provisions of this chapter having more than fifty thousand population the council shall each month print in pamphlet form a detailed itemized statement of all receipts and disbursements of the city, and a summary of its proceedings during the preceding month, and furnish copies thereof to the state library, the city library, the daily newspapers of the city and to persons who shall apply therefor at the office of the city clerk. [S13, §1056-a33; C24, 27, 31, 35, §6581.]

6582 Annual examination. At the end of each fiscal year the council shall cause a full and complete examination of all the books and accounts of the city to be made by competent accountants, and shall publish the result of such examination in the manner above provided for publication of statements of monthly expenditures. [S13,§1056-a33; C24, 27, 31, 35,§6582.]

Fiscal year, §5676.1

DRAINAGE IN CERTAIN CITIES

6583 Authorization. All cities in this state organized and existing under this chapter and having a population of one hundred thousand or over, into or through which a stream flows which furnishes drainage for any city or town farther up the stream, and whose boundary lines join, shall have the power to construct, repair, and maintain the necessary drains and sewers to preserve and protect the health of such cities. [C24, 27, 31, 35,§6583.]

Referred to in §6586

6584 Resolution of necessity—notice—objections. When any such city located as above indicated desires to construct, repair, and maintain any such sewer or drain, the council of such city shall by resolution determine the necessity for the construction of such drains and sewers, the character and extent thereof, the method of construction, the one or more kinds and size thereof, the property to be assessed therefor, the location and terminal points thereof, and cause twenty days notice of time when said resolution will be considered by such council for passage to be given by two publications in said city in some newspaper of general circulation published therein, the last of which shall be not less than two nor more than four weeks prior to the time fixed for the consideration of said resolution, at which time the owners of the property subject to assessment for the same may appear and make objection to the contemplated improvement, sewer, or drain, and the passage of said proposed resolution, at which hearing the same may be amended and passed or passed as proposed. [C24, 27, 31, 35,§6584.]

Referred to in §6586

6585 Sewer districts—assessments. Such city shall have power to establish sewer districts to embrace all or such portions of said commission-governed cities as in the judgment of the council thereof will receive special benefits from the construction, repair, improvement, or reconstruction of such sewer or sewers, to change the boundaries of same from time to time as may become in the judgment of such council just and equitable, and to assess so much of the cost of such drains and sewers against all lots or tracts of land contained in the sewer district within which such improvements are made as shall equal and be in proportion to the special benefits conferred by said improvement and not in excess thereof. In no case shall such assessment exceed twenty-five percent of the actual value of said lots or tracts at the time of levy thereof. [C24, 27, 31, 35,§6585.]

Referred to in §6586

6586 Construction ordered. Whenever the resolution of necessity hereinabove provided for has been adopted and the provisions of sections 6583 to 6585, inclusive, complied with, the council may by ordinance or resolution order the construction, repair, improvement, or reconstruction of said drain or sewer upon a yea and nay vote entered of record, which record shall also show whether such improvement was petitioned for or made on the motion of the council. [C24, 27, 31, 35,§6586.]

POLICE EQUIPMENT IN CERTAIN CITIES

6587 Applicability of act. Sections 6588 to 6591, inclusive, shall apply only to cities having a population of seventy thousand or more as shown by the last United States or state census. [S13,§1056-a59; C24, 27, 31, 35,§6587.]

6588 Equipment authorized. The council of any city organized under this chapter shall have the power to levy a special tax upon all taxable property in said city, not to exceed one-fourth mill on the dollar each year, for the purpose of purchasing and maintaining apparatus and equipment for use in police service in the department of public safety, but nothing in this section or sections 6589 to 6591, inclusive, shall be held to extend the powers of such cities to make annual levies for general and special taxes in excess of twelve mills on the dollar of the taxable value of the property therein. [S13, §1056-a55; C24, 27, 31, 35,§6588.]

Referred to in §6587

6589 Levy. When the whole or any part of the cost of purchasing and maintaining apparatus and equipment for use in police service in the department of public safety of any city organized under this chapter shall be ordered paid from the city fund designated to purchase and maintain apparatus and equipment for use in police service in the department of public safety, to be levied upon all the taxable property within such city, it shall have the power after the purchase of said apparatus and equipment, by ordinance or resolution, to levy at any one time the whole or any part of the cost of such apparatus and equipment upon all the taxable property within such city and determine the whole percentage of taxes necessary to pay the same, and the percentage to be paid each year not exceeding one-half of the maximum annual limit of the tax such city may levy for funds to purchase and maintain apparatus and equipment for police service in the department of public safety, and the number of years, not exceeding ten, given for the maturity of each installment thereof, but no part of such costs shall be levied against property owned by the city, county, state, or the United States. Certificates of such levy shall be filed with the auditor of the county or counties in which said city is located, setting forth the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all taxable property in said city, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax lists of the

proper county or counties. [S13,§1056-a56; C24, 27, 31, 35,§6589.]

Referred to in §§6587, 6588

6590 Bonds. Any such city may anticipate the collection of taxes authorized to be levied for the purchase and maintenance of apparatus and equipment for police service in the department of public safety, and for that purpose may issue police equipment fund certificates or bonds with interest coupons, and the provisions of chapter 320 shall be operative as to such certificates, bonds, and coupons, insofar as they may be applicable. [S13,§1056-a57; C24, 27, 31, 35,§6590.]

Referred to in §§6587, 6588

6591 Pledge of special fund. Said certificates, bonds, and interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds derived from such levies and pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such city to collect such funds with interest thereon and to hold the same separate and apart in trust for the payment of said certificates, bonds, and interest, and to apply the proceeds of such funds pledged for such purpose to the payment of said certificates, bonds, and interest. [S13,§1056-a58; C24, 27, 31, 35,§6591.]

Referred to in §§6587, 6588

GARBAGE PLANTS IN CERTAIN CITIES

6592 Tax. The council of any city having a population of seventy thousand or more, organized under this chapter, shall have the power to levy a tax upon all taxable property in said city not to exceed one-fourth mill on the dollar each year for the purpose of acquiring a location for and equipment, maintenance, and construction of a garbage disposal plant or system, but nothing in this and sections 6593, 6594, and 6595 shall be held to extend the powers of such cities to make annual levies for general and special taxes in excess of twelve mills on the dollar of the taxable value of the property therein. [S13, §1056-a61; C24, 27, 31, 35,§6592.]

6593 Levy. When the whole or any part of the cost of purchasing a location for and equipment, maintenance, and construction of a garbage disposal plant or system by any such city, shall be ordered paid from the city fund designated for such purchase, equipment, maintenance, and construction, to be levied upon all taxable property within such city, it shall have the power, after purchase of the property, equipment, maintenance, and construction of any such plant or system, by ordinance or resolution, to levy at any one time, the whole or any part of the total cost of such plant or system and the maintenance thereof upon all the taxable property within such city and determine the whole percentage of taxes necessary to pay the same, and the percentage to be paid each year not exceeding one-half of the maximum annual limit of the tax such city may levy for funds to purchase a location for, maintain, equip, and construct a garbage disposal plant or system, and the number of years, not exceeding ten, given for the maturity of each installment thereof, but no part of such cost shall be levied against property owned by the city, county, state, or the United States. Certificates of such levy shall be filed with the auditor of the county or counties in which said city is located, setting forth the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all taxable property in said city, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax list of the proper county or counties. [S13, §1056-a62; C24, 27, 31, 35,§6593.]

Referred to in §6592

6594 Bonds. Any such city may anticipate the collection of taxes authorized to be levied for the purchase of its location and for the equipment, maintenance, and construction of a garbage disposal plant or system, and for that purpose may issue garbage disposal plant certificates or bonds with interest coupons, and the provisions of chapter 320 shall be operative as to such certificates, bonds, and coupons, insofar as they may be applicable. [S13,§1056-a63; C24, 27, 31, 35,§6594.]

Referred to in §6592

6595 Payment. Said certificates, bonds, and interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds derived from such levies and pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such city to collect such funds. with interest thereon, and to hold the same separate and apart in trust for the payment of said certificates, bonds, and interest, and to apply the proceeds of such funds pledged for that purpose to the payment of said certificates, bonds, and interest. [S13,§1056-a64; C24, 27, 31, 35,§6595.]

Referred to in §6592

RIVER FRONT COMMISSION AND FIRE DEPARTMENT IN CERTAIN CITIES

6596 Transfer of powers. All cities which have heretofore been organized and acting under special charters and which have heretofore, or shall hereafter adopt the plan of government provided in this chapter, and in which river front improvement commissions have been or shall hereafter be organized, under chapter 294, shall have and may exercise all the rights and powers conferred by said chapter on the said river front improvement commission, and all such rights and powers are hereby transferred to and vested in the city council of any such city or cities. Said council shall have the power to elect and shall elect a commission of three persons, to be known as the river front improvement commission, whose duties shall be to carry out the powers and duties with respect to the beds and banks of streams in such cities, herein conferred upon said city council, or such limited

powers in respect thereto as the council may prescribe by ordinance. Said commission shall be elected biennially on the first Tuesday in May, and shall hold office for a term of six years and until their successors are elected and qualify. The members of the river front improvement commission shall be elected, one for two years, one for four years, and one for six years. [S13,§1056-a48; C24, 27, 31, 35,§6596.]

Referred to in §§6597-6600

6597 Meandered streams. Every city specified in section 6596 shall have control of all the meandered streams within the boundaries thereof, and of the beds, banks, and waters of such streams. Said cities shall have power to prevent the placing or maintenance of nuisances and obstructions in such streams, or on or along the banks thereof, and to abate and remove such nuisances or obstructions therefrom, and to recover the expense thereof from the person or persons causing, placing, or maintaining such nuisances therein or thereon; to deepen, widen, straighten, or change the channels of such streams; to improve and beautify the banks of such streams; to construct levees, embankments, and other works to protect the city and its property and its inhabitants and their property from floods; to acquire and take by purchase or condemnation any real property necessary for any such works or improvements; to assess upon property benefited by any such works or improvements, the cost thereof, to the extent of the special benefits conferred thereby, but not in excess of such special benefit and not in excess of twenty-five percent of the actual value of the property benefited; to provide funds for any of the expenditures herein authorized, by levy upon all the taxable property in such city of a continuous tax of not more than one-half mill on the dollar each year for not more than ten years, and to issue bonds in anticipation of such tax, and to pledge the proceeds of said tax to the payment of said bonds. The said special tax levy and the issuance of bonds in anticipation thereof, the general plans recommended by the river front improvement commission, and the estimated costs of said improvement based upon surveys, plans, and estimates made by the city engineer shall be provided for by ordinance. [S13,§1056-a49; C24, 27, 31, 35,§6597.]

6598 Tax sales — redemptions. Whenever any property shall have been heretofore sold for any taxes or special assessment by any city specified in section 6596, or by the treasurer thereof, the county treasurer shall have the power and it shall be his duty to collect said taxes and on any such sale to issue tax sale deeds therefor in the same manner and under the same provisions of law as are or may hereafter be applicable to tax sales made by the county treasurer; and any tax sale deed heretofore or hereafter issued on any such sale shall have the same force and effect as though the tax sales had been made by the county treasurer. Redemptions from such tax sales shall be made as from sales made by the county treasurer. [S13,§1056-a50; C24, 27, 31, 35,§6598.]

6599 Care of streets. The council of any city specified in section 6596 shall have the power to divide the city into not less than five road districts for the purpose of cleaning, sprinkling, and repairing the streets and public places, or any of said purposes, and to provide for the manner of doing the same and for the payment of the cost thereof out of the district road fund, and shall determine the amount of money necessary for such purposes in each district; and such city council may levy a special tax not exceeding one-half mill on the dollar on all taxable property in each of said road districts, to be known as the road district fund and to be used only to pay the cost of cleaning, sprinkling, and repairing the streets and public places in such districts. [S13,§1056-a51; C24, 27, 31, 35,§6599.]

6600 Tax for fire department. The council of any city specified in section 6596 shall have the power to levy a special tax upon all taxable property in said city, not exceeding one and one-half mills on the dollar each year, for the purpose of acquiring property for the use of the fire department and equipping and maintaining such department. [S13,§1056-a52; C24, 27, 31, 35,§6600.]

6600.1 Uniforms and equipment. Cities under the commission form of government, having a population of twenty thousand to thirty thousand inhabitants, may provide for the use of the members of the fire and police departments, uniforms and suitable equipment. [C31, 35,§6600-c1.]

MEANDERED STREAMS IN CERTAIN CITIES

6601 Improvement authorized. All cities which have heretofore, or shall hereafter adopt the plan of government provided in this chapter, and which have their corporate limits divided by a meandered stream, and which have a population of thirty-five thousand or more according to the last preceding state or federal census, shall have power to acquire land along or adjacent to such stream as may be deemed desirable by the council of any such city for park purposes, or as sites for public buildings, or shall, by such council, be deemed necessary for the widening, straightening, and improving of the channel of such stream and the improvement of the banks thereof, by purchase, or by condemnation in the manner provided by law for the taking of private property for public use, and shall have power to improve said land for public purposes. [C24, 27, 31, 35,§6601.]

Referred to in §§6603, 6605
Condemnation procedure, ch 366

6602 Leases. Such cities may temporarily lease any property so acquired when, in the judgment of the city council, public interests or welfare will thereby be subserved. [C24, 27, 31, 35,§6602.]

Referred to in §6605

6603 Election—bonds—tax. The city councils of any such cities may submit to the electors thereof at a regular city election or at a special

election called by the city council for that purpose, the question of the issuance of bonds to provide for the payment for land to be acquired under the provisions of section 6601, and for permanently improving the same for public purposes, and if a majority of the electors voting at any such election shall vote in favor thereof the city council may issue bonds maturing not more than fifty years from date of issuance, or serially within such period, payable at such place and of such form as the city council may by ordinance designate, and in an amount not in excess of that authorized by said electors.

In issuing such bonds, such cities may become indebted in an amount which, added to all other indebtedness, shall not exceed five percent of the actual value of the taxable property in such city as shown by the last preceding assessment roll.

For the purpose of providing for the payment of said bonds and the interest thereon, such cities shall have the power to levy upon all the taxable property within the limits thereof an annual tax of not exceeding one and one-fourth mills on the dollar until such bonds and the interest thereon have been fully paid or provided for, not exceeding fifty years. [C24, 27, 31, 35,§6603.]

Referred to in §6605
Maturity and payment of bonds, ch 63.1
Vote required to authorize bonds, §1171.18

6604 Notice—ballot. Notice of such election shall be given in two newspapers published in said city, if there be two, but if not, then in one, once each week for at least four consecutive weeks. The election shall be held not less than five nor more than twenty days after the last publication of such notice. The question to be submitted shall be in the following form:

Shall the city issue bonds in the amount of $.... for the purpose of acquiring land along and adjacent to the ..... within the city limits (Name of stream) and permanently improve the same for public purposes?	Yes ☐ No ☐

[C24, 27, 31, 35,§6604.]

Referred to in §6605

6605 Interpretative clause. Sections 6601 to 6604, inclusive, shall be construed as granting additional power without limiting the power already granted to cities designated in section 6601. [C24, 27, 31, 35,§6605.]

PARKS, SWIMMING POOLS, ETC., IN CERTAIN CITIES

6606 Powers granted. The council of any city organized under this chapter, and having a population of fifty thousand, shall have the power to establish in, and in connection with the parks, swimming pools, bathing beaches, bathhouses, exhibition halls, armories, ice rinks, dance pavilions, shelter houses, wading pools, and river walls, and to pave, macadamize, and otherwise improve the roadways, drives, avenues, and walks in and through such parks. The city council of any city organized under this chapter, and having a population of over twenty thousand, shall have the power to establish armories at any suitable location within the corporate limits of said city, and to maintain, lease and dispose of the same. [C24, 27, 31, 35, §6606; 48GA, ch 170,§1.]

Armories, ch 303.2

6607 Tax for swimming pools and paving. The council of any such city shall have the power, and it is hereby authorized in its discretion, to certify to the county auditor and to cause to be collected annually, a special tax of not to exceed one-eighth mill on the dollar on all taxable property of the city to be used for the construction of, and procuring a site for such swimming pools, bathing beaches, bathhouses, exhibition halls, armories, ice rinks, dance pavilions, shelter houses, wading pools, and river walls, and an additional annual special tax of one-eighth mill on the dollar on all taxable property of the city to be used for the sole and only purpose of paving, macadamizing, and otherwise improving the roadways, drives, avenues, and walks in and through such parks. The city council may anticipate the collection of either or both of said taxes herein authorized to be levied for the purposes herein stated, and for that purpose may issue certificates or bonds with interest coupons, and the provisions of chapter 320 shall be operative as to such certificate, bonds, and coupons, insofar as they may be applicable. The proceeds of such special taxes when so anticipated shall be kept as a separate fund and shall be used for the purpose of paying certificates or bonds and the coupons issued thereupon and for no other purpose whatsoever. Said city council may in and by the proceedings authorizing the issuance of any such bonds pledge to the payment of such bonds, all or any part of the earnings to be derived from the operation of any improvement acquired from the proceeds thereof, which earnings to the extent so pledged shall be used for the payment of such bonds and interest thereon and toward the reduction of the tax otherwise provided. [C24, 27, 31, 35,§6607; 48GA, ch 170,§2.]

6607.1 Armories—assumption of indebtedness. Any city which is acting under the commission form of government, and which has a population of less than eighty-five thousand and more than sixty thousand, and which has heretofore or which may hereafter take title to any privately owned armory situated in such city, is hereby authorized to assume the indebtedness existing against such armory and to finance such indebtedness by the issuance of the bonds of such city, provided, said indebtedness shall not exceed the sum of one hundred thirty thousand dollars. In addition to the said power to issue bonds, the city shall have power to pledge the net yearly rentals of such armory to the payment of said bonds and the interest thereon. Bonds issued hereunder shall be issued, as near as may be, under and in accordance with chapter 320. [C35,§6607-f1.]

MISCELLANEOUS POWER TO CERTAIN CITIES

6608 Trees and shrubbery. Cities now or hereafter having a population of twenty-five thousand or over and organized under this chapter shall have power by ordinance to take and assume charge, custody, and control of all trees and shrubbery upon the public streets, and to plant, prune, care for, and maintain all trees and shrubbery upon the public streets in such manner as not to interfere with public travel and to pay for the same out of the general fund or to provide by ordinance for assessing the cost thereof upon the lots and parcels of land in front of which trees or shrubbery are planted and maintained. No power shall exist to remove other than dead, damaged, or unsightly trees and shrubbery. The carrying into effect of the provisions of any ordinance enacted hereunder shall be vested in the department of parks and public property. [S13,§1056-a65; C24, 27, 31, 35, §6608.]

6609 Sale or gift of islands. The council of any city organized and acting under the provisions of this chapter and having a population of over thirty-five thousand and under fifty thousand, according to the last preceding state census, and the corporate limits of which city are divided by a river, shall have power by ordinance adopted as by law provided, to sell or donate to the county in which such city is located such part of any island in such river belonging to such city as may be desirable or necessary for a courthouse and county seat site. [C24, 27, 31, 35,§6609.]

6610 Street improvements and sewers. Cities under the commission plan having a population of more than twenty thousand, and in which is situated no city cemetery, but contain within their confines a cemetery established for more than twenty years, and is conducted by a cemetery association or corporation operated not for pecuniary profit, and which cemetery contains more than forty acres and is so situated as to for a distance of more than fifteen hundred feet bar access to the city, which cemetery has a frontage of more than fifteen hundred feet upon one of the main-traveled streets or highways leading into said city, and upon which street or highway a streetcar track is laid, and which street or highway is so situated as to make it impracticable to levy special assessments against a large portion of the abutting property so situated, for the purpose of building, repairing, and paying for sewer under and curbing and pavement along and upon said street or highway in front of such cemetery are hereby authorized to avail themselves of the provisions of chapter 308 relating to the establishment of districts for the construction, maintenance, and repair of sewers, and for the improvement or repair, by paving or graveling, of such streets within the corporation as in the judgment of the council constitute main-traveled highways into and out of cities; and for the proportion of the cost thereof not properly assessable against such streetcar line and not justly assessable against abutting property other than that owned by the cemetery association, in addition to all other levies now authorized by law, may levy an annual tax not exceeding one-fourth mill upon all taxable property excepting moneys and credits contained in said city, or any principal division or district thereof as may be determined or established by the city council. The tax herein provided for may be accumulated from year to year until such special fund is sufficient for the purposes herein authorized. And such city may anticipate the collection of such tax under the provisions of section 6261. [C24,27,31,35,§6610.]

CHAPTER 326.1

STREET IMPROVEMENTS AND SEWERS IN CITIES UNDER COMMISSION FORM OF GOVERNMENT

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6610.01 Terms defined. The words "city" or "city council" when used herein shall be construed to refer to a city or council thereof referred to or designated in section 6610.05. [C31, 35,§6610-c71.]

43GA, ch 194, §27, editorially divided.

6610.02 General procedure. All necessary proceedings, forms and requirements not included in or contemplated or regulated by the provisions hereof, shall be in accordance with the provisions of the general law of the state relating to the same subject matter, including definitions and regulations relating to valuations, benefited property, estimates, assessments, plans, specifications, schedules, resolutions, protests, objections, remonstrances, maintenance, bids, deposits, contracts, bonds or the form of improvement bonds issued in payment for any such public improvement. [C31, 35,§6610-c67.]

6610.03 Conflicting statutes. In the event of conflict between any provision hereof, and any provision of any general law of the state pertaining to the same subject matter, this chapter shall prevail, and in the event of any conflict between the provisions hereof and the provisions of chapter 326, the provisions of this chapter shall prevail. [C31, 35,§6610-c68.]

6610.04 Proceedings—plans. All resolutions of necessity, contracts and proceedings for local improvements to be paid for wholly or in part by special assessment shall be governed by the provisions hereof and resolutions of necessity, plans, specifications and contracts shall be approved by the civil engineer, except as herein otherwise provided, and except as to sidewalks and sewer connections and water connections. Petitions for all such public improvements shall be addressed to the city council. The civil engineer shall have the power to recommend a plan for any local improvement, to be paid for wholly or in part by special assessment, either with or without a petition. "Local improvements", "public improvements", and "improvements", when herein referred to, shall mean street improvements or sewers payable in whole or in part by special assessments. [C31, 35,§6610-c8.]

6610.05 Advisory committee—officers. All cities operating under the commission plan of municipal government and having a population of one hundred twenty-five thousand or more, shall have the power to organize any number of their employees into an advisory committee, for the purpose of investigating and advising the council in the matter of the construction of street improvements and sewers, and assess-

ments therefor, of which committee the city engineer shall be the presiding and executive officer. The chief clerk in the department of streets and public improvements shall be the secretary thereof and the city treasurer shall be the vice president thereof. The corporation counsel or city solicitor may be a member of said committee. [C31, 35,§6610-c1.]

Referred to in §6610.01
43GA, ch 194, §1, editorially divided

6610.06 Duty of officers. The city engineer shall advise the council as to the general utility, necessity or efficiency of any proposed public improvement.

The city treasurer shall advise the council upon the method and manner of financing any such improvement.

The corporation counsel or solicitor shall advise the council as to proper legal procedure in ordering or constructing any such improvement and in assessing and financing the same.

The chief clerk in the department of streets and public improvements shall have general supervision of the preparation of resolutions of necessity, schedules of assessments, valuations, liens and schedules of property subject to tax sale.

The civil engineer shall have general supervision of the preparation of plans and specifications for any public improvement, and shall have such other duties as may be prescribed by law. [C31, 35,§6610-c2.]

6610.07 Assessment clerk. The council shall also employ an assessment clerk, who shall have charge of the detail work of preparing schedules of assessments under the direction of the chief clerk. [C31, 35,§6610-c3.]

6610.08 Valuation committee. The city council shall appoint three persons who shall be known as the valuation committee, who shall be appointed to serve on one or more improvement projects or for any length of time not exceeding one year, and who may be reappointed for a similar term or terms and receive such compensation as the council shall fix by ordinance, which compensation may be a proper incidental expense chargeable to any proposed improvement. Said valuation committee shall be persons skilled in the knowledge of real estate values in any such city, and possess qualifications which will justify the reception of their testimony by the district court of the county where such real estate is located, as experts upon real estate values. [C31, 35,§6610-c4.]

6610.09 Secretary—duties. The chief clerk in the department of streets and public improvements shall be secretary of said valuation committee, shall attend all meetings, shall have charge of all books, papers and records, and shall keep a record of all valuations fixed by said committee. The meetings of said committee shall be held in the office of the civil engineer in the city hall. [C31, 35,§6610-c5.]

6610.10 Assessment values. The city council may accept the valuations fixed by the assessor upon property proposed to be assessed in all cases where deficits and defaults are improbable. [C31, 35,§6610-c6.]

6610.11 "Value of property" defined. As construed by this chapter, value of property shall include the assessment for the type of proposed improvement approved by the said city council. [C31, 35,§6610-c57.]

43GA, ch 194, §15, editorially divided

6610.12 Inspection of records—cooperation of employees. City employees or any property owner or his attorney shall have access to all public records for determining assessed values, descriptions and other information desirable for the proper performance of their work. The city council and city officials shall be entitled to the full cooperation of all public employees without additional compensation therefor. [C31, 35, §6610-c60.]

43GA, ch 194, §18, editorially divided

6610.13 Private initiation of improvement plan. All owners of property to be affected by any public improvement to be paid for in whole or in part by special assessment, may initiate any plan for a public improvement, by written contract to be approved by the city council and signed by all the said owners of record and record lienholders of all the property affected by the proposed assessment for said public improvement, and the contractor performing the work or furnishing material, and by any such city, but no liability shall attach to said city because of work done, material furnished or assessment levied, other than to accommodate said property owners and contractor with the procedure of said city for the levying of the special assessment as in this chapter provided. [C31, 35,§6610-c7.]

6610.14 Assessment basis. Each lot, part of lot or parcel of property shall bear its just proportion of said assessment upon the area basis, except as herein otherwise provided. [C31, 35,§6610-c20.]

43GA, ch 194, §5, editorially divided

6610.15 "Incidental expenses" defined. Incidental expenses shall include all engineering costs, the expense of estimates, valuations and inspections, court expenses, clerk hire, cost incidental to notice and printing bonds, and such other costs of service and material as shall enter into the total expense of initiating and carrying to completion the particular improvement and assessment therefor. [C31, 35, §6610-c18.]

6610.16 Requirements of resolution. The contents of such resolution of necessity shall be the same as required by section 5991, and shall provide whether the same shall be paid for wholly or in part by special assessment, and if in part only, shall so state. The council may equalize valuations and assessments. [C31, 35, §6610-c17.]

6610.17 Schedule of unpaid assessments. The chief clerk of the department of streets and public improvements shall prepare and have

on file with the city clerk at the time the resolution of necessity is originally considered, a schedule showing the total amount of unpaid special assessments against each lot, part of lot or parcel of real estate proposed to be further assessed, and showing all assessed properties sold at or subject to tax sale, and the same shall be exhibited to the court. [C31, 35,§6610-c61.]

6610.18 Payments chargeable to city. A definite plan for the payment of the proportion of the cost of any public improvement properly chargeable to the city, shall be outlined by the city treasurer and set forth in the resolution of necessity. The city's proportion shall be included in the proposed assessment schedule, and may be payable out of the proper fund in annual installments, or otherwise as the city treasurer may indicate. [C31, 35,§6610-c63.]

6610.19 Plans and specifications—variance—effect. With any such resolution of necessity presented by said civil engineer to said city council, shall be presented also the approval by the civil engineer of the plans and specifications for such improvement. The civil engineer shall select and recommend to the council the particular type of improvement approved by him. If a variance be shown in the proceedings in the court, it shall not affect the validity of the proceedings, unless the court shall deem the same wilful or substantial. [C31, 35,§6610-c24.]

6610.20 Filing of plans and specifications. At the time of any hearing on any proposed local improvement, the city council shall have before it the plans, specifications and schedule of assessments, which shall accompany the resolution of necessity, and shall remain on file with the city clerk for fifteen days before final consideration by said city council. [C31, 35, §6610-c25.]

43GA, ch 194, §7, editorially divided

6610.21 Notice—manner of service. Notice of the time and place of public consideration or hearing by the council on any resolution of necessity and schedule of valuations and assessments, shall be given by the chief clerk of the department of streets and public improvements, by delivering written notice thereof to the occupant of said real estate, or any person over fourteen years of age in possession of said real estate affected by said special assessment, said real estate being within three hundred feet of said proposed street improvement or sewer, and in the case of any railway company, by delivering written notice to any local agent or officer thereof, at least fifteen days before said public consideration or hearing, and similar notice shall be posted upon all vacant or unoccupied real estate subject to assessment and within three hundred feet of said proposed local improvement, at least fifteen days before said public consideration or hearing, and similar written notice shall be given to all owners of property outside of said three hundred feet area and within the benefited district, by posting written notices in conspicuous places at least fifteen days before said public consideration or hearing. Vacant property shall include property, the owner and occupant of which, and the members of his family over fourteen years of age, are absent therefrom at the time service or posting is made or attempted to be made. [C31, 35,§6610-c9.]

43GA, ch 194, §4, editorially divided

6610.22 Contents of notice. The foregoing notice shall be given of the time and place for said public consideration or hearing upon said proposed resolution of necessity and schedule of valuations and assessments, and said notices above required shall also notify the owners and any persons interested in said proposed local improvement that upon final passage of said resolution of necessity by the city council, the said city will petition the district court of the county where said city is located for confirmation of said schedule of valuations and assessments within ten days from the date of said final passage of said resolution of necessity by the city council. Said notice shall also describe the character of the improvement; the extent and location thereof; the total estimated cost, and that the said district court will set a date for hearing on said petition within thirty days from the date of final passage of the resolution of necessity. [C31, 35,§6610-c10.]

6610.23 Publication of notice. Said notice shall be published and said petition shall be on file within ten days from the date of the final passage of said resolution of necessity by the city council, and thereupon said district court shall have jurisdiction of the real estate, the real estate valuations and assessments as finally fixed by the city council as herein provided. [C31, 35, §6610-c13.]

6610.24 Proof of service. A sworn statement by the person delivering or posting any of the above-mentioned notices, giving the date when said notices are actually delivered or posted, shall be filed with the said chief clerk, and shall be presumptive evidence of valid service of notice hereunder. [C31, 35,§6610-c11.]

6610.25 Noncompliance with procedure—effect. The time within which publication of notice hereunder shall be given, or petition filed in district court shall not be grounds for objection unless found to be material by the district court, in which event the said court may prescribe a new notice. [C31, 35,§6610-c14.]

6610.26 Hearing before council. At the time and place fixed in said notice for the public hearing, the city council shall meet and hear the complaints of any interested property owner desiring to be heard on the subject of the necessity for the proposed improvement, the nature and type thereof, the valuation or the cost as estimated, and the assessment. [C31, 35,§6610-c15.]

6610.27 Objections. Any objection or remonstrance filed with the city council shall contain the signatures of the owners, legal representatives, or their attorney, a general description of the property owned or represented, the

area so owned or represented upon said local improvement or affected by a proposed special assessment therefor, but when signatures of objectors are procured and filed by a person or persons other than the owner, legal representative or attorney, said objections shall be verified by said person or persons so procuring said signatures and filing the same, and said affidavit shall set forth that said objectors are the owners, legal representatives or the attorney of the owner or legal representatives of the property described therein. [C31, 35,§6610-c23.]

6610.28 Final determination. After consideration of said proposed improvement and objections thereto, if any, or to any of the elements thereof, the city council shall adopt a resolution abandoning the said proposed plan, or adhering thereto, or approving, changing or modifying the extent, nature, kind, character, type or estimated cost, provided such change shall not increase the estimated cost of the improvement to exceed ten percent of the same or change the district without a further public hearing thereon with notice as required for the original hearing. Immediately after the adoption of the resolution of necessity by the city council, the city clerk shall return the checks of all bidders, except that of the lowest responsible bidder, on the improvement adopted by the city council. [C31, 35,§6610-c16.]

6610.29 Hearing before state comptroller—time. Hearings on objections made to the comptroller shall be held and determined before the city solicitor shall file the petition for the confirmation by the court of the schedule of assessments. [C31, 35,§6610-c26.]

6610.30 Jurisdiction. The district court of the county where said local improvement is proposed to be made shall have jurisdiction of the proceedings under this chapter. Said cause shall be triable as in equity. A decree of the district court upon any such proceeding shall be final unless there shall be an appeal therefrom. [C31, 35,§6610-c29.]

43GA, ch 194, §8, editorially divided

6610.31 Petition to district court. Upon the passage of any resolution of necessity for a local improvement, and pursuant thereto, it shall be the duty of the city solicitor to file a petition in district court of the county where said real estate is located, in the name of such municipality, praying that steps be taken to levy a special assessment for said improvement, in accordance with the provisions of said resolution of necessity. [C31, 35,§6610-c28.]

6610.32 Petition—procedure. Upon the filing of such petition, the city solicitor shall verify the fact that due notice has been given of the time and place of the hearing upon said petition. Any such petition shall have precedence over any other business of the court, except in criminal cases, and said court shall set the said petition for hearing within thirty days from the date that it is filed with the clerk of said court. [C31, 35,§6610-c36.]

43GA, ch 194, §9, editorially divided

6610.33 Petition—exhibits required. There shall be attached to or filed with such petition a copy of said resolution of necessity, certified by the city clerk, and the schedule of assessments, and plans and specifications, as approved by the civil engineer and city council. The failure to file any or either of said copies shall not affect the jurisdiction of said court to proceed in said cause and to act upon said petition. But, upon objection made by any interested property owner calling the attention of the court to the failure to attach copies, the court shall permit the city solicitor to supply any missing copy or copies. [C31, 35,§6610-c35.]

6610.34 Notice of court hearing. After the final passage of the resolution of necessity, the chief clerk of the department of streets and public improvements shall publish a notice in some newspaper of general circulation in the city where said real estate is located, notifying the owner or persons interested in the real estate proposed to be assessed and referred to in said resolution of necessity, that the said city has filed a petition in the district court of the county where said real estate is located praying said court to confirm the valuations and assessments, and giving the date which the said district court has set for the trial upon said petition. [C31, 35, §6610-c12.]

6610.35 Condemnation proceedings. Trials upon appeal from condemnation proceedings shall be the same as now or hereafter provided by general law. [C31, 35,§6610-c30.]

Procedure in civil actions, ch 555

6610.36 Power of court. Upon the hearing upon said petition, the said court shall have power to correct any irregularities or inequalities in valuations or in the schedule of assessments, and shall consider any objections because of alleged illegal procedure or fraud in the proceedings.

The court shall inquire whether the city solicitor has omitted any property benefited, and as to whether the schedule of assessments is just and equitable as between the public and the property assessed, and between the lots or parcels of property assessed.

The court shall have the power to revise, correct or modify the description or the cost between the properties affected, or the city solicitor shall make any corrections upon the order of the court. [C31, 35,§6610-c37.]

6610.37 Peremptory confirmation. If no objections are filed by the time set for the hearing on said petition, the court shall immediately confirm said assessment and order the clerk to certify the same to the city clerk. [C31, 35, §6610-c43.]

6610.38 Corrections. Corrections of assessments or valuations made by or upon the order of the court shall be conclusive and not subject to review on appeal, or otherwise, except as herein provided. [C31, 35,§6610-c38.]

6610.39 Time for decree. The court shall render a decision upon said hearing within seven days thereafter. [C31, 35,§6610-c39.]

6610.40 Court costs. The cost of all court proceedings shall be a legitimate item of expense in connection with any local improvement, and shall be included within the final assessment against the property proposed to be improved. [C31,35,§6610-c44.]

6610.41 Appeals. An appeal from the decree of the district court shall be perfected within thirty days from the date of said decree and the abstract shall be served and filed in the office of the clerk of the supreme court within ninety days from the date of said district court decree. [C31, 35,§6610-c31.]

6610.42 Appeal bond. Any person aggrieved shall file a bond on appeal to the supreme court as provided by law. [C31, 35,§6610-c33.]

Presumption of approval of bond, §12759.1

6610.43 Effect of appeal. An appeal shall not, in the discretion of the city council, delay the certification of an assessment or progress of an improvement, but upon decision of the appeal the assessment appealed from shall be corrected and collected as herein provided. [C31, 35,§6610-c34.]

6610.44 Awaiting outcome of appeal. If the aggregate of all appeals exceeds ten percent of the total assessment as confirmed by the district court, the contract may or may not be let, in the discretion of the council, until said appeals are finally determined, but said appeals shall not delay the execution of a contract for the work, if the city council concludes said appeals were not taken in good faith. [C31, 35, §6610-c32.]

6610.45 Default and deficiency fund. The assessment as prepared and as approved by the city council, and as confirmed by the court, shall include an item to be known as the default and deficiency fund not to exceed ten percent of the total estimated cost of the improvement, including all incidentals, which shall be added thereto, and which said fund shall be used to pay deficits and defaulted installments, and other unforeseen costs and expenses incidental to said improvement and assessment, including payments made by city for tax sales or redemption from tax sales. [C31, 35,§6610-c19.]

6610.46 Certification of decision. The clerk of said court shall certify to the city clerk the final action of the court within three days from the date of the final order, or judgment of said court, upon said petition, showing assessments as changed and confirmed in the schedule of assessments. [C31, 35,§6610-c40.]

6610.47 Certification and lien. The clerk of the district court shall certify to the county auditor and the city clerk the assessment as confirmed, made or approved by the district court, thereupon, the county auditor shall re-certify said assessment to the county treasurer, within three days, and the treasurer shall spread the same upon the records in his office and the same shall be a lien from the date of the re-certification by the auditor against any property therein described, and the treasurer shall proceed to collect installments of said assessment as by law provided. [C31, 35,§6610-c45.]

6610.48 Resolution ordering work. Upon receipt by the city clerk of the certified copy of the order entered by the court upon the petition for any local improvement and assessment therefor, the city council shall pass a resolution ordering the work, which shall remain on file with the clerk for one week, and be finally passed by the city council. [C31, 35,§6610-c47.]

43GA, ch 194, §10, editorially divided

6610.49 Bids — advertisement — letting of contract. At the time the resolution of necessity is presented to the city council and the date for the hearing is determined, the council shall order the mayor and city clerk to advertise for bids for the improvement as set out in the resolution of necessity, and said bids shall be received not later than the date set for the hearing on said proposed improvement.

Contract for said improvement shall not be awarded until after the assessments therefor have been confirmed by the district court and a resolution ordering the work finally adopted. [C31, 35,§6610-d2.]

6610.50 Bids. Said bids shall be opened by the city clerk in the presence of the city council, and referred to the civil engineer, and thereupon the civil engineer shall examine the bids and recommend to the council the award of contract to the lowest responsible bidder for the particular type of improvement which the civil engineer shall recommend, or the council may order that all bids be rejected, and the council may order the rejection and cancellation of the proposed improvement and all proceedings. [C31, 35,§6610-c48.]

6610.51 Contract or re-advertisement. The council may award the contract, or may refuse to enter into any contract therefor. However, the city council may order re-advertisement for bids upon the same types of improvements for which bids were originally requested. [C31, 35, §6610-c49.]

6610.52 Execution of contract. All public work shall proceed under the direction of the civil engineer and contractors shall be required to proceed to timely completion of the work. [C31, 35,§6610-c51.]

43GA, ch 194, §13, editorially divided

6610.53 Acceptance or rejection. Within twenty days after the completion of the work, the civil engineer shall recommend the acceptance or rejection of the work. [C31, 35, §6610-c52.]

6610.54 Reserved powers of council. The city council shall retain the power to deny the passage of any resolution of necessity, and shall have the power to stop the work on any local

improvement in accordance with the provisions of the contract for the performance of said work. [C31, 35,§6610-c27.]

6610.55 Notice of final action. Within ten days after the completion of the work the city clerk shall publish a notice in some newspaper published in such city, addressed to the owners or persons interested in any real estate included in any assessment or street improvement or sewer project or improvement district, notifying them that unless further, legal, unadjudicated matters or objections are made within twenty days from the date of publication of said notice, the council will take action on the recommendation of the civil engineer, and in the event no such objection is filed the property owners shall be conclusively presumed to have waived all such objections. [C31, 35,§6610-c53.]

6610.56 Report by engineer. The civil engineer shall file with the city clerk a report of the completion of any public improvement. [C31, 35,§6610-c54.]

6610.57 Railways and street railways. Nothing herein contained shall be construed to relieve railways or street railways of any obligation now or hereafter imposed by the general law of the state. [C31, 35,§6610-c50.]

6610.58 Trackless trolleys—fees and taxes.

1. Every street railway or passenger carrier operating trackless-trolley passenger busses over fixed routes wholly within cities under the commission form of government having a population of one hundred twenty-five thousand or over shall pay into the city treasury an annual license fee or tax in quarterly installments beginning April 1, 1940, for the purpose of paving, repaving, constructing, reconstructing, resurfacing, repairing, or maintaining the streets and roadways over which said busses are operated, and for the reconstruction, repair, servicing and maintenance of sewers and catch basins serving said streets and roadways as follows:

For each trackless-trolley passenger bus having forty-five or less passenger seats .... $65.00 per annum.

For each trackless-trolley passenger bus having more than forty-five passenger seats .... $85.00 per annum.

The proceeds of collection of said tax or license fee and of the further license fee or tax provided for by subsection 2 hereof shall be used for no other purpose than for the paving, repaving, constructing, reconstructing, resurfacing, repairing, or maintaining the streets and roadways over which said busses are operated and for the reconstruction, repair, servicing, and maintenance of sewers and catch basins serving said streets and roadways.

2. In addition to the license fee or tax provided for by the foregoing, from and after July 4, 1939, every street railway or passenger carrier operating trackless-trolley passenger busses and self-propelled motor-driven passenger busses over fixed routes wholly within such cities as are defined in subsection 1 of this section shall pay into the city treasury an additional annual license fee or tax in an amount equivalent to one and one-half percent of the gross passenger revenue from all motor-driven passenger busses and trackless-trolley passenger busses. The said gross passenger-revenue tax or license fee shall be payable in semiannual installments and within thirty days after the expiration of each six months period.

3. The license fees or taxes hereby imposed upon street railways or passenger carriers operating trackless-trolley passenger busses and motor-driven passenger busses over fixed routes shall be in lieu of all general property taxes and property assessments upon such busses and of all special assessment taxes for the paving, repaving, constructing, reconstructing, resurfacing, repairing, or maintaining the streets and roadways over which said busses are operated or for the construction, reconstruction, repair, or maintenance of sewers servicing said streets and roadways, and of all other license fees and taxes, general or local, except motor vehicle fuel license fees and motor vehicle license fees on self-propelled motor-driven passenger busses levied by the state, to which such motor vehicles or trackless-trolley busses may be subject.

4. The money collected pursuant to the provisions hereof shall be paid into the special improvement fund of any such city and shall be used only for the purposes herein contemplated, notwithstanding the provisions of sections 5008.01, 5008.05, 5008.12, 5008.15, 5008.16, 5008.17, 5010.01, and 5103.02.

5. The term "passenger carrier" or "carriers" shall include any railway operated as a street railway, person, firm, corporation, or association operating a line of busses between fixed termini within any such city.

6. Any such city shall have the power and authority to issue certificates and bonds in anticipation of the collection of any such taxes or license fees, in accordance with the provisions of chapter 311. [48GA, ch 160,§1.]

Omnibus repeal, 48GA, ch 160, §2

6610.59 Excess assessment—adjustment. If, after the completion and acceptance of any improvement by the city council, it appears that the total assessment exceeds the total cost of said improvement, including incidentals, by more than ten percent, then the city solicitor shall petition the district court to reduce and adjust said assessment to an amount not to exceed ten percent in excess of said total cost, including said incidentals, taking into account installments of assessment previously paid. [C31,35,§6610-c21.]

6610.60 Payment from improvement or sewer fund. The proportion of any assessment beneficial to the public shall be paid out of the improvement fund, or sewer funds as the case may be, except that portion which should be otherwise borne by park property affected by said improvement, in which event said portion shall be paid out of park funds. [C31, 35,§6610-c22.]

6610.61 Interest. Interest on special assessments or any portion thereof remaining unpaid, shall commence upon the final acceptance of the work by the city council. Immediately upon the final acceptance of said work by the city council, the city clerk shall certify to the county treasurer the date of the acceptance of said work. [C31, 35,§6610-c41.]

6610.62 Assessments—payment. The county treasurer shall pay to the city treasurer all funds payable to the city treasurer hereunder, within fifteen days after the first of the month following their receipt. Receipts in March and September in each year shall be so payable not later than May 15 and November 15, respectively. [C31, 35,§6610-c46.]

6610.63 Assessment funds—transfer to city—application. The county treasurer is hereby authorized and directed to transfer to the treasurer of any city or town issuing special assessment certificates, all moneys collected by said county treasurer on said certificates which have not been called for by the owners of said certificates and which said moneys shall have been in the possession of said county treasurer for a period of four years or more. When said moneys have been paid to the city treasurer the said city treasurer shall retain the same for the benefit of the owners of said certificates and pay the same to the said owners of any such certificates upon his demand. When a period of ten years has elapsed from the date said installments, respectively, become due and payable, and the owner of said certificates has not called for said moneys, the said moneys so uncalled for shall become the property of said city or town and shall be placed in a fund which shall be known as the general default and deficiency fund, from which any defaults and deficiences on bond schedules may be paid.

In the interim between the date when said money shall have been received by said city or town and the expiration of said ten-year period, said city or town shall hold the same for the benefit of the owner of any such certificate, and shall pay the same to any such owner upon demand. [C35, §6610-g1.]

6610.64 Payment before work accepted. Special assessments or any portion thereof remaining unpaid may be paid without interest at the office of the county treasurer prior to the final acceptance of the improvement by the city council. [C31, 35,§6610-d1.]

6610.65 Cancellation of assessments. In the event no contract is entered into within sixty days from date of confirmation by the court, the court shall cancel said assessment and order return of any assessment so paid, upon application by the city solicitor, if no appeal is pending. [C31, 35,§6610-c42.]

6610.66 Assessments increased. No increased assessment against any property shall be in excess of twenty-five percent of the valuation confirmed by the court, nor in excess of the benefits conferred. [C31, 35,§6610-c55.]

6610.67 Deficiencies. Wherever on a hearing by the court or on appeal, the amount of any assessment shall be reduced or canceled so that there shall be a deficiency in the total amount remaining assessed in the proceeding, the court shall have the power to distribute such deficiency upon the other property abutting upon or adjacent to said improvement or in the district assessed, in such manner as the court shall find to be just and equitable, not exceeding, however, the amount said property would be benefited by said improvement, and not exceeding twenty-five percent of the value finally fixed thereon in said assessment schedule. [C31, 35, §6610-c56.]

6610.68 Re-assessments. If any special assessment shall hereafter be annulled or held invalid or void for any reason whatsoever, a new assessment shall be made and returned and like notice shall be given and proceedings had as herein required in relation to an original proposed assessment; and, if any local improvement has been constructed under the direction of the city council and has been accepted by it, and a special assessment levied in payment thereof has been or shall be annulled or declared invalid, then a new special assessment shall be made and returned to pay for the costs of the improvement so constructed, or to pay for the cost of such part thereof as the city council might lawfully have authorized to be constructed and paid for by special assessment. [C31, 35,§6610-c58.]

6610.69 Noninvalidating matters. No special assessment shall be held invalid or void because levied for work already done, if it shall appear that such work was done under a contract which has been duly let and entered into pursuant to a resolution of necessity providing that such improvement should be constructed and paid for by special assessment, and that the work was done under the direction of the civil engineer and has been accepted by the council; nor shall it be a valid objection to the confirmation of such new assessment that the original assessment has been declared void or that the improvement as actually constructed does not conform to the description thereof as set forth in the original resolution of necessity, if the improvement so constructed is accepted by the city council. [C31, 35,§6610-c59.]

6610.70 Rebate to property owner. After ten years and seven months from the date of re-certification of any schedule by the county auditor to the county treasurer for the collection of any assessment, if all bonds, interest, penalties, deficits, defaulted installments and proper charges against the proceeds of the collection of any assessment for any public improvement are fully paid, then the balance remaining in said fund shall be rebated to the property owners named in the original schedule of assessments, who have paid their assessments in full, in the proportion that any assessment bears to the whole assessment. If, at the

end of the eleventh year from the first day of April following the re-certification of the levy of an assessment to the county treasurer, there is still a balance remaining in said fund so collected from said assessment, after allowing for the retirement of all bonds, interest, and proper charges, then said property owners so failing to collect the same shall forfeit all right and title to the same, and said fund shall be transferred to the consolidated improvement fund. [C31, 35,§6610-c62.]

6610.71 Bonds. The city council shall authorize the issuance of bonds, payable only out of the proceeds received from the collection of the special assessments upon any improvement. The city treasurer shall determine whether the contractor shall be paid in cash or bonds. It shall be optional with the city council to fix the rate of interest on such bonds at any rate not exceeding six percent. Bonds shall mature June 1 in the year in which installments thereof become due.

Bonds may be sold by the city treasurer at not less than par, and proceeds equal to the contract price delivered to the contractor in full payment and satisfaction of his contract. The proceeds of bonds equal to incidentals shall be distributed as hereinafter provided. Bonds may be delivered at not less than par to the contractor in the aggregate sum of the contract price, plus incidentals, in full payment and satisfaction of said contract price, and the said contractor shall pay to the city treasurer in cash the amount represented by incidentals. The city treasurer shall promptly reimburse the funds from which the items constituting said incidentals were originally paid. Deficits and defaulted payments in installments of any special assessment shall be payable out of the funds in the hands of the city treasurer, received from any special assessment in excess of moneys paid in fulfillment of the contract and incidentals. Deficits and defaulted payments upon installments of special assessments with interest, shall not be payable from the funds in the hands of the city treasurer until ninety days after said deficits and defaulted payments become delinquent. Said bonds shall be entitled to such tax exemption privileges as may be provided by general law of the state with respect to similar obligations of any municipality. [C31, 35,§6610-c65.]

6610.72 Liability of city. No person, firm or corporation accepting the bonds as provided herein, shall have any claim or lien upon the city in any event for the payment of such bonds or the interest or penalties thereon, except from the collections of the assessment against which said bonds are issued, or from any balance remaining in the consolidated improvement fund, and a municipality shall not be liable to the holders of said bonds in case of failure to collect the same, but shall with all reasonable diligence so far as it can legally do so cause a valid special assessment to be levied and collected to pay said bonds until all bonds shall be fully paid from said assessments or the proceeds thereof. [C31, 35,§6610-c66.]

6610.73 Existing incompleted improvement. Any public improvement heretofore begun under any existing law shall be prosecuted to completion as now provided by law, irrespective of the provisions hereof. [C31, 35,§6610-c64.]

Constitutionality, §6610-c69, code 1935; 43GA, ch 194, §26

6610.74 Pending proceedings. This chapter shall not affect any right, remedy or cause of action accrued or now pending, or growing out of any improvement or assessment made under any prior law. [C31, 35,§6610-c70.]

CHAPTER 327

CITY MANAGER PLAN BY ORDINANCE

6611 Duties and compensation.
6612 Appointment—tenure.
6613 Duties imposed.
6614 Manager supersedes appointive officers.

6611 Duties and compensation. All cities and towns, except cities under the commission form of government and cities having a population of more than twenty-five thousand as shown by the last preceding census, are hereby authorized to provide by ordinance for the creation of the office of city manager and to fix likewise the duties and powers and compensation of such officer. [SS15,§679-1a; C24, 27, 31, 35, §6611.]

6612 Appointment—tenure. The city manager shall be appointed by a majority vote of the city or town council at a regular meeting of such body, and such manager shall hold office during the pleasure of the said body, and shall be subject to removal by a majority vote thereof. [SS15,§679-2a; C24, 27, 31, 35,§6612.]

6613 Duties imposed. Said city or town after having selected or appointed such city manager may by ordinance provide that the city manager shall perform any or all of the duties incumbent upon the street commissioner, or manager of public utilities, cemetery sexton, city clerk, and superintendent of markets, and that he shall superintend and inspect all improvements and work upon the streets, alleys, sewers, and public grounds of the city or town, and perform such other and further duties as may be imposed upon him, and possess such other and further power as may, from time to time, be by ordinance conferred upon him. [SS15,§679-3a; C24, 27, 31,35,§6613.]

6614 Manager supersedes appointive officers. Whenever by ordinance or resolution of the council the powers and duties heretofore vested in any other appointive municipal officer are to be wholly performed by the said city manager, then no appointment of such appointive officer shall be made, and any appointment of such officer made prior to the adoption of such ordinance or resolution shall be thereby canceled. [SS15,§679-4a; C24, 27, 31, 35,§6614.]

CHAPTER 328

CITY MANAGER PLAN BY POPULAR ELECTION

Referred to in §§5633.1, 6617, 6687, 6783

ADOPTION OF PLAN

6615 Organization authorized.
6616 Petition—election.
6617 Form of submission.
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ADOPTION OF PLAN

6615 Organization authorized. Any city or incorporated town and any city organized under chapter 326 may become organized as a city or incorporated town, as the case may be, under the provisions of this chapter, by proceeding as hereinafter provided. [SS15,§1056-b; C24, 27, 31, 35,§6615.]

Referred to in §6616
SS15, §1056-b, editorially divided

6616 Petition — election. Upon petition, signed by the electors of any city or town specified in section 6615 equal in number to twenty-five percent of the votes cast for all candidates for mayor at the last preceding election of such city or town, the mayor shall, not less than thirty days prior to the election to be held as herein provided, by proclamation, submit the question of organizing the government of such city or town, under this chapter, at a special election to be held at a time specified in such proclamation, and within two months after such petition is filed with the clerk of such city or town; provided that in case not less than ten percent of the qualified electors of any city reside in each of two or more townships, said petition shall be signed by not less than ten percent of the qualified electors of such city residing in each of such townships. [SS15,§1056-b1; C24, 27, 31, 35,§6616.]

Referred to in §6690
SS15, §1056-b1, editorially divided

6617 Form of submission. At such election, the proposition to be submitted shall be: "Shall the city (or incorporated town, as the case may be) of (name of city or incorporated town), organize under chapter 328 of the code?" [SS15,§1056-b1; C24, 27, 31, 35,§6617.]

Referred to in §6690

6618 Conduct of election. The election at which the question of organizing the government of such city or town, under this chapter, shall be conducted, the vote canvassed, and the result declared in the same manner as provided by law in respect to elections in cities and towns organized under the general laws of the state. [SS15,§1056-b1; C24, 27, 31, 35,§6618.]

Referred to in §6690

6619 Certification. Upon the adoption of the proposition to organize the government of such city or town, under this chapter, the mayor shall immediately transmit to the governor, to the secretary of state, and to the county auditor, a certificate that the form of government provided by this chapter has been adopted. [SS15, §1056-b1; C24, 27, 31, 35,§6619.]

6620 Limit on submissions. If such plan of government be not adopted at the special election called, the question of adopting said plan shall not be resubmitted to the voters of such city or town within two years thereafter. [SS15, §1056-b1; C24, 27, 31, 35,§6620.]

6685 Applicable statute.
6686 Limit of indebtedness.

ABANDONMENT OF PLAN

6687 Procedure—petition—election.
6688 Officers elected.
6689 Effect of abandonment.
6690 Law governing procedure.

THE COUNCIL AND MINOR EMPLOYEES

6621 Number of councilmen. If a majority of the votes cast at such election shall be in favor of the organization of the government of such city or town, under the provisions of this chapter, cities having a population of twenty thousand or more shall thereupon proceed to the election of five councilmen, and cities and towns having a population of less than twenty thousand shall proceed to the election of three councilmen. [SS15,§1056-b1; C24, 27, 31, 35, §6621.]

6622 Exception. In any city having a population of twenty thousand or more, and less than seventy-five thousand, of which the territory embraced within the boundaries of such city lies in two townships which are divided by a watercourse, four councilmen shall be elected, two of whom shall be residents of and elected from that part of the city lying within each of such townships. [SS15,§1056-b1; C24, 27, 31, 35,§6622.]

Referred to in §6625

6623 When elected. The councilmen for which provision is made herein shall be elected at the next regular city or town election after the adoption of such form of government. If, however, the next regular city or town election does not occur within one year after the special election at which such form of government is adopted, the mayor shall, within ten days after such election, by proclamation, call a special election for the election of councilmen, as herein provided, and shall give thirty days notice of such special election, which notice shall be included and given in the call for such special election. The special election, so called for the election of councilmen, shall in either case be conducted as hereinafter provided. [SS15, §1056-b1; C24, 27, 31, 35,§6623.]

6624 Temporary officers. The councilmen elected at the special election called by the mayor, after the adoption of the form of government contemplated by this chapter, shall qualify, and their terms of office shall begin on the first Monday after their election, and they shall hold office until the next regular biennial municipal election, and until their successors are elected and qualified. [SS15,§1056-b3; C24, 27, 31, 35,§6624.]

SS15, §1056-b3, editorially divided

6625 Adjustment of terms. At the first regular biennial election, after the organization of

any city or town under the provisions of this chapter, in all such cities and towns where three councilmen are to be elected, one councilman shall be elected for the term of two years, and two for the term of three years. When four councilmen are to be elected, as provided in section 6622, one shall be elected from each township for the term of two years, and one from each township for the term of three years; and in cities where five councilmen are to be elected, two shall be elected for two years, and three for three years. [SS15,§1056-b3; C24, 27, 31, 35,§6625.]

6626 Regular election. At the next regular biennial municipal election, and biennially thereafter, there shall be elected a member or members of the council for the term of three years to succeed those whose terms of office will expire the first Monday in April following such election, and there shall also be elected at such regular biennial municipal election a member or members of the council for a term of three years to succeed those whose terms will expire one year after the first Monday in April following such election. [SS15,§1056-b3; C24, 27, 31, 35,§6626.]

6627 Tenure noted on ballots. The time when each candidate for councilman shall begin his term of office shall be specified under his name on the ballot, and all petitions for nomination of members of the council, to be voted for at such regular biennial municipal election, shall specify the length of the term of office for which the candidate seeks nomination. [SS15,§1056-b3; C24, 27, 31, 35,§6627.]

6628 Termination of official terms. The terms of office of the mayor and councilmen or aldermen of any city or incorporated town adopting the form of government contemplated by this chapter, in office at the beginning of the terms of office of the councilmen first elected, under the provisions hereof, shall then cease and determine. [SS15,§1056-b3; C24, 27, 31, 35, §6628.]

6629 Termination of minor positions. Except the members of the library board, whose terms of office shall continue as now provided by law, the terms of office of all other officers, including park commissioners and waterworks trustees, whether elected or appointed, and of all employees of such city or incorporated town, shall be subject to the action of the council or manager. [SS15,§1056-b3; C24, 27, 31, 35,§6629.]

6630 Tenure by council. Except the members of the library board, the council shall have power to determine the tenure of office of any officer or the term of employment of any employee that it is authorized to appoint or employ, and to declare any such office vacant, or to discharge any such employee with or without cause, as it may deem advisable. [SS15, §1056-b3; C24, 27, 31, 35,§6630.]

6631 Tenure by manager. The manager shall have power to determine the tenure of office of any officer or the term of employment of any employee that he is authorized to appoint or employ, and to declare any such office vacant, or to discharge any such employee with or without cause, as he may deem advisable. [SS15, §1056-b3; C24, 27, 31, 35,§6631.]

6632 Vacancies. Any vacancy in the council, caused by death, resignation, removal from office, or removal from the city or town, shall be filled by appointment by the council, and in cities where the territory lies in two townships divided by a watercourse, the member of the council so appointed shall be a resident of the township in which his predecessor in office resided at the time of his election. The person so appointed by the council shall hold his office for the unexpired term of his predecessor. [SS15, §1056-b25; C24, 27, 31, 35,§6632.]

6633 Compensation. The members of the city or town council elected under the provisions of this chapter shall serve and perform all of the duties of their respective offices without compensation. [SS15,§1056-b9; C24, 27, 31, 35, §6633.]

SS15, §1056-b9, editorially divided

6634 Nominated by petition. Candidates for councilmen to be voted for under the provisions of this chapter shall be nominated by petition, filed with the city or town clerk ten days before the day of election, and no name shall be placed upon the ballot except the names of candidates nominated by such petition. [SS15,§1056-b4; C24, 27, 31, 35,§6634.]

SS15, §1056-b4, editorially divided

6635 Petitioners. The petition for the nomination of councilmen shall be signed by at least ten electors of the city or town for every one thousand inhabitants of such city or town as shown by the last previous federal or state census, and no petitioner shall sign any petition or petitions for more candidates than are to be elected in the city or town in which such petition is filed. No person shall be deemed nominated for the office of councilman unless the petition for his nomination shall have been signed as herein required. [SS15,§1056-b4; C24, 27, 31, 35,§6635.]

6636 Form of petition. The petition for the nomination of councilmen shall be substantially in the following form:

"The undersigned, duly qualified electors of (here insert the name of the city or town), and residing at the place set opposite our respective names, hereby nominate (name of candidate), as candidate for the office of councilman, of (name of city or town), and request that his name be placed upon the official ballot of said city (or town), at the municipal election to be held therein, on the.....Monday of ....., 19.... We further state that we know the said (name of candidate) to be a qualified elector of said city (or town), a man of good moral character, and, in our judgment, qualified for the duties of councilman.

Name of elector. Residence. Street and number. ....." [SS15,§1056-b4; C24, 27, 31, 35,§6636.]

6637 Residence noted. In cities where the residences are numbered, the street and number of the residence of each elector signing such petition shall be written on the petition immediately after the name of the elector, and no name upon any such petition shall be counted unless the street and number of the residence of the person signing the same appear thereon, as herein provided. [SS15,§1056-b4; C24, 27, 31, 35,§6637.]

6638 Canvass of petitions. Petitions for nomination of councilmen, filed with the city or town clerk, shall, within two days after the expiration of the time within which such petitions may be filed, be canvassed by the city or town council, as the case may be, and the names of all persons who shall have been nominated by such petitions shall, by the clerk, be placed upon the official ballot of the city or town, for the municipal election for which such nominations are made. [SS15,§1056-b4; C24, 27, 31, 35, §6638.]

6639 Arrangement of names. The names of the candidates shall be arranged upon the ballot in the manner provided by section 556, as nearly as may be, with a square at the left of each name, and below the name of each of such candidates, shall appear the words, "Vote for (here insert the number of councilmen to be elected)" as the case may be. [SS15,§1056-b4; C24, 27, 31, 35,§6639.]

6640 Form of ballots. The ballots shall be printed upon plain, substantial, white paper, through which the printing or writing cannot be read, and shall be headed, "Candidates for councilmen of (name of city or town), at the general (or special) municipal election of 19...." [SS15,§1056-b4; C24, 27, 31, 35,§6640.]

6641 Voting mark. The candidates upon the ballot shall be voted for by placing a cross in the square preceding the name of the candidate for whom the vote is cast. [SS15,§1056-b4; C24, 27, 31, 35,§6641.]

6642 Ballots — clerk to prepare — number. The city or town clerk shall cause the ballots to be prepared and printed as herein specified, and shall deliver, or cause to be delivered, at every polling precinct in the city or town, a number of ballots equal to twice the number of votes cast in such precinct at the last general municipal election. [SS15,§1056-b5; C24, 27, 31, 35,§6642.]

SS15, §1056-b5, editorially divided

6643 Conduct of election. The city or town council shall appoint the judges and clerks of the election. The election shall be conducted, the vote canvassed, and the certified return thereof made by the judges of such election as provided by law. The returns from the voting precincts shall be canvassed and the result declared by the council and clerk on the day after the election, and notice of the result given at the time and in the manner provided by statute. [SS15,§1056-b5; C24, 27, 31, 35,§6643.]

6644 Election laws applicable. All of the provisions of sections 6515 and 6516 shall apply to elections held under the provisions of this chapter, and any person violating any of the provisions of either of said sections shall, upon conviction thereof, be punished as therein provided. [SS15,§1056-b6; C24, 27, 31, 35,§6644.]

6645 Mayor — election. The councilmen elected hereunder, after having duly qualified as officers of the city or town in which they are respectively elected, shall, on the first Monday after their election, organize the government of such city or town under the provisions of this chapter, and shall, at that time, elect one of their number as chairman and presiding officer who shall be designated as mayor of the city or town in which he is elected. [SS15,§1056-b7; C24, 27, 31, 35,§6645.]

SS15, §1056-b7, editorially divided

6646 Official head—service of process. The member of the council so elected shall be recognized as the official head of the city or town, by the courts and officers of the state, upon whom service of civil process may be made. [SS15, §1056-b7; C24, 27, 31, 35,§6646.]

6647 Duties and power. The mayor may take command of the police, and govern the city by proclamation at times of public danger, or during an emergency, and shall be the judge as to what constitutes such public danger or emergency. The election of a member of such city or town council as mayor shall not give him or confer upon him any additional power or authority, except such as is herein provided and such as is ordinarily exercised by a presiding officer. [SS15,§1056-b7; C24, 27, 31, 35,§6647.]

6648 Meetings—presiding officer pro tem. Regular meetings of the council shall be held on the first Monday after the election of councilmen, and on the first Monday of each month thereafter. Special meetings may be called from time to time by two councilmen. All meetings of the council, whether regular or special, shall be open to the public. If, at any meeting, the presiding officer of the council be not present, the members of the council present shall select one of their number to act as presiding officer pro tem, and his acts as presiding officer pro tem shall have the same force and legality as though performed by the regularly elected presiding officer of the council. [SS15,§1056-b10; C24, 27, 31, 35,§6648.]

6649 Quorum. In all cities where five or four councilmen are chosen, three members of the council shall constitute a quorum, and in cities and incorporated towns in which three councilmen are chosen, under the provisions of this chapter, two of the council shall constitute a quorum. [SS15,§1056-b8; C24,27,31,35,§6649.]

SS15, §1056-b8, editorially divided

6650 Yeas and nays—motions, etc.—writing and recording. Upon every vote of the city or town council, the yeas and nays shall be called and recorded, and every motion, resolution, or ordinance shall be reduced to writing, and read before the vote is taken thereon. [SS15,§1056-b8; C24, 27, 31, 35,§6650.]

6651 Appointments by council. The council shall, at the first meeting after its members are elected, appoint a clerk, and at such meeting, or as soon thereafter as practicable, appoint a police judge or magistrate, a solicitor, an assessor, and the members of the library board, as the terms of office of the members of said board shall expire. It may also appoint a corporation counsel, and assistant solicitors, if deemed advisable. [SS15,§1056-b18; C24, 27, 31, 35,§6651.]

SS15, §1056-b18, editorially divided

6652 Powers. All officers so appointed by the council shall have and exercise all powers conferred upon such officers by the laws governing cities and towns organized under the general laws of the state, and their compensation shall be fixed and paid, and they shall perform the duties of their respective offices, as required by such laws. In addition to the compensation provided for under section 5669 the city council may allow and pay to the city assessor and to full-time deputy assessors additional compensation for extra or special services performed by them. [SS15,§1056-b18; C24, 27, 31, 35,§6652; 48GA, ch 171,§1.]

6653 Board of review. The council shall, on or before the first Monday of April, in each year, also appoint three persons who shall constitute a local board of review of the city or town in which they are appointed. The compensation of such board of review shall be fixed by the council and paid from the general fund of the city or town, and such board shall be governed by the statute relating to boards of review, and shall possess and exercise all of the powers conferred upon local boards of review by law. [SS15,§1056-b18; C24, 27, 31, 35,§6653.]

Boards of review, ch 343

6654 Official newspapers. The council shall also select one or more newspapers of general circulation published within the city or town, which shall be designated official papers. If no newspaper is published in any town organized under this chapter, the council of such town may, in its discretion, select a newspaper published in the county, which has a circulation in such town, and designate the same the official paper of the town. [SS15,§1056-b18; C24, 27, 31, 35,§6654.]

Official newspapers defined, §11099.1

6655 Publications. All ordinances, resolutions, and proceedings of any city or town, organized under the provisions of this chapter, required to be published, shall be published in the official paper or papers so selected by the council. [SS15,§1056-b18; C24, 27, 31, 35,§6655.]

6656 Statutes made applicable. All of the provisions of sections 6534 to 6538, inclusive, shall apply to all officers and employees elected or appointed in any city or town, organized under this chapter, as fully as though the provisions of such sections were incorporated and repeated herein. [SS15,§1056-b11; C24, 27, 31, 35,§6656.]

ORDINANCES AND RESOLUTIONS

6657 Ordinances—time limit on enactment. Every ordinance or resolution appropriating money or ordering any sewer or street improvement, or making or authorizing the making of any contract, or granting any franchise, or the right to use and occupy the streets, highways, bridges, or public places of the city or town, for any purpose, shall be complete in the form in which it is finally passed, and, except an ordinance or resolution for an improvement, the preservation of the public peace, health, or safety, which contains a statement of its urgency, shall remain on file with the city or town clerk, for public inspection, at least one week before its final passage or adoption. [SS15, §1056-b23; C24, 27, 31, 35,§6657.]

SS15, §1056-b23, editorially divided

6658 When effective. No ordinance passed by the council, except when otherwise required by the general laws of the state, or by the provisions of this chapter, and, except an ordinance for an improvement, the preservation of the public peace, health, or safety, which contains a statement of its urgency, and is passed by a unanimous vote of the council, shall go into effect before ten days from the time of its passage. [SS15,§1056-b23; C24, 27, 31, 35,§6658.]

6659 Petition of protest. If during said ten days, a petition, signed by the electors of the city or town, equal in number to at least twenty-five percent of the entire vote cast in such city or town at the last preceding general or municipal election, as shown by the poll books of such election, protesting against the passage of such ordinance, be presented to the council, such ordinance shall thereupon be suspended from going into operation, and it shall be the duty of the council to reconsider the same, and, if the same be not repealed, the council shall submit the ordinance to the vote of the electors of the city or town at a regular election or a special election called for that purpose, in the manner provided by subdivision (b) of section 6557. [SS15, §1056-b23; C24, 27, 31, 35,§6659.]

6660 Petition—requirements. The petition protesting against an ordinance shall be, in all respects, in accordance with the provisions of section 6556, except as to the percentage of signers thereof, and shall be examined and certified by the clerk, as provided in such section. [SS15,§1056-b23; C24, 27, 31, 35,§6660.]

6661 Adoption by electors—status. If a majority of the qualified electors voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid ordinance of the city or town; and, any ordi-

nance so adopted cannot be repealed or amended except by a vote of the electors of the city or town. [SS15,§1056-b23; C24, 27, 31, 35,§6661.]

6662 Amendment or repeal. The council may submit a proposition for the repeal of any ordinance so adopted by the electors, or for the amendment thereof, to be voted upon at any succeeding regular municipal election; and should such proposition so submitted receive a majority of the votes cast at such election, such ordinance shall thereby be repealed or amended, according to the proposition submitted. [SS15,§1056-b23; C24, 27, 31, 35,§6662.]

6663 Franchises. No franchise or right to occupy or use the streets, highways, bridges, or public places of any such city or town shall be granted, renewed, or extended, except by ordinance, and every franchise or grant for interurban or street railways, gas or water works, electric light or power plants, heating plants, telegraph or telephone systems, or other public utilities within such city or town must be authorized or approved by a majority of the electors of such city or town, voting thereon, at a regular or special election, as provided by sections 5905 to 5909, inclusive. [SS15,§1056-b24; C24, 27, 31, 35,§6663.]

6664 Signing and recording. Every resolution or ordinance passed by the council must be signed by a majority of the council, and be recorded before the same shall be in force. [SS15,§1056-b8; C24, 27, 31, 35,§6664.]

THE MANAGER

6665 Appointment—tenure. At the first meeting after its election, or as soon thereafter as practicable, the council shall appoint a competent person manager, who shall be the administrative head of the municipal government of the city or town in which he is appointed. [SS15, §1056-b12; C24, 27, 31, 35,§6665.]

6666 Basis for appointment. The council in making the appointment of a manager, shall consider only the qualification and fitness of the person appointed, and he shall be appointed without regard to his political affiliation and need not be a resident of the city or town at the time of his appointment. [SS15,§1056-b14; C24, 27, 31, 35,§6666.]

SS15, §1056-b14, editorially divided

6667 Manager pro tem. During the absence or disability of the manager, the council may designate some properly qualified person to perform and execute the duties of his office. [SS15, §1056-b14; C24, 27, 31, 35,§6667.]

6668 Qualification—bond. Before entering upon the duties of his office, the manager shall take an official oath that he will support the constitution of the United States, the constitution of the state of Iowa, and, without fear or favor, will, to the best of his ability, faithfully and honestly perform the duties of his office, and shall execute a bond in favor of the city or town, for the faithful performance of his duties, in such sum as may be fixed by the council. [SS15, §1056-b13; C24, 27, 31, 35,§6668.]

6669 Duties. The duties of the manager shall be as follows:

1. He shall see that the laws and ordinances of the city or town are faithfully enforced and executed.
2. He shall attend all meetings of the council.
3. He shall recommend to the council such measures as he may deem necessary or expedient for the good government and welfare of the city or town.
4. He shall have the general supervision and direction of the administration of the city or town government.
5. He shall supervise and direct the official conduct of all appointive officers of the city or town, except the clerk, police judge or magistrate, solicitor, corporation counsel, assessor, board of review, and members of the library board.
6. He shall supervise the performance of all contracts for work to be done for the city or town, make all purchases of material and supplies, and see that such material and supplies are received, and are of the quality and character called for by the contract.
7. He shall have power to employ and discharge from time to time, as occasion requires, all employees of the city or town, and to fix the compensation to be paid to such employees, except as otherwise herein provided.
8. He shall have power to discharge summarily and without cause any officer, appointee, or employee that he has power to appoint or employ.
9. He shall supervise and manage all public improvements, works, and undertakings of the city or town, and shall have charge of the construction, improvement, repair, and maintenance of streets, sidewalks, alleys, lanes, squares, bridges, viaducts, aqueducts, public highways, sewers, drains, ditches, culverts, streams, and watercourses, except those designated in and which are covered by the provisions of chapter 293, and of all public buildings.
10. He shall manage, supervise, and control market houses, crematories, sewage disposal plants, and farms, and shall enforce all obligations of privately owned or operated public utilities enforceable by the city or town.
11. He shall have charge of the making and preservation of all surveys, maps, plans, drawings, specifications and estimates for public works or public improvements; the cleaning, sprinkling, and lighting of streets, alleys, and public places; the collection and disposal of waste, and the preservation of tools and appliances belonging to the city or town.
12. He shall manage all municipal water plants, lighting, heating, or power plants, and transportation enterprises; except that in any city having a population of twenty thousand or more and less than seventy-five thousand wherein the territory embraced within the boundaries of such city lies in two townships which are divided by a watercourse, and which city at the

time of the adoption of the city manager plan is the owner of its waterworks, managed and operated by a board of waterworks trustees, under the provisions of chapter 313, and in cities where the voters have decided by ballot to place the management of the municipal waterworks in the hands of a board of trustees as provided in chapter 312 such waterworks shall continue to be managed and controlled by such board of waterworks trustees.

13. He shall manage, supervise, and control the use, construction, improvement, repair, and maintenance of all recreational facilities of the city or town, including parks, playgrounds, public gymnasiums, and public bathhouses.

14. He may, without notice, summarily cause the affairs of any department or the conduct of any officer under his supervision, or of any employee, to be investigated; and he, or any person appointed by him to examine or investigate the affairs of any department or the conduct of any officer or employee, shall have power to compel the attendance of witnesses, the production of books and papers and other evidence, and to punish for contempt any person who shall fail to attend and testify as a witness when duly summoned, or who shall fail to produce any books, papers, or other evidence under his control when required to do so.

Contempts, ch 536

15. He shall take active control of the police, fire, and engineering departments of the city or town, and employ such assistants and employees therein as by him shall be deemed advisable.

16. He shall, in his discretion, issue licenses, authorized by law, and may revoke the same at pleasure. All licenses issued shall be signed by the manager and the clerk, and duly entered in a book kept for that purpose.

17. He shall keep the council fully advised of the financial and other conditions of the city or town, and of its future needs.

18. He shall have power to appoint or employ persons to fill all places for which no other mode of appointment is provided, and shall have power to administer oaths. [SS15,§1056-b15; C24, 27, 31, 35,§6669; 47GA, ch 178,§1.]

6670 Budget. The manager shall prepare and submit to the council an annual budget on the basis of estimates of the expenses of the various departments of the city or town. These departmental estimates shall show the expenses of each department for the preceding year, and shall indicate wherein an increase or a diminution is recommended for the ensuing year. Such estimate shall be published in the official newspapers of the city or town two weeks before such estimates are submitted by the manager to the council, and printed copies thereof shall be furnished to any citizen upon request to the manager. The budget so submitted to the council shall be taken up by it in open meeting, and full opportunity shall be given for hearing any objections or protests which any taxpayer of the city or town may desire to make to any item or items in such budget, or to any omissions therefrom. [SS15,§1056-b16; C24, 27, 31, 35,§6670.]

SS15, §1056-b16, editorially divided

6671 Methods and accounts. He shall, at all times, see that the business affairs of the municipal corporation of which he is manager are transacted in a modern and scientific method, in an efficient and businesslike manner, and that accurate records of all of the business affairs of the city or town under his management, are fully and accurately kept. [SS15, §1056-b16; C24, 27, 31, 35,§6671.]

6672 Monthly reports. He shall make to the council an itemized monthly report in writing, showing in detail the receipts and disbursements for the preceding month, and such report shall be made by him not later than the tenth day of each month. The reports so made, after having been passed upon by the council, shall be published each month in the official newspapers of the city or town. [SS15,§1056-b16; C24, 27, 31, 35,§6672.]

6673 General accountability — discharge. Such manager shall be under the direction and supervision of the council, and shall hold office at its pleasure. He shall be accountable to the council for his actions and conduct, and for the management of the business affairs of the city or town. He shall perform any duty specially required of him by the council, and may be discharged at the will of the council, without cause. [SS15,§§1056-b12,-b16; C24, 27, 31, 35,§6673.]

6674 Salary. The salary of the manager shall be fixed by the council, and paid monthly from the treasury of the city or town, upon an order signed by the presiding officer of the council and by the clerk. [SS15,§1056-b17; C24, 27, 31, 35,§6674.]

6675 Councilman ineligible—removal. No councilman elected under the provisions of this chapter shall be appointed by the manager to any office of the city or town in which he is elected, or employed in any department thereof; and any councilman or manager who shall violate the provisions of this section shall be guilty of a misdemeanor. Any councilman or manager violating the provisions of this section may be removed from office, under the provisions of chapter 56. [SS15,§1056-b19; C24, 27, 31, 35, §6675.]

Punishment, §12894

6676 Political activity. The manager shall take no part in any election held for the purpose of electing councilmen, except that he may attend at the polls and cast his vote, if he is a qualified elector of the city or town, and any attempt upon his part to procure the election of any person as councilman, or to induce any elector to vote for any person for councilman, or any solicitation by such manager of any elector to vote for any person or persons for the office of councilman, shall be a misdemeanor, and he may be removed from office under the provisions of chapter 56. [SS15,§1056-b20; C24, 27, 31, 35, §6676.]

Misdemeanor, punishment, §12894

GENERAL POWERS AND DUTIES

6677 Classification of city. Every city which shall adopt the form of government herein con-

templated shall, upon the adoption of such form of government, become a city of the first or second class, under the general laws of the state, according to the population of such city. [SS15, §1056-b9; C24, 27, 31, 35,§6677.]

6678 General powers conferred. The council of every city or town organized hereunder shall have, possess, and may exercise all executive, legislative, and judicial powers, not inconsistent with this chapter, conferred by law upon councils of cities and towns of the same class organized under the general laws of the state; and every city and town organized under this chapter shall have, possess, and may exercise the corporate powers, not inconsistent with the provisions hereof, conferred upon cities and towns of the same class organized under the general laws of the state. [SS15,§1056-b9; C24, 27, 31, 35,§6678.]

6679 Statutes made applicable. All laws governing cities of the first class, organized under the general laws of the state, not inconsistent with the provisions of this chapter, shall apply to and be in force in every city of the first class organized hereunder; all laws governing cities of the second class organized under the general laws of the state, not inconsistent with the provisions of this chapter, shall apply to and be in force in every city of the second class organized hereunder; and all laws governing incorporated towns, not inconsistent with the provisions of this chapter, shall apply to and be in force in every such town organized hereunder. [SS15,§1056-b2; C24, 27, 31, 35,§6679.]

SS15, §1056-b2, editorially divided

6679.1 Lease of city property. Cities in excess of twenty thousand population organized under this chapter, as provided in section 6580, may lease property owned by such cities in the manner provided by section 6580. [C31, 35, §6679-c1.]

6680 Existing ordinances, etc. All bylaws, ordinances, and resolutions lawfully passed and in force in any such city or incorporated town under its former organization shall be and remain in force until altered or repealed by the council elected under the provisions of this chapter. [SS15,§1056-b2; C24, 27, 31, 35,§6680.]

6681 Existing limits, rights, property, and liability. The territorial limits of such city or town shall remain the same as under its former organization, and all rights and property of every description which were vested in any such city or town under its former organization shall vest in the same when organized under the provisions of this chapter, and no right or liability in favor of or against such city or town existing at the time of the adoption of the form of government herein contemplated, and no suit or prosecution of any kind shall be affected by the change of the form of government of such city or town, unless herein otherwise provided. [SS15,§1056-b2; C24, 27, 31, 35,§6681.]

6682 Departments to continue. All departments of cities and towns which shall adopt the form of government herein contemplated, shall continue to exist as departments of the government of such city or town until abolished, changed, or modified under the provisions of this chapter. [SS15,§1056-b22; C24, 27, 31, 35,§6682.]

6683 Parks and park commissioners. The provisions of chapter 293, relating to parks and park commissioners, shall be applicable to and be in force in cities and towns organized under the provisions of this chapter, to the same extent and effect that such provisions are applicable to and in force in cities and towns of the same class organized under the general laws of the state, except as changed or modified by this chapter. The board of park commissioners shall have and may exercise all powers conferred upon them by the provisions of said chapter, except as herein changed or modified. [SS15, §1056-b21; C24, 27, 31, 35,§6683.]

6684 Policemen and firemen—pensions. The law as it appears in chapter 322 shall be applicable to and effective in cities which adopt the city manager plan of government under the provisions of this chapter. [C24, 27, 31, 35, §6684.]

See ch 322.1

6685 Applicable statute. Section 6735 is hereby made applicable to cities and towns organized under this chapter. [C24, 27, 31, 35,§6685.]

6686 Limit of indebtedness. In any city adopting the form of government provided for in this chapter, whose indebtedness prior to the time the change in government was made was limited to five percent of the actual value of the taxable property therein, and whose actual indebtedness, at the date of such change, exceeds one and one-quarter percent of the actual value of the taxable property of said city, the limit of indebtedness of such city shall be determined by adding to the indebtedness limit, under the general laws for cities, the actual value, as determined by the city council, of municipally owned and operated utilities, and it shall be limited to such an amount; provided, however, that the amount thus arrived at shall in no event exceed five percent of the actual value of the taxable property in said city, as shown by the state and county tax list. [C24, 27, 31, 35,§6686.]

ABANDONMENT OF PLAN

6687 Procedure — petition — election. Any city or town which shall have operated for six years or more under the provisions of this chapter, may abandon its organization hereunder, and accept the provisions of the general law of the state then applicable to cities or towns of like population, or if now organized under special charter, may resume such special charter by proceeding as follows:

Upon the petition signed by the electors of such city or town, equal in number to twenty-five percent of the votes cast in said city or town for all the candidates for governor at the

last preceding general election, a special election shall be called at which the following proposition shall be submitted:

"Shall the city (or town) of (name of city or town) abandon its organization under chapter 328 of the code, become a city (or town) under the general law governing cities and towns, or if now organized under special charter, resume such special charter?" [SS15,§1056-b26; C24, 27, 31, 35,§6687.]

SS15, §1056-b26, editorially divided

6688 Officers elected. If the majority of the votes cast at such election be in favor of the abandonment of the form of government provided by this chapter, the officers elected at the next succeeding regular biennial election shall be those then prescribed by the general law of the state for cities and towns of like population, or those prescribed by the special charter of such city, as the case may be, and upon qualification of such officers, such city or town shall become a city or town under the general law of the state, or under special charter, as the case may be. [SS15,§1056-b26; C24, 27, 31, 35,§6688.]

6689 Effect of abandonment. Such change shall not, in any manner, affect the property, rights, or liabilities of such city or town, and shall extend only to such change in the form of government thereof. [SS15,§1056-b26; C24, 27, 31, 35,§6689.]

6690 Law governing procedure. The petition for the abandonment of the form of government herein provided, shall be signed, filed, its sufficiency determined, the election ordered and conducted, and the results declared generally, as provided by sections 6616 to 6618, inclusive, so far as the provisions thereof are applicable. [SS15,§1056-b26; C24, 27, 31, 35, §6690.]

CHAPTER 329

CITIES UNDER SPECIAL CHARTER

Referred to in §§6903, 6943.007

Agricultural land school tax credit, §6943.159; homestead tax credit, §6943.142; short courses for police officers, §1225.16

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OFFICERS AND EMPLOYEES

6691 Council—number. In any city acting under special charter having a population of twenty thousand or more, as shown by the last state or national census, the council shall consist of two aldermen at large, and one alderman from each ward, elected biennially. [C97,§937; SS15,§937; C24, 27, 31, 35,§6691.]

SS15,§937, editorially divided

6692 Vacancies filled by election. Vacancies occurring in the office of alderman shall be filled by special election, unless such vacancy shall have occurred less than sixty days prior to a regular city election. [SS15,§937; C24, 27, 31, 35,§6692.]

6693 Election called. Such special election shall be called by a proclamation of the mayor, giving at least ten days notice of such election, designating the time and polling places therefor and the vacancy to be filled thereat. [SS15, §937; C24, 27, 31, 35,§6693.]

6694 Notice of election. Notice of such election shall be published in at least one newspaper printed and published in said city, and in two if there be such number, for a period of ten days prior to such election. Notice of such election shall be posted at or near the polling places designated for said election for a similar length of time. [SS15,§937; C24, 27, 31, 35,§6694.]

6695 Election board. The election board at any such special election shall be the same as at the last preceding city election. In case of vacancies happening therein the mayor shall make appointments to fill the same, such appointee to be a member of the same political party or organization as the member filling such position before the vacancy. [SS15,§937; C24, 27, 31, 35,§6695.]

6696 Ballots. The city clerk shall, on notice from the mayor, cause ballots to be prepared for such election as provided by law; or, in the event of his refusal or inability to act, the mayor shall cause such ballots to be prepared. [SS15,§937; C24, 27, 31, 35,§6696.]

6697 Nominations. Nominations of candidates for such vacant office may be made as provided in chapters 37.1 and 37.2. [SS15,§937; C24, 27, 31, 35,§6697.]

Applicability of general primary law, §639

6698 Vacancies filled by council. In the event that such vacancy shall have occurred less than sixty days prior to a regular city election, then the vacancy so existing shall be filled by a majority vote of the remaining aldermen of the city council. [SS15,§937-a; C24, 27, 31, 35,§6698.]

6699 Presiding officer. The mayor shall be the presiding officer of the council with the right to vote only in case of a tie. [C24, 27, 31, 35,§6699.]

6700 Marshal — policemen. Cities under special charters shall have power to provide by ordinance for the appointment of a marshal by the mayor, or for his election by the electors thereof, or may dispense with such officer and confer his duties upon any other officer. All policemen shall be appointed and may be removed by the mayor. [C97,§938; C24, 27, 31, 35, §6700.]

6701 Police matrons. Police matrons shall be appointed and paid the same compensation as in cities organized under the general law.

Such appointees shall be, so far as applicable, subject to the same regulations and restrictions as policemen in such cities. [S13,§654-a; C24, 27, 31, 35,§6701.]

See also §§5635, 6756.1

6702 Assessors. They shall provide by ordinance for the election of one or more assessors, who shall discharge the duties usually performed by township assessors, so far as applicable, and such as may be required by ordinance. [C97,§939; C24, 27, 31, 35,§6702.]

6703 Other officers—terms. They may provide by ordinance for the election, by the electors, of a marshal, recorder or clerk, treasurer, collector, auditor, attorney, and engineer; and all elective officers hereafter elected shall hold office for the term of two years, and until their successors are elected and qualified, and, when appointed, for such time as may be fixed by ordinance, not exceeding two years. [C97,§940; C24, 27, 31, 35,§6703.]

6704 Compensation of aldermen. Aldermen shall be paid an amount prescribed by ordinance, not in excess of six hundred dollars per annum, which shall be in full compensation for all services connected with their official duties. [C97,§943; C24, 27, 31, 35,§6704.]

C97,§943, editorially divided

6705 Compensation of mayor. The mayor shall receive such salary as may be provided by ordinance, not exceeding two thousand five hundred dollars per annum, and in addition he shall receive for holding a mayor's or police court, or discharging the duties of a justice of the peace, the compensation allowed by law for similar services by such officers, to be paid in the same manner; which amount shall be in full compensation of all such services. [R60, §§1091, 1121; C73,§§519, 547; C97,§945; C24, 27, 31, 35,§6705.]

6706 Compensation of other officers—report. Police judges, magistrates, marshals, and police officers, in criminal cases under the ordinances, shall receive the fees allowed for similar services in criminal cases under the state law, payable out of the city treasury; and for criminal cases under the state law they shall be paid the same fees that justices and constables receive under the state law, payable from the county treasury. When such officers are paid a salary, the same shall be in lieu of all fees, and such fees, when collected, shall be paid into the city treasury. They shall make, under oath, a monthly report of such fees to the council. [R60,§§1086, 1104, 1107, 1118; C73,§§515, 533, 536, 544; C97,§946; C24, 27, 31, 35,§6706.]

6707 Change of compensation. The emoluments of any officer shall not be increased or diminished during the term for which he shall have been elected or appointed, nor shall any change of compensation affect any officer during his existing term, unless the office be abolished. [R60,§1122; C73,§491; C97,§944; C24, 27, 31, 35,§6707.]

C97,§944, editorially divided

6708 Ineligibility when compensation increased. No person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed, when, during the same time, the emoluments have been increased. [R60,§1122; C73,§491; C97,§944; C24, 27, 31, 35,§6708.]

6709 Ineligible to appointment. No member of the council shall, during the time for which he has been elected, or for one year thereafter, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the term for which he was elected. [R60,§1122; C73,§490; C97,§943; C24, 27, 31, 35,§6709.]

6710 Interest in contract. No member of the council shall be interested directly or indirectly in any contract for work or service to be performed for the corporation. [R60,§1122; C73,§490; C97,§943; C24, 27, 31, 35,§6710.]

Similar provisions, §§180, 275, 3828.101, 3922, 4685, 4686.14, 4755.10, 5361, 5673, 5828, 6534, 13324, 13327

MISCELLANEOUS OFFICIAL DUTIES

6711 Estimates. Each officer, board, or committee shall file in the office of the clerk or recorder, thirty days before the beginning of each fiscal year, a detailed statement of the necessary labor, supplies, and materials, and the work to be done by or through his or its department during the next fiscal year, and the estimated cost thereof. [C97,§941; C24, 27, 31, 35, §6711.]

Fiscal year, §5676.1

6712 Appropriations. The council shall make the appropriations for all the different expenditures for each fiscal year at or before the beginning thereof; and it shall be unlawful to issue any warrant, or to enter into any contract or appropriate any money, in excess of the amount thus appropriated, for the different expenses of the city during the year for which said appropriations shall be made. [C97,§942; C24, 27, 31, 35,§6712.]

C97,§942 editorially divided

6713 Limitation. It shall not appropriate, in the aggregate, an amount in excess of its annual legally authorized revenue, but nothing herein shall prevent such cities from anticipating their revenue for the year for which such appropriations are made, or from bonding or refunding their outstanding indebtedness. [C97, §942; C24, 27, 31, 35,§6713.]

6714 Deposit of funds. The treasurer shall deposit city funds in his possession in the same manner and under the same terms as treasurers in cities organized under the general law. [S13, §660-a; C24, 27, 31, 35,§6714.]

Deposit of funds, ch 352.1
Interest diverted to state sinking fund, §7420.09 et seq.

6714.1 Sinking fund for public deposits. Chapter 352.2 shall be applicable to cities acting under special charters. [C27, 31, 35,§6714-b1.]

6715 Expense of bond. If the treasurer shall request it, the city shall pay the reasonable

expense of procuring a bond for the treasurer, not to exceed one-half of one percent per annum upon the amount thereof. [C24, 27, 31, 35,§6715.]

6716 Warrants. The auditor, clerk, or other officer whose duty it is to draw warrants shall draw no warrant except upon the vote of the council, and no warrant for an amount in excess of one thousand dollars. [C97,§1009; C24, 27, 31, 35,§6716.]

6717 List of warrants. Section 5642 is made applicable to cities acting under special charters. [C97,§1008; C24, 27, 31, 35,§6717.]

6718 Annual financial report. Sections 5676.1, 5676.2, 5676.3, 5677, 5677.1, 5679, 5680, and 5681 shall apply to cities acting under special charters. [S13,§1056-a13; C24, 27, 31, 35, §6718.]

6719 Accounts. Sections 5675 and 5676 are applicable to special charter cities. [S13, §§741-a,-b; C24, 27, 31, 35,§6719.]

ORDINANCES

6720 Ordinances—fines. Such cities shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this chapter, and the charters thereof, and such as are necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such cities and the inhabitants thereof; and to enforce obedience to such ordinances by a fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days. [R60,§§1071–1073; C73,§482; C97,§947; C24, 27, 31, 35,§6720.]

Similar section, §5714

6721 General procedure—veto. Ordinances and resolutions shall be adopted and signed, recorded, published, and evidenced and be subject to veto by the mayor as in cities organized under the general law. [R60,§1076; C73,§3720; C97,§§951, 952, 954; S13,§952; C24, 27, 31, 35, §6721.]

Ordinances, ch 290

6722 Applicable statutes. Sections 5724, 5725, 5726, and 5727 are applicable to special charter cities. [C24, 27, 31, 35,§6722.]

6723 Jury and change of venue. In any prosecution or proceeding for the violation of any ordinance, the defendant shall not be entitled to a trial by jury or to a change of venue, except on appeal, but shall be tried by the court or magistrate before whom the action is commenced; except in cities where a municipal court has been established, when such trials shall be governed by the law applicable to municipal courts. [C97,§948; C24, 27, 31, 35,§6723.]

6724 Limitation on prosecutions. All suits for the recovery of fines, and prosecutions for the commission of offenses made punishable as herein provided, shall be barred in one year after the commission of the offense for which the fine is sought to be recovered or the prosecution is commenced. [R60,§1075; C73,§486; C97, §950; C24, 27, 31, 35,§6724.]

6725 Commitment—executions. Whenever a fine and costs imposed for the violation of any ordinance are not paid, the person convicted may be committed at hard labor until the fine and costs are paid, not to exceed thirty days, and, in addition thereto, such fine and costs may be collected by the issuance of an execution on such judgment against any property of the defendant, which execution shall have the same force and effect and be executed in the same manner as provided by law for the collection of judgments in civil suits by execution. [C97, §949; C24, 27, 31, 35,§6725.]

C97,§949, editorially divided

6726 Transcripts. Transcripts of such judgments may be filed in the district court of the proper county as in civil cases, and with the same force and effect, and execution may be issued thereon from such court. [C97,§949; C24, 27, 31, 35,§6726.]

6727 Action to recover. Fines and penalties may in all cases be recovered by action before a justice of the peace or other court of competent jurisdiction, and in the name of the proper municipal corporation. In any such action, where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title and the date of its adoption or passage, and showing, as near as may be, the facts of the alleged violation. [C24, 27, 31, 35,§6727.]

40ExGA, SF 182, §6a, editorially divided

6728 Accounting. All fees, fines, forfeitures, costs, and expenses collected shall be turned over to the city treasurer by the officer collecting the same on or before the tenth day of each succeeding month, and the city treasurer shall forthwith pay to the county treasurer for the benefit of the school fund the portion of fines and forfeitures collected for the violation of state laws. [C24, 27, 31, 35,§6728.]

GENERAL PROVISIONS AND POWERS

6729 Powers. Any city organized under special charter shall have and exercise, in addition to the provisions of such special charter, the rights, powers, and privileges contained in this chapter. [C97,§934; C24, 27, 31, 35,§6729.]

6730 Applicability of provisions. The provisions of this chapter shall apply only to cities acting under special charters. No provisions of this code, nor laws hereafter enacted, relating to the powers, duties, liabilities, or obligations of cities or towns, shall in any manner affect, or be construed to affect, cities while acting under special charters, unless the same have special reference or are made applicable to such cities.

In all laws hereafter enacted such reference or application shall be in a separate section in the act. [C97,§933; C24, 27, 31, 35,§6730.]

6731 Definition. Wherever the words "cities organized under the general law" appear in this chapter, they refer to the law for cities organized under chapter 286. [C24, 27, 31, 35,§6731.]

6732 Application of certain terms. Whenever the words "boards of supervisors", "county auditor or recorder of deeds", and "county treasurer" are used in any section made applicable by this chapter to special charter cities, the words "city council", "city clerk" or "city recorder", and "city collector or treasurer" shall be respectively substituted.

This section shall not be construed as depriving boards of supervisors, county auditors, and county treasurers of their powers to spread tax levies and collect taxes certified by cities acting under special charter as provided in sections 6867, 6868, and 6871. [C97,§§958, 1024; S13,§958; C24, 27, 31, 35,§6732.]

6733 Unliquidated claim—limitation of action. No suit shall be brought against any such city for any unliquidated claim or demand unless within three months from the time the same became due or cause of action accrued thereon, nor unless a written, verified statement of the general nature, cause, and amount of same is filed with the clerk or recorder thirty days before the commencement of such suit. [C97, §1050; C24, 27, 31, 35,§6733.]

6734 Claims for personal injury — limitation. In all cases of personal injury or damage to property resulting from defective streets or sidewalks, or from any cause originating in the neglect or failure of any municipal corporation or its officers to perform their duties, no suit shall be brought against any such city after three months from the time of the injury or damage, and not then unless a written verified statement of the amount, nature, and cause of such injury or damage, and the time when and the place where such injury occurred, and the particular defect or negligence of the city or its officers which it is claimed caused or contributed to the injury or damage, shall be presented to the council or filed with the clerk within thirty days after said alleged injury or damage was sustained. [C97,§1051; C24, 27, 31, 35,§6734.]

Similar provision, §11007, subsection 1

6735 Notice to person liable over. In case any action is brought against any such city for damages for injury to person or property claimed to have been caused by or through the negligence of said city, the city may notify in writing any person or corporation, by or in consequence of whose negligence it is claimed by said city the injury occurred or was caused, of the pendency of said suit, the name of the plaintiff and where pending, and the general nature of the claim, and that the city claims that the person or corporation so notified is liable to said city for any judgment obtained against said city, and asking such person or corporation to appear and defend; thereupon any judgment obtained in such suit shall be conclusive in any action by the city against any person or corporation so notified as to the existence of the defect or other cause of the injury or damage, and as to the liability of the city to the plaintiff in the first named suit in consequence thereof, and as to the amount of the damage or injury occasioned thereby; and every such city is hereby empowered to maintain an action against the person or corporation so notified to recover the amount of any such judgment, together with all the expenses incurred by such city in such suit. [C97,§1053; C24, 27, 31, 35,§6735.]

Applicable to cities under commission plan, §6567; also to cities under manager plan, §6685

6736 Purchase on execution. Such cities shall have power to acquire real estate, or any interest therein, as a purchaser at an execution sale, when judgment is entered in favor of the city, or when it has a lien thereon, or is otherwise interested therein. [C97,§1000; C24, 27, 31, 35,§6736.]

Applicable to cities under commission plan, §6567
Municipality as bidder, ch 449

6737 Elections. All elections held in such cities shall be governed by the general election laws. [C97,§936; C24, 27, 31, 35,§6737.]

6738 Conveyance of land. They shall have power, by a three-fourths vote of all members of the council, to dispose of and convey lands unsuitable, insufficient, or unnecessary for the purposes for which they were originally acquired; but when such lands are disposed of, enough shall be reserved for streets to accommodate adjacent property owners; and to dispose of the title or interest of such city in any real estate, or any lien thereon, or share or certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, upon such terms as the council shall direct. Conveyance executed in accordance with this section shall extinguish all the rights and claims of the city existing prior thereto. [C97,§1001; C24, 27, 31, 35,§6738.]

6739 Use of public grounds. Any such cities situated on the Mississippi river, having within their limits public grounds heretofore set apart or dedicated for levee, warehouse, or other public purposes, and in which the use of such ground for such purposes has ceased or been abandoned in whole or in part, may use or provide for the use of such grounds otherwise than for levee and warehouse purposes, as said council of such cities may determine are for the public interest, and upon such terms and conditions as may be fixed by said council. [C97, §1054; C24, 27, 31, 35,§6739.]

6740 Condemnation of land. They shall have power to purchase and provide for the condemnation of, and pay for out of the general or grading fund, or assess and levy the whole or any part of the cost thereof upon the property benefited thereby, and enter upon and take

any lands within or without the territorial limits of such city, for the following purposes:

1. For parks, commons, cemeteries, crematories, hospital grounds, natatoriums, or public baths.

2. For establishing, laying out, widening, straightening, narrowing, extending, and lighting streets, avenues, highways, alleys, landing places, public squares, public grounds, public markets, or market places, and public slaughterhouses.

3. For obtaining gravel, stone, or other suitable material with which to improve their streets and alleys, including a suitable roadway thereto by the most reasonable route.

4. For any other purpose, where such purchase or condemnation is herein, or in the charters of such cities, or may hereafter be, authorized. [R60,§1064; C73,§§464, 470; C97, §999; S13,§2024-j; C24, 27, 31, 35,§6740.]

Gifts, see §10188

6741 Proceedings to condemn. Proceedings for condemnation of land as contemplated in this chapter shall be in accordance with the provisions of this code relating to taking private property for works of internal improvement, except that the jurors shall have the additional qualification of being freeholders of the city, or as provided in the charters of said cities. [R60,§§1065, 1066; C73,§§469, 476, 477; C97, §1002; C24, 27, 31, 35,§6741.]

Condemnation procedure, ch 366

6742 Infirmary—outdoor relief—baths. The council shall have power, by two-thirds vote of the whole council, to establish and maintain, either within or without the limits of the city, an infirmary for the accommodation of the poor of the city, and to provide for the distribution of outdoor relief, and for a public bathhouse or natatorium when declared by the board of health of such city to be essential to the preservation of the public health, and to regulate by ordinance the use of such baths and the conduct and maintenance of the same. The appropriation for the construction and maintenance of such bathhouse or natatorium shall be paid from the general current revenues of said city not appropriated to other purposes. [R60, §1111; C73,§538; C97,§957; C24, 27, 31, 35, §6742.]

6743 Smoke nuisance. The emission of dense smoke within the corporate limits of special charter cities having a population of sixteen thousand or over is hereby declared a nuisance. [S13,§713-a; C24, 27, 31, 35,§6743.]

6744 Property inside curb lines. Cities under special charter shall have and are hereby granted power to place by ordinance, the exclusive charge, custody, and control of all property outside of the lot or property lines and inside the curb lines and upon the public streets in the park commission. [SS15,§997-a; C24, 27, 31, 35,§6744.]

6745 Permanent sidewalks. Special charter cities having a population of twenty-five thousand or over may confer upon the park commission by ordinance, the right to determine the location of permanent sidewalks outside lot or property lines, and upon the public streets. [SS15,§997-b; C24, 27, 31, 35,§6745.]

6746 Trees and shrubbery. Cities under special charters shall have and are hereby granted the power to place by ordinance, the charge, custody, and control in the park commission, of all trees, shrubbery, flowers, and grass outside of the lot or property lines and inside the curb lines and upon the public streets, and authorize the park commission to plant, cut, prune, remove, transplant, spray, care for, and maintain all trees, shrubbery, flowers, and grass outside of the lot or property lines and inside the curb lines and upon the public streets, in such a manner as not to interfere with public travel; and to pay for the same or any part thereof out of the park fund, or to provide by ordinance for assessing the cost thereof or any part thereof upon the lots and parcels of land in front of which such trees, shrubbery, flowers, and grass are planted and maintained. [SS15,§997-c; C24, 27, 31, 35,§6746.]

6747 Board of public works. Such cities shall have power to establish a board of public works, consisting of not more than three members. The members of the board shall consist of one commissioner appointed by the mayor with the approval of the council; when the board consists of two members, the associate member shall be the city engineer; when the board consists of three members, the associate members shall be the city engineer and street commissioner, and shall be appointed for such length of time, possess such qualifications, receive such compensation, be removed for such causes, possess such powers, perform such duties, be governed by such rules and regulations, as may be prescribed by ordinance. [C97, §998; C24, 27, 31, 35,§6747.]

6748 Changing watercourses — condemnation. They shall have power to deepen, widen, straighten, wall, fill, cover, alter, or change the channel of any watercourse or part thereof flowing through the city; to construct artificial channels or covered drains sufficient to carry the water flowing in such watercourse, and divert it from the natural channel, and conduct the same through such artificial channels or covered drains, and fill old channels; and in doing such work, or in carrying off flowing water, or building main or lateral sewers through ravines or hollows, they shall have the right to pass through private property and condemn the same for such purposes; and the cost of such work, including the cost of the land condemned, shall be paid for as provided herein for the payment of the cost of constructing sewers. [C97,§960; C24, 27, 31, 35,§6748.]

6749 Eminent domain. They may condemn and appropriate so much private property as shall be necessary to carry into effect the provisions of this chapter relating to the change of watercourses, and the construction of sewers

and of artificial channels in the manner provided for condemning land for city purposes. [C97,§961; C24, 27, 31, 35,§6749.]

Condemnation proceedings, ch 366

6750 Assessment. If a covered drain or new channel of a watercourse shall be constructed along any street or alley and used by the city as a sanitary or storm waterway, the council shall have the power to assess upon the lots or land adjacent to the line of such covered drain or new channel the whole or a portion of the cost thereof, not exceeding the sum of two dollars per linear foot, in the manner provided for the assessment of the cost of sewers. [C97, §963; C24, 27, 31, 35,§6750.]

GENERAL STATUTES MADE APPLICABLE

6750.1 Audit of accounts. Chapter 10 shall apply to special charter cities. [48GA, ch 42, §§3, 7.]

6751 Memorial buildings. The law relative to soldiers, sailors, and marines memorial buildings in cities organized under the general law shall apply to special charter cities. [C24, 27, 31, 35,§6751.]

6752 Sale of bonds. Sections 1175 to 1177, inclusive, are applicable to cities acting under special charters. [C24, 27, 31, 35,§6752.]

6752.1 Maturity and payment of bonds. Chapter 63.1 shall apply to cities acting under special charters. [C27, 31, 35,§6752-b1.]

Retail cigarette permits applicable to special charter cities, §1556.08

6753 Rep. by 41GA, ch 31

6753.1 Street as continuation of secondary road. Section 4644.45 shall apply to cities and towns acting under special charter. [C31, 35, §6753-c1.]

Farm-to-market roads. See §§4686.21, 4686.25

6754 Street as secondary road. Section 4745.1 is applicable to cities acting under special charters having a population of thirty-five hundred or less. [C24, 27, 31, 35,§6754.]

Chapter 241.1 is applicable to special charter cities. See §4755.32
Sections 6754-c1 and 6754-c2, code 1935, repealed by 47GA, ch 134, §§545, 546

6754.1 Motor vehicles. The provisions of chapter 251.1 shall apply to special charter cities. [C31, 35,§§6754-c1, -c2; 47GA, ch 134, §552.]

6755 Motor vehicle carriers. Section 5100.27 is applicable to cities acting under special charters. [C24, 27, 31, 35,§6755.]

6756 Territorial limits. All the provisions of chapter 286 in relation to the extension of the boundaries of cities or towns, the annexation of territory thereto, and the severance of territory therefrom are made applicable to cities acting under special charters. [C97,§935; C24, 27, 31, 35,§6756.]

6756.1 Police matrons. Section 5635 shall apply to cities acting under special charter. [C35,§6756-f1.]

6757 Iowa League of Municipalities. Sections 5683, 5683.1, and 5684 are applicable to special charter cities. [C24, 27, 31, 35,§6757.]

6758 Civil service. Chapter 289 shall apply to cities acting under special charters except those parts thereof specially applicable to cities having a population of more than one hundred thousand. [S13,§679-a; C24, 27, 31, 35,§6758.]

6759 General powers. Chapter 292 is applicable to special charter cities. [C97,§§952, 958, 959; S13,§§694-b, 696-a, 709-a, 711, 713-a, 737-a, 952, 958, 1056-a13; SS15,§§696-b, 711-a; C24, 27, 31, 35,§6759.]

6759.1 Personal service trades. The provisions of chapter 292.1 shall be applicable to special charter cities. [C35,§6759-g1.]

6760 Park commissioners. Chapter 293 is applicable to special charter cities. [C97,§§991, 997; S13,§§991, 991-a; C24, 27, 31, 35,§6760.]

6761 Municipal bands. Chapter 296 is applicable to cities acting under special charters which have a population of not over forty thousand. [C24, 27, 31, 35,§6761.]

6762 Juvenile playgrounds. The law relative to juvenile playgrounds in cities organized under the general law shall apply to special charter cities. [SS15,§879-r; C24, 27, 31, 35, §6762.]

Juvenile playgrounds, ch 298, see also ch 229

6763 City halls. The law relative to city halls in cities organized under the general law shall apply to special charter cities. [SS15, §741-d; C24, 27, 31, 35,§6763.]

City hall, §5773 et seq.

6764 Public libraries. The law relative to public libraries in cities organized under the general law shall apply to special charter cities. [C97,§952; S13,§952; C24, 27, 31, 35,§6764.]

Public libraries, ch 299

6765 Bridges. Chapter 301 is applicable to cities acting under special charters. [C97,§958; C24, 27, 31, 35,§6765.]

6766 Interstate bridges. Chapters 302 and 302.1 are applicable to cities acting under special charters. [C24, 27, 31, 35,§6766; 47GA, ch 164,§2.]

6767 Public docks. Chapter 303 is applicable to cities acting under special charters. [S13,§741-w3; C24, 27, 31, 35,§6767.]

6767.1 Airports. Chapter 303.1 shall apply to cities acting under special charter. [C31, 35, §6767-c1.]

Amendment by 47GA to §5904.1 (motorbus lines), applicable to special charter cities

6768 Viaducts. Chapter 305 is applicable to special charter cities. [C24, 27, 31, 35,§6768.]

6769 Jitney busses. Chapter 306 is applicable to special charter cities. [SS15,§754-a; C24, 27, 31, 35,§6769.]

Referred to in §5100.27

6770 Streets and public grounds. Chapter 307 except sections 5949.1 and 5949.2, is ap-

plicable to special charter cities. [C97,§§777-a, 791-h, 958; S13,§958; C24, 27, 31, 35,§6770.]

For additional declaration of applicability, see 48GA, ch 175,§2

6770.1 Improvements by street railways. Sections 6051.1 and 6051.2 shall apply to cities acting under special charter. [C31, 35,§6770-c1.]

6770.2 Joint sewers — rentals. Chapters 308.1 and 308.2 are made applicable to special charter cities having a population of fifty thousand or over. [47GA, ch 179,§1.]

6771 Protection from floods. Chapter 310 is applicable to cities acting under special charters. [S13,§963-a; C24, 27, 31, 35,§6771.]

6771.1 Extension of water mains. Chapter 314.1 is applicable to cities acting under special charter, regardless of population. [C31, 35, §6771-c1.]

6771.2 Consolidated tax levy. Section 6217 is applicable to cities acting under special charter. [C31, 35,§6771-c2.]

6772 Outside highways—aid. Sections 6224, 6225, and 6226 are made applicable to cities acting under special charters. [C97,§1008; C24, 27, 31, 35,§6772.]

6773 Omitted. Duplicate of §6864

6774 Indebtedness authorized. Section 6239, subsection 2, is applicable to special charter cities. [C24, 27, 31, 35,§6774.]

6775 Indebtedness limited. Sections 6238, 6239, subsection 1, and 6240 are applicable to cities acting under special charters when such cities have a population of less than two thousand. [C24, 27, 31, 35,§6775.]

6776 Elections. Sections 6241 and 6246 are applicable to special charter cities. [C97,§952; SS15,§§696-b, 741-d; C24, 27, 31, 35,§6776.]

6777 Maturity of bonds—interest. Section 6249 is applicable to special charter cities. [C97,§952; SS15,§696-b; C24, 27, 31, 35,§6777.]

6778 Bonds and certificates. Chapter 320 including amendments by senate file 179 of the fortieth extra general assembly is applicable to special charter cities. [C97,§§1021, 1022; C24, 27, 31, 35,§6778.]

Referred to in §6779

6779 Limitation of action. No action shall be brought questioning the legality of any bond or certificate authorized in section 6778, or any other bond or certificate authorized by this chapter, from and after three months from the time the same are ordered issued by the proper authority. [C97,§1023; C24, 27, 31, 35,§6779.]

Applicable to cities under commission plan, §6567
Similar provision, §§6264, 6932, 7673, 7714.23

6780 Plats. Chapter 321 is applicable to special charter cities. [C97,§1024; S13,§917-a; C24, 27, 31, 35,§6780.]

6781 Disabled and retired firemen and policemen. Chapter 322 is applicable to special charter cities. [S13,§§932-a,-j; C24, 27, 31, 35, §6781.]

6781.1 Retirement system—firemen and policemen. The provisions of chapter 322.1 are hereby made applicable to special charter cities. [48GA, ch 166,§1.]

Prior proceedings legalized, 48GA, ch 290

6781.2 Leasing city property. Section 6580 is hereby made applicable to cities operating under special charter. [47GA, ch 177,§2.]

6782 Commission form of government. A special charter city having by the last state or national census a population of two thousand or over may become organized as a city under the provisions of chapter 326 by proceeding as therein provided. [S13,§1056-a17; C24, 27, 31, 35,§6782.]

6783 Manager plan of government. Any special charter city may become organized as a city under the provisions of chapter 328 by proceeding as therein provided. [SS15,§1056-b; C24, 27, 31, 35,§6783.]

6784 Municipal courts. The law relative to municipal courts shall apply to special charter cities. [SS15,§694-c1; C24, 27, 31, 35,§6784.]

Municipal courts, ch 475

PUBLIC UTILITIES

6785 Street railways. Chapter 315 is applicable to special charter cities. [C97,§958; S13, §958; C24, 27, 31, 35,§6785.]

6786 Railways to maintain drainage. Such cities shall have power to order any railway or street railway to construct and maintain, under the direction and subject to the approval of the city engineer, culverts and drains across its right-of-way on any street, alley, highway, or other public place as such council may deem necessary, and if any railway or street railway company neglect or refuse, for more than thirty days after such notice as may be prescribed by resolution, to comply with the requirements of any such order, the city may construct such culvert or drain and recover the cost thereof from such company. [C97,§964; C24, 27, 31, 35, §6786.]

Applicable to cities under commission plan, §6567

6787 Waterworks. Chapters 313 and 314 are applicable to cities acting under special charters. [C97,§958; S13,§958; C24, 27, 31, 35, §6787.]

6788 Heating, water, gas, and electric plants. Sections 6129 and 6134 to 6143, inclusive, and 6134.01 to 6134.11, inclusive, are applicable to cities acting under special charters. [C97, §§722, 952; S13,§§722, 952; C24, 27, 31, 35,§6788; 47GA, ch 166,§1.]

6789 Establishment of utilities. Such cities shall have power to establish, erect, purchase, lease, maintain, or operate, within or without

the corporate limits, heating plants, waterworks, gasworks, electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants. [C73,§471; C97,§955; S13,§955; C24, 27, 31, 35,§6789.]

Referred to in §§6792, 6943.001
Applicable to cities under commission plan, §6567
Similar power, §6127
S13,§955, editorially divided

6790 Election necessary. No such works or plants shall be thus established, erected, purchased, or leased unless a majority of the electors voting on such proposition shall vote in favor of the same, at a general or special election. [C73,§471; C97,§955; S13,§955; C24, 27, 31, 35,§6790.]

Referred to in §6792
Applicable to cities under commission plan, §6567

6791 Power to grant franchise. They may also grant individuals or private corporations the authority to erect, maintain, or purchase such works or plants or railways, street railways, or telephone systems, for the term of not more than twenty-five years, and may renew or extend the term of such grants for a period not exceeding twenty-five years; but no exclusive franchise shall be thus granted, extended, or renewed, and no franchise shall be granted or authorized unless a majority of the electors voting thereon shall vote in favor of same at a general or special election. [C97,§955; S13,§955; C24, 27, 31, 35,§6791; 47GA, ch 180,§1.]

Referred to in §6792
Applicable to cities under commission plan, §6567

6792 Question submitted. The council may order any of the questions, including the granting to individuals or corporations authority to erect, maintain, or purchase water or gas works, electric light or power plants, or street railway or telephone systems, provided in sections 6789, 6790, and 6791, submitted to a vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in the city. [C97, §956; C24, 27, 31, 35,§6792.]

Applicable to cities under commission plan, §6567
C97,§956, editorially divided

6793 Notice—costs. Notice of such election shall be given in two newspapers published in said city, if there are two, if not, then in one, once each week for at least four consecutive weeks. The party asking for a renewal or extension of such franchise shall pay the cost incurred in holding such election. [C97,§956; C24, 27, 31, 35,§6793.]

Applicable to cities under commission plan, §6567

6794 Management of waterworks. The waterworks now owned* by such special charter cities having a population of thirty-five thousand or more shall be managed and operated by a board of waterworks trustees, which shall be composed of three resident electors, appointed by the mayor of any such city. [S13,§1056-a1; C24, 27, 31, 35,§6794.]

Referred to in §6809
*32GA ch 47, effective March 3, 1907
S13, §1056-a1, editorially divided

6795 Appointment. One of such trustees shall be appointed for a term of one year, another for a term of two years, and the remaining trustee for a term of three years, and thereafter each such trustee shall be appointed for a term of three years. [S13,§1056-a1; C24, 27, 31, 35,§6795.]

Referred to in §6809

6796 Compensation. Said trustees shall receive no compensation whatever for their duties as such. [S13,§1056-a1; C24, 27, 31, 35,§6796.]

Referred to in §6809

6797 Vacancies. All vacancies occurring on said board occasioned by death, resignation, removal, or otherwise, shall be filled by appointment to be made by the mayor of said city for the unexpired term. [S13,§1056-a1; C24, 27, 31, 35,§6797.]

Referred to in §6809

6798 Bond. Each trustee upon qualifying shall execute and furnish the city an official bond, in the sum of five thousand dollars, for the faithful performance of his duties, which bond, if sufficient, shall be approved by the city council and filed with the city recorder and by him kept in his office and recorded in a book kept for that purpose. The expense of such bonds shall be paid by the city treasurer, upon the order of the trustees, out of the waterworks funds. [S13,§1056-a1; C24, 27, 31, 35,§6798.]

Referred to in §6809

6799 Removal. Any of such trustees may be removed from office for cause under the provisions of chapter 56, and in addition thereto, the mayor may, for like cause after hearing, remove any of such trustees. [S13,§1056-a1; C24, 27, 31, 35,§6799.]

Referred to in §6809

6800 Superintendent and employees. The said board of trustees shall employ an efficient superintendent, and such other employees as may be necessary and proper, for the operation and betterment of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. [S13,§1056-a2; C24, 27, 31, 35,§6800.]

Referred to in §6809
S13, §1056-a2, editorially divided

6801 Bonds. The said board of trustees shall require of the superintendent, and of the other employees as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duties, which bonds shall run in the name of the city and be filed with the city recorder and by him kept in his office and recorded in a book kept for that purpose. [S13,§1056-a2; C24, 27, 31, 35,§6801.]

Referred to in §6809

6802 Deposit and custody of funds. All money collected by the board of waterworks trustees shall be deposited at least daily by them with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund, for which funds the city treasurer shall be liable upon his official bond the same as for other funds received by him as such treasurer. [S13,§1056-a2; C24, 27, 31, 35,§6802.]

Referred to in §6809

6803 Disbursement. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the maintenance, operation, betterment, and extension of said waterworks; and said board of waterworks trustees shall make no payment of any kind whatsoever, except by written order on the city treasurer. [S13,§1056-a2; C24, 27, 31, 35,§6803.]

Referred to in §6809

6804 Anticipation of revenues. For the operation, betterment, and improvement of such works, said board of trustees may incur obligations, and to pay therefor may anticipate the revenues of such works for a period not to exceed one year, unless the city council shall by tax levy make provision for the payment thereof. [S13,§1056-a2; C24, 27, 31, 35,§6804.]

Referred to in §6809

6805 Rates. The board of trustees shall fix uniform water rates and make and enforce proper rules and regulations for the collection of water rentals and the supplying of good water service, and shall furnish the city council a schedule of such water rates and duplicate of such rules and regulations for publication as part of the proceedings of the city council. [S13, §1056-a2; C24, 27, 31, 35,§6805.]

Referred to in §6809

6806 Reports required. Such board of trustees shall each three months furnish the city council an itemized statement of all receipts and expenditures during such period, including all current liabilities and outstanding accounts, and also complete annual statements, in the form of a balance sheet, which shall include all assets and liabilities; and, at least annually, and oftener if they see fit, report the general condition and needs of the waterworks plant; and such quarterly and annual statements and such reports shall, when so furnished, be at once published as a part of the proceedings of the city council. [S13,§1056-a2; C24, 27, 31, 35, §6806.]

Referred to in §6809

6807 Records required. Said board of trustees shall keep a book wherein a record shall be entered and kept of their proceedings, which proceedings, duly attested, shall be at once published in two of the official newspapers of any such city. [S13,§1056-a2; C24, 27, 31, 35,§6807.]

Referred to in §6809

6808 Records public. All books, vouchers, and records of said trustees in any wise relating to the waterworks shall be open to the inspection and examination of any resident of said city. [S13,§1056-a2; C24, 27, 31, 35,§6808.]

Referred to in §6809

6809 Cities affected. All the provisions of sections 6794 to 6808, inclusive, shall be held and construed as applying to cities acting under special charters having a population of thirty-five thousand or more as shown by the last state census; and all acts or parts of acts in conflict with said sections shall not be applicable to any such cities insofar as they relate to the future management of waterworks. [S13,§1056-a3; C24, 27, 31, 35,§6809.]

6810 Management of heating, gas, and electric plants. The heating plants, gasworks, or electric light or electric power plants authorized to be purchased or erected by cities acting under special charters having a population of less than thirty-five thousand shall be acquired, erected, managed, and operated by a board of trustees, which shall be composed of three resident electors, appointed for the term of six years by the mayor of said city. [C24, 27, 31, 35,§6810.]

40GA, ch 138, §1, editorially divided

6811 Appointment — term. After the authorization of the purchase or erection of such works or plant by the electors of such city, in the manner provided by law, the mayor thereof shall thereafter appoint such board of trustees, the first appointees thereof to hold office for the following designated terms, namely: one for two years, one for four years, and one for six years. [C24, 27, 31, 35,§6811.]

6812 Vacancies. All vacancies occurring on said board, occasioned by expiration of terms, by death, resignation, or removal, shall be filled by appointment by the mayor of such city. [C24, 27, 31, 35,§6812.]

Referred to in §6943.008

6813 Compensation. The compensation of said trustees shall be not more than three hundred dollars per annum to each member of said board. [C24, 27, 31, 35,§6813.]

6814 Bond. Each of said trustees shall execute and furnish to the city an official bond in the sum of ten thousand dollars to be approved by the mayor and filed with the city clerk. [C24, 27, 31, 35,§6814.]

6815 Removal. Such trustees may be removed from office for proper cause under the provisions of chapter 56. [C24, 27, 31, 35, §6815.]

Referred to in §6943.006

6816 Power of trustees. The said board of trustees shall have power to contract for the

purchase or erection and construction of any such works or plant, and like powers and authority to manage and control the same as are conferred upon waterworks trustees appointed as provided in section 6157. [C24, 27, 31, 35, §6816.]

6817 Regulation of electric wires. Special charter cities shall have power to regulate telegraph, district telegraph, telephone, streetcar, electric light and power poles, subways, and wires, and provide the manner in which and the places where the same shall be placed, including the right to construct subways under and erect poles upon and along the streets, alleys, and public places; and to compel companies having wires on the same street or alley to use the same poles or subways upon reasonable terms. [C97, §959; C24, 27, 31, 35,§6817.]

Applicable to cities under commission plan, §6567
Similar power, §5904

BUILDING RESTRICTIONS

6818 Housing law. Chapter 323 is applicable to cities acting under special charters which, by the last state or federal census, had a population of fifteen thousand or more, and to every such city as its population shall reach fifteen thousand thereafter by any state or federal census; provided, however, that in all other such cities having a population of less than fifteen thousand, the council may adopt ordinances for the regulation and control of any or all matters covered by the provisions of said chapter, insofar as same may be reasonably applicable, and fix penalties for the violation thereof; and fix rules and regulations not inconsistent with those provided in said chapter for the enforcement of said ordinances. [C24, 27, 31, 35,§6818.]

6819 Construction or alteration. Section 6430 is applicable to special charter cities of more than fifty thousand population, as shown by the last state or federal census, having a department or division of building inspection in charge of a person devoting his entire time to the supervision of building construction and to the enforcement of laws and ordinances relating to building construction, repair, alteration, removal, and related matters. [C24, 27, 31, 35, §6819.]

6820 Municipal zoning. Chapter 324 is applicable to cities acting under special charters. [C24, 27, 31, 35,§6820.]

6821 Restricted residence districts. Chapter 325 is applicable to special charter cities. [C24, 27, 31, 35,§6821.]

6822 Building permits. Such cities shall require plans and specifications for all buildings costing over two thousand dollars, and all buildings to be erected within the fire limits of such cities, to be submitted for approval, and no such building shall be erected until such plans are approved by the board of public works, chief of fire department, or other proper officer of such city. Such city shall require any person, before erecting any building or improvement within the city, to submit plans and specifications for the plumbing, drainage, ventilation, and electric wiring of such building, for approval, and provide for the inspection of the construction thereof, and obtaining a permit for such erection or construction, which shall not be issued until such plans and specifications have been approved by the board of health or electrician, and may make reasonable charges for such approval and inspection, as provided by ordinance, and the money derived therefrom shall be paid monthly to the treasurer or collector. [C97,§1052; C24, 27, 31, 35,§6822.]

RIVER-FRONT AND LEVEE IMPROVEMENTS

6823 Water-front improvement—fund. Any city acting under special charter, which is bounded in part or divided by a river, may improve said water front by constructing retaining walls, filling, grading, paving, macadamizing, or riprapping the same and may improve and beautify its water front and the river bank and nearby uplands and made and reclaimed lands in such city; and to pay for such improvements the council of such city is empowered to levy a tax of not exceeding one-fourth mill on the dollar per annum on the taxable property thereof, the same when collected to be known as the levee improvement fund. The proceeds of such fund shall be used exclusively for said purposes. [S13, §1056-a6a; C24, 27, 31, 35,§6823; 48GA, ch 172, §1.]

Referred to in §6823.1
Applicable to cities under commission plan, §6567

6823.1 Condemning river-front land. Any city acting under special charter shall have power to acquire, by purchase or gift, and to condemn, enter upon, and take in the manner provided by law for the taking of private property for public use, lands and interests therein, which lands lie along or near any river dividing, or in part bounding, such city, for the purpose of regularizing or rectifying the boundaries of other lands to which such city may have, or may acquire, title, which other lands lie along or near such river or on the banks or in the bed thereof, or for the purpose of making more advantageous use of any such other lands, or for the purpose of exercising any power granted by section 6823 and further shall have power so to acquire and condemn, enter upon and take, for any of the purposes aforesaid, all riparian rights incident to ownership of any lands which lie along or near any such river and thus to bar such rights in respect to any other lands to which such city may have, or may acquire, title. Payment for any lands, interests, or rights acquired or condemned hereunder may be made out of the levee improvement fund of such city. [48GA, ch 172,§2.]

Applicable to cities under commission plan, §6567

6824 Bonds. In the event that the proceeds of such tax in any one year shall be insufficient to pay for the improvements of that year, or if the city council shall deem best to extend the payment over a number of years, then upon a majority vote of said council approving the same,

said cities may borrow the money to make such improvements and issue the negotiable interest-bearing bonds of said city to evidence said debt; provided that the total bond that may be issued under this chapter by any one city shall not exceed one percent of the assessed value of said city. [S13,§1056-a6b; C24, 27, 31, 35,§6824.]

Applicable to cities under commission plan, §6567

6825 Form of bonds. Said bonds shall be in amounts provided in, and conform in substance to, the requirements of section 6253. [S13, §1056-a6c; C24, 27, 31, 35,§6825.]

Applicable to cities under commission plan, §6567

6826 River-front commission. Chapter 294 is applicable to cities acting under special charters. [S13,§879-o; C24, 27, 31, 35,§6826.]

6827 Levee improvement commission. Any city acting under special charter may establish a levee improvement commission to consist of the mayor, who shall be its chairman, and not more than four other persons to be appointed by the mayor with the approval of the city council. [S13,§1056-a6d; C24, 27, 31, 35,§6827.]

S13,§1056-a6d, editorially divided

6828 Qualifications — compensation — term. The appointive members shall be residents and qualified electors of the city, and shall hold no other official position in the city, and no member shall receive any salary for his services as a member of such commission. Their term of office shall be fixed by ordinance and shall not exceed six years. [S13,§1056-a6d; C24, 27, 31, 35,§6828.]

6829 Bond. Before entering upon their office the appointive members shall each execute a bond in favor of the city in the penal sum of two thousand dollars, with approved fidelity company surety, for the faithful performance of their duties. The expense of this bond shall be paid out of the levee improvement fund. [S13, §1056-a6d; C24, 27, 31, 35,§6829.]

6830 Powers and duties. The levee improvement commission shall have full charge and supervision of all improvements of the water front along any river within the corporate limits of the city. It shall have exclusive charge and control of the levee improvement fund and of all moneys derived from the sale of bonds issued by the city council for the purpose of carrying on the work of making water-front improvements. It shall pay out of these funds only for the purposes named. [S13,§1056-a6e; C24, 27, 31, 35,§6830.]

S13,§1056-a6e, editorially divided

6830.1 Management, sale or lease of land. Any such city which has established, or may establish, a levee improvement commission may, by ordinance, authorize said commission to manage all, or any part, of the lands owned by such city which lie along or near any such river or on the banks or in the bed thereof. If, at any time, in the judgment of said commission, any parts or parcels of the lands under its management may not advantageously be put to public use, said commission may lease the same upon such terms and conditions as it may deem to be in the public interest. If, in the judgment of said commission, any parts or parcels of the lands under its management may, at any time, be sold with greater public advantage than would result from retaining the same for public use, it may certify its recommendations for disposition thereof to the city council of any such city, and such parts or parcels may thereafter be disposed of, sold and conveyed by the city by a three-fourths vote of all members of the council thereof. All moneys realized out of the lease or sale of any lands hereunder shall be paid into the levee improvement fund of such city. [48GA, ch 172,§§3, 4.]

6831 Ferries. In cities under special charter which have established levee improvement commissions, all of the powers enumerated in section 5770 shall be exercised by the levee improvement commission and in addition thereto in such cities the levee improvement commission shall have the exclusive power to prescribe the character, design, and type of construction of any ferry dock or landing had or used by any ferry running to or from any landing place which is on the water front along any river within the corporate limits of said city; to prescribe the amount of license to be paid by any such ferry for the privilege of having or using any such landing place; to prescribe the terms and conditions under which any such ferry may have the right to run to and from any such landing place; to prescribe the time during which any such ferry shall operate; and to make any other reasonable provisions regarding the operation of such ferry. [C24, 27, 31, 35, §6831.]

6832 Treasurer. The city treasurer shall be the treasurer of the levee improvement commission. He shall keep the levee improvement funds and the moneys derived from the sale of bonds for water-front improvements in a separate and distinct fund from which he shall pay no money except upon the order of the levee improvement commission signed by its chairman and secretary, and countersigned by at least one other member of said levee improvement commission. [S13,§1056-a6e; C24, 27, 31, 35,§6832.]

BOARD OF HEALTH

6833 Appointment. There shall be appointed in every such city a local board of health consisting of five members, a majority of whom, including the mayor, shall be members of the city council. The mayor of the city shall be ex officio one of said members and the chairman thereof. The manner of appointment and duration of office of said board shall be determined by ordinance of said city. [C97,§1025; C24, 27, 31, 35,§6833.]

6834 Officers appointed — quorum. The board of health shall appoint a physician to the board, who shall hold office during the pleasure of the board. The city clerk or recorder shall be clerk of the board, unless some other clerk may be provided by ordinance. The board of

health shall appoint, with the consent of the council, all officers and agents necessary to carry their rules and orders into effect, and shall recommend the compensation or salaries to be paid such officers or agents, which shall be determined by the council. In cases of emergency, the board of health may employ persons to aid in the execution of its orders, and fix the compensation of such employees. The majority of the members of the board shall constitute a quorum for the transaction of all business and the exercise of powers conferred upon the board. [C97,§1026; C24, 27, 31, 35,§6834.]

6835 Physician and clerk. It shall be the duty of such clerk and physician to report at least once a year to the department of health the proceedings of such board, and such other facts as may be required, on blanks in accordance with instructions received from the said department. They shall also make special reports whenever required so to do by the said department. [C97,§1027; C24, 27, 31, 35,§6835.]

6836 General powers. The local board of health shall make such rules and regulations and orders respecting the connection of buildings and tenements with sewers, and the approval of plans for plumbing and the inspection thereof; and the inspection of milk, provisions, and of all food products sold within such city, and the condemnation and destruction of the same when impure or diseased; the collection and disposition of garbage; the condemnation of impure wells and cisterns; the prompt report of contagious or infectious diseases; nuisances, sources of filth, and cases of sickness within its jurisdiction, and on all boats in its ports and harbors, or railroad cars passing through such city; and for the prevention of nuisances and the preservation of the public health, as said board may judge necessary for the public health and safety; and shall, from time to time, report to the city council ordinances for carrying such rules, regulations, and provisions into effect, and for the appointment of the proper inspectors and officers necessary to enforce the same. [C97,§1028; C24, 27, 31, 35,§6836.]

6837 Violation of regulations. Such cities shall have power and may provide by ordinance for the punishment by fine and imprisonment of any person who shall knowingly violate or fail to comply with any rule, regulation, or order of such local board of health, but the fine shall not exceed one hundred dollars, nor the imprisonment thirty days. The prosecution for the violation of any rule, regulation, or order of such board of health shall be in the name of the city appointing such board, and shall be conducted in the same manner and before the same tribunals as other prosecutions for the violation of ordinances of such city. [C97,§1029; C24, 27, 31, 35,§6837.]

6838 Sewer connections. The board of health shall have power to compel all property owners owning property situated on streets along which sewers have been constructed, or within two hundred fifty feet of any sewer, to make proper connections therewith, and to use the same for proper purposes; and in case such owner shall fail to make such connections within the time fixed by such board, they may cause such connections to be made and report the cost and expense thereof to the city council, which shall assess the same against the property so connected, and such assessment shall be a lien on said property which the city council can enforce by the sale of same. [C97,§1030; C24, 27, 31, 35,§6838.]

6839 Plumbing. Such board shall have power to prescribe rules and regulations for all plumbing connections of buildings or tenements with any sewer, and for all plumbing, drainage, and ventilation of any building or tenement, and may prescribe the kind and size of materials to be used in any plumbing, drainage, and ventilation of buildings, and the manner in which plumbing shall be done, and compel the plans and specifications for the plumbing of any building to be submitted to and approved by said board before the same is installed, and that such work be done by a competent licensed plumber, and provide for the inspection of the work done under such plans and specifications, and have the power to appoint, with the approval of the city council, an inspector of such plumbing, and define his duties and powers. [C97,§1031; C24, 27, 31, 35,§6839.]

6840 Nuisances. Such board may order the owner or occupant of any property, place, or building at his own expense to remove or abate any nuisance, source of filth, or cause of sickness, to dispose of garbage, to destroy diseased or impure milk, provisions, or food products, to purify, fill up, or cease from using any impure well or cistern, to report to the proper officer all contagious or infectious diseases found on his property or property over which he has control, to make sewer connection, and to do such acts as may be required. The board may in its discretion specify in its notice the time and manner of compliance with such order, and if such person neglect to comply with such order he may be punished in accordance with the provisions hereof, and the board may do or cause to be done whatever is required by the order. [C97,§1032; C24, 27, 31, 35,§6840.]

6841 Abatement. Whenever the owner, occupant, or person having the control or management of such property shall not be found in the city, or whenever the board may deem immediate action necessary, it may, without notice to such owner or occupant or person having the control or management of the same, immediately proceed to remove said nuisance, source of filth, or other cause of sickness, and the expense thereof shall be reported to the council and levied and assessed against the property, place, or building, and collected as a special tax, and shall be a lien upon such property, place, and building, or the same may be enforced in any court having jurisdiction, by the proper

officer, in the name of the city. [C97,§1033; C24, 27, 31, 35,§6841.]

6842 Enjoining. Whenever any person or persons are engaged in a work, or doing things, or threatening to do things, which, in the opinion of the board, will result in a nuisance or endanger the public health, the board may forbid the doing or continuance thereof, and in case any such person shall fail to comply with any such order, after personal service of a notice thereof, he may be proceeded against and punished under the provisions hereof. [C97, §1034; C24, 27, 31, 35,§6842.]

6843 Health regulations. Whenever any such board shall make or adopt any general rules and regulations for the public health, they shall be signed by the mayor or other presiding officer and attested by the clerk of such board, and, when so signed and attested, shall be published twice in the official newspaper of such city. When such publication is completed, due proof thereof by affidavit shall be attached to said rules and regulations, and the same shall then be recorded by the clerk of such board in a book kept for such purpose, which record shall be certified to by the mayor or presiding officer and attested by the clerk; such general rules and regulations shall be in force and effect from and after the completion of such record. [C97, §1035; C24, 27, 31, 35,§6843.]

6844 Notices. Any notice from the board may be served by any city officer, or by any other person whom the board of health may appoint or designate. [C97,§1036; C24, 27, 31, 35,§6844.]

6845 Premises unfit for habitation. The board, when satisfied upon due examination that any cellar, room, tenement, or building in said city, occupied as a dwelling house, has become, by reason of the number of inhabitants or want of cleanliness or other cause, unfit for such habitation, and a cause of nuisance or sickness to the occupants thereof or to the public, may issue a notice to the occupants thereof or any of them, requiring the premises to be put into a proper condition as to cleanliness or health, or may require the occupants to remove from the premises, within such time as the board deems reasonable. If the persons so notified neglect or refuse to comply with the terms of the notice, the board may cause the premises to be properly cleaned at the expense of the owners or property, or the board may remove the occupants forcibly and close up the premises, and the same shall not again be occupied as a dwelling place until put in a sanitary condition to the satisfaction of the board. [C97,§1037; C24, 27, 31, 35,§6845.]

6846 Contagious diseases. Whenever by reason of the prevalence of smallpox, or other contagious or infectious disease, in any such city or the vicinity thereof, the board may deem it dangerous to permit the congregation together of people, the board may, with the consent of the council, by public proclamation published once in some newspaper of general circulation in the city, prohibit the congregation of people in schools, churches, theaters, and in all other buildings in said city, and it shall thereupon become the duty of the principals, teachers, and other persons in charge of such places or buildings specified in said publication to keep the same closed and to prevent the congregation of people therein; and when smallpox is prevalent in said city or its vicinity, the said board of health may, with the consent of the council, by notice served upon the teachers or persons in charge of any of the public or private schools, prohibit the admission therein of any pupil until such pupil shall have proved, to the satisfaction of the board or the persons selected by it for that purpose, that such pupils have been vaccinated within five years prior thereto, or within such time as the board may designate; and said board may in like manner prevent the admission of persons not furnishing satisfactory proof of vaccination into churches, theaters, or other buildings, by notifying the persons in charge thereof not to admit such persons. [C97, §1038; C24, 27, 31, 35,§6846.]

6847 Warrant. Whenever the board of health shall think it necessary for the preservation of the lives or the health of the inhabitants to enter a place, building, or vessel within its jurisdiction, for the purpose of examining into and destroying, removing, or preventing any nuisance, source of filth, or cause of sickness, and shall be refused such entry, any member of the board may make complaint, under oath, before any justice of the peace, or other judicial officer having jurisdiction to enforce the ordinances of such city, stating the facts of the case so far as he has knowledge thereof. Such officer shall thereupon issue a warrant, directed to the sheriff or any constable of the county, marshal or public officer, commanding him to take sufficient aid and, being accompanied by two or more members of said board, between the hours of sunrise and sunset, repair to the place where such nuisance, source of filth, or cause of sickness may be, and destroy, remove, or prevent the same under the direction of such members of the board. [C97, §1039; C24, 27, 31, 35,§6847.]

6848 Removal of diseased person. When any person coming from abroad or residing within such city shall be infected, or lately shall have been infected, with smallpox or other sickness dangerous to the public health, the board shall make provisions in the manner by it deemed best for the safety of the inhabitants, by removing such sick or infected person to a separate house, if it can be done without injury to his health, and by providing nurses and other assistance and supplies, which shall be charged to the person himself, his parents, or other person liable for his support, if able, otherwise to the county. [C97,§1040; C24, 27, 31, 35,§6848.]

Referred to in §6849

6849 Care of such person. If any afflicted person cannot be removed without danger to his health, the board shall make provision for him, as directed in section 6848, in the house in which

he may be, and in such case they may cause the persons in the neighborhood to be removed, and take other means as may be deemed necessary for the safety of the inhabitants. [C97,§1041; C24, 27, 31, 35,§6849.]

6850 Warrant. Any justice of the peace, or tribunal having jurisdiction to enforce the ordinances of such city, on application under oath, showing cause therefor, by any member of said board, shall issue his warrant, directed to the sheriff or constable of the county or marshal or police officer, commanding him, under the directions of the board, to remove any person infected with contagious disease, or to take possession of condemned houses and lodgings, and to provide nurses and attendants and other necessaries for the care, safety, and relief of the sick. [C97,§1042; C24, 27, 31, 35,§6850.]

6851 Meetings—report. Every such board shall meet for the transaction of business at least once each month, and at such other times as occasion may require, and the clerk of the board shall transmit his annual report to the department of health within two weeks after the October meeting, and at such other time as may be required by the said department. Such report shall embrace a history of any epidemic disease which may have prevailed within the city. The failure of the clerk to make such report shall be considered a misdemeanor, for which he shall be subject to a fine of not more than twenty-five dollars. [C97,§1043; C24, 27, 31, 35,§6851.]

6852 Powers—assessment of expenses. The foregoing provisions in regard to boards of health shall not in any manner limit the powers of cities acting under special charters in relation to matters affecting the public health, and the city councils of such cities shall provide by ordinance for the manner of the exercise of the powers herein conferred upon such boards, and for the enforcement of the orders, rules, and regulations thereof, and punishment for the violation of the same, as prescribed in this chapter, and shall also have power to provide and shall provide for the assessment of all expenses incurred by said board and by said cities, in consequence of the failure or neglect of any owner or occupant of property to comply with any order of such board, upon the real estate upon which such expenditures are made or expenses incurred, and it shall be a lien thereon from the time said work is done, and may be assessed, levied, and collected as other special assessments, and may be collected and the lien enforced by civil action in any court of competent jurisdiction. [C97,§1044; C24, 27, 31, 35,§6852.]

6853 Proceedings reported. Boards of health shall report their doings and proceedings to the council from time to time as required by ordinance or resolution, and the council shall have supervision over the orders and proceedings of said board. [C97,§1045; C24, 27, 31, 35,§6853.]

6854 Construction of powers. The provisions of this chapter in regard to the police powers, sanitary regulations, and regulations for the prevention and spread of fires and of contagious diseases, shall not be construed as a limitation of the general powers of such cities. [C97, §1046; C24, 27, 31, 35,§6854.]

GENERAL TAXATION

6855 General levy. The council of each city or town shall levy a tax for the year then ensuing, for the purpose of defraying its general and incidental expenses, which shall not exceed two and one-half mills on the dollar. [C97,§1003; S13,§1003; C24, 27, 31, 35,§6855.]

6856 Special levies. They shall have power to levy annually the following taxes for special purposes:

1. *Grading fund.* A tax not exceeding three-fourths mill on the dollar for a grading fund, to be used for the purpose of opening, widening, extending, or grading any street, public ground, or market place.

2. *Improvement fund.* A tax not exceeding one and one-half mills on the dollar for the city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction, and repair of any street improvement at the intersection of streets, and spaces opposite streets intersecting but not crossing, and the spaces opposite property owned by the city or state.

3. *Sewer fund.* A tax not exceeding one and one-fourth mills on the dollar on the assessed valuation of all property therein, for the city sewer fund, to be used to pay the cost of making, reconstructing, or repairing any sewer at the intersection of streets, and all spaces opposite streets intersecting but not crossing, and at spaces opposite property owned by the city or state, or to pay the whole or any part of the cost of making, reconstructing, or repairing any sewer within the limits of such city, and for the maintenance and operation of any sewage disposal plant included in said sewer district. When the city has been divided into sewer districts, a tax not exceeding one and one-fourth mills on the taxable real property in the sewer district, for the district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located or laid in that particular district, and for the maintenance and operation of any sewage disposal plant included in said sewer districts; provided that, on petition of the owners of two-thirds in value of all the taxable real estate within such sewer district for the construction of a sewer in such district, the maximum percentage of taxes that can be levied in any one year shall not be limited to one and one-fourth mills, but shall be such percentage of the valuation of such property as will produce at least one-tenth of the whole cost of such sewer assessable upon the real property in such district.

4. *Fire fund.* A tax not exceeding one and one-fourth mills on the dollar for the purpose of creating a city fire fund, to be used for paying the expenses of organizing, keeping, and maintaining a fire department, including the expenses of constructing, purchasing, leasing, and maintaining the proper and necessary buildings,

grounds, and apparatus therefor; provided that where a paid fire department is maintained, all money derived from the sale of any buildings, grounds, or apparatus of such fire department which was originally paid for out of the fire fund, shall belong to said fire fund.

5. *Road fund.* When any city is divided into road districts, a tax not exceeding one-half mill on the dollar on all taxable property in such road district, to be known as the district road fund, and to be used only to pay the cost of cleaning, sprinkling, and repairing the streets and public places in such district.

6. *Library tax.* In cities which have established, or may establish, a free public library, a tax as provided in section 6211, subsections 19 and 20.

7. *Tax for water and gas works and electric plants.* A tax not exceeding one and one-fourth mills on the dollar, which, with the rates, rents, or revenues derived therefrom, shall be sufficient to pay the expenses of running, operating, and repairing water and gas works and electric light and power plants owned and operated by such city, and the interest on or principal of any bonds issued to pay the cost of the construction of such works; but such taxes shall not be levied upon the property which lies wholly without the limits of the benefits or protection of such works or plants, which limit shall be fixed by the council each year before making the levy.

8. *Tax for water, gas, and electric light or power.* A tax not exceeding one and one-fourth mills on the dollar for the purpose of paying the amount due, or to become due, to any individual or company operating water or gas works or electric light or power plants, for water, light, gas, or power supplied to the city, the levy to be limited to the property benefited thereby.

9. *Bond fund.* A tax for the purpose of creating a bond fund sufficient to pay the interest, to accrue before the next annual levy, on funding or refunding bonds outstanding, and to pay the principal of such funding or refunding bonds. In case of such bonds, the levy shall be so made that, dividing the principal into as many parts as the bonds have years to run, not less than one such part shall be levied each year, and shall be made so that the fund derived therefrom shall be available and sufficient to pay the bonds at their maturity.

10. *Water and gas or electric light and power bonds.* A tax to be used exclusively in payment of the principal and interest of bonds issued for the construction of water and gas works, or electric light and power plants, and which shall be levied in the manner provided in the preceding subdivision.

11. *Park tax.* A tax not exceeding one-half mill on the dollar, as authorized by the vote of the electors, to purchase, improve, and maintain public parks in such city.

12. *Special bridge tax.* A special tax to aid in the construction of bridges, when such tax has been voted by the electors of the city under the provisions of section 5883.

13. *Drainage tax.* A tax in such sum or amount as may be necessary to pay any special assessment, with interest, or any installment of any special assessment, with interest, levied against any street, alley, highway, public way, or park of any city acting under a special charter, levied under the provisions of sections 7627 and 7629.

14. *Emergency fund.* With the approval of the state comptroller, levy a tax not to exceed one mill for an emergency fund, and may transfer funds from said emergency fund to any other fund of the city to meet deficiencies in such other funds, provided the state comptroller approves of said proposed transfers after the governing body of the city has unanimously requested such approval. [C73,§§461, 475; C97, §1005; S13,§1005; C24, 27, 31, 35,§6856.]

6857 Park levy. Section 6214 is applicable to cities acting under special charters. [C24, 27, 31, 35,§6857.]

6858 City bridge levy. Section 6209 is made applicable to special charter cities. [C97,§1004; S13,§1004; C24, 27, 31, 35,§6858.]

6859 Road levy on agricultural land. Section 6210 is made applicable to special charter cities. [C97,§1004; S13,§1004; C24, 27, 31, 35, §6859.]

6860 Fire department maintenance levy. Section 6211, subsections 8 and 9, is applicable to special charter cities. [C24, 27, 31, 35,§6860.]

6861 Garbage and street cleaning levy. Section 6211, subsection 16, is applicable to special charter cities. [SS15,§696-b; C24, 27, 31, 35,§6861.]

6861.1 Snow removal. The provisions of section 6211, subsection 31, shall be made applicable to cities acting under special charter. [47GA, ch 170,§2.]

6862 Excess of judgment or bond tax. When a tax has been levied to pay any judgment against any such city, or the principal and interest of funding or refunding bonds issued by such city, or for any other special purpose, such tax shall not be held invalid if the amount received exceed the amount sought for such specific object, but the excess shall go into the general fund. Money so raised is especially appropriated for such purposes, and shall constitute a distinct fund in the hands of the treasurer until the obligation is discharged. [C51,§§123, 124; R60,§§259, 260; C73,§§318, 319; C97,§1006; C24, 27, 31, 35,§6862.]

6863 Anticipating revenue. Loans may be negotiated or warrants issued by any such city in anticipation of its revenues for the fiscal year in which such loans are negotiated or warrants issued, but the aggregate amount of such loans and warrants shall not exceed one-half the estimated revenue of such corporation for the fund or purpose for which the taxes are to be collected for such fiscal year. [R60,§1129; C73, §500; C97,§1007; C24, 27, 31, 35,§6863.]

Fiscal year, §5676.1

6864 Diversion of funds. Section 6230 is made applicable to cities acting under special charters. [C97,§1008; C24, 27, 31, 35,§6864.]

6864.1 State tax commission. Chapter 329.2 as amended is applicable to cities acting under special charter. [C31, 35,§6864-d1.]

6865 Valuation. The assessed or taxable value of all property except moneys and credits including moneyed capital other than moneyed capital within the meaning of section 548 of title 12 of the United States code as amended, and the value at which it shall be listed and upon which the levy shall be made, in special charter cities, shall be provided by the city council of such city, and if the city council of such city shall fix the taxable value of property at any portion thereof except twenty-five* percent of the actual value thereof as shown by the assessment, such city council, when the levy for city purposes has been determined, shall ascertain the equivalent thereof, based upon such twenty-five* percent valuation and shall certify the aggregate of the levy so ascertained to the county treasurer of the county in which such city is located and the county treasurer shall pay to the treasurer of such city, such portion of the five-mill tax on moneys and credits collected within such city, as the aggregate levy so certified is of the total levy obtained by adding such certified levy to the levy for all purposes except city purposes. [S13,§1056-a5; C24, 27, 31, 35,§6865.]

*See §7109; also 45GA, ch 121, §88

6866 Property valued by state tax commission. Where all property except such as is listed and valued by the state tax commission is assessed upon its full or a certain percentage of its full valuation, the levy upon all such property valued and returned by the state tax commission shall be on a like percentage of the valuation so returned. [S13,§1056-a6; C24, 27, 31, 35,§6866; 48GA, ch 173,§1.]

6867 Levy and collection. The council shall have power to levy and collect taxes for all general and special purposes in this chapter authorized, upon all property within the city not exempted from taxation by the general law of the state, and to fix the number of mills to be levied on the value thereof, which shall be ascertained by the assessor of said city. [C97, §1010; C24, 27, 31, 35,§6867.]

Referred to in §6732
C97, §1010, editorially divided

6867.1 Taxation in general. The provisions of sections 6944, 6946 to 6952, inclusive, 6959, 6971 to 6978, inclusive, 6987, 6996, 6997 to 7004, inclusive, 7008, 7009, 7086, 7087, 7089, 7091, 7102, 7109, 7144 to 7146, inclusive, 7161, 7163 to 7167, inclusive, and 7279 to 7283, inclusive, so far as applicable, shall apply to cities acting under special charters. [S13,§1322-3a; C24, 27, 31, 35, §7007.]

6868 Assessment procedure. The council shall provide by ordinance the time and manner of taking such assessment, when the same shall be equalized and returned to the auditor or recorder, and for the assessing and placing upon the tax list all property that may have been omitted, overlooked, brought into the city before the levy of said tax, or otherwise not returned by the assessor, and to fix the time when such officer shall make out and deliver a copy of the assessment and the taxes levied thereon to the collector or treasurer. [C97,§1010; C24, 27, 31, 35,§6868.]

Referred to in §6732

6869 Assessment — equalization. All the property of individuals, companies, copartnerships, and corporations shall be listed and returned by the assessor for city taxation, and the duty of the owner, officer, agent, or individual having control of the same to assist the assessor in listing the same, and the penalties for his neglect or refusal so to do, shall be as provided in title XVI, so far as the same may be applicable and not in contravention of any of the provisions herein, or of the charters of such cities; but the equalization of all assessments shall be made by the council as provided by ordinance or the charters of said cities. [C97, §1011; C24, 27, 31, 35,§6869.]

6870 Board of review. Sections 7129, and 7132 to 7136, inclusive, are made applicable to special charter cities, except that the words "city treasurer" or "collector" and "city" shall be substituted for "county auditor" or "county" wherever the same appear in said sections. [C97,§1004; S13,§1004; C24, 27, 31, 35,§6870.]

6871 Collection through county. The council may provide by ordinance for certifying all taxes and assessments to the county auditor, as provided in sections 6227 to 6229, inclusive, which shall be applicable to the city adopting the provisions thereof, and the taxes so certified shall be collected and paid over in the same way, with the same penalties, rights, and liabilities, as in and for other cities to which such sections are applicable. [C97,§1010; C24, 27, 31, 35,§6871.]

Referred to in §6732

6872 Collection procedure. Such cities shall have power and shall provide by ordinance when general or special taxes and assessments shall become delinquent, and the rate of interest which they shall thereafter bear, not exceeding ten percent per annum on the whole amount thereof, including penalty, and for the sale of both real and personal property for the collection of general and special delinquent taxes and assessments, on such terms as the council may determine. [C97,§1012; C24, 27, 31, 35, §6872.]

C97, §1012, editorially divided.

6873 Sale of real estate — notice. In the sale of real property for taxes and assessments, the notice of the time and place of such sale shall be given by the treasurer or the collector, and shall contain the description of each separate tract to be sold, as taken from the tax list; the amount of taxes for which it is liable, de-

linquent for each year, and the amount of penalty, interest, and cost thereon; the name of the owner, if known, or the person, if any, to whom it is taxable; by publication in some newspaper in the city once each week for two consecutive weeks, the last of which shall be not more than two weeks before the date of such sale, and by posting a copy thereof at the door of the office of the collector or treasurer one week before the day of such sale. '[C97, §1012; C24, 27, 31, 35,§6873.]

6874 **Cost of publication.** The compensation for such publication shall not exceed thirty cents for each description, and shall be paid by the city. The amount paid therefor shall be collected as a part of the costs of sale and paid into the treasury. [C97,§1012; C24, 27, 31, 35, §6874.]

6875 **Sufficiency of notice.** In all cases such advertisement shall be sufficient notice to the owners and persons having an interest in or claiming title to any lot or parcel of real estate, of the sale of their property for delinquent taxes. [C97,§1012; C24, 27, 31, 35,§6875.]

6876 **Irregularities disregarded.** No irregularity or informality in the advertisement shall affect the legality of any sale or the title of any property conveyed, if it shall appear that said property was subject to taxation for the year or years for which the same was sold, and that the tax was due and unpaid at the time of sale. [C97,§1012; C24, 27, 31, 35,§6876.]

6877 **Demand unnecessary.** A failure of the collector to make personal demand of taxes shall not affect the validity of any sale or the title of any property acquired under such sale. [C97, §1012; C24, 27, 31, 35,§6877.]

6878 **Adjournment of sale.** Section 7259 is made applicable to cities acting under special charters. [C97,§1013; C24, 27, 31, 35,§6878.]

6879 **Tax list.** All assessments and taxes levied by the council, except as otherwise provided by law, shall be placed by the auditor, clerk, or recorder, as provided by ordinance, upon the proper tax book, to be known as the "tax list", properly ruled and headed with distinct columns to correspond with the assessment books, with a column for polls and one for payments, and he shall complete the same by carrying out the consolidated tax and all other taxes levied, and at the end of the list shall make an abstract thereof and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each, and certify the same to the collector or treasurer at or before the regular time for the collection and payment of taxes. [R60,§§1123, 1126; C73,§§495, 498; C97,§1014; C24, 27, 31, 35,§6879.]

6880 **Lien on real estate.** Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title. [C97,§1015; C24, 27, 31, 35,§6880.]

C97, §1015, editorially divided

6881 **Lien between vendor and vendee.** As between vendor and vendee, such lien shall attach to real estate on the thirty-first day of December following the levy, unless otherwise provided in this chapter. [C97,§1015; C24, 27, 31, 35,§6881.]

6882 **Stocks of goods.** Taxes upon stocks of goods and merchandise shall be a lien thereon, and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser, or vendee, but the property of the seller thereof shall be first exhausted for the payment. [C97,§1015; C24, 27, 31, 35,§6882.]

6883 **When lien attaches.** All of such taxes shall remain a lien on the property aforesaid from and after the date of the levy in each year. [C97,§1015; C24, 27, 31, 35,§6883.]

6884 **Tax receipt.** The collector or treasurer shall in all cases make out and deliver to the taxpayer a receipt, which receipt shall contain the description and the assessed value of each lot and parcel of real estate, and the assessed value of personal property, and in case the property has been sold for taxes and not redeemed, the date of such sale and to whom sold, also the amount of taxes, interest, and costs paid; and the collector or treasurer shall give separate receipts for each year; whereupon he shall make proper entries of such payments on the books of his office. [C97,§1016; C24, 27, 31, 35,§6884.]

Referred to in §6885
C97,§1016, editorially divided

6885 **Payment refused—receipt made conclusive.** The council may provide by ordinance:

1. That no person shall be permitted to pay taxes of any one year until the taxes for the previous years shall be first paid.

2. That the receipt contemplated in section 6884 shall be conclusive evidence that all taxes and the costs of every kind against the property described in such receipt are paid to the date of such receipt.

3. That for any failure or neglect on the part of the collector, or on the part of anyone acting as collector, he and his bondsmen shall be liable to an action on his official bond for damages sustained by any person or the city for such neglect. [C97,§1016; C24, 27, 31, 35,§6885.]

6886 **Certificate of purchase.** The treasurer or collector of taxes, or person authorized to act as collector, shall make, sign, and deliver to the purchaser of any real property sold for the payment of any taxes or special assessments authorized by the provisions of this chapter, or by any law applicable to such cities, a certificate of purchase, which shall have the same force and effect as certificates issued by county treasurers for the sale of property for delinquent county taxes. [C97,§1017; C24, 27, 31, 35,§6886.]

6887 Redemption — terms. Real property sold under the provisions of this chapter, or by virtue of any power heretofore given, may be redeemed before the time of redemption expires, as hereinafter provided, by payment to the treasurer, collector, or person authorized to receive the same, to be held by him subject to the order of the purchaser on surrender of the certificate, or in case the same is lost and destroyed, on his making affidavit of such fact, and of the further fact that it was not assigned, of the amount for which the same was sold, and ten percent of such amount immediately added as a penalty, with eight percent per annum on the whole amount thus made from the day of sale, and the amount of all taxes, either general or special, with interest and costs, paid at any time by the purchaser or his assignee subsequent to the sale, and a similar penalty of ten percent added as before on the amount of the payment made at any subsequent time, with eight percent interest per annum on the whole of such amount or amounts from the day or days of payment; provided that such penalty for the nonpayment of the taxes at any subsequent time or times shall not attach, unless such subsequent tax or taxes shall have remained unpaid for thirty days after they became delinquent. [C97, §1018; C24, 27, 31, 35,§6887.]

C97, §1018, editorially divided

6888 Certificate of redemption. The treasurer, collector, or person authorized to receive the same, upon application of any party to redeem real property sold as aforesaid, and being satisfied that such person has a right to redeem the same, and on payment of the proper amount, shall issue to such party a certificate of redemption, in substance and form as provided for the redemption of property sold for state and county taxes, and shall make proper entry thereof in the sale book, which redemption shall thereupon be deemed complete without further proceedings. [C97,§1018; C24, 27, 31, 35,§6888.]

6889 Redemption statutes applicable. The provisions of sections 7277 to 7283, inclusive, shall, so far as the same shall be applicable, and are not herein changed or modified, apply to sales of real estate for delinquent taxes herein contemplated; but where the words "auditor of the county" or "treasurer" are used in said sections the words "city clerk", "recorder", "auditor", or "person authorized to make out the tax list" and "city collector" or "city treasurer or officer authorized to receive same" shall be substituted. [C97,§1018; C24, 27, 31, 35,§6889.]

6890 Deed — when executed. Immediately after the expiration of ninety days from the date of service of the notice, as prescribed by sections 7279 to 7284, inclusive, the treasurer, collector, or person authorized to act as collector of taxes, shall make out a deed for each lot or parcel of land sold and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase. [C97,§1019; C24, 27, 31, 35,§6890.]

C97, §1019, editorially divided

6891 Different parcels. Any number of parcels of real estate bought by one person may be included in one deed, if required by the purchaser. [C97,§1019; C24, 27, 31, 35,§6891.]

6892 Formal execution. Deeds executed by the city treasurer, collector, or person authorized to act as collector, may be in form substantially as provided by section 7285, and shall be signed and acknowledged by him in his official capacity. [C97,§1019; C24, 27, 31, 35,§6892.]

6893 Force and effect. All deeds and conveyances hereafter made and executed on account of any general or special tax sale shall be of the same force and effect as deeds made by the county treasurer as provided in sections 7286 to 7288, inclusive, for delinquent county taxes. [C97,§1019; C24, 27, 31, 35,§6893.]

6894 Rights and remedies. The purchaser as well as the owner of any real property sold on account of such general or special delinquent taxes or assessments shall be entitled to all the rights and remedies which are granted and prescribed by sections 7269, 7270, and 7289 to 7296, inclusive, but wherever the words "county and county treasurer and auditor" are used, the words "city, city treasurer, city clerk, recorder, auditor, or collector or officer authorized to act as collector", shall be substituted. [C97,§1019; C24, 27, 31, 35,§6894.]

6895 Tax and deed statutes applicable. Sections 7185, 7222 to 7226, inclusive, 7240 to 7243, inclusive, 7253, 7266, 7267, 7293 to 7295, inclusive, are hereby made applicable to cities acting under special charters, except that, where the word "treasurer" is used, there shall be used the words "city collector or treasurer or deputy treasurer or deputy or officer authorized to collect city taxes"; and where the word "auditor" is used, there shall be substituted the words "city clerk or recorder". [C97,§1020; S13,§1020; C24, 27, 31, 35,§6895.]

6896 Penalty or interest on unpaid taxes. In cities acting under special charters no penalty or interest shall be collected upon taxes or assessments remaining unpaid four years or more, from the first day of January of the year in which the tax books containing the same were first placed in the hands of the city collector or treasurer. [S13,§1056-a4; C24, 27, 31, 35,§6896.]

6897 Poll tax. Chapter 318 is made applicable to special charter cities. [C97,§1004; S13, §1004; C24, 27, 31, 35,§6897.]

6898 Alcoholic beverages. Title VI is made applicable to cities acting under special charters. [C97,§1013; C24, 27, 31, 35,§6898.]

STREET IMPROVEMENTS AND SEWERS

6899 How paid. The cost of construction, reconstruction, or resurfacing of any street or alley improvement, except as provided in section 6011, and except the cost of constructing

electric light fixtures along any street, and except for that part for which railways or street railways are liable, shall be assessed as a special tax against all lots according to area, so as to include one-half of the privately owned property between the street improved and the next street, whether such privately owned property abut upon said street or not.

In no case except where the district method of assessment is used, shall property situated more than three hundred feet from the street so improved be so assessed.

Such assessment for improvements upon an alley shall be confined to property in the block or blocks in which such alley is located, or, where adjoining property is not platted into blocks, such assessment shall be confined to property within one hundred fifty feet of the alley so improved. [R60,§1064; C73,§§464, 465; C97,§969; C24, 27, 31, 35,§6899.]

6899.1 Lighting fixtures—assessments. The cost of constructing and reconstructing electric light fixtures along any street shall be assessed as a special tax against the property abutting on such street in proportion to the linear front feet thereof. [C27, 31, 35,§6899-a1.]

6900 Road districts—cost at intersections. The council may divide the city into road districts, or may make each ward a separate road district, or make the entire city into a general district for the purpose of cleaning, sprinkling, and repairing the streets, or for any of said purposes, and provide for the manner of doing the same, and for the payment of the cost thereof out of the district road fund, and shall determine the amount necessary for such purposes in each district, and make appropriations therefor at the time and in the manner in this chapter provided for making appropriations for other purposes; but the cost of making, reconstructing, and repairing streets at the intersection of streets, and one-half of the space opposite streets intersecting and not crossing, and opposite city property in any district, shall be paid from the city improvement fund. [C97,§970; C24, 27, 31, 35,§6900.]

6901 Notice and levy of assessments. After filing the plat and schedule referred to in section 6023, the council shall direct the clerk or recorder to give ten days notice, by publishing same three times in a newspaper published in said city, that such plat and schedule are on file in the office of the clerk, fixing a time within which all objections thereto or to the prior proceedings must be made in writing; and the council, having heard the objections and made necessary corrections, shall levy the special assessment as shown in such plat and schedule. [C97,§971; S13,§971; C24, 27, 31, 35,§6901.]

6902 Levy and payment as tax. The special assessments made in said plat and schedule, as corrected and approved, shall be levied at one time, by resolution, against the property abutting upon or adjacent to such street or sewer, and, when levied and certified, shall be payable as ordinary city taxes. [C97,§972; SS15,§972; C24, 27, 31, 35,§6902.]

SS15, §972, editorially divided

6903 Maturity under waiver. If the owner of any lot or parcel of land or railroad or street railway, the assessment against which is embraced in any bond or certificate provided for in chapter 311, shall, within thirty days from the date of such assessment, promise and agree in writing, indorsed on such bond or certificate, or in a separate agreement, that, in consideration of having the right to pay his assessment in installments, he will not make any objections of illegality or irregularity, or to the assessment or levy of such tax upon and against his property, and will pay said assessment, with interest from the date of acceptance of the work by the city council at a rate not exceeding six percent per annum, as shall by ordinance or resolution of the council be prescribed, then such tax so levied against the lot or parcel of land or railroad or street railway shall be payable in not less than five nor more than ten equal installments, the first of which may become due and payable, with interest from the date of acceptance of the work by the city council on the whole amount, at a time fixed in the year in which the levy is made, or in the following year, and the other installments shall be due and payable, with interest on the whole amount unpaid, at intervals of one or two years, as fixed by the resolution making the levy, and all of such installments, with interest from the date of acceptance of the work by the city council, shall mature in ten years or less from the time fixed for the payment of the first installment. [C97,§972; SS15,§972; C24, 27, 31, 35,§6903.]

6904 Maturity without waiver. Where no such agreement is made, the whole of such assessment so levied shall mature at one time, and be due and payable, with interest from the date of acceptance of the work by the city council, as hereinafter provided. [C97,§972; SS15,§972; C24, 27, 31, 35,§6904.]

6905 Collection. Such assessments shall be duly entered on the tax books of the city, and shall be then due and payable at the office of the collector, or other officer authorized to collect city taxes, and shall be collected, like other special taxes, as provided by ordinance. [C97, §973; C24, 27, 31, 35,§6905.]

6906 Interest. Such assessment shall bear interest from the date of acceptance of the work by the city council at six percent per annum. Interest on the whole assessment unpaid shall become due and payable at the time fixed by resolution or ordinance for the payment of each installment. [C97,§974; SS15,§974; C24, 27, 31, 35,§6906.]

6907 When delinquent. Such assessment, and each installment with the interest thereon, shall be paid with accrued costs, at the office of the collector or treasurer, by the owner of the property upon which it is levied, at or before the

time said property is sold for taxes or interest or both, and each installment and all interest due and unpaid shall become delinquent at the time fixed by ordinance or resolution, and shall bear such interest from the time of becoming delinquent, as ordinary taxes. [R60,§1068; C73,§478; C97,§975; C24, 27, 31, 35,§6907.]

S13, §975, editorially divided

6908 When lien attaches. All special assessments shall be a lien upon the property against which the same are assessed from the date of the resolution of the council levying the same and shall be prior and superior to all other liens except ordinary taxes, and shall not be divested by any judicial sale of the property. [R60, §1068; C73,§481; C97,§975; S13,§975; C24, 27, 31, 35,§6908.]

6909 Tax sale. Property against which any special assessment has been levied for street improvements or sewers may be sold for any part of the principal or interest, due and delinquent, at any regular, adjourned, or special tax sale, in the same manner and under the same forfeiture, penalty, and right of redemption; and certificates and deeds of such sale shall be made in the same manner and with like effect as in sales of property for nonpayment of ordinary taxes. [C97,§976; C24, 27, 31, 35,§6909.]

C97, §976, editorially divided

6910 City as purchaser. The city may be a purchaser at any tax sale, whether such purchase be for ordinary taxes or for special assessments, and be entitled to all the rights of purchasers at tax sales, with the right to sell and dispose of the same by the council. [C97,§976; C24, 27, 31, 35,§6910.]

Municipalities as bidders, ch 449

6911 Right of purchaser. The purchaser at any such tax sale shall have the same rights as purchasers at ordinary tax sales, but shall take the property charged with the lien of the remaining unpaid installments and interest. [C97,§976; C24, 27, 31, 35,§6911.]

6912 Street improvements. Chapter 308 is applicable to special charter cities insofar as the subject matter of said chapter is not specifically provided for in this chapter. [R60,§§1068, 1069; C73,§§478, 479; C97,§§962, 966–979, 984–986; S13,§§972-e, 979; C24, 27, 31, 35,§6912.]

6913 Plat and estimate. Before the council orders any street improved or sewer constructed, it shall direct the engineer to prepare a plat, showing the location and general nature of the improvement, the extent thereof, the kinds of material, or, in case of sewers, the size and kinds of material to be used, and an estimate of the cost thereof, and the amount assessable upon any railway or street railway and upon each lot or parcel of land adjacent to such improvement or sewer per square foot in area, and file such plat and estimate in the office of the clerk or recorder. [C97,§965; S13,§965; C24, 27, 31, 35,§6913.]

6914 Publication of notice. Notice of its intention to make such improvement or sewer shall be published by the city clerk or recorder in three consecutive issues of a newspaper of such city, stating that such plat is on file, and, generally, the nature of the improvement, its location, the kinds of material to be used, and the estimate of its cost, and fixing the time before which objections thereto can be filed, which time shall not be less than five days after the last publication of such notice. [C97,§965; S13,§965; C24, 27, 31, 35,§6914.]

6915 Passage of resolution. The council, after considering such objections, shall determine what changes, if any, shall be made in the plan shown by such plat, and may, by resolution, order such improvement or sewer, prescribing generally the extent of the work, the kinds of material, and in case of sewers, the size and kinds of material to be used, when the work shall be completed, the terms of payment, and provide for the publication of notice asking proposals for doing such work, and the time the same will be acted upon. [C97,§965; S13,§965; C24, 27, 31, 35,§6915.]

6915.1 Remonstrance—vote required. Whenever a remonstrance shall have been filed with the council within the time limited in its notice of intention signed by sixty percent of the property owners and by the owners of seventy-five percent of the property subject to assessment, said resolution ordering said improvement shall not be passed except by a three-fourths vote of the entire council. [C31, 35,§6915-c1.]

6916 Street improvement fund. When the whole or any part of the cost of the making or reconstruction of any street improvement shall be ordered paid from the city improvement or grading fund, the council shall have power, after the completion of the work, by resolution, to levy at one time, the whole or any part of the cost of such improvement upon all the taxable property within such city, and determine the whole percentage of taxes necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years, not exceeding ten, given for the maturity of each installment thereof; but no part of such cost shall be levied against any property owned by the city, county, or state. [C97,§977; C24, 27, 31, 35,§6916.]

Referred to in §6918

6917 Sewer fund. When the whole or any part of the cost of the making or reconstruction of any sewer shall be ordered paid from the district or city sewer fund, the council may, after the completion, by resolution, levy at one time the whole or any part of the cost of such sewer upon all taxable real property within such sewer district or within the city, and determine the whole percentage of taxes necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years, not exceeding ten, given for the maturity of each installment; but no part of such cost shall

be levied against the property owned by the city, county, or state. [C97,§978; C24, 27, 31, 35, §6917.]

Referred to in §6918

6918 Certificates of levies. Certificates of levies provided for in sections 6916 and 6917 shall be filed with the collector or treasurer, setting forth the amount or percentage and maturity of said taxes and each installment thereof, with a sufficient description of the boundaries of the particular sewer district, and of the real property of the sewer district or city upon which taxes are levied, duly certified as correct by the clerk or recorder, and thereupon said taxes shall be placed on the tax books of the city and collected as provided for the collection of other special taxes. [C97,§§977, 978; C24, 27, 31, 35, §6918.]

6919 Sewer outlets and purifying plants. Special charter cities may acquire real estate and easements therein for constructing and maintaining sewer outlets and purifying plants as authorized in cities organized under the general law. [C97,§881; SS15,§881; C24, 27, 31, 35,§6919.]

6920 Relevy. When, by reason of nonconformity to any law or ordinance, or by reason of any omission, informality, or irregularity, any special tax or assessment is invalid, or is adjudged irregular, the council shall have power to correct the same by resolution or ordinance, including the reordering of the work and the preliminary notice, and may reassess and relevy the same with the same effect and force as if done at the proper time and in the manner provided by law or by resolution or ordinance relating thereto; and when so corrected it shall be a lien upon the property from the same time and in the same manner and to the same extent as if the original assessment and levy had been in all respects legal. [C97,§980; C24, 27, 31, 35, §6920.]

Referred to in §6921

6921 Correction. When, in making any special assessment, any property is assessed too high or too low, the same may be corrected and a reassessment and relevy made, and any taxes collected in excess of the proper amount shall be refunded. The corrected assessment shall be a lien on the lots and parcels of land the same as the original, and shall be certified by the clerk or recorder to the collector or treasurer in the same manner, and, so far as possible, be collected in the same installments, draw interest at the same rates, and be enforced in the same manner as the original assessments. Any provisions of law, resolution, or ordinance, specifying a time when or order in which acts shall be done in the proceedings which may result in any special assessment, shall be taken to be subject to the qualification of this and section 6920. [C97,§981; C24, 27, 31, 35,§6921.]

6922 Certification—lien. All special assessments, where no other provision is made, shall be levied by the council, and a copy filed with the clerk or recorder, and entered upon the tax book of the collector or treasurer, and be a lien upon the property against which the same is assessed from the date of the levy of such assessment, and shall be prior to all other liens except ordinary taxes, and shall not be divested by any judicial or tax sale. The lien of different special assessments shall take priority in the order of their levy. [R60,§1068; C73,§478; C97, §982; C24, 27, 31, 35,§6922.]

C97, §982, editorially divided

6923 Interest—delinquency. Special assessments shall bear interest at the rate of six percent per annum from the date of the levy, unless otherwise provided, and shall become delinquent thirty days after the levy, and be collected in the same manner, and, when delinquent, they shall bear the same interest, with the same penalties, as ordinary taxes. [R60,§1068; C73,§481; C97, §982; C24, 27, 31, 35,§6923.]

6924 Tax sale — procedure. The property upon which any special assessment is a lien, where not otherwise provided, shall be sold for delinquent assessments and interest in the same manner, and with the same force and effect, as property sold for ordinary delinquent city taxes; and tax sale certificates, certificates of redemption from tax sales, and tax deeds shall be made in the same way and with the same force and effect as in sales for ordinary taxes. [C97, §983; C24, 27, 31, 35,§6924.]

6925 Call for bonds or certificates. For the purpose of providing for the payment of the assessed cost of any street improvement or sewer which has been, or is to be, assessed upon the property abutting thereon or adjacent thereto, including railways or street railways liable for the payment thereof, the council is authorized from time to time, as the work progresses or is completed, to make requisition on the mayor for the issuance of bonds or certificates, as herein provided, in such denominations as shall be deemed best, in anticipation of the deferred payment of the taxes levied or to be levied for such improvement. [C97,§987; C24, 27, 31, 35,§6925.]

C97, §987, editorially divided

6926 Mayor to execute bonds. It shall be the duty of the mayor to make and execute bonds or certificates accordingly, to an amount not exceeding the cost and expense of such improvement to be actually assessed on the property liable for the payment of the same. [C97,§987; C24, 27, 31, 35,§6926.]

6927 Requirements of bonds. The bonds shall bear the name of the street, place, or district improved, or in which any sewer is constructed, which street or place shall be particularly described in the resolution authorizing such issue, and such bonds shall be signed by the mayor, countersigned by the clerk or recorder, and sealed with the corporation seal, and shall bear the same date and be payable at the time fixed in said resolution, and be redeemable at any time at the option of the city, and shall bear interest at a rate not exceeding five percent per annum, payable semiannually. [C97,§987; C24, 27, 31, 35,§6927.]

6928 Form of bonds. The bonds shall be substantially in the following form:

The city of....., in the state of Iowa, promises to pay, as hereinafter stated, to the bearer hereof, on the .....day of....., or at any time before that date, the sum of..... dollars, with interest thereon at the rate of .....percent per annum, payable on the presentation and surrender of the interest coupons hereto attached. Both principal and interest of this bond are payable at the..... bank in the city of....., state of..... This bond is issued by the city of..... pursuant to and by virtue of the laws of the state of Iowa, and the ordinance of said city passed in accordance therewith, and in accordance with a resolution of the council of said city, duly passed on the.....day of....., A.D..... This bond is one of a series of bonds of like tenor, date, and amount, numbered from.....to....., and issued for the purpose of defraying the cost of improving, curbing, and paving a portion of.....street or streets in said city (or constructing a sewer on .....street) as described in said resolution, which cost is assessable to and levied on the property along said improvements, and is made by said law a lien on all abutting or adjacent property, and payable in annual installments, with interest on all deferred payments at the rate of five percent per annum, and this bond is payable only out of the money derived from the collection of said special tax, and said money can be used for no other purpose. And it is hereby certified and recited that all the acts, conditions and things required to be done, precedent to and in the issuing of this series of bonds, have been done, happened, and performed, in regular and due form, as required by said law and ordinance; and for the assessment, collection, and payment hereon of said special tax, the full faith and diligence of said city of.....are hereby irrevocably pledged.

In testimony whereof, the city of....., by its city council, has caused this bond to be signed by its mayor and countersigned by its city clerk, with the seal of said city affixed, this.....day of....., A. D.....

.....
Mayor.

.....
City Clerk.

COUPON

No..... $.....

On the.....day of.....the city of....., Iowa, promises to pay to bearer, as provided in said bond, the sum of .....dollars, at the.....bank in the city of....., being..... months interest due that day on its improvement bond No....., dated....., A. D.....

.....
Mayor.

Countersigned .....
City Clerk.

[C97,§987; C24, 27, 31, 35,§6928.]

6929 Duty to levy, collect, and apply. It shall be the duty of the city, its council and officers, to comply with the requirements of this chapter in the issuance of said bonds or certificates, and to assess and levy upon the property liable therefor the cost and expenses of such improvement or improvements, and to collect the same, and to apply the proceeds to the redemption of such bonds and certificates, and to no other purpose. [C97,§987; C24, 27, 31, 35,§6929.]

6930 Trust fund — liability of city. Said bonds and certificates shall be payable only out of the fund derived from such assessment. The city shall not be obliged to appropriate money from any other fund to the payment of such bonds or certificates or any part of the same. [C97,§987; C24, 27, 31, 35,§6930.]

6931 Sewer bonds and certificates. Chapter 311 is applicable to special charter cities insofar as the subject matter of said chapter is not specifically provided for in this chapter. [C97, §§978, 988, 990; C24, 27, 31, 35,§6931.]

6932 Limitation of action. No action shall be brought, questioning the legality of any street improvement or sewer certificates or bonds, from and after three months from the time the issuance of such certificates or bonds is ordered by the proper authority. [C97,§989; C24, 27, 31, 35,§6932.]

Applicable to cities under commission plan, §6567
Similar provisions, §§6264, 6779, 7673, 7714.23

AMENDMENT OF CHARTER

6933 Procedure. On the presentation of a petition signed by one-fourth of the electors, as shown by the vote at the next preceding city election, of any city or town acting under a special charter or act of incorporation, to the governing body thereof, asking that the question of the amendment of such special charter or act of incorporation be submitted to the electors of such city, such governing body shall immediately propose sections amendatory of said charter or act of incorporation, and shall submit the same, as requested, at the first ensuing city or town election. At least ten days before such election the mayor of such city or town shall issue his proclamation setting forth the nature and character of such amendment, and shall cause such proclamation to be published in a newspaper published therein, or, if there be none, he shall cause the same to be posted in five public places in such city. On the day specified, the proposition to adopt the amendment shall be submitted to the electors thereof for adoption or rejection, in the manner provided by the general election laws. [R60,§1141; C73,§548; C97,§1047; C24, 27, 31, 35,§6933.]

6934 Proclamation of result. If a majority of the votes cast be in favor of adopting said amendment, the mayor shall issue his proclamation accordingly; and the amendment shall thereafter constitute a part of said charter. [R60,§1142; C73,§549; C97,§1048; C24, 27, 31, 35,§6934.]

6935 Submission at special election. The legislative body of said city may submit any amendment to the vote of the people as aforesaid at any special election, provided one-half of the electors as aforesaid petition for that purpose, and the proceedings shall be the same as at the general election. [R60,§1143; C73, §550; C97,§1049; C24, 27, 31, 35,§6935.]

ABANDONMENT OF CHARTER

6936 Abandonment authorized. Any city or town incorporated by special charter may abandon its charter and organize under the provisions of the general law, with the same territorial limits, by pursuing the course hereinafter prescribed. [C73,§434; C97,§631; C24, 27, 31, 35,§6936.]

6937 Petition—election. Upon a petition of legal voters, equaling ten percent of the number voting at the last preceding municipal election in any such city or town, to the council, praying that the question of abandoning its charter be submitted to the legal voters, the council shall immediately direct a special election to be held at which such question shall be decided, specifying at the same time the time and place of holding the same, and appointing the judges and clerks of the election. [C73, §435; C97,§632; C24, 27, 31, 35,§6937.]

6938 Notice. The mayor, or, in case there is no mayor, the president of the council, shall at once issue a proclamation giving notice of such election, of the question to be submitted to the electors, and of the time and place of holding the election, which proclamation shall be published, once each week, for four consecutive weeks in some newspaper published in such city or town, and, if there is none published therein, then such proclamation shall be published by posting a copy thereof in five public places within the corporate limits of such city or town, one of which shall be on the door of the mayor's office. [C73,§436; C97,§633; S13, §633; C24, 27, 31, 35,§6938.]

6939 Submission—canvass. At such election the proposition to be submitted shall be: "Shall the proposition to abandon the special charter of (naming the city or town) be adopted?" and the proposition shall be printed and placed upon the ballots, and the election shall be conducted in the same manner, as provided with respect to like or similar propositions in the title on elections. The abstract of votes shall be returned to the council or board of trustees, who shall canvass the same and declare the result, which shall be entered on the journal. [C73,§437; C97,§634; C24, 27, 31, 35,§6939.]

6940 Officers elected—ordinances — resubmission. If a majority of the votes cast be in favor of the adoption of the proposition, the charter shall be abandoned. Prior to the holding of the next succeeding city election, the mayor shall issue his proclamation and an election shall be held and officers chosen in the city or town under the provisions of the chapter relating to the election of officers for cities or towns of the class to which the corporation will belong when the charter is abandoned. Upon the election and qualification of such officers, the charter of the city or town shall be deemed abandoned, and it shall be held organized under chapter 286. All ordinances in force at the time of the abandonment of the charter not inconsistent or in conflict with the laws of the state shall remain in force until amended or repealed. If a majority of the votes be against the abandonment of the charter, the question shall not be again submitted until after the expiration of one year from the time of such election. [C73,§438; C97,§635; C24, 27, 31, 35, §6940.]

6941 Delinquent taxes. In special charter cities or towns accepting the provisions of the general incorporation laws, all delinquent taxes remaining unpaid upon the tax books thereof, except such as were levied to pay indebtedness created to take stock or aid in the building of railways, shall be certified at the time, and collected and paid over as provided in the title relating to taxation. [C73,§495; C97,§636; C24, 27, 31, 35,§6941.]

6942 Rights and liabilities. All rights and property of every description which were vested in any such city or town under its former organization shall vest in the same under the organization herein contemplated, and no right or liability, either in favor of or against it, existing at the time, and no suit or prosecution of any kind, shall be affected by such change; but when a different remedy is given by this title, which can be made properly applicable to any right existing at the time such change is made, the same shall be cumulative to the remedies before provided, and may be used accordingly. [C73,§439; C97,§637; C24, 27, 31, 35, §6942.]

6943 Funds. When a special charter city or town shall abandon its charter the funds which it may then have on hand shall be transferred to the appropriate funds under its new organization in such proportions as the council shall determine. [C24, 27, 31, 35,§6943.]

CHAPTER 329.1

CITY-OWNED PUBLIC UTILITIES

6943.001 Management.
6943.002 Appointment—term.
6943.003 Vacancies.
6943.004 Compensation.
6943.005 Bonds.
6943.006 Removals.
6943.007 Powers and duties.
6943.008 Vacancies declared.
6943.009 Applicability of chapter.

6943.001 Management. In special charter cities having a population of less than twenty-five thousand owning two or more public utility plants and works, as provided for under section 6789, such works and plants shall be managed, operated, extended and controlled by a coordinated board of trustees which shall be composed of five resident electors appointed for the term of five years by the mayor of said city. [C31, 35, §6943-c1.]

6943.002 Appointment—term. After the authorization of the purchase or erection of such works or plants by the electors of such city, in the manner provided by law, the mayor thereof shall thereafter appoint such board of trustees, the first appointees thereof to hold office for the following designated terms, namely:—one for one year, one for two years, one for three years, one for four years and one for five years. [C31, 35,§6943-c2.]

6943.003 Vacancies. All vacancies occurring on said board shall be filled by the mayor as provided by section 6812. [C31, 35,§6943-c3.]

6943.004 Compensation. The compensation of said trustees shall not be more than six hundred dollars per annum to each member of said board. [C31, 35,§6943-c4.]

6943.005 Bonds. Each of said trustees shall execute and furnish to the city an official bond in the penal sum of five thousand dollars to be approved by the mayor, and filed with the city clerk. The premium on such bonds, if any, shall be paid pro rata from the funds of said plants or works. [C31, 35,§6943-c5.]

6943.006 Removals. Such trustees may be removed as provided in section 6815. [C31, 35, §6943-c6.]

6943.007 Powers and duties. The said board of trustees shall have and exercise all of the powers, duties and obligations enumerated in and conferred upon such boards by chapters 312, 313, 314, 314.1, and 329 appertaining to heating plants, waterworks, gasworks, electric light or electric power plants, and said board of trustees may anticipate the revenues of such works and plants for a period not to exceed three years for the operation, extension, betterment and improvement of such works and plants. [C31, 35,§6943-c7.]

6943.008 Vacancies declared. To effectuate the purposes and provisions of this chapter, as provided in the preceding sections, the mayor of said city shall declare all of the existing offices of such trustees vacant. [C31, 35,§6943-c8.]

Omnibus repeal, §6943-c9, Code 1935; 43GA, ch 192

6943.009 Applicability of chapter. This chapter is applicable to cities acting under special charter having a population of less than twenty-five thousand. [C31, 35,§6943-c10.]

TITLE XVI

TAXATION

Referred to in §§6869, 6941

CHAPTER 329.2

STATE TAX COMMISSION

Chapter applicable to special charter cities, §6864.1

6943.010 Creation of commission.
6943.011 Appointment.
6943.012 Qualifications.
6943.013 Prohibitions.
6943.014 Tenure of office.
6943.015 Full-time appointment.
6943.016 Vacancies.
6943.017 Salary.
6943.018 Organization.
6943.019 Office—quorum—sessions.
6943.020 Meetings.
6943.021 Secretary.
6943.022 Duties of secretary.
6943.023 Rules and regulations.
6943.024 Seal.
6943.025 Expenses.
6943.026 Powers.
6943.027 Duties of public officers.
6943.028 Counsel.
6943.029 Actions.
6943.030 Administration of oaths.
6943.031 Service of orders.
6943.032 Fees and mileage.

6943.010 Creation of commission. There is hereby created a commission composed of three members, to be designated as the state tax commission. [C31, 35,§6943-c11; 48GA, ch 174, §1.]

Assistant attorney general assigned, §151.1

6943.011 Appointment. The members of said commission shall be appointed by the governor with the consent of two-thirds of the senate in executive session. [C31, 35,§6943-c12; 48GA, ch 174,§2.]

Confirmation by senate, §38.1

6943.012 Qualifications. The persons appointed as members of said commission shall be such as possess knowledge of the subject of taxation and skill in matters pertaining thereto. Not more than two members of said commission shall belong to the same political party. [C31, 35,§6943-c13; 48GA, ch 174,§3.]

6943.013 Prohibitions. No person appointed as a member of said commission shall, while holding such office, hold any other office under the laws of the United States or of this state or of any other state. Each member of said commission shall devote his entire time to the duties of his office and shall not hold any position of profit, engage in any occupation or business interfering with or inconsistent with his duties, or serve on or under any committee of any political party or contribute to the campaign fund of any person or political party. [C31, 35,§6943-c14; 48GA, ch 174,§4.]

6943.014 Tenure of office. Each full-time member shall serve for six years from the first day in July of the year of appointment. [C31, 35,§6943-c15.]

6943.015 Full-time appointment. The governor shall, within sixty days following the organization of each regular session of the general assembly, appoint, with the approval of two-thirds of the members of the senate in executive session, a successor to the member of said commission whose term of office will expire on the first day of July next thereafter. [C31, 35,§6943-c16; 48GA, ch 174,§5.]

6943.016 Vacancies. In case of a vacancy, it shall be filled by appointment by the governor for the unexpired portion of the term in which such vacancy shall occur, with the consent of two-thirds of the members of the senate in executive session. If such appointment be made when the general assembly is not in regular session, the appointee shall hold his office until the first Monday in February during the next biennial session of the general assembly, when, if such appointment is not confirmed by the senate, the office shall become vacant, and on or before the last Monday of the same month the governor, with the consent of two-thirds of the members of the senate in executive session, shall appoint a suitable person to fill such vacancy for the unexpired term. A person appointed to fill a vacancy shall take his office immediately upon qualifying. [C31, 35,§6943-c17.]

6943.017 Salary. Each member of said commission shall receive a salary of four thousand five hundred dollars a year, payable in the same manner as the salaries of other state officers. [C31, 35,§6943-c18; 48GA, ch 174,§6.]

6943.018 Organization. The commission shall elect one of its members to serve as chairman of the commission for a period of one year, who

shall sign on behalf of the commission all orders, subpoenas, warrants, and other documents of like character issued by the commission. The commission may elect a vice chairman who shall act in the absence or inability of the chairman to act. [C31, 35,§6943-c19; 48GA, ch 174,§7.]

6943.019 Office — quorum — sessions. Said commission shall have its office at the seat of government of this state. A majority of said commission shall constitute a quorum for the transaction of business. The commission shall be deemed to be in continuous session and open for the transaction of business every day except Sundays and legal holidays, and the session of said commission shall stand and be deemed to be adjourned from day to day without formal entry thereof on its record. [C31, 35,§6943-c20; 48GA, ch 174,§8.]

6943.020 Meetings. The commission may hold sessions in conducting investigations at any place within the state when deemed necessary to facilitate and render more thorough the performance of its duties, and for that purpose one member may conduct the same but shall submit a written report of proceedings in writing to the commission for its findings. [C31, 35,§6943-c21; 48GA, ch 174,§9.]

6943.021 Secretary. The commission may appoint a secretary, and may employ such other assistants and employees as may be included in the budget submitted by said commission to the comptroller for the payment of the compensation for which money has been provided by appropriation. [C31, 35,§6943-c22; 48GA, ch 174, §10.]

6943.022 Duties of secretary. The secretary shall:

1. Keep full and correct minutes of all hearings, transactions, and proceedings of said commission.

2. Keep an assessment record, wherein shall be recorded the detailed proceedings relating to valuations and assessments of properties made, taxes levied, and levies determined by said commission.

3. Certify to the several county auditors all property assessments and levies so made by the commission, when such certification is required by law.

4. When the commission is arriving at values for taxable purposes, so keep the records that they shall show the members making the various motions, the amounts such motions designate, the values undertaken to be fixed thereby, the negative and affirmative votes thereon, and the names of the members voting.

5. Prepare and maintain, under the direction of said commission, forms for reports of all persons and concerns required by law to make reports to the state tax commission.

6. Prepare, as soon as practicable after January 1 of each odd-numbered year, a report covering the two preceding calendar years, and showing:

a. The assessment of all common carriers, sleeping and dining cars, express and telegraph companies,

b. The aggregate assessment of telephone property by classes.

The report specified in this subsection 6 shall be published in the Iowa official register.

7. Annually, under the direction of said commission, compile detailed reports of the assessment of railways; sleeping, dining, and equipment cars; express properties, telegraph and telephone properties.

8. Perform such other duties as may be required by said commission. [C31, 35,§6943-c23; 48GA, ch 174,§11.]

6943.023 Rules and regulations. The commission shall have power to establish all needful rules not inconsistent with law for the orderly and methodical performance of its duties, and to require the observance of such rules by those having business with or appearing before said commission. [C31, 35,§6943-c24; 48GA, ch 174, §12.]

6943.024 Seal. The commission shall have an official seal, and orders or other papers executed by it may, under its direction, be attested, with its seal affixed, by the secretary. [C31, 35,§6943-c25; 48GA, ch 174,§13.]

6943.025 Expenses. The members of the commission, secretary and assistants shall be entitled to receive from the state their actual necessary expenses while traveling on the business of the commission; such expenditures to be sworn to by the party who incurred the expense, and approved by a majority of the members of the commission, and allowed by the state comptroller. Provided, however, that no such expense shall be allowed the members, the secretary or employees of the commission while in the city of Des Moines or traveling between their homes and the city of Des Moines. [C31, 35,§6943-c26; 48GA, ch 174,§14.]

6943.026 Powers. In addition to the powers and duties transferred to the state tax commission, said commission shall have and assume the following powers and duties:

1. To have and exercise general supervision over the administration of the assessment and tax laws of the state, over boards of supervisors and all other officers or boards of assessment and levy in the performance of their official duties, in all matters relating to assessments and taxation, to the end that all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law.

2. To prescribe and promulgate all forms of books and forms to be used in the listing and assessment of property, and on or before November 1 of each year shall furnish to the county auditor of each county such prescribed forms of assessment rolls and other forms to properly list and assess all property subject to taxation in each county. It shall also from time to time prepare and furnish in like manner forms for any and all other blanks, memoranda

or instructions which it deems necessary or expedient for the use or guidance of any of the officers over which it is authorized by law to exercise supervision.

3. To confer with, advise and direct boards of supervisors, boards of review and others obligated by law to make levies and assessments, as to their duties under the laws.

4. To direct proceedings, actions and prosecutions to be instituted for the enforcement of the laws relating to the penalties, liabilities and punishment of public officers, and officers or agents of corporations, and other persons or corporations, for failure or neglect to comply with the provisions of the statutes governing the return, assessment and taxation of property; to make or cause to be made complaints against members of boards of review, boards of supervisors or other assessing, reviewing or taxing officers for official misconduct or neglect of duty.

5. To require city, town, township, school districts, county, state or other public officers to report information as to the assessment of property and collection of taxes and such other information as may be needful or desirable in the work of the commission in such form and upon such blanks as the commission may prescribe.

6. To hold public hearing either at the seat of government or elsewhere in the state, and tax the costs thereof; to summon and compel witnesses to appear and give testimony, to administer oaths to said witnesses and to compel said witnesses to produce for examination records, books, papers, and documents relating to any matter which the commission shall have the authority to investigate or determine. Provided, however, that no bank or loan and trust company or its officers or employees shall be required to divulge knowledge concerning the property of any person when such knowledge was obtained through information imparted as a part of a business transaction with or for such person and in the usual and ordinary course of business of said bank or loan and trust company, and was necessary and proper to the discharge of the duty of said bank or loan and trust company in relation to such business transaction. This proviso shall be additional to other provisions of the law relating to confidential and privileged communications.

7. To cause the depositions of witnesses residing within or without the state, or absent therefrom, to be taken either on written or oral interrogatories, and the clerk of the district court of any county shall upon the order of the commission issue a commission for the taking of such depositions. The proceedings therefor shall be the same as the proceeding for the taking of depositions in the district court so far as applicable.

8. To investigate the work and methods of boards of review, boards of supervisors or other public officers, in the assessment, equalization and taxation of all kinds of property, and for that purpose the commission, and members or employees thereof may visit the counties or localities when deemed necessary so to do.

9. To require any board of review at any time after its adjournment to reconvene and to make such orders as the state tax commission shall determine are just and necessary; to direct and order any county board of equalization to raise or lower the valuation of the property, real or personal, in any township, town, city or taxing district, to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property in any township, town, city or taxing district, and generally to make any order or direction to any county board of equalization as to the valuation of any property, or any class of property, in any township, town, city, county or taxing district, which in the judgment of the commission may seem just and necessary, to the end that all property shall be valued and assessed in the manner and according to the real intent of the law.

10. To carefully examine into all cases where evasion or violation of the law for assessment and taxation of property is alleged, complained of, or discovered, and to ascertain wherein existing laws are defective or are improperly or negligently administered, and cause to be instituted such proceedings as will remedy improper or negligent administration of the laws relating to the assessment or taxation of property.

11. To make a summary of the tax situation in the state, setting out the amount of moneys raised by both direct and indirect taxation; and also to formulate and recommend legislation for the better administration of the fiscal laws so as to secure just and equal taxation. To recommend such additions to and changes in the present system of taxation that in its judgment is for the best interest of the state and will eliminate the necessity of any millage levy for state purposes.

12. To transmit biennially to the governor and to each member and member-elect of the legislature, thirty days before the meeting of the legislature, the report of the commission, covering the subject of assessment and taxation, the result of the investigation of the commission, its recommendations for improvement in the system of taxation in the state, together with such measures as may be formulated for the consideration of the legislature.

13. To publish in pamphlet form the revenue laws of the state and distribute them to the county auditors, assessors, and boards of review.

14. To procure in such manner as the commission may determine any information pertaining to the discovery of property which is subject to taxation in this state, and which may be obtained from the records of another state, and may furnish to the board or proper officers of another state, any information pertaining to the discovery of property which is subject to taxation in such state as disclosed by the records in this state.

15. To call upon any state department or institution for technical advice and data which may be of value in connection with the work of assessment and taxation.

16. To certify to the state comptroller on January 1 of each year the aggregate of each state tax for each county for said year. [C31, 35, §6943-c27; 47GA, ch 188,§§4–7; 48GA, ch 174, §§15, 21; ch 175,§20.]

6943.027 Duties of public officers. It shall be the duty of all public officers of the state and of all municipalities to give to the commission information in their possession relating to taxation when required by the commission, and to cooperate with and aid the commission in its efforts to secure a fair, equitable and just enforcement of the taxation and revenue laws. [C31, 35,§6943-c28; 48GA, ch 174,§16.]

6943.028 Counsel. It shall be the duty of the attorney general and of the county attorneys in their respective counties to commence and prosecute actions, prosecutions and complaints, when so directed by the commission and to represent the commission in any litigation in which it may become involved in the discharge of its duties. [C31, 35,§6943-c29; 48GA, ch 174, §17.]

Assistant attorney general assigned, §151.1

6943.029 Actions. The commission may bring actions of mandamus or injunction or any other proper actions in the district court or before any judge thereof, to compel the performance of any order made by said commission or to require any board of equalization or any other officer or person to perform any duty required by this chapter. Said commission shall select the district court in the county which is most accessible to the subject matter, and the defendant or defendants in any such action; but no removal of the question to any other county shall be had by any defendant in consequence of his not being a resident of the county where the action is brought or because the subject matter shall not be located in the county in which said action may be brought. [C31, 35,§6943-c30; 48GA, ch 174,§18.]

Garnishment proceedings for collection of tax, §§11679.1–11679.3

6943.030 Administration of oaths. Each member of the commission and each employee thereof when duly authorized by the commission shall have the power to administer all oaths authorized and required under the provisions of this chapter. [C31, 35,§6943-c31; 48GA, ch 174,§19.]

6943.031 Service of orders. Any sheriff, constable, or other person may serve any subpoena or order issued under the provisions of this chapter. [C31, 35,§6943-c32.]

6943.032 Fees and mileage. The fees and mileage of witnesses attending any hearing of the commission, pursuant to any subpoena, shall be the same as those of witnesses in civil cases in district court. [C31, 35,§6943-c33; 48GA, ch 174,§20.]

Omnibus repeal and constitutionality clause, §6943-c34, code 1935; 43GA, ch 205, §27

CHAPTER 329.3

INCOME, CORPORATION, AND SALES TAX

Referred to in §§6943.104, 6943.108

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6943.035 Definitions controlling chapter.

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DIVISION VI

ALLOCATION OF REVENUES

6943.100 Generally.
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DIVISION I. INTRODUCTORY PROVISIONS

6943.033 Classification of chapter. The provisions of this chapter are herein classified and designated as follows:

Division I Introductory provisions.
Division II Personal net income tax.
Division III Business tax on corporations.
Division IV Retail sales tax.
Division V Administration.
Division VI Allocation of revenues.
[C35,§6943-f1.]

6943.034 Purpose or object. This chapter shall be known as the "Property Relief Act", and shall have for its purpose the direct replacement of taxes already levied or to be levied on property to the extent of the net revenue obtained from the taxes imposed herein, which shall be apportioned back to the credit of individual taxpayers on the basis of the assessed valuation of taxable property as provided in division VI of this chapter. [C35,§6943-f2.]

6943.035 Definitions controlling chapter. For the purpose of this chapter and unless otherwise required by the context:

1. The word "commission" means the state tax commission.

2. The word "taxpayer" includes any person, corporation, or fiduciary who is subject to a tax imposed by this chapter. [C35,§6943-f3; 48GA, ch 176,§1.]

DIVISION II. PERSONAL NET INCOME TAX

6943.036 Definitions controlling division. For the purpose of this division and unless otherwise required by the context:

1. The words "taxable income" mean all net income as computed in this division.

2. The word "person" includes individuals and fiduciaries.

3. The words "income year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this division.

4. The words "tax year" mean the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this division.

5. The words "fiscal year" mean an accounting period of twelve months, ending on the last day of any month other than December.

6. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporate, acting in any fiduciary capacity for any person, trust, or estate.

7. The word "paid", for the purposes of the deductions under this division, means "paid or accrued" or "paid or incurred", and the terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this division. The term "received", for the purpose of the computation of net income under this division, means "received or accrued", and the term "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this division.

8. The word "resident" applies only to individuals and includes, for the purpose of determining liability to the tax imposed by this division upon or with reference to the income of any tax year, any individual domiciled in the state, and any other individual who maintains a permanent place of abode within the state, or spends in the aggregate more than six months of the tax year within the state.

9. The words "foreign country" mean any jurisdiction other than one embraced within the United States. The words "United States", when used in a geographical sense, include the states, the territories of Alaska and Hawaii, the District of Columbia, and the possessions of the United States.

10. The word "individual" means a natural person.

11. The word "dividend" means any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property of the corporation.

12. The term "head of a family" means an individual who, during the taxable year, maintained a household and supported therein himself and one or more persons who were dependent upon him for support; provided, however, that such dependents must be of blood relation, marriage or adoption.

13. The word "nonresident" applies only to individuals, and includes all individuals who are not "residents" within the meaning of subsection 8 hereof.

14. The term "withholding agent" means any individual, fiduciary, corporation, association or partnership in whatever capacity acting, including all officers and employees of the state or of any municipal corporation or political subdivision of the state, that is obligated to pay or has control of paying to any nonresident any "gross income", within the meaning of section 6943.040, in excess of fifteen hundred dollars in

any calendar year. [C35,§6943-f4; 47GA, ch 184,§1.]

Referred to in §6943.064

6943.037 Tax imposed—applicable to federal employees. A tax is hereby imposed, beginning the first day of January, 1934, upon every resident of the state, and beginning on the first day of January, 1937, upon that part of the income of any nonresident which is derived from any property, trust, or other source within this state, including any business, trade, profession or occupation carried on within this state, which tax shall be levied, collected and paid annually upon and with respect to his entire taxable income as herein defined at rates as follows:

1. On the first one thousand dollars of taxable income, or any part thereof, one percent.
2. On the second thousand dollars of taxable income, or any part thereof, two percent.
3. On the third thousand dollars of taxable income, or any part thereof, three percent.
4. On the fourth thousand dollars of taxable income, or any part thereof, four percent.
5. On the fifth thousand dollars of taxable income, or any part thereof, five percent, and on all taxable income in excess of five thousand dollars, five percent.

The tax herein levied shall be computed and collected as hereinafter provided.

The provisions of this division shall apply to all salaries received by federal officials or employees of the United States government as provided for herein from and after January 1, 1939. [C35,§6943-f5; 47GA, ch 184,§2; 48GA, ch 178,§3.]

6943.038 Income from estates or trusts. 1. The tax imposed by this division shall apply to and become a charge against estates or trusts, which tax shall be levied, collected and paid annually upon and with respect to the income of estates or any kind of property held in trust, including:

a. Income received by estates of deceased persons during the period of administration or settlement of the estate.

b. Income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interest.

c. Income held for future distribution under the terms of the will or trust.

d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a fiduciary to be held or distributed, as the court may direct.

e. Income of an estate during the period of administration or settlement upon which the tax is to be paid as provided in subsection 4 of this section.

f. The net income received during the year by deceased individuals who have died on or after the date a return was due to be filed without having made a return.

2. The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts, whether such income be taxable to the estate or trust or to the beneficiaries thereon. The net income of an estate or trust shall be computed in the same manner and on the same basis as provided in this division for individual taxpayers, except that there shall also be allowed as a deduction any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is, during the taxable year, paid to or permanently set aside for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and, in cases under paragraphs *d* and *e* of subsection 1 of this section, the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income whether or not distributed before the close of the tax year for which the return is made.

3. In cases under paragraphs *a*, *b*, and *c* of subsection 1 of this section the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In cases under *a*, *b*, and *c* the estate or trust shall be allowed the same exemptions as are allowed to single persons under this division, and in cases under paragraph *f* the same exemption as would be allowed the deceased, if living.

4. In cases under paragraphs *d* and *e* of subsection 1 of this section, if the distribution of income is in the discretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subsection 3 of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary. In all other cases under paragraphs *d* and *e* of subsection 1 of this section, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. [C35,§6943-f6.]

Referred to in §6943.046

6943.039 "Net income" defined. The term "net income" means the gross income of the taxpayer less the deductions allowed by this division. [C35,§6943-f7.]

Referred to in §6943.067

6943.040 "Gross income" defined — exceptions.

1. The term "gross income" includes gains, profits and incomes derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or re-occurring profits and income growing out of the ownership or use of or interest in property, real or personal; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit; or gains or profits, and income derived from any source whatever and in whatever form paid. The amount of all such items shall be included in the gross income of the tax year in which received by the taxpayer, unless, under the methods of accounting permitted under this division, any such amounts are to be properly accounted for as of a different period.

2. The term "gross income" does not include the following items, which shall be exempted from taxation under this division:

a. Capital gains and profits arising from the sale or exchange of real or personal property of the taxpayer.

b. (1) Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or in installments (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income).

(2) Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts) under a life insurance, endowment, or annuity contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premium or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract or any interest therein, only the actual value of such consideration shall be exempt from taxation under paragraph (1) or this paragraph.

c. The value of property acquired by good faith, gift, bequest, devise, or descent (but the income from such property shall be included in gross income).

d. Pensions of all kinds received by veterans from the United States government by reason of service in the military forces of the United States, including disability or dependency compensation paid to veterans, their widows, orphans, or parents, and the retirement pay of persons retired from the military forces of the United States under the laws of the United States.

e. Any amounts received through accident or health insurance or under workmen's compensation acts as compensation for personal injuries or sickness, plus the amount of damages received, whether by suit or agreement, on account of such injuries or sickness.

f. Stock dividends of a corporation distributed to its own stockholders.

3. Every individual, taxable under this division, who is a beneficiary of an estate or trust, shall include in his gross income the distributive share of the net income of the estate or trust, received by him or distributable to him during the income year. Unless otherwise provided in the law, the will, the deed or other instrument creating the estate, trust or fiduciary relation, the net income shall be deemed to be distributed or distributable to the beneficiaries (including the fiduciary as a beneficiary, in the case of income accumulated for future distribution) ratably, in proportion to their respective interests.

4. In the case of a nonresident, the term "gross income" shall only refer to such gross income, as herein defined, as is derived from any property, trust or other source within this state, including any business, trade, profession or occupation carried on within this state, but shall not include income received by a nonresident in the form of annuities, interest on bank deposits, interest on bonds, notes or other interest bearing obligations, or dividends from corporations, whether received by the nonresident directly or as beneficiary of a trust, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this division.

If any income is received from a business, trade, profession or occupation carried on partly within and partly without the state, only such portion of such income as is fairly and equitably attributable to that part of the business, trade, profession or occupation carried on within the state of Iowa shall be included within such gross income, and such allocation shall be made under rules and regulations prescribed by the commission, which shall, in any event, require the entire amount of such income and the allocation made, to be shown in the return which said nonresident shall, and must, file pursuant to sections 6943.045 to 6943.055, inclusive. [C35,§6943-f8; 47GA, ch 184,§3; 48GA, ch 177,§1; ch 178,§§1, 2.]

Referred to in §§6943.036, 6943.067

6943.041 Allowable deductions on gross income. In computing net income there shall be allowed as deductions:

1. All the ordinary and necessary expenses, paid or incurred, in case of report on an accrual basis, during the tax year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal service actually rendered, traveling expenses while away from home in pursuit of trade or business, and including rentals or other payments required to be made as a condition to the continued use or possession, for the purpose of the trade or business, of property

to which the taxpayer has not taken or is not taking title or in which he has no equity.

2. All interest paid or accrued during the tax year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities, the interest on which is exempt from taxation under this division.

3. Taxes paid or accrued within the income year, imposed by the authority of the United States or of any of its possessions or of any state, territory or the District of Columbia or of any foreign country; except inheritance taxes, federal estate taxes or estate taxes of this or any other state, and except income taxes imposed by this division and taxes assessed for local benefit, of a kind tending to increase the value of the property assessed.

4. Credits ascertained to be worthless and charged off within the tax year if the amount has previously been included in gross income in a return under this division.

5. A reasonable allowance for the damage, destruction, depreciation, exhaustion, wear and tear and obsolescence of property used in the trade or business, and in the case of mines or other natural deposits and timber a reasonable allowance for depletion; provided, that in computing the allowances granted under this subsection the basis shall be the cost of such property (including, in the case of mines and other natural deposits, the cost of development not otherwise deducted), except where the property was acquired prior to January 1, 1934, the basis shall be the cost less reasonable depreciation accrued thereon up to January 1, 1934, but in no event less than its fair market value on said date. The reasonable allowance under this subsection shall be made under rules and regulations to be prescribed by the commission. In the case of leases the allowances granted may be equitably apportioned between the lessor and the lessee.

6. Donations made within the taxable year to or for the use of:

a. The United States, any state, territory or political subdivision thereof, or the District of Columbia, for exclusively public purposes.

b. Any corporation or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

c. Gifts and donations made and accepted under section 3855.

d. Posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations.

e. Fraternal societies operating under the lodge system, if such contributions are to be used exclusively for religious, charitable or educational purposes.

The foregoing deductions in this subsection are limited to an amount which, in all of the above cases combined, does not exceed fifteen percent of the taxpayer's net income, computed without the benefit of such deductions.

7. For the purpose of simplifying returns, in all cases where the taxpayer's gross income does not exceed, in the case of a single individual, one thousand dollars, and in the case of husband and wife or head of a family, one thousand six hundred dollars, the taxpayer may claim a deduction of ten percent of the gross income, in lieu of all other deductions which might be claimed under this division.

8. A nonresident shall be allowed the deductions provided herein, excepting that the deductions provided in subsections 1 to 5 inclusive shall be allowed to a nonresident only if, and to the extent that, they are connected with income arising from sources within the state and taxable under this division; and the proper apportionment and allocation of the deductions with respect to income received from a business, trade, profession or occupation carried on partly within and partly without the state shall be determined under rules and regulations to be prescribed by the commission. [C35,§6943-f9; 47GA, ch 184,§4; 48GA, ch 176, §2; ch 177,§2.]

Referred to in §6943.067

6943.042 Unallowable deductions on gross income. In computing the income no deductions shall in any case be allowed in respect to the following:

1. Personal, living or family expenses.

2. Any amount paid out for new buildings or for permanent improvements or betterments, made to increase the value of any property or estate.

3. Any amount expended in restoring property for which an allowance for depreciation or depletion is or has been made.

4. Premiums paid on any life insurance policy covering the life of any officer or employee or of any individual financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

5. Capital losses resulting from the sale or exchange of real or personal property of the taxpayer, or in connection with stocks, bonds, or other securities determined to be worthless and charged off during the taxable year. [C35, §6943-f10.]

Referred to in §6943.067

6943.043 Credit on tax. A credit shall be allowed against the amount of tax computed to be due and payable under this division, to the extent of the tax which has been assessed against and paid by a corporation under division III of this chapter on income which is represented by dividends on stock in said corporation, received by the taxpayer and included in his gross income within the tax year; provided, that when only part of the income of any corporation shall have been assessed and income tax paid under said division, only a corresponding amount of tax shall be deducted; and provided, further, that such corporation has reported the name and address of each person owning stock and the amount of dividends paid each such person during the year. [C35,§6943-f11.]

Referred to in §6943.067

6943.044 Deductions from computed tax. There shall be deducted from the tax after the same shall have been computed as set forth in this division, a personal exemption as follows:

1. For a single individual, ten dollars.
2. For husband and wife or head of a family, twenty dollars.
3. For each child under the age of twenty-one years who is actually supported by and dependent upon the taxpayer for his support, an additional five dollars.
4. For each actual dependent other than as specified in subsection 3 of this section, an additional five dollars.

If the status of a taxpayer, insofar as it affects the personal exemption or credit for dependents, changes during the taxable year, the personal exemption and credit shall be apportioned under rules and regulations prescribed by the commission. [C35,§6943-f12; 47GA, ch 185,§1; 48GA, ch 176,§3.]

Constitutionality, 47GA, ch 185, §4

6943.045 Return by individual.

1. Every individual having a net income for the tax year from sources taxable under this division, of one thousand dollars or over, if single, or if married and not living with husband or wife; or having a net income for the tax year of fifteen hundred dollars or over if married and living with husband or wife, shall make a return under oath, stating specifically the items of gross income and the deductions and exemptions allowed by this division.
2. If husband and wife living together have an aggregate net income of fifteen hundred dollars or over, each shall make such a return, unless the income of each is included in a single joint return.
3. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer.
4. Provided, also, that every individual having a gross income of three thousand dollars a year or over, shall file a return. [C35,§6943-f13; 47GA, ch 185,§2.]

Referred to in §6943.040

6943.046 Return by fiduciary.

1. Every fiduciary subject to taxation under the provisions of this division, as provided in section 6943.038, shall make a return under oath for the individual, estate or trust for whom or for which he acts, if the net amount thereof amounts to six hundred* dollars or more or the gross amount thereof amounts to three thousand dollars or more.
2. The return made by a fiduciary shall state specifically the items of gross income and the deductions and exemptions allowed by this division and such other facts as the commission may prescribe. Under such regulations as the commission may prescribe, a return may be made by one of two or more joint fiduciaries.
3. Fiduciaries required to make returns under this division shall be subject to all the provisions of this division which apply to individuals. [C35,§6943-f14; 47GA, ch 185,§3; 48GA, ch 176, §4.]

Referred to in §6943.040
*Amendment by 47GA, ch 185, §3, inapplicable

6943.047 Information at source.

1. Every person or corporation being a resident of or having a place of business in this state, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers and all officers and employees of the state or of any political subdivision of the state, having the control, receipt, custody, disposal or payment of interest (other than interest coupons payable to bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income, amounting to one thousand dollars or over, paid or payable during any year to any individual, whether a resident of this state or not, shall make complete return thereof under oath, to the commission, under such regulations and in such form and manner and to such extent as may be prescribed by it.
2. Every partnership, having a place of business in the state, shall make a return, stating specifically the items of its gross income and the deductions allowed by this division, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed, and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.
3. Every fiduciary shall make, under oath, a return for the individual, estate, or trust for whom or for which he acts, and shall set forth in such return the items of the gross income, the deductions allowed by this division, the net income, the names and addresses of the beneficiaries, the amounts distributed or distributable to each and the amount, if any, lawfully retained by him for future distribution. Such return may be made by one or two or more joint fiduciaries. [C35,§6943-f15; 47GA, ch 184,§6; 48GA, ch 176,§5.]

Referred to in §§6943.040, 6943.048, 6943.070

6943.048 Withholding agents and nonresidents.

1. Excepting as provided herein and in section 6943.049, every withholding agent shall deduct and withhold in each calendar year five percent of all gross income, in excess of fifteen hundred dollars, which such withholding agent pays, including the five percent so withheld, to any nonresident during such calendar year. In case the nonresident files with the state commission a verified statement, in such form and containing such information as the commission shall prescribe, showing that any income described therein is derived from a source upon which the net income will be less than twenty percent of the gross income, the commission, if satisfied that such statement is correct, shall give to such nonresident a certificate directing the withholding agent to withhold only one percent of the described income. Upon receipt of such certificate, the withholding agent shall

withhold only one percent of the income described in such certificate in excess of seventy-five hundred dollars; and no part of the first seventy-five hundred dollars shall be withheld.

2. Withholding agents shall make returns upon the basis of each calendar year on such forms and at such times throughout the year as the commission shall from time to time prescribe, and shall include therein such information as the commission shall require. The commission shall fix such times for the making of returns and the payment of the amounts withheld as in its judgment are necessary to insure payment of such amounts. Such returns may, in the discretion of the commission, be consolidated with the returns required by section 6943.047; and in the discretion of the commission, a withholding agent may be required to make a separate withholding agent's return for every nonresident a portion of whose income is required to be withheld under subsection* 1 hereof.

*"section 1" in enrolled act.

3. At the time of making such returns, the withholding agent shall pay to the commission the entire amount required to be withheld under subsection 1 hereof. Such amounts shall be paid to the commission in the form of remittances payable to the treasurer of state and which shall be transmitted to the state treasurer to be deposited in the state treasury to the credit of a special nonresident income tax fund, which is hereby created for such a purpose. That portion of such fund applicable to the payment of taxes pursuant to subsection 5 hereof shall from time to time be transferred by the state treasurer, upon order of the commission, to the credit of the special tax fund created by section 6943.093. Any amounts in such nonresident income tax fund required by subsection 5 hereof to be paid to a nonresident shall be so paid by the state treasurer by means of a warrant drawn by the comptroller at the direction of an authorized employee of the state commission upon such fund to the order of such nonresident, without requiring the nonresident to file a claim for refund.

4. Each nonresident shall make his returns and pay his taxes upon the basis of the calendar year, unless permission is obtained from the commission to report on a different taxable year in cases when he carries on a business of such a nature as to make it impractical to report on the basis of the calendar year. That amount withheld from and paid for each nonresident by the withholding agent for any calendar year shall be credited pursuant to subsection 5 hereof upon the tax due from such nonresident for the same calendar year. In case a taxable year other than the calendar year is authorized the amount so withheld and paid for the calendar year shall be so credited upon the income tax due for the nonresident's first taxable year ending after the end of such calendar year.

5. In addition to all other income subject to the tax herein imposed, each nonresident shall report in his return all income a portion of which is required to be withheld pursuant to this section, including the portion so withheld. Any amount of the income withheld and paid to the commission by any and all withholding agents shall be credited against the total amount of income tax required to be paid by such nonresident for such year as is provided in subsection 4 hereof. If the amount so withheld and paid to the commission is in excess of the amount of income tax due by such nonresident for such year, the excess shall be paid to the nonresident taxpayer. If the nonresident taxpayer fails to file a return within the time required by law, the commission may consider as the net income of such nonresident the entire gross income of such nonresident, as shown by the returns of all withholding agents, and may assess the tax accordingly pursuant to subsection 2 of section 6943.057.

6. All of the provisions of section 6943.053, section 6943.054, section 6943.055 and sections 6943.057 to 6943.063, inclusive, shall apply to returns and payments by withholding agents and to determination and collection of amounts required to be withheld by withholding agents, and to penalties therefor, as well as to the "taxes" to which such sections expressly relate. [47GA, ch 184,§5; 48GA, ch 177,§3.]

Referred to in §§6943.040, 6943.049, 6943.070

6943.049 Bonds and securities.

1. Any nonresident whose income is subject to the provisions of section 6943.048 may file with the commission a bond issued by a surety company authorized to transact business in this state and approved by the insurance commissioner as to solvency and responsibility, in the amount hereinafter provided, conditioned upon the payment of any tax, interest, and/or penalties which may become due for a named taxable year from such nonresident under the provisions of this division. Such bond shall be made payable to the state of Iowa, and shall be for a term expiring four years after the termination of the taxable year for which it is given. In any action on said bond a certificate signed by the chairman of the commission certifying that a certain amount of taxes, interest, and/or penalties are due and owing by the principal for the taxable year fixed in the bond shall be prima facie evidence that such amount is due, and the burden of proof shall be upon the principal and/or surety to prove that such amount is not due. The attorney general shall, upon direction of the commission, bring and prosecute actions on said bond in the name of the state of Iowa. The venue for all such actions shall be in Polk county, Iowa.

2. In lieu of such bond, the nonresident may deposit with the commission securities approved by the commission, in the amount hereinafter provided, under a deposit agreement in such form as the commission may prescribe, which agreement shall make such securities collateral security for the payment of any tax, interest and/or penalties which may become due from such nonresident under the provisions of this division and shall authorize the sale of such securities by the commission at public or private sale without notice to the depositor thereof, if it becomes

necessary to do so in order to recover any tax and/or penalties due.

3. The amount of such bond or the value of such securities shall not be less than the total amount which would be required by subsection 1 of section 6943.048 to be withheld from the income for which certificates are sought pursuant to subsection 4 hereof.

4. Any nonresident who has so filed with the commission such bond or securities may, upon making application in such form and containing such information as the commission shall prescribe, obtain a certificate from the commission directed to a named withholding agent authorizing such withholding agent during a specified period to pay to such nonresident without withholding any percentage thereof, any sums which may be due such nonresident not in excess of the amount fixed in such certificate. The commission shall not issue any such certificate unless the amount of the bond and/or the value of the securities deposited with the commission is not less than the total amount which would be required by subsection 1 of section 6943.048 to be withheld from the aggregate income fixed in such certificate and all certificates theretofore issued. [47GA, ch 184,§5; 48GA, ch 177,§3.]

Referred to in §§6943.040, 6943.048, 6943.070

6943.050 Credit for tax payable in state of residence. Whenever a nonresident taxable under the provisions of this division has become liable to pay an income tax to the state where he resides upon his net income for the taxable year derived from sources within this state and subject to taxation under this division, the commission shall credit the amount of income tax payable by him under this division with such proportion of the tax so payable by him to the state wherein he resides (before deducting any credit therefrom for the income tax payable to this state) as his income subject to taxation under this division bears to his entire income upon which the tax so payable to such other state was imposed; provided that such credit shall be allowed only if the laws of said state (1) grant a substantially similar credit to residents of this state subject to income tax under such laws or (2) impose a tax upon the personal income of its residents derived from sources in this state and exempt from taxation the personal incomes of residents of this state. No credit shall be allowed against the amount of the tax on any income taxable under this division which is exempt from taxation under the laws of such other state. [47GA, ch 184,§5; 48GA, ch 177,§3.]

Referred to in §§6943.040, 6943.070

6943.051 Scope of nonresidents tax. The tax herein imposed upon certain income of nonresidents shall apply to all such income actually received by such nonresident on or after January 1, 1937, regardless of when such income was earned. If the nonresident is reporting on the accrual basis it shall apply to all such income which first became available to the nonresident so that he might demand payment thereof on or after January 1, 1937, regardless of when such income was earned. The duty to withhold herein imposed upon withholding agents shall apply only to amounts paid after June 30, 1937, but all amounts paid between January 1, 1937, and the expiration of thirty days from the effective date* of this act [47GA, ch 184] shall be included in calculating the fifteen hundred dollars or seventy-five hundred dollars, as the case may be, which must be paid before the duty to withhold arises. [47GA, ch 184,§8.]

Referred to in §§6943.040, 6943.070
*Effective date, May 28, 1937
Constitutionality, 47GA, ch 184, §9

6943.052 Basis of returns.

1. Taxpayers, who customarily determine their income on a basis other than that of actual cash receipts and disbursements, may, with the approval of the commission, return their net income under this division upon a similar basis. Taxpayers who customarily determine their income on the basis of an established fiscal year instead of on that of the calendar year, may, with the approval of the commission, and subject to such rules and regulations as it may establish, return their net income under this division on the basis of such fiscal year, in lieu of that of the calendar year.

2. A taxpayer may, with the approval of the state commission, and under such regulations as it may prescribe, change his income year from the fiscal year to the calendar year or otherwise, in which case his net income shall be computed upon the basis of such new tax year.

3. An individual carrying on business in partnership shall be liable for income tax only in his individual capacity and shall include in his gross income his share of the net income of the partnership during the income year.

4. Every individual, taxable under this division, who is a beneficiary of an estate or trust, shall include in his gross income the distributive share of the net income of the estate or trust, received by him or distributable to him during the income year. Unless otherwise provided in the law, the will, the deed or other instrument creating the estate, trust or fiduciary relation, the net income shall be deemed to be distributed or distributable to the beneficiaries (including the fiduciary as a beneficiary, in the case of income accumulated for future distribution) ratably, in proportion to their respective interests. [C35,§6943-f16; 48GA, ch 176,§6.]

Referred to in §§6943.040, 6943.070

6943.053 Form and time of return. Returns shall be in such form as the commission may, from time to time, prescribe, and shall be filed with the commission within ninety days after the expiration of the tax year. In case of sickness, absence or other disability, or whenever, in its judgment, good cause exists, the commission may allow further time for filing returns. The return shall be made under oath. The commission shall cause to be prepared blank forms for said returns and shall cause them to be distributed throughout the state and to be furnished upon application, but failure to receive or secure the form shall not relieve the taxpayer from the obligations of making any return herein required. [C35,§6943-f17; 48GA, ch 176,§7.]

Referred to in §§6943.040, 6943.048, 6943.070

6943.054 Supplementary returns. If the commission shall be of the opinion that any taxpayer required under this division to file a return has failed to file such a return or to include in a return filed, either intentionally or through error, items of taxable income, it may require from such taxpayer a return or supplementary return, under oath, in such form as it shall prescribe, of all the items of income which the taxpayer received during the year for which the return is made, whether or not taxable under the provisions of this division. If from a supplementary return, or otherwise, the commission finds that any items of income, taxable under this division, have been omitted from the original return, it may require the items so omitted to be added to the original return. Such supplementary return and the correction of the original return shall not relieve the taxpayer from any of the penalties to which he may be liable under any provisions of this division, whether or not the commission required a return or a supplementary return under this section. [C35,§6943-f18; 48GA, ch 176,§8.]

Referred to in §§6943.040, 6943.048, 6943.070

6943.055 Return by administrator. The return by an individual, who, while living, was subject to income tax in the state during the tax year, and who has died before making the return, shall be made in his name and behalf by the administrator or executor of the estate and the tax shall be levied upon and collected from his estate. [C35,§6943-f19.]

Referred to in §§6943.040, 6943.048

6943.056 Installment payments—interest.

1. The tax may be paid in two installments, each consisting of one-half of the total amount of the tax. The first installment shall be remitted with the return and the second installment shall be paid on or before six months after the date fixed for filing the return; provided, however, that in case the total amount of the tax shall be ten dollars or less, then, and in that case, the whole amount of the tax shall be paid at the time of filing the return.

2. When, at the request of the taxpayer, the time for filing the return is extended, interest at the rate of six percent per annum on one-half of the total tax, from the time when the return was originally required to be filed to the time of payment, shall be added and paid. [C35, §6943-f20.]

Referred to in §6943.071

6943.057 Computation of tax, interest and penalties.

1. As soon as practicable and in any event within two years after the return is filed the commission shall examine it and determine the correct amount of tax, and the amount so determined by the commission shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the excess, together with interest and penalty as hereinafter provided shall be paid by the taxpayer within ten days after the commission shall have given notice thereof to the taxpayer by registered mail.

2. If the commission discovers from the examination of the return or otherwise that the income of the taxpayer, or any portion thereof, has not been listed in the return, or that no return was filed when one was due, it may at any time within five years after the time when such return was due, determine the correct amount of the tax together with interest and penalty as hereinafter provided. The amount thereof shall be paid within ten days after the commission shall have given notice thereof to the taxpayer by registered mail.

3. In addition to the tax or additional tax as determined by the commission under the provisions of subsections 1 and 2 of this section, the taxpayer shall pay interest on such tax or additional tax so determined at the rate of six percent per annum, computed from the date the return was required by law to be filed; provided that in case the return was not filed within the time required by law, or in case the failure to report any income was due to an attempt to avoid and evade the tax, rather than a mistake in interpreting or applying the law, there shall be added to and made a part of such tax or additional tax, an additional amount by way of penalty, equal to five percent of such tax and additional tax, but in no case less than one dollar, and interest upon the entire amount shall be paid at the rate of one percent per month for each month, or fraction of a month, the tax remains unpaid, instead of the interest hereinbefore provided.*

*Subsection 3 in amended form applicable only to returns filed on or after April 1, 1939; see 48GA, ch 179, §2

4. If the amount of the tax as determined by the commission shall be less than the amount theretofore paid, the excess shall be refunded with interest after sixty days from the date of payment at six percent per annum under the provisions of such regulations as may be prescribed by the commission.

5. All payments received must be credited first, to the penalty and interest accrued, and then to the tax due.

6. The commission shall have power, upon making a record of its reasons therefor, to waive or reduce any of the penalties and/or interest provided for herein.

7. Any person who, with fraudulent intent, refuses to pay any tax or to make, render, sign or verify any return, or to supply any information within the time required by or under the provisions of this division, shall be liable to a penalty of not more than one thousand dollars to be recovered by the attorney general in the name of the state by action in the district court. The commission shall have the power to compromise the penalty imposed by this subsection. Such penalties shall be in addition to all other penalties in this division provided.

8. Any person required to make, render, sign or verify any return or supplemental return, who makes any false or fraudulent return, with intent to defeat or evade the assessment required by law to be made, shall be guilty of a felony and shall upon conviction, for each such

offense, be fined not more than five thousand dollars and be imprisoned not exceeding one year, or be subject to both fine and imprisonment, in the discretion of the court.

9. The certificate of the commission to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required under the provisions of this division shall be prima facie evidence thereof. [C35,§6943-f21; 48GA, ch 175,§20; ch 176,§9; ch 179,§1.]

Referred to in §§6943.048, 6943.071

6943.058 Lien of tax—collection—action authorized. Whenever any taxpayer liable to pay a tax and/or penalty imposed refuses or neglects to pay the same, the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the state upon all property and rights to property, whether real or personal, belonging to said taxpayer.

The lien aforesaid shall attach at the time the tax becomes due and payable and shall continue until the liability for such amount is satisfied.

In order to preserve the aforesaid lien against subsequent mortgagees, purchasers or judgment creditors, for value and without notice of the lien, on any property situated in a county, the commission shall file with the recorder of the county, in which said property is located, a notice of said lien.

The county recorder of each county shall prepare and keep in his office a book to be known as "index of income tax liens", so ruled as to show in appropriate columns the following data, under the names of taxpayers, arranged alphabetically:

1. The name of the taxpayer.
2. The name "State of Iowa" as claimant.
3. Time notice of lien was received.
4. Date of notice.
5. Amount of lien then due.
6. When satisfied.

The recorder shall indorse on each notice of lien the day, hour, and minute when received and preserve the same, and shall forthwith index said notice in said index book and shall forthwith record said lien in the manner provided for recording real estate mortgages, and the said lien shall be effective from the time of the indexing thereof.

The commission shall pay a recording fee as provided in section 5177, for the recording of such lien, or for the satisfaction thereof.

Upon the payment of a tax as to which the commission has filed notice with a county recorder, the commission shall forthwith file with said recorder a satisfaction of said tax and the recorder shall enter said satisfaction on the notice on file in his office and indicate said fact on the index aforesaid.

The commission shall, substantially as provided in sections 7189 and 7189.1, proceed to collect all taxes and/or penalties as soon as practicable after the same become delinquent, except that no property of the taxpayer shall be exempt from the payment of said tax.

The attorney general shall, upon the request of the commission, bring an action at law or in equity, as the facts may justify, without bond, to enforce payment of any taxes and/or penalties, and in such action he shall have the assistance of the county attorney of the county in which the action is pending.

It is expressly provided that the foregoing remedies of the state shall be cumulative and that no action taken by the commission or attorney general shall be construed to be an election on the part of the state or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy provided by law. [C35, §6943-f22; 48GA, ch 176,§10.]

Referred to in §§6943.048, 6943.071, 6943.087
Garnishment proceedings for collection of tax, §§11679.1–11679.3

6943.059 Final report of fiduciary—conditions.

1. No final account of a fiduciary shall be allowed by any court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this division upon said fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit or otherwise. The certificate of the commission and the receipt for the amount of the tax therein certified shall be conclusive as to the payment of the tax to the extent of said certificate.

2. For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the commission may, on behalf of the state, agree upon the amount of taxes at any time due or to become due from such fiduciaries under the provisions of this division, and payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates. [C35,§6943-f23; 48GA, ch 176, §11.]

Referred to in §§6943.048, 6943.071
Fiduciaries' reports, §§12071, 12780
Similar provisions, §§7363, 12781.1

6943.060 Revision of tax. A taxpayer may appeal to the commission for revision of the tax, interest and/or penalties assessed against him at any time within ninety days from the date of the notice of the assessment of such tax, additional tax, interest and/or penalties. The commission shall grant a hearing thereon and if, upon such hearing, it shall determine that the tax, interest and/or penalties are excessive or incorrect, it shall revise the same according to the law and the facts and adjust the computation of the tax, interest and/or penalties accordingly. The commission shall notify the taxpayer by registered mail of its findings and shall refund to the taxpayer the amount, if any, paid in excess of the tax, interest and/or penalties found by it to be due with interest after sixty days from the date of payment by the taxpayer at six percent per annum. [C35,§6943-f24; 48GA, ch 176,§12.]

Referred to in §§6943.048, 6943.061, 6943.073

6943.061 Appeals.

1. An appeal may be taken by the taxpayer to the district court of the county in which he resides, or in which his principal place of business is located, or in the case of a nonresident not maintaining a place of business in this state either in any county in which the income

involved was earned or derived or in Polk county, within sixty days after he shall have received notice from the commission of its determination as provided for in section 6943.060.

2. The appeal shall be taken by a written notice to the chairman of the commission and served as an original notice. When said notice is so served it shall, with the return thereon, be filed in the office of the clerk of said district court, and docketed as other cases, with the taxpayer as plaintiff and the commission as defendant. The plaintiff shall file with such clerk a bond for the use of the defendant, with sureties approved by such clerk, in penalty at least double the amount of tax appealed from, and in no case shall the bond be less than fifty dollars, conditioned that the plaintiff shall perform the orders of the court.

3. The court shall hear the appeal in equity and determine anew all questions submitted to it on appeal from the determination of the commission. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the commission who shall then correct the assessment in accordance with said decree. An appeal may be taken by the taxpayer or the commission to the supreme court of this state in the same manner that appeals are taken in suits in equity, irrespective of the amount involved. [C35, §6943-f25; 47GA, ch 184,§7; 48GA, ch 176,§13.]

Referred to in §§1556.24, 6943.048, 6943.073

6943.062 Jeopardy assessments. If the commission believes that the assessment or collection of taxes will be jeopardized by delay, the commission may immediately make an assessment of the estimated amount of tax due, together with all interest, additional amounts or penalties, as provided by law, and demand payment thereof from the taxpayer. If such payment is not made, a distress warrant may be issued or a lien filed against such taxpayer immediately.

The commission shall be permitted to accept a bond from the taxpayer to satisfy collection until the amount of tax legally due shall be determined. Such bond to be in an amount deemed necessary, but not more than double the amount of the tax involved, and with securities satisfactory to the commission. [C35,§6943-f26; 48GA, ch 176,§14.]

Referred to in §6943.048

6943.063 Statute applicable to personal tax. All the provisions of subsection 3 of section 6943.068 shall be applicable to persons taxable under this division. [C35,§6943-f27.]

Referred to in §6943.048

DIVISION III. BUSINESS TAX ON CORPORATIONS

6943.064 Definitions. For the purpose of this division and unless otherwise required by the context:

1. The word "corporation" includes joint stock companies, limited partnerships, and associations organized for pecuniary profit.

2. The words "domestic corporation" mean any corporation organized under the laws of this state.

3. The words "foreign corporation" mean any corporation other than a domestic corporation.

The words, terms, and phrases defined in subsections 1 and 3 to 11, section 6943.036, division II, when used in this division, shall have the meanings ascribed to them in said section except where the context clearly indicates a different meaning. [C35,§6943-f28.]

6943.065 Corporate tax imposed. A tax is hereby imposed upon each corporation organized under the laws of this state, and upon every foreign corporation doing business in this state, annually in an amount equivalent to two percent of the net income as herein defined, received by such corporation during the income year.

1. If the trade or business of the corporation is carried on entirely within the state, the tax shall be imposed on the entire net income, but if such trade or business is carried on partly within and partly without the state, the tax shall be imposed only on the portion of the net income reasonably attributable to the trade or business within the state, said net income attributable to the state to be determined as follows:

a. Interest, dividends, rents and royalties (less related expenses) received in connection with business in the state, shall be allocated to the state, and where received in connection with business outside the state, shall be allocated outside of the state.

b. Net income of the above class having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows:

Where income is derived from business other than the manufacture or sale of tangible personal property, such income shall be specifically allocated or equitably apportioned within and without the state under rules and regulations of the commission.

Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales.

The gross sales of the corporation within the state shall be taken to be the gross sales from goods sold and delivered within the state, excluding deliveries for transportation out of the state.

For the purpose of this section, the word "sale" shall include exchange, and the word "manufacture" shall include the extraction and recovery of natural resources and all processes of fabricating and curing. The words "tangible personal property" shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares, and merchandise, and shall not be taken to mean money deposits in banks, shares of stock, bonds, notes, credits, or evidence of an interest in property and evidences of debt.

2. If any taxpayer believes that the method of allocation and apportionment hereinbefore pre-

scribed, as administered by the commission and applied to his business, has operated or will so operate as to subject him to taxation on a greater portion of his net income than is reasonably attributable to business or sources within the state, he shall be entitled to file with the commission a statement of his objections and of such alternative method of allocation and apportionment as he believes to be proper under the circumstances with such detail and proof and within such time as the commission may reasonably prescribe; and if the commission shall conclude that the method of allocation and apportionment theretofore employed is in fact inapplicable and inequitable, it shall redetermine the taxable income by such other method of allocation and apportionment as seems best calculated to assign to the state for taxation the portion of the income reasonably attributable to business and sources within the state, not exceeding, however, the amount which would be arrived at by application of the statutory rules for apportionment. [C35,§6943-f29; 48GA, ch 176,§15.]

Referred to in §6943.069

6943.066 Exempted corporations and organizations. The following organizations and corporations shall be exempt from taxation under this division:

1. All state, national, private, cooperative and savings banks, credit unions, title insurance and trust companies, building and loan associations, corporations operating under the provisions of chapter 392, insurance companies and/or insurance associations, reciprocal or inter-insurance exchanges, fraternal beneficiary associations, now or hereafter organized or incorporated by or under the laws of this state or lawfully operating in the state.

2. Cemetery corporations, organizations and associations and corporations organized for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

3. Business leagues, chambers of commerce, labor unions and auxiliary organizations, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual.

4. Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare.

5. Clubs, organizations or associations organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member.

6. Farmers associations and fruit growers associations, or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expense, on the basis of the quantity of produce furnished by them. [C35, §6943-f30.]

6943.067 Statutes applicable to computation. All the provisions of sections 6943.039 to 6943.043, inclusive, of division II, insofar as the same are applicable, shall apply in computing the amount of net income of a corporation taxable under this division. [C35,§6943-f31.]

6943.068 Returns.

1. Every corporation shall make a return and the same shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. Before a corporation shall be dissolved and its assets distributed it shall make a return for any settlement of the tax for any income earned in the income year up to its final date of dissolution.

2. When any corporation, liable to taxation under this division, conducts its business in such a manner as either directly or indirectly to benefit the members or stockholders thereof or any person interested in such business by selling its products or the goods or commodities in which it deals at less than the fair price which might be obtained therefor, or where a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products, goods or commodities of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income for either of said corporations, or where a corporation, owning directly or indirectly a substantial portion of the stock of another corporation, acquires and disposes of the products, goods or commodities, of the corporation of which it so owns a substantial portion of the stock, in such a manner as to create a loss or improper net income for either of said corporations, the commission may determine the amount of taxable income of either or any of such corporations for the calendar or fiscal year, having due regard to the reasonable profits which, but for such arrangement or understanding, might or could have been obtained, by the corporation or corporations liable to taxation under this division, from dealing in such products, goods or commodities.

3. Where the state commission has reason to believe that any person or corporation so conducts his trade or business as either directly or indirectly to distort his true net income and the net income properly attributable to the state, whether by the arbitrary shifting of income, through price fixing, charges for services, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, it may require such facts as it deems necessary for the proper computation of the entire net income and the net income properly attributable to the state, and shall determine the same, and in the determination thereof the commission shall have regard to the fair profits which would normally arise from the conduct of the trade or business. [C35, §6943-f32; 48GA, ch 176,§16.]

Referred to in §6943.063

6943.069 Consolidated returns.

1. Any corporation capable of exercising directly or indirectly substantially the entire control of the business of another corporation doing business in the United States either by ownership or control of substantially the entire capital stock of such other corporation, or otherwise, may, under regulations to be prescribed by the commission, be permitted, and upon demand of the commission shall be required, to make a consolidated return, showing the consolidated net income of all of such corporations, and such other information as the commission may require.

The commission shall compute, determine and assess the tax upon the combined net income shown by such consolidated return and as apportioned and allocated according to section 6943.065; provided that the term "taxable income" as used in this chapter shall not include income represented by dividends received by any one of such corporations from another when the income of the dividend paying corporation is reported to and subject to taxation under this chapter by the state of Iowa.

2. The commission may require the filing of a consolidated return where substantially the entire control of two or more such corporations liable to taxation under this division is exercised by the same interests, or under such other circumstances as the effective administration of this chapter may require. Any corporation liable to report under this division and owned or controlled, either directly or indirectly, by another corporation, may be required to make a consolidated report showing the combined net income, such assets of the corporation as are required for the purpose of this division, and such other information as the commission may require.

3. In case it shall appear to the commission that any arrangement exists in such a manner as improperly to reflect the business done, the segregable assets or the entire net income earned from business done in the state, the commission is authorized and empowered, in such manner and under such rules and regulations as it may determine, equitably to adjust the tax.

4. When any corporation required to make a return under this division conducts the business, whether under arrangement or otherwise, in such manner as either directly or indirectly to benefit the members or stockholders of the corporation, or any of them, or any person or persons directly or indirectly interested in such business, by selling its products, or the goods or commodities in which it deals, at less than a fair price which might be obtained therefrom, or where such a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires or disposes of the products of the corporation so owning the substantial portion of its capital stock in such manner as to create a loss or improper net income, the commission may require such facts as it deems necessary for the proper computation provided by this division, and may for the purpose of the division determine the amount which shall be deemed to be the entire net income of the business of such corporation for the calendar or fiscal year, and in determining such entire net income the commission shall have regard to the fair profits which, but for any agreement, arrangement or understanding, might be or could have been obtained from dealing in such products, goods or commodities. [C35,§6943-f33; 48GA, ch 176, §17.]

6943.070 Statutes governing corporations. All the provisions of sections 6943.047 to 6943.054, inclusive, of division II, insofar as the same are applicable, shall apply to corporations taxable under this division. [C35,§6943-f34.]

6943.071 Statutes applicable to corporation tax. All the provisions of sections 6943.056 to 6943.059, inclusive, of division II, respecting payment and collection, shall apply in respect to the tax due and payable by a corporation taxable under this division. [C35,§6943-f35.]

6943.072 Cancellation of authority—penalty —offenses.

1. If a corporation required by the provisions of this division to file any report or return or to pay any tax or fee, either as a corporation organized under the laws of this state, or as a foreign corporation doing business in this state for profit, or owning and using a part or all of its capital or plant in this state, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this division for making such report or return, or for paying such tax or fee, the commission may in its discretion certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The secretary of state shall immediately notify by registered mail such domestic or foreign corporation of the action taken by him.

2. Any person or persons who shall exercise or attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are canceled, as provided in any section of this division, shall pay a penalty of not less than one hundred dollars nor more than one thousand dollars, to be recovered by an action to be brought by the commission.

3. Any corporation whose articles of incorporation or certificate of authority to do business in this state have been canceled by the secretary of state, as provided in subsection 1, or similar provisions of prior revenue acts, upon the filing, within ten years after such cancella-

tion, with the secretary of state, of a certificate from the commission that it has complied with all the requirements of this division and paid all state taxes, fees, or penalties due from it, and upon the payment to the secretary of state of an additional penalty of fifty dollars, shall be entitled again to exercise its rights, privileges, and franchises in this state; and the secretary of state shall cancel the entry made by him under the provisions of subsection 1 or similar provisions of prior revenue acts, and shall issue his certificate entitling such corporation to exercise its rights, privileges, and franchises.

4. Any person, or any officer or employee of any corporation, or member or employee of any partnership, who, with intent to evade any requirement of this division or any lawful requirement of the commission thereunder, shall fail to pay any tax or to make, sign, or verify any return or to supply any information required by or under the provisions of this division, shall be guilty of a misdemeanor* and punished accordingly. Any person, corporation, or any officer or employee of a corporation, or member or employee of any partnership, who, with intent to evade any of the requirements of this division, or any lawful requirements of the commission thereunder, shall make, render, sign, or verify any false or fraudulent return or statement, or shall supply any false or fraudulent information, or who shall aid, abet, direct, cause, or who shall procure anyone so to do, shall be liable to a penalty of not more than five thousand dollars, to be recovered by the attorney general, in the name of the state, by action in any court of competent jurisdiction, and shall also upon conviction be punished by imprisonment in the penitentiary for a term not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or both. Such penalty shall be in addition to all other penalties in this division provided. [C35,§6943-f36; 48GA, ch 176,§18.]

*Misdemeanor, punishment, §12894

6943.073 Corporations. All the provisions of sections 6943.060 and 6943.061 of division II, in respect to revision and appeal, shall be applicable to corporations taxable under this division. [C35,§6943-f37.]

DIVISION IV. RETAIL SALES TAX

6943.074 Definitions. The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

1. "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number.

2. "Sales" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

3. "Retail sale" or "sale at retail" means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property and the sale of gas, electricity, water, and communication service to retail consumers or users, but does not include commercial fertilizer or agricultural limestone, or electricity or steam when purchased and used in the processing of tangible personal property intended to be sold ultimately at retail. Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail, or shall be consumed as fuel in creating heat, power or steam for processing or for generating electric current.

4. "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

5. "Retailer" includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or the furnishing of gas, electricity, water and communication service, and tickets or admissions to places of amusement and athletic events as provided in this division; provided, however, that when in the opinion of the commission it is necessary for the efficient administration of this division to regard any salesmen, representatives, truckers, peddlers or canvassers, as agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain tangible personal property sold by them irrespective of whether or not they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the commission may so regard them, and may regard such dealers, distributors, supervisors, employers, or persons as retailers for the purposes of this division.

6. "Gross receipts" means the total amount of the sales of retailers, valued in money, whether received in money or otherwise, provided, however, that discounts for any purpose allowed and taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. Provided further, that on all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof that only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed by this division, as has actually been received in cash by the retailer during each quarterly period as defined herein.

7. "Relief agency" means the state, any county, city and county, city or district thereof, or any agency engaged in actual relief work.

8. The word "commission" means the state tax commission.

9. The word "taxpayer" includes any person within the meaning of subsection 1 hereof, who is subject to a tax imposed by this division, whether acting for himself or as a fiduciary. [C35,§6943-f38; 47GA, ch 196,§§1, 20; 48GA, ch 180,§1; ch 181,§1.]

Referred to in §6943.102

6943.075 Tax imposed. There is hereby imposed, beginning the first day of April, 1937, a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this division, when sold at retail in the state to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this division.

The tax herein levied shall be computed and collected as hereinafter provided. [C35,§6943-f39; 47GA, ch 195,§22; ch 196,§§2, 20; ch 197, §1.]

6943.076 Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

1. The gross receipts from sales of tangible personal property which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state.

2. The gross receipts from the sales, furnishing or service of transportation service.

3. The gross receipts from sales of tangible personal property used for the performance of a contract on public works executed prior to the ninth day of March, 1934.

4. The gross receipts from sales of tickets or admissions to state, county, district and local fairs, and the gross receipts from educational, religious, or charitable activities, where the entire net proceeds therefrom are expended for educational, religious or charitable purposes.

5. That part of the gross receipts from sales of tangible personal property accepted as part consideration in the sale in Iowa of other property which is not in excess of the original trade-in valuation, provided the seller keeps an accurate record of the identity of such tangible personal property so as to show the name and address of the persons from whom acquired and to whom sold and the exact trade-in and sale price. [C35,§6943-f40; 47GA, ch 196,§§3, 20; 48 GA, ch 182,§1.]

Referred to in §6943.104

6943.077 Credit on tax. A credit shall be allowed against the amount of tax computed to be due and payable on the gross receipts from sales at retail of any tangible personal property upon which the state now imposes a special tax, whether in the form of a license tax, stamp tax, or otherwise, to the extent of the amount of such tax imposed and paid. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided; provided, that if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected. [C35,§6943-f41; 47GA, ch 196,§§4, 20.]

6943.078 Credit to relief agency.

1. A relief agency may apply to the commission for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares, or merchandise used for free distribution to the poor and needy.

2. Such refunds may be obtained only in the following amounts and manner and only under the following conditions:

a. On forms furnished by the commission, and filed within such time as the commission shall provide by regulation, the relief agency shall report to the commission the total amount or amounts, valued in money, expended directly or indirectly for goods, wares, or merchandise used for free distribution to the poor and needy.

b. On these forms the relief agency shall separately list the persons making the sales to it or to its order, together with the dates of the sales, and the total amount so expended by the relief agency.

c. The relief agency must prove to the satisfaction of the commission that the person making the sales has included the amount thereof in the computation of the gross receipts of such person and that such person has paid the tax levied by this division, based upon such computation of gross receipts.

3. If the commission is satisfied that the foregoing conditions and requirements have been complied with, it shall refund the amount claimed by the relief agency. [C35,§6943-f42; 47GA, ch 196,§§5, 20; 48GA, ch 180,§3.]

6943.079 Adding of tax. Retailers shall, as far as practicable, add the tax imposed under this division, or the average equivalent thereof, to the sales price or charge and when added such tax shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

Agreements between competing retailers, or the adoption of appropriate rules and regulations by organizations or associations of retailers to provide uniform methods for adding such tax or the average equivalent thereof, and which do not involve price-fixing agreements otherwise unlawful, are expressly authorized and shall be held not in violation of chapter 434, or other antitrust laws of this state. It shall be the duty of the commission to cooperate with such retailers, organizations, or associations in formulating such agreements, rules and

regulations. The commission shall have the power to adopt and promulgate rules and regulations for adding such tax, or the average equivalent thereof, by providing different methods applying uniformly to retailers within the same general classification for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax. [C35, §6943-f43; 47GA, ch 196,§§6, 20; 48GA, ch 180, §4.]

6943.080 Unlawful acts. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this division will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded. [C35,§6943-f44; 47GA, ch 196, §§7, 20.]

Referred to in §6943.089

6943.081 Records required. It shall be the duty of every retailer required to make a report and pay any tax under this division, to preserve such records of the gross proceeds of sales as the commission may require and it shall be the duty of every retailer to preserve for a period of five years all invoices and other records of goods, wares, or merchandise purchased for resale; and all such books, invoices, and other records shall be open to examination at any time by the commission or any one of its duly authorized agents, and shall be made available within this state for such examination upon reasonable notice when the commission shall deem it advisable and shall so order. [C35,§6943-f45; 47GA, ch 196,§§8, 20; 48GA, ch 180,§5.]

6943.082 Return of gross receipts.

1. The retailer shall, on or before the twentieth day of the month following the close of the first quarterly period as defined in section 6943.083, and on or before the twentieth day of the month following each subsequent quarterly period of three months, make out a return for the preceding quarterly period in such form and manner as may be prescribed by the commission, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the commission may require to enable it correctly to compute and collect the tax herein levied; provided, however, that the commission may, upon request by any retailer and a proper showing of the necessity therefor, grant unto such retailer an extension of time not to exceed thirty days for making such return. If such extension is granted to any such retailer, the time in which he is required to make payment as provided in section 6943.083 shall be extended for the same period.

2. The commission, if it deems it necessary or advisable in order to insure the payment of the tax imposed by this division, may require returns and payment of the tax to be made for other than quarterly periods, the provisions of section 6943.083 or elsewhere to the contrary notwithstanding.

3. Returns shall be signed by the retailer or his duly authorized agent, and must be duly certified by him to be correct. [C35,§6943-f46; 47GA, ch 196,§§9, 20; 48GA, ch 180,§6.]

6943.083 Payment of tax—bond.

1. The tax levied hereunder shall be due and payable in quarterly installments on or before the twentieth day of the month next succeeding each quarterly period, the first of such quarterly periods being the period commencing with April 1, 1937, and ending on the thirtieth day of June, 1937.

2. Every retailer, at the time of making the return required hereunder, shall compute and pay to the commission the tax due for the preceding period.

3. The commission may, when in its judgment it is necessary and advisable to do so in order to secure the collection of the tax levied under this division, require any person subject to such tax to file with it a bond, issued by a surety company authorized to transact business in this state and approved by the insurance commissioner as to solvency and responsibility, in such amount as the commission may fix, to secure the payment of any tax and/or penalties due or which may become due from such person. In lieu of such bond, securities approved by the commission, in such amount as it may prescribe, may be deposited with it, which securities shall be kept in the custody of the commission and may be sold by it at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon any such sale, the surplus, if any, above the amounts due under this division shall be returned to the person who deposited the securities.

4. The tax by this division imposed upon those sales of motor vehicle fuel which are subject to tax and refund under chapter 251.3 shall be collected by the state treasurer by way of deduction from refunds otherwise allowable under said chapter. The amount of such deductions he shall transfer from the motor vehicle fuel fund to the special tax fund. [C35,§6943-f47; 47GA, ch 196, §§10, 20; 48GA, ch 180,§7.]

Referred to in §6943.082

6943.084 Permits—applications for.

1. Sixty days after the effective date* of this division, it shall be unlawful for any person to engage in or transact business as a retailer within this state, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a retailer within this state shall file with the commission an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the commission and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the commission may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive

officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

2. At the time of making such application, the applicant shall pay to the commission a permit fee of fifty cents for each permit, and the applicant must have a permit for each place of business.

3. Upon the payment of the permit fee or fees herein required, the commission shall grant and issue to each applicant a permit for each place of business within the state. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued.

4. Permits issued under the provisions of this division shall be valid and effective without further payment of fees until revoked by the commission.

5. Whenever the holder of a permit fails to comply with any of the provisions of this division or any orders, rules or regulations of the commission prescribed and adopted under this division, the commission upon hearing after giving ten days notice of the time and place of the hearing to show cause why his permit should not be revoked, may revoke the permit. The commission shall also have the power to restore licenses after such revocation.

6. The commission shall charge a fee of one dollar for the issuance of a permit to a retailer whose permit has been previously revoked. [C35, §6943-f48; 47GA, ch 196,§§11, 20; 48GA, ch 180, §8.]

Referred to in §§6943.089, 6943.122
*Effective date, April 1, 1937
Extension of existing permits, 47GA, ch 196, §11, subsection 7

6943.085 Failure to file return—incorrect return. If a return required by this division is not filed, or if a return when filed is incorrect or insufficient and the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the commission, such commission shall determine the amount of tax due from such information as it may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The commission shall give notice of such determination to the person liable for the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply to the commission for a hearing or unless the commission of its own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the commission shall give notice of its decision to the person liable for the tax. [C35,§6943-f49; 47GA, ch 196,§§12, 20; 48GA, ch 180,§9.]

Referred to in §§6943.086, 6943.116

6943.086 Appeals.

1. An appeal may be taken by the taxpayer to the district court of the county in which he resides, or in which his principal place of business is located, within sixty days after he shall have received notice from the commission of its determination as provided for in section 6943.085.

2. The appeal shall be taken by a written notice to the chairman of the commission and served as an original notice. When said notice is so served it shall, with the return thereon, be filed in the office of the clerk of said district court, and docketed as other cases, with the taxpayer as plaintiff and the commission as defendant. The plaintiff shall file with such clerk a bond for the use of the defendant, with sureties approved by such clerk, in penalty at least double the amount of tax appealed from, and in no case shall the bond be less than fifty dollars, conditioned that the plaintiff shall perform the orders of the court.

3. The court shall hear the appeal in equity and determine anew all questions submitted to it on appeal from the determination of the commission. In such appeal, the burden of proof shall be upon the taxpayer. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the commission who shall then correct the assessment in accordance with said decree. An appeal may be taken by the taxpayer or the commission to the supreme court of this state in the same manner that appeals are taken in suits in equity, irrespective of the amount involved. [C35,§6943-f50; 47GA, ch 196,§§13, 20; 48GA, ch 180,§§10, 14.]

Referred to in §6943.116
Service of original notice, §11060

6943.087 Statute applicable to sales tax. All the provisions of section 6943.058 shall apply in respect to the taxes and/or penalties imposed by this division, excepting that, as applied to any tax imposed by this division, the lien therein provided shall be prior and paramount over all subsequent liens upon any personal property within this state, or right to such personal property, belonging to the taxpayer without the necessity of recording as therein provided. The requirements for recording shall, as applied to the tax imposed by this division, apply only to the liens upon real property. When requested to do so by any person from whom a taxpayer is seeking credit, or with whom the taxpayer is negotiating the sale of any personal property, or by any other person having a legitimate interest in such information, the commission shall, upon being satisfied that such a situation exists, inform such person as to the amount of unpaid taxes due by such taxpayer under the provisions of this division. The giving of such information under such circumstances shall not be deemed a violation of section 6943.096* as applied to this division. [C35,§6943-f51; 47GA, ch 196, §§14, 20; 48GA, ch 180,§11.]

Referred to in §6943.117
*In enrolled act as 6443-f59, which did not appear in code; 6943-f59 (6943.096) correct number

6943.088 Service of notices.

1. Any notice, except notice of appeal, authorized or required under the provisions of this division may be given by mailing the same to the person for whom it is intended by registered mail,

addressed to such person at the address given in the last return filed by him pursuant to the provisions of this division, or if no return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this division by the giving of notice shall commence to run from the date of registration and posting of such notice.

2. The provisions of the code relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding* or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this division. [C35,§6943-f52; 47GA, ch 196,§§15, 20.]

Referred to in §§6943.116, 6943.117
*"preceeding" in enrolled act

6943.089 Penalties—offenses.

1. Any person failing to file a return or corrected return or to pay any tax within the time required by this division, shall be subject to a penalty of five percent of the amount of tax due, plus one percent of such tax for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax became due; but the commission, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the commission and disposed of in the same manner as other receipts under this division. Unpaid penalties may be enforced in the same manner as the tax imposed by this division.

2. Any person who shall sell tangible personal property, tickets or admissions to places of amusement and athletic events, or gas, water, electricity and communication service at retail in this state after his license shall have been revoked, or without procuring a license within sixty days after the effective date of this division, as provided in section 6943.084, or who shall violate the provisions of section 6943.080, and the officers of any corporation who shall so act, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment, in the discretion of the court.

3. Any person required to make, render, sign, or certify any return or supplementary return, who makes any false or fraudulent return with intent to defeat or evade the assessment required by law to be made, shall be guilty of a felony and shall, for each such offense, be fined not less than five hundred dollars and not more than five thousand dollars, or be imprisoned not exceeding one year, or be subject to both such fine and imprisonment, in the discretion of the court.

4. The certificate of the commission to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this division, shall be prima facie evidence thereof. [C35,§6943-f53; 47GA, ch 196,§§16, 20; 48GA, ch 180,§12.]

6943.090 Statutes applicable. The commission and its employees shall administer the taxes imposed by this division in the same manner and subject to all of the provisions of, and all of the powers, duties, authority, and restrictions contained in sections 6943.091 to 6943.099, inclusive, or any amendments which may hereafter be made thereto, all of which sections are by this reference incorporated herein. [47GA, ch 196,§17; 48GA, ch 180,§13.]

Constitutionality, 47GA, ch 196, §19
Omnibus repeal, 47GA, ch 196, §20

DIVISION V. ADMINISTRATION

6943.091 Generally—bond—approval. The commission shall administer the taxes imposed by this chapter. Each member of said commission shall give a bond in an amount to be fixed by the governor, which has been issued by a surety company authorized to transact business in this state and approved by the insurance commissioner as to solvency and responsibility. The reasonable cost of said bond shall be paid by the state, out of the proceeds of the taxes collected under the provisions of this chapter. [C35,§6943-f54; 48GA, ch 176,§28.]

Referred to in §§6943.090, 6943.123

6943.092 Powers and duties.

1. The commission shall have the power and authority to prescribe all rules and regulations not inconsistent with the provisions of this chapter, necessary and advisable for its detailed administration and to effectuate its purposes.

2. The commission may, for administrative purposes, divide the state into districts, provided that in no case shall a county be divided in forming a district. [C35,§6943-f55; 48GA, ch 176,§29.]

Referred to in §§6943.090, 6943.123

6943.093 Funds. All fees, taxes, interest, and penalties imposed under this chapter must be paid to the commission in the form of remittances payable to the treasurer of the state, and said commission shall transmit each payment daily to the state treasurer to be deposited in the state treasury to the credit of a special tax fund, which fund is hereby created. [C35, §6943-f56; 48GA, ch176,§30.]

Referred to in §§6943.048, 6943.090, 6943.123

6943.094 General powers—hearings.

1. The commission, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of the taxable income and/or receipts of any taxpayer, shall have power: to examine or cause to be examined by any agent or representative designated by it, books, papers, records, or memoranda; to require by subpoena the attendance and testimony of witnesses; to issue and sign subpoenas; to administer oaths, to examine witnesses and receive evidence; to compel witnesses to produce for examination books, papers, records and documents relating to any matter which it shall have

the authority to investigate or determine.

2. Where the commission finds the taxpayer has made a fraudulent return, the costs of said hearing shall be taxed to the taxpayer. In all other cases the costs shall be paid by the state.

3. The fees and mileage to be paid witnesses and taxed as costs shall be the same as prescribed by law in proceedings in the district court of this state in civil cases. All costs shall be taxed in the manner provided by law in proceedings in civil cases. Where the costs are taxed to the taxpayer they shall be added to the taxes assessed against said taxpayer and shall be collected in the same manner. Costs taxed to the state shall be certified by the secretary of the commission to the state comptroller who shall issue warrant on the state treasurer for the amount of said costs, to be paid out of the proceeds of the taxes collected under this chapter.

4. In case of disobedience to a subpoena the commission may invoke the aid of any court of competent jurisdiction in requiring the attendance and testimony of witnesses and production of records, books, papers, and documents, and such court may issue an order requiring the person to appear before the commission and give evidence or produce records, books, papers, and documents, as the case may be, and any failure to obey such order of court may be punished by the court as a contempt thereof.

5. Testimony on hearings before the commission may be taken by a deposition as in civil cases, and any person may be compelled to appear and depose in the same manner as witnesses may be compelled to appear and testify as hereinbefore provided. [C35,§6943-f57; 48GA, ch 176,§31.]

Referred to in §§6943.090, 6943.123
Contempts, ch 536

6943.095 Assistants—salaries—expenses—bonds.

1. The commission may appoint and remove such agents, auditors, clerks, and employees as it may deem necessary, such persons to have such duties and powers as the commission may, from time to time, prescribe.

2. The salaries of all assistants, agents, and employees shall be fixed by the commission in a budget to be submitted to the comptroller and approved by the legislature.

3. All such agents and employees shall be allowed such reasonable and necessary traveling and other expenses as may be incurred in the performance of their duties.

4. The commission may require such of the officers, agents, and employees as it may designate to give bond for the faithful performance of the duties in such sum and with such sureties as it may determine and the state shall pay, out of the proceeds of the taxes collected under the provisions of this chapter, the premiums on such bonds.

5. The commission may utilize the office of treasurer of the various counties in order to administer this chapter and effectuate its purposes, and may appoint the treasurers of the various counties its agents to collect any or all of the taxes imposed by this chapter, provided, however, that no additional compensation shall be paid to said treasurer by reason thereof. [C35, §6943-f58; 48GA, ch 176,§32.]

Referred to in §§6943.090, 6943.123

6943.096 Information deemed confidential.

1. It shall be unlawful for the commission, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; provided, however, that the commission may authorize examination of such returns by other state officers, or, if a reciprocal arrangement exists, by tax officers of another state, or the federal government.

2. Any person violating the provisions of subsection 1 of this section shall be guilty of a misdemeanor and punishable by a fine not to exceed one thousand dollars. [C35,§6943-f59; 48GA, ch 176,§33.]

Referred to in §§6943.090, 6943.123

6943.097 Correction of errors. If it shall appear that, as a result of mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this chapter, then such amount shall be credited against any tax due, or to become due, under this chapter from the person who made the erroneous payment, or such amount shall be refunded to such person by the commission. [C35,§6943-f60; 48GA, ch 176,§34.]

Referred to in §§6943.090, 6943.123

6943.098 Certification of refund. Wherever in any division of this chapter a refund is authorized, the commission shall certify the amount of the refund and the name of the payee to the state comptroller. Upon certification from the commission, the state comptroller shall draw his warrant on the special tax fund in the amount specified payable to the named payee, and the state treasurer shall pay the same. [C35, §6943-f61; 48GA, ch 176,§35.]

Referred to in §§6943.090, 6943.123

6943.099 Statistics — publication of. The commission shall prepare and publish annually statistics reasonably available, with respect to the operation of this chapter, including amounts collected, classification of taxpayers, and such other facts as are deemed pertinent and valuable. [C35,§6943-f62; 48GA, ch 176,§36.]

Referred to in §§6943.090, 6943.123

DIVISION VI. ALLOCATION OF REVENUES

6943.100 Generally. All revenues arising under the operation of this chapter and carried by the treasurer of state in the special tax fund shall be apportioned as follows:

1. The commission shall set aside and cause to be paid into the old-age assistance fund, from

time to time as available, the first seven million dollars collected each year under the provisions of this chapter.

2. The balance of said fund shall be held by the treasurer of state and shall be designated as the homestead credit fund and shall be distributed by the treasurer of state on warrants drawn by the comptroller upon the direction of the commission under the provisions of chapter 329.6 and made payable to the county treasurers of the several counties of the state. [C35,§6943-f63; 47GA, ch 184,§10; ch 195,§§1, 3; 48GA, ch 140, §21; ch 176,§37; ch 187,§§1, 3.]

Referred to in §§6943.101, 6943.124, 6943.142

6943.101 Apportionment of revenue. All revenues arising under the operation of division IV and carried by the treasurer of state in the special tax fund shall be apportioned as provided for by section 6943.100 and as is further provided for by chapter 329.6, provided further, however, that if for any reason the revenues derived under the operation of division IV cannot be apportioned for homestead relief as provided for by chapter 329.6, then that portion of such revenues as is apportioned to homestead relief by said chapter shall be retained in such special tax fund and shall not be disbursed for any purpose without the further direction of the legislature. [47GA, ch 196,§21.]

Constitutionality, §6943-f66, code 1935; 45ExGA, ch 82, §64; 48GA, ch 178, §4

Omnibus repeal, §6943-f67, code 1935; 45ExGA, ch 82, §65

Ratio and manner of distribution, see chapter 329.6, which is a substitute for §6943-f64, code 1935

Section 6943-f65, code 1935, repealed by 48GA, ch 188, §1

CHAPTER 329.4

USE TAX

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6943.102 Definitions. The following words, terms and phrases when used in this chapter shall have the meanings ascribed to them in this section:

1. "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in "processing" within the meaning of this subsection shall mean and include (a) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail, (b) fuel which is consumed in creating power, heat or steam for processing or for generating electric current, (c) industrial materials and equipment, which are not readily obtainable in Iowa, and which are directly used in the actual fabricating, compounding, manufacturing or servicing of tangible personal property intended to be sold ultimately at retail.

2. "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

3. "Purchase price" means the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise; provided that cash discounts allowed and taken on sales shall not be included.

4. "Tangible personal property" means tangible goods, wares, and merchandise, and gas, electricity, and water when furnished or delivered to consumers or users within this state.

5. "Retailer" means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter; provided, however, that when in the opinion of the commission it is necessary for the efficient administration of this chapter to regard any salesmen, representatives, truckers, peddlers or canvassers as the agents of the dealers, distributors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the commission may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers for purposes of this chapter.

6. "Retailer maintaining a place of business in this state" or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to chapter 386.

7. "Motor vehicle" shall mean every motor vehicle, as is now or may hereafter be so defined by the motor vehicle law of this state, which is required to be registered under such motor vehicle law.

8. "Person", "commission", and "taxpayer" shall have the same meaning as defined in section 6943.074.

9. "Trailer" shall mean every trailer, as is now or may be hereafter so defined by the motor vehicle law of this state, which is required to be registered under such motor vehicle law. [47GA, ch 198,§1; 48GA, ch 175,§§1, 20.]

6943.103 Imposition of tax. An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date* of this chapter for use in this state, at the rate of two percent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided. [47GA, ch 198,§2; 48GA, ch 175,§2.]

*Effective date, April 16, 1937

6943.104 Exemptions. The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this chapter:

1. Tangible personal property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by division IV of chapter 329.3, and any amendments made or which may hereafter be made thereto. This exemption does not include new motor vehicles as defined herein.

2. Tangible personal property used (a) in interstate transportation or interstate commerce, or (b) for the performance of a building or construction contract executed prior to the effective date* of this chapter.

3. Tangible personal property upon which the state now imposes and collects a special tax, whether in the form of a license tax, stamp tax, or otherwise.

4. All articles of tangible personal property brought into the state of Iowa by a nonresident individual thereof for his or her use or enjoyment while within the state.

5. Tangible personal property not readily obtainable in Iowa and used in the operation of street railways.

6. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of section 6943.076. [47GA, ch 198,§3; 48GA, ch 182,§2.]

Referred to in §6943.109
*Effective date, April 16, 1937

6943.105 Evidence of use. For the purpose of the proper administration of this chapter and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state. [47GA, ch 198, §4.]

6943.106 How collected. The tax herein imposed shall be collected in the following manner:

1. The tax upon the use of all new motor vehicles and new trailers shall be collected by the county treasurer pursuant to the provisions of section 6943.107.

2. The tax upon the use of all tangible personal property other than that enumerated in subsection 1 hereof, which is sold by a retailer maintaining a place of business in this state, or by such other retailer as the commission shall authorize pursuant to section 6943.110, shall be collected by such retailer and remitted to the state commission, pursuant to the provisions of sections 6943.109 to 6943.113, inclusive.

3. The tax upon the use of all tangible personal property not paid pursuant to subsections 1 and 2 hereof shall be paid to the commission directly by any person using such property within this state, pursuant to the provisions of section 6943.114. [47GA, ch 198,§5; 48GA, ch 175,§3.]

6943.107 Motor vehicles. The tax hereby imposed upon the use of new motor vehicles and new trailers shall be paid by the owner thereof to the county treasurer from whom the original certificate of registration for such motor vehicle or trailer is obtained. No original certificate of registration for any new motor vehicle or new trailer shall be issued until said tax has been so paid. The county treasurer shall require every applicant for an original certificate of registration for any new motor vehicle or new trailer to supply such information as he or the commission may deem necessary as to the time of purchase, the purchase price, and other information relative to the purchase of said motor vehicle or trailer. On or before the tenth day of each month the county treasurer shall remit to the commission the amount of the taxes so collected during the preceding month, together with an itemized statement on forms furnished by the commission showing the name of each taxpayer, the make and purchase price of each motor vehicle or trailer, the amount of tax paid in each case, and such other information as the commission shall require. [47GA, ch 198,§6; 48GA, ch 175,§4.]

Referred to in §§6943.106, 6943.109

6943.108 Sales tax report—deduction. Motor vehicle or trailer dealers, in making their reports and returns to the commission for the purpose of paying the retail sales tax imposed by division IV of chapter 329.3, shall be permitted to deduct all gross receipts from retail sales of new motor vehicles and new trailers. Gross receipts from such new motor vehicle and new trailer sales are hereby expressly exempted from the tax imposed by said division IV, but, if required by the commission, such gross receipts shall be included in the returns made by motor vehicle or trailer dealers under said division IV, and proper deductions taken pursuant to this section. [47GA, ch 198,§7; 48GA, ch 175,§5.]

6943.109 Collection by retailer. Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section 6943.104 nor collectible under the provisions of section 6943.107, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the commission, if the commission shall, by regulation, require such receipt. Each such retailer shall list with the commission the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state. [47GA, ch 198,§8; 48GA, ch 175,§6.]

Referred to in §§6943.106, 6943.112, 6943.113, 6943.115

6943.110 Foreign retailers. The commission may, in its discretion, upon application authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this state, who, to the satisfaction of the commission furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax in such manner, and subject to such regulations and agreements as the commission shall prescribe. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this state, in the same manner and subject to the same requirements as a retailer maintaining a place of business within this state. Such authority and permit may be canceled when, at any time, the commission considers the security inadequate, or that such tax can more effectively be collected from the person using such property in this state. [47GA, ch 198,§9; 48GA, ch 175, §7.]

Referred to in §§6943.106, 6943.112, 6943.113, 6943.115, 6943.122

6943.111 Absorbing tax. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by this chapter will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded.. The commission shall have the power to adopt and promulgate rules and regulations for adding such tax, or the average equivalent thereof, by providing different methods applying uniformly to retailers within the same general classification for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax. Any person violating any of the provisions of this section within this state shall be guilty of a misdemeanor and subject to the penalties provided in section 6943.120. [47GA, ch 198, §10; 48GA, ch 175,§8.]

Referred to in §6943.106

6943.112 Tax as debt. The tax herein required to be collected by any retailer pursuant to sections 6943.109 or 6943.110, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state. [47GA, ch 198,§11.]

Referred to in §6943.106

6943.113 Payment to commission. Each retailer required or authorized, pursuant to sections 6943.109 or 6943.110, to collect the tax herein imposed, shall be required to pay to the commission the amount of such tax, on or before the twentieth day of the month next succeeding each quarterly period, the first such quarterly period being the period commencing on the first day of April, 1937, and ending on the thirtieth day of June, 1937. At such time, each such retailer shall file with the commission a return for the preceding quarterly period in such form as may be prescribed by the commission showing the sales price of any or all tangible personal property sold by the retailer during such preceding quarterly period, the use of which is subject to the tax imposed by this chapter, and such other information as the commission may deem necessary for the proper administration of this chapter. The return shall be accompanied by a remittance of the amount of such tax, for the period covered by the return, provided that where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended over a period longer than sixty days from the date of the sale thereof, the retailer may collect and remit each quarterly period that portion of the tax equal to two percent of that portion of the purchase price actually received during such quarterly period. The commission, if it deems it necessary in order to insure payment to the state of the amount of such tax, may in any or all cases require returns and payments of such amount to be made for other than quarterly periods. The commission may, upon request and a proper showing of the necessity therefor, grant an extension of time not to exceed thirty days for making any return and payment. Returns shall be signed by the retailer or his duly authorized agent, and must be certified by him to be correct. [47GA, ch 198, §12; 48GA, ch 175,§9.]

Referred to in §§6943.106, 6943.114

6943.114 Liability of user. Any person who uses any property upon which the tax herein imposed has not been paid, either to the county treasurer or to a retailer or direct to the commission as herein provided, shall be liable therefor, and shall on or before the twentieth day of the month next succeeding each quarterly period pay the tax herein imposed upon all such property used by him during the preceding quarterly period in such manner and accompanied by such returns as the commission shall prescribe. All of the provisions of section 6943.113 with reference to such returns and payments shall be ap-

plicable to the returns and payments herein required. [47GA, ch 198,§13; 48GA, ch 175,§10.]

Referred to in §6943.106

6943.115 Bond to secure payment. The commission may, when in its judgment it is necessary and advisable to do so in order to secure the collection of the tax levied under this chapter, authorize any person subject to such tax, and any retailer required or authorized to collect such tax pursuant to the provisions of sections 6943.109 and 6943.110, to file with it a bond, issued by a surety company authorized to transact business in this state and approved by the insurance commissioner as to solvency and responsibility, in such amount as the commission may fix, to secure the payment of any tax, amount, and/or penalties due or which may become due from such person. In lieu of such bond, securities approved by the commission, in such amount as it may prescribe, may be deposited with it, which securities shall be kept in the custody of the commission and may be sold by it at public or private sale, without notice to the depositor thereof, if it becomes necessary to do so in order to recover any tax and/or penalties due. Upon any such sale, the surplus, if any, above the amounts due under this chapter shall be returned to the person who deposited the securities. [47GA, ch 198,§14; 48GA, ch 175,§11.]

6943.116 Determination by commission. If any return required by this chapter is not filed, or if any return when filed is incorrect or insufficient, and the maker or person from whom it is due fails to file a corrected or sufficient return within twenty days after the same is required by notice from the commission, the commission shall have the same power to determine the amount due, as is vested in the commission by sections 6943.085, 6943.086, and 6943.088, subject to all of the provisions, and restrictions, and rights of appeal provided in said sections. [47GA, ch 198,§15; 48GA, ch 175,§12.]

6943.117 Lien of tax—penalties. All of the provisions of sections 6943.087 and 6943.088 shall apply in respect to the procedure, taxes, amounts required to be paid, and/or penalties imposed, as provided by this chapter. [47GA, ch 198,§16.]

6943.118 Failure to pay—penalties. Any person failing to file a return or corrected return or to pay any tax and/or amount required to be paid by this chapter within the time required by this chapter, shall be subject to a penalty of five percent of the amount due, plus one percent of such amount for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax or amount became due; but the commission, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the commission and disposed of in the same manner as other receipts under this chapter. Unpaid penalties may be enforced in the same manner as the tax imposed by this chapter. The certificate of the commission to the effect that a tax and/or amount required to be paid by this chapter has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this chapter, shall be prima facie evidence thereof. [47GA, ch 198,§17; 48GA, ch 175,§13.]

6943.119 Fraud. Any person required to make, render, sign, or certify any return or supplementary return, who makes any false or fraudulent return with intent to defeat or evade the tax, and/or amount required to be paid by this chapter, shall be guilty of a felony and shall, for each such offense, be fined not less than five hundred dollars and not more than five thousand dollars, or be imprisoned not exceeding one year, or be subject to both such fine and imprisonment, in the discretion of the court. [47GA, ch 198, §18.]

6943.120 Penalty. Any retailer or other person failing or refusing to furnish any return herein required to be made, or failing or refusing to furnish a supplemental return or other data required by the commission, shall be guilty of a misdemeanor and subject to a fine of not to exceed one hundred dollars for each such offense, or to imprisonment for not to exceed thirty days, or to both such fine and imprisonment, in the discretion of the court. [47GA, ch 198,§19; 48GA, ch 175,§14.]

Referred to in §6943.111

6943.121 Books—examination. Every retailer required or authorized to collect taxes imposed by this chapter and every person using in this state tangible personal property purchased on or after April 1, 1937, shall keep such records, receipts, invoices, and other pertinent papers as the commission shall require, in such form as the commission shall require. The commission or any of its duly authorized agents is hereby authorized to examine the books, papers, records and equipment of any person either selling tangible personal property or liable for the tax imposed by this chapter, and to investigate the character of the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount due under the provisions of this chapter. Any such books, papers, and records shall be made available within this state for such examination upon reasonable notice when the commission shall deem it advisable and shall so order. [47GA, ch 198, §20; 48GA, ch 175,§15.]

6943.122 Revoking permits. Whenever any retailer maintaining a place of business in this state, or authorized to collect the tax herein imposed pursuant to section 6943.110, fails to comply with any of the provisions of this chapter or any orders, rules, or regulations of the commission prescribed and adopted under this chapter, the commission may, upon notice and hearing as hereinafter provided, by order revoke the permit, if any, issued to such retailer under section 6943.084, or if such retailer is a corporation authorized to do business in this state under chapter 386, may certify to the secretary of state a copy

of an order finding that such retailer has failed to comply with certain specified provisions, orders, rules or regulations. The secretary of state shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this state, and shall issue a new permit only when such corporation shall have obtained from the commission an order finding that such corporation has complied with its obligations under this chapter. No order authorized in this section shall be made until the retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given ten days notice of the time, place, and purpose of such hearing. The commission shall have the power in its discretion to issue a new permit pursuant to section 6943.084 after such revocation. [47GA, ch 198,§21; 48GA, ch 175,§16.]

6943.123 Statutes applicable. The commission is hereby charged with the enforcement of the provisions of this chapter, and the commission and its employees shall administer this chapter and the taxes imposed by this chapter in the same manner and subject to all of the provisions of, and all of the powers, duties, authority, and restrictions contained in sections 6943.091 to 6943.099, inclusive, or any amendments which may hereafter be made thereto, all of which sections are by this reference incorporated herein. [47GA, ch 198,§22; 48GA, ch 175,§17.]

6943.124 Deposit of revenue — homestead credit fund. All revenues arising under the operation of this chapter shall be paid into the general fund of the state.

On March 1 and August 1 of each year the state tax commission shall certify to the state comptroller the amount in the homestead credit fund, the total amount that is then apportionable to the various counties for homestead credit and the shortage in the homestead credit fund, if any.

The state comptroller is hereby authorized and shall transfer to the homestead credit fund established by section 6943.100, the amount of the shortage in said homestead credit fund as certified by the state tax commission, from funds received in the general fund under the provisions of this chapter. [47GA, ch 198,§23; 48GA, ch 175,§§18, 20; ch 190,§1.]

6943.125 Taxation in another state. If any article of tangible personal property has already been subjected to a tax by any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed. If such tax imposed in such other state is two percent or more, then no tax shall be due on such articles. [47GA, ch 198,§26.]

Constitutionality, 47GA, ch 198, §27

CHAPTER 329.5

CHAIN STORE TAX

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6943.126 Title. This chapter shall be known as the "Chain Store Tax Act of 1935". [C35, §6943-g1.]

6943.127 Definitions. The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section except where the context clearly indicates a different meaning.

1. The word "commission" means the state tax commission.

2. "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit, and the plural as well as the singular thereof, and all firms however organized and whatever be the plan of operation.

3. "Sale" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

4. "Retail sale" or "sale at retail" means the sale to a consumer or to any person for any purpose, other than for resale, of tangible personal property including goods, wares and merchandise.

5. "Business" includes any merchandising activity engaged in by any person or caused to be engaged in by him with the object of gain, profit or advantage, either direct or indirect.

6. "Store" means any store or stores, or any mercantile or other establishment in which tangible goods, wares or merchandise of any kind are sold or kept for sale at retail.

7. "Conducting a business by a system of chain stores" when used in this chapter shall be construed to mean and include every person, as defined in this chapter, in the business of owning, operating or maintaining, directly or indirectly, under the same general management, supervision, control or ownership in this state, and/or in this state and any other state, two or more stores, where goods, wares, articles, commodities, or merchandise of any kind whatsoever are sold or offered for sale at retail and where the person operating such store or stores receives the retail profit from the commodities

sold therein. Two or more stores shall, for the purpose of this chapter, be treated as being under a single or common ownership, control, supervision or management, if directly or indirectly owned or controlled by a single person or any group of persons, or by a common interest in such stores, or if any part of the gross revenues, net revenues or profits from such store shall, directly or indirectly, be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit, of any single person or group of persons having a common interest therein. Not more than one of said stores need be located in this state, if one or more of said stores of said person is located in any other state. The fact that two or more retail stores are ostensibly owned and operated by different persons, shall not defeat the application of this chapter where such stores are under the same general management, supervision, or ownership. Lease and agency, and lease and ownership agreements or contracts, or operation under a common name shall, unless shown to the contrary, be deemed to constitute operation under the same general management, supervision, or ownership. Provided, however, that leased or licensed departments, located in a store under a contract obligating such departments to pay to the store a fixed rental or a percentage of the gross receipts, shall not be deemed to be owned, operated, supervised, or managed by the store in which such departments are located.

8. "Gross receipts" when used in this chapter shall be construed to mean and include the total amount of all sales at retail valued in money, whether received in money or otherwise, provided, however, that discounts for any purpose allowed or taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either by cash or in credit be included. Provided, however, that on sales at retail valued in money when such sales are made under a conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days, that only such portion of the sale amount thereof shall be accounted for, for the purpose of the imposition of the tax in this chapter as has actually been received in cash by the retailer during the taxable year as herein defined. Gross receipts as interpreted under this section shall not include any federal or state sales tax or any special taxes now or hereafter imposed by the state or federal government which special tax or taxes are added to or included in the retail selling price of any merchandise sold under this chapter. Gross receipts shall not include the consideration received by the vendor from the purchaser residing without this state unless the purchaser is present within this state at the time of such sale or purchase.

9. "Taxable year" means the year commencing on July 1 and ending on June 30 of each calendar year. [C35,§6943-g2; 48GA, ch 184,§1.]

6943.128 Exemptions. There are specifically exempted from the provisions of the chapter and from the computation of the amount of tax imposed by it the following:

1. Cooperative associations not organized for profit under the laws of this state in good faith and not for the purpose or with the intent of evading the tax hereby imposed.

2. Persons exclusively engaged in gardening and/or farming, selling in this state products of their own raising.

3. Persons selling at retail one or more of the following products: coal, ice, lumber, grain, feed, building materials (not including builders and general hardware, glass, and paints) if the total retail sales of any such person or persons of such products within the state shall, during such taxable year, exceed ninety-five percent of the total retail sales of all sources within the state of any such person or persons.

4. Liquor stores, established and operated by the state liquor control commission.

5. Hotels or rooming houses, including dining rooms or cafes operated in connection therewith and by the same management. [C35,§6943-g3.]

6943.129 Tax imposed. There is hereby imposed upon every person within the state of Iowa engaged in conducting a business by a system of chain stores from any of which stores are sold or otherwise disposed of at retail tangible personal property such as goods, wares, and merchandise an annual occupation tax for each taxable year during which year or any part thereof, such person is so engaged, as follows to wit:

1. A specific amount on each person engaged in conducting a business by a system of chain stores to be determined as follows:

a. Five dollars for each store in excess of one and not in excess of ten if said business is conducted at not in excess of ten stores within this state under a single or common ownership, supervision or management.

b. Fifteen dollars for each store in excess of ten and not in excess of twenty if said business is conducted at in excess of ten but not in excess of twenty stores within this state under a single or common ownership, supervision or management.

c. Thirty-five dollars for each store in excess of twenty and not in excess of thirty if said business is conducted at in excess of twenty but not in excess of thirty stores within this state under a single or common ownership, supervision or management.

d. Sixty-five dollars for each store in excess of thirty and not in excess of forty if said business is conducted at in excess of thirty but not in excess of forty stores within this state under a single or common ownership, supervision or management.

e. One hundred five dollars for each store in excess of forty and not in excess of fifty if said business is conducted at in excess of forty and not in excess of fifty stores within the state under a single or common ownership, supervision or management.

f. One hundred fifty-five dollars for each store in excess of fifty if said business is conducted at in excess of fifty stores within this state under a single or common ownership, supervision or management.

2. This subsection 2 (formerly subsection "b") invalidated by Supreme Court, 222 Iowa 908; see also 299 U. S. 32.

The tax imposed by subsection 1 hereof shall be due and payable on July 1, 1935 and on July 1 of each succeeding year thereafter; the tax imposed hereby as far as measured by subsection 1 hereof, shall be computed on the basis of the number of stores operated by any person under a system of chain stores in this state as of July 1 of each taxable year. [C35,§6943-g4.]

Section 6943-g5, code 1935, omitted. See subsection 2 above

6943.130 Failure to file return — incorrect return. If a return required by this chapter is not filed, or if a return when filed is incorrect or insufficient and the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the commission, such commission shall determine the amount of tax due from such information as it may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The commission shall give notice of such determination to the person liable for the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply to the commission for a hearing or unless the commission of its own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is correct. After such hearing the commission shall give notice of its decision to the person liable for the tax. [C35,§6943-g6; 48GA, ch 184,§3.]

Referred to in §6943.131

6943.131 Appeals.

1. An appeal may be taken by the taxpayer to the district court of the county in which he resides, or in which his principal place of business is located, within sixty days after he shall have received notice from the commission of its determination as provided for in section 6943.130.

2. The appeal shall be taken by a written notice to the chairman of the commission and served as an original notice. When said notice is so served it shall, with the return thereon, be filed in the office of the clerk of said district court, and docketed as other cases, with the taxpayer as plaintiff and the commission as defendant. The plaintiff shall file with such clerk a bond for the use of the defendant, and the state with sureties approved by such clerk, in penalty at least double the amount of tax appealed from, and in no case shall the bond be less than fifty dollars, and conditioned that the plaintiff shall pay any amount found to be due the defendant and/or the state and will perform the orders of the court.

3. The court shall hear the appeal in equity and determine anew all questions submitted to it on appeal from the determination of the commission. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the commission who shall then correct the assessment in accordance with said decree. An appeal may be taken by the taxpayer or the commission to the supreme court of this state in the same manner that appeals are taken in suits in equity, irrespective of the amount involved. [C35, §6943-g7; 48GA, ch 184,§4.]

Service of original notice, §11060

6943.132 Lien of tax—collection—action authorized. Whenever any taxpayer liable to pay a tax and/or penalty imposed refuses or neglects to pay the same, the amount, including any interest, penalty, or addition to such tax, together with the court costs that may accrue in the collection thereof, shall be a lien in favor of the state of Iowa upon all property and rights to property, whether real or personal, belonging to said taxpayer.

The lien aforesaid shall attach at the time the tax becomes due and payable and shall continue until the liability for such amount is satisfied.

In order to preserve the aforesaid lien against subsequent mortgagees, purchasers or judgment creditors, for value and without notice of the lien, on any property situated in a county, the commission shall file with the recorder of the county, in which said property is located, a notice of said lien.

The county recorder of each county shall prepare and keep in his office a book to be known as "index of chain store tax liens" so ruled as to show in appropriate columns the following data, under the names of taxpayers, arranged alphabetically:

1. The name of the taxpayer.
2. The name "State of Iowa" as claimant.
3. Time notice of lien was received.
4. Date of notice.
5. Amount of lien when due.
6. When satisfied.

The recorder shall indorse on each notice of lien the day, hour, and minute when received and preserve the same, and shall forthwith index said notice in said index book and shall forthwith record said lien in the manner provided for recording real estate mortgages, and the said lien shall be effective from the time of the indexing thereof.

The commission shall pay a recording fee as provided in section 5177 for the recording of such lien, or for the satisfaction thereof.

Upon the payment of a tax as to which the commission has filed notice with a county recorder, the commission shall forthwith file with said recorder a satisfaction of said tax and the recorder shall enter said satisfaction on the notice on file in his office and indicate said fact on the index aforesaid.

Upon any tax herein provided for becoming delinquent the commission may notify the county treasurer of any county in which the person owing the tax owns real or personal property of the amount of such delinquent tax

with interest and penalties. Upon receiving such notification the treasurer shall spread the amount of such tax with interest and penalties upon the records in his office against the person owing the same and shall proceed to collect such amount in the manner provided for the collection of delinquent taxes under chapters 346, 347, 348, 349.

The amount realized by the method provided in this paragraph shall not discharge the lien of such tax unless the full amount owing is received. Any amount received by the treasurer shall be remitted by him to the commission.

The attorney general, shall, upon the request of the commission, bring an action at law or in equity, as the facts may justify, without bond, to enforce payment of any taxes and/or penalties, and in such action he shall have the assistance of the county attorney of the county in which the action is pending.

It is expressly provided that the foregoing remedies of the state shall be cumulative and that no action taken by the commission or attorney general shall be construed to be an election on the part of the state or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy provided by law. [C35, §6943-g8; 48GA, ch 184,§5.]

6943.133 Service of notices. Any notice, except notice of appeal, authorized or required under the provisions of this chapter may be given by mailing the same to the person for whom it is intended by registered mail, addressed to such person at the address given in the last return filed by him pursuant to the provisions of this chapter, or if no return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this chapter by the giving of notice shall commence to run from the date of registration and posting of such notice. [C35, §6943-g9.]

6943.134 Limitation on actions. The provisions of the code relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this chapter. [C35,§6943-g10.]

6943.135 Commission to enforce chapter. The state tax commission shall administer and enforce the assessment of the tax imposed by this chapter. It may make and publish such rules and regulations, not inconsistent with this chapter, and shall distribute the same throughout the state and furnish them on application, but failure to receive or secure them shall not relieve any person from the obligation of making any return required of him by this chapter. [C35, §6943-g11; 48GA, ch 184,§6.]

6943.136 Examination of books. For the purpose of determining the correctness of any return, or of determining whether or not any person should have made a return or paid tax hereunder, the tax commission shall have the power to examine or cause to be examined any books, papers, records or memoranda which are the property of or in the possession of the taxpayer or any other person. It shall further have the power to require the attendance of any taxpayer or other person having knowledge, or information relevant to such determinations aforementioned, to compel the production of books, papers, records or memoranda by persons so required to attend, to take testimony on matters material to such determinations, and to administer oaths or affirmations in any such connection. The tax commission is empowered to any time and from time to time to require any owner, manager, or employee of any store in the state to file with the tax commission, a statement under oath, showing the ownership, management and control of such store for the purpose of determining whether or not such store is subject to the tax hereby imposed. Such statement shall be in such form as the commission shall prescribe. [C35,§6943-g12; 48GA, ch 184,§7.]

Section 6943-g13, code 1935, repealed by 48GA, ch 184, §10

6943.137 Payments. All fees, taxes, interest and penalties imposed under this chapter must be paid to the commission in the form of remittances payable to the treasurer of the state, and said commission shall transmit each payment daily to the state treasurer, to be deposited in the state treasury to the credit of the general fund. [C35,§6943-g14; 48GA, ch 184,§8.]

6943.138 Penalties—offenses.

1. Any person failing to file a return or corrected return or to pay any tax within the time required shall be subject to a penalty of five percent of the amount of tax due, plus one percent of such tax for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax became due; but the commission, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the commission and disposed of in the same manner as other receipts under this chapter. Unpaid penalties may be enforced in the same manner as the tax imposed.

2. Any person required to make, render, sign or verify any return or supplementary return, who makes any false or fraudulent return with the intent to defeat or evade the assessment required by law to be made, shall be guilty of a felony and shall, for each such offense, be fined not less than five hundred dollars, nor not more than five thousand dollars, or be imprisoned not exceeding one year, or be subject to both fine and imprisonment, in the discretion of the court.

3. The certificate of the commission to the effect that the tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this chapter, shall be prima facie evidence thereof. [C35,§6943-g15; 48GA, ch 184,§9.]

6943.139 As occupation tax. The tax levied and collected under this chapter shall not be affected or be in lieu of the Iowa retail sales tax

or any other tax levied under any other act but the taxes levied and collected hereunder are levied and collected as an occupation tax. [C35, §6943-g16.]

6943.140 Partial invalidity—effect. If any section, provision or clause of this chapter should be declared invalid, such invalidity shall not be construed to affect the portions of this chapter not so held invalid. [C35,§6943-g17.]

6943.141 Nonapplicability of chapter. This chapter shall not apply to any stores owned or operated by any person, firm, or corporation when all of said stores so owned or operated, are located in unincorporated villages and no store is more than six miles distant from every other store so owned or operated. [C35, §6943-g18.]

Constitutionality, §6943-g19, code 1935; 46GA, ch 75, §19
Omnibus repeal, §6943-g20, code 1935; 46GA, ch 75, §20

CHAPTER 329.6

HOMESTEAD TAX CREDIT

Referred to in §§6943.100, 6943.101, 6943.164

6943.142 Ratio and manner of distribution.
6943.143 Qualifying for credit.
6943.144 Verification by board.
6943.145 Certification to treasurer.
6943.146 Correcting listing.
6943.147 Waiver by neglect.
6943.148 Appeals permitted.
6943.149 Forms—rules.
6943.150 Credits in excess of tax—appeals—refunds.
6943.151 Reversal of allowed claim.
6943.152 Definitions.
6943.153 Indian land.
6943.154 Conspiracy to defraud.
6943.155 False affidavits.

6943.142 Ratio and manner of distribution. 1. The homestead credit fund [§6943.100, subsection 2] shall be apportioned each year as hereinafter provided so as to give a credit against the tax on each eligible homestead in the state, as defined herein; the amount of such credit to be in the same proportion that the assessed valuation of each eligible homestead in the state in an amount not to exceed twenty-five hundred dollars bears to the total assessed valuation of all eligible homesteads in the state in an amount not to exceed twenty-five hundred dollars for each homestead.

2. The revenue distributable from the homestead credit fund, as provided for in subsection 2 of section 6943.100, shall be allocated every six months to the several counties of the state in the same proportion that the assessed valuation of all eligible homesteads in each county in an amount not to exceed twenty-five hundred dollars for each homestead, bears to the total assessed valuation of all eligible homesteads in the state in an amount not to exceed twenty-five hundred dollars for each homestead. On March 25, 1938, and every six months thereafter the commission shall certify and remit to the county treasurer of each county in the state the total amount of money which has been apportioned or is then apportionable to that county.

3. On October 1, 1937, and annually thereafter, the commission shall estimate the millage credit not to exceed twenty-five mills to be given to each dollar of eligible homestead valuation based upon the estimated revenue that may be distributable from the homestead credit fund for the ensuing year, and shall certify to the county auditor of each county such millage credit and the amount in dollars thereof. Each county auditor shall then enter such credit against the tax levied on each eligible homestead in each county and payable during the ensuing year, designating on the tax lists such credit as being from the homestead credit fund, and credit shall then be given to the several taxing districts in which such eligible homesteads are located in an amount equal to the credits allowed on the taxes of such homesteads. The amount of said credits shall be apportioned by each county treasurer to the several taxing districts as provided by law, in the same manner as though the amount of the credit had been paid by the owners of said homesteads; provided, however, that the several taxing districts shall not be permitted to draw the funds so credited until after the semiannual allocations have been received by the county treasurer, as provided in this chapter. Each county treasurer shall show on each tax receipt the amount of credit received from the homestead credit fund.

4. In any county in which is located a special charter city, which levies and collects its own taxes separately from the county, all millage credits and the amount in dollars thereof on eligible homesteads situated in said city in excess of the consolidated state and county levy by the state and said county for the taxing district in which said city is located, but not in excess of the aggregate levy by said city, shall be certified by the county auditor to the treasurer of said city who shall in turn credit on said city tax lists against the taxes levied by said city on each eligible homestead in said city, said excess millage credits so certified to him in the same manner as herein required to be done by the county auditor on the county tax lists. The county treasurer shall pay to the city treasurer out of the funds apportioned to said county from the homestead credit fund, the amount of said funds so apportioned in excess of the state and county consolidated levy, which shall be applied upon the taxes on eligible homesteads in said city as herein provided. All funds so apportioned in excess of the combined city and consolidated state and county levies for said taxing district exclusive of special assessments shall be remitted to the state tax commission to be redeposited in the homestead credit fund for re-allocation as provided in this chapter. The intention and purpose of this provision shall be to allot to each eligible homestead located in

such city the same proportionate tax credits received by eligible homesteads in other cities and towns, but this provision shall not be construed in any way to allot to eligible homesteads in such city any greater benefits or credits than eligible homesteads in other cities and towns. [C35, §6943-f64; 47GA, ch 195,§4; 48GA, ch 187,§4.]

Consolidated levy in special charter cities, §§6217, 6771.2

6943.143 Qualifying for credit. Any person who desires to avail himself of the benefits provided hereunder shall each year commencing January 1, 1938, deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him, and the assessor shall return said statement and designation with the assessment roll to the county auditor with his recommendation for allowance or disallowance indorsed thereon; provided, that if the said verified statement and designation of homestead is not delivered to the assessor, the person may, on or before June 1 of any year, file with the county auditor such verified statement and designation, together with the supporting affidavits of at least two disinterested freeholders of the taxing district in which the claimed homestead is located. [47GA, ch 195,§5.]

6943.144 Verification by board. The county board of supervisors in each county shall forthwith examine all such claims, whether delivered to the assessors or filed with the county auditor as herein provided, and shall either allow or disallow said claims, and in the event of disallowance shall notify the claimant of such action by mailing a written notice thereof addressed to claimant at his last known address. [47GA, ch 195,§6.]

6943.145 Certification to treasurer. All claims which have been allowed by the board of supervisors shall be certified on or before July 1, in each year, by the county auditor to the county treasurer, which certificates shall list the name of each owner, legal description of the claimed homestead, and the assessed valuation of said homestead in an amount not to exceed twenty-five hundred dollars for each homestead. The county treasurer shall forthwith certify to the state tax commission the total assessed valuation of all homesteads so certified in an amount not to exceed twenty-five hundred dollars for each homestead. [47GA, ch 195,§7; 48GA, ch 187,§5.]

6943.146 Correcting listing. If the assessor who last listed and valued a claimed eligible homestead did not, in the description and valuation thereof, comply with the provisions of section 6962, he shall, if still in office, on the written request of such claimant and without expense to the claimant or to the county, correct his listing and valuations of such claimed homestead and contiguous real property originally listed and valued by him, and file such corrected listing and valuations with the county auditor, who forthwith shall certify the same to the county treasurer, and said county treasurer shall so correct his tax books; provided, that if the assessor who last listed and valued such property is not still in office, the assessor in office shall, on such written request and at the expense of the county, so correct such listing and valuations of said homestead and said contiguous real property. [47GA, ch 195,§8.]

6943.147 Waiver by neglect. If any person fails to make claim for the credits provided for under this chapter as herein required, he shall be deemed to have waived the homestead credit for the year in which he failed to make claim. [47GA, ch 195,§9.]

6943.148 Appeals permitted. Any person whose claim is denied under the provisions of this chapter may appeal from the action of the board of supervisors to the district court of the county in which said claimed homestead is situated by giving written notice of such appeal to the county auditor of said county within twenty days from the date of mailing of notice of such action by the board of supervisors.

In the event any claim under this chapter is allowed, any owner of an eligible homestead, or the state tax commission, may appeal from the action of the board of supervisors to the district court of the county in which said claimed homestead is situated, by giving written notice of such appeal to the county auditor of said county and such notice to the owner of said claimed homestead as a judge of the district court shall direct.

Said appeals shall be tried by equitable proceedings. [47GA, ch 195,§10; 48GA, ch 187,§6.]

6943.149 Forms — rules. The commission shall prescribe the form for the making of verified statement and designation of homestead, and the form for the supporting affidavits required herein, and such other forms as may be necessary for the proper administration of this chapter. As soon as practicable after the effective date of this chapter, and from time to time thereafter as necessary, the commission shall forward to the county auditors of the several counties in the state such prescribed sample forms, and the county auditors shall furnish blank forms prepared in accordance therewith with the assessment rolls, books, and supplies delivered to the assessors.

The commission shall have the power and authority to prescribe rules and regulations, not inconsistent with the provisions of this chapter, necessary to carry out and effectuate its purposes. [47GA, ch 195,§16; 48GA, ch 187,§8.]

6943.150 Credits in excess of tax—appeals —refunds. If the amount of credit apportioned to any homestead under the provisions of this chapter in any year shall exceed the total tax, exclusive of any special assessments levied against said homestead, then such excess shall be remitted by the county treasurer to the state tax commission to be redeposited in the homestead credit fund and be re-allocated the following year by the commission as provided hereunder.

In the event any claim for credit made hereunder has been denied by the board of supervisors, and such action is subsequently reversed

on appeal, the same millage credit shall be allowed on the assessed valuation, not to exceed twenty-five hundred dollars in amount, of the homestead involved in said appeal, as was allowed on other homestead valuations for the year or years in question, and the state tax commission, the county auditor, and the county treasurer are hereby authorized and directed to make such millage credit and to change their books and records accordingly.

In the event the appealing taxpayer has paid one or both of the installments of the tax payable in the year or years in question on such homestead valuation, remittance shall be made to such taxpayer of the amount of such credit.

The amount of such credit shall be allocated and paid from the surplus redeposited in the homestead credit fund provided for in the first paragraph of this section. [47GA, ch 195,§17; 48GA, ch 187,§9.]

6943.151 Reversal of allowed claim. In the event any claim is allowed, and subsequently reversed on appeal, any credit made thereunder shall be void, and the amount of such credit shall be charged against the property in question, and the state tax commission, the county auditor, and the county treasurer are authorized and directed to correct their books and records accordingly. The amount of such erroneous credit, when collected, shall be returned by the county treasurer to the homestead credit fund to be re-allocated the following year as provided herein. [47GA, ch 195,§18; 48GA, ch 187,§10.]

6943.152 Definitions. For the purpose of this chapter and wherever used in this chapter:

1. The word, "homestead", shall have the following meaning:

a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this chapter actually lives six months or more in the year except that in the first year of ownership it shall be sufficient if the owner is living in the dwelling house at the time the claim for homestead credit is made, and makes an affidavit of his intention to occupy said dwelling house, in good faith, as a home.

b. It may contain one or more contiguous lots or tracts of land with the buildings or other appurtenances thereon habitually, and in good faith, used as a part of the homestead.

c. If within a city or town plat, it must not exceed one-half acre in extent; if, however, its assessed valuation is less than twenty-five hundred dollars, the land area may be enlarged until its assessed valuation reaches that amount.

d. If outside of a city or town, it must not contain more than forty acres.

e. It must not embrace more than one dwelling house, but where a homestead outside of a city or town has more than one dwelling house situated thereon, the millage credit provided for in this chapter, shall apply to forty acres, the home and buildings used by the owner, but shall not apply to any other dwelling house and buildings appurtenant thereto situated upon said forty acres.

f. The words "dwelling house" shall embrace any building occupied wholly or in part by the claimant as a home.

2. The word, "owner", shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by blood relatives, or by legally adopted children, or where the person is occupying the homestead under a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children.

3. The words "assessed valuation" shall mean the valuation of the homestead as fixed by the assessor, or by the board of review, without deducting therefrom the exemptions authorized in section 6946.

Where not in conflict with the terms of the definitions above set out, the provisions of chapter 441 shall control. [47GA, ch 195,§19; 48GA, ch 188,§1.]

6943.153 Indian land. Each forty acres of land, or fraction thereof, occupied by a member or members of the Sac and Fox Indians in Tama county, which land is held in trust by the secretary of the interior of the United States for said Indians, shall be given a homestead tax credit within the meaning and under the provisions of this chapter. Application for such homestead tax credit shall be made to the county auditor of Tama county and may be made by a representative of the tribal council. [48GA, ch 189,§1.]

6943.154 Conspiracy to defraud. If any two or more persons conspire and confederate together with fraudulent intent to obtain the millage credit provided for under the terms of this chapter by making a false deed, or a false contract of purchase, they are guilty of a conspiracy and every person who is convicted of such a conspiracy shall be imprisoned in the county jail for a period not to exceed one year, or shall be fined in a sum not to exceed one thousand dollars, or shall be imprisoned in the penitentiary not more than three years. [47GA, ch 195,§20.]

6943.155 False affidavits. Any person making a false claim or affidavit for the purpose of securing a homestead tax credit, or for the purpose of aiding another to secure such homestead tax credit, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail not more than thirty days, or by both such fine and imprisonment. [47GA, ch 195,§21.]

Constitutionality, 47GA, ch 195, §23

CHAPTER 329.7

AGRICULTURAL LAND SCHOOL TAX CREDIT

6943.156 Fund set aside for credit.
6943.157 Purpose—distribution.
6943.158 Entry of credit.
6943.159 Special charter cities.
6943.160 Application—forms.
6943.161 Certification of allowed claims.
6943.162 Waiver of claim.
6943.163 Appeal from denial.
6943.164 Dual credit on homestead unallowable.
6943.165 On what land allowable.
6943.166 Not applicable to consolidated districts.

6943.156 Fund set aside for credit. There is hereby set aside for the year 1940 and* annually thereafter from the general fund of this state an amount of five hundred thousand dollars or so much thereof as may be necessary to be known as the agricultural land credit fund to be used in the payment of agricultural land credits as herein specified. [48GA, ch 109,§1.]

*"an" in enrolled act

6943.157 Purpose — distribution. The agricultural land credit fund shall be apportioned each year as hereinafter provided so as to give a credit against the tax in each eligible tract of agricultural land within independent school districts in the state, as defined herein; the amount of such credit to be the amount the tax levied for the general school fund exceeds the amount of tax which would be levied on such property were the school tax levy for the general school fund fifteen mills on all such agricultural land over ten acres belonging to one person and lying within the independent school districts exclusive of consolidated districts.

The said fund shall be held by the treasurer of state and shall be designated by him as the agricultural land credit fund and shall be distributed by the treasurer of the state on warrants drawn by the comptroller on September 1 of each year, beginning the year 1940 and thereafter, and payable to the county treasurers of the several counties of the state in the amounts certified by them as provided in section 6943.161. [48GA, ch 109,§2.]

6943.158 Entry of credit. The county auditor shall enter the agricultural land credit against the tax levied upon each eligible tract of agricultural land in each county and payable during the ensuing years, designating on the tax lists such credit as being from the agricultural land credits funds, and credit shall then* be given to the several taxing districts in which such eligible agricultural lands are located in an amount equal to the credit allowed on the taxes of such agricultural lands.

The amount of said credits shall be apportioned by each county treasurer to the several taxing districts as provided by law, in the same manner as though the amount of the credit had been paid by the owners of said agricultural land. Each county treasurer shall show on each tax receipt the amount of credit received from the agricultural land credit fund. [48GA, ch 109,§3.]

*"them" in enrolled act

6943.159 Special charter cities. In any county in which is located a special charter city, which levies and collects its own taxes separately from the county, all millage credits and the amount in dollars thereof on eligible agricultural land situated in said city in excess of the consolidated state and county levy by the state and said county for the taxing district in which said city is located, but not in excess of the aggregate levy by said city, shall be certified by the county auditor or county treasurer to the treasurer of the said city who shall in turn credit on said city tax lists against the taxes levied by said city on each eligible agricultural land in said city, said excess millage credits so certified to him in the same manner as herein required to be done by the county auditor on the county tax lists. The county treasurer shall pay to the city treasurer out of the funds apportioned to said county from the agricultural land credit fund, the amount of said funds so apportioned in excess of the state and county consolidated levy, which shall be applied upon the taxes on eligible agricultural land in said city as herein provided. The intention and purpose of this provision shall be to allot to eligible agricultural land located in such city the same proportionate credit received by eligible agricultural land in other cities and towns. [48GA, ch 109,§4.]

Consolidated levy in special charter cities, §§6217, 6771.2

6943.160 Application — forms. Any person who desires to avail himself of the benefits provided hereunder shall each year commencing January 1, 1940, deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of agricultural land credit as claimed by him, and the assessor shall return said statement and designation with the assessment roll to the county auditor with his recommendation for allowance or disallowance indorsed thereon; provided, that if the said verified statement and designation of agricultural land credit is not delivered to the assessor, the person may on or before June 1 of any year file with the county auditor such verified statement and designation, together with the supporting affidavits of at least two disinterested freeholders of the taxing district in which the agricultural land is located.

The county board of supervisors in each county shall forthwith examine all such claims, whether delivered to the assessor or filed with the county auditor as herein provided, and shall either allow or disallow said claims, and in the event of disallowance shall notify the claimant of such action by mailing a written notice thereof addressed to the claimant at his last known address. [48GA, ch 109,§5.]

6943.161 Certification of allowed claims. All claims which have been allowed by the board of supervisors shall be certified on or before July

1 in each year by the county auditor to the county treasurer, which certificate shall list the name of each owner, legal description of the claimed agricultural land and the assessed value thereof. The county treasurer shall forthwith certify to the state treasurer the total valuation of all such agricultural lands upon which a credit is claimed. [48GA, ch 109,§6.]

Referred to in §6943.157

6943.162 Waiver of claim. If any person fails to make claim for the credits provided for under this chapter as herein required, he shall be deemed to have waived the agricultural land credit for the year in which he failed to make claim. [48GA, ch 109,§7.]

6943.163 Appeal from denial. Any person whose claim is denied under the provisions of this chapter may appeal from the action of the board of supervisors to the district court of the county in which said claimed agricultural land is situated by giving written notice of such appeal to the county auditor of said county within twenty days from the date of mailing of notice of such action by the board of supervisors. [48GA, ch 109,§8.]

6943.164 Dual credit on homestead unallowable. The agricultural land credit as provided in this chapter shall not be made to any taxpayer on any portion of his property upon which a homestead credit as provided by chapter 329.6 has been allowed for the year in which the agricultural credit is claimed. [48GA, ch 109,§9.]

6943.165 On what land allowable. "Agricultural lands" shall mean and include for the purposes of this chapter real estate over ten acres lying within an independent school district which land is not platted into city or town lots and which is used exclusively for farm and agricultural purposes and is owned by an individual, person, firm, association, joint stock company, syndicate, copartnership, corporation, trustee, agency receiver, or respective legal representative, and the same shall mean and include all land over ten acres lying within an independent school district owned by one entity, as aforesaid, irrespective of whether or not such land or parcels of land are contiguous. [48GA, ch 109,§10.]

6943.166 Not applicable to consolidated districts. None of the provisions of this chapter shall be construed to apply in whole or in part to any agricultural land in consolidated districts. [48GA, ch 109,§11.]

CHAPTER 330

PROPERTY EXEMPT AND TAXABLE

Referred to in §§7008, 7141

6944 Exemptions.
6945 Roads and drainage rights-of-way.
6946 Military service—exemptions.
6947 Reduction—noted by assessor—limitation.
6948 Listing by assessors.
6949 Exemption by board of supervisors.
6950 Petition for exemption.
6950.1 Suspension of taxes.
6951 Additional order.
6952 Grantee or devisee to pay tax.
6952.1 Suspended tax list.
6953 What taxable.
6954 County lands.
6955 Interest of lessee.

6944 Exemptions. The following classes of property shall not be taxed:

1. *Federal and state property.* The property of the United States and this state, including university, agricultural college, and school lands.

Federal-owned lands, §4 et seq.

2. *Municipal and military property.* The property of a county, township, city, town, school district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit.

3. *Public grounds and cemeteries.* Public grounds, including all places for the burial of the dead; and crematoriums with the land, not exceeding one acre, on which they are built and appurtenant thereto, so long as no dividends or profits are derived therefrom.

4. *Fire equipment and grounds.* Fire engines and all implements for extinguishing fires, and the publicly owned buildings and grounds used exclusively for keeping them and for meetings of fire companies.

5. *Public securities.* Bonds or certificates issued by any municipality, school district, drainage or levee district, river-front improvement commission or county within the state of Iowa. No deduction from the assessment of the shares of stock of any bank or trust company shall be permitted because such bank or trust company holds such bonds as are exempted above.

6. *Property of associations of war veterans.* The property of any organization composed wholly of veterans of any war, when such property is devoted entirely to its own use and not held for pecuniary profit.

7. *Property of cemetery associations.* All grounds and buildings used by cemetery associations and societies for cemetery purposes.

8. *Libraries and art galleries.* All grounds and buildings used for public libraries, public art galleries, and libraries and art galleries owned and kept by private individuals, associations, or corporations, for public use and not for private profit.

9. *Property of religious, literary, and charitable societies.* All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for

record before the property herein described shall be omitted from the assessment.

10. *Moneys and credits—property of students.* Moneys and credits belonging exclusively to the institutions named in subsections 7, 8, and 9 and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; and the books, papers, pictures, works of art, apparatus, and other personal property belonging to such institutions and used solely for the purposes contemplated in said subsections and the like property of students in such institutions used for their education.

11. *Property of educational institutions* Real estate owned by any educational institution of this state as a part of its endowment fund, to the extent of one hundred sixty acres in any civil township.

12. *Homes for soldiers.* The buildings, grounds, furniture, and household equipment of homes owned and operated by organizations of soldiers, sailors, or marines of any of the wars of the United States when used for a home for disabled soldiers, sailors, or marines and not operated for pecuniary profit.

13. *Agricultural produce.* The agricultural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, all swine and sheep under nine months of age, and all other domestic animals under one year of age.

14. *Rent.* Obligations for rent not yet due and owned by the original payee.

15. *Private libraries.* Private or professional libraries to the actual value of three hundred dollars.

16. *Family equipment.* Family pictures; household furniture to the actual value of three hundred dollars, and kitchen furniture; beds and bedding requisite for each family; all wearing apparel in actual use; all food provided for the family.

The exemptions allowed in this subsection shall not apply to hotels and boarding houses, except so far as the exempted classes of property shall be for the actual use of the family managing the same.

17. *Farm equipment—drays—tools.* The farming utensils of any person who makes his livelihood by farming, the team, wagon, and harness of the teamster or drayman who makes his living by their use in hauling for others, and the tools of any mechanic, not in any case to exceed three hundred dollars in actual value.

18. *Government lands.* Government lands entered and located, or lands purchased from this state, for the year in which the entry, location, or purchase is made.

19. *Fraternal beneficiary funds.* The accumulations and funds held or possessed by fraternal beneficiary associations for the purposes of paying the benefits contemplated by section 8778, or for the payment of the expenses of such associations.

20. *Capital stock of utility companies.* The shares of capital stock of telegraph and telephone companies, freight line and equipment companies, transmission line companies as defined in section 7089, express companies, corporations engaged in merchandising as defined in section 6971, domestic corporations engaged in manufacturing as defined in section 6975, and corporations not organized for pecuniary profit.

Referred to in §§7034, 7042, 7089

21. *Capital stock of loan companies.* Shares of stock of loan corporations as defined in section 6994, if said corporations have been granted the certificate provided for in section 6996.

22. *Soldiers bonus bonds.* All bonds issued under chapter 332, Acts Thirty-ninth General Assembly.

1. [C51,§455; R60,§711; C73,§797; C97,§1304; SS15,§1304; C24, 27, 31, 35,§6944.]

2. [C51,§455; R60,§711; C73,§797; C97,§1304; SS15,§1304; C24, 27, 31, 35,§6944; 48GA, ch 186, §1.]

3, 4. [C51,§455; R60,§711; C73,§797; C97, §1304; SS15,§1304; C24, 27, 31, 35,§6944.]

5. [SS15,§1304; C24, 27, 31, 35,§6944.]

6. [C24, 27, 31, 35,§6944.]

7, 8, 9, 10. [C51,§455; R60,§711; C73,§797; C97,§1304; SS15,§1304; C24, 27, 31, 35,§6944.]

11. [C97,§1304; SS15,§1304; C24, 27, 31, 35, §6944.]

12. [C24, 27, 31, 35,§6944.]

13. [C51,§455; R60,§711; C73,§797; C97, §1304; SS15,§1304; C24, 27, 31, 35,§6944.]

14, 15, 16. [C97,§1304; SS15,§1304; C24, 27, 31, 35,§6944.]

17. [C51,§455; R60,§711; C73,§797; C97,§1304; SS15,§1304; C24, 27, 31, 35,§6944.]

18. [R60,§711; C73,§797; C97,§1304; SS15, §1304; C24, 27, 31, 35,§6944.]

19. [SS15,§1304; C24, 27, 31, 35,§6944.]

20. [C51,§§468, 469; R60,§§723, 724; C73, §§815, 816; C97,§§1318, 1319, 1323; S13,§§1330-g, 1342-g, 1346-g; SS15,§1346-s; C24, 27, 31, 35, §6944.]

21. [C24, 27, 31, 35,§6944.]

22. [C35,§6944.]

Applicable to special charter cities, §6867.1
40ExGA, SF 183, §1, editorially divided

6945 Roads and drainage rights-of-way. Real estate occupied as a public road, and rights-of-way for established public levees and rights-of-way for established, open, public drainage improvements shall not be taxed. [C73,§809; C97,§1344; C24, 27, 31, 35,§6945.]

6946 Military service — exemptions. The following exemptions from taxation shall be allowed:

1. The property, not to exceed three thousand dollars in actual value, and poll tax of any honorably discharged union soldier, sailor, or marine of the Mexican war or the war of the rebellion.

2. The property, not to exceed eighteen hundred dollars in actual value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection.

3. The property, not to exceed five hundred dollars in actual value, of any honorably discharged soldier, sailor, marine, or nurse of the war with Germany.

4. The property, to the same extent, of the wife of any such soldier, sailor, or marine, where they are living together, and he has not otherwise received the benefits above provided; and the property, to the same extent, of the widowed mother, remaining unmarried, of any such soldier, sailor, or marine, where the said widowed mother is dependent upon any such soldier, sailor, or marine for support, and he has not otherwise received the benefits above provided.

5. The property, to the same extent, of the widow remaining unmarried and of the minor child or children of any such deceased soldier, sailor, or marine. [C97,§1304; S13, SS15,§1304; C24, 27, 31, 35,§6946.]

Referred to in §§6943.152, 6947, 6948
Applicable to special charter cities, §6867.1

6947 Reduction—noted by assessor—limitation. All persons named in section 6946 shall receive a reduction equal to their exemption, to be made from any property owned by such persons and designated by them. Such designation shall be made to and noted by the assessor at the time of making the assessment, or in lieu thereof, shall be made in writing and filed with the county auditor of the county in which such property is located. If no such designation is filed or made as herein provided, then such exemption shall apply to the homestead, if any. Such exemption shall extend only for the period during which said persons remain the owners of such property. [C24, 27, 31, 35,§6947; 48GA, ch 191,§2.]

Referred to in §6948
Applicable to special charter cities, §6867.1

6948 Listing by assessors. The beneficiary of exemptions allowed by sections 6946 and 6947 shall file with the assessor a written statement that he is the owner of the property on which the exemption is claimed, and every assessor shall annually make a list of persons entitled to such exemptions and return such list to the county auditor upon forms to be furnished by the auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption. [SS15, §1304-1a; C24, 27, 31, 35,§6948.]

Applicable to special charter cities, §6867.1

6949 Exemption by board of supervisors. If no such statement is filed, no exemption shall be allowed by the assessor, but it shall be allowed by the board of supervisors if such statement is filed before September 1 of the year following the year for which the same is claimed. [SS15, §1304-1a; C24, 27, 31, 35,§6949; 48GA, ch 191, §1.]

Applicable to special charter cities, §6867.1

6950 Petition for exemption. Whenever a person, by reason of age or infirmity, is unable to contribute to the public revenue, such person may file a petition, duly sworn to, with the board of supervisors, stating such fact and giving a statement of property, real and personal, owned or possessed by such applicant, and such other information as the board may require. The board of supervisors may thereupon order the county treasurer to suspend the collection of the taxes assessed against such petitioner, his polls or estate, or both, for the current year, or such board may cancel and remit said taxes, provided, however, that such petition shall first have been approved by the council of the city or town in which the property of the petitioner is located, or by the township trustees of the township in which said property is located. [C51,§455; R60, §711; C73,§797; C97,§1304; SS15,§1304; C24, 27, 31, 35,§6950.]

Referred to in §§6950.1, 6951
Applicable to special charter cities, §6867.1

6950.1 Suspension of taxes. Whenever a person has been issued a certificate of old-age assistance and is receiving monthly or quarterly payments of assistance from the old-age assistance fund, such person shall be deemed to be unable to contribute to the public revenue. The state board of social welfare shall thereupon notify the board of supervisors, of the county in which such assisted person owns property, of the aforesaid fact, giving a statement of property, real and personal, owned, possessed, or upon which said person is paying taxes as a purchaser under contract. It shall then be the duty of the board of supervisors so notified, without the filing of a petition and statement as specified in section 6950, to order the county treasurer to suspend the collection of all the taxes assessed against said property and remaining unpaid by such person or contractually payable by him, for such time as such person shall remain the owner or contractually prospective owner of such property, and during the period such person receives monthly or quarterly payments of assistance from the old-age assistance fund. [C35,§6950-g1; 47GA, ch 137,§40; ch 186, §1; 48GA, ch 84,§10.]

Referred to in §6951
Special charter cities, see §6867.1

6951 Additional order. The board of supervisors may, if in their judgment it is for the best interests of the public and the petitioner referred to in section 6950, or the public and the aged person referred to in section 6950.1, cancel and remit the taxes assessed against the petitioner referred to in section 6950, or the aged person referred to in section 6950.1, his polls or estate or both, even though said taxes have previously been suspended as provided in sections 6950 and 6950.1. [C51,§455; R60,§711; C73,§797; C97,§1304; SS15,§1304; C24, 27, 31, 35,§6951.]

Applicable to special charter cities, §6867.1

6952 Grantee or devisee to pay tax. In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than the surviving spouse or minor child of such

infirm person, the taxes, without any accrued penalty, that have been thus suspended shall all become due and payable, with six percent interest per annum from the date of such suspension, except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old-age assistance, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child. [C24, 27, 31, 35,§6952.]

Applicable to special charter cities, §6867.1

6952.1 Suspended tax list. The county auditor shall keep and maintain in his office a book which shall be known as the "suspended tax list" and in which he shall enter the following data relative to all taxes, and polls, the collection of which have been suspended by order of the board of supervisors, to wit:

1. A governmental or platted description of the land on which the said tax has been levied or on which it is a lien.
2. The name of the owner of said land.
3. The amount, and current year, of said tax.
4. The date of the order suspending collection of said tax.

Said book shall be so prepared, ruled, and headed that all entries of taxes and polls against the land in a given section or in a given city or town plat addition, or auditor's plat shall be separate from the entry of taxes against the land in any other section, or city or town plat, addition, or auditor's plat.

The county auditor shall, prior to January 1, 1932, enter in said book the aforesaid data as to all unpaid, uncanceled and unremitted taxes, and polls, the collection of which have been ordered suspended by the board of supervisors since July 4, 1921. The data relative to all other suspended taxes and polls shall be entered immediately following the entry of such suspension.

If a tax or poll on said book be paid, or be subsequently legally canceled and remitted, the auditor shall enter in said book and over his official signature a satisfaction thereof. [C31, 35,§6952-d1.]

6953 What taxable. All other property, real or personal, is subject to taxation in the manner prescribed, and this section is also intended to embrace:

1. Ferry franchises and toll bridges, which, for the purpose of this chapter are considered real property.
2. Horses, cattle, mules and asses over one year of age.
3. Sheep and swine over nine months of age.
4. Money whether in possession or on deposit.
5. Credits, including bank bills, government currency, property or labor due from solvent debtors on contract or judgment, mortgages or other like securities, bills receivable.
6. Property situated in this state belonging to any bank or company, incorporated or otherwise, whether incorporated in this or any other state.
7. Corporation shares or stocks not otherwise assessed or excepted.
8. Public or municipal bonds, stocks or loans, except as otherwise provided.
9. Household furniture, beds and bedding made use of in hotels and boarding houses and not hereinbefore exempted.
10. Gold and silver plate, watches, jewelry, and musical instruments.
11. Every description of vehicle, including bicycles, except as otherwise provided.
12. Threshing machines.
13. Boats and vessels of every description, wherever registered or licensed, and whether navigating the waters of the state or not, if owned either wholly or in part by inhabitants of this state, to the amount owned in this state. [C51,§456; R60,§712; C73,§801; C97,§1308; C24, 27, 31, 35,§6953.]

Motor fees in lieu of taxes, §5008.26
Pensions exempt, §6326.13
C97,§1308, editorially divided

6954 County lands. All lands in this state which are owned or held by any other county or counties claiming title under locations with swamp land indemnity scrip, or otherwise, shall be taxed the same as other real estate within the limits of the county. [C51,§456; R60,§712; C73,§801; C97,§1308; C24, 27, 31, 35,§6954.]

6955 Interest of lessee. In all cases where land belonging to any state institution has been leased and the leases renewed, containing an option of purchase, the interest of the lessees therein shall be subject to assessment and taxation as real estate. The value of such interest shall be fixed by deducting from the value of the lands and improvements the amount required by the lease to acquire the title thereto, which leasehold interest so assessed and taxed may be sold for delinquent taxes and deeds issued thereunder as in other cases of tax sales, and the same rights shall accrue to the grantee therein as were held and owned by the tenant. [C97, §1351; C24, 27, 31, 35,§6955.]

CHAPTER 331

LISTING IN GENERAL

Referred to in §§7008, 7112, 7141

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6956 Listing—by whom. Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:

1. The property of one under disability, by the person having charge thereof.
2. The property of a married woman, by herself or husband.
3. The property of a beneficiary for whom the property is held in trust, by the trustee.
4. The personal property of a decedent, by the executor or administrator, or if there is none, by any person interested therein.
5. The property of a body corporate, company, society or partnership, by its principal accountant, officer, agent, or partner, as the assessor may demand.
6. Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor, unless listed by the mortgagee or lessee. [C51, §458; R60,§714; C73,§803; C97,§1312; S13, §1312; C24, 27, 31, 35,§6956.]

S13,§1312, editorially divided

6957 Listing property of another. Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs. [C51,§461; R60,§716; C73, §805; C97,§1316; C24, 27, 31, 35,§6957.]

6958 Agent personally liable. Any person acting as the agent of another, and having in his possession or under his control or management any money, notes, and credits, or personal property belonging to such other person, with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit, for himself or the owner, shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same; and if he refuse to render the list or to swear to the same, the amount of such money, property, notes, or credits may be listed and valued according to the best knowledge and judgment of the assessor. [R60,§725; C73,§817; C97,§1320; C24, 27, 31, 35,§6958.]

6959 Personal property—real estate—buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in 1933 and every four years thereafter, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; but if such buildings are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property, but buildings and fixtures erected on real estate held under a lease of longer than three years duration shall be assessed as real estate. [C51,§§460, 465; R60, §§719, 720; C73,§812; C97,§1350; C24, 27, 31, 35, §6959.]

Applicable to special charter cities, §6867.1
Reassessment of real estate, §7129.1

6960 Unknown owners. When the name of the owner of any real estate is unknown, it shall be assessed without connecting therewith any name, but inscribing at the head of the page the words "owners unknown", and such property, whether lands or town lots, shall be listed as nearly as practicable in the order of the numbers thereof. [R60,§737; C73,§826; C97,§1353; C24, 27, 31, 35,§6960.]

C97,§1353, editorially divided

6961 Deceased owner. The real estate of persons deceased may be listed as belonging to his estate or his heirs, without enumerating them. [C51,§461; R60,§716; C73,§805; C97, §1353; C24, 27, 31, 35,§6961.]

6962 Description of tracts—manner. No one description shall comprise more than one town lot, or more than the sixteenth part of a section or other smallest subdivision of the land according to the government surveys, except in cases where the boundaries are so irregular that it cannot be described in the usual manner in accordance therewith. [C97,§1353; C24, 27, 31, 35,§6962.]

Referred to in §6943.146

6963 Place of listing. Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided, and except that, if personal property not consisting of moneys, credits, corporation or other shares of stock, or bonds, has been kept in another assessment district during the greater part of the year preceding the first of January, or of the portion of that period during which it was owned by the person subject to taxation therefor, it shall be taxed where it has been so kept. [C97,§1313; C24, 27, 31, 35, §6963.]

6964 "Owner" defined. Commission merchants, and all persons, other than warehousemen as defined in section 9718 trading and dealing on commission, and assignees authorized to sell, and persons having in their possession property belonging to another subject to taxation in the asssessment district where said property is found, when the owner of the goods does not reside in the county, are, for the purpose of taxation, to be deemed the owners of the property in their possession. [C51,§459; R60, §715; C73,§804; C97,§1314; C24, 27, 31, 35, §6964.]

6965 Grain, ice, and coal dealers. Each grain, ice, or coal dealer shall be assessed upon the average amount of capital used by him in conducting his business. In estimating the amount of capital so used, there shall be taken into consideration the increase and decrease of the value of grain held in store, and upon the value of his warehouses, ice houses, granaries, or cribs situated upon lands leased from railway companies or other persons, and upon the value, if any, of such leasehold interest.

Such assessment shall be listed as personal property. In determining the average amount of capital invested the assessor shall take into consideration the entire year's business prior to January 1, next preceding the assessment period. [C97,§1315; C24, 27, 31, 35,§6965.]

6966 Business in different districts. When a person, firm, or corporation is doing business in more than one assessment district, the property and credits existing in any one of such districts, or arising from business done in such district, shall be listed and taxed in that district, and the credits not existing in or pertaining especially to the business in any district shall be listed and taxed in that district where the principal place of business may be. [C51,§463; R60,§717; C73,§806; C97,§1317; C24, 27, 31, 35, §6966.]

C97,§1317, editorially divided

6967 Branch banks. The personalty, moneys and credits connected with or growing out of all business transacted directly or indirectly by or through the servants, employees or agents of any person, firm, or corporation engaged in the banking business, having an office or agency in more than one assessment district for the transaction of business, shall be taxable as provided in chapter 333, for the taxing of private banks and bankers, in the assessment district where said branch business is done. [C97,§1317; C24, 27, 31, 35,§6967.]

Branch banking prohibited, §9258.1

6968 How assessment made. An assessment made in such district shall be considered and proper deduction made in determining the taxable property of such person or firm, or shares of stock of such corporation, at its principal place of business. [C97,§1317; C24, 27, 31, 35,§6968.]

6969 Stipulation for payment. The stipulation for the payment of obligations growing out of the business of such agency, in another district than the place where such agency is located, shall not determine where the property or credits of such parties shall be taxed. [C97, §1317; C24, 27, 31, 35,§6969.]

6970 Partners. Any individual of a partnership is liable for the taxes due from the firm. [C51,§463; R60,§717; C73,§806; C97,§1317; C24, 27, 31, 35,§6970.]

6971 "Merchant" defined. Any person, firm, or corporation owning or having in his possession or under his control within the state, with authority to sell the same, any personal property purchased with a view to its being sold, or which has been consigned to him from any place out of this state to be sold within the same, or to be delivered or shipped by him within or without this state, except a warehouseman as defined in section 9718, shall be held to be a merchant for the purposes of this title. [C51, §468; R60,§723; C73,§815; C97,§1318; C24, 27, 31, 35,§6971.]

Referred to in §§6944, 6973
Applicable to special charter cities, §6867.1

6972 Stocks of merchandise. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory and enter the date thereof in the assessment roll. If, in the judgment of the assessor, the inventory is not correct, or if it was taken at such time as to render it unreliable as to the amount or value of such merchandise, he shall assess the same by personal examination. The assessment shall be made at the average value of the stock during the year next preceding the time of assessment, and if the merchant has not been engaged in business for one year, then the average value during such time as he shall have been so engaged, and if commencing on January 1,

then the value at that time. [C51,§468; R60, §723; C73,§815; C97,§1318; C24, 27, 31, 35, §6972.]

Referred to in §6976
Applicable to special charter cities, §6867.1

6973 Warehouseman to file list. A warehouseman as specified in section 6971 shall, upon request, file with the assessor of the township or municipality wherein his warehouse is situated, a written statement showing all property in his possession belonging to another subject to taxation, and the name and address of the person, firm, corporation, or estate to which it belongs. [C24, 27, 31, 35,§6973.]

Applicable to special charter cities, §6867.1
40ExGA, SF 183, §7-a1, editorially divided

6974 Warehouseman deemed owner. If said warehouseman fails to furnish such statement all property in the possession of the warehouseman belonging to another subject to taxation, shall be deemed to be owned by the warehouseman for the purpose of taxation, and he shall be liable for taxes thereon. [C24, 27, 31, 35,§6974.]

Applicable to special charter cities, §6867.1

6975 "Manufacturer" defined—duty to list. Any person, firm, or corporation who purchases, receives, or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, purifying, combining of different materials, or by the packing of meats, with a view to selling the same for gain or profit, shall be deemed a manufacturer for the purposes of this title, and shall list such property for taxation. [C51,§469; R60,§724; C73,§816; C97,§1319; C24, 27, 31, 35,§6975.]

Referred to in §§6944, 6978
Applicable to special charter cities, §6867.1
40ExGA, SF 183, §9, editorially divided

6976 Assessment — how made. Such personal property, whether in a finished or unfinished state, shall be assessed at its average value estimated upon those materials only which enter into the combination, manufacture, or pack, such average to be ascertained as in section 6972. [C51,§469; R60,§724; C73,§816; C97,§1319; C24, 27, 31, 35,§6976.]

Applicable to special charter cities, §6867.1

6977 Machinery deemed real estate. Machinery used in manufacturing establishments shall, for the purpose of taxation, be regarded as real estate. [C97,§1319; C24, 27, 31, 35,§6977.]

Applicable to special charter cities, §6867.1

6978 Manufacturer to list. Corporations organized under the laws of this state for pecuniary profit and engaged in manufacturing as defined in section 6975 shall list their real estate, personal property not hereinbefore mentioned, and moneys and credits in the same manner as is required of individuals. [C97,§1319; C24, 27, 31, 35,§6978.]

Applicable to special charter cities, §6867.1

6979 Public utility plants. The lands, buildings, machinery, and mains belonging to individuals or corporations operating waterworks or gasworks or pipe lines; the lands, buildings, machinery, tracks, poles and wires belonging to individuals or corporations furnishing electric light or power; the lands, buildings, machinery, poles, wires, overhead construction, tracks, cables, conduits, and fixtures belonging to individuals or corporations operating railways by cable or electricity, or operating elevated street railways; and the lands, buildings, tracks, and fixtures of street railways operated by animal power, shall be listed and assessed by the state tax commission. In the making of any such assessment of waterworks plants, the value of any interest in the property so assessed, of the municipal corporation wherein the same is situated, shall be deducted, whether such interest be evidenced by stock, bonds, contracts or otherwise. [C97,§1343; C24, 27, 31, 35,§6979; 48GA, ch 192,§1.]

Referred to in §§7100, 7101
C97,§1343, editorially divided

6980 Property in different districts. Where any such property except the capital stock is situated partly within and partly without the limits of a city or town, such portions of the said plant shall be assessed separately, and the portion within the said city or town shall be assessed as above provided, and the portion without the said city or town shall be apportioned by the state tax commission to the district or districts in which it is located. [C97, §1343; C24, 27, 31, 35,§6980; 48GA, ch 192,§2.]

Referred to in §§7100, 7101

6981 Personal property. All the personal property of such individuals and corporations used or purchased by them for the purposes of such gas or water works, electric light plants, electric or cable railways, elevated street railways or street railways operated by animal power, including the rolling stock of such railways and street railways, and the animals belonging to such street railways operated by animal power, shall be listed and assessed by the state tax commission. In the making of any such assessment of waterworks plants, the value of any interest in the property so assessed, of the municipal corporation wherein the same is situated, shall be deducted, whether such interest be evidenced by stock, bonds, contracts or otherwise. [C97,§1343; C24, 27, 31, 35,§6981; 48GA, ch 192,§3.]

Referred to in §§7100, 7101

6982 Capital stock listed and assessed. The actual value of the capital stock over and above that of the above listed property shall be listed and assessed as prescribed in sections 7008 and 7009. [C97,§1343; C24, 27, 31, 35,§6982.]

Referred to in §§7100, 7101

6982.1 Annual report by utility. Every individual, copartnership, corporation or association operating for profit, waterworks or gasworks or pipe lines, electric light or power plant, railways operated by electricity, elevated street railways, shall, annually on or before the fifteenth day of January of each calendar year, make a report on blanks to be provided by the

state commission of all of the property owned by such individual, copartnership, corporation or association within the incorporated limits of any city or town in the state, and give such other information as the state commission shall require. [C31, 35,§6982-d1; 48GA, ch 192,§4.]

6982.2 Assessment and certification. The state commission shall determine, upon the basis of the data required in such report and any other information it may obtain, the valuation of all property of said individual, copartnership, corporation or association for the purposes of taxation, and shall, on or before the fifteenth day of February, certify to the county auditor of every county in the state the valuations fixed for assessment upon all such property in each and every taxing district in each county by the state commission. This valuation shall then be spread upon the books in the same manner as other valuations fixed by the state commission upon property assessed under its jurisdiction. [C31, 35,§6982-d2; 48GA, ch 192,§§5, 10.]

6982.3 Review. Any taxpayer subject to assessment under the provisions of this act [44GA, ch 174] shall have the right to ask for a review of its assessment by the state commission within ten days after the date the assessment is certified to the county auditor. [C31, 35,§6982-d3; 48GA, ch 192,§6.]

6982.4 Appeal. Appeals may be taken from the final action of the state commission with reference to any complaint that such individual, copartnership, corporation or association may have to the assessment made by said state commission to the district court of the county in which such individual, copartnership, corporation or association has its principal place of business, within twenty days after the final decision on said review has been certified to the county auditor. [C31, 35,§6982-d4; 48GA, ch 192, §7.]

6982.5 Appellate procedure. Appeals shall be taken by written notice to that effect to the said state commission and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the commission which relate to the liability of the property to assessment and its decision shall be certified by the clerk of the court to the state commission who shall correct the assessment and certify the same as fixed and determined to the county auditor who shall correct the entry made on the last list either in his office or in the office of the county treasurer. [C31, 35,§6982-d5; 48GA, ch 192,§8.]

Service of original notice, §11060

6982.6 Jurisdiction of court. Upon the trial of any appeal from the action of the commission fixing the amount of assessment upon any property concerning which complaint is made the court may increase, decrease or affirm the amount of the assessment appealed from. [C31, 35,§6982-d6; 48GA, ch 192,§9.]

6983 Real estate of corporations. All real estate owned by corporations, returned in their statements as part of their assets for purposes of taxation, shall be valued therein for such assessment as other real estate, except as otherwise provided, and shall not be otherwise assessed. [C97,§1327; C24, 27, 31, 35,§6983.]

CHAPTER 332

MONEYS AND CREDITS

Referred to in §§7008, 7112, 7141

6984 "Credits" defined.
6985 Moneys—credits—annuities—bank notes—stock.
6986 Levy—division of money collected.
6987 Bonus bond levy.
6988 Deduction of debts.
6989 Good-faith debt required.
6989.1 Details of debt.
6990 Suretyship.
6991 Debts not deductible.
6992 Stock and moneyed capital denied deduction.
6993 Deductions to fiduciary.
6994 Loan corporations.
6995 Examinations—expense.
6996 Millage tax.

6984 "Credits" defined. The term credit, as used in this chapter, includes every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage, or otherwise; but pensions of the United States or any of them, or salaries, or payments expected for services to be rendered, are not included in the above term. [C51, §457; R60,§713; C73,§802; C97,§1309; C24, 27, 31, 35,§6984.]

6985 Moneys — credits — annuities — bank notes — stock. Moneys, credits, and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed and, excepting shares of stock of national, state, and savings banks, and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides.

[C51,§466; R60,§721; C73,§813; C97,§1310; S13, §1310; C24, 27, 31, 35,§6985.]

Referred to in §§6986, 6987, 7163, 7164, 7167
Bank surplus and profits as moneys and credits, §7003
Corporation shares as credit, §7008
S13, §1310, editorially divided

6986 Levy — division of money collected. The millage tax provided for in section 6985 shall be in lieu of all other taxes upon moneys and credits and shall be levied by the board of supervisors, placed upon the tax list and collected by the county treasurer, and the amount collected in the various taxing districts of the state shall be divided between the various funds upon the same pro rata basis as other taxes collected in such taxing district are apportioned. [S13,§1310; C24, 27, 31, 35,§6986.]

6987 Bonus bond levy. Until the soldiers bonus bonds are retired and paid, there shall be levied and collected upon all property taxed at five mills on the dollar of actual valuation as provided in section 6985 an additional tax of one mill on the dollar of actual valuation. Said tax shall be remitted to the treasurer of state and applied to the payment of the principal and interest of the soldiers bonus bonds. In determining the annual levy for the payment of the principal and interest on such bonds, the state tax commission shall take into consideration the funds to be derived from said tax. [C24, 27, 31, 35,§6987; 48GA, ch 193,§1.]

Referred to in §§7017.05, 7017.11
Applicable to special charter cities, §6867.1
Bonus board, ch 32.1
General bonus levy, §7183.1 et seq.

6988 Deduction of debts. In making up the amount of money or credits which any person is required to list, or to have listed or assessed, including actual value of any building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him. [C51,§467; R60,§722; C73,§814; C97,§1311; S13,§1311; C24, 27, 31, 35,§6988.]

Referred to in §§6989, 6993, 7029, 9063
Debts of insurance companies, §§9063, 9064
S13, §1311, editorially divided

6989 Good-faith debt required. No acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of section 6988. [C51,§467; R60,§722; C73,§814; C97,§1311; S13,§1311; C24, 27, 31, 35,§6989.]

Referred to in §§6993, 7029

6989.1 Details of debt. No person shall be entitled to any deduction from the amount of moneys and credits assessed unless he shall, upon demand, specifically state the nature of such indebtedness and the person to whom he is indebted and any other information the assessor may require. [C31, 35,§6989-d1.]

Referred to in §§6993, 7029

6990 Suretyship. So much only of any liability of such person as security for another shall be deducted as he believes he will be compelled to pay on account of the inability of the principal debtor, and if there are other sureties able to contribute, then so much only as he in whose name the list is made will be bound to contribute. [C51,§467; R60,§722; C73,§814; C97, §1311; S13,§1311; C24, 27, 31, 35,§6990.]

Referred to in §§6993, 7029

6991 Debts not deductible. No person will be entitled to any deduction on account of:

1. Any deposit or security note given in aid of the organization of a mutual insurance company for the premiums of insurance.
2. Any unpaid subscription to any institution, society, corporation or company.
3. Any indebtedness contracted for the purchase of United States bonds or other nontaxable property. [C51,§467; R60,§722; C73,§814; C97,§1311; S13,§1311; C24, 27, 31, 35,§6991.]

Referred to in §§6993, 7029

6992 Stock and moneyed capital denied deduction. No deduction for debts shall be allowed from the shares of stock of any state, savings or national bank or loan and trust company, nor from moneyed capital used in competition with banks, within the meaning of section 548 of title 12 of the United States code. [S13, §1311; C24, 27, 31, 35,§6992.]

Referred to in §§6993, 7029

6993 Deductions to fiduciary. In listing moneys and credits as provided in this chapter, any administrator, executor, trustee or agent shall be entitled to deductions, as prescribed in sections 6988 to 6992, inclusive, of debts owing by the legatee, devisee, beneficiary or principal to the same extent as such fund might be reduced if it were held by such legatee, devisee, beneficiary or principal who may be entitled to the income on such trust or fiduciary fund. [S13, §1312; C24, 27, 31, 35,§6993.]

6994 Loan corporations. Any domestic corporation engaged in the business of loaning money to deserving persons whose business or circumstances are such as to make it desirable or convenient for them to accumulate funds with which to repay such loans by paying into a fund comparatively small amounts at frequent regular intervals, which fund may be held by such corporation as collateral security for the payment of such loans, may take advantage of the provisions of this and sections 6995 and 6996 on or before January 15 of each year by filing with the auditor of state a verified report and statement of its financial condition, and showing the following items:

1. Its total capital stock paid in.
2. Its net surplus and undivided profits.
3. The total amount of loans outstanding.
4. The highest rate of interest charged and collected on loans made by it.
5. Whether its loans have been made to deserving persons whose business or circumstances are such as to make it desirable or convenient for them to accumulate funds with

which to repay such loans by paying into a fund comparatively small amounts at frequent regular intervals.

6. Such further information in detail as the auditor of state shall from time to time require. [C24, 27, 31, 35,§6994.]

Referred to in §§6944, 6996, 9438.20

6995 Examinations—expense. The auditor of state may in his discretion examine the books, records, business, and methods of doing business of such corporation once each year, and the annual expense of said examination shall not exceed twenty-five dollars, which shall be paid by the corporation. [C24, 27, 31, 35,§6995.]

Referred to in §§6994, 9438.20

6996 Millage tax. If the auditor of state finds from such report or said examination, or both, that such corporation has honestly and in good faith so conducted its business as to aid deserving persons in the manner provided in section 6994, and that the corporation has not collected a usurious rate of interest from borrowers on loans, he shall issue to said corporation a certificate to that effect which shall entitle the corporation to be assessed on the net actual value of its moneys and credits at the rate of five mills on the dollar, which taxation shall be in lieu of all other taxes on its moneys and credits. [C24, 27, 31, 35,§6996.]

Referred to in §§6944, 6994, 9438.20
Applicable to special charter cities, §6867.1

CHAPTER 333

BANKS

Referred to in §§6967, 7008, 7112, 7141

6997 Private banks.
6998 National and state bank stock—place of assessment.
6999 List of stockholders and their holdings.
7000 Listing to stockholders.
7001 Statement furnished.
7002 Deductions on account of real estate.
7003 Rule of actual and taxable value.
7004 Refusal to furnish information.
7004.1 Stock of insolvent bank—remission.
7005 Moneyed capital.
7006 Listing.
7007.1 Liability of corporation for tax.
7007.2 Liability of stockholder—lien on stock.
7007.3 Sale of stock.
7007.4 Notice—how given.

6997 Private banks. Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement showing the assets, aside from real estate, and liabilities of such bank or banker on January 1 of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers, or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items.

2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due.

3. The amount of all deposits made with them by others, and also the amount of bills payable.

4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation.

5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof.

The aggregate actual value of moneys and credits less the amount of deposits, the aggregate actual value of bonds and stocks less the portion thereof otherwise taxed in this state, and other property, except real estate, pertaining to the business, shall be assessed and taxed on the same basis as bank stock. Real estate shall be listed and assessed as other real estate. [C51,§§460, 465; R60,§§719, 720; C73,§812; C97, §1321; S13,§1321; C24, 27, 31, 35,§6997.]

Referred to in §7001
Applicable to special charter cities, §6867.1

6998 National and state bank stock—place of assessment. Shares of stock of national banks and state and savings banks and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. [R60,§719; C73,§812; C97,§1322; S13,§1322; C24, 27, 31, 35,§6998.]

Applicable to special charter cities, §6867.1
40ExGA, SF 183, §12, editorially divided

6999 List of stockholders and their holdings. At the time the assessment is made the officers of national banks and state and saving banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each. [R60, §714; C73,§819; C97,§1322; S13,§1322; C24, 27, 31, 35,§6999.]

Referred to in §7004
Applicable to special charter cities, §6867.1

7000 Listing to stockholders. The assessor shall list to each stockholder under the head of corporation stock the total value of such shares. [C97,§1322; S13,§1322; C24, 27, 31, 35,§7000.]

Applicable to special charter cities, §6867.1

7001 Statement furnished. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section 6997, which shall also show separately the

amount of the capital stock and the surplus and undivided earnings. [C97,§1322; S13,§1322; C24, 27, 31, 35,§7001.]

Referred to in §7004
Applicable to special charter cities, §6867.1

7002 **Deductions on account of real estate.** In arriving at the amount of capital stock and surplus and undivided profits taxable as such, of such corporations, the amount of their capital stock together with any or all of their surplus and undivided profits that may be actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any,) on or in which the bank or trust company is located, shall be deducted from the total amount of capital stock and surplus and undivided profits, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. [C97,§1322; S13,§1322; C24, 27, 31, 35, §7002.]

Referred to in §7003
Applicable to special charter cities, §6867.1
40ExGA, SF 188, §13, editorially divided

7003 **Rule of actual and taxable value.** The assessor from such statement shall fix the value of such stock based upon the capital, at the same ratio* of assessed value to actual value as the assessed value of real estate in the taxing district where such bank is located generally bears to its actual value.

The taxable value of such shares of stock shall be the assessed value and shall be taxed as moneys and credits. The provisions hereof shall become effective beginning with the assessment on the capital stock of all of said banks as of January 1, 1934.

All surplus and undivided profits of such bank or trust company remaining after the deduction of its real estate, if any, as provided in section 7002 shall be taxed as moneys and credits, but in no event shall the right to offset bad debts or bad loans or any other losses against the amount of said surplus and undivided profits be authorized. [C73,§§818–820; C97,§1322; S13, §§1322, 1322-1a; C24, 27, 31, 35,§7003.]

Applicable to special charter cities, §6867.1
*See §7109; also 45GA, ch 121, §75

7004 **Refusal to furnish information.** A refusal to furnish the assessor with the list of stockholders and the information required by sections 6999 and 7001 shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars. [S13,§1322; C24, 27, 31, 35, §7004.]

Applicable to special charter cities, §6867.1

7004.1 **Stock of insolvent bank—remission.** Whenever a bank operated within the state has been heretofore or shall hereafter be closed and placed in the hands of a receiver, the board of supervisors shall remit all unpaid taxes on the capital stock, surplus and undivided profits of said bank. [C35,§7004-g1; 47GA, ch 187,§1.]

Similar provision, §7237

7005 **Moneyed capital.** All moneyed capital within the meaning of section 548 of title 12 of the United States code shall be listed and assessed against the owner thereof at his place of business, and if a corporation at its principal place of business, at the same rate as state, savings, national bank and loan and trust company stock is taxed, in the same taxing district, and at the actual value of the moneyed capital so invested. [S13,§§1310, 1322-1a; C24, 27, 31, 35, §7005.]

7006 **Listing.** The person or corporation using moneyed capital in competition with bank capital shall furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used. [S13,§1310; C24, 27, 31, 35,§7006.]

7007 Transferred. Now appears as §6867.1

7007.1 **Liability of corporation for tax.** The corporations described in this chapter shall be liable for the payment of the taxes assessed to the stockholders of such corporations, and such tax shall be payable by the corporation in the same manner and under the same penalties as in cases of taxes due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. [C97,§1325; C24,§7014; C27, 31, 35, §7007-a1.]

Applicable to certain corporate shares, §7013
41GA, ch 159, §1, editorially divided

7007.2 **Liability of stockholder — lien on stock.** Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. [C97,§1325; C24,§7014; C27, 31, 35,§7007-a2.]

Applicable to certain corporate shares, §7013

7007.3 **Sale of stock.** If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stockholders thirty days notice of the amount of such tax and the time and place of sale. [C97,§1325; C24,§7014; C27, 31, 35,§7007-a3.]

Applicable to certain corporate shares, §7013

7007.4 **Notice—how given.** Such notice shall be by registered mail addressed to the stockholder at his post-office address as the same appears upon the books of the company, or is known by its secretary. [C97,§1325; C24,§7014; C27, 31, 35,§7007-a4.]

Applicable to certain corporate shares, §7013

CHAPTER 334

CORPORATION STOCK

Referred to in §§7112, 7141

7008 Shares of stock.
7009 Statement to assessor.
7010 Valuation of stock.
7011 Refusal to make statement.
7013 Corporations liable to pay tax.

BUILDING, SAVINGS AND LOAN ASSOCIATIONS

7017.01 Shares assessed against association.
7017.02 Sworn statement required.
7017.03 Refusal.
7017.04 Determination of value.
7017.05 Amount of tax.
7017.06 Apportionment of tax.
7017.07 Lien.
7017.08 Deductions.
7017.09 Taxation of real estate, furniture and fixtures.
7017.10 Association liable.
7017.11 Tax exclusive.
7018 Foreign company—statement required—duty of auditor of state.
7019 County auditor—duty.

7008 Shares of stock. The shares of stock of any corporation organized under the laws of this state, except corporations otherwise provided for in chapters 330 to 341, inclusive, and except as provided in section 7102, shall be assessed to the owners thereof as moneys and credits at the place where its principal business is transacted. The assessment shall be on the value of such shares on the first day of January in each year. In arriving at the assessable value of the shares of stock of such corporations, the amount of their capital actually invested in property other than moneys and credits shall be deducted from the actual value of such shares. Such property other than moneys and credits shall be assessed as other like property. [C97, §1323; C24, 27, 31, 35,§7008.]

Referred to in §§6982, 7010, 7026
Applicable to special charter cities, §6867.1

7009 Statement to assessor. Every such corporation annually, on or before the twenty-fifth day of January, shall furnish to the assessor of the assessment district in which its principal place of business is located, a verified statement showing specifically, with reference to the year next preceding the first day of January then last past:

1. Total authorized capital stock and number of shares thereof.
2. Number of shares of stock issued and par value of each.
3. Amount paid into the treasury on each share and the total capital paid in.
4. Description of each tract of real estate owned by said corporation, and the amount of capital actually invested therein.
5. An itemized list of all other property owned by said corporation, except moneys and credits, together with the location thereof, and the amount of capital actually invested therein.
6. Date, rate percent, and amount of each dividend declared, and the amount of capital on which each such dividend was declared.
7. Gross and net earnings, respectively, during the year, and amount of surplus.
8. Amount of profit added to sinking fund.
9. Highest price of sales of stock between the first and tenth days of January of the current year.
10. Highest price of sales of stock during the preceding year, and average price of such sales. [C97,§1323; C24, 27, 31, 35,§7009.]

Referred to in §§6982, 7010, 7026
Applicable to special charter cities, §6867.1

7010 Valuation of stock. If the assessor is not satisfied with the appraisement and valuation furnished as provided in sections 7008 and 7009, he may make a valuation of the shares of stock based upon the facts contained in the statements above required, or upon any information within his possession, or that shall come to him, and shall, in either case, assess to the owners the stock at the valuation made by him. [C97,§1324; C24, 27, 31, 35,§7010.]

Referred to in §7026
C97, §1324, editorially divided

7011 Refusal to make statement. If the officers of any corporation refuse or neglect to make the statement required, the assessor shall make a valuation of the capital stock of the defaulting corporation from the best information obtainable. [C97,§1324; C24, 27, 31, 35,§7011.]

Referred to in §7026

7012 Rep. by 44GA, ch 177

7013 Corporations liable to pay tax. Sections 7007.1 to 7007.4, inclusive, shall be applicable to the corporations hereinbefore described in this chapter. [C97,§1325; C24,§§7013, 7014; C27, 31, 35,§7013.]

Referred to in §7026

7014 Rep. by 42GA, ch 175

7015 to 7017, inc. Rep. by 44GA, ch 178

BUILDING, SAVINGS AND LOAN ASSOCIATIONS

7017.01 Shares assessed against association. The value of the shares of each mutual building and loan or savings and loan association exclusively engaged in such business shall be assessed against each association at its principal place of business. [C31, 35,§7017-d1.]

7017.02 Sworn statement required. On or before the first day of February of each year every mutual building and loan or savings and loan association shall furnish to the assessor a sworn statement showing the total amount to the credit of the shareholders at the close of

business on the preceding December 31; said statement shall contain the following information:

1. The total amount credited on all the shares of nonborrowing members.

2. The total amount credited on all the shares of borrowing members whose share credits are in excess of their indebtedness to the association less the amount owing to the association by such borrowing members.

3. The total amount of contingent reserve and all other funds.

4. A legal description of each tract of real estate owned by such association and the amount actually invested therein.

5. The actual value of all furniture, fixtures and other equipment used in the conduct of the business of the association.

6. The actual value of all bonds owned by the association. [C31, 35,§7017-d2.]

Referred to in §§7017.03, 7017.04

7017.03 Refusal. If any officer of a mutual building and loan or savings and loan association, upon demand being made, fails or refuses to furnish the assessor with the statement required in section 7017.02 he shall be guilty of a misdemeanor. [C31, 35,§7017-d3.]

Misdemeanor, punishment, §12894

7017.04 Determination of value. In arriving at the value of the shares of each mutual building and loan or savings and loan association the assessor shall allow as a deduction the total amount of indebtedness of all borrowing members to the association and shall fix and determine the value of the shares based upon the information contained in the statement provided for in section 7017.02, and upon such other information as he may secure. [C31, 35,§7017-d4.]

7017.05 Amount of tax. In addition to the tax provided for in section 6987, there is hereby levied and imposed against each mutual building and loan or savings and loan association a tax of one mill on the dollar on the actual value of the shares of stock of each such association. [C31, 35,§7017-d5.]

44GA, ch 178, §6, editorially divided

7017.06 Apportionment of tax. Each such association shall apportion against the owners of the shares of stock upon the value of which the said tax is so levied their pro rata share of said tax. [C31, 35,§7017-d6.]

7017.07 Lien. The association shall have a lien upon the shares of each such shareholder for his portion of said tax and may deduct the same from the amount of earnings credited to such shareholder. [C31, 35,§7017-d7.]

7017.08 Deductions. From the total actual value of the contingent, reserve and/or other funds of each such association there shall be deducted the actual value of the real estate, personal property and tax exempt bonds owned by the association and the balance obtained after making the deductions herein provided for shall be taxed and assessed against such association at its principal place of business as moneys and credits. [C31, 35,§7017-d8.]

7017.09 Taxation of real estate, furniture and fixtures. The real estate, furniture and fixtures of each mutual building and loan or savings and loan association shall be assessed and taxed to the association in the same manner and at the same rate as is real estate and personal property in the hands of individuals. [C31, 35, §7017-d9.]

7017.10 Association liable. Each building and loan or savings and loan association shall be liable for the payment of the taxes levied and assessed against it and such taxes shall be paid by the association and collected in the same manner and subject to the same penalties as are general taxes. [C31, 35,§7017-d10.]

7017.11 Tax exclusive. Taxes herein provided for shall be in lieu of all other taxes against building and loan or savings and loan associations and against the shares of stock of such association, excepting that said shares of stock shall be subject to the one mill levy for soldiers bonus bonds provided by section 6987. [C31, 35,§7017-d11.]

7018 Foreign company—statement required —duty of auditor of state. The auditor of state shall, on or before the tenth day of February of each year, send to the county auditor of each county a statement of the name and post-office address of each stockholder of a foreign building and loan, or savings and loan association residing in their respective counties, together with the number of shares owned by each person on the first day of January preceding, and the actual value of each share of stock on said first day of January, which facts shall be reported to him by such associations under the law governing building and loan, or savings and loan associations. [C97,§1326; S13,§1326; C24, 27, 31, 35,§7018.]

S13,§1326, editorially divided

7019 County auditor—duty. It shall be the duty of the county auditor to immediately furnish to each assessor in his county the name of each stockholder in any such foreign association residing in such assessor's district, together with the number of shares held by each person, and the actual value of each share on the first day of January preceding. [C97,§1326; S13, §1326; C24, 27, 31, 35,§7019.]

7020 Rep. by 44GA, ch 178

CHAPTER 335

INSURANCE COMPANIES

Referred to in §§7008, 7112, 7141, 8943.06

7021 Alien companies—tax on gross premiums.
7022 Foreign companies—tax on gross premiums.
7023 Receipts—certificate of authority.
7024 Deduction for debts.
7025 Domestic companies—tax on gross premiums.
7026 Domestic companies—shares of stock.
7027 Personal and real property.
7028 Assessment.
7029 Moneys and credits.
7030 Debts deductible.

7021 Alien companies—tax on gross premiums. Every insurance company or association organized or incorporated under the laws of any state or nation other than the United States, and every other insurance company whose charter may be owned or a majority of whose stock may be controlled or whose business shall be carried on in the interest or for the benefit of any insurance company or association incorporated under the laws of any state or nation other than the United States, shall, at the time of making the annual statements as required by law, make such statements in duplicate and furnish one copy thereof to the state tax commission and upon computation and tax statement from the state tax commission, pay into the state treasury as taxes two and one-half percent of the gross amount of premiums received by it or its agents, in cash, promissory obligation, or other form of settlement for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. [C51,§464; R60,§718; C73,§807; C97,§1333; S13,§1333; C24, 27, 31, 35,§7021; 48GA, ch 194,§1.]

Referred to in §8458
S13,§1333, editorially divided

7022 Foreign companies—tax on gross premiums. Every insurance company incorporated under the laws of any state of the United States other than the state of Iowa, not including associations operating under the provisions of chapter 400, or fraternal beneficiary associations doing business in the United States, shall, at the time of making the annual statements as required by law, make such tax statements in duplicate and furnish one copy thereof to the state tax commission and upon computation and tax statement from the state tax commission, pay into the state treasury as taxes two and one-half percent of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. [C51,§464; R60,§718; C97,§1333; S13,§1333; C24, 27, 31, 35,§7022; 48GA, ch 194,§2.]

Referred to in §8458

7023 Receipts—certificate of authority. At the time of paying said taxes, said companies and associations shall take duplicate receipts therefor, one of which shall be filed with the commissioner of insurance, and upon filing of said receipt, and not till then, the commissioner of insurance shall issue the annual certificate as provided by law. [C73,§807; C97,§1333; S13, §1333; C24, 27, 31, 35,§7023.]

Referred to in §8458

7024 Deduction for debts. No deduction or exemption from the taxes herein provided shall be allowed for or on account of any indebtedness owing by any such insurance company or association; provided, however, that companies doing a fire insurance business may deduct from the gross amount of premiums received, the amount of premiums returned upon canceled policies issued upon property situated in this state. [C97,§1333; S13,§1333; C24, 27, 31, 35, §7024.]

Referred to in §8458

7025 Domestic companies — tax on gross premiums. Every insurance corporation or association of whatever kind or character, organized under the laws of the state of Iowa, not including county mutuals or fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, shall, on or before the first day of March of each year, make a statement to the state tax commission of its gross receipts with deductions as hereinafter in this section provided, and upon computation and tax statement from the state tax commission, pay to the treasurer of state a sum equivalent to one percent of the gross receipts from premiums, assessments, fees, and promissory obligations required by insurance contracts which are received during the next year preceding the first day of January last past, after deducting the amounts actually paid for losses, matured endowments, dividends to policyholders, and the increase in the amount of the reserve as certified by the department actuary in his official statement to the commissioner of insurance on the thirty-first day of December previous, based on the actuaries table of mortality and four percent, and the amounts returned to members upon canceled policies, certificates, and rejected applications, during said year, and not until such payment shall the commissioner of insurance issue the annual certificate, as provided by law; provided that insurance companies organized under the provisions of chapter 404 shall only be required to pay to the treasurer of state a sum equivalent to one percent of the gross receipts from premiums, assessments, fees, and promissory obligations for business done within this state, including all insurance upon property situated in the state, after deducting the amount actually paid for losses on property located

within the state, or on claims arising within the state, and the amount returned upon canceled policies and rejected applications covering property situated or on business done within this state. Business written in this state shall include policies upon which no premium tax shall have been paid in any other state, issued to nonresidents of this state by companies organized under the laws of this state, which companies are not subject to the jurisdiction of the courts of the state of the policyholder's residence. [S13,§1333-d; C24, 27, 31, 35,§7025; 48GA, ch 194,§3.]

Referred to in §8458

7026 **Domestic companies—shares of stock.** The shares of stock of every insurance corporation or association having capital stock, organized under the laws of this state, shall be assessed for taxation in the manner provided for the assessment of the shares of corporate stock in sections 7008 to 7013, inclusive, and said shares of stock shall not be otherwise assessed. In addition to the statement required in section 7009, the corporation shall furnish to the assessor a copy of its annual report made to the auditor of state. [S13,§1333-a; C24, 27, 31, 35,§7026.]

7027 **Personal and real property.** Every insurance corporation or association organized under the laws of this state, not including corporations with capital stock, county mutuals, and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, shall, on or before the twenty-sixth day of January in each year, for the purpose of assessment of its property, furnish to the assessor of the assessment district in which its principal place of business is located, a statement verified by its president, showing specifically with reference to the year next preceding the first day of January then last past:

1. A duplicate of the statement required by law to be made to the commissioner of insurance for the said year last past.

2. A detailed statement of all its property and assets of every kind and nature whatsoever, and the value of each item thereof, including surplus, guaranty, and reserve fund, and the amount of each. [S13,§1333-b; C24, 27, 31, 35,§7027.]

Referred to in §7028
S13,§1333-b, editorially divided

7028 **Assessment.** It shall be the duty of the assessor, upon the receipt of said statements, and from other information acquired by him, to assess against every corporation or association referred to in section 7027, the value of all personal property owned by such corporation or association, together with the actual value of each parcel of real estate situated in the assessment district of such assessor, and all the said property shall be assessed at the same rate, and for the same purposes as the property of private individuals, as provided in section 7109. [S13, §1333-b; C24, 27, 31, 35,§7028.]

7029 **Moneys and credits.** In assessing for taxation the moneys and credits of every insurance corporation, company, or association organized under the laws of this state, except county mutuals and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, the assessor shall ascertain the debts or liabilities, if any, of such corporation, company, or association to its shareholders or other persons, which debts and liabilities shall be deducted, as provided in sections 6988 to 6992, inclusive. [S13,§1333-c; C24, 27, 31, 35, §7029.]

S13, §1333-c, editorially divided

7030 **Debts deductible.** In ascertaining the indebtedness or liability of such corporation, company or association, a debt shall be deemed to exist on account of its liability on the policies, certificates or other contracts of insurance issued by it equal to the amount of the surplus or other funds accumulated by any such corporation or association for the purpose of fulfilling its policies, certificates or other contracts of insurance, and which can be used for no other purpose. [S13,§1333-c; C24, 27, 31, 35, §7030.]

CHAPTER 336

TELEGRAPH AND TELEPHONE COMPANIES

Referred to in §§7008, 7112, 7141

7031 Statement required.
7032 Additional statement.
7033 Failure to make statement.
7034 Assessment.
7035 Actual value per mile.
7036 Taxable value.
7037 Hearing.
7038 Assessment in each county—how certified.
7039 Entry of certificate.
7040 Rate of taxation—collection.
7041 Other real and personal property.
7042 "Company" defined.
7043 Line operated by railroad.
7044 Maps required.
7045 Failure to file.

7031 **Statement required.** Every telegraph and telephone company operating a line in this state shall, on or before the first day of May in each year, furnish to the state tax commission a statement verified by its president or secretary showing:

1. The total number of miles owned, operated, or leased within the state, with a separate showing of the number leased.

2. The average number of poles per mile, and the whole number of poles on its lines in this state.

3. The total number of miles in each separate line or division thereof, also the average number of separate wires thereon.

4. The whole number of stations on each line, and the value of the same, including furniture.

5. The whole number of instruments on each separate line, and the gross rental charges per instrument, where the same are rented to patrons of the company making the return, together with the number of stations maintained, other than railroad stations.

6. The gross receipts and operating expenses of said company for the year ending December 31 next preceding, on business originating and terminating in this state.

7. The gross receipts and operating expenses of said company for the year ending December 31 next preceding, and not included in the statement made under subsection 6 hereof.

8. The total capital stock of said company.

9. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

10. The market value of such shares of stock on the first day of January next preceding, and if such shares have no market value, the actual value thereof.

11. All real estate and other property owned by such company and subject to local taxation within this state.

12. The specific real estate, together with the permanent improvements thereon, owned by such company and situated outside this state and taxed as other real estate in the state where located, with a specific description of each piece, where located, and the purpose for which the same is used, and the actual value thereof in the locality where situated.

13. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

14. The total length of the lines of said company.

15. The total length of the lines of said company outside this state. [C97,§1328; S13,§1328; C24, 27, 31, 35,§7031; 48GA, ch 195,§1.]

Referred to in §7033

7032 Additional statement. Upon the receipt of said statements from the several companies, the state tax commission shall examine said statements and if it shall deem the same insufficient and that further information is requisite, it shall require the officer making same to make such other or further statement as it may desire. [C97,§1329; S13,§1329; C24, 27, 31, 35,§7032; 48GA, ch 195,§2.]

S13, §1329, editorially divided

7033 Failure to make statement. In case of failure or refusal of any company to make out or deliver to the state tax commission the statements required in section 7031, such company shall forfeit and pay to the state one hundred dollars for each day such report is delayed beyond the first day of May, to be sued and recovered in any proper form of action in the name of the state, and on the relation of the state tax commission, and such penalty, when collected, shall be paid into the general fund of the state. [C97,§1329; S13,§1329; C24, 27, 31, 35,§7033; 48GA, ch 195,§3.]

7034 Assessment. The state tax commission shall, at its meeting on the second Monday in July of each year, proceed to find the actual value of the property of such companies in this state, taking into consideration the information obtained from the statements above required, and any further information it can obtain, using the same as a means for determining the actual cash value of the property of such companies within this state; also taking into consideration the valuation of all property of such companies, including franchises and the use of the property in connection with lines outside the state, and making such deductions as may be necessary on account of extra value of property outside the state as compared with the value of property in the state, in order that the actual cash value of the property of the company within this state may be ascertained. Said assessment shall include all property of every kind and character whatsoever, real, personal, or mixed, used by said companies in the transaction of telegraph and telephone business; and the property so included in said assessment shall not be taxed in any other manner than as provided in this chapter and section 6944, subsection 20. [C97, §1330; S13,§1330; C24, 27, 31, 35,§7034; 48GA, ch 195,§4.]

7035 Actual value per mile. The state tax commission shall ascertain the value per mile of the property of each of said companies within this state by dividing the total value, as above ascertained, by the number of miles of line of such company within the state, and the result shall be deemed and held to be the actual value per mile of line of the property of such company within this state. [S13,§1330-a; C24, 27, 31, 35, §7035; 48GA, ch 195,§5.]

S13,§1330-a, editorially divided

7036 Taxable value. The taxable value shall be determined by taking the percentage of the actual value so ascertained, as provided by section 7109, and the ratio between the actual value and the assessed or taxable value of the property of each of said companies shall be the same as in the case of property of private individuals. [S13,§1330-a; C24, 27, 31, 35,§7036.]

See also 45GA, ch 121, §75

7037 Hearing. At such meeting in July any company interested shall have the right to appear, by its officers or agents, before the state tax commission and be heard on the question of the valuation of its property for taxation. [S13, §1330-a; C24, 27, 31, 35,§7037; 48GA, ch 195,§6.]

7038 Assessment in each county—how certified. The state tax commission shall, for the purpose of determining what amount shall be assessed to any one of said companies in each county of the state into which the line of the said company extends, multiply the assessed or taxable value per mile of line of said company, as above ascertained, by the number of miles

in each of said counties, and the result thereof shall be by said state commission certified to the several county auditors of the respective counties into, over, or through which said line extends. [S13,§1330-b; C24, 27, 31, 35,§7038; 48GA, ch 195,§7.]

7039 Entry of certificate. At the first meeting of the board of supervisors held after such statement is received by the county auditor, it shall cause such statement to be entered in its minute book, and make and enter therein an order stating the length of the lines and the assessed value of the property of each of said companies situated in each city, town, township, or lesser taxing district in its county, as fixed by the state tax commission, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property when collected by the county treasurer shall be disposed of as other taxes on real estate. The county auditor shall transmit a copy of said order to the council or trustees of each city, town, or township in which the lines of said company extend. [S13,§1330-c; C24, 27, 31, 35, §7039; 48GA, ch 195,§8.]

7040 Rate of taxation—collection. All telegraph and telephone property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, or lesser taxing districts, and the county treasurer shall collect such taxes at the same time and in the same manner as other taxes, and the same penalties for the nonpayment shall be due and collectible as for the nonpayment of individual taxes. [S13, §1330-d; C24, 27, 31, 35,§7040.]

7041 Other real and personal property. Land, lots, and other real estate and personal property belonging to any telegraph company or telephone company not used exclusively in its telegraph or telephone business shall be subject to assessment and taxation on the same basis as other property of individuals in the several counties where situated. [S13,§1330-e; C24, 27, 31, 35,§7041.]

7042 "Company" defined. The word "company" as used in this chapter and section 6944, subsection 20, shall be deemed and construed to mean and include any person, copartnership, association, corporation, or syndicate that shall own or operate, or be engaged in operating, any telegraph or telephone line, whether formed or organized under the laws of this state or elsewhere. [S13,§1330-f; C24, 27, 31, 35,§7042.]

7043 Line operated by railroad. No telegraph line shall be assessed which is owned and operated by any railroad company exclusively for the transaction of its business, and which has been duly reported as such in its annual report under the laws providing for the taxation of railroad property. [C97,§1332; C24, 27, 31, 35,§7043.]

7044 Maps required. On or before the first day of August, 1904, each telephone or telegraph company owning or operating a telephone or telegraph line, any part of which lies within the state of Iowa, shall file with the several county auditors of the counties within which any part of its line is located, a map of all its lines within said county, except its line within any platted city or town, drawn to a scale of not less than one inch to four miles, on which the location of the line or lines of said company is correctly shown. The map of any line situated upon any highway or street which is the dividing line between taxing districts shall show on which side of said street or highway said line is situated and shall locate all points at which said line may cross said street or highway. A statement showing the length of pole line in each taxing district of each company shall be filed when no map of the pole lines of such company is required under the terms of this section. A telephone or telegraph company whose line is situated upon the right-of-way of a railway may file, in lieu of the map required to be filed by the provisions of this section, a certificate setting forth along what lines of railway said company's telephone or telegraph line extends. On or before the first day of March, 1905, and annually thereafter, like maps, statements, or certificates shall be filed with the several county auditors of counties in which any part of said lines may have been extended, constructed, relocated, or taken down entirely, during the preceding calendar year, showing the correct location of all such new or relocated lines, and the location of any part abandoned or taken down, as the same existed on the thirty-first day of December preceding; provided county auditors of the several counties shall, upon application of any company owning or operating a telephone or telegraph line in their respective counties, furnish a map or maps accurately showing the boundaries of all taxing districts in said county, and the public highways located within such taxing districts. [S13,§1400-a; C24, 27, 31, 35, §7044.]

Referred to in §§7045, 7103

7045 Failure to file. In the event of the failure or refusal of any telephone or telegraph company, owning or operating any telephone or telegraph line not situated upon the right-of-way of a railway, to file the map required under the provisions of section 7044, at the time and according to the conditions named, then the county auditor may cause the same to be prepared by the county surveyor and the cost thereof shall, in the first place, be audited and paid by the board of supervisors of the county, out of the county fund, and the amount thereof shall be by said board levied as a special tax against said company and the property of said company, which shall be collected in the same manner as county taxes and become a part of the county fund. [S13,§1400-b; C24, 27, 31, 35, §7045.]

Referred to in §7103

CHAPTER 337

RAILWAY COMPANIES

Referred to in §§7008, 7112, 7141

7046 When assessed—statement required.
7047 Real estate holdings—statement required.
7048 Continuing record.
7049 Additional statements.
7050 Record of railway lands.
7051 Sleeping and dining cars.
7052 Gross earnings.
7053 Method of accounting.
7054 Net earnings.
7055 Reports additional.
7056 Additional rules and regulations.
7057 Refusal to obey.
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7060 Assessment of railways.
7061 Assessment of sleeping and dining cars.
7062 Certification to county auditors.
7063 Plats.
7064 Failure to file.
7065 Property assessed by local authorities.
7066 Roadbeds.
7067 Levy and collection of tax.
7068 Rates—purposes.

7046 When assessed — statement required. On the second Monday in July of each year, the state tax commission shall assess all the property of each railway corporation in the state, excepting the lands, lots, and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice president, general manager, general superintendent, receiver, or such other officer as the state commission may designate, shall, on or before the first day of April in each year, furnish it a verified statement showing in detail for the year ended December 31 next preceding:

1. The whole number of miles of railway owned, operated, or leased by such corporation or company within and without the state.

2. The whole number of miles of railway owned, operated, or leased within the state, including double tracks and sidetracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county.

3. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed.

4. The total number of ties per mile used on all its tracks within the state.

5. The weight of rails per yard in main line, double tracks and sidetracks.

6. The number of miles of telegraph lines owned and used within the state.

7. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight, and other cars, including handcars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately.

8. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said state commission.

9. The gross earnings of the entire road, and the gross earnings in this state.

10. The operating expenses of the entire road, and the operating expenses within this state.

11. The net earnings of the entire road, and the net earnings within this state. [C73,§§810, 1317, 1318; C97,§1334; S13,§1334; C24, 27, 31, 35,§7046; 48GA, ch 196,§1.]

Referred to in §§7047, 7059

7047 Real estate holdings — statement required. Each railway or other corporation required by law to report to the state tax commission under the provisions of the law as it appears in section 7046 shall, on or before the first day of April, 1905, make to the state tax commission a detailed statement showing the amount of real estate owned or used by it on December 31, 1904, for railway purposes, in each county in the state in which said real estate is situated, including the right-of-way, roadbed, bridges, culverts, depot grounds, station buildings, yards, section and tool houses, roundhouses, machine and repair shops, water tanks, turntables, gravel beds and stone quarries, and for all other purposes, with the estimated actual value thereof, in such manner as may be required by the state tax commission. [S13,§1334-a; C24, 27, 31, 35;§7047; 48GA, ch 196,§2.]

Referred to in §7050
S13, §1334-a, editorially divided

7048 Continuing record. Only one such detailed statement by any corporation shall be necessary, and when received by the state commission it shall become the record of railway lands of such corporation, and be deemed as annually thereafter reported for valuation and assessment by the state tax commission. [S13, §1334-a; C24, 27, 31, 35,§7048; 48GA, ch 196,§3.]

Referred to in §7050

7049 Additional statements. On or before the first day of April of each subsequent year such corporation shall in like manner report all real estate acquired for any of the railway purposes above named during the preceding calendar year; and also a list of any real estate, previously reported, disposed of during the same period, which disposition shall be noted by the state commission in an appropriate column opposite to the description of said tract in the original report of the same in the record of railway land. [S13,§1334-a; C24, 27, 31, 35, §7049; 48GA, ch 196,§4.]

Referred to in §7050

7050 Record of railway lands. The state tax commission shall, by some convenient method of binding, arrange the statements required to be made under the provision of sections 7047 to 7049, inclusive, so as to form a consolidated list of all real estate reported to it as being owned or used for railway purposes within the state of Iowa, which list shall be known as the record of railway lands. [S13,§1334-b; C24, 27, 31, 35, §7050; 48GA, ch 196,§5.]

7051 Sleeping and dining cars. In addition to the matters required to be contained in the statement made by the company for the purposes of taxation, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, the value of each car so used, and also the number of miles each month said cars have been run or operated on such railway within the state, and the total number of miles said cars have been run or operated each month within and without the state. Such statement shall show the average daily sleeping car and dining car service or wheelage operated on each part or division of the line or system within the state, designating the points on the line where variations occur, with the mileage of that part having the same daily service or wheelage. [C97,§1340; S13, §1340; C24, 27, 31, 35,§7051.]

Referred to in §7061

7052 Gross earnings. For the purpose of making reports to the state tax commission, the gross earnings of railway companies, owning or operating a line or lines of railway partly within this state and partly within another state, or other states, or territory, or territories, upon their line or lines within this state, shall be ascertained and reported by said railway companies as follows, to wit: The aggregate of the earnings upon business originating and terminating within this state, upon business originating in this state and terminating elsewhere, upon business originating elsewhere and terminating in this state, and upon business neither originating nor terminating in this state but carried on or done over the line or lines in this state or over some part thereof, shall be reported; and with respect to all such interstate business the earnings in this state for the purpose of report shall be actually computed upon the basis of the length of haul or carriage in this state as compared with the length of haul or carriage elsewhere. It is hereby declared that for the purpose of making reports looking to the assessment of railway property for taxation, the gross earnings or business done or carried partly within this state and partly in another state, or other states, or territories, shall be that proportion of the entire earnings of such business that the haul or carriage in this state bears to the entire haul or carriage. [S13,§1340-a; C24, 27, 31, 35,§7052; 48GA, ch 196,§6.]

Referred to in §§7055, 7057

7053 Method of accounting. The state tax commission shall have the power to prescribe such rules and regulations with respect to the keeping of accounts by the railway companies doing business in this state as will insure the accurate division of earnings as aforesaid, and uniformity in reporting the same to the state tax commission. [S13,§1340-b; C24, 27, 31, 35, §7053; 48GA, ch 196,§7.]

Referred to in §§7055, 7057

7054 Net earnings. The state tax commission shall have the power to prescribe a method for all railway companies doing business in this state, together with the rules and regulations, for the ascertainment of the net earnings of the railway lines in this state, to the end that all such railway companies, in ascertaining and making report of net earnings, shall proceed upon the same basis and in a uniform manner. [S13, §1340-c; C24, 27, 31, 35,§7054; 48GA, ch 196,§8.]

Referred to in §§7055, 7057

7055 Reports additional. The reports provided for in sections 7052 to 7054, inclusive, are not in lieu of, but in addition to, the reports provided for by law, and they shall be made at the time and as a part of the reports already required. [S13,§1340-d; C24, 27, 31, 35,§7055.]

Referred to in §7057

7056 Additional rules and regulations. The rules, regulations, method, and requirements herein provided to be made by the state tax commission shall be made and communicated in writing or print to the said several railway companies and shall be and become binding upon said railway companies from the time they are so communicated; provided, however, that the said state tax commission shall have the power to prescribe supplemental or additional rules, regulations, and requirements at any time, and communicate them to the several railway companies in the manner aforesaid, and with respect to such additional or supplemental rules, regulations, and requirements, they shall be and become binding upon the said railway companies within thirty days after they are so communicated. [S13, §1340-e; C24, 27, 31, 35,§7056; 48GA, ch 196, §9.]

Referred to in §7057

7057 Refusal to obey. If any railway company shall fail or refuse to obey or conform to the rules, regulations, method, and requirements so made or prescribed by the state tax commission under the provisions of sections 7052 to 7056, inclusive, or to make the reports therein provided, the state tax commission shall proceed to assess the property of such railway company so failing or refusing, according to the best information obtainable, and shall then add to the taxable valuation of such railway company twenty-five percent thereof, which valuation and penalty shall be separately shown, and together shall constitute the assessment for that year. [S13,§1340-f; C24, 27, 31, 35,§7057; 48GA, ch 196,§10.]

See 45GA, ch 121, §75

7058 Operating expenses. There shall not be included in said operating expenses any pay-

ments for interest or discount, or construction of new tracks except needed sidings, for raising or lowering tracks above or below crossings at grade in cities or towns, for new equipment except replacements, for reducing any bonded or permanent debt, nor for any other item of operating expenses not fairly and reasonably chargeable as such in railway accounts. [C97, §1335; C24, 27, 31, 35,§7058.]

C97, §1335, editorially divided

7059 Amended statement. The state commission may demand, in writing, detailed, explanatory and amended statements of any of the items mentioned in section 7046, or any other items deemed by it important, to be furnished it by such railway corporation within thirty days from such demand, in such form as it may designate, which shall be verified as required for the original statement. The returns, both original and amended, shall show such other facts as the state commission, in writing, shall require. [C73, §1318; C97,§1335; C24, 27, 31, 35,§7059; 48GA, ch 196,§11.]

7060 Assessment of railways. The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, and shall include the right-of-way, roadbed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds, and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said state commission shall take into consideration the gross earnings per mile for the year ending January 1, preceding, and any and all other matters necessary to enable said state commission to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, it shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without this state. [C73,§1319; C97,§1336; C24, 27, 31, 35,§7060; 48GA, ch 196,§12.]

7061 Assessment of sleeping and dining cars. The state commission shall, at the time of the assessment of other railway property for taxation, assess for taxation the average number of sleeping and dining cars as provided in section 7051 so used by such corporation each month and the assessed value of said cars shall bear the same proportion to the entire value thereof that the monthly average number of miles such cars have been run or operated within the state shall bear to the monthly average number of miles such cars have been used or operated within and without the state. Such valuation shall be in the same ratio as that of the property of individuals, and shall be added to the assessed valuation of the corporation, fixed under the preceding sections. [C97,§1341; C24, 27, 31, 35,§7061; 48GA, ch 196,§13.]

See §7109; also 45GA, ch 121, §75

7062 Certification to county auditors. On or before the third Monday in August of each year, the state commission shall transmit to the county auditor of each county, through and into which any railway may extend, a statement showing the length of the main track within the county, and the assessed value per mile of the same, as fixed by a ratable distribution per mile of the assessed valuation of the whole property. [C73,§1320; C97,§1337; S13,§1337; C24, 27, 31, 35,§7062; 48GA, ch 196,§14.]

7063 Plats. Every railroad company owning or operating a line of railroad within this state shall, on or before the first day of August, 1902, place on file in the office of the county auditor of each county in the state into which any part of the lines of any said company lies, a plat of the lines of said companies within said county, showing the length of their said lines and the area of the land owned or occupied by said companies in each government subdivision of land not included within the platted portion of any city or town, within each of said counties, and the length of the said lines within the platted portion of cities and towns. Companies having on file such plats of part or all of their lines, in any of said counties, shall be required to file plats only of that part of their lines not fully shown as above required on the plats now on file. On the first day of January of each year hereafter, like plats shall be filed of all new lines or extensions of existing lines built or completed within the calendar year preceding. [S13,§1337-a; C24, 27, 31, 35,§7063.]

Referred to in §7064

7064 Failure to file. In the event of the failure or refusal of any railroad company to file the plats required under the provisions of section 7063, at the time or according to the conditions named, then the county auditor may cause the same to be prepared by the county surveyor and the cost thereof shall, in the first place, be audited and paid by the board of supervisors out of the county fund, and the amount thereof shall be by said board levied as a special tax against said company and the property of said company, which shall be collected as county taxes and when collected be paid into the county fund. [S13,§1337-b; C24, 27, 31, 35,§7064.]

7065 Property assessed by local authorities. Lands, lots, and other real estate belonging to any railway company, not used exclusively in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, and grain elevators, shall be subject to assessment and taxation on the same basis as property of individuals in the several counties where situated. [C73,§808; C97,§1342; C24, 27, 31, 35,§7065.]

7066 Roadbeds. No real estate used by railway corporations for roadbeds shall be included in the assessment to individuals of the adjacent property, but all such real estate shall be the property of such companies for the purpose of taxation. [C73,§809; C97,§1344; C24, 27, 31, 35, §7066.]

7067 Levy and collection of tax. At the first meeting of the board of supervisors held after said statement is received by the county auditor, it shall cause the same to be entered on its minute book, and make and enter therein an order stating the length of the main track and the assessed value of each railway lying in each city, town, township or lesser taxing district in its county, through or into which said railway extends, as fixed by the state tax commission, which shall constitute the taxable value of said property for taxing purposes; and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall transmit a copy of said order to the council or trustees of the city, town or township. [C73,§1321; C97,§1338; C24, 27, 31, 35,§7067; 48GA, ch 196,§15.]

7068 Rates — purposes. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purpose as the property of individuals within such counties, cities, towns, townships, and lesser taxing districts. [C73,§1322; C97, §1339; C24, 27, 31, 35,§7068.]

CHAPTER 338

FREIGHT-LINE AND EQUIPMENT COMPANIES

Referred to in §§7008, 7112, 7141

7069 "Company" defined.
7070 "Freight-line company" defined.
7071 "Equipment company" defined.
7072 Statement required.
7073 Additional statements.
7074 Failure to furnish.
7075 Assessment.
7076 Rate of tax—payment—distress and sale.

7069 "Company" defined. The word "company" as used in this chapter shall be deemed and construed to mean any person, copartnership, association, corporation, or syndicate that may own or operate, or be engaged in operating, furnishing, or leasing cars, as defined and described in sections 7070 and 7071, whether formed or organized under the laws of this state, or any other state or territory, or any foreign country. [S13,§1342-f; C24, 27, 31, 35,§7069.]

7070 "Freight-line company" defined. Every company engaged in the business of operating cars, not otherwise listed for taxation or taxed in Iowa, for the transportation of freight, whether such freight be owned by such company, or any other person or company, over any railway line or lines, in whole or in part within this state, such line or lines, not being owned, leased, or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, or refrigerator cars, or by some other name, shall be deemed to be a freight-line company. [S13,§1342-a; C24, 27, 31, 35,§7070.]

Referred to in §§7069, 7072
S13,§1342-a, editorially divided

7071 "Equipment company" defined. Every company engaged in the business of furnishing or leasing cars of whatsoever kind or description, to be used in the operation of any railway line or lines, wholly or partially within this state, such line or lines not being owned, leased or operated by such company, and such cars not being otherwise listed for taxation in Iowa shall be deemed to be an equipment company. [S13, §1342-a; C24, 27, 31, 35,§7071.]

Referred to in §§7069, 7072

7072 Statement required. Every freight-line and every equipment company, as designated in sections 7070 and 7071, doing business, or owning cars which are operated in this state, shall, annually, on or before the first Monday of June in each year, make out and deliver to the state tax commission a statement, verified by oath of an officer or agent of such company making such statement, with reference to the first day of January next preceding, showing:

1. The name of the company.
2. The nature of the company, whether a person or persons, an association, copartnership, corporation, or syndicate, and under the laws of what state or county organized.
3. The location of its principal office or place of business.
4. The name and post-office address of the president, secretary, auditor, treasurer, and superintendent or general manager.
5. The name and post-office address of the chief officer or managing agent of the company in Iowa.
6. The aggregate number of miles traveled within the state of Iowa by its cars during the preceding calendar year.
7. The average number of miles traveled by the cars of each class of its cars during the preceding calendar year. The number of cars necessary for the mileage traveled within the state of Iowa, under the circumstances that ordinarily attend the use of such cars, and where different classes of cars are used by said company, as to the matters embraced in this and the preceding subsection, it shall furnish the required information as to each class of said cars, in the form prescribed by blanks to be furnished by the state tax commission.
8. The actual cash value, on the first day of January next preceding, of the said number of cars necessary to provide for the mileage, to be reported as required by subsection 6 of this section.
9. The real estate, personal property, structure, machinery, fixtures and appliances, owned by said company, subject to local taxation within the state, and the location and the actual value thereof in the county, township or district where the same is assessed for local taxation.

[S13,§1342-b; C24, 27, 31, 35,§7072; 48GA, ch 197,§1.]

Referred to in §§7074, 7075

7073 Additional statements. Upon the filing of such statements the state tax commission shall examine each of them, and if it shall deem the same insufficient, or if they fail to fully set out the matters required to be reported, it shall require such officer or agent to make such other and further statements as to such matters as it may deem proper. [S13,§1342-c; C24, 27, 31, 35, §7073; 48GA, ch 197,§2.]

S13,§1342-c, editorially divided

7074 Failure to furnish. In case of the failure or refusal of any company to make and deliver to the state tax commission any statement or statements required by section 7072, such company shall forfeit and pay to the state of Iowa one hundred dollars each day such report is delayed beyond the first Monday of June, to be sued and recovered in any proper form of action, in the name of the state of Iowa, and such penalty when collected shall be paid into the general fund of the state. [S13,§1342-c; C24, 27, 31, 35,§7074; 48GA, ch 197,§3.]

7075 Assessment. At the meeting of the state tax commission on the second Monday in July of each year, it shall value and assess as the property of said company within this state, the cars of the said company necessary, under the circumstances ordinarily attending the use of such cars, for the mileage to be reported under subsections 6 and 7 of section 7072, after examining such statements and after ascertaining the actual value of said property of such company therefrom, and from such other information as it may have or obtain. For that purpose the state tax commission may require such company, by its agents or officers, to appear before said state commission with such books, papers, or additional statements as the state commission may require, and may compel the attendance of witnesses in case said state commission shall deem it necessary to enable it to ascertain the actual value of such property. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said state commission the actual value of all cars locally assessed, and one-fourth* of the residue of such actual value so ascertained shall be by the state tax commission assessed to said company. [S13, §1342-d; C24, 27, 31, 35,§7075; 48GA, ch 197,§4.]

*See §7109; also 45GA, ch 121,§88
Contempts, ch 536

7076 Rate of tax—payment—distress and sale. The state commission shall also at said meeting determine the rate of tax to be levied and collected upon said assessments, which shall be equal, as nearly as may be, to the average rate of taxes, state, county, municipal, and local, levied throughout the state during the previous year, which rate shall be ascertained from the records and files in the auditor's office, and said tax shall be in full of all taxes except on real estate, personal property locally assessed, and special assessments, and shall become due and payable at the state treasury on the first day of February, following the levy thereof, and if not so paid, the state treasurer shall collect the same by distress and sale of any property belonging to such company in the state in the same manner as is required of county treasurers in like cases; and the order of the state tax commission in such cases shall be sufficient authority therefor. [S13, §1342-e; C24, 27, 31, 35,§7076; 48GA, ch 197,§5.]

CHAPTER 339

EXPRESS COMPANIES

Referred to in §§7008, 7112, 7141

7077 "Company" defined.
7078 "Express company" defined.
7079 Statement required.
7080 Additional statements.
7081 Failure to furnish.
7082 Assessment—additional statements—hearing.
7083 Actual value—how ascertained.
7084 Actual value per mile—taxable value.
7085 Assessment in each county—how certified.
7086 Entry of certificate.
7087 Levy of tax—rates.
7088 Action to collect.

7077 "Company" defined. The word "company", as used in this chapter, shall be deemed and construed to mean and include any person, copartnership, association, corporation, or syndicate that may own or operate, or be engaged in operating, any express route as herein defined, whether formed or organized under the laws of this state, any other state or territory, or of any foreign country. [S13,§1346-i; C24, 27, 31, 35, §7077.]

7078 "Express company" defined. Every company engaged in conveying to, from, through, in, or across this state, or any part thereof, money, packages, gold, silver, plate, merchandise, or any other article, by express, under a contract, express or implied, with any railroad company, or the managers, lessees, agents, or receivers thereof, provided such company is not a railroad company, a freight-line company, nor an equipment company, shall be deemed and held to be an express company within the meaning of this chapter. [C97,§1345; S13,§1346-a; C24, 27, 31, 35,§7078.]

S13, §1346-a, editorially divided

7079 Statement required. Every such express company shall, annually, between the first day of February and the first day of March, make out and deliver to the state tax commission a statement verified by the oath of an officer or agent of said company, making such statement,

with reference to the first day of January next preceding, showing:

1. The name of the company, and whether a corporation, partnership, or person, and under the laws of what state or country organized.

2. The principal place of business, and the location of its principal office and the name and post-office address of its president, secretary, and superintendent or general manager and the name and post-office address of its principal officers or managing agent in Iowa.

3. The total capital stock of said company; *(a)* authorized; *(b)* issued.

4. The number of shares of capital stock issued and outstanding, and the par face value of each share, and in case no shares of stock are issued, in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

5. The market value of said shares of stock on the first day of January next preceding, and if such shares have no market value then the actual value thereof; and in case no shares of stock have been issued state the market value, or the actual value, in case there is no market value of the capital thereof, and the manner in which the same is divided.

6. The real estate, buildings, machinery, fixtures, appliances, and personal property owned by said company and subject to local taxation within the state of Iowa, and the location and actual value thereof in the county, township, or district where the same is assessed for local taxation.

7. The specific real estate, together with the improvements thereon, and all bonds, mortgages, and other personal property owned by said company, situated outside of the state of Iowa, and used exclusively outside the conduct of the business, with a specific description of all bonds, mortgages, and other personal property, and the cash value thereof, the purposes for which the same are used, and where the same are kept or deposited and each piece of real estate, where located, the purpose for which the same is used, and the actual value thereof, in the locality where situated.

8. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

9. *a.* The total length of lines or routes over which the company transports such merchandise, freight, or express.

b. The total length of such lines or routes as are outside of the state of Iowa.

c. The length of such lines or routes within each of the counties, townships, and assessment districts within the state of Iowa. [C73,§811; C97,§1346; S13,§1346-a; C24, 27, 31, 35,§7079; 48GA, ch 198,§1.]

Referred to in §§7081, 7083

7080 Additional statements. Upon the filing of such statements, the state tax commission shall examine each of them, and if it shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer or agent to make such other and further statements as the state tax commission may call for. [S13,§1346-b; C24, 27, 31, 35,§7080; 48GA, ch 198,§2.]

Referred to in §7081
S13, §1346-b, editorially divided

7081 Failure to furnish. In the case of the failure or refusal of any company to make out and deliver to the state tax commission any statement or statements required by sections 7079, 7080, and 7082, such company shall forfeit and pay to the state of Iowa one hundred dollars for each day such report is delayed beyond the first Monday in March of that year, to be sued and recovered in any proper form of action in the name of the state of Iowa, on the relation of the state tax commission, and such penalty when collected shall be paid into the general fund of the state. [S13,§1346-b; C24, 27, 31, 35,§7081; 48GA, ch 198,§3.]

7082 Assessment — additional statements— hearing. The state tax commission shall meet on the second Monday in July of each year, and it shall thereupon value and assess the property of such company, in the manner hereinafter set forth, after examining such statements, and after ascertaining the actual value of the property of such company therefrom, and from such other information as it may have or obtain. For that purpose the state tax commission may require such company, by its agents or officers, to appear before said state commission with such books, papers, or statements as the state commission may require, or it may require additional statements to be made by such company, and may compel the attendance of witnesses, in case said state commission shall deem it necessary, to enable it to ascertain the actual value of such property. Any such company interested may, upon written application, appear before the state tax commission at such meeting and be heard in the matter of the valuation of the property of such company for taxation. [S13,§1346-c; C24, 27, 31, 35,§7082; 48GA, ch 198,§4.]

Referred to in §7081
Contempts, ch 536

7083 Actual value—how ascertained. The state tax commission shall first ascertain the actual value of the entire property owned by said company, from said statements or otherwise, for that purpose taking the aggregate market value of all shares of capital stock, in case said shares have a market value, and, in case they have none, taking the actual value thereof or of the capital of said company, in whatever manner the same is divided, in case no shares of capital stock have been issued; provided, however, that in case the whole or any portion of the property of said company shall be incumbered by a mortgage or mortgages, such state commission shall ascertain the actual value of such property by adding to the market value or the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amount of the market or cash value of such mortgage or mortgages, and the result shall be deemed and treated as the actual value of the property of such company. The state tax commission shall, for the purpose of ascertaining the actual value of the

property within the state of Iowa, next ascertain from such statements or otherwise the actual value of the property, both real and personal, owned by the company, and which is used exclusively outside the general business of the company, and also the actual value of that part of its property, if any, without the state which cannot lawfully be considered in determining the mileage value of its routes; and the aggregate of such values shall be deducted from the entire actual value of the property as above ascertained. The state tax commission shall next ascertain and deduct the actual value of the sea or ocean routes of any such company, and in ascertaining the same may take into consideration the earnings, both gross and net per mile, of such sea or ocean routes, as compared with the earnings, gross and net, of the land routes of such company, or may ascertain their value in any other practicable manner, and may require that the reports heretofore provided for shall show such earnings. Thereupon the state tax commission shall ascertain the actual value of the property of such company within the state of Iowa, and for that purpose may take into consideration the proportional value of the company's property without and within the state, and shall take as a basis of valuation of the company's property in this state the proportion of the whole aggregate value of the property of said company, as above ascertained, after making the deductions above provided for which the length of the routes within the state of Iowa bears to the whole length of the routes of such company other than sea or ocean routes, and such amount so ascertained shall be considered and taken to be the entire actual value of the property of such company within the state of Iowa. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said state commission the actual value of all the real estate, buildings, machinery, appliances, and personal property not used exclusively in the conduct of the business within the state that are subject to local taxation within the counties, townships, and other assessment districts as hereinbefore described in the sixth subsection of section 7079. [S13,§1346-d; C24, 27, 31, 35,§7083; 48GA, ch 198,§5.]

7084 Actual value per mile—taxable value. The state tax commission shall thereupon ascertain the value per mile of the property within the state, by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the state, by the number of miles within the state, and the result shall be deemed and held to be the actual value per mile of the property of such company within the state of Iowa. The assessed or taxable value shall be determined by taking that percentage of the actual value so ascertained, as is provided by section 7109, and such valuation and assessment shall be in the same ratio as that of the property of individuals. [S13, §1346-e; C24, 27, 31, 35,§7084; 48GA, ch 198,§6.]

See also 45GA, ch 121, §75

7085 Assessment in each county—how certified. Said state tax commission shall thereupon, for the purpose of determining what amount shall be assessed by it to said company in each county of the state through, across, into, or over which the route of said company extends, multiply the value per mile, as above ascertained, by the number of miles in each of said counties, as reported in said statements, or as otherwise ascertained, and the result thereof, with the mileage and the rate of assessment per mile, shall be by said state commission certified to the auditors respectively of the several counties through, into, over, and across which the routes of said company extend. [S13, §1346-f; C24, 27, 31, 35,§7085; 48GA, ch 198,§7.]

7086 Entry of certificate. At the first meeting of the board of supervisors held after such certificate is received by the county auditor, it shall cause the same to be entered in its minute book, and make and enter therein an order stating the length of the routes and the assessed value of each in each city, town, township, or other taxing district in its county, through or into which said routes extend, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. [S13,§1346-g; C24, 27, 31, 35,§7086.]

Applicable to special charter cities, §6867.1

7087 Levy of tax—rates. The county auditor shall immediately thereafter transmit a copy of said order to the councils of cities, or towns, and to the trustees of each township in the county, and shall also add to the value so apportioned the assessed value of the real estate, buildings, machinery, fixtures, appliances, and personal property not used exclusively in the conduct of the business situated in any township or taxing district as returned by the assessor thereof, and extend the taxes thereon upon the tax list as in other cases. All such property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, townships, or taxing districts. The property so included in said assessment shall not be otherwise taxed. [S13,§1346-g; C24, 27, 31, 35,§7087.]

Applicable to special charter cities, §6867.1

7088 Action to collect. In case any such company shall fail or refuse to pay any taxes assessed against it in any county, township, or assessment district in the state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of Iowa by the county attorneys of the different counties of the state, on the relation of the auditors of the different counties of the state, and judgment in such action shall include a penalty of fifty percent of the amount of the taxes so assessed and un-

paid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over, or across which the routes of any such company shall extend, or in any county where such company shall have an officer or agent for the transaction of business. [S13,§1346-h; C24, 27, 31, 35,§7088.]

CHAPTER 340

ELECTRIC TRANSMISSION LINES

Referred to in §§7008, 7112, 7141

7089 "Company" defined.
7090 Statement required.
7091 Verification.
7092 Additional statement.
7093 Failure to furnish.
7094 Actual value.
7095 Taxable value.
7096 Hearing.
7097 County assessment—certification.
7098 Entry of certificate.
7099 Rate—purposes.
7100 Assessment exclusive.
7101 Local assessment.
7102 Interest of cooperative members.
7103 Reassessment—procedure and requirements.

7089 "Company" defined. The word "company" as used in this chapter and section 6944, subsection 20, shall be deemed and considered to mean and include any person, copartnership, association, corporation, or syndicate (except cooperative corporations or associations which are not organized or operated for profit) that shall own or operate transmission line or lines for the conducting of electric energy located within the state and wholly or partly outside cities and towns, whether formed or organized under the laws of this state or elsewhere. [SS15, §1346-r; C24, 27, 31, 35,§7089.]

Referred to in §6944
Applicable to special charter cities, §6867.1
40ExGA, SF 183, §17-a1, editorially divided

7090 Statement required. Every company owning or operating a transmission line or lines for the conduct of electric energy and which line or lines are located within the state, and which said line or lines are also located wholly or partly outside cities and towns, shall, on or before the first day of May in each year, furnish to the state tax commission a verified statement as to its entire line or lines within this state, when all of said line or lines are located outside cities and towns, and as to such portion of its line or lines within this state as are located outside cities and towns, when such line or lines are located partly outside and partly inside cities and towns, showing:

1. The total number of miles of line owned, operated, or leased, located outside cities and towns within this state, with a separate showing of the number of miles leased.

2. The location and length of each division within the state and the character of poles, towers, wires, substation equipment and other construction of each such division, designating the length and portion thereof in each separate county into which each such division extends. [SS15,§1346-k; C24, 27, 31, 35,§7090; 48GA, ch 199,§1.]

Referred to in §§7093, 7094, 7099, 7101, 7103
Blanks for reports, §6982.1

7091 Verification. The verification of any statement required by law shall, in the case of a person, be made by such person; in the case of a corporation, by the president or secretary thereof; and in the case of a copartnership, association, or syndicate, by some member, officer, or agent thereof having knowledge of the facts. [SS15,§1346-r; C24, 27, 31, 35,§7091.]

Applicable to special charter cities, §6867.1

7092 Additional statement. Upon receipt of said statements from the several companies, the state tax commission shall examine such statements, and if it shall deem same insufficient, and that further information is requisite, it shall require the company making same to make such other or further statement as it may desire, notifying such company thereof by registered mail. [SS15,§1346-l; C24, 27, 31, 35,§7092; 48GA, ch 199,§2.]

Referred to in §7093
SS15, §1346-l, editorially divided

7093 Failure to furnish. In case of the total failure or refusal to make any statement required by sections 7090 and 7092 to be made by May 1 in any year, or of failure or refusal to make such other or further statement within thirty days from the time the registered notice thereof is received by said company that the same is required by the state tax commission, such company shall forfeit and pay to the state of Iowa, one hundred dollars for each day the total failure or refusal to make any report is continued beyond the said first day of May of the year in which it is required, or in case of any such other or further report required by the state tax commission for each day the same is delayed beyond thirty days from the receipt of the notice by said company that same is required, such forfeiture to be sued for and recovered in any proper form of action in the name of the state and on relation of the state tax commission of the state of Iowa, and such penalty when collected, shall be paid into the general fund. [SS15,§1346-l; C24, 27, 31, 35,§7093; 48GA, ch 199,§3.]

7094 Actual value. The state tax commission shall, at its meeting on the second Monday in July of each year, proceed to find the actual value of that part of such transmission line or lines referred to in section 7090, owned or operated by any company, that is located within this state but outside cities and towns, including the whole of such line or lines when all of

such line or lines owned or operated by said company is located wholly outside of cities and towns, taking into consideration the information obtained from the statements required by this chapter, and any further information it can obtain, using the same as a means of determining the actual cash value of such transmission line or lines or part thereof, within this state, located outside of cities and towns. The state tax commission shall then ascertain the value per mile of such transmission line or lines owned or operated by each company specified in section 7090, by dividing the total value as above ascertained by the number of miles of line of such company within the state located outside of cities and towns, and the result shall be deemed and held to be the actual value per mile of said transmission line or lines of each of said companies within the state located outside of cities and towns. [SS15,§1346-m; C24, 27, 31, 35,§7094; 48GA, ch 199,§4.]

Referred to in §7099
SS15, §1346-m, editorially divided

7095 Taxable value. The taxable value of such line or lines of which said state tax commission by this chapter is required to find the value, shall be determined by taking the percentage of the actual value so ascertained, as provided by section 7109, and the ratio between the actual value and the assessed or taxable value of the transmission line or lines of each of said companies located outside of cities and towns shall be the same as in the case of the property of private individuals. [SS15,§1346-m; C24, 27, 31, 35,§7095; 48GA, ch 199,§5.]

Referred to in §7099
See also 45GA, ch 121, §75

7096 Hearing. At said meeting in July, any company interested shall have the right to appear by its officers, agents, and attorneys before the state tax commission, and be heard on the question of the value of its property for taxation. [SS15,§1346-m; C24, 27, 31, 35,§7096; 48GA, ch 199,§6.]

Referred to in §7099

7097 County assessment—certification. The state tax commission shall, for the purpose of determining what amount shall be assessed to any one of said companies in each county of the state into which the line or lines of the company extend, multiply the assessed or taxable value per mile of line of said company, as ascertained according to the provisions of this chapter, by the number of miles of line in each of said counties, and the result thereof shall be by said state commission certified to the several county auditors of the respective counties into, over, or through which said line or lines extend. [SS15,§1346-n; C24, 27, 31, 35,§7097; 48GA, ch 199,§7.]

Referred to in §7099

7098 Entry of certificate. At the first meeting of the board of supervisors held after said statements are received by the county auditor, it shall cause such statement to be entered in its minute book and make and enter therein an order stating the length of the lines and the assessed value of the property of each of said companies situated in each township or lesser taxing district in each county outside cities and towns, as fixed by the state tax commission, which shall constitute the taxable value of said property for taxing purposes. The county auditor shall transmit a copy of said order to the trustees of each township and to the proper taxing boards in lesser taxing districts into which the line or lines of said company extend in the county. The taxes on said property when collected by the county treasurer shall be disposed of as other taxes on real estate. [SS15, §1346-o; C24, 27, 31, 35,§7098; 48GA, ch 199,§8.]

7099 Rate—purposes. Such portions of the transmission line or lines within the state referred to in section 7090, as are located outside cities and towns, shall be taxable upon said assessment provided for by sections 7094 to 7097, inclusive, at the same rate, by the same officers and for the same purposes as property of individuals within such counties, townships or lesser taxing districts, outside cities and towns, and the county treasurer shall collect said taxes at the same time and in the same manner as other taxes, and the same penalties shall be due and collectible as for the nonpayment of individual taxes. [SS15,§1346-p; C24, 27, 31, 35,§7099.]

7100 Assessment exclusive. Every transmission line or part thereof, of which the state tax commission is required by this chapter to find the value, shall be exempt from other assessment or taxation either under sections 6979 to 6982, inclusive, or under any other law of this state except as provided in this chapter. [SS15, §1346-q; C24, 27, 31, 35,§7100; 48GA, ch 199,§9.]

SS15,§1346-q, editorially divided

7101 Local assessment. All lands, buildings, machinery, poles, towers, wires, station and substation equipment, and other construction owned or operated by any company referred to in section 7090, and where such property is located within any city or town within this state, shall be listed and assessed for taxation in the same manner as provided in sections 6979 and 6980 for the listing and assessment of that part of the lands, buildings, machinery, tracks, poles and wires within the limits of any city or town belonging to individuals or corporations furnishing electric light or power, and where such property, except the capital stock, is situated partly within and partly without the limits of a city or town. All personal property of every company owning or operating any such transmission line referred to in section 7090, used or purchased by it for the purpose of such transmission line, shall be listed and assessed in the assessment district where usually kept and housed and under sections 6981 and 6982. [SS15, §1346-q; C24, 27, 31, 35,§7101.]

7102 Interest of cooperative members. The value of the interests of members in such cooperative corporations or associations which are not organized or operated for profit shall, for the purpose of taxation, be deemed real estate,

and be assessed as part of the real estate served by such transmission line or lines. [C24, 27, 31, 35,§7102.]

Referred to in §7008
Applicable to special charter cities, §6867.1

7103 Reassessment—procedure and requirements. Sections 7044, 7045, 7104, and 7105 shall apply to the property of transmission lines which are referred to in section 7090. [SS15,§1346-t; C24, 27, 31, 35,§7103.]

CHAPTER 340.1

PIPE-LINE COMPANIES

7103.01 Taxation required.
7103.02 Definitions.
7103.03 Statement required.
7103.04 Real estate holdings.
7103.05 Statement deemed permanent.
7103.06 Additional corrective statements.
7103.07 Consolidated list of real estate.
7103.08 Gross earnings.
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7103.14 Valuation and certification thereof.
7103.15 Assessed value in each taxing district—record.
7103.16 Taxation procedure.
7103.17 Collection.
7103.18 Nonpayment of tax—effect.
7103.19 Scope of chapter.

7103.01 Taxation required. Every person, copartnership, association, corporation or syndicate engaged in the business of transporting or transmitting gas, gasoline, oils, or motor fuels by means of pipe lines, whether such pipe lines be owned or leased, shall be taxed as herein provided. [C31, 35,§7103-d1.]

Referred to in §7103.02

7103.02 Definitions. The words "pipe-line company" as used in this chapter shall be deemed and construed to mean any person, copartnership, association, corporation or syndicate that may own or operate or be engaged in operating or utilizing pipe lines for the purposes described in section 7103.01.

The word "commission" wherever it appears in this chapter shall mean the state tax commission. [C31, 35,§7103-d2; 48GA, ch 200,§1.]

7103.03 Statement required. Every pipe-line company having lines in the state of Iowa shall annually, on or before the first day of April in each year, make out and deliver to the state tax commission a statement, verified by the oath of an officer or agent of such pipe-line company making such statement, showing in detail for the year ended December 31 next preceding:

1. The name of the company.
2. The nature of the company, whether a person or persons, an association, copartnership, corporation or syndicate, and under the laws of what state organized.
3. The location of its principal office or place of business.
4. The name and post-office address of the president, secretary, auditor, treasurer and superintendent or general manager.
5. The name and post-office address of the chief officer or managing agent of the company in Iowa.
6. The whole number of miles of pipe line owned, operated or leased within the state, including a classification of the size, kind and weight thereof, separated, so as to show the mileage in each county, and each lesser taxing district.
7. A full and complete statement of the cost and actual present value of all buildings of every description owned by said pipe-line company within the state and each lesser taxing district, not otherwise assessed.
8. The number, location, size and cost of each pressure pump or station.
9. Any and all other property owned by said pipe-line company within the state which property must be classified and scheduled in such a manner as the commission may by rule require.
10. The gross earnings of the entire company, and the gross earnings on business done within this state.
11. The operating expenses of the entire company and the operating expenses within this state.
12. The net earnings of the entire company and the net earnings within this state. [C31, 35,§7103-d3; 48GA, ch 200,§2.]

Referred to in §7103.12
Blanks for reports, §6982.1

7103.04 Real estate holdings. Every pipe-line company required by law to report to the state tax commission under the provisions of this chapter shall, on or before the first day of April, 1932, make to the state tax commission a detailed statement showing the amount of real estate owned or used by it on December 31, 1931, for pipe-line purposes, the county in which said real estate is situated, including the rights-of-way, pumping or station grounds, buildings, storage or tank yards, equipment grounds for any and all purposes, with the estimated actual value thereof, in such manner as may be required by the commission. [C31, 35,§7103-d4; 48GA, ch 200,§3.]

Referred to in §7103.07
44GA, ch 179, §4, editorially divided

7103.05 Statement deemed permanent. Only one such detailed statement by any pipe-line company shall be necessary, and when received by the commission, it shall become the record of the pipe-line lands of such company, and be deemed as annually thereafter reported for valuation and assessment by the commission. [C31, 35,§7103-d5; 48GA, ch 200,§4.]

Referred to in §7103.07

7103.06 Additional corrective statements. On or before the first day of April of each subsequent year, such company shall, in like manner, report all real estate acquired for any of the pipe-line purposes above named during the preceding calendar year; and also, a list of any real estate, previously reported, disposed of during the same period, which disposition shall be noted by the commission in an appropriate column opposite to the description of said tract in the original report of the same in the record of pipe-line land. [C31, 35,§7103-d6; 48GA, ch 200,§5.]

Referred to in §7103.07

7103.07 Consolidated list of real estate. The commission shall, by some convenient method of binding, arrange the statements required to be made by sections 7103.04 to 7103.06, inclusive, so as to form a consolidated list of all real estate reported to it as being owned or used for pipe-line purposes within the state of Iowa. [C31, 35,§7103-d7; 48GA, ch 200,§6.]

7103.08 Gross earnings. For the purpose of making reports to the state tax commission, the gross earnings of a pipe-line company, owning or operating a line or lines within this state, shall be computed and reported by said company upon such bases as the commission may by rule require. [C31, 35,§7103-d8; 48GA, ch 200, §7.]

7103.09 Accounts—regulation. The state tax commission shall have power to prescribe such rules and regulations with respect to the keeping of accounts by the pipe-line companies doing business or having property in this state as will insure the accurate division of the accounts and the information to be reported, and uniformity in reporting the same to said commission. [C31, 35,§7103-d9; 48GA, ch 200,§8.]

7103.10 Rules and regulations — promulgation. The rules, regulations, method and requirements herein provided to be made by the state tax commission shall be made and communicated in writing or printing to the said several pipe-line companies, and shall be and become binding upon said pipe-line companies from the time they are so communicated; provided that the said commission shall have the power to prescribe supplemental or additional rules, regulations and requirements at any time, and communicate them to the several pipe-line companies in the manner aforesaid, and with respect to such additional supplemental rules, regulations and requirements, they shall be and become binding upon the said pipe-line companies within thirty days from the time they are so communicated. [C31, 35,§7103-d10; 48GA, ch 200,§9.]

7103.11 Refusal to comply—penalty. If any pipe-line company shall fail or refuse to obey and conform to the rules, regulations, method and requirements so made and prescribed by the state tax commission under the provisions of this chapter, or to make the reports herein provided, the commission shall proceed to assess the property of such pipe-line company so failing or refusing, according to the best information obtainable, and shall then add to its valuation of such pipe-line company twenty-five percent thereof, which valuation and penalty shall be separately shown, and together shall constitute the assessment for that year. [C31, 35, §7103-d11; 48GA, ch 200,§10.]

7103.12 Amended and explanatory statements. The commission may demand, in writing, detailed, explanatory and amended statements of any of the items mentioned in section 7103.03, or any other item deemed to be important, to be furnished it by such pipe-line company within thirty days from such demand in such form as it may designate, which shall be verified as required for the original statement. The returns, both original and amended, shall show such other facts as the commission, in writing, shall require. [C31, 35,§7103-d12; 48GA, ch 200,§11.]

7103.13 Basis of valuation and assessment. The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire pipe-line property within the state, except as otherwise provided; and shall include the rights-of-way, easements, the pipe lines, stations, grounds, shops, buildings, pumps and all other property, real and personal exclusively used in the operation of such pipe line. In assessing said pipe-line company and its equipment, said commission shall take into consideration the gross earnings and the net earnings for the entire property, and per mile, for the year ending December 31 preceding, and any and all other matters necessary to enable said commission to make a just and equitable assessment of said pipe-line property. [C31, 35,§7103-d13; 48GA, ch 200,§12.]

7103.14 Valuation and certification thereof. The state tax commission shall on or before the third Monday in August of each year determine the value of pipe-line property located in each taxing district of the state, and in fixing said value shall take into consideration the structures, equipment, pumping stations, etc., located in said taxing district, and shall transmit to the county auditor of each such county through and into which any pipe line may extend, a statement showing the assessed value of said property in each of the taxing districts of said county. The said property shall then be taxed in said county and lesser taxing districts, based upon the valuation so certified, in the same manner as in other property. [C31, 35, §7103-d14; 48GA, ch 200,§13.]

7103.15 Assessed value in each taxing district—record. At the first meeting of the board of supervisors held after said statement is received by the county auditor, it shall cause the same to be entered on its minute book, and make and enter therein an order describing and stating the assessed value of each pipe line lying in each city, town, township or lesser taxing district in its county, through or into which

said pipe line extends, as fixed by the tax commission, which shall constitute the assessed value of said property for taxing purposes; and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall transmit a copy of said order to the council of the city or town, or the trustees of the township, as the case may be. [C31, 35,§7103-d15; 48GA, ch 200, §14.]

44GA, ch 179, §12, editorially divided

7103.16 Taxation procedure. All such pipe-line property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purpose as the property of individuals within such counties, cities, towns, townships, and lesser taxing districts. [C31, 35, §7103-d16.]

7103.17 Collection. If said tax is not paid, the county treasurer shall collect the same by whatever method may seem proper. [C31, 35, §7103-d17.]

7103.18 Nonpayment of tax—effect. If said tax is not paid within the calendar year in which the same is due, the company shall not be permitted thereafter to use the public or private property of the state of Iowa, or to operate in Iowa for any purpose. [C31, 35,§7103-d18.]

7103.19 Scope of chapter. The provisions of this chapter shall not apply to a gas distributing plant or company located entirely within any city or town and not a part of a pipe-line transportation company. Such local municipal plant shall be taxed in the municipality where located. [C31, 35,§7103-d19.]

CHAPTER 341

REASSESSMENT BY STATE TAX COMMISSION

Referred to in §§7008, 7112, 7141

7104 Reassessment and relevy.
7105 Voluntary payments.

7104 Reassessment and relevy. When by reason of nonconformity to any law, or by any omission, informality, or irregularity, or for any other cause, any tax heretofore or hereafter levied and assessed against any person, company, association, or corporation by the state tax commission is invalid or is adjudged illegal, the state tax commission may assess and levy a tax against such person, company, association, or corporation for the year or years for which such tax is invalid or illegal, or when necessary may assess and certify the same to the proper county officers, who shall levy such tax as by law in such cases made and provided, with the same force and effect as though done at the proper time and under any valid law, whether in force at the time of said levy and assessment or thereafter enacted. [S13,§1330-h; C24, 27, 31, 35,§7104; 48GA, ch 201,§1.]

Referred to in §§7103, 7105

7105 Voluntary payments. When any person, company, association, or corporation, against whom any tax has been assessed and levied by the state tax commission and held invalid or illegal, shall have paid the same voluntarily or shall otherwise waive such invalidity and illegality, the state tax commission shall accept such tax in lieu of the tax to be raised by the reassessment and relevy provided for in section 7104. [S13,§1330-i; C24, 27, 31, 35, §7105; 48GA, ch 201,§2.]

Referred to in §7103

CHAPTER 341.1

ASSESSMENT OF OMITTED PROPERTY BY STATE TAX COMMISSION

7105.1 Assessment of omitted property.
7105.2 Notice.
7105.3 Form of notice.
7105.4 Service of notice.
7105.5 Procedure—penalty.
7105.6 Fraudulent withholding—penalty.
7105.7 Entry on tax books.
7105.8 Delinquency.

7105.1 Assessment of omitted property. When the state tax commission is vested with power and duty to assess property and said assessment has, for any reason, been omitted, said state commission shall proceed to assess said property for each of the omitted years, not exceeding five years last past. [C27, 31, 35,§7105-a1; 48GA, ch 202,§1.]

7105.2 Notice. Notice of the intention to assess such omitted property and of the time and place of hearing shall be served on the persons, firms, or corporations holding or possessing said property. [C27, 31, 35,§7105-a2.]

41GA, ch 145, §2, editorially divided

7105.3 Form of notice. Such notice shall contain a general description of said property and the year or years for which it is proposed to assess it. [C27, 31, 35,§7105-a3.]

7105.4 Service of notice. Such notice shall be served in such manner and for such reasonable time prior to the hearing as the state commission may determine. [C27, 31, 35,§7105-a4; 48GA, ch 202,§2.]

7105.5 Procedure—penalty. If it is made to appear that said property is assessable by said state commission as omitted property, the state commission shall proceed in the manner

in which it would have proceeded had the assessment not been omitted, except that it shall find the value of such omitted property for each year during which it has been omitted and shall add ten percent to each yearly value as a penalty. [C27, 31, 35,§7105-a5; 48GA, ch 202,§3.]

41GA, ch 145, §3, editorially divided

7105.6 Fraudulent withholding — penalty. In case the property has been fraudulently withheld from assessment, the state commission may, in addition to said ten percent add any additional percent, not exceeding fifty percent. [C27, 31, 35,§7105-a6; 48GA, ch 202,§4.]

7105.7 Entry on tax books. Should an assessment be made at such time in the year that, in the opinion of the state commission, said assessment cannot conveniently be entered on the current tax books, the state commission may direct that the assessment be entered on the first ensuing tax books. [C27, 31, 35,§7105-a7; 48GA, ch 202,§5.]

7105.8 Delinquency. A tax based on said assessment shall be deemed delinquent from and after its entry on the tax books. [C27, 31, 35, §7105-a8.]

CHAPTER 342

LOCAL ASSESSOR

Referred to in §7141

7106 Listing and valuation.
7107 Owner to assist.
7108 Oath.
7109 Actual, assessed, and taxable value.
7110 Forest and fruit-tree reservations.
7111 Notice of valuation.
7112 Refusal to furnish statement.
7113 False statement.
7114 Meeting of assessors.
7115 Assessment rolls and books.
7116 Schedules furnished.
7117 Affidavits combined.
7118 Schedules preserved.
7119 Uniform assessment rolls.
7120 Plat book.
7121 Completion of assessment—oath.
7122 Rolls returned to local board.
7123 Assessment book—preparation and return.
7125 Persons subject to poll tax.
7126 Failure to perform duty.
7127 Examination of assessors.

7106 Listing and valuation. Each assessor shall enter upon the discharge of the duties of his office immediately after the second Monday in January in each year, and shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter upon the assessment rolls furnished him for that purpose the several items of property required to be entered for assessment. He shall personally affix values to all property assessed by him. [C51,§473; R60,§733; C73,§822; C97,§1352; C24, 27, 31, 35,§7106.]

Additional duties, §3713

7107 Owner to assist. The assessor shall list every person in his township and assess all the property therein, personal and real, except such as is heretofore exempted or otherwise assessed. Any person who shall refuse to assist in making out a list of his property, or of any property which he is by law required to assist in listing, or who shall refuse to make either of the oaths or affirmations or combinations thereof required by section 7108, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined in a sum not to exceed five hundred dollars. [C51,§477; R60,§734; C73,§823; C97, §1354; S13,§1354; C24, 27, 31, 35,§7107.]

7108 Oath. The assessor shall administer the oath or affirmation printed on the assessment rolls hereinafter prescribed, or combination thereof, to each person assessed, and require the person taking such oath to subscribe the same, and, in case anyone refuses so to do, he shall note the fact in the column of remarks opposite such person's name. [C51,§§474, 475; R60,§735; C73,§824; C97,§1355; S13,§1355; C24, 27, 31, 35,§7108.]

Referred to in §7107

7109 Actual, assessed, and taxable value. All property subject to taxation shall be assessed at its actual value which shall be entered opposite each item. The terms "actual value", "assessed value" and "taxable value" shall hereafter be construed as referring to "actual value".

The tax rate shall be applied to the actual value, except as otherwise provided.

In arriving at said actual value the assessor shall take into consideration its productive and earning capacity, if any, past, present, and prospective, its market value, if any, and all other matters that affect the actual value of the property; and the burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate, or inequitable. [C97,§1305; S13,§1305; C24, 27, 31, 35,§7109.]

Referred to in §§7028, 7036, 7084, 7095
Applicable to special charter cities, §6867.1

7110 Forest and fruit-tree reservations. Forest reservations fulfilling the conditions of sections 2605 to 2617, inclusive, shall be assessed on a taxable valuation of four dollars per acre. Fruit-tree reservations shall be assessed on a taxable valuation of four dollars per acre for a period of eight years from the time of planting. In all other cases where trees are planted upon any tract of land, without regard to area, for forest, fruit, shade, or ornamental purposes, or for windbreaks, the assessor shall not increase the valuation of such property because of such improvements. [S13,§1400-l; C24, 27, 31, 35, §7110.]

7111 Notice of valuation. The assessor shall, at the time of making the assessment, inform the person assessed, in writing, of the valuation put upon his property, and notify him, if he feels aggrieved, to appear before the board of review and show why the assessment should be changed. [C97,§1356; C24, 27, 31, 35,§7111.]

7112 Refusal to furnish statement. If any corporation or person refuse to furnish the verified statements required in chapters 331 to 342, inclusive, or to list his property, or to take or subscribe the oath required, the state tax commission, or assessor, as the case may be, shall proceed to list and assess such property according to the best information obtainable, and shall add to the taxable valuation one hundred percent thereof, which valuation and penalty shall be separately shown, and shall constitute the assessment; and if the valuation of such property shall be changed by any board of review, or on appeal therefrom, a like penalty shall be added to the valuation thus fixed. [C51,§475; R60,§734; C73,§§823, 1318; C97,§1357; C24, 27, 31, 35,§7112; 48GA, ch 203,§1.]

7113 False statement. Any person making any verified statement or return, or taking any oath required by this title, who knowingly makes a false statement therein, shall be guilty of perjury. [C97,§1358; C24, 27, 31, 35,§7113.]

Perjury, punishment, §13165

7114 Meeting of assessors. The county auditor of each county shall, before the third day of January annually, issue a call to all the assessors of his county to meet at his office, or some other place at the county seat, within ten days, for consultation, and to receive from such auditor such information as shall tend to the proper discharge by them of their official duties. It shall be the duty of each of such assessors to attend such meeting, and they shall be allowed pay of one day for such attendance, and mileage at ten cents per mile one way. [C97, §1359; C24, 27, 31, 35,§7114.]

7115 Assessment rolls and books. The auditor shall procure and furnish to each assessor a supply of blank assessment rolls on which to enter, separately, the names of all persons, partnerships, corporations, or associations assessed, which rolls shall be made in duplicate, except that the oath form in the original may be omitted and the following inserted in lieu thereof: "If you are not satisfied that the foregoing assessment is correct, you can appear before the board of review, which meets at..... on the first Monday of April next. Dated..... .....day of..... 19.... .....Assessor". In assessment districts where the board of review meets at any other time than the date fixed herein, the assessor shall change the date to correspond with the date upon which the board meets. Said duplicate shall be signed by the assessor, detached from the original, and delivered to the person assessed. He shall also furnish to each assessor a supply of blanks in this chapter described as "Assessment Roll, Form No. 2", which shall be in duplicate, and subject to the same conditions as the roll above provided for. The auditor shall also furnish to the assessor one assessment book, each page of which shall be headed "Assessor's book for ..... township, ...county, Iowa, independent district of.....," and shall contain columns ruled and headed for the information required by this chapter, which rolls and books shall be substantially in the following form:

ASSESSMENT ROLL

Name ..... Age ..... Address ..... No. Dogs ..... male ..... female .....

No road district	Name or number of school district	Part of Section or Name of Town	Section or lot	Township or block	Range	Value of new buildings	No of acres improved	No of acres unimproved	Total Number of Acres Taxable		Lands		Lots	Total taxable value of real estate.	Exemptions		Net value of lands and lots	No of articles	Description of Personal Property	Actual value	Remarks
									Acres	100	Actual value per acre	Actual value	Actual value		For roads	For homesteads					
																			Colts 1 year old Colts 2 years old Colts 3 years old Horses over 3 years old Stallions Mules and asses over 1 year old Heifers 1 year old Heifers 2 years old Cows Steers 1 year old Steers 2 years old Steers 3 years old or over Bulls Work oxen Sheep 9 months old or over Swine 9 months old or over Vehicles Household furniture of hotel and boarding house Moneys and credits from form No 2 Merchandise Other personal property Corporation stock Total actual value personal Total taxable value personal Total actual value real estate Total net taxable value real estate		

Total number of acres
Total actual value of real estate ..... $
Total taxable value of real estate ..... .
Total exemptions .
Net total value of lands and lots ..

Date of Inventory .....

Report name of soldier or sailor; or widow of soldier or sailor, and names of persons who by reason of age or infirmity claim to be unable to contribute to public revenue.

Notice of right to appear before board of review given ..... A. D. .....

Changes by board of review are as follows:

State of Iowa, }
.....County. } ss.

I, ..., do solemnly swear (or affirm) that I am the person assessed above, that I have read the foregoing assessment roll of property listed or assessed to me, and that the same is a full, true and correct list of my taxable property, both real and personal property, subject to taxation within this district, and all property which should be listed on this assessment roll to me or by me.

.....

Subscribed and sworn to (or affirmed) this ..... day of ..... A. D. ..... before me.

.....Assessor.

ASSESSOR'S BOOK

.....Township, ... County, Iowa.

Independent District of.....

Owner's name.		
Under 45.	Polls.	
Over 45.		
Number of road district.		
Name or number of school district.		
Part of section or name of town.		
Section or lot.		
Township or block.		
Range.		
Number of acres improved.		
Number of acres unimproved.		
Acres.	Total No. of acres taxable.	
100		
Value of new buildings.		
Actual value per acre.	Lands.	
Actual value.		
Actual value.	Lots.	
Total actual value of real estate.		
For roads.	Exemption.	
For homesteads.		
Net actual value of lands and lots.		
Total taxable value of real estate.		
Number.	Colts 1 year old.	Horses.
Actual value.		
Number.	Colts 2 years old.	
Actual value.		
Number.	Horses 3 years old and over.	
Actual value.		
Number.	Stallions.	
Actual value.		
Number.		Mules.
Actual value.		

(CONTINUED)

Number.	Heifers 1 year old.	Cattle.
Actual value.		
Number.	Heifers 2 years old.	
Actual value.		
Number.	Cows.	
Actual value.		
Number.	Steers 1 year old.	
Actual value.		
Number.	Steers 2 years old.	
Actual value.		
Number.	Steers 3 years old or over.	
Actual value.		
Number.	Bulls.	
Actual value.		
Number.		Swine.
Actual value.		
Number.	Sheep 9 months old or over.	
Actual value.		
Number.	Vehicles.	
Actual value.		
	Household furniture, hotel and boarding house.	
Actual value.		
Actual value.	Moneys and credits.	
Corporation stocks.		
Merchandise.		
Other personal property.		
Actual value.	Total personal property.	
Taxable value.		
Actual value of all property.		
Taxable value.		
Male.	Dogs.	
Female.		

ASSESSMENT ROLL—Form No. 2

ASSESSMENT OF MONEYS AND CREDITS

Of .... of ..... township of .... state of Iowa, January 1, ...

Notes Bonds and Other Evidence of Credit	Actual Value
Aggregate amount of notes Aggregate amount of bonds Aggregate amount of other written evidences of credit Aggregate amount of money in bank Aggregate amount of other money Aggregate amount of book accounts—good Aggregate amount of book accounts—doubtful Aggregate amount of checks drafts and other cash items	..
Total moneys and credits	
Liabilities	
Total amount of notes Total amount of accounts Total amount of other debts	
Total amount of debts. .. Net amount of moneys and credits . . .	

The party assessed need list only such of his liabilities as he may desire to have subtracted from his moneys and credits.

State of Iowa,.....County, ss.

I, ..., do solemnly swear (or affirm) that the above is a full, true and correct statement of all moneys and credits owned by me, and that the liabilities above given to be deducted therefrom are obligations in good faith actually owed by me.

Signed .....

Subscribed and sworn to (or affirmed) before me by .....

this ..... day of .....

.....Assessor.

[C51,§§471, 473; R60,§§732, 733; C73,§821; C97,§1360; S13,§1360; C24, 27, 31, 35,§7115.]

Referred to in §§7116, 7118

7116 Schedules furnished. The assessor shall furnish to each person, partnership, corporation, or association, except those otherwise assessed as provided by law, a blank known as "Assessment Roll—Form No. 2", as provided in section 7115, upon which such person, partnership, corporation, or association shall enter and set out all moneys and credits of whatsoever kind or nature belonging to such person, partnership, corporation, or association, and such liabilities as they claim should be deducted from the total of their moneys and credits. The assessor shall carry the aggregate moneys and credits of such persons, partnerships, corporations, or associations to the regular schedule. [C97,§1361; S13,§1361; C24, 27, 31, 35,§7116.]

S13, §1361, editorially divided

7117 Affidavits combined. It shall be lawful to combine the affidavit with reference to real and personal property, and the affidavit as to moneys and credits, into one affidavit. [S13, §1361; C24, 27, 31, 35,§7117.]

7118 Schedules preserved. The assessor shall return all schedules with the assessment books to the county auditor as is provided in this chapter, and the county auditor shall carefully keep all schedules known and described in this chapter as "Assessment Roll—Form No. 2", for the period of five years from the time of filing of the same in his office. [C97,§1361; S13, §1361; C24, 27, 31, 35,§7118.]

7119 Uniform assessment rolls. The state tax commission shall from time to time prepare and certify to each county auditor such instructions as to a uniform method of making up the assessment rolls as it thinks necessary to secure a compliance with the law and uniform returns, which shall be printed upon each assessment roll, and also prepare instructions for the same purpose as to making up the assessment book, which shall be printed therein. [C97, §1362; C24, 27, 31, 35,§7119; 48GA, ch 203,§2.]

7120 Plat book. The county auditor shall furnish to each assessor a plat book on which shall be platted the lands and lots in his assessment district, showing on each subdivision or part thereof, written in ink or pencil, the name of the owner, the number of acres, or the boundary lines and distances in each, and showing as to each tract the number of acres to be deducted for railway right-of-way and for roads and for rights-of-way for public levees and open public drainage improvements. [C51, §181; R60,§733; C73,§821; C97,§1364; C24, 27, 31, 35,§7120.]

7121 Completion of assessment—oath. The assessment shall be completed by the first day

of April, and the assessor shall attach to the assessment rolls his oath in the following form:

I, (A..... B.....), assessor of..... county of ..... and state of Iowa, do solemnly swear (or affirm) that the actual and taxable values of all property, money and credits, of which a statement has been made and verified by the oath of the person required to list the same, is herein truly set forth in such statement; that in every case, where I have been required to ascertain the amount or value of any property, I have diligently, and by the best means in my power, endeavored to ascertain the true amount and value, and as I verily believe the actual and taxable values thereof are set forth in the annexed return; in no case have I knowingly omitted to demand of any person, of whom I was required to do so, a statement of the items of his property which he was required by law to list, nor to administer the oath to him, unless he refused to take it, nor in any way connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation.

Subscribed and sworn to (or affirmed) this ..... day of....., A. D....., before me. .....

[C51,§479; C97,§1365; C24, 27, 31, 35,§7121.]

Legalizing act, see 44GA, ch 245

7122 Rolls returned to local board. Such rolls shall be laid before the local board of review on or before the first Monday of April in each year for correction.

In cities of ten thousand population and over, such assessment rolls shall be laid before the local board of review on or before the first Monday in May in each year. [R60,§736; C73, §825; C97,§1366; S13,§1366; C24, 27, 31, 35, §7122.]

S13, §1366, editorially divided

7123 Assessment book—preparation and return. When such correction has been completed, the assessor shall proceed to make up the assessor's book from such assessment rolls, allotting a sufficient number of pages to each letter, and return to the county auditor, together with the assessment rolls, plat book, and all statements which have been furnished to him in connection with the assessment. [S13,§1366; C24, 27, 31, 35,§7123.]

7124 Rep. by 45GA, ch 127,§4

7125 Persons subject to poll tax. The assessor shall furnish to the clerk of the city, town or township, as the case may be, a list of all persons subject to poll tax. [C24, 27, 31, 35, §7125.]

7126 Failure to perform duty. If any assessor or member of any board of review shall knowingly fail or neglect to make or require the assessment of property for taxation to be of and for its taxable value as provided by law or to perform any of the duties required of him by law, at the time and in the manner specified, he shall forfeit and pay the sum of five hundred dollars, to be recovered in an action in the district court in the name of the county and for its use, and the action against the assessor shall be against him and his bondsmen. [R60,§738; C73,§827; C97,§1367; C24, 27, 31, 35,§7126.]

7127 Examination of assessors. It shall be lawful for the boards of supervisors, the trustees of townships, and councils of cities and incorporated towns as boards of review to summon any assessor or assessors to appear before them, respectively, to be inquired of under oath with respect to the method by which he or they has or have ascertained and fixed any valuation or valuations returned by him or them, and as to the correctness of any such valuation or valuations, and to administer the oath by any one of their members to the assessor or assessors so summoned before them; and any assessor so summoned who shall fail without good cause to appear, or, appearing, shall refuse to submit to such inquiry, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished accordingly. [C97,§1368; C24, 27, 31, 35,§7127.]

Punishment, §12894

7128 Rep. by implication by 43GA, ch 205, §17, par. 13

CHAPTER 343

BOARDS OF REVIEW

7129 Local board of review.
7129.1 Revaluation and reassessment of real estate.
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7129 Local board of review. The township trustees shall constitute the local board of review for the township or the portion thereof not included within any city or town, and the city or town council shall constitute such board for such city or town.

The board shall meet on the first Monday of April, at the office of the township, city or town clerk or recorder, and sit from day to day until its duties are completed, which shall be not later than the first day of May, and shall adjust assessments for the township, city or town by

raising or lowering the assessment of any person, partnership, corporation, or association as to any or all of the items of his assessment, in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value, and shall also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof, as the assessor should have done; provided that:

1. In townships having a population of twenty thousand or more, and situated entirely within the limits of a city under special charter, and in cities having a population of twenty thousand or more, including cities under special charters, the board of review may begin the performance of the duties herein defined on and after the first day of March each year.

2. In cities having a population of ten thousand or over, such board shall meet on the first Monday of May and shall complete its duties not later than the first day of June.

In townships having a population of twenty thousand or more, and situated entirely within the limits of a city under special charter, and in cities under special charters having a population of twenty thousand or more, the city council of said city shall be the board of review, except that the township trustees of said townships may, in the event the city council does not act as such board of review for such townships, be the board of review, the same as township trustees would be in townships in which the township lines are not conterminous* with city limits. [C73,§§829, 830; C97,§1370; S13,§1370; C24, 27, 31, 35,§7129.]

Referred to in §7129.1
Applicable to special charter cities, §6870
Board under city manager plan, §6653
* "Coterminous" in enrolled act

7129.1 Revaluation and reassessment of real estate. In any year after the year in which an assessment has been made of all the real estate in any taxing district, it shall be the duty of the local board of review to meet at the times provided in section 7129, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the true value thereof, and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years. If the assessment of any such property is raised, or any property is added to the tax list by the board, the clerk shall give notice in the manner provided in section 7131, provided, however, that if the assessment of all property in any taxing district is raised the board may instruct the clerk to give immediate notice by one publication in one of the official newspapers of said county, and such published notice shall take the place of the mailed notice provided for in section 7131, but all other provisions of said section shall apply. The decision of the local board as to the foregoing matters shall be subject to appeal to the district court within the same time and in the same manner as provided in section 7133. [C35,§7129-e1; 47GA, ch 188, §§1–3.]

7130 Clerk — assessment correction. The clerk or recorder of the township, city or town, as the case may be, shall be clerk of the board of review and keep a record of its proceedings, and the assessor shall be present at its meeting and make upon the assessment rolls all corrections or additions directed by the board. At such meetings it shall be the duty of the assessor to read each and every taxpayer's name and assessment on the assessment rolls, and, if the assessment is approved, pass to the next name. After checking the same, the board shall then take up the unchecked names in alphabetical order, and raise or lower the same as in their opinion will be just, checking off each taxpayer as the same is adjusted. [R60,§740; C73,§831; C97,§1371; S13,§1371; C24, 27, 31, 35, §7130.]

7131 Notice of assessments raised. In case the value of any specific property or the entire assessment of any person, partnership, corporation, or association is raised, or new property is added by the board, the clerk shall give immediate notice thereof by mail to each at the post-office address shown on the assessment rolls, and at the conclusion of the action of the board therein the clerk shall post an alphabetical list of those whose assessments are thus raised and added, in a conspicuous place in the office or place of meeting of the board, and enter upon the records a statement that such posting has been made, which entry shall be conclusive evidence of the giving of the notice required. The board shall hold an adjourned meeting, with at least five days intervening after the posting of said notices, before final action with reference to the raising of assessments or the adding of property to the rolls is taken, and the posted notices shall state the time and place of holding such adjourned meeting, which time and place shall also be stated in the proceedings of the board. [C97,§1372; S13,§1372; C24, 27, 31, 35,§7131.]

Referred to in §§7129.1, 7132

7132 Complaint to board of review. Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has been added to the assessment rolls, as provided in section 7131, and any member of the board of review aggrieved by any action of the board of review of which he was, at the time complained of, a member, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section. [R60,§740; C73,§831; C97, §1373; S13,§1373; C24, 27, 31, 35,§7132.]

Applicable to special charter cities, §6870
S13,§1373, editorially divided

7133 Appeal. Appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. [C73,§831; C97,§1373; S13,§1373; C24, 27, 31, 35,§7133.]

Referred to in §7129.1
Applicable to special charter cities, §6870
Manner of service, §11060

7134 Trial on appeal. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly. [C97,§1373; S13,§1373; C24, 27, 31, 35,§7134.]

Referred to in §7154
Applicable to special charter cities, §6870

7134.1 Costs, fees and expenses apportioned. The clerk of the court shall likewise certify to the county treasurer the costs assessed by the court on any appeal from a local board of review to the district court, in all cases where said costs are taxed against the local board of review or any taxing body. Thereupon the county treasurer shall compute and apportion the said costs between the various taxing bodies participating in the proceeds of the collection of the taxes involved in any such appeal, and said treasurer shall so compute and apportion the various amounts which said taxing bodies are required to pay in proportion to the amount of taxes each of said taxing bodies is entitled to receive from the whole amount of taxes involved in each of such appeals. The said county treasurer shall deduct from the proceeds of all general taxes collected the amount of costs so computed and apportioned by him from the moneys due to each taxing body from general taxes collected. The amount so deducted shall be certified to each taxing body in lieu of moneys collected. Said county treasurer shall pay to the clerk of the district court the amount of said costs so computed, apportioned and collected by him in all cases now on file or hereafter filed in which said costs have not been paid upon the date this section becomes effective, including all cases in decree. [48GA, ch 204,§1.]

Applicable to special charter cities, §6870
Effective date, July 4, 1939

7134.2 City solicitor and other counsel. The city solicitor shall represent the city assessor and local board of review in all litigation dealing with the assessments made by such city assessor. The county, school district or any other taxing body interested in the taxes derived from such assessments may be represented by an attorney and may be required to appear by attorney upon written request of the city solicitor to the presiding officer of any such taxing body. [48GA, ch 204,§2.]

Applicable to special charter cities, §6870

7135 Appeal on behalf of public. Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect to the assessment of any property in the township, city, or town and an appeal from the action of the board of review in fixing the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers.

Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township, or school district interested and tried in the same manner, except that the notice of appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. [S13,§1373; C24, 27, 31, 35, §7135.]

Applicable to special charter cities, §6870

7136 Power of court. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease, or affirm the amount of the assessment appealed from. [S13, §1373; C24, 27, 31, 35,§7136.]

Referred to in §7154
Applicable to special charter cities, §6870

7137 County board of review. The board of supervisors shall constitute a county board of review, and shall adjust the assessments of the several townships, cities, and towns of their county at their regular meeting in June, and add to or deduct from the assessed value of the property substantially as the state commission adjusts assessments of the several counties of the state. [R60,§739; C73,§832; C97,§1375; C24, 27, 31, 35,§7137; 48GA, ch 205,§1.]

7138 Appeals. Appeals may be taken from any action or decision of a county board of review by the board of review of any city, town, or township aggrieved thereby, within the same time and in the same manner as appeals are taken from the local board of review. [C97, §1376; C24, 27, 31, 35,§7138.]

7139 Abstract to state commission. Each auditor shall, on or before the third Monday in June, make out and transmit to the state commission an abstract of the real and personal property in his county, in which he shall set forth:

1. The number of acres of land and the aggregate actual and taxable values of the same, exclusive of town lots, returned by the assessors, as corrected by the county board of review.
2. The aggregate actual and taxable values of real estate in each township, city, and town in the county, returned as corrected by the county board of review.
3. The aggregate actual and taxable values of personal property.

4. An abstract as to the number and value of all animals as the same are returned by the assessor, showing the aggregate actual and taxable values and number of each kind or class, and such other facts as may be required by the state tax commission. [R60,§741; C73,§833; C97,§1377; C24, 27, 31, 35,§7139; 48GA, ch 205, §2.]

7140 State board of review. The state tax commission shall constitute the state board of review, and shall meet at the seat of government on the second Monday of July in each year. [C51,§§481, 482; R60,§742; C73,§834; C97,§1378; S13,§1378; C24, 27, 31, 35,§7140; 48GA, ch 205, §3.]

7141 Adjusting county valuations. It shall adjust the valuation of property in the several counties, adding to or deducting from the valuation of each kind or class of property such percentage in each case as will bring the same to its taxable value as fixed in chapters 330 to 344, inclusive. [C51,§§481, 482; R60,§742; C73, §834; C97,§1379; C24, 27, 31, 35,§7141.]

7142 Notice of increase. Before such state tax commission shall add to the valuation of any kind or class of property any such percentage, it shall serve ten days notice by mail, on the auditor of the county whose valuation is proposed to be raised and shall hold an adjourned meeting after such ten days notice, at which time such county may appear by its board of supervisors, county attorney, or otherwise, and make written or oral protest against such proposed raise, which protest shall consist simply of a statement of the error, or errors, complained of with such facts as may lead to their correction, and at such adjourned meeting final action may be taken in reference thereto. [C24, 27, 31, 35,§7142; 48GA, ch 205,§4.]

7143 Adjustment by county auditor. The commission shall keep a record of its proceedings and finish its review and adjustment on or before the third Monday of August. The county auditor shall thereupon add to or deduct from the valuation of each kind or class of property in his county the required percentage, rejecting all fractions of fifty cents or less in the result, and counting all over fifty cents as one dollar. [C51,§483; R60,§743; C73,§836; C97,§1382; S13, §1382; C24, 27, 31, 35,§7143; 48GA, ch 205,§5.]

CHAPTER 344

TAX LIST

Referred to in §7141

7144 Consolidated tax.
7145 Tax list.
7146 Correction—tax apportioned.
7147 Tax list delivered—informality and delay.
7148 Aggregate valuations certified.
7149 Corrections by auditor.
7150 Notice.
7151 Right of appeal.
7152 Adjustment of accounts.
7153 Expense—report to supervisors.
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7155 Corrections by treasurer.
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7157 Duty of treasurer.
7158 Time limit.
7158.1 Entry by treasurer—details required.
7158.2 Presumption of five-year ownership.
7159 Real estate—duty of owner.
7160 Irregularities, errors and omissions—effect.
7161 Discovery of property not listed.

7144 Consolidated tax. All taxes which are uniform throughout any township or school district shall be formed into a single tax and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. [C73,§838; C97,§1383; S13,§1383; C24, 27, 31, 35,§7144.]

Applicable to special charter cities, §6867.1
40ExGA, SF 183, §20, editorially divided

7145 Tax list. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns, or cities into a book, to be known as the tax list, properly ruled and headed, with separate columns, in which shall be entered the names of the taxpayers, descriptions of lands, number of acres and value, numbers of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by entering the amount due on each installment, separately, and carrying out the total of both installments. He shall also complete each page by footing all columns and balancing with tax totals. [C51,§486; R60,§745; C73,§837; C97,§1383; S13,§1383; C24, 27, 31, 35,§7145.]

Referred to in §7193.05
Applicable to special charter cities, §6867.1
Limitation on section, §7193.05

7146 Correction—tax apportioned. At the time of transcribing said assessments into the tax list, the county auditor shall correct all transfers up to date and place the legal descriptions of all real estate in the name of the owner at said date as shown by the transfer book in his office. At the end of the list for each township, town, or city he shall make an abstract thereof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each. [C97,§1383; S13,§1383; C24, 27, 31, 35,§7146.]

Applicable to special charter cities, §6867.1

7147 Tax list delivered—informality and delay. He shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a

sufficient authority for the treasurer to collect the taxes therein levied. No informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes. [C51,§487; R60,§748; C73,§843; C97,§1387; C24, 27, 31, 35,§7147.]

7148 Aggregate valuations certified. At the time of delivering the list to the treasurer, the auditor shall furnish to the state tax commission a certified statement showing separately the aggregate full and taxable valuations of the real and personal property in the county, and also the aggregate amount of each separate tax as shown by the tax list. [R60,§748; C73,§844; C97, §1388; C24, 27, 31, 35,§7148; 48GA, ch 206,§1.]

7149 Corrections by auditor. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property. [R60,§747; C73,§841; C97, §1385; S13,§1385-b; C24, 27, 31, 35,§7149.]

S13, §1385-b, editorially divided

7150 Notice. Before assessing and listing for taxation any omitted property, the auditor shall notify by registered letter the person, firm, corporation, or administrator or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment should not be made. [S13,§1385-b; C24, 27, 31, 35,§7150.]

7151 Right of appeal. Should such party feel aggrieved at the action of said auditor he shall have the right of appeal therefrom to the district court. [S13,§1385-b; C24, 27, 31, 35, §7151.]

Referred to in §7154

7152 Adjustment of accounts. If such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be. [S13,§1385-b; C24, 27, 31, 35,§7152.]

7153 Expense—report to supervisors. All expense incurred in the making of said correction or assessment shall be borne pro rata by the funds which are affected by said correction and the proceedings shall be reported to the board of supervisors. [S13,§1385-b; C24, 27, 31, 35,§7153.]

7154 Procedure on appeal. The appeal provided for in section 7151 shall be taken within ten days from the time of the final action of the auditor, by a written notice to that effect to the auditor, and served as an original notice. The court on appeal shall hear and determine the rights of the parties in the same manner as appeals from the board of review, as prescribed in sections 7134 and 7136. [S13,§1385-c; C24, 27, 31, 35,§7154.]

Service of original notice, §11060

7155 Corrections by treasurer. When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when apprised thereof, at any time within five years from the date at which such assessment should have been made, demand of the person, firm, corporation, or other party by whom the same should have been listed, or to whom it should have been assessed, or of the administrator thereof, the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, together with six percent interest thereon from the time the taxes would have become due and payable had such property been listed and assessed. [C97,§1374; C24, 27, 31, 35,§7155.]

C97, §1374, editorially divided

7156 Action by treasurer—apportionment. Upon failure to pay such sum within thirty days, with all accrued interest, he shall cause an action to be brought in the name of the treasurer for the use of the proper county, to be prosecuted by the county attorney, or such other person as the board of supervisors may appoint, and when such property has been fraudulently withheld from assessment, there shall be added to the sum found to be due a penalty of fifty percent upon the amount, which shall be included in the judgment. The amount thus recovered shall be by the treasurer apportioned ratably as the taxes would have been if they had been paid according to law. [C97,§1374; C24, 27, 31, 35,§7156.]

7157 Duty of treasurer. The treasurer shall assess any real property subject to taxation which may have been omitted by the assessor, board of review, or county auditor, and collect taxes thereon, and in such cases shall note, opposite the tract or lot assessed, the words "by treasurer". [C51,§491; R60,§752; C73,§851; C97,§1398; C24, 27, 31, 35,§7157.]

C97, §1398, editorially divided

7158 Time limit. Such assessment shall be made within four years after the tax list shall have been delivered to the treasurer for collection, and not afterwards, if the property is then owned by the person who should have paid the tax. [C73,§851; C97,§1398; C24, 27, 31, 35,§7158.]

7158.1 Entry by treasurer — details required. When the county treasurer makes an entry of taxes on the tax list, or an entry of the correction of a tax, he shall, immediately in connection with the entry, enter the year, month, day, hour, and minute when the entry was made. [C31, 35,§7158-d1.]

7158.2 Presumption of five-year ownership. In any action or proceeding, now pending or hereafter brought, to recover taxes upon property not listed or assessed for taxation during the lifetime of any decedent, it shall be presumed that any property, any evidence of ownership of property, and any evidence of a promise to pay, owned by a decedent at the date of his death, had been acquired and owned by such decedent more than five years before the date of his death; and the burden of proving that any such property had been acquired by such decedent less than five years before the date of his death shall be upon the heirs, legatees, and

legal representatives of any such decedent. [C35,§7158-f1.]

7159 Real estate—duty of owner. In all cases where real estate subject to taxation has not been assessed, the owner, by himself or agent, shall have the same done by the treasurer, and pay the taxes thereon; and if he fails to do so the treasurer shall assess the same and collect the tax assessed as he does other taxes. [R60,§753; C73,§852; C97,§1399; C24, 27, 31, 35, §7159.]

C97, §1399, editorially divided

7160 Irregularities, errors and omissions—effect. No failure of the owner to have such property assessed or to have the errors in the assessment corrected, and no irregularity, error or omission in the assessment of such property, shall affect in any manner the legality of the taxes levied thereon, or affect any right or title to such real estate which would have accrued to any party claiming or holding under and by virtue of a deed executed by the treasurer as provided by this title, had the assessment of such property been in all respects regular and valid. [R60,§753; C73,§852; C97,§1399; C24, 27, 31, 35,§7160.]

7161 Discovery of property not listed. It shall be lawful for the board of supervisors of any county to employ any person, corporation, or firm for a reasonable salary or per diem to assist the proper officers in the discovery of property not listed or assessed for taxation as required by law, and the amount allowed as compensation shall be apportioned pro rata to the funds benefited. [S13,§1407-f; C24, 27, 31, 35,§7161.]

Applicable to special charter cities, §6867.1

CHAPTER 345

TAX LEVIES

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CERTIFICATION OF TAXES

7162 Basis for amount of tax. In all taxing districts in the state, including townships, school districts, cities, towns, and counties, when by law then existing the people are authorized to determine by vote, or officers are authorized to estimate or determine, a rate of taxation required for any public purpose, such rate shall in all cases be estimated and based upon the adjusted taxable valuation of such taxing district for the preceding calendar year. [C24, 27, 31, 35,§7162.]

Referred to in §7170

7163 Amounts certified in dollars. When any authorized tax rate within any taxing district, including townships, school districts, cities, towns, and counties, shall have been thus determined as provided by law, the officer or officers charged with the duty of certifying said authorized rate to the county auditor or board of supervisors shall, before certifying the same, compute upon the adjusted taxable valuation of such taxing district for the preceding calendar year (not including moneys and credits, and other moneyed capital taxed at a flat rate as provided in section 6985), the amount of tax said rate will raise, stated in dollars, and shall certify said computed amount in dollars and not by rate, to the county auditor and board of supervisors. [C24, 27, 31, 35,§7163.]

Referred to in §7170
Applicable to special charter cities, §6867.1

7164 Computation of rate. When the valuations for the several taxing districts shall have been adjusted by the several boards for the current year, the county auditor shall thereupon apply such a rate, not exceeding the rate authorized by law, as will raise the amount required for such taxing district, and no larger amount.

Provided that the county auditor shall, in computing the tax rate for any taxing district, deduct from the total budget requirements certified by any such district all of the tax to be derived from the moneys and credits and other moneyed capital taxed at a flat rate as provided in section 6985 and shall then apply such rate to the adjusted taxable value of the property in the district, necessary to raise the amount required after the deductions herein provided have been made. [C24, 27, 31, 35,§7164.]

Referred to in §7170
Applicable to special charter cities, §6867.1
40ExGA, SF 183, §23, editorially divided

7165 Rep. by 45GA, ch 13,§3

7166 Fractional rates disregarded. If in adjusting the rate to be levied in any taxing district to conform to law, such rates shall make necessary the levying of a fraction of a mill in excess of one-half of one-tenth of a mill, said fractional excess may be computed as one-tenth of a mill, which latter shall be the smallest required to be spread upon the tax lists for any purpose except rates applicable to a state purpose. [C24, 27, 31, 35,§7166.]

Referred to in §7170
Applicable to special charter cities, §6867.1

7167 Interpretative clause. Nothing herein shall be construed as interfering with the right of any taxing district to receive its due proportion of the taxes on moneys and credits and other moneyed capital taxed at a flat rate as provided in section 6985. [C24, 27, 31, 35,§7167.]

Referred to in §7170
Applicable to special charter cities, §6867.1

7168 Record of rates. On the determination by the auditor of the necessary rates as herein directed, it is made his duty to enter a record of such rates for each taxing district upon the permanent records of his office in a book to be kept for that purpose. [C24, 27, 31, 35,§7168.]

Referred to in §7170

7169 Excessive tax prohibited. It is hereby made a misdemeanor for the board of supervisors to authorize, or the county auditor to carry upon the tax lists for any year, an amount of tax for any public purpose in excess of the amount certified or authorized as provided by law. [C24, 27, 31, 35,§7169.]

Referred to in §7170
Misdemeanor, punishment, §12894

7170 Mandatory provisions. The provisions of sections 7162 to 7169, inclusive, and the methods of computation, certification, and levy therein provided shall be obligatory on all officers within the several counties of the state upon whom devolves the duty of determining, certifying, and levying taxes. [C24, 27, 31, 35,§7170.]

COUNTY LEVIES

7171 Annual levies. The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county:

1. For state revenue, such rate of tax as shall be fixed by the state tax commission as hereinafter provided.
2. For ordinary county revenue, not to exceed one and one-half mills on a dollar. [C51,§454; R60,§710; C73,§796; C97,§1303; SS15,§1303; C24, 27, 31, 35,§7171; 48GA, ch 208,§1.]

Additional levy for county revenue for years 1939, 1940; 48GA, ch 207, §1
SS15, §1303, editorially divided

7172 Court expense. In any county where, by reason of extraordinary or unusual litigation the rates herein fixed for ordinary county revenue are found to be insufficient to pay the same, the board of supervisors may create an additional fund to be known as court expense fund, and may levy for such fund such rate of taxes as shall be necessary to pay all court expenses chargeable to the county. Such fund shall be used for no other purpose, and the levy therefor shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses. Provided, further, that the levy for the purpose of providing an additional fund shall not exceed three-fourths mill on a dollar. [C97,§1303; SS15, §1303; C24, 27, 31, 35,§7172.]

Salaries payable from, §5235.1

7173 County orphan fund. The board of supervisors may levy a tax, not exceeding one-eighth mill on the dollar in any one year, on all the taxable property in its county, at the same time other taxes are levied, and to be collected in the same manner, to aid in and for the maintenance and education of destitute orphans. The fund thus raised shall be called the "county orphan fund", and shall be expended in such sums and manner as the exigencies of each case may demand. If there be such children who are without guardian, or, having one, are neglected, they shall be cared for through some suitable person to be appointed by the board. [C73, §§1638–1641; C97,§2687; C24, 27, 31, 35,§7173.]

PEDDLERS

7174 Peddlers. Peddlers plying their vocation in any county in this state outside of a city or incorporated town shall pay an annual county tax of twenty-five dollars for each pack peddler or hawker on foot, fifty dollars for each one-horse or two-wheeled conveyance, and seventy-five dollars for each two-horse conveyance, automobile, or any motor vehicle having attached thereto or made a part thereof a conveyance for merchandise or samples. [C51,§510; R60,§791; C73,§906; C97,§1347; S13,§1347-a; C24, 27, 31, 35,§7174.]

Referred to in §§1225.41, 7176, 7177, 7178
S13, §1347-a, editorially divided

7175 Payment—license. Such tax shall be paid to the county treasurer, who shall issue to the person making such payment duplicate receipts therefor and upon presentation of one of same to the county auditor, he shall issue to the person presenting such receipt a license which shall not be transferable authorizing such person to ply the vocation of a peddler in such county for the term of one year from the date thereof. The license shall be good only in the county in which issued, and shall not authorize peddling in cities and towns. [C97,§1348; S13, §§1347-a, 1348; C24, 27, 31, 35,§7175.]

Referred to in §§7176, 7177
S13, §1348, editorially divided

7176 "Peddlers" defined. The word "peddlers" under the provisions of sections 7174 and 7175, and wherever found in the code, shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery. [S13,§1347-a; C24, 27, 31, 35, §7176.]

Referred to in §7177

7177 Exceptions. The provisions of sections 7174 to 7176, inclusive, shall not be construed to apply to persons selling at wholesale to merchants, nor to transient vendors of drugs, nor to persons running a huckster wagon, or selling and distributing fresh meats, fish, fruit, or vegetables, nor to persons selling their own work or production either by themselves or employees. [C97,§1347; S13,§1347-a; C24, 27, 31, 35,§7177.]

7178 Peddling without license. Any person peddling outside the limits of a city or town without such license or after the expiration thereof, shall be guilty of a misdemeanor, whether he be the owner of the goods sold or carried by him or not, and, on conviction thereof, shall forfeit and pay into the county treasury, in addition to the penalty imposed therefor, double the amount of the tax for one year as fixed in section 7174. [C51,§§511, 512; R60, §792; C73,§907; C97,§1348; S13,§1348; C24, 27, 31, 35,§7178.]

Punishment, §12894

PUBLIC SHOWS AND CIRCUSES

7179 Public shows—license. The board of supervisors shall have power to regulate or prohibit in any county, outside the limits of a city or town, the public exhibition, for any price, gain, or reward, of any traveling show, circus, rodeo, or other public display of any kind.

No person shall exhibit any traveling show, circus, rodeo, or other public display of any kind, as aforesaid, until he shall have obtained a license therefor from the county auditor, upon the payment to the county treasurer of such sum as may be fixed by the board of supervisors, not to exceed one hundred dollars for each place in the county at which such show or circus may exhibit. [C97,§1349; C24, 27, 31, 35,§7179; 47GA, ch 190,§§1, 2.]

7180 Violations. Any person exhibiting any such show without first having obtained such license shall be guilty of a misdemeanor, and shall also forfeit and pay to the county treasurer double the amount fixed for such license, for the benefit of the school fund. [C97,§1349; C24, 27, 31, 35,§7180.]

Punishment, §12894

LEVIES BY STATE TAX COMMISSION

7181 Levy to pay municipal bonds. Whenever any municipal corporation, board, or tribunal is charged with the duty of levying a tax to pay any bonds or interest thereon, and fails to make such levy, the holder thereof may, after obtaining final judgment thereon, in addition to any other remedies he may have, file a transcript thereof with the state tax commission, taking its receipt therefor, and the same shall be registered in its office, and the state tax commission at its regular annual session shall levy upon the taxable property of the county, city, town, or school district for which such bonds were issued a sufficient rate of taxation to realize the amount of interest, or principal and interest, due or to become due on the bonds so filed, prior to the next levy, and the money arising from such levy shall be known as the bond fund, and collected as a part of the state tax, paid into the state treasury, and placed to the credit of such county, city, town, or school district for the payment of said bonds and interest, and shall be paid out as the interest installments or the principal may mature, by warrants drawn by the state comptroller in favor of the holder of such bonds, as shown by the register aforesaid, until the same shall be paid; and, when paid, the bonds and coupons shall be canceled and returned to the treasurer of the county, city, town, or school district issuing the same, who shall receipt therefor. [C97,§1381; C24, 27, 31, 35,§7181; 48GA, ch 208,§2.]

Similar provision, §5291

7182 Annual levy. In each year the state tax commission shall fix the rate in percentage to be levied upon the valuation of the taxable property of the state necessary to raise such amount for general state purposes as shall be designated by the general assembly, either by statute or joint resolution. [S13,§1380-c; C24, 27, 31, 35,§7182; 48GA, ch 208,§3.]

7183 Rate certified to county auditor. The state tax commission shall certify the rate so fixed to the auditor of each county. [S13, §1380-d; C24, 27, 31, 35,§7183; 48GA, ch 208,§4.]

7183.1 Bonus bond levy. To provide for the payment of the principal of the soldiers bonus bonds so issued and sold and the interest thereon as the same become due and mature, there is hereby imposed and levied upon all the taxable property within the state in addition to all other taxes, a direct annual tax for each of the years said bonds are outstanding, sufficient in amount to produce the sum of one million one hundred thousand dollars each year for twenty years for the payment of principal of said bonds and sufficient in amount to produce such additional sums as may be needed to pay the interest on such bonds. [C27, 31, 35,§7183-a1.]

7183.2 Certification as to amount. The treasurer of state shall annually certify to the state tax commission prior to the time for the levy of general state taxes, the amount of money required to be raised to pay the principal and interest on such bonds maturing in the ensuing year. [C27, 31, 35,§7183-a2; 48GA, ch 208,§5.]

7183.3 Rate fixed by state tax commission. Said state tax commission shall annually fix the rate percent necessary to be levied and assessed upon the valuation of the taxable property within this state to produce funds sufficient to pay the principal of and interest upon such bonds as the same become payable. [C27, 31, 35, §7183-a3; 48GA, ch 208,§6.]

Additional levy, §§6987, 7017.11

7183.4 Certification and collection. Such additional annual direct tax shall be levied, certified, assessed, and collected at the same time and in the same manner as are taxes for general state purposes. [C27, 31, 35,§7183-a4.]

CHAPTER 346

COLLECTION OF TAXES

Referred to in §6943.132

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7184 Duty of treasurer. The treasurer, after making the entry provided in section 7193, shall proceed to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years, his efforts to that end to include the sending by mail of a statement to each delinquent taxpayer not later than the first day of November of each year. [R60, §751; C73,§846; C97,§1390; C24, 27, 31, 35, §7184.]

7185 Resistance. If the treasurer, his deputy, or collector is resisted or impeded in the execution of the duties of his office, he may require any person to assist him therein, and if such person refuses, he shall forfeit a sum not exceeding ten dollars, to be recovered by civil action in the name of the county, and the person resisting shall be punished as in the case of resisting an officer in the execution of legal process. [C51,§494; R60,§758; C73,§860; C97, §1408; C24, 27, 31, 35,§7185.]

Applicable to special charter cities, §6895
Punishment, §13331

7186 Actions authorized. In addition to all other remedies and proceedings now provided by law for the collection of taxes on personal property, the county treasurer is hereby authorized to bring or cause an ordinary suit at law to be commenced and prosecuted in his name for the use and benefit of the county for the collection of taxes from any person, persons, firm, or corporation as shown by the tax list in his office, and the same shall be in all respects commenced, tried, and prosecuted to final judgment the same as provided by the code for ordinary actions. [S13, §1452-a; C24, 27, 31, 35,§7186.]

Referred to in §7187

7187 Statutes applicable — attachment — damages. All the provisions of chapters 510 and 513 are hereby made applicable to any proceedings instituted by a county treasurer under section 7186, and a writ of attachment shall be issued upon the county treasurer complying with the provisions of said chapters, for taxes, whether due or not due, except that no bond shall be required from the treasurer or county in such cases, but the county shall be liable for damages, only, as provided by section 12090. [S13,§1452-b; C24, 27, 31, 35,§7187.]

7188 Receipt. The treasurer shall in all cases make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each and costs, if any, giving a separate receipt for each year; and he shall make the proper entries of such payments on the books of his office. Such receipt shall be in full of the first or second half

or all of such person's taxes for that year, but the treasurer shall receive the full amount of any county, state, or school tax whenever the same is tendered, and give a separate receipt therefor. [R60,§760; C73,§867; C97,§1405; C24, 27, 31, 35, §7188.]

7189 Distress and sale. The treasurer shall collect all delinquent taxes by distress or sale of any personal property belonging to the person to whom such taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien, but he shall continue to receive the same until collected, and any owner or claimant of any real estate advertised for sale may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon, with accrued penalties, interest, and costs to the time of payment. [C51,§§495, 497; R60,§§759, 760, 769; C73,§§865, 866; C97,§1414; C24, 27, 31, 35, §7189.]

Referred to in §6943.058
Certain property of national guardsmen exempt, §467.24
Garnishment proceedings by tax commission, §§11679.1–11679.3

7189.1 Distress warrant — form. Distress warrants issued by the county treasurer for the collection of delinquent personal taxes shall be substantially in the following form:

State of Iowa, }
.....County. } ss.

To the sheriff or any constable or tax collector of .....county, Iowa.

Whereas, personal taxes have been duly assessed and levied and entered upon the tax lists in.....county, Iowa, against .....of....., Iowa, in the amount and for the years..... as follows:

Personal tax .....$.....
Interest .....$.....
Penalty .....$.....
Total .....$.....

And, whereas, said taxes and interest remain unpaid as shown by said tax list,

Now, therefore, you are hereby commanded to forthwith distrain, seize, levy upon, and sell, as provided by law, any personal property belonging to the said .....not exempt from taxation, and any personal property upon which said taxes are a lien, sufficient to make the full amount of said taxes, interest, penalty and costs, and to make due and prompt return to my office of the taxes, interest and penalty so collected.

Witness my hand and official signature at.... ....., Iowa, this.....day of .....19....

.....
Treasurer of.....county, Iowa.
[C31, 35,§7189-d1.]

Referred to in §6943.058
Sale, see §§7240–7243

7190 Delinquent personal tax list. The treasurer shall, after October 1, and before December 31, of each year, enter in a book to be kept in his office as a part of the records thereof, to be known as the delinquent personal tax list, all delinquent personal taxes and delinquent poll taxes of any preceding year which do not appear thereon. [C51,§488; R60,§750; C73,§845; C97, §1389; S13,§1389-a; C24, 27, 31, 35,§7190.]

7191 Record—contents. Such entry of tax on delinquent personal tax list shall give the names of delinquents alphabetically arranged, with amounts of tax and for what year or years, and where property was located when assessed. [R60,§750; C73,§845; C97,§1389; S13,§1389-b; C24, 27, 31, 35,§7191.]

7192 Rep. by 43GA, ch 200

7193 Former delinquent real estate taxes. The treasurer shall each year, upon receiving the tax list, enter upon the same in separate columns opposite each parcel of real estate on which the tax remains unpaid for any previous year, the amount of such unpaid tax, and unless such delinquent real estate tax is so brought forward and entered it shall cease to be a lien upon the real estate upon which the same was levied, and upon any other real estate of the owner. But to preserve such lien it shall only be necessary to enter such tax, as aforesaid, opposite any tract upon which it was a lien. Any sale for the whole or any part of such delinquent tax not so entered shall be invalid. Nothing contained in this section shall be held to require that in order to preserve the lien of such tax and make such tax sale valid, delinquent taxes must be brought forward upon the current tax list if said tax list is received by the county treasurer less than six months preceding the date of conducting the said tax sale as provided in section 7259 or section 7262. [R60,§750; C73,§845; C97,§1389; S13,§1389-d; C24, 27, 31, 35,§7193; 48GA, ch 213, §2.]

Referred to in §§7184, 7193.04, 7193.05, 10398.2, 10398.3
Lien of 1932 taxes, see 45ExGA, ch 89
Limitation on section, §7193.05

7193.01 Special assessment book. Upon the record of the levy of any special assessment within any county coming into the hands of the county auditor, the county auditor shall, in blue or black ink, prepare in a book to be known as a special assessment book, the list of the persons owning real estate to be affected thereby, in alphabetical or numerical order, which book shall contain a description of the real estate so affected, the date of the assessment, the total amount so assessed, and the installments to be paid, together with the amounts of the respective installments if said assessment is payable in installments. [C31, 35, §7193-d1.]

Certification to county auditor, §§6007, 6034

7193.02 Additional data. Said special assessment tax list shall also contain space for showing penalties, if any, that may be incurred, a column showing payments and amounts thereof, a column showing number of receipt to be issued by the county treasurer, and a column that may be used to show the date of payment of said assessment, or any installment thereof. [C31, 35, §7193-d2.]

7193.03 Entries—delivery to treasurer—informalities. Said county auditor shall make an entry upon the special assessment tax list show-

ing what it is, for what county, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; such list shall be a sufficient authority for the county treasurer to collect the taxes therein levied. No informality therein and no delay in delivering the same after the time above specified, shall affect the validity of any special assessment taxes, sales or other proceeding for the collection of such special assessment taxes. [C31, 35,§7193-d3.]

7193.04 Entries on general tax list. The county treasurer shall each year, upon receiving the tax list referred to in section 7193 enter in red ink upon the same, in separate columns opposite each parcel of real estate upon which the special assessment remains unpaid for any previous year, the book, page and line number of the special assessment tax list where such special assessment levy and the amount so levied may be found. [C31, 35,§7193-d4.]

7193.05 Limitations. Nothing contained in sections 7145 and 7193 shall apply to special assessment levies. [C31, 35,§7193-d5.]

7193.06 Compromising tax. When any property in this state has been offered by the county treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes, then and in that event the board of supervisors of the county is hereby authorized to compromise the delinquent taxes against said property antedating any tax sale certificate; or being a part of the taxes due for the year for which such property was sold for taxes, and may enter into a written agreement with the owner of the legal title or with any lienholder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement. [C27, 31, 35,§7193-a1.]

Referred to in §7193.09
41GA, ch 148, §1, editorially divided

7193.07 Filing of compromise agreement. A copy of such agreement shall be filed with the county treasurer and county auditor. [C27, 31, 35,§7193-a2.]

Referred to in §7193.09

7193.08 Effect of compromise payment. When payment is made, as by such agreement provided, all taxes included in such agreement shall be thereby fully satisfied and canceled and the county auditor and county treasurer shall cause their books to show such satisfaction. [C27, 31, 35,§7193-a3.]

Referred to in §7193.09

7193.09 Compromising tax on personal property. When personal property taxes are not a lien upon any real estate and are delinquent for one or more years, the board may, when it is evident that such tax is not collectible in the usual manner, compromise such tax as provided in sections 7193.06 to 7193.08, inclusive. [C27, 31, 35,§7193-b1.]

7194 Penalty and interest limited—unavailable taxes. No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer, and the board of supervisors at the January meeting may declare such tax unavailable, and when so declared by the board, the amount shall be credited to the treasurer by the auditor as unavailable and he shall apportion such tax among the funds to which it belongs. [C97,§1391; SS15,§1391; C24, 27, 31, 35,§7194.]

Referred to in §7195
SS15, §1391, editorially divided

7195 County credited. Any portion of such tax belonging to the state shall be reported by him in his semiannual settlement sheets to the state comptroller as unavailable, whereupon the comptroller shall credit the county with the amount so reported, but nothing in this or section 7194 shall be construed to in any way release the county treasurer from any duty required of him in the collection of delinquent taxes, nor to release the taxpayer from his liability for the same. [SS15,§1391; C24, 27, 31, 35,§7195.]

7196 Subsequent collection. Should any of such tax afterward be collected, the county treasurer shall distribute the net amount collected among the several funds the same as though it had never been declared unavailable, and the portion belonging to the state shall be credited back to the state and included in the treasurer's remittance of other state taxes to the treasurer of state and shall be reported by the county auditor in his semiannual settlement sheets to the state comptroller, who shall recharge the same to the county. [SS15,§1391; C24, 27, 31, 35,§7196.]

7197 Certificate of taxes due. The county treasurer, when requested to do so by anyone having an interest therein, shall certify in writing the entire amount of taxes and assessments due upon any parcel of real estate, together with all sales of the same for unpaid taxes or assessments shown by the books in his office, with the amount required for redemption from the same, if still redeemable, if he is paid or tendered his fees for such certificate at the rate of fifty cents for the first parcel in each township, town, or city, and ten cents for each subsequent parcel in the same township, town, or city, and in computing such fees each description in the tax list shall be reckoned a parcel. [C73,§848; C97, §1393; C24, 27, 31, 35,§7197.]

7198 Effect of certificate and receipt. Such certificate, with the treasurer's receipt showing the payment of all the taxes therein specified, and the auditor's certificate of redemption from the tax sales therein mentioned, shall be conclusive evidence for all purposes, and against all persons, that the parcel of real estate in said certificate and receipt described was, at the date thereof, free and clear of all taxes and assessments, and sales for taxes or assessments, except sales whereon the time of redemption had

already expired and the tax purchaser had received his deed. [C73,§849; C97,§1394; C24, 27, 31, 35,§7198.]

7199 Treasurer liable. For any loss resulting to the county, or any subdivision thereof, or to any tax purchaser, or taxpayer, from an error in said certificate or receipt, the treasurer and his sureties shall be liable on his official bond. [C73,§850; C97,§1395; C24, 27, 31, 35,§7199.]

7200 Information as to taxes due. The treasurer, when applied to by letter and receiving thirty cents in postage stamps or money, and ten cents additional for each tract of one hundred sixty acres in excess of three hundred twenty acres, in no case to exceed fifty cents, shall correctly answer the same by mail, giving the amount and interest of unpaid taxes and of any tax sales thereof as the same appear upon the tax list in his office, and upon the return of the letter or a copy, before the last day of the current month, with the demand due as shown therein, he shall pay the taxes and forward to the sender a tax receipt without further charge. [C73,§3794; C97,§1396; C24, 27, 31, 35,§7200.]

Referred to in §7201

7201 Penalty. Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money or stamps inclosed as aforesaid, to answer the same fully as required in section 7200, or who shall directly or indirectly receive or be concerned in receiving any greater compensation for the service mentioned than as above provided, shall forfeit to the person aggrieved, for each offense, the sum of fifty dollars, which may be recovered in a civil action. [C73,§3795; C97,§1397; C24, 27, 31, 35, §7201.]

7202 Lien of taxes on real estate. Taxes upon real estate shall be a lien thereon against all persons except the state. [C51,§495; R60, §759; C73,§§853, 865; C97,§1400; S13,§1400; C24, 27, 31, 35,§7202.]

S13, §1400, editorially divided

7203 Lien of personal taxes. All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect. [C73, §853; C97,§1400; S13,§1400; C24, 27, 31, 35, §7203.]

7204 Lien between vendor and purchaser. As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year. [C97,§1400; S13,§1400; C24, 27, 31, 35,§7204.]

7205 Lien follows certain personal property. Taxes upon stocks of goods or merchandise, fixtures and furniture in hotels, restaurants, rooming houses, billiard halls, moving picture shows and theatres, shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser, or vendee, and such owner, purchaser, or vendee of any of such goods, merchandise, furniture, or fixtures shall be personally liable for all taxes thereon. [C24, 27, 31, 35,§7205.]

7206 Lien follows building assessed as personalty. In all cases where buildings are assessed as personal property, the taxes shall be and remain a lien on said buildings from the date of levy until paid. [S13,§1400; C24, 27, 31, 35,§7206.]

7207 Payment—what receivable. The treasurer is authorized and required to receive in payment of all taxes by him collected, together with the interest and principal of the school fund, the circulating notes of national banking associations organized under and in accordance with the conditions of the act of the congress of the United States, entitled, "An act to provide a national currency secured by the pledge of the United States stocks, and to provide for the redemption thereof", approved February 25, 1863, and acts amendatory thereto, United States legal tender notes, and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency. [C73,§855; C97,§1402; C24, 27, 31, 35,§7207.]

7208 Certain warrants receivable. State comptroller's warrants shall be received by the county treasurer in full payment of state taxes, and county warrants shall be received by the treasurer of the proper county for ordinary county taxes, but money only shall be received for the school tax. [C51,§489; R60,§§754, 2057, 2059; C73,§§854, 1779; C97,§1401; C24, 27, 31, 35,§7208.]

7209 Warrants not receivable. Warrants issued by any city or town shall not be received by the county treasurer in payment of the city or town taxes. [C97,§900; C24, 27, 31, 35,§7209.]

7210 Payment—installments. No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of Septem-

ber following. [C51,§492; R60,§756; C73,§857; C97,§1403; C24, 27, 31, 35,§7210.]

C97, §1403, editorially divided

7211 **When delinquent.** In all cases where the half of any taxes has not been paid before the first day of April succeeding the levy, the amount thereof shall become delinquent from the first day of April after due; and in case the second installment is not paid before the first day of October succeeding its maturity, it shall become delinquent from the first day of October after due. [C97,§1403; C24, 27, 31, 35,§7211.]

7212 **Apportionment.** In all cases where taxes are paid by installment, each of such payments shall be apportioned among the several funds for which taxes have been assessed in their proper proportions. [C97,§1403; C24, 27, 31, 35,§7212.]

7213 Rep. by 44GA, ch 180

7214 **Interest as penalty.** If the first installment of taxes shall not be paid by April 1, said installment shall become due and draw interest, as a penalty, of three-fourths of one percent per month until paid, from the first day of April following the levy; and if the last half shall not be paid by October 1 following such levy, then a like interest shall be charged from the date such last half became delinquent. [C51, §§495, 497; R60,§§759, 760; C73,§865; C97, §1413; C24, 27, 31, 35,§7214.]

7215 **Penalty on personal taxes.** On all personal taxes not paid on or before the first Monday in December a penalty of five percent shall be added and collected in addition to the one* percent per month penalty herein provided; and the tax with all penalties shall be collected at the same time and in the same manner. [C73,§866; C97,§1413; C24, 27, 31, 35, §7215.]

*See §7214

7216 **When interest penalty omitted.** No interest as a penalty shall be added to taxes levied by any court to pay a judgment on county, city, town, or school district indebtedness, other than the interest which such judgment may draw, nor upon taxes levied in aid of the construction of any railroad. [C73,§866; C97,§1413; C24, 27, 31, 35,§7216.]

7217 **Assessment of migratory property of nonresident.** All personal property, the owner of which is a nonresident of the state, and which property is by the owner thereof intended for sale or consumption at a place, or shipment to a place other than where said property is located, shall be assessed in the owner's name, if the owner is known, and if the owner is unknown or uncertain the same shall be assessed to "unknown owner", and shall be by the assessor sufficiently described so that said property may be identified. [C97,§1404; C24, 27, 31, 35, §7217.]

C97, §1404, editorially divided

7218 **Lien on migratory personal property—maturity of tax.** A lien for the tax upon said property as herein provided shall relate back to and exist from the first day of January of the year for which it is assessed, and if anyone seeks to remove the said property from the county before the tax for said year shall be paid, the tax shall immediately become due and collectible. [C97,§1404; C24, 27, 31, 35,§7218.]

7219 **Enforcement of lien.** It shall be the duty of the assessor to notify the county auditor if said property is being, or is about to be, removed from the county. In such event, or if the knowledge of the removal of or intent to remove said property shall come to him in any other authentic manner, the said auditor shall certify such fact to the county treasurer, with a full description of the property as the same appears on the assessor's books, giving assessment district, where located, and the amount of said assessment, and the county treasurer shall thereupon proceed by distress to restrain the removal of said property and secure the lien of the tax due or to become due. [C97,§1404; C24, 27, 31, 35,§7219.]

7220 **Release of lien by bond.** If at the time of such distress the levy for the year is unknown, the auditor is authorized to release the lien of such tax upon a good and sufficient bond, with sureties resident in the county, being filed with said auditor, to be by him approved, which bond shall obligate all parties thereto to pay all taxes due on said property when same are payable. Upon the filing and approving of such bond, the auditor shall make a certificate releasing the said personalty from the lien of such tax. [C97,§1404; C24, 27, 31, 35,§7220.]

7221 **Payment—effect.** The payment of said tax shall be a bar against the collection of taxes for same year on said property in any other county in this state. [C97,§1404; C24, 27, 31, 35, §7221.]

7222 **Collectors—appointment.** Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent taxpayers, and for this purpose he may appoint one or more collectors to assist him in collecting the same. [C73,§859; C97,§1407; S13,§1407; C24, 27, 31, 35,§7222.]

Applicable to special charter cities, §6895
S13, §1407, editorially divided

7223 **Compensation and accounting.** Each collector appointed shall receive for his services and expenses the sum of five percent on the amount of all taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest; and pay the same to the treasurer at the end of each month. [C73, §859; C97,§1407; S13,§1407; C24, 27, 31, 35, §7223.]

Applicable to special charter cities, §6895

7224 **Sheriff or constable as collector.** In the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be

appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, or a constable, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five percent, as constables are entitled to receive for the sale of property on execution. [C73,§859; C97,§1407; S13,§1407; C24, 27, 31, 35,§7224.]

Applicable to special charter cities, §6895

7225 **Personal property tax collectors.** The boards of supervisors may in their discretion authorize the appointment by the treasurer of one or more collectors to assist in the collection of such delinquent personal tax as the board may designate, and may pay such collector as full compensation for all services rendered and expenses incurred a sum not to exceed ten percent of the amount collected, which sum shall in no event be paid or allowed until all such taxes collected have been paid over to the county treasurer by such collector. [C73,§859; C97, §1407; S13,§1407; C24, 27, 31, 35,§7225.]

Applicable to special charter cities, §6895

7226 **Current taxes — when delivered for collection.** In no case shall delinquent taxes of the current year be turned over for collection, whether designated by the board or otherwise, before the first day of November. The provisions of this section shall not apply to counties having a population of eighty thousand or more. [C24, 27, 31, 35,§7226.]

Applicable to special charter cities, §6895

7227 **Interest and penalties—apportionment —compensation of collectors.** The interest and penalty on delinquent taxes collected shall be apportioned to and become a part of the general fund of the county, and the amount allowed as compensation to delinquent tax collectors shall be paid from said fund. [S13,§1407-1a; C24, 27, 31, 35,§7227.]

7228 **Taxes certified to another county.** In all cases of delinquent taxes in any county, where the person upon whose property the same were levied shall have disposed of or removed the said property and the treasurer of the county where the taxes were levied can find no property within said county out of which said taxes can be made, the treasurer of the county where said taxes are delinquent shall make out a certified abstract thereof and forward the same to the treasurer of the county in which the delinquent resides or has property, when the treasurer transmitting the said abstract has reason to believe that said taxes can be collected thereby. [C73,§861; C97,§1409; SS15,§1409; C24, 27, 31, 35,§7228.]

7229 **Collection in such case.** The treasurer forwarding and the one receiving said abstract shall each keep a record thereof, and, upon receipt and filing in the office of the treasurer to whom sent, it shall have the effect of a levy of taxes in that county, and the collection of the same shall be proceeded with in the same manner as in the collection of other taxes. [C73, §862; C97,§1410; C24, 27, 31, 35,§7229.]

7230 **Penalties collectible.** The officer collecting taxes so certified into another county shall, in addition to the penalties on delinquent taxes, assess and collect the further penalty of twenty percent on the whole amount of such taxes, inclusive of the penalties thereon. [C73, §863; C97,§1411; C24, 27, 31, 35,§7230.]

Referred to in §7231

7231 **Return.** The officer receiving said abstract shall, when in his opinion the taxes are uncollectible, return the same with the indorsement thereon "uncollectible", and, if collected, he shall remit the amount to the treasurer of the county where said taxes were levied, less the penalty provided by section 7230. [C73,§864; C97,§1412; C24, 27, 31, 35,§7231.]

7232 **Monthly apportionment.** On or before the tenth day of each month, the treasurer shall apportion all taxes collected during the preceding month among the several funds to which they belong according to the number of mills levied for each fund, and the interest and penalties thereon to the general fund, and shall enter the same upon his cash account, and report the amount of each tax and the interest and penalties collected on the same to the county auditor, who shall charge him in each fund with the same. [C73,§868; C97,§1415; S13, §1415; C24, 27, 31, 35,§7232.]

7233 **Misapplied interest or penalty.** Any interest or penalty on delinquent taxes apportioned or transferred to any fund other than the general fund, together with a penalty of ten percent and interest at six percent on the aggregate, from the time such tax is due and payable, may be recovered in a civil action brought against the county treasurer and his bondsmen by any person in control of the fund affected thereby. [S13,§1415; C24, 27, 31, 35,§7233.]

7234 **Record of separate funds.** The auditor shall keep a complete account with the treasurer, with each separate fund or tax by itself, and in each account he shall charge him with the amounts in his hands at the opening of such account whether it be delinquent taxes, notes, cash, or other assets belonging to such fund, the amount of each tax for each year when the tax list is received by him, and all additions to each tax or fund whether by additional assessments, interest on delinquent taxes, amount received for licenses, or other items, and upon proper vouchers shall credit him for money disbursed for double and erroneous assessments, including all improper and illegal assessments the correction or remission of which causes a diminution of the tax, and for unavailable or uncollectible taxes, as directed by the board of supervisors. [R60,§761; C73,§869; C97,§1416; C24, 27, 31, 35,§7234.]

7235 **Refunding erroneous tax.** The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually

paid thereon. [R60,§762; C73,§870; C97,§1417; C24, 27, 31, 35,§7235.]

C97, §1417, editorially divided

7236 Sale for erroneous tax. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter, but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale. [R60,§762; C73,§870; C97, §1417; C24, 27, 31, 35,§7236.]

7237 Remission in case of loss. The board of supervisors shall have power to remit in whole or in part the taxes of any person whose buildings, crops, stock, or other property has been destroyed by fire, tornado, or other unavoidable casualty, if said property has not been sold for taxes, or if said taxes have not been delinquent for thirty days at the time of the destruction. The loss for which such remission is allowed shall be such only as is not covered by insurance. The loss of capital stock in a bank operated within the state and the making and paying of a stock assessment for the year such stock was assessed for taxation shall be a destruction within the meaning of this section. [R60,§818; C73,§800; C97,§1307; C24, 27, 31, 35, §7237.]

Similar provision as to banks, §7004.1

CHAPTER 347

TAX SALE

Referred to in §§6943.132, 7272

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7238 Sale shown. The auditor, when making up the tax list, before it is placed in the hands of the county treasurer, shall designate each piece or parcel of real estate sold for taxes, and not redeemed, by writing opposite the same the year in which it was sold in a column made for that purpose and headed "sold in". [C73, §842; C97,§1386; C24, 27, 31, 35,§7238.]

7239 Notice of previous sale. Each county treasurer, when any person offers to pay taxes on any real estate marked "sold", shall notify him of such fact and inform him for what taxes and when the sale was made. [C73,§847; C97, §1392; C24, 27, 31, 35,§7239.]

7240 Sale of personal property. If anyone neglects to pay his taxes at or before maturity, the treasurer may collect the same by distress and sale of his personal property not exempt from taxation, and the tax list alone shall be sufficient warrant therefor. When the treasurer distrains goods, and the owner refuses to give a sufficient bond for the delivery of the same on the day of sale, he may keep them at the expense of the owner. [C51,§§492, 493; R60,§§756, 757; C73,§§857, 858; C97,§1406; C24, 27, 31, 35, §7240.]

Applicable to special charter cities, §6895
C97, §1406, editorially divided

7241 Notice of time and place of sale. The treasurer shall give notice of the time and place of their sale within five days after the taking, in the manner constables are required to give notice of the sale of personal property under execution. [C51,§493; R60,§757; C73,§858; C97, §1406; C24, 27, 31, 35,§7241.]

Applicable to special charter cities, §6895
Sales by constable, §11724

7242 Time of sale—adjournment. The time of sale shall not be more than twenty days from the day of taking, but he may adjourn the sale from time to time, not exceeding five days in all, and shall adjourn at least once when there are no bidders, and, in case of adjournment, he shall post up a notice thereof at the place of sale, announcing the time to which the adjournment is ordered. [C51,§493; R60,§757; C73,§858; C97,§1406; C24, 27, 31, 35,§7242.]

Applicable to special charter cities, §6895

7243 Surplus. Any surplus remaining above the taxes, charges of keeping, and fees for sale, shall be returned to the owner, and the treasurer shall, on demand, render an account in writing of the sale and charges. [C51,§493; R60,§757; C73,§858; C97,§1406; C24, 27, 31, 35, §7243.]

Applicable to special charter cities, §6895

7244 Annual tax sale. Annually, on the first Monday in December, the treasurer shall offer at his office at public sale all lands, town lots, or other real property on which taxes of any description for the preceding year or years are delinquent, which sale shall be made for the total amount of taxes, interest, and costs due and unpaid thereon, provided, however, that no property, against which the county holds a tax sale certificate, shall be offered or sold. [C51, §496; R60,§763; C73,§871; C97,§1418; C24, 27, 31, 35,§7244.]

C97, §1418, editorially divided

7245 Dual county seats. In counties having two county seats and divided into two districts for the collection of taxes, such sale may be made by the deputy treasurer and the recorder or his deputy at the county seat where the taxes for the district are collected, and the records thereof shall be kept thereat. Such deputy treasurer and the recorder or his deputy shall have all the powers conferred by law upon the treasurer and auditor in relation to the collection of the revenue, sales for delinquent taxes, redemption therefrom, the execution of tax deeds thereunder, and every other matter connected therewith. [C97,§1418; C24, 27, 31, 35, §7245.]

7246 Notice of sale—service. Notice of the time and place of such sale shall be given by the treasurer, and shall contain a description of each separate tract to be sold as taken from the tax list, the amount of taxes for which it is liable delinquent for each year, and the amount of penalty, interest, and costs thereon, the name of the owner, if known, or the person, if any, to whom it is taxed, by publication in some newspaper in the county, once each week, for two consecutive weeks, the last of which shall be not more than two weeks before the day of sale, and by immediately posting a copy of the first publication thereof at the door of the courthouse, if there be one, if not, at the door of the place where the last term of district court was held. A description of each separate tract to be sold, as herein provided, shall be construed to permit but one description of each separate tract of real estate so to be sold, whether all of the delinquent tax, both regular and special, then existing against the same for the year in which the tax sale is held, and all property which has theretofore been advertised and remains unsold and against which there remains delinquent taxes, shall be indicated by an asterisk preceding the same. [C51,§498; R60,§764; C73,§§872–874, 3833; C97,§1419; S13,§1419; C24, 27, 31, 35,§7246.]

S13, §1419, editorially divided
Tax sales held April 2, 1934, see 45ExGA, ch 93

7247 Costs. The compensation for such publication shall not exceed thirty cents for each description, and shall be paid by the county. The amount paid therefor shall be collected as a part of the costs of sale and paid into the county treasury. [C51,§498; R60,§764; C73, §§873, 3833; C97,§1419; S13,§1419; C24, 27, 31, 35,§7247.]

7248 Substituted service. If the treasurer cannot procure the publication of the notice for the sum herein fixed, then the notice may be given by posting the same in four of the most public places in the county, to be selected by him, for four weeks, and filing a copy thereof with the auditor before the day of sale, with his verified statement thereon that it had been posted as and for the time herein required, and that he could not obtain a publication thereof at the legal rate. [C51,§498; R60,§764; C73,§§873, 3833; C97,§1419; S13,§1419; C24, 27, 31, 35, §7248.]

7249 Certificate of publication. The treasurer shall obtain a copy of the notice of sale, with a certificate of the publication thereof, from the printer or publisher, and file it in the office of the auditor, which certificate shall be substantially in the following form:

I, A.....B....., publisher (or printer) of the....., a newspaper printed and published in the county of.....and state of Iowa, do hereby certify that the foregoing notice and list were published in said newspaper once in each week for three successive weeks, the last of which publications was made on the ..... day of....., A. D. ....., and that copies of each number of said paper in which said notice and list were published were delivered by carrier or transmitted by mail to each of the subscribers to said paper, according to the accustomed mode of business in this office.

A..... B.....

State of Iowa, }
.....County. } ss.

The above certificate of publication was subscribed and sworn to before me by the above named A..... B....., who is personally known to me to be the identical person described therein, on the ..... day of ....., A. D.....

.....
Auditor.....County, Iowa.

[C51,§500; R60,§771; C73,§881; C97,§1420; C24, 27, 31, 35,§7249.]

7250 Method of describing lands, etc. In all entries required to be made by the auditor, treasurer, or other officer, letters and figures may be used to denote townships, ranges, sections, parts of sections, lots, blocks, date, and the amount of taxes, interest, and costs. [R60, §770; C73,§880; C97,§1421; C24, 27, 31, 35, §7250.]

C97, §1421, editorially divided

7251 Irregularities in advertisement. No irregularity or informality in the advertisement shall affect the legality of the sale or the title

to any real estate conveyed by the treasurer's deed under this and chapters 348 and 349, and in all cases its provisions shall be sufficient notice to the owners of the sale thereof. [R60, §770; C73,§880; C97,§1421; C24, 27, 31, 35, §7251.]

7252 Offer for sale. The treasurer shall, on the day of the sale, at ten o'clock in the forenoon, at his office, offer for sale, separately, each tract or parcel of real estate advertised for sale on which the taxes and costs shall not have been paid. [C51,§499; R60,§765; C73,§875; C97,§1422; C24, 27, 31, 35,§7252.]

7253 Bid—purchaser. The person who offers to pay the amount of taxes which are a lien on any parcel of land or town lot for the smallest portion thereof shall be the purchaser, and when such purchaser shall designate the portion of any tract of land or town lot for which he will pay the whole amount of taxes for which it may be sold, the portion thus designated shall be an undivided portion. [C51, §501; R60,§766; C73,§876; C97,§1423; C24, 27, 31, 35,§7253.]

Applicable to special charter cities, §6895

7254 Sale continued. The treasurer shall continue the sale from day to day as long as there are bidders, or until the taxes are all paid. [C51,§499; R60,§767; C73,§877; C97,§1424; C24, 27, 31, 35,§7254.]

7255 "Scavenger sale"—notice. Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale. [C97,§1425; C24, 27, 31, 35,§7255.]

Referred to in §§7255.1, 7279
C97, §1425, editorially divided

7255.1 County as purchaser. When property is offered at a tax sale under the provisions of section 7255, and no bid is received, or if the bid received is less than the total amount of the delinquent general taxes, interest, penalties and costs, the county in which said real estate is located, through its board of supervisors, shall bid for the said real estate a sum equal to the total amount of all delinquent general taxes, interest, penalties and costs charged against said real estate. No money shall be paid by the county or other tax-levying and tax-certifying body for said purchase, but each of the tax-levying and tax-certifying bodies having any interest in said general taxes for which said real estate is sold shall be charged with the full amount of all the said delinquent general taxes due said levying and tax-certifying bodies, as its just share of the purchase price. [C27, 31, 35,§7255-b1.]

Management and disposal, ch 449

7255.2 In special charter cities. General taxes and special assessments, including the collection thereof, levied by a special charter city, levying and collecting its own taxes and special assessments should* not be affected by any such sale to the county in which said real estate is located. [C35,§7255-g1.]

*According to enrolled act

7255.3 Applicable statute. Section 6041 shall apply to all tax sales made under the provisions of this act [46GA, ch 83]. [C35,§7255-g2.]

7256 Unavailable tax — credit given. Any taxes on such real estate, in excess of the amount for which the same was sold, shall be credited to the treasurer by the auditor as unavailable, and he shall apportion such excess among the funds to which it belongs, and if any of such excess belongs to the state, it shall be reported by him to the state comptroller as unavailable, who shall give the county credit therefor. [C97, §1425; C24, 27, 31, 35,§7256.]

7257 Resale. The person purchasing any parcel or part thereof shall forthwith pay to the treasurer the amount bid, and on failure to do so the same shall at once be again offered as if no such sale had been made. Such payments may be made in the funds receivable in payment of taxes. [C51,§502; R60,§768; C73,§878; C97, §1426; C24, 27, 31, 35,§7257.]

7258 Record of sales. The auditor shall attend all sales of real estate for taxes, and keep a record thereof in a book to be kept by him for that purpose, therein describing each tract of real estate on which the taxes and costs were paid by the purchaser as they are described in the copy of the notice on file in his office, stating in separate columns the amount, as obtained from the treasurer's tax list, of each kind of tax, interest, and costs for each tract, how much and what part of each parcel was sold, to whom, and date thereof. The treasurer shall also keep a book of sales in which he shall make the same record. He shall also note in the tax list, opposite the description of the property sold, the fact and date thereof. [R60,§772; C73,§882; C97,§1427; C24, 27, 31, 35,§7258.]

7259 Sale adjourned. When all the real estate advertised for sale has been offered, and a part remains unsold for want of bidders, the treasurer shall adjourn the sale to some day not exceeding two months from adjournment, due notice of which day shall be given at the time thereof, and by keeping such notice posted in a conspicuous place in his office, and no further notice shall be necessary. On the day fixed by the adjournment, the same proceedings shall be had as in the first instance. Further adjournment shall be made from time to time, not exceeding two months, and the sales thus continued until the next regular annual sale, or until all the taxes are paid. [R60,§773; C73, §883; C97,§1428; C24, 27, 31, 35,§7259.]

Referred to in §§7193, 10398.2, 10398.3
Applicable to special charter cities, §6878

7260 Misconduct of officers. Any treasurer or auditor failing to attend a sale of lands in person or by deputy shall forfeit and pay the sum of one hundred dollars, to be recovered in an action in the name of the county and for its use. If such officer or deputy shall sell or assist in selling any real estate, knowing it is not subject to taxation, or that the taxes for which it is sold have been paid, or shall knowingly and wilfully sell or assist in selling any real estate for taxes to defraud the owner thereof, or shall knowingly and wilfully execute a deed for property so sold, he shall, upon conviction, be fined in a sum of not less than one thousand nor more than three thousand dollars, or imprisoned in the county jail not exceeding one year, or both fined and imprisoned, and shall be liable to pay the injured party all damages sustained by him on account thereof, and all such sales shall be void. [R60,§774; C73,§884; C97,§1429; C24, 27, 31, 35,§7260.]

7261 Fraud of officers. If any treasurer or auditor shall be directly or indirectly concerned in the purchase of any real estate sold for the nonpayment of taxes, he and his sureties shall be liable on his official bond for all damages sustained by the owner of such property, and all such sales shall be void. In addition thereto, the officer so offending shall, upon conviction, be fined in a sum of not more than one thousand dollars. [R60,§775; C73,§885; C97,§1430; C24, 27, 31, 35,§7261.]

7262 Subsequent sale. If, from neglect of officers to make returns, or other good cause, real estate cannot be advertised and offered for sale on the first Monday of December, the treasurer shall make the sale on the first Monday of the next succeeding month in which the required notice can be given. [R60,§776; C73, §886; C97,§1431; C24, 27, 31, 35,§7262.]

Referred to in §§7193, 10398.2, 10398.3

7263 Certificate of purchase. The treasurer shall prepare, sign, and deliver to the purchaser of any real estate sold for the nonpayment of taxes a certificate of purchase, describing it as shown in the record of sales, giving the part of each tract or lot sold, the amount of each kind of tax, interest, and costs for each tract or lot as described in such record, and that payment has been made therefor. Not more than one such parcel or description shall be entered upon each certificate of purchase. [C51,§503; R60, §777; C73,§887; C97,§1432; S13,§1432; C24, 27, 31, 35,§7263.]

Recovery for waste, §12410
S13, §1432, editorially divided

7264 Loss of certificate. In case of loss of said certificate of purchase, the owner thereof, as appears on record, may, by filing an affidavit of such loss or destruction with the county treasurer, receive a duplicate thereof, which shall take the place of the original certificate and have the same force and effect in law and be subject to the same rules and regulations. [S13,§1432; C24, 27, 31, 35,§7264.]

7265 Assignment — presumption from deed recitals. The certificate of purchase shall be assignable by indorsement and entry in the register of tax sales in the office of county treasurer of the county from which said certificate issued, and when such assignment is so entered, it shall vest in the assignee or his legal representatives all the right and title of the assignor. The statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof. When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax-certifying bodies having any interest in said general taxes. All money received from assignment of said certificates shall be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold. [R60,§778; C73,§888; C97,§1433; S13,§1433; C24, 27, 31, 35,§7265; 48GA, ch 210,§1.]

7266 Payment of subsequent taxes by purchaser. The treasurer shall also prepare, sign, and deliver to the purchaser of any real estate sold for taxes duplicate receipts for taxes, interest, and costs paid by him after the date of his purchase for any subsequent year or years, one of which receipts shall be filed in the office of the auditor and noted on the register of sales therein. [C73,§889; C97,§1434; C24, 27, 31, 35, §7266.]

Applicable to special charter cities, §6895
C97, §1434, editorially divided

7267 Failure to file duplicate receipt. If such duplicate receipt is not so filed before redemption, such tax shall not be a lien upon the land, and the person paying the tax shall not be entitled to recover it of the owner of the real estate. [C73,§889; C97,§1434; C24, 27, 31, 35, §7267.]

Applicable to special charter cities, §6895

7268 School, agricultural college, or university land. When any school, agricultural college, or university land sold on credit is sold for taxes, the purchaser shall acquire only the interest of the original purchaser therein, and no sale of any such lands for taxes shall prejudice the rights of the state, agricultural college, or university. In all cases where the real estate is mortgaged or otherwise incumbered to the school, agricultural college, or university fund, the interest of the person who holds the fee shall alone be sold for taxes, and in no case shall the lien or interest of the state be affected by any sale thereof. The foregoing provision shall include all lands exempt from taxation by law, and any legal or equitable estate therein held, possessed, or claimed for any public purpose, and no assessment or taxation of such lands, nor the payment of any such tax by any person, or the sale and conveyance for taxes of any such lands, shall in any manner affect the right or title of the public therein, or confer upon the purchaser or person who pays such taxes any right or interest in such land. [R60,

§§810, 811; C73,§900; C97,§1435; C24, 27, 31, 35, §7268.]

7269 Assessment to wrong person. No sale of real estate for taxes shall be invalid on account of its having been taxed in any other name than that of the rightful owner, if it is in other respects sufficiently described. [R60,§787; C73, §904; C97,§1450; C24, 27, 31, 35,§7269.]

Referred to in §6894

7270 Certified copies of records as evidence. The books and records belonging to the offices of the auditor and treasurer, or copies thereof properly certified, shall be sufficient evidence to prove the sale of any real estate for taxes, the redemption thereof, or the payment of taxes thereon. [R60,§788; C73,§905; C97,§1451; C24, 27, 31, 35,§7270.]

Referred to in §6894
Similar provision, §11296

7271 Failure to obtain deed — cancellation of sale. After eight years have elapsed from the time of any tax sale, and no action has been taken by the holder of a certificate to obtain a deed, it shall be the duty of the county auditor and county treasurer to cancel such sales from their tax sale index and tax sale register. [C97, §1452; C24, 27, 31, 35,§7271.]

CHAPTER 348

TAX REDEMPTION

Referred to in §§6943.132, 7251

7272 Redemption—terms.
7273 Nonallowable penalties.
7274 Agricultural college lands.
7275 Redemption from sale for part of tax.
7276 Certificate of redemption—countersigned by treasurer.
7276.1 Erasures prohibited.
7277 Minors and lunatics.
7278 Redemption after delivery of deed.
7279 Notice of expiration of right of redemption.
7280 Service on nonresidents except mortgagees.
7281 Agent of nonresident.
7282 When service deemed complete—presumption.
7283 Cost—fee—report.

7272 Redemption—terms. Real estate sold under the provisions of this chapter and chapter 347 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four percent of such amount added as a penalty, with six percent interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest, and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six percent per annum on the whole of such amount or amounts from the day or days of payment. [C51,§505; R60,§779; C73, §890; C97,§1436; S13,§1436; C24, 27, 31, 35, §7272.]

Referred to in §7277
S13, §1436, editorially divided

7273 Nonallowable penalties. The penalty for nonpayment of taxes of any subsequent year or years shall not attach, unless the same shall have remained unpaid until the first day of April after they become due and have become delinquent, nor shall said penalties apply to taxes voted in aid of the construction of any railroad. [C73,§890; C97,§1436; S13,§1436; C24, 27, 31, 35,§7273.]

Referred to in §7277

7274 Agricultural college lands. In redeeming from a sale of a leasehold interest in agricultural college land, the amount to be paid shall include any amount paid by the holder of the certificate as interest or principal due by the terms of the lease or otherwise to prevent a forfeiture thereof, as provided by law, and for which proper voucher shall have been filed with the auditor, with interest thereon at eight percent per annum from date of payment, which amount shall be paid by the auditor to the holder of the certificate, and the certificate of redemption shall show the amount so paid by the party redeeming. [C51,§505; R60,§779; C73,§890; C97,§1436; S13,§1436; C24, 27, 31, 35,§7274.]

Referred to in §7277

7275 Redemption from sale for part of tax. In case a redemption is made of any real estate sold for a less sum than the taxes, penalty, interest, and costs, the purchaser shall receive only the amount paid and a ratable part of such penalty, interest, and costs. In determining the interest and penalties to be paid upon redemption from such sale, the sum due on any parcel sold shall be taken to be the full amount of taxes, interest, and costs due thereon at the time of such sale, and the amount paid for any such parcel at such sale shall be apportioned ratably among the several funds to which it belongs. Real estate so sold shall be redeemable in the same manner and with the same penalties as that sold for the taxes of the preceding year. [C97,§1437; C24, 27, 31, 35,§7275.]

7276 Certificate of redemption — countersigned by treasurer. The auditor shall, upon application of any party to redeem real estate sold for taxes, and being satisfied that he has a right to redeem the same upon the payment of the proper amount, issue to such party a certificate of redemption, setting forth the facts of the sale substantially as contained in the certificate thereof, the date of the redemption, the amount paid, and by whom redeemed, and make the proper entries in the book of sales in his office, and immediately give notice of such redemption to the treasurer. The certificate of redemption shall then be presented to the latter,

who shall countersign it, noting such fact in the sale book opposite the entry of the sale, and no certificate of redemption shall be evidence of such redemption without the signature of the treasurer. [R60,§780; C73,§891; C97,§1438; C24, 27, 31, 35,§7276.]

7276.1 Erasures prohibited. Said entries by the auditor and treasurer shall be made in ink, and in case errors are subsequently discovered such entries shall not be erased but shall be corrected by drawing a line through the erroneous entries with ink accompanied by the initials of the person who made the alteration and the date when made. [C31, 35,§7276-c1.]

7277 Minors and lunatics. If real property of any minor, lunatic, or person of unsound mind is sold for taxes, it may be redeemed at any time within one year after such disability is removed, in the manner specified in section 7278, or redemption may be made by the guardian or legal representative under sections 7272 to 7274, inclusive, at any time before the delivery of the deed. [R60,§779; C73,§892; C97,§1439; C24, 27, 31, 35,§7277.]

Applicable to special charter cities, §6889

7278 Redemption after delivery of deed. Any person entitled to redeem lands sold for taxes after the delivery of the deed shall do so by an equitable action in a court of record, in which all persons claiming an interest in the land derived from the tax sale, as shown by the record, shall be made defendants, and the court shall determine the rights, claims, and interest of the several parties, including liens for taxes and claims for improvements made on the land by the person claiming under the tax title. No person shall be allowed to redeem land sold for taxes in any other manner after the service of the notice provided for by section 7279 and the execution and delivery of the treasurer's deed. [C73,§893; C97,§1440; C24, 27, 31, 35, §7278.]

Referred to in §7277
Applicable to special charter cities, §6889

7279 Notice of expiration of right of redemption. After two years and nine months from the date of sale, or after nine months from the date of a sale made under the provisions of section 7255, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided for the service of original notices, a notice signed by him, his agent, or attorney, stating the date of sale, the description of the property sold, the name of the purchaser, and that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof. When said notice is given by a county as a holder of a certificate of purchase the notice shall be signed by the county auditor. Service of such notice shall also be made by registered mail on any mortgagee, or his assignee, of record, whether resident or nonresident of the county, if his address is disclosed by the recorded instrument or by a certificate showing the address of the mortgagee or assignee duly filed with the recorder, or the state of Iowa in case of an old-age assistance lien by service upon the superintendent of the division of old-age assistance. [R60,§781; C73,§894; C97,§1441; S13,§1441; C24, 27, 31, 35,§7279; 48GA, ch 212, §1.]

Referred to in §§6890, 7278
Applicable to special charter cities, §§6867.1, 6889
Management when county acquires deed, ch 449
Service of original notice, §11060

7280 Service on nonresidents except mortgagees. Service may be made upon nonresidents of the county, except mortgagees or their assignees of record, by publishing the same once each week, for three consecutive weeks, in some newspaper in said county, or by personal service thereof elsewhere in the same manner as original notices may be served. [C73,§894; C97,§1441; S13,§1441; C24, 27, 31, 35,§7280; 48GA, ch 212,§2.]

Referred to in §6890
Applicable to special charter cities, §§6867.1, 6889
40ExGA, SF 183, §25, editorially divided

7281 Agent of nonresident. Any such nonresident may in writing appoint a resident of the county in which such land is situated as agent, and file said appointment with the treasurer of said county, who shall forthwith record the same in a record kept in his office therefor, and index the same, after which personal service of said notice shall be made upon said agent. [C73,§894; C97,§1441; S13,§1441; C24, 27, 31, 35, §7281.]

Referred to in §6890
Applicable to special charter cities, §§6867.1, 6889

7282 When service deemed complete—presumption. Service shall be complete only after an affidavit has been filed with the treasurer, showing the making of the service, the manner thereof, the time when and place where made, and under whose direction the same was made; such affidavit to be made by the holder of the certificate or by his agent or attorney, and in either of the latter cases stating that such affiant is the agent or attorney, as the case may be, of the holder of such certificate; which affidavit shall be filed by the treasurer and entered upon the sale book opposite the entry of the sale, and said record or affidavit shall be presumptive evidence of the completed service of said notice, and the right of redemption shall not expire until ninety days after service is complete. [C73,§894; C97,§1441; S13,§1441; C24, 27, 31, 35,§7282.]

Referred to in §§6890, 7284
Applicable to special charter cities, §§6867.1, 6889

7283 Cost—fee—report. The cost of serving the notice and affidavit of publication shall be added to the amount necessary to redeem. The fee for serving the notice shall be the same as for service of an original notice, including copy fee and mileage. The treasurer shall, upon the filing of proof of service and statement of costs,

forthwith report the same in writing to the auditor, who shall enter it on the sale book against the proper tract of real estate. The holder of the certificate of sale or his agent may report in writing to the county auditor the amount of costs incurred in giving such notice, and the auditor shall enter the same in the sale book. No redemption shall be complete until such costs are paid. [C73,§894; C97,§1441; S13,§1441; C24, 27, 31, 35,§7283.]

Referred to in §§6890, 10398.1
Applicable to special charter cities, §§6867.1, 6889
Costs of service, §§5191, 10637
Legalizing act, §10398.1

REDEMPTION IN INSTALLMENTS FROM PUBLIC BIDDER
47GA, ch 191 (SF 167)

Section 1. Delinquent taxes upon any parcel of real estate which, prior to the adoption of this act, have been bid in for and held by the county and not assigned by it, including subsequent taxes added to the tax sale record in the office of the county auditor, may be composed into one item or amount for the entire amount of all such taxes and costs, excluding penalties and interest, as hereinafter provided.

The owner of any such property sold to the county under section seventy-two hundred fifty-five-b1 (7255-b1) [code 1935], and not assigned by it, or any person to whom the right to pay taxes has been given by statute, mortgage or other agreement, may make and file with the county auditor of the county wherein said property is located within six months from the effective date of this act, a written offer to pay the current taxes each year before they become delinquent, and to pay the amount of all such delinquent general taxes and costs included in said sale, including all subsequent taxes added affecting the particular property sold appearing on the tax sale record in the office of the county auditor, but excluding penalties and interest, as certified by the county auditor, and shall thereby waive all irregularities in connection with the tax proceedings affecting such property and any defense or objection which he may have thereto, and shall thereby waive the requirement of any notice of default in the payment of any installment or interest to become due, and shall tender therewith one-tenth of the amount of all such delinquent taxes and costs, and agree therein to pay the balance in nine equal annual installments, with interest at the rate of six percent (6%) per annum payable annually, on the installments unpaid from time to time, on or before the anniversary date of such agreement, which offer shall be substantially as follows:

"To the county auditor of.....county: I, ..., owner of the following described real estate situated in..... county, Iowa, to wit:

..... upon which there are delinquent taxes for the year .....and prior years, which said taxes have been bid in by the county and not assigned by it, including subsequent taxes added to the tax sale record by the county auditor, as follows: (here insert year or years of delinquency and the total amount of delinquent taxes and costs, exclusive of penalties and interest); do hereby offer to pay the sum of $..... including taxes for the year....., which on the..... day month in....., was sold to the county for taxes year for prior years, and including subsequent taxes for the year.....added to the tax sale records, and hereby waive all irregularities in the tax proceedings affecting such taxes and any defense or objections which I may have thereto and do hereby tender the sum of $....., being one-tenth of the amount of said taxes and costs.

"I agree to pay the balance of said principal amount in nine equal annual installments, with interest at the rate of six percent (6%) per annum from date of filing of said agreement, payable annually, on the installments remaining unpaid from time to time, said installments and interest to be paid on or before the respective anniversary dates of said agreement and current taxes each year before they become delinquent, all installment payments to be made to the county auditor.

Dated this.....in..... day month year

(Signature) ....."

At the time of filing such offer he shall pay any subsequent delinquent taxes not already entered on the tax sale record in the office of the county auditor, with accrued interest, penalties and costs, and current taxes due, but not delinquent.

Sec. 2. Upon the filing of said agreement, all the accrued penalties and interest on the taxes embraced within said agreement shall be waived and further proceedings shall be suspended as long as no default exists. Upon the payment in full of the amounts required to be paid under the said agreement, the county auditor shall issue the certificate of redemption provided for in section seventy-two hundred seventy-six (7276), code, 1935.

Sec. 3. The county auditor's receipt issued for payment of a deferred installment, as herein provided for, shall not read for any specific year's taxes, but shall read for partial or full release of said agreement as the case may be and shall show the year that such agreement was entered into.

Sec. 4. In the event of default occurring in the payments to be made, under any agreement entered pursuant hereto, the penalties and interest waived under the terms of section two (2) and/or section six (6) of this act shall be reinstated and the lands described in such agreement shall thereupon be subject to such action as might have been had thereon before the filing of said agreement, and if payment of the installment due is not made within sixty (60) days after default, the county auditor shall forthwith serve notice of the termination of the right of redemption.

Sec. 5. The filing of an agreement as described in section one (1) of this act shall suspend the running of the limitation imposed by section seventy-two hundred seventy-one (7271), code, 1935, as to the particular tax sales certificate involved in said agreement and such suspension shall continue so long as no default exists in the payments set forth in said agreement. Where payments are made during the sixty (60) day grace period provided for in section four (4) of this act, such a delinquency shall not be deemed a default within the terms of this section.

Sec. 6. In any case where the period of redemption has already expired upon any tax sale certificate now held by the county, the period of time of redemption from such tax sale is hereby extended for a period of six (6) months following the effective date of this act, and in any case where the period of redemption has expired and the county has taken a tax deed to a piece of property, the county shall not sell said property until six (6) months after the effective date of this act, and any owner or owners of such property may during said six (6) months period enter into a contract with the county for the payment of such taxes or the repurchase of said property from the county for the full amount of said taxes paid for any property to which the county has taken a tax deed less the accumulated penalties and interest or on which a tax sale certificate has been purchased by the county, under the terms and conditions of this act as though said period of redemption had not expired or said tax deed had not been issued, provided, however, that where any piece of property is redeemed after the issuance of a tax deed, all of the liens of every kind which existed prior to the issuance of said tax deed shall be reinstated and take the order of preference they had prior to the issuance of said tax deed as though no tax deed had been issued.

Sec. 7. In event that the owner or owners fail to enter into a contract with the county as herein provided within six (6) months following the effective date of this act, or if said owner or owners shall fail to pay any installment or installments provided for in any contract entered into with the county under the provisions hereof, the county at any time after the expiration of ninety (90) days after the service of notice of the termination of the right of redemption as provided herein may sell for cash and assign such certificate of sale for not less than the full amount of the purchase price of such certificate. Any assignment of a tax sale certificate heretofore made by any county for the full amount of the purchase price of such tax certificate at the time of the sale is hereby legalized and is hereby declared to be valid and a legal transfer.

Sec. 8. Effective by publication, April 23, 1937.

48GA, ch 211 (SF 366)

Section 1. Delinquent taxes upon any parcel of real estate which, prior to the adoption of this act, have been bid in for and held by the county and not assigned by it and on which a tax deed has not been issued to said county, including subsequent taxes added to the tax sale record in the office of the county auditor, may be composed into one item or amount for the entire amount of all such taxes and costs, excluding penalties and interest, as hereinafter provided.

The owner of any such property sold to the county and not assigned by it and on which a tax deed has not been issued to said county, or any person to whom the right to pay taxes has been given by statute, mortgage or other agreement, may upon paying all delinquent installments of special assessments make and file with the county auditor of the county wherein said property is located within six (6) months from the effective date of this act, a written offer to pay the current taxes subsequently maturing installments of special assessments, if any each year before they become delinquent, and to pay the amount of all such delinquent general taxes and costs included in said sale, including all subsequent taxes added affecting the particular property sold appearing on the tax sale record in the office of the county auditor, but excluding penalties and interest, as certified by the county auditor, and shall thereby waive all irregularities in connection with the tax proceedings affecting such property and any defense or objection which he may have thereto, and shall thereby waive the requirement of any notice of default in the payment of any installment or interest to become due, and shall tender therewith one-tenth (1/10) of the amount of all such delinquent taxes and costs, and agree therein to pay the balance in nine (9) equal annual installments, with interest at the rate of six percent (6%) per annum payable annually, on the installments unpaid from time to time, on or before the anniversary date of such agreement, which offer shall be substantially as follows:

"To the county auditor of.....county: I, ...owner of the following described real estate situated in..... county, Iowa, to wit:

..... upon which there are delinquent taxes for the year .....and prior years, which said taxes have been bid in by the county and not assigned by it and on which a tax deed has not been issued to said county, including subsequent taxes added to the tax sale record by the county auditor, as follows: (here insert year or years of delinquency and the total amount of delinquent taxes and costs, exclusive of penalties and interest); do hereby offer to pay the sum of $..... .....including taxes for the year....., which on the.....day of..... month in....., was sold to the county for taxes for prior years, and including subsequent taxes for the year.....added to the tax sale records, and hereby waive all irregularities in the tax proceedings affecting such taxes and any defense or objections which I may have thereto and do hereby tender the sum of $....., being one-tenth (1/10) of the amount of said taxes and costs.

"I agree to pay the balance of said principal amount in nine (9) equal annual installments, with interest at the rate of six percent (6%) per

annum from date of filing of said agreement, payable annually, on the installments remaining unpaid from time to time, said installments and interest to be paid on or before the respective anniversary dates of said agreement and current taxes together with subsequently maturing installments of special assessments, if any each year before they become delinquent, all installment payments to be made to the county auditor. Dated this .... in.....

day month year

(Signature) ....."

At the time of filing such offer he shall pay any subsequent delinquent taxes not already entered on the tax sale record in the office of the county auditor, with accrued interest, penalties and costs, and current taxes due, but not delinquent.

Sec. 2. Upon the filing of said agreement, all the accrued penalties and interest on the taxes embraced within said agreement shall be waived and further proceedings shall be suspended as long as no default exists. Upon the payment in full of the amounts required to be paid under the said agreement, the county auditor shall issue the certificate of redemption provided for in section seventy-two hundred seventy-six (7276), code, 1935.

Sec. 3. The county auditor's receipt issued for payment of a deferred installment, as herein provided for, shall not read for any specific year's taxes, but shall read for partial or full release of said agreement as the case may be and shall show the year that such agreement was entered into.

Sec. 4. In the event of default occurring in the payments to be made, under any agreement entered pursuant hereto, the penalties and interest waived under the terms of section two (2) of this act shall be reinstated and the lands described in such agreement shall thereupon be subject to such action as might have been had thereon before the filing of said agreement, and if payment of the installment due is not made within sixty (60) days after default, the county auditor shall forthwith serve notice of the termination of the right of redemption.

Sec. 5. The filing of an agreement as described in section one (1) of this act shall suspend the running of the limitation imposed by section seventy-two hundred seventy-one (7271), code, 1935, as to the particular tax sales certificate involved in said agreement and such suspension shall continue so long as no default exists in the payments set forth in said agreement. Where payments are made during the sixty (60) day grace period provided for in section four (4) of this act, such a delinquency shall not be deemed a default within the terms of this section.

Sec. 6. In event that the owner or owners fail to enter into a contract with the county as herein provided within six (6) months following the effective date of this act, or if said owner or owners shall fail to pay any installment or installments provided for in any contract entered into with the county under the provisions hereof, the county at any time after the expiration of ninety (90) days after the service of notice of the termination of the right of redemption as provided herein may sell for cash and assign such certificate of sale for not less than the full amount of the purchase price of such certificate. Any assignment of a tax sale certificate heretofore made by any county for the full amount of the purchase price of such tax certificate at the time of the sale is hereby legalized and is hereby declared to be valid and a legal transfer.

Sec. 7. In the event that the owner of any such property or any person to whom the right to pay taxes has been given by statute, mortgage or other agreement do not exercise the right given them in section one (1) of this act to make and file a written offer and agreement as in said section one (1) provided and within six (6) months from the effective date of this act, then in such case, any holder of any special assessment certificate against any such property shall have the right and be entitled to purchase from the county to which such property has been sold and not assigned by it and on which a tax deed has not been issued to said county, the tax sale certificate thereunder, by payment in cash to county auditor, wherein said real property is located, the amount of all delinquent general taxes and costs included in said sale, including all subsequent taxes added affecting the particular property sold appearing on the tax sale record in the office of said county auditor, but excluding penalties and interest, and upon the payment of such amount said tax sale certificate shall be assigned by said county to such holder of said special assessment certificate, the right herein given to such holders of special assessment certificates shall terminate after nine (9) months from the effective date of this act.

Sec. 8. Effective by publication, April 28, 1939.

CHAPTER 349

TAX DEED

Referred to in §§6943.132, 7251

7284 Deed executed.
7285 Form.
7286 Execution and effect of deed.
7287 Presumptive evidence.
7288 Conclusive evidence.
7289 Facts necessary to defeat deed.
7290 Additional facts necessary.
7291 Sale made by mistake.
7292 Fraudulent sale.
7293 Wrongful sales—purchaser indemnified.
7294 Correcting wrongful sale.
7295 Limitation of actions.
7295.1 Limitation of action on tax sales and deeds.
7296 Officers de facto.

7284 **Deed executed.** Immediately after the expiration of ninety days from the date of completed service of the notice provided in section 7282 the treasurer then in office shall make out

a deed for each lot or parcel of land sold and unredeemed, and deliver it to the purchaser upon the return of the certificate of purchase. The treasurer shall receive twenty-five cents for each deed made by him, and may include any number of parcels of land purchased by one person in one deed, if desired by him. [C51,§§503, 504; R60,§§781, 782; C73,§895; C97,§1442; C24, 27, 31, 35,§7284.]

Referred to in §6890
Management when county acquires deed, ch 449

7285 Form. Deeds executed by the treasurer shall be substantially in the following form:

KNOW ALL MEN BY THESE PRESENTS, that the following described real estate, viz: (here follows the description), situated in the county of.....and state of Iowa, was subject to taxation for the year (or years) A. D....., and the taxes assessed thereon for the year (or years) aforesaid remained due and unpaid at the date of the sale hereinafter named; and the treasurer of said county, having on the .....day of ....., A. D....., by virtue of the authority in him vested by law, at (an adjournment of) the sale begun and publicly held on the first Monday of December, A. D. ....., exposed to public sale at the office of the county treasurer in the county aforesaid, in substantial conformity with all the requirements of the statute, the real property above described, for the payment of the taxes, interest and costs then due and remaining unpaid on said property, and at the time and place aforesaid A..... B....., of the county of ..... and state of....., having offered to pay the sum of.....dollars and.....cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, for (here follows the description of the property sold) which was the least quantity bid for, and payment of said sum having been made by him to said treasurer, the property was stricken off to him at that price; and the said A..... B..... did, on the .....day of ....., A. D....., duly assign the certificate of the sale of the property as aforesaid and all his right, title and interest to said property to E..... F..... of the county of .....and state of.....; and by the affidavit of....., filed in said treasurer's office on the ....day of....., A. D....., it appears that notice has been given more than ninety days before the execution of these presents to..... and ..... of the expiration of the time of redemption allowed by law; and three years having elapsed since the date of said sale, and said property having not been redeemed therefrom:

Now, I, C..... D....., treasurer of said county, for the consideration of said sum to the treasurer paid as aforesaid and by virtue of law, have granted, bargained and sold, and by these presents do grant, bargain and sell to the said A..... B..... (or E..... F.....), his heirs and assigns, the real property hereinbefore described, to have and to hold unto him (or E..... F.....), his heirs and assigns, forever; subject, however, to all the rights of redemption provided by law. In witness whereof, I, C..... D....., treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name on this.....day of....., A. D.....

.....

State of Iowa, }
.....County. } ss.

I hereby certify that before me,....., in and for said county, personally appeared the above named C..... D....., treasurer of said county, personally known to me to be the treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as treasurer of said county, and acknowledged the execution of the same to be his voluntary act and deed as treasurer of said county, for the purposes therein expressed.

Given under my hand (and seal) this..... day of....., A. D.....

.....

[R60,§783; C73,§896; C97,§1443; C24, 27, 31, 35,§7285.]

Referred to in §6892

7286 Execution and effect of deed. The deed shall be signed by the treasurer as such, and acknowledged by him before some officer authorized to take acknowledgments, and when substantially thus executed and recorded in the proper record in the office of the recorder of the county in which the property is situated, shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed, subject to all restrictive covenants, resulting from prior conveyances in the chain of title to the former owner, and all the right, title, interest, and claim of the state and county thereto. [C51,§503; R60,§784; C73,§897; C97,§1444; C24, 27, 31, 35,§7286; 47GA, ch 192, §1.]

Referred to in §6893
C97, §1444, editorially divided

7287 Presumptive evidence. The deed shall be presumptive evidence in all the courts of this state in all controversies and actions in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

1. That the real property conveyed was subject to taxation for the year or years stated in the deed.
2. That the taxes were not paid at any time before the sale.
3. That the real property conveyed had not been redeemed from the sale at the date of the deed.
4. That the property had been listed and assessed.
5. That the taxes were levied according to law.
6. That the property was duly advertised for sale.
7. That the property was sold for taxes as stated in the deed. [C51,§503; R60,§784; C73, §897; C97,§1444; C24, 27, 31, 35,§7287.]

Referred to in §§6893, 7288

7288 Conclusive evidence. The deed shall be conclusive evidence of the following facts:

1. That the manner in which the listing, assessment, levy, notice and sale were conducted was in all respects as the law directed.

2. That the grantee named in the deed was the purchaser.

3. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in section 7287 wherein the deed shall be presumptive evidence only. [C51,§503; R60,§784; C73,§897; C97,§1444; C24, 27, 31, 35,§7288.]

Referred to in §6893

7289 Facts necessary to defeat deed. In all actions involving the title to real estate claimed and held under a deed executed substantially as aforesaid by the treasurer, the person claiming title adverse to the title conveyed thereby shall be required to prove, in order to defeat the title, either:

1. That the real property was not subject to taxation for the year or years named in the deed,

2. That the taxes had been paid before the sale,

3. That the property had been redeemed from the sale and that such redemption was had or made for the use and benefit of persons having the right of redemption, or

4. That there had been an entire omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property. [C51,§503; R60,§784; C73,§897; C97, §1445; C24, 27, 31, 35,§7289.]

Referred to in §6894
C97, §1445, editorially divided

7290 Additional facts necessary. No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title. [R60,§784; C73,§897; C97,§1445; C24, 27, 31, 35,§7290.]

Referred to in §6894

7291 Sale made by mistake. In any case where a person had paid his taxes, and through mistake in the entry made in the treasurer's books, or in the receipt, the land upon which the taxes were paid was afterward sold, the treasurer's deed shall not convey the title. [R60, §784; C73,§897; C97,§1445; C24, 27, 31, 35, §7291.]

Referred to in §6894

7292 Fraudulent sale. In all cases where the owner of the lands sold for taxes shall resist the validity of the tax title, he may prove fraud committed by the officer selling the same, or in the purchaser, to defeat the same, and, if fraud is established, the sale and title shall be void. [R60,§784; C73,§897; C97,§1445; C24, 27, 31, 35, §7292.]

Referred to in §6894

7293 Wrongful sales — purchaser indemnified. When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, or when land is sold in consequence of error in describing it in the tax receipt, the county shall hold the purchaser harmless by paying him the amount of principal, interest, and costs to which he would have been entitled had the land been rightfully sold, and the treasurer and his bondsmen shall be liable to the county therefor to the amount of his official bond; or the purchaser, or his assignee, may recover the same directly of him and his bondsmen. [C51,§509; R60,§785; C73,§899; C97, §1446; C24, 27, 31, 35,§7293.]

Referred to in §6894
Applicable to special charter cities, §6895

7294 Correcting wrongful sale. When it shall be made to appear to the treasurer, before the execution of a deed for real estate sold for taxes, or if the deed be returned by the purchaser, that any tract or lot was sold which was not subject to taxation, or upon which the taxes had been paid, he shall make an entry opposite such tract or lot on the sale book that the same was erroneously sold, and such entry shall be evidence of the fact therein stated, and the purchase money shall be refunded to the purchaser. [R60,§789; C73,§901; C97,§1447; C24, 27, 31, 35, §7294.]

Referred to in §6894
Applicable to special charter cities, §6895

7295 Limitation of actions. No action for the recovery of real estate sold for the nonpayment of taxes shall be brought after five years from the execution and recording of the treasurer's deed, unless the owner is, at the time of the sale, a minor, insane person, or convict in the penitentiary, in which case such action must be brought within five years after such disability is removed. [R60,§790; C73,§902; C97,§1448; C24, 27, 31, 35,§7295.]

Referred to in §6894
Applicable to special charter cities, §6895

7295.1 Limitation of action on tax sales and deeds. From and after November 1, 1939, no action shall be brought or defense made attacking the validity of a tax sale or a deed issued pursuant thereto which said tax sale was held prior to January 1, 1936, and in accordance with section 7259 or section 7262, both of the code, 1935, on the grounds of the failure of the county treasurer to comply with section 7193 or section 7259, both of the code, 1935, unless the owner thereof was at the time of the said sale a minor, insane person or convict in the penitentiary; in which case such action must be brought within six months after such disability is removed. Provided, however, that nothing herein contained shall be applicable to actions brought or defenses made by a holder of a special assessment, if the

same continues to remain a lien notwithstanding a tax deed now or hereafter issued pursuant to such tax sale. [48GA, ch 213 (Took effect April 15, 1939).]

7296 Officers de facto. In all actions and controversies involving the question of title to real property held under a treasurer's deed, all acts of assessors, treasurers, auditors, supervisors and other officers de facto shall be of the same validity as acts of officers de jure. [R60, §786; C73,§903; C97,§1449; C24, 27, 31, 35, §7296.]

Referred to in §6894

CHAPTER 350

APPORTIONMENT OF TAXES

7297 Application.
7298 Notice.
7299 Order—record.
7300 Correction of books.
7301 Effect of order.
7302 Appeal.
7303 Trial on appeal.
7304 Interpretative clause.

7297 Application. When a tract of real estate has been assessed and taxed as one item of property, and thereafter and before the tax is paid, the title to different portions of said real estate becomes vested in different parties in severalty, and the said owners are unable to agree as to what portion of the total tax each portion of the real estate should bear, any of said parties may file with the board of supervisors a written application for the apportionment of said tax. [C24, 27, 31, 35,§7297.]

7298 Notice. In the absence of the appearance of all interested parties, the board shall prescribe the notice which nonappearing parties shall receive, and the time and manner of the service thereof. [C24, 27, 31, 35,§7298.]

7299 Order — record. On the hearing, the board shall apportion said tax to the different portions of the real estate owned in severalty, in accordance with the values thereof. All orders and determinations of the board shall be entered of record in its minutes. An order of apportionment shall definitely identify each portion of said real estate so owned in severalty. [C24, 27, 31, 35,§7299.]

7300 Correction of books. The county auditor shall, upon the making of an order of apportionment, at once correct the tax books in his possession, in accordance with said order, and if said books have been delivered to the county treasurer, the said auditor shall at once certify said order of apportionment to the said treasurer who shall make said correction. [C24, 27, 31, 35,§7300.]

7301 Effect of order. An order of apportionment, when followed by a correction of the tax book in accordance therewith, shall have the same effect as though the original assessment had been made in the same manner. [C24, 27, 31, 35,§7301.]

7302 Appeal. A party aggrieved by an order of apportionment may appeal therefrom to the district court at any time within ten days from the date of said order, by serving written notice of said appeal on all other parties to said proceeding. Should personal service of said notice within the county be impossible as to any party, any judge of the district court may prescribe the manner of such service. [C24, 27. 31, 35,§7302.]

7303 Trial on appeal. The district court shall try said appeal anew and in equity. The final order of the court shall be certified by the clerk of the district court to the county auditor and shall be treated in the same manner as though originally made by the board of supervisors. [C24, 27, 31, 35,§7303.]

7304 Interpretative clause. This chapter shall not be construed as exclusive of other legal remedies. [C24, 27, 31, 35,§7304.]

CHAPTER 351

INHERITANCE TAX

Referred to in §§7397.02, 7397.12

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7305 "Person" defined—authority of county attorney. In the construction of this chapter the word "person" shall include plural as well as singular, and artificial as well as natural persons. This chapter shall not be construed to confer upon a county attorney authority to represent the state in any case, and he shall represent the state tax commission only when especially authorized by it to do so. [S13,§1481-a45; C24, 27, 31, 35,§7305; 48GA, ch 214,§§1, 50.]

7306 Estates taxable. The estates of all deceased persons in any property whether the decedents be inhabitants of this state or not, and whether such estates consist of real, personal, or mixed property, tangible or intangible, and any interest in, or income from, any such estate or property which estate or property is, at the death of the decedent owner within this state, or is subject to the jurisdiction of the courts of this state, or thereafter is brought within this state and becomes subject to the jurisdiction of the courts of this state; or the property of any decedent, domiciled within this state at the time of the death of such decedent, even though the property of such decedent so domiciled was situated outside of the state, except real estate located outside of the state, passing in fee from the decedent owner, which shall pass in any manner herein described shall be subject to tax as herein provided. [C97, §1467; S13,§1481-a; C24, 27, 31, 35,§7306.]

39GA, ch 38, §2, editorially divided

7307 Property included. The tax hereby imposed shall be collected upon the net market value and shall go into the general fund of the state to be determined as herein provided, of any property passing:

1. By will or under the statutes of inheritance of this or any other state or country.

2. By deed, grant, sale, gift or transfer made in contemplation of the death of the grantor or donor, and any such transfer of property made by any person within two years prior to the death of the grantor or donor shall, unless shown to the contrary, be deemed to have been made in contemplation of death.

3. By deed, grant, sale, gift or transfer made or intended to take effect in possession or enjoyment after the death of the grantor or donor. A transfer of property in respect of which the transferor reserves to himself a life income or interest shall be deemed to have been intended to take effect in possession or enjoyment at death, provided, that if the transferor reserves to himself less than the entire income or interest, the transfer shall be deemed taxable thereunder only to the extent of a like proportion of the value of the property transferred.

4. Under power of appointment hereafter exercised whether the power was created before or after the taking effect of this chapter.

5. Property which is held jointly or as tenants in the entirety by the decedent and any other person or persons or any deposit in banks, or other institution in their joint names and payable to either or to the survivor, except such part as may be proven to have belonged to the survivor; or any interest of a decedent in property owned by a joint stock or other corporate body whereby the survivor or survivors become beneficially entitled to the decedent's interest upon the death of a shareholder. The tax im-

posed upon the passing of property under the provisions of this subsection shall apply to property held under all such contracts or agreements whether made before or after the taking effect of this chapter.

6. When the decedent shall have disposed of his estate in any manner to take effect at his death with a request secret or otherwise that the beneficiary give, pay to, or share the property or any interest therein received from the decedent, with other person or persons, or to so dispose of beneficial interests conferred by the decedent upon the beneficiaries as that the property so passing would be taxable under the provisions of this chapter if passing directly by will or deed from the decedent owner to those to receive the gift from the beneficiary, compliance with such request shall constitute a transfer taxable under the provisions of this chapter, at the highest rate possible in like cases of transfers by will or deed. [C97,§1467; S13, §1481-a; C24, 27, 31, 35,§7307.]

7308 Exemptions. The tax imposed by this chapter shall not be collected:

1. When the entire estate of the decedent does not exceed the sum of one thousand dollars after deducting the debts, as defined in this chapter.

2. When the property passes in any manner to societies, institutions or associations incorporated or organized under the laws of this state for charitable, educational, or religious purposes, and which are not operated for pecuniary profit, or to cemetery associations, including humane societies or to resident trustees for such uses within this state.

3. When the property passes to public libraries or public art galleries within this state, open to the use of the public and not operated for gain, or to hospitals within this state, or to trustees for such uses within this state, or to municipal corporations for purely public purposes.

4. Bequests for the care and maintenance of the cemetery or burial lot of the decedent or his family, and bequests not to exceed five hundred dollars in any estate of a decedent for the performance of a religious service or services by some person regularly ordained, authorized, or licensed by some religious society to perform such service, which service or services are to be performed for or in behalf of the testator or some person named in his last will. [S13, §1481-a1; C24, 27, 31, 35,§7308.]

7309 Liability for tax. Any person becoming beneficially entitled to any property or interest therein by any method of transfer as herein specified, and all administrators, executors, referees, and trustees of estates or transfers taxable under the provisions of this chapter, shall be respectively liable for all such taxes to be paid by them respectively. [C97,§1467; S13, §1481-a; C24, 27, 31, 35,§7309.]

7310 Accrual of tax—maturity—extension of time. The tax hereby imposed shall be for the use of the state, shall accrue at the death of the decedent owner, and shall be paid to the state tax commission within eighteen months after the death of the decedent owner except when otherwise provided in this chapter. When in the opinion of the state tax commission additional time should be granted for payment to avoid hardship, said commission may extend the period to a date not exceeding three years from date of death of decedent, but in case of any such extension the tax shall bear six percent interest from the expiration of eighteen months from decedent's death. [S13,§1481-a; C24, 27, 31, 35,§7310; 48GA, ch 214,§2.]

Interest on delinquent taxes, §7368

7311 Lien of tax. The tax shall be and remain a legal charge against and a lien upon such estate, and any and all the property thereof from the death of the decedent owner until paid, provided that said lien shall not continue longer than five years from the date such tax becomes due and payable; provided further, such five year limitation shall not apply to estates or beneficiaries embraced in subsection 2 of section 7313, in cases where decedent died prior to the taking effect of this chapter. [C97,§1467; S13,§1481-a; C24, 27, 31, 35,§7311.]

7312 Transfers in contemplation of death. If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of his death, or intended to take effect after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth), and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of his death, shall be subject to a lien for the payment of such tax. [C97, §1467; S13,§1481-a; C24, 27, 31, 35,§7312.]

7312.1 Individual exemptions. In computing the tax on the net estate passing to the surviving spouse, heirs or beneficiaries of the deceased the following credits or exemptions shall be allowed:

1. Wife, forty thousand dollars.
2. Husband, forty thousand dollars.
3. Each son and/or daughter including legally adopted sons and/or daughters, or illegitimate sons and/or daughters entitled to inherit under the law of this state, fifteen thousand dollars.
4. Father or mother, ten thousand dollars.
5. Any other lineal descendant of the deceased, five thousand dollars. [C31, 35,§7312-d1.]

7313 Rate of tax. The property or any interest therein or income therefrom, subject to the provisions of this chapter, shall be taxed as herein provided:

1. When such property, interest, or income passes to the wife or the husband of the deceased, grantor, donor, or vendor, or to the father or mother, or to any child or lineal descendant of such decedent, grantor, donor or vendor, including a legally adopted child or illegitimate child entitled to inherit under the laws of this state, the tax imposed shall be on the individual share so passing in excess of the

exemptions herein allowed and shall be as follows:

One percent on the first ten thousand dollars.

Two percent on any amount in excess of ten thousand dollars and up to twenty-five thousand dollars.

Three percent on any amount in excess of twenty-five thousand dollars and up to fifty thousand dollars.

Four percent on any amount in excess of fifty thousand dollars and up to one hundred thousand dollars.

Five percent on any amount in excess of one hundred thousand dollars and up to one hundred fifty thousand dollars.

Six percent on any amount in excess of one hundred fifty thousand dollars and up to two hundred thousand dollars.

Seven percent on any amount in excess of two hundred thousand dollars and up to three hundred thousand dollars.

Eight percent on all sums in excess of three hundred thousand dollars.

2. When the property or any interest therein or income therefrom taxable under the provisions of this chapter passes to the brother or sister, son-in-law, or daughter-in-law, or stepchildren, the rate of tax imposed on the individual share so passing shall be as follows:

Five percent on any amount up to twenty-five thousand dollars.

Six percent on any amount in excess of twenty-five thousand dollars and up to fifty thousand dollars.

Seven percent on any amount in excess of fifty thousand dollars and up to one hundred thousand dollars.

Eight percent on any amount in excess of one hundred thousand dollars and up to two hundred thousand dollars.

Nine percent on any amount in excess of two hundred thousand dollars and up to three hundred thousand dollars.

Ten percent on all sums in excess of three hundred thousand dollars.

3. When the property or* any interest therein or income therefrom, taxable under the provisions of this chapter, passes to any person not included in subsections 1 and 2 hereof, the rate of tax imposed on the individual share so passing shall be as follows:

Ten percent on any amount up to one hundred thousand dollars.

Twelve percent on any amount in excess of one hundred thousand dollars and up to two hundred thousand dollars.

Fifteen percent on all sums in excess of two hundred thousand dollars.

* "of" in enrolled act

4. When the property or any interest therein or income therefrom, taxable under the provisions of this chapter, passes in any manner to societies, institutions or associations incorporated or organized under the laws of any other state, territory, province or country than this state, for charitable, educational or religious purposes, or to cemetery associations, including humane societies not organized under the laws of this state, or to resident trustees for uses without this state, the rate of tax imposed shall be as follows:

Ten percent on the entire amount so passing.

5. When the property or any interest therein or income therefrom, taxable under the provisions of this chapter, passes to any firm, corporation, or society organized for profit either under the laws of this state or of any other state, territory, province or country, the rate of tax imposed shall be as follows:

Fifteen percent on the entire amount so passing. [C97,§1467; S13,§1481-a; C24, 27, 31, 35, §7313.]

Referred to in §§7311, 7315
39GA, ch 38, §4, editorially divided

7314 Rep. by 44GA, ch 185,§5

7315 Alien beneficiaries. When property or any interest therein shall pass to heirs, devisees, or other beneficiaries subject to the tax imposed by this chapter, who are aliens, nonresidents of the United States, the same shall be subject to a tax of twenty percent of its true value except when such foreign beneficiaries are brothers or sisters of the decedent owner or are within the class described in subsection 1 of section 7313, when the rate of tax to be assessed and collected therefrom shall be ten percent of the value of the property or interest so passing. [C97,§1467; S13,§1481-a; C24, 27, 31, 35,§7315.]

7316 Rep. by 44GA, ch 185,§6

7317 Deductions of debts. There shall be deducted from the gross value of the estate as fixed by the inheritance tax appraisers appointed under the provisions of this chapter, or as fixed by the court, the debts defined as follows:

1. From the estate of such decedent who at the time of his death was domiciled within this state, there shall be deducted the debts owing by the decedent at the time of his death, the local and state taxes due from the estate in January of the year of his death, and federal taxes, a reasonable sum for funeral expenses, temporary allowance for the widow and children under fifteen years of age as granted by the probate court or judge thereof, court costs, the costs of appraisement made for the purpose of assessing the inheritance tax, the statutory fee of executors, administrators, or trustees estimated upon the appraised value of the property, the amount paid by the executor or administrator for a bond, the attorney fee in a reasonable amount to be approved by the court for the ordinary probate proceedings in said estate, and no other sum; provided, however, that the debt of such decedent owing for or secured by property outside of this state, shall not be deducted before estimating the tax, except when the property for which the debt is owing or by which it is secured is subject to the tax imposed by this chapter, or when the foreign debt exceeds the value of the property securing it or for which it was contracted, when the excess may be deducted, provided that satisfactory proof of the value of the foreign property and the amount of such debt is furnished to the state tax commission.

Said debts shall not be deducted unless the same are approved and allowed by the court within eighteen months from the death of the decedent, unless otherwise ordered by the judge or court of the proper county.

2. From the estate of such decedent who at the time of his death is domiciled outside of this state, the state commission shall deduct such debts and expenses as are chargeable to the property under the laws of this state, provided that in the event that the executor, administrator, or trustee of such foreign estate files with the clerk of the court having ancillary jurisdiction and with the state tax commission, or with the state tax commission in case there is no administration of the estate within this state, a duly certified statement exhibiting the true market value of the entire estate of the decedent owner, and the indebtedness for which the said estate has been adjudged liable, which statement shall be duly attested by the judge of the court having original jurisdiction, the beneficiaries of the said estate shall then be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property as the value of the property within this state bears to the value of the entire estate.

3. An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within two years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under this chapter was collected from such estate, and if such property is included in decedent's gross estate. [S13, §1481-a2; C24, 27, 31, 35,§7317; 48GA, ch 214, §3.]

7318 **Inheritance tax and lien book.** The clerk of the district court in and for each county shall provide and keep a suitable book, substantially bound and suitably ruled, to be known as the inheritance tax and lien book, in which shall be kept a full and accurate record of all proceedings in cases where property is charged or sought to be charged with the payment of an inheritance tax under the laws of this state, to be printed and ruled so as to show upon one page:

1. The name, place of residence, and date of death of the decedent.

2. Whether the decedent died testate, or intestate, and, if testate, the record and page where the will was probated and recorded.

3. The name and post-office address of the executor, administrator, trustee, or grantee, with date of appointment or transfer.

4. The names, post-office addresses, and relationship, if known, of all the heirs, devisees, and grantees.

5. The appraised valuation of the personal property.

6. The amount of inheritance tax due upon said personal property.

7. A record of payment with amount and date.

8. Date of filing objections and names of objectors.

9. Blank for index and reference to all proceedings and for memorandum entries of the court or judge in relation thereto.

Upon the opposite page of such record shall be printed:

1. Real estate derived from..... (naming decedent) which is subject to the lien prescribed by the statute for inheritance tax.

2. A full and accurate description of such real estate, by forty-acre or fractional tracts, or by lots, or other complete individual description.

3. The appraised valuation as reported by the appraisers, with a reference to the record of their report, as to each piece of such real estate.

4. The amount of the inheritance tax due upon each such piece.

5. A record of payments, with dates and amounts. [S13,§1481-a25; C24, 27, 31, 35,§7318.]

7319 Rep. by 42GA, ch 181

7320 **Report required — blanks.** The state tax commission shall furnish the clerk of the court with blanks upon which to make the report and inventory required by section 11913. [S13,§1481-a26; C24, 27, 31, 35,§7320; 48GA, ch 214,§4.]

7321 **Examination by court—copy for state tax commission.** Upon the filing of such report the district court shall examine the same together with the papers and files in the case, and if it finds that such estate, in whole or in part, is subject to an inheritance tax it shall indorse its finding thereon, and shall immediately forward a true copy of such report and findings to the state tax commission. [S13,§1481-a26; C24, 27, 31, 35,§7321; 48GA, ch 214,§5.]

7322 **Entry of lien.** If it appears from the inventory or report so filed that the real estate or any part of it is subject to an inheritance tax, it shall be the duty of the executor or administrator or of any person interested in the property if there be no administration, to cause the lien of the same to be entered upon the lien book in the office of the clerk of the court in each county where each particular tract of said real estate is situated. [S13,§1481-a26; C24, 27, 31, 35,§7322.]

Referred to in §7324
S13, §1481-a26, editorially divided

7323 **Conveyance—effect.** When said real estate or any interest therein, is subject to such tax, no conveyance either before or after the entering of said lien, shall discharge the real estate so conveyed from said lien. [S13,§1481-a26; C24, 27, 31, 35,§7323.]

7324 **Acceptance of final report.** No final settlement of the account of any executor, administrator, or trustee shall be accepted or allowed unless a strict compliance has been had by such person with the provision relative to the making and filing of said report, and with section 7322. [S13,§1481-a26; C24, 27, 31, 35,§7324.]

Report required, §11913

7325 **Record of estates by commission.** The state tax commission shall record in a book kept

in its office for that purpose, all estates reported to it as liable for a tax under the provisions of this chapter, showing:

1. The name of the decedent.
2. The place of his residence or county from which such estate was reported.
3. The date of his death.
4. The name of the administrator, executor, or trustee.
5. The appraised value of the property, or the value of any taxable pecuniary legacy.
6. The amount of indebtedness that was deducted before estimating the tax.
7. The amount of tax collected.
8. The amount of fees paid for reporting and collecting such tax.
9. The amount of tax, if any, refunded. [S13, §1481-a46; C24, 27, 31, 35,§7325; 48GA, ch 214, §6.]

S13, §1481-a46, editorially divided

7326 Record of deferred estates. It shall also keep a separate record of any deferred estate upon which the tax due is not paid within eighteen months from the death of the decedent, showing substantially the same facts as are required in other cases, and also showing:

1. The date and amount of all bonds given to secure the payment of the tax with a list of the sureties thereon.
2. The name of the person beneficially entitled to such estate or interest, with place of residence.
3. A description of the property or a statement of conditions upon which such deferred estate is based or limited. [S13,§1481-a46; C24, 27, 31, 35,§7326; 48GA, ch 214,§7.]

7327 Administration on application of commission. If, upon the death of any person leaving an estate that may be liable to a tax under the provisions of this chapter, a will disposing of such estate is not offered for probate, or an application for administration made within four months from the time of such decease, the state tax commission may, at any time thereafter, make application to the proper court, setting forth such fact and praying that an administrator may be appointed, and thereupon said court shall appoint an administrator to administer upon such estate. [S13,§1481-a3; C24, 27, 31, 35,§7327; 48GA, ch 214,§8.]

Referred to in §7328
S13,§1481-a3, editorially divided

7328 Administration avoided. When the heirs or persons entitled to inherit the property of an estate subject to the tax hereby imposed, desire to avoid the appointment of an administrator as provided in section 7327, they or one of them shall, before the expiration of four months from the death of the decedent file under oath the inventories and reports and perform all the duties required by this chapter, of administrators, including the filing of the lien. Proceedings for the collection of the tax when no administrator is appointed, shall conform as nearly as may be to the provisions of this chapter in other cases. [S13,§1481-a3; C24, 27, 31, 35,§7328.]

7329 Nonresident administrator. A nonresident of this state shall not be appointed as executor, administrator, or trustee of any estate that may be subject to the tax imposed by this chapter, unless such nonresident first file a bond conditioned upon the payment of all tax, interest and costs for which the estate may be liable, such bond to be signed by not less than two resident freeholders or by an approved surety company and in an amount not less than twenty-five percent of the total value of the estate, or of the property within this state if the estate is a foreign estate. [S13,§1481-a3; C24, 27, 31, 35, §7329.]

7330 Appraisers. In each county the court shall, annually, at the first term of the court therein, appoint three competent residents and freeholders of said county to act as appraisers of all property within its jurisdiction which is charged or sought to be charged with an inheritance tax. Said appraisers shall serve for one year, and until their successors are appointed and qualified. They shall each take an oath to faithfully and impartially perform the duties of the office, but shall not be required to give bond. They shall be subject to removal at any time at the discretion of the court, and the court, or judge thereof in vacation, may also in its discretion, either before or after the appointment of the regular appraisers, appoint other appraisers to act in any given case. Vacancies occurring otherwise than by expiration of term shall be filled by appointment of the court or by a judge in vacation. No person interested in any manner in the estate to be appraised may serve as an appraiser of such estate. [S13, §1481-a4; C24, 27, 31, 35,§7330.]

7330.1 Compensation of appraisers. Each of said appraisers shall be entitled to receive for time actually spent in making an appraisement required by law, a sum not to exceed five dollars per working day of eight hours, and for such appraisement involving less than eight hours, they shall be paid at not to exceed the rate of one and one-quarter dollars an hour, except that the minimum charge shall not be less than two and one-half dollars. [47GA, ch 193,§1.]

7330.2 Mileage—sworn statement. The appraisers shall also be entitled to five cents a mile for the actual and necessary distance traveled in going to and returning from the place of appraisal, but separate mileage shall not be allowed when one conveyance was or could have been used in making said appraisal nor shall any appraiser be entitled to mileage if gratuitously transported by another. The cost of said appraisement shall be a charge against the estate of the decedent, to be paid out of the property appraised or by the owner or owners thereof. The appraisers shall be required to file a sworn statement with the clerk of the district court, setting out in detail the cost of said appraisement. [47GA, ch 193,§2.]

Omnibus repeal, 47GA, ch 193, §3

7331 Commission to appraisers. Whenever it appears that an estate or any property or interest therein, including any property or interest

therein which has been transferred either in contemplation of death, or to take effect in possession or enjoyment at, or after death is or may be subject to the tax imposed by this chapter, the clerk shall issue a commission to the appraisers, who shall fix a time and place for appraisement, except that if the only interest that is subject to such tax is a remainder or deferred interest upon which the tax is not payable until the determination of a prior estate or interest for life or term of years, he shall not issue such commission until the determination of such prior estate, except at the request of parties in interest who desire to remove the lien thereon. [S13,§1481-a5; C24, 27, 31, 35,§7331.]

7332 Notice of appraisement. It shall be the duty of all appraisers appointed under the provisions of this chapter, upon receiving a commission as herein provided, to forthwith give notice to the state tax commission and other persons known to be interested in the property to be appraised, of the time and place at which they will appraise such property, which time shall not be less than ten days from the date of such notice. The notice shall be served in the same manner as is prescribed for the commencement of civil actions, and if not practicable to serve the notice provided for by statute, they shall apply to the court or a judge thereof in vacation for an order as to notice. [S13,§1481-a6; C24, 27, 31, 35,§7332; 48GA, ch 214,§9.]

Manner of service, §11060
S13, §1481-a6, editorially divided

7333 Returns required. Upon service of such notice and the making of such appraisement, the said notice, return thereon and appraisement shall be filed with the clerk, and a copy of such appraisement shall at once be filed by the clerk with the state tax commission. [C97,§1476; S13,§1481-a6; C24, 27, 31, 35,§7333; 48GA, ch 214,§10.]

7334 Property in different counties. When property is located in more than one county, the appraisers of the county in which the estate is being administered may appraise the whole estate, or those of the several counties may serve for the property within their respective counties or other appraisers be appointed as the district court if in session, or judge thereof in vacation, may direct. [C97,§1476; S13,§1481-a6; C24, 27, 31, 35,§7334.]

7335 Objections. The state tax commission or any person interested in the estate or property appraised may, within twenty days thereafter, file objections to said appraisement and give notice thereof as in beginning civil actions, on the hearing of which as an action in equity either party may produce evidence competent or material to the matters therein involved. [S13, §1481-a7; C24, 27, 31, 35,§7335; 48GA, ch 214, §11.]

Manner of service, §11060
S13, §1481-a7, editorially divided

7336 Hearing—order. If upon such hearing the court finds the amount at which the property is appraised is its value on the market in the ordinary course of trade, and the appraisement was fairly and in good faith made, it shall approve such appraisement; but if it finds that the appraisement was made at a greater or less sum than the value of the property in the ordinary course of trade, or that the same was not fairly or in good faith made, it shall set aside the appraisement, appoint new appraisers and so proceed until a fair and good appraisement of the property is made at its value in the market in the ordinary course of trade. [S13,§1481-a7; C24, 27, 31, 35,§7336.]

7337 Appeal and notice. The state tax commission or anyone interested in the property appraised may appeal to the supreme court from the order of the district court approving or setting aside any appraisement to which exceptions have been filed. Notice of appeal shall be served within sixty days from the date of the order appealed from, and the appeal shall be perfected in the time now provided for appeals in equitable actions. [S13,§1481-a7; C24, 27, 31, 35,§7337; 48GA, ch 214,§12.]

Perfecting appeal, §§12832, 12837 et seq.

7338 Bond on appeal. In case of appeal the appellant, if* not the state tax commission, shall give bond to be approved by the clerk of the court, which bond shall provide that the said appellant and sureties shall pay the tax for which the property may be liable with cost of appeal. [S13,§1481-a7; C24, 27, 31, 35,§7338; 48GA, ch 214,§13.]

Presumption of approval, §12759.1
*Words "he is" omitted by authority of §169, subsection 2

7339 Cancellation of lien. If upon the hearing of objections to the appraisement the court finds that the property is not subject to the tax, the court shall upon expiration of time for appeal, when no appeal has been taken, order the clerk to enter upon the lien book a cancellation of any claim or lien for taxes. If at the end of twenty days from the filing of the appraisement with the clerk, no objections are filed, the appraisement shall stand approved. [S13,§1481-a7; C24, 27, 31, 35,§7339.]

7340 Rep. by 44GA, ch 185,§8

7341 Appraisal of other property. If there be an estate or property subject to said tax wherein the records in the clerk's office do not disclose that there may be a tax due under the provisions of this chapter, the person or persons interested in the property shall report the matter to the clerk with an application that the property be appraised. [S13,§1481-a8; C24, 27, 31, 35,§7341.]

S13, §1481-a8, editorially divided

7342 Market value. The appraised value of the property shall in all cases be its market value in the ordinary course of trade, and in domestic estates the tax shall be calculated thereon after deducting the debts as defined herein. [S13,§1481-a8; C24, 27, 31, 35,§7342.]

7343 Deduction of debts. The debt of a domestic estate owing for or secured by property outside of the state, shall not be deducted before estimating the tax, except when the

property for which the debt is owing or by which it is secured is subject to the tax imposed by this chapter, or when the foreign debt exceeds the value of the property securing it or for which it was contracted, when the excess may be deducted provided that satisfactory proof of the value of the foreign property and the amount of such debt is furnished to the state tax commission. [S13,§1481-a8; C24, 27, 31, 35,§7343; 48GA, ch 214,§14.]

7344 **Relief from appraisement.** All estates subject in whole or in part to the tax imposed by this chapter shall be appraised for the purpose of computing said tax by the regular inheritance tax appraisers; provided that estates liable for the payment of the inheritance tax upon specific legacies, annuities, bequests of money or other property the value of which may be determined without appraisement, and estates which consist of money, book accounts, bank deposits, notes, mortgages, and bonds, need not be appraised by the inheritance tax appraisers if the administrator, executor, or trustee, or the persons entitled to or claiming such property are willing to charge themselves with the full face value of such bequests or property, together with the interest, earnings, or undivided profits which may be due on said properties, at the time of death of the testator or intestate, as the basis for the assessment of said tax. [S13, §1481-a9; C24, 27, 31, 35,§7344.]

S13, §1481-a9, editorially divided

7345 **Nontaxability—order of court.** In all cases where the court finds that said estate is not subject to an inheritance tax he shall enter an order of such finding upon said preliminary inheritance tax report, and no appraisement for inheritance tax purposes shall be made in that estate. [S13,§1481-a9; C24, 27, 31, 35,§7345.]

7346 **Procedure for relief.** In the event that the estate has been duly appraised under the ordinary statutes of inheritance or the property has been sold and such appraisement or selling price is accepted by the state tax commission as satisfactory for inheritance tax purposes, the court or judge thereof in vacation may, upon proper application, relieve the estate from the appraisement by the inheritance tax appraisers; but in order to obtain such relief, the administrator, executor, trustee, or other party interested must file an application for relief with the consent of the state tax commission thereto in the office of the clerk of the court before said clerk issues a commission to the inheritance tax appraisers. [S13,§1481-a9; C24, 27, 31, 35, §7346; 48GA, ch 214,§15.]

7347 **Relief on exempt estate.** The court or judge thereof in vacation may, upon application of the representatives of the estate or parties interested, relieve the estate of the appraisement for tax purposes if it be shown to said court that the market value of the entire estate will not exceed one thousand dollars; provided that prior to the application to said court or judge the written consent of the state tax commission to such relief is procured. [S13,§1481-a9; C24, 27, 31, 35,§7347; 48GA, ch 214,§16.]

7348 **Record as to relief from appraisement.** In all cases where an estate is relieved from an appraisement for inheritance tax purposes, the order granting relief shall be recorded in the clerk's office, and the fact of such relief and reasons therefor shall be duly noted in the decree or order of final settlement made by the court. [S13,§1481-a9; C24, 27, 31, 35,§7348.]

7349 **Remainders—appraisement.** When any person, whose estate over and above the amount of his debts, as defined in this chapter, exceeds the sum of one thousand dollars, shall bequeath or devise or otherwise transfer any real property to or for the use of persons exempt from the tax imposed by this chapter, during life or for a term of years, and the remainder to a person or persons not thus exempt, said property, upon the determination of such estate for life or years, shall be appraised at its then actual market value from which shall be deducted the value of any improvements thereon, or betterments thereto, if any, made by the remainderman during the time of the prior estate, to be ascertained and determined by the appraisers and the tax on the remainder shall be paid by such remainderman as provided in section 7351. [S13,§1481-a10; C24, 27, 31, 35,§7349.]

Referred to in §7351

7350 **Life and term estates—appraisement.** Whenever any real property of a decedent shall be subject to such tax and there be an estate or interest for life or term of years given to a party other than those especially exempt by this chapter, the clerk shall cause such property to be appraised at the actual market value thereof, as is provided in ordinary cases, and the party entitled to such estate or interest shall, within one year from the death of decedent owner, pay such tax, and in default thereof the court shall order such interest in said estate, or so much thereof as shall be necessary to pay such tax and interest, to be sold. [S13,§1481-a11; C24, 27, 31, 35, §7350.]

S13, §1481-a11, editorially divided

7351 **Deferred estate—appraisement.** Upon the determination of any prior estate or interest, when the remainder or deferred estate or interest or any part thereof is subject to such tax and the tax upon such remainder or deferred interest has not been paid, the person or persons entitled to such remainder or deferred interest shall immediately report to the clerk of the proper court the fact of the determination of the prior estate, and upon receipt of such report, or upon information from any source, of the determination of any such prior estate when the remainder interest has not been appraised for the purpose of assessing such tax, the clerk shall forthwith issue a commission to the inheritance tax appraisers, who shall immediately proceed to appraise the property as provided in like cases in section 7349 and the tax upon such remainder interest shall be paid by the remainderman within one year next after the determination of the prior estate. If such tax is not paid within

said time the court shall then order said property, or so much thereof as may be necessary to pay such tax and interest, to be sold. [S13, §1481-a11; C24, 27, 31, 35,§7351.]

Referred to in §7349

7352 Life and term estates in personal property. Whenever any personal property shall be subject to the tax imposed by this chapter and there be an estate or interest for life or term of years given to one or more persons and remainder or deferred estate to others, the clerk shall cause the property so devised or conveyed to be appraised as provided herein in ordinary estates and the value of the several estates or interests so devised or conveyed shall be determined as provided in section 7356, and the tax upon such estates or interests as are liable for the tax imposed by this chapter shall be paid to the state tax commission from the property appraised or by the persons entitled to such estate or interest within eighteen months from the death of the testator, grantor, or donor; provided, however, that payment of the tax upon any deferred estate or remainder interest may be deferred until the determination of the prior estate by the giving of a good and sufficient bond as provided in section 7353. [S13,§1481-a12; C24, 27, 31, 35,§7352; 48GA, ch 214,§17.]

7353 Payment deferred — bond. When in case of deferred estates or remainder interests in personal property or in the proceeds of any real estate that may be sold during the time of a life, term, or prior estate, the persons interested who may desire to defer the payment of the tax until the determination of the prior estate, shall file with the clerk of the proper district court a bond as provided herein in other cases, such bond to be renewed every two years until the tax upon such deferred estate is paid. If at the end of any two-year period the bond is not promptly renewed as herein provided and the tax has not been paid, the bond shall be declared forfeited, and the amount thereof forthwith collected. When the estate of a decedent consists in part of real and in part of personal property, and there be an estate for life or for a term of years to one or more persons and a deferred or remainder estate to others, and such deferred or remainder estate is in whole or in part subject to the tax imposed by this chapter, if the deferred or remainder estates or interests are so disposed that good and sufficient security for the payment of the tax for which such deferred or remainder estates may be liable can be had because of the lien imposed by this chapter upon the real property of such estate, then payment of the tax upon such deferred or remainder estates may be postponed until the determination of the prior estate without giving bond as herein required to secure payment of such tax, and the tax shall remain a lien upon such real estate until the tax upon such deferred estate or interest is paid. [S13,§1481-a13; C24, 27, 31, 35,§7353.]

Referred to in §7352

7354 Bonds — conditions. All bonds required by this chapter shall be payable to the state tax commission and shall be conditioned upon the payment of the tax, interest, and costs for which the estate may be liable, and for the faithful performance of all the duties hereby imposed upon and required of the person whose acts are by such bond to be guaranteed, and shall be in an amount equal to twice the amount of the tax, interest, and costs that may be due, but in no case less than five hundred dollars, and must be secured by not less than two resident freeholders or by a fidelity or surety company authorized by the commissioner of insurance to do business in this state. [S13, §1481-a14; C24, 27, 31, 35,§7354; 48GA, ch 214, §18.]

Referred to in §7355

7355 Removal of property from state—bond. It shall be unlawful for any person to remove from this state any property, or the proceeds thereof, that may be subject to the tax imposed by this chapter, without paying the said tax to the state tax commission. Any person violating the provisions of this section shall be guilty of a felony and upon conviction shall be fined an amount equal to twice the amount of tax, interest, and costs for which the estate may be liable, but in no case less than two hundred dollars, and imprisoned as the court shall direct, until the fine is paid; provided, however, that the penalty hereby imposed shall not be enforced if, prior to the removal of such property or the proceeds thereof, the person desiring to effect such removal files with the clerk a bond conditioned upon the payment of the tax, interest, and costs, as is provided in section 7354 hereof. [S13,§1481-a15; C24, 27, 31, 35,§7355; 48GA, ch 214,§19.]

Duration of imprisonment, §13964

7356 Annuities—life and term estates. The value of any annuity, deferred estate, or interest, or any estate for life or term of years, subject to the inheritance tax, shall be determined for the purpose of computing said tax by the rule of standards of mortality and of value commonly used in actuaries combined experience tables as now provided by law. The taxable value of annuities, life or term, deferred or future estates, shall be computed at the rate of four percent per annum of the appraised value of the property in which such estate or interest exists or is founded. [S13,§1481-a16; C24, 27, 31, 35,§7356.]

Referred to in §7352

Mortality table, §8823; see also American Experience Table of Mortality preceding Index; pages 2106, 2107

S13, §1481-a16, editorially divided

7357 Deferred estates — removal of lien. Whenever it is desired to remove the lien of the inheritance tax on remainders, reversions, or deferred estates, parties owning the beneficial interest may pay at any time the said tax on the present worth of such interests determined according to the rules herein fixed. [S13,§1481-a16; C24, 27, 31, 35,§7357.]

7358 Duty of executor to pay tax. It is hereby made the duty of all executors, administrators, trustees, or other persons charged with the management or settlement of any estate subject to the tax provided for in this chapter, to collect and pay to the state tax commission the amount of the tax due from any devisee, grantee, donee, heir, or beneficiary of the decedent, except in cases where payment of the tax is deferred until the determination of a prior estate, in which cases the state tax commission shall collect the same. [S13,§1481-a17; C24, 27, 31, 35,§7358; 48GA, ch 214,§20.]

S13, §1481-a17, editorially divided

7359 Sale to pay tax. Executors, administrators, trustees, or the state tax commission, shall have power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as is now provided by law for the sale of such property for the payment of debts of testators or intestates. [S13, §1481-a17; C24, 27, 31, 35,§7359; 48GA, ch 214, §21.]

Sale of property, §11932 et seq.

7360 Action to collect. The state tax commission may bring, or cause to be brought in its name of office, suit, for the collection of said tax, interest, and costs, against the executor, administrator, or trustee, or against the person entitled to property subject to said tax, or upon any bond given to secure payment thereof, either jointly or severally, and obtaining judgment may cause execution to be issued thereon as is provided by statute in other cases. The proceedings shall conform as nearly as may be to those for the collection of ordinary debt by suit. [S13, §1481-a17; C24, 27, 31, 35,§7360; 48GA, ch 214, §22.]

7361 Time of payment extended. If because of necessary litigation or other unavoidable cause of delay enforced payment of the tax hereby imposed, by suit and execution, would result in loss or be to the detriment of the best interests of the estate, the court may extend the time for the payment of the tax. Such extensions of time shall not be granted except in cases where security is given for payment of the tax, interest, and costs and the application for such extension is made before the tax is delinquent. [S13,§1481-a17; C24, 27, 31, 35,§7361.]

7362 Tax deducted from legacy or collected. Every executor, administrator, referee, or trustee having in charge or trust any property of an estate subject to said tax, and which is made payable by him, shall deduct the tax therefrom or shall collect the tax thereon from the legatee or person entitled to said property and pay the same to the state tax commission, and he shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon. [S13,§1481-a18; C24, 27, 31, 35,§7362; 48GA, ch 214,§23.]

7363 Final settlement to show payment. No final settlement of the account of any executor, administrator, or trustee shall be accepted or allowed unless it shall show, and the court shall find, that all taxes imposed by the provisions of this chapter upon any property or interest therein, that is hereby made payable by such executors, administrators, or trustees, and to be settled by said account, shall have been paid, and the receipt of the state tax commission for such tax shall be the proper voucher for such payment. Any order contravening the provision of this section shall be void. Upon the filing of such receipt showing payment of the tax, the clerk shall record the same upon the inheritance tax lien book in his office. [S13,§1481-a19; C24, 27, 31, 35,§7363; 48GA, ch 214,§24.]

Similar provisions, §§6943.059, 12781.1

7364 Jurisdiction of court. The district court in the county in which some part of the property is situated, of the decedent who was not a resident, or such court in the county of which the deceased was a resident at the time of his death or where such estate is administered, shall have jurisdiction to hear and determine all questions regularly brought before it in relation to said tax that may arise affecting any devise, legacy, annuity, transfer, grant, gift, or inheritance, subject to appeal as in other cases. [S13,§1481-a20; C24, 27, 31, 35,§7364.]

S13, §1481-a20, editorially divided

7365 Commission to represent state. The state tax commission shall in its name of office, with all the rights and privileges of a party in interest, represent the state in any such proceedings. [S13,§1481-a20; C24, 27, 31, 35,§7365; 48GA, ch 214,§25.]

7366 Bequests to executors or trustees. Whenever a decedent appoints one or more executors or trustees and, in lieu of their allowance or commission, makes a bequest or devise of property to them which would otherwise be liable to said tax, or appoints them his residuary legatees, and said bequests, devises, or residuary legacies exceed the statutory fees as compensation for their services, such excess shall be liable to such tax. [S13,§1481-a21; C24, 27, 31, 35, §7366.]

7367 Legacies charged upon real estate. Whenever any legacies subject to said tax are charged upon or payable out of any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom and pay it to the executor, administrator, trustee, or state tax commission, and the same shall remain a charge against and be a lien upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator, trustee, or state tax commission in his or its name of office as herein provided. [S13,§1481-a22; C24, 27, 31, 35, §7367; 48GA, ch 214,§26.]

7368 Maturity of tax—interest. All taxes imposed by this chapter shall be payable to the state tax commission and, except when otherwise provided in this chapter, shall be paid within eighteen months from the death of the testator or intestate. All taxes not paid within the

time prescribed in this chapter shall draw interest at the rate of eight percent per annum thereafter until paid. [S13,§1481-a23; C24, 27, 31, 35,§7368; 48GA, ch 214,§27.]

Interest on extension of time, §7310
S13, §1481-a23, editorially divided

7369 Clerk furnished receipt showing payment. Upon payment of such tax the state tax commission shall forthwith transmit a duplicate receipt, to the clerk of the court of the county in which the estate is being settled, showing the payment of such tax. [S13,§1481-a23; C24, 27, 31, 35,§7369; 48GA, ch 214,§28.]

7370 Commission to enforce collection. It shall be the duty of the state tax commission to enforce the collection of the delinquent inheritance tax, and the provisions of law with reference thereto. [C24, 27, 31, 35,§7370; 48GA, ch 214,§29.]

7371 Investigation by commission. The state tax commission is hereby authorized and empowered to issue a citation to any person who it may believe or has reason to believe has any knowledge or information concerning any property which it believes or has reason to believe has been transferred by any person and as to which there is or may be a tax due to the state under the provisions of the inheritance tax laws of this state, and by such citation require such person to appear before it or anyone designated by it at the county seat of the county where said person resides and at a time to be designated in such citation, and testify under oath as to any fact or information within his knowledge touching the quantity, value, and description of any such property and the disposition thereof which may have been made by any person, and to produce and submit to the inspection of the state tax commission, any books, records, accounts, or documents in the possession of or under the control of any person so cited. [C24, 27, 31, 35,§7371; 48GA, ch 214,§30.]

Referred to in §7373
39GA, ch 38, §15, editorially divided

7372 Inspection of books, records, etc. The state tax commission shall also have the power to inspect and examine the books, records, and accounts of any person, firm, or corporation, including the stock transfer books of any corporation, for the purpose of acquiring any information deemed necessary or desirable by it for the proper enforcement of the inheritance tax laws of this state, and the collection of the full amount of the tax which may be due to the state thereunder. [C24, 27, 31, 35,§7372; 48GA, ch 214,§31.]

Referred to in §7373

7373 Information confidential. Any and all information acquired by the state tax commission under and by virtue of the means and methods provided for by sections 7371 and 7372 shall be deemed and held by it as confidential and shall not be disclosed by it except so far as the same may be necessary for the enforcement and collection of the inheritance tax provided for by the laws of this state. [C24, 27, 31, 35,§7373; 48GA, ch 214,§32.]

7374 Contempt. Refusal of any person to attend before the state tax commission in obedience to any such citation, or to testify, or produce any books, accounts, records, or documents in his possession or under his control and submit the same to inspection of the state tax commission when so required, may, upon application of the state tax commission, be punished by any district court in the same manner as if the proceedings were pending in such court. [C24, 27, 31, 35,§7374; 48GA, ch 214,§33.]

Contempts, ch 536

7375 Fees. Witnesses so cited before the state tax commission, and any sheriff or other officer serving such citation shall receive the same fees as are allowed in civil actions; to be audited by the state comptroller and paid upon the certificate of the state tax commission out of funds not otherwise appropriated. [C24, 27, 31, 35,§7375; 48GA, ch 214,§34.]

Sheriff's fees, §5191; witness fees, §11326

7376 Proof of amount of tax due. Before issuing its* receipt for the tax, the state tax commission may demand from administrators, executors, trustees, or beneficiaries such information as may be necessary to verify the correctness of the amount of the tax and interest, and when such demand is made they shall send to said commission certified copies of wills, deeds, or other papers, or of such parts of their reports as it may demand, and upon the refusal or neglect of said parties to comply with the demand of the state tax commission, it is the duty of the clerk of the court to comply with such demand, and the expenses of making such copies and transcripts shall be charged against the estate, as are other costs in probate, or the tax may be assessed without deducting debts for which the estate may be liable. [S13,§1481-a24; C24, 27, 31, 35,§7376; 48GA, ch 214,§35.]

*Pronoun changed editorially

7377 Extension of time of appraisement. Whenever, by reason of the complicated nature of an estate, or by reason of the confused condition of the decedent's affairs, it is impracticable for the executor, administrator, trustee, or beneficiary of said estate to file with the clerk of the court a full, complete, and itemized inventory of the personal assets belonging to the estate, within the time required by statute for filing inventories of the estates, the court may, upon the application of such representatives or parties in interest, extend the time for making the inheritance appraisement for a period not to exceed three months beyond the time fixed by this chapter. [S13,§1481-a27; C24, 27, 31, 35,§7377.]

7378 Heirs at law to make report. Whenever any property passing under the intestate laws may be subject to the tax imposed by this chapter, the person or persons entitled to such property shall make or cause to be made to the clerk of the courts of the county wherein

such property is located, within ninety days next following the death of such intestate, a report in writing embodying therein substantially the information required by section 11913. Failure to furnish such report or to probate the will in a testate estate shall not relieve the estate from the lien created hereby or the persons entitled to the property of such decedent from payment of the tax, interest, or other penalties imposed by this chapter. [S13,§1481-a28; C24, 27, 31, 35,§7378.]

7379 **Taxable estates—record by clerk.** The clerk shall enter upon the inheritance tax and lien book the title of all estates subject to the inheritance tax as shown by the inventories or lists of heirs filed in his office, or as reported to him by the county attorney, state tax commission, or other person, and shall enter in said book as against each estate or title at the appropriate place, all such information relating to the situation and condition of the estate as he may be able to obtain from the papers filed in his office, or from any other source, as may be necessary to the collection and enforcement of the tax. He shall also immediately index in the book kept in his office for that purpose, all liens entered upon the inheritance tax and lien book. Failure to make such entries as are herein required shall not operate to relieve the estate from the lien or defeat the collection of the tax. [S13,§1481-a29; C24, 27, 31, 35,§7379; 48GA, ch 214,§36.]

7380 **Probate record.** In all cases entered upon the inheritance tax and lien book, the clerk shall make a complete record in the proper probate record of all the proceedings, orders, reports, inventory, appraisements, and all other matters and proceedings therein. [S13, §1481-a30; C24, 27, 31, 35,§7380.]

7381 **Clerk to report taxable estates.** It shall be the duty of each clerk of the district court to make examination from time to time of all reports filed with him by administrators, executors, and trustees, pursuant to law; also to make examination of all foreign wills offered for probate or recorded within his county, as well as of the record of deeds and conveyances in the recorder's office of said county, and if from such examination or from information or knowledge coming to him from any other source, he finds or believes that any property within his county, or within the jurisdiction of the district court of said county, has, since July 4, 1896, passed by will or by the intestate laws of this or any other state, or by deed or other method of conveyance, made in anticipation of or intended to take effect in possession or in enjoyment after the death of the testator, donor, or grantor, to any person other than to or for the use of the persons, societies, or organizations exempt from the tax hereby imposed, he shall make report thereof in writing to the state tax commission, embodying in such report such information as he may be able to obtain as to the name and residence of decedent, date of death, name and address of administrator, executor, or trustee, the description of any property liable to said tax and the county in which it is located, and name and relationship of all beneficiaries or heirs. [S13,§1481-a31; C24, 27, 31, 35,§7381; 48GA, ch 214,§37.]

S13, §1481-a31, editorially divided

7382 **Information by citizen.** Any citizen of the state having knowledge of property liable to such tax, against which no proceeding for enforcing collection thereof is pending, may report the same to the clerk and it shall be the duty of such officer to investigate the case, and if he has reason to believe the information to be true, he shall forthwith enter the estate and report the same substantially as above indicated. [S13,§1481-a31; C24, 27, 31, 35,§7382.]

7383 **Reporting fee.** For reporting such estates or property the clerk shall receive a compensation of one dollar for each one hundred dollars or fraction thereof of tax paid, but not to exceed the sum of five dollars in any one estate, the same to be in addition to the compensation now allowed him by law. [S13,§1481-a31; C24, 27, 31, 35,§7383.]

Referred to in §7383.1

7383.1 **Appropriation.** There is hereby appropriated out of any funds in the state treasury not otherwise appropriated a sum sufficient to carry out the provisions of section 7383. [C27, 31, 35,§7383-a1.]

7384 **Payment of fee.** Except when this information has first been received from another source, the state tax commission, when it has issued its receipt for the tax in such estate, shall certify to the state comptroller the amount due the clerk for such service and the comptroller shall issue his warrant on the treasurer of state in favor of said clerk for the sum due as herein provided. [S13,§1481-a31; C24, 27, 31, 35,§7384; 48GA, ch 214,§38.]

7385 **Duty of recorder.** Each county recorder shall, upon the filing in his office of any deed, bill of sale, or other transfer of any description whatsoever which shows upon its face that it was made or intended to take effect in possession or enjoyment at or after the death of the maker of such instrument, forward to the state tax commission a certified copy thereof. [C24, 27, 31, 35,§7385; 48GA, ch 214,§39.]

7386 **Conflicting claims for fees.** In the event of uncertainty or of conflicting claims as to fees due county attorneys or clerks under this chapter, the state tax commission is empowered to determine the amount of fees, to whom payable, and when the same are due and, as far as possible, such determination shall be in accord with fixed rules made by the state tax commission. [S13,§1481-a33; C24, 27, 31, 35,§7386; 48GA, ch 214,§40.]

7387 **Inspection of records by court—newly discovered estates — notice — hearing.** On the first day of each regular term, the court shall require the clerk to present for its inspection the inheritance tax and lien book hereinbefore

provided for, together with all reports of administrators, executors, and trustees which have been filed pursuant to this chapter since the last preceding term. If, from information obtained from the records or reports, or from any other source, the court has reason to believe that there is property within its jurisdiction liable to the payment of an inheritance tax, against which proceedings for collection are not already pending, it shall enter an order of record directing the clerk to notify the state tax commission of such fact, and the clerk shall enter said estate on the inheritance tax book. Should any estate, or the name of any grantee or grantees be placed upon the book at the suggestion of the clerk or by order of court, in which the papers already on file in the clerk's office do not disclose that an inheritance tax is due or payable, the clerk shall forthwith give to all parties in interest such notice as the court or judge may prescribe, requiring them to appear on a day to be fixed by the said court or judge, and show cause why the property should not be appraised and subjected to said tax. At any such hearing any person may be required to appear and answer as to his knowledge of any such estate or property, and it shall be the duty of the clerk to notify the state tax commission of the time and place of such hearing. If upon any such hearing the court is satisfied that any property of the decedent, or any property devised, granted, or donated by him is subject to the tax, the same proceeding shall be had as in other cases, so far as applicable. [S13,§1481-a34; C24, 27, 31, 35, §7387; 48GA, ch 214,§41.]

7388 Costs charged against estate—exceptions. In all cases where an estate or interest therein so passes as to be liable to taxation under this chapter, all costs of the proceedings had for the assessment of such tax shall be chargeable to such estate as other costs in probate proceedings and, to discharge the lien, all costs as well as the taxes must be paid. In all other cases the costs are to be paid as ordered by the court. When a decision adverse to the state has been rendered, with an order that the state pay the costs, it shall be the duty of the clerk of the court in which such action was pending to certify the amount of such costs to the state tax commission, which shall, if said costs be correctly certified and the case has been finally terminated and the tax if any due has been paid, present the claim to the state comptroller to audit and, said claim being allowed by said comptroller, the comptroller is directed to issue a warrant on the treasurer of state in payment of such costs. [S13,§1481-a35; C24, 27, 31, 35,§7388; 48GA, ch 214,§42.]

Referred to in §7388.1

7388.1 Appropriation. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated a sum sufficient to carry out the provisions of section 7388. [C27, 31, 35,§7388-a1.]

7389 Securities and assets held by bank, etc. No safe deposit company, trust company, bank, or other institution, person or persons holding securities or assets of the decedent shall deliver or transfer the same to the executor, administrator, or legal representative of said decedent unless the tax for which such securities or assets are liable under this chapter shall be first paid, or the payment thereof is secured by bond as herein provided. It shall be lawful for and the duty of the state tax commission personally, or by any person by it duly authorized, to examine such securities or assets at the time of any proposed delivery or transfer. Failure to serve ten days notice of such proposed transfer upon the state tax commission or to allow such examination on the delivery of such securities or assets to such executor, administrator, or legal representative shall render such safe deposit company, trust company, bank, or other institution, person or persons liable for the payment of the tax upon such securities or assets as provided in this chapter. [S13,§1481-a36; C24, 27, 31, 35,§7389; 48GA, ch 214,§43.]

7390 Transfer of corporation stock. If a foreign executor, administrator, or trustee shall assign or transfer any corporate stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to such tax, the tax shall be paid to the state tax commission on or before the transfer thereof; otherwise the corporation permitting its stock to be so transferred shall be liable to pay such tax, interest, and costs, and it is the duty of the state tax commission to enforce the payment thereof. [S13,§1481-a37; C24, 27, 31, 35,§7390; 48GA, ch 214,§44.]

7391 Corporations to report transfers. Every Iowa corporation organized for pecuniary profit shall, on July 1 of each year, by its proper officers under oath, make a full and correct report to the state tax commission of all transfers of its stocks made during the preceding year by any person who appears on the books of such corporation as the owner of such stock, when such transfer is made to take effect at or after the death of the owner or transferor, and all transfers which are made by an administrator, executor, trustee, referee, or any person other than the owner or person in whose name the stocks appeared of record on the books of such corporation, prior to the transfer thereof. Such report shall show the name of the owner of such stocks and his place of residence, the name of the person at whose request the stock was transferred, his place of residence and the authority by virtue of which he acted in making such transfer, the name of the person to whom the transfer was made, and the residence of such person, together with such other information as the officers reporting may have relating to estates of persons deceased who may have been owners of stock in such corporation. If it appears that any such stock so transferred is

subject to tax under the provisions of this chapter, and the tax has not been paid, the state tax commission shall notify the corporation in writing of its liability for the payment thereof, and shall bring suit against such corporation as in other cases herein provided unless payment of the tax is made within sixty days from the date of such notice. [S13,§1481-a38; C24, 27, 31, 35, §7391; 48GA, ch 214,§45.]

7392 Foreign estates—deduction of debts. Whenever any property belongs to a foreign estate, which estate in whole or in part passes to persons not exempt herein from such tax, the said tax shall be assessed upon the market value of said property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state. In the event that the executor, administrator, or trustee of such foreign estate files with the clerk of the court having ancillary jurisdiction, and with the state tax commission, duly certified statements exhibiting the true market value of the entire estate of the decedent owner, and the indebtedness for which the said estate has been adjudged liable, which statements shall be duly attested by the judge of the court having original jurisdiction, the beneficiaries of said estate shall then be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property as the value of the property within this state bears to the value of the entire estate. [S13,§1481-a39; C24, 27, 31, 35,§7392; 48GA, ch 214,§46.]

Referred to in §7393

7393 Property in this state belonging to foreign estate. Whenever any property, real or personal, within this state belongs to a foreign estate and said foreign estate passes in part exempt from the tax imposed by this chapter and in part subject to said tax and there is no specific devise of the property within this state to exempt persons or if it is within the authority or discretion of the foreign executor, administrator, or trustee administering the estate to dispose of the property not specifically devised to exempt persons in the payment of debts owing by the decedent at the time of his death, or in the satisfaction of legacies, devises, or trusts given to direct or collateral legatees or devisees or in payment of the distributive shares of any direct and collateral heirs, then the property within the jurisdiction of this state belonging to such foreign estate shall be subject to the tax imposed by this chapter, and the tax due thereon shall be assessed as provided in section 7392 relating to the deduction of the proportionate share of indebtedness; provided, however, that if the value of the property so situated exceeds the total amount of the estate passing to other persons than those exempt hereby from the tax imposed by this chapter, such excess shall not be subject to said tax. [S13, §1481-a40; C24, 27, 31, 35,§7393.]

7393.1 Foreign estates — reciprocity — personal property. The tax imposed by this chapter in respect to personal property of nonresidents (other than tangible personal property having an actual situs in this state) shall not be payable (1) if the decedent at the time of his death was a resident of a state or territory of the United States which at the time of his death did not impose a transfer tax or death tax of any character in respect to personal property of residents of this state (other than tangible personal property having an actual situs in such state or territory), or (2) if the laws of the state or territory of residence of the decedent at the time of his death, contained a reciprocal provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property (other than tangible personal property having an actual situs therein) provided the state or territory of residence of such nonresidents allowed a similar exemption to residents of the state or territory of residence of such decedent.

In no case shall the provisions of this section apply to the intangible personal property of nonresident decedents unless such intangible personal property shall have been subjected to a tax or submitted for purposes of taxation in the state of the decedent's residence.

This section shall apply only to estates of decedents dying subsequent to the effective date* of this section.

For the purpose of this section the District of Columbia and possessions of the United States shall be considered territories of the United States. [C31,35,§7393-c1.]

*Effective date July 4, 1929

7394 Compromise settlement. Whenever an estate charged or sought to be charged with the inheritance tax is of such a nature, or is so disposed, that the liability of the estate is doubtful, or the value thereof cannot with reasonable certainty be ascertained under the provisions of law, the state tax commission may, with the written approval of the attorney general, which approval shall set forth the reasons therefor, compromise with the beneficiaries or representatives of such estates, and compound the tax thereon; but said settlement must be approved by the district court or judge of the proper court, and after such approval the payment of the amount of the taxes so agreed upon shall discharge the lien against the property of the estate. [S13,§1481-a41; C24, 27, 31, 35, §7394; 48GA, ch 214,§47.]

7395 Unknown heirs. Whenever the heirs or persons entitled to any estate or any interest therein are unknown or their place of residence cannot with reasonable certainty be ascertained, a tax of five percent shall be paid to the state tax commission upon all such estates or interests, subject to refund as provided herein in other cases; provided, however, that if it be afterwards determined that any estate or interest passes to aliens, there shall be paid within sixty days after such determination and before delivery of such estate or property, an amount equal to the difference between five percent, the amount paid, and the amount which such per-

son should pay under the provisions of this chapter. [S13,§1481-a42; C24, 27, 31, 35,§7395; 48GA, ch 214,§§48, 50.]

7396 Refund of tax improperly paid. When, within five years after the payment of the tax, a court of competent jurisdiction may determine that property upon which an inheritance tax has been paid is not subject to or liable for the payment of such tax, or that the amount of tax paid was excessive, so much of such tax as has been overpaid to the state tax commission shall be returned or refunded to the executor or administrator of such estate, or to those entitled thereto. When a certified copy of the record of such court showing the fact of nonliability of such property to the payment of such tax has been filed with the tax commission of the state, the tax commission shall, if the case has been finally determined, issue an order to the state comptroller directing him to issue a warrant upon the treasurer of state to refund such tax. Such order of court shall not be given until fifteen days notice of the application therefor shall have been given to the state tax commission of the time and place of the hearing of such application, which notice shall be served in the same manner as provided for original notices. [S13,§1481-a43; C24, 27, 31, 35,§7396; 48GA, ch 214,§49.]

Referred to in §§7396.1, 7397
Manner of service, §11060

7396.1 Appropriation. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated a sum sufficient to carry out the provisions of section 7396. [C27, 31, 35,§7396-a1.]

Referred to in §7397

7397 Contingent estates. Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited. When an estate, devise, or legacy can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting. When a devise, bequest, or transfer is one in part contingent, and in part vested so that the beneficiary will come into possession and enjoyment of a portion of his inheritance on or before the happening of the event upon which the possible defeating contingency is based, a tax shall be imposed and collected upon such bequest or transfer as upon a vested interest, at the highest rate possible under the terms of this chapter if no such contingency existed; provided that in the event such contingency reduces the value of the estate or interest so taxed, and the amount of tax so paid is in excess of the tax for which such bequest or transfer is liable upon the removal of such contingency, such excess shall be refunded as is provided in sections 7396 and 7396.1 in other cases. [S13,§1481-a44; C24, 27, 31, 35,§7397.]

CHAPTER 351.1

IOWA ESTATE TAX

7397.01 Definitions.
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7397.01 Definitions. When used in this chapter:

1. The term "executor" means the executor of the will or administrator of the estate of the decedent, or if there is no such executor or administrator appointed, qualified and acting, then any person in actual or constructive possession of any property included in the gross estate of the decedent.

2. The term "gross estate" means the gross estate as determined under the provisions of section 7397.03.

3. The term "net estate" means the net estate as determined under the provisions of section 7397.03.

4. The term "month" means a calendar month.

5. The term "Federal Estate Tax Act" means title III of chapter 27 of the acts of the sixty-ninth congress of the United States, first session, appearing in 44 Statutes at Large, chapter 27, or any amendments thereof.

6. The term "federal estate tax" means the tax imposed by the provisions of said Federal Estate Tax Act referred to in subsection 5 of this section.

7. The term "Iowa estate tax" means the tax imposed by this chapter. [C31, 35,§7397-c1.]

7397.02 Additional tax. In addition to the tax imposed by chapter 351, a tax for general state purposes to be known as the Iowa estate tax, equal to the sum of the following percentages of the value of the net estate, determined as provided in section 7397.03, is hereby imposed upon the transfer of the net estate of every decedent dying after the twenty-sixth day of February, 1926, and being residents of, or

owning property in, this state, except as herein otherwise provided:

1. Four-fifths of one percent of the amount of the net estate not in excess of fifty thousand dollars;

2. One and three-fifths percent of the amount by which the net estate exceeds fifty thousand dollars and does not exceed one hundred thousand dollars;

3. Two and two-fifths percent of the amount by which the net estate exceeds one hundred thousand dollars and does not exceed two hundred thousand dollars;

4. Three and one-fifth percent of the amount by which the net estate exceeds two hundred thousand dollars and does not exceed four hundred thousand dollars;

5. Four percent of the amount by which the net estate exceeds four hundred thousand dollars and does not exceed six hundred thousand dollars;

6. Four and four-fifths percent of the amount by which the net estate exceeds six hundred thousand dollars and does not exceed eight hundred thousand dollars;

7. Five and three-fifths percent of the amount by which the net estate exceeds eight hundred thousand dollars and does not exceed one million dollars;

8. Six and two-fifths percent of the amount by which the net estate exceeds one million dollars and does not exceed one million five hundred thousand dollars;

9. Seven and one-fifth percent of the amount by which the net estate exceeds one million five hundred thousand dollars and does not exceed two million dollars;

10. Eight percent of the amount by which the net estate exceeds two million dollars and does not exceed two million five hundred thousand dollars;

11. Eight and four-fifths percent of the amount by which the net estate exceeds two million five hundred thousand dollars and does not exceed three million dollars;

12. Nine and three-fifths percent of the amount by which the net estate exceeds three million dollars and does not exceed three million five hundred thousand dollars;

13. Ten and two-fifths percent of the amount by which the net estate exceeds three million five hundred thousand dollars and does not exceed four million dollars;

14. Eleven and one-fifth percent of the amount by which the net estate exceeds four million dollars and does not exceed five million dollars;

15. Twelve percent of the amount by which the net estate exceeds five million dollars and does not exceed six million dollars;

16. Twelve and four-fifths percent of the amount by which the net estate exceeds six million dollars and does not exceed seven million dollars;

17. Thirteen and three-fifths percent of the amount by which the net estate exceeds seven million dollars and does not exceed eight million dollars;

18. Fourteen and two-fifths percent of the amount by which the net estate exceeds eight million dollars and does not exceed nine million dollars;

19. Fifteen and one-fifth percent of the amount by which the net estate exceeds nine million dollars and does not exceed ten million dollars;

20. Sixteen percent of the amount by which the net estate exceeds ten million dollars.

The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any state or territory of the United States or to the District of Columbia, in respect of any property included in the gross estate, including the amount paid to the state of Iowa as inheritance taxes under the law as it appears in chapter 351, provided that in no case shall a tax be collected hereunder, which, together with the credits allowed by this paragraph, shall exceed the maximum credits allowed by said Federal Estate Tax Act for any estate, inheritance, legacy or succession taxes actually paid to any state or territory of the United States, or to the District of Columbia. [C31, 35,§7397-c2.]

7397.03 Gross and net estate.

1. a. In the case of a resident of this state, there shall be included in the value of the gross estate the value of all property, wherever situated, (except real estate situated outside this state and tangible personal property having an actual situs outside this state), which is included in the gross estate of such decedent under the provisions of the Federal Estate Tax Act.

b. In the case of a nonresident of this state, there shall be included in the value of the gross estate the value of so much of the property of such decedent, which is included in his gross estate under the provisions of the Federal Estate Tax Act, as is, at the time of his death, situated in this state, or is subject to the jurisdiction of the courts of this state, or is thereafter brought within this state and becomes subject to the jurisdiction of the courts of this state.

2. In computing the value of the net estate of a decedent, whether a resident of this state or not, there shall be deducted from the value of the gross estate, as determined under the provisions of this chapter, all the items of expense, indebtedness, exemptions or other deductions provided for in said Federal Estate Tax Act in the proportion that the value of the gross estate, as determined under the provisions of this chapter, bears to the value of the gross estate as determined under the provisions of the Federal Estate Tax Act; provided, however that, for the purposes of this subsection, the value of real estate situated outside this state shall be excluded from the value of the gross estate as determined under the provisions of the Federal Estate Tax Act; and no indebtedness incurred for, or in respect of, or secured by, real estate situated outside this state, shall be allowed as a deduction from the value of the gross estate, as determined under the provisions of this chapter. [C31, 35,§7397-c3.]

Referred to in §§7397.01, 7397.02

7397.04 Tax on net estate. The tax hereby imposed shall be upon the transfer of:

1. The total net estate of every decedent dying after the effective date* of this chapter;

2. The net personal estate of every decedent dying after the twenty-sixth day of February, 1926, whose estate shall be open and pending in the courts of this state, or subject to the jurisdiction of such courts, at the effective date of this chapter, or whose estate shall or may become subject to administration in, or to the jurisdiction of, the courts of this state after the effective date of this chapter. [C31, 35,§7397-c4.]

*Effective date, April 12, 1929

7397.05 Duty of executor. It shall be the duty of the executor of every decedent whose estate may be subject to the tax imposed by this chapter, to file in the office of the state tax commission, within twelve months after the death of such decedent, duplicate copies of the estate tax return provided for in the Federal Estate Tax Act, and in like manner, duplicate copies of all supplemental or amended returns; and the value of all items included in the gross estate, as shown by such returns, or supplemental or amended returns, shall be taken and considered as the values of such items for the purposes of this chapter; and in case of any revaluation or correction of valuation of any such items, either by such supplemental or amended returns, or by the commissioner of internal revenue, or by any appellate tribunal by which the same may be finally determined, such corrected values shall be taken and considered as the values of such items for the purposes of this chapter. [C31, 35,§7397-c5; 48GA, ch 215,§1.]

7397.06 Payment of tax. The tax imposed by this chapter shall be paid by the executor to the state tax commission within eighteen months from the date of the death of such decedent, or in case such decedent died more than eighteen months prior to the effective date* of this chapter, then within six months after the effective date hereof. [C31, 35,§7397-c6; 48GA, ch 215, §2.]

*Effective date, April 12, 1929
43GA, ch 204, §6, editorially divided

7397.07 Disposal of tax. The proceeds of this tax shall be paid into the general fund of the state. [C31, 35,§7397-c7.]

7397.08 Claim for credit or refund. If the executor of a resident decedent shall have paid to the treasurer of the United States or to a collector of internal revenue an estate tax under the provisions of said Federal Estate Tax Act in respect of property included in the gross estate, determined as herein provided, and shall have claimed as credits against said federal estate tax a sum less than the maximum credits allowed by the provisions of said Federal Estate Tax Act for any estate, inheritance, legacy or succession taxes actually paid to any state or territory of the United States, or to the District of Columbia, it shall be his duty, with due diligence, to file in the bureau of internal revenue a claim for credit or refund for such amount, if any, as such estate shall be properly entitled to receive under the provisions of said Federal Estate Tax Act and of this chapter. [C31, 35,§7397-c8.]

7397.09 Appeal. If any claim for refund or credit, or any part thereof, shall be denied or disallowed by the commissioner of internal revenue, the executor, the state tax commission, or any person having an interest in said estate which may be adversely affected by such denial or disallowance, may apply to the judge of the court having jurisdiction of such estate, for an order directing such executor to take, perfect, and prosecute an appeal from the decision of the commissioner of internal revenue to such court or tribunal as may have jurisdiction of such matter, and, upon the granting of such order, the state tax commission may, at its option, assist in the prosecution of such appeal. The judge of the court granting such order may make a reasonable allowance for attorneys' fees for the prosecution of such appeal, and direct the manner in which the same, together with any other costs or expenses which may be allowed by said court in connection therewith, shall be paid. [C31, 35,§7397-c9; 48GA, ch 215, §3.]

7397.10 Effect of allowance. If any claim for credit or refund, or any part thereof, shall be finally determined in favor of such executor, any amount refunded or credited thereon shall inure to the benefit of such estate. [C31, 35, §7397-c10.]

43GA, ch 204, §9, editorially divided

7397.11 Effect of disallowance. If any claim for credit or refund or any part thereof, shall be finally determined adversely to such executor, for any reason other than lack of diligence or other failure of duty on his part, the amount so denied or disallowed, or so much thereof as shall have been paid to the state tax commission under the provisions of this chapter, shall, upon a claim duly filed with, and proper showing made to, the state tax commission, be refunded by the state tax commission to such executor, and shall inure to the benefit of such estate. [C31, 35,§7397-c11; 48GA, ch 215,§4.]

7397.12 Applicable statutes. All the provisions of the law as it appears in chapter 351 with respect to the determination, imposition, payment and collection of the tax thereby imposed, including interest upon delinquent taxes, are hereby made applicable to the provisions of this chapter, except as the same may be in conflict with the provisions hereof. The state tax commission shall adopt and promulgate all rules and regulations necessary for the enforcement of this chapter. [C31, 35,§7397-c12; 48GA, ch 215,§5.]

7397.13 Invalidation. This chapter shall become void and of no effect in respect to the estates of persons who die after the effective date of the repeal of the Federal Estate Tax Act, or of the provisions thereof providing for a credit of the taxes paid to the several states of

the United States not exceeding eighty percent of the tax imposed by said Federal Estate Tax Act, or after such Federal Estate Tax Act, or the eighty percent credit provision thereof, may be declared, by the supreme court of the United States, to be void by reason of any contravention of the constitution of the United States. [C31, 35,§7397-c13.]

Constitutionality, §7397-c14, code 1935; 43GA, ch 204, §12

CHAPTER 352

SECURITY OF THE REVENUE

7398 County responsible to state.
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7398 County responsible to state. Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double, or erroneous assessments. [R60,§793; C73,§908; C97,§1453; C24, 27, 31, 35, §7398.]

7399 Rep. by 42GA, ch 182

7400 Interest on warrants. When interest is due and allowed by the treasurer of state on the redemption of state warrants, or by the county treasurer on the redemption of county warrants, the same shall be receipted on the warrants by the holder, with the date of the payment, and no interest shall be allowed by the state comptroller or board of supervisors except such as is thus receipted. [R60,§795; C73,§910; C97,§1455; C24, 27, 31, 35,§7400.]

7401 Discounting warrants. If the state treasurer or any county treasurer, by himself or through another, discounts state comptroller's or auditor's warrants, either directly or indirectly, he shall upon conviction be fined in any sum not exceeding one thousand dollars. [R60, §796; C73,§911; C97,§1456; C24, 27, 31, 35, §7401.]

7402 Loans by county treasurer. A county treasurer shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county, or other funds in his hands. [R60, §797; C73,§912; C97,§1457; S13,§1457; C24, 27, 31, 35,§7402.]

7403 Loans by state treasurer. The state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor. [R60,§797; C73,§912; C97,§1457; S13,§1457; C24, 27, 31, 35,§7403.]

7404 Rep. by 44GA, ch 2

7405 Rep. by 41GA, ch 173

7406 Rep. by 43GA, ch 34

7407 Rep. by 44GA, ch 2

7408 Settlement with treasurer. At the meetings in January and June of each year, the board of supervisors shall make a full and complete settlement with the treasurer, and shall certify to the state comptroller all credits to him for double or erroneous assessments and unavailable taxes, and all dues for state revenue, interest, or delinquent taxes, sales of land, peddlers' licenses, and other dues, the amounts collected therefor, and revenues still delinquent, each year to itself, which reports shall be forwarded by mail. [C51,§§157, 158; R60,§798; C73,§913; C97,§1458; C24, 27, 31, 35,§7408.]

7409 Settlement by retiring treasurer. When a county treasurer goes out of office, he shall make a full and complete settlement with the board of supervisors, and deliver up all books, papers, moneys, and all other property pertaining to the office, to his successor, taking his receipt therefor. [R60,§802; C73,§917; C97,§1461; C24, 27, 31, 35,§7409.]

C97, §1461, editorially divided

7410 Supervisors to report to state auditor. The board of supervisors shall make a statement of state dues to the auditor of state, showing all charges against the treasurer during his term of office, and all credits made, the delinquent taxes and other unfinished business charged over to his successor, and the amount of money paid over to his successor, showing to what year and to what account the amount so paid over belongs. [R60,§802; C73,§917; C97, §1461; C24, 27, 31, 35,§7410.]

7411 Correct balances. The board of supervisors shall also see that the books of the treasurer are correctly balanced before passing into the possession and control of the treasurer-elect. [R60,§802; C73,§917; C97,§1461; C24, 27, 31, 35,§7411.]

7412 Custody of public funds. The state treasurer and each county treasurer shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or in some bank legally designated as a depository for such funds. [R60,§804; C73,§918; C97,§1462; S13,§1462; C24, 27, 31, 35,§7412.]

Referred to in §7416
S13, §1462, editorially divided

7413 Manner and details of settlement. At the time of any examination of any such office, or at the time of any settlement with the treasurer in charge of any such public funds, the treasurer shall produce and count in the presence of the officer or officers making such examination or settlement, all moneys or funds then on deposit in the safe or vault in his office, and shall produce a statement of all money or funds on deposit with any depository wherein he is authorized to deposit such funds, which statement shall be certified by one or more officers of such depository, and shall correctly show the balance remaining on deposit in such depository at the close of business on the day preceding the day of such settlement. The treasurer shall also file a statement setting forth the numbers, dates, and amounts of all outstanding checks, or other items of difference, reconciling the balance as shown by the treasurer's books with those of the depositories. [R60,§804; C73,§918; C97,§1462; S13,§1462; C24, 27, 31, 35,§7413.]

Referred to in §7416

7414 Duty of examining officer. It shall be the duty of the officer or officers making such settlement to see that the amount of money produced and counted, together with the amounts so certified by the legally designated depositories, agrees with the balance with which such treasurer should be charged, and he shall make a report in writing of any such settlement or examination, and attach thereto the certified statement of all such depositories. [S13,§1462; C24, 27, 31, 35,§7414.]

Referred to in §7416

7415 Report of settlement filed. The report of any such settlement with the treasurer of state shall be filed in the office of the state comptroller, and the report of a settlement with a county treasurer with the auditor of the county. [S13,§1462; C24, 27, 31, 35,§7415.]

Referred to in §7416

7416 False statements or reports. Any officer or other person making a false statement or report or in any manner violating any of the provisions of sections 7412 to 7415, inclusive, shall be guilty of a misdemeanor and shall be liable to a fine of not less than five hundred dollars. [S13,§1462-a; C24, 27, 31, 35,§7416.]

7417 Official delinquency. If any auditor or treasurer or other officer shall neglect or refuse to perform any act or duty specifically required of him, such officer shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding one thousand dollars, and he and his bondsmen shall be liable on his official bond for such fine, and for the damages sustained by any person through such neglect or refusal. [R60,§§744, 749, 805; C73, §919; C97,§1463; C24, 27, 31, 35,§7417.]

7418 Refund to counties. The state comptroller shall draw his warrant on the state treasury in favor of any county in the state for the amount of any excess in any fund or tax due the state from said county, excepting the state taxes. [C97,§1464; C24, 27, 31, 35,§7418.]

7419 Warrant for excess. When it shall appear from the books in the office of the state comptroller that there is a balance due any county in excess of any revenue due the state, except state taxes, he shall draw his warrant for such excess in favor of the county entitled thereto, and forward the same by mail, or otherwise, to the county auditor of the county to which it belongs, and charge the amount so sent to such county. [C97,§1465; C24, 27, 31, 35,§7419.]

7420 Delivery to treasurer. The auditor to whom said warrant is sent shall immediately, upon receipt thereof, deliver it to the treasurer of his county, and charge the amount thereof to the treasurer, and shall acknowledge the receipt of the amount to the state comptroller. [C97,§1466; C24, 27, 31, 35,§7420.]

CHAPTER 352.1

DEPOSIT OF PUBLIC FUNDS

7420.01 Deposits in general.
7420.02 Approval—requirements.
7420.03 Increase conditionally prohibited.
7420.04 Location of depositories.
7420.05 Refusal of deposits—procedure.
7420.06 Passbook entry.
7420.07 Interest prohibited to public officer.
7420.08 Liability of public officers.

7420.01 Deposits in general. The treasurer of state, and of each county, city, town, and school corporation, and each township clerk and each county recorder, auditor, sheriff, each clerk and bailiff of the municipal court, and clerk of the district court, and each secretary of a school board shall deposit all funds in their hands in such banks as are first approved by the executive council, board of supervisors, city or town council, board of school directors, or township trustees, respectively. The term "bank" shall embrace any corporation, firm, or individual engaged in a general banking business. [C24, 27,§§139, 4319, 5548, 5651, 7404; C31, 35,§7420-d1; 48GA, ch 216,§1.]

Referred to in §7420.08

7420.02 Approval — requirements. The approval of a bank as a depository shall be by written resolution or order which shall be entered of record in the minutes of the approving board, and which shall distinctly name each bank approved, and specify the maximum amount which may be kept on deposit in each such bank. [C24, 27,§139; C31, 35,§7420-d2.]

7420.03 Increase conditionally prohibited. The maximum amount so permitted to be deposited in a named bank shall not be increased except with the approval of the treasurer of state. [C27,§1090-b2; C31, 35,§7420-d3.]

7420.04 Location of depositories. Deposits by the treasurer of state shall be in banks located in this state; by a county officer, in banks located in his county or in an adjoining county within this state; by a city or town treasurer, in banks located in the city or town, but in the event there is no bank in such city or town then in any other bank located in this state which shall be selected as such depository by the city or town council; by a school treasurer or by a school secretary in a bank within this state which shall be selected by the board of directors or the trustees of such school district; by a township clerk in a bank located within this state which shall be selected by such township clerk and approved by the trustees of such township. Provided, that deposits may be made in banks outside of Iowa for the purpose of paying principal and interest on bonded indebtedness of any municipality when such deposit is made not more than ten days before the date such principal or interest becomes due. [C24, 27, §§139, 4319, 5548, 5651, 7404; C31, 35,§7420-d4.]

7420.05 Refusal of deposits—procedure. If none of the duly approved banks will accept said deposits under the conditions herein prescribed or authorized, said funds may be deposited in any approved bank or banks conveniently located within the state. [C24, 27, §5653; C31, 35,§7420-d5.]

7420.06 Passbook entry. Henceforth public deposits shall be deposited with reasonable promptness and shall be evidenced by passbook entry by the depository legally designated as depository for such funds. [C24, 27,§§140, 4319, 5548, 5651, 7404; C31, 35,§7420-d6; 47GA, ch 194,§1.]

7420.07 Interest prohibited to public officer. No bank or trust company shall, directly or indirectly, by any device whatsoever, pay any interest to any public officer on any deposit of public funds, and no public officer shall take or receive any interest whatsoever on public funds. [C31, 35,§7420-d7; 47GA, ch 194,§2.]

7420.08 Liability of public officers. No officer referred to in section 7420.01 shall be liable for loss of funds by reason of the insolvency of the depository bank when said funds have been deposited as herein provided. [C27, §1090-a20; C31, 35,§7420-d8; 48GA, ch 216,§1.]

CHAPTER 352.2

STATE SINKING FUND FOR PUBLIC DEPOSITS

Chapter applicable to special charter cities, §6714.1
Referred to in §§1921.128, 9283.21

7420.09 State sinking fund.
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7420.09 State sinking fund. There is hereby created in the office of the treasurer of state a separate fund to be known as the state sinking fund for public deposits. [C27,§1090-a1; C31, 35,§7420-a1.]

Referred to in §7420.16
41GA, ch 173, §1, editorially divided

7420.10 Purpose of fund. The purpose of said fund shall be to secure the payment of their deposits to state, county, township, municipal, and school corporations having public funds deposited in any bank in this state, when such deposits have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds. [C27,§1090-a2; C31, 35,§7420-a2.]

7420.11 How constituted. There shall be paid into said sinking fund by the treasurer of state all collections either from assessments as hereinafter provided, or from receipts received from the collection of claims assigned or paid whether from security, bonds, or other sources. [C27,§1090-a3; C31, 35,§7420-a3; 47GA, ch 194,§3.]

41GA, ch 174, §1, editorially divided

7420.12 Availability of funds. Any sums in the sinking fund shall be available for the pay-

ment of claims. [C27,§1090-a4; C31, 35,§7420-a4.]

7420.13 Investment of funds. All above a necessary working balance shall be kept invested in United States government bonds under the direction of the executive council. [C27,§1090-a5; C31, 35,§7420-a5.]

Sections 7420-a6 and 7420-a7, code 1935, repealed by 47GA, ch 194, §4

7420.14 Duty of treasurers. It shall be the duty of all school treasurers, city and town treasurers, and township clerks of the county to keep on file with the county treasurer a list of such depositories. [C27,§1090-a8; C31, 35, §7420-a8; 47GA, ch 194,§5.]

7420.15 Certification of deposits. Whenever any such depository bank is hereafter closed and placed in the hands of a receiver or a trustee in bankruptcy or has been heretofore or is hereafter reorganized, either by reopening, sale to another bank of all or part of its assets with assumption of all or part of deposit liability, consolidation with another bank, purchase of part or all of assets of another bank, merger with another bank or banks, or in any manner authorized by sections 9283.05 to 9283.09, inclusive, or by sections 9283.14 to 9283.25, inclusive, or by the National Bank Conservation Act, [48 Stat. L. ch 1] and especially section 207 of title II thereof, and trust certificates have issued pursuant to depositors' agreements; or whenever any bank that has assumed all or part of the deposit liability of a depository bank, has heretofore or is hereafter reorganized in any manner authorized by sections 9283.05 to 9283.09, inclusive, or by sections 9283.14 to 9283.25, inclusive, or by the National Bank Conservation Act and especially section 207 of title II thereof, and trust certificates have issued pursuant to depositors' agreements, and the amount of the several deposits of public funds deposited therein by authority of and in conformity with the direction of the legal governing council or board which is by law charged with the duty of selecting depository banks for said funds and fixing the amount thereof has been ascertained and fixed by an order of court or by the treasurer of state if the matter is not pending in court, the superintendent of banking shall then certify such list of public deposits so approved by the court to the treasurer of state and the state comptroller. [C27,§1090-a9; C31, 35,§7420-a9.]

41GA, ch 173, §4, editorially divided

7420.16 Duty of treasurer of state. Every depository shall pay for the benefit of said state sinking fund, created by section 7420.09, the assessments hereinafter set out. The treasurer of state, with the approval of the executive council, may and is hereby authorized to fix the assessment rate applicable to and for the purpose of providing insurance for public funds on deposit in depositories. On or before the first day of July and the first day of January in each year the state treasurer, with the approval of the executive council, shall determine and fix a fair and reasonable assessment rate to be used in determining the assessments payable by depositories during the succeeding six months period. [C27,§1090-a10; C31, 35,§7420-a10; 47GA, ch 194,§6.]

7420.17 Assessment rate. In fixing such rate the state treasurer shall give due regard to the amount of public funds currently on deposit and the liabilities of the state sinking fund contingent and accrued. For any six months period the assessment rate shall not be more than two percent and not less than one-half of one percent per annum on ninety percent of the collected daily balances, provided that said assessment rate shall not exceed one percent per annum on ninety percent of the daily collected balances for the months of April and October of each year. If, at the beginning of any six months period, no assessment rate on public funds has been fixed, and the amount in the state sinking fund over and above accrued and contingent liabilities does not exceed two hundred fifty thousand dollars, the assessment rate shall be one-half of one percent per annum during such period. No assessment rate shall be fixed, and no assessments paid, for any six months period after the amount in the state sinking fund over and above accrued and contingent liabilities has reached five hundred thousand dollars until the amount in said sinking fund has been reduced to less than two hundred fifty thousand dollars, in which event assessment rates shall again be fixed and assessments paid commencing at the next six months period; provided that, if in the opinion of the treasurer the amount in said sinking fund will not be adequate to meet the demands upon the sinking fund the treasurer may, with the approval of the executive council, fix an assessment rate and require the payment of assessments for the balance of any six months period after the amount in the sinking fund becomes less than two hundred fifty thousand dollars. [C27,§1090-a11; C31, 35,§7420-a11; 47GA, ch 194,§6.]

7420.18 Depositories' and treasurers' duties. On or before the tenth day of each month each depository shall compute, upon the basis of the assessment rate so fixed, and shall pay to the county treasurer of the county in which the depository is located, the amount of assessment so fixed and determined for the benefit of the state sinking fund for the preceding calendar month. Such amount shall be transmitted by the county treasurer to the state treasurer on or before the twentieth day of each month, and credited by the state treasurer to the state sinking fund for public deposits. [C27,§1090-a12; C31, 35,§7420-a12; 47GA, ch 194,§6.]

7420.19 Acceptance by depositories. Any bank or trust company which does not desire to serve as a depository under this act [47GA, ch 194] for public funds of any public body may decline to do so by giving written notice to such public body prior to June 15, 1937. Failure to give such written notice shall constitute an

acceptance of the obligations imposed by this act with regard to all public funds on deposit July 1, 1937. The acceptance by any bank or trust company of any public funds for deposit on or after July 1, 1937, shall constitute an acceptance of the obligations imposed by this act with regard to all such funds so accepted. [47GA, ch 194,§10.]

7420.20 Liability of depository. The failure on the part of any depository bank to pay to the county treasurer or the state treasurer any such assessments on or before the tenth day of the month same becomes due, shall render such bank liable for a ten percent penalty on the amount of assessments due and the same may be recovered by the state treasurer or the county treasurer. [C27,§1090-a13; C31, 35,§7420-a13; 47GA, ch 194,§7.]

41GA, ch 174, §4, editorially divided

7420.21 Liability of public officers. The fiscal governing officers of every county, township, school district, city, or town shall be personally liable to the sinking fund for any misappropriation of such assessments on public balances or for withholding the same when proper demand has been made therefor by the county treasurer or state treasurer. [C27, §1090-a14; C31, 35,§7420-a14; 47GA, ch 194,§8.]

Section 7420-a15, code 1935, repealed by 47GA, ch 194, §4

7420.22 Amount of deposit—determination —effect—objections. Whenever or wherever any depository bank or any bank which has assumed the whole or any part of the deposit liability of a depository bank, has been heretofore or is hereafter closed and placed in the hands of a receiver or trustee in bankruptcy, or has been heretofore or is hereafter reorganized, either by reopening, sale to another bank of a part or all of its assets with the assumption of all or part of deposit liability, consolidation with another bank, purchase of part or all of the assets of another bank, merger with another bank or banks, or in any manner authorized by sections 9283.05 to 9283.09, inclusive, or by sections 9283.14 to 9283.25, inclusive, or the National Bank Conservation Act [48 Stat. L. ch 1] and especially section 207 of title II thereof, and trust certificates have issued pursuant to provisions of depositors' agreements, the state of Iowa or any county, city, town, school district or township, having public funds on deposit therein, may by its governing board at such board's discretion, by written resolution or order, entered of record in the minutes of such board, or executive council, as the case may be, order and direct its treasurer or other officer to file with and furnish to the treasurer of state a statement of the amount of the deposit, a certified copy of the resolution under which the deposit was made, and any other information demanded by him. Whenever trust certificates have issued as herein provided, the statement of the amount of deposit shall include only the balance due on the trust certificate unless the bank or trust company is placed in the hands of a receiver or trustee in bankruptcy. Unless either the bank liable therefor, or claimant has paid all assessments due the state sinking fund for public deposits to the date of its reorganization, both on that part of claimant's deposit left in the bank and that part represented by the trust certificate, the treasurer of state may refuse to file the claim of such claimant.

With the advice of the attorney general, the treasurer of state shall determine the amount thereof deposited by authority of and in conformity with the direction of the legal governing council or board and send a copy of his decision by registered mail to the claimant and to the bank and deliver a copy to the superintendent of banking, which decision shall be final except as to such depositors as within ten days after the mailing of such decision make objections to such decision in writing to the treasurer of state, and shall have the same force and effect as the court order and certificate of the superintendent of banking, as provided in this chapter.

If objections are made within the time and as above provided, the same shall be forwarded to the receiver, and shall be presented and heard and determined by the court as otherwise provided. In the event a receiver or trustee in bankruptcy has not been appointed, the claimant may present the objections, if made within the manner and time provided, to any court of competent jurisdiction by any appropriate action. If objections are not made as above provided, the decision of the treasurer of state shall be final. [C27,§1090-b1; C31, 35,§7420-b1; 47GA, ch 194,§9.]

7420.23 Order of payment. It shall be the duty of the superintendent of banking to direct the order in which such deposits shall be paid. [C27,§1090-a16; C31, 35,§7420-a16.]

41GA, ch 173, §5, editorially divided

7420.24 Certification of claims. As soon as the money is available in such sinking fund the superintendent of banking shall certify to the state comptroller the amount due the several depositors of public funds as shown by such certified list and showing the order in which they shall be paid. [C27,§1090-a17; C31, 35, §7420-a17.]

7420.25 Warrant — payment — subrogation. Upon such certification the state comptroller shall issue his warrant upon such sinking fund in the hands of the treasurer of state payable to such depositor of public funds in the order certified by the superintendent of banking, and the same shall be paid to such depositor of public funds, and the treasurer of state shall thereupon be subrogated to all of the title, interest, and rights of the depositor in such deposit of public funds or segregated trust fund and shall share in the distribution of the assets of such bank or trust fund ratably with the other depositors and the sum received from such distribution shall be paid by the receiver or trustees to the treasurer of state and deposited in said

sinking fund. Until the depositor has been paid in full from the sinking fund, it may share in the distribution of the assets of the bank or trust fund. [C27,§1090-a18; C31, 35,§7420-a18.]

7420.26 Bonds—subrogation. Where public funds are secured by bond and the same are paid or advanced by the treasurer of state as herein provided, said treasurer shall be subrogated to all of the rights of the holder of such bond and is hereby authorized to enforce and collect the same and shall deposit the same in said sinking fund. However, no suit shall be maintained upon any such bond if the money was legally deposited by authority of the governing council or board, and no premium has been paid for the bond. [C27,§1090-a19; C31, 35, §7420-a19.]

Constitutionality, 41GA, ch 173, §12; 47GA, ch 194, §13
Omnibus repeal, see 41GA, ch 173, §11; 47GA, ch 194, §12
Pending litigation, 47GA, ch 194, §11

ANTICIPATORY WARRANTS

7420.27 Anticipatory warrants. Whenever duly allowed and certified claims are on file with the treasurer of state to the amount of fifty thousand dollars or more and the state sinking fund for public deposits contains insufficient funds for immediate payment of said claims the treasurer of state with the written approval of the executive council of the state may issue anticipatory warrants for the purpose of raising funds for the immediate payment of said claims but said warrants outstanding and unpaid shall not exceed at any one time the sum of three million five hundred thousand dollars provided, however, that the treasurer of state by and with the approval of the executive council may issue such additional anticipatory warrants as may be necessary or required to refund existing warrants and the issuance of additional anticipatory warrants for the purpose of refunding anticipatory warrants shall not be considered to be a violation of the prohibition hereinbefore contained fixing the amount of said warrants to be outstanding at any one time in an amount not to exceed three million five hundred thousand dollars. [C27,§1090-b3; C31, 35,§7420-b3.]

Referred to in §§7420.42, 7420.43

7420.28 Interest. Said warrants shall bear interest from date at a rate not to exceed five percent, which interest shall be payable at the end of each year, or for such shorter period as said warrants may remain unpaid. [C27, §1090-b4; C31, 35,§7420-b4.]

Referred to in §7420.42

7420.29 Form of warrants. Said warrants shall, subject to the foregoing limitations, be issued in such individual and gross amounts and in such form and at such rate of interest as the executive council shall approve.

Each certificate or warrant issued under the provisions of this act [42GA, ch 92] shall have printed on the face thereof the words: "This warrant is an obligation of the state sinking fund for public deposits only." [C27,§1090-b5; C31, 35,§7420-b5.]

Referred to in §7420.42

7420.30 Public sale—interest. Said warrants shall be offered by the treasurer of state at public sale and shall be sold at a price not less than par plus accrued interest to the date when the treasurer of state shall actually receive payment for said warrants and make delivery of the same to the purchaser. [C27, §1090-b6; C31,§7420-b6; C35,§7420-g1.]

Referred to in §7420.42

7420.31 Advertisement. When said anticipatory warrants are to be offered for sale, the treasurer of state shall by advertisement published for two or more successive weeks in at least two daily newspapers in the state, one of which shall be in Des Moines, give ten days notice of the time and place of the sale of said warrants which notice shall contain a statement of the amount of such warrants to be offered for sale, the time and place of sale, and any further information which may be deemed pertinent. [C35,§7420-g2.]

Referred to in §7420.42

7420.32 Bids. Sealed bids may be received at any time prior to the call for open bids. After the sealed bids are on file, the executive council shall call for open bids. After all of the open bids have been received the substance of the best bid shall be recorded in the minutes of the secretary of the executive council. The secretary of the executive council shall then in the presence of the executive council open all sealed bids that may have been filed and shall note the substance of the best sealed bids. [C35,§7420-g3.]

Referred to in §7420.42

7420.33 Private sale—preference. Any or all bids may be rejected and the sale may be advertised anew, in the same manner, or the anticipatory warrants or any portion thereof may thereafter be sold at private sale to any one or more of such bidders or other person providing, however, that preference shall be given to individuals residing in Iowa, corporations organized under the laws of the state of Iowa and resident partnerships insofar as possible to do so. In case of a private sale, the said warrants shall be sold upon terms not less favorable to the public than the most favorable bid made by a bona fide and responsible bidder at the last advertised sale. [C27,§1090-b6; C31, §7420-b6; C35,§7420-g4.]

Referred to in §7420.42

7420.34 Commission and expense. No commission shall be paid directly or indirectly in connection with the sale of any anticipatory warrant. No expense shall be contracted or paid in connection with such sale other than the expenses incurred in advertising such anticipatory warrants for sale. [C35,§7420-g5.]

Referred to in §7420.42

7420.35 Misdemeanor. Any public officer or employee who fails to perform any duty

required by this act [46GA, ch 87] or who does any act prohibited by this act shall be guilty of an indictable misdemeanor. [C35,§7420-g6.]

Referred to in §7420.42
Punishment, §12894

7420.36 Construction. Nothing contained in this chapter, as amended by this act [46GA, ch 87], shall be deemed to prevent the refunding of any warrants heretofore or hereafter issued under the provisions of this chapter. [C35, §7420-g7.]

Referred to in §7420.42
Constitutionality, 46GA, ch 87, §10
Omnibus repeal, 46GA, ch 87, §9

7420.37 Record of sales. Said treasurer shall make and retain in his office a complete record of all warrants sold to each purchaser and of the post-office address of such purchaser. [C27,§1090-b7; C31, 35,§7420-b7.]

Referred to in §7420.42

7420.38 Change in addresses. Purchasers of warrants may at any time notify said treasurer of their post-office addresses, or of any change in said addresses, and of the warrants owned or held by them, and said treasurer shall change his sale record accordingly. [C27, §1090-b8; C31, 35,§7420-b8.]

Referred to in §7420.42

7420.39 Payment. Said warrants and all interest thereon shall be payable by the treasurer of state solely from the funds paid into said state sinking fund for public deposits, and said funds are hereby exclusively and irrevocably pledged to such payment in the consecutive order in which said warrants are issued. [C27,§1090-b9; C31, 35,§7420-b9.]

Referred to in §7420.42

7420.40 Application of funds. All funds which are derived from the sale of said warrants shall be applied exclusively to the payment of the allowed and certified claims on account of which such warrants were issued. [C27,§1090-b10; C31, 35,§7420-b10.]

Referred to in §7420.42

7420.41 Termination of interest. After the sale of any series of warrants, the treasurer of state shall, at least by the twentieth day of each month thereafter, if he has funds in the state sinking fund for public deposits sufficient to pay one or more of said outstanding warrants, mail to the purchaser or holder of said warrant or warrants at his post-office address as shown by the record of sale, a notice that said warrant or warrants will be paid on presentation and that interest thereon will cease after the expiration of ten days from the mailing of said notice. Upon the expiration of ten days from the mailing of said notice interest shall cease on said warrant or warrants. [C27, §1090-b11; C31, 35,§7420-b11.]

Referred to in §7420.42

7420.42 Applicability. Sections 7420.27 to 7420.41, inclusive, shall apply to all unpaid claims allowed and certified either before or after said sections take effect. [C27,§1090-b12; C31, 35,§7420-b12.]

7420.43 Investment of sinking fund. The governing council or board who by law are authorized to direct the depositing of funds shall be authorized to direct the treasurer to invest any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest of which is used for the same purpose, in the certificates provided by section 7420.27, or in United States government bonds, or in local certificates or warrants issued by any municipality or school district within the county, or in municipal bonds which constitute a general liability, and the treasurer when so directed shall so invest such fund. [C27, 31, 35,§12775-b1.]

TITLE XVII

CERTAIN INTERNAL IMPROVEMENTS

CHAPTER 353

LEVEE AND DRAINAGE DISTRICTS AND IMPROVEMENTS ON PETITION OR BY MUTUAL AGREEMENT

Referred to in §§7442, 7602, 7612, 7613, 7617, 7621, 7626, 7626.4, 7638, 7648, 7703, 7747, 7751, 7757, 7766

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7421 **Jurisdiction to establish.** The board of supervisors of any county shall have jurisdiction, power, and authority at any regular, special, or adjourned session, to establish a drainage district or districts, and to locate and establish levees, and cause to be constructed as hereinafter provided any levee, ditch, drain, or watercourse, or settling basins in connection therewith, or to straighten, widen, deepen, or change any natural watercourse, in such county, whenever the same will be of public utility or conducive to the public health, convenience, or welfare. [C73,§1207; C97,§1939; S13,§1989-a1; C24, 27, 31, 35,§7421.]

7422 **Presumption.** The drainage of surface waters from agricultural lands or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare. [S13, §1989-a1; C24, 27, 31, 35,§7422.]

7423 **"Levee" defined—bank protection.** For the purpose of this chapter and with reference to improvements along or adjacent to the Missouri river the word "levee" shall be construed to include, in addition to its ordinary and accepted meaning, embankments, revetments, retards, or any other approved system of construction which may be deemed necessary to adequately protect the banks of any river or stream, within or adjacent to any county, from wash, cutting, or erosion. [C24, 27, 31, 35, §7423.]

7424 **Definition of terms.** Within the meaning of this chapter, the term "board" shall embrace the board of supervisors, the joint boards of supervisors in case of intercounty levee or drainage districts, and the board of trustees in case of a district under trustee management.

The term "commissioners" shall mean the men appointed and qualified to classify lands, fix percentages of benefits, apportion and assess costs and expenses in any levee or drainage district, unless otherwise specifically indicated by law.

The term "appraisers" shall mean the men appointed and qualified to ascertain the value of all land taken and the amount of damage arising from the construction of levee or drainage improvements. [C24, 27, 31, 35,§7424.]

7425 General rule for location. The levees, ditches, or drains herein provided for shall, so far as practicable, be surveyed and located along the general course of the natural streams and watercourses or in the general course of natural drainage of the lands of said district; but where it will be more economical or practicable such ditch or drain need not follow the course of such natural streams, watercourses, or course of natural drainage, but may straighten, shorten, or change the course of any natural stream, watercourse, or general course of drainage. [S13,§1989-a2; C24, 27, 31, 35,§7425.]

7426 Location across railroad. When any such ditch or drain crosses any railroad right-of-way, it shall when practicable be located at the place of the natural waterway across such right-of-way, unless said railroad company shall have provided another place in the construction of the roadbed for the flow of the water; and if located at the place provided by the railroad company, such company shall be estopped from afterwards objecting to such location on the ground that it is not at the place of the natural waterway. [S13,§1989-a2; C24, 27, 31, 35,§7426.]

7427 Number of petitioners required. The owner or owners of at least twenty-five percent of the land named in the petition described in section 7429 may file in the office of the county auditor a petition for the establishment of a levee or drainage district. If the district described in the petition is a subdistrict, one or more of the owners of the land affected by the improvement may petition for such subdistrict. [S13,§§1989-a2,-a23; C24, 27, 31, 35,§7427.]

40ExGA, HF 185, §6, editorially divided

7428 Straightening creek or river. When the proposed drainage district involves only the straightening of a creek or river, the board of supervisors shall refuse to consider the petition unless the same is signed by owners of at least thirty-five percent of the acreage affected by or assessed for the expense of the proposed improvement. This section shall not affect drainage projects involving the drainage of swamps or sloughs not in the congressional forty-acre tracts abutting upon such creek or river. [C24, 27, 31, 35,§7428.]

7429 Petition. The petition shall set forth:

1. An intelligible description of the lands sought to be reclaimed, by congressional divisions or otherwise.
2. That said lands are subject to overflow or are too wet for cultivation.
3. That the public benefit, utility, health, convenience, or welfare will be promoted by leveeing, constructing settling basins, ditching, tiling, or draining said lands, or by changing the watercourses thereon.
4. The starting point, route, terminus, and lateral branches of the proposed improvement. [S13,§§1989-a2,-a23; C24, 27, 31, 35,§7429.]

Referred to in §7427

7430 Bond. There shall be filed with the petition a bond in an amount fixed and with sureties approved by the auditor, conditioned for the payment of all costs and expenses incurred in the proceedings in case the district is not finally established. [S13,§1989-a2; C24, 27, 31, 35,§7430.]

Referred to in §5526.01

7431 Additional bond. No preliminary expense shall be incurred before the establishment of such proposed improvement district by the board in excess of the amount of bond filed by the petitioners. In case it is necessary to incur any expense in addition to the amount of such bond, the board of supervisors shall require the filing of an additional bond by the petitioners and shall not proceed with the preliminary survey or authorize any additional expense until the additional bond is filed in a sufficient amount to cover such expense. [C24, 27, 31, 35,§7431.]

7432 Engineer—bond. The board shall at its first session thereafter, regular, special, or adjourned, appoint a disinterested and competent civil engineer who shall give bond to the county for the use of the proposed levee or drainage district, if it be established, and if not established, for the use of the petitioners, in amount and with sureties to be approved by the auditor, and conditioned for the faithful and competent performance of his duties. [S13, §1989-a2; C24, 27, 31, 35,§7432.]

7433 Compensation. Any engineer employed under the provisions of this chapter shall receive such compensation per diem as shall be fixed and determined by the board of supervisors. [S13, §1989-a41; C24, 27, 31, 35,§7433.]

7434 Discharge. The board may at any time terminate the contract with, and discharge the engineer. [S13,§1989-a2; C24, 27, 31, 35,§7434.]

7435 Assistants. Assistants may be employed by the engineer only with the approval of the board, which shall fix their compensation. [S13,§1989-a42; C24, 27, 31, 35,§7435.]

40ExGA, HF 185, §12, editorially divided

7436 Record of work. The engineer shall keep an accurate record of the kind of work done by himself and each assistant, the place where done, and the time engaged therein, and shall file an itemized statement thereof with the auditor. No expenses shall be incurred by the engineer except upon authority of the board, and vouchers shall be filed with the claims therefor. [S13,§1989-a42; SS15,§1527-s21b; C24, 27, 31, 35,§7436.]

7437 Survey. The engineer shall examine the lands described in the petition and any other lands which would be benefited by said improvement or necessary in carrying out the same.

He shall locate and survey such ditches, drains, levees, settling basins, pumping stations, and other improvements as will be necessary, practicable, and feasible in carrying out the purposes of the petition and which will be of public benefit or utility, or conducive to public

health, convenience, or welfare. [S13,§1989-a2; C24, 27, 31, 35,§7437.]

Referred to in §§7439, 7448, 7642

7438 Report. The engineer shall make full written report to the county auditor, setting forth:

1. The starting point, route, and terminus of each ditch, drain, and levee and the character and location of all other improvements.

2. A plat and profile, showing all ditches, drains, levees, settling basins, and other improvements, the course, length, and depth of each ditch, the length, size, and depth of each drain, and the length, width, and height of each levee, through each tract of land, and the particular descriptions and acreage of the land required from each forty-acre tract or fraction thereof as right-of-way, or for settling basin or basins, together with the congressional or other description of each tract and the names of the owners thereof as shown by the transfer books in the office of the auditor.

3. The boundary of the proposed district, including therein by color or other designation other lands that will be benefited or otherwise affected by the proposed improvements, together with the location, size, and elevation of all lakes, ponds, and deep depressions therein.

4. Plans for the most practicable and economic place and method for passing machinery, equipment, and material required in the construction of said improvements across any highways, railroads, and other utilities within the proposed district.

5. The probable cost of the proposed improvements, together with such other facts and recommendations as he shall deem material. [S13, §1989-a2; C24, 27, 31, 35,§7438.]

Referred to in §§7439, 7448, 7642

7439 Procedure on report. Upon the filing of the report of the engineer recommending the establishment of the levee or drainage district, the board shall at its first regular, adjourned, or special meeting examine and consider the same, and, if the plan is not approved the board may employ said engineer or another disinterested engineer to report another plan or make additional examination and surveys and file an additional report covering such matters as the board may direct. Additional surveys and reports must be made in accordance with the provisions of sections 7437 and 7438. At any time prior to the final adoption of the plans they may be amended, and as finally adopted by the board shall be conclusive unless the action of the board in finally adopting them shall be appealed from as hereinafter provided. [S13, §1989-a3; C24, 27, 31, 35,§7439.]

7440 Notice of hearing. When any plan and report of the engineer has been approved by the board, such approval shall be entered of record in its proceedings as a tentative plan only for the establishment of said improvement. Thereupon it shall enter an order fixing a date for the hearing upon the petition not less than forty days from the date of the order of approval, and directing the auditor immediately to cause notice to be given to the owner of each tract of land or lot within the proposed levee or drainage district as shown by the transfer books of the auditor's office, including railway companies having right-of-way in the proposed district and to each lienholder or incumbrancer of any land within the proposed district as shown by the county records, and also to all other persons whom it may concern, including actual occupants of the land in the proposed district, without naming individuals, of the pendency and prayer of the said petition, the favorable report thereon by the engineer, and that such report may be amended before final action, the approval thereof by the board as a tentative plan, and the day and the hour set for hearing on said petition and report, and that all claims for damages except claims for land required for right-of-way, and all objections to the establishment of said district for any reason must be made in writing and filed in the office of the auditor at or before the time set for such hearing. [S13,§1989-a3; C24, 27, 31, 35,§7440.]

Referred to in §7441

7441 Service by publication—proof. The notice provided in section 7440 shall be served, except as otherwise hereinafter provided, by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county, the last of which publications shall be not less than twenty days prior to the day set for hearing of the said petition. Proof of such service shall be made by affidavit of the publisher, and be on file with the auditor at the time the hearing begins. [S13, §1989-a3; C24, 27, 31, 35,§7441.]

Referred to in §7613

7442 Service on agent. If any person, corporation, or company owning or having interest in any land or other property affected by any proposed improvement under chapters 353 to 362, inclusive, and chapter 354.1, shall file with the auditor an instrument in writing designating the name and post-office address of his or its agent upon whom service of notice of said proceeding shall be made, the auditor shall, not less than twenty days prior to the date set for hearing upon said petition, send a copy of said notice by registered mail addressed to the agent so designated. Proof of such service shall be made by affidavit of the auditor filed by him in said proceeding at or before the date of the hearing upon the petition, and such service shall be in lieu of all other service of notice to such persons, corporations, or companies.

This designation when filed shall be in force for a period of five years thereafter and shall apply to all proceedings under said chapters during such period. The person, company, or corporation making such designation shall have the right to change the agent appointed therein or to amend it in any other particular. [S13, §1989-a3; C24, 27, 31, 35,§7442.]

Chapters 353.1, 358.1, and 358.2 enacted after this section was enacted

Similar provision, §6027

7443 Personal service. In lieu of publication, personal service of said notice may be made upon any owner of land in the proposed district, or upon any lienholder or other person interested in the proposed improvement, in the manner and for the time required for service of original notices in the district court. Proof of such service shall be on file with the auditor on the date of said hearing. [S13,§1989-a3; C24, 27, 31, 35,§7443.]

Time and manner of service, §§11059, 11060

7444 Waiver of notice. No service of notice shall be required upon any person who shall file with the auditor a statement in writing, signed by him, waiving notice, or who enters an appearance in the proceedings. The filing of a claim for damages or objections to the establishment of said district or other pleading shall be deemed an appearance. [S13,§1989-a3; C24, 27, 31, 35,§7444.]

7445 Waiver of objections and damages. Any person, company, or corporation failing to file any claim for damages or objections to the establishment of the district at or before the time fixed for said hearing, except claims for land required for right-of-way, or for settling basins, shall be held to have waived all objections and claims for damages. [S13,§1989-a4; C24, 27, 31, 35,§7445.]

7446 Adjournment for service—jurisdiction retained. If at the date set for hearing, it shall appear that any person entitled to notice has not been properly served with notice, the board may postpone said hearing and set another time for the same not less than thirty days from said date, and notice of such hearing as hereinbefore provided shall be served on such omitted parties. By fixing such new date for hearing and the adjournment of said proceeding to said date, the board shall not lose jurisdiction of the subject matter of said proceeding nor of any parties already served with notice. [S13,§1989-a3; C24, 27, 31, 35,§7446.]

7447 Hearing of petition—dismissal. At the time set for hearing on said petition the board shall hear and determine the sufficiency of the petition in form and substance (which petition may be amended at any time before final action thereon), and all objections filed against the establishment of such district, and the board may view the premises included in the said district. If it shall find that the construction of the proposed improvement will not materially benefit said lands or would not be for the public benefit or utility nor conducive to the public health, convenience, or welfare, or that the cost thereof is excessive it shall dismiss the proceedings. [S13,§1989-a5; C24, 27, 31, 35, §7447.]

7448 Establishment—further investigation. If the board shall find that such petition complies with the requirements of law in form and substance, and that such improvement would be conducive to the public health, convenience, welfare, benefit, or utility, and that the cost thereof is not excessive, and no claim shall have been filed for damages, it may locate and establish the said district in accordance with the recommendation of the engineer and the report and plans on file; or it may refuse to establish the proposed district if it deem best, or it may direct the engineer or another one employed for that purpose to make further examination, surveys, plats, profiles, and reports for the modification of said plans, or for new plans in accordance with sections 7437 and 7438, and continue further hearing to a fixed date. All parties over whom the board then has jurisdiction shall take notice of such further hearing; but any new parties rendered necessary by any modification or change of plans shall be served with notice as for the original establishment of a district. The county auditor shall appoint three appraisers as provided for in section 7449 to assess the value of the right-of-way required for open ditches or other improvements. [S13,§1989-a5; C24, 27, 31, 35,§7448.]

7448.1 Settling basins—purchase or lease of lands. If a settling basin or basins are provided as a part of a drainage improvement, the board of supervisors may buy or lease the necessary lands in lieu of condemning said lands. [C27, 31, 35,§7448-a1.]

7449 Appraisers. If the board shall find that such improvement will materially benefit said lands, will be conducive to the public health, convenience, welfare, benefit, or utility, and that the law has been complied with as to form and substance of the petition, the service of notice, and the survey and report of the engineer, and that said improvement should be made, then if any claims for damages shall have been filed, further proceedings shall be continued to an adjourned, regular, or special session, the date of which shall be fixed at the time of adjournment, and of which all interested parties shall take notice, and the auditor shall appoint three appraisers to assess damages, one of whom shall be an engineer, and two freeholders of the county who shall not be interested in nor related to any person interested in the proposed improvement, and the said appraisers shall take and subscribe an oath to examine the said premises, ascertain and impartially assess all damages according to their best judgment, skill, and ability. [S13,§1989-a5; C24, 27, 31, 35,§7449.]

Referred to in §7448

7450 Assessment—report—adjournment—other appraisers. The appraisers appointed to assess damages shall view the premises and determine and fix the amount of damages to which each claimant is entitled, and shall place a separate valuation upon the acreage of each owner taken for right-of-way for open ditches or for settling basins, as shown by plat of engineer, and shall, at least five days before the date fixed by the board to hear and determine the same, file with the county auditor reports in writing, showing the amount of damage sustained by each claimant. Should the report not be filed in time, or should any good cause for

delay exist, the board may postpone the time of final action on the subject, and, if necessary, the auditor may appoint other appraisers. [S13, §1989-a6; C24, 27, 31, 35,§7450.]

7451 **Award by board.** At the time fixed for hearing and after the filing of the report of the appraisers, the board shall examine said report, and may hear evidence thereon, both for and against each claim for damages and compensation, and shall determine the amount of damages and compensation due each claimant, and may affirm, increase, or diminish the amount awarded by the appraisers. [S13,§1989-a6; C24, 27, 31, 35,§7451.]

40ExGA, HF 185, §27, editorially divided

7452 **Dismissal or establishment.** The board shall at said meeting, or at an adjourned session thereof, consider the costs of construction of said improvement as shown by the reports of the engineer and the amount of damages and compensation awarded to all claimants, and if, in its opinion, such costs of construction and amount of damages awarded create a greater burden than should justly be borne by the lands benefited by the improvement, it shall then dismiss the petition and assess the costs and expenses to the petitioners and their bondsmen, but if it finds that such cost and expense is not a greater burden than should be justly borne by the land benefited by the improvement, it shall finally and permanently locate and establish said district and improvement. [S13,§1989-a6; C24, 27, 31, 35,§7452.]

7453 **Dismissal on remonstrance.** If, at or before the time set for final hearing as to the establishment of a proposed levee, drainage, or improvement district, except subdrainage district, there shall have been filed with the county auditor, or auditors, in case the district extends into more than one county, a remonstrance signed by a majority of the landowners in the district, and these remonstrants must in the aggregate own seventy percent or more of the lands to be assessed for benefits or taxed for said improvements, remonstrating against the establishment of said levee, drainage, or improvement district, setting forth the reasons therefor, the board or boards as the case may be, shall assess to the petitioners and their bondsmen or the remonstrators, or apportion the costs among them as the board or boards may deem just or as said parties may agree upon. When all such costs have been paid, the board or boards of supervisors shall dismiss said proceedings and cause to be filed with the county auditor all surveys, plats, reports, and records in relation to the proposed district. [C24, 27, 31, 35,§7453.]

7454 **Dissolution.** When for a period of two years from and after the date of the establishment of a drainage district, or when an appeal is taken or litigation brought against said district within two years from the date such appeal or litigation is finally determined, no contract shall have been let or work done or drainage certificates or bonds issued for the construction of the improvements in such district, a petition may be filed in the office of the auditor, addressed to the board of supervisors, signed by a majority of the persons owning land in such district and who, in the aggregate, own seventy percent or more of all the land embraced in said district, setting forth the above facts and reciting that provision has been made by the petitioners for the payment of all costs and expenses incurred on account of such district. The board shall examine such petition at its next meeting after the filing thereof, and if found to comply with the above requirements, shall dissolve and vacate said district by resolution entered upon its records, to become effective upon the payment of all the costs and expenses incurred in relation to said district. In case of such vacation and dissolution and upon payment of all costs as herein provided, the auditor shall note the same on the drainage record, showing the date when such dissolution became effective. [C24, 27, 31, 35,§7454.]

7455 **Permanent survey, plat, and profile.** When the improvement has been finally located and established, the board may if necessary appoint the said engineer or a new one to make a permanent survey of said improvement as so located, showing the levels and elevations of each forty-acre tract of land and file a report of the same with the county auditor together with a plat and profile thereof. [S13,§1989-a6; C24, 27, 31, 35,§7455.]

7456 **Paying or securing damages.** The amount of damages or compensation finally determined in favor of any claimant shall be paid in the first instance by the parties benefited by the said improvement, or secured by bond in the amount of such damages and compensation with sureties approved by the auditor. [S13, §1989-a7; C24, 27, 31, 35,§7456.]

7457 **Division of improvement.** After the damages as finally fixed, shall have been paid or secured, the board shall divide said improvement into suitable sections, having regard to the kind of work to be done, numbering the same consecutively from outlets to the beginning, and prescribing the time within which the improvement shall be completed. A settling basin, if provided for, may be embraced in a section by itself. [S13,§1989-a7; C24, 27, 31, 35,§7457.]

7458 **Supervising engineer—bond.** Upon the payment or securing of damages, the board shall appoint a competent engineer to have charge of the work of construction thereof, who shall be required before entering upon the work to give a bond to the county for the use and benefit of the levee or drainage district, to be approved by the auditor in such sum as the board may fix, conditioned for the faithful discharge of his duties. [S13,§1989-a7; C24, 27, 31, 35,§7458.]

7459 **Advertisement for bids.** The board shall cause notice to be given by publication once each week for two consecutive weeks in some newspaper published in the county where-

in such improvement is located, and such additional advertisement and publication elsewhere as it may direct, of the time and place of letting the work of construction of said improvement, specifying the approximate amount of work to be done in each numbered section of the district, the time fixed for the commencement, which shall not be prior to the date on which the assessment shall be fixed by the board, and the time of the completion thereof, that bids will be received on the entire work and in sections or divisions thereof, and that each bidder will be required to deposit with his bid cash or certified check on and certified by a bank in Iowa, payable to the auditor or his order, at his office, in an amount equal to ten percent of his bid, in no case to exceed ten thousand dollars. When the estimated cost of the improvement exceeds fifteen thousand dollars, the board shall make additional publication of such notice as the board may prescribe for two consecutive weeks in some contractors journal of general circulation. All notices shall fix the date to which bids will be received, and upon which said work will be let. [C73,§1212; C97,§1944; S13,§1944; SS15,§1989-a8; C24, 27, 31, 35,§7459.]

7460 Bids—letting of work. The board shall award contract or contracts for each section of the work to the lowest responsible bidder or bidders therefor, bids to be submitted, received and acted upon separately as to the main drain and each of the laterals, and each settling basin, if any, exercising their own discretion as to letting such work as to the main drain as a whole, or as to each lateral as a whole, or by sections as to both main drain and laterals, and reserving the right to reject any and all bids and re-advertise the letting of the work. [SS15,§1989-a8; C24, 27, 31, 35,§7460.]

7461 Manner of making bids—deposit. Each bid shall be in writing, specifying the portion of the work upon which the bid is made, and filed with the auditor, accompanied with a deposit of cash or a certified check on and certified by a bank in Iowa, payable to the auditor or his order at his office in a sum equal to ten percent of the amount of the bid, but in any event not to exceed ten thousand dollars. The checks of unsuccessful bidders shall be returned to them, but the checks of successful bidders shall be held as a guarantee that they will enter into contract in accordance with their bids. [SS15,§1989-a8; C24, 27, 31, 35,§7461.]

7462 Performance bond—return of check. Each successful bidder shall be required to execute a bond with sureties approved by the auditor in favor of the county for the use and benefit of the levee or drainage district and all persons entitled to liens for labor or material in an amount not less than seventy-five percent of the contract price of the work to be done, conditioned for the timely, efficient, and complete performance of his contract, and the payment, as they become due, of all just claims for labor performed and material used in carrying out said contract. When such contract is executed and bond approved by the board, the certified check deposited with the bid shall be returned to the bidder. [SS15,§1989-a8; C24, 27, 31, 35,§7462.]

7463 Contracts. All agreements and contracts for work or materials in constructing the improvements of such district shall be in writing, signed by the chairman of the board of supervisors for and on behalf of the district and the parties who are to perform the work or furnish the materials specified in such contract. Such contract shall specify the particular work to be done or materials to be furnished, the time when it shall begin and when it shall be completed, the amount to be paid and the times of payment, with such other terms and conditions as to details necessary to a clear understanding of the terms thereof. [C24, 27, 31, 35,§7463.]

7464 Commissioners to classify and assess. When a levee or drainage district shall have been located and finally established, and the contracts for construction let, or, unless otherwise provided by law, when the required proceedings have been taken to enlarge, deepen, widen, change, or extend any of the ditches, laterals, settling basins, or drains of such district, or the required proceedings have been had to annex additional lands to such district, the board shall appoint three commissioners to assess benefits and classify the lands affected by such improvement. One of such commissioners shall be a competent civil engineer and two of them shall be resident freeholders of the county in which the district is located, but not living within, nor interested in any lands included in, said district, nor related to any party whose land is affected thereby. The commissioners shall take and subscribe an oath of their qualifications and to perform the duties of classification of said lands, fix the percentages of benefits and apportion and assess the costs and expenses of constructing the said improvement according to law and their best judgment, skill, and ability. If said commissioners or any of them fail or neglect to act or perform the duties in the time and as required of them by law, the board shall appoint others with like qualifications to take their places and perform said duties. [SS15, §1989-a12; C24, 27, 31, 35,§7464.]

7465 Duties—time for performance—scale of benefits. At the time of appointing said commissioners, the board shall fix the time within which said assessment, classification, and apportionment shall be made, which may be extended for good cause shown. Within twenty days after their appointment, they shall begin to inspect and classify all the lands within said district, or any change, extension, enlargement, or relocation thereof in tracts of forty acres or less according to the legal or recognized subdivisions, in a graduated scale of benefits to be numbered according to the benefit to be received by each of such tracts from such improvement, and pursue said work continuously until completed and, when completed, shall make a full,

accurate, and detailed report thereof and file the same with the auditor. The lands receiving the greatest benefit shall be marked on a scale of one hundred, and those benefited in a less degree with such percentage of one hundred as the benefits received bear in proportion thereto. They shall also make an equitable apportionment of the costs, expenses, fees, and damages computed on the basis of the percentages fixed. [SS15,§1989-a12; C24, 27, 31, 35, §7465.]

7466 .Rep. by 44GA, ch 186

7467 **Rules of classification.** In the report of the appraisers so appointed they shall specify each tract of land by proper description, and the ownership thereof, as the same appears on the transfer books in the auditor's office.

In estimating the benefits as to the lands not traversed by said improvement, they shall not consider what benefits such land shall receive after some other improvements shall have been constructed, but only the benefits which will be received by reason of the construction of the improvement in question as it affords an outlet to the drainage of such lands, or brings an outlet nearer to said lands or relieves the same from overflow. [S13,§1989-a13; SS15,§1989-a12; C24, 27, 31, 35,§7467.]

Referred to in §7562

7468 **Assessment for lateral ditches.** In fixing the percentages and assessment of benefits and apportionment of costs of construction on lands benefited by lateral ditches and drains as a part of the entire improvement to be made in a drainage district, the commissioners shall ascertain and fix the percentage of benefits and apportionment of costs to the lands benefited by such lateral ditches on the same basis and in the same manner as if said lateral was, with its sublaterals, being constructed as a subdistrict as provided in this chapter, reporting separately:

1. The percentage of benefits and amount accruing to each forty-acre tract or less on account of the construction of the main ditch, drain, or watercourse including pumping plant, if any.

2. The percentage of benefits and amount accruing to each forty-acre tract or less on account of the construction of such lateral improvement. [S13,§1989-a23; SS15,§1989-a12; C24, 27, 31, 35, §7468.]

Referred to in §7562

7469 **Railroad property — collection.** The commissioners to assess benefits and make apportionment of costs and expenses shall determine and assess the benefits to the property of any railroad company extending into or through the levee or drainage district, and make return thereof showing the benefit and the apportionment of costs and expenses of construction. Such assessment when finally fixed by the board shall constitute a debt due from the railroad company to the district, and unless paid it may be collected by ordinary proceedings for the district in the name of the county in any court having jurisdiction. All other proceedings in relation to railroads, except as otherwise provided, shall be the same as provided for individual property owners within the levee or drainage district. [S13,§1989-a18; C24, 27, 31, 35,§7469.]

7470 **Public highways.** When any public highway extends into or through a levee or drainage district, the commissioners to assess benefits shall ascertain and return in their report the amount of benefits and the apportionment of costs and expenses to such highway, and the board of supervisors shall assess the same against such highway.

Such assessments against primary highways shall be paid by the state highway commission from the primary road fund on due certification of the amount by the county treasurer to said commission, and against all secondary roads, from the secondary road construction fund or from the secondary road maintenance fund, or from both of said funds. [S13,§§1989-a19,-a26; C24, 27, 31, 35,§7470.]

7471 **Report of commissioners.** The commissioners, within the time fixed or as extended, shall make and file in the auditor's office a written verified report in tabulated form as to each forty-acre tract, and each tract of less than forty acres, setting forth:

1. The names of the owners thereof as shown by the transfer books of the auditor's office or the reports of the engineer on file, showing said entire classification of lands in said district.

2. The amount of benefits to highway and railroad property and the percentage of benefits to each of said other tracts and the apportionment and amount of assessment of cost and expense against each:

a. For main ditches, and settling basins.

b. For laterals.

c. For levees and pumping station.

3. The aggregate amount of all assessments. [SS15,§1989-a12; C24, 27, 31, 35,§7471.]

7472 **Notice of hearing.** The board shall fix a time for a hearing upon the report of the commissioners, and the auditor shall cause notice to be served upon each person whose name appears as owner, naming him, and also upon the person or persons in actual occupancy of any tract of land without naming him, of the day and hour of such hearing, which notice shall be for the same time and served in the same manner as is provided for the establishment of a levee or drainage district, and shall state the amount of assessment of costs and expenses of construction apportioned to each owner upon each forty-acre tract or less, and that all objections thereto must be in writing and filed with the auditor at or before the time set for such hearing. [SS15,§1989-a12; C24, 27, 31, 35,§7472.]

40ExGA, HF 185, §45, editorially divided

7473 **Hearing and determination.** At the time fixed or at an adjourned hearing, the board

shall hear and determine all objections filed to said report and shall fully consider the said report, and may affirm, increase, or diminish the percentage of benefits or the apportionment of costs and expenses made in said report against any body or tract of land in said district as may appear to the board to be just and equitable. [SS15,§1989-a12; C24, 27, 31, 35,§7473.]

7474 **Evidence—conclusive presumption.** At such hearing, the board may hear evidence both for and against the approval of said report or any portion thereof, but it shall not be competent to show that any of the lands in said district assessed for benefits or against which an apportionment of costs and expenses has been made will not be benefited by such improvement in some degree. Any interested party may be heard in argument by himself or counsel. [SS15, §1989-a12; C24, 27, 31, 35,§7474.]

Similar provision, §7523
40ExGA, HF 185, §46, editorially divided

7475 **Notice of increased assessment.** The board shall cause notice to be served upon the owner of any tract of land against which it is proposed to increase the assessment, requiring him to appear at a fixed date, not less than ten nor more than twenty days from the date of service, and show cause why such assessment should not be so increased, which notice shall be served in the same manner as an original notice upon residents of the county or counties in which the district is located, and upon nonresidents of the county or counties by service on any tenant or occupant of the land affected, and upon any agent of any railroad company affected. [SS15,§1989-a12; C24, 27, 31, 35,§7475.]

Service of notice, §11060 et seq.

7476 **Classification as basis for future assessments.** A classification of land for drainage purposes, when finally adopted, shall remain the basis of all future assessments for the purpose of said district unless revised by the board in the manner provided for reclassification, except that where land included in said classification has been destroyed, in whole or in part, by the erosion of a river, or where additional right-of-way has been subsequently taken for drainage purposes, said land which has been so eroded and carried away by the action of a river or which has been taken for additional right-of-way, may be removed by said board from said district as classified, without any reclassification, and no assessment shall thereafter be made on the land so removed. Any deficiency in assessment existing as the result of said action of the board shall be spread by it over the balance of lands remaining in said district in the same ratio as was fixed in the classification of the lands, payable at the next taxpaying period. [SS15,§1989-a12; C24, 27,§§7466, 7476; C31, 35, §7476.]

7477 **Levy—interest.** When the board has finally determined the matter of assessments of benefits and apportionment, it shall levy such assessments as fixed by it upon the lands within such district, and all assessments shall be levied at that time as a tax and shall bear interest at six percent per annum from that date, payable annually, except as hereinafter provided as to cash payments thereof within a specified time. [SS15,§1989-a12; C24, 27, 31, 35,§7477.]

7478 **Lien of tax.** Such taxes shall be a lien upon all premises against which they are assessed as fully as taxes levied for state and county purposes. [S13,§1989-a45; C24, 27, 31, 35,§7478.]

7479 **Levy for deficiency.** If the first assessment made by the board for the original cost or for repairs of any improvement is insufficient, the board shall make an additional assessment and levy in the same ratio as the first for either purpose, payable at the next taxpaying period after such indebtedness is incurred subject, however, to the provisions of section 7484. [S13,§1989-a26; C24, 27, 31, 35, §7479.]

7480 **Record of drainage taxes.** All drainage or levee tax assessments shall be entered in the drainage record of the district to which they apply, and also upon the tax records of each county. [C24, 27, 31, 35,§7480.]

40ExGA, HF 185, §47, editorially divided

7481 **Funds—disbursement—interest.** Such taxes when collected shall be kept in a separate fund known as the drainage or levee fund of the district to which they belong, and shall be paid out only for purposes properly connected with and growing out of the drainage or levee improvement of such district, and on order of the board. Interest collected by the treasurer on drainage or levee districts funds shall be credited to the drainage or levee district to which such funds belong. [S13,§1989-a13; C24, 27, 31, 35,§7481.]

7482 **Assessments—maturity and collection.** All drainage or levee tax assessments shall become due and payable at the same time as other taxes, and shall be collected in the same manner with the same penalties for delinquency and the same manner of enforcing collection by tax sales. [S13,§1989-a26; C24, 27, 31, 35,§7482.]

Collection of taxes, ch 346

7483 **Payment before bonds or certificates issued.** All assessments for benefits, as corrected and approved by the board, shall be levied at one time against the property benefited, and when levied and certified by the board, shall be payable at the office of the county treasurer. Each person or corporation shall have the right, within twenty days after the levy of assessments, to pay his or its assessment in full without interest, and before any improvement certificate or drainage bond is issued therefor, and any certificate at any time after issue, with accrued interest. [S13,§1989-a26; C24, 27, 31, 35,§7483.]

7484 **Installment payments—waiver.** If the owner of any premises against which a levy exceeding twenty dollars has been made and cer-

tified shall, within thirty days from the date of such levy, agree in writing indorsed upon any improvement certificate referred to in section 7499, or in a separate agreement, that in consideration of having a right to pay his assessment in installments, he will not make any objection as to the legality of his assessment for benefit, or the levy of the taxes against his property, then such owner shall have the following options:

1. To pay one-third of the amount of such assessment at the time of filing such agreement; one-third within twenty days after the engineer in charge shall certify to the auditor that the improvement is one-half completed; and the remaining one-third within twenty days after the improvement has been completed and accepted by the board. All such installments shall be without interest if paid at said times, otherwise said assessments shall bear interest from the date of the levy at the rate of six percent per annum, payable annually, and be collected as other taxes on real estate, with like penalty for delinquency.

2. To pay such assessments in not less than ten nor more than twenty equal installments, the number to be fixed by the board and interest at the rate fixed by the board, not exceeding six percent per annum. One such installment shall be payable at the March semiannual taxpaying date in each year; provided, however, that the county treasurer shall, at the March semiannual taxpaying date, require only the payment of a sufficient portion of the assessments to meet the interest and the amount maturing on bonds or certificates prior to the regular time for the payment of the second installment of taxes and the balance shall be collected with such second installment and without penalty. [S13,§§1989-a26,-a27; SS15,§1989-a12; C24, 27, 31, 35,§7484.]

Referred to in §§7479, 7487

7485 Rep. by 43GA, ch 20,§88

7486 Installment payments after appeal. When an owner takes an appeal from the assessment against any of his land, the option to pay in installments whatever assessment is finally established against such land in said appeal shall continue, if within twenty days after the final determination of said appeal he shall file in the office of the auditor his written election to pay in installments, and within said period pay such installments as would have matured prior to that time if no appeal had been taken, together with all accrued interest on said assessment to the last preceding interest-paying date. [C24, 27, 31, 35,§7486.]

7487 Notice of half and full completion. Within two days after the engineer has filed a certificate that the work is half completed and within two days after the board of supervisors has accepted the completed improvement as in this chapter provided, the county auditor shall notify the owner of each lot or parcel of land who has signed an agreement of waiver as provided in section 7484, of such fact. Such notice shall be given by registered mail sent to such owners, respectively, at the addresses filed with the auditor at the time of making such agreement of waiver. [C24, 27, 31, 35,§7487.]

7488 Lien of deferred installments. No deferred installment of the amount assessed as between vendor and vendee, mortgagor and mortgagee shall become a lien upon the property against which it is assessed and levied until the thirty-first day of December of the year next preceding that in which it is due and payable. [SS15,§1989-a12; C24, 27, 31, 35,§7488.]

7488.1 Surplus funds — application of. Whenever a drainage district has been constructed, consisting of main ditches which are beneficial to the entire district, and also laterals, and where the assessment has been based upon the estimated cost of such main ditches and laterals, and it can be ascertained that the actual cost of construction of such ditches and laterals was less than the estimated cost thereof and that there remains a surplus in the fund of such drainage district, when one-half or more of all assessments have been paid in, then the board of supervisors or joint board of supervisors or other officers having control of such drainage district are authorized to apply not over fifty percent of the surplus upon the assessment due the following year. In case where the original assessment was paid in full, the board of supervisors, or joint board of supervisors, or other officers having control of such drainage district, are authorized to refund to such parties not over fifty percent of the respective proportional parts of such excess assessments or surplus made for such main ditches and laterals, by issue of warrants drawn upon the district fund except that where all construction work has been completed and all assessments paid in full the board of supervisors may refund all of the remaining surplus to the persons paying the assessments. [C35,§7488-e1.]

7489 Laterals—return of excess levy. In all cases where a drainage district has been constructed consisting of main ditches which are beneficial to the entire district, and also of laterals, and where the assessments have been made based upon the estimated cost of such main ditches and laterals, and it can be ascertained that the actual cost of constructing such main ditches and laterals was less than such estimated cost thereof and that there remains a surplus in the fund of such drainage district when all assessments have been paid in, then the board of supervisors or joint board of supervisors, or other officers having control of such drainage district shall be, and hereby are, authorized and directed to refund to such parties the respective proportional parts of such excess assessments or surplus made for such main ditches and laterals by the issue of warrants drawn upon the district fund.

When the assessments on a tract of land have been paid by the different equitable or legal owners thereof, the refund herein provided for shall be made to the several parties in proportion to the amounts paid by each, unless otherwise provided. [C24, 27, 31, 35,§7489.]

7490 Subdrainage district. After the establishment of a drainage district, any person, company, or corporation owning land within such district which has been assessed for benefits, but which is separated from the main ditch, drain, or watercourse for which it has been so assessed, by the land of others, who desires a ditch or drain constructed from his land across the land of such others in order to connect with the main ditch, drain, or watercourse, and shall be unable to agree with such intervening owners on the terms and conditions on which he may enter upon their lands and cause to be constructed such connecting drain or ditch, may file a petition for the establishment of a subdistrict and thereafter the proceedings shall be the same as provided for the establishment of an original district. [S13, §1989-a23; C24, 27, 31, 35,§7490.]

Referred to in §7572
40ExGA, HF185, §52, editorially divided

7491 Presumption—jurisdiction. Such connecting ditch or drain which he shall cause to be constructed shall be presumed conducive to the public health, welfare, convenience, and utility the same as if it had been so constructed as a part of the original improvement of said district. When such subdistrict has been established and constructed it shall become and be a part of the improvement of such drainage district as a whole and be under the control and supervision of the board to the same extent and in every way as if it had been a part of the original improvement of such district. [S13, §1989-a23; C24, 27, 31, 35,§7491.]

7492 Reclassification. After a drainage or levee district has been established and the improvements thereof constructed and put in operation, if the board or boards shall find that the original assessments are not equitable as a basis for the expenses of any enlargement or extension thereof which may have become necessary, they shall order a new classification of all the lands in said district by resolution, and appoint three commissioners, one of whom shall be a civil engineer with qualifications as provided in this chapter and two of whom shall be resident freeholders of the county not living within any township into which the improvement extends, and not interested therein nor related to any party whose land is affected thereby, who shall be duly sworn as hereinbefore provided for such commissioners. [C24, 27, 31, 35,§7492.]

Commissioners, appointment and oath, §7464
40ExGA, HF 185, §54, editorially divided

7493 Bids required. In case the board shall finally determine that any such changes shall be made involving an expenditure of five thousand dollars or more, said work shall be let by bids in the same manner as is provided for the original construction of such improvements. [C24, 27, 31, 35,§7493.]

See §§7459, 7460

7494 Procedure governing reclassification. The proceedings for such reclassification shall in all particulars be governed by the same rules as for original classification. The commissioners shall fix the percentage of actual benefits and make an equitable apportionment of the costs and expenses of construction, enlargement, or extension and file a report thereof with the auditor in the same form and manner as for original classification. Thereafter, all the proceedings in relation thereto as to notice, hearing, and fixing of percentage of benefits and amount of assessments shall be as in this chapter provided in relation to original classification and assessments, and at such hearing the board may affirm, increase, or diminish the percentage and assessment of benefits and apportionment of costs and expenses so as to make them just and equitable, and cause the record of the original classification, percentage of benefits, and assessments to be modified accordingly. [C24, 27, 31, 35,§7494.]

See §§7464, 7471

7495 Drainage warrants received for assessments. Warrants drawn upon the construction or maintenance funds of any district for which an assessment has been or must be levied, shall be transferable by indorsement, and may be acquired by any taxpayer of such district and applied at their accrued face value upon the assessment levied to create the fund against which the warrant was drawn; when the amount of the warrant exceeds the amount of the assessment, the treasurer shall cancel the said warrant, and give the holder thereof a certificate for the amount of such excess, which certificate shall be filed with the auditor, who shall issue a warrant for the amount of such excess, and charge the treasurer therewith. Such certificate is transferable by indorsement, and will entitle the holder to the new warrant, made payable to his order, and bearing the original number, preceded by the words, "Issued as unpaid balance due on warrant number .....". [S13, §1989-a13; C24, 27, 31, 35,§7495.]

7495.1 Bonds received for assessments. Bonds issued for the cost of construction, maintenance or repair of any drainage or levee district, or for the refunding of any obligation of such district, may be acquired by any taxpayer or group of taxpayers of such district, and applied at their face value in the order of their priority, if any priority exists between bonds of the same issue, upon the payment of the delinquent and/or future assessments levied against the property of such taxpayers to pay off the bonds so acquired; the interest coupons attached to such bonds, may likewise be applied at their face value to the payment of assessments for interest accounts, delinquent or future. [C35,§7495-e1.]

7496 to 7498, inc. Rep. by 45ExGA, ch 6

See §1171.11 et seq.

7499 Improvement certificates. The board may provide by resolution for the issuance of improvement certificates payable to bearer or to the contractors, naming them, who have constructed the said improvement or completed any part thereof, in payment or part payment

of such work. [S13,§1989-a26; C24, 27, 31, 35, §7499.]

Referred to in §§7484, 7503

7500 Form, negotiability, and effect. Each of such certificates shall state the amount of one or more drainage assessments or part thereof made against the property, designating it and the owner thereof liable for the payment of such assessments. Said certificates shall be negotiable and transfer to the bearer all right and interest in and to the tax in every such assessment or part thereof described in such certificates, and shall authorize such bearer to collect and receive every assessment embraced in said certificate by or through any of the methods provided by law for their collection as the same mature. [S13, §1989-a26; C24, 27, 31, 35,§7500.]

Referred to in §7503

7501 Interest—place of payment. Such certificates shall bear interest not to exceed six percent per annum, payable annually, and shall be paid by the taxpayer to the county treasurer, who shall receipt for the same and cause the amount to be credited on the certificates issued therefor. [S13,§1989-a26; C24, 27, 31, 35,§7501.]

Referred to in §7503

7502 Sale at par—right to pay. Any person shall have the right to pay the amount of his assessment represented by any outstanding improvement certificate, with the interest thereon to the date of such payment, at any time. No improvement certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or transfer thereof. Every such certificate, when paid, shall be delivered to the treasurer and by him surrendered to the party to whose assessment it relates. [S13, §§1989-a26,-a27; C24, 27, 31, 35,§7502.]

Referred to in §7503

7503 Drainage bonds. When a drainage district has been established or the making of any subsequent repair or improvement determined upon, if the board of supervisors shall find that the cost of such improvement will create assessments against the land included therein greater than should be levied in a single year upon the lands benefited by such improvement, then, instead of issuing improvement certificates, as provided in sections 7499 to 7502, inclusive, the board may fix the amount that shall be levied and collected each year until such cost and expenses are paid, and may issue drainage bonds of the county covering all assessments exclusive of assessments of twenty dollars and less. [C97,§1953; S13,§1989-a27; C24, 27, 31, 35,§7503.]

Referred to in §7507

7504 Form. Each of such bonds shall be numbered and have printed upon its face that it is a "Drainage Bond", stating the county and number of the district for which it is issued, the date and maturity thereof, that it is in pursuance of a resolution of the board of supervisors, that it is to be paid only from taxes for levee and drainage improvement purposes levied and collected on the lands assessed for benefits within the district for which the bond is issued. [S13,§1989-a27; C24, 27, 31, 35,§7504.]

Referred to in §7507
40ExGA, HF 185, §69, editorially divided

7505 Amount — interest — maturity. In no case shall the aggregate amount of all bonds issued exceed the benefits assessed. Such bonds shall not be issued for a greater amount than the aggregate amount of assessments for the payment of which they are issued, nor for a longer period of maturity than twenty years, and bear a rate of interest not to exceed five percent per annum, payable semiannually, on June 1 and December 1 of each year. [C97, §1953; S13,§1989-a27; C24, 27, 31, 35,§7505.]

Referred to in §§5526.21, 7507

7506 Maturity—interest—highway benefits. The board shall fix the amount, maturity, and interest of all bonds to be issued. It shall determine the amount of assessments to highways for benefits within the district to be covered by each bond issue. The taxes levied for benefits to highways within any drainage or levee district shall be paid at the same times and in the same proportion as assessments against the lands of private owners. [S13,§1989-a27; C24, 27, 31, 35,§7506.]

Referred to in §§5526.21, 7507

7507 When issued. The bonds issued under the provisions of sections 7503 to 7506, inclusive, or the proceeds thereof shall be issued in time to be available for the use of the district at a date not later than ninety days after the actual commencement of the work on the improvements of such district; but in districts where an appeal or appeals have been taken, not later than ninety days after such appeals have been finally determined. [C24, 27, 31, 35,§7507.]

Referred to in §7615

7508 Sale or application at par—premium. Such bonds may be applied at par with accrued interest to the payment of work as it progresses upon the improvements of the district, or, the board may sell, through the county treasurer, said bonds at not less than par with accrued interest and devote the proceeds to such payment. Any premium derived from the sale of said bonds shall be credited to the drainage fund of the district. [C97,§1953; S13,§1989-a27; C24, 27, 31, 35,§7508.]

40ExGA, HF 185, §67, editorially divided

7509 Deficiency levy—additional bonds. If any levy of assessments is not sufficient to meet the interest and principal of outstanding bonds, additional assessments may be made on the same classification as the previous ones. Additional bond issues may be made when necessary to complete full payment for improvements, by the same proceedings as previous issues. [C97, §1953; S13,§1989-a27; C24, 27, 31, 35,§7509.]

7509.1 Funding or refunding indebtedness. Drainage districts may settle, adjust, renew, or extend the time of payment of the legal indebt-

edness they may have, or any part thereof, in the sum of one thousand dollars or upwards, whether evidenced by bonds, warrants, certificates, or judgments, and may fund or refund the same and issue bonds therefor in the manner provided in section 7663. [C27, 31, 35,§7509-a1.]

Additional provisions, ch 358.1

7510 Record of bonds. A record of the numbers, amounts, and maturities of all such bonds shall be kept by the auditor showing specifically the lands embraced in the district upon which the tax has not been previously paid in full. [S13,§1989-a27; C24, 27, 31, 35,§7510.]

7511 Assessments payable in cash. All assessments of twenty dollars and less shall be paid in cash. [C24, 27, 31, 35,§7511.]

40ExGA, HF 185, §68, editorially divided

7512 Payment before bonds issued. The board at the time of making the levy, shall fix a time within which all assessments in excess of twenty dollars may be paid in cash, and before any bonds are issued, publish notice in an official newspaper in the county where the district is located, of such time. After the expiration of such time, no assessments may be paid except in the manner and at the times fixed by the board in the resolution authorizing the issue of the bonds. [C24, 27, 31, 35,§7512.]

7513 Appeals. Any person aggrieved may appeal from any final action of the board in relation to any matter involving his rights, to the district court of the county in which the proceeding was held. [S13,§§1989-a6,-a11,-a14; C24, 27, 31, 35,§7513.]

7514 Appeals in intercounty districts. In districts extending into two or more counties, appeals from final orders resulting from the joint action of the several boards or the board of trustees of such district may be taken to the district court of any county into which the district extends. [S13,§1989-a35; C24, 27, 31, 35, §7514.]

7515 Time and manner. All appeals shall be taken within twenty days after the date of final action or order of the board from which such appeal is taken by filing with the auditor a notice of appeal, designating the court to which the appeal is taken, the order or action appealed from, and stating that the appeal will come on for hearing at the next succeeding term of the court and designating such term. This notice shall be accompanied by an appeal bond with sureties to be approved by the auditor conditioned to pay all costs adjudged against the appellant and to abide the orders of the court. [S13,§§1989-a6,-a14,-a35; C24, 27, 31, 35,§7515.]

Referred to in §§5526.33, 7516, 7714.08
Presumption of approval of bond, §12759.1

7516 Transcript. When notice of any appeal with the bond as required by section 7515 shall be filed with the auditor, he shall forthwith make and certify a transcript of the notice of appeal and appeal bond, and file the same with the clerk. [S13,§1989-a14; C24, 27, 31, 35,§7516.]

Referred to in §5526.33

7517 Petition — docket fee — waiver — dismissal. On or before the first day of the next succeeding term of court, the appellant shall file a petition setting forth the order or final action of the board appealed from and the grounds of his objections and his complaint, with a copy of his claim for damages or objections filed by him with the auditor. He shall pay to the clerk the filing fee as provided by law in other cases. A failure to pay the filing fee or to file such petition shall be deemed a waiver of the appeal and in such case the court shall dismiss the same. [S13,§1989-a14; C24, 27, 31, 35,§7517.]

Referred to in §5526.33
Fee, §10837, subsection 1
40ExGA, HF 185, §76, editorially divided

7518 Pleadings on appeal. It shall not be necessary for the appellees to file an answer to the petition unless some affirmative defense is made thereto, but they may do so. [S13, §1989-a14; C24, 27, 31, 35,§7518.]

Referred to in §5526.33

7519 Proper parties—employment of counsel. In all actions or appeals affecting the district, the board of supervisors shall be a proper party for the purpose of representing the district and all interested parties therein, other than the adversary parties, and the employment of counsel by the board shall be for the purpose of protecting the rights of the district and interested parties therein other than the adversary parties. [S13,§1989-a14; C24, 27, 31, 35, §7519.]

Referred to in §5526.33
40ExGA, HF 185, §77, editorially divided

7520 Plaintiffs and defendants. In all appeals or actions adversary to the district, the appellant or complaining party shall be entitled the plaintiff, and the board of supervisors and drainage district it represents, the defendants. [S13,§1989-a14; C24, 27, 31, 35,§7520.]

Referred to in §5526.33

7521 Right of board and district to sue. In all appeals or actions for or in behalf of the district, the board and the drainage district it represents may sue as the plaintiffs. [S13, §1989-a14; C24, 27, 31, 35,§7521.]

Referred to in §5526.33

7522 Trial on appeal — consolidation. Appeals from orders or actions of the board fixing the amount of compensation for lands taken for right-of-way or the amount of damages to which any claimant is entitled shall be tried as ordinary proceedings. All other appeals shall be triable in equity. The court may, in its discretion, order the consolidation for trial of two or more of such equitable cases. [S13,§§1989-a6, -a14,-a35; C24, 27, 31, 35,§7522.]

Referred to in §5526.33

7523 Conclusive presumption on appeal. On the trial of an appeal from the action of the board in fixing and assessing the amount of benefits to any land within the district as established, it shall not be competent to show that any lands assessed for benefits within said dis-

trict as established are not benefited in some degree by the construction of the said improvement. [SS15,§1989-a12; C24, 27, 31, 35,§7523.]

Referred to in §5526.33
Similar provision, §7474

7524 Order as to damages—duty of clerk. If the appeal is from the action of the board as to the amount of damages or compensation awarded, the amount found by the court shall be entered of record, but no judgment shall be rendered therefor. The amount thus ascertained shall be certified by the clerk of said court to the board of supervisors who shall thereafter proceed as if such amount had been by it allowed to the claimant. [S13,§1989-a6; C24, 27, 31, 35,§7524.]

Referred to in §5526.33
40ExGA, HF 185, §81, editorially divided

7525 Costs. Unless the result on the appeal is more favorable to the appellant than the action of the board, all costs of the appeal shall be taxed to the appellant, but if more favorable, the cost shall be taxed to the appellees. [S13, §1989-a6; C24, 27, 31, 35,§7525.]

Referred to in §5526.33

7526 Decree as to establishing district or including lands. On appeal from the action of the board in establishing or refusing to establish said district, or in including land within the district, the court may enter such order or decree as may be equitable and just in the premises, and the clerk of said court shall certify the decree or order to the board of supervisors which shall proceed thereafter in said matter as if such order had been made by the board. The taxation of costs among the litigants shall be in the discretion of the court. [S13,§1989-a6; C24, 27, 31, 35,§7526.]

Referred to in §5526.33

7527 Appeal as exclusive remedy—nonappellants. Upon appeal the decision of the court shall in no manner affect the rights or liabilities of any person who did not appeal. The remedy by appeal provided for in this chapter shall be exclusive of all other remedies. [S13, §1989-a46; C24, 27, 31, 35,§7527.]

Referred to in §5526.33

7528 Reversal by court—rescission by board. In any case where the decree has been entered setting aside the establishment of a drainage district for errors in the proceedings, and such decree becomes final, the board shall rescind its order establishing the drainage district, assessing benefits, and levying the tax based thereon, and shall also cancel any contract made for construction work or material, and shall refund any and all assessments paid. [S13,§1989-a14; C24, 27, 31, 35,§7528.]

Referred to in §5526.33

7529 Setting aside establishment — procedure. After the court on appeal has entered a decree revising or modifying the action of the board, the board shall fix a new date for hearing, and proceed in all particulars in the manner provided for the original establishment of the district, avoiding the errors and irregularities for which the original establishment was set aside, and after a valid establishment thereof, proceed in all particulars as provided by law in relation to the original establishment of such districts. [S13,§1989-a14; C24, 27, 31, 35,§7529.]

Referred to in §5526.33

7530 Reassessment to cure illegality. Whenever any special assessment upon any lands within any drainage district shall have been heretofore adjudged to be void for any jurisdictional defect or for any illegality or uncertainty as to the terms of any contract and the improvement shall have been wholly completed, the board or boards of supervisors shall have power to remedy such illegality or uncertainty as to the terms of any such contract with the consent of the person with whom such contract shall have been entered into and make certain the terms of such contract and shall then cause a reassessment of such land to be made on an equitable basis with the other land in the district by taking the steps required by law in the making of an original assessment and relevying the tax in accordance with such assessment, and such tax shall have the same force and effect as though the board or boards of supervisors had jurisdiction in the first instance and no illegality or uncertainty existed in the contract. [C24, 27, 31, 35,§7530.]

Referred to in §5526.33

7531 Monthly estimate—payment. The supervising engineer shall, on or before the tenth day of each calendar month, furnish the contractor and file with the auditor estimates for work done during the preceding calendar month under the contract on each section, and the auditor shall at once draw warrants in favor of such contractor on the drainage funds of the district or give him an order directing the county treasurer to deliver to him or them improvement certificates, or drainage bonds as the case may be, for eighty percent of the estimate on work done. Such monthly estimates shall remain on file in the office of the auditor as a part of the permanent records of the district to which they relate. [C97,§1944; S13,§§1944, 1989-a9; C24, 27, 31, 35,§7531.]

7532 Completion of work—report—notice. When the work to be done under any contract is completed to the satisfaction of the engineer in charge of construction, he shall so report and certify to the board, which shall fix a day to consider said report and shall give notice of the time and purpose of such meeting by one publication in a newspaper of general circulation published in said county and the date fixed for considering said report shall be not less than five days after the date of such publication. [S13, §1989-a9; C24, 27, 31, 35,§7532.]

Referred to in §5526.18

7533 Objections. Any party interested in the said district or the improvement thereof may file objections to said report and submit any evidence tending to show said report should not be accepted. [C24, 27, 31, 35,§7533.]

Referred to in §5526.18

7534 Final settlement. If it finds the work under any contract has been completed and accepted, the board shall compute the balance due, and if there are no liens on file against such balance, it shall enter of record an order directing the auditor to draw a warrant in favor of said contractor upon the levee or drainage fund of said district or give him an order directing the county treasurer to deliver to him improvement certificates or drainage bonds, as the case may be, for such balance found to be due, but such warrants, improvement certificates or bonds shall not be delivered to the contractor until the expiration of thirty days after the acceptance of the work. [C73,§1212; C97,§1944; S13,§§1944, 1989-a9; C24, 27, 31, 35,§7534.]

Filing of claims, §10308

7535 Abandonment of work. In case any contractor abandons or fails to proceed diligently and properly with the work before completion, or in case he fails to complete the same in the time and according to the terms of the contract, the board shall make written demand on him and his surety to proceed with the work within ten days. Service of said demand may be personal, or by registered mail addressed to the contractor and the surety, respectively, at their places of residence or business, as shown by the records in the auditor's office. [S13,§§1944, 1989-a10; C24, 27, 31, 35,§7535.]

Referred to in §5526.17

7536 New contract—suit on bond. Unless the contractor or the surety on his bond shall appear and in good faith proceed to comply with the demand, and resume work under the contract within the time fixed, the board shall proceed to let contracts for the unfinished work in the same manner as original contracts, and apply all funds not paid to the original contractor toward the completion of the work, and if not sufficient for such purpose, may cause suit to be brought upon the bond of the defaulting contractor for the benefit of the district, and the amount of recovery thereon shall be credited to the district. [C73,§1212; C97,§1944; S13,§§1944, 1989-a10; C24, 27, 31, 35,§7536.]

Referred to in §5526.17

7537 Construction on or along highway. When a levee or drainage district shall have been established by the board and it shall become necessary or desirable that the levee, ditch, drain, or improvement shall be located and constructed within the limits of any public highway, it shall be so built as not materially to interfere with the public travel thereon. [S13,§1989-a20; C24, 27, 31, 35,§7537.]

40ExGA, HF 185, §94, editorially divided

7538 Establishment of highways. The board shall have power to establish public highways along and upon any levee or embankment along any such ditch or drain, but when so established the same shall be worked and maintained as other highways and so as not to obstruct or impair the levee, ditch, or drain. [S13,§1989-a20; C24, 27, 31, 35,§7538.]

7539 Bridges. When such levee, ditch, drain, or change of any natural watercourse crosses a public highway, necessitating moving or building or rebuilding any secondary road bridge, the board of supervisors when in the exercise of its sound discretion it appears that it will promote the general public welfare shall move, build, or rebuild the same, paying the costs and expenses thereof from either or both of the secondary road funds.

If the bridge be a primary road bridge, the work aforesaid shall be done by the state highway commission and paid for out of the primary road fund. [S13,§1989-a19; C24, 27, 31, 35, §7539; 47GA, ch 200,§1.]

Primary and secondary roads, chs 240–242

7540 Construction across railroad. Whenever the board of supervisors shall have established any levee, or drainage district, or change of any natural watercourse and the levee, ditch, drain, or watercourse as surveyed and located crosses the right-of-way of any railroad company, the county auditor shall immediately cause to be served upon such railroad company, in the manner provided for the service of original notices, a notice in writing stating the nature of the improvement to be constructed, the place where it will cross the right-of-way of such company, and the full requirements for its complete construction across such right-of-way as shown by the plans, specifications, plat, and profile of the engineer appointed by the board, and directing such company to construct such improvement according to said plans and specifications at the place designated, across its right-of-way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right-of-way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it. [S13, §1989-a18; C24, 27, 31, 35,§7540.]

Referred to in §7541
Manner of service, §11060 et seq.

7541 Duty to construct. Upon receiving the notice provided in section 7540, such railroad company shall construct the improvement across its right-of-way according to the plans and specifications prepared by the engineer for said district, and build or rebuild the necessary culvert or bridge and complete the same within the time specified. [S13,§1989-a18; C24, 27, 31, 35,§7541.]

40ExGA, HF 185, §97, editorially divided

7542 Bridges at natural waterway—costs. The cost of building, rebuilding, constructing, reconstructing, changing, or repairing, as the case may be, any culvert or bridge, when such improvement is located at the place of the natural waterway or place provided by the railroad company for the flow of the water, shall be borne by such railroad company without reimbursement therefor. [S13,§1989-a18; C24, 27, 31, 35,§7542.]

7543 Construction when company refuses. If the railroad company shall fail, neglect, or

refuse to comply with said notice, the board shall cause the same to be done under the supervision of the engineer in charge of the improvement, and such railroad company shall be liable for the cost thereof to be collected by the county for said district in any court having jurisdiction. [S13,§1989-a18; C24, 27, 31, 35, §7543.]

40ExGA, HF 185, §98, editorially divided

7544 Cost of construction across railway. The cost of constructing the improvement across the right-of-way of such company, not including the cost of building or rebuilding and constructing or reconstructing any necessary culvert or bridge, when such improvement is located at the place of the natural waterway or place provided by the railroad company for the flow of the water, shall be considered as an element of such company's damages by the appraiser to appraise damages. [S13,§1989-a18; C24, 27, 31, 35,§7544.]

7545 Passing drainage equipment across railway. It shall be the duty of any steam or electric railway company to furnish the contractor unrestricted passage across its right-of-way, telegraph, telephone, and signal lines for his machines and equipment, whenever recommended by the engineer and approved by the board of supervisors, and the cost thereof shall be considered as an element of such company's damages by the appraisers thereof; provided that if such company shall fail to do so within thirty days after written notice from the auditor, the engineer shall cause the same to be done under his direction and the company shall be liable for the cost thereof to be collected by the county in any court having jurisdiction. Provided, further, that the railway company shall have the right to designate the day and hours thereof within said period of thirty days above mentioned when such crossing shall be made. [C24, 27, 31, 35,§7545.]

7546 Passage across other public utilities. The owner or operator of a public utility, whether operated publicly or privately other than steam and electric railways shall afford the contractor of any drainage project under this chapter unrestricted passage for his machines and equipment across the right-of-way lines or other equipment of such utility whenever recommended by the engineer and approved by the board of supervisors. [C24, 27, 31, 35,§7546.]

7547 Failure to comply. If the owner or operator of the utility fails to afford such passage within fifteen days after written notice from the drainage engineer so to do, the contractor, under the supervision of the engineer, may proceed to do the necessary work to afford such passage and to place said utility in the same condition as before said passage; but the owner or operator shall have the right to designate the hours of the day when such crossing or passage shall be made. [C24, 27, 31, 35, §7547.]

7548 Expenses attending passage. The work necessary to afford such passage shall be deemed to be covered by and included in the contract with the district under which the contractor is operating, and if the work is done by the owner or operator of such utility the reasonable expense thereof shall be paid out of the drainage funds of the district and charged to the account of the contractor. [C24, 27, 31, 35,§7548.]

7549 Annexation of additional lands. After the establishment of a levee or drainage district, if the board becomes convinced that additional lands are benefited by the improvement and should have been included in the district as originally established, it may adopt a resolution of necessity for annexation of such additional land and appoint an engineer with the qualifications provided in this chapter to examine such additional lands, to make a survey and plat thereof showing their relation, elevation, and conditions of drainage with reference to such established district, and to make and file with the auditor a report as in this chapter provided for the original establishment of such district. [S13,§1989-a54; C24, 27, 31, 35,§7549.]

7550 Proceedings on report. If said report recommends the annexation of such lands or any portion thereof, the board shall consider such report, plats, and profiles and if satisfied that any of such lands are materially benefited by the district and that such annexation is feasible, expedient, and for the public good, it shall proceed in all respects as to notice, hearing, appointment of appraisers to fix damages and as to hearing thereon; and (if such annexation is finally made), as to classification and assessment of benefits, to the same extent and in the same manner as provided in the establishment of an original district. All parties shall have the right to receive notice, to make objections, to file claims for damages, to have hearing, to take appeals and to do all other things to the same extent and in the same manner as provided in the establishment of an original district. [S13,§1989-a54; C24, 27, 31, 35,§7550.]

7551 Petition for annexation. Annexation may be made and brought under the jurisdiction of the board for all of said purposes upon the petition of the owners of all the lands to be annexed. [S13,§1989-a54; C24, 27, 31, 35,§7551.]

7552 Use of former and abandoned surveys. In cases where proceedings have been taken for the establishment of a levee or drainage district and an engineer has been appointed who has made a survey, return, and plat thereof and for any reason the improvement has been abandoned and the proceedings dismissed, and afterwards proceedings are instituted for the establishment of a levee or drainage district which will benefit any territory surveyed in said former proceedings, the engineer shall use so much of the return, levels, surveys, plat, and profile made in the former proceedings as may be applicable. He shall specify in his reports the parts thereof so used, and in case the cost of said returns, levels, surveys, plat, and profile

made in said former proceedings has been paid by the former petitioners or their bondsmen, then a reasonable amount shall be allowed said petitioners or bondsmen for the use of the same. [S13,§1989-a16; C24, 27, 31, 35,§7552.]

7553 Unsuccessful procedure—re-establishment. When proceedings have been instituted for the establishment of a drainage district or for any change or repair thereof, or the change of a natural watercourse, and the establishment thereof has failed for any reason either before or after the improvement is completed, the board shall have power to re-establish such district or improvement and any new improvement in connection therewith as recommended by the report of the engineer. As to all lands benefited by such re-establishment, repair, or improvement, the board shall proceed in the same manner as in the establishment of an original district, using as a basis for assessment the entire cost of the proceedings, improvement, and maintenance from the beginning; but in awarding damages and in the assessment of benefits account shall be taken of the amount of damages and taxes, if any, theretofore paid by those benefited, and credit therefor given accordingly. All other proceedings shall be the same as for the original establishment of the district, making of improvements, and assessment of benefits. [S13,§§1989-a17,-a50; C24, 27, 31, 35,§7553.]

7554 New district including old district. If any levee or drainage district or improvement established either by legal proceedings or by private parties shall be insufficient to properly drain all of the lands tributary thereto, the board upon petition as for the establishment of an original levee or drainage district, shall have power to establish a new district covering and including such old district or improvement together with any additional lands deemed necessary. All outstanding indebtedness of the old levee or drainage district shall be assessed only against the lands included therein. [S13, §1989-a25; C24, 27, 31, 35,§7554.]

Referred to in §7555

7555 Credit for old improvement. When such district as contemplated in section 7554 and the new improvement therein shall include the whole or any part of the former improvement, the commissioners, for classification of lands for assessment of benefits and apportionment of costs and expenses of such new improvement, shall take into consideration the value of such old improvement in the construction of the new one and allow proper credit therefor to the parties owning the old improvement as their interests may appear. In all other respects the same proceedings shall obtain as are provided for the original establishment of levee and drainage districts. [S13,§1989-a25; C24, 27, 31, 35,§7555.]

7556 Repair. When any levee or drainage district shall have been established and the improvement constructed the same shall be at all times under the supervision of the board of supervisors except as otherwise provided for control and management by a board of trustees, and it shall be the duty of the board to keep the same in repair and for that purpose it may cause the ditches, drains, and watercourses thereof to be enlarged, reopened, deepened, widened, straightened or lengthened, or the location changed for better service, or may cause any part thereof to be converted into a closed drain when considered for the best interest of the public, and in connection with said work may construct settling basins.

Where under laws in force prior to 1904 drainage ditches and levees were established and constructed without fixing at the time of establishment a definite boundary line for the body of land to be assessed for the cost thereof, the body of land which was last assessed to pay for the repair thereof shall also be considered as an established drainage district for the purpose of maintaining such drainage improvements. [S13,§1989-a21; C24, 27, 31, 35,§7556.]

Referred to in §7561
40ExGA, HF 185, §116, editorially divided

7557 Payment. Such repairs shall be paid for out of the funds of the levee or drainage district in the hands of the county treasurer, if there be any. [S13,§1989-a21; C24, 27, 31, 35, §7557.]

Referred to in §7561

7558 Assessment without notice. If such funds are not sufficient and the cost thereof does not exceed ten percent of the original cost of the improvements in the district a new assessment shall be made on the basis of the old apportionment and no notice of such assessment shall be necessary. [S13,§1989-a21; C24, 27, 31, 35,§7558.]

Referred to in §7561

7559 Assessment with notice. If the cost thereof does exceed ten percent of the original cost of the improvements in the district, and the nature and/or amount of work proposed differs from mere repairs as defined in section 7561, then the board shall order a new apportionment of, and assessment upon, the lands in the district to be made; and the same proceedings shall be had and the same rules shall be applied as are provided in this chapter for an original establishment and assessment; and the same right to appeal shall be given to any interested party. [S13,§1989-a21; C24, 27, 31, 35,§7559.]

Referred to in §7561

7560 Additional land. If additional land is required in making such repairs or changes then the same proceedings shall be had as to such additional land as are provided in this chapter for the original establishment of the district and the same rights shall be given all interested parties including the right of appeal from the decision of the board concerning any inclusion of land, damages, apportionment of benefits, and assessment for costs. [S13,§1989-a21; C24, 27, 31, 35,§7560.]

Referred to in §7561

7561 Separate assessments for main ditch and laterals. Notwithstanding the provisions

of sections 7556 to 7560, inclusive, so much of the cost of the work and materials as is required to clean out any specific open ditch or main so as to restore it to its original efficiency or capacity and to preserve its sides at a practical slope must be assessed to the lands in the whole district in the same proportion as the costs and expenses of the construction of such specific open ditch was originally assessed to said lands; and so much of the cost of the work and materials as is required to restore any tile line or tile lateral to its original efficiency, or to clean any tile line, or to replace broken or defective tile, or to rebuild any bulkhead, must be assessed to the lands benefited by such specific tile line or tile lateral in the same proportion as the original cost thereof. [C24, 27, 31, 35,§7561.]

Referred to in §§7559, 7563
40ExGA, HF 185, §116-a2, editorially divided

7562 **Reclassification required.** If, however, it shall appear that the original assessment or apportionment did not designate separately the amount each tract should pay for the main ditch or drain and the amount it should pay for the tile lateral drain, then the board shall make such reclassification whenever a new assessment is necessary for repairs or changes according to the principles and rules set forth in sections 7467 and 7468, provided, however, where the district was established prior to the year 1928, the board or trustees of drainage districts, shall have the right at its discretion to levy the cost of such reassessment on the lands of the district according to the original classification and apportionment where such assessment does not exceed fifteen percent of the original cost of the district. [C24, 27, 31, 35,§7562.]

Referred to in §7563

7563 **Improvement of common outlet.** When two or more drainage districts outlet into the same ditch, drain, or natural watercourse and the board determines that it is necessary to clean out, deepen, enlarge, extend, or straighten said ditch, drain, or natural watercourse in order to expeditiously carry off the combined waters of such districts, the board may proceed as provided in sections 7561 and 7562. Each district shall be assessed for the cost of such work in proportion to the benefits derived. [S13,§1989-a24; C24, 27, 31, 35,§7563.]

7564 **Commissioners to apportion benefits.** For the purpose of ascertaining the proportionate benefits, the board shall appoint commissioners having the qualifications of benefit commissioners, one of whom shall be an engineer, to determine the percentage of benefits and the sum total to be assessed to each district for the improvement. [C24, 27, 31, 35,§7564.]

7565 **Time of report.** When said commissioners are appointed, the board shall, by proper order, fix the time when the commissioners shall report their findings, but a report filed within thirty days of the time so fixed shall be deemed a compliance with said order. [C24, 27, 31, 35, §7565.]

7566 **Report and review.** The commissioners shall file with the board a detailed report of their findings. Said board shall review said report and may, by proper order, increase or decrease the amount which shall be charged to each district. [C24, 27, 31, 35,§7566.]

40ExGA, HF 185, §116-a6, editorially divided

7567 **Levy under original classification.** If the amount finally charged against a district does not exceed ten percent of the original cost of the improvement in said district, the board shall proceed to levy said amount against all lands, highways, and railway rights-of-way and property within the district, in accordance with the original classification and apportionment. [C24, 27, 31, 35,§7567.]

7568 **Levy under reclassification.** If the amount finally charged against a district exceeds ten percent of the original cost of the improvement, the board shall order a reclassification as provided for the original classification of a district and upon the final adoption of the new classification and apportionment shall proceed to levy said amount upon all lands, highways, and railway rights-of-way and property within the district, in accordance with said new classification and apportionment. [C24, 27, 31, 35,§7568.]

7569 **Removal of obstructions.** The board shall cause to be removed from the ditches, drains, and laterals of any district any obstructions which interfere with the flow of the water, including trees, hedges, or shrubbery and the roots thereof, and may cause any tile drain so obstructed to be relaid in concrete or any other adequate protection, such work to be paid for from the drainage funds of the district. [C24, 27, 31, 35,§7569.]

7570 **Trees and hedges.** When it becomes necessary to destroy any trees or hedges outside the right-of-way of any ditch, lateral, or drain in order to prevent obstruction by the roots thereof, if the board and the owners of such trees or hedges cannot agree upon the damage for the destruction thereof, the board may proceed to acquire the right to destroy and remove such trees or hedges by the same proceedings provided for acquiring right-of-way for said drainage improvement in the first instance. [C24, 27, 31, 35,§7570.]

Similar provision, §7650

7571 **Outlet for lateral drains—specifications.** The owner of any premises assessed for the payment of the costs of location and construction of any ditch, drain, or watercourse as in this chapter provided, shall have the right to use the same as an outlet for lateral drains from his premises. The board of supervisors shall make specifications covering the manner in which such lateral drains shall be connected with the main ditches or other laterals and be maintained, and the owner shall follow such specifications in making and maintaining any such connection. [S13,§1989-a22; C24, 27, 31, 35,§7571.]

7572 Subdistricts in intercounty districts. The board of supervisors of any county shall have jurisdiction to establish subdrainage districts of lands included within a district extending into two or more counties when the lands to compose such subdistricts lie wholly within such county, and to make improvements therein, repair and maintain the same, fix and levy assessments for the payment thereof, and the provisions of this section shall apply to all such drainage subdistricts, the lands of which lie wholly within one county. The proceedings for all such purposes shall be the same as for the establishment, construction, and maintenance of an original levee or drainage district the lands of which lie wholly within one county, so far as applicable, except that one or more persons may petition for a subdistrict as provided in section 7490. [S13,§1989-a37; C24, 27, 31, 35,§7572.]

7573 District by mutual agreement — presumption. The owners of lands may provide by mutual agreement in writing duly signed, acknowledged, and filed with the auditor for combined drainage of their lands by the location and establishment of a drainage district for such purposes and the construction of drains, ditches, settling basins, and watercourses upon and through their said lands. Such drainage district shall be presumed to be conducive to the public welfare, health, convenience, or utility. [S13,§1989-a28; C24, 27, 31, 35,§7573.]

7574 What the agreement shall contain. Such agreement shall contain the following:

1. A description of the lands by congressional divisions, metes, and bounds, or other intelligible manner, together with the names of the owners of all said lands.
2. The location of the drains and ditches to be constructed, describing their sources and outlets and the courses thereof.
3. The character and extent of drainage improvement to be constructed, including settling basins, if any.
4. The assessment of damages, if any.
5. The classification of the lands included in such district, the amount of drainage taxes or special assessments to be levied upon and against the several tracts, and when the same shall be levied and paid.
6. Such other provisions as may be mutually agreed upon relating to establishment and maintenance of such joint and mutual drainage district. [S13,§1989-a28; C24, 27, 31, 35,§7574.]

7575 Board to establish. When such agreement is filed with the auditor he shall record it in the drainage record. The board shall at a regular, special, or adjourned session thereafter locate and establish a drainage district and locate the ditches, drains, settling basins, and watercourses thereof as provided in said agreement, and enter of record an order accordingly. The board thereafter shall carry out the object, purpose, and intent of such agreement and cause to be completed and constructed the said improvement and shall retain jurisdiction of the same as fully as in districts established in any other manner. It shall cause to be levied upon and against the lands of such district, the drainage taxes and assessments according to said agreement and when collected said taxes and assessments shall constitute the drainage funds of said district to be applied upon order of the board as in said agreement provided. [S13,§1989-a28; C24, 27, 31, 35,§7575.]

7576 Procedure. The board shall proceed to carry out the provisions of the agreement, advertising for and receiving bids, letting the work, making contracts, levying assessments, paying on estimates, issuing warrants, improvement certificates, or drainage bonds as the case may be, in the same manner as in districts established on petition, except as in said mutual agreement otherwise provided. [S13,§1989-a28; C24, 27, 31, 35,§7576.]

7577 Outlet in adjoining county. When a drainage district is established in any county in the state and no practicable outlet can be obtained except through lands in an adjoining county, the board of the county in which the district is located shall have power to purchase a right-of-way for such outlet in such adjoining county and pay for the same out of the funds of such district. In case the board and the owners of the land required for such outlet cannot agree upon the price to be paid as compensation for the land taken, such board is hereby empowered to exercise the right of eminent domain in order to procure such necessary right-of-way. [S13,§1989-a55; C24, 27, 31, 35,§7577.]

Condemnation procedure, ch 366

7578 Outlet in another state. When a district is, or has been established in this state and no practicable outlet therefor can be obtained except through lands in an adjoining state, the board of supervisors of the county where said district is situated shall, as drainage commissioners, have power to purchase a right-of-way and to construct a ditch for such outlet in an adjoining state or to contribute to the construction of such a ditch, in an adjoining state and to pay for the same out of the funds of such district. [S13,§1989-a39; C24, 27, 31, 35,§7578.]

Referred to in §7578.1

7578.1 Tax. The board of supervisors shall have authority to levy a tax on the lands in said drainage district established in this state to provide funds from which to pay for the improvement referred to in section 7578 should such levy be necessary. [C31, 35,§7578-c1.]

7579 Injuring or diverting—damages. Any person who shall wilfully break down or through or injure any levee or bank of a settling basin, or who shall dam up, divert, obstruct, or wilfully injure any ditch, drain, or other drainage improvement authorized by law shall be liable to the person or persons owning or possessing the lands for which such improvements were constructed in double the amount of damages sustained by such owner or person in possession; and in case of a subsequent offense by the same person he

shall be liable in treble the amount of such damages. [C73,§1227; C97,§1961; C24, 27, 31, 35, §7579.]

7580 Obstructing or damaging. Any person or persons wilfully diverting, obstructing, impeding, or filling up, without legal authority, any ditch, drain, or watercourse or breaking down or injuring any levee or the bank of any settling basin, established, constructed, and maintained under any provision of law shall be deemed guilty of a misdemeanor and punished accordingly. [C24, 27, 31, 35,§7580.]

Punishment, §12894

7581 Nuisance — abatement. Any ditch, drain, or watercourse which is now or hereafter may be constructed so as to prevent the surface and overflow water from the adjacent lands from entering and draining into and through the same is hereby declared a nuisance and may be abated as such. [S13,§1989-a15; C24, 27, 31, 35,§7581.]

Nuisances, ch 528

7581.1 Actions—settlement—counsel. Levee and/or drainage districts through their governing bodies are authorized to maintain actions in law or equity for the purposes of preventing or recovering damages that may accrue to such districts on account of the impairment of their functions, or the increase in the cost of maintenance or operation of such districts, or on account of damages to property owned by such districts, resulting from the construction and/or operation of locks, dams and pools in the Mississippi or Missouri rivers; they may make settlements and adjustments of such damages and written contracts with relation thereto, and receive any appropriations that may be made by the congress of the United States for the increased cost to drainage or levee* districts and may agree to the construction and maintenance of present equipment and of new or remedial works, improvements and equipment as a part of such damages, or as a means of lessening the damages which will be suffered by the said districts. Said districts are further authorized to employ legal and engineering counsel for such purposes and to pay for the same out of the award of damages or out of the maintenance funds of the district. [47GA, ch 204,§1.]

*"levy" in enrolled act

Membership in associations, §7598.03

7582 Waste banks—private use. The landowner may have any beneficial use of the land to which he has fee title and which is occupied by the waste banks of an open ditch when such use does not interfere in any way with the easement or rights of the drainage district as contemplated by this chapter. For the purpose of gaining such use the landowner may smooth said waste banks, but in doing so he must preserve the berms of such open ditch without depositing any additional dirt upon them. [C24, 27, 31, 35, §7582.]

7583 Preliminary expenses—how paid. If the proposed district is all in one county, the board of supervisors is authorized to pay all necessary preliminary expenses in connection therewith from the general fund of the county. If it extends into other counties, the boards of the respective counties are authorized to pay from the general fund thereof, such proportion of said expenses as the work done or expenses created in each county bears to the whole amount of work done or expenses created. Said amounts shall be ascertained and reported by the engineer in charge of the work and be approved by the respective boards which shall, as soon as paid, charge the amount to said district in favor of the general fund of the counties, as their interest may appear, as soon as the said district is established. If said district shall not be established, the said amounts shall be collected upon the bond or bonds of the petitioners. [S13,§1989-a48; C24, 27, 31, 35,§7583.]

7584 Additional help for auditor. If the work in the office of the auditor by reason of the existence of drainage districts is so increased that the regular officer is unable by diligence to do the same, the board of supervisors may employ such additional help as may be necessary to keep the records and transact the business of the drainage districts. The expense of such help shall be paid by the districts in proportion to the amount of work done therefor. [S13, §1989-a42; C24, 27, 31, 35,§7584.]

7585 Employment of counsel. The board is authorized to employ counsel to advise and represent it and drainage districts in any matter in which they are interested. Attorney's fees and expenses shall be paid out of the drainage fund of the district for which the services are rendered, or may be apportioned equitably among two or more districts. Such attorneys shall be allowed reasonable compensation for their services, also necessary traveling expenses while engaged in such business. Attorneys rendering such services shall file with the auditor an itemized, verified account of all claims therefor, and statement of expenses, and the same shall be audited and allowed by the board in the amount found to be due. [S13, §1989-a14; C24, 27, 31, 35,§7585.]

7586 Compensation of appraisers. Persons appointed to appraise and award damages and make classification of lands and assess benefits, other than the engineer, shall receive such compensation as the board may fix, not to exceed, however, five dollars per day each, and in addition thereto, the necessary expense of transportation of said persons while engaged upon their work. They shall file with the auditor an itemized, verified account of the amount of time employed upon said work and their expenses. [S13, §1989-a41; C24, 27, 31, 35,§7586.]

7587 Fees for publications. Fees for publication of all notices required to be published by the provisions of this chapter shall be fixed by the board not exceeding thirty-three and one-third cents for each insertion for each ten lines of brevier type or its equivalent. [S13,§1989-a41; C24, 27, 31, 35,§7587.]

7588 Payment. All compensation for services rendered, fees, costs, and expenses when properly shown by itemized and verified statement shall be filed with the auditor and allowed by the board in such amounts as shall be just and true, and when so allowed shall be paid on order of the board from the levee or drainage funds of the district for which such services were rendered or expenses incurred, by warrants drawn on the treasurer by the auditor. [S13, §1989-a41; C24, 27, 31, 35,§7588.]

7589 Purchase at tax sale. When land in a levee, drainage, or improvement district is being sold at a tax sale for delinquent taxes or assessment, the board of supervisors or the district trustees, as the case may be, shall have authority to bid in such land or any part of it, paying the amount of the bid from the funds of the district, and taking the certificate of sale in their names as trustees for such district, and may thereafter pay any assessments for taxes or benefits levied against said premises from the district funds. The amount paid for redemption which shall include such additional payment, shall be credited to the district. [C24, 27, 31, 35,§7589.]

Similar provisions, ch 449
40ExGA, HF 185, §141, editorially divided

7590 Tax deed—sale or lease. If no redemption shall be made the board of supervisors or trustees, as the case may be, shall receive the tax deed as trustees for the district. They shall credit the district with all income from said property. They may lease or sell and convey said property as trustees for such district and shall deposit all money received therefrom to the credit of such district. [C24, 27, 31, 35, §7590.]

7590.1 Purchase of tax certificate. When land in a drainage or levee district, or subdistrict, is subject to an unpaid assessment and levy for drainage purposes and has been sold for taxes the board of supervisors of that county, or if control of the district has passed to trustees then such trustees, may purchase the certificate of sale issued by the county treasurer by depositing with the county auditor the amount of money to which the holder of the certificate would be entitled if redemption was made at that time, and thereupon the rights of the holder of the certificate and the ownership thereof shall vest in the board of supervisors, or the trustees of that district, as the case may be, in trust for said drainage district or subdistrict. [C31, 35, §7590-c1.]

Referred to in §7590.7

7590.2 Terms of redemption. Redemption from said tax sale shall be made on such terms as may be agreed upon between the such* board of supervisors or such trustees and the owner of the land involved; but in any case in which the owner of said land will pay as much as fifty percent of the value of the land at the time of redemption he shall be permitted to redeem. If the parties cannot agree upon such value, either of them may bring an action against the other in the district court of the county where the land is situated, and the court shall determine the matter. The proceeding shall be triable in equity. [C31, 35,§7590-c2.]

*According to enrolled act

7590.3 Payment—assignment of certificate. When such money is deposited with the county auditor he shall by mail notify the purchaser at said tax sale, or the latter's assignee if of record, and shall pay to the holder of such certificate the sum of money deposited with him for that purpose on surrender of the certificate with proper assignment thereon to the board of supervisors, or to the trustees of said district, as the case may be, as trustee for said district. [C31, 35,§7590-c3.]

7590.4 Funds. Payment to the county auditor for such certificate shall be from the fund of said drainage or levee district, or subdistrict, on a warrant issued against that fund which shall have precedence over all other outstanding warrants drawn against that fund in the order of their payment. Should there not be a sufficient amount in the fund of said district, or subdistrict, to pay said warrant then the board of supervisors, or the trustees of the district, as the case may be, are authorized to borrow a sum of money sufficient for that purpose on a warrant for that amount on the fund of the district, or subdistrict, which warrant shall bear interest from date at six percent per annum and shall have preference in payment over all other unpaid warrants on said fund, and the county treasurer shall so enter the same on the list of warrants in his office and call the same for payment as soon as there is sufficient money in said fund. [C31, 35,§7590-c4.]

7590.5 Lease or sale of land. If said certificate goes to deed to the board or to the trustees, all leases and sales of the land shall be effected* and record thereof made in the same manner in which leases and sales are effected* and record thereof made when the county acquires title as a purchaser under execution sale. [C31, 35,§7590-c5.]

* "affected" in enrolled act

7590.6 Duty of treasurer. When any lands in a drainage or levee district, or subdistrict, are subject to an unpaid assessment and levy for drainage purposes and are sold for a less sum of money than the amount of delinquent taxes thereon the county treasurer shall immediately report that fact to the board of supervisors, or to the trustees for the district, as the case may be. [C31, 35,§7590-c6.]

7590.7 Purchase by bondholder. In any event where upon the request of the holder of any bond or bonds issued by any drainage district the board of supervisors shall fail, neglect or refuse to purchase the certificate of sale issued by the county treasurer and referred to in section 7590.1 in manner and form as permitted by said section, the holder of such bond or bonds may, upon filing with the county auditor a sworn statement as to the making of such written

request upon the board of supervisors and a recital of the failure of such board to act in the premises by complying with the provisions of said section, in the same manner and form purchase such certificate and the ownership thereof shall thereupon vest in such holder of such bond or bonds in trust for said drainage district or subdistrict, provided, however, that the holder shall have a lien upon said certificate and any beneficial interest arising therefrom for his actual outlays including his reasonable expenses and attorney's fees, if any, incurred in the premises. In the event any such holder of any bond or bonds shall acquire title he shall have a right to lease or convey said premises, upon giving thirty days written notice to the board of supervisors by filing the same with the county auditor and in the event said board shall not approve said lease or sale, the same shall be referred to the district court of the county where the land is situated and there tried and determined in the manner prescribed in section 7590.1. Any funds realized from the lease or sale of said land shall be first applied in extinguishing the lien of the holder of the certificate herein provided for and the balance shall be paid to the said drainage bond fund of said district. [C35,§7590-g1.]

7591 Voting power. In case any proposition arises in said district to be determined by the vote of parties owning land therein, notice of such hearing shall be given and the board of supervisors or trustees, as the case may be, while holding title in trust to any such land, shall have the same right to vote for or against such proposition as the former owner would have had if he had not been divested of the title to said land. [C24, 27, 31, 35,§7591.]

7592 Inspection of improvements. The board of any county into which a levee or drainage improvement extends shall cause a competent engineer to inspect such levee or drainage improvement as often as it deems necessary for the proper maintenance and efficient service thereof. The engineer shall make report to the board of the condition of the improvement, together with such recommendations as he deems necessary. For any claim for services and expenses of inspection, the engineer shall file with the auditor an itemized and verified account of such service and expense to be allowed by the board in such amount as it shall find due and paid out of the drainage funds of the district. If the district extends into two or more counties, such action shall be had jointly by the several boards, and the expenses equitably apportioned among the lands in the different counties. [S13, §1989-a44; C24, 27, 31, 35,§7592.]

7593 Watchmen. When a levee has been established and constructed in any county, the board shall be empowered to employ one or more watchmen, and fix their compensation, whose duty it shall be to watch such levee and make repairs thereon in case of emergency. Such employee shall file with the auditor an itemized, verified account for services rendered, and cost and expense incurred in watching or repairing such levee, and the same shall be audited and allowed by the board as other claims and paid by the county from funds belonging to such district. [S13,§1989-a40; C24, 27, 31, 35,§7593.]

7594 Construction of drainage laws. The provisions of this chapter and all other laws for the drainage and protection from overflow of agricultural or overflow lands shall be liberally construed to promote leveeing, ditching, draining, and reclamation of wet, swampy, and overflow lands. [S13,§1989-a46; C24, 27, 31, 35, §7594.]

40ExGA, HF 185, §144, editorially divided

7595 Technical defects. The collection of drainage taxes and assessments shall not be defeated where the board has acquired jurisdiction of the interested parties and the subject matter, on account of technical defects and irregularities in the proceedings occurring prior to the order of the board locating and establishing the district and the improvements therein. [S13,§1989-a46; C24, 27, 31, 35,§7595.]

7596 Conclusive presumption of legality. The final order establishing such district when not appealed from, shall be conclusive that all prior proceedings were regular and according to law. [S13,§1989-a46; C24, 27, 31, 35,§7596.]

7597 Drainage record. The board shall provide a drainage record book, which shall be in the custody of the auditor, who shall keep a full and complete record therein of all proceedings relating to drainage districts, so arranged and indexed as to enable any proceedings relative to any particular district to be examined readily. [S13,§§1989-a14,-a42; C24, 27, 31, 35, §7597.]

7598 Records belong to district. All reports, maps, plats, profiles, field notes, and other documents pertaining to said matters, including all schedules, and memoranda relating to assessment of damages and benefits, shall belong to the district to which they relate, remain on file in the office of the county auditor, and be matters of permanent record of drainage proceedings. [C24, 27, 31, 35,§7598.]

DRAINAGE ASSOCIATIONS

7598.01 Membership in National Drainage Association. Any drainage district may join and become a member of the National Drainage Association. A drainage district may pay a membership fee and annual dues upon the approval of the drainage board of such district, but not in excess of the following:

One hundred dollars for drainage districts having indebtedness in excess of one million dollars.

Fifty dollars for drainage districts having an indebtedness of five hundred thousand dollars and less than one million dollars.

Twenty-five dollars for drainage districts having an indebtedness of two hundred fifty thousand dollars and less than five hundred thousand dollars.

Ten dollars for drainage districts having an indebtedness less than two hundred fifty thousand dollars.

The annual dues for any district shall not exceed one-twentieth of one percent of the outstanding indebtedness of the district. [C31, 35, §7598-c1.]

7598.02 Membership fee. The cost of membership fees and dues shall be assessed against the land in the drainage district and collected in the same manner and in the same ratio as assessments for the cost and maintenance of the drainage district. [C31, 35,§7598-c2.]

7598.03 Other associations. Levee and/or drainage districts* are authorized to become members of drainage associations for their mutual protection and benefit, and may pay dues and membership fees therein out of the maintenance funds. [47GA, ch 204,§2.]

*Substitute for words "Said districts" in enrolled act. See §7581.1 and 47GA, ch 204, §§1, 2

RECEIVERSHIP FOR DRAINAGE LANDS

7598.04 Receiver authorized. Whenever the governing board of any drainage or levee district becomes the owner of a tax sale certificate, for any tract of land within the district, and one or more years taxes subsequent to the tax certificate have gone delinquent, the said governing board may, on behalf of such district, make application to the district court of the county within which such real estate or a part thereof is situated, for the appointment of a receiver to take charge of said delinquent real estate. [C35, §7598-e1.]

7598.05 Hearing and notice thereof. Upon the filing of the petition for such appointment, the court or a judge thereof, shall fix a time and place of hearing thereon, which may be in term time or vacation, and shall prescribe and direct the manner for the service of notice upon the owner, lienholders and persons in possession of said real estate, of the pendency of said application. [C35,§7598-e2.]

7598.06 Appointment — grounds. Said application shall be heard by the court, or a judge thereof, at the time and place so designated, and after hearing thereon the court or judge may appoint one of the members of the governing board of said drainage or levee district as receiver for said real estate, on the grounds that the said real estate is producing returns, and that the general and special taxes against the same are not being paid, and direct him to forthwith take possession of the same and to collect the rents, issues and profits therefrom. [C35, §7598-e3.]

45GA, ch 142, §3, editorially divided

7598.07 Bond. The cost of the premium of the bond of such receiver shall be paid for out of the general funds of the drainage or levee district, and no charge shall be made by the receiver for compensation in said cause. [C35, §7598-e4.]

7598.08 Avoidance of receivership. The owner of any such tract of real estate may avoid the appointment of such receiver, either before or after the action is commenced, by entering into a good and sufficient written instrument with the governing board of such district, agreeing to apply the rent share of the products of said land, or its equivalent to the payment of taxes thereon. [C35,§7598-e5.]

45GA, ch 142, §4, editorially divided

7598.09 Preference in leasing. In the event a receiver is appointed for any tract of land, the owner if he is actually in possession thereof, shall have the preference to rent the same. [C35,§7598-e6.]

7598.10 Rents—application of. The rents, issues and profits of the real estate when collected by the receiver, shall be applied as follows:

1. To the payment of the costs and expenses of the receivership.
2. To the payment of current general taxes against said real estate.
3. To the payment of any current special taxes against said real estate.
4. The surplus shall be applied upon any delinquent taxes or tax certificates, and the remainder, if any, shall be paid to the owner of said real estate. [C35,§7598-e7.]

CHAPTER 353.1

DISSOLUTION OF DRAINAGE DISTRICTS

Referred to in §7766

7598.11 Jurisdiction to abandon and dissolve.
7598.12 Notice of hearing.
7598.13 Hearing on petition.
7598.14 Appeal.
7598.15 Expense—refund.
7598.16 Abandonment of rights-of-way.

7598.11 Jurisdiction to abandon and dissolve. When any drainage or levee district is free from indebtedness and it shall appear that the necessity therefor no longer exists or that the expense of the continued maintenance of the ditch or levee is in excess of the benefits to be derived therefrom, the board of supervisors or board of trustees, as the case may be, shall have power and jurisdiction, upon petition of a majority of the landowners, who, in the aggregate, own sixty percent of all land in such district, to abandon the same and dissolve and discontinue such districts. [C35,§7598-g1.]

7598.12 Notice of hearing. Upon the filing of such petition the board shall enter an order fixing the date for hearing thereon not less than forty days from the date of the filing thereof and

shall enter an order directing the county auditor, if such district is under the control of the board of supervisors, or the clerk of the board, if under the control of a board of trustees, to immediately cause notice of hearing thereon to be served on the owners of lands in such district as may then be provided by law in proceedings for the establishment of a drainage or levee district. [C35, §7598-g2.]

7598.13 Hearing on petition. At the time set for hearing on said petition the board shall hear and determine the sufficiency of the petition as to form and substance (which petition may be amended at any time before final action thereon), and all objections filed against the abandonment and dissolution of such district. If it shall find that such district is free from indebtedness and that the necessity for the continued maintenance thereof no longer exists or that the expense of the continued maintenance of such district is not commensurate with the benefits derived therefrom, it shall enter an order abandoning and dissolving such district, which order shall be filed with the county auditor of the county or counties in which such district is situated and noted on the drainage record. [C35, §7598-g3.]

7598.14 Appeal. Appeal may be taken from the order of the board to the district court of the county in which such district or a part thereof is situated, in the same time and manner as appeal may be taken from an order of the board of supervisors establishing a district. [C35,§7598-g4.]

Appeals, §7513 et seq.

7598.15 Expense—refund. In case there are sufficient funds on hand in such district, or there are unpaid assessments outstanding or other property belonging to such district in an amount sufficient to pay such expense, the expense of abandonment and dissolution shall be paid out of such funds or out of funds realized by the sale of such property. Where such district is free of indebtedness but there are not sufficient funds on hand or unpaid assessments outstanding or other assets to pay such expense the board shall assess such expense against the property in the district in the same proportions as the last preceding assessments of benefits. Any excess remaining to the credit of such district after sale of its assets and after payment of such expenses shall be prorated back to the property owners in the district in the proportions according to class and benefits as last assessed. If the petition is denied, the costs of said proceedings shall be paid by the petitioning owners. [C35,§7598-g5.]

7598.16 Abandonment of rights-of-way. If such a dissolution is effected, the rights-of-way of the district for all purposes of the district shall be deemed abandoned. [C35,§7598-g6.]

CHAPTER 354

INTERCOUNTY LEVEE OR DRAINAGE DISTRICTS

Referred to in §§7442, 7626.1, 7648, 7751, 7766

7599 Petition and bond.
7600 Commissioners.
7601 Examination and report.
7602 Duty of engineer.
7603 Notice.
7604 Contents of notice—service.
7605 Claims for damages—filing—waiver.
7606 Organizations—procedure—adjournments.
7607 Tentative adoption of plans.
7608 Appraisers.
7609 Duty of appraisers—procedure.
7610 Meetings of joint boards.
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7620 Monthly estimate—payment.
7621 Final settlement.
7622 Failure of board to act.
7623 Transfer to district court.
7624 Transcript, docket, and trial.
7625 Decree.
7626 Law applicable.

7599 Petition and bond. When the levee or drainage district embraces land in two or more counties, a duplicate of the petition of any owner of land to be affected or benefited by such improvement shall be filed with the county auditor of each county into which said levee or drainage district will extend, accompanied by a duplicate bond to be filed with the auditor of each of the said counties as provided when the district is wholly within one county, in an amount and with sureties approved by the auditor of the county in which the largest acreage of the district is situated, which bond shall run in favor of the several counties in which it is filed. [S13,§1989-a29; C24, 27, 31, 35,§7599.]

Referred to in §7626.1
Procedure for converting several intracounty districts into one intercounty district, ch 354.1

7600 Commissioners. Upon the filing of such petition in each county and the approval of such duplicate bond by the proper auditor, the board of each of such counties shall appoint a commissioner and the commissioners of the several counties so appointed shall meet within thirty days thereafter and appoint a competent engineer who shall also act as a commissioner. [S13, §1989-a29; C24, 27, 31, 35,§7600.]

Referred to in §7626.1
40ExGA, HF 185, §147, editorially divided

7601 Examination and report. The commissioners thus appointed shall examine the application and make an inspection of all the lands embraced in the proposed district and shall determine what improvements in the way of levees, ditches, drains, settling basins, or change of

natural watercourse are necessary for the drainage of the lands described in the petition. Such commissioners, including the engineer, shall file a detailed report of their examination and their findings and file a duplicate thereof in the office of the auditor of each of said counties. [S13, §1989-a29; C24, 27, 31, 35,§7601.]

7602 Duty of engineer. In addition to the report of the commissioners as a whole, the engineer so appointed shall perform the same duties and in the same manner required of the engineer by chapter 353 when the proposed district is located wholly within one county, and his surveys, plats, profiles, field notes, and reports of his surveys shall be made and filed in duplicate in each county. [S13,§1989-a29; C24, 27, 31, 35, §7602.]

7603 Notice. Immediately upon the filing of the report of the commissioners and the engineer, if the same recommends the establishment of such district, notice shall be given by the auditor of each county to the owners of all the lots and tracts of land in his own county respectively embraced within such district as recommended by the commissioners as shown by the transfer books in the office of the auditor of each of said counties, and also to the persons in actual occupancy of all the lots or tracts of land in such district, and also to each lienholder or incumbrancer of any of such lots or tracts as shown by the records of the respective counties. [S13,§1989-a29; C24, 27, 31, 35,§7603.]

40ExGA, HF 185, §149, editorially divided

7604 Contents of notice — service. Such notice shall state the time and place, when and where the boards of the several counties will meet in joint session for the consideration of said petition and the report of the commissioners and engineer thereon, and shall in other respects be the same and served in the same time and manner as required when the district is wholly within one county, except that the auditor of each county shall give notice only to the owners, occupants, incumbrancers, and lienholders of the lots and tracts of land embraced within the proposed district in his own county as shown by the records of such county. [S13, §1989-a29; C24, 27, 31, 35,§7604.]

Notice and service, §7440 et seq.

7605 Claims for damages—filing—waiver. Any person filing objections or claiming damages or compensation on account of the construction of such improvement shall file the same in writing in the office of the auditor of the county in which his land is situated, at or before the time set for hearing. He may, however, file it at the time and place of hearing. If he shall fail to file such claim at the time specified he shall be held to have waived his right thereto, but claims for land taken for right-of-way for any open ditch or for settling basins need not be filed. [S13,§1989-a30; C24, 27, 31, 35,§7605.]

7606 Organizations — procedure — adjournments. At the time set for hearing such petition, the boards of the several counties shall meet at the place designated in said notice. They shall organize by electing a chairman and a secretary, and when deemed advisable may adjourn to meet at the call of such chairman at such time and place as he may designate, or may adjourn to a time and place fixed by said joint boards. They shall sit jointly in considering the petition, the report and the recommendations of the engineer, in the same manner as if the district were wholly within one county. [S13,§1989-a31; C24, 27, 31, 35,§7606.]

40ExGA, HF 185, §151, editorially divided

7607 Tentative adoption of plans. The said boards by their joint action may dismiss the petition and refuse to establish such district, or they may approve and tentatively adopt the plans and recommendations of the engineer for the said district. [C24, 27, 31, 35,§7607.]

7608 Appraisers. If the said boards shall adopt a tentative plan for the district, the board of each county shall select an appraiser and the several boards by joint action shall employ an engineer, and the said appraisers and engineer shall constitute the appraisers to appraise the damages and value of all right-of-way required for open ditches and of all lands required for settling basins. [S13,§1989-a31; C24, 27, 31, 35, §7608.]

7609 Duty of appraisers—procedure. The appraisers shall proceed in the same manner and make return of their findings and appraisement the same as when the district is wholly within one county, except that a duplicate there of shall be filed in the auditor's office of each of the several counties. After the filing of the report of the appraisers, all further proceedings shall be the same as where the district is wholly within one county, except as otherwise provided. [S13,§1989-a31; C24, 27, 31, 35,§7609.]

Procedure, §7449 et seq.

7610 Meetings of joint boards. The board of supervisors of any county in which a petition for the establishment of a levee or drainage district to extend into or through two or more counties is on file, may meet with the board or boards of any other county or counties in which such petition is on file, for the purpose of acting jointly with such other board or boards in reference to said petition or any business relating to such district. Any such joint meetings held in either of the counties in which such petition is on file shall constitute a valid and legal meeting of said joint boards for the transaction of any business pertaining to said petition or to the business of such district. [S13, §1989-a37; C24, 27, 31, 35,§7610.]

7611 Equalizing voting power. When the boards are of unequal membership, for the purpose of equalizing their voting power each member of the smallest board shall cast a full vote and each member of a larger board shall cast such fractional part of a vote as results from dividing the smallest number by such larger number. [S13,§1989-a29; C24, 27, 31, 35,§7611.]

7612 Commissioners to classify and assess. If the boards of the several counties acting jointly shall establish the district, they shall appoint a commission consisting of one from each county, and in addition thereto a competent engineer who shall within twenty days begin to inspect the premises and classify the lands in said district fixing the percentages and assessments of benefits and the apportionment of costs and expenses and shall complete said work within the time fixed by the boards. The qualifications of said commissioners, their classification of lands, fixing percentages and assessments of benefits and apportionment of costs and the report thereof in all details shall be governed in all respects by the provisions of chapter 353 for districts wholly within one county. [S13,§1989-a32; C24, 27, 31, 35,§7612.]

7613 Notice and service thereof—objections. Upon the filing of the report of the commissioners to classify lands, fix and assess benefits and apportion costs and expenses, the auditors of the several counties, acting jointly, shall cause notice to be served upon all interested parties of the time when and the place where the boards will meet and consider such report and make a final assessment of benefits and apportionment of costs, which notice shall be the same and served for the time and in the manner and all proceedings thereon shall be the same as provided in chapter 353 in districts wholly within one county, except publication of notice as provided in section 7441 shall be in each of the counties into which the district extends, and also except that the objections not filed prior to the date of the hearing shall be filed with the boards at the time and place of such hearing. [S13,§1989-a32; C24, 27, 31, 35,§7613.]

7614 Levies—certificates and bonds. After the amount to be assessed and levied against the several tracts of land shall have been finally determined, the several boards, acting separately, and within their own counties, shall levy and collect the taxes apportioned and levied in their respective counties. They may issue warrants, improvement certificates, or bonds for the payment of the cost of such improvement within their respective counties, with the same right of landowners to pay without interest or in installments all as provided where the district is wholly within one county. [S13,§1989-a32; C24, 27, 31, 35,§7614.]

Referred to in §7615
Payment, §7483 et seq.

7615 Bonds or proceeds made available. When drainage bonds are to be issued under the provisions of section 7614 they shall be issued at such time that they or the proceeds thereof shall be available for the use of the district at a date not later than ninety days after the actual commencement of the work on the improvement as provided in relation to districts wholly within one county, and subject to the same exceptions in cases of appeals set forth in section 7507. [C24, 27, 31, 35,§7615.]

7616 Supervising engineer. At the time of finally establishing the district, the boards of the several counties, acting jointly, shall employ a competent engineer to have charge and supervision of the construction of the improvement and they shall fix his compensation and he shall, before entering upon said work, give a bond running to the several counties for the use and benefit of the district in the same amounts and of like tenor and effect as is provided in districts wholly within one county. A duplicate of such bond shall be filed with the auditor of each of said counties. [S13,§1989-a34; C24, 27, 31, 35,§7616.]

Bond, §7458

7617 Duty of engineer. The duties of the supervising engineer shall be the same in all respects as is provided by chapter 353 for districts wholly within one county. [S13,§1989-a34; C24, 27, 31, 35,§7617.]

7618 Notice of letting work—applicable procedure. If the boards, acting jointly, shall establish such district, the auditors of the several counties shall immediately thereafter, acting jointly, cause notice to be given of the time and place of the meeting of the boards for letting contracts for the construction of the improvement. The notices, bids, bonds, and all other proceedings in relation to letting contracts shall be the same as provided where the district is wholly within one county, but duplicates of contractors' bonds shall be filed with the auditor of each county. [S13,§1989-a33; C24, 27, 31, 35,§7618.]

7619 Contracts. All contracts made for engineering work and the work of constructing improvements of an intercounty district shall be made by written contract executed by the contractor and such person as may be authorized by the boards of the several counties and by joint resolution and shall specify the work to be done, the amount of compensation therefor and the times and manner of payment, all as provided in relation to districts wholly within one county. [S13,§1989-a33; C24, 27, 31, 35, §7619.]

7620 Monthly estimate—payment. The engineer in charge of the work shall furnish the contractor monthly estimates of the amount of work done on each section and the amount thereof done in each county, a duplicate of which shall be filed with the auditor of each of the several counties. Upon the filing of such statement, each auditor shall draw a warrant for the contractor or give him an order directing the treasurer to deliver to him improvement certificates or drainage bonds, as the case may be, in favor of the contractor for eighty percent of the amount due from his county. [S13, §1989-a34; C24, 27, 31, 35,§7620.]

7621 Final settlement. When the work to be done on any contract is completed to the satisfaction of the supervising engineer he shall so report and certify to the boards of the several

counties, which by joint action shall fix a day to consider said report, and all the provisions shall apply in relation to objections to said report and the approval of the same and the completion of any unfinished or abandoned work as is provided in chapter 353 relating to completion of work and final settlement in districts wholly within one county, except that, when the completed work is accepted by the joint action of the boards of supervisors of the several counties into which the district extends such acceptance shall be certified to the auditor of each county who shall draw a warrant for the contractor or give him an order directing the treasurer to deliver to him improvement certificates or drainage bonds, as the case may be, for the balance due from the portion of the district in such county. [S13,§1989-a34; C24, 27, 31, 35, §7621.]

7622 Failure of board to act. When the establishment of a district, extending into two or more counties, is petitioned for as hereinbefore provided and one or more of such boards fails to take action thereon, the petitioners may cause notice in writing to be served upon the chairman of each board demanding that action be taken upon the petition within twenty days from and after the service of such notice. [S13, §1989-a36; C24, 27, 31, 35,§7622.]

7623 Transfer to district court. If such boards shall fail to take action thereon within the time named, or fail to agree, the petitioners may cause such proceedings to be transferred to the district court of any of the counties into which such proposed district extends by serving notice upon the auditors of the several counties within ten days after the expiration of said twenty days notice, or after the failure of such boards to agree. [S13,§1989-a36; C24, 27, 31, 35, §7623.]

7624 Transcript, docket, and trial. Upon the giving of such notice the auditors shall, acting jointly, prepare and certify to the clerk of the district court a full and complete transcript of all proceedings had in such case, on or before the first day of the next succeeding term of said court. The clerk of the district court shall thereupon docket the case and the same shall be tried as in equity and the appearance term shall be the trial term. [S13, §1989-a36; C24, 27, 31, 35,§7624.]

40ExGA, HF 185, §166, editorially divided

7625 Decree. The court shall enter judgment and decree dismissing the case or establishing such district and may by proper orders and writs enforce the same. [S13,§1989-a36; C24, 27, 31, 35,§7625.]

7626 Law applicable. Except as otherwise stipulated in this chapter the provisions and procedure set forth in chapter 353 shall govern and apply to the formation, establishment, and conduct of every levee or drainage district extending into two or more counties, the petition therefor, the giving or publication or service of notice therein, the appointment and duties of all officers or appraisers or commissioners, the making or filing of waivers, reports, plats, profiles, recommendations, notices, contracts, and papers, the classification and apportionment and assessment of lands and all other property, the taking and hearing of appeals, the issuance and delivery of warrants, bonds and assessment certificates, the payment of taxes and assessments, the making of improvements, ditches, drains, settling basins, changes, enlargements, extensions, and repairs, the inclusion of lands, and the making or performance of every other matter or thing whatsoever relevant to or in any wise connected with such joint drainage or levee district, and the rights, privileges, and duties of all persons, landowners, officers, appellants, and courts. [S13,§1989-a37; C24, 27, 31, 35,§7626.]

CHAPTER 354.1

CONVERTING INTRACOUNTY DISTRICTS INTO INTERCOUNTY DISTRICT

Referred to in §§7442, 7648, 7751, 7766

7626.1 Intracounty districts converted into intercounty district.
7626.2 Benefited land only included.
7626.3 Appeal by landowner.
7626.4 Procedure on appeal.
7626.5 Appeal by trustees or boards.

7626.1 Intracounty districts converted into intercounty district. Whenever one or more drainage districts in one county outlet into a ditch, drain, or natural watercourse, which ditch, drain, or natural watercourse is the common carrying outlet for one or more drainage districts in another county, the boards of supervisors of such counties acting jointly may by resolution, and on petition of the trustees of any one of such districts or one or more landowners therein, in either case such petition to be accompanied by a bond as provided in section 7599, must initiate proceedings for the establishment of an intercounty drainage district by appointing commissioners as provided in section 7600 and by requiring a bond as provided in section 7599 and by proceeding as provided by chapter 354, and all powers, duties, limitations, and provisions of this chapter and chapter 354, shall be applicable thereto. [C27, 31, 35,§7626-a1.]

41GA, ch 155, §1, editorially divided

7626.2 Benefited land only included. Neither any land nor any previously organized drainage district shall be included within, or assessed for, the proposed new intercounty district unless such land or unless such previously organized district shall receive special benefits from the

improvements in the proposed new intercounty district. [C27, 31, 35,§7626-a2.]

7626.3 Appeal by landowner. Any landowner affected by the establishment of the new intercounty district may appeal to the district court of the county where his land lies from the action of the joint boards in establishing the new district or in including his land within it. [C27, 31, 35,§7626-a3.]

7626.4 Procedure on appeal. The procedure for taking such appeal and for hearing and determining it shall be that provided for similar appeals in chapter 353. [C27, 31, 35,§7626-a4.]

7626.5 Appeal by trustees or boards. Trustees or boards of supervisors having charge of any previously organized district which is proposed to be included (either in whole or in part) within the new intercounty district may, in the same manner and under the same procedure appeal to the district court from the action of the joint boards in establishing the new district or in including therein the previously organized district or any part thereof. [C27, 31, 35,§7626-a5.]

CHAPTER 355

DRAINAGE DISTRICTS EMBRACING PART OR WHOLE OF CITY OR TOWN

Referred to in §§7442, 7648, 7751, 7766

7627 Authority to include city.
7628 Inclusion of city—notice.
7629 Assessments—notice.
7630 Objections—appeal.
7631 Assessments—interest.
7632 Bonds, certificates, and waivers.
7633 Funding bonds.
7634 Jurisdiction relinquished.
7635 Request for relinquishment.
7636 Duty to relinquish.
7637 Jurisdiction of municipality.

7627 Authority to include city. The board of any county shall have the same power to establish a drainage district that includes the whole or any part of any incorporated town or city, including cities under special charter, as they have to establish districts wholly outside of such cities and towns, including assessment of damages and benefits within such cities and towns, but no board of supervisors shall have power or authority to establish a drainage or levee district which lies wholly within the corporate limits of any city or town, nor in any case to establish any district for sewer purposes. [S13,§1989-a38; C24, 27, 31, 35,§7627.]

Referred to in §6856
40ExGA, HF 185, §168, editorially divided

7628 Inclusion of city—notice. Notice of the filing of the petition for such district and the time of hearing thereon, shall set forth the boundaries of the territory included within such city or town and directed to the town or city clerk and the owners and lienholders of the property within such boundaries without naming individuals, to be served in the same manner as notices where the district is wholly outside of such city or town. [S13,§1989-a38; C24, 27, 31, 35,§7628.]

Service of notice, §7441 et seq.

7629 Assessments — notice. When the streets, alleys, public ways, or parks or lots or parcels including railroad rights-of-way of any incorporated town or city, or city under special charter, so included within a levee or drainage district, will be beneficially affected by the construction of any improvement in such district, it shall be the duty of the commissioners appointed to classify and assess benefits to estimate and return in their report the percentage and assessment of benefits to such streets, alleys, public ways, and parks, or lots or parcels including railroad rights-of-way and notice thereof shall be served upon the clerk of such incorporated town or city, irrespective of the form of government, and upon owners of lots, parcels, and railroad rights-of-way so assessed. [S13,§1989-a38; C24, 27, 31, 35,§7629.]

Referred to in §6856

7630 Objections—appeal. The council or clerk of such town or city or individual owners may file objections to such percentage and assessment of benefits in the time and manner provided in case of landowners outside such city or town, and they shall have the same right to appeal from the finding of the board with reference to such assessment. [S13,§1989-a38; C24, 27, 31, 35,§7630.]

Objections, §7472; appeals, §7513 et seq.
40ExGA, HF 185, §170, editorially divided

7631 Assessments—interest. Such assessment as finally made shall draw interest at the same rate and from the same time as assessment against lands. [S13,§1989-a38; C24, 27, 31, 35,§7631.]

7632 Bonds, certificates, and waivers. The board of supervisors and the town or city council shall have the same power in reference to issuing improvement certificates or drainage bonds and executing waivers on account of such assessment for benefits to streets, alleys, public ways, and parks as is herein conferred upon the board of supervisors and the township trustees in reference to assessment for benefits to highways. [S13,§1989-a38; C24, 27, 31, 35,§7632.]

Certificates and bonds, §7499 et seq.

7633 Funding bonds. Such cities or towns may issue their funding bonds for the purpose of securing money to pay any assessment against it as provided by law. [C24, 27, 31, 35,§7633.]

Funding bonds, ch 320

7634 Jurisdiction relinquished. When the board of any county has heretofore established any drainage district which is located wholly

within the corporate limits of any city or town, including those the outlets of which are outside of such limits, and the drains thereof have been wholly or partially constructed of sewer tile, or when the ground that is used for said drains is needed by the city or town for storm sewer and drainage purposes, said board shall relinquish all authority or control of all of said drain that is included within such corporate limits, to the city or town upon request of the city or town council as provided in section 7635. [C24, 27, 31, 35,§7634.]

7635 Request for relinquishment. It is hereby made the duty of any city or town council, if it deems the same for the best interest of the said city or town, to pass, by a majority vote, a resolution requesting the board of supervisors to permit the city or town to take over and control the drains within its corporate limits which resolution shall be certified to the board of supervisors of the county and filed by the auditor, who shall spread the same upon the records of the drainage district. [C24, 27, 31, 35,§7635.]

Referred to in §§7634, 7636

7636 Duty to relinquish. Upon the request of the city or town council, as provided in section 7635, it shall be the duty of the board to pass a resolution and have the same made a part of its proceedings, relinquishing all authority and control of the drainage district which is within the corporate limits, to the said city or town and that whenever said jurisdiction and control has or may hereafter be relinquished that the board of supervisors shall transfer to said city or town all funds held by the county treasurer in his hands, derived from assessments in the drainage district within the corporate limits. [C24, 27, 31, 35,§7636; 47GA, ch 201,§1.]

7637 Jurisdiction of municipality. After the drainage district has been taken over by the city or town, it shall have complete control thereof, and may use the same for any purpose that said city or town through its city or town council deems proper and necessary for the advancement of the city or town or its health or welfare, and the city or town shall be responsible for the maintenance and upkeep of said drainage district only from and after its relinquishment by the board of supervisors to the city or town. [C24, 27, 31, 35,§7637.]

CHAPTER 356

HIGHWAY DRAINAGE DISTRICTS

Referred to in §§7442, 7751, 7766

7638 Establishment.
7639 Powers.
7640 Initiation without petition.
7641 Engineer.
7642 Survey and report.
7643 Assessment—report.
7644 Advanced payments.
7645 Payment from road funds.
7646 Dismissal—costs.
7647 Condemnation of right-of-way.
7648 Laws applicable.
7649 Removal of trees from highway.
7650 Trees outside of highways.

7638 Establishment. Whenever, in the opinion of the board of supervisors, it is necessary to drain any part of any public highway under its jurisdiction, and any land abutting upon or adjacent thereto, it may proceed without petition or bond to establish a highway drainage district by proceeding in all other respects as provided in chapter 353. [SS15,§§1989-b,-b2–b6,-b8,-b12, -b13; C24, 27, 31, 35,§7638.]

40ExGA, HF 185, §175-a1, editorially divided

7639 Powers. Such district, when established, shall have the powers granted to drainage and levee districts, and all parties interested shall have the same rights so far as applicable. [SS15,§§1989-b,-b2–b6,-b8,-b12,-b13; C24, 27, 31, 35,§7639.]

7640 Initiation without petition. When the board of supervisors determines on its own action to proceed.to the establishment of a highway drainage district, it shall do so by the adoption of a resolution of necessity to be placed upon its records, in which it shall describe in a general way the portion of any highway or highways to be included in such district, together with the description of abutting or adjacent land and railroad rights-of-way to be included in such district and made subject to assessment for such improvement. [SS15,§1989-b; C24, 27, 31, 35, §7640.]

7641 Engineer. The board shall appoint a competent engineer for the district. If the county engineer is appointed, he shall serve without additional compensation. In no case shall the county engineer act as a member of the assessment commission in a drainage district provided for in this chapter. [SS15,§§1989-b,-b11; C24, 27, 31, 35,§7641.]

7642 Survey and report. The engineer shall make a survey of the proposed district and report the same to the board, being governed in all respects as provided by sections 7437 and 7438 and designate particularly any portion of the secondary road system, or the primary road system, or any portion of either or both of said systems, as well as all lands adjoining and adjacent thereto, including lands and rights-of-way of railway companies which in his judgment will be benefited by drainage of highways in such district, and which should be embraced within the boundaries of such district. [SS15, §1989-b1; C24, 27, 31, 35,§7642.]

7643 Assessment—report. The commission for assessment of benefits and classification of the property assessed shall determine and report:

1. The separate amount which shall be paid by the county on account of the secondary road system.
2. The separate amount which shall be paid by the state on account of the primary road system.
3. The amounts which shall be assessed against the right-of-way or other real estate of each railway company within such district.
4. The amounts which shall be assessed against each forty-acre tract or less within such district. [SS15,§1989-b5; C24, 27, 31, 35,§7643; 48GA, ch 217,§1.]

Primary and secondary roads, chs 240–242

7644 Advanced payments. The board on construction of such improvement may advance out of the secondary road construction fund or the secondary road maintenance fund, or out of both of said funds that portion to be collected by special assessment, the amount so advanced to be replaced in said road funds as the first special assessments are collected. The board may in lieu of making such advancements, issue warrants to be known as "Drainage Warrants", said warrants to draw not to exceed six percent interest per annum payable annually from the date of issue and to be paid out of the special assessments levied therefor, when the same are collected. [SS15,§1989-b7; C24, 27, 31, 35,§7644.]

7645 Payment from road funds. The amount fixed by the final order of the board to be paid:

1. On account of the primary road system, shall be payable by the state highway commission on due certification of the amount by the county treasurer to said commission out of the primary road fund.
2. On account of the secondary road system, may be payable from the secondary road construction fund, or from the secondary road maintenance fund, or from both of said funds. [SS15,§1989-b5; C24, 27, 31, 35,§7645.]

7646 Dismissal—costs. If such proceedings are dismissed or said improvement abandoned, all costs of such proceedings shall be paid out of the fund of the road system for the benefit of which said proceeding was initiated. [SS15, §1989-b10; C24, 27, 31, 35,§7646; 48GA, ch 217, §2.]

7647 Condemnation of right-of-way. When in the judgment of the board of supervisors, it is inadvisable to establish a drainage district but necessary to acquire right-of-way through private lands for the construction of ditches or drains as outlets for the drainage of highways, the board of supervisors may cause such right-of-way to be condemned by proceedings in the manner required for the exercise of the right of eminent domain as for works of internal improvement, except that no attorney fee shall be taxed, and pay the costs and expense of such condemnation from either or both of said secondary road funds. [S13,§1989-a43; C24, 27, 31, 35,§7647.]

Condemnation procedure, ch 366

7648 Laws applicable. All proceedings for the construction and maintenance of highway drainage districts except as provided for in this chapter shall be as provided for in chapters 353 to 355, inclusive. [C24, 27, 31, 35,§7648.]

Chapter 353.1 enacted after this section was enacted

7649 Removal of trees from highway. When the roots of trees located within a highway obstruct the ditches or tile drains of such highway, the board of supervisors shall remove such trees from highways, except shade or ornamental trees adjacent to a dwelling house or other farm buildings or feed lots, or any tree or trees for windbreaks upon cultivated lands consisting of sandy or other light soils. [C24, 27, 31, 35, §7649.]

7650 Trees outside of highways. When the roots of trees and hedges growing outside a highway obstruct the ditches or tile drains of any highway, the board of supervisors may acquire the right to destroy such trees in the manner provided for taking private property for public use. Ornamental trees adjacent to any dwelling, orchard trees and trees used as windbreaks for a dwelling house, outbuildings, barn or feed lots, shall be exempt from the provisions of this section. [C24, 27, 31, 35,§7650.]

Condemnation procedure, ch 366
Similar provision, §7570

CHAPTER 357

DRAINAGE AND LEVEE DISTRICTS WITH PUMPING STATIONS

Referred to in §§7442, 7751, 7766

7651 Authorization.
7652 Petition—procedure.
7653 Additional pumping station.
7654 Transfer of pumps.
7655 Costs.
7656 Dividing districts.
7657 Notice—publication.
7658 Hearing—jurisdiction of divided districts.
7659 Division in other cases.
7660 Assessments not affected—maintenance tax.
7661 Election and apportionment of trustees.
7662 Settling basin—condemnation.
7663 Funding bonds.
7664 Form of bonds.
7665 Formal execution.
7666 Resolution—requisites—record.
7667 Registration.
7668 Liability of treasurer—reports.
7669 Sale—application of proceeds.
7670 Levy.
7671 Scope of act.
7672 Funds available to pay bonds.
7673 Limitation of actions.
7673.1 Bankruptcy proceedings.

7651 Authorization. The board of supervisors of any county or counties in which a drainage or levee district has been organized as by law provided, may establish and maintain a pumping station or stations, when and where the same may be necessary to secure a proper outlet for the drainage of the land comprising the district or any portion thereof, and the cost of construction and maintenance of said pumping station or stations shall be levied upon and collected from the lands in the district benefited by such pumping station or stations, in the same manner as provided for in the construction and maintenance of said districts. [S13,§§1989-a49,-a52; C24, 27, 31, 35,§7651.]

7652 Petition — procedure. Such pumping station shall not be established or maintained unless a petition therefor shall be presented to the board signed by not less than one-third of the owners of lands benefited thereby. The lands benefited by such pumping station shall be determined by the board on said petition and report of the engineer, and such other evidence as it may hear. No additional land shall be taken into any such drainage district after the improvements therein have been substantially completed, unless one-third of the owners of the land proposed to be annexed have petitioned therefor or consented in writing thereto. [S13, §1989-a49; C24, 27, 31, 35,§7652.]

7653 Additional pumping station. After the establishment of a drainage district, including a pumping plant, and before the completion of the improvement therein, the board or boards may, if deemed necessary to fully accomplish the purposes of said improvement, by resolution authorize the establishment and maintenance of such additional pumping station or stations as the engineer may recommend, and if a petition is filed by one-third of the owners of land within such district asking the establishment of such pumping plant or plants, the board or boards must direct the engineer to investigate the advisability of the establishment thereof and upon the report of said engineer the board or boards shall determine whether such additional pumping plant or plants shall be established. [C24, 27, 31, 35,§7653.]

40ExGA, HF 185, §178, editorially divided

7654 Transfer of pumps. If the board or boards determine that additional pumping plant or plants shall be established and maintained, a pump or pumps may be removed from any pumping station already established and may be installed in any such additional plant, if such removal can be made without injuring the efficient operation of the plant from which removed. [C24, 27, 31, 35,§7654.]

7655 Costs. The cost of the establishment of such additional pumping plant or plants shall be paid in the same manner and upon the same basis as is provided for the cost of the original improvement. [C24, 27, 31, 35,§7655.]

7656 Dividing districts. When a drainage district has been created and more than one pumping plant is established therein, the board or boards of supervisors may, and upon petition of one-third of the owners of land within said district shall, appoint an engineer to investigate the advisability of dividing said district into two or more districts so as to include at least one pumping plant in each of such districts. [C24, 27, 31, 35,§7656.]

40ExGA, HF 185, §179, editorially divided

7657 Notice—publication. If the engineer recommends such division the board of supervisors shall fix a time for hearing upon the question of such division and shall publish notice directed to all whom it may concern of the time and place of such hearing, for the time and in the manner as is required for the publication of notice of the establishment of said district, except that said notice need not name the owners and lienholders. [C24, 27, 31, 35,§7657.]

7658 Hearing—jurisdiction of divided districts. At the time fixed, the board shall determine the advisability of such division and shall make such order with reference thereto as shall be deemed proper, having consideration for the interests of all concerned. If such division is made, the board or boards having jurisdiction of the original district shall retain jurisdiction of the new districts created by such division for the purpose of collecting assessments theretofore made and making such additional assessments as are necessary to pay the obligations theretofore contracted. For all other purposes, each division shall be under the jurisdiction of the board or boards of supervisors which would have had jurisdiction thereof if originally established as an independent district. [C24, 27, 31, 35,§7658.]

7659 Division in other cases. After a levee or drainage district operating a pumping plant shall have been established and the improvement constructed and accepted, if it shall become apparent that the lands can be more effectually drained, managed, or controlled by a division thereof, then the said board or boards, or trustees, may, and if the district is divided by a stream, they shall, divide the district. [C24, 27, 31, 35,§7659.]

7660 Assessments not affected — maintenance tax. Each district after the division shall be conducted as though established originally as a district. Nothing herein shall affect the legality or collection of any assessments levied before the division; but the maintenance tax, if any, shall be divided in proportion to the amount paid in by each district. [C24, 27, 31, 35,§7660.]

7661 Election and apportionment of trustees. If said district, before the division was made, was under the control and management of trustees, then each trustee shall continue to serve in the district in which he is situated, and other trustees shall be elected in each new district. The election for said new trustees shall be called by the old board of trustees in each district within ten days after said division

is made and shall be conducted as provided for the election of trustees. [C24, 27, 31, 35,§7661.]

Election of trustees, ch 358

7662 Settling basin—condemnation. If, before a district operating a pumping plant is completed and accepted, it appears that portions of the lands within said district are wet or nonproductive by reason of the floods or overflow waters from one or more streams running into, through, or along said district and that said district or some other district of which such district shall have formed a part, shall have provided a settling basin to care for the said floods and overflow waters of said stream or watercourse, but no channel to said settling basin has been provided, said board or boards are hereby empowered to lease, buy, or condemn the necessary lands within or without the district for such channel. Proceedings to condemn shall be as provided for the exercise of the right of eminent domain. [C24, 27, 31, 35, §7662.]

Condemnation procedure, ch 366

7663 Funding bonds. When the owners of ten percent of the land in a drainage or levee district having and operating a pumping station shall petition the board of supervisors to extend the time of payment of the taxes assessed against the lands within said district for a period not exceeding twenty years, under such rules and regulations as said board may direct, the interest on such assessments to be paid annually the same as other taxes levied against the property, not less than one-twentieth of the principal of said extended tax to be paid each year until the entire tax is paid, and the lien of such tax to continue until fully paid, the board of supervisors may settle, adjust, renew, or extend the legal indebtedness of such district as shown by the assessments levied against the lands therein whether evidenced by certificates, warrants, bonds, or judgments by refunding all such indebtedness and issuing coupon bonds therefor when such indebtedness amounts to one thousand dollars or upwards, but for no other purpose. [C24, 27, 31, 35,§7663.]

Referred to in §7509.1
Refunding bonds, ch 358.1

7664 Form of bonds. Such bonds shall be issued in sums of not less than one hundred dollars or more than one thousand dollars each, running not more than twenty years, bearing interest not exceeding six percent per annum, payable annually or semiannually, and shall be substantially in the form provided by law for funding bonds issued for drainage purposes. [C24, 27, 31, 35,§7664.]

Form of bond, §7504

7665 Formal execution. Such bonds shall be numbered consecutively, signed by the chairman of the board of supervisors, attested by the county auditor. The interest coupons attached thereto shall be executed in the same manner. [C24, 27, 31, 35,§7665.]

7666 Resolution — requisites — record. All bonds issued under the provisions of this chapter shall be issued pursuant to and in conformity with a resolution adopted by the board of supervisors, which shall specify the amount authorized to be issued, the purpose for which issued, the rate of interest they shall bear and whether payable annually or semiannually, the place where the principal and interest shall be payable and when it becomes due, and such other provisions not inconsistent with law in reference thereto as the board of supervisors shall think proper, which resolution shall be entered of record upon the minutes of the proceedings of the said board and a complete copy thereof printed on the back of each bond, which resolution shall constitute a contract between the drainage district and the purchasers or holders of said bonds. [C24, 27, 31, 35,§7666.]

7667 Registration. When bonds have been executed as aforesaid they shall be delivered to the county treasurer and his receipt taken therefor. He shall register the same in a book provided for that purpose, which shall show the number of each bond, its date, date of sale, amount, date of maturity, and the name and address of the purchaser, and if exchanged what evidences of debt were received therefor, which record shall at all times be open to the inspection of the owners of property within the district. The treasurer shall thereupon certify on the back of each bond as follows:

"This bond duly and properly registered in my office this ..... day of ..... 19....

.....

Treasurer of the County of

....."

[C24, 27, 31, 35,§7667.]

40ExGA, HF 185, §184-a5, editorially divided

7668 Liability of treasurer—reports. The treasurer shall stand charged on his official bond with all bonds so delivered to him and the proceeds thereof. He shall report under oath to the board of supervisors, at each first regular session thereof in each month, a statement of all such bonds sold or exchanged by him since his last report and the date of such sale or exchange and when exchanged a description of the indebtedness for which exchanged. [C24, 27, 31, 35, §7668.]

7669 Sale — application of proceeds. He shall, under a resolution and the direction of the said county board of supervisors, sell the bonds for cash on the best available terms or exchange them on like terms for a legal indebtedness of the said district evidenced by bonds, warrants, or judgments outstanding at the date of the passage of the resolution authorizing the issue thereof, and the proceeds shall be applied and exclusively used for the purpose for which said bonds are issued. In no case shall they be sold or exchanged for a less sum than their face value and all interest accrued at the date of sale or exchange. After registration the treasurer shall deliver said bonds to the purchaser thereof and when exchanged for indebtedness of said district shall at once cancel all warrants or bonds or secure proper credits therefor on judgments. [C24, 27, 31, 35,§7669.]

7670 Levy. Drainage districts issuing funding or refunding bonds under this chapter shall levy taxes for the payment of the principal and interest thereof, where there has not been a prior levy covering same, in accordance with the provisions of the law relating to taxation. [C24, 27, 31, 35,§7670.]

7671 Scope of act. Refunding bonds for the purposes set out in this chapter may be issued to pay off and take up bonds issued in payment for drainage improvements under prior laws or to refund any part thereof. Bonds thus issued shall substantially conform to the provisions of the law relating to drainage bonds and the face amount thereof shall be limited to the amount of the unpaid assessments, with interest thereon, applicable to the payment of the bonds so taken up. [C24, 27, 31, 35,§7671.]

7672 Funds available to pay bonds. When refunding bonds shall be issued to pay for drainage improvements under the provisions of this chapter, all special assessments, taxes, and sinking funds applicable to the payment of such bonds previously issued shall be applicable in the same manner and the same extent to the payment of the refunding bonds issued hereunder, and all the powers and duties to levy and collect special assessments and taxes or create liens upon property shall continue until all refunding bonds shall be paid.

The drainage district shall collect the special assessments out of which the said bonds are payable and hold the same separate and apart in trust for the payment of said refunding bonds but the provisions of this chapter shall not apply to assessments or bonds adjudicated to be void. [C24, 27, 31, 35,§7672.]

7673 Limitation of actions. No action shall be brought questioning the validity of any of the bonds authorized by this chapter from and after three months from the time the same are ordered issued by the proper authorities. [C24, 27, 31, 35,§7673.]

Similar provisions, §§6264, 6779, 6932, 7714.23

7673.1 Bankruptcy proceedings. All drainage districts with pumping plant and/or levee, which have power to incur indebtedness, through action of their own governing bodies are hereby authorized to proceed under and take advantage of all laws enacted by the congress of the United States under the federal bankruptcy powers, which laws have for their object the relief of municipal indebtedness, including 48 Stat. L. ch 345, entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and acts amendatory thereof and supplementary thereto", approved May 24, 1934, and the officials and governing bodies of such drainage, pumping plant and/or levee districts, are authorized to adopt all proceedings and to do any and all acts necessary or convenient to fully avail such drainage, pumping plant, and/or levee districts, of the provisions of such acts of congress. [C35, §7673-g1.]

CHAPTER 358

MANAGEMENT OF DRAINAGE OR LEVEE DISTRICTS BY TRUSTEES

Referred to in §§7442, 7751, 7766

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7674 Trustees authorized. In the manner provided in this chapter, any drainage or levee district in which the original construction has been completed and paid for by bond issue or otherwise, may be placed under the control and management of a board of three trustees to be elected by the persons owning land in the district that has been assessed for benefits. [SS15,§§1989-a52a,-a61; C24, 27, 31, 35,§7674.]

7675 Petition. A petition shall be filed in the office of the auditor signed by a majority

of the persons including corporations owning land within the district assessed for benefits. [S13,§1989-a52b; SS15,§1989-a52a; C24, 27, 31, 35,§7675.]

40ExGA, HF 185, §186, editorially divided

7676 Election. The board, at the next regular, adjourned, or special session shall canvass the petition and if signed by the requisite number of landowners, it shall order an election to be held at some convenient place in the district not less than forty nor more than sixty days from the date of such order, for the election of three trustees of such district. It shall appoint from the freeholders of the district who reside in the county or counties, three judges and two clerks of election. [S13,§1989-a52b; SS15,§1989-a63; C24, 27, 31, 35,§7676.]

Referred to in §7677

7677 Intercounty district. If the district extends into two or more counties, a duplicate of the petition shall be filed in the office of the auditor of each county. The boards of supervisors shall, within thirty days after the filing of such petition, meet in joint session and canvass the same, and if found to be signed by a majority of the owners of land in the district assessed for benefits, they shall by joint action order such election and appoint judges and clerks of election as provided in section 7676. [S13,§1989-a52b; SS15,§§1989-a62,-a63; C24, 27, 31, 35,§7677.]

7678 Election districts. When a petition has been filed for the election of trustees to manage a district containing three thousand acres or more, the board, or, if the district extends into more than one county, the boards of such counties by joint action, shall, before the election, divide the district into three election districts for the purpose of securing a proper distribution of trustees in such district, and such division shall be so made that each election district will have substantially equal voting power and acreage, as nearly as may be. After such division is made there shall be elected one trustee for each of said election districts, but at such election all the qualified voters for the entire district shall be entitled to vote for each trustee. The division here provided for shall be for the purposes only of a proper distribution of trustees in the district and shall not otherwise affect said district or its management and control. [C24, 27, 31, 35, §7678.]

Referred to in §7679

7679 Record and plat of election districts. At the time of making a division into election districts, as provided in section 7678, the board or boards shall designate by congressional divisions, subdivisions, metes and bounds, or other intelligible description, the lands embraced in each election district, and the auditor, or auditors if more than one county, shall make a plat thereof in the drainage record of the district indicating thereon the boundary lines of each election district, numbering them, one, two, and three, respectively. [C24, 27, 31, 35, §7679.]

7680 Eligibility of trustees. Each trustee shall be a citizen of the United States not less than twenty-one years of age, a resident of the county, and the owner of land in the election district for which he is elected. [C24, 27, 31, 35,§7680.]

7681 Notice of election. The board, or, if in more than one county, the boards acting jointly, shall cause notice of said election to be given, setting forth the time and place of holding the same and the hours when the polls will open and close. Such notice shall be published for two consecutive weeks in a newspaper in which the official proceedings of the board are published in the county, or if the district extends into more than one county, then in such newspaper of each county. The last of such publications shall not be less than ten days before the date of said election. [S13,§1989-a52b; SS15,§1989-a63; C24, 27, 31, 35,§7681.]

7682 Assessment to determine right to vote. Before any election is held, the election board shall obtain from the county auditor or auditors a certified copy of so much of the record of the establishment of such district as will show the lands embraced therein, the assessment and classification of each tract, and the name of the person against whom the same was assessed for benefits, and the present record owner, and such certified record shall be kept by the trustees after they are elected, for use in subsequent elections. They shall, preceding each subsequent election, procure from the county auditor or auditors additional certificates showing changes of title of land assessed for benefits and the names of the new owners. [SS15,§1989-a75; C24, 27, 31, 35,§7682.]

7683 New owner entitled to vote. Anyone who has acquired ownership of assessed lands since the latest certificate from the auditor shall be entitled to vote at any election if he presents to the election board for its inspection at the time he demands the right to vote evidence showing that he has title. [SS15,§1989-a75; C24, 27, 31, 35,§7683.]

7684 Qualifications of voters. Each landowner over twenty-one years of age without regard to sex and any railway or other corporation owning land in said district assessed for benefits shall be entitled to one vote only, except as provided in section 7685. [SS15,§1989-a73; C24, 27, 31, 35,§7684.]

7685 Votes determined by assessment. When a petition asking for the right to vote in proportion to assessment of benefits at all elections for any purpose thereafter to be held within said district, signed by a majority of the landowners owning land within said district assessed for benefits, is filed with the board of trustees, then, in all elections of trustees thereafter held within said district, any person whose land is assessed for benefits without regard to age, sex, or condition shall be entitled to one vote for each ten dollars or fraction thereof of the original assessment for

benefits against the land actually owned by him in said district at the time of the election, but in order to have such ballot counted for more than one vote the voter shall write his name upon the ballot. The vote of any resident of a county in which the district is located in whole or in part must be cast in person. [SS15,§1989-a73; C24, 27, 31, 35,§7685.]

Referred to in §7684

7686 Vote by agent. Any nonresident of the county or any corporation owning land or right-of-way lying wholly or in part within the district and assessed for benefits may have his or its vote cast by some resident taxpayer of the district or agent of such corporation when authorized by a power of attorney signed and acknowledged by such nonresident landowner or duly authorized officer of such corporation. Such power of attorney shall be filed with the auditor of the county where such election is held at least five days prior to the election at which it is to be effective. Every such power of attorney shall specify the particular election for which it is to be used, indicating the day, month, and year of such election, and shall be void for all elections subsequently held. [SS15,§1989-a73; C24, 27, 31, 35,§7686.]

7687 Vote of minor or insane. The vote of any person who is a minor, insane, or under other legal incompetency shall be cast by the parent, guardian, or other legal representative of such minor, insane, or other incompetent person and in order to be counted it shall be cast in person. The person casting such vote shall deliver to the judges and clerks of election a written sworn statement giving the name, age, and place of residence of such minor, insane, or other incompetent person, and any false statement knowingly made to secure permission to cast such vote shall render the party so making it guilty of the crime of perjury. [C24, 27, 31, 35,§7687.]

Perjury, punishment, §13165

7688 Ballots. Each ballot for election of trustees shall have the name of each person voted for printed or legibly written thereon, and the number of the election district for which he is a candidate. [C24, 27, 31, 35,§7688.]

40ExGA, HF 185, §198, editorially divided

7689 Candidates voted for. Each qualified voter for the whole district shall be entitled to vote for one candidate for each district for which a trustee is to be elected. [C24, 27, 31, 35,§7689.]

7690 Election—canvass of votes—returns. On the day designated for said election the polls shall open at eight o'clock a. m. and remain open until seven o'clock p. m. The judges of election shall canvass the vote and certify the result, and deposit with the auditor the ballots cast, together with the poll books showing the names of the voters; but if there is more than one county in the district, the returns shall be filed with the auditor of the county having the greatest acreage of said district. [S13,§1989-a52c; SS15,§1989-a64; C24, 27, 31, 35,§7690.]

7691 Canvass—certificates of election. The canvass of the returns by the board or boards of supervisors shall be on the next Monday following said election and it or they shall make a return of the results of such canvass to the auditor, who shall issue certificates to the trustees elected, and when the district extends into more than one county, then the auditor with whom the election returns were filed shall issue such certificates. [S13,§1989-a52c; SS15, §1989-a64; C24, 27, 31, 35,§7691.]

7692 Tenure of office. Except as provided in section 7693, the trustees so elected shall hold office until the fourth Saturday in January next succeeding their election and until their successors are elected and qualify. On the third Saturday in the January next succeeding their original election, an election shall be held at which three trustees shall be chosen, one for one year, one for two years, and one for three years, and each shall qualify and enter upon the duties of his office on the fourth Saturday of the same January. On the third Saturday in each succeeding January, an election shall be held to choose a successor to the trustee whose term is about to expire, and the term of his office shall be for three years and until his successor has qualified. [SS15,§§1989-a52d,-a65–a67; C24, 27, 31, 35,§7692.]

7693 Levee and pumping station districts. In a levee district or drainage district having a pumping station an election of trustees shall be held biennially on the third Saturday in January, at which election two trustees shall be elected for a term of three years, but the term of one shall begin one year from the fourth Saturday in January after his election. Ballots shall indicate which of said trustees is for the term beginning on the first Saturday after his election and which for the term beginning one year from such period. For the purpose of carrying out the provisions of this section the terms of trustees in any such districts shall expire on the fourth Saturday of January, 1925, and on the third Saturday of January, 1925, an election of trustees shall be held at which there shall be two trustees elected for two years, and one for three years, and thereafter biennially two trustees shall be elected with terms of office as first above provided. [S13,§1989-a52e; SS15, §1989-a52d; C24, 27, 31, 35,§7693.]

Referred to in §7692

7694 Division of districts under trustees. In all districts already under trustee management, the board of trustees shall, prior to the election of trustees in the year 1925, divide the district for which they are trustees, into election districts, and at the election for that and each succeeding year, when a trustee is to be elected, it shall be for a specified election district within such district. [C24, 27, 31, 35, §7694.]

7695 Elections—how conducted. After the first election of trustees, the trustees shall act as judges of election; the clerk of the board shall act as one of the clerks; and some owner of land

in the district shall be appointed by the board to act as another clerk. The trustees shall fill all vacancies in the election board. The result of each election shall be certified to the auditor or the several county auditors if the district is located in more than one county. [SS15,§1989-a69; C24, 27, 31, 35,§7695.]

7696 Change of time. The date on which said annual election shall be held may be changed by the choice of a majority of electors of such district expressed by ballot at any such annual election, and the return of such vote shall be certified in the same manner as the returns for election of trustees. [S13,§1989-a52e; C24, 27, 31, 35,§7696.]

7697 Vacancies. If any vacancy occurs in the membership of the board of trustees between the annual elections, the remaining members of the board shall have power to fill such vacancies by appointment of persons having the same qualifications as themselves. The persons so appointed shall qualify in the same manner and hold office until the next annual election when their successors shall be elected. In the event that all places on the board become vacant, then a new board shall be appointed by the auditor, or if more than one county, then by the auditor of the county in which the greater acreage of the district is located. The persons so appointed shall hold office until the next annual election and until their successors are elected and qualify. [SS15,§1989-a68; C24, 27, 31, 35,§7697.]

7698 Bonds. The trustees shall qualify by giving a bond in the sum of not less than one thousand dollars or more than five thousand dollars each, conditioned for the faithful discharge of their duties, said bond to be fixed and approved by the auditor of the county, and if more than one, then of the county in which the greater acreage of the district is located. [SS15, §§1989-a52f,-a71; C24, 27, 31, 35,§7698.]

7699 Organization. As soon as the trustees have qualified, they shall organize by electing one of their own number as chairman and may select some other taxpayer of the district as clerk of the board who shall serve during the pleasure of the board of trustees. [SS15,§1989-a70; C24, 27, 31, 35,§7699.]

7700 Power and duties of trustees. Trustees shall have control, supervision, and management of the district for which they are elected and shall be clothed with all of the powers now conferred on the board or boards of supervisors for the control, management, and supervision of drainage and levee districts under the laws of the state, unless otherwise specially provided. Such authority shall extend only to the district for which they are elected. [SS15,§§1989-a52f,-a71; C24, 27, 31, 35,§7700.]

7701 Costs and expenses. All costs and expenses necessary to discharge the duties by this chapter conferred upon trustees shall be levied and collected as provided by law and such levy shall be upon certificate by the trustees to the board or boards of supervisors of the amount necessary for such levy. [SS15,§§1989-a52f, -a71; C24, 27, 31, 35,§7701.]

40ExGA, HF 185, §209, editorially divided

7702 Disbursement of funds. Drainage and levee taxes when so levied and collected shall be kept by the treasurer of the county in a separate fund to the credit of the district for which it is collected, shall be expended only upon the orders of trustees, signed by the president of the board, upon which warrants shall be drawn by the auditor upon the treasurer. [SS15, §1989-a52f; C24, 27, 31, 35,§7702.]

7703 Certificates and bonds. The board of trustees of any district shall have the same power to issue improvement certificates and levee and drainage bonds under the same conditions and with like tenor and effect as is provided by chapter 353 for such issuance by the board of supervisors, except that in case of the issue of levee or drainage bonds, the same shall be approved by a judge of the district court in and for the county or counties in which such district lies, which approval shall be printed upon such bonds before the same are negotiated. [SS15,§1989-a52f; C24, 27, 31, 35,§7703.]

7704 Reclassification and other changes. If a reclassification of lands or a readjustment of the assessments of property or any important change of the district shall be deemed advisable by the said trustees, they shall submit such questions to the vote of the owners of land of said district assessed for benefits, by ballot, at the next regular election of trustees, or they shall have the power to call a special election therefor, with like notice as for regular elections which shall state the proposition to be submitted. Should the proposition receive the sanction of the majority of the voters at said election, then the trustees shall proceed in the same manner in the reclassification and readjustment of the assessments as is now provided for governing the actions of the board or boards of supervisors. [SS15,§1989-a71; C24, 27, 31, 35,§7704.]

Referred to in §7705
Reclassification, §7492 et seq.

7705 Form of ballot. For the purpose of any election under section 7704, the trustees shall prepare the form of ballot to be used for such election and shall distinctly and separately state on each ballot the propositions to be submitted. If it is a question of reclassification and readjustment of assessments of the district, the ballot shall so state, and be arranged so that the voter may vote for or against said proposition. If the question is one of extensive improvements or important changes of the district, the form of ballot shall specify the extent and estimated cost of such improvements or changes, and be so arranged that each voter may vote for or against such proposition. [C24, 27, 31, 35,§7705.]

40ExGA, HF 185, §212, editorially divided

7706 Ballots distinguished — record. Said ballot shall be separate from any ballot for the election of trustees and when voted, such ballot shall be deposited in a separate box and be kept separate; and the returns of election shall be certified by the judges and clerks of election to the auditor, or if more than one county, to each auditor, and the ballots deposited with the auditor of the county having the largest acreage of the district, and a record made thereof in the drainage record of said district. [C24, 27, 31, 35,§7706.]

7707 Report to auditor. Such trustees shall, from time to time, and with reasonable promptness, furnish the auditor of each county in which any part of said district is situated, with a correct report of their acts and proceedings, which report shall be signed by the chairman and the clerk of the board and shall be recorded by the auditor in the drainage record, and shall be published in one official paper in the county having a general circulation in the district. [S13,§1989-a52g; SS15,§1989-a72; C24, 27, 31, 35,§7707.]

7708 Compensation — statements required. The compensation of the trustees and the clerk of the board is hereby fixed at three dollars per day and necessary expenses, to be paid out of the funds of the drainage or levee district for each day necessarily expended in the transaction of the business of the district, but no one shall draw compensation for services as trustee and as clerk at the same time. They shall file with the auditor or auditors, if more than one county, itemized, verified statements of their time devoted to the business of the district and of the expenses incurred. [SS15,§§1989-a52f,-a74; C24, 27, 31, 35,§7708.]

7709 Change to supervisor management. Any district which has been placed under the management of trustees may be placed back under the management of the board or boards of supervisors in the manner provided in section 7710. [C24, 27, 31, 35,§7709.]

7710 Petition—canvass. For such purposes a petition signed by a majority of persons, including corporations, owning land within the district assessed for benefits and who in the aggregate own more than one-half the acreage of such lands, may be filed in the office of the auditor and if more than one county, then a duplicate shall be filed in the office of the auditor of each county.

The trustees shall fix a date not less than ten nor more than thirty days from the date such petition is filed for the canvass of such petition, and the trustees and auditor or auditors shall canvass said petition and certify and record in the drainage record the result. [C24, 27, 31, 35,§7710.]

Referred to in §7709

7711 Remonstrance. Remonstrances signed by the same persons who are qualified to sign the petition may be filed in the office of the auditor and if the same persons petition and remonstrate they shall be counted on the remonstrance only. Such remonstrances shall be filed not less than five days before the time set for hearing. [C24, 27, 31, 35,§7711.]

7712 When change effective. If the result of the canvass shows a majority in favor of such change, then it shall become effectual on the date at which the next annual election of trustees would be held, and on such date the trustees shall surrender and turn over to the board or boards of supervisors the full and complete management and control of such district, together with all books, contracts, and other documents relating thereto. [C24, 27, 31, 35,§7712.]

7713 Final report of trustees. On or before the date such change becomes effective, the said trustees shall make and file with the auditor, or if more than one county, a duplicate with each auditor, a final report setting forth:

1. The amount of cash funds on hand or to the credit of the district.
2. The amount of outstanding indebtedness of the district, and the form thereof, whether in warrants, improvement certificates, or bonds and the amount of each.
3. Any outstanding contracts for repairs or other work to be done.
4. A statement showing the condition of the improvements of the district, and specifying any portion thereof in need of repair. [C24, 27, 31, 35,§7713.]

7714 Management by supervisors. After such change is made it shall be the duty of the board or boards of supervisors to manage and control the affairs of said district as fully and to the same extent as if it had never been under trustee management. They shall carry out any pending contracts lawfully made by the trustees as fully as if made by the board. [C24, 27, 31, 35,§7714.]

CHAPTER 358.1

DRAINAGE REFUNDING BONDS

Referred to in §7766. Additional provision, §7509.1

7714.01 Refunding bonds.
7714.02 Petition for refunding.
7714.03 Sufficiency of petition—hearing.
7714.04 Notice.
7714.05 Requirements of notice.
7714.06 Extending payment of assessments.
7714.07 Appeal.
7714.08 Time and manner of appeal.
7714.09 Maximum extension.
7714.10 Form of bonds.
7714.11 Numbering, signing, and attestation.
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7714.14 Record of bonds.
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7714.16 Sale, exchange, and cancellation.
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7714.18 Effect of extension.
7714.19 Additional assessments.
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7714.21 Trust fund.
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7714.24 Void bonds or assessments.
7714.25 Interpretative clause.
7714.26 Composition with creditors—federal loans.
7714.27 Refinancing powers.
7714.28 Report and hearing—appeal.

7714.01 Refunding bonds. The board of supervisors of any county may extend the time of the payment of any of its outstanding drainage bonds issued in anticipation of the collection of drainage assessments levied upon property within a drainage district, and may extend the time of payment of any unpaid assessment, or any installment or installments thereof, and may renew or extend the time of payment of such legal bonded indebtedness, or any part thereof, for account of such drainage district, and may refund the same and issue drainage refunding bonds therefor subject to the limitation and in the manner hereinafter provided. [C27, 31, 35,§7714-b1.]

Similar provision, §7663

7714.02 Petition for refunding. Before the time of payment of said assessments or any installment or installments thereof shall be extended and before the board shall institute proceedings for the issuance of drainage refunding bonds, the owners of not less than fifteen percent of the land within a drainage district as shown by the transfer books in the auditor's office upon which drainage assessments are unpaid, shall file a petition with the board requesting the extension of the time of payment of assessments levied in said drainage district or of any installment or installments thereof, setting forth the date said assessments to be extended were levied, the aggregate amount thereof unpaid, and requesting the issuance of drainage refunding bonds, stating the amount and purpose of said bonds. [C27, 31, 35,§7714-b2.]

7714.03 Sufficiency of petition — hearing. Upon the receipt of any such petition the board shall, at the next regular meeting or regular adjourned meeting, determine the sufficiency thereof and fix a date of meeting of the board at which it is proposed to extend the time of payment of said unpaid assessments and to take action for the issuance of drainage refunding bonds. [C27, 31, 35,§7714-b3.]

7714.04 Notice. The board shall give ten days notice of said meeting as required in relation to the issuance of bonds under chapter 23. [C27, 31, 35,§7714-b4.]

Referred to in §7714.28

7714.05 Requirements of notice. Said notice shall be directed to each person whose name appears upon the transfer books in the auditor's office as owner of lands within said drainage district upon which said drainage assessments are unpaid, naming him, and also to the person or persons in actual occupancy of any of said tracts of land without naming them, and shall state the amount of unpaid assessments upon each forty-acre tract of land or less, and that all of said unpaid assessments, installment or installments thereof as proposed to be extended, may be paid in cash on or before the time fixed for said hearing, and that after the expiration of such time no assessments may be paid except in the manner and at the times fixed by the board in the resolution authorizing the issuance of said drainage refunding bonds. [C27, 31, 35, §7714-b5.]

Referred to in §7714.28

7714.06 Extending payment of assessments. In case no appeal is taken to the issuance of said bonds as provided by chapter 23, the board may extend the time of payment of said unpaid assessment or any installment or installments thereof as requested in the petition and may issue drainage refunding bonds, or, in case of an appeal, the board may issue such bonds in accordance with the decision of the state comptroller provided said assessments, installment or installments thereof have not been entered on the delinquent tax lists and have not been previously extended. [C27, 31, 35,§7714-b6.]

Referred to in §7714.28

7714.07 Appeal. Any person aggrieved by the final action of the board extending the time of payment of said unpaid assessment, installment or installments thereof may appeal therefrom to the district court of the county in which such action was taken. [C27, 31, 35,§7714-b7.]

7714.08 Time and manner of appeal. All appeals shall be taken in the manner provided in section 7515 except that said appeal shall be taken within ten days after the date of the final action of the board. [C27, 31, 35,§7714-b8.]

7714.09 Maximum extension. The unpaid assessments against said lands within said drainage district shall not be extended for a

period exceeding forty years from the time any assessment, installment or installments thereof to be extended become due. The board shall fix the amount that shall be levied and collected each year and may issue drainage refunding bonds covering all said unpaid assessments. [C27, 31, 35,§7714-b9.]

7714.10 Form of bonds. Drainage refunding bonds shall be issued in denominations of not less than one hundred dollars nor more than one thousand dollars, each, running not more than forty years, bearing interest not exceeding six percent per annum, payable semiannually, and shall be substantially in the form provided by law relating to drainage bonds, with such changes as shall be necessary to conform with this chapter. [C27, 31, 35,§7714-b10.]

7714.11 Numbering, signing, and attestation. Said bonds shall be numbered consecutively, signed by the chairman of the board and attested by the county auditor with the seal of the county affixed. The interest coupons attached thereto shall be executed by the county auditor. [C27, 31, 35,§7714-b11.]

7714.12 Resolution required. All bonds issued under the provisions of this chapter shall be issued pursuant to and in conformity with a resolution adopted by the board of supervisors which shall specify the amount of unpaid assessments to be extended, the times when the installment or installments of extended assessments shall become due, the amount of drainage refunding bonds authorized to be issued, the purpose for which issued, the rate of interest they shall bear, the place where the principal and interest shall be payable and the time or times when they shall become due, and such other provisions not inconsistent with law in reference thereto, as the board shall deem proper. [C27, 31, 35,§7714-b12.]

7714.13 Record of resolution. Said resolution shall be entered of record upon the minutes of proceedings of said board and shall constitute a contract between the drainage district and the purchasers or holders of said bonds and shall be full authority for the revision of the tax rolls to accord therewith. [C27, 31, 35, §7714-b13.]

7714.14 Record of bonds. When the bonds have been executed as aforesaid they shall be delivered to the county treasurer and his receipt taken therefor. He shall register said bonds in a book provided for that purpose which shall show the number of each bond, its date, date of sale, amount, date of maturity, and the name and address of the purchaser, and if exchanged what evidences of indebtedness were received therefor, which record shall at all times be open to the inspection of the owners of property within said drainage district. The treasurer shall thereupon certify on the back of each bond as follows:

"This bond duly and properly registered in my office this ..... day of ....., 19....

.....;

Treasurer of the County of....."

[C27, 31, 35,§7714-b14.]

7714.15 Liability of treasurer — reports. The treasurer shall stand charged on his official bond with all bonds so delivered to him and the proceeds thereof. He shall report under oath to the board, at each first regular session thereof in each month, a statement of all such bonds sold or exchanged by him since his last report and the date of such sale or exchange and when exchanged a description of the indebtedness for which exchanged. [C27, 31, 35,§7714-b15.]

7714.16 Sale, exchange, and cancellation. He shall, under a resolution and the direction of the said county board of supervisors, sell the bonds for cash on the best available terms or exchange them on like terms for the legal indebtedness of the said drainage district evidenced by the outstanding drainage bonds, authorized to be refunded by the resolution authorizing the issue of said refunding bonds, and the proceeds shall be applied and exclusively used for the purpose for which said bonds are issued. In no case shall they be sold or exchanged for a less sum than their face value and all interest accrued. After registration the treasurer shall deliver said refunding bonds to the purchaser thereof and when exchanged for said bonded indebtedness of said district, shall at once cancel a like amount of said drainage bonds. [C27, 31, 35,§7714-b16.]

7714.17 Redemption from tax sale. In case any land within such drainage district shall have been sold at tax sale for failure of the owner thereof to pay any drainage assessments levied thereon, and before any tax deed has been issued, then on application of the owner of such land, the board of supervisors may effect a redemption thereof for such owner out of the proceeds of any refunding bond issue and add the cost of such redemption of* the amount of the unpaid assessments against such land, payment thereof to be extended in manner and as a part of the remaining unpaid assessments thereon. [C35,§7714-f1.]

*"to" manifestly intended

7714.18 Effect of extension. The extension of the time of payment of any unpaid assessments or installment or installments thereof, in the manner aforesaid shall in no way impair the lien of said assessments as originally levied or the priority thereof, nor the right, duty, and power of the officers authorized by law to levy, collect, and apply the proceeds thereof to the payment of said drainage refunding bonds. [C27, 31, 35,§7714-b17.]

7714.19 Additional assessments. If said assessments should for any reason be insufficient to meet the interest and principal of said drainage refunding bonds additional assessments

shall be made to provide for such deficiency. [C27, 31, 35,§7714-b18.]

7714.20 Applicability of funds. All special assessments, taxes, and sinking funds applicable to the payment of the indebtedness refunded by said drainage bonds shall be applicable in the same manner and to the same extent to the payment of such refunding bonds issued hereunder, and the powers, rights, and duties to levy and collect special assessments or taxes, or create liens upon property shall continue until all refunding bonds shall be paid. [C27, 31, 35, §7714-b19.]

7714.21 Trust fund. The special assessments out of which said bonds are payable shall be collected and held separate and apart in trust for the payment of said refunding bonds. [C27, 31, 35,§7714-b20.]

7714.22 Liens unimpaired. When drainage refunding bonds are issued hereunder, nothing in this chapter shall be construed as impairing the lien of any unpaid drainage assessments or installments in such drainage district, the time of payment of which is not extended, nor shall this chapter be construed as impairing the priority of the lien thereof nor the right, duty, and power of the officers authorized by law to levy, collect, and apply the proceeds thereof to the payment of outstanding drainage bonds issued in anticipation of the collection thereof. [C27, 31, 35,§7714-b21.]

7714.23 Limitation of action. No action shall be brought questioning the validity of any of the bonds authorized by this chapter from and after three months from the time the same are ordered issued by the proper authorities. [C27, 31, 35,§7714-b22.]

Similar provisions, §§6264, 6779, 6932, 7673, 7714.40

7714.24 Void bonds or assessments. The provisions of this chapter shall not apply to bonds or assessments adjudicated to be void. [C27, 31, 35,§7714-b23.]

7714.25 Interpretative clause. This chapter shall be construed as granting additional power without limiting the power already existing for the extension of the time of payment of drainage assessments and the issuance of drainage bonds. [C27, 31, 35,§7714-b24.]

7714.26 Composition with creditors—federal loans. For the purpose of refinancing, adjusting, composing and refunding in such adjusted amount the indebtedness of any drainage districts or levee districts, found to be in financial distress, the governing body thereof, or board of supervisors as the case may be, upon its own motion, is authorized to enter into agreements with the creditors of said district, for the reduction and composition of its outstanding indebtedness, and to make application for and negotiate with the Reconstruction Finance Corporation, or any other loaning agency, for the borrowing of funds for such purposes. [C35, §7714-g1; 47GA, ch 202,§1.]

7714.27 Refinancing powers. In order to effect such loan, the governing body of such district, or board of supervisors, is authorized to execute such agreements and contracts, and to fulfill such requirements of the loaning agency as are not inconsistent with this chapter; and to issue, and pledge or sell such bonds at their face value to the said Reconstruction Finance Corporation, or other loaning agency, furnishing the funds for such debt readjustment, in the amount required for such adjustment.

The governing body, or board of supervisors, shall also have the authority as a part of such plan of refinancing, adjusting, composing, and refunding its indebtedness, to cancel the old assessments collectible against the land within the district, pledged to the payment of its outstanding indebtedness and proportionately and equitably relevy the same, with interest, over the period covered by the new bonds, in an amount sufficient to pay said new bonds and interest thereon, provided, however, that the new assessments thereby created against any tract of land within the district shall not be in excess of the unpaid assessments against such tract before the readjustment or composition is made, and provided further, that such new and extended assessment against such tract shall fully replace the old assessment. [C35, §7714-g2.]

7714.28 Report and hearing—appeal. At the direction of the governing board of such district, or board of supervisors, the county auditor of the county within which the land on which the indebtedness is being adjusted is situated, shall compile a tabulated report as to the lands within the said district, setting forth:

1. The name of the owner of each assessed tract as shown by the transfer books in his office.
2. The amount of the unpaid old assessments against each of said tracts.
3. The amount of the new assessment required to pay the new bonds to be issued, together with the installments to be paid thereon annually of principal and interest, and the maximum period of time over which such assessments shall be paid.

After such report is tabulated and filed, a hearing upon the contemplated action of the governing body of such district, or board of supervisors, to make the proposed adjustment, composition, renewal and refunding in such adjusted amount of its outstanding indebtedness, together with the issuance of bonds and the levying of assessments therefor, shall be had in the manner and upon the same notice as is prescribed in sections 7714.04 to 7714.06, inclusive, and appeal may be made therefrom as provided in this chapter. [C35,§7714-g3.]

CHAPTER 358.2

DEFAULTED DRAINAGE BONDS

Referred to in §7766

7714.29 Extension of payment—application.
7714.30 Petition.
7714.31 Hearing.
7714.32 Parties—notice—service.
7714.33 Jurisdiction of court.
7714.34 Conservator appointed.
7714.35 Report—hearing thereon.
7714.36 Adjudication on report.
7714.37 Refunding bonds.
7714.38 Lien.
7714.39 Trustees as parties.
7714.40 Limitation of action.

7714.29 Extension of payment—application. When drainage district bonds have been issued in anticipation of the collection of drainage district assessments levied on real estate within such drainage district are in default, either for failure to pay principal installments or accrued interest thereon, and funds are not on hand within thirty days after such default, ten owners of real estate in such district or the owners of not less than ten percent in amount of the outstanding drainage bonds of such district may make application to the district court of the county wherein said drainage district is located, asking for an extension of time of payment, and a re-amortization of the assessments on the real estate within such drainage district, which was in default, and a new schedule of payments of the bonds and other indebtedness, and the issuance of new bonds as provided by this chapter. [C35,§7714-f2.]

Referred to in §7714.30

7714.30 Petition. Ten owners of real estate in such district, or the owners of not less than ten percent in amount of the outstanding drainage bonds of such drainage district, may institute proceedings in the district court of the county issuing such bonds wherein the drainage district is located, by filing a petition which shall set forth the names and addresses of the ten petitioning real estate owners or the names and addresses of the petitioning owners of ten percent in amount of the drainage bonds of said district, that said bonds are in default as defined in section 7714.29, that the petitioners have good reason to believe that said default cannot, or will not, be removed by payment under the present schedule of said district, and asking that the matters herein presented be reviewed by the court, and determined as provided by this chapter. [C35,§7714-f3; 48GA, ch 217,§3.]

7714.31 Hearing. On the filing of such petition the judge for said court, either in session, or in vacation, shall enter an order fixing the date for hearing, which date shall be at least four weeks subsequent to the date of the filing of the order. [C35,§7714-f4.]

7714.32 Parties—notice—service. The board of supervisors of such county or counties wherein the drainage district is located, shall be notified of the proceeding and hearing by original notice served in the same manner as in civil actions; notice of said hearing shall be served upon all owners of each tract of land or lot within such drainage district, as shown by the transfer books in the county auditor's office, upon each lienholder or incumbrancer of any land within the said drainage district as shown by the county records, and upon all persons holding claims against said drainage district, as shown by the county records, and also upon all other persons whom it may concern, including bondholders and actual occupants of the land within said drainage district, without naming individuals, by publication thereof, once each week for two consecutive weeks, in some newspaper of general circulation in the county or counties where said drainage district is located, the last of which publications shall be not less than twenty days prior to the date set for hearing on the said petition, and when such notice is complete, it shall be deemed a sufficient notice for all hearings and proceedings under this chapter. Proof of such service shall be made by affidavit of the publisher and be on file with the county auditor on or before the date of hearing. [C35,§7714-f5; 48GA, ch 217,§4.]

7714.33 Jurisdiction of court. The district court shall have jurisdiction and power to adjudicate all the rights and issues between the drainage district, and the landowners, bondholders, lienholders, incumbrancers, claimants and creditors of the drainage district, and in determining the rights of the parties, shall take into consideration, the maturity of the bonds, the interest rate of the bonds, the present schedule and classification of assessments on the real estate, the ratio between the amount in default, and the amount of unpaid assessments in the drainage district, the gross amount needed to retire the bonds now outstanding and in default, the current retirement schedule on other indebtedness of the drainage district, the general tax structure of the drainage district, the unpaid taxes in the drainage district, the default by the drainage district in the payment of its bonded indebtedness, and the current financial condition of the taxpayers. [C35,§7714-f6.]

7714.34 Conservator appointed. If the court finds that the necessary parties have instituted the proceedings, and that all necessary parties have been properly served with notice, and the order of the court, and that the drainage district is in default in the payment of its installment assessments, or the interest thereon, the court shall enter an order appointing the county auditor of the county in which such drainage district is located, or if such drainage district is

located in more than one county, the county auditor of the county wherein the greater portion of the lands within said drainage district are located, receiver for the said drainage district, said receiver being hereafter called "conservator", and the said conservator shall be under the court's direction. The conservator shall be allowed such compensation as may be determined by the court, and said conservator may employ, under the direction and approval of the court, an attorney, and such assistants as may be necessary to perform the duties required by him under the law, and orders of court. [C35,§7714-f7.]

7714.35 Report—hearing thereon. The conservator shall, within thirty days from the date of his appointment, prepare and file with the clerk of the district court, a full report, giving in detail, the bonded indebtedness of said drainage district, the accrued interest thereon, and any and all other indebtedness owing by said drainage district; a full and complete schedule of all lands sold at tax sale, including the amount of drainage assessments thereon; a list of all real estate within the drainage district, showing the unpaid assessments thereon; also said conservator shall set forth a schedule, under which the bonded indebtedness of said drainage district may be re-amortized; also a schedule under which all other indebtedness of said drainage district may be paid or re-amortized. Upon the filing of the report by the conservator, the court shall set a date for hearing thereon, which date shall not be less than ten or more than fifteen days, from the filing thereof. [C35,§7714-f8.]

7714.36 Adjudication on report. At the hearing of the conservator's report, the court shall fix and determine the amount of money in the hands of the county treasurer belonging to said drainage district; the amount of the indebtedness of said drainage district; to whom said indebtedness is due, and fix and determine the time, manner and priority of payment of said indebtedness; also the court shall fix and determine the amount of unpaid assessment or assessments against each tract of land within said drainage district, and may extend the time of payment, re-amortize and re-allocate the said assessments upon each tract of land within said drainage district; also, if the court finds that the assessments as levied against each tract of land within said drainage district, are not sufficient to pay the indebtedness due and owing by said drainage district, the court may order the board of supervisors of the county within which the said drainage district is located, to levy an assessment against the lands within said drainage district, in an amount to pay the deficit; provided, however, that no assessment for the payment of drainage bonds or improvement certificates shall be levied against any tract of land where the owner of said land is not delinquent in payment of any assessment and provided, further, that the amount of the reassessment on a particular piece of land shall be in direct proportion to the amount of unpaid assessments on said land and provided, further, that no assessment or expenses incidental thereto, for the payment of drainage bonds or improvement certificates under this chapter, shall be levied against any tract of land where the owner of said land had previously paid all of his assessment. Said assessment to be assessed and levied by the board of supervisors upon the lands within said drainage district, in the same proportion as the original assessment. A copy of said order entered by the court, shall be filed by the clerk of the district court with the county auditor, and the schedule of payments of the indebtedness of said drainage district as fixed and determined by the court, shall be entered upon the drainage records of the drainage district and also spread upon the tax records of the county, and shall become due and payable at the same time as ordinary taxes, and shall be collected in the same manner with the same penalties for delinquency, and the same manner of enforcing collection by tax sale. Also the court may apportion the costs between the creditors of the drainage district, and the drainage district. [C35,§7714-f9.]

Referred to in §7714.37

7714.37 Refunding bonds. The court shall direct the board of supervisors to issue bonds in lieu of the outstanding drainage bonds for said drainage district, and additional bonds for the accrued interest and other indebtedness of said drainage district. Said bonds shall be payable in amounts, and at the time and manner, and with priority of payments as has been determined by order of court, as provided by section 7714.36, and shall be called "conservator's drainage district bonds". Each bond shall be numbered and shall state on its face that it is a conservator's drainage district bond; that it is issued in pursuance of a resolution adopted by the board of supervisors, under order of court, and giving the name of the court and the county where such court is held; that it is issued to pay indebtedness of the drainage district; shall state the county where such district is located, and the number of the drainage district for which it is issued; shall state the date of maturity of the bond, the rate of interest thereon, which rate shall not be less than three and one-half percent per annum, and that the bond is to be paid only from taxes assessed, levied and collected on the lands within the drainage district for which the bond is issued subject to the provisions of section 7714.36. All bonds shall be signed by the chairman of the board of supervisors and countersigned by the conservator designated as such. The interest coupons attached to said bonds shall be attested by the signature of the conservator or a facsimile thereof. When the bonds have been executed as herein required, the conservator may sell said bonds at not less than par with accrued interest thereon, and pay the indebtedness of said drainage district, or may exchange said bonds with the creditors of said drainage district in amounts as has been fixed and determined by the court, and the conservator shall cancel all drainage bonds, improvement cer-

tificates, warrants or other evidence of indebtedness received by him in lieu of the conservator's bonds. [C35,§7714-f10.]

7714.38 Lien. When conservator's drainage district bonds are issued hereunder, nothing herein, shall be construed as impairing the lien of all unpaid assessments upon the real estate within said drainage district, nor shall this chapter be construed as impairing the priority of the lien thereof, nor the right, duty and power of the officer authorized by law, to levy, collect and apply the proceeds thereof, to the payment of outstanding drainage bonds issued in anticipation of the collection thereof. [C35,§7714-f11.]

7714.39 Trustees as parties. Should a drainage district in default be managed by drainage district trustees, said trustees shall also be named as proper and necessary parties defendant. [C35,§7714-f12.]

7714.40 Limitation of action. No action shall be brought, questioning the validity of any conservator's drainage district bond issued under this chapter from and after three months from the date of the order causing the said bonds to be issued. [C35,§7714-f13.]

Similar provisions, §§6264, 6779, 6932, 7673, 7714.23

CHAPTER 359

INDIVIDUAL DRAINAGE RIGHTS

Referred to in §§7442, 7751, 7766

7715 Drainage through land of others—application.
7716 Notice of hearing—service.
7717 Service upon nonresident.
7718 Service on omitted parties—adjournment.
7719 Claims for damages—waiver.
7720 Hearing—sufficiency of application—damages.
7721 Shall locate when—specifications.
7722 Findings—record.
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7724 Transcript.
7725 Appeal—how tried—costs.
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7728 Construction.
7729 Construction through railroad property.
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7731 Failure to construct.
7732 Repairs.
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7734 Drains on abutting boundary lines.
7735 Boundary between two townships.
7736 Drainage in course of natural drainage.
7737 Drainage connection with highway.
7738 Private drainage system—record.
7739 Drainage plat book.
7740 Record book and index.
7741 Original plat filed.
7742 Record not part of title.
7743 Fees for record and copies.

7715 Drainage through land of others—application. When the owner of any land shall desire to construct any levee, open ditch, tile, or other underground drain, for agricultural, sanitary, or mining purposes, or for the purpose of securing more complete drainage or a better outlet, across the lands of others or across or through the right-of-way and roadbed of a railroad, and shall be unable to agree with the owner of any such lands or with any such railroad company upon the terms upon which such rights may be obtained, he may file with the township clerk of the township in which any such land or right-of-way is situated, an application in writing, setting forth a description of the land or other property through which he is desirous of constructing any such levee, ditch, or drain, the starting point, route, terminus, character, size, and depth thereof. [C73,§1217; C97,§1955; S13,§1955; C24, 27, 31, 35,§7715.]

7716 Notice of hearing—service. Upon the filing of any such application, the clerk shall forthwith fix a time and place for hearing thereon before the township trustees of his township, which hearing shall be not more than ninety days nor less than thirty days from the time of the filing of such application, and cause notice in writing to be served upon the owner of each tract of land across which any such levee, ditch, or drain is proposed to be located, as shown by the transfer books in the office of the county auditor, and also upon the person in actual occupancy of any such lands, of the pendency and prayer of such application and the time and place set for hearing on the same before the township trustees, which notice, as to residents of the county and railroad companies, shall be served not less than ten days before the time set for such hearing, in the manner that original notices are required to be served. Notice to a railroad company may be served upon any station agent. [C73,§1218; C97,§1955; S13,§1955; C24, 27, 31, 35,§7716.]

Manner of service, §11060

7717 Service upon nonresident. In case any such owner is a nonresident of the county, such notice as to him shall be posted in three public places within the township where his land is situated at least fifteen days before the time set for such hearing, one of which places shall be upon the land of which he is the owner. [C73, §1218; C97,§1955; S13,§1955; C24, 27, 31, 35, §7717.]

7718 Service on omitted parties—adjournment. If at the hearing it should appear that any person entitled to notice has not been served with notice, the trustees may postpone such hearing and fix a new time for the same, and notice of such new time of hearing may be served on such omitted persons in the manner and for the time provided by law and by fixing such new time for hearing and by adjournment to such time, the trustees shall not lose jurisdiction of the subject matter of such proceeding

nor of any persons previously served with notice. [S13,§1955; C24, 27, 31, 35,§7718.]

7719 **Claims for damages—waiver.** Any person or corporation claiming damages or compensation for or on account of the construction of any such improvement, shall file a claim in writing therefor with the township clerk at or before the time fixed for hearing on the application. A failure to file such claim at the time specified shall be deemed to be a waiver of the right to claim or recover such damage. [S13, §1955; C24, 27, 31, 35,§7719.]

7720 **Hearing—sufficiency of application—damages.** At the time set for hearing on the application, if the trustees shall find that all necessary parties have been served with notice as required, they shall proceed to hear and determine the sufficiency of the application as to form and substance, which application may be amended both as to form and substance before final action thereon. They shall also determine the merits of the application, all objections thereto, and all claims filed for damages or compensation, and may view the premises. The trustees may adjourn the proceedings from day to day, but no adjournment shall be for a longer period than ten days. [C73,§1219; C97,§1956; S13,§1956; C24, 27, 31, 35,§7720.]

7721 **Shall locate when—specifications.** If the trustees find that the levee, ditch, or drain petitioned for will be beneficial for sanitary, agricultural, or mining purposes, they shall locate the same and fix the points of entrance and exit on such land or property, the course of the same through each tract of land, the size, character, and depth thereof, when and in what manner the same shall be constructed, how kept in repair, what connections may be made therewith, what compensation, if any, shall be made to the owners of such land or property for damages by reason of the construction of any such improvements, and any other question arising in connection therewith. [C73,§1220; C97, §1956; S13,§1956; C24, 27, 31, 35,§7721; 48GA, ch 217,§5.]

7722 **Findings—record.** The trustees shall reduce their findings, decision, and determination to writing, which shall be filed with the clerk of such township, who shall record it in the official record of the trustees proceedings, together with the application and all other papers filed in connection therewith, and he shall cause the findings and decision of the trustees to be recorded in the office of the recorder of the county in which such land is situated and said decision shall be final unless appealed from as provided in section 7723. [C73,§1220; C97, §1956; S13,§1956; C24, 27, 31, 35,§7722.]

7723 **Appeal—notice.** Either party may appeal to the district court from any such decision by causing to be served, within ten days from the time it was filed with the clerk, a notice in writing upon the opposite party of the taking of such appeal, which notice shall be served in the same manner as is provided for the service of original notices. If the appellant is the party petitioning for the drain, he shall also file a bond, conditioned to pay all costs of appeal that may be assessed against him, which bond, if good and sufficient, shall be approved by the township clerk. [C73,§1223; C97,§1957; C24, 27, 31, 35,§7723.]

Referred to in §7722
Manner of service, §11060
Presumption of approval of bond, §12759.1

7724 **Transcript.** In case of appeal, the township clerk shall certify to the district court a transcript of the proceedings before the trustees, which shall be filed in said court with the appeal bond, the party appealing paying for said transcript and the docketing of said appeal, as in other cases. [C97,§1958; C24, 27, 31, 35, §7724.]

Docketing appeal, §11440

7725 **Appeal—how tried—costs.** The cause shall be tried in the district court by ordinary proceedings, upon such pleading as the court may direct, each party having the right to offer such testimony as shall be admissible under the rules of law. If the appellant does not recover a more favorable judgment in the district court than he received in the decision of the trustees, he shall pay all the costs of appeal. [C97,§1957; C24, 27, 31, 35,§7725.]

7726 **Parties—judgment—orders.** The party claiming damages shall be the plaintiff and the applicant shall be the defendant; and the court shall render such judgment as shall be warranted by the verdict, the facts, and the law upon all the matters involved, and make such orders as will cause the same to be carried into effect. [C73,§1224; C97,§1958; C24, 27, 31, 35,§7726.]

7727 **Costs and damages—payment.** The applicant shall pay the costs of the trustees and clerk and for the serving of notices for hearing, the fees of witnesses summoned by the trustees on said hearing, and the recording of the finding of said trustees by the county recorder. [C73, §1221; C97,§1959; S13,§1959; C24, 27, 31, 35, §7727.]

Compensation, §§5571, 5572
Recorder fee, §5177
Service of notice, §§5191, 10637
Witness fees, §11326 et seq.
40ExGA, HF 185, §233, editorially divided

7728 **Construction.** Before entering on the construction of the drain, the party applying therefor shall pay to the party through whose land said drain is to be constructed the damages awarded to him, or shall pay the same to the trustees for his use. The applicant may proceed to construct said drain in accordance with the decision of the trustees, and the taking of an appeal shall not delay such work. [C97,§1959; S13,§1959; C24, 27, 31, 35,§7728.]

7729 **Construction through railroad property.** If any such ditch or drain shall be located through or across the right-of-way or other land of a railroad company, the trustees shall determine the cost of constructing the same and

the railroad company shall have the privilege of constructing such improvement through its property in accordance with the specifications made by the trustees and recover the costs thereof as fixed by the trustees. Such railroad company before it may exercise such privilege shall file its election to that effect with the township clerk within five days after the decision of the trustees is filed. [S13,§1959; C24, 27, 31, 35,§7729.]

40ExGA, HF 185, §234, editorially divided

7730 **Deposit.** In case such election is filed the applicant shall within ten days thereafter pay to the township clerk, for the use of the railroad company, the cost of constructing the drainage improvement through its property, in addition to the amount that may be allowed as damages, and when the railroad company shall have completed the improvement through its property in accordance with such specifications it shall be entitled to demand and receive from the township clerk such cost. [S13,§1959; C24, 27, 31, 35,§7730.]

7731 **Failure to construct.** If the railroad company shall fail to so construct the improvement for a period of thirty days after filing its election so to do, the applicant may proceed to do so and may have returned to him the cost thereof deposited with the township clerk. [S13, §1959; C24, 27, 31, 35,§7731.]

7732 **Repairs.** In case any dispute shall thereafter arise as to the repair of any such drain, the same shall be determined by said trustees upon application in substantially the same manner as in the original construction thereof. [C73,§1226; C97,§1960; C24, 27, 31, 35, §7732.]

7733 **Obstruction.** Any person who shall dam up, obstruct, or in any way injure any ditch or drain so constructed, shall be liable to pay to the person owning or possessing the swamp, marsh, or other low lands, for the draining of which such ditch or ditches have been opened, double the damages that shall be sustained by the owner, and, in case of a second or subsequent offense by the same person, treble such damages. [C73,§1227; C97,§1961; C24, 27, 31, 35,§7733.]

7734 **Drains on abutting boundary lines.** When any watercourse or natural drainage line crosses the boundary line between two adjoining landowners and both parties desire to drain their land along such watercourse or natural drainage line, but are unable to agree as to the junction of the lines of drainage at such boundary line, the township trustees of the township in which said land is located shall have full power and authority upon the application of either party to hear and determine all questions arising between such parties after giving due notice to each of the time and place of such hearing, and may render such decision thereon as to said trustees shall seem just and equitable. [C97,§1962; C24, 27, 31, 35,§7734.]

Referred to in §7735

7735 **Boundary between two townships.** If any controversy referred to in section 7734 relates to a boundary line between adjoining owners which is also the boundary line between two townships, then such controversy shall be determined by the joint action of the board of trustees in said two adjoining townships, and all the proceedings shall be the same as provided in section 7734 except that it shall be by the joint action of the boards of trustees of said two townships. [C24, 27, 31, 35,§7735.]

7736 **Drainage in course of natural drainage.** Owners of land may drain the same in the general course of natural drainage by constructing open or covered drains, discharging the same in any natural watercourse or depression whereby the water will be carried into some other natural watercourse, and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor. Nothing in this section shall in any manner be construed to affect the rights or liabilities of proprietors in respect to running streams. [S13, §1989-a53; C24, 27, 31, 35,§7736.]

7737 **Drainage connection with highway.** When the course of natural drainage of any land runs to a public highway, the owner of such land shall have the right to enter upon such highway for the purpose of connecting his drain or ditch with any drain or ditch constructed along or across the said highway, but in making such connections, he shall do so in accordance with specifications furnished by the highway authorities having jurisdiction thereof, which specifications shall be furnished to him on application. He shall leave the highway in as good condition in every way as it was before the said work was done. [C97,§1963; C24, 27, 31, 35,§7737.]

7738 **Private drainage system — record.** Any person who has provided a system of drainage on land owned by him may have the same made a matter of record in the office of the county recorder of the county in which the drainage system is located as is hereinafter provided. [C24, 27, 31, 35,§7738.]

7739 **Drainage plat book.** The county recorder shall be provided with a loose leaf plat book, made to a scale not larger than sixteen inches to one mile, for each section of the land within the county in which such records shall be made. Such plat book shall consist of sheets of paper interbound by sheets of tracing cloth with proper heading, margin, and binding edge. Said plat book shall be used for keeping a record of drainage systems filed by any landowner. Plats shall be made or approved only by a registered engineer. Plats so offered for record shall be drawn to scale giving distances in feet, indicate the size of tile used, length of mains, submains, and laterals, and location with regard to boundary lines of tract or government corners and subdivisions. [C24, 27, 31, 35,§7739.]

Referred to in §7740

7740 Record book and index. The county recorder shall also be provided with a record book and index referring to the plats provided for in section 7739, and which may be used to give the owner's name, description of tracts of land drained, stating the time when drainage system was established, the kind, quality, and brand of tile used, the name and place of manufacturing plant, the name of contractors who laid the tile, the name of the engineer in charge of the survey and installation, the cost of tile, delivery, installation, and engineering expense, depths, grades, outlets, connections, contracts for agreements with adjoining landowners as to connections, and any other matters or information that may be considered of value, all of said information to be furnished by the landowner or the engineer having charge of the installation of the same and certified to under oath, and shall be certified under oath by a registered engineer as being a true and accurate record. [C24, 27, 31, 35,§7740.]

40ExGA, HF 185, §244, editorially divided

7741 Original plat filed. In lieu of making the record as herein provided any landowner may file with the county recorder the original plat used in the establishment of said drainage system, or a copy thereof, which shall be certified by the engineer having made the same. [C24, 27, 31, 35,§7741.]

7742 Record not part of title. The drainage records herein provided for shall not be construed as an essential part of the title to said lands, but may upon request be set out by abstracters as a part of the record title of said lands. [C24, 27, 31, 35,§7742.]

7743 Fees for record and copies. The county recorder shall be entitled to collect fees for the filing and information heretofore provided for, and for the making of copies of such records the same as is provided for other work of a similar nature. [C24, 27, 31, 35,§7743.]

Recorder fee, §5177

CHAPTER 360

DRAINAGE DISTRICTS IN CONNECTION WITH UNITED STATES LEVEES

Referred to in §§7442, 7766

7744 United States levees—cooperation of board.
7745 Manner of cooperation.
7746 Report of engineer—payment authorized.
7747 Costs assessed.
7748 Annual installments.
7749 Collection of tax.
7750 Cost of maintaining.
7751 Laws applicable.

7744 United States levees—cooperation of board. In any case where the United States has built or shall build a levee along or near the bank of a navigable stream forming a part of the boundary of this state, the board of supervisors of any county through which the same may pass shall have the power to aid in procuring the right-of-way for and maintaining said levee, and providing a system of internal drainage made necessary or advisable by the construction thereof. Such improvement shall be presumed to be conducive to the public health, convenience, welfare, or utility. [C97,§1975; C24, 27, 31, 35,§7744.]

Referred to in §§7745, 7750

7745 Manner of cooperation. Any United States government levee under the conditions mentioned in section 7744 may be taken into consideration by the board as a part of the plan of any levee or drainage district and improvements therein, and such board may, by agreement with the proper authorities of the United States government, provide for payment of such just and equitable portion of the costs of procuring the right-of-way and maintenance of such levee as shall be conducive to the public welfare, health, convenience, or utility. [C97, §1975; C24, 27, 31, 35,§7745.]

Referred to in §7750

7746 Report of engineer—payment authorized. In the proceedings to establish such a district the engineer shall set forth in his report, separately from other items, the amount of the cost for the right-of-way of such levee, of constructing and maintaining the same; and if the plan is approved and the district finally established in connection with such levee, the board shall make a record of any such cooperative arrangement and may use such part of the funds of the district as may be necessary to pay the amount so agreed upon toward the right-of-way and maintenance of such levee. [C97,§1976; C24, 27, 31, 35,§7746.]

Referred to in §7750

7747 Costs assessed. If said district is established, the entire costs and expenses incurred under this chapter shall be assessed against and collected from the lands lying within such district, by the levy of a rate upon the assessable value of the land within such district, sufficient to raise the required sum; provided that where the proposed improvement is for drainage only, the board may, in their discretion, classify the land within such district and graduate the tax thereon, as provided in chapter 353. [C97,§1982; S13,§1982; C24, 27, 31, 35, §7747.]

Referred to in §§7749, 7750

7748 Annual installments. If the proposed improvement is the maintenance of a levee, the amount collected in any one year shall not exceed twelve and one-half mills on the dollar of the assessment valuation, which said assessment shall be levied at a level rate on the assessable value of the said lands, easements, and railroads within the district. If the amount

necessary to pay for the improvement exceed said sum, it shall be levied and collected in annual installments. For all other improvements, the board shall levy a rate sufficient to pay for the same, and may, at their discretion, make the same payable in annual installments of ten or less. [C97,§1984; C24, 27, 31, 35,§7748.]

Referred to in §§7749, 7750

7749 Collection of tax. The assessment required under sections 7747 and 7748 shall be made by the board of supervisors at the time of levying general taxes, after the work has been authorized, and the same shall be entered on the records of the board of supervisors, then entered on the tax books by the county auditor as drainage taxes, and shall be collected by the county treasurer at the same time, in the same manner, and with the same penalties, as general taxes; and if the same is not paid he shall sell all such lands upon which such assessment remains unpaid, at the same time, and in the same manner, as is now by law provided for the sale of lands for delinquent taxes, including all steps up to the execution and delivery of the tax deed for the same. The landowners shall take notice of and pay such assessments without other or further notice than such as is provided for in this chapter. The funds realized from such assessments shall constitute the drainage fund, as contemplated in this chapter, and shall be disbursed on warrants drawn against that fund by the county auditor, on the order of the board of supervisors. [C97,§1983; C24, 27, 31, 35,§7749.]

Referred to in §7750

7750 Cost of maintaining. The board of supervisors shall have the right and power to keep and maintain any such levee, ditches, drains, or system of drainage, either in whole or in part, established under the preceding sections of this chapter, as may in their judgment be required, and to levy the expense thereof upon the real estate within such drainage district as herein provided for, and collect and expend the same; provided, however, that no such work which shall impose a tax exceeding twelve and one-half mills on the dollar on the assessable value of the lands within the district shall be authorized by them, unless the same is first petitioned for and authorized in substantially the manner required by this chapter for the inauguration of new work. [C97,§1986; C24, 27, 31, 35,§7750.]

7751 Laws applicable. In the establishment and maintenance of levee and drainage districts in cooperation with the United States as in this chapter provided, all the proceedings for said purpose in the filing and the form and substance of the petition, assessment of damages, appointment of an engineer, his surveys, plats, profiles, and report, notice of hearings, filing of claims and objections, hearings thereon, appointment of commissioners to classify lands, assess benefits, and apportion costs and expenses, report, notice and hearing thereon, the appointment of a supervising engineer, his duties, the letting of work and making contracts, payment for work, levy and collection of drainage or levee assessments and taxes, the issue of improvement certificates and drainage or levee bonds, the taking of appeals and the manner of trial thereof, and all other proceedings relating to such district shall be as provided in chapters 353 to 359, inclusive, and chapter 354.1, except as otherwise in this chapter provided. [C97, §§1976–1989; S13,§§1976, 1977, 1979, 1981, 1982, 1984, 1985, 1985-a, 1986, 1989; C24, 27, 31, 35, §7751.]

Chapters 353.1, 358.1 and 358.2 enacted after this section was enacted

CHAPTER 361

INTERSTATE DRAINAGE DISTRICTS

Referred to in §§7442, 7766

7752 Cooperation—procedure.
7753 Agreement as to costs.
7754 Contracts let by joint agreement.
7755 Separate contracts.
7756 Conditions precedent.
7757 Assessments, bonds, and costs—limitation.

7752 Cooperation—procedure. When proceedings for the drainage of lands bordering upon the state line are had and the total cost of constructing the improvement in this state, including all damage, has been ascertained, and the engineer in charge, before the final establishment of the district, reports that the establishment and construction of such improvement ought to be jointly done with like proceedings for the drainage of lands in the same drainage area in such an adjoining state and that drainage proceedings are pending in such state for the drainage of such lands, the said authorities of this state may enter an order continuing the hearing on the establishment of such district to a fixed date, of which all parties shall take notice. [SS15,§1989-a77; C24, 27, 31, 35,§7752.]

7753 Agreement as to costs. The board shall have power, when the total cost, including damages, of constructing the improvement in such other state has been ascertained by the authorities of such other state, to enter into an agreement as to the separate amounts which the property owners of each state should in equity pay toward the construction of the joint undertaking. When such amount is thus determined, the board or boards having jurisdiction in this state shall enter the same in the minutes of their proceedings and shall proceed therewith as though such amount to be paid by the portion of the district in this state had been originally determined by them as the cost of constructing the improvement in this state. [SS15, §1989-a77; C24, 27, 31, 35,§7753.]

7754 Contracts let by joint agreement. When the bids for construction are opened, unless the construction work on each side of the line can go forward independently, no contract shall be let by the authorities in this state, unless the acceptance of a bid or bids for the construction of the whole project is first jointly agreed upon by the authorities of both states. [SS15,§1989-a77; C24, 27, 31, 35,§7754.]

7755 Separate contracts. The contract or contracts for the construction of that portion of the improvement within this state shall be entirely distinct and separate from the contract or contracts let by the authorities of the neighboring state; but the aggregate amount of the contract or contracts for the construction of the work within this state shall not exceed an amount equal to the amount of the benefits assessed in this state including damages and other expenses. [SS15,§1989-a77; C24, 27, 31, 35,§7755.]

7756 Conditions precedent. No contract shall be let until the improvement shall be finally established in both states, and after the final adjustment in both states of damages and benefits. No bonds shall be issued until all litigation in both states arising out of said proceedings has been finally terminated by actual trial or agreements, or the expiration of all right of appeal. [SS15,§1989-a78; C24, 27, 31, 35,§7756.]

7757 Assessments, bonds, and costs — limitation. All proceedings except as provided in this chapter in relation to the establishment, construction, and management of interstate drainage districts shall be as provided for the establishment and construction of districts wholly within this state as provided in chapter 353. All such proceedings shall relate only to the lands of such district which are located wholly within this state. Boards having jurisdiction in this state may make just and equitable agreements with like authorities in such adjoining state for the joint management, repair, and maintenance of the entire improvement, after the establishment and completed construction thereof. [SS15,§1989-a77; C24, 27, 31, 35,§7757.]

CHAPTER 362

DRAINAGE OF COAL AND MINERAL LANDS AND MINES

Referred to in §7442

7758 Drainage through lands of another.
7759 Lead or zinc bearing lands.
7760 Setting apart compensation.
7761 Failure to pay compensation.
7762 Notice to smelters—effect.
7763 Right-of-way.
7764 Condemnation.
7765 Limitation of provisions.
7766 Interpretation of codification act.

7758 Drainage through lands of another. Any person or corporation owning or possessing any land underlaid with coal, who is unable to mine the same by reason of the accumulation of water in or upon it, may drain the same through, over, or under the surface of land belonging to another person, and if such person or corporation and the owner of the land cannot agree as to the amount of damages that will be sustained by such owner, the parties may proceed to have the necessary right-of-way condemned and the damages assessed in the manner provided in the chapter on eminent domain. [C73,§1228; C97,§1967; C24, 27, 31, 35,§7758.]

Condemnation procedure, ch 366

7759 Lead or zinc bearing lands. Any person or corporation who by machinery, or by making drains or adit levels, or in any other way, shall rid any lead or zinc bearing lands or lead or zinc mines of water, thereby enabling the owners of mineral interests in said lands to make them productive and available for mining purposes, shall receive one-tenth of all the lead and zinc taken from said lands as compensation for said drainage. [C73,§1229; C97, §1968; S13,§1968; C24, 27, 31, 35,§7759.]

7760 Setting apart compensation. The owners of the mineral interests in said lands, and persons mining upon and taking lead or zinc from said lands, shall jointly and severally set apart and deliver from time to time, when demanded, the said one-tenth of the mineral taken from said lands to the person or corporation entitled thereto, and the owners of the mineral interests therein shall allow the party entitled to such compensation and his agent at all times to descend into and examine said mines, and to enter any building occupied for mining purposes upon any of said lands and examine and weigh the mineral taken therefrom. [C73,§1230; C97,§1969; S13,§1969; C24, 27, 31, 35,§7760.]

Referred to in §7761

7761 Failure to pay compensation. Upon the failure or refusal of any owner of the mineral interests in said lands, or of any person taking the mineral therefrom to comply with the provisions of section 7760, the person or corporation entitled to said compensation may recover the value of said mineral. If it shall appear that the defendant obstructed the plaintiff in the exercise of the right to examine such mines and to weigh such mineral, or concealed or secretly carried away any mineral taken from them, the court shall render judgment for double the amount proved to be due from such defendant. [C73,§1231; C97,§1970; C24, 27, 31, 35,§7761.]

7762 Notice to smelters — effect. The person or corporation entitled to said drainage compensation may at any time leave with any smelter of lead or zinc mineral in this state

a written notice, stating that said person or corporation claims of the persons named in said notice the amount to which said person or corporation may be entitled, which notice shall have the effect of notices in garnishment, and also require the said smelter to retain, for the use of the person entitled thereto, the one-tenth part of the mineral taken from said land and received from the person named in said notice. The payment or delivery of the one-tenth part of the mineral taken from any of said lands by any of the persons whose duty it is hereby made to pay or deliver the same, shall discharge the parties liable jointly with him, except liability to contribute among themselves. [C73,§1232; C97,§1971; S13,§1971; C24, 27, 31, 35,§7762.]

7763 Right-of-way. Any person or corporation engaged as aforesaid in draining such mines and lead or zinc bearing lands, when he or they shall find it necessary for the prosecution of their work, may procure the right-of-way upon, over, or under the surface of such mineral lands and the contiguous and neighboring lands, for the purpose of conveying the water from said mineral lands by troughs, pipes, ditches, water races, or tunnels, and the right to construct and use shafts and air holes in and upon the same, doing as little injury as possible in making said improvements. [C73,§1233; C97,§1972; S13,§1972; C24, 27, 31, 35,§7763.]

7764 Condemnation. If the said person or corporation engaged in draining as aforesaid, and the owner of any land upon which said right-of-way may be deemed necessary, cannot agree as to the amount of damages which will be sustained by the owner by reason thereof, the parties may proceed to have the same assessed in the manner provided for the exercise of the right of eminent domain as provided in chapter 366. [C73,§1234; C97,§1973; C24, 27, 31, 35,§7764.]

7765 Limitation of provisions. The foregoing provisions shall not be construed to require the owners of the mineral interest in any of said lands to take mineral therefrom, or to authorize any other person to take the mineral from said lands without the consent of the owners. [C73,§1235; C97,§1974; C24, 27, 31, 35, §7765.]

7766 Interpretation of codification act. The amendment, revision, and codification of existing law contained in this and chapters 353 to 361, inclusive, of this title (not including chapters 353.1, 358.1 and 358.2) shall not affect litigation pending at the time said chapters go into effect, or the validity of the establishment, construction, or organization of any district then existing, the classification then existing of all lands, the assessment and levy of drainage taxes then made, existing contracts, and vested rights or any warrants, improvement certificates, or drainage bonds outstanding or already provided for under prior existing laws. [C24, 27, 31, 35,§7766.]

Above parenthetical clause inserted because chapters 353.1, 358.1 and 358.2 were enacted and inserted in the title after §7766 was enacted

Chapter 354.1 was enacted as an amendment to chapter 354

CHAPTER 363

MILL DAMS AND RACES

7767 Prohibition—permit.
7768 Application for permit.
7769 Notice of hearing.
7770 Hearing.
7771 When permit granted.
7772 Certificate of approval.
7773 Application for certificate.
7774 Granting or refusing.
7775 Permit fee—annual license.
7776 Construction and operation.
7777 Access to works.
7778 Duty to enforce statutes.
7779 Violations.
7780 Action to collect fees.
7781 Unlawful combination—receivership.
7782 Nuisance.
7783 Condemnation—petition.
7784 Precept for jury—service.
7785 Guardian appointed.
7786 Lands in different counties.
7787 Oath—assessment of damages—costs.
7788 Appeal.
7789 Protection of banks.
7790 Embankments—damages.
7791 Right to utilize fall.
7792 Revocation or forfeiture of permit.
7793 Legislative control.
7794 Pending applications.
7795 Permits for existing dams.
7796 State lands.
7796.1 Cities and towns.

7767 Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same. [R60,§1264; C73, §1188; C97,§1921; C24, 27, 31, 35,§7767.]

7768 Application for permit. Any person, firm, corporation, or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or

other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council. [R60,§1265; C73,§§1188, 1189; C97,§1921; C24, 27, 31, 35, §7768.]

Referred to in §7794

7769 **Notice of hearing.** When any application for a permit to construct, maintain, or operate a dam from and after the passage of this chapter is received, the executive council shall fix a time for hearing, and it shall give notice of the time and place of such hearing by publication once each week for two successive weeks in at least one newspaper in each county in which riparian lands will be affected by the dam. [R60,§§1266, 1270; C73,§1190; C97,§1922; C24, 27, 31, 35,§7769.]

40ExGA, SF 186, §3, editorially divided

7770 **Hearing.** At the time fixed for such hearing or at any adjournment thereof, the council shall take evidence offered by the applicant and any other person, either in support of or in opposition to the proposed construction. [R60,§§1267, 1268; C73,§§1192, 1193; C97, §§1924, 1925; C24, 27, 31, 35,§7770.]

7771 **When permit granted.** If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. [R60,§1269; C73,§§1193, 1198; C97, §1930; C24, 27, 31, 35,§7771.]

7772 **Certificate of approval.** No permit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. [C24, 27, 31, 35,§7772.]

7773 **Application for certificate.** When it is proposed to use the water for manufacturing purposes, except to develop power, or for condensation purposes, application must be made to the department of health, accompanied by a description of the proposed use of the water and what, if any, substances are to be deposited in such water and chemical changes made in the same, and such other information as the department of health may require to enable it to determine the advisability of the issuance of such certificate. [C24, 27, 31, 35,§7773.]

40ExGA, SF 186, §4, editorially divided

7774 **Granting or refusing.** If the department of health is satisfied that the use of the water in any such project will not cause pollution of the same or render it materially unwholesome or impure, or deleterious to fish life, it may issue a certificate, and if it is not so satisfied, it shall refuse to issue same. [C24, 27, 31, 35,§7774.]

7775 **Permit fee — annual license.** Every person, firm, or corporation, excepting a municipality, to whom a permit is granted to construct or to maintain and operate a dam already constructed in or across any stream for the purpose herein specified, shall pay to the executive council a permit fee of one hundred dollars and shall pay an annual inspection and license fee, to be fixed by the executive council, on or before the first day of January, 1925, and annually thereafter, but in no case shall the annual inspection and license fee be less than twenty-five dollars. All fees shall be paid into the general fund of the state treasury.

The provisions of this section shall not apply to dams already constructed having less than twenty-five horsepower capacity. [C24, 27, 31, 35,§7775.]

7776 **Construction and operation.** The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. [C24, 27, 31, 35,§7776.]

40ExGA, SF 186, §6, editorially divided

7777 **Access to works.** Such council or any member, agent, or employee thereof shall at all times be accorded full access to all parts of any dam and its appurtenances being constructed, operated, or maintained in such waters. [C24, 27, 31, 35,§7777.]

7778 **Duty to enforce statutes.** It shall be the duty of the council to require that all existing statutes of the state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. [C24, 27, 31, 35,§7778.]

7779 **Violations.** The construction, maintenance, or operation of a dam for the purpose specified herein without a permit first being issued, as in this chapter provided, shall constitute a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. [C24, 27, 31, 35,§7779.]

40ExGA, SF 186, §7, editorially divided

7780 **Action to collect fees.** If any dam is constructed, operated, or maintained without the provisions of this chapter having been first complied with, including the payment of the permit fee and the annual inspection and license fee, the permit fee and the inspection and license fee may be recovered in an action brought in the name of the state, and in addition to the recovery of the amount due, there shall be collected a penalty of one thousand dollars. [C24, 27, 31, 35,§7780.]

7781 **Unlawful combination — receivership.** If any dam for which a permit has been issued becomes owned, leased, trusteed, possessed, or controlled in such manner as to be controlled by any unlawful combination or trust, or forms the subject or part of the subject of any contract or agreement to limit the output of any hydraulic or hydroelectric power derived therefrom for the purpose of price fixing as to such output, the state may take possession thereof by receivership proceedings instituted by the council, and such proceedings shall be conducted for the purpose of disposing of said property for lawful use and the proceeds shall be turned over to the persons found by the court to be entitled thereto, after the payment of all expenses of the receivership. [C24, 27, 31, 35,§7781.]

7782 **Nuisance.** If any dam is constructed, maintained, or operated for any of the purposes specified herein, in waters of this state in violation of any of the provisions of this chapter or in violation of any provisions of the law, the state may, in addition to the remedies herein prescribed, have such dam abated as a nuisance. [C24, 27, 31, 35,§7782.]

Nuisances, ch 528

7783 **Condemnation—petition.** Any person, firm, corporation, or municipality owning land on one or both sides of a watercourse, desiring to construct or heighten any dam in such watercourse or to construct or enlarge a raceway, canal, or other construction necessary for the development or utilization of the water or water power for any of the purposes specified in this chapter therefrom for the purpose of propelling any mill or machinery or developing any power by the use of the water, and to whom a permit has been granted as in this chapter provided, may file in the office of the clerk of the district court of the county in which such dam is, or is to be erected or heightened, a petition designating himself as plaintiff and the owners of the lands affected, or that will be affected, as defendants, and describing with reasonable certainty the locality where such dam is to be erected or improved, and also of the lands that will be overflowed or otherwise affected thereby. [R60,§§1264, 1265, 1274; C73,§§1188, 1189; C97, §1921; C24, 27, 31, 35,§7783.]

7784 **Precept for jury—service.** The clerk shall thereupon issue an order, with a copy of the petition attached, directed to the sheriff, commanding him to summon a jury of twelve disinterested electors of his county to meet on a day fixed therein, and upon the lands described, which order, including the copy of the petition, shall be served on the defendants in the same manner and for the same length of time previous to the day fixed in the order as is required for the service of original notices. Where the owner of any land affected is a nonresident of the state, service shall be made of the notice by publication in a newspaper in the county once each week for three successive weeks. [R60,§1266; C73,§1190; C97,§1922; C24, 27, 31, 35,§7784.]

Time and manner of service, §§11059, 11060
40ExGA, SF 186, §11, editorially divided

7785 **Guardian appointed.** When service is made upon a minor or insane person having no guardian, the clerk at the time of issuing the order shall, by indorsement made thereon, appoint a suitable person to make defense for him. [C73,§1190; C97,§1922; C24, 27, 31, 35,§7785.]

7786 **Lands in different counties.** If any of the lands are situated in a different county than that in which the petition is required to be filed, the proceedings shall apply thereto to the same extent as if such lands were situated in the county where it is filed. [R60,§1270; C73, §1191; C97,§1923; C24, 27, 31, 35,§7786.]

7787 **Oath—assessment of damages—costs.** The jury shall be sworn, impartially and to the best of their skill and judgment, to view the lands described in the petition, and ascertain and appraise the damages each of the defendants will sustain by reason of such lands being overflowed or otherwise injuriously affected by the dam or raceway or heightening or enlarging the same. They may, in addition to examining the premises, examine witnesses, and shall determine the amount of damages to which each of the defendants are, in their judgment, entitled, by reason of the construction or improvement of the dam or raceway, and shall report their findings in writing, attaching the same to the order and returning it to the sheriff. All costs and fees in connection with the assessment of damages under this chapter shall be the same as in condemnation cases and shall be paid by the plaintiff. [R60,§§1267, 1273; C73,§§1192, 1193, 1203; C97,§§1924, 1925, 1935; C24, 27, 31, 35,§7787.]

Condemnation procedure, ch 366

7788 **Appeal.** Either party may appeal from such assessment to the district court within

thirty days after the assessment is made and such appeal and all further proceedings in connection with such matter, whether as to an appeal or the payment of damages and costs, and all other matters connected with the proceedings, shall be the same as provided by law for assessment of damages in taking property for works of internal improvement. [C73,§1194; C97,§1926; C24, 27, 31, 35,§7788.]

Condemnation procedure, ch 366

7789 **Protection of banks.** Where the water backed up by any dam belonging to any mill or machinery is about to break through or over the banks of the stream or raceway, or to wash a channel, so as to turn the water of such stream or raceway, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be materially injured or affected, the owner or occupant of such mill or machinery, if he does not own such banks or the land lying contiguous thereto, may, if necessary, enter thereon and erect and keep in repair such embankments and other works as may be necessary to prevent such water from breaking through or over the banks, or washing a channel as aforesaid; such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay all damages which the owner of the lands may actually sustain by reason thereof. [R60, §§1275, 1276; C73,§1204; C97,§1936; C24, 27, 31, 35,§7789.]

7790 **Embankments—damages.** If any person shall injure, destroy, or remove any such embankment or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason thereof. [R60,§1277; C73,§1205; C97, §1937; C24, 27, 31, 35,§7790.]

7791 **Right to utilize fall.** Any person owning and using a water power for the purpose of propelling machinery shall have the right to acquire, maintain, and utilize the fall below such power for the purpose of improving the same, in like manner and to the same extent as provided in this chapter for the erection or heightening of mill dams. After such right has been acquired, the fall shall be considered part and parcel of said water power or privilege, and the deepening or excavating of the stream, tail, or raceway, as herein contemplated, shall in no way affect any rights relating to such water power acquired by the owner thereof prior to such change. [C73,§1206; C97,§1938; C24, 27, 31, 35,§7791.]

7792 **Revocation or forfeiture of permit.** If the person to whom a permit is issued under the provisions of this chapter does not begin the construction or the improvement of the dam or raceway within one year from the date of the granting of the permit, his permit may be revoked by the executive council, and if any permit holder does not finish and have in operation the plant for which the dam is constructed within three years after the granting of the permit, unless for good cause shown the council has extended the time for completion, such permit shall be forfeited. [R60,§1269; C73,§1199; C97, §1931; C24, 27, 31, 35,§7792.]

7793 **Legislative control.** No permit granted or rights acquired hereunder shall be perpetual, but they shall be subject to restriction, cancellation, and regulation by legislative action, and subject to all the provisions of this chapter. [C24, 27, 31, 35,§7793.]

7794 **Pending applications.** All applications for a permit to construct a dam pending in the district courts of this state at the time of the passage of this chapter shall be heard and determined by the district court of the county in which same is pending under the laws of Iowa at the time of the making of the application to the district court, and where a permit has, prior to the passage of this chapter, been granted by the district court of any county, the applicant shall, in addition to the making of the application in the form provided in section 7768, file a transcript of the proceedings of the district court granting the said permit with said application, and thereupon a permit shall be issued to the applicant without further proceedings, upon payment of the required fees. [C24, 27, 31, 35, §7794.]

7795 **Permits for existing dams.** The owner of a dam existing at the time of the taking effect of this chapter shall make application for a permit, which application shall be accompanied by such proofs and data as may be required by the executive council. Upon receipt of such application with proofs and data and payment of fees as required, the executive council shall grant a permit for the maintenance and operation of said dam as a matter of course. The owner of such dam shall, however, be subject to all of the regulatory provisions of this chapter. [C24, 27, 31, 35,§7795.]

7796 **State lands.** Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. [C24, 27, 31, 35,§7796.]

7796.1 **Cities and towns.** Cities and towns shall have the authority and power, by complying with the provisions of this chapter and the statutes relating to municipalities, to construct dams for recreational purposes and to acquire lands that may be necessary in the construction thereof, which may be obtained by condemnation or otherwise. [C27, 31, 35,§7796-b1.]

CHAPTER 364

WATER-POWER IMPROVEMENTS

7797 Eminent domain.
7798 Use of highways.
7799 Public lands.
7800 Powers generally.
7801 Completion of work.
7802 Legislative control.

7797 Eminent domain. Any person, or any corporation organized for the purpose of utilizing and improving any water power within this state, or in the streams lying upon the borders thereof, may take and hold so much real estate as may be necessary for the location, construction, and convenient use of its canals, conduits, mains, and waterways, or other means employed in the utilization of such water power, and for the construction of such buildings and their appurtenances as may be required for the purposes aforesaid. Such person or corporation may also take, remove and use, for the construction and repair of its said canals, waterways, buildings, and appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken. Compensation shall be made for the lands and materials so taken and used by such person or corporation, to the owner, in the manner provided for taking private property for works of internal improvement. [C73,§1236; C97,§1990; C24, 27, 31, 35,§7797.]

Condemnation proceedings, ch 366

7798 Use of highways. Such person or corporation may use, raise, or lower any road for the purpose of having its said canals, waterways, mains, and pipes pass over, along, or under the same, and in such case shall put such road, as soon as may be, in good repair and condition for the safe and convenient use of the public. Any such person or corporation may construct and carry its canals, conduits, waterways, mains, or water pipes across, over, or under any railway, canal, stream, or watercourse, when it shall be necessary for the construction or operation of the same, but shall do so in such manner as not to impede the travel, transportation, or navigation upon, or other proper use of, such railway, canal, or stream. The powers conferred in this section can only be exercised in cities and towns with the consent and under the control of the council. [C73,§1237; C97,§1991; C24, 27, 31, 35, §7798.]

7799 Public lands. Such person or corporation is authorized to pass over, occupy, and enjoy any of the school, university, and saline or other lands of this state, whereof the fee or any use, easement, or servitude therein is in the public, making compensation therefor. No more of such land shall be taken than is required for its necessary use and convenience. [C73,§1238; C97, §1992; C24, 27, 31, 35,§7799.]

7800 Powers generally. Such corporation, in addition to other powers, shall have the following: To borrow money for the purpose of constructing, renewing, or repairing its works; to make, execute, and deliver contracts, bonds, notes, bills, mortgages, deeds of trust, and other conveyance charging or incumbering its property, including its franchises, or any part or parcel thereof; to erect, maintain, and operate canals, conduits, mains, waterways, mills, factories, and other buildings and machinery, including waterways, sluices, and conduits for the purpose of carrying waste water off from said premises to the stream from which the same was taken, or other convenient place; to let, lease, or sell and convey, any portion of their water supply, and any of the buildings, mills, or factories, or machinery, for such sums, prices, rents, tolls, and rates as shall be agreed upon between the parties; and to lay down, maintain, and operate such water mains, conduits, leads, and service pipes as shall be necessary to supply any building, village, town, or city with water; and the grantee of any such person or corporation, or purchaser of said property, franchise, right, and privileges under and by virtue of any judicial sale, shall take and hold the same as fully as the same were held and enjoyed by such person or corporation. [C73,§1239; C97,§1993; C24, 27, 31, 35,§7800.]

7801 Completion of work. Such person or corporation shall take, hold and enjoy the privilege of utilizing and improving the water power and the rights, powers, and privileges aforesaid, and shall proceed in good faith to make the improvements and employ the powers above conferred, and shall, within two years from the date of acquiring such powers, provide the necessary capital, complete the preliminary surveys, and actually commence the work of improving and utilizing the water power and furnishing the supply of water as contemplated; and said waterworks and canals shall be completed within five years thereafter. [C73,§1240; C97, §1994; C24, 27, 31, 35,§7801.]

C97, §1994, editorially divided

7802 Legislative control. The rights, powers, and privileges conferred by this chapter shall be at all times subject to legislative control. [C73,§1240; C97,§1994; C24, 27, 31, 35, §7802.]

CHAPTER 365

EMINENT DOMAIN

7803 Exercise of power by state.
7804 On behalf of federal government.
7805 Conveyance by state to federal government.
7806 Right conferred.
7807 Right to purchase.
7808 Railways.
7809 Cemetery lands.
7810 Limitation on right-of-way.
7811 Additional purposes.
7812 Finding by commerce commission.
7813 Lands for water stations—how set aside.
7814 Access to water—overflow limited.
7815 Change in streams.
7816 Unlawful diversion prohibited.
7817 Abandonment of right-of-way.
7818 Right to condemn abandoned right-of-way.
7819 Procedure to condemn.
7820 Parties entitled to damages.
7821 Interpretative clause.

7803 Exercise of power by state. Proceedings may be instituted and maintained by the state of Iowa, or for the use and benefit thereof, for the condemnation of such private property as may be necessary for any public improvement which the general assembly has authorized to be undertaken by the state, and for which an available appropriation has been made. The executive council shall institute and maintain such proceedings in case authority to so do be not otherwise delegated. [C73,§1271; C97, §2024; S13,§2024-d; C24, 27, 31, 35,§7803.]

For state parks and highways connecting therewith, §§1800, 1801.

7804 On behalf of federal government. The executive council may institute and maintain such proceedings when private property is necessary for any use of the government of the United States. [S13,§2024-a; C24, 27, 31, 35, §7804.]

Condemnation by federal government, §4

7805 Conveyance by state to federal government. When land or any easement therein is condemned by the state for the use and benefit of the United States, the governor, after the land has been finally acquired, shall have power to convey, to the United States, the easement or lands so acquired and all rights of the state therein. [S13,§2024-b; C24, 27, 31, 35,§7805.]

7806 Right conferred. The right to take private property for public use is hereby conferred:

1. *Counties.* Upon all counties for such lands as are reasonable and necessary for the erection of courthouses or jails.

2. *Agricultural societies.* Upon all incorporated county fair societies, and county or district agricultural associations, when the property sought to be taken is necessary in order to enable such society or association to carry out the authorized purposes of its incorporation.

3. *Corporations or persons in certain cases.* Upon any corporation or person desiring to construct a canal, road, or bridge as a work of public utility, but the land taken shall not exceed one hundred feet in width.

4. *Owners of land without way thereto.* Upon the owner or lessee of lands, which have no public or private way thereto, for the purpose of providing a public way, not exceeding forty feet in width, which will connect with some existing public road. Such condemned roadway shall be located on a division, subdivision or "forty" line (or immediately adjacent thereto), and along the line which is the nearest feasible route to an existing public road. Such road shall not interfere with buildings, orchards, or cemeteries. When passing through inclosed lands, such roads shall be fenced on both sides thereof by the condemnor.

5. *Owners of mineral lands.* Upon all owners, lessees, or possessors of land, for a railway right-of-way thereto not exceeding one hundred feet in width and located wherever necessary or practical, when such lands have no railway thereto and contain coal, stone, gravel, lead, or other minerals and such railway is necessary in order to reach and operate any mine, quarry, or gravel bed on said land and transport the products thereof to market. Such right-of-way shall not interfere with buildings, orchards, or cemeteries, and when passing through inclosed lands, fences shall be built and maintained on both sides thereof by the party condemning the land and by his assignees. The jury, in the assessment of damages, shall consider the fact that a railway is to be constructed thereon.

6. *Cemetery associations.* Upon any private cemetery or cemetery association which is incorporated under the laws of this state relating to corporations not for pecuniary profit, and having its cemetery located outside the limits of a city or town, for the purpose of acquiring necessary grounds for cemetery use or reasonable additions thereto. The right granted in this subsection shall not be exercised until the board of supervisors, of the county in which the land sought to be condemned is located, has, on written application and hearing, on such reasonable notice to all interested parties as it may fix, found that the land, describing it, sought to be condemned, is necessary for cemetery purposes. The association shall pay all costs attending such hearing.

1. [S13,§2024-f; C24, 27, 31, 35,§7806.]
2. [C24, 27, 31, 35,§7806.]
3. [C51,§759; R60,§§1278–1288; C73,§1269; C97,§2023; C24, 27, 31, 35,§7806.]
4. [C97,2028; S13,§2028; C24, 27, 31, 35, §7806.]
5. [C97,§§2028, 2031; S13,§2028; C24, 27, 31, 35,§7806.]
6. [S13,§§1644-a–e; C24, 27, 31, 35,§7806.]

7807 Right to purchase. Whenever the power to condemn private property for a public use is granted to any officer, board, commission,

or other official, or to any county, township, or municipality, such grant shall, unless otherwise declared, be construed as granting authority to the officer, board, or official body having jurisdiction over the matter, to acquire, at its fair market value, and from the parties having legal authority to convey, such right as would be acquired by condemnation. [R60,§1317; C73, §§1244, 1247; C97,§§1999, 2002, 2014, 2029; S13, §1644-a; C24, 27, 31, 35,§7807.]

7808 Railways. Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction, and convenient use of its railway. Such acquisition shall carry the right to use for the construction and repair of said railway and its appurtenances any earth, gravel, stone, timber, or other material, on or from the land so taken. [R60, §1314; C73,§1241; C97,§1995; S13,§1995; C24, 27, 31, 35,§7808.]

7809 Cemetery lands. No lands actually platted, used, and devoted to cemetery purposes shall be taken for any railway purpose without the consent of the proper officers or owners thereof. [S13,§1995; C24, 27, 31, 35,§7809.]

7810 Limitation on right-of-way. Land taken for railway right-of-way, otherwise than by consent of the owner, shall not exceed one hundred feet in width unless greater width is necessary for excavation, embankment, or depositing waste earth. [R60,§1314; C73,§1241; C97,§1995; S13,§1995; C24, 27, 31, 35,§7810.]

7811 Additional purposes. Any such corporation owning, operating, or constructing a railway may, by condemnation or otherwise, acquire lands for the following additional purposes:

1. For necessary additional depot grounds or yards.
2. For the purpose of constructing a track or tracks to any mine, quarry, gravel pit, manufactory, warehouse, or mercantile establishment.
3. For additional or new right-of-way for constructing double track, reducing or straightening curves, changing grades, shortening or relocating portions of the line, and for excavations, embankments, or places for depositing waste earth.
4. For the purpose of constructing water stations, dams or reservoirs for supplying its engines with water. [R60,§1314; C73,§§1241, 1242; C97,§§1995, 1996, 1998; S13,§§1995, 1998; C24, 27, 31, 35,§7811.]

Referred to in §7812

7812 Finding by commerce commission. The company, before instituting condemnation proceedings under section 7811, shall apply in writing to the Iowa state commerce commission, for permission to so condemn. Said commission shall give notice to the landowner, and examine into the matter, and report by certificate to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for such purposes, present and prospective, of such company; whereupon the company shall have power to condemn the lands so certified by the commission. [C97,§1998; S13,§1998; C24, 27, 31, 35, §7812; 47GA, ch 205,§1.]

7813 Lands for water stations—how set aside. Lands which are sought to be condemned for water stations, dams, or reservoirs, including all the overflowed lands, if any, shall, if requested by the owner, be set aside in a square or rectangular shape by the Iowa state commerce commission. [C73,§1242; C97,§1996; C24, 27, 31, 35,§7813; 47GA, ch 205,§1.]

7814 Access to water—overflow limited. An owner of land, which has in part been condemned for water stations, dams, or reservoirs, shall not be deprived, without his consent, of access to the water, or the use thereof, in common with the company, on his own land, nor, without his consent, shall his dwelling, outhouses, or orchards be overflowed, or otherwise injuriously affected by such condemnation. [C73,§1242; C97,§1996; C24, 27, 31, 35,§7814.]

7815 Change in streams. When a railway company would have the right to excavate a channel or ditch and thereby change and straighten the course of a stream or watercourse, which is too frequently crossed by such railway, and thereby protect the right-of-way and roadbed, or promote safety and convenience in the operation of the railway, it may, by condemnation or otherwise, acquire sufficient land on which to excavate such ditch or channel. [C97,§2014; C24, 27, 31, 35,§7815.]

Referred to in §7816

7816 Unlawful diversion prohibited. Nothing in section 7815 shall give such corporation the right to change the course of any stream or watercourse where such right does not otherwise exist, nor, without the owner's consent, to divert such stream or watercourse from any cultivated meadow or pasture land, when it only touches such lands at one point. [C97,§2014; C24, 27, 31, 35,§7816.]

7817 Abandonment of right-of-way. Where a railway constructed in whole or in part has ceased to be operated for more than five years; or where the construction of a railway has been commenced and work on the same has ceased and has not, in good faith, been resumed for more than five years, and remains unfinished; or where any portion of any such railway has not been operated for four consecutive years, and the rails and rolling stock have been wholly removed therefrom it shall be treated as abandoned. [C73,§1260; C97,§2015; C24, 27, 31, 35, §7817.]

Referred to in §§7818, 7819

7818 Right to condemn abandoned right-of-way. All rights of the person or corporation which constructed or operated any such railway, as is mentioned in section 7817, over so

much as remains unfinished or from which the rails and rolling stock have been wholly removed, may be entered upon and appropriated as provided in section 7819. [C73,§1260; C97, §2015; C24, 27, 31, 35,§7818.]

Referred to in §7819

7819 Procedure to condemn. In case of abandonment, as provided in sections 7817 and 7818, any other corporation may enter upon such abandoned work, or any part thereof, and acquire the right-of-way over the same, and the right to any unfinished work or grading found thereon, and the title thereto, by proceeding as near as may be in the manner provided for an original condemnation. [C73,§1261; C97,§2016; C24, 27, 31, 35,§7819.]

Referred to in §7818

7820 Parties entitled to damages. Parties who have previously received compensation in any form for the right-of-way on the line of such abandoned railway, which has not been refunded by them, shall not be permitted to recover the second time. The value of such roadbed and right-of-way, excluding the work done thereon, when taken for a new company, shall be assessed in the condemnation proceedings for the benefit of the former company or its legal representative. [C73,§1261; C97,§2016; C24, 27, 31, 35,§7820.]

7821 Interpretative clause. A grant in this chapter of right to take private property for a public use shall not be construed as limiting a like grant elsewhere in the code for another and different use. [C24, 27, 31, 35,§7821.]

CHAPTER 366

PROCEDURE UNDER POWER OF EMINENT DOMAIN

Referred to in §§4364, 7764

7822 Procedure provided.
7823 By whom conducted.
7824 Application for condemnation.
7825 Commission to assess damages.
7826 Vacancies.
7827 Commission when state is applicant.
7828 Commissioners to qualify.
7829 Notice of assessment.
7830 Form of notice.
7831 Signing of notice.
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7833 Notice to nonresidents.
7834 Service outside state.
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7839 Appeal.
7839.1 Service of notice—highway matters.
7840 Sheriff to file certified copy.
7841 Appeals—how docketed and tried.
7841.1 Pleadings on appeal.
7842 Question determined.
7843 Reduction of damages.
7844 Right to take possession of lands.
7845 Dispossession of owner.
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7848 Acceptance of deposit.
7849 Additional deposit.
7850 Payment by public authorities.
7851 Removal of condemnor.
7852 Costs and attorney fees.
7853 Refusal to pay final award.
7854 Sheriff to file record.
7855 Clerk to file record.
7856 Form of record—certificate.
7857 Record of proceedings.
7858 Fee for recording.
7859 Failure to record—liability.
7860 Presumption.

7822 Procedure provided. The procedure for the condemnation of private property for works of internal improvement, and for other public uses and purposes, unless and except as otherwise provided by law, shall be in accordance with the provisions of this chapter. [C24, 27, 31, 35,§7822.]

7823 By whom conducted. Such proceedings shall be conducted:

1. By the attorney general when the damages are payable from the state treasury.
2. By the county attorney, when the damages are payable from funds disbursed by the county, or by any township, or school district.
3. By the city attorney, when the damages are payable from funds disbursed by the city or town.

This section shall not be construed as prohibiting any other authorized representative from conducting such proceedings. [C73,§1271; C97,§2024; S13,§§2024-a,-d,-f; C24, 27, 31, 35, §7823.]

7824 Application for condemnation. Such proceedings shall be instituted by a written application filed with the sheriff of the county in which the land sought to be condemned is located. Said application shall set forth:

1. A description of all the property in the county, affected or sought to be condemned, by its congressional numbers, in tracts not exceeding one-sixteenth of a section, or, if the land consists of lots in a city or town, by the numbers of the lot and block, and plat designation.
2. A plat showing the location of the right of-way or other property sought to be condemned with reference to such description.
3. The names of all record owners of the different tracts of land sought to be condemned, or otherwise affected by such proceedings, and of all record holders of liens and incumbrances on such lands; also the place of residence of all such persons so far as known to the applicant.
4. The purpose for which condemnation is sought.

5. A request for the appointment of a commission to appraise the damages. [R60,§1230; C73,§1247; C97,§2002; C24, 27, 31, 35,§7824.]

7825 Commission to assess damages. The sheriff shall thereupon, except as otherwise provided, appoint six resident freeholders of his county, none of whom shall be interested in the same or a like question, who shall constitute a commission to assess the damages to all real estate desired by the applicant and located in the county. [R60,§§1317, 1318; C73,§§1244, 1245; C97,§§1999, 2029; C24, 27, 31, 35,§7825.]

Referred to in §7826

7826 Vacancies. In case any appointee under section 7825 fails to act, the sheriff shall summon some other freeholder, possessing the required qualifications, to complete the membership. [R60,§1319; C73,§1251; C97,§2006; C24, 27, 31, 35,§7826.]

7827 Commission when state is applicant. When the damages are payable out of the state treasury, the sheriff, immediately upon receipt of the application, shall notify the chief justice of the supreme court of the filing of such application. Thereupon the chief justice shall appoint six resident freeholders of the state to assess all said damages. No commissioner, so appointed, shall be interested in the same or a like question. No two members of such commission shall be residents of the same county. The names and places of residence of such commissioners shall be returned by said chief justice to, and filed with, the sheriff. The chief justice shall fill all vacancies which may occur in the commission appointed under this section. [S13, §2024-d; C24, 27, 31, 35,§7827.]

7828 Commissioners to qualify. Before proceeding with the assessment all commissioners shall qualify by filing with the sheriff a written oath that they will to the best of their ability faithfully and impartially assess said damages and make written report to the sheriff. [C24, 27, 31, 35,§7828.]

7829 Notice of assessment. The applicant, or the owner or any lienholder or incumbrancer of any land described in the application, may, at any time after the appointment of the commissioners, have the damages to the lands of any such owner assessed by giving the other party, if a resident of this state, ten days notice, in writing. Such notice shall specify the day and the hour when the commissioners will view the premises, and be served in the same manner as original notices. [R60,§1318; C73,§1245; C97,§2000; C24, 27, 31, 35,§7829.]

Manner of service, §11060

7830 Form of notice. Said notice shall be in substantially the following form, with such changes therein as will render it applicable to the party giving and receiving the notice, and to the particular case pending, to wit:

"To ..... (here name each person whose land is to be taken or affected and each record lienholder or incumbrancer thereof) and all other persons, companies, or corporations having any interest in or owning any of the following described real estate:

(Here describe the land as in the application.)

You are hereby notified that ..... (here enter the name of the applicant) desires the condemnation of the following described land: (Here describe the particular land or portion thereof sought to be condemned, in such manner that it will be clearly identified.)

That such condemnation is sought for the following purpose: (Here clearly specify the purpose.)

That a commission has been appointed as provided by law for the purpose of appraising the damages which will be caused by said condemnation.

That said commissioners will, on the ..... day of ....., 19...., at... o'clock ... m., view said premises and proceed to appraise said damages, at which time you may appear before the commissioners if you care to do so.

.....
Applicant."

[R60,§1320; C73,§1247; C97,§2002; C24, 27, 31, 35,§7830.]

7831 Signing of notice. The notice may be signed by the applicant, by his attorney, or by any other authorized representative. [R60, §1320; C73,§1247; C97,§2002; C24, 27, 31, 35, §7831.]

7832 Filing of notices and return of service. Notices, immediately after the service thereof, shall, with proper return of service indorsed thereon or attached thereto, be filed with the sheriff. The sheriff shall at once cause the commissioners to be notified of the day and hour when they will be required to proceed with the appraisement. [C24, 27, 31, 35,§7832.]

7833 Notice to nonresidents. If the owner of such lands or any person interested therein is a nonresident of this state, or if his residence is unknown, no demand for the land for the purposes sought shall be necessary, but the notice aforesaid shall be published in some newspaper of the county and of general circulation therein, once each week for at least four successive weeks prior to the day fixed for the appraisement, which day shall be at least thirty days after the first publication of the notice. [R60,§1320; C73,§§1247, 1248; C97,§§2002, 2003; S13,§2003; C24, 27, 31, 35,§7833.]

7834 Service outside state. Personal service outside the state on nonresidents in the time and manner provided for the service of original notices shall have the same force and effect as publication service within the state. [C24, 27, 31, 35,§7834.]

7835 Appraisement—report. The commissioners shall, at the time fixed in the aforesaid notices, view, if necessary, the land sought to be condemned and assess the damages which the owner will sustain by reason of the appro-

priation, and file their written report with the sheriff. The appraisement and return may be in parcels larger than forty acres belonging to one person and lying in one tract, unless the agent or attorney of the applicant, or the commissioners, have actual knowledge that the tract does not belong wholly to the person in whose name it appears of record. In case of such knowledge the appraisement shall be made of the different portions as they are known to be owned. [C73,§1249; C97,§§2004, 2029; C24, 27, 31, 35,§7835.]

7836 **Guardianship.** In all cases where any interest in lands sought to be condemned is owned by a person who is under legal disability and has no guardian of his property, the applicant shall, prior to the filing of the application with the sheriff, apply to the district court for the appointment of a guardian of the property of such person. [C24, 27, 31, 35,§7836.]

7837 **Power of guardian.** If the owner of any lands is under guardianship, such guardian may, under the direction of the district court, or judge thereof, agree and settle with the applicant for all damages resulting from the taking of such lands, and give valid conveyances thereof. [R60,§1316; C73,§1246; C97,§2001; C24, 27, 31, 35,§7837.]

7838 **When appraisement final.** The appraisement of damages returned by the commissioners shall be final unless appealed from. [C24, 27, 31, 35,§7838.]

7839 **Appeal.** Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken. [R60,§1317; C73,§1254; C97, §2009; S13,§2009; C24, 27, 31, 35,§7839.]

7839.1 **Service of notice—highway matters.** Such notice of appeal shall be served in the same manner as an original notice. In case of condemnation proceedings instituted by the state highway commission, when the owner appeals from the assessment made, such notice of appeal shall be served upon the attorney general, or the special assistant attorney general acting as counsel to said commission, or the chief engineer for said commission. When service of notice of appeal cannot be made as provided in this section, the district court of the county in which the real estate is situated, or a judge thereof, on application, shall direct what notice shall be sufficient. [47GA, ch 203, §1.]

Service of original notice, §11060

7840 **Sheriff to file certified copy.** The sheriff, when an appeal is taken, shall at once file with the clerk of the district court a certified copy of so much of the assessment as applies to the part appealed from. In case of such appeal the sheriff shall, as soon as all other unappealed assessments are disposed of, file with the clerk all papers pertaining to the proceedings and remaining in his hands. [R60, §1317; C73,§1254; C97,§2009; S13,§2009; C24, 27, 31, 35,§7840.]

7841 **Appeals—how docketed and tried.** The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings. [R60,§1317; C73,§1254; C97, §2009; S13,§§2009, 2024-h; C24, 27, 31, 35,§7841.]

Docketing appeals, §11440

7841.1 **Pleadings on appeal.** A written petition shall be filed by the plaintiff on or before the first day of the term to which the appeal is taken, stating specifically the items of damage and the amount thereof. The defendant shall file a written answer to plaintiff's petition, or such other pleadings as may be proper. [C31, 35,§7841-c1.]

7842 **Question determined.** On the trial of the appeal, no judgment shall be rendered except for costs, but the amount of damages shall be ascertained and entered of record. [C73, §1257; C97,§2011; C24, 27, 31, 35,§7842.]

7843 **Reduction of damages.** If the amount of damages awarded by the commissioners is decreased on the trial of the appeal, the reduced amount only shall be paid to the landowner. [C73,§1259; C97,§2013; C24, 27, 31, 35, §7843.]

7844 **Right to take possession of lands.** Upon the filing of the commissioner's report with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided. [R60,§1317; C73,§§1244, 1272; C97,§§1999, 2010, 2025, 2029; S13,§§2024-e, -g,-h; C24, 27, 31, 35,§7844.]

7845 **Dispossession of owner.** A landowner shall not be dispossessed, under condemnation proceedings, of his residence, dwelling house, outhouse, orchard, or garden, until the damages thereto have been finally determined and paid. This section shall not apply to condemnation proceedings for drainage or levee improvements, or for public school purposes. [C24, 27, 31, 35, §7845; 48GA, ch 108,§2.]

40ExGA, SF 187, §42, editorially divided

7846 **Erection of dam—limitation.** If it appears from the finding of the commissioners that the dwelling house, outhouse, orchard, or garden of the owner of any land taken will be overflowed or otherwise injuriously affected by any dam or reservoir to be constructed as authorized by this chapter, such dam shall not be erected until the question of such overflowing or other injury has been determined in favor of the corporation upon appeal. [C73,§1250; C97, §2005; C24, 27, 31, 35,§7846.]

7847 **Deposit pending appeal.** The sheriff shall not, after being served with notice of appeal by the applicant, pay to the claimant any deposit of damages held by the sheriff, but shall hold the same until the appeal is finally determined. [R60,§1317; C73,§1255; C97,§2010; C24, 27, 31, 35,§7847.]

7848 **Acceptance of deposit.** An acceptance by the claimant of the damages awarded by the commissioners or of the warrant tendered by public authorities, shall bar his right to appeal. Such acceptance after an appeal has been taken by him shall abate such appeal. [R60,§1317; C73,§1256; C97,§2010; C24, 27, 31, 35,§7848.]

7849 **Additional deposit.** If, on the trial of the appeal, the damages awarded by the commissioners are increased, the condemnor shall, if he is already in possession of the property, make such additional deposit with the sheriff, as will, with the deposit already made, equal the entire damages allowed. If the condemnor be not already in possession, he shall deposit with the sheriff the entire damages awarded, before entering on, using, or controlling the premises. [C73,§1258; C97,§2012; C24, 27, 31, 35,§7849.]

7850 **Payment by public authorities.** When damages, by reason of condemnation, are payable from public funds, the sheriff, or clerk of the district court, as the case may be, shall certify to the officer, board, or commission having power to audit claims for the purchase price of said lands, the amount legally payable to each claimant, and, separately, a detailed statement of the cost legally payable from such public funds. Said officer, board, or commission shall audit said claims, and the warrant-issuing officer shall issue warrants therefor on any funds appropriated therefor, or otherwise legally available for the payment of the same. Warrants shall be drawn in favor of each claimant to whom damages are payable. The warrant in payment of costs shall be issued in favor of the officer certifying thereto. [C73,§1272; C97, §2025; S13,§§2024-b,-e,-g; C24, 27, 31, 35,§7850.]

7851 **Removal of condemnor.** The sheriff, upon being furnished with a copy of the assessment as determined on appeal, certified to by the clerk of the district court, may remove from said premises the condemnor and all persons acting for or under him, unless the amount of the assessment is forthwith paid or deposited as hereinbefore provided. [C73,§1258; C97, §2012; C24, 27, 31, 35,§7851.]

7852 **Costs and attorney fees.** The applicant shall pay all costs of the assessment made by the commissioners. The applicant shall also pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court, unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the tribunal from which the appeal was taken, provided that in all cases in which the state of Iowa is the applicant, no attorney fee shall be taxed. [R60,§1317; C73,§1252; C97, §2007; C24, 27, 31, 35,§7852.]

7853 **Refusal to pay final award.** Should the applicant decline, on the final determination of the appeal, to take the property and pay the damages awarded, he shall pay, in addition to the costs and damages actually suffered by the landowner, reasonable attorney fees to be taxed by the court. [C97,§2011; C24, 27, 31, 35, §7853.]

7854 **Sheriff to file record.** The sheriff, in case no appeal is taken, shall, immediately after the final determination of condemnation proceedings, and after the acquiring of the property by the condemnor, file, with the county recorder of the county in which the condemned land is situated, the following papers:

1. The application for condemnation.
2. All notices, together with all returns of service indorsed thereon or attached thereto.
3. The report of the commissioners.
4. All other papers filed in said proceedings.
5. A written statement by the sheriff of all money received in payment of damages, from whom received, to whom paid, and the amount paid to each claimant. [C73,§1253; C97,§2008; C24, 27, 31, 35,§7854.]

7855 **Clerk to file record.** The clerk of the district court, in case an appeal is taken in condemnation proceedings, shall file with the county recorder the records which the sheriff is required to file in case no appeal is taken, and in addition thereto the following:

1. A copy of the record entry of the court showing the amount of damages determined on appeal.
2. A written statement by the clerk of all money received by him in payment of damages, from whom received, to whom paid, and the amount paid to each claimant. [C24, 27, 31, 35, §7855.]

7856 **Form of record — certificate.** Said papers shall be securely fastened together, arranged in the order named above, and be accompanied by a certificate of the officer filing the same that said papers are the original files in the proceedings and that the statements accompanying the same are true. [C24, 27, 31, 35,§7856.]

7857 **Record of proceedings.** The county recorder shall record said papers, statements, and certificate in the record of deeds, properly index the same, and carefully preserve the originals as files of his office. [C73,§1253; C97, §2008; C24, 27, 31, 35,§7857.]

7858 **Fee for recording.** The sheriff or clerk, as the case may be, shall collect from the condemnor such fee as the county recorder would have legal right to demand for making such record, and pay such fee to the recorder upon presenting the papers for record. [C24, 27, 31, 35,§7858.]

Recorder fee, §5177

7859 Failure to record — liability. Any sheriff, or clerk of the district court, as the case may be, who fails to present said papers, statements, and certificate for record, and any recorder who fails to record the same as above provided shall be liable for all damages caused by such failure. [C24, 27, 31, 35,§7859.]

7860 Presumption. The said original papers, statements, and certificate, or the record thereof shall be presumptive evidence of title in the condemnor, and shall constitute constructive notice of the right of such condemnor to the lands condemned. [C73,§1253; C97,§2008; C24, 27, 31, 35,§7860.]

CHAPTER 367

REVERSION

7861 Relocation of railway.
7862 Failure to operate or construct railway.
7863 Quasi-public roads and rights-of-way.
7864 Lands for highway improvement.

7861 Relocation of railway. Such part of a railway right-of-way as is wholly abandoned for railway purposes by the relocation of the line of railway, shall revert to the persons who, at the time of the abandonment, are owners of the tract from which such abandoned right-of-way was taken. [C24, 27, 31, 35,§7861.]

7862 Failure to operate or construct railway. If a railway, or any part thereof, shall not be used or operated for a period of eight years, or if, its construction having been commenced, work on the same has ceased and has not been in good faith resumed for eight years, the right-of-way, including the roadbed, shall revert to the persons who, at the time of the reversion, are owners of the tract from which such right-of-way was taken. [C73,§1260; C97, §2015; C24, 27, 31, 35,§7862.]

7863 Quasi-public roads and rights-of-way. Roads established for the purpose of providing a public road to lands which theretofore had no such road, shall, when not used or operated for said purpose for eight consecutive years, revert to those persons who, at the time of the reversion, are owners of the tract from which such road was taken. [C97,§2030; C24, 27, 31, 35,§7863.]

7864 Lands for highway improvement. Lands condemned by a county, city, or town for the purpose of obtaining gravel or other suitable material for highway improvement, and not used for such purpose for five consecutive years, shall revert to those persons who, at the time of the reversion are owners of the tract from which the condemned lands were taken. [S13,§2024-l; C24, 27, 31, 35,§7864.]

TITLE XVIII

PUBLIC UTILITIES

CHAPTER 368

IOWA STATE COMMERCE COMMISSION

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7865 Eligibility of commissioners and secretary. No person in the employ of any common carrier, or owning any bonds, stock, or property in any railroad company, or who is in any way or manner pecuniarily interested in any railroad corporation, shall be eligible to the office of Iowa state commerce commissioner or secretary of the commission; and the entering into the employ of any common carrier, or the acquiring of any stock or other interest in any common carrier by any officer under this chapter, after his election or appointment, shall disqualify him to hold the office and to perform the duties thereof. [C97,§2111; C24, 27, 31, 35,§7865; 47GA, ch 205.]

7866 Members—organization. The Iowa state commerce commission shall consist of three persons having the qualifications of electors. On the second Tuesday of January of each year, the commission shall organize by electing one of its members as chairman, and appointing a secretary, who shall take the same oath as the commissioners; but this or a part of this may be done at a subsequent meeting. The commission shall have power to employ such additional clerical help as it may find necessary. [C97, §2111; C24, 27, 31, 35,§7866; 47GA, ch 205.]

Oath, §1054

7867 Proceedings. The commission may in all cases conduct its proceedings, when not otherwise prescribed by law, in such manner as will best conduce to the proper dispatch of business and the attainment of justice. [C97,§2142; C24, 27, 31, 35,§7867; 47GA, ch 205.]

C97, §2142, editorially divided

7868 Quorum — personal interest. A majority of the commission shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. [C97,§2142; C24, 27, 31, 35,§7868; 47GA, ch 205.]

7869 Rules, forms, and service. It may from time to time make or amend such general rules or orders as may be necessary for the preservation of order and the regulation of proceedings before it, including forms of notice and the service thereof, which shall conform as nearly as may be to those in use in the courts of the state. [C97,§2142; C24, 27, 31, 35,§7869.]

Manner of commencing actions, ch 489

7870 Appearances—record of votes—public hearings. Any party may appear before it and be heard in person or by attorney. Every vote and official action thereof shall be entered of

record, and, upon the request of either party or person interested, its proceedings shall be public. [C97,§2142; C24, 27, 31, 35,§7870.]

7871 **Seal.** It shall have a seal, of which courts shall take judicial notice. [C97,§2142; C24, 27, 31, 35,§7871.]

7872 **Office—time employed—expense.** The commission shall have an office at the seat of government and each member shall devote his whole time to the duties of the office, and the members and secretary and other employees shall receive their actual necessary traveling expenses while in the discharge of their official duties away from the general offices. [C97,§2121; SS15, §2121; C24, 27, 31, 35,§7872; 47GA, ch 205.]

7873 **Free transportation.** The commissioners, their secretary, experts, or other agents while in the performance of their official duties shall be transported free of charge by all railroad or other transportation companies operating in the state. [C97,§2151; C24, 27, 31, 35, §7873.]

7874 **General jurisdiction.** The commission shall have general supervision of all railroads in the state, express companies, car companies, sleeping-car companies, freight and freight-line companies, interurban railway companies, motor carriers, and any common carrier engaged in the transportation of passengers or freight by railroads, except street railroads, and also all lines for the transmission, sale, and distribution of electrical current for light, heat, or power, except in cities and towns. It shall investigate any alleged neglect or violation of law by any such common carrier, its agents, officers, or employees. [C97,§2112; S13,§2120-n; C24, 27, 31, 35,§7874; 47GA, ch 205.]

7874.1 **Removal of interfering lights.** The commission* is hereby vested with authority to order the removal or alteration of any lights erected for illuminating purposes, whether on public or private property, when such lights interfere with the easy observation of railroad signals by those engaged in the operation of railroad trains or equipment. [48GA, ch 218,§1.]

*"board" in enrolled act. See 47GA, ch 205
Analogous provisions, §4626

7875 **Inspection—notice to repair.** It shall from time to time carefully examine into and inspect the condition of each railroad, its tracks, bridges, and equipment, and the manner of its conduct, operation, and management with regard to the public safety and convenience in the state. If found by it unsafe, it shall immediately notify the railroad company whose duty it is to put the same in repair, which shall be done by it within such time as the commission shall fix. If any corporation fails to perform this duty the commission may forbid and prevent it from running trains over the defective portion while unsafe. [C97,§2113; S13,§2113; C24, 27, 31, 35, §7875; 47GA, ch 205.]

Referred to in §7877

7876 **Connections and shelter.** Should any railroad or transportation company in this state fail to provide proper shelter for its patrons at stations where two or more tracks are operated, or fail or refuse to connect by proper switches or tracks with the tracks or lines of other railroad or transportation companies, the commission may require such railroad or transportation company to provide the same in such manner and upon such conditions as it may determine. [C97, §2113; S13,§2113; C24, 27, 31, 35,§7876; 47GA, ch 205.]

Referred to in §7877
Station houses and connecting tracks, §§8013, 8016

7877 **Changes in operation and improvements.** When, in the judgment of the commission, any railway corporation fails in any respect to comply with the terms of its charter or articles of incorporation or the laws of the state; or when in its judgment any repairs are necessary upon its road; or any addition to its rolling stock, or addition to or change in its stations or station houses, or the equipment thereof, for the health and convenience of the public, or change in its rates of fare for transporting freight or passengers, or change in the mode of operating its road or conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the commission may make an order prescribing such improvements and changes as it finds to be proper and shall serve a notice upon such corporation, in the manner provided for the service of an original notice in a civil action, which notice shall be signed by its secretary. A report of such proceedings shall be included in its annual report to the governor. Nothing in this or sections 7875 and 7876 shall be so construed as relieving any railroad company from its responsibility or liability for damage to person or property. [C97,§2113; S13,§2113; C24, 27, 31, 35,§7877; 47GA, ch 205.]

Manner of service, §11060

7877.1 **Abandoning station.** It shall be unlawful for any railroad company owning or operating, or which may hereafter own or operate, any railroad in whole or in part in this state, to abandon any station in any city, town or village on its line of railroad, within this state, or to remove the depot therefrom, or to withdraw agency service therefrom, unless it shall first have filed notice of its intention with the Iowa state commerce commission and otherwise complied with the provisions of this section and sections 7877.2 and 7877.3. Upon the filing of such notice the commission shall designate the place or places within such town or village where notice shall be posted and the railroad company shall thereupon, at its own expense, cause to be posted at the place or places so designated, fifteen days notice of intention to abandon or discontinue such station or agency, or remove such depot, and shall file proof of such posting with the commission. The notice shall be in such form as prescribed by the commission. [47GA, ch 205; ch 206,§1.]

Referred to in §7877.2

7877.2 Objections—hearing. Any person or persons directly affected by the proposed abandonment or discontinuance of any station or agency, or removal of any depot, may file written objections thereto with the Iowa state commerce commission, stating the grounds for such objections, within fifteen days from the time of the posting of the notice as provided in section 7877.1. Upon the filing of such objections the commission shall fix the time and place for hearing thereon, which hearing shall be held within sixty days from the filing of such objections. Written notice of the time and place of such hearing shall be mailed by the commission to the railroad company and the person or persons filing objections at least ten days prior to the date fixed for such hearing. [47GA, ch 205; ch 206,§1.]

Referred to in §7877.1

7877.3 Order of commission. Upon said hearing the Iowa state commerce commission may prohibit the abandonment or discontinuance of such station or agency, or the removal of the depot, or may make such other order as is warranted by the evidence produced at such hearing. But if no objections are filed as hereinbefore provided, the commission shall make an order permitting the railroad company to proceed with such abandonment or discontinuance, or removal of the depot. [47GA, ch 205; ch 206,§1.]

Referred to in §7877.1

7878 Investigation and inquiry. The commission shall investigate and inquire into the management of the business of all common carriers subject to the jurisdiction of said commission and keep itself well informed as to the manner and method in which the same is conducted. It shall have the right to obtain from them full and complete information necessary to enable the commission to perform its duties. It shall have power to require the attendance and testimony of witnesses, the production of all books, papers, tariff schedules, contracts, agreements, and documents, relating to any matter under investigation, and to inspect the same and to examine under oath or otherwise any officer, director, agent, or employee of any common carrier; to issue subpoenas and to enforce obedience thereto. [C97,§§2115, 2133; C24, 27, 31, 35, §7878; 47GA, ch 205.]

7878.1 Individual hearings. The commission may authorize one of the members to hold hearings and take evidence in any particular case and a hearing so held shall have the same force and effect as a hearing by the commission, but any finding or order as a result of such hearing must be agreed to by a majority of the commission. [C27, 31, 35,§7878-b1; 47GA, ch 205.]

7879 Aid from courts. The commission may invoke the aid of any court of record in any county where the carrier extends, in requiring the attendance and testimony of witnesses and the production of books, papers, tariff schedules, agreements, and other documents. Any court or judge thereof having jurisdiction where any inquiry is carried on shall, in case of the refusal of any person to obey a subpoena or other process, issue an order requiring any of the officers, agents, or employees of any carrier or other person to appear before the commission and produce all books and papers required by such order and testify in relation to any matter under investigation. A failure to obey any such order of the court shall be punished as a contempt. [C97,§2133; C24, 27, 31, 35,§7879; 47GA, ch 205.]

Contempts, ch 536

7880 Hindering or obstructing commission. Any person who shall willfully obstruct it or its members in the performance of their duties, or who shall refuse to give any information within his possession that may be required by it within the line of its duty, shall be fined not exceeding one thousand dollars, in the discretion of the court. [C97,§2115; C24, 27, 31, 35,§7880; 47GA, ch 205.]

7881 Examination of rates. The commission shall, upon the application of the mayor and council of any city or town, or the trustees of any township, make an examination of the rate of passenger fare or freight tariff charged by any railroad company, and of the condition or operation of any railroad, any part of whose location lies within the limits of such city, town, or township; and if twenty-five or more voters in any city, town, or township shall, by written petition, request the mayor and council of such city or town, or the trustees of such township, to make the said complaint and application, and they refuse, they shall state the reason therefor in writing upon the petition, and return the same to the petitioners, who may thereupon, within ten days from the date of such refusal and return, present the same to the Iowa state commerce commission, which shall, if it thinks the public good demands the examination, proceed to make it in the same manner as if called upon by the mayor and council of any city or town, or the trustees of any township. Before proceeding to make such examination, it shall give to the petitioners and the corporation reasonable notice, in writing, of the time and place of entering upon the same. If, upon such an examination, it shall appear to the commission that the complaint is well founded, it shall, within ten days, inform the corporation operating such railroad of its finding, and shall report its doings to the governor. [C97,§2117; C24, 27, 31, 35,§7881; 47GA, ch 205.]

7882 Cumulative remedies. Nothing in this or chapter 373 shall be construed to estop or hinder any persons or corporations from bringing action against any railway company for any violation of the laws of the state for the government of railroads. [C97,§2118; C24, 27, 31, 35,§7882.]

7883 Jurisdiction of courts to enforce order. The district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions, and orders, the rulings, orders and regulations affecting public rights, made by the commission as authorized by law for the direction

and observance of railroads in this state. The proceedings therefor shall be by equitable action in the name of the state, and shall be instituted by the commerce counsel, whenever advised by the commission that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order, or regulation made by the commission, and applicable to such railroad or person. [C97,§2119; S13,§2119; C24, 27, 31, 35, §7883; 47GA, ch 205.]

Referred to in §§7889, 8118

7884 **Mandatory injunction — contempt.** It shall be the duty of the court in which any such cause shall be pending to require the issue to be made up at the first term of the court to which such cause is brought, which shall be the trial term, and to give the same precedence over other civil business. If the court shall find that such rule, regulation, or order is reasonable and just, and that in refusing compliance therewith said railway company is neglecting and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction, compelling obedience to and compliance with such rule, order, or regulation by said railroad company or person, its officers, agents, servants, and employees, and may grant such other relief as may be deemed just and proper. All violations of such decree shall render the company, persons, officers, agents, servants and employees who are in any manner instrumental in such violation, guilty of contempt of court, and the court may punish such contempt by a fine not exceeding one thousand dollars for each offense. Such decree shall continue and remain in effect and be enforced until the rule, order, or regulation shall be modified or vacated by the commission. [C97,§2119; S13,§2119; C24, 27, 31, 35,§7884; 47GA, ch 205.]

Referred to in §§5925, 7889, 8118

7885 **When order effective—violation.** All rules, orders, and regulations affecting public rights, made by the Iowa state commerce commission, as now or may hereafter be authorized for the direction and observance of railroads in this state, shall be in full force and effect from and after the date fixed by the commission. If any railroad fails, neglects, or refuses to comply with any rule, order, or regulation made by the commission within the time specified, it shall, for each day of such failure, pay a penalty of fifty dollars. [S13,§2119; C24, 27, 31, 35, §7885; 47GA, ch 205.]

Referred to in §§7889, 8118

7886 **Time may be extended to test legality.** The time for the taking effect of any rule, order, or regulation affecting public rights, made by the commission, may, in its discretion, be extended; and said extension of time may be granted for the purpose of testing the legality thereof, upon application by any such aggrieved railroad, showing reasonable grounds therefor, and that said application is made in good faith and not for the purpose of delay. [S13,§2119; C24, 27, 31, 35,§7886; 47GA, ch 205.]

Referred to in §§7889, 8118

7887 **Proceedings to vacate order.** Any railroad aggrieved at any rule, order, or regulation made by the commission may institute proceedings in any court of proper jurisdiction to have the same vacated. If found by the court, after due trial, not to be reasonable, equitable, or just, and if upon an appeal from any rule, order, or regulation of the commission the complaining railroad is successful in having such rule, order, or regulation vacated, the aforesaid penalty shall be set aside. [S13,§2119; C24, 27, 31, 35,§7887; 47GA, ch 205.]

Referred to in §§7889, 8118

7888 **Remitting penalty.** When any common carrier shall fail upon appeal to secure a vacation of the order appealed from, it may apply to the court in which the appeal is finally adjudicated for an order remitting the penalty which has accrued during the pendency of the appeal. Upon a satisfactory showing that the appeal was prosecuted in good faith and not for the purpose of delay, and that there were reasonable grounds to believe that the order appealed from was unreasonable or unjust or that the power of the commission to make the same was doubtful, such court may remit the penalty that has accrued during the pendency of the appeal. [S13,§2119; C24, 27, 31, 35,§7888; 47GA, ch 205.]

Referred to in §§7889, 8118

7889 **Costs—attorney's fees.** When a decree shall be entered against a railroad company or person under sections 7883 to 7888, inclusive, the court shall render judgment for costs, and attorney's fees for counsel representing the state. [C97,§2120; C24, 27, 31, 35,§7889.]

7890 **Interstate freight rates.** The commission shall exercise constant diligence to ascertain the rates, charges, rules, and practices of common carriers operating in this state, in relation to the transportation of freight in interstate business. When it shall ascertain from any source or have reasonable grounds to believe that the rates charged on such interstate business or the rules or practices in relation thereto discriminate unjustly against any of the citizens, industries, interests, or localities of the state, or place any of them at an unreasonable disadvantage as compared with those of other states, or are in violation of the laws of the United States regulating commerce, or in conflict with the rulings, orders, or regulations of the interstate commerce commission, the Iowa state commerce commission shall take the necessary steps to prevent the continuance of such rates, rules, or practices. [S13,§2120-a; C24, 27, 31, 35,§7890; 47GA, ch 205.]

7891 **Application to interstate commerce commission.** When any common carrier has put in force any rates, rules, or practices in relation to interstate freight business, in violation of the laws of the United States regulating commerce, or of the orders, rules, or regulations of the interstate commerce commission, or shall unjustly discriminate against any of the citizens, industries, interests, or localities of the

state, the Iowa state commerce commission shall present the material facts involved in such violations or discrimination to the interstate commerce commission and seek relief therefrom, and, if deemed necessary or expedient, the Iowa state commerce commission shall prosecute any charge growing out of such violation or discrimination, at the expense of the state, before the interstate commerce commission. [S13, §2120-b; C24, 27, 31, 35,§7891; 47GA, ch 205.]

7892 Choice of remedies. Any person claiming damages from a common carrier on account of any violation of the provisions of chapter 373 may either make complaint to the Iowa state commerce commission, or may bring action on his own behalf for the recovery of such damages; but he shall not have the right to pursue both of said remedies at the same time. [C97, §2131; C24, 27, 31, 35,§7892; 47GA, ch 205.]

7893 Complaints. Any person, firm, corporation, association, mercantile, agricultural, or manufacturing society, body politic, or municipal organization, may file with the commission a petition setting forth any particular in which any common carrier has violated the law to which it is subject and the amount of damages sustained by reason thereof. The commission shall furnish to the carrier against which complaint is filed, a copy thereof, and a reasonable time shall be fixed within which such carrier shall answer the petition or satisfy the demand therein made. If such carrier fails to satisfy the complaint within the time fixed or there shall appear to be reasonable grounds for investigating the matters set forth in said petition, the commission shall hear and determine the questions involved and make such orders as it shall find to be proper. No petition so filed shall be dismissed on the grounds that the petitioner has not suffered any direct damage. When the commission ascertains or has reason to believe that any carrier is violating any of the laws to which it is subject, it may institute an investigation and cause a hearing to be made before it in relation to such matters in all respects as fully as if a petition had been filed. [C97,§2134; C24, 27, 31, 35,§7893; 47GA, ch 205.]

7894 Investigation—report. When a hearing has been had before the commission after notice, it shall make a report in writing setting forth the findings of fact and its conclusions together with its recommendations or orders as to what reparation, if any, the offending carrier shall make to any party who has suffered damage. Such finding of fact shall thereafter in all legal proceedings be prima facie evidence of every fact found. All reports of hearings and investigations made by the commission shall be entered of record and a copy furnished to the carrier against which the complaint was filed, to the party complaining, and to any other person having a direct interest in the matter. [C97,§2135; C24, 27, 31, 35,§7894; 47GA, ch 205.]

7895 Orders—compliance—release. When the commission finds as the result of any investigation that a common carrier has violated or is violating any of the provisions of law to which it is subject, or that any complainant or other person has sustained damages by reason of such violation, the commission shall notify such carrier to cease such violation at once and shall fix a time within which it shall pay the amount of damage which has been found due to any person as a result of such violation. Upon a satisfactory showing to the commission that the carrier has complied with the notice in the time and manner required, it shall thereupon be relieved from further liability or penalty for that particular violation of law, and the commission shall enter of record such release. [C97,§2136; C24, 27, 31, 35,§7895; 47GA, ch 205.]

7896 Violation of order — petition — notice. When any common carrier shall violate or fail to obey any lawful order or requirement of the commission, the commission shall apply in a summary way by petition in the name of the state, against such common carrier, to the district court of any county through which such carrier owns or operates a line of railroad or in which the failure or violation of such order occurred, alleging such violation or failure to obey; the court shall hear and determine the matter set forth in said petition on reasonable notice to the common carrier, to be fixed by the court and to be served in the same manner as original notices for the commencement of action. [C97, §2137; C24, 27, 31, 35,§7896; 47GA, ch 205.]

Referred to in §§7897, 7898
Manner of service, §11060

7897 Interested party may begin proceedings. Any person, firm, or corporation interested in the matter of enforcing any order or requirement of the commission, may file a petition against such carrier, alleging the failure to comply with such order or requirement and praying summary relief to the same extent and in the same manner as the commission may do under section 7896, and the proceedings after the filing of such petition shall be the same as in said section provided. [C97,§2137; C24, 27, 31, 35, §7897; 47GA, ch 205.]

Referred to in §7898

7898 Duty of commerce counsel and county attorney. When any proceeding has been instituted under sections 7896 and 7897, the commerce counsel shall prosecute the same, and the county attorney of the county in which such proceeding is pending shall render such assistance as the commerce counsel may require of him. [C97,§2137; C24, 27, 31, 35,§7898.]

7899 Hearing in equity — injunction. All such causes shall be in equity, and the order or report of the commission in question shall be prima facie evidence of the matters contained therein. If the court shall find that the order or requirement in question is lawful and has been violated, it shall issue an injunction or other proper process, mandatory or otherwise, to compel obedience to such order or requirement. [C97, §2137; C24, 27, 31, 35,§7899; 47GA, ch 205.]

7900 Violation of injunction. For a violation of any injunction or other process issued

in such proceeding, any common carrier or any officer, agent, or employee thereof shall be fined for contempt in a sum not exceeding one thousand dollars. In addition to any other penalty the court may fix a sum not exceeding one thousand dollars which each defaulting carrier, officer, or agent shall pay after a fixed date for each day such injunction or other process is disobeyed and render judgment for penalty which shall accrue from disobedience after the time fixed. One-half of such sums collected shall be paid into the treasury of the county where the judgment is rendered and one-half into the state treasury. [C97,§2137; C24, 27, 31, 35,§7900.]

7901 Appeal—effect. An appeal to the supreme court shall not stay or supersede the order of the court or the execution of any writ or process thereon. When appeal is taken by the commission, it shall not be required to give an appeal bond or security for costs. [C97,§2137; C24, 27, 31, 35,§7901; 47GA, ch 205.]

7902 Suits by commission. When the commission has reason to believe that any common carrier has been guilty of extortion or unjust discrimination, it shall immediately cause actions to be commenced and prosecuted against such carrier. Such action may be brought in any county through or into which any line of railway owned or operated by such carrier may extend. No actions thus commenced shall be dismissed unless the commission and the commerce counsel consent thereto. The court in which any such action is pending may, in its discretion, give preference as to the time of trial of such action over other business, except criminal cases. [C97,§§2149, 2150; C24, 27, 31, 35, §7902; 47GA, ch 205.]

7903 Uniform gauge — inspection — order. As often as it deems it expedient, the commission shall examine all the railroads in the state that are less than four feet eight and one-half inches gauge, and if in the judgment of the commission, it is necessary and reasonable to change the gauge of any such railroad to four feet eight and one-half inches, it shall make an order in writing, fixing a reasonable time within which such gauge shall be changed, taking into consideration the life of the rolling stock of such narrow-gauged road and all other facts and conditions bearing on the length of time required to make such change. [C24, 27, 31, 35,§7903; 47GA, ch 205.]

7904 Rights and remedies not exclusive. Nothing in this chapter shall abridge any rights or remedies existing at common law or by statute, but shall be in addition to such remedies. [C24, 27, 31, 35,§7904.]

7905 Accidents — investigation of — report. Upon the occurrence of any serious accident upon any railroad within this state, which shall result in personal injury, or loss of life, the corporation operating the road upon which the accident occurred shall give immediate notice thereof to the Iowa state commerce commission whose duty it shall be, if they deem it necessary, to investigate the same, and promptly report to the governor the extent of the personal injuries, or loss of life, and whether the same was the result of mismanagement or neglect of the corporation on whose line the injury or loss of life occurred; but such report shall not be evidence or referred to in any case in any court. [S13,§2120-k; C24, 27, 31, 35,§7905; 47 GA, ch 205.]

7906 Annual reports from companies. The commission shall require annual reports from all common carriers subject to the provisions of chapter 373 to be made at the same time they make report to the executive council,* to cover the same period, and prescribe the manner in which specific answers to all questions upon which it may need information shall be made. [C73,§1280; C97,§2143; C24, 27, 31, 35,§7906; 47GA, ch 205.]

*See note under §8125
C97, §2143, editorially divided

7907 Details of report. Such report shall show in detail the amount of capital stock issued, the amounts paid therefor, and manner of payment; the dividends paid; surplus fund, if any; number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of locomotive engines and cars used in the state, and the number supplied with automatic safety couplers, and the kind and number of brakes used, and the number of each; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how and where expended and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balance of profit and loss, and a complete exhibit of the financial operations thereof each year, including an annual balance sheet. [C73, §1280; C97,§2143; C24, 27, 31, 35,§7907.]

7908 Additional details. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other carriers, and other statistics of the road and its transportation, as the commission may require. [C97,§2143; C24, 27, 31, 35,§7908; 47GA, ch 205.]

7909 Additional reports. The commission may also require of any and all common carriers subject to the provisions of chapter 373 such other reports, and fix the time for filing the same, as in its judgment shall be necessary and reasonable, which reports shall be in such form, and concerning such subjects, and be from such sources as it shall direct, except as otherwise provided herein. [C97,§2143; C24, 27, 31, 35, §7909; 47GA, ch 205.]

7910 Uniform accounts. The commission may prescribe uniformity and methods of keeping accounts, as near as may be, and fix a time

when such regulations shall take effect. [C97, §2143; C24, 27, 31, 35,§7910; 47GA, ch 205.]

7911 Violations. Any corporation, company, or individual owning or operating a railway within the state, neglecting or refusing to make the required reports by the date fixed, or fixed by the commission, shall be subject to a penalty of one hundred dollars for each and every day of delay in making the same after the date thus fixed. [C73,§§1281, 1282; C97,§2143; C24, 27, 31, 35,§7911; 47GA, ch 205.]

7912 Report. The commission shall annually, on or before the first Monday in December, make a report to the governor of its doings for the preceding year, containing such facts, statements, and explanations as will disclose the working of such systems of railroad transportation in the state, and their relation to the general business and prosperity of the citizens thereof, with such suggestions and recommendations in respect thereto as may to the commission seem appropriate. Said report shall also contain, as to every railroad corporation doing business in this state:

1. The amount of its capital.
2. The amount of its preferred stock, if any, and the condition of its preferment.
3. The amount of its funded debt and the rate of interest.
4. The amount of its floating debt.
5. The cost and actual present cash value of its road equipment, including permanent way, buildings, and rolling stock, all real estate used exclusively in operating the road, and all fixtures and conveniences for transacting its business.
6. The estimated value of all other property owned by it, with a schedule of the same, not including lands granted in aid of its construction.
7. The number of acres originally granted it by the United States or this state in aid of the construction of its road.
8. The number of acres of such land remaining unsold.
9. A list of its officers and directors, with their respective places of residence.
10. Such statistics of the road and of its transportation business for the year as may, in the judgment of the commissioners, be necessary and proper for the information of the general assembly or as may be required by the governor.
11. The average amount of tonnage that can be carried over each road in the state with an engine of given power.

Said report shall exhibit and refer to the condition of such corporation on the first day of July of each year, and the details of its transportation business transacted during the year ending June 30. [C97,§2114; C24, 27, 31, 35, §7912; 47GA, ch 205.]

Time of filing report, §253

CHAPTER 369

COMMERCE COUNSEL

7913 Appointment—term.
7914 Vacancy.
7915 Disqualification.
7916 Political activity.
7917 Removal.
7918 Office—assistants—expenses.
7919 Duties.

7913 Appointment — term. Within sixty days after the general assembly convenes in 1927, and every four years thereafter, the Iowa state commerce commission shall appoint a competent attorney to the office of commerce counsel, subject to the approval of two-thirds of the members of the senate. His term of office shall be for four years and till his successor is appointed, and shall begin on the first day of July of the year he is appointed. [S13,§2121-h; C24, 27, 31, 35,§7913; 47GA, ch 205.]

7914 Vacancy. A vacancy in said office occurring while the general assembly is in session, shall be filled for the unexpired term in the same manner as original appointments. If the general assembly is not in session, a vacancy shall be filled by an appointment made by the commission, which appointment shall expire thirty days from the time the next general assembly convenes. [S13,§2121-h; C24, 27, 31, 35,§7914; 47GA, ch 205.]

7915 Disqualification. The existence of any fact which would disqualify a person from election or acting as an Iowa state commerce commissioner shall disqualify such person from appointment or acting as commerce counsel. [S13, §2121-i; C24, 27, 31, 35,§7915; 47GA, ch 205.]

Eligibility, §7865

7916 Political activity. The commerce counsel shall devote his entire time to the duties of his office; and during his term of office he shall not be a member of any political committee or contribute to any political campaign fund or take any part in political campaigns or be a candidate for any political office. [S13,§2121-i; C24, 27, 31, 35,§7916.]

7917 Removal. The commission may, with the approval of the senate, during a session of the general assembly, remove said counsel for malfeasance or nonfeasance in office, or for any cause which renders him ineligible for appointment, or incapable or unfit to discharge the duties of his office; and his removal, when so made, shall be final. [S13,§2121-h; C24, 27, 31, 35,§7917; 47GA, ch 205.]

General removal statutes, ch 56

7918 Office—assistants—expenses. The office of commerce counsel shall be at the seat of

government and he shall have free access to all the files, records, and documents in the office of the commission. The commerce counsel, his assistants and office help shall be paid their actual necessary traveling expenses and other disbursements incurred in the discharge of official duties; such expenditures are to be approved by the Iowa state commerce commission. [S13, §2121-j; C24, 27, 31, 35,§7918; 47GA, ch 205.]

7919 **Duties.** The commerce counsel shall:

1. Act as attorney for, and legal adviser of, the Iowa state commerce commission.

2. Investigate the legality of all rates, charges, tariffs, rules, regulations, and practices of all common carriers and persons under the jurisdiction of the state commission, and institute civil proceedings before the state commission or any proper court to correct any illegality on the part of any common carrier and prosecute the same to final determination.

3. Investigate the reasonableness of rates, tariffs, charges, rules, regulations, and practices of all such common carriers in interstate transportation when directed by the state commission, or when in his judgment they are unlawful, prejudicial, and discriminate against any city, town, community, business, industry, or citizen of the state, and institute before the interstate commerce commission or any other tribunal having jurisdiction and prosecute to final determination any proceeding growing out of such matters.

4. Appear on behalf of any person or persons who shall file any complaint against any common carrier before the state commission in any matter within its jurisdiction.

5. Appear for and represent the state commission, the state, and any citizen, community, city, or town or business or industry of the state in all proceedings brought by or against any common carrier before the interstate commerce commission in which any or all of such parties are interested.

6. Appear for the state commission or for the state and the citizens and industries thereof in all actions instituted in any state or federal court wherein is involved the validity of any rule, order, or regulation of said state commission, or the validity of any rule, order, or regulation of the interstate commerce commission affecting the interests of the citizens and industries of the state, and prosecute in any state or federal court in the name of the state, all actions necessary to enforce, or to restrain the violation of, any rule, order, or regulation made by the state commission or by the interstate commerce commission. [S13,§2121-l; C24, 27, 31, 35,§7919; 47GA, ch 205.]

CHAPTER 370

GENERAL POWERS OF RAILWAY CORPORATIONS

7920 Change of name.
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7945.1 Motorbusses—aerial transportation.

7920 **Change of name.** Any corporation organized under the laws of this state for the purpose of constructing and operating a railway may, with the consent of two-thirds of all the stockholders in interest, change the corporate name thereof, but no such change shall be complete until the president and secretary shall file in the office of the secretary of state a statement under oath showing the consent of the stockholders thereto and the new name adopted, with a certified copy of the proceedings in relation thereto as appears in the records thereof, and from that time the corporation by its new name shall be entitled to all the rights, powers, and franchises that it possessed under the old one, and by such new name shall be liable upon all contracts and obligations entered into by or binding upon such corporation under the old name to the same extent and in the same manner as if no change had been made. [C73,§1273; C97,§2034; C24, 27, 31, 35,§7920.]

7921 **Effect of change.** If any railway company is organized under a corporate name, and has made contracts for payments to it upon delivery of stock in such company, and shall subsequently thereto change its name, or if the real ownership in the property, rights, and franchises has passed legally or equitably into any other company, no such contract shall be enforced until tender or delivery of stock in such last named company or corporation is made. [C73,§1302; C97,§2068; C24, 27, 31, 35,§7921.]

7922 **Where recorded.** The secretary of state shall immediately record in the proper book in his office any document filed pertaining to said change in name, making references to the record of the articles of incorporation. [C73, §1274; C97,§2035; C24, 27, 31, 35,§7922.]

7923 **Joinder at boundary line—consolidation.** Any such corporation may join, intersect, and unite its railway with that of any other cor-

poration at such point upon the boundary line of this state as may be agreed upon, and, with the consent of three-fourths in interest of all the stockholders, by purchase, sale, or otherwise, may merge and consolidate the stock, property, franchises, and liabilities of such corporations, making the same one corporation, upon such terms as may be agreed upon, not in conflict with law. [R60,§1332; C73,§1275; C97,§2036; C24, 27, 31, 35,§7923.]

Referred to in §11073

7924 **Connections with foreign carrier.** Any such corporation which has constructed or may construct its railway so as to meet or connect with another railway in an adjoining state at the boundary line of this state, may make such contracts and agreements therewith for the transportation of freight and passengers, or the use of its railway, as the board of directors may see proper, and not inconsistent with law. [R60, §1334; C73,§1276; C97,§2037; C24, 27, 31, 35, §7924.]

7925 **Extension into foreign state.** Any such corporation organized for the purpose of constructing a railway from a point within the state may construct or extend the same into or through any other state, under such regulations as may be prescribed by the laws of such state, and its rights and privileges over said extension in the construction and use thereof, and in controlling and applying the assets, shall be the same as if its railway was constructed wholly within the state. [R60,§1333; C73,§1277; C97,§2038; C24, 27, 31, 35,§7925.]

7926 **Powers in other states.** Any railroad corporation organized under and by virtue of the laws of this state, and owning and operating a railroad therein, shall be authorized and empowered to exercise in any other state or territory of the United States, in which it may control or operate a connecting line or lines of railway, the powers and privileges conferred upon it by its articles of incorporation and all powers, privileges, and franchises conferred upon railroad corporations under and by virtue of the laws of Iowa or of such other state or territory, for the purposes set forth in section 7927. [S13, §2038-a; C24, 27, 31, 35,§7926.]

7927 **Acquisition of foreign line.** Any railroad corporation so organized under the laws of Iowa and owning and operating a railroad therein may lease, purchase, or otherwise acquire and own, control, or operate any connecting extension of its said railroad not parallel or competing therewith, in any other state or territory of the United States, and to that end may purchase and control the stock, bonds, or securities of any such extension if not contrary to the laws of such other state or territory. [S13,§2038-b; C24, 27, 31, 35,§7927.]

Referred to in §7926

7928 **Duties and liabilities of lessees.** All the duties and liabilities imposed by law upon corporations owning or operating railways shall apply to all lessees or other persons owning or operating such railways as fully as if they were expressly named herein; and any action which might be brought or penalty enforced against any such corporation by virtue of any provisions of law may be brought or enforced against such lessees or other persons. [C73,§1278; C97,§2039; C24, 27, 31, 35,§7928.]

7929 **Offices—location.** The offices of secretary and treasurer or assistant treasurer and general superintendent of railway corporations organized under the laws of the state shall be where its principal place of business is or is to be, in which the original record, stock, and transfer books and all the original papers and vouchers thereof shall be kept. [C73,§1279; C97, §2040; C24, 27, 31, 35,§7929.]

C97, §2040, editorially divided

7930 **Financial record.** Such treasurer or assistant treasurer shall keep a record of the financial condition of the corporation, which shall be open to inspection by any stockholder, or any committee appointed by the general assembly, at all reasonable times. [C73,§1279; C97,§2040; C24, 27, 31, 35,§7930.]

7931 **Stock transfer office — residence required.** Such corporations may keep a transfer office in any other state, with a duplicate transfer book, but no transfer of shares of stock shall be legal or binding until the same is entered in the one kept in the state. The secretary and treasurer or assistant treasurer and general superintendent shall reside in this state. [C73, §1279; C97,§2040; C24, 27, 31, 35,§7931.]

7932 **Bonds — mortgages.** Any such corporation may issue its bonds for the construction and equipment of its railway in sums of not less than fifty dollars, payable to bearer or otherwise, with interest not exceeding eight percent per annum, and making them convertible into stock, and sell the same at such prices as is thought proper. If such bonds are sold below par they shall, nevertheless, be valid, and no plea of usury shall be allowed in any action or proceeding brought to enforce the collection thereof. Such corporation may also secure the payment of the bonds by mortgages or deeds of trust upon the whole or any part of its property and franchises. [R60,§1339; C73,§1283; C97, §2041; C24, 27, 31, 35,§7932.]

7933 **After-acquired property.** Such mortgages or deeds of trust may by their terms include and cover not only the property of the corporation making them, owned at the time of their date, but all property, real and personal, which may thereafter be acquired, and they shall be as valid and effectual for that purpose as if the property were in possession at the time of their execution. [R60,§1340; C73,§1284; C97, §2042; C24, 27, 31, 35,§7933.]

7934 **Execution of mortgages.** They shall be executed in the manner the articles of incorporation or the bylaws of the corporation may provide, and be recorded in each county through which the railway of the company may be lo-

cated, or in which any property mortgaged or conveyed may be situated, and when recorded shall be constructive notice of the rights of all parties thereunder; and for this purpose the rolling stock and personal property of the company belonging to the road shall be deemed a part thereof, and such mortgages and deeds so recorded shall protect the lien of the mortgagee or grantee upon the personal property to the same extent that it does upon real estate thus mortgaged or conveyed. [R60,§1341; C73,§1285; C97,§2043; C24, 27, 31, 35,§7934.]

7935 **Bonds secured by mortgage.** Any railway corporation organized under the laws of the state may mortgage its property and franchises, in whole or in part, to secure bonds issued by it to pay or refund its indebtedness, to improve or develop its property, or for the purpose of effecting the object of its incorporation, to be issued in such amounts, run for such length of time, be payable within or without this state, and bear such rate of interest, not to exceed the legal rate in the state at the time of issue, as the company issuing the same shall determine. [C97, §2049; C24, 27, 31, 35,§7935.]

7936 **Mortgage to secure bonds of lessee.** Any railway corporation organized under the laws of the state may mortgage its property and franchises, in whole or in part, to secure bonds issued by any other railway corporation of this or any other state, which, at the time, is operating the road of such mortgagor under lease thereof; such bonds to be issued to refund or to secure the means to pay the indebtedness of such lessor, or to improve or develop its property, for the purpose of effecting the object of its incorporation. Such bonds may be issued in such amounts, run for such length of time, be made payable within or without the state, and bear such rate of interest, not exceeding the legal rate in this state at the time they are issued, as may be determined by and be acceptable to such lessee. The lessee may secure the bonds issued by it for any of the purposes aforesaid by a mortgage of its leasehold interest in the property and franchises of the lessor. [C97, §2050; C24, 27, 31, 35,§7936.]

7937 **Preferred stock.** Any railway corporation may increase its capital stock by the issuance of preferred stock in one or more classes entitled to such rate or rates of preferred dividends not exceeding eight percent per annum, and to such other preferences including accumulation thereon for future payment of any dividends not earned or paid in any fiscal or corporate year, and with such other privileges and rights as may be authorized by the stockholders pursuant hereto, and may issue the same either in exchange for property upon compliance with the provisions of sections 8412 to 8415, inclusive, or for sale for cash at par or for the retirement of its indebtedness at the rate of par for par; no such stock increase shall be made, and no such preferred stock shall be issued, unless authorized by the vote of not less than seventy-five percent of the total amount of the capital stock of such corporation at the time outstanding, expressed at a meeting called for the purpose, upon not less than thirty days notice inserted in a newspaper published in the city or town wherein such corporation may have its principal place of business in this state, and mailed to each stockholder of record at his address appearing upon the stock books of such corporation, provided that the plan and purpose for the issuance of any preferred stock under the provisions of this section, shall first be submitted to and receive the approval of the Iowa state commerce commission. [C73,§1286; C97, §2044; C24, 27, 31, 35,§7937; 47GA, ch 205.]

7938 **Conversion into common stock.** Such preferred stock and any income or mortgage bond of the corporation shall, at the option of the holder, be convertible into common stock on such terms as the board of directors may prescribe; but the aggregate amount of the common and preferred stock shall not exceed the total amount of stock which the corporation may be authorized by law, or the articles of incorporation, to issue. [C73,§1287; C97,§2045; C24, 27, 31, 35,§7938.]

7939 **Selection of directors by bondholders.** Any railway corporation organized under any law of the state, including consolidated corporations created pursuant to the laws of this and any adjoining state, may in such manner, under such regulations, and to such an extent as may be prescribed by its board of directors, and consented to by at least two-thirds of the capital stock then outstanding, confer upon the holders of its bonds or other evidences of indebtedness, or upon the holders of any particular class of such bonds or evidences of indebtedness, the right to vote for directors thereof, one or more of whom may be chosen from among such bondholders. [C97,§2046; C24, 27, 31, 35,§7939.]

7940 **Corporation may own stock.** Any railway corporation organized under the law of the state, or operating a road therein under the authority of the laws thereof, may acquire, own, and hold either the whole or any part of the stock, bonds, or other securities of any other railroad company of this or any adjoining state. [C97,§2047; C24, 27, 31, 35,§7940.]

7941 **Foreign railway companies.** Any railway corporation organized or created by or under the laws of any other state, owning and operating a line or lines of railroad in such state, may build its road or branches into this state, and shall possess all the powers and privileges, and be subject to the same liabilities, as like corporations organized and incorporated under the laws of this state, if it shall file with the secretary of state a copy of its articles of incorporation, if incorporated under a general law of such state, or a certified copy of the statute incorporating it where the charter thereof was granted by statute. [C97,§2048; C24, 27, 31, 35,§7941.]

7942 **Sale or lease of railroad property.** Any railway corporation may sell or lease its prop-

erty and franchises to, or make joint running arrangements not in conflict with law with, any corporation owning or operating any connecting railway, and any corporation operating the railway of another shall be liable in the same manner and extent as though such railway belonged to it. [C73,§1300; C97,§2066; C24, 27, 31, 35, §7942.]

Referred to in §§7943, 11073

7943 Mortgage of contract or lease. Any contract, lease, or benefit derived under the authority given in section 7942 may be mortgaged for the purpose of securing construction bonds in the same manner as other property of the corporation. [C73,§1301; C97,§2067; C24, 27, 31, 35,§7943.]

7944 Report to general assembly. When any railway has been completed and opened for use, the corporation owning, operating, or constructing it shall report under oath to the next general assembly the total cost thereof, specifying the amount expended for construction, engines, cars, depots, and other buildings, and the amount of all other expenses, together with the length of the railway, the number of planes with their inclination to the mile, the greatest curvature, the average width of roadbed, and the number of ties per mile. [C73,§1303; C97, §2069; C24, 27, 31, 35,§7944.]

7945 Rights reserved. All contracts, stipulations, and conditions regarding the right of controlling and regulating the charges for freight and passengers upon railways, heretofore made in granting land and other property or voting taxes to aid in the construction of or franchises to railway corporations, are expressly reserved, continued, and perpetuated in full force and effect, to be exercised by the general assembly whenever the public good or the public necessity requires such exercise thereof. [C73, §1306; C97,§2070; C24, 27, 31, 35,§7945.]

7945.1 Motorbusses—aerial transportation. Any railroad company operating a railroad in this state may own and operate over the highways of this state for hire and as a common carrier of passengers, freight, mail or express, automobile busses or motor vehicles, subject to the laws of the state applicable to the use of such highways by motor vehicle carriers, and may also own and operate equipment for, and engage in aerial transportation, subject to the laws of the state applicable thereto. Any such railroad company may purchase and own capital stock and securities of a corporation organized for or engaged in the business of a motor carrier, or of aerial transportation. [C31, 35,§7945-c1.]

CHAPTER 371

CONSTRUCTION AND OPERATION OF RAILWAYS

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7946 Crossing railway, canal, or watercourse. Any railroad company may build its railway across, over, or under any other railway, canal, or watercourse, when necessary, but shall not thereby unnecessarily impede travel, transportation, or navigation. It shall be liable for

all damages caused by such crossing. [R60, §1325; C73,§1265; C97,§2020; C24, 27, 31, 35, §7946.]

7947 Maintenance of bridges — damages. Every railroad company shall build, maintain, and keep in good repair all bridges, abutments, or other construction necessary to enable it to cross over or under any canal, watercourse, other railway, public highway, or other way, except as otherwise provided by law, and shall be liable for all damages sustained by any person by reason of any neglect or violation of the provisions of this section. [R60,§§1326, 1327; C73,§§1266, 1267; C97,§2021; C24, 27, 31, 35,§7947.]

7948 Rights of riparian owners. All owners or lessees of lands or lots situated upon the Iowa banks of the Mississippi or Missouri rivers upon which any business is carried on which is in any way connected with the navigation of either of said rivers, or to which such navigation is a proper or convenient adjunct, are authorized to construct and maintain in front of their property, piers, cribs, booms, and other proper and convenient erections and devices for the use of their respective pursuits, and the protection and harbor of rafts, logs, floats, and watercraft, in such manner as to create no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property. [C97,§2032; C24, 27, 31, 35,§7948.]

Referred to in §7949

7949 Railroad on riparian land or lots. No person or corporation shall construct or operate any railroad or other obstruction between the lots or lands referred to in section 7948 and either of said rivers, or upon the shore or margin thereof, unless the injury and damage to owners or lessees occasioned thereby shall be first ascertained and paid in the manner provided for taking private property for works of internal improvement. [C97,§2033; C24, 27, 31, 35,§7949.]

Condemnation procedure, ch 366

7950 Right to lay pipes. Such railway may lay, maintain, and repair pipes through any lands adjoining its tracks for a distance not to exceed three-fourths of a mile therefrom, in order to conduct water, for its engines, from any running stream. Said pipes shall not be laid to any spring, nor be so used as to injuriously withdraw the water from any farm. [C73, §1243; C97,§1997; C24, 27, 31, 35,§7950.]

7951 Duty to restore natural surface. It shall, without unnecessary delay after such laying or repairing, restore the surface of the land to its natural grade, and replace any fence or other improvement which it may have disturbed. [C73,§1243; C97,§1997; C24, 27, 31, 35,§7951.]

7952 Right of landowner. The owner of the land through which any such pipes may be laid shall have the right to use the land in any manner which will not interfere with such pipes. [C73,§1243; C97,§1997; C24, 27, 31, 35,§7952.]

7953 Liability to landowner. Said corporation shall be liable to the owner of the land for any damages occasioned by laying, maintaining, or repairing such pipes. [C73,§1243; C97,§1997; C24, 27, 31, 35,§7953.]

7954 Station telephones. It shall be the duty of all railway companies on all lines of railway operated by them to install a telephone in each passenger or freight depot in any city or town where a telephone exchange is maintained for public service, said telephone to be connected with and for the use of the patrons of said exchange. [S13,§2077-a; C24, 27, 31, 35,§7954.]

Referred to in §7956
S13, §2077-a, editorially divided

7955 Train bulletins required. It shall be the duty of all railway companies on all lines operated by them to keep posted in the waiting room of each passenger station a bulletin plainly showing the time of arrival and departure at such station of all trains carrying passengers, and at all stations where a telegraph or telephone operator is maintained, such bulletin shall indicate whether said trains are late or on time, and if late, the approximate number of minutes late. If the train is less than ten minutes late, the same shall be considered on time for the purpose of this section. [S13,§2077-a; C24, 27, 31, 35,§7955.]

Referred to in §7956

7956 Violations. Any railway company violating the provisions of sections 7954 and 7955, and any agent, telephone or telegraph operator of such railroad company violating the provisions of section 7955 in relation to posting bulletins in the waiting room indicating when the trains are late or on time, shall be punished by a fine of not less than five dollars nor more than fifty dollars. [S13,§2077-a1; C24, 27, 31, 35, §7956.]

7957 Automatic couplers. No corporation, company, or person operating a railroad and no car manufacturing or transportation company using or leasing cars shall operate upon any railroad in this state any car that is not equipped with safety automatic couplers, so constructed as to enable a person to couple and uncouple them without going between cars. [C97,§§2079, 2080; S13,§2080; C24, 27, 31, 35,§7957.]

Referred to in §§7960, 7961

7958 Driver brake on engines. No corporation, company, or person operating any line of railroad in the state shall use any locomotive engine upon any railroad or in any railroad yard in the state that is not equipped with a proper and efficient power brake, commonly called a driver brake. [C97,§2081; C24, 27, 31, 35,§7958.]

Referred to in §§7960, 7961

7959 Power brake on cars. No corporation, company, or person operating a line of railroad in the state shall run any train of cars that shall not have therein a sufficient number of cars with some kind of efficient automatic or power brake to enable the engineer to control the train without requiring brakemen to go between the ends

or on the top of the cars to use the hand brake. [C97,§2082; C24, 27, 31, 35,§7959.]

Referred to in §§7960, 7961

7960 Violations. Any corporation, company, or person operating a railroad in this state and using a locomotive engine, or running a train of cars, or using any freight, way, or other car contrary to the provisions of sections 7957 to 7959, inclusive, shall be guilty of a misdemeanor, and shall be subject to a fine of not less than five hundred nor more than one thousand dollars for each and every offense; but such penalties shall not apply to companies hauling cars belonging to railroads other than those of this state which are engaged in interstate traffic. [C97,§2083; C24, 27, 31, 35,§7960.]

C97, §2083, editorially divided

7961 Nonassumption of risk. Any railway employee who may be injured by the running of such engine, train, or car contrary to the provisions of sections 7957 to 7959, inclusive, shall not be considered as waiving his right to recover damage by continuing in the employ of the corporation, company, or person operating such engine, train, or cars. [C97,§2083; C24, 27, 31, 35,§7961.]

7962 Switch engines — safety devices. It shall be unlawful for any railway or terminal transfer company, or any corporation operating locomotives in switching or yard service, to operate, or permit the same to be operated, unless said locomotives are equipped with headlight on both front and rear of engine, when operated between sunset and sunrise, and all such engines shall be equipped with a footboard of substantially uniform height, width, and length, securely fastened and firmly braced to the pilot beam in front of engine, and a similar footboard on rear of tank or tender of engines, upon which employees may stand or ride when their duties require them so to do, and that a substantial grab rail or rod be securely fastened upon said pilot beam at each end and in the center, at a convenient height for employees to reach and hold on to with their hands, said rod to extend across the full length of the said pilot beam, and also across the rear end beam of said tank or tender. [S13,§2083-c; C24, 27, 31, 35,§7962.]

Referred to in §§7963, 7964
S13, §2083-c, editorially divided

7963 Exceptions. The provisions of section 7962 shall not apply to switching or yard service at stations or places where regular switch engines are not employed exclusively as switch engines, or during a period of not exceeding twelve hours, when a switch engine is being cleaned or washed out, and also switching by work trains; and where regular switch engines are disabled by accident, or in need of repairs, or there is an unusual or unexpected amount of work, switching, under such conditions, with ordinary engines, for a period of not to exceed forty-eight hours, shall not be considered a violation of this statute. [S13,§2083-c; C24, 27, 31, 35,§7963.]

7964 Violations. Any person, railway company, terminal transfer, or other corporation or company who violates any of the provisions of section 7962 shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars or more than five hundred dollars for any such violation, and each day that every such engine is operated shall constitute a separate and distinct violation of said section. [S13,§2083-d; C24, 27, 31, 35,§7964.]

7965 Frost glass in cab windows. Every person, partnership, company, or corporation owning or operating a railway in the state, between November 1 and April 1 of each year, shall equip the cab of all locomotive engines in use, with frost glass, of not less than eight inches in width and eighteen inches in length on either side of the cab of said engine in front of the seats of the engineer and fireman; but when a frost glass is broken or becomes out of repair, a period of not to exceed seventy-two hours is allowed to repair or replace the same. [S13,§2083-e; C24, 27, 31, 35,§7965.]

Referred to in §7966

7966 Violations. Any violation of section 7965 shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each day any locomotive engine is operated in violation thereof. [S13,§2083-f; C24, 27, 31, 35,§7966.]

7967 Headlights. It shall be the duty of every person, firm, or corporation owning or operating any line of railway within the state, except lines under twenty miles in length operated wholly within this state, to equip all locomotives, power vehicles, power cars, or other equipment used as the equivalent of or in place of a locomotive, when used in the transportation of passengers or freight, with a headlight of sufficient candle power, measured with a reflector, to throw a light in clear weather that will enable the operator of same to plainly discern an object the size of a man lying prone on the track at a distance of eleven hundred feet from the headlight, and thereafter to maintain and use such headlights upon every such locomotive, vehicle, car, or other equipment. [S13, §2083-g; C24, 27, 31, 35,§7967.]

Referred to in §§7968, 7969
S13, §2083-g, editorially divided

7968 Exceptions. Section 7967 shall not be construed to apply to power cars used by street railways and operated wholly within the corporate limits of any city or town, nor to engines or other equipment used exclusively for switching purposes, nor to engines or other equipment running after sunrise and before sunset. [S13, §2083-g; C24, 27, 31, 35,§7968.]

7969 Violations. Any person, firm, or corporation owning such line of railway or the equipment operated thereon, who shall cause or permit any locomotive, power vehicle, power car, or other equipment used as the equivalent thereof, to be operated without being equipped

with the headlight required by the provisions of section 7967 shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars for each offense. [S13,§2083-h; C24, 27, 31, 35, §7969.]

S13, §2083-h, editorially divided

7970 Exceptions. No punishment shall be imposed for the operation of any such locomotive or the equivalent thereof without such headlight, when such locomotive was properly equipped with such headlight at the commencement of the trip, providing it is shown that such headlight was in good and sufficient working condition when the trip was begun and became disabled during the trip. [S13,§2083-h; C24, 27, 31, 35,§7970.]

7971 Standard caboose cars. The provisions of sections 7972 and 7973 shall apply to any corporation or to any person or persons while engaged as common carriers in the transportation by railroads of passengers or property within this state except interurban, to which the regulative power of this state extends. [S13, §2083-i; C24, 27, 31, 35,§7971.]

Referred to in §7973

7972 Minimum length — construction — equipment. It shall be unlawful, except as otherwise provided in this chapter, for any such common carrier by railroad to use on its lines any caboose car or other car used for like purposes, unless such caboose or other car shall be at least twenty-four feet in length, exclusive of the platform, and equipped with two four-wheel trucks, and shall be provided with a door in each end thereof and an outside platform across each end of said car; each platform shall not be less than eighteen inches in width and shall be equipped with proper guard rails, and with grab irons and hand brakes, and steps for the safety of persons getting on and off said car; said steps shall be equipped with a suitable rod, board, or other guard at each end and at the back thereof, properly designed to prevent slipping from said step. Such caboose or other car used for like purposes shall be provided with cupola, or side bay windows, and necessary closets and windows. Each caboose car shall be equipped with an emergency air valve, and air gauge, which shall be placed on inside of said car; but the provisions hereof shall not apply to work trains, transfer service, or emergencies not exceeding thirty-six hours. [S13, §2083-j; C24, 27, 31, 35,§7972; 48GA, ch 219,§1.]

Referred to in §§7971, 7973

7973 Violations. Any common carrier as provided in section 7971 violating any of the provisions of section 7972 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. [S13,§2083-m; C24, 27, 31, 35,§7973.]

Referred to in §7971

7973.1 Automatic firebox door. All steam railroad companies operating steam locomotive engines on its railroad or railroads in or through this state, shall provide and equip each and every such steam locomotive engine so operated over its road or roads in this state with an automatic door to the firebox of such locomotive engine. [C27, 31, 35,§7973-a1.]

Referred to in §§7973.4, 7973.5, 7973.6
41GA, ch 156, §1, editorially divided

7973.2 Motive power. Such automatic door shall be constructed and operated by steam, compressed air, or electricity, as deemed best and most efficient by the officers of such railroad. [C27, 31, 35,§7973-a2.]

Referred to in §§7973.4, 7973.5, 7973.6

7973.3 Manner of construction. The device for operating such door shall be so constructed that it may be operated by the fireman on said engine by means of a push button or other appliance located in the floor of the engine deck or floor of the tender at a suitable distance from such door to enable the fireman while firing such engine, by pressure with his foot to open said door for the firing of such engine. [C27, 31, 35, §7973-a3.]

Referred to in §§7973.4, 7973.5, 7973.6

7973.4 Time of installation. The equipment provided for in sections 7973.1 to 7973.3, inclusive, shall be installed when a locomotive undergoes general repair and the use of a locomotive before such general repairs are made shall not be regarded as a violation of said sections. [C27, 31, 35,§7973-a4.]

Referred to in §7973.6

7973.5 Penalty. Each and every steam railroad company failing to provide and maintain in good condition and working order an automatic firebox door as required and provided for in sections 7973.1 to 7973.3, inclusive, shall be guilty of a misdemeanor and shall be liable to a fine of not less than one hundred dollars nor more than five hundred dollars for each and every day such locomotive is operated in this state without such automatic door. [C27, 31, 35, §7973-a5.]

Referred to in §7973.6
41GA, ch 156, §8, editorially divided

7973.6 Exceptions. The provisions of sections 7973.1 to 7973.5, inclusive, shall not apply to locomotive engines equipped with mechanical stokers. [C27, 31, 35,§7973-a6.]

7974 Adequate stockyards required. Any person, firm, or corporation operating a railroad within the state shall provide at each of its stations where livestock is received for shipment, adequate stockyards, which shall be substantially provided with good gates, suitable chutes for loading livestock, suitable sheds for the protection of livestock from the inclemency of the weather, suitable troughs from which livestock may be watered and an ample water supply conveniently located and supplied by pipes from wells or other water supply, the amount of such water supply to be at all times sufficient for all livestock in said yards and also

for the wetting down of cars in hot weather. [C24, 27, 31, 35,§7974.]

Referred to in §7975

7975 **Duty to enforce.** It shall be the duty of the said Iowa state commerce commission to enforce the provisions of section 7974, and, upon a complaint signed by five or more shippers of livestock, it shall be its duty to investigate the stockyards and loading facilities at any such station and determine their adequacy and shall have power to make such order for the improvement of said yards as shall, in its judgment, seem necessary. [C24, 27, 31, 35,§7975; 47GA, ch 205.]

7976 **Depots—closets—sanitation.** At all railway stations in this state, where a depot and waiting rooms for passengers are maintained, there shall be within the same, or connected therewith, sanitary closets, including separate closets for women which, in cities or towns having a system of sewerage so located that the same can be reasonably used by the railroad property, shall be thoroughly drained, constructed, and plumbed according to approved sanitary principles and said depots and closets shall be kept in a clean and sanitary condition, free from any offensive odors. Depots in cities or towns not provided with a sewerage system, shall be provided with privies or closets properly screened and separated for the use of males and females, which shall be cleaned and disinfected as often as necessary to keep and maintain them in an approved sanitary condition. [S13,§2514-y; C24, 27, 31, 35,§7976.]

Referred to in §§7977, 7978, 7979

7977 **Enforcement.** It shall be the duty of the department of agriculture to see that the provisions of section 7976 are fully complied with and, on complaint being filed by an employee or patron of the railway company, shall inspect the same. [S13,§2514-y1; C24, 27, 31, 35, §7977.]

7978 **Delinquency—notice to station agent.** It shall be the duty of the department upon ascertaining by inspection or otherwise that any railroad company has not complied with the provisions of section 7976 at any of its depots, to notify the station agent of such depot, in writing, stating in what respect it is delinquent and requiring it in a reasonable time, to be fixed by the department, to do or cause to be done the things necessary to make it comply with the law. [S13,§2514-y2; C24, 27, 31, 35,§7978.]

7979 **Violations.** Any railroad company which after receiving said notice fails to comply, within the time fixed, with the provisions of section 7976, shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding one hundred dollars for each offense and the inspector shall file information in such a case. [S13,§2514-y3; C24, 27, 31, 35,§7979.]

7980 **Fee.** Such railroad companies shall pay a fee of five dollars to the person making the inspection. If there is no cause of complaint, the person complaining shall be liable for such fee. All fees shall forthwith be paid over to the state treasurer. [S13,§2514-y4; C24, 27, 31, 35,§7980.]

7981 **Freight, passenger, express, and telegraph offices.** All railroads terminating in the state shall establish and maintain at such terminus general freight and passenger offices, and express or telegraph offices when operating an independent express or telegraph company, at localities accessible and convenient to the public, and there keep for sale tickets over their respective roads, and, in advertising, correctly set forth their true connections, starting or terminal points, timetables, and freight tariffs. [C97,§2108; C24, 27, 31, 35,§7981.]

Referred to in §7983

7982 **Sleeping-car tickets.** All railroad and sleeping-car companies, running or operating sleepers or sleeping cars within the state upon railroads terminating therein, shall establish, maintain, and keep open to the public, at such termini, ticket offices at accessible and convenient places, in which they shall keep a diagram of the berths and staterooms in such sleepers or sleeping cars, and shall at all times during the daytime keep them open for the sale of tickets for such berths and staterooms. [C97,§2109; C24, 27, 31, 35,§7982.]

Referred to in §7983

7983 **Violations.** If any officer, agent, or employee of any such company, or any lessee, engaged in operating any sleeper or sleeping-car line terminating or operated within the state, shall neglect or refuse to comply with any of the provisions of sections 7981 and 7982, he shall be guilty of a misdemeanor, and, upon conviction thereof, fined in a sum not exceeding five hundred dollars, and imprisoned not more than six months. [C97,§2110; C24, 27, 31, 35,§7983.]

7984 **Employees hours of service.** It shall be unlawful for any railway company within the state, or any of its officers or agents, to require or permit any employee engaged in or connected with the movement of any rolling stock, engine, or train, to remain on duty more than sixteen consecutive hours, or to require or permit any such employee who has been on duty sixteen consecutive hours to perform any further service without having at least ten hours for rest, or to require or permit any such employee to be on duty at any time to exceed sixteen hours in any consecutive twenty-four hours. [S13,§2110-a; C24, 27, 31, 35,§7984.]

Referred to in §§7985, 7986, 7987
S13, §2110-a, editorially divided

7985 **Exceptions.** Section 7984 shall not apply to work performed in the protection of life or property in cases of accident, wreck, or other unavoidable casualty, or prevent train crews from taking a passenger train, or freight train loaded exclusively with livestock or perishable freight, to the next nearest division point upon such railroad; and it shall not apply to that time necessary for the trainmen to reach a resting place when an accident, wreck, washout, snow blockade, or other unavoidable cause has

delayed their train; and provided further that said section shall not apply to employees of sleeping-car companies. [S13,§2110-a; C24, 27, 31, 35,§7985.]

7986 Violations — investigation — prosecutions. Any superintendent, trainmaster, train dispatcher, yardmaster, or other official of any railroad in the state, violating any of the provisions of section 7984, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars for each offense. [S13,§2110-b; C24, 27, 31, 35, §7986.]

S13, §2110-b, editorially divided

7987 Investigation by commission. It shall be the duty of the Iowa state commerce commission to receive written statements of violations of section 7984, and when so requested to hold the same without disclosure of the name of the person making such statement, and to investigate each and every complaint filed alleging such violation. [S13,§2110-b; C24, 27, 31, 35,§7987; 47GA, ch 205.]

7988 Hearing—report. The commission in making such investigation shall have the power to administer oaths, interrogate witnesses, take testimony, and require the production of books and papers, and must file a report of such investigation in writing with a full statement of its finding to the governor. [S13,§2110-b; C24, 27, 31, 35,§7988; 47GA, ch 205.]

7989 Prosecutions. In all cases of violation of said provisions, the Iowa state commerce commission, through the attorney general, must at once begin the prosecution of all parties against whom evidence of violation is found; but said provisions shall not be construed to prevent any other person from beginning prosecution for violation thereof. [S13,§2110-b; C24, 27, 31, 35,§7989; 47GA, ch 205.]

7990 Semimonthly payment of wages. Every railway corporation operating or doing business in the state shall as often as semimonthly pay to every employee engaged in its business all wages or salaries earned by such employee to a day not more than eighteen days prior to the date of such payment. Any employee who is absent at the time fixed for payment, or who for any other reason is not paid at that time, shall be paid thereafter at any time upon six days demand, and any employee leaving his or her employment or discharged therefrom shall be paid in full following his or her dismissal or voluntary leaving his or her employment at any time upon six days demand. No corporation coming within the meaning of this section shall by special contract with the employees or by any other means secure exemption from the provisions of this section. Each and every employee of any corporation coming within the meaning hereof shall have his or her right of action against any such corporation for the full amount of his or her wages due on each regular pay day as herein provided in any court of competent jurisdiction of this state. [SS15,§2110-b1; C24, 27, 31, 35,§7990.]

Referred to in §7991

7991 Violations. Any corporation violating section 7990 shall be deemed guilty of a misdemeanor and fined in a sum not less than twenty-five dollars, nor more than one hundred dollars, for each separate offense, and each and every failure or refusal to pay each employee the amount of wages due him or her at the time, or under the conditions required in section 7990, shall constitute a separate offense. [SS15,§2110-b2; C24, 27, 31, 35,§7991.]

7992 Destruction of weeds. It shall be the duty of every corporation owning or operating a railroad in this state on written notice from the owner, lessee or occupant of any land abutting upon its right-of-way to cut and burn, or otherwise destroy once each year during the month of July, all cockleburs, burdock weeds, quack grass, and thistles on its right-of-way adjacent to said land. [S13,§2110-i; C24, 27, 31, 35,§7992.]

Referred to in §§7993, 7994
Weeds, ch 246.1

7993 Violations. Any failure to comply with the provisions of section 7992 shall be deemed a misdemeanor and shall be punished accordingly. [S13,§2110-j; C24, 27, 31, 35,§7993.]

Referred to in §7994
Punishment, §12894

7994 Enforcement. It shall be the duty of the county attorneys in the respective counties to enforce the provisions of sections 7992 and 7993. [S13,§2110-k; C24, 27, 31, 35,§7994.]

7995 Profane language on trains. Any person who shall use profane or indecent language on any passenger railway car, or on any streetcar, or interurban car, in service, shall be guilty of a misdemeanor. [S13,§2461-f; C24, 27, 31, 35, §7995.]

Punishment, §12894

7996 Power to eject passenger. Any conductor of a railway train, or streetcar, or interurban car carrying passengers shall have the right to refuse to permit any person, not in the custody of an officer, to enter any passenger car on his train, or streetcar, or interurban car in his charge, who shall be in a state of intoxication; and shall have the further right to eject from his train at any station, or from his streetcar, or interurban car at any regular stop, any person found in a state of intoxication or drinking intoxicating liquors as a beverage, or using profane or indecent language, and for that purpose may call to his aid any employee of the railway or streetcar or interurban company. [S13,§2461-g; C24, 27, 31, 35,§7996.]

7997 Changing names of stations. In all cases where any railway company shall fail or refuse to make the name of the railway station conform to the name of the village, incorporated town, or city within the limits of which it is situated, it shall be the duty of the Iowa state commerce commission to order a change of

the name of said railway station to effect such uniformity, within sixty days after a petition in writing by the town council of said incorporated town or city, or, in the case of a village, by the township trustees, asking for such order, is filed with said Iowa state commerce commission. [C97,§2105; C24, 27, 31, 35,§7997; 47GA, ch 205.]

7998 Notice. When the commissioners shall order a change in the name of a railway station, they shall give the company owning or operating the same notice of such order, and if it is not complied with within thirty days from the date of service of such notice, the commissioners shall notify the attorney general thereof, who shall begin proceedings in the proper court to compel the enforcement of said order. [C97, §2106; C24, 27, 31, 35,§7998.]

7999 Violations. A failure to comply with the order of the commissioners within thirty days from service of such notice shall also be a misdemeanor, for which said company shall be subject to a fine of one thousand dollars, and noncompliance for each thirty days thereafter shall constitute a separate and distinct offense, subject to a fine of one thousand dollars. [C97, §2107; C24, 27, 31, 35,§7999.]

CHAPTER 372

CATTLE GUARDS, FENCES, CROSSINGS, AND INTERLOCKING SWITCHES

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8000 Cattle guards — crossings — signs. Every corporation constructing or operating a railway shall make proper cattle guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public road good, sufficient, and safe crossings and cattle guards, and erect at such points, at a sufficient elevation from such road as to admit of free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railway, and warn persons of the necessity of looking out for trains. Any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such refusal or neglect, and it shall only be necessary, in order to recover, for the injured party to prove such neglect or refusal. [R60, §1331; C73,§1288; C97,§2054; C24, 27, 31, 35, §8000.]

8001 Railway fences required. All railway corporations owning or operating a line of railway within the state, shall construct, maintain, and keep in repair a fence on each side of the right-of-way, so connected with cattle guards at all public road crossings as to prevent livestock getting upon the tracks. All such rights-of-way shall be fenced within six months after the completion of the track or any part thereof. [C97, §2057; S13,§2057; C24, 27, 31, 35,§8001.]

Referred to in §8002
40ExGA, HF 190, §5, editorially divided

8002 Exception. Section 8001 shall not apply to a class C line of railway through the lands of any owner who by written agreement with the company owning or operating such line waives the fencing thereof. [C97,§2057; S13, §2057; C24, 27, 31, 35,§8002.]

8003 Specifications. All fences shall be not less than fifty-four inches high and may be of any of the following types:

1. Not less than five barbed wires, properly spaced.
2. Not less than three barbed wires above and not less than twenty-four inches of woven wire below.
3. Entirely of woven wire.
4. Five boards properly spaced.
5. Any other type which the fence viewers of any township through which it passes may determine as efficient as any of the above types.

Each of the above types shall be securely nailed to posts firmly set, not more than twenty feet apart for the first three types, nor more than eight feet apart for the fourth. [C97, §2057; S13,§2057; C24, 27, 31, 35,§8003.]

8004 Hog-tight fences. When any person owning land abutting on the right-of-way is maintaining a hog-tight fence on all sides thereof or any division of such land except along such right-of-way, the railway company owning such right-of-way shall, on written request of the landowner, make such right-of-way fence along such inclosed land hog-tight by the addition of barbed or woven wire or other equally efficient means. [S13,§2057; C24, 27, 31, 35,§8004.]

8005 Failure to fence. Any corporation operating a railway and failing to fence its right-of-way against livestock running at large or to maintain proper and sufficient cattle guards at all points where the right to fence or maintain cattle guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle guards for the full amount of the damages sustained by the owner, unless it was occasioned by the willful act of such owner or his agent; and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. [C73,§1289; C97,§2055; C24, 27, 31, 35, §8005.]

Referred to in §8160

8006 Double damages. If such corporation fails or neglects to pay such damages within thirty days after notice in writing that a loss or injury has occurred, accompanied by an affidavit thereof, served upon any officer or station or ticket agent employed by said corporation in the county where such loss or injury occurred, such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him. [C73,§1289; C97, §2055; C24, 27, 31, 35,§8006.]

Referred to in §8160

8007 Laws and local regulations not applicable. No law of the state or any local or police regulations of any county, township, city, or town, relating to the restraint of domestic animals, or in relation to the fences of farmers or landowners, shall be applicable to railway rights-of-way, unless specifically so stated in such law and regulation. [C73,§1289; C97, §2055; C24, 27, 31, 35,§8007.]

Referred to in §8160

8008 Depot grounds — speed limit. Upon depot grounds necessarily used by the public and the corporation, the operating of trains at a greater rate of speed than eight miles an hour where no fence is built, shall be negligence, and shall render such corporation liable for all damages occasioned thereby, in the same manner and to the same extent, except as to double damages, as in cases where the right to fence exists. [C73,§1289; C97,§2055; C24, 27, 31, 35,§8008.]

Referred to in §8160

8009 Failure to fence—general penalty. If the corporation, officer thereof or lessee owning or engaged in the operation of any railroad in the state refuses or neglects to comply with any provision of this chapter relating to the fencing of the tracks, such corporation, officer, or lessee shall be guilty of a misdemeanor, and upon conviction fined in a sum not exceeding five hundred dollars for each offense, and every thirty days continuance of such refusal or neglect shall constitute a separate and distinct offense. [C97,§2058; C24, 27, 31, 35,§8009.]

C97, §2058, editorially divided

8010 Killing of stock—interpretative clause. Nothing herein contained shall be construed to relieve the corporation from liability arising from the killing or maiming of livestock on said track or right-of-way by its negligence or that of its employees, nor shall anything in this chapter interfere with the right of open or private crossings, or with the right of persons to such crossings, nor in any way limit or qualify the liability of any corporation or person owning or operating a railway that fails to fence the same against livestock running at large for any stock injured or killed by reason of the want of such fence. [C97,§2058; C24, 27, 31, 35,§8010.]

8011 Private crossings. When any person owns land on both sides of any railway, or when a railway runs parallel with a public highway thereby separating a farm from such highway, the corporation owning or operating such railway, on request of the owner of such land or farm, shall construct and maintain a safe and adequate farm crossing or roadway across such railway and right-of-way at such reasonable place as the owner of the land may designate, and shall construct and maintain a cattle guard on each side of such roadway where it crosses the track, connected by wing or cross fences to the fences on each side of the right-of-way. [R60,§1329; C73,§1268; C97,§2022; S13,§2022; C24, 27, 31, 35,§8011.]

8012 Overhead, underground, or more than one crossing. Such owner of land may serve upon such railroad company a request in writing for more than one such farm or private crossing, or for an overhead or underground crossing, accompanied by a plat of his land designating thereon the location and character of crossing desired. If the railroad company refuses or neglects for thirty days after such service to comply with such request, the owner of the land may make written application to the Iowa state commerce commission to hear and determine his rights in said respect. Such commission, after reasonable notice to the railroad company, shall hear said application and all objections thereto, and make such order as shall be reasonable and just, and if it requires the railroad company to construct any crossing or roadway, fix the time for compliance with such order. The matter of costs shall be in the discretion of the commission. [S13,§2022; C24, 27, 31, 35,§8012; 47GA, ch 205.]

8013 Station houses at crossings. All railway corporations shall, at all points of connection, crossings, or intersection with the roads of other corporations, unite therewith in establishing and maintaining suitable platforms and station houses for the convenience of pas-

sengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage, or freight, whenever the same shall be ordered by the Iowa state commerce commission; and shall, when ordered by it, keep such depot or passenger house warmed, lighted, and opened a reasonable time before the arrival, and until after the departure of all trains carrying passengers. [C97,§2103; C24, 27, 31, 35,§8013; 47GA, ch 205.]

Referred to in §8017
Proper stations required, §7876
C97, §2103, editorially divided

8014 Expense. The expense of constructing and maintaining such station houses and platforms shall be paid by such corporations in such proportions as may be fixed by the commission. [C97,§2103; C24, 27, 31, 35,§8014.]

Referred to in §8017

8015 Stopping of trains. Said railway companies shall stop all trains at said depots for the transfer of passengers, baggage, and freight when so ordered by the commission. [C97, §2103; C24, 27, 31, 35,§8015.]

Referred to in §8017

8016 Connecting tracks. Such corporations whose roads so connect or intersect shall, when ordered by the commission, so unite and connect the tracks of the several roads as to permit the transfer of cars from the track of one to that of the other. [C73,§§1292-1295; C97,§2103; C24, 27, 31, 35,§8016.]

Referred to in §8017
Connecting tracks required, §7876

8017 Violations. Any railway corporation or company which, after having received ninety days notice from the commissioners, shall neglect or refuse to comply with the provisions of sections 8013 to 8016, inclusive, shall, for every day it fails, neglects, or refuses to comply therewith, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state for the use of the school fund of the county wherein such crossing or intersection is situated, and the county attorney of such county shall prosecute the same. [C97,§2104; C24, 27, 31, 35,§8017.]

8018 Signals at road crossings. A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; but at street crossings within the limits of cities or towns the sounding of the whistle may be omitted, unless required by ordinance or resolution of the council thereof; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect. [C97,§2072; C24, 27, 31, 35, §8018.]

Referred to in §8019
C97, §2072, editorially divided

8019 Violations. Any officer or employee of any railway company violating any of the provisions of section 8018 shall be punished by a fine not exceeding one hundred dollars for each offense. [C97,§2072; C24, 27, 31, 35,§8019.]

8020 Railway and highway crossing at grade. Wherever a railway crosses or shall hereafter cross a highway at grade, the railway company and the board of supervisors of the county in which such crossing is located, if a primary or secondary highway, or such railway company and the trustees of the township in which such crossing is located, if a township highway, may agree upon any change, alteration, vacation, or relocation of such highway so as to carry such highway over or under such railway or eliminate such crossing entirely, and upon the expense each party shall pay for making such changes. [R60,§1321; C73,§1262; C97,§2017; SS15,§2017; C24, 27, 31, 35,§8020.]

8021 Disagreement — application — notice. If the railway company and said highway authorities cannot agree upon the changes to be made, either party may make written application to the Iowa state commerce commission, setting forth the changes and alterations desired, and said commission shall fix a date for hearing and give the other party ten days written notice by mail of such date. [SS15,§2017; C24, 27, 31, 35,§8021; 47GA, ch 205.]

8022 Hearing—order. The Iowa state commerce commission shall hear and determine such application, taking into consideration the necessity of such changes and the expense thereof, the location of any crossing and the manner in which it shall be constructed and maintained, or whether a crossing is to be eliminated and the provisions therefor, and may make such order in relation thereto as shall be equitable, including authority to condemn and take additional land for such purposes when necessary, and shall determine what portion of the expense shall be paid by any party to such controversy. [SS15,§2017; C24, 27, 31, 35,§8022; 47GA, ch 205.]

8023 Railway company to hold in trust. Any portion of the expense of making such crossing changes and alterations borne by any municipal corporation or township, the state or any person, shall forever be held in trust by such railroad corporation or its successors, and no part of such funds shall constitute any part of the value of its property on which it is entitled to receive a return. [SS15,§2017; C24, 27, 31, 35, §8023.]

8024 Repairs—aid by court. If the board of supervisors, township trustees, city or town council, or any official having jurisdiction over such highway, shall determine that such crossing is unsafe or is in need of further repairs or alterations, and cannot agree with the railroad company as to such repairs or additional alterations, the proper board, council, or officer shall file a petition in the district court of the county in which the crossing is located, setting forth the facts and conditions on which relief is sought and serve the railroad company with

written notice thereof in the time and manner required for original notices. [R60,§1322; C73, §1263; C97,§2018; C24, 27, 31, 35,§8024.]

Time and manner of service, §§11059, 11060

8025 Issues—hearing—order. The railroad company may join issue by answer. The court or a judge thereof shall hear the controversy in a summary manner in equity in term time or vacation and make such order or decree as may be found equitable and fix a reasonable time for compliance therewith and, on default of the railroad company, it may enjoin the operation of trains over that portion of the railway during the continuance of such default. The court may award costs against either party in its discretion. [R60,§1322; C73,§1263; C97,§2018; C24, 27, 31, 35,§8025.]

8026 Condition after change — temporary ways. When a railroad company changes, alters, or repairs a highway crossing, it shall upon completion of the work leave it free from obstructions to travel and in good condition. If travel will be obstructed while any alterations or repairs are being made, the railroad company shall provide safe and convenient temporary ways for the public to avoid or pass such obstructions. [R60,§§1321, 1324; C73,§§1262, 1264; C97,§§2017, 2019; SS15,§2017; C24, 27, 31, 35,§8026.]

8027 Railway crossings near Mississippi river. When in the construction of a railway it becomes necessary to cross another railway near the shore of the Mississippi river, each shall be so constructed and maintained at the point of crossing that the respective roadbeds thereof shall be above high water mark in such river; but where the crossing occurs within the limits of any city or town containing six thousand or more inhabitants, the council or other governing authorities thereof may establish the crossing grade. [C73,§1290; C97,§2059; C24, 27, 31, 35,§8027.]

8028 Grade crossings. The Iowa state commerce commission shall have jurisdiction over all crossings at grade of steam and interurban railways within the state. Upon the application of any interurban railway or upon its own motion, the said commission may require the trains of any steam railway to stop at any crossing of such railway tracks at grade or said commission may make such rules and regulations in relation to speed or other methods of operation at such grade crossings as in its judgment are necessary to protect the public safety. This section shall be construed as an exception to the general rule as provided by law, with reference to interurban railways being street railways within cities and towns. [C24, 27, 31, 35,§8028; 47GA, ch 205.]

Interurban railways, §8202

8029 Duties of employees. Wherever the tracks of an interurban railway cross the tracks of any steam railway at grade, the steam railway shall, except where required to stop by order of the Iowa state commerce commission, have the right-of-way and not be compelled to stop its trains and the interurban company operating its line shall cause its cars to come to a full stop not nearer than ten feet nor more than fifty feet from such crossing. Before proceeding to cross said steam railway tracks some employee of the interurban company shall first cross said track ahead of its car or cars and ascertain if the way is clear and free from danger for the passage of such interurban cars. The interurban car or cars shall not proceed to cross until signaled to do so by such person employed as aforesaid. No steam railway in the operation of its engine and cars shall obstruct the free passage of cars of an intersecting interurban railway at such crossing except in the exercise of its right-of-way as provided in this section. [S13,§2033-e; C24, 27, 31, 35,§8029; 47GA, ch 205.]

Referred to in §§8030, 8031

8030 Stopping at crossings — exceptions. Except as otherwise in this chapter provided in relation to interlocking switches at railway grade crossings and except as otherwise provided in section 8029, all trains run upon any steam railroad in this state which intersects and crosses any other railroad upon the same level, shall be brought to a full stop at a distance of not less than two hundred nor more than eight hundred feet from the point of intersection or crossing, before such intersection or crossing is passed. [C97,§2073; C24, 27, 31, 35,§8030.]

Referred to in §8031

8031 Violations. Any person in charge of an interurban car or cars, who shall violate the provisions of section 8029 and any engineer or person in charge of an engine, who shall violate the provisions of section 8030 shall be fined for each offense not exceeding one hundred dollars; and the corporation or company on whose road such offense is committed, shall be fined not exceeding two hundred dollars for each offense. [C97,§2073; S13,§2033-e; C24, 27, 31, 35,§8031.]

8032 Interlocking switches. When in any case two or more railroads cross each other at a common grade, or a railroad crosses a stream by swing or drawbridge, they may be equipped thereat with an interlocking switch system, or other suitable safety device rendering it safe for engines or trains to pass thereover without stopping. The plans for such proposed interlocking system or other safety device shall be first submitted to the Iowa state commerce commission for approval, and after the same has been installed no engines or trains shall pass over such crossings or bridges without stopping until the Iowa state commerce commission shall have inspected and issued a certificate of approval of such interlocking system or safety device. [C97,§2060; C24, 27, 31, 35,§8032; 47GA, ch 205.]

8033 Changing plan. In the event any railroad company desires to make a change in the mechanical construction, arrangement, or location of any interlocking system or other safety device, or in any of the parts of such system or device, the plans showing specifically the na-

ture of the changes proposed shall be filed with the Iowa state commerce commission, and such system or device as changed shall not be operated until a certificate of approval thereof has been issued by the commission. [C24, 27, 31, 35,§8033; 47GA, ch 205.]

8034 **Condemnation — reconstruction.** Any interlocking system or other safety device now or hereafter constructed or operated, which may be found by the Iowa state commerce commission, after inspection, to be unsafe or dangerous, may be condemned by the said commission, and the railroad company or companies required to reconstruct the same in accordance with the rules governing the construction, operation, and maintenance of interlocking plants adopted by said Iowa state commerce commission. [C24, 27, 31, 35,§8034; 47GA, ch 205.]

8035 **Compulsory establishment.** Whenever in the judgment of the Iowa state commerce commission it is necessary for the public safety, said commission may require the establishment of an interlocking system or other safety device at any railroad crossing, junction, or drawbridge. [C24, 27, 31, 35,§8035; 47GA, ch 205.]

CHAPTER 373

REGULATION OF CARRIERS

Referred to in §§7882, 7892, 7906, 7909

GENERAL PROVISIONS

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8036 Applicability of chapter. The provisions of this chapter shall apply to the transportation of passengers and property, and to the receiving, delivering, storing, and handling of property wholly within this state, and shall apply to all railroad corporations, express companies, car companies, sleeping-car companies, freight or freight-line companies, and to any common carrier engaged in this state in the transportation of passengers or property by railroad therein, and to shipments of property made from any point within the state to any point within the state, whether the transportation of the same shall be wholly within this state or partly within this state and partly within an adjoining state. [C97,§2122; C24, 27, 31, 35,§8036.]

Referred to in §§8067, 8072

8037 Definition of terms. The terms "railroad" and "railway" as used in this chapter shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation, receiver, trustee, or other person operating a railroad, whether owned or operated under contract, agreement, lease, or otherwise.

The term "transportation" shall include all instrumentalities of shipment or carriage.

The term "railway corporation" shall mean all corporations, companies, or individuals owning or operating any railroad or carrier in whole or in part in this state, except street railways.

The term "switching service" is hereby defined to be shifting of a car or of cars between two points, both of which points are within the industrial vicinity of an industry, a group of industries, a station, a village, or a city, as such industrial vicinity may be defined by the Iowa state commerce commission. [C97,§2122; SS15, §2125; C24, 27, 31, 35,§8037; 47GA, ch 205.]

Referred to in §§8067, 8072

8038 Duty to furnish cars and transport freight. Every railway corporation shall upon reasonable notice, and within a reasonable time, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch, and provide and keep suitable facilities for the receiving and handling thereof at any depot on the line of its road. [C97,§2116; S13, §2116; C24, 27, 31, 35,§8038.]

Referred to in §§8041, 8067, 8072
40ExGA, HF 196, §2, editorially divided

8039 Cars of connecting roads. It shall receive and transport in like manner the empty or loaded cars furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged or reloaded and returned to the road so connecting. For compensation it shall not demand or receive any greater sum than is accepted by it from any connecting railroad for a similar service. [C97, §2116; S13,§2116; C24, 27, 31, 35,§8039.]

Referred to in §§8041, 8067, 8072

8040 Passenger service — frequency — presumption. Every railway corporation owning or operating lines of railroad of more than seventeen miles in length within the limits of the state, shall maintain a service of not less than two passenger trains each way every twenty-four hours, over the entire length of each division of such line or lines, when so ordered by the Iowa state commerce commission. Passenger service of less than the number of trains provided herein shall be presumed to be unreasonable. [S13,§2116; C24, 27, 31, 35, §8040; 47GA, ch 205.]

Referred to in §§8041, 8067, 8072

8041 Burden of proof. In any action in court, or before the commission, brought against a railroad corporation for the purpose of enforcing rights arising under the provisions of this and sections 8038 to 8040, inclusive, the burden of proving that the provisions thereof have been complied with by such railroad corporation, shall be upon such railroad corporation. [S13,§2116; C24, 27, 31, 35,§8041; 47GA, ch 205.]

Referred to in §§8067, 8072

8042 Limitation on liability. No contract, receipt, rule, or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which

would exist had no contract, receipt, rule, or regulation been made or entered into. [C73, §1308; C97,§2074; C24, 27, 31, 35,§8042.]

Referred to in §§8067, 8072

8043 Limitation on liability. No contract, receipt, rule, or regulation shall exempt any corporation or person engaged in transporting persons for hire from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made. [C73,§2184; C97,§3136; C24, 27, 31, 35,§8043.]

Referred to in §§8067, 8072

8044 Preference prohibited—exception. It shall be unlawful for any common carrier to give any preference or advantage to, or entail any prejudice or disadvantage upon any particular person, company, firm, corporation, locality, or any class of business or traffic, by any rate, rule, regulation, or practice whatsoever. This provision shall not prevent any common carrier from giving preference as to time of shipping livestock, live poultry, uncured meats, fruits, vegetables, or other perishable property. [C97,§2125; SS15,§2125; C24, 27, 31, 35,§8044.]

Referred to in §§8067, 8072

8045 Interchange of traffic—switching and forwarding. All common carriers shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and switching of cars, passengers, and property to and from their several lines, and to and from other lines and places connected therewith; and shall not discriminate in their accommodations, rates, and charges between such connecting lines. Any common carrier may be required to switch and transfer cars for another, for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the Iowa state commerce commission. [C97, §2125; SS15,§2125; C24, 27, 31, 35,§8045; 47GA, ch 205.]

Referred to in §§8067, 8072

8046 Unjust discrimination—exceptions. If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; but this section shall not be construed as prohibiting a less rate per one hundred pounds in a carload lot than is charged, collected, or received for the same kind of freight in less than a carload lot. [C97,§2124; C24, 27, 31, 35,§8046.]

Referred to in §§8067, 8072

8047 Reconsignment without charge. Upon request of the consignee it shall be the duty of any common carrier of freight to reconsign, rebill, and reship from any place of destination within the state to any other place within the state any property in carload lots, whether accompanied by any person or not, brought to said place of destination over its own or other line and treat the same in all respects as an original shipment between such places, provided the charges to first place of destination are paid or secured to the satisfaction of such company. [S13,§2157-r; C24, 27, 31, 35,§8047.]

Referred to in §§8067, 8072

8048 Charges to be reasonable. All charges made for any service rendered or to be rendered in the transportation of passengers or property in this state, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [C97,§2123; C24, 27, 31, 35,§8048.]

Referred to in §§8067, 8072

8049 Long and short haul—fair rate. No common carrier, subject to the provisions of this chapter, shall charge more for the transportation of persons or property to or from any point on its railroad than a fair and just rate or charge.

No such common carrier, or carriers, shall charge or receive any greater compensation in the aggregate for the transportation of persons or of a like kind of property for a shorter than for a longer distance, over the same line or route in the same direction within this state, the shorter being included within the longer distance, or charge any greater compensation as a through rate than the aggregate of the intermediate rates; but this shall not be construed as authorizing any such common carrier or carriers to charge or receive as great a compensation for a shorter as for a longer distance or haul; provided that upon application to the Iowa state commerce commission such common carrier or carriers may, in special cases, after investigation, be authorized by the Iowa state commerce commission to charge less for a longer than for a shorter distance for the transportation of persons or property; and the Iowa state commerce commission may from time to time prescribe the extent to which such designated common carrier or carriers may be relieved from the operation and requirement of this section; but, in exercising the authority conferred upon it in this proviso, the Iowa state commerce commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and, if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher

charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points. [C97,§2126; C24, 27, 31, 35,§8049; 47GA, ch 205.]

Referred to in §§8067, 8072

8050 Pooling contracts. It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freight of different and competing railroads, or divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be a separate offense. [C73,§§1297–1299; C97,§2127; C24, 27, 31, 35,§8050.]

Referred to in §§8067, 8072

8051 Continuous shipments. It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or, by other means or device, the carriage of freights from being continuous from place of shipment to the place of destination in the state; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this chapter. [C97,§2129; C24, 27, 31, 35,§8051.]

Referred to in §§8067, 8072

8052 Violations—treble damages. In case any common carrier subject to the provisions of this chapter shall do, cause, or permit to be done anything herein prohibited or declared to be unlawful, or shall omit to do anything in this chapter required to be done, it shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence, together with costs of suit, and a reasonable attorney's fee to be fixed by the court, on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; but in all cases demand in writing shall be made for the money damages sustained before action is brought for a recovery under this section, and no action shall be brought until the expiration of fifteen days after such demand. [C97,§2130; C24, 27, 31, 35,§8052.]

Referred to in §§8067, 8072

8053 Criminal liability. Except as otherwise specially provided for in this chapter, and unless relieved from the consequences of a violation of the law as provided herein, any common carrier subject to the provisions hereof, or, when such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party shall willfully do or cause to be done, or shall willfully suffer or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing, so directed or required by the provisions of this chapter to be done, not to be so done; or shall aid or abet any such omission or failure, or shall be guilty of any infraction of the provisions of this chapter, or shall aid or abet therein, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not more than five thousand nor less than five hundred dollars for each offense. [C97,§2132; C24, 27, 31, 35,§8053.]

Referred to in §§8067, 8072

8054 "Extortion" defined—penalty. If any railway corporation or carrier subject to the provisions of this chapter shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railway car upon its track or any of the branches thereof, or upon any railroad within the state which it has the right, license or permission to use, operate, or control; or shall make any unjust and unreasonable charge prohibited in this chapter, it shall be deemed guilty of extortion, and be dealt with as hereinafter provided; and if any such railroad corporation or common carrier shall be found guilty of any unjust discrimination as defined in this chapter, it shall, upon conviction thereof, be dealt with as hereinafter provided. [C97,§2144; C24, 27, 31, 35,§8054.]

Referred to in §§8067, 8072

8055 Discrimination—prima facie evidence. If any such railway corporation shall:

1. Charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class, over a greater distance of the same railway; or

2. Charge, collect, or receive at any point upon its road a higher rate of toll or compensation for receiving, handling, or delivering freight of the same class and quantity than it shall at the same time charge, collect, or receive at any other point upon the same railway; or

3. Charge, collect, or receive for the transportation of any passenger or freight of any description over its railway a greater amount as toll or compensation than shall at the same

time be charged, collected, or received by it for the transportation of any passenger or like quantity of freight of the same class being transported in the same direction over any portion of the same railway of equal distance; or

4. Charge, collect, or receive from any person a higher or greater amount of toll or compensation than it shall at the same time charge, collect, or receive from any other person for receiving, handling, or delivering freight of the same class and like quantity at the same point upon its railway; or

5. Charge, collect, or receive from any person for the transportation of any freight upon its railway a higher or greater rate of toll or compensation than it shall at the same time charge, collect, or receive from any other person or persons for the transportation of the like quantity of freight of the same class being transported from the same point in the same direction over equal distances of the same railway; or

6. Charge, collect, or receive from any person for the use and transportation of any railway car or cars upon its railroad for any distance, a greater amount of toll or compensation than is at the same time charged, collected, or received from any other person for the use and transportation of any railway car of the same class or number, for a like purpose, being transported in the same direction over a greater distance of the same railway; or

7. Charge, collect, or receive from any person for the use and transportation of any railway car or cars upon its railway a higher or greater compensation in the aggregate than it shall, at the same time, charge, collect, or receive from any other person for the use and transportation of any railway car or cars of the same class for a like purpose, being transported from the same original point in the same direction, over an equal distance of the same railway—

all such discriminating rates, charges, collections, or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be received as prima facie evidence of the unjust discriminations prohibited by this chapter. [C97,§2145; C24, 27, 31, 35, §8055.]

Referred to in §§8057, 8058, 8059, 8060, 8062, 8067, 8072
S13, §2145, editorially divided

8056 "Competition" no defense—exceptions. It shall not be a sufficient excuse or justification thereof on the part of said railway corporation that the station or point at which it shall charge, collect, or receive less compensation in the aggregate for the transportation of such passenger or freight, or for the use and transportation of such railway car the greater distance than for the shorter distance, is a station or point at which there exists competition with another railway or other transportation line:

Provided, however, where two or more railroads run into a city or village, one having a shorter mileage than the other from a given point through which they pass, terminate, or originate, the Iowa state commerce commission may permit the railroad or railroads having the longer mileage to meet the rate made by the shortest line at such city or village; and

Provided, further, that where an industry or any commodity now is, or may hereafter be, located within the state of Iowa, and which is competitive with an industry or commodity located without the state of Iowa, the Iowa state commerce commission may permit the railroad or railroads serving the industry within the state of Iowa to meet, individually or jointly with other railroads, the freight and passenger rates established and charged by the railroad or railroads serving the industry located as aforesaid without the state of Iowa. [C97, §2145; C24, 27, 31, 35,§8056; 47GA, ch 205.]

Referred to in §§8057, 8058, 8059, 8060, 8062, 8067, 8072

8057 Other evidence. Sections 8055 and 8056 shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight or passenger rates. [C97, §2145; C24, 27, 31, 35,§8057.]

Referred to in §§8058, 8059, 8060, 8062, 8067, 8072

8058 Railways included. The provisions of sections 8055 to 8057, inclusive, shall apply to any railway, the branches thereof, and any road or roads which any railway corporation has the right, license or permission to use, operate or control, wholly or in part, within this state. [C97,§2145; C24, 27, 31, 35,§8058.]

Referred to in §§8059, 8060, 8062, 8067, 8072

8059 Exceptions. The provisions of sections 8055 to 8058, inclusive, shall not be so construed as to prevent railway corporations from issuing commutation, excursion, or thousand-mile tickets, if the same are issued alike to all applying therefor. [C97,§2145; C24, 27, 31, 35,§8059.]

Referred to in §§8060, 8062, 8067, 8072

8060 Switching charges. Nothing in sections 8055 to 8059, inclusive, shall be so construed as to prevent railroad companies or the Iowa state commerce commission from establishing schedules of reasonable charges applicable to switching services only, and which shall be independent of any schedule of charges which may be provided for the regular line haul freight service of common carriers. [S13,§2145; C24, 27, 31, 35,§8060; 47GA, ch 205.]

Referred to in §§8062, 8067, 8072

8061 Discrimination as to quantity. For transporting freight over the same railway for the same distance in the same direction, no common carrier shall charge, collect, demand, or receive more for transporting a car of freight than it at the same time charges, collects, demands, or receives per car for more than one car of a like class of freight; nor more for transporting a ton of freight than it charges, collects, demands, or receives per ton for more than one ton of freight but less than a carload of a like class; nor more for transporting one hundred pounds of freight than it charges, collects, demands, or receives per hundred for more than one hundred pounds of freight, but less than a

ton of a like class. [C97,§2146; C24, 27, 31, 35, §8061.]

Referred to in §§8062, 8063, 8067, 8072

8062 **New industries—limitation.** For the protection and development of any new industry, including existing coal mines and agricultural enterprises in the state, any common carrier may grant concessions or special rates on freight shipments from such new industry or such coal mines, on any agreed number of carloads or for a specified period of time, which rates and period of time, shall be fixed and approved by the Iowa state commerce commission, and a copy thereof filed in its office:

Provided that any concessions or special rates fixed and approved under the provisions of this section shall not affect or otherwise disturb existing rates on points intermediate between the origin and destination of the shipment as to which such concession or special rates shall be so fixed and approved; and

Provided further that the provisions of sections 8055 to 8061, inclusive, shall not apply to any concessions or special rates fixed and approved by the Iowa state commerce commission as provided in this section, and when any concessions or special rates shall be fixed and approved, as provided for herein, the provisions of this section shall apply thereto to the exclusion of all other provisions of law in real or apparent conflict therewith; and

Provided further that "new industries" as used in this section shall include any and all industries that have not been operating within this state for a period exceeding ten years, and "existing coal mines" shall mean all coal mines being operated, or now being developed, or now partially developed for operation, within this state. [C97,§2146; C24, 27, 31, 35,§8062; 47GA, ch 205.]

Referred to in §§8067, 8072

8063 **Prima facie evidence of violation.** Any such discriminating rates, charges, collections, or receipts whether made directly or indirectly by means of any rebate, drawback, or other method or means, shall be prima facie evidence of a violation of the provisions of section 8061. [C97, §2146; C24, 27, 31, 35,§8063.]

Referred to in §§8067, 8072

8064 **Penalty for discrimination.** Any such corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railway cars, or in receiving, handling, or delivering freights, shall, upon conviction thereof, be fined in any sum not less than one thousand nor more than five thousand dollars for the first offense, and for each subsequent offense not less than five thousand nor more than ten thousand dollars,—such fine to be imposed in a criminal prosecution by indictment; or shall be subject to the liability prescribed in section 8065, to be recovered as therein provided. [C97,§2147; C24, 27, 31, 35,§8064.]

Referred to in §§8065, 8067, 8072

8065 **Civil forfeiture.** Any such railway corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railway cars, or in receiving, handling, or delivering freights, shall forfeit and pay to the state not less than one thousand nor more than five thousand dollars for the first offense, and not less than five thousand nor more than ten thousand dollars for each subsequent offense, to be recovered in a civil action in the name of the state; and the release from liability or penalty provided for in this chapter shall not apply to a criminal prosecution under section 8064, or to a civil action under this section. [C97,§2148; C24, 27, 31, 35,§8065.]

Referred to in §§8064, 8067, 8072

8066 **Free or reduced freight rates permitted.** Nothing in this chapter shall apply to free or reduced rates for the transportation, storage, or handling of:

1. Property for the United States, this state, or municipal governments.
2. Materials to be used by public authorities in constructing or maintaining public highways outside of the corporate limits of cities and towns.
3. Property for charitable purposes.
4. Property for exhibition at fairs or expositions.
5. Private property or goods for the family use of such employees as are entitled to free passenger transportation. [C97,§2150; C24, 27, 31, 35,§8066.]

Referred to in §§8067, 8072

JOINT RATES

8067 **Authorization.** Sections 8036 to 8066, inclusive, of this chapter shall not be construed to prohibit the making of rates by two or more railway companies for the transportation of property over two or more of their respective lines within the state; and a less charge by each of said companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state shall not be considered a violation of said chapter, and shall not render such company liable to any of the penalties thereof. [C97,§2152; C24, 27, 31, 35,§8067.]

Referred to in §§8068, 8072
C97, §2152, editorially divided

8068 **Discrimination against stations.** The provisions of section 8067 shall not be construed to permit railway companies establishing joint rates to make thereby any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by this chapter. [C97, §2152; C24, 27, 31, 35,§8068.]

Referred to in §8072.

8069 **Connecting lines.** Every owner or consignor of freight to be transported by railway from any point within this state to any

other point within this state shall have the right to require that the same shall be transported over two or more connecting lines of railway, to be transferred at the connecting point or points without change of car or cars if in carload lots, and with or without change of car or cars if in less than carload lots, whenever the distance from the place of shipment to destination, both being within this state, is less over two or more connecting lines of railway than it is over a single line of railway, or where the initial line does not reach the place of destination; and it shall be the duty, upon the request of any such owner or consignor of freight, made to the initial company, of such railway companies whose lines so connect, to transport the freight without change of car or cars if the shipment be in a carload lot or lots, and with change of car or cars if it be in less than carload lots, from the place of shipment to destination, whenever the distance from the place of shipment to destination, both being within this state, is less than the distance over a single line, or when the initial line does not reach the point of destination, for a reasonable joint through rate. This section shall apply to interurban railways and their connection with ordinary steam railways. [C97,§2153; S13,§2153; C24, 27, 31, 35,§8069.]

Referred to in §8072

8069.1 Routing intrastate shipments. It shall be the duty of every common carrier subject to the provisions of this chapter, when shipments are tendered for transportation between points in this state, to route such shipments from shipping point to point of destination over the cheapest available route between such points except in cases where the shipper, in shipping orders or bills of lading, specifically designates a particular route over which it is desired such shipments shall be moved. [C31, 35, §8069-d1.]

Referred to in §8072

8070 Reasonable through rates. When shipments of freight to be transported between different points within the state are required to be carried by two or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or state traffic as they give to interstate traffic over their lines of road. [C97,§2154; C24, 27, 31, 35,§8070.]

Referred to in §8072

8071 Schedules of joint rates. The Iowa state commerce commission shall make and publish a schedule of joint through railway rates for such traffic and on such routes as in its judgment the fair and reasonable conduct of business requires shall be done by carriage over two or more lines of railway, and will promote the interests of the people of this state. [C97, §2155; S13,§2155; C24, 27, 31, 35,§8071; 47GA, ch 205.]

Referred to in §§8072, 8079
S13, §2155, editorially divided

8072 Matters considered. In the making thereof, and in changing, revising, or adding to the same, the commission shall be governed as nearly as may be by sections 8036 to 8071, inclusive, of this chapter, and shall take into consideration, among other things, the rates established for shipments within this state for like distances over single lines, the rates charged by the railway companies operating such connecting lines for joint interstate shipments, and the increased cost, if any, of a joint through shipment as compared with a shipment over a single line for like distances. [C97,§2155; S13,§2155; C24, 27, 31, 35,§8072; 47GA, ch 205.]

Referred to in §8079

8073 Transfer at stations. In establishing such rates for shipments in less than carload lots, in cases where at the connecting point or points in the line of shipment the connecting railways have not and are not required to have a common station or stopping place for loading or unloading freight, the commission shall make such lawful regulations as in its judgment will be fair and just respecting the transportation of such freight from the usual unloading place of one railway to the usual loading place of the other. [S13,§2155; C24, 27, 31, 35,§8073; 47GA, ch 205.]

Referred to in §8079

8074 When effective — presumption. The joint through rates thus established shall be promulgated by mailing a printed copy thereof to each railway company affected thereby, and shall go into effect within ten days after they are so promulgated; and from and after that time an official printed schedule thereof shall be prima facie evidence, in all the courts of this state, that the rates therein fixed are just and reasonable for the joint transportation of such freight between the points and over the lines described therein. [C97,§2155; S13,§2155; C24, 27, 31, 35,§8074.]

Referred to in §8079

8075 Copies. The said commission shall deliver a printed copy of said schedule to any person making application therefor. [S13,§2155; C24, 27, 31, 35,§8075; 47GA, ch 205.]

Referred to in §8079

8076 Share of each company—effect. The share of any railway company of any joint through rate shall not be construed to fix the charge that it may make for transportation for a similar distance over any part of its line for any single rate shipment or the share of any other joint rate. [S13,§2155; C24, 27, 31, 35, §8076.]

Referred to in §8079

8077 Revision of joint rates. The commission, upon such reasonable notice as it may prescribe, may, upon its own motion or upon the application of any person, firm, or corporation interested therein, revise, change, or add to any joint through rates fixed or promulgated hereunder; and any such revised, changed, or added joint rates shall have the same force and effect

as the rate or rates originally established. [S13, §2155; C24, 27, 31, 35,§8077; 47GA, ch 205.]

Referred to in §8079

8078 Permissible rate for long haul. The said commission is empowered to authorize, upon proper hearing, any railway company whose line connects the point of shipment with the point of destination but requires a longer haul than the joint haul over which a joint rate has been established, to charge the joint rate without affecting the charge upon any other part of its line, except that the charge for a like kind of property must not be greater for a shorter than for a longer distance over its railroad, all of the shorter haul being included within the longer. [S13,§2155; C24, 27, 31, 35,§8078; 47GA, ch 205.]

Referred to in §8079

8079 Interurban railways included. Sections 8071 to 8078, inclusive, shall apply to interurban railways and their connection with ordinary steam railways. [S13,§2155; C24, 27, 31, 35,§8079.]

8080 Division of joint rates. Before the promulgation of such rates, the commission shall notify the railroad companies interested of the schedule of joint rates fixed, and give them a reasonable time thereafter to agree upon a division of the charges provided for therein. If such companies fail to agree upon a division, and to notify the commission thereof, it shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by it shall, in all controversies or actions between the railway companies interested, be prima facie evidence of a just and reasonable division thereof. [C97,§2156; C24, 27, 31, 35,§8080; 47GA, ch 205.]

8081 Unreasonable charges. Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this state is prohibited, and every company making such unreasonable and unlawful charges, or otherwise violating the provisions of this chapter, shall be punished as provided in this chapter for the making of unreasonable charges for the transportation of freight and cars over a single line of railroad by a single railway company. [C97,§2157; C24, 27, 31, 35, §8081.]

RATE SCHEDULES

8082 Definitions. The term "commission" as employed in this chapter means the Iowa state commerce commission.

The term "rates" embraces fares, tariffs, tolls, charges, and all classifications, contracts, practices, rules, and regulations of common carriers relating to such rates.

The term "joint tariffs" embraces joint rates, tolls, contracts, classifications, and charges. [C24, 27, 31, 35,§8082; 47GA, ch 205.]

8083 Rate schedules—filing and publication. Every common carrier, subject to the provisions of this chapter shall file with the commission and shall print and keep open to public inspection schedules showing the rates for the transportation within this state of persons and property from each point upon its route to all other points thereon and from all points upon its route to all points upon every other route leased, operated, or controlled by it; and from each point on its route or upon any route leased, operated, or controlled by it to all points upon the route of any other common carrier, whenever a through route and a joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the schedules of the several carriers in such through route shall show the separately established rates, applicable to the through transportation. [C73,§1304; C97, §2128; C24, 27, 31, 35,§8083; 47GA, ch 205.]

8084 Detailed requirements. The schedules aforesaid shall plainly state the places between which such property and persons will be carried, and, separately, all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and all rules or regulations which may in any wise change, affect, or determine any part or the aggregate of such rates, or the value of the various services rendered to the passenger, shipper, or consignee. [C73,§1304; C97,§2128; C24, 27, 31, 35,§8084; 47GA, ch 205.]

8085 Printing—accessible to public. Subject to such rules and regulations as the commission may prescribe, such schedules shall be plainly printed in large type and a copy thereof shall be kept by every such carrier readily accessible to and for inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation when such station or office is in charge of an agent, and in every station or office of such carrier where passenger tickets or tickets for sleeping car, parlor car, or other train accommodations are sold, or bills of lading or waybills or receipts for property are issued. [C73,§1304; C97,§2128; C24, 27, 31, 35,§8085; 47GA, ch 205.]

8086 Right to inspect. Any or all of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. [C24, 27, 31, 35, §8086.]

8087 Notice as to schedules. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person, and that the agent will assist any person to determine from such schedules any rate, shall be kept posted by the carrier in two public and conspicuous places in every such station or office. [C97,§2128; C24, 27, 31, 35,§8087.]

8088 **Form of schedules.** The form of every such schedule shall be prescribed by the commission and shall conform, in the case of common carriers subject to an act of congress entitled "An Act to Regulate Commerce", approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, as nearly as may be to the form of schedule prescribed by the interstate commerce commission under said act. [C24, 27, 31, 35,§8088; 47GA, ch 205.]

8089 **Interstate commerce schedules.** When schedules and classifications required by the interstate commerce commission contain in whole or in part the information required by the provisions of this chapter, the posting, publishing, and filing of a copy or copies of such schedules and classifications shall be deemed a compliance with the requirements of this chapter insofar as such schedules and classifications contain the information required by this chapter, and any additional or different information may be posted, published, and filed in a supplementary schedule. [C24, 27, 31, 35,§8089.]

8090 **Partial schedules.** In lieu of filing its entire schedule in each station or office, any common carrier may, subject to the regulations of the commission, file or keep posted at such stations or offices, schedules of such rates as are applicable at, to, and from the places where such stations or offices are located. [C97,§2128; C24, 27, 31, 35,§8090; 47GA, ch 205.]

8091 **Changes in schedules.** The commission shall have power from time to time, in its discretion, to determine and prescribe by order such changes in the form of the schedules referred to in this chapter as it may find expedient, and to modify the requirements of any of its orders, rules, or regulations in respect thereto. [C97,§2128; C24, 27, 31, 35, §8091; 47GA, ch 205.]

8092 **Joint tariff schedules.** The names of the several common carriers which are parties to any joint tariff, shall be specified in the schedule or schedules showing the same. Unless otherwise ordered by the commission, a schedule showing such joint tariff need be filed with the commission by only one of the parties if there is also filed with the commission, in such form as the commission may require, a concurrence in such joint tariff by each of the other parties thereto. [C97,§2128; C24, 27, 31, 35, §8092; 47GA, ch 205.]

8093 **Contracts affecting rate.** Every common carrier shall file with the commission, copies of all contracts, agreements, or arrangements with other common carriers in relation to any service, affected by the provisions of this chapter, to which it may be a party, and copies of all other contracts, agreements, or arrangements with any other person or corporation affecting in the judgment of the commission the cost to such common carrier of any service. [C97,§2128; C24, 27, 31, 35,§8093; 47GA, ch 205.]

8094 **Transportation prohibited.** No common carrier shall undertake to perform any service nor engage or participate in the transportation of persons or property between points within this state, until its schedule of rates shall have been filed and published as herein provided. [C24, 27, 31, 35,§8094.]

8095 **Change in rate.** Unless the commission otherwise orders, no change shall be made by any common carrier in any rate, except after thirty days notice to the commission and to the public as herein provided. [C97,§2128; C24, 27, 31, 35,§8095; 47GA, ch 205.]

8096 **Notice of change.** Such notice shall be given by filing with the commission and by keeping open for public inspection new schedules or supplements stating plainly the change or changes to be made in the schedule or schedules then in effect, and the time when the change or changes will go into effect. [C97,§2128; C24, 27, 31, 35,§8096; 47GA, ch 205.]

8097 **Changes without notice.** The commission, for good cause shown, may allow changes without requiring said thirty days notice by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. [C97,§2128; C24, 27, 31, 35,§8097; 47GA, ch 205.]

8098 **Indicating change.** When any change is proposed in any rate, such proposed change shall be plainly indicated on the new schedule filed with the commission, by some character immediately preceding or following the item. [C97, §2128; C24, 27, 31, 35,§8098; 47GA, ch 205.]

8099 **Schedule charge mandatory—refunds and discrimination.** No common carrier, except as otherwise provided, shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property or for any service in connection therewith than the rates, fares, and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified except upon order of the courts or of the commission as may be now or hereafter by law provided, nor extend to any shipper or person any privilege or facility in the transportation of passengers or property except such as are specified in such schedules. [C97,§2128; C24, 27, 31, 35,§8099; 47GA, ch 205.]

8100 **Power to revise rates.** Whenever there shall be filed with the commission any schedule, stating an individual or joint rate, the commission shall have power, either upon complaint or upon its own motion, at once, and, if it so orders, without answer or formal pleadings by the interested common carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate. [C24, 27, 31, 35,§8100; 47GA, ch 205.]

8101 **Suspension of rates.** Pending the hearing and the decision thereon, such rate shall not go into effect; but the period of suspension

of such rate shall not extend more than one hundred twenty days beyond the time when such rate would otherwise go into effect, unless the commission, in its discretion, extends the period of suspension for a further period of not exceeding thirty days. [C24, 27, 31, 35,§8101; 47GA, ch 205.]

8102 Decision. On such hearing the commission shall establish the rates, in whole or in part, or others in lieu thereof, which it shall find to be just and reasonable. [C24, 27, 31, 35, §8102; 47GA, ch 205.]

8103 When rates effective. All such rates not so suspended shall, on the expiration of thirty days from the time of filing the same with the commission or of such less time as the said commission may grant, go into effect and be the established and effective rates, subject to the power of the commission after a hearing had upon its own motion or upon complaint, as herein provided, to alter or modify the same. [C24, 27, 31, 35,§8103; 47GA, ch 205.]

8104 Posting and filing of revised schedules. After such changes have been authorized by the commission, copies of the new or revised schedules shall be posted or filed as provided in this chapter within such reasonable time as may be fixed by the commission. [C24, 27, 31, 35,§8104; 47GA, ch 205.]

8105 Commission's schedules of rates—effect. The schedules of reasonable maximum rates of charges for the transportation of freight and cars, together with the classification of such freights now in effect, shall remain in force until changed by the commission according to law, which, in all actions brought against railway corporations, wherein there are involved the charges thereof for the transportation of any freight or cars, or any unjust discrimination in relation thereto, shall be taken as prima facie evidence in all courts that the rates fixed therein are reasonable and just maximum rates of charge for which said schedules have been prepared. The commission shall from time to time, and as often as circumstances may require, change and revise such schedules, but the rates fixed shall not be higher than established by law. The commission shall give notice of its intention to revise or change such schedules, by publishing a notice thereof in two weekly newspapers published at the seat of government, for two consecutive weeks, and the last publication of such notice shall be at least ten days before the time fixed for considering the matter, and such notice shall contain, in general terms, a statement of the matters the commission proposes to consider, and the date when and the place where the matter will be taken up, and shall be addressed to all persons interested therein. When any schedule is thus revised the commission must cause notice thereof to be published for two successive weeks in some public newspaper printed at the seat of government, which shall state the date of the taking effect thereof, and it shall take effect at the time so stated. A printed copy of such revised schedule shall be conspicuously posted by said common carrier in each freight office and passenger depot upon all lines affected thereby, and, when certified by the commission that the same is a true copy prepared by it for the railway company or corporation therein named, and that notice thereof had been published as required by law, shall be received in evidence in all actions as prima facie the schedule of such commission. [C97,§2138; C24, 27, 31, 35,§8105; 47GA, ch 205.]

Referred to in §8108

8106 Complaint of violation. When any person in his own behalf, or in behalf of a class of persons similarly situated, or a firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, shall make complaint to the Iowa state commerce commission that the rate charged or published by any railway company, or the maximum rates fixed by the commission in the schedule of rates made by it, or the maximum rate fixed by law, is unreasonably high or discriminating, the commission shall investigate the matter, and, if the charge appears to be well-founded, fix a day for hearing the same, giving the railway company notice of the time and place thereof by mail, directed to any division superintendent, general or assistant superintendent, general manager, president, or secretary of such company, which notice shall contain the substance of the complaint, also the person or persons complaining. [C97,§2139; C24, 27, 31, 35,§8106; 47GA, ch 205.]

8107 Hearing—evidence. Upon the hearing the commission shall receive any evidence and listen to any arguments offered or presented by either party relevant to the matter under investigation, and the burden of proof shall not be upon the person or persons making the complaint; but it shall add to the showing made at such hearing whatever information it may then have, or can obtain from any source, including schedules of rates actually charged by any railway company for substantially the same kind of service, in this or any other state. The lowest rates published or charged by any railway company for substantially the same kind of service whether in this or another state, shall, at the instance of the person or persons complaining, be accepted as prima facie evidence of a reasonable rate for the services under investigation; and if the railway company complained of is operating a line of railroad beyond the state, or has a traffic arrangement with any such railway company, the same shall be taken into consideration in determining what is a reasonable rate; if it be operating a line of railway beyond the state, the rate charged or established for substantially a similar or greater service by it in another state shall also be considered. [C97, §2140; C24, 27, 31, 35,§8107; 47GA, ch 205.]

8108 Determination. After such hearing and investigation, the commission shall fix and determine the maximum charges to be thereafter

made by the railroad company or common carrier complained of, which charge shall in no event exceed the one now or hereafter fixed by law; and the commission shall render its decision in writing, and shall spread the same at length in the record to be kept for that purpose; such decision shall specifically set out the sums or rate which the railroad company or common carrier so complained of may thereafter charge or receive for the service therein named, and including a classification of such freight; and the commission shall not be limited in its said decision and the schedule to be contained therein to the specific case or cases complained of, but it shall be extended to all such rates between points in this state, and whatever part of the line of railway of such company or common carrier within this state may have been fairly within the scope of such investigation; and any such decisions so made and entered on record of the commission, including any such schedules and classifications, shall, when duly authenticated, be received and held in all suits brought against any such railroad corporation or common carrier, wherein is in any way involved the charges of any such corporation or carrier mentioned in said decisions, in any of the courts of this state, as prima facie evidence that the rates therein fixed are reasonable maximum rates, the same as the schedule made by the commission as provided in section 8105; and the rates and classifications so established, after such hearing and investigation, shall, from time to time thereafter, upon complaint duly made, be subject to revision by the commission, the same as any other rates and classifications. [C97, §2141; C24, 27, 31, 35,§8108; 47GA, ch 205.]

LIVESTOCK

8109 **Shipment—free transportation.** Common carriers of livestock, in carload lots, upon receiving, in this state, for shipment one or more carloads of horses or mules or two or more carloads of other livestock, shall upon demand of the owner of such animals offered for shipment, issue to such owner, or the actual agent or employee of such owner, without other consideration, transportation from the place of receiving such shipment to the place of destination, and return; such transportation to be limited to one person for each shipment, as is above set out. When a single shipment aggregates six cars or more, such owner shall be entitled, on demand, as is above provided, to transportation for one additional person, such additional person to be an actual agent or employee of such owner, and such common carrier shall in like manner and under similar conditions issue transportation for one person to destination of shipment only to the shipper of one carload of cattle, hogs, or sheep. The return transportation herein provided for is to be delivered, upon demand, at the office of the carrier at the place of destination, upon proper identification of the person so entitled to same, and shall be good for transportation if presented within forty-eight hours from the time of the delivery of such shipment at place of destination. [S13,§2157-a; C24, 27, 31, 35,§8109.]

Referred to in §8111

8110 **Violations.** Any common carrier violating the above provisions shall forfeit and pay to the owner of any shipment, as is above provided, three times the amount of the regular fare expended by such owner for himself, or his agent, in going from point of shipment to point of destination, and return, of a shipment of stock as herein provided. [S13,§2157-b; C24, 27, 31, 35,§8110.]

Referred to in §8111

8111 **Misuse of transportation.** Any person other than the owner, his agent, or employees, as is described in sections 8109 and 8110, attempting to use, or using, the transportation therein provided for, shall be considered a trespasser upon the trains or premises of such common carrier. [S13,§2157-c; C24, 27, 31, 35, §8111.]

8112 **Water closets in cabooses.** The cabooses or cars attached to such stock trains, and in which the holders of such transportation are required to ride when accompanying such livestock to market, shall be provided with suitable water closets for the use of such persons while in transit. [S13,§2157-d; C24, 27, 31, 35,§8112.]

Referred to in §8113

8113 **Violations.** Any railroad in this state engaged in the transportation of livestock, and failing or refusing to comply with the requirements of section 8112 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars for each day's negligence or refusal to comply therewith; and all moneys so collected as fines shall be paid into the public school funds of the state. [S13,§2157-e; C24, 27, 31, 35,§8113.]

8114 **Movement of livestock — burden of proof.** It is hereby made the duty of all common carriers of freight within this state to move cars of livestock at the highest practicable speed consistent with reasonable safety, and the reasonable movement of its general traffic. The burden of proof that cars of livestock are so moved shall be upon the carrier, and proof that such cars were moved according to schedule or timetable shall not be prima facie evidence that they were moved at the highest practicable speed consistent with reasonable safety. [S13,§2157-s; C24, 27, 31, 35, §8114.]

Referred to in §§8116, 8118

8115 **Power to prescribe speed.** The power to prescribe speed and determine conditions for the movement of cars of livestock within this state is hereby expressly conferred upon the said Iowa state commerce commission. [S13, §2157-t; C24, 27, 31, 35,§8115; 47GA, ch 205.]

Referred to in §8118
S13, §2157-t, editorially divided

8116 Commission to prescribe speed. In order to enforce the duty prescribed in section 8114, the Iowa state commerce commission shall from time to time investigate the practice of the common carriers with respect to the movement of livestock; and if it ascertains at any time that the common carriers or any of them are not moving cars of livestock with the proper speed, then upon notice to any such common carrier or carriers, the said commission shall prescribe the speed at which and the conditions under which cars of livestock shall be moved within this state by any such carrier or carriers. [S13,§2157-t; C24, 27, 31, 35,§8116; 47GA, ch 205.]

Referred to in §8118

8117 Order — when effective. The order shall specify the time at which it shall go into effect, which shall be as soon as, in the judgment of the commission, the carrier or carriers affected can, with reasonable diligence, readjust its or their timetables. [S13,§2157-t; C24, 27, 31, 35,§8117; 47GA, ch 205.]

Referred to in §8118

8118 Enforcement. Any order, ruling, or regulation made by the commission under sections 8114 to 8117, inclusive, shall be enforceable as provided in sections 7883 to 7888, inclusive. [S13,§2157-u; C24, 27, 31, 35,§8118; 47GA, ch 205.]

8119 Unloading livestock. No railway company in this state, in the carrying or transportation of cattle, sheep, swine, or other animals, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storm or other accidental cause, without unloading for rest, water, and feeding for a period of at least five consecutive hours; provided that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. [C73, §4032; C97,§4970; C24, 27, 31, 35,§8119.]

Referred to in §§8120–8122
C97, §4970, editorially divided

8120 Estimating time. In estimating such confinement, the time the animals have been confined without such rest on connecting railways from which they are received shall be computed, it being the intention of sections 8119 to 8122, inclusive, to prevent their continuous confinement beyond twenty-eight hours, except upon the contingencies before stated. [C73, §4032; C97,§4970; C24, 27, 31, 35,§8120.]

Referred to in §§8121, 8122

8121 Care of unloaded animals—lien. Animals unloaded for rest, water, and feeding shall be properly fed, watered, and sheltered during such rest by the owners or persons in custody thereof, or, in case of their default in so doing, then by the railway company transporting them, at the expense of said owners or persons in custody thereof, and said company shall have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals authorized by sections 8119 to 8122, inclusive. [C73,§4032; C97, §4970; C24, 27, 31, 35,§8121.]

Referred to in §§8120, 8122

8122 When unloading not required—violations. When such animals shall be carried in cars in which they shall and do have proper food, water, space and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply. Any railway company, owner or custodian of such animals, who shall fail to comply with the provisions of sections 8119 to 8121, inclusive, shall, for each and every such offense, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. [C73,§4032; C97,§4970; C24, 27, 31, 35,§8122.]

Referred to in §§8120, 8121

CLASSIFICATION AND PASSENGER RATES

8123 Classification of railroads. All railroads of the state shall be classified in accordance with the gross amount of their several annual earnings within the state, per mile, for the preceding year, as follows:

1. Class A shall include those whose gross annual earnings per mile shall be four thousand dollars or more.
2. Class B shall include those whose gross annual earnings per mile shall be three thousand dollars or any sum in excess thereof less than four thousand dollars.
3. Class C shall include those whose gross annual earnings per mile shall be less than three thousand dollars. All steam railroads operating wholly within this state, and not to exceed twenty-five miles in length, shall be included in and classified as class C railroads. [C97,§§2076, 2077; S13,§§2076, 2077; C24, 27, 31, 35,§8123.]

Referred to in §8125

8124 Basis of classification. In determining the classification of any railroad, the entire railroad property owned or operated by any company shall be considered as a single railroad, and the aggregate gross earnings of the entire railroad within the state shall be divided by the entire mileage owned or operated within the state, to ascertain the gross earnings per mile of such railroad. [S13,§2076; C24, 27, 31, 35,§8124.]

Referred to in §8125

8125 Classification by executive council. The executive council shall at its regular meeting on the second Monday in July in each year classify the different railways, as provided by sections 8123 and 8124, from information as to gross earnings obtained from the annual reports of railways made to the executive council for assessment and taxation, if it shall be satisfied of the correctness of same, or from information obtained by said executive council from any other source, and, when there shall be any change in classification, shall issue a certificate

to any corporation or corporations affected by such change, certifying the class to which they are respectively assigned. Any change of rates by any corporation pursuant to any change of classification shall take effect and be in force from and after the date of such certificate. [C97, §2078; S13,§2078; C24, 27, 31, 35,§8125.]

The duties of the executive council in taxation matters transferred to the state board of assessment and review, 48GA, ch 205, §33

The name "state board of assessment and review" changed to "state tax commission", 48GA, ch 175, §20

8126 Passenger rates—limitation. All railroad corporations according to their classifications as herein prescribed shall be limited to compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred fifty pounds in weight, as follows:

1. Class A, two cents.
2. Class B, two and one-half cents.
3. Class C, three cents.
4. For children twelve years of age or under, one-half the rate above prescribed.
5. Every railroad corporation shall be entitled to charge a fare of not to exceed ten cents for the transportation of each passenger with ordinary baggage for any distance not exceeding five miles.
6. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train, except in those cases where a minimum of ten cents is charged for a distance of less than five miles as above provided. [C73,§1305; C97,§2077; S13,§2077; C24, 27, 31, 35,§8126.]

8127 Free passes and reduced passenger rates prohibited. No common carrier of passengers shall, directly or indirectly, issue, furnish or give free or at reduced rate, any ticket, pass, or other evidence of the right or privilege of transportation to any person, except as provided in section 8128; nor shall any person accept or use any free ticket, pass, or other evidence of the right or privilege of transportation, except as in said section provided. The words "free ticket", "free pass", or other evidence of the right or privilege of transportation as used in this section shall include any ticket, pass, contract, permit, or transportation issued, furnished, or given to any person, by any common carrier of passengers, for carriage or passage, for any other consideration than money paid in the usual way at the rate, fare, or charge open to all who desire to purchase. [S13,§2157-f; C24, 27, 31, 35,§8127.]

Referred to in §§8131, 8132

8128 Exceptions. The persons to whom tickets, free passes, free transportation, or discriminating reduced rates may be issued, furnished, or given, shall be as follows:

1. The Iowa state commerce commissioners, their secretary and experts or other agents, and the commerce counsel, while engaged in the performance of their respective duties.
2. The general officers of such common carrier.
3. The officers, agents, employees, attorneys, physicians, and surgeons of such common carriers, whose chief and principal occupation is to render service to common carriers of passengers, to the families of such persons, to physicians and surgeons actually employed by such common carriers to render medical service in behalf of said common carriers and to attorneys actually employed by such common carriers to render legal services in behalf of said common carriers.
4. Sleeping car and express company employees, linemen of telegraph and telephone companies operated in connection with such carriers, railway mail service employees, post-office inspectors, customs inspectors, immigration inspectors, newsboys on trains, and baggage agents.
5. Persons injured in wrecks and physicians and nurses attending such persons.
6. Persons traveling for the purpose of providing relief in cases of railroad accident, general epidemic, pestilence, or other calamitous visitation.
7. The necessary caretakers of livestock, vegetables, and fruit, including return transportation to forwarding station.
8. The officers, agents, or regularly accredited representatives of labor organizations composed wholly of employees of railway companies.
9. Inmates of homes for the reform or rescue of the vicious or unfortunate, including those about to enter and those returning home after discharge, and boards of managers, including officers and superintendents of such homes.
10. Superannuated and pensioned employees and members of their families, widows of employees who die while in the service of such common carrier, and widows of pensioned employees.
11. Employees crippled and disabled in the service of such common carrier.
12. Mail carriers and firemen and all peace officers (except state policemen and agents of the department of justice) of any city, within the limits of such city, while wearing the insignia of their office.
13. Ministers of religion, traveling secretaries of railroad young men's christian associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work.
14. Indigent, homeless, and destitute persons, while being transported by charitable societies or hospitals, and the necessary agents or employees accompanying such persons.
15. School children to and from public, private, or parochial schools.
16. The state conservation director, his car and necessary assistants accompanying the same, when engaged in the performance of official duties.
17. The adjutant general of Iowa for the transportation of officers or enlisted men of the Iowa national guard or other military organi-

zation of the state, when traveling under the order of the commander in chief. [C97,§2150; S13,§2157-g; C24, 27, 31, 35,§8128; 47GA, ch 205.]

Referred to in §§8127, 8129, 8131, 8132

8129 Interchange of passes. The provisions of section 8128 shall not prohibit the officers of any railway from interchanging passes and tickets with other railway companies for their officers and employees, or the interchange of passes by railway companies for the persons to whom free tickets, passes, or transportation may lawfully be given or furnished, nor to invalidate any existing contract between a street railway company and a city where a condition of any franchise granted requires the furnishing of transportation to policemen, firemen, and city officers, while in the performance of their duties. [C97,§2150; S13,§2157-g; C24, 27, 31, 35,§8129.]

Referred to in §§8131, 8132

8130 Burden of proof. In any prosecution wherein it is charged that a free ticket, pass, or transportation was wrongfully issued or given to or accepted by a physician, surgeon, attorney, agent or employee of a common carrier, the burden of proof shall be upon the defendant to prove the amount and character of the service rendered or to be rendered. [S13, §2157-g; C24, 27, 31, 35,§8130.]

Referred to in §§8131, 8132

8131 Violations. Any common carrier, its officer, agent, or representative, violating any of the provisions of sections 8127 to 8130, inclusive, shall be fined in a sum not less than one hundred dollars and not more than ten hundred dollars for each offense, or in the discretion of the court shall be imprisoned in the county jail for not less than thirty and not more than ninety days; and any person other than the persons excepted in sections 8128 and 8129 who accepts or uses any free ticket, free pass, or free transportation for carriage or passage within this state shall be subject to a like penalty. [S13, §2157-i; C24, 27, 31, 35,§8131.]

Referred to in §8132

8132 Names of free pass beneficiaries reported. Every common carrier of passengers within the provisions of sections 8127 to 8131, inclusive, shall on or before the first day of February of each year, file with the executive council a sworn statement showing the names of all persons within this state to whom, during the preceding calendar year, it issued, furnished, or gave a free ticket, free pass, free transportation, or a discriminating reduced rate, except wage earners of common carriers in their ordinary employment and families of such wage earners, and disclosing such further information as will enable the council to determine whether the person to whom it was issued was within the exception of said provisions. [S13,§2157-j; C24, 27, 31, 35,§8132.]

8133 Passenger tickets—redemption—time limit. It shall be the duty of every railroad company, corporation, person, or persons acting as common carriers of passengers in the state to provide for the redemption, at the place of purchase and at the general passenger agent's office of said carrier, of the whole or any integral part of any passenger ticket or tickets that such carrier may have sold, as the purchaser or owner has not used for passage or received transportation for which such ticket should have been surrendered; and said carrier shall there redeem the same at a rate which shall equal the difference between the price paid for the whole ticket and the cost of a ticket between the points for which said ticket has been actually used, and no carrier shall limit the time in which redemption shall be made to less than ten days from date of sale at the place of purchase and six months from date of sale at general passenger agent's office. [S13,§2128-a; C24, 27, 31, 35, §8133.]

Referred to in §§8134-8136

8134 Notice as to limitation and transferability. No railroad company, corporation, person, or persons doing business in the state, as common carrier of passengers, whose rate of fare is regulated by statute of this state, shall sell or issue to any person, at the maximum rate allowed by law, any ticket or tickets bearing any condition of limitation as to the time of use, or as to transferability, without first providing for the redemption of said ticket, as directed by section 8133, and also having notice of such provision and privilege of redemption conspicuously posted at each place where sales of tickets are made by such common carriers in this state. A failure to provide for the redemption of such ticket or to give notice as above provided shall make all conditions and limitations as to time of use or transferability of no force or effect. [S13,§2128-b; C24, 27, 31, 35, §8134.]

Referred to in §§8135, 8136

8135 Violations. Any railroad company, corporation, person, or persons, who as common carriers shall sell or issue tickets as set forth in sections 8133 and 8134, and shall refuse or neglect to redeem the same, as by said sections provided, within ten days of date of demand, shall forfeit and pay to the owner of such ticket the purchase price of said ticket, and the further sum of one hundred dollars. [S13, §2128-c; C24, 27, 31, 35,§8135.]

Referred to in §8136

8136 Mileage books. Nothing in sections 8133 to 8135, inclusive, shall prohibit the sale of mileage books or tickets, at less than the maximum rates allowed by law, bearing reasonable conditions of limitation, as to the right of use for passage. [S13,§2128-d; C24, 27, 31, 35,§8136.]

WEIGHING OF COAL

8137 Coal in car lots. Every person, firm, or corporation engaged in operating any railroad within the state shall equip the line of its track and thereafter maintain thereon in good order, track scales of sufficient capacity to weigh all carloads of coal that may be transported over

the said railroad, and shall weigh the same at the request of any owner, consignor, or consignee of such commodities, and furnish written certificates of such weights to such owner, consignor, or consignee as hereinafter provided. Such track scales shall be so installed and maintained at all division stations along the line of such railroads within the state, and at such other stations as the Iowa state commerce commission shall from time to time direct. [S13, §2157-l; C24, 27, 31, 35,§8137; 47GA, ch 205.]

Referred to in §§8141, 8142

8138 **Where weighed—bills of lading.** Every person, firm, or corporation engaged in operating any railroad within the state over which coal in carload lots shall be transported for hire, shall weigh such coal at point where such shipment originates unless covered by weight agreement between consignor and railway company, provided such point is equipped with track scales. If not so equipped, it shall be weighed at first practicable point en route where track scales are provided. Said person, firm, or corporation shall furnish to said shipper a bill of lading showing date and place weighed, also the gross, tare, and net weights for each carload of coal so weighed. The tare weight shall be determined by using actual weight of empty car at loading station, provided track scales are maintained at such point. [S13,§2157-m; C24, 27, 31, 35,§8138.]

Referred to in §§8141, 8142

8139 **Weight at destination—fee.** Such coal shall be weighed at destination upon request of consignee when there are track scales at such point. If not equipped with track scales at such point, then at nearest practicable point en route where such scales are maintained, and certificate of weight, showing actual gross, tare, and net weights, shall be furnished to consignee and settlement of freight charges based on these weights. A reasonable charge of not more than one dollar per car may be made for such weighing on request. [S13,§2157-n; C24, 27, 31, 35, §8139.]

Referred to in §§8141, 8142

8140 **How weighed.** Cars when weighed on track scales shall be uncoupled, clear and unhampered at both ends, carefully weighed by competent weighmen and certificates issued upon request of consignees, showing gross, tare, and net weights. [S13,§2157-o; C24, 27, 31, 35, §8140.]

Referred to in §§8141, 8142

8141 **Prima facie evidence.** Certificates mentioned in sections 8137 to 8142, inclusive, shall be prima facie evidence of the facts therein recited in any action arising between consignors and consignees and common carriers. [S13, §2157-p; C24, 27, 31, 35,§8141.]

Referred to in §8142

8142 **Violation—penalty.** Any common carrier operating in this state violating any of the provisions of sections 8137 to 8141, inclusive, by neglecting or refusing to weigh cars or to furnish certificates of weights as therein provided shall be guilty of a misdemeanor and shall be, upon conviction thereof, fined in the sum of not more than one hundred twenty-five dollars for each and every violation. [S13,§2157-q; C24, 27, 31, 35,§8142.]

Referred to in §8141

APPROPRIATION OF FUEL

8143 **Fuel in transit.** It shall be unlawful for any common carrier doing business in this state, or any director, officer, receiver, trustee, agent, or employee, acting for or employed by such common carrier, to take, use, divert, or appropriate, any coal, coke, or oil received for shipment, without having obtained written consent of the Iowa state commerce commission as hereinafter provided. [C24, 27, 31, 35,§8143; 47GA, ch 205.]

Referred to in §8149

8144 **Application for permission.** Whenever it appears to a corporation operating a common carrier that it does not have a sufficient supply of fuel to adequately operate its motive power for thirty days next ensuing, an application in writing, duly verified by its proper officer or employee in charge of motive power, setting forth the amount of fuel on hand, and the amount of fuel needed for that specific purpose, for the next thirty days, and that said corporation does not have sufficient fuel in transit, or is unable to obtain a sufficient supply of fuel, and that unless permitted to take fuel in transit, the operation of its motive power will be materially lessened, and to be supplemented by such other facts and showing as may be required by said Iowa state commerce commission, may in the discretion of such commission be permitted by written order to take and use such fuel in transit for the period, and in such amount as shall by such commission be deemed reasonable or adequate. [C24, 27, 31, 35,§8144; 47GA, ch 205.]

Referred to in §8149

8145 **Modification of orders.** The Iowa state commerce commission in its discretion may modify or annul any order or orders made, without notice or additional showings. [C24, 27, 31, 35,§8145; 47GA, ch 205.]

Referred to in §8149

8146 **State or public utility as consignee.** Fuel consigned to the state, or to a person, firm, or corporation operating a public utility, shall not be included in any order made by the Iowa state commerce commission. [C24, 27, 31, 35, §8146; 47GA, ch 205.]

Referred to in §8149

8147 **Notice of application.** The commission in its discretion may require notice to be served upon the owner of fuel sought to be taken by virtue hereof, the manner and form of such notice, and the time and place of the hearing, to be fixed by said commission. [C24, 27, 31, 35, §8147.]

Referred to in §8149

8148 **Notification of owner—payment.** Whenever a common carrier is permitted to take fuel

in transit by order of the Iowa state commerce commission, it shall be the duty of the common carrier to promptly notify the owner of such taking and the owner thereof may, at his option, accept as payment therefor, the full value of such fuel, plus twenty percent of such value, to be promptly paid by such carrier; but if the owner does not so elect, nothing herein shall be construed to affect any other right or remedy. [C24, 27, 31, 35,§8148; 47GA, ch 205.]

Referred to in §8149

8149 Violations. Any common carrier subject to the provisions of sections 8143 to 8148, inclusive, or any director or officer thereof, or any receiver, trustee, lessee, agent, or employee, who alone, or with any other director, officer, receiver, trustee, lessee, agent, or employee, shall willfully take, use, divert, or appropriate, any coal, coke, or oil, or suffer or permit the same to be taken, shall be guilty of a misdemeanor, and upon conviction thereof, be fined not more than five thousand dollars, nor less than five hundred dollars for each offense. [C24, 27, 31, 35,§8149.]

ADJUSTMENT OF CLAIMS

8150 Time limit for adjustment. Every claim for loss of or damage to property while in the possession of any common carrier, or for delay in delivering freight or baggage or express, or for a charge in excess of the legal and regular charge for the service rendered, shall be adjusted and paid within forty days in case of shipments wholly within this state, and within ninety days in case of shipments from without the state after the filing of such claim with the agent or agent's carrier at the point of origin or of destination of each shipment; but no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination or until after the lapse of a reasonable time for the arrival thereof; and if such claim is not filed within sixty days from the time it accrues, the penalty provided in section 8151 shall not apply. [S13,§2074-c; C24, 27, 31, 35,§8150.]

Referred to in §8152

8151 Failure to adjust. Failure to adjust and pay such claim, within the period herein prescribed shall subject the common carrier, so failing, to the penalty of a sum which in amount shall be equal to the amount of the claim originally filed; but it shall in no case be less than twenty-five dollars or more than one hundred dollars for each and every failure, to be recovered by the party aggrieved in any court of competent jurisdiction; and said claim shall be filed in proper form, including such information possessed by the claimant as will aid in establishing his claim. The penalty shall not apply unless the claimant shall recover the full amount claimed by him, nor when the claim exceeds five hundred dollars. [S13,§2074-d; C24, 27, 31, 35,§8151.]

Referred to in §§8150, 8152

8152 No division of claims. The claimant shall not be permitted under this chapter to divide his claims arising from loss, damage, or injury to one shipment or consignment of goods, but only one claim within the meaning of this and sections 8150 and 8151 shall be filed for one shipment. [S13,§2074-e; C24, 27, 31, 35, §8152.]

TERMINATING CARRIER'S LIABILITY

8153 Notice of arrival of shipment. All companies, corporations, or individuals that now, or hereafter, may own or operate any railroads, in whole or in part, in the state, and all persons, firms, or companies, and all associations of persons, whether incorporated or not, that shall do business as a common carrier upon any of the lines of railway in this state, shall be and remain liable as a common carrier upon all less than carload shipments until the consignee shall be notified of the arrival of the shipment and has reasonable time and opportunity to receive same. [SS15,§2074-f; C24, 27, 31, 35,§8153.]

Referred to in §§8154, 8155
SS15, §2074-f, editorially divided

8154 Notice prescribed. A deposit in the United States post office or public mailing box of a written notice addressed to the consignee at the address given upon the bill of lading will constitute service of the notice required by section 8153, and forty-eight hours from the date of the mailing of such notice shall be a reasonable time in which to receive said shipment. [SS15,§2074-f; C24, 27, 31, 35,§8154.]

Referred to in §8155

8155 Exceptions. The provisions of sections 8153 and 8154 shall not apply to shipments to stations or platforms where no agent is regularly employed. [SS15,§2074-f; C24, 27, 31, 35,§8155.]

NEGLIGENCE OF EMPLOYEES

8156 Liability for negligence of employees. Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers, or other employees thereof, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. [C73,§1307; C97,§2071; S13,§2071; C24, 27, 31, 35,§8156.]

Referred to in §§8157, 8158

8157 Relief or indemnity contract. No contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, and no acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury,

from such corporation, person, or association, shall constitute any bar or defense to any cause of action brought under the provisions of section 8156; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received. [S13,§2071; C24, 27, 31, 35,§8157.]

8158 Contributory and comparative negligence. In all actions brought against any railway corporation to recover damages for the personal injury or death of any employee under or by virtue of any of the provisions of section 8156, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. [S13, §2071; C24, 27, 31, 35,§8158.]

Burden of proof, §11210
40ExGA, HF 194, §3, editorially divided

8159 Unallowable pleas. No such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier or corporation of any statute enacted for the safety of employees contributed to the injury or death of such employee; nor shall it be any defense to such action that the employee who was injured or killed assumed the risks of his employment. [S13,§2071; C24, 27, 31, 35, §8159.]

Assumption of risk, §1495

8160 Damages by fire. Any corporation operating a railway shall be liable for all damages sustained by any person on account of loss of or injury to his property occasioned by fire set out or caused by the operation of such railway. Such damages may be recovered by the party injured in the manner set out in sections 8005 to 8008, inclusive, and to the same extent, save as to double damages. [C73,§1289; C97, §2056; C24, 27, 31, 35,§8160.]

8161 Baggage — liability. Omnibus and transfer companies or other common carriers, and their agents, shall be liable for damages occasioned to baggage or other property belonging to travelers through careless or negligent handling while in the possession of said companies or carriers, and, in addition to the damages, the plaintiff shall be entitled to an allowance of not less than five dollars for every day's detention caused thereby, or by action brought to recover the same. [C73,§2183; C97,§3135; C24, 27, 31, 35,§8161.]

CHAPTER 374

RELOCATION OF LINE

8162 Petition.
8163 Notice.
8164 Conditions.
8165 Order of court.
8166 Effect.
8167 Notice to township trustees—vested rights.
8168 Cuts and banks.

8162 Petition. Any railroad desiring to change or remove the line of its road, after the same has been permanently located and constructed, may file a petition in the district court in any county wherein the change or removal is proposed to be made, describing with reasonable accuracy that portion of its line which it seeks to have changed or removed, and asking the court to grant authority to make such change or removal. All trustees, mortgagees, and other lienholders, and all townships, cities, and counties which have aided by taxation to build the road, must be made defendants and served with notice as in other actions. [C97, §2092; C24, 27, 31, 35,§8162.]

Method of service, §11060

8163 Notice. A public notice to all whom it may concern of the time of filing such petition, the object thereof, and the term of court at which the application will be made for authority to make the change, and requiring all persons desiring the repayment of money or return of property, as in this chapter provided, to appear and present their claims therefor, must be published in a newspaper printed in each county in which the change is to be made, once each week, for a period of ten successive weeks before the term of court at which the application is to be heard. The court may order any additional notice or publication that it may think proper. [C97,§2093; S13,§2093; C24, 27, 31, 35,§8163.]

8164 Conditions. No railway company shall be allowed to change or remove its line of road, after a permanent location and construction, without repaying all moneys, and restoring all property, or its value, which were donated to the company building the same exclusively in consideration of said railroads being located and constructed on such line, to the parties donating the same, their heirs, or assigns, nor without first procuring the consent of all parties having liens upon the railroad, and of any township, city, or county that by taxation or by the issuing of bonds has contributed money to aid in the construction thereof; but the consent of such township, city, or county shall be necessary only with reference to the change to be made within its own territorial limits. [C97,§2094; C24, 27, 31, 35,§8164.]

8165 Order of court. If the court finds that notice has been given, and the consent of the proper parties has been obtained, it shall ascertain the amount of money or property contributed to the company by any person or party thereto or appearing therein that was so contributed exclusively in consideration that the

road should be located on the line from which it is proposed to remove it, which shall be repaid in case of money, and returned if property, or its value fixed, and in either case shall render judgment therefor, and may also enter a decree authorizing, if the public interest demands it, the removal of or change in the line of said road upon condition that all judgments above provided for be first paid or satisfied, and foreclosing all persons or parties not appearing in the action, and forever barring them from asserting any claim against such company on account of the contributions or donations herein mentioned. [C97,§2095; C24, 27, 31, 35,§8165.]

8166 Effect. All mortgage liens or other incumbrances on the line of road which the company is authorized by the court to change shall attach to the line to which said road is removed, and have the same priority over other liens that they held on the original line. [C97,§2096; C24, 27, 31, 35,§8166.]

8167 Notice to township trustees — vested rights. For the purpose of this chapter, the trustees of each township shall be served with notice and shall represent and act for it. No vested right of any person or persons living on and along the line of any railroad thus removed shall be defeated or affected by the removal. [C97,§2097; C24, 27, 31, 35,§8167.]

8168 Cuts and banks. When any railway company shall take up its track and relocate the same under the provisions of this chapter, it shall within two years therefrom fill up the cuts and level down the banks, or cause the same to be done. [C97,§2098; C24, 27, 31, 35,§8168.]

CHAPTER 375

PRIVATE BUILDINGS AND SPUR TRACKS

8169 Buildings on railroad lands.
8170 Destruction of buildings.
8171 Spur tracks.
8172 Cost of construction.
8173 Bond for construction.
8174 Costs in excess of deposit.
8175 Failure of company to act.
8176 Connections with original spurs.

8169 Buildings on railroad lands. When a disagreement arises between a railroad company and the owner of any building used for receiving, storing, or manufacturing any article of commerce transported or to be transported, situated on the railroad right-of-way or any land owned or controlled by the railroad company for railroad purposes, as to the terms and conditions on which the same is to be continued thereon or removed therefrom, or when application is made by any person, firm, or corporation for a site on such lands for the erection and maintenance of such improvements, and the railway company and the applicant cannot agree as to whether such improvement shall be placed on such lands, or as to the character and location of the buildings to be erected and maintained thereon, or as to the terms and conditions under which the same may be placed or operated, such railway company, person, firm, or corporation may make written application to the Iowa state commerce commission and such commission shall, as speedily as possible after the filing of such application, hear and determine such controversy and make such order in relation thereto as shall be just and equitable between the parties, which order shall be enforced in the same manner as other orders of the commission. [S13,§2110-l; C24, 27, 31, 35, §8169; 47GA, ch 205.]

Referred to in §8170

8170 Destruction of buildings. In the event that any building referred to in section 8169, situated on the right-of-way or other land of a railroad company used for railway purposes, shall be injured or destroyed by the negligence of the railroad company, or the servants or agents thereof in the conduct of the business of such company, the railroad company causing such injury or destruction shall be liable therefor to the same extent as if such building used for said purposes was not situated on the right-of-way or other land of such railroad company used for railway purposes, any provision in any lease or contract to the contrary notwithstanding. [S13,§2110-m; C24, 27, 31, 35,§8170.]

8171 Spur tracks. Every railroad, whether operated by steam or electricity, shall acquire the necessary rights-of-way for, by condemnation or purchase, and shall construct, connect, and operate and maintain a reasonably adequate and suitable spur track, whenever such spur track does not necessarily exceed three miles in length, and is required for the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest. No such track is required to be constructed until, or if hereafter constructed need not be maintained unless, the Iowa state commerce commission, after hearing, shall have declared the same to be necessary. [C24, 27, 31, 35,§8171; 47GA, ch 205.]

8172 Cost of construction. Such railroad company may require the person or persons, firm, corporation, or association primarily to be served thereby to pay the legitimate cost and expense of acquiring, by condemnation or purchase, the necessary right-of-way for such spur track and of constructing the same as shall be determined in separate items by the Iowa state commerce commission. Except as in section 8173 provided, the total estimated cost thereof as ascertained by said commission shall be de-

posited with the railroad company before it shall be required to incur any expense whatsoever therefor. [C24, 27, 31, 35,§8172; 47GA, ch 205.]

Referred to in §8175

8173 Bond for construction. When the total estimated cost has been ascertained by the commission such person, firm, corporation, or association shall have the option to either deposit said amount with the railroad company or to file with such company its written election to build and construct such spur track accompanied by a good and sufficient surety company bond running to such railroad company and conditioned upon the construction of such spur track in a good and workmanlike manner according to plans and specifications furnished by such railroad company and approved by the commission. If such person, firm, corporation, or association so elects to build such spur track it shall only be required to deposit with such railroad company the estimated cost of the necessary right-of-way for such spur track as ascertained by the commission, and the total amount stated in such written election. [C24, 27, 31, 35,§8173; 47GA, ch 205.]

Referred to in §§8172, 8175

8174 Costs in excess of deposit. In any event before the railroad company shall be required to incur any expense whatever in the construction of such spur track the person, firm, corporation, or association primarily to be served thereby shall give the railroad company a bond to be approved by the commissioners as to form, amount, and surety, securing the railroad company against loss on account of any expense incurred beyond the amount so deposited with the railroad company. [C24, 27, 31, 35, §8174.]

Referred to in §8175

8175 Failure of company to act. In case of failure, neglect, or refusal of any railroad company to comply with any of the provisions of sections 8172 to 8174, inclusive, the person, firm, corporation, or association primarily to be served thereby may file a complaint with the Iowa state commerce commission setting forth the facts upon which such grievance is based. The said commission after reasonable notice to the railroad company shall investigate and determine all matters in controversy and make such order as the facts in relation thereto will warrant. Any such order shall have the same force and effect as other orders made by said commission in other proceedings within its jurisdiction and shall be enforced in the same manner. [C24, 27, 31, 35,§8175; 47GA, ch 205.]

8176 Connections with original spurs. Whenever such spur track is so connected with the main line, as provided in this chapter, at the expense of the owner of such proposed or existing mill, elevator, storehouse, dock, wharf, pier, manufacturing establishment, and any person, firm, corporation, or association shall desire a connection with such spur track, application therefor shall be made to the commission, and such person, firm, corporation, or association shall be required to pay to the person, firm, corporation, or association that shall have paid or contributed to the primary cost and expense of acquiring the right-of-way for such original spur track, and of constructing the same, an equitable proportion thereof, to be determined by the commission, upon such application and notice, to the persons, firms, corporations, or associations that have paid or contributed towards the original cost and expense of acquiring the right-of-way and constructing the same. [C24, 27, 31, 35,§8176.]

CHAPTER 376

UNION DEPOTS

8177 Corporations authorized.
8178 Eminent domain.
8179 Connecting tracks.
8180 Liability for damages.

8177 Corporations authorized. Any number of persons or railway corporations, or both persons and railway corporations, may form a body corporate under the laws of this state relating to corporations for pecuniary profit, for the purpose of acquiring, establishing, constructing, and maintaining at any place in the state union station houses or depots for freight or passengers, or both, with necessary offices for express, baggage, or postal rooms in the same or separate buildings, and railroad tracks and other appurtenances of such depots. Any railroad company operating a road in the state, or interested therein, whether organized under its laws or elsewhere, may become a stockholder in such corporation. A copy of the bylaws, if any are adopted, shall be posted in the passenger or waiting rooms of the depot and in the office of the company. [C97,§2099; C24, 27, 31, 35,§8177.]

Referred to in §8178

8178 Eminent domain. Every corporation formed under the provisions of section 8177 shall have power to take and hold, for the purposes therein mentioned, such real estate as may be found necessary by the Iowa state commerce commission for the location of its depot and approaches, which it may acquire by purchase or condemnation as provided for the taking of private property for works of internal improvement. [C97,§2100; C24, 27, 31, 35,§8178; 47GA, ch 205.]

Condemnation procedure, ch 366

8179 Connecting tracks. Such corporations, with the consent of the council of any city or town in which any such depot is located, shall have the right to lay its tracks to make necessary connection with all railways desiring to use such depot, upon the streets or alleys of such city or town, and, by and with the consent of the council, may erect such depot upon or across

any street or alley; but no railway track can thus be located, nor can any such depot be so erected, until after the injury to property abutting upon the streets or alleys thus appropriated has been ascertained and paid in the manner provided for taking private property for works of internal improvement. [C97,§2101; C24, 27, 31, 35,§8179.]

Condemnation procedure, ch 366

8180 Liability for damages. Nothing in this chapter contained, or in the articles of incorporation or bylaws of such corporation, shall release the railroad companies using such union depots, tracks, or appurtenances from the same liability for all damages on account of injuries to persons, stock, baggage, or freight, or for the loss of baggage or freight in or about such union depot grounds, as they would be under if said depot tracks and appurtenances belonged to and were operated by the railway companies using the same. [C97,§2102; C24, 27, 31, 35,§8180.]

CHAPTER 377

TAX AID

8181 Tax aid authorized.
8182 Requisites for petition.
8183 Exception—approval by commission.
8184 Filing of petition.
8185 Proceedings on petition.
8186 Form of notice.
8187 Manner of giving notice.
8188 Form of ballot.
8189 Election returns.
8190 Canvass of returns.
8191 District in more than one county.
8192 Terms and conditions entered.
8193 Collection of special tax.
8194 Limitation.
8195 Money paid out—certificate.
8196 Certificates exchangeable for stock or bonds—exception.
8197 Liability of directors.
8198 Forfeiture of tax.
8199 Taxes paid in labor or supplies.
8200 Trolley or electric railways.

8181 Tax aid authorized. The qualified voters of the following named districts may file a petition under the conditions hereinafter specified to vote taxes not exceeding one and one-fourth* percent on the assessed value of the real property within the district for any of the following purposes:

1. To aid any railway incorporated under the laws of this state in constructing a projected steam railway into, through, or along a district composed of a township, a town, or a city.

2. To aid in the construction of a projected electric railroad or in electrifying an existing steam railroad into, through, or along a district contiguous to and within five miles of such railroad.

3. To aid in the construction of a proposed railroad or in reconstruction, improvement, repair, or maintenance of a railroad heretofore constructed, the operation of which has been abandoned, into, through, or along a district contiguous to and within a distance not to exceed two and one-half miles from the center line of the right-of-way thereof measured at right angles thereto. [C97,§§2084. 2086; S13,§§2084, 2086, 2091-b; C24, 27, 31, 35,§8181.]

Referred to in §8182

*"five" percent in code 1931 changed by code editor, under authority of 45GA, ch 121, §88, to "one and one-fourth" percent

8182 Requisites for petition. The petition shall show:

1. The name and the location of the principal office of the company to be aided.

2. For which of the purposes stated in section 8181 it is proposed to vote the taxes.

3. The rate of tax proposed and the number of years not exceeding five in which it shall be levied and paid in equal installments.

4. The location of the line of railway for which it is proposed to vote the tax.

5. The limits of the proposed district and the county or counties in which the same is located.

6. The amount of work required to be done and when and where the same shall be done before any of the tax shall be payable.

7. Any other conditions which shall be performed before any part of the tax shall be payable.

8. The signatures of a majority of the resident freehold taxpayers of the proposed district; except that in cities of any form of government having a population of twenty-five thousand or over, not more than two thousand such signatures shall be required. [C97,§2085; S13,§§2085, 2091-c; C24, 27, 31, 35,§8182.]

8183 Exception—approval by commission. No tax shall be levied to aid in the electrification of any steam railway for the benefit of any person, firm, or individual, who is not the owner in fee simple of said steam railway, unless with or prior to the presentation of the petition to the board of supervisors asking for said election, the agreement between the person, firm, or corporation proposing to electrify said steam railway and the owner of said steam railway, for its electrification and use, has been presented to the Iowa state commerce commission, and its duration, terms, and conditions found suitable by said commission, and said approval made a matter of record in the proceedings of said commission, and certified to such board of supervisors. [S13,§2091-e; C24, 27, 31, 35,§8183; 47GA, ch 205.]

8184 Filing of petition. Said petition shall be filed in the office of the auditor of the county in which the district is wholly located or of the county in which the greater acreage of the

proposed district is located. [C97,§2085; S13, §§2085, 2091-c; C24, 27, 31, 35,§8184.]

8185 **Proceedings on petition.** At its next regular adjourned or special session after such petition is filed, the board of supervisors shall canvass the petition, and if found to meet the requirements of law, it shall fix a time and place for holding a special election in the proposed district, appoint judges and clerks of such election, fix the hours when the polls shall open and close and cause notice to be given as hereinafter provided. The date of such election shall be at least ten days after completed service of such notice.

The railroad company for whose benefit such election is held shall pay the expense thereof, including publication of notice and printing of ballots. [C97,§2085; S13,§§2085, 2091-c; C24, 27, 31, 35,§8185.]

8186 **Form of notice.** The notice shall be addressed to the qualified electors of the township, city, town, district, or territory in which the election is to be held and shall state:

1. The time and place of holding such election and the hours at which the polls will open and close.
2. The name and location of the principal office of the corporation to which it is proposed to vote the tax.
3. The purpose for which it is proposed to vote such tax.
4. The rate of such tax, the installments into which it shall be divided, the years in which it is payable, and the rate of interest on deferred payments.
5. The amount of work to be done, or any other conditions to be performed before the tax is payable.
6. From what point to what point the improvement shall extend and within what time it is to be completed.
7. Any other special conditions set forth in the petition. [C97,§2085; S13,§§2085, 2091-c; C24, 27, 31, 35,§8186.]

8187 **Manner of giving notice.** The auditor shall cause such notice to be published for three consecutive weeks in the official newspapers of each county in which the election is to be held, and if in a district or territory extending into more than one county, then the official newspapers of each of such counties, and the last publication shall be not less than ten days before such election. Proof of such publication, by affidavit of the publisher, shall be filed with the auditor on completion of the publication.

The auditor shall also cause such notice to be posted in five public places in the proposed district, not less than ten days before the date of the election, and proof of such posting by affidavit of the parties who did or saw it done, shall be filed in the office of the auditor. [C97, §2085; S13,§§2085, 2091-c; C24, 27, 31, 35, §8187.]

8188 **Form of ballot.** The auditor shall cause to be prepared and printed the ballots for such election on which shall be plainly stated the proposition to be voted upon, placed in interrogatory form with the words "yes" and "no" so arranged as to enable the voter to clearly indicate his vote for or against such proposition, which ballots shall be delivered to the judges of election by the time the polls are open. [C97,§2085; S13,§§2085, 2091-c; C24, 27, 31, 35,§8188.]

8189 **Election returns.** The judges and clerks shall count the ballots cast as soon as the polls close and certify and file the returns, with all the ballots cast, in the office of the auditor. [C97,§2085; S13,§§2085, 2091-c; C24, 27, 31, 35,§8189.]

8190 **Canvass of returns.** On the filing of the returns, the board shall convene and canvass the same and certify the result to the auditor. If a majority of the votes cast are in favor of such taxes, the board shall, at the time of levying the ordinary taxes next following, levy such taxes as are voted and cause the same to be placed on the tax lists of the proper township, city, town, or district as the case may be. [C97,§2085; S13,§§2085, 2091-c; C24, 27, 31, 35,§8190.]

8191 **District in more than one county.** If the district or territory in which taxes are voted extends into more than one county, the auditor in whose office the returns are filed shall make and certify a copy of such returns and file the same in the office of the auditor of every other county into which the district extends. The board of supervisors of such other counties shall levy the tax upon the real estate in the portion of the district located in such county and cause such tax to be entered upon the tax list of such county. [C97,§2085; S13,§2085; C24, 27, 31, 35,§8191.]

8192 **Terms and conditions entered.** In all cases where a tax has been voted and levied in aid of a railroad there shall be entered upon the tax lists of the county all the terms and conditions upon which such taxes are payable. [C97,§2085; S13,§§2085, 2091-c; C24, 27, 31, 35, §8192.]

8193 **Collection of special tax.** Special taxes voted for any of the purposes aforesaid, shall be collected at the same time and in the same manner as other taxes, with the same penalties for delinquency and the same manner of enforcing collection by sale as ordinary taxes. When collected they shall be kept in a separate fund and paid out only for the purposes for which and on the terms and conditions upon which they were voted, all of which shall be shown by the records and files of the auditor's office relating thereto. [C97,§2085; S13,§§2085, 2091-c; C24, 27, 31, 35,§8193.]

8194 **Limitation.** The aggregate amount of taxes on property in aid of railroads shall not during any ten years exceed five percent on the value thereof.* [C97,§2086; S13,§§2086, 2091-f; C24, 27, 31, 35,§8194.]

*See 45GA, ch 121, §75

8195 Money paid out — certificate. The moneys collected under the provisions of this chapter shall be paid out by the county treasurer to the treasurer of the railway company for whom the same was voted, upon the orders of the president or managing director thereof, at any time after the trustees of such township or council of such town or city voting the same, or a majority thereof, shall have certified to the county treasurer that the conditions required of the railway company and set forth in the notice for the special election have been complied with, which certificate said township trustees or council of such town or city shall make when conditions have been sufficiently complied with to entitle the railway company thereto, or when the conditions are fully complied with on the part of the railway company; but if the costs and expenses of holding the election and of recording the certificates have not been paid, then the treasurer shall first deduct from the moneys collected the amount thereof, and pay same to the parties entitled thereto. [C97, §2087; C24, 27, 31, 35,§8195.]

8196 Certificates exchangeable for stock or bonds—exception. The county treasurer, when required, shall, in addition to a tax receipt, issue to each taxpayer, on the payment of any taxes voted under the provisions of this chapter, a certificate showing the amount of tax paid, the name of the railway company entitled thereto, and when the same was paid; and he may charge twenty-five cents for each certificate issued. Said certificates shall be assignable, and, when presented by any person holding the legal title thereto to the president, managing director, treasurer, or secretary of the railroad company receiving the taxes paid, as shown by such certificates, in sums of one hundred dollars or more of taxes, it shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes, to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of stock, then the holder thereof shall be entitled to receive the full number of shares of stock covered by said certificates, and may make up in money the balance of any share when the certificates held by him are not equal to one full share of such stock, which stock for such purpose shall be estimated at par. When it shall be proposed in the petition and notice calling an election to issue first mortgage bonds not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, and not exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge in lieu of stock, it shall be lawful to issue bonds of the denomination of one hundred dollars in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal thereof; but the provisions of this section shall not be applicable to taxes that are voted and paid in aid of the construction of railroads that are interurban in character. [C97,§2088; S13,§2088; C24, 27, 31, 35,§8196.]

8197 Liability of directors. The board of directors of any railway company receiving taxes voted in aid thereof under the provisions of this chapter, or any member thereof, who shall vote to bond, mortgage, or in any manner incumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, or exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge, not including in either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount, estimated at its par value, of the stock by him held, if the same should be rendered of less value or lost thereby. [C97,§2089; C24, 27, 31, 35,§8197.]

8198 Forfeiture of tax. Should the taxes voted in aid of any railroad under the provisions of this chapter remain in the county treasury for more than one year after the same have been collected, the right to them by the railroad company shall be forfeited, and the persons who paid the same entitled to receive back from the county treasurer their pro rata shares thereof remaining; and in all cases where any taxes have been voted or levied upon the real or personal property in any township, town, or city to aid in the construction of any railroad, and the road in aid of which they were voted or levied has not been built, completed, or operated into or through such township, town, or city, it shall be the duty of the board of supervisors of the county where said taxes have been voted and levied and still remain on the tax books to give the railway company in aid of which the tax was voted at least thirty days notice in writing, to be served like original notices, of their intention to cancel such taxes, and thereupon to cause the same to be canceled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy thereof.

In all cases where the railway company to whom taxes have been voted neglects or refuses to receive such taxes, or to require or permit the same to be collected and certificates therefor to be issued, for the period of one year after they become due and collectible, and in all cases where taxes have been voted in aid of any railroad, and the conditions upon which the same were voted have not in fact been complied with, and the time in which said conditions were to be fulfilled has expired, the same shall be forfeited, and the county officers of the county in which they have been levied and entered upon the tax books shall enter cancellation thereof upon the proper records.

In all cases where any taxes to aid in the construction of any railroad may be voted upon the inducement or promise offered on the part of said railroad company, or any duly author-

ized agent thereof, for any rebates or exemptions from said tax or any part thereof, or any agreed price to be paid for the stock that may be issued in lieu of said tax, or a division of said tax, or any portion or percentage thereof, with any of the voters or taxpayers as an inducement to procure said tax to be voted, all taxes so procured to be voted shall be void. [C97,§2090; C24, 27, 31, 35,§8198.]

8199 **Taxes paid in labor or supplies.** Nothing contained in this chapter shall preclude any taxpayer who may contract with a railroad company for which taxes may be voted to pay his tax, or any part thereof, in labor upon the line of said railroad, or in material for its construction, or supplies furnished or money paid for the construction thereof, in pursuance of the terms and conditions stipulated in the notices of election, in lieu of a payment to the county treasurer. Upon presenting to the county treasurer a receipt from such railroad company or its duly authorized agent, specifying the amount of such payment, the same shall be credited by the treasurer on his tax, with the same effect as though paid to him in money, and when such receipts have been presented and credited they shall have the same validity in his settlement with the board of supervisors as the orders from the railroad company provided for in this chapter. Laborers shall have a lien upon any tax voted in aid of a railroad company for the amount due them for labor performed in the construction of said railroad. [C97,§2091; C24, 27, 31, 35,§8199.]

8200 **Trolley or electric railways.** All of the provisions of this chapter relating to tax in aid of railways are hereby made applicable to trolley or electric railways. And wherever the word "railroad" appears in any of said provisions the same shall be held to include trolley or electric railroad; and wherever the words "railroad company" or "railway company" appear in said provisions the same shall be held to include trolley railway company, and electric railway company; no stock shall be issued by any such company except upon payment therefor of the full par value thereof in cash or its equivalent. [S13,§2091-a; C24, 27, 31, 35,§8200.]

CHAPTER 378

INTERURBAN RAILWAYS

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8201 **Definition.** Any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town, or village, or any railway operated by electric or other power than steam, extending from one city, town, or village to another city, town, or village, shall be known as an interurban railway, and shall be a work of internal improvement. [S13,§2033-a; C24, 27, 31, 35,§8201.]

8202 **When deemed a street railway.** Any interurban railway shall, within the corporate limits of any city or town, or of any city acting under a special charter, upon such streets as it shall use for transporting passengers, mail, baggage, and such parcels, packages, and freight as it may carry in its passenger or combination baggage cars only, be deemed a street railway, and be subject to the laws governing street railways [S13,§2033-c; C24, 27, 31, 35,§8202.]

Exception, §8028

8203 **Applicable statutes.** The words railway, railway company, railway corporation, railroad, railroad company, and railroad corporation, as used in the code and acts of the general assembly, now in force or hereafter enacted, are hereby declared to apply to and include all interurban railways, and all companies or corporations constructing, owning, or operating such interurban street railways, and all provisions of the code and acts of the general assembly, now in force or hereafter enacted, affecting railways, railway companies, railway corporations, railroads, railroad companies, and railroad corporations, are hereby declared to affect and apply in full force and effect to all interurban railways, and to all interurban railway companies or railway corporations constructing, owning, or operating such interurban railways. [S13,§2033-b; C24, 27, 31, 35,§8203.]

8204 **On highway.** Any interurban or street railway operated by any motive power other than steam, may build and operate its line over, along, and upon any public highway

which is not less than one hundred feet wide, outside the limits of any city or town. The board of supervisors may, without expense to the county, accept conveyances of real estate abutting on any highway, or any part thereof, for the purpose of increasing such highway or part thereof to the width of one hundred feet or more for said purposes. [C97,§2026; S13,§2026; C24, 27, 31, 35,§8204.]

8205 **Narrow highways.** When the board of supervisors shall find that it is not practicable or expedient to widen a highway to one hundred feet or more for the purpose aforesaid and when there is filed with the county auditor the written consent of two-thirds of the residents of the county owning real estate abutting upon the portion of the highway upon and along which it is proposed to build and operate such railway, the board may grant the right to build and operate such line upon and along the portion of such highway to which such written consent applies. [C97,§2026; S13,§2026; C24, 27, 31, 35,§8205.]

Referred to in §8206

8206 **Damages.** The signing of written consent as provided in section 8205 shall not be a waiver of any damages which may accrue to any owner of abutting land on account of the building and operation of such railway upon and along such highway, or resulting from the negligence of any officer, agent, or servant of such railway company in the building or operation of such railway. [S13,§2026; C24, 27, 31, 35,§8206.]

40ExGA, HF 200, §3, editorially divided

8207 **Waiver—condemnation.** Unless the owners of land abutting each side of said road shall make written waiver of any damages, the railway company shall pay all damages sustained by such abutting owners caused by building said road. If the parties cannot agree, the amount of such damages shall be ascertained and paid in the same manner as is provided for taking private property for works of internal improvement. [C97,§2027; C24, 27, 31, 35.§8207.]

Condemnation procedure, ch 366

8208 **Sixty-foot highways.** The board of supervisors may without such written consent grant the right to such interurban or street railway company to build and operate its line for a distance not exceeding two miles outside the limits of any city or town upon and along any highway not less than sixty feet wide. [C97, §2026; S13,§2026; C24, 27, 31, 35,§8208.]

8209 **Regulations.** All rights to build and operate any such railway upon and along any public highway shall be subject to such restrictions and regulations as shall be prescribed from time to time by the board of supervisors. The construction and operation of such railway shall be so conducted as to cause the least interference with the convenient use of such highway by the public, and such highway shall, as soon as practicable, be placed in as good condition as it was before the location of such railway thereon. [C97,§2026; S13,§2026; C24, 27, 31, 35,§8209.]

8210 **Eminent domain.** All questions as to damages sustained by owners of land abutting on a highway along and upon which has been constructed such railway, shall be subject to proceedings relating to eminent domain. [S13, §2026; C24, 27, 31, 35,§8210.]

Eminent domain, ch 366

8211 **Franchises.** Cities and towns under any form of government may, as provided by law, authorize or forbid the construction and operation of such railways upon, over, or along the streets, alleys, and public grounds within their limits and prescribe the conditions and regulations for such construction and operation. The right to operate as a street railway shall not be granted for a period exceeding twenty-five years. [S13,§2033-d; C24, 27, 31, 35, §8211.]

Referred to in §8212

8212 **Contracts and rates.** Nothing in section 8211 shall impair the obligation of contracts of any city under any form of government or town entered into prior to April 8, 1902, nor affect any provisions of law relating to free or reduced or discriminating rates of transportation. [S13,§2033-d; C24, 27, 31, 35,§8212.]

8213 **Terminal facilities.** Any person or corporation owning or operating an electric street railway in any city or town, shall permit the use of its tracks, poles, wires, and terminal facilities within such city or town by any interurban railway entering such city or town for interurban business only in the transportation of passengers, mail, express, and baggage in passenger or in combination baggage cars, but shall not be required to permit the use of its car houses or barns by such interurban railway. [S13,§2110-c; C24, 27, 31, 35,§8213.]

Referred to in §8215

8214 **Electric power.** When the power plant of a street railway is sufficient therefor and during the hours its streetcars are in operation, and to the extent it can do so without interference with its own traffic, it shall furnish power for the operation of interurban passenger and combination baggage cars on such portions of such street railway tracks as such interurban railway has the right to use. It shall have preference in the use of its own power and tracks so that its cars shall not be delayed in transit. [S13,§2110-c; C24, 27, 31, 35,§8214.]

Referred to in §8215

8215 **Interurban to furnish facilities and power.** Any interurban electric railway company carrying on a street railway business in a city or town shall furnish to any other interurban electric railway company entering said city or town, for interurban purposes only, the same privileges and facilities which an electric street railway is required to furnish under sections 8213 and 8214. [S13,§2110-f; C24, 27, 31, 35, §8215.]

8216 Compensation — disagreement — proceedings. Any interurban railway company shall pay a reasonable compensation for the privileges and facilities furnished to it by a street railway company and in case of disagreement as to the facilities to be furnished or the conditions for their use or the compensation therefor, the question shall be submitted to and heard and determined by the Iowa state commerce commission, on petition of either party, and on ten days written notice of such hearing served on the opposite party. Any order made by the commission or the court on appeal shall be subject to review and modification from time to time on ten days written notice by either party setting forth the grounds of the application. [S13,§2110-c; C24, 27, 31, 35,§8216; 47GA, ch 205.]

8217 Appeal — notice — transcript. Either party shall have the right to appeal from any order or decision of the commission to the district court of the county in which the street railway is located, within twenty days from the date of the order or decision, by serving written notice of appeal on the other party and filing the same with proof of service with the secretary of the commission. Such secretary shall forthwith make and file in the office of the clerk of said court a transcript of the petition and such other documents as are on file in said cause, including the order or decision and notice of appeal. [S13, §2110-d; C24, 27, 31, 35,§8217; 47GA, ch 205.]

8218 Trial — bond. The appeal shall be tried in equity and have precedence over all other civil causes. The first term after the transcript is filed shall be the trial term. No appeal shall suspend the order or decision appealed from, if the interurban company on whose behalf the order or decision is made shall file with the secretary of the commission a bond with sureties approved by the commission, conditioned for the payment of any judgment for costs and compensation and for obedience to any order or decree of the court. [S13,§2110-d; C24, 27, 31, 35,§8218; 47GA, ch 205.]

Presumption of approval of bond, §12759.1

8219 Trackage acquired. Any interurban railway company doing a street railway business on its own tracks in a city or town, may, for the purpose of completing a terminal loop for its interurban cars only, acquire under the foregoing provisions the use of so much of the track, poles, and wire of a street railway as shall be necessary for said purposes. [S13,§2110-f; C24, 27, 31, 35,§8219.]

8220 Right to furnish power. Street railroad companies desiring so to do shall be authorized to furnish to interurban railway companies, power for the operation of the cars of interurban railway companies outside of cities and towns, but no street railroad company shall be required to furnish such power. [S13,§2110-e; C24, 27, 31, 35,§8220.]

8221 Water supply. Any interurban railway company requiring an electric generating plant for its operation, shall have the power of eminent domain to acquire, by condemnation, the right of access to all necessary streams or other sources for the purpose of supplying its powerhouse with water, and of making the necessary changes and improvements, and to repair or renew the same from time to time, in such streams, or upon the lands from which it is to obtain said water supply, in the same manner provided by law for the taking of private property for works of internal improvement. Such company shall pay to the owner of any lands or water rights all damages arising out of the exercises of such right. [SS15,§2033-l; C24, 27, 31, 35, §8221.]

8222 Limitations. In exercising such right, the owner of any water right or supply shall not be deprived of access thereto or the use thereof in common with such railway corporation, and no dwelling house or other buildings, orchard, or garden shall be overflowed or injuriously affected. [SS15,§2033-l; C24, 27, 31, 35,§8222.]

8223 Proceedings to acquire. Before proceeding to condemn any property rights to acquire or reach a water supply, such railway company shall make written application to the Iowa state commerce commission, accompanied by a drawing showing in detail the land required, the water supply to be obtained and the changes and improvements to be made, and giving the names and addresses of all persons whose rights will be affected thereby. [SS15,§2033-l; C24, 27, 31, 35,§8223; 47GA, ch 205.]

8224 Notice of application—expense. Such commission shall forthwith give written notice to all persons whose rights will be affected by the proposed changes of the date on which a hearing will be had on said application. If upon examination into the matter the commission finds that any rights of the public will be affected by such improvements, it shall give such notice as it deems sufficient to advise the public thereof. Any person having any interest may file objections to the application. The expenses of all such notices shall be paid by the company or person making the application. [SS15,§2033-l; C24, 27, 31, 35,§8224; 47GA, ch 205.]

8225 Findings—certificate. If the commission finds that such proposed changes or improvements are necessary and proper and the exercise of the power of eminent domain is reasonable, it shall grant the application as made, or with such modifications as shall be proper and just, and file in the office of the clerk of the district court of the county in which the improvements are to be made a certified transcript of the proceedings and order accompanied by plans and specifications showing in reasonable detail the land and water rights to be acquired for present and prospective use of such company, whereupon such company may proceed to acquire the same by condemnation, but shall not take possession of such property and water rights till the damages awarded by the condemnation commission have been deposited with the

sheriff. [SS15,§2033-l; C24, 27, 31, 35,§8225; 47GA, ch 205.]

8226 Applicable statutes. Except as in this chapter otherwise provided, all provisions relating to eminent domain conferring upon railway companies the right to condemn land for reservoirs and to enable them to reach and acquire sources of water supply and access thereto, shall apply to interurban railway companies for reaching and acquiring water supplies for their power plants. [SS15,§§2033-l,-m; C24, 27, 31, 35, §8226.]

8227 Heating of passenger cars. Every person, partnership, company, or corporation owning or operating an interurban line or a street railway in a city of more than twenty thousand population in this state shall, from November 15 of each year to April 1 following, heat all cars, used for the transportation of passengers, while in service, to at least forty degrees Fahrenheit; provided that open cars may be operated during the month of November for special trips to transport heavy traffic. [C24, 27, 31, 35,§8227.]

Referred to in §8228

8228 Violations. Every person, partnership, company, or corporation owning or operating a street railway in this state who shall fail to comply with the provisions of section 8227 shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars, nor more than one hundred dollars for each offense. Any failure to comply with the provisions of section 8227 shall be deemed a separate offense. [C24, 27, 31, 35, §8228.]

8229 Automobile railway — statutes applicable. Any system of railway operating cars within the state over or upon any track other than steel or iron shall be known as an automobile railway, and shall be a work of internal improvement. The words "railway", "railway company", "railway corporation", "railroad", "railroad company" or "railroad corporation", as used in the code and acts of the general assembly now in force or hereafter enacted, are hereby declared to apply to, and include, automobile railways, and all companies or corporations owning or operating such automobile railways, and all provisions of the code and acts of the general assembly now in force or hereafter enacted affecting railways, railway companies, railway corporations, railroads, railroad companies, or railroad corporations, are hereby declared to affect and apply in full force and effect to all automobile railways and to all automobile railway companies owning or operating such automobile railways. [S13,§2033-f; C24, 27, 31, 35, §8229.]

CHAPTER 379

INTERURBAN RAILWAYS IN CERTAIN CITIES

8230 Use of other tracks—relocation—compensation.
8231 Disputes—notice—hearing—procedure—modification of orders.
8232 Appeal—trial.
8233 Order not suspended by appeal—bond.
8234 Appliances—specifications for construction.
8235 Rules—enforcement of orders.

8230 Use of other tracks—relocation—compensation. When any corporation has heretofore, or hereafter shall be authorized by any city of this state having not less than thirty thousand nor more than thirty-five thousand inhabitants according to the federal census of 1910, to construct and operate an interurban railway upon any of the streets of such city, and shall desire to extend, construct and operate its said interurban railway upon other streets of said city upon which railroad track or tracks are located, and shall be authorized by the city council of said city by resolution so to do, and such streets are so occupied by railroad tracks that it is not practicable to construct and operate said interurban railway thereon, the owners, lessees and operators of said railroad tracks are authorized and required, if practicable, to relocate such of their tracks on said streets as are necessary to permit of the construction and operation of said interurban railway, and if it is not practicable to relocate said railroad tracks, then the owners, lessees and operators are authorized and required to permit said interurban railway to use such of their said tracks as are necessary for the operation and carrying on of the business of said interurban railway, and to permit to be made such alterations in, attachments to and connections with said railroad tracks and to be installed and maintained such trolley system or other construction or equipment as will permit the use in common of said railroad tracks by said interurban railway for railway purposes and by the owners, lessees or other operators thereof for ordinary steam railway purposes.

Where it is practicable to relocate said railroad tracks, and it is also practicable to operate said interurban railway over said tracks without relocating the same, the owners, lessees and operators of such railroad tracks may elect to grant the use thereof to said interurban railway and permit to be made such alterations in, attachments to, and connections with the same and to the installation and maintenance of such trolley system or other construction or equipment as will permit the use in common of said railroad tracks by said interurban railway and the said owners, lessees, and operators thereof, and signify such election in writing, filed in the proceeding before the commencement of the hearing of said proceeding on appeal in the district court as hereinafter provided. then said tracks may be so used in place of being relocated.

The owner of said interurban railway shall

pay just compensation to the owners, lessees, or operators of any railroad tracks for the relocation or use and alteration of said railroad tracks, and for the exercise of such other privileges as are granted such interurban railway under the provisions of this chapter. [SS15,§2033-g; C24, 27, 31, 35,§8230.]

Referred to in §8235

8231 Disputes—notice—hearing—procedure—modification of orders. If an agreement cannot be made between the said owner of said interurban railway and the owners, lessees, and operators of such railroad tracks for the relocation or use of such railroad tracks, or as to the alterations, attachments, and connections that shall be made therein or thereto, or as to the manner of the installation and maintenance of the trolley system or other construction or equipment such as will permit such common use of such tracks, or the terms and conditions of or the compensation to be paid for such relocation or use and the alterations or attachments to said railroad tracks and the exercise of such other privileges as are granted to such interurban railway under the provisions of this chapter, then all said matters shall be heard and determined by the Iowa state commerce commission upon petition to said commission by the owner of said interurban railway or other party to the controversy.

Upon filing of said petition said commission shall fix a time for the hearing thereof, and twenty days notice of the filing of said petition and of the time fixed for the hearing thereof shall be given by the petitioner to the opposite parties. Said notice shall be served in the manner provided by law for the service of notices of the commencement of a civil action in the district court.

The commission shall have the power and, upon the demand of any party appearing in said proceeding, shall appoint a shorthand reporter who shall take the evidence offered or introduced upon the hearing, and the commission shall have power to require any party to said hearing to produce books, records, papers, or other documents material to said inquiry, and shall have the power to subpoena and require the attendance of witnesses.

All orders of the commission or revisions or modifications of said orders shall be subject to revision or modification by the commission upon application of any party to the original proceeding, made in the same manner and under the same procedure as is provided for applications for original orders, provided that there shall be no revisions or modification of any order for the relocation of railroad tracks or of compensation if the total compensation was fixed at one definite sum; provided, further, that in the event of additional cost of construction or additional cost of maintenance occasioned by viaducts, track elevation or depression, crossing gates, or other safety appliances or the installation of more expensive types of track construction, the compensation shall be subject to revision and modification in the manner and by the method as in this chapter provided. [SS15,§2033-h; C24, 27, 31, 35,§8231; 47GA, ch 205.]

8232 Appeal—trial. Any party to said proceeding may appeal to the district court of the county where said city is located from any order made by the Iowa state commerce commission under this chapter within twenty days from the date of the order appealed from.

Such appeal shall be taken and perfected by the party appealing by serving a notice in writing upon the other parties to said proceeding, specifying the order or part thereof appealed from, and by filing in the office of the clerk of the district court of the county to which said appeal is taken, a petition stating the general nature of the proceeding before said Iowa state commerce commission and of the order or part thereof appealed from, and that an appeal has been taken and asking the court to determine the matter in controversy.

Such notice of appeal shall be served and proof of service thereof made in the same manner as an original notice in a civil action, and shall be filed with the secretary of the Iowa state commerce commission. Service of such notice of appeal may be made upon any attorney appearing for any party in the proceedings before the Iowa state commerce commission with the same force and effect as if served upon such party.

Such petition filed in the office of the clerk of the district court to which an appeal is taken shall be entitled in the name of the interurban railway company as plaintiff and the other parties to the appeal as defendants.

Immediately after twenty days from the date of any order appealed from, said Iowa state commerce commission shall certify to the clerk of the district court to which an appeal or appeals have been taken, a transcript of the papers and proceedings before said commission and its order thereon and all notices of appeal therefrom with proofs of service thereof.

All appeals growing out of a single order of said Iowa state commerce commission shall be consolidated and tried together, provided that if the owners, lessees, and operators of said railroad tracks have filed their election to permit the use of said tracks by said interurban railway after an appeal has been taken by any party to the proceedings as herein provided, each and all of the matters and things heard and determined by the Iowa state commerce commission shall, subject to such election, be heard and determined by the district court the same as if each of the parties to said proceeding had appealed from the entire order of said commission.

The proceedings upon appeal shall be in equity and subject to all of the rules of equity practice, except that the court shall require the issues to be made up at the first term after the petition is filed and give the proceedings precedence over other civil business and try the same thereat, if possible. The action shall be triable de novo upon said appeal; provided, however, that the question of the amount of compensation for the relocation or use of any

tracks and for the other privileges granted shall be tried in the same manner and with the same effect as trials upon appeal from assessments for the taking of private property for works of internal improvement.

Upon trial to determine the amount of compensation, the court shall first determine the basis, whether as rental or otherwise, upon which compensation shall be paid, and the terms and conditions of such payment, and all questions of the amount of compensation shall, upon such appeal, be tried before the same jury, who shall return a separate verdict fixing the amount of compensation to which each party to the proceedings is entitled, and in the event of appeal to the supreme court, the proceedings tried before a jury shall be heard and determined the same as in a law action. [SS15, §2033-i; C24, 27, 31, 35,§8232; 47GA, ch 205.]

8233 Order not suspended by appeal—bond. The appeal shall not suspend any order appealed from, if the interurban railway company in whose behalf any order is made by the Iowa state commerce commission shall file in the office of the clerk of the district court of the county to which such appeal is taken, a bond in such amount and upon such conditions as the district court to which such appeal is taken, or a judge thereof, may, upon application of said interurban railway, require. [SS15,§2033-j; C24, 27, 31, 35,§8233; 47GA, ch 205.]

8234 Appliances — specifications for construction. The Iowa state commerce commission is hereby authorized, directed, and empowered to inspect any and all wires and appliances authorized by this section and to condemn and order removed, or placed in safe condition, all wires and appliances erected or maintained in violation of the terms and conditions hereof.

1. No wire or cable used to conduct electricity for light and power shall be erected or maintained on any pole or appliance attached to such pole, within a less distance than thirteen inches from the center line of such pole; nor shall any wire or cable be erected or maintained in the vicinity of any pole, and unattached thereto, within the distance of thirteen inches from the center line of such pole.

2. Nor shall any wire or cable carrying less than six hundred volts of electricity be erected or maintained within a distance of forty inches from any wire or cable which carries at any time more than six hundred volts of electricity.

3. Nor shall any wire or cable which carries at any time more than six hundred volts of electricity be erected or maintained within a distance of forty inches from any wire or cable carrying less than six hundred volts of electricity.

4. Nor shall any wire be erected or maintained running parallel, crossing, or attached to same pole at a less distance than seven feet from any wire carrying thirteen thousand volts or more.

5. No wire or cable carrying more than thirteen thousand volts of electricity shall be erected or maintained across or above any wire or cable carrying less than thirteen thousand volts at point of crossing without at all times maintaining approved methods of construction to prevent falling and coming in contact with wires of lesser voltage.

6. No guy wire or guy cable attached to any pole or appliance to which is attached any wire or cable used to conduct electricity for light and power shall be erected or maintained without causing such guy wire or guy cable to be kept effectively insulated by approved insulators placed in such wire or cable not less than nine feet, nor more than eleven feet, from each end thereof; provided, however, that the lower insulator shall not be less than eight feet, perpendicularly, from the ground.

7. No wire or cable shall be erected or maintained vertically on any wooden pole, without causing such wire or cable to be at all times incased in a casing of wooden material not less than three-quarters of an inch in thickness, or of other insulating material approved by the Iowa state commerce commission; provided, however, that the provisions of this section shall not apply to any vertical wire which is more than thirteen inches from center line of pole.

8. Trolley span wires shall be insulated by not less than two approved insulators between such trolley wire and the pole or other support; such insulators shall be placed not less than two or more than four feet from point of attachment to wire or pole.

9. No pole or other structure used for the support of wires shall be erected or maintained at a less distance than six feet from the nearest rail of any steam, electric, or other railway track over which freight cars may be operated.

10. All poles must be distinctly and permanently marked with owner's name, at a point not less than five nor more than seven feet above the ground. All wooden poles of any lead must be as nearly as practicable uniformly spaced, of uniform height, and not less than forty poles to the mile.

11. Wires or cables carrying electric current for light and power must not be erected or maintained on any bracket or knob attached directly to any pole or cross-arm.

12. No trolley wire authorized by this chapter shall be erected or maintained at a less distance than twenty-two feet above any track.

13. All devices and materials, insulators, and other methods of insulation of wires shall conform to specifications approved by the Iowa state commerce commission. No wire shall be stretched within four feet of any building without being attached to and insulated therefrom. No wires shall hang within a less distance than twenty-two feet of the ground at the lowest point of sag. In case of leads crossing each other, each lead must pass above or below the other, and under no circumstances shall any wire of one lead run through the other lead.

14. Primary or high potential wire must be provided with approved line cut-outs on all branches, and at all transformers; and mains shall be divided into sections by approved cut-outs located as directed by the Iowa state commerce commission. All wires and cut-outs on

same cross-arm must be at least fourteen inches apart, except pole wires, which must be twenty-six inches apart. [SS15,§2033-k; C24, 27, 31, 35, §8234; 47 GA, ch 205.]

Referred to in §8235

8235 Rules—enforcement of orders. In any case where it is found impracticable to comply with the foregoing requirements or when to the satisfaction of the Iowa state commerce commission it is found that in the advancement of the art or trade, improved methods, appliances, fixtures, and requirements will the better conserve persons and property, including the operation of such property, the Iowa state commerce commission is hereby empowered, upon application made in writing, to allow such reasonable deviation therefrom as may be deemed reasonably safe and necessary.

It shall be unlawful for any person, firm, association, or corporation including a municipal corporation to place, construct, keep, or maintain any fixture, appliance, or other thing contrary to the terms and provisions of this and section 8234, and the Iowa state commerce commission is hereby empowered to enforce the provisions of this and section 8234 with reference to such matter.

The Iowa state commerce commission is hereby authorized and empowered to make such other rules and regulations and fix standards of and for appliances and fixtures as may be deemed reasonably necessary from time to time for the purpose of protecting persons and property; and such order made by the commission shall be deemed reasonable and necessary and the burden of proof shall rest upon any complainant to prove the contrary.

The Iowa state commerce commission shall give reasonable notice of any order or requirement within the contemplation of this chapter and cause the same to be enforced by an action in equity.

The terms, conditions, and provisions of this and section 8234 shall only apply to such interurban railway construction and conditions contemplated by section 8230. [SS15,§2033-k; C24, 27, 31, 35,§8235; 47GA, ch 205.]

CHAPTER 380

EXPRESS COMPANIES

8236 Regulation—statutes applicable.
8237 Supervision—joint rates.
8238 Schedule of rates.
8239 Presumption.
8240 Posting of schedules.
8241 Excessive charges.
8242 Violations.
8243 Duty to transport.
8244 Damages and penalty.

8236 Regulation — statutes applicable. All express companies operating and doing business in this state are declared to be common carriers, and it shall be the duty of every such express company or common carrier to transport all property, parcels, money, merchandise, packages, and other things of value which may be offered to them for transportation, at a reasonable charge or rate therefor; and all laws so far as applicable, now in force or hereafter enacted, regulating the transportation of property by railroad companies, shall apply with equal force and effect to express companies. [C97,§2165; S13,§2165-a; C24, 27, 31, 35,§8236.]

8237 Supervision—joint rates. The Iowa state commerce commission shall have general supervision of all express companies operating and doing business in this state; and shall inquire into any unjust discrimination, neglect, or violation of the laws of this state governing common carriers, by any express company doing business therein, or by the officers, agents, or employees thereof; and they shall have power, and it shall be their duty, to fix and establish reasonable, fair, and just rates of charges including a schedule of maximum joint rates for each kind or class of property, money, parcels, merchandise, packages, and other things to be charged for and received by each express company or carriers by express, separately or conjointly, on all such property, money, parcels, merchandise, packages, and other things which by the contract of carriage are to be transported separately or conjointly by such express companies, or carriers by express, doing business over the line of any railroad or other carrier between points wholly within the state, which rates or charges shall be made to apply to all such express companies or express carriers, and may be changed or modified by said commission from time to time in such manner as may become necessary. [C97, §2166; S13,§2165-b; C24, 27, 31, 35,§8237; 47GA, ch 205.]

8238 Schedule of rates. It shall be the duty of said Iowa state commerce commission, and it is hereby directed, to prepare and make for each express company doing business in this state a schedule of reasonable maximum charges of rates for transporting property, money, parcels, merchandise, packages, and other things carried by such express company or companies between points wholly within the state. [C97,§2166; S13, §2165-c; C24, 27, 31, 35,§8238; 47GA, ch 205.]

S13, §2165-c, editorially divided

8239 Presumption. In all actions brought against such common carriers wherein there are involved the charges thereof for the transportation of any property, or any unjust discrimination in relation thereto, the schedules or reasonable maximum rates of charges so made by the Iowa state commerce commission shall be taken as prima facie evidence in all courts that the rates fixed therein are reasonable and just maximum rates of charges for which said schedules

have been prepared. [C97,§2166; S13,§2165-c; C24, 27, 31, 35,§8239; 47GA, ch 205.]

8240 Posting of schedules. It shall be the duty of every such company or common carrier engaged in transporting property, money, parcels, merchandise, packages and other things, to print in clear and legible type the schedules of rates for transportation of such property, money, parcels, merchandise, packages, and other things, so made by such Iowa state commerce commission, and shall post in each of its offices or places of business where patrons visit for the purpose of making and receiving shipments, and keep displayed in each office or place of business within convenient access, and for the inspection and use of the public during customary business hours such printed schedule of rates of charges and any amendments thereto, and shall also post and display in similar manner any special rules and regulations which may be promulgated by them or said Iowa state commerce commission for the information of their patrons. [S13, §2165-d; C24, 27, 31, 35,§8240; 47GA, ch 205.]

8241 Excessive charges. It shall be unlawful for any express company or common carrier to charge, demand, collect, or receive a greater compensation for such transportation of property, or for any service in connection therewith, between the points named in such schedules than the rates and charges which are specified in the schedules made by said Iowa state commerce commission and in effect at the time. [S13,§2165-e; C24, 27, 31, 35,§8241; 47GA, ch 205.]

S13, §2165-e, editorially divided

8242 Violations. Any such express company or common carrier, any officer, representative, or agent of any express company, or carrier, who knowingly violates the provisions of this chapter shall forfeit to the state the sum of five hundred dollars for each offense, to be recovered as by law provided. [S13,§2165-e; C24, 27, 31, 35,§8242.]

8243 Duty to transport. Each and every express company or carrier by express, as herein defined, doing business within the state, shall at all convenient times during the hours of business accept and receive for prompt transportation and shipment destined to points on their own line, or to points on the lines of other express companies operating within the state, or for points beyond said state, all property, parcels, money, merchandise, packages, and other things of value which may be offered to them, or either of them for transportation by the public. [S13,§2165-f; C24, 27, 31, 35,§8243.]

S13, §2165-f, editorially divided

8244 Damages and penalty. Any express company or other common carrier refusing to transport goods as above provided taking the same in the order presented, shall be liable to the party injured for damages sustained by reason of its refusal, and in addition thereto shall be liable to a penalty of not less than five nor more than five hundred dollars, to be recovered in each case by the owner of the goods in any court having jurisdiction in the county where the wrong is done, or where the common carrier resides or has an agent, and each case of refusal shall be construed as a separate offense under this section. [S13,§2165-f; C24, 27, 31, 35,§8244.]

Similar provision, §11041

CHAPTER 381

UNIFORM BILLS OF LADING LAW

Bracketed numbers indicate the corresponding section of the uniform act

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PART I

THE ISSUE OF BILLS OF LADING

8245 [§1] Bills governed. Bills of lading issued by any common carrier shall be governed by this chapter. [S13,§3138-b; C24, 27, 31, 35, §8245.]

8246 [§2] Essential terms. Every bill must embody within its written or printed terms:

1. The date of its issue,
2. The name of the person from whom the goods have been received,
3. The place where the goods have been received,
4. The place to which the goods are to be transported,
5. A statement whether the goods received will be delivered to a specified person, or to the order of a specified person,
6. A description of the goods or of the packages containing them which may, however, be in such general terms as are referred to in section 8267, and
7. The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section. [S13,§3138-b1; C24, 27, 31, 35,§8246.]

8247 [§3] What terms may be inserted. A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions shall not:

1. Be contrary to law or public policy, or
2. In any wise impair his obligation to exercise at least that degree of care in the transportation and safekeeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. [S13,§3138-b2; C24, 27, 31, 35, §8247.]

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8248 [§4] Nonnegotiable or straight bill. A bill in which it is stated that the goods are consigned or destined to a specified person, is a nonnegotiable or straight bill. [S13,§3138-b3; C24, 27, 31, 35,§8248.]

8249 [§5] Negotiable or order bill. A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill. Any provision in such a bill that it is nonnegotiable shall not affect its negotiability within the meaning of this chapter. [S13,§3138-b4; C24, 27, 31, 35,§8249.]

8250 [§6] Negotiable bills must not be issued in sets. Negotiable bills issued in this state for the transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets. If so issued the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. [S13,§3138-b5; C24, 27, 31, 35, §8250.]

8251 [§7] Duplicate negotiable bills must be so marked. When more than one negotiable bill is issued in this state for the same goods to be transported to any place in the United States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. [S13,§3138-b6; C24, 27, 31, 35,§8251.]

Referred to in §8290

8252 [§8] **Nonnegotiable bill shall be so marked.** A nonnegotiable bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable". This section shall not apply, however, to memoranda or acknowledgments of an informal character. [S13,§3138-b7; C24, 27, 31, 35,§8252.]

8253 [§9] **Insertion of name of person to be notified.** The insertion in a negotiable bill of the name of a person to be notified of the arrival of goods shall not limit the negotiability of the bill, or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. [S13,§3138-b8; C24, 27, 31, 35, §8253.]

8254 [§10] **Acceptance of bill indicates assent to its terms.** Except as otherwise provided in this chapter, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy. [S13,§3138-b9; C24, 27, 31, 35, §8254.]

PART II

OBLIGATIONS AND RIGHTS OF CARRIERS UPON THEIR BILLS OF LADING

8255 [§11] **Obligation of carrier to deliver.** A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or if the bill is negotiable, by the holder thereof, if such demand is accompanied by:

1. An offer in good faith to satisfy the carrier's lawful lien upon the goods,
2. An offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is negotiable, and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. [S13,§3138-b10; C24, 27, 31, 35,§8255.]

8256 [§12] **Justification of carrier in delivering.** A carrier is justified, subject to the provisions of sections 8257 to 8259, inclusive, in delivering goods to one who is:

1. A person lawfully entitled to the possession of the goods, or
2. The consignee named in a nonnegotiable bill for the goods, or
3. A person in possession of a negotiable bill for the goods by the terms of which the goods are deliverable to his order, or which has been indorsed to him or in blank by the consignee or by the mediate or immediate indorsee of the consignee. [S13,§3138-b11; C24, 27, 31, 35, §8256.]

Referred to in §§8257, 8266

8257 [§13] **Carrier's liability for misdelivery.** Where a carrier delivers goods to one who is not lawfully entitled to the possession of them the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subsections 2 and 3 of section 8256; and, though he delivered the goods as authorized by either of said subsections, he shall be so liable if prior to such delivery he:

1. Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or
2. Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

A request or information to be effective within the meaning of this section must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. [S13,§3138-b12; C24, 27, 31, 35,§8257.]

Referred to in §8256

8258 [§14] **Negotiable bill must be canceled when goods delivered.** Except as provided in section 8271, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto. [S13,§3138-b13; C24, 27, 31, 35,§8258.]

Referred to in §8256

8259 [§15] **Negotiable bills must be canceled or marked when part of goods delivered.** Except as provided in section 8271, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either:

1. To take up and cancel the bill, or
2. To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill, to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto. [S13, §3138-b14; C24, 27, 31, 35,§8259.]

Referred to in §8256

8260 [§16] **Altered bills.** Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor. [S13,§3138-b15; C24, 27, 31, 35,§8260.]

8261 [§17] **Lost or destroyed bill.** Where a negotiable bill has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the carrier or any person injured by such delivery from any liability or loss, incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. [S13,§3138-b16; C24, 27, 31, 35,§8261.]

8262 [§18] **Effect of duplicate bills.** A bill upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability. [S13, §3138-b17; C24, 27, 31, 35,§8262.]

8263 [§19] **Carrier cannot set up title in himself.** No title to goods or right to their possession, asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien. [S13, §3138-b18; C24, 27, 31, 35,§8263.]

8264 [§20] **Interpleader of adverse claimants.** If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate. [S13,§3138-b19; C24, 27, 31, 35,§8264.]

Referred to in §8266

8265 [§21] **Carrier has reasonable time to determine validity of claims.** If someone other than the consignee or person in possession of the bill, has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill, or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. [S13, §3138-b20; C24, 27, 31, 35,§8265.]

Referred to in §8266

8266 [§22] **Adverse title is no defense, except as above provided.** Except as provided in section 8256 and in sections 8264 and 8265, no right or title of a third person unless enforced by legal process shall be a defense to an action brought by the consignee of a nonnegotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand. [S13,§3138-b21; C24, 27, 31, 35,§8266.]

8267 [§23] **Liability for nonreceipt or misdescription of goods.** If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to:

1. The consignee named in a nonnegotiable bill, or
2. The holder of a negotiable bill, who has given value in good faith relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in the bill merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or the condition of contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill. [S13,§3138-b22; C24, 27, 31, 35,§8267.]

Referred to in §8246

8268 [§24] **Attachment or levy upon goods for which a negotiable bill has been issued.** If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to de-

liver the actual possession of the goods until the bill is surrendered to him or impounded by the court. [S13,§3138-b23; C24, 27, 31, 35,§8268.]

8269 [§25] **Creditor's remedies to reach negotiable bills.** A creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. [S13, §3138-b24; C24, 27, 31, 35,§8269.]

8270 [§26] **Negotiable bill must state charges for which lien is claimed.** If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those goods for freight, storage, demurrage, and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier. [S13,§3138-b25; C24, 27, 31, 35,§8270.]

8271 [§27] **Effect of sale.** After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable. [S13,§3138-b26; C24, 27, 31, 35, §8271.]

Referred to in §§8258, 8259

PART III

NEGOTIATION AND TRANSFER OF BILLS

8272 [§28] **Negotiation of negotiable bills by delivery.** A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank. [S13,§3138-b27; C24, 27, 31, 35,§8272.]

8273 [§29] **Negotiation of negotiable bills by indorsement.** A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner. [S13,§3138-b28; C24, 27, 31, 35,§8273.]

8274 [§30] **Transfer of bills.** A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A nonnegotiable bill cannot be negotiated, and the indorsement of such a bill gives the transferee no additional right. [S13, §3138-b29; C24, 27, 31, 35,§8274.]

Similar provisions, ch 422

8275 [§31] **Who may negotiate a bill.** A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. [S13,§3138-b30; C24, 27, 31, 35,§8275.]

8276 [§32] **Rights of person to whom a bill has been negotiated.** A person to whom a negotiable bill has been duly negotiated acquires thereby:

1. Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value, and
2. The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. [S13,§3138-b31; C24, 27, 31, 35,§8276.]

8277 [§33] **Rights of person to whom a bill has been transferred.** A person to whom a bill has been transferred but not negotiated acquires thereby as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the bill is nonnegotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a nonnegotiable bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods. [S13,§3138-b32; C24, 27, 31, 35,§8277.]

8278 [§34] **Transfer of negotiable bill without indorsement.** Where a negotiable bill is transferred for value by delivery, and the in-

dorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. [S13, §3138-b33; C24, 27, 31, 35,§8278.]

8279 [§35] **Warranties on sale of bill.** A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants:

1. That the bill is genuine,
2. That he has a legal right to transfer it,
3. That he has knowledge of no fact which would impair the validity or worth of the bill, and
4. That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In the case of an assignment of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim. [S13, §3138-b34; C24, 27, 31, 35,§8279.]

8280 [§36] **Indorser not a guarantor.** The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations. [S13,§3138-b35; C24, 27, 31, 35,§8280.]

8281 [§37] **No warranty implied from accepting payment of a debt.** A mortgagee or pledgee, or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described. [S13, §3138-b36; C24, 27, 31, 35,§8281.]

8282 [§38] **When negotiation not impaired by fraud, accident, mistake, duress, or conversion.** The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, or conversion. [S13,§3138-b37; C24, 27, 31, 35,§8282.]

8283 [§39] **Subsequent negotiation.** Where a person having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation. [S13,§3138-b38; C24, 27, 31, 35,§8283.]

8284 [§40] **Form of the bill as indicating rights of buyer and seller.** Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows:

1. Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.
2. Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligation under the contract.
3. Where by the bill the goods are deliverable to the order of the buyer or his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.
4. Where the seller draws on the buyer for the price and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. If, however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful. [S13,§3138-b39; C24, 27, 31, 35,§8284.]

8285 [§41] **Sight draft — assumptions of buyer.** Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming:

1. If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter, whether such three days be termed days of grace or not, that the seller intended to require payment of

the draft before the buyer should be entitled to receive or retain the bill.

2. If the draft is by its terms payable on time, extending beyond three days after demand, presentation, or sight, whether such three days be termed days of grace or not, that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order. [S13,§3138-b40; C24, 27, 31, 35,§8285.]

8286 [§42] **Negotiation defeats vendor's lien.** Where a negotiable bill has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation. [S13,§3138-b41; C24, 27, 31, 35.§8286.]

Referred to in §8287

8287 [§43] **When rights and remedies under mortgages and liens are not limited.** Except as provided in section 8286, nothing in this chapter shall limit the rights and remedies of a mortgagee or lienholder whose mortgage or lien on goods would be valid, apart from this chapter, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them. [S13,§3138-b42; C24, 27, 31, 35,§8287.]

PART IV

CRIMINAL OFFENSES

8288 [§44] **Issue of bill for goods not received.** Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier, or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [S13,§3138-b43; C24, 27, 31, 35, §8288.]

Referred to in §8294.1

8289 [§45] **Issue of bill containing false statement.** Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [S13,§3138-b44; C24, 27, 31, 35,§8289.]

Referred to in §8294.1

8290 [§46] **Issue of duplicate bills not so marked.** Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of section 8251 knowing that a former negotiable bill for the same goods or any part of them is outstanding and uncanceled, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [S13,§3138-b45; C24, 27, 31, 35,§8290.]

Referred to in §8294.1

8291 [§47] **Negotiation of bill for mortgaged goods.** Any person who ships goods to which he has not a title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [S13,§3138-b46; C24, 27, 31, 35,§8291.]

Referred to in §8294.1
Analogous section, §13037

8292 [§48] **Negotiation of bill when goods are not in carrier's possession.** Any person who with intent to deceive negotiates or transfers for value a bill knowing that any or all of the goods which by the terms of such bill appear to have been received for transportation by the carrier which issued the bill, are not in the possession or control of such carrier, or of a connecting carrier, without disclosing this fact, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [S13,§3138-b47; C24, 27, 31, 35,§8292.]

Referred to in §8294.1

8293 [§49] **Inducing carrier to issue bill when goods have not been received.** Any person who with intent to defraud secures the issue by a carrier of a bill knowing that at the time of such issue, any or all of the goods described in such bill as received for transportation have not been received by such carrier, or an agent of such carrier, or a connecting carrier, or are not under the carrier's control, by inducing an officer, agent, or servant of such carrier falsely to believe that such goods have been received by such carrier, or are under its control, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [S13,§3138-b48; C24, 27, 31, 35,§8293.]

Referred to in §8294.1

8294 [§50] **Issue of nonnegotiable bill not so marked.** Any person who with intent to

defraud issues or aids in issuing a nonnegotiable bill without the words "not negotiable" placed plainly upon the face thereof, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. [S13, §3138-b49; C24, 27, 31, 35,§8294.]

Referred to in §8294.1

8294.1 Place of imprisonment. The imprisonment referred to in sections 8288 to 8294, inclusive, shall be in the penitentiary or men's or women's reformatory, as the case may be. [C31, 35,§8294-d1.]

Not in original uniform act

PART V

INTERPRETATION

8295 [§51] Rule for cases not provided for in this chapter. In any case not provided for in this chapter, the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators, and trustees, and to the effect of fraud, misrepresentation, duress, or coercion, accident, mistake, bankruptcy, or other invalidating cause, shall govern. [S13,§3138-b50; C24, 27, 31, 35,§8295.]

8296 [§52] Interpretation shall give effect to purpose of uniformity. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [S13,§3138-b51; C24, 27, 31, 35,§8296.]

8297 [§53] **Definitions.**

1. In this chapter, unless the context or subject matter otherwise requires:

"Action" includes counterclaim, set-off, and suit in equity.

Counterclaim generally, §§11019, 11151

"Bill" means bill of lading.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation, or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

Similar provisions, §§9485, 9718, 10005

2. A thing is done "in good faith", within the meaning of this chapter, when it is in fact done honestly, whether it be done negligently or not. [S13,§3138-b52; C24, 27, 31, 35,§8297.]

8298 [§54] Obsolete.

8299 [§57] Name of chapter. This chapter may be cited as the "Uniform Bills of Lading Law". [S13,§3138-b56; C24, 27, 31, 35,§8299.]

CHAPTER 382

TELEGRAPH AND TELEPHONE LINES AND COMPANIES

8300 Right-of-way.
8301 Removal of lines.
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8303 Condemnation.
8304 Equal facilities—delay.
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RECIPROCAL SERVICE

8308.1 Definitions.
8308.2 Facilities to local exchange.
8308.3 Transmission of messages.
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8308.5 Violations—effect.

8300 Right-of-way. Any person or firm, and any corporation organized for such purpose, within or without the state, may construct a telegraph or telephone line along the public roads of the state, or across the rivers or over any lands belonging to the state or any private individual, and may erect the necessary fixtures therefor. [C51,§780; R60,§1348; C73,§1324; C97, §2158; C24, 27, 31, 35,§8300.]

Authorization in cities and towns, ch 304
Removal, ch 248
C97, §2158, editorially divided

8301 Removal of lines. When any road along which said line has been constructed shall be changed, the person, firm or corporation shall, upon ninety days notice in writing, remove said lines to said road as established. The notice may be served upon any agent or operator in the employ of such person, firm or corporation. [C73,§1324; C97,§2158; C24, 27, 31, 35, §8301.]

8302 Construction—damages. Such fixtures shall not be so constructed as to inconvenience the public in the use of any road or the navigation of any stream; nor shall they be set up on the private grounds of any individual without paying him a just equivalent for the dam-

age he thereby sustains. [C51,§781; R60,§1349; C73,§1325; C97,§2159; C24, 27, 31, 35,§8302.]

8303 Condemnation. If the person over whose lands such telegraph or telephone line passes claims more damages therefor than the proprietor of such line is willing to pay, the amount thereof may be determined in the same manner as provided for taking private property for works of internal improvement. [C51,§782; R60,§1350; C73,§1326; C97,§2160; C24, 27, 31, 35,§8303.]

Condemnation procedure, ch 366

8304 Equal facilities—delay. If the proprietor of any telegraph or telephone line within the state, or the person having the control and management thereof, refuses to furnish equal facilities to the public and to all connecting lines for the transmission of communications in accordance with the nature of the business which it undertakes to carry on, or to transmit the same with fidelity and without unreasonable delay, the law in relation to limited partnerships, corporations, and to the taking of private property for works of internal improvement, shall not longer apply to them, and property taken for the use thereof without the consent of the owner may be recovered by him. [C51,§783; R60,§1351; C73,§1327; C97,§2161; C24, 27, 31, 35,§8304.]

Eminent domain, ch 365
Limited partnerships, ch 428

8305 Delay—willful error — revealing contents. Any person employed in transmitting messages by telegraph or telephone must do so with fidelity and without unreasonable delay, and if anyone willfully fails thus to transmit them, or intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or his agent or attorney, or willfully and wrongfully takes or receives any telegraph or telephone message, he is guilty of a misdemeanor. [C51,§784; R60,§1352; C73, §1328; C97,§2162; C24, 27, 31, 35,§8305.]

Punishment, §12894

8306 Mistakes and delays. The proprietor of a telegraph or telephone line is liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law, the provisions of any contract to the contrary notwithstanding. [C51, §785; R60,§1353; C73,§1329; C97,§2163; C24, 27, 31, 35,§8306.]

8307 Negligence presumed. In any action against any telegraph or telephone company for damages caused by erroneous transmission of a message, or by unreasonable delay in delivery of a message, negligence on the part of the telegraph or telephone company shall be presumed upon proof of erroneous transmission or of unreasonable delay in delivery, and the burden of proof that such error or delay was not due to negligence upon its part shall rest upon such company. [C97,§2164; C24, 27, 31, 35, §8307.]

C97, §2164, editorially divided

8308 Presentation of claim. No action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company, officer or agent thereof within sixty days from time cause of action accrues. [C97,§2164; C24, 27, 31, 35,§8308.]

RECIPROCAL SERVICE

8308.1 Definitions.

1. "Local exchange", within the meaning of this act [45ExGA, ch 102], shall refer to a telephone line or lines and /or to a telephone switchboard or switchboards operating by virtue of a franchise granted by a city or town furnishing telephonic communication between two or more members of the public within the same city, town, village, community, locality and/or neighborhood, which said line or lines and/or switchboard or switchboards shall be under the same management and control.

"Local exchange" within the meaning of this act shall not include or refer to privately owned or leased lines and/or switchboards, operated and used by members of the public other than telephone and/or telegraph companies as a public utility by which the public is offered telephonic service.

2. "Local exchange company" within the meaning of this act, shall refer to any one or more individuals, firms or corporations operating one or more local exchanges as herein defined.

3. "Long distance company" within the meaning of this act shall refer to and include one or more persons, firms or corporations operating connecting lines between two or more local exchanges, one or more of which local exchanges are owned by a local telephone company other than such person, firm or corporation, over which line or lines telephonic communication is had between members of the public connected with said local exchanges. [C35,§8308-f1.]

8308.2 Facilities to local exchange. Long distance companies shall furnish equal facilities to any local exchange within the state desiring same, and to that end shall immediately make, or at the option of the long distance company, shall immediately permit to be made under its direction and at reasonably accessible places to be designated by such long distance company, the necessary connections between said local exchange and said long distance company telephone system to effect the furnishing of equal facilities to such local exchange. [C35,§8308-f2.]

8308.3 Transmission of messages. After such connection has been made said long distance company shall transmit communications and messages to, from and through all local exchanges connected with its system when requested, with fidelity and equality and without discrimination or unreasonable delay. [C35, §8308-f3.]

8308.4 Facilities to long distance companies. A connected local exchange company shall accept

and furnish telephonic connection for all messages offered over the lines or through the system of any long distance company without discrimination or unreasonable delay, and with equality. [C35,§8308-f4.]

8308.5 Violations—effect. Should any local exchange company or long distance company refuse or fail to furnish the connection or service above required, the law in relation to limited partnerships, corporations, or the taking of private property for works of internal improvement shall no longer apply to them and property taken for the use thereof without the consent of the owner may be recovered by him. [C35, §8308-f5.]

Eminent domain, ch 365
Limited partnerships, ch 428

CHAPTER 383

ELECTRIC TRANSMISSION LINES

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8309 Franchise. No individual, company, or corporation shall erect, maintain, or operate any transmission line, wire, or cable along, over, or across any public highway or grounds outside of cities and towns for the transmission, distribution, or sale of electric current, without first procuring from the Iowa state commerce commission, or from the board of supervisors in the county or each of the respective counties in which such transmission line is to be constructed or operated, a franchise granting authority so to do as in this chapter provided. [S13,§§1527-c, 2120-n; C24, 27, 31, 35,§8309; 47GA, ch 205.]

Authorization in cities and towns, ch 304

8310 Petition for franchise. Any person, corporation, or company authorized to transact business in the state including cities and towns may file a verified petition asking for a franchise to erect, maintain, and operate a line or lines for the transmission, distribution, use, and sale of electric current outside cities and towns and for such purpose to erect, use, and maintain poles, wires, guy wires, towers, cables, conduits, and other fixtures and appliances necessary for conducting electric current for light, heat, or power over, along, and across any public lands, highways, streams, or the lands of any person, company, or corporation, and to acquire necessary interests in real estate for such purposes.

Where the application is made to a board of supervisors the applicant shall file a copy of such petition with the Iowa state commerce commission at least ten days before the time of the hearing thereon. The Iowa state commerce commission must furnish the applicant with a certificate showing the fact with reference to the filing of such copy. [S13,§2120-n; C24, 27, 31, 35,§8310; 47GA, ch 205.]

8311 Petition—requirements. The petition shall set forth:

1. The name of the individual, company, or corporation asking for the franchise.
2. The principal office or place of business.
3. The starting points, routes, and termini of the proposed lines, accompanied with a map or plat showing such details.
4. A general description of the public or private lands, highways, and streams over, across, or along which any proposed line will pass.
5. General specifications as to materials and manner of construction.
6. The maximum voltage to be carried over each line. [S13,§2120-n; C24, 27, 31, 35,§8311.]

8312 Notice of hearing. Upon the filing of such petition, the board or commission shall fix a date for hearing thereon and cause a notice, addressed to the citizens of each county through which the proposed line or lines will extend, to be published in one of the official newspapers of each such county for two consecutive weeks. Said notice shall contain a general statement of the contents and purpose of the petition, a general description of the lands and highways to be traversed by the proposed line or lines, the date and place fixed for hearing thereon, and that all objections thereto must be filed at least five days before said date. Said hearing shall be not less than ten days from the date of the last publication and at the offices of the board or commission before which said matter is pending, unless a different place in such notice is specified. [S13,§2120-n; C24, 27, 31, 35,§8312; 48GA, ch 220.]

8313 Objections — hearing. Any person, company, city, town, or corporation whose rights or interests may be affected, shall have

the right to file written objections to the proposed improvement or to the granting of such franchise; but all such objections shall be on file with the board or commission at least five days before the date fixed for said hearing. The board or commission may allow objections to be filed later in which event the applicant must be given reasonable time to meet such late objections. The board or commission may examine the proposed route or cause any engineer selected by it to do so. It shall consider said petition and any objections filed thereto, and may hear such testimony as may aid it in determining the propriety of granting such franchise. It may grant such franchise in whole or in part upon such terms, conditions, and restrictions, and with such modifications as to location and route as may seem to it just and proper. The petitioners shall pay all costs and expenses of said proceeding, including cost of publishing notice, before such franchise shall become effective. [S13,§2120-n; C24, 27, 31, 35, §8313; 48GA, ch 220.]

8314 **Form of franchise.** The commerce counsel shall prepare a blank form of franchise for such purposes, which shall provide space for a general description of the improvement authorized thereby, the name and address of the person or corporation to whom granted, the general terms and conditions upon which it is granted, and such other things as may be necessary. This blank form shall be filled out and signed by the chairman of the board or commission which grants the franchise, and the official seal shall be attached. Such franchise shall be subject to such regulations and restrictions as the general assembly from time to time may prescribe, and to such rules, not inconsistent with statutes, as the Iowa state commerce commission may establish from time to time. [S13,§2120-n; C24, 27, 31, 35,§8314; 47GA, ch 205; 48GA, ch 220.]

Legislative control in general, §8376

8315 **Valuation of franchise.** No financial consideration shall be charged for such franchise. In fixing the value for rate-making purposes of the property of any person, company, or corporation owning it or operating under it no account shall be taken of, and no increased value shall be allowed for, any such franchise, except that the reasonable cost to the petitioners of obtaining said franchise may be included in the cost of constructing said line. [C24, 27, 31, 35,§8315.]

8316 **Exclusive rights — duration of franchise.** No exclusive right shall ever be given by franchise or otherwise to any person, company, corporation, town, or city to conduct electrical energy, or to place electric wires, along or over or across any public highway or public place or ground; and no franchise or privilege shall ever be granted for any such purpose for a longer period than twenty-five years. [C24, 27, 31, 35,§8316.]

8317 **Franchise transferable—notice.** When any such electric transmission line or lines are sold and transferred either by voluntary or judicial sale, such transfer shall carry with it the franchise under which the said improvement is owned, maintained, or operated. If a transfer of such franchise is made before the improvement for which it was issued is constructed, in whole or in part, such transfer shall not be effective till the person, company, or corporation to whom it was issued shall file in the office of the board or commission granting the franchise a notice in writing stating the date of such transfer and the name and address of the transferee. [C24, 27, 31, 35,§8317; 48GA, ch 220.]

8318 **Record of franchises.** The board or commission granting the franchise shall keep a record of all such franchises granted and issued by it, when and to whom issued, with a general statement of the location, route, and termini of the transmission line or lines covered thereby. When any transfer of such franchise has been made as provided in this chapter, the board or commission shall also make note upon its record of the date of such transfer and the name and address of the transferee.

Every person, company, or corporation which secures a franchise for transmission lines from any board of supervisors must file with the Iowa state commerce commission a copy of the order or resolution granting the franchise, certified by the county auditor. The franchise shall be effective when such copy is filed. When so filed the Iowa state commerce commission shall issue a statement showing that fact. [C24, 27, 31, 35, §8318; 47GA, ch 205; 48GA, ch 220.]

8319 **Acceptance of franchise.** Any person, company, or corporation obtaining a franchise as in this chapter provided, or owning or operating under one, shall be conclusively held to an acceptance of the provisions thereof and of all laws relating to the regulation, supervision, or control thereof which are now in force or which may be hereafter enacted, and to have consented to such reasonable regulation as the commission may, from time to time, prescribe. The provisions of this chapter shall apply equally to assignees as well as to original owners. [S13,§2120-p; C24, 27, 31, 35,§8319.]

8320 **Extension of franchise.** Any person, firm, or corporation owning a franchise granted under this chapter or previously existing law, desiring to acquire extensions of such franchise, may petition the board or commission in the manner provided for the granting of a franchise, and the same proceeding shall be had as on an original application. Such petition shall be accompanied by the written consent of the applicant that the provisions of all laws relating to public utilities, franchises, and transmission lines, or to the regulation, supervision, or control thereof which are then in force or which may be thereafter enacted shall apply to its existing line or lines, franchises, and rights with the same force and effect as if such franchise had been granted or such lines had been constructed or rights had been obtained under

the provisions of this chapter. [S13,§2120-o; C24, 27, 31, 35,§8320; 48GA, ch 220.]

8321 **Service furnished.** Any city or town which owns or operates a system for the distribution of electric light or power, and which has obtained electric energy for such distribution from any person or firm or corporation owning or operating an electric light and power plant or transmission line, shall be entitled to have the service reasonably needed by such municipality and its patrons continued at and for a reasonable rate and charge and under reasonable rules of service.

It shall be unlawful for the owner or operator of such light and power plant or transmission line to disconnect or discontinue such service (except during nonpayment of reasonable charges) so long as such operator holds or enjoys any franchise to go upon or use any public streets, highways, or grounds.

Until the municipality and the operator shall agree upon a rate or charge for such service the municipality shall pay and the operator shall accept the rate provided in the expired contract if any existed, and if none existed then the rate before paid. This shall be without prejudice, however, to the right of either party to test in court or before any lawfully constituted rate-making tribunal the reasonableness of such rate.

This section shall not apply if the original service to the municipality was given in case of emergency or for any other temporary purpose. [C24, 27, 31, 35,§8321.]

8322 **Eminent domain—procedure.** Any person, company, or corporation having secured a franchise as provided in this chapter, shall thereupon be vested with the right of eminent domain to such extent as may be necessary and as prescribed and approved by the board or commission, not exceeding one hundred feet in width for right-of-way and not exceeding one acre in any one location, in addition to right-of-way, for the location of transformer or other stations to carry out the purposes of said franchise. If agreement cannot be made with the private owner of lands as to damages caused by the construction of said transmission line, the same proceedings shall be taken as provided for taking private property for works of internal improvement. [S13,§2120-q; C24, 27, 31, 35,§8322; 48GA, ch 220.]

Condemnation procedure, ch 366

8323 **Injury to person or property.** In case of injury to any person or property by any such transmission line, negligence will be presumed on the part of the person or corporation operating said line in causing said injury, but this presumption may be rebutted by proof. Such presumption shall not exist in favor of employees of the person or corporation operating said transmission line who are charged with or engaged in the construction, reconstruction, repair, or maintenance thereof, unless otherwise provided by the employers liability and workmen's compensation laws of the state. [S13, §2120-s; C24, 27, 31, 35,§8323.]

8324 **Access to lines—damages.** Individuals or corporations operating such transmission lines shall have reasonable access to the same for the purpose of constructing, reconstructing, enlarging, repairing, or locating the poles, wires, or construction and other devices used in or upon such line, but shall pay to the owner of such lands and of crops thereon all damages to said lands or crops caused by entering, using, and occupying said lands for said purposes. Nothing herein contained shall prevent the execution of an agreement between the person or company owning or operating such line and the owner of said land or crops with reference to the use thereof. [S13,§2120-t; C24, 27, 31, 35,§8324.]

8325 **Supervision of construction—location.** The Iowa state commerce commission shall have power of supervision over the construction of said transmission line and over its future operation and maintenance. Said transmission line shall be constructed near and parallel to the right-of-way of the railways of the state or along the division lines of the lands, according to the government survey thereof, wherever the same is practicable and reasonable, and so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant thereof. [S13,§2120-r; C24, 27, 31, 35, §8325; 47GA, ch 205.]

Removal from highway, ch 248

8326 **Manner of construction.** Such lines shall be built of strong and proper wires attached to strong and sufficient supports properly insulated at all points of attachment; all wires, poles, and other devices which by ordinary wear or other causes are no longer safe shall be removed and replaced by new wires, poles, or other devices, as the case may be, and all abandoned wires, poles, or other devices shall be at once removed. Where wires carrying current are carried across, either above or below wires used for other service, the said transmission line shall be constructed in such manner as to eliminate, so far as practicable, damages to persons or property by reason of said crossing. There shall also be installed sufficient devices to automatically shut off electric current through said transmission line whenever connection is made whereby current is transmitted from the wires of said transmission line to the ground, and there shall also be provided a safe and modern improved device for the protection of said line against lightning. [S13,§2120-r; C24, 27, 31, 35,§8326.]

8327 **Distance from buildings.** No transmission line shall be constructed, except by agreement, within one hundred feet of any dwelling house or other building, except where said line crosses or passes along a public highway or is located alongside or parallel with the right-of-way of any railway company. In addition to the foregoing, each person, company, or corporation shall conform to any other rules, regulations, or specifications established by the Iowa state commerce commission, in the con-

struction, operation, or maintenance of such lines. [S13,§2120-r; C24, 27, 31, 35,§8327; 47 GA, ch 205.]

8328 Lines along or crossing highway — danger label. At any crossing of any highway by such transmission line, the poles or towers next to the highway shall be labeled with the following words: "Danger ..... volts electricity", filling in the voltage. The stroke of said letters and numbers shall be at least four inches in length and not less than five-eighths of an inch in width, and the color of the letters and numbers shall be in contrast with the color of the background. The said labels shall show the maximum number of volts of electricity transmitted over said line, and shall face toward the highway. Where said poles or towers are extended along said highway and within the limits thereof or immediately adjacent thereto, the sign herein prescribed shall be placed at least every quarter of a mile. The Iowa state commerce commission shall have power to make and enforce such further and additional rules relating to location, construction, operation, and maintenance of said transmission line as may be reasonable. [S13, §2120-r; C24, 27, 31, 35,§8328; 47GA, ch 205.]

8329 Nonuser. Unless the improvement for which a franchise is granted is constructed in whole or in part within two years from the granting thereof, it shall be forfeited and the board or commission which granted the franchise shall cancel and revoke the same and make record thereof. [C24, 27, 31, 35,§8329; 48GA, ch 220.]

8330 Forfeiture for violations. If any person, company, or corporation shall violate the provisions of this chapter or any rule established for the construction, maintenance, or operation of such electric transmission line, and shall fail for ninety days after notice from the board or commission to comply therewith, such board or commission shall have power to cancel and annul such franchise and order the removal of such line.

Provided, however, that if proceedings are commenced within said ninety days in any court of competent jurisdiction to determine whether the provisions of this chapter, or whether any rule established for the construction or maintenance or operation of an electrical transmission line, have been violated, or are legal and enforceable rules or provisions, no forfeiture shall be declared or become effective if within sixty days from the date of the final decree or judgment in such proceedings the said rule or provisions have been fully complied with and the cause of forfeiture removed. [C24, 27, 31, 35,§8330; 48GA, ch 220.]

8331 Prior franchises—legislative control. Any such franchise heretofore granted under previously existing law shall not be abrogated by the provisions of this chapter, but all such franchises and all franchises granted under the provisions of this chapter shall be subject to further legislative control. [C24, 27, 31, 35, §8331.]

8332 Violations. Any person, company, or corporation constructing or undertaking to construct or maintain any electric transmission line, without first procuring a franchise for such purpose in accordance with the provisions of this chapter, shall be fined in the sum of not less than one hundred dollars nor more than one thousand dollars; and for violating any of the other provisions of this chapter relating to electric transmission lines or disobeying any order or rule made by the Iowa state commerce commission in relation thereto, shall be fined not exceeding one hundred dollars. [S13,§1527-d; C24, 27, 31, 35,§8332; 47GA, ch 205.]

8333 Wire crossing railroads—supervision. The Iowa state commerce commission shall have general supervision over any and all wires whatsoever crossing under or over any railway track and shall make rules prescribing the manner in which such wires shall cross such track; but in no case shall the Iowa state commerce commission prescribe a less height for any wire than twenty-two feet above the top of the rails of any railroad track. [S13,§§2120-d,-e,-h; C24, 27, 31, 35,§8335; 47GA, ch 205.]

8334 Wires across railroad right-of-way at highways. The Iowa state commerce commission shall prescribe the manner for the crossing of wires over and across railroad rights-of-way at highways and other places within the state. [S13,§2120-i; C24, 27, 31, 35,§8334; 47GA, ch 205.]

8335 Wires—how strung. No corporation or person shall place or string any such wire for transmitting electric current or any wire whatsoever across any track of a railroad except in the manner prescribed by the Iowa state commerce commission. [S13,§2120-f; C24, 27, 31, 35,§8335; 47GA, ch 205.]

8336 Examination of existing wires. The Iowa state commerce commission shall, either by personal examination or otherwise, obtain information where railroad tracks are crossed by wires contrary to, or not in compliance with, the rules prescribed by it. It shall order such change or changes to be made by the persons or corporations owning or operating such wires as may be necessary to make the same comply with said rules and within such reasonable time as it may prescribe. [S13,§2120-g; C24, 27, 31, 35, §8336; 47GA, ch 205.]

8337 Penalty—enforcement. Any person or corporation who shall string or maintain any wire across any railroad track in this state at a different height or in a different manner from that prescribed by the Iowa state commerce commission shall forfeit and pay to the state the sum of one hundred dollars for each separate period of ten days during which such wire is so maintained. Such forfeiture shall be recovered in a civil action in the name of the state by the commerce counsel, or by the county at-

torney of the county in which such wire is situated, at the request of the Iowa state commerce commission. [S13,§2120-j; C24, 27, 31, 35,§8337; 47GA, ch 205.]

8338 Crossing highway. Nothing in this chapter shall prevent any such individual or corporation having its high tension line on its own private right-of-way on both sides of any highway, from crossing such public highway under such rules and regulations as the Iowa state commerce commission may prescribe, and subject from time to time to legislative control as to duration and use. [C24, 27, 31, 35,§8338; 47 GA, ch 205.]

CHAPTER 383.1

COMMISSION OF AERONAUTICS

8338.01 Commission created.
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8338.03 Vacancies.
8338.04 Compensation—expenses—offices.
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8338.01 Commission created. There is hereby created within the department of the adjutant general, a commission of aeronautics which shall consist of three persons, not more than two of whom shall belong to the same political party and who shall be appointed by the governor, with the approval of two-thirds of the members of the senate in executive session. [C35,§8338-f1.]

8338.02 Tenure. The members of said commission shall hold office for four years, except, that on the first commission, one member shall be appointed for the period ending on the third Monday in January, 1935, one for the period ending on the third Monday in January, 1936, and one for the period ending on the third Monday in January, 1937. [C35,§8338-f2.]

8338.03 Vacancies. Vacancies on the commission shall be filled by appointment by the governor for the balance of the unexpired term. [C35,§8338-f3.]

8338.04 Compensation — expenses — offices. The members of the aeronautical commission shall serve without compensation. The commission shall be given office space in the offices of the adjutant general who shall supply necessary stenographic and clerical help from the personnel of his office as well as necessary records and stationery. The executive council shall designate rooms within the statehouse for any hearings herein provided, held in Des Moines and court rooms of the district court in the county where the hearing is held, shall be used for other hearings. The members of the commission shall be reimbursed by the adjutant general for any actual necessary expenses incurred by them in attending upon hearings. All other expenses in connection with the administration of this chapter shall be paid from the appropriations to the department of the adjutant general. [C35,§8338-f4.]

8338.05 Investigations and hearings. The commission or any commissioner, or officer of the commission designated by the commission, shall have the power to hold investigations, inquiries and hearings concerning matters relating to aeronautics, and all accidents in aeronautics within this state. All hearings conducted by the commission shall be open to the public. [C35,§8338-f5.]

8338.06 Oaths—subpoenas. Each commissioner, and every officer of the commission designated by it to hold any inquiry, investigation or hearing, shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, compel the attendance and testimony of witnesses, and the production of papers, books, and documents. On request of the commission or any officer or member thereof subpoenas as above authorized shall be issued by any court of record or by the clerk thereof in vacation. [C35,§8338-f6.]

8338.07 Contempt — procedure. In case of failure to comply with any subpoena or order issued under authority of the said commission, or its authorized representative, the commission, commissioner or officer may invoke the aid of any district court in this state. The court may thereupon order the witness to comply with the requirements of the subpoena, and give such evidence as he may be able touching the matter in question. Any failure to obey the order of said court may be punished by the court as a contempt thereof. [C35,§8338-f7.]

Contempts, ch 536

8338.08 Records and testimony. The reports of investigations, or hearings, or any part thereof, shall not be admitted in evidence or used for any purpose in any suit, action, or proceedings, growing out of any matter referred to in said investigation, hearing, or report thereof, except in case of criminal or other proceedings instituted by or in behalf of the commission under the provisions of the chapter, nor shall any commissioner or employee of the said commission be required to testify to any facts ascertained in, or information gained by reason of, his official capacity, and further, no commissioner shall be required to testify as an expert witness in any suit, action or proceeding involving any aircraft. [C35,§8338-f8.]

8338.09 Cooperation. It shall be the duty of the commission to properly instruct every state highway maintenance policeman, and

every county and municipal officer charged with the enforcement of state and municipal laws, to enforce, and assist in the enforcement of the laws of this state pertaining to aeronautics. [C35,§8338-f9.]

8338.10 Injunction. The commission is further authorized to enforce the provisions of the aeronautics laws of the state by injunction in the district courts of this state. [C35,§8338-f10.]

8338.11 Appeal — procedure. Any party aggrieved by any final ruling or decision of said commission may take an appeal therefrom to the district court of the county of his residence if within this state, or if he resides outside the state then to the district court of the county where the matters ruled upon by said commission arose. Said appeal to be taken and perfected by serving upon any member of said commission a notice of said appeal stating briefly the ruling or decision appealed from. Said notice shall be served as original notices are served in the district court and by filing the same in the office of the clerk of the district court to which said appeal is taken within thirty days from the making of the order or decision appealed from. The appeal shall be docketed for trial not less than ten days after the filing in the clerk's office of said notice of appeal and shall be tried by the district court, the parties filing such pleadings as they may desire, subject to the prevailing rules of pleading in this state. Upon trial of the appeal the court shall hear evidence as to matters concerning the order in question, as to the condition of the property in question and the manner of its operation, and shall enter judgment either affirming or setting aside the order of the commission, or the court may remand the matter to the commission for further hearing. The filing of the notice of appeal shall operate as a supersedeas. Other departments and political subdivisions of this state are further authorized to cooperate with the aeronautics commission in the development of aeronautics and aeronautic facilities within the state. [C35,§8338-f11.]

8338.12 Failure to appeal—waiver. If no appeal is taken from the order of the commission within the period fixed, the party against whom the order was entered, shall be deemed to have waived the right to have the reasonableness or lawfulness of the order reviewed by a court and there shall be no trial of that issue in any court in which suit may be instituted for the penalty for failure to comply with the order. [C35,§8338-f12.]

8338.13 Administration. The commission shall cooperate in every way with the department of the adjutant general and with his advice and assistance shall administer this chapter. The commission may make and adopt such rules and regulations for the administration of this chapter as it may deem necessary, not inconsistent with the provisions of this chapter. [C35, §8338-f13.]

CHAPTER 383.2

AERIAL TRANSPORTATION

8338.14 Definitions.
8338.15 License required.
8338.16 Display of license—revocation—inspection.
8338.17 Pilot license.
8338.18 Inspection of pilot's certificate.
8338.19 Mechanics.
8338.20 Rules.
8338.21 Penalty.

8338.14 Definitions. Whenever the word "aircraft" is used in this chapter, it shall mean any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air, except a parachute designed for such navigation but used primarily as safety equipment.

Whenever the word "airman" is used in this chapter, it shall mean any person who engages in the navigation of aircraft while under way, and any individual who is in charge of the inspection, overhauling or repairing of aircraft.

Whenever the word "passenger" is used in this chapter, it shall mean any person riding in an aircraft other than its pilot or a member of its crew.

The term "public aircraft" means an aircraft used exclusively in the governmental service of the United States or of any of the states.

The term "civil aircraft" means any aircraft other than "public aircraft". [C31, 35,§8338-c1.]

8338.15 License required. It shall be unlawful for any person to navigate any civil aircraft within the state of Iowa, unless such aircraft is registered and licensed under or pursuant to the laws of the United States then in force unless said requirements are waived in writing by the commission of aeronautics. [C31, 35,§8338-c2.]

8338.16 Display of license—revocation—inspection. The aircraft license must be carried in the aircraft whenever it is in service, and must be conspicuously posted where it may readily be seen by any passenger or inspector. Whenever the craft is unairworthy the license must be removed from the craft, and when the license is suspended or revoked, or when it is no longer in force, it shall be surrendered to the authority issuing the same. The license must be produced for inspection upon demand of any passenger of such aircraft, or by any peace officer of the state of Iowa, or by any officer, manager or employee in charge of any airport, landing field or airdrome upon which such aircraft has been landed, or from which it is proposed to be navigated. [C31, 35,§8338-c3.]

8338.17 Pilot license. It shall be unlawful for any person within the state of Iowa to navi-

gate any civil aircraft, carrying a passenger, unless such person is an airman licensed to operate aircraft by the United States government, in accordance with the laws, rules and regulations then in force. [C31, 35,§8338-c4.]

8338.18 Inspection of pilot's certificate. Pilots' certificates shall be kept in their personal possession when navigating aircraft within the state of Iowa, and shall be produced for inspection upon demand by any passenger of such aircraft, or by any peace officer of the state of Iowa, or by an officer, manager or employee in charge of any airport, landing field or airdrome upon which such pilot has landed or from which he proposes to make a flight. [C31, 35,§8338-c5.]

8338.19 Mechanics. It shall be unlawful for any person to have charge of the inspection, overhauling or repairing of aircraft within the state of Iowa, unless he is the holder of a mechanic's license, issued under or pursuant to the laws of the United States then in force. [C31, 35,§8338-c6.]

8338.20 Rules. The operation of civil aircraft in the state of Iowa shall be in accordance with the following rules:

1. Aircraft, flying in established civil airways, when it is safe and practicable, shall keep to the right side of such airways.

2. Aircraft shall give way to each other in the following order:

a. Airplanes.

b. Airships.

c. Balloons, fixed or free.

An airship not under control is classed as a free balloon.

Aircraft required to give way shall keep a safe distance, having regard to the circumstances of the case. Three hundred feet will be considered a minimum safe distance.

3. If the circumstances permit, the craft which is required to give way shall avoid crossing ahead of the other. The other craft may maintain its course and speed, but no engine-driven craft may pursue its course if it would come within three hundred feet of another craft, three hundred feet being the minimum distance within which aircraft other than military aircraft of the United States engaged in military maneuvers and commercial aircraft engaged in local industrial operations, may come within proximity of each other in flight.

4. When two engine-driven aircraft are on crossing courses the aircraft which has the other on its right side shall keep out of the way.

5. When two engine-driven aircraft are approaching head-on, or approximately so, and there is risk of collision, each shall alter its course to the right, so that each may pass on the left side of the other. This rule does not apply to cases where aircraft will, if each keeps on its respective course, pass more than three hundred feet from each other.

6. a. An overtaking aircraft is one approaching another directly from behind or within seventy degrees of that position, and no subsequent alteration of the bearing between the two shall make the overtaking aircraft a crossing aircraft within the meaning of these rules or relieve it of the duty of keeping clear of the overtaken craft until it is finally past and clear.

b. In case of doubt as to whether it is forward or abaft such position it should assume that it is an overtaking aircraft and keep out of the way.

c. The overtaking aircraft shall keep out of the way of the overtaken aircraft by altering its own course to the right, and not in the vertical plane.

7. Exclusive of taking off from or landing on an established landing field, airport, or on property designated for that purpose by the owner, and except as otherwise permitted by this chapter, aircraft shall not be flown:

a. Over the congested parts of cities, towns, or settlements, except at a height sufficient to permit of a reasonably safe emergency landing, which in no case shall be less than one thousand feet.

b. Elsewhere at height less than five hundred feet, except where indispensable to an industrial flying operation.

8. The commission of aeronautics shall have power to grant waivers for any flight other than as herein provided.

9. a. Acrobatic flying means intentional maneuvers not necessary to air navigation.

b. No person shall acrobatically fly an aircraft:

(1) Over a congested area of any city, town, or settlement.

(2) Over any open-air assembly of persons or below two thousand feet in height over any established civil airway, or at any height over any established airport or landing field, or within one thousand feet horizontally thereof.

(3) Any acrobatic maneuvers performed over any other place shall be concluded at a height greater than fifteen hundred feet.

(4) No person shall acrobatically fly any airplane carrying passengers for hire.

(5) When an aircraft is in flight the pilot shall not drop or release, or permit any person to drop or release, any object or thing which may endanger life or injure property, except when necessary to the personal safety of the pilot, passengers, or crew.

10. Take-offs and landings shall be made upwind when practicable. The take-off shall not be commenced until there is no risk of collision with landing aircraft and until preceding aircraft are clear of the field. No take-off or landing shall be made from or on a public street or highway without the consent of the local governing authority and the approval of the commission of aeronautics.

11. If practicable, when within one thousand feet horizontally of the leeward side of the landing field the airplane shall maintain a direct course toward the landing zone.

12. A landing plane has the right-of-way over planes moving on the ground or taking off.

13. When landing and maneuvering in preparation to land, the airplane at the greater height

shall be responsible for avoiding the airplane at the lower height and shall, as regards landing, observe the rules governing overtaking aircraft.

14. An aircraft in distress shall be given free way in attempting to land.

15. The angular limits laid down in these rules will be determined as when the aircraft is in normal flying position.

16. Between one-half hour after sunset and one-half hour before sunrise airplanes in flight must show the following lights:

a. On the right side a green light and on the left side a red light, each showing unbroken light between two vertical planes whose dihedral angle is one hundred ten degrees when measured to the left and right, respectively, from dead ahead. These lights shall be visible at least two miles.

b. At the rear and as far aft as possible a white light shining rearward, visible in a dihedral angle of one hundred forty degrees bisected by a vertical plane through the line of flight and visible at least three miles.

17. Between one-half hour after sunset and one-half hour before sunrise airships shall carry and display the same lights that are prescribed for airplanes, excepting the side lights shall be doubled horizontally in a fore-and-aft position, and the rear light shall be doubled vertically. Lights in a pair shall be at least seven feet apart.

18. A free balloon, between one-half hour after sunset and one-half hour before sunrise, shall display one white light not less than twenty feet below the car, visible for at least two miles. A fixed balloon, or airship, shall carry three lights—red, white, and red—in a vertical line, one over the other, visible at least two miles. The top red light shall be not less than twenty feet below the car, and the lights shall be not less than seven nor more than ten feet apart.

19. a. Between one-half hour after sunset and one-half hour before sunrise, all aircraft which are on the surface of water and not under control, or which are moored or anchored in navigation lanes, shall show a white light visible for at least two miles in all directions.

b. Balloon and airship mooring cable between one-half hour after sunset and one-half hour before sunrise shall show groups of three red lights at intervals of at least every one hundred feet, measured from the basket, the first light in the first group to be approximately twenty feet from the lower red balloon light. The object to which the balloon is moored on the ground shall have a similar group of lights to mark its position.

20. By day, balloon and airship mooring cable shall be marked with tubular streamers not less than eight inches in diameter and seven feet long and marked with alternate bands of white and red, twenty inches in width. The object to which the balloon or airship is moored on the ground shall have the same kind of streamers, which must be in the same position as the lights specified herein.

21. The following signals, separately or together, shall, where practicable, be used in case of distress:

a. The international signal, S O S, by radio.

b. The international-code flag signal of distress, NC.

c. A square flag having either above or below it a ball, or anything resembling a ball.

22. When an aircraft is forced to land at night at a lighted airport it shall signal its forced landing by making a series of short flashes with its navigation lights if practicable to do so.

23. In fog, mist, or heavy weather an aircraft on the water in navigation lanes, when its engines are not running, shall signal its presence by a sound device emitting a signal for about five seconds in two-minute intervals. [C31, 35, §8338-c7.]

8338.21 Penalty. Any person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and shall be punished by a fine of not more than one hundred dollars or imprisonment for not more than thirty days, or by both such fine and imprisonment. [C31, 35, §8338-c8.]

CHAPTER 383.3

PIPE LINES

8338.22 Purpose and policy.
8338.23 Definitions.
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8338.26 Application for permit.
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8338.48 Financial condition of permittee—bond.
8338.49 Venue—service of original notice.
8338.50 Orders—enforcement.
8338.51 Violation of injunction.

8338.22 Purpose and policy. It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the commission the power and authority to su-

pervise the transportation or transmission of gas, gasoline, oils or motor fuels and/or inflammable fluid within or through this state by pipe line, whether specifically mentioned herein or not, so as to protect the safety and welfare of the public in their use of any public and/or private highways, grounds, waters and streams of any kind in this state. [C35,§8338-f14.]

45ExGA, ch 105, §1, editorially divided

8338.23 Definitions. The term "pipe line" insofar as this chapter is concerned shall include and mean any pipe, pipes or pipe lines used for the transportation or transmission of gas, gasoline, oils or motor fuels and/or inflammable fluids within or through this state.

The term "pipe-line company", insofar as this chapter is concerned shall include and mean any person, firm, copartnership, association, corporation or syndicate engaged in or organized for the purpose of owning, operating or controlling pipe lines for the transportation or transmission of gas, gasoline, oils or motor fuels and/or inflammable fluids within or through this state.

The term "commission" when used in this chapter means the Iowa state commerce commission. [C31,§8338-d1; C35,§8338-f15; 47GA, ch 205.]

8338.24 Conditions attending operation. No pipe-line company shall construct, maintain or operate any pipe line or lines under, along, over or across any public and/or private highways, grounds, waters or streams of any kind in this state except in accordance with the provisions of this chapter. [C31,§8338-d2; C35, §8338-f16.]

8338.25 Dangerous construction. The commission is vested with power and authority and it shall be its duty to supervise all pipe lines and pipe-line companies and shall from time to time inspect and examine the construction, maintenance and the condition of said pipe lines and whenever said commission shall determine that any pipe line or any apparatus, device or equipment used in connection therewith is unsafe and dangerous it shall immediately in writing notify said pipe-line company, constructing or operating said pipe line, device, apparatus or other equipment to repair or replace any defective or unsafe part or portion of said pipe line, device, apparatus or equipment. [C31,§8338-d29; C35, §8338-f17; 47GA, ch 205.]

8338.26 Application for permit. Any pipe-line company engaging in its said business in this state shall file with the Iowa state commerce commission its verified petition asking for a permit to construct, maintain and operate its pipe line or lines along, over or across the public and/or private highways, grounds, waters and streams of any kind of this state. Any pipe-line company now owning or operating a pipe line in this state shall be issued a permit by the commission upon supplying the information as provided for in section 8338.27. [C31, §8338-d3; C35,§8338-f18; 47GA, ch 205.]

8338.27 Petition. Said petition shall state:

1. The name of the individual, firm, corporation, company, or association asking for said permit.
2. The applicant's principal office and place of business.
3. A legal description of the route of said proposed line or lines, together with a map thereof.
4. A general description of the public and/or private highways, grounds and waters, streams and private lands of any kind along, over or across which said proposed line or lines will pass.
5. The specifications of material and manner of construction.
6. The maximum and normal operating pressure under which it is proposed to transport gas, gasoline, oils, or motor fuels and/or inflammable fluids. [C31,§8338-d4; C35,§8338-f19.]

Referred to in §8338.26

8338.28 Hearing—notice. Upon the filing of said petition the Iowa state commerce commission shall fix a date for hearing thereon and shall cause notice thereof to be published in some newspaper of general circulation in each county through which said proposed line or lines will extend; said notice to be published for two consecutive weeks. [C31,§8338-d5; C35, §8338-f20; 47GA, ch 205.]

8338.29 Time and place. Said hearing shall not be less than ten days nor more than thirty days from the date of the last publication and shall be held in the office of said Iowa state commerce commission, or such place as the commission shall designate. [C31,§8338-d6; C35,§8338-f21; 47GA, ch 205.]

8338.30 Objections. Any person, corporation, company, city or town whose rights or interests may be affected by said pipe line or lines may file written objections to said proposed pipe line or lines or to the granting of said permit. [C31,§8338-d7; C35,§8338-f22.]

8338.31 Filing. All such objections shall be on file in the office of said Iowa state commerce commission not less than five days before the date of hearing on said application but said Iowa state commerce commission may permit the filing of said objections later than five days before said hearing, in which event the applicant must be granted a reasonable time to meet said objections. [C31,§8338-d8; C35,§8338-f23; 47GA, ch 205.]

8338.32 Examination—testimony. The said Iowa state commerce commission may examine the proposed route of said pipe line or lines or may cause such examination to be made by an engineer selected by it. At said hearing the said Iowa state commerce commission shall consider said petition and any objections filed thereto and may in its discretion hear such testimony as may aid it in determining the propriety of granting such permit. [C31,§8338-d9; C35,§8338-f24; 47GA, ch 205.]

8338.33 Final order — condition. It may grant such permit in whole or in part upon such

terms, conditions and restrictions as to safety requirements and as to location and route as may be determined by it to be just and proper. Provided, however, that before any permit shall be granted to any pipe-line company proposing to engage in intrastate commerce, the commission shall, after a public hearing as provided in this chapter, determine whether the services proposed to be rendered will promote the public convenience and necessity, and an affirmative finding to such effect shall be a condition precedent to the granting of such permit. [C31, §8338-d10; C35,§8338-f25.]

8338.34 Costs and fees. Applicant shall pay all costs and expenses of the hearing and necessary preliminary investigation in connection therewith including the cost of publishing notice of hearing and shall pay a construction inspection fee in the sum of fifty cents per mile of pipe line or fraction thereof for each inch of diameter of such pipe line located in the state. [C31,§§8338-d11,-d12; C35,§8338-f26.]

8338.35 Inspection fee. Every pipe-line company shall pay an annual inspection fee in the sum of twenty-five cents per mile of pipe line or fraction thereof for each inch of diameter of such pipe line located in the state and said inspection fee to be paid for the calendar year in advance and before January 1 of each year to the Iowa state commerce commission. [C31,§8338-d13; C35,§8338-f27; 47GA, ch 205.]

8338.36 Failure to pay. It shall be the duty of the commission to collect all inspection fees provided in this chapter, and failure to pay any such inspection fee within thirty days after the time the same shall become due shall be cause for revocation of the permit. [C35,§8338-f28.]

8338.37 Accounting for fees. The commission shall on the last day of each month remit to the treasurer of state all moneys collected under this chapter during such month. [C31, §8338-d14; C35,§8338-f29.]

8338.38 Use of funds. All moneys received under the provisions of this chapter or so much thereof as may be necessary shall be used for the administration and enforcement of the provisions of this chapter and the regulation of pipe lines and shall be paid to the commission by warrant drawn from time to time by the comptroller of state upon the treasurer of state. Unexpended balances on December 31 of each year shall be credited to the general fund of the state by June 30 following. [C31,§8338-d14; C35,§8338-f30.]

8338.39 Rules and regulations. The said Iowa state commerce commission shall have full authority and power to promulgate such rules and regulations as it deems proper and expedient to insure the orderly conduct of the hearings herein provided for and also to prescribe rules and regulations for the enforcement of this chapter. [C31,§8338-d15; C35,§8338-f31; 47GA, ch 205.]

8338.40 Permit. The said Iowa state commerce commission shall cause to be prepared a uniform blank form of permit which shall provide a space for a general description of the route authorized thereby, the name and address of the pipe-line company to whom said permit is granted and the terms and conditions upon which it is granted. The provisions of this chapter shall not be retroactive as against existing rights of property owners where pipe lines have been constructed or are in the process of construction. Said permit shall be signed by the chairman of the Iowa state commerce commission and the official seal of said commission shall be attached thereto. [C31, §8338-d16; C35,§8338-f32; 47GA, ch 205.]

8338.41 Limitation on grant. No exclusive right shall ever be granted to any pipe-line company to construct, maintain and operate its pipe line or lines along, over or across any public highway, grounds or waters and no such permit shall ever be granted for a longer period than twenty-five years. [C31,§8338-d17; C35, §8338-f33.]

8338.42 Sale of permit. No permit shall be sold until the sale is approved by the commission. [C35,§8338-f34.]

8338.43 Transfer of permit. If a transfer of such permit is made before the construction for which it was issued is completed in whole or in part such transfer shall not be effective until the person, company or corporation to whom it was issued shall file in the office of said Iowa state commerce commission a notice in writing stating the date of such transfer and the name and address of said transferee. [C31, §8338-d11; C35,§8338-f35; 47GA, ch 205.]

8338.44 Records. The Iowa state commerce commission shall keep a record of all permits granted and issued by it, showing when and to whom issued and the location and route of said pipe line or lines covered thereby. When any transfer of such permit has been made as provided in this chapter the said commission shall also note upon its record the date of such transfer and the name and address of such transferee. [C31,§8338-d20; C35,§8338-f36; 47GA, ch 205.]

8338.45 Extension of permit. Any pipe-line company owning a permit granted under this chapter desiring to acquire an extension of such permit may petition the commission in the same manner provided for the granting of such permit and the same proceeding shall be had as on an original application. [C31,§8338-d22; C35, §8338-f37; 47GA, ch 205.]

8338.46 Eminent domain. Any pipe-line company having secured a permit as in this chapter provided shall thereupon be vested with the right of eminent domain to such extent as may be necessary and as prescribed and approved by said Iowa state commerce commission, not exceeding seventy-five feet in width for right-of-way and not exceeding one acre in any one location in addition to right-of-way for the location of pumps, pressure apparatus or other stations or equipment necessary to the

proper operation of its said pipe line or lines. If agreement cannot be made with the private owner of lands as to damages caused by the construction of said pipe line the same proceedings shall be taken as provided for taking private property for works of internal improvement.

Nothing in this chapter shall authorize the construction of a pipe line longitudinally on, over or under any railroad right-of-way or public highway, or at other than an approximate right angle to such railroad track or public highway without the consent of such railroad company, the highway commission or board of supervisors, as the case may be, nor shall any provision of this chapter authorize or give the right of condemnation or eminent domain for such purposes. [C31,§8338-d23; C35,§8338-f38; 47GA, ch 205.]

Condemnation procedure, ch 366

8338.47 Damages. Pipe-line companies operating pipe lines shall have reasonable access to the same for the purpose of constructing, reconstructing, enlarging, repairing or locating their* pipes, pumps, pressure apparatus or other stations, devices or equipment used in or upon such line but shall pay to the owner of such lands for the right of entry thereon and the owner of crops thereon all damages caused by entering, using or occupying said lands for said purposes; and shall pay to the owner or owners of such lands all damages caused after the completion of construction of said pipe line on account of wash or erosion of the soil at or along the location of said pipe line by reason of the construction thereof upon said lands on account of the settling of the soil along and above said pipe line, provided, that nothing herein contained shall prevent the execution of an agreement between the pipe-line company and the owner of said land or crops with reference to the use thereof. [C31,§8338-d26; C35, §8338-f39.]

*"its" in enrolled act

8338.48 Financial condition of permittee—bond. Before any permit is granted under the provisions of this chapter the applicant must satisfy the Iowa state commerce commission that the applicant has property within this state other than pipe lines, subject to execution of a value in excess of fifty thousand dollars, or said applicant must file and maintain with said commission a surety bond in the penal sum of fifty thousand dollars with surety approved by the commission, conditioned that said applicant will pay any and all damages legally recovered against it growing out of the operation of its said pipe line in the state of Iowa. When such pipe-line company deposits with said Iowa state commerce commission security satisfactory to said commission as a guaranty for the payment of said damages, or furnishes to said commission satisfactory proofs of its solvency and financial ability to pay said damages, the said pipe-line company shall be relieved of the said provisions requiring bond. [C31,§8338-d27; C35,§8338-f40; 47GA, ch 205.]

8338.49 Venue—service of original notice. In all cases arising under this chapter the district court of any county, through which said pipe-line company is located, shall have jurisdiction; and service of original notice on the pipe-line company therein shall be had and made upon the chairman of the Iowa state commerce commission. [C31,§8338-d28; C35,§8338-f41; 47GA, ch 205.]

8338.50 Orders—enforcement. If said pipe-line company fails to obey an order within a time prescribed by the said Iowa state commerce commission the said commission may commence an equitable action in the district court of the county where said defective, unsafe, or dangerous portion of said pipe line, device, apparatus or equipment is located to compel compliance with its said order. If, after due trial of said action the court finds that said order is reasonable, equitable and just, it shall decree a mandatory injunction compelling obedience to and compliance with said order and may grant such other relief as may be just and proper. Appeal from said decree may be taken in the same manner as in other actions. [C31, §8338-d30; C35,§8338-f42; 47GA, ch 205.]

Appeal in civil actions, ch 555

8338.51 Violation of injunction. For a violation of any injunction or other process issued, any pipe-line company or any officer, agent, or employee thereof, shall be fined for contempt in the sum not exceeding one thousand dollars. In addition to any other penalty the court may fix a sum not exceeding one thousand dollars which each defaulting company, officer, or agent shall pay after a fixed date for each day such injunction or other process is disobeyed and render judgment for penalty which shall accrue from disobedience after the time fixed. One-half of such sums collected shall be paid into the treasury of the county where the judgment is rendered and one-half into the state treasury. [C35,§8338-f43.]

Constitutionality, §8338-f44, code 1935; 45ExGA, ch 105, §30

TITLE XIX

CORPORATIONS

Referred to in §8376

CHAPTER 384

CORPORATIONS FOR PECUNIARY PROFIT

Referred to in §§8442, 8896, 8944, 9029, 9070, 9259

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8339 Who may incorporate. Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided. [C51,§673; R60,§1150; C73, §1058; C97,§1607; C24, 27, 31, 35,§8339.]

8340 Single person. Except as otherwise provided by law, a single person may incorporate under the provisions of this chapter, thereby entitling himself to all the privileges and immunities provided herein, but if he adopts the name of an individual or individuals as that of the corporation, he must add thereto the word "incorporated". [C51,§702; R60,§1179; C73, §1088; C97,§1608; C24, 27, 31, 35,§8340.]

8341 Powers. Among the powers of such corporations are the following:

1. To have perpetual succession.
2. To sue and be sued by its corporate name.
3. To have a common seal, which it may alter at pleasure.
4. To render the interests of the stockholders transferable.
5. To exempt the private property of its members from liability for corporate debts, except as otherwise declared.
6. To make contracts, acquire and transfer property,—possessing the same powers in such respects as natural persons.
7. To establish bylaws, and make all rules and regulations necessary for the management of its affairs. [C51,§674; R60,§1151; C73,§1059; C97,§1609; C24, 27, 31, 35,§8341.]

8342 Index book. The county recorder shall keep in his office an index book for articles of incorporation, which shall be ruled and headed substantially after the following form, and shall

make entries therein in the order in which they are filed in his office.

INDEX TO ARTICLES OF INCORPORATION

Name	Place of Business	Date of Filing			Date of Inst.			Where Recorded		Capital Stock	Remarks
		Mo.	Day	Yr.	Mo.	Day	Yr.	Bk.	Pg.		

[S13,§1610; C24, 27, 31, 35,§8342.]
S13, §1610, editorially divided

8343 Articles adopted and recorded. Before commencing any business except their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators. Said articles shall then be forwarded to the secretary of state. Upon the filing of such articles, the secretary of state shall issue a certificate of incorporation and record said articles in a book kept for that purpose. The secretary of state shall then forward said articles to the county recorder of deeds of the county where the principal place of business is to be located and there be recorded in a book kept therefor, and the recorder shall indorse thereon the book and page where the record will be found.

Such articles shall contain:

1. Name of corporation and its principal place of business.

2. The objects for which it is formed.

3. The amount of authorized capital stock, the classes of stock authorized, with the par value and conditions of each class of such shares, and the time when and conditions under which it is to be paid in.

4. The time of commencement and termination of the corporation.

5. The names and addresses of the incorporators and the officers or persons its affairs are to be conducted by, and the times when and manner in which such officers will be elected.

6. Whether private property is to be exempt from corporate debts.

7. The manner in which the articles may be amended. [C51,§675; R60,§1152; C73,§1060; C97,§1610; S13,§1610; C24, 27, 31, 35,§8343.]
Referred to in §8348

8344 Filing or refusal to file. When articles of incorporation are presented to the secretary of state for the purpose of being filed, if he is satisfied that they are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan for doing business, if any be provided for, is honest and lawful, he shall file them; but if he is of the opinion that they are not in proper form to meet the requirements of the law, or that their object is an unlawful one, or against public policy, or that their plan for doing business is dishonest or unlawful, he shall refuse to file them. [S13,§1610; C24, 27, 31, 35,§8344.]
Referred to in §8348

8345 Question of legality submitted. Should a question of doubt arise as to the legality of the articles, he shall submit them to the attorney general whose duty it shall be to forthwith examine and return them with an opinion in writing touching the point or points concerning which inquiry has been made of him. [S13, §1610; C24, 27, 31, 35,§8345.]
Referred to in §8348

8346 Action on opinion. If such opinion is in favor of the legality of the articles, and no other objections are apparent, they shall then, upon payment of the proper fee, be filed and otherwise dealt with as the law provides. If, however, such opinion be against their legality they shall not be filed. [S13,§1610; C24, 27, 31, 35,§8346.]
Referred to in §8348

8347 Submission to executive council. Upon the rejection of any articles of incorporation by the secretary of state, except for the reason that they have been held by the attorney general to be illegal, they shall, if the person or persons presenting them so request, be submitted to the executive council, which shall, as soon as practicable, consider the said articles and if the council determines that the articles are in proper form, of honest purpose, not against public policy, nor otherwise objectionable, it shall so advise the secretary of state in writing, whereupon he shall, upon the payment of the proper fees, file the same and proceed otherwise as the law directs; but if the council sustains the previous action of the secretary of state in rejecting said articles, such decision by the council shall be reported to the secretary of

state in writing, and he shall then return said articles to the person or persons presenting them with such explanation as shall be proper in the case. [S13,§1610; C24, 27, 31, 35,§8347.]

Referred to in §8348

8348 **Interpretative clause.** Nothing in sections 8343 to 8347, inclusive, shall be construed as repealing or modifying any statute now in force in respect to the approval of articles of incorporation relating to insurance companies, building and loan associations or investment companies. [S13,§1610; C24, 27, 31, 35,§8348.]

8349 **Incorporation fee.** Such corporation shall pay to the secretary of state, before a certificate of incorporation is issued, a fee of twenty-five dollars together with a recording fee of ten cents per hundred words, and, for all authorized stock in excess of ten thousand dollars, an additional fee of one dollar per thousand. Should any corporation increase its capital stock, it shall pay a fee to the secretary of state of one dollar for each one thousand dollars of such increase, and a recording fee of ten cents per one hundred words, no recording fee to be less than fifty cents. [C97,§1610; S13, §1610; C24, 27, 31, 35,§8349.]

Foreign corporations, §8432

8350 **Exemption from fee.** Farmers mutual cooperative creamery associations, whose articles of incorporation provide that the business of the association be conducted on a purely mutual and cooperative plan, without capital stock, and whose patrons shall share equally in expense and profits, domestic and domestic local building and loan associations and incorporations organized for the manufacture of sugar from beets grown in the state, shall be exempt from the payment of the incorporation filing fee provided herein in excess of twenty-five dollars. [C97,§1610; S13,§1610; C24, 27, 31, 35,§8350.]

Similar provision, §8369

8351, 8352 Rep. by 43GA, ch 12

8353 **Place of business.** Any corporation organized under the laws of this state shall fix upon and designate in its articles of incorporation its principal place of business which must be in this state, and if outside the limits of a city or town then its post-office address must be given. The place of business so designated shall not be changed except through an amendment to its articles of incorporation.

No change of the principal place of business of any corporation from one county to another county shall be valid until the articles of incorporation and all amendments shall have been recorded in the office of the recorder of deeds of the county to which said corporation's principal place of business is changed, and proof of same duly certified to the secretary of state for filing. [C97,§1612; S13,§1612; C24, 27, 31, 35, §8353.]

S13, §1612, editorially divided

8354 **Custody of office—business maintained.** Its place of business shall be in charge of an agent of the corporation and shall be the place where it shall hold its stockholders meetings, keep a record of its proceedings and its stock and transfer books. [C97,§1612; S13,§1612; C24, 27, 31, 35,§8354.]

8355 **Secretary of state as process agent.** Any corporation organized under the laws of this state that does not maintain an office in the county of its organization, or transact business in this state, shall file with the secretary of state a written instrument duly signed and sealed, authorizing the secretary of state to acknowledge service of notice or process for and in behalf of such corporation in this state, and consenting that service of notice or process may be made upon the secretary of state, and when so made shall be taken and held as valid as if served according to the laws of this state, and waiving all claim or right or error by reason of such acknowledgment of service. [S13,§1612; C24, 27, 31, 35,§8355.]

Similar provisions, §§8421, 8766, 8801, 8952, 9087, 9376

8356 **Acknowledgment of service.** Such notice or process, with a copy thereof, may be mailed to the secretary of state at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereon in behalf of the defendant corporation by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the corporation or person who shall be named or designated by the corporation in such written instrument. [C97,§1612; S13, §1612; C24, 27, 31, 35,§8356.]

Analogous section, §8581.09

8357 **Notice of incorporation.** A notice must be published once each week for four weeks in succession in some newspaper as convenient as practicable to the principal place of business, which must contain:

1. The name of the corporation and its principal place of business.
2. The general nature of the business to be transacted.
3. The amount of capital stock authorized, and the times and conditions on which it is to be paid in.
4. The time of the commencement and termination of the corporation.
5. By what officers or persons its affairs are to be conducted, and the times when and manner in which they will be elected.
6. Whether private property is to be exempt from corporate debts. [C51,§§677, 678; R60, §§1154, 1155; C73,§§1062, 1063; C97,§1613; S13, §1613; C24, 27, 31, 35,§8357.]

Referred to in §8370
Legalizing acts, ch 465
S13, §1613, editorially divided

8358 **Proof of publication — filing.** Proof of such publication, by affidavit of the publisher

of the newspaper in which it is made, shall be filed with the secretary of state, and shall be evidence of the fact. [C97,§1613; S13,§1613; C24, 27, 31, 35,§8358.]

8359 Commencement of business. The corporation may commence business as soon as the certificate is issued by the secretary of state, and its acts shall be valid if the publication in a newspaper is made within three months from the date of such certificate; providing that when the notice is not published within the time herein prescribed, but is subsequently published for the required time, and proof of the publication thereof filed with the secretary of state, the acts of such corporation after such publication shall be valid. [C51,§679; R60,§1156; C73, §1064; C97,§1614; C24, 27, 31, 35,§8359.]

8360 Amendments—fees. Amendments to articles of incorporation making changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. If no increase is made in the amount of capital stock, a certificate fee of one dollar and a recording fee of ten cents per one hundred words must be paid; no recording fee less than fifty cents. Where capital stock is increased the certificate fee shall be omitted but a filing fee of one dollar per thousand dollars of such increase together with a recording fee of ten cents per one hundred words shall be paid. [C51,§680; R60,§1157; C73,§1065; C97,§1615; S13,§1615; C24, 27, 31, 35,§8360.]

S13, §1615, editorially divided

8361 Signing and acknowledging of amendments. Such amendments need only be signed and acknowledged by such officers of the corporation as may be designated by the stockholders to perform such act. [C97,§1615; S13, §1615; C24, 27, 31, 35,§8361.]

8362 Individual property liable. A failure to substantially comply with the foregoing requirements in relation to organization and publicity shall render the individual property of the stockholders liable for the corporate debts; but corporators and stockholders in railway and street railway companies shall be liable only for the amount of stock held by them therein. [C51,§689; R60,§§1166, 1338; C73,§1068; C97, §1616; C24, 27, 31, 35,§8362.]

8363 Dissolution—notice of. A corporation may be dissolved prior to the period fixed in the articles of incorporation, by unanimous consent, or in accordance with the provisions of its articles, and notice thereof must be given in the same manner and for the same time as is required for its organization; provided, however, that the notice of such dissolution shall be deemed sufficient if signed by the officers of such corporation and published as required by law. [C51,§§682, 683; R60,§§1159, 1160; C73,§§1066, 1067; C97,§1617; C24, 27, 31. 35,§8363.]

Referred to in §§8445, 8448

8364 Duration. Corporations for the construction and operation, or the operation alone, of steam railways, interurban railways, and street railways, for the establishment and conduct of savings banks, or for the transaction of the business of life insurance, may be formed to endure fifty years; those for other purposes, not to exceed twenty years. [C51,§681; R60, §1158; C73,§1069; C97,§1618; S13,§1618; C24, 27, 31, 35,§8364.]

S13, §1618, editorially divided
Temporary amendment, 46GA, ch 93

8365 Renewal—conditions. In either case they may be renewed from time to time for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election, or special election called for that purpose, be in favor of such renewal, and if those voting for such renewal will purchase at its real value the stock voted against such renewal. Stockholders voting for renewal shall have three years from the date such action for renewal was taken in which to purchase the stock voted against such renewal, which purchase price shall bear interest at eight percent per annum from the date of such renewal action until paid, and the provisions of this act [45GA, ch 143] shall not apply to any renewal voted before this act becomes operative. [C51,§681; R60,§1158; C73,§1069; C97,§1618; S13,1618; C24, 27, 31, 35,§8365.]

8366 Computation and duration. Such renewals shall date from the expiration of the corporate period which it succeeds and shall be limited in duration to a period not exceeding the time allowed by law to the same class of corporations. [S13,§1618; C24, 27, 31, 35,§8366.]

8367 Execution of renewal — record required. Within ten days after the said action of the stockholders for the renewal of any corporation, a certificate, showing the proceedings resulting in such renewal, sworn to by the president and secretary of the corporation, or by such other officers as may be designated by the stockholders, together with the articles of incorporation, which may be the original articles of incorporation or amended and substituted articles, shall be filed with the secretary of state and be by him recorded in a book kept for that purpose. The secretary of state shall then forward said renewal articles to the recorder of deeds of the county where the principal place of business is located, and the recorder shall record said renewal articles and indorse thereon the book and page where the record will be found. [S13,§1618; C24, 27, 31, 35,§8367.]

8368 Filing with secretary of state—fees—certificate of renewal. Upon filing with the secretary of state the said certificate and articles of incorporation, and upon the payment to the secretary of state of a fee of twenty-five dollars, together with a recording fee of ten cents per one hundred words and an additional fee of one dollar per thousand for all authorized stock in excess of ten thousand dollars, the secretary of

state shall issue a proper certificate for the renewal of the corporation. [S13,§1618; C24, 27, 31, 35,§8368.]

Referred to in §§8369, 8373

8368.1 Erroneous certificate—correction. In all cases wherein the secretary of state, of the state of Iowa, has heretofore issued to a corporation organized or purporting to have been organized under the laws of this state a certificate renewing and extending its corporate existence from an erroneous date and/or for a period of time in excess of that provided by law, the secretary of state shall, upon the surrender of such certificate, issue to such corporation a new certificate, extending and renewing the corporate existence thereof from the correct date and/or for the period of time provided by law. [C31, 35,§8368-d1.]

Pending litigation excepted, 44GA, ch 192

8369 Exemption from fee. Farmers mutual cooperative creamery associations, domestic and domestic local building and loan associations, and corporations organized for the manufacture of sugar from beets grown in the state of Iowa, shall be exempt from the payment of the incorporation fee, provided in section 8368, in excess of twenty-five dollars. [S13,§1618; C24, 27, 31, 35,§8369.]

Similar provision, §8350

8370 Notice of renewal—publication. Within three months after the filing of the certificate and articles of incorporation with the secretary of state, the corporation so renewed shall publish a notice of renewal. Said notice shall be published once each week for four weeks in succession in a newspaper as convenient as practicable to the principal place of business of the corporation, and proof of publication filed in the office of the secretary of state, and shall contain the matters and things required to be published by section 8357, relating to original incorporations. [S13,§1618; C24, 27, 31, 35, §8370.]

8371 Renewal of banks—conditions. The corporate existence of any state or savings bank may be renewed or extended, from time to time, for a period not longer than the time for which such banks may organize, by an affirmative vote of two-thirds of the shareholders thereof, at a stockholders meeting held for that purpose, within three months before or after the time of the expiration of its charter as shown by its certificate of incorporation issued by the secretary of state. [S13,§1618-a; C24, 27, 31, 35,§8371.]

Referred to in §§8451, 9304
S13, §1618-a, editorially divided

8372 Meeting and notice thereof. Such meeting shall be called upon a notice signed by at least two of the officers of the bank and by a majority of its directors, specifying the object of the meeting, and the time and place thereof, published once a week for four consecutive weeks before the time at which the same is to be held, in some newspaper in the county wherein the bank is located. [S13, §1618-a; C24, 27, 31, 35,§8372.]

Referred to in §§8451, 9304

8373 Execution of renewal—record and fees. If at such meeting the required vote is given, a certificate of the proceedings showing compliance with the foregoing provisions and the time to which the corporate period is to be continued, shall be signed and verified by the affidavit of the chairman and secretary of the meeting, certified to by a majority of the board of directors, and together with the articles of incorporation, as they exist at the date of the meeting, shall be submitted to the superintendent of banking for approval, filed, recorded, and fees paid, as provided in section 8368, and shall be by the secretary of state certified to the superintendent of banking. [S13,§1618-a; C24, 27, 31, 35,§8373.]

Referred to in §§8451, 9304
Similar provision, §9140.1

8374 Amendments to articles. When the meeting is held previous to the expiration of the charter of the bank, such amendments may be made to the articles of incorporation, subject to the provisions thereof, as may be deemed necessary and whether held before or after the extension of the corporate period, such changes may be made in the articles as are necessary to show the time to which the corporate period is extended and the names of the officers and directors at the time of the renewal or extension. [S13,§1618-a; C24, 27, 31, 35,§8374.]

Referred to in §§8451, 9304

8375 Certificate of renewal—notice. When the above has been complied with, the superintendent of banking shall issue to such bank a certificate as provided in section 9161, notice of which shall be published as required by the provisions of said section. [S13,§1618-a; C24, 27, 31, 35,§8375.]

Referred to in §§8451, 9304

8375.1 Consolidation of interstate bridge companies. Any corporation heretofore or hereafter organized under the laws of this state for the purpose of constructing and/or operating a bridge, one extremity of which shall rest in an adjacent state, may merge and/or consolidate the stock, property, rights, franchises, privileges, assets and liabilities of such corporation with the stock, property, rights, franchises, privileges, assets and liabilities of a corporation organized for a similar purpose under the laws of such adjacent state, upon such terms not in conflict with law as may be mutually agreed upon, and thereafter such merged and/or consolidated corporations shall be one corporation with such name as may be agreed upon, and shall have all of the property, rights, privileges, assets and franchises, and be subject to all of the liabilities, of the merging or consolidating corporations. [C31, 35,§8375-d1.]

8376 Legislative control. The articles of incorporation, bylaws, rules and regulations of corporations hereafter organized under the provisions of either title XIX, XX, XXI, or XXII or

whose organization may be adopted or amended thereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good. [C73, §1090; C97,§1619; C24, 27, 31, 35,§8376.]

Constitution, Iowa, Art. I, §21; Art. VIII, §12
Constitution, U. S., Art. I, §10

8377 **Fraud—penalty for.** Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, shall be a misdemeanor, and shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud may also recover damages therefor against those guilty of participating in such fraud. [C51,§686; R60,§1163; C73,§1071; C97, §1620; C24, 27, 31, 35,§8377.]

Referred to in §§8378, 8379
Punishment, §12894

8378 **Diversion of funds—unlawful dividends.** The diversion of the funds of the corporation to other objects than those mentioned in its articles and in the notice published, if any person be injured thereby, and the payment of dividends which leaves insufficient funds to meet the liabilities thereof, shall be such fraud as will subject those guilty thereof to the penalties of section 8377; and such dividends, or their equivalent, in the hands of stockholders, shall be subject to such liabilities. If the directors or other officers or agents of any corporation shall declare and pay any dividend when such corporation is known by them to be insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, all directors, officers, or agents knowingly consenting thereto shall be jointly and severally liable for all the debts of such corporation then existing, but dividends made in good faith before knowledge of the occurring of losses shall not come within the provisions of this section. [C51,§§687, 688; R60, §§1164, 1165; C73,§§1072, 1073; C97,§1621; C24, 27, 31, 35,§8378.]

Referred to in §8379

8379 **Forfeiture.** Any intentional violation by the board of directors or the managing officers of the corporation of the provisions of sections 8377 and 8378 shall work a forfeiture of the corporate privileges, to be enforced as provided by law. [C51,§690; R60,§1167; C73, §1074; C97,§1622; C24, 27, 31, 35,§8379.]

8380 Rep. by 43GA, ch 12

8381 **Keeping false accounts.** The intentional keeping of false books or accounts shall be a misdemeanor on the part of any officer, agent, or employee of the corporation guilty thereof, or of anyone whose duty it is to see that such books or accounts are correctly kept. [C51,§691; R60,§1168; C73,§1075; C97,§1623; C24, 27, 31, 35,§8381.]

Punishment, §12894
Similar criminal provision, §13071

8382 **Bylaws posted.** A copy of the bylaws of the corporation, with the names of all of its officers, must be posted in the principal places of business subject to public inspection. [C51,§684; R60,§1161; C73,§1076; C97,§1624; C24, 27, 31, 35,§8382.]

8383 **Statement of stock and indebtedness.** A statement of the amount of capital stock subscribed, the amount of capital actually paid in, and the amount of the indebtedness in a general way, must also be kept posted in like manner, which shall be corrected as often as any material change takes place in relation to any part of the subject matter thereof. [C51,§685; R60,§1162; C73,§1077; C97,§1625; C24, 27, 31, 35,§8383.]

8384 **Stockholders entitled to names of stockholders.** The secretary of each corporation shall, upon a written request, furnish to the stockholders of said corporation a printed or typewritten list, giving the names of the stockholders and their post-office address, and the number of shares owned by each stockholder. Said list shall be prepared and ready for delivery upon said request not later than thirty days prior to the annual meeting of the stockholders and not more than sixty days prior to said annual meeting. Said written request must be made at least forty days prior to said annual meeting. The foregoing provisions shall not apply to building and loan associations, and savings and loan associations. [C24, 27, 31, 35, §8384; 48GA, ch 231,§18.]

8385 **Stock book and transfers.** The books of the corporation must be so kept as to show the original stockholders, their interests, the amount paid on their shares, and all transfers thereof; which books, or a copy thereof, so far as the items mentioned in this and section 8386 are concerned, shall be subject to the inspection of any person desiring the same. The foregoing provisions shall not apply to building and loan associations, and savings and loan associations. [C51,§692; R60,§1169; C73,§1078; C97,§1626; C24, 27, 31, 35,§8385; 48GA, ch 231,§19.]

C97, §1626, editorially divided

8385.1 **Stock certificates—signing.** A corporation organized and existing under the laws, either general or special, of this state, may designate in its articles or bylaws the officer or officers who shall be empowered to sign stock certificates issued by the corporation. If the articles or bylaws provide for the signature of a registrar or the signature or countersignature of a transfer agent on stock certificates issued by it, the corporation may likewise provide in the articles or bylaws that in lieu of the actual signature of the officer or officers authorized to sign stock certificates, the facsimile thereof may be either engraved or printed thereon. [C31, 35, §8385-d1.]

8385.2 Noninvalidating fact. The fact that at the time of the actual issue or delivery of a stock certificate, the officer whose signature either actual or facsimile, appears on such stock certificate, shall prior thereto have ceased to be such officer, shall not invalidate the signature, nor such certificate. [C31, 35,§8385-d2.]

8386 Transfer of shares. The transfer of shares is not valid, except as between the parties thereto, until regularly entered upon the books of the company, showing the name of the person by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not exempt the person making it from any liability of said corporation created prior thereto. [C51,§692; R60,§1169; C73,§1078; C97,§1626; C24, 27, 31, 35,§8386.]

Referred to in §8385

8387 Transfer of shares as collateral. When any shares of stock shall be transferred to any person, firm, or corporation as collateral security, such person, firm, or corporation may notify in writing the secretary of the corporation whose stock is transferred as aforesaid, and from the time of such notice, and until written notice that said stock shall have ceased to be held as collateral security, said stock so transferred and noticed as aforesaid shall be considered in law as transferred on the books of the corporation which issued said stock, without any actual transfer on the books of such corporation of such stock. [C97,§1626; C24, 27, 31, 35,§8387.]

8388 Release of shares held as collateral. In such case, it shall be the duty of the secretary or cashier of the corporation or of the person or firm to which such stock shall have been transferred as collateral security, at once upon its ceasing to be so held, to inform the secretary of the corporation issuing such stock of such fact. [C97,§1626; C24, 27, 31, 35,§8388.]

8389 Record of transfers as collateral. The secretary of the company whose stock is transferred as collateral shall keep a record showing such notice of transfer as collateral, and notice of discharge as collateral, subject to public inspection. [C97,§1626; C24, 27, 31, 35,§8389.]

8390 Liability of collateral holder. No holder of stock as collateral security shall be liable for assessments on the same. [C97,§1626; C24, 27, 31, 35,§8390.]

8391 Right to vote stock—attachment. Every executor, administrator, guardian, or trustee shall represent the stock in his hands at all corporate meetings, and may vote the same as a stockholder.

Every person who shall pledge his stock, in the absence of a written agreement to the contrary, may represent the same at all such meetings and vote accordingly.

The owner of corporate stock levied upon by attachment or other proceeding shall have the right to vote the same at all corporate meetings, until such time as he shall have been divested of his title thereto by execution sale.

Nothing contained in this section shall in any manner conflict with any provision in the articles of incorporation, or the bylaws of the corporation issuing the stock. [S13,§1641-a; C24, 27, 31, 35,§8391.]

Similar provision, §9175

8392 Expiration and closing of business. Corporations whose charters expire by limitation or the voluntary act of the stockholders may nevertheless continue to act for the purpose of winding up their affairs. [C51,§694; R60,§1171; C73,§1080; C97,§1629; C24, 27, 31, 35,§8392.]

8393 Sinking fund and loaning thereof. For the purpose of repairs, rebuilding, enlarging, or to meet contingencies, or for the purpose of creating a sinking fund, the corporation may set apart a sum which it may loan, and take proper securities therefor. [C51,§699; R60,§1176; C73, §1081; C97,§1630; C24, 27, 31, 35,§8393.]

8394 Liability of stockholders. Neither anything in this chapter contained, nor any provisions in the articles of corporation, shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them for the purpose of defrauding creditors; and execution against the company may, to that extent, be levied upon the private property of any such individual. The foregoing provisions shall not apply to building and loan associations, and savings and loan associations. [C51,§695; R60,§1172; C73,§1082; C97,§1631; C24, 27, 31, 35,§8394; 48GA, ch 231,§20.]

C97, §1631, editorially divided

8395 Levy on private property. In none of the cases contemplated in this chapter can the private property of the stockholders be levied upon for the payment of corporate debts while corporate property can be found with which to satisfy the same; but it will be sufficient proof that no property can be found, if an execution has issued on a judgment against the corporation, and a demand has been thereon made of some one of the last acting officers of the body for property on which to levy, and he neglects to point out any such property. [C97,§1631; C24, 27, 31, 35,§8395.]

Referred to in §8397

8396 Suit by creditor—measure of recovery. In suits by creditors to recover unpaid installments upon shares of stock against any person who has in any manner obtained such stock of the corporation, the stockholder shall be liable for the difference between the amount paid by him to the corporation for said stock and the face value thereof. [C97,§1631; C24, 27, 31, 35, §8396.]

8397 Corporate property exhausted. Before any stockholder can be charged with the payment of a judgment rendered for a corporate debt, an action shall be brought against him, in any stage of which he may point out corporate

property subject to levy; and, upon his satisfying the court of the existence of such property, by affidavit or otherwise, the cause may be continued, or execution against him stayed, until the property can be levied upon and sold, and the court may subsequently render judgment for any balance which there may be after disposing of the corporate property; but if a demand of property has been made as contemplated in section 8395, the costs of said action shall, in any event, be paid by the company or the defendant therein, but he shall not be permitted to controvert the validity of the judgment rendered against the corporation, unless it was rendered through fraud and collusion. [C51,§§696, 697; R60,§§1173, 1174; C73,§§1083, 1084; C97,§1632; C24, 27, 31, 35,§8397.]

8398 **Indemnity — contribution.** When the property of a stockholder is taken for a corporate debt, he may maintain an action against the corporation for indemnity, and against any of the other stockholders for contribution. [C51, §698; R60,§1175; C73,§1085; C97,§1633; C24, 27, 31, 35,§8398.]

8399 **Franchise sold on execution.** The franchise of a corporation may be levied upon under execution and sold, but the corporation shall not become thereby dissolved, and no dissolution of the original corporation shall affect the franchise, and the purchaser becomes vested with all the powers of the corporation therefor. Such franchise shall be sold without appraisement. [C51,§700; R60,§1177; C73,§1086; C97, §1634; C24, 27, 31, 35,§8399.]

8400 **Production of books.** In proceedings by or against a corporation or a stockholder to charge his private property, or the dividends received by him, the court may, upon motion of either party, upon cause shown for that purpose, compel the officers or agents of the corporation to produce the books and records of the corporation. [C51,§701; R60,§1178; C73,§1087; C97, §1635; C24, 27, 31, 35,§8400.]

Similar provision, §11316 et seq.

8401 **Estoppel.** No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense. [C51,§704; R60, §1181; C73,§1089; C97,§1636; C24, 27, 31, 35, §8401.]

8402 **Dissolution—receivership.** Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the state of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them. [C97, §1640; C24, 27, 31, 35,§8402.]

8403 **Ownership of alien property.** Corporations organized in any foreign country or corporations organized in this country, the stock of which is owned in whole or in part by nonresident aliens, shall have the same rights, powers, and privileges with regard to the purchase and ownership of real estate in this state as are granted to nonresident aliens in section 10215. [C97,§1641; S13,§1641; C24, 27, 31, 35,§8403.]

8404 **False statements or pretenses.** Every director, officer, or agent of any corporation or joint-stock association, who knowingly concurs in making, publishing, or posting, either generally or privately to the stockholders or other persons, any written report, exhibit, or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or any untrue or willfully or fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures, or prospects, or any other paper or document intended to produce or give, or having a tendency to produce or give, the shares of stock in such corporation a greater value or a less apparent or market value than they really possess, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not to exceed one year, or by imprisonment in the county jail not to exceed six months or a fine not exceeding five hundred dollars. [S13,§1641-g; C24, 27, 31, 35,§8404.]

8405 **Political contributions prohibited.** It shall be unlawful for any corporation doing business within the state, or any officer, agent, or representative thereof acting for such corporation, to give or contribute any money, property, labor, or thing of value, directly or indirectly, to any member of any political committee, political party, or employee or representative thereof, or to any candidate for any public office or candidate for nomination to any public office or to the representative of such candidate, for campaign expenses or for any political purpose whatsoever, or to any person, partnership, or corporation for the purpose of influencing or causing such person, partnership, or corporation to influence any elector of the state to vote for or against any candidate for public office or for nomination for public office or to any public officer for the purpose of influencing his official action, but nothing in this section shall be construed to restrain or abridge the liberty of the press or prohibit the consideration and discussion therein of candidacies, nominations, public officers, or political questions. [S13, §1641-h; C24, 27, 31, 35,§8405.]

Referred to in §8407

8406 **Solicitation from corporations.** It shall be unlawful for any member of any political committee, political party, or employee or representative thereof, or candidate for any office or the representative of such candidate, to

solicit, request, or knowingly receive from any corporation or any officer, agent, or representative thereof, any money, property, or thing of value belonging to such corporation, for campaign expenses or for any political purpose whatsoever. [S13,§1641-i; C24, 27, 31, 35,§8406.]

Referred to in §8407

8407 Violations. Any person convicted of a violation of any of the provisions of sections 8405 and 8406 shall be punished by imprisonment in the county jail not less than six months or more than one year and, in the discretion of the court, by fine not exceeding ten hundred dollars. [S13,§1641-k; C24, 27, 31, 35,§8407.]

CHAPTER 385

CAPITAL STOCK

Referred to in §8944

8408 Indorsement of amount paid.
8409 Effect of violation.
8410 Penalties.
8411 Certain corporations excepted.
8412 Par value required.
8413 Payment in property other than cash.
8414 Executive council to fix amount.
8415 Elements considered in fixing amount.
8416 Certificate of issuance of stock.
8417 Cancellation of stock—reimbursement.
8418 Dissolution—distribution of assets.
8419 Violations.

8408 Indorsement of amount paid. No certificate or shares of stock shall be issued, delivered, or transferred by any corporation, officer or agent thereof, or by the owner of such certificate or shares without having indorsed on the face thereof what amount or portion of the par value has been paid to the corporation issuing the same, and whether such payment has been in money or property. [C97,§1627; S13,§1627; C24, 27, 31, 35,§8408.]

Referred to in §§8409, 8410, 8411
40ExGA, HF 202, §1, editorially divided

8409 Effect of violation. Any certificate of stock issued, delivered, or transferred in violation of section 8408 when the corporation has not received payment therefor at par in money or property at a valuation approved by the executive council, shall be void, and the issuance, delivery, or transfer of each certificate shall be considered a separate transaction. [C24, 27, 31, 35,§8409.]

Referred to in §§8410, 8411

8410 Penalties. Any person violating the provisions of sections 8408 and 8409, or knowingly making a false statement on such certificate, shall be fined not less than one hundred dollars nor more than five hundred dollars, and shall stand committed to the county jail until such fine and costs are paid. [C97,§1627; S13, §1627; C24, 27, 31, 35,§8410.]

Referred to in §8411
Duration of imprisonment, §13964

8411 Certain corporations excepted. Sections 8408 to 8410, inclusive, shall not apply to railway or quasi-public corporations organized before October 1, 1897. [S13,§1627; C24, 27, 31, 35,§8411.]

8412 Par value required. No corporation organized under the laws of this state, except building and loan associations, shall issue any certificate of a share of capital stock, or any substitute therefor, until the corporation has received the par value thereof. [S13,§1641-b; C24, 27, 31, 35,§8412.]

Referred to in §§7937, 8417, 8418, 8419, 8433

8413 Payment in property other than cash. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. [S13, §1641-b; C24, 27, 31, 35,§8413.]

Referred to in §§7937, 8417, 8418, 8419, 8419.04, 8433, 8512.25

8414 Executive council to fix amount. The executive council shall make investigation, under such rules as it may prescribe, and ascertain the real value of the property or other thing which the corporation is to receive for the stock. It shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed. [S13,§1641-b; C24, 27, 31, 35,§8414.]

Referred to in §§7937, 8417, 8418, 8419, 8419.04, 8433, 8512.25

8415 Elements considered in fixing amount. For the purpose of encouraging the construction of new steam or electric railways, and manufacturing industries within this state, the labor performed in effecting the organization and promotion of such corporation, and the reasonable discount allowed or reasonable commission paid in negotiating and effecting the sale of bonds for the construction and equipment of such railroad or manufacturing plant, shall be taken into consideration by said council as elements of value in fixing the amount of capital stock that may be issued. [S13,§1641-b; C24, 27, 31, 35, §8415.]

Referred to in §§7937, 8417, 8418, 8419, 8419.04, 8433

8416 Certificate of issuance of stock. It shall be the duty of every corporation, except corporations qualified under chapter 386 or chapter 417, to file a certificate under oath with the secretary of state, within ten days after the

issuance of any capital stock, stating the date of issue, the amount issued, the sum received therefor, if payment be made in money, or the property or thing taken, if such be the method of payment. [S13,§1641-c; C24, 27, 31, 35,§8416.]

Referred to in §§8417, 8418, 8419, 8433

8417 Cancellation of stock—reimbursement. The capital stock of any corporation issued in violation of the terms and provisions of sections 8412 to 8416, inclusive, shall be void, and in a suit brought by the attorney general on behalf of the state in any court having jurisdiction, a decree of cancellation shall be entered; and if the corporation has received any money or thing of value for the said stock, such money or thing of value shall be returned to the individual, firm, company, or corporation from whom it was received, and if represented by labor or other service of intangible nature, the value thereof shall constitute a claim against the corporation issuing stock in exchange therefor. [S13,§1641-d; C24, 27, 31, 35,§8417.]

8418 Dissolution—distribution of assets. Any corporation violating the provisions of sections 8412 to 8416, inclusive, shall, upon the application of the attorney general, in behalf of the state, made to any court of competent jurisdiction, be dissolved, its affairs wound up, and its assets distributed among the stockholders other than those who have received the stock so unlawfully issued. [S13,§1641-e; C24, 27, 31, 35,§8418.]

8419 Violations. Any officer, agent or representative of a corporation who violates any of the provisions of sections 8412 to 8416, inclusive, shall, upon conviction, be fined not less than two hundred dollars nor more than ten hundred dollars, and be imprisoned in the county jail for not less than thirty days nor more than six months. [S13,§1641-f; C24, 27, 31, 35,§8419.]

CHAPTER 385.1

CORPORATION STOCK WITHOUT PAR VALUE

8419.01 Authorization.
8419.02 Par value—method of stating.
8419.03 Amount of stock.
8419.04 Sale value.
8419.05 Liability of holder.
8419.06 Status of stock.
8419.07 Certificates of stock.
8419.08 Number of shares.
8419.09 Change in stock.
8419.10 Convertibility.
8419.11 Incorporation fee—computation.
8419.12 Applicability of statutes.

8419.01 Authorization. Any corporation, heretofore or hereafter organized for pecuniary profit under the laws of this state, except banks, savings banks, trust companies, building and loan associations and insurance companies, may create one or more classes of stock without any nominal or par value, with such rights, preferences, privileges, voting powers, limitations, restrictions and qualifications thereon not inconsistent with law as shall be expressed in its articles of incorporation, or any amendment thereto. Stock without par value which is preferred as to dividends, or as to its distributive share of the assets of the corporation upon dissolution, may be made subject to redemption at such times and prices as may be determined in such articles of incorporation, or any amendment thereto. In the case of stock without par value which is preferred as to its distributive share of the assets of the corporation upon dissolution, the amount of such preference shall be stated in the articles of incorporation, or any amendment thereto. [C31, 35,§8419-c1.]

8419.02 Par value—method of stating. In any case in which the par value of the shares of stock of a corporation shall be required to be stated in the articles of incorporation, or any amendment thereto, or in any other place, it shall be stated in respect to shares without par value that such shares are without par value, and when the amount of such stock authorized, issued or outstanding shall be required to be stated, the number of shares thereof authorized, issued or outstanding, as the case may be, shall be stated, and it shall also be stated that such shares are without par value. [C31, 35,§8419-c2.]

8419.03 Amount of stock. For the purpose of any rule of law or of any statutory provision relating to the amount of capital stock issued and represented by shares of stock without par value except as otherwise provided in this chapter such amounts shall be taken to be the amount of money or the actual value of the consideration, as fixed by the directors or otherwise, in accordance with law, as the case may be, for which such shares of stock shall have been issued. In any such case in which stock having a par value shall have been issued with stock without par value for a specified combined consideration, in determining the amount of the capital stock issued and represented by shares of stock without par value the then book value of such stock having a par value shall first be deducted from the amount of the money or actual value of the consideration determined as aforesaid, and the excess thereof, if any, shall be taken to be the amount of capital stock represented by the shares of stock without par value so issued. [C31, 35,§8419-c3.]

8419.04 Sale value. Subject to any limitations and restrictions set forth in the articles of incorporation, or amendment thereto, any such corporation may issue its authorized capital stock without par value for such consideration as may be prescribed in the articles of incorporation, or amendment thereto, or, if not prescribed, then for such consideration as may be fixed by resolution passed by the stockholders of such corporation at any annual meeting thereof, or at any special meeting thereof duly called for that purpose, or by the board of directors acting under authority of such stockholders given in

like manner. In the absence of fraud in the transaction, the judgment of the board of directors in fixing and determining such sale value as* shall be conclusive as to the creditors and stockholders. Nothing in this chapter shall be so construed as to repeal the law as it now appears in sections 8413, 8414, and 8415. [C31, 35,§8419-c4.]

Referred to in §8419.05
* According to enrolled act

8419.05 Liability of holder. Any and all shares without par value issued for the consideration as prescribed or fixed in section 8419.04 shall be deemed fully paid and nonassessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereto. [C31, 35,§8419-c5.]

8419.06 Status of stock. Except as to any preferences, rights, limitations, privileges and restrictions, lawfully granted or imposed with respect to any stock or class thereof, shares of stock without nominal or par value shall be deemed to be an aliquot part of the aggregate capital of the corporation issuing the same and equal to every other share of stock of the same class. [C31, 35,§8419-c6.]

8419.07 Certificates of stock. Each stock certificate issued for shares without nominal or par value shall have plainly written or printed upon its face the number of shares which it represents, and the number of such shares the corporation is authorized to issue, and no such certificate shall state any nominal or par value of such shares or express any rate of dividend to which it shall be entitled in terms of percentage of any par or other value. [C31, 35, §8419-c7.]

8419.08 Number of shares. The number of authorized shares of stock without par value may be increased or reduced in the manner and subject to the conditions provided by law for the increase or reduction of the capital stock of a similar corporation having shares with par value. All other statutory provisions relating to stock having a par value shall also apply to stock without par value, so far as the same may be legally, necessarily or practically applicable to, and not inconsistent with, the provisions of this chapter. [C31, 35,§8419-c8.]

8419.09 Change in stock. Any such corporation may, by appropriate amendments to its articles of incorporation, adopted by a two-third affirmative vote of each class of stock then issued and outstanding and affected by such amendment, change its stock (common or preferred) having a par value to an equal, greater or less number of shares of stock having no par value, and, in connection therewith, may fix the amount of capital represented by such shares of stock without par value. [C31, 35,§8419-c9.]

8419.10 Convertibility. The articles of incorporation, or any amendment thereto, of any such corporation may provide that shares of stock of any class shall be convertible into shares of stock of any other class upon such terms and conditions as may be therein stated. [C31, 35,§8419-c10.]

8419.11 Incorporation fee — computation. For the purpose of computing the statutory fee for incorporating or for any other statutory provision based on the par value of shares of stock, but for no other purpose, each share of stock without par value shall be considered equivalent to a share having a nominal or par value of one hundred dollars. [C31, 35,§8419-c11.]

8419.12 Applicability of statutes. Except as otherwise provided by this chapter, such corporations issuing shares without par value, under the provisions hereof, shall be and remain subject to the laws of this state, now or hereafter in force, relating to the formation, regulation, consolidation, or merger, rights, powers and privileges of corporations organized for pecuniary profit, and all other laws applicable thereto.

All acts or parts of acts providing for the incorporation, organization, administration and management of the affairs of corporations organized for pecuniary profit and having shares of stock with a par value are hereby made applicable to corporations having shares of stock without par value, except where the same are inconsistent with the provisions of this chapter. [C31, 35,§8419-c12.]

CHAPTER 386

PERMITS TO FOREIGN CORPORATIONS

Referred to in §§6943.102, 6943.122, 8416, 8442

8420 Application for permit.
8421 Details of application—secretary of state as process agent.
8422 Secretary of state to determine values.
8423 Fees.
8424 Increase of capital—blanks.
8425 Exemption.
8426 Issuance of permit—effect.
8427 Denial of right to sue.
8428 Alphabetical records required.
8429 Powers denied.
8430 Violations by corporation.
8431 Violations by officers.
8432 Status of corporation and officers.

8420 Application for permit. Any corporation for pecuniary profit organized under the laws of another state, or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa since September 1, 1886, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with

the secretary of state a certified copy of its articles of incorporation, duly attested by the secretary of state or other state officer in whose office the original articles were filed, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter. [C97,§1637; S13,§1637; C24, 27, 31, 35, §8420.]

Referred to in §8433
40ExGA, ch 6, §6, editorially divided

8421 Details of application—secretary of state as process agent. Said application shall also contain a statement subscribed and sworn to by at least two of the principal officers of the corporation, setting forth the following facts, to wit:

1. The total authorized capital of the corporation.
2. The total paid up capital of the corporation.
3. The total value of all assets of the corporation, including money and property other than money represented by capital, surplus, undivided profits, bonds, promissory notes, certificates of indebtedness or other designation, whether carried as money on hand or in bank, real estate or personal property of any description.
4. The total value of money and all other property the corporation has in use or held as investment in the state, at the time the statement is made (if any).
5. The total value of money and all other property the corporation proposes or expects to make use of in the state, during the ensuing year.
6. Certified copy of the resolution of the board of directors of said corporation giving name and address in Iowa of a resident agent on whom the service of original notice of civil suit in the courts of this state may be served. Failing which, or in the event such agent may not be found within the state, service of such process may then be made upon said corporation through the secretary of state by sending the original and two copies thereof to him, and on the original of which he shall accept service on behalf of said corporation, retain one copy for his files and send the other by registered mail to the corporation at the address of its home office as shown by the records in his office, which service shall have the same force and effect as if lawfully made upon said corporation within the county where such civil suit could be maintained against it under the laws of this state. [S13,§1637; C24, 27, 31, 35,§8421.]

Referred to in §8433
Similar provisions, §§8355, 8766, 8801, 8952, 9087, 9376

8422 Secretary of state to determine values. The secretary of state can make such independent and further investigation as to the property within this state owned by any such corporation as he may desire, and upon the true facts determine the value thereof, and fix the fee to be paid by such company. [S13,§1637; C24, 27, 31, 35, §8422.]

Referred to in §8433

8423 Fees. Before a permit is issued authorizing such corporation to transact business in the state, said corporation shall file with the secretary of state a certified copy of the articles of incorporation, with resolution and statement as previously set forth, and pay a filing fee of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state, and of one dollar for each one thousand dollars of such money or property within this state in excess of ten thousand dollars. [C97,§1637; S13,§1637; C24, 27, 31, 35,§8423.]

Referred to in §§8425, 8433

8424 Increase of capital—blanks. If from time to time the amount of money or other property in use in the state by said foreign corporation is increased, said corporation shall at the time of said increase, or at the time of making annual report to the secretary of state, in July of each year, file with the secretary of state a sworn statement showing the amount of such increase, and shall pay a filing fee thereon of one dollar for each one thousand dollars or fraction thereof of such increase. The secretary of state shall upon request furnish a blank upon which to make report of such increase of capital in use within the state. [C97,§1637; S13,§1637; C24, 27, 31, 35,§8424.]

Referred to in §§8425, 8433

8425 Exemption. Any corporation transacting business in this state prior to September 1, 1886, shall be exempt from the payment of the fees required under the provisions of sections 8423 and 8424. [C97,§1637; S13,§1637; C24, 27, 31, 35,§8425.]

Referred to in §8433

8426 Issuance of permit—effect. The secretary of state shall thereupon issue to such corporation, a permit, in such form as he may prescribe, for the transaction of the business of such corporation, and upon the receipt of such permit said corporation shall be permitted and authorized to conduct and carry on its business in this state. [C97,§1637; S13,§1637; C24, 27, 31, 35,§8426.]

Referred to in §8433

8427 Denial of right to sue. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such permit. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee of such foreign corporation or under either of them. [C24, 27, 31, 35,§8427.]

Referred to in §8433

8428 Alphabetical records required. The secretary of state shall number consecutively all such certified copies heretofore and hereafter filed in his office and shall maintain a card

index thereof alphabetically arranged and shall preserve the same and the originals of said certified copies as permanent records of his office. [C24, 27, 31, 35,§8428.]

Referred to in §8433

8429 Powers denied. No foreign corporation which has not in good faith complied with the provisions of this chapter and taken out a permit shall possess the right to exercise the power of eminent domain, or exercise any of the rights and privileges conferred upon corporations, until it has so complied herewith and taken out such permit. [C97,§1638; C24, 27, 31, 35,§8429.]

8430 Violations by corporation. Any foreign corporation that shall carry on its business in violation of the provisions of this chapter in the state of Iowa, by its officers, agents, or otherwise, without having complied with the preceding sections of this chapter and taken out and having a valid permit, shall forfeit and pay to the state, for each and every day in which such business is transacted and carried on, the sum of one hundred dollars, to be recovered by suit in any court having jurisdiction. [C97, §1639; C24, 27, 31, 35,§8430.]

Referred to in §8437
C97, §1639, editorially divided

8431 Violations by officers. Any agent, officer, or employee who shall knowingly act or transact such business for such corporation, when it has no valid permit as provided herein, shall be guilty of a misdemeanor, and for such offense shall be fined not to exceed one hundred dollars, or be imprisoned in the county jail not to exceed thirty days, or be punished by both such fine and imprisonment, and pay all costs of prosecution. [C97,§1639; C24, 27, 31, 35, §8431.]

Referred to in §8437

8432 Status of corporation and officers. Nothing contained in this chapter shall relieve any person, company, corporation, association, or partnership from the performance of any duty or obligation now enjoined upon or required of it, or from the payment of any penalty or liability created by the statutes heretofore in force, and all foreign corporations, and the officers and agents thereof, doing business in this state shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. [C97, §1639; C24, 27, 31, 35,§8432.]

Referred to in §8437

CHAPTER 387

FOREIGN PUBLIC UTILITY CORPORATIONS

8433 Capital stock and permit.
8434 Holding companies.
8435 Annual report—fee.
8436 Sale of capital stock.
8437 Violations—stock void.
8438 Dissolution—receiver.

8433 Capital stock and permit. Sections 8412 to 8416, inclusive, and 8420 to 8428, inclusive, are hereby made applicable to any foreign corporation which directly or indirectly owns, uses, operates, controls, or is concerned in the operation of any public gasworks, electric light plant, heating plant, waterworks, interurban or street railway located within the state, or the carrying on of any gas, electric light, electric power, heating business, waterworks, interurban or street railway business within the state, or that owns or controls, directly or indirectly, any of the capital stock of any corporation which owns, uses, operates or is concerned in the operation of any public gasworks, electric light plant, electric power plant, heating plant, waterworks, interurban or street railway located within the state, or any foreign corporation that exercises any control in any way or in any manner over any of said works, plants, interurban or street railways or the business carried on by said works, plants, interurban or street railways by or through the ownership of the capital stock of any corporation or corporations or in any other manner whatsoever, and the ownership, operation, or control of any such works, plants, interurban or street railways or the business carried on by any of such works or plants or the ownership or control of the capital stock in any corporation owning or operating any of such works, plants, interurban or street railways by any foreign corporation in violation of the provisions of this chapter is hereby declared to be unlawful. [S13, §1641-l; C24, 27, 31, 35,§8433.]

8434 Holding companies. The provisions of this chapter are hereby made applicable to all corporations, including so-called "holding companies" which by or through the ownership of the capital stock in any other corporation or corporations or a series of corporations owning or controlling the capital stock of each other can or may exercise control over the capital stock of any corporation which owns, uses, operates, or is concerned in the operation of any public gasworks, electric light plant, electric power plant, heating plant, waterworks, interurban or street railway located in the state, or the business carried on by such works or plants. [S13,§1641-m; C24, 27, 31, 35,§8434.]

8435 Annual report—fee. All corporations subject to the provisions of this chapter are hereby required to pay the annual fee and to make the annual report in the form and manner and at the time as specified in chapter 388. [S13,§1641-n; C24, 27, 31, 35,§8435.]

8436 Sale of capital stock. The provisions of this chapter are hereby made applicable to the sale of its own capital stock by any corporation subject to the provisions of this chapter,

whether said capital stock has been heretofore issued by said corporation or not, including the sale of so-called "treasury stock" or stock of the corporation in the hands of a trustee or where the corporation participates in any way or manner in the benefits of said sales, and also to the sale of any of the obligations of any corporation subject to the provisions of this chapter, the payment of which is secured by the deposit or pledge of any of the capital stock of said corporation. [S13,§1641-o; C24, 27, 31, 35,§8436.]

8437 **Violations — stock void.** Shares of capital stock of any corporation owned or controlled in violation of the provisions of this chapter shall be void and the holder thereof shall not be entitled to exercise the powers of a shareholder of said corporation or permitted to participate in or be entitled to any of the benefits accruing to shareholders of said corporation, and sections 8430 to 8432, inclusive, are hereby made applicable to violations of the provisions of this chapter; and courts and juries shall construe this chapter so as to prevent evasion and to accomplish the intents and purposes thereof. [S13,§1641-p; C24, 27, 31, 35, §8437.]

8438 **Dissolution—receiver.** Courts of equity shall have full power to dissolve, close up, or dispose of any business or property owned, operated, or controlled in violation of the provisions of this chapter; to dissolve any corporation owning or controlling the capital stock of any other corporation in violation of the provisions of this chapter and to close up or dispose of the business or property of said corporation; and if the court finds that, in order to carry out the purposes of this chapter, it is necessary so to do, it may dissolve the corporation issuing the stock which is owned in violation of the provisions of this chapter, close up the business of said corporation and dispose of its property, and the court may also appoint a receiver who shall be a resident of Iowa for any business or for any corporation which has violated the provisions thereof or of the corporation issuing the stock which is held in violation thereof. Any action to enforce the provisions of this chapter may be instituted by the attorney general in the name of the state of Iowa or by a citizen in the name of the state of Iowa at his own proper cost and expense, reserving, however, to the stockholders owning capital stock not held in violation of this chapter all rights possessed by them. [S13,§1641-q; C24, 27, 31, 35,§8438.]

CHAPTER 388

ANNUAL REPORTS OF CORPORATIONS

Referred to in §8435

8439 Time of report—requirements.
8440 Signature and oath—permit.
8441 Exemption.
8442 Annual fee.
8443 Schedule of penalties.
8444 Collection.
8445 Dissolution—effect.
8446 Forfeiture of right to do business.
8447 Notice of delinquency—recommendation of attorney general.
8448 Notice of recommendations.
8449 Service of notice.
8450 Forfeiture of right to do business.
8451 Compromise.
8452 Effect of forfeiture.
8453 Corporate rights canceled.
8454 Lien.
8455 Annual notice of requirements.
8456 Service of notice.
8458 Corporations exempted.

8439 **Time of report — requirements.** Any corporation, organized under the laws of this state or under the laws of any other state, territory, or any foreign country, which has complied with the laws of this state relating to the organization of corporations and secured a certificate of incorporation or permit to transact business in this state, and any corporation that may hereafter organize and become incorporated under the laws of this state, and shall secure a certificate of incorporation or permit to transact business in this state, and any foreign corporation that may hereafter comply with the laws of this state relating to foreign corporations and secure a permit to transact business within this state, shall, between the first day of July and the first day of August of each year, make an annual report to the secretary of state, said report to be in such form as he may prescribe, upon a blank to be prepared by him for that purpose, and such report shall contain the following information:

1. Name and post-office address of the corporation.
2. The amount of capital stock authorized.
3. The amount of capital stock actually issued and outstanding.
4. Par value of such stock, designating whether preferred or common stock, and the amount of each kind.
5. The names and post-office addresses of its officers and directors and whether any change of place of business has been made during the year previous to making said report. [S13, §1614-c; C24, 27, 31, 35,§8439.]

Referred to in §§8440, 8443

8440 **Signature and oath—permit.** The report required by section 8439 shall be signed and sworn to by an officer of the corporation and when filed with the secretary of state shall be accompanied by the fee required in section 8442, and also by an application for a permit to be issued to said corporation under the provisions of this chapter; said permit to be in such form as the secretary of state may prescribe and which shall be in force and effect for one year from and after the first day of July of the

year in which it is issued, except that where the term of a corporate existence shall expire in less than a year from the first day of July aforesaid, then said permit shall be issued for such unexpired term only. [S13,§1614-d; C24, 27, 31, 35,§8440.]

S13, §1614-d, editorially divided

8441 Exemption. Any corporation organized under the laws of this state, and any foreign corporation filing a certified copy of its articles of incorporation after the first day of April of any year, shall be exempt from the provisions of this chapter, for the period ending one year from the first day of July following, after which it shall be subject to all the provisions of this chapter. [S13,§1614-d; C24, 27, 31, 35,§8441.]

8442 Annual fee. Every corporation whose corporate period has not expired, which has heretofore obtained, or may hereafter obtain, a certificate of incorporation or permit under the provisions of chapters 384 or 386, to transact business in this state as a corporation, whether the same be a domestic or a foreign corporation, shall pay to the secretary of state an annual fee in the sum of one dollar. [S13,§1614-e; C24, 27, 31, 35,§8442.]

Referred to in §8440

8443 Schedule of penalties. Any corporation organized under the laws of this state, and any foreign corporation authorized to do business in this state, which shall fail to make the report and pay the annual fee provided for in this chapter, and within the time required in section 8439, shall, in addition to the annual fee of one dollar required, incur the following penalties beginning with the month of September and dating from the first day thereof, to wit: For the month of September the sum of one dollar, for the month of October the sum of two dollars, for the month of November the sum of three dollars, for the month of December the sum of four dollars, and for each month thereafter the sum of five dollars. [S13,§1614-f; C24, 27, 31, 35,§8443.]

Referred to in §8447
S13, §1614-f, editorially divided

8444 Collection. If on the first day of January following, such corporation shall not have filed the annual report and paid the annual fee, together with all monthly penalties due at the time of filing said report and paying said fee, the secretary of state shall furnish to the attorney general a list of delinquent domestic corporations and he may direct the county attorney of the county in which the corporation has its principal place of business to bring suit for the collection of the fee and penalties then due, or may bring such action himself. [S13, §1614-f; C24, 27, 31, 35,§8444.]

8445 Dissolution—effect. Any domestic corporation may, prior to the first day of February of any subsequent year, escape the payment of fee and penalty by dissolving the corporation in the manner provided by section 8363 and filing with the secretary of state a proof of publication of notice of dissolution. [S13,§1614-f; C24, 27, 31, 35,§8445.]

8446 Forfeiture of right to do business. Any foreign corporation that shall fail to make the annual report and pay the annual fee and penalties that may be due shall thereby forfeit its right to do business within this state. [S13, §1614-f; C24, 27, 31, 35,§8446.]

8447 Notice of delinquency—recommendation of attorney general. During the month of August of each year the secretary of state shall prepare a list of all delinquent corporations and file the same in his office, and on or before the first day of September he shall send by registered mail to each delinquent a notice of such delinquency and of the penalties provided in section 8443 and if the annual report required is not filed and the annual fee paid, together with penalties due, on or before the last day of January, on the first day of February following, notice of such delinquency will be filed with the attorney general, who may cause action to be brought for the collection of the fee and penalties due the state; or, at his discretion, the attorney general may recommend that the secretary of state cancel the name of any delinquent corporation from the list of live corporations in his office, and enter such cancellation on the proper records, and when so canceled by the secretary of state the corporate rights of any such corporation shall be forfeited and its corporate period terminated on the date such cancellation shall have been entered on the records of his office. [S13,§1614-g; C24, 27, 31, 35,§8447.]

Referred to in §§8448, 8453
38GA, ch 265, §2, editorially divided

8448 Notice of recommendations. The secretary of state shall forward to such corporation, a written notice of the recommendations of the attorney general, such notice to state that unless said corporation shall within sixty days of the date of such notice fully comply with the provisions of section 8447 by filing in the office of the secretary of state any report that may be due and pay all fees and penalties that have accrued, or, in lieu thereof file a proof of publication of notice of dissolution as required by section 8363, a declaration of forfeiture and cancellation will be entered on the records of his office. [C24, 27, 31, 35,§8448.]

Referred to in §8449

8449 Service of notice. The notice herein provided for, when inclosed in a sealed envelope with legal postage affixed thereon, and addressed to the corporation, shall constitute a legal notice for the purpose of section 8448. [C24, 27, 31, 35,§8449.]

8450 Forfeiture of right to do business. After such declaration and forfeiture shall have been entered by the secretary of state on the records of his office such corporation shall not be entitled to exercise the rights of a corporate body, except, it may be allowed a reasonable time to close up its business and wind up its

affairs, but no new business shall be transacted. [C24, 27, 31, 35,§8450.]

8451 **Compromise.** Any corporation whose corporate rights shall have been canceled and forfeited in the manner provided herein, or any stockholders or creditor of such corporation may, however, make an application to the secretary of state for a compromise of the claim of the state for the fee and penalties that may have accrued under the provisions of this chapter, and upon payment to the secretary of state the fee or fees that may have accrued, and such amount in addition thereto as penalties as may be fixed by the secretary of state, and also, upon filing such annual reports as may be delinquent, the secretary of state shall reinstate said corporation and the decree of cancellation and forfeiture previously entered shall be annulled and the corporation shall be entitled to continue to act as a corporation for the unexpired portion of its corporate period, as fixed by its articles of incorporation and the limitations prescribed by law, with the right of renewal under sections 8371 to 8375, inclusive. [C24, 27, 31, 35,§8451.]

8452 **Effect of forfeiture.** No corporation shall be permitted to waive any duty or obligation required of corporations or the payment of any just claim or claims by reason of such cancellation, forfeiture, and reinstatement as herein provided. [C24, 27, 31, 35,§8452.]

8453 **Corporate rights canceled.** On the first day of February following the date of the notice provided for in section 8447, all foreign corporations that have not complied with the provisions of this chapter shall forfeit the right to transact business in this state and a declaration of forfeiture and cancellation shall be entered upon the margin of the record of the certified copy of the articles of incorporation of such company in the office of the secretary of state or in such other record as the secretary of state may provide. [S13,§1614-h; C24, 27, 31, 35,§8453.]

8454 **Lien.** The fees and penalty provided for in this chapter shall be a prior lien on any property of the corporation against all persons, whether said property is in the possession of said corporation or otherwise. [C24, 27, 31, 35, §8454.]

8455 **Annual notice of requirements.** It shall be the duty of the secretary of state between the first day of May and the first day of July of each year to notify all corporations whose corporate period has not expired, or that have not dissolved according to law, that are subject to the provisions of this chapter, of the requirements herein made, inclosing therewith a blank form of report and application as provided. [S13,§1614-k; C24, 27, 31, 35,§8455.]

S13, §1614-k, editorially divided

8456 **Service of notice.** The mailing of said notice at Des Moines, Iowa, addressed to the corporation at its post-office address as shown by the records of his office shall be deemed a full, complete, and legal notice for the purpose of this chapter. [S13,§1614-k; C24, 27, 31, 35, §8456.]

8457 Rep. by 44GA, ch 195

8458 **Corporations exempted.** Nothing in this chapter shall be construed as imposing an annual fee or requiring a report from any corporation organized for religious, educational, scientific, or charitable purposes or other corporations not organized for pecuniary profit, or from any corporation engaged in the banking or loan and trust business, nor from insurance companies or associations who have paid or have been exempted from the taxes provided in sections 7021 to 7025, inclusive, and received a certificate of authority from the commissioner of insurance. [S13,§1614-i; SS15,§1920-u4; C24, 27, 31, 35,§8458.]

CHAPTER 389

COOPERATIVE ASSOCIATIONS

Applicable only to associations originally chartered before July 4, 1935. See ch 390.1
Referred to in §§8510, 8512.60, 8515, 8581.33, 10413.1
Permissible reorganization under new law, §8512.43

8459 Plan authorized.
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8459 Plan authorized. Any number of persons, not less than five, may associate themselves as a cooperative association, society, company or exchange, for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the cooperative plan. For the purposes of this chapter, the words "association", "company", "corporation", "exchange", "society", or "union", shall be construed to mean the same. [SS15,§1641-r1; C24, 27, 31, 35,§8459.]

Referred to in §8461

8460 Articles of incorporation. They shall sign and acknowledge written articles which shall contain the name of said association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association, and shall designate the city, town, or village where its principal place of business shall be located. Such articles shall also state the amount of capital stock, the number of shares, and the par value of each. [SS15,§1641-r2; C24, 27, 31, 35,§8460.]

Referred to in §8461

8461 Filing—certificate of incorporation. The original articles of incorporation of associations organized under this chapter shall be filed with the secretary of state, and be by him recorded in a book kept for that purpose; and if such articles comply with the provisions of sections 8459 and 8460, he shall issue a certificate of incorporation to the association. The secretary of state shall then forward said articles of incorporation to the recorder of deeds of the county where the principal place of business is to be located, and the same shall be there recorded by such recorder who shall indorse thereon the book and page where the record will be found and the date of the record. No publication of notice of the incorporation of such an association shall be required. [SS15,§1641-r3; C24, 27, 31, 35,§8461.]

8462 Fee. For filing the articles of incorporation of associations organized under this chapter, there shall be paid to the secretary of state ten dollars, and for the filing of an amendment to such articles, five dollars; provided that when the capital stock of such corporation shall be less than five hundred dollars, such fee for filing either the articles of incorporation or amendments thereto shall be one dollar. In all cases there shall be paid a recording fee of ten cents per hundred words, no fee to be less than fifty cents. For recording copy of such articles, the recorder of deeds shall receive the usual fee for recording. [SS15,§1641-r4; C24, 27, 31, 35, §8462.]

Recorder's fee, §5177

8463 Board of directors. Every such association shall be managed by a board of not less than five directors, who shall be elected by and from the stockholders at such time and for such term of office as the bylaws may prescribe, and shall hold office for the time for which elected and until their successors are elected and qualify. [SS15,§1641-r5; C24, 27, 31, 35,§8463.]

SS15, §1641-r5, editorially divided

8464 Removal. A majority of the stockholders shall have the power at any regular or special stockholders meeting, legally called, to remove any director or officer for cause, and fill the vacancy, and thereupon the director or officer so removed, shall cease to be a director or officer of said corporation. [SS15,§1641-r5; C24, 27, 31, 35,§8464.]

8465 Officers. The officers of every such association shall be a president, one or more vice presidents, a secretary, and a treasurer, who shall be elected annually by the directors, and each of said officers must be a director of the association. The offices of secretary and treasurer may be combined, and when so combined the person filling the office shall be secretary-treasurer. [SS15,§1641-r5; C24, 27, 31, 35, §8465.]

8466 Amending articles. The association may amend its articles of incorporation by a majority vote of its stockholders at any regular stockholders meeting, or at any special stockholders meeting called for that purpose, on ten days notice to all stockholders. Said power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares; provided the amount of the capital stock shall not be diminished below the amount of paid-up capital at the time the amendment is adopted. [SS15,§1641-r6; C24, 27, 31, 35,§8466.]

SS15, §1641-r6, editorially divided

8467 Record of amendments. Within thirty days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the secretary of state and of the recorder of deeds of the county where its principal place of business is located. [SS15, §1641-r6; C24, 27, 31, 35,§8467.]

8468 Powers. An association created under this chapter shall have power to conduct any agricultural, dairy, mercantile, mining, manufacturing, or mechanical business, on the cooperative plan, and may buy, sell, and deal in the products of any other cooperative company heretofore or hereafter organized under the provisions hereof. [SS15,§1641-r7; C24, 27, 31, 35, §8468.]

8469 Ownership of shares and voting power limited. No stockholder in any such association shall own shares of a greater aggregate par value than five thousand dollars, except as hereinafter provided, nor shall he be entitled to more than one vote. [SS15,§1641-r8; C24, 27, 31, 35, §8469.]

8470 Stockholding. At any regular meeting, or any regularly called special meeting, at which at least a majority of all its stockholders shall be present, or represented, an association organized under this chapter, may by a major-

ity vote of the stockholders present or represented, subscribe for shares and invest its reserve fund, not to exceed twenty-five percent of its capital, in the capital stock of any other cooperative association. [SS15,§1641-r9; C24, 27, 31, 35,§8470.]

8471 Issue of shares as payment. Whenever an association created under this chapter shall purchase the business of another association, person, or persons, it may pay for the same in whole or in part by issuing to the selling association or person shares of its capital stock to an amount, which at fair market value as determined by the executive council, would equal the fair market value of the business so purchased as determined by the executive council as in cases of other corporations. [SS15, §1641-r10; C24, 27, 31, 35,§8471.]

Payment in property other than money, §8413 et seq.

8472 May act as trustee. In case the cash value of such purchased business exceeds one thousand dollars, the directors of the association are authorized to hold the shares in excess of one thousand dollars in trust for the vendor, and dispose of the same to such persons, and within such times, as may be mutually satisfactory to the parties in interest, and to pay the proceeds thereof as currently received to the former owner of said business. [SS15, §1641-r11; C24, 27, 31, 35,§8472.]

40ExGA, SF 312, §1, editorially divided

8473 Paid-up stock—right to vote. Certificates of stock shall not be issued to any subscriber until fully paid, but the bylaws of the association may allow subscribers to vote as stockholders; provided part of the stock subscribed for has been paid in cash. [SS15, §1641-r11; C24, 27, 31, 35,§8473.]

8474 Voting by mail. At any regularly called general or special meeting of the stockholders, a written vote received by mail from any absent stockholder, and signed by him, may be read in such meeting, and shall be equivalent to a vote of each of the stockholders so signing; provided he has been previously notified in writing by the secretary of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him. [SS15,§1641-r12; C24, 27, 31, 35,§8474.]

8475 Reserve fund. The board of directors, subject to revision by the association at any general or special meeting, shall each year set aside not less than ten percent of the net profits for a reserve fund, until an amount has accumulated therein equal to fifty percent of the paid-up capital stock. [SS15,§1641-r13; C24, 27, 31, 35, §8475.]

8476 Educational fund — dividends. The board may each year, out of remaining net profits, subject to the approval of the association at any general or special meeting:

1. Provide an educational fund to be used in teaching cooperation, not exceeding five percent of the net profits.

2. Declare and pay a dividend on the stock, not exceeding ten percent. [SS15,§1641-r13; C24, 27, 31, 35,§8476.]

8477 Additional dividends. The remainder of said net profits shall be distributed by uniform dividends upon the amount of purchases of shareholders, and upon the wages and salaries of employees. In producing associations, such as creameries, canneries, elevators, factories, and the like, dividends shall be on raw material delivered instead of on goods purchased. In case the association is both a selling and a producing concern, the dividends may be on both raw material delivered and goods purchased by patrons. [SS15,§1641-r13; C24, 27, 31, 35,§8477.]

8478 When dividends distributed. The profits or net earnings of such associations shall be distributed to those entitled thereto, at such times as the bylaws shall prescribe, which shall be as often as once in twelve months. [SS15, §1641-r14; C24, 27, 31, 35,§8478.]

SS15, §1641-r14, editorially divided

8479 Dissolution. If such association, for five consecutive years, shall fail to declare a dividend upon the shares of its paid-up capital, five or more stockholders, by petition, setting forth such fact, may apply to the district court of the county wherein is situated its principal place of business in this state, for its dissolution. If, upon hearing, the allegations of the petition are found to be true, the court may adjudge a dissolution of the association. [SS15, §1641-r14; C24, 27, 31, 35,§8479.]

8480 Annual report—penalty. Every association organized under the terms of this chapter shall annually, on or before the first day of March of each year, make a report to the secretary of state; such report shall contain the name of the company, its principal place of business in this state, and generally a statement as to its business, showing total amount of business transacted, amount of capital stock subscribed for and paid in, number of stockholders, total expense of operation, amount of indebtedness for liabilities, and its profits and losses. Such reports shall be for the calendar or fiscal year immediately preceding the said first day of March, provided that a calendar or fiscal year has been completed upon said date.

Failure to comply with this section before the first day of April shall subject the delinquent association to a penalty of ten dollars. [SS15, §1641-r15; C24, 27, 31, 35,§8480.]

Referred to in §§8480.1, 8480.3

8480.1 Exemption from report. Any corporation organized under the provisions of this chapter after the first day of January shall be exempt from the provisions of section 8480 for the year in which incorporated, after which it shall, however, be subject to all of the provisions of said section. [C27, 31, 35,§8480-a1.]

8480.2 List of delinquents. In the month of April of each year the secretary of state shall

prepare a list of all delinquent corporations and file the same in his office. [C27, 31, 35,§8480-a2.]
41GA, ch 160, §2, editorially divided

8480.3 Notice to delinquents. On or before the first day of May he shall send by registered mail to each delinquent and to each of its officers, as may be disclosed by the latest records on file in the office of the secretary of state, a notice of such delinquency and of the penalties provided in section 8480. [C27, 31, 35,§8480-a3.]

8480.4 Cancellation. If the annual report required is not filed and penalties paid on or before the last day of June the secretary of state shall, on the first day of July following, cancel the name of any delinquent corporation from the list of live corporations in his office, and enter such cancellation on the proper records. [C27, 31, 35,§8480-a4.]

8480.5 Effect of cancellation. When so canceled the corporate rights of any such corporation shall be forfeited and its corporate period terminated on the date such cancellation shall have been entered on the records of his office. [C27, 31, 35,§8480-a5.]

8480.6 Reinstatement of corporation. Any corporation whose corporate rights have been canceled and forfeited in the manner provided herein may, however, before September 1 following such cancellation, make application to the secretary of state for reinstatement and upon being furnished good and sufficient reasons for not having filed its report he shall, upon the filing of such report and the payment of the penalty, reinstate said corporations and the decree of cancellation shall be annulled and the corporation shall be entitled to continue to act as a corporation for the unexpired portion of its corporate period as fixed by its articles of incorporation and the limitations prescribed by law. [C27, 31, 35,§8480-a6.]

8481 Chapter extended to former companies. All cooperative corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all the provisions of this chapter and be bound thereby, on filing with the secretary of state and the county recorder of the county in which the principal place of business is located, amended and substituted articles of incorporation drawn in accordance with the provisions of this chapter and a written declaration, signed and sworn to by the president and secretary to the effect that said cooperative company or association has by a majority vote of its stockholders decided to accept the benefits of and to be bound by the provisions hereof. [SS15,§1641-r16; C24, 27, 31, 35,§8481.]

8482 Use of term "cooperative" restricted. No corporation or association organized after July 4, 1915, shall be entitled to use the term "cooperative" as part of its corporate or other business name or title, unless it has complied with the provisions of this chapter, and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any stockholder of any association legally organized under the provisions of this chapter. [SS15,§1641-r17; C24, 27, 31, 35,§8482.]

8483 Use of funds. None of the funds of any association organized under the provisions of this chapter shall be used in the payment of any promotion; as commissions, salaries or expenses of any kind, character, or nature whatsoever. [SS15,§1641-r18; C24, 27, 31, 35,§8483.]

8484 Private property exempt. The private property of the stockholders shall be exempt from execution for the debts of the corporation. [SS15,§1641-r19; C24, 27, 31, 35,§8484.]

8485 Rep. by 43GA, ch 12

CHAPTER 390

NONPROFIT-SHARING COOPERATIVE ASSOCIATIONS

Applicable only to associations originally chartered before July 4, 1935. See ch 390.1
Referred to in §§8512.60, 8581.33
Permissible reorganization under new law, §8512.43

8485.1 Nature.
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8509 Chapter extended to former associations.
8510 Use of term "cooperative"—injunction.
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8512 Duration of incorporation—renewal.

8485.1 Nature. Associations organized under the provisions of this chapter are declared to be not for pecuniary profit. [C27, 31, 35, §8485-b1.]

42GA, ch 192, §2, editorially divided

8486 Organization. Any number of persons, not less than five, may associate themselves as a cooperative association, without capital stock, for the purpose of conducting any agricultural, livestock, horticultural, dairy, mercantile, mining, manufacturing, or mechanical business, or the constructing and operating of telephone and high tension electric transmission lines on the cooperative plan and of acting as a cooperative selling agency. Cooperative livestock shipping associations organized under this chapter shall do business with members only. [C24, 27, 31, 35,§8486.]

8487 Terms defined—products of nonmember. For the purpose of this chapter, the words "association", "exchange", "society", or "union", shall be construed to mean the same and are defined to mean a corporate body composed of actual producers or consumers of the given commodity handled by the association, whose business is conducted for the mutual benefit of its members and not for the profit of stockholders, and control of which is vested in its members upon the basis of one vote to each member. Associations shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members. [C24, 27, 31, 35,§8487.]

8488 Articles — personal liability. They shall sign and acknowledge written articles, which shall contain the name of the association and the names and residences of the incorporators. Such articles shall also contain a statement of the purposes of the association, the amount of the membership fee, and shall designate the city, town, or village where its principal place of business shall be located, and the manner in which such articles may be amended, and any limitation which the members propose to place upon their personal liability for the debts of the association. [C24, 27, 31, 35,§8488.]

8489 Filing — certificate of incorporation. The original articles of incorporation shall be filed for record with the secretary of state. Upon approval of such articles, the secretary of state shall issue a certificate of incorporation. [C24, 27, 31, 35,§8489.]

8490 Fees. For filing the articles of incorporation of associations organized under this chapter, there shall be paid to the secretary of state five dollars, and for the filing of an amendment to such articles, two dollars. In all cases there shall be paid a recording fee of ten cents per hundred words, no recording fee to be less than fifty cents. [C24, 27, 31, 35,§8490.]

8491 Amendments. Within thirty days after the adoption of any amendment to its articles of incorporation, the association shall cause a copy of such amendment to be recorded in the office of the secretary of state. [C24, 27, 31, 35, §8491.]

8492 Board of directors—removals. Every such association shall be managed by a board of not less than five directors, who shall be elected by and from the members at such time and for such term of office as the articles may prescribe. They shall hold office until their successors are elected and qualify; but a majority of the members shall have the power at any regular or special meeting of the association legally called, to remove any director or officer for cause, and fill the vacancy. [C24, 27, 31, 35,§8492.]

8493 Officers. The officers of every such association shall be a president, one or more vice presidents, a secretary, and treasurer, who shall be elected annually by the directors, from amongst their own number. The offices of secretary and treasurer may be held by the same person. [C24, 27, 31, 35,§8493.]

8494 Admission of members. Under the terms and conditions prescribed in its bylaws, an association may admit as members persons engaged in the production of the products, or in the use or consumption of the supplies, to be handled by or through the association, including the lessors and landlords of lands used for the production of such products, who receive as rent part of the crop raised on the leased premises. [C24, 27, 31, 35,§8494.]

39GA, ch 122, §9, editorially divided

8495 Membership certificates. Membership certificates in due form shall be issued to all charter members and to such others as shall subsequently be admitted by the association in accordance with its articles and bylaws. [C24, 27, 31, 35,§8495.]

8496 Certificates nontransferable—surrender. No such certificate shall be transferable by the member to any other person, but shall be surrendered to the association in case of his voluntary withdrawal. [C24, 27, 31, 35,§8496.]

Referred to in §8498

8497 Automatic cancellation — revocation. It shall become void upon his death, or may be revoked by the directors upon proof duly made that he has ceased to be a producer of products handled by or through the association, in the case of producing or selling associations or has ceased to be the user of products handled by or through the association in case of stores and supply associations, or for failure to observe its bylaws or his contractual obligations to it. [C24, 27, 31, 35,§8497.]

Referred to in §8498

8498 Conditions printed on certificates. The conditions of membership specified in sections 8496 and 8497 shall be printed upon the face of every membership certificate. [C24, 27, 31, 35, §8498.]

8499 Combinations of local associations. Likewise, associations may be formed under this chapter whose membership shall consist of other

associations formed under the provisions of this chapter, the purpose being to federate local associations into central cooperative associations for the more economical and efficient performance of their marketing or other operations. [C24, 27, 31, 35,§8499.]

8500 Powers of central associations. Such central associations may enter into contracts, agreements, and arrangements with their member associations. Each member association in such federated associations shall have an official representative chosen by its own board of directors, who shall cast one vote and no more at all business meetings of the federated association. [C24, 27, 31, 35,§8500.]

8501 Voting power. Each member of an association shall be entitled to one vote and no more upon all questions affecting the control and management of the affairs of the association and in the selection of its board of directors. [C24, 27, 31, 35,§8501.]

39GA, ch 122, §10, editorially divided

8502 Proxies—voting by mail. No vote by proxy shall be permitted, but a written vote received by mail from any absent member, and signed by him, may be read and counted at any regular or special meeting of the association, provided that the secretary shall notify all members in writing of the exact motion or resolution upon which such vote is to be taken, and a copy of same shall be forwarded with and attached to the vote so mailed by the member. [C24, 27, 31, 35,§8502.]

8503 Power to compel sales and purchases —liquidated damages. The association may require members to sell all or a stipulated part of their specifically enumerated products exclusively through the association or to buy specifically enumerated supplies exclusively through the association, but in such case, a reasonable period during each year shall be specified during which any member, by giving notice in prescribed form, may be released from such obligation thereafter. Where it is desired to enter into the exclusive arrangement provided in this section, the association shall execute a contract with each such member setting forth what goods or wares are to be handled and upon what terms. In order to protect itself in the necessary outlay, which it may make for the maintenance of its services, the association may stipulate that some regular charge shall be paid by the member for each unit of goods covered by such contract whether actually handled by the association or not, and in order to reimburse the association for any loss or damage which it or its members may sustain through the member's failure to deliver his products to or to procure his supplies from the association.

In case it is difficult or impracticable to determine the actual amount of damage suffered by the association or its members through such failure to comply with the terms of such a contract, the association and the member may agree upon a sum to be paid as liquidated damages for the breach of his contract, said amount to be stated in the contract. [C24, 27, 31, 35,§8503.]

8504 Financial power. Every association may borrow money necessary for the conduct of its business, and may issue notes, bonds, or debentures therefor, and may give security in the form of mortgage or otherwise for the repayment thereof. [C24, 27, 31, 35,§8504.]

8505 Personal liability. Members of such association may limit their personal liability to the amount of their membership fee as provided in their articles of incorporation. [C24, 27, 31, 35,§8505.]

8506 Cost of service—dues, etc. Associations formed under this chapter shall perform services on a basis of the lowest practicable cost, and may provide for meeting the cost thereof through dues, assessments, or service charges, which shall be prescribed in the bylaws. Such charges shall be set high enough to provide a margin of safety above current operating costs and fixed charges upon borrowed capital. [C24, 27, 31, 35,§8506.]

39GA, ch 122, §14, editorially divided

8507 Reserve and educational funds — patronage dividends. Out of any surplus remaining in any given year, the directors shall each year set aside not less than ten percent of such savings for the accumulation of a reserve fund until such reserve shall equal at least forty percent of the invested capital of the association, not less than one percent nor more than five percent for a permanent educational fund from which expenditures shall be made annually at the discretion of the directors for the purpose of teaching cooperation, and the remainder to be returned to the members as a patronage dividend prorated on a uniform basis to each member upon the value of business done by him through the association. [C24, 27, 31, 35,§8507.]

8508 Annual report—penalty. Every association organized under the terms of this chapter shall annually, on or before the first day of March of each year, make a report to the secretary of state; such report shall contain the name of the company, its principal place of business in this state, and generally a statement as to its business, showing total amount of business transacted, number of members, total expense of operation, amount of indebtedness, and its profits or losses. Such reports shall be for the calendar or fiscal year immediately preceding the said first day of March, provided that a calendar or fiscal year has been completed upon said date.

Failure to comply with this section before April 1 of each year shall subject the delinquent association to a penalty of ten dollars. [C24, 27, 31, 35,§8508.]

Referred to in §§8508.1, 8508.3

8508.1 Exemption from report. Any corporation organized under the provisions of this chapter after the first day of January shall be exempt from the provisions of section 8508 for the year in which incorporated, after which it

shall, however, be subject to all of the provisions of said section. [C27, 31, 35,§8508-a1.]

8508.2 List of delinquents. In the month of April of each year the secretary of state shall prepare a list of all delinquent corporations and file the same in his office. [C27, 31, 35,§8508-a2.]

41GA, ch 160, §4, editorially divided

8508.3 Notice to delinquents. On or before the first day of May he shall send by registered mail to each delinquent and to each of its officers, as may be disclosed by the latest records on file in the office of the secretary of state, a notice of such delinquency and of the penalties provided in section 8508. [C27, 31, 35,§8508-a3.]

8508.4 Cancellation. If the annual report required is not filed and penalties paid on or before the last day of June the secretary of state shall, on the first day of July following, cancel the name of any delinquent corporation from the list of live corporations in his office, and enter such cancellation on the proper records. [C27, 31, 35,§8508-a4.]

8508.5 Effect of cancellation. When so canceled the corporate rights of any such corporation shall be forfeited and its corporate period terminated on the date such cancellation shall have been entered on the records of his office. [C27, 31, 35,§8508-a5.]

8508.6 Reinstatement of corporation. Any corporation whose corporate rights have been canceled and forfeited in the manner provided herein may, however, before September 1 following such cancellation, make application to the secretary of state for reinstatement and upon being furnished good and sufficient reasons for not having filed its report he shall, upon the filing of such report and the payment of the penalty, reinstate said corporation and the decree of cancellation shall be annulled and the corporation shall be entitled to continue to act as a corporation for the unexpired portion of its corporate period as fixed by its articles of incorporation and the limitations prescribed by law. [C27, 31, 35,§8508-a6.]

8509 Chapter extended to former associations. All corporations, or associations heretofore organized and doing business under prior statutes, or which have attempted so to organize and do business cooperatively, shall have the benefit of all the provisions of this chapter and be bound thereby, on filing with the secretary of state amended and substituted articles of incorporation drawn in accordance with the provisions of this chapter and a written declaration signed and sworn to by the president and secretary, to the effect that said company or association has, by a majority vote of its stockholders, decided to accept the benefits of and to be bound by the provisions of this chapter. [C24, 27, 31, 35,§8509.]

8510 Use of term "cooperative" — injunction. No corporation or association hereafter organized shall be entitled to use the term "cooperative" as part of its corporate or other business name or title, unless it has complied with the provisions of this chapter or of chapter 389, and any corporation or association violating the provisions of this chapter may be enjoined from doing business under such name at the instance of any stockholder of any association legally organized under the provisions of this chapter. [C24, 27, 31, 35,§8510.]

8511 Use of funds — promotion expenses. None of the funds of any association shall be used for purposes of any promotion as commissions, salaries, or expenses of any kind, character, or nature whatsoever, except that in the case of associations operating in more than one county, if the par value of securities to be sold is in excess of one hundred thousand dollars, a sum not to exceed five percent of the par value of bonds or debentures sold may be used by committees elected by the members for selling or soliciting for the sale of such securities or for hiring responsible salaried solicitors for that purpose. [C24, 27, 31, 35,§8511.]

8512 Duration of incorporation — renewal. Associations formed under the provisions of this chapter shall continue for a period of twenty-five years, unless earlier dissolved by order of its members or by other processes as by law provided, and the term of its existence may be renewed by the filing of new articles of association, as by law provided. [C24, 27, 31, 35, §8512.]

CHAPTER 390.1

COOPERATIVE ASSOCIATIONS

(NEWLY ORGANIZED)

Applicable to associations organized after July 4, 1935, §8512.60

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8512.01 Applicable. This chapter applies only to cooperative associations as defined in section 8512.02. All such associations hereafter formed must be organized under this chapter. [C35,§8512-g1.]

8512.02 Definitions. A "cooperative association" is one which, in serving some purpose enumerated in section 8512.06, deals with or functions for its members at least to the extent required by section 8512.03, and which distributes its net earnings among its members in proportion to their dealings with it, except for limited dividends or other items permitted in this chapter; and in which each voting member has one vote and no more.

"Association" means a corporation formed under this chapter.

"Agricultural products" include horticultural, viticultural, forestry, dairy, livestock, poultry, bee and any other farm products.

"Agricultural associations" are those formed for a purpose specified in subsection 2, section 8512.06.

"Member" refers not only to members of nonstock associations but also to common stockholders of stock associations, unless the context of a particular provision otherwise indicates. [C35,§8512-g2.]

Referred to in §8512.01

8512.03 Dealing with nonmembers. A nonstock livestock shipping association shall not handle livestock of any nonmembers.

Any association may limit its dealings or any class thereof to members only.

No association shall, during any year, deal or function with or for nonmembers to an extent exceeding one-half of the value of business done. This provision shall not apply to its sales or services to municipal or governmental bodies; nor to agricultural associations' purchases from or sales to corporate landowners who are not primarily engaged in the business of farming. [C35,§8512-g3.]

Referred to in §§8512.02, 8512.49

8512.04 Use of term "cooperative" restricted. No person or firm, and no corporation hereafter organized, which is not an association defined herein, shall use the word "cooperative" or any abbreviation thereof in its name or advertising or in any connection with its business, except foreign associations admitted under section 8512.54. The attorney general or any association or any member thereof may sue and enjoin such use. [C35,§8512-g4.]

8512.05 Permissible organizers. Five or more individuals, or two or more associations, may organize an association. All individual incorporators of agricultural associations must be engaged in producing agricultural products, which term shall include landlords and tenants as specified in section 8512.13. [C35,§8512-g5.]

8512.06 Objects. Associations may be formed either:

1. To conduct a mercantile, manufacturing, mechanical or mining business, or to construct or operate telephone or electric transmission lines; or

2. To produce, grade, blend, preserve, process, store, warehouse, market, sell or handle any agricultural product, or any byproduct thereof; or to purchase, produce, sell or supply machinery, petroleum products, equipment, fertilizer, supplies, business or educational service to or for those engaged as bona fide producers of agricultural products; or to finance any such activities; or to engage in any cooperative activity connected with any of said purposes; or for any number of these purposes. [C35,§8512-g6.]

Referred to in §§8512.02, 8512 07

8512.07 Powers. Except as expressly limited in its articles, each association shall have power to do anything permitted anywhere in this chapter, and also:

1. To conduct any business enumerated in section 8512.06 which its articles specify; and to conduct such business either as principal or as agent for its members.

2. To borrow any amounts of money, and give any form of obligation or security therefor.

3. To make advances to patrons or members, or members of member-associations, and take any form of obligation or security therefor.

4. To acquire, hold, transfer or pledge any

obligation or security representing funds actually advanced or used for any cooperative activity; or stock, memberships, bonds or obligations of any cooperative organization dealing in any product handled by the association, or any byproduct thereof.

5. To make any contract, indorsement or guaranty it deems desirable incident to its transfer or pledge of any obligation or security.

6. To acquire, own or dispose of any real or personal property deemed convenient for its business, including patents, trademarks and copyrights.

7. To exercise any power, right or privilege suitable or necessary for, or incident to, promoting or accomplishing any of its powers, purposes or activities, or granted to ordinary corporations, save such as are inconsistent with this chapter.

8. To exercise any of its powers anywhere.

No association organized under this chapter shall engage in the business of banking. Provided, however, that nothing in this chapter shall be construed in any way to repeal or change chapter 415.2, relating to cooperative banks. [C35,§8512-g7.]

8512.08 Contracts authorized. An agricultural association may contract with any member for his exclusive sale to or through it, of all or any part of his agricultural products or other designated commodities. Such contracts may permit the association to take and sell the property without acquiring title thereto, and pay the member the sale price less costs and expenses of selling, which may include the member's pro rata portion of the association's annual outlay for overhead, interest, preferred dividends, reserves or other specified charges. Such contracts must be for a specified time, not less than one year. Each contract shall fix a period of at least ten days during each year after the first, within which either party may terminate it without affecting any liability previously accrued. [C35, §8512-g8.]

Referred to in §8512.09

8512.09 Penalties — performance — injunction — arbitration. Contracts permitted by section 8512.08 may provide that the member pay the association any sum, fixed in amount or by a specified method of computation, for each violation thereof; also all the association's expenses of any suit thereon, including bond premiums and attorney's fees. All such provisions shall be enforced as written, whether at law or in equity, and shall be deemed proper measurement of actual damages, and not penalties or forfeitures.

The association may obtain specific performance of any such contract, or enjoin its threatened or continued breach, despite the adequacy of any legal or other remedy.

If the association files a verified petition, showing an actual or threatened breach of any such contract and seeking any remedy therefor, the court or any judge thereof shall, without notice or delay but on such bond as it deems proper, issue a temporary injunction against such breach or its continuance.

The parties to such contracts may agree to arbitrate any controversy subsequently arising thereunder, and fix the number of arbitrators and method of their appointment. Such agreements shall be valid and irrevocable, except on such grounds as invalidate contracts generally. If they specify no method for appointing arbitrators, or if either party fails to follow such method, or if for any reason arbitrators are not named or vacancies filled, either party may apply to the district court to designate the necessary arbitrator, who shall then act under the agreement with the same authority as if named in it. Unless otherwise agreed, there shall be but one arbitrator. [C35,§8512-g9.]

8512.10 Cooperative agreements. Any association may make any agreement or arrangement with any other association or cooperative organization for the cooperative or more economical carrying on of any of its business. Any number of such associations or organizations may unite to employ or use, or may separately employ or use, the same methods, means or agencies for conducting their respective businesses. [C35,§8512-g10.]

8512.11 Legality declared. No association, contract, method or act which complies with this chapter shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen business or fix prices arbitrarily, or to accomplish any improper or illegal purpose. [C35,§8512-g11.]

8512.12 Exemption of private property. The private property of the members or stockholders shall be exempt from execution for the debts of the corporation. [C35,§8512-g12.]

8512.13 Membership—eligibility. No membership or share of common stock shall ever be issued to, or held by, any party not eligible to membership in the association under its articles. Individuals may be made eligible only if they are engaged in producing products marketed by the association, or if they customarily consume or use the supplies or commodities it handles, or use the services it renders. Farm tenants, and landlords who receive a share of agricultural products as rent, may be made eligible to membership in agricultural associations as producers. Other associations engaged in any directly or indirectly related activity may be made eligible to membership. Federated associations may be formed whose membership is restricted to cooperative associations. [C35,§8512-g13.]

Referred to in §8512.05

8512.14 Membership in nonstock associations. Membership in associations without capital stock may be acquired by eligible parties in the manner provided in the articles, which shall specify the rights of members, the issuing price of memberships, and what, if any, fixed dividends accrue thereon. If the articles so provide, membership shall be of two classes, voting and nonvoting. Voting members shall be agricultural producers, and all other members shall be nonvoting members. Nonvoting members shall

have all the rights of membership except the right to vote. [C35,§8512-g14.]

8512.15 **Contents of certificates.** The association shall issue certificates of membership or stock, each of which state the fixed dividend, if any, and the restrictions or limitations upon its ownership, voting, transfer, redemption or cancellation. [C35,§8512-g15.]

8512.16 **Subscriptions—issuing certificates.** If the articles permit, any eligible subscriber for common stock or membership may vote and be treated as a member, after making part payment therefor in cash and giving his note for the balance. Such subscriptions may be forfeited as provided in section 8512.32. No stock or membership certificate shall be issued until fully paid for. No subscriber shall hold office until his certificate has been issued. [C35,§8512-g16.]

Referred to in §8512.30

8512.17 **Transfer of stock or membership.** No common stock shall be transferable, unless the articles expressly provide for transfer to others eligible for membership. Such provision may require that the transfer be preceded by an offer to the association, or be otherwise restricted. No nonstock membership shall be transferable, and all certificates thereof shall be surrendered to the association on the member's voluntary withdrawal. [C35,§8512-g17.]

8512.18 **Expulsion of members.** The directors may expel any member if he has attempted to transfer his membership or stock in violation of its terms, or has willfully violated any article or bylaw which provides for such penalty. [C35, §8512-g18.]

8512.19 **Cancellation of membership or stock.** If a common stockholder or member dies, or becomes ineligible, or is expelled, his stock or membership shall forthwith be canceled. In cases of expulsion the association shall pay him its value as shown by the books on the date of cancellation, but not more than its original issuing price, within sixty days thereafter. In cases of death or ineligibility, it shall pay such value to him or his personal representative within two years thereafter, without interest. [C35, §8512-g19.]

8512.20 **Withdrawal of members.** The articles may permit and regulate voluntary withdrawal of members and the resulting cancellation of their common stock and memberships. [C35,§8512-g20.]

8512.21 **Obligations not affected.** The death, expulsion or withdrawal of a member shall not impair his contracts, debts, or obligations to the association. [C35,§8512-g21.]

8512.22 **Capital stock.** Associations with capital stock may divide the shares into common and preferred stock. Par value stock shall not be issued for less than par. The general corporation laws shall govern the consideration for which no-par stock is issued. If the articles so provide, common stock may be issued in two classes, voting and nonvoting. Voting stock shall be issued to all agricultural producers and nonvoting stock to all other members. Nonvoting stock shall have all privileges of membership except the right to vote. Preferred stock held by nonmembers shall not exceed in amount that held by members. [C35,§8512-g22.]

8512.23 **Dividends on common stock.** Unless the articles provide that common stock shall receive no dividends, the directors may declare noncumulative dividends thereon at such rate as they may fix, not exceeding eight percent per annum. [C35,§8512-g23.]

8512.24 **Preferred stock.** Preferred stock shall bear cumulative or noncumulative dividends as fixed by the articles, not exceeding eight percent per annum. It shall have no vote. It shall be issued and be transferable without regard to eligibility or membership, and be redeemable on terms specified in the articles. The directors shall determine the time and amount of its issue. [C35,§8512-g24.]

8512.25 **Issuing preferred stock in purchases.** An association may discharge all or any part of obligations incurred in purchasing any business, property or stock, or an interest therein, by issuing its authorized preferred stock in an amount not exceeding the fair market value of the thing purchased. Issuance of such stock in an amount exceeding twenty-five thousand dollars shall be governed by the law as found in sections 8413 and 8414. Issuance of such stock in amounts smaller than twenty-five thousand dollars shall be upon the fair market value of the property purchased, as determined through an appraisal made by the directors or a competent appraiser employed by the directors. Within thirty days after such issue, the association shall file with the secretary of state a verified report containing an accurate detailed description of the thing purchased, the valuation thereof by the directors, and the amount of preferred stock thus issued. Such preferred stock shall be valid as though paid for in cash. [C35,§8512-g25.]

8512.26 **Service charges.** Unless the articles otherwise provide, the bylaws or the directors may prescribe charges to be made to each member for services rendered him or upon products bought from or sold to him, and the time and manner of their collection. [C35,§8512-g26.]

8512.27 **Meetings.** Regular meetings of members shall be held at least once each year, the first of which shall be on the date specified in its articles. Unless otherwise provided in the articles or bylaws, subsequent meetings shall be on the same date in each succeeding year.

Unless otherwise provided in the articles, the directors may call special meetings of members, and must do so upon written demand of twenty percent of the members.

Unless he waives it in writing, each member shall have ten days written notice of the time and place of all meetings, and of the purpose of

all special meetings. Such notice shall be given to him in person or by mail directed to his address as shown on the books of the association, or if the articles so provide, by publication in a regular publication of general circulation among its members, or a newspaper of general circulation published at the principal place of business of the association. [C35,§8512-g27.]

Articles of incorporation, §8512.40

8512.28 Number of votes. No member may own more than one membership or share of common stock. Each voting member shall be entitled to one vote and no more at all corporate meetings. [C35,§8512-g28.]

8512.29 Manner of voting. Votes shall be cast in person, and not by proxy. The vote of a member-association shall be cast only by its representative duly authorized in writing. If the articles or bylaws permit, an absent member may cast his signed written vote upon any proposition of which he has been previously notified in writing, and of which a copy accompanies his vote. [C35,§8512-g29.]

8512.30 Distribution of earnings. The directors shall annually dispose of the earnings of the association in excess of its operating expenses as follows:

To provide a reasonable reserve for depreciation, obsolescence, bad debts, or contingent losses or expenses.

At least ten percent of the remaining earnings must be added to surplus until surplus equals either thirty percent of the total of all capital paid in for stock or memberships, plus all unpaid patronage dividends, plus certificates of indebtedness payable upon liquidation, or one thousand dollars, whichever is greater. No additions shall be made to surplus whenever it exceeds either fifty percent of such total, or one thousand dollars, whichever is greater.

Not less than one percent nor more than five percent of such earnings in excess of reserves may be placed in an educational fund, to be used as the directors deem suitable for teaching or promoting cooperation.

After the foregoing, to pay fixed dividends on stock or memberships, if any.

All remaining net earnings shall be allocated to a revolving fund and shall be credited to the account of each member including subscribers described in section 8512.16 ratably in proportion to the business he has done with the association during such year. Such credits are herein referred to as "deferred patronage dividends". [C35,§8512-g30.]

Referred to in §8512.31

8512.31 Control of allocation by members. The members may at any meeting control the amount to be allocated to surplus or educational fund, within the limits specified in section 8512.30, or the amount to be allocated to reserves. [C35,§8512-g31.]

8512.32 Patronage dividends of subscribers. Patronage dividends to subscribers whose stock or membership is not fully paid in cash shall be applied toward such payment until it is completed. If the articles or bylaws so provide, subscriptions not fully paid within two years may be canceled and all payments or patronage dividends thereon forfeited. [C35,§8512-g32.]

Referred to in §8512.16

8512.33 Use of revolving fund. The directors may use the revolving fund to pay the obligations or add to the capital of the association or retire its preferred stock. In such event the deferred patronage dividends credited to members shall constitute a charge on the revolving fund and future additions thereto, and on the corporate assets, subordinate to creditors and preferred stockholders then or thereafter existing. Deferred patronage dividends for any year shall have priority over those for any subsequent year. [C35,§8512-g33.]

Referred to in §§8512.35, 8512.48

8512.34 Patronage dividend certificates. If its articles or bylaws so provide, an association may issue transferable or nontransferable certificates for deferred patronage dividends. [C35, §8512-g34.]

Referred to in §8512.35

8512.35 Time of payment. Credits or certificates referred to in sections 8512.33 and 8512.34 shall not mature until the dissolution or liquidation of the association, but shall be callable by the association at any time in the order of priority specified in section 8512.33. [C35,§8512-g35.]

Referred to in §8512.48

8512.36 Directors.

1. The affairs of each association shall be managed by a board of not less than five directors, who must be members of the association or officers or members of a member-association. They shall be elected by the members as the articles prescribe.

2. Unless the articles or bylaws otherwise provide, vacancies in the board shall be filled by the remaining directors, the director thus selected to serve for the remainder of the vacant term.

3. The articles or bylaws may permit the directors to select an executive committee from their own number; and may prescribe its authority, which may be coextensive with that of the whole board.

4. Directors shall be elected by districts, if the articles specify the districts, the number of directors from each, the manner of nomination, redistricting or reapportionment, and whether directors shall be directly elected by the members or by delegates chosen by them. Districts shall be so formed and redistricting shall be ordered, from time to time, so that the districts contain as nearly as possible an equal number of members. [C35,§8512-g36.]

Referred to in §8512.38

8512.37 Officers and employees. The directors shall select from their own number a president, one or more vice presidents, a secretary-treasurer or a secretary and a treasurer, and shall fill vacancies in such offices. Unless the articles or bylaws otherwise provide, said offi-

cers shall be chosen for annual terms at the close of the first regular meeting of members in each year.

The directors shall also choose and may remove such other officers and employees as they deem proper, or as the articles or bylaws may prescribe. [C35,§8512-g37.]

8512.38 Removal of officers and directors. At any meeting called for that purpose, any officer or director may be removed by vote of a majority of all voting members of the association. A director chosen under section 8512.36, subsection 4, may likewise be removed by vote of a majority of all members in his district. [C35,§8512-g38.]

8512.39 Referendum. If provided for in the articles of incorporation, any action of directors shall, on demand of one-third of the directors made and recorded at the same meeting, be referred to a regular or special meeting of members called for such purpose. Such action shall stand until and unless annulled by a majority of the votes cast at such meeting, which vote shall not impair rights of third parties previously acquired. [C35,§8512-g39.]

8512.40 Articles. Articles of incorporation must be signed and acknowledged by each incorporator. They may deal with any fiscal or internal affair of the association or any subject hereof in any manner not inconsistent with this chapter. All articles must state in the English language:

1. The name of the association, which must include the word "cooperative"; and the address of its principal office.
2. The purposes for which it is formed, and a statement that it is organized under this chapter.
3. Its duration, which may be perpetual.
4. The name, occupation and post-office address of each incorporator.
5. The number of directors, their qualifications and terms of office and how they shall be chosen and removed.
6. Who are eligible for membership, how members shall be admitted and membership lost, how earnings shall be distributed among members, how assets shall be distributed in liquidation, and, in addition, either:

a. That the association shall have capital stock; the classes, par value and authorized number of shares of each class thereof; how shares shall be issued and paid for; and what rights, limitations, conditions and restrictions pertain to the stock, which shall be alike as to all stock of the same class; or

b. That the association shall have no capital stock, and what limitations, conditions, restrictions and rights pertain to membership; and if the rights are unequal, the rules respecting them shall be specifically stated.

7. The date of the first regular meeting of members. [C35,§8512-g40.]

Referred to in §§8512.42, 8512.43

8512.41 Amendments. Articles may be amended at any meeting called for that purpose, an exact copy of the proposed amendment having been first mailed to each member ten days prior to such meeting, by an affirmative vote of three-fourths of all votes cast, providing that at least twenty-five percent of all members vote thereon.

Amendments, signed and acknowledged by officers designated for such purpose, shall be filed and recorded as provided in section 8512.44. [C35,§8512-g41.]

Referred to in §8512.42

8512.42 Renewal. An association may extend its duration perpetually, or for any definite time, by resolution adopted by a majority of all its members, or any different vote for which the articles may provide, at a meeting called for that purpose and held before its original expiration.

Unless the association has meanwhile wound up, its duration may be extended in like manner within three years after its original expiration, with the same effect as if done prior thereto, by a vote of two-thirds of all its members.

The resolution must state the name of the association, its original expiration date, and for how long thereafter its duration is extended, and must also adopt, and designate officers to execute, renewal articles of incorporation containing the things required in section 8512.40.

The renewal articles shall be signed, filed and recorded as required by section 8512.41. Renewal shall not relieve the association from fees, charges or penalties which may have accrued against it. [C35,§8512-g42.]

8512.43 Existing corporations—option. Any existing Iowa cooperative corporation may, by a majority vote of all its members, at a meeting called for that purpose and held before its present articles expire, amend its articles so as to comply with this chapter and section 8512.40, which may extend its corporate duration. Such amended articles, signed and acknowledged by officers designated for that purpose, shall be filed and recorded, and a certificate of incorporation issued, as required by section 8512.44, whereupon such corporation shall be deemed an association under this chapter.

Any such existing corporation whose present articles have now expired, or will expire before January 1, 1938, may adopt this chapter as above provided at any time before that date, with the same effect as though done before such articles expired.

If any shareholder or member of such corporation vote against such amendment, those voting for it shall purchase his stock or interest at its real value, within two years from the date of such vote, paying interest thereon at the rate of six percent until paid. The association may retire the stock or interest thus purchased.

If any shareholder or member of such corporation shall not be eligible to continue membership under such amendment, the association shall within two years after the amendment is filed purchase and retire his stock or membership for its real value.

It shall be presumed that the real value of such stock or interest is its proportionate share of the corporate assets at book value less liabilities as shown by its books. [C35,§8512-g43.]

8512.44 Filing and recording — certificate of incorporation. Articles, amendments, and renewals shall be filed with and approved and recorded by the secretary of state; and recorded in the county where the association has its principal place of business, as required by the general corporation laws.

Upon approving the articles, the secretary of state shall issue a certificate of incorporation, whereupon corporate existence shall begin. [C35, §8512-g44.]

Referred to in §§8512.41, 8512.43
Filing and recording, §8343

8512.45 Fees. The following fees shall be paid to the secretary of state:

1. Upon filing articles of incorporation or renewals thereof, ten dollars for authorized capital stock up to twenty-five thousand dollars, and one dollar per one thousand dollars or fraction in excess thereof; or ten dollars if there be no capital stock.

2. Upon filing amendments, one dollar, and if authorized capital stock is increased to an amount exceeding twenty-five thousand dollars, an* additional fee of one dollar per thousand dollars or fraction of such excess.

3. Upon filing all articles, renewals, or amendments, a recording fee of ten cents per one hundred words, but not less than fifty cents.

4. An annual license fee of one dollar shall be paid by each domestic or foreign association on or before the first day of April in each year, with its annual report. [C35,§8512-g45.]

Referred to in §§8512.49, 8512.54
*"and" in enrolled act

8512.46 Bylaws. Unless the articles otherwise provide, the directors may adopt bylaws for the association, which shall remain in force until altered by a vote of a majority of the members, or such larger vote as may be fixed by its articles. Bylaws shall be kept by the secretary subject to inspection by any member at any time. Bylaws may deal with the fiscal or internal affairs of the association or any subject of this chapter in any manner not inconsistent with this chapter or the articles. [C35,§8512-g46.]

8512.47 Dissolution.

1. An association whose duration has expired, or which is sooner dissolved by voluntary act of its members, shall continue to exist for the purpose of winding up its affairs until its complete liquidation under subsection 3 hereof.

2. An association may be dissolved by two-thirds of all votes cast at any meeting called for that purpose at which a majority of all voting members vote.

3. Upon the expiration or voluntary dissolution of an association, the members shall designate three of their number as trustees to replace the officers and directors and wind up its affairs. Such trustees shall thereupon have all the powers of the board, including the power to sell and convey all real or personal property and execute conveyances thereof. Within the time fixed in their designation, or any extension thereof, they shall liquidate its assets, pay its debts and expenses, and distribute any remaining funds among the members, and thereupon the association shall stand dissolved and cease to exist. The trustees shall make, sign, and acknowledge a duplicate report of such dissolution, filing one with the secretary of state and one with the recorder of the county where the articles were recorded.

4. The trustees and their successors in office shall be chosen, and the time for their action fixed and extended, by a majority of all votes cast at any meeting called for such purpose. [C35,§8512-g47.]

8512.48 Distribution in liquidation. On dissolution or liquidation, the assets of the association shall first pay liquidation expenses, next its obligations other than patronage dividends or certificates issued therefor; and the remainder shall be distributed in the following priority:

1. To pay preferred stock and any dividends accrued thereon.

2. To pay any deferred patronage dividends or certificates issued therefor. If the fund is insufficient to pay them all, it shall be prorated regardless of the priority specified in sections 8512.33 and 8512.35.

3. To pay to members or common stockholders the amounts for which their memberships or shares were originally issued, together with such accrued dividends, if any, as the articles provide.

4. Any remaining assets shall be distributed among the members at the date of dissolution or liquidation in proportion to their deferred patronage dividends. [C35,§8512-g48.]

8512.49 Annual reports. Each association shall, before April 1 of each year, file a report with the secretary of state on forms prescribed by him, to be accompanied by the annual fee required by section 8512.45, subsection 4. Such report shall be sworn to by an officer of the association, or a receiver or trustee liquidating its affairs, and shall state:

1. Its name and address.

2. The names, addresses and occupations of its officers and directors.

3. The number of shares of each class of stock authorized and outstanding and the par value thereof; or, if there be none, the number of members and the amount of membership fees paid in.

4. The nature and character of its business.

5. What percentage of its business was done with or for its own members during the preceding fiscal or calendar year, and what percentage thereof was done with or for each class of nonmembers specified in section 8512.03.

6. Any other information deemed necessary by the secretary to advise him whether the association is actually functioning as a cooperative. [C35,§8512-g49.]

8512.50 Notice of delinquent reports. Before May 15 the secretary shall send to each associa-

tion failing to report or pay the fee, a registered letter directed to its principal office specified in its articles, stating the delinquency and its consequences. [C35,§8512-g50.]

8512.51 Forfeiture. If an association fails to file such report or pay such fee before July 1, its corporate rights shall stand forfeited. The secretary shall notify it thereof by mail, remove its name from his list of live corporations, and notify the attorney general who shall cause its affairs to be wound up. [C35,§8512-g51.]

8512.52 Reinstatement. If, following such forfeiture, the association shall file the report and pay the annual fee plus a penalty of ten dollars and all actual expenses of any suit begun to wind it up, and shall make a showing of good cause for its delinquency which is satisfactory to the secretary of state and* the secretary shall set aside such forfeiture and any such suit shall be dismissed. [C35,§8512-g52.]

*According to enrolled act

8512.53 Quo warranto. The right of an association to exist or continue under this chapter may be inquired into by the attorney general, but not otherwise. If from its annual report or otherwise, the secretary of state is informed that it is not functioning as a cooperative, he shall so notify the attorney general, who, if he finds reasonable cause so to believe, shall bring action to oust it and wind up its affairs. [C35, §8512-g53.]

8512.54 Foreign associations. Any foreign corporation now or hereafter organized under generally similar laws of any other state shall be admitted to do business in Iowa upon compliance with the general laws relating to foreign corporations and payment of the fees required by section 8512.45. Upon the secretary of state being satisfied that such foreign corporation is so organized and has so complied, he shall issue it a certificate authorizing it to do business in Iowa.

Such foreign associations thus admitted shall be entitled to all remedies provided in this chapter, and to enforce all contracts theretofore or thereafter made by it which any association might make under this chapter.

If such foreign corporation amends its articles it shall forthwith file a copy thereof with the secretary of state, certified by the secretary or other proper official of the state under whose laws it is formed, and shall pay the fees prescribed for amendments by section 8512.45. [C35,§8512-g54.]

Referred to in §8512.04
Foreign corporations, ch 386
Foreign public utility corporations, ch 387

8512.55 Individual exemptions applicable. All exemptions or privileges applying to agricultural products in the possession or control of the individual producer shall apply to such products in the possession or control of any association which have been delivered to it by its members. [C35,§8512-g55.]

8512.56 Conflicting laws. Any law conflicting with any part of this chapter shall be construed as not applicable to associations formed hereunder. [C35,§8512-g56.]

8512.57 Reserved powers. The state reserves the right to modify, amend or repeal this chapter, or any part hereof, and to cancel, modify, repeal or extend any grant, power, permit or franchise obtained or secured under this chapter, at any future time. [C35,§8512-g57.]

8512.58 Limitation of promotion expense. No funds of the association shall be used, nor any of its stock or memberships issued for any promotion expenses, either in the form of commissions, fees, salaries or otherwise. [C35, §8512-g58.]

8512.59 Exemptions from securities act. None of the exemptions contained in sections 8581.04 and 8581.05 shall apply to any security issued by any association formed hereunder, when the total amount thereof exceeds twenty-five thousand dollars.

This section shall not apply to certificates of interest or indebtedness issued to members or patrons for revolving fund deductions or for deferred patronage dividends. [C35,§8512-g59.]

Constitutionality, §8512-g60, code 1935, 46GA, ch 91, §60.

8512.60 Chapters inapplicable. The provisions of chapters 389 and 390 are hereby declared inoperative as to corporations chartered from and after July 4, 1935, but said chapters 389 and 390 shall continue in force and effect as to corporations organized or operating thereunder prior to July 4, 1935, so long as any such corporations elect to operate under or renew their charters under said chapters. [C35,§8512-g61.]

CHAPTER 391

COLLECTIVE MARKETING

8513 Authorization.
8514 Liquidated damages.
8515 Applicability of chapter.

8513 Authorization. Persons engaged in the conduct of any agricultural, horticultural, dairy, livestock, mercantile, mining, or manufacturing business in the manner provided in section 8515 may act together in associations, corporate or otherwise, for the purpose of collectively producing, processing, preparing for market, handling, and marketing the products of their members. Such persons may organize and operate such associations, and such associations may

make the necessary contracts and agreements to effect that purpose, any law to the contrary notwithstanding. [C24, 27, 31, 35,§8513.]

8514 Liquidated damages. Contracts and agreements entered into between associations and the members thereof may, where damages that may be sustained for the breach thereof are difficult of ascertainment, provide for such penalties as may be agreed upon, which penalties, if the parties thereto so agree, shall be construed as liquidated damages and be enforceable in the full amount thereof both at law and in equity. [C24, 27, 31, 35,§8514.]

8515 Applicability of chapter. The provisions of this chapter shall apply:

1. To corporations organized under the provisions of chapter 389.
2. To other incorporated associations or companies organized without capital stock, not for pecuniary profit and for the mutual benefit of their members. [C24, 27, 31, 35,§8515.]

Referred to in §8513

8516 Constitutionality, 39GA, ch 176,§4

CHAPTER 392

SALE OF STOCK ON INSTALLMENT PLAN

Referred to in §§6943.066, 8581.33

8517 Terms defined.
8518 Certificate—how obtained.
8519 Approval by commissioner.
8520 Annual report.
8521 Bonds or securities deposited.
8522 Unauthorized companies—penalty.
8523 Fee.
8524 Examination.

8517 Terms defined. The term "association" when used in this chapter shall mean any person, firm, company, partnership, association, or corporation, other than building and loan associations and insurance companies and associations, which issue stocks on the partial payment or installment plan. The term "issue" shall mean issue, sell, place, engage in or otherwise dispose of or handle. The term "stock" shall mean certificates, memberships, shares, bonds, contracts, debentures, stocks, tontine contracts, or other investment securities or agreements of any kind or character issued upon the partial payment or installment plan. [S13,§1920-k; C24, 27, 31, 35,§8517.]

8518 Certificate—how obtained. No association contemplated by this chapter shall issue any stock until it shall have procured from the commissioner of insurance a certificate of authority authorizing it to engage in such business. To procure such certificate of authority it shall be necessary for such association to file with the commissioner of insurance a statement, under oath, showing the name and location of such association, the name and post-office address of its officers, the date of organization, and if incorporated a copy of its articles of incorporation, also, a copy of its bylaws or rules by which it is to be governed, the form of its certificates, stocks, or contracts, all printed matter issued by it, together with a detailed statement of its financial condition and such other information concerning its affairs or plan of business as the commissioner of insurance may require. [S13,§1920-l; C24, 27, 31, 35,§8518; 48GA, ch 221,§§6, 9.]

8519 Approval by commissioner. If the commissioner of insurance is satisfied that the business is not in violation of law or of public policy, and is safe, reliable, and entitled to public confidence, and shall approve the form of certificate of stock or contract, he shall issue to such association a certificate of authority authorizing it to transact business within this state until the first day of March next succeeding the date of such authorization. [S13,§1920-m; C24, 27, 31, 35,§8519; 48GA, ch 221,§10.]

8520 Annual report. During the month of January of each year, every association transacting the business contemplated by this chapter, shall file with the commissioner of insurance a statement showing its condition on the thirty-first day of December preceding. Said statement shall be in such form as shall be prescribed by the commissioner of insurance. If it appears from such statement that such association is doing a safe business and is solvent, the commissioner of insurance may renew its certificate of authority authorizing it to transact business within the state until the first day of March of the following year. If at any time it shall appear that such association is doing an unsafe business or is insolvent the commissioner of insurance may revoke its certificate of authority authorizing it to transact business within the state until the first day of March of the following year. If at any time it shall appear that such association is doing an unsafe business or is insolvent the commissioner of insurance may revoke its certificate of authority to transact business and having revoked the certificate of authority of an association organized under the laws of this state, he shall report his action to the attorney general who shall at once apply to the district court or a judge thereof for the appointment of a receiver to close up the affairs of such association, and an injunction may issue in the same proceeding enjoining and restraining the association from transacting business in this state. [S13,§1920-o; C24, 27, 31, 35,§8520; 48GA, ch 221,§6.]

Referred to in §8524
Injunctions, ch 535

8521 Bonds or securities deposited. Before any association shall be authorized to transact business contemplated by this chapter, it shall deposit with the commissioner of insurance a

bond approved by the commissioner of insurance, guaranteeing the faithful performance of all contracts entered into by such association or securities of the kind designated in subsections 1, 2, 3, 4, and 5 of section 8737, or such other securities as shall be approved by the commissioner of insurance in the amount of twenty-five thousand dollars, which amount shall remain in possession of the commissioner of insurance until the end of the calendar year in which the association shall first be authorized to transact business. At the end of such calendar year, such association shall deposit with the commissioner of insurance securities of the kind above provided in an amount equal to all its liabilities to persons residing within this state and shall keep such deposit at all times equal to such liability; provided that at no time shall such deposit be reduced below twenty-five thousand dollars except at such time as such association shall be by law closing out its business and its liabilities shall have been reduced below twenty-five thousand dollars. [S13,§1920-p; C24, 27, 31, 35,§8521; 48GA, ch 221,§§6, 11.]

Since the enactment of section 8521, section 8737 has undergone material changes. See 42GA, ch 199; 43GA, chs 222–224; 45GA, ch 117; 45ExGA, ch 107; also repeal and reenactment by 47GA, ch 213

8522 Unauthorized companies—penalty. Any member or representative of any association who shall attempt to issue or sell any stock as contemplated by this chapter or to transact any business whatsoever in the name of or on behalf of such association, not authorized to do business within this state, or which has failed or refused to comply with the provisions of this chapter, or has violated any of its provisions shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by imprisonment in the county jail not to exceed one year, or by a fine of not less than one hundred nor more than ten hundred dollars or by both such fine and imprisonment in the discretion of the court. [S13,§1920-q; C24, 27, 31, 35,§8522.]

8523 Fee. Such association shall pay to the commissioner of insurance for its certificate of authority to transact business, a fee of twenty-five dollars, and for each annual renewal thereof at the time of filing the annual statement ten dollars, which fee shall be by the commissioner of insurance turned into the state treasury as are other fees of his office. [S13,§1920-r; C24, 27, 31, 35,§8523; 48GA, ch 221,§6.]

8524 Examination. Every such association doing business within this state, shall be subject to examination in the same manner as is provided for the examination of insurance companies and shall pay the same fees and costs therefor, and shall so far as is consistent with the plan of business, be subject to the same restrictions and regulations. Such examinations shall be full and complete and in making the same the commissioner of insurance or examiner shall have full access to and may demand the production of all books, securities, papers, moneys, etc., of the association under examination, and may administer oaths, summon and compel the attendance and testimony of any persons connected with such association. If upon such examination, it shall appear that such association does not conduct its business in accordance with law, or if it permits forfeiture of payments by persons holding its stock, after three years from the issuance of said stock or provides for the payment of its expenses other than from earnings, or that any profits, advantage, or compensation of any form or description is given to any member or investor over any other member or investor of the same class, or if beneficiaries are selected or determined or advantages given one over another by any form of chance, lottery, or hazard, or if certificates of stock are by their terms or by any other provision to be redeemed in numerical order or by any arbitrary order or precedence, without reference to the amount previously paid thereon by the holder thereof, or that the affairs are in an unsound condition, or if such association refuses such examination to be made, the commissioner of insurance may revoke its certificate of authority to do business in this state, and having revoked the certificate of authority of an association organized under the laws of this state, he shall report the same to the attorney general, who shall proceed as provided in section 8520. [S13,§1920-s; C24, 27, 31, 35,§8524; 48GA, ch 221,§6.]

Examination, ch 397

CHAPTER 393

INVESTMENT COMPANIES

This chapter (§§8525 to 8581, inc.) repealed by 43GA, ch 10, and chapter 393.1 enacted in lieu thereof

CHAPTER 393.1

IOWA SECURITIES ACT

Referred to in §8581.32

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8581.02 Administration.
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8581.05 Exempt transactions.
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8581.27 General violations.
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8581.29 Promotion by state officials and employees.
8581.30 Secret agents—failure to disclose interest.
8581.31 Statement not open to public.

8581.01 Title. This chapter shall be known as the "Iowa Securities Law". [C31, 35,§8581-c1.]

8581.02 Administration. The administration of the provisions of this chapter shall be vested in the commissioner of insurance of the state of Iowa.

The commissioner of insurance shall appoint a superintendent in charge of the securities department and may appoint one or more assistants. The superintendent appointed under this chapter shall perform such duties as the commissioner of insurance shall generally or specifically direct. In case of vacancy in the office of commissioner of insurance, by reason of absence, physical disability or other cause, to administer properly the provisions of this chapter, the superintendent appointed under this chapter shall act for and in the stead of the commissioner of insurance, and thereupon the superintendent shall have generally, for the time being, all the power and authority of this chapter conferred upon the commissioner of insurance.

The commissioner of insurance shall also employ from time to time, such other officers, attorneys, clerks and employees as are necessary for the administration of this chapter. They shall perform such duties as the commissioner of insurance shall assign to them. [SS15,§§1920-u,-u10; C24, 27,§§8525, 8550; C31, 35,§8581-c2; 48GA, ch 221,§§2, 3.]

8581.03 Definitions. When used in this chapter the following terms shall, unless the text otherwise indicates, have the following respective meanings:

1. "Security" shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest in an oil, gas, or mining lease, collateral trust certificate, pre-organization certificate, pre-organization subscription, any transferable share, investment contract, or beneficial interest in title to property, interest in or under a profit-sharing or participating agreement or scheme, or any other instrument commonly known as a security.

2. "Person" shall include a natural person, a corporation created under the laws of this or any other state, county, sovereignty, or political subdivision thereof, a partnership, an association, a joint stock company, a trust and any unincorporated organization. As used herein the term "trust" shall be deemed to include a common law trust, but shall not include a trust created or appointed under or by virtue of a last will and testament, or by a court of law or equity, or any public charitable trust.

3. "Sale" or "sell" shall include every disposition, or attempt to dispose, of a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. "Sale" or "sell" shall also include an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell, directly or by an agent, or a circular, letter advertisement or otherwise; provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same issuer shall not be deemed a sale, or offer to sell, or option of sale of such other security within the meaning of this definition and such privilege shall not be construed as affecting the status of the security to which such privilege pertains with respect to exemption or registration under the provisions of this chapter, but when such privilege of conversion shall be exercised such conversion shall be subject to the limitations hereinafter provided in subsection 8 of section 8581.05; and provided further, that the issue or transfer of a right pertaining to a security and entitling the holder of such right to subscribe to another security of the same issuer, when such right is issued or transferred with the security to which it pertains, shall not be deemed a sale or offer to sell or option of sale of such other security within the meaning of this definition, and such right shall not be construed as affecting the status of the security to which such right pertains with respect to exemption or registration under the provisions of this chapter; but the sale of such other security upon the exercise of such right shall be subject to the provisions of this chapter.

4. "Dealer" shall include every person other than a salesman who in this state engages either for all or part of his time directly or through an agent in the business of selling any securities issued by another person or purchasing or otherwise acquiring such securities from another for the purpose of reselling them or of offering them for sale to the public, or offering, buying, selling or otherwise dealing or trading in securities as agent or principal for a commission or at a profit, or who deals in futures or differences in market quotations of prices or values of any securities or accepts margins on purchases or sales or pretended purchases or sales of such securities; provided that the word "dealer" shall not include a person having no place of business in this state who sells or offers to sell securities exclusively to brokers or dealers actually en-

gaged in buying and selling securities as a business.

5. "Issuer" shall mean and include every person who proposes to issue, has issued, or shall hereafter issue any security. Any natural person who acts as a promoter for and on behalf of a corporation, trust or unincorporated association or partnership of any kind to be formed shall be deemed to be an issuer.

6. "Salesman" shall include every natural person, other than a dealer, employed or appointed or authorized by a dealer or issuer, to sell securities in any manner in this state. The partners of a partnership and the executive officers of a corporation or other association registered as a dealer shall not be salesmen within the meaning of this definition.

7. "Broker" shall mean dealer as herein defined.

8. "Agent" shall mean salesman as hereinabove defined.

9. "Commissioner of insurance" shall mean the commissioner of insurance of the state of Iowa.

10. "Superintendent" shall mean the superintendent in charge of securities department.

11. "Mortgage" shall be deemed to include a deed of trust to secure a debt. [C31, 35,§8581-c3; 48GA, ch 221,§2.]

8581.04 Exempt securities. Except as hereinafter otherwise provided, the provisions of this chapter shall not apply to any of the following classes of securities:

1. Any security issued or guaranteed by the United States or any territory or insular possession thereof, or by the District of Columbia or by any state or political subdivision or agency thereof.

2. Any security issued by and representing an interest in or a direct obligation of a national bank or by any federal land bank or joint-stock land bank or national farm loan association under the provisions of the Federal Farm Loan Act of July 17, 1916, or by any corporation created and acting as an instrumentality of the government of the United States pursuant to authority granted by the congress of the United States.

3. Any security issued or guaranteed either as to principal, interest, or dividend by a corporation owning or operating a railroad, provided that such corporation is subject to regulation or supervision as to the issue of its own securities by the interstate commerce commission.

4. Any security issued by a corporation, organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual.

5. Securities appearing in any list of securities dealt in on any recognized and responsible stock exchange which has been previously approved by the head of the securities department and which securities have been so listed and dealt in on said exchange pursuant to the official authorization by such exchange, and also all securities senior to or on a parity with any security so listed, or represented by subscription rights which have been so listed, or evidences of indebtedness guaranteed by companies any stock of which is so listed, such securities to be exempt only so long as such listing shall remain in effect. If, after application by any recognized and responsible stock exchange requesting that said exemption be granted to it, the applicant shall fail to convince the commissioner of insurance that it is entitled to such exemption, it is hereby provided that no order of refusal shall be entered until the applicant has been given due notice of not less than twenty days and a hearing on the reasons for such refusal. The commissioner of insurance shall have power at any time to withdraw approval theretofore granted by him to any exchange, and thereupon no security listed on such exchange shall be longer entitled to the benefit of such exemption, only after due notice of not less than twenty days and a copy of the grounds upon which withdrawal was based has been sent by registered mail to the main office of the exchange, citing it to appear at a regularly held hearing and to show cause why the exemption theretofore granted to the exchange should not be withdrawn. The commissioner of insurance shall have the power and authority at any time after twenty days notice and opportunity for hearing has been given to the exchange, and issuer of the security involved, by registered mail, to withdraw the exemption of any such security listed on one or more of the exchanges that had previously been granted an exemption, when, in his opinion, the further sale of the security would work a fraud. Thereafter such security shall not be entitled to the benefit of the exemption except upon the further written order of the commissioner of insurance.

6. Any security issued by and representing an interest in or a direct obligation of a state bank, trust company or savings institution incorporated under the laws of and subject to the examination, supervision, and control of any state or territory of the United States or of any insular possession thereof; or issued by any building and loan association of this state or by any insurance company under the insurance department of this state.

7. Negotiable promissory notes or commercial paper issued in good faith in the usual course of carrying on and conducting the business of the issuer: provided, that such issue of notes or commercial paper mature in not more than twelve months from date of issue and shall be issued within three months after the date of sale.

8. Any security other than common stock outstanding and in the hands of the public for a period of not less than five years upon which no default in payment of principal, interest or dividend exists and upon which no such default has occurred for a continuous immediately preceding period of five years.

9. Securities evidencing indebtedness due under any contract made in pursuance to the provi-

sions of any statute of any state of the United States providing for the acquisition of personal property under conditional sales contracts.

10. Securities of any cooperative association organized in good faith under the laws of this state exclusively for the purpose of conducting upon the cooperative plan among its stockholders any or all of the following businesses: Any agricultural, dairy, livestock or produce business; the business of selling, marketing or otherwise handling, any agricultural, dairy or livestock products, or other produce, by any cooperative association; the manufacture of any products from any agricultural, dairy, or livestock products, or other produce; any business incidental to any of the above purposes; the operation of a rural telephone among its stockholders. [SS15, §1920-u1; C24, 27,§8526; C31, 35,§8581-c4; 48GA, ch 221,§§1, 2.]

Referred to in §§8512.59, 8581.06, 8581.11, 8581.21

8581.05 Exempt transactions. Except as hereinafter expressly provided, the provisions of this chapter shall not apply to the sale of any security in any of the following transactions:

1. At any judicial, executor's, administrator's, guardian's, or conservator's sale, or at any sale by a receiver or trustee in insolvency or bankruptcy.

2. By or for the account of a pledge holder or mortgagee selling or offering for sale or delivery in the ordinary course of business and not for the purpose of avoiding the provisions of this chapter, to liquidate a bona fide debt, a security pledged in good faith as security for such debt.

3. An isolated transaction in which any security is sold, offered for sale, subscription or delivery by the owner thereof, or by his representative for the owner's account, such sale or offer for sale, subscription or delivery not being made in the course of repeated and successive transactions of a like character by such owner, or on his account by such representative, and such owner or representative not being the underwriter of such security.

4. The distribution by a corporation actively engaged in the business authorized by its charter of capital stock, bonds or other securities to its stockholders or other security holders as a stock dividend or other distribution out of earnings or surplus; or the issuance of securities to the security holders or other creditors of a corporation in the process of a bona fide reorganization of such corporation made in good faith and not for the purpose of avoiding the provisions of this chapter, either in exchange for the securities of such security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors; or the issuance of additional capital stock of a corporation sold or distributed by it among its own stockholders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such increased capital stock.

5. The sale, transfer or delivery to any bank, savings institution, trust company, insurance company or to any corporation or to any broker or dealer; provided that such broker or dealer is actually engaged in buying and selling securities as a business.

6. The transfer or exchange by one corporation to another corporation of their own securities in connection with a consolidation or merger of such corporations, subject to the approval by the commissioner of insurance of any proposed plan of consolidation or merger. The commissioner of insurance shall have the right to demand any information necessary to assist him in determining that said plan complies with the Iowa securities act.

7. Bonds or notes secured by mortgage upon real estate or tangible personal property where the entire mortgage together with all of the bonds or notes secured thereby are sold to a single purchaser at a single sale.

8. The issue and delivery of any security in exchange for any other security of the same issuer pursuant to a right of conversion entitling the holder of the security exchanged to make such conversion, provided that the security exchanged has been registered under the law or was when sold, exempt from the provisions of the law and that the security issued and delivered in exchange if sold at the conversion price would at the time of such conversion fall within the class of securities entitled to registration by qualification under the law. Upon such conversion the par value of the security surrendered in such exchange shall be deemed the price at which the securities issued and delivered in such exchange are sold.

9. Subscriptions to capital stock made by incorporators in an Iowa corporation, not exceeding twenty-five in number, provided, that no public offering is made or commissions received for such subscriptions and that such subscribers actually sign the articles of incorporation in person and not by agent.

10. Bonds or notes secured by mortgage upon real estate or tangible personal property situated within the state of Iowa where the bonds or notes are sold to not more than twenty purchasers and the total face amount of all bonds or notes secured by a single mortgage does not exceed fifty thousand dollars.

11. The sale by a registered dealer of any security acquired in the ordinary and usual course of business, when such security is part of an issue which has theretofore been sold and distributed to the public, in whole or in part, in this state in compliance with the provisions of any applicable law regulating the sale of securities at the time of original issuance and sale, or any security issued in exchange for such security under a bona fide plan of reorganization of a corporation by order of a court having jurisdiction or under a plan of reorganization previously having become operative through action of security holders of a corporation, but excepting securities theretofore sold only in exempt transactions under this section, and when such sale is made in good faith and not directly or indirectly for the benefit of the issuer of such security or

for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this chapter, provided, however, that this exemption shall not apply where the authority to sell such security has been revoked or enjoined in accordance with the provisions of this chapter. [SS15,§§1920-u1, -u13; C24, 27, §§8526, 8554; C31, 35,§§8581-c5; 47GA, ch 208,§1; 48GA, ch 221,§2.]

Referred to in §§8512.59, 8581.03, 8581.06, 8581.11, 8581.21

8581.06 Registration of securities. No securities except of a class exempt under any of the provisions of section 8581.04 or unless sold in any transaction exempt under any of the provisions of section 8581.05 shall be sold within this state unless such securities shall have been registered by qualification as hereinafter defined. Registration of stock shall be deemed to include the registration of rights to subscribe to such stock if the application under section 8581.07 for registration of such stock includes a statement that such rights are to be issued.

A record of the registration of securities shall be kept in a register of securities to be kept in the office of the commissioner of insurance, in which register of securities shall also be recorded any orders entered by the commissioner of insurance with respect to such securities. Such register, and all information with respect to the securities registered therein shall be open to public inspection. [C31, 35,§8581-c6; 48GA, ch 221,§2.]

8581.07 Registration by qualification. All securities required by this chapter to be registered before being sold in this state shall be registered only by qualification in the manner provided by this section.

The commissioner of insurance shall receive and act upon applications to have securities registered by qualification, and may prescribe forms on which he may require such applications to be submitted. Applications shall be in writing and shall be duly signed by the applicant and sworn to by any person having knowledge of the facts, and filed in the office of the commissioner of insurance and may be made either by the issuer of the securities for which registration is applied or by any registered dealer desiring to sell the same within this state.

The commissioner of insurance may require the applicant to submit to him the following information respecting the issuer and such other information as he may in his judgment deem necessary to enable him to ascertain whether such securities shall be registered pursuant to the provisions of this section:

1. The names and addresses of the directors, trustees and officers, if the issuer be a corporation or association or trust organized or existing under the common law (as hereinbefore defined), of all partners, if the issuer be a partnership, and of the issuer, if the issuer be an individual.

2. The location of the issuer's principal business office and of its principal office in this state, if any.

3. The purposes of incorporation (if incorporated) and the general character of the business actually to be transacted by the issuer, and the purpose of the proposed issue.

4. A statement of the capitalization of the issuer; a balance sheet showing the amount and general character of its assets and liabilities on a day not more than sixty days prior to the date of filing such balance sheet; a detailed statement of the plan upon which the issuer proposes to transact business; a copy of the security for the registration of which application is made; and a copy of all circulars, prospectuses, advertisements or other descriptions of such securities then prepared by or for such issuer and/or by or for such applicant (if the applicant shall not be the issuer) to be used for distribution or publication in this state.

5. A statement of the amount of the issuer's income, expenses, and fixed charges during the last fiscal year, or if in actual business less than one year, then for such time as the issuer has been in actual business.

6. A statement showing the price at which such security is proposed to be sold, together with the maximum amount of commission or other form of remuneration to be paid in cash or otherwise, directly or indirectly, for or in connection with the sale or offering for sale of such securities.

7. A detailed statement showing the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment.

8. The amount of capital stock which is to be set aside and disposed of as promotion stock, and a statement of all stock issued from time to time as promotion stock.

9. If the issuer is a corporation, there shall be filed with the application a certified copy of its articles of incorporation with all amendments and of its existing bylaws. If the issuer is a trustee there shall be filed with the application a copy of all instruments by which the trust is created or declared and in which it is accepted and acknowledged. If the issuer is a partnership or an unincorporated association, or joint-stock company, or any other form of organization whatsoever, there shall be filed with the application a copy of its articles of partnership or association and all other papers pertaining to its organization.

All of the statements, exhibits and documents of every kind required by the commissioner of insurance under this section, except properly certified public documents, shall be verified by the oath of the applicant or of the issuer in such manner and form as may be required by the commissioner of insurance.

The commissioner of insurance shall have power to place such conditions, limitations and restrictions on any registration as may be necessary to carry out the purposes of this chapter and the conditions, limitations and restrictions, if any, shall be entered in the register of securities or an entry shall be made in the register of securities referring to a formal order of the

commissioner of insurance on file showing such conditions, limitations and restrictions.

The applicant shall pay to the commissioner of insurance at the time of filing the information as hereinbefore prescribed in this section, a fee of one-tenth of one percent of the aggregate par value of the securities to be sold in this state for which the applicant is seeking registration. Such fee shall not be less than twenty-five dollars nor more than three hundred dollars where the amount of the securities to be sold is not in excess of one million dollars. In case the amount to be sold exceeds one million dollars the fee shall be five hundred dollars. Par value as used in this section for the purpose of computing fees shall be construed:

In case of stock of no par value to be the price at which the stock is to be offered to the public;

The price at which the security is to be sold or offered for sale to the public in cases where the security is to be sold or offered for sale at a price greater than the stipulated par value.

If upon examination of any application the commissioner of insurance shall find that the sale of security referred to therein would not be fraudulent or would not work or tend to work a fraud upon the purchaser, or that the enterprise or business of the issuer is not based upon unsound business principles, he shall record the registration of such security in the register of securities, and thereupon such security so registered may be sold by the issuer or by any registered dealer, subject, however, to the further order of the commissioner of insurance as hereinafter provided.

So long as any security is sold or offered for sale pursuant to registration by qualification under this section, there shall be filed with the commissioner of insurance, each year, within thirty days after the termination of the fiscal year of the issuer of such security, a statement properly verified, which statement shall set forth the financial condition, the amount of assets and liabilities and such other information concerning the financial affairs or the plan of business of the issuer as the commissioner of insurance may require in order to determine whether the continued sale of such securities would result or tend to result in fraud. [SS15, §§1920-u2,-u3,-u6,-u8; C24, 27,§§8527, 8528, 8531, 8536, 8543; C31, 35,§8581-c8; 47GA, ch 209,§1; 48GA, ch 221,§§2, 5.]

Referred to in §§8581.06, 8581.09, 8581.19, 8581.20

8581.08 May limit price and commission. The commissioner of insurance may also limit the price at which the securities, either of par or no par value, may be sold. In case of a sale by or on behalf of an issuer, the commissioner of insurance may allow a commission not to exceed twenty percent of the sale price, such percentage to include all expenses incidental to such sale, including advertising or any other expense chargeable in any way to the sale of such securities. [C35,§8581-f1; 47GA, ch 208,§2; 48GA, ch 221,§§2, 4.]

8581.09 Consent to service. Upon any application for registration by qualification under section 8581.07, whether made by an issuer or registered dealer, where the issuer is not domiciled in this state, there shall be filed with such application the irrevocable written consent of the issuer that suits and actions, growing out of the violation of any provision or provisions of this chapter, may be commenced against it in the proper court of any county in this state in which a cause of action may arise or in which the plaintiff may reside, by the service of any process or pleading authorized by the laws of this state, on the commissioner of insurance, said consent stipulating and agreeing that such service of such process or pleadings on such commissioner of insurance shall be taken and held in all courts to be as valid and binding as if due service had been made upon the issuer himself, and said written consent shall be authenticated by the seal of said issuer, if it has a seal, and by the acknowledged signature of any officer of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, duly authorized by resolution of the board of directors, trustees or managers of the corporation or association, and shall in such case be accompanied by a duly certified copy of the resolution of the board of directors, trustees or managers of the corporation or association, authorizing the officers to execute the same. In case any process or pleadings mentioned in this chapter are served upon the commissioner of insurance, it shall be by duplicate copies, one of which shall be filed in the office of the commissioner of insurance and another immediately forwarded by registered mail to the principal office of the issuer against which said process or pleadings are directed. [SS15,§1920-u5; C24, 27,§§8534, 8535; C31, 35, §8581-c9; 48GA, ch 221,§2.]

Referred to in §8581.11

8581.10 Revocation of registration of securities. The commissioner of insurance may refuse or revoke the registration of any security by entering an order to that effect, with his findings in respect thereto, if after a reasonable notice and a hearing or upon examination into the affairs of the issuer of such security it shall appear that the issuer:

1. Is insolvent; or

2. Has violated any of the provisions of this chapter or any order of the commissioner of insurance of which such issuer has notice; or

3. Has been or is engaged or is about to engage in fraudulent transactions; or

4. Is in any other way dishonest or has made any fraudulent representations in any prospectus or in any circular or other literature that has been distributed concerning the issuer or its securities; or

5. Is of bad business repute; or

6. Does not conduct its business in accordance with law; or

7. That its affairs are in an unsound condition; or

8. That the enterprise or business of the issuer is not based upon sound business principles.

In making such examination the commissioner of insurance shall have access to and may compel the production of all the books and papers of such issuer, and he or the superintendent may administer oaths to and examine the officers of such issuer or any other person connected therewith as to its business and affairs and may also require a balance sheet exhibiting the assets and liabilities of any such issuer or his income statement, or both, to be certified to by a public accountant either of this state or of any other state where the issuer's business is located, approved by the commissioner of insurance.

Whenever the commissioner of insurance may deem it necessary, he may also require such balance sheet or income statement, or both to be made more specific in such particulars as the commissioner of insurance shall point out or to be brought down to the latest practicable date.

If any issuer shall refuse to permit an examination to be made by the commissioner of insurance, it shall be proper ground for refusal or cancellation of registration.

If the commissioner of insurance shall deem it necessary he may enter an order suspending the right to sell securities pending any investigation or hearing, provided that the order shall state the grounds of the commissioner of insurance for taking such action.

Notice of the entry of such order shall be given personally or by telephone, telegraph, or mail to the issuer and every registered dealer who shall have notified the commissioner of insurance of an intention to sell such security. [SS15,§1920-u7; C24, 27,§§8539, 8540; C31, 35, §8581-c10; 47GA, ch 209,§2; 48GA, ch 221,§2.]

8581.11 Registration of dealers and salesmen. No dealer or salesman shall engage in business in this state as such dealer or salesman or sell any securities including securities exempted in section 8581.04, except in transactions exempt under section 8581.05, unless he has been registered as a dealer or salesman in the office of the commissioner of insurance pursuant to the provisions of this section.

An application for registration in writing shall be filed in the office of the commissioner of insurance in such form as the commissioner of insurance may prescribe, duly verified by oath, which shall state the principal office of the applicant, wherever situated, and the location of the principal office and all branch offices in this state, if any, the name or style of doing business, the names, residence and business addresses of all persons interested in the business as principals, copartners, officers and directors, specifying as to each his capacity and title, the general plan and character of business and the length of time the dealer has been engaged in business. The commissioner of insurance may also require such additional information as to applicant's previous history, record and association, as he may deem necessary to establish the good repute in business of the applicant.

There shall be filed with such application an irrevocable written consent to the service of process upon the commissioner of insurance in actions against such dealer in manner and form as provided in section 8581.09.

If the commissioner of insurance shall find that the applicant is of good repute and has complied with the provisions of this section including the payment of the fee hereinafter provided he shall register such applicant as a dealer upon his filing a bond as in section 8581.18 provided.

Upon the written application of a registered dealer and general satisfactory showing as to good character and the payment of the proper fee the commissioner of insurance shall register as salesmen of such dealer such natural persons as the dealer may request. Such registration shall cease upon the termination of the employment of such salesman by such dealer.

The names and addresses of all persons approved by registration as dealers or salesmen and all orders with respect thereto shall be recorded in a register of dealers and salesmen kept in the office of the commissioner of insurance which shall be open to public inspection. The fee for such registration and for each annual renewal shall be twenty-five dollars in the case of dealers and three dollars in the case of salesmen, which fees shall be paid at the time the information and application is filed with the commissioner of insurance. Every registration under this section shall expire one year from date of issuance, but new registrations for the succeeding year may be issued upon written application and upon payment of said fee without filing of further statements or furnishing any further information unless specifically required by the commissioner of insurance.

Changes in registration occasioned by changes in the personnel of a partnership or in the principals, copartners, officers or directors of any dealer may be made from time to time by written application setting forth the facts with respect to such change.

The commissioner of insurance shall have the power, in connection with any dealer's or salesman's registration, to require the dealer or salesman to furnish the commissioner of insurance, in such form as he may designate, any information or reports deemed necessary to assist the commissioner of insurance in determining whether such registration should remain in force, and to make an investigation of the books, records, property, business and affairs of such dealer or salesman. Every dealer shall, at such time as may be required by the commissioner of insurance, make and file in the office of the commissioner of insurance, a true and correct statement concerning any security sold or offered for sale by such dealer, pursuant to the provisions of section 8581.05, subsection 3, or any other provisions of this chapter, showing the name and location of the principal office of the issuer of such security, the names of its managing officers, if it is a corporation, or of its members, if it is a partnership; its assets,

liabilities, and issued capital stock, at the close of its fiscal year then last ended, or at a later date; its gross income, expenses, and fixed charges for the year next preceding such date, or for such time as such issuer of such security has transacted business, if for less than one year, and the approximate price at which such dealer has sold or proposes to sell such security, together with such other information, of which the dealer may have knowledge, as the commissioner of insurance may require, nor shall any dealer sell or offer for sale any security after notice in writing given to it by the commissioner of insurance, that, in his opinion, the sale thereof would be unfair, unjust or inequitable to the purchaser thereof, unless the commissioner of insurance shall subsequently in writing withdraw such objection to the sale thereof.

Any issuer of a security required to be registered under the provisions of this chapter, selling such securities except in exempt transactions as defined in section 8581.05, shall be deemed a dealer within the meaning of this section and required to comply with all the provisions hereof, but such issuer shall be required to pay only one fee which shall be either the fee for registration of the security or for dealer's registration, whichever is the greater, and shall not be required to furnish the bond herein prescribed. [SS15,§1920-u15; C24, 27,§§8561, 8563; C31, 35,§8581-c11; 47GA, ch 209,§3; 48GA, ch 221,§§2, 5.]

Referred to in §§8581.14, 8581.18, 8581.48

8581.12 Deposits for special examinations. Whenever it is necessary for the commissioner of insurance to incur any expense in connection with any application, registration or license, he shall have the power by written order to require the interested person to make an advance deposit with the commissioner of insurance in an amount estimated as sufficient to cover such expense. All such deposits shall be covered into the state treasury and credited to "securities department investigation fund", from which fund disbursements shall be made upon order of the commissioner of insurance to pay such expenses. Any unexpended portion shall be refunded. On field examinations made by the commissioner of insurance or superintendent or other employee away from the seat of government a per diem prorated upon the salary of such official or employee may be charged in addition to the actual expenses. [C31, 35,§8581-c12; 48GA, ch 221,§2.]

Referred to in §8581.41

8581.13 Trust funds. Every dealer shall segregate from his general fund all trust funds and items placed with said dealer by any individual, firm or corporation, and shall at all times carry the same in a special trust account in a reputable depository, and all violations of this section shall be prosecuted as provided in section 8581.27. [C35,§8581-f2.]

8581.14 Revocation of dealers' and salesmen's registrations. Registration under section 8581.11 may be refused or any registration granted may be revoked by the commissioner of insurance if after a reasonable notice and a hearing the commissioner of insurance determines that such applicant or registrant so registered:

1. Has violated any provision of this chapter or any regulation made hereunder; or
2. Has made a material false statement in the application for registration; or
3. Has been guilty of a fraudulent act in connection with any sale of securities, or has been or is engaged or is about to engage in making fictitious or pretended sales or purchases of any of such securities or has been or is engaged or is about to engage in any practice or sale of securities which is fraudulent or in violation of the law; or
4. Has demonstrated his unworthiness to transact the business of dealer or salesman;
5. Has been convicted of a felony, or any misdemeanor of which an essential element is fraud;
6. Has made any misrepresentations or false statements to, or concealed any essential or material fact from, any person in the sale of a security to such person;
7. Has failed to account to persons interested for all money and/or property received;
8. Has not delivered after a reasonable time, to persons entitled thereto, securities held or agreed to be delivered by the dealer or broker, as and when paid, and due to be delivered;
9. Has made or is making misrepresentations of any essentials or material fact to the commissioner of insurance, or has violated a provision of the laws of any foreign state regulating the sale of securities therein;
10. Is insolvent;
11. Is selling or offering for sale securities through any solicitor and agent not registered in compliance with the provisions of this chapter;
12. Has been refused a license in any state, or that any license in any state theretofore granted the applicant or registrant, or any officer, director, member or partner, manager or trustee thereof has been canceled, suspended or withdrawn for fraudulent conduct or violation of the law of such state regulating the sale of securities therein;
13. Is or has been using practices in the sale of securities that work or tend to work a fraud;
14. Has refused to furnish or give pertinent data to the commissioner of insurance;
15. Has in the sale of a security stated that a dividend would be paid thereon, when said dividend had not actually been declared by the issuer thereof; or
16. Has in the sale of a security, promised that such security would be listed on a security exchange when no application for such a listing has actually been made to the exchange.

In cases of charges against a salesman notice thereof shall also be given the dealer employing such salesman.

Pending the hearing the commissioner of insurance shall have the power to order the suspension of such dealer's or salesman's regis-

tration; provided, such order shall state the cause for such suspension.

During the suspension and pending the hearing, the commissioner of insurance shall have access to and may compel the production of all books and papers of such dealer or salesman, and he or the superintendent may administer oaths to and examine the officers of such dealer or any other person connected therewith, as to its business and affairs and may also require a balance sheet exhibiting assets and liabilities of any such dealer or salesman or his income statement, or both, to be certified to by a public accountant either of this state or of any other state, wherever the dealer's business is located, approved by the commissioner of insurance. If any dealer shall refuse to permit an examination to be made by the commissioner of insurance, it shall be proper ground for cancellation of registration.

In the event the commissioner of insurance determines to refuse or revoke a registration as hereinabove provided he shall enter a final order thereon with his findings on the register of dealers and salesmen and suspension or revocation of the registration of a dealer shall also suspend or revoke the registration of all his salesmen.

It shall be sufficient cause for refusal or cancellation of registration in case of a partnership or corporation or any unincorporated association, if any member of a partnership or any officer or director of the corporation or association has been guilty of any act or omission which would be cause for refusing or revoking the registration of an individual dealer or salesman. [SS15,§1920-u15; C24, 27,§8562; C31, 35, §8581-c13; 48GA, ch 221,§2.]

Referred to in §8581.43

8581.15 Examinations and insolvency. The commissioner of insurance may compel every licensed dealer to make a report not later than the tenth of each month of all securities purchased and sold by such dealer and its salesmen during the preceding calendar month, and the books of all dealers, whether they are duly licensed or their license has been suspended, revoked or canceled, shall at all times be open to examination and inspection by the commissioner of insurance or any of his employees or any person delegated to examine them. If, upon examination, it is found that the dealer is insolvent or if the records are in such condition that the examiner is unable to determine the financial condition of the dealer, the commissioner of insurance may ask the appointment of a receiver to safeguard the interests of the public; the district court in Polk county or the county in which such dealer has its principal place of business shall have authority to appoint such receiver. [C35,§8581-f3; 48GA, ch 221,§2.]

8581.16 Transactions with insolvent dealer. It shall be unlawful for any person engaged in business as a broker within the meaning of this chapter and who is insolvent, to accept or receive from a customer, ignorant of such broker's insolvency, any money or securities belonging to such customer otherwise than in liquidation of or as security for an existing indebtedness and to thereby cause the customer to lose in whole or in part any money or securities. A person shall be deemed insolvent within the meaning of this chapter whenever the aggregate of his property shall not at a fair value be sufficient in amount to pay his debts. [C35,§8581-f4.]

8581.17 Hypothecation of customer's securities. It shall be unlawful for any person engaged in business as a broker, within the meaning of this chapter, who has in his possession for safekeeping or otherwise any securities belonging to a customer without having any lien thereon, to pledge or dispose of the same or any part thereof without such customer's consent; or for one who has in his possession any securities belonging to a customer on which he has a lien for indebtedness due him by the customer, to pledge the same or any part thereof for more than the amount due to him thereon, or otherwise dispose of the same or any part thereof for his own benefit without the customer's consent without having other securities of the kind and amount to which the customer is then entitled, for delivery to him upon demand therefor and tender of the amount due thereon, and to thereby cause the customer to lose such securities or any part thereof. [C35, §8581-f5.]

8581.18 Bond and conditions. Any bond required by section 8581.11 shall be conditioned that the dealer shall properly account for any moneys or securities received from or belonging to another and shall pay, satisfy and discharge any judgment or decree that may be rendered against such dealer in a court of competent jurisdiction in a suit or action brought by a purchaser of securities against such dealer in which it shall be found or adjudged that such securities were sold by the dealer in violation of this chapter or that such purchaser was defrauded in the sale of such securities. Such bond may be drawn to cover the original license and any renewals thereof.

Every such bond shall run in favor of the state of Iowa for the use and benefit of any purchaser of securities sustaining damages as a result of any breach of the conditions thereof, in the sum of five thousand dollars and shall be in such form consistent with the provisions hereof as the commissioner of insurance may prescribe, and shall be executed with surety or sureties satisfactory to the commissioner of insurance. In suits against the surety upon such bond it shall not be necessary to join such dealer as a party.

Banks or trust companies under the supervision of this state or of the United States which would otherwise be required under the provisions of this chapter to execute as dealers the bond required herein may execute said bond without surety.

One or more recoveries upon any such bond shall not vitiate the same but it shall remain in full force and effect, but no recoveries from the surety upon any such bond shall ever exceed

the full amount of the same, and upon suits being commenced in excess of the amount of same the commissioner of insurance may require additional bond, and if the same is not given within ten days the commissioner of insurance may revoke the registration of such dealer.

Any person injured by any breach of the bond given by any dealer may sue on the bond of such dealer in any proper court of the state of Iowa of competent jurisdiction for the recovery of damages, not exceeding the amount of the bond, sustained in consequence of such breach, but no such action shall be brought after two years after the accruing of the cause of action thereon. [SS15,§1920-u16; C24, 27,§8571; C31, 35, §8581-c14; 48GA, ch 221,§2.]

Referred to in §8581.11

8581.19 Burden of proof. It will not be necessary to negative any of the exemptions in this chapter provided in any complaint, information, indictment or any other writ or proceedings laid or brought under this chapter and the burden of proof of any such exemption shall be upon the party claiming the benefit of such exemption and any person claiming the right to register any securities by qualification under section 8581.07 shall also have the burden of proving the right so to register such securities. [C31, 35,§8581-c15.]

8581.20 Escrow agreement. If the statement containing information as to securities to be registered, as provided for in section 8581.07, shall disclose that any such securities or any securities senior thereto shall have been or shall be intended to be issued for any patent right copyright, trademark, process, formulas or good will, or for promotion fees or expenses or for other intangible assets, the amount and nature thereof shall be fully set forth and the commissioner of insurance may require that such securities so issued in payment of such patent right, copyright, trademark, process, formulas or good will, or for promotion fees or expenses, or for other intangible assets shall be delivered in escrow to the commissioner of insurance under an escrow agreement that the owners of such securities shall not be entitled to withdraw such securities from escrow until all other stockholders who have paid for their stock in cash shall have been paid a dividend or dividends aggregating not less than six percent, shown to the satisfaction of said commissioner of insurance to have been actually earned on the investment in any common stock so held, and in case of dissolution or insolvency during the time such securities are held in escrow, that the owners of such securities shall not participate in the assets until after the owners of all other securities shall have been paid in full. [C31, 35,§8581-c16; 48GA, ch 221,§2.]

8581.21 Injunctions. Whenever it shall appear to the commissioner of insurance, either upon complaint or otherwise, that in the issuance, sale, promotion, negotiation, advertisement, or distribution of any securities within this state, including any security exempted under the provisions of section 8581.04*, and including any transaction exempted under the provisions of section 8581.05*, any person, as defined in this chapter, shall have employed or employs, or is about to employ any device, scheme or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, or that any such person shall have made, makes or attempts to make, in this state fictitious or pretended purchases or sales of securities or shall have engaged in, or engages in or is about to engage in any practices or transaction or course of business relating to the purchase or sale of securities which is in violation of law or which is fraudulent or which has operated or which would operate as a fraud upon the purchaser, any one or all of which devices, schemes, artifices, fictitious or pretended purchases or sales of securities, practices, transactions and courses of business are hereby declared to be and are hereinafter referred to as fraudulent practices; or that any person acting as a dealer or salesman within this state without being duly registered as such dealer or salesman as provided in this chapter, the commissioner of insurance may:

1. Require or permit such person to file with him on such forms as he may prescribe, a statement or report in writing under oath or otherwise, as to all the facts and circumstances concerning the sale of securities within or from this state by such person, and such other data and information as may be relevant and material thereto.

2. Examine the promoter, seller, broker, dealer, negotiator, advertiser or issuer of any such securities, and any agents, employees, partners, officers, directors, members or stockholders thereof, under oath; and examine such records, books, documents, accounts and papers as may be relevant or material to the inquiry. For this purpose the commissioner of insurance shall have power to require by subpoena the attendance and testimony of witnesses and the production of papers, and the commissioner of insurance may sign subpoenas, administer oaths, and affirmations, examine witnesses and receive evidence. The fees and mileage shall be the same as prescribed by law in judicial procedure in the courts of this state in civil cases. Any party to any hearing before the commissioner of insurance, shall have the right to the attendance of witnesses in his behalf at such hearing, upon making a request therefor to the commissioner of insurance and designating the person or persons sought to be subpoenaed.

In cases of disobedience to a subpoena the commissioner of insurance may invoke the aid of any court of competent jurisdiction in requiring the attendance and testimony of witnesses and the production of papers; and such court may issue an order requiring the persons to appear before the commissioner of insurance and give evidence or to produce papers as the case may be: and any failure to obey such order of the court may be punished by the court as a contempt thereof.

4. In case any person shall fail or refuse to file any such statement or report or shall fail or refuse to obey any subpoena or summons of the commissioner of insurance, or to give testimony or to answer questions as required, or to produce any books, records, documents, accounts or papers as required, the commissioner of insurance may apply to a court of competent jurisdiction for the issuance and service of a proper subpoena or summons, directing the party so required to appear before the commissioner of insurance for examination under oath and to produce any books, documents or other things necessary for such examination. Any person failing to comply with such court subpoena or summons may be cited and punished for contempt of court as in such cases provided in the courts of record.

5. Whenever it shall appear to the commissioner of insurance from any report or statement filed, from any examination made as provided for in this chapter, or from any other source that any person, as defined in this chapter, has engaged in, is engaged in or is about to engage in any practice declared to be illegal and prohibited by the chapter, or that it will be against public interest for any person, as defined in this chapter, to issue, sell, offer for sale, purchase, offer to purchase, promote, negotiate, advertise or distribute any securities within or from this state, he may by petition apply to a court of equity for a writ of injunction or the appointment of a receiver, or both. The said petition shall allege that it appears to the commissioner of insurance from an investigation made in accordance with the provisions of this chapter, that such person, as defined in the chapter, is engaged in or is about to engage in practices declared to be illegal and prohibited or that it is against public interests for such person, as defined in this chapter, to issue, sell, offer for sale, purchase, offer to purchase, promote, negotiate, advertise or distribute any securities within or from this state, which allegations may be verified generally, and on the filing of said petition the court may issue an injunction restraining such person from continuing such practices or engaging therein or doing any acts in furtherance thereof and/or the court may issue an injunction restraining the issuance, sale, offer for sale, purchase or offer to purchase, promotion, negotiation, advertisement, or distribution within or from this state, of any securities by such person and any agents, employees, brokers, partners, officers, directors or stockholders thereof, until the court shall otherwise order. [C31, 35,§8581-c17; 48GA, ch 221,§2.]

*See 45ExGA, ch 106, §19
Contempts, ch 536

8581.22 Hearings—rules authorized. The commissioner of insurance shall have the authority to provide the necessary rules and regulations and procedure under which all hearings, examinations or investigations as provided in this chapter shall be held. [C35,§8581-f6; 48GA, ch 221,§2.]

8581.23 Remedies. Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director, officer or agent of or for such seller who shall have personally participated in making such sales and at the time knew of such violations shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller in person or in open court of the securities sold or of the contract made for the full amount paid by such purchaser, together with all taxable court costs and reasonable attorney's fees in any action or tender under this section; provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale; and provided further, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within thirty days from the date thereof to accept an offer in writing of the seller to take back the security in question and to refund the full amount paid by such purchaser, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed:

1. In case such securities consist of interest-bearing obligations at the same rate as provided in such obligations; and

2. In case such securities consist of other than interest-bearing obligations at the rate of six percent per annum; less, in every case, the amount of any income from said securities that may have been received by such purchaser. [C31, 35,§8581-c18.]

8581.24 Appeals. An appeal may be taken by any person interested from any final order of the commissioner of insurance to the district court of Polk county, Iowa, by serving upon the commissioner of insurance within twenty days after the date of the entry of such order a written notice of such appeal stating the grounds upon which a reversal of such final order is sought; a demand in writing for a certified transcript of the record and of all papers on file in his office affecting or relating to such order and executing a bond in the penal sum of one thousand dollars to the state of Iowa, with sufficient surety, to be approved by the clerk of said court conditioned upon the faithful prosecution of such appeal to final judgment, and the payment of all costs as shall be adjudged against the appellant. Thereupon the commissioner of insurance shall within ten days make, certify and deliver to the appellant such a transcript; and the appellant shall within five days thereafter file the same and a copy of the notice of appeal with the clerk of said court, which said notice of appeal shall stand as appellant's complaint and thereupon said cause shall be entered on the trial calendar of said court for trial de novo and given precedence over all matters pending in said court. The court shall receive and consider any pertinent evidence, whether oral or documentary, concerning the order of the commissioner of

insurance from which the appeal is taken. If the order of the commissioner of insurance shall be reversed said court shall by its mandate specifically direct said commissioner of insurance as to his further action in the matter, including the making and entering of any order or orders in connection therewith, and the conditions, limitations or restrictions to be therein contained, provided that the commissioner of insurance shall not thereby be barred from thereafter revoking or altering such order for any proper cause which may thereafter accrue or be discovered. If said order shall be affirmed, said appellant shall not be barred after thirty days from filing a new application provided such application is not otherwise barred or limited. Such appeal shall not in any wise suspend the operation of the order appealed from during the pendency of such appeal unless upon proper order of the court. An appeal may be taken from the judgment of the said district court on any such appeal on the same terms as an appeal is taken in civil actions. [SS15,§1920-u17; C24, 27,§8575; C31, 35,§8581-c19; 48GA, ch 221,§2.]

Presumption of approval of bond, §12759.1

8581.25 Fees. All fees herein provided for shall be collected by the commissioner of insurance, shall be accounted for and paid over to the treasurer of the state at the time and in the manner provided by law; and the commissioner of insurance shall keep a record of the receipts and expenditures incurred in carrying out the provisions of this chapter. [SS15,§1920-u12; C24, 27,§8553; C31, 35,§8581-c20; 48GA, ch 221, §2.]

8581.26 False statements, entries, and representations. Any person, firm, association, company or corporation subject to the provisions of this chapter, that shall subscribe or cause to be made any false statement or false entry in any book required to be kept or relating to any business to be transacted in this state pursuant to the provisions of this chapter, or make or subscribe to any false statement, exhibit or paper filed with the commissioner of insurance, or shall make to the commissioner of insurance, his superintendent, agent or representative any false or fraudulent statement concerning the proposed plan of business to be transacted, or the nature, value or character of securities to be sold in this state, or shall make to said commissioner of insurance, his superintendent, agent or representative any false statement as to the financial condition of such person, firm, association, company or corporation shall be deemed guilty of a felony, and upon conviction shall be fined in the sum of not more than five thousand dollars, or imprisoned not to exceed five years in the penitentiary or reformatory, or by both such fine and imprisonment in the discretion of the court. [SS15,§1920-u19; C24, 27,§8577; C31, 35,§8581-c21; 48GA, ch 221,§2.]

8581.27 General violations. Any person, firm, association, company or corporation subject to the provisions of this chapter that shall knowingly and with intent to evade the provisions of this chapter sell or negotiate for the sale of any securities within this state without complying with the provisions of this chapter, or that knowingly and with intent to evade the provisions of this chapter continues to sell, offer for sale or knowingly and with intent to evade the provisions of this chapter negotiates for the sale of securities in this state after his registration has been revoked or canceled by the commissioner of insurance, or that shall otherwise neglect or refuse to comply with any of the provisions of this chapter, shall be guilty of a felony and upon conviction thereof shall be fined not to exceed five thousand dollars or be imprisoned not to exceed five years in the penitentiary or reformatory or by both such fine and imprisonment in the discretion of the court. [SS15,§1920-u20; C24, 27,§8578; C31, 35,§8581-c22; 48GA, ch 221,§2.]

Referred to in §8581.13

8581.28 False representations. Any person, firm, association, company or corporation, or any agent or representative thereof, whether subject to the provisions of this chapter or otherwise, that sells, offers for sale or negotiates for the sale of any securities within this state, and knowingly makes any false representations or statements as to the nature, character or value of such security, or the amount of the earning power of such security whether in the nature of interest, dividends or otherwise, or knowingly makes any other false or fraudulent representation to any person for the purpose of inducing said person to purchase said security, or conceals any material fact in the advertisement or prospectus of such security for the purpose of defrauding the purchaser, or knowingly violates any of the provisions of this chapter with intent to defraud, shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars or by imprisonment in the penitentiary or reformatory for not more than five years or by both such fine and imprisonment. [SS15, §1920-u21; C24, 27,§8579; C31, 35,§8581-c23.]

8581.29 Promotion by state officials and employees. No state official or employee of the state shall use his name in his official capacity in connection with the indorsement or recommendation of the organization or the promotion of any company or in the disposal to the public of its securities, nor shall anyone use the stationery of the state or of any official thereof in connection with any such transaction. Whoever violates the aforesaid provision shall, upon conviction by any court of competent jurisdiction, be deemed guilty of a misdemeanor and fined in any sum not to exceed five hundred dollars or be punished by confinement in a county jail for not more than ninety days or by both such fine and imprisonment. [C24, 27,§8580; C31, 35,§8581-c24.]

8581.30 Secret agents—failure to disclose interest. Any individual, not licensed as a dealer or salesman, who, with intent to secure financial gain for himself, advises and procures or assists in procuring any person to purchase

any securities contemplated by this chapter and who received for such service any commission or reward, without disclosing to the purchaser the fact of his interest shall, in addition to any other penalty, be guilty of a misdemeanor. [C24, 27, §8564; C31, 35,§8581-c25.]

Punishment, §12894

8581.31 Statement not open to public. Any statement, report or information required to be made or furnished by any person by this chapter shall be for the information of the commissioner of insurance, the attorney general or any public official who may be interested in an official way in receiving such statement, report or information, but such statement, report or information shall not be open to public inspection, nor shall it be published or used for private purposes but may be used in an official, legitimate way if need be. [C31, 35,§8581-c26; 48GA, ch 221,§2.]

Constitutionality, §8581-c27, code 1935, 43GA, ch 10, §26

CHAPTER 393.2

MEMBERSHIP SALES

8581.32 Administration.
8581.33 Definitions.
8581.34 Nonapplicability.
8581.35 Application for authority.
8581.36 Certificate of authority.
8581.37 Bond.
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8581.39 Tenure of license—fees.
8581.40 Financial report.
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8581.42 Revocation of certificate—receiver—injunction.
8581.43 Salesmen—license—revocation.
8581.44 Misdemeanor.
8581.45 Commissioner as process agent.

8581.32 Administration. The administration of the provisions of this chapter shall be vested in the commissioner of insurance, to be administered in the same manner as is provided for in chapter 393.1. [C35,§8581-e1; 48GA, ch 221, §7.]

8581.33 Definitions. The term "association" when used in this chapter shall mean any person, firm, company, partnership, association or corporation other than building and loan associations, insurance companies and associations, and corporations and cooperative associations subject to the provisions of chapters 389, 390 and 392*, which sell, offer for sale. and/or issue to the public generally memberships or certificates of membership entitling the holder thereof to purchase merchandise, materials, equipment and/or services on a discount or cost-plus basis.

The term "issue" when used in this chapter shall mean issue, sell, place, engage in or otherwise dispose of or handle.

* See also ch 390.1

The term "membership" when used in this chapter shall mean certificates, memberships, shares, bonds, contracts, stocks or agreements of any kind or character issued upon any plan offered generally to the public entitling the holder thereof to purchase merchandise, materials, equipment and/or service, either from the issuer or someone designated by the issuer, either under a franchise or otherwise, whether it be at a discount, cost plus a percentage, cost plus a fixed amount, at a fixed price, or on any other basis. [C35,§8581-e2.]

45GA, ch 47, §2, editorially divided

8581.34 Nonapplicability. This chapter shall not apply to any corporation or association organized upon the assessment plan, for the purpose of insuring the lives of individuals or furnishing benefits to the widows, heirs, orphans or legatees of deceased members, or insuring the health of persons, or furnishing accident indemnity, nor to any benevolent associations or societies. [C35,§8581-e3.]

8581.35 Application for authority. No association contemplated by this chapter shall issue any membership until it shall have procured from the commissioner of insurance a certificate of authority authorizing it to engage in such business.

To secure such certificate of authority it shall be necessary for such association to file with the commissioner of insurance an application under oath, showing the name and location of such association, the name and post-office address of its officers, the date of organization, and if incorporated, a certified copy of its articles of incorporation, a copy of its bylaws or rules by which it is to be governed, the form of its certificates or contracts, all printed matter issued by it, together with a detailed statement of its financial condition and such other information concerning its affairs or plan of business as the commissioner of insurance may require. [C35, §8581-e4; 48GA, ch 221,§7.]

Referred to in §8581.36

8581.36 Certificate of authority. Upon the filing of the application referred to in section 8581.35, if the commissioner of insurance is satisfied that the business is not in violation of law, or against public policy, and is safe, reliable and entitled to public confidence, and that the certificate or contract is in proper form, he may issue a certificate of authority authorizing it to transact business within this state for the period of one year from the date of the issuance thereof. [C35,§8581-e5; 48GA, ch 221,§7.]

8581.37 Bond. Before any association shall be authorized to transact the business contemplated by this chapter, it shall file and deposit with the commissioner of insurance a bond in the penal sum of twenty-five thousand dollars, running to the state of Iowa, for the use and benefit of any purchaser of a membership or contract,

conditioned upon the faithful performance of all contracts entered into by such association, to be performed by it or someone designated by it, for whose benefit the same may be made, and providing for the refunding of the amount of the membership fee in the event of the failure of the association, or someone designated by it, to perform its contract or contracts in accordance with the terms and conditions thereof, and the payment of any and all damages sustained as a result of any breach of the conditions of said bond. Said bond shall be in such form, consistent with the provisions hereof, as the commissioner of insurance may prescribe, and shall be executed with surety by a surety company authorized to do business in this state. In suits against the surety company upon such bond it shall not be necessary to join the issuer as a party. [C35,§8581-e6; 48GA, ch 221,§7.]

8581.38 **Deposit of securities.** In addition to the filing of the bond as hereinbefore provided, every such association shall on the tenth day of each month deposit with the commissioner of insurance, securities of the kind provided for in section 8737, in an amount equal to fifty percent of the amount of the sale price of the memberships sold by said association during the previous month, and said association shall keep such deposit at all times equal to fifty percent of the sale price of all outstanding and unredeemed memberships.

For the purpose of determining the amount of such deposit liability, every such association shall file with its deposit on the tenth of each month, a sworn statement showing the names and addresses of all persons to whom memberships were sold during the previous month, together with the selling price, the amount received from each person, and the amount, if any, due from each person.

Said sworn statement shall also show the names and addresses of all persons whose memberships were redeemed and canceled during the previous month, and by whom.

The deposit herein provided for shall be for the protection of all purchasers or holders of memberships in the association making said deposit. [C35,§8581-e7; 48GA, ch 221,§7.]

8581.39 **Tenure of license—fees.** The license period for each such association shall be one year, and renewable annually thereafter on the same terms and conditions as provided for in the original qualification.

Such association shall pay to the commissioner of insurance for its certificate of authority to transact business in accordance with this chapter, a fee of one hundred dollars and an annual renewal fee of one hundred dollars to be paid on or before the date of the expiration of the license period both of which fees shall be by the commissioner of insurance turned into the state treasury as are other fees of his office. [C35, §8581-e8; 48GA, ch 221,§7.]

8581.40 **Financial report.** During the month of January of each year, or at such other time as the commissioner of insurance may require, every association transacting the business contemplated herein shall file with the commissioner of insurance in such form as he prescribes, a statement showing its financial condition on the thirty-first day of December preceding. [C35, §8581-e9; 48GA, ch 221,§7.]

45GA, ch 47, §8, editorially divided

8581.41 **Examination.** Every such association shall be subject to examination by the commissioner of insurance or his representatives, the expense of which shall be paid by the association in the same manner and on the same basis and under the same terms and conditions as is now provided for in section 8581.12. In making such examination the commissioner of insurance or his representatives, shall have full access to and may demand the production of all books, securities, papers, contracts, moneys, etc., of said association, and may administer oaths, summon and compel the attendance of witnesses and the giving of testimony thereby. [C35, §8581-e10; 48GA, ch 221,§7.]

8581.42 **Revocation of certificate—receiver—injunction.** If upon such examination, or at any other time after reasonable notice and a hearing, it shall appear that such association does not conduct its business in accordance with law, or is insolvent, or is doing an unsafe and unsound business, or is conducting its business contrary to public policy, or that the further continuance of its business is hazardous and against the public interest, or if such association upon request refuses to be examined, or fails to make the deposit and reports as herein required, he shall revoke its certificate of authority, and having revoked the certificate of authority of such association he shall report this fact to the attorney general, who shall at once apply to the district court or a judge thereof, for the appointment of a receiver to close up the affairs of such association, and an injunction may issue in the same proceeding enjoining and restraining the association from transacting business in this state. [C35,§8581-e11.]

8581.43 **Salesmen—license—revocation.** The salesmen or agents of every association qualified under this chapter, shall be licensed or registered in the same manner and under the same terms and conditions as is provided for in section 8581.11, and the license or registration of such salesmen or agents shall be subject to suspension and revocation in the same manner and under the same terms and conditions as is provided for in section 8581.14. [C35,§8581-e12.]

8581.44 **Misdemeanor.** Any member, salesman, agent or representative of any association, who shall attempt to issue any membership as contemplated by this chapter, or to transact any business whatsoever, in the name of or on behalf of such association not authorized to do business in this state, or which has failed or refused to comply with the provisions of this chapter, or has violated any of its provisions, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by impris-

onment in the penitentiary not to exceed five years, or fined not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment. [C35,§8581-e13.]

8581.45 Commissioner as process agent. Every association as defined herein shall, before receiving a certificate of authority to do business in this state, or any renewal thereof, file in the office of the commissioner of insurance an agreement in writing that thereafter service of notice or process of any kind may be made on the commissioner of insurance, and when so made shall be as valid, binding and effective for all purposes as if served upon the association according to the laws of this or any other state, and waiving all claim or right of error by reason of such acknowledgment of service.

The service of such notice or process on any association shall be in the same manner as is provided for in section 8767. [C35,§8581-e14; 48GA, ch 221,§7.]

Constitutionality, §8581-e15, code 1935, 45GA, ch 47, §12

CHAPTER 394

CORPORATIONS NOT FOR PECUNIARY PROFIT

Referred to in §§5835, 8895.01, 8895.02

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GENERAL PROVISIONS

8582 Articles. Any three or more persons of full age, a majority of whom shall be citizens of the state, may incorporate themselves for the establishment of churches, colleges, seminaries, lyceums, libraries, fraternal lodges or societies, temperance societies, trades unions or other labor organizations, commercial clubs, associations of business men, agricultural societies, farmers granges, or organizations of a benevolent, charitable, scientific, political, athletic, military, or religious character, by signing, acknowledging, and filing for record with the county recorder of the county where the principal place of business is to be located, articles of incorporation, stating the name by which the corporation or association shall be known, which shall not be the same as that of any such organization previously existing, its business or objects, the number of trustees, directors, managers or other officers to conduct the same, and the names thereof for the first year. [C51,§§708, 709; R60,§§1187, 1188, 1190, 1191, 1193, 1197; C73,§§1091, 1092, 1095, 1100; C97,§1642; C24, 27, 31, 35,§8582.]

Referred to in §8600

8583 Powers—duration. Upon filing such articles, the persons signing and acknowledging the same, and their associates and successors, shall become a body corporate, with the name therein stated, and may sue and be sued. It may have a corporate seal, alterable at its pleasure, and may take by gift, purchase, devise, or bequest real and personal property for purposes appropriate to its creation, and may make bylaws. Corporations so organized shall endure for fifty years, unless a shorter period is fixed in the articles, or they are sooner dissolved by three-fourths vote of all the members thereof, or by act of the general assembly, or by operation of law. [R60,§§1185, 1194, 1198; C73,§§1070, 1096, 1101; C97,§1643; S13,§1643; C24, 27, 31, 35,§8583.]

S13, §1643, editorially divided
Temporary amendment, 46GA, ch 93

8584 Property of extinct religious society—rules. State, diocesan, or district religious organizations incorporated under this chapter, or those existing by voluntary association and having permanent funds, shall have the power to adopt and enforce rules as to the property of extinct local societies which at any time have been or which may be connected therewith and defining when such a local society shall be considered extinct, and to take charge of and to control the real and personal property of such extinct society. [S13,§1643; C24, 27, 31, 35, §8584.]

Referred to in §8599

8585 For agricultural, horticultural, and cemetery purposes. Corporations organized for agricultural or horticultural purposes, and cemetery associations, shall not own to exceed nine sections of land, and the improvements and necessary personal property for the proper management thereof; and the articles of incorporation shall provide a mode by which any member may at any time withdraw therefrom, and also

the mode of determining the amount to be received by such member upon withdrawal, and for the payment thereof to him, subject to the right of creditors of the corporation; and their duration shall be without limit, unless terminated by act of the general assembly. [R60, §1185; C73,§1070; C97,§1644; C24, 27, 31, 35, §8585.]

Referred to in §8585.1

8585.1 Territorial associations. The power and right to acquire lands to the extent granted by section 8585 shall be possessed by any association incorporated for cemetery purposes by any territorial legislature of Iowa and now existing even though said incorporation act contains a lesser limitation on such power and right. [C27, 31, 35,§8585-b1.]

8586 Dividend. No dividend or distribution of property among the stockholders shall be made until the dissolution of the corporation. [C51,§710; R60,§1188; C73,§1093; C97,§1645; S13,§1645; C24, 27, 31, 35,§8586.]

S13,§1645, editorially divided

8587 When society deemed extinct. When a local religious society shall have ceased to support a minister or leader or regular services and work for two years or more, or as defined by the rules of any incorporated state, diocesan, or district society with which it has been connected, it shall be deemed extinct, and its property may be taken charge of and controlled by such state or similar society of that denomination with which it had been connected. [S13,§1645; C24, 27, 31, 35,§8587.]

Referred to in §8599

8588 Power to confer degree. Any corporation of an academical character may confer the degrees usually conferred by such an institution. No academic degree for which compensation is to be paid shall be issued or conferred by such corporation or by any individual conducting an academic course unless the person obtaining the said degree shall have completed at least one academic year of resident work at the institution which grants the degree. [C51, §711; R60,§1189; C73,§1094; C97,§1646; C24, 27, 31, 35,§8588.]

Referred to in §8588.1

8588.1 Penalty. A violation of section 8588 by a corporation shall be punished by a fine of not more than one thousand dollars. A violation of section 8588 by an individual conducting an academic course or by an officer or managing head of a corporation shall be punished by imprisonment in the penitentiary or men's or women's reformatory not more than seven years; or by fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. [C27, 31, 35,§8588-b1.]

8589 Trustees or managers. Such corporation may, annually or oftener, elect from its members its trustees, directors or managers, at such time and place and in such manner as may be specified in its bylaws, who shall have the control and management of its affairs and funds, a majority of whom shall constitute a quorum for the transaction of business. When a vacancy occurs in its governing body, it shall be filled in such manner as shall be provided by the bylaws. When the corporation consists of the trustees, directors or managers of any benevolent, charitable, scientific, or religious institution which is or may be established in the state, and which is or may be under the patronage, control, direction or supervision of any synod, conference, association or other ecclesiastical body in any state established agreeably to the laws thereof, such ecclesiastical body may nominate and appoint such trustees, directors or managers, according to the usages of the appointing body, and may fill any vacancy which may occur among them; and when any such institution may be under the patronage, control, direction or supervision of two or more of such synods, conferences, associations or other ecclesiastical bodies, they may severally nominate and appoint such proportion of such trustees, directors or managers as shall be agreed upon by the bodies immediately concerned, and any vacancy occurring among such appointees last named shall be filled by the synod, conference, association or body having appointed the last incumbent. [R60,§1195; C73, §1097; C97,§1647; C24, 27, 31, 35,§8589.]

8590 Academical—meetings. Any corporation of an academical character, the membership of which shall consist of lay members and pastors of churches, delegates to any synod, conference, or council holding its annual meetings alternately in this and one or more adjoining states, may hold its annual meetings for the elections of officers and the transaction of business in any adjoining state, at the place where such synod, conference, or council holds its annual meeting; and the election and business transacted shall be of the same effect as if held and transacted at its place of business in this state. [C73,§1098; C97,§1648; C24, 27, 31, 35,§8590.]

8591 Election of officers. If an election of trustees, directors, or managers shall not be made on the day designated by the bylaws, the society for that cause shall not be dissolved, but such election may take place on any other day directed in the bylaws. [R60,§1196; C73,§1099; C97,§1649; C24, 27, 31, 35,§8591.]

8592 Reincorporation prior to expiration of term. The trustees, directors, or members of any corporation organized under this chapter may reincorporate the same, and all the property and rights thereof shall vest in the corporation as reincorporated. [R60,§1199; C73,§1102; C97, §1650; S13,§1650; C24, 27, 31, 35,§8592.]

8592.1 Reincorporation after expiration of term. When the term of incorporation of a corporation organized under this chapter has expired, but the organization has continued to act as such corporation, the trustees, directors, or members thereof may reincorporate, and the property and rights therein shall vest in the re-

incorporation for the use and benefit of all of the shareholders in the original corporation. [C27, 31, 35,§8592-a1.]

8593 Amendment of articles. Any corporation organized under this chapter may change its name or amend its articles of incorporation by a vote of a majority of the members, in such manner as may be provided in its articles; but if no such provision is made in the articles the same may be amended at any regular meeting or special meeting called for that purpose by the president or secretary or a majority of the board of directors. Notice of any meeting at which it is proposed to amend the articles of incorporation, shall be given by mailing to each member at his last known post-office address at least ten days prior to such meeting, a notice signed by the secretary setting forth the proposed amendments in substance, or by two publications of said notice in some daily or weekly newspaper in general circulation in the county wherein said corporation has its principal place of business. The last publication of said notice shall be not less than ten days prior to the date of said meeting. If the trustees, directors, or managers of such corporation are appointed by two or more synods, conferences, associations, or other ecclesiastical bodies, such change or amendment shall not be made without the concurrence of a majority of those appointed by each such body. [C97,§1651; C24, 27, 31, 35, §8593.]

Referred to in §8594

8594 Record—effect. The change or amendment provided for in section 8593 shall be recorded as the original articles are recorded. From the date of filing such change or amendment for record, the provisions of the previous section having been complied with, the change or amendment shall take effect as a part of the original articles, and the corporation thus constituted shall have the same rights, powers, and franchises, be entitled to the same immunities, and liable upon all contracts to the same extent, as before such change or amendment. [C97, §1652; C24, 27, 31, 35,§8594.]

8595 Endowment fund — trustees. Any presbytery, synod, conference, state or diocesan convention, or other state or district representative body of any religious denomination in this state, now or hereafter incorporated under this chapter, or any assembly, synod, conference, convention, or other general ecclesiastical body of any religious denomination in the United States having local societies in this state and wherever incorporated, may in its articles of incorporation or by amendment thereto create a board, committee, or commission of three or more members for any endowment fund or other fund or property of the denomination represented by such body, and at any regular meeting of such presbytery, synod, conference, state or diocesan convention, or other representative assembly of such denomination in this state, or of such assembly, synod, conference, convention, or other general ecclesiastical body in the United States, may elect not less than three members of such denomination, one of whom shall be a resident freeholder in this state, to serve as trustees of such fund or property; and a copy of such articles of incorporation and amendment, duly certified to by the officer with whom the same have been filed for record, shall be evidence in the courts of this state of the existence of such trust and of the powers of such trustees. [S13,§1652-a; C24, 27, 31, 35,§8595.]

Referred to in §8599

8596 Powers of trustees. Such trustees, if chosen to take charge of any endowment or other like fund, may invest, manage, and dispose of the same in accordance with the purpose for which it was created, subject to such regulations as the body by which they were elected may from time to time prescribe; and shall have power to make contracts regarding, and to collect and sue for, and in all ways to control and protect, any property belonging or which should belong to any such funds. [S13,§1652-b; C24, 27, 31, 35,§8596.]

Referred to in §8599

8597 Extinct religious societies — disposition of property. When any local religious society shall have become extinct, such trustees of the denomination with which it shall have been at any time connected shall take charge of its property, whether real or personal, and control, dispose of and use the same in trust, as part of the endowment or other like funds of such denomination within the territorial limits represented by such trustees and the corporation by which they were elected and especially for the work of such denomination at the place where such extinct local society shall have been situated. A transfer of such property by resolution or act of the remaining member or members, representative or representatives, of such extinct local society to such trustees shall operate to pass complete title. If on demand therefor there is a failure or refusal to transfer such property to such trustees, or if such trustees think proper so to do, they may commence action in equity in the district court of the county where such extinct local society was situated, making parties defendant thereto all persons known to have any interest in or claim upon such property; notice shall be given as in other equitable actions, and said court shall have jurisdiction to enter a decree whereby the title to all the property of such extinct society shall be transferred to such trustees, or for the sale thereof and transfer of the proceeds of such sale to such trustees. Such decree or sale thereunder shall pass good title to such property. Provisions shall be made for the protection of all having claims against such local society or its property. [S13,§1652-c; C24, 27, 31, 35,§8597.]

Referred to in §8599

8598 Property in trust—use of principal. The property of any such extinct religious society shall be held and disposed of by such trustees in trust for the work of the denomination in the territorial limits represented by such trustees,

and especially in trust for such work at the place where such extinct society was situated or its immediate vicinity within the judgment of the religious body by which such trustees were elected. Only income therefrom shall be used for the general work of such denomination in such territorial limits, but the principal shall be kept as a permanent fund for not less than five years, except that it may be used in the locality where such extinct local society was situated or its immediate vicinity if thought best by such body. No local society of such denomination at such place shall be allowed to demand the use of such principal for its benefit until it has been recognized and approved by and has complied with the reasonable requirements of the body so electing such trustees. If the principal or income in the hands of such trustees is not used in the locality where the extinct local society was situated within the term of five years from the time of the sale or disposition of its property, then the said principal and income, if any, may be used for building or improving other property of the denomination within the territorial limits in which such extinct society was located. [S13,§1652-d; C24, 27, 31, 35,§8598.]

Referred to in §8599

8599 Contract and rights not affected. Existing contract and property rights arising under the organization, rules, laws, or canons heretofore adopted by any corporation or organization of a religious character, shall not be affected by the provisions of sections 8584, 8587, and 8595 to 8598, inclusive, except by consent of the interested parties. [S13,§1652-e; C24, 27, 31, 35, §8599.]

Act effective July 4, 1911

FOREIGN NONPECUNIARY CORPORATIONS

8600 Permits. Any corporation organized under the laws of another state, or of any territory of the United States, for any of the purposes mentioned in section 8582, desiring a permit to do business in the state, shall file with the secretary of state a certified copy of its articles of incorporation duly attested by the secretary of state, or other state officer in whose office the original articles were filed, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in the state. [C24, 27, 31, 35,§8600.]

Referred to in §§8602, 8603
37GA, ch 354, §1, editorially divided

8601 Record and permit. If it appears that said foreign corporation is, in fact, organized not for pecuniary profit, the secretary of state shall file said articles of incorporation and issue a permit to such corporation to do business in the state, for which permit the secretary of state shall charge, and receive, a fee of five dollars. Upon the issuance of such permit the corporation shall be entitled to carry on its business in the state. The secretary of state shall number consecutively all such certified copies filed in his office and shall maintain a card index thereof alphabetically arranged and shall preserve the same as permanent records of his office. [C24, 27, 31, 35,§8601.]

Referred to in §§8602, 8603

8602 Annual reports. Any corporation, organized as provided in sections 8600 and 8601 shall, between the first day of July and the first day of August of each year, make an annual report to the secretary of state, said report to be in such form as he may prescribe and upon a blank to be prepared by him for that purpose. [C24, 27, 31, 35,§8602.]

8603 Forfeiture. Should any corporation referred to in sections 8600 and 8601 fail to comply with the provisions of this chapter, notice of such failure shall be called to its attention by the secretary of state by registered letter and, if such delinquent corporation fails or neglects to comply with this chapter within sixty days from the receipt of such letter from the secretary of state, then and in such case said corporation shall forfeit its right to do business in this state. [C24, 27, 31, 35,§8603.]

TITLE XX

INSURANCE

Referred to in §8376

CHAPTER 395

INSURANCE DEPARTMENT

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

8604 Location.
8605 Appointment and term.
8607 Vacancies.
8608 Deputy—assistants—bond.
8610 Expenses.
8611 Documents and records.
8612 Fees.
8612.1 Discrimination against Iowa companies.
8613 General powers and duties.
8613.1 Ex officio receiver.
8613.2 Expenses attending liquidation.
8613.3 Refunds.
8614 Life insurance—annual report.
8615 Other insurance—annual report.

8604 Location. The insurance department of Iowa, as heretofore created and established, with the commissioner of insurance as head thereof, shall be located at the seat of government. [S13,§§1683-r,-r1; C24, 27, 31, 35,§8604.]

8605 Appointment and term. The governor shall, within sixty days following the organization of the regular session of the general assembly in 1927, and each four years thereafter, appoint, with the approval of two-thirds of the members of the senate in executive session, a commissioner of insurance, who shall be selected solely with regard to his qualifications and fitness to discharge the duties of this position, devote his entire time to such duties, and serve for four years from July 1 of the year of appointment. The governor with the approval of the executive council may remove said commissioner for malfeasance in office, or for any cause that renders him ineligible, incapable, or unfit to discharge the duties of his office. [S13, §1683-r; C24, 27, 31, 35,§8605; 48GA, ch 221,§8.]

Confirmation, §38.1

8606 Rep. by 42GA, ch 9

8607 Vacancies. Vacancies that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes. Prior to the expiration of said thirty days the governor shall transmit to the senate for its confirmation an appointment for the unexpired portion of the regular term. Vacancies occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session, and for the unexpired portion of the regular term. [S13,§1683-r; C24, 27, 31, 35, §8607.]

8608 Deputy—assistants—bond. The commissioner of insurance shall appoint a first and second deputy commissioner and such other clerks and assistants as shall be needed to assist him in the performance of his duty, all of whom shall serve during the pleasure of the commissioner. Before entering upon the duties of their respective offices, deputy commissioners shall give a bond in the penal sum of ten thousand dollars. [S13,§1683-r2; C24, 27, 31, 35,§8608.]

8609 Rep. by 42GA, ch 197

8610 Expenses. The commissioner shall be entitled to reimbursement of his actual necessary expenses in attending meetings of insurance commissioners of other states, and in the performance of the duties of his office, not exceeding one thousand dollars annually. He may incur such other and additional expenses as may be authorized by the executive council, not exceeding one thousand dollars annually. [S13, §1683-r2; C24, 27, 31, 35,§8610.]

8611 Documents and records. All books, records, files, documents, reports, and securities, and all papers of every kind and character relating to the business of insurance shall be delivered to, and filed or deposited with, the said commissioner of insurance. [S13,§1683-r4; C24, 27, 31, 35,§8611.]

8612 Fees. All fees and charges of every character whatsoever which are required by law to be paid by insurance companies and associations shall be payable to the commissioner of insurance whose duty it shall be to account for and pay over the same to the treasurer of state at the time and in the manner provided by law. [S13,§1683-r5; C24, 27, 31, 35,§8612.]

Deposit of fees, §143

8612.1 Discrimination against Iowa companies. If, by the existing or future laws of any state, an insurance corporation of this state or the agents thereof, shall be required to make any deposit of securities in such other state for

the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties, certificates of authority, license fees or otherwise, or are subjected to any restrictions, obligations, conditions, or penalties greater than are required or imposed by the laws of the state of Iowa relating to insurance companies from or under similar corporations of such other states by the then existing laws of this state, then and in every such case all similar insurance corporations of such states shall be and they are hereby required to make like deposit for the like purposes in the insurance department of this state, and to pay to the commissioner of insurance for taxes, fines, penalties, certificates of authority, license fees and otherwise an amount equal to the amount of such charges and payments, and shall be subjected to the same restrictions, obligations, conditions or penalties imposed by the laws of other states upon insurance companies and agents thereof.

Whenever it shall appear to the commissioner of insurance that permission to transact the business of insurance and/or to sell its securities in any state within the United States or in any foreign country is refused to a company organized under the laws of this state, after a certificate of solvency and good management of such company has been issued to it by the commissioner of insurance and after such company has complied with any reasonable laws of such state or foreign country, then, and in every such case, the commissioner of insurance may cancel the authority of every company organized under the laws of such state or foreign government, licensed to do business in this state, and may refuse a certificate of authority to any and all insurance companies of such state thereafter applying for authority to do business in this state, until such time as the certification of the commissioner of insurance of this state shall have been duly recognized by the government of such state or country. Securities as defined herein shall mean the shares of capital stock, subscription certificates, debenture bonds, and any and/or other contracts or evidences of ownership of or interest in insurance corporations as referred to in this section. [C73,§1154; C97,§§1736, 1810; C24, 27,§§8752, 8969; C31, 35, §8612-c1.]

8613 General powers and duties. The commissioner of insurance shall be the head of the insurance department, and shall have general control, supervision, and direction over all insurance business transacted in the state, and shall enforce all the laws of the state relating to such insurance.

He shall supervise all transactions relating to the organization, reorganization, liquidation, and dissolution of domestic insurance corporations, and all transactions leading up to the organization of such corporations.

He shall also supervise the sale in the state of all stock, certificates, or other evidences of interest, either by domestic or foreign insurance companies or organizations proposing to engage in any insurance business. [S13,§1683-r3; C24, 27, 31, 35,§8613.]

8613.1 Ex officio receiver. The commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership. [C31, 35,§8613-c1.]

8613.2 Expenses attending liquidation. All expenses of supervision and liquidation shall be fixed by the commissioner of insurance, subject to approval by the court or a judge thereof, and shall, upon his order, be paid out of the funds of such company, association or insurance carrier in his hands. [C31, 35,§8613-c2.]

8613.3 Refunds. Whenever it appears to the satisfaction of the commissioner of insurance that because of error, mistake, or erroneous interpretation of statute that a foreign or domestic insurance corporation has paid to the state of Iowa taxes, fines, penalties, or license fees in excess of the amount legally chargeable against it, the commissioner of insurance shall have power to refund to such corporation any such excess by applying the amounts thereof toward the payment of taxes, fines, penalties, or license fees already due or which may hereafter become due, until such excess payments have been fully refunded. [C31, 35,§8613-c3.]

8614 Life insurance—annual report. Before the first day of May the commissioner of insurance shall make an annual report to the governor of the general conduct and condition of the life insurance companies doing business in the state, and include therein an aggregate of the estimated value of all outstanding policies in each of the companies; and in connection therewith prepare a separate abstract thereof as to each company, and of all the returns and statements made to him by them. [C73,§1176; C97,§1781; C24, 27, 31, 35,§8614.]

Period covered by report, §247

8615 Other insurance—annual report. The commissioner shall cause the information contained in the statements required of the companies, other than life insurance, organized or doing business in the state to be arranged in detail, and prepare the same for printing, which report shall be made to the governor on or before the first day of May of each year. [C73, §1158; C97,§1720; S13,§1720-a; C24, 27, 31, 35, §8615.]

CHAPTER 396

ORGANIZATION OF DOMESTIC INSURANCE COMPANIES

8616 Sale of stock or membership—conditions.
8617 Power over organization—certificate.
8618 Promotion expense—unallowable dividends.
8619 General regulation by commissioner.
8620 Unallowable contracts.
8621 Violations.
8622 Liability for illegal sale of stock.
8623 Appeal.
8624 Sale of stock as inducement to insurance.

8616 Sale of stock or membership—conditions. Neither the stock in an insurance company nor the membership in an insurance association in process of organization shall be sold or solicited until such company or association, and the promoters thereof, shall have first complied with all of the statutory provisions regulating the organization of such companies and associations, and also have secured from the commissioner of insurance a certificate indicating full compliance with the provisions of this section. [S13,§1683-r3; C24, 27, 31, 35,§8616.]

8617 Power over organization—certificate. Before the commissioner of insurance shall issue such certificate of compliance, he shall first be satisfied with the general plan of such organization and the character of the advertising to be used; he shall also fix the time within which such organization shall be completed; he shall also prescribe the method of keeping books and accounts of such corporation and those of fiscal agents. [S13,§1683-r3; C24, 27, 31, 35, §8617.]

8618 Promotion expense—unallowable dividends. The maximum promotion expense which may be incurred shall in no case exceed twelve and one-half percent of the par value of said stock, and no portion of such amount shall be used in the payment of salaries for officers and directors before the issuance, by the commissioner of insurance, of authority to transact an insurance business. Any amount paid to the company for stock above the par value of the stock shall constitute a contributed surplus but no dividends shall be paid by the company except from the earned profits arising from their business, which shall not include contributed capital or contributed surplus. [C24, 27, 31, 35, §8618.]

Referred to in §§8620, 8917

8619 General regulation by commissioner. The commissioner of insurance shall have power to regulate all other matters in connection with the organization of such domestic corporations, and the sale of stock or the issuing of certificates by all insurance corporations within the state, to the end that fraud may be prevented in the organization of such companies and the sale of their stocks and securities. [S13,§1683-r3; C24, 27, 31, 35,§8619.]

Referred to in §8917

8620 Unallowable contracts. No company shall enter into any contract with any promoter, officer, director, or agent of the company or any other person to pay his expenses or to pay him any commission or any compensation for his services in promoting or organizing such company, or in selling its stock in excess of the amount authorized in section 8618; nor shall it contract with any such person to pay him any part of the premiums arising from the insurance it has written or may write as compensation, directly or indirectly, for aiding in the promotion or for aiding or effecting any consolidation of such company with any other company, without the approval of the commissioner of insurance. [C24, 27, 31, 35,§8620.]

Referred to in §8917

8621 Violations. Any person who violates any of the provisions of the preceding sections of this chapter, or who violates any order of the commissioner of insurance made by authority thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not to exceed one thousand dollars, and by imprisonment in the county jail not to exceed six months. [C24, 27, 31, 35,§8621.]

8622 Liability for illegal sale of stock. Any person, association, or corporation who sells or aids in selling or causes to be sold any stock, certificate of membership, or evidence of interest in any such corporation or association, in violation of law, shall be personally liable to any person to whom he may have sold any stock or certificate of membership or evidence of interest, in an amount equal to the price paid therefor by such person with legal interest, and suit to recover the same may be brought by such purchasers, jointly or severally, in any court of competent jurisdiction. [C24, 27, 31, 35,§8622.]

8623 Appeal. Any person, corporation, or association aggrieved by any order made by the commissioner of insurance under the provisions of this chapter, may appeal to the district court at the seat of government, by the service of a written notice of such appeal on the commissioner of insurance and attorney general. If such appeal is taken, the commissioner of insurance shall transmit the transcript of the proceedings had before him to such court, and the cause shall be docketed and tried as an equitable action. [C24, 27, 31, 35,§8623.]

Docketing appeal, §11440

8624 Sale of stock as inducement to insurance. No insurance company shall issue in this state, or permit its agents, officers, or employees to issue in this state its own stock, agency company stock or other stock or securities, or any special or advisory board or other contract of any kind promising returns and profits as an inducement to insurance.

No insurance company shall be authorized to

do business in this state which issues or permits its agents, officers, or employees to issue in this state or in any other state or territory, agency company stock or other stock or securities, or any special advisory board or other contract of any kind promising returns and profits as an inducement to insurance.

No corporation or stock company, acting as an agent of an insurance company, or any of its agents, officers, or employees, shall be permitted to agree to sell, offer to sell, or give, or offer to give, directly or indirectly, in any manner whatsoever, any share of stock, securities, bonds or agreement of any form or nature, promising returns and profits as an inducement to insurance, or in connection therewith.

Nothing herein contained shall impair or affect in any manner any such contracts issued or made as an inducement to insurance prior to the enactment of this section, or prevent the payment of the dividends or returns therein stipulated to be paid.

It shall be the duty of the commissioner upon being satisfied that any insurance company, or any agent thereof, has violated any of the provisions of this section, to revoke the certificate of authority of the company or agent so offending. [C24, 27, 31, 35,§8624.]

CHAPTER 397

EXAMINATION OF INSURANCE COMPANIES

Referred to in §8895.10

8625 "Company" defined.
8626 Examination required.
8627 Companies to assist—oaths.
8628 Examiner—assistants.
8629 Bond.
8630 Employment of experts.
8631 Expenses.
8632 Payment by company.
8633 Fees—accounting.
8634 Suspension or revocation of certificate—receivership.
8635 Procedure against nonlife companies.
8636 Procedure against life companies.
8637 Notice of application.
8638 Publication of examination.
8639 Transfer pending examination.
8640 Unlawful solicitation of business.
8641 Refusing to be examined.
8642 Examination of nonresident companies.

8625 "Company" defined. The word "company" as used in this chapter shall mean all companies or associations organized under the provisions of chapters 398, 400, 401, 404, 406, except county mutuals, and 408, and all companies or associations admitted or seeking to be admitted to this state under the provisions of any of the chapters herein referred to. [S13, §1821-i; C24, 27, 31, 35,§8625.]

8626 Examination required. The commissioner of insurance may, at any time he may deem it advisable, make an examination of, or inquire into the affairs of any insurance company authorized or seeking to be authorized to transact business within this state, provided that such examination shall not be less frequent than once during each biennial period. [S13, §1821-a; C24, 27, 31, 35,§8626.]

Referred to in §8696

8627 Companies to assist—oaths. When any company is being examined, the officers, employees, or agents thereof, shall produce for inspection all books, documents, papers, or other information concerning the affairs of such company, and shall otherwise assist in such examination so far as they can do. The commissioner of insurance, or his legally authorized representative in charge of the examination, shall have authority to administer oaths and take testimony bearing upon the affairs of any company under examination. [S13,§1821-b; C24, 27, 31, 35, §8627.]

8628 Examiner — assistants. The commissioner of insurance is hereby authorized to appoint two insurance examiners, one of whom shall be an experienced actuary, the other of whom shall be an experienced and competent fire insurance accountant, and who, while conducting examinations, shall possess all the powers conferred upon the commissioner of insurance for such purposes. The entire time of the examiners shall be under the control of the said commissioner, and shall be employed as he may direct.

The said commissioner may, when in his judgment it is advisable, appoint assistants to aid in making examinations. [S13,§1821-c; C24, 27, 31, 35,§8628.]

S13, §1821-c, editorially divided

8629 Bond. Said examiners shall give bond to the state conditioned upon the faithful performance of their duties, in the sum of five thousand dollars, which bond shall be filed with and approved by said commissioner. [S13,§1821-c; C24, 27, 31, 35,§8629.]

8630 Employment of experts. If in making any examination a situation develops which, in the judgment of the commissioner, requires the services of an expert examiner having special training and knowledge not possessed by the regular examiners of the department, he may also employ such an expert assistant examiner, who shall receive as full compensation for such services the sum of not to exceed twenty-five dollars per day. [C24, 27, 31, 35,§8630.]

8631 Expenses. Said examiners and assistants and the said commissioner shall receive actual and necessary traveling, hotel, and other expenses while engaged in conducting examinations away from their respective places of residence. [S13,§1821-c; C24, 27, 31, 35,§8631.]

8632 Payment by company. All bills for expenses of any examination, together with the compensation of the assistants, shall be charged to and paid by the companies examined, and upon failure or refusal of any company examined to pay such bill or bills, the same may be recovered in an action brought in the name of the state under the direction of the executive council, and the commissioner may also revoke the certificate of authority of such company to transact business within this state. [S13, §1821-c; C24, 27, 31, 35,§8632.]

Referred to in §9061

8633 Fees—accounting. All fees collected under the provisions of this chapter shall be paid to the commissioner of insurance and shall be by him turned into the state treasury as are other fees of his office. [S13,§1821-c; C24, 27, 31, 35,§8633.]

Deposit of fees, §143

8634 Suspension or revocation of certificate —receivership. If upon investigation or examination, it shall appear that any company is insolvent or in an unsound condition, or is doing an illegal or unauthorized business, or that it has refused or neglected for more than thirty days to pay final judgment rendered against it in the courts of this state, the commissioner of insurance may suspend its authority to transact business within this state until it shall have complied in all respects with the laws applicable to such company or has paid such judgment, or he may revoke its certificate of authority to transact business within this state and having revoked the certificate of any company organized under the laws of this state, he shall at once report the same to the attorney general, who shall apply to the district court or any judge thereof for the appointment of a receiver to close up the affairs of said company. [S13, §1821-d; C24, 27, 31, 35,§8634.]

Referred to in §8762
S13, §1821-d, editorially divided

8635 Procedure against nonlife companies. In the case of companies organized on the stock plan under the provisions of chapter 404, the above named officers shall proceed as provided in sections 8964 and 8965. [S13,§1821-d; C24, 27, 31, 35,§8635.]

Referred to in §8762

8636 Procedure against life companies. In case of companies organized under the provisions of chapter 398, said officers shall proceed as provided in sections 8661 to 8663, inclusive. [S13, §1821-d; C24, 27, 31, 35,§8636.]

Referred to in §8762

8637 Notice of application. No receiver shall be appointed for any company contemplated by this chapter except upon application of the attorney general, unless five days notice shall have been served upon the commissioner and attorney general, stating the time and place of the hearing of such application, at which time and place said officers shall have the right to appear and be heard as to such application and appointment. [S13,§1821-d; C24, 27, 31, 35, §8637.]

Referred to in §8762

8638 Publication of examination. The results of any examination shall be published in one or more newspapers of the state or in pamphlet form, when in the opinion of the commissioner of insurance the interests of the public require it. [S13,§1821-d; C24, 27, 31, 35, §8638.]

8639 Transfer pending examination. Any transfer of stock of any company, pending an investigation, shall not release the party making the transfer from any liability for losses that may have occurred previous to such transfer. [S13,§1821-e; C24, 27, 31, 35,§8639.]

8640 Unlawful solicitation of business. Any officer, manager, agent, or representative of any insurance company contemplated by this chapter, who, with knowledge that its certificate of authority has been suspended or revoked, or that it is insolvent, or is doing an unlawful or unauthorized business, solicits insurance for said company, or receives applications therefor, or does any other act or thing toward receiving or procuring any new business for said company, shall be deemed guilty of a misdemeanor and shall be subject to the penalties provided in sections 8755 and 8756, and the provisions of said sections are hereby extended to all companies contemplated by this chapter. [S13, §1821-f; C24, 27, 31, 35,§8640.]

8641 Refusing to be examined. Should any company decline or refuse to submit to an examination as in this chapter provided, the commissioner of insurance shall at once revoke its certificate of authority, and if such company is organized under the laws of this state, he shall report his action to the attorney general, who shall at once apply to the district court or a judge thereof for the appointment of a receiver to wind up the affairs of the company. [S13, §1821-g; C24, 27, 31, 35,§8641.]

8642 Examination of nonresident companies. Examination of insurance companies not located within this state shall only be made by order of the executive council, and at such time as it may direct. [S13,§1821-h; C24, 27, 31, 35,§8642.]

Similar provision, §9009

CHAPTER 398

LIFE INSURANCE COMPANIES

Referred to in §§8625, 8636, 8684.04, 8721, 8732, 8737, 8765, 9104

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8643 Level premium plan companies. Every life insurance company upon the level premium or the natural premium plan, created under the laws of this or any other state or country, shall, before issuing policies in the state, comply with the provisions of this chapter applicable to such companies. [C73,§1161; C97,§1768; S13,§1768; C24, 27, 31, 35,§8643.]

S13, §1768, editorially divided

8644 Approval of articles. Before any such company shall be permitted to incorporate under the laws of this state, it shall present its articles of incorporation to the commissioner of insurance and the attorney general and have the same by them approved. [S13,§1768; C24, 27, 31, 35,§8644.]

8645 Requirements of articles. Such articles shall show the name, location of principal place of business, object, amount of capital, if a stock company, and shall contain such other provisions as may be necessary to a full understanding of the nature of the business to be transacted and the plan upon which the same is to be conducted. [S13,§1768; C24, 27, 31, 35, §8645.]

8646 Approval of amendments. All amendments to such articles and amendments hereafter made to the articles of incorporation of companies already organized under the laws of this state shall be approved in like manner. [C97,§1768; C24, 27, 31, 35,§8646.]

8647 Capital and surplus required. No stock life insurance company shall be authorized to transact business under the provisions of this chapter with less than two hundred thousand dollars capital stock fully paid for in cash and one hundred thousand dollars of surplus paid in in cash or invested as provided by law. Nothing herein contained shall affect companies now authorized to transact business under the provisions of this chapter. [C73, §1162; C97,§1769; C24, 27, 31, 35,§8647.]

Referred to in §8651

8648 Deposit of securities—certificate. Such securities shall be deposited with the commissioner of insurance and when such deposit is made and evidence furnished, by affidavit or otherwise, satisfactory to the commissioner, that the capital stock is all fully paid and the company possessed of the surplus required and that the company is the actual and unqualified owner of the securities representing the paid-up capital stock or other funds of the company, and all laws have been complied with, he shall issue to such company the certificate hereinafter provided for. [C73,§1162; C97,§1769; C24, 27, 31, 35,§8648.]

40GA, ch 263, editorially divided

8649 Loans to officers. No part of the capital or other funds shall be loaned directly or indirectly to any officer, director, stockholder, or employee of the company or directly or indirectly to any relative of any officer or director of such company. [C73,§1162; C97,§1769; C24, 27, 31, 35,§8649.]

8650 Loan on stock or to prohibited companies. No such company shall invest in or make any loan upon its own stock or the stock of any other life insurance company as collateral, or directly or indirectly make any loan to or invest any of its funds in the property of any corporation, firm, association or trustees, if any officer of the insurance company is an officer or director of such corporation or association, a member of such firm, or a trustee of such trustees. [C24, 27, 31, 35,§8650; 47GA, ch 210,§1.]

8651 Mutual companies—conditions. Level premium and natural premium life insurance companies organized under the laws of this state upon the mutual plan shall, before issuing any policies, have actual applications on at least two hundred and fifty lives for an average amount of one thousand dollars each, a list of which, giving the name, age, residence, amount of insurance, and annual premium of each applicant shall be filed with the commissioner of insurance, and a deposit made with

him of an amount equal to three-fifths of the whole annual premium on said applications, in cash or the securities required by section 8647, and in addition thereto a deposit of cash or securities of the character provided by law for the investment of funds for life insurance companies in the sum of twenty-five thousand dollars, which shall constitute a guaranty fund for the protection of policyholders. In no event shall the contribution to said guaranty fund give to any contributors thereof, or to any other persons any voting or other power in the management of the affairs of the company by reason of such contribution. Said guaranty fund may be repaid to the contributors thereto with interest at six percent from the date of contribution, at any time, in whole or in part, provided such repayment does not reduce the surplus of the company below the amount of twenty-five thousand dollars and then only provided consent in writing for such repayment is obtained from the commissioner of insurance; and on compliance with the provisions of this section, the commissioner shall issue to such mutual company the certificate hereinafter prescribed. [C73,§1163; C97,§1770; C24, 27, 31, 35,§8651.]

8652 Foreign companies—capital or surplus—investments. No company incorporated by or organized under the laws of any other state or government shall transact business in this state unless it is possessed of the actual amount of capital required of any company organized by the laws of this state, or, if it be a mutual company, of surplus equal in amount thereto, and the same is invested in bonds of the United States or of this state, or in interest-paying bonds, when they are at or above par, of the state in which the company is located, or of some other state, or in notes or bonds secured by mortgages on unincumbered real estate within this or the state where such company is located, worth one and two-thirds times the amount loaned thereon, which securities shall, at the time, be on deposit with the superintendent of insurance, auditor, comptroller, or chief financial officer of the state by whose laws the company is incorporated, or of some other state, and the commissioner of insurance is furnished with a certificate of such officer, under his official seal, that he as such officer holds in trust and on deposit for the benefit of all the policyholders of such company, the securities above mentioned. This certificate shall embrace the items of security so held, and show that such officer is satisfied that such securities are worth one hundred thousand dollars. Nothing herein contained shall invalidate the agency of any company incorporated in another state by reason of its having exchanged the bonds or securities so deposited with such officer for other bonds or securities authorized by this chapter, or by reason of its having drawn its interest and dividends on the same. [C73,§1164; C97, §1772; C24, 27, 31, 35,§8652; 47GA, ch 211,§1.]

8653 Annual statement. The president or vice president and secretary or actuary, or a majority of the directors of each company organized under this chapter, shall annually, by the first day of March, prepare under oath and file in the office of the commissioner of insurance a statement of its affairs for the year terminating on the thirty-first day of December preceding, showing:

1. The name of the company and where located.
2. The names of officers.
3. The amount of capital, if a stock company.
4. The amount of capital paid in, if a stock company.
5. The value of real estate owned by the company.
6. The amount of cash on hand.
7. The amount of cash deposited in banks, giving the name of the bank or banks.
8. The amount of cash in the hands of agents, and in the course of transmission.
9. The amount of bank stock, with the name of each bank, giving par and market value of the same.
10. The amount of bonds of the United States, and all other bonds and securities, giving names and amounts, with the par and market value of each kind.
11. The amount of loans secured by first mortgage on real estate, and where such real estate is situated.
12. The amount of all other bonds, loans, how secured, and the rate of interest.
13. The amount of premium notes and their value on policies in force, if a mutual company.
14. The amount of notes given for unpaid stock, and their value in detail, if a stock company.
15. The amount of assessments unpaid on stock or premium notes.
16. The amount of interest due and unpaid.
17. The amount of all other securities.
18. The amount of losses due and unpaid
19. The amount of losses adjusted but not due.
20. The amount of losses unadjusted.
21. The amount of claims for losses resisted.
22. The amount of money borrowed and evidences thereof.
23. The amount of dividends unpaid on stock.
24. The amount of dividends unpaid on policies.
25. The amount required to safely reinsure all outstanding risks.
26. The amount of all other claims against the company.
27. The amount of net cash premiums received.
28. The amount of notes received for premiums.
29. The amount of interest received from all sources.
30. The amount received from all other sources.
31. The amount paid for losses.
32. The amount of dividends paid to policyholders, and the amount to stockholders, if a stock company.
33. The amount of commissions and salaries paid to agents.

34. The amount paid to officers for salaries and other compensation.
35. The amount paid for taxes.
36. The amount of all other payments and expenditures.
37. The greatest amount insured on any one life.
38. The amount deposited in other states or territories as security for policyholders therein, stating the amount in each state or territory.
39. The amount of premiums received in this state during the year.
40. The amount paid for losses in this state during the year.
41. The whole number of policies issued during the year, with the amount of insurance effected thereby, and total amount of risk.
42. All other items of information necessary to enable the commissioner of insurance to correctly estimate the cash value of policies, or to judge of the correctness of the valuation thereof. [C73,§1167; C97,§1773; C24, 27, 31, 35,§8653.]

Referred to in §8730

8654 Valuation of policies. As soon as practicable after the filing of such statement, the commissioner of insurance shall ascertain the net cash value of every policy in force upon the basis of the American table of mortality and four and one-half percent interest, or actuaries' combined experience table of mortality and four percent interest, in all companies organized under the laws of this state. For the purpose of making such valuation he may employ a competent actuary, who shall be paid by the company for which the service is rendered; but the company may make such valuation and it shall be received by the commissioner upon satisfactory proof of its correctness. [C73,§1169; C97,§1774; C24, 27, 31, 35,§8654.]

Referred to in §§8738, 8825
C97, §1774, editorially divided

8655 Deposit to cover valuation — policy loan agreements. The net cash value of all policies in force in any such company being ascertained, the commissioner shall notify it of the amount, and within thirty days thereafter the officers thereof shall deposit with the commissioner the amount of the ascertained valuation in the securities specified in section 8737.

Any Iowa company may file a verified statement of the total amount of loans secured by its policies, and evidence of such indebtedness shall be checked by the commissioner at least semiannually. Such verified statement shall be taken and considered as a security to be deposited under the provisions of section 8741.

There may be included in the deposit an amount of cash on hand not in excess of five percent of the deposit required, such deposit to be evidenced by a certified check, certificate of deposit, or other evidence satisfactory to the commissioner of insurance.

Deposits of securities may be made in excess of the amounts required hereby. [C73,§1169; C97,§1774; C24, 27, 31, 35,§8655; 47GA, ch 212, §1.]

Referred to in §8738

8656 Deposit by stock company. No stock company organized under the laws of this state shall be required to make such deposit until the cash value of the policies in force, as ascertained by the commissioner, exceeds the amount deposited by it as capital. [C73,§1169; C97,§1774; C24, 27, 31, 35,§8656.]

8657 Annual certificate of authority. On receipt of such deposit and statement, and the statement and evidence of investment of foreign companies, all of which shall be renewed annually, by the first day of March, the commissioner of insurance shall issue a certificate setting forth the corporate name of the company, its home office, that it has fully complied with the laws of the state and is authorized to transact the business of life insurance for the ensuing year, which certificate shall expire on the first day of April of the ensuing year, or sooner upon thirty days notice given by the commissioner, of the next annual valuation of its policies. Such certificate shall be renewed annually, upon the renewal of the deposit and statement by a domestic company, or of the statement and evidence of investment by a foreign company, and compliance with the conditions above required, and be subject to revocation as the original certificate. [C73,§1170; C97,§1775; C24, 27, 31, 35 §8657.]

8658 Violation by domestic company. Upon a failure of any company organized under the laws of this state to make the deposit or file the statement in the time herein stated, the commissioner of insurance shall notify the attorney general of the default, who shall at once apply to the district court of the county where the home office of such company is located, if the court is in session, if not, to any judge thereof, for an order requiring the company to show cause upon reasonable notice, to be fixed by the court or judge, as the case may be, why its business shall not be discontinued. If, upon the hearing, no sufficient cause is shown, the court shall decree its dissolution. [C73,§1171; C97,§1776; C24, 27, 31, 35, §8658.]

C97, §1776, editorially divided

8659 Violation by foreign company. Companies organized and chartered by the laws of a foreign state or country, failing to file the evidence of deposit and statement within the time fixed, shall forfeit and pay the sum of three hundred dollars, to be collected in an action in the name of the state for the use of the school fund, and their right to transact further new business in this state shall immediately cease until the requirements of this chapter have been fully complied with. [C73,§1171; C97,§1776; C24, 27, 31, 35,§8659.]

8660 Examination. The commissioner of insurance at any time may make a personal examination of the books, papers, securities, and business of any life insurance company doing business in this state, or authorize any other suitable person to make the same, and he or the person so authorized may examine under oath

any officer or agent of the company, or others, relative to its business and management. [C73, §1172; C97,§1777; C24, 27, 31, 35,§8660.]

C97, §1777, editorially divided

8661 Injunction—receivership—dissolution. If upon such examination the commissioner is of the opinion that the company is insolvent, or that its condition is such as to render its further continuance in business hazardous to the public or holders of its policies, he shall advise and communicate the facts to the attorney general, who shall at once apply to the district court of the county or any judge thereof, where the home office of a domestic company or an agency of a foreign company is located, for an injunction to restrain the company from transacting further business except the payment of losses already ascertained and due, until further hearing, and for the appointment of a receiver, and, if a domestic company, for the dissolution of the corporation. The judge of such court may grant a preliminary injunction with or without notice, as he may direct. [C73,§1172; C97,§1777; C24, 27, 31, 35,§8661.]

Referred to in §§8636, 8663

8662 Decree. The court, on the final hearing, may make decree subject to the provisions of section 8663 as to the appointment of a receiver, the disposition of the deposits of the company in the hands of the commissioner, and its dissolution, if a domestic company. [C73, §1172; C97,§1777; C24, 27, 31, 35,§8662.]

Referred to in §§8636, 8663

8663 Securities. The securities of a defaulting or insolvent company, or a company against which proceedings are pending under sections 8661 and 8662, on deposit shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same shall, by the order of the court upon final hearing, be divided among the holders thereof in the proportion of the last annual valuation of the same, or at any time be applied to the purchase of reinsurance for their benefit. [C73, §1173; C97,§1778; C24, 27, 31, 35,§8663.]

Referred to in §§8636, 8662

8664 Change of securities. Companies shall have the right at any time to change the securities on deposit by substituting a like amount of the character required in the first instance. If the annual valuation of the policies in force shows them to be less than the amount of security deposited, then the company may withdraw such excess, but twenty-five thousand dollars must always remain on deposit. [C73,§1174; C97,§1779; C24, 27, 31, 35,§8664.]

8665 Interest on securities. Companies having on deposit with the commissioner of insurance bonds or other securities may collect the dividends or interest thereon, delivering to their authorized agents the coupons or other evidence of interest as the same become due, but if any company fails to deposit additional security when and as called for by the commissioner, or pending any proceedings to close up or enjoin it, the commissioner shall collect such dividends or interest and add the same to such securities. [C73,§1175; C97,§1780; C24, 27, 31, 35,§8665.]

8666 Discriminations—rebates. No life or casualty, health or accident insurance company or association shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes; nor shall any such company or association or agent thereof make any contract of insurance agreement, other than as plainly expressed in the policy issued; nor shall any such company or association or agent pay or allow, directly or indirectly, as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy or contract of insurance. [C97, §1782; S13,§1782; C24, 27, 31, 35,§8666.]

Referred to in §8667

8667 Violations. Every corporation, officer, or agent thereof who shall knowingly violate any of the provisions of section 8666 shall forfeit and pay a sum not exceeding five hundred dollars, to be recovered by an action in the name of the state for the benefit of the school fund, and the license may be revoked for three years, in the discretion of the court. [C97,§1783; C24, 27, 31, 35,§8667.]

8668 Policy forms—approval. It shall be unlawful for any insurance company transacting business within this state, under the provisions of this chapter, to write or use any form of policy or contract of insurance, on the life of any individual in this state, until a copy of such form of policy or contract has been filed with and approved by the commissioner of insurance. [S13,§1783-a; C24, 27, 31, 35,§8668.]

Referred to in §§8670, 8692

8669 Failure to file copy. Should any company decline to file a copy of its form of policies or contracts, the commissioner of insurance shall suspend its authority to transact business within the state until such form of policies or contracts have been so filed and approved. [S13, §1783-c; C24, 27, 31, 35,§8669.]

S13, §1783-c, editorially divided

8670 Violations. Any company violating any of the provisions of section 8668 shall, upon conviction thereof, be fined in a sum not less than one hundred nor more than one thousand dollars for each such offense, and the court may also revoke its authority to do business within this state. [S13,§1783-c; C24, 27, 31, 35,§8670.]

8671 Policy provision for medical examination. The commissioner of insurance shall decline to approve any such form of policy or contract of insurance unless the same shall, in

all respects, conform to the laws of this state applicable thereto, and unless the issuance of the same is based upon a satisfactory medical examination of the applicant by a physician duly authorized to practice medicine or by an osteopathic physician duly authorized to practice osteopathy in the state of Iowa or the state where examined, and no policy or contract of insurance shall be issued by any insurance company to any individual in this state until such examination shall have been passed and duly approved by the medical examiner or medical board of such company.

Provided that medical examination of the applicant as condition precedent to approval of policy forms shall not be required in the case of juvenile and industrial policies, and policies in amount of two thousand dollars or less; policies so written shall be incontestable for any reason except for nonpayment of premiums after two years from date of issue. [SS15,§1783-b; C24, 27, 31, 35,§8671.]

Referred to in §8684.14

8672 Authority to write other insurance. Any life insurance company organized on the stock or mutual plan and authorized by its charter or articles of incorporation so to do, may in addition to such life insurance, insure, either individually or on the group plan, the health of persons and against personal injuries, disablement or death, resulting from traveling or general accidents by land or water, and insure employers against loss in consequence of accidents or casualties of any kind to employees or other persons, or to property resulting from any act of the employee or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith, but nothing herein contained shall be construed to authorize any life insurance company to insure against loss or injury to person, or property, or both, growing out of explosion or rupture of steam boilers. [S13, §1783-d; C24, 27, 31, 35,§8672.]

Referred to in §8673

8673 Liability. Every life insurance company issuing a separate policy, or maintaining a separate department, for the purpose of writing any of the classes of insurance authorized by section 8672 shall also be subject to all of the provisions applicable to companies authorized to write a similar kind of insurance under the provisions of chapter 404. [C24, 27, 31, 35,§8673.]

8673.1 Annuities. Any life insurance company organized on the stock or mutual plan may grant and sell annuities. [C35,§8673-e1.]

8674 Proceeds of policy held in trust. Any life insurance company organized under the provisions of this chapter and doing business in this state, shall have the power to hold in trust the proceeds of any life insurance policy issued by it, upon such terms and subject to such limitations as to revocation by the policyholder and control by the beneficiary thereunder, as shall have been agreed to in writing by such company and the policyholder; provided that the trust provisions herein contemplated shall in no manner subject said corporation to any of the provisions of the laws of Iowa relating to banks or trust companies; and provided further, that the forms of such trust agreements shall be first submitted to and approved by the commissioner of insurance. [C24, 27, 31, 35,§8674.]

CHAPTER 399

GROUP LIFE INSURANCE

This chapter (§§8675 to 8684, inc.) repealed by 45GA, ch 144, and chapter 399.1 enacted in lieu thereof

CHAPTER 399.1

GROUP INSURANCE

8684.01 "Group insurance" defined.
8684.02 Employer—scope of term.
8684.03 Employee—scope of term.
8684.04 Authorized companies.
8684.05 Life policy—requirements.
8684.06 Accident or health policy—requirements.
8684.07 Form—filing and approval.
8684.08 Violation—effect.
8684.09 Foreign policies.
8684.10 Policies by foreign companies.
8684.11 Particular policies allowable.
8684.12 Employer—voting power.
8684.13 Exemption.
8684.14 Medical examination.

8684.01 "Group insurance" defined. Group insurance is hereby declared to be that form of either life, health or accident insurance covering not less than fifty employees with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly and insuring only all of his employees, or all of any class or classes thereof, determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection for the benefit of persons other than the employer; provided, however, that when the premium is to be paid by the employer and employees jointly, and the benefits of the policy are

offered to all eligible employees, not less than seventy-five percent of such employees may be so insured. [C24, 27, 31,§8675; C35,§8684-e1.]

Referred to in §§8684.02, 8684.03, 8684.04

8684.02 Employer—scope of term. The word "employer" as used in section 8684.01 shall also include:

1. Advisory, supervising or governing body or bodies of all regularly organized religious denominations.

2. Labor unions and teachers associations whose members are actively engaged in the same occupation or profession; provided, however, that, when the premium is to be paid by a labor union or teachers association and their members jointly, and the benefits are to be offered to all eligible members, not less than sixty-five percent of such members may be so insured.

Provided also that, in case an insurance policy is renewable annually only at the option of both parties to the contract, and provided that the basis of premium rates may be changed by the insurance company at the beginning of any policy year, all members of a trade union or teachers association may be insured.

3. Volunteer fire companies, provided, however, that the requirements for fifty members shall not apply thereto, and provided, further, that not less than one hundred percent of such members shall be so insured.

4. Fraternal societies or associations and any subordinate lodges or branches thereof; provided, however, that the requirement for not less than fifty members shall not apply thereto. [C24, 27, 31,§8676; C35,§8684-e2.]

Referred to in §§8684.03, 8684.04

8684.03 Employee — scope of term. The word "employee" as used in sections 8684.01 and 8684.02 shall also include clergymen, priests and ministers of the gospel, members of any labor union, teachers association or volunteer fire company, and members of fraternal societies or associations, or any subordinate lodges or branches thereof. [C24, 27, 31,§8676; C35,§8684-e3.]

Referred to in §8684.04

8684.04 Authorized companies.

1. Any level premium life insurance company, organized on the stock or mutual plan and authorized to transact business under the provisions of chapter 398 may, upon complying with the provisions of said chapter and of this chapter, issue contracts providing for group life or health and/or accident insurance as defined in sections 8684.01 to 8684.03, inclusive.

2. Any casualty company organized on the stock or mutual plan, or accident and health association authorized to transact business under the provisions of chapter 400 or chapter 404 may, by complying with the provisions of said chapters and of this chapter, issue contracts providing for health and/or accident insurance as defined in sections 8684.01 to 8684.03, inclusive. [C24, 27, 31,§8677; C35,§8684-e4.]

Group insurance, §§8672, 8673

8684.05 Life policy — requirements. All group life insurance policies issued in this state shall contain in substance the following provisions:

1. A provision that the policy shall be incontestable after two years from its date of issue, except for nonpayment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war.

2. A provision that the policy, the application of the employer and the individual applications, if any, of the employees insured, shall constitute the entire contract between the parties, and that all statements made by the employer or by the individual employees shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall be used in defense to a claim under the policy, unless it is contained in a written application.

3. A provision for the equitable adjustment of the premium or the amount of insurance payable in the event of a misstatement of the age of an employee.

4. A provision that the company will issue to the employer for delivery to the employee, whose life is insured under such policy, an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom payable, together with provision to the effect that, in case of the termination of the employment for any reason whatsoever, the employee shall be entitled to have issued to him by the company, without further evidence of insurability, and upon application made to the company within thirty-one days after such termination, and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the company, except term insurance, in an amount equal to the amount of his protection under such group insurance policy at the time of such termination. Provided, however, that the provision for issuing a policy to the employee upon termination of his employment shall not be required in policies issued to fraternal societies or associations or subordinate lodges or branches thereof, but such policies shall provide that in case the member changes his membership to another lodge or branch of the same society or association, his individual certificate hereinafter referred to may be transferred with his membership.

5. A provision that to the group or class thereof originally insured shall be added from time to time all new employees of the employer eligible to insurance in such group or class. [C24, 27, 31,§8678; C35,§8684-e5.]

8684.06 Accident or health policy—requirements. All group accident and/or health policies issued in this state shall contain in substance the following provisions:

1. The policy shall have a provision that the application of the employer and the individual applications, if any, of the employees insured

shall constitute the entire contract between the parties, and that all statements made by the employer or by the individual employees shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall be used in defense to a claim under the policy unless it is contained in a written application attached thereto.

2. A provision that the company will issue to the employer for delivery to the employee who is insured under such policy an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom payable, and such provisions of the master contract as are, in the opinion of the commissioner of insurance, necessary to inform the holder thereof as to his rights under the contract.

3. A provision that to the group or class thereof originally insured shall be added from time to time all new employees of the employer eligible to insurance in such group or class. [C24, 27, 31,§8678; C35,§8684-e6.]

8684.07 Form — filing and approval. No policy or certificate of group insurance shall be issued in this state until the form thereof has been filed with the commissioner of insurance and approved by him. [C24, 27, 31,§8678; C35, §8684-e7.]

Referred to in §8684.08

8684.08 Violation — effect. Failure to comply with section 8684.07 shall be deemed sufficient grounds for revocation of the certificate of authority of any company so violating. [C35, §8684-e8.]

Referred to in §8684.09

8684.09 Foreign policies. Policies of group insurance issued in other states or countries by companies organized in this state may contain any provision required by the laws of the state, territory, district, or country in which the same are issued, anything in section 8684.08* to the contrary notwithstanding. [C24, 27, 31,§8679; C35,§8684-e9.]

*According to enrolled act. See also §§8684.05, 8684.06

8684.10 Policies by foreign companies. Policies of group insurance, when issued in this state by any company not organized under the laws of this state, may contain when issued any provision required by the law of the state, territory or district of the United States under which the company is organized. [C24, 27, 31, §8680; C35,§8684-e10.]

8684.11 Particular policies allowable. Any such policy may be issued or delivered in this state which, in the opinion of the commissioner of insurance, contains provisions on any one or more of the several foregoing requirements more favorable to the employer or to the employee than hereinbefore required. [C24, 27, 31,§8681; C35,§8684-e11.]

8684.12 Employer—voting power. In every group policy issued by a domestic life insurance company the employer shall be deemed to be the policyholder for all purposes within the meaning of this chapter, and, if entitled to vote at meetings of the company, shall be entitled to one vote thereat. [C24, 27, 31,§8682; C35, §8684-e12.]

8684.13 Exemption. No policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other person who may have a right thereunder, either before or after payment; nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute a part of the estate of the employee for the payment of his debts. [C24, 27, 31,§8683; C35,§8684-e13.]

Similar provisions, §§8776 8796, 11919

8684.14 Medical examination. The provisions of section 8671, relating to medical examination of applicants, shall not apply to insurance written under this chapter. [C24, 27, 31,§8684; C35,§8684-e14.]

CHAPTER 400

ASSESSMENT LIFE INSURANCE

Referred to in §§7022, 8625, 8684.04, 8732, 8737, 8754, 8765, 8783, 9104

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8685 **"Association" defined.** Every corporation organized upon the assessment plan, for the purpose of insuring the lives of individuals or furnishing benefits to the widows, heirs, orphans or legatees of deceased members, or insuring the health of persons, or furnishing accident indemnity, shall be styled an association. [C97,§1784; S13,§1784; C24, 27, 31, 35, §8685.]

S13, §1784, editorially divided

8686 **Assessment plan of life insurance defined.** Any corporation doing business under this chapter which provides for the payment of policy claims, accumulation of a reserve or emergency fund, the expense of management and prosecution of the business, by payment of assessments as provided in its contracts, and wherein the liability of the insured to contribute to the payment of policy claims is not limited to a fixed amount, shall be deemed to be engaged in the business of life insurance upon the assessment plan, and shall be subject to the provisions of this chapter, and chapter 401. [C97,§1784; S13,§1784; C24, 27, 31, 35,§8686.]

8687 **"Certificate" defined.** "Certificates of membership" or "certificate", when used in this chapter with respect to the insurance of the members, shall be taken to mean and include policy of insurance. [C97,§1785; C24, 27, 31, 35, §8687.]

C97, §1785, editorially divided

8688 **Articles—approval.** The articles of incorporation and bylaws of any such association shall show its plan of business, and be submitted to the commissioner of insurance and the attorney general, and if they are found by those officers to comply with the provisions of this title, chapter and of law, they shall approve the same. [C97,§1785; C24, 27, 31, 35,§8688.]

8689 **Record and publication.** When the articles are thus approved, they shall be recorded in the office of the secretary of state, and a notice published within ninety days in the manner and for the time provided in the general incorporation laws. [C97,§1785; C24, 27, 31, 35,§8689.]

Publication of notice, §8357 et seq.

8690 **Right of member to vote.** Every member of any association organized under the provisions of this chapter shall be entitled to vote, either in person or by proxy, at every regular and special meeting of such association. No such association shall limit the right of any member to so vote, unless the proposal to limit shall have first been submitted to the entire membership for vote and shall have been approved by a majority of those voting. [C24, 27, 31, 35,§8690.]

8691 **Name.** No such association shall take any name in use by another organization, or one so closely resembling it as to mislead the public as to its identity. [C97,§1786; C24, 27, 31, 35,§8691.]

8692 **Conditions for commencing business—approval of policy forms.** Before issuing any policy or certificate of membership, if the association at the time has not a membership sufficient to pay the full amount of its certificate or policy on an assessment, it shall cause all applications for insurance to have printed in red ink, in a conspicuous manner along the margin thereof, the words: "It is understood that the amount of insurance to be paid under this application, and certificate or policy issued thereon, shall depend upon the amount collected from an assessment therefor." It must have actual applications upon at least two hundred fifty lives for at least one thousand dollars each; and it shall file with the commissioner of insurance satisfactory proof that the president, secretary, and treasurer have each given a good and sufficient bond for five thousand dollars for the faithful discharge of their duties as such officers, sworn copies of which shall be filed with him. It shall also file with him a list, verified by the president and secretary, of the applications, giving the name, age and residence of each applicant, the amount of insurance applied for by each, together with the annual dues and the proposed assessments thereon. Its policy forms shall be approved, as provided by section 8668. [C97,§1787; S13,§1787; C24, 27, 31, 35,§8692.]

8693 **Assessments—diversion of funds.** The articles and bylaws of each such association shall state the objects to which the money to be collected is to be devoted, and no part of the proceeds thereof shall be applied to any other purpose than as stated, and the excess, if any, beyond payment of the benefit, shall be set aside and applied only to like purposes, except that all sums collected for expenses and not used for that purpose may be transferred to the benefit, emergency, or reserve fund. [C97, §1788; S13,§1788; C24, 27, 31, 35,§8693.]

8694 **Insurable age—beneficiary and change thereof—assignment.** No association organized or operating under this chapter shall issue a certificate of membership to any person under fifteen or over sixty-five years of age, or unless the beneficiary named in the certificate is the husband, wife, relative, legal representative, heir, creditor or legatee of the insured member, nor shall any such certificate be assigned. Any certificate issued or assignment made in violation of this section shall be void.

The beneficiary named in the certificate may be changed at any time at the pleasure of the assured, as may be provided for in the articles or bylaws, but no certificate issued for the

benefit of a wife or children shall be thus changed so as to become payable to the creditors; provided that the foregoing provisions of this section shall not be applicable except as to certificates issued prior to July 4, 1923, to life associations organized and operating under this chapter issuing life insurance policies or certificates of membership, and any member or policyholder in any such life association shall have the right to designate his beneficiary, and unless the policy is issued without the right of revocation, shall have the right to change the beneficiary in the manner authorized by the rules, laws, and regulations of the association, or as may be provided in the policy contract; and no beneficiary under any policy shall have or obtain any vested right or interest in the death benefits to be payable under said policy, until such benefits shall become due and payable after the death of the insured. [C97,§1789; C24, 27, 31, 35,§8694.]

Similar provisions, §§8789.1, 8842.1, 8845, 8857

8695 Business year — annual report — fees. The annual business of such association organized under the laws of this state shall close on the thirty-first day of December of each year, and it shall within sixty days thereafter prepare and file in the office of the commissioner of insurance a detailed statement, verified by its president and secretary, giving its assets, liabilities, receipts from each assessment and all other sources, expenditures, salaries of officers, number of contributing members, death losses paid and amount paid on each, death losses reported but not paid, and furnish such other information as the commissioner, who shall provide blanks for that purpose, may require, so that its true financial condition may be shown, and shall pay, upon filing each annual statement, the sum of three dollars, and such other fees as are required by the provisions of sections 8763 to 8765, inclusive. [C97,§1790; C24, 27, 31, 35,§8695.]

Referred to in §8780
C97, §1790, editorially divided

8696 Publication of report — examination and expense. The commissioner of insurance shall publish such annual statement in detail in his report, and for the purpose of verifying it he may make or cause to be made an examination of the affairs of any such association at its expense, which shall be, if done by him or his clerk, necessary hotel and traveling expenses only, if by a person not regularly employed in his office, the actual cost thereof, not exceeding ten dollars per day for the time required and actual expenses; but the examination herein provided for shall be in addition to those authorized by the provisions of section 8626. [C97,§1790; C24, 27, 31, 35,§8696.]

8697 Bonds—supplemental reports. If the commissioner regards it necessary for the safety of the funds of the association, he may require the bonds of the officers to be increased to an amount not exceeding double the sum for which they are accountable, and he may also require supplemental reports from such association at such time and in such form as he may direct, and it shall be the duty of its officers to furnish the bonds and reports when thus required. [C97, §1790; C24, 27, 31, 35,§8697.]

Referred to in §8780

8698 Investments. Any association accumulating any moneys to be held in trust for the purpose of the fulfillment of its policy or certificate, contract, or otherwise, shall invest such accumulations in the securities provided in section 8737 and deposit the same with the commissioner of insurance as provided in section 8741. [C97,§1791; C24, 27, 31, 35,§8698.]

C97, §1791, editorially divided

8699 Investment for office building. Such association may invest in real estate in Iowa such a portion of said accumulation as is necessary for its accommodation in the transaction of its business to be owned by said association, and in the erection of any building for such purpose may add thereto rooms for rental. [C97, §1791; C24, 27, 31, 35,§8699.]

Similar provisions, §§8735, 8737, 8747, 8826

8700 Change of securities. Such association may at any time change its securities on deposit by substituting a like amount in other securities of the same character, and the commissioner of insurance shall permit a withdrawal of the same, upon satisfactory proof in writing filed with him that they are to be used for the purpose for which they were originally deposited. [C97,§1792; C24, 27, 31, 35,§8700.]

8701 Interest on securities. The commissioner of insurance shall permit the associations owning the bonds or other securities to collect and retain the interest accruing thereon, delivering to them the evidences of interest as the same become due; but on default of any association to make or enforce such collection, he may collect the same and add it to the securities in his possession, less the expense thereof. [C97, §1793; C24, 27, 31, 35,§8701.]

8702 Certificate of authority. Upon compliance with the provisions of this chapter by an association, the commissioner of insurance shall issue to it a certificate, setting forth that it has fully complied with the provisions of this chapter, and is authorized to transact business for a period of one year from April 1 of the year of its issue. [C97,§1796; C24, 27, 31, 35, §8702.]

8703 Foreign companies. Any association organized under the laws of any other state to carry on the business of insuring the lives of persons, or of furnishing benefits to the widows, orphans, heirs, or legatees of deceased members, or of paying accident indemnity, or surrender value of certificates of insurance, upon the stipulated premium plan or assessment plan, may be permitted to do business in the state by complying with the requirements hereinafter made, but not otherwise. [C97,§1794; S13,§1794; C24, 27, 31, 35,§8703.]

Referred to in §8711
S13, §1794, editorially divided

8704 Articles — bylaws — applications and policy. It shall file with the commissioner of insurance a copy of its charter or articles of incorporation, duly certified by the proper officers of the state wherein it was organized, together with a copy of its bylaws, application and policy or certificate of membership. [C97, §1794; S13,§1794; C24, 27, 31, 35,§8704.]

Referred to in §§8707, 8711

8705 Location—officers—financial showing. It shall also file with the commissioner a statement, signed and verified by its president and secretary, which shall show the name and location of the association, its principal place of business, the names of its president, secretary, and other principal officers, the number of certificates or policies in force, the aggregate amount insured thereby, the amount paid to beneficiaries in the event of death or accident, the amount paid on the last death loss and the date thereof, the amount of cash or other assets owned by the association and how invested, and any other information which the commissioner may require. [C97,§1794; S13,§1794; C24, 27, 31, 35,§8705.]

Referred to in §§8707, 8711

8706 Adequacy of assessments and management. The statement, papers, and proofs thus filed shall show that the death loss or surrender value of the certificate of insurance or accident indemnity is in the main provided for by assessments upon or contributions by surviving members of such association, and that it is legally organized, honestly managed, and that an ordinary assessment upon its members or other regular contributions to its mortuary fund are sufficient to pay its maximum certificate to the full limit named therein. [C97,§1794; S13, §1794; C24, 27, 31, 35,§8706.]

Referred to in §§8707, 8711

8707 Certificate of authority—fee. Upon its complying with the provisions of sections 8704 to 8706, inclusive, and of section 8766, and the payment of twenty-five dollars, the commissioner shall issue to it a certificate of authority to do business in this state, provided the same right is extended by the state in which said association is organized to associations of the same class in this state. [C97,§1794; S13,§1794; C24, 27, 31, 35,§8707.]

Referred to in §8711

8708 Examinations. When the commissioner doubts the solvency of any foreign association, and the failure to pay the full limit named in its certificate or policy shall be such evidence of its insolvency as to require the commissioner to investigate it, he shall for this or other good cause, at the expense of such association, cause an examination of its books, papers, and business to be made. [C97,§1794; S13,§1794; C24, 27, 31, 35, §8708.]

Referred to in §8711

8709 Examiner's fee—payment. If the commissioner appoints someone not receiving a regular salary in his office to make this examination, such examiner shall receive ten dollars per day for his services in addition to his actual traveling and hotel expenses, to be paid by the association examined, or by the state on the approval of the executive council, if the association fails to pay the same. [C97,§1794; S13,§1794; C24, 27, 31, 35,§8709.]

Referred to in §8711

8710 Revocation of certificate. If upon such examination he finds that the association is not financially sound, or is not paying its policies or certificates in full, or is conducting its business fraudulently, or if it shall fail to make the statement required by law, he may revoke its authority and prohibit it from doing business until it shall again comply with the provisions of this chapter. [C97,§1794; S13,§1794; C24, 27, 31, 35,§8710.]

Referred to in §8711

8711 Applicability of sections. The provisions of sections 8703 to 8710, inclusive, shall apply to fraternal beneficiary associations doing exclusively an accident insurance business, and upon compliance with the provisions of this chapter, and the provisions of chapter 401, so far as the same are applicable, such associations may be authorized to transact business within this state. [S13,§1794; C24, 27, 31, 35,§8711.]

8712 Proceedings to control or wind up. When any association organized under this title and chapter fails to make its annual statement on or before the first day of March, or is conducting its business fraudulently or not in compliance with law, or is not carrying out its contracts with its members in good faith, the commissioner of insurance shall promptly communicate the fact to the attorney general, who shall at once commence action before the district court of the county in which such association has its principal place of business, giving it reasonable notice thereof. [C97,§1795; C24, 27, 31, 35,§8712.]

C97, §1795, editorially divided

8713 Removal of officers. If upon a hearing it is found to be advantageous to the holders of certificates of membership therein, said court or judge may remove any officer or officers, and appoint others in their place until the next annual election. [C97,§1795; C24, 27, 31, 35,§8713.]

8714 Receiver. If it is advantageous to the holders of certificates that the affairs of said corporation be wound up, the court or judge shall so direct, and for that purpose may appoint a receiver who shall treat all legal claims for death benefits as preferred. [C97,§1795; C24, 27, 31, 35,§8714.]

8715 Transfer of membership—division of surplus. The receiver may also, with the approval of the court or judge, transfer the members of such association who consent thereto to some like solvent association of the state, or divide the surplus accumulated in proportion to the share due each certificate at the time. [C97, §1795; C24, 27, 31, 35,§8715.]

8716 Distribution of surplus. Any association which provides in the main for the payment of death losses or accident indemnity by assessments upon its members, or stipulated premium plan, may provide for the equitable distribution of any surplus or advance insurance fund accumulated in the course of its business, which may be paid in cash, or applied in the reduction or payment of future premiums, paid-up or extended insurance, as its rules or contracts may provide, and for an equitable surrender value upon the cancellation of a certificate or policy, provided the terms and conditions thereof are set forth in such policy or certificate of membership, and such surrender value shall in the main be accumulated during the term of such policy or certificate. [C97,§1797; C24, 27, 31, 35,§8716.]

8717 Benevolent societies—process. Nothing in this chapter shall be construed to apply to any association organized solely for benevolent purposes and composed wholly of members of any one occupation, guild, profession, or religious denomination, but any such society may, by complying with the provisions hereof, become entitled to all the privileges thereof, in which event it shall be amenable to the provisions of this chapter so far as they are applicable; provided that if organized under the laws of another state or country, they shall file with the commissioner of insurance an agreement in writing authorizing service or notice of process to be made upon the said commissioner, and when so made shall be as valid and binding as if served upon the association within this state. [C97, §1798; S13,§1798; C24, 27, 31, 35,§8717.]

8718 Assessment associations prohibited. No life, health, or accident insurance company or association, other than fraternal beneficiary associations, which issues contracts, the performance of which is contingent upon the payment of assessments of call made upon its members, shall do business within this state except such companies or associations as are now authorized to do business within this state and which, if a life insurance company or association, shall value their assessment policies or certificates of membership as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state. [S13,§1798-a; C24, 27, 31, 35,§8718; 47GA, ch 217,§1.]

Referred to in §8719

8719 Exceptions. The provisions of section 8718 shall not apply to unincorporated assessment associations now existing in this state, and having policyholders or certificates of membership numbering not less than two hundred fifty, and which were organized or in existence in this state as such unincorporated assessment associations prior to March 23, 1907; but any such unincorporated assessment association now existing in this state, having policyholders or certificates of membership numbering not less than two hundred fifty and which were organized or in existence in this state prior to March 23, 1907, may, by becoming hereafter incorporated in this state, and complying with the provisions of this chapter, become entitled to all of the privileges hereof, in which event it shall become amenable to the provisions of this chapter as far as they are applicable. [C24, 27, 31, 35,§8719.]

8720 Reciprocal authorization. The commissioner of insurance of this state may authorize any health or accident insurance company or association organized under the laws of any other state or territory, to do business in this state, if, under the laws of such state or territory health and accident insurance companies or associations organized under the laws of this state are permitted to do business in such state. [C24, 27, 31, 35,§8720.]

8721 Separate classes of policyholders. Any life insurance association, other than fraternal beneficiary associations, incorporated and doing business under the provisions of this chapter, may establish a separate class of members or policyholders to whom it may issue certificates or policies of insurance on the legal reserve or level premium plan, provided that all such policies on the legal reserve or level premium plan shall be valued on a basis not lower than the valuations required for insurance companies operating on the level premium or the natural premium plan under the provisions of chapter 398. [C24, 27, 31, 35,§8721.]

40GA, ch 171, §3, editorially divided

8722 Cash value of policies. The net cash value of all policies in force on the legal reserve or level premium plan in any such association shall be ascertained in accordance with the basis of valuations which shall be adopted for said policies, and the amount of such ascertained valuation, and all other amounts which shall be accumulated and held in trust for the benefit of members or policyholders of any class or held for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the securities provided in section 8737, and deposited with the commissioner of insurance as provided in section 8741. [C24, 27, 31, 35,§8722.]

8723 Trust funds. An amount of the funds herein provided for, not less than the reserve valuation required to be maintained on all such policies on the legal reserve or level premium plan, shall be held at all times for the exclusive use and benefit of the class of policyholders having policies on said legal reserve or level premium plan. [C24, 27, 31, 35,§8723.]

8724 Reincorporation. Any existing domestic assessment company or association, or fraternal beneficiary society may, with the written consent of the commissioner of insurance, upon a majority vote of its trustees or directors, amend its articles of incorporation and bylaws in such manner as to transform itself into a legal reserve or level premium company, and upon so doing and upon procuring from the commissioner a certificate of authority, as prescribed by law, to transact business in this

state as a legal reserve or level premium company, shall incur the obligations and enjoy the benefits thereof, the same as though originally thus incorporated, and such corporation, under its charter as thus amended, shall be a continuation of such original corporation. The officers thereof shall serve through their respective terms as provided in the original charter, but their successors shall be elected and serve as in such amended articles provided; but such amendment or reincorporation shall not affect existing suits, rights, or contracts. [SS15, §1798-b; C24, 27, 31, 35,§8724.]

Referred to in §§8726, 8727
S13, §1798-b, editorially divided

8725 Valuation of policies. Any assessment company or fraternal beneficiary society reincorporated to transact life insurance business, shall value its assessment policies or certificates or benefit certificates as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state. [SS15,§1798-b; C24, 27, 31, 35,§8725.]

Referred to in §§8726, 8727

8726 Reinsurance reserve required. No such company or association shall reorganize under the provisions of sections 8724 and 8725 unless it shall have accumulated sufficient surplus to constitute a reinsurance reserve equal to the unearned premium on all outstanding policies or certificates, as prescribed by the statutes of this state relating thereto. [SS15,§1798-b; C24, 27, 31, 35,§8726.]

Referred to in §8727

8727 Accident or health associations. Accident or health associations may take advantage of all the provisions of sections 8724 to 8726, inclusive, insofar as applicable, and may thereupon transform themselves into stock companies. [SS15,§1798-b; C24, 27, 31, 35, §8727.]

CHAPTER 401

PROVISIONS APPLYING TO LIFE INSURANCE COMPANIES AND ASSOCIATIONS

Referred to in §§8625, 8686, 8711, 9104

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8728 Annual statement of foreign companies. Every company or association organized under the laws of any other state or country and doing business in this state shall annually, by the first day of March, file with the commissioner of insurance a statement of its affairs for the year terminating on the thirty-first day of December preceding, in the same manner and form provided for similar companies or associations organized in this state. [C73,§1166; C97, §1799; C24, 27, 31, 35,§8728.]

Referred to in §8730
C97, §1799, editorially divided

8729 Amended forms of statement. The commissioner may amend the form of the annual statement required to be made by companies or associations doing business in this state, and propose and require such additional matter to be covered therein as he may think necessary to elicit a full exhibit of the standing of any such company or association. [C73,§1168; C97, §1799; C24, 27, 31, 35,§8729.]

Referred to in §8730

8730 Blanks for reports. All reports contemplated under sections 8653, 8695, 8697, 8728, 8729, 8822, 8945, and 8946 may be upon forms furnished by the commissioner of insurance, and who may, at his option upon authority of the executive council, purchase such forms as are approved by the national convention of insurance commissioners, known as convention edition. [S13,§1820-d; C24, 27, 31, 35,§8730.]

8731 Advertisements — who deemed agent. The provisions of sections 9001 to 9005, inclusive, shall apply to life insurance companies and associations. [C97,§1815; C24, 27, 31, 35,§8731.]

8732 Agent's certificate to act. No person shall, directly or indirectly, act within this state as agent, or otherwise, in receiving or procuring applications for insurance, or in doing or transacting any kind of life insurance business, for any company or association contemplated in chapters 398 and 400, except for the purpose of taking applications for organizations, unless the company or association for which he is acting has received a certificate from the commissioner of insurance authorizing it to transact business therein, and unless he shall have received from said commissioner a certificate showing that such company or association has complied with the provisions of law, and that such person is authorized to act for it. [C73,§1166; C97,§1800; C24, 27, 31, 35, §8732.]

Referred to in §8733

8733 Violations. Any such company or association that does or solicits new business without the certificates required by the said chapters shall forfeit five hundred dollars for every day's neglect to procure the same. Any person knowingly soliciting applications or making insurance for any company or association having no such certificate from the commissioner of insurance as required, shall forfeit and pay the sum of three hundred dollars, and any person acting for any company or association authorized to transact business without having the agent's certificate prescribed in section 8732 in his possession, shall be liable to pay twenty-five dollars for each day's neglect to procure the same during the time he thus acts. [C73,§1177; C97,§1801; C24, 27, 31, 35,§8733.]

8734 Recovery of penalties. Actions brought to recover any of the penalties provided for in this chapter shall be instituted in the name of the state by the county attorney of the county, under the direction and authority of the commissioner of insurance, and may be brought in the district court of any county in which the company or association proceeded against is engaged in the transaction of business, or in which the offending person resides, if it is against him. The penalties, when recovered, shall be paid into the state treasury for the use of the school fund. [C73,§1178; C97,§1802; C24, 27, 31, 35,§8734.]

8735 Acquisition of real estate. No such company or association organized under the laws of this state shall purchase, hold or convey real estate, except for the purposes and in the manner herein set forth:

1. Such as is required for its use in the transaction of its business.

2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted in the course of its dealings.

3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4. Such as shall have been purchased at sales under execution issued upon judgments and decrees based upon debts due it, or obtained by redemption as junior judgment creditor or mortgagee. [C73,§1180; C97,§1803; C24, 27, 31, 35, §8735.]

Similar provisions, §§8699, 8737, 8747, 8826

8736 When to be sold. All real estate acquired which is not necessary for such company or association in the convenient transaction of its business shall, unless a deed to or a contract for the sale of the same shall have been deposited with or assigned to the commissioner of insurance as provided in subsection 12 of section 8737, be sold within five years after it acquired title thereto, unless it procures a certificate from the commissioner of insurance that its interests will suffer by a forced sale thereof, in which event the time may be extended as the commissioner shall direct in said certificate. [C73,§1181; C97,§1804; C24, 27, 31, 35,§8736.]

8737 Investment of funds. The funds required by law to be deposited with the commissioner of insurance by any company or association contemplated in chapters 398 and 400, and the funds or accumulations of any such company or association organized under the laws of this state, held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and no other:

1. *Federal and territorial obligations.* Bonds or other evidences of indebtedness issued or guaranteed by the United States or any insular or territorial possession of the United States, federal farm loan bonds, federal home loan bank bonds, home owners' loan corporation bonds, bonds, notes or obligations representing loans and advances of credit which are eligible for insurance by the federal housing administrator, and bonds, notes or obligations secured by real property or leasehold which the federal housing administrator has insured or has committed himself to insure or debentures issued by such administrator.

Investments in federal insured loans, §12786.1

2. *State and municipal obligations.* Bonds or other evidences of indebtedness issued or guaranteed by the state of Iowa or any other state, or any county, city, town, school, road, drainage, or other district, or any civil subdivision or governmental authority of such state or states, or any instrumentality of any of such authorized by statute to borrow money and issue securities, provided that the obligations are:

a. General or full faith and credit obligations of the issuing or guaranteeing unit, or

b. Payable from assessments levied for improvement purposes and secured by a lien upon real estate, or

c. Payable from especially designated revenues which are specifically pledged to the payment of principal and interest on such obligations.

3. *Canadian governmental and municipal obligations.* Bonds or other evidences of indebtedness issued or guaranteed by the Dominion of Canada, or any province thereof, or any municipality or district therein with a population in excess of ten thousand according to the last dominion or provincial census taken prior to the date of such investment, which are general or full faith and credit obligations of the issuing or guaranteeing unit.

4. *Public utility obligations.* Bonds or other evidences of indebtedness bearing a fixed rate of interest, issued or guaranteed by any corporation incorporated under the laws of the United States or this or any other state or the Dominion of Canada, or any province thereof, provided the corporation has been in operation for at least five years, or its predecessor or principal subsidiary has been in operation for at least five years, and is engaged directly or primarily in the sale of electricity, gas, water, or furnishing telephone service, provided that the gross revenues of such corporation shall have been at least two hundred and fifty thousand dollars for each of the three fiscal years next preceding the date of purchase, and average net annual earnings for the five years next preceding purchase shall have been equal to at least twice the annual interest requirements on the issue from which purchase is made, and on all other funded debt outstanding at the time of purchase, less the requirements on any funded debt for the retirement of which funds have been provided. (Net earnings in this subsection shall be considered to be the sum of (a) net operating income after the deduction of all operating expenses, maintenance charges, and taxes (except federal income taxes) but before the deduction of the allowance for depreciation, and (b) such other corporate income as is available to pay fixed charges.)

5. *Railroad obligations.*

a. Bonds or other evidences of indebtedness bearing a fixed rate of interest issued or guaranteed by any railroad or railway corporation, having substantially all of its trackage in the United States or Canada, and directly or primarily engaged in furnishing transportation service, or obligations for the payment of which such railroad or railway corporation is obligated under the terms of a lease made or assumed, not including street railways, provided,

(1) The corporation shall have had income available for fixed charges during four of the five fiscal years next preceding the date of investment equal to at least one and one-half times the total annual fixed charges to which the company is subject at the time of investment, less the fixed charges on any indebtedness for which payment has been provided, or

(2) Such bonds or other evidences of indebtedness are secured by a lien on mileage which, from reports satisfactory to the commissioner of insurance, is shown to have supplied income available for fixed charges during four out of the five fiscal years next preceding the date of investment, equal to at least two times the total of (a) all fixed charges on such bonds outstanding at the date of purchase, and (b) all charges against such mileage having an equal or prior lien, less the charges on any indebtedness for which payment has been provided.

The amount of income available for fixed charges for the purposes of this subsection shall be the amount obtained by deducting from gross income all items deductible in ascertaining net income other than contingent income interest and items constituting fixed charges. Fixed charges shall be: rent for leased roads, fixed interest on funded debt, interest on unfunded debt, and amortization of discount on funded debt. Accounting terms used in this paragraph shall be deemed to refer to those used in the accounting reports prescribed by the accounting regulations for common carriers subject to the provisions of the interstate commerce act. If the interstate commerce commission shall prescribe accounting regulations wherein shall be defined the term "income available for fixed charges" and the term "fixed charges", the definitions thereof, as so prescribed, shall be taken and used in lieu of the definitions set forth in this paragraph.

b. Equipment trust obligations, issued in connection with the purchase of new standard gauge equipment of a type in general use on most railroads in an amount not to exceed eighty percent of the cost of such equipment, which mature in substantially equal amounts not later than fifteen years from date of issue and which provide:

(1) For vesting of title free from incumbrance in a corporate trustee, or

(2) For creation of a first lien on such equipment.

(3) And further provided that the owner, purchaser, or lessee of such equipment be not in default upon any indebtedness which is a fixed charge, and shall be obligated either to pay the principal and interest on such certificates as they mature, or make payments to the trustee which will be sufficient to pay such principal and interest at maturity.

6. *Other fixed obligations.* Bonds or other evidences of indebtedness bearing a fixed rate of interest issued or guaranteed by any corporation incorporated under the laws of the United States or any state thereof, or the Dominion of Canada or any province thereof, in addition to those included in subsections 4 and 5, provided such corporation has had net earnings during each of the five fiscal years, next preceding the date of investment, equal to at least twice the fixed charges to which the company is subject at the date of investment, less the charges on any indebtedness for which payment has been provided. (Net earnings in this subsection shall be gross earnings less all operating expenses, maintenance charges, taxes (except federal income taxes), and allowance for depreciation, obsolescence and depletion.)

7. *Ineligible securities.* Securities included under subsections 4, 5, and 6 shall not be eligible for deposit if the issuing, guaranteeing or assuming corporation shall have been in default on fixed obligations for a period of more than ninety days during the five years next preceding investment, nor shall the investments of any com-

pany or association in such securities be eligible for deposit in excess of the following percentage of the reserve of such company or association:

a. Two percent of the reserve in the securities of any one corporation.

b. Twenty percent of the reserve in the securities described in subsection 4.

c. Twenty percent of the reserve in the securities described in subsection 5.

d. Ten percent of the reserve in securities described in subsection 6.

No securities except fixed interest mortgage bonds shall be eligible if the issuing, guaranteeing or assuming corporation has total assets of less than ten million dollars at the date of investment.

Securities of corporations with substantially all their assets invested in the securities of other corporations shall not be eligible.

In determining whether the requirements of subsections 4, 5, and 6 have been complied with, the earnings of all merged, consolidated or purchased companies shall be considered.

8. *Real estate bonds and mortgages.* Entire issues of bonds or notes secured by first mortgages or deeds of trust which are a first lien upon real estate within this state or any other state in the United States, provided that the total indebtedness secured by such lien shall not exceed sixty percent of the value of the property upon which it is a lien, provided, however, that such sixty percent limitation shall not apply to bonds and notes described in subsection 1 hereof.

Improvements shall not be considered in estimating the value of the property unless the owner shall contract to keep the same adequately insured in some reliable fire insurance company or companies, association or associations, authorized to do business in the state, during the life of the loan, the insurance to be made payable in case of loss to the mortgagee, trustee, or assigns as its interests may appear at the time of the loss.

Provided further that for the purposes of this subsection a first mortgage or deed of trust shall not be deemed to be other than a first lien upon property within the meaning of this subsection by reason of the existence of taxes or assessments that are not delinquent, instruments creating or reserving mineral, oil or timber rights, rights-of-way, joint driveways, sewer rights, rights in walls, nor by reason of building restrictions or other like restrictive covenants, nor when such real estate is subject to lease in whole or in part whereby rents or profits are reserved to the owner.

9. *Real estate.* Any such real estate in this state as is necessary for its accommodation as a home office; and in the erection of any buildings for such purposes, it may add thereto rooms for rent. Before the company or association shall invest any of its funds in accordance with the provisions of this subsection it shall first obtain the consent of the executive council.

10. *Policy loans.* Loans upon the security of its own policies and constituting a lien thereon in an amount not exceeding the reserve thereon.

11. *Collateral loans.* Loans secured by collateral security consisting of any securities enumerated in this section, provided there is a margin of ten percent between the amount of the loan and the value of the securities.

Provided further that subsection 7 shall apply to the collateral securities pledged to the payment of loans authorized in this subsection.

12. *Substitution of certificates of sale and satisfactory evidences of ownership of real estate.* Companies or associations may substitute for securities deposited, certificates of sale owned by them and obtained by foreclosure of liens on real estate, but such certificates shall be accepted for deposit for an amount not in excess of the amount of the original securities and shall be withdrawn at the end of the period of redemption or within thirty days if redemption is made.

Companies or associations may also substitute for securities deposited evidences of ownership satisfactory to the commissioner of insurance of any real estate acquired in settlement of such securities; but such evidences of ownership shall be accepted for deposit for an amount not in excess of the amount of the original securities and shall be withdrawn within thirty days of termination of ownership, (and in any event must be withdrawn within ten years from date of deposit).

The total amount for which certificates of sale and evidences of ownership may be deposited shall not exceed at any one time thirty percent of the amount required by law to be deposited with the insurance department.

13. *Substitution of contracts of sale and purchase money mortgages or purchase money deeds of trust.* Companies or associations may substitute for securities deposited contracts of sale, purchase money mortgages or purchase money deeds of trust obtained through foreclosure, settlement or satisfaction of other securities but only for an amount approved by the commissioner of insurance. [C73,§1179; C97,§1806; SS15, §1806; C24, 27, 31, 35,§8737; 47GA, ch 213,§1.]

Referred to in §§8521, 8581.38, 8655, 8698, 8722, 8736, 8738, 8743, 8745, 10212

Similar provisions, §§8699, 8735, 8747, 8826, 8829, 8927

8738 **Home office—limitation.** The maximum amount which any such company or association shall be permitted to invest in accordance with the provisions of subsection 9 of section 8737 shall not exceed ten percent of the lawful reserve on its policies or certificates of insurance, provided, however, that a stock company may invest such portion of its paid-up capital, in addition to said ten percent of the lawful reserve on its policies, as is not held to constitute a part of its legal reserve deposit under sections 8654 and 8655; provided, further, that the total legal reserve of such company shall be equal to or exceed the amount of its paid-up capital stock. [C24, 27, 31, 35,§8738.]

Referred to in §8745

37GA, ch 404, §1, editorially divided

8739 Real estate as deposit of legal reserve. Any company or association so investing its funds may use the value of any such real estate and home office building as a part of the deposit of legal reserve in which case it shall convey the same to the commissioner of insurance by trust deed, such property to be held by him in trust for the benefit of the policyholders or members of the company or association. [SS15, §1806; C24, 27, 31, 35,§8739.]

Referred to in §8745

8740 Reconveyance of real estate — valuation. The commissioner of insurance shall execute and deliver to the company or association a quitclaim deed to the property held by him in trust whenever the full legal reserve of said company or association shall be invested in other securities and deposited with the commissioner of insurance. The value of said property whether deeded in trust or otherwise shall be determined from time to time by the commissioner of insurance. [C24, 27, 31, 35,§8740.]

Referred to in §8745

8741 Securities deposited. All such securities shall be deposited with the commissioner, subject to his approval and kept at such place or places and on such terms as he may designate, and shall remain on deposit until withdrawn in accordance with law, or the order of the commissioner. [C97,§1806; SS15,§1806; C24, 27, 31, 35, §8741.]

Referred to in §§8655, 8698, 8722, 8745

8741.1 Exchange of securities. Any of the securities owned and held under the provisions of this chapter, including real estate owned and held, in its own office or on deposit with the insurance department may be exchanged for other securities and real estate authorized to be held under said chapter provided that it appears that such exchange will strengthen the position of said company and be to its advantage and that such exchange shall receive the approval of the commissioner of insurance, and provided further that in the exchange of such securities the values may be placed upon such securities and real estate so received and shall be fixed and determined by the department of insurance but upon a valuation not relatively higher than that of any such securities so exchanged. Such securities and real estate so received may be accepted by the insurance department as eligible for reserve deposits. All acts and parts of acts insofar as they are in conflict with this section are hereby repealed. [C35,§8741-e1.]

Referred to in §8745

8742 Payments to be reported — penalty. Any company or association receiving payments or partial payments on any securities deposited with the commissioner shall notify him of such fact, giving the amount and date of payment, within thirty days after such payment shall have been made. The officers of any company or association which fails to report the receipt of payments or partial payments as above provided, shall be liable to a fine in double the amount collected and not reported within the time and in the manner above specified. [SS15, §1806; C24, 27, 31, 35,§8742.]

Referred to in §8745

8743 Withdrawals on lapsed policies. It shall be the duty of the company or association and of the officers thereof to withdraw from deposit any loans made in accordance with the provisions of subsection 10 of section 8737 within fifteen days after the date of the lapsing or termination of any policy of insurance upon which any such loan is made. [SS15,§1806; C24, 27, 31, 35,§8743.]

Referred to in §8745

8744 Purpose of withdrawal. Any association making deposit with the commissioner as herein contemplated, shall at the time of making request for the withdrawal of any securities designate for what purpose the same are desired to be withdrawn. [SS15,§1806; C24, 27, 31, 35,§8744.]

Referred to in §8745

8745 Violations. The commissioner shall have authority to suspend or revoke the certificate of authority of any company or association failing to comply with any of the provisions of sections 8737 to 8744, inclusive, or for violating the same. [SS15,§1806; C24, 27, 31, 35,§8745.]

8746 Rule of valuation. All bonds or other evidences of debt having a fixed term and rate, held by any life insurance company, assessment life association, or fraternal beneficiary association authorized to do business in this state may, if amply secured and not in default as to principal and interest, be valued as follows:

1. If purchased at par, at the par value.
2. If purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity and so as to yield in the meantime the effective rate of interest at which the purchase was made.

Provided that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase.

The commissioner of insurance shall have full discretion in determining the method of calculating values according to the foregoing rule. [C24, 27, 31, 35,§8746.]

8747 Investment in land and buildings. Such organization may purchase such real estate in the state with a portion of its accumulations as may be necessary for its use in the transaction of its business, and in the erection of a building thereon for such purpose, to which rooms for rent may be added. [C97,§1807; C24, 27, 31, 35,§8747.]

Similar provisions, §§8699, 8735, 8737, 8826

8748 Prohibited loans. No insurance company or association organized under the statutes of this state to transact an insurance business, shall invest its capital, surplus funds, or other assets, in or loan the same on property owned by any officer or director of such company or by any of the immediate members of the

family of any such officer or director. [C24, 27, 31, 35,§8748.]

38GA, ch 348, §13, editorially divided

8749 **Officers not to profit by investments.** No such officer or director shall gain through the investment of funds of any such company. [C24, 27, 31, 35,§8749.]

8750 **Disbursements — vouchers — affidavit.** No domestic life insurance company shall make any disbursement of one hundred dollars or more unless the same be evidenced by a voucher signed by or on behalf of the person, firm, or corporation receiving the money and correctly describing the consideration for the payment. If the expenditure be for both services and disbursements the voucher shall set forth the services rendered and an itemized statement of the disbursements made. When such voucher cannot be obtained the expenditure shall be evidenced by an affidavit of some officer or agent of said company describing the character and object of the expenditure and stating the reason for not obtaining such voucher. [S13,§1820-a; C24, 27, 31, 35,§8750.]

8751 **Taxes—from what funds payable.** In case this or any other state shall impose or levy any tax on any company or association, the same may be paid from any surplus or emergency fund of such company or association. [C97, §1821; C24, 27, 31, 35,§8751.]

8752 Rep. by 43GA, ch 225. See §8612.1

8753 Impliedly repealed by 43GA, ch 225

8754 **Discrimination against domestic company.** It shall be unlawful for the commissioner of insurance to impose upon companies or associations organized under chapter 400 any rules or regulations, requirements or limitations, that shall not be imposed with equal force upon like companies or associations from other states doing a like business in this state. [C97,§1810; C24, 27, 31, 35,§8754.]

8755 **Illegal business.** Any officer, manager, or agent of any life insurance company or association who, with knowledge that it is doing business in an unlawful manner or is insolvent, solicits insurance with said company or association, or receives applications therefor, or does any other act or thing towards procuring or receiving any new business for such company or association, shall be guilty of a misdemeanor, and for every such act, on conviction thereof, shall be adjudged to pay a fine of not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment. [C97,§1814; C24, 27, 31, 35,§8755.]

Referred to in §8640
C97, §1814, editorially divided

8756 **Contracts void—recovery—damages—attorney fees.** All contracts, promises, and agreements made by any person to or with any such company or association concerning any premium, policy, or certificate of new business, after the revocation of its certificates or denial of authority to do business, shall be null and void, and all payments of premium or assessments advanced or made by any person on account of any such policy, certificate of new business, or upon any arrangement therefor, may be recovered from such company or association, or its agent to whom payment was advanced or made, or from both of them, and in addition thereto plaintiff may recover an equal amount as liquidated damages, together with a reasonable fee to plaintiff's attorney for services in the case. [C97,§1814; C24, 27, 31, 35, §8756.]

Referred to in §8640

8757 **Fraud in procuring insurance.** Any agent, physician, or other person who shall knowingly, by means of concealment of facts or false statements, procure or assist in procuring from any life insurance organization any policy or certificate of insurance, shall be punished by a fine of not to exceed one thousand dollars or by imprisonment in the county jail not to exceed one year, or by both, in the discretion of the court. [C97,§1816; C24, 27, 31, 35,§8757.]

8758 **Conspiracy to defraud.** If two or more persons conspire to defraud or obtain any money from any life insurance company or association by means of false statements as to the death of any person insured, or the false appearance of the death of any such person, each shall be punished by imprisonment in the penitentiary not to exceed ten years. Any person who by such means obtains any money or property on the policy or certificate of the person so insured shall be punished by imprisonment in the penitentiary not to exceed fifteen years. Any person who thus attempts to obtain money from any such company or association shall be punished by like imprisonment not to exceed seven years. [C97,§1817; C24, 27, 31, 35,§8758.]

Conspiracy in general, §13162

8759 **Misrepresentations.** No life insurance corporation doing business in this state and no officer, director, or agent thereof shall issue, circulate, or use, or cause or permit to be issued, circulated, or used, any estimate, illustration, circular, or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or shall use any title of any policy or class of policies misrepresenting the true nature thereof. [S13,§1820-b; C24, 27, 31, 35, §8759.]

Referred to in §8760

8760 **Violations.** Any person violating the provisions of section 8759 shall be deemed guilty of a misdemeanor and shall be punished accordingly. [S13,§1820-c; C24, 27, 31, 35, §8760.]

Punishment, §12894

8761 **May not advertise authorized capital.** No insurance company shall be permitted to

advertise or publish an authorized capital, or to represent in any manner itself as possessed of any greater capital than that actually paid up and invested. [S13,§1783-g; C24, 27, 31, 35, §8761.]

Referred to in §8762

8762 **Penalties.** Any person, firm or corporation violating any of the provisions of section 8761, or sections 8903 to 8905, inclusive, or failing to comply with any of the provisions therein, shall be subjected to the penalties provided in sections 8634 to 8637, inclusive. [S13, §1783-h; C24, 27, 31, 35,§8762.]

8763 **Fees from foreign companies.** When not otherwise provided, each life insurance company doing business in this state, except those organized under the laws thereof, shall pay to the commissioner of insurance the following fees:

1. Upon filing declaration or certified copy of the charter or articles of incorporation, twenty-five dollars.
2. Upon filing the annual statement, twenty dollars.
3. For each certificate of authority and certified copy thereof, two dollars.
4. For each agent's certificate, two dollars.
5. For every copy of any paper filed, the sum of twenty cents per folio, and for certifying and affixing the official seal thereto, one dollar.
6. For valuing policies, ten dollars for each million dollars of insurance or fraction thereof.

[C73,§1183; C97,§1818; C24, 27, 31, 35,§8763.]

Referred to in §§8695, 8765
C97,§1818, editorially divided

8764 **Fees from domestic companies.** Companies organized under the laws of the state shall pay the following fees:

1. For filing and examination of the first application and the issuance of certificate thereon, ten dollars.
2. For filing each annual statement and issuance of renewal certificate, three dollars.
3. For each agent's certificate, fifty cents.

[C73,§1183; C97,§1818; C24, 27, 31, 35,§8764.]

Referred to in §§8695, 8765

8765 **Fee statute—applicability.** The provisions of the chapter on insurance other than life shall apply as to fees under this chapter and chapters 398 and 400, except as modified by sections 8763 and 8764. [C97,§1818; C24, 27, 31, 35,§8765.]

Referred to in §8695

8766 **Commissioner as process agent.** Every life insurance company and association organized under the laws of another state or country shall, before receiving a certificate to do business in this state or any renewal thereof, file in the office of the commissioner of insurance an agreement in writing that thereafter service of notice or process of any kind may be made on the commissioner, and when so made shall be as valid, binding, and effective for all purposes as if served upon the company according to the laws of this or any other state, and waiving all claim or right of error by reason of such acknowledgment of service. [C73,§1165; C97, §1808; C24, 27, 31, 35,§8766.]

Referred to in §§8707, 8768
Similar provisions, §§8355, 8421, 8801, 8952, 9087, 9376
C97, §1808, editorially divided

8767 **Service of process.** Such notice or process, with a copy thereof, may be mailed to the commissioner at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereon on behalf of the defendant foreign insurance company by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed to him by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the person or corporation who shall be named or designated by such company in such written instrument. [C73,§1165; C97, §1808; C24, 27, 31, 35,§8767.]

Referred to in §§8581.45, 8768

8768 **Interpretation.** The provisions of sections 8766 and 8767 are merely additions to the general provisions of law on the subjects therein referred to, and are not to be construed to be exclusive. [C97,§1809; C24, 27, 31, 35,§8768.]

Service generally, ch 489

8769 **Intoxication as defense.** In any action pending in any court of the state on any policy or certificate of life insurance, wherein the defendant seeks to avoid liability upon the alleged ground of the intemperate habits or habitual intoxication of the assured, it shall be a sufficient defense for the plaintiff to show that such habits or habitual intoxication of the assured were generally known in the community or neighborhood where the agent of the defendant resided or did business, if thereafter the company continued to receive the premiums falling due thereon. [C97,§1811; C24, 27, 31, 35,§8769.]

8770 **Physician's certificate — conclusiveness.** In any case where the medical examiner, or physician acting as such, of any life insurance company or association doing business in the state shall issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company or association or its agent under the rules and regulations of such company or association, it shall be thereby estopped from setting up in defense of the action on such policy or certificate that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the assured. [C97,§1812; C24, 27, 31, 35,§8770.]

8771 **Misrepresentation of age.** In all cases where it shall appear that the age of the person insured has been understated in the proposal, declaration or other instrument upon which a policy of life insurance has been founded or issued, then the amount payable under the policy

shall be such as the premium paid would have purchased at the correct age; provided, however, that one who, by misstating his age, obtains life insurance not otherwise obtainable shall be entitled to recover from the insurer on account of such policy only the aggregate premiums paid. [C97,§1813; C24, 27, 31, 35,§8771.]

8772 Application for insurance — duty to attach to policy. All life insurance companies or associations organized or doing business in this state under the provisions of the preceding chapters shall, upon the issue of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy, or, upon reinstatement of a lapsed policy, shall attach to the renewal receipt a true copy of all representations made by the assured upon which the renewal or reinstatement is made. [C97, §1819; C24, 27, 31, 35,§8772.]

Referred to in §8773
Similar provisions, §§8793, 8974
C97, §1819, editorially divided

8773 Failure to attach—defenses—estoppel. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of section 8772, it shall forever be precluded from pleading, alleging, or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option. [C97,§1819; C24, 27, 31, 35,§8773.]

Similar provisions, §§8794, 8975

8774 Limitation on proofs of loss. No stipulation or condition in any policy or contract of insurance or beneficiary certificate issued by any company or association mentioned or referred to in this chapter, limiting the time to a period of less than one year after knowledge by the beneficiary within which notice or proofs of death or the occurrence of other contingency insured against must be given, shall be valid. [C97,§1820; S13,§1820; C24, 27, 31, 35,§8774.]

Similar provisions, §§8775, 8978, 8979, 8986, 9045
S13, §1820, editorially divided

8775 Limitation under health and accident. In case of accident or health insurance it shall be valid for any company or association to limit by contract the time when notice or proofs of death, cause of disability or other contingency insured against shall be given; but in no case shall said notice be limited to a period of less than sixty days after knowledge by the beneficiary within which such notice or proofs must be given. [S13,§1820; C24, 27, 31, 35,§8775.]

Similar provisions, §§8774, 8978, 8979, 8986, 9045

8776 Policy exempt from execution. A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors.

The proceeds of an endowment policy payable to the assured on attaining a certain age shall be exempt from liability for any of his debts.

Any benefit or indemnity paid under an accident, health or disability policy shall be exempt to the assured, or in case of his death to the husband or wife and children of the assured, from his debts.

The avails of all policies of life, accident, health or disability insurance payable to the surviving widow shall be exempt from liability for all debts of such beneficiary contracted prior to the death of the assured, but the amount thus exempted shall not exceed fifteen thousand dollars. [C51,§1330; R60,§2362; C73,§§1182, 2372; C97,§1805; C24, 27, 31, 35,§8776; 48GA, ch 223, §1.]

Similar provisions, §§8684.18, 8796, 11919

CHAPTER 402

FRATERNAL BENEFICIARY SOCIETIES, ORDERS, OR ASSOCIATIONS

GENERAL PROVISIONS

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GENERAL PROVISIONS

8777 Definition. A fraternal beneficiary association is hereby declared to be a corporation, society, or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, and having a lodge system, with ritualistic form of work and representative form of government. [C97,§1822; S13,§1822; C24, 27, 31, 35,§8777.]

S13, §1822, editorially divided

8778 Death, sick, and disability benefits. Such association shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as a result of disease, accident, or old age, provided the period of life at which payment of physical disability benefits on account of old age commences shall not be under seventy years, subject to the compliance by members with its constitution and laws. [C97, §1822; S13,§1822; C24, 27, 31, 35,§8778.]

Referred to in §6944, subsection 19

8779 Exclusive religious orders. Beneficiary societies or associations, whose membership is confined to the members of any one religious denomination, shall only be required to have a branch system and a representative form of government. Such beneficiary societies or associations shall be governed by the provisions of this chapter, and shall be exempt from the provisions of the statutes of this state, relating to life insurance companies, to the same extent as fraternal beneficiary associations. [S13,§1822; C24, 27, 31, 35,§8779.]

8780 Sick and funeral benefits only. The provisions of this chapter shall not be construed to include fraternal orders which only provide for sick and funeral benefits. [C97,§1822; S13, §1822; C24, 27, 31, 35,§8780.]

8781 Certificates permitted. Any fraternal beneficiary society issuing certificates, based upon rates not lower than those required by the mortality table set forth in section 8823, may issue certificates providing for death benefits upon the term, whole life, or limited payment plan, in which event it shall maintain the required legal reserve on all such certificates, based on the standard adopted for the issuing of such certificates, which said reserve shall be set aside and held as a special reserve fund for the exclusive benefit of the members contributing thereto. [C24, 27, 31, 35,§8781.]

38GA, ch 343, §1, editorially divided

8782 Benefits. Any such society may grant to its members extended and paid-up protection

or such withdrawal equities as its constitution and laws may permit, provided that such grants shall in no case exceed in value the portion of the reserve to the credit of the members to whom they are made. [C24, 27, 31, 35,§8782.]

8783 **Exclusive membership in religious order.** Any corporation heretofore organized under the laws of this or any other state, whose membership is confined to the members of any one religious denomination, and whose plan of business permits, may take advantage of the preceding sections of this chapter by amendment to its articles of incorporation, and by complying with the provisions of sections 8806 to 8811, inclusive; provided that such corporations as on March 15, 1907, were and have since continuously been doing business under chapter 400, may take advantage of said sections without raising their mortuary assessment rates or showing that their said rates are such as are required by section 8823. [SS15,§1822-a; C24, 27, 31, 35,§8783.]

8784 **Assessments.** The fund from which the payment of such benefits shall be made and the expenses of such association defrayed shall be derived from beneficiary calls, assessments, or dues collected from its members. [C97,§1823; C24, 27, 31, 35,§8784.]

8785 to 8789, inc. Rep. by 48GA, ch 224,§1

8789.1 **Qualifications for membership.** Any fraternal beneficiary society or association authorized to do business as such in this state may admit to beneficial membership any person not less than fifteen and not more than sixty-five years of age at nearest birthday, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society, or who has made declaration of insurability acceptable to the society, and any person so admitted prior to attaining the full age of twenty-one years shall be bound by the terms of his or her application and certificate, and by all the laws, rules, and regulations of the society, and shall be entitled to all the rights and privileges of membership therein, as fully and to the same extent as though he or she were not a minor at the time of applying for such beneficial membership; provided, that any beneficial member of a society who shall apply for additional benefits more than six months after becoming a beneficial member shall pass an additional medical examination or make an additional declaration of insurability, as required by the society, provided, however, that a declaration of insurability may be accepted only in cases (1) of an applicant under forty-five years of age and for insurance not to exceed two thousand dollars, and (2) of insurance on the lives of children under fifteen years of age.

Nothing herein contained shall prevent such society from accepting general or social members to whom no certificates of insurance in any form shall be issued and who shall have no voice or vote in the management of the insurance affairs of the society, nor from issuing juvenile certificates on the lives of children under the age of fifteen years. [C97,§§1824, 1839; C24, 27, 31, 35,§§8785, 8821; 48GA, ch 224,§1.]

Similar provisions, §§8694, 8842.1

8789.2 **Beneficiaries — vested interest.** No beneficiary shall have or obtain any vested interest in the proceeds of any certificate until such certificate has become due and payable in conformity with the provisions of the insurance contract. The insured member shall have the right at all times to change the beneficiary or beneficiaries in accordance with the constitution, bylaws, rules or regulations of the society. Every society may, by its constitution, bylaws, rules or regulations, limit the scope of beneficiaries. [C24, 27, 31, 35,§§8786–8789; 48GA, ch 224,§1.]

Similar provisions, §§8694, 8845

8790 **Association as beneficiary.** Any association or society, whose articles of incorporation, or constitution, or rules, or bylaws, provide that at the time of the admission to membership into such society, every member, when joining shall belong to one occupation or guild, may become a beneficiary as may be provided in its articles of incorporation, or constitution, or rules, or bylaws. [C24, 27, 31, 35,§8790.]

8791 **Statutes applicable.** Associations organized hereunder* shall be governed by this chapter, and shall be exempt from the provisions of the statutes of this state relating to life insurance companies, except as hereinafter provided. [C97,§1825; C24, 27, 31, 35,§8791.]

*See Homesteaders Life v Murphy, 224 Iowa 173

8792 **Change in beneficiary notwithstanding contract.** No contract between a member and his beneficiary that the beneficiary or any person for him shall pay such member's assessments and dues, or either of them, shall deprive the member of the right to change the name of the beneficiary. [C97,§1834; C24, 27, 31, 35,§8792.]

8793 **Duty to attach copy of application.** All such associations shall, upon the issue or renewal of any beneficiary certificate, attach to such certificate or indorse thereon a true copy of any application or representation of the member which by the terms of such certificate are made a part thereof. [C97,§1826; C24, 27, 31, 35,§8793.]

Referred to in §8794
Similar provisions, §§8772, 8974
C97, §1826, editorially divided

8794 **Failure to attach.** The omission so to do shall not render the certificate invalid, but if any such association neglects to comply with the requirements of section 8793 it shall not plead or prove the falsity of any such certificate or representation or any part thereof in any action upon such certificate, and the plaintiff in any such action, in order to recover against such association, shall not be required

to either plead or prove such application or representation. [C97,§1826; C24, 27, 31, 35, §8794.]

Similar provisions, §§8773, 8975

8795 **Where suable.** Such associations may be sued in any county in which is kept their principal place of business, or in which the beneficiary contract was made, or in which the death of the member occurred; but actions to recover old-age, sick, or accident benefits may, at the option of the beneficiary, be brought in the county of his residence. [C97,§1827; C24, 27, 31, 35,§8795.]

8796 **Exemption of proceeds.** The proceeds of any beneficiary certificate issued by any such association, and of any claims for benefits, shall be exempt from execution and attachment, to the same extent as the proceeds of any policy of life or endowment insurance, as is now or may hereafter be provided by the laws of this state. [C97,§1828; C24, 27, 31, 35,§8796.]

Similar provisions, §§8684.13, 8776, 11919

8797 **Permit to foreign companies—conditions.** Any such association organized under the laws of any other state shall be permitted to do business in this state, when it shall have filed with the commissioner of insurance a duly certified copy of its charter and articles of association, and a copy of its constitution or laws, certified to by its secretary or corresponding officer, together with an appointment of the commissioner as a person upon whom process may be served as hereinafter provided, if such association shall be shown to be authorized to do business in the state in which it is incorporated or organized. [C97,§1829; C24, 27, 31, 35,§8797.]

Referred to in §8811
C97, §1829, editorially divided

8798 **Examination.** The commissioner may personally, or by some person to be designated by him, examine into the conditions, affairs, character, and business methods, accounts, books, and investments of such association at its home office, which examination shall be at the expense of such association, and shall be made within thirty days after demand therefor. [C97,§1829; C24, 27, 31, 35,§8798.]

8799 **Expense.** The expense of such examination shall be limited to five dollars per day and the necessary expenses of travel and for hotel bills. [C97,§1829; C24, 27, 31, 35,§8799.]

8800 **Refusal of permit.** If the commissioner, after such examination, is of the opinion that no permit should be granted to such association, he may refuse to issue the same. [C97,§1829; C24, 27, 31, 35,§8800.]

8801 **Commissioner as process agent.** Any such association permitted to do business within this state, and not having its principal office within this state, and not organized under the laws of this state, shall appoint, in writing, the commissioner of insurance to be attorney in fact, on whom all process in any action or proceeding against it shall be served, and in such writing shall agree that any process against it which is served on said attorney in fact shall be of the same validity as if served upon the association, and that the authority shall continue in force so long as any liability remains outstanding in this state. [C97,§1831; C24, 27, 31, 35,§8801.]

Similar provisions, §§8355, 8421, 8766, 8952, 9087, 9376
C97, §1831, editorially divided

8802 **Copies.** Copies of such certificate, certified by said commissioner, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original. [C97,§1831; C24, 27, 31, 35,§8802.]

8803 **Service—notice to association.** When legal process against any such association is served upon said commissioner, he shall immediately notify the association of such service by letter, postage prepaid, directed and mailed to its secretary or corresponding officer, and shall within two days after such service forward in the same manner a copy of the process served on him to such officer. [C97,§1831; C24, 27, 31, 35,§8803.]

8804 **Service deemed sufficient.** Service upon such attorney shall be deemed sufficient service upon such association. [C97,§1831; C24, 27, 31, 35,§8804.]

8805 **Record of service of process.** The commissioner shall keep a record of all processes served upon him, which record shall show the day and hour when such service was made. [C97, §1831; C24, 27, 31, 35,§8805.]

8806 **Commencement of business — conditions.** Before any beneficiary society, order, or association shall be authorized to commence business within this state, it shall submit to the commissioner of insurance its bylaws or rules by which it is to be governed, and also its articles of incorporation, if a corporation, which shall include its plan of business. [S13,§1832; C24, 27, 31, 35,§8806.]

Referred to in §8783
S13, §1832, editorially divided

8807 **Opinion of attorney general.** The commissioner shall thereupon submit its articles of incorporation to the attorney general for examination, and if found by him to be in harmony with this title, chapter, and with law, he shall so certify upon said articles and return them to the commissioner. [S13,§1832; C24, 27, 31, 35,§8807.]

Referred to in §8783

8808 **Permit—fees.** If the commissioner shall approve the articles and also the bylaws or rules, he shall issue to the society, order, or association a permit in writing, authorizing it to transact business within this state for a period of one year from the first day of April of the year of its issue, for which certificate and all proceedings in connection therewith, there shall be paid to the commissioner a fee of twenty-five dollars, and for each annual renewal thereof a like fee shall be paid. [C97,§1832; S13,§1832; C24, 27, 31, 35,§8808.]

Referred to in §8783

8809 Insurance required. Before such certificate shall be issued, the fraternal society, order, or association shall have actual bona fide applications upon the lives of at least five hundred persons, residents of this state, for at least one thousand dollars of insurance each, and the commissioner may require the presentation of such applications, signed by the applicants themselves. [S13,§1832; C24, 27, 31, 35,§8809.]

Referred to in §8783

8810 Renewal of permit conditional. No renewal of certificate of authority shall be made to any society, order, or association whose membership, in good standing, or the amount of whose insurance in force shall be reduced below the above requirements. [S13,§1832; C24, 27, 31, 35,§8810.]

Referred to in §8783

8811 Foreign societies—conditions. Societies, orders, or associations not organized under the laws of this state, in addition to the requirements of the provisions of section 8797, must also comply with all of the provisions of this chapter, except as to the residence of membership; provided that no such society, order, or association shall be authorized to transact business within this state unless it shall be shown to have actual members, in good standing, of at least one thousand, and at least one million dollars of insurance in force. [S13,§1832; C24, 27, 31, 35,§8811.]

Referred to in §8783

8812 Employment of agents. Such association shall not employ paid agents in soliciting or procuring members, except in the organization or building up of subordinate bodies, or granting members inducements to procure new members. [C97,§1833; C24, 27, 31, 35,§8812.]

8813 Meetings in foreign states. Any such association organized under the laws of this state may provide for the meetings of its legislative or governing body in any other state, territory, or province wherein such association shall have subordinate bodies, and all business transacted at such meetings shall be valid, in all respects, as if such meetings were held within this state. [C97,§1835; C24, 27, 31, 35,§8813.]

C97, §1835, editorially divided

8814 Voting in foreign state. Where the laws of any such association provide for the election of its officers by votes to be cast in its subordinate bodies, the votes so cast in its subordinate bodies in any other state, territory, or province shall be valid, as if cast within this state. [C97,§1835; C24, 27, 31, 35,§8814.]

8815 Violations of statute. Any such association refusing or neglecting to make the report as provided in this chapter shall be excluded from doing business within this state. [C97,§1836; C24, 27, 31, 35,§8815.]

C97,§1836, editorially divided

8816 Delinquency reported — injunction. The commissioner of insurance must, within sixty days after failure to make such report, or in case any such association shall exceed its powers, or shall conduct its business fraudulently, or shall fail to comply with any of the provisions of this chapter, give notice in writing to the attorney general, who shall immediately commence an action against such association to enjoin the same from carrying on any business. [C97,§1836; C24, 27, 31, 35,§8816.]

8817 Business prohibited — reinstatement. No association so enjoined shall have authority to continue business until such report shall be made, or overt act or violation complained of shall have been corrected, or until the costs of such action be paid by it, provided the court shall find that such association was in default, as charged; whereupon the commissioner shall reinstate such association, and not until then shall such association be allowed to again do business in this state. [C97,§1836; C24, 27, 31, 35,§8817.]

8818 Violations. Any officer, agent, or person acting for any such association or subordinate body thereof within this state, while such association shall be so enjoined or prohibited from doing business pursuant to this chapter, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court. [C97, §1836; C24, 27, 31, 35,§8818.]

Referred to in §8819

8819 Illegal business—agents. Any person who shall act within this state as an officer, agent, or otherwise for any such association which has failed, neglected, or refused to comply with, or which has violated any of the provisions of this chapter, or shall have failed or neglected to procure from the commissioner of insurance proper certificate of authority to transact business as provided for by this chapter, shall be subject to the penalty provided in section 8818 for the misdemeanor therein specified. [C97,§1837; C24, 27, 31, 35,§8819.]

8820 False representations. Any officer, agent, or member of such association, who shall obtain any money or property belonging thereto by any false or fraudulent representation, shall be fined not more than five hundred dollars and costs, and stand committed until such fine and costs are paid, or may be imprisoned in the county jail not more than six months. [C97, §1838; C24, 27, 31, 35,§8820.]

8821 Rep. by 48GA, ch 224,§1. See §8789.1

8822 Report. Every such association doing business in this state shall, on or before the first day of March of each year, make, and file with the commissioner of insurance, a report for the year ending on the thirty-first day of December immediately preceding. All reports shall be upon blank forms to be provided by the commissioner, or may be printed in pamphlet

form, and shall be verified under oath by the authorized officers of such association, and shall be published, or the substance thereof, in the annual report of the commissioner under the separate title "Fraternal Beneficiary Associations", and shall contain answers to the following questions:

1. Number of certificates issued during the year, or members admitted.
2. Amount of indemnity effected thereby.
3. Number of losses or benefit liabilities incurred.
4. Number of losses or benefit liabilities paid.
5. The amount received from each assessment for the year.
6. Total amount paid members, beneficiaries, legal representatives, or heirs.
7. Number and kind of claims for which assessments have been made.
8. Number and kind of claims compromised or resisted, and brief statement of reason.
9. Does association charge annual or other periodical dues or admission fees.
10. How much on each one thousand dollars annually, or per capita, as the case may be.
11. Total amount received, from what source, and the disposition thereof.
12. Total amount of salaries, fees, per diem, mileage, expenses paid to officers, showing amount paid to each.
13. Does the association guarantee, in its certificates, fixed amounts to be paid regardless of amount realized from assessments, dues, admission fees, and donations.
14. If so, state amount guaranteed, and the security of such guarantee.
15. Has the association a reserve or emergency fund.
16. If so, how is it created, and for what purpose, the amount thereof, and how invested.
17. Has the association more than one class.
18. If so, how many, and amount of indemnity in each.
19. Number of members in each class.
20. If voluntary, so state, and give date of organization.
21. If organized under the laws of this state, under what law and at what time, giving chapter and year, and date of passage of the act.
22. If organized under the laws of any other state, territory, or province, state such fact and the date of organization, giving chapter and year, and date of passage of the act.
23. Number of certificates of beneficiary membership lapsed during the year.
24. Number in force at beginning and end of year; if more than one class, number in each class.
25. Names and addresses of its presidents, secretary, and treasurer, or corresponding officers.

The commissioner is empowered to make any additional inquiries of any such association relative to the business contemplated by this chapter, and such officer of such association as the commissioner may require shall promptly reply in writing, under oath, to all such inquiries. [C97, §1830; C24, 27, 31, 35, §8822.]

Referred to in §8730

RATES

8823 **Mortuary assessment rates.** No fraternal beneficiary society not admitted to transact business in this state prior to July 4, 1907, shall be incorporated, or given a permit or certificate of authority to transact business within this state, unless it shall first show that the mortuary assessment rates provided for in whatever plan of business it has adopted, including the issuance of term, whole life, or limited payment certificates with withdrawal options, are not lower than is indicated as necessary by the following mortality table:

NATIONAL FRATERNAL CONGRESS MORTALITY TABLE

Age	Number Living	Number Dying	Probability of Dying	Age	Number Living	Number Dying	Probability of Dying
20	100,000	500	0050000	60	69 801	1 588	0227504
21	99 500	501	0050352	61	68 213	1 681	0246434
22	98 999	502	0050708	62	66 532	1 778	0267240
23	98,497	503	0051068	63	64 754	1 880	0290330
24	97 994	505	0051535	64	62,874	1 985	0315701
25	97 489	507	0052006	65	60 889	2 094	0343904
26	96 982	510	0052587	66	58 795	2,206	0375202
27	96 472	513	0053176	67	56 589	2 308	0409620
28	95 957	517	0053877	68	54 271	2 430	0447753
29	95 442	522	0054693	69	51 841	2 539	0489767
30	94 920	527	0055520	70	49 302	2 645	0536489
31	94 393	533	0056466	71	46 657	2 744	0588122
32	93 860	540	0057532	72	43 913	2 832	0644912
33	93 320	548	0058723	73	41 081	2 909	0708113
34	92,772	557	0060040	74	38 172	2 969	0777795
35	92 215	567	0061487	75	35 203	3 009	0854957
36	91 648	578	0063067	76	32 194	3 026	0939927
37	91 070	591	0064895	77	29 168	3 016	1031010
38	90 479	606	0066977	78	26 152	2 977	1138345
39	89 873	622	0069209	79	23 175	2 905	1253506
40	89 251	640	0071708	80	20 270	2 799	1380858
41	88 611	660	0074483	81	17 471	2 659	1521951
42	87 951	683	0077657	82	14 812	2 485	1677694
43	87 268	708	0081129	83	12 327	2 280	1849599
44	86 568	734	0084797	84	10 047	2 050	2040410
45	85 826	761	0088668	85	7 997	1 800	2250844
46	85 065	790	0092870	86	6 197	1 539	2483460
47	84 275	822	0097538	87	4 658	1 277	2741520
48	83 453	857	0102693	88	3 381	1 023	3025732
49	82,596	894	0108238	89	2 358	788	3341815
50	81 702	935	0114440	90	1 570	579	3687898
51	80 767	981	0121460	91	991	404	4076690
52	79 786	1 029	0128970	92	587	264	4497445
53	78,757	1,083	0137512	93	323	161	4984520
54	77 674	1 140	0146767	94	162	89	5493827
55	76 534	1 202	0157054	95	73	44	6027397
56	75 332	1 270	0168587	96	29	19	6551724
57	74 062	1 342	0181200	97	10	7	7000000
58	72 720	1 418	0194994	98	3	3	1 0000000
59..	71,302	1 501	0210513				

[S13,§1839-j; C24, 27, 31, 35,§8823.]

Referred to in §§8781, 8783, 8824
S13, §1839-j, editorially divided

8824 Exceptions. Section 8823 shall not be construed so as to apply to or affect any association organized solely for benevolent purposes and whose articles of incorporation, constitution, rules, or bylaws provide that at the time of the admission to membership each member, when joining, shall belong to one certain occupation or guild. [S13,§1839-j; C24, 27, 31, 35, §8824.]

8825 Valuation of certificates. The certificate written by any domestic fraternal beneficiary association operating under the provisions of the foregoing mortality table shall be valued in the same manner as provided in section 8654, except that such valuation shall be based upon the foregoing mortality table and four percent interest.

If the society makes loans on its certificates, the valuation shall be based upon a mortality table not lower than the American table of mortality and four and one-half percent interest. [S13,§1839-j; C24, 27, 31, 35,§8825.]

American Experience Table of Mortality precedes Index pages 2106 2107

INVESTMENTS

8826 Real estate for home office. Any fraternal beneficiary society, order, or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts, shall be permitted to invest not to exceed ten percent of the aggregate amount of such accumulation in such real estate in this state as is necessary for its accommodation as a home office, and in the purchase or erection of any building for such purpose it may add thereto rooms for rent; provided that before any association shall invest any of its funds in accordance with the provisions of this section it shall first obtain the consent of the executive council. [S13,§1839-k; C24, 27, 31, 35,§8826.]

Referred to in §§8827, 8829
Similar provisions, §§8699, 8735, 8737, 8747
S13, §1839-k, editorially divided

8827 Society to authorize. Nothing in section 8826 shall be construed to permit the officials or board of directors of such society, order, or association to make such investment without authority specifically granted by the said society, order, or association through its grand or supreme lodge or convention. [S13, §1839-k; C24, 27, 31, 35,§8827.]

8828 Conveyance to commissioner—valuation. Any company or association so investing its funds shall convey the real estate thus acquired to the commissioner of insurance by deed, such property to be held by him in trust for the benefit of the members of such association, the value thereof to be determined from time to time by the commissioner. [S13,§1839-k; C24, 27, 31, 35,§8828.]

8829 Schedule of investments. Any fraternal beneficiary society, order, or association, organized under the laws of this state, accumulating money to be held in trust for the purpose of fulfillment of its certificates or contracts, shall invest such accumulation in the following securities and no other, except as provided in section 8826:

Investments in federal insured loans, §12786.1

1. *Federal, territorial and Dominion obligations.* Bonds or other evidence of indebtedness issued or guaranteed by the United States or any insular or territorial possession of the United States, federal farm loan bonds, federal home loan bank bonds, home owners' loan corporation bonds, bonds, notes or obligations representing loans and advances of credit which are eligible for insurance by the federal housing administrator, and bonds, notes or obligations secured by real property or leasehold which the federal housing administrator has insured or has committed himself to insure or debentures issued by such administrator and bonds issued by or guaranteed by the Dominion of Canada.

2. *State and provincial bonds.* The bonds of this or any other state and bonds issued or guaranteed by any province of the Dominion of Canada.

3. *Municipal and district bonds.*

a. Bonds of any county, city, town, school, road, drainage, or other taxing district, within the state of Iowa or any other state.

b. Bonds or other evidence of indebtedness which are a general obligation of any county, city, town, village or school district, within the Dominion of Canada, and having a population of not less than ten thousand according to the last dominion or* provincial census taken prior to the date of such investment.

* "of" in enrolled act

c. Anticipation certificates issued by waterworks trustees, as provided by the laws of this state, and improvement certificates or other evidences of indebtedness issued by any county, city, town, school, road, drainage, or other district in this state or any other state authorized by law to levy assessments for improvement purposes, and to issue bonds or certificates as evidence of indebtedness therefor; said certificates or other evidence of indebtedness being secured by a lien upon any real estate within the limits of said public corporation or district.

All bonds and other evidences of indebtedness referred to above shall be issued by authority of and according to law, and bearing interest.

4. *Public utility bonds.* Bonds or other evidences of indebtedness of any corporation incorporated under the laws of the United States or any state and engaged in the generation and sale of electricity or artificial gas, or owning and operating any telephone system; provided,

a. The corporation, its predecessor or principal subsidiary, shall have been in operation not less than five years prior to the making of the investment, and

b. Not more than twenty-five percent of the gross operating revenue of such corporation shall be derived from property operating under a franchise or franchises, which extend less than five years beyond the date of maturity of such bonds, or under an indeterminate franchise or permit, and

c. The gross earnings of such corporation shall have been not less than one million dollars for the last fiscal year preceding the purchase of said bonds, or shall have been at least two hundred fifty thousand dollars per annum for the five years next preceding the date of purchase, and the net earnings have averaged not less than one and three-fourths times the interest charges on the total funded debt outstanding for a period of five years next preceding the date of purchase, and not less than one and three-fourths times the interest requirements on the total funded debt for the year next preceding the purchase, and

d. The bonds are secured by a mortgage, the lien of which covers at least seventy-five percent of the property owned in fee, and

e. At least seventy-five percent of the revenues of such corporation are derived from the generation and sale of electricity or artificial gas, or the operation of a telephone system, and

f. The total funded debt of such corporation shall not exceed sixty percent of the reasonable value of the properties as shown by the books of the corporation, provided, however, that no company shall be permitted to have more than ten percent of its reserve invested in securities included in this subsection at any one time. No such investment in utility bonds to be made except where the funded debt of said utility company is less than seventy percent of the total value of its assets.

5. *Collateral loans.* In loans secured by collateral security consisting of any securities enumerated in this section, provided there is a margin of ten percent between the amount of the loan and the value of the securities.

6. *Real estate bonds and mortgages.* Entire bond issues and mortgages and other interest-bearing securities being first liens upon real estate within this state or any other state, provided that the total indebtedness secured by such lien shall not exceed sixty percent of the value of the property upon which it is a lien,

provided, however, that such sixty percent limitation shall not apply to bonds and notes described in subsection 1 of this section. Improvements shall not be considered in estimating the value unless the owner shall contract to keep the same insured in some reliable fire insurance company or companies, association or associations, authorized to do business in the state, during the life of the loan in the sum at least equal to the excess of the loan above one-half the value of the ground exclusive of the improvements, the insurance to be made payable in cases of loss to the society, order or association investing its funds, as its interests may appear at the time of loss.

Any mortgage lien upon real estate shall not, for the purpose of this section, be held or construed to be other than a first lien by reason of the fact that drainage or other improvement assessments may have been levied against the real estate covered by said mortgage, whether the installments of said assessments be matured or not, provided that in determining the value of said real estate for loan purposes, the amount of the drainage or other assessment tax unpaid, shall be deducted.

7. *Certificate loans.* Loans upon its own certificates, where the same have been in force at least two full years, in an amount not exceeding the net terminal reserve. If such loan is made, the company must describe in the note or contract taken, the amount of the loan, the name of the borrower, the number of the certificate, and the terms of such note or contract shall make the amount loaned a lien against such certificate and such note or contract shall be numbered, dated, and signed, giving the post-office address of the insured.

8. *Substitution of certificates of sale, and deeds.* Companies may, with the consent of the commissioner of insurance, substitute for such securities certificates of sale furnished by the sheriff in connection with the foreclosure of mortgages on real estate, owned only by said companies; but such certification shall be accepted for deposit only for the amount of the original securities and shall be withdrawn at the end of the period of redemption or within thirty days if redemption is made or a deed obtained prior to the expiration of the time fixed for redemption by law.

Said companies may also substitute for such securities warranty deeds conveying any of the property included in the original mortgage to the commissioner of insurance, and to his successors in office, in their official capacity.

Before depositing any such deed with the commissioner of insurance it shall first be recorded in the county where such property is located. Said deed shall be accompanied by a certificate that the company has in its possession either an abstract showing good title to the property conveyed or a policy or contract guaranteeing said title, and said deed shall be accepted for deposit not in excess of the amount of the original security, and only so long as the company annually certifies the taxes are paid and fire insurance maintained. Upon request of the company any of such property shall be reconveyed by quitclaim deed by the commissioner then in office, in his official capacity, to the company or other person designated by such company, and shall be so reconveyed at the end of ten years from the date of conveyance to the commissioner unless for good cause shown, the commissioner may extend the time for reconveyance. The company may agree to sell any property to which it has obtained title in connection with the foreclosure or satisfaction of a mortgage, or mortgages, under contract of sale, in form to be approved by the commissioner of insurance, and to run for a period of not longer than twenty years. Such contracts when assigned to the commissioner, in form satisfactory to him, may be substituted for any of the securities hereinbefore mentioned, or may be deposited with the commissioner as provided in section 8830, the valuation to be fixed by the commissioner, which may be changed from time to time as he may determine.

The total amount of certificates of sale, and deeds deposited, as herein provided, shall not exceed at any one time thirty percent of the amount any such company is required by law to deposit with the insurance department.

No such change of security shall be made if the same has been purchased from any officer, stockholder, agent or employee of the insurer.

9. *Substitution of contracts of sale and purchase money mortgages or purchase money deeds of trust.* Companies or associations may substitute for securities deposited contracts of sale, purchase money mortgages or purchase money deeds of trust obtained through foreclosure, settlement or satisfaction of other securities but only for an amount approved by the commissioner of insurance. [S13,§1839-l; C24, 27, 31, 35,§8829; 48GA, ch 225,§§1–5.]

Referred to in §8835
Similar provisions, §§8737, 8927
S13, §1839-l, editorially divided

8830 Deposit with commissioner. All such securities shall be deposited with the commissioner of insurance subject to his approval, and shall remain with him until withdrawn in accordance with the provisions of section 8834.

Provided that societies, orders, or associations doing business in the Dominion of Canada may there deposit such portion of their securities as is necessary to maintain the required reserves on business written in that country. [S13,§1839-l; C24, 27, 31, 35,§8830.]

Referred to in §§8829, 8835

8831 Payment of securities. Any fraternal beneficiary society, order, or association receiving payments, or partial payments on any securities deposited with the commissioner, shall notify him of such fact giving the amount and date of payment within fifteen days after such payment shall have been made. [S13, §1839-l; C24, 27, 31, 35,§8831.]

Referred to in §8835

8832 Failure to report payments. The officers of any society, order, or association which fails to report the receipt of payments or par-

tial payments as above provided shall be liable to a fine in double the amount collected and not reported within the time and in the manner above specified. [S13,§1839-l; C24, 27, 31, 35, §8832.]

Referred to in §8835

8833 **Authority for fund—purpose of withdrawal.** Any society, order, or association required to make a deposit with the commissioner as herein contemplated, shall at the time of making such deposit, designate by what provisions of its articles of incorporation or laws such fund is accumulated and upon making request for withdrawal of any funds shall designate for what purpose such withdrawal is desired. [S13,§1839-l; C24, 27, 31, 35,§8833.]

Referred to in §8835

8834 **Change of securities.** Any society, order, or association, may at any time change its securities on deposit by depositing a like amount in other securities of the same character and the commissioner shall permit a withdrawal of the same upon satisfactory proof in writing filed with him that they are to be used for the purpose for which they were originally deposited. [S13,§1839-l; C24, 27, 31, 35,§8834.]

Referred to in §§8830, 8835

8835 **Violations—associations excepted.** The commissioner shall have authority to suspend or revoke the certificate of authority of any society, order, or association failing to comply with any of the provisions of sections 8829 to 8834, inclusive, or for violating the same. Nothing in sections 8829 to 8834, inclusive, shall be construed to apply to any association organized solely for benevolent purposes and whose articles of incorporation, constitution, rules, or bylaws provide that, at the time of the admission to membership, each member, when joining, shall belong to one certain occupation, guild, profession, or religious denomination. [S13,§1839-l; C24, 27, 31, 35,§8835.]

8836 **Applicability—exceptions.** The provisions of this chapter shall not be construed to apply to organizations, societies, or associations, the membership of which consists of female members of the families of members of any one occupation, guild, profession, or religious denomination, nor shall the provisions of this chapter be construed to apply to auxiliary societies or associations, the membership of which consists of female members of the families of members of any one occupation, guild, profession, or religious denomination. [S13,§1839-l; C24, 27, 31, 35,§8836.]

BENEFITS ON LIVES OF CHILDREN

8837 to 8842, inc. Rep. by 42GA, ch 202

8842.1 **Authorization.** Any fraternal benefit society authorized to do business in this state may provide in its laws, in addition to other benefits provided therein, for insurance and/or annuities upon the lives of children at any age, upon the application of a relative by blood to the fourth degree, stepfather, stepmother, stepbrother, stepsister, or person responsible for the support of the child, as the laws of such society may provide. Any such society may, at its option, organize and operate branches for such children and membership in local lodges and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. [C24,§§8837, 8838; C27, 31, 35,§8842-b1.]

Referred to in §§8842.4, 8848
Similar provisions, §§8694, 8789.1

8842.2 **Contributions.** The contributions to be made upon such certificate shall be based upon the standard industrial mortality table or the English life table number six, or such other mortality table as may be approved by the commissioner of insurance. [C24,§8841; C27, 31, 35,§8842-b2.]

Referred to in §§8842.3, 8842.4

8842.3 **Reserve.** Any society issuing such benefit certificates shall maintain on all such certificates the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in section 8842.2. [C24,§8842; C27, 31, 35, §8842-b3.]

Referred to in §8842.4

8842.4 **General regulations.** A society shall have full power to provide for means of enforcing payment of contributions, designation and change of beneficiaries, which beneficiary shall be the child itself or a person qualified to make application therefor as provided in section 8842.1, and in all other respects for the regulation, government, and control of such certificates and all rights, obligations, and liabilities incident thereto and connected therewith, not at variance with the provisions of this and sections 8842.1 to 8842.3, inclusive. [C24, §8844; C27, 31, 35,§8842-b4.]

8843 Rep. by 48GA, ch 224,§2

8844 Rep. by 42GA, ch 202

8845 **No vested interest in new certificate.** Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. [C24, 27, 31, 35,§8845.]

Similar provisions, §§8694, 8789.2

8846, 8847 Rep. by 48GA, ch 224,§2

8848 **Specified payments.** Any society shall have the right to provide in its laws and the certificate issued under section 8842.1 for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society as its constitution and bylaws may provide. [C24, 27, 31, 35,§8848.]

8849 Rep. by 41GA, ch 167

FRATERNAL CHARITABLE INSTITUTIONS

8850 General power granted. It shall be lawful for any fraternal beneficiary society, order, or association now organized and existing, or hereafter organized under and by virtue of the laws of this state, or any such society, order, or association organized and existing under and by virtue of the laws of any other state, province, or territory, and now or hereafter admitted to do business within this state, to create, maintain, and operate, for the benefit of its sick, disabled, or distressed members and their families and dependents, out of any general, special, or expense fund, and from any voluntary contributions it may receive therefor, hospitals, asylums, sanatoriums, schools, or homes. [C24, 27, 31, 35,§8850.]

Referred to in §8856
40GA, ch 172, §1, editorially divided

8851 Financial powers. For such purpose any such society, order, or association may own, hold, lease, mortgage, sell, and convey personal property and real property located within or without this state, with necessary buildings thereon; provided that the amount of the general, special, or expense fund to be expended, as herein provided, shall not exceed such amounts as shall have been or shall be, from time to time, authorized by the legislative or supreme governing body of such society, order, or association. [C24, 27, 31, 35,§8851.]

8852 Charges. Maintenance, treatment, training, and proper attendance in any such hospital, asylum, sanatorium, school, or home may be furnished free, or a reasonable charge may be made therefor. [C24, 27, 31, 35,§8852.]

8853 Profit prohibited. No such hospital, asylum, sanatorium, school, or home shall be operated for profit. [C24, 27, 31, 35,§8853.]

8854 General funds protected. No part of the cost or expense of creating, maintaining, or operating any such hospital, asylum, sanatorium, school, or home shall be defrayed or paid out of the mortuary, sick, disability, or benefit funds of any such society. [C24, 27, 31, 35, §8854.]

8855 Management. The management of such institutions shall be in such officers as the supreme governing body may designate, and such officers may or may not be members of the society, order, or association. [C24, 27, 31, 35, §8855.]

8856 Legal standing. Any such hospital, asylum, sanatorium, school, or home, when established in the manner provided by section 8850, is hereby declared to be a charitable institution, with all the rights, benefits, and privileges given to charitable institutions under and by the constitution and laws of this state. [C24, 27, 31, 35,§8856.]

40GA, ch 172, §2, editorially divided

8857 May be beneficiary. Such hospital, asylum, sanatorium, school, or home is hereby declared to be competent to be named and to take as beneficiary in and by the benefit certificate of any member of such society, order, or association. [C24, 27, 31, 35,§8857.]

Similar provision, §8694

8858 General powers of commissioner. The commissioner of insurance shall have the same powers, supervision, and control over such hospitals, asylums, sanatoriums, schools, and homes erected by any such society incorporated in this state, as he now has, or may hereafter legally exercise over fraternal beneficiary societies or ganized or transacting business in this state. [C24, 27, 31, 35,§8858.]

40GA, ch 172, §3, editorially divided

8859 Mismanagement—delinquency reported. Whenever the commissioner of insurance finds that any such hospital, asylum, sanatorium, school, or home erected by such domestic society is being mismanaged or that the interest of the society or public requires it, the commissioner may direct an order to the officers responsible for such mismanagement or in control of such institution with reference to such mismanagement, and if such officers refuse, neglect, or fail to comply with such order within the time fixed by the commissioner of insurance, the commissioner shall communicate the fact to the attorney general. [C24, 27, 31, 35,§8859.]

8860 Duty of attorney general—decree. The attorney general shall proceed in the manner provided for in section 8888, or the court may remove such officers guilty of mismanagement and appoint others until the society may regularly elect or select other officers to succeed those deposed. [C24, 27, 31, 35,§8860.]

CONSOLIDATION OR REINSURANCE

8861 Presenting proposed plan. When any domestic fraternal beneficiary association shall propose to consolidate or enter into any reinsurance contract with any other association or organization whether domiciled in this or any other state or territory, it shall present its proposed plan of consolidation or reinsurance, together with a statement of the condition of its affairs to the commissioner of insurance for his approval. [S13,§1839-g; C24, 27, 31, 35, §8861.]

Referred to in §§8867, 8868
S13, §1839-g, editorially divided

8862 Submission of plan—notice. Should the commissioner approve the plan, the same shall be submitted by any association proposing to reinsure its risks or transfer its business, to its local lodges or organizations or to a regular or special meeting of its supreme lodge or governing body to be voted upon, such notice being given as the commissioner may direct. [S13, §1839-g; C24, 27, 31, 35,§8862.]

Referred to in §§8867, 8868

8863 Submission to reinsuring association. If, in the judgment of the commissioner, it is deemed advisable he may also require the plan to be in like manner submitted to the association proposing to accept or reinsure the risks

of any other association. [S13,§1839-g; C24, 27, 31, 35,§8863.]

Referred to in §§8867, 8868

8864 Multiple consolidation. In case two or more associations propose to consolidate, the proposed plan of consolidation shall be submitted, as above provided, to all of the associations interested in such consolidation. [S13, §1839-g; C24, 27, 31, 35,§8864.]

Referred to in §§8867, 8868

8865 Approval — proxies. In any of the above cases, a two-thirds vote of all of the members of each association present and voting shall be necessary to an approval of any plan of consolidation or reinsurance, and in no case shall proxies be voted. [S13,§1839-g; C24, 27, 31, 35,§8865.]

Referred to in §§8867, 8868

8866 Official order of approval. On presenting to the commissioner satisfactory proof that the foregoing provisions have been complied with and that the required number of votes have been cast in favor of the proposed plan, he shall issue to the association an order to the effect that the plan has been approved, and the same shall be in force and effect from and after the date of such order, and the commissioner shall direct such distribution of the assets of any such association or associations as shall be just and equitable. [S13,§1839-g; C24, 27, 31, 35,§8866.]

Referred to in §§8867, 8868

8867 Expenses. All expenses or costs incident to proceedings under the provisions of sections 8861 to 8866, inclusive, shall be paid by the associations interested. [S13,§1839-h; C24, 27, 31, 35,§8867.]

8868 Violations. Any officer, director, or manager of any association violating or consenting to the violation of any of the provisions of sections 8861 to 8866, inclusive, shall be punished by a fine of not less than ten hundred dollars, or by imprisonment in the county jail not less than one year, or by both such fine and imprisonment in the discretion of the court. [S13,§1839-i; C24, 27, 31, 35,§8868.]

REORGANIZATION

8869 Authorization. Any existing fraternal beneficiary society may amend its articles of incorporation and bylaws in such a manner as to transform itself into a legal reserve level premium company doing business either as a mutual or stock company, but only after complying with the provisions of sections 8870 to 8883, inclusive. [C24, 27, 31, 35,§8869.]

Referred to in §§8880.1, 8884
38GA, ch 302, §1, editorially divided

8870 Submission of plan. Whenever any such society shall propose to transform itself into a legal reserve level premium company as herein provided, it shall file with the commissioner of insurance, its proposed articles and bylaws, its plan of transformation, setting forth in detail the terms and conditions of such transformation and also the method by which it proposes to protect the interests of its membership. [C24, 27, 31, 35,§8870.]

Referred to in §§8869, 8880.1, 8884

8871 Notice. The commissioner may proceed to hear and determine such petition without notice, or, if he deems it necessary that such notice should be given in order to conserve the interests of the membership, he shall require the society to first notify, by mail, all of the members of such society of the pendency of such petition, the contents of such notice to be determined by the commissioner. [C24, 27, 31, 35,§8871.]

Referred to in §§8869, 8880.1, 8884

8872 Appearance. When notice shall have been given, as above provided, any member of said society shall have the right to appear before said commissioner and be heard with reference to said petition. [C24, 27, 31, 35,§8872.]

Referred to in §§8869, 8880.1, 8884

8873 Examination. The commissioner may also make such examination into the affairs and conditions of the society as he deems proper, and shall have power to summon and compel the attendance and testimony of witnesses, and the production of books and papers, and may administer oaths. [C24, 27, 31, 35,§8873.]

Referred to in §§8869, 8880.1, 8884

8874 Authorization order. If satisfied that the interests of the membership of said society are properly protected and that no reasonable objection to said petition exists, the commissioner may authorize in writing, such transformation, or may first require such modification thereof as may seem to him necessary for the best interests of such membership. [C24, 27, 31, 35,§8874.]

Referred to in §§8869, 8880.1, 8884

8875 Disposition of assets. The said commissioner shall make such order and disposition of the assets of any such society as in his judgment may be just and equitable. [C24, 27, 31, 35,§8875.]

Referred to in §§8869, 8880.1, 8884

8876 Submission to supreme governing body. The commissioner shall require the plan of transformation to be submitted to the supreme governing body of such society, to be voted upon. When submitted, it shall be either at a regular meeting of said supreme governing body or at a special meeting of same called for that purpose. [C24, 27, 31, 35,§8876.]

Referred to in §§8869, 8880.1
38GA, ch 302, §2, editorially divided

8877 Notice—vote required—proxies. A notice of said special meeting, in the form approved by the commissioner of insurance, shall be given in accordance with the requirement of the bylaws of such society. When so submitted, a majority vote of the said supreme governing body present and voting, as authorized by its articles of incorporation and bylaws, shall be necessary to an approval of such plan of trans-

formation; and no proxies shall in any case be voted. [C24, 27, 31, 35,§8877.]

Referred to in §§8869, 8880.1

8878 **Referendum.** If the supreme governing body approves the plan of transformation, the board of directors or other managing body of such society shall submit the plan to a referendum vote of the members of such society under such regulations as may be prescribed by the commissioner of insurance, and if the result of such vote shall show that the majority of the members of such society has voted to repeal the action of the supreme governing body, then the same shall be considered as repealed by such society and shall be null and of no effect. [C24, 27, 31, 35,§8878.]

Referred to in §§8869, 8880.1

8879 **Approval by commissioner—vote filed.** Any such plan of transformation submitted to the supreme governing body as herein contemplated, must first have been approved by the commissioner of insurance; and the result of said vote must be filed with such commissioner and be by him determined before any transformation shall be so effective. [C24, 27, 31, 35, §8879.]

Referred to in §§8869, 8880.1

8880 **Conditions precedent.** No such transformation shall take place until after its plan has been approved by the commissioner, either with or without a hearing as herein provided, and until such approved plan has been adopted by a majority vote of the board of directors or board of trustees of such society; and, if submitted to the supreme governing body, until such approved plan has also been adopted by a majority vote of the said supreme governing body present and voting. [C24, 27, 31, 35,§8880.]

Referred to in §§8869, 8880.1

8880.1 **Scope of reorganization act.** Nothing in sections 8869 to 8880, both inclusive, shall be construed to apply to any association organized solely for benevolent purposes and whose articles of incorporation, or constitution, rules or bylaws provide that, at the time of the admission to membership, each member, when joining, shall belong to one certain occupation or guild. [C31, 35,§8880-d1.]

Referred to in §8869

8881 **Effect of reorganization—officers.** Any such society so transformed, shall incur the obligations and enjoy the benefits thereof the same as though originally thus incorporated, and such corporation, under its charter as thus amended, shall be a continuation of such original corporation, and the officers thereof shall serve through their respective terms as provided in the original charter, but their successors shall be elected and serve as in such amended articles provided. Any society so transformed shall have the power to acquire, own, hold, lease, mortgage, sell and convey personal and real property, and to provide the necessary funds, and to do all things necessary for the purpose of operating and maintaining such hospitals, asylums, sanitariums, school, or homes as it was operating and maintaining when so transformed and it shall have the power to discontinue operating and maintaining the same and to lease, mortgage, sell and convey the personal and real property acquired for use in connection therewith. [C24, 27, 31, 35,§8881.]

Referred to in §§8869, 8883
38GA, ch 302, §3, editorially divided

8882 **Pending suits.** Such amendment or reincorporation shall not affect existing suits, claims, or contracts. [C24, 27, 31, 35,§8882.]

Referred to in §8869

8883 **Purchase of stock.** Any such fraternal beneficiary society taking advantage of section 8881, to reorganize into a stock company shall offer to each member of said society the privilege of subscribing for and purchasing his or her proportionate amount of capital stock. [C24, 27, 31, 35,§8883.]

Referred to in §8869

8884 **Valuation of existing certificates.** The existing certificates of membership of any fraternal beneficiary society which shall have transformed itself into a legal reserve level premium life insurance company, in conformity with the provisions of sections 8869 to 8875, inclusive, shall be valued as follows:

1. Certificates on which rates of contribution are not on the basis of any table of mortality, valued as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state.

2. Certificates on which the rates of contribution are based upon a standard table of mortality and specified rate of interest, valued in accordance with such standard.

The reserve so ascertained shall be held as a liability by the company in its annual statement rendered to the insurance department. [C24, 27, 31, 35,§8884.]

EXAMINATION AND RECEIVERSHIP

8885 **"Association" defined.** The term "association" when used in this chapter shall mean any society, order, or association organized or authorized under the provisions of this chapter. [S13,§1839-a; C24, 27, 31, 35,§8885.]

8886 **Examination.** The commissioner of insurance may, at any time he may deem it advisable, either in person or by his legally appointed representative, make an examination of, or inquire into the affairs of any fraternal beneficiary association authorized or seeking to be authorized to transact business within this state, provided the examination of associations organized under the laws of this state shall not be less frequent than once during each biennial period. [S13,§1839-b; C24, 27, 31, 35,§8886.]

8887 **Officers to assist—oaths.** When an association is being examined, the officers, agents, or employees thereof shall produce for inspection all books, papers, documents, or other

information concerning the affairs of the association and shall otherwise assist in the examination. The commissioner of insurance or examiner shall have authority to administer oaths, and may summon and may examine under oath any officer, employee, representative, or agent of any association concerning its affairs or condition. [S13,§1839-c; C24, 27, 31, 35, §8887.]

8888 **Revocation or suspension of authority —action by attorney general.** If upon investigation or examination, it shall appear to the satisfaction of the commissioner of insurance that any association is doing an illegal or unauthorized business, or is failing to fulfill its contracts with its members, or is conducting its business fraudulently, or if its membership or the amount of its insurance in force has been reduced below the legal requirement, or should any association decline or refuse to submit to an examination, the commissioner may suspend or revoke its certificate of authority to transact business within this state, and having revoked the certificate of authority of any association organized under the laws of this state, he shall at once report the same to the attorney general who shall apply to the district court or any judge thereof for the appointment of a receiver to wind up the affairs of such association. [S13,§1839-d; C24, 27, 31, 35,§8888.]

Referred to in §8860

8889 **Expenses—how paid.** In addition to the compensation of the assistants, the commissioner of insurance or examiner and assistants shall be entitled to actual and necessary traveling, hotel, and other expenses while conducting examinations away from their respective places of residence, the same to be paid by the treasurer of state upon warrants drawn by the state comptroller, bills therefor having been filed under oath and approved by the comptroller. Such expense and compensation shall, by the commissioner, be charged to and collected from the associations examined and should any association neglect or refuse to pay the same, the commissioner shall at once revoke its certificate of authority to transact business within this state. [S13,§1839-e; C24, 27, 31, 35,§8889.]

8890 **Illegal business.** Any officer, manager, agent, or representative of any association who with knowledge that its certificate of authority has been suspended or revoked, or that it is doing an illegal, unauthorized, or fraudulent business solicits insurance for said association, or receives applications therefor, or does any other act or thing toward receiving or procuring any new business for said association, shall be deemed guilty of a misdemeanor and for every such act, on conviction thereof, shall pay a fine of not less than one hundred nor more than ten hundred dollars, or be imprisoned in the county jail not more than one year, or be punished by both such fine and imprisonment. [S13,§1839-f; C24, 27, 31, 35,§8890.]

8891 **Application for receiver.** No application for the appointment of a receiver for any fraternal beneficiary society, or branch thereof, shall be entertained by any court in this state, unless same is made by the attorney general. [SS15,§1839-m; C24, 27, 31, 35,§8891.]

8892 **When commenced.** No such proceedings shall be commenced by the attorney general against any fraternal beneficiary society until the commissioner of insurance has first made an examination of such fraternal beneficiary society, and completed a report upon its affairs, and not until after notice has been duly served on the chief executive officers of the society, and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceedings should not be commenced. [SS15,§1839-m; C24, 27, 31, 35,§8892.]

8893 **Examinations confidential.** Pending, during, or after an examination or investigation of such fraternal beneficiary society, the commissioner of insurance shall make public no financial statement, report, or finding, nor shall he permit to become public any financial statement, report, or finding affecting the status, standing, or rights of any such society until a copy of such examination and investigation shall have been served upon such society, at its home office, nor until such society shall have been afforded a reasonable opportunity to answer such financial statement, investigation, report, or finding, and to make such showing in connection therewith, as it may desire. [SS15, §1839-o; C24, 27, 31, 35,§8893.]

CHAPTER 403

EMPLOYEES MUTUAL INSURANCE

8894 Exemption.

8894 **Exemption.** Unless specific reference is made thereto, no provision of this title shall include or apply to domestic societies which limit their membership to the employees of:

1. A particular city or town, or
2. A designated firm, business house, or corporation. [C24, 27, 31, 35,§8894.]

8895 Power of commissioner.

8895 **Power of commissioner.** The commissioner of insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of the laws relating to insurance or to fraternal benefit societies. [C24, 27, 31, 35, §8895.]

CHAPTER 403.1

MUTUAL HOSPITAL SERVICE

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8895.01 Insurance laws excluded generally. Any corporation hereafter organized under the provisions of chapter 394 for the purpose of establishing, maintaining, and operating a nonprofit hospital service plan, whereby hospital service may be provided by the said corporation or by a hospital with which it has a contract for such service, to such of the public who become subscribers to said plan under a contract which entitles each subscriber to hospital service, shall be governed by the provisions of this chapter and shall be exempt from all other provisions of the insurance laws of this state, unless specifically designated herein, not only in governmental relations with the state but for every other purpose, and no additions hereafter enacted shall apply to such corporations unless they be expressly designated therein. [48GA, ch 222,§1.]

8895.02 Incorporation. Persons desiring to form a nonprofit hospital service corporation shall incorporate under the provisions of chapter 394, as supplemented and amended herein and any acts amendatory thereof. [48GA, ch 222,§2.]

8895.03 Approval by commissioner. The articles of incorporation, and any subsequent amendments, of such corporation shall have indorsed thereon or annexed thereto the approval of the commissioner of insurance before the same shall be filed for record. [48GA, ch 222, §3.]

8895.04 Directors. At least a majority of the directors of such corporation must be at all times administrators, or directors, or trustees, or members of the clinical staff of hospitals which have contracted or may contract with such corporation to render to its subscribers hospital service. The board of directors of such corporation shall consist of at least nine members and not more than one shall be from any one hospital. [48GA, ch 222,§4.]

8895.05 Contracts for service. Any corporation organized under the provisions of said chapter may enter into contracts for the rendering of hospital service to any of its subscribers with hospitals maintained and operated by the state or any of its political subdivisions, or by any corporation, association, or individual. Hospital service is meant to include bed and board, general nursing care, use of the operating room, use of the delivery room, ordinary medications and dressings and other customary routine care. [48GA, ch 222,§5.]

8895.06 Rates—approval by commissioner. The rates charged by such corporation to the subscribers for hospital service shall at all times be subject to the approval of the commissioner of insurance. [48GA, ch 222,§6.]

8895.07 Contracts—approval by commissioner. The contracts by such corporation with the subscribers for hospital service shall at all times be subject to the approval of the commissioner of insurance. [48GA, ch 222,§7.]

8895.08 Contracts with hospitals—approval. The contracts by such corporation with participating hospitals for hospital service shall at all times be subject to the approval of the commissioner of insurance. [48GA, ch 222,§8.]

8895.09 Annual report. Every such corporation shall annually, on or before the first day of March, file in the office of the commissioner of insurance a statement verified by at least two of the principal officers of said corporation showing its condition on the thirty-first day of December then next preceding, which shall be in such form and shall contain such matters as the commissioner of insurance shall prescribe. [48GA, ch 222,§9.]

8895.10 Examination. Every such corporation shall be subject to examination under the provisions of chapter 397 and any acts amendatory thereto, so far as the chapter may be applicable. [48GA, ch 222,§10.]

8895.11 Costs approved. All acquisition costs in connection with the solicitation of subscribers to such hospital service plan and administration costs including salaries paid its officers, if any, shall at all times be subject to the approval of the commissioner of insurance. [48GA, ch 222,§11.]

8895.12 Investment of funds. The funds of any corporation subject to the provisions of this chapter shall be invested only in securities permitted by the laws of this state for the investment of funds of life insurance companies. [48GA, ch 222,§12.]

8895.13 Arbitration of disputes. Any dispute arising between a corporation organized under said chapter and any hospital with which such corporation has a contract for hospital service, as provided for herein, may be submitted to the commissioner of insurance for his decision. All decisions and findings of the commissioner of insurance may be reviewed by proper proceedings in a court of competent jurisdiction. [48GA, ch 222,§13.]

8895.14 Dissolution or merger. Any dissolution, merger, or liquidation of a corporation organized under the provisions of said chapter shall be under the supervision of the commissioner of insurance who shall have all powers with respect thereto granted to him under the insurance laws of this state. [48GA, ch 222,§14.]

8895.15 Nonexempt from taxation. Every corporation organized under the provisions of this chapter is hereby declared to be a charitable and benevolent institution but its property and funds, including subscribers' contracts, shall not be exempt from taxation. [48GA, ch 222, §15.]

CHAPTER 404

INSURANCE OTHER THAN LIFE

Referred to in §§7025, 8625, 8635, 8673, 8684.04, 8765, 9044, 9065, 9078, 9104, 12763, 12765

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8896 Incorporation. Corporations formed for the purpose of insurance, other than life insurance, shall be governed by the provisions of chapter 384, except as modified by the provisions of this chapter. [C73,§1122; C97,§1684; C24, 27, 31, 35,§8896.]

Referred to in §8917

8897 Articles—approval. Each such organization shall present to the commissioner of insurance its articles of incorporation, which shall show its name, objects, location of its principal place of business, and amount of its capital stock, who shall submit it to the attorney general for examination, and if found by him to be in accordance with the provisions of this title, the laws of the United States, and the constitution and laws of the state, he shall certify such fact thereon and return the same to said commissioner, and no articles shall be approved by him or recorded unless accompanied with such certificate. [C73,§1122; C97, §1685; C24, 27, 31, 35,§8897.]

Referred to in §8917

8898 Certificate—recording. If the commissioner of insurance approves them, he shall so certify, and the articles with the certificates of approval shall be recorded in the office of the secretary of state as articles of other corporations are, who shall indorse thereon his certificate thereof, as is required in case of other corporations for pecuniary profit. [C73,§1123; C97, §1686; C24, 27, 31, 35,§8898.]

Recording, §8343

8899 Name. If the commissioner of insurance finds the name of the company to be so similar to one already appropriated by a corporation of the same character as to be likely to mislead the public or to cause inconvenience, he shall refuse his certificate to its articles on that ground. [C73,§1122; C97,§1687; C24, 27, 31, 35,§8899.]

8900 Filing with commissioner. The articles, when thus certified by the secretary of state as recorded in his office, or a copy thereof certified by him as such, shall be filed in the office of the commissioner of insurance and remain therein. [C73,§1123; C97,§1688; C24, 27, 31, 35,§8900.]

8901 Nature of organization entered on policy. Every domestic and foreign insurance company organized and doing business under this chapter shall indicate upon the first page of every policy and renewal receipt that the policy is issued by a mutual company in case of a mutual company, and by a stock company in case of a stock company. [C73,§1140; C97, §1689; S13,§1689; C24, 27, 31, 35,§8901.]

8902 Stock and mutual plan distinguished. No company shall be organized to do business upon both stock and mutual plans; nor shall a company organized as a stock company do business upon the plan of a mutual company; nor shall a company organized upon the mutual plan do business or take risks upon the stock plan. [C73,§1159; C97,§1690; C24, 27, 31, 35,§8902.]

8903 Paid-up capital required. No insurance company other than life shall be incorporated to transact business upon the stock plan with less than two hundred thousand dollars capital, the entire amount of which shall be fully paid up in cash and invested as provided by law. No increase of the capital stock of any company shall be made unless the amount of such increase is fully paid up in cash. The stock shall be divided into shares of not less than ten dollars each. [C73,§1124; C97,§1691; S13,§1783-e; C24, 27, 31, 35,§8903.]

Referred to in §8762
40ExGA, ch 9, §11, editorially divided

8903.1 Reduction of capital or shares. Any insurance company, other than life, may, upon the vote of a majority of its shares of stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof or the par value of the shares thereof, provided that the total amount of capital shall not be reduced to an amount less than the minimum required by law, but no part of its assets and property shall be distributed to its stockholders without the consent of the insurance commissioner. [C27, 31, 35,§8903-b1.]

Referred to in §8762

8904 Surplus required. Such company shall be possessed of a surplus in cash or invested in securities authorized by law, equal to twenty-five percent of such paid-up and outstanding capital at the time certificate of authority is first applied for and issued. [C73,§1124; C97, §1691; C24, 27, 31, 35,§8904.]

Referred to in §8762

8905 Prohibited loans. No part of the capital referred to shall be loaned to any officer

or stockholder of the company. [S13,§1783-e; C24, 27, 31, 35,§8905.]

Referred to in §8762

8906 Mutual companies — conditions. No mutual company shall issue policies or transact any business of insurance unless it shall hold a certificate of authority from the commissioner of insurance authorizing the transaction of such business, which certificate of authority shall not be issued until and unless the company shall comply with the following conditions:

1. It shall hold bona fide applications for insurance upon which it shall issue simultaneously, or it shall have in force, at least two hundred policies issued to at least two hundred members for the same kind of insurance upon not less than two hundred separate risks, each within the maximum single risk described herein; provided that not more than one hundred members shall be required for employer's liability and workmen's compensation insurance.

2. The maximum single risk shall not exceed twenty percent of the admitted assets, or three times the average risk, or one percent of the insurance in force, whichever is the greater, any reinsurance taking effect simultaneously with the policy being deducted in determining such maximum single risk.

3. It shall have collected a premium upon each application, which premium shall be held in cash or securities in which insurance companies are authorized to invest, which shall be equal, in case of fire insurance, to not less than twice the maximum single risk assumed subject to one fire nor less than ten thousand dollars; and in any other kind of insurance, to not less than five times the maximum single risk assumed; and, in case of employer's liability and workmen's compensation insurance, to not less than fifty thousand dollars.

4. For the purpose of transacting employer's liability and workmen's compensation insurance, the applications shall cover not less than one thousand five hundred employees, each such employee being considered a separate risk for determining the maximum single risk.

5. It shall have in cash or in securities in which insurance companies are authorized to invest, surplus in an amount of not less than five thousand dollars; provided that the commissioner of insurance, if in his judgment it appears necessary, may require surplus in excess of said amount, but not more than twenty-five thousand dollars. The surplus so required may be advanced in accordance with the provisions of section 8912.

Provided, however, that such surplus requirements shall not apply to a company which establishes and maintains a guaranty fund as provided by section 8912.1. [C73,§1124; C97,§1692; C24, 27, 31, 35,§8906; 47GA, ch 214,§1.]

8906.1 Reservation. None of the provisions of subsection 5* of section 8906 shall apply to any company heretofore organized and approved by the commissioner of insurance, but which had not completed its organization at the time of the taking effect** of said subsection, nor shall said subsection 5 apply to any company already licensed to issue policies. [47GA, ch 214,§2.]

*Omnibus repeal, 47GA, ch 214, §3
**Effective date, May 28, 1937

8907 Membership in mutuals. Any public or private corporation, board, or association in this state, or elsewhere, may make applications, enter into agreements for and hold policies in any such mutual insurance company. Any officer, stockholder, trustee, or local representative of any such corporation, board, association, or estate may be recognized as acting for, or on its behalf for the purpose of such membership, but shall not be personally liable upon such contract of insurance by reason of acting in such representative capacity. The right of any corporation organized under the laws of this state to participate as a member of any such mutual insurance company is hereby declared to be incidental to the purpose for which such corporation is organized and as much granted as the rights and powers expressly conferred. [C73,§1124; C97, §1693; C24, 27, 31, 35,§8907.]

8908 Voting power. Every policyholder of such mutual company shall be a member of the company and shall be entitled to one vote, and such member may vote in person or by proxy as may be provided in the bylaws. [C24, 27, 31, 35,§8908.]

8909 Maximum premium. The maximum premium payable by any member of a mutual company shall be expressed in the policy and in the application for the insurance. Such maximum may be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium, which premium may be made payable in installments or regular assessments. No policy shall be issued for a cash premium without an additional contingent premium unless the company has a surplus which is not less in amount than the capital stock required, at the time of the organization of such mutual insurance company, of domestic stock insurance companies writing the same kind of insurance; but said surplus shall not be less than one hundred thousand dollars. [C24, 27, 31, 35,§8909.]

8910 Unearned premiums. Such mutual company shall maintain unearned premium and other reserves separately for each kind of insurance, upon the same basis as that required of domestic insurance companies transacting the same kind of insurance; provided that any reserve for losses or claims based upon the premium income shall be computed upon the net premium income, after deducting any so-called dividend or premium returned or credited to the member. [C24, 27, 31, 35,§8910.]

8911 Assessments. Any such mutual company not possessed of assets at least equal to the unearned premium reserve and other liabilities shall make an assessment upon its members

liable to assessment to provide for such deficiency, such assessment to be against each member in proportion to such liability as expressed in his policy; provided the commissioner may by written order, relieve the company from an assessment or other proceedings to restore such assets during the time fixed in such order. [C24, 27, 31, 35,§8911.]

Referred to in §8912.1

8912 Advancement of funds. Any director, officer, or member of any such mutual company, or any other person, may advance to such company, any sum or sums of money necessary for the purpose of its business, or to enable it to comply with any of the requirements of the law, and such moneys and such interest thereon as may have been agreed upon, not exceeding the maximum statutory rate of interest, shall not be a liability or claim against the company or any of its assets, except as herein provided, and upon approval of the commissioner of insurance may be repaid, but only out of the surplus earnings of such company. No commission or promotion expenses shall be paid in connection with the advance of any such money to the company. The amount of such advance shall be reported in each annual statement. [C24, 27, 31, 35, §8912.]

Referred to in §§8906, 8912.1

8912.1 Guaranty fund. Any mutual company heretofore or hereafter organized under this chapter may establish and maintain a guaranty fund of at least fifty thousand dollars made up of multiples of ten thousand dollars, divided into shares of not less than fifty dollars each, to be invested as provided for the investment of insurance capital and funds by section 8927. Guaranty shareholders shall be members of the corporation, and provision may be made for representation of the shareholders of such guaranty fund on the board of directors of the corporation, such representation not to exceed one-third of the membership of such board. Guaranty shareholders in such mutual companies shall be subject to the same regulations of law relative to their right to vote as apply to its policyholders. Such guaranty fund shall be applied to the payment of the legal obligations of the corporation only when such corporation has exhausted its assets in excess of the unearned premium reserve and other liabilities; and if such guaranty fund be thus impaired, the directors may restore the whole, or any part thereof, by assessment on its policyholders as provided for in section 8911. By a legal vote of the policyholders of the corporation, at any regular or special meeting thereof, said guaranty fund may be fully retired or may be reduced to an amount of not less than fifty thousand dollars, provided, that the net surplus of the corporation together with the remaining guaranty fund shall equal or exceed the amount of minimum assets required by this chapter for such companies, and provided, further, that the commissioner of insurance consents thereto. Due notice of such proposed action on the part of the corporation shall be included in the notice given to policyholders and shareholders of any annual or special meeting and notice of such meeting shall also be given in accordance with the provisions of its articles of incorporation. No company with such guaranty fund, which has ceased to do business, shall distribute among its shareholders or policyholders any part of its assets, or guaranty fund, until it has fully performed, or legally canceled, all of its policy obligations. Shareholders of such guaranty fund shall be entitled to interest on the par value of their respective shares at a rate to be fixed by the board of directors, not to exceed seven percent per annum, cumulative, payable semiannually, and payable only out of the surplus earnings of such company, but in no event shall the surplus account of such company be reduced by the payment of such interest below the figure maintained at the time said guaranty fund was established; and provided, further, that no such interest payment shall be made unless the surplus assets remaining after the payment thereof shall at least equal the amount required by the statutes of Iowa to permit such corporation to continue in business. In the event of the dissolution and liquidation of any corporation having a guaranty fund under the provisions hereof, the shareholders of such fund shall be entitled, after the payment of all valid obligations of the company, to receive the par value of their respective shares, together with any unpaid interest thereon, before there may be any distribution of the assets of said corporation among its policyholders. These provisions are in addition to and independent of the provisions now contained in section 8912. [C35,§8912-f1.]

Referred to in §8906

8913 Additional policy provisions. Such mutual company may insert in any form of policy prescribed by the law of this state any additional provisions or conditions required by its plan of insurance if not inconsistent or in conflict with any law of this state. [C24, 27, 31, 35, §8913.]

8914 Countersigning policies. Such mutual company shall comply with the provisions of any law applicable to stock insurance companies effecting the same kind of insurance requiring that policies be countersigned and delivered through a resident agent, provided that this requirement shall not apply to any policy of such mutual company on which no commission shall be paid to any local agent. [C24, 27, 31, 35,§8914.]

8915 Existing companies. The provisions of this chapter [37GA, ch 429] shall not apply to any company or association of this state now doing business whether organized under chapter 4 or chapter 5, title IX of the code, as amended [code of 1897], unless such company or association shall so elect by resolution of its board of directors duly certified to by the president and secretary and filed with and approved by the commissioner, and shall further amend its articles, if necessary, to permit full

compliance with this chapter [37GA, ch 429] and to include such additional kind or kinds of insurance as such company or association intends to transact. On the filing and approval of such resolution and on making such amendment if required, such company may be authorized to transact such kinds of insurance under this chapter. [C24, 27, 31, 35,§8915.]

8916 **Tax—computation.** For the purpose of determining the basis of any tax upon the "gross amount of premiums", or "gross receipts from premiums, assessments, fees, and promissory obligations", now or hereafter imposed upon any mutual fire or casualty insurance company under any law of this state, such gross amount or gross receipts shall consist of the gross premiums or receipts for direct insurance, without including or deducting any amounts received or paid for reinsurance, but with such other deductions as provided by law, and in addition deducting any so-called dividend or return of savings or gains to policyholders; provided that as to any deposits or deposit premiums received by any such company, the taxable premiums shall be the portion of such deposits or deposit premiums earned during the year with such deductions therefrom as provided by law. [C24, 27, 31, 35,§8916.]

8917 **Subscriptions of stock—applications.** After compliance by the incorporators with sections 8896 and 8897, the secretary of state shall certify the articles of incorporation to the commissioner of insurance. When the commissioner of insurance is satisfied that all provisions of law in relation to the promotion and organization of said corporation, including sections 8618 to 8620, inclusive, have been complied with, he shall issue a certificate to that effect, and thereupon such corporation may open books for subscriptions to the stock of stock companies or if a mutual company take applications and receive premiums for insurance at such times and places as it may find convenient, and may keep such books open until the full amount required is subscribed or taken, or the time granted therefor has expired, or until an order is issued by the commissioner of insurance to desist for failure to comply with the provisions of law in reference thereto. [C73,§1125; C97,§1694; C24, 27, 31, 35,§8917.]

8918 **Directors.** The affairs of a company organized as provided by this chapter shall be managed by a number of directors to be stated in the articles of not less than five nor more than twenty-one, all of whom, in case of a stock company, shall be stockholders, or, in case of a mutual company, be policyholders, or before the company shall effect insurance, be subscribers for stock or for insurance as the case may be. When the paid-up capital for a stock company, or the subscriptions for insurance for a mutual company, shall have been obtained, the incorporators or directors in charge of the business shall give at least ten days written notice by mail to stockholders or subscribers, as the case may be, of a meeting of the stockholders or subscribers, for the election of directors, and such meeting shall be held within thirty days after the paid-up capital or subscriptions have been secured. The directors then elected shall continue in office until their successors have been elected and qualified. [C73,§1126; C97,§1695; C24, 27, 31, 35,§8918.]

8919 **Election.** The annual meetings for the election of directors shall be held during the month of January, at such time as the bylaws of the company may direct; but if for any cause no election is held, or there is a failure to elect at any annual meeting, then a special meeting for that purpose shall be held on the call of a majority of the directors, or of those persons holding a majority of the stock, or of a majority of policyholders if a mutual company, by giving thirty days notice thereof in some newspaper of general circulation in the county in which the principal office of the company is located. [C73, §1127; C97,§1696; C24, 27, 31, 35,§8919.]

C97, §1696, editorially divided

8920 **Term of office.** The directors chosen at any such annual or special meeting shall continue in office until the next annual meeting, and until their successors are elected and have accepted. [C73,§1127; C97,§1696; C24, 27, 31, 35, §8920.]

8921 **Classification of directors.** A company may in its articles of incorporation provide that the board of directors be divided into classes holding for a term of not to exceed three years and providing for the election of the members of one class at each annual meeting. [C24, 27, 31, 35,§8921.]

8922 **Powers of directors—president.** The directors shall elect by ballot from their own number a president, and fill all vacancies occurring in the board or presidency thereof; and the board of directors thus constituted, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in them by this chapter. [C73,§1128; C97,§1697; C24, 27, 31, 35,§8922.]

8923 **Secretary and other officers.** The board of directors shall have power to appoint a secretary and any other officers or agents necessary for transacting the business of the company, paying such salaries and taking such security of them as is reasonable. [C73,§1129; C97,§1698; C24, 27, 31, 35,§8923.]

C97, §1698, editorially divided

8924 **Bylaws.** It may adopt such bylaws and regulations not inconsistent with law as shall appear to them necessary for the regulation and conduct of the business. [C73,§1129; C97, §1698; C24, 27, 31, 35,§8924.]

8925 **Record and inspection.** The directors shall keep full and correct entries of their transactions, which shall at all times be open to the inspection of the stockholders if a stock company, or policyholders if a mutual company, and to the inspection of persons invested by law with

the right thereof. [C73,§1129; C97,§1698; C24, 27, 31, 35,§8925.]

8926 Right to own real estate. No company organized under this chapter shall purchase, hold, or convey any real estate, save for the purpose and in the manner herein set forth:

1. Such as shall be required for the transaction of its business.

2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for money due.

3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the legitimate business of the company, or for money due.

4. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debt, or obtained by redemption as junior judgment creditor or mortgagee; but it may convey real estate which shall be found in the course of its business not necessary therefor, and all such last-mentioned real estate shall be sold and conveyed within three years after the same has been determined, by the commissioner of insurance, unnecessary, unless the company shall procure a certificate from him that the interest of the company will materially suffer by a forced sale, in which event the sale may be postponed for such a period as he may direct in such certificate. [C73,§1137; C97, §1703; C24, 27, 31, 35,§8926.]

8927 Investments. Any company organized under the provisions of this chapter shall invest its capital and funds in the following described securities and no other:

1. *Federal and territorial obligations.* Bonds or other evidences of indebtedness issued or guaranteed by the United States, federal farm loan bonds. federal home loan bank bonds, home owners' loan corporation bonds, bonds, notes or obligations representing loans and advances of credit which are eligible for insurance by the federal housing administrator, and bonds, notes or obligations secured by real property or leasehold which the federal housing administrator has insured or has committed himself to insure or debentures issued by such administrator.

Investments in federal insured loans, §12786.1

2. *State and municipal obligations.* Bonds or other evidences of indebtedness issued or guaranteed by the state of Iowa or any other state, or any county, city, town, school, road, drainage, or other district, or any civil subdivision or governmental authority of such state or states, or any instrumentality of any such authorized by statute to borrow money and issue securities, provided that the obligations are:

a. General or full faith and credit obligations of the issuing or guaranteeing unit, or

b. Payable from assessments levied for improvement purposes and secured by a lien upon real estate, or

c. Payable from especially designated revenues which are specifically pledged to the payment of principal and interest on such obligations.

3. *Canadian government and municipal obligations.* Bonds or other evidences of indebtedness issued or guaranteed by the Dominion of Canada, or any province thereof, or any municipality or district therein with a population in excess of ten thousand according to the last dominion or provincial census taken prior to the date of such investment, which are general or full faith and credit obligations of the issuing or guaranteeing unit.

4. *Real estate mortgages.* Mortgages and other interest-bearing securities being first liens upon real estate within this or any other state of the United States worth at least double the amount loaned thereon and secured thereby. Improvements shall not be considered in estimating value unless the owner shall contract to keep the same insured in a reliable fire insurance company or companies, association or associations authorized to transact business in this state, during the life of the loan in a sum at least equal to the excess of the loan above one-half of the value of the ground, exclusive of improvements, the insurance to be made payable in case of loss to the company or association investing its funds as its interests may appear at the time of loss. Any mortgage lien upon real estate shall not for the purpose of this section be held or construed to be other than a first lien, by reason of the fact that drainage or other improvement assessments may have been levied against the real estate covered by said mortgage whether the installment of said assessments be matured or not, provided that in determining the value of such real estate for loan purposes the amount of drainage or other assessment tax unpaid shall be first deducted.

5. *Real estate bonds.* Real estate bonds which are first lien upon real estate within this or any other state of the United States, provided the outstanding indebtedness against the property does not exceed sixty percent of the reasonable value thereof and provided further that the average earnings of the property are at least two and one-half times the interest requirements of all outstanding bonds and indebtedness.

6. *Corporate stock or bonds.* Not to exceed twenty percent of such capital and funds in stocks, other than the company's own stock, and/or bonds or other evidences of indebtedness of any solvent dividend-paying corporation organized under the laws of any of the states of the United States, provided that no company may invest an amount in excess of ten percent of the surplus of the company in the stock and/or bonds of any one corporation, and provided further that any such company may purchase or acquire its own stock in furtherance of a general savings and investment plan for employees of such company with the approval of the Iowa state insurance commissioner.

7. *Loans.* Any loans secured by collateral security consisting of any securities enumerated in this section, provided there is a margin of ten percent between the amount of the loan and the

value of the securities. [C73,§1130; C97,§1699; S13,§1699; C24, 27, 31, 35,§8927; 48GA, ch 226, §1; ch 227,§1.]

Referred to in §§8912.1, 9040
Similar provisions, §§8737, 8829

8928 Financial statements. After complying with the requirements of the preceding sections of this chapter, the company shall file with the commissioner of insurance a satisfactory detailed statement showing the financial condition of the company, including all transactions had during its organization, together with a record of all moneys received and disbursed, a list of the stockholders, the amount of stock purchased by each, and the price paid. [C97, §1700; C24, 27, 31, 35,§8928.]

37GA, ch 429, §14, editorially divided

8929 Mutual companies. The incorporators or officers of such mutual company shall file the statement under oath required of stock companies. [C73,§1131; C97,§1700; C24, 27, 31, 35, §8929.]

8930 Examination — certificate of compliance. Such commissioner may appoint in writing some disinterested person to make an examination and if it shall be found that the capital or assets herein required of the company named, according to the nature of the business proposed to be transacted by such company, have been paid in, and are now possessed by it in money or such stock, bonds, and mortgages as are required by the preceding sections of this chapter, he shall so certify; but if the examination is made by another than the commissioner, the certificate shall be by him, and under his oath. [C73,§1131; C97,§1700; C24, 27, 31, 35,§8930.]

8931 Ownership of assets — oath. The incorporators or officers of any such company, or proposed company, shall be required to state to the commissioner of insurance under oath that the capital or assets exhibited to the person making the examination are actually and in good faith the property of the company examined, and free and clear of any lien or claim on the part of any other person. [C73,§1131; C97, §1700; C24, 27, 31, 35,§8931.]

8932 Form of certificate. The certificate of examination of a mutual company shall be to the effect that it has received and has in its actual possession:

1. The cash premiums.
2. Actual contracts of insurance upon property, belonging to the signers thereof, and upon which the insurance applied for can properly be issued.
3. Other securities, as the case may be, to the extent and value hereinbefore required. [C97,§1700; C24, 27, 31, 35,§8932.]

8933 Certificate of authority. The certificate and statements above contemplated shall be filed in the insurance department and the commissioner of insurance shall deliver to the company a copy of the report of the examination, in the event one is made, together with his written permission for it to commence the business proposed in its articles of incorporation, which permission shall be its authority to commence business and issue policies. [C73,§1131; C97,§1700; C24, 27, 31, 35,§8933.]

8934 Tenure of certificate—renewal—evidence. Such certificate of authority shall expire on the first day of April next succeeding its issue, and shall be renewed annually so long as such company shall transact business in accordance with the requirements of law; a copy of which certificate, when certified to by the commissioner of insurance, shall be admissible in evidence for or against a company with the same effect as the original. [C73,§1131; C97,§1700; C24, 27, 31, 35,§8934.]

8935 Capital increased. When the directors of a stock company with less than the maximum capital allowed in this chapter desire to increase the amount, they shall, if authorized by the holders of a majority of the stock to do so, file with the commissioner of insurance an amendment of its articles authorizing such increase, not exceeding the maximum authorized capital, and thereupon shall be entitled to have the increased amount of capital fixed by such amendment, and the examination of securities constituting the increased capital stock shall be made in the same manner as provided for the original capital stock. [C73,§1135; C97,§1701; C24, 27, 31, 35,§8935.]

8936 Dividends. The directors or managers of a stock company, incorporated under the laws of this state shall make no dividends except from the earned profits arising from their business, which shall not include contributed capital or contributed surplus. [C73,§1136; C97,§1702; C24, 27, 31, 35,§8936.]

Referred to in §8938

8937 Reserve fund required. In estimating the profits, a reserve for unearned premiums as set out in section 8939, also a reserve for unpaid losses, expenses, and taxes which have been incurred shall be set up; and there shall also be held as nonadmitted assets all sums due the corporation on bonds and mortgages, bonds, stocks, and book account, of which no part of the principal or interest thereon has been paid during the year preceding such estimate of profits, and upon which suit for foreclosure or collection has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and on which interest has not been paid; and such judgment with the interest due or accrued thereon and remaining unpaid, shall also be so held. [C73,§1136; C97,§1702; C24, 27, 31, 35, §8937.]

Referred to in §8938
39GA, ch 190, §1, editorially divided

8938 Forfeiture of franchise. Any dividend made contrary to the provisions of sections 8936 and 8937 shall subject the company making it to forfeiture of its franchise. [C73,§1136; C97, §1702; C24, 27, 31, 35,§8938.]

8939 Unearned premium reserve—computation. The policy liability of any company or association, transacting business under the provisions of this chapter, and the amount such company or association shall hold as a reserve for unearned premiums, shall be computed in the following manner:

1. On all policies written or renewed prior to January 1, 1922, there shall be held as such unearned premium reserve an amount equal to forty percent of the aggregate gross premiums written in all policies in force, less deductions for reinsurance in authorized companies or associations.

2. On all policies written or renewed on and after January 1, 1922, and running one year or less from date of policy or last renewal thereof, shall be held as such unearned premium reserve an amount equal to fifty percent of the aggregate gross premiums written in all policies in force, less deductions for reinsurance in authorized companies or associations.

3. On all policies written or renewed on and after January 1, 1922, and running for more than one year, and not exceeding five years, from date of policy or last renewal thereof there shall be held as such unearned premium reserve an amount of the aggregate gross premiums written in all policies in force, less deductions for reinsurance in authorized companies or associations, computed in accordance with the following table:

Term for which Policy was written	Reserve for Unearned Premium	
Two years	1st year	3-4
	2nd year	1-4
Three years	1st year	5-6
	2nd year	1-2
	3rd year	1-6
Four years	1st year	7-8
	2nd year	5-8
	3rd year	3-8
	4th year	1-8
Five years	1st year	9-10
	2nd year	7-10
	3rd year	1-2
	4th year	3-10
	5th year	1-10

4. On all policies written or renewed on and after January 1, 1922, and running for more than five years from date of policy or last renewal thereof, there shall be held as such unearned premium reserve an amount of the aggregate gross premiums, less deductions for reinsurance in authorized companies or associations equal to the pro rata unearned premium on all policies in force. The term "pro rata" used herein shall be such proportion of the gross premiums on policies in force as the number of months unexpired bears to the total number of months for which the policy was written.

5. On all policies written or renewed and for which any premium has been received which would continue a policy in force for a period beyond the term for which it was written, or term covered by last renewal thereof, there shall be held as such unearned premium reserve an amount equal to one hundred percent of such premium on all policies in force.

6. Mutual companies or associations, organized, or doing business under this chapter, shall hold as a reserve for unearned premiums an amount equal to at least forty percent of the aggregate gross premiums written in all policies in force less deductions for reinsurance in authorized companies or associations. [C73, §1136; C97,§1702; C24, 27, 31, 35,§8939.]

Referred to in §8937

8940 Kinds of insurance. Any company organized under this chapter or authorized to do business in this state may:

1. Insure dwelling houses, stores, and all kinds of buildings and household furniture, and other property against loss or damage, including loss of use or occupancy, by fire, lightning, rain, windstorm, tornado, cyclone, earthquake, hail, frost or snow, weather or climatic conditions including excess or deficiency of moisture, flood, rain or drought, rising of the waters of the ocean or its tributaries, bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, and by explosion whether fire ensues or not, except explosion on risks specified in subsection 6 of this section, and also against loss or damage by insects or disease to farm crops or products, and loss of rental value of land used in producing such crops or products, and also against loss or damage by water or other fluid to any goods or premises arising from sprinkler leakage or from the breakage of sprinkler, pumps or other apparatus erected for extinguishing fires, or all other conduits or containers, or by water entering through leaks or openings in buildings and of water pipes, and against accidental injury to such sprinklers, pumps, apparatus, conduits, containers, or water pipes; and may also insure glass against breakage; and also against loss or damage caused by railroad equipment, motor vehicles, airplanes, seaplanes, dirigibles or other aircraft.

2. Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given, or filed, including all bonds in criminal causes and insure the maker, drawer, drawee, or indorser of checks, drafts, bills of exchange, or other commercial paper against loss by reason of any alteration of such instruments.

3. Insure the safekeeping of books, papers, moneys, stocks, bonds, and all kinds of personal property, and receive them on deposit.

4. Insure against loss or damage by theft, injury, sickness, or death of animals and to furnish veterinary service.

5. *a.* Insure the health of persons and against personal injuries, disablement, or death resulting from traveling or general accidents by land or water.

b. Insure against liability for loss, damage, or expense resulting from personal injury or death

caused by error or negligence of the insured in the practice of medicine, surgery, or dentistry, including the performance of surgical operations, or in the prescribing or dispensing of drugs or medicines, or for loss by reason of damages in other respects, for which loss, damage, or expense the insured is legally liable.

c. Insure against loss or damage to property caused by the accidental discharge or leakage of water from automatic sprinkler system.

d. Insure employers against loss in consequence of accidents or casualties of any kind to employees, including workmen's compensation, or other persons, or to property resulting from any act of an employee, or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith.

e. Insure against liability for loss or expense arising or resulting from accidents occurring by reason of the ownership, maintenance, or use of automobiles or other conveyances including aircraft, resulting in personal injuries or death, or damage to property belonging to others, or both, and for damages to assured's own automobile when sustained through collision with another object, and insure the assured's own automobile against loss or damage, including the loss of use thereof, by fire, lightning, windstorm, tornado, cyclone, hail, burglary or theft, vandalism, malicious mischief, or the wrongful conversion, disposal or concealment thereof, or any one or more of such hazards, whether said automobile is held under conditional sale, contract, or subject to chattel mortgages.

Insurer's liability—unsatisfied judgments, §9024.1

6. Insure against loss or injury to person or property, or both, and against loss of rents or use of buildings and other property, growing out of explosion or rupture of boilers, pipes, flywheels, engines, and machinery.

7. Insure against loss or damage resulting from burglary or robbery, or attempt thereat, or larceny.

8. Insure or guarantee and indemnify merchants, traders, and those engaged in business and giving credit from loss and damage by reason of giving and extending credit to their customers and those dealing with them, which business shall be known as credit insurance. Such insurance may cover losses, less a deduction of an agreed percentage, not to exceed ten percent, representing anticipated profits, and a further deduction not to exceed thirty-three and one-third percent, on losses on credits extended to risks who have inferior ratings, and less an agreed deduction for normal loss.

Such coinsurance percentages shall be deducted in advance of the agreed normal loss from the gross covered loss sustained by the insured.

9. Insure vessels, boats, cargoes, goods, merchandise, freights, specie, bullion, jewels, profits, commissions, bank notes, bills of exchange, and other evidences of debt, bottomry and respondentia interest and every insurance appertaining to or connected with marine risks of transportation and navigation, and insure automobiles, airplanes, seaplanes, dirigibles, or other aircraft, whether stationary or being operated under their own power, which include all or any of the hazards of fire, explosion, transportation, collision, loss by legal liability for damage to property resulting from the maintenance and use of automobiles, airplanes, seaplanes, dirigibles, or other aircraft, and loss by burglary or theft, vandalism, malicious mischief, or the wrongful conversion, disposal, or concealment of automobiles whether held under conditional sale, contract, or subject to chattel mortgages, or any one or more of such hazards, including insurance against loss by reason of bodily injury to the person. [C73,§1132; C97,§1709; S13,§1709; C24, 27, 31, 35,§8940; 47GA, ch 215,§3.]

Referred to in §§8941, 9025, 18619
Action on liability policy, ch 404.1

8941 Limitation on risks. No company authorized to transact business in this state as provided in this chapter, shall issue policies of insurance for more than one of the nine purposes or subsections enumerated in section 8940, except as herein provided, as follows:

1. Any domestic or foreign insurance company authorized in this state to do the business specified in subsection 1 of section 8940 may, in addition to the business specified in subsection 1 insure against the casualties specified in subsection 9 of section 8940.

2. Any domestic or foreign insurance company authorized in this state to do the business contemplated by either subsection 2 or 5 may in addition to such business insure against the casualties specified in subsection 6 of section 8940, and also to insure against theft, larceny, burglary and robbery, or attempt thereat.

3. Any domestic or foreign company authorized in this state to transact the business specified in subsection 5 of section 8940, if it is possessed of a paid-up capital of five hundred thousand dollars, may, in addition to insuring against the casualties specified in subsection 5 transact the business specified in subsections 2 and 6 of section 8940, and insure glass against breakage.

4. Any domestic insurance company authorized in this state to transact the business specified in subsection 5 of section 8940, and possessed of two hundred fifty thousand dollars paid-up capital stock, may, in addition to insuring against the casualties specified in subsection 5, insure against injury or loss to persons or property, or both, contemplated by subsection 6, and may also insure glass against breakage.

5. Any foreign insurance company authorized in this state to transact the business specified in subsection 5 of section 8940, if possessed of a paid-up capital or surplus of three hundred thousand dollars, may, in addition to insuring against the casualties specified in said subsection 5, insure against the casualties specified in subsection 6 of section 8940, and also insure glass against breakage.

6. Any domestic or foreign insurance company authorized in their state to transact the

business specified in subsection 2 of section 8940, if possessed of paid-up capital stock of five hundred thousand dollars, may, in addition to transacting the business authorized by said subsection 2, transact the business of credit insurance as authorized by subsection 8 of section 8940.

7. Any foreign or domestic mutual insurance company, when found upon examination by the commissioner of insurance to possess surplus and other funds available for the payment of liabilities equal to the capital stock as by law required of like stock insurance companies may transact the same kinds of insurance permitted to like stock insurance companies.

Providing always, that the charter or articles of incorporation of any such company authorizes the writing of such additional insurance.

No company shall expose itself to loss on any one risk or hazard, to an amount exceeding ten percent of its paid-up capital, except that fidelity and surety companies may be exposed on any one risk or hazard to an amount not exceeding ten percent of their paid-up capital and surplus, unless the excess shall be reinsured in some other good and reliable company licensed to do an insurance business in this state. But in no case shall such excess reinsurance exceed ten percent of the capital of the reinsuring company, and that a certificate of such reinsurance shall be furnished to the insured.

The restrictions as to the amount of risk a company may assume shall not be applicable to a company that receives on deposit and guarantees the safekeeping of books, papers, and moneys and other personal property. [C73, §1132; C97,§1710; S13,§1710; C24, 27, 31, 35, §8941.]

8942 Loans—reinsurance. Such company may lend money on bottomry or respondentia, and cause itself to be insured in companies only authorized to do business in this state, against any loss or risk it may have incurred in the course of its business, and upon the interest which it may have in any property on account of any such loan, and generally to do and perform all other matters and things proper to promote these objects. [C73,§1132; C97,§1711; S13,§1711; C24, 27, 31, 35,§8942.]

8943 Execution of policies. All policies or contracts of insurance made or entered into by the company may be made either with or without the seal of said company, but shall be subscribed by the president, or such other officer as may be designated by the directors for that purpose, and be attested by the secretary thereof. [C73,§1133; C97,§1712; C24, 27, 31, 35,§8943.]

Sections 8943-e1, 8943-e2, code 1935, repealed by 48GA, ch 228, §1

8943.01 Issuance by licensed agents. No insurance company shall write, issue, or place, or cause to be written, issued, or placed any policy or contract of insurance or indorsement thereto, covering risks on any property, insurable business activity, or interest, located within, or transacted within this state, including any contract of indemnity or suretyship, except through or by a duly licensed agent of such company, residing within this state, who shall before delivery, countersign said policy or contract of insurance or indorsement thereto. No such resident agent shall countersign such policies, contracts of insurance or indorsements in blank. [C35,§8943-e1; 48GA, ch 228,§2.]

Referred to in §§8943.02, 8943.03, 8943.07, 8943.08, 8943.09, 8943.10

8943.02 Agents on commission only. Only resident agents within this state, whose compensation for soliciting and writing insurance is by way of commission figured as a percentage of the premium or membership fee for each policy or contract of insurance written, may countersign policies, contracts of insurance or indorsements thereto within this state. No branch manager, state agent, special agent, or other supervisory agent, or any other representative of an insurance company whose compensation in the insurance business is derived either in whole or in part by salary may countersign policies, contracts of insurance or indorsements thereto on risks located in this state within the purview of section 8943.01. [48GA, ch 228,§3.]

Referred to in §§8943.07, 8943.08, 8943.09, 8943.10

8943.03 Agent within state countersigning —commission. In the event policies, contracts of insurance or indorsements thereto on risks located within this state as defined in section 8943.01 are contracted for or otherwise originate without the state, then in that event, there shall be payable to the countersigning agent, resident of the state, a commission which shall be not less than five percent of the premium charged for such policy, or contract of insurance or indorsement thereto, provided, however, said countersigning commission shall not exceed one-half of the total commission on any line, form, or type of insurance. Nothing herein shall prevent the payment of a larger commission to the resident countersigning agent if agreed to by the interested parties, as hereinafter provided. [48GA, ch 228,§4.]

Referred to in §§8943.04, 8943.05, 8943.07, 8943.08, 8943.09, 8943.10

8943.04 Commission agreements enforceable. In the event that any insurance company is furnished with a written signed agreement, duly executed by and between a forwarding nonresident agent or broker and a resident countersigning agent, providing for a commission in excess of that provided in section 8943.03, then and in that event until notice is received by the company to the contrary, the commission due and payable to the resident countersigning agent shall be as contained in said agreement, and the rights of such resident countersigning agent to enforce payment thereof shall be the same as are applicable to the commission provided for in section 8943.03. [48GA, ch 228,§5.]

Referred to in §§8943.05, 8943.07, 8943.08, 8943.09, 8943.10

8943.05 Action on claim. The resident countersigning agent shall have a direct claim against the insurance company issuing such policy, or contract of insurance or indorsement

thereto for his commission in accordance with sections 8943.03 and 8943.04. The liability of such company for such commission may be enforced in an action at law or equity as the case may be. [48GA, ch 228,§6.]

Referred to in §§8943.07, 8943.08, 8943.09, 8943.10

8943.06 Records of out-of-state contracts. It shall be the duty of every resident countersigning agent for business originating without this state but covering property or business transactions within this state, and the insurance companies issuing such policies, to keep a written record of each such transaction which shall contain the name of the company issuing the policy, the name of the assured, the number of the policy, the expiration date thereof and the amount of the premium payable thereunder, and such record shall be subject to the inspection of the commissioner of insurance for the purpose of verifying the amount of premium tax payable by such company under the provisions of chapter 335. [48GA, ch 228,§7.]

Referred to in §§8943.07, 8943.08, 8943.09, 8943.10

8943.07 Contracts covered and exempt. The provisions of sections 8943.01 to 8943.06, inclusive, shall be applicable to all companies doing business under this chapter and interinsurance exchanges engaged in business under the provisions of chapter 408, when such companies or exchanges are engaged in business on the commission basis, and the agents thereof, but shall not have application to life insurance companies, associations doing business under chapter 406, domestic insurance companies or exchanges, or companies or exchanges who solicit insurance exclusively by salaried representatives who are paid no commission on business written, or to the business of mutual insurance companies obtained through salaried representatives and upon which no commission is paid; nor shall such sections apply to insurance on rolling stock of railroad corporations operating between states, or property in transit from one state to another while in possession of railroads or other common carriers; or to insurance upon ocean marine risks or property in transportation. [C35,§8943-e2; 48GA, ch 228, §8.]

Referred to in §§8943.08, 8943.09, 8943.10

8943.08 Commissioner's power to enforce. The commissioner of insurance may revoke or suspend the certificate of authority of any insurance company or exchange violating the provisions of any of sections 8943.01 to 8943.07, inclusive, or the license of any agent violating any of such sections. [48GA, ch 228,§9.]

Referred to in §§8943.09, 8943.10

8943.09 Penalty. Any employee, representative, or agent of an insurance company violating any of the provisions of sections 8943.01 to 8943.08, inclusive, shall be guilty of a misdemeanor, and upon conviction shall be liable to imprisonment for a term of not to exceed thirty days or for a fine not to exceed one hundred dollars or for both such fine and imprisonment. [48GA, ch 228,§10.]

Referred to in §8943.10

8943.10 Lawful commissions in other states applicable. If, by the existing or future laws of any state, a higher commission is payable to agents resident of such state on risks located in such state, the policies or contracts of insurance for which originate in this state, then and in that event the resident countersigning agent under sections 8943.01 to 8943.09, inclusive, shall be entitled to a like commission on risks located in this state as defined in section 8943.01 and which are contracted for or otherwise originate in such other state. [48GA, ch 228,§11.]

8944 Transfer of stock. Transfers of stock made by any stockholder or his legal representative shall be subject to the provisions of chapters 384 and 385 relative to transfer of shares, and to such restrictions as the directors shall establish *in their bylaws, except as hereinafter provided.* [C73,§1134; C97,§1713; C24, 27, 31, 35,§8944.]

8945 Annual statement. The president or the vice president and secretary of each company organized or authorized to do business in the state shall annually before the first day of March of each year prepare under oath and file with the commissioner of insurance a full, true, and complete statement of the condition of such company on the last day of the preceding year, which shall exhibit the following items and facts:

First—The amount of capital stock of the company.

Second—The names of the officers.

Third—The name of the company and where located.

Fourth—The amount of its capital stock paid up.

Fifth—The property or assets held by the company, specifying:

1. The value of real estate owned by the company.
2. The amount of cash on hand and deposited in banks to the credit of the company, and in what bank deposited.
3. The amount of cash in the hands of agents and in the course of transmission.
4. The amount of loans secured by first mortgage on real estate, with the rate of interest thereon.
5. The amount of all other bonds and loans and how secured, with the rate of interest thereon.
6. The amount due the company on which judgment has been obtained.
7. The amount of bonds of the state, of the United States, of any county or municipal corporation of the state, and of any other bonds owned by the company, specifying the amount and number thereof, and par and market value of each kind.
8. The amount of bonds, stock, and other evidences of indebtedness held by such company as collateral security for loans, with amount loaned on each kind, and its par and market value.
9. The amount of assessments on stock and premium notes, paid and unpaid,

10. The amount of interest actually due and unpaid.
11. All other securities and their value.
12. The amount for which premium notes have been given on which policies have been issued.

Sixth—Liabilities of such company, specifying:
1. Losses adjusted and due.
2. Losses adjusted and not due.
3. Losses unadjusted.
4. Losses in suspense and the cause thereof.
5. Losses resisted and in litigation.
6. Dividends in scrip or cash, specifying the amount of each, declared but not due.
7. Dividends declared and due.
8. The amount required to reinsure all outstanding risks on the basis of the unearned premium reserve as required by law.
9. The amount due banks or other creditors.
10. The amount of money borrowed and the security therefor.
11. All other claims against the company.

Seventh—The income of the company during the previous year, specifying:
1. The amount received for premiums, exclusive of premium notes.
2. The amount of premium notes received.
3. The amount received for interest.
4. The amount received for assessments or calls on stock notes, or premium notes.
5. The amount received from all other sources.

Eighth—The expenditures during the preceding year, specifying:
1. The amount of losses paid during said term, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statement, and the amount at which such losses were estimated in such statement.
2. The amount paid for dividends.
3. The amount paid for commissions, salaries, expenses, and other charges of agents, clerks, and other employees.
4. The amount paid for salaries, fees, and other charges of officers and directors.
5. The amount paid for local, state, national, and other taxes and duties.
6. The amount paid for all other expenses, including printing, stationery, rents, furniture, or otherwise.

Ninth—The largest amount insured in any one risk.

Tenth—The amount of risks written during the year then ending.

Eleventh—The amount of risks in force having less than one year to run.

Twelfth—The amount of risks in force having more than one and not over three years to run.

Thirteenth—The amount of risks having more than three years to run.

Fourteenth—The dividends, if any, declared on premiums received for risks not terminated. [C73,§1141; C97,§1714; C24, 27, 31, 35,§8945.]

Referred to in §8730
C97, §1714, editorially divided

8946 Accident insurance—record. Each accident insurance company, or company insuring against accidents, shall keep a register of tickets sold or policies issued by its officers or agents, which register shall show the name and residence of the person insured, the amount of insurance, the date of issue of such ticket or policy, and the time the same will remain in force; and the annual statement of each such company shall show the number of tickets sold and policies issued by it during the year, and the aggregate amount of insurance evidenced by such tickets and policies, classified as to the length of time for which such insurance is given. [C73,§1141; C97,§1714; C24, 27, 31, 35, §8946.]

Referred to in §8730

8947 Certificate refused. The commissioner of insurance shall withhold his certificate or permission of authority to do business from any company neglecting or failing to comply with the provisions of this chapter. [C97,§1715; C24, 27, 31, 35,§8947.]

8948 Annual statement of foreign company. The annual statement of foreign companies doing business in this state shall also show, in addition to the foregoing matters, the amount of losses incurred and premiums received in the state during the preceding period, so long as such company continues to do business in this state. [C73,§1146; C97,§1716; C24, 27, 31, 35,§8948.]

8949 Inquiry by commissioner. The commissioner of insurance shall address any inquiries to any insurance company in relation to its doings and condition, or any other matter connected with its transactions, which he may deem necessary for the public good, or for a proper discharge of his duties, and any company so addressed shall promptly reply in writing thereto. [C73,§1142; C97,§1718; C24, 27, 31, 35,§8949.]

8950 Forms for statements. He shall cause to be prepared and furnished to each company organized under the laws of this state, and to the attorney or agent of each company incorporated in other states and foreign governments, who may apply therefor, printed forms of statements required by this chapter, and may from time to time make such changes in the forms as shall seem to him best adapted to elicit from the companies a true exhibit of their condition in respect to the several points hereinbefore enumerated. [C73,§1157; C97,§1719; C24, 27, 31, 35,§8950.]

8951 Foreign companies—capital required. No stock insurance company organized under or by the laws of any other state or foreign government for the purpose specified in this chapter, shall, directly or indirectly, take risks or transact any business of insurance in this state unless possessed of two hundred thousand dollars of actual paid-up capital, exclusive of any assets deposited in any state, territory, district, or country for the special benefit or security of those insured therein, but companies organized to insure plate glass, or livestock

exclusively, are not required to have a greater capital than one hundred thousand dollars; and such companies organized to insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water, having an actual paid-up capital of one hundred thousand dollars and surplus in an amount to be approved by the commissioner of insurance, exclusive of any assets deposited in other states and territories for the special benefit or security of the insured therein, shall be deemed sufficient within the meaning of this section. [C73,§1144; C97,§1721; SS15,§1721; C24, 27, 31, 35,§8951.]

8952 Commissioner as process agent. Any foreign company desiring to transact the business of insurance under this chapter, by an agent or agents in the state, shall file with the commissioner of insurance a written instrument, duly signed and sealed, authorizing such commissioner to acknowledge service of notice or process for and in behalf of such company in this state, and consenting that service of notice or process may be made upon the said commissioner, and when so made shall be taken and held as valid as if served upon the company according to the laws of this or any other state, and waiving all claim, or right, or error, by reason of such acknowledgment of service. [C73, §1144; C97,§1722; C24, 27, 31, 35,§8952.]

Similar provisions, §§8355, 8421, 8766, 8801, 9087, 9376
C97, §1722, editorially divided

8953 Manner of service. Such notice or process with a copy thereof may be mailed to the commissioner of insurance at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereon on behalf of the defendant foreign insurance company by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed to him by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the person or corporation who shall be named or designated by such company in such written instrument. [C97,§1722; C24, 27, 31, 35,§8953.]

8954 Additional statements—impaired capital. Such company shall also file with the commissioner a certified copy of its charter or deed of settlement, together with a statement under oath of the president or vice president or other chief officer and the secretary of the company for which they may act, stating the name of the company, the place where located, the amount of its capital, with a detailed statement of the facts and items required from companies organized under the laws of this state, and a copy of the last annual report, if any, made under any law of the state by which such company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by liabilities as specified in this chapter to the extent of twenty percent thereof, while such deficiency shall continue. [C73,§1144; C97,§1722; C24, 27, 31, 35,§8954.]

8955 Foreign mutual companies — surplus. Any mutual insurance company organized outside of this state and authorized to transact the business of insurance on the mutual plan in any other state of the United States or in the District of Columbia, may be admitted to this state and authorized to transact herein any of the kinds of insurance authorized by its charter or articles of incorporation, when so permitted by the provisions of this chapter, with the powers and privileges and subject to the conditions and limitations specified in said chapter; provided, however, such company has complied with all the statutory provisions which require stock companies to file papers and to furnish information and to submit to examination, and is also solvent according to the requirements of this chapter and is possessed of a surplus safely invested as follows:

1. In case any such mutual company issuing policies for a cash premium without an additional contingent liability equal to or greater than the cash premium, the surplus shall be at least two hundred thousand dollars.

2. In case of any other such mutual company issuing policies for a cash premium or payment with an additional contingent liability equal to or greater than the cash premium or payment, the surplus shall be such an amount as the commissioner of insurance of Iowa may require, but in no case less than fifty thousand dollars, provided that the provisions of this section fixing a minimum surplus of fifty thousand dollars shall not apply to companies now admitted to do business in Iowa; provided, further, that no such mutual company shall be authorized to transact compensation insurance without a surplus of at least two hundred thousand dollars unless all liability for each adjusted claim in this state, the payment of any part of which is deferred for more than one year, shall be provided for by a special deposit, in a trust company of this state, which shall be a trust fund applicable solely and exclusively to the payment of the compensation benefits for which such deposit is made, or shall be reinsured in an authorized stock company, or in an authorized mutual company with a surplus of at least two hundred thousand dollars. [C73,§1144; C97, §1723; C24, 27, 31, 35,§8955.]

8956 Certificate to foreign company. When any foreign company has fully complied with the requirements of law and become entitled to do business, the commissioner of insurance shall issue to such company a certificate of that fact, which certificate shall be renewed annually on the first day of April, if the commissioner is satisfied that the capital, securities, and investments of such company remain unimpaired, and the company has complied with the provisions of law applicable thereto. [C73,§1146; C97,§1724; C24, 27, 31, 35,§8956.]

8957 Agent's certificate of authority. No agent shall directly or indirectly act for any insurance company referred to in this chapter, in taking risks or transacting business of insurance in the state, without procuring from the commissioner of insurance a certificate of authority to the effect that such company has complied with all the requirements of this chapter. [C73,§1145; C97,§1725; C24, 27, 31, 35, §8957.]

8958 Notes taken for insurance. All notes taken for policies of insurance in any company doing business in the state shall state upon their face that they have been taken for insurance, and shall not be collectible unless the company and its agents have fully complied with the laws of the state relative to insurance. [C73, §1146; C97,§1726; C24, 27, 31, 35,§8958.]

8959 Forfeiture of policies—notice. No policy or contract of insurance provided for in this chapter shall be forfeited or suspended for nonpayment of any premium, assessment or installment provided for in the policy, or in any note or contract for the payment thereof, unless within thirty days prior to, or on or after the maturity thereof, the company shall serve notice in writing upon the insured that such premium, assessment, or installment is due or to become due, stating the amount, and the amount necessary to pay the customary short rates, up to the time fixed in the notice when the insurance will be suspended, forfeited, or canceled, which shall not be less than thirty days after service of such notice, which may be made in person, or by mailing in a registered letter addressed to the insured at his post office as given in or upon the policy, and no suspension, forfeiture, or cancellation shall take effect until the time thus fixed and except as herein provided, anything in the policy, application or a separate agreement to the contrary notwithstanding. [C97,§1727; C24, 27, 31, 35,§8959.]

Referred to in §8961

8960 Cancellation of policy. At any time after the maturity of a premium, assessment, or installment provided for in the policy, or any note or contract for the payment thereof, or after the suspension, forfeiture, or cancellation of any policy or contract of insurance, the insured may pay to the company the customary short rates and costs of action, if one has been commenced or judgment rendered thereon, and may then, if he so elect, have his policy and all contracts or obligations connected therewith, whether in judgment or otherwise, canceled, and they and each of them thereafter shall be void; and in case of suspension, forfeiture, or cancellation of any policy or contract of insurance, the assured shall not be liable for any greater amount than the short rates earned at the date of such suspension, forfeiture, or cancellation and the costs herein provided. The policy may be canceled by the insurance company by giving five days notice of such cancellation, in which event it may retain only the pro rata premium. [C97,§1728; S13,§1728; C24, 27, 31, 35,§8960.]

Referred to in §8961

8961 Short rates. The commissioner of insurance shall prepare and publish a table of the short rates provided for in sections 8959 and 8960, which, when published, shall be for the guidance of all companies covered in this chapter, and the rate to be given in the notice therein provided, and no greater sum than thus fixed shall be demanded or collected. A copy of said short rates shall be printed on or attached to each policy. [C97,§1729; C24, 27, 31, 35,§8961.]

8962 Policy restored. At any time before cancellation of the policy for nonpayment of any premium, assessment, or installment provided for therein, or in any note or contract for the payment thereof, or after action commenced or judgment rendered thereon, the insured may pay to the insurer the full amount due, including court costs if any, and from the date of such payment, or the collection of the judgment, the policy shall revive and be in full force and effect, provided such payment is made during the term of the policy and before a loss occurs. [C97, §1730, C24, 27, 31, 35,§8962.]

C97, §1730, editorially divided

8963 Right of insured to cancel. No provision, stipulation, or agreement to the contrary in or independent of the policy or contract of insurance shall avoid or defeat the right of any insured to pay short rates and costs of action, if any, and have the policy and all contracts connected therewith, including judgments rendered thereon, canceled. [C97,§1730; C24, 27, 31, 35, §8963.]

8964 Examination—dissolution. The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in the state, to examine into the affairs and condition of any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty percent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if

in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge. [C73,§1149; C97, §1731; C24, 27, 31, 35,§8964.]

Referred to in §8635

8965 Requisition on stockholders—personal liability. Any company receiving such a requisition from the commissioner of insurance shall forthwith call upon its stockholders for such amounts as will make its paid-up capital equal to the amount fixed by this chapter or the articles of incorporation of said company; and in case any stockholder shall refuse or neglect to pay the amount called for after notice personally given, or by advertisement in such time and manner as the commissioner shall approve, it shall be lawful for the company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificates for such number of shares as the said stockholder may be entitled to in the proportion that the ascertained value of the funds of the said company may be found to bear to its original capital, the value of such shares for which new certificates shall be issued to be ascertained under the direction of the commissioner, the company paying for the fractional parts of shares, and the directors of such company may issue new stock and dispose of the same, and issue new certificates therefor, to an amount sufficient to make up the original capital of the company. In the event of additional losses accruing upon new risks, taken after the expiration of the period limited by the commissioner in the aforesaid requisition for the filling up of the deficiency in the capital of such company, and before said deficiency shall have been made up, the directors shall be individually liable to the extent thereof. [C73, §1150; C97,§1732; C24, 27, 31, 35,§8965.]

Referred to in §8635

8966 Mutual companies—dissolution—personal liability. If, upon such examination, it shall appear to the commissioner of insurance that the assets of any company organized or operating upon the plan of mutual insurance under this chapter are insufficient to justify the continuance of such company in business, he shall proceed in relation to such company in the same manner as herein required in regard to stock companies; and the trustees or directors of such company are made personally liable for any losses which may be sustained upon risks taken after the expiration of the period limited by the commissioner for filling up the deficiency in the assets or premium notes, and before such deficiency shall have been made up. [C73,§1151; C97,§1733; C24, 27, 31, 35,§8966.]

8967 Transfers pending investigation. Any transfer of the stock of any company organized under this chapter, made pending any investigation above required, shall not release the party making the transfer from any liability for losses which may have accrued previous to such transfer. [C73,§1151; C97,§1734; C24, 27, 31, 35,§8967.]

8968 Revocation of certificate of foreign company. The commissioner of insurance shall be authorized to examine into the condition and affairs of any insurance company, as provided for in this chapter, doing business in this state, not organized under its laws, or cause such examination to be made by some person or persons appointed by him having no interest in any insurance company; and when it shall appear to his satisfaction that the affairs of any such company are in an unsound condition, he shall revoke the certificates granted in its behalf, and cause a notification thereof to be published in some newspaper of general circulation, published at the seat of government, and no agent or agents of such company after such notice shall issue policies or renew any previously issued. [C73,§1152; C97,§1735; C24, 27, 31, 35, §8968.]

8969 Rep. by 43GA, ch 225. See §8612.1

8970 Certificates of compliance—how published. The commissioner of insurance shall annually, as soon as practicable after the first of March, publish in two newspapers of general circulation, a statement made up from the annual report of every insurance company of the character provided for in this chapter and doing business in this state whether organized under the laws of this or any other state, which statements shall contain a synopsis of the company's annual report and shall show that the company has in all respects complied with the laws of the state relating to insurance and is authorized to transact business in the state. One publication as above contemplated, shall be made at the seat of government, and in case of companies organized in this state and located elsewhere than in the city of Des Moines, the other shall be made in the county in which the home office of the company is located. The fee for each publication shall be six dollars, which shall be paid to the commissioner at the time and in the manner provided for in section 9007, and shall be by him paid to the papers making the publication upon receipt of a bill for same, together with an affidavit by the publisher or foreman showing that such publication has been properly made, the same to be filed within thirty days from the date of such publication. [C73, §1155; C97,§1737; S13,§1737; C24, 27, 31, 35, §8970.]

8971 False statement of assets. No company transacting the business of fire insurance

within the state shall state or represent by advertisement in any newspaper, magazine, or periodical, or by any sign, circular, card, policy of insurance, or renewal certificate thereof or otherwise, any funds or assets to be in its possession and held available for the protection of holders of its policies unless so held, except the policy of insurance or certificate of renewal thereof may state, as a single item, the amount of capital set forth in the charter, or articles of incorporation, or association, or deed of settlement under which it is authorized to transact business. [C97,§1738; C24, 27, 31, 35,§8971.]

Referred to in §8973

8972 Statement of capital and surplus. Every advertisement or public announcement, and every sign, circular, or card issued or published by any foreign company transacting the business of fire insurance in the state, or by any officer, agent, or representative thereof, which shall purport to make known its financial standing, shall exhibit the capital actually paid in in cash, and the amount of net surplus of assets over all its liabilities actually held and available for the payment of losses by fire and for the protection of holders of fire policies, and shall also exhibit the amount of net surplus of assets over all liabilities in the United States actually available for the payment of losses by fire and held in the United States for the protection of holders of fire policies in the United States, including in such liabilities the fund reserved for reinsurance of outstanding risks, and the same shall correspond with the latest verified statement made by the company or association to the commissioner of insurance. No such company shall write, place, or cause to be written or placed, any policy or contract for insurance upon property situated or located in this state except through its resident agent or agents. [C97, §1739; C24, 27, 31, 35,§8972.]

Referred to in §8973

8973 Violations. Any violation of the provisions of sections 8971 and 8972 shall for the first offense subject the company, association, or individual guilty thereof to a penalty of five hundred dollars, to be recovered in the name of the state, with costs, in an action instituted by the county attorney, either in the county in which the company, association, or individual is located or transacts business, or in the county where the offense is committed, and such penalty, when recovered, shall be paid into the school fund of the county in which action is brought. Every subsequent violation of said sections shall subject the company, association, or individual to a penalty of one thousand dollars, to be sued for, recovered, and disposed of in like manner. [C97,§1740; C24, 27, 31, 35, §8973.]

8974 Copy of application—duty to attach. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, is made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. [C97,§1741; C24, 27, 31, 35,§8974.]

Referred to in §8975
Similar provisions, §§8772, 8793
C97, §1741, editorially divided

8975 Failure to attach—effect. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of section 8974 it shall forever be precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option. [C97,§1741; C24, 27, 31, 35,§8975.]

Similar provisions, §§8773, 8794

8976 Presumption as to value. In any action brought in any court in this state on any policy of insurance for the loss of any building so insured, the amount stated in the policy shall be received as prima facie evidence of the insurable value of the property at the date of the policy. [C97,§1742; C24, 27, 31, 35,§8976.]

Referred to in §8986
Similar provision, §9049
C97, §1742, editorially divided

8977 Value of building—liability. The insurance company or association issuing such policy may show the actual value of said property at date of policy, and any depreciation in the value thereof before the loss occurred; but the said insurance company or association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount stated in the policy. [C97, §1742; C24, 27, 31, 35,§8977.]

Referred to in §8986
Similar provision, §9050

8978 Prima facie right of recovery. In an action on such policy it shall only be necessary for the assured to prove the loss of the building insured, and that he has given the company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred, so far as they are within his knowledge, and the extent of his loss. [C97,§1742; C24, 27, 31, 35,§8978.]

Referred to in §8986
Similar provisions, §§8774, 8775, 8979, 8986, 9045

8979 Proofs of loss of personal property. In furnishing proofs of loss under any contract of insurance for damages or loss of personal property it shall only be necessary for the assured, within sixty days from the time the loss occurs, to give notice in writing to the company issuing such contract of insurance accompanied by an affidavit, stating the facts as to how the loss occurred, so far as same are within his knowledge, and the extent of the loss, any agreement or contract to the contrary notwithstanding. [S13,§1742-a; C24, 27, 31, 35,§8979.]

Referred to in §§8986, 8987
Similar provisions, §§8774, 8775, 8978, 8986, 9045

8980 Invalidating stipulations — avoidance. Any condition or stipulation in an application, policy, or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss. [C97,§1743; S13, §1743; C24, 27, 31, 35,§8980.]

Referred to in §§8981, 8984, 8985, 8986
S13, §1743, editorially divided

8981 Conditions invalidating policy. Any condition or stipulation referring:

1. To any other insurance, valid or invalid, or
2. To vacancy of the insured premises, or
3. To the title or ownership of the property insured, or
4. To lien, or incumbrances thereon created by voluntary act of the insured and within his control, except a lien accruing to the benefit of the old age pension fund as provided for in sections 3828.022 and 3828.023, or
5. To the suspension or forfeiture of the policy during default or failure to pay any written obligation given to the insurance company for the premium, or
6. To the assignment or transfer of such policy of insurance before loss without the consent of the insurance company, or
7. To the removal of the property insured, or
8. To a change in the occupancy or use of the property insured, if such change or use makes the risk more hazardous, or
9. To the fraud of the insured in the procurement of the contract of insurance—

shall not be changed or affected by the provision of section 8980. [C97,§1743; S13,§1743; C24, 27, 31, 35,§8981.]

Referred to in §§8984, 8985, 8986

8982 Arbitration agreements. No recovery on a policy or contract of insurance shall be defeated for failure of the insured to comply, after a loss occurs, with any arbitration or appraisement stipulation as to fixing value of property. No arbitration shall take place except where the property was situated at the time of loss. [C97,§1743; S13,§1743; C24, 27, 31, 35, §8982.]

Referred to in §§8984, 8985, 8986
Similar provision, §9051.1

8983 Right to rebuild. Any agreement, stipulation, or condition in any policy or contract of insurance by which any insurance company reserves or has the right to rebuild shall be void and of no effect in case of total loss, or where the amount of loss, upon the request of the insurance company, has been submitted to arbitration. [C97,§1743; S13,§1743; C24, 27, 31, 35, §8983.]

Referred to in §§8984, 8985, 8986

8984 Pleadings. Nothing in sections 8980 to 8983, inclusive, shall be construed to change the limitations or restrictions respecting the pleading or proving of any defense by any insurance company to which it is subject by law. [C97,§1743; S13,§1743; C24, 27, 31, 35,§8984.]

Referred to in §§8985, 8986

8985 Applicability of statute. The provisions of sections 8980 to 8984, inclusive, shall apply to all contracts of insurance on real and personal property. [C97,§1743; S13,§1743; C24, 27, 31, 35,§8985.]

Referred to in §8986

8986 Notice and proof of loss—limitation of actions. The notice of loss and proof thereof required in section 8978, and the notice and proof of loss under oath in case of insurance on personal property, shall be given within sixty days from the time loss occurred, and no action for such loss shall be begun within forty days after such notice and proofs have been given to the company, nor shall the time within which action shall be brought be limited to less than one year from the time when a cause of action for the loss accrues. No provisions of any policy or contract to the contrary shall affect the provisions of this and sections 8976 to 8985, inclusive. [C97,§1744; S13,§1744; C24, 27, 31, 35, §8986.]

Referred to in §8987
Similar provisions, §§8774, 8775, 8978, 8979, 9045, 9048

8987 More favorable conditions. Nothing contained in section 8979 or in section 8986 shall be so construed as to prohibit any insurance company not required by the statutes of Iowa to issue a standard form of policy, from embodying, with the approval of the commissioner of insurance, in any insurance contract issued by it, provisions or conditions which are more favorable to the insured than those authorized in said statutes. [C24, 27, 31, 35,§8987.]

8988 Forms of policies — approval. The form of all policies or permits issued or proposed to be issued by any insurance company doing business in this state under the provisions of this chapter, shall first be examined and approved by the commissioner of insurance. [C97, §1745; S13,§1745; C24, 27, 31, 35,§8988.]

S13, §1745, editorially divided

8989 Special policy requirements. Such commissioner shall refuse to authorize it to do business or to renew its permission to do business when the form of policy issued or proposed to be issued does not provide for the cancellation of the same at the request of the insured upon equitable terms, and the return to the insured of any premium paid in excess of the customary short rates for the insurance up to the time of cancellation, or the release of the insured from any liability beyond such short rates, or for losses after the cancellation of the policy if the insurance be in a mutual company; and in case any company or association shall issue any policies not containing such provision, it shall be the duty of the commissioner to revoke the authority of such company or association to do business. [C97,§1745; S13,§1745; C24, 27, 31, 35, §8989.]

8990 Coinsurance—void stipulations. Any provisions, contract, or stipulation contained in any policy of fire, lightning, tornado, cyclone, windstorm and/or sprinkler leakage insurance,

issued by any insurance company doing business in the state under the provisions of this chapter, providing or stipulating that the insured shall maintain insurance on any property covered by such policy to any extent, or shall to any extent be an insurer of the property insured in such policy, or shall bear any portion of the loss on the property insured, shall be void; and the commissioner of insurance shall refuse to authorize any such company to do business or to renew the authority or the certificate of any such company when the form of policy issued or proposed to be issued contains any such provision, contract, or stipulation. [C97,§1746; S13, §1746; C24, 27, 31, 35,§8990.]

40GA, ch 180, §1, editorially divided

8991 Coinsurance riders—exceptions. Upon the written request of any person desiring insurance, a rider providing for coinsurance may be attached to and become a part of the policy, but in no case shall such rider apply to dwellings or farm property. [S13,§1746; C24, 27, 31, 35,§8991.]

8992 Request for coinsurance rider—signing. The request for the application of the coinsurance clause or rider to any policy of insurance shall be written or printed on a single sheet of paper which shall contain nothing but the request hereinafter set out, and said request must be signed by the insured and a copy thereof be left with him by the agent at the time the insurance is applied for. [S13,§1746; C24, 27, 31, 35,§8992.]

8993 Form of request. No form of request for coinsurance except the following shall be used by any company doing business within this state:

REQUEST FOR THE APPLICATION OF THE COINSURANCE CLAUSE

In consideration of a reduction from the established rate of ..... percent to..... percent in premiums to be paid to the ..... insurance company for insurance upon the following described property .....
.....
I hereby request that a coinsurance rider be attached to the policy to be issued by said company, and hereby agree that during the life of the policy I will maintain insurance of the character mentioned in said policy upon said property, to the extent of at least ..... percent of the actual cash value thereof at the time of loss, and that failing to do so, I shall become a coinsurer to the extent of such deficit.

Before signing this request or the coinsurance rider to be attached to the policy to be issued, I carefully read each of them and fully understand that in case I shall fail to maintain insurance of the character mentioned in the policy on the previously described property to the extent above provided, then in the event of loss or damage this company shall not be liable for a greater percent of the loss or damage to said property than the total amount of insurance maintained bears to ..... percent of the actual cash value of the property insured at the time of loss.

Date..... ..... Insured.

[S13,§1746; C24, 27, 31, 35,§8993.]

8994 Signing of rider. The coinsurance rider to be used shall be signed by both the agent and the insured, and a copy thereof shall be left with the insured at the time the application is made for insurance. [S13,§1746; C24, 27, 31, 35,§8994.]

8995 Form of rider. The rider shall be in form and restrictions as follows:

IOWA COINSURANCE AND REDUCED RATE CLAUSE

(This clause must be signed by both the insured and the agent.)

In consideration of the acceptance by the insured of a reduction in premiums from the established rate of.....percent to.....percent, it is hereby agreed that the insured shall maintain insurance during the life of this policy upon the property insured, to the extent of at least.....percent of the actual cash value thereof at the time of loss, and, that failing to do so, the insured shall be a coinsurer to the extent of such deficit.

This clause, at the request of the insured, is attached to and forms part of policy number .....of the.....insurance company of .....and shall in no case apply to dwellings or farm property.

..... Insured.

Date..... .....Agent.

[S13,§1746; C24, 27, 31, 35,§8995.]

8996 Stipulation as to prorating. No condition or stipulation in a policy of insurance fixing the amount of liability or recovery under such policy with reference to prorating with other insurance on property insured shall be valid except as to other valid and collectible insurance, any agreement to the contrary notwithstanding. [C97,§1746; S13,§1746; C24, 27, 31, 35,§8996.]

8997 Limitation on coinsurance riders. The request and the rider hereinbefore referred to shall only be permitted to be used in connection with insurance contracts issued in this state against the hazards of fire, lightning, tornadoes, cyclones, windstorms, and sprinkler leakage. [S13,§1746; C24, 27, 31, 35,§8997.]

8998 Compliance with law — change of articles. Every insurance company organized under the laws of or doing business in this state shall conform to all the provisions of this chapter and to other laws of this state, whether now existing or hereafter enacted, applicable thereto, and when necessary any existing company shall change its charter and bylaws so as to conform thereto, by a vote of a majority of its board of directors. [C73,§1147; C97,§1747; C24, 27, 31, 35,§8998.]

C97, §1747, editorially divided

8999 Violations. Any officer, manager, or agent of any insurance company or association

who, with knowledge that it is doing business in an unlawful manner, or is insolvent, solicits insurance with said company or association, or receives applications therefor, or does any other act or thing towards procuring or receiving any new business for such company or association, shall be guilty of a misdemeanor, and for every such act, on conviction thereof, shall be adjudged to pay a fine of not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment. [C73,§1147; C97,§1747; C24, 27, 31, 35,§8999.]

9000 Officers punished. Any president, secretary, or other officer of any company organized under the laws of this state, or any officer or person doing or attempting to do business in this state for any insurance company organized either within or without this state, failing to comply with any of the requirements of this chapter, or violating any of the provisions thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and be imprisoned in the county jail for a period not less than thirty days nor more than six months. [C73,§1147; C97,§1748; C24, 27, 31, 35,§9000.]

9001 Advertisements. Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town, or village in which it is located, and the state or government under the laws of which it is organized. [C73,§1148; C97,§1749; C24, 27, 31, 35,§9001.]

Applicable to life companies, §8731
C97, §1749, editorially divided

9002 "Soliciting agent" defined. Any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application, policy, or contract to the contrary notwithstanding. [C73,§1148; C97,§1749; C24, 27, 31, 35,§9002.]

Applicable to life companies, §8731

9003 Agent—general definition. The term "agent" used in the foregoing sections of this chapter shall include any other person who shall in any manner directly or indirectly transact the insurance business for any insurance company complying with the laws of this state. [C97,§1750; C24, 27, 31, 35,§9003.]

Applicable to life companies, §8731
C97, §1750, editorially divided

9004 Agent—specific definition. Any officer, agent, or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses, or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, bylaws, or articles of incorporation of such company to the contrary notwithstanding. [C97,§1750; C24, 27, 31, 35, §9004.]

Applicable to life companies, §8731

9005 Exceptions. Members of mutual assessment associations which pay no commission, reward, or gratuity for the procuring of applications for membership, the income of which associations is derived solely from assessments, dues, and fees collected from its members for the sole purpose of meeting loss and expenses, shall not be deemed to be agents under any section of this chapter. [C24, 27, 31, 35,§9005.]

Applicable to life companies, §8731

9006 Applicability to organizations and individuals. The provisions of the foregoing sections relative to insurance companies shall apply to all such companies, partnerships, associations, or individuals, whether incorporated or not. [C73,§1148; C97,§1751; C24, 27, 31, 35, §9006.]

9007 Fees. There shall be paid to the commissioner of insurance for services required under the provisions of this chapter the following fees, which shall be accounted for by him in the same manner as other fees received in the discharge of the duties of his office:

1. For filing and examination of the first application of any company and accompanying articles of incorporation for organization in this state, and the issuing of the permission to do business, ten dollars.
2. For filing application of any foreign company for certificate to do business in this state, and the accompanying certified copy of charter or articles of incorporation, twenty-five dollars.
3. For permission to foreign company to do business in this state, or certified copy thereof, two dollars.
4. For filing annual statement of a domestic company, and issuing the renewal of the permission required by law to authorize continuance in business, three dollars.
5. For filing annual statement of a foreign company, twenty dollars, and issuing renewal of permission, two dollars.
6. For certificate of authority to agent of foreign company, two dollars.
7. For each certificate of authority to agent of domestic company, fifty cents.
8. For every copy of any paper filed, the sum of twenty cents per folio, and for affixing the official seal to such copy and certifying the same, one dollar.
9. For each certificate for publication of foreign companies, two dollars, and for each certificate for publication of Iowa companies, fifty cents. [C73,§1153; C97,§1752; S13,§1752; C24, 27, 31, 35,§9007.]

Referred to in §8970
Deposit of fees, §143

9008 Expenses of examination. The necessary expenses of any examination of any insurance company made or ordered to be made by

the commissioner of insurance under this chapter shall be certified to by him, and paid on his requisition by the company so examined; and in case of failure of the company to make such payment, the commissioner shall suspend such company from doing business in this state until such expenses are paid. If such expenses are not paid by the company, they shall be audited by the state comptroller and paid out of the state treasury. [C73,§1156; C97,§1753; C24, 27, 31, 35,§9008.]

C97, §1753, editorially divided

9009 Examination of foreign companies. In no case shall any foreign insurance company be examined except by order of executive council. [C97,§1753; C24, 27, 31, 35,§9009.]

Similar provision, §8642

9010 Unlawful combinations — exceptions. It shall be unlawful for two or more insurance companies doing business in this state, or for the officers, agents, or employees of such companies, to make or enter into any combination or agreement relating to the rates to be charged for insurance, the amount of commissions to be allowed agents for procuring the same, or the manner of transacting the insurance business within this state, but any number of insurance companies may appoint the same person or persons, who shall be residents of the state of Iowa, as their common agent or agents for the purpose of filing, in the manner prescribed by the insurance commissioner of Iowa, the forms of policies or permits as required by the laws of this state to be examined and approved by the said commissioner. [C97,§1754; C24, 27, 31, 35,§9010.]

Referred to in §§9012, 9013
C97, §1754, editorially divided

9011 Violations. Any such company, officer, agent, or employee violating the above provision shall be guilty of a misdemeanor, and on conviction thereof shall pay a penalty of not less than one hundred dollars nor more than five hundred dollars for each offense, to be recovered in the name of the state for the use of the permanent school fund. [C97,§1754; C24, 27, 31, 35,§9011.]

9012 Examination of officers and employees. The commissioner of insurance is authorized to summon before him, for examination under oath, any officer, agent, or employee of any such company suspected of violating any of the provisions of section 9010, and, on complaint to him in writing by two or more residents of this state charging such company under oath upon their knowledge or belief with violating the provisions of said section 9010, he shall summon any officer, agent, or employee of said company before him for examination under oath. [C97, §1755; C24, 27, 31, 35,§9012.]

Referred to in §9015
C97, §1755, editorially divided

9013 Revocation of authority. If upon such examination, and that of any other witness produced and examined, he shall determine that such company is guilty of a violation of any of the provisions of section 9010, or if any such officer, agent, or employee after being duly summoned shall fail to appear or submit to examination, the commissioner shall forthwith issue an order revoking the authority of such company to transact business within this state, and it shall not thereafter be permitted to do the business of fire insurance in this state at any time within one year therefrom. [C97,§1755; C24, 27, 31, 35,§9013.]

Referred to in §§9014, 9015

9014 Appeal. Either party may appeal from the decision of the commissioner of insurance, made pursuant to section 9013, to the district court of the county where the same was made, within twenty days from the time of the rendition of such decision, by serving a written notice of such appeal on the opposite party and on the commissioner, and filing with the clerk of said court a good and sufficient bond for the payment of all costs on the appeal in case the decision shall be affirmed. On such appeal said court shall try the case de novo, as equitable causes are tried, and on such evidence as either party may produce, and may reverse, modify, or affirm the decision of the commissioner. [C97,§1756; C24, 27, 31, 35,§9014.]

Referred to in §9015
Docketing appeals, §11440
Presumption of approval of bond, §12759.1

9015 Incrimination. The statements and declarations made or testimony given by any such officer, agent, or employee in the investigation before the commissioner of insurance, or upon the hearing and trial before the district court, as provided in sections 9012 to 9014, inclusive, shall not be used against the person making the same in any criminal prosecution against him. [C97,§1757; C24, 27, 31, 35,§9015.]

Incrimination generally, §11267 et seq.

9016 Insurance in unauthorized companies. No action shall be maintained in any court in the state upon any policy or contract of fire insurance issued upon any property situated in the state by any company, association, partnership, individual, or individuals that have not been authorized by the commissioner of insurance to transact such insurance business, unless it shall be shown that the insurer or insured, within six months after the issuing of such policy or contract of insurance, has paid into the state treasury two and one-half percent of the gross premium paid or agreed to be paid for such policy or contract of insurance. [C97,§1758; C24, 27, 31, 35,§9016.]

9017 Standard policy — additions, riders, and clauses. It shall be unlawful for any insurance company to issue any policy of fire insurance upon any property in this state except upon automobiles, airplanes, seaplanes, dirigibles, or other aircraft and marine risks other or different from the standard form of fire insurance policy herein set forth except:

I. It may print in its policy its name, location, date of incorporation, amount of its paid-up capital stock (if a stock company), names of its officers and agents, the number and date of the

policy, the amount (under dollar mark) for which it is issued, and if issued through an agent the words: "This policy shall not be valid until countersigned by the duly authorized agent of this company at .....".

II. It may use in or upon its policy forms or slips of the description, location, and specifications of the property insured, together with permits upon such conditions not in conflict with the provisions of law, as may be agreed upon, for the use or storage of electricity, gasoline, explosives, or other extra-hazardous products or materials; for repairs or improvements; for the operation or ceasing to operate; and for the vacancy of the premises; and permits for hazards other than those specifically mentioned above; also a mortgagee's or loss payable clause, and other permits or riders, not in conflict with law.

III. It may also by written or printed clause upon such conditions not in conflict with the provisions of law as may be agreed upon, provide that a policy shall cover any loss or damage caused by lightning, tornadoes, cyclones, hail, or windstorms not exceeding the sum insured or the interest of the insured in the property; provided if there shall be other valid insurance on such property, whereby the same is insured against loss by lightning, tornadoes, cyclones, hail, or windstorms, said company shall be liable only pro rata with such other valid and collectible insurance for any such loss by lightning, tornadoes, cyclones, hail, or windstorms.

IV. Any company incorporated in this state, or authorized to do business herein, shall print in its policy or attach thereto any provision which such company is required by law to insert in its policies or attach thereto, not included in the provisions of this policy, but such provisions shall be printed apart from the other conditions and agreements of this policy and under a separate title as follows: "PROVISIONS REQUIRED BY LAW TO BE STATED IN THE POLICY OF INSURANCE".

V. It shall print upon its policy issued in compliance with the preceding provisions of this section, the words: "IOWA STANDARD FIRE INSURANCE POLICY". [S13,§1758-a; C24, 27, 31, 35,§9017.]

Referred to in §§9019, 9020

9018 Form of standard policy. The policy shall be plainly printed, and no part thereof shall be in type smaller than brevier; the conditions thereof shall be printed in uniform numbered lines, as adopted and approved by the commissioner of insurance, and such policy shall be in terms and conditions as follows:

I. In consideration of the stipulations herein named and of .... dollars, ... does insure .... for the term of ..... from the .... **day of .....**, 19...., at noon (standard time), to the .... day of ....., 19...., at noon (standard time), against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding ..... dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit:

.....

.....

It is hereby agreed that the insured may obtain $..... additional insurance in companies authorized to do business in the state of Iowa.

II. This company shall not be liable beyond the actual cash value of the property covered by this policy at the time any loss or damage occurs, and said liability shall in no event exceed what it would cost the insured to repair or replace the property lost or damaged with material of like kind and quality. The sum for which this company is liable pursuant to this policy, shall be payable forty days after due notice and proofs of loss have been received by this company in accordance with law.

III. This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof.

IV. Unless otherwise provided by agreement of this company this policy shall be void:

a. If the insured now has or shall hereafter procure any other contract of insurance valid or invalid on the property covered in whole or in part by this policy; or

b. If the subject of insurance be a manufacturing establishment, and it cease to be operated for more than ten consecutive days; or

c. If the building herein described, whether intended for occupancy by the owner or tenant be or become vacant or unoccupied and so remain for ten consecutive days; or

d. If the interest of the insured be other than unconditional and sole ownership; or

e. If the subject of insurance be a building on ground not owned by the insured; or

f. If any change other than by death of the insured whether by legal proceedings, judgment, voluntary act of the insured or otherwise, take place in the interest, title, possession, or use of the subject of insurance, if such change in the possession or use makes the risk more hazardous; or

g. If the subject of insurance or a part thereof (as to the part so incumbered) be or become incumbered by lien, mortgage, or otherwise created by voluntary act of the insured or within his control; or

h. If the property insured or any part thereof (as to the part so removed) be removed to any other building or location than that specified in the policy; or

i. If this policy be assigned before loss.

V. Unless otherwise provided by agreement of this company, this policy shall be void:

a. If the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock; or

b. If the hazard be increased by any means within the knowledge of the insured; or

c. If mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or

d. If illuminating gas or vapor be generated in any building covered hereby, or on any premises adjacent thereto for use upon the insured premises; or

e. If there be kept, used, or allowed on the within described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire,

gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, calcium carbide, petroleum or any of its products of greater inflammability than kerosene of lawful standard, which last named article may be used for lights and kept for sale according to law, in quantities not exceeding five barrels; or

f. If the insured permits the property which is the subject of insurance, or any part thereof, to be used for any unlawful purpose.

Provided that nothing contained in paragraph V herein shall operate to avoid this policy in any case, if the insured shall establish that the failure to observe and comply with such provisions and conditions did not contribute to the loss.

VI. This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or military or usurped power, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property during and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for damage by fire only) by explosion of any kind or by lightning; but liability for direct damage by lightning may be assumed by specific agreement.

VII. This company shall not be liable for loss or damage to any property covered by this policy if the insured shall fail to pay any written obligation given to the company for the premium or any assessment or installment of premium when due; provided the company shall have given the insured notice as required by law. Upon payment and acceptance by the company of the delinquent premium, assessment, or installment of premium, before loss occurs, or after loss, if the company shall have had notice thereof and accepts such payment, this policy shall be revived and in full force according to its terms.

VIII. If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building, or its contents, shall immediately cease.

IX. This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed thereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, plate glass, frescoes, or decorations; nor property held in storage nor for repairs; nor, beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repairs of buildings, or by interruption of business, manufacturing processes or otherwise.

X. Any application, survey, plan, or description of property signed by the insured and referred to in this policy shall, when a copy is attached hereto, be a part of this contract, and shall be held to be a representation and not a warranty.

XI. This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation either by registered letter directed to the insured at his last known address, or by personal written notice. If this policy shall be canceled as hereinbefore provided, or becomes void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rates; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

XII. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the provisions and conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be agreed upon by the company.

XIII. If property covered by this insurance is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one new location bears to the value in all such new locations; but this company shall not in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total valid and collectible insurance on the whole property at the time of fire, whether the same cover in new location or not.

XIV. If loss occur the insured shall as soon as practicable after he ascertains the fact of such loss, give notice in writing thereof to the company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, and put it in the best possible order, and shall, within sixty days from date of loss, furnish this company with notice thereof in writing accompanied by affidavit stating the facts as to how the loss occurred and the extent thereof, so far as such facts are within his knowledge.

XV. The insured, as often as reasonably required, shall exhibit to any person designated by this company, all that remains of any property herein described as to which a claim for loss or damage is made, and submit to examination under oath by any person named by this company, and subscribe the same, and, as often as reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its repre-

sentatives, and shall permit extracts and copies thereof to be made; provided, however, that this company shall not be held to have waived any of the provisions or conditions of this policy or any forfeiture thereof by any examination or investigation herein provided for.

XVI. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole amount of valid and collectible insurance covering such property.

XVII. No suit or action on this policy, for the recovery of any claim thereon, shall be sustainable in any court of law or equity, unless commenced within twelve months next after the right of action for the loss accrues.

XVIII. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage".

XIX. This policy is issued and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions now or hereafter specifically authorized by law as may be indorsed hereon or added hereto.

In witness whereof, this company has executed and attested these presents.

.....Secretary.

.....President.

Countersigned at ..... this .... day of ....., 19.....

.....Agent.

[S13,§1758-b; C24, 27, 31, 35,§9018.]

Referred to in §§9019, 9020

9019 Violations—status of policy. Any insurance company, its officers or agents, or either of them, violating any of the provisions of sections 9017 and 9018, by issuing, delivering, or offering to issue or deliver any policy of fire insurance on property in this state other or different from the standard form, herein provided for, shall be guilty of a misdemeanor, and upon complaint made by the commissioner of insurance, or by any citizen of this state, shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than one hundred dollars for the first offense, and not less than one hundred dollars nor more than two hundred dollars for each subsequent offense, but any policy so issued or delivered shall, nevertheless, be binding upon the company issuing or delivering the same, and such company shall, until the payment of such fine, be disqualified from doing any insurance business in this state; but any policy so issued or delivered shall, nevertheless, be binding upon the company issuing or delivering the same. [S13,§1758-c; C24, 27, 31, 35,§9019.]

Referred to in §9020

9020 Existing statutes — waiver. Nothing contained in sections 9017 to 9019, inclusive, nor any provisions or conditions in the standard form of policy provided for in section 9018, shall be deemed to repeal or in any way modify any existing statutes or to prevent any insurance company issuing such policy, from waiving any of the provisions or conditions contained therein, if the waiver of such provisions or conditions shall be in the interest of the insured. [S13,§1758-d; C24, 27, 31, 35,§9020.]

9021 Policy—formal execution. Every fire insurance company and association authorized to transact business in this state shall conduct its business in the name under which it is incorporated, and the policies issued by it shall be headed or entitled only by such name. There shall not appear on the face of the policy or on its filing back, anything that would indicate that it is the obligation of any other than the company responsible for the payment of losses under the policy, though it will be permissible to stamp or print on the bottom of the filing back, the name or names of the department or general agency issuing the same. [SS15, §1758-e; C24, 27, 31, 35,§9021.]

Referred to in §§9023, 9024

9021.1 Joint policies—insurer designated. Companies associating themselves together for the purpose of issuing joint policies may issue them under the underwriters' title used by them, provided the names of the companies represented by such underwriters' title shall appear on the face and filing back of the policy and the percentage of the total risk assumed by each shall be set out opposite the signature of each company. [C27, 31, 35,§9021-a1.]

Referred to in §§9023, 9024

9022 Misleading statements. No insurance company, or department or general agency of an insurance company, doing business in this state, or its officers or agents, shall issue any false or misleading advertisements through newspapers or other periodicals, or any false or misleading representations by signs, cards, letterheads, tending to conceal or misrepresent the true identity of the insurer or insurance company, which is carrying the liability under any policy issued in this state.

Nor shall any insurance company, or department or general agency of an insurance company, doing business in this state issue any advertisement or representation of any character, giving the appearance of a separate or independent insuring organization on the part of any department or general agency, and the type or lettering used in any advertisement or representation shall set forth the name of the company or organization assuming the risk more conspicuously than that of any department or general agency. [SS15,§1758-f; C24, 27, 31, 35, §9022.]

Referred to in §§9023, 9024

9023 Violations. Any violation of sections 9021, 9021.1, and 9022 shall be punished by a fine of not exceeding five hundred dollars. [SS15,§1758-g; C24, 27, 31, 35,§9023.]

9024 Advertisements by agents. Nothing contained in sections 9021, 9021.1, and 9022 shall be construed to prevent any representative of an insurance company from advertising his own individual business without specific mention of the name of the company or companies which he may represent. [SS15,§1758-h; C24, 27, 31, 35,§9024.]

CHAPTER 404.1

LIABILITY POLICIES—UNSATISFIED JUDGMENTS

9024.1 Inurement of policy.
9024.2 Settlement.
9024.3 Limitation on action.

9024.1 Inurement of policy. All policies insuring the legal liability of the insured, issued in this state by any company, association or reciprocal exchange shall, notwithstanding any other provision of the statutes, contain a provision providing that, in event an execution on a judgment against the insured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the insurer to the same extent that such insured could have enforced his claim against such insurer had such insured paid such judgment. [C35,§9024-g1.]

9024.2 Settlement. No settlement between said insurer and insured, after loss, shall bar said action unless consented to by said judgment plaintiff. [C35,§9024-g2.]

9024.3 Limitation on action. Said action may be brought against said insurer within one hundred eighty days from the entry of judgment in case no appeal is taken, and, in case of appeal, within one hundred eighty days after the judgment is affirmed on appeal, anything in the policy or statutes to the contrary notwithstanding. [C35,§9024-g3.]

CHAPTER 405

EMPLOYERS LIABILITY INSURANCE

9025 Reserve required.
9026 Terms defined.
9027 Distribution of unallocated payments.
9028 Reports required.

9025 Reserve required. Every corporation, association, company, or reciprocal exchange writing any of the several classes of insurance authorized by paragraph *d* of subsection 5 of section 8940 shall maintain reserves for outstanding losses under insurance against loss or damage from accident to or injuries suffered by an employee or other person and for which the insured is liable computed as follows:

1. For all liability suits being defended under policies written more than:

a. Ten years prior to the date as of which the statement is made, one thousand five hundred dollars for each suit.

b. Five and less than ten years prior to the date as of which the statement is made, one thousand dollars for each suit.

c. Three and less than five years prior to the date as of which the statement is made, eight hundred fifty dollars for each suit.

2. For all liability policies written during the three years immediately preceding the date as of which the statement is made, such reserve shall be sixty percent of the earned liability premiums of each of such three years less all loss and loss expense payments made under liability policies written in the corresponding years; but in any event, such reserve shall, for the first of such three years, be not less than seven hundred and fifty dollars for each outstanding liability suit on said year's policies.

3. For all compensation claims under policies written more than three years prior to the date as of which the statement is made, the present values at four percent interest of the determined and the estimated future payments.

4. For all compensation claims under policies written in the three years immediately preceding the date as of which the statement is made, such reserve shall be sixty-five percent of the earned compensation premiums of each of such three years, less all loss and loss expense payments in connection with such claims under policies written in the corresponding years; but in any event, in the case of the first year of any of such three-year period such reserve shall be not less than the present value at four percent interest of the determined and the estimated unpaid compensation claims under policies written during such year. [C24, 27, 31, 35,§9025.]

9026 Terms defined. The term "earned premiums" as used herein shall include gross premiums charged on all policies written, including all determined excess and additional premiums, less returned premiums, other than premiums returned to policyholders as dividends, and less reinsurance premiums and premiums on policies canceled, and less unearned premiums on policies in force.

Any participating company which has charged in its premiums a loading solely for dividends shall not be required to include such loading in its earned premiums, provided a statement of the amount of such loading has been filed with and approved by the commissioner of insurance.

The term "compensation" as used in this chapter shall relate to all insurances affected

by virtue of statutes providing compensation to employees for personal injuries irrespective of fault of the employer.

The term "liability" shall relate to all insurance, except compensation insurance, against loss or damage from accident to or injuries suffered by an employee or other person and for which the insured is liable.

The terms "loss payments" and "loss expense payments" as used herein shall include all payments to claimants, including payments for medical and surgical attendance, legal expenses, salaries and expenses of investigators, and field men, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employees, home office expenses, and all other payments made on account of claims, whether such payments shall be allocated to specific claims or unallocated. [C24, 27, 31, 35,§9026.]

9027 Distribution of unallocated payments. All unallocated liability loss expense payments made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies shall be distributed as follows: Thirty-five percent shall be charged to the policies written in that year, forty percent to the policies written in the preceding year, ten percent to the policies written in the second year preceding, ten percent to the policies written in the third year preceding, and five percent to the policies written in the fourth year preceding, and such payments made in each of the first four calendar years in which an insurer issues liability policies shall be distributed as follows: In the first calendar year one hundred percent shall be charged to the policies written in that year, in the second calendar year fifty percent shall be charged to the policies written in that year and fifty percent to the policies written in the preceding year, in the third calendar year forty percent shall be charged to the policies written in that year, forty percent to the policies written in the preceding year, and twenty percent to the policies written in the second year preceding, and in the fourth calendar year thirty-five percent shall be charged to the policies written in that year, forty percent to the policies written in the preceding year, fifteen percent to the policies written in the second year preceding, and ten percent to the policies written in the third year preceding, and a schedule showing such distribution shall be included in the annual statement.

All unallocated compensation loss expense payments made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed as follows:

Forty percent shall be charged to the policies written in that year, forty-five percent to the policies written in the preceding year, ten percent to the policies written in the second year preceding and five percent to the policies written in the third year preceding, and such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed as follows: In the first calendar year one hundred percent shall be charged to the policies written in that year, in the second calendar year fifty percent shall be charged to the policies written in that year and fifty percent to the policies written in the preceding year, in the third calendar year forty-five percent shall be charged to the policies written in that year, forty-five percent to the policies written in the preceding year and ten percent to the policies written in the second year preceding, and a schedule showing such distribution shall be included in the annual statement.

Whenever, in the judgment of the commissioner of insurance, the liability or compensation loss reserves of any insurer under his supervision, calculated in accordance with the foregoing provisions, are inadequate, he may, in his discretion, require such insurer to maintain additional reserves based upon estimated individual claims or otherwise. [C24, 27, 31, 35, §9027.]

9028 Reports required. Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the commissioner of insurance may prescribe. [C24, 27, 31, 35,§9028.]

Annual statement, §8945

CHAPTER 406

MUTUAL FIRE, TORNADO, HAILSTORM AND OTHER ASSESSMENT INSURANCE ASSOCIATIONS

Referred to in §§8625, 8943.07, 9079, 9104, 11044. Additional provisions, ch 404

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9029 Organization — purpose and powers. 1. Any number of persons may by incorporating under chapter 384, enter into contracts with each other for the following kinds of insurance from loss or damage by:

a. Fire and lightning.

b. Tornado, cyclone, and windstorm.

c. Against any or all loss, expense and liability resulting from the ownership, maintenance, or use of any automobile or other vehicle; but shall not include, by county mutuals, insurance against bodily injury to the person.

d. Plate glass, against breakage of glass, local or in transit.

e. Hailstorms.

f. Theft of personal property.

g. Injury, sickness or death of animals, and the furnishing of veterinary service.

h. Smoke, explosion, aircraft, vehicles, and riot (including riot attending a strike).

2. For the purpose of this protection these contracts of insurance shall be subject only to such provisions as are contained in this chapter and shall consist of:

a. An application on blanks furnished by the association and signed by the insured or his representative, which may contain in addition to other provisions; the value of the property, the proper description thereof, the amount of other insurance and the incumbrance thereon, and agreement to be governed by the articles of incorporation and bylaws in force at the time the policy is issued, a representation that the foregoing statements are true as far as the same are known to the insured or material to the risk, and that the insurance shall take effect when approved by the secretary.

b. A policy issued by the association in accordance with its rules, and approved by the commissioner of insurance.

3. Such associations may insure risks of their members or may reinsure risks of other associations or companies; or may organize reinsurance associations for the reinsurance of risks.

4. The words "persons" and "members" as used in this chapter shall be construed to mean trustees, administrators, and all other individuals, public or private corporations or associations.

5. Insurance on the property of one or more minors may be granted on application of an adult parent, friend or guardian who consents to become a member as representing such minor. [C73,§1160; C97,§1759; S13,§1759-a; C24, 27, 31, 35,§9029; 48GA, ch 229,§1.]

Referred to in §9035

9030 County and state mutual associations. Any association incorporated under the laws of this state for the purpose of furnishing insurance as provided for in this chapter, doing business only within the county in which is situated the town or city named in its articles of incorporation as its principal place of business, or the counties contiguous thereto, shall for the purpose of this chapter, be deemed a county mutual assessment association; all other associations operating hereunder shall, for the purposes of this chapter, be deemed state mutual assessment associations, and such associations may do business throughout the state and in other states where they are legalized and authorized to do business. The words "mutual" and "association" shall be incorporated in and become a part of their name. [C97,§1760; S13, §1759-b; C24, 27, 31, 35,§9030.]

9031 Meetings. Unless the time and place of holding the annual meeting of the members of any association transacting business under the provisions of this chapter are plainly stated in their articles of incorporation or bylaws, twenty days notice of the time and place of holding of said meetings shall be given to all members of the association. Annual meetings may adjourn from time to time. [S13,§1759-o; C24, 27, 31, 35,§9031.]

89GA, ch 120, §11, editorially divided

9032 Amendments to articles. Members of the association at such annual meetings shall have power to make or amend articles of incorporation or bylaws as they in their judgment may deem necessary. [S13,§1759-o; C24, 27, 31, 35,§9032.]

9033 Articles and bylaws part of policy. When such articles of incorporation and bylaws are printed on the policy they become a part thereof and are binding upon the association and the insured alike. [C24, 27, 31, 35, §9033.]

9034 Officers — election. Officers or directors shall be elected in the manner and for the length of time prescribed in the articles of incorporation or bylaws. [C24, 27, 31, 35,§9034.]

9035 Policies — issuance — conditions. No state mutual assessment association shall issue policies until at least one hundred twenty-five applications have been received in any class as shown by section 9029, representing the following amount of insurance: Classes one, two, three, and five, two hundred fifty thousand dollars each; class four, one hundred thousand dollars, and no county mutual assessment association shall issue policies until applications for insurance to the amount of fifty thousand

dollars representing at least fifty applicants have been received, and no application for insurance during the period of organization shall exceed two percent of the amount required for organization, or after one year of organization, one percent of the total insurance in force, any reinsurance taking effect simultaneously with the policy being deducted in determining such maximum single risk. [C97,§1761; S13,§1759-c; C24, 27, 31, 35,§9035.]

39GA, ch 120, §3, editorially divided

9036 Approval by commissioner. Neither shall any association issue policies of insurance until its articles of incorporation, bylaws, and form of policy shall have been submitted to the commissioner of insurance and if upon examination of same he finds them to conform to the provisions of this chapter he shall at once issue to the association a certificate authorizing it to transact an insurance business. [C97,§1761; S13,§1759-c; C24, 27, 31, 35,§9036.]

9037 Allowable assessments and fees. Such associations may collect a policy and contingent fee, and such assessments, provided for in their articles of incorporation and bylaws, as are required to pay losses and necessary expenses, and for the creation and maintenance of an emergency fund for the payment of excess losses and no part of such emergency fund can be claimed by any member whose policy expires or is surrendered for cancellation. [C97, §1765; S13,§1759-h; C24, 27, 31, 35,§9037.]

Referred to in §9080
39GA, ch 120, §4, editorially divided

9038 Advance assessments. Any association may collect assessments for losses and expenses for one year in advance; or for more than one year in advance where such advance assessment does not exceed five mills on each dollar of insurance in force. [S13,§1759-h; C24, 27, 31, 35,§9038.]

Referred to in §9080

9039 Borrowing money. In case the funds of any association are not sufficient to pay losses that have been reported or adjusted the association may borrow money for payment of losses until such time as it is practical to make an assessment or until the regular assessment period. [C24, 27, 31, 35,§9039.]

9040 Emergency fund. Funds raised by such associations which because of temporarily low rate of losses are not needed to pay losses and expenses in any year, may be passed to an emergency fund to be held for payment of excess losses in a subsequent year or years; such fund may be deposited in banks, or at the option of the board of directors may be invested in the classes of securities permitted by section 8927; but under the direction of the board of directors and with the consent of the commissioner of insurance a part of such fund may be invested in a home office building or loaned to other associations organized under this chapter only when such loan shall be secured by a pledge of future assessments of such other association. [C24, 27, 31, 35,§9040.]

Referred to in §9043

9041 Policies with fixed premiums. When the emergency fund of any association reaches an amount equal to one hundred percent of the average cost per thousand on all policies in force for the full term for which assessment is collected and not less than one hundred thousand dollars or such amount of capital stock as is required of domestic companies, such associations may issue policies of fixed premiums. [C24, 27, 31, 35,§9041.]

9042 Net assets required—liability of members. Associations using a basis rate whose risks consist principally of store buildings and their contents, manufacturing establishments, public garages, lumber yards, office buildings, hotels, theaters, moving picture houses, stocks of implements or automobiles, shall maintain at all times net assets equal to forty percent of one annual assessment at the basis rate charged for such insurance on all policies in force, less deductions for reinsurance in authorized companies or associations; and may provide in its bylaws and specify in its policies the maximum liability of its members to the association; such liability shall not be less than a sum equal to the basis rate charged by the association for insurance nor greater than a sum equal to three times such basis rate. [S13, §1759-i; C24, 27, 31, 35,§9042.]

Referred to in §9080

9042.1 Reserve for unearned premiums. Every association organized and operating under the provisions of this chapter, except county mutual assessment associations, reinsurance associations for county mutual associations, and associations operating on a post loss basis and not charging any advance assessments or premiums, shall hold as reserve for unearned premiums or assessments an amount equal to at least forty percent of the aggregate gross premiums or assessments in force, on all policies or contracts running one year or less, less deductions for reinsurance in force in authorized companies or associations. On all policies or contracts running more than one year, there shall be maintained such a reserve in an amount equal to at least forty percent of the amount of the aggregate gross premiums in force for any current year and one hundred percent of the amount of the aggregate gross premiums in force for each succeeding year of said terms, less deductions for reinsurance in authorized companies or associations. [47GA, ch 216,§1.]

9042.2 Time to comply. Every association heretofore organized and operating, and to which the provisions of section 9042.1 apply, shall not be required to maintain the unearned premium reserve required in said section until December 31, 1940. However, such associations must have established by December 31, 1937, a reserve equal to at least one-fourth of the reserve required by said section; by December 31, 1938, at least one-

half of such reserve and by December 31, 1939, at least three-fourths of such reserve. [47GA, ch 216,§2.]

Omnibus repeal, 47GA, ch 216, §3

9043 Hail assessments—payment of losses. Associations engaged in writing hail insurance may, as concerns such insurance, provide in their bylaws and policies for a limited assessment in any one year.

The books of any association which relate to hail insurance business shall be closed and balanced as of the thirty-first day of December of each year, and the aggregate amount of assessments and other sums paid by the members during the year, and the aggregate amount of losses paid including those in the process of adjustment sustained during the year, shall be ascertained.

Not less than fifty percent of such aggregate amount of assessments, and other sums paid by the members shall be returned to the members, either through the payment of losses or through dividends, to be credited on the assessments required for the succeeding year, or, at the discretion of the board of directors, may be set aside in the emergency fund as defined in section 9040, but no sum less than forty percent of such aggregate assessments, and other sums paid by the members, shall be returned to the members through payment of such losses or dividends.

In the event that losses sustained exceed a sum equal to fifty percent of such aggregate assessments and other sums paid by the members, such losses shall be paid from any emergency or surplus funds then in existence, and if the total funds available for the payment of losses is insufficient to pay such losses, such funds shall be prorated among the members sustaining such losses.

Such losses shall be due and payable on or before the twentieth day of January of the year succeeding that in which they occur, except such as may be then in dispute or litigation. [C24, 27, 31, 35,§9043.]

9044 Annual report. Each association doing business under the provisions of this chapter shall, annually, in the month of January report to the commissioner of insurance, upon blanks furnished by him, such facts as are required of domestic insurance companies organizing under chapter 404, as are applicable to this chapter. These reports shall be tabulated and published by the commissioner of insurance in the annual report of insurance, one copy of which shall be sent to each association. The county associations, the state associations, and those doing an exclusive tornado, an exclusive hailstorm, or an exclusive automobile insurance business shall be separately classified in said report. [C73,§1160; C97,§§1762, 1763; S13, §§1759-d,-e; C24, 27, 31, 35,§9044.]

9045 Proof of loss—sixty-day limit. In furnishing proofs of loss under any contract of insurance under this chapter for loss or damage it shall be necessary for the insured within sixty days from the time loss or damage occurs, to give notice in writing to the association issuing such contracts of insurance accompanied by an affidavit stating the facts as to how the loss occurred so far as the same are within the knowledge of the insured, the property destroyed or damaged, and the extent of the loss. [C24, 27, 31, 35,§9045.]

Similar provisions, §§8774, 8775, 8978, 8979, 8986
39GA, ch 120, §6, editorially divided

9046 Five-day limit. In case of damage or loss to livestock by fire or lightning or loss or damage to automobiles by theft or fire, notice of such loss must be given the association by mailing written notice within five days from the time such loss or damage occurred. [C24, 27, 31, 35,§9046.]

9047 Ten-day limit. In case of loss to growing crops by hail, notice of such loss must be given the association by mailing a registered letter within ten days from the time such loss or damage occurred. [C24, 27, 31, 35,§9047.]

9048 Limitation of action. No action on any loss shall be begun until the date when such loss becomes due in accordance with the articles of incorporation or bylaws of such association and in no event sooner than forty days after such proof has been given to the association and no action can be started after one year from the date such cause of action accrues. [C24, 27, 31, 35,§9048.]

Similar provision, §8986

9049 Presumption as to value. In any action brought in any court in this state on any policy of insurance for the loss of any building so insured, the amount stated in the policy shall be received as prima facie evidence of the insurable value of the building at the date of the policy. [C24, 27, 31, 35,§9049.]

Similar provision, §8976
39GA, ch 120, §7, editorially divided

9050 Value of building—liability. The association issuing such policy may show the actual value of said property at date of policy, and any depreciation in the value thereof before the loss occurred; but the said association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount of insurance stated in the policy. [C24, 27, 31, 35,§9050.]

Similar provision, §8977

9051 Value of personal property—value of crops. In any action on a policy to recover loss or damage on personal property, the association shall not be liable in excess of the amount of damage or loss at the time the loss or damage occurs; provided that the value of growing crops may be stated in the policy or contract. [C24, 27, 31, 35,§9051.]

9051.1 Arbitration. No recovery on a policy or contract of insurance shall be defeated for failure of the insured to comply, after a loss occurs, with any arbitration or appraisement stipulation as to fixing the value of prop-

erty. No arbitration shall take place except substantially where the property was situated at the time of loss. Contracts of insurance to indemnify against loss by hail to growing crops which stipulate for arbitration shall provide that the decision of the majority of the arbitrators shall be final only as to the arbitration. [C31, 35,§9051-c1.]

Similar provision, §8982

9052 Reinsurance — quo warranto. The commissioner of insurance may address inquiries to any association in relation to its doings and condition and any association so addressed shall promptly reply thereto in writing. If the commissioner of insurance is then satisfied that the association has failed to comply with any provisions of this law, or is exceeding its powers, or is not carrying out its contracts in good faith; or is transacting business fraudulently or soliciting insurance in territories where it is not legally admitted to do business, or is in such condition as to render the further transaction of business by it hazardous to the public or its policyholders, the business under his supervision and with the consent of the association may be reinsured in some mutual association, or he may present the facts relating thereto to the attorney general and if the circumstances warrant he may commence an action in quo warranto in a court of competent jurisdiction. [C97, §1766; S13,§1759-g; C24, 27, 31, 35,§9052.]

Referred to in §9059
39GA, ch 120, §8, editorially divided

9053 Decree — receivership. Such court shall thereupon notify the officers of such association of a hearing, and unless it shall then appear that some special and good reason exists why such association should not be closed, said association shall be enjoined from carrying on any further business, and some person shall be appointed receiver of such association and shall proceed at once to take possession of the books, papers, moneys, and other assets of the association and shall forthwith, under the direction of the court proceed to close the affairs of the association and to distribute its funds to those entitled thereto, or he may make an assessment pro rata on the membership liable to an assessment to pay the legitimate debts of the association. [C97,§1766; S13,§1759-g; C24, 27, 31, 35,§9053.]

Referred to in §§9059, 9080

9054 Cancellation by association — notice. Any policy of insurance issued by any association operating under the provisions of this chapter may be canceled by the association giving five days written notice thereof to the insured. [S13,§1759-m; C24, 27, 31, 35,§9054.]

39GA, ch 120, §9, editorially divided

9055 Cancellation by insured — conditions. If the insured shall demand in writing or in person of the association the cancellation of policy, the association shall immediately advise him by letter to last known address, the amount, if any, due, as his pro rata share of losses and in addition actual expenses incurred on said policy. Upon surrender of his policy and payment of all sums due, his membership shall cease, provided that during the months of May, June, July, and August, hail insurance policies may be canceled only at the option of the officers of the association carrying the risk. On or before the first day of April in each calendar year a member of any mutual hail insurance association doing business in Iowa may cancel his membership and contract or policy of insurance on which at least one annual assessment has been paid and upon which at the time no assessment is past due in such association without being required to pay anything therefor; and it shall be considered that no liability for insurance risks or for expenses shall attach against such member in that particular year if he shall cancel his contract and membership on or before April 1. [S13,§1759-m; C24, 27, 31, 35,§9055.]

9056 Unearned assessments—return. Upon the cancellation of any policy of insurance issued under the provisions of this chapter all obligations to the association having been paid, the unearned portion of any advance assessment paid, other than the emergency fund, shall be returned to the insured upon the surrender of his policy, the association retaining a pro rata share for losses and in addition actual expenses incurred on said policy. [S13,§1759-m; C24, 27, 31, 35,§9056.]

9057 When pro rata assessment retained. When the policy is canceled by the association by giving notice thereof it shall retain only the pro rata assessment. [S13,§1759-m; C24, 27, 31, 35,§9057.]

9058 Bonds of officers. Any state mutual assessment association contemplated by this chapter, before being authorized to do business in this state, shall require its secretary and treasurer to give a fidelity bond, personal or surety, to the association in such sums as the directors shall deem sufficient, no less, however, than ten thousand dollars for each office, which bond after being approved by the president of the association shall be deposited with the commissioner of insurance. [C97,§1767; S13, §1759-n; C24, 27, 31, 35,§9058.]

39GA, ch 120, §10, editorially divided

9059 Additional security — noncompliance. Should the commissioner of insurance find the surety on said bonds, or the amount thereof, insufficient, he may require additional security, or an increase in the amount of the bond. If such additional security or increase be not furnished within thirty days after notice thereof, the commissioner of insurance shall refer the matter to the attorney general the same as under sections 9052 and 9053, and it shall be taken care of by him in accordance therewith. [C97,§1767; S13, §1759-n; C24, 27, 31, 35,§9059.]

9060 Annual tax. Every state mutual association doing business under this chapter shall on or before the first day of March, each year, pay to the treasurer of state a sum equivalent

to one percent of the gross receipts from premiums, assessments, fees, and promissory obligations for business done within the state, including all insurance upon property situated in the state after deducting the amount actually paid for losses on property located within this state, and the amount returned upon canceled policies and rejected applications covering property situated within the state, and the amount paid for reinsurance on property situated within the state, and dividends returned to policyholders on property situated within the state. [C24, 27, 31, 35,§9060.]

Referred to in §9062
39GA, ch 120, §12, editorially divided

9061 Examination — expense. The commissioner of insurance shall at least once in each biennial period cause the books of each state mutual association doing business under this chapter to be examined and shall furnish a report of such examination to the association so examined. The expense of such examination shall be paid by the association as provided for in section 8632. [C24, 27, 31, 35,§9061.]

Referred to in §9062

9062 Exemption of county mutuals. County mutual associations shall be exempt from the examination and the payment of tax provided for in sections 9060 and 9061. [C24, 27, 31, 35, §9062.]

9063 Moneys and credits. In assessing for taxation the moneys and credits of such mutual insurance corporations, the assessor shall ascertain the debts or liabilities, if any, of the corporation to its policyholders or other persons which liabilities shall be deducted as provided in section 6988. [C24, 27, 31, 35,§9063.]

Assessment of moneys and credits, §6985
39GA, ch 120, §13, editorially divided

9064 "Debt" defined. In ascertaining such corporate indebtedness, a debt shall be deemed to exist, on account of its liabilities on the policy certificates or contracts of insurance issued by it equal to the amount of surplus or other funds accumulated by such corporation for the purpose of fulfilling its policy contracts of insurance and which can be used for no other purpose. [C24, 27, 31, 35,§9064.]

9065 Annual fees. Such associations shall pay the same fees for annual reports and annual certificates of authority as are required to be paid by domestic companies organized and doing business under chapter 404, which certificates shall expire March 1 of the year following the date of issue. [C73,§1160; C97,§1764; S13, §1759-f; C24, 27, 31, 35,§9065.]

9066 Agents to be licensed. No person or corporation shall solicit any application for insurance for any association, other than county mutuals, in this state without having procured from the commissioner of insurance a license authorizing him to act as agent. Violation of this provision shall be punished by a fine not exceeding twenty-five dollars per day. [C24, 27, 31, 35,§9066.]

39GA, ch 120, §15, editorially divided

9067 License — fee. The commissioner of insurance shall upon the receipt of payment of fifty cents issue license to act as agent to any person for whom a license is requested by any association doing business under the provisions of this chapter. [C24, 27, 31, 35,§9067.]

9068 Cancellation of license. The commissioner of insurance may, for a just and reasonable cause, cancel the license of such agent after due notice and hearing. [C24, 27, 31, 35,§9068.]

CHAPTER 407

LIABILITY INSURANCE—CERTAIN PROFESSIONS

9069 Authorization.
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9069 Authorization. Any number of physicians, druggists, dentists, and graduate nurses, licensed to practice their profession in this state, may, by complying with the provisions of this chapter and without regard to other statutory provisions, enter into contracts with each other for the purpose of protecting themselves by insurance against loss by reason of actions at law on account of their alleged error, mistake, negligence, or carelessness in the treatment and care of patients, including the performance of surgical operations, or in the prescribing and dispensing of drugs and medicines, or for loss by reason of damages in other respects, and to reimburse any member in case of such loss. [C24, 27, 31, 35,§9069.]

Action on liability policy, ch 404.1
38GA, ch 286, §1, editorially divided

9070 Incorporation — powers. All corporations, organized for the purpose of transacting such insurance business under the provisions of this chapter, shall incorporate under the provisions of chapter 384, and be known as mutual corporations; and are hereby empowered to collect such assessments, or premium payments, provided for in their articles of incorporation or bylaws, as are required to pay losses and expenses incurred in the conduct of their business. Such

mutual insurance corporations may issue certificates of membership, or policies; and may provide that all assessments, or premium payments, payable thereunder, be made in cash, or on the installment, or assessment plan. [C24, 27, 31, 35, §9070.]

9071 Rep. by 46GA, ch 97,§5

9072 **Approval of articles.** The articles of such mutual insurance corporations shall be submitted to, and approved by, the attorney general and the commissioner of insurance before being filed with the secretary of state. [C24, 27, 31, 35, §9072.]

38GA, ch 286, §2, editorially divided

9073 **Approval of policy—certificate of authority.** No such mutual insurance corporation shall issue membership certificates, or policies, until its form of certificate, or policy, shall have been submitted to, and approved by, the commissioner of insurance and until it has secured from such commissioner of insurance a certificate authorizing it to transact such an insurance business. [C24, 27, 31, 35,§9073.]

9074 **Conditions.** No such certificate shall be issued by the commissioner of insurance until two hundred fifty applications have been received, representing, in the aggregate, one million dollars of insurance, and until the commissioner of insurance has satisfied himself that such mutual insurance corporation has bona fide applications representing the number of applicants and the amount of insurance herein required, and that there is in the possession of such mutual insurance corporation cash assets amounting to not less than ten thousand dollars. [C24, 27, 31, 35,§9074.]

9075 **Reports.** Such mutual insurance corporations doing business under the provisions of this chapter shall, annually, in the month of January, report to the commissioner of insurance, upon blanks furnished by him, the same facts, so far as applicable, as are required to be furnished by mutual insurance associations under the statutes of Iowa, which report shall be tabulated by the commissioner of insurance and published by him in the annual report on insurance. [C24, 27, 31, 35,§9075.]

Annual report, §8615

9076 **Reinsurance reserve.** Such mutual insurance corporations shall, annually, set aside and maintain as a reinsurance reserve, an amount equal to ten percent of the receipts from assessments, or premium payments, during the year until the total amount thus accumulated shall equal forty percent, but not to exceed fifty percent of the amount of the annual assessment, or premium payment, at the rate charged for such insurance on all policies in force. The reserve thus accumulated may be used for the payment of losses and expenses, and when so used shall be restored and maintained in like manner as originally accumulated. [C24, 27, 31, 35,§9076.]

9077 **Cancellation of policy.** Any certificate of membership, or policy, issued by such a mutual insurance corporation may be canceled by the corporation by giving five days written notice thereof to the insured; or such cancellation may be upon demand of the insured; and such cancellation, when so made, either by the corporation or by the insured, shall be upon a pro rata basis, and the cancellation of such certificate or policy shall release the member from all other future obligations to such corporation. [C24, 27, 31, 35,§9077.]

9078 **Fees.** Such a mutual insurance corporation shall pay the same fees for admission into the state, for annual reports, and for annual certificates of authority as are required to be paid by domestic mutual companies organized and doing business under chapter 404; such certificate shall expire March 1 of the year following the date of its issue. [C24, 27, 31, 35, §9078.]

38GA, ch 286, §6, editorially divided

9079 **Powers of commissioner.** The commissioner of insurance shall have and exercise the same control over such corporations as he now has over mutual assessment insurance associations organized and doing business under the provisions of chapter 406. [C24, 27, 31, 35, §9079.]

9080 **Liability to assessments.** The provisions as to maximum liability of members to assessments when assets are insufficient and to assessments when the corporation is insolvent, found in sections 9037, 9038, 9042, and 9053, shall apply to all mutual insurance corporations organized under the provisions of this chapter. [C24, 27, 31, 35,§9080.]

9081 **Foreign companies.** Any mutual insurance association organized under the laws of any other state, for the purpose of transacting the kind of business described in this chapter, and which has been in business not less than one year, and has on hand cash assets in an amount of not less than ten thousand dollars, and has not less than three hundred members, shall upon application, be admitted to do business in this state; and shall thereafter make all reports and be subject to taxation, examination, and supervision by the commissioner of insurance to the same extent and in the same manner as are domestic corporations organized under the provisions of this chapter. [C24, 27, 31, 35,§9081.]

9082 **Construction.** All laws, or parts of laws, in conflict herewith shall be so construed as not to include corporations regulated by this chapter. [C24, 27, 31, 35,§9082.]

CHAPTER 408

RECIPROCAL OR INTERINSURANCE CONTRACTS

Referred to in §§8625, 8943.07

9083 Authorization.
9084 Execution of contract.
9085 Office of attorney—foreign office.
9086 Preliminary declaration.
9087 Actions — venue — commissioner as process agent.
9088 Manner of service.
9089 Judgment—satisfaction.
9090 Reports—limitations on risks.
9091 Standard of solvency.
9092 Annual report—examination.
9093 Implied powers of corporations.
9094 Certificate of authority.
9095 Violations—exceptions.
9096 Refusal or revocation of certificate.
9097 Bonds.
9098 Additional security—refusal.
9099 Foreign attorney—bonds.
9100 Annual tax—fees.
9101 Form of policy—construction.
9102 Reinsurance.
9103 Laws applicable.

9083 Authorization. Individuals, partnerships, and corporations, including independent school districts and municipal corporations, of this state, hereby designated subscribers, are hereby authorized to exchange reciprocal or interinsurance contracts with each other, and with individuals, partnerships, and corporations of other states, territories, districts, and countries, providing insurance among themselves from any loss which may be insured against under the law, except life insurance. [C24, 27, 31, 35,§9083.]

9084 Execution of contract. Such contracts may be executed by an attorney, agent, or other representative herein designated attorney, duly authorized and acting for such subscribers under powers of attorney, and such attorney may be a corporation. [C24, 27, 31, 35,§9084.]

37GA, ch 180, §2, editorially divided

9085 Office of attorney—foreign office. The principal office of such attorney shall be maintained at such place as is designated by the subscribers in the power of attorney; provided that, where the principal office of such attorney is located in another state, the commissioner of insurance shall not issue a certificate of authority, or license, as provided in this chapter unless such attorney shall hold a license or certificate of authority from the insurance department of such other state. [C24, 27, 31, 35,§9085.]

9086 Preliminary declaration. Such subscribers so contracting among themselves, shall, through their attorney, file with the commissioner of insurance a declaration verified by the oath of such attorney, or, where such attorney is a corporation, by the oath of the duly authorized officers thereof, setting forth:

1. The name of the attorney and the name or designation under which such contracts are issued, which name or designation shall not be so similar to any name or designation adopted by any attorney or by any insurance organization in the United States prior to the adoption of such name or designation by the attorney, as to confuse or deceive.
2. The location of the principal office.
3. The kind or kinds of insurance to be effected.
4. A copy of each form of policy, contract, or agreement under or by which insurance is to be effected.
5. A copy of the form of power of attorney under which such insurance is to be effected.
6. That applications have been made for indemnity or insurance upon at least one hundred separate risks aggregating not less than one and one-half million dollars represented by executed contracts or bona fide applications to become concurrently effective; or, in case of employers liability or workmen's compensation insurance, covering a total pay roll of not less than two and one-half million dollars.
7. That there is in the possession of such attorney and available for the payment of losses, assets amounting to not less than fifty thousand dollars, and, in case of employers liability or workmen's compensation insurance, that such assets shall amount to not less than one hundred thousand dollars.
8. A financial statement under oath in form prescribed for the annual statement.
9. The instrument authorizing service of process as provided for in this chapter.
10. Certificate showing deposit of funds. [C24, 27, 31, 35,§9086.]

Referred to in §§9087, 9091, 9099

9087 Actions — venue — commissioner as process agent. Concurrently with the filing of the declaration provided for by the terms of section 9086, the attorney shall file with the commissioner of insurance, an instrument in writing executed by him for said subscribers, conditioned that, upon the issuance of certificate of authority provided for in this chapter, action may be brought in the county in which the property or person insured thereunder is located, and that service of process shall be had upon the commissioner of insurance or upon the attorney in fact in all suits in this state, whether arising out of such policies, contracts, agreements or otherwise, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or interinsurance contracts through such attorney. All suits of every kind and description brought against such reciprocal exchange or the subscribers thereto on account of their connection therewith, must be brought against the attorney in fact therefor or the exchange as such, and shall not be brought against any of the subscribers thereto individually on account of their connection with or membership in such reciprocal exchange, and must be brought

in the manner and method above provided. [C24, 27, 31, 35,§9087; 48GA, ch 230,§1.]

Similar provisions, §§8355, 8421, 8766, 8801, 8952, 9376
37GA, ch 180, §4, editorially divided

9088 **Manner of service.** Three copies of such process shall be served and the commissioner of insurance shall file one copy, forward one copy to said attorney, and return one copy with his admission of service. [C24, 27, 31, 35,§9088.]

9089 **Judgment—satisfaction.** A judgment rendered in any such case where service of process has been so had upon the commissioner of insurance, shall be valid and binding against any and all such subscribers as their interests appear and such judgment may be satisfied out of the funds in the possession of the attorney belonging to such subscribers. [C24, 27, 31, 35,§9089.]

9090 **Reports—limitations on risks.** There shall be filed with the commissioner of insurance by such attorney whenever the commissioner of insurance shall so require, a statement under oath of such attorney showing the maximum amount of indemnity upon a single risk, and, except as to workmen's compensation insurance, no subscriber shall assume on any single risk an amount greater than ten percent of the net worth of such subscriber. [C24, 27, 31, 35,§9090.]

9091 **Standard of solvency.** There shall at all times be maintained as assets a sum in cash, or in securities of the kind designated by the laws of the state where the principal office is located for the investment of funds of insurance companies, equal to one hundred percent of the net unearned premiums or deposits collected and credited to the accounts of subscribers, or assets equal to fifty percent of the net annual deposits collected and credited to the accounts of subscribers on policies having one year or less to run and pro rata on those for longer periods; in addition to which there shall be maintained in cash, or in such securities, assets sufficient to discharge all liabilities on all outstanding losses arising under policies issued, the same to be calculated in accordance with the laws of the state relating to similar reserves for companies insuring similar risks; provided that where the assets on hand available for the payment of losses other than determined losses, shall not equal two hundred thousand dollars, all liability for each determined loss or claim deferred for more than one year, shall be provided for by a special deposit in a trust company of the state in which the principal office is located, to be used in payment of compensation benefits for disability; such deposit to be a trust fund and applicable only to the purposes stated, or such liability may be reinsured in authorized companies with a surplus of at least two hundred thousand dollars. For the purpose of said reserves, net deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amount specifically provided in the subscribers' agreements for expenses. If at any time the assets so held in cash or such securities shall be less than required above, or less than one hundred thousand dollars as to employers liability or workmen's compensation insurance, or less than fifty thousand dollars as to other classes of insurance, the subscribers or their attorney for them shall make up the deficiency within thirty days after notice from the commissioner of insurance so to do. In computing the assets required by this section, the amount specified in subsection 7, section 9086, shall be included. [C24, 27, 31, 35, §9091.]

9092 **Annual report — examination.** Such attorney shall, within the time limited for filing the annual statement by insurance companies transacting the same kind of business, make a report, under oath, to the commissioner of insurance for each calendar year, showing the financial condition of affairs at the office where such contracts are issued and shall, at any and all times, furnish such additional information and reports as may be required; provided, however, that the attorney shall not be required to furnish the names and addresses of any subscribers except in case of an unpaid final judgment. The business affairs, records, and assets of any such organization shall be subject to examination by the commissioner of insurance at any reasonable time, and such examination shall be at the expense of the organization examined. [C24, 27, 31, 35,§9092.]

9093 **Implied powers of corporations.** Any corporation now or hereafter organized under the laws of this state shall, in addition to the rights, powers, and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as fully granted as the rights and powers expressly conferred. [C24, 27, 31, 35,§9093.]

9094 **Certificate of authority.** Upon compliance with the requirements of this chapter, the commissioner of insurance shall issue a certificate of authority or a license to the attorney, authorizing him to make such contracts of insurance, which license shall specify the kind or kinds of insurance and shall contain the name of the attorney, the location of the principal office and the name or designation under which such contracts of insurance are issued. Such license shall be renewed annually upon a showing that the standard of solvency required herein has been maintained, and that all fees and taxes required have been paid. [C24, 27, 31, 35,§9094.]

9095 **Violations—exceptions.** Any attorney who shall exchange any contracts of insurance of the kind and character specified in this chapter, or any attorney or representative of such attorney, who shall solicit or negotiate any applications for the same without the attorney having first complied with the foregoing provisions, shall

be deemed guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars. For the purpose of organization and upon issuance of permit by the commissioner of insurance, powers of attorney and applications for such contracts may be solicited without compliance with the provisions of this chapter, but no attorney, agent, or other person shall make any such contracts of indemnity until all of the provisions of this chapter shall have been complied with. [C24, 27, 31, 35,§9095.]

9096 Refusal or revocation of certificate. In addition to the foregoing penalties and where not otherwise provided, the penalty for failure or refusal to comply with any of the terms and provisions of this chapter, upon the part of the attorney, shall be the refusal, suspension, or revocation of certificate of authority or license by the commissioner of insurance and the public announcement of his act, after due notice and opportunity for hearing has been given such attorney so that he may appear and show cause why such action should not be taken. [C24, 27, 31, 35,§9096.]

9097 Bonds. Where the principal office of the attorney in fact is located in this state, he shall give bond to the subscribers in such sum as the advisory committee of the exchange shall deem sufficient, not less, however, than in the sum of ten thousand dollars, which bond, after being approved by the advisory committee and by the commissioner of insurance, shall be deposited with the commissioner of insurance as security for the faithful performance of the duties of the attorney in handling the funds of the subscribers. [C24, 27, 31, 35,§9097.]

37GA, ch 180, §12, editorially divided

9098 Additional security—refusal. Should the commissioner of insurance consider the surety on said bond, or the amount thereof, insufficient, he may require additional security or an increase in the amount of the bond. If such additional security or increase be not furnished within thirty days after notice to furnish the same, the commissioner of insurance may revoke the certificate of authority. [C24, 27, 31, 35, §9098.]

9099 Foreign attorney—bonds. Where the principal office of the attorney is located in another state, there shall be filed with the commissioner of insurance, in connection with the declaration, provided for by section 9086, certified copies of all such bonds given by such attorney as security for the funds of subscribers. [C24, 27, 31, 35,§9099.]

9100 Annual tax—fees. In lieu of all other taxes, licenses, charges, and fees whatsoever, such attorney shall pay annually on account of the transaction of such business in this state, the same fees as are paid by mutual companies transacting the same kind of business, and an annual tax of one percent, if a domestic reciprocal organization, and two and one-half percent, if a foreign reciprocal organization, calculated upon the gross premiums or deposits collected from subscribers in this state during the preceding calendar year, after deducting therefrom returns, or cancellations, considerations for reinsurances, and all amounts returned to subscribers or credited to their accounts as savings, and after deducting the amount actually paid for losses on property located within this state, or on claims arising within this state, and the amount returned upon canceled policies and rejected applications covering property situated or on business done within this state. [C24, 27, 31, 35,§9100.]

9101 Form of policy — construction. The attorney may insert in any form of policy prescribed by the laws of this state any provisions or conditions required by the plan of reciprocal or interinsurance, provided the same shall not be inconsistent with or in conflict with any law of this state. Such policy, in lieu of conforming to the language and form prescribed by such law, shall be held to conform thereto in substance if such policy includes a provision or indorsement reciting that the policy shall be construed as if in the language and form prescribed by such law. Any such policy or indorsement shall first be filed with and approved by the commissioner of insurance. [C24, 27, 31, 35,§9101.]

9102 Reinsurance. Such attorney shall not effect any reinsurance on risks in this state unless the insurance carrier granting such reinsurance shall be licensed in this state. [C24, 27, 31, 35,§9102.]

9103 Laws applicable. Except as provided in this chapter, the making of contracts as herein provided for and such other matters as are properly incident thereto, shall not be subject to the laws of this state relating to insurance, unless they are therein specifically mentioned. [C24, 27, 31, 35,§9103.]

CHAPTER 409

CONSOLIDATION AND REINSURANCE

9104 "Company" defined.
9105 Life companies — consolidation and reinsurance.
9106 Submission of plan.
9107 Procedure—notice.
9108 Commission to hear petition.
9109 Examination.
9110 Appearance by policyholders.
9111 Authorization.
9112 Unanimous decision required.
9113 Election called.
9114 Approval and filing with commissioner.
9115 Companies other than life—approval of plan.
9116 Consolidation prohibited.
9117 Expenses—how paid.
9118 Violations.

9104 "Company" defined. The word "company" or "companies" when used in this chapter shall mean any company or association organized under the provisions of chapters 398, 400, 401, 404, or 406, except county mutuals. [S13, §1821-m; C24, 27, 31, 35,§9104.]

Referred to in §§9105, 9116, 9118

9105 Life companies—consolidation and reinsurance. No company organized under the laws of this state to do the business of life insurance, either on the stock, mutual, stipulated premium, or assessment plan, shall consolidate with any other company or reinsure its risks, or any part thereof, with any other company, or assume or reinsure the whole or any part of the risks of any other company, except as hereinafter provided; provided that nothing contained in this chapter shall prevent any company, as defined in section 9104, from reinsuring a fractional part of any single risk. [S13,§1821-n; C24, 27, 31, 35,§9105.]

Referred to in §§9115, 9118

9106 Submission of plan. When any such company shall propose to consolidate or enter into any reinsurance contract with any other company, it shall present its plan to the commissioner of insurance, setting forth the terms of its proposed contract of consolidation or reinsurance, asking for the approval or any modification thereof, which the commission hereinafter provided for may approve. The company must also file a statement of its assets and if a legal reserve company, of the reserve value of its policies or contracts. [S13,§1821-o; C24, 27, 31, 35,§9106.]

Referred to in §9118

9107 Procedure — notice. The commission shall proceed to hear and determine such petition, without notice. If the commission shall deem it necessary in order to conserve the interests of the policyholders that notice shall be given, it shall require the company or companies to notify, by mail, all of the members or policyholders of the said company or companies of the pendency of such petition, and the time and place at which the same will be heard, the length of time of such notice to be determined by the commission. [S13,§1821-p; C24, 27, 31, 35,§9107.]

Referred to in §9118

9108 Commission to hear petition. For the purpose of hearing and determining such petition, a commission consisting of the governor, commissioner of insurance, and attorney general is hereby created. In the inability of the governor to act, the secretary of state may act in his stead. [S13,§1821-q; C24, 27, 31, 35,§9108.]

Referred to in §9118
S13, §1821-q, editorially divided

9109 Examination. The commission may make such examination into the affairs and condition of any company or companies as it may deem proper, and shall have power to summon and compel the attendance and testimony of witnesses, and the production of books and papers before said commission and may administer oaths. [S13,§1821-q; C24, 27, 31, 35,§9109.]

Referred to in §9118

9110 Appearance by policyholders. When notice shall have been given as above provided, any policyholder, or stockholder of said company or companies shall have the right to appear before said commission and be heard with reference to said petition. [S13,§1821-q; C24, 27, 31, 35,§9110.]

Referred to in §9118

9111 Authorization. Said commission, if satisfied that the interests of the policyholders of said company or companies are properly protected and no reasonable objection to said petition exists, may authorize the proposed consolidation or reinsurance or may direct such modification thereof as may seem to it best for the interests of the policyholders; and said commission may make such order and disposition of the assets of any such company thereafter remaining as shall be just and equitable. [S13, §1821-q; C24, 27, 31, 35,§9111.]

Referred to in §9118

9112 Unanimous decision required. Such consolidation or reinsurance shall only be approved by the consent of all of the members of said commission, and it shall be the duty of said commission to guard the interests of the policyholders of any such company or companies proposing consolidation or reinsurance. [S13, §1821-q; C24, 27, 31, 35,§9112.]

Referred to in §9118

9113 Election called. In case of companies organized on the assessment plan, the commission may require the plan of consolidation or reinsurance to be submitted to the membership of such company or companies to be voted upon. When submitted, it shall be at a meeting called for that purpose, thirty days notice being given, and a two-thirds vote of all the members present and voting shall be necessary to an approval of any plan of consolidation or reinsurance, and no

proxies shall, in any case, be voted. [S13, §1821-q; C24, 27, 31, 35,§9113.]

Referred to in §9118

9114 Approval and filing with commissioner. Any plan of consolidation or reinsurance submitted as herein contemplated, must first have been approved by the commission, and the result of said vote must be filed with the commissioner of insurance and be by him determined before any consolidation or reinsurance shall be effected. [S13,§1821-q; C24, 27, 31, 35,§9114.]

Referred to in §9118

9115 Companies other than life — approval of plan. When any company or companies not named in section 9105 desire to consolidate or reinsure, it shall only be necessary for such company or companies to submit the plan of consolidation or reinsurance with any other information that may be required, to the commissioner of insurance and the attorney general and have the same by them approved. [S13, §1821-r; C24, 27, 31, 35,§9115.]

Referred to in §9118

9116 Consolidation prohibited. No company or companies as defined by section 9104 shall consolidate or reinsure with any other company or companies not authorized to transact business in this state. [S13,§1821-s; C24, 27, 31, 35,§9116.]

Referred to in §9118

9117 Expenses—how paid. All expenses and costs incident to proceedings under the provisions of this chapter, shall be paid by the company or companies bringing the petition. [S13, §1821-t; C24, 27, 31, 35,§9117.]

9118 Violations. Any officer, director or stockholder of any company or companies, as defined in section 9104, violating or consenting to the violation of any of the provisions of sections 9105 to 9116, inclusive, shall be punished by a fine of not less than one thousand dollars, or by imprisonment in the county jail for not less than one year, or by both such fine and imprisonment in the discretion of the court. [S13,§1821-u; C24, 27, 31, 35,§9118.]

CHAPTER 410

LICENSING OF AGENTS

9119 License required.
9120 Term of license.
9121 Issuance and revocation.
9122 Fee.
9123 Violations.

9119 License required. No person shall directly or indirectly, act within this state as agent, or otherwise, in receiving or procuring applications for insurance, or in doing or transacting any kind of insurance business for any company or association, other than county mutuals or fraternal beneficiary associations, until he has procured from the commissioner of insurance a license authorizing him to act for such company or association as agent. [S13, §1821-k; C24, 27, 31, 35,§9119.]

Referred to in §9123
S13, §1821-k, editorially divided

9120 Term of license. Said license shall terminate at the end of the insurance year for which such company or association is authorized to transact business. [S13,§1821-k; C24, 27, 31, 35,§9120.]

9121 Issuance and revocation. The commissioner may, for good cause, decline to issue such license or may, for like cause, revoke the same. [S13,§1821-k; C24, 27, 31, 35,§9121.]

9122 Fee. The fee charged for such agent's license shall be, for domestic companies, fifty cents, and for companies located outside the state, two dollars. [S13,§1821-k; C24, 27, 31, 35, §9122.]

9123 Violations. Any person acting as agent or otherwise representing any insurance company or association, in violation of the provisions of section 9119, shall be liable to a fine of twenty-five dollars for each day he shall so act. [S13,§1821-l; C24, 27, 31, 35,§9123.]

CHAPTER 411

ELECTIONS AND PROPORTIONATE REPRESENTATION

9124 Proxies authorized.
9125 Conditions—revocation.
9126 Filing proxy.
9127 Solicitation by agents—use of funds.
9128 Proportionate representation.
9129 Amendment of articles.

9124 Proxies authorized. Any insurance company or association organized under the laws of this state, may provide in its articles of incorporation, that its members or stockholders may vote by proxies, voluntarily given, upon all matters of business coming before the stated or called meetings of the stockholders or members, including the election of directors. [S13,§1821-x; C24, 27, 31, 35,§9124.]

Referred to in §9127
S13, §1821-x, editorially divided

9125 Conditions — revocation. No proxy shall be valid unless signed and executed within two months prior to such meeting or election for

which said proxy was given, and such proxy shall be limited to thirty days subsequent to the date of such meeting or election, and may be revoked at any time by the policyholder or stockholder who executed the said proxy. [S13, §1821-x; C24, 27, 31, 35,§9125.]

Referred to in §9127

9126 Filing proxy. All proxies shall be filed with the company at least one day prior to an election at which they are to be used. [S13, §1821-x; C24, 27, 31, 35,§9126.]

Referred to in §9127

9127 Solicitation by agents — use of funds. Soliciting of proxies by an agent of the company either for personal use, or for the use of officers of the company or association, or for any other persons, is forbidden. Nor shall any of the funds of a company or association be expended in procuring proxies. Any violation of this or sections 9124 to 9126, inclusive, shall be deemed a misdemeanor and punishable accordingly. [S13, §§1821-y,-z; C24, 27, 31, 35,§9127.]

Punishment, §12894

9128 Proportionate representation. The holder or holders, jointly or severally, of not less than one-fifth but less than a majority of the shares of the capital stock of corporations organized on the stock plan under the laws of this state for transacting the business of life or fire insurance, shall be entitled to nominate, to be elected, or appointed, as the case may be, directors or other persons performing the functions of directors by whom, according to the articles of incorporation of such corporations, its affairs are to be conducted. In the event such nomination shall be made, there shall be elected or appointed to the extent that the total number to be elected or appointed is divisible, such proportionate number from the persons so nominated as the shares of stock held by persons making such nominations bear to the whole number of shares issued; provided the holder or holders of the minority shares of stock shall only be entitled to one-fifth (disregarding fractions) of the total number of directors to be elected for each one-fifth of the entire capital stock of such corporation so held by them; and provided, further, that this section shall not be construed to prevent the holders of a majority of the stock of any such corporation from electing the majority of its directors. Vacancies occurring from time to time shall be filled so as to preserve and secure to such minority and majority stockholders proportionate representation as above provided. [S13,§1821-v; C24, 27, 31, 35,§9128.]

Referred to in §9129

9129 Amendment of articles. All such existing corporations shall by amendment to their articles of incorporation, approved by the commissioner of insurance, provide for the nomination, election, or appointment of the directors or other persons by whom its affairs are to be conducted, in conformity with the provisions of section 9128, and the articles of incorporation of all such corporations hereafter organized shall contain like provisions. [S13,§1821-w; C24, 27, 31, 35,§9129.]

TITLE XXI

BANKS

Referred to in §8876

CHAPTER 412

BANKING DEPARTMENT

Identification and use of publicly owned automobiles, etc., §18316.1 et seq

9130 Superintendent of banking—term.
9131 Appointment—qualifications.
9133 Vacancies.
9134 Removal of superintendent.
9135 Suspension of superintendent.
9136 Deputy superintendent—examiners—employees.
9137 Salaries.
9138 Bond of examiners—qualifications.
9139 Bond of deputy and assistants.
9140 Duties and powers.
9140.1 Approval of articles.
9141 Appeal.
9142 Time of appeal—decision.
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9144 Expenses.
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9146 When examiner disqualified.
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PRIVATE BANKS

9151 Use of banking terms prohibited.
9152 Violations.
9153 Exceptions.
9154 Construction.
9154.01 Application for supervision.
9154.02 Regulations.
9154.03 Administration—receivership.

9130 Superintendent of banking—term. The superintendent of banking shall have his office at the seat of government. His regular term of office shall be four years from the first day of July of the year of his appointment. [C24, 27, 31, 35,§9130.]

9131 Appointment—qualifications. The governor shall, within sixty days following the organization of the regular session of the general assembly in 1925, and each four years thereafter, appoint, with the approval of two-thirds of the members of the senate in executive session, a superintendent of banking. Such appointee shall be selected solely with regard to his qualification and fitness to discharge the duties of his office, and no person shall be appointed who has not had at least five years executive experience in a state or savings bank in the state. [C24, 27, 31, 35,§9131.]

Confirmation, §38.1

9132 Rep. by 42GA, ch 9

9133 Vacancies. Vacancies that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes. Prior to the expiration of said thirty days the governor shall transmit to the senate for its confirmation an appointment for the unexpired portion of the regular term. Vacancies occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session, and for the unexpired portion of the regular term. [C24, 27, 31, 35,§9133.]

9134 Removal of superintendent. The governor may, by and with the consent of a majority of the senate during a session of the general assembly, remove the superintendent of banking for malfeasance in office or for any cause that renders him ineligible to appointment, or incapable or unfit to discharge the duties of his office, and his removal, when so made, shall be final. [C24, 27, 31, 35,§9134.]

37GA, ch 40, §3, editorially divided

9135 Suspension of superintendent. When the general assembly is not in session the governor may suspend the superintendent of banking so disqualified, and shall appoint another to fill the vacancy thus created, subject, however, to the approval or disapproval of a majority of the senate when next in session; and if the senate shall concur therein he shall be removed from the office. But if the senate shall at the same session fail to concur or to act on the same, said suspension shall thereupon cease. [C24, 27, 31, 35,§9135.]

9136 Deputy superintendent — examiners — employees. The superintendent of banking subject to the approval of the state banking board may appoint examiners, to hold office for a term of two years, but not to exceed one examiner for each fifty banks, or major fraction thereof, under his supervision; and may also appoint a deputy superintendent of banking, who shall perform the duties attached to the office of the superintendent of banking during the absence or the inability of the superintendent, and as directed by him; and may also appoint such clerks, stenographers, and special assistants as he may need to discharge in a proper manner

the duties imposed upon him by law; but the total number, including the deputy superintendent, shall not exceed one for each one hundred banks and trust companies, or major fraction thereof, under his supervision.

Provided that whenever the proper conduct of the affairs of the office demands, he may, with the approval of the state banking board, appoint for a term not to exceed one year such additional bank examiners and employees as may be necessary, any provision of the law for said department to the contrary notwithstanding. Such additional examiners or employees shall be paid out of current or accumulated earnings of the banking department, their salaries to be not greater than those of other similar employees authorized by law. All such appointees shall be removable at the pleasure of said superintendent. [C24, 27, 31, 35,§9136.]

9137 Salaries. The superintendent, deputy superintendent of banking and all bank examiners shall receive a salary to be fixed by the state banking board, which salaries shall be commensurate with the work done. In no case shall the salary of anyone under the superintendent exceed the sum of thirty-eight hundred dollars per annum, except that the salaries of the deputy superintendent and of not more than three examiners may be increased by the state banking board in an amount in each instance not in excess of six hundred dollars in any one year upon the request of the superintendent of banking and a showing by him of the need of such action, but under this provision no salary shall exceed a maximum of forty-eight hundred dollars. [C24, 27, 31, 35,§9137.]

9138 Bond of examiners — qualifications. Each examiner shall give a corporate surety bond to the state, conditioned for the faithful discharge of his duties, for the sum of three thousand dollars, which shall be filed with said superintendent and approved by him. Said examiners shall have had at least three years experience in practical bank work or as bank examiners. [C24, 27, 31, 35,§9138.]

9139 Bond of deputy and assistants. The deputy superintendent and all such clerks, stenographers, special assistants, and other employees shall give bond to the state in such sum as shall be fixed by the executive council. [C24, 27, 31, 35,§9139.]

9140 Duties and powers. The superintendent of banking shall be the head of the banking department of Iowa and shall have general control, supervision, and direction of all banks and trust companies incorporated under the laws of Iowa, and shall be charged with the execution of the laws of this state relating to banks and banking. The organization and reorganization of state and savings banks and trust companies shall be subject to the approval of the superintendent of banking.

He shall have power to adopt and promulgate such rules and regulations as in his opinion will be necessary to properly and effectively carry out and enforce the provisions of this section. [C24, 27, 31, 35,§9140.]

43GA, ch 30, §13, editorially divided

9140.1 Approval of articles. Before any state or savings bank shall be permitted to incorporate under the laws of this state, it shall present its articles of incorporation to the superintendent of banking for approval. All amendments to such articles and the renewal articles of incorporation shall also be submitted to and approved by the superintendent of banking. [C31, 35,§9140-c1.]

Similar provision, §8373

9141 Appeal. Any person aggrieved by the action of the superintendent of banking in granting or refusing to grant a certificate of authority to engage in banking may appeal to the executive council of the state by filing with the secretary of the council a notice of appeal, in writing, and serving the same upon the superintendent of banking or some employee of the office. [C24, 27, 31, 35,§9141.]

9142 Time of appeal — decision. Such appeal shall be taken within ten days after the action of the superintendent of banking. When notified of such appeal the executive council shall fix a time and place for the hearing and its findings in the matter shall be final. [C24, 27, 31, 35,§9142.]

9142.1 Canceling charters. In the event that any state or savings bank, or trust company which has heretofore been granted a charter or may hereafter be granted a charter to transact business within the state fails to transact the business or perform the duties contemplated by such charter, the superintendent of banking may certify to the attorney general such facts and the attorney general may thereupon file a petition in the district court of the county in which any such institution is located, and upon the presentation of such petition to the district court an order shall issue setting the date of hearing and prescribing notice thereof, and upon completed service of said notice, hearing shall be had and the court may enter an order canceling such charter and make any further order necessary to terminate the affairs of said corporation. [C31, 35,§9142-c1.]

9143 Fees for examination. Every bank including every private bank subject to examination and regulation by the banking department and trust company shall pay to the superintendent of banking within ten days after the date of each examination a fee based on the assets of said bank or trust company as the date for the close of business for which such examination is made, as follows: At the rate of one dollar per one thousand dollars of assets on the first twenty-five thousand dollars of assets, and at the rate of three cents per one thousand dollars of assets on all assets over and above twenty-five thousand dollars of assets, provided that no examination shall be made for less than twenty dollars. [C97, §1876; SS15,§1875; C24, 27, 31, 35,§9143.]

9144 Expenses. The superintendent of banking and examiners shall be entitled to actual and necessary expenses incurred in the examination of banks and trust companies, and the actual and necessary expenses within the state of special assistants and other employees, who may be designated by the superintendent to aid in the official work of this department, shall be allowed. The superintendent of banking shall also be entitled to actual and necessary expenses incurred in attending the district or group meetings and state convention of the Iowa Bankers Association; the annual convention of the American Bankers Association, any meetings that may be called by the federal reserve bank of Chicago, and the annual session, if any, or any conference of state supervisors of banking or banking commissioners, that may be called by said state supervisors of banking, or banking commissioners, or their organization, if any, not to exceed five hundred dollars in any one year, as shall be approved by the state comptroller, and such expenses shall be paid by the treasurer of state on warrants drawn by the comptroller, but the total amount of expense and salaries shall not, in any one year, exceed the amount of fees collected from banks and trust companies. [C24, 27, 31, 35,§9144.]

9145 Payment. No payments of any kind shall be made by the treasurer of state to cover expenses and salaries of the banking department or any part thereof, unless there shall be on hand in the office of the treasurer of state sufficient funds, received as income from said department to pay the same, and such salaries and expenses shall be paid from such funds. The superintendent shall furnish to the comptroller from time to time a list of the salaries as fixed by him or as authorized by the executive council and all salaries shall be paid monthly by the treasurer of state on warrants drawn by the comptroller in conformity with such salary list so furnished. [C24, 27, 31, 35,§9145.]

9146 When examiner disqualified. No bank examiner shall be assigned by the superintendent of banking to examine a bank or trust company in a county in which he is interested in the business of a bank or trust company. [C97,§§1875, 1876; SS15,§1875; C24, 27, 31, 35,§9146.]

9146.1 Information confidential. The information received or obtained by any examination of any bank or trust company shall not be divulged or offered in evidence in any court in this state except in such actions as are brought by the superintendent of banking or under the criminal provision. [C31, 35,§9146-c1.]

9147 Records. All books, records, files, documents, reports, and securities, and all papers of every kind and character relating to the business of banking shall be delivered to and filed or deposited with the said superintendent of banking. [C24, 27, 31, 35,§9147.]

9148 Annual report. The superintendent of banking shall, at the time provided by law, make an annual report as to the condition of every bank from which reports have been received, and may embrace in said report such observations and recommendations as he may deem of value. [C97,§1881; C24, 27, 31, 35, §9148.]

Time of filing report, §251

9149 Accounting. All fees and charges of every character whatsoever which are required by law to be paid by banks and trust companies shall be payable to the superintendent of banking, whose duty it shall be to account for and pay over the same to the treasurer of state at the time and in the manner as now provided for by law. [C24, 27, 31, 35,§9149.]

Accounting, §143

9150 Cost bill—penalty. Upon the completion of each examination the bank examiner in charge of said examination shall render a bill for such fee, in triplicate, and shall deliver one copy thereof to the bank, and shall forward one copy to the treasurer of state, and one copy to the superintendent of banking at his office in Des Moines. Failure to place the amount of said fee in the hands of the superintendent of banking within ten days, as hereinbefore provided, shall subject the bank to an additional fee equal to five percent of the amount of such fee for each day same shall be delinquent. The superintendent shall account for and pay over said fees to the treasurer of state at the time and in the manner as now provided for by law. [C97,§§1875, 1876; SS15,§1875; C24, 27, 31, 35,§9150.]

Referred to in §9230
Accounting, §143

PRIVATE BANKS

9151 Use of banking terms prohibited. It shall be unlawful for any individual, partnership, or unincorporated association, or corporation, other than national banking associations, not subject to the supervision or examination of the banking department, to make use of any office sign bearing thereon the word "bank", "banking", "banker", or any derivative, plural or compound, of the word "banking", or word or words in a foreign language having the same or similar meaning, or to make use of any exterior or interior sign bearing thereon such word or words whatsoever to indicate to the general public, or to any individual, that such place or office is the place or office of a bank, nor shall such person or persons, partnership, unincorporated association, or corporation, make any use of or circulate any letterheads, billheads, bank notes, bank receipts, certificates, circulars, or any written or printed, or partly written, or partly printed, papers whatever having thereon any other word or words indicating that such business is the business of a bank. [C24, 27, 31, 35,§9151.]

Referred to in §§9152, 9153, 9154, 9154.01
38GA, ch 236, §2, editorially divided

9152 Violations. Any person or persons violating any of the provisions of section 9151, either individually or as an interested party in any such copartnership or corporation, shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not less than three hun-

dred dollars nor more than one thousand dollars, or be imprisoned in the county jail not less than sixty days nor more than one year, or be punished by both such fine and imprisonment. [C24, 27, 31, 35,§9152.]

Referred to in §§9153, 9154, 9154.01

9153 Exceptions. Nothing in sections 9151 and 9152 shall be construed as affecting or in any wise interfering with any private bank or private banker that was engaged in lawful business previous to April 19, 1919. [C24, 27, 31, 35, §9153.]

Referred to in §§9154, 9154.01

9154 Construction. If any part of sections 9151 to 9153, inclusive, shall be declared unconstitutional, it shall not affect any other part of said sections. [C24, 27, 31, 35,§9154.]

Referred to in §9154.01

9154.01 Application for supervision. Any person, firm, association, business, or trust company doing business as a private bank in this state as permitted under the sections 9151 to 9154, inclusive, may request of the superintendent of banks that such bank be subjected to examination and regulation under the laws of this state and under the regulations that may be prescribed by the superintendent of banks. [C35, §9154-f1.]

Referred to in §§9154.02, 9154.03

9154.02 Regulations. The superintendent of banks upon receiving a request as provided in section 9154.01, shall make such regulations as to examination and regulation of private banks as will show the condition of such banks conforming generally to the regulations governing savings banks, state banks and trust companies and to insure that the affairs of such banks will be conducted in such manner as will best protect the rights of the parties dealing therewith and of such banks. [C35,§9154-f2.]

9154.03 Administration—receivership. From and after the receipt of such request by the superintendent of banks as in section 9154.01 provided, the bank making such application shall be subject to such examination and regulation as may be provided in the regulations made by the superintendent of banks and the superintendent of banks shall have power to take possession of any such bank and of its assets and administer the affairs thereof as nearly as may be and in the same manner as he administers the affairs of savings banks, state banks and trust companies and in the event of a receiver being appointed for any such bank, the superintendent of banks shall be the receiver thereof. [C35,§9154-f3.]

CHAPTER 412.1

STATE BANKING BOARD

9154.04 Board created—membership.
9154.05 Appointment—vacancies.
9154.06 Tenure.
9154.07 Compensation and expense.
9154.08 Source of payment.
9154.09 Record—audit—payment.
9154.10 Meetings.
9154.11 Rights and duties.

9154.04 Board created—membership. There is hereby created a board to be called the state banking board, composed of five members of which the superintendent of banking shall be ex officio a member and chairman, and four members who shall be chosen from various sections of the state, so far as it is geographically practical to do so. [C27, 31, 35,§9154-a1.]

41GA, ch 178, §1, editorially divided

9154.05 Appointment — vacancies. Said board shall be appointed by the governor. In case of any vacancy in said board the governor shall appoint a new member to fill such vacancy for the unexpired term. [C27, 31, 35,§9154-a2.]

9154.06 Tenure. The term of office of each member thereof shall be contemporaneous with the term of office of the superintendent, and each member shall hold his office for such term and until his successor shall have been appointed and qualified. [C27, 31, 35,§9154-a3.]

9154.07 Compensation and expense. The members of said board, other than the superintendent of banking, shall receive no salary, but shall be allowed and paid the sum of ten dollars per diem each, for the time actually engaged in performing their duties as members of such board together with all the expenses necessarily incurred and paid out by them in connection therewith. [C27, 31, 35,§9154-a4.]

9154.08 Source of payment. Such compensation and expenses shall be paid from the current and accumulated earnings of the banking department. [C27, 31, 35,§9154-a5.]

9154.09 Record—audit—payment. The superintendent of banking shall keep a permanent record in his office containing an itemized statement of the per diem and all expenses incurred by each member of said board, and shall approve all expense accounts before they are submitted to the state comptroller for payment, and thereupon vouchers shall be allowed and paid out of the state treasury as provided by law. [C27, 31, 35,§9154-a6.]

9154.10 Meetings. The state banking board shall meet regularly at the office of the superintendent of banking once each month on such date as the board may appoint, and shall meet at such other times as the board may deem necessary, or when called by the chairman of the board, or any two members thereof. [C27, 31, 35,§9154-a7.]

9154.11 Rights and duties. The members of said board shall have free access to all the records in the office of the superintendent of banking. Said board shall act in connection with the superintendent in an advisory capacity concerning all matters pertaining to the conduct of the banking department and the administration of the Iowa banking laws. [C27, 31, 35,§9154-a8.]

Omnibus repeal, §9154-a9, code 1935; 41GA, ch 178, §4

CHAPTER 413

SAVINGS BANKS

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9155 Organization. Corporations designated savings banks may be formed by not less than five persons of lawful age, a majority of whom shall be citizens of the state, and must be organized as provided in this chapter. [C97,§1840; C24, 27, 31, 35,§9155.]

Referred to in §9304
Renewal, §8371 et seq.

9156 Banking powers. Savings banks may receive on deposit the savings and funds of others, preserve and invest the same, pay interest or dividends thereon, and transact the usual business of such institutions, but shall not have power to issue bank notes, bills, or other evidences of debt for circulation as money. [C97, §1841; C24, 27, 31, 35,§9156.]

9157 Articles of incorporation. The articles of incorporation of a savings bank shall be signed and acknowledged by the corporators before some officer authorized to take acknowledgment of deeds, and give:

1. The corporate name,
2. The object for which it is formed,
3. The amount of capital,
4. The time of its existence, which shall not exceed fifty years,
5. The number of its directors,
6. The name and post-office address of each person or officer who shall manage its affairs until the first election, and
7. The name of the city, town, or village, and the county, in which the principal place of business is to be located. [C97,§1842; S13,§1842; C24, 27, 31, 35,§9157.]

Referred to in §9304
S13, §1842, editorially divided

9158 Record required. Such articles shall be filed and recorded in the office of the recorder of deeds of the county of the principal place of business, and in the office of the secretary of state. [C97,§1842; S13,§1842; C24, 27, 31, 35, §9158.]

Referred to in §§9205, 9304

9159 Notice of incorporation. Notice of its incorporation shall be given by publication in some newspaper published in the county wherein the bank is located, once each week, for four consecutive weeks, which notice shall state, in substance, the matters required to be given in the articles of incorporation. [C97,§1842; S13, §1842; C24, 27, 31, 35,§9159.]

Referred to in §§9205, 9304

9160 Rep. by 43GA, ch 30,§4. See §9217.1

9161 Commencement of business — conditions. The corporation may commence business when its first directors or officers named in its recorded articles of incorporation shall have furnished the superintendent of banking proof, under oath, that the required capital has been paid in and is held in good faith by said bank, and he has satisfied himself of such fact, for which purpose he may make a personal examination, or cause it to be made, at the expense of such bank, and he is also satisfied that the preceding sections of this chapter have been complied with, and has issued a certificate to that effect, naming therein its first board of directors, notice of which certificate shall be given by the publication thereof once each week for four consecutive weeks in some newspaper printed in the

county where its articles are recorded, at the expense of such bank, and proof of such publication by the oath of the publisher or his foreman filed with said superintendent. [C97,§1843; S13,§1843; C24, 27, 31, 35,§9161.]

Referred to in §§8375, 9304

9162 Powers. The corporators and their successors shall be a body corporate with the right of succession for the period limited, and shall have power to:

1. Sue and be sued.
2. Have a corporate seal and alter it at pleasure.
3. Purchase, hold, sell, convey, and release from trust or mortgage such real and personal estate as provided for in this chapter.
4. Appoint such officers, agents, employees, and servants as the business of the corporation shall require, to define their powers, prescribe their duties, fix their compensation, and to require of them such security as may be proper for the performance of their duties.
5. Loan and invest the funds of the corporation, to receive deposits of money, to loan and invest the same as provided in this chapter, and to repay such deposits without interest, or with such interest as the bylaws or articles may provide.
6. Make bylaws for the management and regulation of the corporation, its property and affairs, prescribing the condition on which the deposits will be received and interest paid thereon, and the time and manner of dividing the profits, and for carrying on all business within its power. [C97,§1844; C24, 27, 31, 35,§9162.]

9163 Directors—citizenship. The business and property of such banks shall be managed by a board of directors of not less than five, all of whom shall be shareholders, and at least three-fourths of the directors must be citizens of the state. [C97,§1845; C24, 27, 31, 35,§9163.]

Referred to in §9304
C97, §1845, editorially divided

9164 Articles to designate number—changes. The articles of incorporation shall designate the maximum number of directors, and the stockholders by a majority of all of the votes of the stockholders of such bank may change at any annual meeting by resolution, the number of its directors, as said stockholders may decide, to any number not less than five nor more than the maximum designated in the articles of incorporation or certificate of authorization, provided that said resolution of the stockholders shall after being duly adopted as aforesaid be filed in the office of the superintendent of banking within thirty days after such adoption. [C24, 27, 31, 35,§9164.]

Referred to in §9304

9165 Amendment of articles. The maximum number of directors as fixed by the articles of incorporation may be changed in the manner prescribed by law for changing the said articles of incorporation. [C24, 27, 31, 35,§9165.]

Referred to in §9304

9166 Rep. by 43GA, ch 30,§9. See §9217.2

9167 Rep. by 43GA, ch 30,§12. See §9224

9168 First meeting — notice. The call for the first meeting of the directors or trustees shall be signed by one or more persons named in said superintendent's certificate, stating the time and place of meeting, and shall be delivered personally to each director or published at least ten days in some newspaper in the county wherein the principal place of business of the incorporation is located. [C97,§1845; C24, 27, 31, 35, §9168.]

Referred to in §9304

9169 Officers and employees — bonds. At their first meeting, and as often thereafter as the bylaws require, they shall elect from their number a president and one or more vice presidents for the ensuing year, and appoint a treasurer or cashier, and such other officers and employees as may be required, who shall hold their office during the pleasure of the board, and give such security for the faithful performance of their duties as may be required of them by the bylaws. [C97,§1845; C24, 27, 31, 35,§9169.]

Referred to in §9304

9170 Vacancies on board. All vacancies in the board of directors shall be filled at its next regular meeting after such vacancy shall arise from among the stockholders, and the person receiving a majority of the votes of the whole number of directors shall be duly elected to fill such vacancy. [C97,§1846; C24, 27, 31, 35,§9170.]

Referred to in §9304
C97, §1846, editorially divided

9171 First regular board — tenure. The directors to succeed those named in the certificate of the superintendent of banking shall be elected at the first annual meeting thereafter, at such time and place, in such manner and upon such notice as shall be provided by the bylaws, and shall hold office until their successors are elected and qualify, which shall be annually thereafter. [C97,§1846; C24, 27, 31, 35,§9171.]

Referred to in §9304

9172 Manner of elections. All such elections shall be by ballot, and the persons receiving the greater number of votes cast shall be directors. [C97,§1846; C24, 27, 31, 35,§9172.]

Referred to in §9304

9173 Postponement. If an election of directors shall not be held on the day designated, it may be held on any other day, after giving the notice required by the bylaws. [C97,§1846; C24, 27, 31, 35,§9173.]

Referred to in §9304

9174 Quorum. A majority of directors shall constitute a quorum for the transaction of business, but in no case shall a measure be declared carried unless receiving three affirmative votes. [C97,§1846; C24, 27, 31, 35,§9174.]

Referred to in §9304

9175 Voting of stock—stockholder disqualified. At all stockholders meetings, and all elections held thereat, each share of stock shall

be entitled to one vote. Any stockholder may vote upon his shares in person, or by proxy in writing. Shares belonging to an estate may in like manner be voted by the administrator thereof, and shares belonging to a corporation, association, or society may be voted by any person authorized by its board of directors to do so, but no stockholder shall be entitled to vote who owes the bank any past due indebtedness. [C97, §1847; C24, 27, 31, 35, §9175.]

Referred to in §9304
Similar provision, §8391

9176 Deposits. Any savings bank organized under this chapter may receive on deposit money equal to twenty times the aggregate amount of its paid-up capital and surplus, and no greater amount of deposits shall be received without a corresponding increase of the aggregate paid-up capital and surplus, which capital and surplus shall be a guaranty fund for the better security of depositors, and invested in safe and available securities. [C97,§1848; S13, §1848; C24, 27, 31, 35, §9176.]

Referred to in §9304
S13, §1848, editorially divided

9177 Payment. The deposits so received shall be paid to such depositor or his representative, when requested, with such interest and under such regulations as the board of directors shall, from time to time, prescribe, not inconsistent with the provisions of this chapter. [C97, §1848; S13,§1848; C24, 27, 31, 35, §9177.]

Referred to in §9304

9178 Regulations — posting. Said regulations shall be printed and conspicuously exposed in the business office of the bank, in some place accessible and visible to all; and no alteration which may at any time be made in such rules and regulations shall affect the rights of depositors acquired previously thereto in respect to deposits or interest thereon. [C97,§1848; S13,§1848; C24, 27, 31, 35, §9178.]

Referred to in §9304

9179 Notice of withdrawal. Savings banks may require sixty days written notice of the withdrawal of savings deposits, but when there are sufficient funds on hand the officers thereof may, in their discretion, waive this requirement. [C97,§1848; S13,§1848; C24, 27, 31, 35, §9179.]

Referred to in §9304

9180 Closing of accounts. They may close any account, upon such written notice as may be provided for in the bylaws, directing a depositor to withdraw his deposits, after which it shall cease to draw interest. [C97,§1848; S13,§1848; C24, 27, 31, 35, §9180.]

Referred to in §9304

9181 Demand certificates. Nothing in this chapter shall prevent such banks, in their discretion, issuing certificates of deposit payable upon demand. [C97,§1848; S13,§1848; C24, 27, 31, 35, §9181.]

Referred to in §9304

9182 Limitation as to interest. All accounts upon which no deposit or drafts shall be made for a period of ten years in succession shall be so far closed that neither the sum deposited, nor the interest that shall have accrued thereon, shall be entitled to any interest after the expiration of the ten years from the date of the last deposit or draft. This provision, however, shall not apply to endowments for children, to trust estates, nor to other cases where special provision is made therefor at the time of the deposit thereof. [C97,§1849; C24, 27, 31, 35, §9182.]

Referred to in §9304

9183 Investment of funds. Each savings bank shall invest its funds or capital, all moneys deposited therein, and all its gains and profits, only as follows:

1. *Federal securities.* In bonds or interest-bearing notes or certificates of the United States.

2. *Federal farm loan bonds.* In farm loan bonds issued under the act of congress approved July 17, 1916, as amended, where the corporation issuing such bonds is loaning in Iowa; and in bonds of the Home Owners' Loan Corporation, as provided for in the act of congress, approved June 13, 1933 [12 USC,§§1461–1468], or in any amendments thereto and in class "A" stock of the Federal Deposit Insurance Corporation, as provided for in the act of congress, approved June 16, 1933 [12 USC,§221a et seq.], or in any amendments thereto.

3. *State securities.* In bonds or evidences of debt of this state, bearing interest.

4. *Municipal securities.* In bonds or warrants of any city, town, county, school district, or drainage district of this state, issued pursuant to the authority of law; but not exceeding twenty-five percent of the assets of the bank shall consist of such bonds or warrants.

5. *Real estate bonds and mortgages.* In notes or bonds secured by mortgage or deed of trust upon unincumbered real estate located in Iowa or upon unincumbered farm land in adjoining states, worth at least twice the amount loaned thereon; provided, however, that no such loan shall be made upon any real estate located west of the one-hundredth meridian line.

6. *Federal reserve and land bank stock.* An amount not exceeding ten percent of their capital stock and surplus in the capital stock of corporations chartered or incorporated under the provisions of section 25-a of the Federal Reserve Act, approved December 24, 1919 [12 USC,§§611–631], and a like amount in the capital stock of corporations organized under the laws of this state for the purpose of extending credit to those engaged in agriculture and to agricultural organizations, and an amount not in excess of fifteen percent of their capital stock and surplus in capital stock of any national mortgage association authorized under title III of the National Housing Act [12 USC,§§1716–1723] approved June 27, 1934, or any amendments thereto, subject, however, to the approval of the superintendent of banking; provided that said investments by savings banks shall in no event exceed in the aggregate twenty percent of the capital stock and surplus of said bank.

7. *Federal housing securities.* In bonds and notes secured by mortgage or trust deed insured

by the federal housing administrator, and in debentures issued by the federal housing administrator pursuant to title II of the National Housing Act, or amendments to said act, and in securities issued by national mortgage associations or similar credit institutions now or hereafter organized under title III of the National Housing Act, or amendments to said act; but not exceeding twenty-five percent of the assets of the bank or trust company shall consist of such investments. [C97,§1850; S13,§1850; C24, 27, 31, 35,§9183.]

Referred to in §9187
Also see §§12772, 12786.1
Investments in federal reserve and farm loan bank stock, §§9269, 9271
S13, §1850, editorially divided

9183.1 Inapplicable statutes. No law of this state requiring security upon which loans or investments may be made, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments pursuant to the foregoing paragraphs*. [C35,§9183-g1.]

*Refers to 46GA, ch 98, §§1-3

9183.2 Saving clause. Should any section of this act [46GA, ch 98] or part thereof be held unconstitutional or invalid, such decisions shall only affect the specific provisions which may be held invalid or unconstitutional and shall not affect the validity of the remaining portions of this act, provided that nothing in this act shall deny equal privileges to national banks located in this state insofar as such banks now or later may be authorized by federal law to carry on federal housing administration loan work. [C35, §9183-g2.]

9183.3 Investments by state banks and trust companies. The provisions governing the investment of funds or capital, all money deposited therein and all gains and profits of savings banks shall apply with equal force and effect to all state banks and trust companies. [C31, 35, §9183-c1.]

9184 Commercial paper. It may discount, purchase, sell, and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security. [C97,§1850; S13,§1850; C24, 27, 31, 35,§9184.]

Prohibited holdings and loans, §9221.2

9185 Expense attending loans. In all cases of loans upon real estate, all the expenses of searches, examination, and certificates of title, or the inspection of property, appraisals of value, and of drawing, perfecting, and recording papers, shall be paid by such borrowers. [C97, §1850; S13,§1850; C24, 27, 31, 35,§9185.]

9186 Insurance. If buildings are included in the valuation of real estate upon which a loan shall be made, they shall be insured by the mortgagor for at least two-thirds of their value, in some solvent company, and the loss, if any, under the policy of insurance shall be made payable to the bank or its assigns, as its interests may appear. When the mortgagor neglects to procure the insurance as above provided, the mortgagee may procure the same in the mortgagor's name for its benefit, and the premium so paid therefor shall be added to the mortgage debt. [C97,§1850; S13,§1850; C24, 27, 31, 35, §9186.]

9187 Surplus fund—investment. The directors of any savings bank may set apart from its earnings, over and above expenses, a surplus fund, to be maintained as such, separate and apart from earnings usually carried and designated as undivided profits, and which surplus fund shall not be drawn upon for the payment of expenses or dividends, except that it may be made use of as a stock dividend for increasing the capital of the bank. Such surplus shall be invested in the same manner as the capital of the bank, as provided in section 9183. [S13, §1850-a; C24, 27, 31, 35,§9187.]

Surplus created, §9262.1
S13, §1850-a, editorially divided

9188 Retransfer of fund. The directors may transfer said surplus fund, or any part of the same, back to the undivided profits account, and make use of the same, when so transferred, for the payment of expenses and dividends when the deposits of the bank shall be less than ten times the capital, or capital and remaining surplus, and not otherwise. [S13,§1850-a; C24, 27, 31, 35,§9188.]

9189 Rep. by 46GA, ch 99

9190 Real estate holdings. A savings bank may purchase, hold, and convey real estate only as follows:

1. The lot and building in which its business is carried on.

2. Such as shall have been purchased at sales upon foreclosure of mortgages owned by it, or upon judgments or decrees obtained or rendered for debts due it, or such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or such as it may obtain by redemption as junior mortgagee or judgment creditor, and which shall be sold by said bank within ten years after the title shall be vested in it. [C97,§1851; C24, 27, 31, 35, §9190.]

9191 Interest—dividends. No dividend shall be declared or paid to stockholders, save out of the undivided profits on hand after paying or setting apart sums sufficient for the payment of all expenses in operating the bank, and of interest to depositors according to the rate fixed therefor by the board of directors from time to time. The bank shall pay interest to the depositors, when due, upon presentation of deposit book or certificate. [C97,§1852; S13,§1852; C24, 27, 31, 35,§9191.]

Similar provisions, §§9263, 9299

9192 Shares—transfers. The capital of savings banks shall be divided into shares of one hundred dollars each or into shares of such less amount as may be provided in the articles of

incorporation, issued or acquired only upon full payment of the sums represented by them, transferable on the books of the corporation in such manner as shall be prescribed by law and in its bylaws. Stock owned by any corporation, association, or society may be transferred by any person authorized to do so by its board of directors or trustees. [C97,§1853; C24, 27, 31, 35,§9192.]

Referred to in §9304
Similar provisions, §§9209, 9261.1
Transfers generally, §8386 et seq.

9193 Deposits—to whom payable. Deposits made by a person as executor, administrator, or in any other official capacity, shall be payable to him as such official; if personally made by a minor, to him, although he have no guardian, or his guardian shall not have authorized such payment, and the check, receipt, or acquittance of the minor therefor shall be valid and binding. If a deposit be made in her own name by a woman, then or afterwards married, payment shall be made to her upon her check or receipt; if made by any corporation, association, or society, to any person authorized by its board of directors or trustees to receive the same. [C97,§1854; C24, 27, 31, 35,§9193.]

Referred to in §9304

9194 Increase of capital stock. The capital of savings banks may be increased by an affirmative vote of two-thirds of the shares thereof, at a stockholders meeting, called upon a notice signed by the officers of the bank and a majority of its directors, specifying the object of the meeting, its time and place, and the amount of the proposed increase, published once a week for four consecutive weeks before the time fixed, in some newspaper of the county where the bank is located. [C97,§1856; C24, 27, 31, 35,§9194.]

Referred to in §9304
C97, §1856, editorially divided

9195 Record of increase—certificate. If at such meeting the required vote is given, a certificate of the proceedings showing compliance with the foregoing provisions, the amount of capital paid in, the amount to which it is to be increased, and the manner thereof, shall be signed and verified by the affidavit of the chairman and secretary of the meeting, certified to by a majority of the board of directors, and filed and recorded in the office of the recorder of deeds of the proper county, and with the secretary of state, and a certificate shall thereupon be issued by him in the manner required in the original organization of the bank. When this is done, the stock shall be increased to the amount stated in the certificate. [C97,§1856; C24, 27, 31, 35,§9195.]

Referred to in §9304

9196 Reorganization as savings bank. Any bank existing under any law of the state may be reorganized under the provisions of this chapter by filing with the recorder of deeds of the county in which the business is to be conducted, articles of incorporation as required for the organization of savings banks, or such amendment of its articles as will comply with the provisions of this chapter. [C97,§1858; C24, 27, 31, 35,§9196.]

Referred to in §9304
Approval by superintendent, §§8373, 9140.1
Renewal, §8371 et seq.
C97, §1858, editorially divided

9197 Articles—execution—record — certificate. Such articles or amendment shall be signed by a majority of the directors of such bank, acknowledged before some officer authorized to take the acknowledgment of deeds, and recorded in the office of the proper recorder of deeds and secretary of state, as if the original articles, whereupon the superintendent of banking shall issue his certificate, as in case of the original organization of savings banks, which, when received and published as in such cases required, shall authorize it to transact business. [C97,§1858; C24, 27, 31, 35,§9197.]

Referred to in §9304

9198 Effect of reorganization. All the provisions relating to savings banks shall apply to banks thus reorganized, and all its securities, real estate, or property may be then transferred to such new organization. [C97,§1858; C24, 27, 31, 35,§9198.]

Referred to in §9304

9199 Pre-existing obligations. Such reorganization shall not discharge the original bank, its directors or stockholders from any liability to its depositors or any other person; and such new savings bank shall be liable for every claim or demand existing against such former organization. [C97,§1858; C24, 27, 31, 35,§9199.]

Referred to in §9304

9200 Fraudulent representations. Any bank, banking association, private banker, or person, not incorporated under the provisions of this chapter, or any officer, agent, servant, or employee thereof, who shall advertise, issue, or circulate any card or other paper, or exhibit any sign as a savings bank or savings institution, and any savings bank advertising in any way a greater amount of capital than it has actually paid in, shall forfeit and pay one hundred dollars for each day the offense is continued, to be recovered in a suit brought in the name of the state, by the county attorney, of and for the use of the school fund of the county where such bank is located, and, in addition thereto, shall be guilty of a misdemeanor for each day the same is done or continued. [C97, §1859; C24, 27, 31, 35,§9200.]

Punishment, §12894

9201 Rep. by 43GA, ch 30,§31. See §9270.1

CHAPTER 414

STATE BANKS

9202 "State banks" defined.
9203 Other use of name prohibited.
9204 Incorporation—articles—contents.
9205 Record and notice of incorporation.
9207 Commencement of business—certificate.
9208 Publication of certificate.
9209 Shares.
9210 Directors.
9211 Articles to state number — change by stockholders.
9212 Amendment of articles.

9202 "State banks" defined. Associations organized under the general incorporation laws of this state for transacting a banking business, buying or selling exchange, receiving deposits, discounting notes and bills, other than savings banks, shall be designated state banks, and shall have the word "state" incorporated in and made a part of the name of such corporation; and no such corporation shall be authorized to transact business unless the provisions of this code have been complied with. [C97,§1861; C24, 27, 31, 35, §9202.]

Exceptions, as to word "state", §9261
Renewal, §8371 et seq.

9203 Other use of name prohibited. No partnership, individual, or unincorporated association engaged in buying or selling exchange, receiving deposits, discounting notes and bills, or other banking business, shall incorporate or embrace the word "state" in its name, but this section shall not apply to associations organized under the laws of the United States. [C97, §1862; C24, 27, 31, 35,§9203.]

9204 Incorporation — articles — contents. State banks may be hereafter organized by not less than five persons of lawful age, who shall, prior to the commencement of business, sign and acknowledge articles of incorporation before some officer authorized to take acknowledgments of deeds. Such articles of incorporation shall state:

1. The object of the corporation and the name by which it shall be known.
2. The principal place of business.
3. The time of the commencement and termination of the corporation, which shall in no case exceed twenty years.
4. The amount of capital stock authorized, and the times and conditions in which it shall be paid in.
5. By what officers and persons the affairs of the corporation are to be conducted, and the times at which they will be elected.
6. The highest amount of indebtedness to which the corporation may at any time subject itself.
7. Whether private property, in addition to the liability fixed by law, shall be liable for corporate debts.
8. The name and post-office address of each officer or person who shall manage the affairs of the corporation until the first election.
9. Such other provisions, not contrary to law, which the corporation may adopt for the conduct of the business of the corporation. [C97, §1863; C24, 27, 31, 35,§9204.]

C97, §1863, editorially divided

9205 Record and notice of incorporation. Such articles shall be filed and recorded, and notice of incorporation given, as provided in sections 9158 and 9159 in reference to savings banks. [C97,§1863; C24, 27, 31, 35,§9205.]

9206 Rep. by 43GA, ch 30,§4. See §9217.1

9207 Commencement of business — certificate. No such association shall have the right to commence business until its officers or its stockholders shall have furnished to the superintendent of banking a sworn statement of the paid-up capital, and, when the said superintendent is satisfied as to that fact, he shall issue to such association a certificate authorizing it to commence business. [C97,§1864; S13,§1864; C24, 27, 31, 35,§9207.]

S13, §1864, editorially divided

9208 Publication of certificate. The association shall cause said certificate to be published in some newspaper printed in the city or town where the association is located, once each week, for at least four weeks, or, if no newspaper is published in such city or town, then in a newspaper published nearest thereto in the county. [C97,§1864; S13,§1864; C24, 27, 31, 35,§9208.]

9209 Shares. The capital of state banks organized shall be divided into shares of one hundred dollars each or into shares of such less amount as may be provided in the articles of incorporation, issued or acquired only upon full payment of the sum represented by them. [C97, §1865; C24, 27, 31, 35,§9209.]

Similar provisions, §§9192, 9261.1

9210 Directors. The business and property of each state bank shall be managed by a board of directors of not less than five, all of whom shall be shareholders. [C97,§1866; C24, 27, 31, 35,§9210.]

9211 Articles to state number—change by stockholders. The articles of incorporation shall designate the maximum number of directors, and the stockholders by a majority of all of the votes of the stockholders of such bank may change at any annual meeting by resolution, the number of its directors, as said stockholders may decide, to any number not less than five nor more than the maximum designated in the articles of incorporation or certificate of authorization, provided that said resolution of the stockholders shall after being duly adopted as aforesaid be filed in the office of the superintendent of banking within thirty days after such adoption. [C97,§1866; C24, 27, 31, 35, §9211.]

39GA, ch 70, §1, editorially divided

9212 Amendment of articles. The maximum number of directors as fixed by the articles of incorporation may be changed in the manner prescribed by law for changing the said articles of incorporation. [C97,§1866; C24, 27, 31, 35,§9212.]

Renewal, §8371 et seq.

9213 Rep. by 43GA, ch 30,§9. See §9217.2

9214, 9215 Rep. by 46GA, ch 99

9216 Rep. by 43GA, ch 30,§31. See §9270.1

9217 Rep. by 46GA, ch 99

CHAPTER 415

GENERAL PROVISIONS RELATING TO BANKS AND TRUST COMPANIES

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9217.1 Minimum capitalization of banks. The paid-up capital of state and savings banks and trust companies shall be:

1. In villages, towns and cities having a population of three thousand or less, not less than ten thousand dollars;
2. In cities and towns having a population from three thousand but not exceeding six thousand, not less than twenty-five thousand dollars;
3. In cities and towns having a population from six thousand but not exceeding fifteen thousand, not less than fifty thousand dollars;
4. In cities and towns having a population over fifteen thousand, not less than one hundred thousand dollars.

This section shall not apply to state and savings banks and trust companies already established.

The foregoing population requirements shall be based upon the latest federal census. [C97, §§1843, 1864; S13,§§1843, 1864; C24, 27,§§9160, 9206; C31, 35,§9217-c1.]

Preferred capital stock, §9283.42

9217.2 Directors — eligibility. No person shall be eligible as director of any savings or state bank or trust company, nor can that person qualify or serve as such, unless that person owns in his or her own right, shares of stock in such bank or trust company as follows:

1. In those having a capital of less than thirty thousand dollars, shares of stock the par value of which shall be two hundred dollars or more.
2. In those having a capital of thirty thousand dollars or more, shares of stock the par value of which shall be five hundred dollars or more.

The foregoing requirements shall apply to all existing banks and trust companies on January 1, 1930, provided that if the charters of said institutions shall be renewed prior to that date, said provisions shall apply on date of renewal of said charter. Said provision shall apply at once to charters of all new banks or new trust companies before they are permitted to commence business. [C97,§§1845, 1866; C24, 27, §§9166, 9213; C31, 35,§9217-c2.]

9217.3 Bonds of officers and employees. The officers and employees of any state bank, savings bank or trust company having the care, custody or control of any funds or securities for any such bank or trust company, shall give a good and sufficient bond in a company authorized to do business in this state indemnifying the said bank or trust company against all losses, which may be incurred by reason of any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction, misapplication, misappropriation or other criminal act committed by such officer or employee directly or through connivance with others, until all of his accounts with the said bank or trust company shall have been fully settled and satisfied. The amounts and sureties shall be subject to the approval of the board of directors of any such bank or trust company. The premium on said bonds shall be paid by the said bank or trust company. [C31, 35,§9217-c3.]

9218 Misnomer. The misnomer of any savings or state bank in any instrument shall not vitiate or impair the same, if such bank be sufficiently described to ascertain the intention of the parties. [C97,§1868; C24, 27, 31, 35,§9218.]

Referred to in §9304

9219 Compensation of officers. Officers of savings and state banks may receive for their services a reasonable compensation to be fixed from time to time in the bylaws, or by vote of the board of directors; provided, however, directors as such shall receive only such reasonable compensation as shall be fixed from year to year by the stockholders at their annual meeting and when approved by the superintendent of banking, and a director of such bank who is paid a salary as an active officer thereof shall not draw any added compensation for attendance upon board meetings. [C97,§1869; S13,§1869; C24, 27, 31, 35,§9219.]

Referred to in §§9221, 9304
S13, §1869, editorially divided

9220 Loans to officers or employees—use of funds. No officer or employee of the bank shall in any manner directly or indirectly use its funds or deposits or any part thereof, except for the regular business transactions of the bank, and no loans shall be made by it to any of them except upon express order of the board of directors, made in the absence of the applicant, duly entered in the records of the board proceedings and only upon the same security as required of others; but the board of directors may by resolution, duly entered in the records of the board proceedings, authorize loans to directors not holding any other office nor being an employee, not exceeding a maximum sum at any one time, which resolution shall be voted upon in the absence of such director.

No active executive officer of any state bank, savings bank, or trust company shall use or borrow for himself, directly or indirectly, any money or other property belonging to any state bank, savings bank or trust company of which

he is an officer, in excess of ten percent of the capital and surplus of such bank or trust company, nor shall the total amount loaned to all such active executive officers of any bank or trust company exceed twenty-five percent of the capital and surplus of such bank or trust company.

Where loans are made to such active executive officers they must first be approved by a majority of the board of directors, said approval to be in writing and the active executive officer to whom said loans are made, not voting. The form of said approval shall be as follows:

We, the undersigned, constituting a majority of the.....of the.....bank or trust company, do hereby approve a loan of $.....to.....; it appearing that said loan is not more than ten percent of the capital stock and surplus of.....bank or trust company; it further appearing that said loan will not make the aggregate of loans to said active executive officers more than twenty-five percent of the capital and surplus of the bank or trust company.

.....
.....
.....
.....

Dated this.....day of....., 19..

Provided, if any such active executive officer shall own a majority of the stock of any other corporation a loan to that corporation shall be considered for the purpose of this section as a loan to him. [C97,§1869; S13,§1869; C24, 27, 31, 35,§9220.]

Referred to in §§9221, 9304

9221 Violations. Any such officer, director or employee of the bank violating any of the provisions of sections 9219 and 9220 shall be guilty of embezzlement and shall be imprisoned in the penitentiary not exceeding ten years, or fined in a sum not less than the amount embezzled, or punished by both fine and imprisonment, but nothing in this and sections 9219 and 9220 shall prevent or defeat the right to recover upon any note or notes given in violation thereof. [C97,§1869; S13,§1869; C24, 27, 31, 35, §9221.]

Referred to in §9304

9221.1 Unsecured loans — conditions. The superintendent of banking may require, whenever in his judgment it would promote and strengthen the banking industry to do so, that unsecured loans in amounts exceeding five hundred dollars shall not be made except when the request therefor is accompanied by a satisfactory financial statement of such character and setting out such facts as he shall direct. Such financial statement shall be held in strict confidence by the bank to which it is given. Such financial statement shall be attached to the note and, upon request of the borrower, returned to the borrower with the canceled note when the note is paid. [C31, 35,§9221-c1.]

9221.2 Owning or loaning on its own stock —prior lien of bank. No state bank, savings bank, or trust company shall make any loan or discount on the security of the shares of its own capital stock, or be the purchaser or holder of any shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall be sold at public or private sale, or otherwise disposed of, within one year from the time of its purchase or acquisition unless the time is extended by the superintendent of banking.

State banks, savings banks, and trust companies shall have prior lien on their debtors' shares of stock for all obligations to the bank subject, however, to loans against the stock which the bank has acknowledged by written notice. [C97,§1850; S13,§1850; C24, 27,§9184; C31, 35,§9221-c2.]

9221.3 Loans—conditions — gratuities. No loan or investment shall be made from the funds of any state bank, savings bank or trust company directly or indirectly except by an active executive officer, and any active executive officer making any loan or investment from the funds of said bank or trust company under or from which or in connection with which he receives or is to receive any gift, gratuity or compensation whatsoever shall be guilty of a misdemeanor and shall be punished accordingly. [C31, 35,§9221-c3.]

Investments, §9183.3
Punishment, §12894

9222 Rep. by 43GA, ch 30,§19. See §9297

9222.1 Interest on time deposits. No banking institution or trust company under the jurisdiction of the banking department shall pay interest on savings accounts or certificates of deposit or on any other time deposit at a rate greater than four percent per annum, payable semiannually. No interest in any event shall be paid upon such time deposits for any period less than three months. Any savings accounts or time deposits bearing interest at a rate greater than four percent per annum shall be considered borrowed money and shall be so reported to the superintendent of banking. [C31, 35,§9222-c1.]

9222.2 Pledge of bank assets. The cashier or any other officer or employee shall have no power to pledge or hypothecate any notes, bonds or other obligations owned by said bank or trust company until such power and authority shall have been given, at least annually, to such cashier or other officer or employee pursuant to a resolution by the board of directors, a written record of which proceedings shall first have been made; and a certified copy of said resolution signed by the president and cashier with the corporate seal annexed, shall be conclusive evidence of the grant of such power.

All acts of pledging or hypothecation done by the cashier or other officer or employee of such bank or trust company without the authority from the board of directors shall be null and void, and any such cashier or other officer or employee violating the provisions of this section

shall be guilty of embezzlement and shall on conviction thereof be imprisoned in the penitentiary not to exceed twenty years. [C31, 35,§9222-c2.]

Similar provision, §9297

9222.3 Pledge to secure public funds. State and savings banks and trust companies when authorized by the superintendent of banks may pledge a portion of their assets to secure public funds and such other funds as may be authorized by the superintendent of banking. [C31, 35,§9222-c3.]

9223 Limit of liabilities. The total liabilities to any savings or state bank of any person, corporation, company, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed twenty percent of the actually paid-up capital and surplus of such bank; provided that they may loan not to exceed one-half of their capital stock to any person, corporation, company, or firm on notes or bonds secured by mortgage or deed of trust upon unincumbered farm land in this state, worth at least twice the amount loaned thereon; but the discount of bona fide bills of exchange drawn against actually existing value, and the discount of commercial or business paper actually owned by the person or persons, corporation, company, or firm negotiating the same, shall not be considered money so borrowed. Provided, further, that irrespective of the provisions of this or any other section of the code, state banks, savings banks and trust companies may make such loans and advances of credit and purchases of obligations representing loans and advances of credit as are eligible for insurance pursuant to title I, section 2 of the National Housing Act, or amendments to said act, and may obtain such insurance; and may make such loans secured by real property or leasehold as the federal housing administrator insures or makes a commitment to insure pursuant to title II of the National Housing Act, or amendments to said act, and may obtain such insurance; but such loans, advances of credits, purchases of obligations representing loans and advances of credit shall in no event, exceed in the aggregate, twenty-five percent of the assets of the bank or trust company.

Obligation of any person, copartnership, association or corporation in the form of notes or drafts secured by shipping documents, warehouse receipts or similar documents transferring or securing title covering readily marketable nonperishable staples when such property is fully covered by insurance shall be subject under this section to a limitation of twenty percent of such capital and surplus. Provided, that such obligations in amounts not to exceed forty percent of such capital and surplus may be permitted when the market value at any time is not less than one hundred twenty percent of the face amount of such obligation, provided further that if such obligations are secured by instruments securing title covering livestock or by a first lien on livestock with sufficient corn and rough feed to fatten said livestock during the term of the note and given for not more than the purchase price of said livestock, they shall be subject under this section to a limitation of forty percent of such capital and surplus. [C97,§1870; SS15,§1870; C24, 27, 31, 35, §9223.]

Referred to in §9304

9224 Oath of directors. Each director of all state banks, savings banks, and trust companies, before acting as such, shall take an oath that he will diligently, faithfully, and impartially perform the duties imposed upon him by law, that he will not knowingly violate or willingly permit to be violated any of its provisions, that he is the bona fide owner in his own right of the number of shares of stock required to be owned by him as provided in this chapter; that the same is not hypothecated nor in any manner pledged as security for any loan obtained or debt owing by him, which oath shall be signed by such director and certified by the officer before whom it is taken, and filed with, and preserved in the office of, the superintendent of banking. [C97, §1845; C24, 27,§9167; C31, 35,§9224.]

Referred to in §9304
43GA, ch 30, §12, editorially divided

9224.1 Meetings — examining committee. Such board of directors shall hold at least one meeting each calendar month. At its annual meeting the board shall appoint from its members an examining committee of not less than two, which shall examine the condition of the bank, at least every quarter, and report the same in writing duly signed to the board, which shall cause said report to be recorded in the directors' minute book of the bank. [C97,§1871; S13,§1871; C24, 27,§9224; C31, 35,§9224-c1.]

Referred to in §9304

9224.2 Removal of director. The superintendent of banking, with the approval of the state banking board, may remove any director from office for failure to attend such meetings except for good cause shown. [C31, 35,§9224-c2.]

Referred to in §9304

9225 Time of examination—report. One of these examinations shall be made during the month of June, and another one during the month of December, in each year, and these two examinations, besides being recorded in the minute book of the bank, shall be reported to the superintendent of banking on blanks to be supplied by him. [S13,§1871; C24, 27, 31, 35,§9225.]

Referred to in §9304
S13, §1871, editorially divided

9226 Failure to report. In case any bank refuses or neglects to so forward such report, said superintendent shall be authorized to have such examination made by one of his regular examiners, and the bank shall be charged with and required to pay the reasonable expense of such examination. [S13,§1871; C24, 27, 31, 35, §9226.]

Referred to in §9304

9227 Compensation. Members of such examining committee shall receive for their services a reasonable compensation, to be fixed by the board at its annual meeting, but in no case

shall such compensation exceed five dollars per day for each day's actual service to each member. [C97,§1871; S13,§1871; C24, 27, 31, 35, §9227.]

Referred to in §9304

9228 Statements. All savings and state banks shall make a full, clear and accurate statement of the condition of the bank, verified by the oath of the president, vice president, cashier, or assistant cashier, and attested by the signatures of at least three of the directors, or verified by the oath of two of its officers and attested by two of the directors, which statement shall contain:

1. The amount of capital actually paid in.
2. The amount of debts of every kind due to banks, bankers, or persons other than regular depositors.
3. The amount due depositors, including sight and time deposits.
4. The amount subject to be drawn at sight then remaining on deposit with solvent banks or bankers of the country, specifying each city and town and the amount deposited in each and belonging to such bank.
5. The amount of gold and silver coin and bullion belonging to such bank at the time of making such statement.
6. The amount then on hand of legal tender and national bank notes and subsidiary coin.
7. The amount of drafts and checks on other solvent banks, and other cash items not dishonored, then on hand and belonging to such bank.
8. The amount of bills, bonds, and other evidences of debt discounted or purchased by such bank, and then belonging to the same.
9. The value of real or personal property owned by such bank, specifying the amount of each.
10. The amount of undivided profits, if any, then on hand.
11. The total amount of liabilities to such association on the part of the directors thereof. [R60,§1636; C73,§1570; C97,§1872; C24, 27, 31, 35,§9228.]

Referred to in §§9231, 9304, 9305
C97, §1872, editorially divided

9229 Filing with superintendent. Said statement shall be transmitted to the superintendent of banking within ten days after the receipt of a request or requisition therefor from him, and by him filed in his office. [R60,§1636; C73,§1570; C97,§1872; C24, 27, 31, 35,§9229.]

Referred to in §§9230, 9304

9230 Failure to furnish information. Any bank or trust company subject to supervision by the superintendent of banking which fails to furnish him the call statement within the time required by section 9229, or fails to furnish him any report, or other information he is legally authorized to call for, within ten days of his call therefor, or within the time required by law, shall be subject to a penalty of ten dollars for each such day of delinquency, unless prior to such delinquency the superintendent has extended the time within which the same may be filed and same is filed within such extended time; such penalty to be paid to the superintendent of banking and collected and accounted for by him, pursuant to the provisions of section 9150. [C24, 27, 31, 35,§9230.]

Referred to in §9304

9231 Examinations—reports required. The superintendent of banking may, at any time he may see proper, make or cause to be made an examination of any savings or state bank, or he shall call upon it for a report of its condition upon any given day which has passed, as often as three times or more, at his discretion, each year, which report shall contain the information under section 9228. [R60,§1637; C73,§1571; C97, §1873; S13,§1873; C24, 27, 31, 35,§9231.]

Referred to in §9304
S13, §1873, editorially divided

9232 Publication of reports—expense. The said superintendent shall cause said report to be published, except as hereinafter provided, in one regular issue in some daily, semiweekly or weekly newspaper in the city or town where such bank is located, or if there be none in such city or town, then, in one regular issue of some daily, semiweekly, triweekly or weekly newspaper printed in said county or in a newspaper in an adjoining county circulating in the territory served by such bank, and the expense of such publication shall be paid by the bank. [R60,§1637; C73,§1571; C97,§1873; S13,§1873; C24, 27, 31, 35,§9232.]

Referred to in §9304

9233 Matters not published. The statement published in the newspaper shall not contain the name of the bank or banks in which the bank making the statement, has on deposit, funds subject to be drawn at sight, nor shall said statement show the amount of liabilities due such bank on the part of the directors thereof, nor contain an itemized statement of reserve. The reserve with respect to the total amount of cash on hand and due from banks may be shown in one sum. [S13,§1873; C24, 27, 31, 35,§9233.]

Referred to in §9304

9234 Special reports. The superintendent of banking shall also have power to call for special reports from savings and state banks whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of their condition, which reports shall be verified and attested in the same manner as required in this chapter. [C97,§1874; C24, 27, 31, 35,§9234.]

Referred to in §9304

9235 Illegal practices—insolvency. When it shall appear to the superintendent of banking that any savings or state bank has refused to pay its deposits in accordance with the terms on which such deposits were received, or has become insolvent, or that its capital has become impaired, or it has violated the law, or is conducting its business in an unsafe manner, he shall, by an order addressed to such bank, direct a discontinuance of such illegal or unsafe prac-

tices, and require conformity with the law. [C73,§1572; C97,§1877; C24, 27, 31, 35,§9235.]

Referred to in §9304

9236 Examination — oath — evidence. The said superintendent may appoint an examiner to investigate the affairs of any savings or state bank, who shall have power to administer oaths to any person whose testimony may be required on such examination, and to compel his attendance for the purpose thereof, by subpoena or attachment, in the manner now authorized in respect to witnesses in the courts of the state, and all books and papers which it may be found necessary to inspect on the examination so ordered shall be produced, and their production may be compelled in like manner. [C97,§1877; C24, 27, 31, 35,§9236.]

Referred to in §9304
Contempts, ch 536

9237 Expense of examination. All expenses thereof shall be paid by the banks examined, in such amount as the said superintendent shall certify to be just and reasonable, but costs taxed as such shall not exceed those allowed for like services in the district court. [C97,§1877; C24, 27, 31, 35,§9237.]

Referred to in §9304

9238 Liquidation—right of levy suspended. If any such bank shall fail or refuse to comply with the demands made by the said superintendent, or if the said superintendent shall become satisfied that any such bank is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may appoint an additional bank examiner to assist him in the duty of liquidation and distribution, whereupon the right of levy, or execution, or attachment against said bank or its assets shall be suspended. [C73,§1572; C97,§1877; C24, 27, 31, 35,§9238.]

Referred to in §9304
40GA, ch 189, §1, editorially divided

9239 Receivership — distribution. The superintendent of banking may apply to the district court for that district in which said bank is located, or a judge thereof, for the appointment of said superintendent as receiver for such bank, and its affairs shall thereafter be under the direction of the court, and the assets thereof after the payment of the expenses of liquidation and distribution shall be ratably distributed among the creditors thereof, giving preference in payment to depositors. [C73,§1572; C97, §1877; C24, 27, 31, 35,§9239.]

Referred to in §9304
Priority under general receivership, §12719

9239.1 Clearings, and purchasers of drafts preferred. Any draft drawn and issued by any bank or trust company prior to its failure or closing and given in payment of clearings and any money paid in the usual course of business to any bank, or trust company for the purchase of a draft for the bona fide transfer of funds shall be a preferred claim against the assets of the bank or trust company. [C31, 35,§9239-c1.]

Referred to in §9304

9239.2 Agreement as to reorganization, consolidation, or sale. If a majority of the creditors holding direct unsecured and unpreferred obligations of such bank in excess of ten dollars each, and totaling in the aggregate amount seventy-five percent of all direct unsecured and unpreferred obligations, shall agree in writing to a plan of disposition and distribution of assets through sale to another bank, reopening, reorganization, or consolidation of the bank, the district court in which such receivership is pending, upon application of the superintendent of banking, may order a disposition and distribution, sale to another bank, or reopening, conforming in general to the provisions of such plan. [C27, 31, 35,§9239-a1.]

Referred to in §§9239.7, 9283.09, 9304

9239.3 Agreement by public bodies. Any county, city, town, township, or school district, through its governing board, may so agree to the extent of its unsecured and unpreferred claims. The state may through the executive council so agree as to its unsecured and unpreferred claims.

Joining in such agreements shall not be a waiver of any preference or of the right to participate in the state sinking fund for public deposits, but after receipt of payment from such fund, or assignment of the deposit to the treasurer of state he shall represent the same and may in his discretion join in such agreements. [C27, 31, 35,§9239-a2.]

Referred to in §§9239.7, 9304

9239.4 Hearing — notice. Prior to ordering any such disposition or distribution of assets, the court or judge thereof shall fix the time and place of hearing upon said application and shall by order prescribe the kind and character of notice to be given to all creditors and stockholders. [C27, 31, 35,§9239-a3.]

Referred to in §§9239.7, 9304

9239.5 Court to determine. At such hearing the court shall determine the equities of all parties and also determine whether such disposition and distribution is for the best interest of the unsecured creditors. If the plan shall be approved, thereafter and until the assets are distributed, the court shall have power to make such requirements as in his sound discretion will conserve the assets and insure the distribution thereof as provided by law. [C27, 31, 35, §9239-a4.]

Referred to in §§9239.7, 9304

9239.6 Receivership concluded—report. If such disposition and distribution shall be ordered, compliance therewith shall be effected and the receivership concluded at the earliest possible date consistent with good business and at the least possible cost to the receivership. At the conclusion of said receivership, the receiver shall file his final report of his doings therein, so provided by law, together with such additional facts as the court may require. [C27, 31, 35,§9239-a5.]

Referred to in §§9239.7, 9304

9239.7 Secured creditors — contracts with third parties. Nothing contained in sections 9239.2 to 9239.6, inclusive, shall affect the rights of secured creditors in the security pledged, or to share in the capital stock assessment, nor affect the rights of depositors or creditors on bonds or other contracts with third parties. [C27, 31, 35,§9239-a6.]

Referred to in §9304

9240 Attorney for receiver. The attorney general of the state, or such assistants as may be appointed by the court, shall represent the superintendent of banks in all proceedings provided for hereunder. [C97,§1877; C24, 27, 31, 35,§9240.]

Referred to in §9304
See §9283.86

9241 General assignments. No general assignment for the benefit of creditors shall be of any validity. [C97,§1877; C24, 27, 31, 35,§9241.]

Referred to in §9304

9242 Superintendent as receiver. The superintendent of banking henceforth shall be the sole and only receiver or liquidating officer for state incorporated banks and trust companies and he shall serve without compensation other than his stated compensation as superintendent of banking, but he shall be allowed clerical and other expenses necessary in the conduct of the receivership. [C24, 27, 31, 35,§9242.]

Referred to in §9304

9243 Expenses of liquidation. All expenses of supervision and liquidation shall be fixed by the superintendent, subject to approval by the court or a judge thereof, and shall upon his certificate be paid out of the funds of such bank in his hands. [C24, 27, 31, 35,§9243.]

Referred to in §9304

9244 Converted assets — examination. The court having direction and control of any such receiver, or any judge thereof, may require, upon the motion of said receiver, any person suspected of having taken wrongful possession of any of the effects of a state or savings bank for which said receiver has been appointed, or of having had such effects under his control, or any officer or agent of any such suspected person, to appear and submit to an examination, under oath, touching such matters, and if, on such examination, it appears that the person examined has the wrongful possession of any such property, the court or judge may order the delivery thereof to the receiver. [C24, 27, 31, 35, §9244.]

Referred to in §9304

9245 Contempt — enforcement of orders. If, on being served with the order of the court or judge requiring him to do so, any person fails to appear in accordance therewith, or if, having appeared, he refuses to answer any questions which the court or judge thinks proper to be put to him in the course of such examination, or if he fails to comply with the order of the court or judge requiring him to deliver any such property or effects to the receiver, he may be committed to the jail of the county until he does. [C24, 27, 31, 35,§9245.]

Referred to in §9304

9246 to 9254, inc. Rep. by 47GA, ch 219

9255 List of officers, stockholders, and holdings. The president and cashier of every savings and state bank shall cause to be kept at all times a full and correct list of the names and residences of the officers, directors, examining committee, and of all the stockholders in the bank, and the number of shares held by each, in the office where its business is transacted. [C97,§1889; S13,§1889; C24, 27, 31, 35, §9255.]

Referred to in §§9260, 9304
S13, §1889, editorially divided

9256 Right to inspect list. Said list shall be subject to the inspection of all the stockholders and creditors of the bank during business hours of each day in which business may be legally transacted. [C97,§1889; S13,§1889; C24, 27, 31, 35,§9256.]

Referred to in §§9260, 9304

9257 Lists filed with superintendent. A copy of such list, verified by the oath of the president or cashier, shall be transmitted to the superintendent of banking within ten days after each annual meeting.

In addition to such list the superintendent of banking is authorized to require the president or cashier to furnish him with financial statements of the stockholders. [C97,§1889; S13, §1889; C24, 27, 31, 35,§9257.]

Referred to in §§9260, 9304

9258 Banking business — exceptions. No corporation shall engage in the banking business, receive deposits, and transact the business generally done by banks, unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits subject to the same limitations as are now or may hereafter be prescribed for the receiving of deposits by state banks and issue drafts on their depositories. [C97,§1889; S13,§1889; C24, 27, 31, 35,§9258.]

Referred to in §§9260, 9304

9258.1 Branch banking prohibited—exceptions. No banking institution shall open or maintain any branch bank. However, as may be authorized by and subject to the jurisdiction of the banking department any banking institution may establish an office for the sole and only purpose of receiving deposits and paying checks and performing such other clerical and routine duties not inconsistent with this section. No banking institution may establish any office beyond those counties contiguous to the county in which said banking institution is located nor in a city or town in which there is already an established banking institution. No office shall be continued at any place after a banking institution has actually commenced business at that place. Nothing in this section shall prohibit national banks the privileges of this section

whenever they may be so authorized by federal law. [C27, 31, 35,§9258-b1.]

Referred to in §§9260, 9304

9259 Loan and trust companies. All such companies and all corporations organized under the provisions of chapter 384, whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name the word "trust" is incorporated and forms a part, shall have a full-paid capital of not less than the amount of capital of savings banks, as provided in section 9160 and shall be subject to examination, regulation and control by the superintendent of banking, like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in sections 9251 to 9253, inclusive, for stockholders in savings and state banks. [C97, §1889; S13,§1889; C24, 27, 31, 35,§9259.]

Referred to in §§9260, 9304
Section 9160 repealed by 43GA, ch 30; see §9217.1
Sections 9251 to 9253, inc., repealed. See 47GA, ch 219

9260 Violations. Any corporation violating sections 9255 to 9259, inclusive, shall forfeit its charter at the suit of the attorney general, and said corporation, its officers, directors and agents, shall be punished by a fine of not less than five hundred dollars, or imprisonment of not less than two years in the penitentiary, or by both such fine and imprisonment, at the discretion of the court. [C97,§1889; S13,§1889; C24, 27, 31, 35,§9260.]

Referred to in §9304

9261 Reorganizations—loan and trust companies. Loan and trust companies organized under the general incorporation laws of the state, which were engaged in the banking business prior to January 1, 1886, and have continued therein since said date, may, by the proper additions to their articles of incorporation, become state banks within the provisions of this title, without incorporating the word "state" in the names of such corporations. [C97, §1889; S13,§1889; C24, 27, 31, 35,§9261.]

Referred to in §9304

9261.1 Shares. The capital of trust companies shall be divided into shares of one hundred dollars each or into shares of such less amount as may be provided in the articles of incorporation. [C31, 35,§9261-c1.]

Referred to in §9304
Similar provisions, §§9192, 9209

9262 Withdrawal of capital stock. No corporation organized under the banking laws of this state shall withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any part of its capital stock, except as hereinafter provided. [C24, 27, 31, 35,§9262.]

Referred to in §9304
37GA, ch 218, §1, editorially divided

9262.1 Surplus required. No banking institution organized under the laws of this state shall declare or pay any dividend, except dividends required to be paid on Class "A" preferred stock issued by such banking institutions to the Reconstruction Finance Corporation, or any other governmental agency, until it has first established a surplus of at least twenty percent of its capital. Whenever such banking institution has created a surplus of twenty percent, it shall credit to surplus from net earnings not less than ten percent thereof each year until a surplus of fifty percent of the capital has been created. Thereafter each such institution shall maintain a surplus equal to at least fifty percent of its capital, and any reduction of said surplus shall be restored in the same manner as originally created as provided herein. [C31, 35,§9262-c1.]

Referred to in §9304

9263 Unallowable dividends. If losses have at any time been sustained, equal to or exceeding undivided profits on hand, no dividends shall be made; and no dividends shall be made by any association formed under the banking laws of the state to an amount greater than the net profits on hand, less the losses and bad debts. [C24, 27, 31, 35,§9263.]

Referred to in §9304
Similar provisions, §§9191, 9299

9264 Reduction of capital stock. The capital stock may be reduced by the affirmative vote of the stockholders holding two-thirds of the shares of the capital stock, at a meeting of the stockholders to be called for this purpose in the manner and after the publication of notice as required in case of the increase of the capital stock. No reduction shall be to any amount less than the capital required to authorize the confirmation of such association. [C24, 27, 31, 35,§9264.]

Referred to in §9304

9265 Approval of reduction or cancellation. There shall be no reduction of capital or cancellation of stock, until said reduction or cancellation shall first be approved by the superintendent of banking. [C24, 27, 31, 35,§9265.]

Referred to in §9304

9266 Forged or raised checks—liability of bank. No bank shall be liable to a depositor for the payment by it of a forged or raised check unless within six months after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid is forged or raised. [S13,§1889-a; C24, 27, 31, 35,§9266.]

Referred to in §9304

9266.1 Stop-order on checks and drafts—requirements. No revocation, countermand, or stop-order, relating to the payment of any check or draft against an account of a depositor, in any bank or trust company, doing business in this state, shall be sufficient unless notice thereof in writing and accurately describing such check or draft shall be given the bank or trust company upon which drawn, previous to the presentment of such check or draft for payment, certification or acceptance to the bank or trust company upon which drawn, and no such notice shall remain in force more than sixty days from the giving of the same unless renewed, which renewal shall be in writing and shall be in effect for not more than thirty days from date of receipt by service upon such bank

or trust company but renewals thereof in writing may be made from time to time. [C31, 35, §9266-d1.]

Referred to in §9304
Effectiveness of notices antedating July 4, 1931, 44GA, ch 204

9267 Deposit in names of two persons. When a deposit shall hereafter be made in any bank or trust company in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or interest or dividend thereon, may be paid to either of said persons whether the other be living or not, and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank, banker, or trust company for any payment so made. [S13,§1889-b; C24, 27, 31, 35,§9267.]

Referred to in §9304
See §9501

9267.1 Safe-deposit boxes—liability. Any corporation, partnership or person engaged in the business of renting out lock boxes as safes, for storage or safekeeping of securities and valuables, in a vault in a building under the control of the corporation, partnership or person, so engaged within this state, may in any lease or contract governing or regulating the use of any such box to or by any customer or customers, limit its liability, as such lessor or bailee in any of the following respects:—

Limit its liability for any loss by negligence to such maximum amount as may be so stipulated, not less however than three hundred times the annual rental of such box or safe.

Stipulate they shall in no event be liable for loss of money, jewelry or such other articles as may be so excepted against in such lease or contract.

Stipulate that evidence tending to prove that securities, money, valuables or other articles were left in any such box, or safe upon the last entry by such customer or his authorized agent, and that the same or any part thereof were found missing upon subsequent entry, shall not be sufficient to raise a presumption that the same were lost by any negligence or wrongdoing for which such lessor is responsible, or put upon the lessor the burden of proof that such alleged loss was not the fault of the lessor. [C31, 35,§9267-c1.]

Referred to in §9304

9268 Securities—deposit with federal treasurer. All state and savings banks existing under and by virtue of the laws of this state are authorized and permitted to deposit with the treasurer of the United States such of the securities of the depositing bank as may be required to secure the postal savings funds deposited therein. [S13,§1889-c; C24, 27, 31, 35, §9268.]

Referred to in §9304

9269 Membership in federal reserve system. Any state bank, savings bank, or trust company, organized under the laws of this state is authorized and empowered, upon the passage of a resolution so to do by the board of directors thereof, to become a member of the federal reserve bank system and to invest their funds in the stock of the federal reserve bank in the federal reserve district in which said banks or trust companies are located, and to incur liability therefor. [SS15,§1889-o; C24, 27, 31, 35, §9269.]

Investment in federal reserve bank stock, §9183

9270 Reserve funds of members federal reserve. Any state bank, savings bank, or trust company incorporated under the laws of this state, which is or hereafter may become a member of the federal reserve bank system of the United States of America, shall be required to carry during the period of such membership only such cash reserve funds as may be required from time to time to be maintained by national bank members of said federal reserve bank system. [C24, 27, 31, 35,§9270.]

9270.1 Cash reserve fund required. State and savings banks and trust companies doing a commercial business and not located in a reserve city as now or hereafter defined under the provisions of the Federal Reserve Act, as amended, shall hold and maintain an actual net balance equal to not less than seven percent of the aggregate amount of its demand deposits and three percent of its time deposits.

State and savings banks and trust companies doing a commercial business and that may be located in reserve cities as now or hereafter defined by the Federal Reserve Act [38 Stat. L. 251] as amended shall hold and maintain an actual net balance equal to not less than ten percent of the aggregate amount of its demand deposits and three percent of its time deposits; provided that if located in the outlying districts of a reserve city or in territory added to such a city by the extension of its corporate charter it may upon the approval of the superintendent of banking and state banking board, hold and maintain reserve balances specified for those banks not located in reserve cities.

All savings banks, doing exclusive savings bank business shall at all times keep a cash fund equal to eight percent of their deposits.

Eighty-five percent of such reserve fund required under the provisions of this section for all banks and trust companies located either in or outside of reserve cities may be kept on deposit subject to call, with other banks organized under state or national laws. [C97,§§1860, 1867; SS15,§1860; C24, 27,§§9201, 9216; C31, 35, §9270-c1.]

9271 Investment in federal reserve and farm loan bank stock. State banks and trust companies are hereby authorized, subject to the approval of the superintendent of banking, to invest an amount not exceeding ten percent of their capital stock and surplus in the capital stock of corporations chartered or incorporated under the provisions of section 25-a of the Federal Reserve Act, approved December 24, 1919 [12 USC,§§611-631], and a like amount in the capital stock of corporations organized under the laws of this state for the purpose of extending

credit to those engaged in agriculture and to agricultural organizations; provided that the said investments by state banks and trust companies shall in no event exceed in the aggregate twenty percent of the capital stock and surplus of said state bank or trust company. [C24, 27, 31, 35,§9271.]

Similar provision, §9183, subsection 6

9272 Acceptance of drafts. Any state bank, savings bank, or trust company may accept drafts or bills of exchange drawn upon it having not more than six months sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods, provided shipping documents conveying or securing title are attached at the time of acceptance, or which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples. [C24, 27, 31, 35,§9272.]

38GA, ch 66, §1, editorially divided

9273 Acceptances limited. No state bank, savings bank, or trust company shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten percent of its paid-up and unimpaired capital stock and surplus, unless the bank is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance; nor shall the total of bills accepted for and money borrowed by any one person, company, firm, or corporation exceed in the aggregate more than twenty percent of its paid-up capital and surplus; and no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus. [C24, 27, 31, 35,§9273.]

9274 Superintendent to regulate acceptances. The superintendent of banking, under such general regulations as he may prescribe, which shall apply to all banks alike regardless of the amount of capital stock and surplus, may authorize any state bank, savings bank, or trust company to accept such bills to an amount not exceeding at any time in the aggregate one hundred percent of its paid-up and unimpaired capital stock and surplus; but the aggregate of acceptances growing out of domestic transactions shall in no event exceed fifty percent of such capital stock and surplus. [C24, 27, 31, 35, §9274.]

9275 Commission for organizing banks. No individual, partnership, or corporation shall, directly or indirectly, receive or contract to receive any commission or bonus of any kind for organizing any bank or trust company in this state, or for securing a subscription to the original capital stock or surplus of any bank or trust company in this state, or to any increase thereof; provided that this section shall not be construed as prohibiting an attorney at law from receiving reasonable compensation for legal service in connection therewith. [C24, 27, 31, 35,§9275.]

Referred to in §9276
38GA, ch 144, §1, editorially divided

9276 Violations. Each and every individual, partnership, or corporation violating the provisions of section 9275 shall forfeit to the state one hundred dollars, for each and every such violation, and in addition thereto forfeit double the amount of such commission, compensation, or bonus. [C24, 27, 31, 35,§9276.]

9277 Dissolution. State or savings banks may be dissolved prior to the period fixed in the certificate of incorporation, by the affirmative votes of the stockholders holding three-fourths of the capital, at a meeting of stockholders to be called for this purpose in the manner and after publication of notice as required in case of the increase of its capital. [C97,§1857; S13,§1857; C24, 27, 31, 35,§9277.]

Referred to in §9304
Dissolution generally, §8363
S13, §1857, editorially divided

9278 Receivership — forced sale. In case of dissolution of the bank or proceedings to close the same as authorized in this chapter, no receiver appointed thereunder shall be allowed to sell the assets thereof at forced sale, but he shall collect the same with all diligence, and make distribution of the proceeds from time to time to those entitled thereto. [C97,§1857; S13,§1857; C24, 27, 31, 35,§9278.]

Referred to in §§9278.1, 9304

9278.1 Selling assets — effectuating sales. After having made diligent effort to collect or realize on the assets as provided in section 9278 the receiver may sell the remaining assets, in whole or in part, including real estate or any interest therein, and may execute assignments, releases and satisfactions to effectuate such sales and a receiver may execute assignments, releases and satisfactions to effectuate sales and transfers made by his predecessors. [C31, 35,§9278-c1.]

C35,§9278-c1, editorially divided

9278.2 Terminated receivership—removing liens. The superintendent of banking may sell, release, satisfy or assign any remaining asset, mortgage or lien of a bank or trust company receivership which has already been terminated. [C31, 35,§9278-c1.]

9278.3 Method — court approval. All of the aforesaid sales, assignments, releases and satisfactions shall be made only on application approved by the court in which the receivership is or was pending after hearing thereon and on such notice as the court may have prescribed and after it is shown that the consideration for such sale, assignment, release or satisfaction has been paid. [C31, 35,§9278-c1.]

9279 Receiving deposits when insolvent. No bank, banking house, exchange broker, deposit office, firm, company, corporation, or person engaged in the banking, brokerage, ex-

change, or deposit business, shall, when insolvent, accept or receive on deposit, with or without interest, any money, bank bills or notes, United States treasury notes or currency, or other notes, bills, checks, or drafts, or renew any certificate of deposit. [C97,§1884; C24, 27, 31, 35,§9279.]

Referred to in §9304

9280 Violations. If any such bank, banking house, exchange broker, deposit office, firm, company, corporation, or person shall receive or accept on deposit any such deposits, as aforesaid, when insolvent, any owner, officer, director, cashier, manager, member, or person knowing of such insolvency, who shall knowingly with intent to defraud or receiving financial benefit therefrom receive or accept, be accessory, or permit, or connive at receiving or accepting on deposit therein, or thereby, any such deposits, or renew any certificate of deposit, as aforesaid, shall be guilty of a felony, and, upon conviction, shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment in the penitentiary for a term of not more than ten years, or by imprisonment in the county jail not more than one year, or by both fine and imprisonment. [C97,§1885; C24, 27, 31, 35,§9280.]

Referred to in §9304

9281 Official neglect of officers. Any officer or officers whose duty it is to make statement of the condition of their bank and make publication of same, who shall willfully neglect or refuse to perform such duties imposed upon them or either of them, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not less than three months nor more than three years in the penitentiary. [C97,§1886; C24, 27, 31, 35,§9281.]

Referred to in §9304

9282 False statements or entries—diversion of funds. Any owner, director, officer, agent, employee, or clerk of any bank who shall knowingly subscribe or make any false statements or false entries in the books thereof, or knowingly subscribe or exhibit false papers with intent to deceive any person authorized to examine its condition, or shall knowingly subscribe and make false reports, or shall knowingly divert the funds of the bank to other objects than those authorized by law, shall be punished by a fine not exceeding ten thousand dollars, and be imprisoned in the penitentiary not less than two nor more than five years, and be forever after barred from holding any office created by this chapter. [C97,§1887; C24, 27, 31, 35,§9282.]

Referred to in §9304

9283 Intentional fraud—unlawful dividends. Any owner, director, officer, agent, employee, or clerk of any bank who is guilty of intentional fraud, or of deceiving the public or individuals in relation to the means or liabilities of such bank, or who aids, assists, or consents to the payment of dividends which leave insufficient funds with which to meet the liabilities of the bank, shall be punished by a fine of not less than five hundred dollars, or imprisonment of not less than one year, or by both such fine and imprisonment, at the discretion of the court; and such act shall cause a forfeiture of all the privileges of said bank, and the court may proceed to close the same in the manner prescribed by law. [C97,§1888; C24, 27, 31, 35,§9283.]

Referred to in §9304

9283.01 Unauthorized sale of real estate or securities. It shall be unlawful for any officer, or employee of any bank or trust company to offer for sale or promote the sale of any stock, real estate, policies for life or fire insurance, bonds or other securities unless the sale of the same shall have been sanctioned and approved by the board of directors and said approval entered of record.

Any officer or employee violating the provisions of this section shall be guilty of a misdemeanor, and shall be punished accordingly. [C31, 35,§9283-c1.]

Punishment, §12894

9283.02 False certification of checks or deposits. Any officer of a state or savings bank or trust company, who shall certify any check, when there are not sufficient funds on hand available to the credit of the drawer of said check to pay the same, or who shall issue any certificate of deposit when funds have not been deposited equal in amount to said certificate, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail for a period not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. [C31, 35,§9283-c2.]

9283.03 False statements for credit. Any person (1) who shall knowingly make or cause to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon, and with intent to defraud respecting the financial condition, or means or ability to pay, of himself or of any other person, firm or corporation, in which he is interested, or for whom he is acting, for the purpose of procuring and does thereby procure in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable, or the making, acceptance, discount, sale or indorsement of a bill of exchange, or promissory note, for the benefit of either himself or of such person, firm or corporation; or (2) who, knowing that a false statement in writing has been made, respecting the financial condition or means or ability to pay, of himself, or of such person, firm or corporation, in which he is interested, or for whom he is acting, procures, upon the faith thereof, for the benefit either of himself, or of such person, firm or corporation, either or any of the things of benefit mentioned in the first subdivision of this section; or (3) who, knowing that a statement in writing has been made, respecting the financial condition or means or ability to pay

of himself or of such person, firm or corporation, in which he is interested, or for whom he is acting, with intent to defraud represents on a later day, in writing that such statement theretofore made, if then again made on said day, would then be true, when in fact, said statement if then made would be false, and procures upon the faith thereof, for the benefit either of himself or such person, firm or corporation, either or any of the things of benefit mentioned in the first subdivision of this section, shall be guilty of a misdemeanor and upon conviction thereof shall be punished accordingly. [C31, 35, §9283-c3.]

Punishment, §12894

9283.04 False reports against banks and trust companies. Whoever maliciously or with intent to deceive makes, publishes, utters, repeats, or circulates any false report concerning any bank or trust company which imputes, or tends to impute, insolvency or unsound financial condition or financial embarrassment, or which may tend to cause or provoke or aid in causing or provoking a general withdrawal of deposits from such bank or trust company, or which may otherwise injure or tend to injure the business or good will of such bank or trust company, shall be guilty of a felony and shall be fined not more than five thousand dollars or imprisoned for not more than five years in the penitentiary or be punished by both such fine and imprisonment. [C31, 35,§9283-c4.]

MANAGEMENT BY SUPERINTENDENT

9283.05 Management by superintendent — legal and equitable remedies suspended. The superintendent of banking shall, upon application of the officers or directors of any state bank, savings bank or trust company or private bank doing a banking business, have the power, with the consent of the executive council or of the governor or of the lieutenant governor, to take over the management of any such bank and may, at his discretion, manage the same either by its officers or a part thereof or by any suitable person or persons he may select for such purpose. Such period of management by the superintendent of banking shall not, however, extend beyond two years from the date of taking possession unless further extended by authority of the executive council. During the period of such management and possession by the superintendent of banking, all the remedies at law or in equity of any creditor or stockholder against any such bank or trust company shall be suspended, and the statute of limitations against such claims shall be tolled during such period. [C35,§9283-e1.]

Referred to in §§7420.15, 7420.22, 9283.06, 9283.07, 9283.10, 9283.29, 9283.38, 9283.43

9283.06 Powers of superintendent. The superintendent of banking, whenever he shall have taken over the management of any such banking institution as provided in section 9283.05, shall have the right and power, with the approval of the executive council, to proceed to wind up its affairs as provided by law; or may continue the operation of the same, holding all deposits in the same, taking in deposits and carrying on the same under such rules and regulations as he may make for the conduct of its business and deem for the best interest of the debtors and creditors of such institution, including the right to compromise any rights, claims and liabilities of such institution. If such institution is kept open for business under the management of the banking department, and new deposits are received, such deposits shall be segregated, and any new assets acquired on account of such deposits shall be segregated and held in trust especially for such new deposits. [C35,§9283-e2.]

Referred to in §§7420.15, 7420.22, 9283.10, 9283.29, 9283.38, 9283.43

9283.07 Power to reorganize. However, if in the opinion of the superintendent of banking it is deemed advisable to reorganize any banking institution as set out in section 9283.05, he shall, with the approval of the executive council, have power so to do on such terms and conditions as he may prescribe, including the right to issue stock upon such conditions as he, with the approval of the executive council, may prescribe, for such stock, and which shall be nonassessable. [C35,§9283-e3.]

Referred to in §§7420.15, 7420.22, 9283.10, 9283.29, 9283.38, 9283.43

9283.08 Power to sell or pledge assets. If, in the opinion of the superintendent of banking, with the approval of the executive council, it is advisable to sell, hypothecate or pledge or exchange any or all of the assets of such banking institutions by said superintendent, the said superintendent is given the power so to do with the Reconstruction Finance Corporation or with any other party he may select. [C35,§9283-e4.]

Referred to in §§7420.15, 7420.22, 9283.10, 9283.29, 9283.38, 9283.43

Omnibus repeal, §9283-e5, code 1935; 45GA, ch 156, §6

9283.09 Voluntary agreement — percentage governing. Nothing in this act [45GA, ch 156] shall prevent the voluntary adoption of any form of depositors agreement not now or heretofore in contravention of the statutes thereto provided and under any such agreement the percentages as provided in section 9239.2, shall be fully applicable. [C35,§9283-e6.]

Referred to in §§7420.15, 7420.22, 9283.10, 9283.29, 9283.38, 9283.43

DEPOSITORS AGREEMENTS

9283.10 Power to enter into. During the period of management by the superintendent of banking of any state bank, savings bank or trust company or private bank pursuant to sections 9283.05 to 9283.09, inclusive, any county, city, town, township or school district, by its governing board at the board's discretion, may enter into depositors agreements looking toward the reorganization, reopening or consolidation of the bank to the extent of its unsecured and unpreferred claims.

The state may so agree through the executive council as to its unsecured and unpreferred claims.

The board of supervisors may at its discretion, enter into such depositors agreements as to

taxes for the state, school, townships, cities, towns, motor vehicle fund, primary road fund or other purposes and for other funds created by law, whether regular, temporary or special, which have been duly collected by the treasurer of the county and duly and regularly deposited by the county treasurer in a state bank, savings bank, trust company or private bank or any national bank whose deposit liability has been assumed by a state bank, savings bank or trust company or private bank prior to the period of management by the state superintendent of banking.

Any public body hereinbefore named may with depositors of any national bank enter into a depositors agreement with said bank, provided the form of said agreement shall be one that shall have been first approved by the superintendent of banking and by the executive council of the state of Iowa. Any depositors agreement that has heretofore been entered into by any public body above referred to with any state, savings, national or private bank or trust company in Iowa and to which depositors agreement no objections have been taken by court action, is hereby legalized and approved. [C35,§9283-e7.]

Agreements legalized, see 45ExGA, ch 120

9283.11 Depositors agreement—effect. Joining in such agreement shall not be a waiver of any preference or of the right to participate in state sinking fund for public deposits, but after receipt of payment from such fund or assignment of deposit to the treasurer of state, he shall represent the same and may with the approval of the executive council, join in such agreements. [C35,§9283-e8.]

9283.12 Liability of treasurer. If the treasurer has duly and regularly deposited money in such bank, then after the reorganization, reopening or consolidation of said bank he shall only be held to account for such amount of the deposit as remains on deposit in such bank after the reorganization, reopening or consolidation, irrespective of whether a depositors agreement was entered into or not. [C35,§9283-e9.]

9283.13 Distribution of trustee funds. Wherever the depositors agreement provides for the appointment of trustees and the subsequent payment of funds by the trustees to the depositors, such payments shall be paid to the county treasurer and by him distributed pro rata to the funds entitled thereto, unless payment has been received from the state sinking fund for public deposits or assignment of the deposit has been made to the treasurer of state and in such event, such payment shall be made to him and credited to the state sinking fund. [C35,§9283-e10.]

Omnibus repeal, §9283-e11, code 1935; 45GA, ch 157, §5

9283.14 Conditions precedent to reorganization. Before any savings bank, state bank, private bank or trust company shall attempt to reorganize or take waivers or depositors agreements from its depositors, the banking department shall make an examination of said bank and shall determine, with the approval of the governor, what can and should be required to be paid by the officers, directors, and stockholders of said bank or trust company and no waivers or depositors agreements shall be taken until the amount so required shall have been paid in full in cash or in other securities to be approved by the governor and the superintendent of banking to the bank or trust company. Any stockholder, or assignee of such holder, upon paying an amount equal to the sum so required, may present his certificate or certificates of stock to the superintendent of banking, who shall indorse thereon the amount so paid, and thereupon the holder of such stock, or those claiming by, through or under such holder by sale, transfer, assignment or otherwise, shall thereafter be released from any further liability, statutory or otherwise, on such stock or any reissue thereof, to the extent of the amount so paid and indorsed thereon. Provided, however, that the banking department shall, with the approval of the governor, have the right to waive or modify any of the provisions or requirements of this act [45GA, ch 159] where a bank is not to resume or continue banking operations, and where waivers or depositors agreements are taken as a part of a plan for reorganizing and/or liquidating such bank. [C35,§9283-e12.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.15 Applicability to prior waivers. Banks or trust companies now operating on waivers or depositors agreements heretofore taken shall be subject to and come within the provisions of this act [45GA, ch 159]. Except that no unexpired waivers or depositors agreements between such banks or trust companies and their depositors shall be abrogated hereby. [C35,§9283-e13.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.16 Segregation of assets—trust certificates. Before waivers or depositors agreements are taken as herein provided, the superintendent of banking may authorize the bank to set aside a percentage of its assets to be determined by him and which may be regarded as slow or doubtful and to segregate the same. The superintendent of banking shall determine, with the approval of the governor, the percentage of deposits which may be waived, and shall authorize the issuance of trust certificates by said bank in an amount equal to the deposits so waived and the delivery of such trust certificates to depositors in said bank whose deposits exceed ten dollars, in an amount equal to the amount of deposits so waived by each such depositor. A dividend shall be declared at the end of each year covering the entire net earnings of the bank and the earnings of and collections from the segregated assets, which dividend shall be applied pro rata to the payment of outstanding certificates of trust as herein provided, no dividends on any common stock in such bank shall be paid as long as any trust certificates are outstanding, unless otherwise agreed upon between such bank or trust company and a majority of the depositors holding direct, unsecured and unpreferred obligations of such bank in excess of ten

dollars each, and totaling in the aggregate amount seventy-five percent of the direct, unsecured and unpreferred obligations, and approved by the superintendent of banking. Such certificates shall be preferred in earnings and have preference in liquidation only over the common stock of said bank. [C35,§9283-e14.]

Referred to in §§7420.15, 7420.22, 9283.18, 9283.26, 9283.29, 9283.30, 9283.43

9283.17 Priority of certificates. All trust certificates issued under the provisions of this act [45GA, ch 159] shall have preference and priority on all of the assets of the bank ahead of the rights of the holders of the common stock, and shall be paid in full before the common stockholders shall be entitled to any dividends or profits, unless otherwise agreed upon between such bank or trust company and a majority of the depositors holding direct, unsecured and unpreferred obligations of such bank in excess of ten dollars each, and totaling in the aggregate amount seventy-five percent of the direct, unsecured and unpreferred obligations, and approved by the superintendent of banking. [C35, §9283-e15.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.18 Priority under distribution of assets. Where trust certificates are issued pursuant to section 9283.16, the holders of such certificates in event of the distribution of assets of the bank, shall have a claim ahead of common stockholders or depositors against any assets of said bank which have been segregated for the protection of such trust certificates. [C35,§9283-e16.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.19 Certificates nontaxable. The trust certificates issued under the provisions of this act [45GA, ch 159] shall be nonassessable and nontaxable. [C35,§9283-e17.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.20 Acceptance of certificates. Any county, city, town, township, or school district by its governing board, at the board's discretion, may accept the trust certificates authorized in this act for their deposits in any bank issuing the same. The state may so agree through the executive council to accept the trust certificates provided for in this act [45GA, ch 159]. Any county, city, town, township, or school district which was regularly a depositor in any national bank in Iowa the deposit liabilities of which have been assumed by any savings, state, national or private bank, or trust company, shall be held to be or to have been a depositor in such state incorporated bank or trust company or national bank or private bank. [C35,§9283-e18.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.21 Effect of acceptance. The acceptance of such trust certificates by public bodies shall not be a waiver of their right to participate in the state sinking fund for public deposits. In event of receivership or bankruptcy, the unpaid balance of any trust certificate held by any such public body shall be construed as a depositor's claim of such public body in accordance with the provisions of chapter 352.2. [C35,§9283-e19.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.22 Liability of treasurer. If the treasurer of any public body has duly and regularly deposited money in such bank, then after the reorganization, reopening or consolidation of said bank, he shall only be held to account for such amount of the deposit as remains on deposit in such bank after reorganization, reopening or consolidation, irrespective of whether such trust certificates as provided herein, have been accepted by the public body or not. [C35, §9283-e20.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.23 Majority agreement governs minority. If a majority of the depositors, holding direct, unsecured and unpreferred obligations of such bank in excess of ten dollars each, and totaling in the aggregate amount seventy-five percent of the direct, unsecured and unpreferred obligations, shall agree to come within the provisions of this act [45GA, ch 159] by accepting trust certificates as herein provided, then, and in that event, all of the depositors of such bank are bound thereby. [C35,§9283-e21.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.24 Retirement of certificates. Banks coming within the provisions of this act [45GA, ch 159] shall retire the trust certificates issued hereunder pro rata through the earnings of and the collections from the segregated assets and the net earnings of said bank as hereinbefore provided or agreed upon under the provisions of this act. [C35,§9283-e22.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

9283.25 Salaries suspended. Until all trust certificates issued as provided herein, have been paid off and liquidated in full, no salary shall be paid to any officer, director, or employee unless first approved by the superintendent of banking and the governor of the state of Iowa, unless otherwise agreed upon between such bank or trust company and a majority of the depositors holding direct, unsecured and unpreferred obligations of such bank in excess of ten dollars each, and totaling in the aggregate amount seventy-five percent of the direct, unsecured and unpreferred obligations, and approved by the superintendent of banking. [C35, §9283-e23.]

Referred to in §§7420.15, 7420.22, 9283.26, 9283.29, 9283.30, 9283.43

Omnibus repeal, §9283-e24, code 1935; 45GA, ch 159, §13

DEPOSITORS SUPPLEMENTAL AGREEMENTS

9283.26 Certificate holders—number governing. In the event any state bank, savings bank or trust company organized under the laws of this state, proposing to issue preferred stock pursuant to the laws of this state, shall have theretofore been reorganized and/or recapital-

ized or shall then be in process of reorganization and/or recapitalization (whether pursuant to the provisions of sections 9283.14 to 9283.25, inclusive, and amendments thereto, or otherwise) pursuant to a plan of reorganization and/or recapitalization providing that the future earnings or income of such state bank, savings bank or trust company, or any portion thereof be pledged, assigned or trusteed for the benefit of depositors, creditors or holders of trust certificates of such state bank, savings bank or trust company (hereinafter, for convenience, referred to as "certificate holders"), the rights of such "certificate holders" in such earnings or income may, with the written consent of a majority of such "certificate holders" holding claims totaling in the aggregate seventy-five percent of the claims of all "certificate holders" for whose benefit such earnings shall have been pledged, assigned, or trusteed, be made subordinate, junior and inferior to the rights of holders of preferred stock issued pursuant to the laws of this state, both as to the payment of dividends and any sinking fund or other requirements, if any, for the retirement of such preferred stock.

Upon such written consent being executed by a majority in number of such "certificate holders" holding claims totaling in the aggregate seventy-five percent of the claims of such "certificate holders", all such "certificate holders" shall be bound thereby whether or not they shall have consented. [C35,§9283-f1.]

Referred to in §9283.28

9283.27 Preferred stock issue. Such state banks, savings banks or trust companies shall issue preferred stock of one or more classes in the same manner as provided by law for the issuance of preferred stock in state banks, savings banks or trust companies organized under the laws of this state. [C35,§9283-f2.]

9283.28 Public bodies—sinking fund. The state, through the executive council, in its discretion, and any county, city, town, municipality, township or school district, in the discretion of its governing board, when a "certificate holder" as defined in section 9283.26, may enter into the written consent and subordination agreement as provided in section 9283.26, through and by any member or officer designated for that purpose by such public body. Joining in such written consent and subordination agreement shall not be a waiver of any preference or of the right to participate in the state sinking fund for public deposits. [C35, §9283-f3.]

9283.29 Method of reorganization — approval. The reorganization of state banks, savings banks and trust companies referred to in this act [45ExGA, ch 112] and in sections 9283.05 to 9283.09 and 9283.14 to 9283.25, both inclusive, and acts amendatory thereto, may with the approval of the superintendent of banking be brought about through the use of the existing corporation or by the organization of a new bank, where such bank as so reorganized acquires all or a portion of the assets, and assumes all or a portion of the liabilities, of one or more existing banks. [C35,§9283-f4.]

Omnibus repeal, §9283-f5, code 1935; 45ExGA, ch 112, §8
Constitutionality, §9283-f6, code 1935; 45ExGA, ch 112, §9

9283.30 Waiver by certificate holders. In the event any state bank, savings bank or trust company, organized under the laws of this state, shall have heretofore reorganized and/or recapitalized, or shall be in the process of reorganization and/or recapitalization (whether pursuant to provisions of sections 9283.14 to 9283.25, inclusive, and amendments thereto, or otherwise), pursuant to the plan of reorganization and/or recapitalization; providing, that the future earnings or income of such state bank, savings bank or trust company, or any portion thereof, be pledged, assigned or trusteed for the benefit of depositors, creditors or holders of trust certificates of such state banks, savings banks, or trust companies (hereinafter for convenience referred to as "certificate holders"), the rights of such "certificate holders" in such earnings or income, or the application of the same or any part thereof to payment of trust certificates may, with written consent of the majority of such "certificate holders" holding claims totaling in the aggregate, seventy-five percent of the claims of all "certificate holders" for whose benefit such earnings have been pledged, assigned or trusteed, be waived and the trust agreement and any other agreements pertaining thereto may be so modified to such extent; and the future earnings and income dealt with in any manner approved by the superintendent of banking.

Upon such written consent being executed by a majority in number of such "certificate holders" holding claims totaling in the aggregate, seventy-five percent of the claims of such "certificate holders", all such "certificate holders" shall be bound thereby, whether or not they shall have consented. [C35,§9283-f7.]

Referred to in §9283.31

9283.31 Waiver by public bodies. The state, through the executive council, in its discretion, and any county, city, town, municipality, township or school district, in the discretion of its governing board, when a "certificate holder", as defined in section 9283.30 may enter into the written consent and waiver agreement as provided in section 9283.30, through and by any member or officer designated for that purpose by such public body. Joining in such consent and waiver agreement shall not be a waiver of any preference or of the right to participate in the state sinking fund for public deposits. [C35, §9283-f8.]

9283.32 Governing provisions. Insofar as the provisions of this act [45ExGA, ch 113] may conflict with any other act or parts thereof, the provisions of this act shall control. [C35, §9283-f9.]

Constitutionality, §9283-f10, code 1935; 45 ExGA, ch 113, §4

9283.33 Trusts—segregated assets—liquidation. Wherever a state bank, savings bank or trust company has reorganized pursuant to law

and the plan of reorganization provides for the creation of a trust fund made up of segregated assets of such bank or trust company against which trust certificates have issued and trustees have been appointed or designated to administer the fund and trust, and the liquidation of the trust assets has reached a point in the judgment of the trustees where the trust should be wound up and the trustees released and discharged and they shall become satisfied that the interests of certificate holders or creditors require the termination of the trust and its liquidation, the superintendent of banking may appoint an examiner in charge or a trustee or trustees of said trust with or without pay but if with pay then not in excess of that fixed by statute for examiners in charge, to assist him in the liquidation and distribution of the assets of the fund, whereupon the right of levy or execution or attachment, if any, against such trust fund or its assets shall be suspended. [47GA, ch 218,§1.]

9283.34 Accounting — discharge. In such event, the duties of the trustees as trustees shall be terminated and they shall be released and discharged of any further duties pertaining thereto upon making proper accounting to the superintendent of banking upon such notice as he or the court shall direct, as the case may be. [47GA, ch 218,§1.]

9283.35 Superintendent as receiver—ratable distribution. The superintendent of banking may apply to the district court for that district in which the said trust is located or a judge thereof for the appointment of said superintendent of banking as receiver of such trust fund and its affairs shall thereafter be subject to the approval of the court and the fund liquidated in the same manner as provided by law for liquidation of state banks and trust companies, and the assets thereof after the payment of expense of liquidation and distribution shall be ratably distributed among creditors and the holders of trust certificates, giving preference in payment to holders of trust certificates. [47GA, ch 218, §1.]

9283.36 Attorney for receiver. The attorney general of the state or such assistants as may be designated by him and approved by the judge or court having jurisdiction thereof shall represent the superintendent of banking in all proceedings provided for hereunder. [47GA, ch 218,§1.]

See §9240

9283.37 Public deposits. In event of such liquidation and distribution of such trust funds, public bodies as holders of trust certificates may file against and participate in the state sinking fund for public deposits upon the taking over of the fund for liquidation by the superintendent of banking in the same manner as provided by law where a bank is closed and placed in the hands of a receiver, except that all interest due the state sinking fund for public deposits to the date of the reorganization of the bank or trust company, must be paid prior to filing against the state sinking fund. [47GA, ch 218,§1.]

9283.38 Reports to superintendent. With respect to all trusts created pursuant to the provisions of sections 9283.05 to 9283.09, inclusive, and supplementary statutes thereto, it shall be the duty of the superintendent of banking to require periodic reports as often as he may wish from the trustee or trustees in charge of said trusts which reports shall by the superintendent of banking or by whom he may designate to represent him be submitted to the district court for that district in which the said trust is located or a judge thereof for approval in the same manner as now provided by law for liquidation of bank receiverships. [47GA, ch 218,§1.]

Omnibus repeal, 47GA, ch 218, §2
Constitutionality, 47GA, ch 218, §3

CAPITAL STOCK—CLASSES—NONASSESSABILITY

9283.39 Time and method of amending articles. Any corporation now organized under the laws of this state as a savings bank, state bank, or trust company may amend its articles of incorporation upon authorization of the stockholders, evidenced by a resolution adopted by the affirmative vote of the amount of stock as required in its articles of incorporation (or if no such provision appears in such articles, then by the affirmative vote of not less than fifty-one percent of the voting stock of said corporation issued and outstanding) at any annual meeting of the stockholders of such corporation, or at any special meeting thereof, called and held in the manner and upon the notice as in this act [45ExGA, ch 119] provided. [C35,§9283-f11.]

9283.40 Procedure. At any annual or special meeting of the stockholders of any such corporation, a proposal to amend the articles of incorporation, and/or to provide for the exercise by the corporation of any or all of the powers and rights as specified in section 9283.42, may lawfully be considered and passed upon; provided, that at least five days before the day that any such meeting is held, a written notice of the hour, date and place at which such meeting is to be convened shall have been given by the presiding officer of the board of directors, or such other person as the board may designate, which notice shall state briefly the matters that are to be submitted to and passed upon at such meeting. Such notice shall be deemed sufficiently given if the same is mailed to each voting stockholder of record by registered mail at his last known address as shown by the records of the corporation, at least five days before the day that such meeting is to be convened; and any meeting thus called shall be a lawful meeting and, provided, the requisite amount of stock is represented thereat, shall be qualified to consider and pass upon the matters specified in such notice, irrespective of contrary provisions of law, if any, or contrary provisions in the articles of incorporation, amendments thereto, or bylaws of any such corporation. [C35,§9283-f12.]

Referred to in §9283.41

9283.41 Vote required. Where the right to amend its articles of incorporation and/or to exercise any of the rights and powers as specified

in section 9283.42, is submitted to either an annual meeting or special meeting of stockholders as provided in section 9283.40, an affirmative vote of the amount of stock as required in its articles of incorporation (or if no such provision appears in such articles, then an affirmative vote of fifty-one percent of the voting stock of said corporation issued and outstanding) shall be required to exercise the right or to amend the articles of incorporation for that purpose if such amendment is necessary. At all such meetings, proxies may be voted. [C35,§9283-f13.]

9283.42 Preferred stock. Any corporation now or hereafter organized under the laws of this state as a savings bank, state bank, or trust company, shall have the power (provided it assumes to have and exercise the same by appropriate provisions in its articles of incorporation, or an amendment thereto duly adopted):

1. To create and issue preferred stock of one or more classes, as well as common stock, and to fix the rights, privileges, preferences, limitations and conditions of such stock; such rights, privileges, preferences, limitations and conditions, however, shall not permit such stockholder, either common or preferred, in case of liquidation of such bank, to share in the assets thereof before the depositors shall have been paid in full; provided, that no preferred stock shall be issued by any such corporation unless upon the approval of the superintendent of banking of the state of Iowa.

2. To provide for the decrease of its capital stock upon the authorization of the stockholders of such corporation, evidenced by a resolution adopted by the affirmative vote of the amount of stock as required in its articles of incorporation to authorize such change (or if said articles contain no provisions designating the required majority of stockholders, then by the affirmative vote of not less than fifty-one percent of the stock of said corporation issued and outstanding) either through a reduction of par value of stock issued and outstanding, or by a reduction of the number of shares, and to provide for the exchange of new shares to be issued for outstanding shares of such corporation, and to provide by similar methods for the increase of the capital stock of such corporation; provided, however, that any such action shall be subject to the approval of the superintendent of banking of the state of Iowa.

3. To declare any or all classes of its stock nonassessable when issued and fully paid for, except as otherwise expressly provided by law.

4. To exempt its stockholders and their private property from liability for the liabilities of the corporation accruing after this act [45ExGA, ch 119] becomes effective* as law.

5. To exempt persons becoming stockholders after this act becomes effective* as law, and their private property, from liability for liabilities of the corporation, whether such liabilities accrued before or after this act became effective* as law.

All preferred stock may be sold without first offering the same to the holders of common or preferred stock.

Any preferred stock lawfully issued pursuant to and under the provisions of this act, shall be included in determining whether such banking institution has complied with the minimum capital requirements provided by law for banking institutions in this state. [C35,§9283-f14.]

Referred to in §§9283.40, 9283.41
*Effective date, December 1, 1933

9283.43 Assessment limitations. Persons becoming holders of stock, either common or preferred, of either a state bank, savings bank or trust company, now organized or hereafter organized, under the laws of this state, and who acquire such stock after the effective* date that this act [45ExGA, ch 119] becomes a law, shall not be held liable to assessment on such stock or to pay any penalty for refusal to pay any assessment on such stock as contemplated and provided in sections 9246, 9247, 9248, and 9248-a1** of the code; nor shall such persons be liable to the creditors of any such corporation under section 9251, because of ownership of such stock, nor may any action be maintained against any such person to enforce liability because of the ownership of such stock under sections 9252 and 9253 of the code, or otherwise. Provided, that nothing herein contained shall be construed as relieving or releasing any person who held stock prior to the date this act becomes effective* as law, in any such corporation existing prior to the date that this act becomes effective* as law, from liability for assessment pursuant to section 9246, on stock held by him at or prior to such time or for liability as provided by section 9251, for liabilities of such corporation accruing prior to the time this act becomes effective* as law, the extent of such liability to be measured by his stock holdings at or prior to the time that this act becomes effective* as law, and as contemplated by sections 9251, 9252, and 9253, and provided, further, that nothing herein contained shall create, or be construed as creating any liability, on the part of any stockholder in any such banking corporation, contrary to the provisions of sections 9283.05 to 9283.09, inclusive, or sections 9283.14 to 9283.25, inclusive, or acts amendatory thereto. [C35,§9283-f15.]

*Effective date, December 1, 1933
**Sections 9246 to 9254 repealed by 47GA, ch 219
Constitutionality and omnibus repeal, §9283-f16, code 1935; 45ExGA, ch 119, §6

CHAPTER 415.1

STATE-FEDERAL BANKING COORDINATION

9283.44 Definition.
9283.45 General powers.
9283.46 Subrogation of FDIC.
9283.47 Examinations by FDIC.
9283.48 Pledge or sale of assets to FDIC.

9283.44 Definition. The term "banking institution", as used in this chapter shall be construed to mean any state bank, trust company, bank and trust company, banking association or stock savings bank, which is now or may hereafter be organized under the laws of this state. [C35,§9283-g1.]

9283.45 General powers. Any banking institution now or hereafter organized under the laws of this state is hereby empowered, on the authority of its board of directors, or a majority thereof, with the approval of the superintendent of banking, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section 8 of the federal "Banking Act of 1933" (sec. 12B of the Federal Reserve Act, as amended), [48 Stat. L. ch 89] which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or of any other act or resolution of congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation. [C35, §9283-g2.]

9283.46 Subrogation of FDIC. Whenever the Federal Deposit Insurance Corporation shall pay, or make available for payment, the insured deposit liabilities of any closed state bank, trust company, bank and trust company, banking association or stock savings bank, it shall be subrogated to all rights of the depositor to the extent of such payment. Such subrogation in the case of any closed state bank, trust company, bank and trust company, banking association or stock savings bank shall include the right to receive the same dividends from the proceeds of the assets of said closed bank as would have been payable to such depositor on a claim for the insured deposit, such depositor retaining his claim for any uninsured portion of his deposit. [C35,§9283-g3.]

9283.47 Examinations by FDIC. The Federal Deposit Insurance Corporation may, at any time it sees proper, make or cause to be made an examination of any state bank, trust company, bank and trust company, banking association or stock savings bank that is or may hereafter become a member of its fund, and, upon the application of any such institution to become a member of its fund, shall have the right of such examination for the purpose of determining the applicant's qualification for admission to such fund, and the corporation shall furnish the superintendent of banking with a copy of all such examinations when completed. The superintendent of banking may furnish to said corporation, or to any official or supervising examiner thereof, a copy of any or all examinations made of any such banking institutions and of any and all reports made by the same, and shall give access to said corporation, or any official or supervising examiner thereof, any and all information possessed by the office of said superintendent of banking with reference to the condition or affairs of any such insured institution.

Nothing in this section shall be construed to limit the duty of any banking institution in this state, deposits in which are to any extent insured under the provisions of section 8 of the "Banking Act of 1933" (section 12B of the Federal Reserve Act, as amended), [48 Stat. L. ch 89] or of any amendment of or substitution for the same, to comply with the provisions of said act, its amendments or substitutions, nor to limit the powers of the superintendent of banking with reference to examinations and reports under existing law. [C35,§9283-g4.]

9283.48 Pledge or sale of assets to FDIC. With respect to any banking institution, which is now or may hereafter be closed on account of inability to meet the demands of its depositors or by action of the superintendent of banking or of a court or by action of its directors or in the event of its insolvency or suspension, the superintendent of banking and/or the receiver or liquidator of such institution with the permission of said superintendent of banking may borrow from said corporation and furnish any part or all of the assets of said institution to said corporation as security for a loan from same, provided, that where said banking institution is in receivership, the order of a court of record of competent jurisdiction shall be first obtained approving such loan, and upon a like order from such court, and, with the permission of said superintendent of banking, the receiver of any such institution and/or the superintendent of banking without such order may sell to said corporation any part or all of the assets of such institution.

The provisions of this section shall not be construed to limit the power of any banking institution, the superintendent of banking or receivers or liquidators to pledge or sell assets in accordance with any existing law. [C35, §9283-g5.]

Constitutionality, §9283-g6, code 1935; 46GA, ch 101, §6
Omnibus repeal, §9283-g7, code 1935; 46GA, ch 101, §7

CHAPTER 415.2

COOPERATIVE BANKS

Referred to in §8512.07

9283.49 Application for charter.
9283.50 Articles of incorporation.
9283.51 Bylaws.
9283.52 Articles recorded—fee—certificate.
9283.53 Amendment of bylaws.
9283.54 Prohibited use of words.
9283.55 Stock subscriptions required.
9283.56 Right to transact business.
9283.57 Real estate.
9283.58 Loans and investments.
9283.59 Private property exempt.
9283.60 Dividends.
9283.61 Liquidation—distribution of assets.
9283.62 Supervision and reports.
9283.63 Examinations.
9283.64 Violations—procedure.
9283.65 Insolvency—procedure.
9283.66 Fiscal year.
9283.67 Annual and special meetings.
9283.68 Powers of stockholders.
9283.69 Oath of directors.
9283.70 Officers.
9283.71 Directors—powers.
9283.72 Compensation.
9283.73 Statutes applicable.
9283.74 Suggested bylaws.

9283.49 Application for charter. Any fifty or more persons, residents of the state of Iowa, may secure a charter for the organization of a cooperative bank by making application therefor to the department of banking and by complying with the conditions of this chapter. At least ten of the persons making the application shall sign as incorporators and acknowledge the articles of incorporation, forms for which may be provided by the banking department.

Such application shall be accompanied by a duplicate copy of the proposed bylaws of the corporation. [C27, 31, 35,§9283-b1.]

42GA, ch 205, §§1, 2, editorially divided

9283.50 Articles of incorporation. The articles of incorporation shall contain the following:

1. Name of proposed bank and place of doing business. The name selected shall contain the words "Cooperative Bank".
2. Purposes for which the association is formed.
3. Par value of shares of stock, which shall not be less than ten dollars. The amount of capital stock that may be issued need not be fixed in the articles of incorporation or the application therefor.
4. Qualifications for subscribers to capital stock.
5. Date of annual meeting, which shall be the second Tuesday in January of each year, or within ten days thereafter, the manner in which stockholders shall be notified of meetings and the number of stockholders constituting a quorum.
6. Number of directors (not less than five), all of whom must be residents of the state and stockholders of the corporation. Names and addresses of directors for the first year shall be inserted in the application. The directors shall be divided into three classes so that the terms of their service shall not exceed three years.
7. The application shall state the number of shares of stock subscribed for and must be signed by the incorporators whose addresses shall be given.
8. The conditions upon which shares of stock may be subscribed for and paid for, transferred and withdrawn and their par values. [C27, 31, 35,§9283-b2.]

9283.51 Bylaws. The bylaws shall contain the following provisions for the management of the corporation:

1. Name and place of doing business.
2. Purposes for which the corporation is formed.
3. Powers and duties of officers and directors.
4. The conditions upon which deposits may be received and withdrawn, and provisions as to the power of the corporation to make loans or to secure additional funds to carry on its business.
5. The conditions upon which loans may be made and repaid by stockholders of the corporation.
6. The method of receipting for money paid in on account of stock, deposits, or loans.
7. The manner in which the surplus fund shall be accumulated.
8. The rate of dividends to be paid on capital stock, and the manner in which dividends shall be determined and paid out.
9. The manner in which voluntary dissolution of the corporation may be effected. [C27, 31, 35, §9283-b3.]

Referred to in §9283.74

9283.52 Articles recorded—fee—certificate. When the application for incorporation and the bylaws shall have been approved by the department of banking, the incorporators shall have the articles of incorporation recorded with the secretary of state, for which he shall be paid a fee of ten dollars and a recording fee of ten cents per hundred words. The secretary of state shall then issue to the association a certificate of incorporation. [C27, 31, 35,§9283-b4.]

9283.53 Amendment of bylaws. The bylaws so approved shall be the bylaws of the corporation. They may be amended by the corporation upon the filing with, and approval of such amendments by the department of banking, and by posting them as in the case of corporations for pecuniary profit, and by compliance with such other requirements as may be contained in the articles of incorporation. [C27, 31, 35,§9283-b5.]

9283.54 Prohibited use of words. No banking partnership, association, or group, except such as are formed under the provisions of this chapter, shall use a name or designation containing the words "Cooperative Bank". The use of such name or designation by any other person or associations shall be a misdemeanor subject to a fine not to exceed five hundred dollars. [C27, 31, 35,§9283-b6.]

9283.55 Stock subscriptions required. A certificate of incorporation for a cooperative bank shall not be issued until an amount of stock has been subscribed for equal to the capitalization required for a state bank in the place where such bank is to be located. The sale of additional stock shall be regulated by the board of directors. [C27, 31, 35,§9283-b7.]

9283.56 Right to transact business. When the certificate of incorporation has been issued and the required capital stock has been paid in cash, the cooperative bank shall open its books for deposits and other business, issue certificates of stock to subscribers, and be entitled to do all the things authorized to be done by state banks. [C27, 31, 35,§9283-b8.]

9283.57 Real estate. A cooperative bank shall have power to buy and own real estate upon which the banking business is conducted, and to buy, own and sell other real estate under the rules and restrictions governing state banks. [C27, 31, 35,§9283-b9.]

9283.58 Loans and investments. A cooperative bank shall have power to make loans and invest its funds in the manner and ways granted state banks. [C27, 31, 35,§9283-b10.]

9283.59 Private property exempt. The private property of stockholders shall not be liable for the payment of debts of the corporation, except as provided in sections 9251 and 9252. [C27, 31, 35,§9283-b11.]

Sections 9251 and 9252 repealed. See 47GA, ch 219

9283.60 Dividends. No annual distribution of dividends upon capital stock shall ever exceed eight percent of the par value of the capital stock. After the maximum annual dividend has been paid, and a surplus has been created equal to one-half the capital stock, the net earnings may be distributed or credited to the depositors and the borrowers from the bank, who are stockholders, in proportion to the amount of interest received and accrued to the depositors and the amount of interest paid by and accrued against the obligations of the borrowers. [C27, 31, 35, §9283-b12.]

9283.61 Liquidation—distribution of assets. Upon the liquidation of the corporation after payment of all liabilities, the balance of the assets shall be distributed as follows:

1. The capital stock shall be redeemed in full at par together with accrued dividends.
2. All other assets of the bank shall be distributed to the depositors and borrowers then stockholders of the bank in proportions provided for the distribution of profits after payment of dividends on capital stock, but should the assets of the bank after payment of debts as provided herein not be sufficient to redeem all the capital stock at par, then the same shall be paid pro rata to the then stockholders. In case of liquidation the banking department shall have power and authority to take control of the corporation and liquidate the affairs thereof and make the distribution as herein provided. [C27, 31, 35,§9283-b13.]

9283.62 Supervision and reports. Cooperative banks shall be subject to supervision by the department of banking and shall report to the department on blank forms supplied by it on the dates reports are required of state banks, notice of which calls shall be sent out by the department of banking. Such reports shall be verified by the oath of the president and treasurer or secretary, or by the oath of a majority of the board of directors. Such further reports shall be made under oath as the department of banking shall at any time demand. [C27, 31, 35, §9283-b14.]

42GA, ch 205, §13, editorially divided

9283.63 Examinations. The corporation shall be examined at least once every year by the department of banking. Such department shall have access to all books, papers, securities, and other sources of information in making such examination. The superintendent of the banking department, or any of his deputies, shall have power to subpoena and examine witnesses under oath whether such witnesses are stockholders of the corporation or not, and to examine documents and examine witnesses under oath in regard to documents whether such documents are documents of the corporation or not. [C27, 31, 35,§9283-b15.]

9283.64 Violations—procedure. Should it appear to the department of banking that any such corporation has violated any of the provisions of this chapter, it may, by an order, after an opportunity for hearing has been given such corporation, direct any such corporation to discontinue the violations named in the order. [C27, 31, 35,§9283-b16.]

9283.65 Insolvency—procedure. If any such corporation is found to be insolvent, or has violated any of the provisions of this chapter, or has failed within a reasonable time to comply with any such order, the department of banking may immediately, or within a reasonable time, take possession of the property and business of such corporation, and retain such possession until such time as said department permits it to resume business, or its affairs are finally liquidated as provided in this chapter. [C27, 31, 35, §9283-b17.]

9283.66 Fiscal year. The fiscal year of such corporation shall end on the thirty-first day of December. [C27, 31, 35,§9283-b18.]

42GA, ch 205, §14, editorially divided

9283.67 Annual and special meetings. Annual meetings shall be held on the second Tuesday in January, or within ten days thereafter, as provided by the articles of incorporation.

Special meetings may be held by order of the president of the board or a majority of the directors, and shall be held upon the request in writing of ten percent of the stockholders. Notice of all meetings shall be given in the manner prescribed in the articles of incorporation and bylaws. At all meetings each stockholder shall have but one vote, irrespective of the number of shares of stock held. [C27, 31, 35, §9283-b19.]

9283.68 Powers of stockholders. At any meeting the stockholders, by a majority vote of all, may decide upon any question of interest to the corporation, may overrule the board of directors, and may amend the bylaws by a three-fourths vote of those present and represented by proxy, provided the notice of the meeting shall have specified the question to be considered. [C27, 31, 35,§9283-b20.]

9283.69 Oath of directors. Directors as well as all officers, shall be sworn to perform properly the duties of their offices. Such oath shall provide that they shall diligently and honestly administer the affairs of the corporation; that they will not violate or knowingly permit to be violated any of the provisions of law applicable to the corporation; that they are the owners in good faith of at least fifty shares each in the stock of the corporation. Such oath shall be subscribed by the individual making it and certified by the officer before whom it is taken, and shall be immediately transmitted to the department of banking and preserved in its office. [C27, 31, 35,§9283-b21.]

9283.70 Officers. At the first annual meeting and at each annual meeting thereafter, the board of directors shall elect from their number a president, vice president, secretary and treasurer. The offices of secretary and treasurer may, if the articles of incorporation so provide, be held by one person. Other officers may be elected at the discretion of the directors. [C27, 31, 35,§9283-b22.]

42GA, ch 205, §16, editorially divided

9283.71 Directors—powers. The board of directors shall have general management of the affairs, funds and records of the corporation. They shall meet regularly once each month. Unless the bylaws make other reservations, it shall be the duty of the directors:

1. To act upon all subscriptions for stock and the withdrawal and the expulsion of stockholders.
2. To fix the amount of the surety bond required of each officer of the corporation.
3. To determine the rate of interest allowed on deposits and charged on loans, subject to the limitations of law.
4. To arrange for a place of deposit for the funds of the corporation and for such loans from banks or individuals as they may deem necessary for carrying out the objects of the corporation.
5. To fix the maximum number of shares of stock which may be held by, and the maximum amount which may be loaned to, any one stockholder; to declare dividends; and to recommend amendments to the bylaws.
6. To fill vacancies in the board of directors until the next annual meeting.
7. To have charge of the investment of the funds of the corporation and to perform such other duties as the stockholders may from time to time authorize.
8. To employ such help as may be necessary in conducting the business, and to fix the salaries of the help.

The board of directors shall decide what standing committees are necessary in the operation of the bank and prescribe the duties of such committees, and the president of the board at the first monthly meeting of the board after the annual meeting, shall appoint such standing committees. [C27, 31, 35,§9283-b23.]

9283.72 Compensation. No member of the board of directors shall receive any compensation for his services as a member of said board, unless said compensation has been authorized at a stockholders meeting. [C27, 31, 35,§9283-b24.]

9283.73 Statutes applicable. All provisions of law relative to state banks shall apply to cooperative banks insofar as they are applicable and not inconsistent with the express provisions of this chapter. [C27, 31, 35,§9283-b25.]

9283.74 Suggested bylaws. The department of banking shall prepare suggested bylaws and regulations covering the provisions of section 9283.51, which shall be furnished to applicants upon request. [C27, 31, 35,§9283-b26.]

CHAPTER 416

BANKS AND TRUST COMPANIES ADDITIONAL POWERS AS FIDUCIARIES

Referred to in §12065.3

9284 Authorization—additional powers.
9285 Deposit of trust funds—payment.
9286 Avoiding burdensome bond by deposit.
9287 Payment of deposited funds.
9288 National banks.
9289 Voting of stock.
9290 Separation of funds—liability.
9291 Analogous rights and duties—compensation—bonds.
9292 Appointment of successor.
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9295 Mandatory use of "trust", "state", or "savings".
9296 Prohibited use of word "trust".
9297 Indebtedness or liability—exceptions.
9298 Attorney—appointment of—fee.
9299 Dividends.
9300 "Bad debts" defined.
9303 Investment of surplus.
9304 Applicable provisions.
9305 Trust matters—report.

9284 Authorization — additional powers. Trust companies, state and savings banks existing under the provisions of this title, in addition to the powers already granted to such corporations, shall have power, when so authorized by their articles of incorporation:

1. To be appointed assignee or trustee by deed, and guardian, executor, or trustee by will, and such appointment, upon qualification as herein required, shall be of like force as in case of appointment of a natural person.

2. To be appointed receiver, assignee, guardian, administrator, or other trustee by any court of record in this state, and it shall be lawful for such court to appoint such corporation as such receiver, assignee, guardian, administrator, or other trustee, in the manner provided by law for the appointment of any natural person to such trust; provided any such appointment as guardian shall apply to the estate and not the person.

3. To act as fiscal or transfer agents, or registrar for estates, municipalities, companies, and corporations.

4. To take, accept, and execute any and all such trusts and powers of whatsoever character and description, not in conflict with the laws of the United States or of this state, as may be conferred upon or entrusted or committed to them by any person or persons or any body politic, corporation, or other authority, by grant, assignment, transfer, devise, bequest, or otherwise, or which may be entrusted or committed or transferred to them or vested in them by order of any court of record, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust, and to manage and dispose of such property or estate in accordance with the terms of such trust or power.

5. To issue drafts upon depositories, and to purchase, invest in, and sell promissory notes, bills of exchange, bonds, mortgages, and other securities.

6. To exercise the powers conferred on and to carry on the business of a safe-deposit company. [SS15,§1889-d; C24, 27, 31, 35,§9284.]

Referred to in §9288
SS15, §1889-d, editorially divided

9285 Deposit of trust funds—payment. Any court having appointed, and having jurisdiction of any receiver, executor, administrator, guardian, assignee, or other trustee, upon the application of such officer or trustee, after such notice to the other parties in interest as the court may direct, and after a hearing upon such application, may order such officer or trustee to deposit any moneys then in his hands, or which may come into his hands thereafter, and until the further order of said court, with any such trust company, state or savings bank, and upon deposit of such money, and its receipt and acceptance by such corporation, the said officer or trustees shall be discharged from further care or responsibility therefor. Such deposit shall be paid out only upon the orders of said court. [SS15,§1889-d; C24, 27, 31, 35,§9285.]

Referred to in §9288

9286 Avoiding burdensome bond by deposit. Whenever, in the judgment of any court having jurisdiction of any estate in process of administration by any assignee, receiver, executor, administrator, guardian, or other trustee, the bond required by law of such officer shall seem burdensome or excessive, upon application of such officer or trustee, and after such notice to the parties in interest as the court shall direct, and after a hearing on such application, the said court may order the said officer or trustee to deposit with any such corporation for safekeeping, such portions or all of the personal assets of said estate as it shall deem proper, and thereupon said court shall, by an order of record, reduce the bond to be given, or theretofore given by such officer or trustee, and the property as deposited shall thereupon be held by the corporation under the orders and directions of said court. [SS15,§1889-d; C24, 27, 31, 35,§9286.]

Referred to in §9288

9287 Payment of deposited funds. When any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the corporation in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the said deposit was made, or to his or her legal representatives; provided that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the consent of the legal representatives of said trustee. [SS15,§1889-d; C24, 27, 31, 35,§9287.]

Referred to in §9288

9288 National banks. When so authorized by any law of the United States now in force or hereafter enacted, national banks may exercise the same powers and perform the same duties as are by sections 9284 to 9287, inclusive, conferred upon trust companies, state and savings banks. [SS15,§1889-d; C24, 27, 31, 35, §9288.]

9289 Voting of stock. In case any corporation shall hold any of its own shares of stock in any of the trust capacities herein authorized, then such shares shall be voted at stockholders meetings by any person so authorized by the board of directors of said corporation. [S13, §1889-e; C24, 27, 31, 35,§9289.]

9290 Separation of funds — liability. All property, real or personal, received in trust by any such corporation exercising the powers granted by this chapter, shall be kept separate from such funds or property which may be in the possession of such corporation, and shall not be liable for the debts or obligations of such corporation. [S13,§1889-f; C24, 27, 31, 35, §9290.]

9291 Analogous rights and duties—compensation—bonds. Every state or savings bank, or trust company, acting as guardian, adminis-

trator, executor, trustee, assignee, receiver, or custodian shall have the same rights, powers, and privileges as individuals so acting, and receive the same compensation as is or may be allowed individuals for exercising similar offices or trusts, so far as the same are fixed by statutes, and shall execute a bond for the faithful performance of the trust confided to it in like sum and with like penalties as is required by individuals. [S13,§1889-g; C24, 27, 31, 35, §9291.]

9292 **Appointment of successor.** In case any corporation desires to retire from business under this chapter, or in case of the dissolution of any such corporation, the court having jurisdiction of each of the several trusts and appointments held by such corporation shall, upon application of such corporation or its receiver, after such notice to the other parties in interest as the court may direct, and after a hearing upon such application, appoint another corporation, person or persons as successor trustee or appointee. [S13,§1889-h; C24, 27, 31, 35, §9292.]

S13, §1889-h, editorially divided

9293 **Release from liability.** Upon the acceptance of such office by the successor trustee and due qualification therefor, and the transfer of the property in such case held, to the successor trustee then the dissolving corporation shall be discharged from any further responsibility in such trust capacity or appointment. [S13, §1889-h; C24, 27, 31, 35,§9293.]

9294 **Return of securities.** The superintendent of banking, upon being furnished with satisfactory evidence of said corporation's release and discharge from all of the obligations and trusts assumed by virtue of this chapter, shall thereupon return to such corporation the securities deposited by it with him. [S13, §1889-h; C24, 27, 31, 35,§9294.]

9295 **Mandatory use of "trust", "state", or "savings".** Any trust company, state or savings bank, which under this chapter and by its original or amended articles of incorporation shall be authorized to exercise any of the powers herein granted, shall have the word "trust", "state", or "savings" incorporated in the name thereof. [S13,§1889-i; C24, 27, 31, 35,§9295.]

S13, §1889-i, editorially divided

9296 **Prohibited use of word "trust".** No corporation hereinafter organized without complying with the terms of this chapter, and no partnership, individual or unincorporated association, shall incorporate or embrace the word "trust" in its name. [S13,§1889-i; C24, 27, 31, 35,§9296.]

9297 **Indebtedness or liability—exceptions.** Trust companies, state or savings banks, may contract indebtedness or liability for the following purposes: For necessary expenses in managing and transacting their business, for deposits, and to pay depositors, to maintain proper legal reserves and for other corporate purposes, and the directors of said trust company, state or savings bank shall have the right to pledge as security for said indebtedness or liability such assets of said bank or trust company as may be necessary. Nothing herein contained shall limit the issuance by trust companies, of debentures or bonds, the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, provided said securities shall be at least equal in amount to the par value of such debentures or bonds, and be first liens upon unincumbered real estate worth at least twice the amount loaned thereon. [S13, §1889-j; C24, 27, 31, 35,§9297.]

Similar provision, §9222.2

9298 **Attorney—appointment of—fee.** The beneficiaries of any trust held by any such corporation may appoint, by and with the approval of the court having jurisdiction thereof, a practicing attorney in good standing to look after the legal interests of said beneficiaries; and said attorney shall be allowed by the court a reasonable fee for such legal services, to be paid out of said trust estate. [S13,§1889-k; C24, 27, 31, 35,§9298.]

9299 **Dividends.** After providing for all expenses, interest, and taxes accrued or due from any corporation exercising the powers herein conferred and deducting all losses and bad debts, the board of directors of said corporation may declare a dividend of so much of the profits of the corporation as they shall judge expedient. [S13,§1889-l; C24, 27, 31, 35,§9299.]

Referred to in §9300
Similar provisions, §§9191, 9263
S13, §1889-l, editorially divided

9300 **"Bad debts" defined.** All debts past due to any corporation on which interest is past due and unpaid for a period of twelve months, unless the same are well secured and in process of collection, shall be considered bad debts within the meaning of section 9299. [S13,§1889-l; C24, 27, 31, 35,§9300.]

9301, 9302 Rep. by 46GA, ch 99

9303 **Investment of surplus.** Said surplus shall be invested the same as the original capital. [S13,§1889-l; C24, 27, 31, 35,§9303.]

9304 **Applicable provisions.** All of the provisions of sections 8371 to 8375, inclusive, relating to the renewal of corporate existence of state and savings banks, and all of the provisions of sections 9155, and 9157 to 9161, inclusive, so far as same relate to time and manner of commencing business, sections 9163 to 9182, inclusive, 9192 to 9199, inclusive, 9201, 9277, and 9278, and all the provisions of sections 9218 to 9221, inclusive, 9223 to 9268, inclusive, and 9279 to 9283, inclusive, shall apply with equal force and effect to all trust companies organized or reorganized under this chapter. [S13,§1889-m; C24, 27, 31, 35,§9304.]

Section 9201 repealed by 43GA, ch 30
S13, §1889-m, editorially divided

9305 **Trust matters—report.** Any corporation exercising any of the powers herein

granted, in addition to matters required by section 9228, to be given in the statement of conditions, shall give:

A list and brief description of the trusts held by such company, the source of the appointment thereto, and the amount of real and personal estate held by such company by virtue thereof, except that mere mortgage trusts wherein no action has been taken by such company, shall not be included in such statement; said list to be transmitted to the superintendent of banking within thirty days after the receipt of requisition therefor, but such list shall not be published. [S13,§1889-m; C24, 27, 31, 35,§9305.]

CHAPTER 416.1

CREDIT UNIONS

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9305.01 Organization and definition. Any seven residents of the state of Iowa may apply to the superintendent of banking for permission to organize a credit union.

A credit union is organized in the following manner:

1. The applicants shall execute in duplicate a certificate of organization by the terms of which they agree to be bound. The certificate shall state:

a. The name and location of the proposed credit union.

b. The names and addresses of the subscribers to the certificate and the number of shares subscribed by each.

c. The par value of the shares of the credit union which shall not exceed ten dollars each.

2. Said applicants shall prepare and adopt bylaws for the general government of the credit union consistent with the provisions of this chapter, and execute the same in duplicate.

3. The certificate and the bylaws, both executed in duplicate, shall be forwarded with a fee of two dollars to the superintendent of banking.

4. The superintendent shall, within thirty days of the receipt of said certificate and bylaws, determine whether they conform with the provisions of this chapter, and whether or not the organization of the credit union in question would benefit the members of it and be consistent with the purposes of this chapter.

5. The superintendent shall thereupon notify the applicants of his decision. If it is favorable he shall issue a certificate of approval, attached to the duplicate certificate of organization and return the same, together with the duplicate bylaws to the applicants.

6. The applicants shall thereupon file the said duplicate of the certificate of organization, with the certificate of approval attached thereto, with the county recorder of the county within which the credit union is to do business, who shall record and index the same as articles of incorporation are recorded and indexed and return it, with his certificate of record attached thereto, to the said superintendent of banking for permanent record.

7. The applicants shall thereupon become and be a credit union, incorporated in accordance with the provisions of this chapter.

In order to simplify the organization of credit unions, the superintendent of banking, upon the taking effect of this chapter, or as soon thereafter as sufficient fees shall have accumulated to liquidate the cost of same, shall cause to be prepared an approved form of certificate of organization and a form of bylaws, consistent with this chapter which may be used by credit union incorporators for their guidance, and on written application of any seven residents of the state, shall supply them without charge with a blank certificate of organization and a copy of said form of suggested bylaws. [C27, 31, 35,§9305-a1.]

9305.02 Amendments. Any and all amendments to the bylaws must be approved by the superintendent of banking before they become operative. [C27, 31, 35,§9305-a2.]

9305.03 Restriction. It shall be a misdemeanor for any person, association, copartnership, or corporation, except corporations organized in accordance with the provisions of this chapter, to use the words "credit union" in their name or title. [C27, 31, 35,§9305-a3.]

Punishment, §12894

9305.04 Powers. A credit union shall have the following powers to:

1. Receive the savings of its members either as payment on shares or as deposits, including the right to conduct Christmas clubs, vacation clubs, and other such thrift organizations within the membership.

2. Make loans to members for provident or productive purposes.

3. Make loans to a cooperative society or other organization having membership in the credit union.

4. Deposit in state and national banks and, to an extent which shall not exceed twenty-five percent of its capital, invest in the paid-up shares of building and loan associations and of other credit unions.

5. Invest in any investment legal for savings banks or for trust funds in the state.

6. Borrow money as hereinafter indicated.

7. Assess fines as may be provided by the bylaws for failure to make repayments on loans and payments on shares when due. [C27, 31, 35, §9305-a4.]

9305.05 Membership. Credit union membership shall consist of the incorporators and such other persons as may be elected to membership and subscribe for at least one share, pay the installment thereon and the entrance fee. Organizations, incorporated or otherwise, composed for the most part of the same general group as the credit union membership may be members. Credit union organization shall be limited to groups having a common bond of occupation, or association or to groups within a well-defined neighborhood, community, or rural district. [C27, 31, 35,§9305-a5.]

9305.06 Reports, etc. Credit unions shall be under the supervision of the superintendent of banking. They shall report to him annually on or before the first day of January on blanks supplied by him for that purpose. Additional reports may be required. Credit unions shall be examined at their expense annually by the said superintendent or his duly authorized representative except that, if a credit union has assets of less than twenty-five thousand dollars he may accept the audit of a practicing public accountant in place of such examination. If the superintendent determines that the credit union is violating the provisions of this chapter, or is insolvent, he may serve notice on the credit union of his intention to revoke the certificate of approval. If, for a period of fifteen days after such notice, said violation continues, the superintendent may revoke said certificate and take possession of the business and property of said credit union and maintain possession until such time as he shall permit it to continue business or its affairs are finally liquidated. He may take similar action if any report required remains in arrears for more than fifteen days. [C27, 31, 35,§9305-a6.]

9305.07 Fiscal year—meetings. The fiscal year of all credit unions shall end December 31. Special meetings may be held in the manner indicated in the bylaws. At all meetings a member shall have but a single vote whatever his share holdings. To amend the bylaws, the proposed amendment must be contained in the call for the meeting and it must be approved by three-fourths of the members then present, which number must constitute a quorum, and by the superintendent of banking. There shall be no voting by proxy. A member other than a natural person shall cast a single vote through a delegated agent. [C27, 31, 35,§9305-a7.]

9305.08 Elections. At the annual meeting, the organization meeting being the first annual meeting, the credit union shall elect a board of directors of not less than five members, a credit committee of not less than three members and a supervisory committee of three members, all to hold office for such terms respectively as the bylaws provide and until successors qualify. A record of the names and addresses of the members of the board and committees and the officers shall be filed with the superintendent of banking within ten days after their election. [C27, 31, 35,§9305-a8.]

9305.09 Directors and officers. At the first meeting the directors shall elect from their own number a president, vice president, treasurer and clerk, of whom the last two named may be the same individual. It shall be the duty of the directors to have general management of the affairs of the credit union, particularly to:

1. Act on applications for membership.

2. Determine interest rates on loans and deposits.

3. Fix the amount of the surety bond which shall be required of all officers and employees handling money.

4. Declare dividends, and to transmit to the members recommended amendments to the bylaws.

5. Fill vacancies in the board and in the credit committee until successors are chosen and qualify.

6. Determine the maximum individual share holdings and the maximum individual loan which can be made with and without security.

7. Have charge of investments other than loans to members.

The duties of the officers shall be determined in the bylaws, except that the treasurer shall be the general manager. No member of the board or of either committee shall, as such, be compensated. [C27, 31, 35,§9305-a9.]

9305.10 Credit committee. The credit committee shall have the general supervision of all loans to members. Applications for loans shall be on a form, prepared by the credit committee, and all applications shall set forth the purpose for which the loan is desired, the security, if any, offered, and such other data as may be required. Within the meaning of this section an assignment of shares or deposits or the indorsement of a note may be deemed security. At least a majority of the members of the credit committee shall pass on all loans and approval must be unanimous. The credit committee shall meet as often as may be necessary after due notice to each member. [C27, 31, 35,§9305-a10.]

9305.11 Supervisory committee. The supervisory committee shall:

1. Make an examination of the affairs of the credit union at least quarterly, including an audit of its books and, in the event said committee feels such action to be necessary, it shall call the members together thereafter and submit to them its report.

2. Make an annual audit and report and submit the same at the annual meeting of the members.

3. By unanimous vote, if it deem such action to be necessary to the proper conduct of the credit union, suspend any officer, director, or member of committee and call the members together to act on such suspension. The members at said meeting may sustain such suspension and remove such officer permanently or may reinstate said officer.

By majority vote, the supervisory committee may call a special meeting of the members to consider any matter submitted to it by said committee. The said committee shall fill vacancies in its own membership. [C27, 31, 35,§9305-a11.]

9305.12 Capital. The capital of a credit union shall consist of the payments that have been made to it by the several members thereof on shares. The credit union shall have a lien on the shares and deposits of a member for any sum due to the credit union from said member or for any loan indorsed by him. A credit union may charge an entrance fee as may be provided by the bylaws. [C27, 31, 35,§9305-a12.]

9305.13 Minors. Shares may be issued and deposits received in the name of a minor or in trust in such manner as the bylaws may provide. The name of the beneficiary must be disclosed to the credit union. [C27, 31, 35,§9305-a13.]

9305.14 Rates. Interest rates on loans made by a credit union shall not exceed one percent a month on unpaid balances. [C27, 31, 35,§1305-a14.]

9305.15 Power to borrow. A credit union may borrow from any source in total sum which shall not exceed fifty percent of its assets. [C27, 31, 35,§9305-a15.]

9305.16 Loans. A credit union may loan to members. Loans must be for a provident or productive purpose and are made subject to the conditions contained in the bylaws. A borrower may repay his loan in whole or in part any day the office of the credit union is open for business. No director, officer, or member of committee may borrow from the credit union in which he holds office beyond the amount of his holdings in it in shares and deposits, nor may he indorse for borrowers. [C27, 31, 35,§9305-a16.]

9305.17 Reserves. All entrance fees, fines, and twenty percent of the net earnings each year, before the declaration of a dividend, shall be set aside as a reserve fund which shall be kept liquid and intact and not loaned out to members, and shall belong to the corporation to be used as a reserve against bad loans and not be distributed except in cases of liquidation. [C27, 31, 35,§9305-a17.]

9305.18 Dividends. On recommendation of the directors, a credit union may, at the end of the fiscal year, declare a dividend from net earnings, which dividend shall be paid on all shares outstanding at the end of the fiscal year. Shares which become fully paid up during the year shall be entitled to a proportional part of said dividend calculated from the first day of the month following such payment in full. [C27, 31, 35,§9305-a18.]

9305.19 Expulsion—withdrawal. A member may be expelled by a two-thirds vote of the members present at a special meeting called to consider the matter but only after a hearing. Any member may withdraw from the credit union at any time but notice of withdrawal may be required. All amounts paid on shares or as deposits of an expelled or withdrawing member, with any dividends or interest accredited thereto, to the date thereof, shall, as funds become available and after deducting all amounts due from the member to the credit union, be paid to him. The credit union may require sixty days notice of intention to withdraw shares and thirty days notice of intention to withdraw deposits. Withdrawing or expelled members shall have no further rights in the credit union but are not, by such expulsion or withdrawal, released from any remaining liability to the credit union. [C27, 31, 35,§9305-a19.]

9305.20 Dissolution. The process of voluntary dissolution shall be as follows:

1. At a meeting called for the purpose, notice of which purpose must be contained in the call, four-fifths of the entire membership of the credit union may vote to dissolve the credit union.

2. Thereupon they shall file with the superintendent of banking a statement of their consent to dissolution, attested by a majority of the officers and including the names and addresses of the officers and directors.

3. The superintendent shall determine whether or not the credit union is solvent. If such is the fact he shall issue in duplicate a certificate to the effect that this section has been complied with.

4. The certificate shall be filed with the county recorder of the county in which the credit union is located, whereupon the credit union shall be declared dissolved and shall cease to carry on business except for the purpose of liquidation.

5. The credit union shall continue in existence for three years for the purpose of discharging its debts, collecting and distributing its assets and doing all other acts required in order to wind up its business, and may sue and be sued for the purpose of enforcing such debts and obligations until its affairs are fully adjusted and wound up. [C27, 31, 35,§9305-a20.]

9305.21 Change in place of business. A credit union may change its place of business on written notice to the superintendent of banking. [C27, 31, 35,§9305-a21.]

9305.22 Taxation. A credit union shall be deemed an institution for savings and shall be subject to taxation only as to its real estate, moneys, and credits. The shares shall not be taxed. [C27, 31, 35,§9305-a22.]

9305.23 Small loans legislation. Nothing contained in this chapter shall apply to any person engaged in the business of loaning money under chapter 419.1. [C27, 31, 35,§9305-a23.]

TITLE XXII

BUILDING AND LOAN ASSOCIATIONS

Referred to in §8876

CHAPTER 417

ORGANIZATION AND GENERAL REGULATIONS

Referred to in §8416

INCORPORATED ASSOCIATIONS

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INCORPORATED ASSOCIATIONS

9306 Defined generally.

1. Corporations organized under the provisions of this chapter to promote thrift and home ownership by providing for their members a cooperative plan for saving money, and investing money so saved in loans to their members, shall be known as building and loan associations or savings and loan associations.

2. The word "supervisor" as used in this chapter shall mean the supervisor of savings and loan associations provided for in this chapter.

3. "Insurance corporation" as used in this chapter shall mean Federal Savings and Loan Insurance Corporation, or its successor, organized under the laws of the United States. [C73, §1184; C97,§1890; C24, 27, 31, 35,§9306; 48GA, ch 231,§1.]

C97, §1890, editorially divided

9307, 9308 Rep. by 45GA, ch 165

9308.1 Associations — scope. Domestic building and loan associations or savings and loan associations shall include corporations incorporated under the laws of this state for the purposes herein specified. The term "building and loan associations" shall be construed to include savings and loan associations. [C97,§1890; C24, 27, 31,§§9307, 9308; C35,§9308-e1.]

9309 Foreign companies. Foreign building and loan or savings and loan associations shall include corporations, societies, organizations, or associations incorporated under the laws of another state, territory, country, or nation for the purposes specified herein. [C97,§1890; C24, 27, 31, 35,§9309.]

9310 Organization. Any number of persons not less than five, residents of the state, may become incorporated as building and loan or savings and loan associations under the general incorporation laws of this state, except as otherwise herein provided, and upon complying with the provisions of this chapter. [C73,§1184; C97, §1891; C24, 27, 31, 35,§9310.]

9311 Capital — commencement of business. The capital named in the articles of incorporation shall be taken to mean the authorized capital, and the association may commence business when one hundred shares thereof have been subscribed and the other provisions of this chapter in relation thereto have been complied with. [C97,§1892; C24, 27, 31, 35,§9311.]

C97,§1892, editorially divided

9311.1 Incorporators committee—treasurer —cash payment—bond. The incorporators shall appoint an incorporators committee and a treasurer thereof. The subscribers to the capital stock shall pay in cash to such treasurer on their subscriptions, before a certificate of incorporation is issued, an aggregate amount to be determined in relation to the population of the city in which the home office of the association is to be located, on the following basis:

1. In cities having not to exceed ten thousand population the minimum paid-in capital shall be five thousand dollars;

2. In cities having more than ten thousand but less than fifty thousand population, the minimum paid-in capital shall be ten thousand dollars;

3. In cities having more than fifty thousand population and less than one hundred thousand population, the minimum paid-in capital shall be twenty-five thousand dollars; and

4. In cities having more than one hundred thousand population, the minimum paid-in capital shall be thirty-five thousand dollars.

The population of any such city shall be determined by the said supervisor in accordance with the latest federal census.

The treasurer of the incorporators committee shall file with the said supervisor a fidelity bond, signed by himself and an authorized surety company acceptable to the supervisor, in a penal sum at least equal to the required paid-in capital and expense fund as hereinafter required, payable to the supervisor of building and loan associations. Such bond shall assure the safekeeping and delivery to the association, after issuance of a certificate of incorporation, and after the association's authorized officers have filed the required bonds of all of such required paid-in capital and expense fund, or in the event of failure to complete organization, such bond shall assure the return to the persons providing such paid-in capital and expense fund of the amounts contributed thereto by them, less any necessary costs and expenses. [48GA, ch 231, §2.]

9312 Directors. Such associations shall be governed by a board of directors who shall be elected annually by the stockholders, and who shall hold their office for not less than one nor more than five years, and, if for a longer period than one year, it shall be so arranged that the terms of an equal number thereof, as nearly as may be, shall expire each year. [C97,§1892; C24, 27, 31, 35,§9312.]

9313 Articles. The articles of incorporation shall show:

1. The names and residences of the incorporators.
2. The name of the association and its principal place of business.
3. The purpose for which such association is formed.
4. The terms and plan of becoming and continuing a member.
5. The plan of making loans.
6. The plan of distributing profits.
7. The plan of equalizing losses.
8. The plan and terms of withdrawal of members.
9. The plan of providing for payment of expenses.
10. The number of shares into which capital stock is to be divided.
11. The classes into which its capital stock is to be divided, and the terms of paying for the same by subscribers.
12. The term of corporate existence.
13. The manner of electing officers and filling vacancies. [C97,§1893; C24, 27, 31, 35,§9313.]

9314 Rep. by 47GA, ch 220,§3

9315 Approval of articles—certificate of authority.

1. The proposed articles of incorporation for any proposed new association, together with proposed bylaws, shall be presented to the auditor of state and by him submitted to the executive council and if it finds that they are in conformity with the law and based upon a plan equitable in all respects to its members, and further finds from the best sources at its command and from such investigation as it may deem necessary, that the proposed incorporators are persons of good character, ability and responsibility; that a reasonable necessity exists for such new institution in the community to be served; that it can be established and operated without undue injury to existing local thrift and home financing institutions and that the proposed name of such institution is not similar to that of any other association operating in the same community and is not misleading or deceitful, the executive council shall attach thereto its certificate of approval and enter its approval of record, and thereupon such articles of incorporation shall be recorded in the office of the secretary of state and in the office of the recorder of the county in which the association's principal place of business is to be situated and then be filed in the office of the auditor of state who shall issue a certificate authorizing the association to transact business as a building and loan association.

2. If the executive council does not affirmatively find as to each and all of the said requirements it shall enter its disapproval of record together with a statement of its findings and conclusions and a certificate of incorporation shall not be issued. Upon such disapproval the executive council shall, by registered mail, notify one, or all, of the proposed incorporators of its disapproval together with the reasons for such disapproval, and thereupon, the proposed incorporators, if not satisfied with such action, may within sixty days after the mailing of such notice appeal to the district court of Iowa in and for the county in which the principal place of business of the proposed association is to be located from such findings and disapproval by serving a notice of such appeal upon the auditor of state, setting forth in general terms the decision appealed from and the grounds of the appeal and by filing with the clerk of the said court, within such sixty days, a duly verified petition stating the facts and the grounds of complaint and having attached thereto a copy of the proposed articles of incorporation and bylaws and a copy of the findings and conclusions of the executive council. Such appeal shall be triable as a mandamus proceeding in equity and the findings and decisions of the executive council shall be binding upon the court unless overcome by clear and convincing proof. Any party aggrieved by the order, judgment or decree of the court may appeal therefrom to the supreme court of Iowa.

3. Before a certificate of authority to do business shall be issued to any such new association, the incorporators shall pay to the treasurer of the incorporators committee, in cash, an amount equal to not less than ten percent of the required minimum capital, which fund shall be in addition to the required minimum paid-in capital and shall, upon issuance of a certificate of incorporation, be paid to the association and shall be set up as a special reserve to be designated "reserve for operating expenses". Such special reserve shall be used only for the purpose of paying the costs and expenses of organization and for paying or contributing toward payment of the operating expenses of such new association during any period or periods during which the association's earnings shall not be sufficient to pay all its expenses in addition to paying dividends to its members at such reasonable rate as shall be approved by the supervisor. Such "reserve for operating expenses" shall be used only for the purposes herein specified and shall be subject to be refunded in full or in part to the contributors as hereinafter provided.

4. After five years from the date of incorporation, the amounts contributed by the incorporators to such reserve for operating expenses may be refunded to the contributors thereto, but the amounts refunded shall at no time be in excess of accumulated net earnings remaining after paying all expenses and paying or making allowance for payment of reasonable dividends to shareholders since the date of incorporation, and crediting at least the minimum amount required to general reserve. In addition to refunding the amounts contributed to such "reserve for operating expenses", the association may also pay to such contributors interest on the amounts contributed, at rates not in excess of the dividend rates paid members since date of incorporation. No such refund shall be made, or interest paid, without first obtaining written approval of the supervisor.

5. In case of dissolution or liquidation of an association before such contributions to such "reserve for operating expenses" have been refunded, the contributors thereto shall be entitled to such refunds out of moneys or assets remaining, if any, after payment of all debts, expenses, costs, and other liabilities, including refund to all members of the amounts paid in and credited on their share accounts. [C97,§1894; C24, 27, 31, 35,§9315; 47GA, ch 220,§10; 48GA, ch 231,§3.]

9315.1 Conversion of federal association. Building and loan or savings and loan associations may be effected by conversion of federal savings and loan associations as authorized by the laws of the United States and regulations made thereunder, subject to approval of the auditor of state. An application for approval together with satisfactory proof that the required procedure authorizing conversion to a state association has been taken shall be filed with the auditor of state who shall thereupon, by examination of the applicant or otherwise, ascertain whether or not the converting association is in good financial condition and is honestly and efficiently managed and if his findings are favorable he shall thereupon grant his approval of such conversion. The converting association shall then adopt and file articles of incorporation and bylaws and otherwise comply

with the provisions and requirements of the laws of Iowa. Upon completion of conversion and organization as a state association, all assets and properties theretofore belonging to it as a federal association shall by operation of law pass to and vest in it as a state association and all liabilities shall thereupon become its liabilities as a state association. For the purpose of showing devolution of titles, there shall be filed with the auditor of state and with the recorder of the county in which the association's principal place of business is located a report duly verified by the president and the secretary showing that the required procedure for conversion has been complied with. [47GA, ch 220, §2.]

9316 Amendments—approval. Amendments to such articles may be made from time to time at any regular or special meeting of the stockholders, and shall in like manner be submitted to the executive council and approved by it. [C97,§1894; C24, 27, 31, 35,§9316.]

9317 Record. The council shall keep a record of its proceedings with reference to such associations. [C97,§1894; C24, 27, 31, 35,§9317.]

9318 Revocation of certificates. The executive council shall have the power, and it shall be its duty, to revoke any certificate of authority given to any building and loan or savings and loan association whenever it appears to said council that said association is transacting business illegally, or is unjust and oppressive to its members or the public. [S13,§1894-a; C24, 27, 31, 35,§9318.]

9319 Domestic companies—bonds—custody. The officers and employees of any domestic building and loan or savings and loan association who sign or indorse checks or handle any funds or securities of such association shall give such bonds or fidelity insurance as the board of directors may require; and no such officer shall be deemed qualified to enter upon the duties of his office until his bond is approved by the board of directors and by the auditor of state. Such bonds shall be deposited and filed with the auditor of state. Such associations may in connection with obtaining such bonds or insurance acquire and hold membership in mutual insurance or bonding companies. No such bond shall be terminated or canceled because of failure to pay premium or for any other cause until after ten days written notice to the supervisor of intention to cancel such bond. [C97,§1895; C24, 27, 31, 35,§9319; 47GA, ch 220,§6; 48GA, ch 231, §16.]

Referred to in §9322

9320 Additional bonds. All such bonds shall be increased or additional securities required by the board of directors or the auditor of state when it becomes necessary to protect the interests of the association or its members. [C97, §1895; C24, 27, 31, 35,§9320.]

Referred to in §9322

9321 Disqualified sureties. No director shall be accepted as surety on such bonds, and no person shall be accepted as surety on the bond of more than one officer of said association. [C97, §1895; C24, 27, 31, 35,§9321.]

Referred to in §9322

9322 Liability of directors. The directors shall be individually liable for loss to the association or its members caused by their failure to require a compliance with the provisions of sections 9319 to 9321, inclusive. [C97,§1895; C24, 27, 31, 35,§9322.]

9323 to 9327, inc. Rep. by 45ExGA, ch 122

9328 Banking prohibited. It shall be unlawful for any building and loan or savings and loan association to receive deposits of money without issuing shares of stock for the same, or to transact a banking business. [C97,§1897; C24, 27, 31, 35,§9328.]

9329 Powers. All building and loan or savings and loan associations, upon receiving the certificate from the auditor, shall have power, subject to the terms and conditions contained in their articles of incorporation and bylaws:

1. To issue shares of stock to members to be paid for in single, monthly, optional or irregular payments.
2. To assess and collect from members such dues, membership fees, fines, premiums, and interest on loans as may in the articles of incorporation and bylaws have been provided, and the same shall not be held to be usurious.
3. To permit members, other than holders of guarantee stock, to withdraw all or a part of their stock deposits upon such terms and at such times as the articles of incorporation and bylaws may provide.
4. To acquire, hold, incumber, and convey such real estate and personal property as may be necessary for the transaction of their business.
5. To make loans to members on such terms, conditions, and securities as the articles of incorporation and bylaws provide; said loans to be made only on real estate security, or on the security of their own shares of stock, not to exceed ninety percent of the withdrawal value thereof.
6. To subscribe for, purchase and hold shares of stock of the federal home loan bank of the district in which Iowa is situated, organized under the act of congress known and cited as the Federal Home Loan Bank Act, approved July 22, 1932 [12 USC,§1421 et seq.], and do all acts necessary to become and be members of the federal home loan bank system, established under the said act and amendments thereto, and to receive advances from such bank and make deposits with such bank and invest in the bonds and other obligations of the federal home loan banks and to assume the obligations and participate in the benefits of such memberships.
7. To borrow money for the purpose of making loans to its members, paying withdrawals, paying maturities, paying debts, and for any other purposes within the scope and objects of its articles of incorporation, and to execute written obligations evidencing such indebtedness.

8. To pledge its notes and mortgages and other assets as security for the repayment of borrowed money, and for the repayment of advances received from a federal home loan bank, and to authorize such pledged security to be repledged by such bank.

9. Any such association may provide in its original or amended articles of incorporation that stock shall be treated as issued in proportion to the amounts paid in by and credited to members without regard to any par value. Members holding such stock shall participate in dividends in proportion to their respective investments therein, and shall have one vote in person or by proxy for each one hundred dollars or fraction thereof paid in and credited, but no person shall vote more than ten percent of the total paid-in capital.

10. Any such association shall have power to obtain, continue and pay for insurance of its shares with Federal Savings and Loan Insurance Corporation. [C73,§§1185, 1186; C97,§1898; S13,§1898; C24, 27, 31, 35,§9329; 47GA, ch 220, §1.]

S13, §1898, editorially divided

9330 Limitation on issue of stock. Associations having assets of five hundred thousand dollars or less shall not issue to any one member shares of more than ten thousand dollars par value. Associations having assets in excess of five hundred thousand dollars shall not issue to any one member shares of par value in excess of two percent of its assets. These limitations shall not apply to shares issued to the United States government, to Home Owners' Loan Corporation, or to any other federal government agency or instrumentality. [C73,§1185; S13, §1898; C24, 27, 31, 35,§9330; 47GA, ch 221,§1; 48GA, ch 231,§4.]

9330.1 Joint issuance of shares. Any building and loan association and any federal savings and loan association may issue shares in the joint names of two or more persons with the power of withdrawal in either, or in either or the survivor, and the withdrawal value of such shares may be paid to either of such persons whether the other be living or not, and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge of such association for the payment so made. [C35, §9330-e1; 48GA, ch 231,§14.]

9331 Foreclosure — debit and credit. In case of foreclosure, the borrower shall be charged with the full amount of the loan made to him, together with the dues, interest, premium, and fines for which he is delinquent, and he shall be credited with the same value of his pledged shares as if he had voluntarily withdrawn the same. [C97,§1898; S13,§1898; C24, 27, 31, 35,§9331.]

9332 Rep. by 45ExGA, ch 122

9333 Annual financial statement. It shall be the duty of the secretary of every such association doing business in this state, before the fifteenth day of February of each year, to prepare and mail to each shareholder a written or printed copy of its statement of assets and liabilities as of the date of its annual closing of its books for the preceding year, or in lieu of mailing such statement it may be published in a newspaper of general circulation published at the place of its home office, or if a newspaper is not published at such place, then such statement may be published in any newspaper of general circulation published in the county in which the home office is situated. [C97,§1898; S13,§1898; C24, 27, 31, 35,§9333; 47GA, ch 220, §5.]

9334 Forbidden stocks—rate of dividend. No building and loan or savings and loan associations shall issue guarantee stock, fully paid stock, or single payment stock, or any stock of any other kind or name which shall receive fixed dividends, or is not subject to all the liabilities of all other classes of stock of said associations, except that it shall be lawful for such associations to issue fully paid stock upon the payment by the holder thereof of the par value of such stock upon which the dividends to be declared shall not exceed the sum named in said certificate of stock, but in no event shall the dividend exceed eight percent per annum nor the rate of dividend declared upon the other stock of said association, which said stock shall be subject to be called in and redeemed by the said association by giving the holder thirty days notice thereof. [S13,§1898-c; C24, 27, 31, 35, §9334.]

9335 Rep. by 45ExGA, ch 122

9336 Rep. by 47GA, ch 220,§3

9337, 9338 Rep. by 45ExGA, ch 122

9339, 9340 Rep. by 47GA, ch 220,§3

9340.01 Investments. A building and loan or savings and loan association may invest its idle funds, or any part thereof, in bonds or interest-bearing obligations of the United States, or of the state of Iowa, or of any county, municipal corporation, township, school district, or other political subdivision of this state or bonds and obligations of a federal home loan bank established by act of congress known as the Federal Home Loan Bank Act, approved July 22, 1932 [12 USC,§1421 et seq.]. Investments thus made shall at no time exceed ten percent of the assets of the association.

Such associations may also invest in consolidated bonds and debentures of the federal home loan bank system and in obligations of the Federal Savings and Loan Insurance Corporation issued pursuant to title IV of the National Housing Act. Such investments shall not at any time exceed twenty-five percent of the assets of the association.

Such associations may also invest in shares of other savings and loan associations organized under the laws of this state or of the United States, subject to the limitations as to amounts of investments by members in such associations. [C27, 31, 35,§9340-b1; 48GA, ch 231,§5.]

42GA, ch 207, §1, editorially divided
Investments in federal insured loans, §12786.1

9340.02 Deposit of funds. Funds of such association may be deposited in any state or national bank on certificate of deposit, or the usual bank pass book credit, subject to check by the proper designated officers of such association or in the federal home loan bank of the district in which Iowa is located. [C27, 31, 35, §9340-b2.]

9340.03 Who may invest without court order. Administrators, executors, guardians, guardians of veterans, trustees, receivers and fiduciaries of all kinds, banking institutions, trust companies, life insurance companies, assessment life insurance associations, fraternal beneficiary societies, orders and associations, mutual benefit societies, mutual insurance companies, nonmutual and mutual life, fire, tornado, hail, windstorm and other assessment insurance associations, cooperative associations, credit unions, trustees of cemetery funds, financial institutions of every kind and character, public officials having the custody of public funds, political subdivisions of the state having control of sinking funds, teachers, firemen and other pension and retirement funds and eleemosynary institutions are authorized without any order of court to invest in the shares of savings and loan associations organized under the laws of this state and under the laws of the United States, subject to the limitations as to the amount of shares which may be issued to any one member. [48GA, ch 231,§13(2).]

9340.04 Loans to members. The funds of a building and loan association not used or needed for other authorized purposes shall be invested for the benefit of its shareholders in loans to its members, according to the plan or plans specified in its articles of incorporation, on the security of first liens on real estate or on the security of liens on its own shares of stock, or on both such securities. [C97,§1899; C24, 27, 31, 35,§9340; 47GA, ch 220,§3.]

47GA, ch 220, §3, editorially divided

9340.05 Direct reduction loans—payment. Each loan secured only by real estate shall require the borrower to make weekly, semimonthly or monthly payments which shall be applied first to pay the interest on the unpaid principal and the remainder to reduce the unpaid principal of the debt. [C97,§1899; S13,§1899-a; C24, 27, 31, 35,§§9340, 9341; 47GA, ch 220,§3.]

9340.06 Share accumulation loans—payment. Each loan secured by both lien on real estate and by shares of an association's stock shall require the borrower to subscribe for and pledge shares of stock in the association of par value at least equal to the amount borrowed and to make weekly, semimonthly or monthly payments on such shares until the payments so made, together with dividends credited thereto, have reached a value equal to his unpaid indebtedness and thereupon such pledged shares shall be canceled and the value thereof shall be applied in payment of the loan; provided, however, that any such association may permit the borrower to withdraw all or portions of the credits to such pledged shares periodically, or whenever specified amounts have been accumulated thereon, and apply the proceeds thereof as partial payments on such loan, or to withdraw for such other purposes as may be approved by its board of directors. [C97,§1899; S13,§1899-a; C24, 27, 31, 35,§§9340, 9341; 47GA, ch 220,§3.]

9340.07 Stock—nonliability—dividends offset. Shares of stock subscribed for and pledged as above provided and payments made thereon and dividends credited thereto shall in no event be liable for losses sustained by the association and in case of liquidation of the association such payments and dividends shall be offset against and credited to reduce the borrower's indebtedness. [S13,§1898-d; C24, 27, 31, 35, §9336; 47GA, ch 220,§3.]

9340.08 Requirements for loan. Each loan secured by lien on real estate or by both real estate lien and association's stock shall provide for amortization of all the principal within a period of not to exceed fifteen years and shall be secured by a first mortgage on real estate consisting of residence property or combination of residence and business property, and no such loan shall be made in excess of twenty thousand dollars; provided, however, that not to exceed ten percent of an association's assets may be loaned to members on the security of other improved real estate and without regard to said twenty thousand dollars limitation. Real estate securing loans shall be situated in the county in which the principal place of business of the association is located, or in counties immediately adjoining or abutting on such county. No real estate loans shall be made except upon written signed appraisal reports made by two or more competent persons selected by the association's board of directors, either from or outside its membership, and such loans shall not, when made, exceed seventy-five percent of such appraised value, and all loans must be approved by the board of directors, or a committee thereof, and record made of such approvals; provided, however, that loans insured by the Federal Housing Administration may be made not in excess of eighty percent of such appraised value and for periods not to exceed twenty years. Loans made before this act [47GA, ch 220] takes effect* shall not be affected by its requirements. [C97,§1899; C24, 27, 31, 35,§9340; 47GA, ch 220,§3.]

*Effective date, April 9, 1937

9340.09 Additional loans. If an association holds a first mortgage loan on real estate it may make an additional loan or loans on the security of an additional first lien mortgage or mortgages on the same property, provided the aggregate unpaid principal of such mortgages does not exceed the percentage of the appraised value of the real estate authorized by law. [47GA, ch 220,§3.]

9340.10 Share loans. Loans may also be made upon the security of the pledges of shares of the stock of the lending association held by the borrower, but shall not be made in excess

of ninety percent of the fair value of such pledged shares. No stock loans shall be made when applications for withdrawals have been on file and unpaid for more than sixty days because of lack of available funds, unless specifically authorized by the board of directors. [47GA, ch 220,§3.]

9340.11 Association lien on shares of stock. Every such association shall at all times have a lien upon the stock of a member as security for repayment of money loaned him and as security for his other indebtedness to the association and such lien shall attach and continue without assignment or pledge to or possession by the association of any stock certificate evidencing such stock ownership. Such lien may be enforced to satisfy any past due indebtedness by charging such indebtedness to the debtor's share credits. [47GA, ch 220,§3.]

9340.12 Acquired stock—no offset. A borrowing member shall not without permission of the board of directors be permitted to offset against his indebtedness to such association any stock of the association acquired directly or indirectly from other members. [47GA, ch 220, §3.]

9340.13 Interest rates variable. The rate or rates of interest, premium, commission and other fees to be charged on loans made by such associations and the bases on which different interest rates and charges shall be determined shall from time to time be fixed by the bylaws of the association, but interest charged shall not exceed the maximum interest rate authorized by law. [S13,§§1893-a, 1899-a; C24, 27, 31, 35, §§9314, 9341; 47GA, ch 220,§3.]

Interest, maximum rate, §§9404–9408

9340.14 Notes nonnegotiable. The notes evidencing all loans shall be in nonnegotiable form. [C97,§1899; C24, 27, 31, 35,§9340; 47GA, ch 220,§3.]

9340.15 Borrower as member. Any borrower not holding or subscribing for stock shall nevertheless be a member of such association and shall be entitled to one vote at any shareholders meeting. [47GA, ch 220,§3.]

9340.16 Investment—office building. Any such association may invest an amount not to exceed five percent of its paid-in capital stock in unincumbered real estate for use wholly or partly as its business office. [47GA, ch 220,§4.]

Constitutionality, 47GA, ch 220, §13
Omnibus repeal, 47GA, ch 220, §12

9341 Rep. by 47GA, ch 220,§3

9342 Voting shares of stock. Each member shall have one vote for each one hundred dollars of stock par value owned and held by him at any election, and may vote the same by proxy, but no person shall vote more than ten percent of the outstanding shares at the time of said election. Anyone depositing or transferring stock to the association as collateral security shall be deemed the owner of such stock within the meaning of this section. [C97,§1900; C24, 27, 31, 35,§9342.]

9343 Voting in representative capacity. Any guardian, executor, administrator, or trustee shall have the right to vote, manage, and control the shares held by him in his representative capacity. [C97,§1901; C24, 27, 31, 35,§9343.]

9344 Minors as members. Minors may become members of state and federal savings and loan associations and make withdrawals the same as other members, unless notice to the contrary is given in writing to said association by the parent or guardian of said minor. [C24, 27, 31, 35,§9344; 48GA, ch 231,§15.]

9345 Rep. by 45ExGA, ch 122

9346 Membership fee—"expenses" defined. Building and loan or savings and loan associations may charge as an initial membership fee to purchasers of their stock a fee not to exceed fifty cents per one hundred dollars par value of stock subscribed for or issued, and in no case to exceed a total of ten dollars for any member. Membership fees and expenses of making loans shall not be deemed a part of the expenses of an association. [C97,§1902; C24, 27, 31, 35, §9346.]

9347 Dividends. After making such provision as it deems advisable for absorbing immediate and possible future losses, the board of directors of such association shall annually, semiannually or quarterly declare and apportion as a dividend to members, according to its articles of incorporation, such portion of the association's net profits as it may deem available. [C73,§1187; C97,§§1902, 1903; C24, 27, 31, 35, §§9347, 9350; 47GA, ch 220,§11.]

9347.1 Reserve for contingencies. As of June 30 and December 31 of each year, before declaring any dividends, the board of directors shall transfer and credit to a general reserve account an amount equivalent to not less than two percent of the net earnings of the association for the preceding six months, called the "accounting period", such transfers to be made at the end of each six months accounting period, until such general reserve account is equal to at least five percent of the total amount paid in by members and credited on shares. If at any time thereafter such general reserve account shall on account of losses be reduced to less than five percent of the amount paid in and credited on shares, such transfers and credits thereto shall be resumed and continued until such reserve is again equal to at least five percent of the total amount paid in and credited on shares of members. The reserve account so established shall at all times be maintained and used for the sole purpose of absorbing losses incurred by the association and for no other purposes. An association may establish such other and additional special reserves as may be ordered by its board of directors. [48GA, ch 231,§6.]

9348 Expenditures and expenses. All expenditures and expenses for management and conducting the affairs of such associations, not including membership fees and charges for clos-

ing loans, shall be paid from the receipts of interest, premiums, and other sources of profit. Said associations may thus use for expenses in any one year a sum not in excess of the following percentages on their assets, as shown by the last annual report, to wit:

1. Associations with assets not in excess of one hundred thousand dollars, three percent per annum.

2. Associations with assets in excess of one hundred thousand dollars and less than three hundred thousand dollars, two and one-half percent.

3. Associations in excess of three hundred thousand dollars and less than five hundred thousand dollars, two and one-quarter percent.

4. Associations with assets in excess of five hundred thousand dollars and less than eight hundred thousand dollars, one and three-quarters percent.

5. Associations with assets in excess of eight hundred thousand dollars, one and one-half percent. [S13,§1902-a; C24, 27, 31, 35,§9348; 47GA, ch 220,§7.]

9349 Compensation of officers and agents. No officer, employee, or agent of any association shall receive directly or indirectly any salary or other compensation, except for services actually rendered. Any compensation paid in violation of this section may be recovered by the association or by any shareholder or borrower, in the name and for the use of such association, within three years from the receipt of such illegal compensation, from the person accepting the same, or from any officer knowingly consenting to the allowance thereof. [S13,§1902-a; C24, 27, 31, 35, §9349.]

9350 Rep. by 47GA, ch 220,§11

9351 Fines. Any stockholder in arrears in payments may be fined in a sum not in excess of three cents per share of one hundred dollars each for the first month's delinquency and five cents per share of one hundred dollars each for each succeeding month's delinquency; but said penalty shall only be due and payable from the profits belonging to said delinquent. [S13, §1903-a; C24, 27, 31, 35,§9351.]

S13, §1903-a, editorially divided

9352 Withdrawals. The terms of withdrawal of a member from such association shall be such that any withdrawing member shall receive a sum not less than he has paid into said association, unless losses have occurred to said association, during the time that said withdrawing member was a member, which exceed the amount of the profits, or any fund created with which to pay such losses, and in that case such withdrawing member shall be charged with his proportionate share of the excess of the losses over the profits, and no more. Such association may provide by its articles of incorporation or bylaws or by resolution of its board of directors, the order in which withdrawals shall be paid, and when dividends shall cease on shares on which withdrawal demands have been made, and what portion of the association's funds or receipts shall be used for payment of withdrawals and matured shares. [S13,§1903-a; C24, 27, 31, 35,§9352.]

9353 Nonborrowing members—withdrawal. If authorized by the articles of incorporation or bylaws of such association, the board of directors may by a three-fourths vote provide that any nonborrowing member shall withdraw his stock at book value at the end of any dividend period by giving such stockholder thirty days notice of such order, sent by registered mail to the address shown on the records of such association. [S13,§1903-b; C24, 27, 31, 35,§9353.]

9354 Examinations.

1. The supervisor shall, at least once in each year, without previous notice, examine or cause examination to be made, into the affairs of every association subject to this chapter. If an association is insured under the provisions of title IV of the National Housing Act, as now or hereafter amended, the supervisor may, in lieu of such examination, accept any examination made by the Federal Savings and Loan Insurance Corporation. Any such association may, in lieu of such examination by the supervisor, at its option, be examined by a certified public accountant, or by a public accountant qualified and licensed to practice accountancy under the provisions of the code of Iowa, such examination to be made and reported upon the uniform forms and instructions to be provided by the supervisor. At least two copies of each examination report, signed and verified by the accountant making it, shall promptly be filed with the supervisor. Whenever, in the judgment of the supervisor, the condition of any association renders it necessary or expedient to make an extra examination or to devote any extraordinary attention to its affairs, the supervisor shall cause such work to be done. A copy of every examination report shall be furnished to the association examined, exclusive of confidential comments made by the examiner, and a copy of every report and comments and any other information pertaining to an association may be furnished to the Federal Home Loan Bank Board, Federal Home Loan Bank, and Federal Savings and Loan Insurance Corporation. A copy of such examination report shall be presented to the board of directors at its next regular or special meeting, and their action thereon shall be recorded in the minutes, and two certified copies of such minutes shall be transmitted to the supervisor.

2. The supervisor and examiners shall have full access to all books and papers of an association which relate to its business, and to books, records, and papers kept by any officer, director, agent, or employee relating to, or upon which any record of its business is kept, and may summon witnesses and administer oaths or affirmations, in the examination of the directors, officers, agents, or employees of any such association, or any other person, in relation to its affairs, transactions and condition, and may require and compel the production of records,

books, papers, contracts, or other documents by court order, if not voluntarily produced. [C97, §1904; C24, 27, 31, 35,§§9354, 9355; 48GA, ch 231,§§7, 17.]

Contempts, ch 536
C97, §1904, editorially divided

9354.1 Supervisor—examiners—bonds.

1. The auditor of state shall appoint as a deputy, to be known as "supervisor of savings and loan associations", a person who shall be required to have had at least three years of actual experience as active officer or employee in the office of a savings and loan association. Such supervisor shall be appointed and shall assume the duties of his office July 1, 1939, and shall hold his office until July 1, 1941, and thereafter appointments shall be for terms of two years, subject to removal by the executive council for good cause, after due hearing. Such supervisor's salary shall be at the rate of twenty-five hundred dollars per annum. In addition thereto he shall receive his necessary traveling expenses.

2. The supervisor of savings and loan associations shall have general supervision of all savings and loan associations doing business in this state. He may, with the approval of the auditor of state, appoint examiners and assistants necessary to properly execute the duties of his office. Any examiner so appointed shall have had at least one year of actual experience as examiner, officer, or employee, of a savings and loan association.

3. Before entering upon their duties, the supervisor of savings and loan associations and each examiner appointed by him shall take an oath of office and shall each give bond to the state, signed by a responsible surety company, in the penal sum of two thousand dollars, conditioned upon faithful and impartial discharge of his duty and on proper accounting for all funds and other valuables which may come into his hands. Such bonds shall be approved by and filed with the auditor of state, together with oaths of office of such officers. [C35,§9354-f1; 48GA, ch 231,§8.]

9355 Rep. by 48GA, ch 231,§17

9356 Expenses and per diem. If the examination is made by the auditor in person, he shall receive his actual expenses. If by another, his actual expenses and the per diem fixed by law, which in either case shall be paid by the association examined. [C97,§1904; C24, 27, 31, 35, §9356.]

9357 Record required. A record of such examination shall be kept in the auditor's office, showing in detail as to each association all matters connected with the conduct of the business, its financial standing and everything touching its solvency, plan of business, and integrity.

Such examinations and reports, and other information connected therewith, shall be kept confidential in the office of the auditor of state and the supervisor of savings and loan associations, and shall not be subject to publication or disclosure to others except as in this chapter provided. Members of such associations, other than their officers and directors, shall not be entitled to inspection of any such records or information, and shall not be entitled to any information relative to the names of the members of any association, or the amounts invested by them, as disclosed in the auditor's office, or in the records of any such association. [C97,§1904; C24, 27, 31, 35,§9357; 48GA, ch 231,§9.]

9358 Revocation of authority. If any such association refuse to submit to such examination, the auditor shall revoke its certificate of authority. [C97,§1904; C24, 27, 31, 35,§9358.]

9359 Rep. by 45ExGA, ch 122,§4

9360 Supervisor's annual report. The supervisor of savings and loan associations shall, as of December 31 of each year, prepare and publish a report showing in general terms the condition of all savings and loan associations doing business in this state, and containing such other general information as in his judgment shall seem desirable. Such reports shall also list the names of all examiners and other assistants employed by him, together with the respective salaries and expenses, and shall list all receipts from savings and loan associations, and shall show all expenditures made on account of the supervision and examinations of such associations. [C97,§1906; C24, 27, 31, 35,§9360; 48GA, ch 231,§10.]

Time of report, §246

9361 Rep. by 48GA, ch 231,§17

9361.1 Conservatorship — operation — termination. If the supervisor, as a result of any examination or from any report made to him, shall find that any savings and loan association is violating the provisions of its certificate of incorporation, or bylaws, or the laws of this state, or of the United States, or any lawful order of the supervisor, or is conducting its business in an unsafe manner, he may, by an order, direct discontinuance of such violation or unsafe practice, and conformance with all requirements of law. If any such association shall refuse or neglect to comply with such order within the time specified therein, or if it shall appear to the supervisor that any such association is in an unsafe condition or is conducting its business in an unsafe manner, or if he shall find that an impairment of capital exists to such extent that it threatens loss to the members, or if any association refuses to submit its books, papers, and accounts to the inspection of the supervisor or his representative, he, by written order signed by himself and the auditor of state, may appoint a conservator to take charge of the association and manage its business until the supervisor shall permit the board of directors to resume management of the business or shall reorganize the association, or until a receiver shall be appointed to liquidate its affairs. Any conservator so appointed shall, subject to approval of the supervisor and auditor of state, have all the rights, powers and privileges possessed by the officers,

board of directors, and members of the association. The conservator shall not retain special counsel or other experts, or incur any expenses other than normal operating expenses, or liquidate assets, except in the ordinary course of operations. The directors and officers shall remain in office and the employees shall remain in their respective positions, but the supervisor may remove any director, officer, or employee. While the association is in charge of a conservator, members of such association shall continue to make payments to the association in accordance with the terms and conditions of their contracts, and the conservator, in his discretion, may permit holders of shares, or share accounts, to repurchase such shares, or share accounts, from the association as in the ordinary course of business, or under, and subject to, such rules and regulations as the supervisor may prescribe, and the conservator shall have power to accept payments on shares, or share accounts, but any such payments thereon received by the conservator may be segregated if the supervisor shall so order in writing, and if so ordered, such payments shall not be subject to offset, and shall not be used to liquidate any indebtedness of such association existing at the time the conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating the indebtedness of such association existing at the time such conservator was appointed. All expenses of the association during such conservatorship shall be paid by the association. The appointment of a conservator shall be evidenced by the supervisor issuing a certificate, signed by himself and by the auditor of state, delivered to the president, or the vice president, or to at least three members of the board of directors of the association, certifying that a conservator has been appointed pursuant to this section. Within six months from the date upon which the conservator shall take charge of an association, the supervisor shall determine whether or not he shall restore the management of the association to the board of directors. Such determination shall be evidenced by the supervisor's certificate under the seal of his office, delivered to the president, or vice president, or to the board of directors of the association, that the conservator forthwith is redelivering the management of the association to the board of directors of the association then in office. After the management of the association shall have been redelivered to the board of directors of an association, the association shall thenceforth be managed and operated as though no conservator had been appointed. At any time prior to the redelivery of the management to the board of directors, the supervisor shall determine whether such association shall be required to reorganize. Such determination shall be evidenced by a certificate, signed by the supervisor, and by the auditor of state, under the seal of his office, delivered to an executive officer of the association stating that unless the association reorganize under the laws of this state within a period of sixty days from the date of such certificate, or within such further time as the supervisor shall approve, the supervisor will proceed to liquidate the association. If the association has the insurance protection provided by title IV of the National Housing Act, as now or hereafter amended, a signed and sealed copy of each order and certificate mentioned in this section shall be promptly sent by the supervisor by registered mail to the Federal Savings and Loan Insurance Corporation, Washington, D. C. [48GA, ch 231,§11.]

9362 Quo warranto—receiver. When any building and loan or savings and loan association is conducting its business illegally, or in violation of its articles of incorporation or bylaws, or is practicing deception upon its members or the public, or is pursuing a plan of business that is injurious to the interests of its members, or its affairs are in an unsafe condition, the auditor of state shall notify the directors thereof, and, if they shall fail to put its affairs upon a safe basis, he shall advise the attorney general thereof, who shall take the necessary steps to wind up its affairs in the manner provided by law. In such proceedings a receiver may be appointed by the court and such proceeding shall be the exclusive liquidation or insolvency proceeding and a receiver shall not be appointed in any other proceedings. [C97, §1907; C24, 27, 31, 35,§9362.]

9362.1 Reorganization — liquidation. Any savings and loan association, including one in receivership, may reorganize upon any plan approved by its board of directors and by the supervisor. Such reorganization may include reduction of share credits of its members, not pledged as security for real estate loans, and may also include segregation of assets of uncertain or doubtful value by transfer thereof to trustees for management and liquidation or by transfer to a separate fund within the association, to be managed and liquidated by the association for the benefit of the members whose share credits have been reduced in connection with such segregation. [48GA, ch 231,§13(4).]

9363 Voluntary liquidation. Building and loan or savings and loan associations, by a vote of three-fourths of the shareholders of such associations, represented in person or by proxy, may go into voluntary liquidation upon such plan as shall be determined upon by the shareholders at their meeting. [S13,§1907-a; C24, 27, 31, 35,§9363.]

S13, §1907-a, editorially divided

9363.1 Supervision during liquidation. During the period of voluntary liquidation of any such association, the supervisor shall have substantially the same powers and duties as to supervision as before such liquidation, and the persons in charge of such voluntary liquidation shall furnish and deposit with the supervisor such bonds as he shall require and approve, and shall semiannually, or oftener if required by the supervisor, report to him fully as to their doings

and progress, and as to the financial condition of the association. Upon completion of such liquidation they shall file with the supervisor a verified final report of such liquidation and disbursement of proceeds and upon approval of such report the supervisor shall issue a written order discharging the liquidators, and their duties shall thereupon cease. [48GA, ch 231,§12.]

9364 Transfer of mortgages—maturity. In case any such association resolves to go into voluntary liquidation, it shall have power, after crediting the mortgages given by the borrowing member with the full book value of the stock, to sell and assign such mortgages to a similar building and loan association, or to any other parties who will hold the same upon the terms under which such mortgage was given to the association. In that event the said mortgage shall be held to become due, if no other time can be agreed upon between the mortgagor and the association, within three years after the assignment thereof. [S13,§1907-a; C24, 27, 31, 35, §9364.]

9365 Rep. by 47GA, ch 220,§3

9366 Consolidation with other companies. Any building and loan or savings and loan association organized under the laws of this state shall have authority to consolidate its business and membership with one or more building and loan or savings and loan associations of the same class organized under the laws of this state and to transfer to such association or associations its entire assets subject to its existing liabilities, and upon the consolidation of such associations, if any one or more of said companies shall have heretofore issued guaranty stock, they may provide for the withdrawal and retirement of said guaranty stock, and the same may be withdrawn in accordance with the plan therein adopted. [S13,§1907-b; C24, 27, 31, 35,§9366.]

S13, §1907-b, editorially divided

9367 Approval by executive council. The plan of such consolidation, when approved by the board of directors of each of the associations, shall be reduced to writing and submitted to the executive council, and if they find that the plan is in conformity with the law, and equitable in all respects to the members of both associations, they shall attach thereto their certificate of approval. [S13,§1907-b; C24, 27, 31, 35,§9367.]

9368 Approval by members. Such plan shall then be submitted to the members of both associations, either at the regular meetings or at special meetings called for that purpose, and, if approved by a vote of three-fourths of the shares of stock of each association, the same shall then be filed in the office of the auditor of state, who shall issue a certificate authorizing the consolidation. [S13,§1907-b; C24, 27, 31, 35,§9368.]

9369 Manner of voting. At such meetings the members may vote in person, or by proxy, or by written ballot mailed or otherwise delivered to the secretary at or before the time of meeting. [S13,§1907-b; C24, 27, 31, 35,§9369.]

9370 Consolidation under receivership. In any case where a receiver has been appointed for any such association, its membership and business may in like manner be consolidated with, and its assets transferred to, another such association of the same class, but in such case the receiver shall act in place of the board of directors, and the plan must also be approved by the court by which the receiver was appointed. [S13,§1907-c; C24, 27, 31, 35,§9370.]

9371 Foreign companies. If any foreign building and loan or savings and loan association, as in this chapter defined, desires to transact business within this state, it shall furnish to the executive council a certified copy of its articles of incorporation, or charter and bylaws, and a certified copy of the state laws under which it is organized, together with a report for the year next preceding, verified by its president, vice president, secretary, and at least three directors, which report shall show:

1. The amount of its authorized capital stock and the par value of each share.
2. The number of shares sold during the year.
3. The number of shares canceled or withdrawn during the year.
4. The number of shares in force at the end of the year.
5. A detailed statement of all funds received during the year and all disbursements.
6. The salaries paid each of its officers.
7. A detailed statement of its assets and liabilities at the end of such year and the nature thereof.
8. Any other matters of fact which the council may require. [C97,§1908; C24, 27, 31, 35, §9371.]

C97, §1908, editorially divided

9372 Approval by council — certificate of authority. Upon receipt of such report the council, if it finds therefrom that the association is properly managed, that its financial condition is satisfactory, and that its business is conducted upon a safe and reliable plan and one equitable to its members, shall so certify upon such copy and statement, and, the same being filed with the auditor, he shall issue a like certificate as in the case of domestic associations. [C97,§1908; C24, 27, 31, 35,§9372.]

9373 Conditions attending approval. No building and loan or savings and loan association, incorporated under the laws of any other state or country, shall be authorized to do business in this state, whose articles of incorporation are not found by the executive council to be in substantial compliance with the laws of this state, and affording equal security and protection to the members thereof. [S13,§1908-a; C24, 27, 31, 35,§9373.]

Referred to in §9385

9374 Deposit by foreign company. Every such foreign building and loan or savings and loan association, before the state auditor shall issue to it a certificate, shall comply with the following provisions:

1. It shall deposit with the auditor of state one hundred thousand dollars, either in cash, or bonds of the United States or of the state of Iowa, or of any county or municipal corporation of the state of Iowa, or notes secured by first mortgage, on real estate, or a like amount in such other security as shall be satisfactory to said auditor.

2. Such foreign association may collect and use the interest on any securities so deposited as long as it fulfills its obligations and complies with the provisions of this chapter. It may also exchange them for other securities of equal value and satisfactory to said auditor. [C97,§1909; C24, 27, 31, 35,§9374.]

9375 **Liability of deposit.** The deposit made with the auditor shall be held as security for all claims of resident shareholders of the state against said association, and shall be liable for all judgments or decrees thereon, and subject to the payment of the same. [C97,§1910; C24, 27, 31, 35,§9375.]

9376 **Auditor of state as process agent.** Such foreign associations shall also file with the auditor of this state a duly authenticated copy of a resolution adopted by the board of directors of such association, stipulating and agreeing that, if any legal process or notice affecting such association be served on the said state auditor, and a copy thereof be mailed, postage prepaid, by the party procuring and issuing the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process or notice shall have the same effect as personal service on said association within this state. [C97,§1911; C24, 27, 31, 35, §9376.]

Referred to in §9377
Similar provisions, §§8355, 8421, 8766, 8801, 8952, 9087
C97, §1911, editorially divided

9377 **Manner of service.** When proceedings have been commenced against, or affecting any foreign building and loan or savings and loan association, as contemplated in section 9376, and notice has been served upon the auditor of the state, the same shall be by duplicate copies, one of which shall be filed in his office, and the other mailed by him, postage prepaid, to the home office of such association. [C97,§1911; C24, 27, 31, 35,§9377.]

9378 **Amendments to articles.** All foreign building and loan or savings and loan associations shall file with the auditor of state, within ten days after their adoption, a duly certified copy of any amendment or amendments to their articles of incorporation or bylaws that may have been adopted. [C97,§1912; C24, 27, 31, 35, §9378.]

9379 **Fees — foreign companies.** Foreign building and loan or savings and loan associations shall pay to the auditor of state the following fees, which shall be paid by him into the state treasury: For each application to do business in this state, one hundred dollars; for each certificate of authority and each annual renewal thereof, fifty dollars; for filing each annual statement of the assets of the association, as shown by the statement filed, amounts to fifty thousand dollars or less, three dollars; if more than fifty thousand dollars and less than one hundred thousand dollars, five dollars; if more than one hundred thousand dollars and less than two hundred and fifty thousand dollars, ten dollars; if more than two hundred and fifty thousand dollars, and less than five hundred thousand dollars, twenty dollars; if more than five hundred thousand dollars and less than one million dollars, thirty dollars; and if more than one million dollars, fifty dollars. [C97,§1913; C24, 27, 31, 35,§9379.]

Collection by auditor, §130.8
C97, §1913, editorially divided

9380 **Fees—domestic companies.** Domestic building and loan or savings and loan associations shall pay to the auditor of state the sum of twenty-five dollars for each certificate of authority and each renewal thereof, and for filing each annual statement, fifteen dollars. [C97, §1913; C24, 27, 31, 35,§9380.]

Collection by auditor, §130.8

9381 Rep. by 45ExGA, ch 122,§4

9382 **Annual statement.** All building and loan or savings and loan associations doing business in this state shall, on or before the first day of February of each year, file with the auditor of state a detailed report and financial statement of their business for the year ending the thirty-first day of December next preceding, and such report shall be verified by the president and secretary or by three directors of the association, and such report shall show:

1. The date when the association was incorporated and the par value of each share of stock.
2. The number of shares sold during the year.
3. The number of shares canceled or withdrawn during the year.
4. The number of shares in force at the end of the year.
5. A statement of the assets and liabilities at the end of the year.
6. The salary paid to each of its officers during the year. [C97,§1914; C24, 27, 31, 35,§9382; 47GA, ch 220,§8.]

Referred to in §9384
C97, §1914, editorially divided

9383 **Additional report by foreign company.** All foreign building and loan or savings and loan associations shall, in addition to the above, report the name of each shareholder of such association residing within the state, together with the post-office address of each, and the number of shares owned by each of said persons on the first day of January preceding, and the cash value of each of said shares on said date. [C97,§1914; C24, 27, 31, 35,§9383.]

Referred to in §9384

9384 **Violations.** If an association shall fail or refuse to furnish to the auditor of state the report required in sections 9382 and 9383, it shall forfeit the sum of twenty-five dollars for every day such report shall be withheld, and the auditor of state may maintain an action in the

name of the state to recover such penalty, and the same shall be paid into the treasury of the state. [C97,§1915; C24, 27, 31, 35,§9384.]

9385 Sale of stock in unauthorized foreign company. It shall be unlawful for any agent, solicitor, or other person to sell stock or solicit persons to subscribe for stock in any such association named in section 9373, which has not been authorized to do business in this state, and any person convicted of so doing shall be punished by a fine of not less than fifty nor more than two hundred dollars, and shall be committed to the county jail until the fine and costs are paid. [S13,§1915-a; C24, 27, 31, 35,§9385.]

9386 Discrimination in foreign states. When by the laws of any other state, territory, country, or nation, or by the decision or rulings of the appropriate and proper officers thereof, any greater taxes, fines, penalties, licenses, fees, deposits of money or other securities, or other obligations or prohibitions, are demanded of building and loan or savings and loan associations of this state, as a condition to be complied with before doing business in such other state, territory, country, or nation, or their agents therein, than are imposed upon foreign associations doing business in this state, so long as such laws continue in force, the same requirements, obligations, and prohibitions of whatever kind shall be imposed on all building and loan or savings and loan associations of such other state, territory, country, or nation doing business in this state, and upon their agents. It is hereby made the duty of the auditor of state to enforce the provisions of this section. [C97, §1916; C24, 27, 31, 35,§9386.]

9387 Revocation of certificate. If a certificate of authority to do business shall have been issued to any association, and it shall violate any of the provisions of this chapter, the auditor of state shall revoke the same. [C97,§1917; C24, 27, 31, 35,§9387.]

9388 Criminal offenses. If any officer, director, or agent of any building and loan or savings and loan association shall knowingly and willfully swear falsely to any statement in regard to any matter in this chapter required to be made under oath, he shall be guilty of perjury. If any director of any such association shall vote to declare a dividend greater than has been earned; or if any officer or director or any agent or employee of any such association shall issue, utter, or offer to utter, any warrant, check, order, or promise to pay of such association, or shall sign, transfer, cancel, or surrender any note, bond, draft, mortgage, or other evidence of indebtedness belonging to such association, or shall demand, collect, or receive any money from any member or other person in the name of such association without being authorized to do so by the board of directors in pursuance of its lawful power; or if any such officer, director, agent, or employee shall embezzle or convert to his own use, or shall use or pledge for his own benefit or purpose, any moneys, securities, credits, or other property belonging to the association, or shall knowingly do or attempt to do any business for such association that has not procured and does not hold the certificate of authority therefor as in this chapter provided, or shall knowingly make or cause to be made any false entries in the books of the association, or shall, with the intent to deceive any person making an examination in this chapter required to be made, exhibit to the person making the examination any false entry, paper, or statement, or shall knowingly do or solicit business for any building and loan or savings and loan association which has not procured the required certificate therefor, he shall be fined in any sum not exceeding ten thousand dollars, or imprisoned in the penitentiary not exceeding ten years, or punished by both such fine and imprisonment. [C97,§1918; C24, 27, 31, 35,§9388.]

Similar provision, §9401

9388.1 Acknowledgments by employees. No public officer qualified to take acknowledgments or proofs of execution of written instruments shall by reason of his membership in or being an officer of or employment by a savings and loan association interested in such instrument be disqualified from taking and certifying to the acknowledgment or proof of execution of any written instrument in which such association is interested, and any such acknowledgment or proof heretofore taken or certified is hereby legalized and declared valid. [48GA, ch 231,§13(1).]

9388.2 Malicious circulation of reports. Whoever maliciously or with intent to deceive makes, publishes, utters, repeats, or circulates any false report concerning any building and loan or savings and loan association which imputes, or tends to impute, insolvency or unsound financial condition or financial embarrassment, or which may tend to cause or provoke or aid in causing or provoking a general withdrawal of funds from such building and loan or savings and loan association, or which may otherwise injure or tend to injure the business or goodwill of such building and loan or savings and loan association, shall be guilty of felony and shall be fined not more than five thousand dollars or be imprisoned for not more than five years in the penitentiary or be punished by both such fine and imprisonment. [C35,§9388-e1.]

9389 Pre-existing associations. All building and loan or savings and loan associations having heretofore *transacted business in this state, which shall not have complied with the provisions of this chapter, shall have the right to close up their business and fulfill their contracts heretofore entered into with the residents of this state, without being subject to the penalties prescribed in this chapter. [C97,§1919; C24, 27, 31, 35,§9389.]

*Effective date. July 4. 1896

Constitutionality, §9389-e1, code 1935; 45GA, ch 165, §11

UNINCORPORATED ASSOCIATIONS

9390 Statutes applicable. All unincorporated organizations, associations, societies, partnerships, or individuals conducting and carrying on a business, the purpose of which is to create a fund derived from periodical payments by members of such organizations, associations, societies, or other persons, upon contracts or otherwise, as well as from fines, forfeitures, incidental fees, and payment of premiums and interest; which fund is to be loaned or advanced to members of the organization, association, society, or to the persons making such periodical payments, for the purpose of enabling them to acquire the ownership or free possession of real estate, or personal property, or to construct buildings, or any or all of such purposes, shall be deemed building and loan associations; and the provisions of this chapter shall apply to all such building and loan associations so far as the same can be made applicable to unincorporated organizations, associations, societies, partnerships, or individuals. [S13,§1920-a; C24, 27, 31, 35,§9390.]

Referred to in §9391

9391 Statement of resources, liabilities, and plan. Every such unincorporated organization, association, society, partnership, or individual, conducting and carrying on the business defined in section 9390 shall, before transacting any business in this state, submit to the executive council a full and complete sworn statement of the resources and liabilities of such organization, association, society, partnership, or individual, and of the proposed plan or method of doing business. [S13,§1920-b; C24, 27, 31, 35, §9391.]

S13, §1920-b, editorially divided

9392 Deposit of securities. No such unincorporated building and loan association shall be permitted to carry on its business within this state unless it shall first deposit with the auditor of state at least fifty thousand dollars of first mortgages and negotiable notes in the same amount secured thereby upon real estate in the state, bearing interest at a rate not less than five percent per annum, which said mortgages shall in no case exceed one-half the actual value of the real estate upon which they are taken. [S13,§1920-b; C24, 27, 31, 35,§9392.]

Referred to in §9395

9393 Additional deposits. The auditor of state shall have power and authority to require that such further amount of such securities shall be deposited with him as in his judgment may thereafter be necessary to protect the members of such building and loan association, or the persons making periodical payments thereto. [S13,§1920-b; C24, 27, 31, 35,§9393.]

Referred to in §§9395, 9402

9394 Securities held in trust. The notes, mortgages, and securities so deposited with the auditor of state shall, with all interest and accumulations thereon, be held in trust by him for the purpose of fulfilling and carrying out all contracts made by such building and loan association with the members thereof, and with the persons making periodical payments thereto. [S13,§1920-b; C24, 27, 31, 35,§9394.]

Referred to in §9395

9395 Approval—certificate of authority. If the executive council approves the plan or method of business of any such building and loan association, it shall indorse its approval upon the statement of the resources and liabilities and plan of business presented to it, and such statement shall thereupon be filed in the office of the auditor of state, who shall issue a certificate to such building and loan association to transact business within the state, if such association has deposited with him the mortgages and securities required by the provisions of sections 9392 to 9394, inclusive. [S13, §1920-c; C24, 27, 31, 35,§9395.]

9396 Officers to give bonds — approval. Every officer of such building and loan association who signs or indorses checks, or handles any of the funds or securities thereof, shall give such bond or fidelity insurance for the faithful performance of his duty in such sum as the auditor of state may require, and no such officer shall be deemed qualified to enter upon the duties of his office until his bond is approved by, and deposited with, the auditor of state. And any such bond may be increased or additional sureties required by the auditor of state whenever in his judgment it becomes necessary to protect the interest of the association or its members, or persons making periodical payments of money thereto. [S13,§1920-d; C24, 27, 31, 35,§9396.]

9397 Examination. The auditor of state may at any time he may see proper, make, or cause to be made, an examination of any such building and loan association, or he may call upon it for a report of its condition upon any given day which has passed, as often as four times each year, which report shall contain the information hereinafter required. [S13,§1920-e; C24, 27, 31, 35,§9397.]

9398 Expense of examination. The expense of making such examination shall be paid by the building and loan association, and if made by the auditor in person he shall be paid his necessary expenses only; if made by an examiner designated by the auditor, he shall receive ten dollars a day for the time employed by him, and his necessary expenses. [S13,§1920-f; C24, 27, 31, 35,§9398.]

9399 Annual reports. On or before the first day of February of each year, every such building and loan association shall file with the auditor of state its annual report in writing for the year ending on the thirty-first day of December preceding, giving a complete statement in detail of all of its receipts from all sources, and all disbursements made during such year, arranged and itemized as may be required by the auditor of state. Such report shall also show the number of members or persons making periodical payments to such

association, the number and amount of loans made to such persons, the interest received therefrom, the number and amounts of mortgages, contracts or other securities held by the association, the actual cash value of the real estate securing such mortgages or contracts, the salary paid to each of its officers during the preceding year, the assets and liabilities of the association at the end of the year, and any other matters which in the judgment of the auditor of state may be required to give him full information as to the business transacted by such building and loan association. [S13,§1920-g; C24, 27, 31, 35,§9399.]

Referred to in §9400

9400 Failure to furnish reports. If any such building and loan association shall fail or refuse to furnish to the auditor of state the report required in section 9399, the officers or persons conducting the business of such building and loan association shall forfeit the sum of twenty-five dollars for each day that such report is withheld, and the auditor of state may maintain an action, jointly or severally, against them in the name of the state to recover such penalty, and the same shall be paid into the state treasury when recovered by him. [S13, §1920-h; C24, 27, 31, 35,§9400.]

9401 Criminal offenses. If any officer or agent of any such building and loan association, or any person conducting the business thereof, shall knowingly and willfully swear falsely to any statement in regard to any matter in this chapter required to be made under oath, he shall be guilty of perjury and punished accordingly. And if any officer, agent or employee of any such association, or any person transacting the business thereof, shall issue, utter or offer to utter, any warrant, check, order, or promise to pay of such association, or shall sign, transfer, cancel, or surrender any note, bond, draft, mortgage, or other evidence of indebtedness belonging to such association, or shall demand, collect, or receive any money from any member or other person in the name of such association without being authorized so to do; or if any such officer, agent or employee of such association, or any person transacting the business thereof, shall embezzle, convert to his own use, or shall use or pledge for his own benefit or purpose, any moneys, securities, credits, or other property belonging to the association, or shall knowingly solicit, transact, or attempt to transact any business for any such association which has not procured and does not hold the certificate of authority from the auditor of state to transact business in this state as provided herein; or shall knowingly make, or cause to be made, any false entries in the books of the association, or shall, with intent to deceive any person making an examination of such association, as herein provided, exhibit to the person making the examination any false entry, paper, or statement, he shall be fined in a sum not exceeding ten thousand dollars, or imprisoned in the penitentiary not exceeding ten years, or punished by both such fine and imprisonment. [S13, §1920-i; C24, 27, 31, 35,§9401.]

Similar provision, §9388

9402 Revocation of certificate — receiver. If any such building and loan association, holding a certificate of authority to transact business within this state issued by the auditor as herein provided, shall violate any of the provisions of this chapter, or shall fail to deposit with the auditor of state such further amount of mortgages or securities as he may require under section 9393, the auditor of state shall at once revoke such certificate and notify the executive council of the revocation thereof; and under the direction of the executive council, application shall be made by the attorney general to the proper court for the appointment of a receiver to wind up the affairs of the association; and in such proceedings the amount due from the borrowing members or persons making periodical payments upon contracts or mortgages given by them, shall be ascertained in the manner provided in section 9365*; and the amounts owing upon such mortgages or contracts from members of the association or persons making periodical payments thereto, shall be treated and considered as due and payable within a reasonable time, to be fixed by the court after the appointment of a receiver. [S13, §1920-j; C24, 27, 31, 35,§9402.]

*Section 9365, code, 1935, repealed by 47GA, ch 220,§3. See §§9361.1, 9362

CONVERSION INTO FEDERAL ASSOCIATION

9402.1 Method of conversion. If authorized by a vote of not less than three-fourths of the shares represented in person or by proxy at any stockholders meeting any building and loan or savings and loan association organized under the laws of this state shall have power to convert into a federal savings and loan association organized under the act of congress entitled and known as "Home Owners' Loan Act of 1933" [12 USC,§§1461-1468] and to transfer all or any part of its assets, engagements and obligations to such federal savings and loan association upon such terms and conditions and for such consideration as shall be authorized and agreed upon by the boards of directors of such state and such federal savings and loan associations. [C35,§9402-f1.]

9402.2 Shareholders rights. When such conversion and transfer of assets are made to a federal savings and loan association all shareholders, including borrowing shareholders, in the state association shall become shareholders in the federal savings and loan association and shall be entitled to receive shares of stock in the federal savings and loan association in lieu of shares of stock canceled in the state association, in such amounts and upon such terms and conditions as shall be approved by the boards of directors of such state and such federal association. [C35,§9402-f2.]

9402.3 Shareholders option. The borrowing shareholders whose mortgages have been

transferred to a federal savings and loan association shall have a period of thirty days after such transfer is completed and recorded with the county recorder in which to elect whether to continue their loans on the plan, rate of interest and terms of such state association or on the loan plan adopted and used by such federal savings and loan association. Each borrowing shareholder shall give notice in writing of such election, delivered to the president or secretary of such federal savings and loan association and if such notice is not so given within such thirty-day period it shall be conclusively presumed that borrowing shareholders not giving such notice have elected and accepted and agreed to the loan plan, terms and rate of interest adopted by such federal savings and loan association. [C35,§9402-f3.]

9402.4 Liquidation. If only a portion of the assets and business of a state association is transferred to a federal savings and loan association such state association may continue in business for the purpose of liquidating its remaining assets and if authorized by a three-fourths vote of the shares represented at any stockholders meeting it may from time to time make additional transfers of assets to such federal savings and loan association in exchange for stock or may transfer such remaining assets to trustees who shall liquidate the same in the manner authorized, but after any such partial or complete transfer of assets no such state association shall sell or issue any additional shares or accept any payments on stock except on shares still held by it as security for loans not transferred to such federal savings and loan association. [C35,§9402-f4.]

9402.5 Rights of creditors. The rights of creditors of a state association shall not be impaired by such transfer of assets to a federal savings and loan association and they shall have the same rights to follow and satisfy their claims out of all transferred assets as if no transfer had been made, or they may elect to accept the obligations of such federal savings and loan association in satisfaction of their claims against such state association. [C35, §9402-f5.]

9402.6 Association under receivership. A state association in receivership may convert and transfer all or part of its assets to a federal savings and loan association if in such case the court having jurisdiction of the receivership shall after due notice and hearing approve such conversion and transfer. [C35,§9402-f6.]

9402.7 Approval by state auditor. Before any conversion and transfer of assets are made to a federal savings and loan association the proposed plan of conversion and transfer shall either before or after it is authorized by the shareholders be submitted in writing to the auditor of state who shall issue to the state association his written approval thereof if he finds that the proposed plan is legal and that the requirements of law have been complied with. [C35,§9402-f7.]

9402.8 Report of conversion filed. When such conversion and transfer are made the president and secretary of the state association shall file with the recorder of the county in which the principal place of business of such association is located and with the auditor of state a written report showing in general terms the nature of such conversion and transfer together with true copies of the agreements entered into and transfers made and the resolutions of shareholders and directors authorizing the same. [C35, §9402-f8.]

9402.9 Federal associations have same rights. Every federal savings and loan association incorporated under the provisions of Home Owners' Loan Act of 1933, as now or hereafter amended, and the holders of shares or accounts issued by any such association shall have all the rights, powers, and privileges, and shall be entitled to the same exemptions and immunities, as savings and loan associations organized under the laws of this state and holders of the shares of such associations, respectively, are entitled to. [48GA, ch 231,§13(3).]

Constitutionality, 48GA, ch 231, §22
Omnibus repeal, 48GA, ch 231, §21

TITLE XXIII

TRADE AND COMMERCE

CHAPTER 418

MONEY AND INTEREST

9403 Denominations of money.
9404 Rate of interest.
9405 Interest on judgments and decrees.
9406 Illegal rate prohibited—usury.
9407 Penalty for usury.
9408 Interest in excess of two percent per month.
9409 Assignee of usurious contract.

9403 Denominations of money. The money of account of this state is the dollar, cent, and mill, and all public accounts, and the proceedings of all courts in relation to money, shall be kept and expressed in the above denominations. Demands expressed in money of another denomination shall not be affected by the provisions of this section, but in any action or proceeding based thereon it shall be reduced to and computed by the denominations given. [C51, §§943, 944; R60,§§1785, 1786; C73,§§2075, 2076; C97,§3037; C24, 27, 31, 35,§9403.]

9404 Rate of interest. The rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest not exceeding seven cents on the hundred by the year:

1. Money due by express contract.
2. Money after the same becomes due.
3. Money loaned.
4. Money received to the use of another and retained beyond a reasonable time, without the owner's consent, express or implied.
5. Money due on the settlement of accounts from the day the balance is ascertained.
6. Money due upon open accounts after six months from the date of the last item.
7. Money due, or to become due, where there is a contract to pay interest, and no rate is stipulated. [C51,§945; R60,§1787; C73,§2077; C97,§3038; C24, 27, 31, 35,§9404.]

9405 Interest on judgments and decrees. Interest shall be allowed on all money due on judgments and decrees of courts at the rate of five cents on the hundred by the year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding seven cents on the hundred by the year, which rate must be expressed in the judgment or decree. [C51,§946; R60,§1789; C73, §2078; C97,§3039; C24, 27, 31, 35,§9405.]

9406 Illegal rate prohibited — usury. No person shall, directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any sale or loan of real or personal property, than is in this chapter prescribed. [R60,§1790; C73,§2079; C97,§3040; C24, 27, 31, 35,§9406.]

9407 Penalty for usury. If it shall be ascertained in any action brought on any contract that a rate of interest has been contracted for, directly or indirectly, in money or in property, greater than is authorized by this chapter, the same shall work a forfeiture of eight cents on the hundred by the year upon the amount of the principal remaining unpaid upon such contract at the time judgment is rendered thereon, and the court shall enter final judgment in favor of the plaintiff and against the defendant for the principal sum so remaining unpaid without costs, and also against the defendant and in favor of the state, for the use of the school fund of the county in which the action is brought, for the amount of the forfeiture; and in no case where unlawful interest is contracted for shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not. [R60,§1791; C73,§2080; C97,§3041; C24, 27, 31, 35,§9407.]

9408 Interest in excess of two percent per month. Every person or persons, company, corporation, or firm, and every agent of any person, persons, company, corporation, or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money in the sum or amount of more than three hundred dollars a rate greater than two percent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law. [SS15,§3041-a; C24, 27, 31, 35,§9408.]

9409 Assignee of usurious contract. Any assignee of a usurious contract, becoming such in good faith in the usual course of business and without notice of such fact, may recover of the usurer the full amount of the consideration paid by him therefor, less any sum that may have been realized on the contract, anything in this chapter contained to the contrary notwithstanding. [R60,§1792; C73,§2081; C97, §3042; C24, 27, 31, 35,§9409.]

CHAPTER 419

CHATTEL LOANS

This chapter (§§9410 to 9438, inc.) repealed by 45ExGA, ch 125, and chapter 419.1 enacted in lieu thereof.

CHAPTER 419.1

CHATTEL LOANS

Referred to in §9305.23. Loans in excess of $300, §9408

9438.01 License and rights thereunder.
9438.02 Application—fees.
9438.03 Bond.
9438.04 Grant or refusal of license.
9438.05 License—form—posting.
9438.06 Additional bond.
9438.07 Separate license—change of place of business.
9438.08 Annual fee—payment—new bond.
9438.09 Suspension, revocation or surrender of license.
9438.10 Examination of business.
9438.11 Records—annual report by licensee.
9438.12 False representations — miscellaneous restrictions.
9438.13 Banking board—report—additional restrictions.
9438.14 Statement given borrower—payments.
9438.15 Usury—limitation on principal loan.
9438.16 Loan—what constitutes.
9438.17 Assignment of wages.
9438.18 Interest limited—violation—effect.
9438.19 Violations.
9438.20 Nonapplicability of statute.
9438.21 Rules and regulations.
9438.22 Assistants.
9438.23 Polk district court—jurisdiction.

9438.01 License and rights thereunder. No person, copartnership, association, or corporation shall engage in the business of making loans of money, credit, goods, or things in action in the amount or of the value of three hundred dollars or less and charge, contract for, or receive on any such loan a greater rate of interest or consideration therefor than the lender would be permitted by law to charge if he were not a licensee hereunder except as authorized by this chapter and without first obtaining a license from the superintendent of banking, hereinafter called the superintendent. The word "person", when used hereinafter, shall include individuals, copartnerships, associations, and corporations unless the context requires a different meaning. [C24, 27, 31, §9410; C35,§9438-f1.]

Referred to in §§9438.10, 9438.13, 9438.19

9438.02 Application—fees. Application for such license shall be in writing, under oath, and in the form prescribed by the superintendent, and shall contain the name and the address (both of the residence and place of business) of the applicant, and if the applicant is a copartnership or association, of every member thereof, and if a corporation, of each officer and director thereof; also the county and municipality with street and number, if any, of the place where the business of making loans under the provisions of this chapter is to be conducted and such further relevant information as the superintendent may require. Such applicant at the time of making such application shall pay to the superintendent the sum of fifty dollars if the liquid assets of the applicant are not in excess of twenty thousand dollars, and the sum of one hundred dollars if the liquid assets of the applicant are in excess of twenty thousand dollars, as a fee for investigating the application and the additional sum of seventy-five dollars if the liquid assets of the applicant are not in excess of twenty thousand dollars, and one hundred fifty dollars if the liquid assets of the applicant are in excess of twenty thousand dollars, as an annual license fee and in full payment of all expenses for examinations under and for administration of this chapter for a period terminating on the last day of the current calendar year; provided, that if the application is filed after June 30 in any year such payment shall be seventy-five dollars as such license fee in addition to the said fee for investigation.

Every applicant shall also prove, in form satisfactory to the superintendent, that he or it has available for the operation of such business at the place of business specified in the application, liquid assets of at least five thousand dollars, or that he or it has at least the said amount actually in use in the conduct of such business at such place of business. [C24, 27, 31, §§9411, 9412; C35,§9438-f2.]

Referred to in §§9438.04, 9438.08, 9438.22

9438.03 Bond. The applicant shall also at the same time file with the superintendent a bond to be approved by him in which the applicant shall be the obligor, with one or more sureties, in the sum of one thousand dollars. The said bond shall run to the state for the use

of the state and of any person or persons who may have a cause of action against the obligor of said bond under the provisions of this chapter. Such bond shall be conditioned that said obligor will faithfully conform to and abide by the provisions of this chapter and of all rules and regulations lawfully made by the superintendent hereunder, and will pay to the state and to any such person or persons any and all moneys that may become due or owing to the state or to such person or persons from said obligor under and by virtue of the provisions of this chapter. [C24, 27, 31,§§9413, 9414; C35, §9438-f3.]

Referred to in §§9438.06, 9438.08

9438.04 Grant or refusal of license. Upon the filing of such application, the approval of such bond and the payment of such fees, the superintendent shall make such investigation of the facts as he may deem necessary or proper.

If the superintendent shall determine from such application or from such investigation that the financial responsibility, experience, character, and general fitness of the applicant, and of the members thereof if the applicant be a copartnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to warrant the belief that the business will be operated lawfully, honestly, fairly, and efficiently within the purposes of this chapter, and if the superintendent shall find that the applicant has available or actually in use the assets described in section 9438.02, he shall thereupon issue and deliver a license to the applicant to make loans in accordance with the provisions of this chapter at the place of business specified in the said application; if the superintendent shall not so find he shall not issue such license and he shall notify the applicant of the denial and return to the applicant the bond and the sum paid by the applicant as a license fee, retaining the investigation fee to cover the costs of investigating the application. The superintendent shall approve or deny every application for a license hereunder within sixty days from the filing of the application and the approved bond and the payment of the said fees.

If the application is denied the superintendent shall within twenty days thereafter file with the banking department a written transcript of the evidence and decision and findings with respect thereto containing the reasons supporting the denial, and forthwith serve upon the applicant a copy thereof. [C24, 27, 31,§9415; C35,§9438-f4.]

9438.05 License — form — posting. Such license shall state the address of the place where the business of making such loans is to be conducted and shall state fully the name of the licensee, and if the licensee is a copartnership or association, the names of the members thereof, and if a corporation, the date and place of its incorporation. Such license shall be kept conspicuously posted in such place of business and shall not be transferable or assignable. [C24, 27, 31,§§9411, 9418; C35,§9438-f5.]

9438.06 Additional bond. If the superintendent shall find at any time that the bond is insecure or exhausted or otherwise of doubtful validity or collectibility, an additional bond to be approved by him, with one or more sureties and of the character specified in section 9438.03, in the sum of not more than one thousand dollars, shall be filed by the licensee within ten days after written demand upon the licensee by the superintendent.

Every licensee shall have available at all times for each licensed place of business at least five thousand dollars in assets, either in liquid form or actually in use in the conduct of such business. [C24, 27, 31,§9437; C35,§9438-f6.]

9438.07 Separate license—change of place of business. Not more than one place of business where such loans are made shall be maintained under the same license, but the superintendent may issue more than one license to the same licensee upon compliance, for each such additional license, with all the provisions of this chapter governing an original issuance of a license.

Whenever a licensee shall change such place of business to another location he shall at once give written notice thereof to the superintendent who shall attach to the license in writing his record of the change and the date thereof, which shall be authority for the operation of such business under such license at such new place of business. [C24, 27, 31, §§9416, 9419; C35,§9438-f7.]

9438.08 Annual fee — payment — new bond. Every licensee shall, on or before the fifteenth day of each December, pay to the superintendent the sum as provided in section 9438.02 as an annual license fee for the next succeeding calendar year and shall at the same time file with the superintendent a new bond or renewal of the old bond in the same amount and of the same character as required by section 9438.03. [C35, §9438-f8.]

9438.09 Suspension, revocation or surrender of license.

1. The superintendent may, upon at least twenty days written notice to the licensee stating the contemplated action and grounds, and upon reasonable opportunity to be heard, revoke any license issued hereunder if he shall find that:

a. The licensee has failed, after ten days notice of default, to pay the annual license fee or to maintain in effect the bond or bonds required under the provisions of this chapter or to comply with any rule or regulation of the superintendent lawfully made pursuant to and within the authority of this chapter; or that

b. The licensee has violated any provision of this chapter or any rule or regulation lawfully made by the superintendent under and within the authority of this chapter; or that

c. Any fact or condition exists which would clearly have warranted the superintendent in refusing originally to issue such license.

2. If the superintendent shall find that probable cause for revocation of any license exists and that the enforcement of the chapter requires immediate suspension of such license pending investigation, he may, upon five days written notice and a hearing, suspend such license for a period not exceeding thirty days.

3. The superintendent may revoke or suspend only the particular license with respect to which grounds for revocation or suspension may occur or exist, or, if he shall find that such grounds for revocation or suspension are of general application to all licensed places of business, or to more than one licensed place of business, operated by such licensee, he shall revoke or suspend all of the licenses issued to such licensee or such licenses as such grounds apply to, as the case may be.

4. Any licensee may surrender any license by delivering to the superintendent written notice that he thereby surrenders such license, but such surrender shall not affect such licensee's civil or criminal liability for acts committed prior to such surrender.

5. No revocation or suspension or surrender of any license shall impair or affect the obligation of any pre-existing lawful contract between the licensee and any borrower.

6. Every license issued hereunder shall remain in force and effect until the same shall have been surrendered, revoked, or suspended in accordance with the provisions of this chapter. The superintendent shall have authority on his own initiative to reinstate suspended licenses or to issue new licenses to a licensee whose license or licenses shall have been revoked if no fact or condition then exists which would have warranted the superintendent in refusing originally to issue such license under this chapter.

7. Whenever the superintendent shall revoke or suspend a license issued under this chapter, he shall forthwith file with the banking department a written transcript of the evidence and order to that effect and findings with respect thereto containing the reasons supporting the revocation or suspension, and forthwith serve upon the licensee a copy thereof. [C24, 27, 31, §9436; C35,§9438-f9.]

9438.10 Examination of business. For the purpose of discovering violations of this chapter or securing information lawfully required by him hereunder, the superintendent may at any time, either personally or by an individual or individuals duly designated by him, investigate the loans and business and examine the books, accounts, records, and files used therein, of every licensee and of every person engaged in the business described in section 9438.01, whether such person shall act or claim to act as principal or agent, or under or without the authority of this chapter. For that purpose the superintendent and his duly designated representatives shall have and be given free access to the place of business, books, accounts, papers, records, files, safes, and vaults of all such persons. The superintendent and all individuals duly designated by him shall have authority to require the attendance of and to examine under oath all individuals whomsoever whose testimony he may require relative to such loans or such business.

The superintendent shall make an examination of the affairs, place of business, and records of each licensed place of business at least once each year. [C24, 27, 31,§9433; C35,§9438-f10.]

9438.11 Records—annual report by licensee. The licensee shall keep such books, accounts, and records as the superintendent may require in order to determine whether such licensee is complying with the provisions of this chapter and with the rules and regulations lawfully made by the superintendent hereunder. Every licensee shall preserve for at least two years after making the last entry on any loan recorded therein all books, accounts, and records, including cards used in the card system, if any.

Each licensee shall annually on or before the twentieth day of January file a report with the superintendent giving such relevant information as the superintendent reasonably may require concerning the business and operations during the preceding calendar year of the licensed places of business conducted by such licensee within the state. Such report shall be made under oath and shall be in the form prescribed by the superintendent who shall make and publish annually an analysis and recapitulation of such reports. [C24, 27, 31,§9434; C35,§9438-f11.]

9438.12 False representations — miscellaneous restrictions. No licensee or other person shall advertise, print, display, publish, distribute, or broadcast or cause or permit to be advertised, printed, displayed, published, distributed, or broadcast, in any manner whatsoever, any statement or representation with regard to the rates, charges, terms, or conditions for the lending of money, credit, goods, or things in action in the amount or of the value of three hundred dollars or less, which is false, misleading, or deceptive. The superintendent may order any licensee to desist from any conduct which he shall find to be a violation of the foregoing provisions.

If any licensee refers in any advertising matter to the rate of charge to be made upon loans the superintendent may require such licensee to state such rate of charge fully and clearly in such manner as he may deem necessary to prevent misunderstanding thereof by prospective borrowers.

No licensee shall take a real estate mortgage as security for any loan made under the provisions of this chapter.

No licensee shall conduct the business of making loans under the provisions of this chapter within any office, room, suite, or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, except as may be authorized in writing by the superintendent upon his finding that the character of such other business is such that the granting of such authority would not

facilitate evasions of this chapter or of the rules and regulations lawfully made by him hereunder.

No licensee shall make any loan provided for by this chapter under any other name or at any other place of business than that named in the license.

No licensee shall take any confession of judgment or any power of attorney to appear or to confess judgment on behalf of a borrower. No licensee shall take any note, promise to pay, or security that does not accurately disclose the actual amount of the loan, the time for which it is made, and the agreed rate of charge, nor any instrument in which blanks are left to be filled in after execution. [C24, 27, 31,§§9426, 9432; C35,§9438-f12.]

Referred to in §9438.19

9438.13 Banking board — report — additional restrictions.

1. It shall be the duty of the state banking board, hereinafter called the board, and it shall have power, jurisdiction, and authority, from time to time to investigate the conditions and find the facts with reference to the business of making small loans, as described in section 9438.01, hereinafter referred to as small loans, and after making such investigation, report in writing their findings to the next regular session of the general assembly, and upon the basis of such facts:

a. To classify small loans by a regulation according to such system of differentiation as will reasonably distinguish such classes of loans for the purposes of this chapter, and

b. To determine and fix by a regulation such maximum rate of interest or charges upon each such class of small loans as will induce efficiently managed commercial capital to enter such business in sufficient amounts to make available adequate credit facilities to individuals without the security or financial responsibility usually required by commercial banks.

2. The board may from time to time, commencing March 1, 1935, redetermine and refix by a regulation, in accordance with subsection 1 above, any maximum rate of interest or charges previously fixed by it, but such changed maximum rates shall not affect pre-existing loan contracts lawfully entered into between any licensee and any borrower; all regulations which the board may make respecting rates of interest or charges shall fix and contain the effective date thereof, which shall not be earlier than thirty days after notice to each licensee by mailing such notice to each licensed place of business.

3. Before fixing any classification of small loans or any maximum rate of interest or charges, or changing any such classification or rate under authority of this section, the board shall give reasonable notice of its intention to consider doing so to all licensees and a reasonable opportunity to be heard thereon and to introduce evidence with respect thereto.

4. Until March 1, 1935, and until such further time as a different rate is fixed by the board, the maximum rate of interest or charges upon such class or classes of small loans shall be three percent per month on any part of the unpaid principal balance of the loan not exceeding one hundred and fifty dollars and two and one-half percent per month on any part of the loan in excess of one hundred fifty dollars.

5. Every licensee hereunder may lend any sum of money not exceeding three hundred dollars in amount and may charge, contract for, and receive thereon interest or charges at a rate not exceeding the maximum rate of interest or charges determined and fixed by the board under authority of this section or by the provisions of the preceding subsection 4.

6. The following provisions shall apply to any or all loans in the amount or of the value of three hundred dollars or less made by any licensee hereunder:

Interest shall not be paid, deducted, or received in advance. Interest shall not be compounded and shall be computed only on unpaid principal balances. The maximum interest permitted shall be computed on the basis of the number of days actually elapsed and for the purpose of such computations a month shall be any period of thirty consecutive days. No licensee shall induce or permit any borrower or borrowers to split up or divide any loan or loans for the purpose of evading any provision of this chapter nor shall any licensee knowingly permit any borrower, nor any husband and wife individually or together, to be indebted to him under more than one contract of loan at the same time. In addition to the rates of interest or charges herein provided for no further or other charge for examination, service, brokerage, commission, expense, fee, or bonus or other thing shall be directly or indirectly charged, contracted for, or received, except the lawful fees, if any, actually and necessarily paid out by the licensee to any public officer, for filing or recording or releasing in any public office any instrument securing the loan, which fees may be collected when the loan is made, or at any time thereafter. If any interest or charges in excess of these permitted by this chapter are charged, contracted for, or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever. [C24, 27, 31,§§9420–9423; C35,§9438-f13.]

Referred to in §§9438.14, 9438.19

9438.14 Statement given borrower — payments. Every licensee shall:

1. Deliver to the borrower at the time any loan is made a statement (upon which there shall be printed a copy of subsections 1, 5, and 6 of section 9438.13) in the English language showing in clear and distinct terms the lawful maximum rate or rates of interest or charges in effect, the amount and date of the loan and of its maturity, the nature of the security, if any, for the loan, the name and address of the borrower and of the licensee, and the agreed rate of charge;

2. Give to the borrower a plain and complete receipt for all payments made on account of any such loan at the time such payments are made, specifying the amount applied to interest or charges and the amount applied to principal;

3. Permit payment to be made in advance in any amount on any contract of loan at any time, but the licensee may apply such payment first to all interest or charges up to the date of such payment;

4. Upon repayment of the loan in full, mark indelibly every obligation and security signed by the borrower with the word "paid" or "canceled", and release any mortgage, restore any pledge, return any note and any assignment given to the licensee by the borrower;

5. Display prominently in each licensed place of business an accurate schedule, to be approved by the superintendent, of the charges currently to be made upon all loans. [C24, 27, 31,§9425; C35,§9438-f14.]

Referred to in §9438.19

9438.15 Usury — limitation on principal loan. No licensee shall directly or indirectly charge, contract for, or receive any interest or consideration greater than the lender would be permitted by law to charge if he were not a licensee hereunder upon the loan, use, or forbearance of money, goods, or things in action, or upon the loan, use, or sale of credit, of the amount or value of more than three hundred dollars. The foregoing prohibition shall also apply to any licensee who permits any person, as borrower or as indorser, guarantor, or surety for any borrower, or otherwise, to owe directly or contingently or both to the licensee at any time the sum of more than three hundred dollars for principal. [C24, 27, 31,§9424; C35, §9438-f15.]

9438.16 Loan—what constitutes. The payment of three hundred dollars or less in money, credit, goods, or things in action, as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, shall for the purposes of this chapter be deemed a loan secured by such assignment, and the amount by which such assigned compensation exceeds the amount of such consideration actually paid shall be deemed interest or charges upon such loan from the date of such payment to the date such compensation is payable. Such transaction shall be governed by and subject to the provisions of this chapter. [C35,§9438-f16.]

9438.17 Assignment of wages. A valid assignment or order for the payment of future salary, wages, commissions, or other compensation for services, may be given as security for a loan made by any licensee under this chapter, and under such assignment or order a sum not to exceed ten percent of the borrower's salary, wages, commissions, or other compensation for services shall be collectible from the employer of the borrower by the licensee at the time of each payment to the borrower of such salary, wages, commissions, or other compensation for services, from the time that a copy of such assignment, verified by the oath of the licensee or his agent, together with a similarly verified statement of the amount unpaid upon such loan, is served upon the employer.

No assignment of or order for payment of any salary, wages, commissions, or other compensation for services, earned or to be earned, given to secure any loan made by any licensee under this chapter, shall be valid unless the amount of such loan is paid to the borrower simultaneously with its execution; nor shall any such assignment or order, or any chattel mortgage or other lien on household furniture then in the possession and use of the borrower, be valid unless it is in writing, signed in person by the borrower, nor if the borrower is married unless it is signed in person by both husband and wife, provided, that written assent of a spouse shall not be required when husband and wife have been living separate and apart for a period of at least five months prior to the making of such assignment, order, mortgage, or lien. [C24, 27, 31,§§9427, 9428; C35,§9438-f17.]

Similar provision, §9454

9438.18 Interest limited—violation — effect. No person, except as authorized by this chapter, shall directly or indirectly charge, contract for, or receive any interest or consideration greater than the lender would be permitted by law to charge if he were not a licensee hereunder upon the loan, use, or forbearance of money, goods, or things in action, or upon the loan, use, or sale of credit of the amount or value of three hundred dollars or less.

The foregoing prohibition shall apply to any person who, by any device, subterfuge, or pretense whatsoever, shall charge, contract for, or receive greater interest, consideration, or charges than authorized by this chapter for any such loan, use, or forbearance of money, goods, or things in action or for any such loan, use, or sale of credit.

No loan of the amount or value of three hundred dollars or less for which a greater rate of interest, consideration, or charges than is permitted by this chapter has been charged, contracted for, or received, wherever made, shall be enforced in this state and every person in anywise participating therein in this state shall be subject to the provisions of this chapter, provided, that the foregoing shall not apply to loans legally made in any state or country which then had in effect a regulatory small loan law substantially similar in principle and purpose to this chapter. [C24, 27, 31, §§9429, 9431; C35, §9438-f18.]

Referred to in §9438.19

9438.19 Violations. Any person, copartnership, association, or corporation and the several members, officers, directors, agents, and employees thereof, who shall violate or participate in the violation of any of the provisions of sections 9438.01, 9438.12, 9438.13, 9438.14 or 9438.18, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punishable by a fine of not more than five hundred dollars or

by imprisonment of not more than six months, or by both such fine and imprisonment, in the discretion of the court. [C24, 27, 31,§9435; C35, §9438-f19.]

9438.20 Nonapplicability of statute. This chapter shall not apply to any person doing business under and as permitted by any law of this state or of the United States relating to banks, savings banks, trust companies, building and loan associations, credit unions or licensed pawnbrokers, nor shall it apply to any domestic corporation entitled to the benefits of sections 6994 to 6996, inclusive. [C35,§9438-f20.]

9438.21 Rules and regulations. The superintendent is hereby authorized and empowered to make such reasonable and relevant rules and regulations as may be necessary for the execution and the enforcement of the provisions of this chapter, in addition hereto and not inconsistent herewith. All rules and regulations shall be filed and entered by the superintendent in the banking department in an indexed, permanent book or record, with the effective date thereof suitably indicated, and such book or record shall be a public document. [C35,§9438-f21.]

9438.22 Assistants. The superintendent of banking is hereby authorized to employ such competent help as he deems necessary to carry out and perform the provisions of this chapter, and is hereby authorized and empowered to pay such persons so employed from the license fees and investigation fees referred to in section 9438.02. [C35,§9438-f22.]

9438.23 Polk district court — jurisdiction. The district court in and for Polk county shall have jurisdiction in an equitable action by an aggrieved party to review any final order, demand, finding, or decision of the superintendent or the state banking board, and to grant such relief as may be warranted by the facts under the provisions of this chapter. An appeal to the supreme court may be taken as in other equitable actions. [C35,§9438-f23.]

Constitutionality, §9438-f25, code 1935; 45ExGA, ch 125, §25
Omnibus repeal, §9438-f24, code 1935; 45ExGA, ch 125, §24

CHAPTER 420

CONTRACTS

9439 Seals abolished.
9440 Consideration implied.
9441 Failure of consideration.
9442 Gaming contracts void.

9439 Seals abolished. The use of private seals in written contracts, or other instruments in writing, by individuals, firms, or corporations that have not adopted a corporate seal, is hereby abolished; but the addition of a seal to any such instrument shall not affect its character or validity in any respect. [C51,§974; R60,§1823; C73, §2112; C97,§3068; S13,§3068; C24, 27, 31, 35, §9439.]

Corporate seals, §10067 et seq.

9440 Consideration implied. All contracts in writing, signed by the party to be bound or by his authorized agent or attorney, shall import a consideration. [C51,§975; R60,§1824; C73, §2113; C97,§3069; C24, 27, 31, 35,§9440.]

Similar provision, §9484

9441 Failure of consideration. The want or failure, in whole or in part, of the consideration of a written contract may be shown as a defense, total or partial, except as provided in the negotiable instruments law. [C51,§976; R60, §1825; C73,§2114; C97,§3070; C24, 27, 31, 35, §9441.]

Negotiable instruments law, ch 424

9442 Gaming contracts void. All promises, agreements, notes, bills, bonds, or other contracts, mortgages or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, laid, staked, or bet, at or upon any game of any kind or on any wager, are absolutely void and of no effect. [C51,§2724; R60,§4366; C73,§4029; C97,§4965; C24, 27, 31, 35,§9442.]

CHAPTER 421

TENDER OF PAYMENT AND PERFORMANCE

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9443 Demand required.
9444 Tender of labor or property.
9445 Tender when contract assigned.
9446 Effect of tender.
9447 Tender when holder absent from state.
9448 Offer in writing—effect.
9449 Nonacceptance of tender.
9450 Receipt—objection.

9443 Demand required. No cause of action shall accrue upon a contract for labor or the payment or delivery of property other than money, where the time of performance is not fixed, until a demand of performance has been made upon the maker and refused, or a reasonable time for performance thereafter allowed. [C51,§959; R60,§1806; C73,§2097; C97,§3056; C24, 27, 31, 35,§9443.]

9444 Tender of labor or property. When a contract for labor, or for the payment or delivery of property other than money, does not fix a place of payment, the maker may tender the

labor or property at the place where the payee resided at the time of making the contract, or at the residence of the payee at the time of performance of the contract, or where any assignee of the contract resides when it becomes due, but if the property in such case is too ponderous to be conveniently transported, or if the payee had no known place of residence within the state at the time of making the contract, or if the assignee of a written contract has no known place of residence within the state at the time of performance, the maker may tender the property at the place where he resided at the time of making the contract. [C51,§§960, 961; R60,§§1807, 1808; C73,§§2098, 2099; C97,§3057; C24, 27, 31, 35, §9444.]

9445 Tender when contract assigned. When the contract is contained in a written instrument which is assigned before due, and the maker has notice thereof, he shall make the tender at the residence of the holder if he resides in the state and no farther from the maker than the payee did at the making thereof. [C51, §962; R60,§1809; C73,§2100; C97,§3058; C24, 27, 31, 35,§9445.]

9446 Effect of tender. A tender of the property, as above provided, discharges the maker from the contract, and the property becomes vested in the payee or his assignee, and he may maintain an action therefor as in other cases. But if the property tendered be perishable, or requires feeding, or other care, and no person is found to receive it when tendered, the person making the tender shall preserve, feed, or otherwise take care of the same, and shall have a lien thereon for his reasonable expenses and trouble in so doing. [C51,§§963, 964; R60, §§1810, 1811; C73,§§2101, 2102; C97,§3059; C24, 27, 31, 35,§9446.]

9447 Tender when holder absent from state. When the holder of an instrument for the payment of money is absent from the state when it becomes due, and the indorsee or assignee of such an instrument has not notified the maker of such indorsement or assignment, the maker may tender payment at the last residence or place of business of the payee before the instrument becomes due, and if there be no person there authorized to receive payment and give proper credit therefor, the maker may deposit the amount due with the clerk of the district court in the county where the payee resided at the time it became due, and the maker shall not be liable for interest from that date. [C51, §958; R60,§1805; C73,§2103; C97,§3060; C24, 27, 31, 35,§9447.]

9448 Offer in writing—effect. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, if not accepted, is equivalent to the actual tender of the money, instrument, or property, subject, however, to the condition contained in section 9449; but if the party to whom the tender is made desires an inspection of the instrument or property tendered, other than money, before making his determination, it shall be allowed him on request. [C51,§967; R60, §1816; C73,§2105; C97,§3061; C24, 27, 31, 35, §9448.]

9449 Nonacceptance of tender. When a tender of money or property is not accepted by the party to whom it is made, the party making it may, if he sees fit, retain it in his possession; but if afterwards the party to whom the tender was made concludes to accept it and gives notice thereof to the other party, and the subject of the tender is not delivered to him within a reasonable time, the tender shall be of no effect. [C51,§966; R60,§1815; C73,§2104; C97,§3062; C24, 27, 31, 35,§9449.]

Referred to in §9448

9450 Receipt—objection. The person making a tender may demand a receipt in writing for the money or article tendered, as a condition precedent to the delivery thereof. The person to whom a tender is made must, at the time, make any objection which he may have to the money, instrument, or property tendered, or he will be deemed to have waived it. [C51,§§968, 969; R60, §§1817, 1818; C73,§§2106, 2107; C97,§3063; C24, 27, 31, 35,§9450.]

CHAPTER 422

ASSIGNMENT OF ACCOUNTS AND NONNEGOTIABLE INSTRUMENTS

Assignment of thing in action, §10971

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9452 Assignment prohibited by instrument.
9453 Assignment of open account.
9454 Assignment of wages.
9455 Priority.
9456 Assignor liable.

9451 Assignment of nonnegotiable instruments. Bonds, duebills, and all instruments by which the maker promises to pay another, without words of negotiability, a sum of money, or by which he promises to pay a sum of money in property or labor, or to pay or deliver any property or labor, or acknowledges any money, labor, or property to be due, are assignable by indorsement thereon, or by other writing, and the assignee shall have a right of action thereon in his own name, subject to any defense or counterclaim which the maker or debtor had against any assignor thereof before notice of such assignment. [C51,§949; R60,§1796; C73,§2084; C97,§3044; C24, 27, 31, 35,§9451.]

Nonnegotiable bills of lading, §8274
Related section, §10971

9452 Assignment prohibited by instrument. When by the terms of an instrument its assignment is prohibited, an assignment thereof shall

nevertheless be valid, but the maker may avail himself of any defense or counterclaim against the assignee which he may have against any assignor thereof before notice of such assignment is given to him in writing. [C51,§951; R60,§1798; C73,§2086; C97,§3046; C24, 27, 31, 35,§9452.]

Referred to in §9453
Related section, §10971

9453 Assignment of open account. An open account of sums of money due on contract may be assigned, and the assignee will have a right of action thereon in his own name, subject to such defenses and counterclaims as are allowed against the instruments mentioned in section 9452, before notice of such assignment is given to the debtor in writing by the assignee. [C51, §952; R60,§1799; C73,§2087; C97,§3047; S13, §3047; C24, 27, 31, 35,§9453.]

Related section, §10971
S13, §3047, editorially divided

9454 Assignment of wages. No sale or assignment, by the head of a family, of wages, whether the same be exempt from execution or not, shall be of any validity whatever unless the same be evidenced by a written instrument, and if married, unless the husband and wife sign and acknowledge the same joint instrument before an officer authorized to take acknowledgments. [S13,§3047; C24, 27, 31, 35,§9454.]

Incumbrance on exempt property, §10013
Similar provision, §9438.17

9455 Priority. Assignments of wages shall have priority and precedence in the order in which notice in writing of such assignments shall be given to the employer, and not otherwise. [S13,§3047; C24, 27, 31, 35,§9455.]

9456 Assignor liable. The assignor of any of the above instruments not negotiable shall be liable to the action of his assignee without notice. [C51,§956; R60,§1803; C73,§2088; C97, §3048; C24, 27, 31, 35,§9456.]

CHAPTER 423

SURETIES

9457 Requiring creditor to sue.
9458 Refusal or neglect of creditor.
9459 Suit by surety.
9460 Executor—official bonds.

9457 Requiring creditor to sue. When any person bound as surety for another for the payment of money, or the performance of any other contract in writing, apprehends that his principal is about to become insolvent or remove permanently from the state without discharging the contract, he may, if a cause of action has accrued thereon, by writing, require the creditor to sue upon the same, or permit the surety to commence an action in such creditor's name and at the surety's cost. [C51,§970; R60,§1819; C73, §2108; C97,§3064; C24, 27, 31, 35,§9457.]

Order of liability, §11577
Right of subrogation, §11667

9458 Refusal or neglect of creditor. If the creditor refuses or neglects to bring an action for ten days after request, and does not permit the surety to do so, and to furnish him with a true copy of the contract or other writing therefor, and enable him to have the use of the original when requisite in such action, the surety shall be discharged. [C51,§971; R60,§1820; C73,§2109; C97,§3065; C24, 27, 31, 35,§9458.]

9459 Suit by surety. When the surety commences such action, he shall give a bond to pay such costs as may be adjudged against the creditor, and the action shall be brought against all the obligors, but those joining in the request to the creditor shall make no defense thereto, but may be heard on the assessment of the damages. [C51,§972; R60,§1821; C73,§2110; C97,§3066; C24, 27, 31, 35,§9459.]

9460 Executor—official bonds. The provisions of this chapter extend to the executor of a deceased surety and holder of the contract, but not to the official bonds of public officers, executors, or guardians. [C51,§973; R60,§1822; C73,§2111; C97,§3067; C24, 27, 31, 35,§9460.]

CHAPTER 424

NEGOTIABLE INSTRUMENTS LAW

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9461 [§1] Form of negotiable instrument. An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand or at a fixed or determinable future time.
4. Must be payable to the order of a specified person or to bearer.
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. [S13, §3060-a1; C24, 27, 31, 35,§9461.]

9462 [§2] Certainty as to sum—what constitutes. The sum payable is a sum certain within the meaning of this chapter although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. [S13,§3060-a2; C24, 27, 31, 35,§9462.]

9463 [§3] When promise is unconditional. An unqualified order or promise to pay is un-

conditional within the meaning of this chapter, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional. [S13,§3060-a3; C24, 27, 31, 35,§9463.]

9464 [§4] Determinable future time—what constitutes. An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. [S13,§3060-a4; C24, 27, 31, 35,§9464.]

9465 [§5] Provisions not affecting negotiability. An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal. [S13, §3060-a5; C24, 27, 31, 35,§9465.]

9466 [§6] Omissions — seal — particular money. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or

2. Does not specify the value given, or that any value has been given therefor; or

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal; or

5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. [S13,§3060-a6; C24, 27, 31, 35, §9466.]

9467 [§7] When payable on demand. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand. [S13,§3060-a7; C24, 27, 31, 35,§9467.]

9468 [§8] When payable to order. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer, or drawee; or

2. The drawer or maker; or

3. The drawee; or

4. Two or more payees jointly; or

5. One or some of several payees; or

6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty. [S13, §3060-a8; C24, 27, 31, 35,§9468.]

9469 [§9] When payable to bearer. The instrument is payable to bearer:

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer; or

3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; or

5. When the only or last indorsement is an indorsement in blank. [S13,§3060-a9; C24, 27, 31, 35,§9469.]

9470 [§10] Terms — when sufficient. The negotiable instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof. [S13, §3060-a10; C24, 27, 31, 35,§9470.]

9471 [§11] Date—presumption as to. When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement, as the case may be. [S13,§3060-a11; C24, 27, 31, 35,§9471.]

9472 [§12] Antedated and postdated. The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. [S13,§3060-a12; C24, 27, 31, 35, §9472.]

9473 [§13] When date may be inserted. When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be pay-

able accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date. [S13,§3060-a13; C24, 27, 31, 35,§9473.]

9474 [§14] Blanks — when may be filled. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. [S13,§3060-a14; C24, 27, 31, 35, §9474.]

9475 [§15] Incomplete instrument not delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. [S13,§3060-a15; C24, 27, 31, 35, §9475.]

9476 [§16] Delivery—when effectual. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. [S13, §3060-a16; C24, 27, 31, 35,§9476.]

9477 [§17] Construction. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay", is signed by two or more persons, they are deemed to be jointly and severally liable thereon. [S13,§3060-a17; C24, 27, 31, 35,§9477.]

9478 [§18] Liability of person signing in trade or assumed name. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. [S13, §3060-a18; C24, 27, 31, 35,§9478.]

Use of trade name, §9866.1 et seq.

9479 [§19] Signature by agent — authority —how shown. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. [S13, §3060-a19; C24, 27, 31, 35,§9479.]

9480 [§20] Liability of person signing as agent. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability. [S13, §3060-a20; C24, 27, 31, 35,§9480.]

9481 [§21] Signature by procuration — effect of. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. [S13,§3060-a21; C24, 27, 31, 35,§9481.]

9482 [§22] Effect of indorsement by infant or corporation. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corpo-

ration or infant may incur no liability thereon. [S13,§3060-a22; C24, 27, 31, 35,§9482.]

Liability of minors, ch 472

9483 [§23] Forged signature — effect of. Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. [S13,§3060-a23; C24, 27, 31, 35,§9483.]

CONSIDERATION

9484 [§24] Presumption of consideration. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. [S13,§3060-a24; C24, 27, 31, 35,§9484.]

Consideration implied, §9440

9485 [§25] Consideration — what constitutes. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such, whether the instrument is payable on demand or at a future time. [S13,§3060-a25; C24, 27, 31, 35,§9485.]

Similar provisions, §§8297, 9718, 10005

9486 [§26] What constitutes holder for value. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. [S13,§3060-a26; C24, 27, 31, 35,§9486.]

9487 [§27] Lien on instrument constitutes holder for value. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. [S13,§3060-a27; C24, 27, 31, 35,§9487.]

9488 [§28] Effect of want of consideration. Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise. [S13,§3060-a28; C24, 27, 31, 35, §9488.]

Failure of consideration, §9441

9489 [§29] Liability of accommodation party. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. [S13,§3060-a29; C24, 27, 31, 35,§9489.]

NEGOTIATION

9490 [§30] What constitutes negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. [S13,§3060-a30; C24, 27, 31, 35,§9490.]

9491 [§31] Indorsement — how made. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. [S13,§3060-a31; C24, 27, 31, 35,§9491.]

9492 [§32] Indorsement must be of entire instrument. The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue. [S13, §3060-a32; C24, 27, 31, 35,§9492.]

9493 [§33] Kinds of indorsement. An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional. [S13,§3060-a33; C24, 27, 31, 35, §9493.]

9494 [§34] Special indorsement — indorsement in blank. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. [S13,§3060-a34; C24, 27, 31, 35,§9494.]

9495 [§35] Blank indorsement—how changed to special indorsement. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. [S13,§3060-a35; C24, 27, 31, 35,§9495.]

9496 [§36] When indorsement restrictive. An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive. [S13,§3060-a36; C24, 27, 31, 35, §9496.]

9497 [§37] Effect of restrictive indorsement — rights of indorsee. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.
2. To bring any action thereon that the indorser could bring.
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. [S13,§3060-a37; C24, 27, 31, 35, §9497.]

9498 [§38] Qualified indorsement. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. [S13,§3060-a38; C24, 27, 31, 35,§9498.]

9499 [§39] Conditional indorsement. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the conditions have been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally. [S13,§3060-a39; C24, 27, 31, 35,§9499.]

9500 [§40] Indorsement of instrument payable to bearer. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. [S13,§3060-a40; C24, 27, 31, 35, §9500.]

9501 [§41] Indorsement where payable to two or more persons. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. [S13,§3060-a41; C24, 27, 31, 35,§9501.]

See §9267

9502 [§42] Effect of instrument drawn or indorsed to a person as cashier. Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. [S13,§3060-a42; C24, 27, 31, 35,§9502.]

9503 [§43] Indorsement where name is misspelled. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described adding, if he thinks fit, his proper signature. [S13,§3060-a43; C24, 27, 31, 35,§9503.]

9504 [§44] Indorsement in representative capacity. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability. [S13,§3060-a44; C24, 27, 31, 35,§9504.]

9505 [§45] Time of indorsement—presumption. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue. [S13,§3060-a45; C24, 27, 31, 35,§9505.]

9506 [§46] Place of indorsement—presumption. Except where the contrary appears every indorsement is presumed prima facie to have been made at the place where the instrument is dated. [S13,§3060-a46; C24, 27, 31, 35,§9506.]

9507 [§47] Continuation of negotiable character. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. [S13,§3060-a47; C24, 27, 31, 35, §9507.]

9508 [§48] Striking out indorsement. The owner may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. [S13, §3060-a48; C24, 27, 31, 35,§9508.]

9509 [§49] Transfer without indorsement—effect of. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. [S13,§3060-a49; C24, 27, 31, 35,§9509.]

9510 [§50] When prior party may negotiate instrument. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same, but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. [S13,§3060-a50; C24, 27, 31, 35,§9510.]

RIGHTS OF HOLDER

9511 [§51] Right of holder to sue—payment. The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument. [S13, §3060-a51; C24, 27, 31, 35,§9511.]

9512 [§52] What constitutes a holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. [S13,§3060-a52; C24, 27, 31, 35,§9512.]

9513 [§53] **When person not deemed holder in due course.** Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. [S13,§3060-a53; C24, 27, 31, 35,§9513.]

9514 [§54] **Notice before full amount paid.** Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. [S13,§3060-a54; C24, 27, 31, 35,§9514.]

9515 [§55] **When title defective.** The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. [S13,§3060-a55; C24, 27, 31, 35,§9515.]

9516 [§56] **What constitutes notice of defect.** To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. [S13,§3060-a56; C24, 27, 31, 35,§9516.]

9517 [§57] **Rights of holder in due course.** A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. [S13,§3060-a57; C24, 27, 31, 35,§9517.]

9518 [§58] **When subject to original defenses.** In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. [S13,§3060-a58; C24, 27, 31, 35, §9518.]

9519 [§59] **Who deemed holder in due course.** Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. [S13, §3060-a59; C24, 27, 31, 35,§9519.]

Note for gambling debt, §9442
Paper given for intoxicating liquors, §2068

LIABILITIES OF PARTIES

9520 [§60] **Liability of maker.** The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. [S13,§3060-a60; C24, 27, 31, 35,§9520.]

9521 [§61] **Liability of drawer.** The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder. [S13,§3060-a61; C24, 27, 31, 35,§9521.]

9522 [§62] **Liability of acceptor.** The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse. [S13,§3060-a62; C24, 27, 31, 35,§9522.]

9523 [§63] **When person deemed indorser.** A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. [S13,§3060-a63; C24, 27, 31, 35,§9523.]

9524 [§64] **Liability of irregular indorser.** Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. [S13,§3060-a64; C24, 27, 31, 35,§9524.]

9525 [§65] **Warranty where negotiation by delivery.** Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be.
2. That he has a good title to it.
3. That all prior parties had capacity to contract.
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subsection 3 of this section do not apply to persons negotiating public or corporate securities, other than bills and notes. [S13, §3060-a65; C24, 27, 31, 35,§9525.]

Referred to in §§9526, 9529

9526 [§66] Liability of general indorser. Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subsections 1, 2, and 3 of section 9525; and
2. That the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. [S13, §3060-a66; C24, 27, 31, 35,§9526.]

9527 [§67] Liability of indorser where paper negotiable by delivery. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. [S13,§3060-a67; C24, 27, 31, 35, §9527.]

9528 [§68] Order in which indorsers are liable. As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally. [S13,§3060-a68; C24, 27, 31, 35,§9528.]

9529 [§69] Liability of agent or broker. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section 9525, unless he discloses the name of his principal, and the fact that he is acting only as agent. [S13, §3060-a69; C24, 27, 31, 35,§9529.]

PRESENTMENT FOR PAYMENT

9530 [§70] Effect of want of demand on principal debtor. Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. [S13, §3060-a70; C24, 27, 31, 35,§9530.]

Tender in general, ch 421

9531 [§71] Presentment — instrument payable and not payable on demand. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. [S13,§3060-a71; C24, 27, 31, 35,§9531.]

Days of grace, §9658

9532 [§72] Sufficient presentment. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.
3. At a proper place as herein defined.
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. [S13,§3060-a72; C24, 27, 31, 35,§9532.]

Referred to in §9607

9533 [§73] Place of presentment. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.
2. Where no place of payment is specified and the address of the person to make payment is given in the instrument and it is there presented.
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. [S13,§3060-a73; C24, 27, 31, 35,§9533.]

9534 [§74] Instrument must be exhibited. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it. [S13,§3060-a74; C24, 27, 31, 35,§9534.]

9535 [§75] Presentment where instrument payable at bank. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. [S13,§3060-a75; C24, 27, 31, 35,§9535.]

9536 [§76] Presentment where principal debtor is dead. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise

of reasonable diligence he can be found. [S13, §3060-a76; C24, 27, 31, 35, §9536.]

9537 [§77] **Presentment to persons liable as partners.** Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. [S13, §3060-a77; C24, 27, 31, 35, §9537.]

9538 [§78] **Presentment to joint debtors.** Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all. [S13, §3060-a78; C24, 27, 31, 35, §9538.]

9539 [§79] **When presentment not required to charge the drawer.** Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. [S13, §3060-a79; C24, 27, 31, 35, §9539.]

9540 [§80] **When presentment not required to charge the indorser.** Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. [S13, §3060-a80; C24, 27, 31, 35, §9540.]

9541 [§81] **Delay in making presentment is excused.** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. [S13, §3060-a81; C24, 27, 31, 35, §9541.]

Referred to in §9630

9542 [§82] **Presentment dispensed with.** Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this chapter cannot be made.
2. Where the drawee is a fictitious person.
3. By waiver of presentment, express or implied. [S13, §3060-a82; C24, 27, 31, 35, §9542.]

9543 [§83] **When instrument dishonored by nonpayment.** The instrument is dishonored by nonpayment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid. [S13, §3060-a83; C24, 27, 31, 35, §9543.]

9544 [§84] **Liability of person secondarily liable, when instrument is dishonored.** Subject to the provisions of this chapter, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder. [S13, §3060-a84; C24, 27, 31, 35, §9544.]

9545 **Holidays affecting presentation.** The first day of the week, called Sunday, the first day of January, the twelfth day of February, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, the twenty-fifth day of December, and the following Monday, whenever any of the foregoing named legal holidays may fall on a Sunday, the day of general election, and any day appointed or recommended by the governor of this state or by the president of the United States as a day of fasting or thanksgiving, shall be regarded as holidays for all purposes relating to the presentation for payment or acceptance, and for the protesting and giving notice of the dishonor of bills of exchange, drafts, bank checks, orders, and promissory notes, and any bank or mercantile paper falling due on any of the days above named shall be considered as falling due on the succeeding business day. [C73, §2094; C97, §3053; S13, §3053; C24, 27, 31, 35, §9545.]

Not in original uniform act
Appearance in court, §11090
Days of grace, §9658

9546 [§85] **Time of maturity.** Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday. [S13, §3060-a85; C24, 27, 31, 35, §9546.]

Referred to in §9607
Days of grace, §9658

9547 [§86] **Time — how computed.** Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. [S13, §3060-a86; C24, 27, 31, 35, §9547.]

Similar provision, §63, subsection 23

9548 [§87] **Rule where instrument payable at bank.** Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. [S13, §3060-a87; C24, 27, 31, 35, §9548.]

9549 [§88] **What constitutes payment in due course.** Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. [S13, §3060-a88; C24, 27, 31, 35, §9549.]

NOTICE OF DISHONOR

9550 [§89] **Notice of dishonor.** Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonaccept-

ance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. [S13,§3060-a89; C24, 27, 31, 35,§9550.]

9551 [§90] By whom given. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. [S13,§3060-a90; C24, 27, 31, 35, §9551.]

9552 [§91] Notice given by agent. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. [S13,§3060-a91; C24, 27, 31, 35,§9552.]

9553 [§92] Effect of notice given on behalf of holder. Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. [S13,§3060-a92; C24, 27, 31, 35,§9553.]

9554 [§93] Effect where notice is given by party entitled thereto. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom the notice is given. [S13,§3060-a93; C24, 27, 31, 35, §9554.]

9555 [§94] When agent may give notice. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder. [S13, §3060-a94; C24, 27, 31, 35,§9555.]

9556 [§95] When notice is sufficient. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. [S13,§3060-a95; C24, 27, 31, 35,§9556.]

9557 [§96] Form of notice. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails. [S13,§3060-a96; C24, 27, 31, 35,§9557.]

9558 [§97] To whom notice may be given. Notice of dishonor may be given either to the party himself or to his agent in that behalf. [S13,§3060-a97; C24, 27, 31, 35,§9558.]

9559 [§98] Notice where party is dead. Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased. [S13,§3060-a98; C24, 27, 31, 35,§9559.]

9560 [§99] Notice to partners. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. [S13,§3060-a99; C24, 27, 31, 35,§9560.]

9561 [§100] Notice to persons jointly liable. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. [S13,§3060-a100; C24, 27, 31, 35, §9561.]

9562 [§101] Notice to bankrupt. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee. [S13,§3060-a101; C24, 27, 31, 35,§9562.]

9563 [§102] Time within which notice must be given. Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter. [S13, §3060-a102; C24, 27, 31, 35,§9563.]

Days of grace, §9658

9564 [§103] Where parties reside in same place. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post office in time to reach him in the usual course of the day following. [S13,§3060-a103; C24, 27, 31, 35,§9564.]

9565 [§104] Where parties reside in different places. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision. [S13, §3060-a104; C24, 27, 31, 35,§9565.]

Referred to in §9629

9566 [§105] When sender deemed to have given due notice. Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. [S13,§3060-a105; C24, 27, 31, 35,§9566.]

9567 [§106] Deposit in post office — what constitutes. Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post-office department. [S13, §3060-a106; C24, 27, 31, 35,§9567.]

9568 [§107] Notice to antecedent party — time of. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. [S13,§3060-a107; C24, 27, 31, 35,§9568.]

9569 [§108] Where notice must be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or
2. If he live in one place and have his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this chapter, it will be sufficient, though not sent in accordance with the requirements of this section. [S13,§3060-a108; C24, 27, 31, 35,§9569.]

9570 [§109] Waiver of notice. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied. [S13,§3060-a109; C24, 27, 31, 35,§9570.]

9571 [§110] Whom affected by waiver. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only. [S13,§3060-a110; C24, 27, 31, 35,§9571.]

9572 [§111] Waiver of protest. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. [S13,§3060-a111; C24, 27, 31, 35,§9572.]

9573 [§112] When notice is dispensed with. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. [S13,§3060-a112; C24, 27, 31, 35, §9573.]

9574 [§113] Delay in giving notice — how excused. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. [S13,§3060-a113; C24, 27, 31, 35, §9574.]

9575 [§114] When notice need not be given to drawer. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment. [S13,§3060-a114; C24, 27, 31, 35,§9575.]

9576 [§115] When notice need not be given to indorser. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.
2. Where the indorser is the person to whom the instrument is presented for payment.
3. Where the instrument was made or accepted for his accommodation. [S13,§3060-a115; C24, 27, 31, 35,§9576.]

9577 [§116] Notice of nonpayment where acceptance refused. Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary, unless in the meantime the instrument has been accepted. [S13,§3060-a116; C24, 27, 31, 35,§9577.]

9578 [§117] Effect of omission to give notice of nonacceptance. An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission. [S13,§3060-a117; C24, 27, 31, 35,§9578.]

9579 [§118] When protest need not be made —when must be made. Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be; but protest is not required, except in the case of foreign bills of exchange. [S13, §3060-a118; C24, 27, 31, 35,§9579.]

DISCHARGE OF NEGOTIABLE INSTRUMENTS

9580 [§119] How instrument discharged. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder.

4. By any other act which will discharge a simple contract for the payment of money.

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. [S13,§3060-a119; C24, 27, 31, 35, §9580.]

9581 [§120] When persons secondarily liable discharged. A person secondarily liable on the instrument is discharged:

1. By an act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. By the discharge of a prior party.
4. By the valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. [S13, SS15,§3060-a120; C24, 27, 31, 35,§9581.]

9582 [§121] Right of party who discharges instrument. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated. [S13,§3060-a121; C24, 27, 31, 35,§9582.]

9583 [§122] Renunciation by holder. The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. [S13,§3060-a122; C24, 27, 31, 35,§9583.]

9584 [§123] Cancellation — unintentional — burden of proof. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. [S13,§3060-a123; C24, 27, 31, 35,§9584.]

9585 [§124] Alteration of instrument — effect of. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor. [S13,§3060-a124; C24, 27, 31, 35, §9585.]

9586 [§125] What constitutes a material alteration. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. [S13,§3060-a125; C24, 27, 31, 35, §9586.]

BILLS OF EXCHANGE—FORM AND INTERPRETATION

9587 [§126] "Bill of exchange" defined. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. [S13,§3060-a126; C24, 27, 31, 35,§9587.]

9588 [§127] Bill not an assignment of funds in hands of drawee. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. [S13, §3060-a127; C24, 27, 31, 35,§9588.]

9589 [§128] Bill addressed to more than one drawee. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession. [S13,§3060-a128; C24, 27, 31, 35,§9589.]

9590 [§129] Inland and foreign bills of exchange. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. [S13,§3060-a129; C24, 27, 31, 35,§9590.]

9591 [§130] Bill treated as promissory note. Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. [S13,§3060-a130; C24, 27, 31, 35, §9591.]

9592 [§131] Referee in case of need. The drawer of a bill and any indorser may insert

thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit. [S13,§3060-a131; C24, 27, 31, 35,§9592.]

ACCEPTANCE

9593 [§132] Acceptance—how made. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. [S13, §3060-a132; C24, 27, 31, 35,§9593.]

9594 [§133] Holder entitled to acceptance on face of bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. [S13,§3060-a133; C24, 27, 31, 35,§9594.]

9595 [§134] Acceptance by separate instrument. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. [S13,§3060-a134; C24, 27, 31, 35,§9595.]

9596 [§135] Promise to accept—when equivalent to acceptance. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. [S13,§3060-a135; C24, 27, 31, 35, §9596.]

9597 [§136] Time allowed drawee to accept. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation. [S13, §3060-a136; C24, 27, 31, 35,§9597.]

9598 [§137] Liability of drawee retaining or destroying bill. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same. [S13,§3060-a137; C24, 27, 31, 35,§9598.]

9599 [§138] Acceptance of incomplete bill. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. [S13,§3060-a138; C24, 27, 31, 35,§9599.]

9600 [§139] Kinds of acceptances. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. [S13,§3060-a139; C24, 27, 31, 35,§9600.]

9601 [§140] What constitutes a general acceptance. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere. [S13,§3060-a140; C24, 27, 31, 35, §9601.]

9602 [§141] Qualified acceptance. An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
3. Local, that is to say, an acceptance to pay only at a particular place.
4. Qualified as to time.
5. The acceptance of some one or more of the drawees, but not of all. [S13,§3060-a141; C24, 27, 31, 35,§9602.]

9603 [§142] Qualified acceptance refused. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto. [S13,§3060-a142; C24, 27, 31, 35,§9603.]

PRESENTMENT FOR ACCEPTANCE

9604 [§143] When presentment for acceptance must be made. Presentment for acceptance must be made:

1. When the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable. [S13,§3060-a143; C24, 27, 31, 35,§9604.]

Referred to in §9605

9605 [§144] Release of drawer and indorser. Except as herein otherwise provided, the holder of a bill which is required by section 9604 to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so,

the drawer and all indorsers are discharged. [S13,§3060-a144; C24, 27, 31, 35,§9605.]

9606 [§145] Presentment—how made. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf, and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.
2. Where the drawee is dead, presentment may be made to his personal representative.
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. [S13,§3060-a145; C24, 27, 31, 35,§9606.]

9607 [§146] Days for presentment. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections 9532 and 9546. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day. [S13,§3060-a146; C24, 27, 31, 35,§9607.]

9608 [§147] Presentment where time is insufficient. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. [S13,§3060-a147; C24, 27, 31, 35,§9608.]

9609 [§148] Where presentment is excused. Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.
2. Where after the exercise of reasonable diligence, presentment cannot be made.
3. Where although presentment has been irregular, acceptance has been refused on some other ground. [S13,§3060-a148; C24, 27, 31, 35, §9609.]

9610 [§149] When dishonored by nonacceptance. A bill is dishonored by nonacceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this chapter is refused or cannot be obtained; or
2. When a presentment for acceptance is excused and the bill is not accepted. [S13,§3060-a149; C24, 27, 31, 35,§9610.]

9611 [§150] Duty of holder where bill not accepted. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers. [S13,§3060-a150; C24, 27, 31, 35, §9611.]

9612 [§151] Rights of holders where bill not accepted. When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary. [S13,§3060-a151; C24, 27, 31, 35, §9612.]

PROTEST

9613 [§152] In what cases protest necessary. Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary. [S13,§3060-a152; C24, 27, 31, 35,§9613.]

9614 [§153] Protest—how made. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
3. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. [S13,§3060-a153; C24, 27, 31, 35,§9614.]

9615 [§154] Protest—by whom made. Protest may be made by:

1. A notary public; or
2. By any reputable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. [S13,§3060-a154; C24, 27, 31, 35,§9615.]

Interested notary, §1205; protest fee, §1214

9616 [§155] Protest — when to be made. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. [S13, §3060-a155; C24, 27, 31, 35,§9616.]

9617 [§156] Protest—where made. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by nonacceptance, it must be protested for nonpayment at the place where it is expressed to be payable; and no other presentment for payment to, or demand on, the drawee is necessary. [S13,§3060-a156; C24, 27, 31, 35,§9617.]

9618 [§157] Nonacceptance and nonpayment. A bill which has been protested for nonacceptance may be subsequently protested for nonpayment. [S13,§3060-a157; C24, 27, 31, 35, §9618.]

9619 [§158] Protest before maturity where acceptor insolvent. Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. [S13,§3060-a158; C24, 27, 31, 35,§9619.]

9620 [§159] When protest dispensed with. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. [S13,§3060-a159; C24, 27, 31, 35,§9620.]

9621 [§160] Protest where bill is lost. Where a bill is lost or destroyed, or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. [S13,§3060-a160; C24, 27, 31, 35, §9621.]

ACCEPTANCE FOR HONOR

9622 [§161] When bill may be accepted for honor. Where a bill of exchange has been protested for dishonor by nonacceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. [S13,§3060-a161; C24, 27, 31, 35,§9622.]

9623 [§162] Acceptance for honor — how made. An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. [S13,§3060-a162; C24, 27, 31, 35,§9623.]

9624 [§163] When deemed to be an acceptance for honor of the drawer. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. [S13, §3060-a163; C24, 27, 31, 35,§9624.]

9625 [§164] Liability of acceptor for honor. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. [S13, §3060-a164; C24, 27, 31, 35,§9625.]

9626 [§165] Agreement of acceptor for honor. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him. [S13,§3060-a165; C24, 27, 31, 35, §9626.]

9627 [§166] Maturity of bill payable after sight—accepted for honor. When a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor. [S13,§3060-a166; C24, 27, 31, 35,§9627.]

9628 [§167] Protest of bill accepted for honor. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need. [S13,§3060-a167; C24, 27, 31, 35,§9628.]

9629 [§168] Presentment for payment to acceptor for honor—how made. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for nonpayment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 9565. [S13,§3060-a168; C24, 27, 31, 35, §9629.]

9630 [§169] When delay in making presentment is excused. The provisions of section 9541 apply where there is delay in making presentment to the acceptor for honor or referee in case of need. [S13,§3060-a169; C24, 27, 31, 35, §9630.]

9631 [§170] Dishonor of bill by acceptor for honor. When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him. [S13,§3060-a170; C24, 27, 31, 35,§9631.]

PAYMENT FOR HONOR

9632 [§171] Who may make payment for honor. Where a bill has been protested for nonpayment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. [S13,§3060-a171; C24, 27, 31, 35,§9632.]

9633 [§172] Payment for honor—how made. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it. [S13,§3060-a172; C24, 27, 31, 35,§9633.]

9634 [§173] Declaration before payment for honor. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. [S13,§3060-a173; C24, 27, 31, 35,§9634.]

9635 [§174] Preference of parties offering to pay for honor. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference. [S13,§3060-a174; C24, 27, 31, 35,§9635.]

9636 [§175] Effect on subsequent parties where bill is paid for honor. Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. [S13, §3060-a175; C24, 27, 31, 35,§9636.]

9637 [§176] Refusal to receive payment supra protest. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment. [S13,§3060-a176; C24, 27, 31, 35,§9637.]

9638 [§177] Rights of payer for honor. The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. [S13,§3060-a177; C24, 27, 31, 35,§9638.]

BILLS IN A SET

9639 [§178] Bills in sets constitute one bill. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. [S13,§3060-a178; C24, 27, 31, 35,§9639.]

9640 [§179] Rights of holders where different parts are negotiated. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. [S13, §3060-a179; C24, 27, 31, 35,§9640.]

9641 [§180] Liability of holder who indorses two or more parts of a set to different persons. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. [S13,§3060-a180; C24, 27, 31, 35,§9641.]

9642 [§181] Acceptance of bills drawn in sets. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. [S13,§3060-a181; C24, 27, 31, 35,§9642.]

9643 [§182] Payment by acceptor of bills drawn in sets. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. [S13,§3060-a182; C24, 27, 31, 35,§9643.]

9644 [§183] Effect of discharging one of a set. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. [S13,§3060-a183; C24, 27, 31, 35, §9644.]

PROMISSORY NOTES AND CHECKS

9645 [§184] "Promissory note" defined. A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. [S13,§3060-a184; C24, 27, 31, 35,§9645.]

9646 [§185] "Check" defined. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check. [S13,§3060-a185; C24, 27, 31, 35,§9646.]

9647 [§186] Within what time a check must be presented. A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. [S13,§3060-a186; C24, 27, 31, 35,§9647.]

9648 [§187] Certification of check — effect of. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. [S13,§3060-a187; C24, 27, 31, 35,§9648.]

9649 [§188] Effect where the holder of check procures it to be certified. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon. [S13,§3060-a188; C24, 27, 31, 35,§9649.]

9650 [§189] Check not an assignment — when bank liable. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. [S13, §3060-a189; C24, 27, 31, 35,§9650.]

GENERAL PROVISIONS

9651 [§190] Short title. This chapter shall be known as the "Negotiable Instruments Law". [S13,§3060-a190; C24, 27, 31, 35,§9651.]

9652 [§191] Definitions and meaning of terms. In this chapter, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print. [S13,§3060-a191; C24, 27, 31, 35, §9652.]

9653 [§192] Person primarily liable on instrument. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable. [S13,§3060-a192; C24, 27, 31, 35,§9653.]

9654 [§193] Reasonable time—what constitutes. In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. [S13,§3060-a193; C24, 27, 31, 35,§9654.]

9655 [§194] Time—how computed when last day falls on holiday. When the day, or last day, for doing an act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day. [S13,§3060-a194; C24, 27, 31, 35,§9655.]

9656 [§195] Application of chapter. The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the passage hereof. [S13,§3060-a195; C24, 27, 31, 35,§9656.]

9657 [§196] Law merchant—when governs. In any case not provided for in this chapter, the rules of the law merchant shall govern. [S13, §3060-a196; C24, 27, 31, 35,§9657.]

9658 Days of grace—demand made on. A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this chapter, and the provisions of this chapter as to notice of nonpayment, nonacceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this chapter; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face. [S13, §3060-a198; C24, 27, 31, 35,§9658.]

Added to the original uniform act by 29GA, ch 130

9659 Indemnifying bond to protect payer. Whenever a note, bond, bill of exchange, certificate of deposit, check, or other evidence of indebtedness shall have been lost, stolen, or destroyed, and the owner thereof desires payment to be made by the person, firm, or corporation issuing the same, he shall execute and deliver, if demanded, to such person, firm, or corporation, a good and sufficient bond agreeing to indemnify and save harmless the payer thereof. [S13, §3060-a199; C24, 27, 31, 35,§9659.]

Not in original uniform act

9660 Indemnifying bond to protect defendants. When an action is brought on a lost note, bond, bill of exchange, draft, certificate of deposit, or other evidence of indebtedness, upon demand of any defendant therein, a good and sufficient bond shall be given to indemnify and save harmless the defendants in said cause. [S13,§3060-a200; C24, 27, 31, 35,§9660.]

Not in original uniform act

CHAPTER 425

WAREHOUSE RECEIPTS LAW

Referred to in §9752.25. Bracketed numbers indicate the corresponding section of the uniform act

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PART I

THE ISSUE OF WAREHOUSE RECEIPTS

9661 [§1] **Persons who may issue receipts.** Warehouse receipts may be issued by any warehouseman. [S13,§3138-a1; C24, 27, 31, 35,§9661.]

9662 [§2] **Form of receipts—essential terms.** Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

1. The location of the warehouse where the goods are stored;
2. The date of issue of the receipt;
3. The consecutive number of the receipt;
4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;
5. The rate of storage charges;
6. A description of the goods or of the packages containing them;
7. The signature of the warehouseman, which may be made by his authorized agent;
8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damages caused by the omission from a negotiable receipt of any of the terms herein required. [S13,§3138-a2; C24, 27, 31, 35,§9662.]

9663 [§3] **Form of receipts—what terms may be inserted.** A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not:

1. Be contrary to the provisions of this chapter.
2. In any wise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. [S13,§3138-a3; C24, 27, 31, 35, §9663.]

9664 [§4] **"Nonnegotiable receipt" defined.** A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt. [S13,§3138-a4; C24, 27, 31, 35,§9664.]

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PART V

INTERPRETATION

9716 [§56] Common law and equity applicable.
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9718 [§58] Definitions.

9665 [§5] "Negotiable receipt" defined. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provision shall be inserted in a negotiable receipt that it is nonnegotiable. Such provisions, if inserted, shall be void. [S13,§3138-a5; C24, 27, 31, 35,§9665.]

9666 [§6] Duplicate receipts must be so marked. When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to anyone who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. [S13,§3138-a6; C24, 27, 31, 35,§9666.]

9667 [§7] Failure to mark "not negotiable". A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "nonnegotiable", or "not negotiable". In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. [S13,§3138-a7; C24, 27, 31, 35,§9667.]

PART II

OBLIGATIONS AND RIGHTS OF WAREHOUSEMEN UPON THEIR RECEIPTS

9668 [§8] Obligation of warehouseman to deliver. A warehouseman, in the absence of some lawful excuse provided by this chapter, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

1. An offer to satisfy the warehouseman's lien;
2. An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. [S13,§3138-a8; C24, 27, 31, 35,§9668.]

9669 [§9] Justification of warehouseman in delivering. A warehouseman is justified in delivering the goods, subject to the provisions of sections 9670, 9671 and 9672 to one who is:

1. The person lawfully entitled to the possession of the goods, or his agent;
2. A person who is either himself entitled to delivery by the terms of a nonnegotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper; or
3. A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. [S13,§3138-a9; C24, 27, 31, 35, §9669.]

Referred to in §§9670, 9679, 9752.25

9670 [§10] Warehouseman's liability for misdelivery. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subsections 2 and 3 of section 9669 and though he delivered the goods as authorized by said subsections he shall be so liable, if prior to such delivery he had either:

1. Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery; or
2. Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. [S13,§3138-a10; C24, 27, 31, 35,§9670.]

Referred to in §§9669, 9752.25

9671 [§11] Negotiable receipt must be canceled when goods delivered. Except as provided in section 9696, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to anyone who purchases for value in good faith such receipt, for failure to deliver goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. [S13,§3138-a11; C24, 27, 31, 35,§9671.]

Referred to in §§9669, 9752.25

9672 [§12] Negotiable receipt must be canceled or marked when part of goods delivered. Except as provided in section 9696, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to anyone who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. [S13,§3138-a12; C24, 27, 31, 35,§9672.]

Referred to in §§9669, 9752.25

9673 [§13] Altered receipts. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was:

1. Immaterial,
2. Authorized, or
3. Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. [S13,§3138-a13; C24, 27, 31, 35, §9673.]

Referred to in §9752.25

9674 [§14] Lost or destroyed receipts. Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. [S13,§3138-a14; C24, 27, 31, 35,§9674.]

Referred to in §§9712, 9714, 9752.25

9675 [§15] Effect of duplicate receipts. A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. [S13,§3138-a15; C24, 27, 31, 35,§9675.]

Referred to in §9752.25

9676 [§16] Warehouseman cannot set up title in himself. No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. [S13,§3138-a16; C24, 27, 31, 35,§9676.]

Referred to in §9752.25

9677 [§17] Interpleader of adverse claimants. If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead. [S13, §3138-a17; C24, 27, 31, 35,§9677.]

Referred to in §§9679, 9752.25

9678 [§18] Warehouseman has reasonable time to determine validity of claims. If someone other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. [S13,§3138-a18; C24, 27, 31, 35,§9678.]

Referred to in §§9679, 9752.25

9679 [§19] Adverse title no defense—exceptions. Except as provided in sections 9677 and 9678 and in sections 9669 and 9696, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. [S13,§3138-a19; C24, 27, 31, 35,§9679.]

Referred to in §9752.25

9680 [§20] Liability for nonexistence or misdescription of goods. A warehouseman shall be liable to the holder of a receipt for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate or of the kind they were said to be by the depositor. [S13,§3138-a20; C24, 27, 31, 35,§9680.]

Referred to in §9752.25

9681 [§21] Liability for care of goods. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a rea-

sonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. [S13,§3138-a21; C24, 27, 31, 35,§9681.]

Referred to in §9752.25

9682 [§22] Goods must be kept separate. Except as provided in section 9683, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and re-delivery of the goods deposited. [S13,§3138-a22; C24, 27, 31, 35, §9682.]

Referred to in §9752.25

9683 [§23] Fungible goods may be commingled, if warehouseman authorized. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. [S13,§3138-a23; C24, 27, 31, 35,§9683.]

Referred to in §§9682, 9752.25

9684 [§24] Liability of warehouseman to depositors of commingled goods. The warehouseman shall be severally liable to each depositor for the care and re-delivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. [S13,§3138-a24; C24, 27, 31, 35, §9684.]

Referred to in §9752.25

9685 [§25] Attachment or levy upon goods for which a negotiable receipt has been issued. If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishing or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. [S13,§3138-a25; C24, 27, 31, 35,§9685.]

Referred to in §9752.25

9686 [§26] Creditors' remedies to reach negotiable receipts. A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from the courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process. [S13,§3138-a26; C24, 27, 31, 35, §9686.]

Referred to in §9752.25

9687 [§27] What claims included in warehouseman's lien. Subject to the provisions of section 9690, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. [S13,§3138-a27; C24, 27, 31, 35,§9687.]

Referred to in §§9690, 9752.25

9688 [§28] Against what property lien may be enforced. Subject to the provisions of section 9690, a warehouseman's lien may be enforced:

1. Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

2. Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid;

3. Against all goods deposited at any time by the owner or person in legal possession thereof received in good faith and without notice of incumbrances, and, provided further, that, if the warehouseman has either actual or constructive notice of any prior incumbrance, he may give written notice to such prior incumbrancer and, unless such incumbrancer shall remove such goods within ten days thereafter, the lien of the warehouseman for all services and charges in relation to such goods shall be prior to such incumbrance. [S13,§3138-a28; C24, 27, 31, 35,§9688.]

Referred to in §9752.25
Subsection 3 not in original uniform act

9689 [§29] How lien may be lost. A warehouseman loses his lien upon goods:

1. By surrendering possession thereof; or

2. By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this chapter. [S13,§3138-a29; C24, 27, 31, 35,§9689.]

Referred to in §9752.25

9690 [§30] Negotiable receipt must state charges for which lien is claimed. If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section 9687, although the amount of the charges so enumerated

is not stated in the receipt. [S13,§3138-a30; C24, 27, 31, 35,§9690.]

Referred to in §§9687, 9688, 9752.25

9691 [§31] Warehouseman need not deliver until lien is satisfied. A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. [S13,§3138-a31; C24, 27, 31, 35,§9691.]

Referred to in §9752.25

9692 [§32] Warehouseman's lien does not preclude other remedies. Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. [S13, §3138-a32; C24, 27, 31, 35,§9692.]

Referred to in §9752.25

9693 [§33] Satisfaction of lien by sale. A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:

1. An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;
2. A brief description of the goods against which the lien exists;
3. A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail; and
4. A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, and advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this chapter, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. Such sale may be conducted by the sheriff or his deputy or by any constable of the county where such sale is made, and when so conducted, the warehouseman, his representative or assigns, may fairly and in good faith purchase any property sold under the provisions of this chapter. [S13,§3138-a33; C24, 27, 31, 35,§9693.]

Referred to in §§9694, 9752.25
Last sentence not in original uniform act

9694 [§34] Perishable and hazardous goods. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman, after a reasonable effort, is unable to sell such goods, he may dispose of them in a lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of section 9693. [S13,§3138-a34; C24, 27, 31, 35,§9694.]

Referred to in §9752.25

9695 [§35] Other methods of enforcing liens. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. [S13,§3138-a35; C24, 27, 31, 35,§9695.]

Referred to in §9752.25

9696 [§36] Effect of sale. After the goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. [S13,§3138-a36; C24, 27, 31, 35, §9696.]

Referred to in §§9671, 9672, 9679, 9714, 9752.25

PART III

NEGOTIATION AND TRANSFER OF RECEIPTS

9697 [§37] Negotiation of negotiable receipts by delivery. A negotiable receipt may be negotiated by delivery:

1. Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer; or

2. Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee. [S13,§3138-a37; C24, 27, 31, 35,§9697.]

Referred to in §9752.25

9698 [§38] Negotiation of negotiable receipts by indorsement. A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner. [S13,§3138-a38; C24, 27, 31, 35,§9698.]

Referred to in §9752.25

9699 [§39] Transfer of receipts. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right. [S13,§3138-a39; C24, 27, 31, 35,§9699.]

Referred to in §9752.25

9700 [§40] Who may negotiate a receipt. A negotiable receipt may be negotiated:

1. By the owner thereof; or

2. By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if, at the time of such entrusting, the receipt is in such form that it may be negotiated by delivery. [S13,§3138-a40; C24, 27, 31, 35, §9700.]

Referred to in §9752.25

9701 [§41] Rights of persons to whom receipt has been negotiated. A person to whom a negotiable receipt has been duly negotiated acquires thereby:

1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

2. The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. [S13,§3138-a41; C24, 27, 31, 35,§9701.]

Referred to in §9752.25

9702 [§42] Rights of persons to whom receipt has been transferred. A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the receipt is nonnegotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferor or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or by a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. [S13,§3138-a42; C24, 27, 31, 35,§9702.]

Referred to in §9752.25

9703 [§43] Transfer of negotiable receipt without indorsement. Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. [S13, §3138-a43; C24, 27, 31, 35,§9703.]

Referred to in §9752.25

9704 [§44] Warranties on sale of receipt. A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants:

1. That the receipt is genuine;
2. That he has a legal right to negotiate or transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the receipt; and
4. That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby. [S13,§3138-a44; C24, 27, 31, 35,§9704.]

Referred to in §9752.25

9705 [§45] Indorser not a guarantor. The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. [S13,§3138-a45; C24, 27, 31, 35,§9705.]

Referred to in §9752.25

9706 [§46] No warranty implied from accepting payment of debt. A mortgagee, pledgee, or holder for security of a receipt who, in good faith, demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quality or quantity of the goods therein described. [S13,§3138-a46; C24, 27, 31, 35§9706.]

Referred to in §9752.25

9707 [§47] When negotiation not impaired by fraud, mistake, or duress. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress. [S13,§3138-a47; C24, 27, 31, 35,§9707.]

Referred to in §9752.25

9708 [§48] Subsequent negotiation. Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage, or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. [S13, §3138-a48; C24, 27, 31, 35,§9708.]

Referred to in §9752.25

9709 [§49] Negotiation defeats vendor's lien. Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. [S13,§3138-a49; C24, 27, 31, 35,§9709.]

PART IV

CRIMINAL OFFENSES

9710 [§50] Issue of receipt for goods not received. A warehouseman or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of felony, and upon conviction shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [S13,§3138-a50; C24, 27, 31, 35,§9710.]

9711 [§51] Issue of receipt containing false statement. A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods, knowing that it contains any false statement, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [S13, §3138-a51; C24, 27, 31, 35,§9711.]

9712 [§52] Issue of duplicate receipts not so marked. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate", except in the case of a lost or destroyed receipt after proceedings as provided for in section 9674, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [S13,§3138-a52; C24, 27, 31, 35,§9712.]

9713 [§53] Receipts which do not state facts. Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a misdemeanor, and upon conviction shall be punished for each

offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [S13,§3138-a53; C24, 27, 31, 35,§9713.]

9714 [§54] Delivery of goods without obtaining negotiable receipt. A warehouseman, or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt, the negotiating of which would transfer the right to the possession of such goods, is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections 9674 and 9696, be found guilty of a misdemeanor and on conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [S13,§3138-a54; C24, 27, 31, 35,§9714.]

9715 [§55] Negotiation of receipt for mortgaged goods. Any person who deposits goods to which he has no title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [S13, §3138-a55; C24, 27, 31, 35,§9715.]

PART V

INTERPRETATION

9716 [§56] Common law and equity applicable. In any case not provided for in this chapter, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. [S13,§3138-a56; C24, 27, 31, 35,§9716.]

9717 [§57] Interpretation to give effect to purpose of uniformity. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [S13,§3138-a57; C24, 27, 31, 35,§9717.]

9718 [§58] Definitions. In this chapter, unless the context or subject matter otherwise requires:

"Action" includes the counterclaim, set-off, and suit in equity.

Counterclaim generally, §§11019,11151

"Delivery" means voluntary transfer of possession from one person to another.

"Fungible goods" means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

"Goods" means chattels or merchandise in storage, or which has been or is about to be stored.

"Holder of a receipt" means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by indorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Receipt" means a warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

Similar provisions, §§8297, 9485, 10005

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

A thing is done "in good faith" within the meaning of this chapter when it is in fact done honestly whether it be done negligently or not. [S13,§3138-a58; C24, 27, 31, 35,§9718.]

Referred to in §§6964, 6971

CHAPTER 426

BONDED WAREHOUSES FOR AGRICULTURAL PRODUCTS

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9719 to 9751, inc. Rep. by 46GA, ch 104

9751.01 Terms defined. As used in this chapter:

1. "Commissioners" shall mean the "Iowa state commerce commissioners".

2. "Warehouse" shall be deemed to mean every building, structure, or other protected inclosure in which any agricultural product, or products, the consumption of which is specially related to agricultural activities, is or may be stored within the state. Auxiliary buildings to a key building, for the administrative purposes of this chapter, shall be construed to be a part of such key building.

3. "Grain elevator" means a type of warehouse equipped with mechanical devices specially adapted to aid in handling grain and in common use as an adjunct to transportation of grain.

4. "Agricultural product" means any unprocessed product of agriculture found by the commission to be suitable for keeping in storage, which shall include cotton, wool, grain, tobacco, flaxseed, forage, and meadow plant seed, and shall include sugar and all canned goods made from agricultural products.

5. "Grain" means wheat, corn, oats, barley, rye, flaxseed, field peas, soybeans, grain sorghums, spelts, and such other products as are usually stored in grain elevators, subject to determination by the commissioners.

6. "Person" means an individual, corporation, partnership, or two or more persons having a joint or common interest.

7. "Warehouseman" means a person lawfully engaged in the business of storing warehouseable products as defined in this section.

8. "Receipt" means a warehouse receipt drawn under authority of a warehouse license or permit issued by the commission.

9. "Delivery charge" means a charge on delivery of products from a warehouse whether same has been in storage or in temporary deposit, and shall include all compensation for handling the product in receiving it into and delivering it from the warehouse, and shall be independent of and in addition to storage rates or any charges for cleaning or other processing of the product.

10. "Storage rates" means a charge for storage based on elapsed time of storage and shall be independent of and in addition to handling charges connected with receiving products into and removing them from a warehouse.

11. "Storage" means:

a. Agricultural products, not the property of the warehouseman, that are placed in a warehouse to be held under the custody of the warehouseman.

b. Agricultural products that are the property of a warehouseman licensed under the provisions of this chapter, and held in his warehouse, when others than the warehouseman acquire an interest in their being held and safely kept.

c. Grain other than the property of the operator when received into a grain elevator warehouse for any purpose whatsoever if allowed to remain in the warehouse more than ten days from the day of receipt of the first consignment of any given lot, which lot shall include only products deposited during the ten-day period.

12. "Warehouseable products" shall include all agricultural products as defined in subsection 4 of this section and shall also include such products generally consumed in the production of agricultural products, as binding twine, stock salt, bran, cracked corn, soybean meal, cottonseed meal, and the commercial feeds labeled as required in section 3114, when such products are designated by the commission.

13. "Grain elevator operating unit" means a grain elevator or elevators including auxiliary buildings thereto for which a common and distinct primary record of grain accounts is kept. [C24, 27, 31,§9719; C35,§9751-g1; 47GA, ch 205,§1; 48GA, ch 232,§1.]

9751.02 License required. Any warehouseman in this state before receiving agricultural products into grain elevators for storage as defined in this chapter, must first procure a bonded warehouse license from the Iowa state commerce commission or be licensed and bonded under the provisions of a United States warehouse act, except as permitted under the provisions of this chapter relating to temporary permits. No unlicensed elevator shall receive grain, other than that which is the property of its operator, except for the purpose that such grain is to be sold to the elevator at a price to be determined within ten days or is to be processed, cleaned, and/or returned to the depositor within ten days, or except that such grain is to be shipped by the elevator for account of the depositor within ten days; provided, however, that in the case of grain owned by the United States government or subdivisions thereof, the period of leniency shall be thirty days instead of ten. No grain elevators in this state shall receive grain for purchase, nor under agreement to purchase, at a price left for determination later than ten days after the receipt of the grain, except that this shall not be construed to prohibit licensed or permit warehouses from purchasing grain for which lawful receipts have been issued. [C24, 27, 31,§§9722, 9724; C35, §9751-g2; 47GA, ch 205,§1; 48GA, ch 232,§2.]

Referred to in §§9751.10, 9751.33

9751.03 Rules and regulations. The commission shall from time to time make such rules and regulations as it may deem necessary for the efficient execution of the provisions of this chapter, and may at its discretion designate an employee or officer of the commission to act for the commission in any details connected with the administration of this chapter, including the issuance of licenses and approval of warehouse bonds in the name of the commission, but not to include matters requiring a public hear-

ing or suspension or revocation of licenses. [C24, 27, 31,§9721; C35,§9751-g3; 48GA, ch 232, §3.]

9751.04 License—conditions. The commissioners are authorized, upon application to them, to issue to any warehouseman or to any person about to become a warehouseman a license or licenses for the conduct of a warehouse or warehouses in accordance with this chapter and such rules and regulations as may be made hereunder, provided that each such warehouse, or designated portion thereof, be found suitable for the proper storage of the particular agricultural product or products for which a license is applied, and that such warehouseman agrees, as a condition to the granting of a license or licenses, to comply with and abide by all the terms of this chapter and the rules and regulations that may be prescribed hereunder; and may issue temporary permits to any warehouseman to operate grain elevator warehouses, receiving storage therein, for such reasonable time as the commissioners may deem necessary, to provide opportunity for such warehouseman to procure bond and be licensed. Two or more warehouse buildings located in the same city or town, and operated under the same management and responsibility may be licensed as one warehouse. Licenses to operate warehouses under the same control and responsibility in two or more cities or towns, may be issued under one application, but separate licenses will be required for such warehouses as to each city or town. Licenses issued to operate grain elevators and auxiliaries thereto as warehouses shall be restricted to the storage of grain as defined in this chapter. [C24, 27, 31,§9722; C35,§9751-g4.]

Referred to in §9751.08

9751.05 Bond required. Any person applying for a license or licenses to conduct a warehouse or warehouses in accordance with this chapter shall, as a condition to the granting thereof, execute and file with the commissioners a good and sufficient bond, other than personal security, to the state to secure the faithful performance of his obligations as a warehouseman under the terms of this chapter and the rules and regulations prescribed hereunder, and of such additional obligations as a warehouseman which may be assumed by him under contracts with the respective depositors of agricultural products in such warehouse. [C24, 27, 31,§9723; C35,§9751-g5.]

Referred to in §§9751.06, 9751.10, 9751.30, 9751.31

9751.06 Form, amount, sureties, and conditions. Bonds required under section 9751.05 shall be in such form and shall contain such terms and conditions as the commission may prescribe to carry out the purposes of this chapter, and shall be indorsed as surety by a bonding company authorized to do business in this state. The minimum amount of such bond required for grain elevators with an approved storage capacity up to twelve thousand bushels shall be not less than three thousand dollars; the minimum bond for grain elevators with an approved storage capacity greater than twelve thousand bushels shall be increased at the rate of one thousand dollars for each additional four thousand bushels or fraction thereof up to a total of forty thousand bushels, and shall be increased at the rate of one thousand dollars for each additional six thousand bushels or fraction thereof over forty thousand up to one hundred thousand bushels, and shall be increased at the rate of one thousand dollars for each additional ten thousand bushels or fraction thereof over one hundred thousand bushels. The minimum bond for warehouses other than grain elevators for storage products of a value up to six thousand dollars at the time of storage shall be three thousand dollars, the minimum for storage products of a value above six thousand dollars shall be increased at the rate of one thousand dollars for each two thousand dollars value or fraction thereof up to twenty thousand dollars value, and shall be increased at the rate of one thousand dollars for each additional three thousand dollars value of products or fraction thereof up to fifty thousand dollars value, and shall be increased at the rate of one thousand dollars for each additional five thousand dollars value of products or fraction thereof above fifty thousand dollars value. One bond cumulative as to minimum requirements may be accepted from a warehouseman operating warehouses of the same kind in two or more cities or towns, when the licenses to operate the several warehouses are issued under one application. [C24, 27, 31, §9725; C35,§9751-g6; 48GA, ch 232,§4.]

Referred to in §§9751.10, 9751.30, 9751.31

9751.07 Insurance required. All agricultural products in storage in a warehouse, licensed or operated under permit, as provided in this chapter, also all such products deposited temporarily in such warehouses other than property not in storage owned by the warehouseman, shall be kept fully insured as to current value by the warehouseman against loss by fire, inherent explosion, or windstorm with insurance companies authorized to operate in this state. The expense of providing such insurance shall be borne by the warehouseman and absorbed in his storage rates or delivery charges. Holders of licensed warehouse receipts shall have first claim against such insurance as their interest may appear, and owners other than the warehouseman of products not covered by licensed warehouse receipts shall have second claim against such insurance as their interest may appear. [C24, 27, 31,§9725; C35,§9751-g7; 48GA, ch 232,§5.]

Referred to in §§9751.30, 9751.33

9751.08 Tenure of license—renewal. Each license issued under section 9751.04 shall terminate on the thirtieth day of June next after the date of issuance, except that upon a showing satisfactory to the commission that the minimum storage of certain products usually occurs at some other season of the year, the commission may set some other date for termination of licenses relating to the storage of such products.

Licenses may from time to time be renewed or extended by a written instrument, which shall likewise terminate on the next anniversary of the terminal date of the original license after the effective date of such renewal or extension. [C24, 27, 31,§9727; C35,§9751-g8; 48GA, ch 232, §6.]

9751.09 Fees. The commission shall charge, assess, and cause to be collected ten dollars for every examination or inspection of a warehouse under this chapter when such examination or inspection is made upon application of a warehouseman, and a warehouse license fee not exceeding the rate of one dollar per month for the term of each original warehouse license, and a fee of twelve dollars for each renewal or extension of warehouse license issued under this chapter. All such fees shall be deposited with the treasurer of state as miscellaneous receipts. [C24, 27, 31,§9726; C35,§9751-g9; 48 GA, ch 232,§7.]

9751.10 Use of term "bonded warehouse". Upon the filing with the approval by the commission of a bond, in compliance with this chapter, for the conduct of a warehouse, such warehouse shall be designated as bonded hereunder; but no warehouse shall be designated as bonded under this chapter, and no name or description conveying the impression that it is so bonded, shall be used, until a bond, such as provided for in sections 9751.02, 9751.05, and 9751.06, has been filed with and approved by the commissioners, nor unless the license issued under this chapter for the conduct of such warehouse remains unsuspended and unrevoked. Every grain elevator in this state not operating under a license issued under a United States warehouse act, if open for receipt of agricultural products not wholly the property of the operator thereof, shall within thirty days after the effective date of this chapter display, in a conspicuous place, a sign in letters not less than four inches high containing either the words "licensed storage warehouse" or "grain storage not accepted" or "storage warehouse license applied for" according to its true status. [C24, 27, 31,§9728; C35, §9751-g10; 48GA, ch 232,§8.]

Referred to in §9751.33

9751.11 Discrimination. Every warehouseman conducting a warehouse licensed under this chapter shall receive for storage therein, so far as its authorized storage capacity permits, any product of the kind covered by his license which may be tendered to him in a suitable condition for warehousing, in the usual manner and in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities, except that the provisions of this section do not apply to storage rates to be paid by the United States government or any subdivisions thereof. [C24, 27, 31,§9729; C35,§9751-g11; 48 GA, ch 232,§9.]

9751.12 Presumption attending storage. Any person who deposits agricultural products for storage in a warehouse licensed, or operating under permit, under this chapter shall be deemed to have deposited the same subject to the terms of this chapter and the rules and regulations prescribed hereunder. A deposit of agricultural products in a grain elevator licensed or operated under permit, under this chapter, without instructions otherwise, will be assumed to be a delivery for sale at the local market on the day of delivery. If such deposit is accompanied with a request to hold for instructions and is not legally removed from the warehouse, or sold to the warehouseman, paid for in full, within ten days after the day of receipt of the first consignment of the lot, it shall be assumed to become storage and the warehouseman shall issue his receipt therefor. [C24, 27, 31,§9730; C35,§9751-g12.]

9751.13 Separate keeping of deposits. Every warehouseman conducting a warehouse licensed under this chapter shall keep the agricultural products therein of one depositor so far separate from agricultural products of other depositors, and from other agricultural products of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and re-delivery of the agricultural products deposited, except that, if authorized by agreement or by custom, a warehouseman may mingle fungible agricultural products with other agricultural products of the same kind and grade, and shall be severally liable to each depositor for the care and re-delivery of his share of such mass, to the same extent and under the same circumstances as if the agricultural products had been kept separate, except that as to grain for which nonnegotiable receipts are issued the warehouseman may deliver like kinds of grain of higher grade in such quantity as will equal in value at the warehouse the grade and quantity of grain described in the receipt. [C24, 27, 31,§§9731, 9732; C35,§9751-g13; 48GA, ch 232,§10.]

9751.14 Inspecting and grading. Grain, flaxseed, or any other fungible agricultural product stored in a warehouse licensed under this chapter for which no separate compartment is provided, and its identity preserved, shall be inspected and graded by a person duly licensed to grade the same. [C24, 27, 31,§9733; C35, §9751-g14.]

9751.15 License to classify, grade, or weigh. The commissioners may, upon presentation of satisfactory proof of competency, issue to any person a license to classify any agricultural product or products, stored or to be stored in a warehouse licensed under this chapter, according to grade or otherwise and to certificate the grade or other class thereof, or to weigh the same and certificate the weight thereof, or both to classify and weigh the same and to certificate the grade or other class and the weight thereof, upon condition that such person agree to comply with and abide by the terms of this chapter and of the rules and regulations prescribed hereunder so far as the same relate to him. It shall be construed that any person licensed under the United States Grain Standards Act to grade

grain is automatically licensed under the provisions of this section to render such service, and consenting to render the service will be assumed to be an agreement to abide by the terms of this chapter so far as they relate to him. In cities and towns where public weighing is prohibited by ordinance except by persons licensed or otherwise authorized by such city or town, any person so authorized and is* subject to regulations by the city or town will be construed to be automatically licensed under the provisions of this section, and consenting to render the service will be assumed to be an agreement to abide by the terms of this chapter so far as they relate to him. [C24, 27, 31,§9734; C35,§9751-g15; 48GA, ch 232,§11.]

*According to enrolled act

9751.16 Revocation of license to classify or weigh. Any license issued to any person to classify or to weigh any agricultural product or products under this chapter may be suspended or revoked by the commissioners whenever they are satisfied, after opportunity afforded to the licensee concerned for a hearing, that such licensee has failed to classify or to weigh any agricultural product or products correctly, or has violated any of the provisions of this chapter or of the rules and regulations prescribed hereunder, so far as the same may relate to him or that he has used his license or allowed it to be used for any improper purpose whatsoever. Pending investigation, the commissioners, whenever they deem necessary, may suspend a license temporarily without hearing. [C24, 27, 31,§9735; C35,§9751-g16.]

9751.17 Original receipts. For all agricultural products that become storage in a warehouse licensed under this chapter, original receipts shall be issued by the warehouseman conducting the same. When mutually agreed between the warehouseman and the depositor the receipts may be negotiable. Receipts that do not specifically show to be nonnegotiable shall be construed to be negotiable. It shall be the duty of the warehouseman to refrain from issuing a negotiable receipt when he has any doubt that full title to the product is in the person or persons whose names are shown in the receipt in such manner that their indorsement is essential to a transfer of same. All receipts issued by a warehouseman operating under permit as provided in this chapter shall be nonnegotiable. The warehouseman may issue a negotiable receipt to replace a nonnegotiable receipt if satisfactory showing of title is made to him, but no receipts shall be issued except for agricultural products actually stored in the warehouse at the time of the issuance thereof. [C24, 27, 31,§9736; C35,§9751-g17; 48GA, ch 232,§12.]

Section in re existing receipts (46GA, ch 104, §36) omitted

9751.18 Contents of receipt. Every receipt issued for agricultural products stored in a warehouse licensed under this chapter shall embody within its written or printed terms:

1. The location of the warehouse in which the agricultural products are stored.
2. The date of issue of the receipt.
3. The consecutive number of the receipt.
4. A statement whether the agricultural products received will be delivered to the bearer, to a specified person, or to a specified person or his order.
5. The rate of storage and delivery charges. In the case of grain stored in grain elevators, the storage rate shall not be less than one-thirtieth cent per day per bushel, after the date of warehouse receipt which must be not later than ten days after the date of deposit of the first consignment of any lot, except that a warehouseman upon filing a copy of the contract with the commission, may make a special contract for a reduced rate of storage for grain owned by the United States government or its subdivisions, and may delay issuing receipts for such government grain for thirty days instead of ten. The delivery charge shall be two cents per bushel. No delivery charge shall be made for products sold to the warehouseman whether such product has been in storage or not. The specific delivery charge herein provided shall not be mandatory as to grain received into grain elevators from railroad cars nor as to grain sold by a warehouseman and carried as storage for the purchaser. The commission may, after public hearing, change such minimum storage rates and delivery charges, and may provide different rates for different kinds of grain.
6. A description of the agricultural products received, showing the quantity thereof, or, in case of agricultural products customarily put up in bales or packages, a description of such bales or packages, by marks, numbers, or other means of identification, and the weight of such bales or packages.
7. The grade or other class of the agricultural products received and the standard or description in accordance with which such classification has been made; provided that such grade or other class shall be stated according to the official standard of the United States applicable to such agricultural products as the same may be fixed and promulgated; provided, further, that until such official standards of the United States for any agricultural product or products have been fixed and promulgated, the grade or other class thereof may be stated in accordance with any recognized standard or in accordance with such rules and regulations not inconsistent herewith as may be prescribed by the secretary of agriculture of the United States.
8. A statement that the receipt is issued subject to the Iowa bonded warehouse license act and the rules and regulations prescribed thereunder.
9. If the receipt be issued for agricultural products of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership.
10. A statement of the amount of advances made and of liabilities incurred for which the

warehouseman claims a lien; provided that, if the precise amount of such advances made or of such liabilities incurred be at the time of the issue of the receipt unknown to the warehouseman or his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof shall be sufficient.

11. The date of termination of storage contract.

12. Such other terms and conditions as may be required by the state commerce commission.

13. The signature of the warehouseman, which may be made by his authorized agent. [C24, 27, 31,§9737; C35,§9751-g18; 47GA, ch 205, §1; 48GA, ch 232,§13.]

Referred to in §9751.20

9751.19 Receipts covering warehouseman's own grain. When a warehouseman issues a warehouse receipt for products owned by himself, and disposes of the title or an interest in the title to such products through the medium of such receipt, he shall be construed to have the custody of such products in the interest of the person acquiring such title or interest, and to be the warehouseman for such products to the same degree and responsibility as though the receipt had been issued against products owned by the person acquiring such title or interest. The rights of such person acquired through such receipt shall be of the same standing as though such person had made the deposit from owned products or as the owner of a preferred interest in such products. The extent of interest or title that may be transferred through the medium of such receipt will be subordinate to the equivalent of the warehouseman's usual storage charges, and shall be superior to any and all other interests that the warehouseman may retain, or that he may transfer in any other manner whatsoever. [C35, §9751-g19.]

9751.20 Receipt for nonfungible products. When requested by the depositor of other than fungible agricultural products, a receipt omitting compliance with subsection 7 of section 9751.18 may be issued if it have plainly and conspicuously embodied in its written or printed terms a provision that such receipt is not negotiable. [C24, 27, 31,§9738; C35,§9751-g20.]

9751.21 Termination of storage contracts. Storage contracts shall terminate as to shelled corn not later than April 1, and as to all other products not later than the expiration date of the license under which it is issued. The owner of a receipt may terminate a storage contract at will prior to stated date of termination. Storage contracts shall have a forced termination*, (1) on revocation of warehouse license or permit, (2) when for any reason the warehouseman determines he will be unable to prevent ruinous deterioration of any products in storage, by giving such notice to the owner of the receipt, or to the person in whose name the deposit was made, as is reasonably possible under the circumstances and shall notify the commission, (3) at lawful termination of bond provided and inability of warehouseman to replace same, (4) on lawful cancellation of insurance by insurance company, and inability of warehouseman to replace same, except as otherwise provided in subsection 3 of section 9751.26. [C35, §9751-g21; 48GA, ch 232,§14.]

Referred to in §9751.24
"termina" in enrolled act

9751.22 Standards for products. The commissioners are authorized from time to time, to establish and promulgate standards for agricultural products in this chapter defined by which their quality or value may be judged or determined; provided that the standards for any agricultural products which have been or which in future may be established by or under authority of any act of congress shall be, and are hereby, adopted for the purpose of this chapter as the official standards for the agricultural products to which they relate. [C24, 27, 31,§9739; C35,§9751-g22.]

9751.23 Duplicate receipts. While an original receipt issued under provisions of this chapter is outstanding and uncanceled by the warehouseman issuing the same no other or further receipt shall be issued for the product covered thereby nor for any part thereof, except that in case of a lost or destroyed receipt a new receipt, shown to be a duplicate of the missing original receipt may be issued by the warehouseman. Such duplicate of original receipt shall be endowed with all rights appertaining to the original. Before issuing such duplicate receipt, if it is a negotiable receipt, the warehouseman shall require an indemnity bond that will fully protect all rights under the missing original receipt. [C24, 27, 31,§9740; C35,§9751-g23.]

9751.24 Delivery of products on demand—conditions. A warehouseman conducting a warehouse licensed under this chapter in the absence of some lawful excuse shall, without unnecessary delay, deliver the agricultural products stored therein upon a demand made either by the holder of a receipt for such agricultural products or by the depositor thereof if such demand be accompanied with:

1. An offer to satisfy the warehouseman's lien.

2. An offer to surrender the receipt, which if negotiable, shall bear such indorsements as would be necessary for the negotiation of the receipt.

3. A readiness and willingness to sign, when the products are delivered, an acknowledgment that they have been delivered if such signature is requested by the warehouseman.

4. At termination of storage period other than forced termination as defined in section 9751.21, in the absence of a demand for delivery, or mutual agreement for the renewal of the storage contract entered into prior to the expiration of the storage contract, the warehouseman shall sell the storage products. If such products are other than grain stored in

a grain elevator the sale shall be after giving ten days notice by registered mail to the address of the depositor as shown on warehouse receipts or to the holder of the receipt if he is known to be other than the depositor and is recorded with the warehouseman. If the product is grain stored in a grain elevator the sale shall be at the local market price at the close of business on the day the storage contract terminates except that if the termination date is not a market day—the sale shall be on the basis of the next market day's opening. The warehouseman shall deduct from the proceeds of such sale all legal accrued charges, and pay the balance of such proceeds to the owner upon surrender of the storage receipt. In the event of forced termination of storage contract as provided in section 9751.21, the warehouseman shall provide such reasonable opportunity as the circumstances will permit for the depositor to repossess the deposit, but will be permitted to take such prompt action as is necessary to minimize loss, and may sell such products, the proceeds of such sale to be applied as elsewhere provided in this section. The warehouseman in the event of forced termination of storage contract shall be responsible to the depositor for the value of the product on the date of such termination for the kind and quality of products evidenced by the receipt. [C24, 27, 31,§9741; C35,§9751-g24.]

9751.25 Cancellation of receipt. A warehouseman conducting a warehouse licensed under this chapter shall plainly cancel upon the face thereof each receipt returned to him upon the delivery by him of the agricultural products for which the receipt was issued. [C24, 27, 31, §9742; C35,§9751-g25.]

9751.26 Duties of warehouseman. Every warehouseman conducting a warehouse licensed under this chapter shall:

1. Keep in a place of safety complete and correct records of all agricultural products stored therein and withdrawn therefrom of all warehouse receipts issued by him, and of the receipts returned to and canceled by him.

2. Make reports to the commissioners concerning such warehouse and the condition, contents, operation, and business thereof in such form and at such times as the commissioners may require.

3. Conduct said warehouse in all other respects in compliance with this chapter and the rules and regulations made hereunder, and shall be liable for any loss or injury to the stored products caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar products would exercise, but he shall not be liable in the absence of an agreement to the contrary for any loss or injury to the products which could not have been avoided by the exercise of such care.

4. Warehousemen operating grain elevators that are licensed under this chapter to operate less than the full capacity of such elevators, shall receive into holding compartments of such elevators, products other than their own, only into such designated sections that they are licensed to operate. [C24, 27, 31,§9743; C35, §9751-g26.]

Referred to in §9751.21

9751.27 Duties of commissioners. The commissioners are authorized:

1. To investigate the storage, warehousing, classifying, according to grade and otherwise, weighing, and certification of agricultural products.

2. Upon application to them by any person applying for license to conduct a warehouse under this chapter, to inspect such warehouse or cause it to be inspected.

3. At any time, with or without application to them, to inspect or cause to be inspected all warehouses licensed under this chapter, and shall check the storage quantities not less than once each three months.

4. To determine whether warehouses for which licenses are applied or have been issued under this chapter are suitable for the proper storage of the agricultural product or products proposed to be stored therein.

5. To classify warehouses licensed or applying for a license in accordance with their ownership, location, surroundings, capacity, conditions, and other qualities, and as to the kinds of licenses issued or that may be issued for them pursuant to this chapter.

6. To prescribe, within the limitations of this chapter, the duties of the warehousemen conducting warehouses licensed under this chapter with respect to their care of and responsibility for agricultural products stored therein. [C24, 27, 31,§9744; C35,§9751-g27.]

9751.28 Examination of books, records, and accounts. The commissioners are authorized through their officials, employees, or agents designated by them to examine all books, records, papers, and accounts of warehouses licensed under this chapter, and of the warehousemen conducting such warehouses relating thereto. [C24, 27, 31,§9746; C35,§9751-g28.]

9751.29 Suspension or revocation of license. The commission may, after opportunity for hearing has been afforded to the licensee concerned, suspend or revoke any license issued to any warehouseman conducting a warehouse under this chapter, for any violation of or failure to comply with any provision of this chapter or of the rules and regulations made hereunder or upon the ground that unreasonable or exorbitant charges have been made for services rendered. Pending investigation, the commission, whenever it deems necessary, may suspend a license temporarily without hearing. [C24, 27, 31,§9747; C35,§9751-g29; 48GA, ch 232,§15.]

9751.30 Insufficiency of bond or insurance —revocation of license. Whenever the commissioners shall determine that a bond approved by them is, or for any cause has become insufficient, or that insurance is not fully provided as required under section 9751.07, they may require

additional bond or insurance be provided by the warehouseman concerned, conforming with the requirements of sections 9751.05 to 9751.07, inclusive, and unless the same be provided within the time fixed by a written demand therefor the license of such warehouseman may be suspended or revoked. [C24, 27, 31,§9748; C35,§9751-g30.]

Referred to in §9751.31

9751.31 Action on bond. Any person injured by the breach of any obligation for which a bond is given as security under the provisions of sections 9751.05, 9751.06, or 9751.30 shall be entitled to sue on the bond in his own name in any court of competent jurisdiction to recover the damages he may have sustained by such breach. [C24, 27, 31,§9749; C35,§9751-g31.]

9751.32 Publication of results of investigation. The commissioners from time to time may publish the results of any investigation made under this chapter, and they may publish the names and locations of warehouses licensed and bonded and the names and addresses of persons licensed under this chapter and lists of all licenses terminated under this chapter and the causes therefor. [C24, 27, 31,§9750; C35,§9751-g32.]

9751.33 Penalties. Every person who shall violate or fail to comply with any of the provisions of sections 9751.02, 9751.07, and 9751.10 shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by imprisonment in the county jail not more than thirty days. Every person who shall without proper authority use or shall falsely represent, forge, alter, counterfeit, or simulate any license issued under this chapter, or who shall issue or utter a false or fraudulent receipt or certificate, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail not more than ninety days, or both, in the discretion of the court. [C24, 27, 31,§9751; C35, §9751-g33; 48GA, ch 232,§16.]

Constitutionality, §9751-g34, code 1935; 46GA, ch 104, §38

CHAPTER 427

UNBONDED AGRICULTURAL WAREHOUSES

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9752 Definitions. Wherever the words "secretary of agriculture" shall appear in this chapter it shall refer to the secretary of agriculture of the state of Iowa in charge of that department.

The word "board" shall refer to any local supervisory board of individual producers appointed by the secretary of agriculture under the provisions of this chapter.

The word "sealer" shall refer to any person whose duty it shall be under the provisions of this chapter to seal any granary, crib, bin, or other receptacle for grain.

The word "certificate" shall refer to any certificate or receipt evidencing the storage of grain under the provisions of this chapter and any rules or regulations promulgated thereunder.

The word "owner" shall refer to and include any person or persons (whether individuals, copartnerships, or corporations) who shall either personally or as guardian, trustee, administrator or executor, have title to or the right of possession of any grain stored under the provisions of this chapter.

The words "grain in storage" shall refer to any grain stored under the provisions of this chapter.

Where the word "owner" is used in this chapter, it shall be construed to be used in the same connection as the word "warehouseman" is used in the uniform warehouse act.

Where the word "certificate" is used in this chapter, it shall be construed to be used in the same connection as the word "receipt" is used

in the uniform warehouse act. [C24, 27, 31, 35, §9752; 48GA, ch 233,§1; ch 242,§2.]

Uniform warehouse act, ch 425

9752.01 Duties of secretary of agriculture. The secretary of agriculture shall have general supervision of the administration of the provisions of this chapter. He shall:

1. Make and promulgate such rules and regulations, not inconsistent herewith, as shall be necessary or desirable effectually to carry out the purposes hereof.

2. Make such reasonable regulations with respect to the construction and maintenance of granaries, cribs, bins, or other receptacles as may be necessary to protect the grain to be stored therein under the provisions of this chapter.

3. Prepare and have printed under the same conditions as other state printing the necessary blanks, forms, and other printed matter and shall make such charges to persons desiring such printed matter as shall meet the cost of production thereof. [C24, 27, 31,§9790; C35, §9752-g1.]

9752.02 Fees of secretary of agriculture. The secretary of agriculture shall receive for services rendered under the provisions of this chapter, three dollars, for each license issued. [C24, 27, 31,§9798; C35,§9752-g2.]

9752.03 Disposition of fees. All moneys received by the secretary of agriculture from fees and other sources in connection with the administration of the provisions of this chapter shall be paid into the state treasury and may be drawn upon by him for the purposes thereof, subject to the provisions of the law applicable to disbursements by the secretary of agriculture. [C24, 27, 31,§9799; C35,§9752-g3.]

9752.04 Board—appointment. A local supervisory board consisting of not less than three nor more than seven members shall be appointed by the secretary of agriculture in any county upon the application of one or more citizens as hereinafter provided for the purpose of supervising grain in storage and the issuing of certificates against such grain, and generally and under the direction of the secretary of agriculture for carrying out the purposes and enforcing the provisions of this chapter. [C24, 27, 31,§9753; C35,§9752-g4.]

9752.05 Application for board. Any person may make application to the secretary of agriculture for the appointment of a board in and for the county in which he resides, or the secretary of agriculture may make such appointments upon his own initiative. When any such application is made the secretary of agriculture shall as soon as practicable investigate the situation and determine upon the advisability or otherwise of making the requested appointment. [C24, 27, 31,§9754; C35,§9752-g5.]

9752.06 License to board. Upon the appointment and qualification of the members of such board the secretary of agriculture shall immediately issue a license to it, and prescribe the duties of its officers and the records they shall keep. Each license shall be numbered, and specify the territory which shall be under the jurisdiction of the board and within which certificates may be issued, and such certificates shall bear the names and the license number of the board. It shall also have printed thereon such other directions, rules, and regulations as the secretary of agriculture shall make or promulgate and deem necessary to set forth upon such license. [C24, 27, 31,§9755; C35,§9752-g6.]

9752.07 Name and number. A suitable name and a number shall be given to such board by the secretary of agriculture. [C24, 27, 31,§9756; C35,§9752-g7.]

9752.08 Qualifications of members. The members of such boards shall at the time of their appointment be producers of grain in the state and residents in the county thereof. [C24, 27, 31,§9757; C35,§9752-g8.]

9752.09 Oath of members. Members of such boards shall qualify by taking oath similar to that required of public officials. [C24, 27, 31, §9758; C35,§9752-g9.]

Oath, §1054

9752.10 Term of office—vacancies. They shall continue in office until their successors are appointed by the secretary of agriculture. In the event of vacancies arising by reason of the resignation or upon removal from the district or death of any member or members, such vacancies shall be filled in manner and form as in the case of original appointments. [C24, 27, 31, §9759; C35,§9752-g10.]

9752.11 Officers. Each board shall elect one of its own members as its secretary-treasurer and shall also elect a president and vice president from its own membership and their duties shall be those of such officers in similar organizations. [C24, 27, 31,§9760; C35,§9752-g11.]

9752.12 Bond and oath of secretary-treasurer. Each secretary-treasurer shall furnish a corporate surety bond for the faithful performance of his duties in such amount as shall be determined by the secretary of agriculture, but in no event shall such bond be in an amount less than one thousand dollars. Such bonds shall in every case be subject to the secretary's approval and be deposited with him. The premium thereon shall be payable out of any funds in the hands of the board. [C35,§9752-g12.]

9752.13 Supervision fund — disbursement. For the purposes of defraying the expenses of supervision, the owner shall pay to the board at the time of sealing, an amount which shall not exceed one cent per bushel of grain inspected and sealed by the sealer. In no case shall the cost to the owner of the grain, housed in a single warehouse, be less than one dollar, nor more than twenty dollars. Out of the fund thus created the compensation of the sealer, as fixed

by the board, subject to the approval of the secretary of agriculture, and all other expenses, shall be paid. [C24, 27, 31,§9795; C35,§9752-g13.]

9752.14 Compensation of board members. No compensation shall be paid to members of the board except by the express authorization and approval of the secretary of agriculture, and then only in case such payments may be made without overdrawing upon or unduly depleting the funds in the hands of the board. [C24, 27, 31,§9796; C35,§9752-g14.]

9752.15 Refunds. Surplus funds remaining in the treasury of the local warehouse board October 1 of each year shall be refunded to the owners as the board may direct providing, however, that the procedure and time and amount of such refund is approved by the secretary of agriculture and providing that where the amount paid by the owner was insufficient to meet the costs incurred in sealing, no refund shall be made to such owners. [C35,§9752-g15.]

9752.16 Local sealer. The board shall submit to the secretary of agriculture the name of some person or persons, none of whom shall be members of said board, who shall, subject to the approval of the secretary of agriculture, act as the local sealer or sealers, and every such sealer shall have the same authority with respect to the provisions of this chapter and the rules and regulations promulgated thereunder, and the enforcement thereof, as any officer of the peace. [C24, 27, 31,§9762; C35,§9752-g16.]

9752.17 Bond and oath of sealer. Each sealer shall furnish a corporate surety bond for the faithful performance of his duties in such amount as shall be determined by the secretary of agriculture, but in no event shall such bond be in an amount less than one thousand dollars. Such bonds shall in every case be subject to the secretary's approval and be deposited with him, the premium thereon shall be payable out of any funds in the hands of the board. Such sealer shall also qualify by taking an oath similar to that required of public officials. [C24, 27, 31,§9763; C35,§9752-g17.]

9752.18 Duties of sealer. It shall be the duty of the sealer under the direction of the secretary of agriculture to:

1. Supervise the storage of grain.
2. Ascertain the amount stored by each owner who shall desire to avail himself of the provisions of this chapter.
3. Determine, so far as possible, the grade and quality thereof.
4. Ascertain, prior to the issuance of any certificate, and/or certificate of reinspection that the granary, crib, bin or other receptacle in which the grain is stored is satisfactory for the storage of such grain, and that such receptacle conforms to the regulations applicable thereto promulgated by the secretary of agriculture.

He shall, before delivering certificate and/or certificate of reinspection to the owner, ascertain that there are no other certificates outstanding upon the grain, and shall seal the granary, crib, bin or other receptacle in which the grain is stored in the manner hereinafter provided, and thereafter make periodic inspections of the granaries, cribs, bins or other receptacles so sealed at such times and in such manner as the secretary of agriculture may determine, but in no event less frequently than ninety-day intervals, rendering to the secretary of agriculture with reference to each such subsequent inspection, and to the owner when requested, report or affidavit, in such form as may be required, in regard to the amount and condition of the grain under seal and the condition of the structure within which it is stored.

The sealer shall at the request of any borrower, issue a certificate of reinspection on forms prescribed by the secretary of agriculture for the purpose of enabling said borrower to obtain the renewal or extension of an outstanding obligation secured by the pledge of a farm warehouse certificate. The fees for such reinspection shall be determined and collected in the same manner as hereinbefore provided for original sealing fees. [C24, 27, 31,§9764; C35,§9752-g18.]

9752.19 Right to enter premises. The sealer shall have authority at all times to enter upon any premises for the purpose of inspecting grain in storage or the granary, crib, bin, or other receptacle in which it shall have been stored, and the acceptance of a certificate by the owner shall be deemed consent to entry and inspection by the sealer or any person duly authorized thereunto by the secretary of agriculture. [C24, 27, 31,§9765; C35,§9752-g19.]

9752.20 Fees of sealer. In the exercise of his powers and functions as an officer of the peace in connection with the provisions of this chapter, the sealer may, at the discretion of the board, be entitled to the same fees as are provided by law for the performance of similar duties. [C24, 27, 31,§9797; C35,§9752-g20.]

9752.21 Seals and locks. Seals, locks, or other fastenings employed shall be in accordance with specifications furnished by the secretary of agriculture. [C24, 27, 31,§9766; C35, §9752-g21.]

9752.22 Unlawful breaking of seals. Any person unlawfully removing, breaking, or in any manner interfering or tampering with any seal, lock, or other fastening placed upon any granary, crib, bin, or other receptacle for grain under the provisions of this chapter, except when such removal shall be rendered imperative to prevent the damage, loss, or destruction of grain stored therein, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. [C24, 27, 31, §9800; C35,§9752-g22.]

9752.23 Delivery without obtaining certificates. An owner, or any officer, agent, or ser-

vant of an owner, who delivers grain out of the possession of such owner, knowing that a negotiable certificate, the negotiating of which would transfer the right to the possession of such grain, is outstanding and uncanceled, without obtaining the possession of such certificate at or before the time of such delivery, shall, except when ordered by the court, as hereinbefore provided, be found guilty of a misdemeanor, and on conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such imprisonment and fine. [C24, 27, 31,§9803; C35,§9752-g23.]

9752.24 Unlawful sale, mortgage, or incumbrance. Any owner who shall, after the issuance of a certificate for grain in storage, take, sell, mortgage, pledge, hypothecate, or otherwise incumber, or attempt to take, sell, mortgage, pledge, or otherwise incumber the said grain, or who shall take or remove it from the receptacle where standing, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars, or be imprisoned in the county jail for not more than one year, or be punished by both such fine and imprisonment. [C24, 27, 31,§9804; C35, §9752-g24.]

9752.25 Uniform warehouse receipts law. All the provisions in the uniform warehouse receipts law as found in chapter 425, and as set forth in sections 9669 to 9708, inclusive, relative to the negotiation, transfer, sale, or indorsement of warehouse receipts shall, so far as possible, apply to the negotiation, transfer, sale, or indorsement of the certificates provided for herein. [C24, 27, 31,§9805; C35,§9752-g25.]

9752.26 Certificates — form and contents. Certificates shall be upon forms prepared by the secretary of agriculture, and every such certificate must embody within its written or printed terms:

1. The name and license number of the board under which such certificate is issued.
2. The consecutive number of the certificate.
3. The date of issue of the certificate.
4. A particular description of the granary, bin, crib, or other receptacle in which the grain is stored, and of the premises upon which it is located.
5. A description of the grain.
6. The name of the owner or owners, whether ownership is sole, joint, or in trust, and the conditions of such ownership, and in the case of tenants the date of termination of the lease.
7. A statement of any loans or other indebtedness made to or owing by the owner which in any manner constitutes a lien, whether statutory or contractual, including both mortgage and landlord's liens, upon the grain, which statement shall be signed by the owner or his agent.
8. A form of waiver of liens which may be signed by the lienholder.
9. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order, and at what place it will be delivered.
10. A facsimile signature of the secretary of agriculture, and the countersignature of the sealer.
11. If the owner is married, a waiver by the spouse of any claim of exemption and a consent to the instrument.
12. Statement that no other certificates are outstanding on the grain represented thereby. [C24, 27, 31,§9767; C35,§9752-g26.]

9752.27 Amount of certificates. The sealer shall issue to the owner one or more certificates as herein provided, but the aggregate amount of the grain represented by such certificate or certificates shall in no event exceed the amount of grain stored and sealed by the sealer and each certificate shall cover a separate granary, crib, or bin. [C24, 27, 31,§9769; C35,§9752-g27.]

9752.28 Prohibited terms in certificate. No term or condition shall be inserted in any certificate, whether negotiable or otherwise, which shall in any manner purport to relieve the owner from exercising that degree of care in the safekeeping of the grain in storage which a reasonably prudent man would exercise with regard to similar property of his own. [C24, 27, 31, §9768; C35,§9752-g28.]

9752.29 Fraudulent issuance of certificates. An owner, the agent, or servant of an owner, or any member of any board, or any sealer, who fraudulently issues or aids in fraudulently issuing a certificate for grain, knowing that it contains any false statement, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [C24, 27, 31,§9801; C35,§9752-g29.]

9752.30 Issuance of duplicate certificates. An owner, or any officer, agent, or servant of any owner, who issues or aids in issuing a duplicate or additional negotiable certificate for grain, knowing that a former negotiable certificate for the same grain, or any part of it, is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate", except in the case of a lost or destroyed certificate after proceedings as provided for in section 9752.43, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment in the penitentiary not exceeding two years, or by a fine not exceeding one thousand dollars, or by both such imprisonment and fine. [C24, 27, 31,§9802; C35,§9752-g30.]

9752.31 "Board duplicate" certificates. The sealer shall file with the secretary of the board a duplicate of all certificates delivered by him, and the secretary shall keep an accurate record thereof in a book provided by the secretary

of agriculture for the purpose. Such duplicates shall have plainly printed upon the face thereof, "board duplicate, no value". [C24, 27, 31,§9770; C35,§9752-g31.]

9752.32 Nonnegotiable certificates. A certificate in which it is stated that the grain stored shall be released or delivered to the owner, or to any other specified person, is a nonnegotiable certificate. [C24, 27, 31,§9772; C35,§9752-g32.]

9752.33 Marking of certificates. A nonnegotiable certificate shall have plainly printed or written upon its face, "nonnegotiable" or "not negotiable". [C24, 27, 31,§9773; C35,§9752-g33.]

9752.34 Negotiable certificates. A certificate in which it is stated that the grain stored will be delivered to the bearer, or to the order of any person named in such certificate, is a negotiable certificate. No provision shall be inserted in a negotiable certificate that it is nonnegotiable. Such provisions, if inserted, shall be void. [C24, 27, 31,§9774; C35,§9752-g34.]

9752.35 Duplicate certificate — filing with recorder. Before or at the time the owner negotiates the original warehouse certificate he shall file or cause to be filed a duplicate copy of said certificate in the office of the county recorder of the county in which the grain is located, which duplicate shall remain in the custody of the recorder except as hereinafter provided.

Said owner shall then deliver to the assignee said original certificate bearing the stamp of the county recorder, showing the date, time and number of filing the duplicate thereof. [C24, 27, 31,§9775; C35,§9752-g35.]

9752.36 Indexing by recorder. When a duplicate is filed in the office of the recorder, he shall index the same in the chattel mortgage index or other suitable index book showing date of the certificate, the number thereof, to whom issued, kind, quantity and location of the grain and stamp the original thereof showing the date, time and number of filing. He shall collect twenty-five cents for each certificate indexed. The filing and indexing of such certificate shall impart the same notice as the filing and indexing of a chattel mortgage. [C24, 27, 31,§9776; C35,§9752-g36.]

9752.37 Record of assignment. When the owner or holder of a certificate makes written assignment thereof after said instrument is filed, the recorder shall on request of the assignee enter a copy of such assignment upon the duplicate in his office, and enter upon his index book the date of the assignment and the names of the assignor and the assignee. He shall collect twenty-five cents for each such assignment entered. [C24, 27, 31,§9777; C35,§9752-g37.]

9752.38 Release of certificates. The owner may secure the cancellation of a certificate by delivering the original to the secretary of agriculture or secretary of the local board, through which it was issued with the request that it be canceled. The secretary of agriculture or secretary of the local board shall stamp the original "canceled", with the date of such cancellation and retain same. Upon notice in writing from the secretary of agriculture or the secretary of the local board through which the certificate was issued that it has been canceled, the county recorder shall release the duplicate filed of record without charge. [C35,§9752-g38.]

9752.39 Duty to deliver. The owner shall, in the absence of some lawful excuse provided by this chapter, deliver the grain stored upon demand made by the holder of a certificate for the grain, or for such part thereof as is represented by the certificate if such demand is accompanied by:

1. A showing that all such liens as may appear upon the certificate and which shall subsist upon the date of the demand have been waived or satisfied.
2. An offer to surrender the certificate if negotiable, with such indorsements as would be necessary for the negotiation of certificate.
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the owner. [C24, 27, 31,§9783; C35,§9752-g39.]

9752.40 Refusing to deliver — burden of proof. In case the owner refuses or fails to deliver the goods in compliance with a demand by the holder of a certificate so accompanied, the burden shall be upon the owner to establish the existence of a lawful excuse for such refusal. [C24, 27, 31,§9784; C35,§9752-g40.]

9752.41 Right of owner. The privileges of this chapter shall be open to all owners upon the same conditions. Any owner desiring to place his grain in storage and have a certificate or certificates issued against it shall make application therefor to the board. [C24, 27, 31, §9761; C35,§9752-g41.]

9752.42 Right of appeal. Any owner aggrieved by any ruling or decision of the board may appeal to the secretary of agriculture whose decision shall be final. [C24, 27, 31, §9791; C35,§9752-g42.]

9752.43 Procedure in case of complaints. If any person shall feel aggrieved by any action of the board or of the sealer or any other official, he may submit his complaint in writing to the secretary of agriculture and the secretary of agriculture shall, as soon thereafter as possible, set the matter down for hearing before himself or one of his deputies, at such place as shall be desirable and proper, having regard to the character of the controversy and the locality of the grain and residence of the parties involved. Likewise, the board may present to the secretary of agriculture any proper complaint against any owner and the procedure shall be as nearly as practicable the same as that in the case of

charges filed by owners. [C24, 27, 31,§9792; C35, §9752-g43.]
Referred to in §9752.30

9752.44 Orders—correction of abuses. The secretary of agriculture shall, upon final hearing, make and enter such orders as he shall deem proper for the correction of improper practices, and may suspend the license of the board offending until such orders are obeyed. But such suspension shall in no manner relieve the board or the owners of any liability previously incurred under the provisions of this chapter. [C24, 27, 31,§9793; C35,§9752-g44.]

9752.45 Costs of hearings. The costs and expenses of such hearings shall be defrayed by the parties thereto, and shall be apportioned by the secretary of agriculture in such manner as he shall deem just and equitable. [C24, 27, 31, §9794; C35,§9752-g45.]

9753, 9754 Rep. by 46GA, ch 105

9755, 9756 Transferred. See §§9752.06, 9752.07

9757 Rep. by 46GA, ch 105

9758, 9759 Transferred. See §§9752.09, 9752.10

9760 Rep. by 46GA, ch 105

9761 Transferred. See §9752.41

9762 Transferred. See §9752.16

9763, 9764 Rep. by 46GA, ch 105

9765 Transferred. See §9752.19

9766 Transferred. See §9752.21

9767 Rep. by 46GA, ch 105

9768 Transferred. See §9752.28

9769 Rep. by 46GA, ch 105

9770 Transferred. See §9752.31

9771 Rep. by 46GA, ch 105

9772, 9773 Transferred. See §§9752.32, 9752.33

9774 to 9783, inc. Rep. by 46GA, ch 105

9784 Transferred. See §9752.40

9785 to 9789, inc. Rep. by 46GA, ch 105

9790 Transferred. See §9752.01

9791 to 9794, inc. Transferred. See §§9752.42 to 9752.45, inc.

9795, 9796 Transferred. See §§9752.13, 9752.14

9797 Transferred. See §9752.20

9798 Rep. by 46GA, ch 105

9799 Transferred. See §9752.03

9800 Transferred. See §9752.22

9801, 9802 Transferred. See §§9752.29, 9752.30

9803 to 9805, inc. Transferred. See §§9752.23 to 9752.25, inc.

CHAPTER 428

LIMITED PARTNERSHIP LAW

Bracketed numbers indicate corresponding section of the uniform act

9806 [§ 1] "Limited partnership" defined.
9807 [§ 2] Formation.
9808 [§ 2] Sufficiency of certificate.
9809 [§ 3] Business which may be carried on.
9810 [§ 4] Nature of contribution.
9811 [§ 5] Partnership name.
9812 [§ 5] Violation—effect.
9813 [§ 6] Liability for false statements.
9814 [§ 7] Limited partner not liable to creditors.
9815 [§ 8] Additional limited partners.
9816 [§ 9] Rights, powers, and liabilities.
9817 [§10] Rights of limited partners.
9818 [§10] Right to receive profits and income.
9819 [§11] Mistake—effect.
9820 [§12] One person both general and limited.
9821 [§12] Partner holding dual relation.
9822 [§13] Transactions with limited partner.
9823 [§13] Violation—effect.
9824 [§14] Relation of limited partners inter se.
9825 [§15] Compensation of limited partner.
9826 [§16] Withdrawal of contribution.
9827 [§16] Return of contribution.
9828 [§16] Contribution payable in cash.
9829 [§16] Dissolution.
9830 [§17] Liability of limited partner.
9831 [§17] Limited partner held as trustee.
9832 [§17] Continuing liability of limited partner.
9833 [§17] Liability of limited partner—waiver.
9834 [§18] Limited partner's interest in partnership.
9835 [§19] Substituted limited partner.
9836 [§19] Rights of assignee.
9837 [§19] Assignee's right.
9838 [§19] When assignee limited partner.
9839 [§19] Right of substituted limited partner.
9840 [§19] Liability of assignor.
9841 [§20] Effect of retirement, death, or insanity.
9842 [§21] Death of limited partner.
9843 [§21] Liability of estate of limited partner.
9844 [§22] Rights of creditors of limited partner.
9845 [§22] Redemption.
9846 [§22] Exemptions.
9847 [§23] Distribution of assets.
9848 [§23] Share in partnership assets.
9849 [§24] Cancellation of certificate.
9850 [§24] Amendment of certificate.
9851 [§25] Requirements for amendment.
9852 [§25] Requirement for cancellation.
9853 [§25] Petition for cancellation or amendment.
9854 [§25] Order of court.
9855 [§25] Consummation of cancellation.
9856 [§25] Amended certificate.
9857 [§26] Parties to actions.
9858 [§27] Name of law.
9859 [§28] Rules of construction.
9860 [§28] Impairment of contracts.
9861 [§29] Rules for cases not provided for.
9862 [§30] Existing limited partnerships converted.
9863 [§30] Existing limited partnership continued.

9806 [§1] "Limited partnership" defined. A limited partnership is a partnership formed by two or more persons under the provisions of this chapter, having as members one or more

general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. [C24, 27, 31, 35,§9806.]

9807 [§2 (1), (a) I to XIV, inc., & (b)] Formation. Two or more persons desiring to form a limited partnership shall sign and acknowledge a certificate and file the same for record in the office of the county recorder of the county in which the principal place of business is located. The same shall be recorded in the miscellaneous records and indexed in the names of all the signers, both as grantors and grantees. Said certificate shall state:

1. The name of the partnership.
2. The character of the business.
3. The location of the principal place of business.
4. The name and place of residence of each member; general and limited partners being respectively designated.
5. The term for which the partnership is to exist.
6. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.
7. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made.
8. The time, if agreed upon, when the contribution of each limited partner is to be returned.
9. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.
10. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution.
11. The right, if given, of the partners to admit additional limited partners.
12. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority.
13. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement, or insanity of a general partner.
14. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution. [C24, 27, 31, 35, §9807.]

Referred to in §§9808, 9851, 9862

9808 [§2 (2)] Sufficiency of certificate. A limited partnership is formed if there has been substantial compliance in good faith with the requirements of section 9807. [C24, 27, 31, 35, §9808.]

Referred to in §9862

9809 [§3] Business which may be carried on. A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking. [C24, 27, 31, 35, §9809.]

9810 [§4] Nature of contribution. The contributions of a limited partner may be cash or other property, but not services. [C24, 27, 31, 35,§9810.]

9811 [§5 (1), (a) & (b)] Partnership name. The surname of a limited partner shall not appear in the partnership name:

1. Unless it is also the surname of a general partner, or
2. Unless, prior to the time when the limited partner became such, the business had been carried on under a name in which his surname appeared. [C24, 27, 31, 35,§9811.]

Referred to in §9812

9812 [§5 (2)] Violation — effect. A limited partner whose name appears in a partnership name contrary to the provisions of section 9811 is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. [C24, 27, 31, 35,§9812.]

9813 [§6 (a) & (b)] Liability for false statements. If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false:

1. At the time he signed the certificate, or
2. Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as hereinafter provided. [C24, 27, 31, 35,§9813.]

Referred to in §9840

9814 [§7] Limited partner not liable to creditors. A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. [C24, 27, 31, 35,§9814.]

9815 [§8] Additional limited partners. After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of sections 9851 to 9856, inclusive. [C24, 27, 31, 35,§9815.]

9816 [§9 (1), (a) to (g), inc.] Rights, powers, and liabilities. A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority:

1. To do any act in contravention of the certificate.
2. To do any act which would make it impossible to carry on the ordinary business of the partnership.
3. To confess a judgment against the partnership.

4. To possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose.
5. To admit a person as a general partner.
6. To admit a person as a limited partner, unless the right so to do is given in the certificate.
7. To continue the business with partnership property on the death, retirement, or insanity of a general partner, unless the right so to do is given in the certificate. [C24, 27, 31, 35,§9816.]

9817 [§10 (1), (a) to (c), inc.] Rights of limited partners. A limited partner shall have the same rights as a general partner:
1. To have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them.
2. To have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable.
3. To have dissolution and winding up by decree of court. [C24, 27, 31, 35,§9817.]

9818 [§10 (2)] Right to receive profits and income. A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as hereinafter provided. [C24, 27, 31, 35,§9818.]

9819 [§11] Mistake—effect. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income. [C24, 27, 31, 35,§9819.]

9820 [§12 (1)] One person both general and limited. A person may be a general partner and a limited partner in the same partnership at the same time. [C24, 27, 31, 35,§9820.]

9821 [§12 (2)] Partner holding dual relation. A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to his contributions, he shall have the rights against the other members which he would have had if he were not also a general partner. [C24, 27, 31, 35,§9821.]

9822 [§13 (1), (a) & (b)] Transactions with limited partner. A limited partner may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner, in respect to any such claim, shall:
1. Receive or hold as collateral security any partnership property.
2. Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners. [C24, 27, 31, 35,§9822.]

Referred to in §9823

9823 [§13 (2)] Violation — effect. The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of section 9822 is a fraud on the creditors of the partnership. [C24, 27, 31, 35,§9823.]

9824 [§14] Relation of limited partners inter se. Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing. [C24, 27, 31, 35,§9824.]

9825 [§15] Compensation of limited partner. A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. [C24, 27, 31, 35,§9825.]

9826 [§16 (1), (a) to (c), inc.] Withdrawal of contribution. A limited partner shall not receive from a general partner or out of partnership property any part of his contribution:
1. Until all liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them.
2. Until the consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of section 9827.
3. Until the certificate is canceled or so amended as to set forth the withdrawal or reduction. [C24, 27, 31, 35,§9826.]

Referred to in §§9827, 9829

9827 [§16 (2), (a) to (c), inc.] Return of contribution. Subject to the provisions of section 9826, a limited partner may rightfully demand the return of his contribution:
1. On the dissolution of a partnership.
2. When the date specified in the certificate for its return has arrived.
3. After he has given six months notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership. [C24, 27, 31, 35,§9827.]

Referred to in §9826

9828 [§16 (3)] Contribution payable in cash. In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution. [C24, 27, 31, 35,§9828.]

9829 [§16 (4), (a) & (b)] Dissolution. A limited partner may have the partnership dissolved and its affairs wound up:

1. When he rightfully but unsuccessfully demands the return of his contribution, or
2. When the other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by subsection 1 of section 9826 and the limited partner would otherwise be entitled to the return of his contribution. [C24, 27, 31, 35, §9829.]

9830 [§17 (1), (a) & (b)] Liability of limited partner. A limited partner is liable to the partnership:

1. For the difference betweeen his contribution as actually made and that stated in the certificate as having been made.
2. For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate. [C24, 27, 31, 35,§9830.]

Referred to in §§9833, 9840

9831 [§17 (2), (a) & (b)] Limited partner held as trustee. A limited partner holds as trustee for the partnership:

1. Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned.
2. Money or other property wrongfully paid or conveyed to him on account of his contribution. [C24, 27, 31, 35,§9831.]

Referred to in §§9833, 9840

9832 [§17 (4)] Continuing liability of limited partner. When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return. [C24, 27, 31, 35,§9832.]

Referred to in §§9833, 9840

9833 [§17 (3)] Liability of limited partner —waiver. The liabilities of a limited partner as set forth in sections 9830 to 9832, inclusive, can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities. [C24, 27, 31, 35,§9833.]

Referred to in §9840

9834 [§§18, 19 (1)] Limited partner's interest in partnership. A limited partner's interest in the partnership is personal property, and is assignable. [C24, 27, 31, 35,§9834.]

9835 [§19 (2)] Substituted limited partner. A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership. [C24, 27, 31, 35,§9835.]

9836 [§19 (3)] Rights of assignee. An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled. [C24, 27, 31, 35, §9836.]

9837 [§19 (4)] Assignee's right. An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto, or if the assignor, being thereunto empowered by the certificate, gives the assignee that right. [C24, 27, 31, 35, §9837.]

9838 [§19 (5)] When assignee limited partner. An assignee becomes a substituted limited partner when the certificate is appropriately amended as hereinafter provided. [C24, 27, 31, 35,§9838.]

9839 [§19 (6)] Right of substituted limited partner. The substituted limited partner has all the rights and powers and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate. [C24, 27, 31, 35,§9839.]

9840 [§19 (7)] Liability of assignor. The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under sections 9813 and 9830 to 9833, inclusive. [C24, 27, 31, 35,§9840.]

9841 [§20 (a) & (b)] Effect of retirement, death, or insanity. The retirement, death, or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners:

1. Under a right so to do stated in the certificate, or
2. With the consent of all members. [C24, 27, 31, 35,§9841.]

Referred to in §9850

9842 [§21 (1)] Death of limited partner. On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner. [C24, 27, 31, 35,§9842.]

9843 [§21 (2)] Liability of estate of limited partner. The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner. [C24, 27, 31, 35,§9843.]

9844 [§22 (1) & (3)] Rights of creditors of limited partner. On due application to a court

of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require. The remedies conferred by this section shall not be deemed exclusive of others which may exist. [C24, 27, 31, 35,§9844.]

9845 [§22 (2)] Redemption. The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property. [C24, 27, 31, 35, §9845.]

9846 [§22 (4)] Exemptions. Nothing in this chapter shall be held to deprive a limited partner of his statutory exemption. [C24, 27, 31, 35, §9846.]

9847 [§23 (1), (a) to (f), inc.] Distribution of assets. In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

1. Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners.
2. Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions.
3. Those to limited partners in respect to the capital of their contributions.
4. Those to general partners other than for capital and profits.
5. Those to general partners in respect to profits.
6. Those to general partners in respect to capital. [C24, 27, 31, 35,§9847.]

9848 [§23 (2)] Share in partnership assets. Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions, respectively, in proportion to the respective amounts of such claims. [C24, 27, 31, 35,§9848.]

9849 [§24 (1)] Cancellation of certificate. The certificate shall be canceled when the partnership is dissolved or all limited partners cease to be such. [C24, 27, 31, 35,§9849.]

9850 [§24 (2), (a) to (j), inc.] Amendment of certificate. A certificate shall be amended:

1. When there is a change in the name of the partnership or in the amount or character of the contribution of any limited partner.
2. When a person is substituted as a limited partner.
3. When an additional limited partner is admitted.
4. When a person is admitted as a general partner.
5. When a general partner retires, dies, or becomes insane, and the business is continued under section 9841.
6. When there is a change in the character of the business of the partnership.
7. When there is a false or erroneous statement in the certificate.
8. When there is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution.
9. When a time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate.
10. When the members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them. [C24, 27, 31, 35,§9850.]

9851 [§25 (1), (a) & (b)] Requirements for amendment. The writing to amend a certificate shall:

1. Conform to the requirements of section 9807 as far as necessary to set forth clearly the change in the certificate which it is desired to make.
2. Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner. [C24, 27, 31, 35, §9851.]

Referred to in §§9815, 9853, 9855, 9856

9852 [§25 (2)] Requirement for cancellation. The writing to cancel a certificate shall be signed by all members. [C24, 27, 31, 35,§9852.]

Referred to in §§9815, 9853, 9855, 9856

9853 [§25 (3)] Petition for cancellation or amendment. A person desiring the cancellation or amendment of a certificate may petition the district court to direct a cancellation or amendment in those cases where any person designated in sections 9851 and 9852 as a person who must execute the writing, refuses to do so. [C24, 27, 31, 35,§9853.]

Referred to in §§9815, 9856

9854 [§25 (4)] Order of court. If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the county recorder in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment. [C24, 27, 31, 35,§9854.]

Referred to in §§9815, 9855, 9856

9855 [§25 (5), (a) & (b)] Consummation of cancellation. A certificate is amended or canceled when there is filed for record in the office of the county recorder:

1. A writing in accordance with the provisions of sections 9851 or 9852, or

2. A certified copy of the order of court in accordance with the provisions of section 9854. [C24, 27, 31, 35,§9855.]

Referred to in §§9815, 9856

9856 [§25 (6)] Amended certificate. After the certificate is duly amended in accordance with sections 9851 to 9855, inclusive, the amended certificate shall thereafter be for all purposes the certificate provided for by this statute. [C24, 27, 31, 35,§9856.]

Referred to in §9815

9857 [§26] Parties to actions. A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership. [C24, 27, 31, 35,§9857.]

9858 [§27] Name of law. This law may be cited as the "Uniform Limited Partnership Act". [C24, 27, 31, 35,§9858.]

9859 [§28 (2)] Rules of construction. This law shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it. [C24, 27, 31, 35,§9859.]

9860 [§28 (3)] Impairment of contracts. This law shall not be so construed as to impair the obligations of any contract existing when said law goes into effect, nor to affect any action or proceedings begun or right accrued before it takes effect. [C24, 27, 31, 35,§9860.]

9861 [§29] Rules for cases not provided for. In any case not provided for in this statute the rules of law and equity shall govern. [C24, 27, 31, 35,§9861.]

9862 [§30 (1), (a) & (b)] Existing limited partnerships converted. A limited partnership formed under any statute of this state prior to the adoption of this chapter, may become a limited partnership hereunder by complying with the provisions of sections 9807 and 9808; provided the certificate sets forth:

1. The amount of the original contribution of each limited partner, and the time when the contribution was made.

2. That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners. [C24, 27, 31, 35,§9862.]

9863 [§30 (2)] Existing limited partnership continued. A limited partnership formed under any statute of this state prior to the adoption of this chapter, until or unless it becomes a limited partnership hereunder, shall continue to be governed by the provisions of such statute except that such partnership shall not be renewed unless so provided in the original agreement. [C24, 27, 31, 35,§9863.]

CHAPTER 429

AUCTIONEERS

9864 Nonresident auctioneers—crying sales.
9865 Penalty.
9866 Exceptions.

9864 Nonresident auctioneers—crying sales. It shall be unlawful for any nonresident of the state to cry any sale of property as an auctioneer within the state, unless by the law of the state of which such person is a resident, a resident of this state would be permitted to cry any and all sales of property within such state as an auctioneer without a license. [C24, 27, 31, 35,§9864.]

Referred to in §§9865, 9866

9865 Penalty. If any person shall sell or attempt to sell any property as an auctioneer in violation of the provisions of section 9864, he shall be guilty of a misdemeanor, and punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days. [C24, 27, 31, 35,§9865.]

Referred to in §9866

9866 Exceptions. The provisions of sections 9864 and 9865 shall not be applicable to sales of property under direction or authority of any chattel mortgage, court, or process thereof. [C24, 27, 31, 35,§9866.]

CHAPTER 429.1

CONDUCTING BUSINESS UNDER TRADE NAME

9866.1 Use of trade name—verified statement required.
9866.2 Change in statement.
9866.3 Penalty.
9866.4 "Offense" defined.

9866.1 Use of trade name—verified statement required. It shall be unlawful for any person or copartnership to engage in or conduct a business under any trade name, or any assumed name of any character other than the true surname of each person or persons owning or having any interest in such business, unless such person or persons shall first file with the county recorder of the county in which the business is to be conducted a verified statement

showing the name, post-office address, and residence address of each person owning or having any interest in the business, and the address where the business is to be conducted. [C27, 31, 35,§9866-a1.]

Signing in trade name, §9478
41GA, ch 183, §1, editorially divided

9866.2 Change in statement. A like verified statement shall be filed of any change in ownership of the business, or persons interested therein, and the original owners shall be liable for all obligations until such certificate of change is filed. [C27, 31, 35,§9866-a2.]

9866.3 Penalty. Any person violating the provisions of this chapter shall, upon conviction, be punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for a term not exceeding thirty days. [C27, 31, 35, §9866-a3.]

41GA, ch 183, §2, editorially divided

9866.4 "Offense" defined. Each day that any person or persons violate the provisions of this chapter shall be deemed to be a separate and distinct offense. [C27, 31, 35,§9866-a4.]

CHAPTER 430

REGISTRATION OF TRADEMARKS, LABELS, AND ADVERTISEMENTS

Record of trademarks, §13063 et seq.

9867 Registration.
9868 Certification of registration—fees.
9869 Prima facie proof of right to use.
9870 Alterations—registration.
9871 Injunction.
9872 Damages and general relief.
9873 Persons entitled to sue.
9874 Unlawful use.
9875 Penalty.

9867 Registration. Every person, firm, association, or corporation that has heretofore adopted or shall hereafter adopt for their protection any label, trademark, or form of advertisement, may file the same for record in the office of the secretary of state by leaving two copies, counterparts, or facsimiles thereof with the secretary of state. Said label, trademark, or form of advertisement shall be of a distinctive character and not of the identical form or in any near resemblance to any label, trademark, or form of advertisement previously filed for record in the office of the secretary of state. [C97, §5049; C24, 27, 31, 35,§9867.]

39GA, ch 29, editorially divided

9868 Certification of registration — fees. When the said secretary of state is satisfied that the facsimile copies or counterparts filed are true and correct, and that they are not in any manner an infringement or are calculated to deceive, he shall deliver to such person, firm, association, or corporation so filing the same, a duly attested certificate of registration of the same for which he shall receive a fee of one dollar for filing and an additional fee of one dollar for a certificate of registration. [C97,§5049; C24, 27, 31, 35,§9868.]

9869 Prima facie proof of right to use. Such certificate of registration shall in all actions and prosecutions be sufficient proof of the adoption of such label, trademark, or form of advertisement, and of the right of such person, firm, association, or corporation to adopt and use the same. [C97,§5049; C24, 27, 31, 35,§9869.]

9870 Alterations — registration. Should there be at any time any change, alteration, or modification in such label, trademark, or form of advertisement so registered, the same shall be registered in the office of the secretary of state in the same manner and upon the payment in amount of the same fees as in the case of the original registration. [C24, 27, 31, 35,§9870.]

9871 Injunction. Every person, firm, association, or corporation adopting a label, trademark, or form of advertisement as specified in this chapter, may proceed by action to enjoin the manufacture, use, display, or sale of any counterfeits or imitations thereof. [C97,§5050; C24, 27, 31, 35,§9871.]

9872 Damages and general relief. All courts having jurisdiction of such actions shall grant injunctions to restrain such manufacture, use, display, or sale, and shall award the complainant therein such damages resulting from such wrongful manufacture, use, display, or sale, and a reasonable attorney's fee to be fixed by the court, and said court shall also order that all such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to an officer of the court to be destroyed. [C97,§5050; C24, 27, 31, 35,§9872.]

9873 Persons entitled to sue. Such actions may be prosecuted for the benefit of any firm, association, or corporation by any officer or member thereof. [C97,§5050; C24, 27, 31, 35, §9873.]

9874 Unlawful use. It shall be unlawful for any person, firm, association, or corporation to imitate any label, trademark, or form of advertisement adopted as provided in this chapter, or to knowingly use any counterfeit or imitation thereof, or to use or display such genuine label, trademark, or form of advertisement of such person, firm, association, or corporation unless authorized by him or it. [C97,§5051; C24, 27, 31, 35,§9874.]

Referred to in §9875

9875 Penalty. Any person violating any provision of section 9874 shall be imprisoned in the county jail not more than thirty days, or be fined not less than twenty-five nor more than one hundred dollars. [C97,§5051; C24, 27, 31, 35, §9875.]

CHAPTER 431

TRADEMARKS FOR ARTICLES MANUFACTURED IN IOWA

Record of trademarks, §13063 et seq.

9876 "Manufacturer" defined.
9877 Iowa state manufacturers association.
9878 Trademark "Made in Iowa"—state registration.
9879 Federal or foreign registration.
9880 Board of awards.
9881 Uniform regulations.
9882 Revocation of right.
9883 Use of trademark without permission.
9884 Moneys collected—how expended.

9876 "Manufacturer" defined. Where the word "manufacturer" is used in this chapter it shall be construed to mean any person, firm, or corporation engaged in manufacturing in the state. [S13,§3138-c5; C24, 27, 31, 35,§9876.]

9877 Iowa state manufacturers association. When the organization now existing in the state and known as the Iowa state manufacturers association shall have filed with the secretary of state verified proofs of its organization and the name of its president, vice president, secretary, and treasurer, and that it has one hundred bona fide members, such association shall be recognized as the Iowa state manufacturers association, and be entitled to the benefits of this chapter. [S13, §3138-c; C24, 27, 31, 35,§9877.]

9878 Trademark "Made in Iowa" — state registration. For the purpose of aiding in the promotion and development of manufacturing in Iowa, such association may adopt a label or trademark bearing the words "Made in Iowa", together with any other appropriate design or inscription, and this label or trademark shall be registered in the office of the secretary of state. [S13,§3138-c1; C24, 27, 31, 35,§9878.]

S13, §3138-c1, editorially divided

9879 Federal or foreign registration. Said association shall have the right to register or file such label or trademark under the laws of the United States or any foreign country which permits such registration, making such registration as an association or through an individual for the use and benefit of the association. [S13, §3138-c1; C24, 27, 31, 35,§9879.]

9880 Board of awards. The said association shall by its articles of association provide for the election or appointment of a board of not less than fifteen manufacturers, who are residents of Iowa, which board shall be known as a board of awards. [S13,§3138-c2; C24, 27, 31, 35, §9880.]

S13, §3138-c2, editorially divided

9881 Uniform regulations. The said board of awards shall then establish uniform regulations and shall then grant to any manufacturer in the state, who conforms to such regulations, the right to use said label or trademark. In making such regulations the said board of awards may make requirements as to good quality of such products, both as to materials and workmanship, and it may also fix a charge to be paid by such manufacturer for the use of such label. [S13,§3138-c2; C24, 27, 31, 35,§9881.]

9882 Revocation of right. Upon failure to comply with any requirements established by the board of awards such privilege may be by them revoked, it being the purpose of this chapter to make the said label or trademark stand for Iowa-made goods, and also for goods of quality and merit. [S13,§3138-c2; C24, 27, 31, 35,§9882.]

9883 Use of trademark without permission. No person, firm, or corporation shall use the said label or trademark or advertise the same, or attach or stamp the same upon any article or product except under permission obtained in accordance with the provisions of this chapter. Any person or persons who shall use the said label or trademark except as herein authorized shall be guilty of a misdemeanor. [S13,§3138-c3; C24, 27, 31, 35,§9883.]

Punishment, §12894

9884 Moneys collected—how expended. All moneys collected by the said association under the provisions of this chapter shall be expended by the said association in advertising and promoting the sale of Iowa-made goods bearing the said label or trademark in the state of Iowa. [S13,§3138-c4; C24, 27, 31, 35,§9884.]

CHAPTER 431.1

DISTRIBUTION OF TRADEMARKED ARTICLES

9884.1 Contracts as to selling price.
9884.2 Implied exceptions.
9884.3 Actions for damages.
9884.4 Nonapplicability.
9884.5 Definitions.

9884.1 Contracts as to selling price. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of Iowa by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee. [C35,§9884-g1.]

Referred to in §9884.3
46GA, ch 106, §1, editorially divided

9884.2 Implied exceptions. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering such commodity.
2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.
3. By any officer acting under the orders of any court. [C35,§9884-g2.]

Referred to in §9884.3

9884.3 Actions for damages. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of sections 9884.1 and 9884.2, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. [C35, §9884-g3.]

9884.4 Nonapplicability. This chapter shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. [C35,§9884-g4.]

9884.5 Definitions. The following terms, as used in this chapter, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce. [C35,§9884-g5.]

Constitutionality, §9884-g6, code 1935; 46GA, ch 106, §5
Omnibus repeal, §9884-g7, code 1935; 46GA, ch 106, §6

CHAPTER 432

UNFAIR DISCRIMINATION

9885 Unfair discrimination in sales.
9886 Unfair discrimination in purchases.
9887 Violation.
9888 Penalty.
9889 Contracts or agreements.
9890 Enforcement.
9891 Complaint—to whom made.
9892 Revocation of permit.
9893 Corporation to be enjoined.
9894 Cumulative remedies.

9885 Unfair discrimination in sales. Any person, firm, company, association, or corporation, foreign or domestic, doing business in the state, and engaged in the production, manufacture, sale, or distribution of any commodity of commerce or commercial services excepting those, the rate of which is now subject to control of cities or towns or other governmental agency, that shall, for the purpose of destroying the business of a competitor in any locality or creating a monopoly, discriminate between different sections, localities, communities, cities, or towns of this state, by selling such commodity or commercial services excepting those, the rate of which is now subject to control of cities or towns or other governmental agency at a lower price or rate in one section, locality, community, city, or town than such commodity or commercial services excepting those, the rate of which is now subject to control of cities or towns or other governmental agency is sold for by said person, firm, association, company, or corporation, in another section, locality, community, city, or town, after making due allowance in case of telephone service for the difference in the cost of furnishing service in different localities, and in the case of commodities and commercial services other than telephone service, for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of production or purchase, if a raw product, or from the point of manufacture, if a manufactured product, to a place of sale, storage, or distribution shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; provided, however, that prices made to meet competition in such section, locality, community, city, or town shall not be in violation of this section. [S13,§5028-b; C24, 27, 31, 35,§9885; 47GA, ch 222,§§1-4.]

Referred to in §§9887-9893
S13,§5028-b, editorially divided

9886 Unfair discrimination in purchases. Any person, firm, association, company, or corporation, foreign or domestic, doing business in the state, and engaged in the business of purchasing for manufacture, storage, sale, or distribution, any commodity of commerce that shall, for the purpose of destroying the business of a competitor or creating a monopoly, discriminate between different sections, localities, communities, cities, or towns, in this state, by purchasing such commodity at a higher rate or price in one section, locality, community, city, or town, than is paid for such commodity by such party in another section, locality, community, city, or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of purchase to the point of manufacture, sale, distribution, or storage, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; provided, however, that prices made to meet competition in such section, locality, community, city, or town

shall not be in violation of this section. [S13, §5028-b; C24, 27, 31, 35,§9886.]

Referred to in §§9887-9893

9887 Violation. Any person, firm, association, company, or corporation, or any officer, agent, or member of any such firm, company, association, or corporation, found guilty of unfair discrimination as defined in sections 9885 and 9886, shall be punished as provided in section 9888. [S13,§5028-b; C24, 27, 31, 35,§9887.]

Referred to in §9890

9888 Penalty. Any person, firm, company, association, or corporation violating any of the provisions of sections 9885 and 9886, and any officer, agent, or receiver of any firm, company, association, or corporation, or any member of the same, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred dollars nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or suffer both penalties. [S13, §5028-c; C24, 27, 31, 35,§9888.]

Referred to in §§9887, 9890

9889 Contracts or agreements. All contracts or agreements made in violation of any of the provisions of sections 9885 and 9886 shall be void. [S13,§5028-d; C24, 27, 31, 35,§9889.]

Referred to in §9890

9890 Enforcement. It shall be the duty of the county attorneys, in their counties, and the attorney general, to enforce the provisions of sections 9885 to 9889, inclusive, by appropriate actions in courts of competent jurisdiction. [S13,§5028-e; C24, 27, 31, 35,§9890.]

9891 Complaint — to whom made. If complaint shall be made to the secretary of state that any corporation authorized to do business in this state is guilty of unfair discrimination, within the terms of sections 9885 and 9886, it shall be the duty of the secretary of state to refer the matter to the attorney general who may, if the facts justify it in his judgment, institute proceedings in the courts against such corporation. [S13,§5028-f; C24, 27, 31, 35,§9891.]

9892 Revocation of permit. If any corporation, foreign or domestic, authorized to do business in this state, is found guilty of unfair discrimination, within the terms of sections 9885 and 9886, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this state. [S13, §5028-g; C24, 27, 31, 35,§9892.]

9893 Corporation to be enjoined. If after revocation of its permit such corporation, or any other corporation not having a permit and found guilty of having violated any of the provisions of sections 9885 and 9886, shall continue or attempt to do business in this state, it shall be the duty of the attorney general, by a proper suit in the name of the state of Iowa, to enjoin such corporation from transacting all business of every kind and character in said state. [S13, §5028-h; C24, 27, 31, 35,§9893.]

9894 Cumulative remedies. Nothing in this chapter shall be construed as repealing any other act, or part of act, but the remedies herein provided shall be cumulative to all other remedies provided by law. [S13,§5028-i; C24, 27, 31, 35,§9894.]

CHAPTER 433

OPTIONS AND BUCKET SHOPS

9895 Dealing in options—bucket shops.
9896 Certain contracts exempted.
9897 Penalty.
9898 Bucket shops and bucket shopping.
9899 Definitions.
9900 Completion of offense.
9901 Keeping or maintaining.
9902 Second offense.
9903 "Accessory" defined.
9904 Statement of purchases or sales furnished on demand.
9905 Prima facie evidence.

9895 Dealing in options—bucket shops. It shall be unlawful for any person, corporation, association, or society to keep within the state any store, office, or other place for the pretended buying or selling of grain, pork, lard, or any mercantile, mining, or agricultural products or corporation stocks, on margins, without any intention of future delivery, whether such pretended contracts are to be performed within or without the state; and no person, corporation, association, or society within the state shall make or enter into any contract or pretended contract, such as is above stated and referred to; the intention of this section being to prevent and prohibit within the state the business now engaged in and conducted in places commonly known and designated as bucket shops. [C97,§4967; C24, 27, 31, 35,§9895.]

Referred to in §§9896, 9897
C97,§4967, editorially divided

9896 Certain contracts exempted. Section 9895 shall not apply or in any way affect any contract for the actual buying or selling of any commodity whatever for present or future delivery, where the actual delivery or receipt of the thing sold is contemplated and in good faith intended by either of the parties to the contract. [C97,§4967; C24, 27, 31, 35,§9896.]

9897 Penalty. Any person, whether acting individually or as a member of any copartnership, corporation, association, or society, guilty of violating any of the provisions of section 9895, shall be fined not less than one hundred nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than one year, or both. [C97,§4968; C24, 27, 31, 35,§9897.]

9898 Bucket shops and bucket shopping. It is the intention of this and sections 9899 to 9905,

inclusive, to prevent, punish, and prohibit, within this state, the business now engaged in and conducted in places commonly known and designated as "bucket shops", and also to include the practice now commonly known as "bucket shopping" by any person or persons, agent, corporations, associations, or copartnerships, who or which ostensibly carry on the business or occupation of commission merchants or brokers in grain, provisions, cotton, coffee, petroleum, stocks, bonds, or other commodities whatsoever. [S13,§4975-d; C24, 27, 31, 35,§9898.]

Referred to in §§9899, 9903, 9905
S13,§4975-d, editorially divided

9899 Definitions. A bucket shop, within the meaning of sections 9898 to 9905, inclusive, is defined to be:

1. An office, store, or other place wherein the proprietor or keeper thereof, or other person or agent, either in his or its own behalf, or as the agent or correspondent of any other person, corporation, association, or copartnership within or without the state, conducts the business of making, or offering to make, contracts, agreements, trades, or transactions respecting the purchase or sale, or purchase and sale, of any stocks, grain, provisions, cotton, or other commodity, or personal property:

a. Wherein both parties thereto, or said proprietor or keeper, contemplate or intend that such contracts, agreements, trades, or transactions shall be, or may be closed, adjusted, or settled according to, or upon the basis of, the public market quotations of prices made on any board of trade or exchange, upon which the commodities or securities referred to in such contracts, agreements, trades, or transactions are dealt in by competitive buying and selling, and without a bona fide transaction on such board of trade or exchange; or

b. Wherein both parties, or such keeper or proprietor, shall contemplate or intend that such contracts, agreements, trades, or transactions shall be, or may be, deemed closed or terminated when the public market quotations of prices made on such board of trade, or exchange, for the articles or securities named in such contracts, agreements, trades, or transactions, shall reach a certain figure.

2. Any office, store or other place where the keeper, person, or agent, or proprietor thereof, either in his or its own behalf, or as an agent, as aforesaid, therein makes, or offers to make, with others, contracts, trades, or transactions for the purchase or sale of any such commodity, wherein the parties thereto do not contemplate or intend the actual or bona fide receipt or delivery of such property, but do contemplate or intend a settlement therefor based upon differences in the price at which said property is, or is claimed to be, bought and sold. [S13,§4975-d; C24, 27, 31, 35,§9899.]

Referred to in §§9898, 9903, 9905

9900 Completion of offense. The said crime shall be complete against any proprietor, person, agent, or keeper thus offering to make any such contracts, trades, or transactions, whether such offer is accepted or not. [S13,§4975-d; C24, 27, 31, 35,§9900.]

Referred to in §§9898, 9899, 9903, 9905

9901 Keeping or maintaining. It shall be unlawful, and the same is hereby made a felony, for any corporation, association, copartnership, person or persons, or agent to keep or cause to be kept, within this state, any such bucket shop; and any corporation, person or persons, or agent whether acting individually or as a member, or as an officer, agent, or employee of any corporation, association, or copartnership, who shall keep, maintain, or assist in the keeping and maintaining of any such bucket shop within this state, shall, upon conviction thereof, be fined in a sum not to exceed one thousand dollars or be imprisoned in the penitentiary not exceeding two years. [S13,§4975-e; C24, 27, 31, 35,§9901.]

Referred to in §§9898, 9899, 9902, 9903, 9905
S13, §4975-e, editorially divided

9902 Second offense. Any person or persons who shall be guilty of a second offense under section 9901, in addition to the penalty above prescribed, may, upon conviction, be both fined and imprisoned in the discretion of the court, and, if a corporation, it shall be liable to forfeiture of all its rights and privileges as such; and the continuance of such establishment after the first conviction shall be deemed a second offense. [S13,§4975-e; C24, 27, 31, 35, §9902.]

Referred to in §§9898, 9899, 9903, 9905

9903 "Accessory" defined. Any corporation, association, copartnership, person or persons, or agents who shall communicate, receive, exhibit, or display in any manner any statements of quotations of the prices of any property mentioned in sections 9898 to 9900, inclusive, with a view to any transactions prohibited in sections 9898 to 9905, inclusive, shall be deemed an accessory, and upon conviction thereof shall be fined and punished the same as the principal, and as provided in sections 9901 and 9902. [S13, §4975-f; C24, 27, 31, 35,§9903.]

Referred to in §§9898, 9899, 9905

9904 Statement of purchases or sales furnished on demand. It shall be the duty of every commission merchant, copartnership, association, corporation, person or persons, or agent or broker in this state engaged in the business of buying or selling, or of buying and selling, stocks, bonds, grain, provisions, cotton, or other commodities or personal property for any person, principal, customer, or purchaser, to furnish to any customer or principal for whom such commission merchant, broker, copartnership, corporation, association, person or persons, or agent, has executed any order for the actual purchase or sale of the commodities hereinbefore mentioned, either for immediate or future delivery, a written statement containing the names of the parties from whom such property was bought, or to whom it shall have been sold, as the case may be, the time when, the place where, and the price at which, the same was

either bought or sold. [S13,§4975-g; C24, 27, 31, 35,§9904.]

Referred to in §§9898, 9899, 9903, 9905
S13,§4975-g, editorially divided

9905 Prima facie evidence. In case such commission merchant, broker, person or persons, or agent, copartnership, corporation, or association shall fail to furnish the said statement, the fact of such failure shall be prima facie evidence that such property was not sold or bought in a legitimate manner, but was bought in violation of sections 9898 to 9904, inclusive. [S13, §4975-g; C24, 27, 31, 35,§9905.]

Referred to in §§9898, 9899, 9903

CHAPTER 434

COMBINATIONS, POOLS, AND TRUSTS

Referred to in §6943.079

9906 Pools and trusts.
9907 Corporation not to enter.
9908 Penalty.
9909 Contracts void.
9910 Defense.
9911 Forfeiture of charter.
9912 Notice by secretary of state.
9913 Enforcement—inquiry by grand jury.
9914 Fees of prosecutors.
9915 Combinations, pools, and trusts—fixing prices.
9916 Labor—unions.
9917 Liability.
9918 Violation—penalty.
9919 Duty of grand jury.
9920 Gift enterprises.
9921 "Gift enterprise" defined.
9922 Violation.
9923 "Person" defined.
9924 Grain combinations prohibited.
9925 Liability for damages.
9926 Violation—penalty.
9927 Duty of grand jury.
9928 Provision part of every contract—forfeit.
9929 "Pittsburgh plus".

9906 Pools and trusts. Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership, association, or individual, creating, entering into, or becoming a member of, or a party to, any pool, trust, agreement, contract, combination, confederation, or understanding with any other corporation, partnership, association, or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, shall be guilty of a conspiracy. [C97,§5060; C24, 27, 31, 35,§9906.]

Referred to in §§9908-9914

9907 Corporation not to enter. No corporation shall issue or own trust certificates, and no corporation, nor any agent, officer, employee, director, or stockholder of any corporation, shall enter into any combination, contract, or agreement with any person or corporation, or with any stockholder or director thereof, for the purpose of placing the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with intent to limit or fix the price or lessen the production or sale of any article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article. [C97,§5061; C24, 27, 31, 35,§9907.]

Referred to in §§9908-9914

9908 Penalty. Any corporation, company, firm, or association violating any of the provisions of sections 9906 and 9907 shall be fined not less than five hundred nor more than five thousand dollars, and any president, manager, director, officer, agent, or receiver of any corporation, company, firm, or association, or any member of any corporation, company, firm, or association, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both. [C97,§5062; S13,§5062; C24, 27, 31, 35,§9908.]

Referred to in §§9909-9914

9909 Contracts void. All contracts or agreements in violation of any provisions of sections 9906 to 9908, inclusive, shall be void. [C97, §5063; C24, 27, 31, 35,§9909.]

Referred to in §§9910-9914

9910 Defense. Any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provisions of sections 9906 to 9909, inclusive, shall not be liable for the price or payment thereof, and may plead such provisions as a defense to any action for such price or payment. [C97,§5064; C24, 27, 31, 35,§9910.]

Referred to in §§9911-9914

9911 Forfeiture of charter. Any corporation created or organized by or under the law of this state, which shall violate any provision of sections 9906 to 9910, inclusive, shall thereby forfeit its corporate right and franchise, as provided in section 9912. [C97,§5065; C24, 27, 31, 35, §9911.]

Referred to in §§9912-9914

9912 Notice by secretary of state. The secretary of state, upon satisfactory evidence that any company, or association of persons incorporated under the laws of this state has entered into any trust, combination, or association in violation of the provisions of sections 9906 to 9911, inclusive, shall give notice to such corporation that, unless it withdraws from and severs all business connection with said trust, combination, or association, its articles of incorporation will be revoked at the expiration of thirty days

from date of such notice. [C97,§5066; C24, 27, 31, 35,§9912.]

Referred to in §§9911, 9913, 9914

9913 Enforcement—inquiry by grand jury. County attorneys, in their counties, and the attorney general shall enforce the provisions of a public nature in sections 9906 to 9912, inclusive, and it shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, or combination within their respective counties. [C97,§5067; C24, 27, 31, 35,§9913.]

C97,§5067, editorially divided

9914 Fees of prosecutors. Any county attorney or the attorney general securing a conviction under the provisions of sections 9906 to 9912, inclusive, shall be entitled, in addition to such fee or salary as by law he is allowed for such prosecution, to one-fifth of the fine recovered. When the attorney general and county attorney act in conjunction in the prosecution of any action under such provisions, they shall be entitled to one-fourth of the fine recovered, which they shall divide equally between them, where there is no agreement to the contrary. [C97,§5067; C24, 27, 31, 35,§9914.]

9915 Combinations, pools, and trusts—fixing prices. It shall be unlawful for any person, company, partnership, association, or corporation owning or operating any business of buying, selling, handling, consigning, or transporting any commodity or any article of commerce:

1. To enter into any agreement, contract, or combination with any other dealer or dealers, partnership, company, corporation, or association of dealers, whether within or without the state, engaged in like business, for the fixing of the price or prices at which any commodity or any article of commerce should be sold by different dealers or sellers.

2. To divide between said dealers the aggregate or net proceeds of the earnings of such dealers and sellers, or any portion thereof.

3. To form, enter into, maintain, or contribute money or anything of value to any trust, pool, combination, or association of persons of whatsoever character or name, which has for any of its objects the prevention of full and free competition among buyers, sellers, or dealers in any commodity or any article of commerce.

4. To do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of any commodity or any article of commerce is restrained or prevented. [S13,§5067-a; C24, 27, 31, 35,§9915.]

Referred to in §§9917-9919

9916 Labor—unions. The labor of a human being either mental or physical is not a commodity or article of commerce and it shall not be unlawful for men and women to organize themselves into or carry on unions for the purpose, by lawful means, of lessening the hours of labor or increasing the wages, or bettering the condition of the members of such organizations, or lawfully carrying out their legitimate purposes. [C24, 27, 31, 35,§9916.]

Referred to in §9918

9917 Liability. In case any person, company, partnership, corporation, or association, trust, pool, or combination of whatsoever name shall do, cause to be done, or permit to be done, any act, matter, or thing in section 9915 prohibited or declared to be unlawful, such person, partnership, company, association, corporation, trust, pool, or combination shall be liable to the person, partnership, company, association, or corporation injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of section 9915. [S13,§5067-b; C24, 27, 31, 35,§9917.]

Referred to in §9918

9918 Violation—penalty. Any person, partnership, company, association, or corporation subject to the provisions of sections 9915 to 9917, inclusive, or any person, trust, combination, pool, or association, or any director, officer, lessee, receiver, trustee, employee, clerk, agent, or any person acting for or employed by them, who shall violate any of the provisions of section 9915, or who shall aid and abet in such violation, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined any sum not less than five hundred dollars and not exceeding two thousand dollars or imprisoned in the county jail for a period not exceeding six months, or both, at the discretion of the court. [S13,§5067-c; C24, 27, 31, 35,§9918.]

S13,§5067-c, editorially divided

9919 Duty of grand jury. It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, combination or violation of any provision in section 9915, in their respective counties. [S13,§5067-c; C24, 27, 31, 35,§9919.]

9920 Gift enterprises. All gift enterprises, as hereinafter defined, and all trade practices carried on in connection therewith are hereby prohibited and declared to be unlawful. [S13, §5067-d; C24, 27, 31, 35,§9920.]

9921 "Gift enterprise" defined. Whenever two or more persons enter into any contract arrangement or scheme, whereby for the purpose of inducing the public to purchase merchandise or other property of one of the parties to said scheme, any other party thereto, for a valuable consideration and as a part of such scheme, advertises and induces or attempts to induce the public to believe that he will give gifts, premiums, or prizes to persons purchasing such merchandise or other property of such party to said scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such property to receive such prizes or gifts from any other party to such scheme, the parties so undertaking and carrying out such scheme shall be deemed to be engaged in a "gift enterprise", unless the articles or things so promised to be given as gifts or premiums with or on account

of such purchases, shall be definitely described on such stamp or ticket and the character and value of such promised prize or gift fully made known to the purchaser of such merchandise or other property at the time of the sale thereof, and unless the right of the holder of such stamp or ticket to the gift or premium so promised becomes absolute upon the completion upon the delivery thereof without the holder being required to collect any specified number of other similar stamps or tickets and to present them for redemption together, and the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance, uncertainty, or contingency whatever. [S13,§5067-e; C24, 27, 31, 35,§9921.]

Referred to in §§9922, 9923

9922 Violation. Any person who engages in a gift enterprise such as is defined in section 9921 or who advertises the same in any manner or who in furtherance of such scheme, as an inducement to purchasers, issues in connection with the sale of any merchandise or other property any such ticket or stamp purporting to be redeemable in some indefinite article not described thereon, only when presented with a collection of other stamps or tickets of like kind by some other party to such scheme, and which unless presented in the manner aforesaid is not redeemable at all, shall each and all be guilty of a misdemeanor. [S13,§5067-f; C24, 27, 31, 35,§9922.]

Referred to in §9923
Penalty, §12894

9923 "Person" defined. The word "person" as used in sections 9921 and 9922 may in proper cases, in order to make the intent and meaning of the law effective, be construed to mean firm or corporation. [S13,§5067-g; C24, 27, 31, 35, §9923.]

9924 Grain combinations prohibited. It shall be unlawful for any person, company, partnership, association, or corporation owning or operating any grain elevator or engaged in the business of buying, selling, handling, consigning, or transporting grain:

1. To enter into any agreement, contract, or combination with any other grain dealer, or grain dealers, partnership, company, corporation, or association of grain dealers, whether within or without the state, engaged in like business, for the fixing of prices to be paid for grain by different dealers or buyers.

2. To divide between said dealers the aggregate or net proceeds of the earnings of such dealers and buyers, or any portion thereof.

3. To form, enter into, maintain, or contribute money or anything of value to any trust, pool, combination, or association of persons of whatsoever character or name, which has for any of its objects the prevention of full and free competition among buyers, sellers, or dealers in grain.

4. To do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of grain is restrained or prevented. [S13, §5077-a3; C24, 27, 31, 35,§9924.]

Referred to in §§9925, 9926, 9927

9925 Liability for damages. In case any person, company, partnership, corporation, or association, trust, pool, or combination of whatsoever name shall do, cause to be done, or permit to be done, any act, matter, or thing in section 9924 prohibited or declared to be unlawful, such person, partnership, company, association, corporation, trust, pool, or combination shall be liable to the person, partnership, company, association, or corporation injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of said section, together with a reasonable attorney's fee to be fixed by the court in every case of recovery and to be taxed as part of the costs in the case, and the property of any person who may be a member of any such trust, pool, combination, corporation, or association, violating the provisions of said section, shall be liable for the full amount of such judgment. [S13,§5077-a4; C24, 27, 31, 35,§9925.]

Referred to in §§9926, 9927

9926 Violation—penalty. Any person, partnership, company, association, or corporation subject to the provisions of sections 9924 and 9925, or any person, trust, combination, pool, or association, or any director, officer, lessee, receiver, trustee, employee, clerk, agent, or any person acting for or employed by them or either of them, who shall violate any of the provisions of section 9924, or who shall aid and abet in such violation, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined any sum not less than five hundred dollars and not exceeding two thousand dollars, or imprisoned in the county jail for a period not exceeding six months, or both, at the discretion of the court. [S13,§5077-a5; C24, 27, 31, 35, §9926.]

S13,§5077-a5, editorially divided

9927 Duty of grand jury. It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, combination or violation of any provision in sections 9924 and 9925 in their respective counties. [S13, §5077-a5; C24, 27, 31, 35,§9927.]

9928 Provision part of every contract—forfeit. The following provision shall be deemed and held to be a part of every contract hereafter entered into by any person, firm, or private corporation with the state, or with any county, city, town, city acting under special charter, city acting under commission form of government, school corporation, or with any municipal corporation, now or hereafter created, whether said provision be inserted in such contract or not, to wit:

"The party to whom this contract has been awarded, hereby represents and guarantees that he has not, nor has any other person for or

in his behalf, directly or indirectly, entered into any arrangement or agreement with any other bidder, or with any public officer, whereby he has paid or is to pay to any other bidder or public officer any sum of money or anything of value whatever in order to obtain this contract; and that he has not, nor has another person, for or in his behalf, directly or indirectly, entered into any agreement or arrangement with any other person, firm, corporation, or association which tends to or does lessen or destroy free competition in the letting of this contract, and he hereby agrees that in case it hereafter be established that such representations or guaranties, or any of them, are false, he will forfeit and pay not less than five percent of the contract price but in no event less than three hundred dollars, as liquidated damages to the other contracting party." [S13,§1279-c; C24, 27, 31, 35,§9928.]

9929 "Pittsburgh plus." There is hereby created a committee consisting of the governor and attorney general, which committee shall have full power and authority to protect and shall be charged with the duty of protecting the state of Iowa and the people thereof against the steel trade practice commonly known as "Pittsburgh plus" and other similar trade practices, and said committee is hereby authorized to use all lawful means for the accomplishment of said purposes. [C24, 27, 31, 35,§9929.]

TITLE XXIV

PERSONAL PROPERTY

CHAPTER 435

SALES LAW

Bracketed numbers indicate the corresponding section of the uniform act

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PART I

FORMATION OF THE CONTRACT

9930 [§1] Contracts to sell and sales.

1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called price.

2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

3. A contract to sell or a sale may be absolute or conditional.

4. There may be a contract to sell or a sale between one part owner and another. [C24, 27, 31, 35,§9930.]

9931 [§2] Capacity—liabilities for necessaries. Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person and to his actual requirements at the time of delivery. [C24, 27, 31, 35,§9931.]

FORMALITIES OF THE CONTRACT

9932 [§3] Form of contract or sale. Subject to the provisions of this chapter and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. [C24, 27, 31, 35,§9932.]

9933 [§4] Statute of frauds.

1. A contract to sell or a sale of any goods or choses in action shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold and actually receive the same or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods. [C24, 27, 31, 35, §9933.]

9933.1 Applicable statutes. Sections 11287 and 11288 shall apply to sales of goods and choses in action. [C27, 31, 35,§9933-a1.]

Not part of original uniform act

SUBJECT MATTER OF CONTRACT

9934 [§5] Existing and future goods.

1. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this chapter called "future goods".

2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

3. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods. [C24, 27, 31, 35, §9934.]

9935 [§6] Undivided shares.

1. There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer by force of the agreement becomes an owner in common with the owner or owners of the remaining shares.

2. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure

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bought bears to the number, weight, or measure of the mass. If the mass contains less than the number, weight, or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears. [C24, 27, 31, 35,§9935.]

Referred to in §9946

9936 [§7] Destruction of goods sold.

1. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

2. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale:

a. As avoided; or

b. As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible. [C24, 27, 31, 35,§9936.]

9937 [§8] Destruction of goods contracted to be sold.

1. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

2. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may, at his option treat the contract:

a. As avoided; or

b. As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible. [C24, 27, 31, 35,§9937.]

THE PRICE

9938 [§9] Definition and ascertainment of price.

1. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

2. The price may be made payable in any personal property.

3. Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this chapter shall not apply.

4. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. [C24, 27, 31, 35,§9938.]

9939 [§10] Sale at a valuation.

1. Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

2. Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are hereinafter provided. [C24, 27, 31, 35,§9939.]

CONDITIONS AND WARRANTIES

9940 [§11] Effect of conditions.

1. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the nonperformance of the condition as a breach of warranty.

2. Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods. [C24, 27, 31, 35,§9940.]

9941 [§12] Definition of "express warranty". Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty. [C24, 27, 31, 35, §9941.]

9942 [§13] Implied warranties of title. In a contract to sell or a sale, unless contrary intention appears, there is:

1. An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

3. An implied warranty that the goods shall be free at the time of the sale from any charge or incumbrance in favor of any third person not declared or known to the buyer before or at the time when the contract or sale is made.

4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest. [C24, 27, 31, 35,§9942.]

9943 [§14] Implied warranty in sale by description. Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. [C24, 27, 31, 35, §9943.]

9944 [§15] Implied warranties of quality. Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

2. Where the goods are bought by description from a seller who deals in goods of that description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.

3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name there is no implied warranty as to its fitness for any particular purpose.

5. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

6. An express warranty or condition does not negative a warranty or condition implied under this chapter unless inconsistent therewith. [C24, 27, 31, 35,§9944.]

SALE BY SAMPLE

9945 [§16] Implied warranties in sale by sample. In the case of a contract to sell or a sale by sample:

1. There is an implied warranty that the bulk shall correspond with the sample in quality.

2. There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 9976, subsection 3.

3. If the seller is a dealer in goods of that kind there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. [C24, 27, 31, 35,§9945.]

PART II

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

9946 [§17] When property passes. Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 9935. [C24, 27, 31, 35,§9946.]

9947 [§18] Property in specific goods passes when parties so intend.

1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case. [C24, 27, 31, 35,§9947.]

9948 [§19] Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

RULE 1.

Where there is an unconditional contract to sell specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

RULE 2.

Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such things be done.

RULE 3.

1. When goods are delivered to the buyer "on sale or return", or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

a. When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

b. If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

RULE 4.

1. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 9949. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

RULE 5.

If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. [C24, 27, 31, 35,§9948.]

Referred to in §9975

9949 [§20] Reservation of right of possession or property when goods are shipped.

1. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

2. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

3. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

4. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith for value the bill of lading or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or the goods, without notice of the facts making the transfer wrongful. [C24, 27, 31, 35,§9949.]

Referred to in §9948

9950 [§21] Sale by auction. In the case of sale by auction:

1. Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid, and the auctioneer may withdraw the goods from the sale unless the auction has been announced to be without reserve.

3. A right to bid may be reserved expressly by or on behalf of the seller.

4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer. [C24, 27, 31, 35,§9950.]

9951 [§22] Risk of loss. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that:

1. Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

2. Where delivery has been delayed through the fault of either buyer or seller the goods are

at the risk of the party in fault as regards any loss which might not have occurred but for such fault. [C24, 27, 31, 35,§9951.]

TRANSFER OF TITLE

9952 [§23] Sale by a person not the owner. 1. Subject to the provisions of this chapter, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

2. Nothing in this chapter, however, shall affect:

a. The provisions of any factors acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

b. The validity of any contract to sell or sale under any common law or statutory power of sale or under the order of a court of competent jurisdiction. [C24, 27, 31, 35,§9952.]

9953 [§24] Sale by one having a voidable title. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title. [C24, 27, 31, 35,§9953.]

9954 [§25] Sale by seller in possession of goods already sold. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. [C24, 27, 31, 35,§9954.]

9955 [§26] Creditors' rights against sold goods in seller's possession. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void. [C24, 27, 31, 35,§9955.]

9956 [§27] Definition of "negotiable documents of title". A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title. [C24, 27, 31, 35, §9956.]

9957 [§28] Negotiation of negotiable documents by delivery. A negotiable document of title may be negotiated by delivery:

1. Where by the terms of the document the carrier, warehouseman, or other bailee issuing the same undertakes to deliver the goods to the bearer; or

2. Where by the terms of the document the carrier, warehouseman, or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee. [C24, 27, 31, 35, §9957.]

9958 [§29] Negotiation of negotiable documents by indorsement. A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner. [C24, 27, 31, 35,§9958.]

9959 [§30] Negotiable documents of title marked "not negotiable". If a document of title which contains an undertaking by a carrier, warehouseman, or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of specified person, or which contains words of like import, has placed upon it the words "not negotiable", "nonnegotiable", or the like, such a document may, nevertheless, be negotiated by the holder and is a negotiable document of title within the meaning of this chapter. But nothing in this chapter contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable", "nonnegotiable", or the like. [C24, 27, 31, 35,§9959.]

9960 [§31] Transfer of nonnegotiable documents. A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A nonnegotiable document cannot be negotiated, and the indorsement of such a document gives the transferee no additional right. [C24, 27, 31, 35,§9960.]

9961 [§32] Who may negotiate a document. A negotiable document may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the document the bailee issuing it undertakes to deliver the goods to the order of such person, or if at the time of negotiation the document is in such form that it may be negotiated by delivery. [C24, 27, 31, 35,§9961.]

9962 [§33] Rights of person to whom document has been negotiated. A person to whom a negotiable document of title has been duly negotiated acquires thereby:

1. Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value; and

2. The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him. [C24, 27, 31, 35,§9962.]

9963 [§34] Rights of person to whom document has been transferred. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is nonnegotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a nonnegotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. [C24, 27, 31, 35,§9963.]

9964 [§35] Transfer of negotiable document without indorsement. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. [C24, 27, 31, 35,§9964.]

9965 [§36] Warranties on sale of document. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title, unless a contrary intention appears, warrants:

1. That the document is genuine;

2. That he has a legal right to negotiate or transfer it;

3. That he has knowledge of no fact which would impair the validity or worth of the document; and

4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby. [C24, 27, 31, 35,§9965.]

9966 [§37] Indorser not a guarantor. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations. [C24, 27, 31, 35,§9966.]

9967 [§38] When negotiation not impaired by fraud, mistake, or duress. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake, or duress to intrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress. [C24, 27, 31, 35,§9967.]

9968 [§39] Attachment or levy upon goods for which a negotiable document has been issued. If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court. [C24, 27, 31, 35,§9968.]

9969 [§40] Creditors' remedies to reach negotiable documents. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. [C24, 27, 31, 35,§9969.]

PART III

PERFORMANCE OF THE CONTRACT

9970 [§41] Seller must deliver and buyer accept goods. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale. [C24, 27, 31, 35, §9970.]

9971 [§42] Delivery and payment are concurrent conditions. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the

seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods. [C24, 27, 31, 35,§9971.]

9972 [§43] Place, time, and manner of delivery.

1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

2. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

3. Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

5. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller. [C24, 27, 31, 35,§9972.]

9973 [§44] Delivery of wrong quantity.

1. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

2. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

3. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

4. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties. [C24, 27, 31, 35,§9973.]

9974 [§45] Delivery in installments.

1. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

2. Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation but not to a right to treat the whole contract as broken. [C24, 27, 31, 35, §9974.]

9975 [§46] Delivery to a carrier on behalf of the buyer.

1. Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 9948, rule 5, or unless a contrary intent appears.

2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows, or ought to know, that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit. [C24, 27, 31, 35,§9975.]

9976 [§47] Right to examine the goods.

1. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is

bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

3. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery", or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination. [C24, 27, 31, 35,§9976.]

Referred to in §9945

9977 [§48] What constitutes acceptance. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. [C24, 27, 31, 35,§9977.]

9978 [§49] Acceptance does not bar action for damages. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach the seller shall not be liable therefor. [C24, 27, 31, 35,§9978.]

9979 [§50] Buyer is not bound to return goods wrongly delivered. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them. [C24, 27, 31, 35, §9979.]

9980 [§51] Buyer's liability for failing to accept delivery. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the right against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default. [C24, 27, 31, 35,§9980.]

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

9981 [§52] Definition of "unpaid seller".

1. The seller of goods is deemed to be an unpaid seller within the meaning of this chapter:

a. When the whole of the price has not been paid or tendered.

b. When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

2. In this part of this chapter the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for the price, or any other person who is in the position of a seller. [C24, 27, 31, 35,§9981.]

9982 [§53] Remedies of an unpaid seller.

1. Subject to the provisions hereof, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has:

a. A lien on the goods or right to retain them for the price while he is in possession of them.

b. In case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them.

c. A right of resale as limited by this chapter.

d. A right to rescind the sale as limited by this chapter.

2. Where the property in goods has not passed to the buyer the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transit where the property has passed to the buyer. [C24, 27, 31, 35,§9982.]

Referred to in §9998

UNPAID SELLER'S LIEN

9983 [§54] When right of lien may be exercised.

1. Subject to the provisions of this chapter, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

a. Where the goods have been sold without any stipulation as to credit.

b. Where the goods have been sold on credit, but the term of credit has expired.

c. Where the buyer becomes insolvent.

2. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. [C24, 27, 31, 35,§9983.]

9984 [§55] Lien after part delivery. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder unless such part delivery has been

made under such circumstances as to show an intent to waive the lien or right of retention. [C24, 27, 31, 35,§9984.]

9985 [§56] When lien is lost.

1. The unpaid seller of goods loses his lien thereon:

a. When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof.

b. When the buyer or his agent lawfully obtains possession of the goods.

c. By waiver thereof.

2. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods. [C24, 27, 31, 35,§9985.]

STOPPAGE IN TRANSITU

9986 [§57] Seller may stop goods on buyer's insolvency. Subject to the provisions of this chapter, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods at any time while they are in transit and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession. [C24, 27, 31, 35, §9986.]

Referred to in §9987

9987 [§58] When goods are in transit.

1. Goods are in transit within the meaning of section 9986:

a. From the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.

b. If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

2. Goods are no longer in transit within the meaning of section 9986:

a. If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination.

b. If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer.

c. If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

3. If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer.

4. If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods. [C24, 27, 31, 35,§9987.]

9988 [§59] Ways of exercising the right to stop.

1. The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal by the exercise of reasonable diligence, may prevent a delivery to the buyer.

2. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions, of the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation. [C24, 27, 31, 35,§9988.]

RESALE BY THE SELLER

9989 [§60] When and how resale may be made.

1. Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

3. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods, or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

4. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

5. The seller is bound to exercise reasonable care and judgment in making a resale, and sub-

ject to this requirement may make a resale either by public or private sale. [C24, 27, 31, 35,§9989.]

RESCISSION BY THE SELLER

9990 [§61] When and how the seller may rescind the sale.

1. An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted. [C24, 27, 31, 35, §9990.]

9991 [§62] Effect of sale of goods subject to lien or stoppage in transitu. Subject to the provisions of this chapter, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu. [C24, 27, 31, 35,§9991.]

PART V

ACTIONS FOR BREACH OF THE CONTRACT

Remedies of the Seller

9992 [§63] Actions for the price.

1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of subsection 4 of section 9993 are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price. [C24, 27, 31, 35,§9992.]

9993 [§64] Action for damages for nonacceptance of the goods.

1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

3. Where there is an available market for the goods in question. the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

4. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damage than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages. [C24, 27, 31, 35,§9993.]

Referred to in §9992

9994 [§65] When seller may rescind contract or sale. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer. [C24, 27, 31, 35, §9994.]

Remedies of the Buyer

9995 [§66] Action for converting or detaining goods. Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods,

the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld. [C24, 27, 31, 35,§9995.]

9996 [§67] Action for failing to deliver goods.

1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. [C24, 27, 31, 35,§9996.]

9997 [§68] Specific performance. Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just. [C24, 27, 31, 35,§9997.]

9998 [§69] Remedies for breach of warranty.

1. Where there is a breach of warranty by the seller, the buyer may, at his election:

a. Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price.

b. Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.

c. Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty.

d. Rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

2. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

3. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

4. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods or immediately after an offer to return the goods in exchange for repayment of the price.

5. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 9982.

6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. [C24, 27, 31, 35,§9998.]

9999 [§70] Interest and special damages. Nothing in this chapter shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. [C24, 27, 31, 35,§9999.]

PART VI

INTERPRETATION

10000 [§71] Variation of implied obligations. Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale. [C24, 27, 31, 35,§10000.]

10001 [§72] Rights may be enforced by action. Where any right, duty, or liability is declared by this chapter, it may, unless otherwise by this chapter provided, be enforced by action. [C24, 27, 31, 35,§10001.]

10002 [§73] Rule for cases not provided for herein. In any case not provided for in this chapter the rules of law and equity, including the law merchant, and in particular the rules

relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods. [C24, 27, 31, 35,§10002.]

10003 [§74] Interpretation shall give effect to purpose of uniformity. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it. [C24, 27, 31, 35, §10003.]

10004 [§75] Provisions not applicable to mortgages. The provisions of this chapter relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security. [C24, 27, 31, 35,§10004.]

10005 [§76] Definitions.

1. In this chapter, unless the context or subject matter otherwise requires:

"Action" includes counterclaim, set-off, and suit in equity.

Counterclaim, generally, §§11019, 11151

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods as proof of the possession or control of the goods or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" includes all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this chapter relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale, as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods or any legal successor in the interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as to security therefor.

Similar provisions, §§8297, 9485, 9718

2. A thing is done "in good faith" within the meaning of this chapter when it is in fact done honestly, whether it be done negligently or not.

3. A person is insolvent within the meaning of this chapter who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

4. Goods are in a "deliverable state" within the meaning of this chapter when they are in such a state that the buyer would, under the contract, be bound to take delivery of them. [C24, 27, 31, 35,§10005.]

10006 [§76a] Chapter does not apply to existing sales or contracts to sell. None of the provisions of this chapter shall apply to any sale, or to any contract to sell, made prior to the taking effect of this chapter. [C24, 27, 31, 35,§10006.]

10007 [§76b] No repeal of uniform warehouse receipt act or uniform bills of lading act. Nothing in this chapter or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the chapter to make uniform the law of warehouse receipts, or of the chapter to make uniform the law of bills of lading, or of the bulk sales law. [C24, 27, 31, 35,§10007.]

CHAPTER 436

SALES IN BULK

10008 Inventory—creditors—notice.
10009 Meaning of terms.
10010 Exceptions.
10011 Purchaser deemed a receiver.
10012 When purchaser protected.

10008 Inventory — creditors — notice. The sale, transfer, or assignment, in bulk, of any part or the whole of a stock of merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferor, or assignor, shall be void as against the creditors of the seller, transferor, or assignor:

1. *Inventory.* Unless the seller, transferor, assignor and purchaser, transferee, and assignee, shall, at least seven days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller, transferor, and assignor of each article to be included in the sale; and

2. *Creditors.* Unless the purchaser, transferee, and assignee demand and receive from the seller, transferor, and assignor a written list of names and addresses of the creditors of the seller, transferor, and assignor, with the amount of the indebtedness due or owing to each and certified by the seller, transferor, and assignor, under oath, to be a full, accurate, and complete list of his creditors, and of his indebtedness; and

3. *Notice.* Unless the purchaser, transferee, and assignee shall, at least seven days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms, and conditions thereof. [SS15,§§2911-a,-b; C24, 27, 31, 35, §10008.]

10009 Meaning of terms. Sellers, transferors and assignors, purchasers, transferees and assignees, under this chapter, shall include corporations, associations, copartnerships, and individuals. [S13,§2911-c; C24, 27, 31, 35, §10009.]

37GA, ch 64, §2, editorially divided

10010 Exceptions. Nothing contained in this chapter shall apply to sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process. [S13,§2911-c; C24, 27, 31, 35,§10010.]

10011 Purchaser deemed a receiver. Any purchaser, transferee, or assignee who shall not conform to the provisions of this chapter shall, upon application of any of the creditors of the seller, transferor, or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise, and fixtures that have come into his possession by virtue of such sale, transfer, or assignment. [C24, 27, 31, 35,§10011.]

37GA, ch 64, §8, editorially divided

10012 When purchaser protected. Any purchaser, transferee, or assignee who shall conform to the provisions of this chapter shall not be held in any way accountable to any creditor of the seller, transferor, or assignor, or to the seller, transferor, or assignor for any of the goods, wares, merchandise, or fixtures that have come into the possession of said purchaser, transferee, or assignee by virtue of such sale, transfer, or assignment. [C24, 27, 31, 35,§10012.]

CHAPTER 437

CHATTEL MORTGAGES AND CONDITIONAL SALES OF PERSONAL PROPERTY

GENERAL PROVISIONS

10013 Exempt property—mortgage by husband and wife—exception.
10014 Right to possession—title.
10015 Sales or mortgages—recording.
10016 Conditional sales.
10017 Filing equivalent of recording.
10018 Receipt.
10019 Option to record.
10020 Time of filing noted—effect.
10021 Index book.
10021.1 Under name of vendee.
10022 Transfers in representative capacity.
10023 Mortgage void after five years—extension.
10024 Assignments—how made.
10025 Copy furnished and certified—additional filings.
10026 Certified copies.
10027 Production of original.
10028 Release of mortgage.
10029 Original returned to maker.
10030 Originals destroyed.
10031 Fees.
10032 Real estate mortgage with chattel mortgage clause.

SALE OR LEASE OF UTILITY EQUIPMENT

10033 Conditional sale or lease authorized.
10034 Rental as purchase money.
10035 Validity of contract conditioned.
10036 Recording.
10037 Release and satisfaction.
10038 Fees.
10039 Prior contracts not affected.

GENERAL PROVISIONS

10013 Exempt property—mortgage by husband and wife—exception. No incumbrance of personal property which may be held exempt from execution by the head of a family, if a resident of this state, shall be of any validity as to such exempt property only, unless the same be by written instrument, and unless the husband and wife, if both be living, concur in and sign the same joint instrument. Incumbrances on the property sold, given to secure the purchase price, need only be signed and acknowledged by the purchaser. [C51,§1193; R60,§2201; C73,§1923; C97,§2906; C24, 27, 31, 35,§10013.]

Assignment of wages, §9454

10014 Right to possession—title. In the absence of stipulations in the mortgage, the mortgagee of personal property is entitled to the possession thereof, but the title shall remain in the mortgagor until divested by sale as provided by law. [C51,§1210; R60,§2217; C73,§1927; C97,§2911; C24, 27, 31, 35,§10014.]

10015 Sales or mortgages—recording. No sale or mortgage of personal property where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and such instrument or a true copy thereof is duly recorded by, or filed and deposited with, the recorder of the county where the mortgagor or vendor resides if he be a resident of this state at the time of the execution of the instrument; but if he be not such a resident then of the county where the property is situated at that time. [C51,§1193; R60,§2201; C73,§1923; C97,§2906; C24, 27, 31, 35,§10015.]

10016 Conditional sales. No sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor and vendee, or by the lessor and lessee, acknowledged by the vendor or vendee, or by the lessor or lessee, and such instrument or a true copy thereof is duly recorded by, or filed and deposited with, the recorder of deeds of the county where the vendee or lessee resides if he be a resident of this state at the time of the execution of the instrument; but if he be not such a resident, then of the county where the property is situated at that time. [C73,§1922; C97,§2905; C24, 27, 31, 35, §10016; 47GA, ch 223,§1.]

Referred to in §10021.1

10017 Filing equivalent of recording. Upon receipt of any such instrument or a true copy thereof affecting the title to personal property, the recorder shall indorse thereon the time of receiving it, and shall file the same in his office for the inspection of all persons, and such filing shall have the same force and effect as if recorded at length. [C24, 27, 31, 35,§10017.]

40ExGA, SF 75, §5, editorially divided

10018 Receipt. Upon request of person presenting such instrument or a true copy thereof for filing, the county recorder shall issue a receipt therefor, and such receipt shall describe the instrument as to grantor, grantee, date, consideration, and date filed. [C24, 27, 31, 35, §10018.]

10019 Option to record. The recorder shall, if requested, as soon as practicable, record such instrument or any assignment or release thereof, and enter in his index book in its proper place the page and book where the record may be found, and deliver the instrument to the owner upon request. [C51,§1196; R60,§2204; C73, §1926; C97,§2910; C24, 27, 31, 35,§10019.]

10020 Time of filing noted—effect. When any such instrument or a true copy thereof of the character above contemplated is filed, the recorder shall note thereon the day and exact time of filing the same, and forthwith enter in his index book the first seven requirements specified in section 10021; and from the time of said entry the sale or mortgage shall be deemed complete as to third persons, and have the same effect as though it had been accompanied by the actual delivery of the property sold or mortgaged. [C51,§1195; R60,§2203; C73,§1925; C97, §2908; C24, 27, 31, 35,§10020.]

10021 Index book. The county recorder shall keep an index book in which shall be entered a list of instruments affecting title to or incumbrance of personal property, which may be filed under this chapter. Such book shall be ruled into separate columns with appropriate heads, and shall set out:

1. Time of reception.
2. Name of each mortgagor or vendor.
3. Name of each mortgagee or vendee.
4. Date of instrument.
5. A general description of the kind or nature of the property.
6. Where located.
7. Amount secured.
8. When due.
9. Page and book where the record is to be found.
10. Extension.
11. When released.
12. Remarks and assignments.

[C51,§1194; R60,§2202; C73,§1924; C97,§2907; C24, 27, 31, 35,§10021.]

Referred to in §10020

10021.1 Under name of vendee. A sale or contract recorded or filed under the provisions of section 10016 need only be indexed under the name of the vendee or purchaser. [48GA, ch 234,§1.]

10022 Transfers in representative capacity. In indexing transfers of personal property made by an administrator, executor, guardian, referee, receiver, sheriff, commissioner, or other person acting in a representative capacity, the

recorder shall enter upon such index book the name and representative capacity of each person executing such instrument, and the owner of the property, if disclosed therein. [C97,§2909; C24, 27, 31, 35,§10022.]

10023 Mortgage void after five years—extension. Every mortgage so filed shall be void as against the creditors of the person making the same, or as against subsequent purchasers or mortgagees in good faith, after the expiration of five years after the maturity of the debt thereby secured, unless an extension agreement, duly executed by the mortgagor, shall be filed with the instrument to which it relates, and such extension agreement shall operate to continue the lien in the same manner as the original instrument. [C24, 27, 31, 35,§10023.]

10024 Assignments—how made. A chattel mortgage filed or recorded may be assigned of record by the mortgagee or the record holder thereof, by the execution of an appropriate written instrument, duly acknowledged, and filed in the same office where the mortgage is filed or recorded. If the mortgage is recorded, an assignment thereof may be made by the mortgagee or the record holder of the mortgage executing an assignment on the margin of the record of such mortgage, or, if the mortgage be filed but not recorded, such assignment may be indorsed upon the original instrument, but where the assignment is on the margin of the record or indorsed upon the instrument, the assignor shall be identified and his signature to such assignment witnessed and attested by the recorder or his deputy. [C24, 27, 31, 35,§10024.]

10025 Copy furnished and certified—additional filings. A duplicate or copy of such mortgage, bill of sale, or other instrument filed under the provisions of this chapter, shall be supplied by the county recorder upon request of any party in interest, and the payment of fees therefor. Such duplicate or copy shall be duly certified by the county recorder and may be filed in other counties of the state in the same manner as herein provided. [C24, 27, 31, 35, §10025.]

10026 Certified copies. A copy of such original instrument, duly certified by the county recorder in whose office the same shall have been filed, shall be received in evidence in all suits to which it may be applicable. [C24, 27, 31, 35,§10026.]

40ExGA, SF 75, §13, editorially divided

10027 Production of original. If in any suit or action, the due execution of such instrument or its genuineness be questioned in such manner as to render the production of the original instrument desirable or necessary, then the same may be produced by the recorder of the county in obedience to a proper judicial process or court order. [C24, 27, 31, 35,§10027.]

10028 Release of mortgage. Any mortgage or pledge of personal property may be released of record by filing with the original instrument a duly executed satisfaction piece or release of mortgage; or by the mortgagee or his authorized agent indorsing a satisfaction of said mortgage on the index book under the head of "remarks" in the same manner as mortgages are now released by marginal satisfaction, and when so released on index book, the recorder shall enter a memorandum thereof on the original instrument or on the record thereof, if recorded. [C24, 27, 31, 35,§10028.]

10029 Original returned to maker. When any unrecorded chattel mortgage or other instrument of writing or indebtedness, which may have been filed as herein provided, shall have been satisfied, it shall be the duty of the recorder, after making a proper entry of such satisfaction in the index book or record where the original instrument is recorded, to return the original instrument, with any extension, assignment, or release, thereto attached, to the mortgagor or person executing the same, upon request therefor. [C24, 27, 31, 35,§10029.]

10030 Originals destroyed. In case such unrecorded instrument, with the extension or release thereof, if any, be not returned as hereinbefore provided, after the expiration of five years from the maturity thereof, or the maturity of any extension thereof, the recorder shall destroy such chattel mortgages with the extension or releases thereto attached, or other instruments or writing relating thereto, by burning the same in the presence of the board of county supervisors, or a committee appointed by the board of supervisors from their own number, to superintend the same, and when so destroyed the date of such destruction shall be entered on the index record under "remarks". [C24, 27, 31, 35,§10030.]

10031 Fees. The fees to be collected by the county recorder under this chapter shall be as follows:

1. For filing any instrument affecting the title to or incumbrance of personal property, twenty-five cents each.

2. For recording or making certified copies of such instruments, fifty cents for the first four hundred words and ten cents for each one hundred additional words or fraction thereof. [C24, 27, 31, 35,§10031.]

Fees in general, §5177

10032 Real estate mortgage with chattel mortgage clause. Real estate mortgages which create an incumbrance on personal property, shall, after being recorded at length, be indexed in the chattel mortgage index book. Said indexing shall show the book and page where said mortgage is recorded and such record and index shall have the same effect as though said mortgage were retained by the recorder as a chattel mortgage, or as though the same had been recorded at length in the chattel mortgage records and indexed accordingly. When such mortgage is released of record, the recorder shall make entry thereof on said chattel mortgage index book. [C24, 27, 31, 35,§10032.]

SALE OR LEASE OF UTILITY EQUIPMENT

10033 Conditional sale or lease authorized. In any contract for the sale of railroad or street railway equipment or rolling stock or power house, electric or other equipment of street or interurban railways or of electric light and power companies or of steam-heating companies, such equipment including engines, boilers, generators, switchboards, transformers, motors, and other machinery and appliances, it may be agreed that the title thereto, although possession thereof be delivered immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money. [C97,§2051; S13,§2051; C24, 27, 31, 35, §10033.]

Referred to in §10039
S13, §2051, editorially divided

10034 Rental as purchase money. In any contract for the leasing or hiring of such property, it may be stipulated for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee. [C97,§2051; S13,§2051; C24, 27, 31, 35,§10034.]

Referred to in §10039

10035 Validity of contract conditioned. No such contract shall be valid as against any subsequent judgment creditor, or subsequent bona fide purchaser for value without notice, unless:

1. The same shall be evidenced by an instrument executed by the parties and acknowledged by the vendee, or lessee, or bailee, as the case may be, in the same manner as deeds are acknowledged or proved.
2. Such instrument shall be filed for record in the office of the secretary of state.
3. Each locomotive engine, stationary engine, boiler, switchboard, transformer, motor, other piece of machinery or appliance or car sold, leased, or hired as aforesaid shall have the name of the vendor, lessor, or bailor plainly marked on each side thereof, followed by the word "owner", "lessor", or "bailor", as the case may be. [C97,§2051; S13,§2051; C24, 27, 31, 35, §10035.]

Referred to in §10039
Acknowledgment of deed, §10085 et seq.

10036 Recording. The contracts herein authorized shall be filed with the secretary of state who shall number consecutively all such contracts filed in his office and shall maintain a card index thereof alphabetically arranged, and shall preserve the same as permanent records of his office. [C97,§2052; S13,§2052; C24, 27, 31, 35,§10036.]

Referred to in §10039
40ExGA, HF 190, §3, editorially divided

10037 Release and satisfaction. On payment in full of the purchase money and the performance of the terms and conditions stipulated in such contract, a declaration in writing to that effect may be made by the vendor, lessor, or bailor, or his or its assignee, either on the margin of the record of the contract, duly attested, or in a separate instrument to be acknowledged by the vendor, lessor, or bailor, or his or its assignee, and recorded in such record. [C97,§2052; S13,§2052; C24, 27, 31, 35,§10037.]

Referred to in §10039

10038 Fees. For such service the secretary of state shall charge a filing fee of one dollar for each contract and each declaration. [C97,§2052; S13,§2052; C24, 27, 31, 35,§10038.]

Referred to in §10039

10039 Prior contracts not affected. Sections 10033 to 10038, inclusive, shall not invalidate or affect in any way any contract of the kind referred to in sections 10033 to 10035, inclusive, made prior to April 24, 1894, and any such contract made prior to said date upon compliance with the provisions of said sections 10033 to 10038, inclusive, may be recorded as therein provided. [C97,§2053; C24, 27, 31, 35,§10039.]

TITLE XXV

REAL PROPERTY

CHAPTER 438

REAL PROPERTY IN GENERAL

GENERAL PRINCIPLES

10040 Who deemed seized.
10041 Estate in fee simple.
10042 Conveyance passes grantor's interest.
10043 After-acquired interest—exception.
10044 Adverse possession.
10045 Future estates.
10046 Contingent remainders.
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10050 Conveyances by married women.
10051 Conveyances by husband and wife.
10052 Covenants—spouse not bound.
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10055 Cotenant liable for rent.
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REGISTRATION OF FARMS

10061 Authorization—certificate.
10062 Vested interest.
10063 Fee.
10064 Transfer of farm.
10065 Cancellation—fee.

GENERAL PRINCIPLES

10040 Who deemed seized. All persons owning real estate not held by an adverse possession shall be deemed to be seized and possessed of the same. [C51,§1199; R60,§2207; C73,§1928; C97,§2912; C24, 27, 31, 35,§10040.]

10041 Estate in fee simple. The term "heirs" or other technical words of inheritance are not necessary to create and convey an estate in fee simple. [C51,§1200; R60,§2208; C73, §1929; C97,§2913; C24, 27, 31, 35,§10041.]

10042 Conveyance passes grantor's interest. Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used. [C51,§1201; R60,§2209; C73,§1930; C97,§2914; C24, 27, 31, 35,§10042.]

10043 After-acquired interest — exception. Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee. But if the wife or husband of such grantor joins in such conveyance for the purpose of relinquishing dower or homestead only, and subsequently acquires an interest therein as above defined, it shall not be held to inure to the benefit of the grantee. [C51,§1202; R60,§2210; C73, §1931; C97,§2915; C24, 27, 31, 35,§10043.]

10044 Adverse possession. Adverse possession of real estate does not prevent any person from selling his interest in the same. [C51, §1203; R60,§2211; C73,§1932; C97,§2916; C24, 27, 31, 35,§10044.]

10045 Future estates. Estates may be created to commence at a future day. [C51, §1204; R60,§2212; C73,§1923; C97,§2917; C24, 27, 31, 35,§10045.]

10046 Contingent remainders. A contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner in which it would have taken effect if it had been an executory devise or a springing or shifting use, and shall, as well as such limitations, be subject to the rule respecting remoteness known as the rule against perpetuities, exclusive of any other supposed rule respecting limitations to successive generations or double possibilities. [C24, 27, 31, 35, §10046.]

Referred to in §10047

This and the two following sections are (except the limiting date) literal copies of sections 3 and 10, chapter 184, General Laws of Massachusetts, 1921, Vol. II

40ExGA, SF 281, §2, editorially divided

10047 Applicability. Section 10046, except so far as declaratory of existing law, shall apply only to instruments executed on or after July 1, 1925, and to wills and codicils revived or confirmed by a will or codicil executed on or after said date. [C24, 27, 31, 35,§10047.]

10048 Defeating expectant estate. No expectant estate shall be defeated or barred by an alienation or other act of the owner of the precedent estate, nor by the destruction of such precedent estate by disseizin, forfeiture, surrender, or merger. [C24, 27, 31, 35,§10048.]

10049 Declarations of trust. Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance; but this provision

does not apply to trusts resulting from the operation or construction of law. [C51,§1205; R60, §2213; C73,§1934; C97,§2918; C24, 27, 31, 35, §10049.]

Statute of frauds, §11285

10050 Conveyances by married women. A married woman may convey or incumber any real estate or interest therein belonging to her, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons. [C51,§1207; R60,§2215; C73,§1935; C97,§2919; C24, 27, 31, 35, §10050.]

10051 Conveyances by husband and wife. Every conveyance made by a husband and wife shall be sufficient to pass any and all right of either in the property conveyed, unless the contrary appears on the face of the conveyance. [R60,§2255; C73,§1936; C97,§2920; C24, 27, 31, 35,§10051.]

10052 Covenants—spouse not bound. Where either the husband or wife joins in a conveyance of real estate owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance, unless it is expressly so stated on the face thereof. [C73, §1937; C97,§2921; C24, 27, 31, 35,§10052.]

10053 Title and possession of mortgagor. In absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereto. [C51,§1210; R60,§2217; C73,§1938; C97,§2922; C24, 27, 31, 35,§10053.]

10054 Tenancy in common. Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed. [C51,§1206; R60,§2214; C73,§1939; C97,§2923; C24, 27, 31, 35,§10054.]

10055 Cotenant liable for rent. In all cases in which any real estate is now or shall be hereafter held by two or more persons as tenants in common, and one or more of said tenants shall have been or shall hereafter be in possession of said real estate, it shall be lawful for any one or more of said tenants in common, not in possession, to sue for and recover from such tenants in possession, his or their proportionate part of the rental value of said real estate for the time, not exceeding a period of five years, such real estate shall have been in possession as aforesaid. [C24, 27, 31, 35,§10055.]

37GA, ch 27, §1, editorially divided

10056 Partition — cotenant charged with rent. In case of partition of such real estate held in common as aforesaid, the parties in possession shall have deducted from their distributive shares of said real estate the rental value thereof to which their cotenants are entitled. [C24, 27, 31, 35,§10056.]

10057 Vendor's lien. No vendor's lien for unpaid purchase money shall be enforced in any court of this state after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit by the vendor, his executor, or assigns to enforce such lien. [C73,§1940; C97,§2924; C24, 27, 31, 35, §10057.]

Referred to in §10058
C97, §2924, editorially divided

10058 Fraudulent conveyances. Nothing in section 10057 shall be construed to deprive a vendor of any remedy now existing against conveyance procured through the fraud or collusion of the vendees therein, or persons purchasing of such vendees with notice of such fraud or lien. [C73,§1940; C97,§2924; C24, 27, 31, 35, §10058.]

10059 Rule in Shelley's case. The rule or principle of the common law known as the rule in Shelley's case is hereby abolished and is declared not to be a part of the law of this state. [S13,§2924-a; C24, 27, 31, 35,§10059.]

10060 Devise, bequest, or conveyance not enlarged. No express devise, bequest, or conveyance of an estate for life, or other limited estate in real or personal property shall be enlarged or construed to pass any greater estate to the devisee, legatee, or grantee thereof by reason of any devise, bequest, or conveyance to the heirs, heirs of the body, children, or issue of such devisee, legatee, or grantee; but this section shall not in any manner or under any circumstances be so construed as to impair or affect the vested rights of any person in or to any lands or estates acquired prior to July 4, 1907. [S13,§2924-b; C24, 27, 31, 35,§10060.]

REGISTRATION OF FARMS

10061 Authorization—certificate. Any owner of a farm in the state may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the county recorder of the county in which said farm is located.

Such recorder shall furnish to such landowner a proper certificate setting forth said name and a description of such lands. [S13, §2924-c; C24, 27, 31, 35,§10061.]

Referred to in §10063
S13,§2924-c, editorially divided

10062 Vested interest. When any name shall have been recorded as the name of any farm in such county, such name shall not be recorded as the name of any other farm in the same county. [S13,§2924-c; C24, 27, 31, 35,§10062.]

10063 Fee. Any person having the name of his farm recorded as provided in section 10061 shall first pay to the county recorder a fee of one dollar, which fee shall be paid to the county treasurer as other fees are paid to the county treasurer by such recorder. [S13,§2924-d; C24, 27, 31, 35,§10063.]

10064 Transfer of farm. When any owner of a farm, the name of which has been recorded

as hereinbefore provided, transfers by deed or otherwise the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then in that event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed of conveyance. [S13,§2924-e; C24, 27, 31, 35,§10064.]

10065 Cancellation—fee. When any owner of a registered farm desires to cancel the registered name thereof, he shall state on the margin of the record of the register of such name the following: "This name is canceled and I hereby release all rights thereunder", which shall be signed by the person canceling such name and attested by the county recorder. For such latter service the county recorder shall charge a fee of twenty-five cents, which shall be paid to the county treasurer as other fees are paid to the county treasurer by him. [S13, §2924-f; C24, 27, 31, 35,§10065.]

CHAPTER 439

CONVEYANCES

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10066 "Instruments affecting real estate" defined—revocation. All instruments containing a power to convey, or in any manner relating to real estate, shall be held to be instruments affecting the same; and no such instrument, when certified and recorded as in this chapter prescribed, can be revoked as to third parties by any act of the parties by whom it was executed, until the instrument containing such revocation is acknowledged and filed for record in the same office in which the instrument containing such power is recorded. [C51,§1226; R60,§2234; C73,§1969; C97,§2957; C24, 27, 31, 35,§10066.]

10067 Corporation having seal. In the execution of any written instrument conveying, incumbering, or affecting real estate by a corporation that has adopted a corporate seal, the seal of such corporation shall be attached or affixed to such written instrument. [C51,§974; R60,§1823; C73,§2112; C97,§3068; S13,§3068; C24, 27, 31, 35,§10067.]

Seals generally, §9489
40ExGA, HF 77, §2, editorially divided

10068 Corporation not having seal. If the corporation has not adopted a corporate seal, such fact shall be stated in such written instrument. [S13,§3068; C24, 27, 31, 35,§10068.]

10069 Release of corporate lien—omission of seal. It shall not hereafter be necessary to attach or affix the corporate seal to any release or satisfaction of any mortgage, judgment, or other lien, that is made or entered by any corporation on the page of the official record where any such lien appears, but the officer executing such release or satisfaction shall therein certify

that same is executed with authority of the board of directors of such corporation, and the county recorder or deputy shall attach thereto a statement showing the relation such officer then bears to the corporation. [S13,§3068; C24, 27, 31, 35, §10069.]

10070 Contract for deed — presumption of abandonment. When the record shows that a contract or bond for a deed has been given prior to January 1, 1900, and the record discloses no performance of the same and that more than ten years have elapsed since the contract by its terms was to be performed, such contract shall be deemed abandoned and of no effect and the land freed from any lien or defect on account of such contract. [S13,§2963-j; C24, 27, 31, 35, §10070.]

10071 Christian names—variation — effect. When there is a difference between the christian names or initials in which title is taken, and the christian names or initials of the grantor in a succeeding conveyance, and the surnames in both instances are written the same or sound the same, such conveyances or the record thereof shall be presumptive evidence that the surname in the several conveyances and instruments refers to the same person. This section shall only apply to conveyances executed prior to January 1, 1915. [S13,§2963-k; C24, 27, 31, 35, §10071.]

Temporary provisions, see 43GA, ch 242

10072 Assignment of certificate of entry deemed deed. When the record shows:

1. That the original entry, certificate of entry, receipt, or duplicate thereof has been assigned;
2. That prior or subsequent to such assignment, the United States or state issued a patent or conveyance to the assignor;
3. That no deed of conveyance appears on record from the original entryman or assignor to the assignee; and
4. That the present record owner holds title under such assignment—

such assignment shall have the same force and effect as a deed of conveyance and shall be conclusively presumed to carry all right, title, and interest of the patentee of said real estate, the same as though a deed of conveyance had been subsequently executed by the patentee or assignor to a subsequent grantor. [S13,§2963-n; C24, 27, 31, 35,§10072.]

10073 Affidavits explanatory of title—presumption. Affidavits explaining any defect in the chain of title to any real estate may be recorded as instruments affecting the same, but no one except the owner in possession of such real estate shall have the right to file such affidavit. Such affidavit or the record thereof, including all such affidavits now of record, shall raise a presumption from the date of recording that the purported facts stated therein are true; after the lapse of three years from the date of such recording, such presumption shall be conclusive. [C51,§1226; R60,§2234; C73,§1969; C97,§2957; S13,§2963-i; C24, 27, 31, 35,§10073.]

10074 Railroad land grants—duty to record. Every railroad company which owns or claims real estate in this state, granted by the government of the United States or this state to aid in the construction of its railroad, where it has not already done so, shall place on file and cause to be recorded, in each county wherein the real estate granted is situated, evidence of its title or claim of title, whether the same consists of patents from the United States, certificates from the secretary of the interior, or governor of this state, or the proper land office of the United States or this state. Where no patent was issued, reference shall be made in said certificate to the acts of congress, and the acts of the legislature of this state, granting such lands, giving the date thereof, and date of their approval under which claim of title is made. [C97,§2939; C24, 27, 31, 35,§10074.]

10075 Patents covering land in different counties. Where the certificate of the secretary of the interior or the patents cover real estate situated in more than one county, the secretary of state shall, upon the application of any railroad company or its grantee, prepare and furnish, to be recorded, a list of all the real estate situated in any one county so granted, patented, or certified; and all such evidences of title shall be entered by the auditor upon the index, transfer, and plat books. [C97,§2939; C24, 27, 31, 35, §10075.]

10076 Record — constructive notice. The evidence of title shall be filed with the recorder of deeds of the county in which the real estate is situated, who shall record the same, and place an abstract thereof upon the index of deeds. The recording thereof shall be constructive notice to all persons, as provided in other cases of entries upon said index, and the recorder shall receive the same fees therefor as for recording other instruments. [C97,§2940; C24, 27, 31, 35,§10076.]

Fees, §5177

10077 Transcript of instruments. Any person interested therein may procure from any recorder in this state a transcript of any instrument affecting real estate which is of record in his office. Such transcript shall be certified by the recorder, and the clerk of the district court shall certify under the seal of his office to the signature of such recorder and his official character. [S13,§2938-a; C24, 27, 31, 35,§10077.]

Referred to in §10078
Fees, §1220

10078 Transcript recorded. A transcript of the record of any instrument affecting real estate, certified as provided in section 10077, shall be entitled to record in the office of the recorder of any other county in which is situated any of the real estate affected by such instrument. The effect of the recording of such transcript shall be the same as the recording of the original instrument. [S13,§2938-a; C24, 27, 31, 35,§10078.]

10079 Grantor described as "spouse" or "heir"—presumption. All conveyances or the

record title thereof of real estate executed prior to January 1, 1900, wherein the grantor or grantors described herself, himself, or themselves as the surviving spouse, heir at law, heirs at law, surviving spouse and heir at law, or surviving spouse and heirs at law, of some person deceased in whom the record title or ownership of said real estate previously vested, shall be conclusive evidence of the facts so recited as far as they relate to the right of the grantor or grantors to convey, as fully as if the record title of said grantor or grantors had been established by due probate proceedings in the county wherein the real estate is situated. [S13, §2963-e; C24, 27, 31, 35,§10079.]

10080 Notarial seals of nonresidents—presumption. Any notarial seal purporting to have been affixed to any instrument in writing, by any notary public residing elsewhere than in this state, shall be prima facie evidence that the words thereon engraved conform to the requirements of the law of the place where such certificate purports to have been made. [S13, §2943-a; C24, 27, 31, 35,§10080.]

10081 Records transcribed. The board of supervisors of any county may have copied, indexed, and arranged any deed, probate, mortgage, court, or county record, or government survey belonging or relating to said county, and have a complete index thereof made; and may cause any index of deeds, mortgages, or other records to be correctly copied. [R60,§§2258, 2259; C73,§§1971, 1972; C97,§2961; C24, 27, 31, 35,§10081.]

Referred to in §10082

10082 Compensation. The board of supervisors may employ any suitable person to perform the labor contemplated in section 10081, the amount of compensation therefor to be previously fixed by them, not exceeding six cents for each one hundred words of the records proper, and twelve and one-half cents for each one hundred words of indexing. [R60,§2260; C73,§1973; C97,§2962; C24, 27, 31, 35,§10082.]

10083 Certification—effect. When any such records are copied, the officer to whose office the original records belong shall compare the copy so made with the original, and when found correct, shall attach his certificate in each volume or book of such copied records, to the effect that he has compared such copies with the original and they are true and correct, and such copied records shall thereupon have the same force and effect in all respects as the original records. [R60,§§2261, 2262; C73,§§1974, 1975; C97,§2963; C24, 27, 31, 35,§10083.]

10084 Forms of conveyance. The following or other equivalent forms of conveyance, varied to suit circumstances, are sufficient for the purposes herein contemplated:

1. FOR A QUITCLAIM DEED

For the consideration of.....dollars, I hereby quitclaim to.....all my interest in the following tract of real estate (describing it).

2. FOR A DEED IN FEE SIMPLE WITHOUT WARRANTY

For the consideration of.....dollars, I hereby convey to.....the following tract of real estate (describing it).

3. FOR A DEED IN FEE WITH WARRANTY

The same as the last preceding form, adding the words: "And I warrant the title against all persons whomsoever" (or other words of warranty, as the party may desire).

4. FOR A MORTGAGE

The same as deed of conveyance, adding the following: "To be void upon condition that I pay", etc. [C51,§1232; R60,§2240; C73,§1970; C97,§2958; C24, 27, 31, 35,§10084.]

10085 Acknowledgments within state. The acknowledgment of any deed, conveyance, or other instrument in writing by which real estate in this state is conveyed or incumbered, if made within this state, must be before some court having a seal, or some judge or clerk thereof, or some county auditor, or justice of the peace within the county, or notary public within the county of his appointment or in an adjoining county in which he has filed with the clerk of the district court a certified copy of his certificate of appointment. Each of the officers above named is authorized to take and certify acknowledgments of all written instruments, authorized or required by law to be acknowledged. [C51,§1217; R60,§2226; C73,§1955; C97,§2942; S13,§2942; C24, 27, 31, 35,§10085.]

Certain acknowledgments legalized, §10387.1

10086 Acknowledgments outside of state. When made out of the state but within the United States, it shall be before a judge of a court of record, or officer holding the seal thereof, or a commissioner appointed by the governor of this state to take the acknowledgment of deeds, or some notary public, or justice of the peace. [R60,§2245; C73,§1956; C97,§2943; S13, §2943; C24, 27, 31, 35,§10086.]

Referred to in §10088

10087 Certificate of authenticity. When made out of the state but within the United States and before a judge, or justice of the peace, a certificate, under the official seal of the clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state of the state or territory within which such acknowledgment was taken, under the seal of his office, of the official character of said judge, or justice, and of the genuineness of his signature, shall accompany said certificate of acknowledgment. [R60,§2245; C73,§1956; C97,§2943; S13,§2943; C24, 27, 31, 35,§10087.]

10088 Authorized foreign officials. The proof or acknowledgment of any deed or other written instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence, when made by any person without this state and within any other state, territory, or district of the United States, may also be made before any officer of such state, territory, or district authorized by the laws thereof to take the proof and acknowledg-

ment of deeds; and when so taken and certified as provided in section 10089, may be recorded in this state, and read in evidence in the same manner and with like effect as proofs and acknowledgments taken before any of the officers named in section 10086. [C97,§2944; C24, 27, 31, 35,§10088.]

Referred to in §10089

10089 Certificate of authenticity. To entitle any conveyance or written instrument, acknowledged or proved under section 10088, to be read in evidence or recorded in this state, there shall be subjoined or attached to the certificate of proof or acknowledgment signed by such officer a certificate of the secretary of state of the state or territory in which such officer resides, under the seal of such state or territory, or a certificate of the clerk of a court of record of such state, territory, or district in the county in which said officer resides or in which he took such proof or acknowledgment, under the seal of such court. Such certificate shall comply substantially with section 10090. [C97,§2945; C24, 27, 31, 35,§10089.]

Referred to in §10088

10090 Form of authentication. The following form of authentication of the proof or acknowledgment of a deed or other written instrument, when taken without this state and within any other state, territory, or district of the United States, or any form substantially in compliance with the foregoing provisions of this chapter, shall be used:

(Begin with a caption specifying the state, territory or district, and county or place where the authentication is made.)

"I, ..., clerk of the..... court in and for said county, which court is a court of record, having a seal (or I,....., secretary of state of such state or territory), do hereby certify that....., by and before whom the foregoing acknowledgment or proof was taken, was at the time of taking the same.....residing
(Name of office held)
or authorized to act in said county, and was duly authorized by the laws of said state, territory, or district to take and certify acknowledgments or proofs of deeds of land in said state, territory, or district, and that said conveyance and the acknowledgment thereof are in due form of law; and, further, that I am well acquainted with the handwriting of said..... ....., and that I verily believe that the signature to said certificate of acknowledgment or proof is genuine. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court or state this.....day of ....., A. D. 19....." [C97,§2946; C24, 27, 31, 35,§10090.]

Referred to in §10089

10091 Acknowledgments outside United States. When the acknowledgment is made without the United States, it may be before any ambassador, minister, secretary of legation, consul, vice consul, charge d'affaires, consular agent, or any other officer of the United States in a foreign country who is authorized to issue certificates under the seal of the United States. [C73,§1957; C97,§2947; C24, 27, 31, 35,§10091.]

10092 Authorized alien officials. Said instruments may also be acknowledged or proved without the United States before any officer of a foreign country who is authorized by the laws thereof to certify to the acknowledgments of written documents. [C73,§1957; C97,§2947; C24, 27, 31, 35,§10092.]

40ExGA, HF 77, §25, editorially divided

10093 Certificate of authenticity. The certificate of acknowledgment by a foreign officer must be authenticated by one of the abovenamed officers of the United States, whose official written statement that full faith and credit is due to the certificate of such foreign officer shall be deemed sufficient evidence of the qualification of said officer to take acknowledgments and certify thereto, and of the genuineness of his signature, and seal if he have any. [C73, §1957; C97,§2947; C24, 27, 31, 35,§10093.]

10094 Certificate of acknowledgment. The court or officer taking the acknowledgment must indorse upon the deed or instrument a certificate setting forth the following particulars:

1. The title of the court or person before whom the acknowledgment was made.
2. That the person making the acknowledgment was known to the officer taking the acknowledgment to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness, naming him.
3. That such person acknowledged the execution of the instrument to be his voluntary act and deed. [C51,§1219; R60,§2227; C73,§1958; C97,§2948; C24, 27, 31, 35,§10094.]

10095 Proof of execution and delivery in lieu of acknowledgment. Proof of the due and voluntary execution and delivery of a deed or other instrument may be made before any officer authorized to take acknowledgments, by one competent person other than the vendee or other person to whom the instrument is executed, in the following cases:

1. If the grantor dies before making the acknowledgment.
2. If his attendance cannot be procured.
3. If, having appeared, he refuses to acknowledge the execution of the instrument. [C51, §§1220, 1221; R60,§2228; C73,§1959; C97,§2949; C24, 27, 31, 35,§10095.]

10096 Contents of certificate. The certificate indorsed by the officer upon a deed or other instrument thus proved must state:

1. The title of the officer taking the proof.
2. That it was satisfactorily proved that the grantor was dead, or that for some other reason his attendance could not be procured in order to make the acknowledgment, or that, having appeared, he refused to acknowledge the same.
3. The name of the witness by whom proof was made, and that it was proved by him that

the instrument was executed and delivered by the person whose name is thereunto subscribed as a party. [C51,§1222; R60,§2230; C73,§1960; C97,§2950; C24, 27, 31, 35,§10096.]

10097 Subpoenas. An officer having power to take the proof hereinbefore contemplated may issue the necessary subpoenas, and compel the attendance of witnesses residing within the county, in the manner provided for the taking of depositions. [C51,§1225; R60,§2233; C73,§1965; C97,§2956; C24, 27, 31, 35,§10097.]

Attendance of witnesses, §11367

10098 Use of seal. The certificate of proof or acknowledgment may be given under seal or otherwise, according to the mode by which the officer making the same usually authenticates his formal acts. [C51,§1223; R60,§2231; C73, §1961; C97,§2951; C24, 27, 31, 35,§10098.]

10099 Married women. The acknowledgment of a married woman, when required by law, may be taken in the same form as if she were sole, and without any examination separate and apart from her husband. [C97,§2960; C24, 27, 31, 35,§10099.]

10100 Attorney in fact. The execution of any deed, mortgage, or other instrument in writing, executed by any attorney in fact, may be acknowledged by the attorney executing the same. [R60,§2251; C73,§1962; C97,§2952; C24, 27, 31, 35,§10100.]

10101 Certificate of acknowledgment. The person taking the acknowledgment must indorse upon such instrument a certificate, setting forth the following particulars:

1. The title of the person before whom the acknowledgment was taken.

2. That the person making the acknowledgment was known to the officer taking the acknowledgment to be the identical person whose name is subscribed to the instrument as attorney for the grantor therein named, or that such identity was proved to him by at least one credible witness, to him personally known and therein named.

3. That such person acknowledged said instrument to be the act and deed of the grantor therein named, by him, as such attorney thereunto appointed, voluntarily done and executed. [R60,§2252; C73,§1963; C97,§2953; C24, 27, 31, 35,§10101.]

10102 Officers of corporation. If the acknowledgment is made by the officers of a corporation, the certificate shall show that such persons as such officers, naming the office of each person, acknowledged the execution of the instrument as provided in section 10103. [C97, §2954; C24, 27, 31, 35,§10102.]

Employee of corporation as notary, §1205.1

10103 Forms of acknowledgment. The following forms of acknowledgment shall be sufficient in the cases to which they are respectively applicable. In each case where one of these forms is used, the name of the state and county where the acknowledgment is taken shall precede the body of the certificate, and the signature and official title of the officer shall follow it as indicated in the first form and shall constitute a part of the certificate, and the seal of the officer shall be attached when necessary under the provision of this chapter. No certificate of acknowledgment shall be held to be defective on account of the failure to show the official title of the officer making the certificate if such title appears either in the body of such certificate or in connection therewith, or with the signature thereto.

1. In the case of natural persons acting in their own right:

State of....., }ss.
County of..... }

On this.....day of....., A. D. 19...., before me....., personally ap-
(Insert title of acknowledging officer)
peared....., to me known to be the person...named in and who executed the foregoing instrument, and acknowledged that..... executed the same as.....voluntary act and deed.

.....
Notary Public in and for said county.

2. In the case of natural persons acting by attorney:

On this.....day of....., A. D. 19...., before me....., personally appeared.....
(Insert title of acknowledging officer)
to me known to be the person who executed the foregoing instrument in behalf of....., and acknowledged that he executed the same as the voluntary act and deed of said.....

3. In the case of corporations or joint-stock associations:

On this.....day of....., A. D. 19...., before me, a....., in
(Insert title of acknowledging officer)
and for said county, personally appeared....., to me personally known, who being by me duly [sworn or affirmed] did say that he is.....
.....of said [corporation association], that
(Insert title of executing officer)
[the seal affixed to said instrument is the seal of said / no seal has been procured by the said]
[corporation association] and that said instrument was signed and sealed on behalf of the said [corporation association] by authority of its board of [directors trustees] and the said .....acknowledged the execution of said instrument to be the voluntary act and deed of said [corporation association] by it voluntarily executed.

(In all cases add signature and title of the officer taking the acknowledgment, and strike from between the parentheses the word or clause not used, as the case may be.) [C97,§2959; C24, 27, 31, 35,§10103.]

Referred to in §10102

10104 Liability of officer. Any officer, who knowingly misstates a material fact in either of the certificates mentioned in this chapter, shall be liable for all damages caused thereby, and shall be guilty of a misdemeanor, and fined any sum not exceeding the value of the property conveyed or otherwise affected by the instrument on

which such certificate is indorsed. [C51,§1224; R60,§2232; C73,§1964; C97,§2955; C24, 27, 31, 35,§10104.]

10105 Recording. No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless filed in the office of the recorder of the county in which the same lies, as hereinafter provided. [C51,§1211; R60, §2220; C73,§1941; C97,§2925; C24, 27, 31, 35, §10105.]

10106 Acknowledgment as condition precedent. It shall not be deemed lawfully recorded, unless it has been previously acknowledged or proved in the manner prescribed in this chapter, except that affidavits need not be thus acknowledged. [C51,§1212; R60,§2221; C73,§1942; C97, §2926; C24, 27, 31, 35,§10106.]

10107 Assignment by separate instrument. Recorded mortgages upon real estate may be assigned of record by the mortgagee or the record holder thereof, by the execution of an appropriate written instrument duly acknowledged and recorded in the county in which such real estate is situated. [C24, 27, 31, 35,§10107.]

40ExGA, HF 77, §39, editorially divided

10108 Assignment by marginal entry. If such mortgage is recorded, an assignment thereof may be made by the mortgagee or the record holder of such mortgage executing an assignment on the margin of the record of such mortgage, and the assignor shall be identified and his signature to such assignment witnessed and attested by the recorder or his deputy. [C24, 27, 31, 35,§10108.]

10108.1 Marginal reference. Where any mortgage, contract, or other instrument constituting an incumbrance upon real estate shall be assigned or released by a separate instrument it shall be the duty of the recorder to enter in the margin of the record of such mortgage, contract, or instrument the character of such assignment or release and the book and page where the same is recorded. [C27, 31, 35,§10108-a1.]

Dual methods of satisfaction, §12384

10108.2 Assignment—report to auditor required. The assignment, sale, or transfer of all real estate mortgages or notes secured by real estate mortgages or other evidences of indebtedness secured by real estate mortgages, shall be reported to the county auditor of the residence of the assignee, by the assignee thereof, within thirty days from the date of the execution of said assignment, sale or transfer, unless such assignment be recorded in the county recorder's office of the county in which the assignee resides. [C35,§10108-e1.]

10108.3 When assignment void. No such assignment shall be of any validity until the same be reported to said county auditor. [C35, §10108-e2.]

10108.4 Existing assignments — when reportable. The assignment, sale or transfer of mortgages or notes secured thereby, heretofore sold, assigned or transferred, shall be reported to the county auditor, aforesaid, within thirty days after taking effect of this act [45GA, ch 166]. [C35,§10108-e3.]

10109 Index books. The recorder must keep index books, the pages of which are so divided as to show in parallel columns:

1. Each grantor.
2. Each grantee.
3. The time when the instrument was filed.
4. The date of the instrument.
5. The nature of the instrument.
6. The book and page where the record thereof may be found.
7. The description of the real estate conveyed.

[C51,§1213; R60,§2222; C73,§1943; C97,§2935; S13,§2935; C24, 27, 31, 35,§10109.]

10110 Index for affidavits. In case of affidavits each and every affidavit filed for record shall be indexed in appropriately ruled columns as follows:

Affidavit of	Concerning Whom	Concerning Lands in							Remarks
		Lot	Blk.	Addition	Town	Sec.	Twp.	Rng.	

Affiant	Date of Filing				Date of Instrument			Where Recorded	
	Month	Day	Year	Hour A.M. P.M.	Month	Day	Year	Book	Page

[S13,§2935; C24, 27, 31, 35,§10110.]

10111 Separate indexes required. Separate index books shall be kept for mortgages and satisfactions or releases of same, one for those containing descriptions of lots, and one for those containing land; and separate books for other conveyances of real estate, one for lots, and one for lands; and an index book shall be kept for powers of attorney and affidavits; all of above indexes to be arranged alphabetically as provided in section 10112. [S13,§2935; C24, 27, 31, 35,§10111.]

10112 Alphabetical arrangement. The entries in such book shall show the names of the respective grantors and grantees, arranged in alphabetical order. When such instrument is executed by an administrator, executor, guardian, referee, commissioner, receiver, sheriff, or other person acting in a representative capacity, the recorder shall enter upon the index book the name and representative capacity of each person executing the instrument and the owner of the property if disclosed therein. [C51, §1215; R60,§2224; C73,§1945; C97,§2937; C24, 27, 31, 35,§10112.]

Referred to in §10111

10113 Town lot deeds and mortgages. The recorder shall index and record all deeds, mortgages, and other instruments affecting lots in cities, towns, or villages, the plats whereof are recorded, in separate books from those in which other conveyances of real estate are recorded. [R60,§2241; C73,§1947; C97,§2941; S13,§2941; C24, 27, 31, 35,§10113.]

10114 Deeds covering both lands and lots. Where any instrument contains a description of land or lots in cities, towns, or villages, the plats whereof are recorded, and other land, he shall record such instrument in but one record and charge but one fee, but shall index in both land and town lot indexes. [S13,§2941; C24, 27, 31, 35,§10114.]

10115 Filing and indexing — constructive notice. The recorder must indorse upon every instrument properly filed for record in his office, the day, hour, and minute of such filing, and forthwith enter in the index book the entries required to be made therein, except the book and page where the complete record will appear, and such filing and indexing shall constitute constructive notice to all persons of the rights of the grantees conferred by such instruments. [C51,§1214; R60,§2223; C73,§1944; C97,§2936; C24, 27, 31, 35,§10115.]

10115.1 Marginal entries indexed. As soon as a marginal assignment or release has been witnessed by the county recorder, the county recorder shall forthwith index the same just as though such assignment or release had been by separate written instrument. [C31, 35,§10115-c1.]

10116 Entry on auditor's transfer books. The recorder shall not record any deed or other instrument unconditionally conveying real estate until the proper entries have been made upon the transfer books in the auditor's office, and indorsement made upon the deed or other instrument properly dated and officially signed, in substantially the following form:

Entered upon transfer books and for taxation this.....day of....., 19.....
My fee 25¢ paid by recorder.

.....
Auditor.

[C73,§§1952, 1953; C97,§§2932, 2934; C24, 27, 31, 35,§10116.]

Referred to in §10117

10117 Recorder to collect and deliver to auditor. At the time of filing any deed or other instrument mentioned in section 10116, the recorder shall collect from the person filing the same the recording fee provided by law, also the auditor's transfer fee, and forthwith deliver the deed and the transfer fee to the county auditor, after indorsing upon said instrument the following:

Filed for record, indexed, and delivered to county auditor this.....day of....., 19....., at.....o'clock.....M. Recorder's and auditor's fee $.....paid.

.....
Recorder.

[C24, 27, 31, 35,§10117.]

10118 Final record. Every such instrument shall be recorded, as soon as practicable, in a suitable book to be kept by the recorder for that purpose; after which he shall complete the entries aforesaid so as to show the book and page where the record is to be found. [C51,§1216;

R60,§2225; C73,§1946; C97,§2938; C24, 27, 31, 35,§10118.]

10119 Transfer and index books. The county auditor shall keep in his office books for the transfer of real estate, which shall consist of a transfer book, index book, and plat book. [C73,§1948; C97,§2927; C24, 27, 31, 35,§10119.]

10120 Form of transfer book. Said transfer book shall be ruled and headed substantially after the following form; and entries therein shall be in numerical order, beginning with section one:

Section No....., Township....., Range.....

Grantee	Grantor	Date of Instrument	Description	Page of Plats
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

[C73,§1949; C97,§2928; C24, 27, 31, 35,§10120.]

10121 Form of index book. Said index book shall be ruled and headed substantially after the following form:

NAMES OF GRANTEES	PAGES OF TRANSFER BOOK
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

[C73,§1949; C97,§2928; C24, 27, 31, 35,§10121.]

10122 Book of plats—how kept. The auditor shall keep the book of plats so as to show the number of lot and block, or township and range, divided into sections and subdivisions as occasion may require, and shall designate thereon each piece of real estate, and mark in pencil the name of the owner thereon, in a legible manner; which plats shall be lettered or numbered so that they may be conveniently referred to by the memoranda of the transfer book, and shall be drawn on the scale of not less than four inches to the mile. [C73,§1950; C97,§2929; C24, 27, 31, 35,§10122.]

10123 Entries of transfers. When a deed of unconditional conveyance of real estate or transcript of decree in a partition proceeding is presented, the auditor shall enter in the index book, in alphabetical order, the name of the grantee, and opposite thereto the number of the page of the transfer book on which such transfer is made; and upon the transfer book he shall enter in the proper columns the name of the grantee, the grantor, date, and character of the instrument, the description of the real estate, and the number or letter of the plat on which the same is marked. [C73,§1951; C97, §2930; S13,§2930; C24, 27, 31, 35,§10123.]

10124 Council's approval of certain plats. No conveyances or plats of additions to any city or town or subdivision of any lands lying within or adjacent to any city or town in which streets and alleys and other public grounds are sought to be dedicated to public use, or other conveyances in which streets and alleys are sought to be conveyed to such city or town, shall be so entered, unless such conveyances, plats, or other instruments have indorsed thereon the approval of the council of such city or town, the certificates of such approval to be made by the city clerk. [S13,§2930; C24, 27, 31, 35,§10124.]

City and town plats, ch 321

10125 Title decree—entry on transfer books. Upon receipt of a certificate from the clerk of the district or supreme court, that the title to real estate has been finally established in any named person by judgment or decree of said court, or by will, the auditor shall enter the same upon the transfer books, upon payment of a fee of twenty-five cents, which fee shall be taxed as costs in the cause, collected by the clerk, and paid to the auditor at the time of filing such certificate. [C97,§2931; C24, 27, 31, 35,§10125.]

Change of title—certification, §10886

10126 Correction of books and instruments. The auditor from time to time shall correct any error appearing in the transfer books, and shall notify the grantee of any error in description discovered in any instrument filed for transfer, and permit the same to be corrected by the parties before completing such transfer. [C73, §1954; C97,§2933; C24, 27, 31, 35,§10126.]

10127 Perpetuities prohibited. Every disposition of property is void which suspends the absolute power of controlling the same, for a longer period than during the lives of persons then in being, and twenty-one years thereafter. [C51,§1191; R60,§2199; C73,§1920; C97,§2901; C24, 27, 31, 35,§10127.]

CHAPTER 440

OCCUPYING CLAIMANTS

10128 Right to improvements.
10129 "Color of title" defined.
10130 Petition—trial—appraisement.
10131 Rights of parties to property.
10132 Tenants in common.
10133 Waste by claimant.
10134 Option to remove improvements.

10128 Right to improvements. Where an occupant of real estate has color of title thereto and has in good faith made valuable improvements thereon, and is thereafter adjudged not to be the owner, no execution shall issue to put the owner of the land in possession of the same, after the filing of a petition as hereinafter provided, until the provisions of this chapter have

been complied with. [C51,§1233; R60,§2264; C73,§1976; C97,§2964; C24, 27, 31, 35,§10128.]

10129 "Color of title" defined. Persons of each of the classes hereinafter enumerated shall be deemed to have color of title within the meaning of this chapter, but nothing contained herein shall be construed as giving a tenant color of title against his landlord:

1. *Purchaser at judicial or tax sale.* A purchaser in good faith at any judicial or tax sale made by the proper officer, whether said officer had sufficient authority to make said sale or not, unless want of authority in such officer was known to the purchaser at the time of the sale.

2. *Occupancy for five years.* A person who has by himself or together with those under whom he claims, occupied the premises for a period of five years continuously.

3. *Occupancy and improvements.* A person whose occupancy of the premises has been for a shorter period than five years, if during such occupancy the occupant or those under whom he claims have, with the knowledge or consent of the real owner, express or implied, made any valuable improvements thereon.

4. *Occupancy and payment of taxes.* A person whose occupancy of the premises has been for a shorter period than five years, if such occupant or those under whom he claims have at any time during such occupancy paid the ordinary county taxes thereon for any one year, and two years have elapsed without a repayment or offer of repayment of the same by the owner thereof, and such occupancy has continued to the time the action is brought by which the recovery of the real estate is obtained.

5. *Occupancy under state or federal law or contract.* A person who has settled upon any real estate and occupied the same for three years under or by virtue of any law, or contract with the proper officers of the state or of the United States for the purchase thereof and shall have made valuable improvements thereon. [C51, §§1239, 1240; R60,§§2268, 2269; C73,§§1982–1984; C97,§§2967, 2968; C24, 27, 31, 35,§10129.]

10130 Petition—trial—appraisement. The petition of the occupant must set forth the grounds upon which he seeks relief, and state as accurately as practicable the value of the real estate, exclusive of the improvements made thereon by the claimant or his grantors, and the value of such improvements. The issue joined thereon must be tried as in ordinary actions and the value of the real estate and of such improvements separately ascertained. [C51,§§1234, 1235; R60,§§2265, 2266; C73,§§1977, 1978; C97, §2965; C24, 27, 31, 35,§10130.]

10131 Rights of parties to property. The owner of the land may thereupon pay to the clerk of the court, for the benefit of the occupying claimant, the appraised value of the improvements and take the property and an execution may issue for the purpose of putting the owner of the land in possession thereof. Should he fail to make such payment within such reasonable time as the court may fix, the occupying claimant may pay to the clerk of the court, within such time as the court may fix, for the use of the owner of the land, the value of the property exclusive of the improvements and take and retain the property together with the improvements. [C51,§§1236–1238, 1243; R60, §§2267,2272; C73,§§1979–1981, 1986; C97, §§2966, 2970; C24, 27, 31, 35,§10131.]

Referred to in §10132

10132 Tenants in common. Should the owner of the land fail to pay for the improvements and the occupying claimant fail to pay for the land within the time fixed by the court as provided in section 10131, the parties shall be held to be tenants in common of all the real estate including the improvements, each holding an undivided interest proportionate to the values ascertained on the trial. [C51,§§1236–1238; R60,§2267; C73,§§1979–1981; C97,§2966; C24, 27, 31, 35,§10132.]

10133 Waste by claimant. If the occupying claimant has committed any injury to the real estate by cutting timber or otherwise, the owner may set the same off against any claim for improvements made by such claimant. [C51,§1241; R60,§2270; C73,§1985; C97,§2969; C24, 27, 31, 35,§10133.]

10134 Option to remove improvements. Any person having improvements on any real estate granted to the state in aid of any work of internal improvement, whose title thereto is questioned by another, may remove such improvements without other injury to such real estate at any time before he is evicted therefrom, or he may have the benefit of this chapter by proceeding as herein directed. [C73,§1987; C97, §2971; C24, 27, 31, 35,§10134.]

CHAPTER 441

HOMESTEAD

Referred to in §6943.152

10135 "Homestead" defined.
10136 Extent and value.
10137 Dwelling and appurtenances.
10138 Selecting—platting.
10139 Platted by officer having execution.
10140 Platting under order of court.
10141 Changes—nonconsenting spouse.
10142 Referees to determine exemption.
10143 Referring back—marking off—costs.
10144 Change of circumstances.
10145 Occupancy by surviving spouse.
10146 Life possession in lieu of dower.
10147 Conveyance or incumbrance.
10148 Devise.
10149 Removal of spouse or children.
10150 Exemption—divorced spouse.
10151 "Family" defined.
10152 Descent.
10153 Exemption in hands of issue.
10154 New homestead exempt.
10155 Debts for which homestead liable.

10135 "Homestead" defined. The homestead must embrace the house used as a home by the owner, and, if he has two or more houses thus used, he may select which he will retain. It may contain one or more contiguous lots or tracts of land, with the building and other appurtenances thereon, habitually and in good faith used as part of the same homestead. [C51, §§1250, 1251; R60,§§2282, 2283; C73,§§1994, 1995; C97,§2977; C24, 27, 31, 35,§10135.]

10136 Extent and value. If within a city or town plat, it must not exceed one-half acre in extent, otherwise it must not contain in the aggregate more than forty acres, but if, in either case, its value is less than five hundred dollars, it may be enlarged until it reaches that amount. [C51,§1252; R60,§2284; C73,§1996; C97,§2978; S13,§2978; C24, 27, 31, 35,§10136.]

40GA, ch 237, §2, editorially divided

10137 Dwelling and appurtenances. It must not embrace more than one dwelling house, or any other buildings except such as are properly appurtenant thereto, but a shop or other building situated thereon, actually used and occupied by the owner in the prosecution of his ordinary business, and not exceeding three hundred dollars in value, is appurtenant thereto. [C51, §1253; R60,§2285; C73,§1997; C97,§2978; S13, §2978; C24, 27, 31, 35,§10137.]

10138 Selecting—platting. The owner, husband, or wife, may select the homestead and cause it to be platted, but a failure to do so shall not render the same liable when it otherwise would not be, and a selection by the owner shall control. When selected, it shall be designated by a legal description, or if incapable thereof it shall be marked off by permanent, visible monuments, and the description thereof shall give the direction and distance of the starting point from some corner of the dwelling, which description, with the plat, shall be filed and recorded by the recorder of the proper county in the homestead book, which shall be, as nearly as may be, in the form of the record books for deeds, with an index kept in the same manner. [C51,§§1254, 1255; R60,§§2286, 2287; C73,§§1998, 1999; C97,§2979; S13,§2979; C24, 27, 31, 35,§10138.]

10139 Platted by officer having execution. Should the homestead not be platted and recorded at the time levy is made upon real property in which a homestead is included, the officer having the execution shall give notice in writing to said owner, and the husband or wife of such owner, if found within the county, to plat and record the same within ten days after service thereof; after which time said officer shall cause said homestead to be platted and recorded as above, and the expense thereof shall be added to the costs in the case. [C51, §1254; R60,§2286; C73,§1998; S13,§2979; C24, 27, 31, 35,§10139.]

Referred to in §10140

10140 Platting under order of court. Upon application made to the district court by any creditor of the owner of the homestead, or other person interested therein, such court shall hear the cause upon the proof offered, and fix and establish the boundaries thereof, and the judgment therein shall be filed and recorded in the manner provided in section 10139. [C97,§2980; C24, 27, 31, 35,§10140.]

10141 Changes—nonconsenting spouse. The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or vacate it.

Such changes shall not prejudice conveyances or liens made or created previously thereto.

No such change of the entire homestead, made without the concurrence of the husband or wife, shall affect his or her rights, or those of the children. [C51,§§1256, 1257; R60,§§2288, 2289; C73,§§2000, 2001; C97,§2981; C24, 27, 31, 35,§10141.]

10142 Referees to determine exemption. When a disagreement takes place between the owner and any person adversely interested, as to whether any land or buildings are properly a part of the homestead, the sheriff shall, at the request of either party, summon nine disinterested persons having the qualifications of jurors. The parties then, commencing with the owner, shall in turn strike off one person each, until three remain. Should either party fail to do so, the sheriff may act for him, and the three as referees shall proceed to examine and ascertain all the facts of the case, and report the same, with their opinion thereon, to the next term of court from which the execution or other process may have issued. [C51,§§1258, 1259; R60,§§2290, 2291; C73,§§2002, 2003; C97,§2982; C24, 27, 31, 35,§10142.]

10143 Referring back—marking off—costs. The court in its discretion may refer the whole or any part of the matter back to the same or other referees, to be selected in the same manner, or as the parties agree, giving them directions as to the report required of them. When the court is sufficiently advised in the case, it shall make its decision, and may direct the homestead to be marked off anew, or a new plat and description to be made and recorded, and take such other steps as shall be lawful and expedient in attaining the purpose of this chapter. It shall also award costs in accordance with the practice in other cases, as nearly as may be. [C51,§§1260, 1261; R60,§§2292, 2293; C73,§§2004, 2005; C97,§2983; C24, 27, 31, 35, §10143.]

Costs, ch 497

10144 Change of circumstances. The extent or appurtenances of the homestead thus established may be called in question in like manner, whenever a change in value or circumstances will justify such new proceedings. [C51,§1262; R60,§2294; C73,§2006; C97,§2984; C24, 27, 31, 35, §10144.]

10145 Occupancy by surviving spouse. Upon the death of either husband or wife, the

survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law, but the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is herein contemplated. [C51,§1263; R60,§2295; C73,§§2007, 2008; C97,§2985; C24, 27, 31, 35,§10145.]

10146 Life possession in lieu of dower. The survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased. [C73,§2008; C97,§2985; C24, 27, 31, 35,§10146.]

40GA, ch 237, §11, editorially divided

10147 Conveyance or incumbrance. No conveyance or incumbrance of, or contract to convey or incumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, and the instrument sets out the legal description of the homestead, provided however that where the homestead is conveyed or incumbered along with or in addition to other real estate it shall not be necessary to particularly describe or set aside the tract of land constituting such homestead, whether the homestead is exclusively the subject of the contract or not; but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or incumbrancer. [C51,§1247; R60,§2279; C73,§1990; C97,§2974; C24, 27, 31, 35,§10147.]

10148 Devise. Subject to the rights of the surviving husband or wife, the homestead may be devised like other real estate of the testator. [C51,§1266; R60,§2298; C73,§2010; C97,§2987; C24, 27, 31, 35,§10148.]

10149 Removal of spouse or children. Neither husband nor wife can remove the other nor the children from the homestead without the consent of the other. [C51,§1462; R60,§2514; C73,§2215; C97,§3166; C24, 27, 31, 35,§10149.]

10150 Exemption — divorced spouse. The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary, and such right shall continue in favor of the party to whom it is adjudged by divorce decree during continued personal occupancy by such party. [C51,§1245; R60,§2277; C73,§1988; C97,§§2972, 2973; C24, 27, 31, 35,§10150.]

10151 "Family" defined. A widow or widower, though without children, shall be deemed a family within the meaning of this chapter, while continuing to occupy the real estate used as a homestead at the death of the husband or wife. [C51,§1246; R60,§2278; C73,§1989; C97, §2973; C24, 27, 31, 35,§10151.]

10152 Descent. If there be no survivor, the homestead descends to the issue of either husband or wife according to the rules of descent, unless otherwise directed by will. [C51,§1264; R60,§2296; C73,§2008; C97,§2985; C24, 27, 31, 35, §10152.]

10153 Exemption in hands of issue. Where the homestead descends to the issue of either husband or wife the same shall be held by such issue exempt from any antecedent debts of their parents or their own, except those of the owner thereof contracted prior to its acquisition. [C51, §1264; R60,§2296; C73,§2008; C97,§2985; C24, 27, 31, 35,§10153.]

10154 New homestead exempt. Where there has been a change in the limits of the homestead, or a new homestead has been acquired with the proceeds of the old, the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been. [C51,§1257; R60, §2289; C73,§2001; C97,§2981; C24, 27, 31, 35, §10154.]

10155 Debts for which homestead liable. The homestead may be sold to satisfy debts of each of the following classes:

1. Those contracted prior to its acquisition, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution.
2. Those created by written contract by persons having the power to convey, expressly stipulating that it shall be liable, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.
3. Those incurred for work done or material furnished exclusively for the improvement of the homestead.
4. If there is no survivor or issue, for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead. [C51,§§1248, 1249, 1265; R60,§§2280, 2281, 2297; C73,§§1991–1993, 2009; C97,§§2975, 2976, 2986; C24, 27, 31, 35,§10155.]

Homestead acquired with pension funds, §11762
Liability for relief furnished poor person, §3828.086

CHAPTER 442

LANDLORD AND TENANT

Landlord's lien, ch 450

10156 Apportionment of rent.
10157 Double rental value—liability.
10158 Attornment to stranger.
10159 Tenant at will—notice to quit.
10160 Termination of farm tenancies.
10161 Agreement for termination.
10162 Notice—how served.

10156 Apportionment of rent. The executor of a tenant for life who leases real estate so held, and dies on or before the day on which the rent is payable, and a person entitled to rent dependent on the life of another may recover the proportion of rent which had accrued at the

time of the death of such life tenant. [C51, §1267; R60,§2299; C73,§2011; C97,§2988; C24, 27, 31, 35,§10156.]

10157 Double rental value—liability. A tenant giving notice of his intention to quit leased premises at a time named, and holding over after such time, and a tenant or his assignee willfully holding over after the term, and after notice to quit, shall pay double the rental value thereof during the time he holds over to the person entitled thereto. [C51,§1268; R60,§2300; C73,§2012; C97,§2989; C24, 27, 31, 35,§10157.]

10158 Attornment to stranger. The payment of rent, or delivery of possession of leased premises, to one not the lessor, is void, and shall not affect the rights of such lessor, unless made with his consent, or in pursuance of a judgment or decree of court or judicial sale to which the lessor was a party. [C51,§1269; R60,§2301; C73,§2013; C97,§2990; C24, 27, 31, 35,§10158.]

10159 Tenant at will—notice to quit. Any person in the possession of real estate, with the assent of the owner, is presumed to be a tenant at will until the contrary is shown, and thirty days notice in writing must be given by either party before he can terminate such a tenancy; but when in any case, a rent is reserved payable at intervals of less than thirty days, the length of notice need not be greater than such interval. [C51,§§1208, 1209; R60,§§2216, 2218; C73, §§2014, 2015; C97,§2991; C24, 27, 31, 35,§10159.]

Three-day forcible entry notice, §§12265 and 12266

10160 Termination of farm tenancies. In case of tenants occupying and cultivating farms, the notice must fix the termination of the tenancy to take place on the first day of March, except in cases of mere croppers, whose leases shall be held to expire when the crop is harvested; if the crop is corn, it shall not be later than the first day of December, unless otherwise agreed upon. [R60,§2218; C73,§2015; C97, §2991; C24, 27, 31, 35,§10160.]

Forcible entry provisions, §§12265 and 12266

10161 Agreement for termination. Where an agreement is made fixing the time of the termination of the tenancy, whether in writing or not, it shall cease at the time agreed upon, without notice. In the case of farm tenants, except mere croppers, occupying and cultivating an acreage of forty acres or more, the tenancy shall continue for the following crop year upon the same terms and conditions as the original lease unless written notice for termination is given by either party to the other not later than November 1, whereupon the tenancy shall terminate March 1 following; provided further, the tenancy shall not continue because of absence of notice in case there be default in the performance of the existing rental agreement. [R60,§2218; C73,§2015; C97,§2991; C24, 27, 31, 35,§10161; 48GA, ch 235,§1.]

Forcible entry provisions, §§12265 and 12266

10162 Notice—how served. When a tenant cannot be found in the county, the notice above required may be given to any subtenant or other person in possession of the premises, or, if the premises be vacant, by affixing the notice to any outside door of the dwelling house thereon, or other building, if there be no dwelling house, or in some conspicuous position on the premises, if there be no building. [C73,§2016; C97,§2991; C24, 27, 31, 35,§10162.]

Forcible entry provisions, §§12265 and 12266

CHAPTER 443

WALLS IN COMMON

10163 Resting wall on neighbor's land.
10164 Contribution by adjoining owner.
10165 Openings in walls.
10166 Repairs—apportionment.
10167 Beams, joists, and flues.
10168 Increasing height of wall.
10169 Rebuilding in order to heighten.
10170 Heightened wall made common.
10171 Paying for share of adjoining wall.
10172 Openings in walls—fixtures.
10173 Disputes—delay—bonds.
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10163 Resting wall on neighbor's land. Where building lots have been surveyed and plats thereof recorded, anyone who is about to build contiguous to the land of another may, if there be no wall on the line between them, build a brick or stone wall thereon, when the whole thickness of such wall above the cellar wall does not exceed eighteen inches exclusive of the plastering, and rest one-half thereof on the adjoining land, but the adjoining owner shall not be compelled to contribute to the expense of building said wall. [R60,§1914; C73,§2019; C97, §2994; C24, 27, 31, 35,§10163.]

10164 Contribution by adjoining owner. If the adjoining owner contributes one-half of the expense of building such wall, then it is a wall in common between them, but if he refuses to contribute, he shall have the right to make it a wall in common by paying to the person who erected or maintained it one-half of its appraised value at the time of using it. [R60, §1915; C73,§2020; C97,§2995; C24, 27, 31, 35, §10164.]

10165 Openings in walls. No wall shall be built by any person partly on the land of another with any openings therein, and every separating wall between buildings shall, as high as the upper part of the first story, be presumed to be a wall in common, if there be no titles, proof, or mark to the contrary, and if any wall is erected which, under the provisions of this chapter, becomes, or may become, at the option of another, a wall in common, such person shall not be compelled to contribute to the expense of closing any openings therein, but this shall be done at the expense of the owner of such

wall. [R60,§1916; C73,§2021; C97,§2996; C24, 27, 31, 35,§10165.]

10166 Repairs — apportionment. The repairs and rebuilding of walls in common are to be made at the expense of all who have a right to them, and in proportion to the interest of each therein, but every coproprietor of a wall in common may be exonerated from contributing to the same by giving up his right in common, if no building belonging to him is actually supported by such wall. [R60,§1917; C73,§2022; C97,§2997; C24, 27, 31, 35,§10166.]

10167 Beams, joists, and flues. Every coproprietor may build against a wall held in common, and cause beams or joists to be placed therein; and any person building such a wall shall, on being requested by his coproprietor, make the necessary flues, and leave the necessary bearings for joists or beams, at such height and distance apart as shall be specified by his coproprietor. [R60,§1918; C73,§2023; C97,§2998; C24, 27, 31, 35,§10167.]

10168 Increasing height of wall. Every coproprietor may increase the height of a wall in common at his sole expense, and he shall repair and keep in repair that part of the same above the part held in common. [R60,§1919; C73,§2024; C97,§2999; C24, 27, 31, 35,§10168.]

C97, §2999, editorially divided

10169 Rebuilding in order to heighten. If the wall so held in common cannot support the wall to be raised upon it, one who wishes to have it made higher must rebuild it anew and at his own expense, and the additional thickness of the wall must be placed entirely on his own land. [R60,§1920; C73,§2025; C97,§2999; C24, 27, 31, 35,§10169.]

10170 Heightened wall made common. The person who did not contribute to the heightening of a wall held in common may cause the raised part to become common by paying one-half of the appraised value of raising it, and half the value of the ground occupied by the additional thickness thereof, if any ground was so occupied. [R60,§1921; C73,§2026; C97,§2999; C24, 27, 31, 35,§10170.]

10171 Paying for share of adjoining wall. Every proprietor joining a wall has the right of making it a wall in common, in whole or in part, by repaying to the owner thereof one-half of its value, or one-half of the part which he wishes to hold in common, and one-half of the value of the ground on which it is built, if the person who has built it has laid the foundation entirely upon his own ground. [R60,§1922; C73, §2027; C97,§3000; C24, 27, 31, 35,§10171.]

10172 Openings in walls—fixtures. Adjoining owners of walls held in common shall not make openings or cavities therein, nor affix nor attach thereto any work or structure, without the consent of the other, or upon his refusal, without having taken all necessary precautions to guard against injury to the rights of the other, to be ascertained by persons skilled in building. [R60,§1923; C73,§2028; C97,§3001; C24, 27, 31, 35,§10172.]

10173 Disputes—delay—bonds. No dispute between adjoining owners as to the amount to be paid by one or the other, by reason of any of the matters provided in this chapter, shall delay the execution of the provisions of the same, if the party on whom the claim is made shall enter into bonds, with security, to the satisfaction of the clerk of the district court of the proper county, conditioned that he shall pay to the claimant whatever may be found to be his due on the settlement of the matter between them, either in a court of justice or elsewhere; upon the presentation of such a bond, the clerk shall indorse his approval thereon, and retain the same until demanded by the party for whose benefit it is executed. [R60,§1924; C73, §2029; C97,§3002; C24, 27, 31, 35,§10173.]

10174 Special agreements—evidence. This chapter shall not prevent adjoining proprietors from entering into special agreements about walls on the lines between them, but no evidence thereof shall be competent unless in writing, signed by the parties thereto or their lawfully authorized agents, or the guardian of either, if a minor, who shall have full authority to act for his ward in all matters relating to walls in common without an order of court therefor. [R60,§1925; C73,§2030; C97,§3003; C24, 27, 31, 35,§10174.]

Statute of frauds in general, §11285

CHAPTER 444

EASEMENTS

10175 Adverse possession—"use" as evidence.
10176 Light and air.
10177 Footway.
10178 Notice to prevent acquisition.
10179 Effect of notice.
10180 Notice, service, and record.
10181 Evidence.
10182 Action to establish.

10175 Adverse possession — "use" as evidence. In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private

claims. [C73,§2031; C97,§3004; C24, 27, 31, 35, §10175.]

See annotations under §11007

10176 Light and air. Whoever has erected, or may erect, any house or other building near the land of another person, with windows overlooking such land, shall not, by the mere continuance of such windows, acquire any easement of light or air, so as to prevent the erection of any building on such land. [C73,§2032; C97, §3005; C24, 27, 31, 35,§10176.]

10177 Footway. No right of footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time. [C73, §2033; C97,§3006; C24, 27, 31, 35,§10177.]

10178 Notice to prevent acquisition. When any person is in the use of a way, privilege, or other easement in the land of another, the owner of the land in such case may give notice in writing to the person claiming or using the way, privilege, or easement of his intention to dispute any right arising from such claim or use. [C73,§2034; C97,§3007; C24, 27, 31, 35,§10178.]

C97, §3007, editorially divided

10179 Effect of notice. Said notice, when served and recorded as hereinafter provided, shall be an interruption of such use, and prevent the acquiring of any right thereto by the continuance thereof. [C73,§2034; C97,§3007; C24, 27, 31, 35,§10179.]

10180 Notice, service, and record. Said notice, signed by the owner of the land, his agent, or guardian, may be served in the same manner as in a civil action, upon the party, his agent, or guardian, if within this state, otherwise on the tenant or occupant, if there be any, and it, with the return thereof, shall be recorded within three months thereafter in the recorder's office of the county in which the land is situated. [C73,§2034; C97,§3007; C24, 27, 31, 35,§10180.]

Manner of service, §11060

10181 Evidence. A certified copy of such record of said notice and the officer's return thereon shall be evidence of the notice and the service thereof. [C73,§2034; C97,§3007; C24, 27, 31, 35,§10181.]

10182 Action to establish. When notice is given to prevent the acquisition of a right to a way or other easement, it shall be considered so far a disturbance thereof as to enable the party claiming to bring an action for disturbing the same in order to try such right, and if the plaintiff in the action prevails, he shall recover costs. [C73,§2035; C97,§3008; C24, 27, 31, 35,§10182.]

CHAPTER 445

GIFTS

10183 Churches may lease.
10184 Taxation.
10185 Gifts to state.
10186 Management of property.
10187 Gifts to state institutions.
10188 Gifts to municipal corporations.
10189 Trustees appointed by court—bond.
10190 Tax voted to maintain.
10191 Amount of levy.
10192 Disbursement.
10193 Tax discontinued.
10194 Condition as to annuity.
10195 Annuity tax.
10196 Limitation on acceptance.
10197 Surplus of tax.

10183 Churches may lease. Church organizations, occupying real property granted to them by the territory or state, may lease the same for business purposes, and occupy other real property with their church edifices, but all of the income derived from such leased real property shall be devoted to maintaining the religious exercises and ordinance of the church to which the grant was originally made, and to no other purpose; and such churches and their affairs shall remain in the control of boards of trustees regularly chosen in accordance with their charters. [C73,§1921; C97,§2902; C24, 27, 31, 35,§10183.]

C97, §2902, editorially divided

10184 Taxation. Real property so leased shall in all cases be subject to taxation, the same as the real property of natural persons. [C73, §1921; C97,§2902; C24, 27, 31, 35,§10184.]

10185 Gifts to state. A gift, devise, or bequest of property, real or personal, may be made to the state, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state. [C73,§1387; C97,§2903; C24, 27, 31, 35,§10185.]

Referred to in §10186

10186 Management of property. If gifts are made to the state in accordance with section 10185, for the benefit of an institution thereof, the property, if accepted, shall be held and managed in the same way as other property of the state, acquired for or devoted to the use of such institution; and any conditions attached to such gift shall become binding upon the state, upon the acceptance thereof. [C97,§2904; C24, 27, 31, 35,§10186.]

10187 Gifts to state institutions. Gifts, devises, or bequests of property, real or personal, made to any state institution for purposes not inconsistent with the objects of such institution, may be accepted by its governing board, and such board may exercise such powers with reference to the management, sale, disposition, investment, or control of property so given, devised, or bequeathed, as may be deemed es-

sential to its preservation and the purposes for which the gift, devise, or bequest was made. [S13,§2904-a; C24, 27, 31, 35,§10187.]

10188 Gifts to municipal corporations. Counties, cities, towns, the park board of any city or town, including cities acting under special charter, and civil townships wholly outside of any city or town, and school corporations, are authorized to take and hold property, real and personal, by gift and bequest; and to administer the same through the proper officer in pursuance of the terms of the gift or bequest. No title shall pass unless accepted by the governing board of the corporation, township, or park board. Conditions attached to such gifts or bequests become binding upon the corporation, township, or park board upon acceptance thereof. [C97,§§740, 2903, 2904; S13,§740; C24, 27, 31, 35,§10188.]

10189 Trustees appointed by court—bond. When made for the establishing of institutions of learning or benevolence, and no provision is made in the gift or bequest for the execution of the trust, the judge of the district court having charge of the probate proceedings in the county shall appoint three trustees, residents of said county, who shall have charge and control of the same, and who shall continue to act until removed by the court. They shall give bond as required in case of executors, and be subject to the orders of said court. [C97,§740; S13,§740; C24, 27, 31, 35,§10189.]

Bond, §11887
General control over trusts, §§10764, 11876

10190 Tax voted to maintain. When any county, city, or town shall receive by gift or devise, property, real or personal, for the purpose of establishing any institution of benevolence including hospitals, and no sufficient fund or endowment is provided for its maintenance, or is received upon condition that the donee or devisee provide for aiding the maintenance of such institution by a tax levy upon the assessed property of such municipality, it shall be the duty of the governing board of such municipality to submit by resolution to the qualified electors thereof at a regular or special election the question whether there shall be levied upon the assessed property of such municipality an annual tax not exceeding three-fourths mill on the dollar for the purpose of aiding the maintenance of such institution. The said proposition shall be submitted in the manner provided for similar propositions in the title on elections. [S13,§740; C24, 27, 31, 35,§10190.]

Manner of submission, §761 et seq.

10191 Amount of levy. If a majority of the votes cast at such election on the proposition so submitted shall be in favor of the proposition, the governing board of such municipality shall determine the amount to be levied for such purpose, not exceeding three-fourths mill on the dollar, and the amount so fixed shall be levied upon the assessed property of such municipality and collected in the same manner as other taxes of such municipality are levied and collected. [S13, §740; C24, 27, 31, 35,§10191.]

10192 Disbursement. When collected by the county treasurer said tax shall be paid over to the treasurer of the institution authorized to receive the same and shall be paid out on the order of the trustees of such institution who are authorized to manage and control the same, for the purposes for which it was authorized. [S13, §740; C24, 27, 31, 35,§10192.]

10193 Tax discontinued. The governing board of such municipality may discontinue such levy of tax in the event the institution to be aided thereby is destroyed by the elements and no fund is provided or available for its rebuilding; or after five years of continuance of such tax aid the governing board may, and upon the petition of twenty-five percent of the qualified electors of such municipality as shown by the poll books of the last preceding general election, shall, by resolution, resubmit to the qualified electors of such municipality, at a regular or special election, in the same manner hereinbefore specified, the question whether tax aid for such institution shall be discontinued, and if sixty-five percent of the votes cast at such election on the proposition so submitted be in favor of discontinuing tax aid, no further levy of tax shall be made for such purpose. [S13,§740; C24, 27, 31, 35,§10193.]

10194 Condition as to annuity. When a gift or bequest is conditioned upon the payment of an annuity to the donor, or any other person, the governing board of such municipality may, upon acceptance of such gift or bequest, agree to pay such annuity providing the amount thereof does not exceed five percent of the amount of the gift or bequest and does not exceed the amount realized from a one mill tax levy upon the taxable property of said municipality. [C24, 27, 31, 35,§10194.]

40GA, ch 289, §10, editorially divided

10195 Annuity tax. To provide for the payment of such annuity, said municipality, through its proper officers, shall annually thereafter levy a tax, not exceeding three-fourths mill, sufficient to pay such annuity. [C24, 27, 31, 35,§10195.]

10196 Limitation on acceptance. No agreement shall be made unless the annuity provided for therein, and all annuities provided for under prior agreements, may be paid from the proceeds of one annual tax levy of three-fourths mill. [C24, 27, 31, 35,§10196.]

10197 Surplus of tax. Any amount collected by a tax so levied and which is not required for the payment of such annuity shall be used for the purposes for which such gift or bequest is made and may be transferred to such fund as will enable it to be used for such purpose. [C24, 27, 31, 35,§10197.]

CHAPTER 446

CEMETERIES AND MANAGEMENT THEREOF

MANAGEMENT BY TRUSTEE

10198 Trustee appointed—trust funds.
10199 Requisites of petition.
10200 Approval of court—surplus fund.
10201 Receipt—cemetery record.
10202 Loans—security.
10203 Other investments.
10204 Bond—approval—oath.
10205 Clerk—duty of.
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10208 Removal—vacancy filled.
10209 County auditor as trustee.
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MANAGEMENT BY MUNICIPALITIES

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10213.1 Settlement of estates—maintenance fund.

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10213.2 Reversion.
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10213.4 Notice of abandonment.
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10213.6 Notice of nonabandonment—effect.
10213.7 Reversioner's right to sell.
10213.8 Use of fund.
10213.9 Applicability of statute.

MANAGEMENT BY TRUSTEE

10198 Trustee appointed—trust funds. The owners of, or any party interested in, any cemetery may, by petition presented to the district court of the county where the cemetery is situated, have a trustee appointed with authority to receive any and all moneys or property that may be donated for and on account of said cemetery and to invest, manage, and control same under the direction of the court; but he shall not be authorized to receive any gift, except with the understanding that the principal sum is to be a permanent fund, and only the net proceeds therefrom to be used in carrying out the purpose of the trust created, and all such funds shall be exempt from taxation. [S13,§254-a4; C24, 27, 31, 35,§10198.]

General control over trusts, §§10764, 11876

10199 Requisites of petition. Such petition may state the amount proposed to be placed in such trust fund, the manner of investment thereof, the provisions made for the disposition of any surplus income not required for the care and upkeep of the property described in such petition. [C24, 27, 31, 35,§10199.]

40ExGA, HF 82, §2, editorially divided

10200 Approval of court — surplus fund. Such provisions shall all be subject to the approval of the court and when so approved the trust fund and the trustee thereof shall, at all times, be subject to the orders and control of the court and such surplus arising from said fund shall not be used except for charitable, eleemosynary, or public purposes under the direction of the court. [C24, 27, 31, 35,§10200.]

10201 Receipt — cemetery record. Every such trustee shall execute and deliver to the donor a receipt showing the amount of money or other property received, and the use to be made of the net proceeds from same, duly attested by the clerk of the court granting letters of trusteeship, and a copy thereof, signed by the trustee and so attested, shall be filed with and recorded by the clerk in a book to be known as the cemetery record, in which shall be recorded all reports and other papers, including orders made by the court or judge relative to cemetery matters. [S13,§254-a5; C24, 27, 31, 35,§10201.]

10202 Loans—security. Any such trustee shall loan all moneys received by him, under the direction and with the approval of the court, but only as same may be secured by first mortgage upon Iowa real estate, and no loan shall be made or approved, unless it be made to appear upon oath of three disinterested citizens that such real estate is worth at least double the amount of the loan applied for, and that the applicant for the loan has good title thereto. [S13,§254-a6; C24, 27, 31, 35,§10202.]

40ExGA, HF 82, §4, editorially divided

10203 Other investments. Said trustee may invest said fund in government bonds of the United States, federal farm loan bonds, bonds issued by authority of law by cities, towns, counties, school or drainage districts at their marketable value. [S13,§254-a6; C24, 27, 31, 35,§10203.]

10204 Bond—approval—oath. Every such trustee before entering upon the discharge of his duties or at any time thereafter when required by the court or judge, must give bond in such penalty as may be required by the court, approved by the clerk, conditioned for the faithful discharge of his duties, and take and subscribe an oath the same in substance as the condition of the bond, which bond and oath must be filed with the clerk. [S13,§254-a7; C24, 27, 31, 35,§10204.]

10205 Clerk—duty of. It shall be the duty of the clerk at the time of filing each such receipt, to at once advise the court or judge as to the amount of the principal fund in the hands of such trustee, the amount of bond filed, and whether it is good and sufficient for the amount given. [S13,§254-a8; C24, 27, 31, 35,§10205.]

10206 Compensation—costs. Such trustee shall serve without compensation, but may, out of the income received, pay all proper items of expense incurred in the performance of his duties, including cost of bond, if any. [S13, §254-a9; C24, 27, 31, 35,§10206.]

10207 Annual report. Such trustee shall make full report of his doings in the month of January following his appointment and in January of each successive year. In each of said reports he shall apportion the net proceeds received from the sum total of the permanent fund and make proper credit to each of the separate funds assigned to him in trust. [S13,§254-a10; C24, 27, 31, 35,§10207.]

10208 Removal—vacancy filled. Any such trustee may be removed by the court or judge thereof at any time for cause, and in the event of removal or death, the court or judge must appoint a new trustee and require his predecessor or his personal representative to make full accounting. [S13,§254-a11; C24, 27, 31, 35,§10208.]

10209 County auditor as trustee. In case no trustee is appointed, or if so appointed does not qualify, then such funds, or any funds donated by any person or estate to improvement of cemeteries, unless otherwise provided by law, shall be placed in the hands of the county auditor, who shall receipt for, loan, and make annual reports of such funds in such manner as provided in this chapter. [SS15,§254-a12; C24, 27, 31, 35,§10209.]

10210 Accounting. The said auditor shall annually turn over the accrued interest in his hands to the cemetery association or other person having control of the cemetery entitled thereto, who shall use the same in carrying out the provisions of said trust, and who shall file a written report annually with the county auditor. [SS15,§254-a12; C24, 27, 31, 35,§10210.]

MANAGEMENT BY MUNICIPALITIES

10211 Municipal corporation as trustee. Counties, cities, irrespective of their form of government, incorporated towns, boards of trustees of cities or towns to whom the management of municipal cemeteries has been transferred by ordinance, and civil townships wholly outside of any city or incorporated town, shall be and they are hereby created trustees in perpetuity, and are required to accept, receive, and expend all moneys and property donated or left to them by bequest, and that portion of cemetery lot sales or permanent charges made against cemetery lots which has been set aside in a perpetual care fund, to be used in caring for the property of the donor, or lot owner who by purchase or otherwise has provided for the perpetual care of a cemetery lot in any cemetery, or in accordance with the terms of such donation, bequest, or agreement for sale and purchase of a cemetery lot, and the money or property thus received shall be used for no other purpose. [S13,§740; C24, 27, 31, 35,§10211; 48 GA, ch 236,§1.]

10212 Authority to invest funds. The board of supervisors, mayor and council, or board of trustees, as the case may be, shall have authority to receive and invest all moneys and property, so donated or bequeathed, and that portion of cemetery lot sales and permanent charges made against cemetery lots which has been set aside in a perpetual care fund in such authorized investments as are now set forth in section 8737, except subsections 9 to 13, inclusive, or as the same may be hereafter amended. Such money must be invested at the market value of such securities, and they shall use the income from such investment in caring for the property of the donor in any cemetery, or as shall be provided in the terms of such gift or donations or agreement for sale and purchase of a cemetery lot. [S13,§740; C24, 27, 31, 35, §10212; 48GA, ch 236,§2.]

10213 Resolution of acceptance — interest. Before any part of the principal may be so invested or used, the said county, city, incorporated town, board of trustees of cities and towns to whom the management of municipal cemeteries has been transferred by ordinance, or civil township shall, by resolution, in accordance with the law as now provided, accept said donation or bequest, and that portion of cemetery lot sales or permanent charges made against cemetery lots which is to be used for perpetual care of cemetery lots, and shall, by said resolution, duly provide for the payment of interest thereon, payable annually, to the cemetery general fund or to the cemetery association, or to the person having charge of said cemetery, to be used in caring for or maintaining the individual property of the donor in said cemetery, or lots which have been sold where, in said sale, provision was made for the perpetual care thereof, all to be in accordance with the terms of the donation or bequest, or the terms of the sale or purchase of a cemetery lot.

In case there is no cemetery association then the income from said fund shall be expended under the direction of the board of supervisors in accordance with the terms of said donation or bequest, or the terms of the sale or purchase of a cemetery lot. [S13,§740; C24, 27, 31, 35, §10213; 48GA, ch 236,§3.]

MAINTENANCE UNDER COURT ORDER

10213.1 Settlement of estates—maintenance fund. The court in which the estate of any deceased person is administered, before final distribution, may allow and set apart from such estate, a sum sufficient to provide an income adequate to perpetual pay for the care and upkeep of the cemetery lot upon which the body of the deceased is buried, except where perpetual care has otherwise been provided for. The sum so allowed and set apart shall be paid to a trustee as provided by this chapter. [C27, 31, 35, §10213-a1.]

ABANDONED LOTS

10213.2 Reversion. The ownership or right in or to an unoccupied cemetery lot or half lot shall upon abandonment revert to the person or corporation having ownership and charge of the cemetery containing such lots. [C31, 35,§10213-d1.]

Referred to in §10213.9
44GA, ch 207, §1, editorially divided

10213.3 Presumption of abandonment. The continued failure to maintain or care for a cemetery lot for a period of twenty years shall create and establish the presumption that the same has been abandoned. [C31, 35,§10213-d2.]

Referred to in §10213.9

10213.4 Notice of abandonment. Abandonment shall not be deemed complete unless after such twenty-year period there shall have been given by the reversionary owner to the recorded owner, or if he be deceased or his whereabouts unknown, to the heirs of such deceased, notice declaring the lot to be abandoned. [C31, 35, §10213-d3.]

Referred to in §10213.9

10213.5 Service of notice. The notice may be served personally on the owner or his heirs, or may be served by the mailing of the notice by registered mail to the owner, or his heirs as the case may be, to their last known address. In the event that the address of the owner or his heirs cannot be ascertained, then notice of such abandonment shall be by one publication in the official newspaper of the county, in which the cemetery is located. [C31, 35,§10213-d4.]

Referred to in §10213.9

10213.6 Notice of nonabandonment—effect. If within one year from the time of serving such notice the recorded owner or his heirs shall in writing give the reversionary owner notice that in fact there has been no such abandonment, then shall the presumption of abandonment no longer exist. [C31, 35,§10213-d5.]

Referred to in §10213.9
44GA, ch 207, §2, editorially divided

10213.7 Reversioner's right to sell. In case the abandonment has been complete as herein provided the reversionary owner of the abandoned lot or half lot may sell the same and convey title thereto. [C31, 35,§10213-d6.]

Referred to in §10213.9

10213.8 Use of fund. Any funds realized from the sale of such lots or half lots shall constitute a fund to be used solely for the perpetual care and upkeep of such lot or half of lot so sold and likewise any occupied portion thereof. [C31, 35,§10213-d7.]

Referred to in §10213.9

10213.9 Applicability of statute. Sections 10213.2 to 10213.8, inclusive, shall not apply to a cemetery lot or tract for which perpetual care has been provided by will, by order of court or by contract with the original grantor. [C31, 35, §10213-d8.]

CHAPTER 447

RIGHTS OF ALIENS

10214 Acquisition of real estate.
10215 Holders of liens—escheat.
10216 Corporate holdings—obligation to sell.
10217 Contract to sell.
10218 Escheat.
10219 Citizen may initiate proceedings.
10220 Limitation.

10214 Acquisition of real estate. Nonresident aliens, or corporations incorporated under the laws of any foreign country, or corporations organized in this country one-half of the stock of which is owned or controlled by nonresident aliens, are prohibited from acquiring title to or holding any real estate in this state, except as hereinafter provided.

The widow and heirs and devisees, being nonresident aliens, of any alien or naturalized citizen who has acquired real estate in this state, may hold the same by devise, descent, or distribution, for a period of twenty years; and if at the end of that time such real estate has not been sold to a bona fide purchaser for value, or such alien heirs have not become residents of this state, such land shall escheat to the state.

Nothing in this section contained shall prevent aliens from having or acquiring property of any kind within the corporate limits of any city or town in the state, or lands not to exceed three hundred and twenty acres in the name of one person, or any stock in any corporation for pecuniary profit, or from alienating or devising the same.

This chapter shall not affect the distribution of personal property, and shall apply to real estate heretofore devised or descended when no proceedings for forfeiture have been commenced. [C73,§§1908, 1909; C97,§2889; C24, 27, 31,35,§10214.]

Referred to in §10215

10215 Holders of liens—escheat. The provisions of this chapter shall not prevent the holder of any lien upon or interest in real estate, acquired before or after the date mentioned in the last section* from taking or holding a valid title to the real estate in which he has such interest, or upon which he has such lien; nor shall it prevent any nonresident alien enforcing any lien or judgment for any debt or liability which may have been created subsequently to said date, or which he may hereafter acquire, nor from becoming a purchaser at any sale by virtue of such lien, judgment, or liability, if all real estate so acquired shall be sold within ten years after the title shall be perfected in such alien under such sale.

Any real estate owned or held by any nonresident alien, as provided in this and section 10214 and not disposed of as therein required, shall escheat to the state. [C97,§2890; C24, 27, 31, 35,§10215.]

Referred to in §§8403, 10216

*The words "date mentioned in the last section" as used in the above section originally had reference to sections 1 and 2, chapter 1, Title XIV of *The Code of Iowa as reported to the Twenty-sixth General Assembly by the Code Commission*, 1895, pp. 597, 598. During consideration by the legislature, sections 1 and 2 were combined and the date which originally appeared in these sections was eliminated.

10216 Corporate holdings — obligation to sell. All corporations organized under the laws of any foreign country, and corporations organized under the laws of any state of the United

States, one-half of whose stock is owned and controlled by nonresident aliens, shall have the right to own, hold, and dispose of any real property owned or held by any such corporations on July 4, 1888, or any real property acquired by any such corporations under the provisions of section 10215; but any such corporation shall sell or dispose of any such property now owned by it on or before March 16, 1910, and in default thereof the provisions of sections 10218 to 10220, inclusive, shall be applied thereto. [S13, §2889-a; C24, 27, 31, 35,§10216.]

Referred to in §10217

10217 Contract to sell. A bona fide contract for the sale of any such lands owned by any such corporation shall be held and considered as a sale within the provisions of section 10216 and a good and valid deed of conveyance may be made by such corporation at any time upon the fulfillment of such contract by the purchaser of any such lands. [S13,§2889-b; C24, 27, 31, 35,§10217.]

10218 Escheat. The county attorney of any county in which any real estate subject to escheat is situated shall proceed by petition in the name of the state against the owner thereof.

The court shall hear and determine the issues presented in said petition, and declare such real estate escheated, or dismiss the petition, as the facts may require.

When such escheat is decreed by the court, the clerk shall notify the governor that the title to such real estate is vested in the state by the decree of said court, and present to the state comptroller a bill of the costs incurred by the county in prosecuting such action, under his official certificate and seal, who shall issue a warrant payable to said clerk, drawn on the state treasurer, to pay the costs so incurred.

Any real estate, the title to which shall be acquired by the state under the provisions of this chapter, shall be sold in the manner provided for the sale of school lands, and the proceeds of such sales shall become a part of the permanent school fund. [C97,§2891; C24, 27, 31, 35,§10218.]

Referred to in §§10216, 10219
Sale of school lands, §4472 et seq.

10219 Citizen may initiate proceedings. Any citizen of the state, knowing of lands which have escheated under the provisions of this chapter, may file a motion or petition in the district court, praying an order directing the county attorney to commence the proceeding provided for in section 10218; and if, after hearing such proofs as may be offered, it finds there is reasonable ground to believe that any land has escheated, shall direct the county attorney to proceed as provided in this chapter.

If in any such case the county attorney is adversely interested, the court may appoint an attorney to prosecute such action, and fix a reasonable attorney's fee therefor, to be paid as other costs in the case. [C97,§2892; C24, 27, 31, 35,§10219.]

Referred to in §10216

10220 Limitation. No action for the recovery of real estate, the title to which is acquired by the state under the provisions of this chapter, shall lie, after the execution and recording of a patent or conveyance thereof by the state, unless such action shall have been commenced within five years after the title became vested in the grantee of the state; but a minor or person of unsound mind shall have the right to bring an action therefor at any time within five years after his disability ceases.

The defendant in any action brought under the provisions of this chapter, if the decree is for the plaintiff, shall be entitled to the benefit of the provisions of the chapter relating to occupying claimants. [C97,§2893; C24, 27, 31, 35,§10220.]

Referred to in §10216
Occupying claimants, ch 440
Recovery of lands in general, §11007, subsection 6

CHAPTER 448

ISLANDS AND ABANDONED RIVER CHANNELS

10221 Sale authorized.
10222 Application by county auditor.
10223 Application by prospective purchaser.
10224 Form of application.
10225 Survey.
10226 Report of survey.
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10228 Contract for survey.
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10233 Previous survey.
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10236 Purchase money refunded.
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10240 Withholding patent—deposit money refunded.
10241 Sale or lease authorized.
10242 Survey—appraisement—sale.
10243 Lease.
10244 Sales and leases for cash—expenses.
10245 Patent or lease.

10221 Sale authorized. All land between high-water mark and the center of the former channel of any navigable stream, where such channel has been abandoned, so that it is no longer capable of use, and is not likely again to be used for the purposes of navigation, and all land within such abandoned river channels, and all bars or islands in the channels of navigable streams not heretofore surveyed or platted by the United States or the state of Iowa, and all within the jurisdiction of the state of Iowa shall be sold and disposed of in the manner

hereinafter provided. [S13,§2900-a2; C24, 27, 31, 35,§10221.]

Referred to in §10222

10222 Application by county auditor. It shall be the duty of the county auditor to file written application with the secretary of state, asking that certain land located within the county be surveyed, appraised, and sold, whenever he is satisfied that such land is of the character contemplated by section 10221. [S13, §2900-a3; C24, 27, 31, 35,§10222.]

S13,§2900-a3, editorially divided

10223 Application by prospective purchaser. If the county auditor fails or neglects to make such application, then any person desiring to purchase such land may file a written application with the secretary of state, asking that the said land be surveyed, appraised, and sold. [S13, §2900-a3; C24, 27, 31, 35,§10223.]

10224 Form of application. The said application whether made by the county auditor or by a person desiring to purchase the land, shall contain an accurate description thereof, stating whether the land is abandoned river channel, or land within such abandoned river channel, or an island or a sand bar in a navigable stream, and giving the number of township and range in which it is located, and the section numbers if possible, and also the estimated acreage. [S13, §2900-a3; C24, 27, 31, 35,§10224.]

10225 Survey. Upon receiving such application, it shall be the duty of the secretary of state to order a complete survey of such land to be made by the county surveyor of the county wherein the land is situated, and in case of the refusal or inability of such county surveyor to make such survey then the secretary of state shall appoint some other competent surveyor to make such survey. [S13,§2900-a4; C24, 27, 31, 35,§10225.]

S13,§2900-a4, editorially divided

10226 Report of survey. When such survey is made, a full report thereof, with field notes, shall be filed with the clerk of the state land office, which report and field notes shall constitute the official survey of such land. [S13, §2900-a4; C24, 27, 31, 35,§10226.]

10227 Appraisement. Upon the filing of such report, with the accompanying field notes, the secretary of state shall thereupon appoint a commission of three disinterested freeholders of the county wherein the land is situated, to view the land and make appraisement of the value thereof, which appraisement shall be returned and filed with the clerk of the state land office in the office of the secretary of state.

The secretary of state, if he deems it necessary, may either go in person or send the clerk of the state land office into the county to make proper selection of the said commissioners. [S13, §2900-a5; C24, 27, 31, 35,§10227.]

Referred to in §10231

10228 Contract for survey. The secretary of state shall make a contract with some surveyor for making such survey; the surveyor to furnish all the chainmen and other attendants and pay all necessary expenses, which contract before it becomes binding shall be submitted to and approved by the executive council. [S13, §2900-a6; C24, 27, 31, 35,§10228.]

10229 Commissioners' compensation. Commissioners, for their services in making such appraisement shall each be entitled to receive five dollars per day for the actual time employed. [C24, 27, 31, 35,§10229.]

10230 Sale—how effected—rights of occupants. Such lands shall be sold in the following manner: Any person who has in fact lived upon any such land and occupied the same, as a home, continuously for a period of three or more years immediately prior to the time of the appraisement thereof, and such occupancy has been in good faith for the purpose of procuring title thereto, whenever by law such title could be vested in him by purchase from the proper authority, or any person who has acquired possession of such land by inheritance, or by purchase made in good faith from a former occupant, or occupants, whose occupancy dates back over a period of three years prior to the date of appraisement of the land, shall have first right to purchase such land at the appraised value; provided such bona fide occupant shall file his application for the purchase thereof at the appraised value with the secretary of state within sixty days after the day the appraisement is made, and shall accompany such application with affidavits showing proof of such bona fide occupancy. If no application has been filed by such bona fide occupant within the sixty-day period above provided, then the secretary of state shall advertise the sale of such land once each week for four consecutive weeks in two newspapers of general circulation published in the county wherein the land is situated, and proof of publication shall be filed with the secretary of state. The sale shall be made upon written bids addressed to the secretary of state and the advertisements shall fix the time when such bids will be received and opened. All bids shall be opened by the secretary of state or by the clerk of the state land office at the time fixed, and the land thereupon may be sold to the highest bidder and at not less than the appraised value. [SS15.§2900-a7; C24, 27, 31, 35,§10230.]

Referred to in §10231

10231 Lease authorized—lands re-advertised—sale. If no application is filed for the purchase of the land within the sixty-day period by a bona fide occupant, and if no bids are received for the purchase thereof, on or before the date of the sale as advertised, then the secretary of state is authorized to lease the land for a period of from one to five years, upon as favorable terms as he can obtain. At the expiration of such lease he shall re-advertise the land for sale in the manner provided in section 10230. If no bids for the purchase of the land are received on the date of the second advertised sale, then the secretary of state shall submit the matter to the executive council, and they may

either order the land reappraised in the manner provided in section 10227, and then advertised and sold in the manner provided in section 10230, or if they deem it advisable, they may authorize the secretary of state to sell the land for less than the appraised value. In such event the secretary of state shall re-advertise the land for sale in the manner provided in section 10230, and such advertisement shall also state that the land will be sold to the highest bidder without restrictions as to the appraised value. [S13, §2900-a8; C24, 27, 31, 35,§10231.]

10232 Deed or patent. When, upon full compliance with the conditions of this chapter, any person shall become entitled to a deed or patent for any land, a deed or patent shall thereupon be executed and delivered to such person by the governor, on behalf of the state, duly attested with the seal of the state attached thereto, which deed shall, in addition to the usual formalities, also recite the name of the party making application to have the land surveyed, appraised, and sold, the date and the amount of the appraisement, the name of the party making final payment and entitled to a deed therefor, whether as bona fide occupant or as highest bidder, and also that such deed is given for the purpose of conveying such title and interest in the land as the state may at the time own and possess, and has the right to convey. A record of such conveyance shall be made and kept by the clerk of the state land office of the secretary of state. [S13,§2900-a9; C24, 27, 31, 35,§10232.]

10233 Previous survey. When any such land shall be found to have been previously surveyed under and by virtue of any order of a court of record, and the record of such survey has been duly made and preserved, then and in that event, in the discretion of the secretary of state, a duly certified transcript of such record, together with the field notes accompanying the same, if obtainable, may be filed with the clerk of the state land office in the office of secretary of state, and when so filed shall obviate the necessity for any further survey of such land except when such survey becomes necessary for the purpose of execution of conveyance thereof, and the record of such transcript, when filed, shall constitute the official survey of such land. [S13,§2900-a10; C24, 27, 31, 35,§10233.]

10234 Boundary commission. If in any proceeding contemplated by the provisions of this chapter, it shall become necessary to determine the boundary line between this state and either of the states adjoining, the matter shall then be at once referred to the executive council, who shall thereupon proceed to confer with the proper authority of such adjoining state, and if the cooperation of the proper authority of such adjoining state shall be obtained, then the executive council shall appoint a commission of three disinterested, competent persons, who shall, in conjunction with the parties acting for such adjoining state, have authority to ascertain and locate the true boundary line between this state and such adjoining state, so far as the particular land under consideration at the time is concerned. The report of the commissioners with a statement of their findings shall be submitted to the executive council, who shall file the same with the clerk of the state land office in the office of the secretary of state. The line so ascertained and located shall constitute the true and permanent boundary line between this state and such other state to the extent such line shall be so ascertainable and located. [S13,§2900-a11; C24, 27, 31, 35,§10234.]

10235 How constituted. The members of the commission shall be selected with reference to their fitness for the duties required and at least one of them shall be a competent surveyor and civil engineer. [S13,§2900-a12; C24, 27, 31, 35, §10235.]

10236 Purchase money refunded. If the grantee of the state, or his successors, administrators, or assigns, shall be deprived of the land conveyed by the state under this chapter by the final decree of a court of record for the reason that the conveyance by the state passed no title whatever to the land therein described, because title thereto had previously for any reason been vested in others, then the money so paid the state for the said land shall be refunded by the state to the person or persons entitled thereto, provided the said grantee, or his successors, administrators, or assigns, shall file a certified copy of the transcript of the said final decree with the executive council within one year from the date of the issuance of such decree, and shall also file satisfactory proof with the executive council that the action over the title to the land was commenced within ten years from the date of the issuance of patent or deed by the state. The amount of money to be refunded under the provisions of this section shall be certified by the executive council to the state comptroller, who shall draw his warrant therefor, and the same shall be paid out of the general fund. [S13,§2900-a13; C24, 27, 31, 35, §10236.]

10237 Sales and leases for cash. All sales and leases of land under the provisions of this chapter shall be for cash. All money received for such sales and leases shall be paid into the state treasury by the secretary of state. [S13, §2900-a14; C24, 27, 31, 35,§10237.]

10238 Good faith possession—preference. If any lands in the present or in any former channel of any navigable river, or island therein, or any lands formed by accretion or avulsion in consequence of the changes of the channel of any such river, have been for ten years or more in the possession of any person, company, or corporation, or of his or its grantors or predecessors in interest under a bona fide claim of ownership, and the person, company or corporation so in possession, or his or its grantors or predecessors in interest, have paid state or county taxes upon said lands for a period of five years, and have in good faith and under bona fide claim of title made valuable improvements thereon, and also in any other case where, in the judgment of the executive council, the

person in possession of any land subject to the provisions of this chapter, has, in equity and good conscience, a substantial interest therein, then the said lands shall be sold to the person, company, or corporation so in possession thereof as hereinafter provided. [S13,§2900-a16; C24, 27, 31, 35,§10238.]

Referred to in §10240

10239 Notice—action to determine title and value—patent. When any person, company or corporation so in possession of any such lands shall give to the secretary of state written notice of his or its claim, or whenever the executive council shall deem it advisable, it shall be the duty of the attorney general to bring an action in equity, in the district court of the county in which said lands are situated, against the party in possession thereof to determine the title of the state to such lands, and the value thereof, exclusive of improvements made thereon by the occupant or by his or its grantors or predecessors in interest. If the person, company, or corporation in possession of such land shall, after the court has determined the value thereof as herein provided, tender to the secretary of state the amount adjudged to be the value of said lands, exclusive of improvements made thereon by the occupant or by his or its grantors or predecessors in interest, a deed or patent of such land shall be executed by the governor, attested by the secretary of state, and delivered to the person, company, or corporation making such tender, as provided by law. If the person, company, or corporation so in possession shall fail to pay to the state the amount so adjudged within six months after the final determination of the action so brought by the state, then said lands shall be subject to the other provisions of this chapter. [S13,§2900-a17; C24, 27, 31, 35, §10239.]

Referred to in §10240

10240 Withholding patent — deposit money refunded. If the land described in any application is covered by the provisions of sections 10238 and 10239, and notice thereof is given to the secretary of state as provided in section 10239, no deed or patent of such land, or any part thereof, shall be executed or issued until the title thereto shall have been established by the court as herein provided. If the party making such application, or his assignee, does not desire to prosecute his application, or if he does not purchase the land under this chapter, then all of the money deposited by him with the secretary of state under the provisions of this chapter shall be repaid to said applicant by the secretary of state; and if any part of the money so deposited has been expended by the secretary of state, then the amount so expended shall be certified by the secretary of state to the state comptroller, who shall draw his warrant upon the general fund in favor of the person entitled thereto. [S13,§2900-a18; C24, 27, 31, 35,§10240.]

10241 Sale or lease authorized. The executive council of the state is hereby authorized and empowered to sell, convey, lease, or demise any of the islands belonging to the state which are within the meandered banks of rivers in the state, and to execute and deliver a patent or lease thereof. Nothing in this and sections 10242 to 10245, inclusive, shall be construed to apply to islands in the Mississippi or Missouri rivers. [S13,§2900-a28; C24, 27, 31, 35,§10241.]

Referred to in §10242

10242 Survey—appraisement—sale. Before a sale of any island is made under the provisions of section 10241, the executive council shall cause a survey and plat of such island to be made, showing its location and area, and the plat and notes of such survey shall be filed with the secretary of state. The land composing the island shall then be appraised by a commission appointed by the governor, consisting of three disinterested freeholders of the state, who shall report their appraisement to the executive council. The sale of the island shall then be advertised once each week for four consecutive weeks in some newspaper of general circulation published in the county where the island is located, and proof of such publication filed with the executive council. The sale shall be made upon written bids addressed to the executive council of the state, and the advertisement shall fix the time when such bids will be received and opened. All bids shall be opened by the executive council at the time fixed, and the island may thereupon be sold to the highest bidder and at not less than its appraised value. [S13,§2900-a29; C24, 27, 31, 35,§10242.]

Referred to in §§10241, 10243

10243 Lease. If it shall be deemed expedient to lease any such island, a lease thereof may be made upon written bids addressed to the executive council, and the island proposed to be leased shall be surveyed and platted, and notice of the leasing thereof and of the receiving and opening of bids shall be published, in the manner provided in section 10242, but no appraisement shall be necessary. Upon the opening of the bids received by the executive council it may make a lease of such island to the highest bidder for such term as is deemed advisable. [S13,§2900-a30; C24, 27, 31, 35,§10243.]

Referred to in §10241

10244 Sales and leases for cash—expenses. All sales and leases must be for cash, and the money received therefor shall be paid into the state treasury. All expenses incurred in making the survey, plat, appraisement, sale, or lease of any such island shall be certified by the executive council to the state comptroller, who shall draw his warrant upon the state treasury for the amount, and the same shall be paid from the general fund. [S13,§2900-a31; C24, 27, 31, 35, §10244.]

Referred to in §10241

10245 Patent or lease. When any sale or lease of any island belonging to the state is made by the executive council as herein provided, the governor shall execute and deliver to the purchaser or lessee a patent or a lease thereof, as the case may be, duly attested by the seal of the state. [S13,§2900-a32; C24, 27, 31, 35,§10245.]

Referred to in §10241

CHAPTER 449

ACQUISITION OF TITLE BY STATE OR MUNICIPAL CORPORATION

10246 Right to receive conveyance.
10247 Bidding in at execution sale.
10248 Amount of bid.
10249 Costs and expenses.
10260.1 Management.
10260.2 Costs, expenses and proceeds.
10260.3 Execution of deeds and leases.
10260.4 Title under tax deed—sale—apportionment of proceeds.

10246 Right to receive conveyance. When it becomes necessary, to secure the state or any county or other municipal corporation thereof from loss, to take real estate on account of a debt by bidding the same in at execution sale or otherwise, the conveyance shall vest in the grantee as complete a title as if it were a natural person. [C73,§1910; C97,§2894; C24, 27, 31, 35, §10246.]

10247 Bidding in at execution sale. Such real estate shall be bid in, if for the state, by the attorney general, if for the county, by the county attorney, and if for any other municipal corporation, by its attorney or agent appointed for that purpose, the proceeds of any such real estate, when sold, to be covered into the state, county, or municipal treasury, as the case may be, for the use of the general or the special fund to which it rightfully belongs. [C73,§1911; C97, §2895; C24, 27, 31, 35,§10247.]

Bidding at tax sale, §§6039, 6910, 7255.1, 7589
Bidding at execution sale, §§6204, 6736

10248 Amount of bid. When real estate is sold as above provided, the fair and reasonable value shall be bid therefor, unless in excess of the judgment, interest, costs and accruing costs, in which case the bid shall be for such sum only. [C73,§1912; C97,§2896; C24, 27, 31, 35,§10248.]

10249 Costs and expenses. In all cases in which the state becomes the purchaser of real estate under the provisions of this chapter, the costs and expenses attending such purchases shall be audited and allowed by the state comptroller, and paid out of any money in the state treasury not otherwise appropriated, upon the comptroller's warrant, and charged to the fund to which the indebtedness belonged upon which such real estate was taken.

If the real estate is purchased by a county, the costs and expenses shall be audited by the board of supervisors and paid out of the county treasury, upon a warrant drawn by the auditor on the treasurer, from the fund to which the debt belonged upon which said real estate was purchased.

If the real estate is purchased by any other municipal corporation, then the costs shall be audited and paid by it in the same manner as other claims against it are audited and paid. [C73,§1913; C97,§2897; C24, 27, 31, 35,§10249.]

10250 to 10260, inc. Rep. by 45GA, ch 167

10260.1 Management. When the title to real estate becomes vested in the state, or in a county or municipality under this chapter, or by conveyance under the statutes relating to taxation, the executive council, board of supervisors or other governing body, as the case may be, shall manage, control, protect by insurance, lease or sell said real estate on such terms, conditions, or security as said governing body may deem best. [C73,§§1914–1917, 1919; C97,§§2898, 2899; C24, 27, 31,§§10250–10252, 10254–10256; C35,§10260-e1.]

10260.2 Costs, expenses and proceeds. The cost and expense resulting from the exercise of said powers shall be paid from the fund to which said real estate belongs and the proceeds of a lease or sale shall be credited to said fund. [C73, §§1914–1917, 1919; C97,§§2898, 2899; C24, 27, 31,§§10250–10252, 10254–10256; C35,§10260-e2.]

10260.3 Execution of deeds and leases. The said governing body may appoint its chairman, president or other member to execute and acknowledge, for and on behalf of the state, county, or municipality, leases and deeds of conveyance, but said instruments when executed shall be approved by the said body and said approval spread upon its minutes with the yea and nay vote thereon. A transcript of said minutes certified by the secretary of said body shall be entitled to be recorded in the same manner as the approved instrument is entitled to be recorded. [C73,§§1916, 1918, 1919; C97,§§2898–2900; C24, 27, 31,§§10254, 10257–10260; C35, §10260-e3.]

10260.4 Title under tax deed—sale—apportionment of proceeds. When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests and costs, without the written approval of a majority of all the tax levying and tax certifying bodies having any interest in said general taxes. All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold. [C35, §10260-g1.]

TITLE XXVI

CERTAIN SPECIAL LIENS

CHAPTER 450

LANDLORD'S LIEN

Landlord and tenant generally, ch 442

10261 Lien created—property subjected.
10262 Duration of lien.
10263 Limitation on lien in case of sale under judicial process.
10264 Enforcement—proceeding by attachment.
10265 Lien upon additional property.
10266 Action by tenant to recover property.
10267 Acts sufficient to constitute taking of property.
10268 Sale of crops held by landlord's lien.
10269 Action barred by payment of rent.

10261 Lien created—property subjected. A landlord shall have a lien for his rent upon all crops grown upon the leased premises, and upon any other personal property of the tenant which has been used or kept thereon during the term and which is not exempt from execution. [C51, §1270; R60,§2302; C73,§2017; C97,§2992; C24, 27, 31, 35,§10261.]

10262 Duration of lien. Such lien shall continue for the period of one year after a year's rent, or the rent of a shorter period, falls due. But in no case shall such lien continue more than six months after the expiration of the term. [C51,§1270; R60,§2302; C73,§2017; C97,§2992; C24, 27, 31, 35,§10262.]

10263 Limitation on lien in case of sale under judicial process. In the event that a stock of goods or merchandise, or a part thereof, subject to a landlord's lien, shall be sold under judicial process, order of court, or by an assignee under a general assignment for benefit of creditors, the lien of the landlord shall not be enforcible against said stock or portion thereof, except for rent due for the term already expired, and for rent to be paid for the use of demised premises for a period not exceeding six months after date of sale, any agreement of the parties to the contrary notwithstanding. [C97, §2992; C24, 27, 31, 35,§10263.]

10264 Enforcement—proceeding by attachment. The lien may be enforced by the commencement of an action, within the period above prescribed, for the rent alone, in which action the landlord shall be entitled to a writ of attachment, upon filing with the clerk or justice a verified petition, stating that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the petition; and the procedure thereunder shall be the same, as nearly as may be, as in other cases of attachment, except no bond shall be required. [C51,§1271; R60,§2303; C73,§2018; C97,§2993; C24, 27, 31, 35,§10264.]

Attachment, ch 510
Uncollectible rents, §6482

10265 Lien upon additional property. If a lien for rent is given in a written lease or other instrument upon additional property, it may be enforced in the same manner as a landlord's lien and in the same action. [C51,§1271; R60,§2303; C73,§2018; C97,§2993; C24, 27, 31, 35,§10265.]

10266 Action by tenant to recover property. An action brought by a tenant, his assignee or undertenant, to recover the possession of specific personal property taken under landlord's attachment, may be against the party who sued out the attachment; and the property claimed in such action may, under the writ therefor, be taken from the officer who seized it, when he has no other claim to hold it than that derived from the writ. [R60,§2770; C73,§2575; C97,§3490; C24, 27, 31, 35,§10266.]

10267 Acts sufficient to constitute taking of property. The indorsement of a levy on the property, made upon the process by the officer holding it, shall be a sufficient taking of the property to sustain an action against the party who sued out the writ. [R60,§2770; C73,§2575; C97,§3490; C24, 27, 31, 35,§10267.]

Levy generally, §11669 et seq.; §12102 et seq.

10268 Sale of crops held by landlord's lien. If any tenant of farm lands, with intent to defraud, shall sell, conceal, or in any manner dispose of any of the grain, or other annual products thereof upon which there is a landlord's lien for unpaid rent, without the written consent of the landlord, he shall be guilty of larceny and punished accordingly. [S13, §4852-a; C24, 27, 31, 35,§10268.]

Referred to in §10269
Larceny, §§13005, 13006

10269 Action barred by payment of rent. The payment of the rent for the lands upon which such grain or other annual products were raised at or before the time the same falls due, shall be a bar to any prosecution under section 10268 and no prosecution shall be commenced until such rent be wholly due. [S13,§4852-b; C24, 27, 31, 35,§10269.]

CHAPTER 450.1

THRESHERMAN'S OR CORNSHELLER'S LIEN

10269.1 Nature of lien.
10269.2 Priority of lien.
10269.3 Preservation of lien.
10269.4 Enforcement—time limit.
10269.5 Enforced as chattel mortgage.

10269.1 Nature of lien. Any person, firm, corporation or association engaged in operating a machine for the threshing or combining of any kind of grain or seed or for the mechanical husking or shelling of corn, and doing custom threshing, combining, mechanical husking, or corn shelling for hire shall have a first lien on grain and seed threshed or corn shelled or husked for the reasonable value of such services. [C35, §10269-e1; 48GA, ch 237,§1.]

10269.2 Priority of lien. Said lien shall be prior and superior to any landlord's lien or mortgage lien upon said grain, seed or corn. [C35,§10269-e2.]

10269.3 Preservation of lien. In order to preserve said lien the person entitled thereto must, within ten days from the completion of the work for which the lien is claimed, file in the office of the clerk of the district court of the county in which said services were rendered an itemized and verified statement setting forth the services rendered, the number of bushels of grain threshed or corn shelled, the value of said services and the name of the person for whom said services were rendered and the place where said services were rendered; and the clerk of the district court shall note the filing of said verified statement in a book kept by him for that purpose and index the same under the name of the person for whom such service was performed. [C35,§10269-e3.]

10269.4 Enforcement—time limit. Proceedings to enforce said lien must be brought within thirty days after the filing of said verified statement and cannot be brought thereafter. [C35, §10269-e4.]

10269.5 Enforced as chattel mortgage. Said lien may be foreclosed as a chattel mortgage lien under the provisions of chapter 523, except that the notice of sale need not be published but in lieu thereof may be posted in three public places of the county, one of which shall be the bulletin board in the corridor of the courthouse and one of which shall be the place where the grain or seed or corn is located. [C35, §10269-e5.]

CHAPTER 451

MECHANIC'S LIEN

Referred to in §1360.09

10270 Definitions and rules of construction.
10271 Persons entitled to lien.
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10273 Security after completion of work.
10274 Extent of lien.
10275 In case of leasehold interest.
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10284 Discharge of subcontractor's lien.
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10287 Priority over other liens.
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10290 Foreclosure of mechanic's lien when lien on land.
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10292 Acknowledgment of satisfaction of claim.
10293 Time of bringing action—court.
10294 Place of bringing action.
10295 Kinds of action.
10296 Limitation on action.
10297 Demand for bringing suit.
10298 Assignment of lien.

10270 Definitions and rules of construction. For the purpose of this chapter:

1. "Owner" shall include every person for whose use or benefit any building, erection, or other improvement is made, having the capacity to contract, including guardians.

2. "Subcontractor" shall include every person furnishing material or performing labor upon any building, erection, or other improvement, except those having contracts therefor directly with the owner, his agent, or trustee.

3. "Building" shall be construed as if followed by the words "erection, or other improvement upon land".

4. "Material" shall be construed as if followed by the words "machinery or fixtures". [C51,§982; R60,§§1866, 1871; C73,§§2144, 2146; C97,§§3096, 3097; C24, 27, 31, 35,§10270.]

10271 Persons entitled to lien. Every person who shall furnish any material for or perform any labor upon any building, including those engaged in the construction or repair of any work of internal improvement and those engaged in grading any land or lot, by virtue of any contract with the owner, his agent, trustee, contractor, or subcontractor shall have a lien upon such building and upon the land belonging to such owner on which the same is situated, or upon the land or lot so graded, to secure pay-

ment for material furnished or the labor performed. [C51,§§981, 1010; R60,§1846; C73,§2130; C97,§3089; C24, 27, 31, 35,§10271.]

Homestead liable, §10155

10272 Collateral security before completion of work. No person shall be entitled to a mechanic's lien who, at the time of making a contract for furnishing material or performing labor, or during the progress of the work, shall take any collateral security on such contract. [C51,§1009; R60,§1845; C73,§2129; C97,§3088; C24, 27, 31, 35,§10272.]

10273 Security after completion of work. After the completion of such work, the taking of security of any kind shall not affect the right to establish a mechanic's lien unless such new security shall, by express agreement, be given and received in lieu of such lien. [C97,§3088; C24, 27, 31, 35,§10273.]

10274 Extent of lien. The entire land upon which any building is situated, including that portion not covered therewith, shall be subject to a mechanic's lien to the extent of the interest therein of the person for whose benefit such material was furnished or labor performed. [R60, §1854; C73,§2140; C97,§3090; C24, 27, 31, 35, §10274.]

10275 In case of leasehold interest. When the interest of such person is only a leasehold, the forfeiture of the lease for the nonpayment of rent, or for noncompliance with any of the other conditions therein, shall not forfeit or impair the mechanic's lien upon such building; but the same may be sold to satisfy such lien, and removed by the purchaser within thirty days after the sale thereof. [R60,§1854; C73,§2140; C97,§3090; C24, 27, 31, 35,§10275.]

10276 In case of internal improvement. When the lien is for material furnished or labor performed in the construction, repair, or equipment of any railroad, canal, viaduct, or other similar improvement, said lien shall attach to the erections, excavations, embankments, bridges, roadbeds, rolling stock, and other equipment and to all land upon which such improvements or property may be situated, except the easement or right-of-way. [C73,§2132; C97,§3091; C24, 27, 31, 35,§10276.]

10277 Perfection of lien. Every person who wishes to avail himself of a mechanic's lien shall file with the clerk of the district court of the county in which the building to be charged with the lien is situated a verified statement or account of the demand due him, after allowing all credits, setting forth:

1. The time when such material was furnished or labor performed, and when completed.
2. The correct description of the property to be charged with the lien. [R60,§1851; C73, §2137; C97,§3092; C24, 27, 31, 35,§10277.]

Referred to in §10278

10278 Time of filing. The statement or account required by section 10277 shall be filed by a principal contractor within ninety days, and by a subcontractor within sixty days, from the date on which the last of the material was furnished or the last of the labor was performed. A failure to file the same within said periods shall not defeat the lien, except as otherwise provided in this chapter. [R60,§1851; C73, §2137; C97,§3092; C24, 27, 31, 35,§10278.]

Referred to in §10279

10279 Perfecting subcontractor's lien after lapse of sixty days. After the lapse of the sixty days prescribed in section 10278, a subcontractor may perfect a mechanic's lien by filing his claim with the clerk of the district court and giving written notice thereof to the owner, his agent, or trustee. Such notice may be served by any person in the manner original notices are required to be served. If the party to be served, his agent, or trustee, is out of the county wherein the property is situated, a return of that fact by the person charged with making such service shall constitute sufficient service from and after the time it was filed with the clerk of the district court. [C73,§2133; C97, §3094; SS15,§3094; C24, 27, 31, 35,§10279.]

Referred to in §10280
Service of notice, §11060

10280 Extent of lien filed after sixty days. Liens perfected under section 10279 shall be enforced against the property or upon the bond, if given by the owner, as hereinafter provided, only to the extent of the balance due from the owner to the contractor at the time of the service of such notice; but if the bond was given by the contractor, or person contracting with the subcontractor filing the claim for a lien, such bond shall be enforced to the full extent of the amount found due the subcontractor. [C73, §2133; C97,§3094; SS15,§3094; C24, 27, 31, 35, §10280.]

10281 Time of filing against railway. Where a lien is claimed upon a railway, the subcontractor shall have sixty days from the last day of the month in which such labor was done or material furnished within which to file his claim therefor. [R60,§1851; C73,§2137; C97,§3092; C24, 27, 31, 35,§10281.]

10282 Liability of owner to original contractor. No owner of any building upon which a mechanic's lien of a subcontractor may be filed, shall be required to pay the original contractor for compensation for work done or material furnished for said building until the expiration of sixty days from the completion of said building, unless the original contractor shall furnish to the owner:

1. Receipts and waivers of claims for mechanics' liens, signed by all persons who furnished any material or performed any labor for said building, or
2. A good and sufficient bond to be approved by said owner, conditioned that said owner shall be held harmless from any loss which he may sustain by reason of the filing of mechanics' liens by subcontractors. [R60,§1847; C73,§2131; C97, §3093; S13,§3093; C24, 27, 31, 35,§10282.]

10283 Liability to subcontractor after payment of original contractor. Payment to the original contractor by the owner of any part or all of the contract price of such building before the lapse of the sixty days allowed by law for the filing of a mechanic's lien by a subcontractor, will not relieve the owner from liability to the subcontractor for the full value of any material furnished or labor performed upon said building, if the subcontractor file his lien within the time provided by law for the filing of the same. [S13,§3093; C24, 27, 31, 35, §10283.]

10284 Discharge of subcontractor's lien. Every mechanic's lien of a subcontractor may be discharged at any time by the owner, principal contractor, or intermediate subcontractor filing with the clerk of the district court of the county in which the property is located a bond in twice the amount of the sum for which the claim for the lien is filed, with surety or sureties, to be approved by said clerk, conditioned for the payment of any sum for which the claimant may obtain judgment upon his claim. [C97,§3093; S13,§3093; C24, 27, 31, 35,§10284.]

10285 Rule of construction. Nothing in this chapter shall be construed to require the owner to pay a greater amount or at an earlier date than is provided in his contract with the principal contractor, unless said owner pays a part or all of the contract price to the original contractor before the expiration of the sixty days allowed by law for the filing of a mechanic's lien by a subcontractor. [C97,§3093; S13,§3093; C24, 27, 31, 35,§10285.]

10286 Priority of mechanics' liens between mechanics. Mechanics' liens shall have priority over each other in the order of the filing of the statements or accounts as herein provided. [R60,§§1853, 1855; C73,§§2139, 2141; C97,§3095; C24, 27, 31, 35,§10286.]

10287 Priority over other liens. Mechanics' liens shall be preferred to all other liens which may attach to or upon any building and to the land upon which it is situated, except liens of which the contractor or subcontractor, as the case may be, has actual or constructive notice before the commencement of the work or the furnishing of material; but the rights of purchasers, incumbrancers, and other persons who acquire interests in good faith and for a valuable consideration, and without notice, after the expiration of the time for filing claims for such liens, shall be prior to the claims of all contractors or subcontractors who have not, at the dates such rights and interests were acquired, filed their claims for such liens. [R60,§§1851, 1853, 1855; C73,§§2137, 2139, 2141; C97,§§3092, 3095; C24, 27, 31, 35,§10287.]

10288 Priority over garnishments of the owner. Mechanics' liens shall take priority of all garnishments of the owner for the contract debts, whether made prior or subsequent to the commencement of the furnishing of the material or performance of the labor, without regard to the date of filing the claim for such lien. [C97,§3095; C24, 27, 31, 35,§10288.]

10289 Priority as to buildings over prior liens upon land. Mechanics' liens, including those for additions, repairs, and betterments, shall attach to the building for which the material or labor was furnished or done, in preference to any prior lien, incumbrance, or mortgage upon the land upon which such building was erected or situated. [R60,§§1853, 1855; C73,§§2139, 2141; C97,§3095; C24, 27, 31, 35, §10289.]

10290 Foreclosure of mechanic's lien when lien on land. In the foreclosure of a mechanic's lien when there is a prior lien, incumbrance, or mortgage upon the land the following regulations shall govern:

1. *Lien on original and independent building.* If such material was furnished or labor performed in the construction of an original and independent building commenced after the attaching or execution of such prior lien, incumbrance, or mortgage, the court may, in its discretion, order such building to be sold separately under execution, and the purchaser may remove the same in such reasonable time as the court may fix. If the court shall find that such building should not be sold separately, it shall take an account of and ascertain the separate values of the land, and the building, and order the whole sold, and distribute the proceeds of such sale so as to secure to the prior lien, incumbrance, or mortgage priority upon the land, and to the mechanic's lien priority upon the building.

2. *Lien on existing building for repairs or additions.* If the material furnished or labor performed was for additions, repairs, or betterments upon any building, the court shall take an accounting of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs, or betterments; and upon the sale of the premises, distribute the proceeds of such sale so as to secure to the prior mortgagee or lienholder priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien, and to the mechanic's lienholder priority upon the enhanced value caused by such additions, repairs, or betterments. In case the premises do not sell for more than sufficient to pay off the prior mortgage or other lien, the proceeds shall be applied on the prior mortgage or other liens. [R60, §§1853, 1855; C73,§§2139, 2141; C97,§3095; C24, 27, 31, 35,§10290.]

10291 Record of claim. The clerk of the court shall indorse upon every claim for a mechanic's lien filed in his office the date and hour of filing and make an abstract thereof in the mechanic's lien book kept for that purpose. Said book shall be properly indexed and shall contain the following items concerning each claim:

1. The name of the person by whom filed.
2. The date and hour of filing.
3. The amount thereof.

4. The name of the person against whom filed.
5. The description of the property to be charged therewith. [R60,§1852; C73,§2138; C97, §3100; C24, 27, 31, 35,§10291.]

10292 Acknowledgment of satisfaction of claim. When a mechanic's lien is satisfied by payment of the claim, the claimant shall acknowledge satisfaction thereof upon the mechanic's lien book, or otherwise in writing, and, if he neglects to do so for thirty days after demand in writing, he shall forfeit and pay twenty-five dollars to the owner or contractor, and be liable to any person injured to the extent of his injury. [R60,§§1867-1869; C73,§2145; C97, §3101; C24, 27, 31, 35,§10292.]

10293 Time of bringing action—court. An action to enforce a mechanic's lien, or an action brought upon any bond given in lieu thereof, may be commenced in the district or superior court after said lien is perfected. [R60,§1856; C73,§2142; C97,§3098; C24, 27, 31, 35,§10293.]

10294 Place of bringing action. An action to enforce a mechanic's lien shall be brought in the county in which the property to be affected, or some part thereof, is situated. [C73, §2578; C97,§3493; C24, 27, 31, 35,§10294.]

10295 Kinds of action. An action to enforce a mechanic's lien shall be by equitable proceedings, and no other cause of action shall be joined therewith. [C51,§985; R60,§4183; C73, §2510; C97,§3429; C24, 27, 31, 35,§10295.]

10296 Limitation on action. An action to enforce a mechanic's lien may be brought within two years from the expiration of the sixty or ninety days, as the case may be, for filing the claim as provided in this chapter and not afterwards. [C51,§984; R60,§1865; C73,§2529; C97, §3447; S13,§3447; C24, 27, 31, 35,§10296.]

10297 Demand for bringing suit. Upon the written demand of the owner, his agent, or contractor, served on the lienholder requiring him to commence action to enforce his lien, such action shall be commenced within thirty days thereafter, or the lien and all benefits derived therefrom shall be forfeited. [C73,§2143; C97, §3099; C24, 27, 31, 35,§10297.]

10298 Assignment of lien. A mechanic's lien is assignable, and shall follow the assignment of the debt for which it is claimed. [C97, §3099; C24, 27, 31, 35,§10298.]

CHAPTER 452

LABOR AND MATERIAL ON PUBLIC IMPROVEMENTS

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10299 Terms defined. For the purpose of this chapter:

1. "Public corporation" shall embrace the state, and all counties, cities, towns, public school corporations, and all officers, boards, or commissions empowered by law to enter into contracts for the construction of public improvements.
2. "Public improvement" is one, the cost of which is payable from taxes or other funds under the control of the public corporation, except in cases of public improvement for drainage or levee purposes the provisions of the drainage law in cases of conflict shall govern.
3. "Construction" shall, in addition to its ordinary meaning, embrace repair and alteration.
4. "Material" shall, in addition to its ordinary meaning, embrace feed, gasoline, kerosene, lubricating oils and greases, provisions, and fuel, but shall not include personal expenses or personal purchases of employees for their individual use.
5. "Service" shall, in addition to its ordinary meaning, include the furnishing to the contractor of workmen's compensation insurance, and premiums and charges for such insurance shall be considered a claim for service. [C24, 27, 31, 35,§10299.]

Municipal protection of subcontractors, §5774

10300 Public improvements—bond and conditions. Contracts for the construction of a public improvement shall, when the contract price equals or exceeds one thousand dollars, be accompanied by a bond, with surety, conditioned for the faithful performance of the contract, and for the fulfillment of such other requirements as may be provided by law. Such bond may also be required when the contract price does not equal said amount. [C24, 27, 31, 35,§10300.]

10301 Bond mandatory. The obligation of the public corporation to require, and the contractor to execute and deliver said bond, shall not be limited or avoided by contract. [C24, 27, 31, 35,§10301.]

10302 Deposit in lieu of bond. A deposit of money, or a certified check on a solvent bank of the county in which the improvement is to be located, or state or federal bonds, or bonds issued by any city, town, school corporation, or county of this state, or bonds issued on behalf of any drainage or highway paving district of this state, may be received in an amount equal to the amount of the bond and held in lieu of a surety on such bond, and when so received such securities shall be held on the terms and conditions applicable to a surety. [C24, 27, 31, 35,§10302.]

10303 Amount of bond. Said bond shall run to the public corporation. The amount thereof shall be fixed, and the bond approved, by the official board or officer empowered to let the contract, in an amount not less than seventy-five percent of the contract price, and sufficient to comply with all requirements of said contract and to insure the fulfillment of every condition, expressly or impliedly embraced in said bond; except that in contracts where no part of the contract price is paid until after the completion of the public improvement the amount of said bond may be fixed at not less than twenty-five percent of the contract price. [C24, 27, 31, 35,§10303.]

10304 Subcontractors on public improvements. The following provisions shall be held to be a part of every bond given for the performance of a contract for the construction of a public improvement, whether said provisions be inserted in such bond or not, to wit:

1. "The principal and sureties on this bond hereby agree to pay to all persons, firms, or corporations having contracts directly with the principal or with subcontractors, all just claims due them for labor performed or materials furnished, in the performance of the contract on account of which this bond is given, when the same are not satisfied out of the portion of the contract price which the public corporation is required to retain until completion of the public improvement, but the principal and sureties shall not be liable to said persons, firms, or corporations unless the claims of said claimants against said portion of the contract price shall have been established as provided by law."

2. "Every surety on this bond shall be deemed and held, any contract to the contrary notwithstanding, to consent without notice:

a. To any extension of time to the contractor in which to perform the contract.

b. To any change in the plans, specifications, or contract, when such change does not involve an increase of more than twenty percent of the total contract price, and shall then be released only as to such excess increase.

c. That no provision of this bond or of any other contract shall be valid which limits to less than one year from the time of the acceptance of the work the right to sue on this bond for defects in workmanship or material not discovered or known to the obligee at the time such work was accepted." [S13,§1527-s18; C24, 27, 31, 35,§10304.]

10305 Claims for material or labor. Any person, firm, or corporation who has, under a contract with the principal contractor or with subcontractors, performed labor, or furnished material, service, or transportation, in the construction of a public improvement, may file, with the officer, board or commission authorized by law to let contracts for such improvement, an itemized, sworn, written statement of the claim for such labor, or material, service, or transportation. [C97,§3102; S13,§1989-a57; C24, 27, 31, 35,§10305.]

10306 Highway improvements. In case of highway improvements by the county, claims shall be filed with the county auditor of the county letting the contract.

But no claims filed for credit extended for the personal expenses or personal purchases of employees for their individual use shall cause any part of the unpaid funds of the contractor to be withheld. [C24, 27, 31, 35,§10306.]

10307 Officer to indorse time of filing claim. The officer shall indorse over his official signature upon every claim filed with him, the date and hour of filing. [C24, 27, 31, 35,§10307.]

10308 Time of filing claims. Claims may be filed with said officer as follows:

1. At any time before the expiration of thirty days immediately following the completion and final acceptance of the improvement.

2. At any time after said thirty-day period, if the public corporation has not paid the full contract price as herein authorized, and no action is pending to adjudicate rights in and to the unpaid portion of the contract price. [C97,§3102; S13,§1989-a57; C24, 27, 31, 35,§10308.]

10309 Claims filed after action brought. The court may permit claims to be filed with it during the pendency of the action hereinafter authorized, if it be made to appear that such belated filing will not materially delay the action. [C97,§3102; C24, 27, 31, 35,§10309.]

10310 Payments under public contracts. Payments made under contracts for the construction of public improvements, unless provided otherwise by law, shall be made on the basis of monthly estimates of labor performed and material delivered; said payments to be made for not more than ninety percent of said estimates and to be so made that at least ten percent of the contract price will remain unpaid at the date of the completion of the contract, anything in the contract to the contrary notwithstanding. [S13, §1989-a57; C24, 27, 31, 35,§10310.]

Referred to in §10311

10311 Inviolability and disposition of fund. No public corporation shall be permitted to plead noncompliance with section 10310, and the retained percentage of the contract price,

which in no case shall be less than ten percent, shall constitute a fund for the payment of claims for materials furnished and labor performed on said improvement, and shall be held and disposed of by the public corporation as hereinafter provided. [C97,§3102; S13, §1989-a57; C24, 27, 31, 35,§10311.]

10312 Retention of unpaid funds. Said fund shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement. If at the end of said thirty-day period claims are on file as herein provided the public corporation shall continue to retain from said unpaid funds a sum not less than double the total amount of all claims on file. [C97,§3104; S13,§1989-a59; C24, 27, 31, 35,§10312.]

10312.1 Exception. No part of the unpaid fund due the contractor shall be retained as provided in this chapter on claims for material furnished, other than materials ordered by the general contractor or his authorized agent, unless such claims are supported by a certified statement that the general contractor had been notified within thirty days after the materials are furnished or by itemized invoices rendered to contractor during the progress of the work, of the amount, kind and value of the material furnished for use upon the said public improvement. [C31, 35,§10312-d1.]

10313 Optional and mandatory actions — bond to release. The public corporation, the principal contractor, any claimant for labor or material who has filed his claim, or the surety on any bond given for the performance of the contract, may, at any time after the expiration of thirty days, and not later than sixty days, following the completion and final acceptance of said improvement, bring action in equity in the county where the improvement is located to adjudicate all rights to said fund, or to enforce liability on said bond.

Provided that upon written demand of the contractor served on the person or persons filing said claims requiring him to commence action in court to enforce his claim in the manner as prescribed for original notices, such action shall be commenced within thirty days thereafter, otherwise such retained and unpaid funds due the contractor shall be released; and it is further provided that, after such action is commenced, upon the general contractor filing with the public corporation or person withholding such funds, a surety bond in double the amount of the claim in controversy, conditioned to pay any final judgment rendered for such claims so filed, said public corporation or person shall pay to the contractor the amount of such funds so withheld. [C97,§3103; S13, §1989-a58; C24, 27, 31, 35,§10313.]

Action against surety, §11047
Manner of service, §11060

10314 Parties. The official board or officer letting the contract, the principal contractor, all claimants for labor and material who have filed their claim, and the surety on any bond given for the performance of the contract shall be joined as plaintiffs or defendants. [C24, 27, 31, 35,§10314.]

10315 Adjudication — payment of claims. The court shall adjudicate all claims. Payments from said retained percentage, if still in the hands of the public corporation, shall be made in the following order:

1. Costs of the action.
2. Claims for labor.
3. Claims for materials.
4. Claims of the public corporation. [C24, 27, 31, 35,§10315.]

Referred to in §10316

10316 Insufficiency of funds. When the retained percentage aforesaid is insufficient to pay all claims for labor or materials, the court shall, in making distribution under section 10315, order the claims in each class paid in the order of filing the same. [C97,§3102; S13, §1989-a57; C24, 27, 31, 35,§10316.]

10317 Converting property into money. When it appears that the unpaid portion of the contract price for the public improvement, or a part thereof, is represented, in whole or in part, by property other than money, or if a deposit has been made in lieu of a surety, the court shall have jurisdiction thereover, and may cause the same to be sold, under such procedure as it may deem just and proper, and disburse the proceeds as in other cases. [C24, 27, 31, 35, §10317.]

10318 Attorney fees. The court may tax, as costs, a reasonable attorney fee in favor of any claimant for labor or materials who has, in whole or in part, established his claim. [C97, §3103; S13,§1989-a58; C24, 27, 31, 35,§10318.]

10319 Unpaid claimants—judgment on bond. If, after the said retained percentage has been applied to the payment of duly filed and established claims, there remain any such claims unpaid in whole or in part, judgment shall be entered for the amount thereof against the principal and sureties on the bond. In case the said percentage has been paid over as herein provided, judgment shall be entered against the principal and sureties on all such claims. [C24, 27, 31, 35,§10319.]

10320 Abandonment of public work—effect. When a contractor abandons the work on a public improvement or is legally excluded therefrom, the improvement shall be deemed completed for the purpose of filing claims as herein provided, from the date of the official cancellation of the contract. The only fund available for the payment of the claims of persons for labor performed or material furnished shall be the amount then due the contractor, if any, and if said amount be insufficient to satisfy said claims, the claimants shall have a right of action on the bond given for the performance of the contract. [C24, 27, 31, 35,§10320.]

10321 Retention of funds — road improvement. If payment for such improvement is to

be made in whole or in part from the primary road fund, the county auditor shall immediately notify the state highway commission of the filing of all claims. [C24, 27, 31, 35,§10321.]

10322 Filing of claim — effect. The filing of any claim shall not work the withholding of any funds from the contractor except the retained percentage, as provided in this chapter. [C24, 27, 31, 35,§10322.]

10323 Public corporation—action on bond. Nothing in this chapter shall be construed as limiting in any manner the right of the public corporation to pursue any remedy on the bond given for the performance of the contract. [C24, 27, 31, 35,§10323.]

CHAPTER 453

MINER'S LIEN

10324 Nature of miner's lien.

10324 Nature of miner's lien. Every laborer or miner who shall perform labor in opening, developing, or operating any coal mine shall have a lien for the full value of such labor upon all the property of the person, firm, or corporation owning or operating such mine and used in the construction or operation thereof, including real estate and personal property. Such lien shall be secured and enforced in the same manner as a mechanic's lien. [C97,§3105; C24, 27, 31, 35,§10324.]

Mechanics' liens, ch 451

CHAPTER 454

COMMON CARRIER'S LIEN

Referred to in §§10342, 10344, 10344.2

10325 Definitions.
10326 Lien of common carrier.
10327 Enforcement.
10328 Personal notice of sale.
10329 Manner of giving notice.
10330 Actual notice.
10331 Sale.
10332 Sale when owner unknown.
10333 Inventory—sale in bulk or separate articles.
10334 Recovery of property by satisfaction of lien.
10335 Application of proceeds.
10336 Disposition of unclaimed balance.
10337 Release of carrier.
10338 Duties of county treasurer.
10339 Owner may reclaim—limitation.
10340 Other remedies.

10325 Definitions. For the purpose of this chapter:

1. "Perishable property" shall include fruits, vegetables, fish, oysters, candies, bakery goods, game, butter, eggs, dairy products, dressed poultry, fresh meats, and other property which by keeping may deteriorate in value or damage other property; also, gasoline, kerosene, oils, and distillates, dynamite, powder, munitions, and explosives, and other substances, which by reason of odor or leakage, or their volatile, inflammable, explosive, or dangerous nature, may become damaged or may be dangerous to persons or to other property.
2. "Livestock" shall include animals, live poultry, and birds.
3. "Nonperishable property" shall include all property not defined as perishable property or livestock.
4. "Carrier" shall mean common carrier. [R60,§1903; C73,§2180; C97,§3132; C24, 27, 31, 35,§10325.]

10326 Lien of common carrier. Every carrier shall have a lien upon all property of every kind in its possession for all lawful charges thereon for transportation, demurrage, storage, handling, keeping, caring for, and, if sold under the provisions of this chapter, for selling the same. [R60,§§1898, 1899; C73,§§2177, 2178; C97, §3130; C24, 27, 31, 35,§10326.]

Bond to release, ch 459

10327 Enforcement. When any property upon which a carrier has a lien is unclaimed, or no directions have been given for the disposition thereof, or when any of the charges thereon are unpaid, the same may be sold by the carrier after giving the notice herein prescribed. [R60,§§1900–1902; C73,§2179; C97, §3131; S13,§3131; C24, 27, 31, 35,§10327.]

10328 Personal notice of sale. Notices for the sale of property under the provisions of this chapter shall be given as follows:

1. In the case of perishable property notice may be given, at any time after the arrival of the property at its destination, to the consignee or person designated in the waybill to be notified, and said notice shall state that the property is on hand and that unless all legal charges are paid and the property removed or directions given for the disposition of the same within the time hereinafter prescribed, the property will be sold as provided in this chapter.
2. In the case of livestock the same notice as prescribed in the preceding subsection may be given at any time after the lapse of forty-eight hours from the time of arrival of the property at its destination.
3. In the case of nonperishable property notice may be given in accordance with the provisions of the preceding subsection, but a like notice shall also be given to the consignor.
4. In case no shipping directions have been

received for the disposition of the property, the notice required by this section may be given to the person from whom the property was received, if said person and his address are known, otherwise the carrier shall proceed as provided in section 10332.

1. [R60,§1903; C73,§2180; C97,§3132; C24, 27, 31, 35,§10328.]

2. [C24, 27, 31, 35,§10328.]

3. [R60,§§1899, 1901, 1902; C73,§§2178, 2179; C97,§§3130, 3131; S13,§3131; C24, 27, 31, 35, §10328.]

4. [C24, 27, 31, 35,§10328.]

Referred to in §10329

10329 Manner of giving notice. The deposit in the United States post office or public mailing box of a written notice addressed to the person entitled to notice under section 10328, at the address given in the waybill, with the proper postage thereon, shall constitute the service of notice required by this chapter, but in the case of nonperishable property notice shall be given by registered mail. In case there is no waybill, notice may be given as prescribed in this section to the person entitled thereto at his known place of residence or business. [R60, §§1901, 1903; C73,§§2179, 2180; C97,§§3131, 3132; S13,§3131; C24, 27, 31, 35,§10329.]

10330 Actual notice. Actual notice to the persons entitled to notice shall be sufficient and render the mailing of notice unnecessary, and the time within which said property may be sold shall begin to run from the time of such actual notice. [C24, 27, 31, 35,§10330.]

10331 Sale. After the required notice has been given, the carrier may make public or private sale of the property at such time and place as in its judgment may be advisable, as follows:

1. In case of perishable property, at any time after the lapse of twenty-four hours from the service of notice.

2. In case of livestock, at any time after the lapse of five days from the service of notice.

3. In case of nonperishable property, at any time after the lapse of ten days from the service of notice. [R60,§1901; C73,§§2179, 2180; C97,§§3131, 3132; S13,§3131; C24, 27, 31, 35, §10331.]

Referred to in §10332

10332 Sale when owner unknown. When a carrier is in possession of property which is unclaimed or for which no directions have been given for the disposition thereof, and the owner or person entitled thereto, or his address, is unknown, the same may be sold as provided in this chapter, after the lapse of time prescribed in section 10331 from the receipt of the property or arrival at its destination, without giving the notice heretofore prescribed, except that in the case of nonperishable property, advertisement of the sale, describing the property to be sold, and the time and place of sale, shall be published, after the lapse of the time prescribed before sale can be made, once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. [R60,§§1899–1901; C73,§§2177–2179; C97,§§3130, 3131; S13,§3131; C24, 27, 31, 35,§10332.]

Referred to in §10328

10333 Inventory—sale in bulk or separate articles. Property sold under the provisions of this chapter shall first be listed by the carrier, so as to show the number and kind of articles or packages, or the number of head and kind of livestock, and may be sold in bulk, in lots, or by separate package or articles, or by the head, and the carrier shall keep an accurate account of the separate and aggregate amounts received for all property sold. [R60,§§1899, 1904; C73, §§2177, 2178, 2181; C97,§§3130, 3133; C24, 27, 31, 35,§10333.]

10334 Recovery of property by satisfaction of lien. At any time before the property is sold any person entitled to the same may pay the amount necessary to satisfy the lien and all charges due the carrier who shall then deliver the property to said person. [C24, 27, 31, 35, §10334.]

10335 Application of proceeds. The carrier shall make the following disposition of the proceeds of such sale:

1. Apply so much as may be necessary for the payment of all lawful charges for transportation, demurrage, storing, keeping, feeding, and selling, including costs of notices and all expenses connected with the sale and disposition of proceeds.

2. Pay the balance to the consignee or owner or person entitled thereto upon a proper showing that the person claiming it is entitled thereto. [R60,§§1901, 1904; C73,§§2179, 2181; C97,§§3131, 3133; S13,§3131; C24, 27, 31, 35, §10335.]

10336 Disposition of unclaimed balance. When no claim is made by any person for such balance, within one month after the sale the carrier shall pay the same to the treasurer of the county where such property was sold, taking his receipt therefor, which payment shall be accompanied by a verified list of the property sold, showing the amount received, the amount deducted or applied for lawful charges, and the names and addresses of the consignor and consignee as they appear on the waybill. In case there is no waybill the verified list shall show the name and address of the person entitled to notice before the sale of the property, or in case the only notice given was by advertisement then a copy of said advertisement shall be attached to said list. [R60,§1904; C73, §2181; C97,§3133; C24, 27, 31, 35,§10336.]

10337 Release of carrier. Upon payment to the county treasurer of such balance or in case such property does not sell for an amount in

excess of the lawful charges, the carrier shall be released from all further liability in relation to the property. [C24, 27, 31, 35,§10337.]

10338 Duties of county treasurer. Any county treasurer receiving any funds under the provisions of this chapter, shall make a record in his office of the date and amount received, and shall file and preserve the verified list of property; and if said fund shall remain unclaimed for one year, he shall credit it to the general fund of the county. [R60,§1905; C73, §2182; C97,§3134; C24, 27, 31, 35,§10338.]

10339 Owner may reclaim—limitation. The rightful owner of any such fund may at any time within ten years after it is credited to the general fund, make claim for said amount to the board of supervisors and on proof of his right thereto, it shall be allowed and paid as other claims against the county. [R60,§1905; C73,§2182; C97,§3134; C24, 27, 31, 35,§10339.]

Payment of claims, §5124

10340 Other remedies. The remedy for enforcing the lien herein provided shall not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the carrier's claim as shall not be paid by the proceeds of the sale. [C24, 27, 31, 35,§10340.]

Attachment to enforce lien, §12147

CHAPTER 455

FORWARDING AND COMMISSION MERCHANT'S LIEN

10341 Nature of lien.

10341 Nature of lien. Every forwarding and commission merchant shall have a lien upon all property of every kind in his possession, for the transportation and storage thereof, for all lawful charges and services thereon or in connection therewith, and, if sold under the provisions of this chapter, for selling the same. [R60,§§1898, 1899, 1900–1902; C73,§§2177–2179; C97,§§3130, 3131; S13,§3131; C24, 27, 31, 35,§10341.]

Bond to release, ch 459

10342 Enforcement of lien.

10342 Enforcement of lien. The lienholder may enforce his lien in the same manner as a common carrier and all the provisions of chapter 454 shall govern such proceedings as far as applicable. [R60,§§1898–1905; C73,§§2177–2182; C97,§§3130–3134; S13,§3131; C24, 27, 31, 35, §10342.]

Attachment to enforce lien, §12147

CHAPTER 456

ARTISAN'S LIEN

10343 Nature of lien.

10343 Nature of lien. Any person who renders any service or furnishes any material in the making, repairing, improving, or enhancing the value of any inanimate personal property, with the assent of the owner, express or implied, shall have a lien thereon for the agreed or reasonable compensation for his service and material while such property is lawfully in his possession, which possession he may retain until such compensation is paid, but such lien shall be subject to all prior liens of record. [R60, §1898; C73,§2177; C97,§3130; C24, 27, 31, 35, §10343.]

Bond to release, ch 459

10344 Enforcement of lien.

10344 Enforcement of lien. The lienholder may enforce his lien by suit in equity or in the same manner as a common carrier and all the provisions of chapter 454 shall govern such proceedings as far as applicable, except that notice shall be given to the owner or bailor in lieu of the persons specified in said chapter as entitled to notice. [R60,§§1898–1905; C73,§§2177–2182; C97,§§3130–3134; S13,§3131; C24, 27, 31, 35, §10344.]

Attachment to enforce lien, §12147

CHAPTER 456.1

COLD STORAGE LOCKER LIEN

Regulation and licensing, ch 184.1

10344.1 Storage lien.

10344.1 Storage lien. Every lessor owning or operating a refrigerated locker plant or plants shall have a lien upon all property of every kind in its possession for all reasonable charges and rents thereon and for the handling, keeping, and caring for the same. [48GA, ch 89,§11.]

10344.2 Enforcement of lien.

10344.2 Enforcement of lien. Said lien may be enforced by a suit in equity or in the same manner as a common carrier, and all provisions of chapter 454 shall govern such proceedings as far as applicable, except that notice shall be given to the owner or lessee in lieu of the persons specified in said chapter as entitled to notice. [48GA, ch 89,§12.]

CHAPTER 457

LIEN FOR CARE OF STOCK AND STORAGE OF MOTOR VEHICLES

10345 Nature of lien.
10346 Satisfaction of lien by sale.
10347 Disposal of proceeds.

10345 Nature of lien. Livery and feed stable keepers, herders, feeders, and keepers of stock and of places for the storage of motor vehicles shall have a lien on all property coming into their hands, as such, for their charges and the expense of keeping, but such lien shall be subject to all prior liens of record. [C97, §3137; C24, 27, 31, 35,§10345.]

Bond to release, ch 459

10346 Satisfaction of lien by sale. If such charges and expenses are not paid, the lienholder may sell said stock and property at public auction, after giving to the owner or claimant, if found within the county, ten days notice in writing of the time and place of such sale, and also by posting written notices thereof in three public places in the township where said stock and property were kept or received. [C97. §3137; C24, 27, 31, 35,§10346.]

Attachment to enforce, §12147

10347 Disposal of proceeds. Out of the proceeds of such sale the lienholder shall pay all of the charges and expenses of keeping said stock and property, together with the costs and expenses of said sale, and the balance shall be paid to the owner or claimant of the stock and property. [C97,§3137; C24, 27, 31, 35,§10347.]

CHAPTER 457.1

LIEN FOR SERVICES OF ANIMALS

10347.01 Nature of lien—forfeiture.
10347.02 Period of lien—sale or removal.
10347.03 Sale or removal prohibited—penalty.
10347.04 Affidavit of foreclosure.
10347.05 Possession and notice.
10347.06 Service.
10347.07 Joinder of liens.
10347.08 Sale—application of proceeds.
10347.09 Right of contest—injunction.

10347.01 Nature of lien — forfeiture. The owner or keeper of any stallion or jack kept for public service shall have a prior lien on the progeny of such stallion or jack, to secure the amount due such owner or keeper for the service resulting in such progeny, but no such lien shall obtain where the owner or keeper misrepresents his animal by a false or spurious pedigree, or fails to substantially comply with the laws of Iowa relating to such animals. [S13,§2341-s; C24, 27, 31,§2967; C35,§10347-a1.]

Stallions and jacks, ch 127

10347.02 Period of lien—sale or removal. The lien herein provided for shall attach at the birth of such progeny and shall remain in force on such progeny for one year and shall not be lost by reason of any sale, exchange, or removal from the county of the animals subject to such lien. [S13,§2341-t; C24, 27, 31,§2968; C35, §10347-a2.]

10347.03 Sale or removal prohibited — penalty. It shall be unlawful to sell, exchange, or remove permanently from the county any animal subject to the lien herein provided for, without the written consent of the holder of such lien, and any person violating this provision, shall, on conviction be punished by a fine of not less than twenty-five dollars nor more than fifty dollars. [C24, 27, 31,§2969; C35,§10347-a3.]

10347.04 Affidavit of foreclosure. Liens may be enforced by the holder filing with any constable of the county in which the progeny is kept, or with the sheriff of such county, an affidavit which shall, in addition to a demand for foreclosure, **contain:**

1. A description of the stallion or jack, and of the dam and its progeny.
2. The time and terms of said service.
3. A statement of the amount due for said service. [S13,§2341-u; C24, 27, 31,§2970; C35, §10347-a4.]

10347.05 Possession and notice. The constable or sheriff shall, under said affidavit, take immediate possession of said progeny, and give written notice of the sale thereof, which notice shall contain:

1. A copy of the said affidavit.
2. The date and hour when, and the particular place at which, said property will be sold. [S13, §2341-u; C24, 27, 31,§2971; C35,§10347-a5.]

10347.06 Service. Said notice shall be served as follows:

1. By posting a duplicate copy for ten days prior to the day of sale in three public places in the township in which the sale is to take place, and
2. If the owner of the progeny resides in the said county, by also serving a duplicate copy on the owner in the manner in which original notices are served, at least ten days prior to the day of sale. [S13,§2341-u; C24, 27, 31,§2972; C35,§10347-a6.]

Manner of service, §11060

10347.07 Joinder of liens. A foreclosure may embrace liens on more than one progeny of the same stallion or jack when all of said progenies are owned by the same person. In such case there shall be separate sales until an amount is realized sufficient to pay all liens and costs. [C24, 27, 31,§2973; C35,§10347-a7.]

10347.08 Sale—application of proceeds. If payment of the service fee, and constable costs, be not made prior to the time of sale, as fixed in such notice, the constable may sell property so held by him, or so much thereof as may be necessary, at public auction to the highest bidder, and the proceeds shall be applied, first, to the payment of the costs, and second, in payment of amount due for service fee. Any surplus arising from such sale shall be forthwith paid to the owner of the property sold. [S13,§2341-u; C24, 27, 31,§2974; C35,§10347-a8.]

10347.09 Right of contest—injunction. The right of the owner or keeper to foreclose, as well as the amount claimed to be due, may be contested by anyone interested in so doing, and the proceeding may be transferred to the district court, for which purpose an injunction may issue, if necessary. [S13,§2341-v; C24, 27, 31,§2975; C35,§10347-a9.]

Injunctions, ch 535

CHAPTER 457.2

VETERINARIAN'S LIEN

10347.10 Nature of lien.
10347.11 Priority.
10347.12 Statement—filing.
10347.13 Enforcement.

10347.10 Nature of lien. Every veterinarian, licensed and registered in accordance with chapter 132, shall have a lien for the actual and reasonable value of any biological product used and for the actual and reasonable value of any service rendered in the administration of any such biological product used by him in the prevention or control of any contagious livestock disease, providing claim for their said lien be filed as hereinafter provided. [C35,§10347-f1.]

10347.11 Priority. Said lien shall have priority over all other liens and incumbrances upon said livestock if filed as hereinafter provided. [C35,§10347-f2.]

10347.12 Statement — filing. Any veterinarian entitled to a lien under this chapter shall make an account in writing, duly verified, stating the kind and number and a particular description of livestock upon which such services were rendered, the amount and kind of biological product used and the actual and reasonable value of such services and biological products and the name of the person or persons for whom such services were rendered and file the same in the office of the clerk of the district court in the county in which the person or persons owning such livestock resides, within sixty days after the day on which said services were rendered. Said lien shall be effective from the date of filing. [C35,§10347-f3.]

10347.13 Enforcement. The lienholder may enforce his lien by a suit in equity. [C35, §10347-f4.]

CHAPTER 457.3

HOSPITAL LIEN

10347.14 Nature of lien.
10347.15 Written notice of lien.
10347.16 Duration and enforcement of lien.
10347.17 Lien book—fees.

10347.14 Nature of lien. Every association, corporation, county or other institution, including a municipal corporation, maintaining a hospital in the state, which shall furnish medical or other service to any patient injured by reason of an accident not covered by the workmen's compensation act, shall, if such injured party shall assert or maintain a claim against another for damages on account of such injuries, have a lien upon that part going or belonging to such patient of any recovery or sum had or collected or to be collected by such patient, or by his heirs or personal representatives in the case of his death, whether by judgment or by settlement or compromise to the amount of the reasonable and necessary charges of such hospital for the treatment, care and maintenance of such patient in such hospital up to the date of payment of such damages; provided, however, that this lien shall not in any way prejudice or interfere with any lien or contract which may be made by such patient or his heirs or personal representatives with any attorney or attorneys for handling the claim on behalf of such patient, his heirs or personal representatives; provided, further, that the lien herein set forth shall not be applied or considered valid against anyone coming under the workmen's compensation act in this state. [C35,§10347-f5.]

Workmen's compensation, ch 70
45ExGA, ch 181, §1, editorially divided

10347.15 Written notice of lien. No such lien shall be effective, however, unless a written notice containing the name and address of the injured person, the date of the accident, the name and location of the hospital, and the name of the person or persons, firm or firms, corporation or corporations alleged to be liable to the injured party for the injuries received, shall be filed in the office of the clerk of the district court of the county in which such hospital is located, prior to the payment of any moneys to such injured person, his attorneys or legal representative, as compensation for such injuries; nor unless the hospital shall also mail, postage pre-

paid, a copy of such notice with a statement of the date of filing thereof to the person or persons, firm or firms, corporation or corporations alleged to be liable to the injured party for the injuries sustained prior to the payment of any moneys to such injured person, his attorneys or legal representative, as compensation for such injuries. Such hospital shall mail a copy of such notice to any insurance carrier which has insured such person, firm or corporation against such liability, if the name and address shall be known. [C35,§10347-f6.]

10347.16 Duration and enforcement of lien. Any person or persons, firm or firms, corporation or corporations, including an insurance carrier, making any payment to such patient or to his attorneys or heirs or legal representatives as compensation for the injury sustained, after the filing and mailing of such notice without paying to such hospital the amount of its lien or so much thereof as can be satisfied out of the moneys due under any final judgment or compromise or settlement agreement, after paying the amount of any prior liens, shall, for a period of one year from the date of payment to such patient or his heirs, attorneys or legal representatives, as aforesaid, be and remain liable to such hospital for the amount which such hospital was entitled to receive as aforesaid; any such association, corporation or other institution maintaining such hospital may, within such period, enforce its lien by a suit at law against such person or persons, firm or firms, corporation or corporations making any such payment. [C35,§10347-f7.]

10347.17 Lien book—fees. Every clerk of the district court shall, at the expense of the county, provide a suitable well-bound book to be called the hospital lien docket in which, upon the filing of any lien claim under the provisions of this chapter, he shall enter the name of the injured person, the date of the accident and the name of the hospital or other institution making the claim. Said clerk shall make a proper index of the same in the name of the injured person and such clerk shall be entitled to twelve cents for filing each claim, and at the rate of eight cents per folio for such entry made in the lien docket, and six cents for every search in the office for such lien claim. [C35,§10347-f8.]

CHAPTER 458

HOTELKEEPER'S LIEN

10348 Definitions.
10349 Nature of hotelkeeper's lien.
10350 Enforcement of claim by ordinary action.
10351 Satisfaction of lien by sale.
10352 Disposal of proceeds—statement.
10353 Duty of county treasurer—right of guest.

10348 Definitions. For the purposes of this chapter:

1. "Hotel" shall include inn, rooming house, and eating house, or any structure where rooms or board are furnished, whether to permanent or transient occupants.
2. "Hotelkeeper" shall mean a person who owns or operates a hotel.
3. "Guest" shall include boarder and patron, or any legal occupant of any hotel as herein defined.
4. "Baggage" shall include all property which is in any hotel belonging to or under the control of any guest. [C97,§3138; S13,§3138; C24, 27, 31, 35,§10348.]

10349 Nature of hotelkeeper's lien. A hotelkeeper shall have a lien upon the baggage of any guest, which may be in his hotel, for:

1. The accommodations and keep of said guest.
2. The money paid for or advanced to said guest.
3. The extras and other things furnished said guest. [C97,§3138; S13,§3138; C24, 27, 31, 35, §10349.]

Bond to release, ch 459

10350 Enforcement of claim by ordinary action. The hotelkeeper may take and retain possession of all baggage and may enforce his claim by an ordinary action. Said baggage shall be subject to attachment and execution for the reasonable charges of the hotelkeeper against the guest, and for the costs of enforcing the lien thereon. [C97,§3138; S13,§3138; C24, 27, 31, 35,§10350.]

Attachment to enforce lien, §12147

10351 Satisfaction of lien by sale. If the hotelkeeper does not proceed by an ordinary action he shall retain the baggage upon which he has a lien for a period of ninety days, at the expiration of which time, if such lien is not satisfied, he may sell such baggage at public auction after giving ten days notice of the time and place of sale in a newspaper of general circulation in the county where the hotel is situated, and also by mailing a copy of such notice addressed to said guest at the place of residence registered by him in the register of the hotel. [C97,§3138; S13,§3138; C24, 27, 31, 35,§10351.]

10352 Disposal of proceeds — statement. From the proceeds of said sale the hotelkeeper shall satisfy his lien, the reasonable expense of storage, and the costs for enforcing the lien, and any remaining balance shall, on demand within six months, be paid to the guest, and if not demanded within said period of time, said balance shall be deposited by the hotelkeeper with the county treasurer of the county in which the hotel is situated, together with:

1. A statement of the hotelkeeper's claim and the costs of enforcing same.
2. A copy of the published notice of sale.
3. A statement of the amounts received for the goods sold at said sale. [C97,§3138; S13, §3138; C24, 27, 31, 35,§10352.]

Referred to in §10353

10353 Duty of county treasurer — right of guest. The balance received by the county treasurer under section 10352 shall be credited by him to the general fund of the county, subject to a right of the guest, or his representative, to reclaim the same at any time within three years from the date of deposit with the county treasurer. [C97,§3138; S13,§3138; C24, 27, 31, 35,§10353.]

CHAPTER 459

RELEASE OF LIENS BY BOND

10354 Liens subject to release.
10355 Requirements of bond.
10356 Effect of bond.
10357 Action on bond.

10354 Liens subject to release. An owner of personal property in this state who disputes, either the existence, on such property, of a common law or statutory lien, or the amount of any such lien, may release such lien, if any, and become entitled to the immediate possession of said property by filing a bond as hereinafter provided. [C24, 27, 31, 35,§10354.]

10355 Requirements of bond. Said bond shall be in an amount equal to twice the amount of the lien claimed, shall have one or more sureties, shall be approved by and filed with the clerk of the district court of the county where the property is being held under the claimed lien, and shall be conditioned to pay claimant any sum found to be due and also found to have been a lien on said property at the time the bond is filed. [C24, 27, 31, 35,§10355.]

10356 Effect of bond. When said bond is filed and claimant is given written notice of such filing, the said lien, if any, shall stand released, and the owner shall be entitled to the immediate possession of said property. [C24, 27, 31, 35, §10356.]

10357 Action on bond. An action upon said bond shall be brought in the county where the owner of the property resides; when the said owner is a nonresident of this state, the action shall be brought in the county where the bond is filed. [C24, 27, 31, 35,§10357.]

TITLE XXVII

LEGALIZING ACTS

The date given in the historical reference, which indicates the time of taking effect of an act by publication, has been computed on the theory that such acts take effect on the first day following the last publication. (Arnold v. Board, 151 Iowa 155.)

In those instances in which the historical reference shows that the source of the section consists of more than one legislative enactment, the date indicates the time when the last legislative act took effect

CHAPTER 460

PUBLICATION OF PROPOSED LEGALIZING ACTS

10358 Publication prior to passage.
10359 Place of publication in certain cases.
10360 Caption of publication.
10361 Cost of publication.
10362 Subsequent amendment—effect.

10358 Publication prior to passage. No bill which seeks to legalize the official proceedings of any board of supervisors, board of school directors, or city or town council, or which seeks to legalize any warrant or bond issued by any of said official bodies, shall be placed on passage in either house or senate until such bill as introduced shall have been published in full in some newspaper published within the territorial limits of the public corporation whose proceedings, warrants, or bonds are proposed to be legalized, nor until proof of such publication shall have been filed with the chief clerk of the house, and with the secretary of the senate, and a brief minute of such filing entered on the respective journals. [C24, 27, 31, 35,§10358.]

Fee for printing, §263

10359 Place of publication in certain cases. In case no newspaper is published within such territorial limits, the publication required by this chapter shall be made in one newspaper of general circulation published within the county. [C24, 27, 31, 35,§10359.]

10360 Caption of publication. The publication required by this chapter shall be made under the following caption or heading, to wit:

"Proposed bill for the legalization of the proceedings of (name of official body)".

If the proposed bill be for the legalization of the bonds or warrants of the public corporation, the caption shall be modified accordingly. [C24, 27, 31, 35,§10360.]

10361 Cost of publication. If the bill be introduced at the instance of the public body whose proceedings, bonds, or warrants are sought to be legalized, the cost of the aforesaid publication may be paid from the general fund of the public corporation. [C24, 27, 31, 35, §10361.]

Cost of printing, §263

10362 Subsequent amendment—effect. The amendment of the proposed bill after its publication as aforesaid shall not affect its legality, provided the subject matter of the bill is not substantially changed. [C24, 27, 31, 35,§10362.]

CHAPTER 461

NOTARIES PUBLIC AND ACKNOWLEDGMENTS

10363 Official acts of notaries public.
10364 Official acts of notaries public.
10365 After expiration of commission.
10366 Acknowledgments outside jurisdiction.
10367 Mayors and notaries.
10368 County auditors and deputies.
10369 Acknowledgments of school-fund mortgages.
10370 Acknowledgments under code of 1873.
10371 Certificate of officer—unqualified official.
10372 Acknowledgments of foreign instruments.
10373 Defective acknowledgment by attorney.
10374 When no power of attorney on record.
10374.1 Defective certificate.

10363 Official acts of notaries public.

WHEREAS, certain notaries public whose commissions expired July 4, 1909, and who have continued to act as such notaries public after the expiration of such commissions and who have since qualified as such notaries public, and,

WHEREAS, certain notaries public in the state of Iowa, under a misapprehension as to the date when their commissions were issued as notaries public, did, prior to March 17, 1911, and before their commissions had actually been issued, take certain acknowledgments, and administer certain oaths, and,

WHEREAS, it is the desire of all such notaries public to have their official acts as such notaries public legalized, now, therefore:

All acknowledgments of all written instruments, affidavits, deeds, mortgages, papers and documents, by notaries public as described in the preamble hereof, whether or not the same is required by law to be acknowledged, and all taking of affidavits made by notaries public, be, and the same are hereby, legalized and made valid the same as though they had been duly

commissioned as notaries public at the time such acknowledgments were taken, provided this act shall not apply to title to real estate or other property rights which are now in litigation. [34GA, ch 229 (Took effect by publication April 18, 1911); C24, 27, 31, 35,§10363.]

10364 Official acts of notaries public. All of the official acts of all notaries public holding their office during the term ending July 4, 1903, who continued to act as such notaries public after July 4, 1903, before qualifying as such, but have since qualified as provided by law, are hereby legalized and made valid to the same extent as though they had become duly qualified to act as notaries public immediately upon the expiration of the term ending July 4, 1903; provided, however, that nothing in this act [31GA, ch 223] shall affect any pending litigation. [S13,§2942-l (Took effect July 4, 1906); C24, 27, 31, 35,§10364.]

10365 After expiration of commission. All of the official acts of all notaries public holding their office during the term ending July 4, 1918, who continued to act as such notaries public after July 4, 1918, before qualifying as such, but have since qualified as provided by law, are hereby legalized and made valid to the same extent as though they had become duly qualified to act as notaries public immediately upon the expiration of the term ending July 4, 1918; provided, however, that nothing in this act shall affect any pending litigation. [38GA, ch 146 (Took effect July 4, 1919); C24, 27, 31, 35, §10365.]

10366 Acknowledgments outside jurisdiction. Acknowledgments heretofore taken by notaries public outside their jurisdiction are hereby declared valid and legal. Nothing in this act shall affect pending litigation. [39GA, ch 151 (Took effect July 4, 1921); C24, 27, 31, 35,§10366.]

10367 Mayors and notaries.

WHEREAS, certain mayors, under section 691 of the code of 1897, have taken the acknowledgments of written instruments and administered oaths in proceedings not connected with the administration of their offices; and,

WHEREAS, certain notaries public, whose commissions expired July 4, 1906, and who continued to act as such notaries public and who have since qualified as notaries public, desire to have their acts as such notaries public legalized. Now, therefore:

All acknowledgments and taking of affidavits made by the mayors and notaries public, as described in the preamble hereof, are hereby legalized and made of full effect, the same as though said mayors and notaries public had been originally empowered to take said acknowledgments and administer said oaths. [S13,§2942-k (Took effect by publication March 15, 1907); C24, 27, 31, 35,§10367.]

10368 County auditors and deputies. All acknowledgments of deeds, mortgages, and contracts heretofore taken and certified by any county auditor, deputy county auditor, or deputy clerk of the district court within this state, be and the same are hereby declared to be as legal and valid as though the law had authorized such acknowledgments at the time they were made. [18GA, ch 103 (Took effect by publication March 28, 1880); C24, 27, 31, 35,§10368.]

See 17GA, ch 164

10369 Acknowledgments of school-fund mortgages. All acknowledgments of school-fund mortgages and contracts heretofore taken and certified by any county auditor or deputy county auditor in any county in this state be and the same are hereby legalized and declared to be as legal, valid and binding, as though such officer had been authorized to take such acknowledgment when taken. [21GA, ch 163 (Took effect by publication April 18, 1886); C24, 27, 31, 35,§10369.]

10370 Acknowledgments under code of 1873. All acknowledgments of instruments in writing taken and certified according to the provisions and form prescribed by the code of 1873, which were taken and certified after September 29, 1897, and prior to the passage of this act [27GA, ch 165], by officers having authority under the provisions of the code of 1873 to take and certify acknowledgments, are here declared to be legal and valid, and of the same force and effect as though the same were taken and certified according to the form and provisions of the code [code of 1897]; and as though the officers taking and certifying the same were authorized to take and certify acknowledgments. [S13,§2942-c (Took effect by publication April 14, 1898); C24, 27, 31, 35,§10370.]

10371 Certificate of officer—unqualified official. The acknowledgments of all deeds, mortgages, or other instruments in writing, taken and certified previous to the passage of this act [29GA, ch 249], and which have been duly recorded in the proper counties in this state, and which are defective only in the form of the certificate of the officer taking the same, or by reason of such acknowledgment having been made before an official not qualified to take the same, but who was at the time qualified to take acknowledgments generally, are hereby declared to be as legal and valid for all purposes as if the form of the certificate had been made in accordance with law, and the official taking such acknowledgments duly qualified therefor. [S13,§2942-e (Took effect July 4, 1902); C24, 27, 31, 35,§10371.]

10372 Acknowledgments of foreign instruments. In all acknowledgments of instruments in writing which by the laws of Iowa are required to be so acknowledged, and which said acknowledgments have been taken without the United States by officers of such countries outside the United States authorized by section 2947 of the code [code of 1897] to take such acknowledgments, the said acknowledgments are hereby legalized whether or not there is attached to such written instrument a certificate by an ambassador, minister, consul, vice consul, charge d'affaires, or consular agent of the United States certifying that full faith and

credit is due such officer of such foreign country taking said acknowledgment; and the certificate of acknowledgment of such officer of such foreign country is hereby declared and made conclusive evidence that such officer was duly qualified to make such certificate of acknowledgment. [38GA, ch 181 (Took effect July 4, 1919); C24, 27, 31, 35,§10372.]

10373 Defective acknowledgment by attorney. No instruments affecting real estate, including satisfactions of mortgages, executed by a party as attorney in fact for the grantor, or grantors, where a duly executed and sufficient power of attorney is on record in the county in which the land is situated, shall be held invalid for the reason that the attorney in fact executed and acknowledged the said instrument in the following form: "A. B., attorney in fact for C. D." instead of "C. D., by A. B. his attorney in fact", but all such instruments heretofore filed for record are hereby legalized and made valid as if the record showed the execution and acknowledgment thereof in the latter form above. [SS15,§2963-v (Took effect July 4, 1915); C24, 27, 31, 35,§10373.]

10374 When no power of attorney on record. No instruments affecting real estate, including satisfactions of mortgages, executed and duly recorded prior to January 1, 1900, by a party purporting to act for the grantor, or grantors, as attorney in fact, shall be invalid by reason of the fact that no power of attorney is of record in the county in which the land is situated authorizing him to so act, but all such instruments are hereby legalized and made valid as if the record showed a duly executed power of attorney authorizing the attorney to act in the premises. [SS15,§2963-x (Took effect July 4, 1915); C24, 27, 31, 35,§10374.]

10374.1 Defective certificate. Any instrument in writing to which is attached a defective certificate of acknowledgment, which was, prior to the taking effect of this act, [42ExGA, ch 8] filed, recorded or spread upon the records in the office of the recorder of the proper county, together with the recording and the record thereof, is legalized and declared as valid, legal and binding, as if such instrument had been properly acknowledged and had had a proper certificate of acknowledgment thereto attached and had been legally recorded. [42ExGA, ch 8 (Took effect by publication March 23, 1928); C31, 35,§10374-b1.]

Special limitation on action, 42ExGA, ch 8

CHAPTER 462

JUDGMENTS AND DECREES

10375 Decrees against unknown claimants.
10376 Certain publications of original notices.
10376.1 Original notices failing to name term.
10377 Decrees for sale of real estate by guardian.
10378 Judgments or decrees respecting wills.
10379 Judgments in probate by circuit courts.
10380 Judgments or decrees quieting title.
10381 Decrees in general—affidavit of nonresidence.
10382 Decrees in general—affidavit of publication by editor.
10383 Annulment of marriages—service by publication.

10375 Decrees against unknown claimants. All decrees of court obtained in cases prior to January 15, 1915, in which the notice was entitled in the initial or initials of the plaintiff instead of his full christian name are hereby legalized and said decrees shall have the same force and effect as if such notice had been entitled in the full name of the plaintiff as was provided for in section 3538 of the code [code of 1897], and as is provided for in section 3538 of the supplement to the code, 1913. [SS15,§3540-a (Took effect July 4, 1915); C24, 27, 31, 35,§10375.]

10376 Certain publications of original notices. No action in which unknown persons were made parties defendant pursuant to the requirements of section 3538, supplemental supplement to the code, 1915, and in which notice of such action was given by publication between July 1, 1913, and July 1, 1915, for four consecutive weeks, the last publication being ten days prior to the first day of the term for which said action was brought as shown by proof on file in the office of the clerk of the court where said action was pending, shall be held ineffectual, void, or insufficient because the records fail to show that the court or judge approved said notice before publication or failed to indorse his approval on said notice or failed to designate in which paper said notice should be published, as required by section 3539 of the code [code of 1897]. [37GA, ch 37 (Took effect July 4, 1917); C24, 27, 31, 35,§10376.]

10376.1 Original notices failing to name term. All judgments and decrees heretofore entered by default in causes wherein the original notices set out the date when and the place where the court would convene, are hereby declared legal and binding, notwithstanding the fact that said original notices fail to name the term at which defendant or defendants was or were required to appear. Nothing contained in this section shall affect pending litigation. [48GA, ch 252 (Took effect July 4, 1939).]

10377 Decrees for sale of real estate by guardian. In all cases where decrees and orders of court have been obtained for the sale of real estate by a guardian prior to January 1, 1921, where the original notice shows that service of notice pertaining to the sale of such real estate was made on the minor or ward outside of the state of Iowa, such services of notices are hereby legalized; and that all decrees so obtained as aforesaid are hereby legalized and held to have the same force and effect as though the service of such original notice had

been made on the minor or ward within the state of Iowa. [39GA, ch 88 (Took effect by publication April 2, 1921); C24, 27, 31, 35, §10377.]

10378 Judgments or decrees respecting wills. No judgment or decree purporting to set aside any will, or the provisions of any will, or to place any construction upon any will or terms of any will, or to aid in carrying out the provisions of any will and no contract or agreement purporting to be a settlement of any suit or action to set aside any will or the terms of any will, or to place any construction upon any will or any of the terms thereof shall be held ineffectual, void, or insufficient because the records fail to show proper service of notice on all parties interested, that persons under disability affected by the action were not properly served with notice, or represented by guardian or guardian ad litem, either in suit, action, or in a settlement thereof, that all persons interested participated in the settlement, or that any other provisions of law had been complied with which are necessary to make a valid decree, judgment, or settlement; provided more than ten years had elapsed since the judgment, decree, contract, or agreement was filed, entered, or placed on record in the county where the real estate affected thereby is situated. And said decree, judgment, contract, or agreement shall be conclusive evidence of the right, title, or interest it purports to establish or adjudicate insofar as it affects the title to such real estate, and said proceedings therein are hereby made legal and effectual the same as though all provisions of law had been complied with in the obtaining of said decree, judgment, or execution of said contract or agreement; and that any judgment, decree, contract, or agreement such as above described which is now of record less than ten years in the county in which the real estate is situated, shall, at the expiration of ten years from date of filing, entering, or recording thereof, have the same force and effect as is above given to those now in effect more than ten years. [S13,§2963-m (Took effect July 4, 1913); C24, 27, 31, 35, §10378.]

10379 Judgments in probate by circuit courts. In all cases where matters or proceedings in probate have been heard by the circuit courts, or judges outside the county in which such matters or proceedings were pending, and in all cases where orders, and judgments in probate matters, and proceedings have been made by the circuit courts, and judges outside the county in which such proceeding or matter was pending, and where such hearing was had or order or judgment made within the circuit to which the county belonged in which such proceeding or matter was pending, such hearing, order, or judgment shall be held, and deemed to be of the same validity and force and effect as if such hearing was had or such order or judgment was made within the county in which such proceeding or matter was pending, and that all titles and rights acquired under such orders and judgments shall be held and deemed to be of the same legal force and effect, and to be as valid as if such order or judgment had been made within the county in which proceeding or matter was pending. [21GA, ch 41 (Took effect by publication March 26, 1886); C24, 27, 31, 35,§10379.]

10380 Judgments or decrees quieting title. No existing judgment or decree quieting title to real estate as against defects arising prior to January 1, 1900, and purporting to sustain the record title shall be held ineffectual because of the failure to properly set out in the petition or notice the derivation or devolution of the interest of the unknown defendants, or on account of the failure of the record to show that such notice was approved by the court or that the same was published as directed by the court, or because of the failure of the record to show that an affidavit was filed by plaintiff showing that personal service could not be made on any defendant in the state of Iowa, or because of the failure of defense by a guardian ad litem for any defendant under legal disability, or where there was more than one tract of real estate described in the same petition and decree, or where the plaintiffs have no joint or common interest in the property or defects of title, or because of failure to comply with any other provision of law, but all such decrees are hereby made legal and effectual the same as if all provisions of law had been complied with in obtaining them. [S13,§2963-f (Took effect July 4, 1913); C24, 27, 31, 35,§10380.]

10381 Decrees in general—affidavit of nonresidence. In all cases where decrees of court have been obtained prior to January 1, 1907, upon publication of notice before the filing of the affidavit of nonresidence, as provided by section 3534 of the code [code of 1897], and the same has not been filed as provided by law, but has been filed during the time that the notice was being published, on which such decrees are based, are hereby legalized and such decrees shall have the same force and effect as though the affidavit of nonresidence, as provided in said section, was filed at the time of or prior to the first publication of such notice, and that all decrees so obtained, as aforesaid, are hereby legalized and held to have the same force and effect as though the affidavit of nonresidence had been filed, as by law required. [S13,§3534-a (Took effect by publication April 12, 1911); C24, 27, 31, 35,§10381.]

10382 Decrees in general—affidavit of publication by editor. In all cases where decrees of court have been obtained prior to January 1, 1917, in which the proof of publication of the original notice has been made by the affidavit of the editor of the newspaper or the publisher, manager, cashier, or foreman thereof in which such original notice was published, the same are hereby legalized, and such decrees shall have the same force and effect as though the affidavit of the publisher, or his foreman, of the newspaper in which original notice was published had been filed as provided by section 3536 of the code [code of 1897], that all decrees obtained as

aforesaid are hereby legalized and held to have the same force and effect as though the proof of the publication on the original notice had been made by the affidavit of the publisher, or his foreman, of the newspaper in which such original notice was published. [S13,§3536-a; 38GA, ch 89 (Took effect July 4, 1919); C24, 27, 31, 35,§10382.]

10383 Annulment of marriages—service by publication. All decrees of the courts of this state made and entered of record in actions brought to annul a marriage and in which cases the service of the original notice was made by publication in the manner provided by law for actions for divorce, be and the same are hereby legalized and validated as fully and to the same extent as if the statute at the time such suit was instituted had provided for service of the original notice by publication in the time and manner aforesaid. [S13,§3187-a (Took effect July 4, 1913); C24, 27, 31, 35,§10383.]

CHAPTER 462.1

EXECUTION SALES

10383.1 Failure to make proper entries.
10383.2 Homestead selection—deficiency.

10383.1 Failure to make proper entries. All execution sales heretofore had wherein the execution officer has failed to indorse on the execution the day and hour when received, the levy, sale or other act done by virtue thereof, with the date thereof, the dates and amounts of any receipts or payment in satisfaction thereof at the time of the receipt or act done, or has failed to indorse thereon, an exact description of the property levied upon at length with the date of levy, be and the same are hereby legalized and declared to be legal and valid as if all of the provisions of laws as required by sections 11664 to 11668.1, both inclusive, had been in all respects strictly and fully complied with. [C35,§10383-e1; 47GA, ch 251,§1 (Took effect by publication February 19, 1937).]

10383.2 Homestead selection — deficiency. All execution sales of real estate heretofore had in which the execution officer has failed to serve notice upon the titleholders in possession to select their homestead or has defectively served such notice or, having served such notice, has, upon the failure of defendants to select a homestead, neglected to plat the same or has defectively platted the same, or where said execution officer in such sales has offered the property en masse without first offering the same in the least legal subdivisions, or where said officer has failed to offer property, including the homestead, first separately in least legal subdivisions exclusive of homestead, then offering all property en masse, exclusive of the homestead, then offering the homestead separately, then offering all of the property for sale, en masse, be and the same are hereby legalized and declared to be legal and valid in all particulars as if all of the provisions of the law had been in all respects strictly and fully complied with at the time of said acts or said sales. [47GA, ch 251,§2 (Took effect by publication February 19, 1937).]

Pending litigation and grace period, 47GA, ch 251, §8

CHAPTER 463

REAL PROPERTY

Dubuque and Pacific R. R. lands, see §99.1

10384 Acknowledgments—seal not affixed.
10385 Conveyances by county.
10386 Absence of or defective acknowledgments.
10387 Acknowledgments by officers of corporations.
10387.1 Acknowledgments by corporation officers.
10388 Acknowledgments by stockholders.
10389 Instruments affecting real estate.
10390 Sales, contracts, and deeds by corporations.
10391 Marginal releases of mortgages.
10392 Marginal releases of school-fund mortgages.
10393 Marginal assignment of mortgage or lien.
10394 Conveyances by executors, trustees, etc.
10395 Conveyances by administrators, trustees, etc.
10396 Sheriffs' deeds.
10397 Sheriff's deed executed by deputy.
10398 Defective tax deeds.
10398.1 Tax deeds legalized.
10398.2 Tax sales legalized.
10399 Conveyances by spouse under power.
10400 Conveyances by foreign executors.
10401 Conveyances by foreign executors.
10401.1 Conveyances under school-fund foreclosures.
10402 Conveyances according to law of other states.
10403 Releases and discharges in re real estate.
10404 Certain loans, contracts, and mortgages.
10405 Descriptions referring to defective plats.
10406 Defective conveyances—tax deeds—etc.

10384 Acknowledgments — seal not affixed. All deeds, mortgages, or other instruments in writing, for the conveyance of lands which have heretofore been made and executed, and the officer taking the acknowledgment has not affixed his seal to the acknowledgment; such acknowledgment shall, nevertheless, be good and valid in law and equity, anything in any law heretofore passed to the contrary notwithstanding. [S13,§2942-h (Took effect by publication March 24, 1906); C24, 27, 31, 35,§10384.]

See 18GA, ch 160, §8

10385 Conveyances by county. All deeds heretofore executed by a county judge, or county court, or the chairman of the board of super-

visors of any county, and to which the officer executing the same has failed or omitted to affix the county seal, and all deeds where the clerk has failed or omitted to countersign when required so to do, be and the same are hereby legalized and made valid the same in all respects as though the law had in all respects been fully complied with. [18GA, ch 180 (Took effect July 4, 1880); C24, 27, 31, 35,§10385.]

10386 Absence of or defective acknowledgments. Any instrument in writing affecting the title to real estate within the state of Iowa, to which is attached no certificate of acknowledgment, or to which is attached a defective certificate of acknowledgment, which was, prior to January 1, 1915, recorded or spread upon the records in the office of the recorder of the county in which the real estate described in such instrument is located, is, together with the recording and the record thereof, legalized and declared as valid, legal, and binding as if such instrument had been properly acknowledged and legally recorded. [SS15,§2963-a; 37GA, ch 388; 40GA, ch 195 (Took effect July 4, 1923); C24, 27, 31, 35,§10386.]

See 35GA, ch 265, §1; 14GA, ch 110, §2; 13GA, ch 160, §2

10387 Acknowledgments by officers of corporations. The acknowledgments of all deeds, mortgages, or other instruments in writing heretofore taken or certified, and which instruments have been recorded in the recorder's office of any county of this state, including acknowledgments of instruments made by any private or other corporation, or to which such corporation was a party, or under which such corporation was a beneficiary, and which have been acknowledged before or certified by any notary public who was at the time of such acknowledgment or certifying, a stockholder or officer in such corporation, are hereby declared to be legal and valid official acts of such notaries public, and to entitle such instruments to be recorded, anything in the laws of the state of Iowa in regard to acknowledgments to the contrary notwithstanding. [S13,§2942-a; 40ExGA, ch 36 (Took effect by publication January 15, 1924); C24, 27, 31, 35,§10387.]

See 37GA, ch 397, §1; 37GA, ch 173, §1; 34GA, ch 151, §1; 31GA, ch 146, §1; 26ExGA, ch 23, §1
Analogous provision, §10387.1

10387.1 Acknowledgments by corporation officers. The acknowledgments of all deeds, mortgages, or other instruments in writing heretofore taken or certified, and which instruments have been recorded in the recorder's office of any county of this state, including acknowledgments of instruments made by any private or other corporation, or to which such corporation was a party, or under which such corporation was a beneficiary, and which have been acknowledged before or certified by any notary public who was at the time of such acknowledgment or certifying a stockholder or officer in such corporation, are hereby declared to be legal and valid official acts of such notaries public, and to entitle such instruments to be recorded, anything in the laws of the state of Iowa in regard to acknowledgments to the contrary notwithstanding. This section shall not affect pending litigation. [48GA, ch 253 (Took effect July 4, 1939).]

Analogous provision, §10387

10388 Acknowledgments by stockholders. All deeds and conveyances of lands within this state heretofore executed but which have been acknowledged or proved according to and in compliance with the laws of this state before a notary public or other official authorized by law to take acknowledgments who was, at the time of such acknowledgment, an officer or stockholder of a corporation interested in any such deed or conveyance, or otherwise interested therein, are, if otherwise valid, hereby declared effectual and valid in law to all intents and purposes as though acknowledged or proved before an officer not interested therein; and if heretofore recorded in the respective counties in which such lands may be, the records thereof are hereby confirmed and declared effectual and valid in law to all intents and purposes as though said deeds and conveyances, so acknowledged or proved and recorded, had (prior to being recorded) been acknowledged or proved before an officer having no interest therein. [S13,§2942-d (Took effect July 4, 1898); C24, 27, 31, 35, §10388.]

10389 Instruments affecting real estate. All instruments in writing executed by any corporation prior to July 4, 1909, conveying, incumbering, or affecting real estate, including releases, satisfaction of mortgages, judgments, or any other liens by entry of such release or satisfaction upon the page or pages where such lien appears recorded or entered, where the corporate seal of such corporation has not been affixed or attached thereto, and which are otherwise legally and properly executed, are hereby declared legal, valid, and binding, the same as though the corporate seal had been attached or affixed thereto. [S13,§3068-a (Took effect July 4, 1911); C24, 27, 31, 35,§10389.]

10390 Sales, contracts, and deeds by corporations. All sales, contracts, deeds, or conveyances of lands owned by any such corporation* on July 4, 1888, or acquired by any such corporation under the provisions of section 6 of chapter 85 of the laws of the twenty-second general assembly or section 2890 of the code [code of 1897], bearing date on or after July 4, 1888, are hereby legalized and rendered of full force and effect, according to their terms, insofar as their validity or the validity of the titles conveyed thereby may be affected by chapter 85 of the laws of the twenty-second general assembly, or any amendments thereto, or by chapter 1, title XIV, of the code [code of 1897]. [S13, §2889-c (Took effect by publication March 17, 1900); C24, 27, 31, 35,§10390.]

*"such corporation" refers to §§10216, 10217

10391 Marginal releases of mortgages. Any release or satisfaction of any mortgage or trust deed, or of any instrument in writing creating a lien upon real estate where such release or

satisfaction has been recorded in the recorder's office of the county in this state, or upon the margin of the record, where such original instrument was recorded and which release or satisfaction was made by any individual, association, copartnership, assignee, corporation, attorney in fact, or by a resident or foreign executor, administrator, referee, receiver, trustee, guardian, or commissioner, and which release or satisfaction was executed, filed, and recorded prior to March 1, 1907, is hereby legalized, declared valid, legal and binding and of full force and effect, any defects in the execution, acknowledgment, recording, filing, or otherwise of such releases or satisfactions to the contrary notwithstanding. [S13,§2938-b; 37GA, ch 345 (Took effect July 4, 1917); C24, 27, 31, 35,§10391.]

10392 Marginal releases of school-fund mortgages. The release or satisfaction of any school-fund mortgage entered on the margin of the record of such mortgage by the auditor of the county prior to July 4, 1894, is hereby legalized and given the same force and effect as though such auditor had had, at the time of entering such release or satisfaction, the same power thereafter conferred upon him by chapter 53 of the acts of the twenty-fifth general assembly. [37GA, ch 339 (Took effect July 4, 1917); C24, 27, 31, 35,§10392.]

10393 Marginal assignment of mortgage or lien. In any case where an assignment of a mortgage or other recorded lien on real estate has heretofore been made by written assignment thereof on the margin of the record where such mortgage or other lien is recorded or entered, such assignment shall be deemed to have passed all the right, title, and interest therein, which the assignor at the time had, with like force and effect as if such assignment had been made by separate instrument duly acknowledged and recorded; and any such assignment or a duly authenticated copy thereof when accompanied by a duly authenticated copy of the record of the instrument or lien it purports to assign, shall be admissible in evidence as is provided by law for the admission of the records of deeds and mortgages. [SS15,§2963-x2 (Took effect July 4, 1915); C24, 27, 31, 35,§10393.]

See 34GA, ch 227, §1

10394 Conveyances by executors, trustees, etc. In all cases where, prior to the year 1920, an executor, administrator, trustee, guardian, assignee, receiver, referee, or commissioner, acting as such in this or any state, has conveyed in such trust capacity real estate lying in this state and such conveyance has been of record since prior to January 1, 1920, in the county where the real estate so conveyed is located and which conveyance purports to sustain the title in the present record owner or owners thereof, such conveyance shall not be held void or insufficient by reason of the fact that due and legal notice of all proceedings with reference to the making of any such conveyance was not served upon all interested or necessary parties, or that such executor, administrator, trustee, guardian, assignee, receiver, referee, or commissioner is not shown to have been duly authorized by an order of court to make and execute such conveyance, that a bond was not given therefor, or that no report of the sale was made; or such sale or deed of conveyance was not approved by order of court, or that any such foreign executor, administrator, trustee, guardian, assignee, receiver, referee, or commissioner was not appointed or qualified in the state of Iowa prior to the making of such conveyance, or that the record thereof fails to disclose compliance with any other provisions of law, and all such conveyances are hereby legalized and declared valid, legal, and binding and of full force and effect. Allotments by referees in partition shall be considered conveyances within the meaning of this section. [SS15,§2963-l; 37GA, ch 388; C24, 27, 31, 35,§10394; 43GA, ch 245 (Took effect by publication March 21, 1929).]

10395 Conveyances by administrators, trustees, etc. In all cases where, prior to the year 1890, an executor, administrator, trustee, guardian, referee, or commissioner, duly appointed and qualified, and acting as such in this or any other state, has conveyed in such trust capacity, real estate lying in this state, and such conveyance has been of record since prior to January 1, 1890, in the county where the real estate so conveyed is located, and the possession of said real estate since said date has rested in the grantee thereunder, or parties claiming by, through, or under him, such conveyance shall not be held void or insufficient by reason of the fact that due and legal notice of all proceedings with reference to the making of any such conveyance was not served upon all interested or necessary parties, or that such executor, administrator, trustee, guardian, referee, or commissioner is not shown to have been duly authorized by an order of court to make and execute such conveyance, or that a bond was not given therefor; or that no report of the sale was made; or such sale or deed of conveyance was not approved by order of court, or that any such foreign executor, administrator, trustee, guardian, referee, or commissioner was not appointed or qualified in the state of Iowa, prior to the making of such conveyance, and all such conveyances are hereby legalized and declared valid, legal, binding, and of full force and effect. [S13,§2942-j (Took effect July 4, 1911); C24, 27, 31, 35,§10395.]

10396 Sheriffs' deeds. No foreclosure proceeding or sale of real estate on execution prior to January 1, 1900, wherein a sheriff's deed was executed and which purports to sustain the record title shall be held ineffectual on account of the failure of the record to show that any of the steps in obtaining said judgment or in the sale of said property were complied with. Such proceedings are hereby legalized and made valid as if the record showed that all the provisions of the law had been complied with. [S13,

§2963-c; 40GA, ch 240 (Took effect July 4, 1923); C24, 27, 31, 35,§10396.]

See 35GA, ch 272, §4

10397 Sheriff's deed executed by deputy. All conveyances of land in this state, executed in this state by a deputy sheriff, and properly recorded in the office of the county recorder of the county wherein the land is located, prior to January 1, 1900, shall have the same force and effect as though such conveyance had been executed by the sheriff. [40GA, ch 240 (Took effect July 4, 1923); C24, 27, 31, 35,§10397.]

See 34GA, ch 226, §1

10398 Defective tax deeds. No sale of real property for taxes made prior to January 1, 1915, wherein the tax deed was executed and which deed purports to sustain the record title, shall be held ineffectual on account of the failure of the record to show that any of the steps in the sale and deeding of said property were complied with; said proceedings are hereby legalized and made valid and effectual as if the record showed that all the provisions of law had been complied with. [S13,§2963-o; C24, 27, 31, 35,§10398; 43GA, ch 246 (Took effect July 4, 1929).]

10398.1 Tax deeds legalized. That in all instances where tax deeds have been issued by county treasurers in the absence of the report and entry required by section 7283, of the code, 1931, or corresponding sections of earlier codes relating to collection of costs of serving notices, such tax deeds shall not by reason of omission to make such report and entry be held invalid, but are hereby legalized. Nothing herein contained shall be construed as curing any other defect in tax deeds than that herein specifically described. Nothing herein contained shall be so construed as to affect pending litigation. [46GA, ch 203 (Took effect March 22, 1935); C35,§10398-g1.]

Limitation of actions on tax sales and deeds, §7295.1

10398.2 Tax sales legalized. In all instances where a county treasurer heretofore conducted a tax sale at the time provided in section 7259 or section 7262, both of the code, 1935, sales made at such tax sale or any adjournment thereof shall not be held invalid by reason of the failure of the county treasurer to have brought forward the delinquent tax of prior years upon the current tax lists in use by the said county treasurer at the time of conducting the sale, or by reason of the failure of the county treasurer to have offered all the property unsold before each adjournment of said sale and said tax sales are hereby legalized and declared valid notwithstanding the provisions of section 7193 and section 7259, both of the code, 1935, provided the delinquent taxes for which the said real estate was sold had been brought forward upon the current tax list of the year preceding the year in which the said tax sale was conducted. Provided, however, that no tax sale so legalized and validated shall affect a special assessment if the same continues to remain a lien notwithstanding a tax deed now or hereafter issued pursuant to such tax sale. [48GA, ch 251 (Took effect April 28, 1939).]

10399 Conveyances by spouse under power. No conveyance of real estate heretofore made, wherein the husband or wife conveyed or contracted to convey the inchoate right of dower through the other spouse, acting as the attorney in fact, by virtue of a power of attorney executed by such spouse, such power of attorney not having been executed as a part of a contract of separation, shall be held invalid as contravening the provisions of section 3154 of the code [code of 1897], but all such conveyances are hereby legalized and made effective. [37GA, ch 351 (Took effect July 4, 1917); C24, 27, 31, 35, §10399.]

See 30GA, ch 118; 29GA, ch 237, §1

10400 Conveyances by foreign executors. All conveyances of real property made prior to January 1, 1913, by executors or trustees under foreign wills and prior to the expiration of three months after the recording of a duly authenticated copy of the will, original record of appointment, qualification, and bond, as required by the provisions of section 3295 of the code [code of 1897], are hereby legalized and declared as valid and effective in law as though the provisions of said section had been strictly followed, provided the proper proof of authority was a matter of record in the office of the clerk of the district court in the county where the real property is situated, at the time the conveyance was executed, or was made a matter of record prior to the passage of this act; provided that nothing in this act shall affect pending litigation. [S13, §3295-b (Took effect July 4, 1913); C24, 27, 31, 35,§10400.]

See 35GA, ch 272, §12; 34GA, ch 157, §1; 27GA, ch 182, §1; 23GA, ch 38; 18GA, ch 162, §2

10401 Conveyances by foreign executors. All conveyances of real property made prior to January 1, 1913, by executors or trustees under foreign wills and prior to the date upon which such will was admitted to probate in Iowa or prior to the expiration of three months after the recording of a duly authenticated copy of such will, original record of appointment, qualification, and bond as required by the provisions of section 3295 of the code [code of 1897], and in which such will was subsequent to said conveyance, probated in Iowa or shall hereafter be probated in Iowa, and in which a duly authenticated copy of the will, original record of appointment, qualification, and bond as required by said section 3295 was subsequent to such conveyance, or shall be hereafter made a matter of record as provided in said section 3295, are hereby legalized and declared as valid and effectual in law and in equity as though such will had been probated in Iowa prior to such conveyance and as though the provisions of said section 3295 had been strictly complied with; provided nothing in this act [35GA, ch 273,§1] shall affect pending litigation. [S13,§3295-c (Took effect July 4, 1913); C24, 27, 31, 35, §10401.]

10401.1 Conveyances under school-fund foreclosures. In any case where the title to real estate has been heretofore conveyed by the sheriff of any county in the state of Iowa pursuant to sheriff's sale under the foreclosure of permanent school-fund mortgages to the state of Iowa, or to the state of Iowa for the use of the school fund, or to the county for the school fund; and said land has been heretofore sold under authority of the board of supervisors of said county and conveyed under its authority, prior to the effective date of this act [43GA, ch 276], and the full purchase price paid and credited to, and used by, the county for the permanent school fund of said county, all right, title, or interest of the state of Iowa in and to said real estate is hereby relinquished and quitclaimed to the purchaser or his grantees forever, and the title thereto confirmed in such purchaser, or his grantees insofar as the aforesaid erroneous conveyance is concerned. [43GA, ch 276 (Took effect by publication March 23, 1929); C31, 35,§10401-c1.]

10402 Conveyances according to law of other states. All deeds and conveyances of lands lying and being within this state heretofore executed and which said deeds have been acknowledged or proved according to and in compliance with the laws and usages of the state, territory, or country in which said deeds or conveyances were acknowledged and proved are hereby declared effectual and valid in law to all intents and purposes as though the same acknowledgments had been taken or proof of execution made within this state and in pursuance of the acts and laws thereof, and such deeds so acknowledged or proved as aforesaid shall be admitted to be legally recorded in the respective counties in which such lands may be, anything in the acts and laws of this state to the contrary notwithstanding, and all deeds and conveyances of lands situated within this state which have been acknowledged or proved in any other state, territory, or country according to and in compliance with the laws and usages of such state, territory, or country and which deeds and conveyances have been recorded within this state be and the same are hereby confirmed and declared effectual and valid in law to all intents and purposes as though the said deeds or conveyances so acknowledged or proved and recorded had prior to being recorded been acknowledged or proved within this state.

This act [20GA, ch 203] shall apply to all deeds, mortgages, and conveyances made, filed, recorded, and proved as contemplated in section 1 of this act prior to January 1, 1884. [20GA, ch 203 (Took effect July 4, 1884); C24, 27, 31, 35, §10402.]

See 14GA, ch 110, §1; 18GA, ch 160, §1

10403 Releases and discharges in re real estate. All releases and discharges of judgments, mortgages, or deeds of trust affecting property in this state made prior to January 1, 1903, by administrators, executors, or guardians appointed by the court of any other state or country without complying with the provisions of section 3308 of the code [code of 1897] are hereby legalized and declared as valid and effective in law and in equity as though the provisions of said section had been strictly followed; provided that nothing in this act [35GA, ch 276,§1] shall affect pending litigation. [S13, §3308-a (Took effect July 4, 1913); C24, 27, 31, 35,§10403.]

10404 Certain loans, contracts, and mortgages. All loans, contracts, and mortgages which are affected by the repeal of chapter 48, acts of the twenty-seventh general assembly, are hereby legalized so far as to permit recovery to be had thereon for interest at the rate of eight percent per annum, but at no greater rate, and nothing contained in such contracts shall be construed to be usurious so as to work a forfeiture of any penalty to the school fund. [S13, §1898-b (Took effect by publication May 4, 1900); C24, 27, 31, 35,§10404.]

10405 Descriptions referring to defective plats. The description of land in all instruments, conveyances, and incumbrances describing lots in or referring to plats made by the county auditors of Iowa, or by the county surveyor for the owner, and placed of record by the county recorders of Iowa, are hereby legalized and the same declared valid and binding the same as though the said plats had been signed and acknowledged and filed and recorded in strict compliance with law. [S13,§924-b (Took effect by publication March 3, 1907); C24, 27, 31, 35,§10405.]

10406 Defective conveyances — tax deeds — etc. Any deed of conveyance, or other instrument purporting to convey real estate within the state of Iowa, where such deed or instrument has been recorded in the office of the recorder of any county wherein such real estate is situated, and which said deed or instrument was executed by a county treasurer under a tax sale, a sheriff under execution sale, or by a resident or foreign executor, administrator, referee, receiver, trustee, guardian, commissioner, individual, copartnership, association, or corporation, and was executed and recorded prior to January 1, 1915, and where the grantee or grantees named in such deed or conveyance, or other instrument, his, her, their, or its grantees, heirs, or devisees, by direct line of title or conveyance have been in the actual, open, adverse possession of such premises since said date, be and the same is hereby legalized, declared valid, legal, and binding, and of full force and effect, notwithstanding any defects in the execution of said deed or instrument. [S13,§2963-c; C24, 27, 31, 35, §10406; 43GA, ch 247 (Took effect July 4, 1929).]

Temporary provisions, 43GA, ch 247

CHAPTER 464

WILLS

10407 Notice of appointment of executors.

10407 Notice of appointment of executors. In all instances prior to January 1, 1920, where executors or administrators have failed to publish notice of their appointment as required by code section 3304 [code of 1897], but have published a notice of appointment, such notice of appointment is hereby legalized and shall have the same force and effect as though the same had been published as directed by the court or clerk. [40GA, ch 208 (Took effect July 4, 1923); C24, 27, 31, 35,§10407.]

CHAPTER 465

CORPORATIONS

10408 Defective publication.
10409 Publication after required time.
10410 Filing of renewals after required time.
10411 Defective notice or acknowledgment, etc.
10412 Notices of incorporation.
10413 Amended articles and change of name.
10413.1 Cooperative associations or corporations.
10413.2 Defective organization or renewal.
10413.3 Interstate bridges — merger and consolidation.

10408 Defective publication. Corporations heretofore incorporated under the laws of the state of Iowa which have caused notice of their incorporation to be published once each week for four consecutive weeks in some daily, semiweekly, or triweekly newspaper, instead of causing the same to be published in each issue of such newspaper for four consecutive weeks, are hereby legalized and are declared legal incorporations the same as though the law had been complied with in all respects in regard to the publication of notice. [S13,§1613-a (Took effect by publication March 12, 1902); C24, 27, 31, 35,§10408.]

10409 Publication after required time. In all instances where the incorporators of corporations organized in this state for pecuniary profit have omitted to publish notices of such incorporation within three months from and after the date of the certificates of incorporation issued by the secretary of state, but did publish such notices thereafter in the manner and form as required by law, such notices of incorporation are hereby legalized, and shall have the same force and effect as though published within said period of three months. Nothing herein contained shall be so construed as to affect any pending litigation. [40GA, ch 380 (Took effect July 4, 1923); C24, 27, 31, 35,§10409.]

See 39GA, ch 398, §§1, 2; 38GA, ch 272, §1

10410 Filing of renewals after required time. In all instances where proper action has been or is taken prior to July 1, 1929, by the stockholders for renewal of any corporation for pecuniary profit and the certificate showing such proceedings together with the articles of incorporation have been filed and recorded in the office of the county recorder and later in the office of the secretary of state, although there has been failure to file such certificates and articles of incorporation in either or both of the said offices within the time specified therefor by law; such renewals are hereby legalized and shall be held to have the same force and effect as though the filings of the said documents in the said offices had been made within the periods prescribed by the statute. [SS15, §1618-1a; 40GA, ch 196; C24, 27, 31, 35,§10410; 43GA, ch 9 (Took effect by publication May 4, 1929).]

10411 Defective notice or acknowledgment, etc. In all instances where the incorporators of corporations organized in the state prior to January 1, 1929, have failed to publish notices of such incorporation within three months from and after the date of the certificates of incorporation issued by the secretary of state, but did publish such notices within three months after the date required by law in such cases in manner and form as required by law, and in all instances where the number of incorporators, or the signatures or acknowledgments thereof were less than the number required by law, or the articles of incorporation were otherwise defective, but where the corporation or association has thereafter been conducted with the requisite number of stockholders or members, such notices of incorporation, and the incorporation of corporations or associations so defectively incorporated, are in each and every case hereby legalized and all the corporate acts of all such corporations and associations are hereby legalized in all respects. [38GA, ch 158; C24, 27, 31, 35,§10411; 43GA, ch 8 (Took effect by publication April 19, 1929).]

10412 Notices of incorporation. In all instances where the incorporators of corporations for pecuniary profit have omitted to publish notice of incorporation within three months from the date of the certificate of incorporation issued by the secretary of state, but have published notice thereafter, in manner and form as by law required, such notices are hereby legalized and shall have the same force and effect as though published within said period of three months. as to all acts of said corporation from the date of said completed publication. [37GA, ch 96 (Took effect July 4, 1917); C24, 27, 31, 35, §10412.]

10413 Amended articles and change of name. Any corporation so organized [32GA, ch 250] under chapter 2 of title IX of the code [code of 1897], which shall have heretofore adopted articles of incorporation, or changed its name, or amended its articles, and some question has arisen as to whether such articles, change in name, or amendment was adopted by a majority of the members of such corporation as required by section 1651 of the code [code of 1897], and such corporation shall have been engaged in the exercise of its corporate functions for the period of at least three years, such articles, change in name, or amendment, shall be held and considered to have been duly adopted by a majority of all the members of such corporation, and are hereby legalized and made valid. [S13,§1642-b (Took effect by publication April 19, 1907); C24, 27, 31, 35,§10413.]

10413.1 Cooperative associations or corporations. In all instances where cooperative associations or corporations have been organized under the law as it appears in chapter 389, where such associations or corporations have filed the original articles rather than a verified copy with the county recorder, or where the secretary of state failed to certify the filing and acceptance of such articles, or where the certificate of the secretary of state contained a facsimile signature rather than the true signature of the secretary of state, or where there is any defect in the articles, notice, procedure or otherwise the incorporation of such corporation or association and all of the corporate acts thereof are hereby legalized in all respects. [43GA, ch 398 (Took effect by publication April 26, 1929); C31, 35, §10413-c1.]

10413.2 Defective organization or renewal. In all cases wherein a corporation organized or purporting to have been organized under the laws of this state has adopted articles of incorporation, or other instrument of similar import, and has functioned as a corporation in carrying out the objects and purposes set forth therein and in the transaction of its business, but has failed to file its articles of incorporation or such other instrument with the secretary of state, and/or otherwise to comply with the laws of this state relating to the organization of corporations, and/or to take appropriate action for the renewal of its existence within the period limited by law, and has subsequent thereto filed in the office of the secretary of state its renewal articles of incorporation and a certificate of the adoption thereof, paid all fees in connection therewith and has heretofore received a certificate from the secretary of state renewing and extending its corporate existence, the acts, franchises, rights, privileges and corporate existence of any such corporation are hereby legalized and validated and shall have the same force and effect as if all the provisions of the laws of this state relating to the organization of corporations and the renewal of their corporate existence had been strictly complied with. Nothing in this section shall affect pending litigation. [44GA, ch 212 (Took effect by publication March 29, 1931); C31, 35,§10413-d1.]

10413.3 Interstate bridges — merger and consolidation. In all cases wherein any corporation organized, or purporting to have been organized, under the laws of this state, for the purpose of constructing and/or operating a bridge, one extremity of which shall rest in an adjacent state, has attempted to merge or consolidate its stock, property, franchises, assets and liabilities with the stock, property, franchises, assets and liabilities of a corporation organized, or purporting to have been organized, for a similar purpose under the laws of such adjacent state, and such corporations have in fact united and combined their stock, property, franchises, assets and liabilities, such merger and/or consolidation, together with the action taken in effecting such merger or consolidation, is hereby legalized and validated, and such corporations so merging and/or consolidating shall be deemed to have become one merged and/or consolidated corporation under such name as shall have been agreed upon, and such merged and/or consolidated corporation shall be deemed on the date of such merger and/or consolidation to have succeeded to all the property, rights, privileges, assets and franchises and to have assumed all of the liabilities, of such merging and/or consolidating corporations. Nothing in this section shall affect pending litigation. [44GA, ch 211 (Took effect by publication March 27, 1931); C31, 35,§10413-d2.]

CHAPTER 466

CITIES AND TOWNS

10414 Bonds for garbage disposal plants.
10415 Plats legalized.
10416 City and town plats.
10417 Making and recording plats.
10418 Ordinances and proceedings of council.
10419 Contracts, elections, and ordinances in re libraries.
10420 Changing names of streets.

10414 Bonds for garbage disposal plants. All proceedings of such cities and towns as herein included, heretofore had, subsequent to the adoption of section 696-b by the thirty-sixth general assembly, and prior to the passage of this act [37GA, ch 367], providing for the issuance of bonds within the limitations of this act, for the purchase or erection of garbage disposal plants, the vote of the people authorizing such issue and the bonds issued under such proceedings and vote, are hereby legalized and declared legal and valid, the same as though all of the provisions of this act had been included in said section 696-b of the supplemental supplement to the code, 1915, and such cities may issue and sell such bonds without again submitting such question to vote. [37GA, ch 367 (Took effect by publication May 1, 1917); C24, 27, 31, 35,§10414.]

10415 Plats legalized. None of the provisions of this chapter [ch 13, title V, code of 1897] shall be construed to require replatting in any case where plats have been made and recorded in pursuance of law; and all plats heretofore filed for record and not subsequently vacated are hereby declared valid, notwithstanding irregularities and omissions in the required statement or plat, or in the manner or form of acknowledgment, or certificates thereof. [C73, §571; C97,§929 (Took effect October 1, 1897); C24, 27, 31, 35,§10415.]

10416 City and town plats. In all cases where, prior to January 1, 1895, any person, persons, or corporations have laid out any parcel of land into town or city lots and the plat or plats thereof have been recorded and the same appears to be insufficient because of failure to show certificates of the county judge, county treasurer, or county recorder, or because said certificates are defective, or because said plat failed to show signatures or acknowledgment of proprietors as provided by law, or because said acknowledgment was defective, and, subsequent to such platting, lots or subdivisions thereof have been sold and conveyed, all such said plats which have not been vacated and have been of record for a period of twenty years or more, are hereby legalized and made of full force and effect as of the date of the making thereof the same as though all certificates had been attached and all the other necessary steps taken as provided by law, and the record thereof shall be conclusive evidence that the person, persons, firm, or corporation were the proprietors of such tract of land and the owners thereof at the time of said platting, and that said tract of land was free and clear of all incumbrances unless an affidavit to the contrary was filed at the time of recording such plat. Any person or persons having, or claiming to have, any right, title, or interest in any platted premises affected by the provisions of this act [37GA, ch 79] and which right, title, or interest this act terminates or cuts off, or purports to terminate or cut off, shall have six months from the taking effect of this act in which to commence an action, or actions, to establish such right, and thereafter shall be barred from claiming any such right, title, or interest. The provisions of this act shall not affect pending litigation. [37GA, ch 79 (Took effect July 4, 1917); C24, 27, 31, 35,§10416.]

10417 Making and recording plats. The acts of the county auditors of Iowa, in making and recording plats as authorized under sections 922, 923, and 924 of the code [code of 1897] without first having properly signed or acknowledged the same, and the acts of the county recorders of Iowa in recording such plats, are hereby legalized and the same declared valid and binding the same as though they had in such respects been made and recorded in strict compliance with law. [S13,§924-a (Took effect by publication March 3, 1907); C24, 27, 31, 35,§10417.]

10418 Ordinances and proceedings of council. All acts, motions, proceedings, resolutions, and ordinances heretofore passed or adopted by the council of any city, including cities acting under special charter, and incorporated towns in the state on the supposition that the mayor was not a member of such council, and which would conform to the law if the mayor had not been a member of said council, shall for all purposes from the date of such act, motion, proceeding, resolution, or ordinance, be considered as valid and legal as they would have been had the mayor not been a member of such body. [S13,§658-a (Took effect by publication March 1, 1902); C24, 27, 31, 35,§10418.]

10419 Contracts, elections, and ordinances in re libraries. Where cities or incorporated towns and institutions of learning have established or contracted to establish public libraries to be maintained and controlled jointly as contemplated by this act [30GA, ch 24], all contracts, elections, ordinances, and other proceedings made, held, or passed in the manner provided by law are hereby declared as valid and obligatory upon the parties thereto as though the same had been made, held, or passed after the taking effect of this act. [S13,§730-a (Took effect July 4, 1904); C24, 27, 31, 35, §10419.]

10420 Changing names of streets.

WHEREAS, certain cities or towns throughout the state of Iowa have passed ordinances changing the name or names of certain streets in said cities;

Now, therefore, it is provided that the acts of

said city and town councils of such cities and towns in enacting said ordinances changing the names of said certain streets are hereby declared valid. On the filing for record of the said ordinances, duly certified by the mayor and city or town clerk, with the county recorder he shall make and record in the records of his office a plat showing the changes in the names of the streets and shall file a copy of said plat with the county auditor. [34GA, ch 228 (Took effect by publication March 30, 1911); C24, 27, 31, 35, §10420.]

CHAPTER 467

BONDS

10421 Refunding bonds.
10422 Drainage bonds.
10423 Street improvement and sewer bonds.
10424 Park bonds and certificates.

10421 Refunding bonds. All bonds which have been heretofore issued under chapter 152 of the laws of the thirty-second general assembly of Iowa and which are subject to the objection that they were issued to refund bonds which had been issued subsequent to the adoption of said chapter 152 are hereby legalized in respect to said objection, the same in effect as if the bonds refunded had been issued prior to the adoption of said chapter 152. [37GA, ch 262 (Took effect by publication May 2, 1917); C24, 27, 31, 35,§10421.]

10422 Drainage bonds. All such drainage districts [38GA, ch 135] heretofore organized, and assessments levied and confirmed in respect thereof, and bonds issued in anticipation of the collection of such assessments, are hereby validated and legalized. [38GA, ch 135 (Took effect by publication April 11, 1919); C24, 27, 31, 35,§10422.]

10423 Street improvement and sewer bonds. All bonds heretofore issued pursuant to the provisions of section 843 of the code [code of 1897] wherein dates of maturity are fixed in said bonds other than April 1, are hereby legalized, notwithstanding such maturities. Nothing in this act [39GA, ch 347] contained shall affect any pending litigation. [39GA, ch 347 (Took effect by publication March 15, 1921); C24, 27, 31, 35,§10423.]

10424 Park bonds and certificates. In all cities covered by the provisions of chapter 312, acts of the thirty-eighth general assembly, which have heretofore caused to be issued park certificates or bonds in anticipation of levies authorized in subsection 2 of section 1 of said chapter 312, for the purpose of paying the cost of any building constructed or under construction in any public park, such certificates or bonds, as the case may be, which have been issued or shall be issued, and all proceedings relating thereto, are hereby legalized; and in all cases where the levy of the tax authorized under subsection 2 has been made, such levy is hereby legalized. [39GA, ch 125 (Took effect by publication April 8, 1921); C24, 27, 31, 35, §10424.]

CHAPTER 468

ELECTIONS

10425 Elections in re school bonds.
10426 Elections in re sites and buildings for counties.

10425 Elections in re school bonds. In all cases where an election has been held in any school district, under the provisions of sections 2820-d1 to 2820-d5, inclusive, supplement to the code, 1913, and a majority of the votes cast, regardless of the sex of the voter, at such election was in favor of the issuance of bonds, such election is hereby declared to be sufficient authorization for the issuance of bonds, and all bonds so authorized, whether heretofore issued or hereafter to be issued, are hereby legalized and validated. [38GA, ch 134 (Took effect by publication April 6, 1919); C24, 27, 31, 35,§10425.]

10426 Elections in re sites and buildings for counties. The provisions of sections 443 of the code [code of 1897] and 448 of the supplemental supplement to the code, 1915, as here amended [37GA, ch 304] are hereby made retroactive, and shall apply to any election held prior to as well as after with the same effect as if the said amendments had been made prior to the call and holding of such election, and the tax levies and bond issues voted at such prior election are hereby legalized, confirmed, and made valid. [37GA, ch 304 (Took effect by publication May 1, 1917); C24, 27, 31, 35,§10426.]

TITLE XXVIII

DOMESTIC RELATIONS

CHAPTER 469

MARRIAGE

Referred to in §2422

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10427 Contract. Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise declared. [C51,§1463; R60,§2515; C73,§2185; C97,§3139; C24, 27, 31, 35,§10427.]

10428 Age. A marriage between a male of sixteen and a female of fourteen years of age is valid; but if either party has not attained the age thus fixed, the marriage will be a nullity or not, at the option of such party, made known at any time before he or she is six months older than the age thus fixed. [C51,§1464; R60, §2516; C73,§2186; C97,§3140; C24, 27, 31, 35, §10428.]

10429 License. Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to be solemnized. Such license must not be granted in any case:

1. Where either party is under the age necessary to render the marriage valid.
2. Where the male is a minor, or the female is under eighteen years of age, unless a certificate of the consent of the parents is filed. If one of the parents is dead such certificate may be executed by the survivor. If both parents are dead the guardian of such minor may execute such certificate.
3. Where either party is disqualified from making any civil contract.
4. Where the parties are within the degrees of consanguinity or affinity in which marriages are prohibited by law.
5. Where either party is an idiot, imbecile, insane, or under guardianship as an incompetent. [C51,§§1465, 1466; R60,§§2517, 2518; C73, §§2187, 2188; C97,§3141; S13,§3141; C24, 27, 31, 35,§10429.]

Referred to in §§10434, 10445.1
Additional prohibition, §10445.3

10430 Age and qualification — affidavit. When an application for a license is made the clerk shall require at least one affidavit from some competent and disinterested person, stating such facts as to age and qualification of the parties as the clerk may deem necessary to determine the competency of the parties to contract a marriage. [C51,§1468; R60,§2520; C73, §2190; C97,§3142; C24, 27, 31, 35,§10430.]

40ExGA, HF 213, §2, editorially divided

10431 Age and qualification—certificate. If the clerk is acquainted with the age and qualification of the parties, he may execute, in lieu of said affidavit, a certificate stating such fact, and that he knew the parties to be competent to contract a marriage. [C51,§1467; R60,§2519; C73,§2189; C97,§3142; C24, 27, 31, 35,§10431.]

10432 Filing and record required. The affidavit or certificate, in each case, shall be filed by the clerk and constitute a part of the records of his office. A memorandum of such affidavit or certificate shall also be entered in the license book. [C51,§1468; R60,§2520; C73,§2190; C97, §3142; C24, 27, 31, 35,§10432.]

10433 Delivery of blank with license. When a license is issued the clerk shall deliver to the applicant a blank return for the marriage, and give such instructions relative thereto as will insure a complete and accurate return. [C24, 27, 31, 35,§10433.]

10434 Consent of parent. If either applicant for a license is a minor, a certificate in writing of the parents or guardian, as the case may be, of consent, as provided in section 10429, must be filed in the office of the clerk, and be acknowledged by them or proven to be genuine, and a memorandum thereof entered in the license book. The false making of such certificate shall be punishable as forgery. [C51, §1469; R60,§2521; C73,§2191; C97,§3143; C24, 27, 31, 35,§10434.]

Referred to in §10435
Punishment, §13189

10435 Violations. If the clerk issues a license in violation of the provisions of section 10434, or if a marriage is solemnized without its being procured, the clerk so issuing the same, and the parties married, and all persons aiding them, are guilty of a misdemeanor. [C51,§1470; R60,§2522; C73,§2192; C97,§3144; C24, 27, 31, 35,§10435.]

Punishment, §12894

10436 Who may solemnize. Marriages must be solemnized by:

1. A justice of the peace, or the mayor of the city or town wherein the marriage takes place.
2. Some judge of the supreme, district, superior, or municipal court of the state.
3. Some minister of the gospel, ordained or licensed according to the usages of his denomination. [C51,§1472; R60,§2524; C73,§2193; C97, §3145; C24, 27, 31, 35,§10436; 48GA, ch 238,§1.]

10437 Nonstatutory solemnization — forfeiture. Marriages solemnized, with the consent of parties, in any other manner than as herein prescribed, are valid; but the parties thereto, and all persons aiding or abetting them, shall forfeit to the school fund the sum of fifty dollars each; but this shall not apply to the person conducting the marriage ceremony, if within fifteen days thereafter he makes the required return to the clerk of the district court. [C51, §§1474, 1475; R60,§§2526, 2527; C73,§§2195, 2196; C97,§3147; S13,§3147; C24, 27, 31, 35, §10437.]

10438 Fee. Any person authorized to solemnize marriage may charge two dollars in each case for officiating and making return. [C51, §2551; R60,§4159; C73,§3828; C97,§3152; C24, 27, 31, 35,§10438.]

10439 Certificate — return. After the marriage has been solemnized, the officiating minister or magistrate shall:

1. Give each of the parties a certificate of the same.
2. Make return of such marriage within fifteen days to the clerk of the district court, upon the blank provided for that purpose. [C51, §§1473, 1476; R60,§§2525, 2528; C73,§§2194, 2197; C97,§3146; S13,§3146; C24, 27, 31, 35, §10439.]

10440 Contents of return. The return of a marriage shall state:

1. Full name, age, color, nationality, residence, occupation, place of birth, father's full name, mother's full maiden name, and number of marriage for both bride and groom; also, full maiden name of bride, if a widow.
2. Time and place of ceremony.
3. Witnesses to marriage.
4. Name and office of person officiating. [C24, 27, 31, 35,§10440.]

Disposition of marriage returns, §2425
40ExGA, HF 213, §5, editorially divided

10441 Inadequate return. If the return of a marriage is not complete in every particular, the clerk shall require the person making the same to supply the omitted information. [C24, 27, 31, 35,§10441.]

10442 Husband responsible for return. When a marriage is consummated without the services of a clergyman or magistrate, the required return thereof shall be made to the clerk by the husband. [C51,§1478; R60,§2530; C73, §2199; C97,§3149; C24, 27, 31, 35,§10442.]

10443 Exceptions. The provisions of this chapter, so far as they relate to procuring licenses and to the solemnizing of marriages, are not applicable to members of any particular denomination having, as such, any peculiar mode of entering the marriage relation. [C51,§1477; R60,§2529; C73,§2198; C97,§3148; C24, 27, 31, 35,§10443.]

10444 Issue legitimatized. Illegitimate children become legitimate by the subsequent marriage of their parents. [C51,§1479; R60,§2531; C73,§2200; C97,§3150; C24, 27, 31, 35,§10444.]

10445 Void marriages. Marriages between the following persons shall be void:

1. Between a man and his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter, or sister's daughter.
2. Between a woman and her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, or sister's son.
3. Between first cousins.
4. Between persons either of whom has a husband or wife living, but, if the parties live and cohabit together after the death or divorce of the former husband or wife, such marriage shall be valid. [R60,§§4367, 4368; C73,§4030; C97, §§3151, 4936; S13,§4936; C24, 27, 31, 35,§10445.]

Incest, §12978
Similar provision, §10486, subsection 3

10445.1 Lists of mental defectives. The board of control shall furnish quarterly to each clerk of the district court lists of all persons then living and over fourteen years of age who are or who have been inmates of state institutions for the insane or feeble-minded, or who have been committed to the guardianship of the board as feeble-minded, except persons whose competency to marry shall subsequently have been established by judicial proceedings, or who

shall have been discharged as cured under sections 3501 and 3506, together with the names of such other persons as are, within the knowledge of the board, disqualified for marriage under subsection 5 of section 10429. [C27, 31, 35,§10445-a1.]

41GA, ch 187, §1, editorially divided

10445.2 Contents of lists. Such lists shall contain as far as obtainable the dates of birth and places of birth of the individuals listed, together with such other identifying information as may be desirable and obtainable. [C27, 31, 35,§10445-a2.]

10445.3 License prohibited. No clerk shall issue any marriage license to any applicant without first satisfying himself that the name of neither party to the marriage is contained in the latest list furnished by the board of control. [C27, 31, 35,§10445-a3.]

10445.4 Action to determine competency. Any person aggrieved by such refusal to grant a license may by petition bring proceedings in the district court of the county of his residence to have his competency to enter into the marriage relation established. [C27, 31, 35,§10445-a4.]

10445.5 Notice to board of control. Petitioner shall cause notice of the filing of said petition to be served on the state board of control in the manner required for the service of original notice at least ten days before the date set for hearing of said petition. [C27, 31, 35,§10445-a5.]

Service of notice, §11060

10445.6 Appearance by board. The board of control shall have the right to appear and contest the allegations of said petition in behalf of the state. [C27, 31, 35,§10445-a6.]

10445.7 Method of trial. The trial shall be as in an equitable proceeding. [C27, 31, 35, §10445-a7.]

10445.8 Appeal. Either party may appeal from the decree rendered to the supreme court as in proceedings in equity. [C27, 31, 35,§10445-a8.]

10445.9 When license issued. If on hearing, decree be entered in favor of the aggrieved party, such license may be issued on order of the court. [C27, 31, 35,§10445-a9.]

CHAPTER 470

HUSBAND AND WIFE

10446 Property rights of married women.
10447 Interest of spouse in other's property.
10448 Remedy by one against the other.
10449 Conveyances to each other.
10450 Attorney in fact.
10451 Insanity—conveyance of property.
10452 Proceedings.
10453 Decree.
10454 Conveyances—revocation.
10455 Abandonment of either—proceedings.
10456 Contracts and sales binding.
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10458 Annulment of decree.
10459 Family expenses.
10460 Custody of children.
10461 Wages of wife—actions by.
10465 Liability for separate debts.
10466 Contracts of wife.
10467 Husband not liable for wife's torts.

10446 Property rights of married women. A married woman may own in her own right, real and personal property, acquired by descent, gift, or purchase, and manage, sell, and convey the same, and dispose thereof by will, to the same extent and in the same manner the husband can property belonging to him. [C73,§2202; C97,§3153; C24, 27, 31, 35,§10446.]

10447 Interest of spouse in other's property. When property is owned by the husband or wife, the other has no interest therein which can be the subject of contract between them, nor such interest as will make the same liable for the contracts or liabilities of the one not the owner of the property, except as provided in this chapter. [C73,§2203; C97,§3154; C24, 27, 31, 35, §10447.]

Distributive share, §11990

10448 Remedy by one against the other. Should the husband or wife obtain possession or control of property belonging to the other before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried. [C73, §2204; C97,§3155; C24, 27, 31, 35,§10448.]

10449 Conveyances to each other. A conveyance, transfer, or lien, executed by either husband or wife to or in favor of the other, shall be valid to the same extent as between other persons. [C73,§2206; C97,§3157; C24, 27, 31, 35, §10449.]

10450 Attorney in fact. A husband or wife may constitute the other his or her attorney in fact, to control and dispose of his or her property for their mutual benefit, and may revoke the appointment, the same as other persons. [C73,§2210; C97,§3161; C24, 27, 31, 35,§10450.]

10451 Insanity — conveyance of property. Where either the husband or wife is insane and incapable of executing a deed or mortgage relinquishing, conveying, or incumbering his or her right to the real property of the other, including the homestead, the other may petition the district court of the county of his or her residence or the county where the real estate to be conveyed or incumbered is situated, setting forth the facts and praying for an order authorizing the applicant or some other person to execute a deed or mortgage and relinquish or incumber the interest of the insane person in said

real estate. [R60,§1500; C73,§2216; C97,§3167; S13,§3167; C24, 27, 31, 35,§10451.]

10452 Proceedings. The petition shall be verified by the petitioner, and filed in the office of the clerk of the district court of the proper county, notice of which shall be given as in other cases. Upon completed service, the court shall appoint some responsible attorney thereof guardian for the person alleged to be insane, who shall ascertain the propriety, good faith, and necessity of the prayer of the petitioner, and may resist the application by making any legal or equitable defense thereto, and he shall be allowed by the court a reasonable compensation to be paid as the other costs. [R60,§1501; C73,§2217; C97,§3168; C24, 27, 31, 35,§10452.]

10453 Decree. Upon the hearing of the petition the court, if satisfied that it is made in good faith by the petitioner, and he is a proper person to exercise the power and make the conveyance or mortgage, and it is necessary and proper, shall enter a decree authorizing the execution of the conveyance or mortgage for and in the name of such husband or wife by such person as the court may appoint. [R60, §1502; C73,§2218; C97,§3169; S13,§3169; C24, 27, 31, 35,§10453.]

10454 Conveyances—revocation. All deeds executed as provided in this chapter shall convey the interest of such insane person in the real estate described, but such power shall cease and be revoked as soon as he or she shall become of sound mind and apply to the court therefor, but such revocation shall not affect conveyances previously made. [R60,§1503; C73,§2219; C97, §3170; C24, 27, 31, 35,§10454.]

10455 Abandonment of either—proceedings. In case the husband or wife abandons the other for one year, or leaves the state and is absent therefrom for such term, without providing for the maintenance and support of his or her family, or is confined in jail or the penitentiary for such period, the district court of the county where the abandoned party resides may, on application by petition setting forth the facts, authorize the applicant to manage, control, sell, and incumber the property of the guilty party for the support and maintenance of the family and for the purpose of paying debts. Notice of such proceedings shall be given as in ordinary actions, and anything done under or by virtue of the order or decree of the court shall be valid to the same extent as if the same was done by the party owning the property. [C51,§§1456–1459, 1461; R60,§§2508–2511, 2513; C73,§2207; C97,§3158; C24, 27, 31, 35,§10455.]

Referred to in §§10456, 10458
Service in ordinary actions, ch 489

10456 Contracts and sales binding. All contracts, sales, or incumbrances made by either husband or wife under the provisions of section 10455 shall be binding on both, and during such absence or confinement the person acting under such power may sue and be sued thereon, and for all acts done the property of both shall be liable, and execution may be levied or attachment issued accordingly. [C73,§2208; C97, §3159; C24, 27, 31, 35,§10456.]

Referred to in §10458
C97,§3159, editorially divided

10457 Nonabatement of action. No action or proceeding shall abate or be affected by the return or release of the person absent or confined, but he or she may be permitted to prosecute or defend jointly with the other. [C73, §2208; C97,§3159; C24, 27, 31, 35,§10457.]

Referred to in §10458

10458 Annulment of decree. The husband or wife affected by the proceedings contemplated in sections 10455 to 10457, inclusive, may obtain an annulment thereof, upon filing a petition therefor and serving a notice on the person in whose favor the same was granted, as in ordinary actions; but the setting aside of such decree or order shall not affect any act done thereunder. [C51,§1460; R60,§2512; C73,§2209; C97,§3160; C24, 27, 31, 35,§10458.]

10459 Family expenses. The reasonable and necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. [C51,§1455; R60, §2507; C73,§2214; C97,§3165; S13,§3165; C24, 27, 31, 35,§10459.]

10460 Custody of children. If the husband abandons the wife she is entitled to the custody of the minor children, unless the district court, upon application for that purpose, shall otherwise direct. [C51,§1462; R60,§2514; C73,§2215; C97,§3166; C24, 27, 31, 35,§10460.]

10461 Wages of wife—actions by. A wife may receive the wages for her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property, as if unmarried. [C73,§2211; C97, §3162; C24, 27, 31, 35,§10461.]

10462 to 10464, inc. Rep. by 44GA, ch 214. See §10991.1

10465 Liability for separate debts. Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, and, except as herein otherwise declared, they are not liable for the debts of each other contracted after marriage; nor are the wages, earnings, or property of either, nor is the rent or income of the property of either, liable for the separate debts of the other. [C51,§1453; R60, §2505; C73,§2212; C97,§3163; C24, 27, 31, 35, §10465.]

10466 Contracts of wife. Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her, to the same extent and in the same manner as if she were unmarried. [C51,§1454; R60,§2506; C73, §2213; C97,§3164; C24, 27, 31, 35,§10466.]

10467 Husband not liable for wife's torts. For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist. [C73,§2205; C97,§3156; C24, 27, 31, 35,§10467.]

CHAPTER 471

DIVORCE AND ANNULMENT OF MARRIAGES

10468 Jurisdiction.
10469 Kind of action—joinder.
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10474 Corroboration of plaintiff.
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10487 Petition.
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10489 Children—legitimacy.
10490 Legitimacy in case of prior marriage.
10491 Alimony.

10468 Jurisdiction. The district court in the county where either party resides has jurisdiction of the subject matter of this chapter. [C51,§1480; R60,§2532; C73,§2220; C97,§3171; C24, 27, 31, 35,§10468.]

10469 Kind of action—joinder. An action for a divorce shall be by equitable proceedings, and no cause of action, save for alimony, shall be joined therewith. [R60,§4184; C73,§2511; C97,§3430; C24, 27, 31, 35,§10469.]

10470 Petition. Except where the defendant is a resident of this state, served by personal service, the petition for divorce, in addition to the facts on account of which the plaintiff claims the relief sought, must state that the plaintiff has been for the last year a resident of the state, specifying the township and county in which he or she has resided, and the length of such residence therein after deducting all absences from the state; that it has been in good faith and not for the purpose of obtaining a divorce only; and in all cases it must be alleged that the application is made in good faith and for the purpose set forth in the petition. [C51,§1481; R60,§2533; C73,§2221; C97,§3172; C24, 27, 31, 35,§10470.]

10471 Verification — evidence. The petition must be verified by the plaintiff, and its allegations established by competent evidence. [C51,§1481; R60,§2533; C73,§2222; C97,§3173; C24, 27, 31, 35,§10471.]

C97,§3173, editorially divided

10472 Public hearing—commissioners. All such actions shall be heard in open court upon the oral testimony of witnesses, or depositions taken as in other equitable actions or by a commissioner appointed by the court. [C73, §2222; C97,§3173; C24, 27, 31, 35,§10472.]

10473 Residence — failure of proof. If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the court. [C73,§2222; C97,§3173; C24, 27, 31, 35,§10473.]

10474 Corroboration of plaintiff. No divorce shall be granted on the testimony of the plaintiff alone. [C73,§2222; C97,§3173; C24, 27, 31, 35,§10474.]

10475 Causes. Divorces from the bonds of matrimony may be decreed against the husband for the following causes:

1. When he has committed adultery subsequent to the marriage.
2. When he willfully deserts his wife and absents himself without a reasonable cause for the space of two years.
3. When he is convicted of a felony after the marriage.
4. When, after marriage, he becomes addicted to habitual drunkenness.
5. When he is guilty of such inhuman treatment as to endanger the life of his wife. [C51, §1482; R60,§2534; C73,§2223; C97,§3174; C24, 27, 31, 35,§10475.]

Referred to in §10477
Separate maintenance, see 133 Iowa 22

10476 Husband from wife — other causes. The husband may obtain a divorce from the wife for like cause, and also when the wife at the time of the marriage was pregnant by another than the husband, of which he had no knowledge, unless such husband had an illegitimate child or children then living, which at the time of the marriage was unknown to the wife. [C51,§1483; R60,§2535; C73,§2224; C97,§3175; C24, 27, 31, 35,§10476.]

Referred to in §10477

10477 Cross petition. The defendant upon a cross petition may obtain a divorce for either of the causes stated in section 10475, and if the husband is defendant he may, in addition to those causes, have a like decree for the cause stated in section 10476. [C73,§2225; C97,§3176; C24, 27, 31, 35,§10477.]

10478 Maintenance during litigation. The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or

defend the action. [C73,§2226; C97,§3177; C24, 27, 31, 35,§10478.]

10479 Attachment. The petition may be presented to the court or judge for the allowance of an order of attachment, who, by indorsement thereon, may direct such attachment and fix the amount for which it may issue, and the amount of the bond, if any, that shall be given. Any property taken by virtue thereof shall be held to satisfy the judgment or decree of the court, but may be discharged or released as in other cases. [C73,§2227; C97,§3178; C24, 27, 31, 35,§10479.]

10480 Showing. In making such orders, the court or judge shall take into consideration the age and sex of the plaintiff, the physical and pecuniary condition of the parties, and such other matters as are pertinent, which may be shown by affidavits, in addition to the pleadings or otherwise, as the court or judge may direct. [C73,§2228; C97,§3179; C24, 27, 31, 35,§10480.]

10481 Alimony — custody of children — changes. When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.

Subsequent changes may be made by it in these respects when circumstances render them expedient. [C51,§1485; R60,§2537; C73,§2229; C97, §3180; C24, 27, 31, 35,§10481.]

When personal earnings not exempt, §11764

10482 Contempt. If any party against whom such decree has been entered, shall willfully disobey the same, or secrete his property, he may be cited and punished by the court for contempt and be committed to the county jail for a period of time not to exceed thirty days for each offense. [C24, 27, 31, 35,§10482; 47GA, ch 224,§1.]

Contempts, ch 586

10483 Forfeiture of rights. When a divorce is decreed the guilty party forfeits all rights acquired by marriage. [C51,§1486; C73,§2230; C97,§3181; S13,§3181; C24, 27, 31, 35,§10483.]

S13,§3181, editorially divided

10484 Remarriage. In every case in which a divorce is decreed, neither party shall marry again within a year from the date of the filing of said decree unless permission to do so is granted by the court in such decree. Nothing herein contained shall prevent the persons divorced from remarrying each other. [S13,§3181; C24, 27, 31, 35,§10484.]

Referred to in §10485

10485 Violations. Any person marrying contrary to the provisions of section 10484 shall be deemed guilty of a misdemeanor and punished accordingly. [S13,§3181; C24, 27, 31, 35,§10485.]

Punishment, §12894

10486 Annulling illegal marriage — causes. Marriage may be annulled for the following causes:

1. Where the marriage between the parties is prohibited by law.
2. Where either party was impotent at the time of marriage.
3. Where either party had a husband or wife living at the time of the marriage, provided they have not, with a knowledge of such fact, lived and cohabited together after the death or divorce of the former spouse of such party.

Similar provision, §10445, subsection 4

4. Where either party was insane or idiotic at the time of the marriage. [C73,§2231; C97, §3182; C24, 27, 31, 35,§10486.]

10487 Petition. A petition shall be filed in such cases as in actions for divorce, and all the provisions of this chapter in relation thereto shall apply to such cases, except as otherwise provided. [C73,§2232; C97,§3183; C24, 27, 31, 35,§10487.]

10488 Validity determined. When the validity of a marriage is doubted, either party may file a petition, and the court shall decree it annulled or affirmed according to the proof. [C73, §2233; C97,§3184; C24, 27, 31, 35,§10488.]

10489 Children—legitimacy. When a marriage is annulled on account of the consanguinity or affinity of the parties, the issue shall be illegitimate; if because of the impotency of the husband, any issue of the wife shall be illegitimate; but when on account of nonage, insanity, or idiocy, the issue will be legitimate as to the party capable of contracting the marriage. [C73, §2234; C97,§3185; C24, 27, 31, 35,§10489.]

10490 Legitimacy in case of prior marriage. When a marriage is annulled on account of a prior marriage and the parties contracted the second marriage in good faith, believing the prior husband or wife to be dead, that fact shall be stated in the decree of nullity, and the issue of the second marriage begotten before the decree of the court will be the legitimate issue of the parent capable of contracting. [C73,§2235; C97,§3186; C24, 27, 31, 35,§10490.]

10491 Alimony. In case either party entered into the contract of marriage in good faith, supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree, and the court may decree such innocent party compensation as in cases of divorce. [C73,§2236; C97,§3187; C24, 27, 31, 35,§10491.]

CHAPTER 472

MINORS

10492 Period of minority.
10493 Contracts—disaffirmance.
10494 Misrepresentations—engaging in business.
10495 Payments.

10492 Period of minority. The period of minority extends to the age of twenty-one years, but all minors attain their majority by marriage, and females, after reaching the age of eighteen years, may make valid contracts for marriage the same as adults. [C51,§1487; R60,§2539; C73, §2237; C97,§3188; C24, 27, 31, 35,§10492.]

10493 Contracts—disaffirmance. A minor is bound not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority, except as otherwise provided. [C51,§1488; R60, §2540; C73,§2238; C97,§3189; C24, 27, 31, 35, §10493.]

10494 Misrepresentations — engaging in business. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting. [C51,§1489; R60,§2541; C73, §2239; C97,§3190; C24, 27, 31, 35,§10494.]

10495 Payments. Where a contract for the personal services of a minor has been made with him alone, and the services are afterwards performed, payment therefor made to him, in accordance with the terms of the contract, is a full satisfaction therefor, and the parent or guardian cannot recover a second time. [C51,§1490; R60, §2542; C73,§2240; C97,§3191; C24, 27, 31, 35, §10495.]

CHAPTER 473

ADOPTION

Referred to in §§3702, 3715.1

10501.1 Who may adopt—petition.
10501.2 Investigation—minimum residence.
10501.3 Consent, when necessary.
10501.4 Notice of hearing.
10501.5 Decree—change of name.
10501.6 Status of the adopted child.
10501.7 Annulment.
10501.8 Records of adoption.

10496 to 10501, inc. Rep. by 42GA, ch 218

10501.1 Who may adopt—petition. Any person of lawful age may petition any court of record of the county in which he or the child resides for permission to adopt any child not his own, but no person other than the parent of a child may assume the permanent care and custody of a child under fourteen years of age except in accordance with the provisions of this chapter or chapter 181.5. If the petitioner be married, the spouse shall join in the petition. A person of full age may be adopted. [R60,§2600; C73,§2307; C97,§3250; C24,§10496; C27, 31, 35, §10501-b1.]

Relinquishment of custody, §3661.097 et seq.

10501.2 Investigation — minimum residence. Upon the filing of a petition for the adoption of a minor child, the court shall proceed to verify the allegations of the petition; to investigate the conditions and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption; and to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child. No petition shall be granted until the child shall have lived for six months in the proposed home, provided, however, that such investigation and period of residence may be waived by the court upon good cause shown when satisfied that the proposed home and the child are suited to each other. [C27, 31, 35, §10501-b2.]

10501.3 Consent, when necessary. No person may assign, relinquish or otherwise transfer to another his rights or duties with respect to the permanent care or custody of a child under fourteen years of age except in accordance with this chapter. The consent of both parents shall be given to such adoption unless one is dead, or is considered hopelessly insane, or is imprisoned for a felony, or is an inmate or keeper of a house of ill fame, or unless the parents are not married to each other, or unless the parent or parents have signed a release of the child in accordance with the statute on child placing, or unless one or both of the parents have been deprived of the custody of the child by judicial procedure because of unfitness to be its guardian. If not married to each other, the parent having the care and providing for the wants of the child may give consent. If the child is not in the custody of either parent, but is in the care of a duly appointed guardian, then the consent of such guardian shall be necessary. Where the child is a ward of the state in a state institution the consent of the board of control of state institutions shall be first obtained before said adoption shall be effective. If the child has been given by written release* to a licensed child welfare agency in accordance with the statute on child placing, the consent of the agency to whom the release was made shall be necessary. When the child adopted is fourteen years of age or over, his consent shall also be necessary. [R60,

§2601; C73,§2308; C97,§3251; C24,§10497; C27, 31, 35,§10501-b3.]

Child-placing agencies, ch 181.5
*"lease" in enrolled act

10501.4 Notice of hearing. When the parents of any minor child are dead or have abandoned him, and he has no guardian in the state, the court may order such notice of a hearing on such petition as he may determine or such notice may be waived. [C27, 31, 35,§10501-b4.]

10501.5 Decree—change of name. If upon the hearing the court shall be satisfied as to the identity and relationship of the persons concerned, and that the petitioners are able to properly rear and educate the child, and that the petition should be granted, a decree shall be entered in the office of the clerk, setting forth the facts including as far as known the name of the child, of its parents and of the persons adopting it, and the name under which the child is thereafter to be known, and ordering that from the date thereof, the child shall be the child of the petitioners. The clerk shall deliver to the foster parents a certified copy of the decree. If desired, the court, in and by said decree, may change the name of the child. [R60, §2601; C73,§2308; C97,§3251; C24,§10498; C27, 31, 35,§10501-b5.]

10501.6 Status of the adopted child. Upon the entering of such decree, the rights, duties and relationships between the child and parent by adoption shall be the same that exist between parents and child by lawful birth and the right of inheritance from each other shall be the same as between parent and children born in lawful wedlock. [R60,§2603; C73,§2310; C97,§3253; S13,§3253; C24,§10500; C27, 31, 35,§10501-b6.]

Referred to in §§3684.17, 3828.015

10501.7 Annulment. If within five years after the adoption, a child develops feeblemindedness, epilepsy, insanity or venereal infection as a result of conditions existing prior to the adoption, and of which the adopting parent had no knowledge or notice, a petition setting forth such facts may be filed with the district court of the county where the adoptive parents are residing. If upon hearing the facts alleged are proved, the court may annul the adoption and commit the child to the guardianship of the state board of social welfare. In every such proceeding it shall be the duty of the county attorney to represent the interests of the child. [C27, 31, 35,§10501-b7; 47GA, ch 118, §11; 48GA, ch 84,§7.]

10501.8 Records of adoption. The findings of the court in any petition for adoption shall be made a complete record and same shall be filed as are other records of the court, but in addition thereto, the clerk of court shall cause a duplicate copy thereof to be sent to the state board of social welfare for their files. [R60, §2602; C73,§2309; C97,§3252; C24,§10499; C27, 31, 35,§10501-b8; 47GA, ch 118,§11; 48GA, ch 84, §7.]

TITLE XXIX

JUSTICES OF THE PEACE

CHAPTER 474

JUSTICE OF THE PEACE COURT

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10502 Jurisdiction. The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties; but does not embrace actions for the recovery of money against actual residents of any other county, except as provided in this chapter. [C51,§2261; R60,§3849; C73,§3507; C97, §4476; C24, 27, 31, 35,§10502.]

10503 Amount in controversy. Within the prescribed limit, it extends to all civil actions, except those by equitable proceedings, where the amount in controversy does not exceed one hundred dollars; and, by consent of parties in writing, it may be extended to actions where the amount claimed is not more than three hundred dollars. [C51,§2262; R60,§3850; C73,§3508; C97, §4477; C24, 27, 31, 35,§10503.]

10504 Suits brought where party resides. Actions in all cases may be brought in the township where the plaintiff, or the defendant, or one of several defendants, resides, unless otherwise provided by law. [C51,§2263; R60,§3851; C73, §3509; C97,§4478; C24, 27, 31, 35,§10504.]

10505 Where defendant served. They may also be brought in any other township of the same county, if actual service on one or more of the defendants is made in such township. [C51, §2264; R60,§3852; C73,§3510; C97,§4479; C24, 27, 31, 35,§10505.]

10506 Replevin. Actions in replevin may also be brought before any justice in the county in which the property is found. [C51,§2265; R60, §3853; C73,§3511; C97,§4480; C24, 27, 31, 35, §10506.]

C97,§4480, editorially divided

10507 Attachment. Actions aided by attachment may be brought against nonresidents of the state in any county and township wherein the property sought to be levied upon is found. [C51,§2265; R60,§3853; C73,§3511; C97,§4480; C24, 27, 31, 35,§10507.]

10508 Nonresident. Any action against such nonresidents may be brought in any county wherein any defendant is served with notice thereof. [C51,§2266; R60,§3854; C73,§3512; C97, §4480; C24, 27, 31, 35,§10508.]

10509 Written stipulation for place of suit. On written contracts stipulating for payment at a particular place, action may be brought in the township where the payment was agreed to be made. [C51,§2267; R60,§3855; C73,§3513; C97, §4481; S13,§4481; C24, 27, 31, 35,§10509.]

Referred to in §§10510, 10511
S13,§4481, editorially divided

10510 Costs when plaintiff defaults. Should action be brought under the provisions of section 10509 in any county other than that of the residence of the defendant and the plaintiff shall fail to appear at the time fixed for the trial in the original notice, the justice of the peace before whom said action is brought, shall, upon presentation of the copy of the original notice served upon the defendant, docket said cause and enter judgment therein against the plaintiff in favor of the defendant for all costs in the action, which costs shall include all reasonable expenses of the defendant in attending the place of trial and an attorney's fee not to exceed fifteen dollars for defendant's attorney. [S13, §4481; C24, 27, 31, 35,§10510.]

10511 Dismissal without trial on merits. Should any action brought under the provisions of section 10509 for any cause, except upon trial upon the merits, be dismissed, the defendant shall recover like costs and expenses and attorney fees. [S13,§4481; C24, 27, 31, 35,§10511.]

10512 Change of venue for fraud. Where an action is brought relying upon the foregoing provisions to fix the venue in a township in a county other than the residence of the signer of a written contract, and the defendant files a verified answer setting forth a legal defense alleging fraud in the inception of the contract, and he files therein a motion asking to have said cause transferred to the county of his residence, accompanied by a cost bond of fifty dollars to be approved by the court where the action is brought, the justice before whom such action is brought shall thereupon order the same transferred to such county upon the defendant paying fees of transcript and postage, and all papers and transcript shall forthwith be mailed, by registered letter, to the clerk of the district court of the county of defendant's residence, and said cause shall be docketed for trial. [S13, §4481; C24, 27, 31, 35,§10512.]

Referred to in §10513
Similar provision, §11411

10513 Dual applications. If two or more defendants in the same cause apply for change of venue as provided in section 10512, the justice shall transmit said papers to the county of the defendant making first application. [S13, §4481; C24, 27, 31, 35,§10513.]

10514 Costs and attorney fees. If, upon trial, the defendant shall establish his defense of fraud, then he shall be entitled to recover, as a part of his costs, the reasonable expense, including attorney's fees, for securing the change of place of trial, but if he shall fail to

establish said defense, then he shall be liable to plaintiff, as a part of the costs, for the reasonable additional expense caused to him by reason of such change. [S13,§4481; C24, 27, 31, 35,§10514.]

10515 In adjoining township. If there is no justice in the proper township qualified or able to act, the action may be commenced in any adjoining township in the same county. If there be no such justice in an adjoining township, it may be commenced before the justice in the same county nearest to the township in which the defendant resides. [C51,§2268; R60,§3856; C73,§3514; C97,§4482; C24, 27, 31, 35,§10515.]

10516 Docket furnished. The board of supervisors of each county shall furnish to each justice of the peace thereof a well-bound blank record book of not less than four quires, with index, suitable for a docket, upon his certificate that the same is necessary for the business of the office. [C73,§3635; C97,§4483; C24, 27, 31, 35,§10516.]

10517 Entries on docket. Each justice shall keep such docket by entering therein each action and each act done, with the proper date as follows:

1. The title of the action.
2. A brief statement of the nature and amount of the plaintiff's demand, and defendant's counterclaim, if any, giving date to each where dates exist.
3. The issuing of the notice and the return thereof.
4. The appearance of the parties.
5. Every adjournment, stating at whose instance and for what time.
6. The granting of a change of place of trial, and the name of the justice to whom the case is sent.
7. The trial, and whether by the justice or by a jury.
8. The verdict and judgment.
9. The issuance of each execution, to whom delivered, the renewals, if any, and the amount of judgment and costs to be collected thereunder.
10. The issuance of each writ of attachment or replevin or other process, to whom delivered, and the particulars thereof.
11. The taking of an appeal, if any.
12. The giving of a transcript for filing in the clerk's office, or for setting off against another judgment.
13. A note of all motions made or demurrers interposed, and whether sustained or overruled. [C51,§2269; R60,§3857; C73,§3515; C97,§4484; C24, 27, 31, 35,§10517.]

10518 Parties—district court procedure applicable. The parties to the action may be the same as in the district court, and all the proceedings prescribed for that court, so far as applicable and not herein changed, shall be pursued in justices' courts. The powers of the court are only as herein enumerated. [C51, §2270; R60,§3858; C73,§3516; C97,§4485; C24, 27, 31, 35,§10518.]

10519 How commenced. Actions in justices' courts are commenced by voluntary appearance or by notice. [C51,§2271; R60,§3859; C73, §3517; C97,§4486; C24, 27, 31, 35,§10519.]

10520 Petition not necessary. No petition need be filed except as in this chapter required. The notice must state the cause of the action in general terms, sufficient to apprise the defendant of the nature of the claims against him. [C51,§2272; R60,§3860; C73,§3518; C97,§4487; C24, 27, 31, 35,§10520.]

10521 Form of notice. It must be addressed to the defendant by name, but if his name is unknown, a description of him will be sufficient. It must be subscribed by the plaintiff, his attorney, or the justice before whom it is returnable. [C51,§2273; R60,§3861; C73,§3519; C97, §4488; C24, 27, 31, 35,§10521.]

10522 Amount of judgment claimed. It must state the amount for which the plaintiff will take judgment if the defendant fails to appear and answer at the time and place therein fixed. [C51, §2274; R60,§3862; C73,§3520; C97,§4489; C24, 27, 31, 35,§10522.]

10523 Time of trial. The time fixed in the notice must be not less than five nor more than fifteen days from the date, and it must be served not less than five days previous to the trial. [C51,§2275; R60,§3863; C73,§3521; C97,§4490; C24, 27, 31, 35,§10523.]

10524 Service and return. The service and return thereto must be made in the same manner as in the district court, except no service shall be made by publication other than is herein provided, nor shall any return made by another than the sheriff or a constable of the county be valid unless sworn to. [C51,§2276; R60,§3864; C73,§3522; C97,§4491; C24, 27, 31, 35,§10524.]

Manner of service, §11060 et seq.
Similar provision as to return, §11066

10525 Defendant may pay officer. The defendant may at any time pay to the officer having the notice for service, or to the justice of the peace, the amount of the claim, together with the costs which have then accrued, and thereupon the proceedings shall be dismissed. [C51, §2277; R60,§3865; C73,§3523; C97,§4492; C24, 27, 31, 35,§10525.]

10526 Appearance—personal or by agent. Either of the parties may appear in person or by agent; if by agent, he may be required by the justice to show his authority, if written, or prove it by his oath or otherwise, if verbal. [C51, §2278; R60,§3866; C73,§3524; C97,§4493; C24, 27, 31, 35,§10526.]

10527 Security for costs. If a defendant in any cause of action in the justice court at any time within two days before the commencement of the trial of the cause, shall make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he is a nonresident of this state, or a private or for-

eign corporation, before any other proceedings in the action, must file with the justice of the peace before whom such action is pending, a bond with sureties to be approved by such justice in an amount to be fixed by the justice for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other justice court to which it may be carried, either to the defendant or to the officers of the court. [S13,§4493-a; C24, 27, 31, 35,§10527.]

Similar provision, §11245
S13,§4493-a, editorially divided

10528 Application for cost bond. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavit annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once and none thereafter. [S13,§4493-a; C24, 27, 31, 35, §10528.]

10529 Time for appearance. The parties in all cases are entitled to one hour in which to appear after the time fixed therefor, but neither party is bound to wait longer for the other. [C51, §2279; R60,§3867; C73,§3525; C97,§4494; C24, 27, 31, 35,§10529.]

10530 Postponement. Upon the return day, if the justice is actually engaged in other official business, he may postpone proceedings in the case until such business is finished. [C51, §2280; R60,§3868; C73,§3526; C97,§4495; C24, 27, 31, 35,§10530.]

10531 Adjournment. If from any cause the justice is unable to attend to the trial at the time fixed, or if a jury is demanded, he may adjourn the cause for a period not exceeding three days, nor shall he make more than two such adjournments. [C51,§2281; R60,§3869; C73,§3527; C97,§4496; C24, 27, 31, 35,§10531.]

10532 Showing for. In case of the absence of witnesses, either party, at his own cost, may have an adjournment, not exceeding sixty days, upon motion supported by an affidavit like that required to obtain a continuance in the district court for a like cause. [C51,§2282; R60,§3870; C73,§3528; C97,§4497; C24, 27, 31, 35,§10532.]

Showing required, §11444

10533 Testimony of witness taken. Either party applying for an adjournment must, if required by the adverse party, consent that the testimony of any witness of the adverse party who is in attendance be then taken in writing, to be used as a deposition on the trial of the cause. [C51,§2283; R60,§3871; C73,§3529; C97, §4498; C24, 27, 31, 35,§10533.]

10534 Pleadings. The pleadings must be substantially the same as in the district court. They may be written or oral, but if required to be verified they must be in writing. If oral, they must in substance be written down by the justice in his docket. [C51,§2284; R60,§3872; C73,§3530; C97,§4499; C24, 27, 31, 35,§10534.]

Pleadings in district court, ch 491

10535 Counterclaim. A counterclaim must be made, if at all, at the time the answer is put in. [C51,§2285; R60,§3873; C73,§3531; C97, §4500; C24, 27, 31, 35,§10535.]

10536 Written instruments filed. The original, or a copy, of all written instruments upon which a cause of action or counterclaim is founded must be filed with the claim founded thereon, or a sufficient reason given for not doing so. [C51,§2286; R60,§3874; C73,§3532; C97, §4501; C24, 27, 31, 35,§10536.]

10537 Change of place of trial. Either party, before the trial is commenced, may have the place of trial changed, upon filing an affidavit that the justice is prejudiced against him, or is a near relative of the other party, or is a material witness for the affiant, or that he cannot obtain justice before him; but no more than one change shall be allowed each party, unless the justice to whom the case is transmitted is related to either party by consanguinity or affinity within the fourth degree, or is a witness, or has been an attorney employed in the action; in either of which events a second change may be allowed. [R60,§3875; C73,§3533; C97,§4502; C24, 27, 31, 35,§10537.]

10538 Next nearest justice. When a change is allowed and the fees for transcript are paid, said justice shall transmit all the original papers in the case, and a transcript of his proceedings, to the next nearest justice in the township, if there be any; if not, to the next nearest justice in his county, and said justice shall proceed to try said case, and, if he cannot try the same immediately, he shall then fix a time therefor, of which all parties shall take notice. [R60, §3876; C73,§3534; C97,§4503; C24, 27, 31, 35, §10538.]

10539 When change is not effected. If the person to whom the cause is sent is not a justice, or for any reason, though a justice, cannot act, the court granting the change shall retain jurisdiction of the case for the purpose of perfecting the same and sending it to the next nearest justice who can serve. [C97,§4504; C24, 27, 31, 35, §10539.]

10540 Title to real property. If the title to real property is put in issue by verified pleadings, or such fact manifestly appears from the proof on the trial of the issue, the justice shall, without further proceedings, certify the cause and papers, with a transcript of his docket showing the reason of such transfer, to the district court, where the same shall be tried on the merits. No cause so transferred shall be dismissed because the justice erred in transferring the same. [C51,§§2287, 2288; R60,§§3877, 3878; C73, §3535; C97,§4505; C24, 27, 31, 35,§10540.]

Analogous provision as to title, §10665

10541 Other causes severed. When a case is thus transferred, if there are other causes of action not necessarily connected with the issue of title, they may be severed, retained, and tried before the justice. [C51,§2289; R60,§3879; C73, §3536; C97,§4506; C24, 27, 31, 35,§10541.]

10542 Demand for jury. Unless one of the parties demands a trial by jury at or before the time for joining issue, it shall be by the justice. [C51,§2290; R60,§3880; C73,§3537; C97,§4507; C24, 27, 31, 35,§10542.]

10543 Dismissal of action. If the plaintiff fails to appear by himself or agent on the return day or time fixed for the trial, the justice shall dismiss the case and render judgment against him for costs, except as provided in section 10544. [C51,§2291; R60,§3881; C73,§3538; C97,§4508; C24, 27, 31, 35,§10543.]

10544 On written instrument. When the action is founded on an instrument in writing, purporting to have been executed by the defendant, calling for a certain sum as due the plaintiff, if the signature of the defendant is not denied under oath, and if the instrument has been filed with the justice previous to the time fixed for appearance, or the action is upon an account which is verified, he may proceed with the cause, whether the plaintiff appears or not. [C51, §2292; R60,§3882; C73,§3539; C97,§4509; C24, 27, 31, 35,§10544.]

Referred to in §§10543, 10545
Similar provision, §11204

10545 Default in such case. In the case provided for in section 10544, if the defendant does not appear, judgment shall be rendered against him for the amount of the plaintiff's claim. [C51,§2293; R60,§3883; C73,§3540; C97, §4510; C24, 27, 31, 35,§10545.]

Referred to in §10547

10546 Default in other cases. Where the plaintiff's claim is not founded upon such written instrument or account, and the defendant does not appear, the justice shall proceed to hear the allegations and proofs of the plaintiff, and render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount stated in the notice. [C51,§2294; R60,§3884; C73,§3541; C97,§4511; C24, 27, 31, 35,§10546.]

Referred to in §10547

10547 Default as to counterclaim. In the cases contemplated in sections 10545 and 10546, if the defendant has previously filed a counterclaim, founded on a written instrument purporting to have been signed by the plaintiff, calling for a certain sum, or on a verified account, the justice shall allow such counterclaim in the same manner as though the defendant had appeared, and render judgment accordingly. [C51,§2295; R60,§3885; C73,§3542; C97,§4512; C24, 27, 31, 35,§10547.]

10548 Judgment set aside. Judgment dismissing the cause, or by default, may be set aside by the justice at any time within six days after being rendered, if the party applying therefor shows a satisfactory excuse for his nonappearance. [C51,§2296; R60,§3886; C73,§3543; C97, §4513; C24, 27, 31, 35,§10548.]

10549 New trial. In such case a new day shall be fixed for trial, and notice thereof given to the other party or his agent. [C51,§2297; R60, §3887; C73,§3544; C97,§4514; C24, 27, 31, 35, §10549.]

10550 Costs of new trial. Such orders shall be made in relation to the additional costs thereby created as are equitable. [C51,§2298; R60, §3888; C73,§3545; C97,§4515; C24, 27, 31, 35, §10550.]

10551 Execution recalled. Any execution which may in the meantime have been issued shall be recalled in the same manner as in cases of appeal. [C51,§2299; R60,§3889; C73,§3546; C97,§4516; C24, 27, 31, 35,§10551.]

Execution recalled, §10590

10552 Jury summoned. If a jury be demanded, the justice shall issue his precept to some constable of the township, directing him to summon the requisite number of jurors possessing the same qualifications as are required in the district court. [C51,§2301; R60,§3890; C73,§3547; C97,§4517; C24, 27, 31, 35,§10552.]

Qualifications, §10842

10553 Selection of jury. The jury shall consist of six jurors, unless a smaller number be agreed upon between the parties. Each party is entitled to three peremptory challenges and no more. Any deficiency in their number, arising from any cause, may be supplied by summoning others in the manner above directed. [C51, §2302; R60,§3891; C73,§3548; C97,§4518; C24, 27, 31, 35,§10553.]

10554 Discharge of jury. The justice may discharge the jury, when satisfied that it cannot agree, and shall immediately issue a new precept for summoning another, to appear at a time therein fixed, not more than three days distant, unless the parties otherwise agree. [C51,§2303; R60,§3892; C73,§3549; C97,§4519; C24, 27, 31, 35,§10554.]

10555 Motion in arrest or for new trial — instructions. No motion in arrest of judgment, to set aside a verdict, or for a new trial, can be entertained by a justice of the peace; nor can the justice give instructions to the jury, but must rule on objections to evidence. [C51,§2304; R60,§3893; C73,§3550; C97,§4520; C24, 27, 31, 35,§10555.]

10556 Verdict. The verdict of the jury must be general. Where there are several plaintiffs or defendants, it may be for or against one or more of them. [C51,§2305; R60,§3894; C73, §3551; C97,§4521; C24, 27, 31, 35,§10556.]

10557 Judgment entered. In cases of dismissal, or of judgment by confession, or on the verdict of a jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases, it shall be done within three days after the cause is submitted to the justice for final action. [C51,§2306; R60,§3895; C73, §3552; C97,§4522; C24, 27, 31, 35,§10557.]

10558 In excess of jurisdiction. If the sum found for either party exceeds the jurisdiction of the justice, such party may remit the excess

and take judgment for the residue, but he cannot afterwards sue for the amount remitted. [C51,§2307; R60,§3896; C73,§3553; C97,§4523; C24, 27, 31, 35,§10558.]

10559 Dismissal. Instead of remitting the excess, the party obtaining such verdict may elect to have judgment dismissing the action, in which case such party shall pay the costs. [C51,§2308; R60,§3897; C73,§3554; C97,§4524; C24, 27, 31, 35,§10559.]

10560 Mutual judgments set off. Mutual judgments between the same parties, rendered by the same or different justices, may be set off against each other. [C51,§2309; R60,§3898; C73, §3555; C97,§4525; C24, 27, 31, 35,§10560.]

Set-off in district court, §11740

10561 As in district court. When rendered by the same court, the same course shall be pursued as is prescribed in the district court. [C51,§2310; R60,§3899; C73,§3556; C97,§4526; C24, 27, 31, 35,§10561.]

Set-off in district court, §11740

10562 When by different justices. If the judgment proposed to be set off was rendered by another justice, the party offering it must obtain a transcript thereof, with a certificate of such justice indorsed thereon, stating that no appeal has been taken, and that the transcript was obtained for the purpose of being used as a counterclaim in that case. [C51,§2311; R60, §3900; C73,§3557; C97,§4527; C24, 27, 31, 35, §10562.]

10563 Transcripts. Such transcript shall not be given until the time for taking an appeal has elapsed. [C51,§2312; R60,§3901; C73,§3558; C97,§4528; C24, 27, 31, 35,§10563.]

10564 Docket entry. The justice giving the transcript shall make an entry of the fact in his docket, and all other proceedings in his court shall thenceforth be stayed. [C51,§2313; R60, §3902; C73,§3559; C97,§4529; C24, 27, 31, 35, §10564.]

10565 Execution for balance. The transcript being presented to the justice who has rendered a judgment between the same parties, if execution has not been issued thereon, he shall strike a balance between the judgments and issue execution for such balance. [C51, §2314; R60,§3903; C73,§3560; C97,§4530; C24, 27, 31, 35,§10565.]

10566 Execution on transcript. If execution has issued, he shall also issue execution on the transcript filed with him, and deliver it to the officer who has the other execution. [C51, §2315; R60,§3904; C73,§3561; C97,§4531; C24, 27, 31, 35,§10566.]

10567 Execution as set-off. Such officer shall treat the lesser execution as so much cash collected on the larger, and proceed to collect the balance. [C51,§2316; R60,§3905; C73,§3562; C97,§4532; C24, 27, 31, 35,§10567.]

10568 Costs in case of set-off. The above rules as to setting off judgments between the same parties are subject to the same prohibition as to setting off costs, when the effect will be to leave an insufficient amount of money actually collected to satisfy the costs of both judgments, as is contained in the rules of proceedings in the district court. [C51,§2317; R60,§3906; C73, §3563; C97,§4533; C24, 27, 31, 35,§10568.]

Set-off in district court, §11740

10569 Transcript filed. When the judgment of another justice is thus allowed to be set off, the transcript thereof shall be filed among the papers of the case in which it is to be used, and the proper entry made in the justice's docket. [C51,§2318; R60,§3907; C73,§3564; C97,§4534; C24, 27, 31, 35,§10569.]

10570 Refusal to allow set-off of judgment. If the justice refuses the judgment as a set-off, he shall so certify on the transcript and return it to the party who offered it. When filed in the office of the justice who gave it, proceedings may be had by him in the same manner as though no transcript had been certified. [C51, §2319; R60,§3908; C73,§3565; C97,§4535; C24, 27, 31, 35,§10570.]

10571 Judgment by confession. A judgment by confession, without action, may be entered by a justice of the peace for an amount within his jurisdiction, and the provisions of law regulating judgments by confessions in courts of record shall, so far as may be, apply to confessions of judgment before a justice of the peace, and the justice shall enter such judgment on his docket, and may issue execution thereon as in other cases. [C51,§§1837, 1841; R60,§§3397, 3401; C73,§3566; C97,§4536; C24, 27, 31, 35,§10571.]

Judgment by confession, ch 545

10572 Transcripts — filing authorized. A party obtaining a judgment in the justice's or mayor's court may cause a transcript thereof to be certified to the office of the clerk of the district court in the county. [C51,§2320; R60, §3909; C73,§3567; C97,§4537; C24, 27, 31, 35, §10572.]

Referred to in §10573

10573 Prior filings legalized. All transcripts from mayors' courts heretofore filed in the office of the clerk of the district court as provided in section 10572, shall have the same force and effect as though from the office of the justice of the peace. [C24, 27, 31, 35,§10573.]

10574 Effect. The clerk shall file the transcript as soon as received, and enter a memorandum thereof and the time of filing in the judgment docket and lien index, and from such entry it shall be treated in all respects and in its enforcement as a judgment obtained in the district court. No execution shall issue from the justice's court after the filing of such transcript. [C51,§2321; R60,§3910; C73,§3568; C97, §4538; S13,§4538; C24, 27, 31, 35,§10574.]

Action on transcripted judgment, §11009
Lien of transcripted judgment, §11602 et seq.

10575 Executions. Executions for the enforcement of judgments in a justice's court may

be issued, as provided in this chapter, at any time within ten years from the entry of the judgment, but not afterward. [C51,§2322; R60, §3911; C73,§3569; C97,§4539; C24, 27, 31, 35, §10575.]

Execution on certain judgments prohibited, ch 487.1

10576 Form. Such execution shall be against the goods and chattels of the defendant therein, and shall be directed to any constable of the county. [C51,§2323; R60,§3912; C73,§3570; C97,§4540; C24, 27, 31, 35,§10576.]

10577 Return. It must be dated on the day on which it is issued, and made returnable within thirty days thereafter. [C51,§2324; R60, §3913; C73,§3571; C97,§4541; C24, 27, 31, 35, §10577.]

10578 Execution renewable. If not satisfied when returned, it may be renewed from time to time by an indorsement thereon to that effect, signed by the justice, and dated of the date of such renewal. [C51,§2325; R60,§3914; C73, §3572; C97,§4542; C24, 27, 31, 35,§10578.]

10579 Thirty-day extension. The indorsement must state the amount paid thereon, and shall continue the execution in full force for thirty days from the date of renewal. [C51, §2326; R60,§3915; C73,§3573; C97,§4543; C24, 27, 31, 35,§10579.]

10580 Garnishment. Garnishment proceedings under execution shall be the same as in the district court, except, upon return of the garnishment being made to the justice who issued the execution, he shall docket a cause, fix a time, and cite the garnishee then to appear and answer. Judgment against the garnishee shall not be entered until the principal defendant shall have had five days notice of the garnishment proceedings to be served in the same manner as original notices. [C97,§4544; S13,§4544; C24, 27, 31, 35,§10580.]

Garnishments generally, ch 513
Notices in district court, §§12168.1, 12170

10581 Property sold. Property levied on before such renewal may be retained by the officer and sold after renewal. [C51,§2327; R60, §3916; C73,§3574; C97,§4545; C24, 27, 31, 35, §10581.]

10582 Appeal. Any person aggrieved by the final judgment of a justice may appeal therefrom to the district or a superior court in the county, at his option, in the manner provided by law. [C51,§2328; R60,§3917; C73,§3575; C97, §4546; C24, 27, 31, 35,§10582.]

Notice of appeal, §10596 et seq.

10583 Amount in controversy. No such appeal shall be allowed when the amount in controversy does not exceed twenty-five dollars. [C97,§4547; C24, 27, 31, 35,§10583.]

10584 Time. The appeal must be perfected within twenty days after the rendition of the judgment. [C51,§2329; R60,§3918; C73,§3576; C97,§4548; C24, 27, 31, 35,§10584.]

10585 By clerk. If within twenty days the appellant is prepared to take his appeal, and is prevented only by the absence or death of the justice, or his inability to act, he may apply to the clerk of the court to which the appeal may be taken for the allowance thereof. [C51,§2330; R60,§3919; C73,§3577; C97,§4549; C24, 27, 31, 35,§10585.]

10586 How secured. Such application shall be founded on an affidavit, stating the amount and nature of the judgment, and the time of the rendition thereof, as nearly as practicable, and the reason why he thus applies. [C51,§2331; R60,§3920; C73,§3578; C97,§4550; C24, 27, 31, 35,§10586.]

10587 Action of clerk. The clerk has thereupon the same power to act in the premises as the justice would have had. He may require the books and papers of the justice to be delivered to him, for which purpose he may issue a precept to the sheriff to that effect, if necessary, and may make out and file the transcript. After this he shall return to the office of the justice of the peace all the papers proper to be kept by the justice. [C51,§2332; R60, §3921; C73,§3579; C97,§4551; C24, 27, 31, 35, §10587.]

10588 Form of bond. The appeal is not perfected until a bond in the following form, or its equivalent, is taken and filed in the office of the justice or clerk as above provided, in an amount sufficient to secure the judgment and costs of appeal:

The undersigned acknowledge ourselves indebted to.....in the sum of..... dollars, upon the following conditions: Whereas.....has appealed from the judgment of ....., a justice of the peace, in an action between.....as plaintiff, and..... defendant:

Now, if said appellant pays whatever amount is legally adjudged against him in the further progress of this cause, then this bond to be void.

Approved, A....B...., principal.
E....F...., justice. C....D...., surety.

If the judgment is affirmed, or if on a new trial the appellee recovers, or if the appeal is withdrawn or dismissed, judgment shall be rendered against the principal and surety on said bond. [C51,§2333; R60,§3922; C73,§3580; C97, §4552; C24, 27, 31, 35,§10588.]

Presumption of approval, §12759.1

10589 Proceedings suspended. Upon the appeal being perfected, all further proceedings in that court shall be suspended, and the case will be in the court to which the appeal is taken. [C51,§§2334, 2337; R60,§§3923, 3926; C73, §§3581, 3584; C97,§4553; C24, 27, 31, 35,§10589.]

10590 Execution recalled. If, in the meantime, an execution has been issued, the justice shall give the appellant a certificate that an appeal has been taken and perfected. Upon that certificate being presented to the constable, he shall cease further action, and release any property taken in execution. [C51,§2335; R60,

§3924; C73,§3582; C97,§4554; C24, 27, 31, 35, §10590.]

10591 Papers filed. Upon the appeal being perfected, the justice shall file in the office of the clerk of the court to which it is taken all the original papers relating to the action, with a transcript of all the entries in his docket. [C51, §2336; R60,§3925; C73,§3583; C97,§4555; C24, 27, 31, 35,§10591.]

10592 Return amended. The proper court may, by rule, compel the justice to approve an appeal bond, or make or amend his return according to law. [C51,§2338; R60,§3927; C73, §3585; C97,§4556; C24, 27, 31, 35,§10592.]

Presumption of approval, §12759.1

10593 Mistakes corrected. Where an omission or mistake has been made by the justice in his docket entries, and that fact is made unquestionable, the court to which the appeal is taken may correct the mistake or supply the omission, or direct the justice to do so. [C51,§2339; R60, §3928; C73,§3586; C97,§4557; C24, 27, 31, 35, §10593.]

10594 Return—when made. If an appeal is perfected ten days before the next term of the court to which it is taken, the justice's return must be made at least five days before that term. All such cases must be tried when reached unless continued for cause. [C51,§2340; R60,§3929; C73,§3587; C97,§4558; C24, 27, 31, 35,§10594.]

10595 Affirmance — trial. If the appellant fails to pay the docket fee and have the case docketed by noon of the second day of the term at which the appeal should properly come on for trial, unless time is extended by the court, the appellee may do so, and have the judgment below affirmed, or have the case set down for trial on its merits, as he may elect. If the appellant, before noon of the next day after an order of affirmance has been granted, shall appear and make a sufficient showing of merits and proper excuse for his default, and pay to the clerk the docket fee, the court in its discretion may set aside the order of affirmance, and the cause shall stand for trial at that term, unless appellee asks a continuance, and the clerk shall pay over to the appellee the docket fee, but, if the appeal at the election of appellee is set down for trial on its merits, and the trial has commenced, the foregoing provision shall not apply. [C97,§4559; C24, 27, 31, 35,§10595.]

Similar provisions, §§10611, 11440

10596 Notice of appeal. If an appeal is not perfected on the day on which judgment is rendered, written notice thereof must be served on the appellee or his agent, at least ten days before the next term of the court to which the appeal is taken, if ten days intervene, or the action, on motion of the appellee, shall be continued at the cost of the appellant. [C51,§2341; R60,§2930; C73,§3588; C97,§4560; C24, 27, 31, 35,§10596.]

10597 How served. Such notice may be served like the original notice, and if the appellee or his agent has no place of residence in the county, it may be served by being left with the justice. [C51,§2342; R60,§3931; C73,§3589; C97,§4561; C24, 27, 31, 35,§10597.]

Service of notice, §11060

10598 Trial of appeal. An appeal brings up the action for trial on the merits alone. All errors, irregularities, and illegalities are to be disregarded under such circumstances, if the action might have been prosecuted in the court to which the appeal is taken. [C51,§2343; R60, §3932; C73,§3590; C97,§4562; C24, 27, 31, 35, §10598.]

10599 New demand. No new demand or counterclaim can be made upon the appeal, unless by mutual consent. [C51,§2344; R60,§3933; C73,§3591; C97,§4563; C24, 27, 31, 35,§10599.]

10600 Costs of appeal. The appellant must pay the costs of the appeal, unless he obtains a more favorable judgment than that from which he appealed. [C51,§2345; R60,§3934; C73,§3592; C97,§4564; C24, 27, 31, 35,§10600.]

10601 Offer to confess judgment. Appellant may offer to confess judgment for a certain amount, with costs, and if the final amount recovered be less favorable to the appellee than such offer, he shall pay the costs of appeal. [C51, §2346; R60,§3935; C73,§3593; C97,§4565; C24, 27, 31, 35,§10601.]

Confession in district court, ch 546

10602 Judgment on appeal bond. Any judgment on the appeal against the appellant shall be entered against him and his sureties, and shall recite the order of liability as principal and surety. [C51,§2347; R60,§3936; C73,§3594; C97, §4566; C24, 27, 31, 35,§10602.]

Analogous provisions, §§11577, 11665, 11712

10603 Damages for delay. If an appeal is taken for delay, the court to which it is taken may award such damages, not exceeding ten percent on the amount of the judgment below, as may seem right. [C51,§2348; R60,§3937; C73, §3595; C97,§4567; C24, 27, 31, 35,§10603.]

Similar provision, §12878

10604 Appeal from default — pleadings. If the appeal is taken from a judgment by default, the defendant may file, before noon of the second day of the term at which the appeal is triable, in the court to which it is taken, and the plaintiff reply thereto as in other cases, any pleadings necessary to properly set forth any defense he may have to the action. In such case the costs of the trial before the justice shall be taxed to the defendant. [C73,§3596; C97,§4568; C24, 27, 31, 35,§10604.]

10605 Writs of error—when allowed. Any person aggrieved by an erroneous decision in a matter of law or other illegality in the proceedings of a justice of the peace may, within twenty days after the final decision is made, remove the same, or so much thereof as is necessary, for correction, into the court to which an appeal from such justice might be taken. [C51,§2349; R60, §3938; C73,§3597; C97,§4569; C24, 27, 31, 35, §10605.]

10606 Affidavit — notice. The basis of the proceedings is an affidavit filed in the office of the clerk, setting forth the errors complained of, and must be filed in the same time, and the notice must be the same as in case of appeal. [C51, §2350; R60,§3939; C73,§3598; C97,§4570; C24, 27, 31, 35,§10606.]

10607 Writ. The clerk shall thereupon issue an order commanding the justice to certify the record and proceedings, so far as they relate to the facts stated in the affidavit. [C51,§2351; R60,§3940; C73,§3599; C97,§4571; C24, 27, 31, 35,§10607.]

10608 Copy served—return. A copy of the affidavit shall accompany the order and be served upon the justice, who shall, with the least practicable delay, make the return required. [C51,§2352; R60,§3941; C73,§3600; C97,§4572; C24, 27, 31, 35,§10608.]

10609 Bond. All proceedings in the justice's court subsequent to judgment may be stayed by a bond, entered into like that required in cases of appeals, and on which judgment shall be entered against the principal and surety in like manner and under like circumstances. [C51, §2353; R60,§3942; C73,§3601; C97,§4573; C24, 27, 31, 35,§10609.]

10610 Amended return. The court may compel a return to the writ, or an amended return when the first is not full and complete. [C51, §2354; R60,§3943; C73,§3602; C97,§4574; C24, 27, 31, 35,§10610.]

10611 Hearing—dismissal—affirmance. The action shall stand for hearing on the writ of error at the first term after due notice thereof has been given. In case the party suing out the writ fails to have the return of the justice docketed before noon of the second day of the term at which the case should properly come on for hearing on such writ of error, and to pay the clerk's fees therefor, the appellee, unless time is extended by the court, may cause the action to be docketed and the writ of error dismissed, and, if he so elect, the judgment below affirmed; and the provisions of the section relating to docketing of appeals by appellee shall be applicable to proceedings under writs of error, so far as may be. [C97,§4575; C24, 27, 31, 35,§10611.]

Similar provisions as to docketing, §§10595, 11440

10612 Judgment. The court may render final judgment, or it may remand the cause to the justice for a new trial, or such further proceedings as shall be deemed proper, and prescribe the notice necessary to bring the parties again before the justice. [C51,§2355; R60,§3944; C73, §3603; C97,§4576; C24, 27, 31, 35,§10612.]

10613 Restitution. If the court renders a final judgment reversing the judgment of the justice of the peace, after such judgment has been collected in whole or in part, it may award restitution, with interest, and issue execution accordingly, or it may remand the cause to the justice for this purpose. [C51,§2356; R60, §3945; C73,§3604; C97,§4577; C24, 27, 31, 35, §10613.]

10614 Replevin. The proceedings and verdict in replevin shall be the same as are prescribed in such cases in the district court, except as modified in this chapter. [C51,§2357; R60,§3946; C73,§3605; C97,§4578; C24, 27, 31, 35,§10614.]

Replevin in general, ch 514

10615 Attachment. Proceedings in attachment, except as modified in this chapter, shall be the same as in the district court, the justice performing the duties with reference thereto which are required of the clerk of that court. The petition must be verified, and claim more than five dollars, and, if a less sum is recovered, the plaintiff shall pay all the costs of the attachment. [C51,§§1884, 2358; R60,§§3245, 3947; C73,§§3024, 3606; C97,§4579; C24, 27, 31, 35, §10615.]

Attachment and garnishment, ch 510 et seq.

10616 Answers of garnishee. The constable has the same power to administer an oath to the garnishee in attachment or on execution, and to take his answer, as is given to the sheriff in like cases in the district court. [C51,§2360; R60,§3948; C73,§3607; C97,§4580; C24, 27, 31, 35,§10616.]

Garnishment, ch 513

10617 Appearance. Garnishees may be required to appear and answer at the time fixed for the appearance of the parties to the action, and the conduct of the same shall be governed by the law relating to garnishments under attachments in the district court. [C51,§2361; R60,§3949; C73,§3608; C97,§4581; C24, 27, 31, 35,§10617.]

Garnishment, ch 513

10618 Attachment without personal service. In actions in which an attachment is sought, if it is made to appear by affidavit that personal service cannot be had on the defendant within the state, the justice, upon the return day, unless the defendant appear, shall make an order fixing the day for the trial, not less than sixty days thereafter, and requiring notice to be given by any constable as provided in section 10619. [R60,§3950; C73,§3609; C97,§4582; C24, 27, 31, 35,§10618.]

10619 Notice by posting. Upon such order being made, at least sixty days notice of the pendency of such action shall be given by posting up written or printed notices in three public places in the township where the action was commenced, which shall have the effect of a service by publication in the district court, and the justice shall proceed to hear the cause upon the day specified for that purpose; but no bond shall be required of the plaintiff after judgment as may be in the district court. [R60,§3951; C73,§3610; C97,§4583; C24, 27, 31, 35,§10619.]

Referred to in §10618
Service by publication, §11081

10620 Records deposited with successor. Every justice of the peace, upon the expiration

of his term of office, must deposit with his successor, his official docket, as well as those of his predecessors which may be in his custody, there to be kept as public records. All his official papers shall also be turned over to his successor. [C51,§2377; R60,§3967; C73,§3625; C97, §4584; C24, 27, 31, 35,§10620.]

10621 Records deposited with county auditor. If his office becomes vacant before his successor is elected, the said docket and papers shall be placed in the hands of the county auditor, and by him turned over to his successor when elected and qualified. [C51,§2378; R60, §3968; C73,§3626; C97,§4585; S13,§4585; C24, 27, 31, 35,§10621.]

S13,§4585, editorially divided

10622 Transcripts by clerk. During the time of the vacancy in said office, and while the docket and papers are in the hands of the auditor, the clerk of the district court of said county, on the filing of a written request and payment of the fee required by law for the filing of transcripts, by the plaintiff, his agent, or attorney, in any case in which a judgment appears in said docket, shall make a transcript and certify to the same, as provided by law, noting said fact on said docket with date thereof, which transcript, when so made and filed in the office of the clerk of the district court, shall have the same force and effect as though made by a justice of the peace rendering said judgment. [S13,§4585; C24, 27, 31, 35,§10622.]

Effect of transcript, §10574

10623 Execution or transcript by successor. The justice with whom the docket of his predecessor is thus deposited may issue or renew execution on or give a transcript of any judgment there entered, in the same manner and with like effect as the justice who rendered the judgment might have done. [C51,§2379; R60, §3969; C73,§3627; C97,§4586; C24, 27, 31, 35, §10623.]

Similar provision, §10633
C97,§4586, editorially divided

10624 Absence, sickness, or inability of justice. In case of the death, absence, or inability to act of any justice, or the vacation of the office from any cause, execution may be issued from the docket of said justice, or transcript given therefrom, by any other justice in said township, with like effect as might have been done by the justice who rendered the judgment. [C73,§3627; C97,§4586; C24, 27, 31, 35,§10624.]

10625 Successor — how determined. When two or more justices are equally entitled to be held the successor in office of any justice, the county auditor shall determine by lot which is, and certify accordingly; which certificate shall be in duplicate, one copy of which shall be filed in the office of such auditor, and the other given to such successor. [C51,§§2380, 2381; R60,§§3970, 3971; C73,§3628; C97,§4587; C24, 27, 31, 35,§10625.]

10626 Interchange. In case of sickness, or other disability, or absence of a justice at the time fixed for a trial of a cause or other proceeding, any other justice of the township may, at his request, attend and transact the business for him without any transfer to another office. The entries shall be made in the docket of the justice at whose office the business is transacted, and the same effect shall be given to the proceedings as though no such interchange of official service had taken place. [C51,§2382; R60, §3972; C73,§3629; C97,§4588; C24, 27, 31, 35, §10626.]

10627 Special constables. Any justice of the peace, in writing, may specially appoint any person of suitable age to perform any particular duty properly devolving upon a constable, and for that particular purpose the appointee shall be subject to the same obligations and receive the same fees. If such person is appointed to serve an attachment, execution, or order for the delivery of property, he shall, before levying upon the same, execute a bond to the state in a penal sum of not less than two hundred dollars, to be fixed by the justice, with one or more freeholders as sureties, to be approved by and filed with the justice making the appointment, and the usual official oath shall be indorsed thereon and signed. For any breach of such bond, any person injured thereby may bring action thereon in his own name, and recover the same damages as upon a constable's bond in like cases. [C51,§2383; R60,§3973; C73, §3630; C97,§4589; C24, 27, 31, 35,§10627.]

10628 No process to another county. No process can issue from a justice's court into another county, except when specially authorized. [C51,§2384; R60,§3974; C73,§3631; C97, §4590; C24, 27, 31, 35,§10628.]

See §§12093, 12097, 12184 et seq.

10629 Constables—duties. Constables are ministerial officers of justices of the peace, and shall serve all warrants, notices, or other process directed to them by and from any lawful authority, and perform all other duties now or hereafter required of them by law. [C51,§§229, 230; R60,§§451, 452; C73,§§398, 399; C97,§579; C24, 27, 31, 35,§10629.]

10630 Sheriff and constable. The constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him. The powers and duties of the sheriff in relation to the business of the district court, so far as the same are applicable and not modified by statute, devolve upon the constable in relation to the justice's court. [C51, §2385; R60,§3975; C73,§3632; C97,§4591; C24, 27, 31, 35,§10630.]

10631 Justice his own clerk. The justice shall be his own clerk, and perform the duty of both judge and clerk. [C51,§2386; R60,§3976; C73,§3633; C97,§4592; C24, 27, 31, 35,§10631.]

10632 Jury fees. Jury fees in justices' courts shall be taxed as part of the costs. [C51, §2545; R60,§4154; C73,§3811; C97,§4593; C24, 27, 31, 35,§10632.]

Jury fees, §10846

10633 Powers of successor. When the term of office of a justice of the peace expires, his successor may issue execution, or renew execution, in the same manner and under the same circumstances as the former justice might have done if his term of office had not expired. [C51, §2387; R60,§3977; C73,§3634; C97,§4594; C24, 27, 31, 35,§10633.]

Similar provision, §10623

10634 Report of unclaimed witness fees. Each justice of the peace shall, on the first Monday in January and July each year, pay into the county treasury for the use of the county, all fees of whatsoever kind in his hands at the date of payment and still unclaimed, and shall take from the treasurer duplicate receipts therefor, giving the title of the cause, the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive, one of which he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and enter the same upon the proper records as a claim allowed, and, on demand by the persons entitled to said fees, shall issue county orders for the amount due each person, respectively. [C73, §3815; C97,§4595; C24, 27, 31, 35,§10634.]

10635 Penalty. Any failure to pay over to the county treasurer witness fees, as above provided, is a misdemeanor, and shall be prosecuted as provided by law. [R60,§352; C73,§3816; C97, §4596; C24, 27, 31, 35,§10635.]

Punishment, §12894

10636 Fees of justice. Justices of the peace shall be entitled to charge and receive the following fees:

1. For docketing each case in any action, except in garnishment proceedings, fifty cents.
2. For issuing each original notice, fifty cents.
3. For issuing attachment or order for the delivery of property, twenty-five cents.
4. For drawing and approving bond, when required in any case, fifty cents.
5. For entering judgment by confession after action brought, fifty cents.
6. For entering judgment by confession before action brought, one dollar.
7. For entering judgment by default, or on a plea of guilty, fifty cents.
8. For entering judgment when contested, fifty cents.
9. For additional when a jury is called, one dollar.
10. For issuing venire for jury, twenty-five cents.
11. For each subpoena in civil action, when demanded, twenty-five cents.
12. For each oath or affirmation, except in proceedings connected with actions before him, five cents.
13. For each continuance at the request of either party, fifty cents.
14. For setting aside each judgment by default, fifty cents.
15. For each information and affidavit, fifty cents.
16. For each execution, renewal of execution, or warrant of any kind, fifty cents.
17. For each bond or recognition, fifty cents.
18. For each mittimus or order of discharge, fifty cents.
19. For each official certificate or acknowledgment, twenty-five cents.
20. For making and certifying transcript, fifty cents.
21. For trial of all actions, civil or criminal, for each six hours or fraction thereof, one dollar.
22. For all money collected and paid over without action, five percent; and for all money collected and paid over after action brought without judgment, two percent, which shall be added to the costs. [C73,§3804; C97,§4597; C24, 27, 31, 35,§10636.]

Referred to in §10638

10637 Fees of constable. Constables shall be entitled to charge and receive the following fees:

1. For serving any notice or civil process, on each person named therein, fifty cents.
2. For copy thereof when required, ten cents.
3. For serving attachment or order for the delivery of property, fifty cents.
4. For traveling fees, going and returning by the nearest traveled route, per mile, five cents.
5. For summoning a jury, including mileage, one dollar.
6. For attending the same on trial, for each calendar day, one dollar.
7. For serving execution, besides mileage, fifty cents.
8. For advertising and selling property, seventy-five cents.
9. For advertising without selling, twenty-five cents.
10. For return of execution when no levy is made, ten cents.
11. For serving each subpoena, besides mileage, fifteen cents.
12. For posting up each notice required by law, fifteen cents.
13. For serving each warrant of any kind, seventy-five cents.
14. For attending each trial in a criminal case, for each calendar day, one dollar.
15. For serving each mittimus or order of release, besides mileage, thirty cents.
16. For serving a warrant for the seizure of intoxicating liquors and any other matter connected therewith, the same compensation as allowed a sheriff for a like service.
17. For all money collected on execution and paid over, except costs, five percent, which shall constitute part of the costs. [C73,§3805; C97, §4598; C24, 27, 31, 35,§10637.]

Referred to in §10638

10638 In criminal cases. The fees contemplated in sections 10636 and 10637, in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit. [C73, §3806; C97,§4599; C24, 27, 31, 35,§10638.]

Similar provisions, §§5191.1, 13968

10639 Accounting for fees—compensation. 1. Justices of the peace and constables in townships having a population of more than twelve thousand shall pay into the county treasury all criminal fees collected in each year.

2. Justices of the peace and constables in townships having a population of under twelve thousand shall pay into the county treasury all fees collected each year in excess of the following sums:

a. In townships having a population of four thousand and under twelve thousand, justices, eight hundred dollars; constables, six hundred dollars.

b. In all townships having a population of under four thousand, justices, six hundred dollars; constables, five hundred dollars.

3. In townships having a population of ten thousand or more, justices of the peace and constables shall receive in full compensation for their services performed in criminal cases during the year, the following sums which shall be paid monthly out of the county treasury:

a. In townships having a population of forty thousand or more, justices, eighteen hundred dollars; constables, fifteen hundred dollars.

b. In townships having a population of twenty-eight thousand or more, justices, fifteen hundred dollars; constables, twelve hundred dollars.

c. In townships having a population of twenty thousand and under twenty-eight thousand, justices, twelve hundred dollars; constables, one thousand dollars.

d. In townships having a population of ten thousand and under twenty thousand, justices, one thousand dollars; constables, eight hundred dollars.

4. Justices and constables in all townships having a population of ten thousand and over shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred dollars per annum, and in townships having a population over fifty thousand, not to exceed one thousand dollars per annum for expenses of their offices actually incurred, and shall pay into the county treasury all the balance of the civil fees collected by them. [C97,§4600; S13,§4600-a; C24, 27, 31, 35,§10639.]

Duty to account, §1224

10640 Annual report to board of supervisors. All justices of the peace and constables shall under oath make an annual report to the board of supervisors, upon blanks furnished by the county auditor, of all criminal fees taxed and collected during the year, which report shall also show that all criminal fees and fines collectible by law have been received, such annual report to be made on the first Monday in January, and before the annual settlement shall be made, and accompanied with the receipts of the treasurer for all money paid in to him. [C97,§4600; S13, §4600-b; C24, 27, 31, 35,§10640.]

10641 Quarterly report to county auditor. Justices of the peace shall make, under oath, quarterly reports, upon blanks furnished by the county auditor, and shall file the same with the county auditor, which reports shall contain a true and correct transcript of all criminal proceedings which have been instituted or adjudicated in their courts, with the names of all attending witnesses and jurors and fees taxed in their favor. [C97,§4600; S13,§4600-c; C24, 27, 31, 35,§10641.]

TITLE XXX

COURTS OF RECORD OF ORIGINAL JURISDICTION

CHAPTER 475

MUNICIPAL COURT

Chapter made applicable to special charter cities, §6784

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10642 Court established — district defined. A municipal court may be established in any city having a population of five thousand or more, by proceeding as hereinafter provided. All the civil townships in which such city or any part thereof is located shall constitute the municipal court district. [SS15,§694-c1; C24, 27, 31, 35, §10642.]

10643 Election. Upon the filing with the city clerk of a petition of not less than fifteen percent of the qualified electors, as shown by the poll list in the last municipal or state election of any municipal court district, the mayor shall, by proclamation published once a week for three consecutive weeks in two newspapers of general circulation published in said municipality, or, if two such newspapers be not published, then in one such newspaper, submit the question of establishing a municipal court at a general, municipal, or special election to be held at a time specified therein, which time shall be within two months after said petition is filed. If the said proposition is not adopted at such election, said question shall not be resubmitted to the voters of said district within two years thereafter. [SS15,§694-c2; C24, 27, 31, 35, §10643.]

10644 Polling places. The city council shall for all elections provided for in this chapter designate and provide polling places, select judges and clerks of the election, and furnish booths and ballots for the voters residing in each such township outside the limits of such city; but no registration of such voters shall be required. [C24, 27, 31, 35,§10644.]

10645 Question submitted—election—certifying result. At such election the proposition to be submitted shall be, "Shall the proposition to establish a municipal court in the city of (name of city) be adopted?" The election shall be conducted, the vote canvassed, and the result declared in the manner provided by law in respect to other municipal elections. If the majority of the votes cast on said proposition be in favor thereof, said municipal court shall be deemed established. Immediately after such proposition is adopted, the mayor shall transmit

to the governor, the secretary of state, and the county auditor, each, a certificate showing that such proposition was adopted. [SS15,§694-c3; C24, 27, 31, 35,§10645.]

10646 Number of judges. In any municipal court district having a population of less than thirty thousand, wherein a municipal court has been established, there shall be one municipal judge; in districts having more than thirty thousand and less than fifty thousand inhabitants, there shall be two municipal judges; in districts having more than fifty thousand inhabitants there shall be one municipal judge for each thirty thousand inhabitants or major fraction thereof, but no district shall have more than four judges. [SS15,§694-c6; C24, 27, 31, 35,§10646.]

10647 Appointment of officers. Whenever such court has been established, or whenever any city becomes entitled to an additional judge of such court, the governor shall appoint a judge to fill the position until the beginning of the regular term of office succeeding the next election, or until his successor is elected and qualified. Under like conditions, or, if for any other reason a vacancy shall exist, the other elective officers of the court shall be appointed by the mayor with the approval of the city council. [SS15,§694-c16; C24, 27, 31, 35,§10647.]

10648 Qualification and duties of officers. Each officer of the court shall be a qualified elector residing in the municipal court district. The judge shall be a practicing lawyer, and shall subscribe to the oath required of judges of the district court, which shall be filed with the city clerk. The duties of the clerk and the bailiff shall be the same, so far as applicable, as those of the clerk of the district court, and of constables and sheriffs, respectively. All regular police officers shall be ex officio special bailiffs when so ordered by a judge, without other compensation than that paid for their services as police officers. [SS15, §§694-c7–c9; C24, 27, 31, 35,§10648.]

Oath, §1050

10649 Deputy clerks and bailiffs. The clerk and bailiff, with the approval of the city council, shall each have power to appoint such deputies as may be necessary to transact the business of the court, whose salaries shall be fixed by the city council. [SS15,§694-c10; C24, 27, 31, 35,§10649.]

10650 Bonds. The clerk of the court, the deputy clerks, the bailiff, and the deputy bailiffs shall give such bonds as may be required by the city council, which bonds shall be filed with and approved by the city clerk. [SS15,§694-c11; C24, 27, 31, 35,§10650.]

10651 Officers — election and appointment. Whenever a municipal court has been established, there shall be elected at the following city election a judge or judges thereof; also a clerk and bailiff, unless the council shall appoint the city clerk to act as clerk and a policeman to act as bailiff thereof. [SS15,§§694-c3,-c6; C24, 27, 31, 35,§10651.]

10652 Qualification of officers — term. The elective officers of the court shall qualify, and their term of office shall begin, on the first Monday after their election. They shall serve for a term of four years. If the city clerk acts as clerk, or a policeman as bailiff, the council shall determine whether or not they shall have compensation additional to their regular salaries, and fix the same if allowed. [SS15,§§694-c3,-c6; C24, 27, 31, 35,§10652.]

10653 Nomination and election of officers. The elective officers of the court shall be nominated and elected in the manner provided by law for the nomination and election of other elective officers of the city in such district, except as herein otherwise provided. At all primary and general municipal elections at which officers of the court are to be nominated or elected, as the case may be, there shall be a separate ballot entitled "The Municipal Judiciary Ballot" upon which shall be placed the names of the candidates without party designation. The number of judges, clerks, and bailiffs for whom each elector is entitled to vote shall be designated thereon.

Those receiving the highest number of votes at the primary election, if one be held, shall be nominated for such offices to the extent of twice the number to be filled, if that many or more candidates are voted for at such primary.

The names of all candidates for an office shall be arranged and printed on primary and general election ballots as follows: All precincts shall be arranged in numerical order. The surnames of all candidates for an office shall, for the first precinct in the list, be alphabetically arranged; thereafter for each succeeding precinct the name appearing first in the last preceding precinct shall be placed last so that the name that was second before the change shall be first after the change. [SS15,§§694-c6,-c12–c15; C24, 27, 31, 35,§10653; 47GA, ch 225,§§1, 2.]

Nominations of political candidates, §689

10654 Court of record—records. The court shall be a court of record, and shall have a seal with the words "Municipal court of..... (inserting name of city), Iowa" thereon. The records of the court shall be kept in substantially the same form and manner as the records of the district court. [SS15,§694-c25; C24, 27, 31, 35,§10654.]

10655 Jurisdiction—civil matters. It shall have concurrent jurisdiction with the district court in all civil matters where the amount in controversy does not exceed one thousand dollars, except in probate matters, actions for divorce and alimony and separate maintenance, juvenile proceedings unless otherwise authorized, and those directly affecting the title to real estate. [SS15,§694-c18; C24, 27, 31, 35,§10655.]

10656 Criminal matters. In all criminal matters the court shall exercise the jurisdiction conferred on the district court for the trial of misdemeanors, on justice of peace courts, mayors' courts, and police courts, except that the mayor's court of any incorporated city or

town within such municipal court district other than the city within which said court is established shall have exclusive jurisdiction of prosecutions for the violations of the ordinances of such town. [SS15,§§694-c1,-c18; C24, 27, 31, 35,§10656.]

10657 Territorial jurisdiction and powers. The jurisdiction of the municipal court shall be coextensive with the territorial limits of the county. However, in counties having two jurisdictions of the district court, the jurisdiction of the municipal court is restricted to the territory of the district court where the municipal court is situated. The powers exercised by the district court and the judges thereof relating to county attorney informations and the prosecution of misdemeanor offenses is conferred upon and may be exercised by the municipal court and the judges thereof. In all matters of which the municipal court has jurisdiction, the court and the judges shall have the same powers in reference to injunctions, writs, orders, and other proceedings in and out of court as are possessed by the district court and the judges thereof. [SS15,§§694-c18,-c25; C24, 27, 31, 35, §10657.]

Information by county attorney, §10669.1

10658 Inferior courts abolished. Upon the qualification of the officers of the municipal court, the police court, mayor's court, except in incorporated cities or towns other than the city in which said court is established, justice of the peace courts, and the superior court, in and for the municipal court district, and the offices of police judge, clerk of police court, justices of the peace, constables, judge and clerk of the superior court, shall be abolished. [SS15, §§694-c1,-c5; C24, 27, 31, 35,§10658.]

10659 Transfer of causes and records. All causes pending in the superior court of which the district court has original jurisdiction shall be forthwith transferred to the district court and there docketed, and all records and papers pertaining to the same delivered to and preserved by the clerk. [SS15,§694-c5; C24, 27, 31, 35,§10659.]

Referred to in §10661

10660 Other causes and records transferred. All other causes pending in the superior court, and all causes pending in the police court, mayor's court, except for violation of ordinances of incorporated cities or towns other than that in which said court is established, and justice of the peace courts shall forthwith be transferred to the municipal court and there docketed, and all records and papers pertaining to such causes shall be delivered to the clerk thereof, except that certified copies of such records as have been filed in the district court may be filed with the clerk of the municipal court in lieu of original records. [SS15,§694-c5; C24, 27, 31, 35,§10660.]

Referred to in §10661

10661 Records transferred to municipal court. All records and papers of the superior court, police court, mayor's court, except for violation of ordinances of incorporated cities or towns other than that in which said court is established, and justice of the peace courts not transferred under sections 10659 and 10660 shall be transferred to the municipal court. [SS15,§694-c5; C24, 27, 31, 35,§10661; 48GA, ch 239,§1.]

10662 Certified copies of records. The clerk of the district court shall have full power to certify and transcript such records of the superior court as come into his possession; and the clerk of the municipal court shall have full power and authority to certify and transcript such records and certified copies thereof as may come into his possession, and certified copies made by him of said certified copies filed with him shall have the same force and effect as though they were certified copies of the original records. [SS15,§694-c5; C24, 27, 31, 35, §10662.]

10663 Sessions to be continuous—absence of judge. There shall be no terms of court, and the court shall be open for business twelve months of the year. There shall always be one judge present each day to hold court and issue such writs and orders as are required. In case of inability of any judge to act, any other judge of any municipal or district court may hold court during such inability; or the governor may appoint a judge to hold court during such inability, who shall have the same qualifications and shall be paid the same salary and in the same manner as the regular judge. [SS15, §§694-c16,-c17; C24, 27, 31, 35,§10663.]

10664 Laws applicable — rules. All provisions of law relating to the district court and the judges and jurors thereof shall, so far as applicable and when not inconsistent with this chapter, apply to the municipal court and the judges thereof. The judges of the municipal court shall adopt and promulgate rules of practice which shall conform, as nearly as may be, to the rules of the district court of the district in which said municipal court is located. If not established by statute or rule, the judge hearing the cause may prescribe the method of procedure. [SS15,§§694-c4,-c20,-c25,-c26; C24, 27, 31, 35,§10664.]

10665 Change of venue. All provisions of the law relating to change of venue from the district court shall govern so far as applicable changes of venue from the municipal court. [SS15,§694-c23; C24, 27, 31, 35,§10665.]

Change of venue, ch 495

10666 Causes of action divided. Causes of action within its jurisdiction shall be divided into the following classes:

Class "A" shall include all equitable actions, actions of forcible entry and detainer, and all ordinary actions, when the amount in controversy exceeds one hundred dollars, and all special actions of which the court has jurisdiction.

Class "B" shall include all ordinary actions when the amount in controversy is one hundred dollars or less.

Class "C" shall include the trial of all public offenses of which this court has jurisdiction, other than for the violation of the city ordinances.

Class "D" shall include search warrant proceedings and all criminal actions for the violation of city ordinances. [SS15,§694-c19; C24, 27, 31, 35,§10666.]

10667 Filing petition—pleadings. The petition in class "A" cases must be filed with the clerk of the court not less than five days before the date set in the original notice for the appearance of the defendant and unless so filed the defendant shall not be held to appear and answer. Pleadings in class "B" cases shall be the same as for civil actions in justice of the peace courts. [SS15,§§694-c21,-c22; C24, 27, 31, 35,§10667.]

Pleadings in justice courts, §10534

10668 Return day. In all civil actions, the original notice shall require the defendant, if served within the county, to appear and answer not less than five nor more than fifteen days from the day of service thereof; if served without the county, not less than ten nor more than twenty days from the day of service thereof. [SS15,§694-c22; C24, 27, 31, 35,§10668.]

10669 Criminal actions — how tried. All criminal actions for the violation of city ordinances shall be tried summarily and without a jury. All other criminal actions shall, except as otherwise provided in this chapter, be triable in the same manner as criminal actions in justice of the peace or other courts having jurisdiction thereof. Prisoners may be committed to either the city or county jail. The judges shall have the same powers of parole and suspension of sentences as are possessed by the judges of the district court.

Misdemeanor cases in which the punishment exceeds a fine of one hundred dollars or exceeds imprisonment for thirty days shall be tried in the same manner as like cases in the district court. [SS15,§§694-c18,-c24; C24, 27, 31, 35, §10669.]

Referred to in §10670
Trial in justice court, chs 626, 627

10669.1 Information by county attorney. The provisions of chapter 634 shall be applicable to the trial in the municipal court of cases within its jurisdiction. [C27, 31, 35,§10669-b1.]

10670 Witness fees. In class "A" cases and in misdemeanor cases specifically mentioned in section 10669, witnesses shall receive the same fees as witnesses in the district court. In all other cases witness fees shall be the same as in justice of the peace courts. In class "C" and "D" cases, no witness fees shall be paid to any regular police officer of said city, any clerk of said court or his deputy, or any bailiff thereof or his deputy, except when such officers are called as witnesses when not on duty. [SS15, §694-c28; C24, 27, 31, 35,§10670.]

Witness fees, §11326 et seq.

10670.1 Payment of witness fees. The city treasury shall be reimbursed from the county treasury for witness fees and mileage paid in class "C" cases. Once each month the city treasurer shall certify to the county auditor an itemized statement of such fees, showing in each case the names of the defendants, date of judgment, book and page of the court record, names of witnesses and amount paid to each, whereupon, the county auditor shall issue a warrant therefor payable to the city treasurer without audit, as provided in section 5143. [C27, 31, 35, §10670-b1.]

10671 Fees, costs, and expenses. If no provision is made in the laws applicable to the district court for fees, costs, and expenses, they shall be the same as in justice of the peace courts. The bailiff may retain the amounts allowed to him by law for mileage and necessary actual expenses in addition to his salary. All other fees, fines, forfeitures, costs, and expenses shall be turned over to the city treasurer by the officer collecting the same on or before the tenth day of each succeeding month, and the city treasurer shall forthwith pay to the county treasurer, for the benefit of the school fund, the portion of the fines and forfeitures collected for the violation of state laws. [R60,§1791; C73, §2080; C97,§3041; SS15,§694-c27; C24, 27, 31, 35, §10671.]

Costs in justice court, §§10636, 10637

10672 Jury commission. The city clerk and the city auditor, or in cities not having both such officers, then the city clerk and the city treasurer, and the clerk of the municipal court shall constitute the jury commission. They shall receive no additional compensation, but necessary expenses incurred in the performance of their duties shall be allowed and paid from the city treasury. [SS15,§§694-c29,-c30,-c40; C24, 27, 31, 35,§10672.]

10673 Jury list. The commission, in the presence and under the supervision of the judge of said court, if only one, and if more than one, a judge of said court designated by the judges thereof, shall, on the establishment of the court, prepare from the poll books of the last preceding general election in the territory included in the municipal court district, a list equal in number to one-tenth of all electors thereon qualified for jury service, which shall be known as the "jury list"; and shall, before the last Monday in April following the general municipal election thereafter, prepare such a list from the poll books of the preceding general municipal election. [SS15, §694-c32; C24, 27, 31, 35,§10673.]

10674 Jury list book. The name of each person on said list shall be entered in alphabetical order in a book kept for that purpose, and opposite each name shall be entered the person's place of residence, giving his street and number or other definite location if possible. The book shall be kept in the office of the city clerk, and shall be open to the public for inspection and investigation. The jury list may be revised annually on order of the judge. [SS15,§694-c32; C24, 27, 31, 35,§10674.]

10675 Jury—how drawn—when. When the jury commission shall have completed such jury list, each name contained thereon shall be prepared and deposited in a jury box in the manner required in the district court, which jury box, after being sealed by the jury commissioners, shall be deposited with and remain in the custody of the clerk of the court. On the last Monday of each month, the jury commission shall, in open court and in the presence of the judge or judges, break the seal on said jury box, and draw therefrom the number of names ordered by the court, to constitute the jury panel for the succeeding month. [SS15,§§694-c34–c36, -c39; C24, 27, 31, 35,§10675.]

Preparation of ballots, §10873

10676 Jury summons—mileage. The clerk of the municipal court shall forthwith issue a summons to each person drawn to appear in court at such time during the succeeding month as may be ordered by the judge or judges. At such time each juror shall be called and all excuses heard and determined. Jurors shall not be allowed mileage. [SS15,§§694-c37,-c42; C24, 27, 31, 35,§10676.]

10677 Jurors to serve one month — exemptions. The clerk of the court shall, at the end of each month, check off the jury list the names of all jurors who have served during that month, and such names shall not be again deposited in the jury box until after a new jury list has been prepared, but the names of those who have been drawn and excused from service shall be again deposited therein. Jurors in the district court shall be exempt from service in the municipal court during the biennium in which service was rendered in the district court. [SS15,§§694-c31, -c38; C24, 27, 31, 35,§10677.]

Exemption from jury service, ch 480

10678 Jurors—number—demand for jury. Demand for trial by jury may be made as provided by rule of court, and if not so made, the cause shall be tried by the court. The jury shall consist of six jurors, unless, in class "A" cases, a jury of twelve is demanded. The party demanding a jury of twelve must at the time deposit with the clerk the sum of six dollars. [SS15, §694-c42; C24, 27, 31, 35,§10678.]

10679 Peremptory challenges in jury of six. In all cases where the jury consists of six jurors, the clerk shall select eight jurors by lot from the regular panel or additions thereto. Each party shall have the right to peremptorily challenge two jurors and strike off one juror. After all challenges have thus been exercised or waived, and two jurors have been stricken from the list, the clerk shall read the names of the six jurors remaining who shall constitute the jury selected. [SS15,§694-c43; C24, 27, 31, 35,§10679.]

10680 Instructions. In all criminal actions and in all civil actions triable to a jury where the amount in controversy exceeds one hundred dollars, the judge shall instruct the jury in writing. Where the amount in controversy in civil actions is one hundred dollars or less, the instructions may be oral. [SS15,§694-c44; C24, 27, 31, 35,§10680.]

10681 Entry judgment — jurisdiction — setting aside default. Judgments shall be rendered and entered upon the record in all cases within ten days after final submission of the cause, unless for good cause the court extends the time. The court shall retain jurisdiction, for the purpose of correction of errors of the court or in the record, for ten days after the entry of final judgment. Motions to set aside defaults may be made within ten days after the entry thereof. Motions to vacate a judgment or order, because of irregularity in obtaining it, must be made within ninety days from the entry thereof. [SS15,§694-c17; C24, 27, 31, 35,§10681.]

10682 Judgment liens. Judgments of the court may be by it enforced the same as judgments of the district court, except that no real property shall be levied on or sold on process issued out of said court. Judgments may be made liens on real estate in the county by filing transcripts thereof in the district court, which thereafter shall have exclusive jurisdiction for the enforcement of such judgments as though rendered in the district court as of the date of filing in said court. [SS15,§694-c46; C24, 27, 31, 35,§10682.]

Execution on certain judgments prohibited, ch 487.1
Judgment liens, §11602 et seq.

10683 Appeals. The laws relating to appeals from judgments or orders of the district court, or a judge thereof, to the supreme court shall apply to judgments or orders of the municipal court, or a judge thereof, in all civil actions. In class "C" actions, appeals shall be taken direct to the supreme court the same as from the district court. In class "D" actions, appeals shall be taken to the district court as provided in the case of appeals from justice courts. [SS15, §§694-c24,-c45; C24, 27, 31, 35,§10683.]

Appeals in civil actions, ch 555; in criminal actions, ch 658; to district court, §13599

10684 Judgments superseded. Whenever a judgment of the court is appealed from and superseded and a transcript of the judgment has been, or thereafter shall be, filed in the district court, the clerk of the municipal court shall certify such fact to the clerk of the district court thereof, who shall note the same on the docket entry of the cause, which shall have the same effect as though the cause had been appealed from and superseded in the district court. Whenever further action is taken in such causes in the municipal court, the same shall be certified to the clerk of the district court, who shall note the same on the docket entry of said cause. [C24, 27, 31, 35,§10684.]

10685 Shorthand reporter. Each judge of the municipal court may appoint a shorthand reporter. All provisions relating to shorthand reporters and their duties in the district court, insofar as applicable, shall govern, except their compensation which shall be fixed by order of the court not exceeding eight dollars per day, for the time actually engaged in their court

duties, and shall be paid one-half by the county and one-half by the city.

All actions included in class "A" hereof, may be reported the same as in the district court, and the reporter's fees shall be taxed therein as costs.

The transcript fees paid reporters shall be the same as in the district court, and may be taxed as part of the costs on appeal. [SS15, §694-c49; C24, 27, 31, 35,§10685.]

In district court, §10807 et seq.; report of trial, §11456

10686 Report of preliminary examinations. The judge may order the testimony offered upon preliminary examinations taken down and certified by the shorthand reporter and a transcript of the testimony of the witnesses upon such preliminary examination, or the substance of their testimony, prepared by such reporter and filed in the district court with the transcript of proceedings on such preliminary examination. The fees for reporting such preliminary examinations and for transcript of the testimony shall be the same as allowed in civil causes, and shall be taxed as part of the costs in the case. [C24, 27, 31, 35,§10686.]

Fee, §10812; payment, §5191.1

10687 No report in class "B" actions. No reporter shall be provided for in the trial of actions in class "B" unless the party demanding the same shall pay the fees of the reporter to the clerk in advance, which shall be taxed as costs in the case, unless otherwise ordered by the court. [SS15,§694-c49; C24, 27, 31, 35, §10687.]

10688 Salary. The annual salary of each municipal judge shall be three thousand dollars in cities of less than thirty thousand inhabitants; three thousand four hundred dollars in cities of thirty thousand and less than seventy-five thousand inhabitants; and three thousand six hundred dollars in cities of seventy-five thousand or more inhabitants.

Each clerk shall receive an annual salary of eighteen hundred dollars in cities of less than thirty thousand inhabitants; twenty-two hundred dollars in cities of thirty thousand and less than seventy-five thousand inhabitants; and twenty-six hundred dollars in cities of seventy-five thousand or more inhabitants.

Each bailiff shall receive an annual salary of fifteen hundred dollars in cities of less than thirty thousand inhabitants; seventeen hundred fifty dollars in cities of thirty thousand and less than seventy-five thousand inhabitants; and two thousand dollars in cities of seventy-five thousand or more inhabitants.

The deputy clerks and deputy bailiffs shall receive such compensation as the city council may allow.

The salaries of municipal judges, clerk, bailiff, and all deputies shall be paid monthly on the first Monday of each month. For the first month such salary shall be paid from the city treasury and the second month such salary shall be paid from the court expense fund of the county. Each month thereafter such payments shall alternate from the city to the county expense fund of the county in like manner. [SS15, §694-c47; C24, 27, 31, 35,§10688.]

10689 City to provide rooms. The city council shall provide suitable place for holding said court, and such other rooms and offices as may be necessary for the transaction of the business of said court. All of the other expenses of maintaining said court not otherwise provided for in this chapter shall be paid from the city treasury. [SS15,§694-c48; C24, 27, 31, 35, §10689.]

10690 Abolishing municipal courts. When a municipal court shall have been established for more than four years, it may be abandoned by proceeding as follows: Upon the filing with the city clerk of a petition of not less than fifteen percent of the qualified electors of such municipal court district as shown by the poll lists of the last munipical or state election, the mayor, by proclamation, shall submit such proposition at a general election. If the majority of votes cast at such election be in favor of the proposition of abandoning the court, the officers elected at the next succeeding general election shall be those prescribed by law for such cities and townships, and upon the qualification of such officers such municipal court shall be abolished. [SS15,§694-c50; C24, 27, 31, 35,§10690.]

10691 Municipal court buildings authorized. Cities having a population of fifty thousand or over shall have the power to erect a municipal court building, and to purchase the grounds therefor, such building when constructed to be used for the housing of the municipal court and such other like purposes as the council from time to time may by ordinance direct, including the housing and retention of persons charged with offenses against the laws of the city and the state. Provided that no such grounds shall be purchased nor any building erected thereon until the question has been submitted to the people at a regular or special election, and approved by a majority of the votes cast at such election voting on said question. [C24, 27, 31, 35, §10691.]

Vote required to authorize bonds, §1171.18

10692 Tax levy authorized. For the purpose of paying for the construction of such building, and the purchase price of such grounds, such city shall have the power to levy upon all the property within the corporate limits of such cities, subject to taxation, in addition to all other taxes provided by law, a special tax not exceeding in any one year one-fourth mill on the dollar for a period of years not exceeding fifty. [C24, 27, 31, 35,§10692.]

Referred to in §10693

10693 Bonds authorized—maturity—duty of treasurer. Any city desiring to construct such a building or to purchase grounds therefor, may anticipate the collection of the tax herein authorized to be levied for the construction of a municipal court building, and for that purpose may issue interest-bearing bonds carrying a

rate of interest not to exceed five percent per annum, to be denominated "municipal court building bonds" and the said bonds, and the interest thereon, shall be secured by said assessment and levy, and shall be payable only out of the proceeds of the special tax provided for in section 10692, and no bonds shall be issued in excess of taxes authorized to be levied to secure the payment of the same. It shall be the duty of the treasurer of such city to collect said tax authorized to be levied, and to hold the same separate and apart in trust, for the payment of said bonds, and interest, and to apply the proceeds of said special tax, pledged for that purpose, to the payment of said bonds and interest. Such bonds shall be known as "municipal court building bonds" and shall be issued and sold in accordance with the provisions of chapter 320. In issuing such bonds, the city council may cause portions of said bonds to become due at different definite periods, but none of such bonds so issued shall be due and payable in less than three or more than fifty years from date. [C24, 27, 31, 35,§10693.]

Payment and maturity, ch 63.1

10694 Election as condition precedent. No building shall be erected under the provisions of this chapter unless a majority of the legal voters voting thereon vote in favor of the same at a general city election, or at a special election called for such purpose. [C24, 27, 31, 35,§10694.]

Referred to in §10695
Vote required to authorize bonds, §1171.18

10695 Election — procedure. The question provided in section 10694, to be submitted, may be ordered by the city council submitted to a vote at a general city election, or at one specially called for that purpose. Notice of such election shall be given by publication in two newspapers published in said city, once each week, for not less than four consecutive weeks, and the election shall be held not less than seven nor more than ten days after the completion of such publication. The question to be submitted shall be in the following form:

"Shall the city of.....erect a municipal court building at a cost not exceeding $.....?" [C24, 27, 31, 35,§10695.]

10696 Fund to be exclusive. No part of the purchase price of the grounds or of any of the bonds issued hereunder and no part of the interest accruing thereon shall ever be paid from the general revenue or funds of the city, or out of any fund, or from the proceeds of any tax, other than funds arising from the tax provided for herein. [C24, 27, 31, 35,§10696.]

CHAPTER 476

SUPERIOR COURT

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10697 Establishment and effect of. Any city in this state containing four thousand inhabitants, whether organized under a special charter or the general law for the incorporation of cities and towns, may establish a superior court as hereinafter provided, which, when established, shall take the place of the police court of such city. [C97,§255; S13,§255; C24, 27, 31, 35, §10697.]

10698 Submission to voters. Upon petition of one hundred citizens of any such city, the mayor, by and with the consent of the council, may, at least ten days before any general or city election, issue a proclamation submitting to the qualified voters of any city the question of establishing said court. Should a majority of all the votes cast upon such proposition be in favor of said court, the same shall be deemed established. [C97,§256; S13,§256-a; C24, 27, 31, 35, §10698.]

10699 Governor to appoint judge. Whenever such court has been established, the governor shall appoint a judge, who shall hold office until the day following the first Monday in May succeeding the next regular city election and until his successor is elected and qualified. [C24, 27, 31, 35,§10699.]

10700 Judges—terms of office—commission. Each judge hereafter elected shall hold office for four years from the first Monday in May next succeeding his election and shall be elected at the regular municipal election next preceding the expiration of the term of the incumbent as herein extended. The term of each present incumbent is extended until the first Monday in May next succeeding the city election first following the expiration of the term for which he was elected. The mayor shall transmit his certificate of election of such judge to the governor who shall thereupon issue to him the commission empowering him to act as judge. [C97, §256; S13,§256-a; C24, 27, 31, 35,§10700.]

10701 Judge—qualification—bond as clerk. Said judge shall be a qualified elector of the city, and a practicing attorney at law, and shall subscribe in writing the same oath required of judges of the district court, and file the same with the mayor of the city, and when he acts as clerk thereof he shall give bond to the state in the sum of four thousand dollars, for the faithful discharge of his duties as clerk, which must be filed with and approved by the mayor; and the effect of such election and qualification shall be to abolish the office of police judge of such city. [C97,§257; C24, 27, 31, 35,§10701.]

Oath, §1060

10702 Vacancy. In case of vacancy in said office, the governor shall appoint a judge who shall hold office until the next city election, and in case of inability of any judge to act through sickness or any other cause, a judge shall be appointed by the governor to hold office during such inability. [C97,§258; S13,§258-a; C24, 27, 31, 35,§10702.]

10703 Terms. There shall be held not less than eight nor more than eleven terms of court in each year, the times being arranged by the judge in such manner as shall least conflict with the terms of the district court of the county where said superior court is held, to be fixed by general order made of record, at least ten days before the first term in each year; but, as a police court, it shall always be open for the dispatch of business. [C97,§259; C24, 27, 31, 35, §10703.]

10704 Concurrent jurisdiction. Said court shall have jurisdiction concurrent with the district court in all civil matters, except in probate matters and actions for divorce, alimony, and separate maintenance. [C97,§260; S13,§260; C24, 27, 31, 35,§10704.]

S13,§260, editorially divided

10705 Exclusive jurisdiction. It shall have exclusive original jurisdiction to try and determine all actions, civil and criminal, for the violation of city ordinances, and all jurisdiction conferred on police courts as now or as may hereafter be provided by law, and concurrent jurisdiction with justices of the peace. [C97,§260; S13,§260; C24, 27, 31, 35,§10705.]

10706 Writs of error. Writs of error and appeals may be taken thereto from justices' courts in the township in which the court is held, and, by consent of parties, from any other township in the county. [C97,§260; S13,§260; C24, 27, 31, 35,§10706.]

10707 Criminal actions. For the trial of criminal actions on information and complaint, the court shall be open at such times and under such rules as it shall prescribe. [C97,§260; S13, §260; C24, 27, 31, 35,§10707.]

10708 Attachment. In actions by attachment, where real property is levied on by writ of attachment, the officer levying the writ shall make entry thereof in the incumbrance book in the office of the clerk of the district court, in like manner and with like effect as of levies made in the district court. [C97,§260; S13, §260; C24, 27, 31, 35,§10708.]

Attachment, ch 510

10709 Commitments. Parties may be committed to the city prison for confinement or punishment, instead of the county jail, at the option of the judge. [C97,§260; S13,§260; C24, 27, 31, 35,§10709.]

10710 Substitute judge. In the absence of the judge, or in case of his inability to act, then, during such time, proceedings for the violation of city ordinances may be had before a justice of the peace residing in such city. [C97,§260; S13,§260; C24, 27, 31, 35,§10710.]

10711 Changes of venue. Changes of venue may be taken from said court in all civil actions to the district court of the same or another county, in the same manner, for like causes and with the same effect as the venue is changed from the district court. [C97,§261; S13,§261; C24, 27, 31, 35,§10711.]

District court procedure, ch 495
S13,§261, editorially divided

10712 Nonresident defendants. In all civil cases where any party defendant shall, before any pleading is filed by him, file in said cause a motion for a change of venue to the district court of the county, supported by affidavit showing that such party defendant was not a resident of the city where such court is held, at the time of the commencement of the action, the cause, upon such motion, shall be trans-

ferred to the district court of the county. [S13, §261; C24, 27, 31, 35,§10712.]

10713 Criminal actions. All criminal actions, including those for the violation of the city ordinances, shall be tried summarily and without a jury, saving to the defendant the right of appeal to the district court, which appeal shall be taken in the same time and manner as appeals are taken from justices' courts in criminal actions. [C97,§261; S13,§261; C24, 27, 31, 35,§10713.]

Appeals in justice court, §13599

10714 Transfers to district court. In case of vacancy in said office for sixty days or more, a district judge of the county may, on application of any party to any proceeding pending in the superior court, enter an order directed to the clerk of that court, or his deputy, or the acting clerk, directing such clerk to forthwith transmit to said district court the files and exhibits in said cause, together with a certified copy of the record in said cause, and thereupon said cause shall be disposed of in the district court as though originally brought therein. [C24, 27, 31, 35,§10714.]

10715 Powers of judge. The judge shall have the same power in regard to injunctions, writs, orders, and other proceedings, out of court, as are possessed by the judges of the district court. [C97,§262; C24, 27, 31, 35,§10715.]

10716 Court of record — laws applicable. The superior court shall be a court of record. All statutes governing the district court as to venue, commencement of action, jurisdiction, process, pleadings, practice, modes of trial, judgment, execution, and costs shall apply to and govern the superior courts, except when the same may be inconsistent with the provisions of this chapter. [C97,§263; C24, 27, 31, 35,§10716.]

Execution on certain judgments prohibited, ch 487.1

10717 Seal. Each such court shall have its own seal, with the words "Superior court" and the name of the city and state thereon. [C97, §264; C24, 27, 31, 35,§10717.]

10718 Recorder to act as clerk. As long as the business of the court can be done without a clerk, the judge shall be the clerk of said court, and the city recorder or city clerk shall be deputy clerk of said court and may perform the duties of his principal as clerk of said court. Whenever, from the accumulation of causes and other demands upon the court, a clerk becomes necessary, the city recorder or clerk shall be the clerk thereof. He shall give bonds as required when the judge acts as clerk, and perform the same services as required by law of the clerk of the district court. [C97,§265; S13,§265; C24, 27, 31, 35,§10718.]

Clerk of the district court, ch 479

10719 Marshal as sheriff. The city marshal shall be the executive officer of said court, and his duties and authority in court and in executing process shall correspond with those of the sheriff of the county in the district court, and with process from that court. The process of said court may be also served by the sheriff. [C97,§266; C24, 27, 31, 35,§10719.]

10720 Costs in civil actions. The costs and fees of said courts in civil actions shall be the same as in the district court, except as herein otherwise provided. [C97,§267; C24, 27, 31, 35, §10720.]

Costs in general, ch 497
C97,§267, editorially divided

10721 Accounting by clerk. The clerk of the superior court shall account for and pay over to the city all fees that may be paid into the said court, and also all fines for the violation of the city ordinances. Of all other fines he shall render the same account as is provided for justices of the peace. [C97,§267; C24, 27, 31, 35,§10721.]

Accounting for fine, §13596 et seq.

10722 Violations of ordinances. In actions for the violation of city ordinances, if unsuccessful, the city shall pay all costs, the same as provided by law for the county in criminal actions prosecuted in the name and on behalf of the state. [C97,§267; C24, 27, 31, 35,§10722.]

Payment by county, §5191.1

10723 Criminal actions. The fees in criminal actions shall be the same as in justices' courts, and shall be paid and accounted for as hereinbefore stated, and as otherwise provided by law for justices of the peace and their courts. [C97,§267; C24, 27, 31, 35,§10723.]

Fees, §§10686, 10687

10724 Right to jury. When causes are assigned for trial, any party desiring a jury shall then make his demand therefor, or the same shall be deemed to have been waived. Causes in which a jury has been demanded shall be tried first in their order, and when disposition shall have been made of such causes the jury shall be discharged from further attendance at that term. [C97,§268; C24, 27, 31, 35,§10724.]

10725 How jurors drawn. In order to provide jurors for the superior courts, the county auditor, clerk of the district court and recorder, of the county in which any city having a superior court is located, shall meet at the courthouse on the third Monday of February, April, June, August, October and December of each year, and proceed, in the manner provided by chapter 482, to draw the names of fifteen persons to act as jurors in said superior court. [C97, §269; C24, 27, 31, 35,§10725.]

C97,§269, editorially divided

10726 Drawing to constitute panel. The persons whose names are drawn at any drawing under the provisions hereof shall be subject to jury duty, and constitute the regular panel of jurors in said superior court, for the two calendar months commencing with the first day of the month next succeeding the drawing. [C97, §269; C24, 27, 31, 35,§10726.]

10727 Certification to city clerk. A list of the names of the persons drawn at each drawing provided by this chapter shall be immediately

made out and certified by the clerk of the district court, under his hand and seal, and such certified list transmitted by mail to the recorder or clerk of the city in which said superior court is located. [C97,§269; C24, 27, 31, 35,§10727.]

10728 Precept. A precept of said superior court shall issue, five days before the first day of each term of court, for the jurors constituting the panel for such term, under the provisions hereof, which precept shall be issued and served as provided by law in like cases in the district court. [C97,§269; C24, 27, 31, 35,§10728.]

Issuance and service, §10888 et seq.

10729 Drawing of jurors — provisions applicable. The provisions of chapter 482 in relation to the selection and drawing of petit jurors and talesmen for the district courts, shall also apply to the selection and drawing of petit jurors and talesmen for the superior courts in such counties. [C24, 27, 31, 35,§10729.]

10730 Jury of six. The jury shall consist of six qualified jurors, unless, when a jury is demanded as provided in this chapter, the party at that time shall demand a jury of twelve. [C97,§270; C24, 27, 31, 35,§10730.]

C97,§270, editorially divided

10731 Jury of twelve. In all civil cases the party requesting a jury of twelve shall at the time of making such demand deposit with the clerk the entire additional expense of the additional jurors, which sum shall be fixed by the court and paid to the clerk at the time of making such demand. [C97,§270; C24, 27, 31, 35,§10731.]

Referred to in §10734

10732 Talesmen. Talesmen may be summoned on the order of the court by the marshal from the body of the county. [C97,§270; C24, 27, 31, 35,§10732.]

10733 Accounting. All such deposits of additional expense for jurors shall be paid into the county treasury at the close of each term of such superior court, and the county treasurer shall give duplicate receipts therefor, one to be held by said clerk, and the other to be presented by him to the county auditor, who shall charge the treasurer with the amount thereof in the proper account. [C97,§270; C24, 27, 31, 35,§10733.]

10734 Juries in certain cities. In all cities which now have a population of forty thousand or more, and in which superior courts are now or may hereafter be established, it shall be unnecessary in such superior court to make demand for trial by jury, and causes triable to a jury shall be tried to twelve jurors without the additional expense to any of the parties, required by section 10731. [S13,§280-a; C24, 27, 31, 35,§10734.]

Referred to in §10742

10735 Manner of drawing. In providing jurors for superior courts in all such cities, the names of sixty persons shall be drawn by the officers at the times and in the manner provided by chapter 482. [S13,§280-b; C24, 27, 31, 35, §10735.]

Referred to in §10742
38GA, ch 245, §3, editorially divided

10736 Drawing to constitute panel. Such persons whose names are drawn shall be subject to jury duty, and shall constitute the regular panel of jurors in said superior courts for the two calendar months, commencing with the first day of the month succeeding the drawing. [S13,§280-b; C24, 27, 31, 35,§10736.]

Referred to in §10742

10737 Certification to city clerk. A list of the names of the persons drawn at each drawing provided by this chapter shall be immediately made out and certified by the clerk of the district court, under his hand and seal, and such certified list transmitted by mail to the recorder or clerk of the city in which said superior court is located. [C24, 27, 31, 35, §10737.]

Referred to in §10742

10738 Precept. A precept of said superior court shall issue at such time or times as the judge of said court shall direct, authorizing and directing the marshal of said city in which said superior court is located, to summon such number of said jurors, in the order of their certification by the clerk of the district court, as the judge of said superior court shall deem necessary, which precept shall be issued and served as provided by law in like cases in the district court. [S13,§280-b; C24, 27, 31, 35, §10738.]

Referred to in §10742
Issuance and service, §10888

10739 Salary of judge. In all such cities the salary of the judge of the superior court shall be thirty-seven hundred fifty dollars per annum, and paid quarterly; the first two quarters from the city treasury, and the last two from the county treasury of the county wherein such court is located. [S13,§280-c; C24, 27, 31, 35,§10739.]

Referred to in §10742

10740 Per diem of shorthand reporters. In all such cities the compensation of the shorthand reporter in such superior court shall be eight dollars a day for the time actually employed. [S13,§280-d; C24, 27, 31, 35,§10740.]

Referred to in §10742

10741 Deputy clerk—compensation. In all such cities there may be appointed by the city council, a deputy clerk of the court, who shall receive such compensation as the city council may allow. [S13,§280-e; C24, 27, 31, 35,§10741.]

Referred to in §10742

10742 Applicable to certain cities. Sections 10734 to 10741, inclusive, shall apply to cities which now have, or may hereafter have a population of forty-five thousand or more. [S13, §280-f; C24, 27, 31, 35,§10742.]

10743 Challenges. In all civil cases, where the jury shall consist of six jurors, the chal-

lenges allowed to either party shall be limited to three each, but where the jury shall consist of twelve jurors, the same number of challenges shall be allowed to either party as is or may be allowed in the district court. [C97,§271; C24, 27, 31, 35,§10743.]

In district court, §11460 et seq.

10744 Appeals to supreme court. All appeals from judgments or orders of said court, or the judge thereof, in civil actions shall be taken to the supreme court in the same manner, under the same restrictions, within the same time, and with the same effect, as appeals are taken from the district court to the supreme court. [C97,§272; C24, 27, 31, 35,§10744.]

Appeals from district court, ch 555

10745 Judgments made liens. Judgments in said court may be made liens upon real estate in the county in which the city is situated, by filing transcripts of the same in the district court, as provided in this code in relation to judgments of justices of the peace, and with equal effect, and from the time of such filing they shall be treated in all respects as to their effect and mode of enforcement as judgments rendered in the district court as of that date, and no execution can thereafter be issued from the said superior court on such judgments, and no real property shall be levied on or sold on process issued out of the superior court. Judgments of said court may be made liens upon real estate in other counties in the same manner as judgments in the district courts. [C97,§273; C24, 27, 31, 35,§10745.]

Real estate in foreign county, §11603
Transcripts from justice courts, §10572 et seq.

10746 Informations. It shall be the duty of the city attorney or solicitor to file informations in the superior court for violations of the city ordinances and prosecute the same, and for such services he shall receive such compensation as the city council shall allow. [C97,§274; C24, 27, 31, 35,§10746.]

10747 Shorthand reporters—compensation. The judge of each superior court may appoint a shorthand reporter. All provisions relating to shorthand reporters and their duties in the district court, insofar as applicable in every respect, shall govern, except the compensation shall not exceed eight dollars a day for the time actually employed. [C97,§275; C24, 27, 31, 35, §10747.]

Duties in district court, §§10807, 11456

10748 Salary of judge. The salary of each superior court judge in all cities having a population of less than twenty-five thousand shall be two thousand dollars per annum, payable quarterly. In cities having a population of more than twenty-five thousand and less than forty-five thousand such salary shall be three thousand dollars per annum, payable quarterly.

The first two quarters shall, in all cases, be paid from the city treasury, and the last two from the county treasury of the county wherein said court is located. [C97,§278; C24, 27, 31, 35, §10748.]

10749 Compensation of clerk. When a clerk or recorder of a city in which such court is established is required to perform the duties of clerk thereof, he shall receive such compensation for such services as the city council may allow. [C97,§279; C24, 27, 31, 35,§10749.]

10750 Compensation of marshal. The marshal shall receive the same fees and compensation for serving the process of said court, and for other services required of the sheriff in the district court, as the sheriff receives for like services, but in all criminal cases in said court the marshal shall receive the same fees for his services as are paid to the constable in justice court. [C97,§280; S13,§280; C24, 27, 31, 35, §10750.]

Sheriff's fees, §5191; constable's fees, §10637

10751 Question of abolishing court. Upon the filing with the city clerk of the petition of two hundred of the qualified electors of any city in which a superior court is now or hereafter established, the mayor shall at least ten days before any general election or election for city officers, issue a proclamation submitting to the qualified voters of said city the proposition to abolish the superior court. The ballots shall be printed in the following form: "Shall the proposition to abolish the superior court of..... .....be adopted?", and the election shall be conducted in all respects in accordance with the provisions of the election law. [C97,§276; S13,§276; C24, 27, 31, 35,§10751.]

10752 Certificate that court abolished. If a majority of the votes cast at said election are for abolishing said superior court, the mayor of such city shall immediately transmit a certificate showing such fact to the secretary of state. [C97,§277; C24, 27, 31, 35,§10752.]

C97,§277, editorially divided

10753 Date when court abolished. Said court shall be abolished, to take effect upon the date of the expiration of the term of office of the judge then upon the bench. [C97,§277; C24, 27, 31, 35,§10753.]

10754 Effect of abolishment. The effect of such abolition shall be to revive and re-establish in such city the police court and all the powers incident thereto, in the same manner as the law prescribes for cities where superior courts do not exist. [C97,§277; C24, 27, 31, 35,§10754.]

10755 Deposit with city clerk. The judge of said superior court shall, before retiring from said position, turn over to the clerk of said city the judgment records of his court in which are entered and recorded all judgments and fines for the violation of ordinances of such city, together with all money collected as fines for the violation of such ordinances, and take the clerk's receipt therefor. [C97,§277; C24, 27, 31, 35, §10755.]

10756 Deposit with clerk district court. All other books, records, and papers pertaining to said superior court shall be turned over to the clerk of the district court of the county in which

such city is situated, and his duplicate receipt taken therefor, together with all the money in the hands of said judge which has come into his hands as judge of said court, one receipt to be filed with the county auditor. [C97,§277; C24, 27, 31, 35,§10756.]

10757 Report to supervisors. Said judge shall immediately make reports to the board of supervisors and city council as to the disposition made of said books, papers, dockets, and moneys, as herein provided. [C97,§277; C24, 27, 31, 35, §10757.]

10758 Pending actions. It shall be the duty of the clerk of the district court, upon receipt of such books, dockets, and records belonging to said superior court, to transfer all cases pending before the same, as shown by said record, and of which the district court would have jurisdiction, to the proper appearance docket of the district court, and to notify the parties or their attorneys of such transfer, and such causes shall stand for trial as if brought originally in said court. [C97, §277; C24, 27, 31, 35,§10758.]

10759 Actions transferred to police court. All causes pending in the superior court at the time it is abolished, of which the district court would not have jurisdiction, shall be transferred to the police court. [C97,§277; C24, 27, 31, 35, §10759.]

10760 Transcripts and executions. The clerk of the district court shall make transcripts and issue executions from the records of said superior court under the seal of the district court, for which he shall be entitled to charge and receive the same fees as are now allowed for like services in the district court, and all papers so issued shall have the same force and effect as if issued from the superior court during its existence. [C97,§277; C24, 27, 31, 35,§10760.]

Fees, §10837

CHAPTER 477

DISTRICT COURT

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10761 General jurisdiction. The district court shall have general, original, and exclusive jurisdiction of all actions, proceedings, and remedies, both civil and criminal, except in cases where exclusive or concurrent jurisdiction is or may hereafter be conferred upon some other court or tribunal by the constitution and laws of the state, and shall have and exercise all the powers usually possessed and exercised by courts of record. [C51,§1576; R60,§2663; C73, §161; C97,§225; C24, 27, 31, 35,§10761.]

Constitution, Art. V, §6
C97,§225, editorially divided

10762 Appeals and writs of error. It shall also possess and exercise jurisdiction in all appeals and writs of error taken in civil and criminal actions and special proceedings authorized to be taken from all inferior courts, tribunals, boards, or officers, under any provisions of the laws of this state, and shall have a general supervision thereof, in all matters, to prevent and correct abuses, where no other remedy is provided. [C51,§1576; R60,§2663; C73,§161; C97, §225; C24, 27, 31, 35,§10762.]

10763 Wills — administration — guardianship. The district court of each county shall have original and exclusive jurisdiction to:

1. Probate the wills of, and to grant administration upon the estates of, all persons who at the time of their death were residents of the county, and of nonresidents of the state who die leaving property within the county subject to administration, or whose property is afterwards brought into the county.

2. Appoint guardians of the persons and property of all persons resident in the county subject to guardianship.

3. Appoint guardians of the property of all such persons nonresidents of the state who have property within the county subject to guardianship, or whose property is afterwards brought

into the county. [C73,§2312; C97,§225; C24, 27, 31, 35,§10763.]

10764 Executors and trustees. It shall have jurisdiction in all matters in relation to the appointment of executors and trustees, and the management and disposition of the property of and settlement of such estates; provided that where jurisdiction has heretofore been acquired, the same shall be retained until such estate is closed. [C97,§225; C24, 27, 31, 35,§10764.]

Investment of funds, ch 551
Similar provision, §11876

10765 Circuit court records. The district court shall succeed to, and exercise full authority and jurisdiction over, the records of the circuit court, and may enforce all judgments, decrees, and orders thereof in the same manner and to the same extent as it may exercise like jurisdiction and authority over its own records, and, for the purpose of the issuance of process, and of any and all other acts necessary to the due and efficient enforcement of the orders, judgments, and decrees of the circuit court, the records thereof shall be deemed records of the district court. [C73,§§162, 2312; C97,§225; C24, 27, 31, 35,§10765.]

10766 Transcripts — process. Transcripts and process from the judgments, decrees, and records of the circuit court shall be issued by the clerk of the district court, and under the seal of his office. [C97,§225; C24, 27, 31, 35, §10766.]

10767 Counties bordering on Missouri river. The jurisdiction of the courts of the state of Iowa, in counties bordering on the Missouri river, in all civil and criminal actions and proceedings, is hereby declared to extend to the center of the main channel of the Missouri river, where the same now is or may hereafter be, and to all lands and territory lying along said river, which have been adjudged by the United States supreme court or the supreme court of this state to be within the state of Iowa, and to such other lands and territory along said river over which the courts of this state have heretofore exercised jurisdiction. [S13,§395-a; C24, 27, 31, 35,§10767.]

Related provisions, Admission of Iowa; Constitution, Preamble; also §§2, 3, 18453

10768 Judicial districts. For judicial purposes, the state is hereby divided into twenty-one judicial districts, as follows:

The first district shall consist of the county of Lee, and have two judges.

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

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

The fourth district shall consist of the counties of Woodbury and Monona, and have four judges.

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

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

The seventh district shall consist of the counties of Muscatine, Scott, Clinton, and Jackson, and shall have five judges who shall be so elected that each county shall have at least one resident judge.

The eighth district shall consist of the counties of Iowa and Johnson, and have two judges, who shall not be residents of the same county.

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

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

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

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

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

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

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

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

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

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

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

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

The twenty-first district shall consist of the counties of Cherokee, O'Brien, Osceola, Lyon, Sioux, and Plymouth, and shall have three judges. [C97,§227; SS15,§227; C24, 27, 31, 35, §10768.]

SS15,§227, editorially divided

10769 Place of holding court. Courts must be held at the places provided by law, except for the determination of actions, special proceedings, and other matters not requiring a jury, when they may, by consent of the parties therein, be held at some other place. [C51,§1597; R60,§2687; C73,§192; C97,§286; C24, 27, 31, 35, §10769.]

10770 County without courthouse. When there is no courthouse at the place where the courts are to be held, its sessions shall be at such suitable place as the board of supervisors

provide, but if no such place is provided, the court may direct the sheriff to procure one at the expense of the county. [C51,§§1573, 1574; R60,§§2660, 2661; C73,§§173, 174; C97,§239; C24, 27, 31, 35,§10770.]

10771 City or town to provide court room. Where terms are held in any city or town not the county seat, such city or town shall provide and furnish the necessary rooms and places for such terms, free of charge to the county. Any necessary alterations, repairs, or additions to said rooms and places shall be provided at the expense of the county; and the board of supervisors is authorized and empowered to make such alterations, improvements or additions, the cost thereof not to be in excess of the limitations imposed by section 5261. [C51,§1566; R60, §2653; C73,§163; C97,§226; C24, 27, 31, 35, §10771.]

10772 Dual county seats. In any county having two county seats, terms of court shall be held at each, and, in the county of Pottawattamie, court shall be held at Avoca, as well as at the county seat. [C73,§164; C97,§228; C24, 27, 31, 35,§10772.]

10773 Terms not at county seats—effect—duty of clerk. When a court shall be held at a place not the county seat, all of the provisions of the statute in relation to district courts shall be applicable thereto, except as herein modified. All proceedings had in said court shall have, within the territory over which said court shall have jurisdiction, the same force and effect as though ordered in the court at the county seat of said county, but transcripts of judgments and decrees rendered therein, levies of writs of attachment upon real estate, mechanics' liens, lis pendens, sales of real estate, redemption, satisfaction of judgments and mechanics' liens, dismissals or decrees in lis pendens, together with all other matters affecting titles to real estate, shall be forthwith certified by the deputy clerk at such place, to the clerk of such court at the county seat, who shall immediately enter the same upon the records in his office. [C97,§230; C24, 27, 31, 35,§10773.]

10774 Terms to be held. The district judges shall hold four terms of court at each of the places in the several counties of their districts where court is authorized to be held, and, if business requires, then the judges of such district shall, by joint order made at the time of making the assignment of terms hereinafter required and entered of record, provide for regular additional terms. [C97,§229; C24, 27, 31, 35, §10774.]

10775 First district—judges to alternate. The judges in the first judicial district shall as nearly as practicable, alternate in holding terms at the places for holding court in said judicial district, and terms may be held simultaneously at both places. [S13,§227-1a; C24, 27, 31, 35, §10775.]

10776 Eighth district—judges to alternate. The judges in the eighth judicial district shall as nearly as practicable, alternate in holding terms at the places for holding court in said judicial district, and terms may be held simultaneously at both places. [SS15,§227-8ab; C24, 27, 31, 35,§10776.]

10777 Schedule of terms. On or before the first day of October in each odd-numbered year the judges shall meet in their respective districts and determine the times and places of holding their courts during the two succeeding calendar years. [C51,§1567; R60,§2654; C73, §165; C97,§232; S13,§232; C24, 27, 31, 35,§10777.]

S13,§232, editorially divided

10778 Filing of schedule. The plan or schedule thus agreed upon, or ordered by the chief justice of the supreme court when they cannot agree, shall be forthwith forwarded by the district judges to the secretary of state and the clerk of the district court in each county in such district, and the clerk shall file the same and enter it of record in the journal of the court. [C73,§165; C97,§232; S13,§232; C24, 27, 31, 35, §10778.]

10779 Tabular statement prepared. The secretary of state shall, within ten days after receiving said orders, or before the first Monday in December after said orders are made, prepare a tabular statement of the times of holding the several courts, as fixed by the several orders in his office, and have printed five thousand copies thereof. [C51,§1568; R60,§2655; C73,§165; C97, §232; S13,§232; C24, 27, 31, 35,§10779.]

10780 Distribution. Said tabular statement shall be distributed as follows: One copy to each state officer, each county auditor and sheriff, two copies to each judge of the district and superior courts, ten copies each to the state library, the library of the law department of the state university, and the state historical society, thirty-five hundred copies to the clerks of the district court, in proportion to the population of the county, for gratuitous distribution among the attorneys of the county, and the residue for free distribution under the supervision of the secretary of state. [C51,§1567; R60,§2655; C73,§165; C97,§232; S13,§232; C24, 27, 31, 35,§10780.]

10781 Judge to hold one term. In preparing said plan or schedule, the judges shall so arrange, if practicable, that each judge shall hold at least one term of court during the year in each of the several counties of his district. [C73,§165; C97,§232; S13,§232; C24, 27, 31, 35, §10781.]

10782 Special terms. A special term may be ordered in any county at any regular term of court in that county, or at any other time, by any judge of the district, for the trial of all causes pending at the last regular term of said court held prior to said special term, in which either party shall have served a trial notice as provided by law, or for receiving pleas of guilty in criminal cases and the entry of judgment thereon. When ordering a special

term, the court or judge shall direct whether a grand or trial jury, or both, shall be summoned. [C51,§§1569–1571; R60,§§2656–2658; C73,§166; C97,§233; S13,§233; C24, 27, 31, 35, §10782.]

Arraignment, plea, and judgment in vacation, §13666 et seq.

10783 Disagreements. In case the judges of any district are unable to agree as to the manner of holding their courts, or as to the counties in which they are severally to preside, they shall refer the matter to the chief justice of the supreme court, who shall assign said judges to such counties as he may determine. [C97,§231; C24, 27, 31, 35,§10783.]

Referred to in §10784
C97,§231, editorially divided

10784 Power to assign judge. The chief justice of the supreme court shall also have power to assign any district judge, when not occupied in holding court in his own district, to hold court in any other district in the state where any judge may be incapacitated from holding court, or there may arise a necessity therefor. This and section 10783 shall not be held to affect the right of the judges to interchange holding their terms of court, as now provided by law. [C97,§231; C24, 27, 31, 35, §10784.]

10785 Temporary additional judge. When, from any cause, the business of the district court of any judicial district of this state cannot be disposed of within a reasonable time by the judges elected within and for such district, then upon the filing of a petition signed by five or more resident attorneys of such district with the clerk of the supreme court, addressed to the chief justice thereof, setting forth the facts, the chief justice, being satisfied that the business of such judicial district demands an additional judge for a temporary period of time to dispose of such business or assist in the disposal of such business, shall name and transfer a judge from some other judicial district where the business of such district will warrant, to the place in the judicial district for which such petition is filed, who shall hold a term of court for such length of time as the chief justice of the supreme court may determine. [S13,§240-b; C24, 27, 31, 35, §10785.]

Referred to in §10787
S13,§240-b, editorially divided

10786 Expenses. The judge so transferred shall be allowed and paid all reasonable and actual expenses while in the performance of his duties in said temporary character, in addition to his salary. [S13,§240-b; C24, 27, 31, 35, §10786.]

Preparation and audit of claim, §84.06

10787 Filing of order. Upon the order being made for the transfer of such judge as contemplated by section 10785, such order shall be filed in the office of the clerk of the district court of the county where such judge shall hold a term or part thereof. [S13,§240-c; C24, 27, 31, 35, §10787.]

S13,§240-c, editorially divided

10788 Jurors drawn. Upon the filing of said order the proper officers, as by statute provided, shall proceed and are hereby empowered as by statute provided, to draw a grand jury and trial jury, if necessary, which shall have the same force and effect as if drawn for a regular term and upon the order of a judge elected for such district in the usual and ordinary transaction of business of such district. [S13,§240-c; C24, 27, 31, 35,§10788.]

Drawing of jurors, §10878 et seq.

10789 Failure of judge to appear. If the judge does not appear on the day appointed for holding the term, the clerk shall make an entry thereof in his record, and adjourn the court until the next day, and so on until the third day, unless he appears, provided three days are allowed for such term, and if he does not appear by five o'clock p. m. of the third day, and before the expiration of the time allotted to the term, it shall stand adjourned until the next regular term. [C51,§§1581, 1582; R60,§§2668, 2669; C73, §§167, 168; C97,§234; C24, 27, 31, 35,§10789.]

10790 Special adjournments. If the judge is sick, or for any cause is unable to attend court, at the regularly appointed time, he may by letter, telegram, or telephone direct an adjournment to a particular day, and the clerk shall, on the first day thereof, or as soon after as he receives the order, adjourn the court as directed. [C51, §1583; R60,§2670; C73,§169; C97,§235; C24, 27, 31, 35,§10790.]

Referred to in §10791

10791 Failure of term—effect. No recognizance or other instrument or proceeding shall be rendered invalid by reason of there being a failure of the term; but all proceedings pending in court shall be continued to the next regular term, unless an adjournment be made as authorized in section 10790. [C51,§1584; R60,§2671; C73,§170; C97,§236; C24, 27, 31, 35,§10791.]

10792 Recognizances continued. In cases of such continuances or adjournments, persons recognized or bound to appear at the regular term, which has failed as aforesaid, shall be held bound in like manner to appear at the time so fixed, and their sureties, if any, shall be liable in case of their nonappearance, in the same manner as though the term had been held at the regular time and they had failed to make their appearance thereat. [C51,§1585; R60,§2672; C73,§171; C97,§237; C24, 27, 31, 35,§10792.]

10793 Regular adjournment—effect. Upon any final adjournment of the court, all business not otherwise disposed of shall stand continued. [C51,§1586; R60,§2673; C73,§172; C97,§238; C24, 27, 31, 35,§10793.]

10794 Decisions and entries in vacation. With consent of parties, actions and other matters pending in the courts named in this chapter may be taken under advisement by the judges, decided and entered of record in vacation, or at the next term; if so entered in vacation, they shall have the same force and effect from the

time of such entry as if done in term time. [C73, §183; C97,§247; C24, 27, 31, 35,§10794.]

Orders executed outside district, §11242.1
Vacation procedure in criminal cases, §13958.1

10795 Expiration of term—pending trials. Whenever a trial has been commenced, it may be concluded and all proceedings in the case thereafter conducted in the usual course, whether the time has arrived for commencing a term in another county in the district or not, and without regard to any other court or term thereof. [C73,§§185, 186; C97,§248; C24, 27, 31, 35, §10795.]

C97,§248, editorially divided

10796 Judges may interchange. The district judges may interchange and hold each other's courts. [C51,§1575; R60,§2662; C73, §175; C97,§240; C24, 27, 31, 35,§10796.]

10797 Judges not to sit together. In districts in which the district court is composed of more than one judge, the judges shall not sit together in the trial of causes, nor upon the hearing of motions for new trials, but may together hold the same term, making an apportionment of the business between them; and in districts composed of more than one county they may hold terms in different counties at the same time. [C97,§241; C24, 27, 31, 35,§10797.]

10798 Preparation and signing of record. The clerk shall from time to time make a record of all proceedings of the court, which, when correct, shall be signed by the judge. [C51,§1577; R60,§2664; C73,§176; C97,§242; C24, 27, 31, 35, §10798.]

C97,§242, editorially divided

10799 Signing after term—effect. When it is not practicable to have all the records prepared and signed during the term, they may be prepared in vacation and corrected and signed at the next succeeding term; but such delay shall not prevent an execution from issuing in the meantime, and all other proceedings may be had in the same manner as though the record had been signed. [C51,§1578; R60,§2665; C73, §177; C97,§242; C24, 27, 31, 35,§10799.]

10800 Vacation entries. Entries authorized to be made in vacation shall be signed at the next term of the court. [C51,§1578; R60,§2665; C73, §177; C97,§242; C24, 27, 31, 35,§10800.]

10801 Amending or expunging entry. The record aforesaid is under the control of the court, and may be amended, or any entry therein expunged, at any time during the term at which it is made, or before it is signed by the judge. [C51,§1579; R60,§2606; C73,§178; C97,§243; C24, 27, 31, 35,§10801.]

10802 Unauthorized alteration. No record shall be amended or impaired by the clerk or other officer of the court, or by any other person without the order of such court, or of some court of competent authority. [R60,§2984; C73,§2736; C97,§3646; C24, 27, 31, 35,§10802.]

10803 Corrections because of mistakes. Entries made and signed at a previous term can be altered only to correct an evident mistake. [C51,§1580; R60,§2667; C73,§179; C97,§244; C24, 27, 31, 35,§10803.]

CHAPTER 478

GENERAL PROVISIONS RELATING TO JUDGES AND COURTS

10804 Salary of judges.
10805 Expenses.
10805.1 Contest—to whom salary and expenses paid.
10805.2 Acts of judge de facto.
10806 Audit and payment.
10807 Shorthand reporter.
10808 Oath—removal.
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10810 Deficiency—how paid.
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10819 Sunday—permissible acts.
10820 Rules for conciliation.
10821 Procedure.
10822 Condition to maintaining action.
10823 Exceptions.
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10804 Salary of judges. The salary of each judge of the district court shall be five thousand dollars per year. [C73,§3774; C97,§253; SS15,§253; C24, 27, 31, 35,§10804.]

Referred to in §10805.1
SS15,§253, editorially divided

10805 Expenses. Where a judge of the district court is required, in the discharge of his official duties, to leave the county of his residence or leave the city or town of his residence to perform such duties, he shall be paid such actual and necessary hotel and living expenses not to exceed the sum of three dollars per day and transportation expenses as shall be incurred. [SS15,§253; C24, 27, 31, 35,§10805.]

Referred to in §10805.1

10805.1 Contest—to whom salary and expenses paid. The salary and expense of district judges as provided in sections 10804 and 10805 shall be paid to any person who has received a certificate of election as such judge, and has qualified, and is acting thereunder, during the period he so acts without regard to the result of any contest or action brought to test the validity of such election. [C35,§10805-e1.]

Section 10805-e2, code 1935, omitted as obsolete

10805.2 Acts of judge de facto. The right, power and authority of any such person acting as judge in any and all matters which may come before the court or judge shall be of the same force and effect as if the said person had been duly elected and qualified as such judge. [C35, §10805-e3.]

10806 Audit and payment. An itemized expense account shall be certified by the party entitled thereto to the state comptroller, which account shall be rendered quarterly and shall be paid in the same manner as the salary of such judge. [SS15,§253; C24, 27, 31, 35,§10806.]

Preparation and audit of claim, §84.06

10807 Shorthand reporter. Each judge of the district court shall appoint a shorthand reporter who shall, upon the request of either party in a civil case or a criminal case, take and report in full the oral evidence and proceedings in the case, and perform all duties required of him on the trial, as provided by law. [C73,§181; C97,§245; C24, 27, 31, 35,§10807.]

Detailed report of trial, §11456

10808 Oath—removal. Such reporter shall take an oath faithfully to perform the duties of his office, which shall be filed in the office of the clerk. He shall attend such sessions of the court as the judge who appointed him may direct, and may be removed by the judge making such appointment. [C73,§182; C97,§246; C24, 27, 31, 35,§10808.]

10809 Compensation. Shorthand reporters of the district court shall be paid ten dollars per day for each day's attendance upon said court, under the direction of the judge, out of the county treasury where such court is held, upon the certificate of the judge holding the court. [C73,§3777; C97,§254; SS15,§254-a2; C24, 27, 31, 35,§10809.]

SS15,§254-a2, editorially divided

10810 Deficiency—how paid. In case the total per diem of each reporter and his substitute shall not amount to the sum of twenty-four hundred dollars per year, the judge appointing him shall at the end of the year apportion the deficiency so remaining unpaid among the several counties of the district, if there be more than one county in such district, in proportion to the number of days of court actually held by said judge in such counties, which apportionment shall be by him certified to the several county auditors, who shall issue warrants therefor to said reporter, which warrants shall be paid by the county treasurers out of any funds in the treasury not otherwise appropriated. [SS15,§254-a2; C24, 27, 31, 35,§10810.]

10811 Expenses. Where a shorthand court reporter is required, in the discharge of his official duties, to leave the county of his residence or leave the city or town of his residence to perform such duties, he shall be paid his actual and necessary hotel and living expenses not to exceed the sum of three dollars per day and transportation expenses as shall be incurred, which account shall be itemized and approved by the presiding judge of the district court and certified to the county auditor of the county in which such expenses are incurred, and shall be paid in the same manner as the per diem of such reporter is paid. [SS15, §254-a2; C24, 27, 31, 35,§10811.]

10812 Transcript fee. Shorthand reporters shall also receive eight cents per hundred words for transcribing their official notes, to be paid for in all cases by the party ordering the same. [C73,§3777; C97,§254; SS15,§254-a2; C24, 27, 31, 35,§10812.]

10813 Taxed as part of costs. A charge of six dollars per day for reporting in all cases, except where the defendant in a criminal case is acquitted, shall be taxed as part of the costs in the case by the clerk of the court and paid into the county treasury when collected. [S13, §254-a3; C24, 27, 31, 35,§10813.]

10814 Residence. The district judge shall be a resident of the district in which he is elected. [C97,§227; SS15,§227; C24, 27, 31, 35, §10814.]

10815 Judge to be attorney. No person shall be eligible to the office of judge of a court of record, except of police courts, who is not, at the time of his election, an attorney at law, duly admitted to practice under the laws of this state. [S13,§281; C24, 27, 31, 35,§10815.]

40GA, ch 264, editorially divided

10816 Practice prohibited. During the time that he is holding such office he shall not practice as an attorney or counselor or give advice in relation to any action pending or about to be brought in any of the courts of the state. Nothing contained in this section shall be construed to prohibit police court judges from practicing as attorneys and counselors in civil matters. [C51,§1587; R60,§2674; C73,§187; C97, §281; S13,§281; C24, 27, 31, 35,§10816.]

10817 Judicial proceedings public. All judicial proceedings must be public, unless otherwise specially provided by statute or agreed upon by the parties. [C51,§1593; R60,§2683; C73,§189; C97,§283; C24, 27, 31, 35,§10817.]

Constitution, Art. I, §10

10818 When judge disqualified. A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding. This section shall not prevent him from disposing of any preliminary matter not affecting the merits of the case. [C51, §1595; R60,§2685; C73,§190; C97,§284; C24, 27, 31, 35,§10818.]

Computing relation, §63 subsection 24
Similar provision, §11823

10819 Sunday—permissible acts. No court can be opened nor any judicial business transacted on Sunday, except to:

1. Give instructions to a jury then deliberating on its verdict.
2. Receive a verdict or discharge a jury.
3. Exercise the powers of a single magistrate in a criminal proceeding.
4. Perform such other acts as are provided by law. [C51,§1596; R60,§2686; C73,§191; C97, §285; C24, 27, 31, 35,§10819.]

Analogous or related provisions, §§11064, 11653, 12082, 12179, 12560
Appearance on holiday, §11090

10820 Rules for conciliation. The judges of the district court for their districts, the judges of the superior court for their districts, and the judges of the municipal court for their districts may adopt and enforce rules prescribing the manner of settlement of controversies by conciliation and the duties of the clerks of the several courts in respect thereto; may appoint conciliators or any judge may act as such, but no judge shall preside at the trial of any action involving a controversy in which he has acted as conciliator. [C24, 27, 31, 35,§10820.]

10821 Procedure. No party shall be represented by counsel, except by consent of the conciliator. The proceedings shall be informal and no record thereof shall be preserved except the agreement of settlement signed by the parties. The judge may direct the same to be filed in the office of the clerk and judgment to be entered thereon. [C24, 27, 31, 35,§10821.]

10822 Condition to maintaining action. In districts in which rules for conciliation are adopted and the conciliators appointed, no person may maintain an action for the recovery of a disputed claim of one hundred dollars, or less, unless he alleges and proves by certificate of the conciliator that he has made a good-faith effort to settle the controversy. [C24, 27, 31, 35, §10822.]

Referred to in §10823
40GA, ch 265, §3, editorially divided

10823 Exceptions. Section 10822 shall not apply to suits aided by attachment, or to enforce a lien, or for replevin, or upon written contracts when due, or in cases where the petition states that the defendant is about to change his residence from the county, or where either party to the controversy is a nonresident of the county in which the conciliator is acting. [C24, 27, 31, 35,§10823.]

10824 Speedy determination. Such judges shall adopt rules for the speedy determination of causes involving comparatively small amounts as stated in such rules, and the clerks shall enter such causes upon a separate short cause calendar. It shall be the duty of the court to set aside a day or days each week when such causes will be heard. Before entering upon the trial of any such cause, the judge or court will, if practicable, bring the parties together and endeavor to secure a settlement thereof by conciliation or arbitration. [C24, 27, 31, 35,§10824.]

CHAPTER 479

CLERK OF THE DISTRICT COURT

10825 General duties.
10826 Payment of money—notice.
10827 Service of notice.
10828 Default—liability.
10829 Attestation of process.
10830 Records and books.
10831 Appearance docket—entries required.
10832 Entry of return of notice.
10832.1 Entry of lien—details required.
10833 Pleadings—when deemed filed—removal of papers.
10834 Subsequent proceedings.
10835 Not to be justice or attorney.
10836 Change in title—certification.
10837 Fees.
10838 Accounting for fees.
10839 Receipts—filing with auditor.
10840 Allowed claims—payment.
10841 Salary exclusive.

10825 General duties. The clerk of the district court shall keep his office at the county seat, attend the sessions of the district court himself or by deputy, keep the records, papers, and seal, and record the proceedings of the court as hereinafter directed, under the direction of the judge. [C51,§1577; R60,§343; C73, §194; C97,§287; C24, 27, 31, 35,§10825.]

Right to select newspapers for publication, §11102

10826 Payment of money — notice. When money to the amount of five hundred dollars or more is paid to the clerk to be paid to any person, and not disbursed within thirty days, he shall notify the person entitled to receive such money, or for whose account the money is paid, or the attorney of record of such person. [C24, 27, 31, 35,§10826.]

40GA, ch 266, §2, editorially divided

10827 Service of notice. The notice shall be by registered mail, and shall be mailed within forty days from the receipt of the money, to the last address of the person or attorney known to the clerk, and memorandum thereof entered on the proper record. [C24, 27, 31, 35,§10827.]

10828 Default—liability. If the clerk fails to give said notice, he and his bondsmen shall be personally liable for interest on such money from the date of the receipt thereof by him to the date the same is paid to the person or attorney. [C24, 27, 31, 35,§10828.]

10829 Attestation of process. All process issued by the clerk of the court shall bear date the day it is issued, and be attested in the name of the clerk who issued it, and under the seal of the court. [C51,§1592; R60,§2682; C73,§188; C97,§282; C24, 27, 31, 35,§10829.]

10830 Records and books. The records of said court shall consist of the original papers

filed in all proceedings, and the books to be kept by the clerk thereof as follows:

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

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

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

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

5. *Incumbrance book.* One to be called the "incumbrance book", in which the sheriff shall enter a statement of the levy of every attachment on real estate.

6. *Appearance or combination docket.* One to be known as the "appearance docket", which shall contain all matters required by law to be kept therein; but the entries provided for in this subsection and subsections 2 and 3 may be combined in one book, indexed as provided in subsection 1 hereof, which, when thus kept, shall be known as the "combination docket".

7. *Lien book.* One in which an index of all liens in said court shall be kept. [R60,§§345, 346; C73,§§196, 197; C97,§288; C24, 27, 31, 35, §10830.]

10831 Appearance docket—entries required. The clerk shall enter in said appearance docket the titles of all actions or special proceedings that shall be brought in the court, numbering them consecutively in the order in which they shall have been commenced, which numbers shall not be changed during the further progress thereof. In making such entries, the clerk shall set out the full names of all the parties, plaintiffs and defendants, as contained in the petition, or as subsequently made parties by any pleading, proceeding, or order. [C73,§198; C97,§289; C24, 27, 31, 35,§10831.]

10832 Entry of return of notice. When the original notice shall be returned to the office of the clerk, he shall enter in said docket so much of the return thereon as to show who of the parties have been served therewith, and the manner and time of service. [C73,§199; C97, §290; C24, 27, 31, 35,§10832.]

10832.1 Entry of lien — details required. When the clerk of the district court enters a lien, or indexes an action affecting real estate, on the records of his office, he shall, immediately in connection with the entry, enter the year, month, day, hour, and minute when the entry was made. [C31, 35,§10832-d1.]

10833 Pleadings — when deemed filed — removal of papers. The clerk shall, immediately upon the filing thereof, make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions, or papers of any other description in the cause; and no pleading of any description shall be considered as filed in the cause, or taken from the clerk's office, until the said memorandum is made. [C73,§200; C97,§291; C24, 27, 31, 35, §10833.]

10834 Subsequent proceedings. Immediately upon the sustaining or overruling of any demurrer or motion, the striking out or amendment of any pleading, trial of the cause, rendition of the verdict, entry of judgment, issuing of execution, or any other act or thing done in the progress of the cause, the like memorandum thereof shall be made in said docket, giving the date thereof, and the number of the book and page of the record where such entry shall have been made, it being intended that the appearance docket shall be an index from the commencement to the end of a suit. [C73,§201; C97, §292; C24, 27, 31, 35,§10834.]

10835 Not to be justice or attorney. The clerk or deputy clerk of the district court is prohibited from holding the office of justice of the peace, or practicing, directly or indirectly, as an attorney or solicitor in any of the courts of this state. [C73,§204; C97,§294; C24, 27, 31, 35, §10835.]

10836 Change in title—certification. Where the title of any real estate is finally established in any person or persons by judgment or decree of said court or of the supreme court, or where title to real estate is changed by judgment, decree, will, proceeding, or order in probate, the clerk of the district court shall certify the same, under the seal of said court, to the county auditor of the county in which said land is located. [C97,§295; C24, 27, 31, 35,§10836.]

Entry on transfer books, §10125

10837 Fees. The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury:

1. For filing any petition, appeal, or writ of error and docketing the same, one dollar and fifty cents.

2. For every attachment, fifty cents.

3. For every cause tried by jury, one dollar and fifty cents.

4. For every cause tried by the court, seventy-five cents.

5. For every equity case, one dollar and fifty cents.

6. For each injunction or other extraordinary process or order, one dollar.

7. For all causes continued on application of a party by affidavit, fifty cents.

8. For all other continuances, fifteen cents.

9. For entering any final judgment or decree, seventy-five cents.

10. For taxing costs, fifty cents.

11. For issuing execution or other process after judgment or decree, fifty cents.

12. For filing and properly entering and indorsing each mechanic's lien, one dollar, and in case a suit is brought thereon, the same to be taxed as other costs in the action.

13. For certificate and seal, fifty cents.

14. For filing and docketing transcript of judgment from another county or a justice of the peace or municipal court, fifty cents.

15. For entering any rule or order, twenty-five cents.

16. For issuing writ or order, not including subpoenas, fifty cents.

17. For issuing commission to take depositions, fifty cents.

18. For entering sheriff's sale of real estate, fifty cents.

19. For entering judgment by confession, one dollar.

20. For entering satisfaction of any judgment, twenty-five cents.

21. For all copies of record, or papers filed in his office, transcripts, and making complete record, ten cents for each one hundred words.

22. For taking and approving a bond and sureties thereon, fifty cents.

23. For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar. For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

24. In addition to the fees required in the preceding subsection, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with the clerk money sufficient to cover the expense of subpoenaing and paying the legal fees of witnesses for whom he may request a subpoena, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys aforesaid, and the residue, if any, except such as may be necessary to pay the cost of serving subpoenas, shall be returned by the clerk to the petitioner.

25. For certificates and seal to applications to procure pensions, bounties, or back pay for soldiers or other persons entitled thereto, no charge.

26. For making out transcripts in criminal cases appealed to the supreme court, for each one hundred words, ten cents.

27. In criminal cases, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant.

28. For issuing marriage licenses, one dollar and fifty cents each.

29. For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the property of the estate does not exceed three thousand dollars, three dollars; where such value is between three thousand dollars and five thousand dollars, five dollars; where such value is between five thousand dollars and seven thousand dollars, eight dollars; where such value is between seven thousand dollars and ten thousand dollars, ten dollars; where such value is between ten thousand dollars and twenty-five thousand dollars, fifteen dollars; for each additional twenty-five thousand dollars or major fraction thereof, there shall be taxed the further sum of ten dollars.

30. In addition to all other fees, for making a complete record in cases where the same is required by law or directed by an order of the court, for every one hundred words, ten cents. [C51,§§2527, 2531, 2532; R60,§§430, 436, 1852, 4136, 4140, 4141; C73,§§3781, 3782, 3787; C97, §296; S13,§296; C24, 27, 31, 35,§10837.]

10838 Accounting for fees. He shall, on the first Monday in January and July of each year, pay into the county treasury, for the use of the county, all other fees not belonging to his office, in his hands at the date of preceding payment and still unclaimed. [R60,§353; C73, §3786; C97,§300; C24, 27, 31, 35,§10838.]

Analogous provision, §143.1
C97,§300, editorially divided

10839 Receipts — filing with auditor. At the time of so doing, he shall take from the treasurer duplicate receipts therefor, giving the title of the cause and style of the court in which the same was pending, with the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive; one of which receipts he shall file with the county auditor. [R60,§354; C73,§3786; C97,§300; C24, 27, 31, 35,§10839.]

Analogous provision, §143.2

10840 Allowed claims — payment. The auditor shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and, on demand and proper proof by the person entitled thereto, shall issue warrant accordingly, providing such demand is made within five years from the time the county treasurer received said fund; and that unless and within one year from July 4, 1933, demand is made upon the county auditor and proper proof is made by the person entitled to any unclaimed fees, which have been paid to the county treasurer, as provided in this chapter, on and prior

to July 4, 1930, the person entitled to such unclaimed fees shall be deemed to have waived all right, claim or interest therein, and shall not be permitted to have or make claim therefor. [R60, §356; C73,§3786; C97,§300; C24, 27, 31, 35, §10840.]

Analogous provision, §143.3

10841 Salary exclusive. The clerk of the district court shall accept the salary herein provided, in full compensation of all services performed by him in his official capacity as such clerk of the district court. [C24, 27, 31, 35, §10841.]

Salary provided, §5230

CHAPTER 480

JURORS IN GENERAL

10842 Competency.
10843 Exemption.
10844 Jurors excused.
10845 False excuse—prohibited requests.
10846 Fees of jurors.
10847 Clerk to certify attendance.

10842 Competency. All qualified electors of the state, of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, and who can speak, write, and read the English language, are competent jurors in their respective counties. [C51,§1630; R60,§2720; C73,§227; C97,§332; C24, 27, 31, 35, §10842.]

Electors, Constitution, Art. II, §1; Amendment, 1868, page 57; Constitution, (U. S.), Amendment 19

10843 Exemption. The following persons are exempt from liability to act as jurors:

1. Persons holding office under the laws of the United States or of this state.
2. Practicing attorneys, physicians, licensed embalmers, registered nurses, chiropractors, osteopaths, veterinarians, registered pharmacists, dentists, and clergymen.
3. Acting professors or teachers of any college, school, or other institution of learning.
4. Persons disabled by bodily infirmity.
5. Persons over sixty-five years of age.
6. Active members of any fire company.
7. Persons conscientiously opposed to acting as a juror because of religious faith. [C51, §1631; R60,§2721: C73,§228; C97,§333; S13, §333; C24, 27, 31, 35,§10843.]

Members of national guard, §467.24; of fire companies, §1656; in municipal court, §10677

10844 Jurors excused. Any person may also be excused from serving on a jury when his own interests or those of the public will be materially injured by his attendance, or when the state of his own health, or the death or sickness of a member of his family, requires his absence from court; provided, however, that the court may, in its discretion, excuse any one or more of the jurors for any cause which to the court may seem advisable. [C51,§1632; R60, §2722; C73,§229; C97,§334; C24, 27, 31, 35, §10844.]

10845 False excuse — prohibited requests. Any person who knowingly makes any false affidavit, statement, or claim, for the purpose of relieving himself or another from serving as a juror, or any person who requests the judges of election to return his name as such juror, shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days, or the court may punish such person as for contempt. [C97,§334; C24, 27, 31, 35,§10845.]

Contempts, ch 536

10846 Fees of jurors. Jurors shall receive the following fees:

1. For each day's service or attendance in courts of record, including jurors summoned on special venire, three dollars, and for each mile traveled from his residence to the place of trial, ten cents.
2. For each day's service before a justice of the peace, one dollar.
3. No mileage shall be allowed talesmen or jurors before justices. [C51,§2545; R60,§4154; C73,§3811; C97,§354; S13,§354; C24, 27, 31, 35, §10846.]

10847 Clerk to certify attendance. Immediately after the adjournment of each term of a court of record, the clerk thereof shall certify to the county auditor a list of the jurors, with the number of days attendance to which each one is entitled. [C73,§3811; C97,§354; S13,§354; C24, 27, 31, 35,§10847.]

CHAPTER 481

JURY COMMISSIONS

10848 Ex officio commission to draw jurors.
10849 Appointive commission to select.
10850 Limitation on appointment.
10851 Manner of appointment.
10852 Clerk to notify.
10853 Vacancy.
10854 Qualification—tenure.
10855 Instructions to appointive commission.
10856 Instructions to judges of election.
10857 Compensation and expenses.
10858 Assistants.

10848 Ex officio commission to draw jurors. In all counties the clerk of the district court, the county auditor, and the county recorder shall, ex officio, constitute the jury commission to draw jurors, but shall receive no extra compensation as such. [C24, 27, 31, 35,§10848.]

40ExGA, HF 266, §7, editorially divided

10849 Appointive commission to select. In

each county having situated therein a city with a population of fourteen thousand or more, the judge or judges of the district court of the judicial district in which said county is located shall, on or before October 1 of each year in which the general election is held, appoint three competent electors as a jury commission to select and make lists of the names of persons to serve as grand and petit jurors and talesmen for the two years beginning January 1 after such election. [C24, 27, 31, 35,§10849.]

10850 Limitation on appointment. Not more than two members of the appointive commission shall be residents of the city in which the courthouse of the county in which they are appointed, is located, and no person shall be appointed who has solicited such appointment; nor shall any county officer or attorney at law be appointed a member of such commission. [C24, 27, 31, 35, §10850.]

10851 Manner of appointment. The appointment shall be in writing, signed by the judge, or a majority of the judges if more than one, and shall be filed and made a matter of record, in the office of the clerk of the district court. If, for any reason, any judge is unable to act, the appointment shall be signed by the judge, or a majority of the judges of such district, who are able to act. [C24, 27, 31, 35, §10851.]

10852 Clerk to notify. The clerk of the district court shall at once notify each appointive commissioner of his appointment. [C24, 27, 31, 35,§10852.]

10853 Vacancy. If a vacancy occurs in such appointive commission through death, removal, or inability of a member thereof to act, the judge or judges of the judicial district shall appoint some person to act during the remainder of such unexpired term. [C24, 27, 31, 35,§10853.]

10854 Qualification — tenure. The appointive commissioners shall qualify on or before the tenth day of October, following their appointment, by taking the oath of office required of civil officers. Said oath shall be subscribed by them and filed in the office of the clerk of the district court. They shall hold office for the term of two years and until their successors are duly appointed and qualified. [C24, 27, 31, 35,§10854.]

Oath, §1054

10855 Instructions to appointive commission. It shall be the duty of the judges of the district court to give instructions to appointive jury commissioners at the time of their appointment as to their duties, and to call their especial attention to the provisions of section 10860. [C24, 27, 31, 35,§10855.]

40ExGA, HF 266, §13, editorially divided

10856 Instructions to judges of election. When the county auditor transmits the certificate of apportionment of jurors to the judges of the several election precincts, he shall call the attention of such judges to their duties, especially as set forth in section 10860. [C24, 27, 31, 35,§10856.]

10857 Compensation and expenses. Each appointive commissioner shall, in addition to his actual expenses, receive a compensation of four dollars for each day employed by him in the discharge of his official duties. [C24, 27, 31, 35,§10857.]

10858 Assistants. The commissioners may employ such assistants in preparing the jury lists as they may deem necessary, and the board of supervisors shall allow reasonable compensation to such assistants. [C24, 27, 31, 35, §10858.]

CHAPTER 482

SELECTION OF JURORS

Referred to in §§10725, 10729, 10735

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10859 Jury lists. The appointive jury commission shall, on the second Monday after the general election is held in each even-numbered year, meet at the courthouse in rooms provided by the county, and, in accordance with the certificate of apportionment furnished by the county auditor, prepare, select, and return on blanks furnished by the county, the following lists, to wit:

1. *Grand jurors.* A list of names and addresses of one hundred fifty electors from which to select grand jurors.

2. *Petit jurors.* A list of names and addresses of electors equal to one-eighth of the whole number of qualified electors in said county who voted in the last preceding general state election as shown by the poll books, from which to select petit jurors.

3. *Talesmen.* A list of the names and addresses of electors equal to fifteen percent of the whole number of qualified electors who voted at the last preceding general election, as shown by the poll books, in the city or town in which the district court is held and in the township or townships in which such city or town is located (but in no case exceeding five hundred names) from which to select talesmen. [C51,§1633; R60, §2723; C73,§234; C97,§335; S13,§§335,-a; C24, 27, 31, 35,§10859.]

Referred to in §§10865, 10905

10860 Noneligible names. The appointive commission, in the preparation of said lists, shall not place thereon the name of any person:

1. Who is not an elector of the state.
2. Who is not of good moral character.
3. Who is not of sound judgment.
4. Who is not in full possession of the senses of hearing and seeing.
5. Who cannot speak, write, and read the English language.
6. Who has served in said county and in the district court as a grand or petit juror since the first day of January preceding the last general election.
7. Who by reason of the condition of his or her health, business, domestic duties, or other circumstances will probably be unable to serve as a juror.
8. Who has, directly or indirectly, requested that his or her name be placed on said lists, or on any of them.
9. Who has been exempted by law from jury service. [C97,§337; S13,§337; C24, 27, 31, 35,§10860.]

Referred to in §§10855, 10856, 10867
Exemption, §10843

10861 Judicial division of county. In counties which are divided for judicial purposes, and in which courts are held at more than one place, each division shall be treated as a separate county, and the grand and petit jurors and talesmen, selected to serve in the respective courts, shall be drawn from the division of the county in which the court is held, at which they are required to serve. [S13,§335-b; C24, 27, 31, 35, §10861.]

10862 Auditor to apportion and certify. On or before the date of said meeting of the appointive commission, the county auditor shall apportion the number of grand and petit jurors to be selected among the several election precincts, and the talesmen among the precincts from which the same are to be drawn, in each case as nearly as practicable in proportion to the number of votes polled in such precincts at the last general election, and certify said apportionment to such commission. [C51,§§1635, 1636; R60,§§2725, 2726; C73,§236; C97,§§336, 337; S13,§337; C24, 27, 31, 35,§10862.]

10863 Additional information by auditor. For the purpose of aiding the appointive commission, in making the lists aforesaid, the county auditor shall furnish said commission with the poll books of the last preceding general election, together with the names of all persons who have served as grand or petit jurors, after the first day of January, preceding the last general election. [C97,§337; S13,§337; C24, 27, 31, 35,§10863.]

Referred to in §10864

10864 Clerk to furnish data. The clerk of the district court shall furnish the auditor with the names of the jurors called for by section 10863. [C97,§337; S13,§337; C24, 27, 31, 35, §10864.]

10865 Apportionment in other counties. The county auditor, in counties having no appointive jury commission, shall, prior to furnishing the election judges the poll books, apportion the number of grand and petit jurors to be selected from among the several election precincts, and the talesmen among the precincts from which the same are to be selected, in each case as nearly as practicable in proportion to the number of votes polled in each precinct at the last preceding general election. Such apportionment shall be computed on the same basis as provided in section 10859. [C51,§§1635, 1636; R60,§§2725, 2726; C73,§§236, 237; C97,§336; S13,§337; C24, 27, 31, 35,§10865.]

10866 Certification of apportionment to judges. In all counties having no appointive jury commission, the county auditor shall, at the time of the furnishing of the poll books to the judges of election, furnish them also a certified statement of the number of persons apportioned to the respective precincts to be returned for each grand and petit jury list.

He shall also furnish the judges of election in the city or town in which the district court is held and in the township or townships in which the said city or town is located, with a certified statement of the number of persons to be returned as talesmen.

He shall also furnish the judges of each election precinct in the county with the names of all

persons who have served as grand or petit jurors since January 1 preceding. [C51,§§1635, 1636; R60,§§2725, 2726; C73,§§236, 237; C97,§337; S13, §337; C24, 27, 31, 35,§10866.]

10867 Duties of judges of election. The judges of election of the several precincts shall make selection of the requisite number of persons to serve as grand and petit jurors, and of talesmen, if any, and return separate lists of the names so selected to the county auditor with the return of the election, but shall not place on said lists the name of any person described in section 10860, or judges or clerks of the election. [C51,§1637; R60,§2727; C73,§238; C97, §337; S13,§337; C24, 27, 31, 35,§10867.]

Referred to in §10868

10868 Lists by board of supervisors. If the judges of election in any precinct fail to return any list as provided in section 10867, the board of supervisors shall, at the meeting held to canvass the votes cast at such election, make and certify such list or lists for the delinquent precincts, and the auditor shall file such certified lists in his office and cause copies thereof to be recorded in the proper election books. [R60, §§2727, 2728; C73,§238; C97,§337; S13,§337; C24, 27, 31, 35,§10868.]

10869 Certification. When the jury lists are completed, they shall be separately certified by the appointive commissioners, or by the judges of election for each precinct, as the case may be, in substantially the following form:

We, ..., ..., and ....., constituting the appointive jury commission for ....county,

or

We, ..., ..., and ....., the judges of election for the..... precinct of .... county,

do hereby certify that the foregoing..... ..... list

(Grand jury, or petit jury, or talesmen, as the case may be)

does not, to our knowledge and belief, contain the name of any person:

1. Who is not an elector of the state;
2. Who is not of good moral character;
3. Who is not of good sound judgment;
4. Who is not in full possession of the senses of hearing and seeing;
5. Who cannot speak, write, and read the English language;
6. Who has served in said county and in the district court as a grand or petit juror since the first of January preceding;
7. Who, by reason of the condition of his or her health, business, domestic duties, or other circumstances will probably be unable to serve as a juror;
8. Who has, directly or indirectly, requested that his or her name be placed on said list; or
9. Who has been exempted by law from jury service.
10. (In counties not having an appointive jury system.) Who is a judge or clerk at this election.

Dated at.....this.....day of.....A. D. 19..

.....
.....
.....
Jury commissioners for .....
county, Iowa. Or.....
.....
.....
.....
Judges of election for.....
precinct, ...county, Iowa.

[C97,§337; S13,§337; C24, 27, 31, 35,§10869.]

10870 Filing commissioners' lists. The appointive commissioners shall, after so certifying said lists, place the same in envelopes and on or before the first Monday of December of the year in which such lists are made, deposit the same with the county auditor, who shall file and record the same in the proper record. [C24, 27, 31, 35,§10870.]

Referred to in §10871

10871 Filing election judges' lists. The jury lists returned by the judges of election together with the lists prepared by the board of supervisors, if any, shall, on or before the day stated in section 10870, be filed with and recorded by the county auditor. [C51,§1638; R60,§2728; C73,§238; C97,§337; S13,§337; C24, 27, 31, 35,§10871.]

10872 Lists made official. The names entered upon said lists and returned as herein provided shall constitute the grand and petit jury lists, and the list of talesmen from which grand and petit jurors, and talesmen shall be selected, for the biennial period commencing with the first day of January next after the general election. [C24, 27, 31, 35,§10872.]

10873 Preparation of ballots. Within five days after such lists are deposited with the county auditor, the auditor and clerk of the court shall prepare therefrom separate ballots, which shall be uniform in size, shape, and appearance, and upon which the names and places of residence of all persons selected for grand and petit jurors and talesmen, shall be written. The names of the classes of jurors shall be kept separate, and each ballot shall be folded, so as to conceal the name written thereon. [C51, §1640; R60,§2730; C73,§240; C97,§§338, 342; C24, 27, 31, 35,§10873.]

10874 Names rejected. In preparing the said ballots the county auditor and clerk shall omit the names of all persons who have served as grand or petit jurors since January 1 preceding. [C51,§1640; R60,§2730; C73,§240; C97, §338; C24, 27, 31, 35,§10874.]

10875 Ballot boxes—sealing and custody. The ballots containing the names of the grand and petit jurors and talesmen shall be deposited in separate boxes which shall be plainly marked so as to show the class of jurors whose names are contained therein, and shall have but one aperture through which a hand may be inserted. The boxes shall then be sealed by the auditor,

in the presence of the clerk, and deposited with the clerk of the district court. [C97,§342; C24, 27, 31, 35,§10875.]

10876 Petit jury panel. Petit jurors, in no case less than twenty-four and always in such number as the court or judge may order, shall be drawn for each term at which such jurors are required. [C51,§1642; R60,§2732; C73,§231; C97,§346; C24, 27, 31, 35,§10876.]

10877 Maximum service required. No person shall be required to attend as a petit juror more than one term in the same biennial period. This exemption shall not apply to talesmen. [C51,§1639; R60,§2729; C73,§239; C97,§341; S13,§335-c; C24, 27, 31, 35,§10877.]

10878 Time for drawing. Petit and grand jurors shall be drawn by the ex officio commission at the office of the clerk of the district court and at a time to be fixed by said clerk. Said time shall not be less than twenty days nor more than thirty days before the first day of each term at which a petit or grand jury is required to be drawn. [C51,§1641; R60,§2731; C73,§241; C97,§342; C24, 27, 31, 35,§10878.]

Drawing for special terms, §10788

10879 Notice of drawing. The said clerk shall, at least five days prior to the day of such drawing, notify in writing the other members of the ex officio commission of the time and place of such drawing. [C24, 27, 31, 35,§10879.]

10880 Drawing of petit jurors. The members of the ex officio jury commission or a majority thereof, shall meet at the time and place fixed and shall draw from the petit jury box the required number of names of persons to serve as petit jurors, and the persons whose names are so drawn shall constitute the petit jurors for the next ensuing term of the court. [C24, 27, 31, 35,§10880.]

40ExGA, HF 266, §32, editorially divided

10881 Absence of commissioner. In the absence or inability to act of any one of the ex officio jury commissioners, his deputy shall act as such commissioner in his stead. [C24, 27, 31, 35,§10881.]

10882 Details of drawing. The appropriate box shall, at the time of the drawing, be first thoroughly shaken in the presence of the commissioners attending the drawing, and thereupon the seal on the opening shall be broken, likewise in the presence of the commissioners. One of said commissioners shall then, without looking at the ballots, successively draw the required number of names from the box, and successively pass said ballots to one of the other commissioners, who shall open said ballots as they are drawn, and read aloud the names thereon, and enter said names in writing on an appropriate list. [C51,§1641; R60,§2731; C73,§241; C97,§342; C24, 27, 31, 35, §10882.]

10883 Grand jury panel. A grand jury panel of twelve persons shall be drawn by the said commissioners from the grand jury box at the time of the drawing of the petit jury panel for the January term, and shall be drawn in the same manner and under the same conditions, except as otherwise provided, as are specified for the drawing of said petit jury panel. Such grand jury panel shall constitute the panel from which to select the grand jurors for one year. [C51,§§1641, 1642; R60,§§2731, 2732; C73,§241; C97,§339; C24, 27, 31, 35,§10883.]

10884 Maximum service permitted. No person on the list of grand jurors shall be eligible to serve as a grand juror except for one calendar year of the biennial period for which the list is made. [C51,§1642; R60,§2732; C73,§239; C97, §339; S13,§335-c; C24, 27, 31, 35,§10884.]

10885 Number from township limited. In drawing grand jurors, not more than one person shall be drawn as grand juror from any civil township, except when there are less than twelve civil townships in the county, in which case not more than two persons shall be drawn from any one township. [C97,§339; C24, 27, 31, 35,§10885.]

Effect of violation, §13781.1

10886 Rejecting names. If more persons shall be drawn from any civil township than is hereby authorized, or any person is drawn who has served during the preceding jury year as grand juror, it is the duty of the commissioners to reject all such names so drawn, and to proceed with the drawing until the required number of jurors shall be secured. [C97,§339; C24, 27, 31, 35,§10886.]

10887 Resealing of box. After the required number of grand or petit jurors shall have been drawn in the manner provided, and their names entered upon the list, the box or boxes shall again be sealed by the commission, and returned to the custody of the clerk. [C97,§342; C24, 27, 31, 35,§10887.]

10888 Filing list — precept. The clerk shall file said list or lists, in his office, and immediately issue his precept or precepts to the sheriff, commanding him to summon the persons so drawn to appear at the courthouse at ten o'clock a. m. of the second day of the term, or at such other time as the court or judge may order, to serve as petit or grand jurors, as the case may be. [C51,§1643; R60,§2733; C73,§§230, 241; C97,§§342, 345; C24, 27, 31, 35,§10888.]

10889 Sheriff to summon. The sheriff shall immediately obey such precepts, and on or before the day for the appearance of said jurors must make return thereof, and, on a failure to do so without sufficient cause, may be punished for contempt. [C51,§1644; R60,§2734; C73,§242; C97,§343; C24, 27, 31, 35,§10889.]

Contempts, ch 536

10890 Grand jurors summoned but once. Except when required at a special term, the twelve persons from which the grand jury is to be impaneled need not be summoned after the first term, but must appear at each succeed-

ing term during the year without summons, under the same penalty as though they had been summoned. [C51,§1646; R60,§2736; C73,§243; C97,§344; C24, 27, 31, 35,§10890.]

10891 Contempt. If any person summoned fail to appear without sending a sufficient excuse, the court may issue an order requiring him to appear and show cause why he should not be punished for contempt, and unless he render a sufficient excuse for such failure he may be punished for contempt. [C51,§1645; R60, §2735; C73,§230; C97,§345; C24, 27, 31, 35, §10891.]

Contempts, ch 536

10892 Cancellation for illegality. If the court shall, for any reason, determine that the petit jurors have been illegally drawn, selected, or summoned, it may set aside the precept, under which they were summoned, and direct a sufficient number to be drawn and summoned. In such case, the jury commission shall meet at the office of the clerk of the court, at such time as the court may direct, and in the manner provided for the drawing of an original panel, draw the number of petit jurors required, under the order of the court. The jurors so drawn and summoned shall be required to appear immediately, or at such time as the court may fix. [C97,§342; C24, 27, 31, 35,§10892.]

10893 Discharged jurors — resummoning. Jurors who have been discharged for any reason may, during the term, be resummoned if the business before the court necessitates such action. [C73,§233; C97,§348; C24, 27, 31, 35, §10893.]

10894 Additional petit jurors. The court during any term of court, may order as many additional jurors drawn for the term, or for the trial of any particular case, as may be deemed necessary. [C51,§1647; R60,§2737; C73,§232; C97,§347; C24, 27, 31, 35,§10894.]

Referred to in §10896

10895 Discharge of panel. The court may at any time discharge the panel of jurors, or any part of it, and order a new panel, or such number of jurors as may be deemed necessary to be drawn. [C24, 27, 31, 35,§10895.]

Referred to in §10896

10896 Method of drawing. The names of the jurors contemplated in sections 10894 and 10895 shall be drawn by the commissioners in the manner provided for the drawing of an original panel. [C73,§232; C97,§347; C24, 27, 31, 35,§10896.]

10897 Talesmen. If the court shall determine that it is probable talesmen will be needed to complete a jury, or if the regular panel has been exhausted, the clerk shall, in the presence of the court, draw such number of names as the court may order from the talesmen box to complete the jury. [C97,§349; C24, 27, 31, 35, §10897.]

10898 Rejection of names. The clerk, when the court directs, shall reject the names of those known to be unable to serve, or absent from the territory from which drawn. [C97,§349; C24, 27, 31, 35,§10898.]

10899 Talesmen summoned. The talesmen whose names have been so drawn shall, so far as possible, be immediately summoned by the sheriff to appear forthwith. [C97,§349; C24, 27, 31, 35,§10899.]

10900 Disposition of ballots. The names of talesmen so drawn, and who serve, shall be placed in a safe receptacle from time to time, until all the ballots are drawn from the talesmen's box, when such ballots shall be returned to the said box, to be drawn in like manner as before. [C97,§349; C24, 27, 31, 35,§10900.]

10901 Talesmen at large. When the parties to the cause, by agreement entered of record, waive the drawing of talesmen as above provided, the court may direct the sheriff to summon such talesmen from the body of the county. [C97,§349; C24, 27, 31, 35,§10901.]

10902 Disposition of ballots drawn. All ballots drawn, when the persons do not appear or do not serve (except when permanent ineligibility or disability is shown), shall be returned to the respective boxes from which drawn. The ballots of the petit jurors, except talesmen, so drawn, who appear and serve for any term, shall be destroyed. [C97,§350; C24, 27, 31, 35,§10902.]

10903 Special venire of talesmen. When a city or town is a party to a suit, the talesmen shall not be drawn therefrom, but in such cases the court shall order a special venire, or may order the talesmen drawn from the petit jury box. [C97,§351; C24, 27, 31, 35,§10903.]

10904 Delinquency of officers. Any officer whose duty it is to perform any of the services mentioned in this chapter, who shall intentionally fail to perform them as required by law, or who shall act corruptly in the discharge of such duties or any of them, shall be imprisoned in the county jail not less than six months, nor more than one year. [C97,§352; C24, 27, 31, 35,§10904.]

10905 Correcting illegality in original lists. Should the court for any reason determine that there has been such substantial failure to comply with the law relative to the selection, preparation, or return of grand, petit, or talesmen lists that lawful grand or petit jurors or talesmen cannot be drawn, or when the petit jury list as provided for in subsection 2 of section 10859 becomes exhausted, or insufficient for the needs of the court, said court shall order the appointive jury commissioners or ex officio jury commissioners as the case may be, to convene at the courthouse at a named time and to prepare lists in lieu of those lists which have been found to be illegal, or such additional list or lists as the court may deem necessary. If the ex officio commissioners are called upon to act, they shall make up the lists in the same manner as such lists are required to be made by appointive

commissioners. [S13,§337-a; C24, 27, 31, 35, §10905.]

10906 Notice to commissioners. Whenever the commission shall be required to meet for the purpose of drawing jurors under the order of the court, the clerk of the court shall at once notify each commissioner of such order, and the time fixed for the meeting of the commission; and, if deemed necessary, the court may order the notice to be served by the sheriff. [C24, 27, 31, 35,§10906.]

CHAPTER 483

ATTORNEYS AND COUNSELORS

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10907 Admission to practice. The power to admit persons to practice as attorneys and counselors in the courts of this state, or any of them, is vested exclusively in the supreme court. [C97,§309; C24, 27, 31, 35,§10907.]

10908 Qualifications for admission. Every applicant for such admission must be at least twenty-one years of age, of good moral character, and an inhabitant of this state, and must have actually and in good faith pursued a regular course of study of the law for at least three full years, either in the office of a member of the bar in regular practice of this state or other state, or of a judge of a court of record thereof, or in some reputable law school in the United States, or partly in such office and partly in such law school; but, in reckoning such period of study, the school year of any such law school, consisting of not less than thirty-six weeks exclusive of vacations, shall be considered equivalent to a full year. Every such applicant for admission must also have actually and in good faith acquired a general education substantially equivalent to that involved in the completion of a high school course of study of at least four years in extent. [C51,§1610; R60,§2700; C73, §208; C97,§310; S13,§310; C24,27,31,35,§10908.]

10909 Examinations. Every such applicant shall also be examined by the court, or by a commission of not less than five members constituted as hereinafter provided, as to his learning and skill in the law; and the court must be satisfied, before admitting to practice, that the applicant has actually and in good faith devoted the time hereinbefore required to the study of law, and possesses the requisite learning and skill therein, and has also the general education required by this chapter. The sufficiency of the general education of the applicant may be determined by examination before the commission, or in such other manner as the supreme court may by rule prescribe. [C97,§311; S13,§311; C24, 27, 31, 35,§10909.]

10910 Board of law examiners. The attorney general shall, by virtue of his office, be a member of, and the chairman of, the commission provided for by this chapter, and the court shall appoint from the members of the bar of this state at least four other persons who, with the attorney general, shall constitute said commission, which shall be known as the board of law examiners. [S13,§311-a; C24, 27, 31, 35, §10910.]

S13,§311-a, editorially divided

10911 Term of appointment — vacancies. Each person appointed shall serve for two years, except that in case of a vacancy during the term of office of any commissioner his successor shall be appointed only for the remainder of such term. [S13,§311-a; C24, 27, 31, 35,§10911.]

10912 Oath—compensation. The members thus appointed shall take and subscribe an oath to be administered by one of the judges of the supreme court to faithfully and impartially discharge the duties of the office, and shall receive such compensation as may be allowed by the supreme court out of the fund arising from the examination fees hereinafter provided for. [S13, §311-a; C24, 27, 31, 35,§10912.]

10913 Temporary appointments—compensation. The supreme court may also appoint from time to time, when necessary, temporary examiners to assist the commission, who shall

serve for one examination only, and shall receive such compensation as the court may allow, to be paid from the fund aforesaid. [S13, §311-a; C24, 27, 31, 35,§10913.]

10914 Fees—how used. Every applicant for admission shall pay to the clerk of the supreme court an examination fee of five dollars, payable before the examination is commenced. Practitioners from other states seeking admission to practice in this state as provided by law shall pay an admission fee of ten dollars. The fees thus paid to the clerk shall be retained by him as a special fund to be appropriated as otherwise provided; and any amount thereof remaining in his hands unappropriated on the thirtieth day of June of each year shall be turned over to the state treasury. [S13,§311-b; C24, 27, 31, 35,§10914.]

10915 Students in law department of university. Students in the law department of the state university, who are recommended by the faculty of said department as candidates for graduation and as persons of good moral character, who have actually and in good faith studied law for the time and in the manner required by statute, at least one year of such study having been as a student in said department, may be examined at the university by not less than three members of said commission with the addition of such temporary members as may be appointed by the court in accordance with the provisions of this chapter, and upon the certificate of such examiners, that such candidates possess the learning and skill requisite for the practice of law, they shall be admitted without further examination. [C73, §209; C97,§312; S13,§312; C24,27,31,35,§10915.]

10916 Practitioners from other states. Any person a resident of this state having been admitted to the bar of any other of the United States may, in the discretion of the court, be admitted to practice in this state without examination or proof of period of study, as hereinbefore provided, on proof of the other qualifications required by this chapter, and on satisfactory proof that he has practiced law regularly for not less than one year in the state where admitted to practice, after having been admitted to the bar according to the laws of such state, or on satisfactory proof that he has taught law regularly for one year in a recognized law school in the state of Iowa, after admission to the bar of any other of the United States. [C97, §313; S13,§313; C24, 27, 31, 35,§10916.]

10917 Oath. All persons on being admitted to the bar shall take an oath or affirmation to support the constitution of the United States and of the state of Iowa, and to faithfully discharge the duties of an attorney and counselor of this state according to the best of their ability. [C51,§1613; R60,§2703; C73,§208; C97, §314; C24, 27, 31, 35,§10917.]

10918 Mode of examination. The supreme court may by general rules prescribe the mode in which examinations under this chapter shall be conducted, and in which the qualifications required as to age, residence, character, general education and term of study shall be proved, and may make any other and further rules, not inconsistent with this chapter, for the purpose of carrying out its object and intent. [C97. §315; S13,§315; C24, 27, 31, 35,§10918.]

10919 Nonresident attorney — appointment of local attorney. Any member of the bar of another state, actually engaged in any cause or matter pending in any court of this state, may be permitted by such court to appear in and conduct such cause or matter while retaining his residence in another state, without being subject to the foregoing provisions of this chapter; provided that at the time he enters his appearance he files with the clerk of such court the written appointment of some attorney resident in the county where such suit is pending, upon whom service may be had in all matters connected with said action, with the same effect as if personally made on such foreign attorney within such county. In case of failure to make such appointment, such attorney shall not be permitted to practice as aforesaid, and all papers filed by him shall be stricken from the files. [C51,§1612; R60,§2702; C73,§210; C97, §316; S13,§316; C24, 27, 31, 35,§10919.]

10920 Duties of attorneys and counselors. It is the duty of an attorney and counselor:

1. To maintain the respect due to the courts of justice and judicial officers.
2. To counsel or maintain no other actions, proceedings, or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense.
3. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law.
4. To maintain inviolate the confidence, and, at any peril to himself, to preserve the secret of his client.
5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.
6. Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest.
7. Never to reject for any consideration personal to himself the cause of the defenseless or oppressed. [C51,§1614; R60,§2704; C73,§211; C97,§317; C24, 27, 31, 35,§10920.]

10921 Deceit or collusion. An attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages to be recovered in a civil action. [C51,§1615; R60, §2705; C73,§212; C97,§318; C24, 27, 31, 35, §10921.]

10922 Authority. An attorney and counselor has power to:

1. Execute in the name of his client a bond, or other written instrument, necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding, or final judgment rendered therein.

2. Bind his client to any agreement, in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court.

3. Receive money claimed by his client in an action or proceeding during the pendency thereof, or afterwards, unless he has been previously discharged by his client, and, upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment. [C51,§1616; R60,§2706; C73,§213; C97,§319; C24, 27, 31, 35,§10922.]

Attorney as surety, §§11251, 12755

10923 Proof of authority. The court may, on motion of either party and on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of the several adverse parties, to produce or prove by his own oath, or otherwise, the authority under which he appears, and, until he does so, may stay all proceedings by him on behalf of the parties for whom he assumes to appear. [C51,§1617; R60,§2707; C73,§214; C97,§320; C24, 27, 31, 35,§10923.]

10924 Attorney's lien—notice. An attorney has a lien for a general balance of compensation upon:

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

2. Money in his hands belonging to his client.

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

4. After judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor, by entering the same in the judgment or combination docket opposite the entry of the judgment. [C51,§1618; R60,§2708; C73,§215; C97,§321; C24, 27, 31, 35, §10924.]

10925 Release of lien by bond. Any person interested may release such lien by executing a bond in a sum double the amount claimed, or in such sum as may be fixed by any district judge, payable to the attorney, with security to be approved by the clerk of the supreme or district court, conditioned to pay any amount finally found due the attorney for his services, which amount may be ascertained by suit on the bond. [C51,§1619; R60,§2709; C73,§216; C97,§322; C24, 27, 31, 35,§10925.]

C97,§322, editorially divided

10926 Automatic release. Such lien will be released, unless the attorney, within ten days after demand therefor, files with the clerk a full and complete bill of particulars of the services and amount claimed for each item, or written contract with the party for whom the services were rendered. [C73,§216; C97,§322; C24, 27, 31, 35,§10926.]

10927 Unlawful retention of money. An attorney who receives the money or property of his client in the course of his professional business, and refuses to pay or deliver it in a reasonable time, after demand, is guilty of a misdemeanor. [C51,§1627; R60,§2717; C73,§224; C97,§330; C24, 27, 31, 35,§10927.]

Referred to in §10928
Punishment, §12894

10928 Excuse for nonpayment. When the attorney claims to be entitled to a lien upon the money or property, he is not liable to the penalties of section 10927 until the person demanding the money proffers sufficient security for the payment of the amount of the attorney's claim, when it is legally ascertained. Nor is he in any case liable as aforesaid, provided he gives sufficient security that he will pay over the whole or any portion thereof to the claimant when he is found entitled thereto. [C51,§§1628, 1629; R60, §§2718, 2719; C73,§§225, 226; C97,§331; C24, 27, 31, 35,§10928.]

10929 Revocation of license. Any court of record may revoke or suspend the license of an attorney or counselor at law to practice therein, and a revocation or suspension in one county operates to the same extent in the courts of all other counties. [C51,§1620; R60,§2710; C73, §217; C97,§323; C24, 27, 31, 35,§10929.]

10930 Grounds of revocation. The following are sufficient causes for revocation or suspension:

1. When he has been convicted of a felony, or of a misdemeanor involving moral turpitude; in either of which cases the record of conviction is conclusive evidence.

2. When he is guilty of a willful disobedience or violation of the order of the court, requiring him to do or forbear an act connected with or in the course of his profession.

3. A willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed.

4. Doing any other act to which such a consequence is by law attached.

5. Soliciting legal business for himself or office, either by himself or representative. Nothing herein contained shall be construed to prevent or prohibit listing in legal or other directories, law lists and other similar publications, or the publication of professional cards in any such lists, directories, newspapers or other publica-

tion. [C51,§1621; R60,§2711; C73,§218; C97, §324; C24, 27, 31, 35,§10930.]

10931 Proceedings. The proceedings to remove or suspend an attorney may be commenced by the direction of the court or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter, the accusation must be drawn up and sworn to by the person making it. [C51, §1622; R60,§2712; C73,§219; C97,§325; S13, §325; C24, 27, 31, 35,§10931.]

S13,§325, editorially divided

10932 Costs. If an action is commenced by direction of the court, the costs shall be taxed and disposed of as in criminal cases; provided that no allowance shall be made in such case for the payment of attorney fees. [S13,§325; C24, 27, 31, 35,§10932.]

10933, 10934 Rep. by 42GA, ch 220

10934.1 Order for appearance — notice — service. If the court deem the accusation sufficient to justify further action, it shall cause an order to be entered requiring the accused to appear and answer in the court where the accusation or charge shall have been filed on a day therein fixed, and shall cause a copy of the accusation and order to be served upon him personally. [C51,§1623; R60,§2713; C73,§220; C97, §326; C24,§10933; C27, 31, 35,§10934-b1.]

42GA, ch 220, §1, editorially divided

10934.2 Copy of accusation—duty of clerk. The clerk of the district court shall immediately certify to the clerk of the supreme court a copy of the accusation. [C27, 31, 35,§10934-b2.]

10934.3 Notice to attorney general—duty. Thereupon the chief justice of the supreme court shall notify the attorney general of such accusation and cause a copy thereof to be delivered to him, and it shall thereupon become the duty of the attorney general to superintend either through his office, or through a special assistant to be designated by him, the prosecution of such charges. [C27, 31, 35,§10934-b3.]

10934.4 Trial court. The supreme court shall designate three district judges to sit as a court to hear and decide such charges. [C27, 31, 35,§10934-b4.]

10934.5 Time and place of hearing. The hearing shall be at such time as the chief justice of the supreme court may designate, and shall be held within the county where the accusation was originally filed. [C27, 31, 35,§10934-b5.]

10934.6 Determination of issues. The determination of all issues shall be heard before the said judges selected by the supreme court as herein provided for. [C27, 31, 35,§10934-b6.]

10934.7 Record and judgment. The records and judgment at such trial shall constitute a part of the records of the district court in the county in which the accusations are originally filed. [C27, 31, 35,§10934-b7.]

10934.8 Pleadings—evidence—preservation. To the accusation, the accused may plead or demur and the issues joined thereon shall in all cases be tried by said judges so selected and all of the evidence at such trial shall be reduced to writing, filed and preserved. [C51,§1624; R60,§2714; C73,§221; C97,§327; C24,§10934; C27, 31, 35,§10934-b8.]

10934.9 Costs and expenses. The court costs incident to such proceedings, and the reasonable expense of said judges in attending said hearing after being approved by the supreme court shall be paid as court costs by the executive council. [C27, 31, 35,§10934-b9.]

10935 Plea of guilty or failure to plead. If the accused plead guilty, or fail to answer, the court shall proceed to render such judgment as the case requires. [C51,§1625; R60,§2715; C73, §222; C97,§328; C24, 27, 31, 35,§10935.]

10936 Appeal. In case of a removal or suspension being ordered, an appeal therefrom lies to the supreme court, and all the original papers, together with a transcript of the record, shall thereupon be transferred to the supreme court, to be there considered and finally acted upon. A judgment of acquittal by a court of record is final. [C51,§1626; R60,§2716; C73,§223; C97, §329; C24, 27, 31, 35,§10936.]

10937 Certification of judgment. When a judgment has been entered in any court of record in the state revoking or suspending the license of any attorney at law to practice in the said court, the clerk of the court in which the judgment is rendered shall immediately certify to the clerk of the supreme court the order or judgment of the court in said cause. [S13,§329-a; C24, 27, 31, 35,§10937.]

TITLE XXXI

GENERAL PROVISIONS RELATING TO CIVIL PRACTICE AND PROCEDURE

CHAPTER 484

FORMS OF ACTIONS

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10938 "Proceedings" classified. Every proceeding in court is an action, and is civil, special, or criminal. [R60,§2605; C73,§2504; C97, §3424; C24, 27, 31, 35,§10938.]

10939 Civil and special actions. A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party, known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for the recovery of a penalty or forfeiture.

Every other proceeding in a civil case is a special action. [R60,§§2606, 2607, 2609; C73,§§2505, 2506; C97,§3425; C24, 27, 31, 35,§10939.]

10940 Forms of action. All forms of action are abolished, but proceedings in civil actions may be of two kinds, ordinary or equitable. [R60, §§2608, 2610; C73,§2507; C97,§3426; C24, 27, 31, 35,§10940.]

10941 Equitable proceedings. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive. [R60,§2611; C73,§2508; C97, §3427; C24, 27, 31, 35,§10941.]

10942 Action on note and mortgage. An action on a note, together with a mortgage or deed of trust for the foreclosure of the same, shall be by equitable proceedings. An action on the bond or note alone, without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings. [R60,§4179; C73,§2509; C97, §3428; C24, 27, 31, 35,§10942.]

Actions on certain judgments prohibited, ch 487.1
Related provision, §12375

10943 Ordinary proceedings. In all other cases, unless otherwise provided, the plaintiff must prosecute his action by ordinary proceedings. [R60,§2612; C73,§2513; C97,§3431; C24, 27, 31, 35,§10943.]

10944 Error — effect of. An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer to the proper docket. [R60,§2613; C73,§2514; C97,§3432; C24, 27, 31, 35,§10944.]

10945 Correction by plaintiff. Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards on motion in court. [R60,§2614; C73,§2515; C97,§3433; C24, 27, 31, 35,§10945.]

10946 Correction on motion. The defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provisions of this code wrong proceedings have been adopted. [R60,§§2615, 2616; C73,§2516; C97,§3434; C24, 27, 31, 35,§10946.]

10947 Equitable issues. Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings. [R60,§2617; C73,§2517; C97,§3435; C24, 27, 31, 35,§10947.]

10948 Court may order change. If there is more than one party plaintiff or defendant, who fail to unite on the kind of proceedings to be adopted, the court, on its own motion, may direct such proceedings to be changed to the same extent as if the parties had united in asking it to

be done. [C73,§2518; C97,§3436; C24, 27, 31, 35, §10948.]

10949 Errors waived. An error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the time and in the manner prescribed in this chapter; and all errors in the decisions of the court are waived unless excepted to at the time, save final judgments and interlocutory or final decrees entered of record. [R60,§2619; C73, §2519; C97,§3437; C24, 27, 31, 35,§10949.]

10950 Uniformity of procedure. The provisions of this code concerning the prosecution of a civil action apply to both ordinary and equitable proceedings unless the contrary appears, and shall be followed in special actions not otherwise regulated, so far as applicable. [C51,§2516; R60,§§2620, 4173; C73,§2520; C97, §3438; C24, 27, 31, 35,§10950.]

10951 Title of cause. The title of the cause shall not be changed in any of its stages of transit from one court to another. [R60,§2949; C73,§2721; C97,§3631; C24, 27, 31, 35,§10951.]

Similar provision, §12830

10952 Judgments annulled in equity. Judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. But such judgment does not prevent the recovery of any claim, though such claim might have been used by way of counterclaim in the action on which the judgment was recovered. [R60, §2621; C73,§2522; C97,§3440; C24, 27, 31, 35, §10952.]

10953 Action to obtain discovery. No action to obtain a discovery shall be brought, except, where a person or corporation is liable either jointly or severally with others by the same contract, an action may be brought against any parties who are liable, to obtain discovery of the names and residences of the others. [R60,§4127; C73,§2523; C97,§3441; C24, 27, 31, 35,§10953.]

C97,§3441, editorially divided

10954 Petition for discovery. In such action the plaintiff shall state in his petition, in effect, that he has used due diligence, without success, to obtain the information asked to be discovered, and that he does not believe the parties to the contract who are known to him have property sufficient to satisfy his claim. The petition shall be verified. [R60,§4127; C73, §2523; C97,§3441; C24, 27, 31, 35,§10954.]

10955 Costs. The cost of such action shall be paid by the plaintiff unless the discovery be resisted. [R60,§4127; C73,§2523; C97,§3441; C24, 27, 31, 35,§10955.]

10956 Successive actions. Successive actions may be maintained upon the same contract or transaction whenever, after the former action, a new cause of action has arisen thereon or therefrom. [R60,§4128; C73,§2524; C97,§3442; C24, 27, 31, 35,§10956.]

10957 Actions survive. All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same. [C51,§2502; R60,§3467; C73, §2525; C97,§3443; C24, 27, 31, 35,§10957.]

Referred to in §10959

10958 Civil remedy not merged in crime. The right of civil remedy is not merged in a public offense, but may in all cases be enforced independently of and in addition to the punishment of the latter. [C51,§2500; R60,§4110; C73, §2526; C97,§3444; C24, 27, 31, 35,§10958.]

Referred to in §10959

10959 Actions by or against legal representatives—substitution. Any action contemplated in sections 10957 and 10958 may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived. If such is continued against the legal representative of the defendant, a notice shall be served on him as in case of original notices. [C51, §1699; R60,§4111; C73,§2527; C97,§3445; C24, 27, 31, 35,§10959.]

Manner of service, §11060

CHAPTER 485

JOINDER OF ACTIONS

10960 When permitted.
10961 Separate trial of joined actions.
10962 Plaintiff may strike out.
10963 Motion to strike out.
10964 Misjoinder waived.
10965 Separate petitions.
10966 Principal and agent.

10960 When permitted. Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same rights, and if action on all may be brought and tried in that county, may be joined in the same petition. [C51,§1751; R60,§2844; C73, §2630; C97,§3545; C24, 27, 31, 35,§10960.]

C97,§3545, editorially divided

10961 Separate trial of joined actions. The court may direct all or any portion of the issues

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joined to be tried separately, and may determine the order thereof. [C51,§1751; R60,§2844; C73, §2630; C97,§3545; C24, 27, 31, 35,§10961.]

10962 Plaintiff may strike out. The plaintiff may at any time before the final submission of the case to the jury, or to the court when the trial is by the court, strike from his petition any cause of action or part thereof. [R60,§2845; C73, §2631; C97,§3546; C24, 27, 31, 35,§10962.]

10963 Motion to strike out. The court, at any time before the answer is filed, upon motion of the defendant, shall strike out of the petition any cause or causes of action improperly joined with others. [R60,§2846; C73,§2632; C97,§3547; C24, 27, 31, 35,§10963.]

Referred to in §10964

10964 Misjoinder waived. All objections to the misjoinder of causes of action shall be waived, unless made as provided in section 10963. [R60,§2847; C73,§2633; C97,§3548; C24, 27, 31, 35,§10964.]

10965 Separate petitions. When a motion is sustained on the ground of misjoinder of causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in his discretion, to file several petitions, each including such of said causes of action as may be joined, and an action shall be docketed for each of said petitions, and the causes shall be proceeded in without further service, the court fixing by order the time of pleading therein. [R60, §2848; C73,§2634; C97,§3549; C24, 27, 31, 35, §10965.]

10966 Principal and agent. In any action in which the liability of a party depends upon the existence of the relation of principal and agent, a cause of action against the principal may be joined in the same suit with any cause of action against the agent, growing out of the same transaction where either cause of action is dependent upon the fact of agency, and the issue of agency shall be tried with the other issues of the respective causes of action. [C24, 27, 31, 35, §10966.]

CHAPTER 486

PARTIES TO ACTIONS

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11003 Failure to appear.
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11005 Sheriff may interplead.
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10967 Real party in interest. Every action must be prosecuted in the name of the real party in interest. [C51,§1676; R60,§2757; C73,§2543; C97,§3459; C24, 27, 31, 35,§10967.]

C97,§3459, editorially divided

10968 Plaintiff as legal representative. An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted. [C51,§1676; R60,§2758; C73,§2544; C97,§3459; C24, 27, 31, 35,§10968.]

10969 Plaintiffs joined. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may join as plaintiffs, except as otherwise provided. [C51, §1678; R60,§2759; C73,§2545; C97,§3460; C24, 27, 31, 35,§10969.]

40GA, ch 267, editorially divided

10970 United interests in equity. Where two or more persons claim a right of recovery against the same party or parties on like causes of action cognizable in equity, they may join as parties plaintiff, and relief may be granted to each according to his interest. [C24, 27, 31, 35, §10970.]

10971 Assignments—exception. The assignment of a thing in action shall be without prejudice to any counterclaim, defense, or cause of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and

upon a valuable consideration before due. [R60, §2760; C73,§2546; C97,§3461; C24, 27, 31, 35, §10971.]

Assignment of accounts and nonnegotiable instruments, §§9451-9456

10972 Defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved in the action, except as otherwise expressly provided. [R60, §2761; C73,§2547; C97,§3462; C24, 27, 31, 35, §10972.]

10973 United interest. Persons having a united interest must be joined on the same side, either as plaintiffs or defendants, except as otherwise expressly provided; but when some who should be made plaintiffs refuse to join, they may be made defendants, the reason therefor being set forth in the petition. [C51,§1679; R60,§2762; C73,§2548; C97,§3463; C24, 27, 31, 35,§10973.]

10974 One suing for all. When the question is one of a common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. [C51,§1680; R60,§2763; C73,§2549; C97,§3464; C24, 27, 31, 35,§10974.]

10975 Joint and several obligations. Where two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders, and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives. [C51,§§1681, 1682; R60,§2764; C73,§2550; C97,§3465; C24, 27, 31, 35,§10975.]

Separate trials, §11437
C97,§3465, editorially divided

10976 Adjudication. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others. [R60,§2764; C73,§2550; C97,§3465; C24, 27, 31, 35,§10976.]

10977 Joint common carriers. In all cases where a railway company bills property to a point beyond the terminus of its own railway and provides by contract that it shall not be liable for the destruction of or damage to such property beyond the terminus of its own railway, and the said property is damaged or destroyed between the place of shipment and place of destination to which it was billed, the initial carrier and the connecting carrier or carriers if more than one, over whose line or lines of railway the property shall have been carried between the place of shipment and said place of destination, may be joined as defendants in one action. [S13,§2074-a; C24, 27, 31, 35,§10977.]

S13,§2074-a, editorially divided

10978 Venue. Said action may be brought in any county from or into which shipment shall be made, or suit may be brought in any county through which shipment shall be made. [S13, §2074-a; C24, 27, 31, 35,§10978.]

General provision as to venue, §11041

10979 Service. Service of original notice may be made on any of said carriers in any county of the state, where the carrier to be served has a station agent, by serving such notice on such station agent. [S13,§2074-a; C24, 27, 31, 35,§10979.]

General provision as to service, §11072

10980 Liability of joint carriers. On proof being made by the owner of the property shipped, that the same has been destroyed or damaged in transit between the said place of shipment and the place of destination, the liability of a common carrier shall attach to all the defendants, and judgment shall be entered accordingly against them all unless one or more of the defendants shall prove that it was not or they were not liable, in which case judgment shall go only against the remaining defendant or defendants. [S13,§2074-b; C24, 27, 31, 35, §10980.]

10981 Necessary parties. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, it must order them to be brought in. [C51,§1683; R60,§2765; C73,§2551; C97,§3466; C24, 27, 31, 35,§10981.]

10982 Public bond. When a bond or other instrument given to the state or county or other municipal or school corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, action may be brought thereon in the name of any person intended to be thus secured, who has sustained an injury in consequence of a breach thereof, except when otherwise provided. [C51,§1693; R60,§2787; C73,§2552; C97,§3467; C24, 27, 31, 35,§10982.]

10983 Partnership. Actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof; and a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice. A new action may be brought against the members not made parties, on the original cause of action. [C51, §§1690, 1691; R60,§2785; C73,§2553; C97,§3468; C24, 27, 31, 35,§10983.]

10984 Foreign corporations. Foreign corporations may sue in the courts of this state in

their corporate name. [C51,§1695; R60,§2789; C73,§2554; C97,§3469; C24, 27, 31, 35,§10984.]

10985 Seduction. An unmarried female may maintain, as plaintiff, an action for her own seduction. [C51,§1696; R60,§2790; C73,§2555; C97,§3470; C24, 27, 31, 35,§10985.]

10986 Injury or death of minor child. A father, or, in case of his death or imprisonment or desertion of his family, the mother, may as plaintiff maintain an action for the expenses and actual loss of service resulting from the injury or death of a minor child. [C51,§1697; R60, §2792; C73,§2556; C97,§3471; C24, 27, 31, 35, §10986.]

10987 Unknown defendant. When the precise name of any defendant cannot be ascertained, he may be described as accurately as practicable, and when it is ascertained it shall be substituted in the proceedings. [C51,§1694; R60,§2788; C73,§2557; C97,§3472; C24, 27, 31, 35,§10987.]

10988 Written instrument. When an action is founded on a written instrument, it may be brought by or against any of the parties thereto by the same name and description as those by which they are designated in such instrument. [C51,§1692; R60,§2786; C73,§2558; C97,§3473; C24, 27, 31, 35,§10988.]

10989 Prisoner in penitentiary. No judgment can be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court. [R60,§2784; C73,§2559; C97,§3474; C24, 27, 31, 35,§10989.]

10990 Actions by state. The state may maintain actions in the same manner as natural persons, but no security shall be required in such cases. [R60,§2793; C73,§2560; C97,§3475; C24, 27, 31, 35,§10990.]

Action to abate nuisance, §7782
Attachment by state, ch 512
Right to bid under execution sale, ch 449

10990.1 Actions against state. Upon the conditions herein provided for the protection of the state, the consent of the state be and it is hereby given, to be made a party in any suit or action which is now pending or which may hereafter be brought in any of the district courts of Iowa, any of the United States district courts within the state or in any other court of or in Iowa having jurisdiction of the subject matter, involving the title to real estate, the partition of real estate, the foreclosure of liens or mortgages against real estate or the determination of the priorities of liens or claims against real estate, for the purpose of obtaining an adjudication touching or pertaining to any mortgage or other lien or claim which the state may have or claim to the real estate involved. [C35,§10990-g1.]

Referred to in §10990.3

10990.2 Service on state. Service upon the state shall be made by serving a copy of the original notice with a copy of the petition upon the county attorney for the county, or counties, in which the real estate is located, and by sending a copy of the original notice and petition by registered mail to the attorney general, at Des Moines, at least twenty days before the first day of the next term of court. [C35,§10990-g2.]

Referred to in §10990.3

10990.3 Rights and liabilities. After compliance with sections 10990.1 and 10990.2, the state shall have the same standing as any other defendant and any and all orders, judgments or decrees rendered and entered shall be binding on the state, the same as on any other defendant, and the state shall have the same rights with respect thereto as any other defendant similarly situated. [C35,§10990-g3.]

10991 Nonabatement by transfer of interest. No action shall abate by the transfer of any interest therein during its pendency, and new parties may be brought in, as may be necessary. [C51,§1698; R60,§2794; C73,§2561; C97, §3476; C24, 27, 31, 35,§10991.]

10991.1 Women—injury or death. In any action for damages because of the wrongful or negligent injury or death of a woman, there shall be no disabilities or restrictions, and recovery may be had on account thereof in the same manner as in cases of damage because of the wrongful or negligent injury or death of a man. It is the purpose of this section to remove any common law disabilities or restrictions upon women, or the rights of women, whether single or married, and to give women the same rights and the same status as are possessed by men. [SS15, §3477-a; C24, 27,§10463; C31, 35,§10991-d1.]

10992 Married women. A married woman may in all cases sue and be sued without joining her husband with her, and an attachment or judgment in such action shall be enforced by or against her as if she were single. [R60, §§2771, 2772; C73,§2562; C97,§3477; C24, 27, 31, 35,§10992.]

10993 Defense by husband or wife. If husband and wife are sued together, the wife may defend for her own right, and if either neglects to defend, the other may defend for both. [C51, §1687; R60,§2774; C73,§2563; C97,§3478; C24, 27, 31, 35,§10993.]

10994 Desertion of family. When a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had; and, under like circumstances, the husband shall have the same right. [R60,§2776; C73,§2564; C97,§3479; C24, 27, 31, 35,§10994.]

10995 Minors. The action of a minor must be brought by his guardian, if he has one, if not, by his next friend, but the court may dismiss it if it is not for his benefit, or may substitute a guardian or another person as next friend. [C51,§§1688, 1689; R60,§2777; C73,§2565; C97, §3480; C24, 27, 31, 35,§10995.]

10996 Insane person. The action of a person judicially found to be of unsound mind must be brought by his guardian, but, if he have none, the court or judge thereof, or the clerk in vacation, may appoint one for the purposes of the action. [R60,§2781; C73,§2569; C97,§3481; C24, 27, 31, 35,§10996.]

Referred to in §12351.1

10997 Defense by minor. The defense of a minor must be by his regular guardian, or by one appointed to defend for him where no regular guardian appears, or, where the court directs a defense, by one appointed for that purpose. No judgment can be rendered against a minor until after a defense by a guardian. [C51,§§1688, 1689; R60,§2778; C73,§2566; C97, §3482; C24, 27, 31, 35,10997.]

10998 Guardian ad litem. Such appointment cannot be made until after the required service of the notice in the action, and then may be by the court, or in vacation by a judge or the clerk; but the court shall have the power to remove such guardian when the interests of the minor require it. If made by the judge or clerk, it shall be done by indorsing the name of the person appointed and the time thereof on the petition in the action. [R60,§2779; C73,§2567; C97,§3483; C24, 27, 31, 35,§10998.]

10999 Application for appointment. The appointment may also be made on the application of the minor, if he is of the age of fourteen years, and applies at or before the time he is required to appear and defend. If he does not, or is under that age, the appointment may be made on the application of any friend of his, or on that of the plaintiff in the action. [R60,§2780; C73, §2568; C97,§3484; C24, 27, 31, 35,§10999.]

11000 Defense of insane person. The defense of an action against a person judicially found to be of unsound mind, or of one confined in any state hospital for the insane who, by the certificate of the physician in charge, appears to be insane, must be by his guardian, or a guardian appointed by the court to defend for him. Such appointment may be made upon the application of any friend of the defendant, or on that of the plaintiff, but not until service has been made as directed in this code, and no judgment can be rendered against him until defense has been made as herein provided. [R60,§2782; C73, §2570; C97,§3485; C24, 27, 31, 35,§11000.]

11001 Insanity pending action. Where a party is judicially found to be of unsound mind, or is confined in any state hospital for the insane, and, by the certificate of the physician in charge, appears to be insane, during the pendency of an action, the fact being stated on the record, if he is plaintiff his guardian may be joined with him in the action as such; if defendant, the plaintiff may, on ten days notice thereof to his guardian, have an order making the guardian a defendant also. [R60,§2783; C73,§2571; C97,§3486; C24, 27, 31, 35,§11001.]

11002 Interpleader. Upon the affidavit, before answer, of a defendant in any action upon contract for the recovery of personal property, that some third person, without collusion with him, has or makes a claim to the subject of the action, or on proof thereof, as the court may direct, it may make an order for the safekeeping, or for the payment or deposit in court, or delivery of the subject of the action to such person as it may direct, and an order requiring such third person to appear in a reasonable time and maintain or relinquish his claims against defendant, and in the meantime stay the proceedings. [C51,§§1685, 1686; R60,§2767; C73, §2572; C97,§3487; C24, 27, 31, 35,§11002.]

Referred to in §11005
C97,§3487, editorially divided

11003 Failure to appear. If such third person, being served with a copy of the order, fails to appear, the court may declare him barred of all claims in respect to the subject of the action against the defendant therein. [R60,§2767; C73, §2572; C97,§3487; C24, 27, 31, 35,§11003.]

11004 Appearance—effect. If such third person appears, he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for payment, deposit, or delivery thereof. [C51,§1686; R60,§2767; C73, §2572; C97,§3487; C24, 27, 31, 35,§11004.]

11005 Sheriff may interplead. The provisions of section 11002 shall be so far applicable to an action brought against a sheriff or other officer for the recovery of personal property taken by him under an attachment or execution, or for the value of such property so taken and sold by him, that, upon exhibiting to the court the process under which he acted, with his affidavit that the property for the recovery of which, or its proceeds, the action was brought was taken under such process, he may have the attaching or execution creditor made a joint defendant with him, and if judgment go against them, it shall provide that the property of such creditor shall be first exhausted in satisfaction thereof. [R60,§2768; C73,§2573; C97,§3488; C24, 27, 31, 35,§11005.]

11006 Substitution. In an action against a sheriff or other officer for the recovery of property taken under an attachment or execution, the court may, upon application of the defendant and of the party in whose favor the process issued, permit the latter to be joined with such officer as defendant. [R60,§2769; C73,§2574; C97,§3489; C24, 27, 31, 35,§11006.]

CHAPTER 487

LIMITATIONS OF ACTIONS

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GENERAL PROVISIONS

11007 Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

1. *In actions for injuries from defects in roads or streets—notice.* Those founded on injury to the person on account of defective roads, bridges, streets, or sidewalks, within three months, unless written notice specifying the time, place, and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury.

Similar provision, §6734

2. *Penalties or forfeitures under ordinance.* Those to enforce the payment of a penalty or forfeiture under an ordinance, within one year.

3. *Injuries to person or reputation — relative rights — statute penalty — setting aside will.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within two years from the time the same is filed in the clerk's office for probate and notice thereof is given; provided that after a will is probated the executor may cause personal service of an original notice to be made on any person interested, which shall contain the name of decedent, the date of his death, the court in which and the date on which the will was probated, together with a copy of said will; said notice shall be served in the same manner as original notices and no action shall be instituted by any person so served after one year from date of service.

4. *Against sheriff or other public officer.* Those against a sheriff or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected on execution, within three years, provided that actions against a sheriff, deputy sheriff or other peace officer founded on false arrest shall be brought within six months after the exoneration or discharge of the person arrested.

5. *Unwritten contracts—injuries to property —fraud—other actions.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.

Damages incident to quo warranto, §12427

6. *Written contracts—judgments of courts not of record — recovery of real property.* Those founded on written contracts, or on judgments of any courts except those provided for in the next subsection, and those brought for the recovery of real property, within ten years.

7. *Judgments of courts of record.* Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years.

8. *Judgment quieting title.* No action shall be brought to set aside a judgment or decree quieting title to real estate unless the same shall be commenced within ten years from and after the rendition thereof. [C51,§1659; R60,§§1075, 1865, 2740; C73,§§486, 2529; C97,§3447; S13,§§2963-g, 3447; C24, 27, 31, 35,§11007; 48GA, ch 240,§1.]

Escheated lands, §10220
Legality of municipal bonds, §§6264, 6779, 6932, 7673, 7714.23
Sale or mortgage by executor or guardian, §§11951, 12596
S13,§3447, editorially divided

11008 Death of party to be charged. In all cases where by the death of the party to be charged, the bringing of an action against his estate shall have been delayed beyond the period provided for by statute, the time within which action may be brought against his estate is hereby extended for six months from the date of the death of said decedent. [S13,§3447-a; C24, 27, 31, 35,§11008.]

Administration granted, §11883 et seq.

11009 Judgments. No action shall be brought upon any judgment against a defendant therein, rendered in any court of record of this state, within nine years after the rendition thereof, without leave of the court, or a judge thereof, for good cause shown, and, if the adverse party is a resident of this state, upon reasonable notice of the application therefor to him; nor on a judgment of a justice of the peace in the state within nine years after the same is rendered, unless the docket of the justice or record of such judgment is lost or destroyed; but the time during which an action on a judgment is prohibited by this section shall not be excluded in comput-

ing the statutory period of limitation for an action thereon. [C73,§2521; C97,§3439; S13, §3439; C24, 27, 31, 35,§11009.]

Action on certain judgments prohibited, ch 487.1
Lien of judgments, §11602

11010 Fraud — mistake — trespass. In actions for relief on the ground of fraud or mistake, and those for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake, or trespass complained of shall have been discovered by the party aggrieved. [C51,§1660; R60,§2741; C73,§2530; C97,§3448; C24, 27, 31, 35,§11010.]

11011 Open account. When there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial. [C51,§1662; R60,§2743; C73,§2531; C97, §3449; C24, 27, 31, 35,§11011.]

11012 Commencement of action. The delivery of the original notice to the sheriff of the proper county, with intent that it be served immediately, which intent shall be presumed unless the contrary appears, or the actual service of that notice by another person, is a commencement of the action. [C51,§1663; R60, §2744; C73,§2532; C97,§3450; C24, 27, 31, 35, §11012.]

11013 Nonresidence. The time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitation above described. [C51,§1664; R60,§2745; C73,2533; C97,§3451; C24, 27, 31, 35, §11013.]

11014 Bar in foreign jurisdiction. When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; but this section shall not apply to causes of action arising within this state. [C51,§1665; R60,§2746; C73,§2534; C97, §3452; C24, 27, 31, 35,§11014.]

11015 Minors and insane persons. The times limited for actions herein, except those brought for penalties and forfeitures, shall be extended in favor of minors and insane persons, so that they shall have one year from and after the termination of such disability within which to commence said action. [C51,§1666; R60, §2747; C73,§2535; C97,§3453; C24, 27, 31, 35, §11015.]

Referred to in §11026

11016 Exception in case of death. If the person having a cause of action dies within one year next previous to the expiration of the limitation above provided for, such limitation shall not apply until one year after such death. [C51, §1667; R60,§2748; C73,§2536; C97,§3454; C24, 27, 31, 35,§11016.]

11017 Failure of action. If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first. [C51,§1668; R60,§2749; C73, §2537; C97,§3455; C24, 27, 31, 35,§11017.]

11018 Admission in writing—new promise. Causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same. [C51, §1670; R60,§2751; C73,§2539; C97,§3456; C24, 27, 31, 35,§11018.]

11019 Counterclaim. A counterclaim may be pleaded as a defense to any cause of action, notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred, and was not barred at the time the claim sued on originated; but no judgment thereon, except for costs, can be rendered in favor of the party so pleading it. [R60,§2752; C73,§2540; C97, §3457; C24, 27, 31, 35,§11019.]

11020 Injunction. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition shall not be part of the time limited for the commencement of the action, except as herein otherwise provided. [C73,§2541; C97,§3458; C24, 27, 31, 35,§11020.]

SPECIAL LIMITATIONS

11021 Recovery by cestui que trust. In all cases where any deed of trust or declaration of trust has been executed and the real estate affected thereby has been conveyed by the trustee or the surviving spouse or heirs of said trustee and such conveyance was duly recorded in the proper county prior to January 1, 1890, and the interest of the cestui que trust thereunder has not been by such cestui que trust conveyed, or established by proper proceedings in court, no action, suit or proceeding shall be commenced or maintained to foreclose the same, or to establish or recover the interest of the cestui que trust therein, or of the surviving spouse or heirs of the cestui que trust, unless such action, suit, or proceeding be commenced by filing petition and service of notice not later than March 1, 1914. [S13,§3447; C24, 27, 31, 35, §11021.]

11022 Spouse failing to join in conveyance. In all cases where the holder of the legal or equitable title or estate to real estate situated within this state, prior to January 1, 1905, conveyed said real estate or any interest therein by deed, mortgage, or other instrument, and the spouse failed to join therein, such spouse or the heirs at law, personal representatives, devisees, grantees, or assignees of such spouse shall be barred from recovery unless suit is brought therefor within one year after the taking effect of this act. But in case the right to such distributive share has not accrued by the death of the spouse making such instrument, then the one not joining is hereby authorized

to file in the recorder's office of the county where the land is situated, a notice with affidavit, setting forth affiant's claim, together with the facts upon which such claim rests, and the residence of such claimants; and if such notice is not filed within two years from the taking effect of this act, such claim shall be barred forever. Any action contemplated in this section may include land situated in different counties, by giving notice thereof as provided by section 11095. Provided that the repeal of section 3447-b, supplement to the code, 1907, shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of said repealed section as far as consistent. [S13, §3447-b; C24, 27, 31, 35,§11022.]

Referred to in §11027

The above section was enacted by 34GA, ch 159, §1, and was in itself a substitute for 31GA, ch 152, §1, which became section 3447-b of the supplement to the code, 1907. The 37GA, ch 351, §1, amended the above section by striking out the date "1890" and inserting in lieu thereof the date "1905". This makes it uncertain as to the meaning of the word "act" as it appears in the section and the word has been retained

11023 Interpretative clause. This act [37GA, ch 351] shall not affect pending litigation nor shall it operate to revive rights or claims already barred by the provisions of section 3447-b, supplement to the code, 1913. [C24, 27, 31, 35, §11023.]

Section 3447-b, supplement to the code, 1913, appears in amended form as section 11022, but the reference in the above section is to the original section and no corresponding section in this code can be substituted therefor

11024 Claims to real estate antedating 1920. No action based upon any claim arising or existing prior to January 1, 1920, shall be maintained, either at law or in equity, in any court to recover any real estate in this state or to recover or establish any interest therein or claim thereto, legal or equitable, against the holder of the record title to such real estate in possession, when such holder of the record title and his grantors immediate or remote are shown by the record to have held chain of title to said real estate, since January 1, 1920, unless such claimant, by himself, or by his attorney or agent, or if he be a minor or under legal disability, by his guardian, trustee, or either parent shall within one year from and after July 4, 1931, file in the office of the recorder of deeds of the county wherein such real estate is situated, a statement in writing, which shall be duly acknowledged, definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based.

For the purposes of this and sections 11025 to 11027, inclusive, any person who holds title to real estate by will or descent from any person who held the title of record to such real estate at the date of his death or who holds title by decree or order of any court, or under any tax deed, trustee's, referee's, guardian's, executor's, administrator's, receiver's, assignee's, master's in chancery, or sheriff's deed, shall be deemed to hold chain of title the same as though holding by direct conveyance.

For the purposes of this section, such possession of said real estate may be shown of record by affidavits showing such possession, and when said affidavits have been filed and recorded, it shall be the duty of the recorder to enter upon the margin of said record, a certificate to the effect that said affidavits were filed by the owner in possession, as named in said affidavits, or by his attorney in fact, as shown by the records. [C24, 27, 31, 35,§11024.]

Referred to in §§11026, 11027

11025 Claim indexed. Any such claim so filed, shall be indexed under the description of the real estate involved in a book set apart and specially designed for that purpose to be known as the "claimant's book" and kept in the office of the recorder of the county where such real estate is situated, and said statement, when so indexed, shall be recorded as other instruments affecting real estate. [C24, 27, 31, 35,§11025.]

Referred to in §§11024, 11026, 11027

11026 Minors and insane. The provisions of section 11015 as to the rights of minors and insane persons shall not be applicable against the provisions of sections 11024, 11025, and 11027. [C24, 27, 31, 35,§11026.]

Referred to in §§11024, 11027

11027 Limitation on act. Provided, however, that nothing contained in sections 11024 to 11026, inclusive, shall be construed as limiting or extending the time within which actions by a spouse to recover dower or distributive share in real estate within this state may be brought or maintained under the provisions of section 11022, or as limiting or extending the time within which actions may be brought or maintained to foreclose or enforce any real estate mortgage, bond for deed, trust deed, or contract for the sale or conveyance of real estate under the provisions of section 11028; and, provided further, that sections 11024 to 11026, inclusive, should in no case revive or permit an action to be brought or maintained upon any claim or cause of action which is barred by any statute which is in force July 4, 1919; provided that nothing contained in sections 11024 to 11026, inclusive, shall affect pending litigation. [C24, 27, 31, 35,§11027.]

Referred to in §11024, 11026

11028 Foreclosure of ancient mortgages. No action shall be maintained to foreclose or enforce any real estate mortgage, bond for deed, trust deed, or contract for the sale or conveyance of real estate, after twenty years from the date thereof, as shown by the record of such instrument, unless the record of such instrument shows that less than ten years have elapsed since the date of maturity of the indebtedness or part thereof, secured thereby, or since the right of action has accrued thereon, or unless the record shows an extension of the maturity of the instrument or of the debt or a part thereof, and that ten years from the expiration of the time of such extension have not yet expired.

The date of maturity, when different than as appears by the record of the instrument, and the date of maturity of any extension of said indebtedness or part thereof, may be shown at any time prior to the expiration of the above periods of limitation by the holder of the debt or the owner or assignee of the instrument filing an extension agreement, duly acknowledged as the original instrument was required to be acknowledged, in the office of the recorder where the instrument is recorded, or by noting on the margin of the record of such instrument in the recorder's office an extension of the maturity of the instrument or of the debt secured, or any part thereof; each notation to be witnessed by the recorder and entered upon the index of mortgages in the name of the mortgagor and mortgagee. This section shall in no case revive the rights or claims barred by section 3447-c of the supplement to the code, 1907. [S13,§3447-c; C24, 27, 31, 35,§11028.]

Referred to in §11027
Section 3447-c, S1907, has been repealed

11029 Action affecting ancient deeds. No action shall be maintained to set aside, cancel, annul, declare void or invalid, or to redeem from any tax deed, guardian's deed, executor's deed, administrator's deed, receiver's deed, referee's deed, assignee's deed, sheriff's deed which shall have been recorded in the office of the recorder of the county or counties in this state in which the land described in such deed is situated prior to January 1, 1905, unless such action shall be commenced prior to January 1, 1917, and if no action to set aside, cancel, annul, declare void or invalid, or to redeem from any such deed shall be commenced prior to January 1, 1917, then such deed and all the proceedings upon which the same is based shall be conclusively presumed to have been in all things valid and unimpeachable and effective to convey title according to the purport thereof, without exception for infancy, insanity, absence from the state, or other disability or cause; provided that this and section 11030 shall not apply to any real property described in any such deed which is not on July 4, 1915, in the possession of those claiming title under such deed. [SS15,§3447-d; C24, 27, 31, 35, §11029.]

Referred to in §11030
Legalizing acts, ch 463

11030 How "possession" established. The possession of the persons claiming title as provided for in section 11029 may be established by affidavit recorded in the office of the recorder of the county or counties in this state in which the deed to the land referred to in said affidavit is recorded. [SS15,§3447-e; C24, 27, 31, 35, §11030.]

Referred to in §11029

11031 to 11033, inc. Rep. by 44GA, ch 220

CHAPTER 487.1

SPECIAL LIMITATIONS ON JUDGMENTS

11033.1 Execution on certain judgments prohibited.
11033.2 Revival of certain judgments prohibited.
11033.3 Future judgments without foreclosure.
11033.4 Former judgments without foreclosure.

11033.1 Execution on certain judgments prohibited. From and after January 1, 1934, no judgment in an action for the foreclosure of a real estate mortgage or deed of trust or in any action on a claim for rent or judgment assigned by a receiver of a closed bank or rendered upon credits assigned by the receiver of a closed bank when the assignee is not a trustee for depositors or creditors of the bank the Reconstruction Finance Corporation or any other federal governmental agency to which the bank or the receiver is or may be indebted shall be enforced and no execution issued thereon and no force or vitality given thereto for any purpose other than as a set-off or counterclaim after the expiration of a period of two years from the entry thereof. [C35,§11033-e1.]

See also §12377

11033.2 Revival of certain judgments prohibited. After January 1, 1934, no action or proceedings shall be brought in any court of this state for the purpose of renewing or extending such judgment or prolonging the life thereof. Provided, however, that nothing herein shall prevent the continuance of such judgment in force for a longer period by the voluntary written stipulation of the parties, filed in said cause. [C35,§11033-e2.]

Omnibus repeal, §11033-e3, code 1935; 45GA, ch 178, §3

11033.3 Future judgments without foreclosure. Judgments hereafter rendered on promissory obligations secured by mortgage or deed of trust of real estate, but without foreclosure against said security, shall not be subject to renewal by action thereon, and, after the lapse of two years from the date of rendition, shall be without force and effect for any purpose whatsoever except as a set-off or counterclaim. [C35, §11033-g1.]

Effective date, May 3, 1935

11033.4 Former judgments without foreclosure. Judgments heretofore rendered or in actions now pending upon promissory obligations secured by mortgage or deed of trust of real estate, and upon which judgments or actions now pending the holder thereof brought suit direct upon the said promissory obligation without a foreclosure against said security, shall have no force or vitality for any purpose other than a set-off or counterclaim from and after the expiration of two years from the passage of this act [46GA, ch 108] and no execution shall be issued thereon. [C35,§11033-g2.]

Effective date, May 3, 1935

CHAPTER 488

PLACE OF BRINGING ACTIONS

Change of venue, ch 495

11034 Real property.
11035 Injuries to real property.
11036 Local actions.
11037 Nonresident—attachment.
11038 Resident—attachment.
11039 Transfer—attached property held.
11040 Place of contract.
11041 Certain carriers and transmission companies —actions against.
11042 Construction companies.
11043 Insurance companies.
11044 Nonlife insurance assessments.
11044.1 Nonlife insurance premiums or notes.
11045 Operators of coal mines.
11046 Office or agency.
11047 Surety companies.
11048 Municipal corporations in certain counties.
11049 Personal actions.
11050 Negotiable paper.
11051 Right of nonresident defendant.
11052 Change of residence.
11053 Change when brought in wrong county.
11054 Dismissal.

11034 Real property. Actions for the recovery of real property, or of an estate therein, or for the determination of such right or interest, or for the partition of real property, must be brought in the county in which the subject of the action or some part thereof is situated. [C51, §1703; R60,§2795; C73,§2576; C97,§3491; C24, 27, 31, 35,§11034.]

Real estate foreclosure, §12374

11035 Injuries to real property. Actions for injuries to real property may be brought either in the county where the property is, or where the defendant resides. [C73,§2577; C97,§3492; C24, 27, 31, 35,§11035.]

11036 Local actions. Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. *For fines, penalties, or forfeitures.* Those for the recovery of a fine, penalty, or forfeiture imposed by a statute; but when the offense for which the claim is made was committed on a watercourse or road which is the boundary of two counties, the action may be brought in either of them.

2. *Against public officers.* Those against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who by his command or in his aid shall do anything touching the duties of such officer, or for neglect of official duty.

3. *On official bonds.* Those on the official bond of a public officer.

4. *Actions on bonds of executor or guardian.* Those on the bond of an executor, administrator, or guardian may be brought in the county in which the appointment was made and such bond filed.

5. *Actions on other bonds.* Actions on all other bonds provided for or authorized by law may be brought in the county in which such bond was filed and approved. [R60,§2796; C73, §2579; C97,§3494; S13,§3494; C24, 27, 31, 35, §11036.]

11037 Nonresident—attachment. An action against a nonresident of the state, when aided by an attachment, may be brought in any county of the state wherein any part of the property sought to be attached may be found, or wherein any part was situated when the action was commenced, or where the defendant is personally served in this state. [C51,§1703; R60,§2797; C73, §2580; C97,§3495; C24, 27, 31, 35,§11037.]

C97,§3495, editorially divided

11038 Resident — attachment. Except as hereinafter provided, an action against a resident of this state must be brought in the county of his residence, or that in which the contract was to be performed, except that, if an action be duly brought against such defendant in any other county by virtue of any of the provisions of this chapter, then such action may, if legal cause for an attachment exist, be aided by attachment. [R60,§2797; C73,§2580; C97,§3495; C24, 27, 31, 35,§11038.]

11039 Transfer — attached property held. Should such action be brought against a resident of this state in any other county than that of his residence, he may have the place of trial changed to the district court of the county wherein he resides, in the same manner and upon the same terms as provided in section 11053, and the property attached shall not be released because said action was brought in the wrong county, but shall be held and subject in the same manner as if said action had been brought in the county of defendant's residence. [R60,§2797; C73,§2580; C97,§3495; C24, 27, 31, 35,§11039.]

11040 Place of contract. When, by its terms, a written contract is to be performed in any particular place, action for a breach thereof may, except as otherwise provided, be brought in the county wherein such place is situated. [C51,§1704; R60,§2798; C73,§2581; C97,§3496; C24, 27, 31, 35,§11040.]

Change of venue for fraud, §§10512, 11411

11041 Certain carriers and transmission companies—actions against. An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal, steamboat and other river crafts, telegraph and telephone companies, or the owner of any line for the transmission of electric current for lighting, power, or heating purposes, and the lessees, companies, or persons operating the same, in any county through which such road or line passes or is operated. [C73,

§2582; C97,§3497; S13,§3497; C24, 27, 31, 35, §11041.]

Actions against joint common carriers, §10978
Similar provision, §8244

11042 Construction companies. An action may be brought against any corporation, company, or person engaged in the construction of a railway, canal, telegraph or telephone line, oil, gas or gasoline transmission lines, highway, or public drainage improvement, on any contract relating thereto, or to any part thereof, or for damages in any manner growing out of the contract or work thereunder, in any county where such contract was made, or performed in whole or in part, or where the work was done out of which the damage claimed arose. [C73,§2583; C97,§3498; C24, 27, 31, 35,§11042.]

11043 Insurance companies. Insurance companies may be sued in any county in which their principal place of business is kept, or in which the contract of insurance was made, or in which the loss insured against occurred, or, in case of insurance against death or disability, in the county of the domicile of the insured at the time the loss occurred, or in the county of plaintiff's residence. [C73,§2584; C97,§3499; C24, 27, 31, 35,§11043.]

11044 Nonlife insurance assessments. No court other than that of the county in which the member resides shall have jurisdiction of actions to collect assessments levied by associations organized under the provisions of chapter 406, but such actions shall be brought in the county of the member's residence, any statement or agreement in the policy or contract of insurance, the application therefor, or any other contract entered into between the member and the association to the contrary notwithstanding. [C24, 27, 31, 35,§11044.]

11044.1 Nonlife insurance premiums or notes. No court other than that of the county in which the policyholder resides shall have jurisdiction of actions to collect premiums or premium notes payable or given for insurance other than life, but such actions shall be brought in the county of the policyholder's residence, any statement or agreement in the policy or contract of insurance, the application therefor, or any other contract entered into between the policyholder and the company or its agent to the contrary notwithstanding. [C27, 31, 35,§11044-a1.]

11045 Operators of coal mines. An action may be brought against any corporation, company, or person, owning, leasing, operating, or maintaining a coal mine, in the county where said mine is located, on any contract, or for any tort, in any manner connected with or growing out of the construction, use, or operation of said mine. [S13,§3499-a; C24, 27, 31, 35,§11045.]

11046 Office or agency. When a corporation, company, or individual has an office or agency in any county for the transaction of business, any actions growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located. [C51,§1705; R60,§2801; C73, §2585; C97,§3500; C24, 27, 31, 35,§11046.]

Related section, §11079

11047 Surety companies. Suit may be brought against any company or corporation furnishing or pretending to furnish surety, fidelity, or other bonds in this state, in any county in which the principal place of business of such company or corporation is maintained in this state, or in any county wherein is maintained its general office for the transaction of its Iowa business, or in the county where the principal resides at the time of bringing suit, or in the county where the principal did reside at the time the bond or other undertaking was executed; and in the case of bonds furnished by any such company or corporation for any building or improvement, either public or private, action may be brought in the county wherein said building or improvement, or any part thereof is located. [S13,§3500-a; C24, 27, 31, 35,§11047.]

Surety on public improvements, §10313

11048 Municipal corporations in certain counties. Actions against municipal corporations, including cities organized under special charters, in all counties where terms of the district court are held in more than one place must be brought in the county and at the place where terms of the district court are held nearest to where the cause or subject of the action originated. [S13,§3504-a; C24, 27, 31, 35,§11048.]

11049 Personal actions. Personal actions, except as otherwise provided, must be brought in a county in which some of the defendants actually reside, but if neither of them have a residence in the state, they may be sued in any county in which either of them may be found. [C51,§1701; R60,§2800; C73,§2586; C97,§3501; C24, 27, 31, 35,§11049.]

Referred to in §11051
Cross petition against nonresident, §11155
C97,§3501, editorially divided

11050 Negotiable paper. In all actions upon negotiable paper, except when made payable at a particular place, in which any maker thereof, being a resident of the state, is defendant, the place of trial shall be limited to a county wherein some one of such makers resides. [C73,§2586; C97,§3501; C24, 27, 31, 35,§11050.]

Referred to in §11051

11051 Right of nonresident defendant. Where an action provided for in sections 11049 and 11050 is against several defendants, some of whom are residents and others nonresidents of the county, and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is a failure to obtain judgment against such residents, such nonresidents may, upon motion, have said cause dismissed, with reasonable compensation for trouble and expense in attending at the wrong county, unless they, having appeared to the action, fail to object before judgment is rendered against them. [C73,§2587; C97,§3502; C24, 27, 31, 35,§11051.]

11052 Change of residence. If, after the commencement of an action in the county of the defendant's residence, he removes therefrom, the service of notice upon him in another county shall have the same effect as if it had been made in the county from which he removed. [C73, §2588; C97,§3503; C24, 27, 31, 35,§11052.]

11053 Change when brought in wrong county. If an action is brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demands a change of place of trial to the proper county, in which case the court shall order the same at the cost of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expense in attending at the wrong county. [C51,§1702; R60,§2802; C73,§2589; C97, §3504; C24, 27, 31, 35,§11053.]

Referred to in §11039
Change of venue generally, ch 495
C97,§3504, editorially divided

11054 Dismissal. If the sum so awarded and costs are not paid to the clerk by a time to be fixed by the court, or if the papers in such case are not filed by the plaintiff in the court to which the change is ordered ten days before the first day of the next term thereof, or, if ten days do not intervene between the making of said order and the first day of the next term of said court, ten days preceding the first day of the next succeeding term thereof, in either event the action shall be dismissed. [C73,§2589; C97, §3504; C24, 27, 31, 35,§11054.]

CHAPTER 489

MANNER OF COMMENCING ACTIONS

Referred to in §12644.04

11055 Original notice.
11056 Change in term—effect.
11056.1 Process—criminal defendant.
11057 Dismissal.
11058 Who may serve notice.
11059 How long before term.
11060 Method of service.
11061 Return of personal service.
11062 Indorsement and return by sheriff.
11063 Penalty—amendment.
11064 Service on Sunday.
11065 Notice of no personal claim.
11066 Proof of service.
11067 Insane patients in hospital.
11068 Acknowledgment of service.
11069 Insane person out of hospital.
11070 Inmate of certain institutions.
11071 County.
11072 Public utility and foreign corporations.
11073 Consolidated railways.
11074 Insurance company.
11075 Municipal corporation.
11076 School township or district.
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11078 Publication service substituted.
11079 Actions arising out of agency.
11080 Minor.
11081 Service by publication.
11082 Unknown defendants.
11083 Notice to unknown defendants.
11084 Method of publication.
11085 Service complete—proof.
11086 Actual service.
11087 Mode of appearance.
11088 Special appearance.
11089 Exemption to members of general assembly.
11090 Holidays.
11091 Unserved parties—optional procedure.
11092 Real estate—action indexed.
11093 Lis pendens.
11094 Exceptions.
11095 Real estate in foreign county—superior court.
11096 Constructive notice.
11097 Notice perpetuated.

11055 Original notice. Action in a court of record shall be commenced by serving the defendant with a notice, signed by the plaintiff or his attorney, informing him of the name of the plaintiff, that a petition is, or on or before the date named therein will be, filed in the office of the clerk of the court wherein action is brought, naming it, and stating in general terms the cause or causes thereof, and if it is for money, the amount thereof, and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming said term, and the date when and place where said court will convene, his default will be entered and judgment or decree rendered against him thereon. [C51, §§1714, 1715; R60,§§2811, 2812; C73,§2599; C97, §3514; C24, 27, 31, 35,§11055.]

Commencement of action against nonresident for damages consequent on operation of motor vehicle, see §5038.01 et seq.
Notice to unknown claimant, §11083
C97,§3514, editorially divided

11056 Change in term—effect. In all cases where the time for the commencement of the term has been changed after the notice has been served, the defendant shall be held to appear at the time to which such term has been changed. [C73,§2599; C97,§3514; C24, 27, 31, 35, §11056.]

11056.1 Process—criminal defendant. Any defendant in any criminal action pending or to be brought in any court in the state of Iowa may be served with process, either civil or criminal, in any other action pending or to be brought against him in the courts of this state while he is present in this state, either voluntarily or involuntarily. [47GA, ch 234,§1.]

Process in pending cases legalized, 47GA, ch 234, §2

11057 Dismissal. If the petition is not filed by the date thus fixed, and ten days before the term, the defendant may have the action dismissed. [C51,§1716; R60,§2813; C73,§2600; C97,§3515; C24, 27, 31, 35,§11057.]

11058 Who may serve notice. The notice may be served by any person not a party to the action. [C51,§1718; R60,2814; C73,§2601; C97,§3516; C24, 27, 31, 35,§11058.]

11059 How long before term. The defendant shall be held to appear at the next term after service, except as provided in subsection 4 of this section:

1. If served within the county where the action is brought in such time as to leave at least ten days between the day of service and the first day of the next term.

2. If without the county, but within the judicial district, so as to leave at least fifteen such days.

3. If elsewhere, so as to leave twenty such days for every one thousand miles, or fraction thereof, extending between the places of trial and service, which distance shall be judicially noticed by the court. If not so served, he shall be held to appear at the second term after service.

4. If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, the defendant shall be held to appear within three days after the service of an original notice. [C51,§1720; R60,§2815; C73, §2602; C97,§3517; C24, 27, 31, 35,§11059.]

See §11121.1

11060 Method of service. The notice shall be served as follows:

1. By reading it to the defendant or offering to do so in case he neglects or refuses to hear it read, and in either case by delivering him personally a copy thereof, or, if he refuses to receive it, offering to do so.

2. If not found within the county of his residence, or if, because of his sickness or other disability, personal service cannot be made upon him, by leaving a copy thereof at his usual place of residence with some member of his family over fourteen years of age, or with the person having the care and custody of him, or with the head of the family where he resides.

3. By taking an acknowledgment of the service indorsed thereon, dated and signed by the defendant. [C51,§§1721, 1732; R60,§2816; C73, §2603; C97,§3518; C24, 27, 31, 35,§11060.]

Referred to in §11726

11061 Return of personal service. If served personally, the return must state the time, manner, and place of making the service, and that a copy was delivered to defendant, or offered to be delivered. If made by leaving a copy with the family, it must state at whose house the same was left, and that it was the usual place of residence of the defendant, and the township, town, or city in which the house was situated, the name of the person with whom the same was left, or a sufficient reason for omitting to do so, and that such person was over fourteen years of age and was a member of the family. [C51, §1723; R60,§2817; C73,§2604; C97,§3519; C24, 27, 31, 35,§11061.]

11062 Indorsement and return by sheriff. If the notice is placed in the hands of a sheriff, he must note thereon the date when received, and proceed to serve the same without delay in his county, and must file the same, with his return thereon, in the office of the clerk of the court where the action is pending, or return the same by mail or otherwise to the party from whom he received it. [C51,§1717; R60,§2819; C73,§2605; C97,§3520; C24, 27, 31, 35,§11062.]

11063 Penalty—amendment. If a notice is not filed or returned by the sheriff to the person from whom it was received, or if the return thereon is defective, the officer making the same may be fined by the court not exceeding ten dollars, and he shall be liable to an action for damages by any person aggrieved thereby. The court may, before or after judgment is entered, permit an amendment according to the truth of the case. [R60,§2820; C73,§2606; C97,§3521; C24, 27, 31, 35,§11063.]

11064 Service on Sunday. Notice shall not be served on Sunday unless the plaintiff, his agent, or attorney makes oath thereon that personal service will not be possible unless then made, and a notice so indorsed shall be served by the sheriff, or may be served by another, as on a secular day. [R60,§2821; C73,§2607; C97, §3522; C24, 27, 31, 35,§11064.]

Analogous or related provisions, §§10819, 11653, 12082, 12179, 12560

11065 Notice of no personal claim. The plaintiff may state in the notice the general subject of the action, a brief description of the property affected by it, and that no personal claim is made against any defendant, naming him, and if such defendant unreasonably defends he shall pay the costs occasioned thereby. [C51,§1724; R60,§2822; C73,§2608; C97,§3523; C24, 27, 31, 35,§11065.]

11066 Proof of service. If service is made within the state, the truth of the return is proven by the signature of the sheriff or his deputy, and the court shall take judicial notice thereof. If made without the state, or by one not such officer within the state, the return must be proven by the affidavit of the person making the same. [C51,§1732; R60,§2823; C73,§2609; C97,§3524; C24, 27, 31, 35,§11066.]

Similar provision as to return, §10524

11067 Insane patients in hospital. Service may be made on any patient confined in any of the hospitals for the insane by the superintendent or assistant superintendent thereof, and the certificate of such officer, under the seal of the hospital, shall be proof of such service. [C97, §3524; C24, 27, 31, 35,§11067.]

11068 Acknowledgment of service. When it becomes necessary to serve personally with a notice or process of any kind a person who is confined in any state hospital for the insane, or county home, the superintendent thereof shall acknowledge service for such person, whenever in his opinion personal service would injuriously affect such person, which fact shall be stated in the acknowledgment of service. A service thus made shall be held a personal one on the defendant. [C73,§2616; C97,§3525; C24, 27, 31, 35,§11068.]

11069 Insane person out of hospital. When a defendant has been judicially declared to be of

unsound mind and is not confined in any state hospital for the insane, service must be made upon him and upon his guardian, and, if he have none, or if the guardian institutes the action, then upon the spouse, or the person having the care or custody of him or with whom he lives. [C51,§1729; R60,§2829; C73,§2615; C97,§3526; C24, 27, 31, 35,§11069.]

11070 Inmate of certain institutions. Every civil process addressed to any inmate of the department of the state university hospital for the medical and surgical treatment of indigent persons, of the psychopathic ward of said hospital or of any institution in charge of the board of control shall be served upon him, unless otherwise specially provided by law, by the person in charge of the institution of which he is an inmate, in the same manner as original notices are required to be served, and by delivering to him a correct copy of the petition or application. The person serving such process shall make return accordingly in the same manner and with the same effect as sheriffs in other cases. The process shall also be served on the spouse of such inmate if found within the state, but upon the filing of an affidavit that said spouse, after diligent search and inquiry has been made, cannot be found within this state, such spouse may be served with notice by publication as in the case of an original notice. [C51, §3130; R60,§§2830, 5144; C73,§§2617, 4772; C97, §§3527, 5677; C24, 27, 31, 35,§11070.]

11071 County. If the county is a party to any action, service of process may be made on the chairman of the board of supervisors or county auditor. [C51,§1726; R60,§2824; C73, §2610; C97,§3528; C24, 27, 31, 35,§11071.]

11072 Public utility and foreign corporations. If the action is against any corporation or person owning or operating any railway or canal, steamboat or other river craft, or any telegraph, telephone, stage, coach* or car line, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company, or person, wherever found, or upon any station, ticket, or other agent, or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county. [C51, §1727; R60,§2825; C73,§2611; C97,§3529; S13, §3529; C24, 27, 31, 35,§11072.]

Referred to in §11078
*According to enrolled act
Service on joint common carriers, §10979
S13,§3529, editorially divided

11073 Consolidated railways. If the action is against any railway corporation which has merged and consolidated its stock, property, franchises, and liabilities with that of any other railway corporation, as authorized by section 7923, or which has sold or leased its property and franchises to any other railway corporation as authorized by section 7942, service of the original notice may be made upon any station, ticket, or other agent of the merged, vendee, or lessee corporation in the county where the action is brought; if there is no such agent in said county, then service may be made upon such agent or person in any other county. [S13, §3529; C24, 27, 31, 35,§11073.]

Referred to in §11078

11074 Insurance company. If the action is against an insurance company, for loss or damage upon any contract of insurance or indemnity, service may be had upon any general agent of the company wherever found, or upon any recording agent or agent who has authority to issue policies. [C97,§3530; C24, 27, 31, 35, §11074.]

Referred to in §11078
Actions against bonding companies, §§12769, 12770

11075 Municipal corporation. When the action is against a municipal corporation, service may be made on the mayor or clerk. [C51,§1726; R60,§2824; C73,§2612; C97,§3531; C24, 27, 31, 35, §11075.]

Referred to in §11078
C97,§3531, editorially divided

11076 School township or district. When the action is against a school township or independent district, service may be made on the president or secretary. [C97,§3531; C24, 27, 31, 35,§11076.]

Referred to in §11078

11077 Other corporations. When the action is against any other corporation, service may be made on any trustee or officer thereof, or on any agent employed in the general management of its business, or on any of the last known or acting officers of such corporation. [C51,§1726; R60,§2824; C73,§2612; C97,§3531; C24, 27, 31, 35,§11077.]

Referred to in §11078
Last known or acting officers, §8439
Public officers as process agents, §§8355, 8421, 8766, 8801, 8952, 9087, 9376

11078 Publication service substituted. If no person can be found on whom service can be made as provided in sections 11072 to 11077, inclusive, it may be made by publication as provided in other cases. [C73,§2612; C97,§3531; C24, 27, 31, 35,§11078.]

11079 Actions arising out of agency. When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency. [C51,§1705; R60,§2827; C73,§2613; C97,§3532; C24, 27, 31, 35,§11079.]

Related section, §11046

11080 Minor. If the defendant is a minor under fourteen years of age, the service must be made on his father, mother, or guardian, but if there be none of these within the state, then on the person therein having care of or control over him, or with whom he resides, or in whose service he is employed. When he is over four-

teen years of age, service on him shall be sufficient. [C51,§1729; R60,§2828; C73,§2614; C97, §3533; C24, 27, 31, 35,§11080.]

11081 Service by publication. Service may be made by publication, when an affidavit is filed that personal service cannot be made on the defendant within this state, in either of the following cases:

1. *Recovery of real property.* In actions brought for the recovery of real property, or an estate or interest therein.

2. *Partition.* In an action for the partition of real property.

3. *Foreclosure.* In an action for the sale of real property under a mortgage, lien, or other incumbrance or charge.

4. *Specific performance—wills.* In actions to compel the specific performance of a contract of sale of real estate, or in actions to establish or set aside a will, where in such cases any or all of the defendants reside out of this state and the real property is within it.

5. *Attachment.* In actions brought against a nonresident of this state, or a foreign corporation, having in the state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way.

6. *Adjudicating title or interest.* In actions which relate to or the subject of which is real or personal property in this state, when any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation.

7. *Absconding debtor.* In all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a notice, or keeps himself concealed therein with like intent.

8. *Divorce.* Where the action is for a divorce, or for a change or for modification of a decree of divorce, if the defendant is a nonresident of the state, or his residence is unknown.

9. *Quieting title to real estate.* Where the action is an action to quiet title to real estate if the defendant is a nonresident of the state, or his residence is unknown.

10. *Annulment of marriage.* Where the action is for the annulment of an illegal marriage, if the defendant is a nonresident of the state, or his residence is unknown.

11. *Sale or mortgage in probate.* In actions or proceedings by an executor, administrator, or guardian to sell or mortgage the real property belonging to the estate of a decedent, or to a ward, as the case may be. [C51,§1725; R60, §§2831, 2832; C73,§2618; C97,§3534; S13,§3534; C24, 27, 31, 35,§11081.]

Trial after default, §11595

11082 Unknown defendants. Where it is necessary to make an unknown person defendant, the petition shall be sworn to and state the claim of plaintiff with reference to the property involved in the action, that the name and residence of such person is unknown to the plaintiff, and that he has sought diligently to learn the same. [R60,§2836; C73,§2622; C97,§3538; SS15, §3538; C24, 27, 31, 35,§11082.]

40ExGA, HF 228, §5, editorially divided

11083 Notice to unknown defendants. The notice thereof shall contain the name of the plaintiff, a description of the property, the claim of the plaintiff thereto, the relief demanded, the name of the court, and the term in which appearance must be made. Such notice must be entitled in the name of the plaintiff against the unknown claimants of the property and shall be signed by the plaintiff or his attorney. [R60,§2837; C73, §2623; C97,§3538; SS15,§3538; C24, 27, 31, 35, §11083.]

11084 Method of publication. The publication must be of the original notice required for the commencement of actions, once each week for four consecutive weeks, before or after the filing of the petition, in some newspaper of general circulation published in the county where the petition is or will be filed, selected by the plaintiff or his attorney. [R60,§§2833, 2839; C73,§§2619, 2625; C97,§§3535, 3540; S13,§3540; C24, 27, 31, 35,§11084.]

11085 Service complete—proof. When the foregoing provisions have been complied with, the defendant so notified shall be required to appear as if personally served on the day of the last publication, within the county in which the petition is filed, proof thereof being made by the affidavit of the publisher or his foreman, and filed before default is taken. [C51,§1732; R60, §§2834, 2839; C73,§§2620, 2625; C97,§§3536, 3540; S13,§3540; C24, 27, 31, 35,§11085.]

Proof of publication, §11349

11086 Actual service. Actual personal service of the notice within or without the state supersedes the necessity of publication. [R60, §2835; C73,§2621; C97,§3537; C24, 27, 31, 35, §11086.]

11087 Mode of appearance. The mode of appearance may be:

1. By delivering to the plaintiff or the clerk of the court a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person or his attorney, dated the day of its delivery and filed in the case.

2. By entering an appearance in the appearance docket or judge's calendar or by announcing to the court an appearance which shall be entered of record.

3. By taking part either personally or by attorney in the trial of the case. [R60,§2840; C73,§2626; C97,§3541; S13,§3541; C24, 27, 31, 35, §11087.]

S13,§3541, editorially divided

11088 Special appearance. Any defendant may appear specially for the sole purpose of attacking the jurisdiction of the court. Such special appearance shall be announced at the time it is made and shall limit the party to jurisdictional matters only and shall give him no

right to plead to the merits of the case. [C73, §2626; C97,§3541; S13,§3541; C24, 27, 31, 35, §11088.]

11089 Exemption to members of general assembly. No member of the general assembly shall be held to appear or answer in any civil or special action in any court while such general assembly is in session. [C97,§3541; S13,§3541; C24, 27, 31, 35,§11089.]

11090 Holidays. No person shall be held to answer or appear in any court on any day now or hereafter made a legal holiday. [C97,§3541; S13,§3541; C24, 27, 31, 35,§11090.]

Holidays, §9545; depositions, §11862

11091 Unserved parties — optional procedure. When the action is against two or more defendants, and one or more of them shall have been served, but not all, the plaintiff may proceed as follows:

1. If the action is against defendants who are jointly, or jointly and severally, or severally liable only, he may, without prejudice to his rights in that or any other action against those not served, proceed against those served in the same manner as if they were the only defendants; if he recovers against those jointly liable only, he may take judgment against all thus liable, which may be enforced against the joint and separate property of those served, but not against the separate property of those not served, until they have had opportunity to show cause why judgment should not be enforced against their separate property; or,

2. He may continue until the next term and bring in the other defendants; but at such second term the action shall proceed against all who have been served in due time, and no further delay shall be allowed to bring in the others, unless all that appear shall consent to such delay, or the cause is continued for other reasons. [R60,§2841; C73,§2627; C97,§3542; C24, 27, 31, 35,§11091.]

11092 Real estate — action indexed. When a petition affecting real estate is filed, the clerk of the district court where filed shall forthwith index same in an index book to be provided therefor, under the tract number which describes the property, entering in each instance the cause number as a guide to the record of court proceedings which affect such real estate. If the petition be amended to include other parties or other lands, same shall be similarly indexed. When the cause is finally determined the result shall be indicated in said book wherever indexed. [R60,§2842; C73,§2628; C97,§3543; S13,§3543; C24, 27, 31, 35,§11092.]

Exact time of indexing required, §10832.1
S13,§3543, editorially divided

11093 Lis pendens. When so indexed said action shall be considered pending so as to charge all third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's rights. [R60, §2842; C73,§2628; C97,§3543; S13,§3543; C24, 27, 31, 35,§11093.]

11094 Exceptions. If the real property affected be situated in the county where the petition is filed it shall be unnecessary to show in said index lands not situated in said county. [R60,§2842; C73,§2628; C97,§3543; S13,§3543; C24, 27, 31, 35,§11094.]

11095 Real estate in foreign county — superior court. When any part of real property, the subject of an action, is situated in any other county than the one in which the action is brought, or when the action is brought in the superior court, the plaintiff must, in order to affect third persons with constructive notice of the pendency thereof, file with the clerk of the district court of such county a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby, who shall at once index and enter a memorandum thereof in the incumbrance book. [R60,§2843; C73,§2629; C97,§3544; C24, 27, 31, 35,§11095.]

Referred to in §11022
40ExGA, HF 228, §8, editorially divided

11096 Constructive notice. From the time of such indexing, the pendency of the action shall be constructive notice to subsequent purchasers or incumbrancers thereof, who shall be bound by all the proceedings taken after the filing of such notice, to the same extent as if parties to the action. [R60,§2843; C73,§2629; C97,§3544; C24, 27, 31, 35,§11096.]

11097 Notice perpetuated. Within two months after the determination of the action, there shall also be filed with such clerk a certified copy of the final order, judgment, or decree, who shall enter and index the same as though rendered in that county, or such notice of pendency shall cease to be constructive notice. [R60,§2843; C73,§2629; C97,§3544; C24, 27, 31, 35,§11097.]

CHAPTER 490

PUBLICATION AND POSTING OF NOTICES

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11098 Publications in English. All notices, proceedings, and other matter whatsoever, required by law or ordinance to be published in a newspaper, shall be published only in the English language and in newspapers published wholly in the English language. [C73,§§306, 307; C97,§549; S13,§549; C24, 27, 31, 35,§11098.]

Referred to in §11099

11099 Violation. Any person who is in any manner a party to violation of section 11098 shall be guilty of a misdemeanor. [C97,§550; C24, 27, 31, 35,§11099.]

Punishment, §12894

11099.1 "Newspaper" defined. For the purpose of establishing and giving assured circulation to all notices and/or reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have a bona fide paid circulation recognized by the postal laws of the United States shall be designated for the publication of notices and/or reports of proceedings as required by law. [C35,§11099-e1; 48GA, ch 241,§1.]

Newspapers operating Jan. 1, 1940, excepted, 48GA, ch 241

11099.2 Change in name—effect. A change of name or ownership of a newspaper thus designated that does not affect its general circulation as above required shall in no way disqualify such newspaper for selection in making such publication of legal notices. [C35,§11099-e2.]

11100 Permissible selection. Publications may be made in a newspaper published once a week or oftener. [C73,§3832; C97,§1293; S13, §1293; C24, 27, 31, 35,§11100.]

40ExGA, HF 40, §8, editorially divided

11101 Selection by plaintiff, etc. The plaintiff or executor or his attorney, in all publications concerning actions, executions, and estates, may designate the newspaper in which such publication shall be made. [C73,§3832; C97,§1293; S13,§1293; C24, 27, 31, 35,§11101.]

11102 Selection by county officers. The clerk of the district court, sheriff, auditor, treasurer, and recorder shall designate the newspapers in which the notices pertaining to their respective offices shall be published and the board of supervisors shall designate the newspapers in which all other county notices and proceedings, not required to be published in the official county newspapers, shall be published. [R60,§314; C73,§306; C97,§549; S13, §549; C24, 27, 31, 35,§11102.]

11103 Refusal to publish. If publication be refused when copy therefor, with the cost or security for payment of the cost, is tendered, such publication may be made in some other newspaper of general circulation at or nearest to the county seat, with the same effect as if made in the newspaper so refusing. [C73,§3832; C97,§1293; S13,§1293; C24, 27, 31, 35,§11103.]

11104 Days of publication. When the publication is in a newspaper which is published oftener than once a week, the succeeding publications of such notice shall be on the same day of the week as the first publication. This section shall not apply to any notice for the publication of which provision inconsistent herewith is specially made. [S13,§1293-a; C24, 27, 31, 35,§11104.]

Proof of publication, §11349

11105 Payment for publication. Publications required by law shall, in the first instance, be paid for by the party causing publication, and shall be taxed as costs in the proceeding. [C51, §2558; R60,§4165; C73,§3838; C97,§1296; C24, 27, 31, 35,§11105.]

11106 Fees for publication. The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation, or other publication required or allowed by law, shall not exceed one dollar for one insertion, and fifty cents for each subsequent insertion, for each ten lines of brevier type. In case of controversy or doubt regarding measurements, said controversy shall be referred to the state printing board, and its decision shall be final. [C73,§3832; C97,§1293; S13,§1293; C24, 27, 31, 35,§11106; 47GA, ch 226,§1.]

11107 Fee for posting. In all cases where an officer in the discharge of his duty is required to post an advertisement or notice, he shall, when not otherwise provided, be allowed twenty-five cents, and the same mileage as a sheriff. [C51,§2558; R60,§4165; C73,§3838; C97, §1296; C24, 27, 31, 35,§11107.]

Proof of posting, §11350; mileage, §5191

CHAPTER 491

PLEADINGS

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11108 Technical forms. All technical forms of action and pleading, all common counts, general issues, and all fictions, are abolished, and hereafter the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in the code. [R60,§2872; C73,§2644; C97,§3557; C24, 27, 31, 35,§11108.]

C97,§3557, editorially divided

11109 "Pleadings" defined. Pleadings are the written statements by the parties of their respective claims and defenses and are:

1. The petition of the plaintiff.

2. The motion, demurrer or answer of the defendant.

3. The motion, demurrer or reply of the plaintiff.

4. The motion, or demurrer of the defendant.

[R60,§§2873, 2874; C73,§2645; C97,§3557; C24, 27, 31, 35,§11109.]

Motions in general, ch 492

11110 Filing—option. The filing of a pleading or motion in the clerk's office during a term, and a memorandum of such filing made in the appearance docket within the time allowed, shall be equivalent to filing the same in open court. [R60,§2871; C73,§2643; C97,§3557; C24, 27, 31, 35,§11110.]

When pleading deemed filed, §10833

11111 Petition. The petition must contain:

1. The name of the court and county in which the action is brought.

2. The names of the parties to the action, plaintiffs and defendants, followed by the words, "petition at law" or "petition in equity", as the case may be.

3. A statement of the facts constituting the plaintiff's cause of action.
4. A demand of the relief to which the plaintiff considers himself entitled, and if for money, the amount thereof. [C51,§1736; R60,§2875; C73,§2646; C97,§3559; C24, 27, 31, 35,§11111.]

C97,§3559, editorially divided

11112 Counts or divisions—prayer. Where the petition contains more than one cause of action, each must be stated wholly in a count or division by itself, and must be sufficient in itself; but one prayer for judgment may include a sum based on all counts seeking a money remedy. [R60,§2875; C73,§2646; C97,§3559; C24, 27, 31, 35,§11112.]

11113 When paragraphing required. In a petition by equitable proceedings, each division shall also be separated into paragraphs numbered as such, and each paragraph shall contain, as nearly as may be convenient, a complete and distinct statement. [R60,§2875; C73,§2646; C97, §3559; C24, 27, 31, 35,§11113.]

11114 Answer. The answer shall contain:
1. The name of the court and county, and of the plaintiffs and defendants, but when there are several plaintiffs and defendants it shall only be necessary to give the first name of each class, with the words "and others".
2. A general denial of each allegation of the petition, or of any knowledge or information thereof sufficient to form a belief.
3. A special denial of each allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.
4. A statement of any new matter constituting a defense.
5. A statement of any new matter constituting a counterclaim. [R60,§2880; C73,§2655; C97,§3566; C24, 27, 31, 35,§11114.]

C97,§3566, editorially divided

11115 Multiple defenses and counterclaims. The defendant may set forth in his answer as many causes of defense or counterclaim, whether legal or equitable, as he may have. [R60,§2880; C73,§2655; C97,§3566; C24, 27, 31, 35,§11115.]

11116 Answer of guardian. The guardian of a minor or other person, or attorney for a person in prison, must deny in the answer all the material allegations of the petition prejudicial to such defendant. [R60,§2893; C73, §2656; C97,§3567; C24, 27, 31, 35,§11116.]

11117 Divisions of answer. Each affirmative defense shall be stated in a distinct division of the answer, and must be sufficient in itself, and must intelligibly refer to that part of the petition to which it is intended to apply. [R60, §2882; C73,§2657; C97,§3568; C24, 27, 31, 35, §11117.]

11118 Nonnecessity for prayer. In the defense part of an answer or reply, it shall not be necessary to make a prayer for judgment. [R60,§2883; C73,§2658; C97,§3569; C24, 27, 31, 35,§11118.]

11119 Counts and divisions numbered. The counts of the petition, and divisions of a petition, in equity, must be consecutively numbered as such, and so must the divisions of the answer and reply. [R60,§2902; C73,§2705; C97,§3616; C24, 27, 31, 35,§11119.]

11120 Correction of defect. If any pleading does not conform to the foregoing requirements as to form, divisions, or numbering, or the distinct or separate statements of its causes of action or defense, the court may, on its own motion or that of the adverse party, order the same to be corrected, on such terms as it may impose. [R60,§2903; C73,§2706; C97,§3617; C24, 27, 31, 35,§11120.]

11121 Time to plead. The defendant shall, in an action commenced in a court of record, demur or answer to the original petition, or assail the same by motion, before noon of the second day of the term. [C51,§1737; R60,§2849; C73,§2635; C97,§3550; C24, 27, 31, 35,§11121.]

11121.1 Exception. If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, the defendant shall plead within three days after service of the original notice. [C31, 35,§11121-d1.]

Referred to in §11123.1
See also §11059, subsection 4

11122 Timing pleadings. The day on which the judge actually opens court shall, for the purpose of timing the pleading, be considered the first day of the term. [R60,§2857; C73, §2637; C97,§3553; C24, 27, 31, 35,§11122.]

11123 Extension of time. The court may extend the time for filing any pleading beyond that herein fixed, but shall do so with due regard to making up issues at the earliest day practicable. [R60,§2859; C73,§2638; C97,§3554; C24, 27, 31, 35,§11123.]

11123.1 Exception. If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, the court shall not extend the time to plead more than two days beyond the time fixed in section 11121.1. [C31, 35,§11123-d1.]

11124 Copy of pleading—fee. Every party, at the time of filing any petition, answer, reply, demurrer, or motion, except a motion for continuance or change of venue, shall file with the same one plain copy thereof for the use of the adverse party, and, on failure to do so, the cause may be continued at the option of the adverse party, or the paper so filed stricken from the files. A fee of ten cents per hundred words shall be allowed for all copies and taxed with the costs. [C97,§3558; SS15,§3558; C24, 27, 31, 35,§11124.]

SS15,§3558, editorially divided

11125 Delivery by clerk. The clerk of the court wherein the copy herein provided for is filed, shall, as soon as may be, either deliver or

mail such copy to the attorney for the adverse party. [SS15,§3558; C24, 27, 31, 35,§11125.]

11126 Taking files from office. The original files shall be taken from the clerk's office only on order of the judge by leaving with the clerk a receipt for the same. [C97,§3558; SS15,§3558; C24, 27, 31, 35,§11126.]

11127 Motion for more specific statement. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may, on motion, require it to be made more definite and certain. [R60,§2948; C73,§2720; C97, §3630; C24, 27, 31, 35,§11127.]

C97,§3630, editorially divided

11128 Requirements. Such motion shall point out wherein the pleading is not sufficiently specific, or it shall be disregarded. If the reason for such demand exists outside of the pleadings, the motion must state the same, and be supported by affidavit. [R60,§2948; C73,§2720; C97, §3630; C24, 27, 31, 35,§11128.]

11129 Pleading contract. No pleading which recites or refers to a contract shall be sufficiently specific unless it states whether it is in writing or not. [R60,§2948; C73,§2720; C97, §3630; C24, 27, 31, 35,§11129.]

11130 Equitable actions—motion to dismiss. In actions triable in equity, every defense in point of law arising upon the face of the petition, cross-petition, petition of intervention, answer, counterclaim, or reply, as the case may be, for misjoinder of parties, or which in an action triable at law may be made by demurrer, shall be made by motion to dismiss or in the answer or reply. [R60,§§2876, 2878, 2894, 2899, 2920, 2961, 2963, 2964; C73,§§2648, 2650, 2664, 2668; C97,§§3561, 3563, 3575, 3579; C24, 27, 31, 35,§11130.]

11131 Disposal of points of law. Every point of law going to the whole or any material part of the cause or causes of action stated in the petition, counterclaim, cross-petition, petition of intervention, or defense stated in the answer or reply, shall, on order of court or on motion of either party, be presented to the court and disposed of before final hearing. [C24, 27, 31, 35,§11131.]

11132 Plea in bar or abatement. In such actions, every defense presented by plea in bar or in abatement, or to the jurisdiction under general appearance, made in the answer or reply, shall on motion of either party or on order of court be separately heard and disposed of before the trial of the principal case. [C24, 27, 31, 35,§11132.]

11133 Notice for hearing. The motion to dismiss may be set down for hearing by either party upon five days written notice to the adverse party or his attorney. Such notice with proof of service shall be filed with the original papers. [C24, 27, 31, 35,§11133.]

11134 Time of answer or reply. If the motion be denied, the mover shall answer or reply within five days thereafter, unless the parties agree to a longer time or the court, before or after the expiration of said time, shall extend the same. [C24, 27, 31, 35,§11134.]

11135 Motions and demurrers. All demurrers and motions assailing a pleading shall be in writing, and filed before answer or reply has been filed to the pleading assailed, except as provided in this chapter, and specify and number the causes on which they are founded, and none other shall be argued or considered. [C51,§1754; R60,§§2864–2866, 2877, 2894, 2899; C73,§§2639, 2649, 2664, 2668; C97,§§3551, 3562, 3575, 3579; C24, 27, 31, 35,§11135.]

C35, §11135, editorially divided

11135.1 One motion and demurrer only. Only one motion of the same kind and one demurrer assailing such pleading shall be filed, unless such pleading is amended after the filing of a motion or demurrer thereto. [C51,§1754; R60,§§2864–2866, 2877, 2894, 2899; C73,§§2639, 2649, 2664, 2668; C97,§§3551, 3562, 3575, 3579; C24, 27, 31, 35,§11135.]

11136 Subsequent pleadings. Each party shall so demur, assail by motion, answer, or reply to all subsequent pleadings, including amendments thereto and substitutes therefor, before noon of the day succeeding that on which the pleading is filed, but all pleadings must be filed by the time the cause is reached for trial. [R60,§§2850, 2851, 2858; C73,§2636; C97,§3552; C24, 27, 31, 35,§11136.]

11137 Pleadings suspended. A motion or demurrer assailing any pleading, or count thereof, suspends the necessity of filing any other pleading thereto until the same has been determined, and the next pleading shall be filed by the morning of the day succeeding such determination. [R60,§2867; C73,§2640; C97,§3555; C24, 27, 31, 35,§11137.]

C97,§3555, editorially divided

11138 Argument and submission. All motions and demurrers shall be argued and submitted on the morning of the day succeeding the filing thereof, or at such other time as is ordered by the court, unless the cause is sooner reached for trial. [R60,§2869; C73,§2641; C97,§3555; C24, 27, 31, 35,§11138.]

11139 Withdrawal of motion or demurrer. A motion or demurrer once filed shall not be withdrawn without the consent of the adverse party in writing, or given in open court, or of the court. [R60,§2870; C73,§2642; C97,§3556; C24, 27, 31, 35,§11139.]

11140 Amendment before answer. The plaintiff, without prejudice to the proceedings already had, may amend his petition, without leave, at any time before the answer is filed, notice thereof being given the defendant or his attorney, and the defendant shall have the same time to plead thereto as he had to the original petition. [R60,§2975; C73,§2647; C97,§3560; C24, 27, 31, 35,§11140.]

11141 Demurrer—causes of—actions at law. In actions triable at law, any party may demur to any pleading filed by any adverse party upon one or more of the following grounds appearing on its face:

1. That the court has no jurisdiction of the person of the defendant or the subject of the action.
2. That the adverse party has not legal capacity to sue.
3. That there is another action pending between the same parties for the same cause.
4. That there is a defect of parties, plaintiffs or defendants.
5. That the facts stated in the pleading attacked do not entitle the adverse party to the relief demanded.
6. That the pleading attacked shows that the cause of action or defense is barred by the statute of limitations; or fails to show it to be in writing where it should be so evidenced; or, if founded on an account or writing as evidence of indebtedness, that neither such writing or account or copy thereof is incorporated into or attached to the pleading, or a sufficient reason stated for not doing so. [C51,§1754; R60, §§2876, 2877, 2920, 2961, 2963, 2964; C73,§2648; C97,§3561; C24, 27, 31, 35,§11141.]

40ExGA, SF 229, §7, editorially divided

11142 Insufficient statement. It shall not be sufficient to state the grounds of demurrer in the foregoing terms. [C73,§2649; C97,§3562; C24, 27, 31, 35,§11142.]

11143 Demurrer to one of several causes. The defendant may demur to one or more of the several causes of action alleged in the petition, and answer as to the residue. [C51,§1738; R60, §2879; C73,§2651; C97,§3564; C24, 27, 31, 35, §11143.]

C97,§3564, editorially divided

11144 Effect of demurrer. A demurrer shall be considered as an admission of the allegations of the pleading demurred to for the purposes of demurrer, and for such purposes only; and when a demurrer shall be overruled and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer; and in such case the sufficiency of the pleading thus attacked shall be determined as if no demurrer had been filed. [C97,§3564; C24, 27, 31, 35,§11144.]

11145 Failure to demur. No pleading shall be held sufficient on account of a failure to demur thereto. [C97,§3564; C24, 27, 31, 35,§11145.]

11146 Joinder in demurrer. The opposite party shall be deemed to join in a demurrer whenever he shall not amend the pleading to which it is addressed. [R60,§2900; C73,§2652; C97,§3565; C24, 27, 31, 35,§11146.]

C97,§3565, editorially divided

11147 Pleading over. Upon a demurrer being overruled, the party demurring may answer or reply. [R60,§2976; C73,§2653; C97,§3565; C24, 27, 31, 35,§11147.]

11148 Failure to plead over—effect. Upon a decision of a demurrer, if the adverse party fail to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff or the defendant had made default, as the case may be. [C51, §§1755, 1771; R60,§3086; C73,§2654; C97,§3565; C24, 27, 31, 35,§11148.]

11149 Objection raised by answer or reply. When any ground of demurrer or of motion to dismiss, as the case may be, does not appear on the face of the petition, cross-petition, or counterclaim the issue may be raised by answer or reply. [R60,§2878; C73,§2650; C97,§3563; C24, 27, 31, 35,§11149.]

11150 Objection raised by motion to arrest judgment. When any petition, cross-petition, or counterclaim fails to state a cause of action, or any answer or reply a defense, advantage may be taken thereof by a motion in arrest of judgment, numbering and specifying the grounds thereof. [R60,§2878; C73,§2650; C97,§3563; C24, 27, 31, 35,§11150.]

Analogous provision, §11554

11151 Counterclaim — how stated. Each counterclaim must be stated in a distinct count or division, and must be:

1. When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court.
2. A cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition or connected with the subject of the action.
3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so pleaded. [C51,§1740; R60, §§2884, 2886, 2889, 2891; C73,§2659; C97,§3570; C24, 27, 31, 35,§11151.]

11152 Equitable answer — paragraphs. An equitable division must also be separated into paragraphs and numbered, as required in regard to an equitable cause of action in the petition. [R60,§2885; C73,§2660; C97,§3571; C24, 27, 31, 35,§11152.]

Equitable petition, §11113

11153 Counterclaim by co-maker or surety. A co-maker or surety, when sued alone, may, with the consent of his co-maker or principal, avail himself by way of counterclaim of a debt or liquidated demand due from the plaintiff at the commencement of the action to such co-maker or principal, but the plaintiff may meet such counterclaim in the same way as if made by the co-maker or principal himself. [R60, §2887; C73,§2661; C97,§3572; C24, 27, 31, 35, §11153.]

11154 New party. When a new party is necessary to a final decision upon a counter-

claim, the court may either permit such party to be made, or direct that it be stricken out of the answer and made the subject of a separate action. [R60,§§2888, 2890; C73,§2662; C97, §3573; C24, 27, 31, 35,§11154.]

11155 Cross-petition—third parties. When a defendant has a cause of action affecting the subject matter of the action against a co-defendant, or a person not a party to the action, he may, in the same action, file a cross-petition against the co-defendant or other person. The defendants thereto may be notified as in other cases, and defense thereto shall be made in the time and manner prescribed in regard to the original petition, and with the same right of obtaining provisional remedies applicable to the case. The prosecution of the cross-petition shall not delay the trial of the original action, when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-petition. [R60,§2892; C73,§2663; C97, §3574; C24, 27, 31, 35,§11155.]

11156 Reply—when necessary. There shall be no reply except:

1. Where a counterclaim is alleged.
2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer. [C51, §1741; R60,§2895; C73,§2665; C97,§3576; C24, 27, 31, 35,§11156.]

11157 Statements of. When a reply must be filed, it shall consist of:

1. A general or specific denial of each allegation or counterclaim controverted, or any knowledge or information thereof sufficient to form a belief.
2. Any new matter, not inconsistent with the petition, constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, not inconsistent with the petition, which avoids the same. [R60,§2896; C73,§2666; C97,§3577; C24, 27, 31, 35,§11157.]

C97,§3577, editorially divided

11158 Allegation of new matter—effect. An allegation of new matter in avoidance shall not be treated as a waiver of the denial of the allegations of the answer implied by law. [C97, §3577; C24, 27, 31, 35,§11158.]

11159 Defenses to counterclaim — paragraphs. Any number of defenses, negative or affirmative, are pleadable to a counterclaim, and each affirmative matter of defense in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply. A division of equitable matter must also be separated into paragraphs and numbered, as required in case of such matter in the answer. [R60,§§2897, 2898; C73,§2667; C97,§3578; C24, 27, 31, 35,§11159.]

11160 Signing and verification. Every pleading must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except motions and demurrers, shall be verified also. In all cases of verification of a pleading, the affidavit shall be to the effect that the affiant believes the statements therein to be true. [R60, §2904; C73,§2669; C97,§3580; C24, 27, 31, 35, §11160.]

11161 Verification by officer or agent. Where a corporation is a party, the affidavit may be made by any officer or agent thereof. [R60,§2905; C73,§2670; C97,§3581; C24, 27, 31, 35,§11161.]

11162 Verification by parties united in interest. When there are several parties united in interest, the affidavit may be made by any one of them. [R60,§2906; C73,§2671; C97,§3582; C24, 27, 31, 35,§11162.]

11163 Verification by agent or attorney. If the pleading is founded on a written instrument for the payment of money only, and such instrument is in possession of the agent or attorney, the affidavit may be made by such agent or attorney, so far as relative to the statement of the cause of action thereon; but when relief is asked other than a money judgment or decree of foreclosure, the affidavit must contain averments showing competency, as herein provided. [R60,§2907; C73,§2672; C97,§3583; C24, 27, 31, 35,§11163.]

11164 Verification by person knowing facts. If the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same. [R60,§§2908, 2909; C73,§2673; C97,§3584; C24, 27, 31, 35,§11164.]

11165 Verification of counterclaim. Where the petition is not verified, and the answer contains a counterclaim, the same may be verified apart from the defense part of the answer, and the foregoing provisions are applicable to the counterclaim as if the same were a separate pleading. [C73,§2674; C97,§3585; C24, 27, 31, 35,§11165.]

11166 Verification not required. Verifications shall not be required to any pleading of a guardian, executor, or prisoner in the penitentiary, nor to any pleading controverting the answer of a garnishee, nor to one grounded on an injury to the person or the character. [R60, §§2910, 2912; C73,§2675; C97,§3586; C24, 27, 31, 35,§11166.]

11167 Crimination not required. When it can be seen from the pleading to be answered that an admission of the truth of its allegations might subject the party to a criminal prosecution, no verification shall be required. [R60, §2911; C73,§2676; C97,§3587; C24, 27, 31, 35, §11167.]

11168 Failure to verify. If a pleading is not duly verified, it may be stricken out on motion; but such defect will be waived if the other party responds thereto, or proceeds to trial

without such motion. [R60,§2916; C73,§2677; C97,§3588; C24, 27, 31, 35,§11168.]

11169 Verification applicable to amount claimed. The verification of the pleading does not apply to the amount claimed, except in actions founded on contract, express or implied, for the payment of money only. [R60,§2914; C73,§2678; C97,§3589; C24, 27, 31, 35,§11169.]

11170 Effect of verification. The verification shall not make other or greater proof necessary on the side of the adverse party. [R60, §2915; C73,§2679; C97,§3590; C24, 27, 31, 35, §11170.]

11171 Verification of amendments. Amendments may be made without being verified, unless a new and distinct cause of action or counterclaim is thereby introduced, in which case they shall be verified as other pleadings. [R60,§2981; C73,§2680; C97,§3591; C24, 27, 31, 35,§11171.]

11172 Mitigating facts. In any action brought to recover damages for an injury to person, character, or property, the defendant may set forth, in a distinct division of his answer, any facts, of which evidence is legally admissible, to mitigate or otherwise reduce the damages, whether a complete defense or justification be pleaded or not, and he may give in evidence the mitigating circumstances, whether he proves the defense or justification or not. [R60,§2929; C73,§2682; C97,§3593; C24, 27, 31, 35,§11172.]

C97,§3593, editorially divided

11173 Necessity to plead. No mitigating circumstances shall be proved unless pleaded, except such as are shown by or grow out of the testimony introduced by the adverse party. [R60,§2929; C73,§2682; C97,§3593; C24, 27, 31, 35,§11173.]

Contributory negligence as mitigating fact, §11210

11174 Intervention. Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause, and before the trial commences. [R60,§2930; C73,§2683; C97,§3594; C24, 27, 31, 35,§11174.]

Intervention in attachment, §12186

11175 Decision — delay — costs. The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained he shall pay all costs of the intervention. [R60,§2931; C73,§2684; C97,§3595; C24, 27, 31, 35,§11175.]

11176 Manner of intervening. The intervention shall be by petition, which must set forth the facts on which it rests, and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings.

If such petition is filed during term, the court shall direct the time in which an answer shall be filed thereto. [R60,§2932; C73,§2685; C97, §3596; C24, 27, 31, 35,§11176.]

11177 Variance. No variance between the allegations in a pleading and the proof is to be regarded as material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. [C51,§1758; R60,§2972; C73,§2686; C97,§3597; C24, 27, 31, 35,§11177.]

Referred to in §11180
C97,§3597, editorially divided

11178 Proof of injury—amendments. Whenever it is alleged that a party has been so misled, that fact must be shown by proof to the satisfaction of the court, and such proof must also show in what respect he has been so misled, and thereupon the court may order the pleading to be amended upon such terms as may be just. [R60,§2972; C73,§2686; C97,§3597; C24, 27, 31, 35,§11178.]

Referred to in §11180

11179 Immaterial variance. When the variance is not material, the court may direct the fact to be found according to the evidence, and order an immediate amendment without cost. [C51,§1757; R60,§2973; C73,§2687; C97,§3598; C24, 27, 31, 35,§11179.]

Referred to in §11180

11180 Failure of proof. When, however, the allegation of the claim or defense to which the proof is directed is unproved in its general meaning, it shall not be held to be a case of variance within sections 11177 to 11179, inclusive, but a failure of proof. [R60,§2974; C73, §2688; C97,§3599; C24, 27, 31, 35,§11180.]

11181 Amount of proof. A party shall not be compelled to prove more than is necessary to entitle him to the relief asked for, or any lower degree included therein, nor more than sufficient to sustain his defense. [R60,§2966; C73,§2729; C97,§3639; C24, 27, 31, 35,§11181.]

11182 Amendments allowed. The court may, on motion of either party at any time, in furtherance of justice and on such terms as may be proper, permit such party to amend any pleadings or proceedings by adding or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceedings to the facts proved. [C51,§1759; R60,§2977; C73, §2689; C97,§3600; C24, 27, 31, 35,§11182.]

Amendment to cure defect, §11557

11183 Continuance on account of amendment. When a party amends a pleading or proceeding, the case shall not be continued in

consequence thereof, unless the court is satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of such amendment; if the court is thus satisfied, a continuance may be granted to some day in the same or the next term of said court. [C51, §1756; R60,§2979; C73,§2691; C97,§3602; C24, 27, 31, 35,§11183.]

11184 How amendment made — substitute pleading. All matters of supplement or amendment, whether of addition or subtraction, shall not be made by erasure or interlineation of the original, or by addition thereto, but upon a separate paper, which shall be filed and constitute, with the original, but one pleading. But if it be stated in such paper that it is a substitute for the former pleading intended to be amended, it shall be so taken, but the pleading superseded by the substitute shall not be withdrawn from the files. [R60,§2983; C73,§2692; C97,§3603; C24, 27, 31, 35,§11184.]

11185 Interrogatories annexed to pleading. Either party may annex to his petition, answer, or reply written interrogatories to any one or more of the adverse parties, concerning any of the material facts in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering. [R60,§2985; C73,§2693; C97,§3604; C24, 27, 31, 35,§11185.]

Remnant of common law bill of discovery, §10953

11186 Answers. The party answering shall not be confined to responding merely to the interrogatories, but may state any new matter concerning the same cause of action, which shall likewise be read as a deposition. [R60,§2986; C73,§2694; C97,§3605; C24, 27, 31, 35,§11186.]

11187 Time for answering — exceptions. The interrogatories shall be answered at the same time the pleading to which they are annexed is answered or replied to, unless they are excepted to by the adverse party; in which event the court shall determine as to the propriety of the interrogatories propounded, and which of them shall be answered, and within what time such answer shall be made. [R60,§2987; C73, §2695; C97,§3606; C24, 27, 31, 35,§11187.]

11188 Continuance for failure to answer. The trial of an action by ordinary proceedings shall not be postponed on account of the failure to answer interrogatories, if the party interrogated is present in court at the trial, so that he may be orally examined; nor in case of absence, unless an affidavit is filed showing the facts the party believes will be proved by the answers thereto, and that the party has not filed the interrogatories for the purpose of delay; whereupon, if the party will consent that the facts stated in the affidavit shall be considered as admitted by those interrogated, the trial shall not be postponed for that cause. [R60,§2988; C73, §2696; C97,§3607; C24, 27, 31, 35,§11188.]

11189 Particularity required. The party, in answering such interrogatories, shall distinguish clearly between what is stated from his personal knowledge and what from information or belief merely. An unqualified statement of a fact shall be considered as made of his personal knowledge. [R60,§2989; C73,§2697; C97,§3608; C24, 27, 31, 35,§11189.]

11190 How verified. The answers to the interrogatories shall be verified by the affidavit of the party making them, to the effect that the statements therein made of his own personal knowledge are true, and those made from the information of others he believes to be true. When the party interrogated is a corporation, the answers and affidavit verifying the same shall be made by the officers or agents of such corporation who have knowledge of the subjects and matters covered by the interrogatories. [R60, §2990; C73,§2698; C97,§3609; C24, 27, 31, 35, §11190.]

11191 Effect of failure to answer. Where a party filing interrogatories shall also file an affidavit that he verily believes the subject of the interrogatories, or any of them, is in the personal knowledge of the opposite party, and that his answers thereto, if truly made from such knowledge, will sustain the claim or defense, or any part thereof, and the opposite party shall fail to answer the same within the time allowed therefor, or by the court extended, the claim or defense, or the part thereof, according to such affidavit, shall be deemed to be sustained, and judgment given accordingly. [R60,§2991; C73, §2699; C97,§3610; C24, 27, 31, 35,§11191.]

11192 Answers compelled. The court may compel answers to interrogatories by process of contempt, and may, on the failure of the party to answer them, after reasonable time allowed therefor, dismiss the petition, or strike the pleading of the party so failing from the files. [R60,§2992; C73,§2700; C97,§3611; C24, 27, 31, 35,§11192.]

11193 Denial as to time, sum, quantity, or place. In all cases in which a denial is made by answer or reply concerning a time, sum, quantity, or place alleged, the party denying shall declare whether such denial is applicable to every time, sum, quantity, or place and, if not, what time, sum, quantity, or place he admits. [R60,§2901; C73,§2701; C97,§3612; C24, 27, 31, 35,§11193.]

11194 Allegations as to time. When time is material, the day, month, and year, or when there is a continued act, its duration must be alleged. When time is not material it need not be stated, and, if stated, need not be proved. [R60,§2955; C73,§2702; C97,§3613; C24, 27, 31, 35,§11194.]

11195 Allegations as to place. It shall be necessary to allege a place only when it forms a part of the substance of the issue. [R60,§2957; C73,§2703; C97,§3614; C24, 27, 31, 35,§11195.]

11196 Evidence under denial. Under a denial of an allegation, no evidence shall be introduced which does not tend to negative some

fact the party making the controverted allegation is bound to prove. [R60,§2944; C73,§2704; C97,§3615; C24, 27, 31, 35,§11196.]

11197 Sham defenses — redundant matter. Sham and irrelevant answers and defenses, and irrelevant and redundant matter in all pleadings, may be stricken out on motion, upon such terms as the court may, in its discretion, impose. [C51,§1753; R60,§§2861, 2946; C73,§§2707, 2719; C97,§3618; C24, 27, 31, 35,§11197.]

11198 Statute—how pleaded. In pleading a statute, or a right derived therefrom, it shall be sufficient to refer thereto so as to plainly designate it, and the court shall thereupon take judicial notice thereof. [R60,§2926; C73,§2708; C97,§3619; C24, 27, 31, 35,§11198.]

11199 Inconsistent defenses — verification. Inconsistent defenses may be stated in the same answer or reply, and when a verification is required, it must be to the effect that the party believes one or the other to be true, but cannot determine which. [R60,§2937; C73,§2710; C97, §3620; C24, 27, 31, 35,§11199.]

11200 Pleading exceptions. When a party claims a right in derogation of the general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his pleading. [R60, §2940; C73,§2711; C97,§3621; C24, 27, 31, 35, §11200.]

11201 What deemed admitted. Every material allegation in a pleading not controverted by a subsequent pleading shall, for the purposes of the action, be taken as true, but the allegations of the answer not relating to a counterclaim, and of the reply, are to be deemed controverted. A party desiring to admit any allegations which, by this and section 11202, would be considered controverted, may file at any time a written admission thereof. [C51, §1742; R60,§2917; C73,§2712; C97,§3622; C24, 27, 31, 35,§11201.]

C97,§3622, editorially divided

11202 Allegations as to value or damage. An allegation of value, or amount of damage, shall not be held true by a failure to controvert it. [C51,§1742; R60,§2917; C73,§2712; C97, §3622; C24, 27, 31, 35,§11202.]

Referred to in §11201

11203 Account—bill of particulars. If a pleading is founded on an account, a bill of particulars thereof, with the items therein consecutively numbered, must be incorporated into or attached to such pleading, and considered a portion thereof, subject to be made more specific on motion, and shall define and limit the proof, but may be amended as other pleadings. [R60, §2918; C73,§2713; C97,§3623; C24, 27, 31, 35, §11203.]

11204 Account deemed true. In all actions for money due upon an open account, when the defendant has been personally served with the original notice therein, and the petition is duly verified, and where a bill of particulars of said account is incorporated into or attached to the petition, if the defendant makes default or fails to controvert or deny the same or any of the items thereof by pleading duly verified, the account, or so much thereof as is not so controverted or denied, shall be taken as true and admitted. [C97,§3624; C24, 27, 31, 35,§11204.]

Similar provision, §10544

11205 Judgment—how pleaded. In pleading a judgment, or the determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but it may be stated to have been duly given or made. [R60,§2921; C73,§2714; C97, §3625; C24, 27, 31, 35,§11205.]

Referred to in §11208

11206 Conditions precedent. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part. [R60,§2922; C73, §2715; C97,§3626; C24, 27, 31, 35,§11206.]

Referred to in §11208

11207 Allegation of representative capacity. A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver the same generally, or as a legal conclusion, and where a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way. [R60,§2923; C73,§2716; C97,§3627; C24, 27, 31, 35,§11207.]

Referred to in §11208

11208 Fact denial required. If either of the allegations contemplated in sections 11205 to 11207, inclusive, is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated. [R60,§2925; C73,§2717; C97, §3628; C24, 27, 31, 35,§11208.]

11209 Matters specially pleaded. Any defense showing that a contract, written or oral, or any instrument sued on, is void or voidable; or that the instrument was delivered to a person as an escrow, or showing matter of justification, excuse, discharge, or release, and any defense which admits the facts of the adverse pleading, but by some other matter seeks to avoid their legal effect, must be specially pleaded. [R60,§2942; C73,§2718; C97,§3629; C24, 27, 31, 35,§11209.]

11210 Contributory negligence — burden — special exception — mitigation. In all actions brought in the courts of this state to recover damages caused by the negligence of the defendant, the burden of proving contributory negligence shall rest upon the defendant. This section shall only apply to actions brought by an employee against his or her employer, or by a passenger against a common carrier, and in

such cases contributory negligence may be pleaded in mitigation of damages. [SS15, §3593-a; C24, 27, 31, 35,§11210.]

Contributory and comparative negligence, §8158

11211 Judicial notice. Matters of which judicial notice is taken need not be stated in a pleading. [R60,§2950; C73,§2722; C97,§3632; C24, 27, 31, 35,§11211.]

11212 Pleading conveyance. When a party claims by conveyance, he may state it according to its legal effect or name. [R60,§2952; C73, §2723; C97,§3633; C24, 27, 31, 35,§11212.]

11213 Pleading estate. It shall not be necessary to allege the commencement of either a particular or a superior estate, unless it be essential to the merits of the case. [R60,§2954; C73,§2724; C97,§3634; C24, 27, 31, 35,§11213.]

11214 Injuries to goods. In actions for injuries to goods and chattels, their kind or species shall be alleged. [R60,§2956; C73,§2725; C97,§3635; C24, 27, 31, 35,§11214.]

11215 Injuries to real property. In actions for injuries to real property, the petition shall describe the property, and when the injury is to an incorporeal hereditament, shall describe the property in respect of which the right is claimed, as well as the right itself, either by the numbers by which the property is designated in the national survey, or by its abuttals, or by its courses and distances, or by any name which it has acquired by reputation certain enough to identify it. [R60,§2958; C73,§2726; C97,§3636; C24, 27, 31, 35,§11215.]

11216 Malice. When the party intends to prove malice to affect damages, he must aver the same. [R60,§2959; C73,§2727; C97,§3637; C24, 27, 31, 35,§11216.]

11217 Bond—breaches of. In an action on a bond with conditions, the party suing thereon shall notice the conditions and allege the facts constituting the breaches relied on. [C51,§1818; R60,§2960; C73,§2728; C97,§3638; C24, 27, 31, 35,§11217.]

11218 Denial of genuineness of signature. When a written instrument is referred to in a pleading, and the same or a copy thereof is incorporated in or attached to such pleading, the signature thereto, and to any indorsement thereon, shall be deemed genuine and admitted, unless the person whose signature the same purports to be shall, in a pleading or writing filed within the time allowed for pleading, deny under oath the genuineness of such signature. [R60, §2967; C73,§2730; C97,§3640; C24, 27, 31, 35, §11218.]

C97,§3640, editorially divided

11219 Execution by third party. If such instrument is not negotiable, and purports to be executed by a person not a party to the proceeding, the signature thereto shall not be deemed genuine or admitted, if a party to the proceeding, in the manner and within the time before mentioned, states under oath that he has no knowledge or information sufficient to enable him to form a belief as to the genuineness of such signature. [R60,§2967; C73,§2730; C97,§3640; C24, 27, 31, 35,§11219.]

11220 Inspection of written instrument. The person whose signature purports to be signed to such instrument shall, on demand, be entitled to an inspection thereof. [C73,§2730; C97, §3640; C24, 27, 31, 35,§11220.]

11221 Supplemental pleading. Either party may be allowed to make a supplemental petition, answer, or reply, alleging facts material to the case which have happened or have come to his knowledge since the filing of the former pleading; nor shall such new pleading be considered a waiver of former pleadings. [C51, §1749; R60,§2968; C73,§2731; C97,§3641; C24, 27, 31, 35,§11221.]

11222 Matter in abatement. Matter in abatement may be stated in the answer or reply, either together with or without causes of defense in bar, and no one of such causes shall be deemed to overrule the other. [R60,§2969; C73, §2732; C97,§3642; C24, 27, 31, 35,§11222.]

C97,§3642, editorially divided

11223 Waiver of matter in bar. A party shall not, after trial on matter of abatement, be allowed in the same action to answer or reply matter in bar. [R60,§2969; C73,§2732; C97, §3642; C24, 27, 31, 35,§11223.]

11224 Subsequent defenses. Any defense arising after the commencement of any action shall be stated according to the fact, without any formal commencement or conclusion. [R60, §2970; C73,§2733; C97,§3643; C24, 27, 31, 35, §11224.]

C97,§3643, editorially divided

11225 Presumption. Any answer which does not state whether the defense therein set up arose before or after action shall be held to be of matter arising before action. [R60,§2970; C73,§2733; C97,§3643; C24, 27, 31, 35,§11225.]

11226 Consolidation of actions. When two or more actions are pending in the same court which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no sufficient cause is shown, it shall be done. [R60,§2980; C73, §2734; C97,§3644; C24, 27, 31, 35,§11226.]

11227 Lost pleading — substitution. If an original pleading is lost, or withheld by anyone, the court may order a copy thereof to be substituted, or a substituted pleading to be filed. [C51,§1760; R60,§2982; C73,§2735; C97,§3645; C24, 27, 31, 35,§11227.]

11228 Immaterial errors disregarded. The court, in every stage of an action, must disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. [R60,§2978; C73,§2690; C97,§3601; C24, 27, 31, 35,§11228.]

Immaterial exceptions, §11548

CHAPTER 491.1

MENTAL EXAMINATION OF RECORD PARTY

11228.1 Court may order.
11228.2 Refusal—effect.
11228.3 Construction.

11228.1 Court may order. Any person who is a party, directly or indirectly, to any legal action, suit or other judicial proceedings in any court of record in this state, and who appears therein, either in person or by his guardian, agent, trustee, conservator, committee, legal representative, next friend, attorney or otherwise, and therein pleads affirmatively his own mental incompetency, infirmity or disability, shall, by order of any court of record having jurisdiction of such legal action, suit or judicial proceedings, upon the application, and at the costs of, any interested party thereto, be required to be produced, after due notice and under such reasonable restrictions and conditions as the court may prescribe, either before or after issues are joined in said legal action, suit or judicial proceedings, for mental examination by physicians chosen by the applicant, for the purpose of qualifying said physicians to testify in the trial of said legal action, suit or judicial proceedings as to the mental condition of such person and to enable the applicant to frame his pleadings therein accordingly. [C35,§11228-f1.]

11228.2 Refusal—effect. Upon failure or refusal of such person, whose mental examination has been ordered by such court of record, to submit speedily thereto in the manner prescribed in the rule entered by such court, or upon willful refusal to submit to such reasonable tests by said physicians as such court upon full hearing may require, all allegations as to his mental condition shall be stricken from his pleadings, with prejudice, no evidence with reference thereto shall be admissible on the trial or hearing of said legal action, suit or judicial proceedings, and the same shall be withdrawn from the consideration of the court and/or jury as the case may be. [C35,§11228-f2.]

11228.3 Construction. This chapter shall be construed liberally for the purpose of permitting discovery, effectuating the ends of speedy justice and to prevent concealment, fraud, misrepresentation and deception, but nothing herein contained shall be interpreted to constitute such physicians, selected by the applicant, as officers of the court or to clothe them with greater powers than to examine the person in question and to testify as to their findings in open court or by deposition in the same manner as any other competent witness. [C35,§11228-f3.]

CHAPTER 492

MOTIONS AND ORDERS

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11243 Bond.
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11229 "Motion" defined. A motion is a written application for an order, addressed to the court or to a judge in vacation, by any party to an action, or by anyone interested therein. [R60, §3428; C73,§2911; C97,§3831; C24, 27, 31, 35, §11229.]

Orders executed outside district, §11242.1

11230 Several objects. Several objects may be included in the same motion, if they all grow out of or are connected with the action in which it is made. [R60,§3438; C73,§2912; C97,§3832; C24, 27, 31, 35,§11230.]

11231 Proof by affidavit — cross-examination. Testimony to sustain or resist a motion may be in the form of affidavits, or in such other form as the parties may agree on or the court or judge direct. If by affidavit, the person making the same may be required by the court or judge to appear and submit to a cross-examination. [R60,§3440; C73,§2913; C97,§3833; C24. 27, 31, 35,§11231.]

11232 Notice of motion. A party who has appeared in an action, or who has been served with the original notice therein in any manner provided by this code, shall take notice of all motions filed during term time, upon the same being filed by the clerk and entered in the appearance docket. All motions filed in vacation shall be entered on such docket and served as herein required. [R60,§3429; C73,§2914; C97, §3834; C24, 27, 31, 35,§11232.]

11233 Form and service of notice. When notice of a motion is required to be served, it shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, and the place where and the day on which it is to be heard, and, if affidavits are to be

used on the hearing, the notice shall be accompanied with copies thereof, and shall be served such length of time before the hearing as the court or judge may fix. [R60,§3430; C73,§2915; C97,§3835; C24, 27, 31, 35,§11233.]

11234 Who may serve. Notices and copies of motions mentioned in this chapter may be served by anyone who would be authorized to serve an original notice. [R60,§3431; C73,§2916; C97,§3836; C24, 27, 31, 35,§11234.]

Who may serve, §11058

11235 Parties served. The service shall be on each of the parties adverse to the motion, if more than one, or on an attorney of record of such party. [R60,§3432; C73,§2917; C97, §3837; C24, 27, 31, 35,§11235.]

11236 Manner of service. The service may be personal on such party or attorney, or may be made in the same manner as is provided for the service of the original notice in civil actions; or it may be served on the attorney by being left at his office with any person having the charge thereof. [C51,§2496; R60,§3433; C73,§2918; C97,§3838; C24, 27, 31, 35,§11236.]

Service of original notice, §11060

11237 Return. Any officer authorized to serve any notice shall serve the same at once and make prompt return to the party who delivered it to him, and a failure to do so shall be punished as a disobedience of the process of the court. [R60,§3435; C73,§2919; C97,§3839; C24, 27, 31, 35,§11237.]

Contempts, ch 536

11238 What to state. The return of proof of service must state the manner in which it was made. [C51,§2499; R60,§3436; C73,§2920; C97,§3840; C24, 27, 31, 35,§11238.]

11239 Court may direct mode of service. When the party has no known place of abode in this state, and no attorney in the county where the action is pending, or where the parties, plaintiffs or defendants, are numerous, the court or judge may direct the mode of serving such notices, and on whom they shall be served. [R60,§3437; C73,§2921; C97,§3841; C24, 27, 31, 35,§11239.]

11240 "Order" defined. Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order. [R60, §3427; C73,§2922; C97,§3842; C24, 27, 31, 35, §11240.]

11241 Vacation orders. A judge's order may issue in vacation, directing any of the officers of the court in relation to the discharge of their duties. [C51,§2210; R60,§3795; C73,§2923; C97,§3843; C24, 27, 31, 35,§11241.]

Orders executed outside district, §11242.1

11242 How long in force. Such order except in case of an order which regulates, directs, or authorizes the acts, conduct, or business of any receiver, assignee, trustee, referee, guardian, administrator, executor, or other officer of the court who is conducting a continuing business or a process of liquidation, shall be in force only during the vacation in which it is granted and until the close of the next ensuing term of court. [C51,§2211; R60,§3796; C73,§2924; C97,§3844; C24, 27, 31, 35,§11242.]

Prior orders validated, 43GA, ch 253, §§2, 3

11242.1 Orders executed outside district. When a judge of the district court is authorized to sign orders in vacation, he may do so outside his judicial district, if done within the state. *[C31, 35,§11242-d1.]*

11243 Bond. The judge granting it may require the filing of a bond as in case of an injunction, unless from the nature of the case such requirement would be clearly unnecessary or improper. [C51,§2212; R60,§3797; C73, §2925; C97,§3845; C24, 27, 31, 35,§11243.]

Bond in case of an injunction, §12526

11244 Filed and entered. Orders made out of court shall forthwith be filed with and entered by the clerk in the journal of the court in the same manner as orders made in the term. [R60, §3439; C73,§2926; C97,§3846; C24, 27, 31, 35, §11244.]

Orders entered, §11582
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CHAPTER 493

SECURITY FOR COSTS

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11250 Additional security.
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11245 Bond for costs. If a defendant, at any time before answering shall make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, or party bringing the action or proceeding, if he is a nonresident of this state, or a private or foreign corporation, before any other proceedings in the action, must file in the clerk's office a bond with sureties to be approved by the clerk, in an amount to be fixed by the court, for the payment of all costs which may legally be adjudged against plaintiff. [R60,§3442; C73,§2927; C97, §3847; S13,§3847; C24, 27, 31, 35,§11245.]

Referred to in §§11248, 11249
Similar provision, §10527
87GA, ch 47, §2, editorially divided

11246 Nonresident intervenor — action in probate. A nonresident intervenor or party bringing an action in probate shall be required in like manner to give bond on motion of any

party required to answer or defend. [S13,§3847; C24, 27, 31, 35,§11246.]

Referred to in §§11248, 11249

11247 Procedure. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter. [R60,§3448; C73,§2927; C97,§3847; S13,§3847; C24, 27, 31, 35,§11247.]

Referred to in §§11248, 11249

11248 Dismissal for failure to furnish. An action in which a bond for costs is required by sections 11245 to 11247, inclusive, shall be dismissed, if a bond is not given in such time as the court allows. [R60,§3443; C73,§2928; C97, §3848; C24, 27, 31, 35,§11248.]

Referred to in §11249

11249 Becoming nonresident. If the plaintiff or any intervenor in an action, after its institution and at any time before its final determination, becomes a nonresident of this state, he may be required to give security for costs in the manner provided in the preceding sections of this chapter. [R60,§3444; C73,§2929; C97, §3849; S13,§3849; C24, 27, 31, 35,§11249.]

11250 Additional security. In an action in which a bond for costs has been given, the defendant may, at any time before trial, make a motion for additional security, and if on such motion the court is satisfied that the surety in the plaintiff's bond has removed from the state, or it is not sufficient for the amount thereof, it may dismiss the action unless, in a reasonable time to be fixed by the court, sufficient security is given by the plaintiff. [R60,§3445; C73, §2930; C97,§3850; C24, 27, 31, 35,§11250.]

11251 Prohibited sureties. No attorney or other officer of the court shall be received as security in any proceeding in court. [R60,§3446; C73,§2931; C97,§3851; C24, 27, 31, 35,§11251.]

Similar provision, §12755

11252 Judgment on bond. After final judgment has been rendered in an action in which security for costs has been given as above required, the court may, on motion of the defendant or any other person having the right to such costs or any part thereof, render judgment summarily, in the name of the defendant or his legal representatives, against the sureties for costs, for the amount of costs adjudged against the plaintiff, or so much thereof as may remain unpaid. [R60,§3447; C73,§2932; C97,§3852; C24, 27, 31, 35,§11252.]

11253 Cash in lieu of bond. In all cases in which a bond for security for costs is required, the party required to give such security may deposit in cash the amount fixed in said bond with the clerk of the district court or justice of the peace in lieu of said bond. [S13,§3852-a; C24, 27, 31, 35,§11253.]

CHAPTER 494

EVIDENCE

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GENERAL PRINCIPLES

11254 Witnesses — who competent. Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, except as otherwise declared. [C51,§2388; R60,§3978; C73,§3636; C97, §4601; C24, 27, 31, 35,§11254.]

11255 Credibility. Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility. [C51,§2389; R60,§3979; C73,§3637; C97, §4602; C24, 27, 31, 35,§11255.]

11256 Interest. No person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in this chapter. [R60,§3980; C73,§3638; C97,§4603; C24, 27, 31, 35,§11256.]

11257 Transaction with person since deceased. No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. [R60,§3982; C73,§3639; C97,§4604; C24, 27, 31, 35,§11257.]

Referred to in §11259
C97,§4604, editorially divided

11258 Exceptions. This prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or guardian shall be examined on his own behalf, or as to which the testimony of

such deceased or insane person or lunatic shall be given in evidence. [R60,§3982; C73,§3639; C97,§4604; C24, 27, 31, 35,§11258.]

11259 Depositions taken conditionally. Any person may have his own deposition, or that of any other person, read in evidence in all cases where his evidence would be incompetent by the provisions of section 11257, by causing it to be taken, either before or after action is brought, during the lifetime or sanity of the person against whose executor, heir, or other representative the same is to be used, if such deposition shall have been taken and filed ten days prior to the death or insanity of such person. If after action is brought, such deposition may be taken in the usual manner; if before, then the same may be taken de bene esse, as provided by law. [C73,§3640; C97,§4605; C24, 27, 31, 35,§11259.]

Perpetuating testimony, §11400 et seq.

11260 Husband or wife as witness. Neither the husband nor wife shall in any case be a witness against the other, except:

1. In a criminal prosecution for a crime committed one against the other, or
2. In a civil action or proceeding one against the other, or
3. In a civil action by one against a third party for alienating the affections of the other, or
4. In any civil action brought by a judgment creditor against either the husband or the wife, to set aside a conveyance of property from one to the other on the ground of want of consideration or fraud, and to subject the same to the payment of his judgment. [C51,§2391; R60,§3983; C73, §3641; C97,§4606; S13,§4606; C24, 27, 31, 35, §11260.]

Exception, §13231
S13,§4606, editorially divided

11261 Witness for each other. In all civil and criminal cases the husband and wife may be witnesses for each other. [C51,§2391; R60, §3983; C73,§3641; C97,§4606; S13,§4606; C24, 27, 31, 35,§11261.]

11262 Communications between husband and wife. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted. [C51,§2392; R60,§3984; C73,§3642; C97,§4607; C24, 27, 31, 35,§11262.]

11263 Communications in professional confidence. No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred. [C51,§§2393, 2394; R60,§§3985, 3986; C73,§3643; C97,§4608; S13, §4608; C24, 27, 31, 35,§11263.]

11264 Public officers. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. [C51, §2395; R60,§3987; C73,§3644; C97,§4609; C24, 27, 31, 35,§11264.]

11265 Judge as witness. The judge of the court is a competent witness for either party, and may be sworn upon the trial. In such case it is in his discretion to order the trial to be postponed or suspended, and to take place before another judge. [C51,§2408; R60,§4005; C73,§3645; C97,§4610; C24, 27, 31, 35,§11265.]

11266 Civil liability. No witness is excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability. [C51,§2396; R60,§3988; C73, §3646; C97,§4611; C24, 27, 31, 35,§11266.]

11267 Criminating questions. When the matter sought to be elicited would tend to render a witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as otherwise provided. [C51,§2397; R60, §3989; C73,§3647; C97,§4612; S13,§4612; C24, 27, 31, 35,§11267.]

Additional provision, §13319

11268 Exceptions. In the following cases no witness shall be excused from giving testimony, or from producing any evidence, upon the ground that his testimony or such evidence would tend to render him criminally liable or expose him to public ignominy:

1. In prosecutions against gaming, betting, lotteries, and dealing in options.
2. In prosecutions for creating, entering into or becoming a member of, or a party to, any pool, trust, agreement, contract, combination, confederation, or understanding with any other corporation, partnership, association, or individual to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state.
3. In prosecutions for keeping gambling houses.
4. In prosecutions or proceedings for violations of the statutes relating to intoxicating liquors, including proceedings wherein a peace officer is examined as to his knowledge of violations of such statutes.
5. In prosecutions for the violation of the statutes relating to elections.
6. In prosecutions for making, soliciting, or receiving contributions for political purposes by or to any political committee, party, or candidate, or representative thereof.
7. In actions wherein an election is contested and the matter sought to be elicited relates to the qualification of the witness as a voter, or

consists of a statement by the witness as to the candidate for whom the witness voted when the witness was not a qualified voter.

8. In actions for damages for violation of the laws regulating common carriers.

9. In prosecutions for violations of the statutes relating to the free transportation of persons by common carriers of passengers.

10. In investigations by the state commerce commission into the manner and method pursued by common carriers, subject to their jurisdiction, in conducting their business.

11. In examinations or investigations conducted by any committee of the general assembly.

12. In prosecutions against public officers for unlawfully opening, or divulging the contents of, sealed bids.

13. In proceedings auxiliary to executions.

14. In examinations by the board of control of state institutions, or by a committee thereof, of the affairs of any institution under the control of said board.

15. In any action or investigation in relation to any public work or public contract.

16. In any action, proceeding, investigation or hearing instituted or held by the state tax commission.

1, 2, 3. [C97,§4612; S13,§4612; C24, 27, 31, 35,§11268.]

4. [R60,§1578; C73,§§1538, 1551; C97,§§2399, 2428, 4612; S13,§2428; C24, 27, 31, 35,§11268.]

5. [S13,§1137-a2; C24, 27, 31, 35,§11268.]

6. [S13,§1641-j; C24, 27, 31, 35,§11268.]

7. [C51, §360; R60, §590; C73, §709; C97, §1215; C24, 27, 31, 35,§11268.]

8. [C97,§2131; C24, 27, 31, 35,§11268.]

9. [S13,§2157-h; C24, 27, 31, 35,§11268.]

10. [C97,§2133; C24, 27, 31, 35,§11268; 47GA, ch 205.]

11. [C73,§17; C97,§21; S13,§2727-a2; C24, 27, 31, 35,§11268.]

12. [S13,§1279-b; C24, 27, 31, 35,§11268.]

13. [C51,§1956; R60,§3378; C73,§3138; C97, §4075; C24, 27, 31, 35,§11268.]

14. [S13,§2727-a10; C24, 27, 31, 35,§11268.]

15. [S13,§1279-d; C24, 27, 31, 35,§11268.]

16. [C31, 35,§11268; 48GA, ch 175,§20.]

Referred to in §11269
Additional exceptions, §18319 et seq.

11269 Immunity from prosecution. No person compelled under section 11268 to testify or produce evidence tending to incriminate him or to expose him to public ignominy shall be prosecuted for any crime which such testimony or evidence tends to prove or to which the same relates. This section shall not exempt any person from prosecution for perjury. [C51,§2397; R60,§3989; C73,§3647; C97,§§2399, 4612; S13, §§2727-a2,-a10, 4612; C24, 27, 31, 35,§11269.]

11270 Previous conviction. A witness may be interrogated as to his previous conviction for a felony. No other proof is competent, except the record thereof. [C51,§2398; R60,§3990; C73, §3648; C97,§4613; C24, 27, 31, 35,§11270.]

11271 Moral character. The general moral character of a witness may be proved for the purpose of testing his credibility. [R60,§3991; C73,§3649; C97,§4614; C24, 27, 31, 35,§11271.]

11272 Whole of a writing or conversation. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given. [C51,§2399; R60, §3992; C73,§3650; C97,§4615; C24, 27, 31, 35, §11272.]

C97,§4615, editorially divided

11273 Detached acts, declarations, or conversations. When a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence. [C51,§2399; R60,§3992; C73,§3650; C97, §4615; C24, 27, 31, 35,§11273.]

11274 Writing and printing. When an instrument consists partly of written and partly of printed form, the former controls the latter, if the two are inconsistent. [C51,§2400; R60, §3993; C73,§3651; C97,§4616; C24, 27, 31, 35, §11274.]

11275 Understanding of parties to agreement. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. [C51,§2401; R60,§3994; C73,§3652; C97,§4617; C24, 27, 31, 35,§11275.]

11276 Historical and scientific works. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest therein stated. [C51,§2402; R60,§3995; C73, §3653; C97,§4618; C24, 27, 31, 35,§11276.]

11277 Subscribing witness — substitute proof. When a subscribing witness denies or does not recollect the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence. [C51,§2403; R60,§3996; C73,§3654; C97,§4619; C24, 27, 31, 35,§11277.]

11278 Handwriting. Evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury, with writings of the same person which are proved to be genuine. [C51,§2404; R60,§3997; C73,§3655; C97,§4620; C24, 27, 31, 35,§11278.]

11279 Private writing — acknowledgment. Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without further proof. [C51,§2407; R60,§4000; C73,§3656; C97,§4621; C24, 27, 31, 35,§11279.]

11280 Entries and writings of deceased person. The entries and other writings of a person deceased, who was in a position to know the facts therein stated, made at or near the time of the transaction, are presumptive evidence of such facts, when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty specially enjoined by law. [C51,§2405; R60,§3998; C73, §3657; C97,§4622; C24, 27, 31, 35,§11280.]

11281 Books of account — when admissible. Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility:

1. They must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books.
2. It must be shown by the party's oath, or otherwise, that they are his books of original entries.
3. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof.
4. The charges must also be verified by the party or clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made. [C51,§2406; R60, §3999; C73,§3658; C97,§4623; S13,§4623; C24, 27, 31, 35,§11281.]

Referred to in §11283
S13,§4623, editorially divided

11282 Loose-leaf system of accounts. Any loose-leaf or card or other form of entry which may be in use in the ordinary course of business by the party seeking to prove an account against another, and shall have been properly identified as being the original entry of such account shall be admitted as competent evidence for the purpose of proving such account by deposition or in open court, and it shall be competent for any person whose duties in the ordinary course of such business require a personal knowledge of the records of such business, to verify such account or make deposition or testify in open court with regard to any matters pertaining to such records. [C24, 27, 31, 35,§11282.]

11283 Photographic copies. In all cases where depositions are taken by either method provided by law, outside of the county in which the case is for trial where books of account are competent evidence in the case, the party desiring to offer the entries of said books as evidence may cause the same to be photographed by or under the direction of the officer taking the deposition and such photographic copy when certified by such officer with his seal attached shall be attached to the deposition, and if the record shows affirmatively the preliminary proof required by section 11281, such copy shall be admitted in evidence with the same force and effect as the original. [S13,§4623; C24, 27, 31, 35, §11283.]

11284 Notarial certificate of protest. The usual protest of a notary public, without proof of his signature or notarial seal, is prima facie evidence of what it recites concerning the dishonor, and notice thereof, of a bill of exchange or promissory note, and a copy from his record, properly certified by him, shall receive such faith and credit as it is entitled to by the law and custom of merchants. [C51,§§82, 2414; R60,§§199, 4011; C73,§3668; C97,§4624; C24, 27, 31, 35,§11284.]

11285 Statute of frauds. Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent:

1. Those made in consideration of marriage.
2. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of the decedent from their own estate.
3. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year.
4. Those that are not to be performed within one year from the making thereof. [C51,§§2409, 2410; R60,§§4006, 4007; C73,§§3663, 3664; C97, §4625; C24, 27, 31, 35,§11285.]

Referred to in §11286
Declarations of trust, §10049
Personal property, §9933; party walls, §10174

11286 Exception. The provisions of subsection 3 of section 11285 do not apply where the purchase money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession of the premises under and by virtue of the contract, or when there is any other circumstance which, by the law heretofore in force, would have taken the case out of the statute of frauds. [C51, §2411; R60,§4008; C73,§3665; C97,§4626; C24, 27, 31, 35,§11286.]

11287 Contract not denied in the pleadings. The above regulations, relating merely to the proof of contracts, shall not prevent the enforcement of those not denied in the pleadings, except in cases when the contract is sought to be enforced, or damages recovered for the breach thereof, against some person other than him who made it. [C51,§2412; R60,§4009; C73, §3666; C97,§4627; C24, 27, 31, 35,§11287.]

Applicable to sales of goods, §9933.1

11288 Party made witness. The oral evidence of the maker against whom the unwritten contract is sought to be enforced shall be competent to establish the same. [C51,§2413; R60, §4010; C73,§3667; C97,§4628; C24, 27, 31, 35, §11288.]

Applicable to sales of goods, §9933.1

11289 Instruments affecting real estate—adoption of minors. Every instrument in writing affecting real estate, or the adoption of minors, which is acknowledged or proved and

certified as required, may be read in evidence without further proof. [C51,§1227; R60,§§2235, 4001; C73,§3659; C97,§4629; C24, 27, 31, 35, §11289.]

11290 Record or certified copy. When the recording of any instrument in the office of any public officer is authorized by law, the record of such instrument, or a duly authenticated copy thereof, is competent evidence whenever, by the party's own oath or otherwise, the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control. [C51,§§1228, 1476; R60,§§2528, 4002; C73,§§2197, 3660; C97,§4630; C24, 27, 31, 35, §11290.]

Referred to in §11292
C97,§4630, editorially divided
Federal statute, see page 39 of this code

11291 Absence of seal. In such case, it is no objection to the record that no official seal is appended to the recorded acknowledgment thereof, if, when the acknowledgment purports to have been taken by an officer having an official seal, the record shows, by a scroll or otherwise, that there was such a seal, which will be presumptive evidence that it was attached to the original certificate. [C51,§1228; R60,§4002; C73,§3660; C97,§4630; C24, 27, 31, 35,§11291.]

Referred to in §11292

11292 Retrospective. The provisions of sections 11290 and 11291 are intended to apply to all instruments heretofore recorded, as well as those hereafter to be recorded. [C51,§1229; R60,§§2237, 4003; C73,§3661; C97,§4631; C24, 27, 31, 35,§11292.]

11293 Presumption rebuttable. Neither the certificate, the record, nor the transcript thereof is conclusive evidence of the facts therein stated. [C51,§1230; R60,§§2238, 4004; C73, §3662; C97,§4632; C24, 27, 31, 35,§11293.]

11294 United States and state patents. United States and state patents for land in the state, and duly certified copies thereof from the general land office of the United States, or the state land office, that have been or may be recorded in the recorder's office of the county in which the land is situated, shall be matters of record and such record, and copies thereof, certified to by the recorder, may be received and read in evidence in all courts, with like effect as the record of other instruments, and other certified copies of original papers recorded in his office; and such patents and certified copies may be recorded without an acknowledgment. [C97,§4633; S13,§4633; C24, 27, 31, 35,§11294.]

Referred to in §11304

11295 Field notes and plats. A copy of the field notes of any surveyor, or a plat made by him and certified under oath as correct, may be received as evidence to show the shape or dimensions of a tract of land, or any other fact the ascertainment of which requires the exercise of scientific skill or calculation only. [C51, §2431; R60,§4046; C73,§3701; C97,§4634; C24, 27, 31, 35,§11295.]

Referred to in §11304

11296 Records and entries in public offices. Duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original record or papers so filed. [C51, §2432; R60,§4047; C73,§3702; C97,§4635; C24, 27, 31, 35,§11296.]

Referred to in §11304
Federal statute, see page 39 of this code

11297 Copies of books of original entries. Copies of entries made in the book of "copies of original entries", kept as a record in the office of the county recorder, when such book has been compared with the originals and certified as true copies by the register of the United States land office at which such original entries were made, may, when certified by the recorder to be true copies, be received and read in evidence in all of the courts, with like effect as certified copies of original papers recorded in his office. [R60, §4049; C73,§3704; C97,§4636; C24, 27, 31, 35, §11297.]

Referred to in §§11298, 11304

11298 Additional entries. Copies of additional entries shall, from time to time, be procured as made, certified as required in section 11297, and entered in the book of "copies of original entries", until all the lands in the county have been entered and so certified. [R60,§4050; C73,§3705; C97,§4637; C24, 27, 31, 35,§11298.]

Referred to in §11304

11299 Officer to give copies of records. Every officer having the custody of a public record or writing shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof. [C51,§2433; R60,§4051; C73,§3706; C97,§4638; C24, 27, 31, 35,§11299.]

Referred to in §11304

11300 Maps in office of surveyor general. Copies of all maps, official letters, and other documents in the office of the surveyor general of the United States, when certified by that officer according to law, shall be received by the courts of this state as presumptive evidence of the existence and contents of the originals, and that they are copies of the originals, notwithstanding such maps, official letters, or other papers, may themselves be copied. [R60,§4052; C73,§3707; C97,§4639; C24, 27, 31, 35,§11300.]

Referred to in §11304

11301 Certificate as to loss of paper. The certificate of a public officer, that he has made diligent and ineffectual search for a paper in his office, is of the same efficacy in all cases as if such officer had personally appeared and sworn to such facts. [C51,§2434; R60,§4053; C73, §3708; C97,§4640; C24, 27, 31, 35,§11301.]

Referred to in §11304

11302 Duplicate receipt of receiver of land office. The usual duplicate receipt of the receiver of any land office, or the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title, equivalent to a patent, against all but the holder of an actual patent. [C51,

§2435; R60,§4054; C73,§3709; C97,§4641; C24, 27, 31, 35,§11302.]

Referred to in §11304

11303 Certificate of register or receiver. The certificate of the register or receiver of any land office of the United States, as to the entry of land within his district, shall be presumptive evidence of title, in the person entering, to the real estate therein named. [R60,§4055; C73, §3710; C97,§4642; C24, 27, 31, 35,§11303.]

Referred to in §11304

11304 Official signature presumed genuine. In the cases contemplated in sections 11294 to 11303, inclusive, the signature of the officer shall be presumed to be genuine until the contrary is shown. [C51,§2436; R60,§4056; C73,§3711; C97, §4643; C24, 27, 31, 35,§11304.]

11305 Judicial record — state or federal courts. A judicial record of this state or any court of the United States may be proved by the production of the original, or a copy thereof certified by the clerk or person having the legal custody thereof, authenticated by his seal of office, if he have one. [C51,§2437; R60,§4057; C73,§3712; C97,§4644; C24, 27, 31, 35,§11305.]

11306 Of another state. That of another state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law. [C51,§2438; R60,§4058; C73,§3713; C97,§4645; C24, 27, 31, 35,§11306.]

11307 Of a justice of the peace. The official certificate of a justice of the peace of any of the United States to any judgment and the preliminary proceedings before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature to his certificate is genuine, is sufficient evidence of such proceedings and judgment. [C51,§2439; R60,§4059; C73,§3714; C97,§4646; C24, 27, 31, 35,§11307.]

11308 Of a foreign country. Copies of records and proceedings in the courts of a foreign country may be admitted in evidence upon being authenticated as follows:

1. By the official attestation of the clerk or officer in whose custody such records are legally kept.
2. By the certificate of one of the judges or magistrates of such court, that the person so attesting is the clerk or officer legally entrusted with the custody of such records, and that the signature to his attestation is genuine.
3. By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court. [C51,§2440; R60,§4060; C73,§3715; C97,§4647; C24, 27, 31, 35,§11308.]

11309 Presumption of regularity. The proceedings of all officers and courts of limited and inferior jurisdiction within the state shall be presumed regular, except in regard to matters required to be entered of record, and except where otherwise expressly declared. [C51,§2512; R60,§4120; C73,§3669; C97,§4648; C24, 27, 31, 35,§11309.]

11310 Executive acts. Acts of the executive of the United States, or of this or any other state of the Union, or of a foreign government, are proved by the records of the state department of the respective governments, or by public documents purporting to have been printed by order of the legislatures of those governments, respectively, or by either branch thereof. [C51, §2441; R60,§4061; C73,§3716; C97,§4649; C24, 27, 31, 35,§11310.]

11311 Proceedings of legislature. The proceedings of the legislature of this or any other state of the Union, or of the United States, or of any foreign government, are proved by the journals of those bodies, respectively, or of either branch thereof, and either by copies officially certified by the clerk of the house in which the proceeding was had, or by a copy purporting to have been printed by its order. [C51, §2442; R60,§4062; C73,§3717; C97,§4650; C24, 27, 31, 35,§11311.]

11312 Printed copies of statutes. Printed copies of the statute laws of this or any other of the United States, or of congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the courts of such state or government, shall be admitted in the courts of this state as presumptive evidence of such laws. [C51,§2443; R60,§4063; C73,§3718; C97,§4651; C24, 27, 31, 35,§11312.]

11313 Written law or public writing. The public seal of the state or county, affixed to a copy of the written law or other public writing, is admissible as evidence of such law or writing, respectively. [C51,§2444; R60,§4064; C73,§3719; C97,§4652; C24, 27, 31, 35,§11313.]

C97,§4652, editorially divided

11314 Foreign unwritten law. The unwritten laws of any other state or government may be proved as facts by parol evidence, or by the books of reports of cases adjudged in their courts. [C51,§2444; R60,§4064; C73,§3719; C97,§4652; C24, 27, 31, 35,§11314.]

11315 Ordinances of city or town. The printed copies of the ordinance of any municipal corporation, published by its authority, or transcripts of any ordinance, act, or proceeding thereof recorded in any book, or entries on any minutes or journals kept under its direction, and certified by its clerk, shall be received in evidence for any purpose for which the original ordinances, books, minutes, or journals would be received, and with the same effect. The clerk shall furnish such transcripts, and be entitled to

charge therefor at the rate that the clerk of the district court is entitled to charge for transcripts of records from that court. [R60,§1076; C73, §3720; C97,§4653; C24, 27, 31, 35,§11315.]

Fees, §10887

11316 Production of books and papers. The district or superior court may in its discretion, by rule, require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them. [C51,§2423; R60, §4026; C73,§3685; C97,§4654; C24, 27, 31, 35, §11316.]

Similar provision, §8400

11317 Petition—granting or refusing. The petition for that purpose shall be verified, and must state the facts expected to be proved by such books or papers, and that, as the petitioner believes, such books and papers are under the control of the party against whom the rule is sought, and must show wherein they are material. The rule shall thereupon be granted to produce the books and papers, or show cause to the contrary, if the court deems such rule expedient and proper. [C51,§2424; R60,§4027; C73, §3686; C97,§4655; C24, 27, 31, 35,§11317.]

11318 Failure to obey. On failure to obey the rule or show sufficient cause therefor, the same consequences shall ensue as if the party had failed to appear and testify when subpoenaed by the party now calling for the books and papers. [C51,§2425; R60,§4028; C73,§3687; C97,§4656; C24, 27, 31, 35,§11318.]

11319 Writing called for. Though a writing called for by one party is by the other produced, the party calling for it is not obliged to use it as evidence in the case. [C51,§2426; R60, §4029; C73,§3688; C97,§4657; C24, 27, 31, 35, §11319.]

11320 Subpoenas. The clerks of the several courts shall, on application of any person having a cause or matter pending in court, issue a subpoena for witnesses under the seal of the court, inserting all the names required by the applicant in one subpoena, if practicable, which may be served by the sheriff, coroner, or any constable of the county, or by the party or any other person. [R60,§4012; C73,§3671; C97, §4658; C24, 27, 31, 35,§11320.]

C97,§4658, editorially divided

11321 Proof of service — costs. When a subpoena is served by any person other than the sheriff, coroner, or constable, proof thereof shall be shown by affidavit; but no costs for serving the same shall be allowed. [R60,§4012; C73,§3671; C97,§4658; C24, 27, 31, 35,§11321.]

11322 To whom directed—duces tecum. The subpoena shall be directed to the person therein named, requiring him to attend at a particular time or place to testify as a witness, and it may contain a clause directing the witness to bring with him any book, writing, or other thing under his control, which he is bound by law to produce as evidence. [C51,§2415; R60,§4013; C73,§3672; C97,§4659; C24, 27, 31, 35,§11322.]

11323 How far compelled to attend. Witnesses in civil cases cannot be compelled to attend the district or superior court out of the state where they are served, nor at a distance of more than one hundred miles from the place of their residence, or from that where they are served with a subpoena, unless within the same county. [C51,§2416; R60,§4014; C73,§3673; C97,§4660; C24, 27, 31, 35,§11323.]

Limit on taxation of costs, §11623
C97,§4660, editorially divided

11324 Deposit—effect. The court or judge, for good cause shown, may, upon deposit with the clerk of the court of sufficient money to pay the legal fees and mileage of a witness, order a subpoena to issue requiring the attendance of such witness from a greater distance within the state. Such subpoena shall show that it is issued under the provisions hereof. [C24, 27, 31, 35,§11324.]

11325 Thirty-mile limit. No other subpoena but that from the district or superior court can compel his attendance at a greater distance than thirty miles from his place of residence, or of service, if not in the same county. [C51, §2416; R60,§4014; C73,§3673; C97,§4660; C24, 27, 31, 35,§11325.]

11326 Witness fees. Witnesses in any court of record, except in the police courts, shall receive for each day's attendance two dollars, and in the police courts the same fees and mileage as are allowed before justices of the peace; before a justice of the peace, fifty cents for each day; and in all cases five cents per mile for each mile actually traveled. [C51,§2544; R60,§4153; C73,§3814; C97,§4661; C24, 27, 31, 35,§11326.]

C97,§4661 editorially divided

11327 Attorney, juror, or officer. An attorney, juror, or officer, who is in habitual attendance on the court for the term at which he is examined as a witness, shall be entitled to but one day's attendance. [C51,§2544; R60,§4153; C73,§3814; C97,§4661; C24, 27, 31, 35,§11327.]

11328 Peace officer. No peace officer who receives a regular salary, or any other public official shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case in a court in the county of his residence, except police officers who are called as witnesses when not on duty. [C97,§4661; C24, 27, 31, 35,§11328.]

11329 Expert witnesses — fee. Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensa-

tion shall not exceed four dollars per day while so employed. [C73,§3814; C97,§4661; C24, 27, 31, 35,§11329.]

Superintendent of state hospital, §3487

11330 Fees payable by county. For attending before the trial jury or court in criminal cases where the defendant is adjudged not guilty, the fees above provided for attending the district or justice's court shall be paid by the county, upon a certificate of the clerk or justice showing the amount of the services to which they are entitled. [C51,§2544; R60,§4153; C73,§3814; C97,§4661; C24, 27, 31, 35,§11330.]

11331 Fees in advance. Witnesses, except parties to the action, are entitled to receive in advance, if demanded when subpoenaed, their traveling fees to and from the court, with their fees for one day's attendance. At the commencement of each day after the first, they are further entitled, on demand, to receive the legal fees for that day in advance. If not thus paid, they are not compelled to attend or remain as witnesses. [C51,§2417; R60,§4015; C73,§3674; C97,§4662; C24, 27, 31, 35,§11331.]

11332 Reimbursement to party or county. When the county or any party has paid the fees of any witness, and the same is afterward collected from the adverse party, the county or person so paying the same shall, upon the production of the receipt of such witness or other satisfactory evidence, be entitled to such fee, whether it be in the hands of the justice or clerk, or has been paid into the county treasury. [C73,§3817; C97,§4663; C24, 27, 31, 35,§11332.]

11333 Failure to attend or testify—liability. For a failure to obey a valid subpoena without a sufficient cause or excuse, or for a refusal to testify after appearance, the delinquent is guilty of a contempt of court and subject to be proceeded against by attachment. He is also liable to the party by whom he was subpoenaed for all consequences of such delinquency, with fifty dollars additional damages. [C51,§2418; R60,§4016; C73,§3675; C97,§4664; C24, 27, 31, 35,§11333.]

Contempts, ch 536
Similar provisions, §13885 et seq.

11334 Proceedings for contempt. Before a witness is so liable for a contempt for not appearing, he must be served personally with the process, by reading it to him, and leaving a copy thereof with him, if demanded, and it must be shown that the fees and traveling expenses allowed by law were tendered to him, if required; or it must appear that a copy of the subpoena, if left at his usual place of residence, came into his hands, with the fees and traveling expenses above mentioned. [C51,§2419; R60, §4017; C73,§3676; C97,§4665; C24, 27, 31, 35, §11334.]

11335 Serving subpoena. If a witness conceals himself, or in any manner attempts to avoid being personally served with a subpoena, any sheriff or constable having the subpoena may use all necessary and proper means to serve the same, and may for that purpose break into any building or other place where the witness is to be found, having first made known his business and demanded admission. [C51,§2420; R60,§4018; C73,§3677; C97,§4666; C24, 27, 31, 35,§11335.]

11336 When party fails to obey subpoena. In addition to the above remedies, if a party to an action in his own right, on being duly subpoenaed, fails to appear and give testimony, the other party may, at his election, have a continuance of the cause at the cost of the delinquent. [C51,§2421; R60,§4024; C73,§3683; C97,§4667; C24, 27, 31, 35,§11336.]

11337 Pleading taken true. Or if he shows by his own testimony, or otherwise, that he could not have a full personal knowledge of the transaction, the court may order his pleading to be taken as true; subject to be reconsidered during the term of the court, upon satisfactory reasons being shown for the delinquency. [C51, §2422; R60,§4025; C73,§3684; C97,§4668; C24, 27, 31, 35,§11337.]

11338 Authority to subpoena. Any officer or board authorized to hear evidence shall have authority to subpoena witnesses and compel them to attend and testify, in the same manner as officers authorized to take depositions. [C97, §4669; C24, 27, 31, 35,§11338.]

Enforcing attendance, §§11341, 11367

11339 Prisoner produced. A person confined in a penitentiary or jail in the state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, and in a criminal case in any county in the state; but in all other cases his examination must be by a deposition. [R60,§4019; C73,§3678; C97,§4670; C24, 27, 31, 35,§11339.]

11340 Deposition of. While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking thereof. [R60,§4020; C73,§3679; C97, §4671; C24, 27, 31, 35,§11340.]

11341 Subpoenas — enforcing obedience. When, by the laws of this or any other state or country, testimony may be taken in the form of depositions to be used in any of the courts thereof, the person authorized to take such depositions may issue subpoenas for witnesses, which must be served by the same officers and returned in the same manner as is required in a justice's court, and obedience thereto may be enforced in the same way and to the same extent a justice of the peace might do, or he may report the matter to the district court or a judge thereof, who may enforce obedience as though the action was pending in said court. [C51, §§2477–2479; R60,§§4021–4023; C73,§§3680–3682; C97,§4672; C24, 27, 31, 35,§11341.]

Similar provision, §11367

11342 Affidavits — before whom made. An affidavit is a written declaration made under

oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state. [R60,§§4030, 4035; C73,§§3689, 3690; C97,§4673; C24, 27, 31, 35, §11342.]

Perpetuating testimony, §11400 et seq.

11343 Foreign affidavits. Those taken out of the state before any judge or clerk of a court of record, or before a notary public, or a commissioner appointed by the governor of this state to take acknowledgment of deeds in the state where such affidavit is taken, are of the same credibility as if taken within the state. [C51,§2475; R60,§4036; C73,§3691; C97,§4674; C24, 27, 31, 35,§11343.]

11344 How affidavits compelled. When a person is desirous of obtaining the affidavit of another who is unwilling to make the same fully, he may apply by petition to any officer competent to take depositions, stating the object for which he desires the affidavit. [C51,§2480; R60,§4038; C73,§3692; C97,§4675; C24, 27, 31, 35,§11344.]

11345 Subpoena issued. If the officer is satisfied that the object is legal and proper, he shall issue his subpoena to bring the witness before him, and, if he fails then to make a full affidavit of the facts within his knowledge to the extent required of him by the officer, the latter may proceed to take his deposition by question and answer in the usual way, which may be used instead of an ordinary affidavit. [C51,§2481; R60,§4039; C73,§3693; C97,§4676; C24, 27, 31, 35,§11345.]

11346 Notice. The officer may, in his discretion, require notice of the taking of such affidavit or deposition to be given to any person interested in the subject matter, and allow him to be present and cross-examine such witness. [C51,§2482; R60,§4040; C73,§3694; C97,§4677; C24, 27, 31, 35,§11346.]

11347 Cross-examination. The court or officer to whom any affidavit is presented as a basis for some action, in relation to which any discretion is lodged with such court or officer, may require the witness to be brought before it or him and submit to a cross-examination by the opposite party. [C51,§2483; R60,§4041; C73, §3695; C97,§4678; C24, 27, 31, 35,§11347.]

11348 Signature and seal — presumption. The signature and seal of such officers as are authorized to take depositions or affidavits, having a seal, and the simple signature of such as have no seal, are presumptive evidence of the genuineness thereof, as well as of the official character of the officer, except as otherwise declared. [C51,§2476; R60,§4037; C73,§3696; C97, §4679; C24, 27, 31, 35,§11348.]

11349 Newspaper publications—how proved. Publications required to be made in a newspaper may be proved by the affidavit of any person having knowledge of the fact, specifying the times when and the paper in which the publication was made, but such affidavit must be made within six months after the last day of publication. [C51,§2427; R60,§4042; C73,§3697; C97, §4680; C24, 27, 31, 35,§11349.]

Proof of publication, §11085

11350 Proof of serving or posting notices. The posting up or service of any notice or other paper required by law may be proved by the affidavit of any competent witness attached to a copy of said notice or paper, and made within six months of the time of such posting up. [C51, §2428; R60,§4043; C73,§3698; C97,§4681; C24, 27, 31, 35,§11350.]

11351 Other facts. Any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing the course above indicated, as nearly as the circumstances of the case will admit. [C51,§2429; R60,§4044; C73,§3699; C97,§4682; C24, 27, 31, 35,§11351.]

11352 How perpetuated — presumption of fact. Proof so made may be perpetuated and preserved for future use by filing the papers above mentioned in the office of the clerk of the district court of the county where the act is done. The original affidavit appended to the notice or paper, if there is one, and, if not, the affidavit by itself is presumptive evidence of the facts stated therein, but does not preclude other modes of proof now held sufficient. [C51, §2430; R60,§4045; C73,§3700; C97,§4683; C24, 27, 31, 35,§11352.]

REPORTER'S NOTES AS EVIDENCE

11353 Authorized use. The original shorthand notes of the evidence or any part thereof heretofore or hereafter taken upon the trial of any cause or proceeding, in any court of record of this state, by the shorthand reporter of such court, or any transcript thereof, duly certified by such reporter, when material and competent, shall be admissible in evidence on any retrial of the case or proceeding in which the same were taken, and for purposes of impeachment in any case, and shall have the same force and effect as a deposition, subject to the same objections so far as applicable. [S13,§245-a; C24, 27, 31, 35,§11353.]

S13,§245-a, editorially divided

11354 Transcript must be complete. No portion of the transcript of the shorthand notes of the evidence of any witness shall be admissible as such deposition, unless it shall appear from the certificate or verification thereof that the whole of the shorthand notes of the evidence of such witness, upon the trial or hearing in which the same was given, is contained in such transcript, but the party offering the same shall not be compelled to offer the whole of such transcript. [S13,§245-a; C24, 27, 31, 35,§11354.]

11355 Certification. It shall be the duty of any such reporter, upon demand by any party to any cause or proceeding, or by the attorney of such party, when such shorthand notes are offered in evidence, to read the same before the court, judge, referee, or jury, or to furnish to

any person when demanded a certified transcript of the shorthand notes of the evidence, of any one or more witnesses, upon payment of his fees therefor. [S13,§245-a; C24, 27, 31, 35,§11355.]

Fees, §10812

11356 Sworn verification. When the reporter taking such notes in any case or proceeding in court has ceased to be the reporter of such court, any transcript by him made therefrom, and sworn to by him before any person authorized to administer an oath as a full, true, and complete transcript of the notes of the testimony of the witness, a transcript of whose testimony is demanded, shall have the same force and effect as though duly certified by the reporter of said court. [S13,§245-a; C24, 27, 31, 35,§11356.]

11357 Identification of exhibits. When any exhibit, record, or document is referred to in such shorthand notes or transcript thereof, the identity of such exhibit, record, or document, as the one referred to by the witness, may be proven either by the reporter or any other person who heard the evidence of the witness given on the stand. [S13,§245-a; C24, 27, 31, 35,§11357.]

DEPOSITIONS

11358 When and before whom taken. After the commencement of a civil action or other proceeding, if the witness is, or is about to go, beyond the reach of a subpoena, or is for any other cause expected to be unable to attend court at the time of trial, the party wishing his testimony may take his deposition in writing before any person having authority to administer oaths; and if the action is triable by equitable proceedings, then without any other reason therefor either party may so take the deposition of any witness. [C51,§2445; R60,§4065; C73,§3721; C97,§4684; C24, 27, 31, 35,§11358.]

Depositions ordered by magistrate, §18534 et seq.

11359 Upon notice or by commission. If the deposition is to be taken within the state, it may be upon notice or upon commission, and, if without the state, it must be by the latter method, except by agreement of the parties. [C51, §§2446, 2447; R60, §§4066, 4067; C73, §§3722, 3723; C97,§4685; C24, 27, 31, 35,§11359.]

11360 By consent. By the written consent of parties, depositions may be taken in either method, and without any reason therefor being made to appear, and before any person designated in the agreement. [C51,§2448; R60,§4068; C73,§3724; C97,§4686; C24, 27, 31, 35,§11360.]

11361 On notice. When the deposition is taken upon notice, it must be before some person authorized to administer oaths, or agreed upon by the parties, and notice of the name of the witness, and the time when, the place where, and the person before whom it is to be taken shall be given to the opposite party. [C51, §2445; R60,§4065; C73,§3721; C97,§4687; C24, 27, 31, 35,§11361.]

11362 Not taken on certain days. No party shall be required to take depositions on notice on the day of the general election, or on any of the days on which appearance in an action cannot by law be required, or during a term of the court in which the action is pending, unless such court, upon written motion, in furtherance of justice, shall so order. [C51,§§2446, 2453; R60,§§4066, 4073; C73,§§3722, 3730; C97, §4688; C24, 27, 31, 35,§11362.]

Nonappearance days, §11090
C97,§4688, editorially divided

11363 Different takings on same day. If notices are given in the same case by the same party of the taking of depositions at different places upon the same day, they shall be invalid. [R60,§4066; C73,§3722; C97,§4688; C24, 27, 31, 35,§11363.]

11364 On commission — notice — interrogatories. A party wishing to take a deposition by commission may serve on the opposite party a notice that, on a day named, a commission will issue from the office of the clerk of the court in which the action or proceeding is pending, or in a case in a justice's court, from the office of the clerk of the district court of the county, directed to any of the officers or persons enumerated in section 11365, specifying the officer or person, for the taking of such depositions on written interrogatories to be filed with the clerk, a copy of which must accompany and be served with said notice. Such notice shall give the name of the witness whose deposition is thus to be taken. [C51,§§2451, 2465; R60,§§4071, 4092; C73,§3727; C97,§4689; C24, 27, 31, 35,§11364.]

11365 Who may act as commissioner. Such commission may issue to any of the following named officers who may be designated in the notice and in the commission, either by the name of office of such officer or by his individual name and official style, to wit:

1. The clerk or any judge of any court of record.
2. Any commissioner appointed by the governor of this state to take acknowledgments of deeds in another state.
3. Any notary public.
4. Any consul or consular agent of the United States.
5. When the witness is in the military or naval service of the United States, any commissioned officer under whose command he is serving, or any commissioned officer in the judge advocate general's department. [C51,§2449; R60,§4069; C73,§3725; C97,§4690; C24, 27, 31, 35,§11365.]

Referred to in §11364

11366 Blank subpoenas. Any officer or commissioner before whom a deposition is to be taken within the state shall be supplied by the clerk of the district court with necessary blank subpoenas duly signed by such clerk under the seal of such court, which may be served as subpoenas in the district court. [C24, 27, 31, 35, §11366.]

40ExGA, HF 280, §7, editorially divided

11367 Refusal to appear or testify. Any witness who refuses to obey such subpoena or

after appearance refuses to testify shall be reported by the officer or commissioner to the district court of the county where the subpoena was issued or to a judge thereof who shall thereupon proceed as if the refusal had occurred in the district court. [C24, 27, 31, 35,§11367.]

Similar provision, §11341

11368 Commissioner designated by court or parties. Such commission may also issue to any person designated by the court for that purpose or agreed upon by the parties, such person being named in the notice. [C51,§2449; R60, §4069; C73,§3725; C97,§4690; C24, 27, 31, 35, §11368.]

11369 Specification of place of taking. If the commission issue to any officer or person for the taking of the deposition in any of the United States or in Canada, the name of the state or province and county in which the deposition is to be taken shall be specified in the notice and commission; otherwise it shall be sufficient to name the state, territory, or district, and town or city. [R60,§4069; C73,§3725; C97,§4690; C24, 27, 31, 35,§11369.]

11370 Officer within limits of jurisdiction. None of the above named officers are permitted to take the depositions aforesaid by virtue of a commission directed to him merely as such officer, unless within the limits of his official jurisdiction. [C51,§2450; R60,§4070; C73,§3726; C97,§4691; C24, 27, 31, 35,§11370.]

11371 Cross-interrogatories. At or before the time fixed in the notice for the issuance of the commission, the opposite party may file cross-interrogatories. If cross-interrogatories are not filed, the clerk shall file the following:

1. Are you directly or indirectly interested in this action? If interested, explain the interest you have.
2. Are all your statements in the foregoing answers made from your personal knowledge? If not, do your answers show what are made from your personal knowledge, and what are from information, and the source of that information? If not, now show what is from information, and give its source.
3. State everything you know concerning the subject of this action favorable to either party. [C51,§2452; R60,§4072; C73,§3728; C97,§4692; C24, 27, 31, 35,§11371.]

11372 Oral cross-examination. When notice is served of taking a deposition on commission, the adverse party may elect to appear and orally cross-examine the witness, and, if he so elects, he shall serve written notice of his election on the opposite party or his attorney at least one day before the date on which the commission is to be issued; and if such notice is given, then, before said commission shall issue, the party suing out the same shall deliver to the adverse party or his attorney a written statement, giving the name and address of the commissioner, the place, and, if in a city, the street and number, and the day and hour of taking the deposition. [C97,§4693; C24, 27, 31, 35,§11372.]

Referred to in §11374
C97,§4693, editorially divided

11373 Time limit. Such statement must be delivered to said adverse party or his attorney five days before the date fixed for taking the deposition, if taken within the state; if taken elsewhere, one additional day for every three hundred miles distance between the place where the commission issues and where the deposition is to be taken. [C97,§4693; C24, 27, 31, 35, §11373.]

Referred to in §11374

11374 Waiver of written interrogatories. If the adverse party elects to cross-examine the witness orally, the party suing out the commission may waive his written interrogatories and appear and orally examine the witness. Except as otherwise provided in sections 11372 and 11373, the provision relating to taking depositions on notice shall be followed in taking that part of the deposition which is taken by oral examination. [C97,§4693; C24, 27, 31, 35,§11374.]

11375 Form of commission. On the day fixed in the notice, the commission may issue in the name of the court and under its seal, with the signature of the clerk, and need contain only a statement of the case and court in which the testimony is to be used, the authority conferred upon the commissioner, who shall be designated as hereinbefore provided, and instructions to guide him in the taking of the deposition. The interrogatories and cross-interrogatories filed by the respective parties are to be appended to such commission. [C51,§2455; R60,§4078; C73, §3734; C97,§4694; C24, 27, 31, 35,§11375.]

11376 In justice's court. If the action in which it is desired to take a deposition on commission is pending in a justice's court, the commission shall issue from the office of the clerk of the district court of the county, or of the superior court, if there be one in the same township, on such notice as is required in suing out a commission in a case pending in such court. When such deposition is returned to the clerk of the court from which the commission issued, he shall deliver it personally or forward it by mail to the justice before whom the action is pending. [C97,§4695; C24, 27, 31, 35,§11376.]

11377 Service of notice. The notice of taking depositions by either of the methods provided may be served personally upon the opposite party or his attorney of record, in the same manner as an original notice in a civil action, except by publication, or such service may be accepted by the party or his attorney. [R60, §§4074, 4075; C73,§§3731, 3732; C97,§4696; C24, 27, 31, 35,§11377.]

Manner of service, §11060

11378 Service on nonresident or defaulting party. If the party sought to be served with notice is a nonresident, or his residence is unknown, or in case of default, and the party has

no attorney of record who is a resident of the state, the notice of the taking of depositions or suing out a commission therefor may be served by filing such notice, or such notice with a copy of the interrogatories attached, with the clerk of the court in which the action or proceeding is pending, ten days before the taking of the depositions or the issuance of the commission, as the case may be. [R60,§4076; C73,§3733; C97, §4697; C24, 27, 31, 35,§11378.]

11379 Length of notice. The notice of taking a deposition by either of the methods, except as otherwise provided shall be, when served on the attorney, at least ten days, and upon the party within the county where the deposition is to be taken or the commission sued out, at least five days. If served upon the party outside such county, the length of time shall be that required in serving an original notice. If depositions are to be taken upon notice, whether served upon the attorney or party, one day in addition to the time hereinbefore specified must be allowed for every one hundred miles travel from the place where it is served to where the deposition is to be taken. [C51,§2453; R60,§4073; C73,§3730; C97,§4698; C24, 27, 31, 35,§11379.]

11380 Method of taking. The person before whom depositions are taken must cause the interrogatories propounded, if oral, to be written out; if written, to be stated by number, and the answers thereto inserted immediately thereunder. The answers must be in the language, as nearly as practicable, of the witness. The whole, being read over by or to the witness, must be subscribed and sworn to by him in the usual manner. [C51,§2456; R60,§4079; C73,§3735; C97,§4699; C24, 27, 31, 35,§11380.]

11381 Certificate. The officer taking the deposition shall attach thereto his certificate that the testimony of the witness was correctly and fully written down by him, or by a disinterested person named therein, under his direction and in his presence, and was read over by the officer to such witness and signed and sworn to by the witness in the officer's presence; any exhibits offered and identified shall be referred to in the certificate as thus identified, and the certificate shall show that the same or a true copy thereof is attached to and returned with the deposition. When the oath is administered to the witness by some other person, the officer's certificate shall recite such fact, stating his name and official character. [C51,§§2457, 2458; R60,§§4080, 4081; C73,§§3736, 3737; C97,§4700; C24, 27, 31, 35,§11381.]

11382 Oath administered. If the deposition is taken in the state before a person not authorized to administer oaths, or out of the state, not before an officer enumerated in and allowed by this chapter so to do, the witness must be sworn by someone who has that authority. [C97, §4701; C24, 27, 31, 35,§11382.]

11383 Taking in shorthand. The deposition may be taken in shorthand, in which case the certificate of the person taking it on notice or commission must show that the testimony of the witness was correctly taken down in shorthand, and was correctly extended, and that the notes of his testimony, or such extension thereof, was read over to the witness, and signed by him and sworn to, if within the state, before a person authorized to administer oaths, and if without the state, before one of the officers authorized to take depositions outside of the state, and such extension, together with the shorthand notes, if signed and sworn to, must be returned as the deposition. [C97,§4702; C24, 27, 31, 35,§11383.]

C97,§4702, editorially divided

11384 Oath. Anyone taking depositions in shorthand shall first take and subscribe an oath to take down and transcribe correctly such testimony, and shall certify that his translation thereof is full, true, and complete. [C97,§4702; C24, 27, 31, 35,§11384.]

11385 Authentication of official character. When depositions are taken before an officer not having a seal, unless so done by agreement of parties, his signature and official character must be authenticated by the certificate of the clerk of a court of record under its seal, or that of the officer having in charge the seal of state. If taken before an officer having a seal, whether in or outside the state, the certificate of the officer under such seal shall be received as presumptive evidence of the genuineness of the signature and of his official character. [C51,§2462; R60,§4086; C73,§3742; C97,§4703; C24, 27, 31, 35, §11385.]

11386 When neither party present. Where a deposition is taken upon written interrogatories alone, neither party, nor his agent or attorney, shall be present at the examination of the witness, unless both parties are present or represented by an agent or attorney, and the certificate shall state such fact if a party or his agent is present. [R60,§4082; C73,§3738; C97, §4704; C24, 27, 31, 35,§11386.]

11387 Transmission. The deposition duly certified as hereinbefore required, with the commission and interrogatories, if taken on commission, must be sealed up and deposited by the person taking it, within thirty days, with the clerk of the proper court, or transmitted to him by mail or express, unless some other mode be agreed upon between the parties. [C51,§2458; R60,§4081; C73,§3737; C97,§4705; C24, 27, 31, 35, §11387.]

11388 Indorsement. The deposition, when prepared for filing with or return to the clerk, must be indorsed, on the outside of a sealed envelope in which it is inclosed, with the title of the cause in which it is to be used. [C51,§2460; R60,§4084; C73,§3740; C97,§4706; C24, 27, 31, 35, §11388.]

11389 Opened — custody. When thus returned, it must be opened by the clerk and placed on file in his office, after which he shall at any time furnish any person with an attested copy of the same upon payment of the customary fees,

but must not allow it to be taken from his office previous to the next term of the court, unless by the written consent of all of the parties. [C51, §2459; R60,§4083; C73,§3739; C97,§4707; C24, 27, 31, 35,§11389.]

11390 **Deviations—amendments.** Unimportant deviations from any of the above directions shall not cause the deposition to be excluded, where no substantial prejudice could be wrought to the opposite party thereby, and by order of court it may be returned to the officer taking the same for correction and amendments as to formal matters. [C51,§2461; R60,§4085; C73, §3741; C97,§4708; C24, 27, 31, 35,§11390.]

11391 **Reasons for taking—presence of witness.** The deposition in all cases, unless the record discloses a cause for the taking, must show that the witness is a nonresident of the county, or such other fact as renders its taking legal, and no such deposition shall be read on the trial if, at the time, the witness himself is produced in court. [C51,§2463; R60,§4087; C73, §3743; C97,§4709; C24, 27, 31, 35,§11391.]

11392 **On appeal from justice.** Depositions taken to be used in a justice's court shall be transferred to the court to which the cause is appealed, and used on the trial of such appeal. [C51,§2466; R60,§4093; C73,§3744; C97,§4710; C24, 27, 31, 35,§11392.]

11393 **Notice of filing.** Upon the filing of a deposition in the clerk's office, he shall, on the day it is filed, mail to the attorney of each party to the action, directed to his post-office address, a notice thereof, reciting the title of the case, names of witnesses, and the date of filing. If the post-office address of any such attorney is unknown to the clerk, the notice shall be addressed to him at the post office where the cause is pending for trial. [R60,§§4088, 4089; C73, §3751; C97,§4711; C24, 27, 31, 35,§11393.]

11394 **Exceptions.** If a deposition is filed three days or more prior to noon of the second day of a term, no exceptions thereto, other than for incompetency, irrelevancy, or immateriality, shall be regarded, unless made by motion and filed by that time; if a deposition is filed thereafter or during a term, such exception shall be filed by noon of the third day after such filing, but all such exceptions or motions to suppress such depositions must be made before the cause is reached for trial. [C51,§2464; R60,§§4088, 4089; C73,§3751; C97,§4712; C24, 27, 31, 35, §11394.]

11395 **Hearing.** The court shall, on motion of either party, hear and decide the questions arising on exceptions and motions to suppress depositions before the commencement of the trial. [R60,§4090; C73,§3752; C97,§4713; C24, 27, 31, 35,§11395.]

11396 **Errors waived.** Errors of the court in its decision upon exceptions to depositions are waived, unless excepted to. [R60,§4091; C73, §3753; C97,§4714; C24, 27, 31, 35,§11396.]

11397 **Fees for taking.** Any officer or person taking depositions is authorized to charge therefor ten cents per hundred words, exclusive of the certificate; for administering an oath to each witness, five cents; for certifying to the administration of the oath to and signature of the deposition by each witness, twenty-five cents; and for the certificate to the deposition or depositions, twenty-five cents, the charge for such certificate including the affixing of the seal thereto, if the person certifying is an officer having a seal; for issuing a subpoena for a witness, twenty-five cents; for certifying to a court the failure of a witness to respond to a subpoena, or his refusal to answer questions or to sign and swear to his deposition, twenty-five cents, with ten cents per hundred words for copies of papers required to be certified in such a case. [C51, §2552; R60,§4160; C73,§3835; C97,§4715; C24, 27, 31, 35,§11397.]

11398 **Witness fees.** A witness appearing before an officer directed to take his deposition is entitled to the same fees and mileage as a witness in the court in which the deposition is to be used. If subpoenaed, such a witness is entitled to his fees and mileage in advance, as in other cases. [C97,§4716; C24, 27, 31, 35,§11398.]

Fees and mileage, §11326 et seq.

11399 **Costs.** In all cases of taking depositions, the taxable costs thereof must be paid in the first place by the party at whose instance they are taken, subject, like other costs, to be taxed against the failing party in the action. [C51,§2474; R60,§4100; C73,§3754; C97,§4717; C24, 27, 31, 35,§11399.]

PERPETUATING TESTIMONY

11400 **Petition.** The testimony of a witness may be perpetuated in the following manner: The applicant must file in the office of the clerk of the district or superior court a verified petition, which shall set forth the subject matter relative to which testimony is to be taken, the names of the persons interested, if known, and, if not, such general description as he can give of such persons, as heirs, devisees, alienees, or otherwise. It must also state the names of the witnesses to be examined, the interrogatories to be propounded to each, that the applicant expects to be a party to an action in a court of the state, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where he expects to be the plaintiff. [R60,§§4094, 4095; C73,§§3745, 3746; C97,§4718; C24, 27, 31, 35,§11400.]

Transaction with deceased, §11259; affidavits, §11342 et seq.

11401 **Order of court or judge.** The court, or the judge thereof, may, if the occasion for taking the deposition be a proper one, make an order allowing the examination of such witnesses, which shall prescribe the time and place of the examination, how long the parties interested shall be notified thereof, and the manner in which they shall be notified. [R60,§4096; C73,§3747; C97,§4719; C24, 27, 31, 35,§11401.]

Orders executed outside district, §11242.1

11402 Cross-interrogatories. When it satisfactorily appears to the court or judge that the parties interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition and prepare and file cross-interrogatories to those contained therein. The witnesses must be examined upon the interrogatories of the applicant, and any cross-interrogatories filed by or for parties, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some of them. The attorney filing the cross-interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs. [R60,§4097; C73,§3748; C97, §4720; C24, 27, 31, 35,§11402.]

11403 Before whom taken. Such deposition shall be taken before someone authorized by law to take depositions, or before someone specially authorized by the court or judge, and returned to the clerk's office of the court in which the petition is filed, the method of taking and verifying the same being the same as that provided for in case of depositions in an action, so far as applicable. [R60,§4098; C73,§3749; C97,§4721; C24, 27, 31, 35,§11403.]

11404 Costs. The costs of taking the deposition, including those incurred in the proceeding for securing them, shall be paid in the first instance by the party causing them to be taken. [C97,§4722; C24, 27, 31, 35,§11404.]

11405 Approval and filing. The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same and order them to be filed. [R60,§4099; C73,§3750; C97,§4723; C24, 27, 31, 35,§11405.]

C97,§4723, editorially divided

11406 Use of deposition. If a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained as required. [R60,§4099; C73,§3750; C97, §4723; C24, 27, 31, 35,§11406.]

11407 Permissible objections. Such depositions shall be subject to the same objections for irrelevancy, incompetency, or immateriality as may be made to depositions taken pending an action. [R60,§4099; C73,§3750; C97,§4723; C24, 27, 31, 35,§11407.]

CHAPTER 495

CHANGE OF VENUE

Wrong county, §11058

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11408 Grounds for. A change of the place of trial in any civil action may be had in any of the following cases:

1. *County a party.* Where the county in which the action is pending is a party thereto, if the motion is made by the party adversely interested, and the issue be triable by jury.

2. *Judge a party or interested.* Where the judge is a party, or is directly interested in the action, or is connected by blood or affinity with any person so interested nearer than the fourth degree.

Computing degrees, §63, subsection 24

3. *Prejudice or local influence.* Where either party files an affidavit, verified by himself and three disinterested persons not related to the party making the motion nearer than the fourth degree, nor standing in the relation of servant, agent, or employee of such party, stating that the inhabitants of the county or the judge is so prejudiced against him, or that the adverse party or his attorney has such an undue influence over the inhabitants of the county, that he cannot obtain a fair trial; and when either party files such an affidavit the other party shall have a reasonable time in which to prepare and file counter affidavits, and the court or judge, in its discretion, may cause the affiants upon either side to be brought into court for examination upon the matters contained in their affidavits, and, when fully advised, shall allow or refuse the change according to the very right and merits of the matter.

4. *Agreement.* By the written agreement of the parties.

5. *Jury not obtainable.* If the issue is one triable by a jury, and it is made apparent to the court or judge that a jury cannot be obtained in the county where the action is pending, then, upon the application of either party, a change of place of trial shall be granted to the nearest county in which a jury can be obtained. [C51, §1706; R60,§2803; C73,§2590; C97,§3505; S13, §3505; C24, 27, 31, 35,§11408.]

Referred to in §§11409, 11410, 11423
Change when action in wrong county, §11058
S13,§3505, editorially divided

11409 Limitations. Not more than two such changes to either party shall be allowed for any of the causes enumerated in section 11408; nor shall a change be allowed in case of appeal from a justice of the peace; nor, when the issues can only be tried to the court, for any objection to the inhabitants of the county, or for the objection that the adverse party or his attorney has such an undue influence over the inhabitants thereof that he cannot obtain a fair trial. [C97,§3505; S13,§3505; C24, 27, 31, 35, §11409.]

11410 Subsequent changes. After a change of place of trial has been taken and a trial had, and the jury discharged or a new trial granted, a subsequent change may be taken for any of the causes mentioned in section 11408. [C97, §3505; S13,§3505; C24, 27, 31, 35,§11410.]

11411 Fraud in written contract. In an action brought on a written contract in the county where the contract by its express terms is to be performed, in which a defendant to said action, residing in a different county in the state, has filed a sworn answer alleging fraud in the inception of the contract constituting a complete defense thereto, such defendant, upon application and the filing of a sufficient bond, may have such action transferred to the district court of the county of his residence. [S13, §3505; C24, 27, 31, 35,§11411.]

Referred to in §§11413, 11415, 11423
Similar provision in justice court, §10512

11412 Expense and attorney fees. If upon the trial of the action judgment is rendered against the defendant, it shall include the reasonable expenses incurred by the plaintiff and his attorney, on account of change of place of trial, as part of the costs. [S13,§3505; C24, 27, 31, 35,§11412.]

11413 Bond. The bond referred to in section 11411 shall be with sureties to be approved by the clerk, in an amount to be fixed by the court, or judge in vacation, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the plaintiff or to the officers of the court. [S13,§3505; C24, 27, 31, 35,§11413.]

11414 Application for change. The application for a change of place of trial may be made either to the court or to the judge in vacation, and if made in term time shall not be awarded until the issues are made up, unless the objection is to the court, nor shall such application be allowed after a continuance, except for a cause not known to the affiant before or arising since such continuance, and after one change no party is entitled to another for any cause in existence when the first was obtained. [C51, §1708; R60,§2804; C73,§2591; C97,§3506; C24, 27, 31, 35,§11414.]

11415 To what county or court. If the application for a change is granted for any cause except on account of the prejudice or disability of the judge or under section 11411, the cause shall be sent to the nearest or most convenient county in the district, unless objections supported by affidavit are made to each county in the district, in which case to the nearest or most convenient county in another district. [C51,§1707; R60,§2805; C73,§2592; C97,§3507; S13,§3507; C24, 27, 31, 35,§11415.]

S13,§3507, editorially divided

11416 Objection to judge. If the objections are to the judge, the cause shall not be tried by him, but retained on the docket and tried as provided in section 11417. [C73,§2592; C97, §3507; S13,§3507; C24, 27, 31, 35,§11416.]

11417 Avoiding objections. When a change of venue is granted on the ground of objection made to the judge, he may, in his discretion, if there be a judge or judges of the same district against whom there is no objection, assign the cause to one of such judges for trial. If there be no other judge of his district against whom there is no objection, then he may, in his discretion, send the cause for trial to the nearest and most convenient county of another district, or to a county of another district agreed upon by the parties, for trial before a judge of such district; or he may procure another judge of another district to interchange with him for the trial of such cause. [C97,§249; C24, 27, 31, 35,§11417.]

Referred to in §11416

11418 Notice in vacation. If an application for the change is made in vacation, five days notice thereof, with a copy of the affidavit, shall be served on the adverse party or his attorney, and, if granted, the judge shall forthwith transmit his order to the clerk, with all the papers presented to him. [C51,§1709; R60,§2806; C73, §2593; C97,§3508; C24, 27, 31, 35,§11418.]

11419 When change perfected. If the order for the change is granted in vacation, it must be perfected by noon of the second day after the order is received by the clerk, and if granted during term time, by the morning of the second day thereafter, or before the cause is reached for trial, if sooner reached, or such change, whether granted in term or vacation, will be waived, and the cause tried as though no such order had been granted. [R60,§2810; C73, §2594; C97,§3509; C24, 27, 31, 35,§11419.]

C97,§3509, editorially divided

11420 Transcript and papers. When the change has been perfected or agreed to by the parties, the clerk must forthwith transmit to the clerk of the proper court a transcript of the record and proceedings, with all the original papers, having first made out and filed in his office authenticated copies thereof. [C51,§1710; R60, §2807; C73,§2594; C97,§3509; C24, 27, 31, 35, §11420.]

11421 Nonapplicant for change—trial. If less than all of several plaintiffs or defendants take such change, the original papers shall not be so transmitted, but a copy thereof, and, as to those who take no change, the cause shall proceed as if none had been taken. [C51,§1710; R60,§§2807, 2810; C73,§2594; C97,§3509; C24, 27, 31, 35,§11421.]

11422 Docketed. Upon filing such transcript and papers in the office of the clerk of the court to which the same were certified, the cause shall be docketed without fee and proceeded with as though it had originated therein. [C51,§1711; R60,§2808; C73,§2595; C97,§3510; C24, 27, 31, 35,§11422.]

11423 Costs of change. Unless the change is granted under subsections 2, 4, or 5 of section 11408, or under section 11411, all costs caused thereby or that are rendered useless by reason thereof, shall be paid by the applicant, and the court or judge, at the time of making the order, shall designate in general terms such costs, and no change shall be held perfected until the same are paid. [C51,§1712; R60,§2809; C73,§2596; C97,§3511; S13,§3511; C24, 27, 31, 35,§11423.]

11424 Jury fees. Where the place of trial in any civil or criminal action is changed to any county other than that in which the same was properly commenced, where the trial thereof takes place at a regular term and occupies more than one calendar day, the judge trying it shall certify the number of days so occupied, and the county in which the action was originally commenced shall be liable to the county where the same is tried for the sum of three dollars per day, for each juryman engaged in the trial thereof. [C73,§2597; C97,§3512; C24, 27, 31, 35, §11424.]

Referred to in §11425

11425 Expense of special term. Where a special term of any court is held for the trial of any action contemplated in section 11424, the court trying the same shall make out and certify the amount of county expenses incurred in the trial of each action, and the same shall be paid by the county in which the same was properly commenced. [C73,§2598; C97,§3513; C24, 27, 31, 35,§11425.]

CHAPTER 496

TRIAL AND JUDGMENT

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11426 Issues. Issues arise in the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

1. Of law.
2. Of fact.

[R60,§2993; C73,§2737; C97,§3647; C24, 27, 31, 35,§11426.]

11427 Of fact and of law. An issue of fact arises upon:

1. A material allegation of fact in the petition denied by the answer.
2. Material allegations of new matter in the answer, either denied by a reply or by operation of law.
3. Allegations of new matter in the reply, which shall be considered as controverted by the opposite party without further pleading.

Any other issue is one of law. [R60,§§2994, 2995; C73,§2738; C97,§3648; C24, 27, 31, 35, §11427.]

11428 "Trial" defined. Issues of law must be tried first. A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact. [C51,§1770; R60,§§2996, 2997; C73,§2739; C97,§3649; C24, 27, 31, 35, §11428.]

11429 How issues tried. Issues of fact in an ordinary action must be tried by jury, unless the same is waived. All other issues shall be tried by the court, unless a reference thereof is

made. [C51,§1772; R60,§2998; C73,§2740; C97, §3650; C24, 27, 31, 35,§11429.]

11430 Evidence in ordinary actions. All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as provided by law. [R60,§2999; C73,§2741; C97,§3651; C24, 27, 31, 35,§11430.]

Depositions, §11358 et seq.
C97,§3651, editorially divided

11431 Ordinary actions — evidence on appeal. Upon appeal, in ordinary actions no evidence shall go to the supreme court except such as may be necessary to explain any exception taken in the cause, and such court shall hear and try the case only on the legal errors so presented. [R60,§2999; C73,§2741; C97,§3651; C24, 27, 31, 35,§11431.]

Constitution, Art. V, §4

11432 Evidence in equitable actions. In actions cognizable in equity, wherein issues of fact are joined, the court may order the evidence or any part thereof to be taken in the form of depositions, or either party may take depositions as authorized by law, and may in the discretion of the court be granted a continuance to the second term for that purpose. [R60, §2999; C73,§2742; C97,§3652; S13,§3652; C24, 27, 31, 35,§11432.]

Referred to in §11435
40ExGA, SF 231, §1, editorially divided

11433 Equitable actions—evidence on appeal. The evidence in actions cognizable in equity shall be presented on appeal to the supreme court, which shall try such causes anew. [R60,§2999; C73,§2742; C97,§3652; S13,§3652; C24, 27, 31, 35,§11433.]

11434 Abstracts in equity causes. In equitable causes, where the evidence is taken in the form of depositions, the court may require to be submitted with the arguments an abstract of the pleadings and evidence, substantially as required by the rules of the supreme court for abstracts in appeals in equitable causes, except that the same need not be printed. [C97,§3653; C24, 27, 31, 35,§11434.]

Supreme court rule 18

11435 Finding of facts by court. In all trials of fact by the court, other than those contemplated in section 11432, the court shall, if either party requests it, give its decision in writing, stating separately the facts found and the legal conclusion founded thereon; and the whole decision shall be a part of the record, and the finding shall have the effect of a special verdict. [C51,§1793; R60,§3088; C73,§2743; C97,§3654; C24, 27, 31, 35,§11435.]

11436 Trial term. Causes shall be triable at the first term after legal and timely service has been made. [C51,§1763; R60,§3007; C73, §2744; C97,§3655; C24, 27, 31, 35,§11436.]

11436.1 Exception. If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, the cause shall be tried either in term time or in vacation within three days after the issues are made up. [C31, 35,§11436-d1.]

11437 Separate trials. The court may, in its discretion, allow separate trials between the plaintiff and any defendant, or of any cause of action united with others, or of any issue in an action; and such separate trials may be had at the same or different terms of the court, as circumstances may require. [C51,§1768; R60, §§3024, 3025; C73,§2746; C97,§3657; C24, 27, 31, 35,§11437.]

11438 Trial notice. In any case once continued, where an answer is on file, either party desiring to bring such cause on for trial at any term shall, at least ten days before such term, file with the clerk a notice of trial, and no such cause shall stand for trial unless a trial notice be so filed, except by consent of parties. But after the commencement of the term, the court may in its discretion, by order entered of record, permit notices of trial to be entered in the same manner, ten days prior to such date as the court may name in such order. Such order may be general, and not entered of record in each particular case. The clerk, in preparing the court calendars, shall note thereon, opposite the title of each cause noticed for trial, the words, "for trial", which words shall also appear on the printed calendar. This rule shall not apply to appearance or criminal cases, nor to proceedings in probate. [C97,§3658; C24, 27, 31, 35,§11438.]

11439 Assignments — hearing of motions, etc. On the first day of the term, or as soon thereafter as practicable, the court may make an assignment of the trial causes, which assignment shall fix the day of the term on which each cause will be tried, and parties will be required to conform to this order of trial. Further assignments may be made by the court as often as necessary. The court may also designate particular times for the hearing of motions and demurrers. [C97,§3659; C24, 27, 31, 35,§11439.]

11440 Docketing appeals. In appeals from justices' courts or other inferior tribunals in civil causes, the appellant shall cause the case to be docketed by noon of the second day of the term to which the same is returnable, and, in case of his failure to do so, the appellee may procure the case to be docketed, and thereupon will be entitled to have the judgment below affirmed, or to have the case set down for trial upon its merits, as he may elect, and the provisions of this code as to appeals from justices' courts shall be applicable, so far as may be, to other appeals contemplated in this section. [C97,§3660; C24, 27, 31, 35,§11440.]

Similar provisions, §§10595, 10611

11441 Calendar. The clerk shall keep a calendar distinguishing, first, criminal causes, and next, civil causes, and arranging each in the order of their commencement and, if the court so order, shall, under the direction of the court or judge, apportion the same to as many

days as is believed necessary, and, at the request of any party to a cause or his attorney, shall issue subpoenas accordingly. The clerk shall furnish the court and bar with a sufficient number of copies of the calendar at the first term of court of each year, and shall at each succeeding term of court during said year, furnish the court and bar with a sufficient number of copies of a supplement thereto, which shall include the new causes only. [C51,§§1761, 1762; R60,§3005; C73,§2747; C97,§3661; C24, 27, 31, 35,§11441.]

11442 Continuances—application for. When time is asked for making application for continuance, the cause shall not lose its place on the calendar, or it may be continued at the option of the other party, and at the cost of the party applying therefor, for which cost judgment may at once be entered by the clerk, unless the contrary be agreed between the parties or ordered by the court. [C51,§1764; R60,§3008; C73,§2748; C97,§3662; C24, 27, 31, 35,§11442.]

11443 Causes for. A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor; subject to this rule, it may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly obtained. [C51,§1765; R60,§3009; C73,§2749; C97, §3663; C24, 27, 31, 35,§11443.]

11444 Absence of evidence. Motions for continuance on account of the absence of evidence must be founded on the affidavit of the party, his agent or attorney, and must state:

1. The name and residence of such witness, or, if not known, that the affiant has used reasonable diligence to ascertain them, and in either case facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term.
2. Efforts constituting due diligence which have been used to obtain such witness, or his testimony.
3. What particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proven. [C51,§1766; R60.§§3010, 3011; C73,§2750; C97, §3664; C24, 27, 31, 35,§11444.]

11445 Admission by opposite party. If the application is insufficient, it shall be overruled; if sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated. [C51,§1767; R60,§§3012, 3013; C73,§2751; C97,§3665; C24, 27, 31, 35,§11445.]

11446 Filing motion—diligence. The motion must be filed on the second day of the term, if it is then certain that it will have to be made before the trial, and as soon thereafter as it becomes certain that it will need to be made, and shall not be allowed to be made when the cause is called for trial, except for matters which could not by reasonable diligence have been before that time discovered. If made after the second day of the term, the affidavit must state facts constituting an excuse for the delay in making it. If time is taken when the case is called to make such motion, it shall be made and determined as soon as the court opens after the next ordinary adjournment. [R60,§3014; C73, §2752; C97,§3666; C24, 27, 31, 35,§11446.]

11447 Amendment. The application may be amended but once, unless by permission to supply a clerical error. [R60,§3015; C73,§2753; C97,§3667; C24, 27, 31, 35,§11447.]

11448 Written objections. To such motion, in its original form or as amended, the adverse party may at once, or within such reasonable time as the court shall allow, file written objections, stating wherein he claims that the same is insufficient, and on such motion and objections no argument shall be heard unless the court desires it. [R60,§3016; C73,§2754; C97, §3668; C24, 27, 31, 35,§11448.]

11449 Part of record. Such motion and objections shall be a part of the record. [R60, §3017; C73,§2755; C97,§3669; C24, 27, 31, 35, §11449.]

C97,§3669, editorially divided

11450 Appeal. Error in refusing a continuance or in compelling an election may be reviewed upon appeal. [R60,§3017; C73,§2755; C97,§3669; C24, 27, 31, 35,§11450.]

11451 Entry on appearance docket. No copy of a motion for continuance or of objections thereto need be served, but a minute of the filing thereof shall be entered on the appearance docket. [R60,§3018; C73,§2756; C97,§3670; C24, 27, 31, 35,§11451.]

11452 Costs. Every continuance granted shall be at the cost of the party applying therefor, unless otherwise ordered by the court. [R60,§3019; C73,§2757; C97,§3671; C24, 27, 31, 35,§11452.]

11453 By agreement. The court shall grant continuances whenever the parties agree thereto, and provide as to costs as may be stipulated. [R60,§3020; C73,§2758; C97,§3672; C24, 27, 31, 35,§11453.]

11454 Case remains on docket. A case continued remains for all purposes except a trial on the facts. [R60,§3022; C73,§2759; C97,§3673; C24, 27, 31, 35,§11454.]

11455 One of several defendants. When the defenses are distinct, any one of several defendants may continue as to himself. [R60,§3023; C73,§2760; C97,§3674; C24, 27, 31, 35,§11455.]

11456 Detailed report of trial. In all appealable actions triable by ordinary or equitable proceedings, any party thereto shall be entitled to have reported the whole proceedings upon the trial or hearing, and the court or judge shall

direct the reporter to make such report in writing or shorthand, which shall contain the date of the commencement of the trial, the proceedings impaneling the jury, and any objections thereto with the rulings thereon, the oral testimony at length, and all offers thereof, all objections thereto, the rulings thereon, the identification as exhibits, by letter or number or other appropriate mark, of all written or other evidence offered, and by sufficient reference thereto, made in the report, to make certain the object or thing offered, all objections to such evidence and the rulings thereon, all motions or other pleas orally made and the rulings thereon, the fact that the testimony was closed, the portions of arguments objected to, when so ordered by the court, all objections thereto with the rulings thereon, all oral comments or statements of the court during the progress of the trial, and any exceptions taken thereto, the fact that the jury is instructed, all objections and exceptions to instructions given by the court on its own motion, the fact that the case is given to the jury, the return of the verdict and action thereon of whatever kind, and any other proceedings before the court, judge, or jury which might be preserved and made of record by bill of exceptions, and shall note that exception was saved by the party adversely affected to every ruling made by the court or judge. [C97,§3675; C24, 27, 31, 35,§11456.]

C97,§3675, editorially divided

11457 Certification—ipso facto bill. Such report shall be certified by the trial judge and reporter, when demanded by either party, to the effect that it contains a full, true, and complete report of all proceedings had that are required to be kept, and, when so certified, the same shall be filed by the clerk and, with all matters set out or identified therein, shall be a part of the record in such action, and constitute a complete bill of exceptions. [C97,§3675; C24, 27, 31, 35,§11457.]

Certification by successor, §11541
Duty to file translation, §12850.1
When bill unnecessary, §§11529, 11539

11458 Matters excluded. On a trial before a jury it shall not be necessary to take down arguments of counsel or statements of the court, except his rulings, when not made in the presence of the jury. [C97,§3675; C24, 27, 31, 35, §11458.]

11459 Selection of jury. When an action is to be tried by a jury, the clerk shall select sixteen jurors by lot from the regular panel or additions thereto, which shall be supplied as provided in the chapters on jurors. [C51,§1773; R60,§3026; C73,§2761; C97,§3676; C24, 27, 31, 35,§11459.]

Jurors, ch 480 et seq.

11460 Challenges. A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel.
2. To an individual juror.

[C51,§2972; R60,§3027; C73,§2762; C97,§3677; C24, 27, 31, 35,§11460.]

11461 Joint challenges. Where there are several parties, plaintiffs or defendants, and no separate trial is allowed, they shall not sever their challenges, but must join in them. [R60, §3028; C73,§2763; C97,§3678; C24, 27, 31, 35, §11461.]

11462 To the panel. A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury. [C51,§2974; R60,§3029; C73,§2764; C97,§3679; C24, 27, 31, 35,§11462.]

11463 When and how made. A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge. [C51,§2975; R60,§3030; C73,§2765; C97,§3680; C24, 27, 31, 35,§11463.]

11464 How tried. A challenge to the panel may be taken by either party, and upon the trial thereof the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge. [C51,§2976; R60,§3031; C73, §2766; C97,§3681; C24, 27, 31, 35,§11464.]

11465 Allowance. If the challenge is sustained by the court, the jury must be discharged, and its members will be disqualified from sitting in the trial in question; if it is overruled, the court shall direct the jury to be impaneled. [C51, §2977; R60,§3032; C73,§2767; C97,§3682; C24, 27, 31, 35,§11465.]

11466 To jurors. A challenge to an individual juror is either peremptory or for cause. [C51,§2978; R60,§3033; C73,§2768; C97,§3683; C24, 27, 31, 35,§11466.]

11467 When made—determination. It must be taken when the juror appears and before the jury is sworn. Upon the trial of a challenge, the juror challenged shall be sworn, if demanded by either party, and examined as a witness, and must answer every question pertinent to the inquiry thereof. [C51,§2979; R60,§3034; C73, §2769; C97,§3684; C24, 27, 31, 35,§11467.]

11468 Peremptory. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him. [C51,§2980; R60,§§3035, 4778; C73, §§2770, 4412; C97,§3685; C24, 27, 31, 35,§11468.]

11469 Challenges—number—striking. Each party shall have the right to peremptorily challenge three jurors and shall strike two jurors. The clerk shall prepare a list of jurors called and after all challenges for cause are exhausted or waived, the parties, commencing with the plaintiff, shall alternately challenge peremptorily or waive by indicating any such challenge upon the list opposite the name of the juror challenged or by indicating the number of waiver elsewhere on the list.

After all challenges or waivers have been indicated the parties shall alternately in the same manner each strike two jurors from the list. [C51,§1774; R60,§3036; C73,§2771; C97,§3686; C24, 27, 31, 35,§11469.]

11470 Vacancies. After each challenge, either for cause or peremptory, as indicated on the list, another juror shall be called and examined for challenge for cause before further challenge is made and any new juror thus called may be challenged for cause and shall be subject to peremptory challenge or to being struck from the list as other jurors. [C51,§1775; R60,§3037; C73,§2772; C97,§3687; C24, 27, 31, 35,§11470.]

37GA, ch 310, §4, editorially divided

11471 Reading of names. After all challenges have thus been exercised or waived and four jurors have been struck from the list the clerk shall read the names of the twelve jurors remaining who shall constitute the jury selected. [C24, 27, 31, 35,§11471.]

11471.1 Oath of jurors. The jury shall be sworn in substantially the following form:

You and each of you do solemnly swear (or affirm) that you will well and truly try the issues wherein ..... is plaintiff and ..... is defendant, and a true verdict render, and that you will do so solely on the evidence introduced and in accordance with the instructions of the court, so help you God. [C31, 35,§11471-d1.]

11472 Challenges for cause. A challenge for cause is an objection to a juror, and may be for any of the following causes:

1. A conviction of felony.

2. A want of any of the qualifications prescribed by statute to render a person a competent juror.

Competency, §10842

3. Such defects in the faculties of mind or organs of the body as render him incapable of performing the duties of a juror.

4. Consanguinity or affinity within the ninth degree to the adverse party.

Computing relationship, §68

5. Standing in the relation of guardian and ward, or the client of any attorney engaged in the cause, master and servant, landlord and tenant, or being a member of the family or in the employment of the adverse party.

6. Being a party adverse to the challenging party in a civil action, or having complained against or been accused by him in a criminal prosecution.

7. Having already sat upon the trial of the same issues.

8. Having served as a grand or trial juror in a criminal case based on the same transaction.

9. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict.

10. Being interested in a like question with the issue to be tried.

11. Having requested, directly or indirectly, that his name be returned as a juryman for the regular biennial period.

12. Having served in the district court as a grand or petit juror during the last preceding calendar year. [R60,§§2271, 3037–3040; C73, §2772; C97,§§337, 3688; S13,§337; C24, 27, 31, 35,§11472.]

11473 How tried. Upon the trial of a challenge to an individual juror, he may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon, and other evidence may be heard. [C51,§2988; R60,§3042; C73,§2773; C97, §3689; C24, 27, 31, 35,§11473.]

11474 Determination. In all challenges, the court shall determine the law and the fact, and must either allow or disallow the challenge. [C51,§2989; R60,§3043; C73,§2774; C97,§3690; C24, 27, 31, 35,§11474.]

11475 Saturday as religious day. A person whose religious faith requires him to keep the seventh day of the week cannot be compelled to attend as a juror on that day. [C51,§2504; R60, §4112; C73,§2776; C97,§3691; C24, 27, 31, 35, §11475.]

11476 Exemption as personal privilege. An exemption from service as a juror is not a cause of challenge, but the privilege of the person exempt. [C51,§2987; R60,§§3041, 4772; C73, §§2777, 4406; C97,§3692; C24, 27, 31, 35,§11476.]

11477 Attachment for absent jurors. When a cause is called for trial, and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and an attachment to be issued against those who are absent, but the court may, in its discretion, wait or not for the return of the attachment. [C97, §3693; C24, 27, 31, 35,§11477.]

11478 Ballots prepared. The clerk shall prepare separate ballots containing the names of the persons returned as jurors, which shall be folded, each in the same manner, as nearly as may be, and so that the name thereon shall not be visible, and must deposit them in a box kept for that purpose. [C97,§3694; C24, 27, 31, 35,§11478.]

11479 Drawing. Before the name of any juror is drawn, the box must be closed and shaken, so as to intermingle the ballots therein, and the clerk shall draw such ballots from the box, without seeing the names written thereon, through the top of the lid thereof. [C97,§3695; C24, 27, 31, 35,§11479.]

11480 Jurors absent or excused. If a juror is absent when his name is drawn, or be set aside or excused from serving on that trial, the ballot containing his name must be folded and returned to the box as soon as the jury is sworn. [C97,§3696; C24, 27, 31, 35,§11480.]

11481 Ballots returned to box. When a jury is completed, the ballots containing the names of the jurors sworn must be laid aside and kept

apart from the ballots containing the names of the other jurors until it is discharged, and must then be again folded and returned to the box, and so on, as often as a trial is had. [C97,§3697; C24, 27, 31, 35,§11481.]

11482 **Panel exhausted.** If for any reason the regular panel is exhausted without a jury being selected, it shall be completed in the manner provided in the chapters upon selecting, drawing, and summoning juries. [C97,§3698; C24, 27, 31, 35,§11482.]

Juries, ch 480 et seq.
Similar provision, §13827

11483 **Majority verdict.** The parties, at any time before the final submission, may agree to take the verdict of the majority, which agreement, being stated to the court and entered upon the record, shall bind the parties, and in such case a verdict, signed by any seven or more and duly rendered, when read and not disapproved by said majority, shall in every particular be as binding as if made by a full jury. [R60,§3045; C73,§2778; C97,§3699; C24, 27, 31, 35,§11483.]

11484 Rep. by 42GA, ch 221

11485 **Procedure after jury is sworn—order of evidence.** When the jury has been sworn, the court shall proceed in the following order:

1. The party on whom rests the burden of proof may briefly state his claim and the evidence by which he expects to sustain it.
2. The other party may then briefly state his defense and the evidence by which he expects to sustain it.
3. The party on whom rests the burden of proof in the whole action must first produce his evidence, to be followed by that of the adverse party.
4. The parties then will be confined to rebutting evidence, unless the court for good reasons, in furtherance of justice, permit them to offer evidence in their original case.
5. But one counsel on each side shall examine the same witness. [R60,§3046; C73,§2779; C97, §3700; C24, 27, 31, 35,§11485.]

C97,§3700, editorially divided

11486 **Interlocutory questions.** Upon interlocutory questions, the party moving the court or objecting to testimony shall be heard first; the respondent may then reply by one counsel, and the mover rejoining, confining his remarks to the points first stated and a pertinent answer to respondent's argument. Argument on the questions shall then be closed, unless further requested by the court. [R60,§3046; C73,§2779; C97,§3700; C24, 27, 31, 35,§11486.]

11487 **Argument—opening and closing.** The parties may then either submit or argue the case to the jury. In the argument, the party then having the burden of the issue shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause; and if in the close he should refer to any new material point or fact not relied upon in the opening, the adverse party shall have the right of reply thereto, which reply shall close the argument in the case. [R60,§3047; C73,§2780; C97,§3701; C24, 27, 31, 35,§11487.]

11488 **Waiver of opening.** If the party holding the affirmative waives the opening, he shall be limited in the close simply to a reply to his adversary's argument, otherwise the other party shall have the concluding argument. [R60, §3048; C73,§2781; C97,§3702; C24, 27, 31, 35, §11488.]

11489 **Number of attorneys—court to arrange order.** Every plaintiff or defendant shall be entitled to appear by one attorney, and if there be but one plaintiff or defendant he may appear by two, and where there are several defendants having the same or separate defenses and appearing by the same or different attorneys, the court shall, before argument, arrange their order. [R60,§3049; C73,§2782; C97,§3703; C24, 27, 31, 35,§11489.]

11490 **Argument restricted.** The court may restrict the time of argument of any attorney to itself, but shall not limit the argument in cases tried to a jury. [R60,§3050; C73,§2783; C97, §3704; C24, 27, 31, 35,§11490.]

Similar provision, §13849

11491 **Instructions requested.** At the conclusion of the evidence, any party may file with the clerk and present to the court consecutively numbered instructions to the jury on points of law with the request that they be given. The court may at any time before final submission of the case to the jury grant leave to any party to file a request for the giving of additional instructions. [R60,§3051; C73,§2784; C97,§3705; S13,§3705; C24, 27, 31, 35,§11491.]

11492 **Duty as to instructions asked.** The court shall either give or refuse to give, or modify and give the instructions requested and make a memorandum of the decision on the margin thereof. If the court give any instruction with a modification, the same shall not be indicated on the instruction requested by interlineation or erasure but shall follow some such characterizing words as "changed thus", indicating that the same was refused as requested. [R60,§§3051, 3053, 3054; C73,§§2784–2786; C97, §§3705, 3706, 3708; S13,§3705; C24, 27, 31, 35, §11492.]

11493 **Instructions by the court.** The court shall instruct the jury as to the law applicable to all the material issues in the case and such instructions shall be in writing and in consecutively numbered paragraphs and shall be read to the jury without oral or other comment or explanation. [R60,§§3051, 3057, 3058, 3060; C73, §§2784, 2786, 2788; C97,§§3705, 3708; S13,§3705; C24, 27, 31, 35,§11493.]

In criminal cases, §§13850, 13876

11494 **Record.** All instructions requested or given shall be filed by the clerk and be a part of the record. [R60,§3055; C73,§2787; C97, §3707; C24, 27, 31, 35,§11494.]

11495 **Exceptions to instructions.** Any party may take and file exceptions to the instructions

of the court, or any part of the instructions given, or to the refusal to give any instructions as requested, within five days after the verdict in the cause is filed or within such further time as the court may allow, and may include the same or any part thereof in a motion for a new trial, but all such exceptions shall specify the part of the instructions as excepted to, or of the instructions requested and refused and the grounds of such exceptions. [R60,§3059; C73, §2789; C97,§3709; S13,§3705-a; C24, 27, 31, 35, §11495.]

Time for making application for new trial, §11551

11496 View of premises. When in the opinion of the court it is proper for the jury to have a view of the real property which is the subject of controversy, or the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose; while the jury are thus absent, no one, save such person so selected, shall speak to them on any subject connected with the trial. [C51,§1779; R60,§3061; C73,§2790; C97,§3710; C24, 27, 31, 35,§11496.]

Similar provision, §13856

11496.1 Juror as witness. Section 13858 shall be applicable to the trial of civil cases. [C27, 31, 35,§11496-b1.]

11497 Rules as to jury—deliberation—kept together. When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they shall be kept together, under charge of an officer, until they agree upon a verdict or are discharged by the court. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon. [C51,§1781; R60, §3062; C73,§2791; C97,§3711; C24, 27, 31, 35, §11497.]

Similar provision, §13878

11498 Separation—advice by court. After the jury is sworn they shall not be permitted to separate during the trial, unless so ordered by the court, and, when so ordered, they must be advised by the court that it is the duty of each one of them not to converse with any other of them, or with any person, nor to suffer himself to be addressed by any person, on any subject of the trial, and that, during the same, it is the duty of each one of them to avoid, as far as possible, forming any opinion thereon until the cause is finally submitted to them. [C51,§1780; R60,§3063; C73,§2792; C97,§3712; C24, 27, 31, 35, §11498.]

Similar provisions, §§13860, 13862

11499 Discharge of juror. If, after impaneling a jury and before a verdict, a juror becomes sick, so as to be unable to perform his duty, he may be discharged. In such case the trial shall proceed with the remaining jurors if the parties consent, which consent shall be entered by the court or shorthand reporter and become a part of the record; otherwise the jury shall be discharged. [C51,§1782; R60,§3064; C73,§2793; C97,§3713; C24, 27, 31, 35,§11499.]

Similar provision, §13859

11500 Discharge of jury. The jury may be discharged by the court on account of any accident or calamity requiring it, or by the consent of both parties, or when on an amendment a continuance is ordered, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing. [R60,§3065; C73,§2794; C97,§3714; C24, 27, 31, 35,§11500.]

Similar provision, §13912

11501 Cause retried. In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may then direct. [R60,§3066; C73,§2795; C97,§3715; C24, 27, 31, 35,§11501.]

Similar provision, §13913

11502 Adjournment. The court may, at any time after having entered upon the trial of any cause, and in furtherance of justice, order an adjournment for such time within the term, and subject to such terms and conditions as to costs and otherwise, as it may think just. [R60, §3067; C73,§2796; C97,§3716; C24, 27, 31, 35, §11502.]

11503 What jury may take with them. Upon retiring for deliberation, the jury may take with them all books of accounts and all papers which have been received as evidence in the cause, except depositions, which shall not be taken unless all the testimony is in writing and none of the same has been ordered to be struck out. [C51,§1783; R60,§3068; C73,§2797; C97,§3717; C24, 27, 31, 35,§11503.]

Similar provision, §13910

11504 Court open for verdict. When the jury is absent, the court may adjourn from time to time in respect to other business, but shall be regarded as open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. [C51, §1784; R60,§3069; C73,§2798; C97,§3718; C24, 27, 31, 35,§11504.]

Similar provision, §13914

11505 Further testimony to correct mistake. At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake, but terms may be imposed upon the party obtaining the privilege. [C51,§1778; R60,§3070; C73, §2799; C97,§3719; C24, 27, 31, 35,§11505.]

11506 Additional instructions. After the jury has retired for deliberation, if they desire to be instructed as to any point of law arising in the case, they may request the officer to con-

duct them into court, which he shall do, when the court may further instruct, which instruction shall be given in the presence of, or after notice to, the parties or their counsel. Such instruction shall be in writing, be filed as other instructions in the case, and be a part of the record, and may be excepted to in the same time and manner as the instructions given before the jury retires. [R60,§§3071, 3072; C73,§§2800, 2801; C97,§3720; C24, 27, 31, 35,§11506.]

Similar provision, §13911

11507 Food and lodging. If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court orders them to be provided with suitable food and lodging, it must be provided by the sheriff at the expense of the county. [R60,§3076; C73,§2802; C97,§3721; C24, 27, 31, 35,§11507.]

11508 Verdict—how signed and rendered. The verdict must be in writing, signed by a foreman chosen by the jury itself, and, when agreed to, the jury must be conducted into court, their names called, and the verdict rendered by him and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury shall be discharged from the case. [C51,§1789; R60,§3073; C73, §2803; C97,§3722; C24, 27, 31, 35,§11508.]

Similar provisions, §§13923, 13930

11509 Jury polled. When the verdict is announced, either party may require the jury to be polled, which shall be done by the court or clerk, asking each juror if it is his verdict. If any one answers in the negative, the jury must be sent out for further deliberation. [R60, §3074; C73,§2804; C97,§3723; C24, 27, 31, 35, §11509.]

Similar provision, §13929

11510 Sealed verdict. When by consent of the parties and the court, the jury has been permitted to seal its verdict and separates before it is rendered, such sealing is equivalent to a rendition and a recording thereof in open court, and such jury shall not be polled or permitted to disagree thereto, unless such course has been agreed upon between the parties in open court and entered on the record. [C51,§1785; R60, §3075; C73,§2805; C97,§3724; C24, 27, 31, 35, §11510.]

11511 General or special. The verdict of a jury is either general or special. A general verdict is one in which they pronounce generally for the plaintiff or for the defendant upon all or upon any of the issues. [R60,§3077; C73,§2806; C97,§3725; C24, 27, 31, 35,§11511.]

11512 "Special" defined. A special verdict is one in which the jury finds facts only; it must present the ultimate facts as established by the evidence, and not the evidence to prove them, so that nothing remains to the court but to draw from them its conclusions of law. [R60,§3078; C73,§2807; C97,§3726; C24, 27, 31, 35,§11512.]

11513 Findings. The jury in any case in which it renders a general verdict may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact, to be stated to it in writing, which questions of fact shall be submitted to the attorneys of the adverse party before argument to the jury is commenced. [C51,§§1786, 1787; R60,§3079; C73, §2808; C97,§3727; C24, 27, 31, 35,§11513.]

In criminal cases, §13916

11514 Finding inconsistent with verdict. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly, or set aside the verdict and findings, as justice may require. [R60,§3080; C73,§2809; C97,§3728; C24, 27, 31, 35,§11514.]

11515 Assessment of recovery. When by the verdict either party is entitled to recover money of the adverse party, the jury in its verdict must assess the amount of such recovery. [C51,§1788; R60,§3081; C73,§2810; C97,§3729; C24, 27, 31, 35,§11515.]

11516 Joint or several verdicts. Where there are several plaintiffs or defendants, whether the pleadings are joint or several, the verdicts shall be molded according to the facts and to suit the exigencies of the case. [R60,§3083; C73,§2811; C97,§3730; C24, 27, 31, 35,§11516.]

11517 Form. The verdict shall be sufficient in form if it expresses the intention of the jury. [C51,§1790; R60,§3084; C73,§2812; C97,§3731; C24, 27, 31, 35,§11517.]

11518 Entered of record. The verdict shall in all cases be filed with the clerk and entered upon the record, after having been put into form by the court, if necessary, and be a part of the record. [C51,§1789; R60,§3085; C73,§2813; C97,§3732; C24, 27, 31, 35,§11518.]

11519 Waiver of jury trial. Trial by jury may be waived by the several parties to an issue of fact in the following cases:

1. By suffering default, or by failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes. [R60,§3087; C73,§2814; C97,§3733; C24, 27, 31, 35,§11519.]

11520 Reference—by consent. All or any of the issues in an action, whether of fact or of law, or both, may be referred upon the consent of the parties, written or oral, in court entered upon the record. [C51,§§1650, 1794; R60,§3089; C73, §2815; C97,§3734; C24, 27, 31, 35,§11520.]

11521 Without consent. When the parties do not consent, the court may, upon motion of either, or upon its own motion, direct a reference in either of the following cases:

1. When the trial of an issue of fact shall require the examination of mutual accounts, or when, the account being on one side only, it shall be made to appear to the court that it is necessary that the party of the other side should be examined as a witness to prove the account, in which case the referee may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein.

2. When the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

3. When a question of fact shall arise in any action by equitable proceedings, in which case the court in the order of reference shall prescribe the manner in which the testimony shall be taken on the trial. [R60,§3090; C73,§2816; C97,§3735; C24, 27, 31, 35,§11521.]

11522 Hearing—decision. Where not otherwise declared in the order of reference, all the referees must meet to hear proofs, arguments, and to deliberate, but a decision of a majority shall be regarded as their decision. [C51,§1652; R60,§3091; C73,§2817; C97,§3736; C24, 27, 31, 35,§11522.]

11523 Vacancies. When appointed by the court, the judge thereof may fill vacancies in vacation. [C51,§1653; R60,§3092; C73,§2818; C97,§3737; C24, 27, 31, 35,§11523.]

11524 Powers. The referee shall stand in the place of the court, and shall have the same power, so far as necessary, to discharge his duty. [C51,§1796; R60,§3093; C73,§2819; C97, §3738; C24, 27, 31, 35,§11524.]

11525 Method of trial—power of referee. The trial by referee shall be conducted in the same manner as a trial by the court; he shall have the same power to summon and enforce by attachment the attendance of witnesses, to punish them as for a contempt for nonattendance or refusal to be sworn or to testify, and to administer all necessary oaths in the trial of the case, to take testimony by commission, to allow amendments to pleadings, grant continuances, preserve order, and punish all violations thereof. [R60,§3094; C73,§2820; C97, §3739; C24, 27, 31, 35,§11525.]

Contempts, ch 536

11526 Report—judgment. The report of the referee on the whole issue must state the facts thus found and the conclusions of the law separately, and shall stand as the finding of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; the report may be excepted to and reviewed in like manner. [R60,§3095; C73,§2821; C97,§3740; C24, 27, 31, 35,§11526.]

11527 Finding of facts. When the reference is to report the facts, the report shall have the effect of a special verdict. [R60,§3096; C73, §2822; C97,§3741; C24, 27, 31, 35,§11527.]

11528 Bill of exceptions. The referee shall sign any true bill of exceptions taken to any ruling by him made in the case upon the demand of either party, who shall have the same rights to obtain such bill as exists in the court, which bill shall be returned with the report. [R60,§3097; C73,§2823; C97,§3742; C24, 27, 31, 35,§11528.]

C97,§3742, editorially divided

11529 When bill unnecessary. No bill of exceptions is necessary to preserve or make of record any matter taken or noted down by the official shorthand reporter of the court, or one appointed by it or the referee, or agreed upon by the parties, and whose report is certified by such reporter and referee to be a full and true report of all the proceedings had, which shall be filed with the referee's report, and the whole be a part of the record. Such reporter shall be governed by the law relating to official shorthand reporters. [C97,§3742; C24, 27, 31, 35, §11529.]

Detailed report as bill, §§11457, 11539

11530 Selection of referees. In all cases of reference, the parties, except when a minor is a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be persons free from objection, or the court may allow each party to select one and itself select a third. [C51,§§1651, 1795; R60,§3098; C73,§2824; C97,§3743; C24, 27, 31, 35,§11530.]

11531 Appointed in vacation. A judge of the court, when a cause is pending, may, in vacation, upon the written consent of the parties, make an order of reference, which shall be written on the agreement to refer, and filed with the clerk with the other papers in the case, and become part of the record. [R60,§3099; C73, §2825; C97,§3744; C24, 27, 31, 35,§11531.]

11532 Oath. The referee must make affidavit well and faithfully to hear and examine the case, and make a just and true report therein, according to the best of his understanding. The affidavit shall be returned with the report, filed by the clerk, and be a part of the record. [R60,§3100; C73,§2826; C97,§3745; C24, 27, 31, 35,§11532.]

11533 Procedure. The order shall not be made until the case is at issue as to the parties whose rights are to be examined on the reference. The order may direct when the referee shall proceed to a hearing and when he shall make his report, but, in the absence of such direction, he shall do so on the morning of the tenth day after the day on which the order of reference was made, and shall file his report as soon as done. The parties shall take notice of the time thus fixed or determined and nonattendance of either party within an hour thereof shall be attended with like consequences as if the case were in court, which consequences shall be reported as any other fact or finding of the referee. [R60,§3102; C73,§2827; C97,§3746; C24, 27, 31, 35,§11533.]

11534 Acceptance by referee. The referee must be called on by the court to accept or refuse the appointment, and his acceptance shall be entered of record; and he shall be under the control of the court, who may, on the motion of either party, make proper orders with a view to his proceeding with all due dispatch, and the court or judge may, on motion, extend the time for making his report. [R60,§3103; C73,§2828; C97,§3747; C24, 27, 31, 35,§11534.]

11535 Proceed as court. The form of procedure which in the court itself regulates service, pleading, proof, trial, and the preparation, progress, and method of each of these, shall obtain before the referee; and in every incident of the proceeding before him the rights and responsibilities of parties and of their attorneys, and of the referee, shall be the same as if the referee was the court engaged in the same manner. [R60,§3105; C73,§2830; C97,§3748; C24, 27, 31, 35,§11535.]

11536 "Exception" defined. An exception is an objection, taken to a decision of the court, or person acting as the court, on a matter of law. [C51,§1805; R60,§3106; C73,§2831; C97,§3749; C24, 27, 31, 35,§11536.]

C97,§3749, editorially divided

11537 Time to except. The party excepting to the decision must do so at the time it is made, unless it is upon a motion or demurrer, in which case it may be taken within ten days. [C51, §1805; R60,§3106; C73,§2831; C97,§3749; C24, 27, 31, 35,§11537.]

11538 Bill of exceptions. An exception may be embodied in a bill of exceptions to be filed within thirty days after the final determination of the case, or within a reasonable time thereafter, to be fixed by the court, not to exceed ninety days therefrom. [C51,§1805; R60,§3106; C73,§2831; C97,§3749; C24, 27, 31, 35,§11538.]

Referred to in §11540

11539 When bill unnecessary. In equitable actions, triable de novo on appeal, no bill of exceptions shall be necessary, nor in other actions in which all the proceedings are, under the direction of the court, taken in writing or shorthand by the regular court reporter, or another appointed by the court or judge for the purpose, and embodied in a report by such reporter, certified by him and the court or judge, in the manner provided in this chapter for making and certifying such report. [C73,§2831; C97,§3749; C24, 27, 31, 35,§11539.]

Referred to in §11540
Bill of exceptions, §§11457, 11529

11540 Optional method. Sections 11538 and 11539 shall not be so construed as to prevent any party embodying in a bill of exceptions all or any part of the proceedings in any action in which he may elect to preserve his exceptions in that form. [C97,§3749; C24, 27, 31, 35,§11540.]

11541 Certification by successor. Whenever the judge or referee trying a cause is unable by reason of death, removal, resignation, or any cause to sign a bill of exceptions, or certify the shorthand reporter's record, the same shall be done by his successor, and the time for such signing or certification shall be extended thirty days after the appointment, or election and qualification of such successor. [C97,§3749; C24, 27, 31, 35,§11541.]

11542 Form and grounds of exception. No stated form of exception is required. If the exception is to the admission or exclusion of evidence, oral or written, the ground of the objection must be stated, and no other shall be regarded. [R60,§3107; C73,§2832; C97,§3750; C24, 27, 31, 35,§11542.]

11543 Exception noted. When the decision objected to is entered on the record, and the grounds of the exception appear in the entry, or when any error appears of record, the exception may be taken by the party causing to be noted at the end of the decision, or in connection therewith, that he excepts. [R60,§3108; C73, §2833; C97,§3751; C24, 27, 31, 35,§11543.]

11544 Writings identified—skeleton bill. A bill of exceptions, when presented for signature, need not include therein, spread out at length, any writing filed in court, but may incorporate the same by any unmistakable reference thereto; and the clerk, in making a transcript of the bill of exceptions, shall write therein at length all of such writing included therein by reference. [R60,§3109; C73,§2834; C97,§3752; C24, 27, 31, 35,§11544.]

11545 Signing by judge or bystanders. When the decision is not entered on the record, or the grounds of objection do not sufficiently appear therein, the party excepting must reduce his exception to writing and present it to the judge for his signature, which, if it fairly presents the facts, he shall sign; if he refuses, the party may procure the signature of two bystanders attesting that the exception is correctly stated, and that the judge has refused to sign the same, which bill of exceptions shall then be filed with the clerk and become a part of the record. [C51, §§1806, 1807; R60,§3110; C73,§2835; C97,§3753; C24, 27, 31, 35,§11545.]

C97,§3753, editorially divided

11546 Exception controverted. The truth of such exceptions may be controverted and maintained by affidavits, not exceeding five on each side, which shall become a part of the record. [R60,§3110; C73,§2835; C97,§3753; C24, 27, 31, 35,§11546.]

11547 Filing affidavits. All affidavits impugning the exception must be filed within three days from the time of filing the bill, and all affidavits sustaining the same within two days thereafter. [R60,§3110; C73,§2835; C97,§3753; C24, 27, 31, 35,§11547.]

11548 Must be on material point. No exception shall be regarded in the supreme court unless the ruling has been on a material point, and the effect thereof prejudicial to the rights of the

party excepting. [R60,§3111; C73,§2836; C97, §3754; C24, 27, 31, 35,§11548.]

Errors disregarded, §11228
Similar provision, §13986

11549 "New trial" defined. A new trial is a re-examination in the same court of an issue of fact, or some part or portions thereof, after verdict by a jury, report of a referee, or a decision by the court. [R60,§3112; C73,§2837; C97, §3755; C24, 27, 31, 35,§11549.]

C97,§3755, editorially divided

11550 Grounds for new trial. The former report, verdict, or decision, or some part or portion thereof, shall be vacated and a new trial granted, on the application of the party aggrieved, for the following causes affecting materially the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, referee, or prevailing party; or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.
2. Misconduct of the jury or prevailing party.
3. Accident or surprise which ordinary prudence could not have guarded against.
4. Excessive damages appearing to have been given under the influence of passion or prejudice.
5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property.
6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law.
7. Newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial.
8. Error of law occurring at the trial, excepted to by the party making the application.
9. That the pleadings of the prevailing party do not state facts sufficient to constitute a cause of action or defense, as the case may be, specifying wherein they are defective. [R60,§3112; C73,§2837; C97,§3755; C24, 27, 31, 35,§11550.]

Referred to in §11551
Additional remedy, ch 552
Recovery of real property, §12255

11551 Application—use of affidavits. The application must be made within five days after the verdict, report, or decision is rendered, unless for good cause the court extends the time, except for the cause of newly discovered evidence; must be by motion upon written grounds, and, if for the causes enumerated in subsections 2, 3, and 7 of section 11550, may be sustained and controverted by affidavits. [C51,§§1808–1810; R60,§§3114, 3115; C73,§2838; C97,§3756; C24, 27, 31, 35,§11551.]

Time for exceptions to instructions, §11495

11552 Verdicts returned after term. If a verdict shall be returned after the expiration of the term, a motion for a new trial may be filed at any time on or before the first day of the next term of court. [C97,§248; C24, 27, 31, 35,§11552.]

11553 Judgment notwithstanding verdict. Either party may file a motion for judgment in his favor notwithstanding the fact that a verdict has been returned against him, if the pleadings of the party in whose favor the verdict has been returned omit to aver some material fact or facts necessary to constitute a complete cause of action or defense, the motion clearly pointing out the omission. [R60,§§3119, 3138; C73,§§2842, 2859; C97,§3757; C24, 27, 31, 35,§11553.]

11554 Arrest of judgment. Either party may file a motion in arrest of judgment, where the pleadings of the prevailing party wholly fail to state a cause of action or a complete defense, and a verdict has been returned in his favor. [R60,§2878; C73,§2650; C97,§2758; C24, 27, 31, 35,§11554.]

Analogous provision, §11150

11555 Filing of motion. The filing of either a motion for a new trial, for judgment notwithstanding the verdict, or in arrest of judgment, shall not be a waiver of the right to file either or both of the others. [C97,§3759; C24, 27, 31, 35,§11555.]

C97,§3759, editorially divided

11556 Time of filing. Any such motion shall be filed within the time fixed for the filing of motions for new trials. [C97,§3759; C24, 27, 31, 35,§11556.]

11557 Curative amendments—time of filing. Upon any motion for a new trial, for judgment notwithstanding the verdict, or in arrest of judgment, the party whose pleading it is alleged is defective may, if the court considers it necessary, file an amendment setting up the omitted facts, which, if true, would remedy the alleged defects. Such amendment shall be filed before the hearing of the motion, and shall suspend the same. [R60,§3119; C73,§2842; C97,§3760; C24, 27, 31, 35,§11557.]

Amendments generally, §11182
C97,§3760, editorially divided

11558 Effect of amendment—procedure. If the facts thus stated would not, if proven, defeat the object of the motion, it shall be sustained. If such new averments would, if proven, defeat its object and are not admitted, they must be denied, or confessed and avoided, by the opposite party within such time as the court shall direct, unless the same are denied by legal operation, and in such case the law of pleading and procedure shall apply, except that the amendment and response need not be verified. [R60,§3119; C73, §2842; C97,§3760; C24, 27, 31, 35,§11558.]

11559 Issues tried—judgment. If the facts thus pleaded are admitted, the party pleading the same shall be entitled to such judgment as he would have been entitled to if such facts had been stated in the original pleading and admitted as proven on the trial, but, if controverted, there shall be a trial of the issues raised by the new pleadings, and judgment shall be rendered on the original verdict or finding, as modified or supplemented by the verdict or find-

ing on the new issues. [R60,§3120; C73,§2843; C97,§3761; C24, 27, 31, 35,§11559.]

11560 Costs of new trial. The cost of all new trials shall either abide the event of the action or be paid by the party to whom such new trial is granted, according to the order of the court, to be made at the time of granting such new trial. [R60,§3117; C73,§2840; C97, §3762; C24, 27, 31, 35,§11560.]

11561 Conditions. The court may determine not to grant a new trial unless certain terms or conditions named by it shall be agreed to by the opposite party, and, in the event of his agreement, the terms or conditions named shall be entered on the record, and no new trial shall be granted if he refuses to agree thereto. [R60,§3118; C73,§2841; C97,§3763; C24, 27, 31, 35,§11561.]

11562 Dismissal of action. An action may be dismissed, and such dismissal shall be without prejudice to a future action:

1. By the plaintiff, before the final submission of the case to the jury, or to the court when the trial is by the court.
2. By the court, when the plaintiff fails to appear when the case is called for trial.
3. By the court, for want of necessary parties, when not made according to the requirements of the court.
4. By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.
5. By the court, for disobedience by the party of an order concerning the pleadings or any proceeding in the action. [C51,§§1803, 1804; R60,§3127; C73,§2844; C97,§3764; C24, 27, 31, 35,§11562.]

11563 Decision on the merits. In all other cases upon the trial of the action the decision must be upon the merits. [R60,§3128; C73,§2845; C97,§3765; C24, 27, 31, 35,§11563.]

11564 Counterclaim tried. In any case when a counterclaim has been filed, the defendant shall have the right of proceeding to trial thereon, although the plaintiff may have dismissed his action or failed to appear. [C51,§1801; R60, §3129; C73,§2846; C97,§3766; C24, 27, 31, 35, §11564.]

11565 Dismissal of counterclaim. The defendant may, at any time before the final submission of the cause to the jury, or to the court when the trial is by the court, dismiss his counterclaim without prejudice. [C51,§1802; R60, §3130; C73,§2847; C97,§3767; C24, 27, 31, 35, §11565.]

11566 Dismissal in vacation. Any party to any claim may dismiss the same in vacation, and the clerk shall make the proper entry of dismissal on the record, and, if the costs are not paid, may enter judgment against such party therefor in favor of the party entitled thereto, and issue execution therefor at the order of such party. The party so dismissing shall be liable for no costs made by the other party after notice to him of such dismissal. [C51,§1822; R60,§3131; C73,§2848; C97,§3768; C24, 27, 31, 35,§11566.]

11567 Judgment—final adjudication. Every final adjudication of the rights of the parties in an action is a judgment; and such adjudication may consist of many judgments, one of which may determine for the plaintiff or defendant on the claim of either as an entirety; or, when a claim consists of several parts or items, such judgment may be for either of them on any specific part or item of such aggregate claim, and against him on the other part thereof; or a judgment may, in either of these ways, determine on the claims of coparties on the same side against each other. [C51,§§1814, 1815; R60,§3121; C73,§2849; C97,§3769; C24, 27, 31, 35,§11567.]

Adjudication of county bonds, §5295

11568 Judgment for part. Any party who succeeds in part of his cause or causes, and fails as to part, may have the entry in such case express judgment for him for such part as he succeeds upon, and against him on the other part. [R60,§3122; C73,§2850; C97,§3770; C24, 27, 31, 35,§11568.]

11569 Pleading in abatement and bar. Where matter in abatement is pleaded in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare. [R60,§3124; C73,§2851; C97,§3771; C24, 27, 31, 35,§11569.]

11570 Special execution—pleading. Where any other than a general execution of the common form is required, the party must state in his pleading the facts entitling him thereto, and the judgment may be entered in accordance with the finding of the court or jury thereon. [R60, §3125; C73,§2852; C97,§3772; C24, 27, 31, 35, §11570.]

11571 Several judgment. In an action by several plaintiffs, or against several defendants, the court may, in its discretion, render judgment for or against one or more of them when a several judgment is proper, leaving the action to proceed as to the others. [C51,§1816; R60, §§3123, 3126; C73,§2853; C97,§3773; C24, 27, 31, 35,§11571.]

11572 Judgment against one of joint defendants. Though all the defendants have been served with notice, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants if the action had been against such alone. [R60,§3132; C73,§2854; C97,§3774; C24, 27, 31, 35,§11572.]

11573 What relief granted. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he has demanded in his petition. In any other case the court may grant him any relief consistent with the case made by the petition and embraced within the

issue. [C51,§1820; R60,§3133; C73,§2855; C97, §3775; C24, 27, 31, 35,§11573.]

11574 Judgment for part of claim. If only part of the claim is controverted by the pleading, judgment may at any time be rendered for the part not controverted. [R60,§3135; C73, §2856; C97,§3776; C24, 27, 31, 35,§11574.]

11575 Judgment on verdict. When a trial by jury has been had, judgment must be entered by the clerk in conformity with the verdict, unless it is special, or the court orders the case to be reserved for future argument or consideration. [R60,§3136; C73,§2857; C97,§3777; C24, 27, 31, 35,§11575.]

11576 When verdict is special. When the verdict is special, or when there has been a special finding on particular questions of fact or issues, or when the court has ordered the case to be reserved, it shall order what judgment shall be entered. [R60,§3137; C73,§2858; C97,§3778; C24, 27, 31, 35,§11576.]

11577 Principal and surety—order of liability. When a judgment is rendered against a principal and his surety, it shall recite the order of their liability therefor, and the term "surety" includes all persons whose liability on the claim is posterior to that of another. [R60,§3259; C73,§3040; C97,§3779; C24, 27, 31, 35,§11577.]

Analogous provisions, §§10602, 11665, 11712

11578 Judgment on counterclaim — affirmative relief. If more is recovered on a counterclaim than on the plaintiff's claim, judgment for the defendant must be given for the excess; or, if it appears that the defendant is entitled to any other affirmative relief, judgment must be given therefor. [C51,§1798; R60,§3139; C73, §2860; C97,§3780; C24, 27, 31, 35,§11578.]

11579 Judgment by agreement. Any judgment in a case pending, other than for divorce, which may be agreed upon between the parties interested therein, may at any time be entered, and if not done in open court, the judgment agreed to shall be in writing, signed, and filed with the clerk, who shall thereupon enter the same accordingly, and execution thereon may issue forthwith unless therein otherwise agreed upon. [C51,§§1821, 1822; R60,§3143; C73,§2861; C97,§3781; C24, 27, 31, 35,§11579.]

11580 Distinction between debt and damages. In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages. [R60,§3144; C73, §2862; C97,§3782; C24, 27, 31, 35,§11580.]

11581 Court acting as jury. The provisions of this chapter relative to juries are intended to be applied to the court when acting as a jury on the trial of a cause, so far as they are applicable and not incompatible with other provisions herein contained. [C51,§1823; R60,§3145; C73,§2863; C97,§3783; C24, 27, 31, 35,§11581.]

11582 Judgments and orders entered. All judgments and orders must be entered on the record of the court, and must specify clearly the relief granted or order made in the action. [R60,§3140; C73,§2864; C97,§3784; C24, 27, 31, 35,§11582.]

11582.1 Surrender of written obligations. Unless otherwise ordered by the court or judge, the clerk of the district court shall not enter or spread upon the records of his office any judgment based upon any promissory note or notes or other written evidence of indebtedness, unless the note or notes or other written evidence of indebtedness are first delivered to the clerk. [C31, 35,§11582-c1.]

11583 Satisfaction of judgment. Where a judgment is set aside or satisfied by execution or otherwise, the clerk shall at once enter a memorandum thereof on the column left for that purpose in the judgment docket. [C51,§1819; R60,§3141; C73,§2865; C97,§3785; C24, 27, 31, 35,§11583.]

40ExGA, SF 231, §8, editorially divided

11584 Complete record. In cases where the title to land is involved and expressly settled or determined, the clerk shall make a complete record of the whole cause, except abstracts of title attached to the pleadings, and enter it in the proper book. In no other case need a complete entry be made, except at the request of either party, which party shall pay the costs of said entry. [C51,§1817; R60,§3142; C73, §2866; C97,§3785; C24, 27, 31, 35,§11584.]

11585 Discharge on motion. A defendant against whom a judgment has been rendered, or any person interested therein, having matter of discharge which has arisen since the judgment may, upon motion, in a summary way, have the same discharged, either in whole or in part, according to the circumstances. [R60, §3146; C73,§2867; C97,§3786; C24, 27, 31, 35, §11585.]

11586 Fraudulent assignment. The court shall have power, on motion, to inquire into the facts attending or connected with the assignment of a judgment, or the entry of the same to the use of any party, and to strike out such use, or to declare such assignment void, either in whole or in part, whenever such assignment or use shall be determined to be inequitable, fraudulent, or in bad faith. [R60,§3147; C73, §2868; C97,§3787; C24, 27, 31, 35,§11586.]

11587 Default — when made and entered. If a party fails to file or amend his pleading by the time prescribed by the rules of pleading, or, in the absence of rules, by the time fixed by the court, or if, having pleaded, his petition, answer, or reply on motion or demurrer is held insufficient, or is stricken out, and he fails to amend, answer, or reply further as required by the rules of or by the court, or if he withdraws his pleading without authority or permission to replead, judgment by default may be rendered against him, on demand of the adverse

party, made before such pleading is filed. [C51, §1824; R60,§3148; C73,§2869; C97,§3788; C24, 27, 31, 35,§11587.]

11588 Failure to appear. Where no appearance is made, default shall not be entered until the court determines from an inspection of the record that notice has been given as required by this code. [C51,§1826; R60,§3149; C73,§2870; C97,§3789; C24, 27, 31, 35,§11588.]

11589 Setting aside default. Default may be set aside on such terms as to the court may seem just, among which must be that of pleading issuably and forthwith, but not unless an affidavit of merits is filed, and a reasonable excuse shown for having made such default, nor unless application therefor is made at the term in which default was entered, or if entered in vacation, then on the first day of the succeeding term. [C51,§1827; R60,§3150; C73,§2871; C97,§3790; C24, 27, 31, 35,§11589.]

11590 Amount of judgment — how determined. When the action is for a money demand, and the amount of the proper judgment is a mere matter of computation, the clerk shall ascertain the amount, but no fee shall be charged therefor. When long accounts are to be examined, the court may refer the matter. In other cases the court shall assess the damages, unless a jury is demanded by the party not in default. The proper amount having been ascertained by either of the above methods, judgment shall be rendered therefor. [C51, §§1828–1830, 1832; R60,§3151; C73,§2872; C97, §3791; C24, 27, 31, 35,§11590.]

11591 Appearance to cross-examine. The party in default may appear at the time of the assessment and cross-examine the witnesses against him, but for no other purpose. [C51, §1831; R60,§3152; C73,§2873; C97,§3792; C24, 27, 31, 35,§11591.]

11592 Default in equitable proceeding. When the action is of an equitable character, the court, upon hearing the pleadings and proofs, and hearing the testimony offered, shall render such judgment as is consistent with the rules of equity. [C51,§1833; R60,§3153; C73, §2874; C97,§3793; C24, 27, 31, 35,§11592.]

11593 Setting aside, if on notice by publication. A defendant served by publication alone shall be allowed, at any time before judgment, to appear and defend the action, and, upon a substantial defense being declared, time may be given on reasonable terms to prepare for trial. [R60,§3154; C73,§2875; C97,§3794; C24, 27, 31, 35,§11593.]

11594 Security required of plaintiff. When judgment by default is rendered against a defendant who has not been personally served, the court, before issuing process to enforce such judgment, may, if deemed expedient, require the plaintiff to give security to abide the future order of the court as contemplated in sections 11595 and 11596. [C51,§1834; R60,§§3156–3159; C73,§2876; C97,§3795; C24, 27, 31, 35,§11594.]

11595 New trial after judgment, on publication. When a judgment has been rendered against a defendant or defendants, served by publication only, and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may, at any time within two years after the rendition of the judgment, appear in court and move to have the action retried, and, security for the costs being given, they shall be permitted to make defense; and thereupon the action shall be retried as to such defendants as if there had been no judgment. [C51,§1835; R60,§3160; C73, §2877; C97,§3796; C24, 27, 31, 35,§11595.]

Referred to in §§11594, 11597, 12259
C97,§3796, editorially divided

11596 Judgment on retrial. Upon the new trial the court may confirm the former judgment, or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it and yet remaining in his possession, and pay to the defendant the value of any property which may have been taken in attachment in the action or under the judgment, and not restored. [C51,§1835; R60, §3160; C73,§2877; C97,§3796; C24, 27, 31, 35, §11596.]

Referred to in §§11594, 11597, 12259

11597 Title to property not affected. The title of a purchaser in good faith to any property sold under attachment or judgment shall not be affected by the new trial permitted by sections 11595 and 11596, except the title of property obtained by the plaintiff and not bought of him in good faith by others. [C51, §1836; R60,§3163; C73,§2878; C97,§3797; C24, 27, 31, 35,§11597.]

11598 Serving copy of judgment. The plaintiff may, at any time after the judgment, cause a certified copy thereof to be served on a defendant served by publication only, whereupon the period in which such defendant is allowed to appear and have a new trial shall be reduced to six months after such service. [R60,§3161; C73, §2879; C97,§3798; C24, 27, 31, 35,§11598.]

11599 Manner of service. The service, whether made within or without the state, shall be actual and personal by delivery of such certified copy, and made and returned as in case of original notice. [R60,§3162; C73,§2880; C97, §3799; C24, 27, 31, 35,§11599.]

11600 Judgment on publication service. No personal judgment shall be rendered against a defendant served by publication only who has not made an appearance. [R60,§3164; C73, §2881; C97,§3800; C24, 27, 31, 35,§11600.]

C97,§3800, editorially divided

11601 Personal judgment — when authorized. A personal judgment may be rendered against a defendant, whether he appears or not, who has been served in any mode provided in this code other than by publication, whether served within or without this state, if such defendant is a resident of the state. [R60,§3164; C73,§2881; C97,§3800; C24, 27, 31, 35,§11601.]

11602 Liens of judgments. Judgments in the supreme or district court of this state, or in the circuit or district court of the United States within the state, are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment. [C51,§§2485, 2489; R60,§§4105, 4109; C73,§2882; C97,§3801; C24, 27, 31, 35, §11602.]

Lien under liquor prosecution, §1960
Nonlienable judgments in probate, §11967
Special limitations on judgments, ch 487.1

11603 When judgment lien attaches. When the real estate lies in the county wherein the judgment of the district court of this state or of the circuit or district courts of the United States was rendered, the lien shall attach from the date of such rendition, but if in another it will not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the real estate lies. [C51,§§2486, 2487; R60,§§4106, 4107; C73,§§2883, 2884; C97,§3802; S13,§3802; C24, 27, 31, 35,§11603.]

11604 Supreme court judgments. The lien of judgments of the supreme court of Iowa shall not attach to any real estate until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the real estate lies. [S13,§3802; C24, 27, 31, 35, §11604.]

11605 Docketing transcript. Such clerk shall, on the filing of such transcript of the judgment of the supreme or district court of this state or of the circuit or district court of the United States in his office, immediately proceed to docket and index the same, in the same manner as though rendered in the court of his own county. [C51,§2488; R60,§4108; C73,§2885; C97, §3803; C24, 27, 31, 35,§11605.]

11606 Judgment against railway. A judgment against any railway, interurban railway, or street railway corporation or copartnership, for an injury to any person or property, and any claim for compensation under the workmen's compensation act for personal injuries sustained by their employees arising out of and in the course of their employment, shall be a lien upon the property of such corporation or copartnership within the county where the judgment was recovered or in which occurred the injury for which compensation is due. [C73, §1309; C97,§2075; C24, 27, 31, 35,§11606.]

87GA, ch 403, §1, editorially divided

11607 Priority. Said lien shall be prior and superior to the lien of any mortgage or trust deed executed since July 4, 1862, by any railway corporation or partnership, and prior and superior to the lien of any mortgage or trust deed executed after August 9, 1897, by any interurban railway or street railway corporation or copartnership. [C73,§1309; C97,§2075; C24, 27, 31, 35, §11607.]

11608 Judgments on motion. Judgments or final orders may be obtained on motion by sureties against their principals, or by sureties against their co-sureties, for the recovery of money due them on account of payments made by them as such; by clients against attorneys; plaintiffs in execution against sheriffs, constables, and other officers, for the recovery of money or property collected for them, and damages; and in all other cases specially authorized by statute. [R60,§3422; C73,§2906; C97,§3826; C24, 27, 31, 35,§11608.]

Related section, §11667

11609 Notice—service. Notice of such motion shall be served on the party against whom the judgment or order is sought, at least ten days before the motion is made. [R60,§3423; C73,§2907; C97,§3827; C24, 27, 31, 35,§11609.]

11610 Form. The notice shall state in plain and ordinary language the nature and grounds thereof, and the day on which it will be made. [R60,§3424; C73,§2908; C97,§3828; C24, 27, 31, 35,§11610.]

11611 When abandoned. Unless the motion is made and filed with the case on or before the day named in the notice, it shall be considered as abandoned. [R60,§3425; C73,§2909; C97, §3829; C24, 27, 31, 35,§11611.]

11612 No written pleadings. It shall be heard and determined by the court without written pleadings, and judgment given according to the very right of the matter. [R60,§3426; C73, §2910; C97,§3830; C24, 27, 31, 35,§11612.]

11613 Conveyance by commissioner. Real property may be conveyed by a commissioner appointed by the court:

1. Where, by judgment in an action, a party is ordered to convey such property to another.
2. Where such property has been sold under a judgment or order of the court, and the purchase price has been paid. [R60,§3165; C73, §2886; C97,§3805; C24, 27, 31, 35,§11613.]

11614 Deed. The deed of the commissioner shall refer to the judgment, orders, and proceedings authorizing the conveyance. [R60,§3166; C73,§2887; C97,§3806; C24, 27, 31, 35,§11614.]

11615 Conveys title. A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land. [R60,§3167; C73,§2888; C97, §3807; C24, 27, 31, 35,§11615.]

11616 Other parties. A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding. [R60,§3168; C73,§2889; C97,§3808; C24, 27, 31, 35,§11616.]

11617 Approval by court. A conveyance by a commissioner shall not pass any right until it has been approved by the court, which approval shall be indorsed on the conveyance and recorded with it. [R60,§3169; C73,§2890; C97, §3809; C24, 27, 31, 35,§11617.]

11618 Form. The conveyance shall be signed by the commissioner only, without affix-

ing the names of the parties whose title is conveyed, but the names of such parties shall be recited in the body of the conveyance. [R60, §3170; C73,§2891; C97,§3810; C24, 27, 31, 35, §11618.]

11619 Recorded. The conveyance shall be recorded in the office in which, by law, it should have been recorded had it been made by the parties whose title is conveyed by it. [R60, §3171; C73,§2892; C97,§3811; C24, 27, 31, 35, §11619.]

11620 Approval in vacation. Whenever by law it is permitted or required that judicial or other sales and conveyances of land may or shall be confirmed and approved by a court, the judge of the court may, in vacation, approve the same, and cause the proper entry or entries to be made. [C73,§2893; C97,§3812; C24, 27, 31, 35,§11620.]

11621 Satisfaction of judgment — penalty. When the amount due upon judgment is paid off, or satisfied in full, the party entitled to the proceeds thereof, or those acting for him, must acknowledge satisfaction thereof upon the record of such judgment, or by the execution of an instrument referring to it, duly acknowledged and filed in the office of the clerk in every county wherein the judgment is a lien. A failure to do so for thirty days after having been requested in writing shall subject the delinquent party to a penalty of fifty dollars, to be recovered in an action therefor by the party aggrieved. [C97, §3804; C24, 27, 31, 35,§11621.]

CHAPTER 497

COSTS

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11622 Recoverable by successful party. Costs shall be recovered by the successful against the losing party. [C51,§1811; R60, §3449; C73,§2933; C97, S13,§3853; C24, 27, 31, 35,§11622.]

40GA, ch 269, §1, editorially divided

11623 Witness fees—limitation. The losing party, however, shall not be assessed with the cost of mileage of any witness for a distance of more than one hundred miles from the place of trial, unless otherwise ordered by the court at the time of entering judgment. [S13,§3853; C24, 27, 31, 35,§11623.]

11624 Apportionment generally. Where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court on rendering judgment may make an equitable apportionment of costs. [C51,§1811; R60,§3449; C73,§2933; C97,§3853; S13,§3853; C24, 27, 31, 35,§11624.]

11625 Apportionment among numerous parties. In actions where there are several plaintiffs or several defendants, the costs shall be apportioned according to the several judgments rendered; and where there are several causes of action embraced in the same petition, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant upon those determined in his favor. [R60,§3451; C73,§2934; C97,§3854; C24, 27, 31, 35,§11625.]

Apportionment between heirs and devisees, §12060

11626 Liability of successful party. All costs accrued at the instance of the successful party, which cannot be collected of the other party, may be recovered on motion by the person entitled to them against the successful party. [R60,§3452; C73,§2935; C97,§3855; C24, 27, 31, 35,§11626.]

11627 Cost of procuring testimony. The necessary fees paid by the successful party in procuring copies of deeds, bonds, wills, or other records filed as a part of the testimony shall be taxed in the bill of costs. [R60,§3453; C73, §2936; C97,§3856; C24, 27, 31, 35,§11627.]

11628 Postage. Postage paid by the officers of the court, or by the parties, in sending process, depositions, and other papers being part of the record, by mail, shall be taxed in the bill of costs. [R60,§3454; C73,§2937; C97, §3857; C24, 27, 31, 35,§11628.]

11629 Jury fees—report. There shall be taxed, in every action tried in a court of record by a jury, a jury fee of ten dollars, which, when collected, shall be paid by the clerk into the county treasury; all such fees, not previously reported, to be by him reported to the board of supervisors at each regular session, and by it charged to the treasurer. [C73,§3812; C97,§3872; C24, 27, 31, 35,§11629.]

11630 Referee fees. Referees, acting under a submission by a court in an action pending

therein, shall receive such compensation as is fixed by the court or judge, or agreed upon by the parties to the action, which shall be taxed as a part of the costs therein. [C51,§2114; R60,§3691; C73,§3834; C97,§3874; C24, 27, 31, 35,§11630.]

11631 Transcripts — retaxation. The fees of shorthand reporters for making transcripts of the notes in any case or any portion thereof, as directed by any party thereto, shall be taxed as costs, as shall also the fees of the clerk for making any transcripts of the record required on appeal, but such taxation may be revised by the supreme court on motion on the appeal, without any motion in the lower court for the retaxation of costs. [C97,§3875; C24, 27, 31, 35, §11631.]

11632 Defense arising after action brought. When a pleading contains as a defense matter which arose after the commencement of the action, whether such matter of defense is pleaded alone or with other matter of defense which arose before the action, the party affected by such matter may confess the same, and shall be entitled to the costs of the action to the time of such pleading. [R60,§3455; C73,§2938; C97, §3858; C24, 27, 31, 35,§11632.]

11633 Dismissal of action or abatement. When a plaintiff dismisses the action or any part thereof, or suffers it to abate by the death of the defendant or other cause, or where the action abates by the death of the plaintiff, and his representatives fail to revive the same, judgment for costs may be rendered against such plaintiff or representative, and, if against a representative, shall be paid as other claims against the estate. [R60,§3456; C73,§2939; C97,§3859; C24, 27, 31, 35,§11633.]

11634 Between coparties. Coparties against whom judgment has been recovered are entitled, as between themselves, to a taxation of the costs of witnesses whose testimony was obtained at the instance of one of the coparties and inured exclusively to his benefits. [R60,§3457; C73, §2940; C97,§3860; C24, 27, 31, 35,§11634.]

11635 Dismissal for want of jurisdiction. Where an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs shall be adjudged against the party attempting to institute or bring up the same. [R60,§3458; C73,§2941; C97, §3861; C24, 27, 31, 35,§11635.]

11636 Costs taxable. The clerk shall tax in favor of the party recovering costs the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow. [R60,§3459; C73,§2942; C97,§3862; C24, 27, 31, 35,§11636.]

11637 Liability of nonparty. In actions in which the cause of action shall, by assignment after the commencement thereof, or in any other manner, become the property of a person not a party to the action, such party shall be liable for the costs in the same manner as if he were a party. [R60,§3460; C73,§2943; C97,§3863; C24, 27, 31, 35,§11637.]

11638 Retaxation. Any person aggrieved by the taxation of a bill of costs may, upon application, have the same retaxed by the court, or by a referee appointed by the court in which the application or proceeding was had, and in such retaxation all errors shall be corrected. [C51,§1813; R60,§3461; C73,§2944; C97,§3864; C24, 27, 31, 35,§11638.]

C97,§3864, editorially divided

11639 Liability of clerk. If the party aggrieved shall have paid any unlawful charge by reason of the first taxation, the clerk shall pay the costs of retaxation, and also to the party aggrieved the amount which he may have paid by reason of the allowing of such unlawful charges. [C51,§1813; R60,§3461; C73,§2944; C97,§3864; C24, 27, 31, 35,§11639.]

11640 Bill of costs on appeal. In cases of appeals from the district court, the clerk, if final judgment is rendered in the supreme court, shall make a complete bill of costs in the court below which shall be filed in the office of the clerk of the supreme court and taxed with the costs in the action therein. [R60,§3462; C73,§2945; C97, §3865; C24, 27, 31, 35,§11640.]

11641 Costs in supreme court. When the costs accrued in the supreme court and the court below are paid to the clerk of the supreme court, he shall pay so much of them as accrued in the court below to the clerk of said court, and take his receipt therefor. [R60,§3463; C73,§2946; C97,§3866; C24, 27, 31, 35,§11641.]

11642 Duty of clerk below. On receiving such costs, the clerk of the court below shall charge himself with the money and pay it to the persons entitled thereto. [R60,§3464; C73, §2947; C97,§3867; C24, 27, 31, 35,§11642.]

11643 Interest. When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto. [R60,§3466; C73,§2948; C97,§3868; C24, 27, 31, 35,§11643.]

Interest on judgments, §9405

11644 Attorney's fees. When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs:

1. On the first two hundred dollars or fraction thereof recovered, ten percent;
2. On the excess of two hundred to five hundred dollars, five percent;
3. On the excess of five hundred to one thousand dollars, three percent; and

4. On all sums in excess of one thousand dollars, one percent. [C97,§3869; C24, 27, 31, 35, §11644.]

Referred to in §11646
C97,§3869, editorially divided

11645 Limitations. If action is commenced and the claim paid off before return day, the amount shall be one-half of the sum above provided, and if it is paid after the return day but before judgment, three-fourths of said sum; but no fee shall be allowed in any case if an action has not been commenced, or expense incurred, nor shall any greater sum be allowed, any agreement in the contract to the contrary notwithstanding. [C97,§3869; C24, 27, 31, 35,§11645.]

Referred to in §11646

11646 Affidavit required. The attorney's fee allowed in sections 11644 and 11645 shall not be taxed in any case unless it shall appear by affidavit of the attorney, filed with the petition at the commencement of the action, that there has been, and is, no agreement between such attorney and his client, express or implied, nor between him and any other person, except a practicing attorney engaged with him as an attorney in the cause, for any division or sharing of the fee to be taxed, which, when taxed, shall be only in favor of a regular attorney and as compensation for services actually rendered in the action. [C97,§3870; C24, 27, 31, 35, §11646.]

11647 Opportunity to pay. No such attorney fee shall be taxed if the defendant is a resident of the county and the action is not aided by an attachment, unless it shall be made to appear that such defendant had information of and a reasonable opportunity to pay the debt before action was brought. This provision, however, shall not apply to contracts made payable by their terms at a particular place, the maker of which has not tendered the sum due at the place named in the contract. [C97,§3871; C24, 27, 31, 35,§11647.]

CHAPTER 498

EXECUTIONS

Referred to in §12099

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11648 Enforcement of judgments and orders. Judgments or orders requiring the payment of money, or the delivery of the possession of property, are to be enforced by execution. Obedience to those requiring the performance of any other act is to be coerced by attachment as for a contempt. [C51,§1885; R60,§3247; C73,§3026; C97, §3954; C24, 27, 31, 35,§11648.]

Contempts, ch 586; exception, §10482
Enjoining enforcement, §12527

11649 Within what time—to what counties. Executions may issue at any time before the judgment is barred by the statute of limitations; and upon those in the district and supreme courts, into any county which the party ordering may direct. [C51,§§1886, 1888; R60, §§3246, 3248; C73,§§3025, 3027; C97,§3955; S13, §3955; C24, 27, 31, 35,§11649.]

Issuance prohibited, ch 487.1
S13,§3955, editorially divided

11650 Limitation on number. Only one execution shall be in existence at the same time. [R60,§3246; C73,§3025; C97,§3955; S13,§3955; C24, 27, 31, 35,§11650.]

11651 Lost writ. When the plaintiff in judgment shall file in any court in which a judgment has been entered an affidavit made by himself, his agent or attorney, or by the officer to whom the execution was issued, that an outstanding execution has been lost or destroyed, the clerk of such court may issue a duplicate execution as of the date of the lost execution, which shall have the same force and effect as the original execution, and any levy made under the execution so lost shall have the same force and effect under the duplicate execution as under the original. [S13,§3955; C24, 27, 31, 35,§11651.]

11652 Expiration of lost writ—effect. When the lost execution shall have expired by limitation and such affidavit is filed, an execution may issue as it might if such lost execution had been duly returned. [S13,§3955; C24, 27, 31, 35, §11652.]

11653 Issuance on Sunday. An execution may be issued and executed on Sunday, when an affidavit is filed by the plaintiff, or some person in his behalf, stating that he believes he will lose his judgment unless process issues on that day. [R60,§3263; C73,§3028; C97,§3956; C24, 27, 31, 35,§11653.]

Analogous or related provisions, §§10819, 11064, 12082, 12179, 12560

11654 Issuance on demand. Upon the rendition of judgment, execution may be at once issued by the clerk on the demand of the party entitled thereto. [R60,§3265; C73,§3029; C97, §3957; C24, 27, 31, 35,§11654.]

C97,§3957, editorially divided

11655 Record kept. The clerk shall enter on the judgment docket the date of its issuance and to what county and officer issued, the return of the officer, with the date thereof, the dates and amount of all moneys received or paid out of the office thereon; which entries shall be made at the time each act is done. [R60,§3265; C73, §3029; C97,§3957; C24, 27, 31, 35,§11655.]

11656 Entries in foreign county. In case execution is issued to a county other than that in which judgment is rendered, and is levied upon real estate in such county, an entry thereof shall be made upon the incumbrance book of that county by the officer making it, showing the same particulars as are required in case of the attachment of real estate, which shall be bound from the time of such entry. [R60,§3249; C73,§3031; C97,§3958; S13,§3958; C24, 27, 31, 35, §11656.]

S13,§3958, editorially divided

11657 Duplicate returns and record. If real estate is sold under said execution said officer shall make return thereof in duplicate, one of which shall be appended to the execution and returned to the court from which it is issued, the other with a copy of the execution to the district court of the county in which said real estate is situated, which shall be filed by the clerk who shall make entries thereof in the sale book in the same manner as if such judgment had been rendered and execution issued from said court. [S13,§3958; C24, 27, 31, 35,§11657.]

11658 Return from foreign county. When sent into any county other than that in which the judgment was rendered, return may be made by mail. Money cannot thus be sent, except by direction of the party entitled thereto, or his attorney. [C51,§1889; R60,§3250; C73,§3032; C97,§3959; C24, 27, 31, 35,§11658.]

11659 Form of execution. The execution must intelligibly refer to the judgment, stating the time when and place at which it was rendered, the names of the parties to the action as well as to the judgment, its amount, and the amount still to be collected thereon, if for

money; if not, it must state what specific act is required to be performed. If it is against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of property of the debtor subject to execution. [C51,§1890; R60,§3251; C73,§3033; C97, §3960; C24, 27, 31, 35,§11659.]

11660 Property in hands of others. If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment and interest out of such property. [R60,§3252; C73,§3034; C97,§3961; C24, 27, 31, 35,§11660.]

11661 Delivery of possession and money recovery. If it is for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require him to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered subject to execution.

The value of the property for which judgment was recovered shall be specified therein, if a delivery thereof cannot be had, and it shall in that respect be regarded as an execution against property. [R60,§3253; C73,§3035; C97, §3962; C24, 27, 31, 35,§11661.]

11662 Performance of other acts. When it requires the performance of any other act, a certified copy of the judgment may be served on the person against whom it is rendered, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. [R60,§3254; C73,§3036; C97, §3963; C24, 27, 31, 35,§11662.]

11663 Receipt and return. Every officer to whose hands an execution may come shall give a receipt therefor, if required, stating the hour when the same was received, and shall make sufficient return thereof, together with the money collected, on or before the seventieth day from the date of its issuance. [R60,§3255; C73,§3037; C97,§3964; C24, 27, 31, 35,§11663.]

11664 Indorsement by officer. The officer to whom an execution is issued shall indorse thereon the day and hour when he received it, the levy, sale, or other act done by virtue thereof, with the date thereof, the dates and amounts of any receipts or payment in satisfaction thereof; which entries must be made at the time of the receipt or act done. [R60,§3257; C73,§3038; C97,§3965; C24, 27, 31, 35,§11664.]

Referred to in §10383.1
Sales legalized, §10383.1

11665 Principal and surety—order of liability. The clerk issuing an execution on a judgment against principal and surety shall state in the execution the order of liability recited in the judgment, and the officer serving it shall exhaust the property of the principal first, and of the other defendants in the order of liability thus stated. To obtain the benefits of this section, the order of liability must be recited in the execution, and the officer holding it must separately return thereon the amount collected from the principal debtor and surety. [C51, §1915; R60,§§3258, 3260, 3261, 3303; C73,§§3039, 3041, 3042, 3071; C97,§3966; C24, 27, 31, 35, §11665.]

Referred to in §§10383.1, 11666
Analogous provisions, §§10602, 11577, 11712
C97,§3966, editorially divided

11666 Duty to point out property. Each person subsequently liable shall, if requested by the officer, point out property owned by the party liable, before him, to obtain the benefits of the provision of section 11665. [R60,§3259; C73,§3040; C97,§3966; C24, 27, 31, 35,§11666.]

Referred to in §10383.1

11667 Surety subrogated. When the principal and surety are liable for any claim, such surety may pay the same, and recover thereon against all liable to him. If a judgment against principal and surety has been paid by the surety, he shall be subrogated to all the rights of the creditor, and may take an assignment thereof, and enforce the same by execution or otherwise, as the creditor could have done. All questions between the parties thereto may be heard and determined on motion by the court, or a judge thereof, upon such notice as may be prescribed by it or him. [C97,§3967; C24, 27, 31, 35,§11667.]

Referred to in §10383.1
Related section, §11608

11668 Levy—how made and indorsed. When an execution is delivered to an officer, he must proceed to execute it with diligence; if executed, an exact description of the property at length, with the date of the levy, shall be indorsed upon or appended to the execution and if it was not executed, or only executed in part, the reason in such case must be stated in the return. [R60,§3262; C73,§3043; C97,§3968; C24, 27, 31, 35,§11668.]

Referred to in §10383.1
Sales legalized, §10383.1

11668.1 Entry on incumbrance book. If real estate is levied upon, except by virtue of a special execution issued in cases foreclosing recorded liens, the officer making the levy shall make an entry in the incumbrance book in the office of the clerk of the district court of the county where the real estate is located, which entry shall constitute notice to all persons of such levy. Such entry shall contain the number and title of the case, date of levy, date of the entry, amount claimed, description of the real estate levied upon, and signature of the officer. [C31, 35,§11668-c1.]

Referred to in §10383.1
Analogous provision, §12104

11669 Acts necessary. The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same, selling the other property, and paying to the clerk or the plaintiff

the proceeds, or so much thereof as will satisfy the execution. He may retain his own costs on receipting therefor on the judgment docket. [C51,§1904; R60,§3267; C73,§3044; C97,§3969; C24, 27, 31, 35,§11669.]

Analogous provision, §12102

11670 Selection of property. The officer shall in all cases select such property, and in such quantities, as will be likely to bring the exact amount required to be raised, as nearly as practicable, and having made one levy, may at any time thereafter make others, if he finds it necessary. [C51,§1903; R60,§3268; C73,§3045; C97,§3970; C24, 27, 31, 35,§11670.]

C97,§3970, editorially divided

11671 Lien on personalty. No execution shall be a lien on personal property before the actual levy thereof. [C73,§3045; C97,§3970; C24, 27, 31, 35,§11671.]

11672 Choses in action. Judgments, money, bank bills, and other things in action may be levied upon, and sold or appropriated thereunder, and an assignment thereof by the officer shall have the same effect as if made by the defendant. [C51,§1893; R60,§3272; C73,§3046; C97,§3971; C24, 27, 31, 35,§11672.]

C97,§3971, editorially divided

11673 Levy on judgment. The levy upon a judgment shall be made by entering upon the judgment docket a memorandum of such fact, giving the names of the parties plaintiff and defendant, the court from which the execution issued, and the date and hour of such entry, which shall be signed by the officer serving the execution, and a return made on the execution of his doings in the premises. [C97,§3971; C24, 27, 31, 35,§11673.]

11674 Persons indebted may pay officer. After the rendition of judgment, any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and his receipt shall be a sufficient discharge therefor. [C51,§1894; R60, §3273; C73,§3047; C97,§3972; C24, 27, 31, 35, §11674.]

11675 Levy against municipal corporation—tax. If no property of a municipal corporation against which execution has issued can be found, or if the judgment creditor elects not to issue execution against such corporation, a tax must be levied as early as practicable to pay off the judgment. When a tax has been so levied and any part thereof shall be collected, the treasurer of such corporation shall pay the same to the clerk of the court in which the judgment was rendered, in satisfaction thereof. [C51, §1896; R60,§3275; C73,§3049; C97,§3973; C24, 27, 31, 35,§11675.]

11676 Corporation stock—debts—property in hands of third persons. Stock or interest owned by the defendant in any company or corporation, and also debts due him and property of his in the hands of third persons, may be levied upon in the manner provided for attaching the same. [C51,§1892; R60,§3269; C73, §3050; C97,§3974; C24, 27, 31, 35,§11676.]

Garnishment, ch 513
Levy on corporate stock, §12098

11677 Garnishment. Property of the defendant in the possession of another, or debts due him, may be reached by garnishment. [R60, §3270; C73,§3051; C97,§3975; C24, 27, 31, 35, §11677.]

11678 Expiration or return of execution. Proceedings by garnishment on execution shall not be affected by its expiration or its return. [R60,§3271; C73,§3052; C97,§3976; C24, 27, 31, 35,§11678.]

C97,§3976, editorially divided

11679 Return of garnishment—action docketed. Where parties have been garnished under it, the officer shall return to the next term thereafter a copy of the execution with all his doings thereon, so far as they relate to the garnishments, and the clerk shall docket an action thereon without fee, and thereafter the proceedings shall conform to proceedings in garnishment under attachments as nearly as may be. [R60,§3271; C73,§3052; C97,§3976; C24, 27, 31, 35,§11679.]

Garnishment, ch 513

11679.1 Distress warrant by tax commission. In the service of a distress warrant issued by the Iowa state tax commission for the collection of income tax, sales tax, and/or use tax, the property of the taxpayer in the possession of another, or debts due him, may be reached by garnishment. [48GA, ch 175,§20; ch 185,§1.]

11679.2 Expiration or return of distress warrant. Proceedings by garnishment under a distress warrant issued by the Iowa state tax commission shall not be affected by its expiration or its return. [48GA, ch 175,§20; ch 185,§2.]

11679.3 Return of garnishment — action docketed. Where parties have been garnished under a distress warrant issued by the Iowa state tax commission, the officer shall make return thereof to the next term of court in the county where the garnishee lives, if he lives in Iowa, otherwise in the county where the taxpayer resides, if he lives in Iowa; and if neither the garnishee nor the taxpayer lives in Iowa, then to the next term of the district court in Polk county, Iowa; the officer shall make return in the same manner as a return is made on a garnishment made under a writ of execution so far as they relate to garnishments, and the clerk of the district court shall docket an action thereon without fee the same as if a judgment had been recovered against the taxpayer in the county where the return is made, an execution issued thereon, and garnishment made thereunder, and thereafter the proceedings shall conform to proceedings in garnishment under attachments as nearly as may be. [48GA, ch 175,§20; ch 185, §3.]

11680 Joint or partnership property. When an officer has an execution against a person

who owns property jointly, in common or in partnership with another, such officer may levy on and take possession of the property owned jointly, in common or in partnership, sufficiently to enable him to appraise and inventory the same, and for that purpose shall call to his assistance three disinterested persons, which inventory and appraisement shall be returned by the officer with the execution, and shall state in his return who claims to own the property. [C51,§1917; R60,§3287; C73,§3053; C97,§3977; C24, 27, 31, 35,§11680.]

Analogous provisions, §12113 et seq.

11681 Lien—equitable proceeding—receiver. The plaintiff shall, from the time such property is so levied on, have a lien on the interest of the defendant therein, and may commence an action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances provided in the chapter relating to receivers. [R60,§§3289–3291; C73,§3054; C97, §3978; C24, 27, 31, 35,§11681.]

Receivers, ch 549

11682 Mortgaged personal property — payment of mortgage. Mortgaged personal property not exempt from execution may be taken on attachment or execution issued against the mortgagor, if the officer, or the attachment or execution creditor, within ten days after such levy, shall pay to the holder of the mortgage the amount of the mortgaged debt and interest accrued, or deposit the same with the clerk of the district court of the county from which the attachment or execution issued, for the use of the holder of the mortgage, or secure the same as in this chapter provided. [C97,§3979; C24, 27, 31, 35,§11682.]

Applicable to attachments, §12116

11683 Interest on mortgage debt. When the debt secured by the mortgage is not due as shown by the mortgage, the officer, or the attachment or execution creditor, must also pay or deposit with the clerk interest on the principal sum at the rate specified in the mortgage for the term of sixty days from the date of the deposit, unless the debt secured falls due in a less time, in which case interest shall be deposited for such shorter period. [C97,§3980; C24, 27, 31, 35,§11683.]

11684 Failure to pay, deposit, or give security. If within ten days after such levy the attachment or execution creditor does not pay the amount, make the deposit, or give the security required, the levy shall be discharged, and the property restored to the possession of the person from whom it was taken and the creditor shall be liable to the holder of the mortgage for any damages sustained by reason of such levy. [C97,§3981; C24, 27, 31, 35,§11684.]

11685 Creditor subrogated. When such sum is paid to the holder of the mortgage or deposited with the clerk, the attachment or execution creditor shall be subrogated to all the rights of such holder, and the proceeds of the sale of the mortgaged property shall be first applied to the discharge of such indebtedness and the costs incurred under the writ of attachment or execution. [C97,§3982; C24, 27, 31, 35,§11685.]

11686 Holder reinstated. If, for any reason, the levy upon the mortgaged property is discharged or released without a sale thereof, the attachment or execution creditor who has paid or deposited the amount of the mortgage debt shall have all the rights under such mortgage possessed by the holder at the time of the levy. If the holder thereof desires to be reinstated in his rights thereunder, he may repay the money received by him, with interest thereon at the rate borne by the mortgage debt for the time it has been held by him, and demand the return of the mortgage, whereupon his rights thereunder shall revest in him, and the attachment or execution creditor shall be entitled to the deposit made, or any part thereof remaining in the hands of the clerk, or any money returned to the clerk by the holder of the mortgage. [C97, §3983; C24, 27, 31, 35,§11686.]

11687 Statement of amount due. The holder of the mortgage shall, before receiving the money tendered to him by the attaching or execution creditor or deposited with the clerk, state over his signature and under oath, on the back of the mortgage, the amount due or to become due thereon, and deliver the same, together with the note or other evidence of indebtedness secured by said mortgage, to the person paying the said amount or the clerk with whom the deposit is made, and the holder of the mortgage shall only receive the amount so stated to be due, and the surplus, if any, shall be returned to the person making the deposit. [C97,§3984; C24, 27, 31, 35,§11687.]

11688 Indemnifying bond. When the attaching or execution creditor thus pays or deposits the amount of the claim under the mortgage, he shall not be required to give an indemnifying bond on notice to the sheriff by the holder of the mortgage of his right to the property thereunder, or if one has been given, it shall be released. [C97,§3985; C24, 27, 31, 35,§11688.]

11689 Sale—costs—surplus. If under execution sale the mortgaged property does not sell for enough to pay the mortgage debt, interests, and costs of sale, the judgment creditor shall be liable for all costs thus made, but if a greater sum is realized, the officer conducting the sale shall at once pay to the mortgage holder the amount due thereunder, and apply the surplus on the execution. [C97,§3986; C24, 27, 31, 35,§11689.]

11690 Statement of indebtedness. For the purpose of enabling the attaching or execution creditor to determine the amount to be tendered or deposited to hold the levy under the writ of attachment or execution, the person entitled to receive payment of the mortgage debt shall deliver to any such person, upon written de-

mand therefor, a statement in writing under oath, showing the nature and amount of the original debt, the date and the amount of each payment, if any, which has been made thereon, and an itemized statement of the amount then due and unpaid. [C97,§3987; C24, 27, 31, 35, §11690.]

11691 Contest as to validity or amount. If the right of the mortgagee to receive such or any sum is for any reason questioned by the levying creditor, he may, within ten days after levy, or after demand is made for a statement of the amount due as above provided, commence an action in equity or contest such right upon filing a bond in a penalty double the amount of such mortgage, or double the value of the property levied upon, conditioned either for the payment of any sum found due on said mortgage to the person entitled thereto, or for the value of the property levied upon, as the party ordering the levy may elect, with sureties to be approved by the clerk. [C97,§3988; S13,§3988; C24, 27, 31, 35,§11691.]

S13,§3988, editorially divided

11692 Nonresident—service—transfer of action. If such mortgagee is a nonresident or his residence is unknown, service may be made by publication as in other actions, but if such residence becomes known before final submission, the court may order personal service to be made. If commenced at law, the court may transfer the same to the equity side as in other cases. [C97,§3988; S13,§3988; C24, 27, 31, 35, §11692.]

Service by publication, §11081

11693 Receiver—decree—costs. The court may appoint a receiver, and shall determine the amount due on the mortgage, the value of the property levied upon, and all other questions properly presented, and may continue and preserve or dismiss the lien of the levy, the costs to be taxed to the losing party as in other cases. [C97,§3988; S13,§3988; C24, 27, 31, 35,§11693.]

Costs, ch 497

11694 Various mortgages—priority. If there are two or more mortgages, the creditor may admit the validity of one or more, and make the required deposit as to such, and contest the other, and where there are two or more such mortgages, each of which is questioned, a failure to establish the invalidity of all shall not defeat the rights of the levying creditor, but in such case the decree shall determine the priority of liens, and direct the order of payment out of the proceeds of the property which shall be sold under special execution to be awarded in said cause. [C97,§3988; S13,§3988; C24, 27, 31, 35,§11694.]

11695 Other remedies. Nothing in this chapter contained shall be construed to forbid or in any way affect the right of a creditor to contest in any other way the validity of any mortgage. [C97,§3988; S13,§3988; C24, 27, 31, 35,§11695.]

11696 Failure to make statement—effect. A failure to make the statement, when required as above provided, shall have the effect to postpone the lien of the mortgage and give the levy of the writ of attachment or execution priority over the claim of the holder thereof. [C97, §3989; C24, 27, 31, 35,§11696.]

11697 Where mortgagee garnished. If the mortgagee, before the levy of a writ of attachment or execution, has been garnished at the suit of a creditor of the mortgagor, a creditor desiring to seize the mortgaged property under a writ of attachment or execution shall pay to the holder of the mortgage, or deposit with the clerk, in addition to the mortgage debt, the sum claimed under the garnishment, and the provisions of this chapter, so far as applicable, in all respects shall govern proceedings relating thereto. [C97,§3990; C24, 27, 31, 35,§11697.]

11698 Duty to levy—notice of ownership or exemption. An officer is bound to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy, unless he has received notice in writing under oath from some other person, his agent or attorney, that such property belongs to him; stating the nature of his interests therein, how and from whom he acquired the same, and consideration paid therefor; or from the defendant, that the property is exempt from execution. [C51,§1916; R60,§3277; C73, §3055; C97,§3991; C24, 27, 31, 35,§11698.]

Applicable to attachments, §12117
C97,§3991, editorially divided

11699 Failure to give notice—effect. Failure to give such notice shall not deprive the party of any other remedy. [C97,§3991; C24, 27, 31, 35,§11699.]

11700 Right to release levy. If after levy he receives such notice, such officer may release the property unless a bond is given as provided in section 11702. [C51,§1916; R60,§3277; C73, §3055; C97,§3991; C24, 27, 31, 35,§11700.]

11701 Exemption from liability. The officer shall be protected from all liability by reason of such levy until he receives such written notice. [C51,§1916; R60,§3277; C73,§3055; C97, §3991; C24, 27, 31, 35,§11701.]

11702 Indemnifying bond—sale and return. When the officer receives such notice he may forthwith give the plaintiff, his agent, or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sufficient sureties, to be approved by the officer, to the effect that the obligors will indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property such estate or interest therein as is sold; and thereupon the officer shall proceed to subject the property to the execution, and

shall return the indemnifying bond to the court from which the execution issued. [R60,§3277; C73,§3056; C97,§3992; C24, 27, 31, 35,§11702.]

Referred to in §11700
Applicable to attachments, §12117

11703 Failure to give bond. If such bond is not given, the officer may refuse to levy, or if he has done so, and the bond is not given in a reasonable time after it is required by the officer, he may restore the property to the person from whose possession it was taken, and the levy shall stand discharged. [R60,§3278; C73,§3057; C97,§3993; C24, 27, 31, 35,§11703.]

11704 Application of proceeds. Where property for the sale of which the officer is indemnified sells for more than enough to satisfy the execution under which it was taken, the surplus shall be paid into the court to which the indemnifying bond is directed to be returned. The court may order such disposition or payment of the money to be made, temporarily or absolutely, as may be proper in respect to the rights of the parties interested. [R60,§3280; C73,§3059; C97, §3994; C24, 27, 31, 35,§11704.]

11705 Executions by justices. The provisions of the preceding sections, as to bonds, shall apply to proceedings upon executions issued by justices of the peace. Indemnifying bonds shall be returned in such cases with the execution under which they are taken. [R60, §3286; C73,§3060; C97,§3995; C24, 27, 31, 35, §11705.]

11706 Stay of execution—exceptions. On all judgments for the recovery of money, except those rendered on any appeal or writ of error, or in favor of a laborer or mechanic for his wages, or against one who is surety in the stay of execution, or against any officer, person, or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution, if the defendant therein shall, within ten days from the entry of judgment, procure one or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest, and costs from the time of rendering judgment until paid, as follows:

1. If the sum for which judgment was rendered, inclusive of costs, does not exceed one hundred dollars, three months.
2. If such sum and costs exceed one hundred dollars, six months. [R60,§3293; C73,§3061; C97,§3996; C24, 27, 31, 35,§11706.]

11707 Affidavit of surety. Officers approving stay bonds shall require the affidavit of the signers thereof, unless waived in writing by the party in whose favor the judgment is rendered, that they own property not exempt from execution, and aside from incumbrance, to the value of twice the amount of the judgment. [C73, §3062; C97,§3997; C24, 27, 31, 35,§11707.]

11708 Stay waives appeal. No appeal shall be allowed after a stay of execution has been obtained. [R60,§3294; C73,§3063; C97,§3998; C24, 27, 31, 35,§11708.]

11709 Bond — approval — recording — effect. The sureties for stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against their property, and shall be indexed in the proper judgment docket, as in case of other judgments. [R60,§§3295, 3298; C73,§3064; C97,§3999; C24, 27, 31, 35,§11709.]

11710 Execution recalled. When the bond is accepted and approved after execution has been issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution with his doings thereon. [R60,§3296; C73,§3065; C97,§4000; C24, 27, 31, 35,§11710.]

11711 Property released. All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer, upon stay of execution being entered. [R60,§3297; C73,§3066; C97,§4001; C24, 27, 31, 35,§11711.]

11712 Execution against principal and sureties. At the expiration of the stay, the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein, and the liability of such sureties shall be subject to that of their principal as provided in this chapter. [R60,§3299; C73,§3067; C97,§4002; C24, 27, 31, 35,§11712.]

Analogous provisions, §§10602, 11577, 11665

11713 Objection by surety. When any court shall render judgment against two or more persons, any of whom is surety for any other in the contract on which judgment is founded, there shall be no stay of execution allowed, if the surety objects thereto at or before the time of rendering the judgment, whereupon it shall be ordered by the court that there be no stay, unless the surety for the stay of execution will undertake specifically to pay the judgment in case the amount thereof cannot be levied of the principal defendant, and the judgment shall recite that the liability of such stay is prior to that of the objecting surety. [R60,§3300; C73, §3068; C97.§4003; C24, 27, 31, 35,§11713.]

11714 Stay terminated by surety. Any surety for the stay of execution may file with the clerk an affidavit, stating that he verily believes he will be compelled to pay the judgment, interest, and costs thereon unless execution issues immediately, and gives notice thereof in writing to the party for whom he is surety; and the clerk shall thereupon issue execution forthwith, unless other sufficient surety be entered before the clerk within five days after such notice is given as in other cases. [R60,§3301; C73,§3069; C97,§4004; C24, 27, 31, 35,§11714.]

11715 Other security given. If other sufficient surety is given, it shall have the force of the original surety entered before the filing of the affidavit, and shall discharge the original surety. [R60,§3302; C73,§3070; C97,§4005; C24, 27, 31, 35,§11715.]

11716 Lien not released. Where a stay of execution has been taken, such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due. [R60,§3303; C73,§3071; C97,§4006; C24, 27, 31, 35,§11716.]

11717 Labor claims preferred. When the property of any company, corporation, firm, or person shall be seized upon by any process of any court, or placed in the hands of a receiver, trustee, or assignee, or their property shall be seized by the action of creditors, for the purpose of paying or securing the payment of the debts of such company, corporation, firm, or person, the debts owing to employees for labor performed within the ninety days next preceding the seizure or transfer of such property, to an amount not exceeding one hundred dollars to each person, shall be a preferred debt and paid in full, or if there is not sufficient realized from such property to pay the same in full, then, after the payment of costs, ratably out of the fund remaining. [C97,§4019; S13,§4019; C24, 27, 31, 35,§11717.]

Referred to in §§11719, 12719
Labor claims preferred, §§11971, 12719, 12732
S13,§4019, editorially divided

11718 Exceptions. Such preference shall be junior and inferior to mechanics' liens for labor in opening and developing coal mines. [C97, §4019; S13,§4019; C24, 27, 31, 35,§11718.]

11719 Statement of claim—allowance. Any employee desiring to enforce his claim for wages, at any time after the seizure of the property under execution or writ of attachment or under any other authority, and before sale thereof is ordered, shall present to the officer levying on such property or to such receiver, trustee, or assignee, or to the court having custody of such property or from which such process issued, or person charged with such property, a statement under oath, showing the amount due after allowing all just credits and set-offs, and the kind of work for which such wages are due, and when performed; and unless objection be made thereto as provided in section 11720, such claim shall be allowed and paid to the person entitled thereto, after first paying all costs occasioned by the proceeding out of the proceeds of the sale of the property so seized or placed in the hands of a receiver, trustee, or assignee, or court, or person charged with the same, subject, however, to the provisions of section 11717. [C97,§4020; S13,§4020; C24, 27, 31, 35,§11719.]

11720 Contest. Any person interested may contest any claim or part thereof by filing objections thereto, supported by affidavit, with such court, receiver, trustee, or assignee, and its validity shall be determined in the same way the validity of other claims are which are sought to be enforced against such property, provided that where the claim is filed with a person charged with the property other than the officers above enumerated and a contest is made, the cause shall be transferred to the district court, and there docketed and determined. [C97,§4021; S13,§4021; C24, 27, 31, 35,§11720.]

Referred to in §11719

11721 Priority. Claims of employees for labor, if not contested, or if allowed after contest, shall have priority over all claims against or liens upon such property, except prior mechanics' liens for labor in opening or developing coal mines as allowed by law. [C97,§4022; C24, 27, 31, 35,§11721.]

11722 Notice of sale. The officer must give four weeks notice of the time and place of selling real property, and three weeks notice of personal property. [C51,§1905; R60,§3310; C73, §3079; C97,§4023; C24, 27, 31, 35,§11722.]

Referred to in §11725

11723 Posting and publication—compensation. Notice shall be given by posting up in at least three public places of the county, one of which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property to the amount of two hundred dollars or upwards is to be sold, there shall be two weekly publications of such notice in some newspaper printed in the county, to be selected by the party causing the notice to be given, and the compensation for such publication shall be the same as is provided by law for legal notices. [C51,§1906; R60,§3311; C73,§3080; C97,§4024; S13,§4024; C24, 27, 31, 35,§11723.]

Referred to in §11725

11724 Sales by constables. In constables' sales, the notice shall be posted for two weeks in three public places of the township of the justice, one of them at his office door, without newspaper publication. [C51,§1906; R60,§3311; C73,§3080; C97,§4026; C24, 27, 31, 35,§11724.]

Referred to in §§11725, 13441.26

11725 Penalty for selling without notice. An officer selling without the notice prescribed in sections 11722 to 11724, inclusive, shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party; but the validity of the sale is not thereby affected. [C51,§1907; R60,§3312; C73, §3081; C97,§4027; S13,§4027; C24, 27, 31, 35, §11725.]

11726 Notice to defendant. If the debtor is in actual occupation and possession of any part of the land levied on, the officer having the execution shall, at least twenty days previous to such sale, serve him with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale, which notice shall be served in the manner provided by section 11060. [R60,§3318; C73,§3087; C97, §4025; S13,§4025; C24, 27, 31, 35,§11726.]

Referred to in §11727
S13,§4025, editorially divided

11727 Setting aside sale. Sales made without the notice required in section 11726 may be set aside on motion made at the same or the next term thereafter. [R60,§3318; C73,§3087; C97,§4025; S13,§4025; C24, 27, 31, 35,§11727.]

11728 Time and manner. The sale must be at public auction, between nine o'clock in the forenoon and four o'clock in the afternoon, and the hour of the commencement of the sale must be fixed in the notice. [C51,§1908; R60,§3313; C73,§3082; C97,§4028; C24, 27, 31, 35,§11728.]

State or municipality as purchaser, ch 449; §§6204, 6736

11729 Sale postponed. When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, or the parties so agree, the officer may postpone the sale for not more than three days without being required to give any further notice thereof, which postponement shall be publicly announced at the time the sale was to have been made, but not more than two such adjournments shall be made, except by agreement of the parties in writing and made a part of the return upon the execution. [C51,§1909; R60,§3314; C73,§3083; C97,§4029; C24, 27, 31, 35,§11729.]

11730 Overplus. When the property sells for more than the amount required to be collected, the overplus must be paid to the debtor, unless the officer has another execution in his hands on which said overplus may be rightfully applied, or unless there are liens upon the property which ought to be paid therefrom, and the holders thereof make claim to such surplus and demand application thereon, in which case the officer shall pay the same into the hands of the clerk of the district court, and it shall be applied as ordered by the court. [C51,§1910; R60,§3315; C73,§3084; C97,§4030; C24, 27, 31, 35,§11730.]

11731 Deficiency—additional execution. If the property levied on sells for less than sufficient to satisfy the execution, the judgment holder may order out another, which shall be credited with the amount of the previous sale. The proceedings under the second execution shall conform to those hereinbefore prescribed. [C51,§1911; R60,§3316; C73,§3085; C97,§4031; C24, 27, 31, 35,§11731.]

11732 Plan of division of land. At any time before nine o'clock a. m. of the day of the sale, the debtor may deliver to the officer a plan of division of the land levied on, subscribed by him, and in that case the officer shall sell, according to said plan, so much of the land as may be necessary to satisfy the debt and costs, and no more. If no such plan is furnished, the officer may sell without any division. [R60,§3319; C73,§3088; C97,§4032; C24, 27, 31, 35,§11732.]

11733 Failure of purchaser to pay—optional procedure. When the purchaser fails to pay the money when demanded, the judgment holder or his attorney may elect to proceed against him for the amount; otherwise the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after postponement as above authorized. [C51,§1913; R60,§3320; C73,§3089; C97,§4033; C24, 27, 31, 35,§11733.]

11734 Sales vacated for lack of lien. When any person shall purchase at a sheriff's sale any real estate on which the judgment upon which the execution issued was not a lien at the time of the levy, and which fact was unknown to the purchaser, the court shall set aside such sale on motion, notice having been given to the debtor as in case of action, and a new execution may be issued to enforce the judgment, and, upon the order being made to set aside the sale, the sheriff or judgment creditor shall pay over to the purchaser the purchase money; said motion may also be made by any person interested in the real estate. [R60,§3321; C73,§3090; C97,§4034; C24, 27, 31, 35,§11734.]

11735 Money — things in action. Money levied upon may be appropriated without being advertised or sold, and so may bank bills, drafts, promissory notes, or other papers of the like character, if the plaintiff will receive them at their par value as cash, or if the officer can exchange them for cash at that value. [C51,§1914; R60,§3322; C73,§3091; C97,§4035; C24, 27, 31, 35,§11735.]

11736 Real estate of deceased judgment debtor. When a judgment has been obtained against a decedent in his lifetime, the plaintiff may file his petition in the office of the clerk of the court where the judgment is rendered, against the executor, the heirs, and devisees of real estate, if such there be, setting forth the facts, and that there is real estate of the deceased, describing its location and extent, and praying the court to award execution against the same. [C51,§1918; R60,§3323; C73,§3092; C97,§4036; C24, 27, 31, 35,§11736.]

11737 Notice. The person against whom the petition is filed shall be notified by the plaintiff to appear on the first day of the term and show cause, if any he have, why execution should not be awarded. [C51,§1919; R60,§3324; C73,§3093; C97,§4037; C24, 27, 31, 35,§11737.]

11738 Service and return. The notice must be served and returned in the ordinary manner, and the same length of time shall be allowed for appearance as in civil actions, and service of such notice on nonresident defendants may be had in such cases by publication. [C51,§1920; R60,§3325; C73,§3094; C97,§4038; C24, 27, 31, 35,§11738.]

Service and return, §11059 et seq.
Service by publication, §11081

11739 Execution awarded. At the proper time, the court shall award the execution, unless sufficient cause is shown to the contrary, but the nonage of the heirs or devisees shall not be held such sufficient cause. [C51,§§1921, 1922; R60, §§3326, 3327; C73,§§3095, 3096; C97,§4039; C24, 27, 31, 35,§11739.]

11740 Mutual judgments—set-off. Mutual judgments, executions on which are in the hands

of the same officer, may be set off the one against the other, except the costs, but if the amount collected on the large judgment is sufficient to pay the costs of both, such costs shall be paid therefrom. [C51,§1923; R60,§3328; C73,§3097; C97,§4040; C24, 27, 31, 35,§11740.]

Set-off in justice courts, §10560 et seq.

11741 **Personal property and leasehold interests—appraisement.** Personal property, and leasehold interests in real property having less than two years of an unexpired term, levied upon and advertised for sale on execution, must be appraised before sale by two disinterested householders of the neighborhood, one of whom shall be chosen by the execution debtor and the other by the plaintiff, or, in case of the absence of either party, or if either or both parties neglect or refuse to make choice, the officer making the levy shall choose one or both, as the case may be, who shall forthwith return to said officer a just appraisement, under oath, of said property if they can agree; if they cannot, they shall choose another disinterested householder, and with his assistance shall complete such appraisement, and the property shall not, upon the first offer, be sold for less than two-thirds of said valuation; but if offered at the same place and hour of the day as advertised upon three successive days, and no bid is received equal to two-thirds of the appraised value thereof, then it may be sold for one-half of said valuation. [C73,§3100; C97,§4041; C24, 27, 31, 35,§11741.]

Referred to in §11742

11742 **Property unsold—optional procedure.** Subject to the provisions of section 11741, when property is unsold for want of bidders, the levy still holds good; and, if there be sufficient time, it may again be advertised, or the execution returned and one issued commanding the officer to sell the property, describing it, previously levied on, to which a clause may be added that, if such property does not produce a sum sufficient to satisfy such execution, the officer shall proceed to make an additional levy, on which he shall proceed as on other executions; or the plaintiff may, in writing filed with the clerk or justice, abandon such levy, upon paying the costs thereof; in which case execution may issue with the same effect as if none had ever been issued. [C51,§1912; R60,§3317; C73,§3086; C97,§4042; C24, 27, 31, 35,§11742.]

11743 **Deed or certificate.** If the property sold is not subject to redemption, the sheriff must execute a deed therefor to the purchaser; but, if subject to redemption, a certificate, containing a description of the property and the amount of money paid by such purchaser, and stating that, unless redemption is made within one year thereafter, according to law, he or his heirs or assigns will be entitled to a deed for the same. [C51,§1925; R60,§3331; C73,§3101; C97,§4044; C24, 27, 31, 35,§11743.]

11744 **Deed.** If the debtor or his assignee fails to redeem, the sheriff then in office must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his assignee. If the person entitled is dead, the deed shall be made to his heirs. [C51,§1946; R60,§3354; C73,§§348, 3124; C97,§4062; C24, 27, 31, 35,§11744.]

11745 **Constructive notice—recording.** The purchaser of real estate at a sale on execution need not place any evidence of his purchase upon record until sixty days after the expiration of the full time of redemption. Up to that time the publicity of the proceedings is constructive notice of the rights of the purchaser. [C51,§1947; R60,§3355; C73,§3125; C97,§4063; C24, 27, 31, 35,§11745.]

11746 **Presumption.** Deeds executed by a sheriff in pursuance of the sales contemplated in this chapter are presumptive evidence of the regularity of all previous proceedings in the case, and may be given in evidence without preliminary proof. [C51,§1948; R60,§3356; C73, §3126; C97,§4064; C24, 27, 31, 35,§11746.]

11747 **Damages for injury to property.** When real estate has been sold on execution, the purchaser thereof, or any person who has succeeded to his interest, may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale and before possession is delivered under the conveyance. [C51,§1949; R60,§3357; C73,§3127; C97,§4065; C24, 27, 31, 35,§11747.]

Recovery for waste, §12408

11748 **Proceedings in justices' courts.** The provisions of this chapter are intended to embrace proceedings in justices' courts, so far as they are applicable; and the terms "sheriff" and "clerk" are to be understood as qualified in this chapter in the same manner in this respect as in that relative to attachment. [C51,§1952; R60,§3359; C73,§3129; C97,§4066; C24, 27, 31, 35,§11748.]

11749 **Death of holder of judgment.** The death of any or all of the joint owners of a judgment shall not prevent an execution being issued thereon, but on any such execution the clerk shall indorse the fact of the death of such of them as are dead, and if all are dead, the names of their personal representatives, if the judgment passed to the personal representatives, or the names of the heirs of such deceased person, if the judgment was for real property. [R60,§3482; C73,§3130; C97,§4067; C24, 27, 31, 35,§11749.]

11750 **Officer's duty.** In acting upon an execution, so indorsed, the sheriff shall proceed as if the surviving owners, or the personal representatives or heirs as above provided, were the only owners of the judgment upon which it was issued, and take bonds accordingly. [R60, §3483; C73,§3131; C97,§4068; C24, 27, 31, 35, §11750.]

11751 **Affidavit required.** Before making the indorsements as above provided, an affidavit shall be filed with the clerk by one of the own-

ers of such judgment, or one of such personal representatives or heirs, or their attorney, of the death of such owners as are dead, and that the persons named as such are the personal representatives or heirs, and in the case of personal representatives they shall file with the clerk a certificate of their qualification, unless their appointment is by the court from which the execution issues, in which case the record of such appointment shall be sufficient evidence of the fact. [R60,§3484; C73,§3132; C97,§4069; C24, 27, 31, 35,§11751.]

11752 Execution quashed. Any debtor in such a judgment may move the court or judge to quash an execution on the ground that the personal representatives or heirs of a deceased judgment creditor are not properly stated in the indorsement on the execution, and during the vacation of the court may obtain an injunction, upon satisfactory showing that the persons named as such are not entitled to the judgment on which the execution was issued. [R60,§3486; C73,§3134; C97,§4070; C24, 27, 31, 35,§11752.]

Injunctions, ch 535

11753 Death of part of defendants. The death of part of the joint debtors in a judgment shall not prevent execution being issued thereon, but, when issued, it shall operate alone on the survivors and their property. [R60,§3485; C73,§3133; C97,§4071; C24, 27, 31, 35,§11753.]

11754 Fee bill execution. After the expiration of sixty days from the rendition of a final judgment not appealed, removed, or reversed, the clerk of the court, or a justice of the peace in whose office the judgment is entered, may, and, upon demand of any party entitled to any part thereof, shall, issue a fee bill for all costs of such judgment, which shall have the same force and effect as an execution issued by such officer; and shall be served and executed in the same manner. [C73,§3842; C97,§1299; C24, 27, 31, 35,§11754.]

CHAPTER 499

EXEMPTIONS

Avails of life and accident insurance and wrongful death, §§8776, 11919, 11920

11755 "Family" defined.
11756 Who deemed resident.
11757 Failure to claim exemption.
11758 Absconding debtor.
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11760 General exemptions.
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11767 Unmarried persons—nonresidents.
11768 Persons starting to leave the state.
11769 Wages of nonresidents—garnishment.
11770 Sending claims out of state.
11771 Public property.

11755 "Family" defined. The word "family", as used in this chapter, does not include strangers or boarders lodging with the family. [C51,§1900; R60,§3306; C73,§3073; C97,§4012; C24, 27, 31, 35,§11755.]

11756 Who deemed resident. Any person coming into this state with the intention of remaining shall be considered a resident. [C51, §1902; R60,§3308; C73,§3076; C97,§4014; C24, 27, 31, 35,§11756.]

C97,§4014, editorially divided

11757 Failure to claim exemption. Any person entitled to any of the exemptions mentioned in this chapter does not waive his rights thereto by failing to designate or select such exempt property, or by failing to object to a levy thereon, unless he fails or neglects to do so when required in writing by the officer about to levy thereon. [C51,§§1898, 1899; R60,§§3304, 3305, 3308; C73,§3072; C97,§4017; C24, 27, 31, 35, §11757.]

11758 Absconding debtor. When a debtor absconds and leaves his family, such property as is exempt to him under this chapter shall be exempt in the hands of his wife and children, or either of them. [R60,§3309; C73,§3078; C97, §4016; C24, 27, 31, 35,§11758.]

11759 Purchase money. None of the exemptions prescribed in this chapter shall be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied. [C73,§3077; C97,§4015; C24, 27, 31, 35,§11759.]

11760 General exemptions. If the debtor is a resident of this state and the head of a family, he may hold exempt from execution the following property:

1. All wearing apparel of himself and family kept for actual use and suitable to their condition, and the trunks or other receptacles necessary to contain the same.
2. One musket or rifle and shotgun.
3. All private libraries, family bibles, portraits, pictures, musical instruments, and paintings not kept for the purpose of sale.
4. A seat or pew occupied by the debtor or his family in any house of public worship.
5. An interest in a public or private burying ground, not exceeding one acre for any defendant.
6. Two cows and two calves.
7. Fifty sheep and the wool therefrom and the materials manufactured from such wool.
8. Six stands of bees.
9. Five hogs, and all pigs under six months.

10. The necessary food for all animals exempt from execution for six months.
11. One bedstead and the necessary bedding for every two in the family.
12. All cloth manufactured by the defendant, not exceeding one hundred yards in quantity.
13. Household and kitchen furniture, not exceeding two hundred dollars in value.
14. All spinning wheels and looms.
15. One sewing machine and other instruments of domestic labor kept for actual use.
16. The necessary provisions and fuel for the use of the family for six months.
17. The proper tools, instruments, or books of the debtor, if a farmer, mechanic, surveyor, professional engineer, architect, clergyman, lawyer, physician, dentist, teacher, or professor.
18. If the debtor is a physician, public officer, farmer, teamster, or other laborer, a team, consisting of not more than two horses or mules, or two yoke of cattle, and the wagon or other vehicle, with the proper harness or tackle, by the use of which he habitually earns his living, otherwise one horse.
19. If a printer, a printing press and the types, furniture, and material necessary for the use of such printing press and a newspaper office connected therewith, not to exceed in all the value of twelve hundred dollars.
20. Poultry to the value of fifty dollars.
21. If the debtor is a resident of this state and is the head of a family, and does not own one or more of the foregoing items of property, his wife, if she is an actual member of the family, and owns one or more such items, and is the debtor, shall be entitled to hold such items exempt from execution.
22. If the debtor is a resident of this state and a woman other than the head of a family, she may hold exempt from execution one sewing machine, and poultry to the value of fifty dollars. [C51,§§1898, 1899; R60,§§3304, 3305, 3308; C73,§3072; C97,§4008; C24, 27, 31, 35,§11760.]

Exemptions denied, §§1960, 3644, 6234
Insurance, proceeds of, §8776
Judgment for exempt property, §12198

11760.1 Motor vehicle. No motor vehicle shall be held exempt from any order, judgment or decree for damages occasioned by the use of said motor vehicle upon a public highway of this state. [C31, 35,§11760-c1.]

11761 Pension money. All money received by any person, a resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution, whether such pensioner shall be the head of a family or not. [C97,§4009; C24, 27, 31, 35, §11761.]

11762 Homestead bought with pension money. The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations thereof, shall also be exempt; and such exemption shall apply to debts of such pensioner contracted prior to the purchase of the homestead. [C97,§4010; C24, 27, 31, 35,§11762.]

11763 Personal earnings. The earnings of a debtor, who is a resident of the state and the head of a family, for his personal services, or those of his family, at any time within ninety days next preceding the levy, are exempt from liability for debt. [C51,§1901; R60,§3307; C73, §3074; C97,§4011; C24, 27, 31, 35,§11763.]

11764 Exception under divorce decree. Where the party in whose favor the order, decree, or judgment was rendered has not remarried, the personal earnings of the debtor shall not be exempt from any order, judgment, or decree for temporary or permanent alimony hereafter rendered in this state, nor from any installment of any such order, judgment, or decree heretofore rendered within this state which, by the provisions thereof, may hereafter become due. [C24, 27, 31, 35,§11764.]

38GA, ch 65, §1, editorially divided

11765 Exception under decree for support of minors. The personal earnings of the debtor shall not be exempt from any order, judgment, or decree for the support of his minor child or children hereafter rendered in this state nor any installment of any such order, judgment, or decree heretofore rendered in this state which, by the provisions thereof, may hereafter become due. [C24, 27, 31, 35,§11765.]

Similar provision, §3644

11766 Workmen's compensation. Any compensation due or that may become due an employee or dependent under the provisions of chapter 70 shall be exempt from garnishment, attachment, and execution. [C24, 27, 31, 35, §11766.]

11767 Unmarried persons — nonresidents. There shall be exempt to an unmarried person not the head of a family, and to nonresidents, their own ordinary wearing apparel and trunk necessary to contain the same. [C51,§1902; R60,§3308; C73,§3075; C97,§4013; C24, 27, 31, 35,§11767.]

11768 Persons starting to leave the state. Where the debtor, if the head of a family, has started to leave this state, he shall have exempt only the ordinary wearing apparel of himself and family, and such other property, in addition, as he may select, in all not exceeding seventy-five dollars in value; which property shall be selected by the debtor and appraised according to the provisions of this code relating to the discharge of attached property. [C51,§1902; R60,§3308; C73,§3076; C97,§4014; C24, 27, 31, 35,§11768.]

Appraisement, §12122

11769 Wages of nonresidents—garnishment. Wages earned outside of this state by a nonresident of this state, and payable outside of this state, shall in all cases where the garnishing creditor is a nonresident of this state, be exempt from attachment or garnishment where

the cause of action arises outside of this state; and it shall be the duty of the garnishee in such cases to plead such exemption, unless the defendant shall be personally served with original notice in this state. [S13,§4071-a; C24, 27, 31, 35,§11769.]

11770 Sending claims out of state. Whoever, whether as principal, agent, or attorney, with intent to deprive a resident in good faith of the state of the benefit of the exemption laws thereof, sends a claim against such resident and belonging to a resident, to another state for action, or causes action to be brought on such claim in another state, or assigns or transfers such claim to a nonresident of the state, with intent that action thereon be brought in the courts of another state, the action in either case being one which might have been brought in this state, and the property or debt sought to be reached by such action being such as might, but for the exemption laws of this state, have been reached by action in the courts of this state, shall be guilty of a misdemeanor, and punished by a fine of not less than ten nor more than fifty dollars. [C97,§4018; C24, 27, 31, 35,§11770.]

11771 Public property. Public buildings owned by the state, or any county, city, school district, or other municipal corporation, or any other public property which is necessary and proper for carrying out the general purpose for which such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied on to pay the debt of any such. [C51,§1895; R60,§3274; C73,§3048; C97,§4007; C24, 27, 31, 35,§11771.]

CHAPTER 500

REDEMPTION

11772 Place of redemption.
11773 When sale absolute.
11774 Redemption by debtor.
11775 Redemption prohibited.
11776 Redemption by creditors.
11777 Mechanic's lien before judgment.
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11779 Redemption by creditors from each other.
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11792 Contest determined.
11793 Assignment of certificate.
11794 Redemption of part of property.
11795 Interest of tenant in common.
11796 Transfer of debtor's right.

11772 Place of redemption. All redemptions made under the provisions of this chapter shall be made in the county where the sale is had. [S13,§4051; C24, 27, 31, 35,§11772.]

S13,§4051, editorially divided

11773 When sale absolute. When real property has been levied upon, if the estate is less than a leasehold having two years of an unexpired term, the sale is absolute, but if of a larger amount, it is redeemable as hereinafter prescribed. [C51,§1924; R60,§§3329, 3330; C73, §§3098, 3099; C97,§4043; C24, 27, 31, 35,§11773.]

11774 Redemption by debtor. The debtor may redeem real property at any time within one year from the day of sale, and will, in the meantime, be entitled to the possession thereof; and for the first six months thereafter such right of redemption is exclusive. Any real property redeemed by the debtor shall thereafter be free and clear from any liability for any unpaid portion of the judgment under which said real property was sold. [C51,§§1926, 1927; R60, §§3332, 3333; C73,§§3102, 3103; C97,§4045; C24, 27, 31, 35,§11774.]

C97,§4045, editorially divided

11775 Redemption prohibited. No party who has taken an appeal from the superior or district court, or stayed execution on the judgment, shall be entitled to redeem. [C73,§3102; C97, §4045; C24, 27, 31, 35,§11775.]

11776 Redemption by creditors. If no redemption is made by the debtor as above provided, thereafter, and at any time within nine months from the day of sale, said redemption may be made by a mortgagee before or after the debt secured by the mortgage falls due, or by any creditor whose claim becomes a lien prior to the expiration of the time allowed for such redemption. [C51,§§1927, 1928; R60,§§3333, 3334; C73,§§3103, 3104; C97,§4046; C24, 27, 31, 35, §11776.]

C97,§4046, editorially divided

11777 Mechanic's lien before judgment. A mechanic's lien before judgment thereon is not of such character as to entitle the holder to redeem. [C51,§1527; R60,§3333; C73,§3103; C97,§4046; C24, 27, 31, 35,§11777.]

11778 Probate creditor. The owner of a claim which has been allowed and established against the estate of a decedent may redeem as in this chapter provided, by making application to the district court or any judge of the district where the real estate to be redeemed is situated. Such application shall be heard after notice to such parties as said court or judge may direct, and shall be determined with due regard to rights of all persons interested. [C97,§4046; C24, 27, 31, 35,§11778.]

11779 Redemption by creditors from each other. Creditors having the right of redemp-

tion may redeem from each other within the time above limited, and in the manner herein provided. [C51,§1929; R60,§3335; C73,§3105; C97,§4047; C24, 27, 31, 35,§11779.]

11780 **Senior creditor.** When a senior creditor thus redeems from his junior, he is required to pay off only the amount of those liens which are paramount to his own, with the interest and costs appertaining to those liens. [C51, §1931; R60,§3337; C73,§3107; C97,§4048; C24, 27, 31, 35,§11780.]

11781 **Junior may prevent.** The junior creditor may in all such cases prevent a redemption by the holder of the paramount lien by paying off the lien, or by leaving with the clerk beforehand the amount necessary therefor, and a junior judgment creditor may redeem from a senior judgment creditor. [C51,§1932; R60,§§3338, 3339; C73,§§3108, 3109; C97,§4049; C24, 27, 31, 35,§11781.]

11782 **Terms.** The terms of redemption, when made by a creditor, in all cases shall be the reimbursement of the amount bid or paid by the holder of the certificate, including all costs, with interest the same as the lien redeemed from bears on the amount of such bid or payment, from the time thereof. [C51,§1930; R60,§3336; C73,§3106; C97,§4050; C24, 27, 31, 35,§11782.]

Advancements to protect lien, §11798
C97,§4050, editorially divided

11783 **Mortgage not matured — interest.** Where a mortgagee whose claim is not yet due is the person from whom the redemption is thus to be made, he shall receive on such mortgage only the amount of the principal thereby secured, with unpaid interest thereon to the time of such redemption. [C51,§1930; R60,§3336; C73,§3106; C97,§4050; C24, 27, 31, 35,§11783.]

11784 **By holder of title.** The terms of redemption, when made by the titleholder, shall be the payment into the clerk's office of the amount of the certificate, and all sums paid by the holder thereof in effecting redemptions, added to the amount of his own lien, or the amount he has credited thereon, if less than the whole, with interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from date of payment, and upon the amount credited on his own judgment from the time of said credit, in each case including costs.

Redemption may also be made by the titleholder presenting to the clerk of the district court sheriff's certificate of sale properly assigned to the titleholder, whereupon the clerk of the district court shall cancel the said certificate and enter full redemption in the sale book. [C51,§1930; R60,§3336; C73,§3106; C97,§4051; S13,§4051; C24, 27, 31, 35,§11784.]

11785 **By junior from senior creditor.** When a senior redeems from a junior creditor, the latter may, in return, redeem from the former, and so on, as often as the land is taken from him by virtue of a paramount lien. [C51,§1933; R60, §3341; C73,§3111; C97,§4052; C24, 27, 31, 35, §11785.]

11786 **After nine months.** After the expiration of nine months from the day of sale, the creditors can no longer redeem from each other, except as hereinafter provided. [C51,§1934; R60,§3342; C73,§3112; C97,§4053; C24, 27, 31, 35,§11786.]

11787 **Who gets property.** Unless the defendant redeems, the purchaser, or the creditor who has last redeemed prior to the expiration of the nine months aforesaid, will hold the property absolutely. [C51,§1935; R60,§3343; C73,§3113; C97,§4054; C24, 27, 31, 35,§11787.]

11788 **Claim extinguished.** In case it is thus held by a redeeming creditor, his lien, and the claim out of which it arose, will be held to be extinguished, unless he pursues the course pointed out in sections 11789 to 11791, inclusive. [C51,§1936; R60,§3344; C73,§3114; C97,§4055; C24, 27, 31, 35,§11788.]

11789 **Mode of redemption.** The mode of redemption by a lienholder shall be by paying into the clerk's office the amount necessary to effect the same, computed as above provided, and filing therein his affidavit, or that of his agent or attorney, stating as nearly as practicable the nature of his lien and the amount still due and unpaid thereon. [C51,§§1938, 1940; R60,§§3346, 3348; C73,§§3116, 3118; C97,§4056; C24, 27, 31, 35,§11789.]

Referred to in §11788
C97,§4056, editorially divided

11790 **Credit on lien.** If he is unwilling to hold the property and credit the debtor thereon the full amount of his lien, he must state the utmost amount he is willing to credit him with. [R60,§3345; C73,§3115; C97,§4056; C24, 27, 31, 35,§11790.]

Referred to in §11788

11791 **Excess payment—entry and credit.** If the amount paid to the clerk is in excess of the prior bid and liens, he shall refund the excess to the party paying the same, and enter each such redemption made by a lienholder upon the sale book, and credit upon the lien, if a judgment in the court of which he is clerk, the full amount thereof, including interest and costs, or such less amount as the lienholder is willing to credit therein, as shown by the affidavit filed. [C51, §§1937, 1939, 1941; R60,§§3340, 3347, 3349; C73, §§3110, 3117, 3119; C97,§4056; C24, 27, 31, 35, §11791.]

Referred to in §11788

11792 **Contest determined.** In case any question arises as to the right to redeem, or the amount of any lien, the person claiming such right may deposit the necessary amount therefor with the clerk, accompanied with the affidavit above required, and also stating therein the nature of such question or objection, which question or objection shall be submitted to the court or a judge thereof as soon as practicable thereafter, upon such notice as it or he shall prescribe of the time and place of the hearing of the controversy, at which time and place the matter shall be tried upon such evidence and in such

manner as may be prescribed, and the proper order made and entered of record in the cause in which execution issued, and the money so paid in shall be held by the clerk subject to the order made. [C97,§4057; C24, 27, 31, 35,§11792.]

11793 Assignment of certificate. A creditor redeeming as above contemplated is entitled to receive an assignment of the certificate issued by the sheriff to the original purchaser as hereinbefore directed. [C51,§1942; R60,§3350; C73, §3120; C97,§4058; C24, 27, 31, 35,§11793.]

11794 Redemption of part of property. When the property has been sold in parcels, any distinct portion may be redeemed by itself. [C51, §1943; R60,§3351; C73,§3121; C97,§4059; C24, 27, 31, 35,§11794.]

11795 Interest of tenant in common. When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately. [C51,§1944; R60,§3352; C73,§3122; C97,§4060; C24, 27, 31, 35,§11795.]

11796 Transfer of debtor's right. The rights of a debtor in relation to redemption are transferable, and the assignee has the like power to redeem. [C51,§1945; R60,§3353; C73,§3123; C97,§4061; C24, 27, 31, 35,§11796.]

CHAPTER 501

PROTECTION OF ADVANCEMENTS

11797 Lienholder's advancements protected—affidavit filed.
11798 Redemption—payment of advances.
11799 Record of lien.

11797 Lienholder's advancements protected —affidavit filed. The holder of a sheriff's sale certificate or junior lien upon any real estate after the delinquency of any taxes or special assessment, or of interest on any senior lien, or breach of any condition of a senior incumbrance, upon payment by him, or performance of the condition broken, shall have a lien upon said real estate for such expenditures and interest thereon of equal priority with the lien so held by him upon his filing with the clerk of the district court in the county in which the land is situated, a verified statement of said expenditures and the dates thereof, together with a description of the real estate, the name of the record owner, and a reference to the lien which he holds, and may recover the same in any action brought for the foreclosure of the junior lien referred to in said verified statement. [C24, 27, 31, 35,§11797.]

40GA, ch 192, §1, editorially divided

11798 Redemption — payment of advances. When such advancements have been made by the holder of a sheriff's sale certificate the sum so advanced shall be a part of the amount required to redeem from said sheriff's sale. [C24, 27, 31, 35,§11798.]

11799 Record of lien. It shall be the duty of the clerk of the district court to record the statements so filed in the incumbrance book and to enter the same in the lien index. Payments advanced after execution has been issued upon the junior lien, shall be added to the execution upon receipt, by the sheriff, of a verified statement of such advancements and when the redemption period has expired the clerk shall release them on his record. [C24, 27, 31, 35, §11799.]

CHAPTER 502

PROCEEDINGS AUXILIARY TO EXECUTION

11800 Debtor examined.
11801 Affidavit as to property.
11802 By whom order granted.
11803 Debtor interrogated.
11804 Witnesses examined.
11805 Disposition of property.
11806 Receiver—injunction.
11807 Equitable interest sold.
11808 Sheriff as receiver.
11809 Continuance.
11810 Debtor failing to appear—contempt.
11811 Service of order.
11812 Compensation.
11813 Warrant of arrest.
11814 Bond.
11815 Equitable proceedings.
11816 Answers verified—petition taken as true.
11817 Lien created.
11818 Surrender of property enforced.

11800 Debtor examined. When execution against the property of a judgment debtor, or one of several debtors in the same judgment, has been issued from the superior, district, or supreme court to the sheriff of the county where such debtor resides, or if he do not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, and execution issued thereon is returned unsatisfied in whole or in part, the owner of the judgment is entitled to an order for the appearance and examination of such debtor. [C51,§1953; R60,§3375; C73, §3135; C97,§4072; C24, 27, 31, 35,§11800.]

11801 Affidavit as to property. The like order may be obtained at any time after the issuing of an execution, upon proof, by the affidavit

of the party or otherwise, to the satisfaction of the court or judge who is to grant the same, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment. [C51,§1954; R60,§3376; C73, §3136; C97,§4073; C24, 27, 31, 35,§11801.]

11802 By whom order granted. Such order may be made by the superior or district court in which the judgment was rendered, or by the district court of the county to which execution has been issued, or in vacation by a judge thereof. The debtor may be required to appear and answer before either of such courts or judges, or before a referee appointed for that purpose by the court or judge who issued the order, to report either the evidence or the facts. [C51, §1955; R60,§§3377, 3385; C73,§3137; C97,§4074; C24, 27, 31, 35,§11802.]

Orders executed outside district, §11242.1

11803 Debtor interrogated. The debtor, on his appearance, may be interrogated in relation to any facts calculated to show the amount of his property, or the disposition which has been made of it, or any other matter pertaining to the purpose for which the examination is permitted to be made. The interrogatories and answers shall be reduced to writing and preserved by the court or officer before whom they are taken. All examinations and answers under this chapter shall be on oath. [C51,§1956; R60, §3378; C73,§3138; C97,§4075; C24, 27, 31, 35, §11803.]

Criminating questions, §§11267-11269

11804 Witnesses examined. Witnesses may be required by order of the court or judge, or by subpoenas from the referee, to appear and testify upon any proceedings under this chapter, in the same manner as upon the trial of an issue. [R60,§3379; C73,§3139; C97,§4076; C24, 27, 31, 35,§11804.]

11805 Disposition of property. If any property, rights, or credits subject to execution are thus ascertained, an execution may be issued and the same levied upon. The court or judge may order any property of the judgment debtor not exempt, in the hands of himself or others, or due him, to be delivered up, or in any other mode applied towards the satisfaction of the judgment. [C51,§1957; R60,§3380; C73,§3140; C97,§4077; C24, 27, 31, 35,§11805.]

11806 Receiver—injunction. The court or judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, or by injunction forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, or any interference therewith. [R60,§3381; C73,§3141; C97,§4078; C24, 27, 31, 35,§11806.]

11807 Equitable interest sold. If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee, or otherwise, and the interest of said debtor can be ascertained as between himself and the person holding the legal estate or having any lien on or interest in the same, without controversy as to the interest of such person, the receiver may be ordered to sell and convey the same, or the debtor's equitable interest therein, in the same manner as is provided for the sale of real estate upon execution. [R60, §3382; C73,§3142; C97,§4079; C24, 27, 31, 35, §11807.]

Sale of real estate, §11722 et seq.

11808 Sheriff as receiver. If the sheriff is appointed receiver, he and his sureties shall be liable on his official bond for the faithful discharge of his duties as such. [R60,§3383; C73, §3143; C97,§4080; C24, 27, 31, 35,§11808.]

11809 Continuance. The court, judge, or referee acting under the provisions of this chapter shall have power to continue his proceedings from time to time until they shall be completed. [R60,§3384; C73,§3144; C97,§4081; C24, 27, 31, 35,§11809.]

11810 Debtor failing to appear — contempt. Should the judgment debtor fail to appear after being personally served with notice to that effect, or should he fail to make full answers to all proper interrogatories propounded to him, he will be guilty of contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. If any person, party, or witness disobey an order of the court, judge, or referee, duly served, such person, party, or witness may be punished as for contempt. [C51,§1958; R60,§3386; C73, §3145; C97,§4082; C24, 27, 31, 35,§11810.]

Contempts, ch 536
Orders executed outside district, §11242.1

11811 Service of order. The order mentioned herein shall be in writing and signed by the court, judge, or referee making the same, and be served in the same manner as an original notice in other cases. [R60,§3387; C73,§3146; C97,§4083; C24, 27, 31, 35,§11811.]

11812 Compensation. Sheriffs, referees, receivers, and witnesses shall receive such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and the collection thereof from such party or parties as ought to pay the same shall be enforced by an order or execution. [R60,§3388; C73,§3147; C97,§4084; C24, 27, 31, 35,§11812.]

11813 Warrant of arrest. Upon proof, to the satisfaction of the court or judge authorized to grant the order aforesaid, that there is danger that the defendant will leave the state, or that he will conceal himself, such court or judge, instead of the order, may issue a warrant for the arrest of the debtor, and for bringing him forthwith before the court or judge, upon which being done, he may be examined in the same manner and with the like effect as is above provided. [C51,§1959; R60,§3389; C73,§3148; C97,§4085; C24, 27, 31, 35,§11813.]

Approval of warrant and expenses, §§1225.04, 1225.05

11814 Bond. Upon being brought before the court or judge, he may enter into an undertaking in such sum as the court or officer shall prescribe, with one or more sureties, that he will attend from time to time for examination before the court or judge as shall be directed, and will not, in the meantime, dispose of his property, or any part thereof; in default whereof he shall continue under arrest, and may be committed to jail for safekeeping until the examination shall be concluded. [R60,§3390; C73,§3149; C97, §4086; C24, 27, 31, 35,§11814.]

11815 Equitable proceedings. At any time after the rendition of a judgment, an action by equitable proceedings may be brought to subject any property, money, rights, credits, or interest therein belonging to the defendant to the satisfaction of such judgment. In such action, persons indebted to the judgment debtor, or holding any property or money in which such debtor has any interest, or the evidences of securities for the same, may be made defendants. [R60,§3391; C73,§3150; C97,§4087; C24, 27, 31, 35,§11815.]

Referred to in §11817
Grantor deemed equitable owner, §12106

11816 Answers verified — petition taken as true. The answers of all defendants shall be verified by their own oath, and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in such answers by process of contempt; or, upon failure to answer the petition, or any part thereof, as fully and explicitly as the court may require, the same, or such part not thus answered, shall be deemed true, and such order made or judgment rendered as the nature of the case may require. [R60, §3392; C73,§3151; C97,§4088; C24, 27, 31, 35, §11816.]

Referred to in §11817
Contempts, ch 536

11817 Lien created. In the case contemplated in sections 11815 and 11816, a lien shall be created on the property of the judgment debtor, or his interest therein, in the hands of any defendant or under his control, which is sufficiently described in the petition, from the time of the service of notice and copy of the petition on the defendant holding or controlling such property or any interest therein. [R60, §§3393, 3394; C73,§3152; C97,§4089; C24, 27, 31, 35,§11817.]

11818 Surrender of property enforced. The court shall enforce the surrender of the money or securities therefor, or of any other property of the defendant in the execution, which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender until it shall be done, or the court is satisfied that it is out of his power to do so. [R60,§3395; C73, §3153; C97,§4090; C24, 27, 31, 35,§11818.]

Analogous provisions, §§11925, 12719.3

TITLE XXXII

PROBATE

CHAPTER 503

PROBATE COURT

11819 Probate court always open.
11820 Time and place of hearings.
11821 Place of hearing—noncontest or agreement.
11822 Notice.
11823 Judge disqualified—procedure.
11824 Concurrent jurisdiction.
11825 Extent of jurisdiction.
11826 Certified copies affecting foreign real estate.
11827 Process revoked.
11828 Bonds filed—approval.
11829 Transfer to another county.
11830 Certified copy filed.
11831 Certified copy recorded.

11819 Probate court always open. The district court shall always be open for the transaction of probate business. [C73,§2313; C97, §3261; C24, 27, 31, 35,§11819.]

C97,§3261, editorially divided

11820 Time and place of hearings. The hearing of any matter requiring notice, except in case of proof of wills, shall be had only in term time, or at such time and place as the judge may appoint. [C73,§2313; C97,§3261; C24, 27, 31, 35,§11820.]

11821 Place of hearing — noncontest or agreement. In cases where there is no contest, or by agreement, such hearing may be had at any place within the judicial district in which the business is pending. [C97,§3261; C24, 27, 31, 35,§11821.]

11822 Notice. When a judge fixes a time and place of hearing thereof, he shall direct what notice shall be given, and no hearing shall be had until proof is made of the giving of such notice. When no notice is prescribed by the judge or court as above provided, the same notice shall be given as in commencing a civil action. [C73,§2314; C97,§3262; C24, 27, 31, 35, §11822.]

Time of notice, §11059

11823 Judge disqualified—procedure. Where the judge is a party, or connected by blood or affinity with a person interested nearer than the fourth degree, or is personally interested in any probate matter, he shall order the same transferred to the district court of another district, or to be heard before another judge of the same district, or procure a judge of another district to hold his court for the hearing of such matter. [C73,§2317; C97,§3263; C24, 27, 31, 35,§11823.]

Computing relation §63 subsection 24
Similar provision, §10818

11824 Concurrent jurisdiction. When a case is originally within the jurisdiction of the courts of two or more counties, that one which first takes cognizance thereof by the commencement of the proceedings shall retain the same throughout. [C51,§1274; R60,§2306; C73,§2318; C97,§3264; C24, 27, 31, 35,§11824.]

11825 Extent of jurisdiction. The court of the county in which a will is probated, or in which administration or guardianship is granted, shall have jurisdiction coextensive with the state in the settlement of the estate and the sale and distribution thereof. [R60,§2472; C73, §2319; C97,§3265; C24, 27, 31, 35,§11825.]

C97,§3265, editorially divided

11826 Certified copies affecting foreign real estate. A certified copy of any order, judgment, or deed, affecting real estate in any county other than that in which administration or guardianship is originally granted, shall be furnished to and entered by the clerk of the district court of the county where such real estate is situated in the probate records of said court. [C97,§3265; C24, 27, 31, 35,§11826.]

11827 Process revoked. Any process or authority emanating from the court in probate matters may for good cause be revoked and a new one issued. [C51,§1275; R60,§2307; C73, §2320; C97,§3266; C24, 27, 31, 35,§11827.]

11828 Bonds filed—approval. All bonds relating to probate matters shall be filed in the office of the clerk of said court, and shall not be sufficient until examined by him, and his approval indorsed thereon. [C51,§1276; R60, §2308; C73,§2321; C97,§3267; C24, 27, 31, 35, §11828.]

11829 Transfer to another county. In any proceeding in probate the court may, on written showing, supported by affidavit and on such notice to interested parties as the court may prescribe, transfer such proceeding to any other county, when it is made to appear that such transfer will be in furtherance of justice, and the same shall thereupon be pending in such other county. [C24, 27, 31, 35,§11829.]

11830 Certified copy filed. The clerk of the court ordering the transfer shall retain the

original files and papers, but shall make a certified copy thereof, and of all record entries pertaining to the proceedings, and at once file the same in the office of the clerk of the court to which the transfer has been made. [C24, 27, 31, 35,§11830.]

Referred to in §11831

11831 Certified copy recorded. The clerk of the court to which the proceedings are transferred shall record at length, in the probate records of his county, the certified copy of the record entries referred to in section 11830. [C24, 27, 31, 35,§11831.]

CHAPTER 504

CLERK OF PROBATE COURT

11832 Probate powers of clerk.
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11832 Probate powers of clerk. The clerk of the district court shall have and exercise within his county all the powers and jurisdiction of the court and of the judge thereof, in the following matters:

1. The appointment, when not contested, of resident administrators, executors, and guardians of minors, and fixing and determining the amount of the bond thereof and the approval of any and all bonds given by administrators, executors, trustees, and guardians in the discharge of their several trusts.

2. The examination and approval of all intermediate or interlocutory accounts or reports of administrators, executors, and guardians.

3. The making of all necessary orders in relation to the personal effects of a deceased person, where no objection is filed, and perform all other acts within his jurisdiction, as provided for in this code.

4. The admission to probate of wills of decedents, when not contested, and the making of necessary orders in relation thereto, including orders for the issuance of commissions to take depositions and proof may be made before the clerk in the same manner as is made in open court. [C73,§2315; C97,§250; C24, 27, 31, 35, §11832.]

Referred to in §11834
88GA, ch 357, §1, editorially divided

11833 Jurisdiction of clerk terminated. If, on or before the date set for hearing before the clerk, written objections to the probate of such will shall be filed, the clerk shall proceed no further, but the proceedings shall stand for trial before the district court on such objections without further notice. [C24, 27, 31, 35,§11833.]

11834 Clerk's actions reviewed. Any person aggrieved by any order made or entered by the clerk, under the powers conferred in section 11832, may have the same reviewed in court, on motion filed at the next term and not afterwards, unless upon good cause shown within one year, and upon such notice as the court or a judge thereof may prescribe. [C97,§251; C24, 27, 31, 35,§11834.]

C97,§251, editorially divided

11835 Docketing and hearing. Upon the filing of such motion, the clerk shall place the cause or proceeding on the docket without additional docket fee, and the matter shall stand for hearing or trial de novo in open court. [C97, §251; C24, 27, 31, 35,§11835.]

11836 Validity of clerk's orders. The records, orders, and judgments made and entered by the clerk as hereinbefore provided, and not reversed, set aside, or modified by the court, shall stand, and be of the same force, validity, and effect, and shall be entitled to the same faith and credit as if made by the court or by the judge thereof. [C97,§252; C24, 27, 31, 35, §11836.]

C97,§252, editorially divided

11837 Clerk not to prepare reports. No clerk, deputy, or employee shall make or assist in making, drafting, or filling out any report of any administrator, executor, guardian, assignee, receiver, trustee, or any other report to be filed in his office. [C97,§252; C24, 27, 31, 35, §11837.]

11838 Bonds—approval. The clerk shall approve the bonds of all guardians, executors, administrators, and trustees. [C97,§3268; S13, §3268; C24, 27, 31, 35,§11838.]

S13,§3268, editorially divided

11839 Annual examination. During the month of June in each year the clerk shall examine into the sufficiency of the sureties, and amount of penalty of all executors', administrators', guardians', and trustees' bonds in force in his office which have been executed more than six months prior thereto. [C97,§3268; S13,§3268; C24, 27, 31, 35,§11839.]

11840 Reapproval or disapproval — procedure. If the clerk finds the said bonds sufficient, he shall note thereon his examination and reapproval, but if he finds the same insufficient, or the sureties shall not requalify on being required by him to do so, he shall note his disapproval thereon, notifying the principal thereof by registered letter, and place the matter upon the calendar of the court at the next term

for the proper order. [C97,§3268; S13,§3268; C24, 27, 31, 35,§11840.]

11841 Probate docket. The clerk shall keep a book to be known as the "probate docket", which shall show:

1. The name of every deceased person whose estate is administered, and who dies seized of any real estate situated within the county, and the date of his death.
2. The names of all the heirs at law and the surviving spouse of such deceased person, and their ages and places of residence, so far as they can be ascertained.
3. The name of each person as to whom application for guardianship of the person or property has been made or granted.
4. A note of every sale of real estate made under the order of the court, with a reference to the volume and page of the record where a complete record thereof may be found. [C73, §2490; C97,§3411; C24, 27, 31, 35,§11841.]

11842 Probate record. He shall also keep a book which shall be known as the "probate record", which shall contain full and complete journal entries of all orders or other proceedings had in probate matters, and where real estate is sold or mortgaged by an executor, administrator, or guardian, under an order of court therefor, a complete record of the same, including the petition, notice, return of service, and all other papers filed, with the orders made, report, deed of conveyance or mortgage, and order of approval. [C73,§2492; C97,§3413; C24, 27, 31, 35,§11842.]

11843 Bond record. The clerk shall also keep a book known as "records of bonds", in which he shall record all bonds given by executors, administrators, and guardians. [C73, §2493; C97,§3414; C24, 27, 31, 35,§11843.]

11844 Calendar. The clerk shall keep a court calendar, and enter thereon only such cases in probate as require the action of the court. [C97,§3269; C24, 27, 31, 35,§11844.]

C97,§3269, editorially divided

11845 Delinquent inventories and reports. On the first day of each term the clerk shall report to the presiding judge all estates wherein an inventory or report is due by law or under the order of the court, and which has not been filed. [C97,§3269; C24, 27, 31, 35,§11845.]

11845.1 Consular representatives — notice. Whenever in the course of any administration or guardianship proceeding, it shall appear that subjects, citizens and/or nationals of any foreign country are interested, either as heirs, devisees, legatees, or otherwise, the clerk of the probate court shall give notice by mail to the consular representative of such country for Iowa, of the pendency of such proceeding and of the particular interest of such foreign subject. Failure to give such notice shall in no event and in no manner affect title to property. Notice need not be given unless the consular representative shall have filed his address with the clerk. [C27, 31, 35,§11845-b1.]

Analogous provision, §1413

CHAPTER 505

WILLS AND LETTERS OF ADMINISTRATION

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GENERAL PROVISIONS

11846 Disposal of property by will. Any person of full age and sound mind may dispose by will of all his property, subject to the rights of homestead and exemption created by law, and the distributive share in his estate given by law to the surviving spouse, except sufficient to pay his debts and expenses of administration. [C51, §1277; R60,§2309; C73,§2322; C97,§3270; C24, 27, 31, 35,§11846.]

40ExGA, SF 237, §1, editorially divided

11847 Presumption attending devise to spouse. Where the survivor is named as a devisee in a will, it shall be presumed, unless the intention is clear and explicit to the contrary, that such devise is in lieu of such distributive share, homestead, and exemptions. [C97,§3270; C24, 27, 31, 35,§11847.]

11848 Limitation on disposal by will. No devise or bequest to a corporation organized under the chapter relating to corporations not for profit or to a foreign corporation of a similar character, or to a trustee for the use or benefit of any such corporation, shall be valid in excess of one-fourth of the testator's estate after the payment of debts, if a spouse, child, child of deceased child, or parent survive the testator. [C51,§1277; R60,§§1198, 2309; C73,§§1101, 2322; C97,§3270; C24, 27, 31, 35,§11848.]

11849 After-acquired property. Property to be subsequently acquired may be devised, when the intention is clear and explicit. [C51, §1278; R60,§2310; C73,§2323; C97,§3271; C24, 27, 31, 35,§11849.]

11850 Verbal wills. Personal property to the value of three hundred dollars may be bequeathed by a verbal will witnessed by two competent persons, but if such bequest is of greater value, it shall be valid only to that extent. [C51, §1279; R60,§2311; C73,§2324; C97,§3272; C24, 27, 31, 35, §11850.]

11851 Soldier or mariner. A soldier in actual service, or a mariner at sea, may dispose of all his personal estate by a will so made and witnessed. [C51,§1280; R60,§2312; C73,§2325; C97,§3273; C24, 27, 31, 35,§11851.]

11852 Formal execution. All other wills, to be valid, must be in writing, signed by the testator, or by some person in his presence and by his express direction writing his name thereto, and witnessed by two competent persons. [C51,§1281; R60,§2313; C73,§2326; C97,§3274; C24, 27, 31, 35,§11852.]

C97,§3274, editorially divided

11853 Defect cured by codicil. If a codicil is duly executed to a will defectively executed and clearly identified in such codicil, the will and codicil shall be considered one instrument and the execution of both sufficient. [C97,§3274; C24, 27, 31, 35,§11853.]

11854 Interest of witness. No subscribing witness to a will can derive any benefit therefrom unless it be signed by two competent and disinterested persons as witnesses thereto, besides himself, but if, without a will, he would be entitled to any portion of the testator's estate, he may receive such portion to the extent in value of the amount devised. [C51,§§1282, 1283; R60,§§2314, 2315; C73,§§2327, 2328; C97,§3275; C24, 27, 31, 35,§11854.]

11855 Revocation—cancellation. Wills can only be revoked in whole or in part by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will. [C51,§§1288, 1289; R60,§§2320, 2321; C73,§§2329, 2330; C97,§3276; S13,§3276; C24, 27, 31, 35,§11855.]

11856 Deposit with clerk. A will sealed up and indorsed may be deposited with the clerk of the court, who shall file and preserve the same until the death of the testator, unless he sooner demands it. [C51,§1290; R60,§2322; C73,§2331; C97,§3277; C24, 27, 31, 35,§11856.]

11857 Executors. If no executors are named in a will, or if those named fail to qualify and act, the court admitting it to probate shall appoint one or more to carry it into effect. [C51, §§1299, 1302; R60,§§2331, 2334; C73,§§2332, 2333; C97,§3278; C24, 27, 31, 35,§11857.]

Banks as executors, ch 416

11858 After-born children. Whenever a testator shall have a legitimate child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child so after-born unprovided for by any settlement, and neither provided for nor mentioned in such will, every such child shall succeed to and inherit the same interest in such parent's real and personal estate as though no will had been made, and the said interest shall be taken ratably from the interests of heirs, devisees, and legatees. [C51,§§1284, 1285; R60, §§2316, 2317; C73,§§2334, 2335; C97,§3279; S13, §3279; C24, 27, 31, 35,§11858.]

11859 Claims in disregard of will. All claims which it becomes necessary to satisfy, and all amounts necessary to be paid from the estate of a testator in disregard of or in opposition to the provisions of a will, shall be taken ratably from the interests of heirs, devisees, and legatees. [S13,§3279-a; C24, 27, 31, 35,§11859.]

11860 Devise—legacy—bequest. The word "devisee", as used in this title, shall, when applicable, be construed to embrace "legatees", and the word "devised" shall, in like cases, be understood as comprising the word "bequeathed". [C51,§1286; R60,§2318; C73,§2336; C97,§3280; C24, 27, 31, 35,§11860.]

11861 Heirs of devisee. If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest. [C51, §1287; R60,§2319; C73,§2337; C97,§3281; C24, 27, 31, 35,§11861.]

11862 Custodian—filing—penalty. Any person having the custody of a will shall, as soon as he is informed of the death of the testator, file the same with the clerk. Any person who fails to produce the same after receiving reasonable notice so to do may be committed to jail until he does, and shall be liable for all damages occasioned by his failure. [C51,§§1291, 1292; R60, §§2323, 2324; C73,§§2338, 2339; C97,§3282; C24, 27, 31, 35,§11862.]

Criminal offenses, §13050

11863 Probate. After the will is produced, the clerk shall open and read the same, and a day shall be fixed by the court or clerk for proving it, which may be postponed from time to time in the discretion of the court. [C51,§1293; R60,§2325; C73,§2340; C97,§3283; C24, 27, 31, 35,§11863.]

C97,§3283, editorially divided

11864 Contest — jury trial. When the probate of a will is contested, either party to the contest shall be entitled to a jury trial thereon. [C97,§3283; C24, 27, 31, 35,§11864.]

Guardian ad litem, §12074
Limitation on action to set aside, §11007, subsection 3

11865 Notice of hearing. The clerk shall give notice of the time fixed, by publishing a notice, signed by himself and addressed to all whom it may concern, in a daily or weekly newspaper printed in the county where the will is filed, once each week, for three consecutive weeks, the last publication of which shall be at least ten days before the time fixed for such hearing. The court or the judge in vacation, or clerk, in his discretion, may prescribe a different notice. [C51,§1294; R60,§2326; C73,§2341; C97,§3284; S13,§3284; C24, 27, 31, 35,§11865.]

11866 Proof—depositions. The proof may be made by the oral testimony of the subscribing witnesses taken in open court, or by deposition when they reside outside of the state or judicial district in which the will is to be proven. When by deposition, the court or judge shall order the issuance of a commission to some officer authorized by the laws of this state to take depositions, with the will annexed, and the officer taking the deposition shall exhibit it to the witness for identification, and, when identified by him, shall mark it as "exhibit.....", and cause the witness to connect his identification with it as such exhibit. Before sending the commission out, the clerk shall make and retain in his office a true copy of such will. [C97,§3285; C24, 27, 31, 35,§11866.]

Additional proof authorized, §11277

11867 Certificate of probate. A will, when admitted to probate, shall have a certificate of such fact indorsed thereon or annexed thereto, signed by the clerk and attested by the seal of the court; and, when so certified, it or the record thereof, or the transcript of such record properly authenticated, may be read in evidence in all courts without further proof. [C51,§1300; R60,§2332; C73,§2342; C97,§3286; C24, 27, 31, 35,§11867.]

11868 Record — copy for executor. After being proved and allowed, the will, together with the certificate hereinbefore required, shall be recorded in a book kept for that purpose, and the clerk shall cause the same, or an authenticated copy thereof, to be placed in the hands of the executor therein named or otherwise appointed. [C51,§§1295, 1298; R60,§§2327, 2330; C73,§§2343, 2344; C97,§3287; S13,§3287; C24, 27, 31, 35,§11868.]

S13,§3287, editorially divided

11869 Record in foreign county. Whenever it shall appear that the testator died seized of real estate located in a county of this state other than that in which probate is granted, a complete transcript, properly authenticated, of the record entry of the order of court admitting the will to probate, and, if a copy of such will is not contained therein, a certified copy of such will shall be attached thereto and the same shall be filed by the clerk in the office of the clerk of the district court in such other county, who shall cause the same to be entered in the probate docket, and said transcript shall be recorded in full in the book kept for the recording of wills in such county. When so recorded such record may be read in evidence in all courts without further proof. [S13,§3287; C24, 27, 31, 35, §11869.]

11870 Costs of transcript. The cost of such transcript and of the recording thereof shall be taxed against the estate of the decedent unless administration thereof is closed, in which event it shall be paid by the owner of the real estate involved. [S13,§3287; C24, 27, 31, 35,§11870.]

11871 Married woman as executor. A married woman may act as executor, independent of her husband. [C51,§1304; R60,§2336; C73, §2345; C97,§3288; C24, 27, 31, 35,§11871.]

11872 Minors as executors. If a minor under eighteen years of age is nominated as an executor, there will be a vacancy as to him until he reaches that age. [C51,§1305; R60,§2337; C73,§2346; C97,§3289; C24, 27, 31, 35,§11872.]

11873 Vacancies. If a person nominated as executor refuses to accept the trust, or neglects to appear within ten days after his appointment and give bond as hereinafter prescribed, or if an executor removes his residence from the state, the office shall be vacant. [C51,§1303; R60,§2335; C73,§2347; C97,§3290; C24, 27, 31, 35,§11873.]

11874 Filling vacancies. In case of a vacancy, letters of administration with the will annexed may be granted to some other person, or, if there be another executor competent to act, he may be allowed to proceed by himself in administering the estate. [C51,§1307; R60, §2339; C73,§2348; C97,§3291; C24, 27, 31, 35, §11874.]

11875 Substitution — effect. The substitution of other executors shall occasion no delay in the administration of the estate. The periods hereinafter mentioned within which acts are to

be performed after the appointment of executors shall all, unless otherwise declared, be computed from the issuing of the letters to the first general executor. [C51,§1308; R60,§2340; C73, §2349; C97,§3292; C24, 27, 31, 35,§11875.]

11876 Trustees to give bond. Trustees appointed by will or by the court must qualify and give bonds the same as executors, and shall be subject to control or removal by it in the same manner, and others appointed. [C73,§2350; C97, §3293; C24, 27, 31, 35,§11876.]

Conditions of bond, §§1059, 1061
Investment of funds, §12772
Similar provision, §10764

11877 Foreign probated wills. A will probated in any other state or country shall be admitted to probate in this state, without the notice required in the case of domestic wills, on the production of a copy thereof and of the original record of probate, authenticated by the attestation of the clerk of the court in which such probation was made, or, if there be no clerk, by the attestation of the judge thereof, and the seal of office of such officers, if they have a seal. [C51,§1296; R60,§2328; C73,§2351; C97,§3294; C24, 27, 31, 35,§11877.]

11878 Foreign wills—procedure. All provisions of law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to probate in this state. [C73,§2352; C97,§3295; C24, 27, 31, 35,§11878.]

C97,§3295, editorially divided

11879 Sales. If the executors or trustees under such wills are empowered to sell and convey real estate, then, upon the production and recording in the proper probate record of a copy of the original record of the appointment, qualification, and bond, unless bond was waived in the will, duly authenticated in the manner foreign wills are required to be, such executors or trustees may, in conformity with the power granted in such wills, sell and convey real estate within any county in this state where such probate and proof of qualification may be of record, without further qualifying in this state, and without reporting such sale to the district court in this state for approval. [C97,§3295; C24, 27, 31, 35,§11879.]

11880 Effect — pending domestic appointment. Such sales and conveyances shall have the same force as if made by executors or trustees qualified within this state and reported to and approved by the district court, unless, at the time of the execution and delivery of said deed, letters testamentary or of administration upon the estate of such decedent shall have been granted in this state and remain in force, and due notice thereof has been given in such county, if other than one in which such letters were granted here, as required in reference to actions affecting real estate; in which case, any conveyance shall be made subject to all the rights acquired under the appointment and letters granted in this state. [C97,§3295; C24, 27, 31, 35,§11880.]

11881 Time limit on sales. No such conveyance shall be made by such executor or trustee until three months after the recording of a duly authenticated copy of the will, original record of appointment, and qualification and bond, unless bond was waived in the will, in the proper probate record of the county where the land is situated. [C97,§3295; C24, 27, 31, 35,§11881.]

11882 Probate conclusive — setting aside. Wills, foreign or domestic, shall not be carried into effect until admitted to probate as hereinbefore provided, and such probate shall be conclusive as to the due execution thereof, until set aside by an original or appellate proceeding. [C51,§1297; R60,§2329; C73,§2353; C97,§3296; C24, 27, 31, 35,§11882.]

Limitation on action to set aside, §11007, subsection 3

11883 Administration granted. In other cases, where an executor is not appointed by will, administration shall be granted to any suitable person or persons on the request and application of:

1. The surviving spouse.
2. The next of kin.
3. Creditors.
4. Any other person showing good grounds therefor. [C51,§§1311, 1312; R60,§§2343, 2344; C73,§§2354, 2355; C97,§3297; C24, 27, 31, 35, §11883.]

Banks as administrators, ch 416

11884 Time allowed. To each of the above classes, in succession, a period of twenty days, commencing with the burial of the deceased, is allowed within which to apply for administration. [C51,§1313; R60,§2345; C73,§2356; C97,§3298; C24, 27, 31, 35,§11884.]

11885 Special administrators. When, from any cause, general administration or probate of a will cannot be immediately granted, one or more special administrators may be appointed to collect and preserve the property of the deceased, and no appeal from such appointment shall prevent their proceeding in the discharge of their duties. [C51,§§1320, 1321; R60,§§2352, 2353; C73,§§2357, 2358; C97,§3299; C24, 27, 31, 35, §11885.]

11886 Inventory—preservation of property. They shall make and file an inventory of the property of the deceased in the same manner as is required of general executors or administrators, and shall preserve such property from injury, and for that purpose may do all needful acts under the direction of the court, but shall take no steps in relation to the allowance of claims against the estate. Upon the granting of full administration, the powers of the special administrators shall cease, and all the business be transferred to the general executor or administrator. [C51,§§1322–1324; R60,§§2354–2356; C73,§§2359–2361; C97,§3300; C24, 27, 31, 35,§11886.]

11887 Bond—oath. Every executor or administrator, except as herein otherwise declared, before entering on the discharge of his duties, must give a bond in such penalty as may be

required by the court, to be approved by the clerk, conditioned for the faithful discharge of the duties imposed on him by law, according to the best of his ability, and take and subscribe an oath the same in substance as the condition of the bond, which oath and bond must be filed with the clerk. [C51,§§1316, 1317; R60,§§2348, 2349; C73,§§2362, 2363; C97,§3301; C24, 27, 31, 35,§11887.]

Conditions of bond, §§1059, 1061
Exemption from bond, §11955
Premiums paid by estate, §12764

11888 New bond. New bonds may be required by the court or judge thereof, to be given in a new penalty and with new securities, when it is found necessary. [C51,§1318; R60, §2350; C73,§2364; C97,§3302; C24, 27, 31, 35, §11888.]

11889 Letters. After filing the bond, the clerk shall issue letters testamentary or of administration, as the case may be, under the seal of the court, giving the executor or administrator the power authorized by law. [C51, §1319; R60,§2351; C73,§2365; C97,§3303; C24, 27, 31, 35,§11889.]

Investment of funds, §12772

11890 Notice of appointment. The executors or administrators first appointed and qualified for the settlement of the estate shall, within ten days after the receipt of their letters, publish such notice of their appointment as the court or clerk may direct, which direction shall be indorsed on the letters when issued and entered of record in the probate docket. [C51, §§1357, 1358; R60,§§2389, 2390; C73,§2366; C97,§3304; C24, 27, 31, 35,§11890.]

Legalizing act, §10407

11891 Limitation on administration. Administration shall not be originally granted after five years from the death of the decedent, or from the time his death was known, in case he died out of the state. [C51,§1325; R60, §2357; C73,§2367; C97,§3305; S13,§3305; C24, 27, 31, 35,§11891.]

11892 Exception—newly discovered personalty. When personal property belonging to the estate of decedent is discovered after the expiration of said five years, administration may be granted after the five-year limit, for the purpose only of making proper disposition and distribution thereof. [S13,§3305; C24, 27, 31, 35, §11892.]

11893 Will executed in foreign state or country. A last will and testament executed without this state, in the mode prescribed by the law, either of the place where executed or of the testator's domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided said last will and testament is in writing and subscribed by the testator. [C97,§3309; C24, 27, 31, 35,§11893.]

APPOINTMENT OF FOREIGN ADMINISTRATOR

11894 Authorization. If administration of the estate of a deceased nonresident has been granted in accordance with the laws of the state or country where he resided at the time of his death, the person to whom it has been committed may, upon his application and upon qualifying in the manner required of nonresident executors, be appointed to administer upon the property of the deceased in this state, unless another had been previously appointed. [C51, §1309; R60,§2341; C73,§2368; C97,§3306; C24, 27, 31, 35,§11894.]

C97,§3306, editorially divided

11895 Conditions attending appointment. The original letters or other authority conferring his power upon such administrator, or an attested copy thereof, must be filed and recorded with the clerk of the proper court, and a bond, with resident sureties, given in such an amount as the court shall prescribe, conditioned for the payment of all claims allowed to residents of the state, and the payment of all legacies and distributive shares coming to such residents, so far as the assets thereof shall extend, before such appointment can be made. [C51,§1310; R60,§2342; C73,§2369; C97,§3306; C24, 27, 31, 35,§11895.]

11896 Removal of property — payment of claims. In such cases, the court or judge may require payment of all claims filed and allowed or proved belonging to residents of this state, and of all legacies or distributive shares payable to such residents, before allowing the estate to be removed from the state. [C97,§3306; C24, 27, 31, 35,§11896.]

ASSIGNMENTS AND SATISFACTIONS BY FOREIGN FIDUCIARY OFFICERS

11897 Mortgages and judgments. Judgments rendered by any court in the state of Iowa, and mortgages, or deeds of trust executed as mortgages, on property in this state, and belonging to an estate, trust, or to a person under guardianship may, in whole or in part as to any particular property, be released and discharged or be assigned by an executor, administrator, guardian, trustee, receiver, referee, assignee, or commissioner, or anyone acting in a fiduciary capacity appointed by a court of record of any foreign state or country, when no resident executor, administrator, guardian, receiver, referee, assignee, commissioner, or person acting in a fiduciary capacity has been appointed or qualified in this state. Such release, satisfaction, discharge, or assignment may be made in any manner or by any instrument which would be valid and effective if made by a like officer qualified under the law of this state. [S13,§3307-a; C24, 27, 31, 35,§11897.]

11898 Certificate of appointment and authority. Before a release, satisfaction, discharge, or assignment by such foreign officer shall be effective, a certificate executed by the

judge or clerk of the court making the appointment, with seal attached, if such officer has a seal, shall be recorded. Said certificate shall show the name of the court making the appointment, the date of the same, and that such foreign officer has not been discharged at the time of the execution of the release, satisfaction, discharge, or assignment and is authorized to execute the same. [C97,§3308; SS15,§3308; C24, 27, 31, 35,§11898.]

11899 Filing of certificate. The certificate aforesaid shall be filed for record:

1. In case of judgments, in the office of the clerk of the court in which the judgment is of record or in which it has been filed, or

2. In case of mortgages, or deeds of trust, in the office of the county recorder of the county in which the mortgage or deed of trust is of record. [C97,§3308; SS15,§3308; C24, 27, 31, 35, §11899.]

11900 Record—index of satisfaction. Such certificate shall be recorded by the proper officer in the judgment records of the court in which the same appears of record, or in the appropriate chattel or real estate records, as the case may be, and the record of such release, satisfaction, discharge, or assignment shall be properly indexed. [C97,§3308; SS15,§3308; C24, 27, 31, 35,§11900.]

CHAPTER 506

ESTATES OF ABSENTEES

Guardianship, ch 542

11901 Administration authorized—petition.
11902 Notice.
11903 Service.
11904 Proof of service—filing.
11905 Hearing—continuance—orders.
11906 Administration.
11907 Sale of real estate.
11908 Procedure in sale of real estate.
11909 Decree as to heirs.
11910 Additional notice.
11911 Rights of absentee barred—sale by spouse.

11901 Administration authorized—petition. Administration may be had on the estate of an absentee. A petition therefor must be filed in the office of the clerk of the district court and must allege:

1. That the absentee was a resident of this state and has, without known cause, absented himself from his usual place of residence, and concealed his whereabouts from his family, for a period of seven years.

2. That said absentee has property in this state (describing it with reasonable certainty), all or part of which is situated in the county in which the petition is filed.

3. The names of the persons, so far as known to the petitioner, who would be entitled to share in the estate of the absentee if he were dead.

4. Facts showing that the petitioner is a party who would be entitled to administer on the estate of said absentee in case the absentee were known to be dead. [C97,§3307; S13,§3307; C24, 27, 31, 35,§11901.]

11902 Notice. Upon the filing of such petition, the court, or a judge thereof in vacation, shall prescribe the notice and the return day therein, which shall be addressed to and served upon said absentee and the said beneficiaries of his estate. [C97,§3307; S13,§3307; C24, 27, 31, 35,§11902.]

11903 Service. Said notice shall in all cases be served:

1. By publication in the county in which the petition is filed, once each week for eight consecutive weeks, in a newspaper designated by the court or judge, and

2. Personally upon all the known or alleged beneficiaries of the estate of said absentee, residing within the state, in the manner and for the length of time required for the service of original notices. [C97,§3307; S13,§3307; C24, 27, 31, 35,§11903.]

Time and manner of service, §§11059, 11060

11904 Proof of service — filing. Proof of the publication and personal service of said notice shall be filed with the clerk aforesaid on or before the day set for hearing. [C97,§3307; S13,§3307; C24, 27, 31, 35,§11904.]

11905 Hearing — continuance — orders. If, on the day set for hearing, the absentee fails to appear, the court shall appoint some disinterested person to appear for the absentee and all beneficiaries not appearing, and said cause shall thereupon stand continued until the next term of said court, and the court shall have authority to make further continuance upon proper showing. Said person shall investigate the matters and things alleged in the petition. The court shall hear the proofs and, if satisfied of the truth of the allegations of the petition, shall order the issuance of letters of administration upon the estate of said absentee as though said absentee were known to be dead. [C97,§3307; S13,§3307; C24, 27, 31, 35,§11905.]

11906 Administration. The person to whom the administration is granted shall proceed to administer and dispose of the estate in the same manner that administrators are required to dispose of and administer the estates of decedents. [S13,§3307-a; C24, 27, 31, 35,§11906.]

11907 Sale of real estate. Such administrator may, under the orders of the court, sell and dispose of all real estate and other property owned by such absentee, and after the payment of legal costs, expenses, and claims, make distribution of the proceeds thereof to the persons

entitled thereto. [S13,§3307-a; C24, 27, 31, 35, §11907.]

11908 Procedure in sale of real estate. The provisions of law regarding application, notice, and manner of sale of real estate for the payment of debts by administrators shall be followed so far as applicable. [S13,§3307-a; C24, 27, 31, 35,§11908.]

Procedure for sale, §11933 et seq.

11909 Decree as to heirs. Prior to any order of distribution, the court shall hear proof and determine the legal heirs and beneficiaries of said absentee, and their respective interests in such estate. [S13,§3307; C24, 27, 31, 35,§11909.]

11910 Additional notice. Before determining said heirs and beneficiaries the court may prescribe further and additional notices and the service thereof. [C24, 27, 31, 35,§11910.]

11911 Rights of absentee barred — sale by spouse. Administration upon the estate of an absentee shall forever bar his or her right of homestead and statutory distributive share or interest in and to any real estate owned or held by the spouse of such absentee, or in which said spouse may have a legal or equitable interest, and a conveyance thereof by such spouse after one year from and after such administration has been granted, shall be free and clear of any claim or right of homestead or statutory distributive share on the part of such absentee. [S13, §3307-b; C24, 27, 31, 35,§11911.]

CHAPTER 507

SETTLEMENT OF ESTATES

Referred to in §3828.021

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11912 Rep. by 42GA, ch 181

11913 Inventory and report. Within thirty days after his qualification, each executor, administrator, or testamentary trustee shall, any will to the contrary notwithstanding, make and return to the clerk, under oath, a full and detailed report, and inventory of the property of the deceased, as far as the same has come to his knowledge, as follows:

1. Name and last residence of decedent.
2. Date of death.
3. Whether decedent left a will.
4. Name and post-office address of executor, administrator, or trustee.

5. Name, age, and post-office address of surviving wife or husband, if any.

6. If testate, name, age, and post-office address of each beneficiary under will.

7. Relationship of each beneficiary to the testator.

8. If intestate, name, age, and post-office address of each heir at law.

9. Relationship of each heir at law to decedent.

10. Inventory of all the real estate of the decedent, giving amount, and an accurate description of each tract.

11. Whether the property passes in possession and enjoyment in fee, for life, or for a term of years.

12. Personal property inventoried as general assets of the deceased.

13. Personal property regarded as exempt.

14. Notes, bonds, stocks, book accounts, and like items. [C51,§1328; R60,§2360; C73,§2370; C97,§3310; S13,§1481-a26; C24,§§7319, 11913; C27, 31, 35,§11913.]

Referred to in §§7320, 7378
State tax commission to furnish blanks, §7320

11913.1 Reporting failure to court. The failure of the executor, administrator, or trustee promptly to make said report shall be forthwith reported by the clerk to the district court if in session, or to a judge thereof, if in vacation, for such order as may be necessary to enforce the making and filing of said report. [C27, 31, 35, §11913-b1.]

11914 Supplemental inventories. A supplemental inventory must be made in the same manner whenever the existence of additional property is discovered. [C51,§1333; R60,§2365; C73,§2376; C97,§3310; C24, 27, 31, 35,§11914.]

C97,§3310, editorially divided

11915 Filing mandatory. Inventories as above provided must be filed in all cases, notwithstanding the provisions of any will or the action of any heirs or devisees waiving the filing thereof, and no administration shall be closed until the same has been filed. The court shall enforce the filing thereof whenever the executor or administrator fails to do so. [C97, §3310; C24, 27, 31, 35,§11915.]

11916 Appraisement—waiver. All personal property inventoried by the executor or administrator shall be valued by three appraisers, who shall be appointed immediately on the filing of the inventory unless the court or judge or clerk of the district court in vacation shall by an order entered of record waive the valuation of the property so inventoried. [C51,§1331; R60, §2363; C73,§2373; C97,§3311; S13,§3311; C24, 27, 31, 35,§11916.]

Appraisement for inheritance tax, §7330 et seq.
S13,§3311, editorially divided

11917 Qualification—duties. The clerk shall issue to them a notice of their appointment, accompanied by a copy of the inventory returned by the executor or administrator, and they shall qualify by taking an oath faithfully and impartially to make the required valuation, and in making the same they shall fix a value to each item of property separately as it appears in the inventory. If any portion of the decedent's personal property is situated in another county, the same appraisers may serve, or others may be appointed. [C51,§1332; R60,§2364; C73,§§2374, 2378; C97,§3311; S13,§3311; C24, 27, 31, 35, §11917.]

11918 Exempt personal property. When the deceased leaves a widow, all personal property which in his hands as the head of a family would be exempt from execution, after being inventoried and appraised, shall be set apart to her as her property, and be exempt in her hands as in the hands of the decedent. [C51,§1329; R60, §2361; C73,§2371; C97,§3312; C24, 27, 31, 35, §11918.]

11919 Proceeds of insurance. The avails of any life or accident insurance, or other sum of money made payable by any mutual aid or benevolent society upon the death or disability of a member thereof, are not subject to the debts of the deceased, except by special contract or arrangement, and shall be disposed of like other property left by the deceased. [C51,§1330; R60, §2362; C73,§§1182, 2372; C97,§3313; C24, 27, 31, 35,§11919.]

Similar provisions, §§8684.13, 8776, 8796
C97,§3313, editorially divided

11920 Damages for wrongful death. When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts. [R60,§4111; C73,§2526; C97,§3313; C24, 27, 31, 35,§11920.]

11921 When "heir" embraces surviving spouse. The words "heirs", or "legal heirs" or other equivalent words used to designate the beneficiaries in any life insurance policy or certificate of membership in any mutual aid or benevolent association, where no contrary intention is expressed in such instrument, shall be construed to include the surviving husband or wife of the insured. [C97,§3313; C24, 27, 31, 35, §11921.]

11922 Share of survivor. The share of such survivor in the proceeds of such policy or certificate made payable as aforesaid shall be the same as that provided by law for the distribution of the personal property of intestates. [C97,§3313; C24, 27, 31, 35,§11922.]

Distribution of personal property, §11986

11923 Allowance to widow and children. The court shall, if necessary, set off to the widow and children of the decedent under fifteen years of age, or to either, sufficient of his property, of such kind as is appropriate, to support them for twelve months from the time of his death, and may, on the petition of the widow or other person interested, review such allowance and increase or diminish the same, and make such orders in the premises as shall be right and

proper. [C51,§1338; R60,§2370; C73,§§2375, 2377; C97,§3314; C24, 27, 31, 35,§11923.]

C97,§3314, editorially divided

11924 Application for allowance. Applications for such allowance shall state under oath the number of children under fifteen years of age, the amount of property already set apart to the widow, the value of her deceased husband's estate, the amount of its indebtedness, the value of all property owned by the widow, and what allowance, if any, has heretofore been made to her. [C97,§3314; C24, 27, 31, 35,§11924.]

11925 Discovery of assets. The court or judge may require any person suspected of having taken wrongful possession of any of the effects of the deceased, or of having had such effects under his control, to appear and submit to an examination under oath touching such matters, and if on such examination it appears that he has the wrongful possession of any such property, the court or judge may order the delivery thereof to the executor or administrator. [C51,§1334; R60,§2366; C73,§2379; C97,§3315; C24, 27, 31, 35,§11925.]

Referred to in §11927
Analogous provisions, §§11818, 12719.3

11926 Commitment. If, on being served with the order of the court or judge requiring him to do so, any person fails to appear in accordance therewith, or if, having appeared, he refuses to answer any question which the court or judge thinks proper to be put to him in the course of such examination, or if he fails to comply with the order of the court or judge requiring him to deliver the property to the executor or administrator, he may be committed to the jail of the county until he does. [C51,§1335; R60,§2367; C73,§2380; C97,§3316; C24, 27, 31, 35,§11926.]

Referred to in §11927

11927 Recovering transferred real estate. When it is probable that the known and acknowledged property of the deceased will not be sufficient for the payment of his debts, any person to whom the legal title of any real estate was conveyed by the decedent, or any person through whom such title has subsequently passed, or any person claiming an interest therein, may be required to appear and submit to an examination as provided in sections 11925 and 11926, subject to the penalties therein described, and the court or judge shall direct the executor or administrator to file a petition in equity to secure to the estate the title to any real estate which, in the event of the insufficiency of the personal property, would be assets for the payment of debts. [C73,§2381; C97,§3317; C24, 27, 31, 35,§11927.]

11928 Compounding claims. The executor or administrator, with the approval of the court, may compound with any debtor of the estate who may be thought unable to pay his whole debt. [C51,§1336; R60,§2368; C73,§2382; C97, §3318; C24, 27, 31, 35,§11928.]

11929 Mortgage as assets — satisfaction. The interest of a deceased mortgagee shall be included among his personal assets and, upon the mortgage being paid off, satisfaction shall be entered by the executor or administrator. [C51,§1337; R60,§2369; C73,§2383; C97,§3319; C24, 27, 31, 35,§11929.]

11930 Unauthorized devise or bequest — security to sustain. When a person by his will makes such a disposition of his effects as to prejudice the rights of creditors, the will may be sustained, by giving security to the satisfaction of the court for the payment of the claims of the creditors, to the extent of the value of the property devised. [C51,§1339; R60,§2371; C73, §2384; C97,§3320; C24, 27, 31, 35,§11930.]

11931 Funds collected—paid out. When no different direction is given by will, debts due the estate, as far as practicable, shall be collected, and the debts owing by the estate paid off therewith, to the extent of the means thus obtained. [C51,§1340; R60,§2372; C73,§2385; C97,§3321; C24, 27, 31, 35,§11931.]

Investment of funds, §12772

11932 Sale of personal property. The court, on the application of the executor, administrator or trustee, from time to time shall direct the sale of such portions of the personal effects as are of a perishable nature, or which from any cause would otherwise be likely to depreciate in value, and also such portions as are necessary to pay off the debts and charges upon the estate. [C51,§1341; R60,§2373; C73,§2386; C97,§3322; C24, 27, 31, 35,§11932; 48GA, ch 242,§1a.]

11932.1 Mortgage of personal property. Upon application by the administrator, executor or trustee the court or judge may, on such notice as shall be prescribed by the court to be given to all heirs in the estate, authorize the administrator, executor or trustee to mortgage or incumber the personal property of the estate as would be to the best interests thereof, either to pay debts or to preserve assets or enhance the value thereof. [48GA, ch 242,§1.]

See also §9752

11933 Sale or mortgage of real estate—application. If the personal effects are found inadequate to satisfy the debts and charges, a sufficient portion of the real estate may be ordered sold or mortgaged for that purpose, application therefor being made in the court granting administration, and only after a full statement of all the claims against the estate, and after rendering a full account of the disposition made of the personal estate. [C51,§§1342, 1343; R60, §§2374, 2375; C73,§§2387, 2388; C97,§3323; C24, 27, 31, 35,§11933.]

Applicability to guardianship, §12595

11934 Rep. by 41GA, ch 191

11935 Time, place of hearing, and service. The court or judge shall fix the time and place of hearing of the application, and prescribe the time and manner of service of the notice of such hearing on all persons interested in such real

estate. [C51,§1344; R60,§2376; C73,§2389; C97, §3324; C24,§§11934, 11935; C27, 31, 35,§11935.]

Referred to in §11951.5
Guardian ad litem, §12074
Service by publication, §11081, subsection 11

11936 Order conditional on service. No order for the sale or mortgage of such real estate shall be granted until proof of service as above provided is made. [C51,§1344; R60,§2376; C73,§2389; C97,§3324; C24, 27, 31, 35,§11936.]

Referred to in §11951.5

11937 Method of sale. The real estate shall, when to the interest of the estate, be divided into parcels, appraised as the personal estate was, and the appraisement filed in like manner; but when a part cannot be sold without material prejudice to the general interests of the estate, the court may order the sale of the whole, or of such parts as can be sold advantageously. [C51, §§1345, 1346; R60,§§2377, 2378; C73,§§2390, 2391; C97,§3325; C24, 27, 31, 35,§11937.]

Appraisement of personal property, §11916 et seq.

11938 Public or private sale — notice — credit. Property may be permitted to be sold at private sales when the court is satisfied that the interest of the estate will be thereby promoted, but in other cases sales must be made at public auction, after giving the same notice as is necessary for the sale of like property on execution, but it may be ordered to be sold on a partial credit of not more than twelve months. [C51,§§1347, 1348, 1350; R60,§§2379, 2380, 2382; C73,§§2392, 2393, 2395; C97,§3326; C24, 27, 31, 35,§11938.]

Notice of sale, §11722 et seq.
C97,§3326, editorially divided

11939 Limitation on private sale. No property can be sold at private sale for less than the appraisement, without the express approval of the court or judge. [C51,§1349; R60,§2381; C73,§2394; C97,§3326; C24, 27, 31, 35,§11939.]

11940 Borrowing money. If the court is satisfied that it will be for the best interest of the estate that the real estate shall be withheld, it may, upon the application hereinbefore provided for, order the executor or administrator to borrow money thereon, and execute a note or notes in the name of such officer, secured by mortgage on any real estate belonging to the estate not exempt as a homestead, to secure the payment thereof, and with the proceeds pay the debts shown in the statement set out in the application, and report his action therein to the court. [C97,§3327; C24, 27, 31, 35,§11940.]

11941 Bond to prevent sale. Any person interested in the estate may prevent a sale of the whole or any part of the real estate by giving bond to the satisfaction of the court, conditioned that he will pay all demands against the estate to the extent of the value of the property thus kept from sale, as soon as called upon by the court for that purpose. [C51,§1351; R60, §2383; C73,§2396; C97,§3328; C24, 27, 31, 35, §11941.]

Referred to in §11951.5
C97,§3328, editorially divided

11942 Breach of bond—procedure. If the conditions of such bond are broken, the property will be liable for the debts unless it has passed into the hands of innocent purchasers, and the executor or administrator may take possession thereof and sell it under the direction of the court, or he may prosecute the bond, or pursue both remedies at the same time, if the court so directs. [C51,§1352; R60,§2384; C73,§2397; C97,§3328; C24, 27, 31, 35,§11942.]

Referred to in §11951.5

11943 Effect of bond. If the conditions of the bond are complied with, the property shall pass by devise, distribution, or descent in the same manner as though there had been no debts against the estate. [C51,§1353; R60,§2385; C73, §2398; C97,§3329; C24, 27, 31, 35,§11943.]

Referred to in §11951.5

11944 Report for approval. All sales, deeds, and mortgages shall be reported to the court for approval as soon as practicable after being made. [C97,§3331; C24, 27, 31, 35,§11944.]

Referred to in §11951.6
C97,§3331, editorially divided

11945 Requirements. Reports of the sale or mortgage of real estate must be sworn to, and state:

1. The term at which the order therefor was obtained.
2. Whether the property was appraised, and, if so, the appraised value.
3. Whether sold at public or private sale.
4. The terms of sale.
5. Whether the additional bond required has been given and approved.
6. The opinion of the persons making them as to whether the sale is an advantageous one and should be approved, or otherwise. [C97, §3331; C24, 27, 31, 35,§11945.]

Referred to in §11951.6

11946 Approval by court required. When real estate is sold or mortgaged, the conveyances or mortgages thereof, executed by the executor or administrator, shall not be valid until approved by the court. [C51,§1354; R60,§2386; C73,§2399; C97,§3330; C24, 27, 31, 35,§11946.]

Referred to in §11951.6
Guardian ad litem, §12074
C97,§3330, editorially divided

11947 Approval recorded and indorsed. Said approval shall be entered of record, and a certificate thereof indorsed on the deed or mortgage, with the signature of the clerk and the seal of the court affixed thereto. [C51,§1355; R60,§2387; C73,§2400; C97,§3330; C24, 27, 31, 35,§11947.]

Referred to in §11951.6

11948 Effect of conveyance — presumption. When so indorsed, said conveyance or mortgage shall pass to the purchaser all the interest of the deceased therein prior to his death, in case of sales, and create a lien thereon, in case of mortgages, and be presumptive evidence of the validity thereof, and of the regularity of all the proceedings connected therewith. [C51,§1355;

R60,§2387; C73,§2400; C97,§3330; C24, 27, 31, 35,§11948.]

Referred to in §11951.6

11949 Record in foreign county. When the subject of the sale, conveyance, or mortgage is located in a county other than that in which administration is granted, a complete transcript of the record of all proceedings relating thereto shall be filed by the administrator in the office of the clerk of the district court in such county, and he shall cause the same to be copied at length in the probate records of such county. [C97,§3331; C24, 27, 31, 35,§11949.]

Referred to in §11951.6

11950 Transcript of court conveyances — recording — effect. Any person interested therein may procure from the clerk of any district court in this state a transcript of any conveyance executed by any executor, administrator, guardian, or trustee, which has been recorded in the office of the clerk of the district or circuit courts of this state, in the county in which such real estate is situated, for more than ten years, and such transcript when certified by the clerk of the district court of such county, under the seal of his office, may be filed in the office of the recorder of such county, and shall have the same effect, when so recorded, as the original conveyance. [C24, 27, 31, 35,§11950.]

Referred to in §11951.6

11951 Limitation of action. No action for the recovery of any real estate sold or mortgaged by an executor or administrator can be maintained by any person claiming under the deceased, unless brought within five years after the sale by him or under the foreclosure of such mortgage. [C51,§1356; R60,§2388; C73,§2401; C97,§3332; C24, 27, 31, 35,§11951.]

Referred to in §11951.6

11951.1 Federal stock—authority to purchase. When any court of competent jurisdiction shall enter an order authorizing any executor, administrator, guardian, trustee or other person in a fiduciary capacity, to execute a real estate mortgage to incumber any property under his control in such capacity to secure a loan obtained or to be obtained from any association or corporation, created or which may be created by authority of the United States and as an instrumentality of the United States, such court may authorize the executor, administrator, guardian, trustee, or other fiduciary, to purchase stock in any association or corporation, created or which may be created by authority of the United States and as an instrumentality of the United States, when such purchase of stock is necessary or required as an incident or condition of obtaining the loan, and to mortgage the property under his control in such capacity for this purpose, as well as to make payment for the stock so purchased from the proceeds of the loan so obtained. [C35, §11951-g1.]

11951.2 Refinancing liens on realty. If a decedent held an interest in real estate, any part of which was exempt to him or is exempt to his spouse or issue as a homestead or otherwise, and any part of said real estate is subject to a lien or liens, claims and charges, on which a payment is delinquent, due, or about to become due, whether a claim for the debt for which said lien exists has been filed in the estate or not, and the court or judge having jurisdiction of said estate is satisfied on consideration of the circumstances that it is for the best interests of said estate and the owners of said real estate or any interest therein to extend or refinance such lien or liens and the indebtedness secured thereby, and to pay any claims and charges against the estate; the court or judge may authorize and order the executor or administrator to borrow money for such purposes, and mortgage all or any part of said real estate therefor, and to execute or join in the execution of a note or notes and a mortgage or mortgages on the same, and from the proceeds thereof also pay the necessary or required commission or other expenses of securing said loans. [C35,§11951-g2.]

11951.3 Waiver by incompetents of exemption. Any such mortgage shall have the effect of waiving any exemption as homestead or otherwise of any minor or incompetent or person under legal disability owning an interest in said real estate as fully as such owner could do if he were sui juris. [C35,§11951-g3.]

11951.4 Application for authority. The application for such authority and order shall be verified by the executor or administrator, shall describe the property and the interest of the owners therein together with the nature of any exemptions in favor of any of them, shall contain a full statement of the liens thereon, and claims or charges to be paid, and the purposes and objects of the proposed loan to be secured by said mortgage and the reasons urged as justifying the same as promoting the best interests of the estate and the owners of said real estate. [C35, §11951-g4.]

11951.5 Notice of application. The notice of said application and the procedure thereon shall be that prescribed in sections 11935, 11936, 11941, 11942, and 11943. [C35,§11951-g5.]

46GA, ch 112, §4, editorially divided

11951.6 Mortgage — requirements. Mortgages executed by such authority shall be in compliance with sections 11944 to 11950, both inclusive, and section 11951 shall apply to mortgages hereunder. [C35,§11951-g6.]

11951.7 Express finding required. Upon the hearing on the application, authority shall not be granted to the executor or administrator by the court or judge except upon an express finding that such mortgage and waiver of exemptions of homestead or otherwise for the purposes stated therein will promote the best interests of the estate and the owners of the real estate and any interest therein. [C35,§11951-g7.]

11952 Possession of real property. If there is no heir or devisee present and competent to take possession of the real estate left by the

decedent, the executor or administrator may do so, and demand and receive the rents and profits, and do all other acts relating thereto which may be for the benefit of the persons entitled to the same. [C73,§2402; C97,§3333; C24, 27, 31, 35,§11952.]

11953 Proceeds — account. Such executor or administrator, under the direction of the court, may apply the profits thereof to the payment of taxes and claims against the estate of the deceased, if the personal assets are insufficient, and account to the heirs or devisees therefor, deducting therefrom the payments made as above provided, together with a reasonable compensation for his own services, to be fixed by the court. [C73,§§2403, 2404; C97,§3334; C24, 27, 31, 35,§11953.]

11954 Minor heirs—payment of taxes. When there are minor heirs for whom no guardian has been appointed, the executor or administrator shall pay, out of any assets in his hands, all taxes assessed against the estate, not otherwise provided for, and be credited therefor as for the payment of other claims against the estate. [C73,§2405; C97,§3335; C24, 27, 31, 35,§11954.]

11955 Procedure prescribed by will. When the interests of creditors will not thereby be prejudiced, a testator may prescribe the entire manner in which his estate shall be administered, may exempt the executor from the necessity of giving bond, and prescribe the manner in which his affairs shall be conducted until his estate is finally settled, or until his minor children become of age. [C51,§1326; R60,§2358; C73,§2406; C97,§3336; C24, 27, 31, 35,§11955.]

See §11913

11956 Business continued—inventory. The court, in its discretion, may authorize an executor or administrator to continue the prosecution of any business in which the deceased was engaged at the time of his death, in order to wind up his affairs with greater advantage, but such authority shall not exempt him from returning a full inventory and appraisement, and making reports, as in other cases. [C51,§1327; R60,§2359; C73,§2407; C97,§3337; C24, 27, 31, 35,§11956.]

11957 Claims against estate—form. Claims against the estate shall be clearly stated, and, if founded upon a written instrument, the same or a copy thereof and of all indorsements thereon shall be attached as a part of the statement, and if upon account, an itemized copy shall be attached, showing the balance. [C51,§1359; R60, §2391; C73,§2408; C97,§3338; C24, 27, 31, 35, §11957.]

C97,§3338, editorially divided

11958 Verification and filing. Said statement must be sworn to and filed with the clerk of the district court. [C51,§1359; R60,§2391; C73,§2408; C97,§3338; C24, 27, 31, 35,§11958.]

11959 Notice of hearing—exceptions. Ten days notice of the hearing thereof, which shall be at some regular term of the court, accompanied by a copy of the claim, shall be served on one of the executors or administrators in the manner required for commencing ordinary actions, unless the same has been approved by the executor or administrator, in which case it may be allowed by the clerk, without notice, and so entered upon the probate calendar. [C51, §§1359, 1361; R60,§§2391, 2393; C73,§2408; C97, §3338; C24, 27, 31, 35,§11959.]

Service of notice, §11060

11960 How entitled. All claims filed against the estate shall be entitled in the name of the claimant against the executor or administrator as such, naming the estate, and in all further proceedings thereon this title shall be preserved. [C73,§2409; C97,§3339; C24, 27, 31, 35,§11960.]

11961 Claims deemed denied. All claims filed, and not expressly admitted in writing signed by the executor or administrator, with the approbation of the court, shall be considered as denied, without any pleading on behalf of the estate, but special defenses must be pleaded. [C73,§2410; C97,§3340; S13,§3340; C24, 27, 31, 35,§11961.]

S13,§3340, editorially divided

11962 Burden of proof. The burden of proving that a claim is unpaid shall not be placed upon the party filing a claim against the estate; but the executor or administrator may, on the trial of said cause, subject the claimant to an examination on the question of payment, or consideration, but the estate shall not be concluded or bound thereby. [C97,§3340; S13, §3340; C24, 27, 31, 35,§11962.]

11963 Hearing—trial by jury. If a claim filed against the estate is not fully admitted by the executor or administrator, the court may hear and allow the same, or may submit it to a jury, and on the hearing, unless otherwise provided, all provisions of law applicable to an ordinary action shall apply. [C51,§§1360, 1362; R60,§§2392, 2394; C73,§2411; C97,§3341; C24, 27, 31, 35,§11963.]

11964 Demands not due. Demands not yet due may be presented, proved, and allowed as other claims. [C51,§1364; R60,§2396; C73, §2413; C97,§3342; C24, 27, 31, 35,§11964.]

11965 Contingent liabilities. Contingent liabilities must be presented and proved, or the executor or administrator shall be under no obligation to make any provision for satisfying them when they accrue. [C51,§1365; R60,§2397; C73, §2414; C97,§3343; C24, 27, 31, 35,§11965.]

11966 Referees. Claims against an estate, and counterclaims thereto, may, in the discretion of the court, be proved before one or more referees, to be agreed upon by the parties or appointed by the court, and their decision, entered upon the record, shall become the decision of the court. [C51,§1366; R60,§2398; C73,§2415; C97,§3344; C24, 27, 31, 35,§11966.]

11967 Actions pending. Actions pending against the decedent at the time of his death may be prosecuted to judgment, his executor or

administrator being substituted as defendant, and any judgment rendered therein shall be placed in the catalogue of established claims, but shall not be a lien. [C51,§1368; R60,§2400; C73,§2416; C97,§3345; C24, 27, 31, 35,§11967.]

11968 Executor interested. If either of the executors or administrators is interested in favor of a claim against the estate, he shall not serve in any manner connected therewith, and if all are thus interested, the court shall appoint some competent person a temporary executor or administrator in relation to such claims. [C51, §1369; R60,§2401; C73,§2417; C97,§3346; C24, 27, 31, 35,§11968.]

11969 Expenses of funeral — allowance to widow. As soon as the executor or administrator is possessed of sufficient means over and above the expenses of administration, he shall pay off the charges of the last sickness and funeral of deceased, and next, any allowance made by the court for the maintenance of the widow and minor children. [C51,§§1370, 1371; R60,§§2402, 2403; C73,§§2418, 2419; C97,§3347; C24, 27, 31, 35,§11969.]

Referred to in §3828.021
Allowance for cemetery maintenance, §10218.1

11970 Other demands—order of payment. Other demands against the estate shall be payable in the following order:

1. Debts entitled to preference under the laws of the United States.
2. Public rates and taxes.
3. Claims filed within six months after the first publication or posting of the notice given by the executors or administrators of their appointment.
4. All other debts.
5. Legacies and the distributive shares, if any.

[C51,§1372; R60,§2404; C73,§2420; C97,§3348; C24, 27, 31, 35,§11970.]

See §§11971–11974
S13,§3348, editorially divided

11971 Labor as preferred claim. In payment of claims of the third class, all debts owing to employees for labor performed within the ninety days next preceding the death of the decedent, having been filed as by law provided, shall be preferred and paid in full before any other claims of said class are paid. If there is not sufficient property to pay said claims in full the same shall be applied ratably on all such claims. [S13,§3348; C24, 27, 31, 35,§11971.]

Labor claims preferred, §§11717, 12719, 12732

11972 When claims of fourth class barred. All claims of the fourth of the above classes, not filed and allowed, or if filed and notice thereof, as hereinbefore provided, is not served within twelve months from the giving of the notice aforesaid, will be barred, except as to actions against decedent pending in the district or supreme court at the time of his death, or unless peculiar circumstances entitle the claimant to equitable relief. [C51,§1373; R60,§2405; C73,§2421; C97,§3349; C24, 27, 31, 35,§11972.]

11973 Payment of claims — classes. After the expiration of the time for filing the claims of the third of the above classes, the executors or administrators shall proceed to pay off all claims against the estate in the order above stated, as fast as the means of so doing come into their hands, but no payment can be made to a claimant in any one class until those of a previous class are satisfied. [C51,§§1374, 1376; R60,§§2406, 2408; C73,§§2422, 2424; C97,§3350; C24, 27, 31, 35,§11973.]

11974 Payment of fourth class. Claims of the fourth class may be paid off at any time after the expiration of six months, without any regard to those claims not filed at the time of such payment. [C51,§1375; R60,§2407; C73, §2423; C97,§3351; C24, 27, 31, 35,§11974.]

11975 Demands not due. Demands not yet due may be paid, if the holder will consent to such a rebate of interest as the court thinks reasonable; otherwise, the money to which he would be entitled shall be invested until his debt becomes due. [C51,§1377; R60,§2409; C73, §2425; C97,§3352; C24, 27, 31, 35,§11975.]

11976 Order of payment—dividends. Within their respective classes, debts shall be paid in the order in which they are filed, unless it is likely there will not be sufficient means with which to pay the whole of the debts of any one class, in which case the court shall from time to time order a dividend of the means on hand among all the creditors of that class, and the executors or administrators shall pay the several amounts accordingly. [C51,§§1378, 1379; R60,§§2410, 2411; C73,§§2426, 2427; C97,§3353; C24, 27, 31, 35,§11976.]

11977 Incumbrances—unexecuted purchases. The executor or administrator may, with the approval of the court, use funds belonging to the estate to pay off incumbrances upon lands owned by the deceased, or to purchase lands claimed or contracted for by him, prior to his death. [C51,§1380; R60,§2412; C73,§2428; C97, §3354; C24, 27, 31, 35,§11977.]

11978 Delivery of specific legacies—security. Specific legacies of property may by the court be turned over to the legatees at any time upon their giving unquestionable security by bond, or upon real estate, as may be ordered by the court or judge, to restore the property or refund the amount at which it was appraised, if wanted for the payment of debts. [C51,§1381; R60, §2413; C73,§2429; C97,§3355; C24, 27, 31, 35, §11978.]

Referred to in §11980

11979 Money. Legacies payable in money may be paid on like terms, whenever the executors possess the means which can be thus used without prejudice to the interest of any claim already filed. [C51,§1382; R60,§2414; C73, §2430; C97,§3356; C24, 27, 31, 35,§11979.]

Referred to in §11980

11980 Legacies — payment after twelve months. After the expiration of the twelve months allowed for filing claims, such legacies may be paid without requiring the security pro-

vided for in sections 11978 and 11979, if means are retained to pay off all the claims proved or pending. [C51,§1383; R60,§2415; C73,§2431; C97,§3357; C24, 27, 31, 35,§11980.]

11981 Order of paying legacies. If the testator has not prescribed the order in which legacies are to be paid, and if no security is given as above provided, in order to expedite their time of payment, they may be paid in the order in which they are given in the will, where the estate is sufficient to pay all. [C51, §1384; R60,§2416; C73,§2432; C97,§3358; C24, 27, 31, 35,§11981.]

11982 Ratable payment. When not incompatible with the manifest intention of the testator, the court may direct all payments of money to legatees to be made ratably. [C51, §1385; R60,§2417; C73,§2433; C97,§3359; C24, 27, 31, 35,§11982.]

11983 Estate insufficient. Such must be the mode pursued when there is danger that the estate will prove insufficient to pay all the legacies, unless security is given to refund as above provided. [C51,§1386; R60,§2418; C73,§2434; C97,§3360; C24, 27, 31, 35,§11983.]

11984 Failure to pay claims. If the executor or administrator fails to make any payment in accordance with the order of the court, any person aggrieved thereby may, on ten days notice to him and his sureties, apply to the court for judgment against them on their bond. [C51, §1387; R60,§2419; C73,§2435; C97,§3361; C24, 27, 31, 35,§11984.]

C97,§3361, editorially divided

11985 Hearing and judgment. The court shall hear the application in a summary manner, and may render judgment against them for the amount of money directed to be paid, and costs, and issue executions against them therefor. If any of the obligors are not served, the same proceedings in relation to them may be had with the same effect as in an action by ordinary proceedings under similar circumstances. [C51,§1389; R60,§2421; C73,§2435; C97,§3361; C24, 27, 31, 35,§11985.]

CHAPTER 508

DESCENT AND DISTRIBUTION OF INTESTATE'S PROPERTY

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11986 Personal property. The personal property of the deceased not necessary for the payment of debts, nor otherwise disposed of, shall be distributed to the same persons and in the same proportions as though it were real estate. [C51,§1390; R60,§2422; C73,§2436; C97, §3362; C24, 27, 31, 35,§11986.]

11987 Payment of shares. The distributive shares shall be paid over as soon as the executor or administrator can properly do so. [C51, §1391; R60,§2423; C73,§2437; C97,§3363; C24, 27, 31, 35,§11987.]

11988 In kind—proceeds distributed. The property itself shall be distributed in kind when that can be satisfactorily and equitably done. In other cases, the court may direct the property to be sold, and the proceeds distributed. [C51,§1392; R60,§2424; C73,§2438; C97, §3364; C24, 27, 31, 35,§11988.]

11989 Partial distribution. When the circumstances of the family require it, the court may, in addition to what is set apart for their use, direct a partial distribution of the money or effects on hand, at any time after filing the

inventory and appraisement, upon the execution of security like that required of legatees in like cases. [C51,§1393; R60,§2425; C73, §2439; C97,§3365; C24, 27, 31, 35,§11989.]

Security required of legatees, §11978

11990 Dower. One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him. The same share of the real estate of a deceased wife shall be set apart to the surviving husband. [C51,§§1394, 1421; R60,§2477; C73,§2440; C97,§3366; C24, 27, 31, 35, §11990.]

Referred to in §11992
C97,§3366, editorially divided
Dower not subject of contract, §10447; not affected by will, §12006; protected in partition, §12347

11991 Coextensive right of husband. All provisions made in this chapter in regard to the widow of a deceased husband shall be applicable to the surviving husband of a deceased wife. [C51,§1421; R60,§2479; C73,§2440; C97, §3366; C24, 27, 31, 35,§11991.]

11992 Dower to embrace homestead. The distributive share of the survivor shall be set off so as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to her by section 11990, unless she prefers a different arrangement; but no such arrangement shall be permitted unless there be sufficient property remaining to pay the debts of the decedent. [C51,§1395; R60,§2426; C73,§2441; C97,§3367; C24, 27, 31, 35,§11992.]

11993 Dower denied. As against a purchaser from a nonresident alien, the survivor shall not be entitled to a distributive share in the estate of the deceased, if at the time of the purchase such survivor was also a nonresident alien. [C73,§2442; C97,§3368; C24, 27, 31, 35,§11993.]

11994 Setting off dower—time limit. The survivor's share may be set off by the mutual consent of all parties in interest, or by referees appointed by the court or the judge thereof, the application therefor to be made in writing, after twenty days from the death of the intestate and within ten years, which application must describe the land in which the share is claimed, and pray the appointment of referees to set it off. [C51,§§1396, 1397; R60,§§2427, 2428; C73,§§2443, 2444; C97,§3369; C24, 27, 31, 35,§11994.]

11995 Referees—notice. The court or judge shall fix the time for making the appointment of the referees, and direct such notice thereof and of the application to be given to all parties interested therein as it thinks proper. [C51, §1398; R60,§2429; C73,§2445; C97,§3370; C24, 27, 31, 35,§11995.]

11996 Survey — mode of setting off. The referees may employ a surveyor, if necessary, and must cause the shares to be marked off by metes and bounds, and make report of their proceedings to the court as early as practicable. [C51,§1399; R60,§2430; C73,§2446; C97,§3371; C24, 27, 31, 35,§11996.]

11997 Report—delinquency. The court or judge may require a report by such a time as it thinks reasonable, and if the referees fail to obey this or any other of its orders, it may discharge them and appoint others in their stead, and impose upon them the payment of all costs previously made, unless they show good cause against it. [C51,§1400; R60,§2431; C73,§2447; C97,§3372; C24, 27, 31, 35,§11997.]

11998 Confirmation — new reference. The court may confirm the report, or set it aside and refer the matter to the same or other referees, at its discretion. [C51,§1401; R60,§2432; C73,§2448; C97,§3373; C24, 27, 31, 35,§11998.]

Referred to in §12000
C97,§3373, editorially divided

11999 Confirmation conclusive—possession. Said confirmation, after the lapse of thirty days, unless appealed from, shall be binding and conclusive, and the survivor may bring an action to obtain possession of the land set apart. [C51, §1402; R60,§2433; C73,§2449; C97,§3373; C24, 27, 31, 35,§11999.]

Referred to in §12000

12000 Right contested. Nothing in sections 11998 and 11999 shall prevent any person interested from controverting the right of the survivor to the shares thus set apart, before confirmation of the report of the referees. [C51, §1403; R60,§2434; C73,§2450; C97,§3374; C24, 27, 31, 35,§12000.]

12001 Sale — division of proceeds. If the referees report that the property or any part of it cannot be readily divided, the court may order the whole sold and one-third of the proceeds paid over to the survivor. [C51,§1404; R60,§2478; C73,§2451; C97,§3375; C24, 27, 31, 35,§12001.]

C97,§3375, editorially divided

12002 Purchase of new homestead. With any money thus obtained, the survivor may procure a homestead, which shall be exempt from liability for all debts from which the former homestead would have been exempt. [C51, §1406; C73,§2451; C97,§3375; C24, 27, 31, 35, §12002.]

12003 Security to avoid sale. No sale shall be made if anyone interested gives security to the satisfaction of the court, conditioned to pay the survivor the appraised value of the share, with eight percent interest on the same, within such reasonable time as it may fix, not exceeding one year. [C51,§1405; C73,§2451; C97,§3375; C24, 27, 31, 35,§12003.]

12004 Security by survivor. If no such arrangement is made, such survivor may keep the property by giving like security to pay the claims of all others interested upon like terms. [C51,

§1405; C73,§2451; C97,§3375; C24, 27, 31, 35, §12004.]

12005 Sale prohibited. Such sale shall not be ordered so long as those in interest shall express a contrary desire and agree upon some mode of sharing and dividing the rents, profits, or use thereof, or shall consent that the court divide it by rent, profits, or use. [C51,§1405; R60,§2478; C73,§2451; C97,§3375; C24, 27, 31, 35, §12005.]

12006 Dower right unaffected by will. The survivor's share cannot be affected by any will of the spouse unless consent thereto is given as hereinafter provided. [C51,§1407; R60,§2435; C73,§2452; C97,§3376; S13,§3376; C24, 27, 31, 35, §12006.]

88GA, ch 192, §1, editorially divided

12007 Election between will and dower—notice. Where a voluntary election to take or refuse to take under a will has not been filed by a surviving spouse within sixty days from the date when the will of a decedent has been admitted to probate, it shall be the duty of the executor appointed to administer the will of such decedent in this state, to cause to be served, in the manner required for service of original notice, upon the surviving spouse, a notice in writing, advising such surviving spouse that the will of such decedent has been admitted to probate, stating the name of the court and the date when the will was admitted to probate, and requiring that such spouse, within six months after the completed service of such notice, elect whether he or she shall take or refuse to take under the provisions of the will of such decedent, and that such election may be made in open court or by writing filed in such court. [C73, §2452; C97,§3376; S13,§3376; C24, 27, 31, 35, §12007.]

Referred to in §12012
Service of notice, §11060

12008 Record of election. Said election, when made, shall be entered on the proper records of the court. [C73,§2452; C97,§3376; S13, §3376; C24, 27, 31, 35,§12008.]

Referred to in §12012

12009 Notice by interested party. The same notice may be given by any other person interested in the estate of decedent, and shall have the same force and effect as if given by the executor. [C73,§2452; C97,§3376; S13,§3376; C24, 27, 31, 35,§12009.]

12010 Election by law—exception. In case such surviving spouse does not make such election within six months from the date of the completed service of such notice, or if such surviving spouse shall be the executor of the will and fails, within six months after the will is admitted to probate, to file with the clerk of the court an election to refuse to take under the provisions of the will of the deceased, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder; unless within such period of six months an affidavit should be filed setting forth that such surviving spouse is mentally incapable of making such election. [C97,§3376; S13,§3376; C24, 27, 31, 35,§12010.]

12011 Insane spouse—election by court. In case such an affidavit is so filed, the court shall fix a time and place of hearing and cause a notice thereof, containing the requirements above set out, to be served upon said surviving spouse in such manner and for such time as the court may direct, and at said hearing, a guardian ad litem shall be appointed to represent such spouse and the court shall enter an order electing for and in behalf of such spouse, as it shall deem under the evidence to be for the best interests of such spouse. [S13,§3376; C24, 27, 31, 35,§12011.]

12012 Election between dower and homestead occupancy—notice. Within six months after written notice to the survivor, given by any heir of a deceased intestate, or by the administrator of his estate in case a sale of the real estate is necessary to pay debts, the survivor may elect to take the distributive share, or the right to occupy the homestead, which election shall be made and entered of record as provided in sections 12007 and 12008. [C97,§3377; S13, §3377; C24, 27, 31, 35,§12012.]

Referred to in §12014
S13,§3377, editorially divided

12013 Failure to elect—effect. In case of a failure to make such election, the right to occupy the homestead in lieu of the distributive share shall be waived. [C97,§3377; S13,§3377; C24, 27, 31, 35,§12013.]

12014 Mentally incapable spouse—election. When such surviving spouse is mentally incapable of making such election, the court on petition being filed alleging such disability, may set the matter down for hearing at such time and place as it may deem best, and direct what notice thereof shall be given; and at such hearing the court may enter an order electing for such spouse, which shall be the election, under section 12012, of the person under such disability. [S13,§3377; C24, 27, 31, 35,§12014.]

12015 Setting off dower. In case of an election of the distributive share, such distributive share may be set off to such surviving spouse under disability on the petition of the guardian of such spouse and under the provisions for setting off the survivor's share. [S13,§3377; C24, 27, 31, 35,§12015.]

12016 Descent to children. Subject to the rights and charges hereinbefore provided, the remaining estate of which the decedent died seized shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case the heirs of such shall inherit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents. [C51,§§1408, 1409; R60,§§2436, 2437; C73, §§2453, 2454; C97,§3378; C24, 27, 31, 35,§12016.]

12017 Absence of issue. If the intestate leaves no issue, the whole of the estate to the amount of seventy-five hundred dollars, after the payment of the debts and expenses of administration, and one-half of all of the estate in excess of said seventy-five hundred dollars shall go to the surviving spouse and the other one-half of said excess shall go to the parents. If no spouse, the whole shall go to the parents. In case of an adopted child, the parents by adoption shall inherit as if they were the natural parents. [C51,§1410; R60,§2495; C73,§2455; C97,§3379; S13,§§3379, 3381-a; C24, 27, 31, 35, §12017.]

12018 Appraisal. Prior to the settlement of every such estate in which there is a surviving spouse it shall be the duty of the court to appoint three competent, disinterested appraisers, whose duty it shall be, after first being duly sworn, to appraise such estate and to make their report to the court, duly verified, at such time as the court may direct by order. In such appraisement, the homestead, if any, shall be appraised separately. [C24, 27, 31, 35,§12018.]

Appraisement for inheritance tax, §7330 et seq.

12019 Procedure determined by court. The court shall at the time it appoints such appraisers, determine the kind of notice, the time for appearance, the method of service, whether by publication or otherwise. [C24, 27, 31, 35, §12019.]

37GA, ch 250, §3, editorially divided

12020 Notice. Said notice shall designate the names of such appraisers, the time and place of such appraisement, and the date on which such appraisers shall file with the clerk of the court the report of their appraisement, directed to all persons interested in such appraisement. [C24, 27, 31, 35,§12020.]

12021 Objections. All persons interested in and having objections to such report and appraisement, shall appear thereto and file their objections before noon of the second day after the day fixed in said notice for the filing of the report of such appraisement. [C24, 27, 31, 35, §12021.]

12022 Trial. Such objections, if any, shall be tried to the court as in equity, and the final order of the court in the matter of such appraisement shall have the same force and effect as a decree of the court in equity. [C24, 27, 31, 35,§12022.]

12023 Right of spouse to select property. Thereafter, and after the payment of debts and costs of administration, the surviving spouse shall have the right to select from the property so appraised, at its appraised value so fixed, property equal to the sum of seventy-five hundred dollars in value, which selection shall be in writing filed with the clerk of the court. [C24, 27, 31, 35,§12023.]

12024 Surviving parent. If one of the parents is dead, the portion which would have gone to such deceased parent shall go to the survivor, including the portion which would have belonged to the intestate's spouse, had one been living. [C51,§1411; R60,§2496; C73, §2456; C97,§3380; C24, 27, 31, 35,§12024.]

12025 Heirs of parents. If both parents are dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on, through ascending ancestors and their issue. [R60,§2497; C73,§2457; C97, §3381; C24, 27, 31, 35,§12025.]

12026 Spouse and heirs. If heirs are not thus found, the portion uninherited shall go to the spouse of the intestate, or the heirs of such spouse if dead, according to like rules, and if such intestate has had more than one spouse who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation. [C51,§1413; R60,§2439; C73,§2458; C97,§3382; C24, 27, 31, 35,§12026.]

12027 Heirs of parents by adoption. If the adopted parent or parents, if more than one, be dead, the portion which would have gone to such parent or parents had they or either of them survived the intestate, shall be disposed of in the same manner as if such parent or parents had outlived the intestate and died in possession of such share, and so on through their ascending ancestors. [S13,§3381-b; C24, 27, 31, 35, §12027.]

12028 Natural parents. If heirs are not thus found, the portion thus uninherited shall go to the natural parents of the intestate, and in case of their death then to their heirs under the ordinary rules of descent. [S13,§3381-c; C24, 27, 31, 35,§12028.]

12029 Advancements. Property given by an intestate by way of advancement to an heir, for the purposes of the division and distribution thereof shall be considered part of the estate, and be taken by him toward his share of the estate at what it would be worth if in the condition in which it was given to him, but if such advancement exceeds the amount to which he would be entitled, he cannot be required to refund any portion thereof. [C51,§§1419, 1420; R60,§§2445, 2446; C73,§2459; C97,§3383; C24, 27, 31, 35,§12029.]

12030 Illegitimate children — inherit from mother. Illegitimate children inherit from their mother, and she from them. [C51,§1415; R60, §2441; C73,§2465; C97,§3384; C24, 27, 31, 35, §12030.]

12031 From father. They shall inherit from the father when the paternity is proven during his life, or they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing.

Under such circumstances, if the recognition has been mutual, the father may inherit from his illegitimate children. [C51,§§1416, 1417; R60,§§2442, 2443; C73,§§2466, 2467; C97,§3385; C24, 27, 31, 35,§12031.]

Paternity determined, ch 544.1

12032 Feloniously causing death. No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or receive any interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him, any portion of his estate. [C97,§3386; S13,§3386; C24, 27, 31, 35,§12032.]

Referred to in §12034
S13,§3386, editorially divided

12033 Insurance beneficiary feloniously causing death. No beneficiary of any policy of insurance or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate. [C97, §3386; S13,§3386; C24, 27, 31, 35,§12033.]

Referred to in §12034

12034 Distribution to other heirs or insured. In every instance mentioned in sections 12032 and 12033, all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken or who is thus disabled shall become subject to distribution among the other heirs of such deceased person, according to the foregoing rules of descent and distribution in case of death, and in case of disability the benefits thereunder shall be paid to the disabled person. [C97,§3386; S13,§3386; C24, 27, 31, 35,§12034.]

12035 Escheat. If there is property remaining uninherited, it shall escheat to the state. [C51,§1414; R60,§2440; C73,§2460; C97,§3387; C24, 27, 31, 35,§12035.]

Payable to county treasurer, see §4470

12036 Proceedings for escheat. When the judge or clerk of the district court has reason to believe that any property of the estate of an intestate within the county should by law escheat, he must forthwith inform the state comptroller thereof, and appoint some suitable person administrator to take charge of such property, unless an executor or administrator has already been appointed for that purpose in some county in the state. [C51,§1443; R60, §2468; C73,§2461; C97,§3388; C24, 27, 31, 35, §12036.]

12037 Notice to persons interested. The administrator must give such notice of the death of the deceased and the amount and kind of property left by him within the state as, in the opinion of the judge or clerk appointing him, will be best calculated to notify those interested, or supposed to be interested, in the property. [C51,§1444; R60,§2469; C73,§2462; C97, §3389; C24, 27, 31, 35,§12037.]

12038 Sale—proceeds. If within six months from the giving of such notice no claimant thereof appears, such property may be sold and the proceeds, under the direction of the state comptroller, paid over by the administrator for the benefit of the school fund. If real estate, the sale shall be conducted and the proceeds treated like those of school lands. [C51,§1445; R60, §2470; C73,§2463; C97,§3390; C24, 27, 31, 35, §12038.]

12039 Payment to person entitled. The money or any portion of it shall be paid at any time within ten years after the sale of the property or the appropriation of the money, but not afterwards, to anyone showing himself entitled thereto. [C51,§1446; R60,§2471; C73, §2464; C97,§3391; C24, 27, 31, 35,§12039.]

12040 Land patented to person deceased. Where a patent has been or may be issued by the state to a person who had died, or who dies before the date of such patent, the title to the land patented shall inure to and vest in the heirs, devisees, or assignees of such patentee, as if the patent had issued to him during his life. [C97,§3392; C24, 27, 31, 35,§12040.]

CHAPTER 509

ACCOUNTING OF EXECUTORS AND ADMINISTRATORS

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12041 Reference—examination of accounts—fees. In matters of accounts of executors and administrators, the court may appoint a referee, which referee, in all counties having a population of less than one hundred thousand shall, whenever in the opinion of the court it seems fit and proper, be the clerk of the district court of the county in which the estate is being probated, as referee, who shall have the powers and perform all the duties therein of referees appointed by the court in a civil action. All fees received by any county officer as such referee shall become a part of the fees of his office and shall be accounted for as such. [C73,§2412; C97,§3393; C24, 27, 31, 35,§12041.]

Referees, §11520 et seq.

12042 First report. On the expiration of six and within seven months from the first publication or notice of his appointment, and sooner if required by the court, the executor or administrator shall render his account to the court, showing the condition of the estate, its debts and effects, the amount of money received, and the disposition made of it. [C51, §1422; R60,§2447; C73,§2469; C97,§3394; C24, 27, 31, 35,§12042.]

C97,§3394, editorially divided

12043 Additional reports. From time to time, as may be required by the court, he shall render further accounts until the estate is finally settled. Such account shall embrace all matters directed by the court and pertinent to the subject. [C51,§§1422, 1423; R60,§§2447, 2448; C73,§2469; C97,§3394; C24, 27, 31, 35, §12043.]

12044 Final settlement—time limit. Said final settlement shall be made within three years, unless otherwise ordered by the court. [C73,§2469; C97,§3394; C24, 27, 31, 35,§12044.]

12045 Examination of executor. He may be examined under oath by the court upon any matter relating to his accounts, when the vouchers and proofs in relation thereto are not sufficiently full and satisfactory. [C51,§1424; R60, §2449; C73,§2470; C97,§3395; C24, 27, 31, 35, §12045.]

C97,§3395, editorially divided

12046 Accounting at inventoried value. He must account for all the property inventoried at the price at which it was appraised, as well as for all other property coming into his hands belonging to the estate. [C51,§1425; R60,§2450; C73,§2471; C97,§3395; C24, 27, 31, 35,§12046.]

12047 Presumption from appraisement. The appraisement shall be presumptive evidence of the value of an article and so regarded, either for or against him. [C51,§1426; R60,§2451; C73, §2472; C97,§3396; C24, 27, 31, 35,§12047.]

12048 Profit and loss. He shall derive no profit from the sale of property for a higher price than the appraisement, nor is he chargeable with any loss occurring without his fault. [C51,§1427; R60,§2452; C73,§2473; C97,§3397; C24, 27, 31, 35,§12048.]

12049 Mistakes corrected. Mistakes in settlements may be corrected in the probate court at any time before his final settlement and discharge, and after that time by equitable proceedings, on showing such grounds as will justify the interference of the court. [C51, §1432; R60,§2457; C73,§2474; C97,§3398; C24, 27, 31, 35,§12049.]

12050 Settlement contested. Any person interested in the estate may attend upon the settlement of his accounts and contest the same. [C51,§1431; R60,§2456; C73,§2475; C97,§3399; C24, 27, 31, 35,§12050.]

Guardian ad litem, §12074
C97,§3399, editorially divided

12051 Opening settlement. Accounts settled in the absence of any person adversely interested, and without notice to him, may be opened within three months on his application. [C51,§1431; R60,§2456; C73,§2475; C97,§3399; C24, 27, 31, 35,§12051.]

12052 Discharge. Upon final settlement, an order shall be entered discharging him from further duties and responsibilities. [C51,§1434; R60,§2459; C73,§2476; C97,§3400; C24, 27, 31, 35,§12052.]

12053 Judgment—execution. If judgment is rendered against an executor or administrator for costs in any action prosecuted or defended by him in that capacity, execution shall be awarded against him as for his own debt, if it appears to the court that such action was prosecuted or defended without reasonable cause. In other cases, the execution shall be awarded against him in his representative capacity only. [C51,§1433; R60,§2458; C73,§2477; C97,§3401; C24, 27, 31, 35,§12053.]

12054 Receipts by one executor. One of the several executors or administrators may receive and receipt for any money, which receipt shall be given by him in his own name only, and he must individually account for all the money thus received and receipted for by himself, and this shall not charge his co-executor or co-administrator, except so far as it can be shown to have come into his hands. [C51,§1442; R60,§2467; C73,§2478; C97,§3402; C24, 27, 31, 35,§12054.]

12055 Notice of order—publication. When the court shall make an order affecting an executor or administrator, and it cannot be personally served upon him, service thereof may be made by publication of a notice, stating the substance

of such order, in some newspaper published in the county where such order was made, once each week, for four weeks in succession, which publication may be proved as in case of original notice. [R60,§§2474, 2475; C73,§§2479, 2480; C97,§3403; S13,§3403; C24, 27, 31, 35,§12055.]

12056 Effect. Service as above shall be as effectual as if personally made, and actions and proceedings may be commenced and prosecuted in all respects as if such notices or orders had been personally served. [R60,§2476; C73,§2481; C97,§3404; C24, 27, 31, 35,§12056.]

12057 Failure to account. Any executor or administrator failing to account, upon being required to do so by the court or as he is required to do by law, shall, for every such failure, forfeit one hundred dollars, to be recovered in a civil action on his bond for the benefit of the estate by anyone interested therein. [C51, §1428; R60,§2453; C73,§2482; C97,§3405; C24, 27, 31, 35,§12057.]

12058 Executor of executor. An executor or administrator has no authority to act in a matter wherein his decedent was merely executor, administrator, or trustee. [C51,§1438; R60, §2463; C73,§2483; C97,§3406; C24, 27, 31, 35, §12058.]

12059 Executors in their own wrong. Any person who, without being regularly appointed as executor or administrator, intermeddles with the property of a deceased person, is responsible only to the regular executor or administrator, when appointed, for the value of all property taken or received by him, and for all damage caused by his acts to the estate of the deceased. [C51,§1439; R60,§2464; C73,§2484; C97,§3407; C24, 27, 31, 35,§12059.]

12060 Action against heirs and devisees—costs—tender. In an action against the heirs and devisees, where the judgment is to be against them in proportion to the respective amounts received by them from the estate, costs awarded against them shall be in like proportion, and anyone may tender the amount due from him to the plaintiff, which shall have the same effect, as far as he is concerned, as though he was the sole defendant. [C51,§§1440, 1441; R60,§§2465, 2466; C73,§§2485, 2486; C97,§3408; C24, 27, 31, 35,§12060.]

12061 Specific performance—how enforced. When a person who is under such obligation to convey real estate as might have been enforced against him, if living, dies before making such conveyance, the court may enforce a specific performance of such contract by the executor or administrator, and require him to execute the conveyance accordingly, and it shall not be necessary to make any other than the executor or administrator party defendant to such proceedings in the first instance, but the court in its discretion may direct other persons interested to be made parties, and may cause them to be notified thereof in such manner as it may think expedient, or the heirs and devisees, upon their own motion, may at any time be made defendants, and such conveyances may be authorized upon the petition of the executor or administrator. [C51,§§1435, 1436; R60,§§2460, 2461; C73, §§2487, 2488; C97,§3409; C24, 27, 31, 35,§12061.]

12062 Executors considered as one. In an action against several executors or administrators, they shall be considered one person, and judgment may be taken and execution issued against all as such, although only part were served with notice. [C51,§1437; R60,§2462; C73, §2489; C97,§3410; C24, 27, 31, 35,§12062.]

12063 Compensation. Executors and administrators shall be allowed such reasonable fee as may be determined by the court, for services rendered, but not in excess of the following commissions upon the personal estate sold or distributed by them and for the proceeds of real estate sold for the payment of debts by them which shall be received as full compensation for all ordinary services:

For the first one thousand dollars, six percent.

For the overplus between one and five thousand dollars, four percent.

For all sums over five thousand dollars, two percent. [C51,§1429; R60,§2454; C73,§2494; C97,§3415; C24, 27, 31, 35,§12063.]

38GA, ch 391, §1, editorially divided

12064 Attorney fee. There shall also be allowed and taxed as part of the costs of administration of estates as an attorney's fee for the administrator's or executor's attorney, such reasonable fee as may be determined by the court, for services rendered, but not in excess of the schedule of fees herein provided for administrators and executors. [C24, 27, 31, 35,§12064.]

12065 Expenses and extraordinary services. Such further allowances as are just and reasonable may be made by the court to administrators, executors, and their attorneys for actual necessary and extraordinary expenses or services. [C51,§1430; R60,§2455; C73,§2495; C97,§3415; C24, 27, 31, 35,§12065.]

12065.1 Itemized claims required. The court shall allow and fix from time to time the compensation of guardians, trustees and receivers and their attorneys for such services as they shall render as shown by an itemized claim or report made and filed setting forth what such services consist of from time to time during the period of time they continue to act in such capacities. [C31, 35,§12065-d1.]

12065.2 Affidavit relative to compensation. In no case shall the compensation of executors, administrators, guardians, trustees, receivers and their attorneys be allowed or paid until there shall have been filed with the clerk of the district court in which administration of the estate is pending an affidavit of the executor, administrator, guardian, trustee, receiver or attorney as the case may be stating that there is no contract, agreement, or arrangement, either oral or written, express or implied, contemplating any division of compensation for such services, or participation therein, directly or indi-

rectly, by any other person, firm or corporation with such executor, administrator, guardian, trustee, receiver or attorney unless it be with one jointly serving with them in the same capacity in relation to the estate in which such compensation is allowed, in which event the affidavit shall show such fact. [C31, 35,§12065-d2.]

Referred to in §12065.3

12065.3 Affidavit for corporate fiduciary. In any case where a corporation is acting as a fiduciary under and by virtue of the provisions of chapter 416, the affidavit required by section 12065.2 shall be executed and made by the president or some executive officer of such corporation. [C31, 35,§12065-d3.]

12066 Removal of executor. After letters testamentary, of special administration, or of administration with the will annexed, or general administration, shall have been granted to any person, he may be removed by the court or judge thereof, when the interests of the estate require it, for any of the following causes:

1. When by reason of age, continued sickness, imbecility, or change of residence, or any other cause, he becomes incapable of discharging his trust in such manner as the interest and proper management of the estate may require.

2. When he shall fail or refuse to return inventories or accounts of sales of the estate, or to make reports of the condition thereof, or fails or refuses to comply with any order of the court or judge thereof, or fails to seasonably apply for authority to sell personal or real estate for the payment of debts or claims against the estate when it shall be necessary for him to do so, or fails or refuses to discharge any of the duties prescribed for him by law, or shall be guilty of any waste or maladministration of the estate, or where for any other reason it appears for the best interests of the estate.

3. Where it is shown to the court or judge thereof by his sureties that he has become or is likely to become insolvent, in consequence of which such sureties have suffered or will suffer loss. [C51,§1306; R60,§2338; C73,§2496; C97,§3416; C24, 27, 31, 35,§12066.]

12067 Petition. Petition for the removal of executors or administrators, or for the purpose of requiring additional sureties, shall be filed in the court from which the letters were issued by any person interested in the estate, which petition must be verified by oath, and specify the grounds of complaint. [C73,§§2497, 2498; C97, §3417; C24, 27, 31, 35,§12067.]

12068 Citation—how served. Upon the filing of such petition, a citation shall issue to the person complained of, requiring him to appear and answer the complaint, and if he is not a resident of the county where it is made, notice thereof shall be served upon him in such manner as the court or judge thereof or clerk may direct. [C73,§§2499, 2500; C97,§3418; C24, 27, 31, 35,§12068.]

12069 Property delivered — penalty. Upon the removal of any executor or administrator, he shall be required by order of the court or judge to deliver to the person who may be entitled thereto all the property in his hands or under his control belonging to the estate, and if he fails or refuses to comply with any proper order of the court, he may be committed to the jail of the county until he does. [C73,§§2501, 2502; C97,§3419; C24, 27, 31, 35,§12069.]

12070 Probate reports—accounts. Each report of an executor, administrator, guardian, or trustee shall be self-explanatory, so that the clerk or court, from a perusal thereof, may understand the matter in hand without explanations or being compelled to examine or refer to other papers in the case. All accountings must state the debit and credit and show the balances. Guardians' and trustees' accounts must show the amount of interest earned since appointment or last report, and how and upon what security the trust fund is invested. All reports and accounts must be verified. [C97,§3420; C24, 27, 31, 35,§12070.]

Similar provision, §12072

12071 Final report. Each executor or administrator shall, in his final report, set forth:

1. An accurate description of all the real estate of which the decedent died seized, stating its nature and extent.

2. Whether the deceased died testate or intestate.

3. The name, age, and place of residence of the surviving spouse, or that none survived the deceased.

4. The name, age, and place of residence of each of the heirs and their relationship to the deceased.

5. The name, age, and place of residence of each legatee or devisee, and whether any legacy or devise remains a charge on the real estate, and, if so, the nature and amount thereof.

6. The name of the guardian or trustee for any heir, legatee, or devisee and the court from which his letters were issued. [C73,§2491; C97, §3412; C24, 27, 31, 35,§12071.]

Fiduciaries' reports, §§6948.059, 12780 et seq.

12072 Orders in probate—applications. All applications for orders in probate must be made in writing, verified and self-explanatory, so that the clerk or court from a perusal thereof may understand the relief sought without explanations. [C97,§3421; C24, 27, 31, 35,§12072.]

Similar provision, §12070

12073 Notice of application for discharge. Unless notice be waived in writing, no administrator, executor, guardian, or trustee shall be discharged from further duty or responsibility upon final settlement, until notice of the application shall have been served upon all persons interested as required for the commencement of a civil action, unless a different service be ordered by the court or judge, which order may be made before or after filing the final report. [C97,§3422; C24, 27, 31, 35,§12073.]

12074 Attorney appointed for minors and persons not represented. At or before the hearing of petitions and contests for the probate of wills, letters testamentary or of administration, for sales of real estate and confirmation thereof, settlements and distributions of estates, and all other proceedings in this title, where all the parties interested in the estate are required to be notified thereof, the court in its discretion may appoint some competent attorney at law to represent therein the devisees, legatees, heirs, or creditors of the decedent who are minors and have no general guardian in the county, or who are nonresidents of the state, and those interested who, though they are neither minors nor nonresidents, are unrepresented. [C97,§3423; C24, 27, 31, 35,§12074.]

C97,§3423, editorially divided

12075 Order and authority thereunder. The order making the appointment must specify the names of the parties, so far as known, for whom the attorney is appointed, and he will be authorized to represent such parties in all such proceedings subsequent to his appointment. [C97, §3423; C24, 27, 31, 35,§12075.]

12076 Compensation. He shall be paid for his services out of the estate, as a part of the cost of administration, a fee to be fixed by the court, and upon distribution it may be charged to the party represented by him. [C97,§3423; C24, 27, 31, 35,§12076.]

12077 Substitution—division of fee. The court may substitute another attorney for the one first appointed, in which case the fees must be divided in proportion to the services rendered. [C97,§3423; C24, 27, 31, 35,§12077.]

12077.1 Small legacies to minors—payment. Whenever a minor shall become entitled under the terms of a will to a bequest or legacy, or to a distributive share of the estate of an intestate, or to a beneficial interest in a trust fund upon the distribution thereof, and the value of such bequest, legacy, distributive share or interest shall not exceed the sum of two hundred dollars, and no legal guardian of the person or property of such minor has been heretofore appointed, the district court having jurisdiction of the distribution of such funds may in its discretion, upon the application of the executor, administrator or trustee, as the case may be, enter an order authorizing such executor, administrator or trustee to pay such bequest, legacy, share or interest to the parents or natural guardian of such minor, or to the person with whom such minor resides, for the use of such minor, and the receipt of such person or persons therefor, when presented to the court or filed with the report of distribution of any such executor, administrator or trustee, shall have the same force and effect as though such payment had been made to a duly appointed and qualified legal guardian of the person or property of such minor. [48GA, ch 244,§1.]

TITLE XXXIII

PARTICULAR ACTIONS AND SPECIAL PROCEEDINGS

CHAPTER 510

ATTACHMENT

Referred to in §7187

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12078 Method. The plaintiff in a civil action may cause the property of the defendant not exempt from execution to be attached at the commencement or during the progress of the proceeding, by pursuing the course hereinafter prescribed. [C51,§1846; R60,§3172; C73, §2949; C97,§3876; C24, 27, 31, 35,§12078.]

12079 Proceedings auxiliary. If it be subsequent to the commencement of the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto. [C51,§1847; R60,§3173; C73,§2950; C97,§3877; C24, 27, 31, 35, §12079.]

12080 Grounds. The petition which asks an attachment must in all cases be sworn to. It must state one or more of the following grounds:

1. That the defendant is a foreign corporation or acting as such.
2. That he is a nonresident of the state.
3. That he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts.
4. That he has disposed of his property, in whole or in part, with intent to defraud his creditors.
5. That the defendant is about to dispose of his property with intent to defraud his creditors.
6. That he has absconded, so that the ordinary process cannot be served upon him.
7. That he is about to remove permanently out of the county, and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff.

8. That he is about to remove permanently out of the state, and refuses to pay or secure the debt due the plaintiff.

9. That he is about to remove his property or a part thereof out of the county with intent to defraud his creditors.

10. That he is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors.

11. That he has property or rights in action which he conceals.

12. That the debt is due for property obtained under false pretenses. [C51,§1848; R60,§3174; C73,§2951; C97,§3878; C24, 27, 31, 35,§12080.]

C97,§3878, editorially divided

12081 Alternative statement of grounds. The causes for the attachment shall not be stated in the alternative. [R60,§3242; C73, §3021; C97,§3878; C24, 27, 31, 35,§12081.]

12082 Issued on Sunday. Where the petition states, in addition to the other facts required, that the plaintiff will lose his claim unless the attachment issues and is served on Sunday, it may be issued and served on that day. [C73,§2952; C97,§3879; C24, 27, 31, 35, §12082.]

Analogous or related provisions, §§10819, 11064, 11653, 12179, 12560

12083 On contract — amount due. If the plaintiff's demand is founded on contract, the petition must state that something is due, and, as nearly as practicable, the amount, which must be more than five dollars in order to authorize an attachment. [C51,§1849; R60,§3175; C73,§2953; C97,§3880; C24, 27, 31, 35,§12083.]

12084 Value of property attached. The amount thus sworn to is intended as a guide to the sheriff, who must, as nearly as the circumstances of the case will permit, levy upon property fifty percent greater in value than that amount. [C51,§1850; R60,§3176; C73,§2954; C97, §3881; C24, 27, 31, 35,§12084.]

12085 Allowance of value in other cases. If the demand is not founded on contract, the original petition must be presented to some judge of the supreme, district, or superior court, who shall make an allowance thereon of the amount in value of the property that may be attached. [C51,§1851; R60,§3177; C73,§2955; C97,§3882; C24, 27, 31, 35,§12085.]

12086 For debts not due — grounds. The property of a debtor may be attached on debts not due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states one or more of the following grounds:

1. That the defendant is about to dispose of his property with intent to defraud his creditors.

2. That he is about to remove or has removed from the state, and refuses to secure the payment of the debt when it falls due, and which removal or contemplated removal was not known to the plaintiff at the time the debt was contracted.

3. That the defendant has disposed of his property in whole or in part with intent to defraud his creditors.

4. That the debt was incurred for property obtained under false pretenses. [C51,§1852; R60,§3178; C73,§2956; C97,§3883; C24, 27, 31, 35,§12086.]

12087 Appearance — judgment — perishable property. If, at the time of the service of the attachment, the claim upon which suit is brought is not due, the defendant need not appear in the action until the maturity of the demand, unless he elects to plead, in which event the cause shall stand for trial when it is reached in its regular order, and no final judgment shall be rendered therein before the maturity of the debt unless such election is made, but if perishable property is levied upon, it may be sold as in other attachment cases. [R60,§§3179, 3180; C73,§§2957, 2958; C97,§3884; C24, 27, 31, 35, §12087.]

12088 Bond. In all cases before it can be issued, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties to be approved by such clerk, in a penalty at least double the value of the property sought to be attached, and in no case, except in a class B case in municipal court, less than two hundred fifty dollars in a court of record, or less than fifty dollars if in a justice court or a class B case in municipal court, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment. [C51,§1853; R60,§3181; C73,§2959; C97,§3885; C24, 27, 31, 35,§12088.]

12088.1 Bond for levy on real property only. In any case where only real property is sought to be attached, the plaintiff shall file such bond in a penalty to be fixed by the court or the clerk, and in such cases, the clerk shall issue a writ thereunder and shall direct therein that real property only shall be attached. [C31, 35, §12088-d1.]

12089 Additional security. The defendant may, at any time before judgment, move the court or judge for additional security on the part of the plaintiff, and if, on such motion, the court or judge is satisfied that the surety on the plaintiff's bond has removed from the state, or is not sufficient, the attachment may be vacated and restitution directed of any property taken under it, unless, in a reasonable time, to be fixed by the court or judge, security is given by the plaintiff. [R60,§3182; C73,§2960; C97,§3886; C24, 27, 31, 35,§12089.]

12090 Action on bond. In an action on such bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained, and reasonable attorney's fees to be fixed by the court; and if it be shown such attachment was sued out maliciously, he may recover exemplary damages, nor need he wait until the principal

suit is determined before suing on the bond. [C51,§1854; R60,§3183; C73,§2961; C97,§3887; C24, 27, 31, 35,§12090.]

Referred to in §7187

12091 Remedy for falsely suing out—counterclaim. The fact stated as a cause of attachment shall not be contested in the action by a mere defense. The defendant's remedy shall be on the bond, but he may in his discretion sue thereon by way of counterclaim, and in such case shall recover damages as in an original action on such bond. [R60,§3238; C73,§3017; C97,§3888; C24, 27, 31, 35,§12091.]

12092 Writ to sheriff. The clerk shall issue a writ of attachment, directing the sheriff of the county therein named to attach the property of the defendant to the requisite amount therein stated. [C51,§1856; R60,§3185; C73,§2962; C97, §3889; C24, 27, 31, 35,§12092.]

12093 Several writs to different counties. Attachments may be issued from the district court to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession and subsequently, until sufficient property has been attached; but only those executed shall be taxed in the costs, unless otherwise ordered by the court. [C51,§§1855, 1858; R60,§3184; C73,§2963; C97,§3890; C24, 27, 31, 35,§12093.]

C97,§3890, editorially divided

12094 Surplus levy. If more property is attached in the aggregate than the plaintiff is entitled to, the surplus must be abandoned, and the plaintiff pay all costs incurred in relation to such surplus. [C51,§1858; R60,§3184; C73, §2963; C97,§3890; C24, 27, 31, 35,§12094.]

12095 Property attached. The sheriff shall in all cases attach the amount of property directed, if sufficient, not exempt from execution, is found in his county, giving that in which the defendant has a legal and unquestionable title a preference over that in which his title is doubtful or only equitable. [C51,§1857; R60, §3186; C73,§2964; C97,§3891; C24, 27, 31, 35, §12095.]

12096 Several attachments. Where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff. [R60, §3187; C73,§2965; C97,§3892; C24, 27, 31, 35, §12096.]

12097 Following property. If, after an attachment has been placed in the hands of the sheriff, any property of the defendant is moved from the county, the sheriff may pursue and attach the same in an adjoining county within twenty-four hours after removal. [R60,§3188; C73,§2966; C97,§3893; C24, 27, 31, 35,§12097.]

Analogous provisions, §§12184, 12185

12098 Corporation stock. Stock or interest owned by the defendant in any company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached. [C51,§§1859, 1860; R60,§3194; C73,§2967; C97,§3894; C24, 27, 31, 35,§12098.]

12099 Judgments — money — things in action. Judgments, money, bank bills, and other things in action may be levied upon by the officer under an attachment in the same manner as levies are made under execution, except that notice of such levy shall be given as in levies by attachment, and after judgment such property shall be sold, appropriated, or transferred as provided for in the chapter on executions. [C51,§§1859, 1860; R60,§3194; C73,§2967; C97, §3895; C24, 27, 31, 35,§12099.]

Levy on judgments, moneys, etc., §§11672, 11673

12100 Property in possession of another. Property of defendant in possession of another, and of which defendant is entitled to the immediate possession, may be seized under attachment by taking possession thereof, in the same manner as though found in the defendant's possession. [C51,§§1859, 1860; R60,§3194; C73, §2967; C97,§3896; C24, 27, 31, 35,§12100.]

12101 Garnishment. Property of the defendant in the possession of another, or debts due the defendant, may be attached by garnishment as hereinafter provided. [C51,§§1859, 1860; R60,§3194; C73,§2967; C97,§3897; C24, 27, 31, 35,§12101.]

Garnishment, ch 513

12102 When property bound. Property capable of manual delivery, and attached otherwise than by garnishment, is bound thereby from the time manual custody thereof is taken by the officer under the attachment. [C51, §§1859,1860,1874; R60,§§3194,3215; C73,§§2967, 2969; C97,§3898; C24, 27, 31, 35,§12102.]

Analogous provision, §11669

12103 Real estate. Real estate or equitable interests therein may be attached. [R60,§3243; C73,§3022; C97,§3899; C24, 27, 31, 35,§12103.]

C97,§3899, editorially divided

12104 Lien. The levy shall be a lien thereon from the time of an entry made and signed by the officer making the same upon the incumbrance book in the office of the clerk of the county in which the land is situated, showing the levy, the date thereof, name of the county from which the attachment issued, title of the action, and a description of the land levied on. [R60,§3243; C73,§3022; C97,§3899; C24, 27, 31, 35,§12104.]

Analogous provision, §11668.1

12105 Levy on equitable interest. In case of a levy upon any equitable interest in real estate, such entry shall show, in addition to the foregoing matters, the name of the person holding the legal title, and the owner of the alleged equitable interest, where known. [C97,§3899; C24, 27, 31, 35,§12105.]

12106 Lands fraudulently conveyed. The grantor of real estate conveyed in fraud of

creditors shall, as to such creditors, be deemed the equitable owner thereof, and such interest may be attached as above provided, when the petition alleges such fraudulent conveyance and the holder of the legal title is made a party to the action. [C97,§3899; C24, 27, 31, 35,§12106.]

Conveyances annulled in auxiliary proceedings, §11815

12107 Notice to defendant—return. When any property is attached, the officer making the levy shall at once give written notice thereof to the defendant, if found within the county in which the levy is made, and the fact of the giving of such notice, or that the defendant is not found within the county, shall be shown by the officer's return. [C51,§§1859, 1860; R60,§3194; C73,§2967; C97,§3900; C24, 27, 31, 35,§12107.]

C97,§3900, editorially divided

12108 Notice to party in possession. A like notice shall be given to the party in possession of the property attached. [C51,§1860; R60, §3194; C73,§2967; C97,§3900; C24, 27, 31, 35, §12108.]

12109 Service when party absent. If the party required to be notified is not found at his usual place of business or residence, such notice may be served upon a member of his family over fourteen years of age at such place. [C97,§3900; C24, 27, 31, 35,§12109.]

12110 Examination of defendant. Whenever it appears by the affidavit of the plaintiff, or by the return of the attachment, that no property is known to the plaintiff or the officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and it being shown to the judge of any court by affidavit that the defendant has property within the state not exempt, the defendant may be required by such judge to attend before him, or before the court in which the action is pending, or a commissioner appointed for that purpose, and give information on oath respecting his property. [R60,§3189; C73,§2968; C97,§3901; C24, 27, 31, 35,§12110.]

12111 Money paid clerk. All money attached by the sheriff, or coming into his hands by virtue of the attachment, shall forthwith be paid over to the clerk, to be by him retained till the further action of the court. [C51,§§1875, 1882; R60,§3217; C73,§2971; C97,§3902; C24, 27, 31, 35,§12111.]

12112 Other property. The sheriff shall make such disposition of other attached property as may be directed by the court or judge, and, where there is no direction upon the subject, he shall safely keep the property subject to the order of the court. [R60,§3218; C73, §2972; C97,§3903; C24, 27, 31, 35,§12112.]

12113 Common, joint, or partnership property. In executing an attachment against a person who owns property jointly or in common with another, or who is a member of a partnership, the officer may take possession of such property so owned jointly, in common, or in partnership, sufficiently to enable him to inventory and appraise the same, and for that purpose shall call to his assistance three disinterested persons; which inventory and appraisement shall be returned by the officer with the attachment, and such return shall state who claims to own such property. [R60,§3190; C73,§2973; C97,§3904; C24, 27, 31, 35,§12113.]

Analogous provisions, §11680 et seq.
C97,§3904, editorially divided

12114 Lien acquired—action to determine interest. The plaintiff shall, from the time such property is taken possession of by the officer, have a lien on the interest of the defendant therein, and may, either before or after he obtains judgment in the action in which the attachment issued, commence action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien. [C73, §2974; C97,§3904; C24, 27, 31, 35,§12114.]

12115 Receiver. If deemed necessary or proper, the court or judge may appoint a receiver under the circumstances and conditions provided in chapter 549. [C73,§2974; C97, §3904; C24, 27, 31, 35,§12115.]

12116 Mortgaged personal property. Mortgaged personal property may be levied on under attachment in the method provided for levying execution thereon. [C97,§3905; C24, 27, 31, 35, §12116.]

Manner of levying, §11682 et seq.

12117 Indemnifying bond. The provisions as to notice of ownership and indemnifying bond to be given in cases of levies under execution shall in all respects be applicable to levies made under writs of attachment. [C97,§3906; C24, 27, 31, 35,§12117.]

Indemnifying bond, §11702 et seq.
Notice of ownership, §11698 et seq.

12118 Bond to discharge. If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the attachment, or after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged, and restitution made of property taken or proceeds thereof. [R60,§3191; C73, §2994; C97,§3907; C24, 27, 31, 35,§12118.]

Similar provisions, §§12121, 12188, 12564
C97,§3907, editorially divided

12119 Automatic appearance. The execution of such bond shall be deemed an appearance of such defendant to the action. [R60, §3192; C73,§2994; C97,§3907; C24, 27, 31, 35, §12119.]

12120 Judgment on bond. Such bond shall be part of the record. If judgment go against the defendant, the same shall be entered against him and sureties. [R60,§3193; C73,§2995; C97, §3908; C24, 27, 31, 35,§12120.]

12121 Delivery bond. The defendant, or any person in whose possession any attached property is found, or any person making affi-

davit that he has an interest in it, may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, to be approved by the sheriff, or after the return of the writ, by the clerk, in a penalty at least double the value of the property sought to be released, but if that sum would exceed double the amount of the claim for which an attachment is sued out, then in such sum as equals double the amount of such claim, conditioned that such property or its appraised value shall be delivered to the sheriff, to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof. This bond shall be filed with the clerk of the court. [C51,§1876; R60,§3219; C73,§2996; C97,§3909; C24, 27, 31, 35,§12121.]

Similar provisions, §§12118, 12188, 12564

12122 **Appraisement.** To determine the value of property in cases where a bond is to be given, unless the parties agree otherwise, the sheriff shall summon two disinterested persons having the qualification of jurors, who, after having been sworn by him to make the appraisement faithfully and impartially, shall proceed to the discharge of their duty. If such persons disagree as to the value of the property, the sheriff shall decide between them. [C51,§§1877, 1878; R60,§3220; C73,§2997; C97,§3910; C24, 27, 31, 35,§12122.]

12123 **Defense in action on delivery bond.** In an action brought upon such bond, it shall be a sufficient defense that the property for the delivery of which the bond was given did not, at the time of the levy, belong to the defendant against whom the attachment was issued, or was exempt from seizure under such attachment. [C51,§1879; R60,§3221; C73,§2998; C97,§3911; C24, 27, 31, 35,§12123.]

12124 **Perishable property — examination.** When the sheriff thinks the property attached in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, or when the plaintiff makes affidavit to that effect, the sheriff may summon three persons having the qualifications of jurors to examine the same. [C51,§1881; R60,§3222; C73,§2999; C97,§3912; S13,§3912-a; C24, 27, 31, 35,§12124.]

S13,§3912-a, editorially divided

12125 **Notice.** The sheriff shall give the defendant, if within the county, three days notice of such hearing, and he may appear before such jury and have a personal hearing. [C51,§1881; R60,§3222; C73,§2999; C97,§3912; S13,§3912-a; C24, 27, 31, 35,§12125.]

12126 **Determination and sale.** If they are of the opinion that the property requires soon to be disposed of, they shall specify in writing a day beyond which they do not deem it prudent that it should be kept in the hands of the sheriff. If such day occurs before the trial day, he shall thereupon give the same notice as for sale of goods on execution, and for the same length of time, unless the condition of the property renders a more immediate sale necessary. The sale shall be made accordingly. If the defendant gives his written consent, such sale may be made without such finding. [C51,§1881; R60, §3222; C73,§2999; C97,§3912; S13,§3912-a; C24, 27, 31, 35,§12126.]

Notice of sale, §11722 et seq.

12127 **Sheriff's return.** The sheriff shall return upon every attachment what he has done under it, which must show the property attached, the time it was attached, and the disposition made of it, by a full and particular inventory; also the appraisement above contemplated when such has been made. [R60, §3224; C73,§3010; C97,§3923; C24, 27, 31, 35, §12127.]

C97,§3923, editorially divided

12128 **Garnishment.** When garnishees are summoned, their names and the time each was summoned must be stated, with a copy of each notice of garnishment served attached as a part of his return. [R60,§3224; C73,§3010; C97, §3923; C24, 27, 31, 35,§12128.]

12129 **Description of real estate.** Where real property is attached, the sheriff shall describe it with certainty to identify it, and, where he can do so, by a reference to the book and page where the deed under which the defendant holds is recorded. [R60,§3224; C73, §3010; C97,§3923; C24, 27, 31, 35,§12129.]

12130 **Bonds, notices, and moneys.** He shall return with the writ all bonds taken under it, any notice of claim to such property by another than the defendant, any indemnifying bond given by the plaintiff in consequence of such notice, and all money and bank bills levied upon or paid to him thereunder. [R60,§3224; C73,§3010; C97,§3923; C24, 27, 31, 35,§12130.]

12131 **Time of return.** Such return must be made immediately after he has attached sufficient property, or all that he can find; or, at latest, on the first day of the first term on which the defendant is notified to appear. [R60,§3224; C73,§3010; C97,§3923; C24, 27, 31, 35,§12131.]

12132 **Judgment—satisfaction—special execution.** If judgment is rendered for the plaintiff in any case in which an attachment has been issued, the court shall apply, in satisfaction thereof, any money seized by or paid to the sheriff under such attachment and by him delivered to the clerk, and any money arising from the sales of perishable property, and if the same is not sufficient to satisfy the plaintiff's claim, the court shall order the issuance of a special execution for the sale of any other attached property which may be under his control. [R60, §3232; C73,§3011; C97,§3924; C24, 27, 31, 35, §12132.]

12133 **Court may control property.** The court may from time to time make and enforce proper orders respecting the property, sales, and

application of the money collected. [R60,§3233; C73,§3012; C97,§3925; C24, 27, 31, 35,§12133.]

12134 Expenses for keeping. The sheriff shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs. [R60,§3234; C73,§3013; C97,§3926; C24, 27, 31, 35,§12134.]

12135 Surplus. Any surplus of the attached property and its proceeds shall be returned to the defendant. [R60,§3235; C73,§3014; C97, §3927; C24, 27, 31, 35,§12135.]

12136 Intervention — petition. Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition verified by oath to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in or lien on it, under any other attachment or otherwise, and setting forth the facts upon which the claim is founded. [R60,§3237; C73,§3016; C97,§3928; C24, 27, 31, 35,§12136.]

Intervention generally, §11174
C97,§3928, editorially divided

12137 Hearing and orders. The petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may impanel a jury to inquire into the facts. If it is found that the petitioner has a title to, a lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. [R60, §3237; C73,§3016; C97,§3928; C24, 27, 31, 35, §12137.]

12138 Costs. The costs of such proceedings shall be paid by either party at the discretion of the court. [R60,§3237; C73,§3016; C97,§3928; C24, 27, 31, 35,§12138.]

12139 Discharge on motion. A motion may be made to discharge the attachment or any part thereof, at any time before trial, for insufficiency of statement of cause thereof, or for other cause making it apparent of record that the attachment should not have issued, or should not have been levied on all or on some part of the property held. [R60,§3239; C73,§3018; C97, §3929; C24, 27, 31, 35,§12139.]

12140 Automatic discharge — canceling entry on incumbrance book. If the judgment is rendered in the action for the defendant, or, if the action is dismissed by the court, by the plaintiff, or, by agreement of the parties, or, if judgment has been entered for the plaintiff and has been satisfied of record, the attachment shall, subject to the right of appeal, automatically be discharged and the property attached, or its proceeds, shall be returned to the defendant. If the attachment has been entered on the incumbrance book, it shall be the duty of the clerk to cancel such attachment, and in his entry of cancellation, he shall refer to the entry in the case showing his authority to cancel said attachment. [R60,§3236; C73,§3015; C97,§3930; C24, 27, 31, 35,§12140.]

12141 Perfecting appeal from order of discharge. When an attachment has been discharged, if the plaintiff then announces his purpose to appeal from such order of discharge, he shall have two days in which to perfect his appeal, and during that time such discharge shall not operate to divest any lien or claim under the attachment, nor shall the property be returned, and the appeal, if so perfected, shall operate as a supersedeas thereof. [R60, §3240; C73,§3019; C97,§3931; C24, 27, 31, 35, §12141.]

Perfecting appeal, §12837

12142 Appeal from judgment against plaintiff. If a judgment in the action be also given against the plaintiff, he must, within the same time, take his appeal thereon, or such discharge shall be final. [R60,§3241; C73,§3020; C97, §3932; C24, 27, 31, 35,§12142.]

12143 Liberal construction — amendments. This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ, or other proceeding; and no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings. [R60,§3242; C73,§3021; C97,§3933; C24, 27, 31, 35,§12143.]

Amendments generally, §§11182, 11557

12144 Sheriff—constables. The word "sheriff", or "officer", as used in this chapter is meant to apply to constables when the proceedings are in a justice's court, or the like officer of any other court. [C51,§1883; R60,§3244; C73,§3023; C97,§3934; C24, 27, 31, 35,§12144.]

12145 Certificate of release. When real estate or an equitable interest therein is attached in any county other than that in which the action is commenced, or is pending, and the action is dismissed, or the attachment is dissolved and discharged or satisfied, the clerk of the court of the county wherein such action is pending must issue a certificate directed to the clerk of the court in which the land is situated giving date of release and setting forth a true copy of the order or release and he shall be allowed as compensation for such service the sum of fifty cents, to be taxed as a part of the costs in the case. [S13,§3934-a; C24, 27, 31, 35, §12145.]

12146 Filing and recording. The clerk of the court receiving such certificate shall file and record the same upon the margin of the incumbrance book at place where the original entry of attachment is found. [S13,§3934-b; C24, 27, 31, 35,§12146.]

CHAPTER 511

SPECIFIC ATTACHMENT

Seizure of boats or rafts, ch 538

12147 When authorized.
12148 Fraudulently induced sales.
12149 Granted by court or judge—terms.
12150 Form of writ.
12151 Bond to discharge.

12147 When authorized. In an action to enforce a mortgage of or lien upon personal property, or for the recovery, sale, or partition of such property, or by a plaintiff having a future estate or interest therein for the security of his rights, where it satisfactorily appears by the petition, verified on oath, or by affidavits or the proofs in the cause, that the plaintiff has a just claim, and that the property has been or is about to be sold, concealed, or removed from the state, or where plaintiff states on oath that he has reasonable cause to believe, and does believe, that unless prevented by the court the property will be sold, concealed, or removed, an attachment may be granted against the property. [R60, §3225; C73,§3000; C97,§3913; C24, 27, 31, 35, §12147.]

Referred to in §12149

12148 Fraudulently induced sales. In an action by a vendor of property fraudulently purchased to vacate the contract and have a restoration of the property or compensation therefor, where the petition shows such fraudulent purchase of property and the amount of the plaintiff's claim, and is verified, an attachment against the property may be granted. [R60, §3226; C73,§3001; C97,§3914; C24, 27, 31, 35, §12148.]

Referred to in §12149

12149 Granted by court or judge—terms. The attachment in the cases mentioned in sections 12147 and 12148 may be granted by the court in which the action is brought, or by the judge of any court, upon such terms and conditions as to security by the plaintiff for the damages which may be occasioned, and with such directions as to the disposition to be made of the property attached as may be just and proper under the circumstances of each case. [R60,§3227; C73,§3002; C97,§3915; C24, 27, 31, 35,§12149.]

12150 Form of writ. The attachment shall describe the specific property against which it is issued, and have indorsed upon it the direction of the court or judge as to the disposition to be made of the attached property, and be directed, executed, and returned as other attachments. [R60,§3230; C73,§3003; C97,§3916; C24, 27, 31, 35,§12150.]

12151 Bond to discharge. The court may, in any of the cases mentioned under this head of specific attachments, direct the terms and conditions of the bond to be executed by the defendant, with security, in order to obtain a discharge of the attachment or to release the attached property. [R60,§3231; C73,§3004; C97,§3917; C24, 27, 31, 35,§12151.]

CHAPTER 512

ATTACHMENT BY STATE

Actions by state, §10990

12152 Indebtedness due the state.
12153 Attachment authorized.
12154 No bond required.
12155 Bond to discharge or release.
12156 Sheriff indemnified.

12152 Indebtedness due the state. In all cases in which any person is indebted to the state, or to any officer or agent thereof for the use or benefit of the state, the proper county attorney or attorney general shall demand payment or security therefor, when, in the opinion of said county attorney or attorney general, the debt is not sufficiently secured. [C73,§3005; C97,§3918; C24, 27, 31, 35,§12152.]

12153 Attachment authorized. In all actions for money due to the state, or to any agent or officer for the use of the state, it shall be lawful for an attachment to issue against the property or debts of the defendant not exempt from execution, upon the filing of an affidavit by the county attorney of the proper county, or of the attorney general, that he verily believes that a specific amount therein stated is justly due, and the defendant therein has refused to pay or secure the same, and unless an attachment is issued against the property of the defendant there is danger that the amount due will be lost to the state. [C73,§3006; C97,§3919; C24, 27, 31, 35, §12153.]

Referred to in §§12155, 12156

12154 No bond required. The attachment so issued shall be levied as in other cases of attachment, and no bond shall be required of the plaintiff in such cases, and the sheriff shall not be authorized to require any indemnifying bond in case of such levy. [C73,§3007; C97,§3920; C24, 27, 31, 35,§12154.]

Referred to in §§12155, 12156

12155 Bond to discharge or release. An attachment levied under the provisions of sections 12153 and 12154 may be discharged, or any property taken thereunder may be released, by the execution of a bond with sufficient sureties, as

provided by law in other cases of attachment. [C73,§3008; C97,§3921; C24, 27, 31, 35,§12155.]

Referred to in §12156
Delivery bond, §12121

12156 Sheriff indemnified. In case any sheriff shall be held liable to pay any damages by reason of the wrongful execution of any writ of attachment issued under sections 12153 to 12155, inclusive, and if a judgment is rendered therefor, the amount thereof, when paid by such sheriff, shall become a claim against the state in his favor, and a warrant therefor shall be drawn by the state comptroller upon proper proof. [C73,§3009; C97,§3922; C24, 27, 31, 35,§12156.]

CHAPTER 513

GARNISHMENT

Referred to in §7187

12157 How effected—notice.
12158 Who may be garnished.
12159 Municipal corporations.
12160 Fund in court.
12161 Death of garnishee.
12162 Sheriff may take answers.
12163 Garnishee required to appear.
12164 Examination in court.
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12167 Paying or delivering.
12168 Answer controverted.
12168.1 Notice of controverting pleadings.
12169 Judgment against garnishee.
12170 Notice.
12171 Pleading by defendant—discharge of garnishee.
12172 When debt not due.
12173 Negotiable paper—indemnity.
12174 Judgment conclusive.
12175 Docket to show garnishments.
12176 Appeal.

12157 How effected — notice. The officer serving a writ of attachment shall garnish such persons as the plaintiff may direct as supposed debtors, or having in possession property of the principal defendant, which shall be effected by a notice served in the manner and as an original notice in civil actions, forbidding his paying any debt owing such defendant, due or to become due, and requiring him to retain possession of all property of the defendant in his hands or under his control, to the end that the same may be dealt with according to law, and, unless answers are required to be taken as hereinafter provided, it shall cite the garnishee to appear on the first day of the next term, if the main cause is pending in a court of record, or not less than ten days thereafter, if such court is then in session, or on the day set for trial, if in a justice's court, and answer such interrogatories as may be propounded, or he will be liable to pay any judgment which the plaintiff may obtain against the defendant. [C51,§§1861, 1863, 1866; R60,§§3195, 3199, 3202; C73,§§2975, 2979, 2981; C97,§3935; C24, 27, 31, 35,§12157.]

Service of notice, §11060

12158 Who may be garnished. A sheriff or constable may be garnished for money of the defendant in his hands; a judgment debtor of the defendant, when the judgment has not been assigned on the record, or by writing filed in the office of the clerk and by him minuted as an assignment on the margin of the judgment docket; and an executor, for money due from decedent. [C51,§1862; R60,§3196; C73,§2976; C97,§3936; C24, 27, 31, 35,§12158.]

C97,§3936, editorially divided
Garnishment proceedings by tax commission, §§11679.1–11679.3

12159 Municipal corporations. A municipal or political corporation shall not be garnished. [R60,§3196; C73,§2976; C97,§3936; C24, 27, 31, 35,§12159.]

12160 Fund in court. Where the property to be attached is a fund in court, the execution of a writ of attachment shall be by leaving with the clerk of the court a copy thereof, with notice, specifying the fund. [R60,§3197; C73,§2977; C97,§3937; C24, 27, 31, 35,§12160.]

12161 Death of garnishee. If the garnishee dies after he has been summoned by garnishment and pending the litigation, the proceedings may be revived by or against his heirs or legal representatives. [R60,§3198; C73,§2978; C97, §3938; C24, 27, 31, 35,§12161.]

12162 Sheriff may take answers. When the plaintiff, in writing, directs the sheriff to take the answer of the garnishee, he shall put to him the following questions:

1. Are you in any manner indebted to the defendant in this suit, or do you owe him money or property which is not yet due? If so, state the particulars.
2. Have you in your possession or under your control any property, rights, or credits of the said defendants? If so, what is the value of the same? State all particulars.
3. Do you know of any debts owing the said defendant, whether due or not due, or any property, rights, or credits belonging to him and now in the possession or under the control of others? If so, state the particulars.

The sheriff shall append the examination to his return. [C51,§§1864, 1865; R60,§§3200, 3201; C73,§2980; C97,§3939; C24, 27, 31, 35,§12162.]

12163 Garnishee required to appear. If the garnishee refuses to answer fully and unequivocally all the foregoing interrogatories, he shall be notified to appear and answer as above provided, and he may be so required in any event, if the plaintiff so notifies him. [C51,1866; R60, §3202; C73,§2981; C97,§3940; C24, 27, 31, 35, §12163.]

12164 Examination in court. The questions propounded to the garnishee in court may be such as are above prescribed to be asked by the

sheriff, and such others as the court may think proper. [C51,§1867; R60,§3203; C73,§2982; C97, §3941; C24, 27, 31, 35,§12164.]

12165 Witness fees. Where the garnishee is required to appear at court, unless he has refused to answer as contemplated above, he is entitled to the pay and mileage of a witness, and may, in like manner, require advance payment before any liability shall arise for nonattendance. [C51,§1868; R60,§3204; C73,§2983; C97, §3942; C24, 27, 31, 35,§12165.]

Witness fees and mileage, §11326 et seq.

12166 Failure to appear or answer—cause shown. If, duly summoned, and his fees tendered when demanded, he fails to appear and answer the interrogatories propounded to him without sufficient excuse, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand, but for a mere failure to appear no judgment shall be rendered against him until he has had an opportunity to show cause against the same. [C51,§§1869, 1870; R60,§§3205, 3206; C73,§§2984, 2985; C97, §3943; C24, 27, 31, 35,§12166.]

12167 Paying or delivering. A garnishee may, at any time after answer, exonerate himself from further responsibility by paying over to the sheriff the amount owing by him to the defendant, and placing at the sheriff's disposal the property of the defendant, or so much of said debts and property as is equal to the value of the property to be attached. [C51,§1871; R60, §3207; C73,§2986; C97,§3944; C24, 27, 31, 35, §12167.]

12168 Answer controverted. When the garnishee has answered the interrogatories propounded to him, the plaintiff may controvert them by pleading thereto, and an issue may be joined, which shall be tried in the usual manner, upon which trial such answer of the garnishee shall be competent testimony. [C51,§1872; R60, §3208; C73,§2987; C97,§3945; C24, 27, 31, 35, §12168.]

12168.1 Notice of controverting pleadings. No judgment shall be rendered against a garnishee on a pleading which controverts his answer until notice of the filing of the controverting pleading and of the time and place of trial thereon is served on the garnishee for such time and in such manner as the court or judge shall order. A garnishee who has been so notified shall not be entitled to notice of the filing of amendments or of trial thereon. [C27, 31, 35,§12168-b1.]

12169 Judgment against garnishee. If in any of the above methods it is made to appear that the garnishee was indebted to the defendant, or had any of his property in his hands, at the time of being served with the notice of garnishment, he will be liable to the plaintiff, in case judgment is finally recovered by him, to the full amount thereof, or to the amount of such indebtedness or property held by the garnishee, and the plaintiff may have a judgment against the garnishee for the amount of money due from the garnishee to the defendant in the main action, or for the delivery to the sheriff of any money or property in the garnishee's hands belonging to the defendant in the main action within a time to be fixed by the court, and for the value of the same, as fixed in said judgment, if not delivered within the time thus fixed, unless before such judgment is entered the garnishee has delivered to the sheriff such money or property. Property so delivered shall thereafter be treated as if levied upon under the writ of attachment in the usual manner. [C51, §§1871, 1873; R60,§§3207, 3209; C73,§§2986, 2988; C97,§3946; C24, 27, 31, 35,§12169.]

12170 Notice. Judgment against the garnishee shall not be entered until the principal defendant shall have had ten days notice of the garnishment proceedings, to be served in the same manner as original notices. [C51,§1861; R60,§3195; C73,§2975; C97,§3947; S13,§3947; C24, 27, 31, 35,§12170.]

Notice in justice court, §10580

12171 Pleading by defendant—discharge of garnishee. The defendant in the main action may, by a suitable pleading filed in the garnishment proceedings, set up facts showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution. or for any other reason is not liable for plaintiff's claim, and if issue thereon be joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property, or any part thereof, is found to be thus exempt or not liable, the garnishee shall be discharged as to that part which is exempt or not liable. [C97,§3948; S13,§3948; C24, 27, 31, 35, §12171.]

12172 When debt not due. If the debt of the garnishee to the defendant is not due, execution shall be suspended until its maturity. [R60, §3210; C73,§2989; C97,§3949; C24, 27, 31, 35, §12172.]

12173 Negotiable paper — indemnity. The garnishee shall not be made liable on a debt due by negotiable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment. [R60,§3211; C73,§2990; C97,§3950; C24, 27, 31, 35,§12173.]

12174 Judgment conclusive. The judgment in the garnishment action, condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand, is conclusive between the garnishee and defendant. [R60, §3212; C73,§2991; C97,§3951; C24, 27, 31, 35, §12174.]

12175 Docket to show garnishments. The docketing of the original case shall contain a

statement of all the garnishments therein, and when judgment is rendered against a garnishee, the same shall distinctly refer to the original judgment. [R60,§3213; C73,§2992; C97,§3952; C24, 27, 31, 35,§12175.]

12176 Appeal. An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee, or an intervenor claiming the money or property. [R60,§3214; C73,§2993; C97,§3953; C24, 27, 31, 35,§12176.]

CHAPTER 514

REPLEVIN

12177 Where brought—petition.
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12193 Judgment.
12194 Execution.
12195 Plaintiff's option.
12196 Judgment on bond.
12197 Concealment.
12198 Exemption.

12177 Where brought—petition. An action of replevin may be brought in any county in which the property or some part thereof is situated. The petition must be verified and must state:

1. A particular description of the property claimed.
2. Its actual value, and, where there are several articles, the actual value of each.
3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership.
4. That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him or against the property; but if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process.
5. The facts constituting the alleged cause of detention thereof, according to his best belief.
6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof. [C51,§§1703, 1994, 1995; R60, §3553; C73,§3225; C97,§4163; C24, 27, 31, 35, §12177.]

12178 Ordinary proceedings — joinder or counterclaim. The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim. [R60,§4175; C73,§3226; C97,§4164; C24, 27, 31, 35,§12178.]

12179 Process on Sunday. If the plaintiff alleges in his petition that he will lose the property unless process issues on Sunday, the order may be issued and served on that day. [C73, §3227; C97,§4165; C24, 27, 31, 35,§12179.]

Analogous or related provisions, §§10819, 11064, 11653, 12082, 12560

12180 New parties. If a third person claims the property or any part thereof, the plaintiff may amend and bring him in as a co-defendant, or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervention. [C51, §§1684, 1999; R60,§3561; C73,§3228; C97,§4166; C24, 27, 31, 35,§12180.]

Interpleader, §11002 et seq.
Intervention, §11174

12181 Bond. When the plaintiff desires the immediate delivery of the property, he shall execute a bond to the defendant, with sureties to be approved by the clerk or justice, in a penalty at least equal to twice the value of the property sought to be taken, conditioned that he will appear at the next term of the court, if in a court of record, or on the day fixed in the original notice, if in a justice's court, and prosecute his action to judgment, and return the property, if a return is awarded, and pay all costs and damages that may be adjudged against him. [C51, §1996; R60,§3554; C73,§3229; C97,§4167; C24, 27, 31, 35,§12181.]

C97,§4167, editorially divided

12182 Filing—purpose of bond. Said bond shall be filed with the clerk or justice, and be for the use of any person injured by the proceeding. [C51,§1996; R60,§3554; C73,§3229; C97,§4167; C24, 27, 31, 35,§12182.]

12183 Writ issued. The clerk or justice shall thereupon issue a writ under his hand, and the seal of the court if a court of record, directed to the proper officer, requiring him to take the property therein described and deliver it to the plaintiff. [C51,§1997; R60,§3555; C73,§3230; C97,§4168; C24, 27, 31, 35,§12183.]

C97,§4168, editorially divided

12184 Wrongful removal — service. If the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced, the writ may issue from the county whence the property was wrongfully taken, and may be served in any county where it may be found. [C73,§3230; C97, §4168; C24, 27, 31, 35,§12184.]

Analogous provision, §12097

12185 Following property—duplicate writs. When any of the property is removed to another

county after the commencement of the action, the officer to whom the writ is issued may follow the same and execute the writ in any county of the state where the property is found. For the purpose of following the property, duplicate writs may be issued, if necessary, and served as the original. [R60,§3556; C73,§3231; C97,§4169; C24, 27, 31, 35,§12185.]

Analogous provision, §12097

12186 Execution of writ. The officer must forthwith execute the writ by taking possession of the property therein described, if it is found in the possession of the defendant or his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the writ was placed in the officer's hands, for which purpose he may break open any dwelling house or other inclosure, having first demanded entrance and exhibited his authority, if demanded. [C51,§1998; R60,§3557; C73,§3232; C97,§4170; C24, 27, 31, 35,§12186.]

12187 Defendant examined. When it appears by affidavit that the property claimed has been disposed of or concealed so that the writ cannot be executed, the court or judge, upon verified petition therefor, may compel the attendance of the defendant or other person claiming or concealing the property, and examine him on oath as to the situation of the property, and punish a willful obstruction or hindrance or disobedience of the order of the court in this respect as in case of contempt. [R60,§3558; C73, §3233; C97,§4171; C24, 27, 31, 35,§12187.]

Contempts, ch 536

12188 Delivery bond. The officer, having taken the property or any part thereof, shall forthwith deliver the same to the plaintiff, unless, before the actual delivery to him, the defendant executes a bond to the plaintiff, with sureties to be approved by the clerk or officer, conditioned that he will appear in and defend the action, and deliver the property to the plaintiff, if he recovers judgment therefor, in as good condition as it was when the action was commenced, and that he will pay all costs and damages that may be adjudged against him for the taking or detention of the property. [R60,§3560; C73,§§3234, 3235; C97,§4172; C24, 27, 31, 35, §12188.]

Similar provisions, §§12118, 12121, 12564
C97,§4172, editorially divided

12189 Release—return of bond. Said bond shall be delivered to the officer, who shall return the property to the defendant, append the bond to the writ, return it therewith to the officer issuing it, and refer thereto in his return on the writ. [R60,§3559; C73,§3237; C97,§4172; C24, 27, 31, 35,§12189.]

12190 Inspection—appraisement. When the property is so retained by the defendant, he shall permit the officer and plaintiff to inspect the same, and, if the plaintiff so request, the officer shall cause it to be examined and appraised by two sworn appraisers chosen by the parties to the action, or, in their default, by the officer himself, in the manner provided for other cases of appraisement, and in case they cannot agree he shall select a third, and an appraisement agreed to by two of them shall be sufficient, and he shall return their appraisement with the writ. [C73,§3236; C97,§4173; C24, 27, 31, 35, §12190.]

12191 Return of writ. The officer must return the writ on or before the first day of the trial term, or the return day if before a justice, and shall state fully what he has done thereunder. If he has taken any property, he shall describe the same particularly. [R60,§3559; C73,§3237; C97,§4174; C24, 27, 31, 35,§12191.]

12192 Assessment of value and damages—right of possession. The jury must assess the value of the property and the damages for the taking or detention thereof, whenever by their verdict there will be a judgment for the recovery or the return of the property, and, when required so to do by either party, must find the value of each article, and find which is entitled to the possession, designating his right therein, and the value of such right. [R60,§3082; C73,§3238; C97,§4175; C24, 27, 31, 35,§12192.]

12193 Judgment. The judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party, and shall also award such damages to either party as he may be entitled to for the illegal detention thereof. If the judgment be against the plaintiff for the money value of the property, it shall also be against the sureties on his bond. [C51,§§2000, 2001; R60,§§3554, 3562, 3567; C73,§§3229, 3239; C97,§4176; C24, 27, 31, 35,§12193.]

12194 Execution. The execution shall require the officer to deliver the possession of the property, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which judgment was recovered to be specified therein if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property. [R60,§3253; C73,§3240; C97,§4177; C24, 27, 31, 35,§12194.]

12195 Plaintiff's option. If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter or otherwise, he may at his option have an execution for the delivery of the specific property, or for the value thereof as determined by the jury, and if any article of the property cannot be obtained on execution, he may take the remainder, with the value of the missing articles. [R60,§§3563, 3568; C73,§3241; C97,§4178; C24, 27, 31, 35,§12195.]

12196 Judgment on bond. When property for which a bond has been given as hereinbefore provided is not forthcoming to answer the judgment, and the party entitled thereto so elects, a judgment may be entered against the principal and sureties in the bond for its value. [C73, §3242; C97,§4179; C24, 27, 31, 35,§12196.]

12197 Concealment. When it appears by the return of the officer or by the affidavit of the plaintiff that any specific property which has been adjudged to belong to one party has been concealed or removed by the other, the court or a judge may require him to attend and be examined on oath respecting such matter, and may enforce its order in this respect as in case of contempt. [R60,§3564; C73,§3243; C97,§4180; C24, 27, 31, 35,§12197.]

Contempts, ch 536

12198 Exemption. A money judgment rendered under the provisions of this chapter for property exempt from execution shall also be to the same extent exempt from execution, and from all set-off or diminution by any person, which exemption may, at the election of the party in interest, be stated in the judgment. [R60,§4176; C73,§3244; C97,§4181; C24, 27, 31, 35,§12198.]

CHAPTER 515

LOST PROPERTY

12199 Taking up vessels, rafts, logs, and lumber.
12200 Warrant—appraisal—return—record.
12201 Value under twenty dollars.
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12203 Advertisement—when title vests.
12204 Lost goods or money.
12205 When owner unknown.
12206 Advertisement.
12207 Record of publication.
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12209 Vesting of title.
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12211 Compensation.
12212 Costs, charges, and care—assessment.
12213 Proceeds—forfeiture.
12214 Responsibility of taker-up.
12215 Penalty for selling.
12216 Failure to comply.

12199 Taking up vessels, rafts, logs, and lumber. If any person shall stop or take up any vessel or watercraft, or any raft of logs, or part thereof, or any logs suitable for making lumber or hewn timber, or sawed lumber, found adrift within the limits or upon the boundaries of this state, of the value of five dollars or upwards, including the cargo, tackle, rigging, and other appendages of such vessel or watercraft, such person, within five days thereafter, provided the same shall not have been previously proved and restored to the owner, shall go before some justice of the peace in the township where such property is found, and make affidavit setting forth the exact description of such property; where and when the same was found; whether any, and if so what cargo, tackle, rigging, or other appendages were found on board or attached thereto; and that the same has not been altered or defaced, either in whole or in part, since the taking up, either by him or by any other person to his knowledge. [C51,§§876–878; R60,§1506; C73,§§1509, 1512; C97,§2371; C24, 27, 31, 35,§12199.]

C97,§2371, editorially divided

12200 Warrant—appraisal—return—record. The said justice shall thereupon issue his warrant, directed to some constable of his township, commanding him to summon three respectable householders of the neighborhood, who shall proceed without delay to examine and appraise such property, including cargo, tackle, rigging, and other appendages if any there be, and to make report thereof under their hands to the justice issuing such warrant, who shall enter the same, together with the affidavit of the taker-up, at large in his estray book, and within five days shall transmit a certified copy thereof to the county auditor of the proper county, to be by him recorded in his estray book and filed in his office. [C51,§§878–880; R60,§1506; C73, §§1509, 1512; C97,§2371; C24, 27, 31, 35,§12200.]

12201 Value under twenty dollars. In all cases where the appraisement of any such property shall not exceed the sum of twenty dollars, the finder shall advertise the same on the door of the courthouse, and in three other of the most public places in the county, within five days after the appraisement, and if no person shall appear to claim and prove such property within six months of the time of taking up, it shall vest in the finder. [C51,§§879, 880; R60,§1507; C73, §1513; C97,§2372; S13,§2372; C24, 27, 31, 35, §12201.]

12202 Value exceeding twenty dollars. If the value thereof shall exceed the sum of twenty dollars, the county auditor, within five days from the time of the reception of the justice's certificate at his office, shall cause an advertisement to be posted on the door of the courthouse, and at three other of the most public places in the county, and also a notice to be published once each week for three weeks successively, in some newspaper printed in this state; and if such property be not claimed or proved within ninety days after the advertisement of the same, as aforesaid, the finder shall deliver the same to the sheriff of the county wherein it was taken up, who shall thereupon proceed to sell it at public auction to the highest bidder for cash, having first given ten days notice of the time and place of sale, and the proceeds of all such sales, after deducting the costs and other necessary expenses, shall be paid into the county treasury. [C51,§881; R60,§1507; C73,§1513; C97,§2372; S13,§2372; C24, 27, 31, 35,§12202.]

12203 Advertisement—when title vests. In all cases where any vessel, watercraft, logs, or lumber shall be taken up as aforesaid, which shall be of a value less than five dollars, the finder shall advertise the same by posting a notice of such finding in three of the most public places in the neighborhood; but in such cases he shall keep and preserve the same in his possession, and shall make restitution thereof to the owner, without fee or reward, except the same be given voluntarily when the owner claims the same, provided it shall be done in three months from such taking up or finding; but, if no owner shall claim such property within the time aforesaid, the exclusive right to it shall be vested in the finder. [C51,§§876, 877; R60,§1510; C73,§1516; C97,§2375; C24, 27, 31, 35,§12203.]

12204 Lost goods or money. If any person shall find any lost goods, money, bank notes, or other things of any description whatever, of the value of five dollars and over, such person shall inform the owner thereof, if known, and make restitution thereof. [C51,§§876–879; R60, §1508; C73,§1514; C97,§2373; C24, 27, 31, 35, §12204.]

12205 When owner unknown. If the owner be unknown, such person shall, within five days after such finding, take such money, bank notes, and a description of any other property before the county auditor of the county where the property was found, and make affidavit of the description thereof, the time when and place where the same was found, and that no alteration has been made in the appearance thereof since the finding; whereupon the county auditor shall enter a description of the property and the value thereof, as nearly as he can determine it, in his estray book, together with the affidavit of the finder. [R60,§1508; C73,§1514; C97,§2373; C24, 27, 31, 35,§12205.]

12206 Advertisement. The finder of such lost goods, money, bank notes, or other things, shall forthwith give written notice of the finding of such property. Such notice shall contain an accurate description of the property and a statement as to the time when and place where the same was found, and the post-office address of the finder. Said notice shall:

1. Be posted at the door of the courthouse in the county in which the property was found and in three other of the most public places in the said county; and

2. In case the property found shall exceed ten dollars in value, the notice shall be published once each week for three consecutive weeks in some newspaper published in and having general circulation in said county. [C51, §§877, 878, 880; R60,§§1509, 1510; C73,§§1510, 1514–1516; C97,§§2372, 2374; S13,§§2372, 2374; C24, 27, 31, 35,§12206.]

12207 Record of publication. Proof of publication of said notice and of the posting thereof shall be made by affidavits of the publisher and the person posting said notices, and said affidavits shall be filed in the office of the county auditor of said county. [C51,§886; C24, 27, 31, 35,§12207.]

Referred to in §12208

12208 Additional publication. The affidavits provided for in section 12207 shall be entered by the auditor in the proceedings of the board of supervisors and the same shall be published with the proceedings of said board. [C24, 27, 31, 35,§12208.]

12209 Vesting of title. If no person appears to claim and prove ownership to said goods, money, bank notes, or other things within twelve months of the date when proof of said publication and posting is filed in the office of the county auditor, the right to such property shall irrevocably vest in said finder. [C51,§§879, 881; R60,§§1509, 1510; C73,§§1510, 1513, 1515, 1516; C97,§§2372, 2374, 2375; S13,§§2372, 2374; C24, 27, 31, 35,§12209.]

12210 Ownership settled. In any case where a claim is made to property found or taken up, and the ownership of the property cannot be agreed upon by the finder and claimant, they may make a case before any justice of the peace in the county, who may hear and adjudicate it, and if either of them refuses to make such case the other may make an affidavit of the facts which have previously occurred, and the claimant shall also verify his claim by his affidavit, and the justice may take cognizance of and try the matter on the other party having one day's notice, but there shall be no appeal from the decision. This section does not bar any other remedy given by law. [C51,§890; R60,§1504; C73,§1517; C97,§2376; C24, 27, 31, 35,§12210.]

12211 Compensation. As a reward for the taking up of boats and other vessels, and for finding lost goods, money, bank notes, and other things, before restitution of the property or proceeds thereof shall be made, the finder shall be entitled to ten percent upon the value thereof, and for taking up any logs or lumber, as hereinbefore described, twenty-five cents for each log not exceeding ten, twenty cents for each exceeding ten and not exceeding fifty, fifteen cents for each exceeding fifty, and fifty cents per thousand feet for sawed lumber. [C51, §892; R60,§1514; C73,§§1511, 1518; C97,§2377; C24, 27, 31, 35,§12211.]

12212 Costs, charges, and care—assessment. The owner shall also be required to pay the finder all such costs and charges as may have been paid by him for services rendered as aforesaid, including the cost of publication, together with reasonable charges for keeping and taking care of such property, which last mentioned charge, in case the finder and the owner cannot agree, shall be assessed by two disinterested householders of the neighborhood, to be appointed by some justice of the peace of the proper county, whose decision, when made, shall be binding and conclusive on all parties. [C51, §893; R60,§1514; C73,§1518; C97,§2377; C24, 27, 31, 35,§12212.]

12213 Proceeds—forfeiture. The net proceeds of all sales made by the sheriff, and all money or bank notes paid over to the county treasurer, as directed in this chapter, shall remain in the hands of the county treasurer in trust for the owner, if any such shall apply within one year from the time the same shall have been paid over; but, if no owner shall appear within such time, the money shall be forfeited, and the claim of the owner thereto forever barred, in which event the money shall remain in the county treasury for the use of the common schools in said county. [C51,§885; R60,§1516; C73,§1519; C97,§2378; C24, 27, 31, 35,§12213.]

12214 Responsibility of taker-up. If the taker-up of any watercraft, logs, or lumber, or finder of lost goods, bank notes, or other things, shall take reasonable care of the same, and any unavoidable accident happens thereto without the fault or neglect of the finder or taker-up before the owner shall have an opportunity of reclaiming the same, such taker-up or finder shall not be accountable therefor, if in cases of accident as aforesaid he within ten days thereafter shall certify the same to the county auditor, who shall make an entry thereof in his estray book. [R60,§1517; C73,§1520; C97,§2379; C24, 27, 31, 35,§12214.]

12215 Penalty for selling. If any person shall trade, sell, loan, or take out of the limits of this state any such property taken up or found as aforesaid, before he shall be vested with the right to the same according to the foregoing provisions, he shall forfeit and pay double the value thereof, to be recovered by any person in an action, one half of which shall go to the plaintiff and the other half to the county. [R60,§1518; C73,§1521; C97,§2380; C24, 27, 31, 35,§12215.]

12216 Failure to comply. If any person shall take up any boat or vessel, or any logs or lumber, or shall find any goods, money, bank notes, or other things, and shall fail to comply with the requirements of this chapter, he shall forfeit and pay the sum of twenty dollars, to be recovered in an action by any person who will sue for the same, one half for the use of the person suing and the other half to be deposited in the county treasury for the use of the common schools; but nothing herein contained shall prevent the owner from having and maintaining his action for the recovery of any damage he may sustain. [R60,§1519; C73,§1522; C97,§2381; C24, 27, 31, 35,§12216.]

CHAPTER 516

PROPERTY STOLEN OR EMBEZZLED

Referred to in §13441.30

12217 Held by officer.
12218 Delivered to owner.
12219 Proof of title.
12220 By order of court.
12221 When not claimed.
12229 Receipt given.

12217 Held by officer. When property alleged to have been stolen or embezzled comes into the custody of a peace officer, he must hold the same subject to the order of the proper magistrate directing the disposal thereof. [C51, §3253; R60,§5049; C73,§4654; C97,§5569; C24, 27, 31, 35,§12217.]

12218 Delivered to owner. On satisfactory proof of title by the owner of the property, the magistrate before whom the information is laid, or who shall examine the charge against the person accused of stealing or embezzling the same, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in the preservation and keeping thereof, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property. [C51,§3254; R60,§5050; C73, §4655; C97,§5570; C24, 27, 31, 35,§12218.]

12219 Proof of title. If the property stolen or embezzled come into the custody of a magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified as before provided. [C51, §3255; R60,§5051; C73,§4656; C97,§5571; C24, 27, 31, 35,§12219.]

12220 By order of court. If the property stolen or embezzled has not been delivered to the owner, the court before which a conviction is had may, on proof of his title, order its restoration. [C51,§3256; R60,§5052; C73,§4657; C97,§5572; C24, 27, 31, 35,§12220.]

12221 When not claimed. If the property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of the person for stealing or embezzling it, the magistrate or other officer having it in his custody must, on payment of the necessary expenses incurred for its preservation, deliver it to the auditor of the county, to be applied under the direction of the board of supervisors thereof for the benefit of the poor of the county. [C51,§3257; R60,§5053; C73,§4658; C97,§5573; C24, 27, 31, 35,§12221.]

12222 to 12228, inc. Rep. by 47GA, ch 134, §547. See §§5006.14 to 5006.20

12229 Receipt given. When money or other property is taken from the defendant arrested upon a charge of a public offense, the officer taking it shall, at the time, give duplicate receipts therefor, specifying particularly the

amount of money and the kind of property taken; one of which receipts he must deliver to the defendant, and the other he must forthwith file with the clerk of the district court of the county where the depositions and statements are to be sent by the magistrate. [C51,§3258; R60, §5054; C73,§4659; C97,§5574; C24, 27, 31, 35, §12229.]

CHAPTER 517

RECOVERY OF REAL PROPERTY

12230 Ordinary proceedings—joinder—counterclaim.
12231 Parties.
12232 Title.
12233 Tenant in common.
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12236 Abstract of title.
12237 Unwritten muniments of title — unrecorded conveyances.
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12247 Judgment for damages.
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12250 Wanton aggression.
12251 Tenant—extent of liability.
12252 Growing crops—bond.
12253 Writ of possession.
12254 Judgment for rent accruing.
12255 New trial.
12256 Notice.
12257 Purchaser not affected—execution.

12230 Ordinary proceedings — joinder — counterclaim. Actions for the recovery of real property shall be by ordinary proceedings, and there shall be no joinder and no counterclaim therein, except of like proceedings, and as provided in this chapter. [R60,§4177; C73,§3245; C97,§4182; C24, 27, 31, 35,§12230.]

12231 Parties. Any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action against any person acting as owner, landlord, or tenant of the property claimed. [C51,§2002; R60,§3569; C73,§3246; C97,§4183; C24, 27, 31, 35,§12231.]

12232 Title. The plaintiff must recover on the strength of his own title. [C51,§2020; R60, §3591; C73,§3247; C97,§4184; C24, 27, 31, 35, §12232.]

12233 Tenant in common. In an action by a tenant in common or joint tenant of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial. [C51, §2027; R60,§3605; C73,§3248; C97,§4185; C24, 27, 31, 35,§12233.]

12234 Service on agent. When the defendant is a nonresident having an agent of record for the property in the state, service may be made upon such agent in the same manner and with the like effect as though made on the principal. [C51,§2004; R60,§3572; C73,§3249; C97, §4186; C24, 27, 31, 35,§12234.]

12235 Petition. The petition may state generally that the plaintiff is entitled to the possession of the premises, particularly describing them, also the quantity of his estate and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the same; but if he claims other damages than the rents and profits, he shall state the facts constituting the cause thereof. [R60,§3570; C73,§3250; C97,§4187; C24, 27, 31, 35,§12235.]

12236 Abstract of title. The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page and book where the same appears of record. [C73,§3251; C97,§4188; C24, 27, 31, 35,§12236.]

Referred to in §12313
C97,§4188, editorially divided

12237 Unwritten muniments of title — unrecorded conveyances. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. [C73,§3251; C97,§4188; C24, 27, 31, 35,§12237.]

Referred to in §12313

12238 Evidence — abstract amended. No written evidence of title shall be introduced on the trial unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific, or may be amended by the party setting it out. [C73,§3251; C97,§4188; C24, 27, 31, 35,§12238.]

Referred to in §12313

12239 Answer. The answer of the defendant, and each if more than one, must set forth what part of the land he claims and what interest he claims therein generally, and if as mere tenant, the name and residence of his landlord. [C51,§2005; R60,§3573; C73,§3252; C97,§4189; C24, 27, 31, 35,§12239.]

12240 Landlord substituted. When it appears that the defendant is only a tenant, the

landlord may be substituted by the service upon him of original notice, or by his voluntary appearance, in which case the judgment shall be conclusive against him. [C51,§2003; R60,§§3571, 3589; C73,§3253; C97,§4190; C24, 27, 31, 35, §12240.]

12241 Possession. When the defendant makes defense it is not necessary to prove him in possession of the premises. [C51,§2007; R60, §3575; C73,§3254; C97,§4191; C24, 27, 31, 35. §12241.]

12242 Purchase pending suit. Any person acquiring title to land or any interest therein, after commencement of an action under this chapter to recover the same, shall take subject to notice of and without prejudice to the rights of the parties to such action. [R60,§3578; C73, §3255; C97,§4192; C24, 27, 31, 35,§12242.]

12243 Order to enter and survey. The court on motion, and after notice to the opposite party, may for cause shown grant an order allowing the party applying therefor to enter upon the land in controversy and make survey thereof for the purposes of the action. [C51,§2021; R60, §3592; C73,§3256; C97,§4193; C24, 27, 31, 35, §12243.]

12244 Service. The order must describe the property, and a copy thereof must be served upon the owner or person having the occupancy and control of the land. [C51,§2022; R60,§3593; C73,§3257; C97,§4194; C24, 27, 31, 35,§12244.]

12245 Verdict — special. The verdict may specify the extent and quantity of the plaintiff's estate and the premises to which he is entitled, with reasonable certainty, by metes and bounds and other sufficient description, according to the facts as proved. [R60,§3594; C73,§3258; C97,§4195; C24, 27, 31, 35,§12245.]

12246 General verdict. A general verdict in favor of the plaintiff, without such specifications, entitles the plaintiff to the quantity of interest or estate in the premises as set forth and described in the petition. [R60,§3595; C73, §3259; C97,§4196; C24, 27, 31, 35,§12246.]

12247 Judgment for damages. If the interest of the plaintiff expires before the time in which he could be put in possession, he can obtain a judgment for damages only. [C51,§2010, R60,§3579; C73,§3260; C97,§4197; C24, 27, 31, 35,§12247.]

12248 Use and occupation. The plaintiff cannot recover for the use and occupation of the premises for more than five years prior to the commencement of the action. [C51,§2008; R60, §3576; C73,§3261; C97,§4198; C24, 27, 31, 35, §12248.]

12249 Improvements set off. When the plaintiff is entitled to damages for withholding or using or injuring his property, the defendant may set off the value of any permanent improvements made thereon to the extent of the damages, unless he prefers to avail himself of the law for the benefit of occupying claimants. [C51,§2023; R60,§3596; C73,§3262; C97,§4199; C24, 27, 31, 35,§12249.]

Occupying claimants, ch 440

12250 Wanton aggression. In case of wanton aggression on the part of the defendant, the jury may award exemplary damages. [C51, §2024; R60,§3597; C73,§3263; C97,§4200; C24, 27, 31, 35,§12250.]

12251 Tenant—extent of liability. A tenant in possession in good faith, under a lease or license from another, is not liable beyond the rent in arrear at the time of suit brought for the recovery of land, and that which may afterward accrue during the continuance of his possession. [R60,§3598; C73,§3264; C97,§4201; C24, 27, 31, 35,§12251.]

12252 Growing crops — bond. If the defendant avers that he has a crop sowed, planted, or growing on the premises, the jury, finding for the plaintiff, and also finding that fact, shall further find the value of the premises from the date of the trial until the first day of January next succeeding, and no execution for possession shall be issued until that time, if the defendant executes, with surety to be approved by the clerk, a bond in double such sum to the plaintiff, conditioned to pay at said date the sum so assessed, which shall be part of the record, and shall have the force and effect of a judgment, and if not paid at maturity the clerk, on the application of the plaintiff, shall issue execution thereon against all the obligors. [R60,§3599; C73,§3265; C97,§4202; C24, 27, 31, 35,§12252.]

12253 Writ of possession. When the plaintiff shows himself entitled to the immediate possession of the premises, judgment shall be entered and an execution issued accordingly. [C51,§2009; R60,§3577; C73,§3266; C97,§4203; C24, 27, 31, 35,§12253.]

12254 Judgment for rent accruing. The plaintiff may have judgment for the rent or rental value of the premises which accrues after judgment and before delivery of possession, by motion in the court in which the judgment was rendered, ten days notice thereof in writing being given, unless judgment is stayed by appeal and bond given to suspend the judgment, in which case the motion may be made after the affirmance thereof. [R60,§3600; C73, §3267; C97,§4204; C24, 27, 31, 35,§12254.]

12255 New trial. In the cases provided for by this chapter the court, in its discretion, may grant a new trial on the application of any party thereto, or those claiming under a party, made at any time within one year after the former trial, although the grounds required for a new trial in other cases are not shown. [C51, §2014; R60,§3584; C73,§3268; C97,§4205; C24, 27, 31, 35,§12255.]

12256 Notice. If the application is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party ten days notice thereof before the term at which the action

stands for trial. [R60,§3585; C73,§3269; C97, §4206; C24, 27, 31, 35,§12256.]

12257 Purchaser not affected — execution. The result of a new trial, if granted at a term subsequent to the one at which the first trial was had, shall in no case affect the rights of third persons, acquired in good faith and for a valuable consideration after the former trial; but the party showing himself on the new trial entitled to lands which have thus passed to a good-faith purchaser, may recover his damages in the same or a subsequent action against the other party, and the successful party in such new trial shall have an execution for the property, if the case requires it. [C51,§§2015–2017; R60,§§3586–3588; C73,§§3270–3272; C97,§4207; C24, 27, 31, 35,§12257.]

CHAPTER 518

RESTORATION OF LOST RECORDS

12258 Action in rem.
12259 Proceedings.
12260 Proof required.
12261 Filing of restored records—effect.
12262 Costs of restoration—how paid.

12258 Action in rem. Whenever the public records in the office of any county official in this state have been or shall hereafter be lost or destroyed in any material part, the said county on relation of said public officer or the owner of any real estate affected thereby, may bring an action in rem in equity in the district court of the state in and for the county in which said real estate is situated against all known and unknown persons, firms, or corporations that might have any interest in said real estate affected by said record, to have said lost or destroyed records restored in whole or in part.

Any number of parcels of land may be included in the same suit; and whenever said action is brought by the owner, the public official in whose office said lost or destroyed public records are required by law to be kept shall be made a defendant therein. [S13,§4227-a; C24, 27, 31, 35,§12258.]

12259 Proceedings. The petition, notice, and decree in said action to restore any lost or destroyed records, and all proceedings in said suit, so far as the same relate to unknown defendants, shall conform to the statutes of this state applicable to actions against unknown defendants and unknown claimants; and all known defendants shall be served with notice in the time and manner now provided by law; and whenever said action is brought by the owner of said real estate, all clouds upon said title and defects therein and all adverse claims thereto may be adjudicated in the same suit and title quieted therein.

The provisions of sections 11595 and 11596 shall be applicable to defendants served with original notice in such action by publication. [S13,§4227-b; C24, 27, 31, 35,§12259.]

Unknown claimants, §§10987, 11082 et seq.

12260 Proof required. No judgment or decree restoring any lost or destroyed record in such action shall be entered by default, but the court must require proof of the facts alleged in reference thereto and the court shall make such finding of facts and decree as may be sustained by the evidence and may order such lost or destroyed record to be prepared by said public official as completely as the circumstances and proof will permit, and said record when so prepared shall be approved by the court and its approval indorsed thereon by the clerk. [S13, §4227-c; C24, 27, 31, 35,§12260.]

12261 Filing of restored records—effect. All public records restored as provided by this chapter shall be filed, bound, and indexed the same as original records are required to be, and shall have the same force and effect as the original records before their loss or destruction. [S13,§4227-d; C24, 27, 31, 35,§12261.]

12262 Costs of restoration — how paid. Whenever any public record is restored, as provided in this chapter, all court costs and necessary expenses of restoring the same shall be paid by the county to which said records belong, whether said action is commenced or prosecuted by a county official or by the owner of any real estate authorized to maintain such action. [SS15, §4227-e; C24, 27, 31, 35,§12262.]

CHAPTER 519

FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY

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12282 Appeal or writ of error.
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12263 Grounds. A summary remedy for forcible entry or detention of real property is allowable:

1. Where the defendant has by force, intimidation, fraud, or stealth entered upon the prior actual possession of another in real property, and detains the same.
2. Where the lessee holds over after the termination of his lease.
3. Where the lessee holds contrary to the terms of his lease.
4. Where the defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale; in either of which cases such title shall be clearly and concisely set forth in the defendant's pleading.
5. For the nonpayment of rent, when due. [C51,§§2362, 2363; R60,§§3952, 3953; C73, §§3611, 3612; C97,§4208; C24, 27, 31, 35,§12263.]

Referred to in §12274

12264 By legal representatives. The legal representative of a person who, if alive, might have been plaintiff may bring this action after his death. [C51,§2364; R60,§3954; C73,§3613; C97,§4209; C24, 27, 31, 35,§12264.]

12265 Notice to quit. Before action can be brought in any except the first of the above classes, three days notice to quit must be given to the defendant in writing. [C51,§2365; R60, §3955; C73,§3614; C97,§4210; C24, 27, 31, 35, §12265.]

40GA, ch 271, §2, editorially divided
Landlord and tenant provisions, §§10159 to 10162, inc.

12266 Notice terminating tenancy. When the tenancy is at will and the action is based on the ground of the nonpayment of rent when due, no notice of the termination of the tenancy other than the three-day notice need be given before beginning the action. [C24, 27, 31, 35, §12266.]

See also §10159
Farm tenancies, §§10160 to 10162, inc.

12267 Jurisdiction—transfer—appeal. The district, municipal, and superior courts within the county, and justices of the peace within the township where the subject matter of the action is situated, shall have concurrent jurisdiction of actions for the forcible entry or detention of real property, and the court first acquiring jurisdiction of an action therefor shall retain the same until judgment, unless it is transferred as hereinafter provided. By agreement of the parties, it may be transferred from a justice's court to a municipal, superior, or the district court, or from a superior or a municipal to the district court, and all such actions in which judgment is rendered in a justice's court may be appealed to the district or superior court, as provided by law. [C51,§2367; R60,§3957; C73, §3616; C97,§4211; C24, 27, 31, 35,§12267.]

12267.1 Municipal court procedure. This chapter shall apply to actions in the municipal court except insofar as the statutory procedure governing said court is in conflict herewith. [C27, 31, 35,§12267-b1.]

12268 Petition. The action must be by petition which must be sworn to. When brought before the justice of the peace, a petition must be on file at the time the defendant is required to appear by the notice. [C51,§2366; R60,§3956; C73,§3615; C97,§4212; C24, 27, 31, 35,§12268.]

39GA, ch 193, §2, editorially divided

12269 Venue. When brought before a justice of the peace, and there is none present or qualified to act in the township where the subject thereof is situated, it may be brought in an adjoining township in the county. If there be no such justice in an adjoining township in the county it may be commenced before the justice in the same county nearest to the township in which the subject thereof is situated. [C51, §2367; R60,§3957; C73,§3616; C97,§4212; C24, 27, 31, 35,§12269.]

12270 Change of venue. In any such action a change of place of trial may be had as in other cases. [C51,§2367; R60,§3957; C73,§3616; C97, §4212; C24, 27, 31, 35,§12270.]

Change of venue, §10537

12271 Service by publication. Where it is made to appear by affidavit that personal service of the original notice in such action cannot be made upon the defendant within the state, the same may be made by publication, if in a court of record, or by posting, if in a justice's court, in the same manner and for the same length of time as is required in other cases where such substituted service may be made. [C97,§4213; C24, 27, 31, 35,§12271.]

Posting, §10619; publication, §11081

12272 Time for appearance. The time for appearance and pleading if in justice's court must be not less than two or more than six days from the time of completed service of the notice. If in district or superior court, the same time as is required in ordinary actions. [C51,§2368; R60,§3958; C73,§3617; C97,§4214; C24, 27, 31, 35,§12272.]

12273 Adjournment. No adjournment shall be made in justice's courts for more than ten days, except by consent of parties. [C51,§2369; R60,§3959; C73,§3618; C97,§4215; C24, 27, 31, 35, §12273.]

12274 Title in issue. The question of title can only be investigated in the district court, and can be pleaded in a municipal court or a justice's court only as provided in subsection 4 of section 12263. [C51,§2371; R60,§3961; C73, §3620; C97,§4216; C24, 27, 31, 35,§12274.]

Referred to in §12278
37GA, ch 230, §4, editorially divided

12275 Transfer to district court. When so put in issue in a justice's court or municipal court, the justice or the judge of the municipal court shall forthwith, without further proceedings, certify the cause and the papers with a transcript of his docket, showing the reason of such transfer to the district court, where the

same shall be tried on the merits. Such cause shall not be dismissed because of error in transferring the same. [C97,§4216; C24, 27, 31, 35, §12275.]

Referred to in §12278

12276 How title tried. When title is put in issue, the cause shall be tried by equitable proceedings. [C97,§4216; C24, 27, 31, 35,§12276.]

Referred to in §12278

12277 Trial term. The appearance term shall be the trial term, and no continuance shall be granted for the purpose of taking the testimony in writing. [C97,§4216; C24, 27, 31, 35, §12277.]

Referred to in §12278

12278 Remedy not exclusive. Nothing contained in sections 12274 to 12277, inclusive, shall prevent a party from suing for trespass or from testing the right of property in any other manner. [C51,§2371; R60,§3961; C73,§3620; C97, §4216; C24, 27, 31, 35,§12278.]

12279 Possession—bar. Thirty days peaceable possession with the knowledge of the plaintiff after the cause of action accrues is a bar to this proceeding. [C51,§2372; R60,§3962; C73, §3621; C97,§4217; C24, 27, 31, 35,§12279.]

12280 No joinder or counterclaim. An action of this kind cannot be brought in connection with any other, nor can it be made the subject of counterclaim. [C51,§2373; R60,§3963; C73, §3622; C97,§4218; C24, 27, 31, 35,§12280.]

12281 Order for removal. The order for removal can be executed only in the daytime. [C51,§2374; R60,§3964; C73,§3623; C97,§4219; C24, 27, 31, 35,§12281.]

12282 Appeal or writ of error. An appeal or writ of error, taken from the action of a justice of the peace in such action in the usual way, if the proper security is given, will suspend the execution for costs, and may, with the consent of the plaintiff, prevent a removal under execution, but not otherwise. [C51,§2375; R60,§3965; C97,§4220; C24, 27, 31, 35,§12282.]

12283 Judgment. If the defendant is found guilty, judgment shall be entered that he be removed from the premises, and that the plaintiff be put in possession thereof, and an execution for his removal shall issue accordingly, to which shall be added a clause commanding the officer to collect the costs as in ordinary cases. [C51, §2370; R60,§3960; C73,§3619; C97,§4221; C24, 27, 31, 35,§12283.]

12284 Restitution. The court, on the trial of an appeal, may issue an execution for removal or restitution, as the case may require. [C51, §2376; R60,§3966; C73,§3624; C97,§4222; C24, 27, 31, 35,§12284.]

CHAPTER 520

QUIETING TITLE

12285 Who may bring action.
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12287 Notice.
12288 Disclaimer—costs.
12289 Demand for quitclaim—attorney's fees.
12290 Equitable proceedings.
12291 Deeds — recitals — rebuttable and conclusive presumptions.
12292 Construction of act.

12285 Who may bring action. An action to determine and quiet the title of real property may be brought by anyone, whether in or out of possession, having or claiming an interest therein, against any person claiming title thereto, though not in possession. [C51,§2025; R60, §3601; C73,§3273; C97,§4223; C24, 27, 31, 35, §12285.]

12286 Petition. The petition therefor must be under oath, setting forth the nature and extent of his estate, and describing the premises as accurately as may be, and that he is credibly informed and believes the defendant makes some claims adverse to the petitioner, and praying for the establishment of the plaintiff's estate, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the plaintiff. [R60,§3602; C73,§3274; C97,§4224; C24, 27, 31, 35,§12286.]

C97,§4224, editorially divided

12287 Notice. The notice in such action shall accurately describe the property, and, in general terms, the nature and extent of the plaintiff's claim, and shall be served as in other cases. [C73,§3274; C97,§4224; C24, 27, 31, 35, §12287.]

12288 Disclaimer—costs. If the defendant appears and disclaims all right and title adverse to the plaintiff, he shall recover his costs. In all other cases the costs shall be in the discretion of the court. [R60,§3603; C73,§3275; C97,§4225; C24, 27, 31, 35,§12288.]

12289 Demand for quitclaim — attorney's fees. If a party, twenty days or more before bringing suit to quiet a title to real estate, shall request of the person holding an apparent adverse interest or right therein the execution of a quitclaim deed thereto, and shall also tender to him one dollar and twenty-five cents to cover the expense of the execution and delivery of the deed, and if he shall refuse or neglect to comply therewith, the filing of a disclaimer of interest or right shall not avoid the costs in an action afterwards brought, and the court may, in its discretion, if the plaintiff succeeds, tax, in addition to the ordinary costs of court, an attorney's fee for plaintiff's attorney, not exceeding twenty-five dollars if there is but a single tract not exceeding forty acres in extent, or a single

lot in a city or town, involved, and forty dollars, if but a single tract exceeding forty acres and not more than eighty acres; in cases in which two or more tracts are included that may not be embraced in one description, or single tracts covering more than eighty acres, or two or more city or town lots, a reasonable fee may be taxed, not exceeding, however, proportionately, those hereinbefore provided for. [C97,§4226; C24, 27, 31, 35,§12289.]

12290 Equitable proceedings. In all other respects, the action contemplated in this chapter shall be conducted as other actions by equitable proceedings, so far as the same may be applicable, with the modifications prescribed. [C51, §2026; R60,§3604; C73,§3276; C97,§4227; C24, 27, 31, 35,§12290.]

12291 Deeds—recitals—rebuttable and conclusive presumptions. In the proof of title to real estate derived from deeds or other conveyances affecting real estate, executed prior to January 1, 1905, where it appears from recitals therein that such deeds or other conveyances have been executed in pursuance to a contract assigned by the original vendee or his assignee to the grantee in such deeds or other conveyances, the recitals thereof shall be presumptive evidence of the truth of said recitals, and of the fact of said assignment, and that such assignment was made in good faith for a valuable consideration, and no action shall be maintained by such original vendee, assignee, or any person or persons holding by, through, or under such vendee or assignee, against the grantee in said deed or other conveyance, and his grantees in the record chain of title, and said recitals shall be conclusive evidence of the fact of such assignment and that it was made in good faith and for a valuable consideration. [C24, 27, 31, 35,§12291.]

Referred to in §12292

12292 Construction of act. Section 12291 shall not be construed to remove the bar of any other statute of limitations. [C24, 27, 31, 35,§12292.]

CHAPTER 521

DISPUTED CORNERS AND BOUNDARIES

12293 When allowed.
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12293 When allowed. When one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, destroyed, or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. [C97, §4228; C24, 27, 31, 35,§12293.]

C97,§4228, editorially divided

12294 County as party. If any public road is likely to be affected thereby, the proper county shall be made defendant. [C97,§4228; C24, 27, 31, 35,§12294.]

12295 Notice. Notice of such action shall be given as in other cases, and if the defendants or any of them are nonresidents of the state, or unknown, they may be served by publication as is provided by law. [C97,§4229; C24, 27, 31, 35, §12295.]

12296 Nature of action. The action shall be a special one. [C97,§4230; C24, 27, 31, 35, §12296.]

C97,§4230, editorially divided

12297 Petition. The only necessary pleading therein shall be the petition of plaintiff describing the land involved, and, so far as may be, the interest of the respective parties, and asking that certain corners and boundaries therein described, as accurately as may be, shall be established. [C97,§4230; C24, 27, 31, 35, §12297.]

12298 Specific issues—acquiescence. Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, which issue may be tried before commission is appointed, in the discretion of the court. [C97,§4230; C24, 27, 31, 35, §12298.]

12299 Commission. The court in which said action is brought shall appoint a commission of one or more disinterested surveyors, who shall, at a date and place fixed by the court in the order of appointment, proceed to locate the lost, destroyed, or disputed corners and boundaries. [C97,§4231; C24, 27, 31, 35,§12299.]

12300 Oath — assistants. The commissioners so appointed shall subscribe and file with the clerk, within ten days from the date of their appointment, an oath for the faithful and impartial discharge of their duties, and shall have

the power to appoint necessary assistants. [C97,§4232; C24, 27, 31, 35,§12300.]

12301 Hearing. At the time and in the manner specified in the order of court, the commission shall proceed to locate said boundaries and corners, and for that purpose may take the testimony of witnesses as to where the true boundaries and corners are located. [C97, §4233; C24, 27, 31, 35,§12301.]

C97,§4233, editorially divided

12302 Finding as to acquiescence. If that issue is presented, the commission shall also take testimony as to whether the boundaries and corners alleged to have been recognized and acquiesced in for ten years or more have in fact been recognized and acquiesced in, and, if it finds affirmatively on such issue, shall incorporate the same into the report to the court. [C97, §4233; C24, 27, 31, 35,§12302.]

12303 Adjournments—report. The proceedings may be adjourned by the commission from time to time as may be necessary, but the survey and location of the corners and boundaries must be completed and the report thereof filed with the clerk of the court at least ten days before the first day of the term next following that of its appointment, unless there are good and sufficient reasons for delay. [C97,§4234; C24, 27, 31, 35,§12303.]

12304 Exceptions — hearing in court. At the term of court after such report is filed, any party interested may file exceptions thereto before noon of the second day of the term, and the court shall hear and determine them, hearing evidence in addition to that reported by the commission, if necessary, and may approve or modify such report, or again refer the matter to the same or another commission for further report. [C97,§4235; C24, 27, 31, 35,§12304.]

12305 Decree conclusive. The corners and boundaries finally established by the court in such proceeding, or on appeal therefrom, shall be binding upon the parties as the corners or boundaries which had been lost, destroyed, or in dispute. [C97,§4236; C24, 27, 31, 35,§12305.]

C97,§4236, editorially divided

12306 Boundaries by acquiescence established. If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established. [C97,§4236; C24, 27, 31, 35,§12306.]

12307 Appeal. There shall be no appeal in such proceeding, except from final judgment of the court, taken in the time and manner that other appeals are, and heard as in an action by ordinary proceedings. [C97,§4237; C24, 27, 31, 35,§12307.]

Appeal, §12837

12308 Costs. The costs in the proceeding shall be taxed as the court shall think just, and shall be a lien on the land or interest therein owned by the party or parties against whom they are taxed, so far as such land is involved in the proceeding. [C97,§4238; C24, 27, 31, 35, §12308.]

12309 Boundaries by agreement. Any lost or disputed corner or boundary may be determined by written agreement of all parties thereby affected, signed and acknowledged by each as required for conveyances of real estate, clearly designating the same, and accompanied by a plat thereof, which shall be recorded as an instrument affecting real estate, and shall be binding upon their heirs, successors, and assigns. [C97,§4239; C24, 27, 31, 35,§12309.]

Acknowledgments, §10085 et seq.

CHAPTER 522

PARTITION

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C97,§4240, editorially divided

12311 Joinder and counterclaims. No joinder or counterclaim of any other kind shall be allowed therein, except to perfect or quiet title, to declare and enforce liens between the parties to the action, and except as provided by this chapter. [R60,§4178; C73,§3277; C97, §4240; C24, 27, 31, 35,§12311.]

12312 Petition. The petition must describe the property and respective interests of the several owners thereof, if known. If any interests, or the owners of any interests, are unknown, contingent, or doubtful, these facts must be set forth in the petition with reasonable certainty. [C51,§§2028, 2029; R60,§§3606, 3607; C73,§3278; C97,§4241; C24, 27, 31, 35,§12312.]

12313 Abstracts of title. Sections 12236 to 12238, inclusive, shall be applicable to proceedings under this chapter. [C73,§3279; C97,§4242; C24, 27, 31, 35,§12313.]

12314 Lien creditors. Creditors having a specific or general lien upon the entire property may be made parties at the option of the plaintiff or defendant. [C51,§2030; R60,§3608; C73, §3281; C97,§4244; C24, 27, 31, 35,§12314.]

12315 Party defendants. Persons having apparent or contingent interests in such property may be made parties to the proceedings. [C51,§2069; R60,§3647; C73,§3280; C97,§4243; C24, 27, 31, 35,§12315.]

C97,§4243, editorially divided

12316 Jurisdiction over property. The proceeds of the property so situated, or the property itself in case of partition, shall be subject to the order of the court until the right becomes fully vested. [C51,§2069; R60,§3647; C73,§3280; C97,§4243; C24, 27, 31, 35,§12316.]

12317 Share of absent owner. The ascertained share of any absent owner shall be retained, or the proceeds invested for his benefit, under like order. [C51,§2070; R60,§3648; C73, §3280; C97,§4243; C24, 27, 31, 35,§12317.]

12318 Answer. The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may deny the interest of any of the plaintiffs, and by supplemental pleading, if necessary, may deny the interest of any of the other defendants. [C51,§2032; R60,§3610; C73,§3282; C97,§4245; C24, 27, 31, 35,§12318.]

12319 Issues — trial — costs. Issues may thereupon be joined and tried between any of the contesting parties, the question of costs on such issues being regulated between the contestants agreeably to the principles applicable to other cases. [C51,§2034; R60,§3612; C73,§3283; C97,§4246; C24, 27, 31, 35,§12319.]

12320 Reference to ascertain incumbrances. Before making any order of sale or partition, the court may refer to the clerk or a referee to report the nature and amount of incumbrances by mortgage, judgment, or otherwise upon any portion of the property. [C51,§§2045, 2046; R60, §§3623, 3624; C73,§3284; C97,§4247; C24, 27, 31, 35,§12320.]

12321 Proof of incumbrances. The referee shall give the parties interested at least five days notice of the time and place when he will receive proof of the amounts of such incumbrances. [C51,§2047; R60,§3625; C73,§3285; C97,§4248; C24, 27, 31, 35,§12321.]

12322 Issue as to incumbrances. If any question arises as to the validity or amount of an incumbrance, or the payment of the same, the court may direct an issue to be made up between the incumbrancer and an owner, and an adjudication thereon shall be decisive of their respective rights; and, upon a sale, it may order the money to be retained or invested to await final action in relation to its disposition, and notice thereof to be forthwith given to the incumbrancer unless he has already been made a party. [C51,§§2050, 2051; R60,§§3628, 3629; C73,§3286; C97,§4249; C24, 27, 31, 35,§12322.]

12323 Lien on undivided interests. If the lien is upon one or more undivided interests, the holder thereof shall be made a party, and the lien shall, after partition or sale, remain a charge upon the particular interests or the proceeds thereof, but the amount of costs is a charge upon those interests, paramount to all other liens. [C51,§2031; R60,§3609; C73,§3287; C97,§4250; C24, 27, 31, 35,§12323.]

12324 Not to delay distribution. The proceedings in relation to incumbrances shall not delay the distribution of the proceeds of other shares not affected thereby. [C51,§2053; R60, §3631; C73,§3288; C97,§4251; C24, 27, 31, 35, §12324.]

12325 Confirmation. After all the shares and interests of the parties have been settled in any of the methods aforesaid, decree shall be rendered establishing the rights of the parties, confirming the shares and interests of the owners of the lands, and directing partition to be made accordingly. [C51,§2037; R60,§3615; C73, §3289; C97,§4252; C24, 27, 31, 35,§12325.]

12326 Referees to partition—sale. Upon entering such decree, the court shall appoint referees to make partition, unless the parties agree to a sale of the property, or where it is shown that the property cannot be equitably divided into the requisite number of shares, a sale shall be ordered. [C51,§§2038, 2040, 2041; R60,§§3616, 3618, 3619; C73,§3290; C97,§4253; S13,§4253; C24, 27, 31, 35,§12326.]

S13,§4253, editorially divided

12327 Number of referees. Three referees shall be appointed to make partition, unless the parties to the suit agree to a less number, but where it is shown that partition cannot be made

and a sale is ordered, the court may fix the number. [C97,§4253; S13,§4253; C24, 27, 31, 35, §12327.]

12328 Possession pending sale. Where there is a delay in making sale and the owners of the property are not able to agree as to the possession or leasing of the same, the court may make such order as to the possession and leasing of said property by the referee as may be found to be for the best interests of the owners of said property. [S13,§4253; C24, 27, 31, 35,§12328.]

12329 Shares marked out. When a partition is ordered, the referees must mark out the shares by visible monuments, and may employ a competent surveyor and assistants to aid them therein, if necessary. [C51,§2059; R60,§3637; C73, §3291; C97,§4254; C24, 27, 31, 35,§12329.]

12330 Report of referees. The report of the referees must be in writing, signed by them, and must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises, and must allot the shares to their several owners. [C51,§§2060, 2061; R60, §§3638, 3639; C73,§3292; C97,§4255; C24, 27, 31, 35,§12330.]

12331 Special allotments. For good and sufficient reasons appearing to the court, the referees may be directed to allot particular portions of the land to particular individuals. In other cases the shares must be made as nearly as possible of equal value. [C51,§2039; R60, §3617; C73,§3293; C97,§4256; C24, 27, 31, 35, §12331.]

12332 Partition of part. When partition can be conveniently made of part of the premises, but not of all, one portion may be partitioned and the other sold, as provided in this chapter. [C51,§2062; R60,§3640; C73,§3294; C97,§4257; C24, 27, 31, 35,§12332.]

12333 Report set aside. On good cause shown, the report may be set aside and the matter again referred to the same or other referees. [C51,§2063; R60,§3641; C73,§3295; C97,§4258; C24, 27, 31, 35,§12333.]

12334 Decree. Upon the report of the referees being approved, a decree shall be rendered confirming the partition and apportioning the costs as herein provided, entering judgment therefor. [C51,§2064; R60,§3642; C73,§3296; C97,§4259; S13,§4259; C24, 27, 31, 35,§12334.]

S13,§4259, editorially divided

12335 Transcript of decree. Upon the rendition of such decree the clerk shall file with the county recorder of the county a duly certified transcript of such part of the entire decree, in the case in which partition has been ordered, as may be necessary to show the volume and page where such decree is recorded, and the confirmation of the shares and interests of the parties in the property of which partition is made, and the names of the parties who are found entitled to such shares, and an accurate description of each of the shares allotted to the several owners. [S13,§4259; C24, 27, 31, 35, §12335.]

12336 Transcript recorded — foreign counties. Such transcript shall be presented to the county auditor for transfer and recorded in the deed records of the county where the action was brought and also in the other counties in the state, if any, where any of the property so partitioned is situated; and in such case the clerk shall transmit to the county recorder of each of such other counties a duplicate of such transcript, and the same shall be there so recorded and transfer so made. [S13,§4259; C24, 27, 31, 35,§12336.]

12337 Transcript to be indexed. Such transcript shall be indexed in the recorder's office the same as conveyances of real estate with the names of the parties so entitled to such shares as grantors, and the name of the party to whom each share is allotted as grantee. [S13,§4259; C24, 27, 31, 35,§12337.]

12338 Costs attending transcript. The costs of making and recording such transcript shall be taxed as part of the costs in the case. [S13, §4259; C24, 27, 31, 35,§12338.]

12339 Costs generally. All the costs of the proceedings in partition shall be paid, in the first instance, by the plaintiffs, but eventually by all the parties in proportion to their interests, except costs which are created by contests. [C51, §2067; R60,§3645; C73,§3297; C97,§4260; C24, 27, 31, 35,§12339.]

12340 Attorney's fees. In actions for partition of real estate, when a decree ordering partition or sale is rendered, there shall be taxed in favor of plaintiff's attorney, as costs in the case, an attorney's fee; but in no case shall the amount so taxed exceed the following, to wit:

1. For the first two hundred dollars or fraction thereof, ten percent;
2. For the next three hundred dollars, five percent;
3. For the next five hundred dollars, three percent;
4. For all excess over above amounts, one percent of the value of the property partitioned.

Such value shall be determined by the court or the appraisement, or by the sale when sale is ordered. [C97,§4261; C24, 27, 31, 35,§12340.]

12341 Sale — referees to give bond — removal. Before selling, the referees shall give a bond in a penalty to be fixed by the court, payable to the parties who are entitled to the proceeds, with sureties to be approved by the clerk, conditioned for the faithful discharge of their duties. At any time thereafter, the court may require further and additional security, and upon failure of the referees to comply with such order they may be removed by the court and others appointed, and the court may at any time, for satisfactory reasons, remove them and appoint others. [C51,§2042; R60,§3620; C73,§3298; C97,§4262; C24, 27, 31, 35,§12341.]

12342 Notice of sale. The same notice of sale shall be given as when lands are sold on execution by the sheriff, and the sale shall be conducted in like manner. [C51,§2043; R60, §3621; C73,§3299; C97,§4263; C24, 27, 31, 35, §12342.]

Notice, §11722 et seq.

12343 Private sale — appraisement. Whenever in the discretion of the court such lands can be disposed of to better advantage and with less expense at private sale than in the manner above provided, they may be sold on such terms as are ordered by the court, but in such case they shall be appraised by three disinterested freeholders to be appointed by the court, and sold for not less than the appraised value. [C51,§2043; R60,§3621; C73,§3299; C97,§4264; C24, 27, 31, 35,§12343.]

12344 Report of sale. After completing said sale, the referees must report their proceedings to the court, with a description of the different parcels sold to each purchaser and the price bid therefor, which report shall be filed with the clerk. [C51,§2044; R60,§3622; C73,§3300; C97,§4265; C24, 27, 31, 35,§12344.]

12345 Conveyance. If the sale is approved and confirmed by the court, an order shall be entered directing the referees, or any two of them, to execute conveyances; but no conveyances can be made until all the money is paid, without receiving from the purchaser a mortgage on the land so sold, or other equivalent security. [C51,§2055; R60,§3633; C73,§3301; C97,§4266; C24, 27, 31, 35,§12345.]

12346 Validity. Such conveyances, being recorded in the county where the premises are situated, shall be valid against all subsequent purchasers, and also against all persons interested at the time, who were made parties to the proceedings in the mode pointed out by law. [C51,§2056; R60,§3634; C73,§3302; C97, §4267; C24, 27, 31, 35,§12346.]

12347 When parties are married. If the owner of any share thus sold has a husband or wife living, and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate, under the supervision of such person as it may appoint, taking the title in the name of the owner of the share sold as aforesaid. Provided that in case the amount of any share shall not exceed the sum of one thousand dollars the court may in its discretion direct the same to be paid to the owner or two-thirds to the owner and one-third to the spouse; and provided, further, that in all cases when it is shown to the satisfaction of the court that the owner has been abandoned by the husband or wife, the whole amount shall be paid to the owner and no agreement therefor shall be required. [C51,§2057; R60,§3635; C73,§3303; C97,§4268; S13,§4268; C24, 27, 31, 35,§12347.]

12348 Sales disapproved. If the sales are disapproved, the money paid and the securities given must be returned to the persons respectively entitled thereto. [C51,§2058; R60,§3636; C73,§3304; C97,§4269; C24, 27, 31, 35,§12348.]

12349 Security to refund money. The court in its discretion may require all or any of the parties, before they receive the moneys arising from any sale authorized in this chapter, to give satisfactory security to refund the same, with interest, in case it afterward appears that such parties were not entitled thereto. [C51, §2054; R60,§3632; C73,§3305; C97,§4270; C24, 27, 31, 35,§12349.]

12350 Life estates. If a tenant for life or years is entitled as such to a part of the proceeds of sale, and the parties cannot agree upon a sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the incumbered property to be invested, and the proceeds to be paid to the incumbrancer during the term of the incumbrance. [C51,§2052; R60,§3630; C73,§3306; C97,§4271; C24, 27, 31, 35,§12350.]

12351 Compensation of appraisers and referees. Appraisers and referees appointed under the provisions of this chapter shall receive such reasonable compensation for their services as the court allows, which shall be taxed as a part of the costs. [C97,§4272; C24, 27, 31, 35,§12351.]

12351.1 Unborn parties. When it appears in the petition for partition that a person not in being has an interest, vested or contingent, as a co-tenant of the land sought to be partitioned, the court shall have jurisdiction over the interest of such person not in being and shall appoint a suitable person to act for him in such proceeding and the provisions of section 10996, so far as applicable, shall apply to persons so appointed. The decree of partition and the division or sale thereunder shall be of the same force and effect as to all such persons, or persons claiming by, through or under them, as though they were in being at the time of entry of the decree, and the property or proceeds of the interest of such person shall be subject to the order of the court until the right thereto becomes fully vested. [C31, 35, §12351-d1.]

CHAPTER 523

FORECLOSURE OF CHATTEL MORTGAGES

Referred to in §§1799.3, 10269.5

12352 Notice and sale.
12353 Notice.
12354 Service.
12355 Return.
12356 Publication of notice.
12357 Title of purchaser.
12358 Attorneys' fees.
12359 Bill of sale.
12360 Evidence of service perpetuated.
12361 Validity of sales.
12362 How contested.
12363 Deeds of trust.

12352 Notice and sale. A mortgage of personal property to secure the payment of money only, where the time of payment is therein fixed, may be foreclosed by notice and sale, unless a stipulation to the contrary has been agreed upon by the parties, or by action in the proper court. [C51,§2071; R60,§3649; C73,§3307; C97,§4273; C24, 27, 31, 35,§12352.]

Attachment in aid of foreclosure, §12147

12353 Notice. The notice must contain a full description of the property mortgaged, together with the time, place, and terms of sale. [C51,§2072; R60,§3650; C73,§3308; C97,§4274; C24, 27, 31, 35,§12353.]

12354 Service. Such notice must be served on the mortgagor and all purchasers from him subsequent to the execution of the mortgage, and all persons having recorded liens upon the same property which are junior to the mortgage, or they will not be bound by the proceedings. [C51,§2073; R60,§3651; C73,§3309; C97,§4275; C24, 27, 31, 35,§12354.]

12355 Return. The service and return must be made in the same manner as in the case of the original notice by which civil actions are commenced in courts of record, except that no publication in the newspapers is necessary, the general publication directed in section 12356 being a sufficient service upon all the parties in cases where service is to be made by publication. [C51,§2074; R60,§3652; C73,§3310; C97, §4276; C24, 27, 31, 35,§12355.]

Service of notice, §11060

12356 Publication of notice. After notice has been served upon the parties, it must be published in the same manner and for the same length of time as is required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner. [C51, §2075; R60,§3653; C73,§3311; C97,§4277; C24, 27, 31, 35,§12356.]

Referred to in §12355
Publication, §11723

12357 Title of purchaser. The purchaser shall take all the title and interest on which the mortgage operated. [C51,§2076; R60,§3654; C73,§3312; C97,§4278; C24, 27, 31, 35,§12357.]

12358 Attorneys' fees. If the notes secured by such mortgage, or the mortgage itself, provide for the payment of attorneys' fees, the same fees shall be collected, if an attorney is employed to look after and direct the proceedings, as are provided by law to be collected after judgment in actions upon such contracts. The attorney shall make an affidavit like that required in actions, and have it attached by the officer or person making sale to his return of the proceedings thereunder. [C97,§4279; C24, 27, 31, 35,§12358.]

Attorney fees, §11644 et seq.

12359 Bill of sale. The officer or other person conducting the sale shall execute to the purchaser a bill of sale of the property, which shall be effectual to carry the whole title and interest purchased. [C51,§2077; R60,§3655; C73, §3313; C97,§4280; C24, 27, 31, 35,§12359.]

12360 Evidence of service perpetuated. Evidence of the service and publication of the notice aforesaid, and of the sale made in accordance therewith, together with any postponement or other material matter, shall be perpetuated by affidavits reciting the facts attached to the bill of sale, and shall constitute the return of the officer or person making the sale, and be receivable in evidence to prove the facts they state. [C51,§§2079, 2080; R60,§§3656, 3657; C73, §§3314, 3315; C97,§4281; C24, 27, 31, 35,§12360.]

Similar provisions, §11850 et seq.

12361 Validity of sales. Sales made in accordance with the above requirements are valid as to property sold to a purchaser in good faith, whatever may be the equities between the mortgagor and mortgagee. [C51,§2081; R60, §3658; C73,§3316; C97,§4282; C24, 27, 31, 35, §12361.]

12362 How contested. The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by anyone interested in so doing, and the proceeding may be transferred to the district court, for which purpose an injunction may issue, if necessary. [C51,§2082; R60,§3659; C73,§3317; C97,§4283; C24, 27, 31, 35,§12362.]

12363 Deeds of trust. Deeds of trust of personal property may be executed as securities for the performance of contracts, and shall be considered as, and foreclosed like, mortgages. [C51,§2096; R60,§3673; C73,§3318; C97,§4284; C24, 27, 31, 35,§12363.]

CHAPTER 524

FORECLOSURE OF PLEDGES

12364 Notice and sale.
12365 Service by registered mail.
12366 Additional service on resident.
12367 Additional service on nonresident.
12368 Contents of notice.
12369 Sale—pledgee as bidder.
12370 Application of proceeds.
12371 Equitable action.

12364 Notice and sale. The pledgee of personal property held as security for an indebtedness, unless otherwise agreed in writing, may sell such property for the payment of the indebtedness when due by giving the pledgor and any purchaser or assignee of the property or any part of it of which the pledgee has notice in writing, ten days written notice of his intention to sell the same for the payment of such debt. [C97,§4285; C24, 27, 31, 35,§12364.]

Attachment in action to enforce lien, §12147

12365 Service by registered mail. The pledgee shall take the address of the pledgor at the time the pledge is made. In all cases the notice shall be served upon the pledgor by registered mail addressed to the address given by the pledgor at the time the property was pledged, or at his last known address. [C24, 27, 31, 35,§12365.]

40ExGA, SF 241, §4, editorially divided

12366 Additional service on resident. If the pledgor is a resident of the county in which the property was held the notice shall be posted for ten days in three public places in the township of the pledgor's residence. [C97,§4285; C24, 27, 31, 35,§12366.]

12367 Additional service on nonresident. If the pledgor is not a resident of the county where the property is held such notice shall be posted for ten days in three public places of such county. [C24, 27, 31, 35,§12367.]

12368 Contents of notice. Such notice shall contain a full and accurate description of the property to be sold, the day and hour when, and the place at which the same will be sold. [C97, §4285; C24, 27, 31, 35,§12368.]

12369 Sale—pledgee as bidder. If redemption is not made before the date thus fixed, the pledgee may sell at public auction, to the highest bidder, the pledged property, or so much of the same as may be necessary to pay the debt, interest, and all costs of making such sale, and may be a bidder at such sale. [C97,§4285; C24, 27, 31, 35,§12369.]

12370 Application of proceeds. He shall apply the proceeds, first, in the payment of such costs, and second, to the payment of the debt. Any surplus arising from the sale and any property remaining unsold shall be paid or returned to the pledgor or his assigns. [C97,§4285; C24, 27, 31, 35,§12370.]

12371 Equitable action. Such pledgee may commence an action in equity for the foreclosure of such collaterals or pledges, and the court shall determine all issues presented as in other equity cases, and render judgment for the amount due from the pledgor, and award special execution for the sale of the collaterals or pledges, and general execution for any balance, or shall render such judgment as may be necessary to carry out any written agreement of the parties concerning the subject matter; but in all cases a sale may be ordered unless there is a written stipulation to the contrary. [C97, §4286; C24, 27, 31, 35,§12371.]

CHAPTER 525

FORECLOSURE OF REAL ESTATE MORTGAGES

Delay of foreclosure, §12383.3

12372 Equitable proceedings.
12373 Deeds of trust.
12374 Venue.
12375 Separate suits on note and mortgage.
12376 Judgment—sale and redemption.
12377 Deficiency—general execution.
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12380 Payment of other liens—rebate of interest.
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12383 Vendee deemed mortgagor.

RENTALS AND RECEIVERSHIP

12383.1 Pledge of rents—priority.
12383.2 Preference in receivership — application of rents.
12383.3 Moratorium continuance.

12372 Equitable proceedings. No deed of trust or mortgage of real estate shall be foreclosed in any other manner than by action in court by equitable proceedings. [C51,§§2083, 2096; R60,§§3660, 3673, 4179; C73,§3319; C97, §4287; C24, 27, 31, 35,§12372.]

12373 Deeds of trust. Deeds of trust of real property may be executed as securities for the performance of contracts, and shall be considered as, and foreclosed like, mortgages. [C51, §2096; R60,§3673; C73,§3318; C97,§4284; C24, 27, 31, 35,§12373.]

12374 Venue. An action for the foreclosure of a mortgage of real property, or for the sale thereof under an incumbrance or charge thereon, shall be brought in the county in which the

property to be affected, or some part thereof, is situated. [C73,§2578; C97,§3493; C24, 27, 31, 35, §12374.]

12375 Separate suits on note and mortgage. If separate actions are brought in the same county on the bond or note, and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at his cost. [C51,§2086; R60,§3663; C73,§3320; C97,§4288; C24, 27, 31, 35,§12375.]

Action on certain judgments prohibited, ch 487.1
Related provision, §10942

12376 Judgment — sale and redemption. When a mortgage or deed of trust is foreclosed, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interest and costs. A special execution shall issue accordingly, and the sale thereunder shall be subject to redemption as in cases of sale under general execution. [C51,§2084; R60, §3661; C73,§3321; C97,§4289; C24, 27, 31, 35, §12376.]

Redemption, ch 500

12377 Deficiency—general execution. If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise. [C51, §2085; R60,§3662; C73,§3322; C97,§4290; C24, 27, 31, 35,§12377.]

See also §11038.1

12378 Overplus. If there is an overplus remaining after satisfying the mortgage and costs, and if there is no other lien upon the property, such overplus shall be paid to the mortgagor. [C51,§2089; R60,§3666; C73,§3324; C97, §4291; C24, 27, 31, 35,§12378.]

12379 Junior incumbrancer entitled to assignment. At any time prior to the sale, a person having a lien on the property which is junior to the mortgage will be entitled to an assignment of all the interest of the holder of the mortgage, by paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with the foreclosure, or discontinue it, at his option. [C51,§2088; R60,§3665; C73,§3323; C97,§4292; C24, 27, 31, 35,§12379.]

12380 Payment of other liens — rebate of interest. If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order. If the money secured by any such lien is not yet due, a rebate of interest, to be fixed by the court or judge thereof, must be made by the holder, or his lien on such property will be postponed to those of a junior date, and if there are none such, the balance shall be paid to the mortgagor. [C51,§2090; R60,§3667; C73,§3325; C97,§4293; C24, 27, 31, 35,§12380.]

12381 Amount sold. As far as practicable, the property sold must be only sufficient to satisfy the mortgage foreclosed. [C51,§2091; R60,§3668; C73,§3326; C97,§4294; C24, 27, 31, 35, §12381.]

12382 Foreclosure of title bond. In cases where the vendor of real estate has given a bond or other writing to convey the same on payment of the purchase money, and such money or any part thereof remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, the vendor may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property. [C51, §2094; R60,§3671; C73,§3329; C97,§4297; C24, 27, 31, 35,§12382.]

12383 Vendee deemed mortgagor. The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. [C51,§2095; R60,§3672; C73,§3330; C97,§4298; C24, 27, 31, 35,§12383.]

RENTALS AND RECEIVERSHIP

12383.1 Pledge of rents—priority. Whenever any real estate is incumbered by two or more real estate mortgages which in addition to the lien upon the real estate grant to the mortgagee the right to subject the rents, profits, avails and/or income from said real estate to the payment of the debt secured by such mortgage, the priority of the respective mortgagees under the provisions of their mortgages affecting the rents, profits, avails and/or incomes from the said real estate shall, as between such mortgagees, be in the same order as the priority of the lien of their respective mortgages on the real estate. [C35,§12383-e1.]

12383.2 Preference in receivership—application of rents. In any action to foreclose a real estate mortgage where a receiver is appointed to take charge of the real estate, preference shall be given to the owner in actual possession, subject to approval of the court, in leasing the mortgaged premises. The rents, profits, avails and/or income derived from said real estate shall be applied as follows:

1. To the cost of receivership.
2. To the payment of taxes due or becoming due during said receivership.
3. To pay the insurance on buildings on the premises and/or such other benefits to the real estate as may be ordered by the court.
4. The balance shall be paid and distributed as determined by the court. [C35,§12383-e2.]

Omnibus repeal, §12383-e3, code 1935; 45GA, ch 181, §3

12383.3 Moratorium continuance. In all actions for the foreclosure of real estate mortgages, deeds of trust of real property and contracts for the purchase of real estate, when the owner or owners enter appearance and file answer admitting some indebtedness and breach of the terms of the above designated instrument (which admissions cannot after a continuance is granted hereunder, be withdrawn or denied)

such owner or owners may apply for a continuance of the foreclosure action when and where the default or inability of such party or parties to pay or perform is mainly due or brought about by reason of drought, flood, heat, hail, storm or other climatic conditions or by reason of the infestation of pests which affect the land in controversy, or when the governor of the state of Iowa by reason of a depression shall have by proclamation declared a state of emergency to exist within this state. Said applications must be in writing and filed at or before final decree. Upon the filing of such application the court shall set a day for hearing of the same and provide by order for notice, to be given to plaintiff, of the time fixed for said hearing. If the court shall on said hearing find that the application is made in good faith, and the same is supported by competent evidence showing that default in payment or inability to pay is due to drought, flood, heat, hail, storm or other climatic conditions or due to infestation of pests or when the governor of the state of Iowa by reason of a depression shall have by proclamation declared a state of emergency to exist within this state, the court may in its discretion continue said foreclosure proceeding or proceedings as follows:

1. If the default or breach of terms of the written instrument or instruments on which the action is based occur on or before the first day of March of any year by reason of any of the causes hereinbefore specified, causing the loss and failure of crops on the land involved in the previous year, then the continuance shall end on the first day of March of the succeeding year.

2. If the default or breach of terms of said written instrument occur after the first day of March, but during that crop year and that year's crop fails by reason of any of the causes hereinbefore set out, then the continuance shall end on the first day of March of the second succeeding year.

3. Only one such continuance shall be granted, except upon a showing of extraordinary circumstances in which event the court may in its discretion grant a second continuance for such further period as to the court may seem just and equitable, not to exceed one year.

4. The order shall provide for the appointment of a receiver to take charge of the property and to rent the same and the owner or party in possession shall be given preference in the occupancy thereof and the receiver shall collect the rents and income and distribute the proceeds as follows:

a. For the payment of the costs of receivership.

b. For the payment of taxes due or becoming due during the period of receivership.

c. For the payment of insurance on the buildings on the premises.

d. The balance remaining shall be paid to the owner of the written instrument upon which the foreclosure is based, to be credited thereon. [48GA, ch 245,§1.]

Constitutionality, 48GA, ch 245, §2

CHAPTER 526

SATISFACTION OF MORTGAGES

12384 Dual methods.
12385 Penalty.
12386 Identification—witnesses.
12387 Entry of foreclosure.
12388 Entry of satisfaction.

12384 Dual methods. When the amount due on a mortgage is paid off, the mortgagee, his personal representative or assignee, or those legally acting for him, and in case of payment of a school fund mortgage the county auditor, must acknowledge satisfaction thereof in the margin of the record of the mortgage, or by execution of an instrument in writing, referring to the mortgage, and duly acknowledged and recorded. [C51,§2093; R60,§3670; C73,§3327; C97,§4295; C24, 27, 31, 35,§12384.]

Duty of recorder, §§10108, 10108.1
40ExGA, SF 241, §5, editorially divided

12385 Penalty. If he fails to do so within thirty days after being requested in writing, he shall forfeit to the mortgagor or any grantee of the property who has paid the mortgage, the sum of twenty-five dollars. [C51,§2093; R60, §3670; C73,§3327; C97,§4295; C24, 27, 31, 35, §12385.]

12386 Identification—witnesses. When any mortgage is satisfied on the margin of the record of the mortgage, as above provided, the person satisfying the same shall be identified to and his signature shall be witnessed by the county recorder or his deputy. [C97,§4295; C24, 27, 31, 35,§12386.]

Indexing, §10115.1

12387 Entry of foreclosure. When a judgment of foreclosure is entered in any court, the clerk shall make upon the margin of the record of the mortgage foreclosed a minute showing that fact, in what court foreclosed, and giving the date of the decree. [C73,§3328; C97,§4296; C24, 27, 31, 35,§12387.]

C97,§4296, editorially divided

12388 Entry of satisfaction. When the judgment is fully paid off and satisfied upon the judgment docket of such court, the clerk shall enter satisfaction upon the margin of such mortgage, and he shall be allowed as compensation for such service the sum of twenty-five cents, to be taxed as a part of the costs in the case. [C73,§3328; C97,§4296; C24, 27, 31, 35, §12388.]

CHAPTER 527

FORFEITURE OF REAL ESTATE CONTRACTS

12389 Conditions prescribed.
12390 Notice.
12391 Service.
12392 Compliance with notice.
12393 Proof and record of service.
12394 Scope of chapter.

12389 Conditions prescribed. A contract which provides for the sale of real estate located in this state, and for the forfeiture of the vendee's rights in such contract in case the vendee fails, in specified ways, to comply with said contract, shall, nevertheless, not be forfeited or canceled except as provided in this chapter. [C97,§4299; S13,§4299; C24, 27, 31, 35,§12389.]

12390 Notice. Such forfeiture and cancellation shall be initiated by the vendor or by his successor in interest, by serving or causing to be served on the vendee or his successor in interest, if known to the vendor or his successor in interest, and on the party in possession of said real estate, a written notice which shall:

1. Reasonably identify said contract, and accurately describe the real estate covered thereby.
2. Specify the terms and conditions of said contract which have not been complied with.
3. Notify said party that said contract will stand forfeited and canceled unless said party within thirty days after the completed service of said notice performs the terms and conditions in default, and, in addition, pays the reasonable costs of serving the notice. [C97,§4299; S13, §4299; C24, 27, 31, 35,§12390.]

12391 Service. Said notice may be served personally or by publication, on the same conditions, and in the same manner as is provided for the service of original notices, except that when the notice is served by publication no affidavit therefor shall be required before publication. Service by publication shall be deemed complete on the day of the last publication. [C97,§4299; S13,§4299; C24, 27, 31, 35,§12391.]

Manner of service, §11060; publication service, §11081

12392 Compliance with notice. The right to forfeit for breach occurring before said notice was served shall terminate if, prior to the expiration of the day for performance as specified in the notice, the party in default performs the terms and conditions as to which he is in default, and pays to the party not in default the reasonable cost of serving said notice. [C97, §4300; S13,§4300; C24, 27, 31, 35,§12392.]

12393 Proof and record of service. If the terms and conditions as to which there is default are not performed within said thirty days, the party serving said notice or causing the same to be served, may file for record in the office of the county recorder a copy of the notice aforesaid with proofs of service attached or indorsed thereon (and, in case of service by publication, his personal affidavit that personal service could not be made within this state) and when so filed and recorded, the said record shall be constructive notice to all parties of the due forfeiture and cancellation of said contract. [S13,§4300; C24, 27, 31, 35,§12393.]

12394 Scope of chapter. This chapter shall be operative in all cases where the intention of the parties, as gathered from the contract and surrounding circumstances, is to sell or to agree to sell an interest in real estate, any contract or agreement of the parties to the contrary notwithstanding. [C97,§4301; C24, 27, 31, 35,§12394.]

CHAPTER 528

NUISANCES

Referred to in §12965
Liquor law violations, §1921.060

12395 Nuisance—what constitutes—action to abate.
12396 What deemed nuisances.
12397 Penalty—abatement.
12398 Process.
12399 Warrant by justice of the peace.
12400 Stay of execution.
12401 Expenses—how collected.

12395 Nuisance—what constitutes—action to abate. Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof. [C51,§§2131–2133; R60,§§3713–3715; C73,§3331; C97,§4302; C24, 27, 31, 35,§12395.]

12396 What deemed nuisances. The following are nuisances:

1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.
2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.
3. The obstructing or impeding without legal authority the passage of any navigable river, harbor, or collection of water.

4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

5. The obstructing or incumbering by fences, buildings, or otherwise the public roads, private ways, streets, alleys, commons, landing places, or burying grounds.

6. Houses of ill fame, kept for the purpose of prostitution and lewdness, gambling houses, or houses resorted to for the use of opium or hasheesh, or houses where drunkenness, quarreling, fighting, or breaches of the peace are carried on or permitted to the disturbance of others.

7. Billboards, signboards, and advertising signs, whether erected and constructed on public or private property, which so obstruct and impair the view of any portion or part of a public street, avenue, highway, boulevard, or alley or of a railroad or street railway track as to render dangerous the use thereof.

Similar provision, §4844

8. Cotton-bearing cottonwood trees and all other cotton-bearing poplar trees in cities acting under special charter of more than fifty thousand population.

9. Any object or structure hereafter erected within one thousand feet of the limits of any municipal or regularly established airport or landing place, which may endanger or obstruct aerial navigation, including take-off and landing, unless such object or structure constitutes a proper use or enjoyment of the land on which the same is located. [C51,§§2759, 2761; R60, §§4409, 4411; C73,§§4089, 4091; C97,§§5078, 5080; C24, 27, 31, 35,§12396.]

12397 Penalty — abatement. Whoever is convicted of erecting, causing, or continuing a public or common nuisance as provided in this chapter, or at common law when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be fined not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding one year, and the court, with or without such fine, may order such nuisance abated, and issue a warrant as hereinafter provided. [C51,§2762; R60,§4412; C73,§4092; C97,§5081; S13,§5081; C24, 27, 31, 35,§12397.]

12398 Process. When upon indictment, complaint, or civil action any person is found guilty of erecting, causing, or continuing a nuisance, the court before whom such finding is had may, in addition to the fine imposed, if any, or to the judgment for damages or cost for which a separate execution may issue, order that such nuisance be abated or removed at the expense of the defendant, and, after inquiry into and estimating as nearly as may be the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor. [C51,§2763; R60,§4413; C73,§4093; C97,§5082; C24, 27, 31, 35,§12398.]

12399 Warrant by justice of the peace. When the conviction is had upon an action before a justice of the peace and no appeal is taken, the justice, after estimating as aforesaid the sum necessary to defray the expenses of removing or abating the nuisance, may issue a like warrant. [C51,§2764; R60,§4414; C73,§4094; C97,§5083; C24, 27, 31, 35,§12399.]

12400 Stay of execution. Instead of issuing such warrant, the court or justice may order the same to be stayed upon motion of the defendant, and upon his entering into an undertaking to the state, in such sum and with such surety as the court or justice may direct, conditioned either that the defendant will discontinue said nuisance, or that, within a time limited by the court, and not exceeding six months, he will cause the same to be abated and removed, as either is directed by the court; and, upon his failure to perform the condition of his undertaking, the same shall be forfeited, and the court in term time or vacation, or justice of the peace, as the case may be, upon being satisfied of such default, may order such warrant forthwith to issue, and action may be brought on such undertaking. [C51,§2765; R60, §4415; C73,§4095; C97,§5084; C24, 27, 31, 35, §12400.]

12401 Expenses — how collected. The expense of abating a nuisance by virtue of a warrant can be collected by the officer in the same manner as damages and costs are collected on execution, except that the materials of any buildings, fences, or other things that may be removed as a nuisance may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal, such balance must be paid by the officer to the defendant, or to the owner of the property levied upon; and if said proceeds are not sufficient to pay such expenses, the officer must collect the residue thereof. [C51,§2766; R60, §4416; C73,§4096; C97,§5085; C24, 27, 31, 35, §12401.]

CHAPTER 529

WASTE AND TRESPASS

12402 Treble damages.
12403 Forfeiture and eviction.
12404 Who deemed to have committed.
12405 Treble damages for injury to trees.
12406 Estate of remainder or reversion.
12407 Action by heir.
12408 Purchaser at execution sale.
12409 Settlers on lands of state.
12410 Holder of tax certificate.
12411 Disposition of money.

12402 Treble damages. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property commit waste thereon, he is liable to pay three times the damages which have resulted from such waste, to the person who is entitled to sue therefor. [C51, §2134; R60,§3716; C73,§3332; C97,§4303; C24, 27, 31, 35,§12402.]

12403 Forfeiture and eviction. Judgment of forfeiture and eviction may be rendered against the defendant whenever the amount of damages so recovered is more than two-thirds the value of the interest such defendant has in the property injured, when the action is brought by the person entitled to the reversion. [C51, §2135; R60,§3717; C73,§3333; C97,§4304; C24, 27, 31, 35,§12403.]

12404 Who deemed to have committed. Any person whose duty it is to prevent waste, and who fails to use reasonable and ordinary care to avert the same, shall be held to have committed it. [C51,§2136; R60,§3718; C73,§3334; C97, §4305; C24, 27, 31, 35,§12404.]

12405 Treble damages for injury to trees. For willfully injuring any timber, tree, or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard, or town lot, or on the public grounds of any city or town, or any land held by the state for any purpose whatever, the perpetrator shall pay treble damages at the suit of any person entitled to protect or enjoy the property. [C51, §2137; R60,§3719; C73,§3335; C97,§4306; C24, 27, 31, 35,§12405.]

12406 Estate of remainder or reversion. The owner of an estate in remainder or reversion may maintain either of the aforesaid actions for injuries done to the inheritance, notwithstanding any intervening estate for life or years. [C51,§2139; R60,§3721; C73,§3337; C97, §4307; C24, 27, 31, 35,§12406.]

12407 Action by heir. An heir, whether a minor or of full age, may maintain these actions for injuries done in the time of his ancestor as well as in his own time, unless barred by the statute of limitations. [C51,§2140; R60,§3722; C73,§3338; C97,§4308; C24, 27, 31, 35,§12407.]

12408 Purchaser at execution sale. The purchaser of lands or tenements at execution sale may have and maintain an action against any person for either of the causes above mentioned, occurring or existing after such purchase; but this provision shall not be construed to forbid the person occupying the lands in the meantime from using them in the ordinary course of husbandry, or taking timber with which to make suitable repairs thereon, unless the timber so taken shall be of higher grade than required, in which case he shall be held guilty of waste and liable accordingly. [C51, §§2141–2143; R60,§§3723–3725; C73,§§3339–3341; C97,§4309; C24, 27, 31, 35,§12408.]

Right of purchaser, §11747

12409 Settlers on lands of state. Any person settled upon and occupying any portion of the public lands held by the state is not liable as a trespasser for improving or cultivating it in the ordinary course of husbandry, nor for taking and using timber or other materials necessary and proper to enable him to do so, provided the timber and other materials are taken from land properly constituting a part of the "claim" or tract of land so settled upon and occupied by him. [C51,§2144; R60,§3726; C73,§3342; C97,§4310; C24, 27, 31, 35,§12409.]

12410 Holder of tax certificate. The owner of a treasurer's certificate of purchase of land sold for taxes may recover treble damages of any person willfully committing waste or trespass thereon. [C73,§3343; C97,§4311; C24, 27, 31, 35,§12410.]

Referred to in §12411

12411 Disposition of money. All money recovered in an action brought under section 12410 shall be paid by the officer collecting it to the auditor of the county in which the lands are situated, which shall be held by him, and an entry thereof made in a book kept for that purpose, until the lands are redeemed, or a treasurer's deed therefor executed to the holder of said certificate. If redemption is made, the money shall be paid to the owner of the land, and if not, to the person to whom the deed is executed. [C73,§3344; C97,§4312; C24, 27, 31, 35, §12411.]

CHAPTER 530

LIBEL AND SLANDER

12412 Pleading.
12413 Libel—retraction—actual damages.
12414 Retraction—actual, special, and exemplary damages.
12415 Candidate for office—retraction—time.
12415.1 Defamatory statement by radio.
12416 Proof of malice.

12412 Pleading. In an action for slander or libel, it shall not be necessary to state any extrinsic facts for the purpose of showing the application to the plaintiff of any defamatory matter out of which the cause of action arose, or that the matter was used in a defamatory sense; but it shall be sufficient to state the defamatory sense in which such matter was used, and that the same was spoken or published concerning the plaintiff. [R60,§2928; C73,§2681; C97,§3592; C24, 27, 31, 35,§12412.]

Similar provision, §13258

12413 Libel — retraction — actual damages. In any action for damages for the publication of a libel in a newspaper, if the defendant can show that such libelous matter was published through misinformation or mistake, the plaintiff shall recover no more than actual damages, unless a retraction be demanded and refused as hereinafter provided. Plaintiff shall serve upon the publisher at the principal place of publication a notice specifying the statements claimed to be libelous, and requesting that the same be withdrawn. [SS15,§3592-a; C24, 27, 31, 35,§12413.]

Referred to in §12415
SS15,§3592-a, editorially divided

12414 Retraction—actual, special, and exemplary damages. If a retraction or correction thereof be not published in as conspicuous a place and type in said newspaper as were the statements complained of, in a regular issue thereof published within two weeks after such service, plaintiff may allege such notice, demand, and failure to retract in his complaint and may recover both actual, special, and exemplary damages if his cause of action be maintained. If such retraction be so published, he may still recover such actual, special, and exemplary damages, unless the defendant shall show that the libelous publication was made in good faith, without malice and under a mistake as to the facts. [SS15,§3592-a; C24, 27, 31, 35, §12414.]

Referred to in §12415

12415 Candidate for office — retraction — time. If the plaintiff was a candidate for office at the time of the libelous publication, no retraction shall be available unless published in a conspicuous place on the editorial page, nor if the libel was published within two weeks next before the election; provided that this and sections 12413 and 12414 shall not apply to any libel imputing unchastity to a woman. [SS15, §3592-a; C24, 27, 31, 35,§12415.]

12415.1 Defamatory statement by radio. The owner, lessee, licensee or operator of a radio broadcasting station, and the agents or employees of any such owner, lessee, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a radio broadcast, by one other than such owner, lessee, licensee or operator, or agent or employee thereof, if such owner, lessee, licensee, operator, agent or employee shall prove the exercise of due care to prevent the publication or utterance of such statement in such broadcast. [47GA, ch 238,§1.]

Pending litigation, 47GA, ch 238, §2

12416 Proof of malice. In actions for slander or libel, an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury on the whole case finds that such defense was made with malicious intent. [R60,§2929; C73,§2682; C97, §3593; C24, 27, 31, 35,§12416.]

CHAPTER 531

QUO WARRANTO

12417 For what causes.
12418 Joinder or counterclaim.
12419 By county attorney.
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12424 Several claimants.
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12432 Corporation dissolved.
12433 Bond.
12434 Action on.
12435 Duty of trustees.
12436 Books delivered to.
12437 Inventory.
12438 Powers.
12439 Penalty for refusing to obey order.

12417 For what causes. A civil action by ordinary proceedings may be brought in the name of the state in the following cases:

1. Against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by this state.

2. Against any public officer who has done

or suffered an act which works a forfeiture of his office.

3. Against any person acting as a corporation within the state without being authorized by law.

4. Against any corporation doing or omitting acts which amount to a forfeiture of its rights and privileges as a corporation, or exercising powers not conferred by law.

5. Against any person claiming under any patent, granted by the proper authorities of the state, for the purpose of annulling or vacating the same as having been obtained by fraud, or through mistake or ignorance of a material fact, or when the defendants have done or omitted an act in violation of the terms or conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same. [C51,§§2151, 2175; R60,§§3732, 3757; C73,§3345; C97,§4313; C24, 27, 31, 35, §12417.]

12418 Joinder or counterclaim. In such action there shall be no joinder of any other cause of action, nor any counterclaim. [R60,§4180; C73,§3346; C97,§4314; C24, 27, 31, 35,§12418.]

12419 By county attorney. Such action may be commenced by the county attorney at his discretion, and must be so commenced when directed by the governor, the general assembly, or a court of record. [C51,§§2152, 2153; R60, §§3733, 3734; C73,§3347; C97,§4315; C24, 27, 31, 35,§12419.]

12420 By private person. If the county attorney, on demand, neglects or refuses to commence the same, any citizen of the state having an interest in the question may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, may bring and prosecute the action to final judgment. [R60, §3735; C73,§3348; C97,§4316; C24, 27, 31, 35, §12420.]

12421 Petition. The petition shall contain a statement of the facts which constitute the grounds of the proceeding, and, with the notice and all the subsequent pleadings and proceedings, shall conform to the rules given for procedure in civil actions, except so far as the same are modified by this chapter. [C51,§§2154–2156; R60,§§3736–3738; C73,§3349; C97,§4317; C24, 27, 31, 35,§12421.]

12422 Costs. When such action is brought upon the relation of a private individual, that fact shall be stated in the petition, and the order allowing him to prosecute may require that he shall be responsible for costs in case they are not adjudged against the defendant. In other cases the payment of costs shall be regulated by the same rule as in criminal actions. [C51,§2164; R60,§3746; C73,§3350; C97, §4318; C24, 27, 31, 35,§12422.]

12423 Right to an office. When the defendant is holding an office to which another is claiming the right, the petition shall set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties. [C51,§2157; R60,§3739; C73,§3351; C97,§4319; C24, 27, 31, 35,§12423.]

12424 Several claimants. When several persons claim to be entitled to the same office or franchise, a petition may be filed against all or any portion thereof, in order to try their respective rights thereto. [C51,§2161; R60,§3743; C73,§3352; C97,§4320; C24, 27, 31, 35,§12424.]

12425 Judgment. If judgment is rendered in favor of such claimant, he shall proceed to exercise the functions of the office, after he has qualified as required by law. [C51,§2158; R60, §3740; C73,§3353; C97,§4321; C24, 27, 31, 35, §12425.]

Manner of qualifying, ch 53

12426 Books and papers. The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody or under his control belonging to said office. [C51,§2159; R60,§3741; C73,§3354; C97,§4322; C24, 27, 31, 35,§12426.]

12427 Action for damages. When judgment has been rendered in favor of the claimant he may, at any time within one year thereafter, bring an action against the defendant, and recover the damages he has sustained by reason of the act of the defendant. [C51,§2160; R60, §3742; C73,§3355; C97,§4323; C24, 27, 31, 35, §12427.]

12428 Judgment of ouster. If the defendant is found guilty of unlawfully holding or exercising any office, franchise, or privilege, or if a corporation is found to have violated the law by which it holds its existence, or is acting contrary to law, or in any manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted and altogether excluded from such office, franchise, or privilege, and also that he pay the costs of the proceeding. [C51,§2162; R60,§3744; C73,§3356; C97,§4324; C24, 27, 31, 35,§12428.]

12429 Judgment in other cases. If the defendant is found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges. [C51,§2163; R60,§3745; C73,§3357; C97,§4325; C24, 27, 31, 35,§12429.]

12430 Pretended corporation — costs. In case judgment is rendered against a pretended but not real corporation, the cost may be collected from any person who has been acting as an officer or proprietor thereof. [C51,§2165; R60,§3747; C73,§3358; C97,§4326; C24, 27, 31, 35,§12430.]

12431 Action against officers of corporation. When judgment of ouster is rendered against a corporation on account of the misconduct of the

directors or officers thereof, such officers shall be jointly and severally liable to an action by anyone injured thereby. [C51,§2173; R60,§3755; C73,§3359; C97,§4327; C24, 27, 31, 35,§12431.]

12432 Corporation dissolved. If a corporation is ousted and dissolved by the proceedings herein authorized, the court shall appoint three disinterested persons as trustees of the creditors and stockholders. [C51,§2166; R60,§3748; C73, §3360; C97,§4328; C24, 27, 31, 35,§12432.]

12433 Bond. Said trustees shall enter into a bond in such a penalty and with such security as the court approves, conditioned for the faithful discharge of their trust. [C51,§2167; R60, §3749; C73,§3361; C97,§4329; C24, 27, 31, 35, §12433.]

12434 Action on. Action may be brought on such bond by any person injured by the negligence or wrongful act of the trustees in the discharge of their duties. [C51,§2168; R60, §3750; C73,§3362; C97,§4330; C24, 27, 31, 35, §12434.]

12435 Duty of trustees. The trustees shall proceed immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled. [C51, §2169; R60,§3751; C73,§3363; C97,§4331; C24, 27, 31, 35,§12435.]

12436 Books delivered to. The court shall, upon application for that purpose, order any officer of such corporation, or any other person having possession of any of the effects, books, or papers thereof, in any wise necessary for the settlement of its affairs, to deliver the same to the trustees. [C51,§2170; R60,§3752; C73,§3364; C97,§4332; C24, 27, 31, 35,§12436.]

12437 Inventory. As soon as practicable after their appointment, the trustees shall make and file in the office of the clerk of the court an inventory, sworn to by each of them, of all the effects, rights, and credits which come to their possession or knowledge. [C51,§2171; R60,§3753; C73,§3365; C97,§4333; C24, 27, 31, 35, §12437.]

12438 Powers. They shall sue for and recover the debts and property of the corporation, and shall be responsible to the creditors and stockholders, respectively, to the extent of the effects which come into their hands. [C51,§2172; R60,§3754; C73,§3366; C97,§4334; C24, 27, 31, 35,§12438.]

12439 Penalty for refusing to obey order. Any person who without good reason refuses to obey an order of the court, as herein provided, shall be guilty of contempt, and fined in any sum not exceeding five thousand dollars, and imprisoned in the county jail until he complies therewith, and shall be further liable for the damages resulting to any person on account of his disobedience. [C51,§2174; R60,§3756; C73, §3367; C97,§4335; C24, 27, 31, 35,§12439.]

CHAPTER 532

MANDAMUS

12440 Definition.
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12443 Order issued.
12444 Auxiliary remedy.
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12446 Other plain, speedy, and adequate remedy.
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12449 Other pleadings.
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12451 Peremptory order.
12452 Form of order—return.
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12455 Appeal by state.

12440 Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. [R60, §3761; C73,§3373; C97,§4341; S13,§4341; C24, 27, 31, 35,§12440.]

S13,§4341, editorially divided

12441 Discretion—exercise of. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion. [C51,§2180; R60,§3763; C73,§3373; C97,§4341; S13,§4341; C24, 27, 31, 35,§12441.]

12442 Nature of action. All such actions shall be tried as equitable actions. [S13,§4341; C24, 27, 31, 35,§12442.]

12443 Order issued. The order may be issued by the district or superior court to any inferior tribunal, or to any corporation, officer, or person; and by the supreme court to any district or superior court, if necessary, and in any other case where it is found necessary for that court to exercise its legitimate power. [C51, §§2179, 2181; R60,§§3761, 3764; C73,§3374; C97, §4342; C24, 27, 31, 35,§12443.]

12444 Auxiliary remedy. The plaintiff in any action, except those brought for the recovery of specific real or personal property, may also, as an auxiliary relief, have an order of mandamus to compel the performance of a duty established in such action. [R60,§3767; C73, §3375; C97,§4343; C24, 27, 31, 35,§12444.]

C97,§4343, editorially divided

12445 "Enforceable duty" defined. If such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust, or station, it must be one for the breach of which a legal right to damages is already

complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance. [R60, §3767; C73,§3375; C97,§4343; C24, 27, 31, 35, §12445.]

12446 **Other plain, speedy, and adequate remedy.** An order of mandamus shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law, save as herein provided. [C51,§2182; R60,§3765; C73,§3376; C97,§4344; C24, 27, 31, 35, §12446.]

12447 **When order granted.** The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the county attorney, when the public interest is concerned, and is in the name of such private party or of the state, as the case may be in fact brought. [R60,§3761; C73,§3377; C97,§4345; C24, 27, 31, 35,§12447.]

12448 **Petition.** The plaintiff in such action shall state his claim, and shall also state facts sufficient to constitute a cause for such claim, and shall also set forth that the plaintiff, if a private individual, is personally interested therein, and that he sustains and may sustain damage by the nonperformance of such duty, and that performance thereof has been demanded by him, and refused or neglected, and shall pray an order of mandamus commanding the defendant to fulfill such duty. [R60,§3762; C73,§3378; C97,§4346; C24, 27, 31, 35,§12448.]

12449 **Other pleadings.** The pleadings and other proceedings in any action in which a mandamus is claimed shall be the same, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages. [R60,§3766; C73,§3379; C97,§4347; C24, 27, 31, 35,§12449.]

12449.1 **Trial in vacation.** When the speedy determination of the issues in an action of mandamus is urgent, the court or a judge thereof may, upon the filing and presentation of the petition, prescribe the notice and service thereof necessary to bring the defendant before the court or judge, and shall have power to cause the issues to be made up in term time or vacation and to try and to decide the cause in vacation with the same force and effect as if tried and decided in term time. [C27, 31, 35,§12449-b1.]

12450 **Injunction may issue—joinder.** When the action is brought by a private person, it may be joined with a cause of action for such an injunction as may be obtained by ordinary proceedings, or with the causes of actions specified in this chapter, but no other joinder and no counterclaim shall be allowed. [R60,§4181; C73,§3380; C97,§4348; C24, 27, 31, 35,§12450.]

12451 **Peremptory order.** When the plaintiff recovers judgment, the court may include therein a peremptory order of mandamus directed to the defendant, commanding him forthwith to perform the duty to be enforced, together with a money judgment for damages and costs, upon which an ordinary execution may issue. [R60,§3768; C73,§3381; C97,§4349; C24, 27, 31, 35,§12451.]

12452 **Form of order — return.** The order shall simply command the performance of the duty, shall be directed to the party, and may be issued in term or vacation, returnable forthwith, and no return except that of compliance shall be allowed; but time to return it may, upon sufficient grounds, be allowed by the court or judge, either with or without terms. [R60,§3769; C73,§3382; C97,§4350; C24, 27, 31, 35,§12452.]

12453 **Performance by another—costs.** The court may, upon application of the plaintiff, besides or instead of proceeding against the defendant by attachment, direct that the act required to be done may be done by the plaintiff or some other person appointed by the court, at the expense of the defendant, and, upon the act being done, the amount of such expense may be ascertained by the court, or by a referee appointed by the court or judge, and the court may render judgment for the amount of the expense and cost, and enforce payment thereof by execution. [R60,§3770; C73,§3383; C97,§4351; C24, 27, 31, 35,§12453.]

12454 **Temporary orders.** During the pendency of the action, the court, or judge in vacation, may make temporary orders for preventing damage or injury to the plaintiff until the action is decided. [R60,§3771; C73,§3384; C97,§4352; C24, 27, 31, 35,§12454.]

12455 **Appeal by state.** When the state is a party, it may appeal without security. [R60, §3772; C73,§3385; C97,§4353; C24, 27, 31, 35, §12455.]

CHAPTER 533

CERTIORARI

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12456 **When writ may issue.** The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there

is no other plain, speedy, and adequate remedy. [C51,§1965; R60,§3487; C73,§3216; C97,§4154; C24, 27, 31, 35,§12456.]

Review of contempt proceedings, §12550

12457 By whom granted. The writ may be granted by the district court, or judge thereof, but if to be directed to said court or judge, or to the superior court or its judge, then by the supreme court, or one of its judges, and shall command the defendant therein to certify to the court from which it issues, at a specified time and place, a transcript of the records and proceedings, as well as the facts in the case, describing or referring to them, or any of them, with convenient certainty, and also to have then and there the writ, and, when allowed by a court, it shall be issued by the clerk thereof and under its seal. [C51,§1966; R60,§3488; C73,§3217; C97,§4155; C24, 27, 31, 35,§12457.]

12458 Stay of proceedings—bond. If a stay of proceedings is sought, the writ can only issue upon the petitioner giving bond, the penalty and conditions thereof to be fixed by the court or judge allowing the writ, which bond with the sureties thereon may be approved by such court or judge, or the clerk issuing the writ, and in either case to be filed with the clerk. [C51, §1967; R60,§3489; C73,§3218; C97,§4156; C24, 27, 31, 35,§12458.]

12459 Petition. The petition therefor must state facts constituting a case wherein the writ may issue, and be verified. [C51,§1968; R60, §3490; C73,§3219; C97,§4157; C24, 27, 31, 35, §12459.]

C97,§4157, editorially divided

12460 Discretion as to notice. The court or judge, before issuing the writ, may require notice of the application to be given the adverse party, or may grant it without. [C51,§1968; R60, §3490; C73,§3219; C97,§4157; C24, 27, 31, 35, §12460.]

12461 When notice is necessary. If a stay of proceedings is sought, the writ can only be granted upon reasonable notice of the time, place, and court or judge before whom the application will be made, which shall be fixed by the court or judge to whom the application is presented. [C73,§3219; C97,§4157; C24, 27, 31, 35,§12461.]

12462 Service and return. The writ must be served and the proof of such service made in the same manner as is prescribed for the original notice in the district court, except the original shall be left with the defendant, and the return of service made upon a copy thereof. [C51,§1969; R60,§3491; C73,§3220; C97,§4158; C24, 27, 31, 35,§12462.]

Manner of service, §11060

12463 Defective return. If the return of the writ be defective, the court may order a further return to be made, and compel obedience to the writ and to such further order by attachment, if necessary. [C51,§1970; R60, §3492; C73,§3221; C97,§4159; C24, 27, 31, 35, §12463.]

12464 Trial—judgment. When full return has been made, the court must proceed to hear the parties upon the record, proceedings, and facts as certified, and such other testimony, oral or written, as either party may introduce, and give judgment affirming or annulling the proceedings in whole or in part, or, in its discretion, correcting the same and prescribing the manner in which the parties or either of them shall further proceed. [C51,§1971; R60, §3493; C73.§3222; C97,§4160; C24, 27, 31, 35, §12464.]

12465 Nature of action. The action shall be prosecuted by ordinary proceedings so far as applicable. [C73,§3223; C97,§4161; C24, 27, 31, 35,§12465.]

C97,§4161, editorially divided

12466 Appeal. From the judgment of the court an appeal lies as in ordinary actions, and the record shall be prepared in the same manner. [C51,§1972; R60,§3494; C73,§3223; C97, §4161; C24, 27, 31, 35,§12466.]

12467 Limitation. No writ shall be granted after twelve months from the time it is alleged the inferior court, tribunal, board, or officer exceeded its or his jurisdiction, or otherwise acted illegally. [C73,§3224; C97,§4162; C24, 27, 31, 35,§12467.]

CHAPTER 534

HABEAS CORPUS

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12468 Petition. The petition for the writ of habeas corpus must state:

1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom and the place where he is so restrained, mentioning the names of the parties, if known, and if unknown describing them with as much particularity as practicable.

2. The cause or pretense of such restraint, according to the best information of the applicant; and if by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence.

3. That the restraint is illegal, and wherein.

4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant.

5. Whether application for the writ has been before made to and refused by any court or judge, and if so, a copy of the petition in that case must be attached, with the reasons for the refusal, or satisfactory reasons given for the failure to do so. [C51,§2213; R60,§3801; C73, §3449; C97,§4417; C24, 27, 31, 35,§12468.]

12469 Verification — presentation to court. The petition must be sworn to by the person confined, or by someone in his behalf, and presented to some court or officer authorized to allow the writ. [C51,§2214; R60,§3802; C73, §3450; C97,§4418; C24, 27, 31, 35,§12469.]

12470 Writ allowed—service. The writ may be allowed by the supreme, district, or superior court, or by any judge of either of those courts, and may be served in any part of the state. [C51,§2215; R60,§3803; C73,§3451; C97,§4419; C24, 27, 31, 35,§12470.]

12471 Application—to whom made. Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to therefor, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient court or a judge thereof. [C51, §2217; R60,§3805; C73,§3452; C97,§4420; S13, §4420; C24, 27, 31, 35,§12471.]

Referred to in §12472
S13,§4420, editorially divided

12472 Inmates of state institutions. When the applicant is an inmate of or confined in a state institution the provisions of section 12471 relating to the court to which or the judge to whom applications must be made are mandatory, and the convenience or preference of an attorney or witness or other person interested in the release of the applicant shall not be a sufficient reason to authorize a more remote court or judge to assume jurisdiction. [S13,§4420; C24, 27, 31, 35,§12472.]

12473 Writ refused. If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge must refuse to allow the writ. [C51,§2218; R60, §3806; C73,§3453; C97,§4421; C24, 27, 31, 35, §12473.]

12474 Reasons indorsed. If the writ is disallowed, the court or judge shall cause the reasons thereof to be appended to the petition and returned to the person applying for the writ. [C51,§2221; R60,§3809; C73,§3454; C97,§4422; C24, 27, 31, 35,§12474.]

12475 Form of writ. If the petition is in accordance with the foregoing requirements, and states sufficient grounds for the allowance of the writ, it shall issue, and may be substantially as follows:

The State of Iowa,

To the sheriff of, etc. (or to A..... B....., as the case may be):

You are hereby commanded to have the body of C..... D....., by you unlawfully detained, as is alleged, before the court (or before me, or before E..... F....., judge, etc., as the case may be), at...., on.... (or immediately after being served with this writ), to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises. [C51,§2219; R60, §3807; C73,§3455; C97,§4423; C24, 27, 31, 35, §12475.]

12476 How issued. When the writ is allowed by a court, it must be issued by the clerk, but when by a judge, he must issue it himself, subscribing his name thereto. [C51,§2220; R60, §3808; C73,§3456; C97,§4424; C24, 27, 31, 35, §12476.]

12477 Penalty for refusing. Any judge, whether acting individually or as a member of the court, who wrongfully and willfully refuses the allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars. [C51,§2222; R60,§3810; C73,§3457; C97,§4425; C24, 27, 31, 35,§12477.]

12478 Issuance on judge's own motion. When any court or judge authorized to grant the writ has evidence, from a judicial proceeding before him, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, such court or judge shall issue the writ or cause it to be issued, on its or his own motion. [C51,§2223; R60,§3811; C73,§3458; C97,§4426; C24, 27, 31, 35,§12478.]

12479 County attorney notified. The court or officer allowing the writ must cause the county attorney of the proper county to be informed thereof, and of the time and place where and when it is made returnable. [C51,§2240; R60,§3828; C73,§3459; C97,§4427; C24, 27, 31, 35,§12479.]

12480 Service of writ. The writ may be served by the sheriff, or by any other person appointed in writing for that purpose by the court or judge by whom it is issued or allowed. If served by any other than the sheriff, he possesses the same power, and is liable to the same penalty for a nonperformance of his duty, as though he were the sheriff. [C51,§2224; R60, §3812; C73,§3460; C97,§4428; C24, 27, 31, 35, §12480.]

12481 Mode. The service shall be made by leaving the original writ with the defendant, and preserving a copy thereof on which to make the return of service, but a failure in this respect shall not be held material. [C51,§2225; R60,§3813; C73,§3461; C97,§4429; C24, 27, 31, 35,§12481.]

12482 Defendant not found. If the defendant cannot be found, or if he has not the plaintiff in custody, the service may be made upon any person who has, in the same manner and with the same effect as though he had been made defendant therein. [C51,§2226; R60,§3814; C73, §3462; C97,§4430; C24, 27, 31, 35,§12482.]

12483 Power of officer. If the defendant conceals himself, or refuses admittance to the person attempting to serve the writ, or if he attempts wrongfully to carry the plaintiff out of the county or the state after the service of the writ, the sheriff, or the person who is attempting to serve or who has served it, is authorized to arrest the defendant and bring him, together with the plaintiff, forthwith before the officer or court before whom the writ is made returnable. [C51,§2227; R60,§3815; C73,§3463; C97,§4431; C24, 27, 31, 35,§12483.]

12484 Arrest. In order to make the arrest, the sheriff or other person having the writ possesses the same power as is given to a sheriff for the arrest of a person charged with a felony. [C51,§2228; R60,§3816; C73,§3464; C97,§4432; C24, 27, 31, 35,§12484.]

Referred to in §12485
Arrest, ch 621 et seq.

12485 Plaintiff taken. If the plaintiff can be found, and if no one appears to have the charge or custody of him, the person having the writ may take him into custody and make return accordingly, and to get possession of the plaintiff's person in such cases he possesses the same power as is given by section 12484 for the arrest of the defendant. [C51,§2229; R60,§3817; C73, §3465; C97,§4433; C24, 27, 31, 35,§12485.]

12486 Defects in writ. The writ must not be disobeyed for any defects of form or misdescription of the plaintiff or defendant, provided enough is stated to show the meaning and intent thereof. [C51,§2234; R60,§3822; C73, §3466; C97,§4434; C24, 27, 31, 35,§12486.]

12487 Penalty for eluding writ. If the defendant attempts to elude the service of the writ, or to avoid the effect thereof by transferring the plaintiff to another, or by concealing him, he shall, on conviction, be imprisoned in the penitentiary or county jail not more than one year, and fined not exceeding one thousand dollars, and any person knowingly aiding or abetting in any such act shall be subject to like punishment. [C51,§2253; R60,§3841; C73,§3467; C97,§4435; C24, 27, 31, 35,§12487.]

12488 Refusal to give copy of process. An officer refusing to deliver a copy of any legal process by which he detains the plaintiff in custody to any person who demands it and tenders the fees therefor, shall forfeit two hundred dollars to the person who demands it. [C51,§2254; R60,§3842; C73,§3468; C97,§4436; C24, 27, 31, 35,§12488.]

12489 Preliminary writ. The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer any irreparable injury before he could be relieved by the proceedings above authorized, may issue an order to the sheriff, or any other person selected instead, commanding him to bring the plaintiff forthwith before such court or judge. [C51, §2230; R60,§3818; C73,§3469; C97,§4437; C24, 27, 31, 35,§12489.]

12490 Arrest of defendant. If the evidence is sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the order must also direct the arrest of the defendant. [C51,§2231; R60,§3819; C73,§3470; C97,§4438; C24, 27, 31, 35,§12490.]

12491 Execution of writ—return. The officer or person to whom the order is directed must execute the same by bringing the defendant, and also the plaintiff if required, before the court or judge issuing it, and the defendant must make return to the writ in the same manner as if the ordinary course had been pursued. [C51,§2232; R60,§3820; C73,§3471; C97,§4439; C24, 27, 31, 35,§12491.]

12492 Examination. The defendant may also be examined and committed, or bailed, or discharged, according to the nature of the case. [C51,§2233; R60,§3821; C73,§3472; C97,§4440; C24, 27, 31, 35,§12492.]

12493 Informalities. Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to him by a wrong name or description, or to another person. [C51,§2235; R60,§3823; C73,§3473; C97,§4441; C24, 27, 31, 35,§12493.]

12494 Appearance—answer. Service being made in any of the modes herein provided, the defendant must appear at the proper time and answer the petition, but no verification shall be required to the answer. [C51,§2236; R60,§§3824,

4182; C73,§3474; C97,§4442; C24, 27, 31, 35, §12494.]

12495 Body to be produced. He must also produce the body of the plaintiff, or show good cause for not doing so. [C51,§2237; R60,§3825; C73,§3475; C97,§4443; C24, 27, 31, 35,§12495.]

12496 Penalty—contempt. A willful failure to comply with the above requirements will render the defendant liable to be attached for contempt, and to be imprisoned till he complies, and shall subject him to the forfeiture of one thousand dollars to the party thereby aggrieved. [C51,§2238; R60,§3826; C73,§3476; C97,§4444; C24, 27, 31, 35,§12496.]

12497 Attachment. Such attachment may be served by the sheriff or any other person authorized by the court or judge, who shall also be empowered to produce the body of the plaintiff forthwith, and has, for this purpose, the same powers as are above conferred in similar cases. [C51,§2239; R60,§3827; C73,§3477; C97, §4445; C24, 27, 31, 35,§12497.]

12498 Answer. The defendant in his answer must state whether he then has, or at any time has had, the plaintiff under his control and restraint, and if so the cause thereof. [C51, §2241; R60,§3829; C73,§3478; C97,§4446; C24, 27, 31, 35,§12498.]

12499 Transfer of plaintiff. If he has transferred him to another person, he must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor. [C51,§2242; R60,§3830; C73,§3479; C97,§4447; C24, 27, 31, 35,§12499.]

12500 Copy of process. If he holds him by virtue of a legal process or written authority, a copy thereof must be annexed. [C51,§2243; R60, §3831; C73,§3480; C97,§4448; C24, 27, 31, 35, §12500.]

12501 Demurrer or reply—trial. The plaintiff may demur or reply to the defendant's answer, but no verification shall be required to the reply, and all issues joined therein shall be tried by the judge or court. [C51,§2244; R60, §3832; C73,§3481; C97,§4449; C24, 27, 31, 35, §12501.]

12502 Commitment questioned. The reply may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge, in connection with any other testimony which may then be produced. [C51,§2245; R60,§3833; C73,§3482; C97, §4450; C24, 27, 31, 35,§12502.]

12503 Nonpermissible issues. It is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of the trial jury in the trial of a cause, nor of a court or judge when lawfully acting within the scope of their authority. [C51, §2246; R60,§3834; C73,§3483; C97,§4451; C24, 27, 31, 35,§12503.]

12504 Discharge. If no sufficient legal cause of detention is shown, the plaintiff must be discharged. [C51,§2247; R60,§3835; C73,§3484; C97,§4452; C24, 27, 31, 35,§12504.]

12505 Plaintiff held. Although the commitment of the plaintiff may have been irregular, if the court or judge is satisfied from the evidence that he ought to be held to bail, or committed, either for the offense charged or any other, the order may be made accordingly. [C51, §2248; R60,§3836; C73,§3485; C97,§4453; C24, 27, 31, 35,§12505.]

12506 Bail increased or diminished. The plaintiff may also, in any case, be committed, admitted to bail, or his bail be reduced or increased, as justice may require. [C51,§2249; R60,§3837; C73,§3486; C97,§4454; C24, 27, 31, 35,§12506.]

12507 Plaintiff retained in custody. Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in his custody, and may use all necessary and proper means for that purpose. [C51,§2250; R60,§3838; C73,§3487; C97,§4455; C24, 27, 31, 35,§12507.]

12508 Right to be present waived. The plaintiff may, in writing, or by attorney, waive his right to be present at the trial, in which case the proceedings may be had in his absence. The writ will in such cases be modified accordingly. [C51,§2251; R60,§3839; C73,§3488; C97, §4456; C24, 27, 31, 35,§12508.]

12509 Disobedience of order. Disobedience to any order of discharge will subject the defendant to attachment for contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by him in consequence thereof. [C51,§2252; R60,§3840; C73,§3489; C97,§4457; C24, 27, 31, 35,§12509.]

12510 Papers filed with clerk. When the proceedings are before a judge, except when the writ is refused, all the papers in the case, including his final order, shall be filed with the clerk of the district court of the county wherein the final proceedings were had, and a memorandum thereof shall be entered by the clerk upon his judgment docket. [C51,§2255; R60,§3843; C73,§3490; C97,§4458; C24, 27, 31, 35,§12510.]

12511 Costs. If the plaintiff is discharged, the costs shall be taxed to the defendant, unless he is an officer holding the plaintiff in custody under a warrant of arrest or commitment, or under other legal process, in which case the costs shall be taxed to the county. If the plaintiff's application is refused, the costs shall be taxed against him, and, in the discretion of the court, against the person who filed the petition in his behalf. [C97,§4459; C24, 27, 31, 35, §12511.]

CHAPTER 535

INJUNCTIONS

Bootlegging, §§1921.071, 1921.072, 1921.073

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12538 Commitment.
12539 Contempt punished.

12512 Writ as independent remedy. An injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of the code. [C51,§2189; R60,§3773; C73,§3386; C97, §4354; C24, 27, 31, 35,§12512.]

Referred to in §12514
C97,§4354, editorially divided

12513 Writ as auxiliary remedy. In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the commission of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress. [R60,§3778; C73,§3386; C97,§4354; C24, 27, 31, 35,§12513.]

Referred to in §12514

12514 Temporary or permanent. In any of the cases mentioned in sections 12512 and 12513 the injunction may either be a part of the judgment rendered in the action, or it may, if proper grounds therefor are shown, be granted by order at any stage of the case before judgment, and shall then be known as a temporary injunction. [C73,§3387; C97,§4355; C24, 27, 31, 35,§12514.]

12515 Temporary—when allowed. Where it appears by the petition therefor, which must be supported by affidavit, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act which would produce great or irreparable injury to the plaintiff; or where, during litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute. [C51,§2191; R60,§3775; C73,§3388; C97,§4356; C24, 27, 31, 35,§12515.]

12516 By whom granted. A temporary injunction may be granted by:

1. The court or judge thereof in which the action is pending or is to be brought.
2. Any judge of the district court of such district, or a superior court in the proper county.
3. Any judge of the supreme, or a judge of any other district court. [C51,§2191; R60,§3775; C73,§3389; C97,§4357; C24, 27, 31, 35,§12516.]

Referred to in §§12518, 12519
C97,§4357, editorially divided

12517 General rule. In cases where an action is pending, and it is applied for to affect the subject matter thereof, it can only be granted by the court or judge thereof in which such action is pending. [C51,§2191; R60,§3775; C73,§3389; C97,§4357; C24, 27, 31, 35,§12517.]

12518 Limitation on district or superior judge. Nor shall it be granted by any judge mentioned in the second subsection of section 12516, unless it satisfactorily appears by affidavit that the court or judge thereof in which the action is brought cannot, for want of time, sickness, or other disability, hear the same, or that the residence of the judge is inconvenient, or that it is for some sufficient reason impracticable to make the application to him. [C51, §2191; R60,§3775; C73,§3389; C97,§4357; C24, 27, 31, 35,§12518.]

12519 Limitation on other judges. Nor shall it be granted by any judge mentioned in the third subsection of section 12516, unless it be made satisfactorily to appear to such judge, by affidavit, that the application therefor cannot, for some sufficient reason, be made to either of the courts or judges mentioned in the first or second subsection of section 12516. [C51,§2191; R60,§3775; C73,§3389; C97,§4357; C24, 27, 31, 35,§12519.]

12520 Notice to defendant. An injunction shall not be granted against a defendant who has answered, unless he has had notice of the application. [C73,§3390; C97,§4358; C24, 27, 31, 35,§12520.]

12521 When notice necessary. An injunction to stop the general and ordinary business of a corporation, or the operations of a railway, or of a municipal corporation, or the erection of any building or other work, or the board of supervisors of any county, or to restrain a nuisance, can only be granted upon reasonable notice of the time and place of the application to the party to be enjoined. [C73,§3391; C97, §4359; C24, 27, 31, 35,§12521.]

C97,§4359, editorially divided

12522 Granting during term time. Nor shall any temporary writ of injunction be allowed by any judge during term time, except the petition therefor shall be first filed with the clerk and entered upon the court calendar of that term, and the order allowing the same, if granted, shall be entered therein. [C97,§4359; C24, 27, 31, 35,§12522.]

12523 Refusal of writ conclusive. No injunction shall be granted by a judge after the application therefor has been overruled by the court; nor by a court or judge, when it has been refused by the court or judge thereof in which the action is brought. A judge refusing an injunction shall, if requested by either party, give him a certificate thereof. [C73,§3392; C97,§4360; C24, 27, 31, 35,§12523.]

12524 Motion to dissolve. The defendant may move to dissolve the injunction, either before or after the filing of the answer. [C51, §2206; R60,§3790; C73,§3393; C97,§4361; C24, 27, 31, 35,§12524.]

12525 Order issued. If the order is made by the court, the clerk shall make an entry thereof in the court record, and issue the order accordingly. If made by the judge, he must indorse the said order upon the petition. [C51, §2192; R60,§3776; C73,§3394; C97,§4362; C24, 27, 31, 35,§12525.]

12526 Bond. The order of allowance must direct the injunction to issue only after the filing of a bond in the office of the clerk of the proper court, in a penalty fixed in the order, with sureties to be approved by the clerk, and conditioned for the payment of all damages which may be adjudged against petitioner by reason of such injunction. [C51,§2193; R60, §3777; C73,§3395; C97,§4363; C24, 27, 31, 35, §12526.]

12527 Restraint on proceedings or judgment —venue. When proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, the action must be brought in the county and court in which such action is pending or the judgment or order was obtained, unless such judgment or final order is obtained in the supreme court, in which case the action must be brought in the county and court from which the case was taken to the supreme court. [C51, §2194; R60,§3778; C73,§3396; C97,§4364; C24, 27, 31, 35,§12527.]

12528 Bond in such case. In an action to enjoin the proceedings in a civil action, or on a judgment or final order, the bond must be further conditioned to pay such judgment, or comply with such final order if the injunction is not made perpetual, or to pay any judgment that may be ultimately recovered against the party obtaining the injunction on the cause of action enjoined. [C51,§2194; R60,§3778; C73, §3396; C97,§4365; C24, 27, 31, 35,§12528.]

12529 Penalty. The penalty of the bond must be twice the probable amount of liability to be thereby incurred. [C51,§2195; R60,§3779; C73,§3397; C97,§4366; C24, 27, 31, 35,§12529.]

12530 Defendant to show cause. The court or judge, before granting the writ, may allow the defendant an opportunity to show cause why such order should not be granted. [C51, §2197; R60,§3781; C73,§3398; C97,§4367; C24, 27, 31, 35,§12530.]

12531 Application for dissolution. If the order is granted without allowing the defendant to show cause, he may, at any time before the next term of the court, apply to the judge who made the order to vacate or modify the same, or the application may be made to the judge of the court in which the action is pending. [C51,§2198; R60,§3782; C73,§3399; C97, §4368; C24, 27, 31, 35,§12531.]

12532 Notice — showing. The application must be with notice to the plaintiff, upon the ground that the order was improperly granted, or it may be founded on the answer of defendants and affidavits. In the latter case, the plaintiff may fortify his application by counter affidavits, and have reasonable time therefor. [C51,§2199; R60,§3783; C73,§3400; C97,§4369; C24, 27, 31, 35,§12532.]

12533 Dissolution. The judge shall decide the matter at once, unless some good cause for delay is shown, but the vacation of the order shall not prevent the action from proceeding, if anything is left to proceed upon. [C51,§2200; R60,§3784; C73,§3401; C97,§4370; C24, 27, 31, 35,§12533.]

12534 Only one motion. Only one motion to dissolve or modify an injunction upon the whole case shall be allowed. [R60,§3793; C73, §3402; C97,§4371; C24, 27, 31, 35,§12534.]

12535 Proceedings for violation. Any judge of the supreme, district, or superior court, being furnished with an authenticated copy of the injunction and satisfactory proof that it has been violated, shall issue his precept to the sheriff of the county where the violation occurred, or to any other sheriff, naming him, more convenient to all parties concerned, directing him to attach the defendant and bring him forthwith before the same or some other judge, at a place to be stated in said precept. [C51, §2201; R60,§3785; C73,§3403; C97,§4372; C24, 27, 31, 35,§12535.]

12536 Contempt purged. When produced, he may file his affidavit denying or excusing the contempt, and the court may hear other evi-

dence, oral or by affidavit, and if satisfied that the defendant is not guilty, or that the contempt is sufficiently excused, he shall be released, and all affidavits shall be filed with and preserved by the clerk. [C51,§2202; R60,§3786; C73,§3404; C97,§4373; C24, 27, 31, 35,§12536.]

12537 Bond required. If not so released, the judge may require him to give bond, with surety, for his appearance at the next term of the court and for his future obedience to the injunction, which shall be filed with the clerk. [C51,§2203; R60,§3787; C73,§3405; C97,§4374; C24, 27, 31, 35,§12537.]

12538 Commitment. If he fails to give such bond, he may be committed to the jail of the county where the proceedings are pending until the next term of court, unless he gives the bond in the meantime. [C51,§2204; R60,§3788; C73, §3406; C97,§4375; C24, 27, 31, 35,§12538.]

12539 Contempt punished. The court at the next term shall act upon the case, and, if a contempt is found to have been committed, punish it in the usual mode. [C51,§2205; R60,§3789; C73,§3407; C97,§4376; C24, 27, 31, 35,§12539.]

CHAPTER 536

CONTEMPTS

Liquor injunction, §1921.068

12540 "Court" defined.
12541 Acts constituting contempt.
12542 In courts of record.
12543 Punishment.
12544 Imprisonment.
12545 Affidavit necessary.
12546 Notice to show cause.
12547 Testimony reduced to writing.
12548 Personal knowledge of court—record required.
12549 Warrant of commitment.
12550 Revision by certiorari.
12551 Indictment not barred.

12540 "Court" defined. Any officer authorized to punish for contempt is a court within the meaning of this chapter. [C51,§1608; R60, §2698; C73,§3501; C97,§4470; C24, 27, 31, 35, §12540.]

12541 Acts constituting contempt. The following acts or omissions are contempts, and are punishable as such by any of the courts of this state, or by any judicial officer, including justices of the peace, acting in the discharge of an official duty, as hereinafter provided:

1. Contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority.
2. Any willful disturbance calculated to interrupt the due course of its official proceedings.
3. Illegal resistance to any order or process made or issued by it.
4. Disobedience to any subpoena issued by it and duly served, or refusing to be sworn or to answer as a witness.
5. Unlawfully detaining a witness or party to an action or proceeding pending before such court, while going to or remaining at the place where the action or proceeding is thus pending, after being summoned, or knowingly assisting, aiding, or abetting any person in evading service of the process of such court.
6. Any other act or omission specially declared a contempt by law. [C51,§1598; R60, §2688; C73,§3491; C97,§4460; C24, 27, 31, 35, §12541.]

12542 In courts of record. In addition to the above, any court of record may punish the following acts or omissions as contempts:

1. Failure to testify before a grand jury, when lawfully required to do so.
2. Assuming to be an officer, attorney, or counselor of the court, and acting as such without authority.
3. Misbehavior as a juror, by improperly conversing with a party or with any other person in relation to the merits of an action in which he is acting or is to act as a juror, or receiving a communication from any person in respect to it without immediately disclosing the same to the court.
4. Bribing, attempting to bribe, or in any other manner improperly influencing or attempting to influence a juror to render a verdict, or suborning or attempting to suborn a witness.
5. Disobedience by an inferior tribunal, magistrate, or officer to any lawful judgment, order or process of a superior court, or proceeding in any matter in a manner contrary to law, after it has been removed from such tribunal, magistrate, or officer. [C51,§1599; R60,§2689; C73, §3492; C97,§4461; C24, 27, 31, 35,§12542.]

12543 Punishment. The punishment for contempt, where not otherwise specifically provided, shall be:

1. In the supreme court, by a fine not exceeding one thousand dollars or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment.
2. In all other courts of record, by a fine not exceeding five hundred dollars or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment.
3. In all other courts, by a fine not exceeding ten dollars. [C51,§1600; R60,§2690; C73,§3493; C97,§4462; C24, 27, 31, 35,§12543; 47GA, ch 227, §1.]

12544 Imprisonment. If the contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it. In that case the act to be performed must be specified in the warrant of the commitment. [C51,§1601; R60,§2691; C73,§3494; C97,§4463; C24, 27, 31, 35,§12544.]

12545 Affidavit necessary. Unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises. [C51,§1602; R60, §2692; C73,§3495; C97,§4464; C24, 27, 31, 35, §12545.]

12546 Notice to show cause. Before punishing for contempt, unless the offender is already in the presence of the court, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor; or he may be brought before the court forthwith, or on a given day, by warrant, if necessary. In either case he may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved. [C51,§1603; R60,§2693; C73,§3496; C97,§4465; C24, 27, 31, 35,§12546.]

12547 Testimony reduced to writing. Where the action of the court is founded upon evidence given by others, such evidence must be in writing, and be filed and preserved. [C51, §1604; R60,§2694; C73,§3497; C97,§4466; C24, 27, 31, 35,§12547.]

C97,§4466, editorially divided

12548 Personal knowledge of court — record required. If the court or judge acts upon personal knowledge in the premises, a statement of the facts upon which the order is founded must be entered on the records of the court, or be filed and preserved when the court keeps no record, and shall be a part of the record. [C51,§1604; R60,§2694; C73,§3497; C97, §4466; C24, 27, 31, 35,§12548.]

12549 Warrant of commitment. When the offender is committed, the warrant must state the particular facts and circumstances on which the court acted in the premises, and whether the same was in the knowledge of the court or was proved by witnesses. [C51,§1605; R60, §2695; C73,§3498; C97,§4467; C24, 27, 31, 35, §12549.]

12550 Revision by certiorari. No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari. [C51,§1606; R60,§2696; C73,§3499; C97, §4468; C24, 27, 31, 35,§12550.]

12551 Indictment not barred. The punishment for a contempt constitutes no bar to an indictment, but if the offender is indicted and convicted for the same offense, the court, in passing sentence, must take into consideration the punishment before inflicted. [C51,§1607; R60,§2697; C73,§3500; C97,§4469; C24, 27, 31, 35,§12551.]

CHAPTER 537

OFFICIAL BONDS, FINES, AND FORFEITURES

12552 Official bonds construed.
12553 Prior judgment no bar.
12554 Fines and forfeitures.
12555 By whom action prosecuted.
12556 Collusion.
12557 Report of forfeited bonds.

12552 Official bonds construed. The official bond of a public officer is to be construed as a security to the body politic or civil corporation of which he is an officer, and to all the members thereof, severally, who are intended to be secured thereby. [C51,§2145; R60,§3727; C73, §3368; C97,§4336; C24, 27, 31, 35,§12552.]

Conditions of bond, §1059

12553 Prior judgment no bar. A judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security for another delinquency, except that sureties can be made liable in the aggregate only to the extent of their undertaking. [C51,§2147; R60,§3728; C73,§3369; C97,§4337; C24, 27, 31, 35,§12553.]

12554 Fines and forfeitures. All fines and forfeitures. after deducting therefrom court costs and fees of collection, if any, and not otherwise disposed of, shall go into the treasury of the county where the same are collected for the benefit of the school fund. [C51,§§1158, 2148; R60,§3729; C73,§3370; C97,§4338; C24, 27, 31, 35,§12554.]

Constitutional provisions, Art. IX, §4 (page 53); Art. XII, §4

12555 By whom action prosecuted. Actions for their recovery may be prosecuted by the officers or persons to whom they by law belong, in whole or in part, or by the public officer into whose hands they are to be paid when collected. [C51,§2149; R60,§3730; C73,§3371; C97,§4339; C24, 27, 31, 35,§12555.]

12556 Collusion. A judgment for a penalty or forfeiture, rendered by collusion, does not prevent another action for the same subject matter. [C51,§2150; R60,§3731; C73,§3372; C97, §4340; C24, 27, 31, 35,§12556.]

12557 Report of forfeited bonds. Clerks of district, municipal, superior, and police courts, mayors of cities and towns, and justices of the peace shall, on the first Monday in January in each year, make report in writing to the board of supervisors for their respective counties of all forfeited recognizances in their offices; of all fines, penalties, and forfeitures imposed in their respective courts, which by law go into the county treasury for the benefit of the school fund; in what cause or proceeding, when and for what purpose, against whom and for what amount, rendered; whether said fines, penalties, forfeitures, and recognizances have been paid, remitted, canceled, or otherwise satisfied; if so, when, how, and in what manner, and if not paid, remitted, canceled, or otherwise satisfied,

what steps have been taken to enforce the collection thereof.

Such report must be full, true, and complete with reference to the matters therein contained, and of all things required by this section to be reported, and be under oath, and any officer failing to make such report shall be guilty of a misdemeanor. [C73,§3974; C97,§1302; C24, 27, 31, 35,§12557.]

Punishment, §12894

CHAPTER 538

SEIZURE OF BOATS OR RAFTS

12558 Seizure.
12559 Petition and warrant.
12560 Warrant issued on Sunday.
12561 Service of notice.
12562 Service of warrant.
12563 Who may appear.
12564 Bond to discharge.
12565 Special execution.
12566 Sale.
12567 Fractional share sold.
12568 Appeal.
12569 Rights saved.
12570 Contract alleged.
12571 Lien.
12572 Appearance by executing bond.

12558 Seizure. In an action brought against the owners of any boat or raft to recover any debt contracted by such owner, or by the master, agent, clerk, or consignee thereof, for supplies furnished, or for labor done in, about, or on such boat or raft, or for materials furnished in building, repairing, fitting out, furnishing, or equipping the same, or to recover for the nonperformance of any contract relative to the transportation of persons or property thereon, made by any of the persons aforementioned, or to recover damages for injuries to persons or property done by such boat or raft or the officers or crew thereof in connection with its business, a warrant may issue for the seizure of the same as herein provided. [C51,§2116; R60,§§3693, 3698, 3700; C73,§§3432, 3445, 3447; C97,§4402; C24, 27, 31, 35,§12558.]

12559 Petition and warrant. The petition must be in writing, sworn to, and filed with the clerk or a justice of the peace, who shall thereupon issue a warrant to the proper officer, commanding him to seize the boat or raft, its apparel, tackle, furniture, and appendages, and detain the same until released by due course of law. [C51,§2121; R60,§3701; C73,§3433; C97, §4403; C24, 27, 31, 35,§12559.]

12560 Warrant issued on Sunday. The warrant may be issued on Sunday, if the plaintiff, his agent, or attorney states in his petition that it would be unsafe to delay proceedings. [R60, §3702; C73,§3434; C97,§4404; C24, 27, 31, 35, §12560.]

Analogous or related provisions, §§10819, 11064, 11653, 12082, 12179

12561 Service of notice. It shall be sufficient service of the original notice in such an action to serve it on the defendant, or on the master, agent, clerk, or consignee of such boat or raft; if neither of them can be found, it may be served by posting a copy thereof on some conspicuous part of the same. [C51,§2122; R60, §3703; C73,§3435; C97,§4405; C24, 27, 31, 35, §12561.]

12562 Service of warrant. Any constable or marshal of any city or town may execute the warrant, whether it issues from the office of the clerk of the district or superior court, or of a justice. [R60,§3704; C73,§3436; C97,§4406; C24, 27, 31, 35,§12562.]

Approval of warrant and expenses, §§1225.04, 1225.05

12563 Who may appear. Any persons interested in the property seized may appear for the defendant by himself, agent, or attorney, and defend the action, and no continuance shall be granted to the plaintiff while the property is held in custody. [C51,§2123; R60,§3705; C73, §3437; C97,§4407; C24, 27, 31, 35,§12563.]

12564 Bond to discharge. The property seized may be discharged at any time before final judgment, by giving a bond with sureties, to be approved by the officer executing the warrant, or by the clerk or justice who issued it, in a penalty double the plaintiff's demand, conditioned that the obligors therein will pay the amount which may be found due to the plaintiff, together with the costs. [C51,§2124; R60, §3706; C73,§3438; C97,§4408; C24, 27, 31, 35, §12564.]

Similar provisions, §§12118, 12121, 12188

12565 Special execution. If judgment is rendered for the plaintiff before the property is thus discharged, a special execution shall be issued against it. If it has been previously discharged, the execution shall issue against the principal and sureties in the bond without further proceedings. [C51,§2125; R60,§3707; C73, §3439; C97,§4409; C24, 27, 31, 35,§12565.]

12566 Sale. The officer must first sell the furniture or appendages of the boat or raft, if by so doing he can satisfy the demand. If he sells the boat or raft, he must do so to the bidder who will advance the amount required to satisfy the execution for the lowest fractional share thereof, unless the person defending desires a different and equally convenient mode of sale. The officer making the sale shall execute a bill of sale to the purchaser for the interest sold. [C51,§2126; R60,§3708; C73, §3440; C97,§4410; C24, 27, 31, 35,§12566.]

12567 Fractional share sold. If a fractional share of the boat or raft is thus sold, the purchaser shall hold such share or interest jointly with the other owners. [C51,§2127; R60,§3709; C73,§3441; C97,§4411; C24, 27, 31, 35,§12567.]

12568 Appeal. If an appeal is taken by the defendant before the property is discharged as above provided, the appeal bond, if one is filed, will have the same effect in discharging it as the bond above contemplated, and execution shall issue against the obligors therein after judgment in the same manner. [C51,§2128; R60,§3710; C73,§3442; C97,§4412; C24, 27, 31, 35,§12568.]

Presumption of approval of bond, §12759.1

12569 Rights saved. Nothing herein contained is intended to affect the rights of a plaintiff to sue in the same manner as though the provisions of this chapter had not been enacted. [C51,§2129; R60,§3711; C73,§3443; C97,§4413; C24, 27, 31, 35,§12569.]

12570 Contract alleged. In actions commenced in accordance with the provisions of this chapter, it is sufficient to allege the contract to have been made with the boat or raft itself. [C51,§2130; R60,§3712; C73,§3444; C97, §4414; C24, 27, 31, 35,§12570.]

12571 Lien. Claims growing out of either of the above causes shall be liens upon the boat or raft, its tackle, and appendages, for the term of twenty days from the time the right of action therefor accrued. [R60,§3699; C73, §3446; C97,§4415; C24, 27, 31, 35,§12571.]

12572 Appearance by executing bond. The execution by or for the owner of such boat or raft of a bond, whereby possession of the same is obtained or retained by him, shall be an appearance of such owner as a defendant to the action. [R60,§4130; C73,§3448; C97,§4416; C24, 27, 31, 35,§12572.]

CHAPTER 539

GUARDIANS FOR MINORS

Referred to in §§12613, 12644.08

12573 Natural guardian of the person.
12574 Surviving parent.
12575 Guardian of property.
12576 Minor may choose.
12577 Bond and oath of guardian of property.
12578 Surety company.
12579 Bond and oath of guardian of person.
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12582 Suits by guardians.
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12600 Disobedience of orders.
12601 New appointment—delivery of property.
12602 Failure to deliver—penalty.
12603 Action on bond.
12604 Removal—new bond.
12605 Nonresident minors.

12573 Natural guardian of the person. Parents are the natural guardians of the persons of their minor children, and equally entitled to their care and custody. [C51,§1491; R60,§2543; C73,§2241; C97,§3192; C24, 27, 31, 35,§12573.]

Guardian of neglected, etc., children, §3638

12574 Surviving parent. The surviving parent becomes such guardian, but, if there is none, the district court shall appoint one, who shall have the same power and control over his ward as the parents would have, if living. [C51, §§1492, 1498; R60,§§2544, 2550; C73,§§2242, 2249; C97,§3193; C24, 27, 31, 35,§12574.]

12575 Guardian of property. If a minor owns property, a guardian must be appointed to manage the same. [C51,§§1493, 1494; R60, §§2545, 2546; C73,§2243; C97,§3194; C24, 27, 31, 35,§12575.]

12576 Minor may choose. A minor over fourteen years of age, of sound mind, may select the guardian, subject to approval by the district court, or a judge thereof, of the county in which his parents reside, if living with them; if not, of the county of his residence. [C51, §1495; R60,§2547; C73,§2244; C97,§3195; C24, 27, 31, 35,§12576.]

12577 Bond and oath of guardian of property. Guardians of the property of a minor shall give bond, with surety to be approved by the court or clerk, in a penalty double the value of the personal estate and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardians according to law, and must take an oath of the same tenor as the condition of the bond. [C51,§1496; R60,§2548; C73,§2246; C97,§3197; C24, 27, 31, 35,§12577.]

Referred to in §§12578, 12644.09
Conditions of bond, §§1059, 1061

12578 Surety company. Where an approved surety company bond is furnished, said bond may be fixed in a lesser amount than is provided in section 12577, but in no case less than the actual value of the personal estate and the rents and profits of the real estate, with twenty-five percent added thereto. [C24, 27, 31, 35, §12578.]

Referred to in §12644.09

12579 Bond and oath of guardian of person. The court or judge may require a bond to

be given by the guardian of the person of minors, with like conditions as when the bond is given by a guardian of the property. [C51,§1496; R60,§2548; C73,§2246; C97,§3197; C24, 27, 31, 35,§12579.]

12580 Inventory and appraisement. Guardians, within fifteen days after their appointment, must make out an inventory of all the property of the minor, which shall be appraised in the same manner as the property of a deceased person, and filed in the office of the clerk of the district court. [C51,§1497; R60,§2549; C73,§2248; C97,§3199; C24, 27, 31, 35,§12580.]

Appraisement, §11916

12581 Duties. Guardians of the property of minors must prosecute and defend for their wards, may employ counsel therefor, lease lands, loan money, and in all other respects manage their affairs, under proper orders of the court or a judge thereof. [C51,§1499; R60,§2551; C73,§2250; C97,§3200; C24, 27, 31, 35,§12581.]

Investment of funds, ch 551

12582 Suits by guardians. Any guardian may sue in his own name, describing himself as guardian of the ward for whom he sues. [R60, §1452; C73,§2275; C97,§3224; C24, 27, 31, 35, §12582.]

C97,§3224, editorially divided

12583 Nonabatement of actions. When his guardianship shall cease by his death, removal, or otherwise, or by the decease of his ward, any action or proceeding then pending shall not abate, but his successor, or the person for whom he was guardian, or the executor or administrator of such person, as the case may require, shall be substituted or joined as party thereto. [R60, §1452; C73,§2275; C97,§3224; C24, 27, 31, 35, §12583.]

12584 Foreign real estate. The guardian and court making the appointment have power and authority over any property of the minor, situated or being in any other county, to the same extent as if it was situated in the county where the appointment was made. [C73,§2245; C97,§3196; C24, 27, 31, 35,§12584.]

C97,§3196, editorially divided

12585 Certification to foreign counties. If an order is made by such court affecting the title of lands lying in another county, a certified copy of such order, and of all the papers on which it is founded, shall be transmitted to the clerk of the district court in the county where such lands are situated, who shall enter the same on the proper docket, index, and make a complete record thereof, in the same manner as if the cause in which the order is made had been commenced in his court. [C73,§2245; C97, §3196; C24, 27, 31, 35,§12585.]

12586 Guardian to complete contracts. The guardian of any person contemplated in this and chapters 540 and 541 of this title providing for the appointment of guardians, whether appointed by a court in this state or elsewhere, may complete the real contracts of his ward, or any authorized contracts of a guardian who has died or been removed, in the same manner and by like proceedings as the real contracts of one deceased may be, under an order of court, performed by his executor or administrator. [R60, §1454; C73,§2277; C97,§3226; C24, 27, 31, 35, §12586.]

12587 Sale or mortgage of property. When not in violation of the terms of a will by which a minor holds his real property, it may, upon application by the guardian to, and under the direction of, the district court or judge, be sold or mortgaged, when such sale or mortgage is necessary for the minor's support or education, or where his interest will be thereby promoted by reason of the unproductiveness of the property, or of its being exposed to waste, or of any other peculiar circumstances. [C51,§1500; R60, §2552; C73,§2257; C97,§3206; C24, 27, 31, 35, §12587.]

12588 Petition. The petition for that purpose must state the ground thereof and be verified. [C51,§1501; R60,§2553; C73,§2258; C97, §3207; C24, 27, 31, 35,§12588.]

12589 Return day — notice. The plaintiff may fix the time and place of hearing before the court and, in such case, a notice thereof, together with a copy of the petition, must be served, unless otherwise provided, on the ward in the same manner, and for the same time, before the day of hearing as would be required if the day of hearing was the first day of a term of court, and the notice was a notice of the commencement of an ordinary civil action, except that when service is made by publication the copy of the petition need not be published. [C51,§1501; R60,§2553; C73,§2258; C97,§3207; C24, 27, 31, 35,§12589.]

Referred to in §12644.23
Time and manner of service, §§11059, 11060

12590 Optional procedure. The court or judge may, on application therefor, fix, by proper order, the time and place of hearing before the court or judge, and the time of service and the manner thereof. [C24, 27, 31, 35,§12590.]

Referred to in §12644.23

12591 Postponement and publication—reference. The court in its discretion, or the judge thereof, may direct a postponement of the matter, and order such further notice, by publication through the newspapers or otherwise, as may be expedient, and may direct a reference for the purpose of ascertaining the propriety of ordering the sale or mortgage applied for. [C51, §§1502, 1503; R60,§§2554, 2555; C73,§§2259, 2260; C97,§3208; C24. 27, 31, 35,§12591.]

Referred to in §12644.23

12592 Bond. Before any such sale or mortgage can be executed, the guardian must give security to the satisfaction of the court or judge, the penalty of which shall be at least double the value of the property to be sold or of the money to be raised by the mortgage, conditioned that he will faithfully account for and apply all money received by him, by virtue of

such sale or mortgage, under the direction of the court or judge. [C51,§1504; R60,§2556; C73, §2261; C97,§3209; C24, 27, 31, 35,§12592.]

Referred to in §12644.23

12593 Costs. When the application for the sale or mortgage of property is resisted, the court may, in its discretion, award costs to the prevailing party, and, when satisfied that there was no reasonable ground for making it, may direct the costs to be paid by the guardian from his own funds. [C51,§1505; R60,§2557; C73, §2262; C97,§3210; C24, 27, 31, 35,§12593.]

Referred to in §12644.23

12594 Deeds—approval. Deeds may be made by the guardian in his own name, but must be returned to the court, and the sale or mortgage be approved, before the same are valid. [C51, §1506; R60,§2558; C73,§2263; C97,§3211; C24, 27, 31, 35,§12594.]

Referred to in §12644.23

12595 Applicable procedure. The rule prescribed in the sale of real property by executors shall be observed in relation to the evidence necessary to show the regularity and validity of the sales of guardians. [C51,§1507; R60,§2559; C73,§2264; C97,§3212; C24, 27, 31, 35,§12595.]

Referred to in §12644.23
Sales by executors, §11933 et seq.
C97,§3212, editorially divided

12596 Validity of sale—limitation to question. No person can question the validity of any such sale after the lapse of five years from the time it was made. [C51,§1508; R60,§2560; C73,§2265; C97,§3212; C24, 27, 31, 35,§12596.]

Referred to in §12644.24

12597 Account. All guardians are required to render an account to the district court, at least once each year, of all moneys or other property in their possession, with all interest which may have accrued on money loaned, belonging to their wards. [R60,§2568; C73,§2254; C97,§3203; C24, 27, 31, 35,§12597.]

12598 Penalty. In case any guardian shall fail to make such report within the time above specified, he shall forfeit and pay into the county treasury the sum of fifty dollars, and such failure shall be ground for his removal. [R60,§2569; C73,§2255; C97,§3204; C24, 27, 31, 35,§12598.]

12599 Compensation. Guardians shall receive such compensation as the court may from time to time allow, the amount and the service for which it was made being entered upon the records of the court. [C51,§1515; R60,§2567; C73,§2256; C97,§3205; C24, 27, 31, 35,§12599.]

12600 Disobedience of orders. A failure to comply with any order of the court or a judge thereof in relation to guardianships shall be ground for removal, and a breach of the guardian's bond. [C51,§1509; R60,§2561; C73,§2251; C97,§3201; C24, 27, 31, 35,§12600.]

C97,§3201, editorially divided

12601 New appointment—delivery of property. The court or judge may appoint a new guardian, if necessary, and require his predecessor to deliver to the person entitled thereto, within a time fixed by the court or judge, the effects of such ward then in the hands of said predecessor, and may commit him to jail until he complies with such order. [C51,§1509; R60, §§2561, 2563; C73,§§2251, 2252; C97,§3201; C24, 27, 31, 35,§12601.]

12602 Failure to deliver—penalty. If property is not delivered in accordance with such order, the guardian removed shall, in addition to any other remedy, be subject to a penalty, for the benefit of the ward's estate, of one hundred dollars, to be recovered in an action on his bond. [C73,§2252; C97,§3201; C24, 27, 31, 35, §12602.]

12603 Action on bond. Action for the breach of such bond may be brought by anyone aggrieved thereby, or by such new guardian. [C51,§1509; R60,§2561; C73,§2251; C97,§3201; C24, 27, 31, 35,§12603.]

12604 Removal—new bond. Guardians may, upon notice given them, be removed by the court at any time for cause, which must be entered of record; and new or additional bonds may be required, if it finds the same necessary for the protection of the estate. [C51,§1510; R60,§2562; C73,§2247; C97,§3198; C24, 27, 31, 35,§12604.]

12605 Nonresident minors. A guardian may be appointed for a nonresident minor, idiot, lunatic, or person of unsound mind, who has property in this state, on application to the district court or judge of the county in which such property or any part thereof may be, who shall qualify in the same manner, have the same powers, and be subject to the same rules, as guardians of resident minors. [C73,§2253; C97, §3202; C24, 27, 31, 35,§12605.]

CHAPTER 540

FOREIGN GUARDIANS

Referred to in §§12586, 12613

12606 Appointment.
12607 Procedure.
12608 Bond omitted.
12609 Personal property.
12610 Copy of bond.
12611 Order for delivery.
12612 Record of bond—notice to court.

12606 Appointment. The foreign guardian of any nonresident minor, idiot, lunatic, or person of unsound mind may be appointed the guardian of the property of such person in this state by the district court or judge thereof, of the county wherein he has any property, for

the purpose of selling, mortgaging, or otherwise controlling that and all other property of such person within the state, unless a guardian has previously been appointed. [C51,§1512; R60, §2564; C73,§2266; C97,§3213; C24, 27, 31, 35, §12606.]

12607 Procedure. Such appointment may be made upon his filing with the clerk of the district court of the county wherein there is any such property an authenticated copy of the order for his appointment. He shall thereupon qualify like other guardians, except as provided in section 12608. [C51,§1513; R60,§2565; C73, §2267; C97,§3214; C24, 27, 31, 35,§12607.]

Bond and oath, §12577

12608 Bond omitted. Upon the filing of an authenticated copy of the bond and inventory filed by the guardian in a foreign state, if the court or judge is satisfied with the sufficiency and the amount of the security, it may dispense with the filing of an additional bond. [C51, §1514; R60,§2566; C73,§2268; C97,§3215; C24, 27, 31, 35,§12608.]

Referred to in §12607

12609 Personal property. Foreign guardians of nonresidents may be authorized by the district court or judge thereof, of the county wherein such ward has personal property, to receive the same upon complying with the provisions of sections 12610 to 12612, inclusive. [C73,§2269; C97,§3216; C24, 27, 31, 35,§12609.]

12610 Copy of bond. Such foreign guardian shall file in the office of the clerk of the district court, in the county where the property is situated, a certified copy of his official bond, duly authenticated by the court granting the letters of guardianship, and shall also execute a receipt for the property received by him. [C73,§2270; C97,§3217; C24, 27, 31, 35,§12610.]

Referred to in §12609

12611 Order for delivery. Upon the filing of the bond as above provided, and the court or judge being satisfied with the amount thereof, it shall order the personal property of the ward to be delivered to the guardian. [C73, §2271; C97,§3218; C24, 27, 31, 35,§12611.]

Referred to in §12609
C97,§3218, editorially divided

12612 Record of bond—notice to court. The clerk shall spread the bonds and receipt upon the records, and notify by mail the court granting the letters of guardianship of the amount of property allowed to the guardian, and the date of the delivery thereof. [C73,§2271; C97, §3218; C24, 27, 31, 35,§12612.]

Referred to in §12609

CHAPTER 541

GUARDIANS FOR DRUNKARDS, SPENDTHRIFTS, LUNATICS, AND PERSONS OF UNSOUND MIND

Referred to in §12586

12613 Statutes governing guardianship.
12614 Petition—appointment.
12615 Ex officio guardian.
12616 Guardian of drunkard.
12617 Party may apply for guardianship.
12618 Notice not required.
12619 Petition—answer.
12620 Temporary guardian.
12621 Trial.
12622 Presumption of fraud.
12623 Petition to terminate.
12624 Notice and service.
12625 Trial.
12626 Costs.
12627 Limit on application to terminate.
12628 Sale or mortgage of real estate.
12629 Allowance to family.
12630 Insolvent estates.
12631 Custody.

12613 Statutes governing guardianship. The provisions of chapters 539 and 540, and all other laws relating to guardians for minors, and regulating or prescribing the powers, duties, or liabilities of each, and of the court or judge thereof, so far as the same are applicable, shall apply to guardians and their wards appointed under sections 12614 to 12618, inclusive. [R60,§1451; C73,§2274; C97,§3223; C24, 27, 31, 35,§12613.]

Additional provisions, ch 171

12614 Petition—appointment. When a petition, verified by affidavit, is presented to the district court that any inhabitant of the county is:

1. An idiot, lunatic, or person of unsound mind; or
2. An habitual drunkard, incapable of managing his affairs; or
3. A spendthrift who is squandering his property;

and the allegations of the petition are satisfactorily proved upon the trial, the court may appoint a guardian of the property of such person. [R60,§1449; C73,§2272; C97,§3219; C24, 27, 31, 35,§12614.]

Referred to in §§12613, 12615

12615 Ex officio guardian. The guardian appointed under section 12614 shall be the guardian of the minor children of his ward, unless the court otherwise orders. [R60,§1449; C73,§2272; C97,§3219; C24, 27, 31, 35,§12615.]

Referred to in §12613

12616 Guardian of drunkard. If a person is an habitual drunkard the court may appoint a guardian of his person, whether he has any estate or not. [C73,§2272; C97,§3219; C24, 27, 31, 35,§12616.]

Referred to in §12613

12617 Party may apply for guardianship. Any person, other than an idiot or lunatic, may, upon his own application, by verified petition, have a guardian appointed for his person or property, or both, if, in the opinion of the district court or judge to whom the petition is presented, said appointment would inure to the best interest of said applicant. [C24, 27, 31, 35, §12617.]

Referred to in §§12618, 12618

12618 Notice not required. Upon application under section 12617 no notice of the hearing shall be required. [C24, 27, 31, 35,§12618.]

Referred to in §12618

12619 Petition—answer. Such petition shall set forth, as particularly as may be, the facts upon which the application is based, and shall be answered as in other ordinary actions, all the rules of which shall govern so far as applicable and not otherwise provided in this chapter. The applicant shall be plaintiff and the other party defendant. [C73,§2273; C97, §3220; C24, 27, 31, 35,§12619.]

12620 Temporary guardian. A temporary guardian may be appointed, but only after a hearing on such notice to the defendant and on such service of said notice as the court or judge shall prescribe. [C73,§2273; C97,§3220; C24, 27, 31, 35,§12620.]

Referred to in §12644.05

12621 Trial. An issue arising on a prayer for the appointment of a temporary guardian shall be tried by the court, or by a judge in vacation. An issue arising on the prayer for the appointment of a permanent guardian shall be tried by the court unless a jury be demanded by either party. [C73,§2273; C97,§3220; C24, 27, 31, 35,§12621.]

Referred to in §12644.06

12622 Presumption of fraud. If a permanent guardian be appointed, all contracts or business transactions of the defendant after the filing of the petition shall be presumed to be a fraud against the rights and interests of the defendant. [C24, 27, 31, 35,§12622.]

12623 Petition to terminate. At any time, not less than six months after the appointment of such guardian, the person under guardianship may apply to the court, or any judge thereof, by petition, alleging that he is no longer a proper subject thereof and asking that the guardianship be terminated. [C97,§3222; C24, 27, 31, 35,§12623.]

C97,§3222, editorially divided

12624 Notice and service. Notice of such petition shall be served upon the guardian in such manner and for such length of time as the court or judge may direct, requiring the guardian to answer the same at or before a time fixed therein. [C97,§3222; C24, 27, 31, 35,§12624.]

12625 Trial. If the guardian shall file an answer denying the allegations of the petition, the court or judge shall try the issue, unless the petitioner demand a jury trial, in which case the issue shall be tried by a jury as soon as practicable. [C97,§3222; C24, 27, 31, 35, §12625.]

12626 Costs. The costs shall be paid by the ward, unless judgment terminating the guardianship is rendered, and a finding is made that the guardian resisted the petition therefor without reasonable cause, in which event the costs or any part thereof may be taxed against him. [C97,§3222; C24, 27, 31, 35,§12626.]

12627 Limit on application to terminate. If any petition for terminating such guardianship shall be denied, no other petition shall be filed therefor until at least four months shall have elapsed since the denial of the former one. [C97, §3222; C24, 27, 31, 35,§12627.]

12628 Sale or mortgage of real estate. Whenever the sale or mortgage of the real estate of such ward is necessary for his support, or for the support of his family, or the payment of his debts, or will be for the interest of the estate or his children, the guardian may sell or mortgage the same, including the homestead under like proceedings as required by law to authorize the sale of real estate by the guardian of the minor. [R60,§1453; C73,§2276; C97,§3225; S13, §3225; C24, 27, 31, 35,§12628.]

Procedure, §12587 et seq.
S13,§3225, editorially divided

12629 Allowance to family. The court shall, if necessary, set off to the wife and minor children of the insane person, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them during the period such person is insane. [C97,§3225; S13,§3225; C24, 27, 31, 35,§12629.]

12630 Insolvent estates. If the estate of such person is insolvent, or will probably be insolvent, the same shall be settled by the guardian in like manner, and like proceedings may be had, as are required by law for the settlement of the insolvent estate of a deceased person. [R60,§1455; C73,§2278; C97,§3227; C24, 27, 31, 35,§12630.]

12631 Custody. The priority of claim to the custody of any idiot, lunatic, person of unsound mind, habitual drunkard, or spendthrift shall be:

1. The legally appointed guardian.
2. The husband or wife.
3. The parents.
4. The children.

[C73,§2279; C97,§3228; C24, 27, 31, 35,§12631.]

CHAPTER 542

GUARDIANS FOR ABSENTEES

Administration, ch 506

12632 Petition.
12633 Notice and publication.
12634 Personal service.
12635 Proof of service.
12636 Hearing.
12637 Evidence transcripted and filed.
12638 County attorney to appear.
12639 Guardian appointed.
12640 Qualifications—powers and duties.
12641 Termination of guardianship.
12642 Expenses chargeable to estate.
12643 Control of court—removal.
12644 Discharge.

12632 Petition. When any adult person owning property within the state and whose whereabouts are and have been unknown for a period of three months, and whose property is liable to become injured, lost, or damaged by reason of such absence, and when there is no other provision of law authorizing supervision and control over such property, any citizen of the county in which the property or any part thereof is situated may file a petition under oath in the district court of said county, setting forth:

1. The facts of such disappearance;
2. The place where and with whom he last resided;
3. The kind and value of his property;
4. The necessity for care and supervision over said property;

and asking that a guardian be appointed to take charge of, preserve, and control such property. [S13,§3228-a; C24, 27, 31, 35,§12632.]

S13,§3228-a, editorially divided

12633 Notice and publication. Whereupon, the court or judge shall prescribe a notice to be given to such absentee and order the same to be published in a newspaper published in said county, to be designated by the court or judge, once each week for four successive weeks. [S13, §3228-a; C24, 27, 31, 35,§12633.]

12634 Personal service. Such notice shall also be served on the county attorney of the county and upon all the members of the family of the absentee residing within the county, for the length of time as is required for the service of original notices. [S13,§3228-a; C24, 27, 31, 35,§12634.]

Time of service, §11059

12635 Proof of service. Proof of the publication and service of such notice shall be filed with said cause. [S13,§3228-a; C24, 27, 31, 35, §12635.]

12636 Hearing. If at the time stated in such notice for hearing the absentee fails to appear, the court shall hear such petition and the proof offered. [S13,§3228-b; C24, 27, 31, 35,§12636.]

S13,§3228-b, editorially divided

12637 Evidence transcripted and filed. All evidence given at such hearing shall be taken down by the official reporter and a verified transcript thereof filed in said cause. [S13,§3228-b; C24, 27, 31, 35,§12637.]

12638 County attorney to appear. At every such hearing the county attorney shall be present and represent the interests of the absentee, and shall be allowed reasonable compensation therefor to be fixed by the court. [S13,§3228-b; C24, 27, 31, 35,§12638.]

12639 Guardian appointed. If on such hearing the court is satisfied that the person has disappeared for the length of time herein required, and that his whereabouts are unknown to his family or friends, and that his property requires supervision and care, it may appoint some suitable person guardian of the estate of such absentee. [S13,§3228-c; C24, 27, 31, 35, §12639.]

12640 Qualifications — powers and duties. The person so appointed to act as such guardian shall qualify in the same manner as is required in the case of other guardians, and shall have the same powers and his duties shall be the same as provided for guardians of the estates of minors, so far as applicable. [S13,§3228-d; C24, 27, 31, 35,§12640.]

Oath and bond, §12577

12641 Termination of guardianship. If at any time the absentee shall return and claim his property, he shall file in said court his application to terminate such guardianship and, thereupon, the guardian shall make full and complete settlement with such absentee, and after paying the costs of the proceedings and the necessary expenses of the guardian in executing the trust, shall turn over to such absentee all money and property then in his hands as such guardian, taking receipt therefor, and shall make a final report to the court of his doings as such guardian. [S13,§3228-e; C24, 27, 31, 35, §12641.]

12642 Expenses chargeable to estate. The estate of such absentee shall be liable for the costs of the proceedings and the necessary expenses incurred by the guardian and allowed by the court. [S13,§3228-f; C24, 27, 31, 35,§12642.]

12643 Control of court — removal. Such guardian shall at all times be under the control and orders of the court, and may at any time be removed for any cause making it apparent to the court that said guardianship should be terminated or the trust transferred to another person. [S13,§3228-g; C24, 27, 31, 35, §12643.]

12644 Discharge. When the final report of such guardian shall have been approved by the court he shall be discharged and the proceedings closed, or the trust transferred, as the court may determine. [S13,§3228-h; C24, 27, 31, 35,§12644.]

CHAPTER 542.1

GUARDIANSHIP OF VETERANS

12644.01 Definitions.
12644.02 Applicability of chapter.
12644.03 Petition.
12644.04 Notice—service.
12644.05 Temporary guardian.
12644.06 Trial.
12644.07 Certificate of incompetency.
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12644.09 Bond.
12644.10 Limitation on appointment.
12644.11 Reports—hearings.
12644.12 Failure to report—effect.
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12644.14 Investment of funds.
12644.15 Use of funds.
12644.16 Construction of chapter.
12644.17 How chapter cited.
12644.18 Interpretation.
12644.19 Repeal—scope of chapter.
12644.20 Dual guardianship.

12644.01 Definitions. As used in this chapter, the term "person" includes a partnership, corporation or an association.

The term "bureau" means the United States Veterans Bureau or its successor.

The terms "estate" and "income" shall include only moneys received by the guardian from the bureau and all earnings, interest and profits derived therefrom.

The term "benefits" shall mean all moneys payable by the United States through the bureau.

The term "director" means the director of the United States Veterans Bureau or his successor.

The term "ward" means a beneficiary of the bureau.

The term "guardian" shall mean any person acting as a fiduciary for a ward. [C31, 35, §12644-c1.]

12644.02 Applicability of chapter. Whenever pursuant to any law of the United States or regulation of the bureau, the director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. [C31, 35,§12644-c2.]

12644.03 Petition. A petition for the appointment of a guardian for an incompetent ward may be filed in the district court of the county of which he is an inhabitant. The petition shall set forth:

1. The name, age, and place of residence of the ward, and the name and address of the person or institution, if any, having actual custody of the ward.
2. The name and place of residence of the nearest known relative of the ward.
3. The fact that the ward is entitled to receive moneys payable by or through the bureau, and the amount thereof then due and the amount of probable future payments.
4. The fact that the ward has been rated incompetent on examination by the bureau in accordance with the laws and regulations governing the bureau. [C31, 35,§12644-c3.]

12644.04 Notice — service. Notice of the commencement of the action shall be served upon the ward as provided by chapter 489. [C31, 35,§12644-c4.]

12644.05 Temporary guardian. A temporary guardian may be appointed as provided by section 12620. [C31, 35,§12644-c5.]

12644.06 Trial. Trial shall be had as provided by section 12621. [C31, 35,§12644-c6.]

12644.07 Certificate of incompetency. Upon trial of an issue arising upon a prayer for the appointment of either a temporary or permanent guardian, a certificate of the director, or his representative, setting forth the fact that the defendant ward has been rated incompetent by the bureau on examination in accordance with the laws and regulations governing the bureau; and that the appointment of a guardian is a condition precedent to the payment of any moneys due such person by the bureau, shall be prima facie evidence of the necessity for such appointment, and the court may appoint a guardian for the property of such person. [C31, 35, §12644-c7.]

12644.08 Appointment of guardian. Guardians for the estate of minor wards may be appointed as provided by chapter 539. [C31, 35, §12644-c8.]

12644.09 Bond. Upon appointment the guardian shall execute and file a bond as provided in the case of guardians of minors in sections 12577 and 12578, and chapter 551. The court shall have power from time to time to require the guardian to file an additional bond. [C31, 35,§12644-c9.]

12644.10 Limitation on appointment. Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for ten wards. In any case, upon presentation of a petition by an attorney of the bureau under this section alleging that a guardian is acting in a fiduciary capacity for more than ten wards and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge such guardian in said case.

The limitations of this section shall not apply where the guardian is a bank or trust company acting for the estate only and not for the person of the ward. An individual may be guardian of

more than ten wards if they are all members of the same family. [C31, 35,§12644-c10.]

12644.11 Reports—hearings. Every guardian who shall receive on account of his ward any moneys from the bureau shall file with the court annually, in addition to such other accounts as may be required by the court, a full, true and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested.

The court, or a judge thereof, shall fix a time and place for the hearing on such account not less than fifteen and not more than thirty days from the date of filing same, and notice thereof by registered mail shall be given by the guardian to the proper office of the bureau not less than fifteen days prior to the date fixed for the hearing, which notice shall include a true copy of the accounting. [C31, 35,§12644-c11.]

Referred to in §§12644.13, 12644.14, 12644.15

12644.12 Failure to report—effect. If any guardian shall fail to file an account of the moneys received by him from the bureau on account of his ward within thirty days after such account is required by either the court or the bureau, or shall fail to furnish the bureau a copy of his accounts as required by this chapter, such failure shall be grounds for removal; provided that the court shall have in addition hereto the same authority to impose penalties and to remove guardians for cause as provided in the general guardianship laws of this state. [C31, 35,§12644-c12.]

12644.13 Compensation. Compensation payable to guardians shall not exceed five percent of the income of the ward during any year. In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the bureau in the manner provided in section 12644.11. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. [C31, 35, §12644-c13.]

12644.14 Investment of funds. Every guardian shall invest the funds of the estate under orders of the court, in such securities, in which the guardian has no interest, as authorized by section 12772; provided that said investments shall be made upon order of the court after notice to the proper office of the veterans administration in the manner provided in section 12644.11. [C31, 35,§12644-c14; 47GA, ch 228, §1.]

12644.15 Use of funds. A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper office of the bureau in the manner provided in section 12644.11. [C31, 35, §12644-c15.]

12644.16 Construction of chapter. This chapter shall be construed liberally to secure the beneficial intent and purpose thereof, and shall apply only to beneficiaries of the bureau. [C31, 35,§12644-c16.]

12644.17 How chapter cited. This chapter may be cited as the "Uniform Veterans Guardianship Act." [C31, 35,§12644-c17.]

12644.18 Interpretation. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [C31, 35,§12644-c18.]

Constitutionality, §12644-c19, code 1935; 43GA, ch 214, §19

12644.19 Repeal—scope of chapter. All laws or parts of laws relating to beneficiaries of the bureau inconsistent with this chapter are hereby repealed.

Guardians appointed under this chapter shall be subject to the general guardianship law of the state except insofar as the same is modified by this chapter.

Insofar as it may be applicable, this chapter shall apply to guardians of bureau beneficiaries heretofore or hereafter appointed under the general laws of the state. [C31, 35,§12644-c20.]

12644.20 Dual guardianship. This chapter shall not be construed to require dual guardianship proceedings of the property of the same person, but when a guardian is such both as to moneys paid by the United States through the bureau and as to other property of the ward, the accounts of the moneys received through the bureau shall be kept separate and apart from the accounts of other property. [C31, 35, §12644-c21.]

CHAPTER 542.2

SALE OR MORTGAGE OF EXEMPT PROPERTY

12644.21 Sale or mortgage authorized.
12644.22 Petition.
12644.23 Notice.
12644.24 Sale—requirements.
12644.25 Express finding required.

12644.21 Sale or mortgage authorized. Whenever any real or personal property, or any interest therein, is owned by any person under guardianship, and any right of exemption, including homestead, as to said property exists in favor of such owner, the court or judge, having jurisdiction of the guardianship, may authorize and order the guardian on behalf of the ward to

waive such exemption as fully as the ward could do if he were sui juris and not under guardianship, and to sell or mortgage or to join with other owners thereof or an executor or administrator of a decedent's estate in a sale or mortgage of such property when the court or judge finds that such sale or mortgage will promote the best interests of such owner and his estate, any provisions of law inconsistent herewith or to the contrary notwithstanding. [C35, §12644-g1.]

Sale or mortgage of homestead, §12628
Sale or mortgage of property, §12587 et seq.

12644.22 Petition. The petition for such authority and order shall be verified by the guardian, shall describe the property and the interest of the ward therein, together with the nature of any exemption or exemptions in his favor, shall contain a full statement of liens, charges or other debts to be paid and the purposes and objects of the proposed waiver and sale or mortgage, and the reasons urged as justifying the same as promoting the best interests of the ward and his estate. [C35,§12644-g2.]

12644.23 Notice. The notice of said petition and the procedure thereon shall be that prescribed in sections 12589 to 12595, inclusive. [C35,§12644-g3.]

46GA, ch 113, §3, editorially divided

12644.24 Sale—requirements. Section 12596 shall apply to sales made hereunder. [C35, §12644-g4.]

12644.25 Express finding required. Upon the hearing on the petition such authority shall not be granted to the guardian by the court or judge except upon an express finding that such waiver and sale or mortgage for the purposes stated therein will promote the best interests of the ward and his estate. [C35,§12644-g5.]

CHAPTER 543

CHANGING NAMES

12645 Who authorized.
12646 Statement—what to contain.
12647 Description of real estate.
12648 Affidavit of freeholder.
12649 Filing and recording.
12650 Re-indexing real estate.
12651 Fees.
12652 Certified copies—fees.
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12654 New name of wife and minor children.
12655 Limitation on change.
12656 Indexing real estate in other counties.
12657 Failure to comply.

12645 Who authorized. Any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female, desiring to change his or her name, may do so as provided in this chapter. [C51,§§2256–2260; R60,§§3844–3848; C73,§§3502–3506; C97,§§4471–4475; S13, §4471-b; C24, 27, 31, 35,§12645.]

12646 Statement—what to contain. Such person shall make and subscribe to a statement under oath showing:

1. That he or she is a resident of the county where such application is made and of the state for a period of not less than one year.
2. His or her place of residence, giving lot and block if in a city, town, or village and street number and business address if any, and the section, township, range, and name of civil township if not in a city or town.
3. The different places of residence and times of such residence for the past five years.
4. Place and date of birth, and, if of foreign birth, the date of immigration to the United States.
5. Legal name and name or names by which such person is usually known and new name as changed or adopted.
6. Names of parents of such person, his or her height and color of hair and eyes.
7. The reason or cause for change of name briefly and concisely stated. [S13,§4471-c; C24, 27, 31, 35,§12646.]

S13,§4471-c, editorially divided

12647 Description of real estate. There shall be incorporated in such statement or attached thereto a concise description of all real estate within this state the title to which is in the person making such statement. [S13, §4471-c; C24, 27, 31, 35,§12647.]

12648 Affidavit of freeholder. An affidavit of a freeholder of the county shall be attached to such statement to the effect that affiant has personally investigated the facts set out in same and that the same are true; that the person filing such statement is an actual resident of the county and the identical person he or she is represented to be. [S13,§4471-d; C24, 27, 31, 35,§12648.]

12649 Filing and recording. Such statement shall be presented to the clerk of the district court who shall file same if it is found to be in substantial compliance with all of the provisions of this chapter, and not otherwise, and enter same of record in a book kept for that purpose and index same both under the former name and new name, and shall enter upon the back the date of filing, the book and page where recorded, and serial number thereof, and file same in his office. [S13,§4471-e; C24, 27, 31, 35, §12649.]

12650 Re-indexing real estate. When such statement shall have been filed and recorded as herein provided, the clerk shall, if the description of any real estate of that county be contained therein, deliver it to the county recorder who shall index the same, both under the former name and under the new name as changed or adopted, in the manner of indexing transfers

of real estate, and enter opposite thereto the description of real estate as found in such statement; such indexing shall be in the index of transfers of land or town property according to the description of said real estate, or both as the case may be. The index shall also show the serial number of such statement and book and page where same is recorded in the office of the clerk of the district court, and the words "change of name" shall be written on said index in red ink, at or opposite to the name. [S13, §4471-f; C24, 27, 31, 35,§12650.]

12651 Fees. The clerk shall receive a fee of one dollar for his services, and shall also collect ten cents for each separate description of real estate in the statement, which sum shall be paid to the recorder for indexing same. [S13, §4471-g; C24, 27, 31, 35,§12651.]

S13,§4471-g, editorially divided

12652 Certified copies — fees. The clerk shall, upon demand of any party and the payment of the fee of one dollar, furnish a certified copy of such statement showing the serial number thereof, date of filing, and the book and page of record of same; and, upon the payment of twenty-five cents, shall compare and certify to any correct copy of such statement furnished him for that purpose. [S13,§4471-g; C24, 27, 31, 35,§12652.]

12653 When change effective. Upon the expiration of thirty days from the time of filing the statement herein provided for, the new name as changed or adopted therein shall become the legal name of the party filing such statement. [S13,§4471-h; C24, 27, 31, 35,§12653.]

S13,§4471-h, editorially divided

12654 New name of wife and minor children. The surname of such new name shall become the legal surname of the wife and minor children of such person. [S13,§4471-h; C24, 27, 31, 35, §12654.]

12655 Limitation on change. No person shall change his or her name more than once under the provisions of this chapter. [S13, §4471-h; C24, 27, 31, 35,§12655.]

12656 Indexing real estate in other counties. Within one year after the filing of such statement, the party changing his or her name shall cause a certified copy thereof to be presented to the recorder of each county in Iowa where there is real estate the legal title to which is in such party, and pay such recorder ten cents for each separate description in such county, and such recorder shall index same in the manner prescribed in this chapter and return same. [S13,§4471-i; C24, 27, 31, 35,§12656.]

Referred to in §12657

12657 Failure to comply. Any person failing or neglecting to comply with the provisions of section 12656 shall be guilty of a misdemeanor and punished accordingly. [S13,§4471-j; C24, 27, 31, 35,§12657.]

Punishment, §12894

CHAPTER 544

BASTARDY PROCEEDINGS

This chapter (§§12658 to 12667, inc.) repealed by 41GA, ch 81,§38, and chapter 544-A1, code 1935, enacted in lieu thereof

CHAPTER 544.1

PATERNITY OF ILLEGITIMATE CHILDREN AND OBLIGATION OF PARENTS THERETO

12667.01 Obligation of parents.
12667.02 Recovery by mother from father.
12667.03 Limitation on recovery.
12667.04 Recovery by others than mother.
12667.05 Discharge of father's obligation.
12667.06 Liability of the father's estate.
12667.07 Proceedings to establish paternity.
12667.08 Who may institute proceedings.
12667.09 Time of instituting proceedings.
12667.10 Venue.
12667.11 Nonresident complainant.
12667.12 Complaint—where brought.
12667.13 Form of complaint—verification.
12667.14 Substance of complaint.
12667.15 Original notice.
12667.16 Lis pendens.
12667.17 Writ of attachment.
12667.18 Method of trial.
12667.19 County attorney to prosecute.
12667.20 Exclusion of bystanders.
12667.21 Death, absence, or insanity of mother—testimony receivable.
12667.22 Death of defendant.
12667.23 Costs payable by county.
12667.24 Judgment in general.
12667.25 Form of judgment.
12667.26 Expenses of confinement.
12667.27 Payment to trustees.
12667.28 Report by trustee.
12667.29 Desertion statute applicable.
12667.30 Agreement or compromise.
12667.31 Continuing jurisdiction.
12667.32 Concurrence of remedies.
12667.33 Limitation of actions.
12667.34 Foreign judgments.
12667.35 Reference to illegitimacy prohibited.
12667.36 Report to registrar of vital statistics.

12667.01 Obligation of parents. The parents of a child born out of wedlock and not legitimized (in this chapter referred to as "the child") owe the child necessary maintenance, education, and support. They are also liable for the child's funeral expenses. The father is also liable to pay the expense of the mother's pregnancy and confinement. The obligation of the

parent to support the child under the laws for the support of poor relatives applies to children born out of wedlock. [C27, 31, 35,§12667-a1.]

Referred to in §12667.25
Analogous provision, §3828.074

12667.02 Recovery by mother from father. The mother may recover from the father a reasonable share of the necessary support of the child. [C27, 31, 35,§12667-a2.]

41GA, ch 81, §2, editorially divided

12667.03 Limitation on recovery. In the absence of a previous demand in writing (served personally or by registered letter addressed to the father at his last known residence or in the manner provided for service of original notices) not more than two years support furnished prior to the bringing of the action may be recovered. [C27, 31, 35,§12667-a3.]

Service of notice, §11060

12667.04 Recovery by others than mother. The obligation of the father as hereby provided creates also a cause of action on behalf of the legal representative of the mother, or on behalf of third persons furnishing support or defraying the reasonable expenses thereof, where paternity has been judicially established by proceedings brought by the mother or by or on behalf of the child or by the authorities charged with its support, or where paternity has been acknowledged by the father in writing or by the part performance of the obligations imposed upon him. [C27, 31, 35,§12667-a4.]

12667.05 Discharge of father's obligation. The obligation of the father other than that under the laws providing for the support of poor relatives is discharged by complying with a judicial decree for support or with the terms of a judicially approved settlement. The legal adoption of the child into another family discharges the obligation for the period subsequent to the adoption. [C27, 31, 35,§12667-a5.]

12667.06 Liability of the father's estate. The obligation of the father, when his paternity has been judicially established in his lifetime, or has been acknowledged by him in writing or by the part performance of his obligations, is enforceable against his estate in such an amount as the court may determine, having regard to the age of the child, the ability of the mother to support it, the amount of property left by the father, the number, age, and financial condition of the lawful issue, if any, and the rights of the widow, if any. The court may direct the discharge of the obligation by periodical payments or by the payment of a lump sum. [C27, 31, 35,§12667-a6.]

Referred to in §12667.22

12667.07 Proceedings to establish paternity. Proceedings to establish paternity and to compel support by the father may be brought in accordance with the provisions of this chapter. They shall not be exclusive of other proceedings that may be available on principles of law and equity. [C27, 31, 35,§12667-a7.]

Additional reference, §3828.075

12667.08 Who may institute proceedings. The proceedings may be brought by the mother, or other interested person or if the child is or is likely to be a public charge, by the authorities charged with its support. After the death of the mother or in case of her disability, it may also be brought by the child acting through its guardian or next friend. [C51,§848; R60,§1416; C73,§4715; C97,§5629; C24,§12658; C27, 31, 35, §12667-a8.]

12667.09 Time of instituting proceedings. The proceedings may be instituted during the pregnancy of the mother or after the birth of the child, but, except with the consent of the person charged with being the father, the trial shall not be had until after the birth of the child. [C27, 31, 35,§12667-a9.]

12667.10 Venue. The action shall be by ordinary proceedings entitled in the name of the complainant against the defendant and shall be brought in the district court in the county in which the alleged father is permanently or temporarily resident, or in which the mother or the child resides or is found. [C51,§848; R60,§1416; C73,§4715; C97,§5629; C24,§12658; C27, 31, 35, §12667-a10; 48GA, ch 246,§2.]

41GA, ch 81, §9, editorially divided

12667.11 Nonresident complainant. It is not a bar to the jurisdiction of the court, that the complaining mother or child resides in another state. [C27, 31, 35,§12667-a11.]

12667.12 Complaint — where brought. The complaint may be made to the county attorney. [C51,§848; R60,§1416; C73,§4715; C97,§5629; C24,§12658; C27, 31, 35,§12667-a12; 48GA, ch 246,§3.]

12667.13 Form of complaint — verification. The complaint may be made in writing, or oral and in the presence of the complainant reduced to writing by the prosecuting attorney. It shall be verified by oath or affirmation of the complainant. [C51,§848; R60,§1416; C73,§4715; C97,§5629; C24,§12658; C27, 31, 35,§12667-a13; 48GA, ch 246,§4.]

12667.14 Substance of complaint. The complainant shall charge the person named as defendant with being the father of the child. [C51, §848; R60,§1416; C73,§4715; C97,§5629; C24, §12658; C27, 31, 35,§12667-a14; 48GA, ch 246, §5.]

Section 12667-a15, code 1935, repealed by 48GA, ch 246, §1

12667.15 Original notice. An original notice shall be issued as in other civil cases, which notice shall be served as in ordinary actions. [C51, §849; R60,§1417; C73,§4716; C97,§5630; C24, §12659; C27, 31, 35,§12667-a16; 48GA, ch 246, §6.]

Manner of service, §11060

12667.16 Lis pendens. From the time of the filing of such complaint, a lien shall be created upon the real property of the accused in the county where the action is pending for the payment of any money and the performance of any order adjudged by the proper court. [C51,§850;

R60,§1418; C73,§4717; C97,§5631; C24,§12660; C27, 31, 35,§12667-a17.]

41GA, ch 81, §14, editorially divided

12667.17 Writ of attachment. The district judge may order an attachment to issue thereon without bond, which order shall specify the amount of property to be seized thereunder, and may be revoked at any time by such judge or the district court on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises. [C73,§4718; C97,§5632; C24,§12661; C27, 31, 35,§12667-a18.]

Sections 12667-a19 to 12667-a26, inc., repealed by 48GA, ch 246, §1

12667.18 Method of trial. The trial shall be by jury, if either party demands a jury, otherwise by the court, and shall be conducted as in other civil cases. [C51,§§851, 854; R60, §§1419, 1422; C73,§4720; C97,§5634; C24, §12663; C27, 31, 35,§12667-a27.]

41GA, ch 81, §18, editorially divided

12667.19 County attorney to prosecute. The county attorney, on being notified of the facts justifying a complaint as provided in this chapter, or of the filing of such complaint, shall prosecute the matter in behalf of the complainant. [C73,§4719; C97,§5633; C24,§12662; C27, 31, 35,§12667-a28.]

12667.20 Exclusion of bystanders. Unless objection is raised by either party to the action the judge shall exclude from the hearing all persons except the employees of the court, witnesses, and immediate relatives of the parties involved. [C27, 31, 35,§12667-a29.]

Section 12667-a30, code 1935, repealed by 48GA, ch 246, §1

12667.21 Death, absence, or insanity of mother—testimony receivable. If after the complaint the mother dies or becomes insane or cannot be found within the jurisdiction, the proceeding does not abate, but the child shall be substituted as complainant. The testimony of the mother taken by deposition as in other civil cases, may in any such case be read as evidence and in all cases shall be read as evidence if demanded by the defendant. [C27, 31, 35,§12667-a31; 48GA, ch 246,§7.]

12667.22 Death of defendant. In case of the death of the defendant the action may be prosecuted against the personal representative of the deceased with like effects as if he were living, subject as regards the measure of support to the provision of section 12667.06. [C27, 31, 35,§12667-a32; 48GA, ch 246,§8.]

12667.23 Costs payable by county. If the verdict of the jury at the trial or the finding of the court be in favor of the defendant the costs of the action shall be paid by the county. [C24,§12666; C27, 31, 35,§12667-a33.]

41GA, ch 81, §22, editorially divided
Section 12667-a34, code 1935, repealed by 48GA, ch 246, §1

12667.24 Judgment in general. If the findings or verdict be against the defendant, the court shall give judgment against him declaring paternity and for support of the child. [C51, §855; R60,§1423; C73,§4721; C97,§5635; C24, §12664; C27, 31, 35,§12667-a35.]

41GA, ch 81, §23, editorially divided

12667.25 Form of judgment. The judgment shall be for annual amounts, equal or varying, having regard to the obligation of the father under section 12667.01, as the court directs, until the child reaches the age of sixteen years. The payments may be required to be made at such periods or intervals as the court directs. [C51, §855; R60,§1423; C73,§4721; C97,§5635; C24, §12664; C27, 31, 35,§12667-a36.]

12667.26 Expenses of confinement. In addition to providing for support, the judgment may also provide for the payment of the necessary expenses incurred by or for the mother in connection with the birth of the child. [C27, 31, 35,§12667-a37.]

12667.27 Payment to trustees. The court may require the payment to be made to the mother, or to some person or corporation to be designated by the court as trustee. The payments shall be directed to be made to a trustee if the mother does not reside within the jurisdiction of the court. [C27, 31, 35,§12667-a38.]

41GA, ch 81, §24, editorially divided

12667.28 Report by trustee. The trustee shall report to the court annually, or oftener as directed by the court, the amounts received and paid over. [C27, 31, 35,§12667-a39.]

Sections 12667-a40 to 12667-a44, inc., code 1935, repealed by 48GA, ch 246, §1

12667.29 Desertion statute applicable. The provisions of chapter 598, relating to desertion and abandonment of children shall have the same force and effect in cases of illegitimacy where paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support, as in cases of children born in wedlock. [C27, 31, 35, §12667-a45.]

12667.30 Agreement or compromise. An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support of the child shall be binding upon the mother and child only when adequate provision is fully secured by payment or otherwise and when approved by a court having jurisdiction to compel support of the child. The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support of the child. [C27, 31, 35, §12667-a46.]

12667.31 Continuing jurisdiction. The court has continuing jurisdiction over proceedings brought to compel support and to increase or decrease the amount thereof until the judgment of the court has been completely satisfied, and also has continuing jurisdiction to determine the custody in accordance with the interests of the child. [C73,§4722; C97,§5636; C24,§12667; C27, 31, 35,§12667-a47.]

Section 12667-a48, code 1935, repealed by 48GA, ch 246, §1

12667.32 Concurrence of remedies. A criminal prosecution shall not be a bar to, or be barred by, civil proceedings to compel support; but money paid toward the support of the child shall be allowed for and accredited in determining or enforcing any civil liability. [C27, 31, 35,§12667-a49; 48GA, ch 246,§9.]

12667.33 Limitation of actions. Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support. [C27, 31, 35,§12667-a50.]

12667.34 Foreign judgments. The judgment of the court of another state rendered in proceedings to compel support of a child born out of wedlock, and directing payment either of a fixed sum or of sums payable from time to time, may be sued upon in this state and made a domestic judgment so far as not inconsistent with the laws of this state, and the same remedies may thereupon be had upon such judgment as if it had been recovered originally in this state. [C27, 31, 35,§12667-a51.]

12667.35 Reference to illegitimacy prohibited. In all records, certificates, or other papers hereafter made or executed, other than birth records and certificates or records of judicial proceedings in which the question of birth out of wedlock is at issue, requiring a declaration by or notice to the mother of a child born out of wedlock, it shall be sufficient for all purposes to refer to the mother as the parent having the sole custody of the child or to the child as being in the sole custody of the mother and no explicit reference shall be made to illegitimacy, and the term natural shall be deemed equivalent to the term illegitimate when referring to parentage or birth out of wedlock. [C27, 31, 35,§12667-a52.]

12667.36 Report to registrar of vital statistics. Upon the entry of a judgment determining the paternity of an illegitimate child the clerk of the district court shall notify in writing the state registrar of vital statistics of the name of the person against whom such judgment has been entered, together with such other facts disclosed by his records as may assist in identifying the record of the birth of the child as the same may appear in the office of said registrar. If such judgment shall thereafter be vacated that fact shall be reported by the clerk in the same manner. [C27, 31, 35, §12667-a53.]

Section 12667-a54, code 1935, repealed by 48GA, ch 246, §1

CHAPTER 545

JUDGMENT BY CONFESSION

Referred to in §12672. Judgments by confession in justice courts, §10571

12668 Judgment by confession—how entered.
12669 For money only—contingent liability.
12670 Statement.
12671 Judgment—execution.

12668 Judgment by confession — how entered. A judgment by confession, without action, may be entered by the clerk of the district court. [C51,§1837; R60,§3397; C73,§2894; C97, §3813; C24, 27, 31, 35,§12668.]

12669 For money only—contingent liability. The judgment can be only for money due or to become due, or to secure a person against contingent liabilities on behalf of the defendant, and must be for a specified sum. [C51,§1838; R60,§3398; C73,§2895; C97,§3814; C24, 27, 31, 35,§12669.]

12670 Statement. A statement in writing must be made, signed, and verified by the defendant, and filed with the clerk, to the following effect:

1. If for money due or to become due, it must state concisely the facts out of which the indebtedness arose, and that the sum confessed therefor is justly due, or to become due, as the case may be.

2. If for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting such liability, and must show that the sum confessed therefor does not exceed the same. [C51,§1839; R60,§3399; C73,§2896; C97,§3815; C24, 27, 31, 35,§12670.]

12671 Judgment — execution. The clerk shall thereupon make an entry of judgment in his court record for the amount confessed and costs, and shall issue execution thereon as in other cases, when ordered by the party entitled thereto. [C51,§1840; R60,§3400; C73,§2897; C97,§3816; C24, 27, 31, 35,§12671.]

CHAPTER 546

OFFER TO CONFESS JUDGMENT

Offer to confess in justice courts, §10601

12672 Offer to confess before action brought.
12673 Nonacceptance—costs.
12674 Effect of nonaccepted offer.
12675 Offer to confess after action brought.
12676 Nonacceptance—costs.
12677 Effect of nonaccepted offer.
12678 Offer to confess after action brought.
12679 Acceptance—judgment.
12680 Effect of nonaccepted offer.
12681 Costs.
12682 Conditional offer.
12683 Acceptance—effect.
12684 Nonacceptance—effect.
12685 No cause for continuance.

12672 Offer to confess before action brought. Before an action for the recovery of money is brought against any person, he may go before the clerk of the county of his residence, or of that in which the person having the cause of action resides, and offer to confess judgment in favor of such person for a specified sum on such cause of action, as provided for in chapter 545. [R60,§3403; C73,§2898; C97,§3817; C24, 27, 31, 35,§12672.]

C97,§3817, editorially divided

12673 Nonacceptance—costs. If such person, having had the same notice as if he were defendant in an action that the offer would be made, of its amount, and of the time and place of making it, refuses to accept it, and afterwards commences an action upon such cause, and does not recover more than the amount so offered to be confessed, he shall pay all the costs of the action. [R60,§3403; C73,§2898; C97,§3817; C24, 27, 31, 35,§12673.]

12674 Effect of nonaccepted offer. On the trial thereof the offer shall not be treated as an admission of the cause of action or amount to which the plaintiff was entitled, nor be given in evidence. [R60,§3403; C73,§2898; C97,§3817; C24, 27, 31, 35,§12674.]

12675 Offer to confess after action brought. After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. [R60,3404; C73,§2899; C97,§3818; C24, 27, 31, 35,§12675.]

C97,§3818, editorially divided

12676 Nonacceptance—costs. If the plaintiff, being present, refuses to accept judgment for such sum in full of his demands in the action, or, having had three days notice that the offer would be made, of its amount, and of the time of making it, fails to attend, and on the trial does not recover more than was offered to be confessed, he shall pay the costs of the defendant incurred after the offer. [R60,§3404; C73,§2899; C97,§3818; C24, 27, 31, 35,§12676.]

12677 Effect of nonaccepted offer. The offer shall not be treated as an admission of the cause of action or amount to which the plaintiff was entitled nor be given in evidence upon the trial. [R60,§3404; C73,§2899; C97,§3818; C24, 27, 31, 35,§12677.]

12678 Offer to confess after action brought. The defendant in an action for the recovery of money only may, at any time after service of notice and before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for a specified sum with costs. [R60,§3405; C73,§2900; C97, §3819; C24, 27, 31, 35,§12678.]

C97,§3819, editorially divided

12679 Acceptance—judgment. If the plaintiff accepts the offer, and gives notice thereof to the defendant or his attorney within five days after the offer is made, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer, verified by affidavit; and in either case a minute of the offer and acceptance shall be entered upon the judge's calendar, and judgment shall be rendered by the court accordingly. [R60,§3405; C73,§2900; C97,§3819; C24, 27, 31, 35,§12679.]

12680 Effect of nonaccepted offer. If the notice of acceptance is not given in the period limited, the offer shall be treated as withdrawn, and shall not be given in evidence or mentioned on the trial. [R60,§3405; C73,§2900; C97,§3819; C24, 27, 31, 35,§12680.]

12681 Costs. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he cannot recover costs, but shall pay the defendant's costs from the time of the offer. [R60,§3405; C73,§2900; C97,§3819; C24, 27, 31, 35,§12681.]

12682 Conditional offer. In an action for the recovery of money only, the defendant, having answered, may serve upon the plaintiff or his attorney an offer in writing that, if he fails in his defense, the amount of recovery shall be assessed at a specified sum. [R60,§3406; C73,§2901; C97,§3820; C24, 27, 31, 35,§12682.]

C97,§3820, editorially divided

12683 Acceptance—effect. If the plaintiff accepts the offer, and gives notice thereof to the defendant or his attorney within five days after it was served, or within three days if served in term time, and the defendant fails in his defense, the judgment shall be for the amount so agreed upon. [R60,§3406; C73,§2901; C97,§3820; C24, 27, 31, 35,§12683.]

12684 Nonacceptance—effect. If the plaintiff does not accept the offer, he shall prove the amount to be recovered as if the offer had not been made, and the offer shall not be given in evidence or mentioned on the trial, and if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in the defense. [R60,§3406; C73,§2901; C97,§3820; C24, 27, 31, 35,§12684.]

12685 No cause for continuance. The making of any offer pursuant to the provisions of this chapter shall not be cause for a continuance of the action or a postponement of the trial. [R60,§3407; C73,§2902; C97,§3821; C24, 27, 31, 35,§12685.]

CHAPTER 547

SUBMITTING CONTROVERSIES WITHOUT ACTION OR IN ACTION

12686 Agreed statement of facts.
12687 Affidavit.
12688 Judgment.
12689 Record.
12690 Judgment enforced.
12691 Submission of cause pending.
12692 Pleadings abandoned—lien and custody of property.
12693 Submission of question of law—agreement as to judgment.
12694 Costs.

12686 Agreed statement of facts. Parties to a question in difference, which might be the subject of a civil action, may, without action, present an agreed statement of the facts to any court having jurisdiction of the subject matter. [C51,§1843; R60,§3408; C73,§3408; C97,§4377; C24, 27, 31, 35,§12686.]

12687 Affidavit. It must be shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto. [C51,§1844; R60, §3409; C73,§3409; C97,§4378; C24, 27, 31, 35, §12687.]

12688 Judgment. The court shall hear and determine the case and render judgment as if an action were pending. [C51,§1845; R60,§3410; C73,§3410; C97,§4379; C24, 27, 31, 35,§12688.]

12689 Record. The statement, the submission, and the judgment shall constitute the record. [R60,§3411; C73,§3411; C97,§4380; C24, 27, 31, 35,§12689.]

12690 Judgment enforced. The judgment shall be with costs, and it may be enforced and shall be subject to review in the same manner as if it had been rendered in an action, unless otherwise provided for in the submission. [R60, §3412; C73,§3412; C97,§4381; C24, 27, 31, 35, §12690.]

12691 Submission of cause pending. The same may also be done at any time before trial in an action pending, subject to the same requirements and attended by the same results as in a case without action. [R60,§3413; C73,§3413; C97,§4382; C24, 27, 31, 35,§12691.]

C97,§4382, editorially divided

12692 Pleadings abandoned—lien and custody of property. Such submission of a stated case shall be an abandonment by both parties of all pleadings filed in such cause, and the cause shall stand on the agreed case alone, which must provide for any lien created for attachment, and for any property in the custody of the law, else such lien and custody will be held to be waived. [R60,§3413; C73,§3413; C97,§4382; C24, 27, 31, 35,§12692.]

12693 Submission of question of law—agreement as to judgment. The parties may, if they think fit, enter into an agreement in writing that, upon the judgment of the court being given on the question of law raised, particular property therein described, or a sum of money fixed by the parties or to be ascertained by the court or in such manner as the court may direct, shall be delivered to and vested in one of the parties by the other, or, in case of money, shall be paid by one of such parties to the other of them, either with or without costs of the action; and the judgment of the court may be entered for the transfer and delivery of such property, or for such sum as shall be so agreed or ascertained, with or without costs, as the case may be. [R60,§3414; C73,§3414; C97,§4383; C24, 27, 31, 35,§12693.]

12694 Costs. In case no agreement is entered into as to the costs, they shall follow the event of the action, and be recovered by the successful party. [R60,§3415; C73,§3415; C97, §4384; C24, 27, 31, 35,§12694.]

CHAPTER 548

ARBITRATION

12695 What controversies.
12696 Written agreement.
12697 What submitted.
12698 Action pending.
12699 Procedure.
12700 Revocation.
12701 Neglect to appear.
12702 Time for award.
12703 When time not fixed.
12704 Award—how made.
12705 Hearing in court.
12706 Rejection—rehearing.
12707 Force and effect of award.
12708 Appeal.
12709 Costs.
12710 Rights saved.
12711 Compensation of arbitrators.
12712 Arbitration by agreement.

12695 What controversies. All controversies which might be the subject of civil action may be submitted to the decision of one or more arbitrators, as hereafter provided. [C51, §2098; R60,§3675; C73,§3416; C97,§4385; C24, 27, 31, 35,§12695.]

12696 Written agreement. The parties themselves, or those persons who might lawfully have controlled a civil action in their behalf for the same subject matter, must sign and acknowledge a written agreement, specifying particularly what demands are to be submitted, the names

of the arbitrators, and court by which the judgment on their award is to be rendered. [C51, §§2099, 2100; R60,§§3676, 3677; C73,§3417; C97, §4386; C24, 27, 31, 35,§12696.]

12697 What submitted. The submission may be of some particular matters or demands, or of all demands which the one party has against the other, or of all mutual demands on both sides. [C51,2101; R60,§3678; C73,§3418; C97,§4387; C24, 27, 31, 35,§12697.]

12698 Action pending. A submission to arbitration of the subject matter of an action may also be made by an order of court, upon agreement of parties, after action is commenced. [C51,§2102; R60,§3679; C73,§3419; C97,§4388; C24, 27, 31, 35,§12698.]

12699 Procedure. All the rules prescribed by law in cases of referees are applicable to arbitrators, except as herein otherwise expressed, or except as otherwise agreed upon by the parties. [C51,§2103; R60,§3680; C73,§3420; C97,§4389; C24, 27, 31, 35,§12699.]

12700 Revocation. Neither party shall have the power to revoke the submission without the consent of the other. [C51,§2104; R60,§3681; C73,§3421; C97,§4390; C24, 27, 31, 35,§12700.]

12701 Neglect to appear. If either party neglects to appear before the arbitrators after due notice, except in case of sickness, they may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them. [C51,§2105; R60,§3682; C73,§3422; C97,§4391; C24, 27, 31, 35,§12701.]

12702 Time for award. If the time within which the award is to be made is fixed in the submission, one made after that time shall not have any legal effect, unless made upon a recommitment of the matter by the court to which it is reported. [C51,§2106; R60,§3683; C73,§3423; C97,§4392; C24, 27, 31, 35,§12702.]

12703 When time not fixed. If the time of filing the award is not fixed in the submission, it must be filed within one year from the time the agreement is signed and acknowledged, unless by mutual consent the time is prolonged. [C51, §2107; R60,§3684; C73,§3424; C97,§4393; C24, 27, 31, 35,§12703.]

12704 Award—how made. The award must be in writing, and shall be delivered by one of the arbitrators to the court designated in the agreement, or it may be inclosed and sealed by them and transmitted to the court, and not opened until the court so orders. [C51,§2108; R60,§3685; C73,§3425; C97,§4394; C24, 27, 31, 35,§12704.]

12705 Hearing in court. The award shall be entered on the docket of the court at the term to which it is returned, as an action is entered, and shall be called up and acted upon in its order, but the court may require actual notice to be given to either party, when it appears necessary and proper, before proceeding to act on the award. [C51,§2109; R60,§3686; C73, §3426; C97,§4396; C24, 27, 31, 35,§12705.]

12706 Rejection — rehearing. The award may be rejected by the court for any legal and sufficient reasons, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon by the parties, or appointed by the court if they cannot agree. [C51,§2110; R60,§3687; C73,§3427; C97,§4397; C24, 27, 31, 35,§12706.]

12707 Force and effect of award. When the award has been adopted, it shall be filed and entered on the records, and shall have the same force and effect as the verdict of a jury. Judgment may be entered and execution issued accordingly. [C51,§2111; R60,§3688; C73,§3428; C97,§4398; C24, 27, 31, 35,§12707.]

12708 Appeal. When an appeal is taken from such judgment, copies of the submission and award, together with all affidavits, shall be filed with the clerk of the supreme court. [C51, §2112; R60,§3689; C73,§3429; C97,§4399; C24, 27, 31, 35,§12708.]

12709 Costs. If there is no provision in the submission respecting costs, the arbitrators may apportion the same. [C51,§2113; R60, §3690; C73,§3430; C97,§4400; C24, 27, 31, 35, §12709.]

12710 Rights saved. Nothing herein contained shall be construed to affect in any manner the control of the court over the parties, the arbitrators or their award; nor to impair or affect any action upon an award, or upon any bond or other engagement to abide an award. [C51,§2115; R60,§3692; C73,§3431; C97,§4401; C24, 27, 31, 35,§12710.]

12711 Compensation of arbitrators. Arbitrators shall be paid, for each day actually and necessarily engaged in their official duties, two dollars, or such greater sum as the parties to the arbitration agree upon. [C51,§2114; R60,§3691; C73,§3834; C97,§3873; C24, 27, 31, 35,§12711.]

12712 Arbitration by agreement. Awards by arbitrators who may have been chosen without complying with the provisions of this chapter shall nevertheless be valid and binding upon the parties thereto, as other contracts, and may be impeached only for fraud or mistake, but such award can only be enforced by an action. [C97,§4395; C24, 27, 31, 35,§12712.]

CHAPTER 549

RECEIVERS

Referred to in §12115

12713 Appointment.
12714 Permissible proofs.
12715 Oath and bond of.
12716 Powers.
12717 Priority of liens.
12718 Taxes as prior claim—nonnecessity to file.
12719 Claims entitled to priority.
12719.1 Nonapplicability.
12719.2 Legislative intent.
12719.3 Discovery of assets.
12719.4 Contempt.

12713 Appointment. On the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him. [C51, §1656; R60,§§3216, 3419; C73,§§2903, 2970; C97, §3822; C24, 27, 31, 35,§12713.]

Exception as to fraternal beneficiary society, §8891
Orders executed outside district, §11242.1
C97,§3822, editorially divided

12714 Permissible proofs. Upon the hearing of the application, affidavits, and such other proof as the court or judge permits, may be introduced, and upon the whole case such order made as will be for the best interest of all parties concerned. [C73,§2903; C97,§3822; C24, 27, 31, 35,§12714.]

12715 Oath and bond of. Before entering upon the discharge of his duties, he must be sworn faithfully to discharge his trust to the best of his ability, and must also file with the clerk a bond with sureties, to be approved by him, in a penalty to be fixed by the court or judge, and conditioned for the faithful discharge of his duties, and that he will obey the orders of the court in respect thereto. [C51, §1657; R60,§3420; C73,§2904; C97,§3823; C24, 27, 31, 35,§12715.]

12716 Powers. Subject to the control of the court or judge, a receiver has power to bring and defend actions, to take and keep possession of property, to collect debts, to receive the rents and profits of real property, and, generally, to do such acts in respect to the property committed to him as may be authorized by law or ordered by the court. [C51,§1658; R60,§3421; C73,§2905; C97,§3824; C24, 27, 31, 35,§12716.]

12717 Priority of liens. Persons having liens upon the property placed in the hands of a receiver shall, if there is a contest as to their priority, submit them to the court for determination. [C97,§3825; S13,§3825; C24, 27, 31, 35, §12717.]

S13,§3825, editorially divided

12718 Taxes as prior claim—nonnecessity to file. When the assets of any corporation, partnership, or person shall be placed in the hands of a receiver, all taxes against said corporation, partnership, or person, whether levied under the laws of the state or ordinances of municipal corporations, shall be entitled to priority and be first paid in full by the receiver and claims therefor need not be filed with said receiver. [S13,§3825; C24, 27, 31, 35,§12718.]

12719 Claims entitled to priority. When the property of any person, partnership, company, or corporation has been placed in the hands of a receiver for distribution, after the payment of all costs the following claims shall be entitled to priority of payment in the order named:

1. Taxes or other debts entitled to preference under the laws of the United States.
2. Debts due or taxes assessed and levied for the benefit of the state, county, or other municipal corporation in this state.
3. Debts owing to employees for labor performed as defined by section 11717. [S13, §3825-a; C24, 27, 31, 35, §12719.]

Referred to in §§12719.1, 12719.2
Bank receivership, §9239
Labor claims preferred, §§11717, 11971, 12732

12719.1 Nonapplicability. The provisions of section 12719 shall not apply to the receivership of state banks, savings banks, loan and trust companies, or private banks, and in the receivership of state banks, savings banks, loan and trust companies, or private banks, no such preference or priority shall be allowed as is provided in said section 12719 except for labor as provided by statute. [C27, 31, 35,§12719-a1.]

Referred to in §12719.2

12719.2 Legislative intent. The provisions of section 12719.1 are declaratory of the intent of the legislature and of its interpretation of the provisions of section 12719. [C27, 31, 35, §12719-a2.]

12719.3 Discovery of assets. The court or any judge thereof having direction or control of a receiver may, on its own motion, or on motion of the receiver, require any person suspected of having taken wrongful possession of any of the effects of any person, corporation or partnership for which said receiver has been appointed, or of having had such effects under his control, or any officer or agent of any such suspected person, to appear and submit to an examination, under oath, touching such matters, and if, on such examination, it appears that

the person examined has the wrongful possession of any such property, the court or judge may order the delivery thereof to the receiver. [C27, 31, 35,§12719-b1.]

Analogous provisions, §§11818, 11925

12719.4 Contempt. If, on being served with the order of the court or judge requiring him to do so, any person fails to apppear in accordance therewith, or if, having appeared, he refuses to answer any questions which the court or judge thinks proper to be put to him in the course of such examination, or if he fails to comply with the order of the court or judge requiring him to deliver any such property or effects to the receiver, he may be committed to the jail of the county until he does. [C27, 31, 35,§12719-b2.]

CHAPTER 550

ASSIGNMENT FOR BENEFIT OF CREDITORS

12720 Must be without preferences.
12721 How made.
12722 Execution—record and index.
12723 Inventory—list of creditors.
12724 Effect of assignment.
12725 Filing with clerk.
12726 Inventory and appraisement—bond.
12727 Notice of assignment—notice to creditors.
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12736 Disposal of property—time limit.
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12738 Examination of debtor.
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12742 Sale of property generally.
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12745 Mandatory removal of assignee.
12746 Permissive removal of assignee.
12747 Accounting and delivery.
12748 Death of assignee—failure to act.
12749 Additional security—misconduct.
12750 Power of judge in vacation.

12720 Must be without preferences. No general assignment of property by an insolvent person, firm, or corporation, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all the creditors in proportion to the amount of their respective claims; and in every such assignment the assent of the creditors shall be presumed. [C51,§§977, 978; R60,§§1826, 1827; C73,§§2115, 2116; C97,§3071; C24, 27, 31, 35, §12720.]

12721 How made. Every such assignment shall be by an instrument in writing, setting forth the name of the assignor, his residence and business, the name of the assignee and his residence and business, and, in a general way, the property assigned and its location, and the purpose of the assignment. [C97,§3072; C24, 27, 31, 35,§12721.]

C97,§3072, editorially divided

12722 Execution — record and index. It shall be signed and acknowledged in the manner prescribed for the execution and acknowledgment of deeds, and recorded in the office of the recorder of the county where the assignor resides, and in any other county in the state in which he has real property to be assigned thereby, in the records of deeds, and indexed in the proper index books. [R60,§1828; C73, §2117; C97,§3072; C24, 27, 31, 35,§12722.]

12723 Inventory — list of creditors. The assignor shall annex to such instrument an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, and a list of his creditors and the amount of their respective demands, but such inventory shall not be conclusive as to the amount of the debtor's estate. [R60,§1828; C73,§2117; C97, §3072; C24, 27, 31, 35,§12723.]

12724 Effect of assignment. Such assignment shall vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment, not exempt from execution. [R60,§1828; C73,§2117; C97, §3072; C24, 27, 31, 35,§12724.]

12725 Filing with clerk. As soon as such assignment is recorded, it shall be filed, with the inventory and list of creditors, in the office of the clerk of the district court, as shall all subsequent papers connected with such proceedings. [R60,§1828; C73,§2117; C97,§3072; C24, 27, 31, 35,§12725.]

12726 Inventory and appraisement — bond. The assignee shall forthwith file with the clerk of the district court where such assignor resides a true and full inventory and valuation of said estate under oath, so far as the same has come to his knowledge, and shall then enter into bonds to said clerk, for the use of the creditors, in double the amount of the inventory and valuation, with one or more sureties to be approved by said clerk, for the faithful performance of said trust, and the assignee may thereupon proceed to perform any duty necessary to carry into effect the purpose of said assignment. [R60,§1830; C73,§2118; C97,§3073; C24, 27, 31, 35,§12726.]

12727 Notice of assignment — notice to creditors. The assignee shall forthwith give notice of such assignment by publication in some newspaper in the county, which shall be continued, once each week, at least six weeks, and forthwith send a notice by mail to each creditor of whom he shall be informed, directed

to his usual place of residence, requiring such creditor to file in the office of the clerk of the district court within three months thereafter his claims under oath. [R60,§1829; C73,§2119; C97,§3074; S13,§3074; C24, 27, 31, 35,§12727.]

Referred to in §12728

12728 Claims filed. The claims of all creditors, clearly and distinctly stated and sworn to by the claimant, or by some person acquainted with the facts, shall be filed in the office of the clerk of the district court within three months from the date of the first publication provided for in section 12727, unless the court extends such time for all or some of such claimants, which it may do in its discretion where peculiar circumstances seem to justify such extension, but in no case shall such time be extended beyond nine months. [C97,§3075; C24, 27, 31, 35, §12728.]

12729 Report required. At the expiration of three months from the time of first publishing notice, the assignee shall report and file with the clerk of the court a true and full list, under oath, of all such creditors of the assignor as shall have claimed to be such, with a statement of their claims, an affidavit of publication of notice, and a list of the creditors, with their places of residence, to whom notice has been sent by mail, and the date of mailing the same. [R60,§1831; C73,§2120; C97,§3076; C24, 27, 31, 35,§12729.]

12730 Claims contested. Any person interested may appear within three months after such report is filed and contest the claim or demand of any creditor by written exceptions thereto filed with the clerk, who shall forthwith cause notice thereof to be given to the creditor, which shall be served as in case of an original notice and returnable at the next term, at which term the court shall proceed to hear the proofs and allegations of the parties in the case, and render such judgment thereon as shall be just, or it may allow a trial by jury. [R60,§1832; C73,§2121; C97,§3077; C24, 27, 31, 35,§12730.]

12731 Priority of taxes — nonnecessity to file claim. In all assignments of property for the benefit of creditors, assessments thereof, or taxes levied thereon, whether under the laws of the state or ordinances of municipal corporations, shall be entitled to priority, and paid in full by the assignee, and claims therefor need not be filed with him. [C97,§3078; C24, 27, 31, 35,§12731.]

Referred to in §12733

12732 Labor claims preferred. If the claim of any creditor is for personal services rendered the assignor within ninety days next preceding the execution of the assignment, it shall be paid in full. [C97,§3079; C24, 27, 31, 35, §12732.]

Referred to in §12733
Labor claims preferred, §§11717, 11971, 12719
C97,§3079, editorially divided

12733 Dividends — compensation. Subject to the provisions contained in sections 12731 and 12732, if no exception be made to the claim of any creditor, or if the same has been adjudicated, the court shall order the assignee to make, from time to time, fair and equal dividends among the creditors of the assets in his hands in proportion to their claims, and as soon as may be to render a final account of said trust to said court, which may allow such compensation to said assignee in the final settlement as may be considered just and right. [C73, §2122; C97,§3079; C24, 27, 31, 35,§12733.]

12734 Absent creditor. If, upon making the final dividend to the creditors, the assignee shall be unable, after reasonable efforts, to ascertain the place of residence of any creditor, or any person who is authorized to receive the dividend due him, he shall report the same to the court, with evidence showing diligent attempts to find such creditor or person authorized to receive the dividend, whereupon the court may, in its discretion, order the distribution of the unclaimed dividend among the other creditors. [C97,§3079; C24, 27, 31, 35, §12734.]

12735 Power of court. The assignee shall be at all times subject to the order and supervision of the court or judge, and from time to time may be compelled by citation or attachment to file reports of his proceedings and of the situation and condition of the trust, and to proceed in the execution of the duties required by this chapter. [R60,§§1834, 1842; C73,§2123; C97,§3080; C24, 27, 31, 35,§12735.]

C97,§3080, editorially divided

12736 Disposal of property —time limit. The assignee shall dispose of all personal property and divide the proceeds of the same among creditors as they may be entitled thereto within six months from the date of the assignment, and shall dispose of real estate within one year from such date, and make full settlement by that time, unless the court or judge, for good reason shown, shall extend the time within which such disposition or settlement shall be made. [C97,§3080; C24, 27, 31, 35,§12736.]

12737 Neglect to file inventory or list. No assignment shall be declared fraudulent or void for want of any list or inventory, as provided in this chapter. [R60,§1835; C73,§2124; C97,§3081; C24, 27, 31, 35,§12737.]

C97,§3081, editorially divided

12738 Examination of debtor. The court or judge may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, or at the next term, to answer under oath such matters as may be inquired of him, and such debtor may be fully examined under oath as to the amount and situation of his estate, and the names of the creditors and amounts due to each, with their places of residence, and may be compelled to deliver to the assignee any property or estate embraced in the assignment. [R60,§1835; C73,§2124; C97,§3081; C24, 27, 31, 35,§12738.]

12739 Additional inventory and security. The assignee shall, from time to time, file with the clerk of the court an inventory and valuation of any additional property which may come into his hands under said assignment after the filing of the first inventory, and the clerk may thereupon require him to give additional security. [R60,§1836; C73,§2125; C97,§3082; C24, 27, 31, 35,§12739.]

12740 Claims not due. Any creditor may claim debts to become due, as well as debts due, but on debts not due a reasonable rebate shall be made when the same are not drawing interest. [R60,§1837; C73,§2126; C97,§3083; C24, 27, 31, 35,§12740.]

C97,§3083, editorially divided

12741 Claims filed after three months. All creditors who shall not file their claims within three months from the publication of notice, as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term, and allowed by the court, unless the court has extended the time for filing such claims, except as provided by this chapter. [R60,§1837; C73,§2126; C97, §3083; C24, 27, 31, 35,§12741.]

12742 Sale of property generally. The assignee may dispose of and sell all the estate assigned, real and personal, which the debtor had at the time of the assignment, may sue for and recover in his name everything belonging or appertaining to said estate, and generally do whatever the debtor might have done in the premises. [R60,§1838; C73,§2127; C97,§3084; C24, 27, 31, 35,§12742.]

C97,§3084, editorially divided

12743 Sale of real estate. No sale of real estate belonging to said trust shall be made without notice, published as in case of sales of real estate on execution, unless the court or judge shall otherwise order. [R60,§1838; C73, §2127; C97,§3084; C24, 27, 31, 35,§12743.]

Sale of real estate, §11722 et seq.

12744 Approval of sales. No such sales shall be valid until approved by such court or judge. [C97,§3084; C24, 27, 31, 35,§12744.]

12745 Mandatory removal of assignee. Upon a written application of two-thirds of the creditors in number, and two-thirds in amount, the court shall remove the assignee and appoint in his stead a person approved by the creditors in the same number and amount. [C97,§3085; C24, 27, 31, 35,§12745.]

C97,§3085, editorially divided

12746 Permissive removal of assignee. If an assignee shall reside out of the state, or become insane or otherwise incapable of discharging the trust, the court may, upon ten days notice to him or his attorney, remove him and appoint another in his stead. [C97,§3085; C24, 27, 31, 35,§12746.]

12747 Accounting and delivery. The person so removed shall immediately turn over to the clerk of the district court, or any person appointed by the court, all moneys and property of the estate in his hands. [C97,§3085; C24, 27, 31, 35,§12747.]

12748 Death of assignee—failure to act. If an assignee dies before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment to file an inventory and valuation, and give bond as required by this chapter, the district court, or any judge thereof, of the county where such assignment may be recorded, on the application of any person interested, shall appoint some person to execute the trust, who shall, on giving bond with sureties as required of an assignee, have all of the powers of the assignee first appointed, and be subject to all the duties hereby imposed. [R60,§1839; C73,§2128; C97,§3086; C24, 27, 31, 35,§12748.]

C97,§3086, editorially divided

12749 Additional security—misconduct. In case any bond or surety is found to be insufficient, or, on complaint before the court or judge, it shall be made to appear that any assignee is guilty of wasting or misapplying the trust estate, such court or judge may require additional security, may remove the assignee and appoint another in his place, and such person so appointed, on giving bond, shall execute such duties, and may demand and sue for all estate in the hands of the person removed, and recover the amount and value of all moneys and property or estate wasted and misapplied, from such person and his sureties. [R60,§1839; C73,§2128; C97,§3086; C24, 27, 31, 35,§12749.]

12750 Power of judge in vacation. Any judge of the district court in vacation shall have power in cases under this chapter to issue citations and attachments, order the sale of personal or real property, and approve sales and deeds thereof. [C97,§3087; C24, 27, 31, 35, §12750.]

CHAPTER 551

SECURITIES AND INVESTMENTS OF TRUST FUNDS

Referred to in §§5930, 12644.09

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SURETY BONDS

12751 Security to be by bond. Whenever security is required to be given by law or by order or judgment of a court, and no particular mode is prescribed, it shall be by bond. [C51, §2505; R60,§4113; C73,§246; C97,§355; C24, 27, 31, 35,§12751.]

12752 Payee. Such security, when not otherwise directed, may, if for the benefit of individuals, be given to the party intended to be secured thereby; if in relation to the public matters concerning the inhabitants of one county or part of a county, it may be made payable to the county; if concerning the inhabitants of more than one county, it may be made payable to the state, but a mere mistake in these respects will not vitiate the security. [C51, §2506; R60,§4114; C73,§247; C97,§356; C24, 27, 31, 35,§12752.]

12753 Defects rectified. No defective bond or other security or affidavit in any case shall prejudice the party giving or making it, provided it be so rectified, within a reasonable time after the defect is discovered, as not to cause essential injury to the other party. [C51,§2511; R60,§4119; C73,§248; C97,§357; C24, 27, 31, 35, §12753.]

12754 Qualifications of sureties. The surety in every bond provided for or authorized by law must be a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured, except as otherwise provided by law. Where there are two or more sureties in the same bond, they must in the aggregate have the qualification prescribed in this section. [R60,§4126; C73, §249; C97, §358; S13, §358; C24, 27, 31, 35, §12754.]

Referred to in §12755
S13,§358, editorially divided

12755 Attorneys not receivable as surety. Attorneys at law shall not be accepted as sureties upon any official bonds provided for in section 12754. [S13,§358; C24, 27, 31, 35,§12755.]

Referred to in §12757
Similar provision, §11251

12756 New bond required. Whenever the board of supervisors of any county shall have knowledge that any attorney at law is surety upon any official bond, above referred to, it shall require said officer to forthwith file a new bond. [S13,§358; C24, 27, 31, 35,§12756.]

Referred to in §12757

12757 Surety bound notwithstanding disqualification. Nothing in sections 12755 and 12756 shall exempt such person from any liability upon the bond signed by him. [S13,§358; C24, 27, 31, 35,§12757.]

12758 Affidavit of sureties—effect of. The officer whose duty it is to take a surety in any bond provided for or authorized by law shall require the person offered as surety to make affidavit of his qualification, which affidavit may be made before such officer, or other officer authorized to administer oaths. [R60,§4125; C73,§250; C97,§359; C24, 27, 31, 35,§12758.]

C97,§359, editorially divided

12759 Effect of affidavit. The taking of such an affidavit shall not exempt the officer from any liability to which he might otherwise be subject for taking insufficient security. [R60,§4125; C73,§250; C97,§359; C24, 27, 31, 35,§12759.]

12759.1 Appeal bonds—presumption. The filing by an approving officer of a duly tendered appeal bond in an appeal to any court shall carry the presumption until the contrary is established that said officer approved the bond even though no formal approval is indorsed on the bond. [C31, 35,§12759-c1.]

SURETY COMPANIES

12760 Certificate of authority. Any company engaged in the business of becoming surety upon bonds shall file, with the clerk of any county in which it shall do business, a certificate from the commissioner of insurance that it has complied with the law and is authorized to do business in this state. [C97,§359; C24, 27, 31, 35,§12760.]

12761 Certificate revoked—notice. Should said authority be withdrawn at any time, the commissioner of insurance shall at once notify the clerk of each district court to that effect. [C97,§359; C24, 27, 31, 35,§12761.]

12762 Record by clerk. The clerk shall keep a book, properly indexed, in which shall be recorded all such certificates and revocations. [C97,§359; C24, 27, 31, 35,§12762.]

12763 Guaranty company as surety. Whenever any person who now or hereafter may be required or permitted to give a bond applies for the approval thereof, any officer or body who is now or shall hereafter be required to approve the sufficiency of such bond shall accept and approve the same, whenever its conditions are guaranteed by a company or corporation duly organized or incorporated under the laws of this state, or authorized to do business therein, and to guarantee the fidelity of persons holding positions of public or private trust, or secure any bond above referred to, and which company shall have the certificate of the commissioner of insurance authorizing it to do business therein, as provided in chapter 404. [C97,§360; SS15, §360; C24, 27, 31, 35,§12763.]

Referred to in §§12764, 12767
SS15,§360, editorially divided

12764 Payment of premiums. The premium for any such guaranty or surety company bond as defined in section 12763, may, by the approval of the court, be paid out of the trust funds in the hands of the party of whom the bond is required. [SS15,§360; C24, 27, 31, 35,§12764.]

Referred to in §12767

12765 Certificate as authority. The certificate of the commissioner of insurance, to the effect that such company has complied with the requirements of chapter 404 and is authorized to do business in this state, shall be sufficient evidence to authorize the officer or body having the approval of such bond to accept and approve the same. [C97,§360; SS15,§360; C24, 27, 31, 35,§12765.]

Referred to in §12767

12766 Limitation on acceptance. No such security shall be accepted on any bond for an amount in excess of ten percent of the paid-up cash capital of such company or corporation unless the excess shall be reinsured in some other company or corporation authorized to do business in the state and in no case to exceed ten percent of the capital of the reinsuring company and provided that a certificate of such reinsurance shall be furnished to the insured. [C97,§360; SS15,§360; C24, 27, 31, 35,§12766.]

Referred to in §12767

12767 Criminal bonds. Nothing contained in sections 12763 to 12766, inclusive, shall apply to bonds in criminal cases. [C97,§360; SS15, §360; C24, 27, 31, 35,§12767.]

12768 Release. Such company or corporation may be released from its liability as such surety on any bond on the same terms and conditions, and in the same manner, as is by law prescribed for the release of natural persons as such sureties; it being the intent of this chapter to enable companies created, incorporated, or chartered for such purposes to become surety on bonds required by law, subject to all the rights and liabilities of natural persons. [C97,§361; C24, 27, 31, 35,§12768.]

Discharge of sureties, ch 55

12769 Suit on bond — service. Whenever suit is required to be brought on any bond given by such company, service shall be had upon any agent of such company in this state, and if there is no agent in the state, then service may be had by serving the commissioner of insurance fifteen days before the term of court in which the suit is sought to be brought. [C97,§362; C24, 27, 31, 35,§12769.]

C97,§362, editorially divided

12770 Commissioner as process agent. It shall be the duty of the commissioner of insurance, upon service being made upon him, to immediately mail a copy of such notice to such company at their principal place of business, and any notice so served shall be deemed to be good and sufficient service on any such company. [C97,§362; C24, 27, 31, 35,§12770.]

12771 Estoppel — stockholders liable. Any company which shall execute any bond as surety under the provisions of this chapter shall be estopped, in any proceeding to enforce the liability which it shall have assumed to incur, to deny its corporate power to execute such instrument or assume such liability; and the private property of the stockholders shall be liable for the debts of the corporation to the full amount of the capital stock held by such stockholders. [C97,§363; C24, 27, 31, 35,§12771.]

INVESTMENT OF FUNDS

12772 Authorized securities. All proposed investments of trust funds by fiduciaries shall first be reported to the court or a judge for approval and be approved and unless otherwise authorized or directed by the court under authority of which he or it acts, or by the will, trust agreement or other document which is the source of authority, a trustee, executor, administrator

or guardian shall invest all moneys received by such fiduciary, to be by him or it invested, in securities which at the time of the purchase thereof are included in one or more of the following classes:

1. *Federal bonds.* Bonds or other interest-bearing obligations of the United States for the payment of which the faith and credit of the United States is pledged.

2. *Federal bank bonds.* Bonds issued by any federal land bank or by the Federal Farm Mortgage Corporation or any corporation or governmental agency or instrumentality authorized to issue bonds, or debentures under the act of congress designated as the Federal Farm Loan Act [12 USC,§§641–1012, 1021–1129] and acts amendatory thereof and in bonds issued by any federal home loan bank under the act of congress known and cited as the Federal Home Loan Bank Act, [12 USC,§§1421–1449] and the acts amendatory thereof.

3. *State bonds.* Bonds or other interest-bearing obligations of any state in the United States for the payment of which the faith and credit of such state is pledged and which state has not defaulted in the payment of any of its bonded debts within the ten preceding years.

4. *Municipal bonds.* Bonds, or other interest-bearing obligations, which are a direct obligation of any county, township, city, village, town, school district, or other municipal corporation or district, having power to levy general taxes, in the state of Iowa, and also bonds, or other interest-bearing obligations, which are a direct obligation of any county, township, city, village, town, school district or other municipal corporation or district, having power to levy general taxes, in any adjoining state, having a population of not less than five thousand; and also bonds, or other interest-bearing obligations, which are a direct obligation of any county, township, city, village, town, school district, or other municipal corporation or district, having power to levy general taxes, in any other state, having a population of not less than ten thousand. Provided the total funded indebtedness of any such municipality enumerated in this subsection shall not exceed ten percent of the assessed value of the taxable property therein, as ascertained by the last assessment for tax purposes, and provided further that such municipality or district has not defaulted in the payment of any of its bonded indebtedness within the ten preceding years.

5. *Real estate mortgage bonds.* Notes or bonds of any individual secured by a first mortgage on improved real estate located in this state, provided the aggregated amount of such notes and/or bonds secured by such first mortgage, does not exceed fifty percent of the value of the mortgage property as determined by the fiduciary.

6. *Corporate mortgages.* Notes or bonds of any corporation secured by a first mortgage on improved real estate located in this or any adjoining state upon which no default in payment of principal or interest shall have occurred within five preceding years provided the aggregate amount of such notes and/or bonds secured by such first mortgage does not exceed fifty percent of the value of the mortgage property as determined by the fiduciary.

7. *Railroad bonds.* Bonds of any railroad corporation which are secured by a first lien mortgage or trust deed upon not less than one hundred miles of main track in the United States and which mortgage or trust deed has been outstanding not less than fifteen years and upon which bonds issued thereunder there has been no default in the payment of principal and/or interest since the date of said such trust deed.

8. *Bonds guaranteed by railroad.* Bonds of any corporation secured by a first lien upon any railroad terminal depot, tunnel or bridge in the United States used by two or more railroad companies which have guaranteed the payment of principal and interest of such bonds and have otherwise covenanted or agreed to pay the same, provided at least one of said railroad companies meets the following requirements:

a. Has earned net income equal to at least four percent of the par value of its outstanding capital stock for five preceding years, and

b. Has regularly and punctually paid interest and maturing principal on all of its mortgage indebtedness for five preceding years.

c. Has outstanding capital stock of the par value of at least one-third of its total mortgage indebtedness.

9. *Public utility bonds.* Bonds of any corporation supplying either water, electric energy, or artificial manufactured gas or two or more thereof for light, heat, power, water or other purposes, or furnishing telephone or telegraph service, provided that such bonds are secured by a first mortgage on all property used in the business of the issuing corporation or by a first and refunding mortgage containing provision for retiring all prior liens, and provided further, that the issuing corporation is incorporated within the United States, and if operating entirely outside this state is operating in a state or other jurisdiction having a public utilities commission with regulatory powers, and providing such operating corporation has annual gross earnings of at least one million dollars, seventy-five percent of which gross earnings have come from the sale of water, gas or electricity, or the rendering of telephone or telegraph service and not more than fifteen percent from any other one kind of business and which corporation has a record on its behalf or for its predecessors or constituent companies, of having officially reported net earnings at least twice its interest charges on all mortgaged indebtedness for the period of five years immediately preceding the investment and having outstanding stock the book value of which is not less than two-thirds of its total funded debt, and which corporation shall have all franchises to operate in the territory it serves in which at least seventy-five percent of its gross income is earned, which franchise shall extend at least five years beyond the maturity of such bonds or which have indeterminate permits or agreements with duly constituted public authorities, or in the bonds of any constituent or subsidiary

company of any such operating company which are secured by a first mortgage on all property of such constituent or subsidiary company, provided such bonds are to be retired or refunded by a junior mortgage, the bonds of which are eligible hereunder.

10. *Building and loan associations.* Shares of building and loan associations and savings and loan associations, incorporated under the laws of Iowa and in shares of federal savings and loan associations organized under the laws of the United States of America.

11. *Bonds and debentures guaranteed by the federal government.* Bonds, debentures, or other interest-bearing obligations, the payment of which is guaranteed by the United States of America.

12. *Stock in federal government instrumentalities.* Stock in any association or corporation created or which may be created by authority of the United States and as an instrumentality of the United States, when the purchase of said stock is necessary or required as an incident or condition of obtaining a loan from any association or corporation created or which may be created by authority of the United States and as an instrumentality of the United States.

13. *Limitation as to court-approved investments.* Nothing in this section shall be construed as prohibiting investment of such funds in a savings account or time certificate of deposit of a banking institution located in this state and when first approved by the court. [C51,§2507; R60,§4115; C73,§251; C97,§364; S13,§364; C24, 27, 31, 35,§12772; 47GA, ch 220,§9; 48GA, ch 247, §1.]

Referred to in §§502.4, 12644.14, 12772.1, 12772.2

12772.1 Population and indebtedness. The population specified in section 12772 shall be determined by the last preceding official state or federal census. The indebtedness of any municipality or governmental subdivision shall be determined by the official certificate of the officer of such municipality or district in charge of its public accounts. [C31, 35,§12772-c1.]

Referred to in §12772.2

12772.2 Existing investments. Any fiduciary may by and with the consent of the court having jurisdiction over such fiduciary or under permission of the will or other instrument creating the trust, continue to hold any investment originally received by him or it under the trust or any increase thereof. Such fiduciary may also make investments which he or it may deem necessary to protect and safeguard investments already made according to the provisions of this and sections 12772 and 12772.1. [C31, 35, §12772-c2.]

Dragnet repeal, 48GA, ch 259, §4

12773 Security subject to court order. When such investment is made by order of any court, the security taken shall in no case be discharged, impaired, or transferred without an order of the court to that effect, entered on the minutes thereof. [C51,§2508; R60,§4116; C73,§252; C97,§365; C24, 27, 31, 35,§12773.]

12774 Collection, application of funds, and reinvestment. The clerk or other person appointed in such cases to make the investment must receive all moneys as they become due thereon, and apply or reinvest the same under the direction of the court, unless the court appoints some other person to do such acts. [C51, §2509; R60,§4117; C73,§253; C97,§366; C24, 27, 31, 35,§12774.]

12775 Annual accounting. Once in each year, and oftener if required by the court, the person so appointed must, on oath, render to the court an account in writing of all moneys so received by him, and of the application thereof. [C51,§2510; R60,§4118; C73,§254; C97, §367; C24, 27, 31, 35,§12775.]

Section 12775-b1, code 1935, transferred. See §7420.43

ESTATE AND TRUST FUNDS

12776 Property or funds in litigation—deposit. When it is admitted by the pleadings, or shown by the examination of a party, that he has in his possession, or under his control, any money or property capable of delivery, which is in any degree the subject of litigation, and which is held by him as trustee for another party, the court, or judge thereof, may order the same to be deposited in the office of the clerk, or delivered to such party, with or without security, subject to the further direction of the court; or may order such money to be deposited in a bank, with the consent of the parties in interest, to the credit of the court in which the action is pending, and the same shall be paid out by such bank only upon the check of the clerk, annexed to a certified copy of the order of the court directing such payment. [R60, §3416; C73,§255; C97,§368; C24, 27, 31, 35, §12776.]

12777 Enforcement of order. Whenever a court, or judge in the exercise of its or his authority, has ordered the deposit or delivery of money or other property, and the order is disobeyed, such court or judge, besides punishing the disobedience, may make an order requiring the sheriff to take the money or property, and deposit or deliver it in conformity with the directions of the court or judge, and in such cases he has the same power as when acting under an order for the delivery of personal property. [R60,§§3417, 3418; C73,§§256, 257; C97,§369; C24, 27, 31, 35,§12777.]

12778 Inability to distribute trust funds—deposit. Whenever any administrator, guardian, trustee, or referee shall desire to make his final report, and shall then have in his possession or under his control any funds, moneys, or securities due, or to become due, to any heir, legatee, devisee, or other person, whose place of residence is unknown to such administrator, guardian, trustee, or referee, or to whom payment of the amount due cannot be made as shown by the report on file, such funds, moneys, or securities may upon order of the court and after such notice as the court may prescribe, be deposited with the clerk of the district court

of the county wherein such appointment was made. [C97,§370; S13,§370; C24, 27, 31, 35, §12778.]

S13,§370, editorially divided

12779 Receipt taken. If said administrator, guardian, trustee, or referee shall otherwise discharge all the duties imposed upon him by such appointment, he may take the receipt of the clerk of the district court for such funds, moneys, or securities so deposited, which receipt shall specifically set forth from whom said funds, moneys, or securities, were derived, the amount thereof, and the name of the person to whom due or to become due, if known. [C97, §370; S13,§370; C24, 27, 31, 35,§12779.]

12780 Final discharge. Said administrator, guardian, trustee, or referee may file such receipt with his final report, and if it shall be made to appear to the satisfaction of the court that he has in all other respects complied with the law governing his appointment and duties, the court may approve such final report and enter his discharge. [C97,§370; S13,§370; C24, 27, 31, 35,§12780.]

Fiduciaries' reports, §§6943.059, 12071

12781 Notice of deposit. Notice of such contemplated deposit, and of final report, shall be given for the same time and in the same manner as is now required in cases of final report by administrators. [C97,§370; S13,§370; C24, 27, 31, 35,§12781.]

Notice, §12073

12781.1 Final report of fiduciary—personal taxes. No final report of a fiduciary shall be approved by any court unless there is attached thereto and made a part thereof, the certificate of the county treasurer of a county in which the estate is held by the fiduciary that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied. [48GA, ch 243,§1.]

Similar provisions, §§6943.059, 7363

12781.2 Compromise of personal taxes. For the purpose of facilitating the speedy settlement and distribution of estates, the county treasurer of such county, by and with the consent of the board of supervisors may compromise and agree upon the amount of personal taxes at any time due or to become due the county from such estate and payment in accordance with such compromise or agreement shall be for the satisfaction of all taxes in such estate matter, and no compensation shall be allowed any person because of such compromise or agreement. Provided, however, where an estate is insolvent the board of supervisors may by proper order certified to the court cancel all unpaid personal property taxes. [48GA, ch 243,§2.]

12782 Duty of clerk. The clerk of the district court with whom any deposit of funds, moneys, or securities shall be made, as provided by any law or an order of court, shall enter in a book, to be provided and kept for that purpose, the amount of such deposit, the character thereof, the date of its deposit, from whom received, from what source derived, to whom due or to become due, if known. [C97,§371; S13, §371; C24, 27, 31, 35,§12782.]

S13,§371, editorially divided

12783 Liability—reports required. He shall be liable upon his bond for all such funds, moneys, or securities which may be deposited with him, and shall make complete verified statements thereof to the board of supervisors at the January and June sessions each year. [C97,§371; S13,§371; C24, 27, 31, 35,§12783.]

12784 Deposit with county treasurer. If the funds, moneys, or securities so deposited with the clerk shall not be paid to the person or persons to whom the same are due, or to become due, within six months from the date of its deposit, the clerk shall then, unless otherwise ordered by the court or judge, deposit such funds, moneys, or securities with the county treasurer for the use of the county wherein such appointment was made, taking the treasurer's receipt therefor, countersigned by the county auditor, who shall thereupon charge upon the books of his office and against the treasurer the amount named in such receipts. [C97,§371; S13,§371; C24, 27, 31, 35,§12784.]

12785 Duty of treasurer. Whenever any funds, moneys, or securities shall be deposited with the county treasurer, as provided in this chapter, he shall enter in a book, provided and kept for that purpose, the date of such deposit, the amount thereof, from whom received, the source from which derived, and the name of the person to whom the same is due or to become due, if known. [C97,§372; C24, 27, 31, 35,§12785.]

C97,§372, editorially divided

12786 Disbursement. Whenever the claimant therefor, upon proper application made to the district court, shall satisfactorily show to such court that he is the rightful owner of said funds, moneys, or securities and entitled thereto, the court, by order entered of record, shall direct the county auditor to issue a warrant on the county treasurer for said money, funds, or securities, and, upon such order, the said treasurer shall pay to the person named in such order the funds, moneys, or securities to which the claimant shall have shown himself entitled. [C97,§372; C24, 27, 31, 35,§12786.]

FEDERAL SECURITIES

12786.1 Federal insured loans. Insurance companies and building and loan associations, (1) may make such loans and advances of credit and purchases of obligations representing loans and advances of credit as are eligible for insurance pursuant to title I, section 2, of the National Housing Act [12 USC,§§1701–1732], and may obtain such insurance, (2) may make such loans, secured by real property or leasehold, as the federal housing administrator insures or makes a commitment to insure pursuant to title II of the National Housing Act, and may obtain such insurance.

It shall be lawful for insurance companies, building and loan associations, trustees, guardians, executors, administrators, and other fidu-

ciaries, the state and its political subdivisions, and institutions and agencies thereof, and all other persons, associations and corporations, subject to the laws of this state, to invest their funds, and the moneys in their custody or possession, eligible for investment, in bonds and notes secured by mortgage or trust deed insured by the federal housing administrator, and in the debentures issued by the federal housing administrator pursuant to title II of the National Housing Act, and in securities issued by national mortgage associations or similar credit institutions now or hereafter organized under title III of the National Housing Act. [C35,§12786-g1.]

Referred to in §§8927, 12786.2

12786.2 Inapplicable statutes. No law of this state requiring security upon which loans or investments may be made, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments may be made, shall be deemed to apply to loans or investments pursuant to section 12786.1. [C35,§12786-g2.]

CHAPTER 552

PROCEDURE TO VACATE OR MODIFY JUDGMENTS

12787 Judgment vacated or modified—grounds.
12788 Petition for new trial after term.
12789 Petition deemed denied—method of trial.
12790 Time limit.
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12792 Petition.
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12798 Grounds to vacate first tried.
12799 Injunction.
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12787 Judgment vacated or modified—grounds. Where a final judgment or order has been rendered or made, the district court, in addition to causes for a new trial hereinbefore authorized, may, after the term at which the same was rendered or made, vacate or modify the same or grant a new trial:

1. For mistake, neglect, or omission of the clerk, or irregularity in obtaining the same.
2. For fraud practiced in obtaining the same.
3. For erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record.
4. For the death of one of the parties before the rendition of the judgment or making of the order, if no substitute has been made of the proper representative before the rendition of the judgment or order.
5. For unavoidable casualty or misfortune preventing the party from prosecuting or defending.
6. For error in the judgment or order shown by a minor within twelve months after arriving at majority. [R60,§3499; C73,§3154; C97,§4091; C24, 27, 31, 35,§12787.]

New trial generally, §11549 et seq.
Recovery of real property, §12255

12788 Petition for new trial after term. Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed, on which notice shall be served upon the successful party and returned, and he be held to appear, as in an original action. [R60, §3116; C73,§3155; C97,§4092; C24, 27, 31, 35, §12788.]

C97,§4092, editorially divided

12789 Petition deemed denied—method of trial. The facts stated in the petition shall be considered as denied without answer, and tried by the court as other actions by ordinary proceedings. [R60,§3116; C73,§3155; C97,§4092; C24, 27, 31, 35,§12789.]

12790 Time limit. No such petition shall be filed after one year from the rendition of final judgment. [R60,§3116; C73,§3155; C97,§4092; C24, 27, 31, 35,§12790.]

12791 Motion to correct mistake or irregularity. Proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining judgment or order, shall be by motion served on the adverse party or his attorney, and within one year; if made to vacate a judgment or order because of irregularity in obtaining it, such motion must be made on or before the second day of the succeeding term. [R60,§3500; C73, §3156; C97,§4093; C24, 27, 31, 35,§12791.]

12792 Petition. The application based upon the other grounds shall be by verified petition setting forth the judgment or order, the alleged facts or errors constituting a cause to vacate or modify it, and the matters constituting a defense to the action, if the party applying was a defendant. [R60,§3501; C73,§3157; C97,§4094; C24, 27, 31, 35,§12792.]

C97,§4094, editorially divided

12793 Time limit. Such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto is a minor or person of unsound mind, and then within one year after the removal of such disability. [R60,§3501; C73, §3157; C97,§4094; C24, 27, 31, 35,§12793.]

12794 Proceedings. In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service, and return, and the pleadings, issues, and form and manner of trial shall be governed by the same rules and conducted in the same man-

ner, as nearly as may be, and with the same right of appeal, as in ordinary actions. [R60,§3502; C73,§3158; C97,§4095; C24, 27, 31, 35,§12794.]

C97,§4095, editorially divided

12795 Joinder — petition deemed denied — method of trial. No new cause of action or defense shall be introduced, and the matter stated in the petition shall be taken as denied without answer, and the issue shall be tried by the court. [R60,§3502; C73,§3158; C97,§4095; C24, 27, 31, 35,§12795.]

12796 Cause of action or defense—necessity. The judgment shall not be vacated on motion or petition until it is adjudged there is a cause of action or defense to the action in which the judgment is rendered. [R60,§3503; C73,§3159; C97,§4096; C24, 27, 31, 35,§12796.]

C97,§4096, editorially divided

12797 Liens preserved. If a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. [R60,§3503; C73,§3159; C97,§4096; C24, 27, 31, 35,§12797.]

12798 Grounds to vacate first tried. The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the cause of action or defense. [R60,§3504; C73,§3160; C97,§4097; C24, 27, 31, 35,§12798.]

12799 Injunction. The party seeking to vacate or modify a judgment or order may have an injunction suspending proceedings on the whole or part thereof, which shall be granted by the court or a judge thereof upon its being rendered probable, by affidavit or verified petition, or by exhibition of the record, that the party is entitled to the relief asked. [R60,§3505; C73, §3161; C97,§4098; C24, 27, 31, 35,§12799.]

12800 Judgment affirmed. If the judgment or order is affirmed and the proceedings have been suspended, an additional judgment shall be rendered against the plaintiff in error for the amount of the costs, together with damages at the discretion of the court, not exceeding ten percent on the amount of the judgment affirmed. [R60,§3506; C73,§3162; C97,§4099; C24, 27, 31, 35,§12800.]

TITLE XXXIV

SUPREME COURT

CHAPTER 553

ORGANIZATION OF SUPREME COURT

12801 Judges—quorum.
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12815 What cases reported.
12816 Attendance of sheriff of Polk county.
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12801 Judges—quorum. The supreme court shall consist of nine judges, five of whom shall constitute a quorum to hold court, but one alone thereof may adjourn from day to day or to a certain day or until the next term. [C51,§1551; R60,§2627; C73,§139; C97,§193; S13,§193; C24, 27, 31, 35,§12801.]

12802 Division into sections. The supreme court may be divided into two sections in such manner as it may by rule prescribe. Said sections may hold open court separately and cases may be submitted to each section separately, in accordance with such rules as the court may adopt. [C97,§194; S13,§194; C24, 27, 31, 35, §12802.]

S13,§194, editorially divided

12803 Submission to entire court—rules. The said supreme court shall also adopt rules for the submission of any case or petition for rehearing whenever differences shall arise between members of either section or whenever the chief justice shall order or direct the submission of said question or petition for rehearing to the whole court. The supreme court shall make all rules and regulations necessary to provide for the submission of cases to the entire bench, or to the separate sections. [C97,§194; S13,§194; C24, 27, 31, 35,§12803.]

12804 Chief justice. Of the elected judges whose terms of office first expire, the senior in time of service shall be chief justice for six months and so on in rotation until all such judges shall have been chief justice. If two or more judges, who would otherwise be entitled to the position, are equal in time of service, then the right to the position and the order in which they shall serve shall be determined by seniority in age. At the last term of each year, the supreme court shall determine and enter of record who, under this statute, shall be chief justice for the six months period beginning on January 1 thereafter. Likewise at the May term in each year and on or before June 30, the supreme court shall determine and enter of record who, under this statute, shall be chief justice for the last six months of the year. The presiding chief justice shall appoint one of the other members of the court to act in his place and stead in case of his absence or inability to act and, when so acting, such member shall have all the rights, duties and powers given by statute to the chief justice of the supreme court. [R60,§467; C73,§582; C97,§1066; S13,§1066; C24, 27, 31, 35,§12804.]

12805 Terms of court. The supreme court shall be held at the seat of government, and shall convene and hold three regular terms each year. The first term shall begin with the second Tuesday of January and end with the first Monday of May; the second shall begin with the first Tuesday after the first Monday of May and end with the third Monday of September; and the third shall begin with the first Tuesday after the third Monday of September and end with the third Saturday of December. [C97,§192; S13,§192-a; C24, 27, 31, 35,§12805.]

12806 Business at each term—docket. Each of said terms of court shall be for the submission and determination of causes, and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term, unless continued or otherwise disposed of by order of the court. The court shall remain in session, so far as practicable, until it is determined what the opinion of the court shall be in all causes submitted to it, except in causes where re-argument is ordered. Judgments of affirmance, rulings, and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time, regardless of the terms of court. [R60,§2623; C73,§133; C97, §192; C24, 27, 31, 35,§12806.]

12807 Recess or adjournment. The court shall not be required to continue in actual public session during an entire term, but may adjourn from time to time as by order or rule it shall direct; provided, however, that no such

recess or adjournment shall be taken for more than thirty days at one time, except during the period from the first Monday in July to the third Monday in September in each year. [S13, §192-b; C24, 27, 31, 35,§12807.]

12808 Causes assigned and submitted. At each regular or adjourned session of a term of court, causes pending therein may be assigned and submitted, but no more submissions shall be taken or allowed at any one session than in the judgment of the court can be properly considered and determined before the next succeeding session. [S13,§193-a; C24, 27, 31, 35, §12808.]

12809 Rules for assignment of causes. The court shall by appropriate rules provide for the assignment of causes for hearing at the regular and adjourned sessions thereof, and for reasonable notice to counsel of the time or times at which their cases will be called. [S13,§193-b; C24, 27, 31, 35,§12809.]

12810 Divided court. When the court is equally divided in opinion, the judgment of the court below shall stand affirmed, but the decision is of no further force or authority, but in such cases opinions may be filed. [C51,§1552; R60,§2628; C73,§140; C97,§195; C24, 27, 31, 35, §12810.]

12811 Failure of judges to attend. If none of the judges attend on the first day of the term, the clerk must enter the fact on the record, and the court shall stand adjourned until the next day, and so on until the fourth day; then, if none of the judges appear, the court shall stand adjourned until the next term. [C51,§1553; R60, §2629; C73,§141; C97,§196; C24, 27, 31, 35, §12811.]

12812 Business continued. No process or proceeding shall in any manner be affected by an adjournment or failure to hold court, but all shall stand continued to the next term, without any special order to that effect. [C51, §1554; R60,§2630; C73,§142; C97,§197; C24, 27, 31, 35,§12812.]

12813 Opinions to be filed. The decisions of the court on all questions passed upon by it, including motions and points of practice, shall be specifically stated, and shall be accompanied with an opinion upon all such as are deemed of sufficient importance, together with any dissent therefrom, which dissent may be stated with or without an opinion. All decisions and opinions shall be in writing and filed with the clerk, except that rulings upon motions may be entered upon the announcement book. [C51,§§1560, 1561; R60, §§2636, 2637; C73, §143; C97, §198; C24, 27, 31, 35,§12813.]

12814 Dissenting opinions. The records and reports must in all cases show whether a decision was made by a full bench, and whether any and, if so, which of the judges dissented from the decision. [C51,§1562; R60,§2638; C73, §144; C97,§199; C24, 27, 31, 35,§12814.]

12815 What cases reported. If the decision, in the judgment of the court, is not of sufficient general importance to be published, it shall be so designated, in which case it shall not be included in the reports, and no case shall be reported except by order of the full bench. [C73, §145; C97,§200; C24, 27, 31, 35,§12815.]

12816 Attendance of sheriff of Polk county. The court may at any time require the attendance and services of the sheriff of Polk county. [C97,§201; C24, 27, 31, 35,§12816.]

12816.1 Salary. Each judge of the supreme court hereafter elected shall receive a salary of seventy-five hundred dollars a year, as provided by law. [C27, 31, 35,§12816-a1.]

Constitutional provision, Art. V, §9

CHAPTER 554

CLERK OF THE SUPREME COURT

12817 Appointment.
12818 Office—duties.
12819 Fees to be collected.
12820 Execution for fees.
12821 Deputy—qualification—duties.

12817 Appointment. Within ninety days prior to the first secular day in January, 1927, and every four years thereafter, the judges of the supreme court shall appoint a clerk of the supreme court who shall hold office for four years and until his successor has been appointed and qualified. In case a vacancy occurs, the same shall be filled by appointment for the unexpired portion of the term only. [C73,§583; C97, §1067; S13, §§207-a,-b; C24, 27, 31, 35, §12817.]

12818 Office—duties. The clerk of the supreme court shall have an office at the seat of government, keep a complete record of the proceedings of the court, and allow no opinion filed therein to be removed except by the reporter, which opinions shall be open to examination and may be copied, and, upon request, shall be certified by him. He shall also, when required, make out and certify a copy thereof. He shall promptly announce by mail to one of the attorneys on each side any ruling made or decision rendered, record every opinion rendered as soon as filed, and perform all other duties pertaining to his office. [C51,§§1564, 1565; R60,§§2647–2651; C73,§§146–149; C97,§204; C24, 27, 31, 35, §12818.]

12819 Fees to be collected. The clerk shall collect the following fees and account for them as provided in section 143, and shall also keep account of and report in like manner all uncollected fees:

Upon filing each appeal, three dollars.

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

Upon each continuance, one dollar.

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

Upon entering satisfaction of each judgment, fifty cents.

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

For copying an opinion to be transmitted to an inferior court upon reversal of a judgment or an order, to be paid by the party against whom the costs are adjudged, or for a copy of such opinion or any record made at the request of any person, for each hundred words, ten cents. [C51, §2525; R60,§§2949, 4134; C73,§3771; C97,§205; S13,§205; C24, 27, 31, 35,§12819.]

12820 Execution for fees. If any of the foregoing fees of the clerk are not paid in advance, execution may issue therefor, except where the fees are payable by the county or the state. [C97,§206; C24, 27, 31, 35,§12820.]

12821 Deputy — qualification — duties. The clerk of the supreme court may appoint, in writing, any person, except one holding a state office, as deputy, which appointment must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner, both the appointment and the revocation to be filed and kept in the office of the secretary of state. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and, when so qualified, he shall, in the absence or disability of the clerk, perform all of the duties of such clerk pertaining to his office. [C97,§207; SS15,§207; C24, 27, 31, 35, §12821.]

CHAPTER 555

PROCEDURE IN THE SUPREME COURT IN CIVIL ACTIONS

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12822 Appellate jurisdiction. The supreme court has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law. [C51, §1555; R60,§2631; C73,§3163; C97,§4100; C24, 27, 31, 35,§12822.]

Jurisdiction, Constitution, Art. V, §4

12823 Appeals from orders. An appeal may also be taken to the supreme court from:

1. An order made affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment from which an appeal might be taken.

2. A final order made in special actions af-

fecting a substantial right therein, or made on a summary application in an action after judgment.

3. An order which grants or refuses, continues or modifies, a provisional remedy; grants or refuses, dissolves or refuses to dissolve, an injunction or attachment; grants or refuses a new trial; sustains or overrules a demurrer in a law action; or sustains or overrules a motion to dismiss in an equitable action.

4. An intermediate order involving the merits or materially affecting the final decision.

5. An order or judgment on habeas corpus. [C51,§1556; R60,§2632; C73,§3164; C97,§4101; C24, 27, 31, 35,§12823.]

12824 From order made by judge. If any of the above orders or judgments are made or rendered by a judge, the same are reviewable the same as if made by a court. [R60,§2633; C73,§3165; C97,§4102; C24, 27, 31, 35,§12824.]

12825 Other intermediate appeals. Such court, in its discretion, may also prescribe rules for allowing appeals on such other intermediate orders or decisions as are expedient, and for permitting such appeals to be taken and tried during the pendency of the action in the court below; but such an intermediate appeal shall not retard proceedings in the court from which the appeal is taken. [C51,§1557; R60,§2634; C73, §3166; C97,§4103; C24, 27, 31, 35,§12825.]

12826 Mistake of clerk below. A mistake of the clerk shall not be ground for an appeal until the same has been presented to and acted upon by the court below. [R60,§3498; C73, §3167; C97,§4104; C24, 27, 31, 35,§12826.]

12827 Motion to correct error. A judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been there made and overruled. [R60,§3545; C73,§3168; C97, §4105; C24, 27, 31, 35,§12827.]

Exception in taxation of costs, §11631

12828 Motion for new trial. The supreme court on appeal may review and reverse any judgment or order of the municipal, superior, or district court, although no motion for a new trial was made in such court. [C73,§3169; C97, §4106; C24, 27, 31, 35,§12828.]

12829 Finding of facts—evidence certified. Where a cause is tried by the court, it shall not be necessary, in order to secure a review of the same in the supreme court, that there should have been any finding of facts or conclusions of law stated in the record, but the supreme court shall hear and determine the same when it appears from a certificate of the judge, agreement of parties, or their attorneys, or, if the record shows the evidence to consist wholly of written testimony, then from the certificate of the shorthand reporter or clerk, that the record contains all the evidence introduced by the parties in the trial in the court below. [C73,§3170; C97,§4107; C24, 27, 31, 35,§12829.]

12830 Title of cause. The cause on appeal shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee. [R60,§3508; C73,§3171; C97,§4108; C24, 27, 31, 35,§12830.]

Similar provision, §10951

12831 Process. The court may issue all writs and processes necessary for the exercise and enforcement of its appellate jurisdiction. [C51,§1558; R60,§2635; C73,§3172; C97,§4109; C24, 27, 31, 35,§12831.]

12832 Time for appealing. Appeals from the district, superior, and municipal courts may be taken to the supreme court at any time within four months except as hereafter provided from the date of the entry of record of the judgment or order appealed from, and not afterwards; but, when a motion for new trial, or in arrest of judgment, or for judgment notwithstanding the verdict has been filed, such time for appeal shall be automatically extended so as to permit the same at any time within sixty days after the entry of the ruling upon such motion. [C51, §1973; R60,§3507; C73,§3173; C97,§4110; C24, 27, 31, 35,§12832.]

12832.1 Time for appealing in re constitutional test. If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, notice of appeal may be taken within three days from and after the entry of the decree in district court, and not afterwards. [C31, 35,§12832-d1.]

12833 Amount in controversy. No appeal shall be taken in any cause in which the amount in controversy between the parties as shown by the pleadings does not exceed one hundred dollars, unless the trial judge shall, during the term in which judgment or order is entered, certify that the cause is one in which the appeal should be allowed. Upon such certificate being filed the same shall be appealable regardless of the amount in controversy. Said limitation shall not affect the right of appeal in any action in which an interest in real estate is involved, nor shall the right of appeal be affected by the remission of any part of the verdict or judgment returned or rendered. [C73,§3173; C97,§4110; C24, 27, 31, 35,§12833.]

12834 Appeal by coparties. A part of several coparties may appeal, but in such case they must serve notice of such appeal upon those not joining therein, and file proof thereof with the clerk of the court from which the appeal is taken. [C51,§1979; R60,§3517; C73,§3174; C97, §4111; C24, 27, 31, 35,§12834.]

12835 Coparties not joining. Coparties, refusing to join in an appeal, cannot afterwards appeal, or derive any benefit therefrom, unless from the necessity of the case, but they shall be held to have joined, and be liable for their proportion of the costs, unless they appear and object thereto. [C51,§§1980, 1981; R60,§§3518, 3519; C73,§§3175, 3176; C97,§4112; C24, 27, 31, 35,§12835.]

12836 Appeal from part of judgment or order—effect. An appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, shall not disturb, delay, or affect the rights of any party to any judgment or order, or part of a judgment or order, not appealed from. [R60,§3510; C73,§3177; C97,§4113; C24, 27, 31, 35,§12836.]

12837 Notice of appeal—service. An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and by filing said notice with return of service indorsed thereon or attached thereto with the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part. [C51,§1974; R60,§3509; C73, §3178; C97,§4114; S13,§4114; C24, 27, 31, 35, §12837.]

S13,§4114, editorially divided

12838 Service fixed by court or judge. When such service cannot be made the trial court or judge on application shall direct what notice shall be sufficient. [S13,§4114; C24, 27, 31, 35, §12838.]

12839 Appeal prior to judgment entry—effect. Notice of appeal shall not be held insufficient because served before the clerk of the trial court has spread the judgment entry upon the court record if it shall appear that such entry has been made in proper form before the appellant's abstract was filed in the office of the clerk of the supreme court. [S13,§4114; C24, 27, 31, 35,§12839.]

12840 Service and filing with trial clerk. A notice of appeal shall be served and return made thereon in the same manner as an original notice in a civil action. [R60,§3523; C73,§3214; C97,§4115; C24, 27, 31, 35,§12840.]

Referred to in §12842
40ExGA, HF 246, §5, editorially divided

12841 Service and filing with appellate clerk. All other notices connected with or growing out of the appeal shall be served and the return made in like manner, and filed in the office of the clerk of the supreme court. [R60, §3523; C73,§3214; C97,§4115; C24, 27, 31, 35, §12841.]

Referred to in §12842

12842 Filed notices part of record. All notices provided for in sections 12840 and 12841 become a part of the record in the case on being filed. [C97,§4115; C24, 27, 31, 35,§12842.]

12843 Docketing—assignment for each day. The clerk shall docket the causes as they are filed in his office and shall, under order of the chief justice, arrange and set a proper number for trial for each day of the term, placing together as far as practicable those from the same judicial district, and shall cause notice thereof to be published and distributed as the court may direct. [R60,§3535; C73,§3203; C97,§4117; C24, 27, 31, 35,§12843.]

12844 Payment of fees. No case shall be docketed until the fees provided by law therefor have been paid. [C97,§4121; C24, 27, 31, 35, §12844.]

12845 Abstracts. Printed abstracts of the record shall be filed by the appellant in the office of the clerk of the supreme court. [C97,§4118; C24, 27, 31, 35,§12845.]

12845.1 Presumption. Abstracts shall be presumed to contain the record, unless denied or corrected by subsequent abstracts. [C97,§4118; C24,§12845; C27, 31, 35,§12845-b1.]

12845.2 Denials — additional abstracts — transcripts. Denials of abstracts, additional abstracts and transcripts may also be filed. [R60, §§3514, 3515; C73,§§3181, 3182; C97,§4120; C24, §12848; C27, 31, 35,§12845-b2.]

12846 Unnecessary abstract or denial. If any denial or abstract is filed without good and sufficient cause, the costs of the same or any part thereof, and of any transcript thereby made necessary, shall be taxed to the party causing the same. [C97,§4118; C24, 27, 31, 35,§12846.]

12847 Time of filing. An abstract must be filed within one hundred twenty days except as hereafter provided after the appeal is taken and perfected unless further time is given before the expiration of said time by the supreme court or a judge thereof for good cause shown. [C97, §4119; C24, 27, 31, 35,§12847.]

See supreme court rule 14-a1
44GA, ch 223, §8, editorially divided

12847.1 Filing in re action to test constitutionality. If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, an abstract of record shall be filed within five days after the service of notice of appeal, unless additional time, not to exceed three days, be granted by the chief justice. [C31, 35,§12847-d1.]

12848 Dismissal or affirmance. If the abstract is not filed within one hundred twenty days after the appeal is taken and perfected or is not filed within the further time as fixed by the court or judge, the appellee may file an abstract of such matters of record as are necessary, or may file a copy of the final judgment or order appealed from, or other matters required, certified to by the clerk of the trial court, and cause the case to be docketed, and the appeal upon motion shall be dismissed, or the judgment or order affirmed. [R60,§§3514, 3515; C73, §§3181, 3182; C97,§4120; C24, 27, 31, 35,§12848.]

See supreme court rule 14-a1

12848.1 Early trial term. If the abstract is filed forty days before the convening of the first term which follows the taking and perfecting of the appeal, the cause shall be placed on the calendar for said first term, and shall come on for hearing; unless otherwise ordered by the court. [C97,§4119; C24,§12847; C27, 31, 35, §12848-b1.]

12849 Certification of record optional with party. Any party may cause a certified copy

of the record in the lower court or any part of the same to be filed in the office of the clerk of the supreme court for its consideration. [C97, §4122; C24, 27, 31, 35,§12849.]

40ExGA, HF 246, §9, editorially divided

12850 Certification on order of court. Upon application to the supreme court or any judge thereof, the clerk of the court from which appeal is taken may be ordered to file such certified copy. [C97,§4122; C24, 27, 31, 35,§12850.]

12850.1 Shorthand reporter's transcript — filing. The shorthand reporter's translation of his report of a trial, duly certified by said reporter as correct, and from which an abstract, or an amendment to the abstract, has been prepared and served on appeal, shall be filed with the clerk of the district court immediately after said abstract or amendment is served on the opposite party, and be deemed a public record for the use of all parties to the appeal. [C35, §12850-g1.]

12851 Transcript of evidence—certification and return. The original transcript of evidence may be sent up, but shall be returned to the clerk of the proper county after the cause has been determined by the supreme court. [C51, §§1975, 1976; R60,§3511; C73,§3179; C97,§4122; C24, 27, 31, 35,§12851.]

12852 What sent up. When certification of the record is required, the designated papers, notices, shorthand reporter's translation of his report, depositions, exhibits identified as evidence, notices of appeal with return or acceptance of service thereon, and any other paper filed in the case, or any part thereof, may be transmitted to the supreme court in the original form, or by a transcript of the same, but all entries of record must be by transcript. [C51, §1977; R60,§3512; C73,§3184; C97,§4123; C24, 27, 31, 35,§12852.]

C97,§4123, editorially divided

12853 Certification by clerk. The clerk of the trial court shall verify his return, whether it be of the record or transcription thereof, by his certificate, under seal, distinguishing between originals and transcripts, and such certification so made shall constitute a part of the record in the supreme court. [C51,§1977; R60, §3512; C73,§3184; C97,§4123; C24, 27, 31, 35, §12853.]

12854 Original papers—production. Where a view of an original paper or exhibit in the action may be important to a correct decision of the appeal, the court or any judge thereof may order the clerk of the court below to transmit the same, which he shall do in the manner provided for the transmission of certifications of the record. [R60,§3525; C73,§3209; C97,§4124; C24, 27, 31, 35,§12854.]

12855 Transmission. The transcript of any paper or exhibit required for use in the supreme court may be transmitted thereto by the clerk of the trial court by express or other safe and speedy method, but not by a party or any attorney of a party. [C51,§§1975, 1976; R60,§3511; C73,§3179; C97,§4125; C24, 27, 31, 35,§12855.]

12856 Return of original papers. If a new trial is granted by the supreme court, the clerk, as soon as the cause is at an end therein, shall transmit to the clerk of the court below all original papers or exhibits certified up from said court, and may at any time return any such papers when no new trial is awarded. [C97,§4126; C24, 27, 31, 35,§12856.]

12857 Perfecting record. The lower court, the supreme court, or a judge of either court, may make any necessary orders to secure a perfect record or transcript thereof, upon a showing by affidavit or otherwise, and upon such notice as it or he may prescribe. [R60,§3524; C73,§3185; C97,§4127; C24, 27, 31, 35,§12857.]

12858 Stay of proceedings — supersedeas bond. No proceedings under a judgment or order, or any part thereof, shall be stayed by an appeal, unless the appellant executes a bond with one or more sureties, to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal; and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. [C51,§1983; R60, §§3527, 3528; C73,§3186; C97,§4128; C24, 27, 31, 35,§12858.]

Referred to in §5021.03
C97,§4128, editorially divided
Presumption as to approval, §12759.1

12859 Partial stay. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. [R60,§3528; C73,§3186; C97,§4128; C24, 27, 31, 35,§12859.]

12860 Order to stay. When thus filed and approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby. [R60,§3528; C73,§3186; C97,§4128; C24, 27, 31, 35,§12860.]

12861 Effect of stay. No appeal or stay shall vacate or affect such judgment or order. [C73, §3186; C97,§4128; C24, 27, 31, 35,§12861.]

12862 Execution on unstayed part of judgment. The taking of the appeal from part of a judgment or order, and the filing of a bond as above directed, does not stay execution as to that part of the judgment or order not appealed from. [C51,§1985; R60,§3532; C73, §3191; C97,§4129; C24, 27, 31, 35,§12862.]

12863 Execution recalled. If execution has issued prior to the filing of the bond, the clerk shall countermand the same. [C51,§1987; R60, §3533; C73,§3192; C97,§4130; C24, 27, 31, 35, §12863.]

12864 Surrender of property. Property levied upon and not sold at the time such countermand is received by the sheriff shall be at once delivered to the judgment debtor. [C51, §1988; R60,§3534; C73,§3193; C97,§4131; C24, 27, 31, 35,§12864.]

12865 Refusal to approve bond. If a party has perfected his appeal, and the clerk of the lower court refuses for any reason to approve the bond, or requires an excessive penalty, or unjust or improper conditions, he may apply to the district court or judge thereof, who shall fix the amount and conditions of the bond and approve the same. Pending the application, the judge may, by a written order, recall and stay all proceedings under the order or judgment appealed from until the decision of the application. The bond thus approved shall be filed with the clerk, who shall issue a written order to stay proceedings. [C73,§3187; C97,§4132; C24, 27, 31, 35,§12865.]

12866 Insufficient security—new bond. The appellee may move the court rendering the judgment or making the order appealed from, or the supreme court, or a judge of either court, if in vacation, upon ten days notice in writing to appellant, to discharge the bond on account of defect in substance or insufficiency in security, which motion if well taken shall be sustained, unless appellant shall, within a day to be fixed in the order made and filed therein, give a new and sufficient bond as required by said order. If the new bond is not given, proceedings shall be had in the lower court as though no bond had been given, but a new and sufficient bond may be given at any time with like effect and results as though given in the first instance. [R60,§§3529, 3530; C73,§§3188, 3189; C97,§4133; C24, 27, 31, 35,§12866.]

12867 Penalty of bond. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars. [C51, §1984; R60,§3531; C73,§3190; C97,§4134; S13, §4134; C24, 27, 31, 35,§12867.]

12868 Bond for costs. The appellant may be required to give security for costs under the same circumstances and upon the same showing as plaintiffs in civil actions in the inferior court may be. [R60,§3526; C73,§3210; C97,§4135; C24, 27, 31, 35,§12868.]

Cost bond, §10527 et seq.; also ch 493

12869 Assignment of errors. No assignment of errors shall be required in any case at law or in equity docketed in the supreme court. [C97, §4136; S13,§4136; C24, 27, 31, 35,§12869.]

See supreme court rule 30

12870 Motion book. All motions must be in writing and entered upon the motion book, and be heard upon such notice and argument, if any, as the court by rule may prescribe, but no motion shall be submitted without being publicly called by the court, unless the parties otherwise agree. [R60,§3547; C73,§3208; C97, §4138; C24, 27, 31, 35,§12870.]

12871 Arguments — submission — decision. The parties to an appeal may be heard orally and in writing, subject to such rules as the court may prescribe; and all causes docketed, not continued by consent or upon cause shown, shall be submitted in the order assigned, unless otherwise directed by the court or the judges thereof. The court may reverse, modify, or affirm the judgment, decree, or order appealed from, or render such as the inferior court should have done. No cause is decided until the written decision is filed with the clerk. [C51,§1989; R60,§§3536, 3548, 3550; C73,§§3194, 3204, 3205; C97,§4139; S13,§4139; C24, 27, 31. 35,§12871.]

Similar provisions, §§14010, 14015

12871.1 Arguments in re constitutional test. If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, the appellant shall file a written argument within ten days after the filing of the abstract and appellee shall file his argument within ten days thereafter, and appellant shall then file his reply within three days. The cause shall then be submitted to the supreme court in regular or special full bench session as soon thereafter as the chief justice may order. [C31, 35,§12871-d1.]

12872 Judgment against sureties on bond. The supreme court, if it affirms the judgment, shall also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment, damages, and costs referred to therein in case such damages can be accurately known to the court without an issue and trial. [C51,§1986; R60,§3537; C73,§3195; C97, §4140; C24, 27, 31, 35,§12872.]

12873 Damages for delay. Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or part has been stayed by an appeal bond, the court may award to the appellee damages upon the amount so stayed; and, if satisfied by the record that the appeal was taken for delay only may award as damages a sum not exceeding fifteen percent thereon. [C51,§1990; R60,§3538; C73,§3196; C97,§4141; C24, 27, 31, 35,§12873.]

Similar provision, §10603

12874 Costs taxed. The supreme court must provide by rule for taxing as costs all printing authorized upon the trial of appeals. The court shall also tax the costs of any translation of the shorthand notes filed as provided in this chapter,

and also any translation of the shorthand notes which has been made of record in the court below, upon the certificate of the clerk of such court as to the amount of such costs. [C97, §4142; S13,§4142; C24, 27, 31, 35,§12874.]

12875 Remand — process. If the supreme court affirms the judgment or order, it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require. [C51,§1991; R60,§3539; C73,§3197; C97,§4143; C24, 27, 31, 35,§12875.]

12876 Decision certified. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court. [R60,§3551; C73,§3206; C97,§4144; C24, 27, 31, 35,§12876.]

12877 Restitution of property. If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to him such property or its value. [C51,§1992; R60,§3540; C73,§3198; C97, §4145; C24, 27, 31, 35,§12877.]

12878 Title not affected. Property acquired by a purchaser in good faith under a judgment subsequently reversed shall not be affected thereby. [C51,§1993; R60,§3541; C73,§3199; C97,§4146; C24, 27, 31, 35,§12878.]

12879 Mandates enforced. The supreme court may enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until obeyed. [R60,§3542; C73,§3200; C97,§4147; C24, 27, 31, 35,§12879.]

12880 Petition for rehearing. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing. [R60,§3543; C73,§3201; C97,§4148; C24, 27, 31, 35,§12880.]

12881 Rehearing — notice. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe. [R60,§3544; C73,§3202; C97,§4149; C24, 27, 31, 35,§12881.]

12882 Petition for rehearing — service — time of filing. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed. [C97,§4149; C24, 27, 31, 35,§12882.]

12883 Petition may constitute brief and argument. The petition may be made the argument or a brief of authorities relied upon for rehearing. The adverse party may file a printed argument in response. If the party applying for a rehearing shall give notice of oral argument in his petition, then both parties shall be entitled to be heard orally, unless the party giving notice waives argument. [R60,§3544; C73,§3202; C97, §4149; C24, 27, 31, 35,§12883.]

12884 Death of party — continuance. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice. [R60,§3520; C73,§3211; C97,§4150; C24, 27, 31, 35,§12884.]

12885 Objection to jurisdiction. All objections to the jurisdiction of the court to entertain an appeal must be made in written form stating specifically the ground thereof and served upon the appellant or his attorney of record not less than ten days before the date assigned for the submission of the cause. [S13, §4139; C24, 27, 31, 35,§12885.]

12886 Dismissal of appeal. Where appellant has no right, or no further right, to prosecute the appeal, the appellee may move to dismiss it, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit. [R60, §3521; C73,§3212; C97,§4151; C24, 27, 31, 35, §12886.]

12887 Proceedings on motion to dismiss. The appellee may, by answer or abstract filed and verified by himself, agent, or attorney, plead any facts which render the taking of the appeal improper or destroy the appellant's right of further prosecuting the same, to which the appellant may file a reply or abstract likewise verified by himself, his agent, or attorney, and the question of law or fact therein shall be determined by the court upon such evidence and in such form as it may prescribe. [R60,§3522; C73,§3213; C97,§4152; C24, 27, 31, 35,§12887.]

12888 Executions. Executions issued from the supreme court shall be like those from the district court, attended with the same consequences, and returnable in the same time. [R60, §3552; C73,§3215; C97,§4153; C24, 27, 31, 35, §12888.]

Executions generally, ch 498

TITLE XXXV

CRIMINAL LAW

CHAPTER 556

PUBLIC OFFENSES

12889 Classification.
12890 "Felony" defined.
12890.1 Felonies by females.
12891 "Misdemeanor" defined.
12892 Manner of punishment.
12893 Prohibited acts—misdemeanors.
12894 Punishment for misdemeanors.

12889 Classification. Public offenses are divided into:

1. Felonies.
2. Misdemeanors. [C51,§2816; R60,§4428; C73,§4103; C97,§5092; C24, 27, 31, 35,§12889.]

12890 "Felony" defined. A felony is a public offense which may be punished with death, or which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary or men's reformatory. [C51,§2817; R60,§4429; C73,§4104; C97,§5093; C24, 27, 31, 35,§12890.]

Referred to in §12890.1

12890.1 Felonies by females. Prostitution and resorting to houses of ill fame for the purpose of prostitution shall be deemed felonies, and also all other public offenses committed by females if the offense, under section 12890, constitutes a felony when committed by a male. [C31, 35,§12890-d1.]

12891 "Misdemeanor" defined. Every other public offense is a misdemeanor. [C51,§2818; R60,§4430; C73,§4105; C97,§5094; C24, 27, 31, 35,§12891.]

12892 Manner of punishment. No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof. [C51,§2819; R60,§4431; C73,§4106; C97,§5095; C24, 27, 31, 35,§12892.]

12893 Prohibited acts—misdemeanors. When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor. [C51,§2675; R60,§4302; C73,§3966; C97,§4905; C24, 27, 31, 35,§12893.]

12894 Punishment for misdemeanors. Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. [C51,§2676; R60,§4303; C73,§3967; C97,§4906; C24, 27, 31, 35,§12894.]

Referred to in §1921.098

CHAPTER 557

PRINCIPALS AND ACCESSORIES

12895 Distinction between principal and accessory.
12896 Accessory after the fact.

12895 Distinction between principal and accessory. The distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried, and punished as principals. [C51,§2928; R60,§4668; C73,§4314; C97,§5299; C24, 27, 31, 35,§12895.]

Corroboration of accomplice, §13901

12896 Accessory after the fact. An accessory after the fact to the commission of a public offense may be indicted, tried, and punished, though the principal be neither tried nor convicted. [C51,§2929; R60,§4669; C73,§4315; C97,§5300; C24, 27, 31, 35,§12896.]

CHAPTER 558

TREASON AND OFFENSES AGAINST THE GOVERNMENT

12897 Treason.
12898 Evidence necessary.
12899 Misprision of treason.
12900 Inciting insurrection.
12901 Inciting treason—display of red flag.
12902 Presumptive evidence.
12903 Aggravated offense.
12904 Inciting hostilities.
12905 Organizations for inciting hostilities.
12906 Criminal syndicalism.
12907 Advocating criminal syndicalism.
12908 Assemblages for promoting.
12909 Use of buildings—punishment of owner or custodian.

12897 Treason. Whoever, within the jurisdiction of the state, levies war against it or adheres to its enemies, giving them aid and comfort, is guilty of treason, and shall be punished by imprisonment in the penitentiary at hard labor for life. [C51,§2565; R60,§4188; C73, §3845; C97,§4724; C24, 27, 31, 35,§12897.]

12898 Evidence necessary. No person can be convicted of the crime of treason except upon the evidence of at least two witnesses to the same overt act, or on confession in open court. [C51,§2567; R60,§4190; C73,§3847; C97,§4726; C24, 27, 31, 35,§12898.]

12899 Misprision of treason. If any person have knowledge of the commission of said crime of treason, and does not as soon as may be disclose such offense to the governor or some judge within the state, he is guilty of misprision of treason, and shall be fined not exceeding one thousand dollars, or be imprisoned in the penitentiary not exceeding three years nor less than one year. [C51,§2566; R60,§4189; C73,§3846; C97,§4725; C24, 27, 31, 35,§12899.]

12900 Inciting insurrection. If any person shall excite an insurrection or sedition amongst any portion or class of the population of this state, or shall attempt by writing, speaking, or by any other means to excite such insurrection or sedition, the person or persons so offending shall be punished by imprisonment in the state penitentiary not exceeding twenty years and shall be fined not less than one thousand nor more than ten thousand dollars. [C24, 27, 31, 35,§12900.]

12901 Inciting treason—display of red flag. Any person who displays, carries, or exhibits any red flag, or other flag, pennant, banner, ensign, or insignia, or who aids, encourages, or advises such display, carriage, or exhibition, with the intent thereby to himself, or to induce others, to advocate, encourage, or incite anarchy or treason or hostility to the government of the United States or of the state of Iowa, or to insult or disregard the flag of the United States, shall be guilty of a misdemeanor and upon conviction shall be fined not to exceed one thousand dollars, or be imprisoned not to exceed six months, or both. [C24, 27, 31, 35,§12901.]

Referred to in §§12902, 12908

12902 Presumptive evidence. In all prosecutions for violation of section 12901, the display, carriage, or exhibition of such red flag, pennant, banner, ensign, or insignia in processions, parades, meetings, or assemblages, shall be presumptive evidence that the same was so displayed, carried, or exhibited with the intent thereby to advocate, teach, encourage, or incite anarchy or treason or hostility to the government of the United States or the state of Iowa, or with intent to insult or disregard the flag of the United States. [C24, 27, 31, 35,§12902.]

12903 Aggravated offense. If any person so violate the provisions of section 12901, and be then and there armed with a dangerous weapon, he shall be guilty of a felony and upon conviction shall be imprisoned not to exceed five years. [C24, 27, 31, 35,§12903.]

12904 Inciting hostilities. Any person who shall in public or private, by speech, writing, printing, or by any other mode or means advocate the subversion and destruction by force of the government of the state of Iowa or of the United States, or attempt by speech, writing, printing, or in any other way whatsoever to incite or abet, promote or encourage hostility or opposition to the government of the state of Iowa or of the United States, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the county jail not less than six months nor more than one year and shall be fined not less than three hundred nor more than one thousand dollars. [C24, 27, 31, 35,§12904.]

12905 Organizations for inciting hostilities. Any person who shall become a member of any organization, society, or order organized or formed, or attend any meeting or council or solicit others so to do, for the purpose of inciting, abetting, promoting, or encouraging hostility or opposition to the government of the state of Iowa or to the United States, or who shall in any manner aid, abet, or encourage any such organization, society, order, or meeting in the propagation or advocacy of such a purpose, shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail not less than six months nor more than one year and shall be fined not less than three hundred nor more than one thousand dollars. [C24, 27, 31, 35,§12905.]

12906 Criminal syndicalism. Criminal syndicalism is the doctrine which advocates crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony punishable as provided in sections

12907 to 12909, inclusive. [C24, 27, 31, 35, §12906.]

Referred to in §12908

12907 Advocating criminal syndicalism. Any person who:

1. By word of mouth or writing, advocates or teaches the duty, necessity, or propriety of crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform; or

2. Prints, publishes, edits, issues, or knowingly circulates, sells, distributes, or publicly displays any book, paper, document, or written matter in any form, containing or advocating, advising, or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or other unlawful methods of terrorism; or

3. Openly, willfully and deliberately justifies, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or other unlawful methods of terrorism with intent to exemplify, spread, or advocate the propriety of the doctrines of criminal syndicalism; or

4. Organizes or helps to organize, or becomes a member of or voluntarily assembles with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism—

is guilty of a felony and punishable by imprisonment in the state penitentiary or reformatory for not more than ten years, or by a fine of not more than five thousand dollars, or both. [C24, 27, 31, 35,§12907.]

Referred to in §§12906, 12908

12908 Assemblages for promoting. Whenever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal syndicalism as defined in sections 12906 and 12907, such an assemblage is unlawful and every person voluntarily participating therein by his aid or instigation is guilty of a felony and punishable by imprisonment in the state penitentiary or reformatory for not more than ten years or by a fine of not more than five thousand dollars or both. [C24, 27, 31, 35, §12908.]

Referred to in §§12906, 12909

12909 Use of buildings — punishment of owner or custodian. The owner, agent, superintendent, janitor, caretaker, or occupant of any place, building, or room, who willfully and knowingly permits therein any assemblage of persons prohibited by the provisions of section 12908, or who, after notification by the sheriff of the county or the police authorities that the premises are so used, permits such use to be continued, is guilty of a misdemeanor and punishable by imprisonment in the county jail for not more than one year or by a fine of not more than five hundred dollars or both. [C24, 27, 31, 35,§12909.]

Referred to in §12906

CHAPTER 559

HOMICIDE

12910 Murder.
12911 First degree murder.
12912 Second degree murder.
12913 Degree determined.
12914 Fixing punishment in first degree murder.
12915 Assault with intent to murder.
12916 Assault while masked.
12917 Advising or inciting murder.
12918 Poisoning food or drink with intent to kill.
12919 Manslaughter.
12920 Death from intoxicating liquors.

12910 Murder. Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. [C51,§2568; R60,§4191; C73,§3848; C97,§4727; C24, 27, 31, 35,§12910.]

12911 First degree murder. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder in the first degree, and shall be punished with death, or imprisonment for life at hard labor in the penitentiary, as determined by the jury, or by the court if the defendant pleads guilty. [C51,§2569; R60,§4192; C73,§3849; C97, §4728; C24, 27, 31, 35,§12911.]

Referred to in §12912

12912 Second degree murder. Whoever commits murder otherwise than as set forth in section 12911 is guilty of murder in the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term of not less than ten years. [C51,§2570; R60,§4193; C73, §3850; C97,§4729; C24, 27, 31, 35,§12912.]

12913 Degree determined. Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty, must inquire, and by its verdict ascertain and determine the degree; but if the defendant is convicted upon a plea of guilty, the court must, by the examination of witnesses, determine the degree, and in either case must enter judgment and pass sentence accordingly. [C51,§2571; R60,§4194; C73,§3851; C97,§4730; C24, 27, 31, 35,§12913.]

12914 Fixing punishment in first degree murder. Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty of murder in the first degree, must direct in its verdict whether the punishment shall be death or imprisonment for life at hard labor in the penitentiary, but if the defendant pleads guilty the court shall so direct, and in either case must enter judgment and pass sentence accordingly. [C97,§4731; C24, 27, 31, 35,§12914.]

12915 Assault with intent to murder. If any person assault another with intent to commit murder, he shall be imprisoned in the penitentiary not exceeding thirty years. [C51, §2591; R60,§4214; C73,§3872; C97,§4768; S13, §4768; C24, 27, 31, 35,§12915.]

12916 Assault while masked. Any person within this state, masked or in disguise, who shall assault another with a dangerous weapon shall be deemed guilty of assault with intent to commit murder and shall be punished by imprisonment in the penitentiary for a term not to exceed twenty years. [C24, 27, 31, 35, §12916.]

12917 Advising or inciting murder. Whoever shall within this state advise, counsel, encourage, advocate, or incite the unlawful killing within or without the state of any human being where no such killing takes place, shall be punished by imprisonment in the state penitentiary for not more than twenty years. [S13, §4750-a; C24, 27, 31, 35,§12917.]

12918 Poisoning food or drink with intent to kill. If any person mingle any poison with any food, drink, or medicine, with intent to kill or injure any human being, or willfully poison any spring, well, cistern, or reservoir of water, he shall be imprisoned in the penitentiary not exceeding ten years, and be fined not exceeding one thousand dollars. [C51,§2596; R60,§4219; C73,§3877; C97,§4773; C24, 27, 31, 35,§12918.]

12919 Manslaughter. Any person guilty of the crime of manslaughter shall be imprisoned in the penitentiary not exceeding eight years, and fined not exceeding one thousand dollars. [C51,§2576; R60,§4199; C73,§3856; C97,§4751; C24, 27, 31, 35,§12919.]

12920 Death from intoxicating liquors. Any person who sells, gives away, or otherwise furnishes intoxicating liquor contrary to law which causes the death of a human being is guilty of manslaughter and punishable accordingly. [C24, 27, 31, 35,§12920.]

Related provision, §13240

CHAPTER 560

SELF-DEFENSE

12921 Lawful resistance in self-defense.
12922 Cases in which permitted.
12923 Persons aiding another.

12921 Lawful resistance in self-defense. Lawful resistance to the commission of a public offense may be made by the party about to be injured, or by others. [C51,§2773; R60, §4442; C73,§4112; C97,§5102; C24, 27, 31, 35, §12921.]

12922 Cases in which permitted. Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person.

2. To prevent an illegal attempt by force to take or injure property in his lawful possession. [C51,§2774; R60,§4443; C73,§4113; C97,§5103; C24, 27, 31, 35,§12922.]

12923 Persons aiding another. Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the same. [C51,§2775; R60,§4444; C73, §4114; C97,§5104; C24, 27, 31, 35,§12923.]

CHAPTER 561

DUELING

12924 Killing in duel.
12925 Fighting duel—seconds—challenges.
12926 Accepting challenge—consenting to assist.
12927 Taunting for not accepting.

12924 Killing in duel. Whoever fights a duel with deadly weapons, and inflicts a mortal wound on his antagonist, is guilty of murder in the first degree, and shall be punished accordingly. [C51,§2572; R60,§4195; C73,§3852; C97,§4747; C24, 27, 31, 35,§12924.]

Penalty, §12911

12925 Fighting duel—seconds—challenges. Any person who fights a duel with deadly weapons, or is present thereat as aid, second, or surgeon, or advises, encourages, or promotes the same, although no homicide ensue; and any person who challenges another to fight a duel, or sends or delivers any verbal or written message purporting or intended to be such challenge, although no duel ensue, shall be fined in a sum not exceeding one thousand nor less than four hundred dollars, and imprisoned in the penitentiary not more than three nor less than one year. [C51,§2573; R60,§4196; C73, §3853; C97,§4748; C24, 27, 31, 35,§12925.]

Referred to in §12926

12926 Accepting challenge—consenting to assist. Any person who accepts such challenge, or who consents to act as a second, aid, or surgeon on such acceptance, or who advises, encourages, or promotes the same, although no duel ensue, shall be punished as prescribed in section 12925. [C51,§2574; R60,§4197; C73, §3854; C97,§4749; C24, 27, 31, 35,§12926.]

12927 Taunting for not accepting. If any person post another, or in writing or print use any reproachful or contemptuous language to or concerning another, for not fighting a duel, or for not sending or accepting a challenge, he shall be fined not exceeding three hundred nor less than one hundred dollars, and shall be imprisoned in the county jail not more than six nor less than two months. [C51,§2575; R60, §4198; C73,§3855; C97,§4750; C24, 27, 31, 35, §12927.]

CHAPTER 562

MAYHEM

12928 Maiming or disfiguring.

12928 Maiming or disfiguring. If any person, with intent to maim or disfigure, cut or maim the tongue; cut out or destroy an eye; cut, slit, or tear off an ear; cut, bite, slit, or multilate the nose or lip; cut off or disable a limb or any member of another person, he shall be imprisoned in the penitentiary not more than five years, and fined not exceeding one thousand nor less than one hundred dollars. [C51,§2577; R60,§4200; C73,§3857; C97,§4752; C24, 27, 31, 35,§12928.]

CHAPTER 563

ASSAULTS

12929 Assault and battery.
12930 Pointing gun at another.
12931 Intimidation while masked.
12932 Assault while masked.
12933 Assault with intent to commit a felony.
12934 Assault with intent to inflict bodily injury.
12935 Assault with intent to commit certain crimes.

12929 Assault and battery. Whoever is convicted of an assault, or an assault and battery, where no other punishment is prescribed, shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [C51,§2597; R60,§4220; C73, §3878; C97,§4774; C24, 27, 31, 35,§12929.]

12930 Pointing gun at another. If any person shall willfully draw or point a pistol, revolver, or gun at another, he shall be guilty of a misdemeanor, and be fined not more than one hundred dollars or imprisoned in the county jail not more than thirty days; but this section shall not apply to police officers or other persons whose duty it is to execute process or warrants, or make arrests. [C73,§3879; C97,§4775; C24, 27, 31, 35,§12930.]

12931 Intimidation while masked. Any person, masked or in disguise, who shall prowl, travel, ride, or walk within this state to the disturbance of the peace or to the intimidation of any person, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail of the county for not less than thirty days nor more than six months, or by both such fine and imprisonment. [C24, 27, 31, 35,§12931.]

12932 Assault while masked. Any person, masked or in disguise, who shall enter upon the premises of another or demand admission into the house or inclosure of another with intent to inflict bodily injury or injury to property, shall be deemed guilty of assault with intent to commit a felony and such entrance or demand for admission shall be prima facie evidence of such intent and, upon conviction thereof, such person shall be punished by imprisonment in the penitentiary for a term of not more than ten years. [C24, 27, 31, 35,§12932.]

12933 Assault with intent to commit a felony. If any person assault another with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year. [C51,§2595; R60,§4218; C73,§3876; C97,§4772; C24, 27, 31, 35,§12933.]

12934 Assault with intent to inflict bodily injury. If any person assault another with intent to inflict a great bodily injury, he shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding five hundred dollars, or be imprisoned in the penitentiary not exceeding one year. [C51,§2594; R60,§4217; C73,§3875; C97,§4771; S13,§4771; C24, 27, 31, 35, §12934.]

12935 Assault with intent to commit certain crimes. If any person assault another with intent to maim, rob, steal, or commit arson or burglary, he shall be imprisoned in the penitentiary not exceeding five years, or be fined not exceeding one thousand dollars, or both so fined and imprisoned, at the discretion of the court. [C51,§2593; R60,§4216; C73,§3874; C97,§4770; C24, 27, 31, 35,§12935.]

CHAPTER 564

WEAPONS, FIREARMS, AND TOY PISTOLS

12935.1 Going armed with intent.
12936 Carrying concealed weapons.
12937 Punishment.
12938 Permit to carry concealed weapon.
12939 Application.
12940 Form of application.
12941 Issuance of permit.
12941.1 Nonresidents.
12941.2 Issuance by commissioner.
12942 Name of holder—transferability.
12943 Authority granted by permit.
12944 General permits for certain companies.
12945 Duration of permit.
12946 Expiration of term of office—revocation.
12947 Duty to carry permit.
12948 Record of permits issued.
12949 Prima facie evidence of violation.
12950 Sale of dangerous weapons prohibited.
12951 Dealer's permit to sell.
12952 Record of permits to sell.
12953 Report and record of sales.
12954 Failure to make report.
12955 Purchasing under fictitious name.
12956 Wholesale dealers and jobbers excepted.
12957 Display of weapons prohibited.
12958 Selling firearms to minors.
12959 Sale of toy pistols and giant firecrackers.
12960 Punishment.

12935.1 Going armed with intent. Any person who with intent to use the same unlawfully against the person of another goes armed with a pistol, revolver, or other firearm, dagger, dirk, razor, stiletto, or knife having a blade of three inches in length or other dangerous or deadly instrument shall be guilty of a felony and on the conviction thereof shall be punished by a fine not to exceed one thousand dollars or imprisonment in the state prison for not more than five years, or by both such fine and imprisonment, in the discretion of the court. [C35,§12935-g1.]

12936 Carrying concealed weapons. It shall be unlawful for any person, except as hereinafter provided, to go armed with or carry a dirk, dagger, sword, pistol, revolver, stiletto, metallic knuckles, pocket billy, sandbag, skull cracker, slug shot or other offensive or dangerous weapon, except hunting knives adapted and carried as such, concealed either on or about his person, except in his own dwelling house or place of business or other land possessed by him. No person shall carry a pistol or revolver concealed on or about his person or whether concealed or otherwise in any vehicle operated by him, except in his dwelling house or place of business or on other land possessed by him, without a license therefor as herein provided. [S13,§4775-1a; C24, 27, 31, 35,§12936; 48GA, ch 248,§1.]

Referred to in §12937

12937 Punishment. Any person who shall violate any of the provisions of section 12936 shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison not more than five years, or by both such fine and imprisonment in the discretion of the court, and in addition thereto may be required to enter into a recognizance with sufficient surety in such sum as the court may order, not exceeding one thousand dollars, to keep the peace and be of good behavior for a period not exceeding one year, provided that in case of the first offense the court may in its discretion reduce the punishment to imprisonment in the county jail of a term not more than three months, or a fine of not more than one hundred dollars. [S13,§4775-11a; C24, 27, 31, 35,§12937.]

12938 Permit to carry concealed weapon. The sheriff of any county may issue a permit to a resident of his county only, limited to the time which shall be designated therein, to carry concealed or otherwise, a revolver, pistol, or pocket billy. [S13,§4775-3a; C24, 27, 31, 35,§12938.]

40ExGA, SF 247, §2, editorially divided

12939 Application. Before any permit to go armed with a revolver, pistol, or pocket billy is granted, an application therefor shall be filed with the sheriff. Permits may be issued only on personal application therefor, except that:

1. Chiefs of police may make application for permits for members of their respective departments.

2. Owners, managing officers, or superintendents of banks, trust companies, mining, transportation, manufacturing, and mercantile companies or establishments may make such application for and in behalf of their employees. [S13,§§4775-4a,-7a; C24, 27, 31, 35,§12939.]

Referred to in §12955
40ExGA, SF 247, §5, editorially divided

12940 Form of application. The application shall be in writing and state the full name, residence, age, place and nature of the employment or business of the person to whom it is proposed to grant the permit. The application shall be signed by the person making application. [S13, §4775-7a; C24, 27, 31, 35,§12940.]

Referred to in §12955

12941 Issuance of permit. It shall be the duty of the sheriff to issue a permit to go armed with a revolver, pistol, or pocket billy to all peace officers and such other persons who are residents of his county, and who, in the judgment of said official, should be permitted to go so armed. [S13,§4775-3a; C24, 27, 31, 35,§12941.]

43GA, ch 261, §2, editorially divided

12941.1 Nonresidents. A nonresident of the state may be issued a permit by the sheriff of any county in which said nonresident is employed or on duty, provided that it shall appear to the sheriff upon investigation, that such nonresident is a fit person to be permitted to go so armed, and any permit issued to such a nonresident shall be valid throughout the state until revoked either by the sheriff issuing the same or upon expiration as provided by law. [C31, 35,§12941-c1.]

12941.2 Issuance by commissioner. The commissioner of public safety may, in his discretion, issue a permit to carry concealed a revolver, pistol, pocket billy or other weapon to any officer or employee of the state. Such a permit may also be issued by the commissioner to a nonresident of the state who is engaged in law-enforcing work in this state. The provisions of this chapter relative to permits to carry concealed weapons shall apply insofar as applicable, and the commissioner of public safety shall keep a record of permits issued the same as is required of sheriffs. [C31, 35,§12941-d1; 48GA, ch 120, §25c.]

12942 Name of holder—transferability. The permit shall be issued, except as otherwise provided in section 12944, to the individual whom it permits to go armed and shall not be transferable. [C24, 27, 31, 35,§12942.]

12943 Authority granted by permit. Permits issued to peace officers or to employees of railroad or express companies shall permit such persons to go armed anywhere within the state while in the discharge of their duties. [S13, §4775-4a; C24, 27, 31, 35,§12943.]

12944 General permits for certain companies. Banks, trust companies, mining, transportation, manufacturing, and mercantile companies or establishments may obtain a general permit good for any of their employees, only while on duty, actually engaged in guarding any property or the transportation of moneys or other valuables. [S13,§4775-4a; C24, 27, 31, 35,§12944.]

Referred to in §12942

12945 Duration of permit. Each such permit shall, unless revoked by notice in writing sent by registered mail to the permit holder by the sheriff issuing same, expire on December 31, following the issuance. [C24, 27, 31, 35,§12945.]

12946 Expiration of term of office—revocation. Whenever a permit is issued to any person to carry concealed weapons by virtue of such person being a peace officer, the right of such person to carry any of said weapons shall cease when said person ceases to be a peace officer. The sheriff may at any time revoke any permit issued by him. [S13,§4775-6a; C24, 27, 31, 35, §12946.]

12947 Duty to carry permit. It shall be the duty of any person armed with a revolver, pistol, or pocket billy concealed upon his person to have in his immediate possession the permit provided for in this chapter and to produce same for inspection at the request of any peace officer. Failure to so produce such permit shall constitute a misdemeanor. [S13,§4775-8a; C24, 27, 31, 35,§12947.]

Punishment, §12894

12948 Record of permits issued. The sheriff shall keep a record showing the names and addresses of all persons to whom permits shall have been issued, together with the dates of issuance and expiration of such permits. [S13, §4775-6a; C24, 27, 31, 35,§12948.]

12949 Prima facie evidence of violation. In all prosecutions on the charge of carrying a concealed weapon without a permit, proof that no permit had been issued to the defendant in the county in which the offense was alleged to have been committed shall be prima facie evidence that the defendant had no permit to carry a concealed weapon. [S13,§4775-8a; C24, 27, 31, 35,§12949.]

12950 Sale of dangerous weapons prohibited. It shall be unlawful to sell, to keep for sale, or offer for sale, loan, or give away, dirk, dagger, stiletto, metallic knuckles, sandbag, or skull cracker, silencer, and no pistol or revolver shall be sold to any person under the age of twenty-one years. The provisions of this section shall not prevent the selling or keeping for sale of hunting and fishing knives. [S13,§4775-2a; C24, 27, 31, 35,§12950.]

12951 Dealer's permit to sell. It shall be unlawful for any person, firm, association, or corporation to engage in the business of selling, keeping for sale, exchange, or to give away to any person within the state, any revolver, pistol, or pocket billy, or other weapons of a like character which can be concealed on the person, without first securing a permit from the proper officials having authority to issue such permit. [S13,§4775-9a; C24, 27, 31, 35,§12951.]

12952 Record of permits to sell. The chief of police, sheriff, or mayor shall have authority to issue permits to sell and shall keep a correct list of all persons to whom permits to sell are issued, together with the number of such permit and the date each is revoked, and furnish the county recorder a copy of all such permits issued and revocations made. [S13,§4775-5a; C24, 27, 31, 35,§12952.]

12953 Report and record of sales. Every person selling revolvers, pistols, pocket billies, and other weapons of a like character which can be concealed on the person, whether such person is a retail dealer, pawnbroker, or otherwise, shall report within twenty-four hours to the county recorder the sale of any revolver, pistol, or pocket billy and in such report shall set forth the time of selling, age, occupation, place of employment or business, name and residence of such purchaser of said weapon or weapons, together with the number, make, and other marks of identification of such weapon or weapons, and the recorder on receipt of such information shall make a permanent record of the same in a book specially kept for that purpose. [S13,§4775-10a; C24, 27, 31, 35,§12953.]

Referred to in §12955

12954 Failure to make report. Every person who shall fail to make such report will be guilty of a misdemeanor, and on being convicted of a second offense his permit shall be revoked. [S13, §4775-10a; C24, 27, 31, 35,§12954.]

Punishment, §12894

12955 Purchasing under fictitious name. Any person purchasing a revolver, pistol, or a pocket billy according to the provisions in sections 12939, 12940, and 12953, and giving a

fictitious name will be guilty of a misdemeanor. [S13,§4775-10a; C24, 27, 31, 35,§12955.]

Punishment, §12894

12956 Wholesale dealers and jobbers excepted. The provisions of the preceding sections of this chapter shall not affect in any respect wholesale dealers or jobbers. [S13, §4775-12a; C24, 27, 31, 35,§12956.]

12957 Display of weapons prohibited. Any person, firm, or corporation or the agent thereof who shall display in any window facing a public street or alley any pistols, revolvers, blackjacks, slugs, billies, knuckles, daggers, stilettos, or bowie-knives, except war relics, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not less than ten dollars nor more than one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [C24, 27, 31, 35,§12957.]

12958 Selling firearms to minors. No person shall knowingly sell, present, or give any pistol, revolver, or toy pistol to any minor. Any violation of this section shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail not less than ten nor more than thirty days. [C97,§5004; C24, 27, 31, 35,§12958.]

12959 Sale of toy pistols and giant firecrackers. No person shall use, sell, offer for sale, or keep for sale within this state any toy pistols, toy revolvers, caps containing dynamite, blank cartridges for toy revolvers or toy pistols, or firecrackers more than five inches in length and more than three-fourths of an inch in diameter; provided caps containing dynamite may be used, kept for sale, or sold when needed for mining purposes, or for danger signals, or for other necessary uses. [S13,§5028-p; C24, 27, 31, 35,§12959.]

Referred to in §12960
See also §§1828.08, 5762, 13245.08, 13245.09

12960 Punishment. Any person violating the provisions of section 12959 shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days. [S13,§5028-q; C24, 27, 31, 35,§12960.]

CHAPTER 564.1

MACHINE GUNS

12960.01 Possession.
12960.02 Aiding possession.
12960.03 Punishment.
12960.04 Exceptions.
12960.05 Interpretative clause.
12960.06 Relics.
12960.07 Additional exception.
12960.08 Finding or summary seizure.
12960.09 Duty of peace officers—order.
12960.10 Indictment.
12960.11 Evidence.

12960.01 Possession. No person, firm, partnership, or corporation, except law enforcement officers, shall knowingly have in his or its possession or under his or its control any machine gun of any nature or kind. [C27, 31, 35,§12960-b1.]

Referred to in §§12960.03, 12960.04

12960.02 Aiding possession. No person, firm, partnership, or corporation shall do any act with the intent to enable any other person, firm, partnership, or corporation to obtain possession of such gun. [C27, 31, 35,§12960-b2.]

Referred to in §§12960.03, 12960.04

12960.03 Punishment. A violation of either section 12960.01 or section 12960.02 shall be punished as follows:

1. If the accused has prior to conviction been convicted of an offense which would constitute a felony under the laws of this state, by imprisonment in the penitentiary or men's or women's reformatory for five years.
2. If such prior conviction for felony be not charged or established, by imprisonment in the penitentiary or men's or women's reformatory for a period not exceeding three years.
3. By a fine in all cases of not less than five hundred dollars nor more than two thousand dollars. [C27, 31, 35,§12960-b3.]

Referred to in §12960.04

12960.04 Exceptions. Sections 12960.01 to 12960.03, inclusive, shall not apply to:

1. Peace officers as herein provided.
2. Persons who are members of the national guards.
3. Persons in the service of the government of the United States.
4. Banks. [C27, 31, 35,§12960-b4.]

Referred to in §12960.05

12960.05 Interpretative clause. Section 12960.04 shall not be construed to exempt any person therein specified when the possession charged had no connection with the official duties or service of said person. [C27, 31, 35, §12960-b5.]

12960.06 Relics. It shall be a defense that the machine gun or machine which the accused is charged with possessing was a gun which was in general use prior to November 11, 1918, and was, prior to the commencement of the prosecution, rendered permanently unfit for use, and was possessed solely as a relic. [C27, 31, 35, §12960-b6.]

12960.07 Additional exception. This chapter shall not apply to any person or persons, firm, or corporation engaged or interested in the improvement, the invention, or manufacture of firearms. [C27, 31, 35,§12960-b7.]

12960.08 Finding or summary seizure. Possession of such machine gun by finding or by summary seizure shall not be deemed an offense provided the finder or person seizing im-

mediately delivers the same to some peace officer of the county in which the gun is found. [C27, 31, 35,§12960-b8.]

12960.09 Duty of peace officers—order. A peace officer to whom such gun is delivered shall forthwith re-deliver it to the sheriff. The sheriff shall forthwith report such possession to the district court or to a judge thereof who, in vacation or term time, may enter a summary order for the destruction of such gun or such order as may be necessary in order to preserve it as evidence. [C27, 31, 35,§12960-b9.]

12960.10 Indictment. When the state relies on prior judgments of convictions of the accused in aggravation of the punishment, such judgments shall be referred to in the indictment or information by stating the court, date, and place of rendition. [C27, 31, 35,§12960-b10.]

12960.11 Evidence. A duly authenticated copy of a judgment of prior conviction of felony shall be prima facie evidence of such conviction and of the finality and conclusiveness thereof. [C27, 31, 35,§12960-b11.]

CHAPTER 565

INJURIES BY EXPLOSIVES

12961 Death caused by high explosives.
12962 Injury to person.
12963 Injury to property.
12964 Putting out high explosives.
12965 Manufacture of gunpowder—public nuisance.

12961 Death caused by high explosives. If any person willfully deposits or throws in, under, or about any dwelling house, building, boat, vessel, or raft or other inhabited place, where its explosion will or is likely to destroy or injure the same, any dynamite, nitroglycerin, giant powder, or other material, and by reason of the explosion thereof any person is killed, he shall be guilty of murder. [C97,§4796; C24, 27, 31, 35,§12961.]

Referred to in §§12962, 12963
Murder, §§12910-12912

12962 Injury to person. If any person willfully deposits or throws any dynamite, nitroglycerin, or giant powder or other explosive material as provided in section 12961, and by means of the explosion thereof any person is injured, he shall be guilty of an assault with intent to commit murder. [C97,§4797; C24, 27, 31, 35,§12962.]

Referred to in §12963
Penalty, §12915

12963 Injury to property. If any person, with intent to destroy or injure any building, boat, vessel, or raft, any bridge, viaduct, or other structure not provided for in sections 12961, 12962, and 12964, deposits or throws in, under, or about such building, boat, vessel, raft, bridge, viaduct, or other structure any dynamite, nitroglycerin, giant powder, or other explosive material, by the explosion of which any such structure will or will be likely to be destroyed or injured, he shall be imprisoned in the penitentiary not more than fifteen years. [C97, §4798; C24, 27, 31, 35,§12963.]

12964 Putting out high explosives. If any person, with intent to destroy or injure any inhabited dwelling house, building, boat, vessel, or raft, deposits or throws therein or thereunder, or elsewhere about the same, where its explosion will or is likely to destroy or injure the same, any dynamite, nitroglycerin, giant powder, or other explosive material, he shall be imprisoned in the penitentiary not more than twenty-five years. [C97,§4795; C24, 27, 31, 35, §12964.]

Referred to in §12963

12965 Manufacture of gunpowder — public nuisance. If any person carry on the business of manufacturing gunpowder, or of mixing or grinding the composition therefor, in any building within eighty rods of any valuable building erected at the time when such business may be commenced, the building in which such business is thus carried on is a public nuisance, and such person shall be fined not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding one year, and the court, with or without such fine, may order such nuisance abated, and issue a warrant as provided in chapter 528. [C51,§§2760, 2762; R60,§§4410, 4412; C73, §§4090, 4092; C97,§§5079, 5081; S13,§5081; C24, 27, 31, 35,§12965.]

CHAPTER 566

RAPE

12966 Definition—punishment.
12966.1 Jurisdiction of the board of parole.
12967 Carnal knowledge of imbecile.
12968 Assault with intent to commit rape.

12966 Definition—punishment. If any person ravish and carnally know any female by force or against her will, or if any person carnally know and abuse any female child under the age of sixteen years, or if any person over the age of twenty-five years carnally know and abuse any female under the age of seventeen years, he shall be imprisoned in the penitentiary for life, or any term of years, not less than five, and the court may pronounce sentence for a lesser period than the maximum, the provisions of the indeterminate sentence

law to the contrary notwithstanding. [C51, §2581; R60,§4204; C73,§3861; C97,§4756; C24, 27, 31, 35,§12966.]

Corroboration, §13900
41GA, ch 197, §1, editorially divided

12966.1 Jurisdiction of the board of parole. When a lesser than the maximum sentence is pronounced, the prisoner shall be subject to the jurisdiction of the board of parole. [C27, 31, 35, §12966-a1.]

12967 Carnal knowledge of imbecile. If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall be punished by imprisonment for life or any term of years. [C51,§2583; R60,§4206; C73,§3863; C97,§4758; C24, 27, 31, 35,§12967.]

12968 Assault with intent to commit rape. If any person assault a female with intent to commit a rape, he shall be imprisoned in the penitentiary not exceeding twenty years, or any term of years, and the court may pronounce sentence for a lesser period than the maximum, the provisions of the indeterminate sentence law to the contrary notwithstanding, and when sentence is pronounced, the prisoner shall be subject to the jurisdiction of the board of parole. [C51,§2592; R60,§4215; C73,§3873; C97,§4769; C24, 27, 31, 35,§12968.]

Corroboration, §13900

CHAPTER 567

FORCIBLE MARRIAGE AND DEFILEMENT

12969 Compelling to marry or be defiled.

12969 Compelling to marry or be defiled. If any person take any woman unlawfully and against her will, and by force, menace, or duress compels her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding ten years. No person shall be convicted under the provisions of this section unless the evidence of the prosecuting witness be corroborated by other evidence tending to connect the defendant with the commission of the crime. [C51,§2582; R60, §4205; C73,§3862; C97,§4757; C24, 27, 31, 35, §12969.]

Similar provision, §13900

CHAPTER 568

SEDUCTION

12970 Definition—punishment.
12971 Marriage a bar to prosecution.
12972 Desertion after seduction and marriage.

12970 Definition—punishment. If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [C51,§2586; R60,§4209; C73,§3867; C97,§4762; C24, 27, 31, 35,§12970.]

Corroboration, §13900

12971 Marriage a bar to prosecution. If, before judgment upon an indictment, the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense. [C51,§2587; R60,§4210; C73,§3868; C97,§4763; C24, 27, 31, 35,§12971.]

12972 Desertion after seduction and marriage. Every man who shall marry any woman for the purpose of escaping prosecution for seduction, and shall afterwards desert her without good cause, shall be deemed guilty of a misdemeanor and shall be punished accordingly. [C97,§4764; C24, 27, 31, 35,§12972.]

Punishment, §12894

CHAPTER 569

ATTEMPT TO PRODUCE ABORTION

12973 Administration of drugs—use of instruments.

12973 Administration of drugs—use of instruments. If any person, with intent to produce the miscarriage of any woman, willfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and be fined in a sum not exceeding one thousand dollars. [R60, §4221; C73,§3864; C97,§4759; SS15,§4759; C24, 27, 31, 35,§12973.]

CHAPTER 570

ADULTERY

12974 Punishment—prosecution.

12974 Punishment — prosecution. Every person who commits adultery shall be imprisoned in the penitentiary not more than three years, or be fined not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married, both shall be punished. No prosecution therefor can be commenced except on the complaint of the husband or wife. [C51,§2705; R60,§4347; C73,§4008; C97,§4932; C24, 27, 31, 35, §12974.]

CHAPTER 571

BIGAMY

12975 Definition—punishment.
12976 Exceptions—absence of spouse.
12977 Knowingly marrying spouse of another.

12975 Definition—punishment. If any person who has a former husband or wife living marry another person, or continue to cohabit with such second husband or wife, he or she, except in the cases mentioned in section 12976, is guilty of bigamy, and shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year. [C51,§2706; R60,§4348; C73,§4009; C97, §4933; C24, 27, 31, 35,§12975.]

Referred to in §12976

12976 Exceptions—absence of spouse. The provisions of section 12975 do not extend to any person whose husband or wife has continually remained beyond seas, or who has voluntarily withdrawn from the other and remained absent, for the space of three years together, the party marrying again not knowing the other to be living within that time; nor to any person who has good reason to believe such husband or wife to be dead; nor to any person who has been legally divorced from the bonds of matrimony. [C51,§2707; R60,§4349; C73,§4010; C97,§4934; C24, 27, 31, 35,§12976.]

Referred to in §12975

12977 Knowingly marrying spouse of another. Every unmarried person who knowingly marries the husband or wife of another, when such husband or wife is guilty of bigamy thereby, shall be imprisoned in the penitentiary not exceeding three years, or be fined not more than three hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2708; R60,§4350; C73,§4011; C97,§4935; C24, 27, 31, 35,§12977.]

CHAPTER 572

INCEST

12978 Definition—punishment.

12978 Definition—punishment. If any persons, being within the degrees of consanguinity or affinity in which marriages are declared by law to be void, carnally know each other, they shall be guilty of incest, and imprisoned in the penitentiary not exceeding twenty-five years. [R60,§§4367–4369; C73,§4030; C97,§4936; C24, 27, 31, 35,§12978.]

Void marriages, §10445

CHAPTER 573

SODOMY

12979 Definition.
12980 Punishment.

12979 Definition. Whoever shall have carnal copulation in any opening of the body except sexual parts, with another human being, or shall have carnal copulation with a beast, shall be deemed guilty of sodomy. [S13,§4937-a; C24, 27, 31, 35,§12979.]

12980 Punishment. Any person who shall commit sodomy, shall be imprisoned in the penitentiary not more than ten years. [C97,§4937; C24, 27, 31, 35,§12980.]

CHAPTER 574

KIDNAPING

12981 Definition—punishment.
12982 Child stealing.
12983 Kidnaping for ransom.

12981 Definition—punishment. If any person willfully, and without lawful authority, forcibly or secretly confine or imprison any other person within the state against his will; or forcibly carry or send such person out of the state; or forcibly seize and confine or inveigle or kidnap any other person with the intent either to cause such person to be secretly confined or imprisoned in the state against his will, or to cause such person to be sent out of the state against his will, he shall be imprisoned in the penitentiary not more than five years, or fined not exceeding one thousand dollars, or be both so fined and imprisoned, at the discretion of the court. [C51,§2588; R60,§4211; C73,§3869; C97,§4765; C24, 27, 31, 35,§12981.]

12982 Child stealing. If any person maliciously, forcibly, or fraudulently take, decoy, or entice away any child under the age of sixteen years with intent to detain or conceal such child from its parents, guardian, or other person or institution having the lawful custody thereof, he shall be imprisoned in the penitentiary not more than ten years, or be imprisoned in the county jail not more than one year, or be fined not exceeding one thousand dollars. [S13,§254-a46; C24, 27, 31, 35,§12982.]

12983 Kidnaping for ransom. Whoever kidnaps, takes, or carries away any person, or decoys or entices such person away from any place in this state for the purpose of or with the intention of receiving or securing from anyone any money, property, or thing of value as a ransom, reward, or price for the return of the person so kidnaped, taken, carried, decoyed, or enticed away, as aforesaid, or whoever shall imprison, detain, or hold any person at any place in this state for the purpose or with the intent of receiving or securing from anyone money, property, or thing of value as a ransom, reward, or price for the return, liberation, or surrender of the person so imprisoned, detained, or held, shall be deemed to be guilty of the crime of kidnaping for the purpose of ransom, and upon conviction thereof shall be punished with death or imprisonment for life at hard labor in the penitentiary as determined by the jury, or the court if the defendant pleads guilty. [S13,§4750-b; C24, 27, 31, 35,§12983.]

CHAPTER 575

ARSON

12991.1 Dwelling house and parcels thereof.
12991.2 Miscellaneous buildings.
12991.3 Cribs—agricultural products and personal property.
12991.4 Defrauding insurers.
12991.5 Attempts.
12991.6 Married women.
12992 Setting out fire.
12993 Allowing fire to escape.

12984 to 12991, inc. Rep. by 42GA, ch 235

12991.1 Dwelling house and parcels thereof. Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, the property of himself or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not more than twenty years. [C51, §§2598, 2599; R60, §§4222, 4223; C73, §§3880, 3881; C97,§§4776, 4777; C24, §§12984, 12985; C27, 31, 35,§12991-b1.]

Referred to in §§12991.5, 12991.6

12991.2 Miscellaneous buildings. Any person who willfully and maliciously sets fire or burns or causes to be burned or who aids, counsels or procures the burning of any barn, stable or other building, the property of himself or of another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, the property of himself or of another; or any church, meetinghouse, courthouse, workhouse, school, jail or other public building or any public bridge; shall, upon conviction thereof, be sentenced to the penitentiary for not more than ten years. [C51,§§2600, 2601; R60,§§4224, 4225; C73,§§3882, 3883; C97,§§4778, 4779; C24,§§12986, 12987; C27, 31, 35,§12991-b2.]

Referred to in §§12991.5, 12991.6

12991.3 Cribs—agricultural products and personal property. Any person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any barrack, cock, crib, rick or stack of hay, corn, wheat, oats, barley or other grain or vegetable product of any kind; or any field of standing hay or grain of any kind; or any pile of coal, wood or other fuel; or any streetcar, railway car, boat, automobile or other motor vehicle; or any other personal property not herein specifically named, such property being the property of another person; shall, upon conviction thereof, be sentenced to the penitentiary for not more than three years, or be fined not to exceed one thousand dollars. [C51,§2602; R60, §4226; C73,§3884; C97,§4780; C24,§12988; C27, 31, 35,§12991-b3.]

Referred to in §§12991.5, 12991.6

12991.4 Defrauding insurers. Any person who willfully and maliciously and with intent to injure or defraud the insurer, sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any goods, wares, merchandise or other chattels or personal property of any kind, the property of himself or of another, which shall at the time be insured by any person or corporation against loss or damage by fire, shall, upon conviction thereof, be sentenced to the penitentiary for not more than five years. [C51,§2606; R60,§4230; C73,§3888; C97,§4784; C24,§12991; C27, 31, 35,§12991-b4.]

Referred to in §§12991.5, 12991.6

12991.5 Attempts. Any person who willfully and maliciously attempts to set fire to, or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in sections 12991.1 to 12991.4, inclusive, shall, upon conviction thereof, be sentenced to the penitentiary for not more than two years or fined not to exceed one thousand dollars. [C51,§2603; R60,§4227; C73,§3885; C97,§4781; C24,§12989; C27, 31, 35,§12991-b5.]

Referred to in §12991.6

12991.6 Married women. Sections 12991.1 to 12991.5, inclusive, of this chapter extend to a married woman who commits either of the offenses therein described, though the property burnt or set fire to may belong partly or wholly to her husband. [C51,§2605; R60,§4229; C73, §3887; C97, §4783; C24, §12990; C27, 31, 35, §12991-b6.]

12992 Setting out fire. If any person willfully, or without using proper caution, set fire to and burn, or cause to be burned, any prairie or timbered land, or any inclosed or cultivated field, or any road, by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or be both so fined and imprisoned in the discretion of the court. [C51,§2607; R60,§4231; C73,§3889; C97,§4785; C24, 27, 31, 35,§12992.]

12993 Allowing fire to escape. If any person, between the first day of September in any year and the first day of May following, set fire to, burn, or cause to be burned, any prairie or timber land, and allow such fire to escape from his control, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars. [C73,§3890; C97,§4786; C24, 27, 31, 35,§12993.]

CHAPTER 576

BURGLARY

12994 Definition—punishment.
12995 Aggravated offense.
12996 Burglary without aggravation.
12997 Burglary by means of explosives.
12998 Burglary by means of electricity.
12999 Punishment.
13000 Possession of burglar's tools—evidence.
13001 Other breakings and enterings.
13002 Entering bank with intent to rob.
13003 Attempting to break and enter.
13004 Breaking and entering car.

12994 Definition—punishment. If any person break and enter any dwelling house in the nighttime, with intent to commit any public offense; or, after having entered with such intent, break any such dwelling house in the nighttime, he shall be guilty of burglary, and shall be punished according to the aggravation of the offense, as is provided in sections 12995 and 12996. [C51,§2608; R60,§4232; C73,§3891; C97, §4787; C24, 27, 31, 35,§12994.]

Referred to in §13738.1

12995 Aggravated offense. If such offender, at the time of committing such burglary, is armed with a dangerous weapon, or so arm himself after having entered such dwelling house, or actually assault any person being lawfully therein, or has any confederate present aiding and abetting in such burglary, he shall be imprisoned in the penitentiary for life or any term of years. [C51,§2609; R60,§4233; C73,§3892; C97,§4788; C24, 27, 31, 35,§12995.]

Referred to in §§12994, 12996, 13738.1

12996 Burglary without aggravation. If such offender commit such burglary otherwise than is mentioned in section 12995, he shall be imprisoned in the penitentiary not exceeding twenty years. [C51,§2610; R60,§4234; C73, §3893; C97,§4789; C24, 27, 31, 35,§12996.]

Referred to in §§12994, 13738.1

12997 Burglary by means of explosives. Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitroglycerin, dynamite, giant powder, gunpowder, or any other explosive material, shall be deemed guilty of burglary with explosives. [S13,§4799-a; C24, 27, 31, 35,§12997.]

Referred to in §§12999, 13738.1

12998 Burglary by means of electricity. Any person who, with intent to commit crime, breaks and enters, either by day or night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by the use of electricity as a motive or burning or melting power or agency, or in any form, or by any electrical means whatsoever, or by the use of acetylene gas, or by oxyacetylene gas, or by any gas in any form whatsoever, shall be deemed guilty of burglary with electricity or gas, as the case may be. [S13,§4799-a; C24, 27, 31, 35, §12998.]

Referred to in §§12999, 13738.1

12999 Punishment. Any person duly convicted of burglary under the terms of sections 12997 and 12998 shall be imprisoned in the pen-

itentiary not more than forty years. [S13, §4799-a; C24, 27, 31, 35,§12999.]

Referred to in §18738.1

13000 Possession of burglar's tools — evidence. If any person be found having in his possession at any time any burglar's tools or implements, with intent to commit the crime of burglary, he shall be imprisoned in the penitentiary not more than fifteen years, or be fined not exceeding one thousand dollars. The court before whom such conviction is had shall order the retention by the sheriff of such tools or implements, to be used in evidence in any court in which such person is tried for the offense herein defined, or that of burglary, and the possession of such tools or implements shall be presumptive evidence of his intent to commit burglary. [C97,§4790; S13,§4790; C24, 27, 31, 35,§13000.]

Referred to in §18738.1

13001 Other breakings and enterings. If any person, with intent to commit any public offense, in the daytime break and enter, or in the nighttime enter without breaking, any dwelling house; or at any time break and enter any office, shop, store, warehouse, railroad car, boat, or vessel, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year. [C51,§2611; R60,§4235; C73,§3894; C97, §4791; C24, 27, 31, 35,§13001.]

Referred to in §18738.1

13002 Entering bank with intent to rob. If any person shall enter or attempt to enter the premises of a bank or trust company or banking association, with intent to hold up and rob any bank or trust company or any banking association, or any person or persons therein, or thought to be therein, of any money or currency or silver or gold or nickels or pennies or of anything of value belonging to said bank or trust company or banking association, or from any person or persons therein; or shall intimidate, injure, wound, or maim any person therein with intent to commit such holdup or "stick-up" or robbery, he shall, upon conviction thereof, be imprisoned in the penitentiary at hard labor for life, or for any term not less than ten years. [C24, 27, 31, 35,§13002.]

Referred to in §18738.1

13003 Attempting to break and enter. If any person, with intent to commit any public offense, shall attempt to break and enter any dwelling house, at any time, or to enter any dwelling house in the nighttime without breaking, or at any time to break and enter any office, shop, store, warehouse, railroad car, boat, vessel, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, he shall be imprisoned in the penitentiary not more than five years, or fined not exceeding three hundred dollars and imprisoned in the county jail not more than one year. [C97,§4792; C24, 27, 31, 35,§13003.]

Referred to in §18738.1

13004 Breaking and entering car. If any person unlawfully break and enter any freight or express car which is sealed or locked, in which any goods, merchandise, or valuable things are kept for use, deposit, or transportation, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year. [C97,§4794; C24, 27, 31, 35,§13004.]

Referred to in §18738.1

CHAPTER 577

LARCENY

13005 Definition.
13006 Punishment.
13007 Measure of value of stolen goods.
13008 Larceny in nighttime.
13009 Larceny in daytime.
13010 Larceny from building on fire or from the person.
13014 Larceny of electric current, water, steam or gas.
13015 Larceny of domestic fowls and animals.
13016 Taking goods from officer.
13017 Custody of property levied on or deposited by officer.
13018 Appropriating found property.
13019 Larceny of logs or lumber.
13020 Punishment.
13021 Double damages for conversion of logs.
13022 Possession as evidence.
13023 Search for lost logs.
13024 Obstructing search—penalty.
13025 Taking property for boat or vessel.
13026 "Common thief" defined.

13005 Definition. If any person steal, take, and carry away of the property of another any money, goods, or chattels, including all domesticated or restrained animals; any writ, process, or public record; any bond, bank note, promissory note, bill of exchange or other bill, or order, or certificate; or any book of accounts respecting money, goods, or other things; or any deed or writing containing a conveyance of real estate; or any contract in force; or any receipt, release, or defeasance; or any instrument or writing whereby any demand, right, or obligation is created, increased, extinguished, or diminished, he is guilty of larceny. [C51,§2612; R60,§4237; C73,§3902; C97,§4831; C24, 27, 31, 35,§13005.]

40GA, ch 273, §1, editorially divided

13006 Punishment. When the value of the property stolen exceeds twenty dollars, he shall be punished by imprisonment in the penitentiary not more than five years, or in the county jail not more than one year, or by fine of not more than one thousand dollars, or by both

such fine and imprisonment; when the value does not exceed twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days. [C51,§2612; R60,§4237; C73,§3902; C97,§4831; C24, 27, 31, 35,§13006.]

13007 Measure of value of stolen goods. If the property stolen consists of any bank note, bond, bill, covenant, bill of exchange, draft, order, or receipt, or any evidence of debt whatever, or any public security, or any instrument whereby any demand, right, or obligation may be assigned, transferred, created, increased, released, extinguished, or diminished, the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected, as the case may be, shall be adjudged the value of the thing stolen. [C51,§2625; R60,§4250; C73,§3914; C97,§4849; C24, 27, 31, 35,§13007.]

13008 Larceny in nighttime. If any person in the nighttime commit larceny in any dwelling house, store, or any public or private building, or other construction of any type or character, or in any boat, vessel, or watercraft, or in any motor vehicle and/or trailer, when the value of the property stolen exceeds the sum of twenty dollars, he shall be imprisoned in the penitentiary not exceeding ten years; and when the value of the property stolen does not exceed twenty dollars, be fined not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2613; R60, §4238; C73,§3903; C97,§4832; C24, 27, 31, 35, §13008; 47GA, ch 229,§1.]

Referred to in §13009

13009 Larceny in daytime. If any person in the daytime commit larceny as defined in section 13008, and the value of the property stolen exceeds twenty dollars, he shall be imprisoned in the penitentiary not more than five years; and when the value of the property stolen does not exceed twenty dollars, be fined not exceeding two hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2614; R60,§4239; C73,§3904; C97,§4833; C24, 27, 31, 35,§13009.]

13010 Larceny from building on fire or from the person. If any person commit the crime of larceny by stealing from any building on fire, or by stealing any property removed in consequence of an alarm caused by fire, or by stealing from the person of another, he shall be imprisoned in the penitentiary not exceeding fifteen years. [C51,§2615; R60,§4240; C73, §3905; C97,§4837; C24, 27, 31, 35,§13010.]

13011 to 13013, inc. Rep. by 47GA, ch 134,§548. See §§5000.01, 5006.11, 5006.12

13014 Larceny of electric current, water, steam or gas. If any person willfully, and with intent to defraud, in any manner take from the wires, pipes, meters, or any other apparatus of any electric motor, electric light, water, steam heating, or gas plant or works, any electric current, water, steam, steam heat, or gas, he shall be guilty of larceny and shall be punished accordingly. [S13,§4852-c; C24, 27, 31, 35,§13014.]

13015 Larceny of domestic fowls and animals. If any person steal, take and carry away, irrespective of value, any domestic fowl or poultry, pig, cow, calf, horse, colt, or other domestic animal, he shall be punished by imprisonment in the penitentiary or men's or women's reformatory not more than five years, or by imprisonment in the county jail not more than one year, or by a fine not more than one thousand dollars, or by both such fine and imprisonment in the county jail. [S13,§4852-d; C24, 27, 31, 35,§13015.]

13016 Taking goods from officer. If any person, knowingly and without authority of law, take, carry away, secrete, or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable, or other officer, and held by such officer by virtue of execution, writ of attachment, or other legal process, he shall be guilty of larceny, and, when the value of the property so taken, carried away, secreted, or destroyed exceeds the sum of twenty dollars, be imprisoned in the penitentiary not more than one year; and when it does not exceed twenty dollars, be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days. [R60,§4251; C73,§3915; C97,§4850; S13, §4850; C24, 27, 31, 35,§13016.]

Referred to in §13017

13017 Custody of property levied on or deposited by officer. The possession or custody of goods and chattels by any person with whom the same have been left or deposited for safekeeping, to be returned for the purpose of being disposed of on legal process, shall be the possession and custody of the officer having or depositing the same and entitled to the custody thereof, and, in a prosecution under section 13016, the property taken, carried away, secreted, or destroyed, as therein mentioned, may be laid in the officer entitled to the custody thereof at the time of the commission of the offense. [R60,§4252; C73,§3916; C97,§4851; C24, 27, 31, 35,§13017.]

13018 Appropriating found property. If any person come by finding to the possession of any personal property of which he knows the owner, and unlawfully appropriate the same or any part thereof to his own use, he is guilty of larceny, and shall be punished accordingly. [C51, §2617; R60,§4242; C73,§3907; C97,§4839; C24, 27, 31, 35,§13018.]

13019 Larceny of logs or lumber. Whoever shall willfully take, carry away, or otherwise convert to his own use, or sell or dispose of, without the consent of the owner or owners, any pile, logs, or cant suitable to be worked into plank, board, joist, shingles, or other lumber, the property of another, whether the owner thereof be known or unknown, lying or being in any lake, bay, or river in or bordering on

this state, or in any tributary of such lake, bay, or river or tributary, or in or on any slough, ravine, island, bottom, or land adjoining any such lake, bay, or river or tributary, such property being so taken, carried away, or otherwise converted or sold or disposed of within this state, or taken possession of with intent to sell or dispose of as aforesaid; or cuts out, mutilates, destroys, or renders illegible the marks or mark thereon, destroying the identification thereof; or in any manner willfully injures any such logs, not his own; or places upon such logs or pieces of timber any mark or device other than the original mark or device, shall be deemed guilty of the crime of larceny. [C97, §4834; C24, 27, 31, 35,§13019.]

Referred to in §§13021, 13022
C97,§4834, editorially divided

13020 Punishment. On conviction thereof, such person shall be fined not less than fifty dollars and be imprisoned in the county jail not less than three months; and, on a second conviction for a like crime, shall be fined not less than one hundred dollars and be imprisoned in the penitentiary not more than two years. [C97,§4834; C24, 27, 31, 35,§13020.]

Referred to in §13022

13021 Double damages for conversion of logs. Every person guilty of any of the offenses described in section 13019 shall, whether convicted thereof in a criminal prosecution or not, be liable to pay the owner or owners of such pile, log, cant, or other lumber respecting which the offense is committed, double the amount of the value of the same, to be recovered in an action therefor. [C97,§4835; C24, 27, 31, 35, §13021.]

Referred to in §13022

13022 Possession as evidence. In any prosecution under sections 13019 to 13021, inclusive, if any such pile, log, or cant shall be found in the possession of the defendant, either with or without the mark cut out or destroyed, or partly cut out or destroyed, or partly sawed or manufactured into lumber of any kind, fence posts, fence rails, or stovewood, such possession shall be presumptive evidence of his guilt. [C97,§4836; C24, 27, 31, 35,§13022.]

C97,§4836, editorially divided

13023 Search for lost logs. The owner of any such pile, log, cant, or other lumber may at any time lawfully, by himself or agent, enter in a peaceable manner into or upon any mill or mill boom or raft of logs, piles, cant, or other lumber, in any river or its tributaries in or bordering on this state, or on or near the banks of such lakes, bays, or rivers, or their tributaries, in search of any such pile, log, cant, or other lumber which he may have lost. [C97, §4836; C24, 27, 31, 35,§13023.]

13024 Obstructing search — penalty. Any person who shall willfully prevent or obstruct such search shall, upon conviction thereof, be liable to a penalty of not less than twenty dollars, nor more than fifty dollars, for every such offense. [C97,§4836; C24, 27, 31, 35,§13024.]

13025 Taking property for boat or vessel. If any owner, master, clerk, or any other person having charge of or belonging to any boat, vessel, or raft take any cordwood or any other species of property from the owner or his agent, without the knowledge of such owner or agent, or without paying the customary price for the same, he shall be fined not exceeding two hundred dollars, or imprisoned in the county jail not exceeding six months. [C51,§2689; R60, §4329; C73,§3988; C97,§4830; C24, 27, 31, 35, §13025.]

13026 "Common thief" defined. If any person, having before been twice convicted within the state of larceny, is guilty of another crime of larceny, he shall be deemed a common thief, and imprisoned in the penitentiary not more than seven years, or fined not exceeding one thousand dollars and imprisoned in the county jail not more than one year. [R60,§4247; C97, §4846; C24, 27, 31, 35,§13026.]

Referred to in §13043
Multifarious convictions, §§13043, 13145, 13149; also ch 614

CHAPTER 578

EMBEZZLEMENT

13027 Embezzlement by public officers.
13028 Punishment.
13029 Funds received by virtue of office.
13030 Embezzlement by bailee.
13031 Embezzlement by agents.
13032 Money converted by series of acts.
13033 Retaining money on account of commission.
13034 Retention of actual commission permitted.
13034.1 Embezzlement by bank officers or employees.
13035 Embezzlement by carrier or persons intrusted.
13036 Embezzlement by executor, administrator, or guardian.
13037 Embezzlement of mortgaged property.
13037.1 Prima facie evidence of disposal.

13027 Embezzlement by public officers. If any state, county, township, school, or municipal officer, or officer of any state institution, or other public officer within the state charged with the collection, safekeeping, transfer, or disbursement of public money or property:

1. Fails or refuses to keep the same in any place of custody or deposit that may be provided by law for keeping such money or property until the same is withdrawn therefrom as authorized by law, or

2. Keeps or deposits such money or property in any other place than in such place of custody or deposit, or

3. Unlawfully converts to his own use in any way whatever, or uses by way of investment in any kind of property, or loans without the authority of law, any portion of the public

money intrusted to him for collection, safekeeping, transfer, or disbursement, or

4. Converts to his own use any money or property that may come into his hands by virtue of his office—

he shall be guilty of embezzlement to the amount of so much of said money or the value of so much of said property as is thus taken, converted, invested, used, loaned, or unaccounted for. [C51,§2618; R60,§§806, 807, 4243; C73,§3908; C97,§4840; C24, 27, 31, 35,§13027.]

C97,§4840, editorially divided

13028 Punishment. Such officer shall be imprisoned in the penitentiary not exceeding ten years, and fined in a sum equal to the amount of money embezzled or the value of such property converted, and shall be forever after disqualified from holding any office under the laws of the state. [C51,§2618; R60, §4243; C73,§3908; C97,§4840; C24, 27, 31, 35, §13028.]

Constitution, Art. II, §5

13029 Funds received by virtue of office. Any such officer who shall receive any money belonging to the state, county, township, school, or municipality, or state institution of which he is an officer shall be deemed to have received the same by virtue of his office, and in case he fails or neglects to account therefor upon demand of the person entitled thereto, he shall be deemed guilty of embezzlement, and shall be punished as above provided. [C51,§2618; R60, §§806, 807, 4243; C73,§3908; C97,§4840; C24, 27, 31, 35,§13029.]

13030 Embezzlement by bailee. Whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him, or any part thereof, which may be the subject of larceny, shall be guilty of larceny and punished accordingly. [C97,§4841; C24, 27, 31, 35,§13030.]

13031 Embezzlement by agents. If any officer, agent, clerk, or servant of any corporation or voluntary association, or if any clerk, agent, or servant of any private person or copartnership, except persons under the age of sixteen years, or if any attorney at law, collector, or other person who in any manner receives or collects money or other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle or convert to his own use, without the consent of his employer, master, or the owner of the money or property collected or received, any money or property of another, or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney at law, collector, or other person, which has come to his possession or under his care in any manner whatsoever, he is guilty of larceny. [C73,§3909; C97,§4842; C24, 27, 31, 35,§13031.]

Referred to in §13033
C97,§4842, editorially divided
Larceny penalty, §13006

13032 Money converted by series of acts. If money or property is so embezzled or converted by a series of acts during the same employment, the total amount of the money and the total value of the property so embezzled or converted shall be considered as embezzled or converted in one act, and he shall be punished accordingly. [C73,§3909; C97,§4842; C24, 27, 31, 35,§13032.]

Referred to in §13033

13033 Retaining money on account of commission. In a prosecution under sections 13031 and 13032, it shall be no defense that such officer, agent, clerk, servant, collector, attorney at law, or other person was entitled to a commission or compensation out of such money or property as compensation or commission for collecting or receiving the same for or on behalf of the owner thereof. [C73,§3909; C97, §4843; C24, 27, 31, 35,§13033.]

C97,§4843, editorially divided

13034 Retention of actual commission permitted. It shall be lawful for such agent, clerk, servant, attorney at law, collector, or other person to retain his reasonable compensation or collection fee for collecting or receiving the same, but no attorney at law may retain any money or property as compensation, or as money and property on which he has an attorney's lien, after the filing of a bond as provided in regard to such liens. [C73,§3909; C97,§4843; C24, 27, 31, 35,§13034.]

Bond to release, §10925

13034.1 Embezzlement by bank officers or employees. Any officer, director, or employee of a bank who shall in any manner, directly or indirectly, use the funds or deposits of a bank or any part thereof, except for the regular business transactions of the bank, or who secretes, with intent to embezzle or fraudulently convert to his own use, any funds, deposits or any part thereof of any bank and which may be the subject of larceny, or money placed in his hands for the purpose of deposit in the bank, or for remittance to any other person, or to apply on or discharge any obligation held by the bank, either as owner, agent, or trustee, which has been received by him or delivered to him as an officer, director, or employee of a bank or on account of his connection therewith, shall be guilty of embezzlement and shall, on conviction thereof, be imprisoned in the penitentiary not to exceed twenty years. [C27, 31, 35,§13034-a1.]

13035 Embezzlement by carrier or persons intrusted. If any carrier or other person to whom any money, goods, or other property which may be the subject of larceny has been delivered to be carried for hire, or if any other person intrusted with such property, embezzle or fraudulently convert to his own use any such money, goods, or other property, either in the mass as the same were delivered or otherwise, and before the same were delivered at the place or to the person where and to whom they were to be delivered, he is guilty of larceny. [C51,

§2620; R60,§4245; C73,§3910; C97,§4844; C24, 27, 31, 35,§13035.]

Larceny penalty, §13006

13036 Embezzlement by executor, administrator, or guardian. If any executor, administrator, or guardian embezzles or fraudulently converts to his own use any money or property collected or received by him or coming into his possession or under his control by virtue of his said office, he is guilty of larceny and the statute of limitations shall not begin to run as to such offense until the settlement of the estate or the attainment of majority by the ward, as the case may be. [S13,§4852-e; C24, 27, 31, 35,§13036.]

Limitation of actions, ch 618
Larceny penalty, §13006

13037 Embezzlement of mortgaged property. If any mortgagor of personal property or purchaser under a conditional bill of sale, while the mortgage or conditional bill of sale upon it remains unsatisfied, willfully and with intent to defraud, destroys, conceals, sells, or in any manner disposes of the property covered by such mortgage or conditional bill of sale without the written consent of the then holder of such mortgage or conditional bill of sale, he shall be guilty of larceny and punished accordingly. [R60,§4236; C73,§3895; C97,§4852; C24, 27, 31, 35,§13037.]

Analogous section, §8291
Larceny penalty, §13006

13037.1 Prima facie evidence of disposal. Failure to produce the property specifically described in such mortgage or conditional bill of sale and existing and owned by the mortgagor or debtor at the time it was executed in accordance with the terms thereof, shall be prima facie evidence that the property described in such mortgage or conditional bill of sale has been destroyed, concealed, sold, or otherwise disposed of by the mortgagor or purchaser. Nothing herein contained shall relieve the mortgagee or seller under conditional bill of sale from making demand for satisfaction or return of the property conveyed by such mortgage or conditional bill of sale. [C31, 35, §13037-c1.]

CHAPTER 579

ROBBERY

13038 Definition—punishment.
13039 Robbery with aggravation.
13040 Robbery without aggravation.
13041 Train robbery.

13038 Definition—punishment. If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense, as is provided in sections 13039 and 13040. [C51,§2578; R60,§4201; C73,§3858; C97,§4753; C24, 27, 31, 35,§13038.]

13039 Robbery with aggravation. If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if, being so armed, he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery, present and so armed, he shall be imprisoned in the penitentiary for a term of twenty-five years. [C51,§2579; R60,§4202; C73,§3859; C97,§4754; C24, 27, 31, 35,§13039.]

Referred to in §§13038, 13040

13040 Robbery without aggravation. If such offender commits the robbery otherwise than is mentioned in section 13039, he shall be imprisoned in the penitentiary not exceeding ten years. [C51,§2580; R60,§4203; C73,§3860; C97,§4755; C24, 27, 31, 35,§13040.]

Referred to in §13038

13041 Train robbery. If any person shall:

1. Stop, or attempt to stop, any railway passenger train, with intent to rob any person thereon, or to rob any coach attached thereto, or to rob any mail pouch, express safe, or box on such train; or
2. Wreck or attempt to wreck, derail, or attempt to derail, any such train, by any means whatever, with intent to commit such robbery; or
3. Obstruct or detain such train, or any locomotive, tender, coach, or car attached thereto, with such intent; or
4. Place upon any railway track, or under any engine, tender, coach, or car any explosive substance, with intent to obstruct, stop, detain, derail, or wreck such train, for the purpose of committing such robbery; or
5. Remove any spike, fishplate, frog, rail, switch, tie, stringer, or appliance used on such railway with intent to obstruct, stop, detain, derail, or wreck such train, for the purpose of committing such robbery; or
6. Enter any locomotive, tender, coach, or car attached to such train, and take or attempt to take possession thereof, for the purpose of committing such robbery; or
7. Rifle any coach, car, safe, box, or mail pouch on such train; or
8. Take and carry away, with force and arms, any valuable thing whatever from such train, or from any person thereon; or
9. Intimidate, injure, wound, or maim any person thereon, with intent to commit such robbery—

he shall, upon conviction thereof, be imprisoned in the penitentiary at hard labor, for life. [S13, §4810-a; C24, 27, 31, 35,§13041.]

CHAPTER 580

RECEIVING STOLEN GOODS

13042 Punishment.
13043 Second conviction.
13044 Receiver convicted without principal.

13042 Punishment. If any person buy, receive, or aid in concealing any stolen money, goods, or property the stealing of which is larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, he shall, when the value of the property so bought, received, or concealed by him exceeds the sum of twenty dollars, be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year; and when the value of the property so bought, received, or concealed by him does not exceed the sum of twenty dollars, be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C51,§2621; R60, §4246; C73,§3911; C97, §4845; C24, 27, 31, 35, §13042.]

Receiving, concealing, or selling motor vehicle, §5006.06

13043 Second conviction. If any person, after having been convicted of the offense of buying, receiving, or aiding in the concealment of stolen money, goods, or any property the stealing of which is larceny, or property obtained by robbery or burglary, be again convicted of the like offense, he shall be punished as provided in section 13026. [C51,§2623; R60,§4248; C73, §3912; C97,§4847; C24, 27, 31, 35,§13043.]

Multifarious convictions, §§13145, 13149; also ch 614

13044 Receiver convicted without principal. In any prosecution for the offense of buying, receiving, or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing the same was so obtained, it shall not be necessary to aver nor prove on the trial that the person who stole, robbed, or took the property has been convicted. [C51,§2624; R60, §4249; C73, §3913; C97, 4848; C24, 27, 31, 35,§13044.]

CHAPTER 581

FALSE PRETENSES, FRAUDS, AND OTHER CHEATS

13045 False pretenses.
13046 Receiving goods by false personation.
13047 False drawing or uttering of checks.
13048 Evidence of violation.
13050 Suppression or destruction of will.
13051 Fraudulent conveyances.
13052 Frauds upon hotel keepers.
13053 Presumptive evidence of fraud.
13054 Exception as to regular boarders.
13055 Fitting out boat to defraud owner or insurer.
13056 Swindling in sale of grain or seed.
13057 Dealing in certain instruments.
13058 False warehouse receipts.
13059 Making false bills of lading.
13060 Making false affidavits or manifests.
13061 Altering stamps or marks of public officer.
13062 Counterfeiting mark of another.
13063 Registration of bottles, boxes, and containers.
13064 Sale or use of registered containers.
13065 Prima facie evidence of misuse.
13066 Fraudulently using stamped cask, package, or box.
13067 Binder twine—label required.
13068 Punishment.
13069 Fraudulent advertisements.
13070 Publishers acting in good faith.
13071 False entries in corporation books.
13072 Transacting business without license.
13073 Unlawfully wearing military badges.
13074 Three-card monte and other games.
13075 Accessories in three-card monte.
13076 Authority and duty to make arrests.
13077 Ejection from public conveyances and places.
13078 Posting copy of law.
13079 Gross fraud or cheat at common law.

13045 False pretenses. If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other property, or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be imprisoned in the penitentiary not more than seven years, or be fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment. [C51,§2744; R60, §4394; C73,§4073; C97,§5041; C24, 27, 31, 35, §13045.]

Referred to in §13047

13046 Receiving goods by false personation. If any person falsely personate or represent another, and in such assumed character receive any money or property intended to be delivered to the person so personated, with intent to convert the same to his own use, he is guilty of larceny, and shall be punished accordingly. [C51,§2616; R60,§4241; C73,§3906; C97,§4838; C24, 27, 31, 35,§13046.]

Larceny penalty, §13006

13047 False drawing or uttering of checks. Any person who with fraudulent intent shall make, utter, draw, deliver, or give any check, draft, or written order upon any bank, person, or corporation and who secures money, credit, or thing of value therefor, and who knowingly shall not have an arrangement, understanding, or funds with such bank, person or corporation sufficient to meet or pay the same, shall be guilty of a felony, if such check, draft or written order shall be for the sum of twenty dollars or more, and shall on conviction thereof be punished as in section 13045, and if such check, draft or written order be for less than twenty dollars,

shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed thirty days. [C24, 27, 31, 35,§13047.]

13048 Evidence of violation. The fact that payment of said check, draft, or written order when presented in the usual course of business shall be refused by the bank, person, or corporation upon which it is drawn, or that it be protested for nonpayment for lack of such arrangement, understanding, or funds with which to meet the same, shall be material and competent evidence of such lack of arrangement, understanding, or lack of funds. [C24, 27, 31, 35, §13048.]

13049 Rep. by 42GA, ch 239

13050 Suppression or destruction of will. If any person, having in his possession or under his control any last will of any deceased person, willfully suppress, secrete, deface, or destroy the same, or any codicil belonging thereto, with intent to injure or defraud any devisee, legatee, or other person, he shall be imprisoned in the penitentiary not more than seven years, or be fined not exceeding one thousand dollars, and imprisoned in the county jail not more than one year. [C51,§2746; R60,§4396; C73,§4075; C97, §5043; C24, 27, 31, 35,§13050.]

Duty to produce will, §11862

13051 Fraudulent conveyances. Any person who, knowingly being a party to any conveyance or assignment of any estate or interest in lands, goods, or things in action, or of any rents or profits arising therefrom, or being a party to any charge on such estate, interest, rents, or profits, made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons, and every person who, being privy to or knowing of such fraudulent conveyance, assignment, or charge, puts the same in use as having been made in good faith, shall be imprisoned in the penitentiary not exceeding three years, or may be fined in the discretion of the court not exceeding one thousand dollars, or imprisoned in the county jail not more than one year. [C51, §2745; R60,§4395; C73,§4074; C97,§5042; C24, 27, 31, 35,§13051.]

13052 Frauds upon hotel keepers. Any person who shall obtain food, lodging, or other accommodation at any hotel, inn, or boarding or eating house, with intent to defraud the owner or keeper thereof, shall be fined not exceeding one hundred dollars, or imprisoned not exceeding thirty days. [C97,§5076; C24, 27, 31, 35,§13052.]

Referred to in §13053

13053 Presumptive evidence of fraud. Proof that lodging, food, or other accommodation was obtained by false pretense, or by false or fictitious show or pretense of baggage, or that the party refused or neglected to pay for such food, lodging, or other accommodation on demand, or that he absconded or left the premises without paying or offering to pay for such food, lodging, or other accommodation, or that he surreptitiously removed or attempted to remove his baggage, shall be presumptive evidence of the fraudulent intent mentioned in section 13052. [C97,§5077; C24, 27, 31, 35,§13053.]

Referred to in §13054
C97,§5077, editorially divided

13054 Exception as to regular boarders. Section 13053 shall not apply to regular boarders, nor when there has been an agreement for delay in payment. [C97,§5077; C24, 27, 31, 35, §13054.]

13055 Fitting out boat to defraud owner or insurer. If any person lade, equip, or fit out, or assist in lading, equipping, or fitting out, any raft, boat, or vessel, with intent that the same be cast away, burnt, sunk, or otherwise destroyed, to injure or defraud any owner or insurer thereof, or of any property laden on board the same, he shall be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [C51,§2754; R60, §4404; C73,§4083; C97,§5055; C24, 27, 31, 35, §13055.]

Similar provision, §13094

13056 Swindling in sale of grain or seed. Whoever, either for his own benefit or as the agent of any corporation, company, association, or person, obtains from any other person anything of value, or procures the signature of any such person as maker, indorser, guarantor, or surety thereon to any bond, bill, receipt, promissory note, draft, check, or any other evidence of indebtedness, as the whole or part consideration of any bond, contract, or promise given the vendee of any grain, seed, or cereal; binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed, or cereal at a fictitious price, or at a price equal to or more than four times the market price thereof, shall be imprisoned in the penitentiary not more than three years, or be fined not more than five hundred nor less than one hundred dollars, or both. [C97,§5069; C24, 27, 31, 35, §13056.]

C97,§5069, editorially divided

13057 Dealing in certain instruments. Whoever sells, barters, or disposes of, or offers to sell, barter, or dispose of, either for his own benefit or as the agent of any corporation, company, association, or person, any bond, bill, receipt, promissory note, draft, check, or other evidence of indebtedness, knowing the same to have been obtained as the whole or part consideration for any bond, contract, or promise given the vendee of any grain, seed, or cereal, binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed, or cereal at a fictitious price, or at a price equal to or more than four times the market price thereof, shall be imprisoned in the penitentiary not more than three years, or be fined not more

than five hundred nor less than one hundred dollars, or both. [C97,§5069; C24, 27, 31, 35, §13057.]

13058 False warehouse receipts. If any person sell, transfer, or dispose of any receipt or voucher, given or purporting to have been given by any person for property in store, knowing that such person has not in his possession such property, or any part thereof, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding five years. [C73,§4088; C97,§5068; C24, 27, 31, 35,§13058.]

13059 Making false bills of lading. If any owner of any boat or vessel, or of any property laden or pretended to be laden on board the same, or if any other person concerned in the lading or fitting out of such boat or vessel, make out and exhibit, or cause to be made out and exhibited, any false estimate of any goods or property laden or pretended to be laden on board such boat or vessel, with intent to injure or defraud any insurer of such boat or vessel or property, or of any part thereof, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not more than three years. [C51,§2755; R60,§4405; C73,§4084; C97, §5056; C24, 27, 31, 35,§13059.]

13060 Making false affidavits or manifests. If any master or other officer of any boat or vessel make, or cause to be made, any false affidavit or manifest, or if any owner or other person concerned in such boat or vessel, or in the goods or property laden on board the same, procure any such false affidavit or manifest to be made, or exhibit the same, with intent to injure, deceive, or defraud any insurer of such boat or vessel, or of the goods or property laden on board of the same, he shall be imprisoned in the penitentiary not exceeding five years, or be fined not exceeding three thousand dollars and imprisoned in the county jail not exceeding one year. [C51,§2756; R60,§4406; C73,§4085; C97,§5057; C24, 27, 31, 35,§13060.]

13061 Altering stamps or marks of public officer. If any person falsely alter any stamp, brand, or mark on any cask, package, box, or bale containing merchandise or produce, made by a public officer, appointed for that purpose, in order to denote the quality, weight, or quantity of the contents thereof, with intent to defraud, he shall be fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2749; R60,§4399; C73,§4078; C97,§5046; C24, 27, 31, 35,§13061.]

13062 Counterfeiting mark of another. If any person counterfeit any mark, stamp, or brand of another, or falsely mark any cask, package, box, or bale as to quality or quantity, with intent to defraud, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not more than six months, or both. [C51,§2750; R60,§4400; C73, §4079; C97,§5047; C24, 27, 31, 35,§13062.]

13063 Registration of bottles, boxes, and containers. Persons engaged in the manufacture, bottling, or selling of soda water, mineral or aerated waters, cider, milk, cream, or other lawful beverages in bottles, boxes, casks, kegs, or barrels, with their names or other marks of ownership stamped or marked thereon, may file in the office of the recorder of the county in which such articles are manufactured, bottled, or sold a description of the name or marks so used by them, and cause notice thereof to be given by three consecutive publications in a weekly newspaper printed in the English language in said county. [C97,§5052; S13,§5052; C24, 27, 31, 35,§13063.]

Trademarks in general, chs 480, 481

13064 Sale or use of registered containers. It shall thereupon be unlawful for any person, without the written consent of the owner, to fill such bottles, boxes, casks, kegs, or barrels so marked or stamped, for the purpose of sale, or to sell, dispose of, buy, or traffic in or wantonly destroy the same, whether filled or not, and any violation of this section shall be a misdemeanor, and any person convicted thereof shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C97,§5052; S13,§5052; C24, 27, 31, 35, §13064.]

Referred to in §13065

13065 Prima facie evidence of misuse. The using by any other person than the rightful owner, without written permission, of any such cask, barrel, keg, bottle, or box, as prohibited in section 13064, or the possession thereof by any junk dealer, or dealer in such casks, barrels, kegs, bottles, or boxes, the same being marked or stamped and registered as herein required, shall be prima facie evidence that such use, and the sale or possession, is unlawful, and search warrants may be procured for the discovery and seizure of such bottles, boxes, casks, kegs, or barrels, as in other criminal cases. [C97,§5052; S13,§5052; C24, 27, 31, 35, §13065.]

13066 Fraudulently using stamped cask, package, or box. If any person, with intent to defraud, use any cask, package, box, or bale, marked, branded, or stamped by another, for the sale of merchandise or produce of an inferior quality or less in quantity or weight than is denoted by such mark, stamp, or brand, he shall be imprisoned in the county jail not more than one year, or fined not exceeding two hundred dollars, or both. [C51,§2751; R60, §4401; C73,§4080; C97,§5048; C24, 27, 31, 35, §13066.]

13067 Binder twine—label required. No binder twine shall be sold, exposed, or offered for sale within this state, except the same bears upon each ball a stamp or label truly stating the name of the manufacturer or importer and the number of feet to the pound in such ball; provided that a deficiency not exceeding five percent in length stated on the stamp or label

shall not be a violation hereof. [S13,§5077-a25; C24, 27, 31, 35,§13067.]

Referred to in §13068

13068 Punishment. Any person, firm, or corporation who violates the provisions of section 13067 shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars. [S13,§5077-a26; C24, 27, 31, 35,§13068.]

13069 Fraudulent advertisements. Any person, firm, corporation, or association who, with intent to sell, or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation, or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes to be made, published, disseminated, circulated, or placed before the public in this state, either directly or indirectly, in a newspaper or other publication or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation, or statement of fact relating to said merchandise, securities, or service offered for sale, or relating to the sale thereof, which is untrue, deceptive, or misleading, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars or not more than one hundred dollars, or thirty days in jail for each offense. [S13,§5051-a; C24, 27, 31, 35,§13069.]

Referred to in §13070

13070 Publishers acting in good faith. The provisions of section 13069 shall not apply to any owner, publisher, printer, agent, or employee of a newspaper or other publication, periodical, or circular who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published, or takes part in the publication of such advertisement. [S13,§5051-a; C24, 27, 31, 35, §13070.]

13071 False entries in corporation books. Any officer, agent, or employee of any corporation who shall knowingly make or knowingly authorize to be made false entries upon the books of such corporation, and any employee of another who shall knowingly make or cause to be made false entries upon the books of his employer, shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment not to exceed two years, or by a fine not to exceed five thousand dollars, or by both such fine and imprisonment. [C24, 27, 31, 35,§13071.]

Similar criminal provision, §8381

13072 Transacting business without license. If any person carry on or transact any business or occupation without license therefor, when such license is required by any law of the state, he shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C51,§2737; R60,§4380; C73,§4046; C97,§5010; C24, 27, 31, 35,§13072.]

13073 Unlawfully wearing military badges. Any person who shall willfully wear, display or use the insignia or rosette of the military order of the Loyal Legion of the United States, or wear, display, or use the button, emblem, or insignia of the Grand Army of the Republic, the United Spanish American War Veterans, the American Legion, the Veterans of Foreign Wars, the Disabled American Veterans of the World War, or any other organization, or auxiliary thereof, composed of members or former members of the military or naval forces of the United States, or use the same to obtain aid or assistance, unless such person is authorized and/or entitled to wear, display or use the same under the rules and regulations or constitutions and bylaws of such organizations, shall be guilty of a misdemeanor, and shall be punished by imprisonment not exceeding thirty days, or fined not to exceed one hundred dollars. [C97,§5071; C24, 27, 31, 35,§13073; 47GA, ch 230,§1.]

13074 Three-card monte and other games. Whoever by means of three-card monte, so-called, or any other form or device, sleight of hand, or other means whatever, by use of cards or instruments of like character, obtains from another person any money or other property, shall be guilty of swindling and be fined not less than two hundred nor more than two thousand dollars, or be imprisoned in the penitentiary not more than five years, or both. [C97, §5072; C24, 27, 31, 35,§13074.]

Referred to in §§13076, 13077, 13078

13075 Accessories in three-card monte. All persons aiding, encouraging, advising, or confederating with, or knowingly harboring or concealing, any such person or persons, or in any manner being accessory to the commission of the above described offense, or confederating together for the purpose of playing such games, shall be deemed principals therein, and punished accordingly. [C97,§5072; C24, 27, 31, 35, §13075.]

Referred to in §§13076, 13078

13076 Authority and duty to make arrests. Any person may, and every conductor and other employee on any railroad car or train, every captain, clerk, and other employee on any boat, every station agent at any railway depot, the officers of any fair or fair grounds, and the proprietor of any place of public resort and his employees, shall, with or without warrant, arrest any person found in the act of committing any of the offenses mentioned in sections 13074 and 13075, or any person whom he or they may have good reason to believe to be guilty of the commission of any such offense. [C97,§5073; C24, 27, 31, 35,§13076.]

Referred to in §13078

13077 Ejection from public conveyances and places. Any conductor, captain, hotel keeper, proprietor or manager of any public conveyance or place of public resort, and the officers of any fair or fair grounds, shall eject from his car, train, boat, hotel, public conveyance, fair grounds or place of public resort any person known to him or whom he has good reason to believe to be a three-card monte man, or who offers to wager or bet money or other valuable thing upon what is commonly known as three-card monte, or bet on any trick or game with cards or other gaming device, and any failure, neglect, or refusal to do so, or to suppress or prevent a violation of section 13074, shall be a misdemeanor. [C97,§5074; C24, 27, 31, 35, §13077.]

Referred to in §13078
Punishment, §12894

13078 Posting copy of law. Any person or company operating any public conveyance by which passengers are carried shall keep posted up in such conveyance a copy of sections 13074 to 13077, inclusive. [C97,§5075; C24, 27, 31, 35, §13078.]

13079 Gross fraud or cheat at common law. Every person who is convicted of any gross fraud or cheat at common law shall be fined not more than two hundred dollars or imprisoned in the county jail not more than one year, or both. [C51,§2752; R60,§4402; C73,§4081; C97, §5053; C24, 27, 31, 35,§13079.]

CHAPTER 582

MALICIOUS MISCHIEF AND WILLFUL TRESPASS

13080 Malicious injury to buildings and fixtures.
13081 Injuring or terrorizing inhabitants of dwelling.
13082 Defacing buildings.
13083 Injury to fence, produce, or fixtures.
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13090 Stealing or knocking off fruit in nighttime.
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13096 Injuries to monuments of state boundaries.
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13099 Defacing or destroying proclamations or notices.
13100 Violating sepulcher.
13101 Exposing dead bodies.
13102 Injury to gravestones or property in cemetery.
13103 Civil liability.
13104 Hunting upon cultivated or inclosed land.
13105 Island in navigable stream.
13106 Prosecution.
13107 Injury to fire apparatus.
13108 Removal of fire apparatus.
13109 Punishment.
13110 False alarms of fire.
13111 Punishment.

13080 Malicious injury to buildings and fixtures. If any person maliciously injure, deface, or destroy any building or fixture attached thereto, or willfully and maliciously destroy, injure, or secrete any goods, chattels, or valuable papers of another, he shall be imprisoned in the penitentiary not more than five years, or shall be imprisoned in the county jail not more than one year, or be fined not exceeding five hundred dollars, and be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured. [C51, §2686; R60,§4326; C73,§3985; C97,§4822; S13, §4822; C24, 27, 31, 35,§13080.]

13081 Injuring or terrorizing inhabitants of dwelling. If any person, with intent to injure or terrorize the inhabitants of any dwelling house, or other building used as a dwelling, or any inhabited boat, vessel, or raft, or with intent to injure or deface any such structure, throws at, against, or into the same any brick, stone, billet of wood, or other missile, or shoots thereat, with such intent, any gun, pistol, or revolver, he shall be imprisoned in the penitentiary not more than three years, or in the county jail not more than one year, or be fined not more than one thousand dollars. [C97, §4799; C24, 27, 31, 35,§13081.]

13082 Defacing buildings. If any person willfully write, make marks, or draw characters on the walls or any other part of any church, college, academy, schoolhouse, courthouse, or other public building, or on any furniture, apparatus, or fixtures therein; or willfully injure or deface the same, or any wall or fence inclosing the same, he shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days. [C51, §2687; R60,§4327; C73,§3986; C97,§4802; C24, 27, 31, 35,§13082.]

13083 Injury to fence, produce, or fixtures. If any person maliciously or mischievously break down, mar, deface, or injure any fence, hedge, or ditch inclosing lands belonging to another; or throw down or leave open any gate or bars not his own or under his charge, whereby an injury is done to another; or maliciously injure, destroy, or sever from the land of another any produce thereof or anything attached thereto, he shall be imprisoned in the county jail not more than one year, or be fined not ex-

ceeding five hundred dollars, or both. [C97, §4825; C24, 27, 31, 35,§13083.]

13084 Rep. by 42GA, ch 235

13085 Injury to sidewalks. Any person guilty of willfully and unlawfully injuring or destroying any sidewalk made of wood, brick, stone, cement, or any other material, shall be fined not more than one hundred dollars or be imprisoned in the county jail not exceeding thirty days. [S13,§4830-b; C24, 27, 31, 35, §13085.]

13086 Trespass by digging, cutting, or carrying away. If any person willfully commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another; or by carrying away timber or wood being on such land; or by digging or carrying away any earth, stone, marble, slate, coal, copper, lead, iron ore, or any other ore or metal; or by taking and carrying from such land any grass, hay, corn, grain, fruit, or other vegetables; or carrying away from any wharf, street, or landing place, any goods whatever in which he has no interest, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or both at the discretion of the court. [C51, §2684; R60,§4324; C73,§3983; C97,§4829; C24, 27, 31, 35,§13086.]

C97,§4829, editorially divided

13087 Value not in excess of fifty dollars. If in any case the value of the property so cut down, carried away, or otherwise taken shall not exceed the sum of fifty dollars, then the person so offending shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C73, §3983; C97,§4829; C24, 27, 31, 35,§13087.]

13088 Injury to fruit or ornamental tree. If any person maliciously or mischievously bruise, break, pull up, carry away, cut down, injure, destroy, or sever from the land any fruit, ornamental, or other tree, vine, or shrub standing or growing on the land of another for ornament or use, he shall upon conviction thereof be punished by imprisonment in the county jail not more than one year, or by fine of not more than five hundred dollars, or both. [C51,§2682; R60,§4322; C73,§§3899, 3981; C97, §4826; C24, 27, 31, 35,§13088.]

13089 Stealing or knocking off fruit in daytime. If any person maliciously or mischievously enter the inclosure of another with intent to knock off, pick, destroy, or carry away, or, having lawfully entered, afterwards wrongfully knocks off, picks, destroys, or carries away any fruit or flower of any tree, shrub, bush, or vine, he shall be fined for the first offense not less than five nor more than one hundred dollars, with the costs of conviction, or be imprisoned in the county jail not exceeding thirty days; and for a second violation he shall be fined not less than ten dollars and costs of conviction, or be imprisoned as above provided. [C73,§3897; C97,§4827; C24, 27, 31, 35,§13089.]

13090 Stealing or knocking off fruit in nighttime. If any person maliciously or mischievously enter the inclosure of another in the nighttime and knock off, pick, destroy, or carry away any fruit or flower of any tree, shrub, bush, or vine, or if, having so entered with intent to knock off, pick, destroy, or carry away any fruit or flower as aforesaid, he be actually found therein, he shall be fined not less than twenty-five nor more than one hundred dollars and costs of conviction, or imprisoned in the county jail not exceeding thirty days. [C73,§3898; C97,§4828; C24, 27, 31, 35, §13090.]

13091 Injury to vehicle or harness. If any person maliciously, willfully, and feloniously cut, break, sever, or unfasten any tug, strap, line, or other part of any harness attached to any horse or team, or maliciously and feloniously remove, break, unfasten, or injure any part of any vehicle, he shall be imprisoned in the penitentiary not to exceed one year, or be imprisoned in the county jail not to exceed six months, or be fined not to exceed five hundred dollars. [C97,§4823; S13,§4823; C24, 27, 31, 35, §13091.]

S13,§4823, editorially divided

13092 Rep. by 47GA, ch 134, §549. See §5006.05

13092.1 Alteration of manufacturer's serial number. Any person or corporation removing from or altering, defacing, mutilating, concealing, covering or destroying the manufacturer's serial number or other distinguishing mark upon any machine or manufactured article, except a motor vehicle, for the purpose of concealing, destroying or misrepresenting the identity of such machine or manufactured article, or who sells or offers for sale, or who owns or has possession of any machine or manufactured article knowing that the manufacturer's serial number or other distinguishing number or identification mark has been removed, altered, defaced, mutilated, concealed, covered or destroyed with the purpose of concealing, destroying or misrepresenting the identity of such machine or manufactured article, shall be guilty of a misdemeanor. [C31, 35,§13092-d1; 47GA, ch 134,§533.]

Referred to in §13092.2
Punishment, §12894
Similar provisions, §§5006.09, 5006.21

13092.2 Presumption of unlawful alteration. It shall be presumed that such serial number, or distinguishing number or identification mark, or portion thereof, was unlawfully removed, altered, defaced, mutilated, concealed, covered or destroyed by said person in violation of the provisions of section 13092.1, if it shall appear that said person has had possession or control of any such machine, musical instrument or other goods, wares or merchandise with such serial number or distinguishing number or identification mark, or portion thereof removed, al-

tered, defaced, mutilated, concealed, covered or destroyed, but such presumption shall not be conclusive. [C31, 35,§13092-d2.]

13093 Injury to rafts or boats. If any person maliciously cut away, let loose, injure, or destroy any boom or raft of wood, logs, or other lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be fined not exceeding five hundred dollars, and imprisoned in the county jail not more than one year, and forfeit to the person injured double the amount of damages sustained. [C51,§2681; R60,§4321; C73,§3980; C97,§4824; C24, 27, 31, 35,§13093.]

13094 Fraudulent destruction of boats. If any person cast away, sink, or otherwise destroy any raft, boat, or vessel, within any county, with intent to defraud any owner or insurer thereof, or the owner or insurer of any property laden on board the same, or of any part thereof, he shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding two thousand dollars and imprisoned in the county jail not exceeding one year. [C51,§2753; R60, §4403; C73,§4082; C97,§5054; C24, 27, 31, 35, §13094.]

Similar provision, §13055

13095 Injury to public library books or property. Any person who shall willfully, maliciously, or wantonly tear, deface, mutilate, injure, or destroy, in whole or in part, any newspaper, periodical, book, map, pamphlet, chart, picture, or other property belonging to any public library or reading room shall be deemed guilty of a misdemeanor and shall be fined not more than one hundred dollars, or imprisoned not more than thirty days. [S13,§4830-a; C24, 27, 31, 35,§13095.]

13096 Injuries to monuments of state boundaries. If any person willfully dig up, pull down, break, or destroy, or in any other manner injure or remove, any of the cast-iron pillars or other evidences planted and fixed in and along any part of the boundaries of this state, he shall be fined not less than fifty nor more than two hundred dollars, or be imprisoned in the penitentiary for a term of not less than six months, or both. [C51,§2690; R60,§4330; C73,§3989; C97, §4800; C24, 27, 31, 35,§13096.]

13097 Injury to boundary marks, milestones, and signboards. If any person maliciously take down, injure, or remove any monument erected or any tree marked as a boundary of any tract of land or city or town lot; or destroy, deface, or alter the marks of any such monument or tree made for the purpose of designating such boundary; or injure or deface any milestone, post, or guideboard erected on any public way; or remove, deface, or injure any signboard; or break or remove any lamp or lamppost or extinguish any lamp on any bridge, way, street, or passage, he shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding one year, or both, at the discretion of the court. [C51,§2683; R60,§4323; C73, §3982; C97,§4801; C24, 27, 31, 35,§13097.]

Referred to in §4852

13098 Removal of safeguards or danger signals. Whoever shall, without the consent of the person in control thereof, willfully remove, throw down, destroy, or carry away from any highway, street, alley, avenue, or bridge, any lamp, obstruction, guard, or other article or things, or extinguish any lamp or other light, erected or placed thereon for the purpose of guarding or inclosing unsafe or dangerous places in said highway, street, alley, avenue, or bridge, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail not exceeding one year. [S13, §4830-c; C24, 27, 31, 35,§13098.]

13099 Defacing or destroying proclamations or notices. If any person intentionally deface, obliterate, tear down, or destroy in whole or in part any transcript or extract from or of any law of the United States or of this state, or any proclamation, advertisement, or notification, set up at any place within this state by authority of law or by order of any court, during the time for which the same is to remain set up, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C51,§2688; R60,§4328; C73,§3987; C97,§4803; C24, 27, 31, 35,§13099.]

13100 Violating sepulcher. If any person, without lawful authority, willfully dig up, disinter, remove, or carry away any human body, or the remains thereof, from its place of interment; or aid, assist, encourage, incite, or procure the same to be done or attempted; or willfully receive, conceal, or dispose of any such human body or the remains thereof; or if any person, with the intent to commit any of the aforesaid acts, partially perform the same, he shall be imprisoned in the penitentiary not more than two years, or be fined not exceeding twenty-five hundred dollars, or both. [C51,§2714; R60,§4356; C73,§4017; C97,§4945; C24, 27, 31, 35,§13100.]

C97,§4945, editorially divided

13101 Exposing dead bodies. If any person willfully and unnecessarily, and in an improper manner, indecently expose, throw away, or abandon any human body, or the remains thereof, in any public place, or in any river, stream, pond, or other place, he shall be imprisoned in the penitentiary not more than two years, or be fined not exceeding twenty-five hundred dollars, or both. [C51,§2714; R60,§4356; C73,§4017; C97, §4945; C24, 27, 31, 35,§13101.]

13102 Injury to gravestones or property in cemetery. Any person who shall willfully and maliciously destroy, mutilate, deface, injure, or remove any tomb, vault, monument, gravestone, or other structure placed in any public or private cemetery in this state, or any fences, railing, or other work for the protection or ornamentation of said cemetery, or of any tomb, vault, monument, or gravestone, or other structure aforesaid, on any cemetery lot within such cemetery,

or shall willfully and maliciously destroy, cut, break, or injure any tree, shrub, plant, or lawn within the limits of said cemetery, or shall drive at an unusual and forbidden speed over the avenues or roads in said cemetery, or shall drive outside of said avenues and roads, and over the grass or graves of said cemetery, shall be guilty of a misdemeanor, and, upon conviction, punished accordingly, in the discretion of the court. [C51,§2715; R60,§4357; C73,§4021; C97,§588; C24, 27, 31, 35,§13102.]

Punishment, §12894
C97,§588, editorially divided

13103 Civil liability. Such offender shall also be liable, in an action in the name of the person or corporation having the custody and control of said cemetery grounds, to pay all such damages as have been occasioned by his unlawful act or acts; which money, when recovered, shall be applied by said person or corporation to the reparation and restoration of the property so injured or destroyed, if the same can be so repaired or restored. [C97,§588; C24, 27, 31, 35,§13103.]

13104 Hunting upon cultivated or inclosed land. Any person who shall hunt with dog or gun upon the cultivated or inclosed lands of another without first obtaining permission from the owner or occupant thereof, or his agent, shall for each offense be fined not more than ten dollars and costs of prosecution, and shall stand committed until such fine and costs are paid. [C97,§4821; S13,§4821; C24, 27, 31, 35,§13104.]

Referred to in §13106
S13,§4821, editorially divided

13105 Island in navigable stream. All islands in navigable streams bordering on the state shall be deemed inclosed lands without fences where the owners or lessees thereof post in plain view notices warning others not to trespass thereon. [S13,§4821; C24, 27, 31, 35, §13105.]

Referred to in §13106

13106 Prosecution. No prosecution shall be commenced under sections 13104 and 13105 except upon the information of the owner or occupant of such cultivated or inclosed lands, or his agent. [C97,§4821; S13,§4821; C24, 27, 31, 35, §13106.]

13107 Injury to fire apparatus. If any person willfully destroy or injure any engine, hose carriage, hose, hook and ladder carriage, or other thing used and kept for the extinguishment of fires, he shall, upon conviction, be imprisoned in the penitentiary for a period of not less than one nor more than three years. [R60, §1766; C73,§1564; C97,§2466; C24, 27, 31, 35, §13107.]

13108 Removal of fire apparatus. No person shall remove any engine or other apparatus for the extinguishment of fire from the house or other place where it is kept or deposited, except in time of fire or alarm thereof, unless authorized so to do by the president, director, or foreman of the company to whom the same shall belong. [R60,§1767; C73,§1565; C97,§2467; S13,§2467; C24, 27, 31, 35,§13108.]

Referred to in §13109
S13,§2467, editorially divided

13109 Punishment. Any person violating the provisions of section 13108 shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days. [R60,§1767; C73,§1565; C97,§2467; S13,§2467; C24, 27, 31, 35,§13109.]

13110 False alarms of fire. No person or persons shall cause or give a false alarm of fire, by setting fire to any combustible material, or by crying or sounding an alarm, or by any other means, without cause. [R60,§1768; C73,§1566; C97,§2468; S13,§2468; C24, 27, 31, 35,§13110.]

Referred to in §13111
S13,§2468, editorially divided

13111 Punishment. Any person violating the provisions of section 13110 shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days. [R60,§1768; C73,§1566; C97,§2468; S13, §2468; C24, 27, 31, 35,§13111.]

CHAPTER 582.1

ALTERATION, SALE, AND CHARGING OF STORAGE BATTERIES

13111.1 Injury to identification mark.
13111.2 Unlawful delivery.
13111.3 Unlawful recharging.
13111.4 Unlawful retention.
13111.5 Penalty.

13111.1 Injury to identification mark. It is unlawful for any person, copartnership, or corporation to remove or deface or alter or destroy, or cause to be removed or defaced or altered or destroyed, the word "rental" or any other word, mark, or character printed or painted or stamped upon or attached to any electric storage battery which has been so placed upon or attached to such electric storage battery to identify the same as belonging to or being the property of any person, copartnership, or corporation. [C27, 31, 35,§13111-a1.]

13111.2 Unlawful delivery. It is unlawful for any person, copartnership, or corporation to sell, dispose of, deliver, or give or attempt to sell, dispose of, deliver, or give to any person, copartnership, or corporation, other than the owner thereof, any electric storage battery upon which the word "rental" or any other word, mark, or character is printed, painted, or stamped, or to which such word, mark, or character is attached, for the purpose of identifying the said electric storage battery as belonging to or being the property of any person,

copartnership, or corporation. [C27, 31, 35, §13111-a2.]

13111.3 Unlawful recharging. It is unlawful for any person, copartnership, or corporation engaged in buying, selling, or recharging electric storage batteries to receive or retain in his, their, or its possession, or to recharge, except in cases of emergency, any electric storage battery not owned by such person, copartnership, or corporation upon which the word "rental" or any other word, mark, or character is printed, painted or stamped, or to which such word, or mark, or character, is attached, for the purpose of identifying the said electric storage battery as belonging to or being the property of any person, copartnership, or corporation. [C27, 31, 35,§13111-a3.]

13111.4 Unlawful retention. It shall be unlawful for any person, copartnership, or corporation to retain in his, their, or its possession for a longer period than thirty days, without the consent of the owner, any electric storage battery upon which the word "rental" or any other word, mark, or character is printed, painted, or stamped, or to which any such word, mark, or character is attached, for the purpose of identifying the said electric storage battery as belonging to or being the property of any person, copartnership, or corporation. [C27, 31, 35,§13111-a4.]

13111.5 Penalty. Any person, copartnership, or corporation, and the officers, agents, employees, and members of any copartnership, or corporation, violating any of the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or be imprisoned in the county jail for a term not exceeding thirty days, or both. [C27, 31, 35, §13111-a5.]

CHAPTER 583

INJURIES TO INTERNAL IMPROVEMENTS AND COMMON CARRIERS

13112 Injury to dams, locks, mills, or machinery.
13113 Injury to levees.
13114 Obstructing public ditches or drains.
13115 Obstructing ditches and breaking levees.
13116 Draining meandered lakes.
13117 Obstructing or defacing roads.
13120 Injury to roads, railways, and other utilities.
13121 Tapping telegraph or telephone wires.
13122 Placing obstructions on railways.
13122.1 Depositing refuse on track.
13123 Shooting or throwing at train.
13124 Uncoupling locomotive or cars.
13125 Seizing and running locomotive.
13126 Conspiracy to seize locomotive.
13127 Wrongfully running handcar.
13128 Aggravated offense.
13129 Interference with air brake or bell rope.
13130 Power of trainmen to arrest.
13131 Jumping off cars in motion.

13112 Injury to dams, locks, mills, or machinery. If any person maliciously injure or destroy any dam, lock, canal, trench, or reservoir, or any of the appurtenances thereof, or any of the gear or machinery of any mill or manufactory; or maliciously draw off the water from any mill pond, reservoir, canal, or trench; or destroy, injure, or render useless any engine or the apparatus belonging thereto, prepared or kept for the extinguishing of fires, he shall be imprisoned in the county jail not exceeding one year and be fined not exceeding five hundred dollars. [C51,§2679; R60,§4319; C73,§3978; C97,§4806; C24, 27, 31, 35,§13112.]

13113 Injury to levees. If any person maliciously injure, break, or cause to be broken, any levee erected to prevent the overflow of land within the state, such person so offending shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [R60,§4332; C73, §3991; C97,§4804; C24, 27, 31, 35,§13113.]

13114 Obstructing public ditches or drains. If any person place any obstruction in any of the public ditches or drains made for the purpose of draining any of the swamp lands in this state, he shall be compelled to remove the same, and be fined not less than five nor more than one hundred dollars, or be imprisoned in the county jail not more than thirty days. [C73, §3992; C97,§4805; C24, 27, 31, 35,§13114.]

13115 Obstructing ditches and breaking levees. Any person, firm, or corporation diverting, obstructing, impeding, or filling up, without legal authority, any ditch, drain, or watercourse, or breaking down any levee established, constructed, or maintained under any provision of law, shall be deemed guilty of a misdemeanor and punished accordingly. [S13,§1989-a15; C24, 27, 31, 35,§13115.]

Punishment, §12894

13116 Draining meandered lakes. Every person who shall drain or cause to be drained, or shall attempt to drain in any manner, any lake, pond, or body of water, which shall have been meandered and its metes and bounds established by the government of the United States in the survey of public lands, shall be guilty of a misdemeanor and be punished by a fine not exceeding one thousand dollars; provided this shall not apply where the drainage was or is authorized by law. [SS15,§2900-e; C24, 27, 31, 35,§13116.]

13117 Obstructing or defacing roads. If any person, without authority or permission from the board of trustees, shall in any manner obstruct, deface, or injure any public road by breaking up, plowing, or digging within the boundary lines thereof, he shall be fined not

less than five nor more than twenty-five dollars, or be imprisoned in the county jail not more than thirty days, at the discretion of the court. [C97,§4808; S13,§4808; C24, 27, 31, 35,§13117.]

13118, 13119 Rep. by 47GA, ch 134, §550. See §§5031.08, 5036.01

13120 Injury to roads, railways, and other utilities. If any person maliciously injure, remove, or destroy any electric railway or apparatus belonging thereto, or any bridge, rail or plank road; or place, or cause to be placed, any obstruction on any electric railway, or on any such bridge, rail or plank road; or willfully obstruct or injure any public road or highway; or maliciously cut, burn, or in any way break down, injure, or destroy any post or pole used in connection with any system of electric lighting, electric railway, or telephone or telegraph system; or break down and destroy or injure and deface any electric light, telegraph or telephone instrument; or in any way cut, break, or injure the wires of any apparatus belonging thereto; or shall willfully tap, cut, injure, break, disconnect, connect, make any connection with, or destroy any of the wires, mains, pipes, conduits, meters, or other apparatus belonging to, or attached to, the power plant or distributing system of any electric light plant, electric motor, gas plant, or water plant; or shall aid or abet any other person in so doing, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both such fine and imprisonment, at the discretion of the court. [C51,§2680; R60,§4320; C73,§3979; C97,§4807; S13,§4807; C24, 27, 31, 35,§13120.]

Proof of obstruction, §13898

13121 Tapping telegraph or telephone wires. Any person who shall wrongfully or unlawfully tap or connect a wire with the telephone or telegraph wires of any person, company, or association engaged in the transmission of messages on telephone or telegraph lines between the states or in this state, shall be fined not more than five hundred dollars, or imprisoned in the county jail not exceeding six months. [C97, §4816; C24, 27, 31, 35,§13121.]

13122 Placing obstructions on railways. If any person shall willfully and maliciously place any obstruction on the track of any railroad in the state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto whereby the life of any person is or may be endangered, he shall be imprisoned in the penitentiary for life, or for any term not less than two years. [R60,§4331; C73, §3990; C97,§4809; C24, 27, 31, 35,§13122.]

13122.1 Depositing refuse on track. If any person engaged in the dragging of a public highway or private way across a railroad shall cause to be deposited any dirt, gravel, stone, or other substance upon the rails of such railroad, or in such close proximity thereto so that it interferes with or jeopardizes the operation of trains upon such railroad, he shall be subject to a fine of not less than twenty-five dollars nor more than one hundred dollars. [C27, 31, 35,§13122-a1.]

13123 Shooting or throwing at train. If any person throw any stone or other substance whatever, or present or discharge any gun, pistol, or other firearm at any railroad train, car, or locomotive engine, he shall be guilty of a misdemeanor. [C97,§4810; C24, 27, 31, 35,§13123.]

Punishment, §12894

13124 Uncoupling locomotive or cars. If any person shall willfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or in any manner aid, abet, or procure the doing of the same, such person shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding one thousand dollars, or both, at the discretion of the court. [C97,§4812; C24, 27, 31, 35,§13124.]

13125 Seizing and running locomotive. If any person shall unlawfully seize upon any locomotive, with or without any express, mail, baggage, or other car attached thereto, and run the same upon any railroad, or aid, abet, or procure the doing of the same, such person shall be imprisoned in the penitentiary not exceeding ten years, or fined not exceeding two thousand dollars, or both fined and imprisoned. [C97,§4813; C24, 27, 31, 35,§13125.]

13126 Conspiracy to seize locomotive. If any two or more persons maliciously and willfully confederate together for the purpose of going upon or taking charge of any locomotive engine or car of any railroad company by force and without the consent of the person or persons in charge thereof, or if one or more persons shall go upon any locomotive engine or car of any railroad company armed with a dangerous or deadly weapon for the purpose of committing a public offense thereon, he shall be imprisoned in the penitentiary for not exceeding five years or pay a fine of not exceeding one thousand dollars. [C24, 27, 31, 35,§13126.]

13127 Wrongfully running handcar. If any person shall, without permission from the proper authority, wrongfully take or run any handcar upon any railroad in this state, he shall be guilty of a misdemeanor. [C97,§4814; C24, 27, 31, 35,§13127.]

Referred to in §13129
C97,§4814, editorially divided
Punishment, §12894

13128 Aggravated offense. If by such unlawful use of any handcar any locomotive or car is thrown from the track, or a collision produced, or any person injured, he shall be imprisoned in the penitentiary for a term of not more than five years; and if thereby any person is killed, such person so offending shall be guilty of manslaughter. [C97,§4814; C24, 27, 31, 35,§13128.]

Referred to in §13129
Punishment, §12919

13129 Interference with air brake or bell rope. If any person not an employee upon the railroad shall wrongfully interfere with any automatic air brake or bell rope upon any rail-

road car, or use the same for the purpose of stopping or in any way controlling the movement of the train, he shall be subject to the penalty provided in sections 13127 and 13128. [C97, §4815; C24, 27, 31, 35,§13129.]

C97,§4815, editorially divided

13130 Power of trainmen to arrest. Any conductor or brakeman on a railroad train shall have power to arrest a person so offending and deliver him to some peace officer on the line of the railroad. [C97,§4815; C24, 27, 31, 35,§13130.]

13131 Jumping off cars in motion. If any person not employed thereon, or not an officer of the law in the discharge of his duty, without the consent of the person having the same in charge, get upon or off any locomotive engine or car of any railroad company while the same is in motion, or elsewhere than at the established depots of such company, or get upon, cling to, or otherwise attach himself to any such engine or car for the purpose of riding upon the same, intending to jump therefrom when such engine or car is in motion, or, for the purpose of riding thereon without the payment of the usual fare, he shall be guilty of a misdemeanor. [C97,§4811; C24, 27, 31, 35,§13131.]

Punishment, §12894

CHAPTER 584

INJURIES TO ANIMALS

13132 Injuries to beasts.
13133 Impounding animals without food and water.
13134 Cruelty to animals.
13135 Docking horses prohibited—exceptions.
13136 Punishment.
13137 Disturbing stock with firearms or dogs.
13138 Driving away stock.

13132 Injuries to beasts. If any person maliciously kill, maim, or disfigure any horse, cattle, or domestic beast of another, or maliciously administer poison to any such animal; or expose any poisonous substance with intent that the same should be taken by such animal, he shall be imprisoned in the penitentiary not exceeding five years, or imprisoned in the county jail not exceeding one year, or be fined not exceeding three hundred dollars. [C51,§2678; R60,§4318; C73,§3977; C97,§4818; C24, 27, 31, 35, §13132.]

13133 Impounding animals without food and water. If any person impound or confine, or cause to be impounded or confined, in any pound or other place, any creature, and fail to supply the same during such confinement with a sufficient quantity of food and water, he shall be guilty of a misdemeanor. [C73,§4034; C97, §4972; C24, 27, 31, 35,§13133.]

Punishment, §12894

13134 Cruelty to animals. If any person torture, torment, deprive of necessary sustenance, mutilate, overdrive, overload, drive when overloaded, cruelly beat, or cruelly kill any animal, or unnecessarily fail to provide the same with proper food, drink, shelter, or protection from the weather, or drive or work the same when unfit for labor, or cruelly abandon the same, or carry the same or cause the same to be cruelly carried on any vehicle or otherwise or shall commit any other act or omission by which unjustifiable pain, distress, suffering, or death is caused or permitted to any animal or animals, whether the acts or omissions herein contemplated be committed either maliciously, willfully, or negligently, and if any person shall knowingly permit such act or omission or shall cause or procure the same to be done he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [C51,§2716; R60,§4358; C73, §4031; C97,§4969; S13,§4969; C24, 27, 31, 35, §13134.]

13135 Docking horses prohibited — exceptions. It shall be unlawful for any person or persons to dock the tail of any colt or horse of any age, other than horses and colts used for breeding and show purposes, or to procure the same to be done. [S13,§4975-a; C24, 27, 31, 35, §13135.]

Referred to in §13136

13136 Punishment. Any person or persons violating any of the provisions of section 13135 shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed thirty days. [S13,§4975-b; C24, 27, 31, 35,§13136.]

13137 Disturbing stock with firearms or dogs. Any person who knowingly discharges firearms of any description within, or in the immediate vicinity of, any inclosure where cattle, hogs, or sheep are being fed for the purpose of fattening the same; or any person who enters such inclosure with firearms or dog, unless such person shall be the owner of said stock, or have the control of the same, or shall have permission from such owner or the person having control thereof to enter said premises, shall be guilty of a misdemeanor. [C73,§3900; C97,§4820; C24, 27, 31, 35,§13137.]

Punishment, §12894

13138 Driving away stock. If any person knowingly or willfully drive off, or suffer or permit to be driven off, any stock of another to a distance exceeding one mile from the residence of the owner, or of his agent having charge of such stock, or the range in which such stock is usually in the habit of running, without the consent of such owner or agent, he shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days; and any justice of the peace in any county through which the stock thus driven off should pass, or in which it may be found, shall have jurisdiction of the offense. [C73,§3896; C97,§4819; C24, 27, 31, 35,§13138.]

CHAPTER 585

FORGERY AND COUNTERFEITING

13139 Forgery.
13140 Uttering forged instrument.
13141 Public instruments.
13142 Counterfeiting bills, notes, or drafts.
13143 Possession of counterfeit papers.
13144 Uttering counterfeit securities.
13145 Second conviction.
13146 Fraudulent alteration of instruments.
13147 Affixing fictitious signatures.
13148 Obliteration of records or instruments.
13149 Second and third convictions.
13150 Existence of corporation—proof.
13151 Making tools for counterfeiting.
13152 Possession of tools for counterfeiting.
13153 Counterfeiting coin.
13154 Uttering or possession of counterfeit coin.
13155 Counterfeiting foreign coin.
13156 Counterfeiting public seals.
13157 Counterfeiting brands or stamps.
13158 Possession of instruments for counterfeiting.
13159 Circulation of foreign bank notes.
13160 Allegations of indictment—proof.
13161 Series of offenses—jurisdiction.

13139 Forgery. If any person, with intent to defraud, falsely make, alter, forge, or counterfeit any:

1. Public record; or
2. Process issued or purporting to be issued by any competent court, magistrate, or officer; or
3. Pleading or proceeding filed or entered in any court of law or equity; or
4. Attestation or certificate of any public officer, or other person, in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof; or
5. Charter, deed, will, bond, writing obligatory, power of attorney, letter of credit, policy of insurance, bill of lading, bill of exchange, promissory note; or
6. Order, acquittance, discharge, or accountable receipt for money or other valuable thing; or
7. Acceptance of any bill of exchange or order; or
8. Indorsement or assignment of any bill of exchange, promissory note or order, or of any debt or contract; or
9. Instrument in writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created, increased, transferred, conveyed, discharged, or diminished—he shall be imprisoned in the penitentiary not more than ten years or imprisoned in the county jail not exceeding one year, or fined not exceeding one thousand dollars. [C51,§2626; R60,§4253; C73,§3917; C97,§4853; S13,§4853; C24, 27, 31, 35, §13139.]

Referred to in §13140

13140 Uttering forged instrument. If any person utter and publish as true any record, process, certificate, deed, will, or any other instrument of writing mentioned in section 13139, knowing the same to be false, altered, forged, or counterfeited, with intent to defraud, he shall be imprisoned in the penitentiary not more than fifteen years, and fined not exceeding one thousand dollars. [C51,§2627; R60,§4254; C73,§3918; C97,§4854; C24, 27, 31, 35,§13140.]

13141 Public instruments. If any person, with intent to defraud, falsely make, utter, forge, or counterfeit any note, certificate, state bond, warrant, or other instrument, being public security for money or other property, issued or purporting to be issued by authority of this state or any other of the United States; or any indorsement or other writing purporting to transfer the right or interest of any holder of such public security, he shall be imprisoned in the penitentiary not more than twenty years. [C51,§2628; R60,§4255; C73,§3919; C97,§4855; C24, 27, 31, 35,§13141.]

13142 Counterfeiting bills, notes, or drafts. If any person make, alter, forge, or counterfeit any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized for that purpose by any state of the United States, or any other government or country, with intent to injure or defraud, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding three hundred dollars, and imprisoned in the county jail not exceeding one year. [C51,§2629; R60,§4256; C73,§3920; C97,§4856; C24, 27, 31, 35, §13142.]

Referred to in §13143

13143 Possession of counterfeit papers. If any person has in his possession any forged, counterfeited, or altered bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued as is mentioned in section 13142, with intent to defraud, knowing them to be forged, counterfeited, or altered, he shall be imprisoned in the penitentiary not more than five years, or fined not exceeding two hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2630; R60,§4257; C73,§3921; C97,§4857; C24, 27, 31, 35,§13143.]

13144 Uttering counterfeit securities. If any person utter, pass, or tender in payment as true any false, altered, forged, or counterfeited note, certificate, state bond, warrant, or other instrument of public security, or any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company, knowing the same to be false, altered, forged, or counterfeited, with the intent to injure or defraud, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2631; R60,§4258; C73,§3922; C97,§4858; C24, 27, 31, 35,§13144.]

Referred to in §13145

13145 Second conviction. If any person, having been convicted of any of the offenses described in section 13144, afterward be convicted of a like offense, he shall be imprisoned in the penitentiary not more than ten years. [C51, §2632; R60,§4259; C73,§3923; C97,§4859; C24, 27, 31, 35,§13145.]

Multifarious convictions, §§13026, 13043, 13149; also ch 614

13146 Fraudulent alteration of instruments. If any person fraudulently connect together different parts of several genuine bank bills, notes, or other instruments in writing, so as to produce one instrument; or alter any note or instrument in writing in a matter that is material, with intent to defraud, the same shall be forgery in like manner as if such bill or note or other instrument had been forged and counterfeited. [C51,§2636; R60,§4263; C73,§3927; C97, §4863; C24, 27, 31, 35,§13146.]

13147 Affixing fictitious signatures. If any fictitious or pretended signature of an officer or agent of any corporation be fraudulently affixed to any instrument of writing purporting to be a note, draft, or other evidence of debt issued by such corporation, with intent to utter or pass the same as true, it is a forgery, though no such person may ever have been an officer or agent of such corporation, nor such corporation have ever existed; and the person guilty thereof shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding three hundred dollars and imprisoned in the county jail not more than one year. [C51,§2637; R60,§4264; C73,§3928; C97,§4864; C24, 27, 31, 35,§13147.]

13148 Obliteration of records or instruments. The total or partial erasure or obliteration of any record, process, certificate, deed, will, or any other instrument in writing mentioned in this chapter, with the intent to defraud, shall be deemed forgery, and the offender shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2638; R60,§4265; C73,§3929; C97,§4865; C24, 27, 31, 35,§13148.]

Referred to in §13149

13149 Second and third convictions. If any person, having been convicted of either of the offenses mentioned in section 13148, be afterward convicted of a like offense, he shall be imprisoned in the penitentiary not more than ten nor less than three years. [C51,§2639; R60, §4266; C73,§3930; C97,§4866; C24, 27, 31, 35, §13149.]

Multifarious convictions, §§13026, 13043, 13145; also ch 614

13150 Existence of corporation—proof. On the trial of any person for forging or counterfeiting any bill, note, or other evidence of debt purporting to be issued by any incorporated company; or for uttering, passing, or attempting to pass, or having in possession the same with intent to utter or pass, such bill, note, or evidence of debt, it is not necessary to prove the incorporation by the charter or act thereof; but the same may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill, note, or evidence of debt is forged or counterfeit. [C51,§3643; R60,§4270; C73,§3934; C97,§4870; C24, 27, 31, 35,§13150.]

13151 Making tools for counterfeiting. If any person engrave, make, or mend, or begin to engrave, make, or mend, any plate, block, press, or other tool, instrument, or implement, or make or provide any paper or other materials, adapted and designed for the forging or making any false and counterfeit note, certificate, state bond, warrant, or other instrument of public security for money or other property of this state or any other of the United States, or any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company, he shall be imprisoned in the penitentiary not more than five years. [C51,§2633; R60,§4260; C73,§3924; C97, §4860; C24, 27, 31, 35,§13151.]

C97,§4860, editorially divided

13152 Possession of tools for counterfeiting. Every person who has in his possession any such plate or block engraved in any part, or any press or other tool, instrument, or implement, paper or other material, adapted and designed as aforesaid, with intent to use the same, or to cause or permit the same to be used, in forging or making any such false and forged certificates, notes, bonds, warrants, public securities, or evidences of debt, shall be imprisoned in the penitentiary not more than five years. [C51,§2633; R60,§4260; C73,§3924; C97, §4860; C24, 27, 31, 35,§13152.]

Similar provision, §13158

13153 Counterfeiting coin. If any person forge or counterfeit any gold or silver coin, current by law or usage within this state, or if any person have in his possession at the same time five or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, he shall be imprisoned in the penitentiary not more than ten years. [C51,§2634; R60,§4261; C73,§3925; C97,§4861; C24, 27, 31, 35,§13153.]

Referred to in §13154

13154 Uttering or possession of counterfeit coin. Any person who has in his possession any number of pieces less than five of the counterfeit coin mentioned in section 13153, knowing the same to be false or counterfeit, with intent to utter or pass the same as true; and any person who utters, passes, or tenders in payment any false and counterfeit coin, knowing the same to be false and counterfeit, shall be imprisoned in the penitentiary not exceeding eight years, or fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2635; R60,§4262; C73,§3926; C97, §4862; C24, 27, 31, 35,§13154.]

13155 Counterfeiting foreign coin. If any person forge or counterfeit any gold or silver coin of any foreign government or country, with intent to export the same to injure or defraud any such government or the citizens thereof, he

shall be imprisoned in the penitentiary not exceeding ten years. [C51,§2641; R60,§4268; C73, §3932; C97,§4868; C24, 27, 31, 35,§13155.]

13156 Counterfeiting public seals. Every person who is convicted of having forged, counterfeited, or falsely altered the great seal of the state; or the seal of any public office authorized by law; or the seal of any court, corporation, city, or county; or who falsely makes, forges, or counterfeits any impression purporting to be the impression of any such seal, with intent to defraud, shall be imprisoned in the penitentiary not exceeding ten years. [C51,§2642; R60, §4269; C73,§3933; C97,§4869; C24, 27, 31, 35, §13156.]

13157 Counterfeiting brands or stamps. If any person, with intent to defraud, falsely make, forge, or counterfeit any stamp or brand authorized by law to be affixed to any substance or thing whatever; or, knowing such stamp or brand to be counterfeit, use the same as genuine, with intent to defraud, he shall be imprisoned in the penitentiary not exceeding ten years. [C73, §3935; C97,§4871; C24, 27, 31, 35,§13157.]

13158 Possession of instruments for counterfeiting. If any person cast, stamp, engrave, make, or amend, or have in his possession any mould, die, press, or other instrument or tool adapted and designed for the forging and counterfeiting of any coin before mentioned, with intent to use the same, or permit the same to be used, for that purpose, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not more than one year. [C51,§2640; R60,§4267; C73,§3931; C97, §4867; C24, 27, 31, 35,§13158.]

Similar provision, §13152

13159 Circulation of foreign bank notes. If any person pay out or offer to pay, or in any manner put in circulation or offer to put in circulation, any bank note, bill, or other instrument intended to circulate as money, issued or purporting to be issued by any bank, individual, or corporation elsewhere than in this state, excepting treasury notes, notes of any bank organized under the law of the United States, or any other description of currency issued by the authority of congress, he shall be fined the sum of five dollars for each note, bill, or other instrument so paid out or offered to be paid out, put in circulation, or offered to be put in circulation. [C73, §4047; C97,§5011; C24, 27, 31, 35,§13159.]

Referred to in §13160
C97,§5011, editorially divided

13160 Allegations of indictment—proof. In prosecutions under section 13159, it shall not be necessary to state in the indictment or information the name of the bank issuing the notes, nor to prove the existence of the bank or other person purporting to issue them; but it shall be sufficient to allege in general terms the fact of paying out, or attempting to pay out, as the case may be, of bank notes issued out of this state; and the proof may be made as if the particulars were alleged. [C73,§4047; C97,§5011; C24, 27, 31, 35,§13160.]

13161 Series of offenses—jurisdiction. Any number of offenses may be included in the same prosecution, and where the total fines shall not exceed one hundred dollars, the offense may be tried before a justice of the peace; but when they exceed one hundred dollars, it shall be within the jurisdiction of the district court. [C73,§4047; C97,§5011; C24, 27, 31, 35,§13161.]

CHAPTER 586

CONSPIRACY

13162 "Conspiracy" defined—common law.

13162 "Conspiracy" defined—common law. If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property, or rights in property of another, or to do any illegal act injurious to the public trade, health, morals, or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law, shall be imprisoned in the penitentiary not more than three years. [C51,§2758; R60,§4408; C73,§4087; C97,§5059; C24, 27, 31, 35, §13162.]

Conspiracy in re insurance, §8758

13163 Conspiracy to prosecute.

13163 Conspiracy to prosecute. If two or more persons conspire or confederate together with intent, falsely and maliciously, to cause or procure another person to be indicted or in any way impleaded or prosecuted for an offense of which he is innocent, whether such person be so impleaded, indicted, or prosecuted or not, they shall be guilty of a conspiracy, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one thousand nor less than one hundred dollars, and imprisoned in the county jail not exceeding one year. [C51,§2757; R60,§4407; C73,§4086; C97,§5058; C24, 27, 31, 35,§13163.]

CHAPTER 587

MALICIOUS THREATS

13164 Malicious threats to extort.

13164 Malicious threats to extort. If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be imprisoned in the penitentiary not more than five years or be fined not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding one year, or both such fine and imprisonment. [C51,§2590; R60,§4213; C73,§3871; C97,§4767; S13,§4767; C24, 27, 31, 35,§13164.]

CHAPTER 588

PERJURY

13165 Definition—punishment.
13166 Subornation of perjury.
13167 Attempt to suborn.

13165 Definition—punishment. If any person, on oath or affirmation lawfully administered, willfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice, or before any officer thereof, or before any tribunal or officer created by law, or in any proceeding in regard to any matter or thing in or respecting which an oath or affirmation is or may be required or authorized by law, he is guilty of perjury, and shall, if the perjury was committed on the trial of a capital crime, be imprisoned in the penitentiary for life or any term not less than ten years; and if committed in any other case, not more than ten years. [C51,§2644; R60,§4271; C73,§3936; C97,§4872; C24, 27, 31, 35,§13165.]

Referred to in §13166
Indictment, §13782.26

13166 Subornation of perjury. If any person procure another to commit perjury, he is guilty of subornation of perjury, and shall be punished as provided in section 13165. [C51, §2645; R60,§4272; C73,§3937; C97,§4873; C24, 27, 31, 35,§13166.]

13167 Attempt to suborn. If any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year. [C51,§2646; R60,§4273; C73,§3938; C97,§4874; C24, 27, 31, 35, §13167.]

CHAPTER 589

COMPOUNDING FELONIES

13168 Compounding certain felonies.
13169 Compounding lesser felonies.

13168 Compounding certain felonies. If any person, having knowledge of the commission of any offense punishable with imprisonment in the penitentiary for life, take any money or valuable consideration or gratuity, or any promise therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense, or not to prosecute the same, or not to give evidence thereof, he shall be imprisoned in the penitentiary not more than six years, or be fined not exceeding one thousand dollars. [C51,§2659; R60,§4286; C73,§3951; C97,§4889; C24, 27, 31, 35,§13168.]

Referred to in §13169
Additional provision, §13757

13169 Compounding lesser felonies. If any person, having knowledge of the commission of any offense punishable by imprisonment in the penitentiary for a limited term of years, is guilty of the offense described in section 13168, he shall be imprisoned in the county jail not more than one year, and be fined not exceeding four hundred dollars. [C51,§2660; R60,§4287; C73, §3952; C97,§4890; C24, 27, 31, 35,§13169.]

CHAPTER 590

OBSTRUCTING JUSTICE

13170 Interference with administration of justice.
13171 Injunction to prevent obstruction of justice.
13172 Unlawful solicitation and promotion of action.

13170 Interference with administration of justice. If any person attempt in any manner to improperly influence, intimidate, impede, or obstruct any petit juror, grand juror, or other officer in any civil or criminal action or proceeding, or any one drawn, summoned, appointed, or sworn as such juror or officer, or any arbitrator or referee, or any witness or any officer in, or of, any court or tribunal in relation to any cause or matter or proceeding pending in, or that may be brought before, such court or tribunal, for which such juror or other officer has been drawn, appointed or in which said witness has been, or may be, called to testify, or in regard to which such officer is, or may be, required to act in his official capacity, or, if any person shall intentionally, or by threat or force, or by any threatening letter or threatening communication, or by any public speech or in any other manner improperly influence, obstruct, or impede, or endeavor or attempt to improperly influence, obstruct, or impede the due administration of justice or the actions or conduct of any such jurors, witnesses, arbitrator, referee, or other officer, he shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the penitentiary not more than one year, or by both such fine and imprisonment. [C51,§2654; R60,§4281; C73,§3946; C97,§4882; C24, 27, 31, 35,§13170.]

13171 Injunction to prevent obstruction of justice. The commission, threat, or attempt to commit any of the acts or things hereinbefore referred to shall be held to be an injury to the general welfare and any person doing or threatening or attempting to do any such acts may be enjoined and restrained at the suit of the state upon the relation of the attorney general. [C24, 27, 31, 35,§13171.]

13172 Unlawful solicitation and promotion of action. It shall be unlawful for any person, with the intent, or for the purpose of instituting a suit thereon outside of this state, to seek or solicit the business of collecting any claim for damages for personal injuries sustained within this state or for death resulting therefrom, or in any way to promote the prosecution of a suit brought outside of this state for such damages, or to do any act or thing in furtherance thereof, in cases where such right of action rests in a resident of this state, or his legal representative, and is against a person, copartnership, or corporation subject to personal service within this state. [C24, 27, 31, 35,§13172.]

CHAPTER 591

PROSTITUTION

13173 Punishment.
13174 Soliciting.
13175 Keeping house of ill fame.
13176 Evidence—general reputation.
13177 Terminating lease after conviction.
13178 Leasing house for prostitution.
13179 Permitting minor females to be inmates.
13180 Detention of females.
13181 Enticing to house of ill fame.
13182 Enticing female child for prostitution.

13173 Punishment. If any person, for the purpose of prostitution or lewdness, resorts to, uses, occupies or inhabits any house of ill fame or place kept for such purpose, or if any person be found at any hotel, boarding house, cigar store, or other place, leading a life of prostitution or lewdness, such person shall be imprisoned in the penitentiary not more than five years. [C97,§4943; C24, 27, 31, 35,§13173.]

13174 Soliciting. Any person who shall ask, request, or solicit another to have carnal knowledge with any male or female for a consideration or otherwise, shall be punished by imprisonment in the penitentiary not exceeding five years, or imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or both such fine and jail imprisonment. [S13,§4975-c; C24, 27, 31, 35,§13174.]

13175 Keeping house of ill fame. If any person keeps a house of ill fame, resorted to for the purpose of prostitution or lewdness such person shall be imprisoned in the penitentiary not more than five years. [C51,§2710; R60, §4352; C73,§4013; C97,§4939; C24, 27, 31, 35, §13175.]

13176 Evidence — general reputation. The state, upon the trial of any person indicted for keeping a house of ill fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evidence of the general reputation of such house as so kept. [C97,§4944; C24, 27, 31, 35,§13176.]

General reputation, §§1962, 2022, 2053, 3164

13177 Terminating lease after conviction. When a tenant, or anyone claiming under him, is convicted of keeping a house of ill fame, the landlord of the premises may terminate the lease therefor, and recover possession thereof in the manner provided in case of violation of the provisions of title VI, relative to intoxicating liquors. [C51,§2711; R60,§4353; C73,§4014; C97, §4940; C24, 27, 31, 35,§13177.]

13178 Leasing house for prostitution. If any person let any house, knowing that the

lessee intends to use it as a place or resort for the purpose of prostitution and lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be fined not exceeding three hundred dollars, or imprisoned in the county jail not exceeding six months. [C51, §2712; R60,§4354; C73,§4015; C97,§4941; C24, 27, 31, 35,§13178.]

13179 Permitting minor females to be inmates. Whoever, being the keeper of a house of prostitution, or assignation house, building, or premises in this state where prostitution, fornication, or concubinage is allowed, or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop, or room in such house, building, or premises, shall, on conviction, be imprisoned in the penitentiary not less than one year nor more than five years. [S13,§4944-i; C24, 27, 31, 35, §13179.]

13180 Detention of females. Whoever shall unlawfully detain or confine any female, by force, false pretense, or intimidation, in any room, house, building, or premises in this state, against the will of such female, for purposes of prostitution or with intent to cause such female to become a prostitute, and be guilty of fornication or concubinage therein, or shall by force, false pretense, confinement, or intimidation attempt to prevent any female so as aforesaid detained, from leaving such room, house, building, or premises, and whoever aids, assists, or abets by force, false pretense, confinement, or intimidation, in keeping, confining, or unlawfully detaining any female in any room, house, building, or premises in this state, against the will of such female, for the purpose of prostitution, fornication, or concubinage, shall, on conviction, be imprisoned in the penitentiary not more than ten years. [S13,§4944-j; C24, 27, 31, 35,§13180.]

13181 Enticing to house of ill fame. If any person inveigle or entice any female, before reputed virtuous, to a house of ill fame, or knowingly conceal or aid or abet in concealing such female so deluded or enticed, for the purpose of prostitution or lewdness, or entice back into a life of prostitution any female who has theretofore been guilty of prostitution and has abandoned it, he shall be imprisoned in the penitentiary not more than ten years. [C51, §2713; R60,§4355; C73,§4016; C97,§4942; C24, 27, 31, 35,§13181.]

13182 Enticing female child for prostitution. If any person take or entice away any unmarried female under the age of eighteen years for the purpose of prostitution, he shall be imprisoned in the penitentiary not more than five years, or be fined not more than one thousand dollars and imprisoned in the county jail not more than one year. [C51,§2584; R60,§4207; C73,§3865; C97,§4760; C24, 27, 31, 35,§13182.]

Corroboration, §13900

CHAPTER 592

OBSCENITY AND INDECENCY

13183 Lewdness—indecent exposure.
13184 Lascivious acts with children.
13185 Immoral plays, exhibitions, and entertainments.
13189 Obscene books or pictures—printing or distributing.
13190 Obscene literature—articles for immoral use.
13191 Circulating obscene matter.
13192 Advertising drugs for venereal disease.
13193 Giving or showing obscene literature to minors.
13194 Warrants for search or seizure.
13195 Exceptions—doctors—druggists—artists.
13196 Obscene productions by phonograph.
13197 Exhibition of deformed or abnormal persons.

13183 Lewdness—indecent exposure. If any man and woman not being married to each other, lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness, and designedly makes an open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be imprisoned in the county jail not exceeding six months, or be fined not exceeding two hundred dollars. [C51,§2709; R60,§4351; C73,§4012; C97,§4938; C24, 27, 31, 35,§13183.]

13184 Lascivious acts with children. Any person over eighteen years of age who shall willfully commit any lewd, immoral, or lascivious act in the presence, or upon or with the body or any part or member thereof, of a child of the age of sixteen years, or under, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child, or of corrupting the morals of such child, shall be punished by imprisonment in the penitentiary not more than three years, or by imprisonment in the county jail not more than six months, or by fine not exceeding five hundred dollars. [S13,§4938-a; C24, 27, 31, 35,§13184.]

13185 Immoral plays, exhibitions, and entertainments. Any person who, as owner, manager, director, or agent, or in any other capacity, prepares, advertises, gives, presents, or participates in any obscene, indecent, immoral, or impure drama, play, exhibition, show, or entertainment, which would tend to the corruption of the morals of youth or others, and every person aiding or abetting such act and every owner or lessee or manager of any garden, building, room, place, or structure, who leases or lets the same or permits the same to be used for the purposes of any such drama, play, exhibition, show, or entertainment, or who assents to the use of the same for any such pur-

pose, if it be so used, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars, or imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. [S13,§4944-k; C24, 27, 31, 35, §13185.]

13186 to 13188, inc. Rep. by 48GA, ch 249,§1

13189 Obscene books or pictures—printing or distributing. If any person import, print, publish, sell, or distribute any book, pamphlet, ballad, or any printed or written paper containing obscene language or obscene prints, pictures, or descriptions, manifestly tending to corrupt the morals of youth; or introduce into any family, school or place of education, or buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed or written paper, picture, or description, either for the purpose of loan, sale, exhibition, or circulation, or with intent to introduce the same into any family, school or place of education, he shall be imprisoned in the penitentiary not more than one year, or be fined not exceeding one thousand dollars. [C51,§2717; R60,§4359; C73,§4022; C97, §4951; C24, 27, 31, 35,§13189.]

13190 Obscene literature—articles for immoral use. Whoever sells, or offers for sale, or gives away, or has in his possession with intent to sell, loan, or give away any obscene, lewd, indecent, lascivious, or filthy book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, writing, card, postal card, model, cast, or any instrument or article of indecent or immoral use, or any medicine, article, or thing designed or intended for procuring abortion or preventing conception, or advertises the same for sale, or writes or prints any letter, circular, handbill, card, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, when, where, how, or by what means any of the articles or things hereinbefore mentioned can be purchased, or otherwise obtained or made, shall be guilty of a misdemeanor and be fined not more than one thousand nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both. [C97,§4952; S13,§4952; C24, 27, 31, 35,§13190.]

Referred to in §§13191, 13195

13191 Circulating obscene matter. Whosoever deposits in any post office within this state, or places in charge of any person to be carried or conveyed, any of the articles or things named in section 13190, or any circular, handbill, card, advertisement, book, pamphlet, or notice of any kind, giving information, directly or indirectly, when, how, where, or by what means any of the articles or things mentioned in section 13190 can be purchased or obtained, or knowingly or willfully receives the same to carry or convey, or knowingly carries or conveys the same in any manner, except in the United States mail, shall be fined not more than one thousand dollars, nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both. [C97,§4953; C24, 27, 31, 35,§13191.]

Referred to in §13195

13192 Advertising drugs for venereal disease. Whoever prints or publishes, or causes to be printed or published, in any newspaper published or circulated in this state, any advertisement of medicine, drug, nostrum, or apparatus for the cure of private or venereal disease, or shall circulate or distribute any newspaper containing such an advertisement or notice, shall be guilty of a misdemeanor, and be fined not more than one thousand dollars nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both. [C97,§4954; C24, 27, 31, 35,§13192.]

Referred to in §13195

13193 Giving or showing obscene literature to minors. Whoever sells, lends, gives away, or shows, or has in his possession with intent to sell, give away, or show, to any minor, any book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication, or principally made up of, criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibits upon any street or highway, or any place within the view, or which may be within the view, of any minor, any of the above described books, papers, or pictures, or uses or employs any minor to give away, sell, or distribute, or who, having the care, custody, or control of any minor, permits him to sell, give away, or distribute, any such books, papers, or pictures, shall be fined not more than five hundred nor less than fifty dollars, or be imprisoned not more than six months in the county jail, or both. [C97,§4955; C24, 27, 31, 35,§13193.]

Referred to in §13195

13194 Warrants for search or seizure. Any magistrate or police judge is authorized, on complaint supported by oath or affirmation of one or more persons, to issue a warrant, directed to the sheriff of the county within which such complaint is made, or to any constable or police officer within said county, directing him or them, or any of them, to search for, seize and take possession of such books, papers, pictures, circulars, articles, and things named in this chapter; and said magistrate or police judge shall deliver personally, or shall transmit, inclosed and under seal, specimens thereof to the county attorney of his county, and shall deposit within the county jail of his county, or other secure place, as to him shall seem meet, inclosed and under seal, the remainder thereof, and shall, upon the conviction of the person or persons offending under the provisions of this chapter, forthwith, in the presence of the person or persons upon whose complaint the seizure or arrest was made, if he or they shall elect to be present, destroy, or cause to be destroyed, the remainder thereof, and shall cause to be entered upon the record of his court the fact of such destruction. [C97, §4956; C24, 27, 31, 35,§13194.]

Referred to in §13195
Search warrant procedure, ch 617

13195 Exceptions—doctors—druggists—artists. Nothing in sections 13190 to 13194, inclusive, shall be construed to affect teaching in regularly chartered medical colleges, or the publication or use of standard medical books, or the practice of regular practitioners of medicine or druggists in their regular business, or the possession by artists of models in the necessary line of their art. [C97,§4957; C24, 27, 31, 35,§13195.]

13196 Obscene productions by phonograph. If any person exhibit through a phonograph, or any other instrument for receiving and reproducing the human voice, any story, song, or any other matter containing any obscene, indecent, or immoral langauge, he shall be imprisoned in the penitentiary not more than one year, or be fined not exceeding one thousand dollars. [C97,§4958; C24, 27, 31, 35,§13196.]

13197 Exhibition of deformed or abnormal persons. Any person, firm, or corporation who shall exhibit, place on exhibition, or cause to be exhibited in any public place in the state, or in any tent, shed, booth, building, or in any theater, hall, or within any inclosure in the state, any deformed, maimed, idiotic, or abnormal person or human monstrosity, and receive any fee or compensation therefor, shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail for a term not less than ten days nor more than thirty days, or be punished by both such fine and imprisonment. [S13,§4975-1a; C24, 27, 31, 35,§13197.]

CHAPTER 593

GAMBLING

13198 Keeping gambling houses.
13199 "Keeper" defined.
13202 Gaming and betting—penalty.
13203 Wagers—forfeiture.
13210 Possession of gambling devices prohibited.
13216 Pool selling—places used for.
13217 Bull fights and other contests.
13218 Lotteries and lottery tickets.
13219 Minors in billiard rooms—duty of owner.
13220 Punishment.

13198 Keeping gambling houses. If any person keep a house, shop, or place resorted to for the purpose of gambling, or permit or suffer any person in any house, shop, or other place under his control or care to play at cards, dice, faro, roulette, equality, punch board, slot machine or other game for money or other thing, such offender shall be fined in a sum not less than fifty nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year, or both. [C51,§2721; R60,§4363; C73,§4026; C97,§4962; C24, 27, 31, 35,§13198; 47 GA, ch 231,§1.]

Referred to in §13199
C97,§4962, editorially divided

13199 "Keeper" defined. In a prosecution under section 13198, any person who has the charge of or attends to any such house, shop, or place is the keeper thereof. [C51,§2721; R60,§4363; C73,§4026; C97,§4962; C24, 27, 31, 35,§13199.]

13200, 13201 Rep. by 46GA, ch 125

13202 Gaming and betting—penalty. If any person play at any game for any sum of money or other property of any value, or make any bet or wager for money or other property of value, he shall be guilty of a misdemeanor. [C51, §2723; R60,§4365; C73,§4028; C97,§4964; C24, 27, 31, 35,§13202.]

Punishment, §12894

13203 Wagers—forfeiture. Property, whether real or personal, offered as a stake, or any moneys, property, or other thing of value staked, paid, bet, wagered, laid, or deposited in connection with or as a part of any game of chance, lottery, gambling scheme or device, gift enterprise, or other trade scheme unlawful under the laws of this state shall be forfeited to the state and said personal property may be seized and disposed of under chapter 617. [C24, 27, 31, 35, §13203.]

Referred to in §13441.03

13204 to 13209, inc. Rep. by 46GA, ch 125

13210 Possession of gambling devices prohibited. No one shall, in any manner or for any purpose whatever, except under proceeding to destroy the same, have, keep, or hold in possession or control any roulette wheel, klondyke table, poker table, punch board, faro, or keno layouts or any other machines used for gambling, or any slot machine or device with an element of chance attending such operation. [S13, §4965-a; C24, 27, 31, 35,§13210; 47GA, ch 231, §2.]

Referred to in §13441.03

13211 to 13215, inc. Rep. by 46GA, ch 125

13216 Pool selling—places used for. Any person who records or registers bets or wagers or sells pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, or upon the result of any political nomination or election, and any person who keeps a place for the purpose of doing any such thing, and any owner, lessee, or occupant of any premises, who knowingly permits the same, or any part thereof, to be used for any such purpose, and anyone who, as custodian or depositary thereof, for hire or reward, receives any money, property, or thing of value staked, wagered, or bet upon any such result, shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both. [C97,§4966; C24, 27, 31, 35,§13216.]

Referred to in §1587

13217 Bull fights and other contests. If any person keep or use, or in any way be connected with, or be interested in the management of, or receive money for the admission of any person to, any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock, or other creature, or engage in, aid, abet, encourage, or assist in any bull, bear, dog, or cock fight, or a fight between any other creatures, he shall be guilty of a misdemeanor. [C73,§4033; C97, §4971; C24, 27, 31, 35,§13217.]

Punishment, §12894

13218 Lotteries and lottery tickets. If any person make or aid in making or establishing, or advertise or make public any scheme for any lottery; or advertise, offer for sale, sell, negotiate, dispose of, purchase, or receive any ticket or part of a ticket in any lottery or number thereof; or have in his possession any ticket, part of a ticket, or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars, or both. [C51,§2730; R60,§4377; C73,§4043; C97,§5000; C24, 27, 31, 35,§13218.]

13219 Minors in billiard rooms — duty of owner. No person who keeps a billiard hall, or nine or ten pin alley, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, or alley, shall permit any minor to remain in such hall, or alley, or to take part in any of the games known as billiards or nine or ten pins. [C97,§5002; C24, 27, 31, 35,§13219.]

Referred to in §13220
C97,§5002, editorially divided

13220 Punishment. A violation of the provisions of section 13219 shall be punished by a fine not less than five nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days. [C97,§5002; C24, 27, 31, 35,§13220.]

CHAPTER 594

AFFRAYS AND PRIZE FIGHTING

13221 "Affray" defined.
13222 Engaging in prize fight.
13223 Aiding or abetting.
13224 Prevention of prize fights by peace officer.
13225 Boxing contest—sparring exhibition.

13221 "Affray" defined. If two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in an angry or quarrelsome manner, in any public place, to the disturbance of others, they are guilty of an affray, and shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [C51,§2738; R60,§4386; C73,§4065; C97,§5029; C24, 27, 31, 35,§13221.]

13222 Engaging in prize fight. Whoever engages as principal in any prize fight shall be fined not less than one hundred nor more than one thousand dollars, or be imprisoned in the penitentiary for a term of not more than one year, or both. [C97,§5036; C24, 27, 31, 35, §13222.]

13223 Aiding or abetting. Whoever aids or assists in any prize fight shall be fined not exceeding five hundred dollars, or imprisoned in the county jail for not more than one hundred fifty days. [C97,§5037; C24, 27, 31, 35,§13223.]

13224 Prevention of prize fights by peace officer. Any peace officer who has reason to believe that any persons are about to engage in a prize fight within the state shall make complaint before some justice of the peace of the county, or other authorized magistrate, and thereupon such justice of the peace or authorized magistrate shall proceed, under chapter 625, to make examination of the charges, and, if he shall find that there is just reason to fear the commission of such offense, he shall require security to keep the peace, to be given as therein provided. [C97, §5038; C24, 27, 31, 35,§13224.]

13225 Boxing contest — sparring exhibition. Whoever engages in any boxing contest or sparring exhibition with or without gloves for a prize, reward, or anything of value, at which an admission fee is charged or received, either directly or indirectly, and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contest or sparring exhibition, shall be fined not exceeding three hundred dollars, or imprisoned in the county jail not exceeding ninety days. [S13,§5038-a; C24, 27, 31, 35,§13225.]

CHAPTER 595

PROFANITY

13226 Using blasphemous or obscene language.

13226 Using blasphemous or obscene language. If any person publicly use blasphemous or obscene language, to the disturbance of the public peace and quiet, he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [C97,§5034; S13,§5034; C24, 27, 31, 35,§13226.]

CHAPTER 596

DESECRATION OF SABBATH

13227 Breach of Sabbath—exceptions.

13227 Breach of Sabbath—exceptions. If any person be found on the first day of the week, commonly called Sunday, engaged in carrying firearms, dancing, hunting, shooting, horse racing, or in any manner disturbing a worshipping assembly or private family, or in buying or selling property of any kind, or in any labor except that of necessity or charity, he shall be fined not more than five nor less than one dollar, and be imprisoned in the county jail until the fine, with costs of prosecution, shall be paid; but nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the Sabbath, or to prevent persons traveling or families emigrating from pursuing their journey, or keepers of toll bridges, toll gates, and ferrymen from attending the same. [R60,§§4392, 4393; C73,§4072; C97, §5040; C24, 27, 31, 35,§13227.]

CHAPTER 597

DESECRATION OF DECORATION DAY

13228 Ball games and other sports.
13229 Punishment.

13228 Ball games and other sports. It shall be unlawful to engage in ball games, horse racing, or sports or entertainments that will interfere with the proper observance of the day which is set apart as decoration day (May 30), prior to the hour of three o'clock p. m. of said day. [S13,§5040-a; C24, 27, 31, 35,§13228.]

Referred to in §13229
S13,§5040-a, editorially divided

13229 Punishment. Any violation of section 13228 shall be punishable by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment in the county jail not to exceed thirty days in the discretion of the court. [S13,§5040-a; C24, 27, 31, 35,§13229.]

CHAPTER 598

DESERTION AND ABANDONMENT OF WIFE AND CHILDREN

Referred to in §12667.29

13230 "Desertion" defined.
13231 Husband or wife may be witness.
13232 Release on bond conditioned on support.
13233 Annulment of bond.
13234 Failure of undertaking — commitment — release.
13235 Prima facie evidence.
13236 Exposing and abandoning child.

13230 "Desertion" defined. Every person who shall, without good cause, willfully neglect or refuse to maintain or provide for his wife, she being in a destitute condition, or who shall, without good cause, abandon his or her legitimate or legally adopted child or children under the age of sixteen years, leaving such child or children in a destitute condition, or shall, without good cause, willfully neglect or refuse to provide for such child or children, they being in a destitute condition, shall be deemed guilty of desertion and, upon conviction, shall be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six months. [S13,§4775-a; C24, 27, 31, 35,§13230.]

13231 Husband or wife may be witness. In all prosecutions under this chapter, the husband or wife shall be a competent witness for the state and may testify to any relevant acts or communications between them, anything in previous statutes to the contrary notwithstanding, provided, however, that no husband or wife shall be called or compelled to testify against the other under this chapter except upon consent of such witness. [S13,§4775-b; C24, 27, 31, 35,§13231.]

General prohibition, §11260

13232 Release on bond conditioned on support. If after arrest and before trial, or after conviction and before sentence, the party so arrested or convicted shall appear before the court in which the case is pending or the conviction had, and enter into a bond to the state in a sum to be fixed by the court, which in no event shall exceed the sum of one thousand dollars, with or without sureties as may be determined by the court, conditioned that such husband will furnish said wife with a necessary and proper home, food, care, and clothing, or that such parent will furnish his or her child or children with a necessary and proper home, food, care, and clothing, then said court may release the defendant. [S13,§4775-c; C24, 27, 31, 35, §13232.]

S13,§4775-c, editorially divided

13233 Annulment of bond. Said bond shall remain in force so long as the court deems the same necessary; and whenever it shall appear to

said court by affidavit or otherwise that such husband or parent is in good faith furnishing his wife, child, or children with the necessary and proper home, food, care, and clothing, the court may annul the said bond. [S13,§4775-c; C24, 27, 31, 35,§13233.]

13234 Failure of undertaking — commitment —release. Upon failure of said husband or parent to comply with his undertaking he or she may be arrested by the sheriff or other officer upon a warrant issued from the court in which the case is pending or the conviction was had and the court may thereupon order a forfeiture of the undertaking and that the defendant be tried or committed in execution of the sentence, or for good cause shown may release the defendant upon a new undertaking. [S13,§4775-d; C24, 27, 31, 35,§13234.]

13235 Prima facie evidence. Proof of the desertion of wife, child, or children in destitute or necessitous circumstances or of neglect to furnish such wife, child, or children necessary and proper food, clothing, or shelter, shall be prima facie evidence that such desertion or neglect was willful. [S13,§4775-e; C24, 27, 31, 35, §13235.]

13236 Exposing and abandoning child. If the father or mother of any child under the age of six years, or any person to whom such child has been intrusted or confided, expose such child in any highway, street, field, house, or outhouse, or in any other place, with intent wholly to abandon it, he or she, upon conviction thereof, shall be imprisoned in the penitentiary not exceeding five years. [C51,§2589; R60,§4212; C73,§3870; C97,§4766; C24, 27, 31, 35,§13236.]

CHAPTER 599

PUBLIC HEALTH AND SAFETY

13237 Spreading infectious disease.
13238 Putting infected person on public conveyance.
13239 Throwing dead animals or refuse in stream.
13240 Selling drugged liquors.
13241 Disposing of liquors to Indians.
13242 Use of dangerous fluids forbidden.
13243 Punishment.
13244 Depositing samples on porches.
13245 Punishment.
13245.01 Stench bombs, etc., prohibited.
13245.02 Manufacture or possession.
13245.03 General exceptions.
13245.04 Specific exceptions.
13245.05 Punishment.
13245.06 Endurance contests.
13245.07 Penalty.
FIREWORKS
13245.08 Definitions.
13245.09 Supervised exhibitions—permit.
13245.10 Penalties.

13237 Spreading infectious disease. If any person inoculate himself or any other person or suffer himself to be inoculated with the smallpox within the state, or come within the state with the intent to cause the prevalence or spread of this infectious disease, he shall be imprisoned in the penitentiary not more than three years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [C51,§2729; R60,§4375; C73,§4039; C97, §4977; C24, 27, 31, 35,§13237.]

13238 Putting infected person on public conveyance. If any person shall place or put, or aid or abet in placing or putting, any person upon any railroad car, steamboat, or other public conveyance, knowing such person to be infected with diphtheria, smallpox, or scarlet fever, he shall be fined not more than one hundred dollars, or be imprisoned in the county jail not more than thirty days. [C51,§2729; R60,§4375; C73, §4039; C97,§4978; C24, 27, 31, 35,§13238.]

13239 Throwing dead animals or refuse in stream. If any person throw, or cause to be thrown, any dead animal, night soil, or garbage into any river, well, spring, cistern, reservoir, stream, or pond, or in or upon any land adjoining, which is subject to overflow, he shall be imprisoned in the county jail not less than ten nor more than thirty days, or be fined not less than five nor more than one hundred dollars. [C73,§4041; C97,§4979; S13,§4979; C24, 27, 31, 35,§13239.]

13240 Selling drugged liquors. If any person willfully sell or keep for sale intoxicating, malt, or vinous liquors, which have been adulterated or drugged by admixture with any deleterious or poisonous substance, he shall be fined not exceeding five hundred dollars, or be imprisoned in the penitentiary not exceeding two years. [R60,§4376; C73,§4040; C97,§4980; C24, 27, 31, 35,§13240.]

Related provision, §12920

13241 Disposing of liquors to Indians. If any person give, sell, or dispose of any spirituous or intoxicating drinks to any Indian within this state, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding one year, or both. [C51,§2735; R60,§4378; C73,§4044; C97,§5001; C24, 27, 31, 35,§13241.]

13242 Use of dangerous fluids forbidden. It shall be unlawful for any person to establish or operate any dye works, pantorium, or cleaning works, in which gasoline, benzine, naphtha, or other explosive or dangerous fluids are used for the purpose of cleaning or renovating wearing apparel or other fabrics, in any building any part of which is used as a residence or lodging house. [S13,§4999-a13; C24, 27, 31, 35, §13242.]

Referred to in §13243

13243 Punishment. Any person convicted of violating the provisions of section 13242 shall

be fined in a sum not exceeding fifty nor less than ten dollars. [S13,§4999-a14; C24, 27, 31, 35,§13243.]

13244 Depositing samples on porches. It shall be unlawful for any person, firm, company, or corporation, either in person or by agent, to deposit any sample of any drugs or medicine upon any porch, lawns, in any vehicle, or any other place where such drugs or medicine might be picked up by children or other persons. [S13, §4999-a42; C24, 27, 31, 35,§13244.]

Referred to in §13245

13245 Punishment. Any person, firm, company, corporation, or agent thereof violating the provisions of section 13244, shall be guilty of a misdemeanor. [S13,§4999-a43; C24, 27, 31, 35,§13245.]

Punishment, §12894

13245.01 Stench bombs, etc., prohibited. It shall be unlawful to throw, drop, pour, explode, deposit, release, discharge or expose, or to attempt to throw, drop, pour, explode, deposit, release, discharge or expose in, upon or about any theater, restaurant, car, vessel, structure, place of business, place of amusement or any place of public assemblage, any stench bomb, tear bomb, liquid, gaseous or solid substance or matter of any kind which is injurious to person or property, or is nauseous, sickening, irritating or offensive to any of the senses. [C35,§13245-e1.]

13245.02 Manufacture or possession. It shall be unlawful to manufacture or prepare, or to possess any stench bomb, tear bomb, liquid, gaseous, or solid substance or matter of any kind which is injurious to person or property, or is nauseous, sickening, irritating or offensive, to any of the senses with intent to throw, drop, pour, explode, deposit, release, discharge or expose the same in, upon or about any theater, restaurant, car, vessel, structure, place of business, place of amusement, or any other place of public assemblage. [C35,§13245-e2.]

Referred to in §13245.04

13245.03 General exceptions. The provisions hereof [§§13245.01–13245.05] shall not apply to any duly constituted police or military authorities or prison officials or peace officers in the discharge of their duties. [C35,§13245-e3.]

13245.04 Specific exceptions. The provisions of section 13245.02 shall not apply to licensed physicians, nurses, pharmaceutists, and other persons licensed under the laws of this state; nor to any established place of business or home having tear gas installed as a protection against burglary, robbery or holdup, nor to any bank or other messenger carrying funds or other valuables; nor to any manufacturer or representative thereof who maintains a permanent place of business in this state for the purpose of manufacturing and/or selling tear gas and tear-gas equipment for such protection, or of supplying tear gas and equipment therefor to regularly constituted peace officers. [C35, §13245-e4.]

13245.05 Punishment. Every person violating any of the provisions hereof [§§13245.01–13245.05] shall be punishable by imprisonment in the county jail for not less than three months and not more than one year, or by a fine of not less than five hundred dollars and not more than two thousand dollars, or by both such fine and imprisonment. [C35,§13245-e5.]

13245.06 Endurance contests. It shall be unlawful for any person or persons, firm or corporation to advertise, operate, maintain, attend, promote or aid in the advertising, operating, maintaining or promoting any mental or physical endurance contest in the nature of a "marathon", "walkathon", "skatathon", or any other such endurance contest of a like or similar character or nature, whether under that or other names. Nothing in this act [§§13245.06, 13245.07] shall apply to the continuance of the ordinary amateur or professional athletic events or contests, or high school, college, and intercollegiate athletic sports. [C35,§13245-f1.]

Referred to in §13245.07

13245.07 Penalty. Any person or persons, firm or corporation participating in, attending or promoting any such contest and violating any of the provisions of section 13245.06 shall be fined not less than one hundred dollars, or more than one thousand dollars, or be imprisoned not more than one year or both. [C35,§13245-f2.]

FIREWORKS

13245.08 Definitions. The term "fireworks" shall mean and include any explosive composition, or combination of explosive substances, or article prepared for the purpose of producing a visible audible effect by combustion, explosion, deflagration or detonation, and shall include blank cartridges, toy pistols, toy cannons, toy canes, or toy guns in which explosives are used, balloons which require fire underneath to propel the same, firecrackers, torpedoes, skyrockets, roman candles, daygo bombs, or other fireworks of like construction and any fireworks containing any explosive or inflammable compound, or other device containing any explosive substance. [47GA, ch 181,§1.]

Referred to in §§13245.09, 13245.10
See also §§1828.08, 5762, 12959

13245.09 Supervised exhibitions — permit. Except as hereinafter provided it shall be unlawful for any person, firm, copartnership, or corporation to offer for sale, expose for sale, sell at retail, or use or explode any fireworks; provided the council of any city or town or the trustees of any township may, upon application in writing, grant a permit for the display of fireworks by municipalities, fair associations, amusement parks, and other organizations or groups of individuals approved by such city, town, or township authorities when such fireworks display will be handled by a competent operator but no such permit shall be required for such display of fireworks at the Iowa state fair grounds by the Iowa state fair board nor of incorporated county fairs nor of district fairs receiving state

aid. After such privilege shall have been granted sales of fireworks for such display may be made for that purpose only; provided further, that nothing in sections 13245.08 to 13245.10, inclusive, shall be construed to prohibit any resident, dealer, manufacturer, or jobber from selling such fireworks as are not herein prohibited; or the sale of any kind of fireworks provided the same are to be shipped out of the state; or the sale or use of blank cartridges for a show or theater, or for signal purposes in athletic sports or by railroads, trucks, for signal purposes, or by a recognized military organization; and provided further that nothing in this act shall apply to any substance or composition prepared and sold for medicinal or fumigation purposes. [47GA, ch 181,§2.]

Referred to in §13245.10
See also §§1828.08, 5762, 12959

13245.10 Penalties. Any person, firm, copartnership, or corporation violating the provisions of sections 13245.08 and 13245.09 shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding ninety days, or by both such fine and imprisonment. [47GA, ch 181,§3.]

Referred to in §13245.09

CHAPTER 600

DISEASED PLANTS

Iowa Crop Pest Act, ch 201.1

13246 Cultivating or selling diseased plants.
13247 Seizure of diseased plants.
13248 Destruction of diseased plants.

13246 Cultivating or selling diseased plants. If any person use, transplant, cultivate, or sell, or bring into this state for the purpose of using, planting, cultivating, or selling, any hop roots, plants, or cuttings which may be diseased in any manner, or infected with lice or vermin of any kind, or which may be brought from any state or country in which the cultivation of hops has been retarded or impaired by the presence of any disease, lice, or vermin of a contagious character, he shall be fined not less than ten, nor more than one hundred dollars, and imprisoned not less than five nor more than twenty days. [C73,§4060; C97,§5022; C24, 27, 31, 35,§13246.]

Referred to in §13247

13247 Seizure of diseased plants. If complaint is made before a justice of the peace by one or more responsible persons, that they have good reason to believe that hop roots have been introduced into or are being cultivated in the city or township where they reside, in violation of section 13246, the justice before whom such complaint is made shall issue a warrant authorizing any peace officer to seize such roots, and they shall be held in charge by such officer until action has been brought against the person so offending, and the cause determined. [C73, §4061; C97,§5023; C24, 27, 31, 35,§13247.]

C97,§5023, editorially divided

13248 Destruction of diseased plants. In case it is found that the said plants, roots, or cuttings are diseased, or are infected by lice or vermin of a contagious character, the officer before whom it is brought shall order the said roots, plants, or cuttings to be burned, charging the expense of doing the same as costs upon the party owning or cultivating the roots, plants, or cuttings; and in no case shall he allow them to be planted or delivered to a third party until the fact is established that they are not infected with any vermin or disease of a contagious character. [C73,§4061; C97,§5023; C24, 27, 31, 35, §13248.]

CHAPTER 601

DESTRUCTION OF FOOD PRODUCTS

13249 Waste of food products to increase price.
13250 Punishment.

13249 Waste of food products to increase price. It shall be unlawful for any person, firm, or corporation to willfully destroy, or negligently suffer to go to waste, with intent to increase the price thereof, any food products of any nature or description, without the authority or consent of the local board of health or local health officer of the city, town, or township in which the food products are located. [C24, 27, 31, 35,§13249.]

Referred to in §13250

13250 Punishment. Any person, firm, or corporation violating any of the provisions of section 13249 shall be guilty of a misdemeanor, and, upon conviction, shall pay a fine in a sum not more than one thousand dollars, or be imprisoned for any length of time not exceeding one year, or be punished by both such fine and imprisonment. [C24, 27, 31, 35,§13250.]

CHAPTER 602

INFRINGEMENT OF CIVIL RIGHTS

13251 Civil rights defined.
13252 Punishment.
13252.1 Religious test.
13252.2 Evidence.
13252.3 Penalty.

13251 Civil rights defined. All persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, chophouses, eating houses, lunch counters, and all other places where refreshments are served, public conveyances, barber shops, bathhouses, theaters, and all other places of amusement. [C97,§5008; C24, 27, 31, 35, §13251.]

Referred to in §13252

13252 Punishment. Any person who shall violate the provisions of section 13251 by denying to any person, except for reasons by law applicable to all persons, the full enjoyment of any of the accommodations, advantages, facilities, or privileges enumerated therein, or by aiding or inciting such denial, shall be guilty of a misdemeanor and shall be punished by a fine not to exceed one hundred dollars or imprisonment in the county jail not to exceed thirty days. [C97,§5008; C24, 27, 31, 35,§13252.]

13252.1 Religious test. Any violation of section 4, article I of the constitution of Iowa is hereby declared to be a misdemeanor. [C35,§13252-f1.]

Referred to in §13252.2

13252.2 Evidence. If any person, agency, bureau, corporation or association employed or maintained to obtain, or aid in obtaining, positions for others in the public schools, or positions in any other public institutions in the state, or any individual or official connected with any public school or public institution shall ask, indicate or transmit orally or in writing the religion or religious affiliations of any person seeking employment in the public schools or any other public institutions, it shall constitute evidence of a violation of section 13252.1. [C35, §13252-f2.]

13252.3 Penalty. Any person, agency, bureau, corporation or association that violates provisions of this act [§§13252.1–13252.3] shall be guilty of a misdemeanor and upon conviction be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned not more than thirty days, or by both such fine and imprisonment. [C35,§13252-f3.]

CHAPTER 603

BLACKLISTING EMPLOYEES

13253 Punishment.
13254 Blacklisting employees—treble damages.
13255 False charges concerning honesty.

13253 Punishment. If any person, agent, company, or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company, or corporation, except by furnishing in writing on request a truthful statement as to the cause of his discharge, such person, agent, company, or corporation shall be punished by a fine not exceeding five hundred nor less than one hundred dollars, and shall be liable for all damages sustained by any such person. [C97,§5027; C24, 27, 31, 35,§13253.]

Referred to in §13254

13254 Blacklisting employees — treble damages. If any railway company or other company, partnership, or corporation shall authorize or allow any of its or their agents to blacklist any discharged employee, or attempt by word or writing or any other means whatever to prevent such discharged employee, or any employee who may have voluntarily left said company's service, from obtaining employment with any other person or company, except as provided for in section 13253, such company or copartnership shall be liable in treble damages to such employee so prevented from obtaining employment. [C97,§5028; C24, 27, 31, 35,§13254.]

13255 False charges concerning honesty. Every person who shall by any letter, mark, sign, or designation whatever, or by any verbal statement, falsely and without probable cause, report to any railroad or any other company or corporation, or to any person or firm, or to any of the officers, servants, agents, or employees of any such corporation, person, or firm, that any conductor, brakeman, engineer, fireman, station agent, or any employee of such railroad company, corporation, person, or firm has received any money or thing of value for the transportation of persons or property or for other service for which he has not accounted to such corporation, person, or firm, or shall falsely and without probable cause report that any conductor, brakeman, engineer, fireman, station agent, or other employee of any railroad company, corporation, firm, or person, neglected, failed, or refused to

collect any money or ticket for transportation of persons or property or other service when it was their duty so to do, shall, on conviction, be adjudged guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one hundred dollars or be imprisoned in the county jail for a period not exceeding thirty days. [SS15,§5028-w1; C24, 27, 31, 35,§13255.]

CHAPTER 604

LIBEL

13256 "Libel" defined.
13257 Punishment.
13258 Indictment for libel.
13259 Truth given in evidence.
13260 Publication.
13261 What constitutes publication.
13262 Jury determines law and fact.

13256 "Libel" defined. A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends. [C51, §2767; R60,§4417; C73,§4097; C97,§5086; C24, 27, 31, 35,§13256.]

13257 Punishment. Every person who makes, composes, dictates, or procures the same to be done, or who willfully publishes or circulates such libel, or in any way knowingly or willfully aids or assists in making, publishing, or circulating the same, shall be imprisoned in the county jail not more than one year, or be fined not exceeding one thousand dollars. [C51, §2768; R60,§4418; C73,§4098; C97,§5087; C24, 27, 31, 35,§13257.]

13258 Indictment for libel. An indictment for a libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter upon which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial. [C51,§2924; R60,§4664; C73,§4310; C97,§5294; C24, 27, 31, 35,§13258.]

Indictments in general, ch 638
Similar provision, §12412

13259 Truth given in evidence. In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted. [C51,§2769; R60,§4419; C73,§4099; C97,§5088; C24, 27, 31, 35, §13259.]

13260 Publication. No printing, writing, or other thing is a libel unless there has been a publication thereof. [C51,§2770; R60,§4420; C73,§4100; C97,§5089; C24, 27, 31, 35,§13260.]

13261 What constitutes publication. The delivering, selling, reading, or otherwise communicating a libel, or causing the same to be delivered, sold, read, or otherwise communicated, to one or more persons or to the party libeled, is a publication thereof. [C51,§2771; R60,§4421; C73,§4101; C97,§5090; C24, 27, 31, 35, §13261.]

13262 Jury determines law and fact. In all prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine at its discretion the law and the fact. [C51,§§2772, 3015; R60,§§4422, 4811; C73,§§4102, 4438; C97,§5091; C24, 27, 31, 35,§13262.]

Question of law for jury, §13864

CHAPTER 605

BRIBERY AND CORRUPTION IN ELECTIONS

Referred to in §581. Offenses under primary election law, §§646, 647

13263 Bribing electors—fine.
13264 Bribe to refrain from voting—payment for work on election day.
13265 Accepting bribe.
13266 Exception.
13267 Services for hire.
13268 Exceptions.
13269 Voting more than once.
13270 Voting when not qualified.
13271 Voting when not resident of county.
13272 Voting when not resident of state.
13273 Counseling to vote when not qualified.
13274 Deceiving voter as to ballot.
13275 Duress to prevent voting.
13276 Bribing election officials.
13277 Procuring vote by duress.
13278 Judges or clerks doing unlawful acts.
13279 Illegally receiving or rejecting votes.
13280 Misconduct to avoid election.
13281 Failure to return poll books.
13282 Improper registry and false personation.
13283 Forgery of papers or ballots.
13284 Political advertisements.
13285 Exceptions.
13286 Illegal voting at primary election.
13287 Punishment.
13288 Prima facie evidence of illegal voting.
13289 Judges to examine voters—administer oaths.
13290 Perjury in examination.
13291 Exception—conventions under caucus system.

13263 Bribing electors — fine. Any person offering or giving a bribe to any elector for the purpose of influencing his vote at any election authorized by law, or any elector entitled to vote at such election receiving such bribe, shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or both. [C51,§2691; R60,§4333; C73, §3993; C97,§4914; C24, 27, 31, 35,§13263.]

13264 Bribe to refrain from voting — payment for work on election day. If any person shall make an agreement with another to pay him any sum of money or other valuable thing in consideration that such other person shall refrain from voting at any election, or shall induce other qualified electors to refrain from voting, or that such other person shall perform any service or labor on any election day in the interest of any candidate for any office who is to be voted for at such election, or in the interest of any measure or political party, he shall be fined in any sum not less than fifty nor more than three hundred dollars, or be imprisoned in the county jail not exceeding ninety days. [C97, §4915; C24, 27, 31, 35,§13264.]

Referred to in §§13265, 13266

13265 Accepting bribe. Any person who shall, in consideration of any sum of money or other valuable thing, agree to refrain from voting at any public election, or to induce or attempt to induce others to do so, or agree to perform on election day any service in the interest of any candidate, party, or measure in consideration of any money or other valuable thing, or who shall accept money or other valuable thing for such services performed in the interest of any candidate, political party or measure, shall be punished as provided in section 13264. [C97, §4916; C24, 27, 31, 35,§13265.]

Referred to in §13266

13266 Exception. Nothing in sections 13264 and 13265 shall be so construed as to punish individuals or committees of any political party for making contracts in good faith for the conveyance of voters to and from polling places and the payment of any reasonable compensation for such service. [C97,§4917; C24, 27, 31, 35,§13266.]

13267 Services for hire. Any person who shall agree to perform any services in the interest of any candidate in consideration of any money or other valuable thing, or who shall accept any money or other valuable thing for such services performed in the interest of any candidate, or any person paying or offering to pay or giving or offering to give money or other valuable things for such services, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail not exceeding ninety days. [S13,§1087-a32; C24, 27, 31, 35, §13267.]

Referred to in §13268

13268 Exceptions. Nothing in section 13267 shall be construed to prohibit any person from making contracts in good faith for the announcement of his candidacy in the newspapers and for securing the names of voters required to file preliminary nomination papers and the payment of any reasonable compensation for such services. [S13,§1087-a32; C24, 27, 31, 35,§13268.]

13269 Voting more than once. If any elector unlawfully vote more than once at any election which may be held by virtue of any law of this state, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding one year. [C51,§2692; R60, §4334; C73,§3994; C97,§4918; C24, 27, 31, 35, §13269.]

13270 Voting when not qualified. If any person, knowing himself not to be qualified, vote at any election authorized by law, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding six months. [C51,§2693; R60,§4335; C73,§3995; C97,§4919; C24, 27, 31, 35,§13270.]

13271 Voting when not resident of county. If any person go or come into any county of this state, and vote in such county, not being a resident thereof, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding one year. [C51,§2694; R60, §4336; C73,§3996; C97,§4920; C24, 27, 31, 35, §13271.]

13272 Voting when not resident of state. If any person willfully vote who has not been a resident of this state for six months next preceding the election, or who, at the time of the election, is not twenty-one years of age, or who is not a citizen of the United States, or who is not qualified, by reason of other disability, to vote at the place where and time when the vote is to be given, he shall be fined in a sum not exceeding three hundred dollars, or imprisoned in the county jail not exceeding one year. [C51,§2695; R60,§4337; C73,§3997; C97,§4921; C24, 27, 31, 35, §13272.]

13273 Counseling to vote when not qualified. If any person procure, aid, assist, counsel, or advise another to give his vote, knowing that such person is disqualified, he shall be fined not exceeding five hundred nor less than fifty dollars, and be imprisoned in the county jail not exceeding one year. [C51,§2696; R60,§4338; C73,§3998; C97,§4922; C24, 27, 31, 35,§13273.]

13274 Deceiving voter as to ballot. If any judge or clerk of election furnish an elector with a ticket or ballot, informing him that it contains a name or names different from those which are written or printed therein, with an intent to induce him to vote contrary to his inclination, or fraudulently or deceitfully change a ballot of any elector, by which such elector is deprived of voting for such candidate or person as he intended, he shall be imprisoned in the county jail not exceeding two years, and be fined not exceeding one thousand dollars nor less than one hundred dollars. [C51,§2697; R60,§4339; C73,§3999; C97,§4923; C24, 27, 31, 35,§13274.]

13275 Duress to prevent voting. If any person unlawfully and by force, or threats of force, prevent, or endeavor to prevent, an elector from giving his vote at any public election, he shall be imprisoned in the county jail not exceeding six months, and fined not more than two hundred dollars. [C51,§2698; R60,§4340; C73, §4000; C97,§4924; C24, 27, 31, 35,§13275.]

13276 Bribing election officials. If any person give or offer a bribe to any judge, clerk, or canvasser of any election authorized by law, or any executive officer attending the same, as a consideration for some act done or omitted to be done contrary to his official duty in relation to such election, he shall be fined not exceeding seven hundred dollars, and imprisoned in the county jail not exceeding one year. [C51,§2699; R60,§4341; C73,§4001; C97,§4925; C24, 27, 31, 35, §13276.]

13277 Procuring vote by duress. If any person procure, or endeavor to procure, the vote of any elector, or the influence of any person over other electors, at any election, for himself, or for or against any candidate, by means of violence, threats of violence, or threats of withdrawing custom or dealing in business or trade, or enforcing the payment of debts, or bringing any civil or criminal action, or any other threat of injury to be inflicted by him or by his means, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year. [C51,§2700; R60,§4342; C73,§4002; C97,§4926; C24, 27, 31, 35,§13277.]

13278 Judges or clerks doing unlawful acts. If any judge or clerk of any election authorized by law knowingly make or consent to any false entry on the list of voters or poll books; or put into the ballot box, or permit to be so put in, any ballot not given by a voter; or take out of such box, or permit to be so taken out, any ballot deposited therein, except in the manner prescribed by law; or by any other act or omission designedly destroy or change the ballots given by the electors, he shall be fined not exceeding one thousand dollars, and imprisoned in the penitentiary not exceeding five years. [C51,§2701; R60,§4343; C73,§4003; C97,§4927; C24, 27, 31, 35, §13278.]

13279 Illegally receiving or rejecting votes. When anyone who offers to vote at any election is objected to by an elector as a person not possessing the requisite qualifications, if any judge of such election unlawfully permit him to vote without producing proof of such qualification in the manner directed by law, or if any such judge willfully refuse the vote of any person who complies with the requisites prescribed by law to prove his qualifications, he shall be fined not more than two hundred nor less than twenty dollars, or be imprisoned in the county jail not exceeding six months. [C51,§2702; R60,§4344; C73,§4004; C97,§4928; C24, 27, 31, 35,§13279.]

13280 Misconduct to avoid election. If any judge, clerk, or executive officer designedly omit to do any official act required by law, or designedly do any illegal act, in relation to any public election, by which act or omission the votes taken at any such election in any city, town, precinct, township, or district be lost, or the electors thereof be deprived of their suffrage at such election, or designedly do any act which renders such election void, he shall be fined not less than one hundred nor more than one thousand dollars, or imprisoned in the county jail not more than one year, or both. [C51,§2703; R60,§4345; C73, §4005; C97,§4929; C24, 27, 31, 35,§13280.]

13281 Failure to return poll books. If any judge, clerk, or messenger, after having been deputed by the judges of the election to carry the poll books of such election to the place where by law they are to be canvassed, willfully or negligently fail to deliver them within the time prescribed by law, safe, with the seal unbroken, he shall, for every such offense, be fined not more than five hundred nor less than fifty dollars. [C51,§2704; R60,§4346; C73,§4006; C97,§4930; C24, 27, 31, 35,§13281.]

13282 Improper registry and false personation. Any person who causes his name to be registered, knowing that he is not or will not become a qualified voter in the precinct where his name is registered previous to the next election, or who shall wrongfully personate any registered voter, and any person causing, or aiding or abetting any person in either of said acts, shall be, for each offense, imprisoned in the penitentiary not less than one year. [C73, §4007; C97,§4931; C24, 27, 31, 35,§13282.]

13283 Forgery of papers or ballots. Any person who shall falsely make, or willfully destroy, any certificate of nomination or nomination papers, or any part thereof, or any letter of withdrawal, or file any certificate of nomination, or nomination papers, knowing the same or any part thereof to be falsely made, or suppress any certificate of nomination, or nomination papers, or in any part thereof, which have been duly filed, or forge or falsely make the official indorsement on any ballot, or substitute therefor any spurious or counterfeit ballot, or make, use, circulate, or cause to be made or circulated as an official ballot, any paper printed in imitation or resemblance thereof, or willfully destroy or deface any ballot, or willfully delay the delivery of any ballots, shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the penitentiary not less than one nor more than five years, or by both fine and imprisonment. [C97,§1136; C24, 27, 31, 35,§13283.]

13284 Political advertisements. Whoever writes, prints, posts, or distributes, or causes to be written, printed, posted, or distributed, a circular, poster, or advertisement which is designed to promote the nomination or election of a candidate for public office or to injure and defeat the nomination or election of any candidate for public office, or to influence the voters on any constitutional amendment, or to influence the vote of any member of the legislature, unless there appears upon such circular or poster or advertise-

ment, in a conspicuous place, either the name of the chairman or secretary or of two officers of the organization issuing the same, or of the person who is responsible therefor, with his name and address, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not to exceed thirty days, or be punished by both such fine and imprisonment. [SS15,§4931-a; C24, 27, 31, 35,§13284.]

Referred to in §13285
SS15,§4931-a, editorially divided

13285 Exceptions. Nothing in section 13284 shall apply to the editorial or news advertisements of any magazine or newspaper where the same is not a political advertisement, nor to cards, posters, lithographs, or circulars, issued by a candidate advertising his own candidacy. [SS15,§4931-a; C24, 27, 31, 35,§13285.]

13286 Illegal voting at primary election. Whenever any political party shall hold a primary election for the purpose of nominating a candidate for any public office or for the purpose of selecting delegates to any convention of such party, it shall be unlawful for any person not a qualified elector, or any qualified elector not at the time a member in good faith of such political party, to vote at such primary election. [S13, §4919-a; C24, 27, 31, 35,§13286.]

Referred to in §§13287, 13288, 13291
S13,§4919-a, editorially divided

13287 Punishment. Any person violating the provisions of section 13286, and any person knowingly procuring, aiding, or abetting such violation, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [S13, §4919-a; C24, 27, 31, 35,§13287.]

Referred to in §13291

13288 Prima facie evidence of illegal voting. It shall be prima facie evidence of the violation of section 13286 for any person who has participated in any primary election of one political party, to vote at a primary election held by another political party, to select candidates to be voted for at the same election; or to select delegates to any convention of the party holding such primary election. [S13,§4919-b; C24, 27, 31, 35,§13288.]

Referred to in §13291

13289 Judges to examine voters—administer oaths. Any judge of such primary election shall have power to administer oaths to, and to examine under oath, any person offering to vote at such election, touching his qualifications to participate in such primary election, and it shall be the duty of such judge of election to so examine or cause to be examined any person challenged as to his right to vote. [S13,§4919-c; C24, 27, 31, 35,§13289.]

Referred to in §13291
S13,§4919-c, editorially divided

13290 Perjury in examination. Any person testifying falsely as to any material matter, touching his qualifications to participate in such primary election, shall be deemed guilty of perjury and punished accordingly. [S13,§4919-c; C24, 27, 31, 35,§13290.]

Referred to in §13291
Punishment, §13165

13291 Exception — conventions under caucus system. Nothing in sections 13286 to 13290, inclusive, shall be construed to apply to conventions held under the caucus system. [S13, §4919-d; C24, 27, 31, 35,§13291.]

CHAPTER 606

BRIBERY AND CORRUPTION OF PUBLIC OFFICIALS

13292 Bribery of public officers.
13293 Acceptance of bribes.
13294 Disqualification for holding office.
13295 Corrupt solicitation of places of trust.
13296 Acceptance of reward for securing.
13297 Bribery of jurors or referees.
13298 Acceptance of bribes by such persons.
13299 Jurors acting corruptly.
13300 Sheriff or other officers receiving bribes.
13301 Accepting reward for public duty.
13302 Corruptly influencing officials.

13292 Bribery of public officers. If any person give, offer, or promise to any executive or judicial officer or member of the general assembly, after his election or appointment, and either before or after he has qualified or has taken his seat, any valuable consideration, gratuity, service, or benefit whatever, with intent to influence his act, vote, opinion, or judgment in any matter, question, cause, or proceeding which may be pending, or which may legally come or be brought before him in his official capacity, he shall be imprisoned in the penitentiary not more than five years, or be fined not more than one thousand dollars and imprisoned in the county jail not more than one year. [C51, §2647; R60,§4274; C73,§3939; C97,§4875; C24, 27, 31, 35,§13292.]

Referred to in §§13294, 13296

13293 Acceptance of bribes. If any executive or judicial officer or member of the general assembly accept any valuable consideration, gratuity, service, or benefit whatever, or any promise to make the same or to do any act beneficial to such officer or member, under the agreement or with the understanding that his vote, opinion, decision, or judgment shall be given in any particular manner or upon any particular side of any question, cause, or other proceeding which is or may by law be brought before him in his official capacity, or that in such capacity he will make any particular nomination or appointment, he shall be imprisoned in the penitentiary not more than ten years, or be fined not more than two thousand dollars and imprisoned in the county jail not more than one year.

[C51,§2648; R60,§4275; C73,§3940; C97,§4876; C24, 27, 31, 35,§13293.]

Referred to in §§1921.092, 13294, 13296

13294 Disqualification for holding office. Every person who is convicted under either section 13292 or section 13293 shall forever afterwards be disqualified from holding any office under the laws of the state. [C51,§2649; R60, §4276; C73,§3941; C97,§4877; C24, 27, 31, 35, §13294.]

Referred to in §§13295, 13296
Constitution, Art. II, §5

13295 Corrupt solicitation of places of trust. If any person, directly or indirectly, give, offer, or promise any valuable consideration or gratuity to any other person not being such officer as is mentioned in section 13294, with intent to induce such person to procure for him by his interest, influence, or any other means whatever any place of trust within this state, he shall be fined not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year. [C51,§2650; R60,§4277; C73,§3942; C97, §4878; C24, 27, 31, 35,§13295.]

Referred to in §13296

13296 Acceptance of reward for securing. If any person, not being such officer as is referred to in sections 13292 to 13295, inclusive, of this chapter, accept and receive of another any valuable consideration or gratuity whatever as a reward for procuring, or attempting to procure, any office or place of trust within the state for any person, he shall be fined not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year. [C51, §2651; R60,§4278; C73,§3943; C97,§4879; C24, 27, 31, 35,§13296.]

13297 Bribery of jurors or referees. If any person give, offer, or promise any valuable consideration or gratuity whatever to anyone summoned, appointed, or sworn as a juror, or appointed or chosen arbitrator, umpire, or referee, or to any master in chancery, or appraiser of real or personal estate, or auditor, with intent to influence the opinion or decision of any such person in any matter, inquest, or cause which may be pending or can legally come before him, or which he may be called on to decide in either of said capacities, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not more than one year. [C51,§2652; R60,§4279; C73,§3944; C97, §4880; C24, 27, 31, 35,§13297.]

13298 Acceptance of bribes by such persons. If any person summoned, appointed, or sworn as a juror, or appointed arbitrator, umpire, or referee, or master in chancery, or auditor, or appraiser, as aforesaid, take or receive any valuable consideration or gratuity whatever to give his verdict, award, or report in favor of any particular party, in a matter for the hearing or decision of which such person has been summoned, appointed, or chosen as aforesaid, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [C51,§2653; R60, §4280; C73,§3945; C97,§4881; C24, 27, 31, 35, §13298.]

13299 Jurors acting corruptly. If any person drawn, summoned, or sworn as a juror make any promise or agreement to give a verdict for or against any person in any civil or criminal action, or corruptly receive any paper, evidence or information from anyone in relation to any matter or cause for the trial of which he is sworn, without the authority of the court or officer before whom such cause or matter is then pending, he shall be fined not exceeding two hundred dollars, or imprisoned in the county jail not exceeding three months. [C51,§2655; R60,§4282; C73,§3947; C97,§4883; C24, 27, 31, 35,§13299.]

13300 Sheriff or other officers receiving bribes. If any sheriff, deputy sheriff, coroner, or constable, or any marshal, deputy marshal, policeman, or police officer of any city or town, receive from a defendant, or other person, any money or other valuable thing as a consideration or inducement for omitting or delaying to arrest any defendant or to carry him before a magistrate or to prison, or for postponing, delaying, or neglecting the sale of property on execution, or for omitting or delaying to perform any other duty pertaining to his office, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both fined and imprisoned, at the discretion of the court. [C51,§2656; R60,§4283; C73,§3948; C97,§4884; C24, 27, 31, 35,§13300.]

13301 Accepting reward for public duty. If any state, county, township, city, school, or other municipal officer, not mentioned in this chapter, directly or indirectly accept any valuable consideration, gratuity, service, or benefit whatever, or the promise thereof, other than the compensation allowed him by law, conditioned upon said officer's doing or performing any official act, casting an official vote, making or procuring the appointment of any person to a place of trust or profit, or using his official influence or authority to give or procure for any person public employment, or conditioned upon said officer's refraining from doing or performing any of the foregoing acts or things, he shall be imprisoned in the penitentiary not exceeding two years, or in the county jail not exceeding one year, or fined in any sum not less than twenty nor more than three hundred dollars. [C97,§4885; C24, 27, 31, 35,§13301.]

13302 Corruptly influencing officials. If any person, directly or indirectly, give, offer, or promise, or conspire with others to give, offer, or promise to any officer contemplated in this chapter any valuable consideration, gratuity, service, or benefit whatever, with a view or for the purpose of corruptly influencing said officer's official acts or votes, such person shall be imprisoned in the penitentiary not exceeding two years, or in the county jail not exceeding one year, or be fined in any sum not exceeding three hundred nor less than twenty dollars. [C97,§4886; C24, 27, 31, 35,§13302.]

CHAPTER 607

MISCONDUCT OR NEGLECT IN OFFICE

13303 Extortion.
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13305 Oppression in official capacity.
13306 Exercising office without authority.
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13303 Extortion. If any person corruptly and willfully demand and receive of another, for performing any service or official duty for which the fee or compensation is established by law, any greater fee or compensation than is allowed or provided for the same, he shall be fined not exceeding one hundred dollars for each offense, or imprisoned in the county jail not exceeding six months. [C51,§2658; R60,§4285; C73,§3950; C97,§4888; C24, 27, 31, 35,§13303.]

13304 False certificate as to witness fees. If any witness falsely and corruptly certify that as such he has traveled more miles or attended more days than he has actually traveled or attended, he shall be fined not exceeding one hundred dollars for each offense, or imprisoned in the county jail not exceeding six months. [C51, §2658; R60,§4285; C73,§3950; C97,§4888; C24, 27, 31, 35,§13304.]

13305 Oppression in official capacity. If any judge or other officer, by color of his office, willfully and maliciously oppress any person under pretense of acting in his official capacity, he shall be fined not exceeding one thousand dollars, and imprisoned in the county jail not more than one year, and be liable to the injured party for any damage sustained by him in consequence thereof. [R60,§§4305, 4306; C73,§3969; C97,§4908; C24, 27, 31, 35,§13305.]

13306 Exercising office without authority. If any person take upon himself to exercise or officiate in any office or place of authority in this state without being legally authorized; or if any person, by color of his office, willfully and corruptly oppress any person under pretense of acting in his official capacity, he shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not more than one year, or be both fined and imprisoned. [C51,§2672; R60,§4299; C73,§3963; C97,§4902; C24, 27, 31, 35, §13306.]

13307 Falsely assuming to be officer. If a person falsely assume to be a judge, justice of the peace, magistrate, sheriff, deputy sheriff, peace officer, special agent of the department of justice, conservation officer, coroner, or constable, and take upon himself to act as such, or require anyone to aid or assist him in any matter pertaining to the duty of any such officer, he shall be imprisoned in the county jail not more than one year, or be fined not exceeding three hundred dollars. [C51,§2671; R60,§4298; C73, §3962; C97,§4901; C24, 27, 31, 35,§13307.]

13308 Stirring up quarrels and suits. If any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, attorney, or counselor at law, encourage, excite or stir up any action, quarrel, or controversy between two or more persons, with intent to injure such persons, he shall be fined not exceeding five hundred dollars, and shall be answerable to the party injured in treble damages. [C51,§2673; R60,§4300; C73,§3964; C97,§4903; C24, 27, 31, 35,§13308.]

13309 Officers failing to pay over fees. If any officer who by law is authorized to receive and required to pay over fees of office, or who is or may be authorized to impose or collect fines, shall fail, neglect, or refuse to pay over, as prescribed by law, all such fees and fines, he shall be guilty of a misdemeanor, besides being liable in a civil action for the amount of fines and fees illegally withheld or appropriated. [R60,§4308; C73,§3970; C97,§4909; C24, 27, 31, 35,§13309.]

Punishment, §12894

13310 Misappropriating fees—removal. Any officer who may be found guilty of the offense of appropriating to his own use fees of office or fines collected for violation of law, or of neglecting to pay over the same as prescribed by law, shall be removed from office by the court before or by whom the offense may be tried and judgment or conviction had; and every person so found guilty shall be fined not exceeding three hundred nor less than ten dollars, or imprisoned in the county jail not exceeding one year, or be both fined and imprisoned, in the discretion of the court. [R60,§4310; C73,§3972; C97,§4911; C24, 27, 31, 35,§13310.]

13311 False entries in relation to fees. If any officer who by law is authorized or required to keep a court docket, or who is required to keep an account of fees or fines, and pay over or in any way account for the same, shall in any manner falsify such docket or account, or shall fail, neglect, or refuse to make an entry upon such docket, or account for such fees and fines as are required to be paid over, he shall be guilty of a misdemeanor. [R60,§4309; C73, §3971; C97,§4910; C24, 27, 31, 35,§13311.]

Punishment, §12894

13312 Taking more than lawful fee. Any officer who willfully takes higher or other fees than are allowed by law is guilty of a misdemeanor. [C51,§2560; R60,§4167; C73,§3840; C97,§1297; C24, 27, 31, 35,§13312.]

Punishment, §12894

13313 Failure to take official oath. If any officer or person willfully fails to take the oath required by law before entering on the discharge of the duties of any office, trust, or station, or makes any contract which contemplates an expenditure in excess of the law under which he was elected or appointed, or fails to report to the proper officer, showing the expenditure of all public moneys with proper vouchers therefor, by the time required by law, he shall be fined not exceeding five thousand dollars, or imprisoned in the penitentiary not exceeding five years, or both, at the discretion of the court. [R60, §§216, 2184; C73,§3976; C97,§4913; C24, 27, 31, 35,§13313.]

13314 False entries, returns, certificates, or receipts. If any public officer fraudulently make or give false entries, false returns, false certificates, or false receipts, in cases where entries, returns, certificates, or receipts are authorized by law, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not exceeding five years, or both. [C51, §2677; R60,§4304; C73,§3968; C97,§4907; C24, 27, 31, 35,§13314.]

13315 Rep. by 47GA, ch 232,§1. See §§13315.1–13315.6, inc.

13315.1 Solicitation for political purposes. It shall be unlawful for any person or political organization either directly or indirectly to solicit or demand from any member of the board of control or any employee of any commission, board or agency created under the statutes of Iowa, any contribution of money or any other thing of value for election purposes or for the purpose of paying expenses of any political organization or any person seeking election to public office. [S13,§2727-a36; C24, 27, 31, 35, §13315; 47GA, ch 232,§1.]

Referred to in §§13315.5, 13315.6

13315.2 Using contributions from nonresidents. It shall be unlawful for any person or political organization to use any funds donated by a nonresident person, firm, or corporation for the purpose of conducting a campaign for political office. [47GA, ch 232,§2.]

Referred to in §§13315.5, 13315.6

13315.3 Using public motor vehicles. It shall be unlawful for any person to use or permit to be used any motor vehicle owned by the state of Iowa or any political subdivision thereof for the purpose of transporting any political literature or any person or persons engaging in a political campaign for any political party or any person seeking an elective office. [47GA, ch 232, §3.]

Referred to in §§13315.5, 13315.6

13315.4 State employees not to participate. It shall be unlawful for any state officer, any state appointive officer, or state employee to leave the place of his or her employment or the duties of his or her office for the purpose of soliciting votes or engaging in campaign work during the hours of employment of any such officer or employee. [47GA, ch 232,§4.]

Referred to in §§13315.5, 13315.6

13315.5 Exception. The provisions of sections 13315.1 to 13315.4, inclusive, shall not be construed as prohibiting any such officer or employee who is a candidate for political office to engage in campaign at any time or at any place for himself. [47GA, ch 232,§5.]

Referred to in §13315.6

13315.6 Penalty. Any person who violates any provision of sections 13315.1 to 13315.5, inclusive, shall be guilty of misdemeanor and shall be punished accordingly. [S13,§2727-a36; C24, 27, 31, 35,§13315; 47GA, ch 232,§6.]

Punishment, §12894

13316 Neglect of duty. When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor. [C51,§2674; R60,§4301; C73, §3965; C97,§4904; C24, 27, 31, 35,§13316.]

Punishment, §12894

13316.1 Private use of public property. No public officer, deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by the state or a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose. [C35,§13316-e1.]

Referred to in §13316.3

13316.2 Labeling publicly owned motor vehicles. All publicly owned motor vehicles shall bear at least two labels in a conspicuous place, one on each side of said vehicle designating the bureau, department or commission using it. This label shall be designed to cover not less than one square foot of surface. This section shall not apply to any motor vehicle which shall be specifically assigned by the head of the department or office owning or controlling it, to enforcement of police regulations. [C35,§13316-e2.]

Referred to in §13316.3

13316.3 Punishment. A violation of sections 13316.1 or 13316.2 shall be punishable as a misdemeanor. [C35,§13316-e3.]

Punishment, §12894

CHAPTER 608

GRATUITIES AND TIPS

13317 Accepting or giving.
13318 Punishment.
13319 Testimony tending to incriminate.
13320 Immunity from prosecution.
13321 Exceptions.
13322 Institutional officers not to receive gratuities.
13323 Punishment.
13324 State employees not to be interested in contracts.
13325 State employees not to receive gratuities.
13326 Punishment.
13327 Interest in public contracts.

13317 Accepting or giving. It shall be unlawful for any agent, representative, or employee, officer or any agent of a private corporation, or a public officer, acting in behalf of a principal in any business transaction, to receive, for his own use, directly or indirectly, any gift, commission, discount, bonus, or gratuity connected with, relating to, or growing out of such business transaction; and it shall be likewise unlawful for any person, whether acting in his own behalf or in behalf of any copartnership, association, or corporation, to offer, promise, or give directly or indirectly any such gift, commission, discount, bonus, or gratuity. [S13,§5028-n; C24, 27, 31, 35,§13317.]

Referred to in §§13318, 13321
S13,§5028-n, editorially divided

13318 Punishment. Any person violating the provisions of section 13317 or any of them shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. [S13, §5028-n; C24, 27, 31, 35,§13318.]

Referred to in §13321

13319 Testimony tending to incriminate. No person shall be excused from attending, testifying, or producing books, papers, contracts, agreements, and documents before any court in obedience to the subpoena of any court having jurisdiction of the misdemeanor on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture. [S13,§5028-o; C24, 27, 31, 35,§13319.]

Referred to in §13321
Immunity in general, §11267 et seq.
S13,§5028-o, editorially divided

13320 Immunity from prosecution. No person shall be liable to any criminal prosecution, for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said court or in obedience to its subpoena or in any such case or proceeding, provided that no person so testifying or producing any such books, papers, contracts, agreements, or documents shall be exempted from prosecution and punishment for perjury committed in so testifying. [S13,§5028-o; C24, 27, 31, 35,§13320.]

Referred to in §13321

13321 Exceptions. Sections 13317 to 13320, inclusive, shall not apply to those cases in which the principals, being the contracting parties, have knowledge of and consent to the payment of a commission to an agent or representative. [S13,§5028-o; C24, 27, 31, 35,§13321.]

13322 Institutional officers not to receive gratuities. No member of the board of control, or officer, agent, or employee thereof, and no superintendent, officer, manager, or employee of any of the institutions under the charge and control of said board, shall, directly or indirectly, for himself or any other person or for any institution under the charge of said board, receive or accept any gift or gratuity from any person or persons, firm, or corporation who are dealers in goods, merchandise, or supplies which may be used in any of said institutions, or from any employee, servant, or agent of such person or persons, firm, or corporation. [S13,§2727-a33; C24, 27, 31, 35,§13322.]

Referred to in §13323
S13,§2727-a33, editorially divided

13323 Punishment. Any person violating the provisions of section 13322 shall be deemed guilty of a misdemeanor, and such violation shall be cause for his removal from office. [S13, §2727-a33; C24, 27, 31, 35,§13323.]

Punishment, §12894

13324 State employees not to be interested in contracts. It shall be unlawful for any trustee, warden, superintendent, steward, or any other officer of any educational, penal, charitable, or reformatory institution, supported in whole or in part by the state, to be interested directly or indirectly in any contract to furnish or in furnishing provisions, material, or supplies of any kind, to or for the institution of which he is an officer; and it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer of any state institution, to be directly or indirectly interested in any contract with the state to build, repair, or furnish any institution of which he may be an officer. [C73,§1388; C97,§189; C24, 27, 31, 35, §13324.]

Referred to in §13326
Similar provisions, §§180, 275, 3828.101, 3922, 4685, 4686.14, 4755.10, 5361, 5673, 5828, 6534, 6710, 13327
C97,§189, editorially divided

13325 State employees not to receive gratuities. It shall be unlawful for any such trustee, warden, superintendent, steward, or other officer, directly, or indirectly, to receive in money or any valuable thing any commission, percentage, discount, or rebate on any provision, material, or supplies furnished for or to any institution of which he is an officer. [C73, §1388; C97,§189; C24, 27, 31, 35,§13325.]

Referred to in §13326

13326 Punishment. Any person violating the provisions of sections 13324 and 13325 shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars, in the discretion of the court, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment, in the discretion of the court. [C97,§190; C24, 27, 31, 35,§13326.]

13327 Interest in public contracts. Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to the county or township in which they are respectively members of such board of supervisors or township trustees. [S13,§468-a; C24, 27, 31, 35,§13327.]

Similar provisions, §§180, 275, 3828.101, 3922, 4685, 4686.14, 4755.10, 5361, 5673, 5828, 6534, 6710, 13324

13328 to 13330, inc. Omitted. Unconstitutional. See Dunahoo v Huber, 185 Iowa 753

CHAPTER 609

RESISTANCE TO EXECUTION OF PROCESS

13331 Resisting execution of process.
13332 Calling out power of county.
13333 Refusing to assist officer.
13334 Certifying to court names of resisters.
13335 Refusing to assist.
13336 Calling out military force or posse.
13337 Armed forces under command of sheriff.
13338 Refusing to execute process.

13331 Resisting execution of process. If any person knowingly and willfully resist or oppose any officer of this state, or any person authorized by law, in serving or attempting to execute any legal writ, rule, order, or process whatsoever, or shall knowingly and willfully resist any such officer in the discharge of his duties without such writ, rule, order, or process, he shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding one thousand nor less than fifty dollars, or be both fined and imprisoned, at the discretion of the court. [C51,§2669; R60,§4296; C73,§3960; C97,§4899; C24, 27, 31, 35,§13331.]

13332 Calling out power of county. When the sheriff or other officer authorized to execute process has reason to apprehend that resistance will be made, or finds that resistance is made, to the execution thereof, he may command as many male inhabitants of his county as he may think proper, and may call upon the governor for the assistance of the military force to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the resisters, their aiders, and abettors, to be held for punishment by law. [C51,§2793; R60,§4489; C73,§4145; C97,§5143; C24, 27, 31, 35,§13332.]

13333 Refusing to assist officer. If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable, or other officer, willfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue, he shall be imprisoned in the county jail not more than six months, or be fined not more than one hundred dollars. [C51,§2670; R60,§4297; C73,§3961; C97,§4900; C24, 27, 31, 35,§13333.]

13334 Certifying to court names of resisters. The officers shall certify to the court from which the process issued the names of the resisters, their aiders, and abettors, to the end that they may be punished as for a contempt. [C51, §2794; R60,§4490; C73,§4146; C97,§5144; C24, 27, 31, 35,§13334.]

Punishment, §12543

13335 Refusing to assist. Every person commanded by a public officer to assist him in the execution of process, as provided in this chapter, who, without lawful cause, refuses or neglects to obey such command, is guilty of a misdemeanor. [C51,§2795; R60,§4491; C73, §4147; C97,§5145; C24, 27, 31, 35,§13335.]

Punishment, §12894

13336 Calling out military force or posse. If it appears to the governor that the power of any county is not sufficient to enable the sheriff to execute process delivered to him, he may, on the application of the sheriff, order such posse or military force from any other county or counties as is necessary. [C51,§2796; R60,§4492; C73,§4148; C97,§5146; C24, 27, 31, 35,§13336.]

13337 Armed forces under command of sheriff. When such armed force is called out, it shall obey the commands of the sheriff or other person appointed by the governor for that purpose, or by a judge of the supreme, district, or superior court, or other magistrate in the order named, but such officer or person shall at all times be subject to the direction of the governor. [C51,§2802; R60,§4498; C73,§4154; C97,§5152; C24, 27, 31, 35,§13337.]

13338 Refusing to execute process. If any officer authorized to serve process willfully refuse to execute any lawful process to him directed, requiring him to apprehend or confine any person charged with or convicted of any public offense, or willfully delay or omit to execute such process, whereby such person escape, he shall be imprisoned in the county jail not more than one year, or be fined not exceeding one thousand dollars, or both fined and imprisoned, at the discretion of the court. [C51,§2657; R60,§4284; C73,§3949; C97,§4887; C24, 27, 31, 35,§13338.]

CHAPTER 610

UNLAWFUL ASSEMBLY AND SUPPRESSION OF RIOTS

13339 Unlawful assembly.
13340 "Riot" defined.
13341 One person may be tried and convicted alone.
13342 Unlawful assemblages—dispersion.
13343 Arrest—aid of other persons.
13344 Refusing to aid.
13345 Failure of duty.
13346 Calling aid—arrest of offenders.
13347 Riotous conduct—injury to person or property.

13339 Unlawful assembly. When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or, when together, attempt to do an act, whether lawful or unlawful, in an unlawful, violent, or tumultuous manner, to the disturbance of others, they are guilty of an unlawful assembly, and shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars. [C51,§2739; R60,§4387; C73, §4066; C97,§5030; C24, 27, 31, 35,§13339.]

Referred to in §13340

13340 "Riot" defined. When three or more persons together and in a violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent, or tumultuous manner, to the disturbance of others, they are guilty of a riot, and shall be punished as is provided in section 13339. [C51,§2740; R60,§4388; C73,§4067; C97,§5031; C24, 27, 31, 35,§13340.]

13341 One person may be tried and convicted alone. Any person guilty of unlawfully assembling, or of a riot, may alone be tried and convicted thereof, but it must be alleged in the information and proved on the trial that three or more persons were engaged therein. [C51, §2741; R60,§4389; C73,§4068; C97,§5032; C24, 27, 31, 35,§13341.]

13342 Unlawful assemblages — dispersion. When persons to the number of twelve or more, armed with dangerous weapons, or persons to the number of thirty or more, whether armed or not, are unlawfully or riotously assembled in any city or town, any judge, sheriff, and his deputies if they be present, the mayor, aldermen, marshal, constables, and justices of the peace of such city or town must go among the persons assembled, or as near them as may be safe, and command them, in the name of the state, immediately to disperse. [C51,§2797; R60,§4493; C73,§4149; C97,§5147; C24, 27, 31, 35,§13342.]

Referred to in §13345

13343 Arrest—aid of other persons. If the persons assembled do not immediately disperse, the magistrate and officers must arrest them, and for that purpose may command the aid of all persons present or within the county. [C51, §2798; R60,§4494; C73,§4150; C97,§5148; C24, 27, 31, 35,§13343.]

13344 Refusing to aid. If any person commanded to aid the magistrate or officer neglect to do so without good cause, he is guilty of a misdemeanor. [C51,§2799; R60,§4495; C73, §4151; C97,§5149; C24, 27, 31, 35,§13344.]

Punishment, §12894

13345 Failure of duty. If a magistrate or officer, having notice of an unlawful or riotous assembly as defined in section 13342, neglect to proceed to the place of assembly, or as near thereto as may be with safety, and exercise the authority with which he is invested for suppressing the same and arresting the persons, he is guilty of a misdemeanor. [C51,§2800; R60, §4496; C73,§4152; C97,§5150; C24, 27, 31, 35, §13345.]

Punishment, §12894

13346 Calling aid—arrest of offenders. If the persons so assembled and commanded to disperse do not immediately obey, any two of the magistrates or officers before mentioned may command the aid of a sufficient number of persons, and proceed in such manner as in their judgment is necessary to disperse the assembly and arrest the offenders. [C51,§2801; R60, §4497; C73,§4153; C97,§5151; C24, 27, 31, 35, §13346.]

13347 Riotous conduct—injury to person or property. If any person or persons, unlawfully or riotously assembled, pull down, injure, or destroy, or begin to pull down, injure, or destroy, any dwelling house or other building; or destroy or attempt to injure or destroy any boat or vessel; or perpetrate any premeditated injury on the person of another, not being a felony, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained. [C51, §2743; R60,§4391; C73,§4070; C97,§5035; C24, 27, 31, 35,§13347.]

CHAPTER 611

DISTURBING PUBLIC ASSEMBLIES

13348 Disturbance of peace.
13349 Disturbing congregations or other assemblies.
13350 Evading admission fee to entertainments.
13350.1 Disturbing public fairs.

13348 Disturbance of peace. If any person make or excite any disturbance in a tavern, store, or grocery, or at any election or public meeting, or other place where the citizens are peaceably and lawfully assembled, he shall be fined not exceeding one hundred dollars, or be

imprisoned in the county jail not exceeding thirty days. [C51,§2742; R60,§4390; C73,§4069; C97,§5033; C24, 27, 31, 35,§13348.]

13349 Disturbing congregations or other assemblies. If any person willfully disturb any assembly of persons met for religious worship by profane discourse or rude and indecent behavior, or by making a noise, either within the place of worship or so near as to disturb the order and solemnity of the assembly, or if any person willfully disturb or interrupt any school, school meeting, teachers institute, lyceum, literary society, or other lawful assembly of persons, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. [C51, §2718; R60,§4360; C73,§4023; C97,§4959; C24, 27, 31, 35,§13349.]

13350 Evading admission fee to entertainments. If any person willfully enters any building or inclosure where any public entertainment or exhibition is being held at which an admission fee is charged, and without paying such fee, or without leave to so enter, he shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days. [C97, §4817; C24, 27, 31, 35,§13350.]

13350.1 Disturbing public fairs. No person, firm, association or corporation shall cry, hawk, sell or expose for sale upon any public highway or the street of any city or town, within six hundred feet of any state, county or district fair grounds during the time a fair, or other event or activity, is being conducted thereon, any wares, merchandise or parking or storage space for vehicles, nor conduct a show, riding device, shooting gallery, or game of any kind, in a temporary place of business within four hundred feet of any state, county or district fair grounds while any such fair or other event or activity is being held. Any violation of the provisions hereof shall constitute a misdemeanor, and upon conviction any such violator shall be fined not less than ten dollars, nor more than one hundred dollars for each such offense. [C27, 31, 35,§13350-b1.]

CHAPTER 612

ESCAPES

13351 Prison breach—escape—punishment.
13352 Actual breaking not necessary.
13353 Violation of parole.
13354 Jurisdiction.
13355 Costs and fees.
13356 Amount certified to comptroller.
13357 Comptroller to issue warrant.
13358 Breaking jail—escape.
13359 Suffering life prisoners to escape.
13360 Suffering other felons to escape.
13361 Suffering other prisoners to escape.
13362 Assisting felon to escape.
13363 Assisting other prisoners to escape.
13364 Assisting escape from officer.
13365 Aiding escapes—bringing liquor or drugs to inmates.
13366 Placing drugs and articles near institutions.
13367 Presumptive evidence.
13368 Attempt to commit act.

13351 Prison breach—escape—punishment. If any person committed to the penitentiary or to the men's or women's reformatory shall break such prison and escape therefrom or shall escape from or leave without due authority any building, camp, farm, garden, city, town, road, street, or any place whatsoever in which he is placed or to which he is directed to go or in which he is allowed to be by the warden or any officer or employee of the prison whether inside or outside of the prison walls, he shall be deemed guilty of an escape from said penitentiary or reformatory and shall be punished by imprisonment in said penitentiary or reformatory for a term not to exceed five years, to commence from and after the expiration of the term of his previous sentence. [S13,§4897-a; C24, 27, 31, 35, §13351.]

Referred to in §§13352, 13353, 13354, 13355

13352 Actual breaking not necessary. In order to constitute an escape under the provisions of section 13351, or section 13358, it is not necessary that the prisoner be within any walls or inclosure nor that there shall be any actual breaking nor that he be in the presence or actual custody of any officer or other person. [S13,§4987-a; C24, 27, 31, 35,§13352; 47GA, ch 233,§1.]

Referred to in §§13354, 13355

13353 Violation of parole. If any person having been paroled from the state penitentiary or state reformatory as provided by law, shall thereafter depart without the written consent of the board of parole from the territory within which by the terms of said parole he is restricted, he shall be deemed to have escaped from the custody within the meaning of section 13351 and shall be punished as therein provided. [S13,§4897-a; C24, 27, 31, 35,§13353.]

Referred to in §§13354, 13355

13354 Jurisdiction. The jurisdiction of an indictment for the crime of escape as defined in sections 13351 to 13353, inclusive, is in the county in which is located the penitentiary or reformatory to which the person charged with such escape has been committed, or in the county in which is located the building, camp, farm, garden, city, town, road, street, or any place in which he is placed or to which he is directed to go or in which he is allowed to be by the warden or any officer or employee of the prison wherefrom he is charged with escaping. [S13, §4897-a; C24, 27, 31, 35,§13354.]

Referred to in §13355

13355 Costs and fees. All costs and fees hereafter incurred in prosecutions for violations of sections 13351 to 13354, inclusive, shall be

paid out of the state treasury from the general fund, in any case where the prosecution fails, or where such fees and costs cannot be collected from the person liable to pay the same, the facts being certified by the clerk of the district court and verified by the county attorney of the county. [S13,§4897-b; C24, 27, 31, 35,§13355.]

13356 Amount certified to comptroller. The clerk of the district court, in which the case is prosecuted or tried, shall, under his seal of office, certify to the state comptroller a statement of the amount of fees or costs incurred in each case, and such statement shall be approved by the presiding judge in writing appended thereto or indorsed thereon. Should the cause be appealed to the supreme court, the costs there incurred shall be certified to the comptroller by the clerk of that court, but no fees, in such case, for the clerk of either the district or supreme court shall be included or paid from the state treasury. [S13,§4897-c; C24, 27, 31, 35, §13356.]

13357 Comptroller to issue warrant. On such certificate being filed in the office of the state comptroller, the comptroller shall issue his warrant on the state treasurer for the amount thereof, payable to the clerk of the district or supreme court, as the case may be, and the clerk shall pay the same to the persons entitled thereto. [S13,§4897-d; C24, 27, 31, 35,§13357.]

13358 Breaking jail—escape. If any person confined in any jail upon any criminal charge, either before or after conviction for a criminal offense, break jail and escape therefrom, or escape from the custody of the officer charged with his keeping, he shall be guilty of a felony and shall be imprisoned in either the state penitentiary or reformatory not exceeding one year, and fined not exceeding three hundred dollars; but when such jail breaking, or escape from custody, occurs during incarceration after conviction, or before trial for a criminal offense whereof he is afterwards convicted, in either of such cases the sentence to commence from and after the expiration of the sentence upon the original charge. [C51,§2668; R60,§4295; C73, §3959; C97,§4898; S13,§4898; C24, 27, 31, 35, §13358.]

Referred to in §13352

13359 Suffering life prisoners to escape. If any jailer or other officer voluntarily suffer any prisoner in custody upon a charge or conviction of a felony punishable by imprisonment for life to escape, he shall be imprisoned in the penitentiary not more than ten years. [C51, §2661; R60,§4288; C73,§3953; C97,§4891; C24, 27, 31, 35,§13359.]

13360 Suffering other felons to escape. If any jailer or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of any other felony to escape, he shall be imprisoned in the penitentiary not more than eight years, or be fined not more than one thousand dollars. [C51,§2662; R60,§4289; C73,§3954; C97,§4892; C24, 27, 31, 35,§13360.]

13361 Suffering other prisoners to escape. If any jailer or other officer suffer any prisoner in his custody upon charge or conviction of any public offense to escape, he shall be fined not exceeding one thousand dollars and be imprisoned in the penitentiary not exceeding five years. [C51,§2663; R60,§4290; C73,§3955; C97,§4893; C24, 27, 31, 35,§13361.]

13362 Assisting felon to escape. If any person by any means whatever aid or assist any prisoner lawfully detained in the penitentiary, or in any jail or place of confinement, for any felony, in an attempt to escape, whether such escape be effected or not, or forcibly rescue any person held in legal custody upon any criminal charge, he shall be imprisoned in the penitentiary not exceeding ten years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C51, §2664; R60,§4291; C73,§3956; C97,§4894; C24, 27, 31, 35,§13362.]

13363 Assisting other prisoners to escape. Every person who by any means whatever aids or assists any prisoner lawfully committed to any jail or place of confinement, charged with or convicted of any criminal offense other than a felony, in an attempt to escape, whether such escape be effected or not; or who conveys into such jail or place of confinement any disguise, instrument, arms, or other things proper or useful to facilitate the escape of any prisoner so committed, whether such escape be effected or attempted or not, shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding five hundred dollars, or be both fined and imprisoned, at the discretion of the court. [C51,§2665; R60,§4292; C73,§3957; C97, §4895; C24, 27, 31, 35,§13363.]

13364 Assisting escape from officer. Every person who aids or assists any prisoner in escaping, or attempting to escape, from the custody of any sheriff, deputy sheriff, marshal, constable, or other officer or person who has the lawful charge, with or without a warrant, of such prisoner upon any criminal charge, shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding five years. [C51,§2666; R60,§4293; C73,§3958; C97,§4896; C24, 27, 31, 35,§13364.]

13365 Aiding escapes—bringing liquor or drugs to inmates. Any person not authorized by law, who shall bring or pass or cause to be brought into any institution under the management of the board of control of state institutions, or onto the grounds of any such institution, or into any inclosure, building, camp, quarry, farm, garden, or other place used in connection with any such institution in which prisoners, patients, or inmates are required or permitted to be, any opium, morphine, cocaine, or other narcotics, or any intoxicating liquor, or any firearm, weapon, or explosive of any kind, or any rope, ladder, or other instrument or device for use in making or attempting an escape, or shall in any manner aid in such an escape, or who, knowing of such escape, shall conceal such inmate after

escape, shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the penitentiary or reformatory for a term not exceeding five years. [C73,§1663; C97,§2712; S13, §4913-a; SS15,§2713-n16; C24,§§13365, 13369, 13370; C27, 31, 35,§13365.]

Referred to in §§13366–13368
S13,§4913-a, editorially divided

13366 Placing drugs and articles near institutions. Any person not duly authorized by law who shall place or cause to be placed or aid in placing any of the drugs, liquors, weapons, explosives, or other articles hereinbefore enumerated in or near any road, park, path, walk, grove, hedge, or field where any prisoner, patient, or other inmate of the state institutions specified in section 13365 is, or is likely to be, with intent that the drug, liquor, weapon, explosive, or other article so placed shall be found by or shall pass into the possession of any such prisoner, patient, or other inmate, shall be punished by imprisonment in the penitentiary or reformatory for a term not exceeding five years, or by a fine of not more than one thousand dollars nor less than one hundred dollars. [S13,§4913-a; C24, 27, 31, 35,§13366.]

Referred to in §§13367, 13368

13367 Presumptive evidence. The bringing or passing or causing to be brought into any of the places designated in sections 13365 and 13366, of any rope, ladder, or other instrument or device adapted for use in making an escape, shall be presumptive evidence that it was so brought or passed for such use, and the leaving of any drug, liquor, weapon, explosive, or other article enumerated in said sections in or near any of the places specified in said sections with knowledge that any prisoner, patient, or other inmate is or is likely to be in such place, shall be presumptive evidence that such article was so left to be found by or to pass into the possession of such prisoner, patient, or other person in violation of said sections. [S13,§4913-a; C24, 27, 31, 35,§13367.]

13368 Attempt to commit act. An attempt to do any of the acts prohibited by sections 13365 and 13366 shall be subject to the same punishment as the completed act. [S13,§4913-a; C24, 27, 31, 35,§13368.]

13369, 13370 Rep. by 41GA, ch 72

CHAPTER 613

VAGRANCY

13371 "Vagrants" defined.
13372 "Tramp" defined.
13373 Intimidation or other misconduct.
13374 Entering unoccupied public building.
13375 Complaint—arrest.
13376 Arrest.
13377 Taking before magistrate.
13378 Security for good behavior.
13379 Record of conviction—commitment.
13380 Breach of undertaking.
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13393 Fees of officers.
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13371 "Vagrants" defined. The following persons are vagrants:

1. All common prostitutes and keepers of bawdyhouses or houses for the resort of common prostitutes.
2. All habitual drunkards, gamesters, or other disorderly persons.
3. All persons wandering about and lodging in barns, outbuildings, tents, wagons, or other vehicles, and having no visible calling or business to maintain themselves.
4. All persons begging in public places, or from house to house, or inducing children or others to do so.
5. All persons representing themselves as collectors of alms for charitable institutions under any false or fraudulent pretenses.
6. All persons playing or betting in any street or public or open place at any game, or pretended game, of chance, or at or with any table or other instrument of gaming.
7. All persons camping on any public highway for the purpose of trading horses. [C51, §3310; R60,§4470; C73,§4130; C97,§5119; S13, §5119; C24, 27, 31, 35,§13371.]

13372 "Tramp" defined. Any male person sixteen years of age or over, physically able to perform manual labor, who is wandering about, practicing common begging, or having no visible calling or business to maintain himself, and is unable to show reasonable efforts in good faith to secure employment, is a tramp, and any person convicted of being a tramp shall be punished by imprisonment at hard labor in the county jail not exceeding ten days, or by imprisonment in such jail in solitary confinement not exceeding five days. [C97,§5134; C24, 27, 31, 35,§13372.]

13373 Intimidation or other misconduct. Any tramp who shall wantonly or maliciously, by means of violence, threats or otherwise, put in fear any inhabitant of this state, or shall enter any public building, or any house, barn, or outbuilding belonging to another, with in-

tent to commit an unlawful act, or shall carry any firearm or other dangerous weapon, or indecently expose his person, or be found drunk and disorderly, or shall commit any offense against the laws of the state for which no greater punishment is provided, shall be guilty of a misdemeanor. [C97,§5135; C24, 27, 31, 35, §13373.]

Punishment, §12894

13374 Entering unoccupied public building. If any tramp or vagrant, without permission, enter any schoolhouse or other public building in the nighttime, when the same is not occupied by another or others having proper authority to be there, or, having entered the same in the daytime, remain in the same at night when not occupied as aforesaid, or at any time commit any nuisance, use, misuse, destroy, or partially destroy any private or public property therein, he shall be imprisoned in the penitentiary not more than three years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year. [C97,§4793; C24, 27, 31, 35,§13374.]

13375 Complaint—arrest. Upon complaint made on oath to any magistrate against any person as being such vagrant within his jurisdiction, he may issue a warrant for the arrest of such person, and his examination, and the complaint, warrant, and arrest shall be governed by the provisions of chapter 625, as nearly as practicable, except as herein provided. [C51, §3311; R60,§4471; C73,§4131; C97,§5120; C24, 27, 31, 35,§13375.]

13376 Arrest. Peace officers shall arrest any vagrant whom they may find at large, and not in the care of some discreet person, and take him before some magistrate of the county, city, or town in which the arrest is made. [R60, §4472; C73,§4132; C97,§5121; C24, 27, 31, 35, §13376.]

13377 Taking before magistrate. If such arrest is made during the night, the officer may keep the person arrested in confinement until the next morning, unless bail be given, and if made within the jurisdiction of a police court, he must be taken before such court, unless the judge is absent. [R60,§4473; C73,§4133; C97, §5122; C24, 27, 31, 35,§13377.]

13378 Security for good behavior. If it appear by the confession of such person, or by competent testimony, that the person arrested is a vagrant, the magistrate may require an undertaking, with sufficient surety, for good behavior for the term of one year thereafter. [R60,§4474; C73,§4134; C97,§5123; C24, 27, 31, 35,§13378.]

13379 Record of conviction — commitment. The magistrate shall make up, sign, and file with the clerk of the district court of the county, a record of conviction of such person as a vagrant, specifying generally the nature and circumstances of the charge, and shall, in default of such security being given, commit such vagrant to the jail of the county, city, or town, as the case may be, until such security is given or such vagrant discharged according to law. [C51,§3312; R60,§4475; C73,§4135; C97,§5124; C24, 27, 31, 35,§13379.]

13380 Breach of undertaking. The committing of any of the acts which constitute such person so bound a vagrant shall be a breach of the condition of the undertaking. [C51,§3313; R60,§4476; C73,§4136; C97,§5125; C24, 27, 31, 35, §13380.]

13381 New security. On a recovery upon the undertaking, the court before which such recovery is had may, in its discretion, require new sureties for good behavior, or commit such vagrant to the county jail for any time not exceeding six months. [C51,§3314; R60,§4477; C73,§4137; C97,§5126; C24, 27, 31, 35,§13381.]

13382 Discharge of bail. Any person committed to jail on account of failing to furnish undertaking for good behavior may be discharged by any magistrate upon giving the same as was originally required. [C51,§3315; R60, §4478; C73,§4138; C97,§5127; C24, 27, 31, 35, §13382.]

13383 Hearing—jury. The district court to which the papers are returned shall, on demand of the defendant, impanel a jury to inquire into and determine the truth of the charge made against him, and the rules of practice applicable to trials of misdemeanors shall govern such trial. [C51,§3316; R60,§4479; C73,§4139; C97, §5128; C24, 27, 31, 35,§13383.]

13384 Judgment. If no jury is demanded, the district court may revise such conviction and discharge such vagrant from the undertaking or confinement absolutely, or upon sureties for good behavior, in its discretion. [C51, §3317; R60,§4480; C73,§4140; C97,§5129; C24, 27, 31, 35,§13384.]

13385 Imprisonment. Such district court may, in its discretion, order any such vagrant to be kept in the common jail for any time, not exceeding six months, at hard labor. [C51,§3318; R60,§4481; C73,§4141; C97,§5130; C24, 27, 31, 35, §13385.]

13386 Expenses. The expenses incurred in pursuance of such order shall be audited by the board of supervisors of the county and paid out of the county treasury. [C51,§3320; R60,§4483; C73,§4143; C97,§5132; C24, 27, 31, 35,§13386.]

13387 Employed while confined — supplies. Such vagrants may be employed at hard labor as provided in chapter 281, or the court may direct the keeper thereof to furnish them such employment as it shall specify, and for that purpose he may purchase any necessary raw materials and implements, not exceeding such amount as the court shall prescribe, and compel such persons to perform such work as shall be allotted to them. [C51,§3319; R60,§4482; C73, §4142; C97,§5131; C24, 27, 31, 35,§13387.]

13388 Employment when sentenced to hard labor. The sheriff or keeper of any jail, under

the direction of the board of supervisors shall keep all persons sentenced to imprisonment at hard labor in such jail, under the provisions of this chapter, at such work as the board of supervisors may provide, and shall appoint or detail any deputy or other police officer to guard them while at work, or he may turn them over to the municipal authorities of any city or town, to be worked on the streets, or at such labor as may be provided. [C97,§5140; C24, 27, 31, 35, §13388.]

13389 Solitary confinement for refusing to work. Any tramp sentenced to hard labor, who wantonly or willfully refuses to work, shall be punished by such jailer while so refusing by imprisonment in solitary confinement in the county jail not exceeding ten days, during which time he shall be fed on bread and water; but such punishment shall not exceed the time for which he is sentenced. [C97,§5141; C24, 27, 31, 35,§13389.]

13390 Method of imprisonment. No sheriff or keeper of any jail shall permit any person convicted of being a tramp to have any tobacco, intoxicating liquors, sporting or illustrated newspaper, cards, or other article of amusement or pastime, or permit such person to be kept or fed otherwise than stated in the commitment, and any person who knowingly violates this section shall be fined not exceeding one hundred nor less than twenty-five dollars. [C97,§5138; C24, 27, 31, 35,§13390.]

13391 Proceeds of labor. One-half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury for the use of the county. [C51,§3321; R60,§4484; C73,§4144; C97,§5133; C24, 27, 31, 35,§13391.]

13392 Tried jointly. If two or more tramps assemble or congregate together, they shall be tried jointly by the court before whom they are brought, and such court shall be entitled only to fees as for the arrest and trial of one person. [C97,§5136; C24, 27, 31, 35,§13392.]

13393 Fees of officers. The board of supervisors shall, at any regular or special session, fix the compensation to be allowed the officers in each case under this chapter; to the trial magistrate, not exceeding one dollar; to the peace officer, for all services, not more than one dollar, and mileage as now allowed by law. [C97,§5137; C24, 27, 31, 35,§13393.]

13394 Unlawful fees. Any officer or magistrate who shall conspire with any person for the purpose of increasing the emoluments of his office, or to evade the provisions of this chapter, or who shall, with such intent, in any manner or by any means, encourage a tramp to remain within his jurisdiction or come within the same, shall be fined not exceeding one hundred dollars, and stand committed until the fine and costs are paid, not to exceed thirty days. [C97,§5139; C24, 27, 31, 35,§13394.]

13395 Compensation for keeping. No sheriff or jailer shall receive, and no board of supervisors allow, any compensation for keeping or boarding any tramp in the jail or other place in the county, unless such tramp has been duly arrested or committed under the provisions of this chapter, except the board of supervisors of each county may furnish one night's lodging for apparently deserving persons, and those who are sick or disabled may be cared for as the necessities of the case demand. [C97,§5142; C24, 27, 31, 35,§13395.]

CHAPTER 614

HABITUAL CRIMINALS

Multifarious convictions, §§13026, 13043, 13145, 13149

13396 Third conviction of felony.
13397 Fourth conviction of petty larceny.
13398 Evidence.
13399 Duties of jury and judge.
13400 "Habitual criminal" defined.
13401 Evidence.
13402 Pardon for former crime.

13396 Third conviction of felony. Whenever any person has been twice convicted of either of the crimes of burglary, robbery, forgery, counterfeiting, larceny where the value of the property stolen exceeded twenty dollars, or of breaking and entering, with intent to commit a public offense, any dwelling house, office, shop, store, warehouse, railroad car, boat, vessel, or building, in which goods, merchandise, or valuable things, were kept for use, sale, or deposit, or has been convicted of two or more of said crimes, and shall thereafter be convicted of any one of such crimes, committed after such conviction, he shall be imprisoned in the penitentiary for any term not more than forty years, provided such former judgments shall be referred to in the indictment, stating the court, date, and place of rendition. [S13,§4871-a; C24, 27, 31, 35,§13396.]

Referred to in §§13398, 13732.33

13397 Fourth conviction of petty larceny. Any person over the age of eighteen years who has been three times convicted of larceny where the value of the property stolen did not exceed twenty dollars, upon being convicted the fourth time of said offense shall be imprisoned in the penitentiary not exceeding three years, provided such former judgments shall be referred to in the indictment, stating the court, date, and place of rendition. [S13,§4871-b; C24, 27, 31, 35, §13397.]

Referred to in §13398

13398 Evidence. On the trial of any of said offenses named in sections 13396 and 13397, a

duly authenticated copy of the record of the former judgment in any court wherein said conviction was had, for either of said crimes against the party indicted, shall be prima facie evidence of such former conviction and may be used in evidence against said party. [S13, §4871-c; C24, 27, 31, 35,§13398.]

13399 Duties of jury and judge. Upon any trial when the indictment refers to former convictions of the defendant, the jury, if it finds the defendant guilty, and the court, if the defendant is convicted on a plea of guilty, must also find and determine specially whether the defendant had previously been convicted of either of the crimes referred to in the indictment, and the number of times so convicted. [S13,§4871-d; C24, 27, 31, 35,§13399.]

13400 "Habitual criminal" defined. Whoever has been twice convicted of crime, sentenced, and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than three years each shall, upon conviction of a felony committed in this state after the taking effect of this section, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not more than twenty-five years, provided that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern. [S13,§5091-a; C24, 27, 31, 35, §13400.]

Referred to in §§13401, 13402

13401 Evidence. On the trial of any cause, under the provisions of section 13400, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for either of the said crimes formerly committed by the party indicted under section 13400, shall be competent and prima facie evidence of such former judgment and commitment, and may be used in evidence upon the trial of said cause. [S13,§5091-b; C24, 27, 31, 35,§13401.]

13402 Pardon for former crime. If the person so convicted shall show, to the satisfaction of the court before whom such conviction was had, that he was released from imprisonment, upon either of said sentences, upon a pardon granted for the reason that he was innocent, such conviction and sentence shall not be considered as such under section 13400. [S13, §5091-a; C24, 27, 31, 35,§13402.]

TITLE XXXVI

CRIMINAL PROCEDURE

CHAPTER 615

MAGISTRATES, PEACE OFFICERS, AND SPECIAL AGENTS

13403 "Magistrate" defined.
13404 Power of magistrates.
13405 "Peace officers" defined.
13405.1 Duties.
13406 "Officers of justice" defined.
13411 Power of governor and attorney general.

13403 "Magistrate" defined. The term "magistrate" includes:

1. All judges of the supreme, district, superior, or municipal courts, throughout the state.
2. All justices of the peace, mayors, and judges of the police court, within their respective counties. [C51,§§2778, 2823; R60,§§4439, 4447; C73,§4108; C97,§5097; C24, 27, 31, 35, 13403.]

13404 Power of magistrates. Magistrates have power to hear complaints, or preliminary informations, issue warrants, order arrests, require security to keep the peace, make commitments, and take bail, as provided by law. [C51, §2778; R60,§4439; C73,§4108; C97,§5098; C24, 27, 31, 35,§13404.]

13405 "Peace officers" defined. The following are "peace officers":

1. Sheriffs and their deputies.
2. Constables.
3. Marshals and policemen of cities and towns.
4. All special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting the members of the clerical force.
5. Such persons as may be otherwise so designated by law. [C51,§2830; R60,§4440; C73,§4109; C97,§5099; C24, 27, 31, 35,§13405; 48GA, ch 120, §22.]

Referred to in §5000.01

13405.1 Duties. It shall be the duty of a peace officer and his deputy, if any, throughout the county, township, or municipality of which he is such officer, to preserve the peace, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed, and present the same to the county attorney, grand jury, mayor or police courts, and to file informations against all persons whom he knows, or has reason to believe, to have violated the laws of the state, and to perform all other duties, civil or criminal, pertaining to his office or enjoined upon him by law. Nothing herein shall be deemed to curtail the powers and duties otherwise granted to or imposed upon peace officers. [C51,§170; R60,§383; C73,§337; C97,§499; S13, §499; C24,§5181; C27, 31, 35,§13405-b1.]

Duty to enforce motor vehicle law, §§5000.06, 5030.01, 5035.22

13406 "Officers of justice" defined. Magistrates and peace officers are sometimes designated as "officers of justice". [R60,§4441; C73, §4110; C97,§5100; C24, 27, 31, 35,§13406.]

13407 to 13410, inc. Rep. by 48GA, ch 120,§23

13411 Power of governor and attorney general. The governor and attorney general shall each have the power to call to their aid in the enforcement of the law any peace officer; and when such officers are so called upon it shall be their duty faithfully to render such assistance as may be required, in any part of the state, and such peace officers while so acting shall have the same powers throughout the state as possessed by the sheriff of the county in which such peace officer is acting. [C24, 27, 31, 35,§13411.]

13412 to 13414, inc. Rep. by 48GA, ch 120,§23

CHAPTER 616

BUREAU OF CRIMINAL IDENTIFICATION

Identification and use of publicly owned automobiles, etc., §13316.1 et seq.

13416 Criminal identification.
13417.1 Finger and palm prints—duty of sheriff and chief of police.
13417.2 Equipment.

13415 Rep. by 48GA, ch 120,§23

13416 Criminal identification. The commissioner of public safety may provide in his department a bureau of criminal identification. He may adopt rules and regulations for the same. The sheriff of each county and the chief of police of each city and town shall furnish to the department criminal identification records and other information as directed by the com-

missioner of public safety. [C24, 27, 31, 35, §13416; 48GA, ch 120,§24.]

13417 Rep. by 48GA, ch 120,§23

Sections 13417-a1, 13417-a2, code 1935, repealed by 47GA, ch 134, §551. See §§5006.01, 5006.04

13417.1 Finger and palm prints—duty of sheriff and chief of police. It shall be the duty of the sheriff of every county, and the chief of police of each city regardless of the form of government thereof and having a population of ten thousand or over, to take the fingerprints of all persons held either for investigation, for the commission of a felony, as a fugitive from justice, or for bootlegging, the maintenance of an intoxicating liquor nuisance, manufacturing intoxicating liquor, operating a motor vehicle while intoxicated or for illegal transportation of intoxicating liquor, and to take the fingerprints of all unidentified dead bodies in their respective jurisdictions, and to forward such fingerprint records on such forms and in such manner as may be prescribed by the commissioner of public safety, within forty-eight hours after the same are taken, to the bureau of criminal investigation. If the fingerprints of any person are taken under the provisions hereof whose fingerprints are not already on file, and said person is not convicted of any offense, then said fingerprint records shall be destroyed by any officer having them. In addition to the fingerprints as herein provided any such officer may also take the palm prints of any such person. [C27, 31, 35,§13417-b1; 48GA, ch 120,§25.]

Referred to in §13417.2
Photographs and Bertillon measurements, §13904

13417.2 Equipment. The board of supervisors of each county and the council of each city affected by the provisions of section 13417.1 shall furnish all necessary equipment and materials for the carrying out of the provisions of said section. [C27, 31, 35,§13417-b2.]

CHAPTER 616.1

POLICE RADIO BROADCASTING SYSTEM

13417.3 Contract authorized.
13417.4 Expenses.
13417.5 Notification to supervisors.
13417.6 Duty of supervisors to install—costs.
13417.7 Duty of city council to install—costs.

13417.3 Contract authorized. The commissioner of public safety may enter into such contracts as he may deem necessary for the purpose of utilizing a special radio broadcasting system for law enforcement and police work and for direct and rapid communication with the various peace officers of the state. The said commissioner shall be empowered, subject to the approval of the governor and executive council, to equip divisional headquarters, cars and motorcycles in his department with radio sending and/or receiving apparatus. [C31, 35,§13417-d1; 48GA, ch 120,§26.]

Referred to in §13417.4

13417.4 Expenses. Any such contract authorized in section 13417.3 shall involve no expense to the state, except that the state may buy its own radio remote control system and install the same in the offices of the department of public safety in broadcasting communications and information direct to the peace officers of the state. [C31, 35,§13417-d2; 48GA, ch 120,§27.]

13417.5 Notification to supervisors. Whenever the commissioner of public safety has entered into a contract and has established radio broadcasting facilities as is provided in this chapter, he shall at once notify the boards of supervisors of the respective counties that such a radio service has been established. [C31, 35,§13417-d3; 48GA, ch 120,§28.]

44GA, ch 241, §8, editorially divided

13417.6 Duty of supervisors to install—costs. It shall then be the duty of the board of supervisors of each county to forthwith install in the office of the sheriff, such a locked-in radio receiving set as may be prescribed by the commissioner of public safety, and such a set in at least one motor vehicle used by the sheriff, for use in connection with said state radio broadcasting system. The board of supervisors of any county may install as many additional such radio receiving sets as may be deemed necessary. The cost of such radio receiving sets and the cost of installation thereof shall be paid from the general fund of the county. [C31, 35, §13417-d4; 48GA, ch 120,§29.]

13417.7 Duty of city council to install—costs. The council of each city shall, and the council of any town may install in such place as said council may determine at least one such a locked-in radio receiving set as may be prescribed by the commissioner of public safety for use in law enforcement and police work. The cost of any such installation shall be paid from the general fund of said city or town. [C31, 35, §13417-d5; 48GA, ch 120,§30.]

Additional broadcasting units authorized, 45ExGA, ch 142; 46GA, ch 124

CHAPTER 617

SEARCH WARRANTS

Referred to in §§1794.101, 2010, 3169.20, 13203

13441.01 Definition.
13441.02 Docketing—trial—nature of proceedings.
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13441.04 Information.
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13441.40 Appeal by claimant.
13441.41 Appeal—how taken.
13441.42 Appeal by state.
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13418 to 13441, inc. Rep. by 46GA, ch 125

13441.01 Definition. A search warrant is an order in writing, in the name of the state, signed by a magistrate, other than a judge of the supreme court, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate. [C51,§3291; R60,§5024; C73,§4629; C97,§5545; C24, 27, 31, §13418; C35,§13441-g1.]

13441.02 Docketing—trial—nature of proceedings. Search warrant proceedings shall be docketed in the name of the state against the property seized and shall be tried as an ordinary action, the county attorney appearing for the state. [C24, 27, 31,§§1967, 13207; C35,§13441-g2.]

13441.03 When authorized. A search warrant may be issued:

1. For property which has been stolen or embezzled.
2. For property which has been used as a means or as one of the means of committing or of accomplishing the commission of a felony.
3. For property which is in the possession of a person with the intent to use it as a means of committing a public offense, or which has been delivered by such person to another for the purpose of concealing it.
4. For property which is being used or employed in carrying on, keeping or maintaining a place of any description for the purpose of gambling for money or for any other thing of value.
5. For personal property of the character enumerated in section 13203.
6. For property of the character specifically enumerated in section 13210.
7. For cigarettes and cigarette papers, and the containers thereof, received, possessed, kept, stored, sold or given away in violation of any law of this state, or with intent to violate any such law.
8. For intoxicating liquors, including alcohol, brandy, whisky, rum, gin, beer, ale, porter, wine, spirituous, vinous, and malt liquors, manufactured, sold, kept for sale, owned, or possessed in violation of any law of this state, including all instrumentalities, containers, equipment, articles or things used or employed or intended to be used or employed in effecting said unlawful acts or any of them.
9. For any other property which is legally subject to a search warrant by any law of this state. [C51,§3292; R60,§5025; C73,§4630; C97, §5546; C24, 27, 31,§13419; C35,§13441-g3.]

Referred to in §13441.30

13441.04 Information. Any credible resident of this state may make application for the issuance of a search warrant by filing before any magistrate, except a judge of the supreme court, a written information, supported by his oath or affirmation, and alleging therein the existence of any ground or grounds specified in this chapter as ground for the issuance of a search warrant and that he believes and has substantial reason to believe that said ground or grounds exist in fact. Said information shall describe with reasonable certainty the person or premises, or both, to be searched, the property to be seized, and the person, if known, in possession of said premises and property. [C51,§2722; R60,§§1565, 4364; C73,§§1544, 1545, 4027; C97, §§2413, 2414, 4963; S13,§§4965-b, 5007-a; SS15, §2413; C24, 27, 31,§§1578, 1968, 1969, 13200, 13211; C35,§13441-g4.]

13441.05 Issuance of warrant. If the magistrate is satisfied from his examination of the applicant, and of other witnesses, if any, and of the allegations of the information, of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him with his name of office, directed to any peace

officer in the county, commanding him forthwith to search the person or place named for the property specified, and bring said property before him. [C51,§§2722, 3294–3296; R60,§§1565, 4364, 5027–5029; C73,§§1544, 4027, 4632–4634; C97,§§2413, 4963, 5548–5550; S13,§5007-a; SS15, §2413; C24, 27, 31,§§1578, 1970, 13200, 13421, 13423; C35,§13441-g5.]

13441.06 Form of warrant. The warrant may be in substantially the following form:

County of .....}
State of Iowa. }

To any peace officer of said county:

Proof having been this day made before me as provided by law that (here, with reasonable certainty and in accordance with the information and other proof obtained by the magistrate, designate the property, its location, the person in possession thereof, and the unlawful use or purpose to which it has been, or is being employed or held)

and being satisfied that the foregoing recital relative to said property is probably true, now, therefore, you are commanded to make immediate search of (here state whether the search is of the person of a named person or of said premises, or of both) and if said property or any part thereof be found you are commanded to bring said property forthwith before me at my office.

Dated at ..... this..... day of ....., 19.....

.....
(Official title)

[R60,§§1565,5031; C73,§§1544,4636; C97,§§2413, 5551; SS15,§2413; C24, 27, 31,§§1970, 13424; C35,§13441-g6.]

13441.07 By whom served. A search warrant may in all cases be served by any peace officer, but by no other person, except in aid of the officer on his requisition, he being present and acting in its execution. [C51,§3297; R60, §§1565, 5032; C73,§§1544, 4637; C97,§§2413, 5552; S13,§5007-a; SS15,§2413; C24, 27, 31, §§1578, 1970, 13425; C35,§13441-g7.]

13441.08 Execution of warrant. The peace officer to whom such warrant shall be delivered shall, in the daytime or in the nighttime, forthwith obey and execute, as effectually as possible, the commands of said warrant, and forthwith make return of his doings to said magistrate, who shall securely keep all property so seized and the vessels, if any, containing said property until final action be had thereon. [R60,§§1565, 5035; C73,§§1544, 4640; C97,§5555; SS15,§§2413, 2415; C24, 27, 31,§§1971, 13428; C35,§13441-g8.]

13441.09 Breaking in to execute warrant. The officer may break open any outer or inner door or window of a house, or any part thereof, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. [C51,§3298; R60,§5033; C73,§4638; C97,§5553; C24, 27, 31,§13426; C35, §13441-g9.]

13441.10 Liberating person assisting in execution. He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or, when necessary, for his own liberation. [R60,§5034; C73,§4639; C97,§5554; C24, 27, 31,§13427; C35,§13441-g10.]

Breaking out after lawful entrance, §13474

13441.11 Arrest of persons. The officer serving a search warrant, shall, in connection therewith, and in addition thereto, make arrest of persons under all circumstances justifying an arrest without a warrant, and take said persons before said magistrate to be dealt with as provided by law. [C35,§13441-g11.]

13441.12 Return of warrant. A search warrant must be executed and returned to the magistrate who issued it within ten days after its date. After the expiration of such time the warrant, unless executed, is void. [C51,§3299; R60,§§1565, 5036; C73,§§1544, 4641; C97,§§2413, 2415, 5556; SS15,§§2413, 2415; C24, 27, 31, §§1581, 1971, 13429; C35,§13441-g12.]

13441.13 Receipt for property. When the officer takes any property under the warrant, he must, on demand, give to the person from whom it was taken, or in whose possession it was found, an itemized receipt therefor. [C51, §3300; R60,§5037; C73,§4642; C97,§5557; C24, 27, 31,§13430; C35,§13441-g13.]

13441.14 Inventory. The officer must forthwith return the warrant to the magistrate, with a complete inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they be present. [C51,§3301; R60,§5038; C73,§4643; C97,§5558; C24, 27, 31,§13431; C35,§13441-g14.]

13441.15 Copy of inventory. The magistrate, if required, must deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant. [C51,§3302; R60,§5039; C73,§4644; C97, §5559; C24, 27, 31,§13432; C35,§13441-g15.]

13441.16 Notice of hearing. Said magistrate, in the event of a seizure under said warrant, shall, within forty-eight hours after the officer's return is filed with him, issue a notice of hearing on said seizure, which notice shall:

1. Be addressed:

a. To the person or persons named or described in said information as the owner or keeper or possessor of said property.

b. "To all persons whom it may concern."

2. Describe said property so seized with reasonable certainty, and state where, when, and why the same was seized.

3. Summon said persons and all others whom it may concern to appear before said magistrate within the county at a place and time named in said notice, which time shall not be less than five nor more than fifteen days after the filing of said return, and show cause, if any they have, why said property, together with the containers

in which the same are contained, if any, should not be forfeited.

4. Be signed by said magistrate. [R60,§1566; C73,§1546; C97,§2415; S13,§4965-b; SS15,§2415; C24, 27, 31,§§1972, 13204, 13205, 13213; C35, §13441-g16.]

13441.17 Service of notice. Said notice shall be served at least three days prior to the hearing:

1. By posting a copy thereof in some conspicuous place on or about the building or place where said property was seized.

2. If the person or persons named or described in the information as owner or keeper of the property so seized be resident of said county, then by personally serving said notice on said person, or by leaving a copy of said notice at the last known usual place of residence of said person with some adult member of his family if found at said residence. [R60,§1566; C73,§1546; C97,§2415; S13,§4965-b; SS15,§2415; C24, 27, 31,§§1973, 13204, 13213; C35,§13441-g17.]

13441.18 Hearing. The magistrate must, at the time so fixed, or at an adjournment thereof, proceed to take testimony in relation to the property so seized. [C51,§§3303, 3304; R60, §§5040, 5041; C73,§§4645, 4646; C97,§§5560, 5561; C24, 27, 31,§§13206, 13433, 13434; C35, §13441-g18.]

13441.19 Substitute magistrate. Should the magistrate issuing the warrant be absent or for any reason be unable to serve at the time of the hearing aforesaid, any other magistrate of the county, designated by the absent magistrate or by the county attorney, shall act. [S13, §4965-b; C24, 27, 31,§13213; C35,§13441-g19.]

13441.20 Procedure. The procedure in the trial of cases not commenced before a judge of the district court may be the same, substantially as in case of misdemeanors triable before justices of the peace. Proceedings commenced before a judge of the district court may be treated as pending in the district court and be disposed of under the general procedure therein provided except as it may be herein modified. [R60,§1566; C73,§1546; C97, SS15,§2415; C24, 27, 31,§§1975, 13207; C35,§13441-g20.]

13441.21 Right to contest forfeiture. At the time and place prescribed in said notice, the person named in said information, or any other person claiming an interest in said property, or in any part thereof, may appear and show specific and legal cause why the same should not be forfeited. [R60,§1566; C73,§1546; C97, SS15, §2415; C24, 27, 31,§§1974, 13206; C35,§13441-g21.]

13441.22 Insufficient description — effect. When any property shall have been seized by virtue of any such warrant, the same shall not be discharged or returned to any person claiming the same, by reason of any alleged insufficiency of description in the warrant, but the claimant shall only have a right to be heard on the merits of the case. [C73,§1545; C97,§2414; C24, 27, 31,§1978; C35,§13441-g22.]

13441.23 Property restored. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken. [C51,§3305; R60,§§1567, 5042; C73,§§1547, 4647; C97,§§2416, 5562; S13,§4965-b; C24, 27, 31,§§1988, 13206, 13214, 13435; C35,§13441-g23.]

13441.24 Execution, return, and costs. The officer shall obey said order and make return thereon to the court of his acts thereunder and the costs of the proceeding in such case attending the restoration shall be taxed to and paid by the state. [R60,§1567; C73,§1547; C97,§2416; C24, 27, 31,§1989; C35,§13441-g24.]

13441.25 Judgment of forfeiture and destruction. If the magistrate finds that the property or any part thereof seized under the search warrant is of the illegal nature or character alleged in the information, he shall enter judgment of forfeiture to the state of said property, or of the part thereof, as the case may be, and shall, in addition to said judgment of forfeiture, enter an order directing the immediate destruction of all such property which does not have a legitimate use and the sale of all property other than money which may be used legitimately, unless said latter property is otherwise disposed of as in this chapter provided. [R60, §1566; C73,§1546; C97,§2415; S13,§5007-a; SS15, §2415; C24, 27, 31,§§1579, 1979, 13208; C35, §13441-g25.]

13441.26 Execution — sale — destruction. Execution shall issue for the sale of all property, except money, which may have a legitimate use, and for the destruction of all property having no legitimate use. Sales shall be made as provided by section 11724. Due return of the execution shall be made thereon by the officer executing it. [C51,§2722; R60,§§4364, 5048; C73,§§4027, 4653; C97,§§4963, 5568; S13,§§4965-b, 5007-a; C24, 27, 31,§§1579, 1993, 1996, 13201, 13208, 13215, 13441; C35,§13441-g26.]

13441.27 Limitation on sale. Property seized under search warrant and forfeited to the state and ordered sold shall be sold only to persons who have legal right to purchase or receive such property. [S13,§5007-a; C24, 27, 31,§1579; C35,§13441-g27.]

13441.28 Stamping cigarettes, etc. In the sale of cigarettes and cigarette papers which have been seized on search warrant and forfeited, the officer shall be exempt from the provisions of the law requiring the stamping of such articles before sale. [S13,§5007-a; C24, 27, 31,§1579; C35,§13441-g28.]

See §1556.27

13441.29 Proceeds. The proceeds derived from a sale and the money seized and forfeited, if any, shall be paid by the peace officer to the county treasurer and by him credited to the

school fund of the county. [C24, 27, 31,§§1580, 13209; C35,§13441-g29.]

13441.30 Disposition of stolen or like property. If the property taken by virtue of a search warrant was stolen or embezzled, it must be restored to the owner, upon his making satisfactory proof to the magistrate of his ownership thereof, or of his right of possession thereto, as provided in chapter 516. If it was taken on a warrant issued on the grounds stated in the second or third subsection of section 13441.03, the magistrate must retain it in his possession, subject to the order of any other court having jurisdiction to try the offense which the property taken was used as a means of committing, or so intended to be. [C51,§3306; R60,§5043; C73, §4648; C97,§5563; C24, 27, 31,§13436; C35, §13441-g30.]

13441.31 Utilizing condemned liquors. When a judgment has been entered decreeing a forfeiture of any intoxicating liquors, the magistrate shall direct the disposition of such liquors and the vessels containing the same:

1. By ordering the destruction thereof; or
2. By ordering any portion thereof consisting of alcohol, brandies, wine, or whisky, to be delivered, for medicinal or scientific purposes, to any state or reputable hospital in the county, or in adjoining counties, or to the board of control of state institutions, or to any reputable educational institution in the state for scientific purposes. [C24, 27, 31,§1990; C35,§13441-g31.]

13441.32 Dispensation by board of control. Liquors delivered to the board of control shall be dispensed by it to any state institution or reputable hospital in this state and solely for medical or scientific purposes. [C24, 27, 31, §1991; C35,§13441-g32.]

13441.33 Transportation by carrier. When any such liquor is ordered delivered or shipped, the magistrate shall securely attach, or cause to be attached, to the box or package containing the same, a certified copy of the order of the court and thereupon any common carrier may receive, transport, and deliver such liquor to the consignee. The cost of packing and transportation shall be paid by the consignee receiving such liquor. [C24, 27, 31,§1997; C35,§13441-g33.]

13441.34 Utilizing other property. When property seized under search warrant has been finally forfeited to the state, and is of a nature useful to peace officers in law enforcement, the magistrate may order it delivered to any state, county, or city law-enforcing agency, and in such case the head, chief, or superintendent of such agency shall receipt to the magistrate therefor, and hold and use such property solely in effecting law enforcement, and deliver the same to his successor and shall be liable therefor on his bond. [C35,§13441-g34.]

13441.35 Costs. If no person be made defendant, or if judgment be in favor of all the defendants who appear and are made such, then the costs of the proceeding shall be paid as in ordinary criminal prosecution where the prosecution fails.

If the judgment shall be against only one party defendant, he shall be adjudged to pay all the costs of the proceedings.

If such judgment shall be against more than one party defendant claiming distinct interests in said property, the costs of said proceedings and trial shall be, according to the discretion of said magistrate, equitably apportioned among said defendants.

Execution shall be issued on said judgments against said defendants for the amount of costs so adjudged against them. [R60,§1566; C73, §1546; C97, SS15,§2415; C24, 27, 31,§1980; C35, §13441-g35.]

13441.36 Seizure of other property—disposition. When any officer in the execution of a search warrant shall find any stolen or embezzled property, or shall seize any other things for which a search warrant is allowed by this chapter, all the property and things so seized shall be safely kept, by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced as evidence on any trial; and as soon as may be afterwards all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant may be destroyed, or otherwise disposed of, under the direction of the court or magistrate. [R60,§5048; C73,§4653; C97,§5568; C24, 27, 31,§13441; C35, §13441-g36.]

13441.37 Searching prisoner. When a person charged with an offense is supposed by the magistrate before whom he is brought to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or evidence to be retained, subject to his order, or the order of the court in which the defendant may be tried. [C51,§3309; R60,§5047; C73,§4652; C97,§5567; C24, 27, 31,§13440; C35, §13441-g37.]

13441.38 Maliciously suing out warrant. Whoever maliciously and without probable cause procures a search warrant to be issued and executed is guilty of a misdemeanor. [C51, §3308; R60,§5045; C73,§4650; C97,§5565; C24, 27, 31,§13438; C35,§13441-g38.]

Punishment, §12894

13441.39 Officer exceeding authority. A peace officer who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor. [R60,§5046; C73,§4651; C97,§5566; C24, 27, 31,§13439; C35,§13441-g39.]

Punishment, §12894

13441.40 Appeal by claimant. Any person appearing as aforesaid may, when the proceedings are not before a judge of the district court, appeal to the district court from said judgment or forfeiture, as to the whole or any part of said property. [R60,§1566; C73,§1546; C97, SS 15,§2415; C24, 27, 31,§1981; C35,§13441-g40.]

13441.41 Appeal—how taken. Said appeal shall be taken by filing with the magistrate, within two days after the entry of forfeiture, a written notice of appeal specifically stating the part of the judgment of forfeiture appealed from, and a bond in such reasonable sum as the magistrate may fix and approve, conditioned to pay all costs of the proceedings in case appellant is unsuccessful on his appeal. [C35,§13441-g41.]

13441.42 Appeal by state. Where the judgment is against the state, it shall have the same right of appeal, and on the same conditions, except that no bond shall be required. [C24, 27, 31,§1982; C35,§13441-g42.]

13441.43 Stay of proceedings. If an appeal be taken, the same shall operate as a stay of proceedings and the property seized under the warrant and involved in the appeal shall not be returned to any claimant thereof nor sold or destroyed or otherwise disposed of until final determination is had. [C24, 27, 31,§1983; C35, §13441-g43.]

CHAPTER 618

LIMITATION OF CRIMINAL ACTIONS

13442 Actions for murder.
13443 Eighteen months limitation.
13444 Three-year limitation.
13445 One-year limitation.
13446 Absence from state deducted.
13447 Time of finding indictment.

13442 Actions for murder. A prosecution for murder may be commenced at any time after the death of the person killed. [C51,§2811; R60, §4513; C73,§4165; C97,§5163; C24, 27, 31, 35, §13442.]

13443 Eighteen months limitation. An indictment for a public offense must be found within eighteen months after its commission, in the following cases, and not after:

1. Taking or enticing away an unmarried female under the age of consent, for the purpose of marriage or prostitution.

2. Seducing or debauching an unmarried female of previously chaste character.

3. For rape or adultery.

4. For an assault with intent to commit a rape. [C51,§2812; R60,§4514; C73,§4166; C97, §5164; C24, 27, 31, 35,§13443.]

13444 Three-year limitation. In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards. [C51,§2813; R60, §4515; C73,§4167; C97,§5165; C24, 27, 31, 35, §13444.]

Accrual in embezzlement by executor, §13086

13445 One-year limitation. A prosecution for a misdemeanor triable before a justice of the peace, or violation of an ordinance of a city or town, must be commenced within one year after the commission thereof, and not after. [C73,§4168; C97,§5166; C24, 27, 31, 35,§13445.]

13446 Absence from state deducted. If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state, and no period during which the party charged was not publicly resident within the state is a part of the limitation. [C51,§2814; R60,§4516; C73,§4169; C97,§5167; C24, 27, 31, 35,§13446.]

13447 Time of finding indictment. An indictment is found, within the meaning of this chapter, when it is duly presented by the grand jury in open court and there filed. [C51,§2815; R60,§4517; C73,§4170; C97,§5168; C24, 27, 31, 35, §13447.]

CHAPTER 619

JURISDICTION OF PUBLIC OFFENSES

13448 Persons subject to laws of state.
13449 Jurisdiction of district court.
13450 Offenses consummated within the state.
13451 Offenses partly in county.
13452 Offenses near boundary of two counties.
13453 Offenses on trains, boats, or aircraft.
13454 Jurisdiction in any county in certain cases.
13455 Jurisdiction of bigamy.
13456 Fighting duel without the state—death within state.
13457 Conviction or acquittal bars action.

13448 Persons subject to laws of state. Every person, whether an inhabitant of this state or any other state or country, or of a territory or district of the United States, is liable to punishment by the laws of this state for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States. [C51,§2803; R60, §4500; C73,§4155; C97,§5153; C24, 27, 31, 35, §13448.]

13449 Jurisdiction of district court. The local jurisdiction of the district court is of offenses committed within the county in which it is held, and of such other cases as are or may be provided by law. [R60,§4502; C73,§4156; C97,§5154; C24, 27, 31, 35,§13449.]

Prison breach, §18854

13450 Offenses consummated within the state. When the commission of a public of-

fense, committed without the state, is consummated within its boundaries, the defendant is liable to punishment therefor, though he was without the state at the time of its consummation, if he committed the offense through the intervention of an agent within the state, or by any other means proceeding directly from himself.

Jurisdiction thereof is in the county in which the offense is completed. [C51,§2804; R60, §4505; C73,§4157; C97,§5155; C24, 27, 31, 35, §13450.]

13451 Offenses partly in county. When a public offense is committed partly in one county and partly in another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county, except as otherwise provided by law. [C51,§2806; R60,§4507; C73,§4159; C97,§5157; C24, 27, 31, 35,§13451.]

13452 Offenses near boundary of two counties. When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county, except as otherwise provided by law. [C51,§2807; R60,§4508; C73,§4160; C97, §5158; C24, 27, 31, 35,§13452.]

13453 Offenses on trains, boats, or aircraft. When an offense is committed within the jurisdiction of the state on any railroad car while passing over any railroad, or any boat, raft, or vessel navigating a river, lake, or canal, or lying therein in the prosecution of her voyage, or in any kind of aircraft while in flight, the jurisdiction is in any county through which it passes in the course of its trip or voyage, or in the county where the trip or voyage shall begin or terminate. [C51,§2808; R60,§4509; C73,§4161; C97, §5159; C24, 27, 31, 35,§13453.]

Concurrent state jurisdiction, §§8, 10767

13454 Jurisdiction in any county in certain cases. The jurisdiction of an indictment for the crime of:

1. Forcibly and without lawful authority seizing and confining another, or kidnaping him with intent, against his will, to cause him to be confined or imprisoned within the state, or to be sent out of the state, or

2. Taking or enticing a child under the age of fifteen years away from the parents, guardian, or other person having the legal charge of the person, with intent to detain or conceal such child, or

3. Taking or enticing away an unmarried female of previously chaste character under the age of consent, for the purpose of prostitution, or

4. Taking any woman unlawfully and against her will or by force, menace, or duress, and compelling her to marry against her will, or

5. Seducing and debauching any unmarried woman of previously chaste character—

is in any county in which the offense is committed, or into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the offender in instigating, procuring, promoting, aiding in, or being an accessory to the commission thereof, or in abetting the parties concerned therein. [C51,§2809; R60,§4510; C73,§4162; C97,§5160; C24, 27, 31, 35,§13454.]

13455 Jurisdiction of bigamy. When the offense of bigamy is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county. [C51,§2810; R60,§4511; C73,§4163; C97,§5161; C24, 27, 31, 35, §13455.]

13456 Fighting duel without the state — death within state. When an inhabitant or resident of the state, by previous appointment or engagement, fights a duel, or is concerned as second therein, without the jurisdiction of the state, and in such duel a wound is inflicted upon any person whereof he dies within the state, the jurisdiction of the offense is in the county where the death occurs. [C51,§2805; R60,§4506; C73,§4158; C97,§5156; C24, 27, 31, 35,§13456.]

13457 Conviction or acquittal bars action. When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment therefor in another. [R60,§4512; C73,§4164; C97,§5162; C24, 27, 31, 35,§13457.]

CHAPTER 620

PRELIMINARY INFORMATION AND WARRANTS OF ARREST

13458 Definition.
13459 Form.
13460 Filing—issuing warrant.
13461 Form of warrant.
13462 Directed to peace officer—contents.
13463 Order for bail—indorsed on warrant.
13464 Manner of executing warrant.

13458 Definition. A complaint or preliminary information is a statement in writing, under oath or affirmation, made before a magistrate, of the commission or threatened commission of a public offense, and accusing someone thereof. [C51,§2822; R60,§4530; C73,§4111; C97, §5101; C24, 27, 31, 35,§13458.]

13459 Form. The information may be substantially in the form required in criminal actions triable before a justice of the peace. [C73, §4185; C97,§5182; C24, 27, 31, 35,§13459.]

Form and contents, §13559 et seq., §13782.32
C97,§5182, editorially divided

13460 Filing — issuing warrant. When a preliminary information is made before a magistrate, charging the commission of some designated public offense triable on indictment in the county in which such magistrate has local

jurisdiction, by some person named therein, he may issue a warrant for the arrest of such person. [C73,§4185; C97,§5182; C24, 27, 31, 35, §13460.]

Approval of warrant and expenses, §§1225.04, 1225.05

13461 Form of warrant. The warrant of arrest on a preliminary information must be substantially in the following form:

State of Iowa, }
County of..... }

To any peace officer of the state:

Preliminary information upon oath having been this day filed with me, charging that the crime (naming it) has been committed and accusing A..... B..... thereof:

You are commanded forthwith to arrest the said A..... B..... and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at..... this..... day of....., A. D.....

C..... D..... (with official title).

[C51,§2827; R60,§4534; C73,§4186; C97,§5183; C24, 27, 31, 35,§13461.]

13462 Directed to peace officer — contents. The warrant must be directed to any peace officer in the state; give the name of the defendant, if known to the magistrate; if unknown, may designate him by any name, and must state by name or general description an offense which authorizes a warrant to issue, the time of issuing it, the county, city, town, village, or township where issued, and be signed by the magistrate with his name of office. [C51,§§2828, 2829; R60,§§4535, 4536; C73,§§4187, 4188; C97,§5184; C24, 27, 31, 35,§13462.]

13463 Order for bail—indorsed on warrant. If the offense stated in the warrant be a misdemeanor, the magistrate issuing it must make an indorsement thereon as follows: "Let the defendant, when arrested, be admitted to bail in the sum of.....dollars", stating the amount in which bail may be taken. [R60,§4537; C73,§4189; C97,§5185; C24, 27, 31, 35,§13463.]

13464 Manner of executing warrant. The warrant may be delivered to any peace officer for execution, and served in any county in the state. [R60,§4538; C73,§4190; C97,§5186; C24, 27, 31, 35,§13464.]

CHAPTER 621

ARREST: GENERAL PROVISIONS

13465 "Arrest" defined—time of making.
13466 Acts necessary.
13467 Persons authorized to make.
13468 Arrests by peace officers.
13469 Arrests by private persons.
13470 Arrests on oral order.
13471 Manner of making.
13472 Resistance to arrest—use of force.
13473 Breaking and entering premises.
13474 Breaking out after lawful entrance.
13475 Summoning aid—refusing to assist.
13476 Taking weapons—delivery to magistrate.
13477 Escape after arrest—recapture.
13478 Arrests by private person — disposition of prisoner.
13479 Conveying prisoner to jail — fees and expenses.
13479.1 Public safety department prisoners.

13465 "Arrest" defined—time of making. Arrest is the taking of a person into custody when and in the manner authorized by law, and may be made at any time of any day or night. [C51,§§2837, 2850; R60,§§4545, 4551; C73, §§4197, 4203; C97,§5193; C24, 27, 31, 35,§13465.]

13466 Acts necessary. An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest. No unnecessary force or violence shall be used in making the same, and the person arrested shall not be subjected to any greater restraint than is necessary for his detention. [C51,§2838; R60,§§4557–4559; C73,§§4209–4211; C97,§5194; C24, 27, 31, 35, §13466.]

13467 Persons authorized to make. An arrest may be made by a peace officer or by a private person. [R60,§4546; C73,§4198; C97, §5195; C24, 27, 31, 35,§13467.]

13468 Arrests by peace officers. A peace officer may make an arrest in obedience to a warrant delivered to him; and without a warrant:

1. For a public offense committed or attempted in his presence.

2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it. [C51,§2840; R60,§§4547, 4548; C73,§§4199, 4200; C97,§5196; C24, 27, 31, 35, §13468.]

13469 Arrests by private persons. A private person may make an arrest:

1. For a public offense committed or attempted in his presence.

2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it. [C51, §2846; R60,§4549; C73,§4201; C97,§5197; C24, 27, 31, 35,§13469.]

13470 Arrests on oral order. A magistrate may orally order a peace officer or a private person to arrest anyone committing or attempting to commit a public offense in the presence of such magistrate, which order shall authorize the arrest. [C51,§2845; R60,§4550; C73,§4202; C97,§5198; C24, 27, 31, 35,§13470.]

13471 Manner of making. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of arrest, of his authority to make it,

and that he is a peace officer, if such be the case, and require him to submit to his custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so; if acting under the authority of a warrant, he must give information thereof and show the warrant, if required. [C51,§§2839, 2841, 2847; R60,§4552; C73,§4204; C97,§5199; C24, 27, 31, 35,§13471.]

13472 Resistance to arrest — use of force. When the arrest is being made by an officer under the authority of a warrant, if, after information of the intention to make the arrest, the person to be arrested attempts to escape or forcibly resists, the officer may use all necessary means to effect the arrest. [C51,§2844; R60, §4553; C73,§4205; C97,§5200; C24, 27, 31, 35, §13472.]

13473 Breaking and entering premises. To make an arrest for any public offense, a peace officer, acting with or, when authorized, without a warrant, may break into a house or other building in which the person to be arrested may be, or in which the officer has reasonable grounds for believing he is, after having demanded admittance and explained the purpose for which admittance is desired. In case of a felony, a private person may use like means to make an arrest. [C51,§§2843, 2848; R60,§4554; C73,§4206; C97,§5201; C24, 27, 31, 35,§13473.]

Referred to in §13474

13474 Breaking out after lawful entrance. Any person who has lawfully entered a house for the purpose of making an arrest, under the provisions of section 13473, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself; and an officer may do the same when necessary for the purpose of liberating a person who, acting in his aid and by his command, lawfully entered for the purpose of making an arrest, and is detained therein. [R60,§4555; C73,§4207; C97,§5202; C24, 27, 31, 35,§13474.]

13475 Summoning aid—refusing to assist. Any person making an arrest may orally summon as many persons as he finds necessary to aid him in making the arrest, and all persons failing to obey such summons shall be guilty of a misdemeanor. [R60,§4556; C73,§4208; C97, §5203; C24, 27, 31, 35,§13475.]

Punishment, §12894

13476 Taking weapons—delivery to magistrate. He who makes an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law. [R60, §4560; C73,§4212; C97,§5204; C24, 27, 31, 35, §13476.]

13477 Escape after arrest—recapture. If a person after being arrested escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him in any part of the state, and may use the same means to retake as are authorized for an arrest; and this may be done at any time under the original warrant or commitment, when there is one. [C51,§2851; R60,§4561; C73,§4213; C97,§5205; C24, 27, 31, 35,§13477.]

13478 Arrests by private person—disposition of prisoner. A private person who has arrested another for the commission of an offense must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer, who may take the arrested person before a magistrate, but the person making the arrest must also accompany the officer before the magistrate. [C51,§§2842,2849; R60,§§4562–4564; C73,§§4214–4216; C97,§5206; C24, 27, 31, 35, §13478.]

13479 Conveying prisoner to jail—fees and expenses. Every officer or person who shall arrest anyone with a warrant or order issued by any court or officer, or who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment, shall be allowed the same fees and expenses as provided for in case of such services by the sheriff. [C73,§3820; C97,§1292; C24, 27, 31, 35,§13479.]

Sheriff's fees, §5191

13479.1 Public safety department prisoners. The sheriff of any county shall accept for custody in the county jail of his respective county any person handed over to him for safekeeping and lodging by any member of the state department of public safety. [48GA, ch 120,§31.]

CHAPTER 622

ARREST BY WARRANT

13480 Disposition of prisoner.
13481 In case of arrest for felony.
13482 In case of arrest for misdemeanor.
13483 Order for discharge.
13484 Discharge—delivery of warrant and papers.
13485 Failure to give bail.
13486 Proceedings after arrest.
13487 Hearing before another magistrate.

13480 Disposition of prisoner. An officer making an arrest in obedience to a warrant shall proceed with the person arrested as commanded by the warrant or as provided by law. [R60,§4565; C73,§4217; C97,§5207; C24, 27, 31, 35,§13480.]

Approval of warrant and expenses, §§1225.04, 1225.05

13481 In case of arrest for felony. If the offense stated in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued it at the place mentioned in the command thereof, or, in the event of his absence or inability to act, before the nearest or most accessible magis-

trate in the county in which it was issued. [C51, §2831; R60,§4539; C73,§4191; C97,§5187; C24, 27, 31, 35,§13481.]

13482 In case of arrest for misdemeanor. If the offense stated in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate or the clerk of the district court of the same county in which he was arrested, for the purpose of giving bail, and the magistrate or clerk before whom he is taken in such county must take bail from him, in the sum indorsed upon the warrant, for his appearance at the district court of the county in which the warrant was issued, on the first day of the following term. [C51,§2832; R60,§4540; C73,§4192; C97,§5188; C24, 27, 31, 35,§13482.]

Referred to in §18488
Similar provision, §18618

13483 Order for discharge. On taking bail in the case provided for in section 13482, the magistrate or clerk taking the same must indorse on the warrant his official order for the discharge of the defendant, substantially as follows:

State of Iowa, }
County of..... }

To the officer (naming him and his official title, thus A..... B....., sheriff of..... county) having in custody C..... D....., (naming him):

The defendant named in the within warrant of arrest, now in your custody under the authority thereof for the offense therein designated, having given sufficient bail to answer the same by the undertaking herewith delivered to you, you are commanded forthwith to discharge him from custody, and, without unnecessary delay, deliver this order, together with the said undertaking of bail, to the clerk of the district court of.....county, on or before the first day of the next term thereof.

Dated at....., this...day of...., A. D.....
E..... F..... (with official title.)

[C51,§2833; R60,§4541; C73,§4193; C97,§5189; C24, 27, 31, 35,§13483.]

C97,§5189, editorially divided

13484 Discharge—delivery of warrant and papers. He must deliver the warrant with the order thereon, together with the undertaking of bail, to the officer having the defendant in custody, who shall forthwith discharge him from arrest, and at once inform the magistrate issuing the warrant of his doings; and the magistrate or clerk, on or before the first day of the next term of the court at which the defendant is required to appear, must deliver or transmit by mail, or otherwise, the warrant with the order thereon, together with the undertaking of bail, to the clerk of the court at which the defendant is required to appear, who shall forthwith file the same in his office. The magistrate who issued the warrant shall return to the clerk, on or before the first day of the next term of the court, the affidavits of the informant and his witnesses upon which the warrant was issued, who shall file all of the same in his office. [C51, §2833; R60,§4541; C73,§4193; C97,§5189; C24, 27, 31, 35,§13484.]

13485 Failure to give bail. If bail be not forthwith given by the defendant as above provided, the magistrate or clerk must re-deliver to the officer the warrant, and the officer must take the defendant before the magistrate who issued it at the place mentioned in the command thereof, or, if he be absent or unable to act, before the nearest or most accessible magistrate in the county in which the warrant was issued. [C51,§2834; R60,§4542; C73,§4194; C97, §5190; C24, 27, 31, 35,§13485.]

13486 Proceedings after arrest. In all cases the defendant, when arrested, must be taken before the magistrate or clerk without unnecessary delay, and the officer must at the same time deliver to the magistrate or clerk the warrant, with his return thereon indorsed and subscribed by him with his official title. [C51,§2835; R60, §4543; C73,§4195; C97,§5191; C24, 27, 31, 35, §13486.]

13487 Hearing before another magistrate. If the defendant be taken before a magistrate in the county in which the warrant was issued, other than the magistrate who issued it as hereinbefore provided, the affidavits on which the warrant was issued must be sent to such magistrate, or if they cannot be procured, the informant and his witnesses must be subpoenaed to make new affidavits. [C51,§2836; R60,§4544; C73,§4196; C97,§5192; C24, 27, 31, 35,§13487.]

CHAPTER 623

ARREST WITHOUT WARRANT

13488 Disposition of prisoner.
13489 Hearing before magistrate.
13490 Transfer for convenience.
13491 Proceedings—same as under warrant.
13492 Offense triable in another county—transfer.
13493 Bail—commitment—discharge.
13494 Proceedings in case of transfer.
13495 Proper magistrate to conduct hearing—bail.
13496 Officer's return.

13488 Disposition of prisoner. When an arrest is made without a warrant, the person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and the grounds on which the arrest was made shall be stated to the magistrate by affidavit, subscribed and sworn to by the person making the statement, in the same manner as upon a preliminary information, as nearly as may be. [R60,§4566; C73,§4218; C97,§5208; C24, 27, 31, 35,§13488.]

13489 Hearing before magistrate. If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest was made, and there is sufficient ground for a trial or preliminary examination, as the case may require, and it will not be inconvenient for the witnesses on the part of the state that it should be had before him, he shall proceed as if the person arrested had been brought before him on arrest under a warrant, and, if the case be one within his jurisdiction to try and determine, shall order an information to be filed against him. [R60,§4567; C73,§4219; C97,§5209; C24, 27, 31, 35,§13489.]

C97,§5209, editorially divided

13490 Transfer for convenience. If the magistrate finds that it will be more convenient for the witnesses on the part of the state that such trial or examination should be had before some other magistrate in the county, he shall, by a written order, commit the person arrested to a peace officer, to be by him taken before the other magistrate, together with the order of commitment and affidavits, unless the person arrested give bail, when authorized, for his appearance, as in case of arrest under a warrant. [R60, §4568; C73,§4220; C97,§5209; C24, 27, 31, 35, §13490.]

13491 Proceedings—same as under warrant. Unless bail is given, the peace officer shall take the arrested person before the designated magistrate, and in any case shall deliver to him the affidavits and order of commitment, and when the person arrested is brought or appears before him, he shall proceed as on an arrest under a warrant, and, when necessary, shall order an information to be filed against the person arrested. [R60,§4568; C73,§4220; C97,§5210; C24, 27, 31, 35,§13491.]

13492 Offense triable in another county—transfer. If the magistrate believes from the statements in the affidavit that the offense charged is triable in a county different from that in which the arrest is made, and there is sufficient ground for a trial or preliminary examination, he shall, by a written order, commit the person arrested to a peace officer, to be by him taken before a magistrate in the county in which the offense is triable, and if the offense be a misdemeanor triable on indictment, shall fix in the order the amount of bail which the person arrested may give for his appearance at the district court of the county (naming it) in which the offense is indictable, on the first day of the next term thereof, to answer to an indictment. If the offense charged be a bailable crime, the arrested person may give bail, conditioned as above provided, before a clerk of the district court. [R60,§4569; C73,§4221; C97,§5211; C24, 27, 31, 35,§13492.]

Referred to in §§13493, 13495

13493 Bail — commitment — discharge. If bail be given before a magistrate, as provided in section 13492, it may be either before the magistrate making the order, or the magistrate in the county in which the offense is triable before whom he is taken under the order, or a magistrate of any county through which he passes in going from the county in which the arrest was made to that in which the offense is triable, or, in any bailable case, before the clerk of the district court of either of said counties; and, when given, the magistrate or clerk taking the same shall make, on the order of commitment, an order for the discharge of the person arrested from custody, who shall forthwith be discharged, and shall transmit by mail, or otherwise, to the clerk of the district court of the county at which the person arrested is bound to appear, on or before the first day of the next term thereof and as soon as it can be conveniently done after taking the bail, the affidavits, the order of commitment, and discharge, together with the undertaking of bail, and he shall file the same together in his office. [R60, §4570; C73,§4222; C97,§5212; C24, 27, 31, 35, §13493.]

Referred to in §13495

13494 Proceedings in case of transfer. If bail be not given as above provided, or if the offense charged is a felony not bailable, or a misdemeanor triable on information, the magistrate must deliver the affidavits and order of commitment to a peace officer, who shall proceed with the person arrested as directed by the order or provided by law; and the magistrate in the county in which the offense is triable, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested. [R60,§4571; C73, §4223; C97,§5213; C24, 27, 31, 35,§13494.]

Referred to in §13495

13495 Proper magistrate to conduct hearing—bail. In the cases contemplated in sections 13492 to 13494, inclusive, the officer having the person arrested in custody, under the order, shall take him before the proper magistrate, in the county in which the offense is triable, which is most convenient for the witnesses on the part of the state; unless, in case of a misdemeanor triable on indictment as hereinbefore provided, the person arrested desires to give bail, in which case he shall take him before the most convenient magistrate in the county in which the offense with which he is charged is triable, or any county through which he passes in going from the county in which the arrest was made to the county in which the offense is triable, or before the clerk of the district court of either of said counties, for the purpose of giving bail. [R60,§4572; C73,§4224; C97,§5214; C24, 27, 31, 35,§13495.]

13496 Officer's return. In all cases, the peace officer, when he takes a person committed to him under an order as provided in this chap-

ter before a magistrate or clerk of the district court, either for the purpose of giving bail, if bail be taken, or for trial or preliminary examination, must make his return on such order, and sign such return with his name of office, and deliver the same to the magistrate or clerk. [R60,§4573; C73,§4225; C97,§5215; C24, 27, 31, 35,§13496.]

CHAPTER 624

FUGITIVES FROM JUSTICE

13497 Agents in extradition cases.
13498 Fees and expenses.
13499 Payment of claims.
13500 Additional compensation prohibited.
13501 Sworn evidence and copy of indictment necessary.
13502 Warrant of arrest.
13503 Filing complaint and issuance of warrant.
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13508 Arrest on warrant of governor.
13509 Liability of complainant—costs.
13510 Arrest without expense to state.
13511 Expenses paid by state.
13512 Peace officers of foreign state.

13497 Agents in extradition cases. The governor, in any case authorized by the constitution and laws of the United States, may appoint agents to demand of the executive authority of another state or territory, or from the executive authority of a foreign government, any fugitive from justice charged with treason or felony. [C51,§3282; R60,§4518; C73,§4171; C97,§5169; C24, 27, 31, 35,§13497.]

Referred to in §13500
88GA, ch 131, §1, editorially divided

13498 Fees and expenses. The expenses to be allowed such agent shall be: fees paid the officers of the state upon whose governor the requisition is made; all necessary and actual traveling expenses paid on account of the agent and fugitive, including the necessary and actual railroad fare of the agent and that paid for transportation of the fugitive. [C51,§3282; R60, §4518; C73,§4171; C97,§5169; C24, 27, 31, 35, §13498.]

13499 Payment of claims. Bills for such expenses shall be made out, itemized so as to show each day's expenses, sworn to and filed with the county auditor of the proper county, the county making application for the requisition, and shall be by said county auditor audited and paid out of the county treasury. [C51,§3282; R60,§4518; C73,§4171; C97,§5169; C24, 27, 31, 35, §13499.]

13500 Additional compensation prohibited. No compensation, fee, or reward of any kind can be paid to or received by a public officer of the state for a service rendered, or expense incurred, in procuring from the governor the demand mentioned in section 13497, or the surrender of the fugitive, or for conveying him into the state, or detaining him therein, except as provided by law; a violation of this section is a misdemeanor. [R60,§§4519, 4520; C73,§§4172, 4173; C97,§5170; C24, 27, 31, 35,§13500.]

Punishment, §12894

13501 Sworn evidence and copy of indictment necessary. No executive warrant for the arrest and surrender of a person demanded by the executive authority of another state or territory, as a fugitive from the justice of such state or territory, and no requisition upon the executive authority of another state or territory for the surrender of any person as a fugitive from the justice of this state, shall be issued, unless the requisition from the executive authority of such other state or territory, or the application for such requisition upon the executive authority of such other state or territory, is accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, preliminary information, or complaint, made before the court or magistrate authorized to receive the same. [R60,§4521; C73,§4174; C97, §5171; C24, 27, 31, 35,§13501.]

13502 Warrant of arrest. Whenever a demand is made upon the governor by the executive of another state or territory, in any case authorized by the constitution and laws of the United States, for the delivery of a person charged in such state or territory with a crime, if such person is not held in custody or under bail to answer for an offense against the laws of the United States or of this state, he shall issue his warrant, under the seal of the state, authorizing the agent who makes such demand, forthwith, or at such time as may be designated in the warrant, to take and transport such person to the line of this state at the expense of such agent, and may also, by such warrant, require all peace officers to afford all needful assistance in the execution thereof. [C51,§3283; R60,§4522; C73,§4175; C97,§5172; C24, 27, 31, 35, §13502.]

13503 Filing complaint and issuance of warrant. If any person is found in the state charged with a crime committed in another state or territory, and liable by the constitution and laws of the United States to be delivered over upon the demand of the governor thereof, any magistrate may, upon complaint on oath setting forth the offense, and such other matters as are necessary to bring the case within the provisions of law, issue a warrant for the arrest of such person. [C51,§3284; R60,§4523; C73, §4176; C97,§5173; C24, 27, 31, 35,§13503.]

Approval of warrant and expenses, §§1225.04, 1225.05

13504 Bail—except when charged with murder. If, upon examination, it appears that there

is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the governor, he shall, if not charged with murder, be required to enter into an undertaking, with sufficient surety in a reasonable sum, to appear before such magistrate at a future day, allowing reasonable time to obtain the warrant from the governor, and abide the order of such magistrate in the premises. [C51, §3285; R60,§4524; C73,§4177; C97,§5174; C24, 27, 31, 35,§13504.]

13505 Failure to give bail—commitment. If such person does not give bail, he must be committed to prison and there detained until such day in like manner as if the offense charged had been committed within the state. [C51, §3286; R60,§4525; C73,§4178; C97,§5175; C24, 27, 31, 35,§13505.]

13506 Forfeiture of bail. A failure of such person to attend before the magistrate at the time and place mentioned in the undertaking is a forfeiture thereof. [C51,§3287; R60,§4526; C73,§4179; C97,§5176; C24, 27, 31, 35,§13506.]

13507 Discharge. If such person appear before the magistrate upon the day ordered, he must be discharged, unless he is demanded by some person authorized by the warrant of the governor to receive him, or unless the magistrate finds good cause to commit him, or to require him to enter into a new undertaking for his appearance at some other day to await a warrant from the governor. [C51,§3288; R60, §4527; C73,§4180; C97,§5177; C24, 27, 31, 35, §13507.]

13508 Arrest on warrant of governor. Whether the person so charged be bound to appear, be committed, or discharged, any person authorized by the warrant of the governor may at any time take him into custody, and the same is a discharge of the undertaking, if there be one, unless a forfeiture thereof has been previously entered of record. [C51,§3289; R60, §4528; C73,§4181; C97,§5178; C24, 27, 31, 35, §13508.]

Approval of warrant and expenses, §§1225.04, 1225.05

13509 Liability of complainant—costs. The complainant in any such case is answerable for all the costs and charges, and for the support in prison of any person so committed; and the magistrate, before issuing his warrant or hearing the cause, must require the complainant to give security for the payment of all such costs, or may require them in advance. [C51,§3290; R60,§4529; C73,§4182; C97,§5179; C24, 27, 31, 35, §13509.]

13510 Arrest without expense to state. Upon the application for the appointment of an agent for the arrest of a fugitive from justice under the provisions of this chapter, the governor may make the appointment and the issuance of the writ conditional that the same be executed without expense to the state. [C73, §4183; C97,§5180; C24, 27, 31, 35,§13510.]

13511 Expenses paid by state. When, in the opinion of the governor, expenses incurred in the arrest of fugitives from justice should be paid by the state, the claim therefor shall be itemized and sworn to, and approved by him and at least two other members of the executive council, and, when so approved, be audited and paid out of the general revenue of the state. [C73,§4184; C97,§5181; C24, 27, 31, 35, §13511.]

Audit of claim, §84.06

13512 Peace officers of foreign state. Any peace officer or extradition agent of another state bringing any person within this state or transporting such person through the state under a warrant of arrest or extradition warrant issued in another state, or the officer of any penal institution of another state conveying or transporting a prisoner of such institution into or through this state, shall have the same authority as to the custody and restraint of such person while in the state of Iowa, as duly constituted peace officers of this state have in making an arrest under process issued by the courts of this state. [C24, 27, 31, 35,§13512.]

CHAPTER 625

SECURITY TO KEEP THE PEACE

Referred to in §§13224, 13375

13513 Public offense threatened—complaint—arrest.
13514 Proceedings before magistrate.
13515 Change of venue—examination.
13516 Discharge ordered—costs.
13517 Defendant bound over—sureties.
13518 Committed to jail.
13519 Disposition of papers.
13520 Assault in presence of court or magistrate.
13521 Bond required on conviction.
13522 Appearance—time of—forfeiture.
13523 Hearing—judgment—costs.
13524 Breach of bond.
13525 Suit brought by county attorney.
13526 Record of conviction must be alleged — evidence.

13513 Public offense threatened—complaint—arrest. When complaint is made before a magistrate that any person has threatened to commit any public offense punishable by law, and such magistrate is satisfied that there is reason to fear the commission thereof, he may issue a warrant for the arrest of the person complained of; and the officer to whom the same shall be delivered for service shall forthwith arrest and bring the accused before such magistrate, or, in case of his absence or inability to act, before the nearest and most acces-

sible magistrate of the same county. When the name of the person complained of is unknown, he may be designated in the warrant by any name, and the warrant issued in pursuance hereof may be executed by any peace officer in any county of the state. [R60,§§4447-4454; C73,§4115; C97,§5105; C24, 27, 31, 35,§13513.]

Approval of warrant and expenses, §§1225.04, 1225.05

13514 Proceedings before magistrate. When the person arrested is taken before a magistrate other than the one who issued the warrant, the peace officer who executed the same and who has charge of the person arrested must, at the same time, deliver to the magistrate before whom the person arrested is taken, the warrant, with his return indorsed and subscribed by him. The complaint and other affidavits, if any, on which the warrant was issued must be sent to the magistrate before whom the person arrested is taken, and, if they cannot be procured, the complainant and his witnesses, if any, must be subpoenaed, if necessary, by the magistrate before whom the person arrested is taken, to appear before him and make a new complaint and affidavits. [R60,§4455; C73, §4116; C97,§5106; C24, 27, 31, 35,§13514.]

13515 Change of venue—examination. When the person complained of is brought before the magistrate, if the charge be controverted, a change of venue may be had as in preliminary examinations, and at the hearing the magistrate must take the testimony in relation thereto, which must be reduced to writing and subscribed by the witnesses. [R60,§4456; C73, §4117; C97,§5107; C24, 27, 31, 35,§13515.]

13516 Discharge ordered—costs. If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged, and the complainant may be ordered to pay the costs of the proceeding if the magistrate regards the complaint as unfounded and frivolous, and, unless when the proceeding is before a judge of the supreme, district, or superior court, may issue execution therefor; and when the proceeding is before a judge of the supreme, district, or superior court, he shall transmit the complaint, affidavits, warrant, and order to the clerk of the district court of the county, who shall file the same, make a memorandum thereof in the judgment docket, and issue execution therefor immediately. [R60, §4457; C73,§4118; C97,§5108; C24, 27, 31, 35, §13516.]

13517 Defendant bound over—sureties. If there be just reason to fear the commission of the offense, the person complained of shall be required to enter into an undertaking, in such sum as the magistrate may direct, with one or more sufficient sureties, to abide the order of the district court of the county at the next term thereof, and in the meantime to keep the peace towards the people of the state, and particularly towards the person against whom or whose property there is reason to fear the offense may be committed. [R60,§4458; C73,§4119; C97, §5109; C24, 27, 31, 35,§13517.]

Referred to in §13518

13518 Committed to jail. If the undertaking required by section 13517 be given, the party complained of must be discharged; if not, the magistrate must commit him to prison, specifying in the warrant the requirements to give security, the amount thereof, and the omission to give the same; if committed for not giving such undertaking, he may be discharged by a magistrate upon giving the required bonds. [R60,§§4459, 4460, 4464; C73,§§4120, 4121; C97, §5110; C24, 27, 31, 35,§13518.]

13519 Disposition of papers. The undertaking, together with the complaints, affidavits, if any, and other papers in the proceeding, must be returned by the magistrate to the district court of the county by the first day of the next term thereof, at which time the case shall stand for trial in the district court in the same manner as appeals from justice's court subject to the provisions of sections 13522 and 13523, no notice of appeal being required. [R60,§4461; C73,§4122; C97,§5111; C24, 27, 31, 35,§13519.]

13520 Assault in presence of court or magistrate. Any person who, in the presence of a court or magistrate, shall assault or threaten to assault another, or to commit an offense against the person or property of another, or contends with another with angry words, may be ordered, without process, to enter into an undertaking to keep the peace for a period of time not extending beyond the next term of the district court of the county, as hereinbefore provided, and in case of his omission to comply with said order, he may be committed accordingly. [R60, §4462; C73,§4123; C97,§5112; C24, 27, 31, 35, §13520.]

13521 Bond required on conviction. The district court, upon the conviction of any person for an offense against the person or property of another, when necessary for the public good, may require the defendant to enter into an undertaking to keep the peace, as hereinbefore provided, and, on his omission to do so, may commit him accordingly. [R60,§4463; C73,§4124; C97,§5113; C24, 27, 31, 35,§13521.]

13522 Appearance—time of—forfeiture. A person who has entered into an undertaking to keep the peace, when required by a magistrate as hereinbefore provided, must appear on the first day of the next term of the district court of the county, and if the complainant appear and the person bound by the undertaking does not appear, the court may forfeit his undertaking and order the same to be prosecuted, unless his default be excused. [R60,§4465; C73, §4125; C97,§5114; C24, 27, 31, 35,§13522.]

Referred to in §13519

13523 Hearing—judgment—costs. If the principal in the undertaking appear, and the complainant does not appear, or if neither of the parties appear, the court shall enter an order discharging the undertaking; but if both

parties appear, the court shall hear their proofs, and may require a new undertaking in such sum as it shall prescribe, for a period not exceeding one year, and may commit the defendant until the same be given. Judgment shall be entered against the party held to keep the peace for all the costs of the proceeding, but if it is made to appear to the court that the proceeding was instituted without probable cause, the court may render judgment against the complainant for such costs. [R60,§4466; C73,§4126; C97, §5115; C24, 27, 31, 35,§13523.]

Referred to in §13519

13524 Breach of bond. An undertaking to keep the peace is broken by the forfeiture of the same by order of the court, as hereinbefore provided, or upon the conviction of the party bound for a breach of the peace. [R60,§4467; C73,§4127; C97,§5116; C24, 27, 31, 35,§13524.]

13525 Suit brought by county attorney. Upon the county attorney's producing evidence of such conviction to the district court to which the undertaking is returned, the court must order the enforcement of the undertaking, and the county attorney must thereupon commence an action upon it. [R60,§4468; C73,§4128; C97, §5117; C24, 27, 31, 35,§13525.]

13526 Record of conviction must be alleged —evidence. In such action, the record of forfeiture or conviction must be alleged as the breach of the undertaking, and is conclusive evidence thereof. [R60,§4469; C73,§4129; C97, §5118; C24, 27, 31, 35,§13526.]

CHAPTER 626

PRELIMINARY EXAMINATIONS

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13527 Procedure — waiver. When the arrested person is brought before the magistrate, with or without a warrant, upon preliminary information, the magistrate must immediately inform him of the offense with which he is charged, and of his right to counsel in every stage of the proceedings, and must allow him a reasonable time to send for counsel, and, if necessary, adjourn for that purpose. After waiting a reasonable time for or on the appearance of counsel for defendant, the magistrate shall immediately proceed with the preliminary examination, or may allow the defendant to waive the same. [C51,§§2852–2854; R60,§§4575–4577; C73,§§4226–4228; C97,§5216; C24, 27, 31, 35,§13527.]

13528 Change of venue—grounds. Before any evidence is heard, the defendant may have a change of venue, upon filing an affidavit that the magistrate is prejudiced against him, or is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes. [C73,§4228; C97,§5217; C24, 27, 31, 35,§13528.]

Similar provision, §13569 et seq.
C97,§5217, editorially divided

13529 Procedure on change. On filing such an affidavit a change of venue must be allowed, and the magistrate must immediately transmit all original papers, and a transcript of the entire record in the case, to the nearest magistrate in the township, if there be one; if not, to the nearest magistrate in the county, who shall proceed with said examination as hereinafter provided; but one such change shall be allowed. [C51,§2854; R60,§4577; C73,§4228; C97,§5217; C24, 27, 31, 35,§13529.]

13530 Examinations — adjournments. The examination must be terminated at one session unless the magistrate, for good cause shown, adjourn it; but it shall not be adjourned for a longer period than thirty days. [C51,§§2855, 2856; R60,§§4578, 4579; C73,§§4229, 4230; C97, §5218; C24, 27, 31, 35,§13530.]

13531 Commitment or bail. If an adjournment be had for any cause, the magistrate shall commit the defendant for examination, or require him to give ample bail for his appearance at the time and place to which the examination is adjourned. [C51,§2857; R60,§4580; C73, §4231; C97,§5219; C24, 27, 31, 35,§13531.]

13532 Absence of jail. If there is no jail in the county, the sheriff must retain the defendant in his custody until the examination. [C51,§2859; R60,§4582; C73,§4232; C97,§5220; C24, 27, 31, 35,§13532.]

13533 Witnesses. The magistrate must issue subpoenas for any witnesses required by

the state or defendant, and those who appear must be examined in the presence of the defendant. [C51,§2860; R60,§4583; C73,§4233; C97, §5221; C24, 27, 31, 35,§13533.]

13534 Depositions. The deposition of a witness who resides out of the county in which the examination is had may be taken on application of the defendant, on the order of the magistrate, before any officer authorized to take depositions in civil actions; which order shall not be made until three days after the filing with the magistrate of the written interrogatories to be propounded to the witness, nor until three days after the service of notice on the state, or on the attorney who appears for the state, of the filing of such interrogatories. [C73,§4234; C97,§5222; C24, 27, 31, 35,§13534.]

Depositions in general, §11358 et seq.

13535 Cross-interrogatories. Before the order to take deposition is made, the state may file cross-interrogatories to be propounded to the witness, which shall be answered by him in the deposition. [C73,§4235; C97,§5223; C24, 27, 31, 35,§13535.]

13536 Order for taking. At the expiration of three days from the filing of the interrogatories and the service of the notice thereof on the state as above provided, the magistrate may order the testimony of the witness to be taken in answer to the interrogatories and cross-interrogatories, if any, on file. [C73,§4236; C97, §5224; C24, 27, 31, 35,§13536.]

C97,§5224, editorially divided

13537 Exclusion of deposition. The deposition thus taken may be read in evidence on the examination; nor shall the same be excluded because of any irregularity in the taking of it, if the magistrate is satisfied that the irregularity complained of could work no substantial prejudice to the opposite party. [C73,§4236; C97, §5224; C24, 27, 31, 35,§13537.]

13538 Witnesses separated. While a witness is under examination before the magistrate he may exclude all others who have not been examined, and may cause the witnesses to be kept separate, that they may not converse with each other until the examination is closed. [C51, §2867; R60,§4591; C73,§4239; C97,§5225; C24, 27, 31, 35,§13538.]

13539 Private hearing. The magistrate must also, upon request of the defendant, exclude from hearing the examination all persons except the magistrate, his clerk, the peace officer who has the custody of the defendant, the attorney or attorneys representing the state, the defendant and his counsel. [R60,§4592; C73,§4240; C97,§5226; C24, 27, 31, 35,§13539.]

13540 Minutes of examination. The magistrate shall, in the minutes of the examination, write out or cause to be written out the substance of the testimony given on the examination by each witness, the name, place of residence, business or profession of each witness, and the amount he is entitled to for mileage and attendance. [C51,§2868; R60,§4593; C73,§4241; C97,§5227; C24, 27, 31, 35,§13540.]

C97,§5227, editorially divided

13541 Taken in shorthand. By agreement of parties or their attorneys, the magistrate may order the examination taken down in shorthand and certified substantially in the manner provided for taking depositions by a stenographer, but the cost thereof shall not be taxed against the county. [C97,§5227; C24, 27, 31, 35,§13541.]

13542 Certification of proceedings. After the examination is closed, the magistrate must attach together the complaint, the warrant or order of commitment, if any, under which the defendant was brought before him, the minutes of the examination, including all depositions used, and annex thereto his certificate, which must set forth, in substance, the time and place of examination, and that the minutes thereof are true, which certificate must be officially signed by the magistrate. [C51,§§2869, 2870; R60,§4594; C73,§4242; C97,§5228; C24, 27, 31, 35, §13542.]

13543 Discharge—indorsement on minutes. If after hearing the testimony it appears to the magistrate that a public offense has not been committed, or that there is no sufficient reason for believing the defendant guilty thereof, he must order him discharged, and such order must be indorsed on the minutes of the examination, or annexed thereto and signed by the magistrate, to the following effect: "There being no sufficient cause for believing the defendant guilty of the offense herein mentioned, I order him to be discharged." [C51,§2871; R60,§4595; C73, §4243; C97,§5229; C24, 27, 31, 35,§13543.]

13544 Commitment — indorsement on minutes. If it appears from the examination that a public offense, triable on indictment, has been committed, and there is sufficient reason for believing the defendant guilty thereof, the magistrate shall in like manner indorse on or annex to the minutes of the examination an order signed by him to the following effect: "It appearing to me by the within minutes that an offense, triable on indictment (stating generally the nature thereof), has been committed, and that there is sufficient cause for believing the defendant guilty thereof, I order that he be held to answer the same." [C51,§2872; R60,§4596; C73,§4244; C97,§5230; C24, 27, 31, 35,§13544.]

C97,§5230, editorially divided

13545 Order as to bail. The order shall either state, "and I have admitted him to bail to answer thereto by the bail bond hereto annexed"; or, if bail is not given, "and that he be committed to the county jail until he give bail in the sum of.....dollars (naming it)"; but if the offense is not bailable, the order of commitment shall state, "without bail". [C51,§§2873, 2874; R60,§§4598, 4599; C73, §§4245, 4246; C97,§5230; C24, 27, 31, 35,§13545.]

13546 Warrant of commitment. If the magistrate order the defendant to be committed, he shall make out a warrant of commitment, offi-

cially signed, and deliver it, with the defendant, to the officer to whom he is committed; or, if the officer be not present, to a peace officer, who shall deliver the defendant into the proper custody, together with the warrant of commitment, which may be in the following form:

The State of Iowa,

To the Sheriff of.....County:

An order having been this day made by me that A..... B..... (the name of the defendant) be held to answer upon a charge of (state the offense), you are commanded to receive him into your custody and detain him in the jail of the county until he be legally discharged.

Dated at....this.... day of....., A. D.....

G..... H..... (with official title).

[C51,§2875; R60,§4600; C73,§4247; C97,§5231; C24, 27, 31, 35,§13546.]

13547 Witnesses bound. On holding the defendant to answer, the magistrate may take from each material witness examined by him on the part of the state a written undertaking, to the effect that he will appear and testify at the court to which the defendant is bound to answer, when required in the further progress of the cause, and that he will not evade or attempt to evade the service of a subpoena, or will forfeit the sum of one hundred dollars. [C51,§2876; R60,§4601; C73,§4248; C97,§5232; C24, 27, 31, 35, §13547.]

13548 Security for appearance. When the magistrate is satisfied by oath or otherwise that there is reason to believe any witness will not fulfill his undertaking and appear and testify unless surety be required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper for his appearance. [C51,§2877; R60,§4602; C73, §4249; C97,§5233; C24, 27, 31, 35,§13548.]

Referred to in §13549

13549 Minors and married women may be bound. Minors and married women who are material witnesses against the defendant may in like manner be required to procure sureties for their appearance as provided in section 13548. [C51,§2878; R60,§4603; C73,§4250; C97, §5234; C24, 27, 31, 35,§13549.]

13550 Witness committed. If a witness required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for the purpose, the magistrate must commit him until he comply or be legally discharged. [C51,§2879; R60, §4604; C73,§4251; C97,§5235; C24, 27, 31, 35, §13550.]

13551 Return to district court. When a magistrate has discharged a defendant, or held him to answer an indictment, he must return to the district court of the county, on or before its opening, on the first day of the next term thereof, and as soon after the closing of the examination as practicable, all the papers filed in the proceeding, including therewith the minutes of the evidence, together with the undertaking of bail for the appearance of the defendant, and the undertakings of the witnesses or for them, taken by him. [C51,§2880; R60,§4605; C73,§4252; C97, §5236; C24, 27, 31, 35,§13551.]

13552 Nonindictable offense — information. If it appear from the examination that a public offense has been committed which is not triable on indictment, but on information only, and there is sufficient reason for believing the defendant guilty thereof, the magistrate shall retain all the papers, and forthwith order an information to be filed against the defendant, before him. [R60,§4607; C73,§4253; C97,§5237; C24, 27, 31, 35,§13552.]

C97,§5237, editorially divided

13553 Lack of jurisdiction — trial transferred. If he have not jurisdiction to try and determine the same, he shall indorse on or annex to the minutes of the examination an order, signed by him, to the following effect: "It appearing to me by the within minutes that the offense of (here state its name or nature generally) has been committed and that there is sufficient reason for believing the defendant guilty thereof, I order that an information be filed against him therefor before (here name some magistrate who is the nearest and most accessible in the same county, giving the name of office), and that the defendant be committed to any peace officer to be taken before such magistrate." [R60,§4607; C73,§4253; C97,§5237; C24, 27, 31, 35,§13553.]

13554 Witnesses bound—papers transferred. The magistrate shall thereupon cause each material witness on the part of the state to enter into a written undertaking, to the effect that he will appear forthwith before the magistrate before whom the defendant is to be taken, or he will forfeit the sum of fifty dollars, and deliver the undertaking, with all the other papers, to a peace officer, who shall forthwith take the defendant before such magistrate, and deliver all the papers with the undertakings of the witnesses to the magistrate directed in the order, and make his return thereto, and sign the same with his name of office, and the magistrate before whom he is taken shall thereupon proceed accordingly. [R60,§4607; C73,§4253; C97,§5237; C24, 27, 31, 35,§13554.]

Similar provision, §13603

13555 Liability of informant—costs. When the defendant is discharged, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause; or if the person commencing the prosecution by filing the information fail to appear by himself, agent, or attorney to prosecute the same or give evidence, and the accused is discharged by reason thereof, the magistrate in his discretion may tax the costs and render a judgment therefor against such person, subject to the right of appeal therefrom in the manner provided for appeals by prosecuting witnesses in cases of acquittal upon trial. [C73,§4254; C97,§5238; C24, 27, 31, 35,§13555.]

Appeal, §13591 et seq.
Similar provision, §13590

13556 Evidence taken in writing. On the demand of the county attorney, the magistrate shall take the evidence in writing of the state's witnesses, notwithstanding he has permitted the defendant to waive the preliminary examination. [C97,§5239; C24, 27, 31, 35,§13556.]

CHAPTER 627

TRIAL OF NONINDICTABLE OFFENSES

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13557 Jurisdiction. Justices of the peace have jurisdiction of, and must hear, try, and determine all public offenses, less than felony, committed within their respective counties, in which the punishment prescribed by law does not exceed a fine of one hundred dollars or imprisonment thirty days. [C51,§3322; R60,§5055; C73,§4660; C97,§5575; C24, 27, 31, 35,§13557.]

13558 Information. Criminal actions for the commission of a public offense must be commenced before a justice of the peace by an information, subscribed and sworn to, and filed with the justice. [C51,§3323; R60,§5056; C73,§4661; C97,§5576; C24, 27, 31, 35,§13558.]

13559 Contents of information. Such information must contain:

1. The name of the county and of the justice where the information is filed.

2. The names of the parties, if the defendants be known, and if not, then such names as may be given them by the complainant.

3. A statement of the acts constituting the offense, in ordinary and concise language, and the time and place of the commission of the offense, as near as may be. [C51,§3324; R60, §5057; C73,§4662; C97,§5577; C24, 27, 31, 35, §13559.]

"Short form" authorized, §13782.32

13560 Form of information. The information may be substantially in the following form:

..... County: Before justice.....
The State of Iowa (here insert the name
against of the justice).
A.... B...., defendant.

The defendant is accused of the crime (here name the offense).

For that the defendant, on the ..... day of ....., A. D....., at the (here name the city, town, or township), in the county aforesaid (here state the act or omission constituting the offense as in an indictment). [C51, §3325; R60,§5058; C73,§4663; C97,§5578; C24, 27, 31, 35,§13560.]

"Short form" authorized, §13782.33

13561 Filing of information. The justice must file such information and mark thereon the time of filing the same. [C51,§3326; R60,§5059; C73,§4664; C97,§5579; C24, 27, 31, 35,§13561.]

13562 Warrant of arrest. Immediately upon the filing of such information, the justice may, in his discretion, issue a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a preliminary information, which may be served in like manner. [C51,§3327; R60,§5060; C73,§4665; C97,§5580; C24, 27, 31, 35,§13562.]

13563 Service of warrant. The officer who receives the warrant must serve the same by arresting the defendant, if in his power, and bringing him without unnecessary delay before the justice who issued the same. [C51,§3328; R60,§5061; C73,§4666; C97,§5581; C24, 27, 31, 35, §13563.]

Approval of warrant and expenses, §§1225.04, 1225.05
C97,§5581, editorially divided

13564 Service against corporation. If defendant is a corporation, it may be proceeded against upon notice as in case of indictment. [C97,§5581; C24, 27, 31, 35,§13564.]

Process against corporation, §13765 et seq.

13565 Appearance of defendant. When the defendant is brought before the justice, the charge against him must be distinctly read to him, and he shall be asked whether he is presented by his right name, and be required to plead. [C51,§3329; R60,§5062; C73,§4667; C97, §5582; C24, 27, 31, 35,§13565.]

C97,§5582, editorially divided

13566 Wrong name—waiver. If he objects that he is wrongly named in the information, he must give his right name, and if he refuses to do so, or does not object that he is wrongly named, the justice shall make an entry thereof in his docket, and he is thereafter precluded from making any such objection. [C51,§3329; R60,§5062; C73,§4667; C97,§5582; C24, 27, 31, 35, §13566.]

13567 Pleadings of defendant. The defendant may plead the same as upon an indictment, orally or in writing, and such pleas shall be entered on the docket of the justice. [C51,§3330; R60,§5063; C73,§4668; C97,§5583; C24, 27, 31, 35, §13567.]

Pleading, ch 642

13568 Trial. Upon a plea other than that of guilty, if the defendant does not demand a trial by jury, the justice must proceed to try the issue, unless a change of venue be applied for by the defendant. [C51,§3331; R60,§5064; C73, §4669; C97,§5584; C24, 27, 31, 35,§13568.]

13569 Change of venue—grounds. Before any testimony is heard, a change of place of trial may be applied for by an affidavit filed, stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as the affiant verily believes. [R60, §5065; C73,§4670; C97,§5585; C24, 27, 31, 35, §13569.]

Similar provision, §13528 et seq.

13570 Change allowed — transmission of papers. If such affidavit be filed, the change of place of trial must be allowed, and the justice must immediately transmit all the original papers, and a transcript of all his docket entries in the case, to the next nearest justice in the township, unless said justice be a party to the action, or is related to either party by consanguinity, or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding; and in such case the justice before whom such action or proceeding is commenced shall transmit all the original papers, together with a transcript of all his docket entries, to the next nearest justice in the county against whom none of the above objections exist, who shall proceed with the case as provided in this chapter, but no more than one change of place of trial in the same case shall be allowed. [R60,§5066; C73,§4671; C97,§5586; C24, 27, 31, 35,§13570.]

13571 Jury trial. Before the justice has heard any testimony upon the trial, the defendant may demand a jury. [C51,§3332; R60, §5067; C73,§4672; C97,§5587; C24, 27, 31, 35, §13571.]

13572 Jury — how obtained. If a trial by jury is demanded, the justice shall direct any peace officer of the county to make out a list of eighteen inhabitants of the county having the qualifications of jurors in the district court, from which list the prosecutor and defendant may each strike out three names. [C51,§3333; R60,§5068; C73,§4673; C97,§5588; C24, 27, 31, 35, §13572.]

Competency of jurors, §10842

13573 Striking names—issue of venire. In case the prosecutor or the defendant neglect or refuse to strike out such names, the justice shall direct some disinterested person to strike them out for either of the parties so neglecting or refusing, and, it being done, he must issue a venire, directed to any peace officer of the county, requiring him to summon the twelve persons whose names remain upon the list to appear before him at the time and place named therein, to make a jury for the trial of the cause. [C51,§3334; R60,§5069; C73,§4674; C97,§5589; C24, 27, 31, 35, §13573.]

13574 Jurors summoned. The officer to whom such venire is delivered must forthwith summon such jurors, and return the venire to the justice within the time therein specified, naming the persons summoned and the manner of service. [C51,§3335; R60,§5070; C73,§4675; C97,§5590; C24, 27, 31, 35,§13574.]

13575 Failure to return — new venire. If the officer by whom the venire is received does not return it as required, he may be punished by the justice as for contempt, and a new venire shall issue for the summoning of the same jurors, which shall be served as above provided. [C51,§3340; R60,§5075; C73,§4680; C97,§5591; C24, 27, 31, 35,§13575.]

Contempts, ch 536

13576 Names of jurors for drawings. The names of the persons returned as jurors shall be written on separate ballots, folded each in the same manner as nearly as possible, and so that the name is not visible, and shall, under the direction of the justice, be deposited in a box or other convenient thing. [C51,§3336; R60,§5071; C73,§4676; C97,§5592; C24, 27, 31, 35, §13576.]

13577 Drawing jurors. The justice must then draw out six of the ballots successively, and if any of the persons whose names are drawn do not appear, or are challenged, or are set aside, such further number must be drawn as will make a jury of six, after all challenges have been allowed. [C51,§3337; R60,§5072; C73,§4677; C97, §5593; C24, 27, 31, 35,§13577.]

13578 Challenges. The same challenges may be taken by either party to any individual juror as on the trial of an indictment for a misdemeanor, but no challenge to the panel

is allowed. [C51,§3338; R60,§5073; C73,§4678; C97,§5594; C24, 27, 31, 35,§13578.]

Challenges, §13880

13579 Bystanders summoned. If any of the jurors named in the venire cannot be found, or do not attend, or are challenged by either party, so that a sufficient number cannot be obtained, the justice may direct the officer to summon any bystander or others who may be competent, and against whom no sufficient cause of challenge appears, to act as jurors. [C51,§3339; R60, §5074; C73,§4679; C97,§5595; C24, 27, 31, 35, §13579.]

13580 Jury of six. When six jurors appear and are accepted, they shall constitute the jury. [C51,§3341; R60,§5076; C73,§4681; C97,§5596; C24, 27, 31, 35,§13580.]

13581 Oath of jurors. The justice must thereupon administer to them the following oath or affirmation: "You do swear (or, you do solemnly affirm, as the case may be) that you will well and truly try the issue between the state of Iowa and the defendant, and a true verdict give according to the law and evidence." [C51,§3342; R60,§5077; C73,§4682; C97,§5597; C24, 27, 31, 35, §13581.]

13582 Proceedings before jury. After the jurors are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public. After which, they may either decide in court or retire for consideration. [C51,§3343; R60,§5078; C73, §4683; C97,§5598; C24, 27, 31, 35,§13582.]

13583 Retirement for consideration — oath. If they do not immediately agree, they must retire with the officer, who shall take the following oath: "You do swear that you will keep the jury together in some private and convenient place, without food or drink, water excepted, unless otherwise ordered by the court; that you will not permit any person to speak to them, nor speak to them yourself, unless it be to ask them if they have agreed upon a verdict, and that you will return them into court when they have so agreed." [C51,§3344; R60,§5079; C73,§4684; C97,§5599; C24, 27, 31, 35,§13583.]

13584 Verdict. When the jury have agreed upon a verdict, they must deliver it publicly to the justice, who shall enter it on his docket. [C51,§3345; R60,§5080; C73,§4685; C97,§5600; C24, 27, 31, 35,§13584.]

13585 Jury kept together. The jury must be kept together after the cause is submitted to them until they have agreed upon and rendered a verdict, unless, for good cause, the justice sooner discharge them. [C51,§3346; R60, §5081; C73,§4686; C97,§5601; C24, 27, 31, 35, §13585.]

Referred to in §13586

13586 Jury discharged. If the jury is discharged as provided in section 13585, the justice may proceed again to the trial in the same manner as upon the first, and so on till a verdict is rendered. [C51,§3347; R60,§5082; C73,§4687; C97,§5602; C24, 27, 31, 35,§13586.]

13587 Judgment—rules. When the defendant pleads guilty or is convicted, either by the justice or by a jury, the justice shall render judgment thereon of fine or imprisonment, as the case may require, being governed by the rules prescribed for the district court, as far as the same are applicable, in rendering such judgment. [C51,§3348; R60,§5083; C73,§4688; C97,§5603; C24, 27, 31, 35,§13587.]

13588 Imprisonment for nonpayment of fine. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. [C51,§3349; R60,§5084; C73, §4689; C97,§5604; C24, 27, 31, 35,§13588.]

Time of imprisonment, §13964

13589 Defendant discharged. When the defendant is acquitted, either by the justice or by a jury, he must be immediately discharged. [C51,§3350; R60,§5085; C73,§4690; C97,§5605; C24, 27, 31, 35,§13589.]

13590 Costs taxed to prosecutor. If the prosecuting witness fails to appear by himself, agent, or attorney to prosecute or give evidence on the trial, and defendant is discharged on account of such nonappearance, the justice may, in his discretion, tax the costs of the proceeding against such prosecuting witness and render judgment therefor; and if defendant is acquitted, the justice shall, if satisfied that the prosecution is malicious or without probable cause, so tax the costs and render judgment therefor. [R60,§5086; C73,§4691; C97,§5606; C24, 27, 31, 35,§13590.]

Similar provision, §13555
C97,§5606, editorially divided

13591 Appeal. In either case the prosecuting witness may appeal from such judgment to the district court, by giving notice thereof as provided in this chapter with reference to appeals by defendant, and the fact of the giving of such notice shall be entered by the justice on his record. [C73,§4691; C97,§5606; C24, 27, 31, 35,§13591.]

Manner of taking, §13599

13592 Transcript of record. If notice of an appeal is given, the justice shall, without delay, make out, sign, and file in the office of the clerk of the district court a full and true statement of all the testimony admitted on the trial, and on which he bases his finding that the prosecution was malicious or without probable cause, and a transcript of his docket entries, and all other papers on file in the case, and such appeal shall stand for hearing in said court at the term thereof commencing next after said papers are filed. [C73,§4691; C97,§5606; C24, 27, 31, 35,§13592.]

13593 Correction of record. The court shall have full power to compel the correction by said justice of any error made apparent in his transcript, statement of testimony, or in any papers returned by him, or may make the

necessary correction itself, and, on the papers, may affirm or reverse the judgment of the justice, or render such judgment as he should have done. [C73,§4691; C97,§5606; C24, 27, 31, 35, §13593.]

13594 Certificate of conviction. When a conviction is had upon a plea of guilty, or upon trial, the justice must make and officially sign a certificate thereof, in which it shall be sufficient briefly to state the offense charged, the conviction and judgment thereon, and, if any fine has been collected, the amount thereof. [C51,§3351; R60,§5087; C73,§4692; C97,§5607; C24, 27, 31, 35,§13594.]

13595 Judgment—how executed. The judgment shall be executed by a peace officer of the county where the conviction is had, by virtue of a warrant under the hand of the justice, specifying the particulars of such judgment. [C51,§3354; R60,§5090; C73,§4693; C97,§5608; C24, 27, 31, 35,§13595.]

13596 Fine—payment to justice. If a fine is imposed, and paid before commitment, it shall be received by the justice and paid over to the county treasurer within thirty days after the receipt thereof. [C51,§3355; R60,§5091; C73, §4694; C97,§5609; C24, 27, 31, 35,§13596.]

13597 Payment to sheriff. If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person, who must in like manner, within thirty days after the receipt thereof, pay it into the county treasury. [C51,§3356; R60,§5092; C73,§4695; C97,§5610; C24, 27, 31, 35,§13597.]

13598 Receipt for fine. If the fine, or any part thereof, is paid to the justice or sheriff, he must execute duplicate receipts therefor, one of which he must file without delay with the county auditor. [C51,§3357; R60,§5093; C73,§4696; C97,§5611; C24, 27, 31, 35,§13598.]

13599 Appeal—how taken. The justice rendering a judgment against the defendant must inform him of his right to an appeal therefrom, and make an entry on the docket of the giving of such information, and the defendant may thereupon take an appeal, by giving notice orally to the justice that he appeals, or by delivering to the justice, not later than twenty days thereafter, a written notice of his appeal, and in either case the justice must make an entry on his docket of the giving of such notice. [C51,§3358; R60,§5095; C73,§4697; C97,§5612; C24, 27, 31, 35,§13599.]

13600 Bail on appeal—form of bond. The justice must thereupon enter an order on his docket, fixing the amount in which bail may be given by the defendant, and the execution of the judgment against the defendant shall not be stayed unless bail in that amount be put in, by an undertaking substantially in the following form:

County of .....:

A..... B..... having been convicted before C..... D....., a justice of the peace of said county, of the crime of (here designate it generally as in the information), by a judgment rendered on the .... day of....., A. D. ....., and having appealed from said judgment to the district court of said county:

We, A..... B....., and E..... F....., hereby undertake that the said A..... B..... will appear in the district court of said county, at the term thereof to which the appeal is returnable, and submit to the judgment of said court, and not depart without leave of the same, or that we (or I, as the case may be) will pay to the state of Iowa the sum of ..... dollars (the amount of bail fixed).

A..... B.....
E..... F.....

Accepted by me, at ....., in the township of ....., this .... day of....., A. D. .....

C..... D.....
Justice of the peace.

[C51,§3359; R60,§5096; C73,§4698; C97,5613; C24, 27, 31, 35,§13600.]

13601 Qualification of surety. The bail must possess the qualifications, justify, and be taken in the manner prescribed in chapter 628, and the same proceedings had in all respects, as far as applicable, except as in this chapter otherwise provided. [R60,§5097; C73,§4699; C97,§5614; C24, 27, 31, 35,§13601.]

13602 Officers authorized to take bail. Bail may be taken by the justice who rendered the judgment, or by any magistrate in the county who has authority to admit to bail, or by the district court or the clerk thereof. [R60,§5098; C73,§4700; C97,§5615; C24, 27, 31, 35,§13602.]

13603 Witnesses bound over. When an appeal is taken, the justice must cause all material witnesses to enter into an undertaking, as in a case where a defendant is held to answer on a preliminary examination, to appear and testify on the trial of the appeal in the district court, at the term at which it is returnable, and shall, as soon as practicable, and at least ten days before the first day of such term of the district court of the county, file in the office of the clerk thereof a certified copy of the entries on his docket, together with all the undertakings and papers in the case. [C51,§3360; R60, §5099; C73,§4701; C97,§5616; C24, 27, 31, 35, §13603.]

Similar provision, §13554

13604 Trial on appeal — procedure. The cause shall stand for trial anew in the district court in the same manner that it should have been tried before the justice, and as nearly as practicable as an issue of fact upon an indictment, without regard to technical errors or defects which have not prejudiced the substantial rights of either party; and the court has full power over the case, the justice of the peace, his docket entries, and his return, to administer the justice of the case according to the law, and shall give judgment accordingly. [C51, §§3361–3365; R60,§5100; C73,§4702; C97,§5617; C24, 27, 31, 35,§13604.]

13605 Dismissal of appeals prohibited. No appeal from the judgment of a justice of the peace in a criminal case shall be dismissed. [R60,§5101; C73,§4703; C97,§5618; C24, 27, 31, 35,§13605.]

13606 Judgment—enforcement. If any proceedings are necessary to carry the judgment upon the appeal into effect, they shall be had in the district court. [R60,§5102; C73,§4704; C97,§5619; C24, 27, 31, 35,§13606.]

13607 Appeal to supreme court—procedure. Either party may appeal from the judgment of the district court to the supreme court in the same manner as from a judgment in a prosecution by indictment, and the defendant may be admitted to bail in like manner, and similar proceedings shall be had on the appeal in all respects, as far as applicable. [C51,§3366; R60, §5103; C73,§4705; C97,§5620; C24, 27, 31, 35, §13607.]

Similar provision, §13994 et seq.

13608 Judgment upon appeal — execution. The same proceedings shall be had to carry into effect the judgment of the supreme court upon the appeal as if it had been taken from a judgment prosecuted by indictment. [C51, §3367; R60,§5104; C73,§4706; C97,§5621; C24, 27, 31, 35,§13608.]

Procedure, §14016 et seq.

CHAPTER 628

BAIL

Referred to in §13601

13609 Bailable offenses.
13610 Nonbailable offenses.
13611 Bail on commitment to answer.
13612 Form of bail bond.
13613 Indictment for misdemeanor.
13614 Felony.
13615 Officers required to take bail.
13616 Form of bail bond.
13617 Bail on appeal—conditions.
13618 By whom taken.
13619 Qualifications of surety—insurance companies excepted.
13620 Affidavit by surety.
13621 Examination as to sufficiency.
13622 Order of allowance.
13623 Discharge of defendant.
13624 Disallowance.

13609 Bailable offenses. All defendants are bailable both before and after conviction, by sufficient surety, except for offenses punishable with death under the laws of the state when the proof is evident or the presumption great. [C51, §§3212, 3213; R60,§4962; C73,§4107; C97,§5096; S13,§5096; C24, 27, 31, 35,§13609.]

S13,§5096, editorially divided

13610 Nonbailable offenses. No defendant convicted of murder in the first degree, or of the crime of treason shall be admitted to bail. [C51,§3211; R60,§4962; C73,§3845; C97,§5096; S13,§5096; C24, 27, 31, 35,§13610.]

Similar provision, §13966

13611 Bail on commitment to answer. When a defendant has been held to answer for any bailable offense, sufficient bail must be taken by the magistrate who held him to answer, by any judge of the supreme, or district court, or by the court to which the papers on the preliminary examination are to be returned by the magistrate who held him to answer, or by the clerk thereof, or by any magistrate of the county in which the offense is triable. [C51,§§3216–3218; R60,§4967; C73,§4573; C97,§5500; C24, 27, 31, 35,§13611.]

13612 Form of bail bond. Bail is put in by a written undertaking, executed by one or more sufficient sureties (with or without the defendant, in the discretion of the court, clerk, or magistrate), accepted by the court, clerk, or magistrate taking the same, and may be substantially in the following form:

County of .....

An order having been made on the.....day of....., A. D....., by A..... B....., a justice of the peace (or other magistrate), of the township of....., (or as the case may be) that C..... D..... be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been duly admitted to bail, in the sum of..... dollars.

We, E..... F..... and G..... H....., hereby undertake that the said C..... D....., shall appear at the district court of the county of....., at the next term thereof, and answer said charge, and submit to the orders and judgment of said court, and not depart without leave of the same, or, if he fail to perform either of these conditions, that we will pay to the state of Iowa the sum of ..... dollars (inserting the sum in which the defendant is admitted to bail).

E..... F.....
G..... H.....

Accepted by me as....., in the township of....., in the county of....., this..... day of....., A. D. .....

I..... J..... (with official title).

[C51,§3219; R60,§4968; C73,§4574; C97,§5501; C24, 27, 31, 35,§13612.]

Information by county attorney—effect on bail, §13678

13613 Indictment for misdemeanor. When the offense charged in an indictment is a misdemeanor, the officer serving the warrant, if bail is authorized, must take the defendant before a magistrate in the county in which it was issued, or in which he is arrested, or before the clerk of the district court of either of such counties, for the purpose of giving bail. [C51,

§3227; R60,§4976; C73,§4582; C97,§5502; C24, 27, 31, 35,§13613.]

Similar provision, §13482

13614 Felony. If the offense charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody according to the command of the warrant. [C51, §3228; R60,§4977; C73,§4583; C97,§5503; C24, 27, 31, 35,§13614.]

13615 Officers required to take bail. When the defendant is so delivered into custody, if the felony charged be bailable, bail must be taken by that court, or its clerk, or by any magistrate in the same county. [C51,§3229; R60, §4978; C73,§4584; C97,§5504; C24, 27, 31, 35, §13615.]

13616 Form of bail bond. The bail must be put in by a written undertaking, executed by one sufficient surety, with or without the defendant, in the discretion of the court, clerk, or magistrate, acknowledged before and accepted by the court, clerk, or magistrate taking the same, and may be substantially in the following form:

County of.....

An indictment having been found in the district court of the county of....., on the.....day of....., A. D....., charging A..... B..... with the crime of (designating it as in the warrant), and he having been duly admitted to bail in the sum of..... dollars:

We, A..... B..... and C..... D....., hereby undertake that the said A..... B..... shall appear and answer the said indictment, and submit to the orders and judgment of said court, and not depart without leave of the same, or, if he fail to perform either of these conditions, that he will pay to the state of Iowa the sum of.....dollars (inserting the sum in which the defendant is admitted to bail).

A..... B.....
C..... D.....
E..... F.....

Acknowledged before and accepted by me, at....., in the township of....., in the county of....., this ..... day of ....., A. D. .....

G..... H..... (with official title).

[R60,§4979; C73,§4585; C97,§5505; C24, 27, 31, 35,§13616.]

13617 Bail on appeal—conditions. After conviction, upon an appeal to the supreme court, the defendant must be admitted to bail, if it be from a judgment imposing a fine, upon the undertaking of bail that he will, in all respects, abide the orders and the judgment of the supreme court upon the appeal; if from a judgment of imprisonment, upon the undertaking of bail that the defendant will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court upon the appeal. [R60,§4966; C73,§4587; C97,§5506; C24, 27, 31, 35,§13617.]

C97,§5506, editorially divided

13618 By whom taken. The bail may be taken, either by the court where the judgment was rendered, or the district court of the county in which he is imprisoned, or by the supreme court, or a judge or clerk of any of such courts. [R60,§4981; C73,§4587; C97,§5506; C24, 27, 31, 35,§13618.]

13619 Qualifications of surety — insurance companies excepted. The surety must be a resident and householder or freeholder within the state, worth the amount specified in the undertaking, exclusive of property exempt from execution. In taking bail each signer may justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to one sufficient bail.

Insurance companies doing business in this state under the provisions of subsection 2 of section 8940, may act as surety in such cases, and need not be a resident, householder or freeholder within the state. Such company need not justify as above provided. [C51,§3220; R60, §4969; C73,§4575; C97,§5507; C24, 27, 31, 35, §13619; 47GA, ch 215,§1.]

Referred to in §13620
Unallowable sureties, §12755

13620 Affidavit by surety. The surety must in all cases justify by affidavit taken before an officer authorized to administer oaths, and the affidavit must state that each possesses the qualifications prescribed in section 13619.

Insurance companies and surety companies referred to in section 13619 need not make such justification. [C51,§3221; R60,§4970; C73,§4576; C97,§5508; C24, 27, 31, 35,§13620; 47GA, ch 215, §2.]

13621 Examination as to sufficiency. The court in which the action is pending, or the clerk thereof, or the county attorney, or magistrate may require the personal appearance of sureties offered, and may thereupon further examine them upon oath concerning their sufficiency, and may also receive other evidence for or against the sufficiency of the bail. [C51, §§3222, 3223; R60,§§4971, 4972; C73,§§4577, 4578; C97,§5509; C24, 27, 31, 35,§13621.]

13622 Order of allowance. When the examination is closed the court, clerk, or magistrate must make an order, either allowing or disallowing the bail, and forthwith cause the same, with the affidavits of justification and the undertaking of bail, to be filed with the clerk of the court to which the papers on the preliminary examination are required to be sent. [C51, §3224; R60,§4973; C73,§4579; C97,§5510; C24, 27, 31, 35,§13622.]

13623 Discharge of defendant. Upon the allowance of bail and the execution of the undertaking, the court, clerk, or magistrate must make an order, signed officially, for the discharge of the defendant, to the following effect:

The State of Iowa,

To the sheriff of the county of.....:

C..... D....., who is detained by you on commitment (or indictment or conviction, as

the case may be) for the offense of (here designate it generally), having given sufficient bail to answer the same, you are commanded forthwith to discharge him from custody.

Dated at....., in the township (town or city) of....., in the county of....., this.....day of....., A. D.....

K..... L..... (with official title).

[C51,§3225; R60,§4974; C73,§4580; C97,§5511; C24, 27, 31, 35,§13623.]

13624 Disallowance. If the bail be disallowed, the defendant must be detained in custody until other bail is put in and justified. [C51, §3226; R60,§4975; C73,§4581; C97,§5512; C24, 27, 31, 35,§13624.]

CHAPTER 629

UNDERTAKINGS OF BAIL AS LIENS

13625 When lien on real estate.
13626 Attested copies filed in proper counties.

13625 When lien on real estate. Undertakings of bail, immediately after filing by the clerk of the district court, shall be docketed and entered upon the lien index as required for judgments in civil cases, and, from the time of such entries, shall be liens upon real estate of the persons executing the same, with like effect as judgments in civil actions. [R60,§§5000, 5001; C73,§§4606, 4607; C97,§5513; C24, 27, 31, 35, §13625.]

Judgment docket and lien book, §10830

13626 Attested copies filed in proper counties. Attested copies of such undertakings may be filed in the office of the clerk of the district court of the county in which the real estate is situated, in the same manner and with like effect as attested copies of judgments, and shall be immediately docketed and indexed in the same manner. [R60,§5002; C73,§4608; C97, §5514; C24, 27, 31, 35,§13626.]

Filing of attested copies, §11603

CHAPTER 630

CASH BAIL

13627 Deposit in lieu of bail.
13628 Cash substituted for bail.
13629 Bail substituted for cash.
13630 Disposition of deposited money.

13627 Deposit in lieu of bail. The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the district court to which the undertaking is required to be sent, the sum mentioned in the order, and, upon delivering to the officer in whose custody he is, a certificate under seal from said clerk of the deposit, he must be discharged from custody. [C51,§3232; R60,§4983; C73,§4589; C97,§5524; C24, 27, 31, 35, §13627.]

13628 Cash substituted for bail. If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the undertaking, and, upon the deposit being made, the bail shall be exonerated. [C51,§3233; R60,§4984; C73,§4590; C97,§5525; C24, 27, 31, 35,§13628.]

Referred to in §13629

13629 Bail substituted for cash. If money is deposited as provided in section 13628, bail may be given in the same manner as if it had been originally given, upon the order for admission to bail at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken shall thereupon direct, in the order of allowance, that the money deposited be refunded by the clerk to the defendant, and it shall be done. [C51,§3234; R60,§4985; C73, §4591; C97,§5526; C24, 27, 31, 35,§13629.]

13630 Disposition of deposited money. When money has been deposited by the defendant, if it remain on deposit at the time of a judgment against him, the clerk, under the direction of the court, shall apply the money in satisfaction of so much of the judgment as requires the payment of money, and shall refund the surplus, if any, to him, unless an appeal be taken to the supreme court, and bail put in, in which case the deposit shall be returned to the defendant. [C51, §3235; R60,§4986; C73,§4592; C97,§5527; C24, 27, 31, 35,§13630.]

CHAPTER 631

FORFEITURE OF BAIL

13631 Entry.
13632 Notice to show cause.
13633 Judgment.
13634 Forfeiture in justice of the peace court.
13635 Clerk to retain funds.
13636 Judgment set aside.

13631 Entry. If the defendant fails to appear for arraignment, trial, or judgment, or at any other time when his personal appearance in court is lawfully required, or to surrender himself in execution of the judgment, the court must at once direct an entry of such failure to be made of record, and the undertaking of his bail, or the money deposited instead of bail, is there-

upon forfeited. [R60,§4990; C73,§4596; C97, §5515; C24, 27, 31, 35,§13631.]

13632 Notice to show cause. As a part of the entry of forfeiture as herein provided, the court shall direct the sheriff of the county to give ten days notice in writing, or otherwise, as directed by the court, to the defendant and his sureties to appear and show cause, if any, why judgment should not be entered for the amount of such bail, or money deposited instead of bail. [C24, 27, 31, 35,§13632.]

40GA, ch 219, §2, editorially divided

13633 Judgment. If the defendant and his sureties fail to appear, judgment shall be entered by the court. If such defendant and his sureties shall appear at the time fixed and offer objections to the entering of such judgment, the court shall set the case down for immediate hearing as an ordinary action; in such hearing the state shall be plaintiff and the defendant and his sureties defendants. The judgment entered by the court either on default or upon trial shall have the same force and effect as any other judgment of such court. [R60,§§4991–4994; C73,§§4597–4600; C97,§§5516, 5517; C24, 27, 31, 35,§13633.]

13634 Forfeiture in justice of the peace court. Where forfeiture is entered before a justice of the peace, or a court of limited jurisdiction, or before an examining magistrate, such court or officer, upon the forfeiture of the undertaking, shall within ten days file the same, with a copy of all official entries in relation thereto, in the office of the clerk of the district court of the county; and thereupon it shall be the duty of the clerk of the district court to direct the sheriff to give notice as herein prescribed for appearance before the district court at the date fixed in such notice, and the district court shall then proceed in the same manner as though such forfeiture had occurred in such court. [C73,§4599; C97,§5518; S13,§5518; C24, 27, 31, 35,§13634.]

13635 Clerk to retain funds. Where a forfeiture and judgment have been entered as herein provided and the amount of the judgment has been paid to the clerk, he shall hold the same as funds of his office for a period of sixty days from the date of judgment. [C24, 27, 31, 35, §13635.]

40GA, ch 219, §4, editorially divided

13636 Judgment set aside. Such judgment shall never be set aside unless, within sixty days from the date thereof, the defendant shall voluntarily surrender himself to the sheriff of the county, or his bondsmen shall, at their own expense, deliver him to the custody of the sheriff within said time, whereupon the court may, upon application, set aside the judgment and in such event the original appearance bond shall stand and the court may order refund of the amount of the judgment paid in to the office of the clerk of the court. Such judgment, however, shall not be set aside unless as a condition precedent thereto the defendant and his sureties shall have paid all costs incurred in connection therewith. [R60,§4994; C73,§4600; C97,§5519; C24, 27, 31, 35,§13636.]

CHAPTER 632

RECOMMITMENT AFTER BAIL

13637 Grounds for recommitment.
13638 Contents of order of recommitment.
13639 Arrest of defendant.
13640 Commitment—in what cases.

13637 Grounds for recommitment. The district court in which a criminal action is pending, or during the pendency of an appeal from its judgment therein, or in which a judgment is to be carried into effect, may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail, or deposited money instead thereof, in the following cases:

1. When by reason of his failure to appear he has incurred a forfeiture of his bail, or money deposited instead thereof.
2. When it satisfactorily appears to the court that his bail, either by reason of the death of one or more of them, or from any other cause, is insufficient, or have removed from the state.
3. When, after the filing of an indictment, the court finds the bail taken by or money deposited with the committing magistrate insufficient. [C51,§3243; R60,§4995; C73,§4601; C97,§5520; C24, 27, 31, 35,§13637.]

13638 Contents of order of recommitment. The order for recommitment must recite generally the facts upon which it is founded, and must direct that the defendant be arrested and committed to the custody of the sheriff of the county where the depositions and statement were returned, or the indictment was found, or the conviction was had, as the case may be, to be detained until legally discharged. [C51, §3244; R60,§4996; C73,§4602; C97,§5521; C24, 27, 31, 35,§13638.]

13639 Arrest of defendant. The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county in the state. [C51,§3245; R60,§4997; C73,§4603; C97,§5522; C24, 27, 31, 35,§13639.]

13640 Commitment—in what cases. If the order recite, as the ground on which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirements of the order; if made for any other cause and the offense is bailable, the court must cause a direction to be inserted in the order that the defendant be admitted to bail, in a sum to be stated in the order. [C51,§§3246, 3247; R60,§§4998, 4999; C73,§§4604, 4605; C97,§5523; C24, 27, 31, 35, §13640.]

CHAPTER 633

SURRENDER OF DEFENDANT

13641 Manner of surrendering defendant.
13642 Arrest of defendant by bail.
13643 Return of money deposited.

13641 Manner of surrendering defendant. At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself, to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of bail must be delivered to the officer, who shall detain the defendant in his custody thereon as upon a commitment, and must, by a certificate in writing, acknowledge the surrender.

2. Upon the undertaking and the certificate of the officer, the court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during term time, at the same term, and upon three clear days notice thereof to the county attorney, with a copy of the undertaking and certificate, may order the bail to be exonerated. [C51,§3236; R60,§4987; C73,§4593; C97,§5528; C24, 27, 31, 35,§13641.]

13642 Arrest of defendant by bail. For the purpose of surrendering the defendant, the bail, at any time before they are finally charged, and at any place within the state, may themselves arrest him, or, by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so. [C51,§3237; R60,§4988; C73, §4594; C97,§5529; C24, 27, 31, 35,§13642.]

13643 Return of money deposited. If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall surrender himself to the officer to whom the commitment was made or directed in the manner prescribed in this chapter, the court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during the term, at the same term, must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon three clear days notice to the county attorney, with a copy of the certificate. [C51,§3238; R60,4989; C73,§4595; C97,§5530; C24, 27, 31, 35,§13643.]

CHAPTER 634

INFORMATION BY COUNTY ATTORNEY

Referred to in §§10669.1, 13738.5

13644 Offenses prosecuted on information—jurisdiction.
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13670 Entry and execution.
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13672 Transfer of record of proceedings.
13673 Bail—construction.
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13677.1 Transfer of misdemeanor cases.
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13644 Offenses prosecuted on information—jurisdiction. Criminal offenses in which the punishment exceeds a fine of one hundred dollars or exceeds imprisonment for thirty days may be prosecuted to final judgment, either on indictment, as is now or may be hereafter provided, or on information as herein provided, and the district and supreme courts shall possess and exercise the same power and jurisdiction to hear, try, and determine prosecutions on information, as herein provided, for all such criminal offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictment. [S13,§5239-a; C24, 27, 31, 35,§13644.]

13645 Filing by county attorney. The county attorney may, at any time when the grand jury is not actually in session, file in the district court, either in term time or in vacation, an information charging a person with an indictable offense. In judicial districts within which a municipal court exists, the county attorney may at any time, whether or not the grand jury is in session, file an information in the district court charging a person with a misdemeanor. [S13,§5239-b; C24, 27, 31, 35,§13645.]

13646 Indorsement. Such information shall be indorsed, "a true information", which indorsement shall be signed by the county attorney. [S13,§5239-c; C24, 27, 31, 35,§13646.]

Similar provision, §13727

13647 Names of witnesses—minutes of evidence. The county attorney shall, at the time of filing such information, indorse or cause to be indorsed thereon the names of the witnesses whose evidence he expects to introduce and use on the trial of the same, and shall also file with such information a minute of the evidence relating to the guilt of the accused of the offense charged of each witness whose name is so indorsed upon the information. [S13,§5239-d; C24, 27, 31, 35,§13647.]

Related and similar provisions, §§13714, 13729
S13,§5239-d, editorially divided

13648 Additional witnesses. Should the county attorney desire to use on the trial witnesses in addition to those whose names are so indorsed, he shall proceed in the same manner as is provided in such cases in trials on indictment. [S13,§5239-d; C24, 27, 31, 35,§13648.]

Notice of additional testimony, §13851 et seq.

13649 Verification by oath. Such information shall be sworn to by the county attorney before some officer authorized by the laws of Iowa to administer oaths. [S13,§5239-e; C24, 27, 31, 35,§13649.]

S13,§5239-e, editorially divided

13650 Approval by judge. The information, before being filed, shall be presented to some judge of the district court of the county having jurisdiction of the offense, which judge shall indorse his approval or disapproval thereon. If the information receive the approval of the judge, the same shall be filed. If not approved, the charge shall be presented to the next grand jury for consideration. [S13,§5239-e; C24, 27, 31, 35,§13650.]

13651 Information set aside. At any time after the approval of an information, and prior to the commencement of trial, the court, or any judge thereof, on its own motion may order said information set aside and said cause submitted to the grand jury. [S13,§5239-e; C24, 27, 31, 35, §13651.]

13652 Copy to accused or attorney. The clerk of the district court shall cause a copy of the information and minutes of evidence to be delivered to the accused, or to his attorney, at or prior to the time of arraignment. [S13, §5239-f; C24, 27, 31, 35,§13652.]

Similar provision, §13730

13653 Filing by private prosecutor — indorsement—costs. If the information is filed at the instance of a private prosecutor, the county attorney may indorse such fact upon the information and sign such indorsement, and, in such case, the costs may be taxed in the same manner and under the same limitations as in case of indictments. [S13,§5239-g; C24, 27, 31, 35,§13653.]

Taxation of costs, §13728

13654 Amendments. An information may be amended in the same manner and to the same extent that an indictment may be amended. [S13, §5239-h; C24, 27, 31, 35,§13654.]

Amendments, §13744 et seq.

13655 Statutes applicable. The information shall be drawn and construed, in matter of substance, as indictments are required to be drawn and construed. All provisions of law applying to prosecutions on indictments and relating to the issuance of warrants, the correction of the name of the accused, the issuing of process, the giving of bail, arraignments, pleadings, trials, change of place of trials, return of verdicts, the taking of exceptions, new trials, arrest of judgments, the entering of judgments and the execution thereof, appeals, except as modified or otherwise provided for in this chapter, and all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as nearly as may be, apply to information and all prosecutions and proceedings thereon. [S13,§5239-i; C24, 27, 31, 35,§13655.]

13656 Warrant for arrest—bail. Upon the filing of such information the clerk shall issue a warrant for the arrest of the accused, and the court or any judge thereof shall fix the bail, if bail is allowable, and in vacation or in the absence of the judge in term time, the clerk of the court shall fix such bail, the action of the clerk being reviewable by the court or judge thereof. [S13,§5239-j; C24, 27, 31, 35,§13656.]

Approval of warrant and expenses, §§1225.04, 1225.05

13657 Assistant county attorney may act. Wherever the words "county attorney" appear in this chapter, the same shall be construed to mean county attorney or the assistant county attorney. [S13,§5239-k; C24, 27, 31, 35,§13657.]

13658 Time of commencing prosecutions. The time in which criminal prosecutions may be commenced by information shall be the same as in cases of prosecutions by indictment, which time shall be computed from the date of the filing of the initial information. [S13,§5239-l; C24, 27, 31, 35,§13658.]

Limitations of criminal actions, ch 618

13659 Motion to set aside—grounds. A motion to set aside the information may be made on one or more of the following grounds:

1. When it is not indorsed "a true information", and the indorsement signed by the county attorney.
2. When the minutes of evidence have not been filed with the information.
3. When the names of the witnesses named in such minutes of evidence are not indorsed on the information.
4. When the information has not been verified or filed in the manner herein required.
5. When the information has not been approved as required. [S13,§5239-m; C24, 27, 31, 35,§13659.]

13660 Time of making motion—rulings of court. Such motion must be made before a plea

is entered by the accused. If not so made, the objection shall be deemed waived. If an objection is shown to be true, the court shall sustain said motion, unless the defects are corrected within such time as the court may order. [S13, §5239-m; C24, 27, 31, 35,§13660.]

13661 Subpoenas. The clerk of the district court, on application of the county attorney, shall issue subpoenas for such witnesses as the county attorney may require, and in such subpoenas shall direct the appearance of said witnesses before the county attorney at a specified time and place; provided that no subpoena shall issue unless an order authorizing same shall have been first made by the court or a judge thereof. [C24, 27, 31, 35,§13661.]

13662 Oath. The county attorney shall have authority to administer oaths to said witnesses. [C24, 27, 31, 35,§13662.]

13663 Refusal. In case a witness refuses to appear in obedience to said subpoena, or refuses to testify, the county attorney shall cause said witness to be taken before some judge of the district court of the county who shall proceed with such refusal as though the said refusal had occurred before said judge in a trial in said court. [C24, 27, 31, 35,§13663.]

13664 Clerk of grand jury. The county attorney, in the taking of testimony, shall be entitled to the services of the clerk of the grand jury in those counties in which such clerk is regularly employed. [C24, 27, 31, 35,§13664.]

13665 Witness fees. The witnesses aforesaid shall receive the same fees and mileage as are allowed witnesses in the district court, and shall be paid in the same manner in which witnesses before the grand jury are paid except that such fees and mileage shall be certified only by the county attorney. [C24, 27, 31, 35, §13665.]

Witness fees and mileage, §11326 et seq.; payment, §5143

13666 Arraignments — pleas. An accused prosecuted on information may, in vacation, be arraigned by any judge of the district court, and, in vacation, be required to plead to the information before any such judge. [S13,§5239-n; C24, 27, 31, 35,§13666.]

Referred to in §13672
Special term authorized, §10782
S13,§5239-n, editorially divided

13667 Place of arraignment. Arraignments can be made and pleas required, in vacation, only before such judge sitting in chambers at the usual place of holding court in the county in which the information was filed, or in any other county of the judicial district, or in any county to which the cause may be sent on change of venue. [S13,§5239-n; C24, 27, 31, 35, §13667.]

Referred to in §13672

13668 Record required. The proceedings with reference to arraignments and the taking of pleas, in vacation, shall be signed by the judge and filed with the clerk of the court of the county where the information was filed and entered at length in the records of the court with the same force and effect as if made and entered in term time. [S13,§5239-n; C24, 27, 31, 35,§13668.]

Referred to in §13672

13669 Judgments on written pleas. Judgments may be rendered in vacation or during a recess of the court, on written pleas of guilty of the offense charged, or of any degree or grade thereof, or of any offense included therein, with the same force and effect as though rendered in term time. [S13,§5239-o; C24, 27, 31, 35,§13669.]

Referred to in §13672
Special term authorized, §10782
S13,§5239-o, editorially divided

13670 Entry and execution. Said written plea of guilt, together with the judge's entry of judgment in reference thereto, shall be forthwith filed with the clerk of the court of the county wherein the information was filed and entered at length in the records of said court, and, after such entry, be executed as in case of judgments on indictment. [S13,§5239-o; C24, 27, 31, 35,§13670.]

Referred to in §13672
Execution, ch 656

13671 Place of rendition. Judgments in vacation, or during a recess of the court, can only be rendered by a judge of the district court sitting in chambers at the usual place of holding court in the county where the information was filed, or in any other county of the judicial district, or in any county to which the cause may be transferred on change of venue. [S13, §5239-o; C24, 27, 31, 35,§13671.]

Referred to in §13672
Special term authorized, §10782

13672 Transfer of record of proceedings. A record of the proceedings and judgment in sections 13666 to 13671, inclusive, when signed by the judge shall be sent to the clerk of the district court of the county in which the information was filed, which shall be entered at length in the records of the court and shall have the same force and effect as if made and entered by the court in said county, and the commitment or subsequent proceedings shall be had upon the judgment and record from that county. [S13,§5239-o; C24, 27, 31, 35,§13672.]

Referred to in §13958.1

13673 Bail — construction. Whenever an accused shall be held to answer to the grand jury for an offense and shall give bail, such bail shall be construed as conditioned to answer to any indictment for said offense returned by the grand jury, to which the accused is legally held to answer, and to any information charging said offense filed by the county attorney. [S13, §5239-p; C24, 27, 31, 35,§13673.]

13674 Form of information. Information shall be, substantially, in the following form:

IN THE DISTRICT COURT OF.....COUNTY.

THE STATE OF IOWA,
VS.
A..... B..... } INFORMATION.

Comes now....., as county attorney

of.....county, state of Iowa, and in the name and by the authority of the state of Iowa accuses A..... B..... of the crime of (here insert the name of the offense), committed as follows:

The said A..... B....., on or about the.....day of....., A. D..... (inserting the year) in the county of....., and state of Iowa, (here insert the acts or omissions constituting the offense).

.....
County Attorney.

State of Iowa, }
}ss.
.....County. }

I, ..., being first duly sworn, do depose and say, that I have made full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing information are true, as I verily believe.

.....

Subscribed and sworn to by.....before me, the undersigned, this.....day of ....., A. D.....

.....
(Here insert title of official before whom verification is made.)

Upon the information shall be indorsed the following:

(a) A true information.

.....
County Attorney.

(b) Names of witnesses:

.....
.....
.....
.....

(c) On this.....day of..... A. D....., being satisfied from the showing made herein that this cause should (or should not, as the case may be) be prosecuted by information, the same is approved (or disapproved and the charge is ordered submitted to the next grand jury, as the case may be).

.....
Judge of District Court.

(d) This information duly filed in the district court, this.....day of....., A. D.....

.....
(Clerk of the District Court of .....County, State of Iowa.)
By.....
Deputy Clerk.

(e) Bail is hereby fixed on the within information in the sum of $.....

.....
(Here insert official title of judge or clerk, as case may be.)

[S13,§5239-q; C24, 27, 31, 35,§13674.]

Short form, §13732 33

13675 to 13677, inc. Transferred. Now appear as §§5180.1 to 5180.3, inc.

13677.1 Transfer of misdemeanor cases. The judges of the district court shall have authority to transfer to the municipal court within their judicial district misdemeanor offenses for trial where either county attorney informations have been filed or indictments have been returned. [C27, 31, 35,§13677-b1.]

42GA, ch 242, §1, editorially divided.

13677.2 Duty of clerk. Upon making an order for the transfer of such cases the clerk of the district court shall certify and transmit at once to the clerk of the municipal court the indictment or county attorney information, and minutes of evidence, together with a transcript of the record. Thereupon such cases shall be prosecuted to final judgment in the municipal court. [C27, 31, 35,§13677-b2.]

CHAPTER 635

IMPANELING GRAND JURY

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13681 Joinder in challenges.
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13684 Effect of allowing challenge to panel.
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13695 Expression of opinion—presence before jury.
13696 Compensation.
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13698 Compensation.
13699 Assistant clerk.
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13701 Discharge of grand jury.

13678 Drawing grand jurors. At the term of court at which grand jurors are required to appear, the names of the twelve persons constituting the panel of the grand jury, except such as may have died, removed from the county, or have been excused by the court, shall, on the second day of each term of court, unless otherwise ordered by the court or judge, be placed by the clerk in a box, and after thoroughly mixing the same, he shall draw therefrom seven names, and the persons so drawn shall constitute the grand jury for that term. Should any of the persons so drawn be excused or fail to attend on said second day of the court, the clerk shall draw other names until the seven grand jurors are secured. [C51,§2881; R60, §§4608–4610; C73,§§4255–4257; C97,§5240; S13, §5240; C24, 27, 31, 35,§13678.]

S13,§5240, editorially divided

13679 Additional drawings. If, for any reason, the number of grand jurors required is

not secured from the twelve persons so constituting such panel, the clerk shall draw from the grand jury box such number of names as the court may direct, and from the persons whose names are so drawn the panel of the grand jury for the term shall be filled, and the court shall issue a venire to secure their attendance. [C51,§2881; R60,§§4609, 4610; C73, §§4256, 4257; C97,§5240; S13,§5240; C24, 27, 31, 35,§13679.]

13680 **Challenge to panel — motion.** A defendant held to answer for a public offense may, before the grand jury is sworn, challenge the panel, only for the reason that it was not selected, drawn, or summoned as prescribed by law. A defendant indicted not having been held to answer, or having been so held after the impaneling of the grand jury, may for the same reasons object to the panel by motion, but the right to make such motion is waived by entering a plea to an indictment. [C51,§§2882, 2883, 2890; R60,§§4611, 4612, 4619; C73,§§4258, 4260, 4266; C97,§5241; C24, 27, 31, 35,§13680.]

13681 **Joinder in challenges.** When several persons are held to answer for one and the same offense, no challenge to the panel can be made unless they all join therein. [C51,§2890; R60,§4619; C73,§4266; C97,§5242; C24, 27, 31, 35, §13681.]

13682 **Grounds of challenge.** A challenge to an individual grand juror may be made before the grand jury is sworn as follows:

1. By the state or the defendant, because the grand juror does not possess the qualifications required by law.

2. By the state only because:

a. He is related either by affinity or consanguinity nearer than in the fifth degree, or stands in the relation of agent, clerk, servant, or employee, to any person held to answer for a public offense, whose case may come before the grand jury.

b. He is bail for anyone held to answer for a public offense, whose case may come before the grand jury.

c. He is defendant in a prosecution similar to any prosecution to be examined by the grand jury.

d. He is, or within one year preceding has been, engaged or interested in carrying on any business, calling, or employment the carrying on of which is a violation of law, and for which the juror may be indicted by the grand jury.

3. By the defendant only because:

a. He is a prosecutor upon a charge against the defendant.

b. He has formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial. [C51,§§2882, 2884, 2890; R60,§§4611, 4613, 4619; C73,§§4258, 4259, 4261, 4266; C97,§5243; C24, 27, 31, 35,§13682.]

Competency of jurors, §10842
Computing relationship, §63

13683 **Decided by the court.** Challenges to the panel or to an individual grand juror must be decided by the court. [C51,§2886; R60,§4615; C73,§4262; C97,§5244; C24, 27, 31, 35,§13683.]

13684 **Effect of allowing challenge to panel.** If a challenge to the panel be allowed, the grand jury is prohibited from inquiring into the charge against the defendant by whom it was interposed, and, if it does so and finds an indictment, the court must set it aside. [C51, §2887; R60,§4616; C73,§4263; C97,§5245; C24, 27, 31, 35,§13684.]

13685 **Dismissal of jurors—new panels.** If a challenge to an individual grand juror be allowed, he shall not be present at or take any part in the consideration of the charge against the defendant. If a challenge to the panel is allowed, or if by reason of challenges to individual grand jurors being allowed, or if for any cause at any time, the grand jury is reduced to a less number than seven, a new grand jury shall be impaneled to inquire into the charge against the defendant in whose behalf the challenge to the panel has been allowed, or the panel of the jury so reduced below the number required by law shall be filled as the case may be. If a challenge is allowed to the panel, the names of jurors required to impanel a new jury shall be drawn from the grand jury list. [C51,§2888; R60,§4617; C73,§4264; C97, §5246; S13,§5246; C24, 27, 31, 35,§13685.]

Referred to in §13687
S13,§5246, editorially divided

13686 **Summoning additional jurors.** If such grand jury has been reduced to a less number than seven by reason of challenges to individual jurors being allowed, or from any other cause, the additional jurors required to fill the panel shall be summoned, first, from such of the twelve jurors originally summoned which were not drawn on the grand jury as first impaneled, or excused, and if they are exhausted, the additional number required shall be drawn from the grand jury list and the court shall, when necessary, issue a venire to secure the attendance of such additional jurors. The persons so summoned shall serve only in the case, or cases, in which, by reason of challenges, or other causes, the regular panel is set aside or is insufficient in number to find an indictment. [S13,§5246; C24, 27, 31, 35,§13686.]

Referred to in §13687

13687 **Effect of violation.** The grand jury must inform the court of any violation of sections 13685 and 13686, which offense shall be punished as a contempt. [C51,§2889; R60,§4618; C73,§4265; C97,§5247; C24, 27, 31, 35,§13687.]

Contempts, ch 536

13688 **Refilling panel.** If for any cause the number of grand jurors is reduced below twelve, the court or judge may order the clerk to immediately draw from the grand jury list sufficient additional names to fill the panel, and such new grand jurors so drawn may, if so ordered by the court, serve as regular grand jurors for the county in which they are drawn for the remainder of the year. [C24, 27, 31, 35,§13688.]

13689 **Foreman appointed.** From the persons impaneled as grand jurors the court must

appoint a foreman, or when the foreman already appointed is discharged, excused, or from any cause becomes unable to act, before the grand jury is finally discharged. [C51,§2891; R60, §4620; C73,§4267; C97,§5248; C24, 27, 31, 35, §13689.]

13690 Oath of foreman. The following oath must be administered to the foreman of the grand jury: "You, as foreman of the grand jury, shall diligently inquire and true presentment make of all public offenses against the people of this state, triable on indictment within this county, of which you have or can obtain legal evidence; you shall present no person through malice, hatred, or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding." [C51,§2892; R60,§4621; C73, §4268; C97,§5249; C24, 27, 31, 35,§13690.]

13691 Oath of members. The following oath must thereupon be administered to the other grand jurors: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part." [C51,§2893; R60,§4622; C73,§4269; C97,§5250; C24, 27, 31, 35,§13691.]

13692 General charge of court. The grand jury, being impaneled and sworn, may be charged by the court, who shall give them such information as may be proper as to the nature of their duties, and any charges for public offenses returned to the court or likely to come before that body. [C51,§2894; R60,§4623; C73, §4270; C97,§5251; C24, 27, 31, 35,§13692.]

C97,§5251, editorially divided

13693 Special charge of court. The court shall specially give in his charge the provisions of the law regulating the accounting by public officers for fines and fees collected by them, and those providing for the suppression of intemperance. [C51,§2894; R60,§4623; C73,§4270; C97, §5251; C24, 27, 31, 35,§13693.]

13694 Clerk—oath. The court may appoint as clerk of the grand jury, a competent person who is not a member thereof. The following oath must be administered to him: "You solemnly swear that you will faithfully and impartially perform the duties of clerk of the grand jury, that you will not reveal to anyone its proceedings or the testimony given before it and will abstain from expressing any opinion upon any question before it, to or in the presence or hearing of the grand jury or any member thereof." [C51,§2895; R60,§§4624, 4629; C73, §4275; C97,§5256; S13,§5256; C24, 27, 31, 35, §13694.]

S13,§5256, editorially divided

13695 Expression of opinion—presence before jury. Such clerk shall strictly abstain from expressing an opinion upon any question before the body, either to or in the presence or hearing of it or any member thereof, and shall not be present when any vote is being taken upon the finding of an indictment. [C97,§5256; S13, §5256; C24, 27, 31, 35,§13695.]

13696 Compensation. Such clerk shall receive compensation at the rate of two dollars per day for time actually and necessarily employed in the performance of the duties prescribed in this chapter. [C97,§5256; S13,§5256; C24, 27, 31, 35,§13696.]

13697 Shorthand reporter as clerk. In all counties having a population of more than fifty thousand inhabitants, the court may, if it deems it necessary, appoint as clerk of the grand jury a competent shorthand reporter. [S13,§5256; C24, 27, 31, 35,§13697.]

13698 Compensation. Such clerk shall receive such compensation as may be fixed by the court at the time of the appointment, but said compensation, in counties having a population of less than seventy-five thousand inhabitants, shall not exceed four dollars per day for each day actually and necessarily employed in the performance of the duties herein defined.

In all counties having a population of more than seventy-five thousand inhabitants and less than one hundred twenty thousand inhabitants, such clerk shall receive as compensation an annual salary of not to exceed fifteen hundred dollars.

In counties having a population of one hundred twenty thousand and over, such clerks shall receive an annual salary of twenty-two hundred dollars. [S13,§5256; C24, 27, 31, 35,§13698.]

13699 Assistant clerk. In addition thereto the court may, in counties having a population of one hundred twenty thousand inhabitants and over, if it deems it necessary, appoint an assistant clerk of the grand jury and fix his salary therefor. [C24, 27, 31, 35,§13699.]

13700 Member appointed clerk. If no such appointment is made by the court, the grand jury shall appoint as its clerk one of its own number who is not its foreman. [R60,§4629; C73,§4275; C97,§5257; C24, 27, 31, 35,§13700.]

13701 Discharge of grand jury. The grand jury, on the completion of its business, shall be discharged by the court, but, whether its business be completed or not, it is discharged by the final adjournment thereof. [C51,§2896; R60, §4625; C73,§4271; C97,§5252; C24, 27, 31, 35, §13701.]

CHAPTER 636

DUTIES OF GRAND JURY

Referred to in §13729

13702 Indictable offenses.
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13704 Access to county jails and public records.
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13722 No indictment found—effect.
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13702 Indictable offenses. The grand jury shall inquire into all indictable offenses which may be tried within the county, and present them to the court by indictment. [C51,§2897; R60,§4626; C73,§4272; C97,§5253; C24, 27, 31, 35, §13702.]

13703 Special duties. It is made the special duty of the grand jury to inquire into:

1. The case of every person imprisoned in the jail of the county on a criminal charge and not indicted.
2. The condition and management of the public prisons within the county.
3. The willful and corrupt misconduct in office of all county officers.
4. The obstruction of highways. [C51,§2902; R60,§4632; C73,§4278; C97,§5261; C24, 27, 31, 35, §13703.]

13704 Access to county jails and public records. The grand jury is entitled to free access at all reasonable times to the county jails, and to the examination without charge of all public records within the county. [C51,§2904; R60,§4634; C73,§4280; C97,§5263; C24, 27, 31, 35, §13704.]

13705 Duty of court and county attorney. The grand jury may at all reasonable times ask the advice of the county attorney or the court. [C51,§2905; R60,§4635; C73,§4281; C97,§5264; C24, 27, 31, 35,§13705.]

C97,§5264, editorially divided

13706 Right of county attorney to appear. The county attorney shall be allowed at all times to appear before the grand jury on his own request for the purpose of giving information relative to any matter cognizable by it, and for the purpose of examining witnesses, when necessary. [C51,§§2905, 2906; R60,§§4635, 4636; C73, §§4281, 4282; C97,§§5264, 5265; C24, 27, 31, 35, §13706.]

C97,§5265, editorially divided

13707 Secrecy of vote. Neither the county attorney nor any other officer or person except the grand jury must be present when the question is taken upon the finding of an indictment. [C51,§2906; R60,§4636; C73,§4282; C97,§5265; C24, 27, 31, 35,§13707.]

13708 Subpoenas. The clerk of the court must, when required by the foreman of the grand jury or county attorney, issue subpoenas for witnesses to appear before the grand jury. [C51,§2903; R60,§4633; C73,§4279; C97,§5262; C24, 27, 31, 35,§13708.]

13709 Failure to obey. If a witness fails to attend before the grand jury in obedience to a subpoena issued for that purpose and duly served, the court shall, upon the application of the county attorney or foreman of the grand jury, coerce the attendance of the witness by attachment, and may punish his disobedience as in the case of a witness failing to attend on the trial. [R60,§4642; C73,§4288; C97,§5271; C24, 27, 31, 35,§13709.]

Contempts, ch 536

13710 Administering oath. The foreman of the grand jury may administer the oath to all witnesses produced and examined before it. [R60,§4628; C73,§4274; C97,§5255; C24, 27, 31, 35,§13710.]

13711 Refusal of witness to testify. When a witness under examination before the grand jury refuses to testify or to answer a question put to him, it shall proceed with the witness into open court, and the foreman shall then distinctly state to the court the question and the refusal of the witness, and if upon hearing the witness the court shall decide that he is bound to testify or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and, if he does, shall proceed with him as in cases of similar refusal in open court. [R60, §4641; C73,§4287; C97,§5270; C24, 27, 31, 35, §13711.]

Contempts, ch 536

13712 Minutes to be kept. The clerk of the grand jury shall take and preserve minutes of the proceedings and of the evidence given before it, except the votes of its individual members on finding an indictment. [R60,§4629; C73, §4275; C97,§5258; S13,§5258; C24, 27, 31, 35, §13712.]

S13,§5258, editorially divided

13713 Minutes read — signing by witness. When the evidence is taken, it shall be read over to and signed by the witness. [C97,§5258; S13, §5258; C24, 27, 31, 35,§13713.]

13714 Evidence returned and filed. When an indictment is found, all minutes and exhibits relating thereto shall be returned therewith and filed by the clerk of the court. [C73,§4275; C97, §5258; S13,§5258; C24, 27, 31, 35,§13714.]

Related provisions, §§13647, 13729

13715 Member as witness. If a member of the grand jury knows or has reason to believe that a public offense has been committed, triable in the county, he must declare the same to his fellow jurors, and be sworn as a witness upon the investigation before them. [C51,§2901; R60, §4631; C73,§4277; C97,§5260; C24, 27, 31, 35, §13715.]

13716 Evidence for defendant. The grand jury is not bound to hear evidence for defendant, but may do so, and must weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it may order the same produced. [C51,§2900; R60,§4630; C73,§4276; C97, §5259; C24, 27, 31, 35,§13716.]

13717 Evidence sufficient for indictment. An indictment should be found when all the evidence, taken together, is such as in the judgment of the grand jury, if unexplained, would warrant a conviction by the trial jury; otherwise it should not. [R60,§4637; C73,§4283; C97,§5266; C24, 27, 31, 35,§13717.]

13718 Kind of evidence required. An indictment can be found only upon evidence given by witnesses produced, sworn, and examined before the grand jury, or furnished by legal documentary evidence, or upon the minutes of evidence given by witnesses before a committing magistrate. [C51,§§2898, 2899; R60,§4627; C73, §4273; C97,§5254; C24, 27, 31, 35,§13718.]

13719 Minutes of preliminary examination. All papers and other matters of evidence relating to the arrest and preliminary examination of the charge against defendants who have been held to answer, returned to the court by magistrates, shall be laid before the grand jury, and shall be competent evidence upon which an indictment may be found. [R60,§4643; C73,§4289; C97,§5272; C24, 27, 31, 35,§13719.]

C97,§5272, editorially divided

13720 When presence of witnesses unnecessary. The grand jury need not have before it for examination any witness who was examined before the committing magistrate, and whose evidence is returned by such magistrate in the minutes, unless requested by the county attorney. [C97,§5272; C24, 27, 31, 35,§13720.]

13721 Minutes of testimony before magistrate. If an indictment was found in whole or in part upon the minutes of evidence taken before a committing magistrate, the clerk of the grand jury shall write out a brief minute of the substance of such evidence, and the same shall be returned to the court with the indictment. [C97,§5272; C24, 27, 31, 35,§13721.]

13722 No indictment found—effect. If, upon investigation, the grand jury refuses to find an indictment, it shall return all of said papers to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody if in jail, and the exoneration of bail if bail be given, unless the court, upon good cause shown, direct that the charge should again be submitted to the grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of court. [R60,§4643; C73,§4289; C97,§5272; C24, 27, 31, 35,§13722.]

Related provision, §14023

13723 Effect of dismissal. Such dismissal of the charge does not prevent the same from being submitted to a grand jury as often as the court may direct; but without such direction it cannot be again submitted. [R60,§4644; C73, §4290; C97,§5273; C24, 27, 31, 35,§13723.]

13724 Proceedings secret—disclosure of action. Every member of the grand jury must keep secret the proceedings of that body and the testimony given before it, except as provided in section 13725; nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against a person not in custody or under bail, otherwise than by presenting the same in court or issuing or executing process thereon, until such person has been arrested. A violation of this section is a misdemeanor. [C51,§2907; R60,§4638; C73, §4284; C97,§5267; C24, 27, 31, 35,§13724.]

Punishment, §12894

13725 Disclosure required. Any member of the grand jury and the clerk thereof, and any officer of the court, may be required by the court or any legislative committee duly authorized to inquire into the conduct or acts of any state officer which might be the basis for impeachment proceedings, to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by him before the court or legislative committee, or to disclose the same upon a charge of perjury against the witness, or when in the opinion of the court or legislative committee such disclosure is necessary in the administration of justice. [C51,§2908; R60,§4639; C73, §4285; C97,§5268; C24, 27, 31, 35,§13725.]

Referred to in §13724

13726 Privilege of jurors. No grand juror shall be questioned for anything he may say or any vote he may give in the grand jury relative to a matter legally pending before it, except for perjury of which he may have been guilty in making an accusation, or in giving testimony to his fellow jurors. [C51,§2909; R60,§4640; C73, §4286; C97,§5269; C24, 27, 31, 35,§13726.]

CHAPTER 637

FINDING AND PRESENTATION OF INDICTMENT

13727 Vote necessary—indorsement.
13728 Indictment at instance of private prosecutor.
13729 Names of witnesses indorsed.
13730 Minutes of evidence not public—copy.
13731 Minutes used on resubmission.

13727 Vote necessary—indorsement. An indictment cannot be found without the concurrence of five grand jurors. Every indictment must be indorsed "a true bill" and the indorsement signed by the foreman of the grand jury. [C51,§2910; R60,§4645; C73,§4291; C97,§5274; S13,§5274-a; C24, 27, 31, 35,§13727.]

Referred to in §13728
Similar provision, §13646

13728 Indictment at instance of private prosecutor. When an indictment is found at the instance of a private prosecutor, the following must be added to the indorsement required by section 13727, "found at the instance of" (here state the name of the person) and, in such case, if the prosecution fails, the court trying the cause may tax the costs against him, if satisfied from all the circumstances that the prosecution was malicious or without probable cause. [R60,§4646; C73,§4292; C97,§5275; C24, 27, 31, 35,§13728.]

Similar provision, §13653

13729 Names of witnesses indorsed. When an indictment is found, the names of all witnesses on whose evidence it is found must be indorsed thereon before it is presented in the court, and must be, with the minutes of the evidence of such witnesses, presented to the court by the foreman in the presence of the grand jury, and all of the same marked "filed" by the clerk, as provided in the chapter relating to the duties of the grand jury, and shall remain in his office as a record. [C51,§§2913, 2914; R60, §§4647, 4648; C73,§§4293, 4294; C97,§5276; C24, 27, 31, 35,§13729.]

Similar and related provisions, §§13647, 13714

13730 Minutes of evidence not public—copy. Such minutes of evidence shall not be open for the inspection of any person except the judge of the court, the county attorney or his assistant or clerk, the defendant and his counsel, or the assistant or clerk of such counsel. The clerk of the court must, within two days after demand made, furnish the defendant or his counsel a copy thereof without charge, or permit the defendant's counsel, or the clerk of such counsel, to take a copy. [C51,§2913; R60,§4647; C73, §4293; C97,§5277; C24, 27, 31, 35,§13730.]

Similar provision, §13652

13731 Minutes used on resubmission. When an indictment is held insufficient, and an order is made to resubmit the case to the same or another grand jury, or where the grand jury has ignored a bill and the same has been ordered back to the same or another grand jury for further investigation, it shall be unnecessary to summon the witnesses again before such jury in such cases, but the minutes of the testimony returned with the defective indictment or ignored bill or information shall be detached and returned to the grand jury; and thereupon, without more, such grand jury may find a bill and attach said minutes of the evidence thereto, and return said indictment therewith into court in the usual manner, and may in either case take additional testimony. [C97,§5278; C24, 27, 31, 35,§13731.]

CHAPTER 638

INDICTMENT

Applicable to county attorney information, §13655

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13732 Definition. *An indictment* is an accusation in writing, found and presented by a grand jury legally impaneled and sworn to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which by law is a public offense, punishable on indictment. [C51,§2915; R60,§4649; C73,§4295; C97,§5279; C24, 27, 31, 35,§13732.]

13732.01 Form of indictment. The indictment may be in substantially the following form:

"In the district court of Iowa in and for ..... county.

State of Iowa vs. A. B.

The grand jurors of the county of ..... accuse A. B. of (here state the offense, e. g., treason, manslaughter, robbery, or larceny) and charge that (here the particulars of the offense, for instance, as set forth in section 13732.33 may be added with the view to avoiding the necessity for a bill of particulars)."

(Illustration for indictment for murder.

The grand jurors of the county of Polk accuse John Doe of murder and charge that on or about the first day of December, 1928, John Doe murdered Richard Roe.

Illustration for indictment for burglary.

The grand jurors of the county of Polk accuse John Doe of burglary and charge that on or about the first day of December, 1928, John Doe committed burglary of the dwelling of Richard Roe.

Illustration for indictment for robbery.

The grand jurors of the county of Polk accuse John Doe of robbery and charge that on or about the first day of December, 1928, John Doe robbed Richard Roe.) [R60,§4651; C73,§4297; C97, §5281; C24, 27,§13734; C31, 35,§13732-c1.]

13732.02 Contents of indictment. The indictment may charge, and is valid and sufficient if it charges, the offense for which the accused is being prosecuted in one or more of the following ways:

1. By using the name given to the offense by statute.

2. By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense, or in terms of substantially the same meaning, as is sufficient to give the court and the accused notice of what offense is intended to be charged.

The indictment may refer to a section or subsection of any statute creating the crime charged therein, and in determining the validity or sufficiency of such indictment regard shall be had to such reference. [C51,§2916; R60,§§4650, 4652, 4659; C73,§§4296, 4298, 4305; C97,§§5280, 5282, 5289; S13,§5289; C24, 27,§§13733, 13735, 13743; C31, 35,§13732-c2.]

Referred to in §§13732.03, 13732.04, 13732.09–13732.13, 13732.15, 13732.21, 13732.28

13732.03 Absence of particulars—effect. No indictment which charges the offense in accordance with the provisions of section 13732.02 shall be held to be insufficient on the ground that it fails to inform the defendant of the particulars of the offense. [C31, 35,§13732-c3.]

13732.04 Bill of particulars.

1. When an indictment charges an offense in accordance with the provisions of section 13732.02, but such indictment together with the minutes of the evidence filed therewith fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense, or to give him such information as he is entitled to under the constitution of this state, the court may, of its own motion, and shall, at the request of the defendant, order the county attorney to furnish a bill of particulars containing such information as may be necessary for these purposes, or the county attorney may of his own motion furnish such bill of particulars.

2. When the court deems it to be in the interest of justice that facts not set out in the indictment or in the minutes of the evidence or in any previous bill of particulars, should be furnished to the defendant, it may order the county attorney to furnish a bill of particulars containing such facts. In determining whether such facts and, if so, what facts, should be so furnished the court shall consider the whole record of the case and the entire course of the proceedings against the defendant.

3. Supplemental bills of particulars or a new bill may be ordered by the court or furnished voluntarily under the conditions above stated.

4. Each supplemental bill shall operate to amend any and all previous bills and a new bill shall supersede any previous bill.

5. When any bill of particulars is furnished it shall be filed and become a part of the record and a copy of such bill shall be given to the defendant upon his request. [C31, 35,§13732-c4.]

Referred to in §13732.05

13732.05 Setting aside indictment. If it appears from the bill of particulars furnished under section 13732.04 that the particulars stated do not constitute the offense charged in the indictment, or that the defendant did not commit that offense, or that a prosecution for that offense is barred by the statute of limitations, the court may and on motion of defendant shall set aside the indictment unless the county attorney shall furnish another bill of particulars which so states the particulars as to show that the particulars constitute the offense charged in the indictment and that the offense was committed by the defendant and that it is not barred by the statute of limitations. [C31, 35,§13732-c5.]

13732.06 Identification of defendant.

1. In an indictment or bill of particulars it is sufficient for the purpose of identifying the defendant to state his true name, or to state the name, appellation or nickname by which he has been or is known, or, if no better way of identifying him is practicable, by stating a fictitious name, or describing him as a person whose name is unknown, or in any other manner. In stating the true name or the name by which the defendant has been or is known or a fictitious name, it is sufficient to state a surname, a surname and one or more given names, or a surname and one or more abbreviations or initials of a given name or names.

2. If the defendant is a corporation, it is sufficient to state the corporate name of such corporation, or any name or designation by which it has been or is known or by which it may be identified, without an averment that the corporation is a corporation or that it was incorporated according to law.

3. If in the course of the proceedings the true name of a person indicted otherwise than by his true name is disclosed by the defendant or in the proceedings before the court, it shall order the true name of the defendant to be inserted in the indictment and court record wherever his name appears otherwise therein, and the case shall proceed against him in his true name.

4. In no case is it necessary to prove that the true name of the defendant is unknown to the grand jury or prosecuting attorney. [C51,§2916; R60,§§4653, 4659; C73,§§4299, 4305; C97,§§5283, 5289; S13,§5289; C24, 27,§§13736, 13743; C31, 35, §13732-c6.]

13732.07 Time of commission of offense.

1. An indictment need contain no allegation of the time of the commission of the offense except in those cases in which time is a material ingredient of the offense.

2. The allegation in an indictment that the defendant committed the offense shall in all cases be considered an allegation that the offense was committed after it became an offense and before the finding of the indictment and within the period of limitations prescribed by law for the prosecution of the offense.

3. All allegations of the indictment and bill of particulars shall, unless stated otherwise, be deemed to refer to the same time. [C51,§2916; R60,§§4651, 4655, 4659; C73,§§4297, 4301, 4305; C97,§§5281, 5285, 5289; S13,§5289; C24, 27, §§13734, 13739, 13743; C31, 35,§13732-c7.]

13732.08 Place of commission of offense.

1. An indictment need contain no allegation of the place of the commission of the offense, except in those cases in which the place is a material ingredient of the offense.

2. The allegation in an indictment that the defendant committed the offense shall in all cases be considered an allegation that the offense was committed within the territorial jurisdiction of the court.

3. All allegations in the indictment and bill of particulars shall, unless stated otherwise, be deemed to refer to the same place. [C51,§§2916, 2920; R60,§§4651, 4659, 4660; C73,§§4297, 4305, 4306; C97,§§5281, 5289, 5290; S13,§5289; C24, 27, §§13734, 13743, 13749; C31, 35,§13732-c8.]

13732.09 Means. An indictment need contain no allegation of the means by which an offense was committed, unless such allegation is necessary to charge an offense under section 13732.02. [C31, 35,§13732-c9.]

13732.10 Value. An indictment or bill of particulars need contain no allegation of the value or price of any property, unless such allegation is necessary to charge an indictable offense under section 13732.02, and in such case it is sufficient to aver that the value or price of the property equals or exceeds the certain value or price which determines the offense. The facts which give the property such value need not be alleged. [C31, 35,§13732-c10.]

13732.11 Ownership.

1. An indictment need contain no allegation of the ownership of any property, unless such allegation is necessary to charge the offense under section 13732.02.

2. An allegation in an indictment or bill of particulars of ownership of property is supported by proof of possession or right of possession of such property, and any statement in an indictment or bill of particulars which implies possession or right of possession is a sufficient allegation of ownership. [C31, 35,§13732-c11.]

13732.12 Intent.

1. An indictment need contain no allegation of the intent with which an act was done, unless such allegation is necessary to charge the offense under section 13732.02.

2. An allegation generally of an intent to defraud and injure is sufficient without alleging an intent to defraud or injure any particular person, unless such allegation is necessary to charge the offense under section 13732.02. [C51, §2927; R60,§4667; C73,§4313; C97,§5298; C24, 27,§13756; C31, 35,§13732-c12.]

13732.13 Immaterial allegations. An indictment need not allege that the offense was committed or the act done "feloniously" or "traitorously" or "unlawfully" or "with force and arms" or "with a strong hand", nor need it use any phrase of like kind otherwise to characterize the offense, nor need it allege that the offense was committed or the act done "burglariously", "willfully", "knowingly", "maliciously", or "negligently", nor need it otherwise characterize the manner of the commission of the offense unless such characterization is necessary to charge the offense under section 13732.02. [C51,§2920; R60,§4660; C73,§4306; C97,§5290; C24, 27,§13749; C31, 35,§13732-c13.]

13732.14 Unnecessary allegations. An indictment need not state any matter not necessary to be proved. [C51,§2920; R60,§4660; C73, §4306; C97,§5290; C24, 27,§13749; C31, 35, §13732-c14.]

13732.15 Description of place or thing. Whenever it is necessary in an indictment to describe any place or thing in order to charge an offense under section 13732.02 it is sufficient to describe such place or thing by any term which in common understanding embraces such place or thing and does not include any place or thing which is not by law the subject of, or connected with, the offense. [R60,§§4656, 4657; C73,§§4302, 4303; C97,§§5286, 5287; C24, 27,§§13740, 13741; C31, 35,§13732-c15.]

13732.16 Identification of others than defendant.

1. In an indictment or bill of particulars it is sufficient for the purpose of identifying any person other than the defendant to state his true name, or to state the name, appellation, or nickname by which he has been or is known, or, if no better way of identifying such person is practicable, by stating a fictitious name, or stating the name of an office or position held by him, or by describing him as "a certain person", or by words of similar import, or in any other manner. In stating the true name of such person or the name by which such person has been, or is known, it is sufficient to state a surname, or a surname and one or more given names, or a surname and one or more abbreviations or initials of a given name or names.

2. It is sufficient for the purpose of describing any group or association of persons not incorporated to state the proper name of such group or association, or to state any name or designation by which the group or association has been or is known or by which it may be identified, or to state the names of all the persons in such group or association, or to state the name or names of one or more persons in such group or association, referring to the other or others as "another" or "others".

3. It is sufficient for the purpose of describing a corporation to state the corporate name of such corporation, or any name or designation by which it has been or is known, or by which it may be identified, without an averment that the corporation is a corporation or that it was incorporated according to law.

4. In no case is it necessary to aver or prove that the true name of any person, group or association of persons or any corporation is unknown to the grand jury or prosecuting attorney.

5. If in the course of the trial the true name of any person, group, or association of persons, or corporation, described otherwise than by the true name is disclosed by the evidence, the court shall cause the true name to be inserted in the indictment and court record wherever the name appears otherwise. [R60,§4656; C73,§4302; C97,§5286; C24, 27,§13740; C31, 35,§13732-c16.]

13732.17 Money or securities. In an indictment in which it is necessary to make an averment as to money, treasury notes or certificates, bank notes or other securities intended to circulate as money, checks, drafts or bills of exchange, it is sufficient to describe the same or any of them as money, without specifying the particular character, number, denomination, kind, species, or nature thereof. [C31, 35, §13732-c17.]

13732.18 Instruments generally. Whenever it is necessary in an indictment or bill of particulars to make an averment relative to any instrument which consists wholly or in part of writing or figures, pictures or designs, it is sufficient to describe such instrument by any name or description by which it is usually known or by which it may be identified, or by its purport, without setting forth a copy or facsimile of the whole or any part thereof: provided that the description, if in a bill of particulars, sets forth the character and contents of the instrument with such particularity as to enable the defendant to prepare his defense. [C51,§2925; R60, §4665; C73,§4311; C97,§5295; C24, 27,§13753; C31, 35,§13732-c18.]

13732.19 Spoken or written words—pictures. Whenever in an indictment or bill of particulars an averment relative to any spoken or written words or any picture is necessary, it is sufficient to set forth such spoken or written words by their general purport or to describe such picture generally, without setting forth a copy or facsimile of such written words or such picture: provided that when such words or description occur in a bill of particulars, the defendant is thereby sufficiently informed of the identity of the words or picture concerning which the averment is made as to enable him to prepare his defense. [C31, 35,§13732-c19.]

13732.20 Words and phrases. The words and phrases used in an indictment or bill of particulars are to be construed according to their usual acceptation, except that words and phrases which have been defined by law or which have acquired a legal signification are to be construed according to their legal signification. [R60, §4657; C73,§4303; C97,§5287; C24, 27,§13741; C31, 35,§13732-c20.]

13732.21 Prior conviction. In alleging in an indictment or information a prior conviction of the defendant it is sufficient to allege that the defendant was convicted of a certain offense, stating the name of the offense, if it has one, or otherwise stating the offense in accordance with the provisions of section 13732.02, subsection 2. [C31, 35,§13732-c21.]

See ch 614

13732.22 Negativing exception. No indictment for an offense created or defined by statute shall be invalid or insufficient merely for the reason that it fails to negative any exception, excuse or proviso contained in the statute creating or defining the offense. [C31, 35,§13732-c22.]

Negativing exceptions, §§1952, 3156

13732.23 Disjunctive or alternative allegations. No indictment for an offense which may be committed by the doing of one or more of several acts, or by one or more of several means, or with one or more of several intents, or with one or more of several results, shall be invalid or insufficient for the reason that two or more

of such acts, means, intents or results are charged in the disjunctive or alternative. [C31, 35,§13732-c23.]

13732.24 Indirect or inferential allegations. No indictment shall be invalid or insufficient for the reason that it alleges indirectly and by inference or by way of recital any matters, facts, or circumstances connected with or constituting the offense. [C31, 35,§13732-c24.]

13732.25 Libel. No indictment for libel shall be invalid or insufficient for the reason that it does not set forth extrinsic facts for the purpose of showing the application to the party alleged to be libeled of the defamatory matter on which the indictment is founded. [C31, 35, §13732-c25.]

Additional provision, §13258

13732.26 Perjury. An indictment for perjury, or for subornation of, solicitation of, or conspiracy to commit, perjury need not set forth any part of the records or proceedings with which the oath was connected, or the commission or authority of the court or other official before whom the perjury was committed or was to have been committed, or the form of the oath or affirmation, or the manner of administering the same. [C51,§2926; R60,§4666; C73,§4312; C97,§5296; C24, 27,§13754; C31, 35,§13732-c26.]

13732.27 Degrees of offense. In an indictment for an offense which is divided into degrees it is sufficient to charge that the accused committed the offense. [C31, 35,§13732-c27.]

13732.28 Repugnant allegation. No indictment shall be invalid or insufficient by reason of any repugnant allegation contained therein: provided that an offense is charged in accordance with the provisions of section 13732.02. [C51,§2920; R60,§4660; C73,§4306; C97,§5290; C24, 27,§13749; C31, 35,§13732-c28.]

13732.29 Surplusage. Any allegation unnecessary under existing law or under the provisions of this act* [43GA, ch 266] may, if contained in an indictment, be disregarded as surplusage. [C51,§2920; R60,§4660; C73,§4306; C97,§5290; C24, 27,§13749; C31, 35,§13732-c29.]

Unnecessary allegations, §13732.14
*Sections 13732.01 to 13732.33, inclusive

13732.30 Indictment under prior law. Nothing contained in this act* [43GA, ch 266] shall be so construed as to make invalid or insufficient any indictment which would have been valid and sufficient under the law existing at the date of the enactment hereof. [C31, 35,§13732-c30.]

*Sections 13732.01 to 13732.33, inclusive

13732.31 Rule of interpretation. Whenever reference is made to what is necessary to be included in an indictment the interpretation shall be that it is necessary to be included in the indictment, information or bill of particulars; and wherever reference is made to what is not necessary to be included in an indictment, the interpretation shall be that it is not necessary to be included in the indictment, information or bill of particulars. [C31, 35,§13732-c31.]

13732.32 Form of informations. No preliminary information and no information for a nonindictable offense which charges the offense in accordance with the provisions of this act* [43 GA, ch 266] shall be held to be insufficient. [C31, 35,§13732-c32.]

*Sections 13732.01 to 13732.33, inclusive

13732.33 Permissible forms. The following forms may be used in the cases in which they are applicable:

Adultery—A. B. committed adultery with C. D.

Affray—A. B. and C. D. made an affray.

Arson—A. B. committed arson of the dwelling of C. D. (Other burnings) A. B. willfully and maliciously burned the warehouse of C. D. A. B. willfully and maliciously set fire to the haystack of C. D.

Assault—A. B. assaulted C. D.

Assault and battery—A. B. committed assault and battery upon C. D.

Assault with intent—A. B. assaulted C. D. with intent to murder (or to rob or to inflict great bodily injury, as the case may be).

Assault while masked—A. B. while masked, assaulted C. D.

Attempt—A. B. attempted to break and enter the dwelling of C. D. with intent to commit a public offense (or attempted to commit arson of the dwelling of C. D., or attempted to produce the miscarriage of C. D., or whatever the indictable attempt may be).

Bigamy—A. B. committed bigamy with C. D.

Bribery—A. B. bribed C. D. (or offered a bribe to C. D., or accepted a bribe from C. D., etc.).

Burglary—A. B. committed burglary of the dwelling of C. D.

Burglary by means of explosives—A. B. committed burglary of the building of C. D. by means of explosives.

Burglary by means of electricity—A. B. committed burglary of the building of C. D. by means of electricity.

(Other breaking and enterings)—A. B. broke and entered the dwelling of C. D. (or A. B. committed an entry of the dwelling of C. D., or A. B. broke and entered office of C. D. as the case may be).

Carrying concealed weapons—A. B. carried concealed weapons.

Cigarettes—A. B. sold cigarettes to C. D. without affixing stamps.

Common felon—A. B. committed burglary of the dwelling of C. D. (or robbed C. D., or set forth any other crime mentioned in section 13396 after the following convictions (set forth convictions of D. of two prior offenses mentioned in section 13396, giving the court, date and place of rendition).

Conspiracy—A. B. and C. D. conspired together to murder E. F. (or to steal the property of E. F. or to rob E. F., as the case may be).

Desertion—A. B. deserted his wife C. B. (or his child D. B.).

Embezzlement—A. B. embezzled fifty dollars of C. D.

Failure to report automobile accident—A. B., while operating a motor vehicle, injured C. D. and failed to give notice of the accident.

False pretenses—A. B. obtained an automobile from C. D. by means of false pretenses.

Forgery—A. B. forged a certain instrument purporting to be a promissory note (or describe the note or give its tenor or substance).

Gambling—A. B. gambled with C. D.

Incest—A. B. committed incest with C. D.

Indecent exposure—A. B. made an indecent exposure of his person.

Intoxicating liquors—

Nuisance—A. B. kept a building at (give street and number and city or otherwise describe or identify the building for purposes of abatement) in which he unlawfully possessed intoxicating liquors.

Possession—A. B. unlawfully possessed intoxicating liquors.

Keeping house of ill fame—A. B. kept a house of ill fame.

Kidnaping—A. B. kidnaped C. D.

Larceny—A. B. stole from C. D. a horse worth more than twenty dollars.

Lascivious acts with children—A. B. committed lascivious acts with C. D. who was under sixteen years of age.

Lewdness—A. B. and C. D. lewdly associated together.

Libel—A. B. published a libel concerning C. D. in the form of a letter (book, picture, etc., as the case may be), (the particulars should specify the pages and lines constituting the libel, when necessary, as where it is contained in a book or pamphlet).

Malicious mischief—A. B. maliciously injured the building of C. D.

Manslaughter—A. B. unlawfully killed C. D.

Murder—A. B. murdered C. D.

Perjury—A. B. committed perjury by testifying as follows: (Set forth the testimony).

Prostitution—A. B. resorted to a house of ill fame for the purpose of prostitution (or A. B. was found in a hotel leading a life of prostitution, as the case may be).

Rape—A. B. raped C. D.

Receiving stolen property—A. B. received a stolen watch belonging to C. D. and worth more than twenty dollars, knowing that it had been stolen.

Robbery—A. B. robbed C. D.

Seduction—A. B. seduced C. D.

Sodomy—A. B. committed sodomy with C. D.

Uttering a forged instrument—A. B. uttered as genuine a forged instrument purporting to be a promissory note (or describe the note or give its tenor or substance). [R60,§4651; C73, §4297; C97, §5281; C24, 27, §13734; C31, 35, §13732-c33.]

Referred to in §13732.01

13733 to 13736, inc. Rep. by 43GA, ch 266

13737 Charging but one offense. The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and, if it may have been committed in different modes and by different means, may allege the modes and means in the alternative. [C51,§2917; R60,§4654; C73,§4300; C97,§5284; C24, 27, 31, 35,§13737.]

C97,§5284, editorially divided

13738 Charging several offenses. In case of compound offenses where in the same transaction more than one offense has been committed, the indictment may charge the several offenses and the defendant may be convicted of any offense included therein. [R60,§4654; C73,§4300; C97,§5284; C24, 27, 31, 35,§13738.]

13738.1 Miscellaneous separate offenses. An indictment may charge in separate counts:

1. A burglary and one or more other indictable offenses committed in connection with said burglary. The term "burglary" shall embrace any violation of sections 12994 to 13004, inclusive, or

2. A robbery and one or more other indictable offenses committed in connection with said robbery, or

3. The forgery of an instrument and the uttering and publishing of said forgery when both offenses are committed by the same person, or

4. A conspiracy and the offense committed in pursuance of said conspiracy, if such offense be indictable, or

5. An attempt to commit an unlawful miscarriage of a woman, and the homicide resulting from such attempt. [C27, 31, 35,§13738-b1.]

Referred to in §§13738.2, 13738.5

13738.2 Judgment. Under section 13738.1, separate judgments shall be rendered on each count on which the accused is convicted. [C27, 31, 35,§13738-b2.]

Referred to in §13738.5

13738.3 Larceny, false pretenses and receiving stolen property. An indictment may charge in separate counts against the same person:

1. An indictable larceny, the obtaining of the same property by false pretenses, and the receiving of the same property with knowledge that it has been obtained by means of a larceny, or

2. The larceny of property and the embezzlement of the same property. [C27, 31, 35,§13738-b3.]

Referred to in §§13738.4, 13738.5

13738.4 Judgment. Under section 13738.3 judgment shall not be rendered against the accused on more than one count. [C27, 31, 35, §13738-b4.]

Referred to in §13738.5

13738.5 "Indictment" includes "information". The term "indictment" as used in sections 13738.1 to 13738.4, inclusive, shall be deemed to embrace not only an indictment but also a trial information as provided in chapter 634. [C27, 31, 35,§13738-b5.]

13739 to 13743, inc. Rep. by 43GA, ch 266

13744 Amendment. The court may, on motion of the state, and before or during the trial, order the indictment so amended as to correct errors or omissions in matters of form or substance. [S13,§5289; C24, 27, 31, 35,§13744.]

Waiver of defects, §13791

13745 Amendment before trial. If the application for an amendment be made before the commencement of the trial, the application

and a copy of the proposed amendment shall be served upon the defendant, or upon his attorney of record, and an opportunity given the defendant to resist the same. [S13,§5289; C24, 27, 31, 35,§13745.]

40ExGA, HF 274, §8, editorially divided

13746 Amendment during trial. If the application be made during the trial, the application and the amendment may be dictated into the record in the presence of the defendant or of his counsel, and such record shall constitute sufficient notice to the defendant. [C24, 27, 31, 35,§13746.]

13747 Nonpermissible amendment. Such amendment shall not be ordered when it will have the effect of charging the accused with an offense which is different than the offense which was intended to be charged in the indictment as returned by the grand jury. [S13, §5289; C24, 27, 31, 35,§13747.]

13748 Continuance. No continuance or delay in trial shall be granted because of such amendment unless it is made to appear that defendant should have additional time to prepare for trial because of such amendment. [S13, §5289; C24, 27, 31, 35,§13748.]

13749, 13750 Rep. by 43GA, ch 266

13751 Pleading judicial proceedings. In pleading a judgment or other determination of or proceeding before a court or officer of special jurisdiction, the facts conferring jurisdiction need not be stated in the indictment. It is sufficient to state that the judgment or determination was duly made, or the proceedings duly had, before such court or officer; but such jurisdictional facts must be established on the trial. [C51,§2922; R60,§4662; C73,§4308; C97, §5292; C24, 27, 31, 35,§13751.]

13752 Pleading private statute. In pleading a private statute or right derived therefrom, it is sufficient to refer to the same by its title and the day of its approval, and the court must thereupon take judicial notice thereof. [C51,§2923; R60,§4663; C73,§4309; C97,§5293; C24, 27, 31, 35,§13752.]

13753 to 13756, inc. Rep. by 43GA, ch 266

13757 Compounding offense. A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another, or a gratuity or reward, or engagement or promise therefor, upon agreement or understanding, express or implied, to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offense has not been indicted or tried. [C51,§2930; R60,§4670; C73,§4316; C97,§5301; C24, 27, 31, 35,§13757.]

13758 Rep. by 43GA, ch 266

CHAPTER 639

PROCESS AFTER INDICTMENT

13759 Bench warrant.
13760 Warrant ordered—bail fixed.
13761 Issuance of warrant.
13762 Form in case of felony.
13763 Form in case of misdemeanor.
13764 Proceedings as to bail.
13765 Process against corporation.
13766 Service and return.
13767 When defendant deemed present.
13768 Indictment against convict in penitentiary.
13769 Defendant returned—how punished.

13759 Bench warrant. The process upon an indictment for the arrest of an individual shall be a warrant. [R60,§4672; C73,§4318; C97, §5303; C24, 27, 31, 35,§13759.]

Approval of warrant and expenses, §§1225.04, 1225.05

13760 Warrant ordered—bail fixed. When an indictment is filed by the clerk of the court against a defendant not in custody nor under bail, or who has not deposited money instead of bail, the judge of the court shall make an order on the indictment, which shall be signed by him with his name of office, that a warrant issue for the arrest of the defendant, and, if the offense charged be bailable, fix the amount in which bail may be taken. [R60,§4673; C73, §4319; C97,§5304; C24, 27, 31, 35,§13760.]

13761 Issuance of warrant. The clerk on the application of the county attorney shall at any time after the making of the order of the judge, whether the court be in session or not, issue a warrant into one or more counties. [R60, §4674; C73,§4320; C97,§5305; C24, 27, 31, 35, §13761.]

13762 Form in case of felony. A warrant, if the offense be a felony, shall be substantially in the following form:

The State of Iowa, }
County of..... }

To any peace officer in the state:

An indictment having been found in the district court of said county on the ..... day of ....., A. D. ...., (the day on which the indictment is marked "filed" by the clerk of the court) charging A. B. with the crime of (here designate the offense by the name, if it have one, or by a brief general description of it, substantially as in the indictment).

You are hereby commanded to arrest the said A. B. and bring him before said court to answer said indictment, if the said court be then in session in said county, or if not then in session in said county, that you deliver him into the custody of the sheriff of said county.

Given under my hand and the seal of said court at my office in the county aforesaid, this ..... day of ....., A. D. ....

.....

[Seal] Clerk.

By order of the judge of the court.

[R60,§4675; C73,§4321; C97,§5306; C24, 27, 31, 35,§13762.]

13763 Form in case of misdemeanor. If the offense be a misdemeanor, the warrant may be in a similar form, adding to the body thereof a direction substantially to the following effect: "Or, if the said A. B. require it, that you take him before a magistrate or the clerk of the district court in said county, or in the county in which you arrest him, that he may give bail to answer the said indictment", and the clerk must make an indorsement thereon to the following effect: "The defendant is to be admitted to bail in the sum of ..... dollars" (the amount fixed by the judge and indorsed on the indictment). The warrant may be served in any county in the state. [C51,§2935; R60, §§4676-4678; C73,§§4322-4324; C97,§5307; C24, 27, 31, 35,§13763.]

13764 Proceedings as to bail. If the defendant, when arrested, is brought before a magistrate or the clerk of the district court of any county for the purpose of giving bail, the same proceedings must be had in all respects as if he had been arrested on a warrant of arrest issued by a magistrate on a preliminary information, as nearly as may be. [R60,§4679; C73,§4325; C97,§5308; C24, 27, 31, 35,§13764.]

Bail, ch 628 et seq.

13765 Process against corporation. The process on an indictment against a corporation shall be a notice under the seal of the court, which shall be issued by the clerk, at any time after the filing of the indictment in his office, on the application of the county attorney, and shall substantially notify the defendant of the finding of the indictment, of the nature of the offense charged, and that it must forthwith appear and answer the same. [C73,§4326; C97, §5309; C24, 27, 31, 35,§13765.]

C97,§5309, editorially divided

13766 Service and return. Said notice may be served by any peace officer in any county in the state on any officer or agent of the defendant, by reading the same to him and leaving with him a copy thereof, and shall be returned to the clerk's office without delay, with proper return of its service. [C73,§4326; C97,§5309; C24, 27, 31, 35,§13766.]

13767 When defendant deemed present. From and after two days from the time of the making of such service, the defendant shall be considered in court, and present to all proceedings had on the indictment. [C73,§4326; C97, §5309; C24, 27, 31, 35,§13767.]

13768 Indictment against convict in penitentiary. Upon the return of an indictment or upon the filing of a trial information for any offense which may be punished by death or life imprisonment, against any person confined in the penitentiary or men's reformatory, the court to which such indictment is returned may enter an order directing that such person be produced before it for trial. The sheriff shall execute such order by serving a copy thereof on the warden having such accused person in custody and thereupon such person shall be delivered to such sheriff and conveyed to the place of trial. [S13,§§5718-b, 5718-c; C24, 27, 31, 35,§13768.]

13769 Defendant returned — how punished. If the defendant be found not guilty, he shall be returned to the institution from which he was taken; if convicted he shall be punished as provided by law. [S13,§5718-d; C24, 27, 31, 35, §13769.]

CHAPTER 640

ARRAIGNMENT OF DEFENDANT

13770 Time of arraignment—waiver—corporation.
13771 Personal presence—when necessary.
13772 Out on bail—failure to appear—arrest.
13773 Right to counsel.
13774 Fee for attorney defending.
13775 Affidavit required.
13776 Arraignment—by whom made.
13777 Arraignment—how made.
13778 Incorrect name—estoppel.
13779 Entry of true name.
13780 Answer—time granted.

13770 Time of arraignment—waiver—corporation. As soon as practicable after an indictment is found, the defendant must be arraigned thereon, unless he waive the same. Where a corporation is defendant, arraignment shall not be required. [C51,§2931; R60,§4680; C73,§4327; C97,§5310; C24, 27, 31, 35,§13770.]

13771 Personal presence — when necessary. A person charged with a felony, or in custody without an attorney, must be personally present for arraignment, but in other cases he may appear therefor by counsel. [C51,§2932; R60, §§4681, 4682; C73,§§4328, 4329; C97,§5311; C24, 27, 31, 35,§13771.]

13772 Out on bail — failure to appear — arrest. If the defendant is at large on bail or deposit of money, and fails to appear for arraignment, or when his personal presence is necessary, the court shall, in addition to the forfeiture of the undertaking of bail or money deposited, enter an order directing the clerk at any time, upon the application of the county attorney, to issue a warrant into one or more counties for his arrest. [C51,§§2933, 2934; R60, §§4683, 4684; C73,§§4330, 4331; C97,§5312; C24, 27, 31, 35,§13772.]

Approval of warrant and expenses, §§1225.04, 1225.05

13773 Right to counsel. If the defendant

appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours. [C51,§2936; R60,§4685; C73, §4332; C97,§5313; C24, 27, 31, 35,§13773.]

13774 Fee for attorney defending. An attorney appointed by the court to defend a person indicted for homicide, or any offense the punishment of which may be life imprisonment, shall receive from the county treasury a fee of twenty dollars per day for time actually occupied in court in the trial of defendant. If the prosecution be for any other felony, he shall receive the sum of ten dollars in full for services. Such attorney need not follow the case into another county or into the supreme court, but if he does so shall receive an enlarged compensation on a scale corresponding to that fixed by this section. Only one attorney in any one case shall receive such compensation. [C51,§§2561–2563; R60, §§1578, 4168–4170; C73,§§3829–3831; C97,§5314; C24, 27, 31, 35,§13774.]

C97,§5314, editorially divided

13775 Affidavit required. To be entitled to such compensation, the attorney must file with the court his affidavit that he has not directly or indirectly received, or entered into a contract to receive, any compensation for such services from any source. [C51,§2563; R60,§4170; C73,§3831; C97,§5314; C24, 27, 31, 35,§13775.]

13776 Arraignment—by whom made. The arraignment may be made by the court, or by the clerk or county attorney under its direction. [C51,§2937; R60,§4686; C73,§4333; C97,§5315; C24, 27, 31, 35,§13776.]

C97,§5315, editorially divided

13777 Arraignment—how made. Arraignment consists in reading the indictment to the defendant, and, unless previously done, delivering to him a copy thereof and the indorsements thereon, and informing him that, if the name by which he is indicted is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment, and asking him what he answers to the indictment. [C51,§2938; R60,§4686; C73, §4333; C97,§5315; C24, 27, 31, 35,§13777.]

13778 Incorrect name—estoppel. If he gives no other name or gives his true name, he is thereafter precluded from objecting to the indictment upon the ground of being therein improperly named. [C51,§2939; R60,§4687; C73, §4334; C97,§5316; C24, 27, 31, 35,§13778.]

13779 Entry of true name. If he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted. [C51,§2940; R60,§4688; C73,§4335; C97,§5317; C24, 27, 31, 35,§13779.]

13780 Answer—time granted. In answer to the arraignment, the defendant may move to set aside the indictment, or demur or plead to it, and is entitled to one day after arraignment, if he demand it, in which to do so. [C51,§§2941, 2942; R60,§§4689, 4690; C73,§4336; C97,§5318; C24, 27, 31, 35,§13780.]

CHAPTER 641

SETTING ASIDE INDICTMENT

13781 Grounds for setting aside indictment.
13781.1 Exception.
13782 Correction of indictment.
13783 Objections to selection of grand jury.
13784 Hearing on motion.
13785 Motion overruled—defendant must answer.
13786 Motion sustained—defendant discharged.
13787 Resubmission—bail.
13788 Order to set aside—effect.

13781 Grounds for setting aside indictment. The motion to set aside the indictment can be made, before a plea is entered by the defendant, on one or more of the following grounds, and must be sustained:

1. When it is not indorsed "a true bill" and the indorsement signed by the foreman of the grand jury as prescribed by this code.
2. When the names of all witnesses examined before the grand jury are not indorsed thereon.
3. When the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith.
4. When it has not been presented and marked "filed" as prescribed by this code.
5. When any person other than the grand jurors was present before the grand jury when the question was taken upon the finding of the indictment.
6. When any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law.
7. That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law, except as hereinafter provided. [C51,§2943; R60,§4691; C73,§4337; C97,§5319; C24, 27, 31, 35,§13781.]

Referred to in §§13782, 13788

13781.1 Exception. A motion to set aside an indictment shall not lie on the ground that the grand jury which returned the indictment was composed of more than one juror from the same civil township. [C31, 35,§13781-c1.]

See §10885

13782 Correction of indictment. A motion to set aside the indictment on the ground that

the names of all the witnesses examined before the grand jury are not indorsed thereon; or that the name of any other witness than those so examined is indorsed thereon as prescribed in the second subsection of section 13781, shall not be sustained if the indorsement is corrected by the insertion or striking out of such names or name by the county attorney or the clerk of the court, under the direction of the court, so as to correspond with the minutes required to be kept by the clerk of the grand jury, and returned and preserved with the indictment to the court. [R60,§4692; C73,§4338; C97,§5320; C24, 27, 31, 35,§13782.]

13783 Objections to selection of grand jury. The ground of the motion to set aside the indictment mentioned in the seventh subsection of section 13781 is not allowed to a defendant who has been held to answer before indictment. [R60,§4693; C73,§4339; C97,§5321; C24, 27, 31, 35,§13783.]

13784 Hearing on motion. The motion must be heard when it is made, unless for good cause the court postpone the hearing to another time. [C51,§2945; R60,§4695; C73,§4340; C97,§5322; C24, 27, 31, 35,§13784.]

13785 Motion overruled — defendant must answer. If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto. [C51, §2946; R60,§4696; C73,§4341; C97,§5323; C24, 27, 31, 35,§13785.]

13786 Motion sustained — defendant discharged. If the motion be granted, the court must order the defendant, if in custody, to be discharged; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the money deposited be refunded to him, unless the court direct that the case be resubmitted to the same or another grand jury. [C51,§2947; R60,§4697; C73,§4342; C97,§5324; C24, 27, 31, 35,§13786.]

13787 Resubmission—bail. If the court direct that the case be resubmitted, the defendant, if already in custody, must so remain unless he be admitted to bail; or, if already admitted to bail, or money had been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment, if a resubmission has been ordered. [C51,§2948; R60,§4698; C73,§4343; C97,§5325; C24, 27, 31, 35,§13787.]

13788 Order to set aside—effect. An order to set aside the indictment, as provided in this chapter, shall be no bar to a future prosecution for the same offense. [C51,§2949; R60,§4699; C73,§4344; C97,§5326; C24, 27, 31, 35,§13788.]

CHAPTER 642

PLEADINGS OF DEFENDANT

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13789 Demurrer or plea. The only pleading on the part of the defendant is a demurrer or plea. [C51,§2950; R60,§4700; C73,§4345; C97, §5327; C24, 27, 31, 35,§13789.]

13790 Grounds of demurrer. The defendant may demur to the indictment when it appears upon its face, either:

1. That it does not substantially conform to the requirements of this code, or
2. That the indictment contains matter which, if true, would constitute a legal defense or bar to the prosecution. [C51,§2952; R60,§4707; C73, §4352; C97,§5328; C24, 27, 31, 35,§13790.]

13791 Failure to demur—waiver. All objections to the indictment relating to matters of substance and form which might be raised by demurrer shall be deemed waived if not so raised by the defendant before the jury is sworn on the trial of the case. [S13,§5289; C24, 27, 31, 35, §13791.]

Related provision, §13744

13792 Method of demurring. A demurrer to the indictment may be filed with the clerk or made in open court, and shall be entered of record substantially in the following form: "The defendant demurs to the indictment". [C51, §2951; R60,§§4701, 4708; C73,§§4346, 4353; C97, §5330; C24, 27, 31, 35,§13792.]

13793 Issues—by whom tried. An issue of law arises upon a demurrer to the indictment, which must be tried by the court, but no joinder is necessary. [R60,§§4702, 4703; C73,§§4347, 4348; C97,§5329; C24, 27, 31, 35,§13793.]

13794 Time of hearing demurrer. When a demurrer is filed or entered of record, it must be heard immediately, or at such time as the court may appoint. [C51,§2954; R60,§4709; C73, §4354; C97,§5331; C24, 27, 31, 35,§13794.]

C97,§5331, editorially divided

13795 Jurisdiction in another county—procedure. If a demurrer is sustained on the

ground that the offense charged was within the exclusive jurisdiction of another county in this state, the same proceedings shall be had as provided in case of the discharge of a jury for want of jurisdiction of the offense charged. [R60, §4710; C73,§4355; C97,§5331; C24, 27, 31, 35, §13795.]

Discharge for want of jurisdiction, §13870

13796 Absolute discharge. If a demurrer is sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final and the defendant must be discharged. [R60,§4711; C73, §4356; C97,§5331; C24, 27, 31, 35,§13796.]

13797 Resubmission. If a demurrer is sustained on any other ground, the defendant must be discharged and his bail exonerated, if bail has been given, unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided in another indictment, in which case the court may order the cause to be resubmitted to the same or another grand jury, and the defendant may be held in custody, if not at large on bail, in which case the undertaking given shall remain in force. [R60,§4712; C73,§4357; C97,§5331; C24, 27, 31, 35,§13797.]

13798 Pleading over—final judgment. If the demurrer is overruled, the defendant has a right to plead to the indictment; if he fails to do so, final judgment may be rendered against him on the demurrer, and, if necessary, a jury may be impaneled to inquire and ascertain the degree of the offense. [C51,§2955; R60,§4713; C73, §4358; C97,§5332; C24, 27, 31, 35,§13798.]

13799 Pleas to the indictment. There are but three pleas to the indictment—(1) guilty, (2) not guilty, or (3) of a former judgment of conviction or acquittal of the offense charged. [C51,§2957; R60,§4714; C73,§4359; C97,§5333; C24, 27, 31, 35,§13799.]

13800 Plea of guilty—form—entry. The plea of guilty can only be made in open court and by the defendant himself, in substantially the following form: "The defendant pleads that he is guilty of the offense charged in the indictment", and shall be entered of record. The plea may be entered in vacation at the usual place of holding court in any county of the judicial district. [R60,§§4715, 4716; C73,§§4360, 4361; C97, §5334; C24, 27, 31, 35,§13800.]

Pleas in vacation, §13666 et seq.
Special term called, §10782

13801 Other pleas—form—entry. The other pleas may be in writing, filed with the clerk, or made in open court, in substantially the following form: "The defendant pleads that he is not guilty of the offense charged in the indictment", or, "The defendant pleads that he has formerly been convicted (or acquitted, as the case may be) of the offense charged in the indictment by the judgment of the.....court of..... (naming it), rendered on the....day of....., A. D....." (naming the time), which may be pleaded alone or with the plea of not guilty. The pleas shall be entered of record. [C51,§2957; R60,§§4714, 4715; C73,§§4359, 4360; C97,§5335; C24, 27, 31, 35,§13801.]

13802 Failure to plead. If the defendant fails or refuses to plead to the indictment by demurrer or plea, a plea of not guilty must be entered by the court. [C51,§2963; R60,§4722; C73,§4367; C97,§5336; C24, 27, 31, 35,§13802.]

13803 Withdrawal of plea of guilty. At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted. [C51,§2961; R60,§4717; C73,§4362; C97,§5337; C24, 27, 31, 35,§13803.]

13804 Issues of fact—trial. An issue of fact arises on a plea of not guilty or of former conviction or acquittal, and no further pleading is necessary. Issues of fact must be tried by a jury. [R60,§§4702, 4704, 4705; C73,§§4347, 4349, 4350; C97,§5338; C24, 27, 31, 35,§13804.]

C97,§5338, editorially divided

13805 Plea of not guilty—evidence admissible. The plea of not guilty is a denial of every material allegation in the indictment, and all matters of fact may be given in evidence under it, except a former conviction or acquittal. [C97,§5338; C24, 27, 31, 35,§13805.]

13806 Personal presence at trial. If a felony is charged, the defendant must be personally present at the trial, but the trial of a misdemeanor may be had in his absence, if he appears by counsel. [R60,§4706; C73,§4351; C97,§5338; C24, 27, 31, 35,§13806.]

13807 Conviction or acquittal—when a bar. A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place. [R60,§4719; C73,§4364; C97,§5339; C24, 27, 31, 35,§13807.]

Constitution, Art. I, §12

13808 Prosecutions barred. When a defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for an offense necessarily included therein. [R60,§4720; C73,§4365; C97, §5340; C24, 27, 31, 35,§13808.]

13809 Other judgments—when a bar. Except where otherwise provided, the judgment for a defendant on a demurrer, or on an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense, if a resubmission has been ordered. [R60,§4721; C73,§4366; C97,§5341; C24, 27, 31, 35,§13809.]

CHAPTER 643

CHANGE OF VENUE

13810 Right to change.
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13810 Right to change. In all criminal cases which may be pending in any of the district courts, any defendant therein, or the state, in cases where defendant is charged with felony, may petition the court for a change of place of trial to another county. [C51,§3270; R60,§4727; C73,§4368; C97,§5342; C24, 27, 31, 35,§13810.]

13811 Petition by defendant. Such petition, when filed by the defendant, must set forth the nature of the prosecution, the court where the same is pending, and that such defendant cannot receive a fair and impartial trial owing to the prejudice of the judge, or to excitement or prejudice against the defendant in such county, and be verified on information and belief by the affidavit of the defendant. [C51,§3271; R60, §4728; C73,§4369; C97,§5343; C24, 27, 31, 35, §13811.]

13812 Additional verification. When the ground alleged in the petition filed by the defendant is excitement or prejudice against him in the county, it must be verified by the affidavit of three disinterested persons, residents of the county from which the change is sought, in addition to the affidavit of the petitioner himself. [R60,§4729; C73,§4370; C97,§5344; C24, 27, 31, 35,§13812.]

13813 Petition by state. Such petition, when filed by the state, shall set forth the nature of the prosecution, the court where the same is pending, and that the state cannot receive a fair and impartial trial in said county owing to excitement or prejudice in such county against the prosecution, and be verified on information and belief by the affidavit of the county attorney or his assistant. [C24, 27, 31, 35,§13813.]

13814 Petition for second change. When a change in place of trial has been granted to one party to the prosecution, the other party thereto to whom no change has been granted, may, in the county to which the case has been sent, petition for a change in the same manner as though said county was the county in which the case was first pending. In such case, if the change be granted, the case shall not be sent to the county in which it was originally pending. [C24, 27, 31, 35,§13814.]

13815 General terms sufficient. The petition need not state the facts upon which the belief of the petitioner or other person verifying the same is founded, but may allege the belief of the particular ground thereof in general terms. [R60,§4730; C73,§4371; C97,§5345; C24, 27, 31, 35,§13815.]

13816 Additional testimony. When the alleged ground in the petition is excitement or prejudice in the county against the petitioner, the court may receive additional testimony by affidavits only, either on the part of the defendant or the state. [R60,§4731; C73,§4372; C97, §5346; C24, 27, 31, 35,§13816.]

13817 Filed with clerk. The petition and affidavits must be filed with the clerk, and are parts of the record. [R60,§4732; C73,§4373; C97,§5347; C24, 27, 31, 35,§13817.]

13818 Discretion of court. The court, in the exercise of a sound discretion, must, when fully advised, decide the matter of the petition according to the very right of it. [C51,§3272; R60, §4733; C73,§4374; C97,§5348; C24, 27, 31, 35, §13818.]

13819 Order of change of venue. If sustained, the court must, if the ground alleged be the prejudice of the judge, order the change of venue to the most convenient county in an adjoining district to which no objection exists. If sustained on the ground of excitement and prejudice in the county, it must be awarded to such county in the same district in which no such objection exists. [C51,§3272; R60,§§4734, 4735; C73,§§4375, 4376; C97,§5349; C24, 27, 31, 35,§13819.]

13820 Transmission of papers. Upon the change of place of trial to another county, if there be but one defendant in the case, or if all have joined in the petition, the clerk must make out and certify a transcript of all papers on file in the case, including the indictment, and file the same in his office; and all the original papers on file, with a certified copy of all record entries therein, must be without unnecessary delay transmitted to the clerk of the court to which the change is ordered. [C51,§3273; R60, §4736; C73,§4377; C97,§5350; C24, 27, 31, 35, §13820.]

13821 Several defendants—transcripts. If there be more than one defendant in such case, and all the defendants have not joined in the petition, the clerk must, without unnecessary delay, make out and certify a transcript of all entries appearing on the record, and of all the papers on file in the case, including the indictment, and transmit the same to the clerk of the court to which the change of place of trial is

ordered, retaining the originals. [R60,§4737; C73,§4378; C97,§5351; C24, 27, 31, 35,§13821.]

13822 Delivery of accused. When a change of place of trial to another county has been ordered, if the defendant is in custody, the sheriff of the county from which the change is granted must, on the order of the court, deliver him to the sheriff of the county to which such change is allowed, and upon such delivery, with a certified copy of the order therefor, the sheriff last mentioned must receive and detain the defendant in his custody until legally discharged therefrom, and give a certificate of such delivery. [C51,§3274; R60,§4738; C73,§4379; C97, §5352; C24, 27, 31, 35,§13822.]

13823 Proceedings after change. The court to which the change is granted must take cognizance of the cause, and proceed therein to trial, judgment, and execution, in all respects as if the indictment had been found by the grand jury impaneled in such court. [C51,§3275; R60, §4739; C73,§4380; C97,§5353; C24, 27, 31, 35, §13823.]

13824 Cost attending change. When the place of trial is changed under the provisions of this chapter, the county from which the change was taken shall pay the expenses and charges of removing, delivering, and keeping the defendant, and all other expenses and costs necessary and consequent upon such change and trial, which shall be audited and allowed by the court trying the case; and all such expenses and costs may be recovered by the county to which the trial is changed in an action against the county in which the prosecution was commenced. [C51, §3276; R60,§§4740, 4745; C73,§§3841, 4381, 4386; C97,§5354; C24, 27, 31, 35,§13824.]

13825 Sheriff's fees. For delivering prisoners under the provisions of this chapter, sheriffs are entitled to the same fees as are allowed for the conveyance of convicts to the penitentiary. [C51,§3277; R60,§4741; C73,§4382; C97,§5355; C24, 27, 31, 35,§13825.]

Fees, §5191

CHAPTER 644

TRIAL JURY

13826 Rules for drawing.
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13828 Challenges to the panel.
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13830 Challenges for cause.
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13836 Peremptory challenges—number.
13836.1 Multiple charges.
13837 Clerk to prepare list—procedure.
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13826 Rules for drawing. The rules for drawing the jury shall be the same as those provided in civil procedure. [R60,§4751; C73, §4389; C97,§5356; C24, 27, 31, 35,§13826.]

See §11459 et seq.

13827 Completion of panel. If for any reason the regular panel is exhausted without a jury being selected, it shall be completed in the manner provided in the chapters upon selecting, drawing, and summoning juries. [C51,§2970; R60,§4758; C73,§4396; C97,§5357; C24, 27, 31, 35, §13827.]

Jurors in general, ch 480 et seq.
Similar provision, §11482

13828 Challenges to the panel. All the provisions of law relating to challenges to the panel of trial jurors in civil procedure, the grounds therefor, the manner of exercising the same, and the effect thereof, shall apply to the panel of trial jurors in criminal cases. [C51,§§2972–2977; R60,§§4760–4765; C73,§§4398–4403; C97, §5358; C24, 27, 31, 35,§13828.]

Challenge to panel, §11462 et seq.

13829 Challenges to individual juror. A challenge to an individual juror is an objection which may be taken orally, and is either for cause or peremptory. [C51,§2978; R60,§4766; C73,§4404; C97,§5359; C24, 27, 31, 35,§13829.]

13830 Challenges for cause. A challenge for cause may be made by the state or defendant, and must distinctly specify the facts constituting the causes thereof. It may be made for any of the following causes:

1. A previous conviction of the juror of a felony.

2. A want of any of the qualifications prescribed by statute to render a person a competent juror.

3. Unsoundness of mind, or such defects in the faculties of the mind or the organs of the body as render him incapable of performing the duties of a juror.

4. Affinity or consanguinity, within the ninth degree, to the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance, the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law.

Computing relationship, §63

5. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance, the prosecution was instituted, or in his employ on wages.

6. Being a party adverse to the defendant in

a civil action, or having been the prosecutor against or accused by him in a criminal prosecution.

7. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment.

8. Having served on a trial jury which has tried another defendant for the offense charged in the indictment.

9. Having been on a jury formerly sworn to try the same indictment and whose verdict was set aside, or which was discharged without a verdict after the cause was submitted to it.

10. Having served as a juror, in a civil action brought against the defendant, for the act charged as an offense.

11. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial.

12. Because of his being bail for any defendant in the indictment.

13. Because he is defendant in a similar indictment, or complainant or private prosecutor against the defendant or any other person indicted for a similar offense.

14. Because he is, or within a year preceding has been, engaged or interested in carrying on any business, calling, or employment, the carrying on of which is a violation of law, where the defendant is indicted for a like offense.

15. Because he has been a witness, either for or against the defendant, on the preliminary trial or before the grand jury.

16. Having requested, directly or indirectly, that his name be returned as a juryman for the regular biennial period.

17. Having served in the district court as a grand or petit juror during the last preceding calendar year. [C51,§§2982–2986; R60,§§4767–4771; C73,§4405; C97,§§337, 5360; S13,§337; C24, 27, 31, 35,§13830.]

13831 Examination of jurors. Upon the trial of a challenge to an individual juror, the juror challenged shall be sworn, if demanded by either party, and examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon, but his answer shall not afterwards be testimony against him. [C51,§2988; R60,§4773; C73,§4407; C97,§5361; C24, 27, 31, 35,§13831.]

13832 Examination of other witnesses. Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge, and the court shall determine the law and the fact, and must allow or disallow the challenge. [C51,§§2989, 2990; R60,§§4774, 4775; C73,§§4408, 4409; C97,§5362; C24, 27, 31, 35, §13832.]

13833 Order of challenges for cause. The state shall first complete its challenge for cause, and the defendant afterwards, until sixteen jurors have been obtained against whom no cause of challenge has been found to exist. [R60, §§4776, 4777; C73,§§4410, 4411; C97,§5363; C24, 27, 31, 35,§13833.]

13834 Order of challenges in general. The challenges of either party need not be all taken at once, but separately, in the following order, including in each challenge all the causes of challenge belonging to the same class: to the panel; to an individual juror for cause; to an individual juror peremptorily. [R60,§4781; C73, §4415; C97,§5367; C24, 27, 31, 35,§13834.]

13835 Peremptory challenges. Peremptory challenges shall be exercised in the same manner as is provided in the trial of civil actions. [R60,§4780; C73,§4414; C97,§5364; C24, 27, 31, 35,§13835.]

See §11469 et seq.

13836 Peremptory challenges—number. If the offense charged in the indictment or information is or may be punishable with death or imprisonment for life, the state and defendant shall each have the right to peremptorily challenge eight jurors and shall strike two jurors.

If the offense charged be any other felony, or if it be a misdemeanor involving a violation of the statutes relative to intoxicating liquors, the state and the defendant shall each have the right to peremptorily challenge four jurors and shall strike two jurors.

If the offense charged be a misdemeanor other than that specified above, the state and the defendant shall each have the right to peremptorily challenge two jurors and shall strike two jurors. [R60,§4779; C73,§4413; C97,§5365; C24, 27, 31, 35,§13836.]

13836.1 Multiple charges. If the indictment charges different offenses in different counts, the state and the defendant shall each have that number of peremptory challenges which they would have if the highest grade of offense charged in the indictment were the only charge. [C27, 31, 35,§13836-b1.]

13837 Clerk to prepare list—procedure. The clerk shall prepare a list of jurors called; and, after all challenges for cause are exhausted or waived, the parties, commencing with the state, shall alternately challenge peremptorily or waive by indicating any such challenge upon the list opposite the name of the juror challenged, or by indicating the number of waiver elsewhere on the list. [R60,§4780; C73,§4414; C97,§5363; C24, 27, 31, 35,§13837.]

13838 Vacancy filled. After each challenge, sustained for cause, or made peremptorily as indicated on the list, another juror shall be called and examined for challenge for cause before a further challenge is made; and any new juror thus called may be challenged for cause and shall be subject to peremptory challenge or to being struck from the list as other jurors. [R60,§4782; C73,§4416; C97,§5366; C24, 27, 31, 35,§13838.]

13839 Reading of names. After all chal-

lenges have thus been exercised or waived and four jurors have been struck from the list the clerk shall read the names of the twelve jurors remaining who shall constitute the jury selected. [C24, 27, 31, 35,§13839.]

13840 Bias in favor of party—waiver. Bias in a juror against either party is no cause of challenge by the other, and may be waived by the party against whom it exists. [R60,§4784; C73, §4418; C97,§5368; C24, 27, 31, 35,§13840.]

13841 Jurors sworn. When twelve jurors are accepted they shall be sworn to try the issues. [R60,§4783; C73,§4417; C97,§5369; C24, 27, 31, 35,§13841.]

CHAPTER 645

TRIAL

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13842 Joint indictment — separate trials. When two or more defendants are jointly indicted for felony, any defendant requiring it may be tried separately; in other cases defendants jointly indicted may be tried separately or jointly, in the discretion of the court. [C51, §2992; R60,§4789; C73,§4424; C97,§5375; C24, 27, 31, 35,§13842.]

13843 Continuances. The provisions of the code of civil procedure relative to the continuances of the trial of civil causes shall apply to the continuance of criminal actions, but no judgment for costs shall be rendered against a defendant on account thereof, except as in this code otherwise provided. [C73,§4419; C97, §5370; C24, 27, 31, 35,§13843.]

Continuances, §11442 et seq.
C97,§5370, editorially divided

13844 Time to prepare for trial. The defendant shall, if he demands it upon entering his plea, be entitled to three days in which to prepare for trial. [C73,§4419; C97,§5370; C24, 27, 31, 35,§13844.]

13845 Mode and manner of trial. All the provisions relating to mode and manner of the trial of civil actions, report thereof, translation of the shorthand reporter's notes, the making such report and translation a part of the record, and in all other respects, apply to the trial of criminal actions. [R60,§4809; C73,§4436; C97, §5371; C24, 27, 31, 35,§13845.]

13846 Order of trial. The jury having been impaneled and sworn, the trial must proceed in the following order:

1. *Reading indictment and plea.* The clerk or county attorney must read the indictment and state the defendant's plea to the jury.

2. *Statement of state's evidence.* The county attorney may briefly state the evidence by which he expects to sustain the indictment.

3. *Statement of defendant's evidence.* The attorney for the defendant may then briefly state his defense, and the evidence by which he expects to sustain it.

4. *Offer of state's evidence.* The state may then offer the evidence in support of the indictment.

5. *Offer of defendant's evidence.* The defendant or his counsel may then offer his evidence in support of his defense.

6. *Rebutting or additional evidence.* The parties may then, respectively, offer rebutting evidence only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original case. [C51,§2991; R60,§4785; C73,§4420; C97,§5372; C24, 27, 31, 35, §13846.]

Referred to in §§13851, 13855
C97,§5372, editorially divided

13847 Arguments. When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the county attorney must commence, the defendant follow by one or two counsel, at his option, unless the court permit him to be heard by a larger number, and the county attorney conclude, confining himself to a response to the arguments of the defendant's counsel. Where two or more defendants are on trial for the same offense, they may be heard by one counsel each. [R60,§4785; C73, §4420; C97,§5372; C24, 27, 31, 35,§13847.]

Referred to in §13855

13848 Closing argument by defendant. When the affirmative of the issue is with the defendant, the court may, in its discretion, award to

the defendant the last argument. [R60,§4785; C73,§4420; C97,§5372; C24, 27, 31, 35,§13848.]

Referred to in §13855

13849 Time for argument. The court shall not restrict counsel as to time in their arguments to the jury. [R60,§4788; C73,§4423; C97, §5372; C24, 27, 31, 35,§13849.]

Similar provision, §11490

13850 Instructions. Upon the conclusion of the arguments, the court shall charge the jury in writing, without oral explanation or qualification, stating the law of the case. [R60,§4785; C73,§4420; C97,§5372; C24, 27, 31, 35,§13850.]

13851 Notice of additional testimony. The county attorney, in offering the evidence in support of the indictment in the order prescribed in section 13846, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant, or his attorney of record if the defendant be not found within the county, a notice in writing stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial. [R60, §4786; C73,§4421; C97,§5373; S13,§5373; C24, 27, 31, 35,§13851.]

S13,§5373, editorially divided

13852 Insufficient time for notice—motion. Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit. [R60,§4786; C73, §4421; C97,§5373; S13,§5373; C24, 27, 31, 35, §13852.]

13853 Election as to continuance. If the court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify. [C97,§5373; S13,§5373; C24, 27, 31, 35,§13853.]

13854 Examination—limitation. If said defendant shall not elect to have said cause continued, the county attorney may examine said witness in the same manner and with the same effect as though four days notice had been given defendant or his attorney as hereinbefore provided, except the county attorney, in the examination of witnesses, shall be strictly confined to the matters set out in his motion. [C97,§5373; S13,§5373; C24, 27, 31, 35,§13854.]

13855 Former conviction or acquittal—order of trial. When the defendant's only plea is a former conviction or acquittal, the order prescribed in sections 13846 to 13848, inclusive, shall be reversed, and the defendant shall first offer his evidence in support of his defense. [R60,§4787; C73,§4422; C97,§5374; C24, 27, 31, 35,§13855.]

13856 View of premises by jury. When the court is of the opinion that it is proper the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which shall be shown them by a person appointed by the court for that purpose. [C51,§3009; R60,§4800; C73, §4432; C97,§5380; C24, 27, 31, 35,§13856.]

Similar provision, §11496
C97,§5380, editorially divided

13857 Officer sworn. The officers must be sworn to suffer no person to speak to or communicate with the jury on any subject connected with the trial, nor to do so themselves, except the person appointed by the court for that purpose, and that only to show the place to be viewed, and to return them into court without unnecessary delay at a specified time. [R60,§4800; C73, §4432; C97,§5380; C24, 27, 31, 35,§13857.]

13858 Juror as witness—grounds to set aside verdict. If a juror have personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial, and if, during the retirement of the jury, a juror declares any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court, and the juror must be sworn as a witness and examined in the presence of the parties, if his evidence be admissible; and in support of a motion to set aside a verdict, proof of such declaration may be made by any juror. [C51,§3010; R60,§4801; C73,§4433; C97,§5381; C24, 27, 31, 35,§13858.]

Applicable in civil cases, §11496.1

13859 Sickness of juror. If before the conclusion of a trial a juror becomes sick so as to be unable to perform his duty, the court may order him to be discharged, and in such case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled. [C51,§3013; R60,§4804; C73,§4443; C97,§5388; C24, 27, 31, 35, §13859.]

Similar provision, §11499

13860 Separation of jury. The jurors sworn to try an indictment, in the discretion of the court, at any time before the final submission of the cause to them, may be permitted to separate, except where one of the parties objects thereto, or be kept together in charge of proper officers. [C51,§3011; R60,§4802; C73,§4434; C97,§5382; C24, 27, 31, 35,§13860.]

Similar provision, §11498
C97,§5382, editorially divided

13861 Officer sworn. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, and to return them into court at the time

to which it adjourns. [R60,§4802; C73,§4434; C97,§5382; C24, 27, 31, 35,§13861.]

13862 Admonition as to communications. The jury, whether permitted to separate or kept together in charge of sworn officers, must be admonished by the court that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial, and that any and all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them. [C51,§3012; R60,§4803; C73,§4435; C97,§5383; C24, 27, 31, 35,§13862.]

Similar provision, §11498
C97,§5383, editorially divided

13863 Admonition repeated. Said admonition must be given or referred to by the court at each adjournment during the progress of the trial previous to the final submission of the cause to the jury. [R60,§4803; C73,§4435; C97, §5383; C24, 27, 31, 35,§13863.]

13864 Questions of law and fact. On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court, saving the right of the defendant and the state to except; questions of facts are to be tried by jury. [C51,§3016; R60,§4812; C73,§4439; C97,§5385; C24, 27, 31, 35,§13864.]

Libel, §13262
C97,§5385, editorially divided

13865 Jury bound by instructions. Although the jury has the power to find a general verdict which includes questions of law as well as fact, it is bound, nevertheless, to receive as law what is laid down as such by the court. [C51,§3016; R60,§4812; C73,§4439; C97,§5385; C24, 27, 31, 35, §13865.]

13866 Higher offense proved—procedure. If it appears by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged and all proceedings on the indictment to be suspended, and order the defendant to be committed or continued on bail to answer any new indictment which may be found against him for the higher offense. [C51,§3000; R60,§4791; C73,§4430; C97, §5378; C24, 27, 31, 35,§13866.]

13867 New indictment not found — procedure. If the indictment for the higher offense be not found and presented at or before the next term, the court must proceed to try the defendant on the original indictment. [C51, §3001; R60,§4792; C73,§4431; C97,§5379; C24, 27, 31, 35,§13867.]

13868 Lack of jurisdiction — no offense charged. The court may also discharge the jury where it appears that it has not jurisdiction of the offense, or that the facts as charged in the indictment do not constitute an offense punishable by law. [C51,§3002; R60,§4793; C73, §4444; C97,§5389; C24, 27, 31, 35,§13868.]

13869 Crime committed in another state. If the jury be discharged because the court has not jurisdiction of the offense charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the defendant must be discharged, or ordered to be retained in custody a reasonable time until the county attorney shall have a reasonable opportunity to inform the chief executive of the state in which the offense was committed of the facts, and for said officer to require the delivery of the offender. [C51,§3003; R60,§4794; C73,§4445; C97,§5390; C24, 27, 31, 35,§13869.]

13870 Crime committed in another county. If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as shall be reasonable to await a warrant from the proper county for his arrest, or, if the offense be bailable, he may be admitted to bail in an undertaking with sufficient sureties that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly designated in the undertaking, to surrender himself upon the warrant, if issued, or that the bail will forfeit such sum as the court may fix, to be mentioned in the undertaking. [C51, §3004; R60,§4795; C73,§4446; C97,§5391; C24, 27, 31, 35,§13870.]

Referred to in §13871

13871 Papers transmitted to proper county. In such case, the clerk must transmit, forthwith, a certified copy of the indictment, and all the papers in the action filed with him, except the undertaking mentioned in section 13870, to the county attorney of the proper county. [C51, §3005; R60,§4796; C73,§4447; C97,§5392; C24, 27, 31, 35,§13871.]

13872 Defendant discharged—procedure. If the defendant be not arrested on a warrant from the proper county, he shall be discharged from custody, and his bail, if any, exonerated, or money deposited instead of bail refunded, as the case may be, and the sureties in the undertaking must be discharged. [C51,§3006; R60, §4797; C73,§4448; C97,§5393; C24, 27, 31, 35, §13872.]

13873 Defendant arrested — procedure. If he be arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate. [C51,§3007; R60,§4798; C73, §4449; C97,§5394; C24, 27, 31, 35,§13873.]

See §13482

13874 No offense charged — resubmission. If the jury be discharged because the facts set forth do not constitute an offense punishable by law, the court must order the defendant discharged and his bail, if any, exonerated, or, if he has deposited money instead of bail, that the money deposited be refunded, unless in its opin-

ion a new indictment can be framed upon which the defendant can be legally convicted, in which case the court may direct that the case be submitted to the same or another grand jury. [C51, §3008; R60,§4799; C73,§4450; C97,§5395; C24, 27, 31, 35,§13874.]

13875 Defendant committed during trial. When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after such appearance, order him committed to the custody of the proper officer to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly. [C51,§3020; R60,§4816; C73,§4451; C97,§5396; C24, 27, 31, 35,§13875.]

13876 Instructions. The rules relating to the instruction of juries in civil cases shall be applicable to the trial of criminal prosecutions. [C51,§§3017, 3018; R60,§§4813, 4814; C73, §§4440, 4441; C97,§5386; C24, 27, 31, 35,§13876.]

In civil cases, §11491 et seq.

13877 Decision in court—retirement. After hearing the charge, the jury may either decide in court or retire for deliberation. [C51,§3019; R60,§4815; C73,§4442; C97,§5387; C24, 27, 31, 35, §13877.]

C97,§5387, editorially divided

13878 Officers sworn. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place without food or drink, water excepted, unless directed by the court, and not to suffer any person to speak to or communicate with them, nor speak to or communicate with them themselves except to ask them whether they have agreed upon their verdict, and not to communicate to anyone the state of their deliberation or the verdict agreed upon, until after the same shall have been declared in open court, and received by the court, and to return them into court when they shall have so agreed upon their verdict, unless, by permission of the court, they be sooner discharged. [C51,§3019; R60, §4815; C73,§4442; C97,§5387; C24, 27, 31, 35, §13878.]

Similar provision, §11497

CHAPTER 646

WITNESSES

13879 Subpoenas for witnesses.
13880 Defense witnesses at expense of state.
13881 Witnesses for defendant—form of subpoena.
13882 Witnesses for defendant in criminal cases.
13883 Service of subpoena.
13884 Breaking in to serve subpoena.
13885 Disobedience of witness.
13886 Civil liability.
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13888 Depositions.
13889 Perpetuating testimony.
13890 Defendant as witness.
13892 Cross-examination.
13893 Attendance of witnesses outside state.
13894 Costs paid in advance.
13895 Order to enforce attendance.
13896 Fees advanced—protection from service of process.

13879 Subpoenas for witnesses. A magistrate in a criminal action before him, and the clerk of court in any criminal action pending therein, shall issue blank subpoenas for witnesses, signed by him, with the seal of the court if by the clerk, and deliver as many of them as requested to the defendant or his attorney or the attorney for the state. They may be served in any part of the state. [C51,§§3168, 3170; R60,§§4950, 4951, 4958; C73,§§4561, 4562, 4569; C97,§5492; C24, 27, 31, 35,§13879.]

C97,§5492, editorially divided

13880 Defense witnesses at expense of state. Witnesses for the defense shall be subpoenaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending, made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other disposition of the case. The board of supervisors shall not allow any claims for fees of witnesses not thus authorized. [C51,§§3168, 3170; R60,§§4950, 4951, 4958; C73,§§3818, 4561, 4562; C97,§5492; C24, 27, 31, 35,§13880.]

13881 Witnesses for defendant — form of subpoena. Subpoenas for defendant's witnesses shall show whether they are summoned on the order of the court. [C51,§3170; R60,§4950; C73, §4562; C97,§5492; C24, 27, 31, 35,§13881.]

13882 Witnesses for defendant in criminal cases. Witnesses subpoenaed for the defendant in criminal cases may demand their fees in advance as in civil cases, unless the subpoena shows that it is issued under the order of the judge. [C97,§1298; C24, 27, 31, 35,§13882.]

Fees in advance in civil cases, §11881

13883 Service of subpoena. A peace officer must serve without delay within his county, city, or town any subpoena issued in a criminal action, delivered to him for service, and make written return thereof, stating the time, place, and manner of service, but a subpoena may be served by any other adult person. Service thereof is made by delivering a copy and showing the original to the witness. [C51,§§3171, 3172; R60,§§4952, 4953; C73,§§4563, 4564; C97,§5493; C24, 27, 31, 35,§13883.]

13884 Breaking in to serve subpoena. If a witness conceal himself to avoid the service of a subpoena, the officer may break open doors or windows for the purpose of making service. [C51,§3176; R60,§4954; C73,§4565; C97,§5494; C24, 27, 31, 35,§13884.]

13885 Disobedience of witness. Disobedience to a subpoena, or refusal to be sworn or to answer as a witness, may be punished by the court or magistrate as a contempt, as provided in the civil procedure. [C51,§3174; R60,§4955; C73,§4566; C97,§5495; C24, 27, 31, 35,§13885.]

Contempts, ch 536

13886 Civil liability. A witness willfully disobeying a subpoena in a criminal case without good cause shall be liable to the party injured for the amount of the damages sustained by such party. [C51,§3175; R60,§4956; C73, §4567; C97,§5496; C24, 27, 31, 35,§13886.]

Similar provision, §11888

13887 Forfeiture of bond. The undertakings of witnesses in criminal cases may be forfeited and enforced like the undertaking of bail. [R60, §4957; C73,§4568; C97,§5497; C24, 27, 31, 35, §13887.]

Forfeiture of bail, ch 681

13888 Depositions. A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on notice or commission, in the same manner and with like effect as in civil actions. [R60,§4960; C73,§4571; C97,§5498; C24, 27, 31, 35,§13888.]

Depositions, §11858 et seq.

13889 Perpetuating testimony. A person apprehensive of a criminal prosecution may perpetuate testimony in his favor in the same manner, and with like effect, as may be done in apprehension of any civil action. [R60,§4961; C73,§4572; C97,§5499; C24, 27, 31, 35,§13889.]

Perpetuating testimony, §11400 et seq.

13890 Defendant as witness. Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state. [C51,§2388; R60,§3978; C73,§3636; C97,§5484; C24, 27, 31, 35,§13890.]

13891 Rep. by 43GA, ch 269

13892 Cross-examination. When the defendant testifies in his own behalf, he shall be subject to cross-examination as an ordinary witness, but the state shall be strictly confined therein to the matters testified to in the examination in chief. [C73,§4238; C97,§5485; C24, 27, 31, 35,§13892.]

13893 Attendance of witnesses outside state. When a petition is filed in the office of a clerk of the district court upon the relation and oath of a prosecuting attorney in another state, which, by its laws, has heretofore or may hereafter make provision for commanding persons within its borders to attend and testify in a criminal action in this state, setting forth that there is a criminal action pending in the courts of such state wherein a person residing or being within the county wherein said court is held is a material witness for the state in such action, to which there is attached a certified copy of the indictment therein, a judge of said court shall issue an order fixing a time and place for a hearing on said petition, which may be during a session of court or in vacation, and thereupon the clerk shall prepare a notice requiring the said witness to appear before the said judge at the time and place specified in said order to make defense thereto and shall deliver the same to the sheriff of said county for service upon said person. [S13,§5499-b; C24, 27, 31, 35, §13893.]

13894 Costs paid in advance. All costs of said proceeding, which shall be estimated by the clerk, shall be paid to the clerk at the time said petition is filed. [S13,§5499-c; C24, 27, 31, 35,§13894.]

13895 Order to enforce attendance. If it shall be shown upon said hearing that the said person is a material and necessary witness for the prosecution in said case, the court shall enter an order commanding said person to appear and testify in said cause in the court in which such criminal action is pending at a certain named time and place, of which order the said person shall take notice. [S13,§5499-d; C24, 27, 31, 35,§13895.]

13896 Fees advanced—protection from service of process. If any person on whom such order has been made, having been tendered by the party asking for the order ten cents for each mile traveled to and from such court, and the sum of five dollars for each day that his attendance is required, including the time going to and returning from the place of trial, the number of days to be specified in such order, shall unreasonably neglect to attend and testify in such court, he shall be punished in the manner provided for the punishment of disobedience of any order issued from the office of the clerk of the district court; provided that the laws of the state in which the trial is to be held give to persons coming into the state, under such order, protection from the service of papers and arrest. [S13,§5499-e; C24, 27, 31, 35,§13896.]

CHAPTER 647

EVIDENCE

13897 Rules of evidence.
13898 Obstructing highway by railroad.
13899 Rape—actual penetration.
13900 Corroboration in rape, seduction, and other crimes.
13901 Corroboration of accomplice.
13902 Proof of overt acts.
13903 Confession of defendant.
13904 Photographs—measurements—Bertillon system.

13897 Rules of evidence. The rules of evidence prescribed in civil procedure shall apply to criminal proceedings as far as applicable and not inconsistent with the provisions of this

chapter. [R60,§4805; C73,§§4426, 4556; C97, §5483; C24, 27, 31, 35,§13897.]

Evidence, ch 494

13898 Obstructing highway by railroad. In a prosecution against a railway company for obstructing a highway or any private way, proof that any such way is in an unsafe condition, or that it is inconvenient for travel at the place of its intersection with such railway, shall be presumptive evidence that such company has obstructed such way. [C73,§4557; C97,§5486; C24, 27, 31, 35,§13898.]

Obstruction punished, §13120

13899 Rape—actual penetration. Proof of actual penetration into the body is sufficient to sustain an indictment for rape. [C51,§2997; R60,§4101; C73,§4558; C97,§5487; C24, 27, 31, 35, §13899.]

13900 Corroboration in rape, seduction, and other crimes. The defendant in a prosecution for rape, or assault with intent to commit rape, or enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or seducing and debauching any unmarried woman of previously chaste character, cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. [C51,§2999; R60,§4103; C73,§4560; C97,§5488; C24, 27, 31, 35,§13900.]

Similar provision, §12969

13901 Corroboration of accomplice. A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof. [C51,§2998; R60,§4102; C73,§4559; C97,§5489; C24, 27, 31, 35,§13901.]

Accessories, §12895

13902 Proof of overt acts. Upon a trial for conspiracy, a defendant cannot be convicted unless one or more overt acts alleged in the indictment are proved, when required by law to constitute the offense, but other overt acts not alleged in the indictment may be given in evidence. [C51,§2996; R60,§4790; C73,§4425; C97, §5490; C24, 27, 31, 35,§13902.]

13903 Confession of defendant. The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed. [R60,§4806; C73,§4427; C97, §5491; C24, 27, 31, 35,§13903.]

13904 Photographs—measurements—Bertillon system. It shall be lawful for the sheriff of any county or the chief of police in any city in this state, to take or procure the taking of the photograph of any person held to answer on a charge of any felony, such person being in the custody of such officer, or to make and record any measurements of such prisoner, by the Bertillon or other system, and to exchange such photographs, or measurements, or copies of the same, with other sheriffs and police officers, or to distribute the same by mail for the purpose of securing evidence for the identification of such person held to answer, if the identity and past record of the said person are unknown to him; and the cost of such photographs and measurements, and of distributing the same, may be allowed by the court as a part of the costs in the case. [S13,§5499-a; C24, 27, 31, 35,§13904.]

Fingerprints, §13417.1

CHAPTER 648

INSANITY OF DEFENDANT DURING TRIAL

13905 Doubt as to sanity—procedure.
13906 Method of trial.
13907 Finding of insanity—discharge.
13908 Restored to reason—return to custody.
13909 Insanity after commitment to jail.

13905 Doubt as to sanity—procedure. If a defendant appears in any stage of the trial of a criminal prosecution, and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had upon that question. [C51,§§3260, 3261; R60,§§5015, 5016; C73,§§4620, 4621; C97,§5540; C24, 27, 31, 35,§13905.]

13906 Method of trial. Such trial shall be conducted in all respects, so far as may be, as the prosecution itself would be, except the defendant shall hold the burden of proof, and first offer his evidence and have the opening and closing argument. [R60,§5017; C73,§4622; C97,§5541; C24, 27, 31, 35,§13906.]

13907 Finding of insanity—discharge. If the accused shall be found insane, no further proceedings shall be taken under the indictment until his reason is restored, and, if his discharge will endanger the public peace or safety, the court must order him committed to the department for the criminal insane at Anamosa until he becomes sane; but if found sane, the trial upon the indictment shall proceed, and the question of the then insanity of the accused cannot be raised therein. [C51,§§3262, 3263; R60, §§5018, 5019; C73,§§4623, 4624; C97,§5542; C24, 27, 31, 35,§13907.]

13908 Restored to reason—returned to custody. If the accused is committed to the depart-

ment for the criminal insane, as soon as he becomes mentally restored, the person in charge shall at once give notice to the sheriff and county attorney of the proper county of such fact, and the sheriff, without delay, must receive and hold him in custody until he is brought to trial or judgment, as the case may be, or is legally discharged, the expense for conveying and returning him, or any other, to be paid in the first instance by the county from which he is sent, but such county may recover the same from his estate, or a relative, or another county or municipal body bound to provide for or maintain him elsewhere, and the sheriff shall be allowed for his services the same fees as are allowed for conveying convicts to the penitentiary. [C51,§§3264–3267; R60,§§5020–5023; C73, §§4625–4628; C97,§5543; C24, 27, 31, 35,§13908.]

Referred to in §13909

13909 Insanity after commitment to jail. If, after conviction for a misdemeanor and judgment of imprisonment in jail, the defendant is suspected of being insane, the same proceedings shall be taken as is provided in chapters 176 to 178, inclusive, and, if found insane, he shall be committed to the department for the criminal insane at Anamosa, and all subsequent proceedings shall be as provided in section 13908. [C97, §5544; C24, 27, 31, 35,§13909.]

CHAPTER 649

JURY AFTER SUBMISSION

13910 Papers taken by jury.
13911 Report for information.
13912 Discharge of jury—grounds.
13913 Retrial—when allowed.
13914 Adjournment pending deliberation—effect.

13910 Papers taken by jury. Upon retiring for deliberation, the jury may take with it all papers which have been received in evidence, except depositions, and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession, also any notes of the testimony or other proceedings taken in the trial by themselves or any of them. [C51,§§3021, 3022; R60,§§4817, 4818; C73, §§4452, 4453; C97,§5397; C24, 27, 31, 35,§13910.]

Similar provision, §11503

13911 Report for information. After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required must be given as provided by law, in the presence of or after oral notice to the county attorney and defendant's counsel. [C51,§3023; R60,§4819; C73, §4454; C97,§5398; C24, 27, 31, 35,§13911.]

Similar provision, §11506

13912 Discharge of jury—grounds. If, after retirement, one of the jury is taken sick so as to prevent further deliberation, or any other accident or cause occurs to prevent its being kept together, the court may discharge it; otherwise the jury cannot be discharged after the cause is submitted to it until it has agreed upon its verdict and rendered it in open court, unless, by the consent of both parties entered upon the record, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that it can agree. [C51,§§3024, 3025; R60, §§4820, 4821; C73,§§4455, 4456; C97,§5399; C24, 27, 31, 35,§13912.]

Similar provisions, §§11499, 11500

13913 Retrial—when allowed. In all cases where a jury is discharged or prevented from giving a verdict, except where the defendant is discharged during the progress of the trial, or after submission to it, the cause may be again tried at the same or another term of the court. [C51,§3026; R60,§4822; C73,§4457; C97,§5400; C24, 27, 31, 35,§13913.]

Similar provision, §11501

13914 Adjournment pending deliberation—effect. While the jury is absent, the court may adjourn from time to time as to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury is discharged, but a final adjournment of the court discharges the jury. [C51,§§3027, 3028; R60,§§4823, 4824; C73,§§4458, 4459; C97, §5401; C24, 27, 31, 35,§13914.]

Similar provision, §11504

CHAPTER 650

VERDICT

13915 General and special verdicts.
13916 Answers to interrogatories.
13917 Reasonable doubt.
13918 Reasonable doubt as to degree.
13919 Finding offense of different degree.
13920 Finding included offense.
13921 Verdict against one of several.
13922 Verdict as to several defendants.
13923 Return of jury—roll call.
13924 Presence of defendant—when necessary.
13925 Verdict rendered.
13926 Verdict insufficient—reconsideration.
13927 Informal verdict.
13928 Certainty in verdict required.
13929 Jury polled.
13930 Reading and entry of verdict—disagreement.
13931 Defendant discharged on acquittal.
13932 Acquittal on ground of insanity—commitment.

13915 General and special verdicts. The jury must render a general verdict of "guilty" or "not guilty", which imports a conviction or acquittal on every material allegation in the indictment, except upon a plea of former conviction or acquittal of the same offense, in which case it shall be "for the state" or "for the defendant", and except in cases submitted to determine the grade of the offense and, when authorized, fixing the punishment therefor. [C51,§§3032-3037; R60,§§4828-4833; C73, §§4463, 4464, 4474-4477; C97,§5405; C24, 27, 31, 35,§13915.]

C97,§5405, editorially divided

13916 Answers to interrogatories. It must also return with the general verdict answers to special interrogatories submitted by the court upon its own motion, or at the request of the defendant in prosecutions where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required. [C97,§5405; C24, 27, 31, 35,§13916.]

In civil cases, §11513

13917 Reasonable doubt. Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal. [R60, §4807; C73,§4428; C97,§5376; C24, 27, 31, 35, §13917.]

13918 Reasonable doubt as to degree. Where there is a reasonable doubt of the degree of the offense of which the defendant is proven to be guilty, he shall only be convicted of the lower degree. [R60,§4808; C73,§4429; C97,§5377; C24, 27, 31, 35,§13918.]

13919 Finding offense of different degree. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment. [C51,§2918; R60, §4835; C73,§4465; C97,§5406; C24, 27, 31, 35, §13919.]

13920 Finding included offense. In all other cases, the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment. [C51,§3039; R60,§4836; C73,§4466; C97,§5407; C24, 27, 31, 35,§13920.]

13921 Verdict against one of several. On an indictment against several, if the jury cannot agree upon a verdict as to all, it may render a verdict as to those in regard to whom it does agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury. [C51,§3040; R60,§4837; C73,§4467; C97,§5408; C24, 27, 31, 35,§13921.]

13922 Verdict as to several defendants. Upon an indictment against several defendants, any one or more may be convicted or acquitted. [C51,§3014; R60,§4810; C73,§4437; C97,§5384; C24, 27, 31, 35,§13922.]

13923 Return of jury—roll call. When the jury has agreed upon its verdict, it must be conducted into court by the officer having it in charge; the names of the jurors must then be called, and if all do not appear the rest must be discharged without giving a verdict; in such case, the cause may again be tried at the same or another term. [C51,§3029; R60,§4825; C73, §4460; C97,§5402; C24, 27, 31, 35,§13923.]

Similar provisions, §§11508, 13930

13924 Presence of defendant—when necessary. If the indictment be for a felony, the defendant must be present at the rendition of the verdict; if it be for a misdemeanor, it may be rendered in his absence. [C51,§3030; R60,§4826; C73,§4461; C97,§5403; C24, 27, 31, 35,§13924.]

13925 Verdict rendered. When the members of the jury have answered to their names, the court or the clerk shall ask them whether they have agreed upon the verdict, and if the foreman answers in the affirmative they must declare the same. [C51,§3031; R60,§4827; C73, §4462; C97,§5404; C24, 27, 31, 35,§13925.]

13926 Verdict insufficient—reconsideration. If the jury renders a verdict which is neither a general nor special one, the court may direct it to reconsider it, and it shall not be recorded until it is rendered in some form from which the intent of the jury can be clearly understood, whether to render a general verdict, or to find the facts specially and leave the judgment to the court. [C51,§§3038, 3041; R60,§§4834, 4838; C73,§§4468, 4478; C97,§5409; C24, 27, 31, 35, §13926.]

13927 Informal verdict. If the jury persists in finding an informal verdict, from which, however, it can be understood that the intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal. [C51,§3042; R60,§4839; C73,§4469; C97, §5410; C24, 27, 31, 35,§13927.]

C97,§5410, editorially divided

13928 Certainty in verdict required. No judgment of conviction can be given unless the jury expressly finds against the defendant upon the issue, or judgment is given against him upon a special verdict. [C51,§3042; R60,§4839; C73, §4469; C97,§5410; C24, 27, 31, 35,§13928.]

13929 Jury polled. When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party; in which case each member thereof shall be asked whether it is his verdict, and if anyone answers in the negative the jury must be sent out for further deliberation. [C51,§3043; R60,§4840; C73,§4470; C97,§5411; C24, 27, 31, 35,§13929.]

Similar provision, §11509

13930 Reading and entry of verdict — disagreement. When the verdict is given and is such as the court may receive, the clerk may immediately enter it in full upon the record, and must read it to the jury, and inquire of the mem-

bers thereof whether it is their verdict. If any juror disagrees, the fact must be entered upon the record and the jury again sent out. But if no disagreement is expressed, the verdict is complete and the jury must be discharged from the case. [R60,§4841; C73,§4471; C97,§5412; C24, 27, 31, 35,§13930.]

Similar provisions, §§11508, 13923

13931 Defendant discharged on acquittal. If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given. [C51,§3045; R60,§4843; C73,§4473; C97,§5413; C24, 27, 31, 35, §13931.]

13932 Acquittal on ground of insanity—commitment. If the defense is insanity of the defendant, the jury must be instructed, if it acquits him on that ground, to state that fact in its verdict. The court may thereupon, if the defendant is in custody, and his discharge is found to be dangerous to the public peace and safety, order him committed to the insane hospital, or retained in custody, until he becomes sane. [C51,§3044; R60,§4842; C73,§4472; C97, §5414; C24, 27, 31, 35,§13932.]

CHAPTER 651

EXCEPTIONS

13933 Bill of exceptions—purpose.
13934 What constitutes record—exceptions unnecessary.
13935 Grounds for exceptions.
13936 Action affecting substantial right.
13937 Bill by judge.
13938 Bill by bystanders.
13939 Time to approve bill.
13940 Modification of bill.
13941 Time allowed to prepare bill.

13933 Bill of exceptions—purpose. The office of a bill of exceptions is to make the proceedings or evidence appear of record which would not otherwise so appear. [R60,§4846; C73, §4481; C97,§5416; C24, 27, 31, 35,§13933.]

13934 What constitutes record—exceptions unnecessary. All papers pertaining to the cause and filed with the clerk, and all entries made by him in the record book pertaining to them, and showing the action or decision of the court upon them or any part of them, and the judgment, are to be deemed parts of the record, and it is not necessary to except to any action or decision of the court so appearing of record. [R60,§4847; C73,§4482; C97,§5417; C24, 27, 31, 35,§13934.]

13935 Grounds for exceptions. On the trial of an indictment, exceptions may be taken by the state or by the defendant to any decision of the court upon matters of law, in any of the following cases:

1. In disallowing a challenge to an individual juror.
2. In admitting or rejecting witnesses or evidence on the trial of any challenge.
3. In admitting or rejecting witnesses or evidence.
4. In deciding any matter of law, not purely discretionary on the trial of the issue. [C51, §3046; R60,§4844; C73,§4479; C97,§5415; C24, 27, 31, 35,§13935.]

C97,§5415, editorially divided.

13936 Action affecting substantial right. Exceptions may also be taken to any action or decision of the court which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on the trial. [R60,§4845; C73,§4480; C97,§5415; C24, 27, 31, 35,§13936.]

Similar provision, §11548

13937 Bill by judge. Either party may take an exception to any decision or action of the court, in any stage of the proceedings, not required to be and not entered in the record book, and reduce the same to writing, and tender the same to the judge, who shall sign it if true, and if signed it shall be filed with the clerk and become a part of the record of the cause. [C51, §3047; R60,§4848; C73,§4483; C97,§5418; C24, 27, 31, 35,§13937.]

C97,§5418, editorially divided

13938 Bill by bystanders. If the judge refuses to sign it, such refusal must be stated at the end thereof, and it may then be signed by two or more attorneys or officers of the court or disinterested bystanders, and sworn to by them, and filed with the clerk, and it shall thereupon become a part of the record of the cause. [R60, §4848; C73,§4483; C97,§5418; C24, 27, 31, 35, §13938.]

13939 Time to approve bill. The judge shall be allowed one clear day to examine the bill of exceptions, and the party excepting shall be allowed three clear days thereafter to procure the signatures and file the same. [R60,§4849; C73,§4484; C97,§5419; C24, 27, 31, 35,§13939.]

13940 Modification of bill. If the judge and the party excepting can agree in modifying the bill of exceptions, it shall be modified accordingly. [R60,§4850; C73,§4485; C97,§5420; C24, 27, 31, 35,§13940.]

13941 Time allowed to prepare bill. Time must be given to prepare the bill of exceptions when it is necessary; if it can reasonably be done, it shall be settled at the time of taking the exception. [R60,§4851; C73,§4486; C97, §5421; C24, 27, 31, 35,§13941.]

CHAPTER 652

NEW TRIAL

13942 Definition.
13943 Application—when made.
13944 Grounds.
13945 Effect of a new trial.

13942 Definition. A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given. [C51,§3050; R60,§4852; C73,§4487; C97,§5422; C24, 27, 31, 35,§13942.]

13943 Application—when made. The application for a new trial can be made only by the defendant, and must be made before judgment. [C51,§3053; R60,§4855; C73,§4490; C97, §5425; C24, 27, 31, 35,§13943.]

13944 Grounds. The court may grant a new trial for the following causes, or any of them:

1. When the trial has been had in the absence of the defendant, if the indictment be for a felony.
2. When the jury has received any evidence, paper, or document out of court not authorized by the court.
3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case.
4. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all the jurors.
5. When the court has misdirected the jury in a material matter of law.
6. When the verdict is contrary to law or evidence; but no more than two new trials shall be granted for this cause alone.
7. When the court has refused properly to instruct the jury.
8. When from any other cause the defendant has not received a fair and impartial trial. [C51, §3052; R60,§4854; C73,§4489; C97,§5424; C24, 27, 31, 35,§13944.]

Knowledge of juror, §13858

13945 Effect of a new trial. The granting of a new trial places the parties in the same position as if no trial had been had; all the testimony must be produced anew and the former verdict cannot be used or referred to either in the evidence or in argument. [C51,§3051; R60,§4853; C73,§4488; C97,§5423; C24, 27, 31, 35, §13945.]

CHAPTER 653

ARREST OF JUDGMENT

13946 "Motion in arrest" defined—grounds.
13947 Time of making motion.
13948 On motion of court.
13949 Defendant held to answer.

13946 "Motion in arrest" defined—grounds. A motion in arrest of judgment is an application to the court in which the trial was had, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty, and shall be granted when upon the whole record no legal judgment can be pronounced. [C51,§3054; R60,§4856; C73,§4491; C97,§5426; C24, 27, 31, 35,§13946.]

13947 Time of making motion. The motion may be made at any time before or after judgment, during the same term. [R60,§4859; C73, §4494; C97,§5429; C24, 27, 31, 35,§13947.]

13948 On motion of court. The court may also, upon its own observation of any of these grounds, arrest the judgment on its own motion. [C51,§3055; R60,§4857; C73,§4492; C97,§5427; C24, 27, 31, 35,§13948.]

13949 Defendant held to answer. If the court is of opinion from the evidence on the trial that the defendant is guilty of a public offense of which no legal conviction can be had on the indictment, he may be held to answer the offense in like manner as upon a preliminary examination. [C51,§3057; R60,§4858; C73,§4493; C97,§5428; C24, 27, 31, 35,§13949.]

CHAPTER 654

JUDGMENT

13950 Judgment of acquittal—time for.
13951 Judgment of conviction—time for.
13952 Presence of defendant.
13953 Forfeiture of bail—warrant of arrest.
13954 Defendant arrested.
13955 Appearance for judgment — showing of cause.
13956 What may be shown for cause.
13957 Insanity.
13958 New trial—motion in arrest.
13958.1 Motions—proceedings in vacation.
13958.2 Judgment entered.
13959 Cumulative sentences.
13960 Indeterminate sentences.
13961 Sentences for two or more offenses.
13962 Discretion as to sentence.
13963 Place of commitment.
13964 Imprisonment for fine.
13965 Commitment to jail of another county.
13966 Allowance of bail upon appeal.
13968 Costs—when payable by state.

13950 Judgment of acquittal—time for. Upon a verdict of not guilty for the defendant, or special verdict upon which a judgment of acquittal must be given, the court must render judgment of acquittal immediately. [R60,§4860; C73,§4495; C97,§5430; C24, 27, 31, 35,§13950.]

13951 Judgment of conviction—time for. Upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction must be rendered, the court must fix a time for pronouncing judgment, which must be at least three days after the verdict is rendered, if the court remains in session so long, or, if not, as remote a time as can reasonably be allowed; but in no case can it be pronounced in less than six hours after the verdict is rendered, unless defendant consent thereto. [C51, §3058; R60,§§4861, 4862; C73,§4496; C97,§5431; C24, 27, 31, 35,§13951.]

Suspension of sentence, §3800 et seq.

13952 Presence of defendant. When judgment is pronounced, if the conviction be for a felony, the defendant must be personally present; if for a misdemeanor, he need not. [C51, §3059; R60,§4863; C73,§4497; C97,§5432; C24, 27, 31, 35,§13952.]

13953 Forfeiture of bail—warrant of arrest. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail or money deposited, may make an order directing the clerk, on the application of the county attorney at any time thereafter, to issue a warrant into one or more counties for his arrest, which may be substantially in the following form:

County of .....
The State of Iowa.

To any peace officer in the state:

A..... B....., having been duly convicted on the....day of....., A. D....., in the district court of ..... county, of the crime of (here designate it generally, as in the indictment).

You are hereby commanded to arrest the said A..... B..... and bring him before said court for judgment, if it be then in session, or, if not, to deliver him into the custody of the sheriff of said county.

Given under my hand and seal of said court, at my office in ....., in said county, this .....day of....., A. D.....

[Seal.] .....
Clerk.

The warrant may be served in any county in the state. [C51,§§3061–3063; R60,§§4865–4868; C73,§§4498–4501; C97,§5433; C24, 27, 31, 35, §13953.]

Approval of warrant and expenses, §§1225.04, 1225.05

13954 Defendant arrested. The officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant. [C51,§3064; R60,§4869; C73,§4502; C97,§5434; C24, 27, 31, 35,§13954.]

13955 Appearance for judgment—showing of cause. When the defendant appears for judgment, he must be informed by the court, or the clerk under its direction, of the nature of the indictment, his plea, and the verdict, if any, thereon, and be asked whether he has any legal cause to show why judgment should not be pronounced against him. [C51,§3065; R60, §4870; C73,§4503; C97,§5435; C24, 27, 31, 35, §13955.]

13956 What may be shown for cause. He may show for cause against the judgment that he is insane, or any sufficient ground for a new trial, or in arrest of judgment. [R60,§4871; C73,§4504; C97,§5436; C24, 27, 31, 35,§13956.]

13957 Insanity. If the court is of opinion that there is reasonable ground for believing him insane, the question of his insanity shall be determined as provided in this code, and if he is found to be insane, such proceedings shall be had as are herein directed. [R60,§4872; C73, §4505; C97,§5437; C24, 27, 31, 35,§13957.]

Insanity of defendant, ch 648

13958 New trial—motion in arrest. If he moves for a new trial, or in arrest of judgment, the court shall defer the judgment and proceed to hear and decide the motions. [C51,§3066; R60,§§4873, 4874; C73,§§4506, 4507; C97,§5438; C24, 27, 31, 35,§13958.]

C24,§13958, editorially divided

13958.1 Motions—proceedings in vacation. Motions for new trial, or in arrest of judgment, in criminal causes, may be disposed of in vacation at any place within the judicial district with the same force and effect as though done in term time, including the imposition of sentence and the rendition of final judgment. The record of such proceedings in vacation shall be substantially as provided in section 13672. [C31, 35,§13958-d1.]

13958.2 Judgment entered. If no sufficient cause is shown why judgment should not be pronounced, and none appears to the court upon the record, judgment shall be rendered. [C51, §3066; R60,§§4873, 4874; C73,§§4506, 4507; C97, §5438; C24,§13958; C27, 31, 35,§13958-a1.]

Suspension of sentence, §3800 et seq.

13959 Cumulative sentences. If the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses. [C51,§3070; R60,§4880; C73,§4508; C97,§5439; C24, 27, 31, 35, §13959.]

13960 Indeterminate sentences. When any person over sixteen years of age is convicted of a felony, except treason or murder, the court imposing a sentence of confinement in the penitentiary, men's or women's reformatory shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime

of which the prisoner was convicted. [S13, §5718-a13; C24, 27, 31, 35,§13960.]

Referred to in §13961
Further exception in case of rape, §§12966, 12968
S13,§5718-a13, editorially divided

13961 Sentences for two or more offenses. If a person be sentenced for two or more separate offenses and the second or further term is ordered to begin at the expiration of the first and such succeeding term of sentence is specified in the order of commitment, the several terms shall for the purpose of section 13960 be construed as one continuous term of imprisonment. [S13,§5718-a13; C24, 27, 31, 35,§13961.]

13962 Discretion as to sentence. Where one is convicted of a felony that is punishable by imprisonment in the penitentiary, or by fine, or by imprisonment in the county jail, or both, the court may impose the lighter sentence if it shall so elect. [S13,§5718-a13; C24, 27, 31, 35, §13962.]

13963 Place of commitment. Any male person who shall be committed to the penitentiary, except those convicted of murder, treason, sodomy, or incest, and who at the time of commitment is between the ages of sixteen and thirty years, and who has never before been convicted of a felony, shall be confined in the men's reformatory; provided, however, that persons between the ages of sixteen and thirty years convicted of rape, robbery, or of breaking and entering a dwelling house in the nighttime with intent to commit a public offense therein, may, as the particular circumstances may warrant, in the discretion of the court, be committed to either the men's reformatory at Anamosa, or the penitentiary at Fort Madison. [S13,§5718-a5; C24, 27, 31, 35,§13963.]

13964 Imprisonment for fine. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine. [C51,§3071; R60,§4881; C73,§4509; C97,§5440; C24, 27, 31, 35, §13964.]

13965 Commitment to jail of another county. When a person is to be committed to jail, if there is no jail or no sufficient one in the county where the party would be committed under the ordinary provisions of law, the court or magistrate committing may order him to be committed to the jail of some other county, which shall be the one which is most convenient and safe, and the county to which the cause originally belonged shall be liable for all the expenses thereof. [C51,§3073; R60,§4884; C73,§4510; C97, §5441; C24, 27, 31, 35,§13965.]

13966 Allowance of bail upon appeal. In all cases, except murder in the first degree and treason, the court rendering judgment must make an order fixing the amount in which bail must be taken, and there shall be no execution of the judgment until such order is made. [R60, §4885; C73,§4511; C97,§5442; C24, 27, 31, 35, §13966.]

Similar provision, §13610

13967 Transferred. Now appears as §5191.1

13968 Costs—when payable by state. All costs and fees incurred in any criminal case brought against an inmate of any state institution for a crime committed while confined in such institution shall be paid out of the state treasury from the general fund in case the prosecution fails, or where such costs and fees cannot be made from the person liable to pay the same, the facts being certified by the clerk of the district court under his seal of office to the state comptroller, including a statement of the amount of fees or costs incurred, such statement to be approved by the presiding judge in writing appended thereto or indorsed thereon. [C24, 27, 31, 35,§13968.]

Similar provision, §10638

CHAPTER 655

LIEN OF JUDGMENTS AND STAY OF EXECUTIONS

13969 Fines lien on real estate.
13970 Stay of execution.

13969 Fines lien on real estate. Judgments for fines, in all criminal actions rendered, are liens upon the real estate of the defendant, and shall be entered upon the lien index in the same manner and with like effect as judgments in civil actions. [R60,§5003; C73,§4609; C97,§5531; C24, 27, 31, 35,§13969.]

Lien book, §10830; lien of judgments, §11602 et seq.

13970 Stay of execution. The defendant may have a stay of execution for the same length of time and in the same manner as provided by law in civil actions, and with like effect, and the same proceedings may be had therein. [R60, §5004; C73,§4610; C97,§5532; C24, 27, 31, 35, §13970.]

Stay of execution, §11706 et seq.

CHAPTER 656

EXECUTIONS

13971 Copy of judgment as execution.
13972 Executions within county of trial.
13973 Executions outside county of trial.
13974 Record of discharge.
13975 Preventing escape—recapture.
13976 Execution for fine.
13977 Execution for abatement of nuisance.

13971 Copy of judgment as execution. When a judgment of imprisonment, either in the penitentiary or county jail, is pronounced, an execution, consisting of a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution. [C51,§3074; R60,§4886; C73,§4512; C97,§5443; C24, 27, 31, 35,§13971.]

13972 Executions within county of trial. A judgment for imprisonment, or for imprisonment until a fine is paid, to be executed in the county where the trial is had, shall be executed by the sheriff thereof, and return made upon the execution, which shall be delivered to and filed by the clerk of said court. [C51,§§3075–3077; R60,§§4897–4899; C73,§§4513–4515; C97,§5444; C24, 27, 31, 35,§13972.]

Imprisonment for fine, §13964
C97,§5444, editorially divided

13973 Executions outside county of trial. Under all other judgments for imprisonment, the sheriff shall deliver a certified copy of the execution with the body of the defendant to the keeper of the jail or penitentiary in which the defendant is to be imprisoned in execution of the judgment, and take his receipt therefor on a duplicate copy thereof, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon, and a minute of said return shall be entered by the clerk as a part of the record of the proceedings in the cause in which the execution issued. [C51,§3077; R60,§§4898, 4899, 4901; C73,§§4514, 4515; C97,§5444; C24, 27, 31, 35, §13973.]

13974 Record of discharge. When such defendant is discharged from custody, the jailer or warden of the penitentiary shall make return of such fact to the proper court, and an entry thereof shall be made by its clerk as is required in the first instance. [C97,§5444; C24,27,31,35,§13974.]

13975 Preventing escape—recapture. The sheriff, or his deputy, while conveying the defendant to the proper prison, has the same authority to require the assistance of any citizen of the state in securing the defendant, and retaking him if he escapes, as if he was in his own county; and every person who neglects or refuses to assist him when so required shall be punishable accordingly. [C51,§3078; R60,§4900; C73,§4516; C97,§5445; C24, 27, 31, 35,§13975.]

Punishment, §12894

13976 Execution for fine. Upon a judgment for a fine, an execution may be issued as upon a judgment in a civil case, and return thereof shall be made in like manner. [R60,§4902; C73, §4518; C97,§5446; C24, 27, 31, 35,§13976.]

Executions, ch 498

13977 Execution for abatement of nuisance. When the judgment is for the abatement or removal of a nuisance, or for anything other than the payment of money by the defendant, an execution consisting of a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize and require him to execute such judgment, and he shall return the same, with his doings under the same thereon indorsed, to the clerk of the court in which the judgment was rendered, within seventy days after the date of the certificate of such certified copy, except as hereinbefore provided for. [R60,§4903; C73,§4519; C97,§5447; C24, 27, 31, 35,§13977.]

CHAPTER 657

EXECUTION OF DEATH PENALTY

13978 Time of execution.
13979 Record sent governor.
13980 Copy of judgment authority for execution.
13981 Reprieve or suspension.
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13983 Finding of commissioners.
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13985 Executive warrant of execution.
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13991 Proceedings on appeal.
13992 Proceedings on affirmance—issuance of warrant.
13993 Execution of warrant.

13978 Time of execution. When the court or jury shall direct that a defendant be punished by death, the court pronouncing judgment shall fix the day of the execution thereof, which shall not be less than one year after the day on which the judgment is rendered, and not longer than fifteen months, during which time the defendant shall be imprisoned in the penitentiary. [C97,§4732; C24, 27, 31, 35,§13978.]

13979 Record sent governor. Immediately after entry of judgment of death, the court ren-

dering the same must transmit by mail to the governor a copy of the indictment, plea, verdict, judgment, and testimony in the case. [C97, §4733; C24, 27, 31, 35,§13979.]

13980 Copy of judgment authority for execution. When a judgment of death is pronounced, a certified copy of the entry thereof in the record book must be furnished to the officer whose duty it is to execute the same, who shall proceed accordingly, and no other warrant or authority is necessary to require or justify the execution. [C97,§4734; C24, 27, 31, 35,§13980.]

13981 Reprieve or suspension. The only officers who shall have power to reprieve or suspend the execution of a judgment of death are the governor and, as provided in this chapter, the warden of the penitentiary, except in cases of appeal to the supreme court. [C97, §4735; C24, 27, 31, 35,§13981.]

13982 Insanity or pregnancy. When the warden of the penitentiary is satisfied that there are reasonable grounds for believing that a defendant in his charge under sentence of death is insane or pregnant, he shall notify the commissioners of insanity of the county wherein the penitentiary is located, who shall be sworn by the warden well and truly to inquire into the facts as to the insanity or pregnancy of the defendant, as the case may be, and return a true report of their findings. [C97,§4736; C24, 27, 31, 35,§13982.]

13983 Finding of commissioners. The commissioners, after being sworn, shall examine the defendant and hear any evidence that may be presented, and may examine the medical attendants at the penitentiary, if necessary, to ascertain the facts, and make report thereon in writing, signed by not less than a majority of them, finding as to the fact of insanity or pregnancy. [C97,§4737; C24, 27, 31, 35,§13983.]

13984 Execution suspended. If the report does not show the defendant to be insane or pregnant, the warden shall not suspend the execution; but if it does, he shall suspend the execution, and immediately transmit the report to the governor. [C97,§4738; C24, 27, 31, 35, §13984.]

13985 Executive warrant of execution. When a judgment of death from any cause has not been executed on the day appointed by the court therefor, the governor, by a warrant under the seal of the state, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution. [C97,§4739; C24,27,31,35,§13985.]

13986 Time and manner of execution. A judgment of death must be executed by the sheriff of the county in which the judgment was rendered, or his deputy, within the walls of the penitentiary where the defendant is confined, or within a yard or inclosure adjoining thereto, on the day fixed in the judgment, between sunrise and sunset, by hanging by the neck until dead. [C97,§4740; C24, 27, 31, 35, §13986.]

13987 Witnesses to execution. The sheriff or his deputy must, at least three clear days before executing a judgment of death, notify the judge of the district court who tried the case, or, if he be not in office, another judge of such court, the county attorney and the clerk of the district court of the county in which the judgment was rendered, the sheriff of the county in which the offense was committed, if other than that in which judgment was rendered, and two physicians and twelve respectable citizens of the state to be selected by him to be present as witnesses at such execution. He must also, at the request of the defendant, permit one or more ministers of the gospel, named by him, and any of his relatives, to attend the execution, and also such magistrates, peace officers, and guards as the sheriff shall deem proper, but no minor, and no person other than those herein authorized, shall be present. [C97,§4741; C24, 27, 31, 35,§13987.]

13988 Certificate of execution. The sheriff or his deputy executing the judgment of death must prepare and sign with his name of office a certificate, setting forth the time and place of the execution, and that judgment was executed upon the defendant according to the foregoing provisions, and cause the certificate to be signed by the public officers, and at least twelve persons, not relations of the defendant, who witnessed the same. [C97,§4742; C24, 27, 31, 35, §13988.]

13989 Certificate filed and published. The sheriff or his deputy executing such judgment must cause the certificate to be filed in the office of the clerk of the district court of the county in which the judgment was rendered, and cause a copy thereof to be published in one newspaper printed at the capital of the state, and in one in his county. [C97,§4743; C24, 27, 31, 35,§13989.]

13990 Stay of execution by appeal. An appeal from a judgment of death shall stay the infliction of that punishment, but the defendant is to be retained in custody without bail to abide the judgment thereon. [C97,§4744; C24, 27, 31, 35,§13990.]

13991 Proceedings on appeal. When an appeal is taken from a judgment of death, the clerk of the district court in which it was rendered shall at once give the defendant or his attorney a certificate, under the seal of the court, certifying that fact, and the sheriff or other officer having the defendant in custody must, upon the delivery to him of the certificate, suspend further proceedings on the judgment until final judgment on the appeal is certified to him by the clerk of the supreme court. [C97,§4745; C24, 27, 31, 35,§13991.]

13992 Proceedings on affirmance—issuance of warrant. When such judgment is affirmed, the supreme court must cause a copy of its judgment to be delivered to the governor, and to the sheriff whose duty it is to execute such judg-

ment, signed by the clerk thereof and under seal of the court, and the governor shall issue a warrant of execution under the seal of the state, and transmit it by messenger or mail to the sheriff whose duty it is to execute the judgment, directing him, on a day and at an hour therein named, not earlier than the day fixed by the district court, to execute such judgment in the manner required by law. [C97, §4746; C24, 27, 31, 35, §13992.]

C97,§4746, editorially divided

13993 Execution of warrant. The sheriff shall execute such warrant in the manner provided in this chapter, and report his doings to the governor and the district court whose judgment was appealed from, and make the publication of his doings in the manner provided for in this chapter. If from any cause the judgment is not executed on the day named in the warrant, the governor may appoint another, and so on until it is done. [C97,§4746; C24, 27, 31, 35, §13993.]

CHAPTER 658

APPEALS

Applicable to workmen's compensation cases, §1456

13994 Office of appeal—who may appeal.
13995 Time of taking—from final judgment only.
13996 Joinder.
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13998 Duty of clerk when appeal is taken.
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14013 Reversal—effect.
14014 Affirmance—effect.
14015 Opinion of supreme court.
14016 Decision recorded and transmitted.
14017 Judgment enforced.
14018 Time of imprisonment deducted.

13994 Office of appeal—who may appeal. The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case is by appeal. Either the defendant or state may appeal. [R60,§§4904, 4905; C73,§§4520, 4521; C97,§5448; S13,§5448; C24, 27, 31, 35, §13994.]

S13,§5448, editorially divided

13995 Time of taking—from final judgment only. An appeal can only be taken from the final judgment, and within sixty days thereafter. [R60,§4906; C73,§4521; C97,§5448; S13,§5448; C24, 27, 31, 35, §13995.]

13996 Joinder. When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards. [R60,§4917; C73,§4526; C97,§5451; C24, 27, 31, 35, §13996.]

13997 Taking and perfecting. An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto. [R60,§§4907, 4908; C73,§§4523, 4524; C97,§5449; C24, 27, 31, 35, §13997.]

13997.1 Abstracts and other filings—service. When an appeal has been taken by the defendant in a criminal case, all filings by the appellant on appeal shall be served on the attorney general. [C27, 31, 35, §13997-b1.]

13998 Duty of clerk when appeal is taken. When an appeal is taken, the clerk of the court in which the judgment was rendered shall:

1. Forthwith prepare and transmit to the attorney general a certified copy of the notice of appeal, together with the date of the service and filing thereof.

2. Promptly prepare and transmit to the clerk of the supreme court a transcript of all record entries in the cause, together with copies of all papers in the case on file in his office, except those returned by the examining magistrate on the preliminary examination, all duly certified under the seal of his court. [R60,§4909; C73, §4525; C97,§5450; C24, 27, 31, 35, §13998.]

13999 Duties of county attorney. The county attorney shall:

1. When an appeal is taken by the state, at least forty days prior to the term at which the cause is to be heard, prepare and deliver to the attorney general a typewritten manuscript for the abstract of record in the cause.

2. When an appeal is taken by the defendant, prepare and transmit to the attorney general a typewritten manuscript covering all matters which may be required to be embraced in any amended abstract which should be filed by the state in order to properly present said appeal.

3. When served with a notice of appeal in a criminal case, immediately furnish the attorney general with a copy of said notice.

Such manuscripts shall be prepared in ample time so that the same may be printed and filed within the time and in the manner prescribed by law and the rules of the supreme court. [C97,§301; SS15,§301; C24, 27, 31, 35, §13999.]

14000 Transcript at expense of county. If a defendant in a criminal cause has perfected an appeal from a judgment against him and shall satisfy a judge of the district court from which the appeal is taken that he is unable to pay for a transcript of the evidence, such judge may order the same made at the expense of the county where said defendant was tried. [C73, §3777; C97,§254; SS15,§254-a2; C24, 27, 31, 35, §14000.]

14001 Appeal by state—effect. An appeal taken by the state in no case stays the operation of a judgment in favor of the defendant. [R60, §4911; C73,§4527; C97,§5452; C24, 27, 31, 35, §14001.]

14002 Appeal by defendant—effect. An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in; but where the judgment is imprisonment in the penitentiary, and an appeal is taken within the time provided after judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, or judge thereof, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desires it. [R60,§§4914, 4915; C73,§§4528, 4529; C97,§5453; C24, 27, 31, 35,§14002.]

14003 Bail—proceedings when given. When an appeal is taken by the defendant, and bail is given, the clerk must give to the defendant, or his attorney, a certificate, under the seal of the court, that an appeal has been taken and bail given, and the sheriff or other officer having the defendant in custody must, upon receiving it, discharge the defendant from custody and cease all further proceedings in execution thereof, and forthwith return to the clerk of the court who issued it the execution under which he acted, with his return thereon; and if it has not been issued, it shall not be until after final judgment on the appeal. [R60,§4916; C73,§4530; C97,§5454; C24, 27, 31, 35,§14003.]

14004 Title of case—how docketed. The party appealing is the appellant, the adverse party the appellee, but the title of the action shall not be changed on the appeal, and the cause shall be so docketed at the commencement of the period assigned for trying causes from the judicial district from which the appeal comes, which causes shall take precedence of all other business, be tried at the term at which the transcript is filed, unless continued for cause or by consent of the parties, and be decided, if practicable, at the same term. [R60, §§4818, 4819; C73,§§4531, 4532; C97,§5455; C24, 27, 31, 35,§14004.]

14005 Personal appearance of defendant. The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary. [R60,§4920; C73,§4533; C97,§5456; C24, 27, 31, 35,§14005.]

14006 Informality or defect. An appeal shall not be dismissed for any informality or defect in taking it, if corrected in a reasonable time; and the supreme court must direct how it shall be corrected. [R60,§4921; C73,§4534; C97,§5457; C24, 27, 31, 35,§14006.]

14007 Assignment of error. No assignment of error is necessary. [R60,§4922; C73,§4535; C97,§5458; C24, 27, 31, 35,§14007.]

See supreme court rule 30

14008 Closing argument. The defendant is entitled to close the argument. [R60,§4923; C73,§4536; C97,§5459; C24, 27, 31, 35,§14008.]

14009 Rules of procedure. The record and case may be presented in the supreme court by printed abstracts, arguments, motions, and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases. [C97,§5461; C24, 27, 31, 35,§14009.]

14010 Decision of supreme court. If the appeal is taken by the defendant, the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it. [C51,§§3097, 3098; R60,§4925; C73, §4538; C97,§5462; C24, 27, 31, 35,§14010.]

Similar provision, §12871
C97,§5462, editorially divided

14011 Costs on reversal. In case the judgment of the trial court is reversed or modified in favor of the defendant, on the appeal of defendant, he shall be entitled to recover the cost of printing abstract and briefs, not exceeding one dollar for each page thereof, to be paid by the county from which the appeal was taken. [C97,§5462; C24, 27, 31, 35,§14011.]

14012 Decisions in appeals by state. If the state appeals, the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings or in the measure of punishment, and its decision shall be obligatory as law. [R60,§4926; C73,§4539; C97, §5463; C24, 27, 31, 35,§14012.]

14013 Reversal — effect. If a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the supreme court shall direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him. [C51,§3099; R60,§4927; C73,§4540; C97,§5464; C24, 27, 31, 35,§14013.]

14014 Affirmance—effect. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as otherwise

provided. [C51,§3100; R60,§4928; C73,§4541; C97,§5465; C24, 27, 31, 35,§14014.]

14015 Opinion of supreme court. The opinion of the supreme court must be in writing, filed with its clerk, and recorded. [R60,§4924; C73,§4537; C97,§5460; C24, 27, 31, 35,§14015.]

Similar provision, §12871

14016 Decision recorded and transmitted. The decision of the supreme court, with any opinion filed or judgment rendered, must be recorded by its clerk, and, after the expiration of the period allowed for a rehearing, or as ordered by the court or provided by its rules, a certified copy of the decision and opinion shall be transmitted to the clerk of the trial court, filed and entered of record by him, and thereafter the jurisdiction of the supreme court shall cease, and all proceedings necessary for executing the judgment shall be had in the trial court, or by its clerk. [C51,§§3101, 3102; R60, §§4929, 4930; C73,§§4542, 4543; C97,§5466; C24, 27, 31, 35,§14016.]

14017 Judgment enforced. Unless some proceeding in the district court is directed, a copy of the judgment of the trial court and decision on appeal, or of the judgment and decision on appeal certified by the clerk of the trial court, shall be delivered to the sheriff, or other proper officer, as an execution, and shall authorize him to execute the judgment of the court, or take any steps required to bring the action to a conclusion. [R60,§4931; C73,§4544; C97,§5467; C24, 27, 31, 35,§14017.]

14018 Time of imprisonment deducted. If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction. [R60,§4933; C73, §4545; C97,§5468; C24, 27, 31, 35,§14018.]

CHAPTER 659

COMPROMISING CERTAIN OFFENSES

14019 Compromisable offenses.
14020 Procedure.
14021 Discharge—effect.
14022 Limitation.

14019 Compromisable offenses. When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in section 14020, except when it was committed:

1. By or upon an officer while in the execution of the duties of his office;
2. Riotously; or,
3. With an intent to commit a felony. [R60, §5106; C73,§4708; C97,§5622; C24, 27, 31, 35, §14019.]

14020 Procedure. If the party injured in such a case appear before the court to which the papers on a preliminary examination are returned, at any time before trial on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. In that case the reasons for the order must be set forth therein and entered upon the minutes. [R60, §5107; C73,§4709; C97,§5623; C24, 27, 31, 35, §14020.]

Referred to in §§14019, 14021

14021 Discharge—effect. The order authorized by section 14020 is a bar to another prosecution for the same offense. [R60,§5108; C73, §4710; C97,§5624; C24, 27, 31, 35,§14021.]

14022 Limitation. No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in this chapter. [R60,§5109; C73,§4711; C97,§5625; C24, 27, 31, 35,§14022.]

CHAPTER 660

DISMISSAL OF CRIMINAL ACTIONS

14023 Failure to indict.
14024 Delay in trial.
14025 Discharge on undertaking.
14026 Discharge on dismissal.
14027 Dismissal by court—effect.

14023 Failure to indict. When a person is held to answer for a public offense, if an indictment be not found against him at the next regular term of the court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown. [C51,§3248; R60,§5007; C73, §4613; C97,§5535; C24, 27, 31, 35,§14023.]

Related provision, §13722

14024 Delay in trial. If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of the court in which the indictment is triable after the same is found, the court must order it to be dismissed, unless good cause to the contrary be shown. [C51,§3249; R60,§5008; C73,§4614; C97,§5536; C24, 27, 31, 35,§14024.]

14025 Discharge on undertaking. If the defendant be not indicted or tried as above provided, and sufficient reason therefor is shown, the court may order the prosecution continued from term to term, and discharge the defendant from custody on his own undertaking, or on the undertaking of bail for his appearance to answer the charge at the time to which the same is continued, but no continuance under this section shall be extended beyond the following three terms of the court. [C51,§3250; R60, §5009; C73,§4615; C97,§5537; C24, 27, 31, 35, §14025.]

14026 Discharge on dismissal. If the court direct the prosecution to be dismissed, the defendant, if in custody, must be discharged, or his bail, if any, exonerated, and if money has been deposited instead of bail, it must be refunded to him. [R60,§5010; C73,§4616; C97, §5538; C24, 27, 31, 35,§14026.]

14027 Dismissal by court—effect. The court, upon its own motion or the application of the county attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a misdemeanor; but it is not a bar if the offense charged be a felony. [C51, §§3251, 3252; R60,§§5011-5013; C73,§§4617-4619; C97,§5539; C24, 27, 31, 35,§14027.]

STATUTES AND RULES

REGULATING PRACTICE AND PROCEDURE

IN THE

SUPREME COURT OF IOWA

OFFICE OF THE CLERK

TO ATTORNEYS:

It will be of great assistance to this office and to the court, if the following suggestions are followed:

No cover or binding should be attached to printed matter, *and no staples used for fasteners,* as binder has to remove them before binding. *All printed matter should be sewed.*

Service should be *printed* on *title page.*

Notice of oral argument should be printed at the close of argument, when it can be filed in time under the rule. When given in the abstract let it be at the close thereof.

Motions or applications for certification of record *should not be embodied in arguments.* Independent applications should be made to the court or one of the judges thereof.

Notify this office of sending printed matter.

Cost of printing should always be inserted on last page of abstracts, arguments, etc.

The filing fee of $3.00 must be paid before the case will be docketed.

B. W. GARRETT,
Clerk Supreme Court

STATUTES AND RULES

REGULATING PRACTICE AND PROCEDURE IN THE

SUPREME COURT OF IOWA

ORGANIZATION

CODE SEC. 12801 The supreme court shall consist of nine judges, five of whom shall constitute a quorum to hold court, but one alone thereof may adjourn from day to day or to a certain day or until the next term.

DIVISION OF COURT

CODE SEC. 12802 The supreme court may be divided into two sections in such manner as it may by rule prescribe. Said sections may hold open court separately and cases may be submitted to each section separately, in accordance with such rules as the court may adopt.

Rule 1 The supreme court shall be divided into two divisions to be known as the first and the second. Each division shall consist of four judges and the chief justice. The personnel of the divisions shall not be permanent, but may be changed from time to time by the chief justice as exigencies may arise, or by affirmative vote by a majority of the justices.

Rule 2 Each division shall, except as hereinafter provided, hear and determine all motions and cases submitted to it, and all petitions for rehearing in cases decided by it, including motions for decrees to retax costs, and all other interlocutory matters.

Rule 3 All cases or other matters passed to another period shall go to and be heard by the division to which the cause was originally assigned; and causes or other matters "passed to last period" shall also be heard by the division to which the case was originally assigned, save where the matter is for the full bench, when it shall be passed to the last period and be heard at that time. The parties waive oral argument in all cases passed from one period to another of the term, except cases ordered submitted to the full bench.

Rule 4 Should there be a difference of opinion among the members of either division as to how a case should be decided, or as to the facts or the rules of law applicable thereto, any member of that division, or the chief justice, on his own motion, may call in the other division and the division thus called in shall consider the case and take part in the decision.

Rule 5 Should a member of a division get behind with his work for any reason, or be disqualified from sitting in any cause, the chief justice may call in a judge from another division who is up with his work to sit in place of the one who is behind or disqualified, and may also, in the event an entire division gets behind, make such a division of the cases for any period as will equalize matters between the two divisions.

Rule 6 Consultation may be had between the divisions at any time upon cases pending on motions, for original submission, or upon petitions for rehearing, upon request of any member of the court.

Rule 7 Where a chief justice retires and is reelected, he shall take his place with the division from which his successor comes, and, if a new man takes his place, he too shall be assigned to the division from which the then chief justice is taken.

CHIEF JUSTICE

CODE SEC. 12804 Of the elected judges whose terms of office first expire, the senior in time of service shall be chief justice for six months and so on in rotation until all such judges shall have been chief justice. If two or more judges, who would otherwise be entitled to the position, are equal in time of service, then the right to the position and the order in which they shall serve shall be determined by seniority in age. At the last term of each year, the supreme court shall determine and enter of record who, under this statute, shall be chief justice for the six months' period beginning on January first thereafter. Likewise at the May term in each year and on or before June thirtieth, the supreme court shall determine and enter of record who, under this statute, shall be chief justice for the last six months of the year.

The presiding chief justice shall appoint one of the other members of the court to act in his place and stead in case of his absence or inability to act and, when so acting, such member shall have all the rights, duties and powers given by statute to the chief justice of the supreme court.

Rule 7-a In case the chief justice is absent or ill or from any other disability is unable to act, he shall select some other member of the court to act as chief during his absence or disability, and in the event he is unable to make such selection, the court shall select one of its other members to act during the pendency of such disability.

In case the judge determined to be eligible as chief justice under the provisions of code section 12804, waives his right to the position and declines to act as chief justice, then the next judge eligible to said position under the provisions of said section of the

code shall be selected to such position for the period of six months, and shall then be succeeded by the next judge entitled to said position under said statute.

FULL BENCH

Rule 8 All cases involving constitutional questions shall, upon timely application by either litigant, be heard by the full bench.

Rule 9 Any case may upon motion supported by showing be ordered by the court or the chief justice submitted to the full bench, or the court may, on its own motion, order such submission.

Rule 10 Assignment shall also be made of all motions, cases for original submission, and petitions for rehearing which are to go to the full bench, all under the orders and directions of the chief justice.

JURISDICTION

CONST., ART. V, SEC. 4 The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state.

CODE SEC. 12822 The supreme court has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law.

CODE SEC. 12823 An appeal may also be taken to the supreme court from:

1. An order made affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment from which an appeal might be taken.
2. A final order made in special actions affecting a substantial right therein, or made on a summary application in an action after judgment.
3. An order which grants or refuses, continues or modifies, a provisional remedy; grants or refuses, dissolves or refuses to dissolve, an injunction or attachment; grants or refuses a new trial; sustains or overrules a demurrer in a law action; or sustains or overrules a motion to dismiss in an equitable action.
4. An intermediate order involving the merits or materially affecting the final decision.
5. An order or judgment on habeas corpus.

CODE SEC. 12824 If any of the above orders or judgments are made or rendered by a judge, the same are reviewable the same as if made by a court.

CODE SEC. 12828 The supreme court on appeal may review and reverse any judgment or order of the municipal, superior, or district court, although no motion for a new trial was made in such court.

CODE SEC. 12831 The court may issue all writs and processes necessary for the exercise and enforcement of its appellate jurisdiction.

CODE SEC. 12879 The supreme court may enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until obeyed.

CODE SEC. 12885 All objections to the jurisdiction of the court to entertain an appeal must be made in written form stating specifically the ground thereof and served upon the appellant or his attorney of record not less than ten days before the date assigned for the submission of the cause.

TERMS

CODE SEC. 12805 The supreme court shall be held at the seat of government, and shall convene and hold three regular terms each year. The first term shall begin with the second Tuesday of January and end with the first Monday of May; the second shall begin with the first Tuesday after the first Monday of May and end with the third Monday of September; and the third shall begin with the first Tuesday after the third Monday of September and end with the third Saturday of December.

CODE SEC. 12806 Each of said terms of court shall be for the submission and determination of causes, and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term, unless continued or otherwise disposed of by order of the court. The court shall remain in session, so far as practicable, until it is determined what the opinion of the court shall be in all causes submitted to it, except in causes where reargument is ordered. Judgments of affirmance, rulings, and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time, regardless of the terms of court.

Rule 11 Each term shall be so divided into periods that the last shall be for the consideration, by the full bench, of all motions, cases on original submission, petitions for rehearing, and other matters properly referable thereto; and all other periods shall be so divided that one division shall sit on the first Tuesday of the period for the submission of such motions, cases, and petitions for rehearing and other matters, as may be assigned to it, and the other shall sit for the hearing of matters assigned to it, on the second Tuesday of each period. And, to equalize the work, cases assigned for each period shall be divided, as nearly as practicable, into two equal parts, save that all cases and other matters for consideration by the entire bench shall be assigned for the last period of the term.

APPEALS IN CIVIL CASES

CODE SEC. 12832 Appeals from the district, superior, and municipal courts may be taken to the supreme court at any time within four months except as hereafter provided from the date of the entry of record of the judgment or order appealed from, and not afterwards; but, when a motion for new trial, or in arrest of judgment, or for judgment notwithstanding the verdict has been filed, such time for appeal shall be automatically extended so as to permit the same at any time within sixty days after the entry of the ruling upon such motion.

CODE SEC. 12832.1 If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, notice of appeal may be taken within three days from and

after the entry of the decree in district court, and not afterwards.

CODE SEC. 12833 No appeal shall be taken in any cause in which the amount in controversy between the parties as shown by the pleadings does not exceed one hundred dollars, unless the trial judge shall, during the term in which judgment or order is entered, certify that the cause is one in which the appeal should be allowed. Upon such certificate being filed the same shall be appealable regardless of the amount in controversy. Said limitation shall not affect the right of appeal in any action in which an interest in real estate is involved, nor shall the right of appeal be affected by the remission of any part of the verdict or judgment returned or rendered.

CODE SEC. 12828 The supreme court on appeal may review and reverse any judgment or order of the municipal, superior, or district court, although no motion for a new trial was made in such court.

CODE SEC. 12834 A part of several coparties may appeal, but in such case they must serve notice of such appeal upon those not joining therein, and file proof thereof with the clerk of the court from which the appeal is taken.

CODE SEC. 12835 Coparties, refusing to join in an appeal, cannot afterwards appeal, or derive any benefit therefrom, unless from the necessity of the case, but they shall be held to have joined, and be liable for their proportion of the costs unless they appear and object thereto.

CODE SEC. 12837 An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and by filing said notice with return of service indorsed thereon or attached thereto with the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part.

CODE SEC. 12838 When such service cannot be made the trial court or judge on application shall direct what notice shall be sufficient.

CODE SEC. 12839 Notice of appeal shall not be held insufficient because served before the clerk of the trial court has spread the judgment entry upon the court record if it shall appear that such entry has been made in proper form before the appellant's abstract was filed in the office of the clerk of the supreme court.

CODE SEC. 12840 A notice of appeal shall be served and return made thereon in the same manner as an original notice in a civil action.

CODE SEC. 12841 All other notices connected with or growing out of the appeal shall be served and the return made in like manner, and filed in the office of the clerk of the supreme court.

CODE SEC. 12842 All notices provided for in sections 12840 and 12841 become a part of the record in the case on being filed.

CODE SEC. 12884 The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice.

Rule 12 The attorneys and guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively in this court until others are retained or appointed and notice thereof served on the adverse party.

SUPERSEDEAS BONDS

CODE SEC. 12858 No proceedings under a judgment or order, or any part thereof, shall be stayed by an appeal, unless the appellant executes a bond with one or more sureties, to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal; and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal.

CODE SEC. 12859 If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone.

CODE SEC. 12860 When thus filed and approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby.

CODE SEC. 12861 No appeal or stay shall vacate or affect such judgment or order.

CODE SEC. 12865 If a party has perfected his appeal, and the clerk of the lower court refuses for any reason to approve the bond, or requires an excessive penalty, or unjust or improper conditions, he may apply to the district court or judge thereof, who shall fix the amount and conditions of the bond and approve the same. Pending the application, the judge may, by a written order, recall and stay all proceedings under the order or judgment appealed from until the decision of the application. The bond thus approved shall be filed with the clerk, who shall issue a written order to stay proceedings.

CODE SEC. 12866 The appellee may move the court rendering the judgment or making the order appealed from, or the supreme court, or a judge of either court, if in vacation, upon ten days' notice in writing to appellant, to discharge the bond on account of defect in substance or insufficiency in security, which motion if well taken shall be sustained, unless appellant shall, within a day to be fixed in the order made and filed therein, give a new and sufficient bond as required by said order. If the new bond is not given, proceedings shall be had in the lower court as though no bond had been given, but a new and sufficient bond may be given at any time with like

effect and results as though given in the first instance.

CODE SEC. 12867 If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars.

CODE SEC. 12872 The supreme court, if it affirms the judgment, shall also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment, damages, and costs referred to therein in case such damages can be accurately known to the court without an issue and trial.

DOCKETING OF CAUSES

CODE SEC. 12830 The cause on appeal shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee.

CODE SEC. 12843 The clerk shall docket the causes as they are filed in his office and shall, under order of the chief justice, arrange and set a proper number for trial for each day of the term, placing together as far as practicable those from the same judicial district, and shall cause notice thereof to be published and distributed as the court may direct.

CODE SEC. 12844 No case shall be docketed until the fees [$3.00] provided by law therefor have been paid.

CODE SEC. 12848.1 If the abstract is filed forty days before the convening of the first term which follows the taking and perfecting of the appeal, the cause shall be placed on the calendar for said first term, and shall come on for hearing; unless otherwise ordered by the court.

CODE SEC. 1456 An appeal may be taken to the supreme court [in a workmen's compensation case] from any final order, judgment, or decree of the district court, but such appeal shall be docketed, placed upon the term calendar, and submitted in the same time and manner as criminal cases in said court.

Rule 13 Immediately after the time expires during which causes may be docketed for trial at a term of court, the clerk shall make and cause to be printed, without delay, the docket for the term, which shall give all causes, whether continuances or appearances, for trial at such term, and which shall designate the number, the party appealing, the court and county from which the appeal is brought, the counsel of the parties, the period for which each cause is assigned for trial, whether noticed for oral argument, the causes continued by reason of the provisions of Rule 15, and such other matter for the information of the court and attorneys as may be conveniently given, and so assign motions and petitions for rehearing as that the same will be submitted to and reach the proper divisions. He shall forward to each judge of the court, to each attorney having causes at the term, and to the clerk of the district, municipal, and superior courts of each county, a copy of said docket.

ADVANCING CAUSES

Rule 14 If a cause involves the decision of a question of public importance, or rights which are likely to be lost or greatly impaired by delay, the court will, in its discretion, upon motion supported by affidavit duly served, order the submission of the cause at a term in advance of that at which it would otherwise be submitted.

ABSTRACTS

CODE SEC. 12845 Printed abstracts of the record shall be filed by the appellant in the office of the clerk of the supreme court.

CODE SEC. 12845.1 Abstracts shall be presumed to contain the record, unless denied or corrected by subsequent abstracts.

CODE SEC. 12845.2 Denials of abstracts, additional abstracts and transcripts may also be filed.

CODE SEC. 12847 An abstract must be filed within one hundred twenty days except as hereafter provided after the appeal is taken and perfected unless further time is given before the expiration of said time by the supreme court or a judge thereof for good cause shown.

CODE SEC. 12847.1 If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, an abstract of record shall be filed within five days after the service of notice of appeal, unless additional time, not to exceed three days, be granted by the chief justice.

Rule 14-a1 An extension of time within which to file abstract will be granted only upon reasonable notice to the adverse party or his attorney, proof of which service shall accompany the application; provided that any justice, may, for good cause in his discretion, grant such extension conditionally within the statutory time without notice, subject to the right of the opposing litigant to have such order set aside upon a showing that sufficient ground for refusal of such order existed at the time the order was made.

Rule 15 In making up the docket for the term, the clerk shall place thereon all cases in which the abstract has been served and filed forty days or more before the first day of said term, unless otherwise ordered by the court; but all cases, in which abstracts have not been served and filed seventy days or more before the time designated by the clerk for the hearing of causes from the judicial district in which said cause was tried, shall ipso facto stand continued until the next term of this court and shall be so marked by the clerk upon the docket. There shall be no waiver of oral argument by reason of such continuance, herein mentioned, if notice in writing or in print, of intention to argue the case orally be served upon an attorney for the adverse party and filed with the clerk of this court at least twenty days before the first day of the term to which continued.

Rule 15-a The appellant shall serve upon each appellee or his attorney a copy of the abstract, which shall be prepared according to these rules. In case of cross appeals, the party first giving notice of appeal shall under this rule be considered the appellant. Appellant shall also file with the clerk eighteen copies of said abstract, including the service copy.

This rule as to number of copies to be filed, including service copy, shall also apply to all denials and additional abstracts, appellant's brief and argument, appellee's brief and argument, the reply, petition for rehearing and the resistance to the same.

Service of abstracts or of any of the other aforesaid documents may be made as follows:

(1) By delivering copy to the opposing litigant or to his attorney of record;

(2) By mailing copy properly addressed to the proper post-office address of such counsel, with postage prepaid, and by registered mail;

Proof of service and the method thereof may be made by appropriate acceptance or affidavit indorsed upon one printed copy and filed as the "service copy" with the clerk of this court. If service be by registered mail the receipt therefor shall be attached as a part of the affidavit of service.

Rule 16 If it appear from an inspection of the abstract that the appellant has negligently or intentionally failed to comply with the rule requiring only so much of the record as may be necessary to a full understanding of the question presented for decision to be included therein, the court may, in its discretion, order a new abstract prepared in conformity with such rule or affirm the judgment of the lower court without considering the appeal.

Rule 17 Every denial shall point out as specifically as the case will permit the defects alleged to exist in the abstract. A denial by appellee shall be taken as true unless the appellant sustains his abstract by a certification of the record. Should the appellee deem the appellant's abstract incorrect or unfair he may prepare such additional abstract as he shall deem necessary to a full understanding of the questions presented to the court for decision. A denial by the appellant of such additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record. The appellee shall serve one printed copy of his additional abstract or denial on each appellant or his attorney and deliver eighteen printed copies thereof, including the service copy, to the clerk within fifteen days after receiving appellant's argument, and a denial by the appellant shall be served on the appellee and eighteen printed copies thereof, including the service copy, shall be delivered to the clerk within five days after service of the additional abstract.

Rule 18 Abstracts of record shall be made in substantially the following form:

IN THE SUPREME COURT OF IOWA

JANUARY TERM, 19....

RICHARD ROE, *Appellee*,
vs.
JOHN DOE, *Appellant*. } "In Equity" or "At Law."

Appeal from Van Buren District Court.

JOHN SMITH, Judge.

J. C. K., of Des Moines, for the Appellant.
H. H. S., of Chicago, Ill., for the Appellee.

APPELLANT'S ABSTRACT OF RECORD

Due, timely, and legal service of the within abstract is hereby acknowledged this.....day of....., 19.....

.....

Attorneys for Appellee

On the.....day of....., 19...., the plaintiff filed in the Van Buren district court a

PETITION

stating his cause of action as follows:

[Set out all of petition necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts, as, for example, if the exhibit be a deed or mortgage and no question is raised as to the acknowledgment, omit the acknowledgment. When the defendant has appeared it is useless to encumber the record with the original notice or the return of the officer.]

On the.....day of....., 19...., the defendant filed a

DEMURRER

to said petition setting up the following grounds:

[State only the grounds of demurrer, omitting the formal parts. If the pleading was a motion and the ruling therein is one of the questions to be considered, set it out in the same way and continue.]

And on the.....day of....., 19...., the same was submitted to the court, and the court made the following ruling thereon:

[Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case; let each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract but it should continue.]

And on the.....day of....., 19...., the defendant filed his

ANSWER

to the petition, setting up the following defenses:

[Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the petition. Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the abstract shows issue joined, proceed.]

EVIDENCE

On the.....day of....., 19...., said cause was tried to a jury (or the court, as the case may be) and on the trial the following proceedings were had:

[Here set out so much of the evidence and proceedings as is necessary to show the rulings of the court to which exceptions were taken during the progress of the trial.]

INSTRUCTIONS

After the evidence and the arguments of counsel were concluded the plaintiff (or defendant, as the case may be) asked the court to give each of the following instructions to the jury:

[Set out instructions referred to, and continue.]

Which the court refused as to each instruction, to which several rulings the plaintiff (or defendant) excepted as follows:

[Set out the exceptions.]

And thereupon the court gave the following instructions to the jury:

[Set out the instructions.]

To the giving of those numbered (give the numbers) and to the giving of each thereof the plaintiff (or defendant) excepted, as follows:

[Set out the exceptions.]

VERDICT

On the.....day of....., 19...., the jury returned into court with the following verdict:

[Set out the verdict.]

MOTION FOR NEW TRIAL

On the.....day of....., 19...., the plaintiff (or defendant) filed a motion praying the court to set aside the verdict and grant a new trial upon the following grounds:

[Set out the grounds aforesaid for the new trial.]

On the.....day of....., 19...., the court made the following ruling upon said motion:

[Set out the record of the ruling.]

To which the plaintiff (or defendant) at the time excepted.

JUDGMENT

On the.....day of....., 19...., the

following judgment was rendered and entered of record:

[Set out the judgment entry appealed from.]

NOTICE OF APPEAL

On the.....day of....., 19...., the plaintiff perfected an appeal to the supreme court of the state of Iowa, by serving upon the defendant and the clerk of the district court of Van Buren county a notice of appeal.

[If supersedeas bond was filed, state the fact.]

INDEX

Abstracts and all amendments thereto must be accompanied by a brief index of their contents. The pleadings should be indicated therein, not alphabetically, but in the order of their filing.

The names of witnesses should be set forth therein, not alphabetically, but in the order in which their testimony appears in the abstract.

All exhibits must be referred to in the index by letter or number and a brief description of each exhibit shall be included therein.

This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course, no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: Preserve everything material to the question to be decided and omit everything else.

CERTIFICATION OF RECORD

CODE SEC. 12849 Any party may cause a certified copy of the record in the lower court or any part of the same to be filed in the office of the clerk of the supreme court for its consideration.

CODE SEC. 12850 Upon application to the supreme court or any judge thereof, the clerk of the court from which appeal is taken may be ordered to file such certified copy.

CODE SEC. 12850.1 The shorthand reporter's translation of his report of a trial, duly certified by said reporter as correct, and from which an abstract, or an amendment to the abstract, has been prepared and served on appeal, shall be filed with the clerk of the district court immediately after said abstract or amendment is served on the opposite party, and be deemed a public record for the use of all parties to the appeal.

CODE SEC. 12851 The original transcript of evidence may be sent up, but shall be returned to the clerk of the proper county after the cause has been determined by the supreme court.

CODE SEC. 12854 Where a view of an original paper or exhibit in the action may be important to a correct decision of the appeal, the court or any judge thereof may order the clerk of the court below to transmit the same, which he shall do in the manner provided for the transmission of certifications of the record.

CODE SEC. 12857 The lower court, the supreme court, or a judge of either court, may make any necessary orders to secure a perfect record or transcript thereof; upon a showing by affidavit or otherwise, and upon such notice as it or he may prescribe.

DISMISSAL OF APPEALS, OR AFFIRMANCE OF JUDGMENTS

CODE SEC. 12848 If the abstract is not filed within one hundred twenty days after the appeal is taken and perfected or is not filed within the further time as fixed by the court or judge, the appellee may file an abstract of such matters of record as are necessary, or may file a copy of the final judgment or order appealed from, or other matters required, certified to by the clerk of the trial court, and cause the case to be docketed, and the appeal upon motion shall be dismissed, or the judgment or order affirmed.

CODE SEC. 12886 Where appellant has no right, or no further right, to prosecute the appeal, the appellee may move to dismiss it, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit.

CODE SEC. 12887 The appellee may, by answer or abstract filed and verified by himself, agent, or attorney, plead any facts which render the taking of the appeal improper or destroy the appellant's right of further prosecuting the same, to which the appellant may file a reply, or abstract likewise verified by himself, his agent, or attorney, and the question of law or fact therein shall be determined by the court, upon such evidence and in such form as it may prescribe.

MOTIONS

CODE SEC. 12870 All motions must be in writing and entered upon the motion book, and be heard upon such notice and argument, if any, as the court by rule may prescribe, but no motion shall be submitted without being publicly called by the court, unless the parties otherwise agree.

Rule 19 Motions must be served by copy of the same and of all affidavits or documents upon which they are based, upon the opposite party or attorney, ten days before the morning on which the causes for the district are set for hearing. Such opposite party shall then have five days to file papers in resistance to the same, copies of which must be served upon the other party or attorney, and no papers will be regarded which do not appear to have been so served. This rule shall not apply to motions the causes whereof arise after the filing of the abstract, but in such cases timely notice of such motions shall be given to the opposite attorneys. Nor shall this rule apply, as to time of service, to motions for continuance, or to advance.

Rule 20 Motions made in a cause after judgment rendered by the supreme court, or after the time assigned for the hearing of causes from the district from which it was appealed, will be heard only upon proof of service of reasonable notice of such motion upon the adverse party or his attorney. Service of all other motions shall be such as is prescribed by the court or a judge thereof.

Rule 21 Arguments in support of motions, if any, must be in writing or print, and shall be filed before the morning of the day set for the hearing of the cause, and served by copy upon the opposite party or attorney when the motion is served; and the arguments in resistance, if any, must be in writing or print and filed before the morning of the day set for the hearing of the cause, and served by copy on the

opposite party or attorney when the papers in resistance are served.

Rule 22 If a difference of opinion should arise upon the disposition of a motion, the chief justice shall call in the other division, which shall take part in the determination thereof.

Rule 23 Tuesday of each period shall be "motion day" for the submission of motions to the proper division of the court, or to the full bench.

BRIEFS AND ARGUMENTS

CODE SEC. 12871 The parties to an appeal may be heard orally and in writing, subject to such rules as the court may prescribe; and all causes docketed, not continued by consent or upon cause shown, shall be submitted in the order assigned, unless otherwise directed by the court or the judges thereof. * * *

CODE SEC. 12871.1 If the action challenges the legality, validity or constitutionality of a proposed constitutional amendment, the appellant shall file a written argument within ten days after the filing of the abstract and appellee shall file his argument within ten days thereafter, and appellant shall then file his reply within three days. The cause shall then be submitted to the supreme court in regular or special full bench session as soon thereafter as the chief justice may order.

Rule 24 When the appeal presents only questions of law upon rulings of the court below, appellant shall open and close the argument, and must, at least forty days before the day assigned for the hearing of the case, serve upon an attorney for each appellee copies of his brief of points, authorities and argument. If appellee desires to be heard, he shall, at least fifteen days prior to the time set for hearing, serve upon an attorney for each appellant copies of his brief or argument; and the printed reply, if any, shall be served at least three days before the case is to be finally submitted. If the trial in the supreme court is *de novo*, and appellant has the burden, he shall observe the foregoing rules. If appellee has the burden, he may waive his right to open the argument; and if he fails to serve and file his brief within the time hereinbefore provided, he shall be held to have waived the right. Appellant will then be entitled to open the argument, and must serve copies of his brief upon an attorney for each appellee fifteen days before the hearing. Appellee may then, and at least three days before the submission, serve upon an attorney for each appellant copies of his argument, which must be strictly confined to matters in reply to appellant's argument. A failure to comply with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance or to have the case submitted at his option upon the briefs and arguments on file when the default occurred.

Rule 25 All printed briefs and arguments, except upon motions, shall be prepared as required by these rules, and each party shall file with the clerk eighteen printed copies of each brief and argument, including the service copy.

Rule 26 Notice in writing, or in print, of intention to argue a case orally, shall be served upon an attorney for the adverse party and filed with the clerk of this court twenty days before the first day of the term, and the party who fails to serve and file such notice shall not be entitled to argue orally, except in reply to an oral argument for the adverse party.

Rule 27 If the case is triable upon errors assigned and not *de novo* and appellant has given notice of oral argument, he will be entitled to open and close. If appellee alone gave the notice he will be entitled to open the argument and appellant must confine his remarks strictly to a reply. If the cause is triable *de novo* the party upon whom rests the burden of the proof may, if he has given the requisite notice, open and close the argument. If he has not given notice he will be confined strictly to an answer to the argument for the other side. No oral argument shall exceed one-half hour in length, unless an extension of time be granted before the argument is commenced or it becomes apparent during the course of the argument that more time is necessary, whereupon the court may grant additional time. On original submission two attorneys may be heard on each side; but in the event counsel opening the argument is not entitled to reply, but one attorney shall be heard for either party. Reply arguments shall be limited to fifteen minutes. On petitions for rehearing only one attorney shall be heard for either party, the petitioner to have not exceeding twenty and the respondent not more than fifteen minutes, unless extensions be granted by the court.

Rule 28 Oral argument shall be confined to a discussion of the proposition and authorities contained in the briefs. Failure to discuss in oral argument points properly made in the briefs shall not be deemed a waiver of such points, but they will be fully considered in determining the cause.

Rule 29 Before taking up the assignment for the several periods a preliminary call of all causes included in that assignment will be made; but the submission of a cause shall not be taken on this call if any party thereto objects. The court will hear all causes included in the assignment and take the submission thereof in the order in which they are assigned, excepting those which have been continued or otherwise disposed of.

Rule 30 The brief of the appellant shall contain a short and clear statement showing:

First. The nature of the action. For example: A suit on a promissory note.

Second. The nature of the defense. For example: A plea of payment.

Third. How the case was decided.

Fourth. A brief statement of the main facts as claimed by the appellant.

Fifth. The appellant shall then state his first error relied upon for a reversal, and shall set out so much of the record as refers thereto, together with the ruling of the court thereon; and shall then point out specifically and in concise language, the complaint against the ruling of the court. This shall be followed by a brief of authorities in support of his contention, without quotation therefrom. Then shall follow his argument, in the usual form, supporting the errors thus claimed, in which, among other things, reference to and quotations from the authorities set out may be made or elaborated. This shall constitute the first division of his brief and argument.

Appellant shall then pass to the next error relied upon for reversal, which shall be stated in like manner as above specified and supported by citation of authorities and argument.

Appellant shall proceed thereafter in the same manner as to each and all claimed errors relied upon for reversal, setting out each error, together with brief and argument thereon, in separate divisions.

A compliance with the following form, as nearly as practicable, will be deemed sufficient:

First. NATURE OF THE ACTION.
Suit on a promissory note.
Second. NATURE OF THE DEFENSE.
Plea of forgery and plea of payment.

DECISION

In favor of the plaintiff on the verdict of the jury.

STATEMENT OF FACT

Plaintiff's evidence tends to show that he sold a horse to the defendant for $150 and took defendant's promissory note therefor. Defendant's testimony, while admitting the purchase of the horse, tends to show that he did not execute a promissory note therefor, and the signature on the note introduced by the plaintiff was a forgery; and, further, that he paid cash for the horse.

DIVISION I

During the trial, the court erred in not admitting the testimony of John Smith as to the genuineness of the defendant's signature. This witness was asked whether or not, in his opinion, the signature of John Smith attached to the note in controversy was the genuine signature of John Smith. The objection thereto was that the witness was incompetent because it was not shown that he was qualified to testify as an expert. (Abs. p..... l.....)

That this witness was duly qualified so to testify, see Abs. p... l.... [Set out the record showing qualification.]

Due exception was taken to the ruling of the court. (Abs. p.... l.....) [Here set out authorities relied upon to support this claimed error.]

ARGUMENT

DIVISION II

The court erred in giving instruction No. 3, reading as follows: [Here set out the instruction. Abs. p.... l.....]

Due exception was taken thereto. (Abs. p.... l.....)

This instruction was erroneous in that it told the jury that the burden of proof was upon the defendant to show the genuineness of the signature in the face of the fact that the signature was denied under oath.

(See ground 3, motion for a new trial, Abs. p.... l.....)

[Here set out authorities on this proposition.]

ARGUMENT

DIVISION III

The court erred in overruling ground 3 of defendant's motion for a directed verdict on the question of payment, which was as follows:

[Here set out the ground.]

The error consists in the refusal of the court to direct a verdict in favor of the defendant on the plea of payment because the testimony of the defendant is in no way contradicted by the plaintiff.

[Here set out authorities on the proposition.]

ARGUMENT

DIVISION IV

The court erred in overruling ground 3 of the defendant's motion in arrest of judgment, which is as follows:

[Set out this ground of the motion. Abs. p.... l....]

For the reason that the petition of the plaintiff does not contain the allegation that the plaintiff made, executed, and delivered said note, or that the same was due and unpaid.

[Here set out what is wanting. Cite authorities.]

ARGUMENT

DIVISION V

The court erred in holding that the evidence was not sufficient to carry the case to the jury on the defendant's plea of payment.

(See ground 4 of motion for a new trial. Abs. p.... l.....)

Because there was no evidence in the case tending to show payment on the part of the defendant. (Abs. p.... l.....)

[Citation of authorities.]

ARGUMENT

And so continuing, treating each error claimed in a separate division, following, as nearly as practicable, the form herein set out.

Where the same error occurs at different places in the proceedings, or where several errors have occurred which are related to each other and are controlled by the same rules of law, they may be treated in one division, but so much of the record as is necessary to an understanding thereof shall be set out and the page and line of the abstract where the error occurred shall be specified.

Any error relied upon for reversal, not argued in the argument in chief, shall be deemed to have been waived.

After the above has been complied with, the appellant may add a division or divisions summarizing his argument or elaborating thereon; and the appellee shall have the privilege of doing the same.

Rule 31 The appellee's brief shall, in form, correspond to that of the appellant. Each division of the appellant's argument shall be answered in a separate division by the appellee, first pointing out any omission or inaccuracy in the appellant's statement of the record, followed by a short and clear statement of the proposition by which appellee seeks to meet each alleged error, or by which such error is claimed to be obviated, followed by a citation of authority and then by argument.

After the divisions of the appellant's argument are thus met, the appellee shall then, in separate divisions (following the form hereinbefore marked out), set out the parts of the record, if any, followed by any new proposition or propositions, stated in separate divisions, which he claims are controlling in the case, together with his citation of authority and argument on each proposition separately. The briefs and arguments of appellee on cross-appeal, shall be treated in the same manner as required of appellant's brief and argument, and the brief and argument of appellant, in answer to the cross-appeal, shall be prepared in the same manner as required of appellee in his brief and argument to appellant's original brief and argument. Reply briefs and arguments may be filed, which shall, in separate divisions, meet any of the propositions advanced by the appellee.

Rule 31-a Stricken by the court.

Rule 31-b In the appeal of equity actions, two conditions may arise. (See, The Exchange Bank v. Pottorfe, 96 Iowa 354.)

First. Where issues of fact have been joined and evidence taken, and the case is triable anew in this court, then the party having the burden of proof shall make a brief and argument in the following manner:

(a) State the nature of the action.
(b) The nature of the defense.
(c) How the case was decided.

(d) A statement of the main facts relied upon.

He shall then state, in separate divisions, each of the propositions of law or fact which he claims sustain his position, and, following each proposition, he shall set out authorities and follow with an argument on the propositions urged. He shall also, when referring to fact propositions, refer to the pages and lines of the abstract where the same may be found. The answer, and reply briefs and arguments, shall follow, as nearly as practicable, the provisions of Rule 31 hereof. When the appeal is triable *de novo*, no errors need be assigned.

Second. Where the appeal is for the correction of errors of law only, the errors must be pointed out, and the method of making a brief and argument thereon shall be the same as provided in Rule 30 hereof.

APPEALS IN CRIMINAL ACTIONS

CODE SEC. 13994 The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case is by appeal. Either the defendant or state may appeal.

CODE SEC. 13995 An appeal can only be taken from the final judgment, and within sixty days thereafter.

CODE SEC. 13996 When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their codefendants who do not join shall take no benefit therefrom, yet they may appeal afterwards.

CODE SEC. 13997 An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto.

CODE SEC. 13997.1 When an appeal has been taken by the defendant in a criminal case, all filings by the appellant on appeal shall be served on the attorney general.

CODE SEC. 13998 When an appeal is taken, the clerk of the court in which the judgment was rendered shall:

1. Forthwith prepare and transmit to the attorney general a certified copy of the notice of appeal, together with the date of the service and filing thereof.

2. Promptly prepare and transmit to the clerk of the supreme court a transcript of all record entries in the cause, together with copies of all papers in the case on file in his office, except those returned by the examining magistrate on the preliminary examination, all duly certified under the seal of his court.

CODE SEC. 14000 If a defendant in a criminal cause has perfected an appeal from a judgment against him and shall satisfy a judge of the district court from which the appeal is taken that he is unable to pay for a transcript of the evidence, such judge may order the same made at the expense of the county where said defendant was tried.

CODE SEC. 14001 An appeal taken by the state in no case stays the operation of a judgment in favor of the defendant.

CODE SEC. 14002 An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in; but where the judgment is imprisonment in the penitentiary, and an appeal is taken within the time provided after judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, or judge thereof, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desires it.

CODE SEC. 14003 When an appeal is taken by the defendant, and bail is given, the clerk must give to the defendant, or his attorney, a certificate, under the seal of the court, that an appeal has been taken and bail given, and the sheriff or other officer having the defendant in custody must, upon receiving it, discharge the defendant from custody and cease all further proceedings in execution thereof, and forthwith return to the clerk of the court who issued it the execution under which he acted, with his return thereon; and if it has not been issued, it shall not be until after final judgment on the appeal.

CODE SEC. 14004 The party appealing is the appellant, the adverse party the appellee, but the title of the action shall not be changed on the appeal, and the cause shall be so docketed at the commencement of the period assigned for trying causes from the judicial district from which the appeal comes, which causes shall take precedence of all other business, be tried at the term at which the transcript is filed, unless continued for cause or by consent of the parties, and be decided, if practicable, at the same term.

CODE SEC. 14005 The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary.

CODE SEC. 14006 An appeal shall not be dismissed for any informality or defect in taking it, if corrected in a reasonable time; and the supreme court must direct how it shall be corrected.

CODE SEC. 14007 No assignment of error is necessary.

CODE SEC. 14008 The defendant is entitled to close the argument.

CODE SEC. 14009 The record and case may be presented in the supreme court by printed abstracts, arguments, motions, and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases.

CODE SEC. 14010 If the appeal is taken by the defendant, the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights

of the parties, and render such judgment on the record as the law demands; it may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it.

CODE SEC. 14011 In case the judgment of the trial court is reversed or modified in favor of the defendant, on the appeal of defendant, he shall be entitled to recover the cost of printing abstract and briefs, not exceeding one dollar for each page thereof, to be paid by the county from which the appeal was taken.

Rule 32 If the appellant desires to submit a criminal case upon a printed abstract and brief and argument, he shall serve on the attorney general and upon the clerk of this court a notice to that effect and shall file the same with the clerk of this court before the day set for the submission of said case, and said cause shall then be automatically continued for submission to the next succeeding term of this court. In that event the appellant shall serve and file his abstract and his brief and argument at least 30 days before the day then assigned for the submission of said cause, and the appellee shall serve and file its denial or amendment to the abstract and its brief and argument at least 15 days before the day assigned for the submission of said cause. If no such notice, as herein provided, is served, or if the appellant fails to serve and file his abstract and his brief and argument as provided herein said cause shall be submitted upon the record unless an extension of time to file has been previously granted.

The provisions of the code and rules of this court in civil procedure relating to the printing, serving, and filing of abstracts, denials, arguments, petitions for rehearing, notice thereof and of oral arguments, motions and resistances thereto, the certification of the record and the filing of decisions and opinions, shall apply in criminal cases insofar as the same are consistent with section 14004 of the code and this rule, and section 12847 of the code shall apply to the filing of the abstract in a criminal case.

CODE SEC. 14012 If the state appeals, the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings or in the measure of punishment, and its decision shall be obligatory as law.

CODE SEC. 14013 If a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the supreme court shall direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him.

CODE SEC. 14014 On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as otherwise provided.

CODE SEC. 14016 The decision of the supreme court, with any opinion filed or judgment rendered, must be recorded by its clerk, and, after the expiration of the period allowed for a rehearing, or as ordered by the court or provided by its rules, a certified copy of the decision and opinion shall be transmitted to the clerk of the trial court, filed and entered of record by him, and thereafter the jurisdiction of the supreme court shall cease, and all proceedings necessary for executing the judgment shall be had in the trial court, or by its clerk.

CODE SEC. 14017 Unless some proceeding in the district court is directed, a copy of the judgment of the trial court and decision on appeal, or of the judgment and decision on appeal certified by the clerk of the trial court, shall be delivered to the sheriff, or other proper officer, as an execution, and shall authorize him to execute the judgment of the court, or take any steps required to bring the action to a conclusion.

CODE SEC. 14018 If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction.

CONSTRUCTION AND MODIFICATION OF RULES

Rule 33 When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation, and argument of causes, ought to be waived or modified in any case, the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application shall be in writing, shall set out the peculiar facts relied upon by the applicant, and shall be verified by the party or person having knowledge of the facts, and certified by counsel as being true and made in good faith. The order upon such application shall be in writing, and shall be filed with the clerk of this court. In no case will these rules be waived or modified upon agreement of counsel alone.

PRINTING ABSTRACTS, BRIEFS, ARGUMENTS, AND PETITIONS FOR REHEARING

Rule 34 All abstracts, denials of abstracts, briefs, arguments, and petitions for rehearing shall be printed upon unruled, unglazed writing paper, with type commonly known as small pica, leaded lines, the printed page to be four inches wide by seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid or brevier with leaded lines. The lines of abstracts must be numbered consecutively on each page.

CONTINUANCES

Rule 35 Causes not fully argued at the period of the term to which they are assigned may be continued on the court's own motion. Causes may also be continued upon stipulation of parties. If notice of oral argument has been given, the cause will be for oral argument at the term to which continued.

DECISIONS AND OPINIONS

CODE SEC. 12871 * * * The court may reverse, modify, or affirm the judgment, decree, or order appealed from, or render such as the inferior court should have done. No cause is decided until the written decision is filed with the clerk.

CODE SEC. 12810 When the court is equally divided in opinion, the judgment of the court below shall stand affirmed, but the decision is of no further force or authority, but in such cases opinions may be filed.

CODE SEC. 12813 The decisions of the court on all questions passed upon by it, including motions and points of practice, shall be specifically stated, and shall be accompanied with an opinion upon all such as are deemed of sufficient importance, together with any dissent therefrom, which dissent may be stated with or without an opinion. All decisions and opinions shall be in writing and filed with the clerk, except that rulings upon motions may be entered upon the announcement book.

CODE SEC. 12814 The records and reports must in all cases show whether a decision was made by a full bench, and whether any and, if so, which of the judges dissented from the decision.

Rule 36 Each and every opinion filed shall show, on its face, what judges participated therein.

Rule 37 No *procedendo* shall issue in any case until the expiration of thirty days from the filing of the opinion, except upon an order of the court, or a judge thereof, upon cause shown, and except in criminal cases and cases where petitions for rehearing have been overruled.

REHEARINGS

CODE SEC. 12881 Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

CODE SEC. 12882 Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed.

CODE SEC. 12883 The petition may be made the argument or a brief of authorities relied upon for rehearing. The adverse party may file a printed argument in response. If the party applying for a rehearing shall give notice of oral argument in his petition, then both parties shall be entitled to be heard orally, unless the party giving notice waives argument.

CODE SEC. 12880 If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.

Rule 38 The petition shall include a copy of the opinion or decision of the court to which objection is made, or reference to the volume and page of the Northwestern Reporter in which it has been printed. Eighteen copies of the petition and argument in support thereof, including service copy, shall be filed with the clerk.

Rule 39 If there be a printed argument in resistance to the petition, a copy thereof shall be served upon the opposing litigant or his attorney, and filed ten days before the day fixed for the hearing of the cause, and eighteen copies, including the service copy, shall be filed with the clerk of this court.

Rule 40 The cause shall be placed on the docket for hearing at the next period commencing not less than thirty days after the service and filing of the petition, and shall be heard by the division to which the case was originally submitted.

EXECUTIONS

CODE SEC. 12875 If the supreme court affirms the judgment or order, it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require.

CODE SEC. 12876 If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court.

CODE SEC. 12877 If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to him such property or its value.

CODE SEC. 12888 Executions issued from the supreme court shall be like those from the district court, attended with the same consequences, and returnable in the same time.

DISTRIBUTION OF PRINTED MATTER

Rule 41 The clerk shall make the following distribution of all printed abstracts, denials of abstracts, briefs, and arguments received under the foregoing rules: One copy to each judge of the court, one copy to the state library, one copy to the law department of the state university, one copy to the law department of Drake university, and the remainder shall be placed in his office, one copy of which shall remain permanently among the files.

RETURN OF PAPERS AND EXHIBITS

CODE SEC. 12856 If a new trial is granted by the supreme court, the clerk, as soon as the cause is at an end therein, shall transmit to the clerk of the court below all original papers or exhibits certified up from said court, and may at any time return any such papers when no new trial is awarded.

Rule 42 If decree is entered in this court, either party desiring to withdraw any of the said files may, by motion, showing proper grounds therefor, and upon five days' notice to the other party or his attorney, secure an order from the court or a judge thereof, allowing him to do so upon filing a receipt for the same with the clerk of this court.

COSTS

CODE SEC. 12874 The supreme court must provide by rule for taxing as costs all printing authorized upon the trial of appeals. The court shall also tax the costs of any translation of the shorthand notes filed as provided in this chapter, and also any translation of the shorthand notes which has been made of record in the court below, upon the certificate of the clerk of such court as to the amount of such costs.

CODE SEC. 12846 If any denial or abstract is filed without good and sufficient cause, the costs of the same or any part thereof, and of any

transcript thereby made necessary, shall be taxed to the party causing the same.

Rule 43 When the parties or their attorneys shall furnish printed abstracts, denials of abstracts, amendments, briefs, arguments, or petitions for rehearing in conformity to these rules, the clerk will tax the actual cost of printing the same, which shall not exceed one dollar for each page embraced in a single copy thereof, and when not so prepared and printed shall not exceed the sum of one dollar for every three hundred and seventy-five words, which in no event shall exceed one dollar per page, against the unsuccessful party not furnishing the document, to be collected and paid to the successful party as other costs. It is made the duty of every party who files any printed matter for which cost of printing is claimed, to state at the end of the document in writing or in print and have certified by his attorney as being correct, the true and actual cost of the printing of the same and no costs will be taxed for such printing unless this statement and certificate be made.

Rule 44 Whenever the translation of the shorthand notes is required to be filed in this court, the clerk shall tax as part of the costs in the case the expense of procuring the same, which shall not exceed the rate of five cents per hundred words. If the amount paid or agreed to be paid is not stated in the translation so filed, the clerk shall tax at the statutory rate.

Rule 45 All other taxable fees and costs shall abide the result of the appeal and be taxed to the unsuccessful party, unless otherwise ordered.

Rule 46 Written notice of intention to petition for a rehearing shall be served on the opposite party, or his attorney, and the clerk of this court, and filed with the clerk within thirty days after filing of the opinion or decision, and if no such notice is served a petition for rehearing shall not be filed after the expiration of such thirty days.

Rule 47 Immediately after it is determined by this court which cases shall be submitted at the succeeding term thereof, the clerk of this court shall promptly notify all the attorneys, who have appeared in any pending case, of the cases which are to be thus submitted.

RULES FOR ADMISSION

TO THE

IOWA BAR

ADOPTED BY THE SUPREME COURT OCTOBER 17, 1939

ADMISSION OF ATTORNEYS AND COUNSELORS—JURISDICTION

10907 Admission to practice. The power to admit persons to practice as attorneys and counselors in the courts of this state, or any of them, is vested exclusively in the supreme court.

BOARD OF LAW EXAMINERS

10910 Board of law examiners. The attorney general shall, by virtue of his office, be a member of, and the chairman of, the commission provided for by this chapter, and the court shall appoint from the members of the bar of this state at least four other persons who, with the attorney general, shall constitute said commission, which shall be known as the board of law examiners.

10911 Term of appointment — vacancies. Each person appointed shall serve for two years, except that in case of a vacancy during the term of office of any commissioner his successor shall be appointed only for the remainder of such term.

10912 Oath—compensation. The members thus appointed shall take and subscribe an oath to be administered by one of the judges of the supreme court to faithfully and impartially discharge the duties of the office, and shall receive such compensation as may be allowed by the supreme court out of the fund arising from the examination fees hereinafter provided for.

10913 Temporary appointments—compensation. The supreme court may also appoint from time to time, when necessary, temporary examiners to assist the commission, who shall serve for one examination only, and shall receive such compensation as the court may allow, to be paid from the fund aforesaid.

MEMBERS OF THE BOARD

Rule 100 1. The board of law examiners shall consist of five members, in addition to the attorney general; and an examination for admission to the bar shall be conducted by not less than three members of the board. The regular and temporary appointive members of the board shall be paid $15.00 each for each day spent in conducting the examinations of the applicants for admission to the bar, as authorized by these rules, and shall also be reimbursed for actual expenses necessarily incurred in the performance of such duties. Said per diem and expense of the members of the board shall be paid by the clerk of this court on the certificate of the attorney general as to accuracy, out of funds in his hands derived from applicants' fees for admission to the bar.

2. No person shall be appointed to more than four successive terms.

AUTHORIZATION FOR COURT RULES

10918 Mode of examination. The supreme court may by general rules prescribe the mode in which examinations under this chapter shall be conducted, and in which the qualifications required as to age, residence, character, general education and term of study shall be proved, and may make any other and further rules, not inconsistent with this chapter, for the purpose of carrying out its object and intent.

STUDENTS IN UNIVERSITY

10915 Students in law department of university. Students in the law department of the state university, who are recommended by the faculty of said department as candidates for graduation and as persons of good moral character, who have actually and in good faith studied law for the time and in the manner required by statute, at least one year of such study having been as a student in said department, may be examined at the university by not less than three members of said commission with the addition of such temporary members as may be appointed by the court in accordance with the provisions of this chapter, and upon the certificate of such examiners, that such candidates possess the learning and skill requisite for the practice of law, they shall be admitted without further examination.

EXAMINATIONS—TIME AND MANNER OF CONDUCTING

Rule 101 Written examinations shall be held at the capitol, at Des Moines, commencing on the first Tuesday in October, and on the first Tuesday in June; and at the University of Iowa commencing on the Monday following the week of the annual commencement of the University; each examination shall be for a period not less than three days, the subjects for examination to be determined by the board of law examiners. Oral examinations of candidates shall be held at the capitol on the second Tuesday following the completion of the written portion of the June examination at the University of Iowa, and on the second Tuesday following the completion of the October written examination, or such earlier dates as the board shall fix. The board shall conduct such oral examinations as it deems necessary and proper. The board shall estimate each examination in percentage on the basis of one hundred percent for the entire examination, and no one shall be recommended by the board for admission who does not on this basis,

receive a grade of at least seventy-five percent. All candidates shall attend upon both the oral and written examinations. Results of examinations shall be announced following the oral examination. However, the board may, in its discretion, excuse any applicant from attending the oral examination provided for herein.

PRELIMINARY QUALIFICATIONS

10908 Qualifications for admission. Every applicant for such admission must be at least twenty-one years of age, of good moral character, and an inhabitant of this state, and must have actually and in good faith pursued a regular course of study of the law for at least three full years, either in the office of a member of the bar in regular practice of this state or other state, or of a judge of a court of record thereof, or in some reputable law school in the United States, or partly in such office and partly in such law school; but, in reckoning such period of study, the school year of any such law school, consisting of not less than thirty-six weeks exclusive of vacations, shall be considered equivalent to a full year. Every such applicant for admission must also have actually and in good faith acquired a general education substantially equivalent to that involved in the completion of a high school course of study of at least four years in extent.

PROOF OF EDUCATIONAL QUALIFICATIONS

Rule 102 1. Every applicant who is a graduate of a collegiate, classical, philosophical, scientific or engineering course in any university or college of good standing in the United States shall attach to his application the diploma or certificate issued to him by such university or college, or a photostatic copy thereof, and the same shall be accepted as proof of general educational qualifications of the applicant.

2. The certificate of the president of any university or college, high school, normal school or academy in this state that the applicant has regularly and in good faith pursued and successfully completed four years of the regular course of such school as above described, or the certificate of the president of the state university or any college in this state having an equivalent collegiate or liberal arts course of study, that the applicant has been found by examination or on proper certification to be entitled to admission without conditions as a student in such course or in any other course of study in such institution for which the same qualifications for admission are required, shall be accepted as sufficient proof of the educational qualifications of any applicant who commenced his study of the law prior to January 1, 1939.

QUALIFICATIONS DETERMINED BY ATTORNEY GENERAL AND CLERK

Rule 103 The attorney general and clerk of this court, subject to review by the board or the court, shall determine the general educational qualifications of the applicants for examination before allowing them to enter upon the examination as to their legal attainments, and for that purpose may require such of them as do not otherwise show their qualifications, to submit to written tests as to their knowledge of the subjects of Orthography, Reading, Writing, Arithmetic, Geography, English, Grammar, United States and English History, Elementary Algebra, Elementary Physics, Elementary Economics and Civil Government, and such other subjects as may be deemed necessary.

COLLEGE PRE-LEGAL EDUCATION

Rule 104 In addition to the general educational requirements of the statutes and rules, no person who begins the study of law after January 1, 1939, shall be eligible for admission to the bar, unless before beginning such law study, he shall have successfully completed two years attendance and study at a university or college of recognized standing, or have successfully completed a course of training determined by the board of law examiners to be equivalent to the foregoing.

FORM OF APPLICATION AND TIME AND MANNER OF MAKING

Rule 105 The board of law examiners and clerk of this court shall prepare such forms as may be necessary for application for examination, and the board may make such rules, not inconsistent with the rules of this court, with reference to the method of conducting the examinations herein provided for, as they may deem expedient.

Every applicant for admission to the bar shall make application, under oath, and upon the form prescribed which will be furnished by the clerk of the supreme court, upon request, and shall file his application with the clerk of the supreme court at least forty-five (45) days before the first day of the next bar examination. A new and complete application shall be filed for each examination for admission.

PROOF OF MORAL CHARACTER

Rule 106 Every applicant shall attach to his application, as proof of his good moral character, a certificate of a judge of the district court of the district, or a clerk of the district court of the county, in which the applicant resides, to the effect that he has knowledge of the moral character of the applicant, and that the same is good.

PROOF OF AGE, PLACE OF RESIDENCE, AND OTHER REQUIREMENTS

Rule 107 Proof of qualifications as to age, place of residence, time and place of study, shall be by affidavit made before some officer authorized to administer oaths and having a seal. Proof of residence and age shall be by affidavits of at least two witnesses, and the applicant shall also make affidavit as to his age and place of residence. Proof of his term of study shall be by affidavit of the member of the bar or judge with whom he pursued his studies; and when he has studied at a law school, such fact, and his term of study, shall be shown by the affidavit of one or more of the professors or instructors of such school; such affidavits must show that the applicant has actually, and in good faith, pursued the study of law in the manner, and for the time prescribed by statute and the rules of the supreme court; and must also show that the affiant is a practicing lawyer or judge of a court of record, or professor or instructor at a law school at which the applicant studied.

ACCREDITED LAW SCHOOL DEFINED

Rule 108 A law school fully approved by the Council of Legal Education of the American Bar Association shall be deemed a reputable law school, as the term is used in section 10908, 1939 Code.

Credit for study completed in a law school not so approved may, in the discretion of the board of examiners, be allowed, provided:

(1) Such school, which is designated a full-time

law school, shall have a three-year course of at least thirty-six (36) weeks each year requiring students to devote substantially all of their working time to their studies.

(2) Such school, which is designated a part-time law school, shall have a course of not less than four years of at least thirty-six (36) weeks each year, equivalent in the number of working hours to the course of study of a full-time law school.

(3) No credit for study completed in schools other than the above shall be allowed, nor shall any credit be allowed for law study pursued through correspondence. A year of study in a part-time law school shall be considered the equivalent of three-fourths year of study in a full-time law school. Shorter periods of study in a part-time law school may be credited upon a like basis.

STUDY IN A LAW OFFICE

Rule 109 1. In addition to all other requirements, the following rule shall govern allowance of credit for study pursued in a law office, after January 1, 1939, but does not apply to students having certificates on file prior to said date, showing that they were then engaged in such study.

2. No credit shall be given for study in the office of a member of the bar unless such member is an attorney engaged in the general practice of law, maintaining an office open to the public generally, or is a judge of a court of record other than a police court.

3. A student pursuing such study shall actually engage in the study of the law and in the general practice work of such office during usual office hours for not less than forty-eight weeks in each year, for at least three full years.

4. No credit shall be given for law study carried on by correspondence, or privately outside a law office, or when merely supervised by a member of the bar while the student is engaged in outside occupation or employment.

5. No credit shall be given any applicant for time of study in an office unless there shall be filed with the clerk of the supreme court at the beginning of such study a certificate signed by an attorney in regular practice and in good standing, or a judge of a court of record other than a police court, certifying that such student of law has entered the office of such attorney or judge for the purpose of studying law, and with the understanding that such attorney or judge will give such student supervision and instruction in the study of law, and with the further understanding that such student will be and remain in regular attendance at said office for such purpose. Said certificate of such attorney shall give the actual date the student entered his office for such purpose, and his address.

6. The affidavit of the attorney or judge certifying to such study, in addition to all other requirements of the statutes and rules, shall set forth facts showing compliance with the requirements of this rule and shall be filed in the office of the clerk of this court at the close of such period of study.

SCOPE OF EXAMINATION

10909 Examinations. Every such applicant shall also be examined by the court, or by a commission of not less than five members constituted as hereinafter provided, as to his learning and skill in the law; and the court must be satisfied, before admitting to practice, that the applicant has actually and in good faith devoted the time hereinbefore required to the study of law, and possesses the requisite learning and skill therein, and has also the general education required by this chapter. The sufficiency of the general education of the applicant may be determined by examination before the commission, or in such other manner as the supreme court may by rule prescribe.

NUMBER DRAWN BY APPLICANT AT BEGINNING OF EXAMINATION

Rule 110 Each applicant permitted to take the law examination at the capitol at Des Moines, shall draw a number at the beginning of the examination, by which number he shall be known throughout such examination. Said number shall be furnished by the clerk of the supreme court.

LIST SHOWING NUMBER DRAWN PREPARED BY CLERK

Rule 111 Said clerk shall prepare a list of the applicants showing the number drawn by each at the beginning of the examination, certify to such facts, seal said list in an envelope immediately after the beginning of said examination and retain the same sealed, in his possession unopened until after the written examination has been completed, and the average made by each applicant set out. On such completion the envelope shall be opened in the presence of the attorney general and the correct name entered opposite the number drawn by each applicant, in the presence of the clerk of the supreme court and a representative of the attorney general's office.

LIST AT STATE UNIVERSITY PREPARED BY DEAN

Rule 112 At each law examination held at the state university, the method of designating the applicants outlined in Rule 111 shall be followed with the exception that the dean of the college of law shall perform the duties required to be performed in Rule 111 by the clerk of the supreme court.

EMPLOYMENT OF CHARACTER INVESTIGATION SERVICE OF NATIONAL BAR CONFERENCE PERMITTED

Rule 113 The attorney general or the clerk of the supreme court is authorized to employ the character investigation services of the national conference of bar examiners. Such character investigation and report shall be procured in all cases where application for admission on motion is made, and where the required investigation fee has been paid by the applicant. Such service may be utilized in cases of applications for admission upon examination where the same is deemed necessary by the clerk of the supreme court or the board of law examiners. The clerk of the supreme court is authorized to pay the cost of such service, not exceeding the sum of twenty-five dollars ($25.00) in each case, to the investigation service of the national conference of bar examiners from investigation fees paid by applicants for admission to the bar.

TIME ELAPSING BEFORE NEXT EXAMINATION—NUMBER PERMITTED

Rule 114 1. No candidate for admission to the bar having failed to pass the examination, shall be permitted to take another examination until at least ten months shall have elapsed since such failure.

2. Unless otherwise ordered by the court, no candidate shall be permitted to take more than three examinations.

PASSING ON SUFFICIENCY OF APPLICATIONS

Rule 115 The authority to pass on the sufficiency of applications for permission to take the bar examination is vested in the attorney general and the

clerk of this court, *ex officio*, subject, however, to review by the board or the court.

INVESTIGATION TO BE MADE BY CLERK

Rule 116 1. Immediately upon the filing of the application the clerk of the court shall notify the president of the local bar association of the county in which the applicant resides of the filing of such application. It shall be the duty of the local bar association to investigate the standing and character of the applicant, and report the same to the clerk of the supreme court at least fifteen days before the date of the holding of the examination.

2. If there be no local bar association, or if the local bar association fails to act, then the clerk shall notify the county attorney of the county in which the applicant resides, and it shall be his duty to make said investigation and said report as provided herein.

FEES REQUIRED

10914 Fees—how used. Every applicant for admission shall pay to the clerk of the supreme court an examination fee of five dollars, payable before the examination is commenced. Practitioners from other states seeking admission to practice in this state as provided by law shall pay an admission fee of ten dollars. The fees thus paid to the clerk shall be retained by him as a special fund to be appropriated as otherwise provided; and any amount thereof remaining in his hands unappropriated on the thirtieth day of June of each year shall be turned over to the state treasury.

INVESTIGATION FEE

Rule 117 Every applicant for admission to the bar upon examination shall, as a part of his application, remit to the clerk of the supreme court an investigation fee in the amount of ten dollars ($10.00). This fee shall be in addition to any charge or fee otherwise required, and shall be paid for each examination.

ADMISSION OF ATTORNEYS FROM OTHER JURISDICTIONS

10916 Practitioners from other states. Any person a resident of this state having been admitted to the bar of any other of the United States may, in the discretion of the court, be admitted to practice in this state without examination or proof of period of study, as hereinbefore provided, on proof of the other qualifications required by this chapter, and on satisfactory proof that he has practiced law regularly for not less than one year in the state where admitted to practice, after having been admitted to the bar according to the laws of such state, or on satisfactory proof that he has taught law regularly for one year in a recognized law school in the state of Iowa, after admission to the bar of any other of the United States.

RECIPROCITY—PERIOD OF PRACTICE—FEES

Rule 118 From and after January 1, 1939, a member of the bar of any other of the United States, the territories thereof, or the District of Columbia, in his application for admission to practice law in this state, in addition to all other requirements of law, shall establish: That he has practiced law five (5) full years under license in such jurisdictions within the seven (7) years immediately preceding the date of his application and still holds a license, provided that the teaching of law as a full-time instructor in a law school approved by the Section of Legal Education and Admissions to the Bar of the American Bar Association in this state or some other state shall, for the purposes of this rule, be deemed the practice of law. In addition to the admission fee of ten dollars ($10.00) now required by law, such applicant shall pay to the clerk of the supreme court at the time of filing application, an investigation fee in the amount of forty dollars ($40.00), no part of said fee to be refunded to any applicant.

CERTIFICATES OF QUALIFICATIONS—PLACE OF ADMISSION

Rule 119 The following proofs must be filed with the attorney general and the clerk of this court and approved by the attorney general to entitle an applicant to admission under section 10916:

(1) Certificate of admission in state of former residence;

(2) Certificate of clerk or judge of a court of record in such state that he was regularly engaged in practice of law in said state for five years;

(3) Certificate of judge or clerk of district court where applicant intends to practice in this state that he is of good moral character;

(4) Affidavits of two citizens and affidavit of applicant as to age and residence in this state.

Applicants must appear for admission in open session of the supreme court.

PROCEEDINGS ON APPLICATION FOR REINSTATEMENT

Rule 120 Any attorney who has been disbarred by the courts of this state, or who has surrendered his certificate to practice law, shall, upon application for re-admission to the bar, be subject to the following rules:

(1) A proceeding for reinstatement as a member of the bar must be commenced by a written application to this court, which must be filed with the clerk of this court, and it shall state the age of the applicant, the date of the original admission, the date of disbarment, or date of surrender of certificate of applicant, and same shall be verified by the oath of the applicant as to the truth of the statements made therein, and shall be accompanied by a recommendation of at least three reputable attorneys practicing in the judicial district in which the applicant then lives, and has lived at least one year prior to filing application. If the applicant lives in a judicial district other than the district in which he lived at the time of the disbarment or surrender of his certificate, he shall file a recommendation of three reputable practicing attorneys of such district.

(2) Upon filing of such application and recommendations with the clerk of this court, the clerk shall give written notice thereof to the attorney general; to the county attorney of the county in which the applicant resides; and to the county attorney where applicant resided at the time of disbarment or surrender of certificate; and to each of the judges of the district in which the applicant resided at the time of disbarment or surrender of certificate; and to the president of the State Bar Association, and to the president of the County Bar Association, if there be any, of the residence of the applicant, and of the county where applicant resided when disbarred or surrendered his certificate.

(3) Such notice shall contain the date of the disbarment or of the cancellation of the certificate; the date of filing the application, and the date of hearing thereon fixed by the court, which shall in no case be less than sixty days after the filing of such application for reinstatement.

(4) If an attorney is reinstated it shall be only upon such conditions as this court shall prescribe.

TABLE OF
CORRESPONDING SECTIONS
OF THE
FORTY-SIXTH EXTRA, AND FORTY-SEVENTH GENERAL ASSEMBLIES

This table shows the sections of the code which correspond in subject matter with the sections of the acts of the 46th extra, and 47th general assemblies which constituted *new* or *substituted* legislation. The table also shows the sections of the code which contain the *amendments* of said general assemblies.

[An asterisk (*) indicates that the session law citation thus marked is an *amendment* to some section of the code, and that the code section indicated in the right-hand column shows such section of law as amended by said session law citation, plus such changes as are indicated in the right-center column. The session law citations which are not marked with an asterisk consist of either *new* or *substituted* legislation.

The omission of a chapter or section number from either of the two left-hand columns, unless otherwise indicated, shows that the same is temporary, special, legalizing, or repealing in character and, therefore, does not appear in the code.

An entry in the right-center column shows an amendment, substitute, or repeal of the session law citation in the left-hand column. "A." indicates an amendment; "R&S." indicates a repeal and substitution.]

Chapter	Section	Amendments, Repeals, and Substitutes	Code 1939
85	1		3790.1
87	1*	A. 48-40-1	84.06
88	1		482.07
	2		482.08
	3	R&S. 48-57-1	482.09
	4	R&S. 48-57-1	482.10
	5		482.11
89	1	R&S. 48-42-1, 2	113
	2	R&S. 48-42-1, 3	124
90	1		237
91	1*		369
	2*		ch 24
	3		390.1-390.7
	4		390.8
92	1*		370
	2*		5663
	3		5663.1
93	1		1171.06
	2	R&S. 48-60-1	1171.07
	3		1171.08
	4		1171.09
	5		1171.10
94	1*		748
95	1*		950
96	1*		ch 68
	2		1242.5
	3		1242.6
	4		1242.7
	5		1242.8
97	1*		1297.1
98	1		1387
99	2*		1703.27
	3[1]		
	4		1703.09
	5		1703.10
	6		1703.11
	7	A. 48-78-1	1703.12
	8	A. 48-78-2	1703.13
	9		1703.14
	10		1703.15
	11	A. 48-78-3	1703.16
	12		1703.17
	13		1703.18
	14		1703.19
	15		1703.20
	16		1703.21
	17	A. 48-78-4	1703.22
	18		1703.23
	19		1703.24
	20		1703.25
	21		1703.26
99	22		1703.27
	24*		1703.50
	25		1703.51
	26*	A. 48-77-5	1789
	27[2]		
	28*		1703.52
	29		1794.001
	30	A. 48-78-5	1794.002
	31		1794.003
	32	A. 48-78-6	1794.004
	33		1794.005
	34		1794.006
	35		1794.007
	36		1794.008
	37		1794.009
	38	A. 48-78-7	1794.010
	39	A. 48-77-9, 10	
		A. 48-78-8	1794.011
	40		1794.012
	41		1794.013
	42		1794.014
	43		1794.015
	44		1794.016
	45		1794.017
	46		1794.018
	47	A. 48-77-11	
		A. 48-78-9	1794.019
	49		1794.020
	50		1794.021
	51		1794.022
	52		1794.023
	53		1794.024
	54		1794.027
	55		1794.028
	56	A. 48-77-12, 13	
		A. 48-78-11	1794.029
	57		1794.030
	58		1794.031
	59		1794.032
	60		1794.033
	61		1794.034
	62	A. 48-78-12	1794.035
	63		1794.036
	64		1794.037
	65	A. 48-78-13	1794.038
	66		1794.039
	67		1794.040
	68		1794.041
	69	A. 48-78-14	1794.042
	70		1794.043
	71		1794.044

[1]Amends ch 85, code 1935, see §§1703.09-1703.27.
[2]Part of amendment applies to chs 85.1 and 86.1.

Chapter	Section	Amendments, Repeals, and Substitutes	Code 1939
99	72		1794.045
	73	A. 48-78-15	1794.046
	74		1794.047
	75		1794.048
	76	A. 48-78-25	1794.049
	77	A. 48-78-16	1794.050
	78		1794.051
	79	A. 48-78-17	1794.052
	80		1794.053
	81	A. 48-78-18	1794.054
	82		1794.055
	83		1794.056
	84		1794.057
	85		1794.058
	86		1794.059
	87		1794.060
	88		1794.061
	89		1794.062
	90		1794.063
	91		1794.064
	92		1794.065
	93		1794.066
	94		1794.067
	95		1794.068
	96	A. 48-78-19	1794.069
	97	A. 48-78-20	1794.070
	98	A. 48-78-21	1794.071
	99		1794.072
	100		1794.073
	101		1794.074
	102	A. 48-78-22	1794.075
	103		1794.076
	104		1794.077
	105		1794.078
	106		1794.079
	107		1794.080
	108		1794.081
	109*		1794.092
	110*		1794.095
	112*		ch 87
	113		1828.01
	114		1828.02
	115	A. 48-78-23	1828.03
	116		1828.04
	117		1828.05
	118		1828.06
	119		1828.07
	120		1828.08
	121		1828.09
	122		1828.10
	123		1828.11
	124		1828.12
	125		1828.13
	126		1828.14
	127		1828.15
	128		1828.16
	129		1828.17
	130		1828.18
	131		1828.19
	132		1828.20
	133		1828.21
	134		1828.22
	135		1828.23
	135a*		1703.42
101	1*		ch 89
102	1		1551.07
	2		1551.08
	3	A. 48-67-1	
		A. 48-68-8	1551.09
	4	A. 48-67-2, 6	1551.10
102	5	A. 48-64-1	
		A. 48-67-3, 4	
		A. 48-68-7	1551.11
	6	A. 48-65-1, 2	
		A. 48-69-1	1551.12
	7	A. 48-67-5	1551.13
	8	A. 48-66-1	1551.14
	9	A. 48-68-1	1551.15
	10	A. 48-69-2	1551.16
	11	A. 48-68-2	1551.17
	12	A. 48-68-3, 4	1551.18
	13	A. 48-68-5	1551.19
	14	A. 48-66-2, 3	
		A. 48-69-7	1551.20
	15		1551.21
	16	A. 48-69-6	1551.22
	17		1551.23
	18		1551.24
	19	A. 48-64-2	
		A. 48-65-3, 4, 5	
		A. 48-69-4, 5	
		A. 48-70-1	1551.25
	20	A. 48-68-6	1551.26
	24		1551.27
103	1	R&S. 47-102-10	1551.16
104	1[3]		
	2		2542
	3		2543
	4		2544
	5		2545
	6		2546
	7		2547
105	1*		2217
	2*		2522
	3[4]		2585.24
106	1*		2585.01
106	2		2534.1
107	1		2585.08
108	1*		2590
109	1*		2746
	2*		2747
	3, 4*		2749
	5*		2753
110	1*		2812
111	1		2953.5
	2		2953.6
	3		2953.7
	4		2953.8
	5		2953.9
112	1, 2*		3058
113	1*		3137.1
114	1		3169.01
	2		3169.02
	3		3169.03
	4		3169.04
	5		3169.05
	6		3169.06
	7		3169.07
	8		3169.08
	9		3169.09
	10		3169.10
	11		3169.11
	12		3169.12
	13		3169.13
	14		3169.14
	15		3169.15
	16		3169.16
	17		3169.17
	18		3169.18
	19		3169.19
	20		3169.20
	21		3169.21

[3]Repealed ch 117, code 1935, for substitutes, see §§2542-2547, inc.
[4]Section amended, and part transferred to §2585.24.

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114	22		3169.22
	24		3169.23
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115	2		3174
	3		3175
	4		3176
	5		3177
	6		3177.1
116	1*		3293
117	1*		3596
118	2*	A. 48-84-2	3661.016
	3	R. 48-84-3	
	4	A. 48-84-4	3661.017
	5	A. 48-84-5	3661.018
	6	A. 48-84-6	3661.019
	7*	A. 48-84-7	3661.025-3661.055
	8*	A. 48-84-7	3661.058-3661.071
	9*	A. 48-84-7	3661.074-3661.114 3666
	10*	A. 48-84-7	3655 3656 3671 3683
	11*		10501.7, 10501.8
	12*	A. 48-84-8	3661.020
	14		3661.021
119	1*		3881
	2*		3883
	3*		3908
120	1		4179.1
121	1*		4235
	2*		4312
	3*		4313
122	1*		4239.3
123	1		4283.01
124	1*		4446
	2*		4447 4447.1
	3		4459.1
	4		4460.1-4460.4
	5*		4238
125	1*		4488
	2*		4506
	3, 4*		4507
126	1		4283.02
	2		4283.03
	3		4283.04
	4		4283.05
	5		4283.06
	6		4283.07
	7		4283.08
	8		4283.09
	9		4283.10
128	1		4755.22
130	1*		4746
131	1		4829.01-4829.22
133	1[5]		
134	1	A. 48-120-32, 33 A. 48-121-2, 3, 26 A. 48-127-1 A. 48-128-1 A. 48-135-1, 9a	5000.01
	2-15	R&S. 48-121-7	5000.02
	16	A. 48-120-36 A. 48-121-8	5000.03
	17	A. 48-121-9	5000.04
	18		5000.05
	19	R&S. 48-121-10	5000.07
	20	A. 48-120-37	5000.08
	21		5000.09
	22		5000.10
	23		5000.11
134	24		5000.12
	25	A. 48-120-38	5000.13
	26	A. 48-120-39	5000.14
	27		5000.15
	29		5000.16
	30-47	R. 48-120-40	See 1225.06 et seq., 5000.06
	48		5001.01
	49	A. 48-126-1	5001.02
	50	A. 48-125-1	5001.03
	51		5001.04
	52		5001.05
	53		5001.06
	54		5001.07
	55		5001.08
	56		5001.09
	57		5001.10
	58		5001.11
	59		5001.12
	60		5001.13
	61		5001.14
	62	A. 48-123-1	5001.15
	63		5001.16
	64		5001.17
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	67		5001.20
	68		5001.21
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	72		5001.25
	73		5001.26
	74		5001.27
	75		5001.28
	76		5002.01
	77		5002.02
	78		5002.03
	79		5002.04
	80		5002.05
	81		5002.06
	82		5002.07
	83		5002.08
	84		5003.01
	85		5003.02
	86		5003.03
	87		5003.04
	88		5004.01
	89		5004.02
	90		5004.03
	91		5004.04
	92		5004.05
	93		5004.06
	94		5004.07
	95		5004.08
	96		5004.09
	97	A. 48-120-76	5004.10
	98		5005.01
	99		5005.02
	100		5005.03
	101		5005.04
	102		5005.05
	103		5006.01
	104		5006.02
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	106		5006.04
	107	R. 48-121-11	
	108		5006.05
	109		5006.06
	110		5006.07
	111		5006.08
	112		5006.09

[5]§4960-d30 amended by 47GA, ch 183, §1; repealed by 47GA, ch 134, §527.

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	114		5006.11
	115		5006.12
	116		5006.13
	117		5006.14
	118	A. 48-120-25d	
		A. 48-121-12	5006.15
	119		5006.16
	120		5006.17
	121		5006.18
	122		5006.19
	123		5006.20
	124		5006.21
	125		5006.22
	126		5006.23
	127	A. 48-121-13	5006.24
	128		5006.25
	129		5007.01
	130		5007.02
	131		5007.03
	132		5007.04
	133		5007.05
	134		5007.06
	135		5007.07
	136		5007.08
	137		5008.01
	138		5008.02
	139		5008.03
	140		5008.04
	141		5008.05
	142		5008.06
	143		5008.07
	144		5008.08
	145		5008.09
	146		5008.10
	147		5008.11
	148		5008.12
	149		5008.13
	150	R&S. 48-135-2	5008.15
	151	R&S. 48-135-3	5008.16
	152	R&S. 48-135-4	5008.17
	153	R&S. 48-135-5	5008.18
	154	R&S. 48-135-6	5008.19
	155	A. 48-121-14	5008.20
	156		5008.21
	157		5008.22
	157-a		5008.23
	158	A. 48-121-15	5008.24
	159		5008.25
	160	A. 48-124-1	5008.26
	161		5008.27
	162		5008.28
	163		5009.01
	164	A. 48-135-8	5009.02
	165		5009.03
	166		5009.04
	167		5009.05
	168		5009.06
	169		5009.07
	170		5009.08
	171		5009.09
	172		5009.10
	173		5009.11
	174		5009.12
	175	A. 48-183-4	5010.01
	176	R. 48-183-5	
	176-a1	R. 48-183-5	
	177	R&S. 48-183-6	5010.02
	178		5010.03
	179		5010.04
	180		5010.05
	181		5010.06
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[6]Amendment renders §5296-f35, code 1935, obsolete.
[7]Part of amendment cannot be applied because words do not appear in section.
[8]Temporary act.

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[9]Not printed in code, §5694 repealed.
[10]Not printed in code, §5694 repealed.
[11]Part of amendment appears in §6788.
[12]Part of amendment cannot be applied because words do not appear in section.
[13]Temporary portion of amendment omitted.
[14]Amendment repealed by 47GA, ch 196, §20.

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208	1*		8581.05
	2*	A. 48-221-24	8581.08
209	1*	A. 48-221-2, 5	8581.07
	2*	A. 48-221-2	8581.10
	3*	A. 48-221-2, 5	8581.11
210	1		8650
211	1*		8652
212	1*		8655
213	1		8737
214	1*		8906
	2		8906.1
215	1*		13619
	2*		13620
	3*		8940
216	1		9042.1
	2		9042.2
217	1		8718
218	1*		9283.33-9283.38
220	1*		9329
	2		9315.1
	3		9340.04-9340.15
	4		9340.16
	5*		9333
	6*	A. 48-231-16	9319
	7*		9348
	8*		9382
	9*	A. 48-247-1	12772
	10	A. 48-231-3	9315
	11		9347
221	1*	R&S. 48-231-4	9330
222	1, 2, 3, 4*		9885
223	1*		10016
224	1*		10482
225	1, 2*		10653
226	1*		11106
227	1		12543
228	1		12644.14
229	1		13008
230	1		13073
231	1*		13198
	2*		13210
232	1		13315.1
	2		13315.2
	3		13315.3
	4		13315.4
	5		13315.5
	6		13315.6
233	1*		13352
234	1		11056.1
235		R. 48-36-2	
238	1		12415.1
251	1		10383.1
	2		10383.2
		46 Ex. G. A.	
4		R&S. 47-102-25	See 47 G. A. Table

[15]Railroad Commission changed to Commerce Commission.

TABLE OF
CORRESPONDING SECTIONS
OF THE
FORTY-EIGHTH GENERAL ASSEMBLY

This table shows the sections of the code which correspond in subject matter with the sections of the acts of the 48th general assembly, which constituted *new* or *substituted* legislation. The table also shows the sections of the code which contain the *amendments* of said general assembly.

[The omission of a chapter or section number from the left-hand column, unless otherwise indicated, shows that the same is temporary, special, legalizing or repealing in character and does not appear in the code.

An asterisk (*) indicates that the session law citation thus marked is an *amendment* to some section of the code, or acts of the 46th extra, or 47th general assembly, and that the section indicated in the right-hand column shows such section of the law as amended by said session law citation. The session law citations which are not marked with an asterisk consist of either *new* or *substituted* legislation.]

Chapter	Section	Code 1939
36[1]		
39	1, 2*	39
40	1*	84.06
41	1*	84.14
	2*	84.16
	3*	84.18
	4*	84.19
	5*	84.06
42	2	113
	3[2]	124
	4	124.1
	5[3]	125
	6[4]	126
	7	6750.1
43[5]	2	125
44	1, 2*[6]	152
	3	151.1
	4	151.2
45	1*	152
46	1*	156
	2[7]	
47	1*	184
48	1, 2*	215
49	1*	252
50	1*	264
51	1*	300
52	1*	302
54	1, 2*	467.21
55	1	467.32
	2	467.33
56	1*	467.40
57	1	482.09 482.10
58	1*	616
59	1	295.1
60	1	1171.07
61	1	1205.1
62	1*	1216
63	1	1360.01
	2	1360.02
	3	1360.03
	4	1360.04
	5	1360.05
	6	1360.06
	7	1360.07
	8	1360.08
	9	1360.09
	10	1360.10
64	1*	1551.11
	2*	1551.25
65	1*	1551.12
	2*	1551.12
	3*	1551.25
	4*	1551.25
	5*	1551.25
66	1*	1551.14
	2*	1551.20
	3*	1551.20
67	1*	1551.09
	2*	1551.10
	3*	1551.11
	4*	1551.11
	5*	1551.13
	6*	1551.10
68	1*	1551.15
	2*	1551.17
	3*	1551.18
	4*	1551.18
	5*	1551.19
	6*	1551.26
	7*	1551.11
	8*	1551.09
69	1*	1551.12
	2*	1551.16
	3*	1551.19
	4*	1551.25
	5*	1551.25
	6*	1551.22
	7*	1551.20
70	1*	1551.25
71	1*	1546.1
	2*	1546
72	1	1552
	2	1556.01
	3	1556.02
	4	1556.03
	5	1556.04
	6	1556.05
	7	1556.06
	8	1556.07
	9	1556.08
	10	1556.09
	11	1556.10
	12	1556.11
	13	1556.12
	14	1556.13
72	15	1556.14
	16	1556.15
	17	1556.16
	18	1556.17
	19	1556.18
	20	1556.19
	21	1556.20
	22	1556.21
	23	1556.22
	24	1556.23
	25	1556.24
	26	1556.25
	27	1556.26
	28	1556.27
	29	1556.28
	30	1556.29
	31	1556.30
	32	1556.31
	33	1556.32
	34	1556.33
	35	1556.34
73	1–9[8]	
	10[9]	
75	1	1703.53
76	1*	1794.082
	2[10]	1794.088
	3[11]	1794.093
	4*	1799
	5	1821.1
77	1*	1714
	2*	1741
	3*	1742
	4	1762
	5*	1789
	6*	1703.02
	7*	1785
	8*	1794.098
	9*	1794.011
	10*	1794.011
	11*	1794.019
	12*	1794.029
	13*	1794.029
	14*	1704
	15*	1705
	16*	1745
	17*	1794.099
78	1*	1703.12
	2*	1703.13

[1]Repealed ch 235, 47GA.
[2]Part of this section is now §6750.1.
[3]Repealed and substituted by 48GA, ch 43, §2.
[4]Amended by 48GA, ch 43, §1.
[5]Amendment to 48GA, ch 42.
[6]Amended by 48GA, ch 45, §1.
[7]Not printed in code, see 48GA, ch 183, §9.
[8]Not printed in code, see 48GA, ch 72, §36.
[9]Amends ch 78, code 1935, and ch 72, 48GA.
[10]Amendment by 48GA, ch 76, §2, printed as new section.
[11]Amendment by 48GA, ch 76, §3, printed as new section.

Chapter	Section	Code 1939
78	3*	1703.16
	4*	1703.22
	5*	1794.002
	6*	1794.004
	7*	1794.010
	8*	1794.011
	9*	1794.019
	10[12]	1794.025
		1794.026
	11*	1794.029
	12*	1794.035
	13*	1794.038
	14*	1794.042
	15*	1794.046
	16*	1794.050
	17*	1794.052
	18*	1794.054
	19*	1794.069
	20*	1794.070
	21*	1794.071
	22*	1794.075
	23*	1828.03
	24	1703.60
	25*	1794.049
79	1[13]	1921.093
80	1*	1921.096
	2*	1921.097
	3*	1921.099
	4*	1921.103
	5*	1921.104
	6*	1921.105
	7*	1921.106
	8*	1921.109
	9*	1921.119
	10*	1921.121
	11*	1921.122
	12*	1921.128
	13*	ch 93.2
81	1*	1931
82	1	2281.1
		2281.2
	2	2315.1
83	1*	2285
	2*	2305
	3*	2287
	4	2316.1
	5*[14]	2315.1
84	1*	3661.007
	2*	3661.016
	4*	3661.017
	5*	3661.018
	6*	3661.019
	7*	3655
		3656
		3661.025–3661.114
		3666
		3671
		3683
		10501.7
		10501.8
	8*	3661.020
	9*	3684.11
	10*	6950.1
	11*	3828.010
86	1	3828.067
	2	3828.068
	3	3828.069
86	4	3828.070
	5	3828.071
	6	3828.072
88	1*	2644
89	1	2872.01
	2	2872.02
	3	2872.03
	4	2872.04
	5	2872.05
	6	2872.06
	7	2872.07
	8	2872.08
	9	2872.09
	10	2872.10
	11	10344.1
	12	10344.2
91	1	3114
	2*	3115
	3*	3117
	4	3118
92	1	2603.02
	2	2603.03
	3	2603.04
	4	2603.05
	5	2603.06
	6	2603.07
	7	2603.08
	8	2603.09
	9	2603.10
	10	2603.11
	11	2603.12
93	1*	3292
	2*[15]	3293
	3*	3300
	4*	3330
	5*	3331
	6*	3332
	7*	3352
	8*	3356
	9*	3395
		3396
		3406
		3499
		3504
	10*	3467
	11*	3287
	12*	3402
	13*	3475
	14*	3476
	15*	3477
	16	3291.1
	17	3291.2
	18	3291.3
94	1[16]	
	2	3384.01
	3	3384.02
	4	3384.03
	5	3384.04
	6	3384.05
	7	3384.06
	8	3384.07
	9	3384.08
	10	3384.09
	11	3384.10
	12	3384.11
	13	3384.12
	14	3384.13
94	15	3384.14
	16	3384.15
	17	3384.16
	18	3384.17
	19	3384.18
	20	3384.19
	21	3384.20
	22	3384 22
	23	3384.21
95	2	3477.1
	3	3477.2
	4	3477.3
	5	3477.4
	6	3477.5
	7	3477.6
	8	3477.7
96	1*	3527
	3*	3604
97	1	3562.2
		3562.3
98	1*	3595
	2	3597
	3*	3598
	4	3604.1–3604.6
99	1*	3621
101	1*	3653
102	1*	4226
103	1*	4233.4
104	1	4275.1
105	1	4275
106	1*	4283.17
107	1*	4323
	2	4323.1
108	1*	4364
	2*	7845
109	1	6943.156
	2	6943.157
	3	6943.158
	4	6943.159
	5	6943.160
	6	6943.161
	7	6943.162
	8	6943.163
	9	6943.164
	10	6943.165
	11	6943.166
110	1*	4473
111	1	4487.1
112	1*	4503
	2*	4505
113	1	4541.01
	2	4541.02
	3[17]	4541.03
	4	4541.04
	5	4541.05
	6	4541.06
	7	4541.07
	8	4541.08
	9	4541.09
	10	4541.10
	11	4541.11
	12	4541.12
	13	4541.13
	14	4541.14
	15[18]	
	16	4541.15
114	1*	4626

[12]Amendment printed as new section.
[13]Not printed in code, see 48GA, ch 120, §94.
[14]Part of this amendment not printed in code because it is a duplicate of 48GA, ch 82, §2.
[15]As amended by 47GA, ch 116, §2.
[16]Repeals ch 168, code 1935, for substitute see ch 168.1, code 1939.
[17]Part of section omitted as temporary.
[18]Repealed §§4512–4541, code 1935, see §§4541.01–4541.14, code 1939.

Chapter	Section	Code 1939
115	1	4773.3
116	1	4773.4
	2	4773.5
117	1–30	4686.01–4686.30
	31[19]	4686.31
	32	4686.32
	33	4686.33
118	1	4755.05
119	1*	4755.20
120	1	1225.06
	2*[20]	1225.07
	3	1225.08
	4	1225.09
	5	1225.10
	6	1225.11
	7[21]	1225.12
	8	1225.13
	9*	5182
	10	1225.14
	11	1225.15
	12	1225.16
	13	1225.17
	14	1225.18
	15	1225.19
	16	1225.20
	17	1225.21
	18	1225.22
	19	1225.23
	20	1225.24
	21	1225.25
	22*	13405
	24*	13416
	25*	13417.1
	25a*	2011
	25b*	5182.1
	25c*	12941.2
	25d*	5006.15
	26*	13417.3
	27*	13417.4
	28*	13417.5
	29*	13417.6
	30*	13417.7
	31	13479.1
	32[23]	5000.01
	33[23]	5000.01
	34, 35[22]	5000.02
	36*	5000.03
	37*	5000.08
	38*	5000.13
	39*	5000.14
	41*	5013.01
	42*	5013.13
	43*	5013.17
	44*	5018.06
	45*	5018.10
	46*	5032.05
	48	1619
	49*	1624
	50*	1628
	51*	1629
	52*	1630
	53*	1631
	54*	1632
	55*	1633
	56*	1645
	57*	1647
	58*	1648
	59*	1650
	60*	1651
	61*	1654
	62*	1514
120	63	1632.1
	64*	1664
	65*	1665
	66*	1666
	67*	1668
	68*	1669
	69*	1670
	70*	1671
	72*	1675
	73*	1676
	74*	1677
	75*	2853
	76	5004.10
	77	5000.06
	78*	5100.03
	79*	5100.02
	80*	5100.18
	81*	5100.28
	82*	5100.29
	83*	5100.33
	84, 85*	5105.02
	86	5105.03
	87*	5105.08
	88*	5105.16
	89*	5105.17
	90*	5105.18
	91*	5105.20
	92*	5105.22
	93*	1921.016
	94*	1921.093
	95[23]	1225.26
	96	1225.27
	97	1225.28
	99	1225.29
121	1*	1225.07
	2*	5000.01
	3*	5000.01
	4*[24]	1225.26
	7	5000.02
	8*	5000.03
	9*	5000.04
	10	5000.07
	12*	5006.15
	13*	5006.24
	14*	5008.20
	15*	5008.24
	16*	5010.09
	17*	5011.04
	18*	5038.01
	19*	5038.03
	20*	5038.05
	21*	2010
	22*	2011
	23*	1225.12
	24	5039.01
	25*	5039.02
	26*	5000.01
	27*	5013.04
	28*	5013.05
	29	5013.12
	30*	5013.18
	31*	5014.09
	32*	5013.14
	33*	5021.05
	34*	5034.34
	35	5034.47
122	1*	5025.07
	2	5034.13
123	1*	5001.15
	2	5020.11
124	1*	5008.26
125	1*	5001.03
126	1*	5001.02
127	1	5000.01
	2*	5023.01
128	1*	5000.01
	2	5008.14
129	1*	5035.16
130	1*	5039.02
	2*	5039.03
	3*	5039.04
	4*	5039.06
	5*	5039.09
	6*	5039.14
131	1–6	308.1–308.6
132	1, 2*	5032.02
133	1*	5093.02
	2*	5093.04
	3*	5093.09
	4*	5093.29
134	1*	5093.31
135	1*	5000.01
	2	5008.15
	3	5008.16
	4	5008.17
	5	5008.18
	6	5008.19
	7	5035.15
	8*	5009.02
	9*	5012.04
	9a*	5000.01
	9b–21	5103.02–5103.13
136	1	5105.10
137	1*	5169.07
138	1*	5290
	2*	5291
139	1	3661.004 3661.006
140	1	3828.009
	2*	3828.008
	3*	3828.027
	4*	3828.032
	5*	3828.039
	7*	3828.001
	8*	3828.005
	9*	3828.010
	10*	3828.008
	11*	3828.026
	12*	3828.047
	13*	3828.028
	14*	3828.042
	15*	3828.044
	16	3828.025
	17	3828.029
	18	3828.030
	19*	3828.014
	20	3828.017
	21*	6943.100
	22*	3828.015
	23*	3828.026
	24*	3828.022
	25*	3828.022
	26*	3828.014
	27	3828.031
141	1*	3828.016
142	1	3828.021
143	1	5348.1
	2*	5353
144	1*	3684.03
145	1*	3828.065
146	1*	5402.1
147	1*	5412

[19]Part of section omitted as temporary.
[20]Amended by 48GA, ch 121, §1.
[21]Amended by 48GA, ch 121, §23.
[22]Repealed by 48GA, ch 121, §7, see §5000.02.
[23]Amended by 48GA, ch 121.
[24]Part of this section amends 48GA, ch 120.

Chapter	Section	Code 1939
148	1*	5413
		5414
	2	5414
149	1	5570 1
		5570 2
		5570 3
		5570 4
150	1	5561 1
151	1*	5574
152	1*	5632
153	1	5766 1
154	1*	5767
155	1*	5789
156	1*	5792
157	1*	5829 19
158	1*	5874
	2*	5875
	3*	5876
	4*	5880
159	1*	6003
160	1*[25]	6610 58
161	1*	6066 24
	2*	6066 25
	3*	6066 29
	4	6066 30
	5*	6066 32
162	1*	6209
163	1, 2*	6211
164	1*	6222
165	1	6261 1
	2	6261 2
166	1	6781 1
167	1*	6474
	2*	6475
	3*	6476
168	1*	6519
169	1*	6580
170	1*	6606
	2*	6607
171	1*	6652
172	1*	6823
	2	6823 1
	3, 4	6830 1
173	1*	6866
174	1*	6943 010
	2*	6943 011
	3*	6943 012
	4*	6943 013
	5*	6943 015
	6*	6943 017
	7*	6943 018
	8*	6943 019
	9*	6943 020
	10*	6943 021
	11*	6943 022
	12*	6943 023
	13*	6943 024
	14*	6943 025
	15*	6943 026
	16*	6943 027
	17*	6943 028
	18*	6943 029
	19*	6943 030
	20*	6943 032
	21*	ch 329 2
175	1–18*	ch 329 4
	19	5093 29
	20†	
176	1*	6943 035
	2*	6943 041
	3*	6943 044
	4*	6943 046
	5*	6943 047
176	6*	6943 052
	7*	6943 053
	8*	6943 054
	9*	6943 057
	10*	6943 058
	11*	6943 059
	12*	6943 060
	13*	6943 061
	14*	6943 062
	15*	6943 065
	16*	6943 068
	17*	6943 069
	18*	6943 072
	19–27[26]	
	28*	6943 091
	29*	6943 092
	30*	6943 093
	31*	6943 094
	32*	6943 095
	33*	6943 096
	34*	6943 097
	35*	6943 098
	36*	6943 099
	37*	6943 100
	38*	ch 329 3
177	1*	6943 040
	2*	6943 041
	3*	6943 048
		6943 049
		6943 050
178	1, 2*	6943 040
	3*	6943 037
179	1*	6943 057
180	1–14	Div IV of ch 329 3
181	1*	6943 074
182	1*	6943 076
	2	6943 104
183	3*	4630 1
	4*	5010 01
	6	5010 02
	7*	4755 04
	8*[27]	5103 12
184	1*	6943 127
	3*	6943 130
	4*	6943 131
	5*	6943 132
	6*	6943 135
	7*	6943 136
	8*	6943 137
	9*	6943 138
	11*	ch 329 5
185	1†	11679 1
	2†	11679 2
	3†	11679 3
186	1*	6944
187	1*	6943 100
	3*	6943 100
	4*	6943 142
	5*	6943 145
	6*	6943 148
	8*	6943 149
	9*	6943 150
	10*	6943 151
188	1*	6943 152
189	1	6943 153
190	1*	6943 124
191	1*	6949
	2	6947
192	1*	6979
	2*	6980
	3*	6981
	4*	6982 1
192	5*	6982 2
	6*	6982 3
	7*	6982 4
	8*	6982 5
	9*	6982 6
	10*	ch 331
193	1*	6987
	2*	ch 332
194	1*	7021
	2*	7022
	3*	7025
195	1*	7031
	2*	7032
	3*	7033
	4*	7034
	5*	7035
	6*	7037
	7*	7038
	8*	7039
196	1*	7046
	2*	7047
	3*	7048
	4*	7049
	5*	7050
	6*	7052
	7*	7053
	8*	7054
	9*	7056
	10*	7057
	11*	7059
	12*	7060
	13*	7061
	14*	7062
	15*	7067
	16*	ch 337
197	1*	7072
	2*	7073
	3*	7074
	4*	7075
	5*	7076
198	1*	7079
	2*	7080
	3*	7081
	4*	7082
	5*	7083
	6*	7084
	7*	7085
	8*	ch 339
199	1*	7090
	2*	7092
	3*	7093
	4*	7094
	5*	7095
	6*	7096
	7*	7097
	8*	7098
	9*	7100
	10*	ch 340
200	1*	7103 02
	2*	7103 03
	3*	7103 04
	4*	7103 05
	5*	7103 06
	6*	7103 07
	7*	7103 08
	8*	7103 09
	9*	7103 10
	10*	7103 11
	11*	7103 12
	12*	7103 13
	13*	7103 14
	14*	7103 15

[25]Amends §6051-c1, code 1935.
†Board of Assessment and Review changed to Tax Commission.
[26]Re-enacted see §§6943 078-6943 089
[27]Not printed in code, section repealed by 48GA, ch 135, §9b

Chapter	Section	Code 1939
200	15*	ch 340.1
201	1*	7104
	2*	7105
202	1*	7105.1
	2*	7105.4
	3*	7105.5
	4*	7105.6
	5*	7105.7
	6*	ch 341.1
203	1*	7112
	2*	7119
204	1	7134.1
	2	7134.2
205	1*	7137
	2*	7139
	3*	7140
	4*	7142
	5*	7143
206	1*	7148
208	1*	7171
	2*	7181
	3*	7182
	4*	7183
	5*	7183.2
	6*	7183.3
209	1	1225.30
	2	1225.31
	3	1225.32
	4	1225.33
	5	1225.34
	6	1225.35
	7	1225.36
	8	1225.37
	9	1225.38
	10	1225.39
	11	1225.40
	12	1225.41
	13	1225.42
	14	1225.43
210	1*	7265
212	1*	7279
	2	7280
213	1	7295.1
	2*	7193
214	1–50*	ch 351
215	1*	7397.05
	2*	7397.06
	3*	7397.09
	4*	7397.11
	5*	7397.12
216	1*	7420.01
	2*	7420.08
217	1*	7643
	2*	7646
	3*	7714.30
	4*	7714.32
	5*	7721
218	1	7874.1
219	1*	7972
220	1*	8312
		8313
		8314
		8317
		8318
		8320
		8322
		8329
		8330
221	1*	8581.04
	2‡	ch 393.1
	3*	8581.02
	4‡	8581.08
	5*‡	8581.07
		8581.11
	6*††	ch 392
	7*‡	ch 393.2
	8*	8605
	9*	8518
	10	8519
	11*	8521
222	1	8895.01
	2	8895.02
	3	8895.03
	4	8895.04
	5	8895.05
	6	8895.06
	7	8895.07
	8	8895.08
	9	8895.09
	10	8895.10
	11	8895.11
	12	8895.12
	13	8895.13
	14	8895.14
	15	8895.15
223	1*	8776
224	1	8789.1
		8789.2
225	1*	8829
	2*	8829
	3*	8829
	4*	8829
	5*	8829
226	1*	8927
227	1*	8927
228	2	8943.01
	3	8943.02
	4	8943.03
	5	8943.04
	6	8943.05
	7	8943.06
	8	8943.07
	9	8943.08
	10	8943.09
	11	8943.10
229	1*	9029
230	1	9087
231	1	9306
	2	9311.1
	3*	9315
	4	9330
	5*	9340.01
231	6	9347.1
	7	9354
	8	9354.1
	9*	9357
	10	9360
	11	9361.1
	12	9363.1
	13 (1)	9388.1
	13 (2)	9340.03
	13 (3)	9402.9
	13 (4)	9362.1
	14*	9330.1
	15*	9344
	16*	9319
	18*	8384
	19*	8385
	20*	8394
232	1*	9751.01
	2*	9751.02
	3*	9751.03
	4*	9751.06
	5*	9751.07
	6	9751.08
	7*	9751.09
	8*	9751.10
	9*	9751.11
	10*	9751.13
	11*	9751.15
	12*	9751.17
	13*	9751.18
	14*	9751.21
	15*	9751.29
	16	9751.33
233	1*	9752
234	1*	10021.1
235	1*	10161
236	1*	10211
	2*	10212
	3*	10213
237	1	10269.1
238	1*	10436
239	1*	10661
240	1*	11007
241	1	11099.1
242	1	11932.1
	1a*	11932
	2*	9752
243	1	12781.1
	2	12781.2
244	1	12077.1
245	1	12383.3
246	2*	12667.10
	3*	12667.12
	4*	12667.13
	5*	12667.14
	6	12667.15
	7*	12667.21
	8*	12667.22
	9*	12667.32
247	1*	12772
248	1*	12936
251	1	10398.2
252	1, 2	10376.1
253	1, 2	10387.1

†Board of Assessment and Review changed to Tax Commission.
‡Inserting "commissioner of insurance" in lieu of "secretary of state."
††Inserting "commissioner of insurance" in lieu of "auditor of state."

TABLE OF
CORRESPONDING SECTIONS
OF THE
CODE, 1935, AND CODE, 1939

This table shows the sections of the code of 1935 which were *amended, repealed,* or *substituted* by the 46th extra, 47th, and 48th general assemblies, and the section or sections in the code of 1939 which correspond in subject matter.

This table, however, is not to be used for the purpose of finding legislation of the 46th extra, 47th, and 48th general assemblies, in the code, 1939, as there are special tables for this purpose (pp. 2065–2078) preceding this table. The omission of a section number in the left-hand column indicates that the omitted section appears in the code, 1939, in identically the same form as in the code, 1935.

["A." indicates an amendment; "R&S." indicates a repeal and substitute; "R." indicates repeal.]

Code 1935	Amendments, Substitutes and Repeals	Code 1939
4-a1		4.1
4-a2		4.2
4-a3		4.3
4-a4		4.4
4-f1		4.5
4-f2		4.6
14-a1		14.1
14-a2		14.2
14-a3		14.3
17-c1	Omitted	
38-b1		38.1
39	A. 48–39–1, 2	39
77-d1		77.1
77-d2		77.2
84-a1		84.27
84-a2		84.30
84-a3		84.32
84-e1		84.01
84-e2		84.02
84-e3		84.03
84-e4		84.04
84-e5		84.05
84-e6	A. 47–87–1	
	A. 48–40–1	
	A. 48–41–5	84.06
84-e7–e12		84.07–84.12
84-e13	A. 47–205–1	84.13
84-e14	A. 48–41–1	84.14
84-e15		84.15
84-e16	A. 48–41–2	84.16
84-e17		84.17
84-e18	A. 48–4–3	84.18
84-e19	A. 48–41–4	84.19
84-e20–e26		84.20–84.26
84-e27		84.28
84-e28		84.29
84-e29		84.31
84-e30		84.33
84-e31	Omitted	
84-e32	Omitted	
88-c1		88.1
101-a1–a5		101.1–101.5
113	R&S. 47–89–1	
	R&S. 48–42–2	113
124	R&S. 47–89–2	
	R&S. 48–42–3	124[1]
125	R&S. 48–42–5	
	R&S. 48–43–2	125
126	R&S. 48–42–6	
	A. 48–43–1	126
130-a1	Omitted	
130-a2		130.1
130-a3		130.2
130-a4		130.8
130-c1		130.9
130-e1		130.3
130-e2		130.4
130-e3		130.5
130-e4		130.6
130-e5		130.7
130-e6	Omitted	
130-e7	Omitted	
143-b1–b3		143.1–143.3
145-b1–b5	Transferred	482.02–482.06
147-c1		147.1
152	A. 48–44–1, 2	
	A. 48–45–1	152
153-c1		153.1
156	A. 48–46–1	156
162	Transferred	221.1
162-d1	Transferred	221.2
163	Transferred	221.3
164	Transferred	221.4
165	Transferred	221.5
167	Transferred	221.6
169-b1		169.1
177	R. 48–183–9	
184	A. 48–47–1	184
215	A. 48–48–1, 2	215
235	Transferred	238.1
237	R&S. 47–90–1	237
238-a1	Transferred	238.3
238-a2		238.2
240-g1	Transferred	161.1
240-g2	Transferred	238.4
252	A. 48–49–1	252
253	A. 47–205–1	253
264	A. 48–50–1	264
265-a1		265.1
265-e1		265.2
275-b1		275.1
296-e1		296.1
300	A. 48–51–1	300
302	A. 47–205–1	
	A. 47–235–8	
	A. 48–36–2	
	A. 48–52–1	
	A. 48–175–20	302
369	A. 47–91–1	369
370	A. 47–92–1	370

[1]Applicable to special charter cities, see §6750.1.

Code 1935	Amendments, Substitutes and Repeals	Code 1939
372	A. 47-91-2	372
373	A. 47-91-2	373
373-a1		373.1
378	A. 47-91-2	378
383	A. 47-91-2	383
384	A. 47-91-2	384
385	A. 47-91-2	385
388	A. 47-91-2	388
389	A. 47-91-2	389
467-f1-f20		467.01-467.20
467-f21	A. 48-54-1, 2	467.21
467-f22-f31		467.22-467.31
467-f32		467.34
467-f33		467.35
467-f34		467.36
467-f35		467.37
467-f36		467.38
467-f37		467.39
467-f38	A. 48-56-1	467.40
467-f39		467.41
467-f40		467.42
467-f41		467.43
467-f42		467.44
467-f43		467.45
467-f44		467.46
467-f45		467.47
467-f46		467.48
467-f47		467.49
467-f48		467.50
467-f49		467.51
467-f50		467.52
467-f51		467.53
467-f52		467.54
467-f53		467.55
467-f54		467.56
467-f55		467.57
467-f56		467.58
467-f57		467.59
467-f58		467.60
467-f59		467.61
467-f60		467.62
467-f61		467.63
467-f62	Omitted	
471-b1		471.1
471-g1		471.2
482-a1		482.12
482-a2		482.13
482-a3		482.14
482-a4		482.15
482-a5		482.16
482-a6		482.17
482-a7		482.18
482-a8		482.19
482-a9		482.20
502-b1		502.1
502-c1		502.2
502-c2		502.3
502-c3		502.4
502-c4		502.5
502-c5		502.6
516	A. 47-205-1	516
523-b1		523.1
526-a1		526.1
526-a2		526.2
526-b1		526.3
526-b2		526.4
526-b3		526.5
607-c1		607.1
616	A. 48-58-1	616
655-a1-a20		655.01-655.20
718-b1-b18		718.01-718.18
718-b19		718.20
718-b20		718.21
718-b21		718.22
718-b22		718.23
718-b23	Omitted	
718-c1		718.24
718-c2		718.25
718-e1		718.19
748	A. 47-94-1	748
791-a1		791.1
913-a1		913.1
950	A. 47-95-1	950
971-e1-e23		971.01-971 23
1063	A. 47-205-1	1063
1066-a1		1066.1
1067-b1		1067.1
1093-e1		1093.1
1097-e1		1097.1
1124-e1		1124.1
1162-g1		1162.1
1171-b1		1171.01
1171-b2		1171.02
1171-d1		1171.03
1171-d2		1171.04
1171-d3		1171.05
1171-d4		1171.18
1171-f1		1171.11
1171-f2		1171.12
1171-f3		1171.13
1171-f4		1171.14
1171-f5		1171.15
1171-f6		1171.16
1171-f7		1171.17
1179-b1		1179.1
1179-b2		1179.2
1179-b3		1179.4
1179-b4		1179.5
1179-c1		1179.3
1179-f1		1179.6
1216	A. 48-62-1	
	A. 48-175-20	1216
1225-d1		1225.01
1225-d2		1225.02
1225-d3		1225.03
1225-e1		1225.04
1225-e2		1225.05
1241-g1-g4		1242.1-1242.4
1248-a1		1248.1
1296-a1		1296.1
1307-a1		1307.1
1307-a2		1307.2
1310-b1		1310.1
1310-b2		1310.2
1387	R&S. 47-98-1	1387
1477-c1		1477.5
1477-c2		1477.6
1477-c3		1477.7
1477-c4		1477.8
1477-g1		1477.1
1477-g2		1477.2
1477-g3		1477.3
1477-g4		1477.4
1481-e1-e4		1481.1-1481.4
1514	A. 48-120-62	1514
1525-f1		1525.1
1525-f2		1525.2
1541-a1-a6		1541.1-1541.6
1546	A. 48-71-2	1546
1546-a1	A. 48-71-1	1546.1
1546-a2		1546.2
1551-c1-c6		1551.01-1551.06
1552	R&S. 48-72-1, 36	
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1558	R&S. 48-72-9, 36	
	A. 48-73-10	1556.08
1559	R&S. 48-72-18, 36	
	A. 48-73-10	1556.17
1560	R&S. 48-72-9, 36	
	A. 48-73-10	1556.08
1561	R&S. 48-72-10, 36	
	A. 48-73-10	1556.09
1562	R&S. 48-72-10, 36	
	A. 48-73-10	1556.09
1563, 1563-d1	R&S. 48-72-9, 36	
	A. 48-73-10	1556.08
1564	R&S. 48-72-9, 36	
	A. 48-73-10	1556.08
1565	R&S. 48-72-22, 36	1556.21
1566, 1567	R. 48-72-36	
1568	R&S. 48-72-24, 36	
	A. 48-73-10	1556.23
1569	R&S. 48-72-31, 36	
	A. 48-73-10	1556.30
1570	R&S. 48-72-2, 36	
	A. 48-73-10	1556.01
1570-b1, b2	R&S. 48-72-11, 36	
	A. 48-73-10	1556.10
1571	R&S. 48-72-6, 36	1556.05
1571-b1	R. 48-72-36	
1572	R&S. 48-72-27, 36	
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1573	R&S. 48-72-32, 34, 36	
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1574	R&S. 48-72-3, 36	
	A. 48-73-10	1556.02
1574-a1	R&S. 48-72-4, 36	
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1575	R&S. 48-72-4, 36	
	A. 48-73-10	1556.03
1575-a1	R. 48-72-36	
1575-a2	R&S. 48-72-32, 36	
	A. 48-73-10	1556.31
1576	R&S. 48-72-21, 36	
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1577	R. 48-72-36	
1582	R. 48-72-36	
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1619	R&S. 48-120-48	1619
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1623	R. 48-120-47	
1623-c1	R. 48-120-47	
1624	A. 48-120-49	1624
1628	A. 48-120-50	1628
1629	A. 48-120-51	1629
1630	A. 48-120-52	1630
1631	A. 48-120-53	1631
1632	A. 48-120-54	1632
1632-c1		1632.2
1633	A. 48-120-55	1633
1645	A. 48-120-56	1645
1647	A. 48-120-57	1647
1648	A. 48-120-58	1648
1650	A. 48-120-59	1650
1651	A. 48-120-60	1651
1654	A. 48-120-61	1654
1655	R. 48-120-47	
1655-g1-g5		1655.1-1655.5
1664	A. 48-120-64	1664
1665	A. 48-120-65	1665
1666	A. 48-120-66	1666
1668	A. 48-120-67	1668
1669	A. 48-120-68	1669
1670	A. 48-120-69	1670
1671	A. 48-120-70	1671
1674	R. 48-120-71	
1675	A. 48-120-72	1675
1676	A. 48-120-73	1676
1677	A. 48-120-74	1677
1684-a1		1684.1
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1703-d11		1703.49
1703-d12	A. 47-99-24	1703.50
1703-d15	A. 47-99-28	1703.52
1703-e1		1703.01
1703-e2	A. 48-77-6	1703.02
1703-e3		1703.03
1703-e4		1703.04
1703-e5		1703.05
1703-e6		1703.06
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1703-e9	Omitted	
1703-e10	A. 47-99-2	1703.27
1703-e11	Omitted	
1703-e12	R&S. 47-99-25	1703.51
1703-g1		1703.28
1703-g2		1703.29
1703-g3		1703.30
1703-g4		1703.31
1703-g5		1703.32
1703-g6		1703.33
1703-g7		1703.34
1703-g8		1703.35
1703-g9		1703.36
1703-g10		1703.37
1703-g11		1703.38
1703-g12		1703.39
1703-g13		1703.40
1703-g14		1703.41
1703-g15	A. 48-99-135a	1703.42
1703-g16		1703.43
1703-g17		1703.44
1703-g18		1703.45
1703-g19		1703.46
1703-g20		1703.47
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1703-g22		1703.48
1703-g23	Omitted	
1703-g24		1703.54
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1709-c1		1709.5
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1741	A. 48-77-2	1741
1742	A. 48-77-3	1742
1745	A. 48-77-16	1745
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1789	A. 47-99-26	
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1794-e3		1794 084
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1794-e5		1794 086
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1794-e8		1794 090
1794-e9		1794 091
1794-e10	A 47-99-109	1794 092
1794-e11		1794 094
1794-e12	A 47-99-110	1794 095
1794-e13		1794 096
1794-e14		1794 097
1794-e15	A 48-77-8	1794 098
1794-e16	A 48-77-17	1794 099
1794-e17		1794 100
1794-e18		1794 101
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1821-e1	R&S 48-76-5	1821 1
1822-a1-a3		1822 1-1822 3
1828-e1		1828 24
1828-e2		1828 25
1828-e3		1828 26
1828-e4		1828 27
1828-e5		1828 28
1828-e6		1828 29
1828-e7		1828 30
1828-e8		1828 31
1828-e9		1828 32
1828-e10		1828 33
1854	R&S 47-101-1	1854
1855	R&S 47-101-1	1855
1856	R&S 47-101-1	1856
1857	R&S 47-101-1	1857
1858	R&S 47-101-1	1858
1859	R&S 47-101-1	1859
1860	R&S 47-101-1	1860
1861	R&S 47-101-1	1861
1862	R&S 47-101-1	1862
1863	R&S 47-101-1	1863
1864	R&S 47-101-1	1864
1865	R&S 47-101-1	1865
1866	R&S 47-101-1	1866
1867	R&S 47-101-1	1867
1868	R&S 47-101-1	1868
1869	R&S 47-101-1	1869
1869-b1	R&S 47-101-1	1869 1
1870	R&S 47-101-1	1870
1871	R&S 47-101-1	1871
1872	R&S 47-101-1	1872
1873	R&S 47-101-1	1873
1874	R&S 47-101-1	1874
1875	R&S 47-101-1	1875, 1875 1
1876	R&S 47-101-1	1876
1905-b1		1905 58
1905-b2		1905 59
1905-b3		1905 60
1905-b4		1905 61
1905-b5		1905 62
1905-b6		1905 63

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1905-b7		1905 64
1905-b8		1905 65
1905-b9		1905 66
1905-b10		1905 67
1905-b11		1905 68
1905-b12		1905 69
1905-b13		1905 70
1905-b14		1905 71
1905-c1		1905 01
1905-c2		1905 02
1905-c3		1905 03
1905-c4		1905.04
1905-c5		1905 05
1905-c6		1905 06
1905-c7		1905 07
1905-c8		1905 08
1905-c9		1905 09
1905-c12		1905 10
1905-c13		1905 11
1905-c14		1905 12
1905-c15		1905 13
1905-c16		1905 14
1905-c17		1905 15
1905-c18		1905 16
1905-c19		1905 17
1905-c20		1905 18
1905-c21		1905 19
1905-c22	Omitted	
1905-c23		1905 20
1905-c24		1905 21
1905-c25		1905 22
1905-c26		1905 23
1905-c27		1905 24
1905-c28		1905 25
1905-c29		1905 26
1905-c30		1905 27
1905-c31		1905 28
1905-c32		1905 29
1905-c33		1905 30
1905-c34		1905 31
1905-c35		1905 32
1905-c36		1905 33
1905-c37		1905 34
1905-c38		1905 35
1905-c39		1905 36
1905-c40		1905 37
1905-c41		1905 38
1905-c42		1905 39
1905-c43		1905.40
1905-c44		1905 41
1905-c45		1905 42
1905-c46		1905 43
1905-c47		1905.44
1905-c48		1905.45
1905-c49		1905 46
1905-c50		1905 47
1905-c51		1905 48
1905-c52		1905 49
1905-c53		1905 50
1905-c54		1905 51
1905-c55		1905 52
1905-c56		1905 53
1905-c57		1905 54
1905-c58		1905.55
1905-c59		1905 56
1905-c60		1905 57
1905-c61	Omitted	
1921-b1-b6		1915 1-1915 6

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1921-f1		1921.001
1921-f2		1921.002
1921-f3		1921.003
1921-f4		1921.004
1921-f5		1921.005
1921-f6		1921.006
1921-f7		1921.007
1921-f8		1921.008
1921-f9		1921.009
1921-f10		1921.010
1921-f11		1921.011
1921-f12		1921.012
1921-f13		1921.013
1921-f14		1921.014
1921-f15		1921.015
1921-f16	A. 48-120-93	1921.016
1921-f17		1921.017
1921-f18		1921.018
1921-f19		1921.019
1921-f20		1921.020
1921-f21		1921.021
1921-f22		1921.022
1921-f23		1921.023
1921-f24		1921.024
1921-f25		1921.025
1921-f26		1921.026
1921-f27		1921.027
1921-f28		1921.028
1921-f29		1921.029
1921-f30		1921.030
1921-f31-f92		1921.031-1921.092
1921-f93	Omitted	
1921-f94	A. 48-79-1	
	A. 48-120-94	1921.093
1921-f95		1921.094
1921-f96		1921.095
1921-f97	A. 48-80-1	1921.096
1921-f98	A. 48-80-2	1921.097
1921-f99	A. 48-80-3, 13	1921.099
1921-f100		1921.100
1921-f101		1921.102
1921-f102	A. 48-80-4	1921.103
1921-f103	A. 48-80-5	1921.104
1921-f104	A. 48-80-6	1921.105
1921-f105	A. 48-80-7	1921.106
1921-f106		1921.107
1921-f107		1921.108
1921-f108	A. 48-80-8	1921.109
1921-f109		1921.110
1921-f110		1921.111
1921-f111		1921.112
1921-f112		1921.113
1921-f113		1921.114
1921-f114		1921.115
1921-f115		1921.117
1921-f116		1921.118
1921-f117	A. 48-80-9	1921.119
1921-f118		1921.120
1921-f119	A. 48-80-10	1921.121
1921-f120	A. 48-80-11	1921.122
1921-f121		1921.123
1921-f122		1921.124
1921-f123		1921.125
1921-f124		1921.127
1921-f125	A. 48-80-12	1921.128
1921-f126		1921.129
1921-f127		1921.132
1921-f128		1921.133
1921-f129	Omitted	
1921-g1		1921.098
1921-g2		1921.101
1921-g3		1921.116
1921-g4		1921.126
1921-g5		1921.130
1921-g6		1921.131
1926-b1		1926.1
1931	A. 48-81-1	1931
1945-a1		1945.2
1945-a2		1945.3
1945-a3		1945.4
1945-a4		1945.5
1945-a5		1945.6
1945-a6		1945.7
1945-d1		1945.1
1965-d1		1965.1
1965-d2		1965.2
1966-a1		1966.1
1966-a2		1966.2
1966-a3		1966.3
2010	A. 47-134-528	
	A. 48-121-21	2010
2011	A. 47-134-529	
	A. 48-120-25a	
	A. 48-121-22	2011
2013-c1-c5		2013.1-2013.5
2023-a1		2023.1
2023-a2		2023.2
2031-a1		2031.1
2169-a1		2169.1
2201-a1		2201.1
2217	A. 47-105-1	2217
2217-c1		2217.1
2246-c1-c4		2246.1-2246.4
2285	A. 48-83-1	2285
2287	A. 48-83-3	2287
2305	A. 48-83-2	2305
2437-c1-c22		2437.01-2437.22
2437-g1		2437.23
2437-g2		2437.24
2437-g3		2437.25
2437-g4		2437.26
2437-g5		2437.27
2437-g6		2437.28
2437-g7		2437.29
2437-g8		2437.30
2437-g9		2437.31
2437-g10		2437.32
2437-g11		2437.33
2437-g12		2437.34
2437-g13		2437.35
2437-g14		2437.36
2437-g15		2437.37
2437-g16		2437.38
2437-g17		2437.39
2437-g18		2437.40
2437-g19		2437.41
2437-g20		2437.42
2437-g21		2437.43
2437-g22		2437.44
2437-g23		2437.45
2437-g24	Omitted	
2465-b1		2465.1
2510-d1		2510.1
2522[3]	A. 47-105-2	2522,2585.24
2523-c1		2523.1
2531-g1		2531.1
2537-d1		2537.7
2537-d2		2537.8
2537-d3		2537.9
2537-g1-g6		2537.1-2537.6
2542	R&S. 47-104-2	2542
2543	R&S. 47-104-3	2543

[3]Part of section transferred to §2585.24.

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2544	R&S 47-104-4	2544
2545	R&S 47-104-5	2545
2546	R&S 47-104-6	2546
2547	R&S 47-104-7	2547
2554-g1-g10		2554 01-2554 10
2573-g1-g17		2573 01-2573 17
2573-g18	Omitted	
2573-g19	Omitted	
2576-e1		2576 1
2581-g1		2581 1
2582-d1		2582 1
2582-d2		2582 2
2585-b1		2585 10
2585-b2		2585 11
2585-b3		2585 12
2585-b4		2585 13
2585-b5		2585 14
2585-b6		2585 15
2585-b7		2585 16
2585-b9		2585 17
2585-b10		2585 19
2585-b11		2585 25
2585-b12		2585 26
2585-b13		2585 27
2585-b14		2585 28
2585-b15		2585 31
2585-b16	Omitted	
2585-b17		2585 32
2585-b18		2585 33
2585-b19		2585 34
2585-c1	A 47-106-1	2585 01
2585-c2		2585 02
2585-c3		2585 03
2585-c4		2585 04
2585-c5		2585 05
2585-c7		2585 06
2585-c8		2585 07
2585-c9		2585 18
2585-c10		2585 20
2585-c11		2585 21
2585-c12		2585 22
2585-c13		2585 23
2585-c14		2585 30
2585-d1		2585 29
2585-f1	A 47-105-3	2585 24
2585-g1		2585 09
2590	A 47-108-1	2590
2603-c1		2603 01
2618[4]		2618
2644	A 48-88-1	2644
2704-b1		2704 1
2704-b2		2704 3
2704-b3		2704 4
2704-c1		2704 2
2704-c2		2704 5
2746	A 47-109-1	2746
2747	A 47-109-2	2747
2749	A 47-109-3, 4	2749
2753	A 47-109-5	2753
2769-b1		2769 1
2799-d1-d6		2799 1-2799 6
2812	A. 47-110-1	2812
2812-f1		2812 1
2812-f2		2812 2
2853	A 48-120-75	2853
2902-d1		2902 1
2926-b1		2926 1
2948-g1-g5		2948 1-2948 5
2953-b1-b4		2953 1-2953 4
2960-a1		2960 1
2962-d1-d4		2962 1-2962 4

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2966-a1		2966 1
3058	A 47-112-1, 2	3058
3076-b1-b3		3076 1-3076 3
3092-f1-f7		3092 1-3092 7
3093-a1		3093 1
3100-c1-c6		3100 01-3100 06
3100-d1		3100 07
3100-d2		3100 08
3100-d3		3100 09
3100-d4		3100 10
3100-d5		3100 11
3100-d6		3100 12
3100-d7		3100 13
3100-d8		3100 14
3100-d9		3100 15
3100-d10		3100 16
3100-d11		3100 17
3100-d12		3100 18
3100-d13		3100 19
3100-g1		3100 20
3100-g2		3100 21
3100-g3		3100 22
3100-g4		3100 23
3100-g5		3100 24
3100-g6		3100 25
3100-g7		3100 26
3100-g8		3100 27
3100-g9		3100 28
3100-g10		3100 29
3100-g11		3100 30
3100-g12		3100 31
3100-g13		3100 32
3100-g14		3100 33
3100-g15		3100 34
3100-g16		3100 35
3100-g17		3100 36
3100-g18		3100 37
3100-g19		3100 38
3100-g20		3100 39
3100-g21		3100 40
3100-g22		3100 41
3100-g23		3100 42
3100-g24		3100 43
3100-g25		3100 44
3100-g26		3100 45
3100-g27		3100 46
3100-g28	Omitted	
3112-b1-b7		3112 1-3112 7
3114	R&S 48-91-1	3114
3114-d1		3114 1
3114-d2		3114 2
3115	A 48-91-2	3115
3117	A 48-91-3	3117
3118	R&S 48-91-4	3118
3122	R 48-91-5	
3123	R 48-91-5	
3125	R 48-91-5	
3137-e1	A 47-113-1	3137 1
3137-e2		3137 2
3137-g1		3137 3
3137-g2		3137 4
3137-g3		3137 5
3137-g4		3137 6
3142-b1-b8		3142 01-3142 08
3149-e1		3149 1
3151	R&S 47-114-1, 26	3169 01
3152	R&S 47-114-2, 26	3169 02
3153	R 47-114-26	
3154	R&S 47-114-5, 26	3169 05
3155	R&S 47-114-5, 12, 26	3169 05, 3169 12
3156	R&S 47-114-18, 26	3169 18

[4]Last four lines of section omitted as obsolete.

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3158	R. 47-114-26	
3159	R&S. 47-114-20, 26	3169.20
3161	R&S. 47-114-13, 26	3169.13
3162	R&S. 47-114-20, 26	3169.20
3163	R&S. 47-114-13, 26	3169.13
3164	R. 47-114-26	
3165	R. 47-114-26	
3166	R. 47-114-26	
3167	R&S. 47-114-24, 26	3169.23
3168	R&S. 47-114-21, 26	3169.21
3169	R&S. 47-114-21, 26	3169.21
3174	R&S. 47-115-1, 2	3174
3175	R&S. 47-115-1, 3	3175
3176	R&S. 47-115-1, 4	3176
3177	R&S. 47-115-1, 5	3177
3177-b1	R&S. 47-115-1, 6	3177.1
3244-b1-b6		3244.01-3244.06
3244-d1		3244.08
3244-d2		3244.09
3244-f1		3244.07
3274-e1		3274.1
3274-e2		3274.2
3287	A. 48-93-11	3287
3290-d1		3290.1
3292	A. 48-93-1	3292
3293	A. 47-116-1	
	A. 48-93-2	3293
3300	A. 48-93-3	3300
3330	A. 48-93-4	3330
3331	A. 48-93-5	3331
3332	A. 48-93-6	3332
3352	A. 48-93-7	3352
3356	A. 48-93-8	3356
3366	R&S. 48-94-1, 2, 3, 5, 6	3384.01 3384.02 3384.04 3384.05
3367	R&S. 48-94-1, 2, 4	3384.01 3384.03
3368	R&S. 48-94-1, 5	3384.04
3369	R&S. 48-94-1, 7	3384.06
3370	R&S. 48-94-1, 14	3384.13
3371	R&S. 48-94-1, 17	3384.16
3372	R&S. 48-94-1, 18	3384.17
3373	R&S. 48-94-1, 10	3384.09
3374	R&S. 48-94-1, 9	3384.08
3375	R&S. 48-94-1, 11	3384.10
3376	R&S. 48-94-1, 13	3384.12
3377	R&S. 48-94-1, 15	3384.14
3378	R&S. 48-94-1, 20	3384.19
3379	R&S. 48-94-1, 16	3384.15
3380	R&S. 48-94-1, 20	3384.19
3381	R&S. 48-94-1, 20	3384.19
3382	R&S. 48-94-1, 20	3384.19
3383	R&S. 48-94-1, 21	3384.20
3384	R&S. 48-94-1, 16	3384.15
3395	A. 48-93-9	3395
3396	A. 48-93-9	3396
3402	A. 48-93-12	3402
3406	A. 48-93-9	3406
3467	A. 48-93-10	3467
3474	R&S. 48-95-1	3477.1
3475	A. 48-93-13	3475
3476	A. 48-93-14	3476
3477	A. 48-93-15	3477
3499	A. 48-93-9	3499
3504	A. 48-93-9	3504
3527	A. 48-96-1	3527
3528	R&S. 48-96-1, 2	3527
3562-b1		3562.1
3595	A. 48-98-1	3595
3596	A. 47-117-1	3596
3597	R&S. 48-98-2	3597
3598	A. 48-98-3	3598
3604	A. 48-96-3	3604
3616-b1		3616.1
3621	A. 48-99-1	3621
3641-b1		3641.1
3650-a1		3650.1
3653	A. 48-101-1	3653
3655	A. 47-118-10	
	A. 48-84-7	3655
3656	A. 47-118-10	
	A. 48-84-7	3656
3661-a1, a2	R&S. 47-118-5	
	A. 48-84-5	3661.018
3661-a3-a7	R. 47-118-1	
3661-a8		3661.022
3661-a9		3661.023
3661-a10		3661.024
3661-a11	A. 47-118-7	
	A. 48-84-7	3661.025
3661-a12	A. 47-118-7	
	A. 48-84-7	3661.026
3661-a13		3661.027
3661-a14		3661.028
3661-a15	A. 47-118-7	
	A. 48-84-7	3661.029
3661-a16		3661.030
3661-a17		3661.031
3661-a18	A. 47-118-7	
	A. 48-84-7	3661.032
3661-a19		3661.033
3661-a20		3661.034
3661-a21		3661.035
3661-a22	A. 47-118-7	
	A. 48-84-7	3661.036
3661-a23		3661.037
3661-a24		3661.038
3661-a25		3661.039
3661-a26	A. 47-118-7	
	A. 48-84-7	3661.040
3661-a27	A. 47-118-7	
	A. 48-84-7	3661.041
3661-a28	A. 47-118-7	
	A. 48-84-7	3661.042
3661-a29		3661.043
3661-a30		3661.044
3661-a31	A. 47-118-7	
	A. 48-84-7	3661.045
3661-a32	A. 47-118-7	
	A. 48-84-7	3661.046
3661-a33	A. 47-118-7	
	A. 48-84-7	3661.047
3661-a34	A. 47-118-7	
	A. 48-84-7	3661.048
3661-a35		3661.049
3661-a36	A. 47-118-7	
	A. 48-84-7	3661.050
3661-a37	A. 47-118-7	
	A. 48-84-7	3661.051
3661-a38		3661.052
3661-a39		3661.053
3661-a40		3661.054
3661-a41	A. 47-118-7	
	A. 48-84-7	3661.055
3661-a42		3661.056
3661-a43		3661.057
3661-a44	A. 47-118-8	
	A. 48-84-7	3661.058
3661-a45		3661.059
3661-a46		3661.060
3661-a47	A. 47-118-8	
	A. 48-84-7	3661.061

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	A. 48-84-7	3661.062
3661-a49	A. 47-118-8	
	A. 48-84-7	3661.063
3661-a50		3661.064
3661-a51		3661.065
3661-a52	A. 47-118-8	
	A. 48-84-7	3661.066
3661-a53		3661.067
3661-a54	A. 47-118-8	
	A. 48-84-7	3661.068
3661-a55	A. 47-118-8	
	A. 48-84-7	3661.069
3661-a56		3661.070
3661-a57	A. 47-118-8	
	A. 48-84-7	3661.071
3661-a58		3661.072
3661-a59		3661.073
3661-a60	A. 47-118-9	
	A. 48-84-7	3661.074
3661-a61		3661.075
3661-a62	A. 47-118-9	
	A. 48-84-7	3661.076
3661-a63		3661.077
3661-a64		3661.078
3661-a65	A. 47-118-9	
	A. 48-84-7	3661.079
3661-a66		3661.080
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[5]Ch 251 and all amendments repealed by 47GA, ch 134, §527; for substitutes see §§5000.01-5038.14.

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5182-d1	A. 48-120-25b	5182.1
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5191-a1		5191.2
5197-d1		5197.01
5197-d2		5197.02
5197-d3		5197.03
5197-d4		5197.04
5197-d5		5197.05
5197-d6		5197.06
5197-d7		5197.07
5197-d8		5197.08
5197-d9		5197.09
5197-d10		5197.10
5197-d11		5197.11
5197-d12		5197.12
5214-c1		5214.1
5235-a1		5235.1
5241-d1		5241.1
5260-c1-c11		5260.01-5260.11
5262-c1		5262.1
5290	A. 48-138-1	5290
5291	A. 48-138-2	5291
5296-f1	R&S. 47-137-1	
	A. 48-140-7	
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5296-f2	R&S. 47-137-2	
	Transferred	3828.002
5296-f3	R&S. 47-137-3	
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	Transferred	3828.005
5296-f4	R&S. 47-137-4, 6	
	Transferred	3828.003
5296-f5	R. 47-137-5	
5296-f6	R. 47-137-5	
5296-f7	R&S. 47-137-5	
	Transferred	3828.006
5296-f8	R. 47-137-5	
5296-f9	Transferred	3828.007
5296-f10	A. 47-137-7	
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5296-f13	A. 47-137-10, 38	
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5296-f14	A. 47-137-11, 38	
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5296-f15	A. 47-137-12	
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5296-f16	A. 47-137-13, 38	
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5296-f17	A. 47-137-38	
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5296-f18	R&S. 47-137-15	
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5296-f19	A. 47-137-38	
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5296-f20	A. 47-137-16, 38	
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5296-f21	A. 47-137-38	
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5296-f22	A. 47-137-17, 38	
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5296-f23	A. 47-137-19, 38	
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5296-f24	R&S. 47-137-20	
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5296-f25	A. 47-137-21, 38	
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5296-f38	R&S. 47-134-4, 6	
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5296-f39	Transferred	3828.048
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5298	Transferred	3828.074
5299	Transferred	3828.075
5300	Transferred	3828.076
5301	Transferred	3828.077
5302	A. 47-137-39	
	Transferred	3828.078
5303	Transferred	3828.079
5304	Transferred	3828.080
5305	Transferred	3828.081
5306	Transferred	3828.082
5307	Transferred	3828.083
5308	Transferred	3828.084
5309	Transferred	3828.085
5309-c1	Transferred	3828.086
5310	Transferred	3828.087
5311	Transferred	3828.088
5312	Transferred	3828.089
5313	Transferred	3828.090
5314	Transferred	3828.091
5315	Transferred	3828.092
5316	Transferred	3828.093
5317	Transferred	3828.094
5318	Transferred	3828.095
5319	Transferred	3828.096
5320	Transferred	3828.097
5321	Transferred	3828.098
5322	Transferred	3828.099
5323	Transferred	3828.100
5324	Transferred	3828.101
5325	Transferred	3828.102
5326	Transferred	3828.103
5327	Transferred	3828.104
5328	Transferred	3828.105
5329	Transferred	3828.106
5330	Transferred	3828.107
5332	Transferred	3828.108
5333	Transferred	3828.109
5334	Transferred	3828.110
5334-c1	Transferred	3828.111
5335	Transferred	3828.112
5336	Transferred	3828.113
5337	Transferred	3828.114
5338	Transferred	3828.115
5339	Transferred	3828.116
5340	Transferred	3828.117
5341	Transferred	3828.118
5342	Transferred	3828.119
5343	Transferred	3828.120
5344	Transferred	3828.121
5345	Transferred	3828.122
5346	Transferred	3828.123
5347	Transferred	3828.124
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5368-a5	A. 47-143-1	5368.5
5369	Transferred	3828.125
5370	Transferred	3828.126
5371	Transferred	3828.127
5372	Transferred	3828.128
5373	Transferred	3828.129
5374	Transferred	3828.130
5375	Transferred	3828.131
5376	Transferred	3828.160
5377	Transferred	3828.161
5378	Transferred	3828.162
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5381	R&S. 47-144-10	
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5387	Transferred	3828.053
5388	Transferred	3828.054
5388-b1	Transferred	3828.055
5389	Transferred	3828.056
5390	Transferred	3828.057
5391	Transferred	3828.058
5392	Transferred	3828.059
5392-b1	Transferred	3828.060
5393	Transferred	3828.061
5394	Transferred	3828.062
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[6]Omitted in view of amendment of 47GA, ch 139, §2.

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5570-c1	R&S. 48-149-1	5570.1
5570-c2	R&S. 48-149-1	5570.2
5570-c3	R&S. 48-149-1	5570.3
5574	A. 48-151-1	5574
5582-c1		5582.1
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5632	A. 48-152-1	5632
5633-d1		5633.1
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5663	A. 47-92-2	5663
5676-a1		5676.1
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5683	R&S. 47-155-1	5683
5689	A. 47-156-1	5689
5691	R&S. 47-156-2	5691
5692	R&S. 47-156-3	5692
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5701	A. 47-156-13	5701
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5705	A. 47-156-17	5705
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5766-c1		5766.2
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5786-g3		5786.3
5786-g4		5786.4
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5786-g6		5786.6
5786-g7	Omitted	
5786-g8		5786.7
5789	A. 48-155-1	5789
5792	A. 48-156-1	5792
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5829-b1		5829.18
5829-b2	A. 48-157-1	5829.19
5829-b3		5829.20
5835	A. 47-161-1	5835
5843-a1		5843.1
5858	A. 47-162-1	5858
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5867-a1		5867.1
5869	R&S. 47-163-1	5869
5873-e1		5873.1
5873-e2		5873.2
5873-e3		5873.3
5874	A. 48-158-1	5874
5875	A. 48-158-2	5875
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5880	A. 48-158-4	5880
5899-c1-c10		5899.01-5899.10
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5903	A. 47-205-1	5903
5903-c1		5903.01
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5911	A. 47-205-1	5911
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5949-a1		5949.1

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6003	A. 48-159-1	6003
6051-c1[7]	A. 48-160-1	6051.1
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6066-a3		6066.05
6066-a4		6066.06
6066-a5		6066.07
6066-a6		6066.08
6066-a7		6066.09
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6066-f3		6066.26
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6066-f7		6066.31
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6159-a1		6159.1
6161-a1		6161.1
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6195	A. 47-167-1	6195
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6326-a1	A. 47-172-1	6326.01
6326-a2		6326.02
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6326-f2		6326.04
6326-f3		6326.05
6326-f4		6326.06
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6326-f6	A. 47-173-1	6326.08
6326-f7		6326.09
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6326-f9	A. 47-173-2	6326.11
6326-f10		6326.12
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6475	A. 48-167-2	6475
6476	A. 48-167-3	6476
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6564	A. 47-174-1	6564
6578-b1	R&S. 47-176-1	6578.1
6579-f1		6579.1
6580	A. 47-177-1	
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6600-c1		6600.1
6606	A. 48-170-1	6606
6607	A. 48-170-2	6607
6607-f1		6607.1
6610-c1		6610.05
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6610-c4		6610.08
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6610-c17		6610.16
6610-c18		6610.15
6610-c19		6610.45
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6610-c21		6610.59
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[7]Amendment appears as §6610.54.

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6610-c51		6610.52
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6610-c55		6610.66
6610-c56		6610.67
6610-c57		6610.11
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6610-c67		6610.02
6610-c68		6610.03
6610-c69	Omitted	
6610-c70		6610.74
6610-c71		6610.01
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6652	A. 48-171-1	6652
6669	A. 47-178-1	6669
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6752-b1		6752.1
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6756-f1		6756.1
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6766	A. 47-164-2	6766
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6866	A. 48-173-1	6866
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6915-c1		6915.1
6943-c1-c8		6943.001-6943.008
6943-c9	Omitted	
6943-c10		6943.009
6943-c11	A. 48-174-1	6943.010
6943-c12	A. 48-174-2	6943.011
6943-c13	A. 48-174-3	6943.012
6943-c14	A. 47-174-4	6943.013
6943-c15		6943.014
6943-c16	A. 48-174-5	6943.015
6943-c17		6943.016
6943-c18	A. 48-174-6	6943.017
6943-c19	A. 48-174-7	6943.018
6943-c20	A. 48-174-8	6943.019
6943-c21	A. 48-174-9	6943.020
6943-c22	A. 48-174-10	6943.021
6943-c23	A. 48-174-11	6943.022
6943-c24	A. 48-174-12	6943.023
6943-c25	A. 48-174-13	6943.024
6943-c26	A. 48-174-14	6943.025
6943-c27	A. 47-188-4-7	
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8104	A. 47-205-1	8104
8105	A. 47-205-1	8105
8106	A. 47-205-1	8106
8107	A. 47-205-1	8107
8108	A. 47-205-1	8108
8115	A. 47-205-1	8115
8116	A. 47-205-1	8116
8117	A. 47-205-1	8117
8118	A. 47-205-1	8118
8128	A. 47-205-1	8128
8137	A. 47-205-1	8137
8143	A. 47-205-1	8143
8144	A. 47-205-1	8144
8145	A. 47-205-1	8145
8146	A. 47-205-1	8146
8148	A. 47-205-1	8148
8169	A. 47-205-1	8169
8171	A. 47-205-1	8171
8172	A. 47-205-1	8172
8173	A. 47-205-1	8173
8175	A. 47-205-1	8175
8178	A. 47-205-1	8178
8183	A. 47-205-1	8183
8216	A. 47-205-1	8216
8217	A. 47-205-1	8217
8218	A. 47-205-1	8218
8223	A. 47-205-1	8223
8224	A. 47-205-1	8224
8225	A. 47-205-1	8225
8231	A. 47-205-1	8231
8232	A. 47-205-1	8232
8233	A. 47-205-1	8233
8234	A. 47-205-1	8234
8235	A. 47-205-1	8235
8237	A. 47-205-1	8237
8238	A. 47-205-1	8238
8239	A. 47-205-1	8239
8240	A. 47-205-1	8240
8241	A. 47-205-1	8241
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8298	Omitted	
8308-f1-f5		8308.1-8308.5
8309	A. 47-205-1	8309
8310	A. 47-205-1	8310
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8314	A. 47-205-1	
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8317	A. 48-220-1	8317
8318	A. 47-205-1	
	A. 48-220-1	8318
8320	A. 48-220-1	8320
8322	A. 48-220-1	8322
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8327	A. 47-205-1	8327
8328	A. 47-205-1	8328
8329	A. 48-220-1	8329
8330	A. 48-220-1	8330
8332	A. 47-205-1	8332
8333	A. 47-205-1	8333
8334	A. 47-205-1	8334
8335	A. 47-205-1	8335
8336	A. 47-205-1	8336
8337	A. 47-205-1	8337
8338	A. 47-205-1	8338
8338-c1		8338.14
8338-c2		8338.15
8338-c3		8338.16
8338-c4		8338.17
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8338-c6		8338.19
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8338-c8		8338.21
8338-f1		8338.01
8338-f2		8338.02
8338-f3		8338.03
8338-f4		8338.04
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8338-f6		8338.06
8338-f7		8338.07
8338-f8		8338.08
8338-f9		8338.09
8338-f10		8338.10
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8338-f12		8338.12
8338-f13		8338.13
8338-f14		8338.22
8338-f15	A. 47-205-1	8338.23
8338-f16		8338.24
8338-f17	A. 47-205-1	8338.25
8338-f18	A. 47-205-1	8338.26
8338-f19		8338.27
8338-f20	A. 47-205-1	8338.28
8338-f21	A. 47-205-1	8338.29
8338-f22		8338.30
8338-f23	A. 47-205-1	8338.31
8338-f24	A. 47-205-1	8338.32
8338-f25		8338.33
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8338-f27	A. 47-205-1	8338.35
8338-f28		8338.36
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8338-f30		8338.38
8338-f31	A. 47-205-1	8338.39
8338-f32	A. 47-205-1	8338.40
8338-f33		8338.41
8338-f34		8338.42
8338-f35	A. 47-205-1	8338.43
8338-f36	A. 47-205-1	8338.44
8338-f37	A. 47-205-1	8338.45
8338-f38	A. 47-205-1	8338.46
8338-f39		8338.47
8338-f40	A. 47-205-1	8338.48
8338-f41	A. 47-205-1	8338.49
8338-f42	A. 47-205-1	8338.50
8338-f43		8338.51
8338-f44	Omitted	
8368-d1		8368.1

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8385	A 48-231-19	8385
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8385-d2		8385 2
8394	A 48-231-20	8394
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8480-a1-a6		8480 1-8480 6
8485-b1		8485 1
8508-a1-a6		8508 1-8508 6
8512-g1-g59		8512 01-8512 59
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8512-g61		8512 60
8516	Omitted	
8518	A 48-221-6, 9	8518
8519	R&S 48-221-10	8519
8520	A 48-221-6	8520
8521	A 48-221-6, 11	8521
8523	A 48-221-6	8523
8524	A 48-221-6	8524
8581-c1		8581 01
8581-c2	A 48-221-2, 3	8581 02
8581-c3	A 48-221-2	8581 03
8581-c4	A 48-221-1, 2	8581 04
8581-c5	A 47-208-1	
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8581-c6	A 48-221-2	8581 06
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8581-c9	A 48-221-2	8581 09
8581-c10	A 47-209-2	
	A 48-221-2	8581 10
8581-c11	A 47-209-3	
	A 48-221-2, 5	8581 11
8581-c12	A 48-221-2	8581 12
8581-c13	A 48-221-2	8581 14
8581-c14	A 48-221-2	8581 18
8581-c15		8581 19
8581-c16	A 48-221-2	8581 20
8581-c17	A 48-221-2	8581 21
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8581-c21	A 48-221-2	8581 26
8581-c22	A 48-221-2	8581 27
8581-c23		8581 28
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8581-c26	A 48-221-2	8581 31
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8581-e4	A 48-221-7	8581 35
8581-e5	A 48-221-7	8581 36
8581-e6	A 48-221-7	8581 37
8581-e7	A 48-221-7	8581 38
8581-e8	A. 48-221-7	8581 39
8581-e9	A 48-221-7	8581 40
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8581-e11		8581 42
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8581-e14	A 48-221-7	8581 45
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8581-f1	A 47-208-2	
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8581-f2		8581 13
8581-f3	A 48-221-2	8581 15
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8581-f5		8581 17
8581-f6	A 48-221-2	8581 22
8585-b1		8585 1
8588-b1		8588 1
8592-a1		8592 1
8605	A 48-221-8	8605
8612-c1		8612 1
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8650	R&S 47-210-1	8650
8652	A 47-211-1	8652
8655	A 47-212-1	8655
8673-e1		8673 1
8684-e1-e14		8684 01-8684 14
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8737	R&S 47-213-1	8737
8741-e1		8741 1
8776	A 48-223-1	8776
8785	R&S 48-224-1	8789 1
8786	R&S 48-224-1	8789 2
8787	R&S 48-224-1	8789 2
8788	R&S. 48-224-1	8789 2
8789	R&S 48-224-1	8789 2
8821	R&S 48-224-1	8789 1
8829	A 48-225-1, 2, 3, 4, 5	8829
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8880-d1		8880 1
8903-b1		8903 1
8906	A 47-214-1	8906
8912-f1		8912 1
8927	A 48-226-1	
	A 48-227-1	8927
8940	A 47-215-3	8940
8943-e1	R&S 48-228-1, 2	8943 01
8943-e2	R&S 48-228-1, 8	8943 07
9021-a1		9021 1
9024-g1-g3		9024 1-9024 3
9029	A 48-229-1	9029
9051-c1		9051 1
9087	R&S 48-230-1	9087
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9154-a7		9154 10
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9154-a9	Omitted	
9154-f1		9154 01
9154-f2		9154 02
9154-f3		9154 03
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9183-g1		9183 1
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9217-c1-c3		9217 1-9217 3
9221-c1-c3		9221 1-9221 3
9222-c1-c3		9222 1-9222 3
9224-c1, c2		9224 1, 9224 2
9239-a1		9239 2
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9261-c1		9261.1
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9266-d1		9266.1
9267-c1		9267.1
9270-c1		9270.1
9278-c1		9278.1 9278.2 9278.3
9283-b1		9283.49
9283-b2		9283.50
9283-b3		9283.51
9283-b4		9283.52
9283-b5		9283.53
9283-b6		9283.54
9283-b7		9283.55
9283-b8		9283.56
9283-b9		9283.57
9283-b10		9283.58
9283-b11		9283.59
9283-b12		9283.60
9283-b13		9283.61
9283-b14		9283.62
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9283-b19		9283.67
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9283-b21		9283.69
9283-b22		9283.70
9283-b23		9283.71
9283-b24		9283.72
9283-b25		9283.73
9283-b26		9283.74
9283-c1		9283.01
9283-c2		9283.02
9283-c3		9283.03
9283-c4		9283.04
9283-e1		9283.05
9283-e2		9283.06
9283-e3		9283.07
9283-e4		9283.08
9283-e5	Omitted	
9283-e6		9283.09
9283-e7		9283.10
9283-e8		9283.11
9283-e9		9283.12
9283-e10		9283.13
9283-e11	Omitted	
9283-e12		9283.14
9283-e13		9283.15
9283-e14		9283.16
9283-e15		9283.17
9283-e16		9283.18
9283-e17		9283.19
9283-e18		9283.20
9283-e19		9283.21
9283-e20		9283.22
9283-e21		9283.23
9283-e22		9283.24
9283-e23		9283.25
9283-e24	Omitted	
9283-f1		9283.26
9283-f2		9283.27
9283-f3		9283.28
9283-f4		9283.29
9283-f5	Omitted	
9283-f6	Omitted	
9283-f7		9283.30
9283-f8		9283.31
9283-f9		9283.32
9283-f10	Omitted	
9283-f11		9283.39
9283-f12		9283.40
9283-f13		9283.41
9283-f14		9283.42
9283-f15		9283.43
9283-f16	Omitted	
9283-g1		9283.44
9283-g2		9283.45
9283-g3		9283.46
9283-g4		9283.47
9283-g5		9283.48
9283-g6	Omitted	
9283-g7	Omitted	
9305-a1-a23		9305.01–9305.23
9306	R&S. 48–231–1	9306
9308-e1		9308.1
9314	R&S. 47–220–3	9340.13
9315	R&S. 47–220–10 A. 48–231–3	9315
9319	A. 47–220–6 A. 48–231–16	9319
9329	A. 47–220–1	9329
9330	A. 47–221–1 R&S. 48–231–4	9330
9330-e1	A. 48–231–14	9330.1
9333	A. 47–220–5	9333
9336	R&S. 47–220–3	9340.07
9339	R. 47–220–3	
9340	R&S. 47–220–3	9340.04 9340.05 9340.06 9340.08 9340.14
9340-b1	A. 48–231–5	9340.01
9340-b2		9340.02
9341	R&S. 47–220–3	9340.05 9340.06 9340.13
9344	A. 48–231–15	9344
9347	R&S. 47–220–11	9347
9348	A. 47–220–7	9348
9350	R&S. 47–220–11	9347
9354	R&S. 48–231–7	9354
9354-f1	R&S. 48–231–8	9354.1
9355	R&S. 48–231–7, 17	9354
9357	A. 48–231–9	9357
9360	R&S. 48–231–10	9360
9361	R. 48–231–17	
9365	R. 47–220–3	
9382	A. 47–220–8	9382
9388-e1		9388.2
9389-e1	Omitted	
9402-f1–f8		9402.1–9402.8
9438-f1–f23		9438.01–9438.23
9438-f24	Omitted	
9438-f25	Omitted	
9751-g1	A. 47–205–1 A. 48–232–1	9751.01
9751-g2	A. 47–205–1 A. 48–232–2	9751.02
9751-g3	A. 48–232–3	9751.03
9751-g4		9751.04
9751-g5		9751.05
9751-g6	A. 48–232–4	9751.06
9751-g7	A. 48–232–5	9751.07
9751-g8	R&S. 48–232–6	9751.08
9751-g9	A. 48–232–7	9751.09
9751-g10	A. 48–232–8	9751.10
9751-g11	A. 48–232–9	9751.11
9751-g12		9751.12
9751-g13	A. 48–232–10	9751.13

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9751-g16		9751.16
9751-g17	A. 48-232-12	9751.17
9751-g18	A. 47-205-1	
	A. 48-232-13	9751.18
9751-g19		9751.19
9751-g20		9751.20
9751-g21	A. 48-232-14	9751.21
9751-g22		9751.22
9751-g23		9751.23
9751-g24		9751.24
9751-g25		9751.25
9751-g26		9751.26
9751-g27		9751.27
9751-g28		9751.28
9751-g29	A. 48-232-15	9751.29
9751-g30		9751.30
9751-g31		9751.31
9751-g32		9751.32
9751-g33	R&S. 48-232-16	9751.33
9751-g34	Omitted	
9752	A. 48-233-1	
	A. 48-242-2	9752
9752-g1-g45		9752.01-9752.45
9866-a1-a4		9866.1-9866.4
9884-g1-g5		9884.1-9884.5
9884-g6	Omitted	
9884-g7	Omitted	
9885	A. 47-222-1, 2, 3, 4	9885
9933-a1		9933.1
10016	A. 47-223-1	10016
10108-a1		10108.1
10108-e1		10108.2
10108-e2		10108.3
10108-e3		10108.4
10115-c1		10115.1
10161	A. 48-235-1	10161
10211	A. 48-236-1	10211
10212	A. 48-236-2	10212
10213	A. 48-236-3	10213
10213-a1		10213.1
10213-d1		10213.2
10213-d2		10213.3
10213-d3		10213.4
10213-d4		10213.5
10213-d5		10213.6
10213-d6		10213.7
10213-d7		10213.8
10213-d8		10213.9
10260-e1		10260.1
10260-e2		10260.2
10260-e3		10260.3
10260-g1		10260.4
10269-e1	R&S. 48-237-1	10269.1
10269-e2		10269.2
10269-e3		10269.3
10269-e4		10269.4
10269-e5		10269.5
10312-d1		10312.1
10347-a1-a9		10347.01-10347.09
10347-f1		10347.10
10347-f2		10347.11
10347-f3		10347.12
10347-f4		10347.13
10347-f5		10347.14
10347-f6		10347.15
10347-f7		10347.16
10347-f8		10347.17
10374-b1		10374.1
10383-e1	Omitted	

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10401-c1		10401.1
10413-c1		10413.1
10413-d1		10413.2
10413-d2		10413.3
10436	A. 48-238-1	10436
10445-a1-a9		10445.1-10445.9
10482	A. 47-224-1	10482
10501-b1-b6		10501.1-10501.6
10501-b7	A. 47-118-11	
	A. 48-84-7	10501.7
10501-b8	A. 47-118-11	
	A. 48-84-7	10501.8
10653	A. 47-225-1, 2	10653
10661	A. 48-239-1	10661
10669-b1		10669.1
10670-b1		10670.1
10805-e1		10805.1
10805-e2	Omitted	
10805-e3		10805.2
10832-d1		10832.1
10934-b1-b9		10934.1-10934.9
10990-g1-g3		10990.1-10990.3
10991-d1		10991.1
11007	A. 48-240-1	11007
11033-e1, e2		11033.1, 11033.2
11033-g1		11033.3
11033-g2		11033.4
11044-a1		11044.1
11099-e1	R&S. 48-241-1	11099.1
11099-e2		11099.2
11106	A. 47-226-1	11106
11121-d1		11121.1
11123-d1		11123.1
11135[10]		11135 11135.1
11228-f1-f3		11228.1-11228.3
11242-d1		11242.1
11268	A. 47-205-1	
	A. 48-175-20	11268
11436-d1		11436.1
11471-d1		11471.1
11496-b1		11496.1
11582-c1		11582.1
11668-c1		11668.1
11760-c1		11760.1
11845-b1		11845.1
11913-b1		11913.1
11932	A. 48-242-1a	11932
11951-g1-g7		11951.1-11951.7
12065-d1-d3		12065.1-12065.3
12088-d1		12088.1
12168-b1		12168.1
12222	R&S. 47-134-117, 547	5006.14
12223	R&S. 47-134-118, 547	
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12224	R&S. 47-134-119, 547	5006.16
12225	R&S. 47-134-120, 547	5006.17
12226	R&S. 47-134-121, 547	5006.18
12227	R&S. 47-134-122, 547	5006.19
12228	R&S. 47-134-123, 547	5006.20
12267-b1		12267.1
12351-d1		12351.1
12383-e1		12383.1
12383-e2		12383.2
12383-e3	Omitted	
12449-b1		12449.1
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12644-c14	R&S. 47-228-1	12644.14

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12644-g2		12644.22
12644-g3		12644.23
12644-g4		12644.24
12644-g5		12644.25
12667-a1-a8		12667.01–12667.08
12667-a9		12667.09
12667-a10	A. 48–246–2	12667.10
12667-a11		12667.11
12667-a12	A. 48–246–3	12667.12
12667-a13	A. 48–246–4	12667.13
12667-a14	A. 48–246–5	12667.14
12667-a15	R. 48–246–1	
12667-a16	R&S. 48–246–6	12667.15
12667-a17		12667.16
12667-a18		12667.17
12667-a19-a26	R. 48–246–1	
12667-a27		12667.18
12667-a28		12667.19
12667-a29		12667.20
12667-a30	R. 48–246–1	
12667-a31	A. 48–246–7	12667.21
12667-a32	A. 48–246–8	12667.22
12667-a33		12667.23
12667-a34	R. 48–246–1	
12667-a35		12667.24
12667-a36		12667.25
12667-a37		12667.26
12667-a38		12667.27
12667-a39		12667.28
12667-a40-a44	R. 48–246–1	
12667-a45		12667.29
12667-a46		12667.30
12667-a47		12667.31
12667-a48	R. 48–246–1	
12667-a49	A. 48–246–9	12667.32
12667-a50		12667.33
12667-a51		12667.34
12667-a52		12667.35
12667-a53		12667.36
12667-a54	R. 48–246–1	
12719-a1		12719.1
12719-a2		12719.2
12719-b1		12719.3
12719-b2		12719.4
12759-c1		12759.1
12772	A. 47–220–9	
	A. 48–247–1	12772
12772-c1		12772.1
12772-c2		12772.2
12775-b1	Transferred	7420.43
12786-g1		12786.1
12786-g2		12786.2
12816-a1		12816.1
12832-d1		12832.1
12845-b1		12845.1
12845-b2		12845.2
12847-d1		12847.1
12848-b1		12848.1
12850-g1		12850.1
12871-d1		12871.1
12890-d1		12890.1
12935-g1		12935.1
12936	A. 48–248–1	12936
12941-c1		12941.1
12941-d1	A. 48–120–25c	12941.2
12960-b1–b11		12960.01–12960.11
12966-a1		12966.1
12991-b1–b6		12991.1–12991.6
13008	A. 47–229–1	13008
13011	R&S. 47–134–114, 548	5006.11
13012	R&S. 47–134–1, 2–15, 415	
	A. 48–120–32, 33	
	A. 48–121–2, 3, 26	
	A. 48–127–1	
	A. 48–128–1	
	A. 48–135–1, 9a	5000.01
13013	R&S. 47–134–115, 548	5006.12
13034-a1		13034.1
13037-c1		13037.1
13073	R&S. 47–230–1	13073
13092	R&S. 47–134–108, 549	5006.05
13092-d1	A. 47–134–533	13092.1
13092-d2		13092.2
13111-a1–a5		13111.1–13111.5
13118	R&S. 47–134–394, 550	5031.08
13119	R&S. 47–134–394, 550	5036.01
13122-a1		13122.1
13186–13188	R. 48–249–1	
13198	A. 47–231–1	13198
13210	A. 47–231–2	13210
13245-e1–e5		13245.01–13245.05
13245-f1		13245.06
13245-f2		13245.07
13252-f1–f3		13252.1–13252.3
13315	R&S. 47–232–1, 6	13315.1 13315.6
13316-e1–e3		13316.1–13316.3
13350-b1		13350.1
13352	A. 47–233–1	13352
13405	A. 48–120–22	13405
13405-b1		13405.1
13407	R&S. 48–120–23, 95	
	A. 48–121–4	1225.26
13408	R&S. 48–120–18, 23, 40	1225.22
13409	R&S. 48–120–16, 23, 40	1225.20
13410	R&S. 48–120–8, 23, 40	1225.13
13412	R. 48–120–23	
13413	R. 48–120–23	
13414	R. 48–120–23	
13415	R. 48–120–23	
13416	A. 48–120–24	13416
13417	R. 48–120–23	
13417-a1	R&S. 47–134–103, 551	5006.01
13417-a2	R&S. 47–123–106, 551	5006.04
13417-b1	A. 48–120–25	13417.1
13417-b2		13417.2
13417-d1	A. 48–120–26	13417.3
13417-d2	A. 48–120–27	13417.4
13417-d3	A. 48–120–28	13417.5
13417-d4	A. 48–120–29	13417.6
13417-d5	A. 48–120–30	13417.7
13441-g1–g43		13441.01–13441.43
13619	A. 47–215–1	13619
13620	A. 47–215–2	13620
13677-b1		13677.1
13677-b2		13677.2
13732-c1–c33		13732.01–13732.33
13738-b1–b5		13738.1–13738.5
13781-c1		13781.1
13836-b1		13836.1
13958-a1		13958.2
13958-d1		13958.1
13997-b1		13997.1

AMERICAN EXPERIENCE TABLE OF MORTALITY

[The following mortality table is no part of any statute and is set out below as a convenience only to meet numerous requests therefor.]

Age	Number Living	Number Dying	Logarithm, Number Living	Logarithm, Number Dying	Logarithm, Probability of Dying	Yearly Probability of Dying	Expectation of Life
10	100 000	749	5 0000000	2 8744818	7 8744818	007490	48 72
11	99 251	746	4 9967349	2 8727388	7 8760039	007516	48 08
12	98 505	743	4 9934583	2 8709888	7 8775305	007543	47 45
13	97 762	740	4 9901701	2 8692317	7 8790616	007569	46 80
14	97 022	737	4 9868702	2 8674675	7 8805973	007596	46 16
15	96 285	735	4 9835586	2 8662873	7 8827287	007634	45 50
16	95 550	732	4 9802307	2 8645111	7 8842804	007661	44 85
17	94 818	729	4 9768908	2 8627275	7 8858367	007688	44 19
18	94 089	727	4 9735389	2 8615344	7 8879955	007727	43 53
19	93 362	725	4 9701701	2 8603380	7 8901679	007765	42 87
20	92 637	723	4 9667845	2 8591383	7 8923538	007805	42 20
21	91 914	722	4 9633817	2 8585372	7 8951555	007855	41 53
22	91 192	721	4 9599567	2 8579353	7 8979786	007906	40 85
23	90 471	720	4 9565094	2 8573325	7 9008231	007958	40 17
24	89 751	719	4 9530393	2 8567289	7 9036896	008011	39 49
25	89 032	718	4 9495461	2 8561244	7 9065783	008065	38 81
26	88 314	718	4 9460296	2 8561244	7 9100948	008130	38 12
27	87 596	718	4 9424843	2 8561244	7 9136401	008197	37 43
28	86 878	718	4 9389098	2 8561244	7 9172146	008264	36 73
29	86 160	719	4 9353057	2 8567289	7 9214232	008345	36 03
30	85 441	720	4 9316663	2 8573325	7 9256662	008427	35 33
31	84 721	721	4 9279911	2 8579353	7 9299442	008510	34 63
32	84 000	723	4 9242793	2 8591383	7 9348590	008607	33 92
33	83 277	726	4 9205251	2 8609366	7 9404115	008718	33 21
34	82 551	729	4 9167223	2 8627275	7 9460052	008831	32 50
35	81 822	732	4 9128701	2 8645111	7 9516410	008946	31 78
36	81,090	737	4 9089673	2 8674675	7 9585002	009089	31 07
37	80 353	742	4 9050021	2 8704039	7 9654018	009234	30 35
38	79 611	749	4 9009731	2 8744818	7 9735087	009408	29 62
39	78 862	756	4 8968678	2 8785218	7 9816540	009586	28 90
40	78 106	765	4 8926844	2 8836614	7 9909770	009794	28 18
41	77 341	774	4 8884098	2 8887410	8 0003312	010008	27 45
42	76 567	785	4 8840416	2 8948697	8 0108281	010252	26 72
43	75 782	797	4 8795661	2 9014583	8 0218922	010517	26 00
44	74 985	812	4 8749744	2 9095560	8 0345816	010829	25 27
45	74 173	828	4 8702458	2 9180303	8 0477845	011163	24 54
46	73 345	848	4 8653705	2 9283959	8 0630254	011562	23 81
47	72 497	870	4 8603200	2 9395193	8 0791993	012000	23 08
48	71 627	896	4 8550768	2 9523080	8 0972312	012509	22 36
49	70 731	927	4 8496098	2 9670797	8 1174699	013106	21 63
50	69 804	962	4 8438803	2 9831751	8 1392948	013781	20 91
51	68 842	1 001	4 8378535	3 0004341	8 1625806	014541	20 20
52	67 841	1 044	4 8314922	3 0187005	8 1872083	015389	19 49
53	66 797	1 091	4 8247570	3 0378248	8 2130678	016333	18 79
54	65 706	1 143	4 8176050	3 0580462	8 2404412	017396	18 09
55	64 563	1 199	4 8099837	3 0788192	8 2688355	018571	17 40
56	63 364	1 260	4 8018426	3 1003705	8 2985279	019885	16 72
57	62 104	1 325	4 7931196	3 1222159	8 3290963	021335	16 05
58	60 779	1 394	4 7837536	3 1442628	8 3605092	022936	15 39
59	59 385	1 468	4 7736768	3 1667261	8 3930493	024720	14 74
60	57 917	1 546	4 7628061	3 1892095	8 4264034	026693	14 10
61	56 371	1 628	4 7510557	3 2116544	8 4605987	028880	13 47
62	54 743	1 713	4 7383286	3 2337574	8 4954288	031292	12 86
63	53 030	1 800	4 7245216	3 2552725	8 5307509	033943	12 26
64	51,230	1,889	4 7095244	3 2762320	8 5667076	036873	11 67

AMERICAN EXPERIENCE TABLE OF MORTALITY

Age	Number Living	Number Dying	Logarithm, Number Living	Logarithm, Number Dying	Logarithm, Probability of Dying	Yearly Probability of Dying	Expectation of Life
65	49,341	1,980	4 6932079	3 2966652	8 6034573	040129	11 10
66	47,361	2,070	4 6754209	3 3159703	8 6405494	043707	10 54
67	45,291	2,158	4 6560119	3 3340514	8 6780395	047647	10 00
68	43 133	2,243	4 6348097	3 3508293	8 7160196	052002	9 47
69	40,890	2 321	4 6116171	3.3656751	8 7540580	056762	8 97
70	38,569	2,391	4 5862384	3 3785796	8 7923412	.061993	8 48
71	36,178	2,448	4 5584446	3 3888114	8 8303668	067665	8 00
72	33,730	2 487	4 5280163	3 3956758	8 8676595	073733	7 55
73	31,243	2,505	4 4947527	3 3988077	8 9040550	080178	7 11
74	28,738	2 501	4 4584565	3 3981137	8 9396572	087028	6 68
75	26,237	2,476	4 4189142	3 3937506	8 9748364	094371	6 27
76	23,761	2,431	4 3758647	3 3857850	9 0099203	102311	5 88
77	21,330	2,369	4 3289909	3 3745651	9 0455742	111064	5 49
78	18,961	2,291	4 2778612	3 3600251	9 0821639	120827	5 11
79	16,670	2,196	4 2219356	3 3416323	9 1196967	131734	4 74
80	14,474	2,091	4 1605886	3 3203540	9 1597654	144466	4 39
81	12,383	1,964	4 0928259	3 2931415	9 2003156	158605	4 05
82	10,419	1,816	4 0178260	3 2591158	9 2412898	174297	3 71
83	8,603	1 648	3 9346499	3 2169572	9 2823073	191561	3 39
84	6,955	1,470	3 8422971	3 1673173	9 3250202	211359	3 08
85	5,485	1,292	3 7391766	3 1112625	9 3720859	235552	2 77
86	4,193	1,114	3 6225249	3 0468852	9 4243603	265681	2 47
87	3,079	933	3 4884097	2 9698816	9 4814719	.303020	2 18
88	2,146	744	3 3316297	2 8715729	9 5399432	346692	1 91
89	1,402	555	3 1467480	2 7442930	9 5975450	395863	1 66
90	847	385	2 9278834	2 5854607	9 6575773	.454545	1 42
91	462	246	2 6646420	2 3909351	9 7262931	532466	1 19
92	216	137	2 3344538	2 1367206	9 8022668	634259	98
93	79	58	1 8976271	1 7634280	9 8658009	734177	80
94	21	18	1 3222193	1 2552725	9 9330532	857143	64
95	3	3	0 4771213	0 4771213	0 0000000	1.000000	50

INDEXER'S PREFATORY NOTE TO CODE OF 1939

FOREWORD. Indexing is a variable and indefinable subject, as will appear from an examination of the different indexes in the various codes. Indexers appear to have followed two theories: (1) to break up the subject into, and index it under its many small component parts, or (2) to use fairly comprehensive titles and to try to secure a logical index arrangement of the component parts under those titles, with ample cross references from other places in the index.

The first plan, while making certain limited phases of the law quickly accessible, requires the searcher to look in many places to find all of the law—and then there is the ever present uncertainty as to whether or not all has been located.

The theory of the second plan has been followed in the index to the 1939 Code and should ultimately be more resultful, though possibly requiring the searcher to follow one cross reference, for example, "**DESCENT AND DISTRIBUTION**, 11980–12040, *For detailed index see main head PROBATE LAW, subhead* DESCENT AND DISTRIBUTION", to lead him to that position in the index where all the law on this subject will be found. Under each main head there will also be found specific cross references to such other topics as are related but which may be sufficiently distinguished to merit being indexed elsewhere. At other places throughout the entire index where a searcher might be expected to begin, cross references are inserted to indicate the place where the law has been indexed. In the long run, this plan should both save the searcher's time and lend certainty to his efforts.

INDEX OBJECTIVES. Our endeavor has been (1) to harmonize the index classifications with those in other legal publications as to subjects, such as **INSURANCE, MUNICIPAL CORPORATIONS, TAXATION**, etc., whenever susceptible to this disposition, (2) to group the law together, having in mind that if the searcher had to do less looking for the main heads where the law might have been treated, he could better afford to scan the broad subject under which it has been treated, for example, **PROBATE LAW**, knowing that the aim in indexing has been either to place under that main head or to account for by means of cross references, all the law pertinent to that subject, (3) to utilize and follow the desires and helpful suggestions received from numerous members of the bar, so as to construct an index useful to both lawyers and other users of the code, and (4) to anticipate, provide for, and secure future index suggestions by including the index notation sheet at the end of the code.

GENERAL CLASSIFICATIONS. The index has been revised to conform generally to the more or less standard classifications of the law found in the commonly used legal digests, except perhaps for such main heads as **COUNTY OFFICERS AND DEPARTMENTS, STATE OFFICERS AND DEPARTMENTS, CIVIL PROCEDURE**, and **CRIMINAL PROCEDURE.**

Most of the following titles as used in the index are in reality standard classifications of the law in many legal publications, and their newness in the index lies chiefly in the extent to which they have been amplified. Only a few of the main heads and their scope in the detailed index will be noted.

ANIMALS: The laws relating to domestic animals, including poultry, because there are statutes applying to both. Wild animals are indexed under **FISH AND GAME.**

BANKS AND BANKING: Banking laws relating to all banks, including trust companies.

CIVIL PROCEDURE: The law generally applicable in civil proceedings from the time a party determines jurisdiction and serves the original notice to judgment, except appellate procedure, special actions, such as Mandamus, etc., and such subjects as **COSTS, DAMAGES** and **EXECUTIONS** which, though related to procedure, seemed preferably indexed separately as main heads. This title and **CRIMINAL PROCEDURE** were adopted with the view of facilitating the use of the procedural subjects in the index—in other words, just the difference between searching over the main heads throughout several hundred pages in the entire index for actions, evidence, trial, etc., or having these subjects collected with many others in about thirty pages of index, while yet appearing in the same alphabetical order as if scattered through the index. Look first in these titles for general matters of practice and procedure.

CORPORATIONS: Corporation law—profit corporations, nonprofit corporations, and foreign corporations.

COUNTY: General county law.

COUNTY OFFICERS AND DEPARTMENTS: All county officers and departments (except clerk of court, which is found under **DISTRICT COURT**) collected together but in the same alphabetical arrangement as if scattered throughout the index—with the law generally applying to all state, county, and city officers indexed under **PUBLIC OFFICERS.**

CRIMES: All of the crimes are listed here except the miscellaneous violations pertaining to particular subjects which are listed under the respective subjects, as "penal provisions."

CRIMINAL PROCEDURE: This main head, together with the main head **CRIMES**, includes all the general criminal law and procedure.

ELECTIONS: Election law and its generally related phases, except such election law as specifically applies to cities, which is indexed under **MUNICIPAL CORPORATIONS**, and to schools which is under **SCHOOLS AND SCHOOL DISTRICTS.**

GENERAL ASSEMBLY: The law pertaining to the legislature.

HIGHWAYS: All the road law.

INSURANCE: All law relating to insurance.

JURY: The law relating to juries is completely indexed here because of its overlapping nature as to both civil and criminal cases and procedure.

LABOR LAWS: New title which, with the main heads **UNEMPLOYMENT COMPENSATION** and **WORKMEN'S COMPENSATION**, indexed separately, covers the subject of labor.

MINORS: The law relating to persons under twenty-one years of age.

MOTOR VEHICLES and **MOTOR VEHICLE CARRIERS:** Two main heads containing the motor vehicle law.

MUNICIPAL CORPORATIONS: All the law relating to cities and towns, and their functions and departments, indexed (1) by subjects, so that all the laws on "ordinances", for example, appear under that subhead, and (2) according to the type of city, so that the laws on "cities under commission plan", for example, may be found there.

PROBATE COURT and **PROBATE LAW:** Two main heads, containing the law relating to probate. Guardianships, although connected with probate in many procedural matters, are indexed under **GUARDIANS.**

RAILROADS: The railroad law, including interurban railways, but not including **STREET RAILWAYS**, which are indexed under that main head.

REAL PROPERTY: The law pertaining to real property except such subjects as **BOUNDARIES, FORCIBLE ENTRY AND DETAINER, LANDLORD AND TENANT, MORTGAGES**, and those subjects which are only incidental to real estate, such as **WEEDS**, or **ZONING LAW.**

RELIGION: The law relating to churches, clergymen, and other related subjects.

SCHOOLS AND SCHOOL DISTRICTS: The school law.

SOCIAL WELFARE: Law relating to child welfare, emergency relief, old-age assistance, social welfare boards, and related subjects.

SOLDIERS, SAILORS, MARINES, AND WAR NURSES: All provisions relating to veterans of all wars, and their organizations. The national guard law is under **NATIONAL GUARD.**

STATE INSTITUTIONS: The institutions maintained by the state, under either the board of education or the board of control and the law governing those boards.

STATE OFFICERS AND DEPARTMENTS: Law relating to all officers, boards, commissions, and departments of the state, collected together, but in the same alphabetical order as if scattered throughout the index. Cross references, with inclusive section numbers added, direct the searcher to this title from other places in the index where the names of the officers appear. Certain general laws applying to all state, county, and city officers are indexed under **PUBLIC OFFICERS.**

TAXATION: The laws relating to taxes of all kinds, either indexed in detail or adequately cross referenced.

UNEMPLOYMENT COMPENSATION: The unemployment compensation act.

Many other main heads, while not mentioned above, have been similarly covered.

As has been stated, the aim in indexing has been to collect in one place, wherever possible, all the law on the one subject, or to insert a specific cross reference to the main head (and subheads, if necessary) where a related subject may be found. Such subjects as might appropriately appear in more than one place have sometimes, where the topic was not large, been indexed in each place, otherwise indexed in one of the places where it was thought the searcher would commonly expect to find it and cross references have been inserted in the other places.

Because the lawyers are the largest single group of users of the code, a letter was sent to each attorney in the state to get his specific suggestions as to where and how he thought the index could be improved. A very satisfactory response followed, and many valuable, specific suggestions were received—practically all of which have been assimilated in the index. For instance, the use of the general classifications of the law in the main heads, e.g., **MUNICIPAL CORPORATIONS**; the use of ample cross references to avoid running into "blind alleys"; the use of inclusive sections in conjunction with cross references; and the use as entries of such commonly used terms as "dead man statute", "cost bond", etc., are attempts to follow the trend of these suggestions. The list of codes and session laws appearing in the fore part of the book, and the index notation sheet at the end of the volume have been inserted in response to lawyers' suggestions which dealt with matters other than indexing. Owing to the favorable comment on the 1897 Code index, it has been thoroughly checked and many

useful items secured therefrom. Although the press of work in preparing the code for publication has so far prevented acknowledging the receipt of the various suggestions, due credit and thanks must be and they are now given for the many helpful suggestions received.

MAIN HEADS. The main heads in the index are set up in large black face capitals like the following style of type: **PROBATE LAW.** As mentioned above, the aim has been to make the main heads inclusive of all appropriate law. Some groupings may, at first thought, appear to be improperly joined, but a closer inspection will reveal some regulatory laws that are common to all, or some other purpose will become apparent which makes the consolidation desirable. For example, poultry is included as a subhead under the main head **ANIMALS.** This may seem a little strange until it is noted that some laws relating to animals, such as the regulations as to feeds and tonics, and the domestic animal fund law, apply to poultry as well as to domestic animals generally. Since it would be impractical to repeat these laws under the heading for each animal or fowl to which it applies, the solution seemed to be the grouping under **ANIMALS.** Of course, if the poultry law were indexed under **POULTRY**, a cross reference from **POULTRY** to such other main heads, as **COMMERCIAL FEEDS**, or **DOMESTIC ANIMAL FUND** could be made, but since this would require the searcher to look elsewhere, as well as under **POULTRY**, for part of the pertinent law, it is better to turn at once to **ANIMALS** and find all of these matters indexed there. In the end it is felt that this will save time for the searcher. Other comparable situations have been handled similarly under main heads, such as **BANKS AND BANKING, ELECTIONS, INSURANCE, MUNICIPAL CORPORATIONS, TAXATION,** and others.

SUBHEADS. The subheads in the index are set up in smaller black face capitals like the following style of type: **NOTICE OF DISHONOR.**

SUB-SUBHEADS. The sub-subheads, or a subdivision under a subhead, are set up in bold face print like the following style of type: **Devises and bequests.**

CROSS REFERENCES. Here are explanatory examples of cross reference uses (Intermediate index entries are omitted. Numbers shown do not appear in the index, but are used only for reference purposes herein). Although to most users of the index the purpose of the following cross references will be apparent, yet for clarity they are explained below.

CROSS REFERENCES TO MAIN HEADS:

1. **DOCTORS,** *See main head PHYSICIANS AND SURGEONS*

This example, number 1, illustrates the use and appearance of a general cross reference from one main head to another main head under which the subject is indexed.

2. **DOCKETS**
   Supreme court, *See main head SUPREME COURT*

Here is an illustration, example number 2, of the use and appearance of a general cross reference from an index entry under one main head to another main head where the law is indexed. In this instance the searcher seeking the law relating to dockets of the supreme court and following the cross reference to the main head **SUPREME COURT,** will thereunder find the same word, "docket", as the lead to his topic. This identity of catchwords and continuity of thought has been used as frequently as possible. In those situations where, under the main head to which the searcher is referred, the catchwords are different or vary, they are so indicated in the cross reference as much as possible—see example number 4 below.

CROSS REFERENCES TO SUBHEADS:

3. **WILLS,** *See main head PROBATE LAW, subhead* WILLS

This example, number 3, shows a cross reference from a main head to a subhead and indicates that the subject of "wills" is indexed as a subhead under **PROBATE LAW.**

4. **MOTOR VEHICLE CARRIERS**
   Chauffeurs' licenses, *See main head MOTOR VEHICLES, subhead* LICENSES TO OPERATE VEHICLES

This example, number 4, informs the searcher that the subject of chauffeurs' licenses for motor vehicle carriers is indexed under the main head **MOTOR VEHICLES,** under the subhead of "licenses" rather than "chauffeurs' licenses". Vagueness is eliminated and the searcher's time is saved. He need not make a second search through the main head to which he is referred (as the usual cross reference in many indexes necessitates) but he may turn directly to the point where the desired topic is covered in the index.

5. **RAILROADS**
   Condemnation, *See subhead* EMINENT DOMAIN *below*

A cross reference like example 5 directs the searcher to a different part of that same main head he is then examining. Its purpose, while directing the searcher to that part of the main head under which his topic is indexed, is to save the searcher's time by avoiding speculation as to synonyms under which the topic may have been indexed and then searching for them when no entry is found at various places where a

searcher might look. The latter routine is customary in using indexes where cross references such as this are not used. Many of these cross references have been used to aid the searcher. The purpose in using this cross reference is also applicable to examples 6, 8, 9, and 10 below.

6. **PROBATE LAW**
WILLS:
Foreign estates, *See subhead* ANCILLARY ADMINISTRATION *above*

Cross references like this example, number 6, from within one subhead to a different subhead under the *same* main head have been used to direct the searcher quickly to the place where, within the title he is then examining, his desired topic is indexed. Although **ANCILLARY ADMINISTRATION** was chosen as the entry under which to index this topic, some searchers may think of "foreign" as the catchword to look for. Cross references such as this, contemplate and relieve this situation, since the topic could not be indexed in every such possible place.

While many lawyers have indicated a desire for an abundance of cross references between related titles and within the detailed index of each subject, other lawyers prefer to find a section number reference instead of the cross reference. Because a detailed index of the law under each related or similar title (for example, under absentees, administrators, bequests, descent and distribution, estates, executors, legatees, probate, wills, etc.) would make the size of the index prohibitive, we have endeavored to meet both of the above desires by collecting the law together in one place, with cross references to it from the other related or equivalent titles, *but also at each cross reference wherever possible a section number reference to the general subject matter will be found.* For example, the above mentioned related subjects have been indexed at one place under the consecutive titles of **PROBATE COURT** and **PROBATE LAW.** As an illustration of section numbers joined with a cross reference to refer to one of these main heads, see example number 7:

7. **DESCENT AND DISTRIBUTION,** 11980-12040, *For detailed index see main head PROBATE LAW, subhead* DESCENT AND DISTRIBUTION

A searcher looking for the law on descent and distribution, and examining the index under the letter "D" finds this entry as shown at 7. For those wishing a detailed index, the cross reference is furnished. For those who wish to turn directly to the *general subject matter,* the section references, as shown, have been added wherever possible. However, since references to many miscellaneous additional sections scattered throughout the code will usually be found in the detailed index, it is suggested that the better practice will be to follow the cross reference and examine the detailed index.

CROSS REFERENCES TO SUB-SUBHEADS:

8. **BEQUESTS,** *See main head PROBATE LAW, subhead* WILLS, *thereunder see* "Devises and bequests"

A searcher desiring the law on bequests, and looking for it under the letter "B" finds this entry as shown at 8. The law there indexed does not lend itself well to a section reference as with the example number 7 above, but with a reference to both the main head and the subhead, the searcher may turn directly to his specific subject without examining other undesired parts of the title. Moreover, other related law indexed under the same main head is convenient and can be found if desired.

9. **PROBATE LAW**
Legacies, *See subhead* WILLS *below, thereunder see* "Devises and bequests"

This cross reference serves the same purpose as explained under example number 4 above, except that it goes one step further and tells the searcher not only the subhead but also the sub-subhead where his topic is indexed.

10. **MOTOR VEHICLES**
REGISTRATION:
Manufacturers' plates, *See* "Special plates" *below, under this subhead* REGISTRATION

Cross references like this example number 10 are used to direct the searcher to the index on the specific topic he seeks, and to simultaneously inform him that it is under the same subhead he is then examining. The catchwords "manufacturers' plates" in the entry are ones which a searcher might logically expect to find, although the legislation involved uses the phrase, "special plates". The entry serves a purpose similar to examples numbers 5 and 6 above.

INDEX ENTRIES AND INDEX SET-UP. The index entries are set in ordinary eight point roman type, as was the 1935 Code index. Whenever possible the entries were phrased to bring out the noun or main thought as the first word in the entry. Specimens, from two different pages of the index, showing the page set-up and the appearance and use of the cross references follow: (see opposite page)

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In certain titles, a subhead GENERAL PROVISIONS, has been used for a grouping of entries referring to provisions applicable generally to the entire subject covered by the main head. For example, in **COUNTY OFFICERS AND DEPARTMENTS**, the entries under GENERAL PROVISIONS apply equally to each of the several county officers. Unless grouped in this manner the entries would have to be repeated many times. When using the index, the searcher should examine both the specific subject or officer desired and the "general provisions" where such subhead exists. Cross references will indicate whenever this is necessary.

DESCRIPTIVE FOLIO LINES. At the top of each page of the index the phrase "detailed index" used in the 1935 Code has been omitted, and substituted in its place is a line of bold-face type indicating what subject matter of the index appears on that page—an aid in quickly locating the general index classifications.

INDEX NOTATION SHEET. At the rear of the book there has been provided a detachable index notation sheet on which the lawyers and other users of the index may make notations as to desired index entries and improvements. The lawyers and other users of the index are urged to use this sheet and to send either their index suggestions therefrom, or this notation sheet with their index notations thereon, to the Code Editor prior to the publication of the next code, so that these suggestions may be considered and utilized.

CONCLUSION. It is hoped that the plan of following the general classifications of the law will be acceptable, and that the utility of the code will be increased by the use of this index, though doubtless many occasions for its improvement will be found. The cooperation of the members of the bar in making suggestions can be of great value in making future improvements.

RICHARD REICHMANN
Code Editor

Office of the Code Editor
State House, Des Moines, Iowa
October, 1939

DETAILED INDEX

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CIVIL PROCEDURE
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CRIMINAL PROCEDURE

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ANNOTATIONS

TO

CODE OF IOWA

VOLUME II

COMPILED AND EDITED BY
RICHARD REICHMANN
REPORTER OF THE SUPREME COURT
AND EDITOR OF THE CODE

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By RICHARD REICHMANN
Reporter of the Supreme Court and Editor of the Code
for the State of Iowa

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EDITOR'S INTRODUCTION

to Volume II of the Annotations to the Code of Iowa

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

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

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

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

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

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

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

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

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

Iowa Reports, Volumes 200 to 227, inclusive (some cases from Volume 228)

North Western Reporter, Volumes 204 to 291

American Law Reports, Annotated, Volumes 39 to 120

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

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

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

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

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

RICHARD REICHMANN,

Reporter of the Supreme Court and Code Editor

OFFICE OF THE REPORTER OF THE
SUPREME COURT AND CODE EDITOR
STATE HOUSE, DES MOINES, IOWA
JUNE, 1940

List of Abbreviations

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

Annotations to Code of Iowa

Volume II

CONSTITUTION OF THE STATE OF IOWA

Preamble—Boundaries.

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

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

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

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

Arnd v Harrington, 227-43; 287 NW 292

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

Bigelow v Herrink, 200-830; 205 NW 531

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

State v Sorenson, 222-1248; 271 NW 234

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

Sheldon v Chambers, 225-716; 281 NW 438

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

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

ARTICLE I

BILL OF RIGHTS

Rights of persons. SECTION 1.

Discussion. See 15 ILR 162—Police power and commerce clause

ANALYSIS

I GUARANTY OF INDIVIDUAL OR PERSONAL RIGHTS
II LIMITING INDIVIDUAL RIGHTS
III FREEDOM OF CONTRACT
IV DISCRIMINATION
V CERTAIN ACTS HELD CONSTITUTIONAL
VI PROPERTY RIGHTS

Automobile cases. See under §5037.09
Cities. See under §§5738, 5945
Due process of law. See under Art I, §9
Invitees, licensees, and trespassers. See under Ch 484, Note 1
Negligence liability in general. See under Ch 484, Note 1
Railroads. See under §§8005, 8156
Uniform operation of laws. See under Art I, §6; Art III, §30

I GUARANTY OF INDIVIDUAL OR PERSONAL RIGHTS

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

In re Schneider, 224-598; 277 NW 567

I GUARANTY OF INDIVIDUAL OR PERSONAL RIGHTS—concluded

Separate trials—right to waive. The statutory right of jointly indicted parties to have separate trials is not such a right that it cannot be voluntarily waived.

State v Moore, 217-872; 251 NW 737

II LIMITING INDIVIDUAL RIGHTS

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

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

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

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

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

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

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

Craven v Bierring, 222-613; 269 NW 801

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

In re Cloud, 217-3; 250 NW 160

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

State v Hueser, 205-132; 215 NW 643

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

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

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

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

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

Peverill v Board, 208-94; 222 NW 535

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

Fevold v Board, 202-1019; 210 NW 139

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

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

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

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

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

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

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

Metropolitan v McDonald, 225-1075; 283 NW 445

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

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

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

Metropolitan v McDonald, 225-1075; 283 NW 445

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

Scott v Waterloo, 223-1169; 274 NW 897

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

State v Arluno, 222-1; 268 NW 179

III FREEDOM OF CONTRACT

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

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

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

State v Woitha, 227-1; 287 NW 99

State v Hardy, 227-12; 287 NW 104

IV DISCRIMINATION

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

Discussion. See 22 ILR 736—Legislation favoring economic groups

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

In re Anderson, 205-324; 218 NW 140

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

Marquis v Waterloo, 210-439; 228 NW 870

V CERTAIN ACTS HELD CONSTITUTIONAL

Cooperative agricultural marketing act.

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

Bovine tuberculosis eradication act.

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

Motor vehicle carriers taxation act.

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

Juvenile court act.

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

Itinerant drug vendor act.

State v Logsdon, 215-1297; 248 NW 4

Act creating park board.

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

Blue sky law.

State v Soeder, 216-815; 249 NW 412

Cigarette permit act.

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

Local budget law—transfer of fund provisions.

State v Manning, 220-525; 259 NW 213

Bank reorganization act.

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

Deficiency judgment limitation law.

Berg v Berg, 221-326; 264 NW 821

Chain store tax act of 1935—constitutional in part.

Tolerton v Board, 222-908; 270 NW 427

Simmer law — municipally owned utility plants.

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

Income tax act.

Vilas v Board, 223-604; 273 NW 338

Short form indictment act.

State v Keturokis, 224-491; 276 NW 600

Motor vehicle fuel—price-posting law.

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

Small loan law.

Miller v Schuster, 227-1005; 289 NW 702

Keeping liquor where beer is sold.

State v Talerico, 227-1315; 290 NW 660

Motor vehicle fuel tax act.

Monamotor Oil Co. v Johnson, 292 US 86

VI PROPERTY RIGHTS

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

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

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

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

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

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

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

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

Crow v Board, 227-324; 288 NW 145

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

Mendenhall v Struck, 207-1094; 224 NW 95

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

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

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

Miller v Milford, 224-753; 276 NW 826

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

Smith v Thompson, 219-888; 258 NW 190

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

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

Political power. SEC. 2.

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

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

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

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

Waugh v Shirer, 216-468; 249 NW 246

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

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

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

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

Religion. SEC. 3.

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

Religious test—witnesses. SEC. 4.

Atty. Gen. Opinion. See '36 AG Op 629

Laws uniform. SEC. 6.

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

ANALYSIS

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

I EQUAL PROTECTION OF LAW—CLASSIFICATIONS

Additional citations. See under Art III, §30

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

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

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

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

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

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

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

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

I EQUAL PROTECTION OF LAW—CLASSIFICATIONS—concluded

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

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

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

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

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

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

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

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

II UNIFORMITY OF OPERATION

Additional citations. See under Art III, §30

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

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

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

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

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

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

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

Loftus v Department, 211-566; 232 NW 412

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

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

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

Berg v Berg, 221-326; 264 NW 821

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

State v Manning, 220-525; 259 NW 213

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

Fevold v Board, 202-1019; 210 NW 139

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

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

Vilas v Board, 223-604; 273NW 338

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

State v Logsdon, 215-1297; 248 NW 4

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

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

III SPECIAL PRIVILEGES

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

Lausen v Board, 204-30; 214 NW 682

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

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

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

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

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

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

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

Smith v Thompson, 219-888; 258 NW 190

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

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

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

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

Liberty of speech and press. SEC. 7.

Slander and libel. See under §§12412, 13256

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

McCuddin v Dickinson, 225-304; 283 NW 886

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

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

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

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

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

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

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

Personal security — searches and seizures. SEC. 8.

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

ANALYSIS

I LAWFUL SEARCHES AND SEIZURES
II SEARCH OF ARRESTED PERSONS
III ILLEGAL OR UNAUTHORIZED SEARCHES
IV DESCRIPTION OF PROPERTY OR PLACE OF SEARCH

I LAWFUL SEARCHES AND SEIZURES

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

State v Bruns, 211-826; 232 NW 684

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

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

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

State v Doe, 227-1215; 290 NW 518

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

State v Friend, 206-615; 220 NW 59

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

State v Friend, 206-615; 220 NW 59

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

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

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

Vilas v Board, 223-604; 273 NW 338

II SEARCH OF ARRESTED PERSONS

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

State v Struble, 71-11; 32 NW 1

III ILLEGAL OR UNAUTHORIZED SEARCHES

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

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

State v Rollinger, 208-1155; 225 NW 841

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

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

IV DESCRIPTION OF PROPERTY OR PLACE OF SEARCH

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

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

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

State v Doe, 227-1215; 290 NW 518

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

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

ANALYSIS

I NATURE OF RIGHT TO JURY TRIAL IN CIVIL CASES
II JURY TRIALS IN INFERIOR COURTS
III DENIAL OF TRIAL BY JURY
IV WAIVER OF JURY TRIAL
V JURY TRIAL IN EQUITY CASES
VI DUE PROCESS OF LAW GENERALLY
VII PERSONS AND PROPERTY ENTITLED TO PROTECTION
VIII DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS
IX TAXATION AND DUE PROCESS OF LAW

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

I NATURE OF RIGHT TO JURY TRIAL IN CIVIL CASES

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

In re Rogers, 226-183; 283 NW 906

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

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

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

Mitchell v Heaton, 227-1071; 290 NW 39

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

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

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

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

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

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

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

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

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

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

II JURY TRIALS IN INFERIOR COURTS

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

State v Porter, 206-1247; 220 NW 100

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

Kinsey v Clark, 215-765; 246 NW 840

III DENIAL OF TRIAL BY JURY

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

Broulik v Henderson, 218-640; 254 NW 63

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

In re Brewer, 224-773; 276 NW 766

III DENIAL OF TRIAL BY JURY—concluded

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

Metier v Brewer, (NOR); 205 NW 734

IV WAIVER OF JURY TRIAL

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

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

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

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

V JURY TRIAL IN EQUITY CASES

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

Broulik v Henderson, 218-640; 254 NW 63

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

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

VI DUE PROCESS OF LAW GENERALLY

Due process not limitation on police power.

Peverill v Board, 208-94; 222 NW 535

Appeal—no constitutional right.

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

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

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

Donlan v Cooke, 212-771; 237 NW 496

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

State v Erickson, 225-1261; 282 NW 728

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

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

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

Hatt v McCurdy, 223-974; 274 NW 72

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

Brunssen v Parker, 227-1364; 291 NW 535

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

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

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

State v Keturokis, 224-491; 276 NW 600

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

State v Keturokis, 224-491; 276 NW 600

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

State v Ferguson, 226-361; 283 NW 917

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

State v Ferguson, 226-361; 283 NW 917

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

Pagano v Bechly, 211-1294; 232 NW 798

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

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

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

State v Baker, 222-903; 270 NW 359

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

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

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

Andrew v Bank, 206-869; 221 NW 668

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

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

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

Board v Board, 214-655; 241 NW 14

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

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

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

Wertz v City, 201-947; 208 NW 511

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

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

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

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

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

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

VI DUE PROCESS OF LAW GENERALLY —continued

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

In re Kessler, 213-633; 239 NW 555

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

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

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

Board v Board, 214-655; 241 NW 14

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

State v Board, 211-1116; 235 NW 303

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

In re Lear, 204-346; 213 NW 240

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

Clark v Herring, 221-1224; 260 NW 436

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

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

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

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

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

State v Hanson, 201-579; 207 NW 769

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

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

State v Howard, 214-60; 241 NW 682

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

Craven v Bierring, 222-613; 269 NW 801

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

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

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

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

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

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

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

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

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

Metropolitan v McDonald, 225-1075; 283 NW 445

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

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

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

Metropolitan v McDonald, 225-1075; 283 NW 445

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

Mennig v Howard, 213-936; 240 NW 473

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

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

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

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

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

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

State v Bevins, 210-1031; 230 NW 865

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

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

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

VI DUE PROCESS OF LAW GENERALLY —concluded

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

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

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

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

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

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

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

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

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

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

Berg v Berg, 221-326; 264 NW 821

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

State v Soeder, 216-815; 249 NW 412

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

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

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

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

VII PERSONS AND PROPERTY ENTITLED TO PROTECTION

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

Hammer v Utterback, 202-50; 209 NW 522

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

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

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

Wertz v Ottumwa, 201-947; 208 NW 511

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

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

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

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

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

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

VIII DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

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

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

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

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

IX TAXATION AND DUE PROCESS OF LAW

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

Ward v Board, 214-1162; 241 NW 26

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

Vilas v Board, 223-604; 273 NW 338

Rights of persons accused. SEC. 10.

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

ANALYSIS

I WHAT IS A CRIMINAL PROSECUTION
II SPEEDY AND PUBLIC TRIAL BY IMPARTIAL JURY
III RIGHT TO TRIAL BY JURY
IV RIGHT TO BE CONFRONTED WITH WITNESSES
V RIGHT TO COPY OF INDICTMENT
VI RIGHT TO COMPULSORY ATTENDANCE OF WITNESSES
VII RIGHT TO ASSISTANCE OF COUNSEL
VIII WAIVER OF RIGHTS IN GENERAL

I WHAT IS A CRIMINAL PROSECUTION

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

State v Henderson, 215-276; 243 NW 289

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

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

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

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

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

II SPEEDY AND PUBLIC TRIAL BY IMPARTIAL JURY

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

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

Davison v Garfield, 221-424; 265 NW 645

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

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

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

State v Ellington, 200-636; 204 NW 307

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

State v Ferguson, 226-361; 283 NW 917

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

Ferguson v Bechly, 224-1049; 277 NW 755

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

Maher v Brown, 225-341; 280 NW 553

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

Maher v Brown, 225-341; 280 NW 553

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

State v Hathaway, 224-478; 276 NW 207

III RIGHT TO TRIAL BY JURY

Instructions in criminal cases. See under §13876

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

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

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

In re Brewer, 224-773; 276 NW 766

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

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

In re Brewer, 224-773; 276 NW 766

IV RIGHT TO BE CONFRONTED WITH WITNESSES

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

State v Henderson, 217-402; 251 NW 640

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

State v Murray, 222-925; 270 NW 355

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

State v Clay, 222-1142; 271 NW 212

V RIGHT TO COPY OF INDICTMENT

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

State v Engler, 217-138; 251 NW 88

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

State v Keturokis, 224-491; 276 NW 600

VI RIGHT TO COMPULSORY ATTENDANCE OF WITNESSES

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

State v Clay, 222-1142; 271 NW 212

VII RIGHT TO ASSISTANCE OF COUNSEL

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

State v Hathaway, 224-478; 276 NW 207

VIII WAIVER OF RIGHTS IN GENERAL

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

Peverill v Board, 201-1050; 205 NW 543

When indictment necessary. SEC. 11.

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

ANALYSIS

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

I NONINDICTABLE OFFENSES: TRIALS IN INFERIOR COURTS

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

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

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

State v Porter, 206-1247; 220 NW 100

I NONINDICTABLE OFFENSES: TRIALS IN INFERIOR COURTS—concluded

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

State v Dillard, 225-915; 281 NW 842

II INDICTMENTS

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

State v Hawks, 213-698; 239 NW 553

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

State v Keturokis, 224-491; 276 NW 600

III RIGHT OF APPEAL FROM INFERIOR COURTS

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

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

Twice tried—bail. SEC. 12.

ANALYSIS

I LEGAL JEOPARDY
II OFFENSES AGAINST TWO JURISDICTIONS
III EFFECT OF FORMER ACQUITTAL OR CONVICTION
IV RIGHT TO BAIL

I LEGAL JEOPARDY

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

State v Blackledge, 216-199; 243 NW 534

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

State v Kelly, 217-1305; 253 NW 49

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

State v Huff, 217-41; 250 NW 581

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

State v Dillard, 225-915; 281 NW 842

II OFFENSES AGAINST TWO JURISDICTIONS

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

State v Purdin, 206-1058; 221 NW 562

III EFFECT OF FORMER ACQUITTAL OR CONVICTION

Statutory guarantee against dual jeopardy. See under §13807

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

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

Bates v Carter, 225-893; 281 NW 727

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

State v Smith, 219-168; 256 NW 651

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

Bates v Carter, 225-893; 281 NW 727

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

State v Wheelock, 216-1428; 250 NW 617

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

Touche v Bonner, 201-466; 205 NW 751

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

State v Osborne, 207-636; 223 NW 363

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

State v Boever, 203-86; 210 NW 571

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

State v Smith, 217-825; 253 NW 130

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

State v Folger, 204-1296; 210 NW 580

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

State v Reinhard, 202-168; 209 NW 419

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

State v Purdin, 206-1058; 221 NW 562

IV RIGHT TO BAIL

No annotations in this volume

Habeas corpus. SEC. 13.

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

Conkling v Hollowell, 203-1374; 214 NW 717

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

Hallway v Byers, 205-936; 218 NW 905

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

McCormick v Hollowell, 215-638; 246 NW 612

Bail—punishments. SEC. 17.

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

State v Dowling, 204-977; 216 NW 271

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

State v Gasparia, (NOR); 214 NW 550

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

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

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

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

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

Touche v Bonner, 201-466; 205 NW 751

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

State v Rayburn, 213-396; 238 NW 908

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

State v Overbay, 201-758; 206 NW 634

Eminent domain. SEC. 18.

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

ANALYSIS

I NATURE OF POWER OF EMINENT DOMAIN
II WHAT IS A PUBLIC PURPOSE
III COMPENSATION AND SECURITY
IV METHOD OF ASSESSING DAMAGE
V EXTENT OF RIGHT ACQUIRED
VI ACTS WHICH DO NOT CONSTITUTE TAKING OF PROPERTY BY EMINENT DOMAIN
VII EMINENT DOMAIN AND TAXATION

I NATURE OF POWER OF EMINENT DOMAIN

Municipal light and power lines—extra-territorial extension—constitutional taxation.

Premise No. 1. The state may, inter alia, constitutionally authorize its governmental agencies to tax for any purpose which justifies the exercise of the power of eminent domain.

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

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

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

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

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

II WHAT IS A PUBLIC PURPOSE

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

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

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

Nalon v City, 216-1041; 250 NW 166

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

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

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

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

III COMPENSATION AND SECURITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV METHOD OF ASSESSING DAMAGE

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

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

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

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

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

Witt v State, 223-156; 272 NW 419

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

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

V EXTENT OF RIGHT ACQUIRED

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

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

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

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

Wertz v City, 201-947; 208 NW 511

VII EMINENT DOMAIN AND TAXATION

No annotations in this volume

Imprisonment for debt. SEC. 19.

Imprisonment for criminal costs. See under §13964

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

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

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

Hammer v Utterback, 202-50; 209 NW 552

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

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

Right of assemblage—petition. SEC. 20.

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

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

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

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

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

Kemble v Weaver, 200-1333; 206 NW 83

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

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

ANALYSIS

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

I EX POST FACTO LAWS

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

State v Norris, 203-327; 210 NW 922

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

State v Marx, 200-884; 205 NW 518

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

State v Johnson, 212-1197; 237 NW 522

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

Lockie v Hammerstrom, 222-451; 269 NW 507

II RETROACTIVE LAWS IN GENERAL

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

Reed v Snow, 218-1165; 254 NW 800

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

Frink v Clark, 226-1012; 285 NW 681

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

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

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

Johnson v Leese, 223-480; 273 NW 111

III LEGALIZING ACTS AS RETROACTIVE LAWS

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

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

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

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

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

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

Peverill v Board, 201-1050; 205 NW 543

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

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

III LEGALIZING ACTS AS RETROACTIVE LAWS—concluded

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

Peverill v Board, 208-94; 222 NW 535

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

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

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

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

IV IMPAIRMENT OF CONTRACTS

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

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

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

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

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

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

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

Berg v Berg, 221-326; 264 NW 821

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

Peverill v Board, 208-94; 222 NW 535

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

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

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

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

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

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

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

Leach v Bank, 205-1154; 213 NW 517

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

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

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

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

Berg v Berg, 221-326; 264 NW 821

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

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

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

Craig v Waggoner, 218-876; 256 NW 285

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

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

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

Tusha v Eberhart, 218-1065; 256 NW 740

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

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

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

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

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

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

Metropolitan v McDonald, 225-1075; 283 NW 445

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

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

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

Metropolitan v McDonald, 225-1075; 283 NW 445

V IMPAIRMENT OF VESTED RIGHTS

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

Leach v Bank, 205-1154; 213 NW 517

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

In re Cloud, 217-3; 250 NW 160

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

Waugh v Shirer, 216-468; 249 NW 246

V IMPAIRMENT OF VESTED RIGHTS—continued

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

Peverill v Board, 201-1050; 205 NW 543

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

Berg v Berg, 221-326; 264 NW 821

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

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

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

Guisinger v Guisinger, 201-409; 205 NW 752

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

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

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

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

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

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

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

Murray v Bank, 202-281; 208 NW 212

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

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

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

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

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

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

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

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

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

Rights reserved. SEC. 25.

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

ARTICLE II

RIGHT OF SUFFRAGE

Electors. SECTION 1.

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

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

Residence—evidence—sufficiency.

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

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

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

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

Dodd v Lorenz, 210-513; 231 NW 422

Military duty. SEC. 3.

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

Persons in military service. SEC. 4.

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

Residence—effect of military service.

Harris v Harris, 205-108; 215 NW 661

Disqualified persons. SEC. 5.

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

ARTICLE III

OF THE DISTRIBUTION OF POWERS

Departments of government. SECTION 1.

Discussion. See 22 ILR 684—Administrative commissions

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

ANALYSIS

I THE TRIPARTITE SYSTEM
II DELEGATION AND USURPATION OF LEGISLATIVE AUTHORITY
III DELEGATION AND USURPATION OF EXECUTIVE AUTHORITY
IV DELEGATION AND USURPATION OF JUDICIAL AUTHORITY

I THE TRIPARTITE SYSTEM

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

State v Woitha, 227-1; 287 NW 99

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

State v Erickson, 225-1261; 282 NW 728

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

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

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

Schneberger v Board, 228- ; 291 NW 859

II DELEGATION AND USURPATION OF LEGISLATIVE AUTHORITY

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

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

Discussion. See 17 ILR 239—Delegation to the people

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

Fevold v Board, 202-1019; 210 NW 139

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

II DELEGATION AND USURPATION OF LEGISLATIVE AUTHORITY—concluded

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

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

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

Miller v Schuster, 227-1005; 289 NW 702

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

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

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

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

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

Miller v Schuster, 227-1005; 289 NW 702

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

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

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

Huxley v Conway, 226-268; 284 NW 136

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

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

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

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

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

Mathewson v Board, 226-61; 283 NW 256

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

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

III DELEGATION AND USURPATION OF EXECUTIVE AUTHORITY

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

Marquis v Waterloo, 210-439; 228 NW 870

IV DELEGATION AND USURPATION OF JUDICIAL AUTHORITY

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

Wilcox v Miner, 201-476; 205 NW 847

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

constitute an unconstitutional invasion of the powers of the judiciary.

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

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

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

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

Frink v Clark, 226-1012; 285 NW 681

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

State v Altoona, 201-730; 207 NW 789

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

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

LEGISLATIVE DEPARTMENT

General assembly. SECTION 1.

ANALYSIS

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

I GENERAL SCOPE OF POWER

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

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

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

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

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

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

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

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

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

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

State v Dobry, 217-858; 250 NW 702

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

State v Erickson, 225-1261; 282 NW 728

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

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

Nelson v Hayes, 222-701; 269 NW 861

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

Smith v Thompson, 219-888; 258 NW 190

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

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

I GENERAL SCOPE OF POWER—conclud'd

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

State v Council, 207-923; 223 NW 737

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

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

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

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

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

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

II DELEGATION OF LEGISLATIVE POWER

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

Discussion. See 22 ILR 684—Administrative commissions

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

Lausen v Board, 204-30; 214 NW 682

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

Miller v Schuster, 227-1005; 289 NW 702

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

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

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

State v Manning, 220-525; 259 NW 213

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

Vilas v Board, 223-604; 273 NW 338

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

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

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

Miller v Schuster, 227-1005; 289 NW 702

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

Goodlove v Logan, 217-98; 251 NW 39

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

ment the manner in which that policy shall apply.

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

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

Kistner v Board, 225-404; 280 NW 587

III JUDICIAL REVIEW OF LEGISLATIVE ACTION

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

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

State v Dunley, 227-1085; 290 NW 41

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

Jones v Dunkelberg, (NOR); 260 NW 717

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

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

Sessions. SEC. 2.

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

Representatives. SEC. 3.

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

Senators—qualifications. SEC. 5.

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

Officers—elections determined. SEC. 7.

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

Protest—record of vote. SEC. 10.

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

Vacancies. SEC. 12.

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

Bills. SEC. 15.

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

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

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

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

Davidson v Mulock, 212-730; 235 NW 45

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

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

Passage of bills. SEC. 17.

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

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

Smith v Thompson, 219-888; 258 NW 190

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

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

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

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

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

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

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

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

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

Smith v Thompson, 219-888; 258 NW 190

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

Scott v Board, 221-1060; 267 NW 111

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

Miller v Schuster, 227-1005; 289 NW 702

Impeachment. SEC. 19.

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

Officers subject to impeachment — judgment. SEC. 20.

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

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

Clark v Herring, 221-1224; 260 NW 436

Members not appointed to office. SEC. 21.

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

Appropriations. SEC. 24.

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

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

Compensation of members. SEC. 25.

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

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

Gallarno v Long, 214-805; 243 NW 719

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

Gallarno v Long, 214-805; 243 NW 719

Time laws to take effect. SEC. 26.

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

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

Butters v City, 202-30; 209 NW 401

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

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

Lotteries. SEC. 28.

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

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

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

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

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

ANALYSIS

I SUBJECT MATTER OF ACTS
II TITLES OF ACTS

I SUBJECT MATTER OF ACTS

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

State v Talerico, 227-1315; 290 NW 660

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

Waugh v Shirer, 216-468; 249 NW 246

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

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

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

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

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

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

State v Miller, 217-1283; 252 NW 121

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

Rains v Bank, 201-140; 206 NW 821

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

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

II TITLES OF ACTS

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

Siegel v Railway, 201-712; 208 NW 78

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

State v Talerico, 227-1315; 290 NW 660

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

State v Talerico, 227-1315; 290 NW 660

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

State v Oge, 227-1094; 290 NW 1

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

State v Henderson, 215-276; 243 NW 289

Simmer law—bond statutes not included.

Weiss v Woodbine, 228- ; 289 NW 469

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

State v Engler, 217-138; 251 NW 88

II TITLES OF ACTS—continued

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

Smith v Thompson, 219-888; 258 NW 190

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

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

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

Andrew v Bank, 216-244; 249 NW 377

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

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

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

Leach v Bank, 205-1154; 213 NW 517

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

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

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

State v Talerico, 227-1315; 290 NW 660

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

Smith v Thompson, 219-888; 258 NW 190

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

Smith v Thompson, 219-888; 258 NW 190

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

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

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

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

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

State v Chenoweth, 226-217; 284 NW 110

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

In re Breen, 207-65; 222 NW 426

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

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

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

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

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

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

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

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

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

Fevold v Board, 202-1019; 210 NW 139

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

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

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

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

ANALYSIS

I GENERAL AND SPECIAL LAWS DISTINGUISHED
II INCORPORATION OF CITIES AND TOWNS
III CLASSIFICATION OF CITIES AND TOWNS
IV TAXATION
V VALIDITY OF CERTAIN TAX LAWS
VI LEGALIZING ACTS
VII SPECIAL LAWS

Uniform operation. See also under Art I, §6

I GENERAL AND SPECIAL LAWS DISTINGUISHED

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

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

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

Fevold v Board, 202-1019; 210 NW 139

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

Davidson v Mulock, 212-730; 235 NW 45

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

Waugh v Shirer, 216-468; 249 NW 246

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

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

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

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

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

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

I GENERAL AND SPECIAL LAWS DISTINGUISHED—concluded

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

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

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

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

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

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

II INCORPORATION OF CITIES AND TOWNS

No annotations in this volume

III CLASSIFICATION OF CITIES AND TOWNS

No annotations in this volume

IV TAXATION

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

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

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

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

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

Vilas v Board, 223-604; 273 NW 338

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

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

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

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

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

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

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

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

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

V VALIDITY OF CERTAIN TAX LAWS

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

State v Logsdon, 215-1297; 248 NW 4

VI LEGALIZING ACTS

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

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

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

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

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

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

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

VII SPECIAL LAWS

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

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

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

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

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

State v Council, 207-923; 223 NW 737

Extra compensation — payment of claims. SEC. 31.

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

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

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

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

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

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

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

ARTICLE IV

EXECUTIVE DEPARTMENT

Governor. SECTION 1.

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

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

Constitutional power to remove officer.

Myers v United States, 272 US 52

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

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

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

Schneberger v Board, 228- ; 291 NW 859

Duties of governor. SEC. 8.

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

Execution of laws. SEC. 9.

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

Vacancies. SEC. 10.

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

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

State v Claussen, 216-1079; 250 NW 195

Term — compensation of lieutenant governor. SEC. 15.

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

Gallarno v Long, 214-805; 243 NW 719

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

Gallarno v Long, 214-805; 243 NW 719

Pardons—reprieves—commutations. SEC. 16.

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

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

State v Hamilton, 206-414; 220 NW 313

Lieutenant governor to act as governor. SEC. 17.

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

President of senate. SEC. 18.

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

Seal of state. SEC. 20.

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

Grants and commissions. SEC. 21.

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

Secretary—auditor—treasurer. SEC. 22.

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

ARTICLE V

JUDICIAL DEPARTMENT

Courts. SECTION 1.

Delegation of judicial authority. See under Art III, §1 (IV) (first)

Power of courts to pass on constitutionality. See under Art XII, §1

Discussion. See 16 ILR 337—Research in administration of justice

Atty. Gen. Opinion. See '36 AG Op 395

Attorney—disbarment by special court—constitutionality. The act of the supreme court in appointing three district court judges as a special court to hear and determine disbarment proceedings against an attorney is necessarily a holding that the statute providing for such appointment is constitutional.

In re Cloud, 217-3; 250 NW 160

Disbarment proceedings—special court. The legislature has ample constitutional power to create a special court to hear and determine disbarment proceedings against an attorney, and the fact that said special court is composed of three district court judges appointed by the supreme court does not constitute an attempt by the legislature to create a district court of three judges in violation of §5, Art. V, of the constitution.

In re Cloud, 217-3; 250 NW 160

Nonusurpation of authority. The supreme court usurps no legislative function when it declares and determines the legislative intent of a statute.

Galvin v Citizens Bank, 217-494; 250 NW 729

Supreme court—no encroachment on legislative function. Supreme court may not write into a statute words that are not there.

Mathewson v Board, 226-61; 283 NW 256

Legalizing act noninvasion of judiciary. The validation by the legislative department of a municipal contract which the judicial department has invalidated, because of noncompliance with statutory requirements, does not constitute an unconstitutional invasion of the powers of the judiciary.

Iowa E. L. & P. Co. v Grand Junction, 221-441; 264 NW 84

Jurisdiction of supreme court. SEC. 4.

ANALYSIS

I LAW AND EQUITY IN GENERAL
II EQUITY JURISDICTION
III LAW JURISDICTION
IV APPEAL IN GENERAL
V SUPERVISORY AND IMPLIED POWERS

I LAW AND EQUITY IN GENERAL

Methods of trial on appeal. See under §§11431, 11433

"Jurisdiction" defined. Jurisdiction means the power of a court to take cognizance of and to decide a case and carry its judgment and decree into execution.

Western Grocer v Glenn, 226-1374; 286 NW 441

Without original jurisdiction. The supreme court has no original jurisdiction.

School Dist. v Samuelson, 220-170; 262 NW 169

II EQUITY JURISDICTION

Equitable action — insufficient record. A quite manifest duty rests on appellant in an equitable action to present the record with such affirmative fullness as will enable the appellate court to intelligently try the cause de novo.

Northrup v Mikkleson, 222-1046; 270 NW 401

Treating improperly stricken plea as in record. Upon appeal in an equity cause, the court, upon discovering from the record that the cause of action is barred by the statute of limitation, will treat an improperly stricken plea of such statute as still in the record, and enter judgment accordingly.

Lawrence v Melvin, 202-866; 211 NW 410

Equitable proceedings—trial de novo. An action which plaintiff denominates when commenced as "In equity", and which is fully tried "In equity" without objection or effort to transfer to law, will, on appeal by defendant, be treated as "In equity" and tried de novo, without assignment of error.

Bates v Seeds, 223-70; 272 NW 515

Limited appeal in equity limits de novo hearing. The de novo hearing on appeal in an equitable action is necessarily limited to the particular part of the decree from which the appeal is taken; and, under such an appeal, appellee cannot have a de novo hearing on some other part of the decree unless he perfects a cross-appeal.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

Trial de novo—custody of child. An appeal in habeas corpus proceedings involving the custody and best welfare of a child, necessarily and unavoidably gravitates to a review de novo; obviously such review is proper when distinctly equitable issues are involved.

Jensen v Sorenson, 211-354; 233 NW 717

De novo hearing regardless of decretal recitals of fact. A recital in a mortgage foreclosure decree that of two defensive pleas one had been established, and one had not been established, does not prevent the appellate court on review de novo from adjudging that both said defensive pleas have been established, even tho the prevailing party—the appellee—does not assume to appeal from the one adverse court finding of fact against him.

Northwest Ins. v Blohm, 212-89; 234 NW 268

Habeas corpus proceedings—custody of child. An appeal in habeas corpus proceedings—a law action—involving the custody and best welfare of a child necessarily and unavoidably gravitates to a review de novo.

Adair v Clure, 218-482; 255 NW 658

Taxation—levy and assessment—board of supervisors as objectors—trial de novo. The board of supervisors as objectors to the assessment of a stockyards company may properly appeal to the supreme court from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

III LAW JURISDICTION

Law (?) or equity (?)—mutual treatment of action. An action mutually treated as a law action, from its inception in the trial court to and including its presentation on appeal, must be treated on appeal as a law action.

Garden v Ins. Co., 218-1094; 254 NW 287

Law action tried by equity procedure—errors must be assigned. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v New York Ins., 225-293; 280 NW 521

Transfer from equity to law—effect. A law action, e. g., quo warranto, commenced as an equitable action and properly transferred by the court to law, will, on appeal, be disposed of as a law action.

State v Murray, 219-108; 257 NW 553

Power to require assignments of error. The supreme court has both constitutional and statutory right and power to require such adequate assignments of error in appeals in law actions as will concisely inform the appellate court and appellee of the definite action of the trial court sought to be reviewed.

Siesseger v Puth, 211-775; 234 NW 540

III LAW JURISDICTION—concluded

Final report of administrator — hearing. Hearings on final reports of administrators are not reviewed de novo in the appellate court.

In re Manning, 215-746; 244 NW 860

Fact findings in probate not triable de novo on appeal. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Statutory punishment excessive—legislature not controlled by court. Tho punishment is believed excessive, supreme court has no power to change punishment fixed by specific enactment of legislature for third and subsequent offense of violating liquor law.

State v Erickson, 225-1261; 282 NW 728

IV APPEAL IN GENERAL

Method of trial on appeal. See §§11431, 11433
Right of appeal as due process. See under Art I, §9

Right of review—statutes govern appeal. The right of appeal, being purely statutory, is controlled by the statutes in effect at the time the judgment appealed from was rendered.

Ontjes v McNider, 224-115; 275 NW 328

Consent to jurisdiction—effect. Parties to litigation cannot, by agreement, confer jurisdiction upon the supreme court.

Hampton v Railway, 216-640; 249 NW 436

Original judgment by supreme court. The supreme court has no constitutional, statutory, implied, or inherent jurisdiction to enter an original judgment on a stay bond given by an appellee in compliance with an order of a judge of said court pending an application by appellee to the supreme court of the United States for a writ of certiorari to review a decision of the supreme court of this state.

Hoskins v Hotel, 206-932; 221 NW 442

Findings by probate court—conclusiveness. Findings of fact by a probate court are conclusive on the appellate court when they are fairly supported by competent testimony.

In re Fish, 220-1247; 264 NW 123

Findings of fact in probate. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams' Est., 219-374; 258 NW 682

Hearings in probate. Where the issue whether a trustee should be credited with a loss of trust funds was heard by the probate court without a jury (as a continuation of the probate proceedings out of which the trust arose) the holding of the court, granting such credit, will be sustained if the evidence pro and con would have presented a jury question had the hearing been before a jury.

In re Moylan, 219-624; 258 NW 766

Accounting and settlement. Supported findings and orders of the probate court on the hearing on the final report of a guardian are conclusive on the appellate court, the proceedings being at law.

In re Jefferson, 219-429; 257 NW 783

Accounting and settlement. An order of the probate court granting an executor credit on his final report for the amount paid by him on his own motion, on a claim against the estate, is conclusive on the appellate court if the record reveals supporting testimony as to the genuineness of the claim.

In re Plendl, 218-103; 253 NW 819

Appeal in name of deceased party. Altho plaintiff died during pendency of action below, supreme court took jurisdiction of appeal taken in name of such decedent, because parties treated cause as one properly before the court and because it was a case where court's constitutional authority could be invoked.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Appeal from unrecorded order — no complaint by appellant. After the unsuccessful termination of his appeal, an appellant may not later challenge the jurisdiction of the supreme court to entertain the appeal because the order appealed from was not spread upon the district court records.

Lincoln Bank v Brown, 224-1256; 278 NW 294

Procedendo—competency as evidence. The supreme court, by virtue of its constitutional powers to issue writs necessary to the exercise of its powers, has power to provide, without the aid of a statute, for the writ of procedendo, in order to furnish the trial court with competent evidence of its final decision and of its release of jurisdiction.

State v Banning, 205-826; 218 NW 572

Dual remedies—appeal or mandatory order. Where, after reversal and remand in an equity cause, the trial court, on procedendo, enters a judgment which it has no discretion to enter, the defendant may apply directly to the appellate court for a mandatory order to the trial court to obey the procedendo, even tho defendant might accomplish the same result by appealing from the entry of said judgment.

Ronna v Bank, 215-806; 246 NW 798

Unconstitutionality must be clearly shown. Courts are reluctant to declare legislation unconstitutional, and will do so only when the violation is clear, palpable, and practically free from doubt.

Maddy v City Council, 226-941; 285 NW 208

V SUPERVISORY AND IMPLIED POWERS

Certiorari—limited jurisdiction of supreme court. Neither a judge of the supreme court, nor the court itself, has jurisdiction to issue a writ of certiorari to other than an inferior judicial tribunal. So held where the writ was inadvertently issued to the superintendent of public instruction and to a county superintendent of schools.

School Dist. v Samuelson, 220-170; 262 NW 169

Writ of prohibition—state as plaintiff. An original action in the supreme court, for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; especially is this true when said private actions arose out of proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Writs of prohibition. The supreme court has original jurisdiction, under the constitution, to issue common-law writs of prohibition; but, when the application is for a writ directed to a district court and commanding it to discontinue further jurisdiction over named actions pending in said lower court, the supreme court must act solely on the established facts as revealed in the proceedings in said district court, and, if material disputed issues of fact arise, the writ will be refused, as the supreme court has no power to take testimony on disputed questions of fact dehors said district court records.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

District court and judge. SEC. 5.

Atty. Gen. Opinions. See '34 AG Op 616; '38 AG Op 739

Disbarment proceedings—special court. The legislature has ample constitutional power to create a special court to hear and determine disbarment proceedings against an attorney, and the fact that said special court is composed of three district court judges appointed by the supreme court does not constitute an attempt by the legislature to create a district court of three judges in violation of §5, Const., Art. V.

In re Cloud, 217-3; 250 NW 160

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Jurisdiction of district court. SEC. 6.

Delegation of judicial authority. See under Art III, §1 (first); §10761

Discussion. See 20 ILR 83—Jurisdiction—Federal receiverships

Jurisdiction defined. Jurisdiction means the power of a court to take cognizance of and to decide a case and carry its judgment and decree into execution.

Western Grocer v Glenn, 226-1374; 286 NW 441

Rules of procedure—power to prescribe by order. Under the recognized rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings in order to expedite the trial of cases, to keep their dockets clear, and to facilitate the administration of justice, the judges of a judicial district could adopt and enforce a general order requiring parties to cause each case to be finally determined within two years from date of filing petition and providing upon failure to comply with such order the clerk should enter upon the record, "Dismissed without prejudice for want of prosecution".

Hammon v Gilson, 227-1366; 291 NW 448

Dismissal of cases for want of prosecution—validity of general order. The fact that an order of the judges of a judicial district, requiring the parties to cause each case to be finally determined within two years from date of filing petition, was a general order applicable to all cases or proceedings pending or to come before the courts of the district did not invalidate such order.

Hammon v Gilson, 227-1366; 291 NW 448

Prosecution and termination—retention of jurisdiction—effect. In a judicial proceedings to accomplish a certain purpose, e. g., the proper and legal protection of both life tenants and remaindermen in the matter of preserving the estate for all the parties, the record retention by the court of jurisdiction over the proceedings and parties thereto, will enable the court subsequently to make valid and supplementary orders in furtherance of the said purpose.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Contempt of court—legislative limitation on punishment. While the general assembly has no power to wholly deprive a constitutionally created court of its inherent power to inflict punishment for acts which are in contempt of such court, yet it may constitutionally impose a reasonable limitation on such courts as to the punishment which may be imposed.

Eicher v Tinley, 221-293; 264 NW 591

Correction—inherent power of court. The district court is but exercising its inherent power when, on motion, it corrects by nunc pro tunc order, and regardless of the one-year limitation imposed by §12791, C., '35, the unquestionably established error of its own clerk in entering a judgment against a judgment defendant for a less amount than theretofore ordered by the court, it appearing that the judgment plaintiff had not, by laches, forfeited the right to demand such correction against the judgment defendant.

Murnan v Schuldt, 221-242; 265 NW 369

Federal appointment—effect on state courts. The mere pendency of federal receivership proceedings over a party does not necessarily oust the jurisdiction of the state courts over the party and over his property.

Lippke v Milling Co., 215-134; 244 NW 845

Federal courts—probate claims—jurisdiction from diversity of citizenship. Tho proceedings for settlement of an estate may be pending in a state court, the federal courts may on account of diversity of citizenship assume jurisdiction to determine the validity of claims against the estate.

Reconstruction F. Corp. v Dingwell, 224-1172; 278 NW 281

State and federal courts—comity—certiorari coercing state court's release of jurisdiction. The necessity for comity between state and federal courts demands that controversies shall not arise concerning their respective jurisdictional powers on account of unsubstantial considerations, and certiorari from the supreme court of Iowa will lie to require a district court of the state to relinquish jurisdiction over a probate matter after the federal court, through diversity of citizenship, has assumed jurisdiction.

Reconstruction F. Corp. v Dingwell, 224-1172; 278 NW 281

Mortgagee suing receiver—decree fixing lien on other assets in different court. Court may authorize a mortgagee's foreclosure action against the receiver in a county where the property is located, tho different from county where receivership is pending and such court, after hearing the foreclosure proceeding, has the right, where such relief is proper, not only to foreclose but to impose a lien for a deficiency judgment on the other receivership assets in the other court.

Klages v Freier, 225-586; 281 NW 145

Injunction — constitutionality. The statute authorizing injunction to restrain the practice of medicine and surgery without a license is constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances; and this is true irrespective of the question whether the district court may be constitutionally vested with an equitable jurisdiction not possessed by chancery courts when the state constitution was adopted.

State v Howard, 214-60; 241 NW 682

Salaries. SEC. 9.

Discussion. See 24 ILR 89—Diminution of judicial salaries

Atty. Gen. Opinions. See '34 AG Op 102, 216

Attorney general. SEC. 12.

Atty. Gen. Opinion. See '34 AG Op 53

System of court practice. SEC. 14.

Contempt of court—legislative limitation on punishment. While the general assembly has no power to wholly deprive a constitutionally created court of its inherent power to inflict punishment for acts which are in contempt of such court, yet it may constitutionally impose a reasonable limitation on such courts as to the punishment which may be imposed.

Eicher v Tinley, 221-293; 264 NW 591
State v Baker, 222-903; 270 NW 359

ARTICLE VII

STATE DEBTS

Credit not to be loaned. SECTION 1.

Atty. Gen. Opinion. See '38 AG Op 80

Assumption of county bonds. The state may validly assume the payment of road bonds issued by counties, a county not being a corporation, within the meaning of this section.

State v Council, 207-923; 223 NW 737

Limitation. SEC. 2.

Atty. Gen. Opinion. See '34 AG Op 230

Unallowable state debt.

Hubbell v Herring, 216-728; 249 NW 430

Losses to school funds. SEC. 3.

Atty. Gen. Opinions. See '38 AG Op 104; AG Op March 16, '39

School fund mortgage—state property—permanent school fund. A school fund mortgage is state property and the state has recognized its right to maintain a permanent school fund intact and inviolate for purpose to which dedicated.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage foreclosure—defenses. In an action to foreclose a school fund mort-

gage, where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until 11 years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien, and that it was unpaid, and he could not rely on lapse of time, laches or negligence, as against the state.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale — school fund mortgage — paramount. The statutes providing that where real estate is incumbered to school fund, the interest of the person holding the fee shall alone be sold for taxes, and that lien of state shall not be affected by the tax sale will be construed as meaning that lien of mortgage given to the state for land bought on credit and lien of a real estate mortgage to school fund will be paramount to a tax lien.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school, agricultural college, or university land—construing statute—catchwords. In construing statute which provides in substance that in the sale of school, agricultural college, or university land sold on credit, which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage unpaid—purchaser charged with knowledge. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

Contracting debt—submission to the people. SEC. 5.

Discussion. See 12 ILR 272—Amendment of acts approved by the people; 13 ILR 293—Banking clauses in Iowa Constitution

Unallowable state debt.

Hubbell v Herring, 216-728; 249 NW 430

Direct tax — nonpermissible substitution. The general assembly has no power to pledge or to substitute indirect taxes for the direct tax required by the constitution for the payment and discharge of a state bonded indebtedness approved by the people.

State v Council, 207-923; 223 NW 737

State debt—mandatory maturity. The constitutional requirement that a state debt be paid "within twenty years from the time of the contracting thereof" means, when the total debt is divided into installments, within twenty years from the contracting of the first installment of the debt.

State v Council, 207-923; 223 NW 737

Legislature may repeal. SEC. 6.

Atty. Gen. Opinion. See AG Op Aug. 4, '39

Tax imposed distinctly stated. SEC. 7.

Uniformity of taxation. See under Art III, §30

Atty. Gen. Opinion. See '38 AG Op 902

Nonapplicability. This section applies only to a legislative enactment which in and of itself "imposes, continues or revives a tax"—not to the legalization of a tax levy already made under an optional and supposedly legal statute which was, in fact, fatally defective in its title.

Chicago RI Ry. v Rosenbaum, 212-227; 231 NW 646

License fee as nonproperty tax. A substantial charge placed by the legislature on motor trucks operated on the public highways, graduated on the weight of the load carried, conceding the same to be a tax, tho termed a "license fee", is not a property tax but a tax imposed for the privilege of using the highways as a place of business, and therefore not within the meaning of this section.

Solberg v Davenport, 211-612; 232 NW 477

Reference to other law to fix tax. Section 7005, C., '31, which provides that "moneyed capital" within the meaning of §5219 of the federal statutes shall be assessed in a named manner and at the same rate as imposed on the stock of certain banks (§7003, C., '31), does not violate the constitutional requirement that in the imposition of a tax "it shall not be sufficient to refer to any other law to fix such tax".

Ballard-Hassett Co. v Board, 215-556; 246 NW 277

ARTICLE VIII

CORPORATIONS

How created. SECTION 1.

Municipal corporations. Local or special laws for incorporation of cities and towns prohibited, see Art III, §30, Anno Vol I, and annotations thereunder

Taxation of corporations. SEC. 2.

Uniformity of taxation. See annotations under Art III, §30

Income tax—corporation provision inapplicable. The constitutional provision that "the property of all corporations for pecuniary profit, shall be subject to taxation the same as that of individuals" has no application to the state income tax act—an excise tax.

Vilas v Board, 223-604; 273 NW 338

Corporate governmental agencies—immunity from legal process and taxation. Immunity of corporate governmental agencies from suits and judicial process, and their incidents, is less readily implied than immunity from taxation.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Bank stock taxed in excess of other moneyed capital—illegal and void. A tax levy on bank stock in excess of that on other moneyed capital used in competition with bank capital, held, to be a denial of equal protection, illegal and void.

Munn v D. M. Nat. Bank, 18 F 2d, 269

Bank shares—discrimination—violating constitutional rights—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Iowa-D. M. Nat. Bk. v Bennett, 284 US 239

Banking associations. SEC. 5.

Discussion. See 13 ILR 293—Banking clauses in Iowa Constitution

General banking law. SEC. 8.

Banking affected with public interest. Principle affirmed that the business of banking is affected with a public interest.

Priest v Whitney Co., 219-1281; 261 NW 374

Moratorium act—no interference with federal land bank as governmental agency. There was no substantial or direct interference with accomplishment of purposes for which congress created joint stock land banks, by reason of the moratorium act of the 47th GA providing for continuance of foreclosure of real estate mortgage actions.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Stockholders' responsibility. SEC. 9.

Applicability. Principle reaffirmed that the above section has reference solely to banks of issue.

Leach v Bank, 203-1052; 213 NW 772

Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Andrew v Bank, 205-42; 217 NW 431; 57 ALR 767

Superadded double liability—improper plaintiff. An insolvent bank may not maintain an action against its stockholders to enforce and collect the superadded double liability imposed by §9251, C., '27.

Home Bank v Berggren, 211-697; 234 NW 573

Credit by amount of former assessment unallowable. One who purchases corporate bank stock by paying an existing assessment thereon (and but little in addition thereto) will not be permitted, after the bank has become insolvent, to assert that said assessment was coercive as to him, and that the amount of such assessment should be credited on his "double liability."

Andrew v Bank, 211-649; 234 NW 542

Amendment or repeal of laws — exclusive privileges. SEC. 12.

Statutory change — constitutionality. This section and §1090, C., '73 (§8376, C., '27), are constitutional and statutory authority for legislative act authorizing the board of directors of a mutual benefit life assessment company to transform said company into a legal reserve or level premium company, even tho such transformation results in leaving the old assessment certificate holders to carry their own assessments for death losses without further addition to their membership.

Wall v Life Co., 208-1053; 223 NW 257

Sale of stock for payment of assessment—common-law or statutory right of action. As to a stockholder who acquired his stock prior to the enactment of a statute permitting the sale of stock to enforce payment of a stockholder's assessment to reimburse an impairment of the bank capital, such statute does not necessarily exclude a common-law remedy by action when not so construed by the highest state court, and such statute declaring that the stockholder shall be liable for any deficiency after applying the proceeds of such sale, and providing for its collection by suit, is not a deprivation of property without due process by impairing a contract obligation.

Shriver v Woodbine Bk., 285 US 467

ARTICLE IX

EDUCATION AND SCHOOL LANDS

1st EDUCATION

State university. SEC. 11.

Atty. Gen. Opinion. See '36 AG Op 293

2nd SCHOOL FUNDS AND SCHOOL LANDS

Control—management. SECTION 1.

Atty. Gen. Opinion. See AG Op Feb. 2, '39

Permanent fund. SEC. 2.

Atty. Gen. Opinion. See '36 AG Op 416

Perpetual support fund. SEC. 3.

Atty. Gen. Opinion. See '38 AG Op 104

School fund mortgage — state property — permanent school fund. A school fund mortgage is state property and the state has recognized its right to maintain a permanent school fund intact and inviolate for purpose to which dedicated.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale — school fund mortgage — paramount. The statutes providing that where real estate is incumbered to school fund, the interest of the person holding the fee shall alone be sold for taxes, and that lien of state shall not be affected by the tax sale, will be construed as meaning that lien of mortgage given to the state for land bought on credit and lien of a real estate mortgage to school fund will be paramount to a tax lien.

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Monona County v Waples, 226-1281; 286 NW 461

Fines—how appropriated. SEC. 4.

Atty. Gen. Opinion. See '38 AG Op 45

Proceeds of lands. SEC. 5.

Atty. Gen. Opinion. See '36 AG Op 224

Agents of school funds. SEC. 6.

Atty. Gen. Opinion. See '38 AG Op 905

ARTICLE X

AMENDMENTS TO THE CONSTITUTION

How proposed—submission. SECTION 1.

Authority of enrolled bill. For citations on the authority of the enrolled bill, see annotations to Art III, §15

Atty. Gen. Opinions. See '30 AG Op 50; '34 AG Op 99

More than one amendment. SEC. 2.

Unallowable combination of proposals. The combining into one proposal to amend the constitution, of two or more separate and distinct proposals each capable of separate submission to the people, is wholly unallowable even tho the combined proposals have but one object or purpose.

Mathews v Turner, 212-424; 236 NW 412

ARTICLE XI

MISCELLANEOUS

Justice of peace—jurisdiction. SECTION 1.

Atty. Gen. Opinion. See '34 AG Op 618

Indebtedness of political or municipal corporations. SEC. 3.

Discussion. See 18 ILR 269—Municipal indebtedness

Atty. Gen. Opinions. See '28 AG Op 120; '32 AG Op 18; AG Op Jan. 24, '39

ANALYSIS

I WHAT CONSTITUTES INDEBTEDNESS
(a) IN GENERAL
(b) PARTICULAR KINDS OF OBLIGATIONS
(c) OBLIGATIONS MATURING BY INSTALLMENTS
(d) OBLIGATIONS PAYABLE FROM EXISTING FUNDS OR ANTICIPATED REVENUES
(e) FUNDING BONDS
(f) TAXATION AS AN INDEBTEDNESS
II COMPUTING INDEBTEDNESS
III INVALIDITY OF PORTION OF INDEBTEDNESS
IV RIGHTS AND DUTIES OF HOLDERS OF MUNICIPAL OBLIGATIONS
V ESTOPPEL
VI CORPORATIONS INCLUDED

I WHAT CONSTITUTES INDEBTEDNESS

(a) IN GENERAL

Debt—payment out of earnings. The expenditure which is necessary to establish a municipal electric light and power plant and which is to be paid solely from the earnings of the said plant, is not a "debt" within the constitutional and statutory limitation on indebtedness.

Wyatt v Town, 217-979; 250 NW 141

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, altho plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff-electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

(b) PARTICULAR KINDS OF OBLIGATIONS

Contract with architect. A contract between an architect and a municipal corporation, which contract imposes a financial obligation on the corporation only in case the corporation enters into a further contract for the erection of the building which the architect has planned, is properly classified as a liability of the corporation's from the moment the building contract was entered into.

Holst v Sch. Dist., 203-288; 211 NW 398

(c) OBLIGATIONS MATURING BY INSTALLMENTS

Municipal light plant—payable out of earnings. In contract for construction of municipal electric plant, payable solely out of net earnings of plant, provision defining "net earnings" as balance of gross receipts after payment solely of necessary expenses of operation and maintenance, without provision for deduction of depreciation reserve, held not violative of statute providing that city should not be liable because of insufficiency of "net earnings".

Iowa So. Utilities v Cassill, 69 F 2d, 703

Waterworks extension—installment payments—future earnings. The trustees of a municipally owned and established waterworks plant may, without an authorizing election, validly contract for improving and extending said plant, and may obtain the funds therefor by issuing bonds payable solely out of the future net earnings of the plant and secured by a lien on said earnings and on said improvements and extensions.

Chitwood v Lanning, 218-1256; 257 NW 345

(d) OBLIGATIONS PAYABLE FROM EXISTING FUNDS OR ANTICIPATED REVENUES

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, altho plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff-electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

Bonds payable from anticipated taxes.

Brunk v Des Moines, 228- ; 291 NW 395

(e) FUNDING BONDS

Exchanging bonds for valid indebtedness. Even tho a county, because of a sudden drop in the value of its taxable property, may find itself indebted beyond the constitutional limit, yet it may fund or refund its valid outstanding indebtedness by an issue of bonds in exchange for such indebtedness.

Hibbs v Fenton, 218-553; 255 NW 688

Funding bonds create no additional debt. A county whose valid bonded indebtedness is beyond the constitutional limitation (because of a drop in property valuations) may, under an

authorizing statute, validly refund said bonds, without creating any additional indebtedness in a constitutional sense, by issuing and selling at par and for cash, refunding bonds, and by irrevocably placing the proceeds of said sale in a separate and distinct trust fund which is also irrevocably pledged for the sole purpose of discharging the particularly designated bonds which are being refunded.

Banta v Clarke County, 219-1195; 260 NW 329

(f) TAXATION AS AN INDEBTEDNESS

No annotations in this volume

II COMPUTING INDEBTEDNESS

"Taxable property" defined. "Taxable property" embraces "moneys and credits", within the meaning of this section.

Mack v Sch. Dist., 200-1190; 206 NW 145

Tax list conclusive. On the issue whether the indebtedness of a municipal corporation exceeds the constitutional limitation, the court cannot add other property to the "last state and county tax list".

Trepp v Sch. Dist., 213-944; 240 NW 247

Tax as asset. In marshaling the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of the constitutional limitation, a duly levied and collectible tax must be deemed a municipal asset in the absence of proof showing the definite purpose of the tax and, if for current expenses, that legal obligations have been or necessarily will be created, sufficient to offset said tax fund.

Holst v Sch. Dist., 203-288; 211 NW 398

Computation of assets and liabilities. In the marshaling of the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of constitutional limitation, collected and uncollected taxes and tuition due the municipality cannot be deemed an asset when it is shown that the current expenses of the municipality will consume the entire amount of said taxes and tuition; otherwise as to municipal property available for sale.

Trepp v Sch. Dist., 213-944; 240 NW 247

Construction of contract. The specific amount for which a municipal corporation obligates itself in a written contract for the construction of a schoolhouse in return for the contractor's agreement to "provide all the material and perform all of the work," etc., is in no wise lessened by a contract clause that said price "includes five thousand dollar figure for millwork".

Holst v Sch. Dist., 203-288; 211 NW 398

III INVALIDITY OF PORTION OF INDEBTEDNESS

Unconstitutional municipal indebtedness not curable. The legislature has no constitutional power to authorize a tax levy or a bond issue to pay, in whole or in part, a constitutionally prohibited indebtedness. More concretely, if a municipality creates an indebtedness which is in part valid, and in part constitutionally invalid, the invalid part may not be cured (1) by the voting of a tax to pay or reduce the indebtedness, or (2) by the issuance of bonds, and the application of the proceeds thereof to the same purpose.

Trepp v Sch. Dist., 213-944; 240 NW 247

IV RIGHTS AND DUTIES OF HOLDERS OF MUNICIPAL OBLIGATIONS

Public debt—valid authorization. The legislature may authorize municipalities to incur, with or without an election, a debt when the debt does not exceed constitutional limitations.

Chitwood v Lanning, 218-1256; 257 NW 345

School warrants—validity. School warrants which are in form the general obligations of the district, and issued under a purported contract of the district providing for such unconditional issuance, are void if in excess of the constitutional limit of indebtedness, notwithstanding the fact that the said contract carries the inference that the warrants will be paid from a special fund arising from the sale of bonds.

Carstens Bros. v Sch. Dist., 218-812; 255 NW 702

Partly void warrants. There can be no recovery on municipal warrants given in payment of part of a total purported indebtedness, part of which is void because in excess of constitutional debt limitation. In other words, recovery, insofar as permissible, must be had in some proceedings other than on said warrants.

Trepp v Sch. Dist., 213-944; 240 NW 247

V ESTOPPEL

No annotations in this volume

VI CORPORATIONS INCLUDED

School districts—computation of assets and liabilities. In the marshaling of the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of constitutional limitation, collected and uncollected taxes and tuition due the municipality cannot be deemed an asset when it is shown that the current expenses of the municipality will consume the entire amount of said taxes and tuition; otherwise as to municipal property available for sale.

Trepp v School Dist., 213-944; 240 NW 247

Oath of office. SEC. 5.

Atty. Gen. Opinions. See AG Op Feb. 7, '39, April 3, '39, April 4, '39, April 5, '39, May 24, '39, July 6, '39, July 21, '39

Official acts—presumption of regularity. In the absence of contrary evidence, presumption obtains as to legality and regularity of official acts of sworn public officials.

Krueger v Mun. Court, 223-1363; 275 NW 122

Motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law, to submit the question of municipal ownership of a public utility, are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

How vacancies filled. SEC. 6.

Statute supplementing constitution. The constitutional provision that appointees to fill vacancies in office shall hold until the next general election, is not self-executing, and therefore has been properly supplemented by §1157, C., '31.

State v Claussen, 216-1079; 250 NW 195

Election to fill vacancy. The statutory provision (§1155, C., '31) that an officer filling a vacancy in an elective office shall hold until the next regular election at which such vacancy can be filled, means the "next regular election" at which such vacancy can be legally filled.

State v Claussen, 216-1079; 250 NW 195

Vacancy—when fillable by election. The statutory provision (§1157, C., '31) that if a vacancy occurs in an elective state office thirty days prior to a general election the vacancy shall be filled at said election, in legal effect prohibits the filling of such vacancy at said election when the vacancy occurs less than thirty days prior to said election.

State v Claussen, 216-1079; 250 NW 195

Title to office—estoppel and waiver. Where, on the erroneous assumption that a vacancy existed in a public office, two persons are formally nominated, by different political parties, to fill the supposed vacancy and are voted on at the ensuing election, the failure of the candidate who is already serving under a valid appointment to withdraw his nomination and legally to question the nominations made, furnishes no basis for the claim that he thereby waived his right longer to hold the office, and estopped himself from objecting to the result of the election.

State v Claussen, 216-1079; 250 NW 195

District court clerk—vacancy filled by board. The district court has neither exclusive nor concurrent authority with the board of supervisors to fill a vacancy in the office of clerk of the court (a county office) by appointment; the court's power is confined to the appointment of a temporary clerk until the board fills the vacancy as provided by law.

State v Larson, 224-509; 275 NW 566

Seat of government established—state university. SEC. 8.

Atty. Gen. Opinions. See '36 AG Op 293, 694

ARTICLE XII

SCHEDULE

Supreme law — constitutionality of acts. SECTION 1.

Atty. Gen. Opinion. See '32 AG Op 4

ANALYSIS

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II POWER TO PASS UPON CONSTITUTIONALITY OF LAWS
III CONSTRUCTION OF THE CONSTITUTION
IV PLEADING OF CONSTITUTIONALITY OF ISSUES
V CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY OF STATUTES
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Acts held constitutional. See under Art I, §1 (V)
Construction of statutes generally. See under §63
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Mortgage moratorium act. See under §12372
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Repeal of acts. See under §63 (II, III)
Titles of acts. See under Art III, §29

I IN GENERAL

Valid statutes read into contracts. Principle affirmed that contracts are conclusively presumed to have been entered into in view of the valid statutes then existing and controlling the subject matter.

Priest v Whitney Co., 219-1281; 261 NW 374

Editorial arrangement of statutes changes no law. A mere rearrangement of statutes in code revision, or dividing one section into several sections, does not without legislative intention change the purpose, operation, and effect thereof.

Jones v Mills Co., 224-1375; 279 NW 96

Statutes — construction — unambiguous language. The word "or" in a statute cannot be judicially construed to mean "and" when the language of the section is too clear and unambiguous to admit of judicial construction.

State v Best, 225-338; 280 NW 551

Constitutionality of expired act — nonnecessity to determine. Courts will not, ordinarily at least, find any necessity to pass on the constitutionality of a statute which has expired ex vi termini.

Pittington v Herring, 220-1375; 264 NW 712

Trustee's liability for taxes—determined by state law as construed by courts. A trustee in bankruptcy takes title to all property of bankrupt by operation of law, and has the rights of an execution creditor, with legal or equitable lien, and whether or not the city and county treasurer's claim for taxes is a lien, or whether or not it is "due and owing", must be determined according to the laws of Iowa, as construed by its highest court.

In re Davenport Dry Goods Co., 9 F 2d, 477

Nonjudicial review. The extension of the limits of a municipal corporation in strict compliance with a constitutional statute is conclusive on the courts, even tho the statute is, to a degree, arbitrary.

State v Altoona, 201-730; 207 NW 789

Disbarment by special court. The act of the supreme court in appointing three district court judges as a special court to hear and determine disbarment proceedings against an attorney is necessarily a holding that the statute providing for such appointment is constitutional.

In re Cloud, 217-3; 250 NW 160

Assessments — unconstitutional basis—burden of proof. The court will not declare a drainage statute unconstitutional because it fixes a ratio of water discharged as the basis for computing assessments between districts, when the record reveals the legal fact that the district does receive a benefit because of the improvement in question and is assessable therefor, and when there is no proof by complainant that the said statutory basis is not the equivalent of benefits.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Class legislation—sale of drugs and medicines. Whether the statute (1) which defines "drugs and medicines" as including all substances and preparations for external or internal use recognized in the United States Pharmacopoeia or National Formulary, and (2) which prohibits the sale of "drugs and medicines" except by or under the supervision of a licensed pharmacist, is unconstitutional on the ground that said publications embrace many harmless substances that are of common and domestic use, quaere.

State v Jewett Co., 209-567; 228 NW 288

Nullity because of unworkableness. Whether the purchase of electrical energy by a city or town may be financed under §6134-d1, C., '31 [§6134.01, C., '39], or whether the provisions of §§6134-d5 and 6134-d6 of said code [§§6134.09, 6134.10, C., '39], relative to competitive bidding for furnishing electrical energy are a nullity because of indefiniteness, uncertainty, or unworkableness, quaere.

Brutsche v Coon Rapids, 218-1073; 256 NW 914

II POWER TO PASS UPON CONSTITUTIONALITY OF LAWS

Public policy of statute. The public policy of a valid statute is solely for the legislature to determine, not the courts.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Determination of constitutional question only when necessary. The supreme court will not pass upon the constitutionality of a statute unless it is necessary to do so in the determination of a given case.

State v Dunley, 227-1085; 290 NW 41

Waiver of statutory right—public policy. A waiver by a corporate creditor of his statutory right to hold officers and directors personally responsible for prohibited excess corporate indebtedness is not violative of public policy.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

III CONSTRUCTION OF THE CONSTITUTION

Title embracing one subject—rules for determination. Constitutional provision that title to legislative acts shall embrace but one subject and matters connected therewith was designed to prevent surprise in legislation, but the title need not be an index or epitome of the act or its details. The subject of the bill need not be specifically or exactly expressed in the title, nor is it necessary that each thought or step toward the accomplishment of object be embodied in a separate act, nor is it important that it contains matters usually expressed in separate acts when they are germane to the general subject.

State v Talerico, 227-1315; 290 NW 660

Title of act—sufficiency—keeping liquor where beer is sold. Section 1921.126, C., '39, forbidding the keeping of intoxicating liquor where beer is sold, is not unconstitutional as violating constitutional provision requiring that the title of every legislative act embrace but one subject, since such subject is germane to an act relating to the sale of 4 percent beer.

State v Talerico, 227-1315; 290 NW 660

IV PLEADING OF CONSTITUTIONALITY OF ISSUES

Particularity required. A pleading assailing the constitutionality of a statute must (1) point out specifically the clause or section of the constitution which it is claimed is violated, and (2) designate the specific grounds upon which the asserted violation is based.

Peverill v Board, 201-1050; 205 NW 543

Particularity—criminal case. If procedure in a criminal case violates a constitutional provision, the complainant must specifically set forth wherein or in what manner said provision has been violated.

State v Hawks, 213-698; 239 NW 553

Presumption of constitutionality. Before the supreme court will declare an act of the legislature unconstitutional, the person assailing the statute must be able to point out the particular provision that he claims has been violated. In other words, there is a presumption in favor of the constitutionality of the statute.

State v Woitha, 227-1; 287 NW 99

Determination of question—necessity. The court will not at the instance of an amicus curiae search for or pass upon constitutional grounds of invalidity of a statute not presented by the parties.

State v Martin, 210-207; 230 NW 540

Constitutionality—necessity for determination. The court will not, on an order dissolving a temporary injunction pending the trial of the main action, pass upon the constitutionality of the statute under attack.

Iowa Mot. v Board, 202-85; 209 NW 511

Nonpresented constitutional questions. Constitutional questions not presented in the trial court will not be considered on appeal.

State v Johnson, 204-150; 214 NW 594
Talarico v City, 215-186; 244 NW 750
Andrew v Bank, 215-1150; 247 NW 797

Constitutional question first raised on appeal —no review. Constitutionality of statute requiring majority stockholders voting for franchise renewal to purchase stock of those voting against renewal, within three years from date of voting, will not be considered on appeal when such question has not been raised in the lower court.

Terrell v Tel. Co., 225-994; 282 NW 702

Unallowable amendment after remand. A party who attacks the constitutionality of a statute on specified grounds, and on appeal is defeated in his contentions, will not, after remand to the trial court, be permitted to file an amendment to his pleading attacking the constitutionality of the law on new and additional grounds.

Rural Dist. v McCracken, 215-55; 244 NW 711

V CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY OF STATUTES

Construction favoring constitutionality. Principle reaffirmed that statutes are presumed to be constitutional, and will not be declared unconstitutional unless such unconstitutionality is apparent beyond reasonable doubt.

Gallarno v Long, 214-805; 243 NW 719
State v Darling, 216-553; 246 NW 390; 88 ALR 218
Priest v Whitney Co., 219-1281; 261 NW 374
State v Manning, 220-525; 259 NW 213
Berg v Berg, 221-326; 264 NW 821
Craven v Bierring, 222-613; 269 NW 801
Maddy v City Council, 226-941; 285 NW 208
Miller v Schuster, 227-1005; 289 NW 702

Burden to prove invalidity. One who attacks the constitutionality of a statute must show its invalidity beyond a reasonable doubt.

Miller v Schuster, 227-1005; 289 NW 702

Presumption of constitutionality. Before the supreme court will declare an act of the legislature unconstitutional, the person assailing the statute must be able to point out the particular provision that he claims has been violated. In other words, there is a presumption in favor of the constitutionality of the statute.

State v Woitha, 227-1; 287 NW 99

Presumption of constitutionality—strong case to invalidate. In passing upon constitutionality of acts of the legislature a presumption exists in favor of constitutionality, and an act will be invalidated only when it is clearly, plainly, and palpably unconstitutional, and it is the duty of the court to give such a construction to an act that, if possible, this necessity is avoided and the act upheld.

State v Talerico, 227-1315; 290 NW 660

Titles of acts—liberal construction for constitutionality. The decisions involving the sufficiency of titles to legislative enactments lay down certain general rules. It is held the constitution should be liberally construed so as to embrace all matters reasonably connected with the title and which are not incongruous, unconnected, or unrelated thereto.

State v Talerico, 227-1315; 290 NW 660

Doubtful constitutionality. Principle reaffirmed that when the court is in doubt as to the constitutionality of a statute, the statute must be declared constitutional.

Loftus v Dept., 211-566; 232 NW 412
Vilas v Board, 223-604; 273 NW 338

Doubt as to unconstitutionality — effect. Cities and towns need no statutory authority in order validly to sell the excess products of their municipally owned utility plants. It follows that the unconstitutionality of a statute

which authorizes a city having 7,500 people and owning its electric light plant, to furnish electricity to a town of 400 people is, at the least, very doubtful, and, being doubtful, the statute must be deemed constitutional.

Carroll v Cedar Falls, 221-277; 261 NW 652

Construction—necessity. The court will not, in order to save the constitutionality of a statute, declare a construction which, in effect, amends the statute.

New York Ins. v Burbank, 209-199; 216 NW 742

VI PART OF STATUTE UNCONSTITUTIONAL

Partial invalidity—effect. A legislative act which is constitutional in part and unconstitutional in part, and unaccompanied by any saving clause, must fall as a whole when the act reveals but a single object or purpose, which object or purpose will not be fully carried out by retaining the constitutional part only.

Smith v Thompson, 219-888; 258 NW 190

Unconstitutional in part. An unconstitutional amendment to a statute will not carry down the entire legislative structure on the subject in question unless it is very manifest that the legislature would have abrogated the entire statute, had it foreseen the unconstitutionality of its amendment.

Peverill v Board, 201-1050; 205 NW 543

Attacking particular part of act. A party contesting the validity of a legislative act may avail himself of the invalidity of a part of the act which does not directly affect himself, provided said part affects the validity of the entire act.

Smith v Thompson, 219-888; 258 NW 190

Invalid amendment — effect. An invalid amendment to a valid section of the statute leaves the section in the form in which it existed before the attempt to amend was made, unless a contrary intent on the part of the legislature is made to appear.

Talbott v Des Moines, 218-1397; 257 NW 393

Amendment—invalidity in whole (?) or part (?). When a statutory enactment for the taking of appeals in tax-adjustment proceedings turns out to be wholly invalid, such invalidity necessarily carries down all amendments which were an inseparable part of the enactment and which were designed to harmonize other statutes with the new enactment.

Talbott v Des Moines, 218-1397; 257 NW 393

Partial unconstitutionality—effect. That part of the state road bond act of 1928 which irrevocably pledged the primary road funds to the payment of the bonds, was necessarily such a persuasive inducement to the approval of the act by the people, as to invalidate the entire act upon its being adjudged that said pledge was invalid.

State v Council, 207-923; 223 NW 737
See State v Bevins, 210-1031; 230 NW 865

Auxiliary provisions. When sections of a statute seeking to control interstate commerce are unconstitutional because they impose unallowable burdens on such commerce, all auxiliary sections of the same statute which prescribe the procedure through which said unconstitutional control is sought to be attained, are likewise unconstitutional. (So held as to §§8338-d4–8338-d11, C., '31.)

State v Pipe Line, 216-436; 249 NW 366

Unconstitutional application of valid statute —banks and banking. The holding by the federal supreme court that the statute of this state (§§9279, 9280, C., '27) prohibiting receipt of deposits by insolvent banks and bankers generally was constitutionally inapplicable to national banks and bankers did not have the effect of carrying down the statute in toto—did not have the effect of thereafter rendering said statute inapplicable to state banks and bankers, even tho the state legislature did not, after said holding, re-enact said sections.

State v Bevins, 210-1031; 230 NW 865

Equal protection—ruling of federal court. The chain store tax act (46 GA, ch 75; C., '35, ch 329-G1 [C., '39, ch 329.5]) is in violation of the equal protection clause of the federal constitution insofar as it attempts to levy an annual tax solely on the basis of the gross receipts of said stores, such being the holding of the federal supreme court and such holding necessarily being conclusive on the courts of this state.

Tolerton & Co. v Board, 222-908; 270 NW 427

VII RIGHT TO CHALLENGE CONSTITUTIONALITY

Noninjured complainant. A party may not question the constitutionality of a statute when he fails to show that he has been or will be injured by the statute. In other words, he may not borrow an objection from one who could complain, but does not complain.

Peverill v Board, 201-1050; 205 NW 543
State v Terpstra, 206-408; 220 NW 357
State v Soeder, 216-815; 249 NW 412

Invalid part of act not affecting contestant —allowable attack. A party contesting the validity of a legislative act may avail himself of the invalidity of a part of the act which does not directly affect himself, provided said part affects the validity of the entire act.

Smith v Thompson, 219-888; 258 NW 190

Member of class favored by act. The claim that the bovine tuberculosis act is unconstitutional because it grants to the owners of breeding cattle the right to initiate or bring into existence the benefits of the act, may not be asserted by one who belongs to such favored class.

Lausen v Board, 204-30; 214 NW 682

VII RIGHT TO CHALLENGE CONSTITUTIONALITY—concluded

Statutory gratuity—unallowable complaint. A party may not complain as to the terms on which a mere gratuity is given to him.

Loftus v Department, 211-566; 232 NW 412

Public corporation. A county has no standing to question the constitutionality of a legislative act relative to its governmental powers.

Scott Co. v Johnson, 209-213; 222 NW 378

School district or taxpayer—diversion of school fund interest. Neither a school district nor a taxpayer thereof has any standing to question the constitutionality of the act which diverts the future-accruing interest on school funds to the state sinking fund for public deposits (Ch. 352-A1, C., '31) for the reason that they have no such thing as a vested right in said interest.

Boyd v Johnson, 212-1201; 238 NW 61

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd Co., 226-583; 284 NW 814

Tax statute—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutionality nor the competency of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Fine and jail sentence not cruel punishment. An accused who has been fined $100 and ordered imprisoned in the county jail for 60 days may not question the constitutionality of the statute under which he was convicted, on the ground that the statute imposed cruel and unusual punishment.

State v Dowling, 204-977; 216 NW 271

VIII EMERGENCY LEGISLATION GENERALLY

Prohibited laws—emergency cannot justify. No legislative declaration or recital of the existence of an emergency can justify the enactment of a statute which is clearly prohibited by the constitution. So held as to an act fixing prices.

Duncan v Des Moines, 222-218; 268 NW 547

Extending redemption period. Neither the federal nor state constitutional prohibitions against (a) the impairment of the obligations of contracts, or (b) the deprivation of vested property rights without due process of law, is violated by a statute (1) which is enacted during, and for the purpose of ameliorating, an existing public financial emergency, (2) which grants to the owner of real estate during the existence of said emergency the right to possession and a time, very materially in excess of that otherwise granted by law, in which to redeem from mortgage foreclosure sale—even tho the sale precedes the passage of the emergency act—and (3) which sequesters the rents during said extended time and fairly and reasonably applies them to the protection of the mortgagee and his security. (45 GA, ch 179)

Reason: Contract rights and vested interests must reasonably yield to the paramount right of the state, through the reservoir of its reserved police power, to protect, by appropriate legislation, its sovereignty, its government, its people and their general welfare, against exigencies arising out of a great emergency.

Des Moines JSL Bank v Nordholm, 217-1319; 253 NW 701

Moratorium act of 47th General Assembly—extension of redemption period—unconstitutionality. Moratorium act of the 47th GA extending the period of redemption from foreclosure is unconstitutional as an impairment of the obligation of contract, when such act is not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Moratorium act of 47th General Assembly—emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441

IX ACTS DONE UNDER UNCONSTITUTIONAL STATUTES

Discussion. See 17 ILR 1—Government bonds—private promises

Fines inure to the state. SEC. 4.

Atty. Gen. Opinion. See '38 AG Op 45

AMENDMENTS TO THE CONSTITUTION

AMENDMENT 2 OF 1884
See annotations under Art V, §§5, 10, Vol I

AMENDMENT 3 OF 1884

Prosecution under trial information. The fifth amendment to the federal constitution (requiring infamous crimes to be presented by indictment) is no limitation upon the power of the state to provide for prosecution of infamous crimes without an indictment by a grand jury.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

TITLE I

SOVEREIGNTY AND JURISDICTION OF THE STATE, AND THE LEGISLATIVE DEPARTMENT

CHAPTER 1

SOVEREIGNTY AND JURISDICTION OF THE STATE

1 State boundaries.

Sudden shifting of boundary river—effect. Principle applied that the sudden shiftings of boundary rivers do not change state boundary lines.

Dermit v School Dist., 220-344; 261 NW 636

2 Sovereignty.

ANALYSIS

I IN GENERAL
II STATE SOVEREIGNTY
(a) IN GENERAL
(b) GOVERNMENTAL FUNCTIONS
III FEDERAL SOVEREIGNTY
(a) IN GENERAL
(b) FEDERAL INSTRUMENTALITIES

I IN GENERAL

State fair board. The Iowa state fair board is an arm or agency of the state, and, therefore, not suable.

De Votie v Board, 216-281; 249 NW 429

II STATE SOVEREIGNTY

(a) IN GENERAL

Discussion. See 10 ILB 297—State rights

State—power and means of existence—policy not to limit. It is not the policy of this state or sovereign to place limitations upon the power and means of maintaining its own existence.

Teget v Lambach, 226-1346; 286 NW 522

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

(b) GOVERNMENTAL FUNCTIONS

Government nonliability for employee's tort—respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior, and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA (NS) 4

Governmental employees—personal liability for torts—no governmental immunity. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA (NS) 4
Futter v Hout, 225-723; 281 NW 286
Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA (NS) 4
Lenth v Schug, 226-1; 281 NW 510; 287 NW 596
Doherty v Edwards, 226-249; 284 NW 159

Nonliability in performance. The statutory-prescribed rules of the state governing aerial navigation (§8338-c7, C., '35 [§8338.20, C., '39]) have no application to the state in its sovereign capacity, nor to its governmental agencies, nor to the officials of said agencies

II STATE SOVEREIGNTY—concluded
(b) GOVERNMENTAL FUNCTIONS—concluded

when exclusively engaged in performing the duties of said agencies.

De Votie v Cameron, 221-354; 265 NW 637

Action against board of control. Allegations in a petition to quiet title to land and to obtain a writ of possession for said land, (1) that defendants constitute the entire membership of the state board of control, an agency of the state, and (2) that said defendants are wrongfully withholding said possession from plaintiff, furnish no sufficient basis for the holding that said action, in truth and fact, is against the state in its sovereign capacity.

Iowa Elec. Co. v Board, 221-1050; 266 NW 543

Employee—action against state or its agent. An employee of a state hospital for the insane may not maintain an action for salary against the executive officer thereof, as such action is, in effect, an action against the state.

Cross v Donohoe, 202-484; 210 NW 532

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

Employee performing governmental function—jurisdiction through original notice. A liquor commission enforcement officer as a state employee performing a governmental function is, nevertheless, subject to the jurisdiction of the courts by proper service of an original notice.

Anderson v Moon, 225-70; 279 NW 396
See also:
Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA (NS) 4
Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA (NS) 4
Futter v Hout, 225-723; 281 NW 286
Doherty v Edwards, 226-249; 284 NW 159
Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Special appearance—nondeterminable matters. Whether an action is, in truth and fact, an action against the state in its sovereign capacity is a question which cannot be tried out on a special appearance—the petition not showing on its face that the action is such.

Iowa Elec. Co. v Board, 221-1050; 266 NW 543

Government employee's automobile collision—immunity as a defense. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Groves v Webster City, 222-849; 270 NW 329
Anderson v Moon, 225-70; 279 NW 396
See also:
Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA (NS) 4
Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA (NS) 4
Futter v Hout, 225-723; 281 NW 286
Doherty v Edwards, 226-249; 284 NW 159
Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Injuries from operation of municipally owned automobiles. The statutory declaration that the owner of a "car" is liable for damages done by it when it is operated with the consent of said owner, does not embrace the ownership of public property used solely for governmental purposes.

Bateson v Marshall County, 213-718; 239 NW 803

Sinking fund—actions—waiver. The state, after reimbursing a county for the loss of county deposits in an insolvent bank, may validly prohibit an action in its own favor on the depositary bond to which it was legally subrogated by the process of reimbursing the county.

State v Bartlett, 207-208; 222 NW 529

Deposits—payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement and notifying the drawee accordingly.

New Amsterdam Co. v Bank, 214-541; 239 NW 4; 242 NW 538

Proceedings against violators of labor union injunction—state as party.

Carey v Dist. Ct., 226-717; 285 NW 236

III FEDERAL SOVEREIGNTY

Discussion. See 22 ILR 39—State taxation and federal agencies

(a) IN GENERAL

Discussion. See 16 ILR 391, 504—Sovereignty and amending power

Foreign judgments—immunity from process—nonright to relitigate issue. A defendant who, when sued in a foreign state, litigates the

issue that he was immune from the service of process in said state because he was then temporarily and involuntarily therein as a military officer of the federal government, and on land owned and used exclusively by said government for military purposes, and who fails to appeal from a ruling denying his claimed immunity, may not relitigate said issue when sued in this state on the foreign judgment.

Northwestern Ins. v Conaway, 210-126; 230 NW 548; 68 ALR 1465

(b) FEDERAL INSTRUMENTALITIES

Federal instrumentality — congress determines immunity from state laws. It is within discretion of congress to determine in what respects and to what extent its instrumentalities, for their proper functioning, shall be immune from legislation of state origin.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Moratorium act—no interference with federal land bank as governmental agency. There was no substantial or direct interference with accomplishment of purposes for which congress created joint stock land banks, by reason of the moratorium act of the 47th GA, providing for continuance of foreclosure of real estate mortgage actions.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Foreclosure—state control over federal agencies. In proceedings instituted by a federal agency for the foreclosure of a mortgage, the state court, manifestly, cannot compel such agency to come to the relief of the debtor, even tho the federal government has advanced funds to the said agency for the primary purpose of relieving debtors.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Corporate governmental agencies — immunity from legal process and taxation. Immunity of corporate governmental agencies from suits and judicial process and their incidents is less readily implied than immunity from taxation.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Land banks as nonpreferential litigants in state courts. There is nothing to show that congress contemplated that land banks should occupy a preferential status as litigants in the state courts.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Representative capacity. The conservator of a national bank may, in an action instituted by him, allege generally his official capacity and authority.

Ross v Long, 219-471; 258 NW 94

Statutory reward applicable to national banks. The statute which obligates the owner of lost goods, money, etc., to compensate the finder of such property, is applicable to a national bank as owner, even tho the federal statutes are silent on the subject, as said statute does not impair the efficiency of said bank as a federal, governmental agency.

Flood v Bank, 220-935; 263 NW 321

Federal conservator—authority. The federal statute that the conservator of a national bank shall act "under the direction" of the comptroller of the currency does not require the conservator to secure specific authority from the comptroller for the bringing of an attachment and the execution of a bond on behalf of the bank.

Ross v Long, 219-471; 258 NW 94

3 Concurrent jurisdiction.

Mississippi and Missouri rivers, concurrent jurisdiction in criminal cases. See under §13449 (III)

Discussion. See 1 ILB 107—Federal control of navigable rivers

Atty. Gen. Opinions. See '36 AG Op 458; '38 AG Op 748

Accretions—formation of sand bars. Land by accretions is not established by showing that sand bars formed in the bed of the stream beyond high watermark and became visible as the waters of the river receded.

McFerrin v Wiltse, 210-627; 231 NW 438

Accretion passes by ordinary deed. Accretion to land passes by a deed of the upland owner unless expressly excepted.

Haynie v May, 217-1233; 252 NW 749

Accretion — apportionment — estoppel. Riparian land owners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop themselves, in an action to quiet title, from asserting that land did not pass under their deed because it was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Dams—new high watermark—title of state. The state of Iowa by erecting a permanent dam in the bed of its navigable river, and by maintaining said dam peaceably and uninterruptedly for a period of ten years, legally extends its title to the new high watermark resulting from the erection of the dam; and especially may a private deedholder not complain when his deed, executed after the dam was erected, simply calls for land "up to the river".

State v Sorenson, 222-1248; 271 NW 234

Fishing regulations on boundary river — rights within territorial limits. The grant of concurrent jurisdiction to two states over a river, the middle of the channel of which is the boundary line between them, does not preclude one of them, without concurrence of the other, from regulating fishing by its own residents in that part of the river that is within its own territorial limits.

Miller v McLaughlin, 281 US 261

4 Acquisition of lands by United States.

Atty. Gen. Opinions. See '36 AG Op 404; '38 AG Op 748

4.2 Conditions.

Atty. Gen. Opinion. See '36 AG Op 404

4.5 National forests.

Atty. Gen. Opinion. See '36 AG Op 404

4.6 Offenses.

Atty. Gen. Opinion. See '36 AG Op 404

CHAPTER 2

GENERAL ASSEMBLY

10 Officers—tenure.

Atty. Gen. Opinions. See '30 AG Op 124; '34 AG Op 394

14 Compensation of full-time members.

Atty. Gen. Opinions. See '34 AG Op 73, 178; '36 AG Op 266; AG Op March 27, '39

15 Compensation of part-time members.

Atty. Gen. Opinion. See '36 AG Op 266

17-c1 (1935 Code) Expenses. [Section omitted from code after being held invalid]

Reimbursement for personal expenses. The legislature cannot constitutionally reimburse its members or the lieutenant governor for an expense incurred by said officers unless said expense is a governmental or legislative expense—an expense necessary to enable said officers to perform their duties. It follows that the monetary allowance to said officers under this section, as purported reimbursement for their personal living expenses incurred while in attendance at a session of the legislature, must be deemed added compensation.

Gallarno v Long, 214-805; 243 NW 719

Compensation of legislators — basis. The compensation of the lieutenant governor and members of the general assembly cannot be constitutionally fixed on any basis except on the basis of "per diem and mileage".

Gallarno v Long, 214-805; 243 NW 719

19 Compensation of officers and employees.

Atty. Gen. Opinion. See '30 AG Op 124

20 Issue of warrants.

Atty. Gen. Opinion. See '36 AG Op 645

23 Contempt.

Atty. Gen. Opinions. See '30 AG Op 90; '36 AG Op 111

24 Punishment for contempt.

Atty. Gen. Opinion. See '36 AG Op 111

25 Warrant—execution.

Atty. Gen. Opinion. See '36 AG Op 111

26 Fines—collection.

Atty. Gen. Opinion. See '36 AG Op 111

27 Punishment—effect.

Atty. Gen. Opinion. See '36 AG Op 111

28 Witness—attendance compulsory.

Atty. Gen. Opinion. See '30 AG Op 90

29 Witnesses—compensation.

Atty. Gen. Opinion. See '30 AG Op 90

38.1 Confirmation of appointments.

Constitutional power to remove officer.

Myers v United States, 272 US 52

39 Committee on retrenchment and reform.

Atty. Gen. Opinions. See '36 AG Op 624; '38 AG Op 616; AG Op Aug. 4, '39

40 Appointive members.

Atty. Gen. Opinion. See '36 AG Op 624

41 Organization—meetings.

Atty. Gen. Opinion. See '36 AG Op 624

42 Authority during recess.

Atty. Gen. Opinion. See '36 AG Op 624

43 Record.

Atty. Gen. Opinion. See '36 AG Op 624

44 Compensation and expenses.

Atty. Gen. Opinion. See '36 AG Op 624

45 Duties.

Atty. Gen. Opinions. See '36 AG Op 624; AG Op May 31, '39

46 May take evidence.

Atty. Gen. Opinion. See '36 AG Op 624

CHAPTER 3

STATUTES AND RELATED MATTERS

47 Form of bills.

Atty. Gen. Opinion. See '25-26 AG Op 44

Directory statute. This statute is directory only.

Solberg v Davenport, 211-612; 232 NW 477
Waugh v Shirer, 216-468; 249 NW 246

Noncompliance with title. The fact that the text of an act contains no repeal or amendments of certain statutory sections which the title declares a purpose to amend or repeal, does not invalidate the act.

Smith v Thompson, 219-888; 258 NW 190

Legislative reference to compiled code. In the amendment, revision, and codification of the statutes which resulted in the Code of 1924, a reference in the code revision acts to a section number of the compiled code or of the supplements thereto effected the same result as tho the reference had been to the corresponding official section number of the statute as it existed when it was carried into the compiled code or supplements.

Rains v First Nat. Bank, 201-140; 206 NW 821

Nonconclusiveness of enrollment. Principle reaffirmed that the enrollment of a bill is not conclusive that constitutional requirements have been complied with in its passage.

Scott v Board, 221-1060; 267 NW 111

Adoption of conference report—effect. When the general assembly is in deadlock over the final form and contents of a bill, the due adoption by both houses of the report of a joint conference committee and of the amendments therein proposed as an adjustment of existing differences terminates all necessary legislative proceedings on said bill—other than enrollment and due signing. In other words, no necessity exists for a further or additional reading and passage of the bill as modified by said newly adopted amendments when it is made to appear that, prior to the time said differences arose, each house had duly passed the bill immediately following the last reading thereof in said houses.

[The conference report and amendments therein proposed were adopted by a yea and nay vote equal to that constitutionally required for the passage of a bill and said vote was duly entered on the journals of each house.]

Scott v Board, 221-1060; 267 NW 111

49 Headnotes and historical references.

Code editor's catchwords—no part of law. Code section catchwords, prepared by code editor, are no part of the law.

State v Chenoweth, 226-217; 284 NW 110

Tax sale—school, agricultural college, or university land—construing statute. In construing statute which provides in substance that in the sale of school, agricultural college, or university land sold on credit, which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee, and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

51 Failure of governor to return bill.

Constitutional provision. See Const Art III, §16, Vol I

Atty. Gen. Opinion. See '32 AG Op 166

55 Designation of papers.

Atty. Gen. Opinion. See '36 AG Op 142

58 Appropriation acts—when effective.

Atty. Gen. Opinion. See '25-26 AG Op 288

59 Pro rata effect of appropriations.

Atty. Gen. Opinion. See '30 AG Op 75

CHAPTER 4

CONSTRUCTION OF STATUTES

63 Rules.

Atty. Gen. Opinions. See '25-26 AG Op 99, 137, 253, 354; '28 AG Op 355, 374; '32 AG Op 209, 219, 226; '34 AG Op 178, 381, 624; '36 AG Op 136, 360, 670; '38 AG Op 147, 549, 678

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Joint and mutual wills. See under §11852
Wills construed, generally. See under §11846

I STATUTORY CONSTRUCTION IN GENERAL

Discussion. See 12 ILR 276—Genuine and spurious interpretation; 15 ILR 485—Substitution of words; 16 ILR 99—Severability of words; 24 ILR 744—Repeal of criminal statute; 25 ILR 736—Extrinsic aids in the federal court

Construction — canons of. Principles recognized that in the construction of statutes:

1. The province of construction lies wholly within the domain of ambiguity, and that prior acts may be resorted to, to solve, but not to create an ambiguity.

2. A thing is within a statute if it is within the intention, tho not within the letter; a thing which is within the letter of a statute is not within the statute unless it is within the intention of the makers.

3. All statutes in pari materia should be construed irrespective of the time of their enactment.

4. Statutes should be so construed that the intent and purpose thereof cannot be eluded.

Smith v Sioux City Yards, 219-1142; 260 NW 531

Fitzgerald v State, 220-547; 260 NW 681

General principles. Principles reaffirmed that:

1. A plain, unambiguous statute admits of no construction.

2. Legislative intent must be arrived at from the words used, construed in accordance with their context and ordinary meaning.

3. The particular procedure for acquiring a statutory right, not existing under the common law must be strictly pursued.

4. The term "shall" is generally construed as a command.

Jefferson v Sherman, 208-614; 226 NW 182

Unquestioned pronouncement of court. Scant consideration will be given to the claim that a pronouncement of the court was pure dictum when it has stood unchallenged and been acted on for half a century.

Schoenwetter v Oxley, 213-528; 239 NW 118

Statutes in pari materia. The rule that statutes in pari materia shall be construed together applies with peculiar force to statutes passed at the same legislative session or appearing in the same chapter.

Iowa Motor v Board, 207-461; 221 NW 364
Dikel v Mathers, 213-76; 238 NW 615

Statutes in pari materia — amendment to clear ambiguity. Statutes in pari materia being construed together, a later statute may be used to clear up an ambiguity, such as in the moratorium statutes where an amending act was passed at the same session of the legislature.

Prudential v Lowry, 225-60; 279 NW 132

Statutes construed together.

Durst v Board, 228- ; 292 NW 73

Elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

General and special statute on same subject —avoiding conflict. Principle recognized that where a general statute, if standing alone, would include the same matter as a special statute, and thus conflict with it, the special

act will be deemed an exception to the general statute.

Workman v Dist. Court, 222-364; 269 NW 27

Sentence—dual statutes. If there be two statutes defining an offense in such language that the accused may be sentenced under either, and one of them is general in its terms, and the other limited and particular, and imposing a lesser penalty, the particular should be construed as an exception to the general, and the lesser penalty prescribed thereby imposed. (So held under §§13140, 13144, C., '27.)

Drazich v Hollowell, 207-427; 223 NW 253

Guest statute—exceptions not to supplant general rule. Interpretation of automobile guest statute should be consistent with the intention of the legislature and its mandate in making a host not liable for injuries to guest except under exceptions of driver being reckless or intoxicated, and the statute should not be so interpreted as to supplant the general rule with the exceptions.

Crabb v Shanks, 226-589; 284 NW 446

General statutes—when applicable to governmental agencies. A general statute will not be construed to embrace a governmental agency in the absence of a definite legislative declaration that such agency is included.

Leckliter v City, 211-251; 233 NW 58

General statutes—when applicable to governmental agencies. General words of a statute will not be construed as applicable to the government or to its agencies unless such construction is clearly and indisputably required by the text of the act.

State v Des Moines, 221-642; 266 NW 41

Ambiguity as prerequisite to construction. A statute is not to be read as tho open to construction as a matter of course; but construction is invoked only when a statute contains such ambiguities or obscurities that reasonable minds may disagree as to their meaning.

Palmer v Board, 226-92; 283 NW 415

Plain meaning given in interpretation.

Green v Brinegar, 228- ; 292 NW 229

Plainness of meaning excluding construction. There can be no construction of a statute which is expressed in such plain and simple language that he who runs may read and understand it. So held as to that clause of the moratorium act which declares: "The provisions of this act shall not apply to any mortgage * * * executed subsequent to January 1, 1934 * * *."

Home Owners Corp. v District Court, 223-269; 272 NW 416

Ambiguous statute — conditions existing — occasion and necessity of statute considered. Where language of statute is ambiguous, it is proper to consider conditions with reference to subject matter that existed when statute was adopted, occasion and necessity for statute, and causes which induced its enactment.

Jones v Dunkelberg, (NOR); 260 NW 717

Income tax—rent received on the land in another state taxable. Income tax statutes held to be so plain and certain as to require no construction and to patently indicate a legislative intent to tax all personal income whether originating in the state or without the state, and to plainly include rent received in the state from property located in another state.

Palmer v Board, 226-92; 283 NW 415

Strict construction rule nonapplicable. Strict construction of statutes granting exemptions from taxation, altho being the rule, has no application to a plain, clear, and unambiguous statute affording no room for construction.

State v Griswold, 225-237; 280 NW 489

Judicial notice of conditions—effect. While the court should, in a proper case, in construing a statute, take judicial notice of the statewide condition surrounding the subject matter covered by the statute, yet such condition will not warrant the court in overthrowing the clear and concise language of the statute.

Andrew v Bank, 214-204; 242 NW 80

Division of sections—effect. The mere act of dividing an existing section of law and printing its parts in the code as separate sections works no change in the meaning of the law. So held as to §4840, C., '97.

State v Gardiner, 205-30; 215 NW 758

Statutes—editorial arrangement changes no law. A mere rearrangement of statutes in code revision, or dividing one section into several sections, does not without legislative intention change the purpose, operation, and effect thereof.

Jones v Mills Co., 224-1375; 279 NW 96

Placement of section in code—catchwords—effect on interpretation. The act of placing a section under a particular chapter of the code and the wording of the headings of the section, have little, if any, weight as official interpretations.

State v Oge, 227-1094; 290 NW 1

Legislative titles. Legislative acts must be construed consistently with their titles. Nor can they be given any broader scope than their titles.

Siegel v Railway, 201-712; 208 NW 78

Subjects and titles of acts—co-operative selling agencies. An act "to provide for the organization of associations without capital stock and not for pecuniary profit" is broad enough to justify the inclusion of a provision (1) authorizing a co-operative selling association to require its members to sell all or a stipulated part of their products through the association, (2) providing for the form of the contract in such cases, and (3) empowering the association to provide for and collect liquidated damages for a violation of such contract.

Co-operative Assn. v Weir, 200-1293; 206 NW 297

I STATUTORY CONSTRUCTION IN GENERAL—continued

Titles of acts—sufficiency—applicability of act. A title which recites that the act "creates a park board in cities having a population of 125,000 or more" sufficiently indicates that the act is designed to apply to cities subsequently acquiring the required population.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Titles of acts—section relating to different but related matters. The constitutional provision (Art. III, §29) which provides that "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title" is not violated by the title preceding §9253, C., '31, to wit, "Action by creditor", even tho said section does provide for action by three different parties, viz: action by an assignee, action by a receiver, and action by a creditor.

Andrew v Bank, 216-244; 249 NW 377

Construing statute—catchwords. In construing statute which provides in substance that in the sale of school, agricultural college, or university land sold on credit, which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee, and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v. Waples, 226-1281; 286 NW 461

Statutes—duty of court to make effective. It is the duty of the court in construing statutes to seek the object and purpose of the law and then give it force and effect if not contrary to established legal precedents.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Giving effect to all provisions. Statutes must be so construed, if possible, as to give effect to every provision thereof.

Rhoades v Allyn, 220-474; 262 NW 788

Giving effect to entire statute. In the construction of a statute, words will never be treated as surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute.

Dorsey v Bentzinger, 209-883; 226 NW 52

Duty to harmonize statutes. On the claim that statutes are inconsistent, the court must preserve both statutes, if reasonably possible.

Ryerson v Ins. Co., 213-524; 239 NW 64

Legislative intent derived from entire act. In construing a particular statute to arrive at the legislative intention, the court should consider the entire act, and, so far as possible, construe its various provisions in the light of their relation to the whole.

Ahrweiler v Board, 226-229; 283 NW 889

Literal words limited by intent. Tho a thing is within the literal words of a statute, it will not be deemed in the statute when it is clearly not within the intention of the statute. Applied in the construction of the statute (§5026, C., '35) relative to the liability of the owner of an automobile who consents to its operation by another.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Criminal law—soliciting for prostitution—soliciting for personal gratification not included. The statute providing a penalty for any person who solicits another to have carnal knowledge is intended to punish for the solicitation for purpose of prostitution and not to punish a defendant in soliciting by mail a female to have carnal knowledge with him for his personal gratification.

State v Oge, 227-1094; 290 NW 1

Gross premiums tax—when payable—legislative intent. Legislative intent being the cardinal rule of statutory construction, the plain intent of a statute taxing gross premiums of foreign corporations is a tax computed on and payable at the end of the year.

State v Ins. Co., 223-1301; 275 NW 26

Punctuation a fallible standard.

Seeger v Manifold, 210-683; 231 NW 479

Punctuation as evincing intention. A comma may be so employed in a will as to be the fair equivalent of the words "and also".

Buck v MacEachron, 209-1168; 229 NW 693

Codification of dual definition of same term. A legislative codification of two different statutory definitions of a term, e. g., "dog", into one definition, needless to say, is conclusive on the courts.

Bigelow v Saylor, 209-294; 228 NW 279

Legislative definition binding on court—"sale"—"retail sale". The legislature having defined certain terms, the court will follow that definition. So held as to "sale" and "retail sale" used in the sales tax act.

Kistner v Board, 225-404; 280 NW 587

Legislative construction—court's consideration. A legislative construction of a statute is entitled to consideration by the courts, but when it appears that an act may have been passed for the purpose of removing doubt from previous statutes, the court should so consider it.

Hansen v Kuhn, 226-794; 285 NW 249

Former statute revised—legislative construction. When the motor vehicle statutes were completely revised, and exempted the

vendor of a motor vehicle under a conditional sales contract from liability for negligent operation of the vehicle, such revision did not create a legislative construction that a former statute defining "owner" as the person with the use or control of a vehicle included such vendor within its definition, as a general revision of the law creates no presumption of an intent to change the law as is created when a particular section or a limited part of an act is re-enacted.

Hansen v Kuhn, 226-794; 285 NW 249

Amended statute. An amended statute will be interpreted as if it had read from the beginning as amended.

State v Local Board, 225-855; 283 NW 87

Amendment—presumption. The enactment of a statutory rule of procedure in lieu of one which the supreme court has held to be of doubtful meaning carries a presumption that the change was made in view of the criticism aimed at the old statute.

Dayton v Ins. Co., 202-753; 210 NW 945

Amendment—unallowable construction. The theory that an amended statute will be construed as tho the original act had been wholly repealed and re-enacted in its amended form, cannot, manifestly, be entertained when the amended statute, as a whole, reflects a contrary intent. So held where the amendment injected into the original statute a superfluous limiting date.

Metropolitan v Reeve, 222-255; 268 NW 531

Illogically placed amendment—effect. An act, additional to existing statutes on the same subject, is not invalid simply because it is declared to be an amendment to a section which, tho on the same subject, is not, perhaps, the most logical section to carry such amendment.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Invalid amendment — effect. An invalid amendment to a valid section of the statute leaves the section in the form in which it existed before the attempt to amend was made, unless a contrary intent on the part of the legislature is made to appear.

Talbott v Des Moines, 218-1397; 257 NW 393

Amendment—invalidity in whole (?) or part (?). When a statutory enactment for the taking of appeals in tax-adjustment proceedings turns out to be wholly invalid, such invalidity necessarily carries down all amendments which were an inseparable part of the enactment and which were designed to harmonize other statutes with the new enactment.

Talbott v Des Moines, 218-1397; 257 NW 393

Amendment of tax sale statute—no implied amendment of special assessment sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax sale—redemption—liberal construction. The right of redemption from a sale will be liberally construed in favor of the taxpayer.

Murphy v Hatter, 227-1286; 290 NW 695

Tax sale—statutory notice to redeem—strict compliance mandatory. The requirements of §7279, C., '35, providing for steps necessary to cut off right of redemption from tax sale, are absolute, and the court is without power or authority to dispense with these positive requirements on the ground that they are unnecessary.

Murphy v Hatter, 227-1286; 290 NW 695

Application to things subsequently coming into existence. It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage.

Bruce Transfer Co. v Johnston, 227-50; 287 NW 278

Public policy of statute. The public policy of a valid statute is solely for the legislature to determine, not the courts.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Comprehensive power of general assembly. The general assembly has power to enact any legislation it sees fit, provided such legislation is not plainly in violation of the state or federal constitution.

Carroll v Cedar Falls, 221-277; 261 NW 652

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Necessity for determination. The court will not, on an order dissolving a temporary injunction pending the trial of the main action, pass upon the constitutionality of the statute under attack.

Iowa Assn. v Board, 202-85; 209 NW 511

I STATUTORY CONSTRUCTION IN GENERAL—continued

Due process of law — "notice" implied in context of statute. A statute is not unconstitutional because it does not expressly provide for notice to an interested party. A clear implication of notice, duly complied with, is all-sufficient.

Chehock v School Dist., 210-258; 228 NW 585

Absence of statutory provision for notice—power of court to prescribe. When due process necessitates notice to a party and the statute makes no provision for such notice, the court may validly prescribe a notice which is reasonably calculated to give the interested party knowledge of the proceeding and opportunity to be heard.

Franklin v Bonner, 201-516; 207 NW 778

Temporary appointment of guardian—validity. The appointment of a temporary guardian on proper and sufficient notice to the person sought to be placed under guardianship is valid, even tho the statute authorizing such appointment is silent as to notice.

In re Barner, 201-525; 207 NW 613

Constitutionality — borrowed objection. A party may not have a portion of a legislative act, which does not affect him, declared unconstitutional.

State v Soeder, 216-815; 249 NW 412

Statutory gratuity—unallowable complaint. A party may not complain as to the statutory terms on which a mere gratuity is given to him.

Loftus v Department, 211-566; 232 NW 412

Burden to prove invalidity. One who attacks the constitutionality of a statute must show its invalidity beyond a reasonable doubt.

Miller v Schuster, 227-1005; 289 NW 702

Doubt as to unconstitutionality — effect. Cities and towns need no statutory authority in order validly to sell the excess products of their municipally owned utility plants. It follows that the unconstitutionality of a statute which authorizes a city, having 7,500 people and owning its electric light plant, to furnish electricity to a town of 400 people is, at the least, very doubtful, and, being doubtful, the statute must be deemed constitutional.

Carroll v Cedar Falls, 221-277; 261 NW 652

Amendment by construction nonpermissible. The court will not, in order to save the constitutionality of a statute, declare a construction which, in effect, amends the statute.

New York Ins. v Burbank, 209-199; 216 NW 742

Uncertainty of meaning — effect. A statute should not be held invalid because of uncertainty of meaning unless such holding is reasonably unavoidable.

Tolerton et al. v Board, 222-908; 270 NW 427

Partial invalidity — effect. The invalidity of a portion of a statute will not carry down the entire statute when the invalid portion is so severable from the valid part that the valid part remains as an effective statute.

State v Bevins, 210-1031; 230 NW 865
Davidson Co. v Mulock, 212-730; 235 NW 45
See State v Council, 207-923; 223 NW 737

Partial unconstitutionality. The holding by the federal supreme court that the statute of this state (§§9279, 9280, C., '27) prohibiting the receipt of deposits by insolvent banks and bankers generally, was constitutionally inapplicable to national banks and bankers did not have the effect of carrying down the statute in toto—did not have the effect of thereafter rendering said statute inapplicable to state banks and bankers, even tho the state legislature did not, after said holding, re-enact said sections.

State v Bevins, 210-1031; 230 NW 865
See State v Council, 207-923; 223 NW 737

Nonconclusiveness of enrollment. Principle reaffirmed that the enrollment of a bill is not conclusive that constitutional requirements have been complied with in its passage.

Scott v Board, 221-1060; 267 NW 111

Adoption of conference report—effect. When the general assembly is in deadlock over the final form and contents of a bill, the due adoption by both houses of the report of a joint conference committee and of the amendments therein proposed as an adjustment of existing differences, terminates all necessary legislative proceedings on said bill—other than enrollment and due signing. In other words, no necessity exists for a further or additional reading and passage of the bill as modified by said newly adopted amendments when it is made to appear that, prior to the time said differences arose, each house had duly passed the bill immediately following the last reading thereof in said houses.

[The conference report and amendments therein proposed were adopted by a yea and nay vote equal to that constitutionally required for the passage of a bill and said vote was duly entered on the journals of each house.]

Scott v Board, 221-1060; 267 NW 111

Liberal construction—workmen's compensation act. The workmen's compensation act is to be liberally construed.

Everts v Jorgensen, 227-818; 289 NW 11

Delegation of powers—liberal interpretation. The constitutional prohibition against delegating legislative powers to administrative boards

is given a liberal interpretation in favor of constitutionality of legislation.

Miller v Schuster, 227-1005; 289 NW 702

Form of bills. A statute providing the form of bills can have no force or effect other than as a directory provision.

Waugh v Shirer, 216-468; 249 NW 246

Statute invalid because unworkable. A statute may be invalid because the legislature has enacted it in such indefinite and uncertain form that it is unworkable. So held as to that part of chapter 205, Acts 43GA, relating to appeals from over-assessments of taxes.

Davidson Co. v Mulock, 212-730; 235 NW 45

Nullity because of unworkableness. Whether the purchase by a city or town of electrical energy may be financed under §6134-d1, C., '31 [§6134.01, C., '39], or whether the provisions of §§6134-d5, 6134-d6 [§§6134.09, 6134.10, C., '39] of said code relative to competitive bidding for furnishing electrical energy are a nullity because of indefiniteness, uncertainty, or unworkableness, quaere.

Brutsche v Town, 218-1073; 256 NW 914

Seeming contradiction—effect. The fact that the so-called Simmer law provides (§6134-d2, C., '35 [§6134.06, C., '39]) that no part of the cost of light and power plants erected thereunder (1) shall be payable by taxation, yet also provides, (2) that the city shall pay for current used by it—which payment necessarily must be made from funds derived from taxation—presents no such contradiction or unworkable condition as to invalidate the law.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Self-nullification. A legislative act which purports to legalize specified municipal warrants, the legality of which are then being litigated, is completely nullified, so far as said question of legality is concerned, by the insertion in the act of a proviso that "nothing in this act shall affect any pending litigation".

Mote v Town, 211-392; 233 NW 695

Reinsertion of stricken words. Principle reaffirmed that the courts will not read into a statute words which have long since been legislatively stricken from the act.

Gardner v Trustees, 217-1390; 250 NW 740

Executive construction. Principle recognized that great weight should be given to the construction placed upon statutes by those charged with their administration. But held principle not applicable under facts of present case.

State v Standard Oil, 222-1209; 271 NW 185

Administrative construction — effect. An administrative construction of a statute which has been fully acquiesced in for more than half a century by those vitally and continuously interested therein, will not be disturbed except for a very compelling reason.

New York Ins. v Burbank, 209-199; 216 NW 742

Executive construction. The long-continued and unquestioned construction placed upon a statute by the state executive department charged with its enforcement will be given great weight by the courts.

John Hancock Ins. v Lookingbill, 218-373; 253 NW 604

Executive construction—weight given. State departmental executive's construction of statutes to be given much weight.

State v Ind. Foresters, 226-1339; 286 NW 425

Construction by executive departments—legislative intent—presumption. The legislature is presumed to know the construction of its statutes by the executive departments, and when legislature indicates no dissatisfaction with such construction, the court may conclude such construction followed legislative intent.

State v Ind. Foresters, 226-1339; 286 NW 425

Carriage of livestock. The statutory provisions to the effect (1) that livestock shall be shipped at the highest practicable speed, etc., (2) that proof that the shipment was made according to timetables will not show prima facie compliance with the statute, and (3) that the railroad commissioners shall prescribe the speed of such shipment (§§8114 to 8118, inclusive, C., '24), do not justify an instruction which, in effect, submits to the jury the question of the reasonableness of a freight train schedule. These statutes contemplate the fixing of livestock shipping schedules by the railroad commission, with the attending presumption that such schedules will be reasonable.

Siegel v Railway, 201-712; 208 NW 78

Jurisdiction—existing but noneffective statute. A city, in acquiring jurisdiction to construct a public improvement, need only comply with existing effective statutes. In other words, it need not comply with a statute which then exists, but which has not yet taken effect.

Butters v Des Moines, 202-30; 209 NW 401

Retroactive effect. Statutes are not, ordinarily, given retroactive effect.

In re Culbertson, 204-473; 215 NW 761
Foster v Bellows, 204-1052; 216 NW 956

Retroactive application. A statute prohibiting the taxation of attorney fees in eminent domain proceedings instituted by the state applies to a proceeding pending but undetermined at the time of the enactment.

Welton v Highway Com., 211-625; 233 NW 876

I STATUTORY CONSTRUCTION IN GENERAL—continued

Nonretrospective statute. A statute which provides that "the superintendent of banking henceforth shall be the sole and only receiver" for state banks and trust companies in no manner displaces a then qualified and acting receiver.

Andrew v Bank, 206-869; 221 NW 668

Nonretroactive statute. The statute limiting the right of a guest riding in an automobile to recover damages consequent on the conduct of the operator has no application to an accident occurring prior to the passage of the statute.

Thomas v Disbrow, 208-873; 224 NW 36

Nonretroactive tax. The legalization of a tax levy made by a county under an optional and supposedly legal statute, which, however, was in fact originally invalid because of a fatal defect in the title, does not constitute a levying by the general assembly of a retroactive tax on the county.

Chicago, RI Ry. v Rosenbaum, 212-227; 231 NW 646

Retroactive operation—venue. A plaintiff may avail himself of a statute which regulates the venue of the action, and which is in force when the action is brought, irrespective of the fact that the statute was not in force when the cause of action accrued.

Goben v Akin, 208-1354; 227 NW 400

Payment of tuition—retroaction. Statute enacted in 1937 providing for payment of tuition of wards of charitable institution attending public schools held not retroactive in action involving liability for tuition incurred for years prior to that date.

School Twp. v Nicholson, 227-290; 288 NW 123

Legalization of invalid tax. The legislature may validly legalize a levy of taxes made under a supposedly legal statute which, however, was invalid because its title was constitutionally insufficient.

Chicago, RI Ry v Rosenbaum, 212-227; 231 NW 646

Statutes defining crime. Principle reaffirmed that statutes definitive of crime are strictly construed and all doubt resolved in favor of the accused.

State v Cooper, 221-658; 265 NW 915

Adding new element of criminal offense. The amendment of a criminal statute by adding a new and additional element of the offense does not, because of the saving clause in subsec. 1 of this section, have the effect of pardoning all unconvicted violators of the statute as it existed prior to the enactment of the additional element, unless the act which adds the new element evinces an intent to pardon.

State v Brown, 215-600; 246 NW 258

Indictment—fatal insufficiency. An indictment which alleges that a member of the Iowa liquor control commission knowingly and willingly permitted a named person unlawfully to possess intoxicating liquors (other than beer), charges no offense under §1921-f92, C., '35 [§1921.092, C., '39], in the absence of an allegation that said possessor was a member, or secretary, or officer, or employee of said commission. The term "such violation" in said section refers solely to violation by members, by the secretary, by officers, or by employees, of the commission.

State v Cooper, 221-658; 265 NW 915

Continuing appropriation statute—biennial appropriation paramount. A statute, altho in the code because of its general and permanent nature, which sets the salary of the attorney general, a state officer, is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

Sale of bank stock for payment of assessment—common-law or statutory right of action. As to a stockholder who acquired his stock prior to the enactment of a statute permitting the sale of stock to enforce payment of a stockholder's assessment to reimburse an impairment of the bank capital, such statute does not necessarily exclude a common-law remedy by action when not so construed by the highest state court, and such statute declaring that the stockholder shall be liable for any deficiency after applying the proceeds of such sale, and providing for its collection by suit, is not a deprivation of property without due process by impairing a contract obligation.

Shriver v Woodbine Bk., 285 US 467

National bank directors—violation of duty—state statute invoked—construction. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

Bastardy proceedings—repeal of statute—effect. The repeal of the former statutes relative to establishing the paternity of an illegitimate child and charging the father with the

support of such child (41 GA, ch 81) did not in any manner affect an existing right to institute such proceeding, even tho no proceedings were pending at the time of the appeal.

State v Shepherd, 202-437; 210 NW 476

Bovine tuberculosis law—nonrequired bond by examiner. In applying the bovine tuberculosis test, the examiner need not, nor may he be required to, post a bond to indemnify the owner against loss in case cattle are wrongfully destroyed, because the statute does not expressly or impliedly require such bond.

Peverill v Department, 216-534; 245 NW 334

De jure corporation. A statute which provides that "no corporation shall have legal existence until such [certified] articles be left for record" does not mean that a failure to strictly comply with the statute prevents a de facto corporation from coming into existence.

Wilkin Co. v Assn., 208-921; 223 NW 899

Restriction on corporations. A statute which limits the power of corporations which are organized under the laws of this state to take a testamentary devise will not be extended by the courts to include foreign corporations.

Ross v Seminary, 204-648; 215 NW 710

Foreign corporations—dissolution—effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Foreign remedial statute—nonapplicability. The remedial statutes of a foreign state, authorizing an action in said state against a corporation which has been dissolved at the instance of said state, do not and cannot control the procedure when the action is sought to be maintained in this state; and especially is this true when said authorized foreign procedure is contrary to the procedural law of this state.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Preferred labor claim act. The preferred labor claim act, providing that, when the property of a person is "seized upon by any process of any court," claims for labor shall be preferred over other claims, does not embrace a seizure under execution at the instance of the labor claimant. In other words, the labor claimant may not base a preference on an execution seizure instigated by himself.

Heessel v Bank, 205-508; 218 NW 298

Legalizing act re void warrants—construction. A legalizing act purporting to legalize specified void municipal warrants then in litigation, but which act was held in said litigation inapplicable to said warrants because of a proviso in said act that it should not affect pending litigation, is not subject to the construction in later litigation that the act is applicable to the extent of legalizing the contract under which said former warrants were issued even tho the warrants were not legalized.

Roland Co. v Town, 215-82; 244 NW 707

Mandatory procedure. The statutory requirement that the county treasurer shall pay collected municipal taxes to the city treasurer only on a written order signed by the mayor and city clerk or auditor is mandatory. (§6229, C., '27)

State v Hanson, 210-773; 231 NW 428

Nonmandatory procedure. The statutory command that the county auditor shall, after each assessment in his county, certify to the secretary of agriculture the number of owners of breeding cattle in his county for the purpose of enabling the said secretary to determine the numerical sufficiency of petitioners to agreements for the enrollment of the county under the accredited area plan for the eradication of bovine tuberculosis, is directory only.

Peverill v Board, 201-1050; 205 NW 543

Nonduty of supervisors to purchase certificate. The statutory provision, that the board of supervisors or the drainage trustees "may" purchase an outstanding certificate evidencing a sale of land for the nonpayment of drainage assessments, simply invests the board or trustees with discretion so to purchase. No mandatory duty so to purchase in order to protect the bondholder is imposed, even tho the bondholder must look solely to assessments for payment of his bond.

Bechtel v Board, 217-251; 251 NW 633

Nonresident with securities office in state—statute authorizing service on agent—constitutional. A state statute permitting the service of process on any agent or clerk employed in an office or agency maintained in the state by a nonresident in all actions growing out of, or connected with, the business of such office or agency does not abridge the privileges and immunities to which he is entitled by Art. IV, §2, of the federal constitution, or deprive him of the equal protection of the laws.

Doherty & Co. v Goodman, 294 US 623

Ordinances—construction as to employment of assistants. The superintendent of a department of municipal government under the so-called commission plan (Ch 326, C., '24) may

I STATUTORY CONSTRUCTION IN GENERAL—concluded

himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof; and this is true notwithstanding an additional existing ordinance which provides, in effect, that all contracts shall be entered into or approved by the council as a whole, it being held that the latter ordinance is not a limitation on the former.

Loran v Des Moines, 201-543; 207 NW 529

Personal earnings—salary of public officer. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety having paid the judgment, and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Return of execution fees. An action to enforce the statutory liability of a county to return mortgage foreclosure execution fees to the certificate holder (when the debtor does not redeem) is barred from and after the expiration of five years from the enactment of the statute giving the right to such return.

Liljedahl v Montgomery Co., 212-951; 237 NW 523

Tax statute—construed against taxing body. A proviso or exemption in a taxing statute in derogation of its general enacting clause must be strictly construed. However, as to contention that an income tax statute does not include out-of-state rent, not because of an exception, but by its terms, if open to construction at all, must fall within the general rule that tax statutes are construed strictly against the taxing body.

Palmer v Board, 226-92; 283 NW 415

Trustee's liability for taxes—determined by state law as construed by courts. A trustee in bankruptcy takes title to all property of bankrupt by operation of law, and has the rights of an execution creditor, with legal or equitable lien, and whether or not the city and county treasurer's claim for taxes is a lien, or whether or not it is "due and owing", must be determined according to the laws of Iowa, as construed by its highest court.

In re Davenport Dry Goods Co., 9 F 2d, 477

Motor vehicle fuel tax—constitutional. The Iowa motor vehicle fuel tax was obviously not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it came to rest in Iowa, and the requirement that the distributor as shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls, imposes no unconstitutional burden, either upon interstate commerce or upon the distributor.

Monamotor Oil Co. v Johnson, 292 US 86

Vacancy in office—statute supplementing constitution. The constitutional provision (Const. Art. XI, §6) that appointees to fill vacancies in office shall hold until the next general election, is not self-executing, and therefore has been properly supplemented by §1157, C., '31.

State v Claussen, 216-1079; 250 NW 195

II PAR. 1. REPEAL

Standing saving clause. The statutory provision that "the repeal of a statute does not * * * affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed", constitutes a standing saving clause which, in effect, accompanies all repealing statutes.

State v Shepherd, 202-437; 210 NW 476

Repeals by implication. Repeals by implication are not favorites of the law.

Ogilvie v City, 212-117; 233 NW 526
Neessen v Armstrong, 213-378; 239 NW 56
Schoenwetter v Oxley, 213-528; 239 NW 118
Fowler v Board, 214-395; 238 NW 618
Towns v City, 214-76; 241 NW 658

Repeal by implication. Principle reaffirmed that in order to work the repeal by implication of an old statute by a new statute, there must be an absolute repugnancy between the two statutes.

Hahn v County, 218-543; 255 NW 695

Inferential repeal—when recognized. The court will not declare a statute repealed, or even modified, on the basis of a mere inference arising from the enactment of a later statute, unless such declaration is unavoidable.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Repugnant statutes—implied repeal. When two statutes are repugnant and cannot be reconciled, the last in time of enactment must prevail.

Waugh v Shirer, 216-468; 249 NW 246

Implied repeal—statutes not in pari materia. A statute cannot be deemed impliedly repealed by other statutes which are not in pari materia. As an illustration, statutes dealing

merely with the procedure to be followed in making nominations for office, and in filling vacancies in such nominations, or in determining the eligibility of candidates, cannot be held to impliedly repeal a statute which authorizes the holding of an election.

State v Claussen, 216-1079; 250 NW 195

Municipal license of trucks—nonrepeal by state law. The legislature by the enactment of Ch 252-C1, C., '31 [Ch 252.3, C., '39], and thereby requiring of truck operators a privilege or occupation tax when not operating between fixed termini nor over a regular route, on any and all highways of the state, did not impliedly repeal that part of §5970, C., '31, which empowers cities and towns to license a truck operator whose business is limited to the municipality—there being no substantial conflict between said statutes.

Towns v Sioux City, 214-76; 241 NW 658

Holdership in due course—amount of recovery. The former statutory rule (§3070, C., '97) to the effect that when a note has its inception in fraud a holder in due course could recover only the amount which he paid for the note was impliedly repealed by the enactment of the negotiable instruments law, §9517, C., '24.

Sword v Spry, 205-266; 215 NW 737

Contiguous corporations combined by respective boards without submission to vote. In view of its legislative history and the apparent intention of the legislature, the enactment of §4191, C., '35, requiring that proposals to add territory to an existing district be approved separately by majority of voters in each territory affected, did not modify or repeal §4133, C., '35, providing that "* * * boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors * * * so * * * that one corporation shall be included with the other as a single corporation" hence, respective boards of directors of contiguous school corporations had authority to combine such school corporations without approval of voters.

Peterson v Sch. Dist., 227-110; 287 NW 275

III PAR. 1. EFFECT OF REPEAL

"Right" and "privilege" contrasted. The statutory provision to the effect that "the repeal of a statute does not affect any right which has accrued" does not protect a mere privilege.

Welton v Highway Com., 211-625; 233 NW 876

Effect on existing action. The repeal of the former statutes relative to establishing the paternity of an illegitimate child and charging the father with the support of such child (41GA, ch 81 [§§12667-a1–12667-a54, C., '27]) did not in any manner affect an existing right to institute such proceedings, even tho no proceedings were pending at the time of repeal.

State v Shepherd, 202-437; 210 NW 476

Preservation of accrued right. An action to recover damages for negligently causing the death of a married woman survives the repeal of the statute authorizing such action, and the measure of recovery in such cases is governed by the repealed statute, not by the measure of recovery provided in a later and substituted statute on the same subject.

Azeltine v Lutterman, 218-675; 254 NW 854

Repeal of source of payment—effect. The repeal of a statute which provides the funds with which to retire duly authorized bonds as they are issued, without providing any new source of payment, necessarily precludes the further issuance of such bonds.

Dee v Tama Co., 209-1341; 230 NW 337

Mulct tax—void. A mulct tax certified and levied some two years after a violation of the intoxicating liquor statutes, and after the repeal of the statutes authorizing the levy of such tax, and after the property affected had passed into the hands of an innocent party, is void as to such latter party. (This on the assumption that the repeal of a statute does not affect any right which has accrued, any duty imposed, or any penalty incurred.)

Shriver v Polk County, 203-529; 212 NW 718

Violation of replaced statute.

State v McDowell, 228- ; 290 NW 65

Subrogation—repeal of preferential deposit law. Sureties on a bank depositary bond conditioned to hold the state harmless on deposit of state funds in said bank, and given at a time when the state possessed a statutory preferential right, in case the bank was thrown into receivership, to be paid in full prior to the payment of general depositors, are not entitled, upon the payment of a loss, in case of such receivership, to be subrogated to such right on the part of the state when, prior to such payment, the statute giving such right has been repealed. This is on the principle that a surety is entitled to subrogation only upon payment of the principal's debt, and only to the rights then possessed by the creditor.

Leach v Bank, 205-1154; 213 NW 517

Discharge of surety—repeal of preferential bank deposit law. The repeal of a statute which gives the state, when it is a depositor in a bank, a preferential right to be paid in full if the bank passes into the hands of a receiver does not constitute a release of security in such sense as to release a surety on a bond which secures said deposit.

Leach v Bank, 205-1154; 213 NW 517

IV PAR. 2. WORDS AND PHRASES

Motor vehicle words and phrases. See under §5000.01

Discussion. See 12 ILR 280—The constituents of "chastity"; 17 ILR 87—"Void" and "voidable"—statute of frauds; 17 ILR 254—Marriage consanguinity; 17 ILR 402—Usury; 17 ILR 524—Gambling; 20 ILR 483—"Domicile" and "residence"

General rules. In the construction of statutes words and phrases will, if possible, be given their ordinary and usual meaning, and that construction will be adopted, if possible, which will give force and effect to every part of the statute.

Des M. Ry. v City, 205-495; 216 NW 284

General and specific words. Principle "Expressio unius est exclusio alterius" applied.

In re Barnett, 217-187; 251 NW 59

"About November first." A contract to deliver a commercial product "about November first" requires a delivery substantially on said date or near approximation thereto.

North Am. Gin. Co. v Gilbertson, 200-1349; 206 NW 610

"Accidental means" defined. An injury caused by the intentional lifting of a log upon a wagon is one resulting from "accidental means" when such resulting injury was unexpected, undesigned, and not the usual or natural result of such an act.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Acquiescence—elements. On the issue of acquiescence by both parties to a boundary line, the intention of the parties is important. Acquiescence is consent inferred from silence, involving notice or knowledge of the claim of the other party, and occurs where one who is entitled to impeach a transaction or enforce a right neglects to do so, from which the other party may infer that he has abandoned such right.

Patrick v Cheney, 226-853; 285 NW 184

Filing information—"actually in session" defined. The statutory right of the county attorney to file a trial information "at any time when the grand jury is not actually in session" does not mean that he is prohibited from filing such information at any time of any day on which the grand jury was in session. So held where the information was filed on the day on which the grand jury was duly convened, but at a time on said day when said jury was not "actually" in session.

Thrasher v Haynes, 221-1137; 264 NW 915

Adverse possession — requirements — intention. For adverse possession there must be occupancy taken with the intention to assert title beyond the true boundary line under a claim of right which must be as broad as the possession, whereas, occupancy taken by mistake beyond the true line with claim of right only up to the true line will not acquire title.

Patrick v Cheney, 226-853; 285 NW 184

"Advertisement for bids"—irregular compliance with mandatory duty. The irregularity of municipal authorities in advertising for, receiving, and opening, bids for the construction of a municipal light and power plant before instead of after the director of the budget had, on appeal, overruled objections to the plans, specifications, and proposed form of contract, (§357, C., '31) does not invalidate the contract entered into after said ruling and specifically approved by said director. But the duty to "advertise for bids" is mandatory in case an appeal is taken to the budget director.

Johnson v Town, 215-1033; 247 NW 552

"And" may be both conjunctive and disjunctive. The word "and", used in the homestead exemption act allowing an owner credit on his taxes "for the 1936 taxes payable in 1937 and for the 1937 taxes payable in 1938", construed to be used as a conjunctive with reference to a homestead eligible to benefits for both of said years; and when used with reference to a homestead not eligible in both years, to be used as a disjunctive, equivalent to the word "or".

Ahrweiler v Board, 226-229; 283 NW 889

"And" as "or". A title, "An act to legalize any and all tax levies heretofore made and collected" supports the legalization of "All taxes heretofore assessed, levied or collected," when the intent of the legislature will be carried out by construing "made and collected" as "made or collected".

Chicago, RI Ry. v Rosenbaum, 212-227; 231 NW 646

"And shall also." When interpreting the words "and shall also" consideration must be given to the harmony of the entire statute in which the words appear.

Brutsche v Town, 218-1073; 256 NW 914

"Apparent authority."

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Insurance—notice and proof of loss—"as soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

"Between fixed termini." A truck operator who, under a permit duly granted under chapter 252-C1, C., '31 [Ch 252.3, C., '39], and by means of his motor truck, transports for hire freight from place to place, at irregular times, and on no schedule of service, and only when

he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31 [Chs 252.1, or 252.2, C., '39], and, therefore, is under no obligation to obtain a certificate of necessity or convenience or to pay the tax required by said chapters.

State v Transfer, 213-1269; 239 NW 125

"Bi-monthly payments." A contract for services providing for payments each two weeks is obligatory, even tho the party rendering the service has not worked two full weeks.

Goben v Pav. Co., 218-829; 252 NW 262

"Building." A schoolhouse is a "building," within the definition of statutory burglary. (§13001, C., '27.)

State v Burzette, 208-818; 222 NW 394

"Buildings"—intent of parties. The word "building" as used in restrictive covenants in deeds of conveyance will be so construed as to give effect to the manifest intention and purposes of the parties. Held, inter alia, that structures for screening sand, and a derrick with hoisting machinery were "buildings" within the meaning of restrictive covenants against the erection of buildings which would cut off a view.

Curtis v Schmidt, 212-1279; 237 NW 463

"Bushel" construed. The admeasurement to a landlord by an agreed arbitrator of a certain number of bushels of corn as rent for a certain year will not be construed as calling for that number of bushels of "shelled" corn when the parties knew at all times that the admeasurement was on the basis of crib measurement; and when the landlord receives in shelled corn all that was set aside to him "on the cob," the rent must be deemed fully paid.

Salinger v Elev. Co., 210-668; 231 NW 366

"Car." A caterpillar road grader belonging to a county, and operated on the public highway, is not a "car" within the meaning of the statutory declaration that the owner of a "car" is liable for damages done by the car when it is operated with his consent.

Bateson v County, 213-718; 239 NW 803

"Chose or thing in action."

Brenton Bros. v Dorr, 213-725; 239 NW 808

"Car"—"line"—"stage" — common carrier venue statute. The terms, "line", "stage", "car" and "other line of coaches and cars" as defined at the time of the enactment of the statute specifying venue of actions against carriers are comprehensive enough to include the operations of a transfer company as a common carrier using motor vehicles, and a damage action against such motor vehicle carrier is properly brought in a county where an automobile collided with one of the carrier's trucks while traveling over its regular route, altho company had no office in such county.

Bruce Co. v Johnston, 227-50; 287 NW 278

"Church purposes." A broad and comprehensive meaning must be accorded to the term "church purposes" in a conveyance of land to trustees "so long as used for church purposes".

Presbyterian Church v Johnson, 213-49; 238 NW 456

"Commissioner" as agent for process.

Green v Brinegar, 228- ; 292 NW 229

Compensable "injury"—workmen's compensation.

Sachleben v Gjellefald, 228- ; 290 NW 48

"Compensation." Title 38, §454, USC, providing that federal funds granted to a World War veteran, "shall not be subject to the claims of creditors", does not prohibit the courts of this state from allowing the guardian of such veteran and from such funds, compensation not only for ordinary services but for extraordinary services rendered the ward—the guardian not being a "creditor" within the meaning of said statute.

Hines v McKenzie, 216-1388; 250 NW 687

"Confidential relations." The position of head bookkeeper in the office of the state treasurer involves "strictly confidential relations" with the head of said office, within the meaning of §1165, C., '31.

Allen v Wegman, 218-801; 254 NW 74

"Consolidated" defined. A "consolidated" school district is an "independent school district," within the meaning of **§4230, C., '24,** authorizing the school board to elect a superintendent for a period not exceeding three years.

Consolidated Dist. v Griffin, 201-63; 206 NW 86

"Construction" as imposing continuous duty. An ordinance which requires all rain spouts on buildings to be so "constructed" that water will not be cast upon sidewalks imposes a continuing duty upon the property owner—a duty not only to "construct" the spouting as required but to maintain the spouting in such required condition.

Updegraff v City, 210-382; 226 NW 928

Cigarettes—retailer not "consumer." The statute requiring packages of cigarettes sold to a "consumer" to have the tax stamps affixed thereto does not apply to a sale by a wholesaler to a retailer, the latter not being a consumer, within the meaning of §1570, C., '24.

State v Lagomarcino-Grupe Co., 207-621; 223 NW 512

Sales tax—shoe repairman as "consumer or user". A shoe repairman is a "consumer or user" of the material used in repairing shoes within the legislative definition of those terms in the sales tax act, and in charging for such repair he is not primarily reselling those materials, but selling his services; wherefore, the one from whom he buys those materials makes the retail sale subject to the tax.

Sandberg Co. v Board, 225-103; 278 NW 643; 281 NW 197

IV Par. 2. WORDS AND PHRASES—continued

"Conveyance." A valid prohibition against the "conveyance" of real property embraces a mortgage.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Distinction between "court" and "judge". Statutes providing for the prosecution of injunction violators which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v Dist. Court, 226-717; 285 NW 236

"Debt." The meaning of the term "debt" is largely dependent on its context.

Smith v Andrew, 209-99; 227 NW 587

"Debt." A decree for alimony in fixed monthly payments does not create a debt in the sense of the garnishment statutes.

Malone v Moore, 212-58; 236 NW 100

"Debt." Schooley v Schooley, 184-835; 169 NW 56, overruled.

Malone v Moore, 212-58; 236 NW 100

Judgment as "debt". A judgment, whether based on contract or tort, is a "debt" within the meaning of the exemption statutes.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

"Indebtedness"—future taxes to pay bonds.

Brunk v Des Moines, 228- ; 291 NW 395

Mortgage redemption—"debtor" defined. The grantee of land who buys subject to an existing mortgage is a "debtor," within the meaning of the redemption statutes; and the original mortgagor is not entitled to the possession of the land or to the value of such possession during the redemption period following foreclosure, even tho such mortgagor is the only "debtor" who is personally liable for the mortgage debt.

Marx v Clark, 201-1219; 207 NW 357

"Donations" defined. Funds received by a court-appointed trustee "for the perpetual care" of a named cemetery are "donations" within the meaning of the statute requiring a bond securing such funds.

Belmond Assn. v Luick, 217-805; 253 NW 521

"Dues" and "subscription" defined. The terms "dues" and "subscriptions" are by no means necessarily synonymous.

Jefferson, etc. v Sherman, 208-614; 226 NW 182

"Dues and pledges." The statutory provision that a farm bureau organization shall be entitled to financial aid from the county when the "yearly membership dues and pledges" amount to a certain sum, authorizes such aid when the "dues" alone amount to the required sum.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Easements and tenements—relation. An easement is a privilege or right without profit which the owner of one piece of realty may have in another, or conversely, it is a service which one tract of land owes to another. The land entitled to the easement is the dominant tenement, and the land burdened with the servitude is the servient tenement, neither the easement nor servitude being personal, but accessory, running with the land.

Dawson v McKinnon, 226-756; 285 NW 258

"Engaged in business." A person is "engaged in the business" of selling a drug when he has such drug for sale to any person who may apply for it for the seller's profit, irrespective of any other business carried on by the said seller.

State v Market Co., 209-567; 228 NW 288

"Fellow servant" and "vice-principal". Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he was a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

"Filing." What constitutes.

Peterson v Barnett, 213-514; 239 NW 77

"Filing within twelve months". Conceding, arguendo, that in the settlement of an estate, the statute of limitation commences to run from the date of the last newspaper publication, yet, when the last publication was on April 16, 1931, a claim filed April 16, 1932, is not filed "within twelve months from the giving of the notice" as provided by §11972, C., '31.

First Tr. JSL Bk. v Terbell, 217-624; 252 NW 769

"Final decision." A statutory declaration that a decision of the court shall be "final" may carry the clear meaning that such decision is not an appealable decision.

State v Webster County, 209-143; 227 NW 595

"Forthwith." The term "forthwith" does not necessarily mean "immediately".

Ashpole v Delaney, 217-792; 253 NW 30

Franchise. A franchise is a privilege or authority vested in certain persons by grant of the sovereign to exercise powers or to do or perform acts which, without such grant, they could not legally do or perform.

Mapleton v Iowa Co., 206-9; 216 NW 683

Gambling devices—punch boards and slot machines. Legislature has specifically recognized punch boards and slot machines as gambling devices and they are subject to forfeiture when seized under a valid search warrant, unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited.

State v Doe, 227-1215; 290 NW 518

Gifts causa mortis—essential elements. A gift causa mortis is a gift of personal property, intentionally made, even orally, by the mentally competent owner of said property, in expectation of his or her imminent death from an impending disorder or peril (tho not necessarily so imminent as to exclude the opportunity to execute a will), and made and delivered by the donor to the donee on the essential condition that, if the gift be not in the meantime revoked, the property shall belong to the donee in case the donor dies, as anticipated, of the disorder or peril, leaving said donee surviving.

Flint v Varney, 220-1241; 264 NW 277

"Guest." Under the rule that passenger is neither a guest nor a mere invitee when he is riding with driver for the mutual, tangible, and definite benefit of both parties, a passenger in an automobile driven by a representative of the Federal Resettlement Administration is not a "guest" when both parties are on their way to a bank to secure a temporary loan for passenger until such time as a loan could be completed with the Federal Resettlement Administration.

Doherty v Edwards, 227-1264; 290 NW 672

"Hear and determine". In certiorari to determine the legality of proceedings of civil service commission in removing a city employee, the commission's statutory duty to "hear and determine" is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony by both sides, from a consideration of which the relief sought by the moving party is either granted or denied.

Sandahl v Des Moines, 227-1310; 290 NW 697

"High watermark." The high watermark of a navigable river is that upper line which ordinary floods permanently mark along the course of the river.

Curtis v Schmidt, 212-1279; 237 NW 463

"Horse" as vehicle. A horse, saddled and bridled, and being used as a means of conveyance or transportation is not a "vehicle" within the meaning of a policy of insurance which provides indemnity "sustained by the wrecking or disablement of any vehicle or car * * * in which the insured is riding or by being accidentally thrown therefrom".

Riser v Ins. Co., 207-1101; 224 NW 67; 63 ALR 292

Illegal transportation. The word "transportation" in the intoxicating liquor statutes is employed in its ordinary sense: that is, to convey from one place to another—any real carrying about.

State v Canalle, 206-1169; 221 NW 847

"In." The preposition "in" may be used in the sense of "for" or "on behalf of".

Willis v Sch. Dist., 210-391; 227 NW 532

"In aerial conveyance"—parachute jump.

Richardson v Assn., 228- ; 291 NW 408

"Inebriacy" defined. Inebriacy is the state of drunkenness or habitual intoxication.

Maher v Brown, 225-341; 280 NW 553

"Interested person"—party to probate.

In re Duffy, 228- ; 292 NW 165

"Intersection" of highways—definition. In a damage action arising from a collision of motor vehicles at a highway intersection, where the question of negligence centered largely around the rights of the parties within the intersection, it was prejudicial error to instruct the jury that "intersection" is the area within the fence lines, if such fence lines were extended across the road, when a statute defines "intersection" as being the area within the lateral boundary lines of highways which join.

Hupp v Doolittle, 226-814; 285 NW 247

"Invitee"—"licensee". An invitee to a place of business is one who goes there, either at the express or implied invitation of the owner or occupant, on business of mutual interest to both, or in connection with the business of the owner or occupant. A licensee is one who goes upon the property of another, either at the invitation, or with the implied acquiescence, of the owner or occupant, for a purpose purely personal to himself.

Wilson v Goodrich, 218-462; 252 NW 142

"Judicial capacity". In adopting plans for pavement of alley intersection, the city was acting in a "judicial capacity" and was not liable for defects in engineer's plans unless as a matter of law the plans were obviously defective.

Russell v Sioux City, 227-1302; 290 NW 708

"Knowingly consenting." A statute (now repealed) placing personal liability on the officers and directors of a corporation for prohibited excess indebtedness of the corporation, "knowingly consented to" by them, necessarily excludes liability (1) on mere proof that the officers or directors were negligent in performing their duties, and (2) as to corporate debts contracted after the officer or director ceased to be such.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140; 38 NCCA 133

IV PAR. 2. WORDS AND PHRASES—continued

"Legally bound" persons. Where a county has maintained in a state hospital an insane person who was a member of an incorporated religious and communistic society the county's statutory right (§3595, C., '31) to recover the resulting expense from any person "legally liable" for the support of such insane person does not entitle it to recover such expense from the said society simply on proof that the society had obligated itself by contract to support said member for life. "Legal" liability under the statute is confined strictly to "common-law" liability.

Iowa Co. v Amana Soc., 214-893; 243 NW 299

"Lost" goods defined. Money taken from the owner thereof by robbery, and the whereabouts of which money is thereafter unknown to said owner until it is returned to him by one who found it, where the robber had hidden it, constitutes "lost" money within the meaning of the statute which provides compensation to the finder of "lost" money and other property.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Generating electricity as "manufacturing or mechanical business". The generation or production of electricity is a manufacturing or mechanical business within the scope of a statute permitting the formation of co-operative associations to conduct a manufacturing or mechanical business.

State v Hardin County Co-op., 226-896; 285 NW 219

"May." The primary meaning of the word "may" is permissive and discretionary.

Bernstein v City, 215-1168; 248 NW 26; 86 ALR 782

"May"—"must". "May" cannot, manifestly, be given the imperative meaning of "must", unless there be substantial warrant for such construction.

Brickson v Schwebach, 219-1368; 261 NW 518

Owner of auto salesroom—neither "mechanic" nor "other laborer". Proprietor of auto salesroom with separate department where repairing is done by employee held not a "mechanic", and therefore tools are not exempt from levy; nor is such proprietor an "other laborer" within vehicle exemption.

First N. Bank v Larson, 213-468; 239 NW 134

"Mistake" — mistake of law — statute not tolled. Where a sheriff collects fees under a mistake of law, the failure to discover the mistake of law will not toll the running of the statute of limitations. The word "mistake" in §11010, C., '35, means mistake of fact.

George v Webster County, 211-164; 233 NW 49

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

"Mortgagor" defined. A "mortgagor" is he who holds title to the premises mortgaged. A wife who joins in a mortgage of the husband's land for the purpose of releasing her distributive share is not a mortgagor.

Wood v Schwartz, 212-462; 236 NW 491

Municipal light rates. A reasonable rate for electric light, duly fixed by a municipality under §6143, C., '27, is both a maximum and a minimum rate. In other words, a public utility may not legally charge more nor less than the prescribed rate.

Mapleton v Iowa Co., 209-400; 223 NW 476; 68 ALR 993

"Net income" — what constitutes. "Net income" does not mean the general income of the estate without provision for the payment of just charges, taxes, and reasonable repair and upkeep. On the contrary, it means the income remaining, if any, after such charges and expenses are taken care of. (So held as to a testamentary trust which provided for the keeping of the trust estate intact and for the annual distribution of the net income.)

In re Whitman, 221-1114; 266 NW 28

"Newspaper." An agreement not to engage in the publication or circulation of a "newspaper" in a named locality is violated by the publication and circulation in said locality, without charge, of a so-called "Shopper's Guide" of eight pages arranged in the form of an ordinary newspaper, and containing much advertisement, some current news, serial stories, editorial comment, and newspaper clippings.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

"Next regular election." The statutory provision (§1155, C., '31) that an officer filling a vacancy in an elective office shall hold until the next regular election at which such vacancy can be filled, means the "next regular election" at which such vacancy can be legally filled.

State v Claussen, 216-1079; 250 NW 195

"Operation upon public highway."

Des M. Co. v Johnson, 213-594; 239 NW 575

"On or about." The phrase "on or about" a specified date permits of some variation from the date specified, but no date in July is "on or about" the last of October of the same year.

Newcomer v Ament, 214-307; 242 NW 82

"Or"—"and". Statute construed and held, not permissible to substitute "and" for "or".

Ballard-Hassett Co. v Miller, 219-1066; 260 NW 65

Unambiguous language—"or" cannot mean "and". The word "or" in a statute cannot be judicially construed to mean "and" when the language of the section is too clear and unambiguous to admit of judicial construction.

State v Best, 225-338; 280 NW 551

Simmer law ballot showing "electric light or power"—"or" synonymous with "and". Since an electric plant produces energy which may be used for either light or power, a ballot which states the question as to whether a city should establish an "electric light or power plant" would be readily understood by the voters that the city was seeking to establish an "electric light and power plant".

Lahn v Primghar, 225-686; 281 NW 214

Conjunctive or disjunctive use of "or"—technical rules disregarded. Under a statute permitting the formation of associations to conduct a manufacturing business or to construct or operate electric transmission lines, the words "or to construct or operate * * * electric transmission lines" could be eliminated where the manufacturing business was the operation of an electric power plant, as the right to use such lines is implied as essential to the manufacture of electricity; so whether "or" was used in a conjunctive or disjunctive sense made no difference, as courts will disregard technical rules of grammar and punctuation to arrive at the intent of a statute.

State v Hardin County Co-op., 226-896; 285 NW 219

"Orchard" defined. A group of some 65 bearing fruit trees of different varieties, maintained by continued replanting, constitutes an "orchard", within the meaning of the statute which prohibits the laying out of highways through orchards without the owner's consent.

Junkin v Knapp, 205-184; 217 NW 834

"Order" as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under §13995, C., '39. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

"Orders." An "order" of court, speaking broadly, is any direction by the court in a proceeding, not including the judgment or decree.

Blunk v Walker, 206-1389; 222 NW 358

"Owner." The term "owner" may be used in a sense other than absolute and unconditional title.

Bare v Cole, 220-338; 260 NW 338

"Owner" defined. The legal titleholder of real estate and a prospective purchaser for whose benefit and use an improvement is erected upon the real estate, may both be considered "owners" of the property within the meaning of the mechanics lien law.

American Bank v West, 214-568; 243 NW 297

Moratorium act — receiver as "owner". The duly qualified and acting receiver of an insolvent private bank is the "owner" of the mortgaged real estate of said bank within the meaning of the moratorium statute (46 GA, ch 110) relative to extension of time in which to redeem from foreclosure sale.

Metropolitan v Van Alstine, 221-763; 266 NW 514

Moratorium act — "owner" defined. An "owner" within the meaning of the moratorium foreclosure act may be such tho his interest is less than a fee ownership.

Prudential v Kraschel, 222-128; 266 NW 550

"Paper" defined. A laboratory analysis, duly reduced to writing, of an organ of the human body and of the contents thereof is a "paper", within the meaning of the statute relative to the compulsory production of "papers or books" (§11316, C., '24), and the party to an action who has the exclusive possession thereof may be compelled to produce it for the inspection of the other party when such inspection is material to the issue whether the deceased died by accident or by suicide by means of poison; but the production of private correspondence or memoranda relative to the analysis may not be coerced.

Travelers Ins. v Jackson, 201-43; 206 NW 98

"Party" and "witness". The terms "party" to an action, and "witness" are not synonymous within the meaning of §11358, C., '31.

Bagley v Dist. Court, 218-34; 254 NW 26

"Person." The general assembly in exercising its constitutional power over an authorized subject matter, may be its own lexicographer —may use its own terms and declare what entities shall be embraced therein. So held where in the enactment of the motor vehicle fuel tax law, Ch 251-F1, C., '35 [Ch 251.3, C., '39], it defined the term "person" and, in effect, declared such term to include a municipal corporation.

State v Des Moines, 221-642; 266 NW 41

IV PAR. 2. WORDS AND PHRASES—continued

"Person in possession". In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

"Person of same household" — scope of term. Where an insurance policy insured the assured against liability arising or resulting from automobile accidents, but excepted liability for injuries to "the assured or persons of the same household as the assured", held that a married woman who furnished the assured a room and board for a stated compensation could not be deemed a "person of the same household as the assured".

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

"Premium." The term "premium", tho used in connection with insurance contract, may embrace a consideration received by an insurance company in payment of an annuity contract, even tho the annuity contract in question is not an insurance contract.

Northwestern Ins. v Murphy, 223-333; 271 NW 899; 109 ALR 1054

Presumption (?) or assumption (?) of malice. The court may, under applicable evidence, instruct that the jury has a right, in the absence of evidence to the contrary, to presume the existence of malice from the use of a deadly weapon in a deadly manner; and in so instructing it is quite immaterial that the court employs the term "assume" instead of the term "presume".

State v Berlovich, 220-1288; 263 NW 853

Provisional remedy. A provisional remedy is one which is provided for present needs, or for the occasion; that is, one adapted to meet a particular exigency, e. g., the appointment of a receiver in mortgage foreclosure. It follows that an order granting such remedy is appealable.

Davenport v Thompson, 206-746; 221 NW 347

"Public place" includes bridge. The term "public place", as used in the statute relative to the obligation of streetcar companies to construct, reconstruct, and maintain paving between and outside the rails of their tracks, embraces a public bridge. (§6051-c1, C., '31 [§6051.1, C., '39]).

In re Walnut Bridge, 220-55; 261 NW 781

"Reasonably safe place" defined. The operator of a filling station was under a legal obligation to exercise reasonable and ordinary care to see that his place of business was reasonably safe for an invitee who was having a truck tire repaired. The phrase "reasonably safe" meaning safe according to the usage, habits, and ordinary risks of the business.

Reynolds v Skelly Co., 227-163; 287 NW 823

"Recklessness". Recklessness goes beyond mere negligence and means proceeding without concern for consequences, with a heedless disregard for the rights of others. Recklessness under the motor vehicle guest statute is not found from evidence that the driver of a car went to sleep, where there was little evidence that he was conscious of the approach of sleep.

Paulson v Hanson, 226-858; 285 NW 189

"Refund." Under a contract to pay an accountant a percentage of the amount "refunded" by the federal government as excess payment for certain years of income and war-profit taxes, the percentage must be computed on the actual amount returned by the government, even tho the government arrived at said amount by deducting from what would otherwise have been the refund the amount of tax inadequately paid in a certain year.

Gregerson v Cherry, 210-538; 231 NW 350

"Renew." The term "renew," as applied to a contract, means a re-establishment of an existing contract for another period of time.

State v Niehaus, 209-533; 228 NW 308

Repairs may incidentally benefit adjacent road. Work on a drainage ditch which prevented erosion and prevented an overflow on reclaimed lands was "repair" work within the statutory authority of the board of supervisors to repair drainage ditches even tho there was an incidental benefit to bridges and to a township road at the side of the ditch.

Baldozier v Mayberry, 226-693; 285 NW 140

"Resulting from." An injury to a passenger on a motor vehicle bus may not be said to "result from" the operation of the bus, when the proximate cause of such injury was the negligence of a third party.

Crozier v Stages, 209-313; 228 NW 320

Child on sled being towed not "riding" in vehicle. A person to be within the provisions of the Iowa guest statute must be "riding" in the motor vehicle, which excludes a child on a sled hooked to the rear of a moving automobile.

Samuelson v Sherrill, 225-421; 280 NW 596

"Rounding corner." The statutory provision that no ground shall be taken for a primary road "for the rounding of a corner" where certain named improvements are located, is violated by locating a primary road through a 40-acre tract on an arc which extends substantially from the southeast to the northwest corner of the tract, and which so bends

convexly to the northeast corner of the tract as to leave approximately 4 acres at said corner where the said improvements are located.

Butterworth v Com., 210-1231; 232 NW 760

"Shall." Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

"Shall" as nonmandatory. Even tho the statute (§2668, C., '31) declares that "before being tested, such animals shall be appraised, etc.", nevertheless, an examination of the entire bovine tuberculosis act clearly demonstrates that "shall" is not used in a mandatory sense.

Peverill v Dept., 216-534; 245 NW 334

"Shall" and "may" used conversely. Rule reaffirmed that word "may" is construed to mean "shall" when the rights of the public or third person depend upon the exercise of the power or performance of the duty referred to, and conversely, the word "shall" is merely directory when no advantage is lost, right destroyed, or benefit sacrificed by giving it such construction.

School Twp. v Nicholson, 227-290; 288 NW 123

"Shall"—when synonymous with "may". Statute providing that person applying for admission to high school shall present affidavit of parent or guardian construed to be directory rather than mandatory, the rule being that the word "shall" is generally construed to be mandatory, but where no right or benefit depends on its imperative use it may be, and often is, treated as synonymous with "may".

School Twp. v Nicholson, 227-290; 288 NW 123

"Subject to liens of record." The expression "subject to liens of record" when embraced in the habendum clause of a deed of conveyance does not have the effect of continuing the lien of a judgment after the holder thereof had failed to exercise his right to redeem.

Paulsen v Jensen, 209-453; 228 NW 357

"Suspension" and "cancellation" compared. The suspension of a policy of insurance is not synonymous with cancellation of the policy.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Taxes and special assessments. There is a distinction between taxes and special assessments—a tax being a general contribution imposed upon property, while a special assessment is a payment for special benefits conferred upon the property by an improvement.

Bennett v Greenwalt, 226-1113; 286 NW 722

"Thereon" and "thereof."

Brenton Bros. v Dorr, 213-725; 239 NW 808

"To take care of" claim. An agreement by one party to a compromise and settlement that he will "take care of" the claim of a named third party may not, in view of the circumstances attending the parties, be equivalent to an agreement to pay said claim.

Southern Sur. v Railway, 215-525; 245 NW 864

"Train wreck." The smashing in of a portion of one side of a passenger coach by swinging a loading bucket against the coach as it was passing, constitutes a "train wreck," within the meaning of a policy of accident insurance, even though the coach (the only one injured) was not derailed, and was not taken from the train for repairs until a division point on the line was reached.

Mochel v Iowa Assn., 203-623; 213 NW 259; 51 ALR 1327

"Unless." The term "unless" as employed in §8958, C., '27, is used in the sense of "if it be not a fact that."

Plunkett v Hopley, 208-1042; 226 NW 772

"Unliquidated." An "unliquidated claim" is one the amount of which has not been ascertained and agreed upon by the parties, or has not been fixed by law.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

"Vacation" of court. The term "vacation" as employed in the county attorney information act (§13667, C., '31) means the interim which commences immediately after the expiration of a term of court and ends at the commencement of the next term of court. The court is not in vacation while it is in a recess.

Dayton v Bechly, 213-1305; 241 NW 416

"Vibrolithic pavement". In action by pedestrian for injuries sustained in fall on paving, evidence that the paving was a "vibrolithic" type composed of granite and concrete chips, that the pavement was dry, that there had been no rain or mist, and that there was no foreign substance on the paving does not present a question for the jury on issue of city's negligence in construction, even tho the pavement was "pretty smooth", the smoothness being a quality inherent in the material.

Russell v Sioux City, 227-1302; 290 NW 708

"Volenti non fit injuria" defined. The maxim "volenti non fit injuria" means: "That to which a person assents is not esteemed in law an injury" or "He who consents cannot receive an injury".

Edwards v Kirk, 227-684; 288 NW 875

IV PAR. 2. WORDS AND PHRASES—concluded

"Wantonness" or "recklessness". Wantonness is something more than recklessness and recklessness is something more than negligence.

Sanburn v Rollins Mills, 217-218; 251 NW 144

"Warrant." A plain, unambiguous statutory declaration that a claim shall be filed "with the officer authorized by law to issue warrants in payment of such improvement" must be strictly construed in accordance with the usual and ordinary meaning of the word "warrant".

Missouri Gravel v Surety Co., 212-1322; 237 NW 635

"Warrant-issuing officer." Claims of laborers and materialmen, under a contract for the paving of a primary highway, entered into by the state highway commission must be filed with the state auditor and not with the said commission, the auditing and approving of claims by said commission not constituting the issuance of a "warrant" within the meaning of §10305, C., '27. (Statute now changed.)

Missouri Gravel v Surety Co., 212-1322; 237 NW 635

"Willful" defined. The term "willful" in the statute specifying grounds for removal from office, when applied to "neglect to perform the duties of his office," or to "misconduct or maladministration in office," means knowingly, intentionally, deliberately, "with a bad or evil purpose."

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Misleading terms. The expression "yielding to the embraces" is not synonymous with "sexual intercourse"; likewise, the expression "wrongful acts" is not synonymous with the term "seduction".

Gardner v Boland, 209-362; 227 NW 902

V PAR. 3. NUMBER AND GENDER

"Person"—political subdivisions not included. The statutory provision that in the construction of statutes "the word 'person' may be extended to bodies corporate" does not embrace political subdivisions of the state.

Julander v Reynolds, 206-1115; 221 NW 807

VI PAR. 5. HIGHWAY—ROAD

Highway traversing city street—highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 724

"Construction of highway." Subgrading a street preparatory to putting down curbing and guttering constitutes "construction of a highway improvement," within the meaning of §11042, C., '27, and the contractor is suable by the subcontractor in any county where the contract is made or performed, irrespective of the residence of the defendant.

Goben v Akin, 208-1354; 227 NW 400

VII PAR. 6. INSANE

Adjudication of insanity — nonretroactive presumption. An adjudication of insanity creates no presumption that the person in question was insane at any particular period of time prior to said adjudication.

Davidson v Piper, 221-171; 265 NW 107

VIII PAR. 7. ISSUE

Wills—construction—"heirs"—inaccurate use of term—intent controls. A testamentary provision that testator's "heirs" shall participate in a specified trust fund will be deemed to include a granddaughter, even tho under the then existing circumstances she is not, technically, an heir, it appearing that testator had in other parts of his will listed his heirs and had therein included his said granddaughter.

Slavens v Bailey, 222-1091; 270 NW 367

IX PAR. 8. LAND—REAL ESTATE

No annotations in this volume

X PAR. 9. PERSONAL PROPERTY

"Property" defined. The term "property" embraces both personal and real property unless the contrary is shown; similarly the term "property owners" embraces the owners of personal as well as real property.

Groenendyke v Fowler, 204-598; 215 NW 718

Real estate and personalty distinguished. Principle reaffirmed that upon the sale of land through the medium of a contract for a deed, the purchaser acquires "land" while the vendor acquires "personal property."

Wood v Schwartz, 212-462; 236 NW 491

Matured crops. Principle reaffirmed that matured corn, standing in the field, is personal property and therefore subject to conversion.

Durflinger v Heaton, 219-528; 258 NW 543

XI PAR. 10. PROPERTY

Municipal corporations—telephone franchise —"property owners" defined. The term "property owners" in the statute relative to calling elections for the purpose of voting on the granting of telephone and other franchises (§5905, C., '24), embraces owners of personal property, as well as owners of real property.

Groenendyke v Fowler, 204-598; 215 NW 718

Judgment as property. A judgment is "property" within the purview of this section, and gives jurisdiction to the district court of the county in which the judgment is entered to appoint an administrator of the deceased judgment creditor's estate.

Edwards v Popham, 206-149; 220 NW 16

XII PAR. 11. MONTH—YEAR—A.D.

Limitation of rent lien—computation of six-months period. In computing the six months during which a landlord's lien survives the expiration of the lease, the count must commence with the first day following the said expiration. The statutory rule to exclude the first day and to include the last day has no application.

Welch v Welch, 212-1245; 238 NW 81

Statutes—time of taking effect—act of special session. Acts of a special session of the general assembly, in the absence of any contrary direction therein, take effect 90 days after final adjournment, the time being computed on the basis of excluding the day of adjournment and including the 90th day.

Clingingsmith v Jackson Dairy, 202-773; 211 NW 413

XIII PAR. 13. PERSON

"Person"—municipality not included. The statutory provision that in the construction of statutes "the word person may be extended to bodies corporate" does not embrace political subdivisions of the state.

Julander v Reynolds, 206-1115; 221 NW 807

XIV PAR. 16. TOWN

Constitutional law—classification of municipalities by population. Assuming that a supportable reason exists for classifying on the basis of population, a statute applicable to cities "now or hereafter having a population of" a named number, cannot be deemed "a local or special law" even tho when enacted it can apply to only one city, and even tho the creation of the official machinery for putting the act into effect in cities thereafter attaining said population is only implied.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Constitutional law—privileges and immunities and class legislation. The general assembly may constitutionally make a law applicable to cities having a certain population and not applicable to cities having a lesser population, provided the subject matter of the law suggests some reasonable necessity for said distinction. So held in sustaining the constitutionality of an act providing for the government and management of municipal parks by a park board of 10 members.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

XV PAR. 19. SHERIFF

Original notice—service—return by deputy. When service of an original notice is made by a deputy sheriff, the return is all-sufficient when made in the name of the sheriff by the deputy in his name.

Thompson Bros. v Phillips, 198-1064; 200 NW 727

XVI PAR. 20. DEED—BOND—INDENTURE—UNDERTAKING

Construction and operation of contract for deed. Principles reaffirmed that under a contract for a deed:

1. The purchaser acquires the full equitable title to the land, while the vendor continues to hold the legal title as security for the performance of the contract, and
2. That, for the purpose of foreclosure, the purchaser will be deemed a mortgagor and the vendor a mortgagee.

Junkin v McClain, 221-1084; 265 NW 362

Motor carrier's bond to pay taxes "incurred"—scope. A bond, (1) reciting that the principal therein had been licensed as a motor carrier under named statutes of the state, and (2) conditioned to pay "the taxes and penalties incurred" under said statutes—a positive liability—embraces liability to pay taxes and penalties incurred before, as well as after, the date of said bond.

Board v U.S.F. & G. Co., 221-880; 266 NW 501

XVII PAR. 21. EXECUTOR—ADMINISTRATOR

Special and general administrators. The fact that, in a will contest, verdict has been returned and judgment entered thereon to the effect that the alleged will in question is not a valid will, does not, in and of itself, legally justify the court in terminating an existing special administratorship and in appointing a general administrator. Said latter appointment would probably be void.

In re Whitehouse, 223-91; 272 NW 110

Executor and executor de son tort. A legatee of a strictly personal property, debt-free estate, who, with the approval of all other legatees, distributes the entire estate in strict accord with the will of the testator, is thereafter under no obligation to account to a subsequently appointed executor who does not question the correctness of her distribution. Especially is this true when such legatee offers to pay the cost of such unnecessary administration.

Davenport v Sandeman, 204-927; 216 NW 55

XVIII PAR. 22. NUMERALS—FIGURES

No annotations in this volume

XIX PAR. 23. COMPUTING TIME

Fractions of a day—when recognized. Principle recognized that the fiction, often encountered in the law, that a day is an individual period of time—that the law will not take cognizance of fractions of a day—is subject to many exceptions.

Thrasher v Haynes, 221-1137; 264 NW 915

Notice—insufficient publication. A notice of the hearing before the board of supervisors on a petition for the enrollment of a county under the county area eradication plan relating to bovine tuberculosis is a nullity when the last newspaper publication was on August 13th, and when the hearing was had on August 17th.

Phelps v Thornburg, 206-1150; 221 NW 835

Timely motion to set aside. Where judgment is entered in a municipal court on April 9th, a motion filed on April 19th following, to set aside the default, is timely.

Service System v Johns, 206-1164; 221 NW 777

Landlord's lien—computation of six months period. In computing the six months during which a landlord's lien survives the expiration of the lease, the count must commence with the first day following the said expiration. The statutory rule to exclude the first day and to include the last day has no application.

Welch v Welch, 212-1245; 238 NW 81

Acts of special session of legislature.

Clingingsmith v Dairy Co., 202-773; 211 NW 413

Danbury v Riedmiller, 208-879; 226 NW 159

Nugatory or ineffective amendments. The mortgage foreclosure redemption act (45 GA, ch 179), which became a law March 19, 1933, and which provided that "In any action * * * which has been commenced" for the foreclosure of a real estate mortgage, the court should, under named conditions, grant an extension of time in which to redeem from sale, manifestly, ex vi termini, had no application to mortgages executed on or after January 1, 1934. It follows that the later amendment (45 Ex. GA, ch 137) which specifically declared the inapplicability of said moratorium act to mortgages executed "on or after January 1, 1934" was nugatory—took naught from, and added naught to, said original moratorium act.

Metropolitan v Reeve, 222-255; 268 NW 531

Redemption from tax sale—law governing. The time in which redemption may be made from tax sale is absolutely governed by the law in force at the time of the sale. It follows that a legislative amendment shortening the redemption period cannot apply to pre-existing sales.

Lockie v Hammerstrom, 222-451; 269 NW 507

Verdict — scope of term — fatally delayed motion. A court-directed verdict (in a jury trial) is the verdict of the jury within the meaning of the statute limiting applications for new trial to five days "after the verdict is rendered" and the court has no jurisdiction to grant an application made after said time irrespective of the time when formal judgment was entered on the verdict. (Verdict rendered in 1916; judgment entered in 1930.)

Selby v McDonald, 219-823; 259 NW 485

Failure to file abstract—"second term" defined. The statutory provision that an appeal may be dismissed if the abstract is not filed "30 days before the second term" after the taking of the appeal, means "30 days before the second term at which the appeal can be submitted," in view of other provisions of the statute. (§§12847, 12848, C., '24.)

Mullenix v Bank, 201-137; 206 NW 670

XX PAR. 24. CONSANGUINITY AND AFFINITY

"Sister" contemplates "half-sister". The statute (§10445, C., '27) which declares void a marriage between a man and his sister's daughter, embraces a marriage between a man and his half-sister's daughter.

State v Lamb, 209-132; 227 NW 830

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

Administrator—next of kin—no degrees of nearness. "Next of kin", within the meaning of the statute regulating the preferential right to apply for administration, embraces those persons who take the personal property of the deceased; and there are no degrees of nearness in said class. For instance, the sister of the deceased has no necessarily preferential right over the niece of the deceased.

In re Wright, 210-25; 230 NW 552

Inheritable existence—criterion. An infant acquires existence capable of taking an inheritance only when it acquires an independent circulation of its blood after being fully separated from the body of the mother.

Wehrman v Farmers & M. Bank, 221-249; 259 NW 564; 266 NW 290

XXI PAR. 25. CLERK—CLERK'S OFFICE

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XXII PAR. 26. POPULATION

Census—when effective. A state census becomes effective only from and after the date of the official certificate of the secretary of state as to its correctness.

Broyles v Mahaska County, 213-345; 239 NW 1

64 Common-law rule of construction.

Additional annotations. See under §§63, 10002

Common-law restrictions. The common-law rule that statutes in derogation of the common law must be strictly construed has no application in this state.

Peterson v Freeburn, 204-644; 215 NW 746
In re Van Vechten, 218-229; 251 NW 729
Sullivan v Harris, 224-345; 276 NW 88

Statutory remedies not necessarily exclusive. A statutory remedy will not be construed as abrogating an existing common-law remedy unless the statute affirmatively indicates an intention to make the statutory remedy exclusive.

Jones v Knutson, 212-268; 234 NW 548

Attachment. Principle reaffirmed that proceedings in attachment are of statutory origin only, and in derogation of the common law.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Quasi-mechanic's lien statute. The statutes relative to materialmen and laborers on public improvements have always been strictly construed.

Aetna Cas. Co. v Kimball, 206-1251; 222 NW 31
Missouri Gravel v Surety Co., 212-1322; 237 NW 635

Tax statute—construed against taxing body. A proviso or exemption in a taxing statute in derogation of its general enacting clause must be strictly construed. However, as to contention that an income tax statute does not include out-of-state rent, not because of an exception, but by its terms, if open to construction at all, must fall within the general rule that tax statutes are construed strictly against the taxing body.

Palmer v Board, 226-92; 283 NW 415

Premises and enjoyment and use thereof—injury to tenant. The housing law (Ch 323, C., '31) providing that "Every dwelling and all the parts thereof shall be kept in good repair by the owner" (§6392, C., '31) does not change the common-law rule of tort liability of the lessor to the lessee.

Johnson v Carter, 218-587; 255 NW 864; 93 ALR 774

Insurance—bylaws and statutes in conflict—statute prevails. In an action to recover damages for loss by hail, bylaws of mutual hail insurance association which are inconsistent with statute relating to notice of cancellation must give way to statute.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Insurance—cancellation—statutory and contract provisions—construction. In an action on an insurance policy to recover damages for loss by hail, held, that statutory provisions for benefit of insured cannot be contracted away and terms of contract are only binding upon the insured if not contrary to applicable statutes. A policy is construed to give the insured his indemnity in questions of cancellation or forfeiture.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Highway traversing city street—highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 724

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Atty. Gen. Opinion. See '34 AG Op 291

73 Submission at special election.

Atty. Gen. Opinion. See '38 AG Op 87

75 Proclamation.

Atty. Gen. Opinion. See '38 AG Op 87

77.1 Action to test legality.

Discussion. See 17 ILR 250—Constitutionality challenged

Unallowable intervention. A taxpayer who is given the right to intervene in an action by joining (1) with the plaintiff, or (2) with the defendant, and in an attempted intervention does neither, has no standing in the action.

Mathews v Turner, 212-424; 236 NW 412

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84.04 State comptroller — salary — bond.

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State comptroller—money payable by appropriation only. State disbursing officer is bound by the constitutional provision that no money shall be drawn from the treasury but in consequence of appropriations made by law.

O'Connor v Murtagh, 225-782; 281 NW 455

Continuing appropriation statute—biennial appropriation paramount — mandamus. A statute, altho in the code because of its general and permanent nature, which sets the salary of the attorney general, a state officer, is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

Limitation on claims for unpaid salary. Claims for back salary for the attorney general, a state officer, must be made within six months after said salary was due.

O'Connor v Murtagh, 225-782; 281 NW 455

Deposits—payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

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84.13 Claims—limitations.

Atty. Gen. Opinions. See AG Op March 22, '39, April 20, '39

Limitation on claims for unpaid salary. Claims for back salary for the attorney general, a state officer, must be made within six months after said salary was due.

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Atty. Gen. Opinion. See '38 AG Op 143

94 When patents issued.

Patents—collateral attack. The issuance by the state of a patent to lands is an assertion of the existence of the property conveyed; and such patent is immune from attack in a collateral proceeding.

Meeker v Kautz, 213-370; 239 NW 27

96 Maps — field notes — records — papers.

Atty. Gen. Opinion. See '38 AG Op 143

99 Lists of federal granted lands.

Invalid reservation in land grant. Principle reaffirmed that the insertion in a patent issued by the federal government under a public improvement grant of a clause "excepting and reserving all mineral lands", is, in the absence of fraud, a nullity even tho the grant itself did except mineral lands.

Herman v Engstrom, 204-341; 214 NW 588

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Atty. Gen. Opinions. See '36 AG Op 6; '38 AG Op 117

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101.4 Report of audits.

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113 Examination of counties.

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114 State examiners.

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Atty. Gen. Opinions. See '25-26 AG Op 165; '34 AG Op 518; '38 AG Op 117

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120 Reports.

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125 Bills—audit and payment.

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130.3 Title of act.

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Continuing appropriation statute—biennial appropriation paramount—mandamus. A statute, altho in the code because of its general and permanent nature, which sets the salary of a state officer is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

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New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

134 Receipts.

Atty. Gen. Opinion. See '38 AG Op 31

135 Payment.

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142 Restoration of cash balance.

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143 Deposits by state officers.

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144 Statement itemized.

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145 Comptroller and treasurer to keep account.

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Continuing appropriation statute—biennial appropriation paramount. A statute, altho in the code because of its general and permanent nature, which sets the salary of a state officer is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

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149 Duties.

Atty. Gen. Opinions. See '36 AG Op 508; '38 AG Op 300, 780

Appeal—attorney general as "adverse party". A liquidator (or receiver) was appointed in a foreign state to liquidate an insolvent insurance company chartered in said state, and doing business in Iowa. The attorney general of Iowa, in his official capacity, at once instituted ancillary receivership proceedings in Iowa, and, in time, certain claims were duly allowed, in said ancillary proceedings, in favor of creditors of the insolvent. The Iowa court later ruled, on intervention by the foreign liquidator, that funds in the hands of the ancillary receiver should be retained by him and distributed under the ancillary receivership.

Held, an appeal by the foreign liquidator from said latter ruling imperatively necessitated service of notice of appeal on the attorney general or on his successor in office.

State v Sur. Co., 223-558; 273 NW 129

Cy pres doctrine invoked by state in equity court. A public charity, created by trust, about to fail, is properly represented in court

of equity to invoke jurisdiction to apply cy pres doctrine by the state or some authorized agency thereof.

Schell v Leander Clark College, 10 F 2d, 542

Writ of prohibition—state as plaintiff. An original action in the supreme court, for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; especially is this true when said private actions arose out of proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Gross premiums tax—attorney general's opinion—not precedent. Attorney general's opinion that payment of gross premiums tax is "condition precedent to a foreign corporation's obtaining any recognition" is not precedent binding on supreme court.

State v Ins. Co., 223-1301; 275 NW 26

152 Special counsel.

Atty. Gen. Opinions. See '34 AG Op 478; '36 AG Op 393, 398; '38 AG Op 891

153.1 Salary.

Atty. Gen. Opinion. See '34 AG Op 54

Continuing appropriation statute—biennial appropriation paramount—mandamus. A statute, altho in the code because of its general and permanent nature, which sets the salary of the attorney general, a state officer, is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

Limitation on claims for unpaid salary. Claims for back salary for the attorney general, a state officer, must be made within six months after said salary was due.

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Rains v Bank, 201-140; 206 NW 821
See Dayton v Ins. Co., 202-753; 210 NW 945

Code editor's catchwords—no part of law. Code section catchwords, prepared by code editor, are no part of the law.

State v Chenoweth, 226-217; 284 NW 110

Catchwords — noneffect on interpretation. The act of placing a section under a particular chapter of the code and the wording of the headings of the section, have little, if any, weight as official interpretations.

State v Oge, 227-1094; 290 NW 1

169 Editorial work.

Atty. Gen. Opinion. See '38 AG Op 360

Division of sections—effect. The mere act of dividing an existing section of law and printing its parts in the code as separate sections works no change in the meaning of the law. So held as to §4840, C., '97.

State v Gardiner, 205-30; 215 NW 758

Editorial arrangement changes no law. A mere rearrangement of statutes in code revision, or dividing one section into several sections, does not without legislative intention change the purpose, operation, and effect thereof.

Jones v Mills Co., 224-1375; 279 NW 96

170 Future codes.

Atty. Gen. Opinions. See '36 AG Op 346; AG Op Feb. 28, '40

171 Preparation.

Sections—placement—noneffect on interpretation. The act of placing a section under a particular chapter of the code and the wording of the headings of the section, have little, if any, weight as official interpretations.

State v Oge, 227-1094; 290 NW 1

175 Official statutes.

Atty. Gen. Opinion. See '38 AG Op 360

CHAPTER 14

STATE PRINTING BOARD

180 Financial interest.

Atty. Gen. Opinions. See '36 AG Op 660; '38 AG Op 16

183 Duties.

Atty. Gen. Opinions. See '28 AG Op 376; '34 AG Op 649; '38 AG Op 16; AG Op April 3, '39

184 Printing defined.

Atty. Gen. Opinion. See '34 AG Op 594

205 Contracts by institutional heads.

Atty. Gen. Opinion. See '38 AG Op 16

CHAPTER 15

SUPERINTENDENT OF PRINTING

213 Appointment.

Atty. Gen. Opinion. See '38 AG Op 16

215 Duties.

Atty. Gen. Opinion. See '38 AG Op 16

236 Purchase by municipalities — accounting.

Atty. Gen. Opinion. See '28 AG Op 96

237 Old codes—free distribution.

Atty. Gen. Opinion. See '36 AG Op 368

238.1 Code—session laws.

Atty. Gen. Opinions. See '28 AG Op 156; '30 AG Op 129; '36 AG Op 368

CHAPTER 17

CUSTODIAN OF PUBLIC BUILDINGS

272 Appointment and tenure.

Atty. Gen. Opinion. See '25-26 AG Op 141

Yardman at state capitol. An honorably discharged veteran of the war with Germany, appointed for no stated time to the position of "yard man" on the statehouse grounds, is not removable by the executive council except on duly preferred charges of incompetency or misconduct, he not being a deputy of the state custodian of public grounds, tho working under the supervision of said latter officer, and his "term" not expiring on the legal removal of said custodian.

Statter v Herring, 217-410; 251 NW 715

273 Duties.

Employees—power to discharge. The custodian of public buildings and grounds (at the seat of government) must, in view of this section, be deemed vested with the sole authority legally to discharge the employees of said department, no statute to the contrary appearing; especially is this true when other legislation, tho it has expired ex vi termini, clearly demonstrates such to have been the intent of the general assembly.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari to review discharge of state employee. The custodian of public buildings and grounds (at Des Moines) is the sole, proper defendant in an action of certiorari to review the legality, under the soldiers preference act, of the discharge of an employee of said department.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari—dismissal re custodian—res judicata. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

275 Interest in contracts.

Atty. Gen. Opinion. See '36 AG Op 660

CHAPTER 18

EXECUTIVE COUNCIL

276 Membership.

Certiorari—dismissing party defendant. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari—reinstatement of discharged employee—unallowable order. The court, in certiorari, is manifestly without authority to order the state executive council to reinstate, in a department of the state government, a discharged state employee, when said council has no legal authority to employ or discharge employees in said department.

Pittington v Herring, 220-1375; 264 NW 712

286 Contingent fund.

Atty. Gen. Opinions. See '34 AG Op 682, 704; '38 AG Op 38

287 Anticipation of revenues.

Atty. Gen. Opinions. See '34 AG Op 631; '36 AG Op 71

288 Compromise of claims.

Atty. Gen. Opinions. See '38 AG Op 558, 902; AG Op Oct. 11, '39; AG Op Apr. 23, '40

290 Report of unexpended balances.

Atty. Gen. Opinions. See '28 AG Op 162; '38 AG Op 130; AG Op Feb. 14, '40

291 Notice to transfer balance.

Atty. Gen. Opinions. See '28 AG Op 162; '38 AG Op 130; AG Op Feb. 14, '40

292 Order of transfer.

Atty. Gen. Opinions. See '38 AG Op 130; AG Op Feb. 14, '40

293 Duty to transfer.

Atty. Gen. Opinions. See '28 AG Op 162; '38 AG Op 130; AG Op Feb. 14, '40

294 Exception.

Atty. Gen. Opinions. See '28 AG Op 162, '30 AG Op 75; '38 AG Op 130; AG Op Feb. 14, '40

295 Assignment of rooms.

Atty. Gen. Opinions. See '30 AG Op 102; '36 AG Op 694

296 Repairs—supplies.

Atty. Gen. Opinions. See '36 AG Op 139, 399; AG Op Feb. 9, '39

297 Advertisement for bids.

Atty. Gen. Opinion. See '38 AG Op 38

300 Sale of state property.

Atty. Gen. Opinion. See '36 AG Op 139

302 Officers entitled to supplies.

Atty. Gen. Opinions. See '34 AG Op 615; '36 AG Op 220

303 Postage.

Atty. Gen. Opinions. See '34 AG Op 592, 713, 747; '36 AG Op 474; AG Op March 3, '39

306 Performance of duty—expense.

Atty. Gen. Opinions. See '30 AG Op 101, '34 AG Op 299; '36 AG Op 1, 694

307 Necessary record.

Atty. Gen. Opinions. See '34 AG Op 299; '36 AG Op 1, 694

CHAPTER 18.1

DISPATCHER OF STATE AUTOMOBILES

308.1 Authority in governor.

Atty. Gen. Opinion. See AG Op Sept. 11, '39

308.5 Private use—rate for state business.

Atty. Gen. Opinion. See AG Op Sept. 7, '39

CHAPTER 23

PUBLIC CONTRACTS AND BONDS

351 Terms defined.

Atty. Gen. Opinions. See '25-26 AG Op 61, 110; '28 AG Op 330, 378; '38 AG Op 838

School property—assessability. A school district having lots assessable under a city contract for paving and curbing cannot be deemed a "municipality" entering "into a contract" within the meaning of the state budget law (Ch 23, C., '31). In such circumstances, the district is simply a property owner.

Schumacher v City, 214-34; 239 NW 71

352 Notice of hearing.

Atty. Gen. Opinions. See '25-26 AG Op 61, 105, 119, 386; '28 AG Op 190, 330, 378; '34 AG Op 365; '38 AG Op 731

Inapplicability of budget act. This section has no application to a contract entered into by a city for street grading on a per diem basis and under a contract legally terminable by the council at any time, even tho the per diem compensation ultimately exceeds $5,000.

Carlson v City, 212-373; 236 NW 421

Public improvements — nonjurisdiction of budget director. A contract for street improvement, e. g., paving and curbing, to be paid for by special assessments, is entirely outside the purview and purpose of this section.

Schumacher v City, 214-34; 239 NW 71

School property — assessability. A school district having lots assessable under a city contract for paving and curbing cannot be deemed a "municipality" entering "into a contract" within the meaning of this section. In such circumstances, the district is simply a property owner.

Schumacher v City, 214-34; 239 NW 71

353 Objections—hearing—decision.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119, 386; '28 AG Op 378

354 Appeal—limitation.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119, 386; '28 AG Op 378

Fatally defective service. Appeal to the director of the budget from the action of the city council in overruling objections to a proposal for paving is not effected by simply delivering to the city clerk a notice which purports to be a copy of an unproduced original, but which was not such copy, in that only twenty-four of the twenty-seven signatures affixed to the original were affixed to the notice served; and this is true even tho the city appears, and moves to dismiss the appeal.

Casey (Town) v Hogue, 204-3; 214 NW 729

357 Hearing and decision.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119, 480; '30 AG Op 69, 129; '38 AG Op 38

Advertisement for bids—irregular compliance with mandatory duty. The irregularity of municipal authorities in advertising for, receiving, and opening bids for the construction of a municipal light and power plant before instead of after the director of the budget had, on appeal, overruled objections to the plans, specifications, and proposed form of contract, does not invalidate the contract entered into after said ruling and specifically approved by said director. But the duty to "advertise for bids" is mandatory in case an appeal is taken to the budget director.

Johnson v Town, 215-1033; 247 NW 552

Competitive bidding—unallowable contract. When a contract for the construction of a proposed public improvement is required by statute to be let on competitive bids, such contract cannot be legally entered into on the basis and in accordance with a bid which fails in any material respect to respond to the proposal for bids. Held, contract illegal because based on, and in accordance with, a bid which failed to respond to the legal proposals:

1. In re time of commencing and completing the work, and
2. In re testing the improvement as a condition to acceptance.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

358 Enforcement of performance.

Atty. Gen. Opinions. See '25-26 AG Op 61, 121, 400

359 Nonapproved contracts void.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119

361 Witness fees—costs.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119

363 Issuance of bonds—notice.

Atty. Gen. Opinions. See '25-26 AG Op 61, 386; '30 AG Op 353, 372; '34 AG Op 365; '38 AG Op 838

364 Objections.

Atty. Gen. Opinions. See '25-26 AG Op 61, 485; '38 AG Op 838

365 Notice of hearing.

Atty. Gen. Opinions. See '25-26 AG Op 61, 485; '38 AG Op 838

366 Decision.

Atty. Gen. Opinion. See '38 AG Op 838

CHAPTER 24

LOCAL BUDGET LAW

368 Short title.

Incongruous matter. A title which gives notice of the creation of the office of state budget director and provides for a state and local budget, for the examination of public accounts, and for review of public contracts and bonds, is not broad enough to justify the inclusion of a provision creating a new fund and power in local municipalities to levy a tax for such fund.

Chi. RI Ry. v Streepy, 207-851; 224 NW 41

369 Definition of terms.

Atty. Gen. Opinions. See '25-26 AG Op 49, 74, 386; '30 AG Op 320; '38 AG Op 96; AG Op April 12, '39

370 Requirements of local budget.

Atty. Gen. Opinions. See '25-26 AG Op 37; '36 AG Op 231; '38 AG Op 21

School district vs. state appeal board—action where school district located—propriety. An action against the state appeal board to review its rulings affecting a school district under the local budget law is properly brought in the county where the school district was located and where proceedings on the levy involved were held from which resulted the board's ruling.

Board v Dist. Court, 225-296; 280 NW 525

School fund estimates under local budget law omitting money on hand—taxes valid—no refund. School districts, in submitting their budgets for their fiscal year beginning July first, are not required to include money on hand derived from taxes levied and estimated two years before and collected a year later to be expended during the current school year, and taxes collected accordingly will not be refunded in a mandamus action.

Lowden v Woods, 226-425; 284 NW 155

Budget—inviolability. After the due adoption and entry by a city council of a financial budget for an ensuing year, on the basis of estimated receipts from (1) taxable sources, and (2) nontaxable sources, the council may not later, in its appropriating ordinance, legally increase the municipal expenditures for said year by the simple expedient of revising and increasing its former estimated receipts from nontaxable sources.

Clark v Des Moines, 222-317; 267 NW 97

372 Estimates itemized.

Atty. Gen. Opinion. See '25-26 AG Op 199

373 Emergency fund—levy.

Atty. Gen. Opinions. See '25-26 AG Op 37, 74, 89, 245, 247, 373, 444, 468; '28 AG Op 36, 134; '34 AG Op 242; '38 AG Op 21

Legalization of invalid tax. The legislature may validly legalize a levy of taxes made under a supposedly legal statute but which was invalid because its title was constitutionally insufficient. (See also Const., Art. I, §21; Art. III, §30)

Chicago, RI Ry. v Rosenbaum, 212-227; 231 NW 646

Legalizing tax levy after invalidating ruling by court. A legislative act which legalizes a tax levy after the appellate court has ruled (but before entry of judgment) that the taxpayer is entitled to a refund of the tax paid, because the tax levy was void, owing to the absence of an authorizing statute, neither disturbs any vested interest of the taxpayer's nor constitutes an unconstitutional interference with the judiciary.

Chi. RI Ry. v Streepy, 211-1334; 236 NW 24

373.1 Supplemental estimates.

Atty. Gen. Opinions. See '28 AG Op 134; '32 AG Op 33, 262

374 Estimated tax collections.

Atty. Gen. Opinions. See '28 AG Op 134; '36 AG Op 231

375 Filing estimates—notice of hearing.

Atty. Gen. Opinions. See '25-26 AG Op 119, 193; '28 AG Op 134; '32 AG Op 33, 115, 262; '38 AG Op 19, 21

377 Meeting for review.

Atty. Gen. Opinion. See '38 AG Op 21

378 Record by certifying board.

School fund estimates under local budget law omitting money on hand—taxes valid—no refund. School districts, in submitting their budgets for their fiscal year beginning July first, are not required to include money on hand derived from taxes levied and estimated two years before and collected a year later to be expended during the current school year, and taxes collected accordingly will not be refunded in a mandamus action.

Lowden v Woods, 226-425; 284 NW 155

380 Tax limited.

Atty. Gen. Opinions. See '25-26 AG Op 37, 72, 74, 247, 373, 468; '28 AG Op 336; '34 AG Op 59, 242; '36 AG Op 355; '38 AG Op 19, 21; AG Op May 19, '39, Sept. 25, '39, Oct. 25, '39

Taxation—source of power. The power of a city to tax is strictly statutory—never implied.

Clark v Des Moines, 222-317; 267 NW 97

Budget — inviolability of. After the due adoption and entry by a city council of a financial budget for an ensuing year, on the basis of estimated receipts from (1) taxable sources, and (2) nontaxable sources, the council may not later, in its appropriating ordinance, legally increase the municipal expenditures for said year by the simple expedient of revising and increasing its former estimated receipts from nontaxable sources.

Clark v Des Moines, 222-317; 267 NW 97

381 Further tax limitation.

Atty. Gen. Opinions. See '25-26 AG Op 37, 74, 112, 247, 373, 468; '28 AG Op 336; '32 AG Op 262; '34 AG Op 242; '38 AG Op 20

383 Budgets certified.

Atty. Gen. Opinions. See '25-26 AG Op 116, 193

387 Transfer of inactive funds.

Atty. Gen. Opinions. See '25-26 AG Op 64, 119, 173, 377, 471; '28 AG Op 210, 441; '38 AG Op 96

388 Transfer of active funds — poor fund.

Atty. Gen. Opinions. See '25-26 AG Op 64, 112, 173, 230, 377, 428, 471; '28 AG Op 106, 210, 336; '34 AG Op 708; '36 AG Op 654; '38 AG Op 721; AG Op Sept. 25,'39

Budget act—nondelegation of legislative authority. The broad, sweeping, and apparently unguarded discretion granted by statute to the director of the budget (now state comptroller) to grant or refuse permission to a municipality to make a transfer of its funds, does not constitute an unconstitutional grant of legislative power.

State v Manning, 220-525; 259 NW 213

Arbitrary administration. An act will not be held unconstitutional because of the possibility that the administering officer will, by arbitrary administration, give the act a nonuniform operation.

State v Manning, 220-525; 259 NW 213

Removal of officer—proof of evil design—when not required. In an action to remove a public official from office, the principle that a corrupt or evil design or purpose must be shown under a charge of "wilful misconduct or maladministration in office", does not apply when the official is charged with the violation of a statute which specifically declares that such violation shall be sufficient ground for removal from office.

State v Manning, 220-525; 259 NW 213

389 Supervisory power of state board.

Atty. Gen. Opinion. See '25-26 AG Op 471

Appeal from local budget—statute directory as to time. The statutory requirement, that the state appeal board in ruling on local budget matters shall render final disposition of all appeals by October 15th of each year, should be obeyed. However, being directory rather than mandatory in its nature, a mere delay of a few days will not invalidate the action of the board or defeat the purposes sought to be obtained.

Woodbury Conference v Carr, 226-204; 284 NW 122

Collateral attack on budget appeal board—illegality on face of petition necessary—certiorari proper remedy. A suit in mandamus, to compel the county auditor to ignore the decision of the state board of appeal in local budget matters on the ground that such decision was made after the board had ceased to exist, is a collateral attack on the board's action—certiorari being the method for a direct attack; and if the mandamus suit is dismissed by the lower court, the supreme court, on appeal, will determine, only, if the acts of the board show on their face by their dates alone that they were illegal acts because the board had ceased to exist as such.

Woodbury Conference v Carr, 226-204; 284 NW 122

Appeal board—decisions modified. The state appeal board has power to modify its decisions.

Woodbury Conference v Carr, 226-204; 284 NW 122

390 Violations.

Atty. Gen. Opinion. See '34 AG Op 277

Removal—proof of evil design. In an action to remove a public official from office, the principle that a corrupt or evil design or purpose must be shown under a charge of "willful misconduct or maladministration in office" does not apply when the official is charged with the violation of a statute which specifically declares that such violation shall be sufficient ground for removal from office.

State v Manning, 220-525; 259 NW 213

390.1 State appeal board.

Suing state appeal board—ruling on venue—appeal sole remedy. Certiorari will not lie to review the action of the trial court in overruling a motion by the state appeal board for a change of venue of a trial questioning a decision of such board.

Board v Dist. Court, 225-296; 280 NW 525

390.7 Decision certified to county.

Appeal from local budget—statute directory as to time. The statutory requirement, that the state appeal board in ruling on local budget matters shall render final disposition of all appeals by October 15th of each year, should be obeyed. However, being directory rather than mandatory in its nature, a mere delay of a few days will not invalidate the action of the board or defeat the purposes sought to be obtained.

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Collateral attack on budget appeal board—illegality on face of petition necessary—certiorari proper remedy. A suit in mandamus, to compel the county auditor to ignore the decision of the state board of appeal in local budget matters on the ground that such decision was made after the board had ceased to exist, is a collateral attack on the board's action—certiorari being the method for a direct attack; and if the mandamus suit is dismissed by the lower court, the supreme court, on appeal, will determine, only, if the acts of the board show on their face by their dates alone that they were illegal acts because the board had ceased to exist as such.

Woodbury Conference v Carr, 226-204; 284 NW 122

Appeal board—decisions modified. The state appeal board has power to modify its decisions.

Woodbury Conference v Carr, 226-204; 284 NW 122

CHAPTER 26

CENSUS

425 Federal census.

Atty. Gen. Opinion. See AG Op Nov. 13, '39

426 Publication.

Atty. Gen. Opinion. See '25-26 AG Op 264

429 Population of counties, cities and towns.

Atty. Gen. Opinions. See '25-26 AG Op 83, 264

When effective. A state census becomes effective only from and after the date of the official certificate of the secretary of state as to its correctness.

Broyles v County, 213-345; 239 NW 1

CHAPTER 27

DEPUTIES OF STATE OFFICERS

431 Deputy to qualify.

Atty. Gen. Opinion. See '36 AG Op 612

TITLE III

MILITARY CODE AND RELATED MATTERS

CHAPTER 28.1

MILITARY CODE

467.01 Military forces.

Discussion. See 17 ILR 40—Martial law

467.17 Bonds of officers.

Atty. Gen. Opinions. See '25-26 AG Op 457; '36 AG Op 484

467.21 Compensation for services, death, and injury.

Atty. Gen. Opinions. See '25-26 AG Op 210; '36 AG Op 619

467.24 Exemptions.

Atty. Gen. Opinion. See '30 AG Op 274

467.25 State and municipal officers and employees not to lose pay while on duty.

Atty. Gen. Opinions. See '36 AG Op 292, 619; AG Op May 18, '39

467.28 Governor may order out troops.

Atty. Gen. Opinion. See '36 AG Op 619

Officers—civil liability. Civil liability of officers of the militia and their agents in putting down, under orders of the governor, an insurrection, discussed.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

467.29 Aid to civil authorities.

Atty. Gen. Opinion. See '36 AG Op 619

467.31 Compensation and expenses of national guard.

Atty. Gen. Opinion. See '36 AG Op 619

467.39 Not liable for acts performed under orders.

Civil liability. Civil liability of officers of the militia and their agents in putting down, under orders of the governor, an insurrection, discussed.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

467.50 Tax exemptions of armories—use of public utilities.

Atty. Gen. Opinion. See '38 AG Op 187

467.53 Training.

Atty. Gen. Opinion. See '36 AG Op 619

467.60 Call by president—term of service.

Discussion. See 4 ILB 122—Constitutionality of Conscription Act

Atty. Gen. Opinion. See '36 AG Op 619

CHAPTER 30

DESECRATION OF FLAG

Atty. Gen. Opinion. See '34 AG Op 272

CHAPTER 32

PENSIONS

Atty. Gen. Opinion. See '28 AG Op 294

CHAPTER 32.1

BONUS BOARD

482.02 Investment of bonus and disability fund.

Atty. Gen. Opinions. See '34 AG Op 410, 754

482.03 Choice of securities.

Atty. Gen. Opinion. See '34 AG Op 754

CHAPTER 33

MEMORIAL HALLS AND MONUMENTS FOR SOLDIERS, SAILORS, AND MARINES

Atty. Gen. Opinions. See '28 AG Op 263; '30 AG Op 231; '36 AG Op 434

TITLE IV

ELECTIONS AND OFFICERS

CHAPTER 35

TIME OF ELECTION AND TERM OF OFFICE

504 General election.

Right of suffrage. See under Const Art II
Time of holding election. See Amendments of 1904, No. 1

506 Proclamation concerning election.

Atty. Gen. Opinion. See '38 AG Op 87

507 Proclamation concerning revision of constitution.

Atty. Gen. Opinion. See '38 AG Op 87

509 Notice of special election.

Atty. Gen. Opinion. See '34 AG Op 68

511 Term of office.

Atty. Gen. Opinions. See '34 AG Op 54, 69; '38 AG Op 12, 896

Expiration of official term. An appeal in an action in which the county is the real party in interest will not be dismissed because the terms of office of the official party defendants have expired.

First N. Bank v Burke, 201-994; 196 NW 287

512 State officers—term.

Atty. Gen. Opinion. See '28 AG Op 43

518 State senators.

Discussion. See 24 ILR 673—Tenure and turnover

520 County officers.

Atty. Gen. Opinions. See '34 AG Op 69; '38 AG Op 12, 777

521 Board of supervisors and township trustees.

Atty. Gen. Opinions. See '34 AG Op 69; '38 AG Op, 679, 777

522 Board of supervisors—limitation.

Atty. Gen. Opinions. See '32 AG Op 214, 221

523 Justices and constables.

Atty. Gen. Opinions. See '25-26 AG Op 312; '36 AG Op 313; AG Op Jan. 16, '39

523.1 Township trustees—manner of election.

Atty. Gen. Opinions. See '28 AG Op 299; '38 AG Op 498

525 Township assessor.

Atty. Gen. Opinions. See '25-26 AG Op 313; '38 AG Op 136

CHAPTER 35.1

CONGRESSIONAL DISTRICTS

526.1 Districts designated.

Discussion. See 17 ILR 390—Re-apportionment of legislative districts

CHAPTER 36

NOMINATIONS BY PRIMARY ELECTION

527 "Primary election" defined.
Atty. Gen. Opinion. See '38 AG Op 804

528 "Political party" defined.
Atty. Gen. Opinions. See '34 AG Op 669; '38 AG Op 758, 804; AG Op March 27, '40

529 Offices affected by primary.
Atty. Gen. Opinion. See '25-26 AG Op 280

531 Applicable statutes.
Atty. Gen. Opinions. See '38 AG Op 659, 736, 823

537 Filing of nomination papers.
Atty. Gen. Opinions. See '30 AG Op 313; '34 AG Op 535

539 Failure to file nomination papers.
Atty. Gen. Opinion. See '30 AG Op 313

542 Withdrawals and additions not allowed.
Atty. Gen. Opinions. See '25-26 AG Op 346; '34 AG Op 534

543 Affidavit to nomination papers.
Atty. Gen. Opinions. See '30 AG Op 313; '32 AG Op 197

544 Affidavit by candidate.
Atty. Gen. Opinions. See '25-26 AG Op 346; '30 AG Op 313; '34 AG Op 535

545 Manner of filing affidavit.
Atty. Gen Opinion. See '34 AG Op 535

546 Signatures required.
Atty. Gen. Opinions. See '32 AG Op 181; '34 AG Op 505, 512

547 Township or precinct office.
Atty. Gen. Opinion. See '28 AG Op 357

548 Nominations certified.
Atty. Gen. Opinion. See '34 AG Op 534

550 Notice of election.
Atty. Gen. Opinion. See '38 AG Op 87

551 Publication of notice.
Atty. Gen. Opinion. See '34 AG Op 552

553 Ballot—form.
Atty. Gen. Opinions. See '30 AG Op 165; '34 AG Op 718

556 Names of candidates—arrangement.
Atty. Gen. Opinion. See '30 AG Op 313

557 Township or district candidates.
Atty. Gen. Opinions. See '28 AG Op 417; '30 AG Op 313

559 Judges and clerks.
Atty. Gen. Opinion. See '38 AG Op 758

563 Designating party affiliation.
Atty. Gen. Opinion. See '30 AG Op 296

566 Voter confined to party ticket.
Atty. Gen. Opinion. See AG Op Apr. 23, '40

568 Records of party affiliation.
Atty. Gen. Opinions. See '34 AG Op 463; AG Op Apr. 23, '40

569 Change of party affiliation.
Atty. Gen. Opinion. See '34 AG Op 509

570 New voters.
Atty. Gen. Opinion. See AG Op Apr. 23, '40

572 Change of affiliation.
Atty. Gen. Opinions. See '34 AG Op 509; '38 AG Op 764

580 Who nominated for county office.
Atty. Gen. Opinion. See '36 AG Op 467

581 Who nominated for township office.
Atty. Gen. Opinions. See '30 AG Op 347, 363; '36 AG Op 467; AG Op May 2, '40

582 Right to place on ballot.
Atty. Gen. Opinion. See '36 AG Op 467

585 Showing must be specific.
Atty. Gen. Opinion. See '30 AG Op 319

586 Recount granted.
Atty. Gen. Opinion. See '30 AG Op 319

592 State canvass conclusive.

Effect of conclusiveness. The fact that the state canvass of primary election returns is final and conclusive has no relevancy to the question whether a convention had the right to make a nomination for an office for which concededly no nomination was made at the primary.

Zellmer v Smith, 206-725; 221 NW 220

593 Who nominated.
Atty. Gen. Opinion. See '32 AG Op 236

594 Minimum requirement for nomination.
Atty. Gen. Opinion. See '32 AG Op 236

Right of convention to nominate. The county convention of a political party may legally make a nomination for an office when no candidate of said party for said office had his name printed on the primary ballot of said party, and when the "written in" names at said primary election for said office did not effect a nomination because the candidate receiving a majority of the votes cast did not receive a vote equal to the 10 percent required by statute.

Zellmer v Smith, 206-725; 221 NW 220

598 Delivery of certificates.

Presumption. It will be presumed, in the absence of a showing to the contrary, that the state board of canvassers has duly performed its duty to certify the result of a primary election to the various chairmen of political parties.

Zellmer v Smith, 206-725; 221 NW 220

601 Secretary of state to certify nominees.

Mandamus. Mandamus will lie to compel the secretary of state to certify a legal nomination to the county auditor.

Zellmer v Smith, 206-725; 221 NW 220

604 Vacancies in nominations prior to convention.

Atty. Gen. Opinions. See '38 AG Op 804, 844

605 Failure of convention to fill.

Atty. Gen. Opinions. See '38 AG Op 804, 844

606 Vacancies in nominations subsequent to convention.

Atty. Gen. Opinions. See '28 AG Op 411; '38 AG Op 804

607 Vacancies in nomination of United States senator.

Atty. Gen. Opinions. See '25-26 AG Op 413; '38 AG Op 804

608 Vacancies in office prior to convention.

Atty. Gen. Opinion. See '38 AG Op 804

609 Vacancies in office subsequent to convention—United States senator.

Atty. Gen. Opinions. See '25-26 AG Op 413; '38 AG Op 804, 844

Statutes—construction and operation—elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

610 Vacancies in office of congressman or state senator.

Atty. Gen. Opinions. See '28 AG Op 55; '34 AG Op 68; '38 AG Op 804

611 Vacancies in office of state senator or representative.

Atty. Gen. Opinions. See '28 AG Op 55; '38 AG Op 804

612 County convention reconvened.

Atty. Gen. Opinions. See '34 AG Op 68; '38 AG Op 804

613 Committee may call convention.

Atty. Gen. Opinion. See '38 AG Op 804

614 Vacancies in nominations and in offices for subdivisions of county.

Atty. Gen. Opinions. See '30 AG Op 338, 347, 358, 363; '36 AG Op 482; '38 AG Op 804

615 Certification of nominations.

Statutes—construction and operation—elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

617 Delegates.

Atty. Gen. Opinion. See '38 AG Op 772

618 Election.

Atty. Gen. Opinion. See '30 AG Op 316

624 Duties performable by county convention.

Atty. Gen. Opinions. See '32 AG Op 23; '36 AG Op 489; '38 AG Op 772, 844

Primary elections—right of convention to nominate. The fact that the state canvass of primary election returns is final and conclusive (§592, C., '27), has no relevancy to the question whether a convention had the right to make a nomination for an office for which concededly no nomination was made at the primary.

Zellmer v Smith, 206-725; 221 NW 220

625 Nominations prohibited.

Atty. Gen. Opinions. See '32 AG Op 236; '36 AG Op 489; '38 AG Op 844

626 Party committeemen.

Atty. Gen. Opinion. See '34 AG Op 436

627 Central committee—vacancies.

Atty. Gen. Opinions. See '32 AG Op 234; '34 AG Op 436; '38 AG Op 772

629 Call for district convention.

Atty. Gen. Opinion. See '34 AG Op 68

630 Duty of county auditor.

Atty. Gen. Opinion. See '34 AG Op 68

631 Organization.

Atty. Gen. Opinion. See '34 AG Op 68

636 Nominations authorized.

Atty. Gen. Opinion. See '28 AG Op 411

638 State central committee — platform.

Atty. Gen. Opinion. See '38 AG Op 772

639 Nominations in certain cities and towns.

Atty. Gen. Opinions. See '25-26 AG Op 280; AG Op Jan. 24, '39

647 Bribery—illegal voting.

Conduct of election—municipal public utility ownership—candidates' statements. Statements made by candidates for municipal office as to what they intended to do in acquiring a public utility plant will not vitiate an election on the proposition of municipal control of said plant without a showing that the election was affected thereby.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291

648 Nominations by petition.

Atty. Gen. Opinion. See '38 AG Op 804

CHAPTER 37.1

NOMINATIONS BY NONPARTY POLITICAL ORGANIZATIONS

655.01 Political nonparty organizations.

Atty. Gen. Opinion. See '38 AG Op 804

655.04 Objections—time and place of filing.

Atty. Gen. Opinions. See '32 AG Op 278; '36 AG Op 633

Statutes—construction and operation—elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

655.05 Notice of objections.

Atty. Gen. Opinions. See '32 AG Op 278; '36 AG Op 633

655.06 Hearing before secretary of state.

Atty. Gen. Opinions. See '32 AG Op 278; '36 AG Op 633

655.07 Hearing before county auditor.

Atty. Gen. Opinion. See '32 AG Op 278

655.09 Withdrawals.

Atty. Gen. Opinions. See '30 AG Op 350; '38 AG Op 823

655.11 Vacancies filled.

Atty. Gen. Opinion. See '30 AG Op 71

655.12 Insufficient time for convention.

Atty. Gen. Opinion. See '30 AG Op 71

655.14 Filing of certificates.

Atty. Gen. Opinions. See '30 AG Op 71; AG Op Jan. 13, '39

CHAPTER 37.2

NOMINATIONS BY PETITION

Atty. Gen. Opinions. See '28 AG Op 319; '30 AG Op 363; '38 AG Op 777, 823

CHAPTER 38

NOMINATION AND ELECTION OF JUDGES

Atty. Gen. Opinion. See AG Op Nov. 1, '39

CHAPTER 39

REGISTRATION OF VOTERS

Atty. Gen. Opinion. See AG Op Apr. 23, '40

676 Registration required.

Petitioners for election—qualifications. The electors of a city or town who are such under the constitution of this state, even tho their names do not appear on the official books of registered voters of the city or town, are qualified to petition for the calling of an election to vote on the proposition whether the municipality shall erect an electric light and power plant.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

677 Registers.

Atty. Gen. Opinions. See '34 AG Op 715; AG Op Apr. 23, '40

678 Vacancies.
Atty. Gen. Opinion. See '34 AG Op 715

684 Term and compensation.
Atty. Gen. Opinion. See '30 AG Op 330

687 Form of registry books.
Atty. Gen. Opinion. See '28 AG Op 421

688 Expenses.
Atty. Gen. Opinion. See '28 AG Op 379

690 Place of meeting of registers.
Atty. Gen. Opinions. See '30 AG Op 263, 330

691 Time of meeting of registers.
Atty. Gen. Opinions. See '36 AG Op 639; AG Op Apr. 23, '40

707 Registration on election day.
Atty. Gen. Opinion. See '36 AG Op 639

713 New registry—how often.
Atty. Gen. Opinion. See '32 AG Op 18

714 Registration book in nonpresidential years.
Atty. Gen. Opinion. See '32 AG Op 18

CHAPTER 39.1

PERMANENT REGISTRATION

Atty. Gen. Opinion. See AG Op Apr. 23, '40

718.01 Commissioner of registration.
Atty. Gen. Opinion. See '28 AG Op 414

718.02 Definitions.
Atty. Gen. Opinion. See '28 AG Op 414

718.03 Registration required.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 639, 640

Petitioners for election—qualifications. The electors of a city or town who are such under the constitution of this state, even tho their names do not appear on the official books of registered voters of the city or town, are qualified to petition for the calling of an election to vote on the proposition whether the municipality shall erect an electric light and power plant.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

718.04 Commissioner of registration—duties.
Atty. Gen. Opinions. See '28 AG Op 414; '30 AG Op 241; '36 AG Op 640

718.05 Registration lists.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

718.06 Form of records.
Atty. Gen. Opinions. See '28 AG Op 414, 421; '36 AG Op 640

718.07 Change of residence.
Atty. Gen. Opinion. See '28 AG Op 414

718.08 Election register.
Atty. Gen. Opinions. See '28 AG Op 414; '34 AG Op 463; '36 AG Op 640

718.09 Correction of list.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

718.10 Deceased persons—record.
Atty. Gen. Opinion. See '28 AG Op 414

718.11 Time and method of registration.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 638, 639, 640

718.12 Disabled or absent voters.
Atty. Gen. Opinions. See '28 AG Op 414; '30 AG Op 302

718.13 Election registers.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 638, 639, 640

718.14 Revision of lists.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

718.15 Challenges.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

718.16 Penalties.
Atty. Gen. Opinion. See '28 AG Op 414

718.17 Qualification of officers.
Atty. Gen. Opinion. See '28 AG Op 414

718.18 Expenses.
Atty. Gen. Opinions. See '28 AG Op 379, 414

718.19 Registration fund.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 639

718.20 Nonapplicability of statutes.
Atty. Gen. Opinions. See '30 AG Op 303; '34 AG Op 463; '36 AG Op 640

718.21 Certificate of registration.
Atty. Gen. Opinion. See '36 AG Op 639

Percentage of voters required. The phrase "fifteen per cent of the qualified electors, as shown by the poll list" as employed in §10643, C., '31 must be deemed to refer to the "poll

books" in cities having no statutory system of permanent registration of voters, while in cities having such system of registration (where poll books are not employed) the phrase must be deemed to refer to the "certificates of registration" duly signed by voters just preceding their actual voting.

Gilman v City, 215-442; 245 NW 868

718.22 Permissive adoption.

Atty. Gen. Opinion. See '32 AG Op 22

718.24 Party affiliations.

Atty. Gen. Opinion. See '34 AG Op 463

718.25 Entries required.

Atty. Gen. Opinion. See '34 AG Op 463

CHAPTER 40

METHOD OF CONDUCTING ELECTIONS

719 Elections included.

Atty. Gen. Opinions. See '25-26 AG Op 253; '38 AG Op 248, 659

Call by unauthorized body. An election which is called by an unauthorized body is a nullity.

Leslie v Barnes, 201-1159; 208 NW 725

Irregularities — effect. A school election will not be held invalid (in the absence of any showing of prejudice) because all the members of the board acted as judges of election, instead of only the president, secretary, and one director, as provided by statute.

Mack v Sch. Dist., 200-1190; 206 NW 145

Failure to initial ballot. Ballots not initialed by the judges of election as required by statute must be counted if otherwise unobjectionable.

Donlan v Cooke, 212-771; 237 NW 496

Elections—public canvass in private room—incomplete election. Until legislative mandates are obeyed, an election is not complete.

Steeves v New Market, 225-618; 281 NW 162

Improper conduct of election—no validation by successors. Statutory requirements as to conducting elections, violated by one set of officials, cannot be validated by their successors in office a year later.

Steeves v New Market, 225-618; 281 NW 162

720 Terms defined.

Atty. Gen. Opinion. See '38 AG Op 248

723 City precincts.

Atty. Gen. Opinion. See '32 AG Op 228

725 Portions of townships combined.

Atty. Gen. Opinion. See '30 AG Op 320

727 Proper place of voting.

Right of suffrage. See Const Art II, §1

Atty. Gen. Opinions. See '32 AG Op 227; '38 AG Op 748, 832

Qualifications of voters — school teachers. Adult unmarried school teachers become "residents" of the county in which they teach, within the meaning of the constitutional provision governing suffrage, when the employment is entered upon with the good-faith intention of making the place of employment their permanent home or residence so long as the employment continues.

Dodd v Lorenz, 210-513; 231 NW 422

729 Notice of boundaries of precincts.

Atty. Gen. Opinion. See '32 AG Op 228

730 Election boards.

Atty. Gen. Opinions. See '30 AG Op 263, 357; '34 AG Op 505; '38 AG Op 758, 800, 856

731 Judges in cities and towns.

Atty. Gen. Opinions. See '30 AG Op 357; '34 AG Op 505; '38 AG Op 758, 856

732 Judges and clerk in township precincts.

Atty. Gen. Opinions. See '30 AG Op 357; '34 AG Op 505; '38 AG Op 758, 856

733 Supervisors to choose additional members.

Atty. Gen. Opinions. See '30 AG Op 241; '34 AG Op 505; '38 AG Op 758, 856

736 Vacancies occurring on election day.

Atty. Gen. Opinion. See '38 AG Op 856

737 Boards for special elections—duty of auditor.

Atty. Gen. Opinion. See '38 AG Op 800

748 All candidates on one ballot—exception.

Atty. Gen. Opinion. See '30 AG Op 347

749 Arrangement of party nominees.

Atty. Gen. Opinions. See '28 AG Op 417; '38 AG Op 804

753 Order of arranging names.

Atty. Gen. Opinion. See '28 AG Op 417

756 Candidate's name to appear but once.

Atty. Gen. Opinions. See '25-26 AG Op 376; '32 AG Op 179

759 Nominees for judge of district court.

Atty. Gen. Opinion. See '25-26 AG Op 376

760 Form of official ballot.

Atty. Gen. Opinions. See '25-26 AG Op 253; '34 AG Op 77, 108, 718

761 Constitutional amendment or other public measure.

Atty. Gen. Opinions. See '38 AG Op 659, 841

Granting franchise — when ordinance not necessary. The passage of an ordinance and the printing of the same on the ballots are not necessary in those cases where the proposal to grant a franchise to a private party for the erection and operation of an electric light and power franchise is not initiated by the city or town council, but is initiated by the voters, through a statutory petition addressed to the mayor. (See §6555, C., '27.)

Mapleton v Iowa Co., 206-9; 216 NW 683

Contents of ballot. At an election called by a city council on its own motion on the question whether the city shall erect an electric light and power plant and pay for the same out of the earnings of the plant, the ballot need only contain (1) the main proposition, and (2) a statement of the maximum amount to be expended. Manifestly, the law does not contemplate the setting forth of a contract which can only be entered into after the election grants the authority for such a contract.

Hogan v City, 217-504; 250 NW 134

Ballots — validity of form — Simmer law — municipal electric plant. In an election to establish a municipal electric plant under the Simmer law, the ballot held to comply with statute.

Interstate Co. v Forest City, 225-490; 281 NW 207

Substantial compliance with statutory ballot. Form of ballot used in election for establishment of a municipal electric light or power plant reviewed, and held to substantially comply with statute and to be unambiguous.

Lahn v Primghar, 225-686; 281 NW 214

Fatally defective ballot. A ballot is fatally defective when it fails to clearly indicate to the voter whether a proposed municipal electric light and power plant is to be financed, (1) by ordinary taxation or, (2) by pledging the plant and the net earnings thereof; and this is true tho the ballot states the maximum amount of money to be expended.

Pennington v Fairbanks, M. & Co., 217-1117; 253 NW 60

Light and power plant—form of ballot. This section has no application when the question submitted is whether a municipality shall erect an electric light and power plant and pay for the same solely from the earnings thereof.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Sufficient reference to statute in ballot.

Weiss v Woodbine, 228- ; 289 NW 469

Power to pledge plant. Due authorization to a municipality by the electors thereof to establish and erect an electric light and power plant at a stated maximum cost payable only out of the earnings of said newly acquired plant without the municipality itself incurring any indebtedness legally invests the council with power to pledge both the plant and its earnings as security for the payment of the resulting cost.

Greaves v City, 217-590; 251 NW 766

762 Form of ballot.

Unallowable impeachment. Evidence of voters, at an election to establish a consolidated school district, that they did not intend to include in said proposed district certain lands described in the petition for said district, and in the ballot used at said election, is wholly immaterial.

Dermit v School Dist., 220-344; 261 NW 636

763 General form of ballot.

Form of petition. A petition for the submission of a proposition to the electors must substantially contain every matter required by the statute in order that from the petition the ballot may be so framed that the entire proposition will be submitted to the electors.

O'Keefe v Hopp, 210-398; 230 NW 876

Substantial compliance with statutory ballot. Form of ballot used in election for establishment of a municipal electric light or power plant reviewed, and held to substantially comply with statute and to be unambiguous.

Lahn v Primghar, 225-686; 281 NW 214

766 Different measures on same ballot.

Atty. Gen. Opinion. See '38 AG Op 841

767 Printing of ballots on public measures.

Atty. Gen. Opinions. See '38 AG Op 659, 841

768 Indorsement and delivery of ballots.

Atty. Gen. Opinion. See '38 AG Op 659

769 County auditor to control printing.

Atty. Gen. Opinion. See '34 AG Op 77

770 Candidates for township offices—when omitted.

Atty. Gen. Opinion. See '30 AG Op 320

771 City or town clerk to control printing.

Atty. Gen. Opinion. See '34 AG Op 108

772 Publication of ballot.

Atty. Gen. Opinions. See '28 AG Op 430; '34 AG Op 552

774 Maximum cost of printing.

Atty. Gen. Opinion. See '38 AG Op 736

776 Vacancies certified before ballots are printed.

Atty. Gen. Opinion. See '30 AG Op 350

Elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

779 Furnishing judges name of vacancy nominee—pasters.

Statutes—construction and operation—elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

782 Number ballots delivered.

Atty. Gen. Opinion. See '36 AG Op 285

790 Publication of list of nominations.

Atty. Gen. Opinion. See '34 AG Op 552

791.1 Voters entitled to vote.

Atty. Gen. Opinion. See '38 AG Op 670

795 Voting under registration.

Atty. Gen. Opinion. See '36 AG Op 639

796 Challenges.

Atty. Gen. Opinions. See '28 AG Op 428; '36 AG Op 640; '38 AG Op 748

797 Examination on challenge.

Atty. Gen. Opinions. See '28 AG Op 428; '36 AG Op 640; '38 AG Op 400, 748

798 Oath in case of challenge.

Atty. Gen. Opinions. See '28 AG Op 428; '36 AG Op 640; '38 AG Op 748, 855; AG Op Apr. 23, '40

799 Voter to receive one ballot—indorsement by judge.

Ballots—failure to initial—effect.

Donlan v Cooke, 212-771; 237 NW 496

800 Names to be entered on poll book.

Atty. Gen. Opinions. See '25-26 AG Op 303; '30 AG Op 296, 303; '34 AG Op 463

Municipal court election—percentage of voters required. The phrase "fifteen percent of the qualified electors, as shown by the poll list" as employed in §10643, C., '31, must be deemed to refer to the "poll books" in cities having no statutory system of permanent registration of voters, while in cities having such system of registration (where poll books are not employed) the phrase must be deemed to refer to the "certificates of registration" duly signed by voters just preceding their actual voting.

Gilman v City, 215-442; 245 NW 868

801 Marking and return of ballot.

Marking with pencil or ink. A voter may very properly mark his ballot with a pencil of any color or with pen and ink.

Donlan v Cooke, 212-771; 237 NW 496

805 Limitation on time for voting.

Atty. Gen. Opinion. See '34 AG Op 720

808 Assistance indicated on poll book.

Atty. Gen. Opinions. See '30 AG Op 303; '34 AG Op 463

809 Voting mark.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

Using check mark instead of cross—effect.

Donlan v Cooke, 212-771; 237 NW 496

School elections. This section is not applicable to the election of subdirectors in school townships. Any ballot voted at such latter election for subdirector must be counted if it plainly reveals the intent of the voter.

Thompson v Roberts, 220-854; 263 NW 491

810 But one vote for same office except in groups.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

811 How to mark a straight ticket.

Atty. Gen. Opinions. See '25-26 AG Op 253; '28 AG Op 374; '30 AG Op 319

812 Voting part of ticket only.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

813 Group candidates for offices of same class.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

814 How to mark a mixed ticket.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

815 Counting ballots.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

Inadvertent identification. The impression of a notarial seal on an official ballot, caused by placing the ballot in the return envelope before the notary affixed his seal to the affidavit on the envelope, does not constitute an illegally identified ballot.

Willis v Sch. Dist., 210-391; 227 NW 532

Invalidating identification marks. Ballots which bear an indorsement of the name of the voter, or foreign writing such as "Let's have it wet", or numbers, or markings deliberately defacing the printed squares, must be classed as identified and void.

Donlan v Cooke, 212-771; 237 NW 496

816 Writing name on ballot.

Atty. Gen. Opinions. See '25-26 AG Op 253; '28 AG Op 374; '30 AG Op 165, 319

School elections. This section is not applicable to the election of subdirectors in school townships. Any ballot voted at such latter election for subdirector must be counted if it plainly reveals the intent of the voter.

Thompson v Roberts, 220-854; 263 NW 491

817 Spoiled ballots.

Atty. Gen. Opinion. See '30 AG Op 319

818 Defective ballot does not nullify vote.

Atty. Gen. Opinion. See '30 AG Op 319

Ballots—failure to initial—effect.

Donlan v Cooke, 212-771; 237 NW 496

819 Defective ballots.

Atty. Gen. Opinion. See '30 AG Op 319

820 Wrong ballots.

Atty. Gen. Opinion. See '30 AG Op 319

821 Persons permitted at polling places.

Atty. Gen. Opinion. See '34 AG Op 720

824 Prohibited acts on election day.

Atty. Gen. Opinions. See '34 AG Op 282, 720

Electioneering by judges—effect. A judge of election who, while conducting an election, electioneers for a particular candidate is guilty of such misconduct as to furnish basis for a contest as to the office involved.

Brooks v Fay, 206-845; 220 NW 30.

825 Penalty.

Atty. Gen. Opinion. See '34 AG Op 282

831 Special police.

Atty. Gen. Opinion. See '34 AG Op 282

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

838 Promise of influence.

Electric company offering rate reduction—not candidates' bribery—election valid. Evidence held insufficient to establish bribery and an illegal election in that candidates for municipal office acquiesced in or ratified an advertised plan by which the local electric company offered to reduce its rates, and pay back to its subscribers an accumulating sum as a rebate, in the event the voters would elect council members opposed to municipal ownership.

Van Der Zee v Means, 225-871; 281 NW 460

CHAPTER 41

CANVASS OF VOTES

Atty. Gen. Opinion. See '34 AG Op 552

840 Canvass by judges.

Atty. Gen. Opinion. See '28 AG Op 326

Elections—public canvass in private room. A canvass of an election required by statute to be made "publicly" cannot be made in a private room.

Steeves v New Market, 225-618; 281 NW 162

850 Proclamation of result.

Elections—public canvass in private room. A canvass of an election required by statute to be made "publicly" cannot be made in a private room.

Steeves v New Market, 225-618; 281 NW 162

851 Return and preservation of ballots.

Preserving and guarding ballots—burden of proof. Ballots cast at an election are not admissible as evidence in a subsequent contest unless the contestant first establishes the fact that the officer legally charged with the custody of said ballots has preserved, guarded, and protected them in such manner as to reasonably preclude the opportunity of unauthorized persons to tamper with them.

Matzdorff v Thompson, 217-961; 251 NW 867
Traeger v Meskel, 217-970; 252 NW 108
Tyler v Klaver, 220-1124; 264 NW 37
Stamos v Gray, 221-145; 264 NW 919

Ballots — preservation — showing required. While in an election contest it must be shown that the ballots have been preserved with meticulous care against tampering yet such showing need not go to the point of excluding all possibility of such tampering.

Donlan v Cooke, 212-771; 237 NW 496

Ballots — preservation—showing required—admissibility. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

Count of votes — directory provisions. Principle reaffirmed that the statutory direction

relative to the folding and wiring of ballots which have been counted is not mandatory.

Tyler v Klaver, 220-1124; 264 NW 37
Stamos v Gray, 221-145; 264 NW 919

863 Canvass by board of supervisors.
Atty. Gen. Opinion. See '36 AG Op 662

864 Abstract of votes.
Atty. Gen. Opinion. See '36 AG Op 662

869 Abstracts forwarded to secretary of state.
Atty. Gen. Opinion. See '36 AG Op 662

877 Time of state canvass.
Atty. Gen. Opinion. See '36 AG Op 662

878 Abstract.
Atty. Gen. Opinion. See '36 AG Op 662

879 Record of canvass.
Atty. Gen. Opinion. See '36 AG Op 662

880 Certificate of election.
Atty. Gen. Opinion. See '36 AG Op 662

883 Tie vote.
Atty. Gen. Opinion. See '36 AG Op 544

CHAPTER 42

DOUBLE ELECTION BOARDS

Atty. Gen. Opinions. See '34 AG Op 505; '38 AG Op 800

CHAPTER 43

VOTING MACHINES

Atty. Gen. Opinion. See '28 AG Op 417

CHAPTER 44

ABSENT VOTERS LAW

Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

927 Right to vote—conditions.
Atty. Gen. Opinions. See '25-26 AG Op 448; '28 AG Op 367, 428; '30 AG Op 79; '34 AG Op 533

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

928 Application for ballot.
Atty. Gen. Opinions. See '25-26 AG Op 448; '34 AG Op 533; AG Op Jan. 13, '39

929 School secretary.
Atty. Gen. Opinion. See '30 AG Op 79

Implied power. The county superintendent, under her statutory powers and duty to call elections in consolidated districts to vote on the question of dissolution of the district, has implied power to receive applications for ballots by, and to deliver ballots to, electors who wish to cast their ballots.

Willis v Sch. Dist., 210-391; 227 NW 532

930 Application blanks.
Atty. Gen. Opinion. See '28 AG Op 367

931 Form of blank application.
Atty. Gen. Opinion. See '34 AG Op 533

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

935 Ballot mailed.
Atty. Gen. Opinions. See '25-26 AG Op 448; '34 AG Op 533

936 Application mailed.
Atty. Gen. Opinions. See '25-26 AG Op 448; '28 AG Op 367; '34 AG Op 533

937 Personal delivery of ballot.
Atty. Gen. Opinion. See '34 AG Op 533

938 Duty of auditor.
Atty. Gen. Opinion. See '25-26 AG Op 448

939 Voter's affidavit on envelope.

Inadvertent identification. The impression of a notarial seal on an official ballot, caused by placing the ballot in the return envelope before the notary affixed his seal to the affidavit on the envelope, does not constitute an illegally identified ballot.

Willis v Sch. Dist., 210-391; 227 NW 532

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

943 Mailing or delivering ballot.

Atty. Gen. Opinion. See '34 AG Op 533

944 Manner of preserving ballot and application.

Atty. Gen. Opinion. See '28 AG Op 428

945 Delivery of ballot.

Atty. Gen. Opinion. See '25-26 AG Op 448

946 Auditor may mail or personally deliver.

Atty. Gen. Opinion. See '25-26 AG Op 448

954 Affidavit envelope constitutes registration.

Atty. Gen. Opinion. See '36 AG Op 640

957 Challenges.

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

959 Laws made applicable.

Atty Gen. Opinion. See '28 AG Op 428

960 False affidavit.

Atty. Gen. Opinion. See '28 AG Op 428

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

CHAPTER 45

PRESIDENTIAL ELECTORS

Atty. Gen. Opinions. See '25-26 AG Op 40; '28 AG Op 411

CHAPTER 45.1

AMENDMENTS TO FEDERAL CONSTITUTION

Atty. Gen. Opinion. See '34 AG Op 291

CHAPTER 46

STATEMENT OF EXPENSES

Atty. Gen. Opinions. See '38 AG Op 49, 93

CHAPTER 47

CONTESTING ELECTIONS—GENERAL PROVISIONS

Atty. Gen. Opinion. See '34 AG Op 129

981 Grounds of contest.

Electioneering by judges—effect. A judge of election who, while conducting an election, electioneers for a particular candidate is guilty of such misconduct as to furnish basis for a contest as to the office involved.

Brooks v Fay, 206-845; 220 NW 30

Election bribery by third person—disqualifying effect. A candidate having been elected to office is not disqualified, merely because some third person may have given or offered a bribe to the voters for the purpose of securing the election of said candidate, unless the candidate actually participated in and approved thereof.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

Electric company offering rate reduction—not candidates' bribery—election valid. Evi-

dence held insufficient to establish bribery and an illegal election in that candidates for municipal office acquiesced in or ratified an advertised plan by which the local electric company offered to reduce its rates, and pay back to its subscribers an accumulating sum as a rebate, in the event the voters would elect council members opposed to municipal ownership.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

Election bribery—electric rate reduction—fulfillment after trial immaterial. When the court, after hearing an election contest, finds that candidates to municipal office did not participate in an illegal bribe by a local electric company offering a rate reduction and a rebate of impounded charges if the municipal ownership opponents were elected, the fact that, after the trial, the council repeals the municipal ownership ordinance and the company does reduce rates and repay impounded funds to consumers, adds nothing new to the proof of participation and does not warrant a new trial.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

Sufficient party contestee. When at an election in a judicial district several judges of the district court are to be elected for a full term, the candidate who, according to the official canvass of the returns, received the highest number of votes among those not officially declared elected, may legally institute a contest solely against him who, among those officially declared elected, received the lowest number of votes.

Haas v Contest Court, 221-150; 265 NW 373

Defect of party contestees—effect. Whether, in an election contest, a defect of party contestees is jurisdictional, quaere.

Haas v Contest Court, 221-150; 265 NW 373

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

983 Incumbent.

Sufficient party contestee. When at an election in a judicial district several judges of the district court are to be elected for a full term, the candidate who, according to the official canvass of the returns, received the highest number of votes among those not officially declared elected, may legally institute a contest solely against him who, among those officially declared elected, received the lowest number of votes.

Haas v Contest Court, 221-150; 265 NW 373

Defect of party contestees—effect. Whether, in an election contest, a defect of party contestees is jurisdictional, quaere.

Haas v Contest Court, 221-150; 265 NW 373

984 Change of result.

Misconduct—effect of. In an election contest over a county office, the entire vote of a precinct will not be thrown out because of the misconduct of the judges of election unless the contestant shows that the number of votes affected by such misconduct was such as to change the result in the county as to that office.

Brooks v Fay, 206-845; 220 NW 30

985 Recanvass in case of contest.

Atty. Gen. Opinion. See '36 AG Op 662

Preserving and guarding ballots—burden of proof. Ballots cast at an election are not admissible as evidence in a subsequent contest unless the contestant first establishes the fact that the officer legally charged with the custody of said ballots has preserved, guarded, and protected them in such manner as to reasonably preclude the opportunity of unauthorized persons to tamper with them.

Matzdorff v Thompson, 217-961; 251 NW 867
Traeger v Meskel, 217-970; 252 NW 108

CHAPTER 48

CONTESTING ELECTIONS OF GOVERNOR AND LIEUTENANT GOVERNOR

987 Notice—grounds.

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

CHAPTER 49

CONTESTING ELECTIONS FOR SEATS IN THE GENERAL ASSEMBLY

994 Statement served.

Ballots — preservation—showing required—admissibility. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

CHAPTER 50

CONTESTING ELECTIONS OF PRESIDENTIAL ELECTORS

1000 Court of contest.

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

CHAPTER 51

CONTESTING ELECTIONS OF STATE OFFICERS

1006 Contest court.

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

1008 Statement filed.

Premature filing and subsequent refiling — effect. The filing of a "statement of contest" some ten days before the official declaration of election of the party whose election is sought to be contested, followed promptly, after such declaration of election, by the filing by contestant of a written assertion of refiling of said prematurely filed statement "and each and every allegation thereof", is not such irregularity as will deprive the subsequently selected court of contest of jurisdiction to proceed with said contest.

Haas v Contest Court, 221-150; 265 NW 373

1012 Contest relative to office of district judge.

Sufficient party contestee. When at an election in a judicial district several judges of the district court are to be elected for a full term, the candidate who, according to the official canvass of the returns, received the highest number of votes among those not officially declared elected, may legally institute a contest solely against him who, among those officially declared elected, received the lowest number of votes.

Haas v Contest Court, 221-150; 265 NW 373

Defect of party contestees—effect. Whether, in an election contest, a defect of party contestees is jurisdictional, quaere.

Haas v Contest Court, 221-150; 265 NW 373

1017 Judgment filed—execution.

Jurisdiction — certiorari to review. Certiorari will lie to review the alleged unauthorized exercise of jurisdiction by a contest court selected for the purpose of deciding who had been elected to a state office, even tho it be true that the decree of said contest court is final under the statute.

Haas v Contest Court, 221-150; 265 NW 373

CHAPTER 52

CONTESTING ELECTIONS OF COUNTY OFFICERS

Atty. Gen. Opinion. See '34 AG Op 129

1020 Contest court.

Atty. Gen. Opinion. See '34 AG Op 129

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

1024 Statement.

Atty. Gen. Opinion. See '25-26 AG Op 337

Premature filing and subsequent refiling — effect. The filing of a "statement of contest" some ten days before the official declaration of election of the party whose election is sought to be contested, followed promptly, after such

declaration of election, by the filing by contestant of a written assertion of refiling of said prematurely filed statement "and each and every allegation thereof", is not such irregularity as will deprive the subsequently selected court of contest of jurisdiction to proceed with said contest.

Haas v Contest Court, 221-150; 265 NW 373

City office—place of filing contest and bond. In an election contest over a city office, the written statement of intention to contest and bond are properly filed with the county auditor.

Jenkins v Furgeson, 212-640; 233 NW 741

1025 Bond.

Premature filing — effect. The fact that the statutory bond required in an election contest was prematurely filed with and accepted by the proper officer—prematurely because said filing and acceptance was had some ten days before the official declaration of the election of the party whose election is sought to be contested —constitutes no such irregularity as will deprive the subsequently selected court of contest of jurisdiction to proceed with such contest, it appearing that said bond was, within 30 days after said declaration of election, officially marked filed by the clerk of the contest court.

Haas v Contest Court, 221-150; 265 NW 373

Belated filing—effect. The statutory requirement, that the contestant in an election contest shall file a prescribed bond, is complied with if such bond is filed at any time within the time provided for the filing of the statement of contest, even tho said bond be filed subsequent to the filing of the statement of contest.

Haas v Contest Court, 221-150; 265 NW 373

City office—place of filing contest and bond. In an election contest over a city office, the written statement of intention to contest and bond are properly filed with the county auditor.

Jenkins v Furgeson, 212-640; 233 NW 741

1032 Procedure—powers of court.

Atty. Gen. Opinions. See '28 AG Op 218; '34 AG Op 129

1033 Sufficiency of statement.

As jurisdictional question. Sufficiency of statement of contest in case under review held to present no question of jurisdiction.

Haas v Contest Court, 221-150; 265 NW 373

1037 Judgment.

Judgment—effect. The judgment of a contest court holding the election in question illegal is valid and conclusive upon both parties to the contest, unless appealed from and reversed.

Leslie v Barnes, 201-1159; 208 NW 725

1039 Appeal.

Consent judgment—appeal. An election contestant may not appeal from the judgment of the contest board holding the election in question illegal and providing for the calling of a new election by said board, when he consented to the entry of such judgment.

Leslie v Barnes, 201-1159; 208 NW 725

Appeal by nonincumbent—bond not required. No appeal bond is required in an appeal to the district court from the judgment of an election contest court by a party who is not an incumbent of the office in question, §11440, C., '31, having no application to such a case.

Donlan v Cooke, 212-771; 237 NW 496

CHAPTER 53

TIME AND MANNER OF QUALIFYING

1045 Time.

Atty. Gen. Opinions. See '28 AG Op 43; '30 AG Op 322; '34 AG Op 511; AG Op June 14, '39

Officers—duties—motives. The motives of public officials when proceeding according to law to submit the question of municipal ownership of a public utility are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

1046 City and town officers.

Atty. Gen. Opinion. See '34 AG Op 94

1052 Vacancies—time to qualify.

Atty. Gen. Opinions. See '38 AG Op 679; AG Op Feb. 21, '39

1054 Other officers.

Atty. Gen. Opinion. See '34 AG Op 685

Official acts—presumption of regularity. In the absence of contrary evidence, presumption obtains as to legality and regularity of official acts of sworn public officials.

Krueger v Mun. Court, 223-1363; 275 NW 122

1057 Approval conditioned.

Requalification as own successor—presumption. The fact that a county treasurer who succeeds himself, requalifies, and gives a new bond for his second term, creates no conclusive presumption that the liability which attached to him during the first term has been carried over to his new bond.

Dallas County v Bank, 205-672; 216 NW 119

CHAPTER 54

OFFICIAL AND PRIVATE BONDS

Atty. Gen. Opinion. See '38 AG Op 475

1058 Bond not required.

Atty. Gen. Opinion. See '34 AG Op 382

1059 Conditions of bond of public officers.

Atty. Gen. Opinions. See '28 AG Op 53; '30 AG Op 40; '32 AG Op 174; '34 AG Op 100; '38 AG Op 475

Not insurer of official funds. The clerk of the district court is not liable for loss of official funds coming into his hands and lost because of the failure of the bank in which they were deposited, when, at the time of deposit, he in good faith justifiably believed the bank to be solvent.

Prudential v Hart, 205-801; 218 NW 529
Danbury v Riedmiller, 208-879; 226 NW 159
Andrew v Bank, 214-105; 241 NW 412

Liability on official bonds—misuse of funds. A county treasurer breaches his official bond by using county funds in paying drainage district bonds, and the county cannot be deemed estopped to insist on said breach, or be held to have waived said breach, because of the fact that the treasurer acted with the knowledge and consent of, or in obedience to the express direction of the board of supervisors.

Mitchell County v Odden, 219-793; 259 NW 774

Excessive bank deposits. A resolution of a city council to the effect that all city funds shall be deposited in a named bank is no authority to the city treasurer to make deposits in excess of the amount of the bond given by the bank to secure said deposits, and the treasurer and the surety on his official bond are liable for such excess, even tho the treasurer was not guilty of any negligence in depositing such excess.

State v Carney, 208-133; 217 NW 472

Deposits—liability of county treasurer. Even tho the county treasurer deposits public funds in a depositary bank in an amount authorized by a resolution of the board of supervisors, yet if the board later, by resolution, reduces the amount authorized to be deposited, the treasurer and his surety are liable for a loss resulting from the failure of the treasurer to exercise reasonable diligence to reduce his deposit to the amount authorized in the latter resolution.

State v Surety Co., 210-215; 230 NW 308

When conditions broken. It may not be said that a county treasurer who succeeds himself in office is not harmed by the nonpayment of bank deposits which were made during his first term, even tho he has requalified and given a new bond to cover his second term.

Dallas County v Bank, 205-672; 216 NW 119

Unallowable deposits.

Bookhart v Younglove, 207-800; 218 NW 533

Delivery of funds to successor—effect. An outgoing sheriff and his bondsmen are absolved from all liability as to funds held by the sheriff in unadjudicated condemnation proceedings by delivering said funds to his successor in office.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

Time deposit works conversion. A sheriff is guilty of instant conversion and a breach of his bond when he deposits in a bank funds properly coming into his hands in unadjudicated condemnation proceedings and takes from the bank a certificate of deposit which is payable at a definite time in the future, and in such case the question of due care or negligence in making the deposit is quite immaterial.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

Good-faith and nonnegligent deposit in bank—effect. Principle reaffirmed that, generally speaking, a public officer, for instance, a sheriff, is not liable for public funds properly coming into his hands and deposited by him in good faith and without negligence in a bank which subsequently fails, with resultant loss of said funds.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

Nonentertainable defense. In an action on the bond of a school treasurer to recover a shortage in his accounts, it is no defense that the plaintiff district has a cause of action against a third party who is unlawfully in possession of the funds constituting the shortage.

School District v Sass, 220-1; 261 NW 30

Indemnification of one of two sureties—effect. In an action against a public officer and his bondsmen to recover a shortage in public funds, it is quite immaterial, as far as plaintiff is concerned, that one of the sureties has received property from the public officer as partial indemnity.

School District v Sass, 220-1; 261 NW 30

Rejected defensive plea. In an action on the bond of a school treasurer, the defensive plea (if it is a defense) that the treasurer was the innocent victim of another party's wrongdoing will be given no consideration when the wrongdoing of the treasurer is manifest.

School District v Sass, 220-1; 261 NW 30

Prima facie liability. Proof that a school treasurer drew a check upon the school district bank account in favor of another bank; that the check was duly cashed; that the payee bank did not credit the amount to any account of the school district; and that said treasurer, on demand, did not deliver said money to the district, constitutes prima facie evidence of the latter's default and of liability on his bond.

School District v Sass, 220-1; 261 NW 30

Unallowable limitation on liability. A statutory bond which is given for the express purpose of securing public deposits in a bank may not be limited in liability to less than the liability called for by the statute; and any such attempt will be deemed nugatory, even tho such bond is approved by the public governing board. (See also §10300; §10982, Anno. 20.)

Leach v Bank, 205-1154; 213 NW 517

Demand on surety. In an action on the bond of a public officer to recover funds unaccounted for, no demand on the surety is necessary before commencing the action, when proper demand has been made on the principal.

State v Carney, 208-133; 217 NW 472

Holding under former statutes. The general bond of a guardian of property must be deemed to embrace liability for the proceeds of a promissory note which is in the hands of the guardian when he gives such bond and which represents the sale price of real estate sold under order of court, but without a sale bond being given by the guardian.

Iowa Bank v Soppe, 215-1242; 247 NW 632

1060 Liability of surety.

Additional annotations. See under §7408, Vol I

Atty. Gen. Opinions. See '32 AG Op 174, 282; '38 AG Op 72

Holding under former statute. The surety on the bond of a public officer is not an insurer or guarantor of the funds coming into the hands of the principal.

Danbury v Riedmiller, 208-879; 226 NW 159

Scope of liability. The liability of the surety on the bond of a public officer is not limited solely to the failure of the official to make proper accounting for all public money and property officially coming into his possession, but embraces liability for the failure of said officer to "faithfully and impartially, without fear, favor, fraud, or oppression, discharge all duties * * * required of his office by law".

Brown v Cochran, 222-34; 268 NW 585

Continuing liability. The liability of a surety on a statutory depository bond conditioned "to hold the county treasurer harmless" because of authorized deposit of public funds in a bank continues for a reasonable time after the expiration of the authorized period as to the undrawn balance of all deposits made during said period.

Dallas County v Bank, 205-672; 216 NW 119

Requalification as own successor—presumption. The fact that a county treasurer who succeeds himself, requalifies, and gives a new bond for his second term, creates no conclusive presumption that the liability which attached to him during the first term has been carried over to his new bond.

Dallas County v Bank, 205-672; 216 NW 119

Unallowable deposits. The principle that an administrator is not liable for estate funds which have been lost because of the failure of a bank in which he has, in good faith, and without negligence, deposited them, has no application to deposits made by an administrator in his own private bank.

Bookhart v Younglove, 207-800; 218 NW 533

Parties plaintiff. An action on a statutory bond is properly brought by the entity to which the bond runs.

Belmond Assn. v Luick, 217-805; 253 NW 521

Unallowable defense. It is no defense on the part of one of two sureties on the bond of a public officer that said officer, while so acting, was also acting as cashier of a bank; that, as cashier, he was short in his account with the bank; that said other surety was also surety on the private bond of the cashier; and that said other surety and said cashier conspired to use and did use the public funds with which to make good the cashier's shortage to the bank.

School District v Sass, 220-1; 261 NW 30

Cross-complaint. In an action on the bonds of a public officer and his bondsmen to recover a shortage, one surety may not cross-petition against a party who he alleges wrongfully received the funds resulting in the shortage, said latter party not being a party to the bond sued on.

School District v Sass, 220-1; 261 NW 30

Taking assignment of claim. Where, because of the peculations of a county auditor, a depositary bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Contract limitations. Whether parties to a statutory bond will be permitted by contract to specify the time before which or after which an action can be maintained, quaere.

Page County v Fidelity Co., 205-798; 216 NW 957

Evidence—unsigned copy of fidelity bond—inadmissible. In action by a surety company against defendant, who was covered by a fidelity bond and who agreed to indemnify plaintiff against loss sustained by reason of its executing fidelity bond in his behalf, it was error to admit in evidence instrument purporting to be a certified copy of the bond, but containing no signatures and which was admittedly no true and genuine copy of original bond.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

Authority of agent. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

Reduction of widow's allowance — effect. Where the amount allowed a widow for her support for the year following the death of the husband is taken by her from the funds of the estate (she being executrix) and spent, a subsequent order, in an adversary proceeding, reducing said former amount is conclusive on the surety—and, of course, on the executrix—and in an action against the principal and surety the reduced amount is the limit of the allowable credit.

In re Durey, 215-257; 245 NW 236

Voluntarily augmented funds. A court-appointed, testamentary trustee and the surety on his official, statutory bond are liable not only for the money which comes into his hands as specifically required by the will, but for additional amounts of the testamentary funds which come into the hands of the trustee, as such, consequent on the generous action of the devisees, generally, in voluntarily augmenting said trust funds from the testamentary funds.

Whisler v Estes, 216-491; 249 NW 264

Salary of public officer. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety having paid the judgment, and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Failure to file claim — when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

1061 Conditions of other bonds.

Necessary conditions. It seems that the official bonds of executors, administrators, court-appointed trustees, and similar officers are necessarily conditioned as the bonds of public officers are conditioned.

Whisler v Estes, 216-491; 249 NW 264

Fraud of trustee—affirmance or disaffirmance. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

Adjudication of liability—conclusiveness. An unappealed order of court adjudicating the amount of the liability of a trustee to the beneficiary is conclusive on the trustee and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Holding under prior statutes. The general bond of a guardian of property must be deemed to embrace liability for the proceeds of a promissory note which is in the hands of the guardian when he gives such bond and which represents the sale price of real estate sold under order of court, but without a sale bond being given by the guardian.

Iowa Bank v Soppe, 215-1242; 247 NW 632

When nonterminable by death—enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

1062 Want of compliance—effect.

Omission of penalty—effect.

Ind. Dist. v Morris, 208-588; 226 NW 66

Attempt to limit liability.

Monona Co. v O'Connor, 205-1119; 215 NW 803

Andrew v Bank, 205-878; 219 NW 34

Statutory bonds—estoppel to deny. A bond given for the performance of a public building contract, and containing some of the conditions which the statute mandatorily prescribes for such a bond, anything in any contract to the contrary notwithstanding, will be deemed a statutory bond, with all the statutory conditions impliedly inserted therein.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Statutory bond—scope. Principle reaffirmed that a statutory bond always carries the obligations imposed by the statute, even tho said obligations are not written into said bond.

In re Durey, 215-257; 245 NW 236

Oral modification of bond.

Leach v Bank, 205-975; 213 NW 612

Surplusage in bond.

U. S. F. & G. v Tel. Co., 174-476; 156 NW 727
Schisel v Marvill, 198-725; 197 NW 662
Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495
Dallas County v Bank, 205-672; 216 NW 119
State v Gregory, 205-707; 216 NW 17
Curtis v Michaelson, 206-111; 219 NW 49
Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Inclusion and exclusion. Statutory requirements will be read into a statutory bond, and nonstatutory requirements will be read out of such bond.

Chas. City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

Acts constituting breach. A statutory bond conditioned to secure the prompt paying over to the proper authorities of public funds on deposit in a bank is breached on the failure to promptly make such payment, and not from the time when the authorities suffer an actual loss.

Leach v Bank, 205-987; 213 NW 528

1063 State officers—amount of bonds.

Atty. Gen. Opinion. See '30 AG Op 40

1064 Amount of bond, when not fixed by law.

Atty. Gen. Opinion. See '38 AG Op 475

1065 County officers.

Atty. Gen. Opinions. See '25-26 AG Op 455; '28 AG Op 53; '36 AG Op 351

1066.1 Bond of county treasurer.

Atty. Gen. Opinion. See '32 AG Op 282

1067.1 Township clerk — expense of bond.

Atty. Gen. Opinions. See '28 AG Op 446; '38 AG Op 475

1068 Municipal officers.

Atty. Gen. Opinions. See '25-26 AG Op 456; '34 AG Op 382

1069 Bonds of deputy officers.

Atty. Gen. Opinion. See '32 AG Op 282

1070 Minimum number of sureties—qualifications.

Atty. Gen. Opinion. See '28 AG Op 446

1071 Surety company bonds.

Atty. Gen. Opinion. See '28 AG Op 446

1073 Approval of bonds.

Atty. Gen. Opinions. See '28 AG Op 446; '34 AG Op 94; '36 AG Op 351; '38 AG Op 475

1077 Custody of bond.

Atty. Gen. Opinion. See '36 AG Op 351

1078 Recording.

Atty. Gen. Opinion. See '36 AG Op 351

CHAPTER 55

ADDITIONAL SECURITY AND DISCHARGE OF SURETIES

1081 New bond.

Release—strict compliance with statute. The release and discharge of the surety on a guardian's bond under any judicial procedure other than that prescribed by statute is a nullity, and, in such case, a new bond cannot be deemed a "substitute bond", but must be deemed additional security.

Brooke v Bank, 207-668; 223 NW 500
Bookhart v Younglove, 207-800; 218 NW 533

1089 Sureties on other bonds.

Release—strict compliance with statute. The release and discharge of the surety on a guardian's bond under any judicial procedure other than that prescribed by statute are a nullity, and, in such case, a new bond cannot be deemed a "substitute bond", but must be deemed additional security.

Brooke v Bank, 207-668; 223 NW 500
Bookhart v Younglove, 207-800; 218 NW 533

CHAPTER 56

REMOVAL FROM OFFICE

Atty. Gen. Opinions. See '36 AG Op 381; '38 AG Op 300

1091 Removal by court.

Atty. Gen. Opinions. See '30 AG Op 336; '36 AG Op 381; '38 AG Op 290, 300

Pleadings. Allegations that a public officer drew statutory mileage on account of official journeys when the travel (1) was without cost to himself, or (2) was by means of a conveyance owned and supplied by the public, do not state facts constituting grounds for removal from office. (See §1225-d3, C., '31 [1225.03, C., '39].)

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Fundamentally required proof. In the absence of willful misconduct and corrupt motives on the part of a public officer, mere error of judgment either as to law or fact will not justify his removal from office.

State v Canning, 206-1349; 221 NW 923
State v Naumann, 213-418; 239 NW 93
State v Missildine, 215-663; 245 NW 303

Systematic disregard of law. The conduct of a member of the board of supervisors in systematically disregarding, or by subterfuges avoiding, the law which requires estimates by the county engineer and advertisement of public contracts for work and supplies evinces such "willfulness" as to render such acts ample ground for removal from office.

State v Garretson, 207-627; 223 NW 390

Using public funds for private use. The acts of a county treasurer in wrongfully and repeatedly taking and using, for his own private purposes, public funds in his possession, ipso facto constitutes "willful misconduct and maladministration in office", notwithstanding the fact (1) that prior to the commencement of an action to remove him from office, he returns to the public treasury the amount of his peculations, and (2) that his bondsmen are liable for his wrongdoing; a priori is this true when he also knowingly connives at and permits like conduct by his official employee.

State v Smith, 219-5; 257 NW 181

Proof of evil design—when not required. In an action to remove a public official from office, the principle that a corrupt or evil design or purpose must be shown under a charge of "willful misconduct or maladministration in office", does not apply when the official is charged with the violation of a statute which specifically declares that such violation shall be sufficient ground for removal from office.

State v Manning, 220-525; 259 NW 213

Constitutional power to remove officer.

Myers v United States, 272 US 52

1093 Who may file petition.

Atty. Gen. Opinion. See '38 AG Op 300

1100 Special prosecutor.

Atty. Gen. Opinion. See '32 AG Op 152

1101 Application for outside judge.

Atty. Gen. Opinion. See '38 AG Op 823

1111 Effect of dismissal.

Allowance of attorney fees—nullification on appeal. An allowance against the county of attorney fees in favor of a county officer unsuccessfully sought to be removed from office will, on reversal in the supreme court on appeal, be set aside.

State v Smith, 219-5; 257 NW 181

1112 Want of probable cause.

Dismissal of proceeding—costs. When citizens, with apparently good cause, and with reason to believe that the complaint is justified, initiate proceedings for the removal of a party from office, they should not be taxed with the costs in case the proceedings are dismissed by the court.

State v Canning, 206-1349; 221 NW 923

Unallowable taxation to relator. In a proceeding to remove a public officer, proof that the officer had drawn fees in a material amount to which he had no legal claim, precludes the court from taxing the costs to the relator, even tho the court, under the evidence, properly exonerates said officer from corrupt motive in drawing said fees.

State v Missildine, 215-663; 245 NW 303

1114 Appointive state officers.

Atty. Gen. Opinion. See '36 AG Op 381

Constitutional power to remove officer. The President of the United States is vested by the federal constitution with the right to remove, without the consent of the senate, any federal executive officer appointed by him, even tho said officer was appointed "by and with the advice and consent of the senate".

Myers v United States, 272 US 52

Due process of law—removal from office without notice. There is, in a constitutional sense, no element of property in a public office. It follows that the statutory power conferred on the state executive council to investigate and remove appointive state officers, without making provision for notice and hearing, will not be held to violate the due process clause of the constitution as to an officer to whom the council has voluntarily given ample written notice and opportunity to be heard.

Clark v Herring, 221-1224; 260 NW 436

CHAPTER 57

SUSPENSION OF STATE OFFICERS

Atty. Gen. Opinions. See '32 AG Op 216; '38 AG Op 223

CHAPTER 59

VACANCIES IN OFFICE

1145 Holding over.

Atty. Gen. Opinions. See '25-26 AG Op 503; 28 AG Op 43; '34 AG Op 67; '38 AG Op 701

Resignation—when effective. Three members of a board of school directors of five members constitute a legal quorum to elect a successor to one of said three members who had theretofore resigned with the intent (shared in by his fellow members) that the resignation would not take effect until his successor had been elected and had qualified.

Cowles v Sch. Dist., 204-689; 216 NW 83

County supervisor-elect—death before qualifying—vacancy. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office to be filled in the manner provided by subsec. 5, §1152, C., '35.

State v Best, 225-338; 280 NW 551

1146 What constitutes vacancy.

Atty. Gen. Opinions. See '25-26 AG Op 489, 502; '28 AG Op 89; '32 AG Op 1, 51; '34 AG Op 81, 383; '38 AG Op 1, 136, 415, 679, 701; AG Op Feb. 21, '39, April 4, '39, July 26, '39

County supervisor-elect—death before qualifying. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office to be filled in the manner provided by subsec. 5, §1152, C., '35.

State v Best, 225-338; 280 NW 551

Unambiguous language—"or" cannot mean "and". The word "or" in a statute cannot be judicially construed to mean "and" when the language of the section is too clear and unambiguous to admit of judicial construction.

State v Best, 225-338; 280 NW 551

Negotiation for other office—effect. A mayor may not be deemed to have vacated his office on a simple showing that he had requested an appointment as justice of the peace, and had executed a bond as such justice but was never appointed.

Meijerink v Lindsay, 203-1031; 213 NW 934

Incompatible offices. The office of constable is ipso facto vacated when the incumbent qualifies as marshal of a city which is coextensive with the township in which the constable was elected.

State v Bobst, 205-608; 218 NW 253

1147 Possession of office.

Atty. Gen. Opinion. See '38 AG Op 415

1148 Resignations.

Atty. Gen. Opinions. See '38 AG Op 1, 415

1151 Duty of officer receiving resignation.

Atty. Gen. Opinion. See '38 AG Op 415

1152 Vacancies—how filled.

Atty. Gen. Opinions. See '25-26 AG Op 413; '28 AG Op 347; '30 AG Op 48; '32 AG Op 1, 114; '36 AG Op 17, 609; '38 AG Op 124, 136, 415, 679, 701

Vacancy—when fillable by election. The statutory provision (§1157, C., '31) that if a vacancy occurs in an elective state office thirty days prior to a general election the vacancy shall be filled at said election, in legal effect prohibits the filling of such vacancy at said election when the vacancy occurs less than thirty days prior to said election.

State v Claussen, 216-1079; 250 NW 195

Power to fill—majority of quorum. Vacancies on an official board (which is empowered to fill vacancies) may be filled by a majority of a quorum, in the absence of a statute which requires a majority of the entire membership of the board.

Cowles v Sch. Dist., 204-689; 216 NW 83

De facto officers. Members of a school board who are, in supposed compliance with the law, and in good faith, elected to fill vacancies caused by resignations, and who in good faith act as such members, are at least directors de facto, and their official actions may not be collaterally assailed.

Cowles v Sch. Dist., 204-689; 216 NW 83

District court clerk—vacancy filled by board. The district court has neither exclusive nor concurrent authority with the board of supervisors to fill a vacancy in the office of clerk of the court (a county office) by appointment; the court's power is confined to the appointment of a temporary clerk until the board fills the vacancy as provided by law.

State v Larson, 224-509; 275 NW 566

County supervisor-elect—death before qualifying. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office to be filled in the manner provided by subsec. 5 of this section.

State v Best, 225-338; 280 NW 551

1154 Appointments.

Officers—qualification—failure to file commission—effect. The appointee to a vacancy in a public office derives his legal authority to act from the duly executed written appointment. Failure to file the appointment with the officer with whom the qualifying oath is required to be filed is but an irregularity.

State v Claussen, 216-1079; 250 NW 195

1155 Tenure of vacancy appointee.

Atty. Gen. Opinions. See '25-26 AG Op 414; '32 AG Op 1, 114; '38 AG Op 701

Election to fill vacancy. The statutory provision that an officer filling a vacancy in an elective office shall hold until the next regular election at which such vacancy can be filled, means the "next regular election" at which such vacancy can be legally filled.

State v Claussen, 216-1079; 250 NW 195

District court clerk—vacancy filled by board. The district court has neither exclusive nor concurrent authority with the board of supervisors to fill a vacancy in the office of clerk of the court (a county office) by appointment; the court's power is confined to the appointment of a temporary clerk until the board fills the vacancy as provided by law.

State v Larson, 224-509; 275 NW 566

1156 Officers elected to fill vacancies—tenure.

Atty. Gen. Opinion. See '25-26 AG Op 414

1157 Vacancies—when filled.

Atty. Gen. Opinions. See '36 AG Op 155; '38 AG Op 701

Statute supplementing constitution. The constitutional provision (Art. XI, §6) that appointees to fill vacancies in office shall hold until the next general election, is not self-executing, and therefore has been properly supplemented by this section.

State v Claussen, 216-1079; 250 NW 195

Estoppel and waiver. Where, on the erroneous assumption that a vacancy existed in a public office, two persons are formally nominated, by different political parties, to fill the supposed vacancy and are voted on at the ensuing election, the failure of the candidate who is already serving under a valid appointment to withdraw his nomination and legally to question the nominations made, furnishes no basis for the claim that he thereby waived his right longer to hold the office, and estopped himself from objecting to the result of the election.

State v Claussen, 216-1079; 250 NW 195

Implied repeal—statutes not in pari materia. A statute cannot be deemed impliedly repealed by other statutes which are not in pari materia. As an illustration, statutes dealing merely with the procedure to be followed in making nominations for office, and in filling vacancies in such nominations, or in determining the eligibility of candidates, cannot be held to impliedly repeal a statute which authorizes the holding of an election.

State v Claussen, 216-1079; 250 NW 195

Statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

Vacancy—when fillable by election. The statutory provision that if a vacancy occurs in an elective state office 30 days prior to a general election the vacancy shall be filled at said election, in legal effect prohibits the filling of such vacancy at said election when the vacancy occurs less than thirty days prior to said election.

State v Claussen, 216-1079; 250 NW 195

1158 Special election to fill vacancies.

Atty. Gen. Opinions. See '25-26 AG Op 482; '34 AG Op 66, 67, 121

CHAPTER 60

SOLDIERS PREFERENCE LAW

Atty. Gen. Opinions. See '30 AG Op 157; '36 AG Op 538; '38 AG Op 190

1159 Appointments and promotions.

Discussion. See 21 ILR 135—General review of legislation

Atty. Gen. Opinions. See '36 AG Op 538; '38 AG Op 190

Qualifications for office sufficiently set out in statute. The soldiers preference law is not unconstitutional for failure to provide standards of qualifications for office when it requires that the applicant be an honorably discharged soldier, that he be a citizen and a resident of the place of appointment, and that his qualifications be equal with those of the nonveteran applicant.

Maddy v City Council, 226-941; 285 NW 208

Police judge appointment—no implied repeal by statute which merely limits. A statute providing that in certain cities the council shall appoint a police judge is not impliedly re-

pealed by the soldiers preference law, which merely places a limitation on the power of appointment.

Maddy v City Council, 226-941; 285 NW 208

Purpose of act. The intent of the soldiers preference law is to make veterans secure in their positions in public service and to prevent their removal except for misconduct, and it is not intended for the purpose of retaining in office one who violates his duty.

Edwards v Civil Service, 227-74; 287 NW 285

Justifiable discharge. An order of a city council to reduce the number of employees in a named department justifies the discharge of an ex-soldier employee whose duties are apparently inseparably connected with said department.

Rounds v City, 213-52; 238 NW 428

Good-faith abolishment of position—evidence sustaining. In an action by world war veteran, claiming to be within soldiers preference law, to compel reinstatement to position in city street cleaning department, finding of trial court that position had been abolished in good faith by city council held sustained by evidence.

Hamilton v MacVicar, (NOR); 269 NW 750

Legislative regulation—soldiers preference appointments. The soldiers preference law cannot be objected to on the grounds that it deprives the city of self-government when the powers of the municipality are derived solely from the legislature which has power under the constitution and under statute to prescribe rules governing municipalities.

Maddy v City Council, 226-941; 285 NW 208

Yardman at state capitol. An honorably discharged veteran of the war with Germany, appointed for no stated time to the position of "yardman" on the statehouse grounds, is not removable by the executive council except on duly preferred charges of incompetency or misconduct, he not being a deputy of the state custodian of public grounds, tho working under the supervision of said latter officer, and his "term" not expiring on the legal removal of said custodian.

Statter v Herring, 217-410; 251 NW 715

1161 Duty to investigate and appoint.

Atty. Gen. Opinion. See '38 AG Op 190

Investigation in re qualification. The general statutory requirement of the soldiers preference act that the appointing board or officer shall "make an investigation" relative to the qualifications of a soldier applicant, necessarily leaves to said board or officer the determination of the nature and kind of investigation to be made.

Miller v Hanna, 221-56; 265 NW 127

Soldiers preference law—findings on qualifications of applicants. In an action to compel the appointment of the plaintiff war veteran as city police judge, where it was shown that both the plaintiff and the nonveteran appointed by the city council were qualified for the position, a finding by the district court in favor of the veteran should not be disturbed.

Maddy v City Council, 226-941; 285 NW 208

Investigation of qualifications. An investigation of the comparative qualifications of applicants is a good faith investigation even tho there was no public hearing or formal taking of evidence, when record shows that supervisors made inquiries concerning and had personal knowledge of qualifications of applicants and were influenced by fact that petitioner had at one time been convicted of assault with intent to commit rape.

McLaughlin v Board, 227-267; 288 NW 74

Investigation—evidence—abuse of discretion. Evidence of past conduct and employment, coupled with appointing board's personal knowledge from having heard of and observed applicant's work held not to show a clear abuse of discretion warranting interference by the court.

McLaughlin v Board, 227-267; 288 NW 74

Grounds for refusing appointment—filing. Failure of appointing board to file the required statutory statement of grounds for refusing appointment does not invalidate another's appointment and under the circumstances of the case held not to be evidence that the board acted arbitrarily and unwarrantedly.

McLaughlin v Board, 227-267; 288 NW 74

Employees—power to discharge. The custodian of public buildings and grounds (at the seat of government) must, in view of §273, C., '35, be deemed vested with the sole authority legally to discharge the employees of said department, no statute to the contrary appearing; especially is this true when other legislation, tho it has expired ex vi termini, clearly demonstrates such to have been the intent of the general assembly.

Pittington v Herring, 220-1375; 264 NW 712

1162 Mandamus.

Nonreview of discretion. The legal freedom of the board of supervisors to determine according to its own judgment, in other words, its discretion to determine, that an applicant who is not an honorably discharged soldier has qualifications for the position of steward of the county home superior to the qualifications of an applicant who is such soldier, will not be reviewed in an action of mandamus unless the record is such as to clearly show that the board abused its discretion—acted in bad faith.

Miller v Hanna, 221-56; 265 NW 127

Refusal—narrow issue. On mandamus to right the alleged wrong in refusing to grant to an ex-soldier a preference in a public appointment or employment, the sole and only

issue before the court is whether the appointing officer or board was justified, within the range of fair discretion, in finding on the law-required investigation as to relative qualifications that the qualifications of the ex-soldier were not equal to the qualifications of the non-soldier appointee.

Bender v Iowa City, 222-739; 269 NW 779

Extent of court's power—soldiers preference. In mandamus action to compel county supervisors to employ war veteran as courthouse janitor and discharge incumbent nonveteran, court cannot control the appointment but can only direct and require the appointing body to make investigation of the comparative qualifications of the applicants, and when such investigation is made court cannot interfere unless it is plainly apparent from the testimony that the board acted arbitrarily and capriciously.

McLaughlin v Board, 227-267; 288 NW 74

1162.1 Appeals.

District court's power in soldiers preference appeals. A soldiers preference law provision giving the district court the power to review the evidence and find whether the applicant is qualified, and to direct the appointing board as to further action to be taken, is not an unconstitutional delegation of power, as the finding of facts is often a judicial function, and the power of appointment is not exclusively a legislative or executive right.

Maddy v City Council, 226-941; 285 NW 208

Soldiers preference law—findings on qualifications of applicants. In an action to compel the appointment of the plaintiff war veteran as city police judge, where it was shown that both the plaintiff and the nonveteran appointed by the city council were qualified for the position, a finding by the district court in favor of the veteran should not be disturbed.

Maddy v City Council, 226-941; 285 NW 208

Findings by district court. In an appeal under the soldiers preference law, the district court may direct a city council to appoint a war veteran to the position of police judge and to cancel all action taken in appointing a nonveteran with the same qualifications for the office, rather than remand the case for further consideration by the city council.

Maddy v City Council, 226-941; 285 NW 208

1163 Removal—certiorari to review.

Purpose of act. The intent of the soldiers preference law is to make veterans secure in their positions in public service and to prevent their removal except for misconduct, and it is not intended for the purpose of retaining in office one who violates his duty.

Edwards v Civil Service, 227-74; 287 NW 285

Civil service and soldiers preference laws—purpose. Civil service and soldiers preference laws were not intended as a cloak or shield to cover misconduct, incompetency, or failure to perform official duties, but to provide protection and safeguard against arbitrary action of superior officers in removing such employees for reasons other than those named in the statutes.

Anderson v Board, 227-1164; 290 NW 493

Employment for definite time—effect. An honorably discharged soldier who is employed by the board of supervisors, under a written contract for a definite period of time as janitor of the courthouse, does not, by serving said contract period of time, acquire a legal right, even tho his competency and conduct are unquestioned, to continue in said position in preference to another honorably discharged soldier of equal qualifications.

Sorenson v Andrews, 221-44; 264 NW 562

Reduction of employees. The city council has plenary power by appropriate resolution to order a good-faith reduction in the number of employees in a municipal department operating under civil service regulations, and may validly delegate to the chief officer of such department the administrative duty to designate, on the basis of efficiency, competency, and length of service, and without the preferring of charges the employees who shall be discharged; and this is true tho the employees be ex-soldiers.

Lyon v Com., 203-1203; 212 NW 579

Right to discharge. A municipality may, in good faith, validly discharge an ex-soldier employee when the emergency under which he was employed has ceased, and at any time when the city has no funds with which to pay such employee.

Douglas v City, 206-144; 220 NW 72

Discharge—conflicting statutes. A duly appointed county engineer, who is an honorably discharged soldier, may not be summarily discharged by the board of supervisors prior to the end of the term for which appointed, even tho the statute authorizing the appointment of such engineer provides that the "tenure of office may be terminated at any time by the board".

Hahn v County, 218-543; 255 NW 695

Hearing prior to discharge—waiver. Tho the soldiers preference act requires a hearing, prior to discharge, on charges of misconduct against a public employee as grounds for discharge, yet, where no such hearing is held, and the parties join issue on certiorari on the issue of misconduct, they must be held thereby to have presented the issue to the court.

Allen v Wegman, 218-801; 254 NW 74

Hearing before discharge—waiver. Tho the soldiers preference law requires, as grounds for and prior to discharge, a hearing on

charges of misconduct against a public employee, yet, when no such hearing is held and in a certiorari action the parties join issue on misconduct, they waive this hearing provided by the soldiers preference law. Evidence held to establish such misconduct.

Butler v Curran, 224-1339; 279 NW 89

Policeman assaulting prisoner—discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Discharge of policeman for nonpayment of debts—nonpermissibility. Civil service commission's removal of police officer, an honorably discharged soldier, on sole ground that he failed to pay his creditors, held arbitrary and void despite fact that police department suffered inconvenience because of creditor's demands for assistance in collection, where such officer made good-faith efforts to meet his obligations which accrued as result of sickness in family.

Anderson v Board, 227-1164; 290 NW 493

Soldier employee—license fee retention. Retention of license fees collected for a state department is not "trivial and inconsequential" but is misconduct and incompetency sufficient to discharge a public employee having a soldier's preference.

Butler v Curran, 224-1339; 279 NW 89

When charges unnecessary. Charges against an ex-soldier employee as a condition precedent to his discharge are unnecessary when the office or position has been necessarily abolished.

Rounds v City, 213-52; 238 NW 428

Legislative abolishment of position—effect. The position known as "clerk of the state employment bureau" was, in legal effect, abolished by the act of the general assembly in accepting the provisions of the Wagner-Peyser Act (29 USC, §49 et seq.) and by the subsequent joint adoption by the federal and state governments of a system under which all employees of the state employment bureau were placed on a civil service basis after competitive examination administered by the federal employment service. It follows that he who was holding the said position of "clerk" at the time the position was legally abolished, tho an honorably discharged soldier, was not entitled to have charges preferred and a hearing had thereon.

Holmes v Reese, 221-52; 265 NW 384

Non-good-faith discharge. The summary discharge by a municipal department superintendent of an honorably-discharged soldier employee cannot be justified on the plea that the position occupied by said employee was in good faith abolished, when, immediately following said discharge, several other persons of no qualifications superior to that of the discharged employee were employed in the same department to do the same work which the discharged employee had done.

Dickey v King, 220-1322; 263 NW 823

Definite tenure of employment—removal.

Durst v Board, 228- ; 292 NW 73

Tenure—removal—yardman at state capitol. An honorably discharged veteran of the war with Germany, appointed for no stated time to the position of "yardman" on the statehouse grounds, is not removable by the executive council except on duly preferred charges of incompetency or misconduct, he not being a deputy of the state custodian of public grounds, tho working under the supervision of said latter officer, and his "term" not expiring on the legal removal of said custodian.

Statter v Herring, 217-410; 251 NW 715

Defendants. The custodian of public buildings and grounds (at Des Moines) is the sole, proper defendant in an action of certiorari to review the legality, under the soldiers preference act, of the discharge of an employee of said department.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari — dismissal re custodian — res judicata. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

Evidence in addition to return. On certiorari, to review the action of a municipality in declining longer to continue the employment of an employee, evidence in addition to the "return" may be received.

Douglas v City, 206-144; 220 NW 72

Failure of proof. Writ of certiorari, to review discharge of ex-soldier from a public appointive position, cannot be sustained when plaintiff predicates his right to relief solely on the unproven allegation that he was discharged by defendant.

Johnson v Herring, 222-1126; 271 NW 175

Reinstatement — unallowable order. The court, in certiorari, is manifestly without authority to order the state executive council to

reinstate, in a department of the state government, a discharged state employee, when said council has no legal authority to employ or discharge employees in said department.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari to review veteran's discharge—scope. Under soldiers preference law affording veterans the right of hearing and review by certiorari, in the event of discharge from public employment, the scope of the review is not, as in ordinary cases of certiorari, limited to evidence on question of jurisdiction or other illegality, but is enlarged to allow a review of all proceedings had before a civil service commission.

Edwards v Civil Service, 227-74; 287 NW 285

Civil service commission findings—conclusiveness. The ruling of a civil service commission as to the discharge of a veteran under soldiers preference law, altho not conclusive, should not be lightly set aside, it being the general rule that where there is compliance in good faith with all requirements as to hearings, the courts will not usually interfere to direct or control the discretion of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Discharge by civil service commission—findings—reviewability. Supreme court will not review findings of civil service commission which are supported by competent evidence, where commission has jurisdiction and has otherwise acted legally; but, where evidence is entirely lacking to support the findings, the question becomes one of law and the action of the commission would not only be erroneous, but would amount to an illegality reviewable by certiorari.

Anderson v Board, 227-1164; 290 NW 493

No waiver by taking civil service examination. A war veteran holding a continuing position for a city does not waive his rights under the soldiers preference law by taking a civil service examination as to the position he holds. He is secure in the position so long as he is capable and efficient altho he may fail in the examination.

Jones v Des Moines, 225-1342; 283 NW 924

Soldiers preference law—not superseded by civil service law. Where a position occupied by a war veteran, such as license collector for a city, was treated by the council as a continuing one and not for a definite term, the fact that the city conducted a civil service examination (which the veteran failed to pass) will not permit the city to oust the veteran and appoint another without charges, notice, and hearing, as provided by the soldiers preference law.

Jones v Des Moines, 225-1342; 283 NW 924

1164 Burden of proof.

Civil service employee's discharge—burden of proof. Burden is on civil service commission to prove statutory grounds for removal of police officer who is entitled to soldiers preference.

Anderson v Board, 227-1164; 290 NW 493

1165 Exceptions.

Atty. Gen. Opinion. See '30 AG Op 157

Confidential employee. The position of head bookkeeper in the office of the state treasurer involves "strictly confidential relations" with the head of said office, within the meaning of this section.

Allen v Wegman, 218-801; 254 NW 74

CHAPTER 61

NEPOTISM

Atty. Gen. Opinions. See '34 AG Op 73, 445

1166 Employments prohibited.

Atty. Gen. Opinions. See '25-26 AG Op 369; '28 AG Op 58; '32 AG Op 175; '34 AG Op 137, 382, 445

Approval of appointment—effect. The appointment by a county superintendent of his wife as deputy superintendent cannot be legally questioned when the appointment was legally approved by the board of supervisors.

Kellogg v County, 218-224; 253 NW 915

1167 Payment prohibited.

Atty. Gen. Opinion. See '34 AG Op 382

CHAPTER 62

DUTIES RELATIVE TO PUBLIC CONTRACTS

Atty. Gen. Opinions. See '28 AG Op 163; '36 AG Op 10

CHAPTER 62.1

PREFERENCE FOR IOWA PRODUCTS AND LABOR

Atty. Gen. Opinions. See '34 AG Op 318, 371; '38 AG Op 457, 499, 506

1171.01 Preference authorized — conditions.

Atty. Gen. Opinions. See '34 AG Op 357, 371; '38 AG Op 499

Domestic products preference—not applicable to Simmer law. Sections 1171-b1 and 1171-b2, C., '35 [§§1171.01, 1171.02, C., '39], have no application to contracts let for construction of municipal public utility plants payable from the earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

1171.02 Advertisements for bids — form.

Domestic products preference—not applicable to Simmer law. Sections 1171-b1 and 1171-b2, C., '35 [§§1171.01, 1171.02, C., '39], have no application to contracts let for construction of municipal public utility plants payable from the earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Simmer law—specifying trade named articles. A call for bids under the Simmer law may specify articles by trade name when followed by the words "or equal" and, if a few minor items omit these words, the entire contract is not vitiated when it appears that these particular items were available to all bidders.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

1171.03 Iowa labor.

Atty. Gen. Opinion. See '34 AG Op 357

1171.07 Bids and contracts.

Atty. Gen. Opinions. See '34 AG Op 318; '38 AG Op 457

CHAPTER 62.2

PUBLIC WARRANTS NOT PAID FOR WANT OF FUNDS

Atty. Gen. Opinions. See '38 AG Op 228, 437

CHAPTER 63

AUTHORIZATION AND SALE OF PUBLIC BONDS

Atty. Gen. Opinions. See '25-26 AG Op 425; '30 AG Op 372; '32 AG Op 269; '36 AG Op 423

1171.18 Bonds — election — vote required.

Atty. Gen. Opinions. See '34 AG Op 244; '38 AG Op 164, 841

Primary road bonds. Section 4753-a11, C., '31, [§4753.11, C., '39] insofar as it authorizes the issuance of primary road bonds on a majority vote was impliedly repealed by the subsequent enactment of this section, requiring a favorable vote equal to 60 percent of all the votes cast.

Waugh v Shirer, 216-468; 249 NW 246

Simmer law—nonapplicable statute. Elections to establish municipally owned public utilities payable from the earnings are controlled by chapter 312, C., '35, and not by this section.

Abbott v Iowa City, 224-698; 277 NW 437
Interstate Co. v Forest City, 225-490; 281 NW 207

1172 Notice of sale.

Atty. Gen. Opinions. See '25-26 AG Op 425; '32 AG Op 269; '34 AG Op 365; '36 AG Op 423

Bonds to contractor—noncompetitive bidding.
Simmer law—noninclusive title of act.

Weiss v Woodbine, 228- ; 289 NW 469

1173 Sealed and open bids.

Atty. Gen. Opinions. See '25-26 AG Op 425; '32 AG Op 269

1174 Rejection of bids.

Atty. Gen. Opinions. See '25-26 AG Op 425; '32 AG Op 269; '34 AG Op 365

1175 Selling price.

Atty. Gen. Opinions. See '25-26 AG Op 425; '34 AG Op 257

Value of government bonds. The face value of government bonds is prima facie evidence of their actual value.

Mulenix v Bank, 203-897; 209 NW 432

1176 Commission and expense.

Atty. Gen. Opinions. See '25-26 AG Op 425; '34 AG Op 257; AG Op Aug. 14, '39

1177 Penalty.

Atty. Gen. Opinions. See '25-26 AG Op 425; '34 AG Op 257

Presumption as to official conduct. Presumptively a public officer will perform his duties as prescribed by law.

Banta v Clarke County, 219-1195; 260 NW 329

1178 Sale of state bonds.

Atty. Gen. Opinion. See '25-26 AG Op 425

1179 Exchange of bonds.

Atty. Gen. Opinions. See '32 AG Op 269; '36 AG Op 423

CHAPTER 63.1

MATURITY AND PAYMENT OF BONDS

1179.1 Mandatory retirement.

Atty. Gen. Opinions. See '28 AG Op 418; '30 AG Op 119

Inadequate provision for payment. The court cannot assume that inadequate provision has been made for the payment of county primary road bonds and that, therefore, the bonds are void, in view of the fact that the state has underwritten every such bond through its primary road fund and has appropriated said fund to said purpose for the life of said bonds.

Harding v Board, 213-560; 237 NW 625

1179.2 Mandatory levy.

Atty. Gen. Opinions. See '28 AG Op 251, 418

1179.4 Permissive application of funds.

Atty. Gen. Opinion. See '30 AG Op 119

1179.6 Place of payment.

Atty. Gen. Opinion. See '36 AG Op 577

CHAPTER 64

COMMISSIONERS IN OTHER STATES

Atty. Gen. Opinion. See '38 AG Op 146

CHAPTER 65

NOTARIES PUBLIC

Atty. Gen. Opinions. See '38 AG Op 71, 146, 276, 650

1197 Appointment.

Atty. Gen. Opinions. See '38 AG Op 71, 276

1198 When appointments made.

Atty. Gen. Opinion. See '38 AG Op 650

Acting after expiration of commission. A notary public may not, after his term of appointment has expired, voluntarily or under order of court validly attach a new certificate of acknowledgment to a statutory agreement for arbitration executed during his expired term, even tho, at the time of attaching such new certificate, he was a notary public under a new appointment.

Koht v Towne, 201-538; 207 NW 596

1200 Conditions.

Atty. Gen. Opinions. See '38 AG Op 48, 71, 276, 650

Bond—action on. An action against a notary public and his sureties for damages consequent on a willfully false certificate of acknowledgment does not sound in tort.

Atlas Sec. Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

1201 Certificate filed.

Atty. Gen. Opinion. See '38 AG Op 276

1203 Powers within county of appointment.

Atty. Gen. Opinions. See '28 AG Op 135; '38 AG Op 276

1204 Powers within adjoining county.

Atty. Gen. Opinions. See '28 AG Op 135; '38 AG Op 276

1206 Improperly acting as notary.

Disqualified notary—when inconsequential. The validity of a deed of conveyance is, as between the grantor and grantee, in no manner affected by the fact that the deed was acknowledged before a disqualified notary public.

Shanda v Clutier Bank, 220-290; 260 NW 841

False certificate—proximate cause. A willfully false certificate by a notary public as to the acknowledgment by the vendee of the execution of a forged conditional sale contract is not the proximate cause of the damage suffered by one who purchases the forged contract and the forged promissory note accompanying it.

Atlas Sec. Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Impeachment by notary of his own certificate. Very little weight will be given to the testimony of a notary public that the recitals of his certificate are false.

McDaniel v Bank, 210-1287; 232 NW 653

1207 Acting under maiden name.

Atty. Gen. Opinion. See '38 AG Op 48

1208 Record to be kept.

Lost certificate—allowable proof. Testimony tending to show the contents of a lost official notarial certificate of protest of a promissory note is inadmissible, but the facts constituting a legal protest of the note may, in such case, be established by any competent oral testimony.

Frank v Johnson, 212-807; 237 NW 488; 75 ALR 128

1212 Change of residence.

Atty. Gen. Opinion. See '38 AG Op 276

CHAPTER 66

ADMINISTRATION OF OATHS

1215 General authority.

Affidavits in general. See §11342

Atty. Gen. Opinion. See '34 AG Op 672

Affidavit lacking seal of court clerk. Affidavit of publication of notice of hearing on drainage assessment was sufficient altho court seal was not attached by court clerk before whom the affidavit was made. Moreover, statute did not require that proof of service be by affidavit.

Whisenand v Van Clark, 227-800; 288 NW 915

1216 Limited authority.

Atty. Gen. Opinions. See '28 AG Op 42; AG Op June 27, '39; AG Op March 25, '40

CHAPTER 67

SALARIES, FEES, MILEAGE, AND EXPENSES IN GENERAL

1218 Salaries paid monthly.

Atty. Gen. Opinions. See '28 AG Op 43; '34 AG Op 54, 69, 663; '36 AG Op 359; '38 AG Op 12, 799

Salary—power to change. The general assembly has plenary power to reduce the salary of any public officer unless such reduction is prohibited by the constitution—a public office not being property.

Smith v Thompson, 219-888; 258 NW 190

Compensation—acceptance in part—effect. An officer who accepts part of a statutory compensation does not thereby estop himself from enforcing payment of the balance.

Broyles v County, 213-345; 239 NW 1

Inequitable demand for legal salary. A city officer who has not, for a series of months, received his full salary as legally fixed by ordinance, may not, in an equitable action, compel the city to pay him the deficiency when during said time he has properly received an unknown amount of fees belonging to the city (or county) but has illegally retained them as salary and makes no offer to return said fees.

King v Eldora, 220-568; 261 NW 602

Personal earnings exempt. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety, having paid the judgment and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

1219 Appraisers of property.

Atty. Gen. Opinions. See '28 AG Op 181; '30 AG Op 149

1220 General fees.

Atty. Gen. Opinions. See '28 AG Op 360; '36 AG Op 400; AG Op July 17, '39, Nov. 13, '39

1225 State accounts—inspection.

Atty. Gen. Opinion. See '36 AG Op 508

1225.01 Charge for use of automobile.

Atty. Gen. Opinions. See '34 AG Op 53, 305; AG Op Sept. 7, '39

1225.02 Mileage and expenses—prohibition.

Atty. Gen. Opinion. See '34 AG Op 305

1225.03 Mileage and expenses — when unallowable.

Atty. Gen. Opinion. See '34 AG Op 305

Removal from office. Allegations that a public officer drew statutory mileage on account of official journeys when the travel (1) was without cost to himself, or (2) was by means of a conveyance owned and supplied by the public, does not state facts constituting grounds for removal from office.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

1225.04 Warrants prohibited.

Atty. Gen. Opinion. See '38 AG Op 87

TITLE V

POLICE POWER

CHAPTER 67.1

DEPARTMENT OF PUBLIC SAFETY

1225.09 Highway patrol.

Atty. Gen. Opinion. See AG Op Oct. 6, '39

1225.12 Patrolmen and employees—salaries.

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

1225.13 Duties of department.

Atty. Gen. Opinion. See '30 AG Op 331

1225.26 Prohibition on other departments.

Atty. Gen. Opinion. See '38 AG Op 170

CHAPTER 67.2

ITINERANT MERCHANTS

Atty. Gen. Opinion. See AG Op Aug. 16, '39

CHAPTER 68

COAL MINES AND MINING

Atty. Gen. Opinions. See '30 AG Op 57; '36 AG Op 282

1226 Board of examiners.

Discussion. See 9 ILB 145—Coal price regulation

1228 Mine inspectors—examinations.

Atty. Gen. Opinion. See '38 AG Op 638

1231 Examination—mine inspector.

Atty. Gen. Opinion. See '38 AG Op 638

1241 Duty of mine owner.

Atty. Gen. Opinion. See '36 AG Op 282

1242.1 Filling or sealing abandoned mine.

Strip mining coal—pipe line right of way easement—back-filling required—judgment. A holder of a strip mine coal lease who enters upon and strips coal from land, upon which land a pipe-line company holds an easement, knowing that by so mining violates his lease, must back-fill the land when the easement holder exercises his option to buy; and upon his failure to make the back-fill, a judgment against the coal lessee for the cost thereof is proper.

Penn v Pipe Line Co., 225-680; 281 NW 194

1272 Ventilation.

Atty. Gen. Opinion. See '38 AG Op 124

1276 Unhealthful conditions.

Operation of mines—gasoline engine—powers and duties of state mine inspector. Where a mine was being worked by its owners without "employees", and the state mine inspector (1) had never been in the mine, (2) had never made a test of air and health conditions therein, and (3) had not made inquiry as to whether air and health conditions were such as to endanger health of workers in the mine, the inspector exceeded his statutory authority in making an order, under §1308, C., '35, to "remove all mining machines operated with or by gasoline [or any other fuel oil whatsoever]"—portion in brackets not being contained in above code section.

State v Padavich, 223-991; 274 NW 51

1286 "Mine foreman" defined.

Atty. Gen. Opinion. See '38 AG Op 638

1292 Duties of foreman or pit boss.

Atty. Gen. Opinions. See '30 AG Op 97; '38 AG Op 638

1293 Duty of miners and other employees.

Atty. Gen. Opinion. See '30 AG Op 97

1308 Gasoline and engines—use and location.

Powers and duties of state mine inspector. Where a mine was being worked by its owners without "employees," and the state mine inspector (1) had never been in the mine, (2) had never made a test of air and health conditions therein, and (3) had not made inquiry

as to whether air and health conditions were such as to endanger health of workers in the mine, the inspector exceeded his statutory authority in making an order, under this section to "remove all mining machines operated with or by gasoline [or any other fuel oil whatsoever]"—portion in brackets not being contained in above code section.

State v Padavich, 223-991; 274 NW 51

1309 Temporary location of engine.

Atty. Gen. Opinion. See '34 AG Op 699

1332 Burden of proof.

Gasoline engine—powers and duties of state mine inspector. Where a mine was being worked by its owners without "employees", and the state mine inspector (1) had never been in the mine, (2) had never made a test of air and health conditions therein, and (3) had not made inquiry as to whether air and health conditions were such as to endanger health of workers in the mine, the inspector exceeded his statutory authority in making an order, under §1308, C., '35, to "remove all mining machines operated with or by gasoline [or any other fuel oil whatsoever]"—portion in brackets not being contained in above code section.

State v Padavich, 223-991; 274 NW 51

1334 Right of adjoining landowner.

Strip mining—coal lease subject to pipe-line easement—lateral support. Where a pipe-line company has an easement across land and an option to buy a designated strip of land along the pipe line if a strip coal mine should be opened on the land, a subsequent strip mine coal lease, subject to the pipe-line easement and option, gives the coal lessee no rights to strip mine coal on the land covered by the purchase option and thus destroy the lateral support of the pipe line, nor is such lessee entitled to any part of the purchase price for such strip of land.

Penn v Pipe Line Co., 225-680; 281 NW 194

Lease of mineable coal—breach—burden of proof. In an action to recover minimum royalties under a lease of coal lands because of defendant's breach of contract to mine all mineable, workable and merchantable coal underlying said lands, plaintiff has the burden to establish the existence of such coal, especially when plaintiff assumed such burden by his pleadings. Evidence exhaustively reviewed and held insufficient to generate a question for the jury.

Scovel v Norwood-White Co., 222-354; 269 NW 9

1336 Double damages.

Failure to quitclaim mineral rights—damages. The measure of damages for breach of contract to quitclaim to the surface owner of lands "the right to coal and minerals" under the lands is not the difference between the value of the land with and without the coal and mining rights existing against the land as an incumbrance, when the unit fee has theretofore been separated into (1) a fee to the surface, (2) a fee to the minerals, and (3) a fee to the right to vertical support, and the two latter fees have been conveyed to other parties and paid for.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Measure of damages—wrongful act without profit to wrongdoer. The lessee of coal lands who seeks to recover damages consequent on the wrongful act of the owner of the land in taking coal from the land, need not show that the defendant-owner made any profit from his wrongful operations. Plaintiff need only show wherein and to what extent he was damaged.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Opinion evidence—examination of experts—improper form. In an action against a mine owner for damages consequent on an injury to the surface of the soil which he did not own, hypothetical questions calling for values should not be framed on the erroneous theory that the mine owner had no right to use the surface of the soil to any extent.

Grell v Lumsden, 206-166; 220 NW 123

Torts—liability of mere employee. The mere employee of a tort-feasor is not necessarily liable for the damage resulting from the tort. So held in an action by the lessee of coal lands for damages consequent on the wrongful removal of coal by the owner of the leased land.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Decree—broad power under general prayer for relief. A court of equity, in dealing with and adjusting involved and complicated matters of fact, has exceptionally broad power to effect equity and justice when both parties pray for general equitable relief. Illustrated where defendant, who was the owner of coal lands, and those working in conjunction with him, had wrongfully interfered with the rights of lessees, and were held liable in a reasonable amount for permanent improvements placed in the mine by lessees, even tho said improvements became worthless—it appearing that defendant's misconduct had materially contributed to said latter condition.

Hartford Co. v Helsing, 220-1010; 263 NW 269

CHAPTER 69

GYPSUM MINES

1349 Duties and powers of inspector.

Atty. Gen. Opinion. See '30 AG Op 57

1353 Separate maps.

Sale of gypsum lands—compensation—jury question. Evidence that defendant orally agreed to pay plaintiff a commission to assist in the sale of gypsum lands upon which plaintiff held drill plats, that agents of purchaser conferred with plaintiff and examined the plats, coupled with a denial by defendant that plaintiff accepted the offer or assisted in consummating the sale, presents a question precisely determinable by the jury.

Maher v Breen, 224-8; 276 NW 52

CHAPTER 70

WORKMEN'S COMPENSATION

Discussion. See 7 ILB 100—Workmen's compensation; 7 ILB 166—Conflict of laws; 17 ILR 181, 343—Commentary on workmen's compensation act

Atty. Gen. Opinions. See '28 AG Op 122; '34 AG Op 145, 648; '36 AG Op 259, 274; '38 AG Op 7, 611

1361 To whom not applicable.

Additional annotations. See under §1421
Interstate commerce. See under §§1417, 8042 (II)

Atty. Gen. Opinions. See '25-26 AG Op 251, 477; '34 AG Op 406, 648

Constitutionality.

Hawkins v Bleakly, 243 US 210

Liberal construction—workmen's compensation act. The workmen's compensation act is to be liberally construed.

Everts v Jorgensen, 227-818; 289 NW 11

Maintenance of residence not "trade or business". Testimony which simply shows that a home owner maintains on his residential grounds an additional residence which is occupied by his son, establishes no such "trade or business" as renders the home owner liable under the workmen's compensation act to an employee who is injured in the course of his employment while repairing the equipment of the house occupied by the son; and this is true even tho the employee was not a casual employee.

Tunnicliff v Bettendorf, 204-168; 214 NW 516

Casual employment—dual provision. The provision of the workmen's compensation act that "persons whose employment is of a casual nature" shall not be under the act (subsec. 2, this section), and the further provision that "A person whose employment is purely casual, and not for the purpose of the employer's trade or business," shall not be deemed an "employee" (§1421, subsec. 3a, C., '31), when construed together, have but one meaning, to wit, the full meaning of the last provision.

Gardner v Trustees, 217-1390; 250 NW 740

Employees within and without the act. If an employee is not engaged in work of a "purely casual nature" he is entitled to the benefits of the compensation act altho the employment was "not for the purpose of the employer's trade or business"; and vice versa, if his employment is "for the purpose of the employer's trade or business," he is entitled to the benefits of the act tho his employment is of a "purely casual nature". In other words, in order to put the employee outside the workmen's act it must appear that the employment was both "purely casual" and "not for the purpose of the employer's trade or business".

Gardner v Trustees, 217-1390; 250 NW 740

Casual employment "for the purpose of the employer's trade or business". An employment to wash the kitchen walls of a restaurant is "for the purpose of the employer's trade or business", even tho the employment is purely casual.

Dial v Coleman's Lunch, 217-945; 251 NW 33

Noncasual employment.

Eddington v Tel. Co., 201-67; 202 NW 374

Operator of sorghum mill not within act. The employee of a farmer is "engaged in an agricultural pursuit" while engaged in operating a sorghum mill on the farm, and therefore is not within the benefits of the workmen's compensation act.

Taverner v Anderson, 220-151; 261 NW 610

Employees within acts—excludes farm supervisors—agricultural pursuit. An employee whose duties consisted of repairing buildings and fences on some 20 farms and who occasionally advised as to crops was engaged in an agricultural pursuit within the meaning of §1361, C., '35, and when fatally injured on the highway while going from one farm to another, his estate is not entitled to workmen's compensation.

Criger v Mustaba Co., 224-1111; 276 NW 788

Scope of employment—jury question. The scope of a servant's duties is to be determined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform. Evidence

held to present a jury question whether a general farm hand was, at the time of his injury, within the scope of his employment.

Bell v Brown, 214-370; 239 NW 785

Nonagricultural pursuit. A workman who is employed by a county as a member of the county highway department, and is paid by the county an hourly wage for driving a heavy tractor road grader in the construction and maintenance of county roads—for which work said grader was exclusively designed—is not, as regards the county, the employer, deprived of the benefits of the workmen's compensation act because, when injured in the operation of said grader, he was, under the orders from the board of supervisors, engaged in the construction on a farm and for the benefit of the owner thereof, of a trench silo, such construction not being an engagement by said workman "in an agricultural pursuit or any operation immediately connected therewith" within the meaning of subsec. 5 of this section.

Trullinger v Fremont Co., 223-677; 273 NW 124

Civil Works Administration employee—status. Workmen who are (1) employed, (2) directed when and where to work, and (3) paid for their services, by the federal Civil Works Administration, are not, while engaged in redecorating a public school building, employees of the school corporation owning said building, within the meaning of the workmen's compensation act.

Hoover v Sch. Dist., 220-1364; 264 NW 611; 39 NCCA 271; 3 NCCA(NS) 741

Township not employer. A civil township is not an "employer" within the meaning of this chapter, such township being but an unincorporated district. It necessarily follows that a township road superintendent is not an "employee."

Hop v Brink, 205-74; 217 NW 551

Wife as employee of husband. A husband who is the sole owner of a printing plant may validly employ his wife as a linotype and press operator in said plant and the wife may legally accept such employment and collect therefor, because such services are wholly outside of, and foreign to, the usual and ordinary marital duties of a wife. It follows that the wife is entitled to compensation under the workmen's compensation act for injuries arising out of and in the course of said employment.

Reid v Reid, 216-882; 249 NW 387

Policemen not within act. The minor children of a deceased policeman who was a member of an organized police department and contributing to the statutory pension fund of said department, and who was killed while attempting to effect an arrest and at a time when he was not actually "pensioned", are not entitled to compensation under this chapter.

Ogilvie v Des Moines, 212-117; 233 NW 526

Iowa judgment for death damages—effect in foreign state. Where a judgment fixing the compensation for a railroad employee's death due to an accident in Iowa was rendered by an Iowa court under the Iowa compensation act, it may be pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act, since both courts had jurisdiction to decide whether deceased was engaged in intrastate or interstate commerce; and the Iowa judgment, being the earlier one rendered, was res judicata in the other action, altho the other action was brought first.

Chicago, RI Ry. v Schendel, 270 US 611

Policemen under coverage. Section 1422, C., '27, providing for coverage under the workmen's compensation act for policemen killed or injured in effecting an arrest, embraces, in view of §1361, subsec. 4, those policemen only who are not members of an organized police department.

Ogilvie v Des Moines, 212-117; 233 NW 526

1362 Compulsory when.

Atty. Gen. Opinions. See '25-26 AG Op 286, 477; '28 AG Op 122, 435; '34 AG Op 649; '36 AG Op 274; '38 AG Op 6

Nonemployee of city. One may not be said to be in the employ of a city, and therefore within the benefits of this chapter, when, at the time of his injury, he was performing work which he had donated, in furtherance of a plan of public-spirited citizens to beautify a plot of municipally owned land as a city park, which plan the city council had approved, provided it be carried out without expense to the city.

Norman v City, 206-790; 221 NW 481; 28 NCCA 831

Indigents on work-relief. An indigent who, through federal, state, and county unemployment relief agencies is given work on county roads and is injured while performing such work, must, in order to hold the county liable under the workmen's compensation act, show that the legal relation between him and the county was, at the time of injury, that of employer and employee.

Oswalt v Lucas Co., 222-1099; 270 NW 847; 3 NCCA(NS) 742

1363 Acceptance presumed.

Employer's failure to insure liability—employee's option—presumption. In workmen's compensation case where employer fails to insure his liability, as required under Iowa law, thereby giving employee election to proceed under the act or collect damages at common law, election to proceed under act will be presumed in absence of filing of his election within required time.

Severson v Hanford Air Lines, 105 F 2d, 622

Applicability of state and federal acts. Injuries received by an employee of a common carrier, engaged in the transportation of both intrastate and interstate freight, are compensable under the state workmen's compensation act, and not under the corresponding federal act, when the employment, in the course of which and out of which the injuries arose, consists solely of the duty to patrol the railroad yards of the employer against thieves, trespassers, and fires.

Califore v Railway, 220-676; 263 NW 29

Extra-territorial effect. The workmen's compensation act of this state, when not formally rejected, becomes a part of a contract of employment entered into in this state by a resident employer and a nonresident employee, tho the contract requires almost exclusive execution of the contract by the employee in the foreign state—where the employee was injured.

Cullamore v Groneweg & S., 219-200; 257 NW 561

Consent of owner-employer to operation of automobile—effect. An employer, whose automobile is being operated with his consent, is not liable, under §5026, C., '35, to his own employee for an injury suffered by said employee in consequence of the actionable negligence of said operator of the car, provided said injury is compensable under the workmen's compensation act.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Injury not occurring from accident. A personal injury may be compensable even tho it did not arise out of an accident, or special incident or unusual occurrence. So held where a workman ruptured his stomach consequent on the physical strain of his ordinary work.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573; 35 NCCA 432

Traumatic injury to diseased organ. A traumatic injury to an organ of the human body is not rendered noncompensable because the organ was already in a weakened condition because of a disease, and, therefore, more susceptible to an injury than a normal organ.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573; 35 NCCA 432

Injury aggravating disease. In workmen's compensation case where the injury aggravates or accelerates a disease with which the workman is afflicted, it is compensable if death results from or is hastened by the injury.

West v Phillips, 227-612; 288 NW 625

Lead poisoning to auto mechanic—occupational disease—nonconclusive finding. As to lead poisoning suffered by an automobile mechanic from using a blowtorch negligently filled with tetraethyl lead gasoline, industrial commissioner's finding it to be an occupational disease was not conclusive on the courts.

Black v Creston Auto Co., 225-671; 281 NW 189

Garage mechanic—lead poisoning from blowtorch not occupational. An occupational disease is a usual or unavoidable incident or result of the particular employment. Lead poisoning suffered by a garage mechanic over a period of time resulting from using a blowtorch containing tetraethyl lead gasoline negligently furnished by the employer is a disease outside the ordinary diseases that follow the usual business of an automobile mechanic, and is compensable as an injury in the course of his employment.

Black v Creston Auto Co., 225-671; 281 NW 189

Fatal sunstroke—when noncompensable. A fatal sunstroke cannot be said to "arise out of" an employment and, therefore, be compensable, when the facts attending the injury fail to reveal any causal connection between the employment and the said injury.

Wax v Des M. Corp., 220-864; 263 NW 333; 38 NCCA 621

Death from lightning—noncompensable. The death of an employee from a fatal stroke of lightning, tho occurring "in the course of" his employment, cannot be deemed to "arise out of" said employment, and therefore be compensable under the workmen's compensation act, unless, by a preponderance of the evidence, a causal connection is established between (1) the circumstances and conditions attending said employment and (2) said death, i. e., that a person engaged in said employment is more susceptible to such an injury than other persons in the same locality. Evidence held insufficient.

Mincey v Dultmeier Co., 223-252; 272 NW 430

Heat exhaustion. In workmen's compensation action it is essential, in order to recover an award for death from heat exhaustion, that natural heat be intensified by artificial heat.

West v Phillips, 227-612; 288 NW 625

Exhaustion from artificial heat. Exhaustion from artificial heat in a bakeshop, which caused the death of a workman in the course of his employment, creates a compensable injury.

West v Phillips, 227-612; 288 NW 625

Excessive heat caused artificially. In workmen's compensation action to recover for death of workman caused by intensified or artificial heat, held, evidence sufficient to sustain finding that there was excessive heat in a bakeshop, caused artificially.

West v Phillips, 227-612; 288 NW 625

Causal connection between injury and death. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein testimony of physician shows that some of the symptoms of heat exhaustion are that patient perspires freely, has an increased thirst, flushed face, increasing weakness and chills, and where workman manifested substantially all of the symptoms enumerated, such testimony supplied evidence that workman suffered heat exhaustion which hastened his death and thus provided the causal connection between his death and injury.

West v Phillips, 227-612; 288 NW 625

Act of courtesy resulting in injury. An injury to an employee may be said to "arise out of and in the course of his employment" when received at the employer's plant during working hours in extending, as a matter of courtesy, helpful assistance to a nonemployee who is rightfully on the premises for a purpose advantageous to the owner of the plant, provided the employee, from all the facts and circumstances attending his employment and work, believed and had reasonable grounds to believe that his employment embraced and contemplated the giving of such assistance under such circumstances.

Yates v Humphrey, 218-792; 255 NW 639; 35 NCCA 541

Hunting pheasants—course of employment—supported findings. The evidence leading up to and attending the injury of a salesman of steel culverts, while hunting pheasants with a son of a prospective customer, may be such as to support a finding of the industrial commissioner that the salesman was injured in the course of his employment and entitled to compensation accordingly.

Fintzel v Stoddard Co., 219-1263; 260 NW 725; 37 NCCA 799; 4 NCCA (NS) 694

1364 Rejection.

Failure to reject—effect. The neglect of an employer specifically to reject the workmen's compensation act in the manner provided automatically and conclusively places such employer under said act; and his neglect to insure his liability does not take him out from under said act.

Van Gorkom v O'Connell, 201-52; 206 NW 637

1367 Defenses when employee rejects.

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

Safe place to work—no warranty by master—reasonable care only. In no event is a master held to warrant or insure the servant's safety, but he is held to the exercise of reasonable care to eliminate those elements of danger to the life and limb of the servant which are not the usual and natural incidents of the service when the master has exercised reasonable care.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Negligence—reasonable care—test. If, in the performance of his duties, the master has exercised that degree of care ordinarily exercised by other reasonably prudent persons acting under the same or similar circumstances, he has met the standard of care the law requires and it cannot be said he is guilty of negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

"Vice-principal" or "fellow servant"—master's liability. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he was a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

1368 Certain defenses not available.

Atty. Gen. Opinion. See '36 AG Op 395

Assumption of risk defined. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Safe tools and place to work—reasonable care required. A master is required to exercise reasonable care to furnish reasonably safe tools, appliances, and instrumentalities for use in the work which the servant is expected to perform and the same degree of care in furnishing a reasonably safe place in which to work.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

1375 Defenses not available when employer rejects.

"Vice-principal" or "fellow servant"—master's liability. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he was a vice-principal, he was such only to the extent

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Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

1376 Willful injury—intoxication.

Liberal construction—workmen's compensation act. The workmen's compensation act is to be liberally construed.

Everts v Jorgensen, 227-818; 289 NW 11

Willful injuries. A claim for workmen's compensation for injuries received by an employee who was attacked by another employee who had recently been discharged was sustainable as not within an exception to the workmen's compensation law providing that no compensation be allowed for injuries caused by an employee's willful intent to injure another, when the commissioner inferred from the evidence that the attack was "willful", meaning "governed by will but without yielding to reason", and was not the result of personal ill will, when the relations between the two men had always been friendly, but that any hostile feelings were against the former employer.

Everts v Jorgensen, 227-818; 289 NW 11

Fact of employment—claimant's burden of proof. The general rule that an employee is entitled to compensation for injuries arising in the course of his employment places upon him the burden of proving himself to be an employee within the meaning of the statute and proving that he received an injury which arose in the course of his employment.

Everts v Jorgensen, 227-818; 289 NW 11

Confession and avoidance. Under a claim for workmen's compensation, a defense alleging that the injuries sustained by the claimant were caused by the willful act of a third person is in the nature of a confession and avoidance and places the burden of proving it to be true upon the defendant.

Everts v Jorgensen, 227-818; 289 NW 11

Burden of proof on one asserting exception. One relying on an exception to the workmen's compensation act, providing that no compensation shall be allowed for an injury caused by the employee's willful intent to injure himself or to willfully injure another, has the burden of establishing the facts which bring the matter within the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Burden of proof not sustained. The defendant in an action for workmen's compensation who relied on an exception to the law failed to sustain the burden of proving the exception when there was an entire lack of evidence tending to prove or disprove the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Employee attacked by discharged employee—course of employment. When a hotel clerk, while on duty, was attacked by a recently discharged employee of the hotel, injuries received in the attack arose out of and in the course of the employment.

Everts v Jorgensen, 227-818; 289 NW 11

Supported findings of fact by commissioner on workmen's compensation claim. In an appeal from the commissioner's allowance of a claim for workmen's compensation, the order of the commissioner should be sustained when the record contains evidence to support his findings of fact.

Everts v Jorgensen, 227-818; 289 NW 11

1377 Implied acceptance.

Foreign employer—adjudication on registered mail service. The workmen's compensation act, in the absence of a statutory rejection thereof, becomes a part of a contract of employment which is performable by the employee wholly within this state, and entered into between a resident employee of this state and a foreign nonresident employer doing business in this state without a state permit; but in case the employee dies from an injury compensable under said act, the industrial commissioner acquires no jurisdiction to determine and adjudicate the compensation due on account of said death by simply sending, by registered mail, notices of said proceedings to

said employer in said foreign state, tho, concededly, the addressee received said notices. An adjudication on such service does not constitute due process.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

1378 Contract to relieve not operative.

Contract in avoidance of liability—effect. A contract must be wholly rejected insofar as it appears to be a mere device resorted to by the employer in order to relieve himself of liability under the workmen's compensation act.

Mallinger v Oil Co., 211-847; 234 NW 254

Invalid agreement—approval by commissioner—effect. The approval by the industrial commissioner of an agreement between the employer and the dependent of a deceased employee, providing for a less compensation than that required by statute, is invalid, and therefore no obstacle to the later entry by the commissioner of a valid order.

Forbes v Sand Co., 216-292; 249 NW 399

Primary liability of employer. The employer is primarily liable for the payment of the compensation provided by the workmen's compensation act, irrespective of any agreement which the dependent may enter into with the employer's insurer.

Biggs v Bank, 218-48; 254 NW 331

1379 Negligence presumed.

Fact of employment—claimant's burden of proof. The general rule that an employee is entitled to compensation for injuries arising in the course of his employment places upon him the burden of proving himself to be an employee within the meaning of the statute and proving that he received an injury which arose in the course of his employment.

Everts v Jorgensen, 227-818; 289 NW 11

1380 Rights of employee exclusive.

Action for damages—jurisdiction. The district court has no jurisdiction to try and determine an original action against an employer for damages consequent on the alleged negligence of the employer resulting in the death of an employee, when both the employer and employee are under the terms and conditions of the workmen's compensation act.

Hlas v Quaker Co., 211-348; 233 NW 514

Compensation bars action for malpractice. A workman who, on receiving an injury which is compensable under the workmen's compensation act, demands and receives (or is receiving) compensation under said act for said injury, may not maintain an action against the attending physician for damages consequent on the aggravation of said injury by the unskillful treatment of said physician.

Paine v Wyatt, 217-1147; 251 NW 78; 39 NCCA 586

1382 Liability of others—subrogation.

Atty. Gen. Opinion. See '25-26 AG Op 388

Action against third party wrongdoer—foreign statute—effect. Under the workmen's compensation act of Illinois, when an employer pays his employee compensation for an injury, said employer is thereby subrogated to the employee's right to maintain an action against a third party wrongdoer who caused the injury, provided all three said parties are operating under said act. Said Illinois act will not be given, in this state, the effect of depriving an employee who renders services in Illinois for his Iowa employer, but who was injured in this state by a wrongdoer resident of this state, of the right to maintain in his own name in this state an action for damages against said wrongdoer, even tho said employer has paid, in Illinois, said employee the compensation called for by the Illinois act, and even tho wrongdoer's general business extended into the state of Illinois.

Henriksen v Stages, Inc., 216-643; 246 NW 913; 32 NCCA 602

Recovery by surety against third party. An insurer who pays compensation to an injured employee of an employer operating under the workmen's compensation act, but who neither (1) demands action by the employee against a third party out of whose operations the injury occurred, nor (2) serves on said third party any notice of his lien in an action voluntarily brought by the employee against said third party, may not, after the employee has settled with said third party and dismissed his action, maintain an action against said third party to recover the sums paid by said insurer to said employee; and especially when said insurer produces no showing that said third party was legally liable for the injury to said employee, or had ever admitted such liability.

Southern Sur. v Railway, 215-525; 245 NW 864

Compensation bars action for malpractice. A workman who, on receiving an injury which is compensable under the workmen's compensation act, demands and receives (or is receiving) compensation under said act for said injury, may not maintain an action against the attending physician for damages consequent on the aggravation of said injury by the unskillful treatment of said physician.

Paine v Wyatt, 217-1147; 251 NW 78; 39 NCCA 586

Discharge of employer's liability—effect on third party wrongdoer. Where an injury, which is mandatorily compensable under the workmen's compensation act, is received by an employee in consequence of the actionable negligence of the operator of an automobile owned by, and operated with the consent of, the employer, the fact that the employer fully discharges his statutory liability to the employee

does not ipso facto discharge the legal liability of the said negligent operator to said employee.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

1383 Notice of injury—failure to give.

Discussion. See 1 ILB 137—Procedure

Computation of period. The ninety-day period within which an employer must receive notice of an injury (in order to fix liability in any event) commences to run from the date of the accident, and not from the date when the causal relation between the accident and the resulting disability is revealed.

Mueller v. U. S. Gyp. Co., 203-1229; 212 NW 577

Proceedings—notice to employer—commissioner's finding conclusive. A conflict in the evidence in a workmen's compensation case as to whether the employer had notice of the injury within the statutory 90-day period, is a question whose determination by the industrial commissioner is conclusive on the courts.

Fritz v Rath Co., 224-1116; 278 NW 208

1386 Limitation of actions.

Atty. Gen. Opinions. See '25-26 AG Op 144; '36 AG Op 395

Nonretroactive effect. This section has no application to an injury received prior to the enactment of the section.

Hinricks v Locomotive Wks., 203-1395; 214 NW 585

Judgment on agreement—time limit. The two-year statute of limitation for instituting original proceedings for compensation under the workmen's compensation act has no application whatever to proceedings instituted in the district court to obtain judgment on a valid agreement as to compensation, even tho such proceedings were instituted more than two years after the agreement was executed and approved.

Biggs v Bank, 218-48; 254 NW 331

1387 Professional and hospital services.

Discussion. See 1 ILB 80—Rights of a physician

Atty. Gen. Opinions. See '28 AG Op 435; '34 AG Op 379

Medical services—condition to allowance. Upon reversing the order of the industrial commissioner that certain injuries were not compensable, the court may not make an allowance for medical services in the absence of a showing that a request was made to the commissioner or to the court for such services.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573

Compromise—paying medical expense—no third party contract for physician. In a workmen's compensation case a stipulation of settlement including "all medical expense incurred" does not make a contract for the benefit of third persons so as to permit an action to be maintained by the physician who rendered medical services to the injured employee.

Casey v Creamery Co., 224-1094; 278 NW 214

1389 Liability in case of no dependents.

Atty. Gen. Opinions. See '30 AG Op 87, 271

Exemption from debts of testator. Workmen's compensation, already collected as the result of a commutation settlement and in the hands of testator's attorney, is subject to the debts of the employee's estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

1390 Compensation schedule.

Atty. Gen. Opinions. See '25-26 AG Op 251; '38 AG Op 6

Deficient earnings—computation. When a fatally injured, adult employee earns less than 300 times the usual daily wage in the same line of industry in the locality, the yearly wage must be computed under §1397, subsec. 5, C., '31, and not under this section.

Shuttleworth v Power Co., 217-398; 251 NW 727

1391 Maturity date and interest.

Tender—effect. A tender by an employer of the proper amount of compensation payments, and for the proper compensation period, absolves the employer from all obligation to pay interest on such payments pending an unsuccessful attempt by the employee to secure an increase in the compensation period.

Pappas v Tile Co., 201-607; 206 NW 146

Nonallowable interest. Interest on a long delayed award of compensation will not be allowed when the delay was consequent on the applicant's neglect to perfect her petition for review of the decision of the board of arbitration.

Bushing v Light Co., 208-1010; 226 NW 719

1392 Death cases—dependents.

Atty. Gen. Opinions. See '25-26 AG Op 437; '28 AG Op 344; '30 AG Op 271

What causes of action survive. While the right of an injured employee to compensation under the workmen's compensation act is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Coal Co., 217-827; 250 NW 607

"Weekly compensation" defined. The "weekly compensation" provided by this section for injuries resulting in death is computed by taking 60 percent of the "average weekly earnings" referred to in §1390, C., '31.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573

200 weeks payment—nonapplicability. Compensation for death under the workmen's compensation act is not limited to payments for 200 weeks simply because the workman happened to be working at the time of his death in a department which "shuts down and ceases operation during a season of each year", when the employer's business as a whole continues throughout the year in other departments, and the deceased employee is a general employee working in all departments.

Forbes v Sand Co., 216-292; 249 NW 399

Leg injury causing pneumonia—failure of proof—claimant's burden. A workmen's compensation claimant fails to maintain her burden to establish a compensable claim sustained in the course of employment when only hearsay evidence is offered to show that a leg injury to her husband occurred during his employment and when the producing cause of subsequent death from lobar pneumonia is under the conflicting medical testimony a matter of uncertainty.

Featherson v Continental-Keller Co., 225-119; 279 NW 432

1395 Permanent total disability.

"Disability" defined. An employee may be permanently and totally "disabled" within the meaning of the workmen's compensation act, and entitled to compensation accordingly, even tho a large percentage of his physical powers remain intact. In other words, the disability for which the law makes compensation is industrial disability—disability from carrying on a gainful occupation—inability to earn wages.

Diederich v Railway, 219-587; 258 NW 899

1396 Permanent partial disabilities.

Rule of computation. The legal formula, under the workmen's compensation act, for computing the weekly compensation due an employee consequent on a fractional, permanent disability not involving the loss of any physical part of the body is: Average weekly wage times 60 percent times the fraction representing the extent of the disability.

Oldham v Scofield et al., 222-764; 266 NW 480, 269 NW 925

"Disability" defined. An employee may be permanently and totally "disabled" within the meaning of the workmen's compensation law, and entitled to compensation accordingly, even tho a large percentage of his physical powers remain intact. In other words, the disability for which the law makes compensation is industrial disability—disability from carrying on a gainful occupation—inability to earn wages.

Diederich v Railway, 219-587; 258 NW 899

Conclusiveness of compensation schedule. An employee under the workmen's compensation act was, under an agreement, paid compensation for a supposedly temporary injury to the employee's foot. On review of said agreement, the deputy industrial commissioner found, on supporting evidence, that the foot had been permanently disabled to the extent of 50 percent of its normal functions, and ordered additional compensation paid according to the statute fixing compensation for permanent partial disabilities.

Held that the court, on appeal, should have treated the finding of the deputy as conclusive —that the court was in error in adjudging that the employee was, in an industrial sense, permanently disabled, and was entitled to compensation for the concededly permanent partial disability, not in accordance with the statutory schedule governing compensation for permanent partial disability, but on the basis of 400 weekly payments for total permanent disability.

Soukup v Shores Co., 222-272; 268 NW 598

Loss of less than arm—compensation period. Inasmuch as the workmen's compensation act does not definitely fix the compensation period for the loss of more than a hand but less than two-thirds of the arm, such period must, in case of dispute, be determined by arbitration, or by the industrial commissioner, in case arbitration is waived, and must, even tho the arm is the only arm possessed by the employee at the time of the injury, be determined by adding to the compensation period of 150 weeks for the loss of a hand, such period as will equitably adjust the compensation between the loss of a hand and the loss of an arm, such total period not to equal, however, 225 weeks—the statutory period for the loss of an arm.

Pappas v Tile Co., 201-607; 206 NW 146

Compensation—acceptance—effect. The acceptance by an employee of tendered compensation payments cannot prejudice him when the sole dispute between the employer and employee is as to the time the payments should continue.

Pappas v Tile Co., 201-607; 206 NW 146

Payment for former injury not deductible. A claimant for industrial compensation for loss of a member is entitled to full payment even tho previously he had been paid for permanent partial disability, if at the time of the last injury he was not receiving compensation under the act for the former injury.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

"Loss of more than one phalange." The provision that "the loss of more than one phalange shall equal the loss of the entire finger" is not subject to any qualifying terms as to the extent of the loss.

Starcevich v Fuel Co., 208-790; 226 NW 138

Loss of one eye. The compensation for the loss of an eye is limited to weekly compensation for one hundred weeks, even tho, at the time of such loss and prior thereto, the employee had lost three-fourths of the normal vision of his remaining eye.

Daugherty v Coal Co., 206-120; 219 NW 65

Loss of subnormal eye—useful industrial vision. The workmen's compensation act makes no requirement that an eye lost in an industrial accident must be a normal one. If there was useful industrial vision, as shown by the facts, and such vision is lost, there is a "loss of an eye" under the act.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Vision—evidence refuting commissioner's decision. Evidence in a workmen's compensation case that the injured employee had from 33 to 50 percent vision in an eye before it was lost in a second industrial accident, leaves the decision of the industrial commissioner, that there was no loss, without support in the evidence, and the trial court was right in reversing the commissioner's decision.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

1397 Basis of computation.

Computation of award. Rule of Richards v Central Iowa Fuel Co., 184 Iowa, 1378, relative to the computation of awards, reaffirmed.

Clingingsmith v Dairy, 202-773; 211 NW 413

Degree of proof. A claimant must establish his right to compensation by a preponderance of the evidence.

Susich v Coal Co., 207-1129; 224 NW 86

Payment for former injury not deductible. A claimant for industrial compensation for loss of a member is entitled to full payment even tho previously he had been paid for permanent partial disability, if at the time of the last injury he was not receiving compensation under the act for the former injury.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Compensation—when determined by earnings of fellow employee. When at the time an employee is fatally injured, he has not been in the employment and work in question for a full year, compensation may be properly computed on the basis of the annual earnings of a fellow employee who has been engaged in the same employment and in the same class of work for a full year. In such case the formula is as follows:

Average daily earnings of the fellow employee multiplied by 300 divided by 52 multiplied by 60 percent equals compensation per week.

Marley v Johnson & Co., 215-151; 244 NW 833; 85 ALR 969

Deficient earnings — computation. When a fatally injured, adult employee earns less than 300 times the usual daily wage in the same line of industry in the locality, the yearly wage must be computed under subsec. 5 of this section and not under §1390, C., '31.

Shuttleworth v Power Co., 217-398; 251 NW 727

200 weeks payment—nonapplicability. Compensation for death under the workmen's compensation act is not limited to payments for 200 weeks simply because the workman happened to be working at the time of his death in a department which "shuts down and ceases operation during a season of each year", when the employer's business as a whole continues throughout the year in other departments, and the deceased employee is a general employee working in all departments.

Forbes v Sand Co., 216-292; 249 NW 399

Seasonal employment—determination. Under a workmen's compensation statute, providing that the basis of computation for compensation for employees in a business or enterprise "which customarily shuts down and ceases operation during a season of each year" shall be the customary number of working days, with a minimum of 200 days, the nature of the business conducted by claimant's employer shall be determined without regard to the operations of other employers engaged in like activities, and it is not necessary to establish that the general industry or business of which the enterprise is a unit is recognized as a seasonal one.

Polich v Anderson-Robinson Coal Co., 227-553; 288 NW 650

"Operation" — seasonal business — construction. Under workmen's compensation statute, providing that the basis of computation for compensation for employees in a business or enterprise "which customarily shuts down and ceases operation during a season of the year" shall be the customary number of working days, with a minimum of 200 days, a corporation operating a wagon mine for production of coal, which ceased to produce coal between months of April and September of each year, but at one time during such period constructed an air shaft, and at other times pumped water from mine for the purpose of preservation of such mine, was not conducting "operation" of the mine within the statute because of such work to preserve the mine.

Polich v Anderson-Robinson Coal Co., 227-553; 288 NW 650

"Customarily"—seasonal employment—construction. Under workmen's compensation statute providing that the basis of computation for compensation for employees in a business or enterprise "which customarily shuts down and ceases operation during a season of the year" shall be the customary number of working days, with a minimum of 200 days, the word "customarily" was not intended to be a custom which takes the place of law. It is only necessary that the custom or habit exist for such a period that it can be said to be the custom or habit of the particular employer to operate on a seasonal basis. So, where coal mining corporation organized in 1936 ceased the production of coal each season between the months of April and September, the requirements of statute were met, and since the mine operated less than 200 days a year, the 200-day rule applied in computing compensation.

Polich v Anderson-Robinson Coal Co., 227-553; 288 NW 650

"Customarily" — seasonal employment — failure to establish. Under workmen's compensation statute providing that the basis of computation of compensation for employees in an enterprise "which customarily shuts down and ceases operation during a season of each year" shall be based on the customary number of working days, with a minimum of 200 days, the word "customarily" as used in statute applies only to the custom of the particular employer involved, and the custom of other employers engaged in like activity is immaterial. Where employer voluntarily assumes the burden of showing that claimant was engaged in a business which customarily shut down and ceased operation during a season of each year, and fails to sustain such burden, it is not error to calculate compensation on a basis of 300 days.

Schriver v McLaughlin, 227-580; 288 NW 657

Death of party—what causes of action survive. While the right of an injured employee to compensation under the workmen's compensation law is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Plainview Co., 217-827; 250 NW 607

1398 Contributions from employees.

Consent of owner-employer to operation of automobile — effect. An employer whose automobile is being operated with his consent, is not liable, under §5026, C., '35, to his own employee for an injury suffered by said employee in consequence of the actionable negligence of said operator of the car, provided said injury is compensable under the workmen's compensation act.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

1399 Examination of injured employees.

Refusal to submit to examination. Before an injured employee will be denied compensation because of his refusal to submit to a medical examination, it must appear that the proposed examining physician was authorized to practice, under the laws of this state.

Smith v Ice Co., 204-1348; 217 NW 264

Evidence — competency — confidential communications. The statutory rule of evidence (§11263, C., '35) that information obtained by a physician from his patient is inadmissible does not apply to workmen's compensation cases (§1441, C., '35).

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

1402 Conclusively presumed dependent.

Concubine not dependent.

Baldwin v Sullivan, 201-955; 204 NW 420; 208 NW 218

Conclusive dependency of stepchildren. The statutory conclusive presumption, that stepchildren of specified ages are wholly dependent upon the stepfather must prevail even tho, shortly prior to the death of the stepfather, the wife of the stepfather permanently deserted the latter, and took her children with her.

Robinson v Eaves, 203-902; 210 NW 578

Commutation—when allowable. Compensation is "definitely determinable", within the meaning of the statute (§1405, subsec. 1, C., '24), and is therefore commutable, when the compensation is for the death of an employee who leaves a widow and a stepchild under 16 years of age, even tho the widow remarries.

Reeves v Mfg. Co., 202-136; 209 NW 289

1403 Payment to spouse.

Instituting new action pending appeal—effect. An appeal by a surviving spouse, in workmen's compensation proceedings, from a judgment that she had no right as surviving spouse to be substituted as plaintiff in a proceeding for compensation commenced by her husband in his lifetime, cannot be deemed abandoned by the act of said appealing spouse in subsequently filing with the industrial commissioner her formal application for compensation as a dependent, when said latter filing was for the sole purpose of avoiding the running of the statute of limitation and preserving her rights as a dependent in the event she, on the merits, lost her pending appeal.

Dille v Plainview Co., 217-827; 250 NW 607

1405 Commutation.

Allowable commutation. Compensation is "definitely determinable", within the meaning of the statute and is therefore commutable, when the compensation is for the death of an employee who leaves a widow and a stepchild under 16 years of age, even tho the widow remarries.

Reeves v Mfg. Co., 202-136; 209 NW 289

Unapproved commutation. An agreement between an employer and one who was dependent upon a deceased employee, as to commutation of future payments, is not enforceable unless approved by the industrial commissioner.

Reeves v Mfg. Co., 202-136; 209 NW 289

1406 Proceedings for commutation.

Approval by commissioner. A petition for the commutation of compensation must carry the indorsement of the approval of the industrial commissioner; but this requirement is complied with by attaching to the petition a copy of the actual written approval of the commissioner.

Reeves v Mfg. Co., 202-136; 209 NW 289

1415 Waivers prohibited.

Invalid agreement—approval by commissioner—effect. The approval by the industrial commissioner of an agreement between the employer and the dependent of a deceased employee, providing for a less compensation than that required by statute, is invalid, and therefore no obstacle to the later entry by the commissioner of a valid order.

Forbes v Sand Co., 216-292; 249 NW 399

1417 Employees in interstate commerce.

Discussion. See 2 ILB 82—Third party rights—Federal Employers' Liability Act

Interstate commerce. A contract of employment for and on behalf of an interstate commerce carrier is consummated in this state when the conditional offer of employment is accepted in this state by a resident thereof, even tho the offer is made in a foreign state.

Chi. RI Ry. v Lundquist, 206-499; 221 NW 228

Interstate commerce. A railway employee who, upon the stopping of an interstate train, proceeds to remove intrastate freight therefrom is engaged in interstate commerce; and if he is injured he must resort to the federal employers' liability act for relief.

Johnston v Railway, 208-202; 225 NW 357; 30 NCCA 268

Interstate commerce. An employee is not engaged in interstate commerce while working for an interstate carrier in the construction of an entirely new, incomplete, and wholly unused telegraph line.

Chicago RI Ry. v Lundquist, 206-499; 221 NW 228; 30 NCCA 255

Iowa judgment for death damages—effect in foreign state. Where a judgment fixing the compensation for a railroad employee's death, due to an accident in Iowa, was rendered by an Iowa court under the Iowa compensation act, it may be pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act, since both courts had jurisdiction to decide whether deceased was engaged in intrastate or interstate commerce; and the Iowa judgment, being the earlier one rendered, was res judicata in the other action, altho the other action was brought first.

Chicago RI Ry. v Schendel, 270 US 611

1418 Employees of state.

Atty. Gen. Opinions. See '25-26 AG Op 260; '28 AG Op 203, 205; '34 AG Op 379

1419 Payment of state employees.

Atty. Gen. Opinions. See '28 AG Op 203, 205; '34 AG Op 379

1421 Definitions.

Atty. Gen. Opinions. See '28 AG Op 122; '34 AG Op 544; '36 AG Op 97; '38 AG Op 6

ANALYSIS

I EMPLOYER
II WORKMAN OR EMPLOYEE
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(a) CASUAL EMPLOYMENT
(b) CLERICAL WORK
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IV INJURY GENERALLY
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I EMPLOYER

Township not employer. A civil township is not an "employer", such township being but an unincorporated district.

Hop v Brink, 205-74; 217 NW 551

Church as employer. A voluntary church association may, in the work attending the erection of its church edifice, be an "employer" under the workmen's compensation act.

Reason: An "employer" need not, as formerly, be a person or concern engaged in a business "for the sake of pecuniary gain".

Gardner v Trustees, 217-1390; 250 NW 740

"Business" of church organization. A workman who is employed by a voluntary church association in work attending the erection of a church edifice is, within the meaning of subsec. 3a, of this section, employed "for the purpose of the employer's trade or business"—the business of erecting a church.

Gardner v Trustees, 217-1390; 250 NW 740

II WORKMAN OR EMPLOYEE

Discussion. See 18 ILR 525—Test of employee; 19 ILR 450—Public dependents

Employer-employee relation—test — control of work. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

Fact of employment—claimant's burden of proof. The general rule that an employee is entitled to compensation for injuries arising in the course of his employment places upon him the burden of proving himself to be an employee within the meaning of the statute and proving that he received an injury which arose in the course of his employment.

Everts v Jorgensen, 227-818; 289 NW 11

Employees within and without the act. If an employee is not engaged in work of a "purely casual nature" he is entitled to the benefits of the compensation act altho the employment was "not for the purpose of the employer's trade or business"; and vice versa, if his employment is "for the purpose of the employer's trade or business", he is entitled to the benefits of the act tho his employment is of a "purely casual nature". In other words, in order to put the employee outside the workmen's compensation act it must appear that the employment was both "purely casual" and "not for the purpose of the employer's trade or business".

Gardner v Trustees, 217-1390; 250 NW 740

Boy scout not an "employee". A boy scout while voluntarily attending a summer camp for recreation, pleasure, and self-development, without expense to himself, and while assisting other boy scouts in their activities as boy scouts in fulfillment of his voluntarily imposed duty as a boy scout, is not, within the meaning of the workmen's compensation act, an "employee" of the duly incorporated boy scout organization under whose auspices the camp is being held.

Stiles v Council, 209-1235; 229 NW 841

Indigents on work-relief. An indigent who, through federal, state and county unemployment relief agencies is given work on county roads and is injured while performing such work, must, in order to hold the county liable under the workmen's compensation act, show that the legal relation between him and the county was, at the time of injury, that of employer and employee.

Oswalt v Lucas County, 222-1099; 270 NW 847; 3 NCCA(NS) 742

Civil Works Administration employee — status. Workmen who are (1) employed, (2) directed when and where to work, and (3) paid for their services, by the federal Civil Works Administration, are not, while engaged in redecorating a public school building, employees of the school corporation owning said building, within the meaning of the workmen's compensation act.

Hoover v Sch. Dist., 220-1364; 264 NW 611; 39 NCCA 271; 3 NCCA(NS) 741

Nonemployee of city. One may not be said to be in the employ of a city, and therefore within the benefits of the workmen's compensation act, when, at the time of his injury, he was performing work which he had donated, in furtherance of a plan of public-spirited citizens to beautify a plot of municipally owned land as a city park, which plan the city council had approved, provided it be carried out without expense to the city.

Norman v City, 206-790; 221 NW 481; 28 NCCA 831

City fireman as "employee". This definition of the term "employee" is quite immaterial on the issue whether a fireman is an employee under §6519, C., '24.

Murphy v Gilman, 204-58; 214 NW 679

Contractor (?) or employee (?). A carpenter who, in repairing an ice house, is subject to the direction of the master as to the manner and means of doing the work may properly be found to be a "workman" or "employee," within the meaning of the workmen's compensation act, even tho the master, because of confidence in the employee, does not exercise such power.

Smith v Ice Co., 204-1348; 217 NW 264

Employee (?) or partner (?). One who has no control over the management of a business, and makes no contribution thereto except his personal services, and has no interest therein except to receive a portion of the profits thereof as compensation for his services, is an employee and not a partner.

Butz v Hahn Co., 220-995; 263 NW 257

Employee (?) or independent contractor (?) —test. One who is employed to do a certain work is a servant of the employer and not an independent contractor, when he—the one doing the work—is subject to the direction and control of the employer as to the details and method to be followed in the performance of the work. So held as to one operating an automobile oil truck, on commission.

Lembke v Fritz, 223-261; 272 NW 300

Road building contractor—truck driver—"employee" rather than "independent contractor". In workmen's compensation proceeding where it is shown that a road builder's contract provided that his own organization, with the assistance of workmen under his immediate superintendence, should perform not less than 80 percent of all work embraced in the contract, and that no portion of the contract should be sublet except with the written consent of contracting officer or his authorized representative, and where claimant, not being a

II WORKMAN OR EMPLOYEE—concluded

subcontractor, was injured while driving a truck which belonged to a person who was not a subcontractor, held, the claimant was an "employee" and not an "independent contractor" as respects the road building contractor's liability for compensation.

Schriver v McLaughlin, 227-580; 288 NW 657

Relation of parties — employee (?) or independent contractor (?). The relation of master and servant, and not of independent contractorship, exists:

1. When one party, as his sole business, enters into a bonded contract, mutually terminable on ten days' notice, with a dealer in oils, and therein agrees (a) to sell and deliver said dealer's oils to said dealer's rated customers and others, in a prescribed territory, at wholesale and retail, for cash or on credit, at said dealer's prices, and on a bi-monthly commission basis, (b) to protect and properly operate the mechanical outfit coming into his possession, (c) to handle said oils as provided by law, (d) to account for all property coming into his hands, and (e) to share in certain losses and expenses, and

2. When said dealer agrees (a) to furnish a mechanical outfit of substantial value and the motor fuel and lubricants to operate it, (b) to keep said outfit in repair in his own shops, and (c) to share with the other party in repair costs and certain losses on collections.

Mallinger v Oil Co., 211-847; 234 NW 254

Relation of parties—"employee" or "independent contractor"—recognized tests. Principle reaffirmed that, on the question whether a party is an "employee" or an "independent contractor," a material consideration is whether the party represents the employer as to the results or only as to the means; also, whether the right exists to terminate the contract instanter, without involving liability for the breach of the contract; also, the extent of the control which one party exercises over the methods and details of the work.

Arthur v School Dist., 209-280; 228 NW 70; 66 ALR 718

Oil company and filling station operator—evidence insufficiency—directing verdict. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence that operator conducted the station before approval of lease just as if it had been accepted, that he bought merchandise for cash from this company and others and kept the profits, that he received no remuneration from company, that although company suggested things to help him, it exercised no supervision, that he took out state permits in own name, and personally arranged for utility service, failed to establish relation of employer and employee. Hence company's motion for directed verdict should have been sustained.

Reynolds v Skelly Oil Co., 227-163; 287 NW 823

Wife as employee of husband. A husband who is the sole owner of a printing plant may validly employ his wife as a linotype and press operator in said plant and the wife may legally accept such employment and collect therefor, because such services are wholly outside of, and foreign to, the usual and ordinary marital duties of a wife. It follows that the wife is entitled to compensation under the workmen's compensation act for injuries arising out of and in the course of said employment.

Reid v Reid, 216-882; 249 NW 387

Termination of employment. An employee who gives the master notice of the termination of his employment, surrenders to his successor in employment the key to the work place, removes from the residence furnished to him as part of his employment, and leaves the master's premises, will not be heard to say that his employment continued during that part of the following day during which he, for the sole purpose of obtaining his tools, returned to the master's works, and during which he voluntarily proceeded to assist his successor in operating the said works.

Johnson v City, 203-1171; 212 NW 419

Maintenance of residence not "trade or business". Testimony which simply shows that a home owner maintains on his residential grounds an additional residence which is occupied by his son, establishes no such "trade or business" as renders the home owner liable under the workmen's compensation act to an employee who is injured in the course of his employment while repairing the equipment of the house occupied by the son; and this is true even tho the employee was not a casual employee.

Tunnicliff v Bettendorf, 204-168; 214 NW 516

County highway maintenance workman—no representative capacity. A county highway maintenance workman stands in no representative capacity for the employer-county when his duties are ministerial only and when he could possess no authority to act for nor bind the county as its representative, since board of supervisors and county engineer cannot delegate their powers and duties to maintain roads except as those duties are ministerial in character.

Schroyer v Jasper Co., 224-1391; 279 NW 118

III EXCLUDED PERSONS

(a) CASUAL EMPLOYMENT

Casual employment—dual provision—construction. The provision of the workmen's compensation act that "Persons whose em-

ployment is of a casual nature" shall not be under the act (§1361, subsec. 2, C., '31), and the further provision that "A person whose employment is purely casual, and not for the purpose of the employer's trade or business," shall not be deemed an "employee" (subsec. 3a, this section), when construed together, have but one meaning, to wit, the full meaning of the last provision.

Gardner v Trustees, 217-1390; 250 NW 740

Employees within and without the act. If an employee is not engaged in work of a "purely casual nature" he is entitled to the benefits of the compensation act altho the employment was "not for the purpose of the employer's trade or business"; and vice versa, if his employment is "for the purpose of the employer's trade or business", he is entitled to the benefits of the act tho his employment is of a "purely casual nature". In other words, in order to put the employee outside the workmen's compensation act it must appear that the employment was both "purely casual" and "not for the purpose of the employer's trade or business".

Gardner v Trustees, 217-1390; 250 NW 740

Employment in emergency. An employee who is employed by another employee under implied authority which arises under an emergency must be deemed a "casual" employee.

Johnson v City, 203-1171; 212 NW 419

Emergency noncasual employment.

Eddington v Tel. Co., 201-67; 202 NW 374

"Casual employment." An employment to wash the kitchen walls of a restaurant is "for the purpose of the employer's trade or business", even tho the employment is purely casual.

Dial v Lunch, 217-945; 251 NW 33

Noncasual employment—findings of commissioner. Evidence that a person was employed for the full term of two months which was the contemplated period for the performance of the work, and that he worked continuously for some eighteen days before being injured, supports the finding of the industrial commissioner that the employment was not "purely casual".

Gardner v Trustees, 217-1390; 250 NW 740

(b) CLERICAL WORK

"Clerical work only" defined. A stenographer and typist employed in the office of an insurance company in caring for and sending out supplies to agents, looking up information, making up lists of losses, and generally performing in the office other miscellaneous duties of a like or similar kind, is engaged in "clerical work only", and therefore not within the benefits of the workmen's compensation act, even tho she is, of course, subject to the hazards of her clerical position.

Crooke v Ins. Assn., 206-104; 218 NW 513; 62 ALR 342

Clerical employee. An injury to a strictly clerical employee is compensable when proximately caused by walking down an open stairway from his place of work and tripping over a scale which in part projected through the stairway and across his pathway.

Kent v Kent, 202-1044; 208 NW 709

(c) INDEPENDENT CONTRACTOR

"Independent contractor" defined. An independent contractor in fact under the common law is an independent contractor under the workmen's compensation act, and may be defined as one who carries on an independent business and contracts to do a piece of work according to his own methods, subject to the employer's control only as to results.

Arthur v School Dist., 209-280; 228 NW 70; 66 ALR 718

Mallinger v Oil Co., 211-847; 234 NW 254

Burns v Eno, 213-881; 240 NW 209

Relation of parties—"employee" or "independent contractor"—recognized tests. Principle reaffirmed that, on the question whether a party is an "employee" or an "independent contractor," a material consideration is whether the party represents the employer as to the results or only as to the means; also, whether the right exists to terminate the contract instanter, without involving liability for the breach of the contract; also, the extent of the control which one party exercises over the methods and details of the work.

Arthur v School Dist., 209-280; 228 NW 70; 66 ALR 718

Independent contractor—test. If, as to the result, and in the employment of the means, one acts entirely independent of the master, he must be regarded as an independent contractor, and not an employee.

Reynolds v Skelly Oil Co., 227-163; 287 NW 823

Trade-mark signs displayed—common knowledge—independent dealer's status not affected. In an action for injuries caused by alleged negligence of filling station operator, the fact that trade-mark signs of defendant oil company were displayed did not estop it from claiming that it was not the owner of filling station business and that operator was not employee of company, it being a matter of common knowledge that such signs are displayed throughout country by independent dealers.

Reynolds v Skelly Oil Co., 227-163; 287 NW 823

Contractor (?) or employee (?). A delivery man who is subject to no control by the person with whom he contracts, except to obey directions as to what and where to deliver, is a contractor, and not an employee.

In re Amond, 203-306; 210 NW 923

III EXCLUDED PERSONS—continued
(c) INDEPENDENT CONTRACTOR—concluded

Employee (?) or independent contractor (?). A party becomes an independent contractor and not an employee, under the workmen's compensation act, when he contracts with a consolidated school district, under a contract terminable instanter by the board, to transport school children to and from school for a stated time (a work which would consume each day but a small part of his time) and, to this end, agrees (1) to furnish at his own expense his own conveyance (except the body thereof) and full equipment for the protection of the children while on the road, and (2) to operate said conveyance at his own expense and personally or by a competent driver satisfactory to the board; and the relation of employer and independent contractor exists in such case even tho the operator is required to comply with certain rules of the board designed to protect the children in their moral and physical welfare.

Arthur v Sch. Dist., 209-280; 228 NW 70; 66 ALR 718

Employee (?) or independent contractor (?). One who equips himself with, and owns, complete oufits for hauling gravel, and for housing and maintaining himself and family while so working, becomes an independent contractor when he contracts to employ said outfits at his own expense and risk and at a fixed price per yard per mile, and on his own time, in hauling gravel from the gravel pit to such places on the highway as the public authorities may direct; and this is true tho the primary contractor with whom the independent contractor contracts is obligated to load the vehicles at the pit; likewise tho the primary contractor is obligated to the public authorities to furnish all employees necessary to carry out his contract.

Burns v Eno, 213-881; 240 NW 209

Employee (?) or independent contractor (?). A salesman who, under a contract with a dealer in goods, travels at his own expense, and when and where he pleases in a prescribed territory in quest for orders for goods to be filled by the dealer, and who receives his compensation solely in the form of commissions on sales effected by him through his own exclusive means and methods, is, within the meaning of the workmen's compensation act, an "independent contractor" and not an "employee" of the said dealer in the goods.

Arne v Silo Co., 214-511; 242 NW 539

Road building contractor—truck driver—"employee" rather than "independent contractor". In workmen's compensation proceeding where it is shown that a road builder's contract provided that his own organization, with the assistance of workmen under his immediate superintendence, should perform not less than 80 percent of all work embraced in the contract, and that no portion of the contract should be sublet except with the written consent of contracting officer or his authorized representative, and where claimant, not being a subcontractor, was injured while driving a truck which belonged to a person who was not a subcontractor, held, the claimant was an "employee" and not an "independent contractor" as respects the road building contractor's liability for compensation.

Schriver v McLaughlin, 227-580; 288 NW 657

Finding against independent contractorship—conclusiveness. A finding by the industrial commissioner, on conflicting but supporting testimony, that a workman when injured was the employee of a named employer, and not of an alleged independent contractor, is conclusive on the courts.

Niemann v Iowa Co., 218-127; 253 NW 815

Independent contractor as invitee—known danger revealed—otherwise reasonable care. Person employing an independent contractor to put steam pipes in downspouting owes only the duty to such invitee to use reasonable care for his safety, and to warn the contractor as to defects or dangers known to the employer and not apparent to the contractor. The employer is not responsible to the contractor for injuries from defects that the contractor knew of or, in the exercise of ordinary care, ought to have known of.

Gowing v Field, 225-729; 281 NW 281

(d) OFFICIALS

President of corporation not employee. The president of a corporation is not within the benefits of the workmen's compensation act, even tho, at the time of his injury, he is personally engaged in selling the products of his company by traveling about the country.

Kutil v Mfg. Co., 205-967; 218 NW 613

President excluded from coverage. A policy of insurance which simply agrees to pay the employees of the insured such sums as may become due them under the workmen's compensation act of this state does not embrace the corporate president of the insured or confer any right on him, even tho it provides, by way of a rider, that the salary of the president "shall be subject to a premium charge at the rate applicable to the hazard to which such officer is exposed".

Reason: No compensation for injuries can accrue, under said act, to the president of a corporation even tho he be deemed an "employee" under said rider.

Maryland Cas. v Dutch Mill, 220-646; 262 NW 776

General manager not "workman". An employer's alter ego, such for instance, as his general manager, is not entitled, if injured, to benefits under the workmen's compensation act.

Hamilton v Farmer Co., 220-25; 261 NW 506

Representative capacity—conclusiveness. A finding by the industrial commissioner, on supporting testimony, that a person, for whose death compensation is asked, stood, at the time of his death, in a representative capacity to his employer, is conclusive on the courts.

Pattee v Lumber Co., 220-1181; 263 NW 839; 38 NCCA 676

Public "official" not an "employee". Even tho it be conceded, arguendo, that the workmen's compensation act applies to the employees of a civil township, yet a township road superintendent would not be within the benefits of said act because he holds an "official" position.

Hop v Brink, 205-74; 217 NW 551

Officer (?) or employee (?) of city. A city marshal who is appointed by the mayor, and who qualifies by taking the usual oath, and by giving an official bond, all as required by a city ordinance, is a city officer and not a city employee within the scope of the workmen's compensation act.

Roberts v Colfax, 219-1136; 260 NW 57

Highway workman but not road patrolman —not excluded by "official position". A county highway maintenance workman is not necessarily a patrolman under §4774, C., '35, and not a person holding an "official position" such as denies him the benefits of the workmen's compensation act, when there was no record of an appointment, no approval of a bond, no oath as an official nor as a peace officer, and when no badge of office had ever been furnished.

Schroyer v Jasper Co., 224-1391; 279 NW 118

IV INJURY GENERALLY

"Personal injury" defined. A personal injury, within the meaning of the workmen's compensation act, is an injury to the body, the impairment of health, or a disease, not excluded by said legislative act, which comes about, not through natural causes, but because of a traumatic, or other, hurt or damage to the health or body of an employee.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573

Acceleration of pre-existing disease. Compensation is payable where an apparently insignificant injury arising out of and in the course of an employment fans into life and accelerates a pre-existing dormant disease. The issue is simply one of causal connection.

Fraze v McClelland Co., 200-944; 205 NW 737; 25 NCCA 368

Traumatic injury to diseased organ. A traumatic injury to an organ of the human body is not rendered noncompensable because the organ was already in a weakened condition because of a disease, and, therefore, more susceptible to an injury than a normal organ.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573; 35 NCCA 432

Injury aggravating disease. In workmen's compensation case where the injury aggravates or accelerates a disease with which the workman is afflicted, it is compensable if death results from or is hastened by the injury.

West v Phillips, 227-612; 288 NW 625

Injury not occurring from accident. A personal injury may be compensable under the workmen's compensation act, even tho it did not arise out of an accident, or special incident or unusual occurrence. So held where a workman ruptured his stomach consequent on the physical strain of his ordinary work.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573; 35 NCCA 432

Finding by commissioner—conclusiveness. A supported finding by the industrial commissioner, as to hernia being the cause of death of an injured workman, is conclusive on the appellate court.

Emery v Service Stations, 220-885; 262 NW 786; 38 NCCA 644; 1 NCCA(NS) 605

"Heat exhaustion" as compensable injury.

Belcher v Elec. Lt. Co., 208-262; 225 NW 404; 30 NCCA 361

Causal connection between injury and death. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein testimony of physician shows that some of the symptoms of heat exhaustion are that patient perspires freely, has an increased thirst, flushed face, increasing weakness and chills, and where workman manifested substantially all of the symptoms enumerated, such testimony supplied evidence that workman suffered heat exhaustion which hastened his death and thus provided the causal connection between his death and injury.

West v Phillips, 227-612; 288 NW 625

Excessive heat caused artificially. In workmen's compensation action to recover for death of workman caused by intensified or artificial heat, held, evidence sufficient to sustain finding that there was excessive heat in a bakeshop, caused artificially.

West v Phillips, 227-612; 288 NW 625

Heat exhaustion. In workmen's compensation action it is essential, in order to recover an award for death from heat exhaustion, that natural heat be intensified by artificial heat.

West v Phillips, 227-612; 288 NW 625

Exhaustion from artificial heat. Exhaustion from artificial heat in a bakeshop, which caused the death of a workman in the course of his employment, creates a compensable injury.

West v Phillips, 227-612; 288 NW 625

Lead poisoning to auto mechanic—occupational disease—nonconclusive finding. As to lead poisoning suffered by an automobile me-

IV INJURY GENERALLY—concluded

chanic from using a blowtorch negligently filled with tetraethyl lead gasoline, industrial commissioner's finding it to be an occupational disease was not conclusive on the courts.

Black v Creston Auto Co., 225-671; 281 NW 189

Occupational disease — supported finding. Record reviewed and held sufficient to support a finding by the industrial commissioner that an employee did not die from an occupational disease, but was injured by and died from the accumulation of deadly gases in a coal mine.

Dille v Plainview Co., 217-827; 250 NW 607; 34 NCCA 571

Willful injuries. A claim for workmen's compensation for injuries received by an employee who was attacked by another employee who had recently been discharged was sustainable as not within an exception to the workmen's compensation law providing that no compensation be allowed for injuries caused by an employee's willful intent to injure another, when the commissioner inferred from the evidence that the attack was "willful", meaning "governed by will but without yielding to reason", and was not the result of personal ill will, when the relations between the two men had always been friendly, but that any hostile feelings were against the former employer.

Everts v Jorgensen, 227-818; 289 NW 11

Absence of causal connection between injury and employment. An injury is not rendered compensable simply on a showing that an employee was on duty when he received the injury. Causal connection between the injury and the employment must be made to appear.

Smith v Hospital, 210-691; 231 NW 490; 30 NCCA 370; 1 NCCA(NS) 623

Accident and injury—causal connection necessary—claimant's burden. A workmen's compensation award cannot be predicated on speculation and conjecture, and the burden of proving a causal connection between the accident and its resulting injury is on claimant. So held as to infection in miner's leg and bruise not proven to have been sustained while working in mine.

Nash v Citizens Co., 224-1088; 277 NW 728

Struck by train away from place of work.

Sachleben v Gjellefald, 228- ; 290 NW 48

V PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT

Discussion. See 12 ILR 73—Employment obtained by fraud

Burden of proof. An injured employee has the burden of showing by a preponderance of the evidence that his injury arose out of and in the course of his employment.

Bushing v Lt. Co., 208-1010; 226 NW 719; 30 NCCA 449

Smith v Hospital, 210-691; 231 NW 490

Death—finding. Tho an employee is found dead on the employer's premises at a place where none of his duties were to be performed, and tho there is no direct testimony as to just when or just how he met his death, yet a finding by the industrial commissioner that the death "arose out of and in the course of" the employment is conclusive on the courts if such finding has support in the circumstances and facts surrounding and attending the death of the employee, so far as known, and in the inferences reasonably deducible from such facts and circumstances.

Bushing v Railway, 208-1010; 226 NW 719; 30 NCCA 449

Death of car salesman. A finding by the industrial commissioner, on supporting testimony, that death of car salesman "arose out of and in the course of" an employment is conclusive on the courts.

Heinen v Motor Corp., 202-67; 209 NW 415; 26 NCCA 53; 4 NCCA(NS) 676

Death from fall due to dizziness. A finding by the industrial commissioner, on supporting testimony, that death resulting from fall of person subject to nosebleed did not arise out of and in the course of an employment is conclusive on the courts.

Pattee v Fullerton Co., 220-1181; 263 NW 839

Night watchman—assault by trespasser. A finding by the industrial commissioner, that injuries to railroad night watchman assaulted by trespasser, "arose out of and in the course of" the employment, is conclusive on the court when the record reveals supporting evidence for the finding.

Califore v Railway, 220-676; 263 NW 29; 38 NCCA 683

Employee attacked by discharged employee —course of employment. When a hotel clerk, while on duty, was attacked by a recently discharged employee of the hotel, injuries received in the attack arose out of and in the course of the employment.

Everts v Jorgensen, 227-818; 289 NW 11

Findings re sportive contest. A finding by the industrial commissioner on conflicting, competent testimony that an injury to an employee arose out of a sportive contest voluntarily participated in by the injured employee and a co-employee is conclusive on the court.

Wittmer v Dexter Mfg. Co., 204-180; 214 NW 700; 27 NCCA 592; 2 NCCA(NS) 824

Chronic dermatitis—secondary infection—noncausal connection—mere possibility insufficient. Since an award of workmen's compensation must stand on something more than a mere possibility of causal connection between the accident and the injury, evidence that ag-

gravation or secondary infection of a chronic dermatitis or ringworm on employee's hand could "possibly" have been the result of housecleaning work done in employer's funeral home was not sufficient to support an award granted by industrial commissioner.

Boswell v Funeral Home, 227-344; 288 NW 402

Findings re aggravation of cancer. Evidence, expert and otherwise, carefully analyzed and reviewed, and held to be such that the industrial commissioner might justifiably find therefrom that a blow received by an employee, in the course of his employment, lit up and aggravated a cancer and caused the premature death of the employee, and inasmuch as the commissioner did so find, held that said finding was not reviewable by the courts.

Shepard v Carnation Co., 220-466; 262 NW 110; 37 NCCA 772

Leg injury causing pneumonia—failure of proof—claimant's burden. A workmen's compensation claimant fails to maintain her burden to establish a compensable claim sustained in the course of employment when only hearsay evidence is offered to show that a leg injury to her husband occurred during his employment and when the producing cause of subsequent death from lobar pneumonia is under the conflicting medical testimony a matter of uncertainty.

Featherson v Continental-Keller Co., 225-119; 279 NW 432

Garage mechanic—lead poisoning from blowtorch not occupational. An occupational disease is a usual or unavoidable incident or result of the particular employment. Lead poisoning suffered by a garage mechanic over a period of time resulting from using a blowtorch containing tetraethyl lead gasoline negligently furnished by the employer is a disease outside the ordinary diseases that follow the usual business of an automobile mechanic, and is compensable as an injury in the course of his employment.

Black v Creston Auto Co., 225-671; 281 NW 189

Hunting pheasants—course of employment—supported findings. The evidence leading up to and attending the injury of a salesman of steel culverts, while hunting pheasants with a son of a prospective customer, may be such as to support a finding of the industrial commissioner that the salesman was injured in the course of his employment, and entitled to compensation accordingly.

Fintzel v Stoddard Co., 219-1263; 260 NW 725; 37 NCCA 799; 4 NCCA(NS) 694

Act of courtesy resulting in injury. An injury to an employee may be said to "arise out of and in the course of his employment" when received, at the employer's plant during working hours, in extending, as a matter of courtesy, helpful assistance to a nonemployee who is rightfully on the premises for a purpose advantageous to the owner of the plant, provided the employee, from all the facts and circumstances attending his employment and work, believed and had reasonable grounds to believe that his employment embraced and contemplated the giving of such assistance under such circumstances.

Yates v Humphrey, 218-792; 255 NW 639; 35 NCCA 541

Finding re act of courtesy. A finding by the industrial commissioner on supporting testimony that an injury consisting of sliver in thumb while performing act of courtesy arose out of and in the course of an employment is conclusive on the courts in the absence of fraud.

Yates v Humphrey, 218-792; 255 NW 639

Heat exhaustion from and in the course of employment. In workmen's compensation case to recover for death of workman allegedly caused by intensified or artificial heat, commissioner, being the sole final judge of the facts, had, under the record, competent evidence to sustain his finding that deceased received an injury growing out of and in the course of his employment which contributed to and hastened his death.

West v Phillips, 227-612; 288 NW 625

Fatal sunstroke—when noncompensable. A fatal sunstroke cannot be said to "arise out of" an employment and, therefore, be compensable, when the facts attending the injury fail to reveal any causal connection between the employment and the said injury.

Wax v Des M. Corp., 220-864; 263 NW 333; 38 NCCA 621

Noncompensable injuries—death from lightning. The death of an employee from a fatal stroke of lightning, tho occurring "in the course of" his employment, cannot be deemed to "arise out of" said employment, and therefore be compensable under the workmen's compensation law, unless, by a preponderance of the evidence, a causal connection is established between (1) the circumstances and conditions attending said employment and (2) said death, i. e., that a person engaged in said employment is more susceptible to such an injury than other persons in the same locality. Evidence held insufficient.

Mincey v Dultmeier Co., 223-252; 272 NW 430

Emergency after working hours. An employee is in the course of his employment when, after returning home at the close of his work for the day, he starts to return to his place of work in order there to adjust an unexpected difficulty within the scope of his usual duties; and an injury received during such return trip by being run over by a passing vehicle arises out of his employment, and is compensable.

Kyle v High School, 208-1037; 226 NW 71; 28 NCCA 812; 30 NCCA 404

V PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT—continued

Working in prohibited place—effect. An employee who takes himself out of "the course of his employment" by deliberately and unjustifiably going into a place where he knows he is positively and invariably prohibited from being, may not say that his act was nothing more than an act of negligence.

Enfield v Products Co., 211-1004; 233 NW 141

Employee injured while in prohibited place. An employee is not injured "in the course of the employment" when he is injured in and at a place on the employer's premises where he knows he is positively and invariably prohibited from being, and when he is in and at said place without justifiable excuse or reason; and it is immaterial that at the time he is doing the master's work.

Enfield v Products Co., 211-1004; 233 NW 141; 30 NCCA 34

Violation of orders. The injuries to an employee must be deemed to "arise out of and in the course of" his employment when, at the time of his injuries, he was doing the identical thing, at the identical place, and with the identical instrumentalities required by his contract of employment, even tho at said time he was operating said instrumentality in a manner which he knew was contrary to the explicit command of his employer.

Wallace v Rex Co., 216-1239; 250 NW 589; 34 NCCA 647

Injury while using own vehicle. An injury to a workman must be deemed to "arise out of and in the course of" his employment when received by the workman as a result of cranking his own automobile, while it was standing on the side of a hill, in order to travel, in accordance with the orders of the employer, from one job of work to another job, it appearing that the employer knew the workman in question was using his own conveyance and made no objection thereto, tho he—the employer—had furnished a conveyance for the use of his workmen.

Marley v Johnson & Co., 215-151; 244 NW 833; 85 ALR 969; 32 NCCA 354

Employee injured during continuous employment. An injury "arises out of and in the course of an employment" when received by the employee on a Sunday while crossing a street on his way from his hotel to a nearby restaurant for his evening meal, it further appearing that the employee was a mechanic traveling about the country at the sole expense of the employer, and had arrived during the afternoon of said Sunday in the city where he was injured, solely because of orders from the employer so to report in order to perform at said place certain mechanical work for the employer on the following Monday.

Walker v Mach. Corp., 213-1134; 240 NW 725; 31 NCCA 610

Nondeparture from employment. An injury to an employee of a corporation "arises out of, and in the course of" his employment when the injury is received while the employee is performing work at the private residence of the general manager of the corporation, for the personal and individual benefit of said manager, and under orders from said manager, it appearing that the contract of employment between the corporation and the employee contemplated and required such occasional work for said manager.

Petersen v Corno Co., 216-894; 249 NW 408; 34 NCCA 633

Temporarily leaving place of work.

Sachleben v Gjellefald, 228- ; 290 NW 48

Violation of orders. The injuries to an employee must be deemed to "arise out of and in the course of" his employment when, at the time of his injuries, he was doing the identical thing, at the identical place, and with the identical instrumentalities required by his contract of employment, even tho at said time he was operating said instrumentality in a manner which he knew was contrary to the explicit command of his employer.

Wallace v Fuel Co., 216-1239; 250 NW 589; 34 NCCA 647

Consent of owner-employer to operation of automobile—effect. An employer, whose automobile is being operated with his consent, is not liable, under §5026, C., '35, to his own employee, for an injury suffered by said employee in consequence of the actionable negligence of said operator of the car, provided said injury is compensable under the workmen's compensation act.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Iowa employment contract—action—place of business. Action for damages under oral contract of employment made in Iowa is not governed by the place where the contract was entered into, but may be maintained in state where employer's business was "localized".

Severson v Hanford Air Lines, 105 F 2d, 622

Extra territorial effect. The workmen's compensation law of this state, when not formally rejected, becomes a part of a contract of employment entered into in this state by a resident employer and a nonresident employee, tho the contract requires almost exclusive execution of the contract by the employee in the foreign state—where the employee was injured.

Cullamore v Groneweg Co., 219-200; 257 NW 561

Applicability of state and federal acts. Injuries received by an employee of a common carrier, engaged in the transportation of both intrastate and interstate freight, are compensable under the state workmen's compensation act, and not under the corresponding federal act, when the employment, in the course of which and out of which the injuries arose, consists solely of the duty to patrol the railroad yards of the employer against thieves, trespassers, and fires.

Califore v Railway, 220-676; 263 NW 29

Scope of employment—jury question. The scope of a servant's duties is to be determined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform. Evidence held to present a jury question whether a general farm hand was, at the time of his injury, within the scope of his employment.

Bell v Brown, 214-370; 239 NW 785

1422 Peace officers.

Atty. Gen. Opinions. See '25-26 AG Op 209, 235, 260; '28 AG Op 299, 368; '30 AG Op 137, 270, 317, 353; '34 AG Op 379

Policemen not within act. The minor children of a deceased policeman who was a member of an organized police department and contributing to the statutory pension fund of said department, and who was killed while attempting to effect an arrest and at a time when he was not actually "pensioned", are not entitled to compensation under the workmen's compensation act.

Ogilvie v Des Moines, 212-117; 233 NW 526

Policemen under coverage. Section 1422, C., '27, providing for coverage under the workmen's compensation act for policemen killed or injured in effecting an arrest, embraces, in view of §1361, subsec. 4, those policemen only who are not members of an organized police department.

Ogilvie v Des Moines, 212-117; 233 NW 526

Noncompensable injuries. The statutory provision (editorially classified as part of the workmen's compensation act, §1422, C., '31) which, inter alia, grants compensation to a city marshal when injured "while performing such official duties where there is peril or hazard peculiar to the work of his office", does not authorize compensation for an injury received by a marshal from the accidental discharge of his revolver as it dropped from his pocket while cleaning the floor of the city jail.

Roberts v Colfax, 219-1136; 260 NW 57; 37 NCCA 807

CHAPTER 71

INDUSTRIAL COMMISSIONER

1423 Industrial commissioner—term.

Atty. Gen. Opinion. See '30 AG Op 52

1425 Duties of the deputy.

Review—allowable appeal. The action of the deputy industrial commissioner (on the application of an injured employee) in opening up for further consideration an existing agreement for compensation, and the decision of said deputy on said further consideration, constitute an authorized "review" (§1457, C., '35) from which an appeal lies to the district court.

Soukup v Shores Co., 222-272; 268 NW 598

1427 Political activity and contributions.

Atty. Gen. Opinion. See '34 AG Op 668

1436 Compensation agreements.

Agreement as to compensation—limitation. An employer and the surviving dependent wife of a deceased employee have no legal right to agree that a stated lump sum shall be paid, in any and all events, by the employer for the death of the employee. Such agreement can legally go no further than to determine what sum shall be paid per week.

Comingore v Shenandoah Co., 208-430; 226 NW 124

Compensation agreement — sufficiency. A memorandum of agreement relative to compensation tho only signed by the dependent, is all-sufficient and binding when duly approved by the commissioner, and acquiesced in, recognized, and acted on, by the employer and insurer.

Biggs v Bank, 218-48; 254 NW 331

Jurisdiction to correct entry. If a memorandum of agreement as to what compensation shall be paid by an employer for the injury or death of an employee, and the approving entry indorsed thereon by the industrial commissioner, are susceptible of both a legal and an illegal construction, the commissioner has ample power, on due application, notice, and hearing, to make such supplemental entries as will show the legal construction.

Comingore v Shenandoah Co., 208-430; 226 NW 124

Application to correct entry—withdrawal of appearance. In an application by an insurance carrier to the industrial commissioner for the correction of an entry of approval on a memorandum of agreement relative to compensation, it is quite immaterial that the employer withdraws his appearance to the proceedings.

Comingore v Shenandoah Co., 208-430; 226 NW 124

Invalid agreement—approval by commissioner—effect. The approval by the industrial commissioner of an agreement between the employer and the dependent of a deceased employee, providing for a less compensation than that required by statute, is invalid, and therefore no obstacle to the later entry by the commissioner of a valid order.

Forbes v Sand Co., 216-292; 249 NW 399

1437 Board of arbitration.

Death of applicant—proper substitution. Where an injured employee files with the industrial commissioner, under the workmen's compensation act, his application for compensation, and dies before compensation has been adjudicated, the surviving wife, who is the sole surviving dependent, may be substituted as claimant.

Dille v Coal Co., 217-827; 250 NW 607

Belated objections. The objection that an insurance carrier was not a proper party defendant along with the employer in proceedings under the workmen's compensation act will not be considered when presented for the first time on appeal to the supreme court.

Walker v Mach. Corp., 213-1134; 240 NW 725

1438 Waiver of right.

Unallowable appeal. Appeal to the district court will not lie from the findings and award of the industrial commissioner sitting as arbitrator. In other words, appeal will lie only from the findings and award of the commissioner when sitting in review of arbitration already had.

Hampton v Railway, 217-108; 250 NW 881

1440 Powers of board—hearings.

Extra-territorial effect. The workmen's compensation act of this state, when not formally rejected, becomes a part of a contract of employment entered into in this state by a resident employer and a nonresident employee, tho the contract requires almost exclusive execution of the contract by the employee in the foreign state—where the employee was injured.

Cullamore v Groneweg & S., 219-200; 257 NW 561

1441 Liberal rules of evidence.

Discussion. See 24 ILR 576—Reception of evidence

Death of party and revival of action. While the right of an injured employee to compensation under the workmen's compensation act is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Coal Co., 217-827; 250 NW 607

Evidence—commissioner not bound by common law or statutory rules. In workmen's compensation case to recover for death of workman, where objection is raised as to expert witnesses testifying to an ultimate fact, held, assuming hypothetical questions called for an ultimate fact, the testimony was admissible under §1441, C., '39, which provides that the commissioner shall not be bound by common law or statutory rules of evidence, but shall make such investigation and inquiries as are best suited to ascertain and conserve the substantial rights of the parties.

West v Phillips, 227-612; 288 NW 625

Rules of evidence and procedure. The legislature did not contemplate that all ordinary rules of evidence and procedure might be disregarded by the industrial commissioner in hearings before him.

Baker v Roberts & Beier, 209-290; 228 NW 9

Right to compensation — degree of proof. Principle reaffirmed that a claimant under the workmen's compensation act must establish his right to compensation by a preponderance of the evidence.

Susich v Coal Co., 207-1129; 224 NW 86

Employee's burden of proof. In proceeding to recover workmen's compensation, burden of proof rests upon the employee to establish his case by a preponderance of the evidence.

Boswell v Funeral Home, 227-344; 288 NW 402

Exception to workmen's compensation—burden of proof on one asserting exception. One relying on an exception to the workmen's compensation act, providing that no compensation shall be allowed for an injury caused by the employee's willful intent to injure himself or to willfully injure another, has the burden of establishing the facts which bring the matter within the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Exception to workmen's compensation—burden of proof not sustained. The defendant in an action for workmen's compensation who relied on an exception to the law failed to sustain the burden of proving the exception when there was an entire lack of evidence tending to prove or disprove the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Unallowable impeachment of witness — effect. When the testimony of witnesses offered by an employer tends to show that an injury to an employee arose out of and in the course of his employment, it is wholly unallowable for the industrial commissioner to permit the employer to impeach his own witnesses by introducing their former ex parte

affidavits as to how the injury occurred, and equally unallowable for said commissioner to treat such affidavits as substantive evidence creating a conflict with the testimony of the injured employee unquestionably showing that his injuries were compensable.

Baker v Roberts & Beier, 209-290; 228 NW 9; 30 NCCA 433; 2 NCCA(NS) 841

Exhibit offered in part — commissioner's right to consider entirety. In a workmen's compensation case where an assignment of error is based upon the contention that the commissioner exceeded his powers in considering an instrument which had been identified and offered as an exhibit, as to which exhibit it was claimed that only a part had been offered, the commissioner considered other parts not offered in evidence, and where it appears that another exhibit was offered which referred to the entire exhibit complained of, the commissioner was authorized to consider such exhibit in its entirety under the statute providing for liberal rules of evidence in workmen's compensation cases, irrespective of what might be the rule under common law, under statutory rules of evidence, or under technical rules of procedure.

Schriver v McLaughlin, 227-580; 288 NW 657

Evidence—records of former compensation claim inadmissible. Records in the industrial commissioner's office as to a former compensation claim are inadmissible when they have no bearing on the merits of the claim at bar.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Res gestae—declarations of injured party. The declarations of an injured party, made shortly after receiving the injury, as to the manner in which the injury was received, may be admissible as substantive evidence.

Califore v Railway, 220-676; 263 NW 29

Hearsay—statements to doctor regarding injuries. Hearsay evidence is not admissible nor competent to prove any of the basic facts in a compensation case. So held, as to statements made by deceased employee to doctor that injury was received in course of employment.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Unobjected to, relevant hearsay evidence considered. In the absence of objection, relevant hearsay evidence may be given consideration.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Hearsay evidence incompetent. A letter written by a physician to an insurer of an employer's industrial risk is incompetent to overthrow a prima facie showing of right of recovery on the part of the employee.

Swim v Fuel Co., 204-546; 215 NW 603

Examining injured employee—physician's opinion—hearsay. The inclusion in a physician's report to an insurance company, of his opinion, that an employee sustaining an eye injury had no vision in that eye previous to the accident, is hearsay evidence.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Evidence—competency—physician—confidential communications—admissibility. The statutory rule of evidence (§11263, C., '35) that information obtained by a physician from his patient is inadmissible does not apply to workmen's compensation cases.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Ex parte communications. Ex parte written communications are incompetent as evidence but the reception, in evidence, of a letter which expresses the opinion of a physician as to the cause of a disability does not constitute reversible error when the findings of the commissioner are otherwise supported by competent evidence, and no request for cross-examination is made.

Hinricks v Locomotive Works, 203-1395; 214 NW 585

Walker v Mach. Corp., 213-1134; 240 NW 725

Expert testimony—evidentiary (?) or ultimate (?) facts. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein defendant asserts that expert witnesses testified to the ultimate fact that there was excessive heat, which fact was for the determination of the commissioner, held, the evidence given by the experts consisted of material, evidentiary facts, constituting a basis for one of the ultimate facts in the case, which was that decedent received an injury arising out of and in the course of his employment, and therefore was admissible, particularly so where defendant did not object to the testimony on the ground that it stated an ultimate fact.

West v Phillips, 227-612; 288 NW 625

Expert testimony—artificial heat. In workmen's compensation action in which objection is raised to the admission of expert testimony to show the heat situation in a bakeshop, where the death of a workman is allegedly caused by intensified or artificial heat, held, that insofar as the conditions, causes, and effects to which the experts testified required special study and experience to understand and explain, the admission of such expert testimony was proper.

West v Phillips, 227-612; 288 NW 625

Failure to set out objections. In workmen's compensation case, wherein defendants contend hypothetical questions propounded to expert witnesses included statements not supported by the record, and also omitted material

facts, and where objections to the questions failed to point out to the commissioner the particular defects, defendant is not in a position to present this proposition on appeal.

West v Phillips, 227-612; 288 NW 625

Deposition—when admissible. The deposition of an injured employee in support of his application for compensation under the workmen's compensation law, is admissible, after his death, on behalf of a dependent spouse who has been substituted as plaintiff, the proceeding by the employee during his lifetime and the proceeding by the dependent spouse as substituted plaintiff being in law one and the same cause of action.

Dille v Plainview Co., 217-827; 250 NW 607

Causal connection between injury and death. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein testimony of physician shows that some of the symptoms of heat exhaustion are that patient perspires freely, has an increased thirst, flushed face, increasing weakness and chills, and where workman manifested substantially all of the symptoms enumerated, such testimony supplied evidence that workman suffered heat exhaustion which hastened his death and thus provided the causal connection between his death and injury.

West v Phillips, 227-612; 288 NW 625

Excessive heat caused artificially. In workmen's compensation action to recover for death of workman caused by intensified or artificial heat, held, evidence sufficient to sustain finding that there was excessive heat in a bakeshop, caused artificially.

West v Phillips, 227-612; 288 NW 625

"Customarily"—seasonal employment—failure to establish—effect. Under workmen's compensation statute providing that the basis of computation of compensation for employees in an enterprise "which customarily shuts down and ceases operation during a season of each year" shall be based on the customary number of working days, with a minimum of 200 days, the word "customarily" as used in statute applies only to the custom of the particular employer involved, and the custom of other employers engaged in like activity is immaterial. Where employer voluntarily assumes the burden of showing that claimant was engaged in a business which customarily shut down and ceased operation during a season of each year, and fails to sustain such burden, it is not error to calculate compensation on a basis of 300 days.

Schriver v McLaughlin, 227-580; 288 NW 657

Conflicting evidence—commissioner's duty. In workmen's compensation case to recover for death of workman, where there is a conflict in the evidence on the question of excessive heat allegedly causing death, it is the duty of the commissioner to determine which testimony is entitled to the greater weight and credibility.

West v Phillips, 227-612; 288 NW 625

Evidence supporting commissioner's finding. In workmen's compensation case to recover for death of workman allegedly caused by intensified or artificial heat, commissioner, being the sole final judge of the facts, had, under the record, competent evidence to sustain his finding that deceased received an injury growing out of and in the course of his employment which contributed to and hastened his death.

West v Phillips, 227-612; 288 NW 625

Undisputed evidence—contrary findings—conclusiveness. Industrial commissioner's finding contrary to undisputed evidence is not conclusive on the courts, but where workman's death from septicemia resulting from scratch on finger involves disputed testimony as to whether injury occurred in the course of the employment, the industrial commissioner's decision must stand.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Commissioner's power—appeal from arbitrator's award. The industrial commissioner, on defendant's appeal from arbitrator's award of compensation, can increase the arbitration award in favor of the nonappealing claimant under the statute authorizing the commissioner to retry the issues de novo, hear the parties, consider the transcribed evidence, hear any additional evidence and affirm, modify, reverse, or remand the arbitrator's decision.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

1443 Transcript of evidence—compensation.

Atty. Gen. Opinion. See AG Op Aug. 15, '39

1444 Depositions.

When admissible. The deposition of an injured employee in support of his application for compensation under the workmen's compensation act is admissible, after his death, on behalf of a dependent spouse who has been substituted as plaintiff, the proceeding by the employee during his lifetime and the proceeding by the dependent spouse as substituted plaintiff being in law one and the same cause of action.

Dille v Coal Co., 217-827; 250 NW 607

1446 Findings of arbitration board filed.

Appeal to district court—only from award of commissioner. An appeal to the district court in compensation cases lies only from the industrial commissioner, and not from an arbitrator's award.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Commissioner's power—appeal from arbitrator's award. The industrial commissioner, on defendant's appeal from arbitrator's award of compensation, can increase the arbitration award in favor of the nonappealing claimant under the statute authorizing the commissioner to retry the issues de novo, hear the parties, consider the transcribed evidence, hear any additional evidence and affirm, modify, reverse, or remand the arbitrator's decision.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

1447 Review.

Commissioner's power—appeal from arbitrator's award. The industrial commissioner, on defendant's appeal from arbitrator's award of compensation, can increase the arbitration award in favor of the nonappealing claimant under the statute authorizing the commissioner to retry the issues de novo, hear the parties, consider the transcribed evidence, hear any additional evidence and affirm, modify, reverse, or remand the arbitrator's decision.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Appeal to district court—only from award of commissioner. An appeal to the district court in compensation cases lies only from the industrial commissioner, and not from an arbitrator's award.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Commissioner's power to "modify" arbitration award. The statutory provision giving the industrial commissioner power to "modify" the decision of the arbitrator is the power to change, and to increase as well as reduce, the arbitration award.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Failure to set out objections. In workmen's compensation case, wherein defendants contend hypothetical questions propounded to expert witnesses included statements not supported by the record, and also omitted material facts, and where objections to the questions failed to point out to the commissioner the particular defects, defendant is not in a position to present this proposition on appeal.

West v Phillips, 227-612; 288 NW 625

Award — nonadjudication. An award made by the deputy industrial commissioner of this state (acting under stipulation as a board of arbitration), based on a finding that the employee when injured was engaged in intrastate commerce, and pending on appeal to the industrial commissioner, constitutes no bar to the prosecution in a foreign state of an action by the employee under the Federal Employers' Liability Act on the theory that the employee, when injured, was engaged in interstate commerce.

Chicago, RI Ry. Co. v Schendel, 270 US 611

1448 Decision and findings of fact.

Conflicting evidence. In workmen's compensation case to recover for death of workman, where there is a conflict in the evidence on the question of excessive heat allegedly causing death, it is the duty of the commissioner to determine which testimony is entitled to the greater weight and credibility.

West v Phillips, 227-612; 288 NW 625

1449 Appeal.

Appeal to district court—only from award of commissioner. An appeal to the district court in compensation cases lies only from the industrial commissioner, and not from an arbitrator's award.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Unallowable appeal. Appeal to the district court will not lie from the findings and award of the industrial commissioner sitting as arbitrator. In other words, appeal will only lie from the findings and award of the commissioner when sitting in review of arbitration already had.

Hampton v Railway, 217-108; 250 NW 881

Review — allowable appeal. The action of the deputy industrial commissioner (on the application of an injured employee) in opening up for further consideration an existing agreement for compensation, and the decision of said deputy on said further consideration, constitute an authorized "review" (§1457, C., '35) from which an appeal lies to the district court.

Soukup v Shores Co., 222-272; 268 NW 598

Trial not de novo. The trial of an appeal from decision of the industrial commissioner to the district court is not de novo, and where aggrieved party fails to appeal, the decision of the industrial commissioner is final and such party cannot obtain a review in either the district or supreme court.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

New action pending appeal — effect. An appeal by a surviving spouse, in workmen's compensation proceedings, from a judgment that she had no right as surviving spouse to be substituted as plaintiff in a proceeding for compensation commenced by her husband in his lifetime, cannot be deemed abandoned by the act of said appealing spouse in subsequently filing with the industrial commissioner her formal application for compensation as a dependent, when said latter filing was for the sole purpose of avoiding the running of the statute of limitation and preserving her rights as a dependent in the event she, on the merits, lost her pending appeal.

Dille v Coal Co., 217-827; 250 NW 607

Failure to appeal — effect. The ruling of the industrial commissioner that a party could not in the capacity of an administratrix maintain a proceeding to recover compensation arising out of an injury to a deceased employee, becomes a finality when not appealed from.

Dille v Coal Co., 217-827; 250 NW 607

Modification of award after appeal. The industrial commissioner has no jurisdiction to modify his award after an appeal has been taken therefrom.

Clingingsmith v Dairy, 202-773; 211 NW 413

Failure to set out objections. In workmen's compensation case, wherein defendants contend hypothetical questions propounded to expert witnesses included statements not supported by the record, and also omitted material facts, and where objections to the questions failed to point out to the commissioner the particular defects, defendant is not in a position to present this proposition on appeal.

West v Phillips, 227-612; 288 NW 625

1451 Trial on appeal.

Trial not de novo. The trial of an appeal from decision of the industrial commissioner to the district court is not de novo, and where aggrieved party fails to appeal, the decision of the industrial commissioner is final and such party cannot obtain a review in either the district or supreme court.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

1452 Record on appeal—findings of fact conclusive.

Discussion. See 11 ILR 381—Cases of undisputed facts

ANALYSIS

I CONCLUSIVE FINDINGS
II NONCONCLUSIVE FINDINGS

I CONCLUSIVE FINDINGS

Findings generally. Findings of fact by the industrial commissioner on substantial and supporting testimony are final.

Clingingsmith v Dairy, 202-773; 211 NW 413
McKinney v Fuel Co., 202-398; 210 NW 459
Mueller v U. S. Gyp. Co., 203-1229; 212 NW 577
Reid v Reid, 216-882; 249 NW 387
Gardner v Trustees, 217-1390; 250 NW 740
Wichers v McKee Co., 223-853; 273 NW 892
Nash v Citizens Co., 224-1088; 277 NW 728
Everts v Jorgensen, 227-818; 289 NW 11

Commissioner's findings — conclusiveness. The supreme court adheres to the residuum of legal evidence rule, and in workmen's compensation cases where there is competent evidence to sustain the decision of the industrial commissioner, the trial court cannot interfere with the award.

West v Phillips, 227-612; 288 NW 625

"Out of and in the course of." A finding by the industrial commissioner, on supporting testimony, that an injury "arose out of and in the course of" an employment is conclusive on the courts in the absence of fraud.

Heinen v Motor Inn, 202-67; 209 NW 415; 26 NCCA 53; 4 NCCA(NS) 676
Heissler v Hide Co., 212-848; 237 NW 343
Yates v Humphrey, 218-792; 255 NW 639
Fintzel v Stoddard Co., 219-1263; 260 NW 725
Califore v Railway, 220-676; 263 NW 29; 38 NCCA 683

"Out of and in the course of." A supported finding by the industrial commissioner, on conflicting testimony, that an employee had failed to show that an injury "arose out of and in the course of" his employment is conclusive on the courts.

Antonew v Cement Co., 204-1001; 216 NW 695
Smith v Hospital, 210-691; 231 NW 490; 30 NCCA 370; 1 NCCA(NS) 623

"Out of and in the course of." Tho an employee is found dead on the employer's premises at a place where none of his duties were to be performed, and tho there is no direct testimony as to just when or just how he met his death, yet a finding by the industrial commissioner that the death "arose out of and in the course of" the employment is conclusive on the courts if such finding has support in the circumstances and facts surrounding and attending the death of the employee, so far as known, and in the inferences reasonably deducible from such facts and circumstances.

Bushing v Iowa Co., 208-1010; 226 NW 719; 30 NCCA 449

Hunting pheasants — course of employment. The evidence leading up to and attending the injury of a salesman of steel culverts, while hunting pheasants with a son of a prospective customer, may be such as to support a finding of the industrial commissioner that the salesman was injured in the course of his employment, and entitled to compensation accordingly.

Fintzel v Stoddard Co., 219-1263; 260 NW 725; 37 NCCA 799; 4 NCCA(NS) 694

Sportive contest. A finding by the industrial commissioner on conflicting, competent testimony that an injury to an employee arose out of a sportive contest voluntarily participated in by the injured employee and a co-employee, is conclusive on the court.

Wittmer v Dexter, 204-180; 214 NW 700; 27 NCCA 592; 2 NCCA(NS) 824

Permanent partial disability. Where the industrial commissioner on a conflicting record found 25 percent permanent disability, the district court may not disregard this finding and award compensation on a total permanent disability basis.

Wichers v McKee Co., 223-853; 273 NW 892

Permanent partial disability — conclusiveness of compensation schedule. An employee under the workmen's compensation act was, under an agreement, paid compensation for a supposedly temporary injury to the employee's foot. On review of said agreement, the deputy industrial commissioner found, on supporting evidence, that the foot had been permanently disabled to the extent of 50 percent of its normal functions, and ordered additional compensation paid according to the statute fixing compensation for permanent partial disabilities.

Held that the court, on appeal, should have treated the finding of the deputy as conclusive —that the court was in error in adjudging that the employee was, in an industrial sense, permanently disabled, and was entitled to compensation for the concededly permanent partial disability, not in accordance with the statutory schedule governing compensation for permanent partial disability, but on the basis of 400 weekly payments for total permanent disability.

Soukup v Shores Co., 222-272; 268 NW 598

Compensation period. The determination by the industrial commissioner (arbitration being waived) of the compensation period for the loss of more than a hand and admittedly less than the arm, at a period between 150 weeks for the loss of a hand and less than 225 weeks for the loss of an arm, is conclusive on the courts.

Pappas v Tile Co., 201-607; 206 NW 146

Advisability of commutation. A supported finding by both the court and the industrial commissioner as to the advisability of commuting compensation is final on the appellate court.

Reeves v Mfg Co., 202-136; 209 NW 289

Length and nature of disability. When an employer agrees with the injured employee to pay the latter a stated compensation "during his disability", the court has no jurisdiction to determine such period of disability and to determine that said injuries are permanent and to enter judgment accordingly.

Sauter v Railway, 204-394; 214 NW 707

Who was employer. A finding by the industrial commissioner on competent, supporting, and conflicting testimony as to who was the employer of an injured servant is conclusive on the courts.

Murphy v Shipley, 200-857; 205 NW 497

Finding of representative capacity. A finding by the industrial commissioner, on supporting testimony, that a person, for whose death compensation is asked, stood, at the time of his death, in a representative capacity to his employer, is conclusive on the courts.

Pattee v Lumber Co., 220-1181; 263 NW 839; 38 NCCA 676

Finding against independent contractorship. A finding by the industrial commissioner, on conflicting but supporting testimony, that a workman when injured was the employee of a named employer, and not of an alleged independent contractor, is conclusive on the courts.

Niemann v Iowa Co., 218-127; 253 NW 815

Nonemployee. A finding by the industrial commissioner, on supporting testimony, that a claimant under the workmen's compensation act was not, at the time of his injury, an employee of the alleged employer is conclusive on the courts.

Norman v City, 206-790; 221 NW 481

Nonwillful neglect of injury. A finding by the industrial commissioner on conflicting and supporting testimony that an employee was not guilty of such willful misconduct in neglecting his injury as to bar recovery of compensation is not reviewable by the appellate courts.

Daugherty v Coal Co., 206-120; 219 NW 65

Notice to employer — finding conclusive. A conflict in the evidence, in a workmen's compensation case, as to whether the employer had notice of the injury within the statutory ninety-day period, is a question whose determination by the industrial commissioner is conclusive on the courts.

Fritz v Rath Co., 224-1116; 278 NW 208

Causal connection. A finding by the industrial commissioner, on competent, supporting, and conflicting testimony, that causal connection has been established between a slight injury and the subsequent condition of an injured workman is conclusive on the court.

Fraze v McClelland Co., 200-944; 205 NW 737

Hinricks v Locomotive Works, 203-1395; 214 NW 585

Noncausal connection — conclusiveness of finding. A finding by the industrial commissioner, on conflicting testimony that the physical condition of an employee was not caused by the heated condition of the atmosphere under which he formerly worked for the employer, is conclusive on the courts.

Brown v Packing Co., 219-9; 257 NW 411; 36 NCCA 540

Cause of death—artificial heat. A finding by the industrial commissioner, on supporting but conflicting testimony, that an employee died during the course of his employment from the effect of artificial heat attending and growing out of his employment is conclusive on the courts.

Belcher v Elec. Lt. Co., 208-262; 225 NW 404; 30 NCCA 361

I CONCLUSIVE FINDINGS—concluded

Cause of death—hernia. A supported finding by the industrial commissioner, as to hernia being the cause of death of an injured workman, is conclusive on the appellate court.

Emery v Ottumwa Service, 220-885; 262 NW 786; 38 NCCA 644; 1 NCCA(NS) 605
Pattee v Lumber Co., 220-1181; 263 NW 839

Employment, injury, and death unconnected. Industrial commissioner's finding that death from lobar pneumonia did not result from employment-connected injury is conclusive on the courts.

Featherson v Continental-Keller Co., 225-119; 279 NW 432

Blow lighting up cancer. Evidence, expert and otherwise, carefully analyzed and reviewed, and held to be such that the industrial commissioner might justifiably find therefrom that a blow received by an employee, in the course of his employment, lit up and aggravated a cancer and caused the premature death of the employee, and inasmuch as the commissioner did so find, held that said finding was not reviewable by the courts.

Shepard v Milk Co., 220-466; 262 NW 110; 37 NCCA 772

Loss of sight—cause. A finding by the industrial commissioner, on competent but conflicting testimony, that the loss of sight was caused by a certain injury, is conclusive on the courts.

Smith v Ice Co., 204-1348; 217 NW 264
Daugherty v Coal Co., 206-120; 219 NW 65

Impairment of vision—finding. A supported finding by the industrial commissioner that the vision of both eyes of an employee has been impaired to a named extent is conclusive on the courts.

Butz v Hahn Co., 220-995; 263 NW 257; 38 NCCA 647

Presence of gas in mine. A finding by the industrial commissioner, on conflicting evidence, as to the presence of carbon dioxide in a mine and as to its effect on a workman if it were present in the mine, is conclusive on the courts.

Susich v Coal Co., 207-1129; 224 NW 86

Cause of injury. A finding by the industrial commissioner, on conflicting, nonspeculative, competent, and supporting testimony, that the cause of death of an employee has been established by a preponderance of the testimony to have been a trauma arising out of the employment is necessarily conclusive on the courts.

Jones v Eppley Co., 208-1281; 227 NW 153; 30 NCCA 449

Septicemia — scratched finger. Industrial commissioner's finding contrary to undisputed evidence is not conclusive on the courts, but where workman's death from septicemia resulting from scratch on finger involves disputed testimony as to whether injury occurred in the course of the employment, the industrial commissioner's decision must stand.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Cerebral hemorrhage—cause. A conflict in the evidence as to whether a workman's injury was, on the following day, the cause of a cerebral hemorrhage from which he died makes a fact question whose determination by the industrial commissioner is a finality on appeal.

Schroyer v Jasper Co., 224-1391; 279 NW 118

Chronic dermatitis—noncausal connection. Since an award of workmen's compensation must stand on something more than a mere possibility of causal connection between the accident and the injury, evidence that aggravation or secondary infection of a chronic dermatitis or ringworm on employee's hand could "possibly" have been the result of housecleaning work done in employer's funeral home was not sufficient to support an award granted by industrial commissioner.

Boswell v Funeral Home, 227-344; 288 NW 402

Riding on freight elevator—prohibition. A finding by the industrial commissioner, on competent, substantial, and supporting testimony, that an employee had full knowledge that all employees were invariably prohibited from riding upon a freight elevator, and that said employee arbitrarily and unjustifiably violated said prohibition, is conclusive on the courts—even tho there is no conflict in the testimony.

Enfield v Prod. Co., 211-1004; 233 NW 141; 30 NCCA 434

Appeal to district court—trial not de novo. The trial of an appeal from decision of the industrial commissioner to the district court is not de novo, and where aggrieved party fails to appeal, the decision of the industrial commissioner is final and such party cannot obtain a review in either the district or supreme court.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

II NONCONCLUSIVE FINDINGS

Law of admitted facts.

Baldwin v Sullivan, 201-955; 204 NW 420; 208 NW 218

Permissible review. A decision by the industrial commissioner is reviewable by the court on appeal (1) if the facts found by the commissioner do not support the decision, or (2) if there is not sufficient competent evidence in the record to justify the decree.

Stiles v Council, 209-1235; 229 NW 841

Findings on undisputed testimony. The findings and conclusions of the industrial commissioner on undisputed testimony are not con-

clusive on the courts when such findings and conclusions are not justified as a matter of law.

Tunnicliff v Bettendorf, 204-168; 214 NW 516
Petersen v Corno Co., 216-894; 249 NW 408

Findings of commissioner—scope of review. Where the facts are in dispute, the court will ordinarily refuse to disturb the findings of the industrial commissioner, but where they are not in dispute, the court may review the conclusions of the commissioner upon such undisputed facts for the purpose of determining whether or not there is sufficient competent evidence to support commissioner's decision.

Boswell v Funeral Home, 227-344; 288 NW 402

Undisputed evidence—contrary findings—conclusiveness. Industrial commissioner's finding contrary to undisputed evidence is not conclusive on the courts, but where workman's death from septicemia resulting from scratch on finger involves disputed testimony as to whether injury occurred in the course of the employment, the industrial commissioner's decision must stand.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Undisputed facts—interstate commerce. A finding by the industrial commissioner on undisputed facts that an employee was not engaged in interstate commerce is reviewable by the courts.

Johnston v Railway, 208-202; 225 NW 357

Undisputed facts—course of employment. Undisputed facts bearing upon the question whether an injury arose out of and in the course of an employment present a question of law reviewable on appeal.

Marley v Johnson & Co., 215-151; 244 NW 833; 85 ALR 969

Insufficient competent evidence—independent contractor. A decision of the industrial commissioner (under a written contract and explanatory oral evidence) that a party was an independent contractor and not an employee is reversible by the court when the undisputed facts demonstrate that the party was, as a matter of law, an employee.

Mallinger v Oil Co., 211-847; 234 NW 254

Unsupported findings—clerical employee. The finding of the industrial commissioner, on nonsupportable or insufficient testimony, that an injury to a clerical employee was not the proximate result of a hazard of the employer's business, is reviewable by the appellate court.

Kent v Kent, 202-1044; 208 NW 709

Nonsupported finding—permanent partial disability. A finding by the industrial commissioner on nonconflicting testimony that the disabilities suffered by an employee were permanent and partial, is reviewable by the court.

Diederich v Railway, 219-587; 258 NW 899

Nonconclusive finding—noncompensable injury. A finding by the industrial commissioner on undisputed testimony that an injured employee was not entitled to compensation is not conclusive on the courts.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573

Lead poisoning to auto mechanic—occupational disease—nonconclusive finding. As to lead poisoning suffered by an automobile mechanic from using a blowtorch negligently filled with tetraethyl lead gasoline, industrial commissioner's finding it to be an occupational disease was not conclusive on the courts.

Black v Creston Auto Co., 225-671; 281 NW 189

Unallowable impeachment of witness—effect. When the testimony of witnesses offered by an employer tends to show that an injury to an employee arose out of and in the course of his employment, it is wholly unallowable for the industrial commissioner to permit the employer to impeach his own witnesses by introducing their former ex parte affidavits as to how the injury occurred, and equally unallowable for said commissioner to treat such affidavits as substantive evidence creating a conflict with the testimony of the injured employee unquestionably showing that his injuries were compensable. In other words, the impeachment being wholly unallowable, the testimony of both the claimant and of the master's witnesses stands uncontradicted and the injury is legally compensable notwithstanding a contrary finding by the commissioner.

Baker v Roberts & Beier, 209-290; 228 NW 9; 30 NCCA 433; 2 NCCA(NS) 841

1453 Decision on appeal.

Permissible review. A decision by the industrial commissioner is reviewable by the court on appeal (1) if the facts found by the commissioner do not support the decision, or (2) if there is not sufficient competent evidence in the record to justify the decree.

Stiles v Council, 209-1235; 229 NW 841

Ruling of commissioner—when reviewable. The ruling of the industrial commissioner on a stipulation of fact is not conclusive on the courts if the facts so stipulated do not legally support said ruling.

Oswalt v Lucas Co., 222-1099; 270 NW 847

Construction of contract by commissioner. An erroneous legal construction placed on a contract by the industrial commissioner is reviewable by the courts.

Arthur v Sch. Dist., 209-280; 228 NW 70; 66 ALR 718

Conclusion of law on undisputed facts—reviewability. The finding of law by the industrial commissioner on undisputed questions of fact is not binding on the appellate court.

Hoover v Sch. Dist., 220-1364; 264 NW 611

Conclusive finding by commissioner. Principle reaffirmed that findings of industrial commissioner based upon conflict of evidence or sufficient competent evidence are effective as a verdict of the jury and conclusive on the courts.

Wichers v McKee Co., 223-853; 273 NW 892

Supported findings of fact—affirmance. In an appeal from the commissioner's allowance of a claim for workmen's compensation, the order of the commissioner should be sustained when the record contains evidence to support his findings of fact.

Everts v Jorgensen, 227-818; 289 NW 11

Finding as to cause of death—artificial heat. A finding by the industrial commissioner, on supporting but conflicting testimony, that an employee died during the course of his employment from the effect of artificial heat attending and growing out of his employment is conclusive on the courts.

Belcher v Light Co., 208-262; 225 NW 404; 30 NCCA 361

Occupational disease. Record reviewed and held sufficient to support a finding by the industrial commissioner that an employee did not die from an occupational disease, but was injured by and died from the accumulation of deadly gases in a coal mine.

Dille v Coal Co., 217-827; 250 NW 607; 34 NCCA 571

Undisputed evidence—contrary findings—conclusiveness. Industrial commissioner's finding contrary to undisputed evidence is not conclusive on the courts, but where workman's death from septicemia resulting from scratch on finger involves disputed testimony as to whether injury occurred in the course of the employment, the industrial commissioner's decision must stand.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Commissioner's decision reversible when unsupported by evidence. In a workmen's compensation case, the decision of the industrial commissioner will be set aside if not supported by sufficient facts.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Vision—evidence refuting commissioner's decision. Evidence in a workmen's compensation case that the injured employee had from 33 to 50 percent vision in an eye before it was lost in a second industrial accident, leaves the decision of the industrial commissioner, that there was no loss, without support in the evidence, and the trial court was right in reversing the commissioner's decision.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Order based on incompetent evidence. An order of the industrial commissioner is subject to nullification by the court when the order is based solely on incompetent evidence.

Swim v Fuel Co., 204-546; 215 NW 603

Fact findings—permanent partial disability. Where the industrial commissioner on a conflicting record found 25 percent permanent disability, the district court may not disregard this finding and award compensation on a total permanent disability basis.

Wichers v McKee Co., 223-853; 273 NW 892

Road building contractor—truck driver—"employee" rather than "independent contractor". In workmen's compensation proceeding where it is shown that a road builder's contract provided that his own organization, with the assistance of workmen under his immediate superintendence, should perform not less than 80 percent of all work embraced in the contract, and that no portion of the contract should be sublet except with the written consent of contracting officer or his authorized representative, and where claimant, not being a subcontractor, was injured while driving a truck which belonged to a person who was not a subcontractor, held, the claimant was an "employee" and not an "independent contractor" as respects the road building contractor's liability for compensation.

Schriver v McLaughlin, 227-580; 288 NW 657

Conflicting adjudications. Where a judgment fixing the compensation for a railroad employee's death due to an accident in Iowa, was rendered by an Iowa court under the Iowa compensation act, it may be pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act, since both courts had jurisdiction to decide whether deceased was engaged in intrastate or interstate commerce; and the Iowa judgment, being the earlier one rendered, was res judicata in the other action, altho the other action was brought first.

Chicago, RI Ry. v Schendel, 270 US 611

Records of former compensation claim inadmissible. Records in the industrial commissioner's office as to a former compensation claim are inadmissible when they have no bearing on the merits of the claim at bar.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Unobjected to, relevant hearsay evidence considered. In the absence of objection, relevant hearsay evidence may be given consideration.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

1454 Judgment or order remanding.

Final decree—modification. A final decree for compensation under the workmen's compensation act is not erroneous because it does not provide that compensation shall cease on the death of all claimants, as the decree may

be promptly modified to meet such a contingency whenever such contingency occurs.

Walker v Mach. Corp., 213-1134; 240 NW 725

1456 Appeal to supreme court.

What constitutes "final order". A ruling of the district court that a surviving wife, sole dependent of her husband, had no right, after the death of her husband, to be substituted as plaintiff in a proceeding for compensation commenced by the husband during his lifetime, and remanding the cause to the industrial commissioner for proceedings in harmony with such ruling, constitutes a final order or judgment from which an appeal will lie to the supreme court.

Dille v Coal Co., 217-827; 250 NW 607

Trial not de novo. Principle reaffirmed that appeals under the workmen's compensation act are not tried de novo.

Arne v Silo Co., 214-511; 242 NW 539

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Belated objections. The objection that an insurance carrier was not a proper party defendant along with the employer in proceedings under the workmen's compensation act will not be considered when presented for the first time on appeal to the supreme court.

Walker v Speeder Corp., 213-1134; 240 NW 725

1457 Review of award or settlement.

Atty. Gen. Opinion. See '34 AG Op 505

Review for additional compensation—burden of proof. An employee under the workmen's compensation act, allowed and paid compensation for an injury, has the burden of proof, on his application for review and compensation for additional consequences of said injury, to establish by a preponderance of evidence that said additional consequences are such as would naturally and proximately follow said original injury—were not the result of intervening accidents or other causes.

Oldham v Scofield, 222-764; 266 NW 480; 269 NW 925

Review—allowable appeal. The action of the deputy industrial commissioner (on the application of an injured employee) in opening up for further consideration an existing agreement for compensation, and the decision of said deputy on said further consideration, constitute an authorized "review" from which an appeal lies to the district court.

Soukup v Shores Co., 222-272; 268 NW 598

1459 Notice and service.

Jurisdiction—special appearance to question—effect. It seems that a special appearance before an administrative officer, e. g., the industrial commissioner, for the sole purpose of questioning the jurisdiction of the officer to act in a certain proceeding, is proper, and will not be deemed an appearance to the merits.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

Foreign employer—adjudication on registered mail service—due process. The workmen's compensation act, in the absence of a statutory rejection thereof, becomes a part of a contract of employment which is performable by the employee wholly within this state, and entered into between a resident employee of this state and a foreign nonresident employer doing business in this state without a state permit; but in case the employee dies from an injury compensable under said act, the industrial commissioner acquires no jurisdiction to determine and adjudicate the compensation due on account of said death by simply sending, by registered mail, notices of said proceedings to said employer in said foreign state, tho, concededly, the addressee received said notices. An adjudication on such service does not constitute due process.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

1465 Judgment by district court on award.

Discussion. See 11 ILR 182—Nature of award

Judgment on agreement—time limit. The two-year statute of limitation for instituting original proceedings for compensation under the workmen's compensation act has no application whatever to proceedings instituted in the district court to obtain judgment on a valid agreement as to compensation, even tho such proceedings were instituted more than two years after the agreement was executed and approved.

Biggs v Bank, 218-48; 254 NW 331

Lost memorandum of agreement—procedure. In a proceeding to obtain judgment on a lost memorandum of agreement relative to compensation the said memorandum, if found after the record is closed, may yet be made a part of the record, with the consent of the court, by proper amendment to the pleadings.

Biggs v Bank, 218-48; 254 NW 331

CHAPTER 72

COMPENSATION LIABILITY INSURANCE

1467 Insurance of liability required.

Atty. Gen. Opinion. See AG Op May 19, '39

Primary liability of employer. The employer is primarily liable for the payment of the compensation provided by the workmen's compensation act, irrespective of any agreement which the dependent may enter into with the employer's insurer.

Biggs v Bank, 218-48; 254 NW 331

1468 Notice of failure to insure.

Neglect to insure liability — effect. The neglect of an employer specifically to reject the workmen's compensation act in the manner provided, automatically and conclusively places such employer under said act; and his neglect to insure his liability does not take him out from under said act.

Van Gorkom v O'Connell, 201-52; 206 NW 637

1475 Policy clauses required.

President excluded from coverage. A policy of insurance which simply agrees to pay the employees of the insured such sums as may become due them under the workmen's compensation act of this state does not embrace the corporate president of the insured or confer any right on him, even tho it provides, by way of a rider, that the salary of the president "shall be subject to a premium charge at the rate applicable to the hazard to which such officer is exposed".

Reason: No compensation for injuries can accrue, under said act, to the president of a corporation even tho he be deemed an "employee" under said rider.

Maryland Cas. v Dutch Mill, 220-646; 262 NW 776

1479 Employer failing to insure.

Neglect to insure liability—effect. The neglect of an employer specifically to reject the workmen's compensation act automatically and conclusively places such employer under said act.

Van Gorkom v O'Connell, 201-52; 206 NW 637

Employer's failure to insure liability—employee's option—presumption. In workmen's compensation case where employer fails to insure his liability, as required under Iowa law, thereby giving employee election to proceed under the act or collect damages at common law, election to proceed under act will be presumed in absence of filing of his election within required time.

Severson v Hanford Air Lines, 105 F 2d, 622

1480 Manner of election—failure to elect.

Employer's failure to insure liability—employee's option—presumption. In workmen's compensation case where employer fails to insure his liability, as required under Iowa law, thereby giving employee election to proceed under the act or collect damages at common law, election to proceed under act will be presumed in absence of filing of his election within required time.

Severson v Hanford Air Lines, 105 F 2d, 622

CHAPTER 73

HEALTH AND SAFETY APPLIANCES

Atty. Gen. Opinion. See '38 AG Op 431

1487 Safety appliances.

Assumption of risk. See under §1495

1493 Report of accidents—evidence.

Atty. Gen. Opinion. See '38 AG Op 431

1495 Assumption of risks.

ANALYSIS

I MASTER AND SERVANT RELATION
II INTERFERENCE WITH THE RELATION BY THIRD PARTIES
III MASTER'S LIABILITY FOR INJURIES TO SERVANT
(a) IN GENERAL
(b) PLACE OF WORK, TOOLS AND APPLIANCES
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IV LIABILITY FOR INJURIES TO THIRD PERSONS

Automobile damage cases—assumption of risk. See under §§5037 09 (VI), 5037.10 (V)
Automobile damage cases—master's liability. See under §§5037.09 (IV), 5037.10 (II)
Employment contracts. See Ch 420, Note 1 (XI)
Federal Employers' Liability Act. See under §8156 (V)
Principal and agent. See under §10966
Railroad employees. See under §§8156–8161
Services and compensation of employees. See Ch 420, Note 1 (XI)
Workmen's compensation. See Chs 70 and 71

I MASTER AND SERVANT RELATION

The relationship—test. The test of the re-

lationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268; 121 ALR 1450

The relation—servant (?) or independent contractor (?)—test. One who is employed to do a certain work is a servant of the employer and not an independent contractor, when he—the one doing the work—is subject to the direction and control of the employer as to the details and method to be followed in the performance of the work. So held as to one operating an automobile oil truck, on commission.

Lembke v Fritz, 223-261; 272 NW 300

Independent contractor—test. If, as to the result, and in the employment of the means, one acts entirely independent of the master, he must be regarded as an independent contractor, and not an employee.

Reynolds v Oil Co., 227-163; 287 NW 823

Independent contractor—burden of proof. One who claims that labor and services accepted by him were performed by an independent contractor has the burden to prove such claim.

Buescher v Schmidt, 209-300; 228 NW 26

Window washer as independent contractor. A party who is employed to clean windows at his own chosen time, and with his own means and appliances, is an independent contractor, and not a servant.

Aita v Beno Co., 206-1361; 222 NW 386; 61 ALR 351; 1 NCCA(NS) 257

The relation—when question of law. When the relationship of parties is fixed by a written contract, the question whether they occupy the relation of master and servant (employer and employee) is one of law to be determined by the court and not one of fact to be determined by the jury.

Page v Koss Con. Co., 215-1388; 245 NW 208

Breach by duty—failure to discharge—effect. Principle recognized that, tho an employer, by continuing the employment after knowledge of the breach of duty by the servant, is deemed thereby to waive his right to discharge, yet he is not thereby deemed to waive the breach of duty.

Durr v Clear Lake Park Co., 205-279; 218 NW 54

Private earnings of servant—right of master. Principle recognized that a master is not entitled to the earnings of his servant for work performed by the servant outside his employment hours and for parties other than the master.

Mayberry v Newell, 200-458; 204 NW 413

Casual employment—"extra" help—character of work. An employment in a labor-employing business, when the employment embraces the hazards incident to the business, is not rendered "casual" by the mere fact that the employment was for a few days only, and was occasioned by the taking on of "extra" help, owing to an unforeseen accumulation of work.

Eddington v Telephone Co., 201-67; 202 NW 374

Subrelationship—dual independent contractors. Where the primary contractor on a highway improvement sublets the hauling to a second party, and retains no substantial control over said second party except in case of the latter's default, and where said second party in turn sublets to a third party under contract terms substantially similar in effect, neither said third party nor his employees are employees either of said primary contractor, or of said second party.

Page v Koss Con. Co., 215-1388; 245 NW 208

Traveling salesman—employee (?) or independent contractor (?). A salesman who, under a contract with a dealer in goods, travels at his own expense, and when and where he pleases in a prescribed territory in quest for orders for goods to be filled by the dealer, and who receives his compensation solely in the form of commissions on sales effected by him through his own exclusive means and methods, is, within the meaning of the workmen's compensation act, an "independent contractor" and not an "employee" of the said dealer in the goods.

Arne v Western Silo Co., 214-511; 242 NW 539

Oil company and filling station operator—directing verdict. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence that operator conducted the station before approval of lease just as if it had been accepted, that he bought merchandise for cash from this company and others and kept the profits, that he received no remuneration from company, that altho company suggested things to help him, it exercised no supervision, that he took out state permits in own name, and personally arranged for utility service, failed to establish relation of employer and employee. Hence company's motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Licenses—"employers' association". Articles of incorporation and the course of business carried on thereunder reviewed, and held to constitute an "employers' association", within the meaning of §1546-a1, C., '27 [§1546.1, C., '39], as amended.

Employment Bur. v State Emp. Agency Com., 209-1046; 229 NW 677

II INTERFERENCE WITH THE RELATION BY THIRD PARTIES

Third person procuring discharge. A person who voluntarily executes an assignment of his wages may not predicate damages against the assignee on the fact that, when the assignee brought the assignment to the attention of the employer, the employer discharged the assignor.

Hutchins v Jones Piano Co., 209-394; 228 NW 281

III MASTER'S LIABILITY FOR INJURIES TO SERVANT

(a) IN GENERAL

Negligence—reasonable care—test. If, in the performance of his duties, the master has exercised that degree of care ordinarily exercised by other reasonably prudent persons acting under the same or similar circumstances, he has met the standard of care the law requires and it cannot be said he is guilty of negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Workmen's compensation act—original action for damages—jurisdiction. The district court has no jurisdiction to try and determine an original action against an employer for damages consequent upon the alleged negligence of the employer, resulting in the death of an employee, when both the employer and the employee are under the terms and conditions of the workmen's compensation act.

Hlas v Quaker Oats Co., 211-348; 233 NW 514

Negligence—proximate cause of injury—when jury question. Whether certain negligence was the proximate cause of a certain injury is always a jury question when different minds might reasonably reach different conclusions.

Bell v Brown, 214-370; 239 NW 785

Injuries to servant—scope of employment—jury question. The scope of a servant's duties is to be determined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform. Evidence held to present a jury question whether a general farm hand was, at the time of his injury, within the scope of his employment.

Bell v Brown, 214-370; 239 NW 785

Duty to prevent injury. A farmer is under duty to exercise ordinary care to prevent injury to his servant. Evidence reviewed and held, the failure of the farmer to throw a harvesting machine out of gear under certain circumstances presented a jury question on the issue of negligence.

Bell v Brown, 214-370; 239 NW 785

Independent contractor as invitee — known danger revealed—reasonable care rule. Person employing an independent contractor to put steam pipes in downspouting owes only the duty to such invitee to use reasonable care for his safety, and to warn the contractor as to defects or dangers known to the employer and not apparent to the contractor. The employer is not responsible to the contractor for injuries from defects that the contractor knew of or, in the exercise of ordinary care, ought to have known of.

Gowing v Field Co., 225-729; 281 NW 281

Negligence—causal connection with injury necessary — no conjecture and speculation in verdict. There must be causal connection when an injury is caused by falling from a fire escape because of an alleged defect in the top step. When the allegation is not substantiated by the evidence any more than by the plaintiff's testimony stating that "something moved", that he "caught his heel on the step", it would be mere conjecture and speculation to base a verdict thereon, and verdicts must rest on something more substantial.

Gowing v Field Co., 225-729; 281 NW 281

Failure of duty by employer. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Contract assumption by employer — effect. An agreement between an employer and an employee that the employer will assume all risk incident to the performance of a named piece of work is valid, yet it does not embrace an injury which results from the employee's own negligence; and especially is this true when the contract sprang from a contemplated danger which never in fact existed.

Rork v Klein, 206-809; 221 NW 460; 60 ALR 469

Charitable institution—nonliability to beneficiaries for employees' negligence. Tho as between benefactor and beneficiary, an institution conducted solely for doing charity may not be liable for the negligence of its employees to a person receiving the benefits of that charity, however, a WPA worker doing work on the premises of a Y.M.C.A. is not a beneficiary of the charitable work of the institution so as to be within this rule.

Andrews v Y.M.C.A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Charitable institution liable to strangers, invitees, or employees. Public policy has never demanded nor has the legislature adopted any immunity to charitable institutions from liability to strangers, invitees, or employees arising because of negligence of the servants of such institutions, and the court will not grant such immunity.

Andrews v Y.M.C.A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Employee injured by falling derrick—evidence—directed verdict. Evidence that employee engaged in tearing down silo was injured when derrick fell on him did not warrant submission of case to jury on issues of employer's negligence, negligence of fellow servant, and assumption of risk, where the employee was acting on the request of fellow servant or limited vice-principal in charge of the work, where steel pins which gave way were of harder steel than that blacksmiths ordinarily use and were of a type successfully used on derrick in the past, but were not scientifically tested for tensile strength or secured from a manufacturer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Painting schoolhouse as governmental act—scope of nonliability. A school district in causing its schoolhouse or the rooms thereof to be painted must be deemed as engaged in a governmental function with complete exemption from liability for negligence in so doing. So held where it was urged that the district had impliedly contracted to furnish the workman a "safe place" in which to work.

Ford v School Dist., 223-795; 273 NW 870

(b) PLACE OF WORK, TOOLS AND APPLIANCES

No warranty by master—reasonable care only. In no event is a master held to warrant or insure the servant's safety, but he is held to the exercise of reasonable care to eliminate those elements of danger to the life and limb of the servant which are not the usual and natural incidents of the service when the master has exercised reasonable care.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Defective appliance—assumption of risk. Where a farmer and his employee both know that an appliance designed to throw a tractor out of gear is defective, and the employee is under no duty to repair the defect, the act of the employee in continuing to use the defective appliance does not constitute an assumption of the risk attending such use.

Bell v Brown, 214-370; 239 NW 785

Safe tools and place to work—reasonable care required. A master is required to exercise reasonable care to furnish reasonably safe tools, appliances, and instrumentalities for use in the work which the servant is expected to perform and the same degree of care in furnishing a reasonably safe place in which to work.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Long use of defective machinery. A farm employee who bases his action for damages on the claim that his employer furnished him a machine with a defective shifting gear with which to perform his work, signally fails to sustain his action when the evidence shows, without question, that the machine and said device thereon had been long used by the employee, and had never, prior to the accident in question, disclosed to anyone any defect.

Degner v Anderson, 213-588; 239 NW 790; 39 NCCA 417

Promise to repair defective equipment—effect. The master's promise to repair a defective instrumentality authorizes the servant to continue its use for a reasonable time without assuming the risk attending such use unless the danger is so imminent that a reasonably prudent person would not continue such use.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67; 39 NCCA 424

Failure to warn employee. An employer is not negligent in failing to warn an experienced farm hand of the danger of going in front of a team of horses when the employee had full knowledge of the temperamental condition of the team.

Hansen v Jensen, 204-1063; 216 NW 677; 39 NCCA 431

Implied contract to furnish "safe place". A school district in causing its schoolhouse or the rooms thereof to be painted must be deemed as engaged in a governmental function with complete exemption from liability for negligence in so doing. So held where it was urged that the district had impliedly contracted to furnish the workman a "safe place" in which to work.

Ford v School Dist., 223-795; 273 NW 870

Insufficient instructions. Instructions to the effect that an employee may not recover damages sustained or resulting from the ordinary and inherent hazards and dangers of an employment, are wholly insufficient to submit the pleaded and supported defensive issue that plaintiff had knowledge of the defects in the instrumentalities used by him, and of the deficiencies and faults in the methods of using such instrumentalities, and that he fully appreciated the danger which might arise therefrom.

McClary v Railway, 209-67; 227 NW 646

Vice-principal's obligation. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he were a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Vicious and runaway team. Evidence held insufficient to establish that a team of horses in question were vicious and addicted to running away.

Hansen v Jensen, 204-1063; 216 NW 677

III MASTER'S LIABILITY FOR INJURIES TO SERVANT—continued

(b) PLACE OF WORK, TOOLS, ETC.—concluded

Appliance on tractor. A farmer must furnish his employee with a reasonably safe machine with which to perform work. Whether an appliance on a tractor designed to throw the tractor out of gear was reasonably safe, held, under the evidence, a jury question.

Bell v Brown, 214-370; 239 NW 785; 39 NCCA 422

Injury from corn shredder—directing verdict. Directing a verdict is proper against a plaintiff, a farm machinery mechanic and salesman, seeking recovery for an injury sustained when his hand was caught in a corn shredder, which had been gratuitously loaned by defendant to a neighbor on whose farm plaintiff was operating the machine, the evidence showing plaintiff was an adult familiar with such machinery and in full possession of his faculties, and that there was no negligence attributable to defendant.

Davis v Sanderman, 225-1001; 282 NW 717

Loose rug on polished floor. The maintenance in the doorway between the dining room and hallway of an ordinary home, and on the polished hardwood floor thereof, of a 3 foot by 6 foot Persian rug with ribbed undersurface but without floor fastenings of any kind, cannot, as a matter of law, as to one who for years has been familiar with said home and the furnishings thereof, be deemed a violation by the householder of his duty to furnish his domestic servant a reasonably safe place in which to work.

Nelson v Smeltzer, 221-972; 265 NW 924

(c) METHOD OF WORK, RULES AND ORDERS

Scope of servant's duties. The scope of a servant's duties is to be determined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform. Evidence held to present a jury question whether a general farm hand was, at the time of his injury, within the scope of his employment.

Bell v Brown, 214-370; 239 NW 785

Failure to warn employee. An employer is not negligent in failing to warn an experienced farm hand of the danger of going in front of a team of horses when the employee had full knowledge of the temperamental condition of the team.

Hansen v Jensen, 204-1063; 216 NW 677; 39 NCCA 431

Elevator operator violating instructions. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y.M.C.A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y.M.C.A., 226-374; 284 NW 186

Employee acting on request of fellow servant. Evidence that employee engaged in tearing down silo was injured when derrick fell on him did not warrant submission of case to jury on issues of employer's negligence, negligence of fellow servant, and assumption of risk, where the employee was acting on the request of fellow servant or limited vice-principal in charge of the work, where steel pins which gave way were of harder steel than that blacksmiths ordinarily use and were of a type successfully used on derrick in the past, but were not scientifically tested for tensile strength or secured from a manufacturer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Operation of truck. Evidence reviewed and held quite insufficient to establish a "rule" as to where trucks should be operated in the course of paving operations.

Hedberg v Lester, 222-1025; 270 NW 447

(d) FELLOW SERVANTS

"Vice-principal" or "fellow servant"—master's liability. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he were a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

(e) ASSUMPTION OF RISK

Assumption of risk. Principle reaffirmed that an employee does not assume the risk of his employer's negligence.

Nelson v. Smeltzer, 221-972; 265 NW 924

Assumption of risk defined. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

"Volenti non fit injuria" defined. The maxim "volenti non fit injuria" means: "That to which a person assents is not esteemed in law an injury" or "He who consents cannot receive an injury."

Edwards v Kirk, 227-684; 288 NW 875

Lack of knowledge. An injured party may not be held to assume the risk of a defect of which he had no knowledge.

Dahna v Fun House, 204-922; 216 NW 262

Contract assumption by employer—effect. An agreement between an employer and an employee that the employer will assume all risk incident to the performance of a named piece of work is valid, yet it does not embrace an injury which results from the employee's own negligence; and especially is this true when the contract sprang from a contemplated danger which never in fact existed.

Rork v Klein, 206-809; 221 NW 460; 60 ALR 469

Long use by employee. A farm employee who bases his action for damages on the claim that his employer furnished him a machine with a defective shifting gear with which to perform his work, signally fails to sustain his action when the evidence shows, without question, that the machine and said device thereon had been long used by the employee, and had never, prior to the accident in question, disclosed to anyone any defect.

Degner v Anderson, 213-588; 239 NW 790; 39 NCCA 417

Promise of betterment — effect. The master's promise to repair a defective instrumentality authorizes the servant to continue its use for a reasonable time without assuming the risk attending such use, unless the danger is so imminent that a reasonably prudent person would not continue such use.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67; 39 NCCA 424

Appliance on tractor. Where a farmer and his employee both know that an appliance designed to throw a tractor out of gear is defective, and the employee is under no duty to repair the defect, the act of the employee in continuing to use the defective appliance does not constitute an assumption of the risk attending such use.

Bell v Brown, 214-370; 239 NW 785

Riding unshod horse. A farm employee assumes the danger of riding an unshod horse over frozen and slippery ground at the direction of the employer when he is experienced in farm work and knows of and fully appreciates the said danger.

Laws v Richards, 210-608; 231 NW 321; 39 NCCA 431

Injury from borrowed corn shredder. A person supplying a chattel for another's use, and who derives some beneficial interest therefrom, must use reasonable care to discover, and is liable for, unreasonable risks due to the condition or disrepair of the chattel or its unfitness or inadequacy for the purpose for which supplied. The user assumes only such risks as are not known and not discoverable by the supplier using ordinary care. Rule applied to corn shredder loaned to neighbor and in which shredder a person injured hand.

Davis v Sanderman, 225-1001; 282 NW 717

(f) CONTRIBUTORY NEGLIGENCE OF SERVANT

Departure of employee from zone of service—burden of proof. An employee who voluntarily steps outside the zone of his specific employment and voluntarily engages in a work in which the employer is engaged, and is injured, must, in an action for damages, prove his own freedom from contributory negligence. (§11210, C., '24.)

Tellier v Davenport, 203-1012; 213 NW 565

Mitigation of damages. In an action by an employee against his employer for damages consequent on the negligence of the employer, the contributory negligence of the employee may be pleaded by the employer in mitigation, only, of damages.

Bell v Brown, 214-370; 239 NW 785; 34 NCCA 68

Mitigation of damages. The court may very properly instruct the jury that a master must establish his plea of contributory negligence on the part of his servant by a preponderance of the evidence, and that such plea, if so established, is available to the master only in mitigation of damages.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67

Walking down fire escape carrying tools. A plumber, an independent contractor, who attempts the acrobatic feat of walking down a steep, but ordinarily safe, fire escape as if it were a stairway, with his hands full of wrenches and a length of pipe, or, while balancing on one heel, attempts to swing his body around while his hands were so employed, has assumed the risk arising from such conduct and must be held, as a matter of law, to have contributed to his injuries, if he falls.

Gowing v Field Co., 225-729; 281 NW 281

Failure to observe rear—negligence per se. The foreman of a paving outfit is guilty of negligence per se in walking along the unpaved portion of a rough road for a distance of some 200 feet without making any observations to his rear for trucks which he knew were being backed along said road and in his immediate direction at the rate of one truck each 90 seconds.

Hedberg v Lester, 222-1025; 270 NW 447

IV LIABILITY FOR INJURIES TO THIRD PERSONS

Liability basis—breach of duty not employment relationship. Every case which allows recovery against a servant can be based not upon any relationship growing out of the employment but upon the fundamental proposition that the servant violated some duty that he owed to the person injured. It may be an act of misfeasance, nonfeasance, or malfeasance.

Montanick v McMillin, 225-442; 280 NW 608

Exoneration of servant exonerates master. A master cannot be held liable for an injury solely on the ground of the negligence of his servant, when the jury wholly exonerates the servant from any negligence.

Hall v Miller, 212-835; 235 NW 298

Departure of servant from zone of service—effect. When the range or zone of service of an employee embraced the taking of a truck to a place of storage for the night, the act of the employee in temporarily using the truck for his own personal use will not per se absolve the employer from liability for a negligent act by the employee occurring after the employee had resumed his duty to take the truck to its storage place, and while he was pursuing a proper route in the immediate vicinity thereof.

Orris v Tolerton & Warfield Co., 201-1344; 207 NW 365; 25 NCCA 549; 34 NCCA 192, 213

Abandonment of employment—jury question. Evidence reviewed and held to present a jury question on the issue whether a servant had temporarily abandoned his employment and had not returned thereto at the time of the commission by him of an alleged negligent act.

Heintz v Iowa Packing Co., 222-517; 268 NW 607

Master and servant—loaning servant to another. A utility corporation, seeking to set its transmission poles along a public highway, is not responsible for the acts of its employees in assisting the county highway engineer, under his absolute direction and control, in finding a lost section corner which, when found, enables the engineer, first, to locate the lines of the highway, and second, the line of the poles.

Swartzwelter v Util. Corp., 216-1060; 250 NW 121; 34 NCCA 471

Mere employee of tort-feasor—nonliability. The mere employee of a tort-feasor is not necessarily liable for the damage resulting from the tort. So held in an action by the lessee of coal lands for damages consequent on the wrongful removal of coal by the owner of the leased land.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Municipal corporation employees personally liable for torts—governmental immunity denied. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218-841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Municipal corporations—nonliability for employee's tort—respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior, and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

County's nonliability. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence, demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Admissions—by employee—competency. Admissions by an employee may be competent evidence against such employee while wholly incompetent against the employer.

Glass v Ice Cr. Co., 214-825; 243 NW 352

Oil company and filling station operator—liability. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence that operator conducted the station before approval of lease just as if it had been accepted, that he bought merchandise for cash from this company and others and kept the profits, that he received no remuneration from company, that altho company suggested things to help him, it exercised no supervision, that he took out state permits in own name, and personally arranged for utility service, failed to establish relation of employer and employee. Hence company's motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Trademark signs displayed — independent dealer's status not affected. In an action for injuries caused by alleged negligence of filling station operator, the fact that trademark signs of defendant oil company were displayed did not estop it from claiming that it was not the owner of filling station business and that operator was not employee of company, it being a matter of common knowledge that such signs are displayed throughout country by independent dealers.

Reynolds v Oil Co., 227-163; 287 NW 823

Partnership—nonpermissible power of partner—burden of proof. A partnership is not bound by the act of one partner in consenting to, and acquiescing in, an act which is subversive of the very purpose of the partnership, unless he who seeks so to bind the partnership establishes the fact that all the partners consented to, and acquiesced in, said act.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Measure of damages—wrongful act without profit to wrongdoer—essential proof. The lessee of coal lands who seeks to recover damages consequent on the wrongful act of the owner of the land in taking coal from the land, need not show that the defendant-owner made any profit from his wrongful operations. Plaintiff need only show wherein and to what extent he was damaged.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Salesman employee (?) or independent contractor (?). A salesman who, when traveling from place to place about the country in behalf of the business of another party, employs his own automobile, and does so with the implied authority of said other party, cannot be deemed an independent contractor as to said matter of transportation when he is at all times subject to summary discharge by said other party, and also subject to the orders of said other party as to what he shall do, and when and where he shall do it.

Heintz v Iowa Packing Co., 222-517; 268 NW 607

Salesman—use of automobile—authority of servant. Evidence reviewed and held to present a jury question on the issue whether a master had impliedly authorized his salesman, in order to perform his duties, to travel about the country by means of the salesman's individually owned automobile.

Heintz v Iowa Packing Co., 222-517; 268 NW 607

Gravel hauler—employee (?) or independent contractor (?). One who equips himself with, and owns, complete outfits for hauling gravel, and for housing and maintaining himself and family while so working, becomes an independent contractor when he contracts to employ said outfits at his own expense and risk and at a fixed price per yard per mile, and on his own time, in hauling gravel from the gravel pit to such places on the highway as the public authorities may direct; and this is true tho the primary contractor with whom the independent contractor contracts is obligated to load the vehicles at the pit; likewise tho the primary contractor is obligated to the public authorities to furnish all employees necessary to carry out his contract.

Burns v Eno, 213-881; 240 NW 209

Independent contractorship—window washer. A party who is employed to clean windows at his own chosen time, and with his own means and appliances, is an independent contractor, and not a servant.

Aita v Beno Co., 206-1361; 222 NW 386; 61 ALR 351; 1 NCCA(NS) 257

Tripping over mop handle—negligence—jury question. A naked showing that a pedestrian, while walking along a public street, was tripped and caused to fall by a mop handle in the hands of a window cleaner, does not present a jury question on the issue of negligence.

Aita v Beno Co., 206-1361; 222 NW 386; 61 ALR 351; 34 NCCA 775

Borrowing automobile to deliver telegraph message. A telegraph company is not responsible for the act of its messenger in borrowing an automobile with which to make a delivery of a message when the usual and ordinary way of making delivery was by means of a bicycle, and when the borrowing aforesaid was wholly unauthorized by and unknown to the company.

Hughes v Western Union, 211-1391; 236 NW 8; 31 NCCA 423

CHAPTER 74

BOARDS OF ARBITRATION

Discussion. See 2 ILB 140—Discrimination in state employment; 8 ILB 162—Coronado Coal Case; 19 ILR 346—Labor union strike under NIRA; 24 ILR 411—Discharge under Wagner Act

Atty. Gen. Opinions. See '28 AG Op 341; '36 AG Op 670

1496 Petition for appointment.

Atty. Gen. Opinion. See '36 AG Op 670

1497 Notification by governor.

Atty. Gen. Opinion. See '36 AG Op 670

Note 1 Labor.

Employment contracts generally. See under Ch 420, Note 1 (XI)

Discussion. See 21 ILR 595—Legislative power to regulate punishment of contempt; 22 ILR 565—Minimum wages; 23 ILR 2—Injunctions—sit-down strikes

Employer-employee relation—test—control of work. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

Contracts—legality. A contract between a street railway company and a local labor union representing the employees will not be decreed illegal by a court of equity on the ground that the contract requires the company, against public policy, to maintain two employees on each car (1) when the city has not exercised its undoubted power over such subject matter, (2) when the city is not a party to the action, and (3) when the object of the action seems to be to obtain a declaratory decree only.

Des Moines Railway v Amalgamated Assn., 204-1195; 213 NW 264

Conflict with international union. Equity will not assume jurisdiction to declare illegal a contract between an employer and a local labor union on the ground that the contract is violative of the constitution of the international union to which the local union is subject, when the international union is not a party to the action and is making no complaint.

Des Moines Railway v Amalgamated Assn., 204-1195; 213 NW 264

Unionizing industry—legality. Equity will not assume to pass upon the public policy of a contract between an employer and a local union on the ground that the contract unionizes an entire industry, when no person is complaining that he is deprived of the right to freely dispose of his labor.

Des Moines Railway v Amalgamated Assn., 204-1195; 213 NW 264

Carriage of livestock—strike as defense. The plea that a carrier of livestock was prevented from making delivery because of a strike among stockyards employees must fall when the jury might well find that, if the carrier had exercised reasonable diligence, delivery would have been made notwithstanding the strike.

Riddle v Railway, 203-1232; 210 NW 770

Boycott—intimidation and coercion. Intimidation and coercion are essential elements of boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done.

Smythe Co. v Local Union, 226-191; 284 NW 126

Peaceful picketing not secondary boycott—no injunction. A threat to do something that a person has a right to do is not a threat in a legal sense. Held that union officials by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers, and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott, and an injunction will not lie.

Smythe Co. v Local Union, 226-191; 284 NW 126

Secondary boycott—essential elements. A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw from their beneficial business intercourse, by threats that, unless they do so, the combination will cause similar loss to them, or by the use of means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm.

Smythe Co. v Local Union, 226-191; 284 NW 126

Injunction against labor union—no denial of freedom of speech and assembly. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

Injunction violation by labor union officials. There was no denial of the right of freedom of speech in holding officers of a trade union in contempt of court for violating an injunc-

tion, when they counseled, aided, abetted, and assisted in the violation of the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

State as party to proceedings against violators of injunction against labor union. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Proceedings against violators of injunction against labor union—state as party. A continuance requested on the ground that the state had been made a party to proceedings involving the violation of an injunction by labor union officers was properly refused when the petition of the state alleged the same matter and sought the same relief as the petition of the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Evidence of injunction violation—passion and prejudice negatived. There was no merit in a contention that a decision finding the defendants guilty of violating an injunction against a labor union was based on passion and prejudice, when evidence showed that they aided and abetted in mass picketing which was unlawful and which was restrained by the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Violators of injunction against labor union—maximum penalty excessive. Sentences of six months in jail and a $500 fine each, the maximum permitted by statute, when imposed against labor union officials for violating an injunction against the union, were excessive in view of the circumstances.

Carey v Dist. Court, 226-717; 285 NW 236

CHAPTER 75

BUREAU OF LABOR

Atty. Gen. Opinions. See '34 AG Op 622; '38 AG Op 431, 565

1511 Appointment.

Atty. Gen. Opinion. See '30 AG Op 52

1513 Industrial statistics and information.

Atty. Gen. Opinion. See '34 AG Op 622

1514 Other duties — jurisdiction in general.

Atty. Gen. Opinions. See '25-26 AG Op 122; AG Op March 16, '39

1518 Right to enter premises.

Atty. Gen. Opinion. See '34 AG Op 622

1519 Power to secure evidence.

Atty. Gen. Opinion. See '34 AG Op 622

1521 Reports to bureau.

Atty. Gen. Opinions. See '34 AG Op 622; '38 AG Op 431

1522 Persons furnishing information.

Atty. Gen. Opinions. See '34 AG Op 622; '38 AG Op 431

1524 Definition of terms.

Employer-employee relation—test—control of work. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

1525 Violations—penalties.

Atty. Gen. Opinions. See '34 AG Op 622; '38 AG Op 431

1525.1 Acceptance of federal act.

Legislative abolishment of position—effect. The position known as "clerk of the state employment bureau" was, in legal effect, abolished by the act of the general assembly in accepting the provisions of the Wagner-Peyser Act (29 USC, §49 et seq.) and by the subsequent joint adoption by the federal and state governments of a system under which all employees of the state employment bureau were placed on a civil service basis after competitive examination administered by the federal employment service. It follows that he who was holding the said position of "clerk" at the time the position was legally abolished, tho an honorably discharged soldier, was not entitled to have charges preferred and a hearing had thereon.

Holmes v Reese, 221-52; 265 NW 384

CHAPTER 76

CHILD LABOR

Atty. Gen. Opinion. See '34 AG Op 85

1526 Child labor — age limit — exception.

Atty. Gen. Opinions. See '28 AG Op 209, 391; '30 AG Op 169; '32 AG Op 243; '34 AG Op 85, 482; 38 AG Op 431, 852

Employer-employee relation—test—control of work. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

Right of mother to use child in her own occupation. A mother whose occupation is that of devising and furnishing theatrical entertainment for a compensation paid to her by the owner of the theater wherein the act of entertainment is performed, is not guilty of violating this section by causing her son, who is under fourteen years of age, to perform in such theater, under her direction and supervision, a part of said entertainment act.

State v Erle, 210-974; 232 NW 279; 72 ALR 137

1527 Hours of labor—noon intermission.

Atty. Gen. Opinions. See '32 AG Op 243; '34 AG Op 482

1530 Permit for child labor.

Atty. Gen. Opinion. See '38 AG Op 852

1536 Life, health, or morals endangered.

Atty. Gen. Opinions. See '30 AG Op 169; '38 AG Op 176

1537 Street occupations forbidden.

Atty. Gen. Opinion. See '28 AG Op 391

1540 Violations—penalties.

Atty. Gen. Opinions. See '28 AG Op 391; '38 AG Op 176

CHAPTER 77

STATE EMPLOYMENT BUREAU AND EMPLOYMENT AGENCIES

Atty. Gen. Opinions. See '34 AG Op 664; '38 AG Op 565

1544 Extension of service.

Atty. Gen. Opinion. See '34 AG Op 664

1546.1 Limitation of fee.

Atty. Gen. Opinions. See '28 AG Op 439; '32 AG Op 241; '34 AG Op 637

Holding under prior statute. Articles of incorporation and the course of business carried on thereunder reviewed, and held to constitute an "employers' association" within the meaning of this section as amended.

Employ. Bur. v Com., 209-1046; 229 NW 677

1550 Investigation by labor commissioner.

Atty. Gen. Opinions. See '28 AG Op 439; '38 AG Op 565

CHAPTER 77.1

LICENSE FOR EMPLOYMENT AGENCIES

Atty. Gen. Opinions. See '34 AG Op 637; '36 AG Op 445

CHAPTER 77.2

UNEMPLOYMENT COMPENSATION

1551.16 The commission, secretary and divisions.

Atty. Gen. Opinion. See '38 AG Op 222

1551.17 Powers, rules, and personnel.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

1551.18 State service absorbed.

Atty. Gen. Opinion. See '38 AG Op 565

CHAPTER 78

CIGARETTES AND TOBACCO

Atty. Gen. Opinions. See '38 AG Op 579, 708

1553 Sale or gift to minor prohibited.

Atty. Gen. Opinions. See '32 AG Op 138; '38 AG Op 708

1554 Violation.

Atty. Gen. Opinion. See '32 AG Op 138

1556.03 Sale and exchange of stamps.

Atty. Gen. Opinions. See '32 AG Op 238; AG Op Sept. 21, '39

1556.05 Affixing of stamps by distributors.

Holding under former statute. The statute requiring packages of cigarettes sold to a "consumer" to have the tax stamps affixed thereto does not apply to a sale by a wholesaler to a retailer, the latter not being a "consumer."

State v Lagomarcino-Grupe Co., 207-621; 223 NW 512

1556.08 Distributor's, wholesaler's and retailer's permits.

Discussion. See 16 ILR 81—Denial of permits to chain stores

Atty. Gen. Opinions. See '28 AG Op 300; AG Op July 17,'39

Construing former statute. This section arms said bodies with power to exercise at least a legal discretion to grant or refuse a permit, e. g., a city council may legally refuse to grant a permit on the supported ground that the applicant is an unfit person to hold such permit.

Whether the statute assumes to grant an unlimited discretion to said governmental bodies, quaere.

Bernstein v City, 215-1168; 248 NW 26; 86 ALR 782

Ford Hopkins v City, 216-1286; 248 NW 668

Construing former statute. A party who has been refused a permissible or optional permit may not successfully contend that he has been (1) denied the equal protection of the law, or (2) deprived of his property and rights without due process and without compensation.

Ford Hopkins v City, 216-1286; 248 NW 668

Construing former statute. A city council may, in the interest of the public as it may view the matter, validly fix the maximum number of permits that will be issued, and may refuse to issue more, and in so refusing it may not be said that the council acts arbitrarily, capriciously, or discriminatively.

Ford Hopkins v City, 216-1286; 248 NW 668

1556.26 Civil penalty for certain violations.

Atty. Gen. Opinions. See '32 AG Op 16, 164

1585 Advertisement near public schools.

Atty. Gen. Opinion. See '34 AG Op 635

CHAPTER 79

HOUSES USED FOR PROSTITUTION, GAMBLING, OR POOL SELLING

Atty. Gen. Opinions. See '25-26 AG Op 319; '28 AG Op 121, 434; '30 AG Op 199; '38 AG Op 300

CHAPTER 80

STATE FIRE MARSHAL

Atty. Gen. Opinions. See '30 AG Op 268; '32 AG Op 82; '36 AG Op 55; '38 AG Op 192; AG Op May 11, '39

CHAPTER 81

FIRE COMPANIES

Atty. Gen. Opinion. See '30 AG Op 373

CHAPTER 83

PASSENGER AND FREIGHT ELEVATORS

1678 General equipment.

Atty. Gen. Opinion. See '25-26 AG Op 122

Personal injury action—bad-faith defense by vouchee. One who is vouched by a defendant into an action, and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a co-defendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee,

knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

"Rapid" descent of elevator—testimony.

Dean v Koolish, 212-238; 234 NW 179

Passenger elevator falling—safety device—nonliability elevator manufacturer. The builder of a passenger elevator is neither liable for a personal injury caused by the falling of the car where the safety device, designed to prevent such falling and stop the car, was of an approved pattern in general use and was not shown to have ever before failed to work efficiently, nor where it is disclosed by the accident a device could have been made which would have obviated the particular defect which caused the particular accident, unless it is further shown that reasonable prudence would have discovered this defect and remedied it. Due care, in a legal sense, does not require an uncanny foresight.

Hoskins v Otis Elev. Co., 16 F 2d, 220

Place of danger—elevator operator violating instructions. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y. M. C. A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Fall in shaft—lights—guard rail.

Riggs v Pan-American, 225-1051; 283 NW 250

1679 Violations.

Atty. Gen. Opinions. See '25-26 AG Op 89; AG Op March 16, '39

1683 Ordinances.

Atty. Gen. Opinion. See '25-26 AG Op 123

1684.1 Door or gate interlock.

Contributory negligence. An invitee who enters a bakery in the nighttime, at a place other than a perfectly safe place where he had entered on a former occasion, and is unable to see anything owing to the darkness, and finds his progress blocked by an obstruction which, by sense of feeling, proves to be a movable, lattice gateway and who deliberately removes said gateway and, on advancing, falls into an elevator shaft, is, per se, guilty of negligence contributing to his resulting injury.

Hammer v Liberty Co., 220-229; 260 NW 720

CHAPTER 84

LIABILITY OF HOTELKEEPERS AND STEAMBOAT OWNERS

Discussion. See 1 ILB 38—Liability of elevator owners

CHAPTER 85

WATER NAVIGATION REGULATIONS

Atty. Gen. Opinions. See '30 AG Op 138; '34 AG Op. 237; '38 AG OP 467, 791

CHAPTER 85.1

STATE CONSERVATION COMMISSION

1703.33 Expenses generally.

Atty. Gen. Opinion. See '38 AG Op 25

1703.36 Offices.

Atty. Gen. Opinion. See '36 AG Op 349

1703.40 Officers and employees.

Atty. Gen. Opinions. See '36 AG Op 349, 404, 419

1703.44 Funds.

Atty. Gen. Opinions. See '25 AG Op 179; '30 AG Op 72, 243; '36 AG Op 35; '36 AG Op 615

1703.46 Expenditures.

Atty. Gen. Opinions. See '34 AG Op 350; '36 AG Op 615

1703.47 Divisions of department.

Atty. Gen. Opinions. See '36 AG Op 615; '38 AG Op 143

1703.49 General duties.

Atty. Gen. Opinion. See '38 AG Op 775

1703.50 Specific powers.

Atty. Gen. Opinions. See '30 AG Op 105; '34 AG Op 357, 379, 611, 621; '36 AG Op 193; '38 AG Op 25, 143, 775; AG Op Feb. 8, '39

Delegation of legislative power. The legislature has no constitutional right to delegate to an administrative department, e. g., the conservation commission, the strictly and exclusively legislative power to formulate a policy and make regulations restricting an-

gling. It may, however, make such declaration of policy, definitely describing the subject, the field, and the character of regulations intended to be imposed and leave to the department the manner in which that policy shall apply.

State v Van Trump, 224-504; 275 NW 569
See Goodlove v Logan, 217-98; 251 NW 39

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Jurisdiction—on boundary waters. The state of Iowa has jurisdiction to try and determine the offense known, under our game laws, as the unlawful use of decoys (in the form of live ducks) tho said offense be committed on a temporary sandbar located in the Missouri river and west of the middle of the main channel thereof.

State v Rorris, 222-1348; 271 NW 515

CHAPTER 85.2

ACQUISITION OF LANDS BY CONSERVATION COMMISSION

Atty. Gen. Opinions. See '36 AG Op 404, 615; AG Op Jan. 26, '40

CHAPTER 86

FISH AND GAME CONSERVATION

1704 State ownership and title—exceptions.

Discussion. See 12 ILR 411—Right to fish in navigable waters

Atty. Gen. Opinions. See '28 AG Op 362; '34 AG Op 308, 503

1709 Fish hatcheries—game farms.

Atty. Gen. Opinions. See '28 AG Op 188; '34 AG Op 503

1709.1 State game refuges.

Atty. Gen. Opinions. See '34 AG Op 503; '38 AG Op 638

1709.2 Game management area.

Atty. Gen. Opinion. See '34 AG Op 503

1709.3 Hunting on game refuges.

Atty. Gen. Opinion. See '38 AG Op 638

1709.5 Spawning grounds.

Atty. Gen. Opinion. See '34 AG Op 503

1713 Arrests—assistance of peace officers.

Atty. Gen. Opinions. See '25-26 AG Op 179; '28 AG Op 440; '38 AG Op 798

1714 Seizure of unlawful game.

Atty. Gen. Opinion. See '30 AG Op 42

1741 Dams—fishways.

Atty. Gen. Opinion. See '34 AG Op 503

1742 Injury to dam.

Atty. Gen. Opinion. See '34 AG Op 503

1777 Parrots and canaries.

Atty. Gen. Opinions. See '28 AG Op 106, 362

1778 Birds as targets.

Atty. Gen. Opinion. See '36 AG Op 105

1780 Transportation for sale prohibited.

Atty. Gen. Opinions. See '28 AG Op 187; '38 AG Op 602

1788 Game brought into the state.

Atty. Gen. Opinions. See '32 AG Op 182; '34 AG Op 129

1789 Violation.

Atty. Gen. Opinions. See '28 AG Op 338; '30 AG Op 259; '38 AG Op 47

Delegation of legislative power. The legislature has no constitutional right to delegate to an administrative department, e. g., the conservation commission, the strictly and exclusively legislative power to formulate a policy and make regulations restricting angling. It may, however, make such declaration of policy, definitely describing the subject, the field, and the character of regulations intended to be imposed and leave to the department the manner in which that policy shall apply.

State v Van Trump, 224-504; 275 NW 569
See Goodlove v Logan, 217-98; 251 NW 39

1793 Information—venue.

Atty. Gen. Opinion. See '34 AG Op 246

1794 Presumptive evidence.

Atty. Gen. Opinions. See '25-26 AG Op 478; '32 AG Op 180

TERRITORIES, OPEN SEASONS, BAG AND POSSESSION LIMITS FOR GAME

1794.011 Restrictions.

Atty. Gen. Opinion. See '28 AG Op 106

1794.013 Selling birds.

Atty. Gen. Opinion. See '32 AG Op 182

SCIENTIFIC COLLECTING

1794.027 License.

Atty. Gen. Opinion. See '32 AG Op 239

ANGLING LAWS

1794.029 Seasons and limits.

Atty. Gen. Opinions. See '30 AG Op 128, 308

1794.034 Hooks.

Atty. Gen. Opinion. See '30 AG Op 153

1794.038 Unlawful means—exception.

Possession of seine. The possession of a seine is not a criminal offense irrespective of the intent and purpose attending such possession.

State v Zellmer, 202-638; 210 NW 774

TRAPPING OF FUR-BEARING ANIMALS

1794.049 Open seasons.

Atty. Gen. Opinions. See '25 AG Op 263; '28 AG Op 62, 187

1794.053 Shooting or spearing.

Atty. Gen. Opinion. See '30 AG Op 240

FUR DEALERS

1794.057 Agent's license.

Atty. Gen. Opinion. See AG Op Sept. 13, '39

1794.058 Possession by dealer.

Atty. Gen. Opinion. See '30 AG Op 79

COMMERCIAL FISHING

1794.068 Nets or seines.

Atty. Gen. Opinion. See '30 AG Op 363

Possession of seine. The possession of a seine is not a criminal offense irrespective of the intent and purpose attending such possession.

State v Zellmer, 202-638; 210 NW 774

1794.071 Nets permitted in boundary rivers—license.

Contradictory state policies. The state of Nebraska may validly prohibit the use of nets and seines in the taking of fish from that part of the Missouri river which lies within its boundary, notwithstanding the fact that the state of Iowa authorizes such use in that part of the river which lies within its boundary.

Miller v McLaughlin, 281 US 261

1794.074 Catching in boundary rivers.

Fishing regulations on boundary river—rights within territorial limits. The grant of concurrent jurisdiction to two states over a river, the middle of the channel of which is the boundary line between them, does not preclude one of them, without concurrence of the other, from regulating fishing by its own residents in that part of the river that is within its own territorial limits.

Miller v McLaughlin, 281 US 261

1794.077 Sale of fish.

Atty. Gen. Opinion. See '38 AG Op 343

1794.079 Wholesale license.

Atty. Gen. Opinions. See '25 AG Op 497; '38 AG Op 343

CHAPTER 86.1

FISH AND GAME LICENSES AND CONTRABAND ARTICLES AND GUNS

1794.082 Licenses.

Atty. Gen. Opinions. See '25 AG Op 97; '28 AG Op 158; '30 AG Op 164; AG Op Sept. 13, '39

Right to kill—absence of hunter's license—effect. On the issue whether a defendant had a legal right to kill an unlicensed dog, the fact that the defendant possessed no hunter's license is quite immaterial.

Mendenhall v Struck, 207-1094; 224 NW 95

1794.086 Fees.

Atty. Gen. Opinions. See '25 AG Op 93; '28 AG Op 381

1794.092 Form of license.

Atty. Gen. Opinion. See '30 AG Op 164

1794.098 License not required.

Atty. Gen. Opinions. See '28 AG Op 289; '32 AG Op 137; '36 AG Op 128

1794.099 Public nuisance.

Possession of seine. The possession of a seine is not a criminal offense irrespective of the intent and purpose attending such possession.

State v Zellmer, 202-638; 210 NW 774

1794.104 Manner of conveyance.

Atty. Gen. Opinions. See '28 AG Op 289; '32 AG Op 148

CHAPTER 87

CONSERVATION AND PUBLIC PARKS

1797 Secretary.

Atty. Gen. Opinion. See '36 AG Op 146

1799 Duties as to parks.

Atty. Gen. Opinions. See '32 AG Op 187; '36 AG Op 615

1799.1 Construction permit — regulations.

Atty. Gen. Opinions. See '28 AG Op 222, 272; '30 AG Op 109, 364; '32 AG Op 71; '34 AG Op 258, 499; AG Op Jan. 26, '40

1799.2 Obstruction removed.

Atty. Gen. Opinion. See AG Op Jan. 26, '40

1800 Eminent domain.

Atty. Gen. Opinions. See '34 AG Op 340, 350; '36 AG Op 193

1801 Highways.

Atty. Gen. Opinion. See '25-26 AG Op 138

1803 Title to lands.

Atty. Gen. Opinions. See '34 AG Op 306, 350, 357, 370

1804 Gifts.

Atty. Gen. Opinions. See '34 AG Op 357, 370; '38 AG Op 143

1805 Conditions—lands.

Atty. Gen. Opinions. See '34 AG Op 357, 370; '36 AG Op 55; '38 AG Op 143

1806 Conditions—personalty.

Atty. Gen. Opinions. See '34 AG Op 357; '36 AG Op 55

1807 Reversion of gift.

Atty. Gen. Opinion. See '36 AG Op 55

1812 Jurdisdiction.

Atty. Gen. Opinions. See '28 AG Op 118, 222, 272, 273, 320; '30 AG Op 300; '32 AG Op 159; '34 AG Op 251, 308; '38 AG Op 352, 784, 791, 897; AG Op Jan. 26,'40

Construction of wharf—paramount right of state. The construction by the state of a wharf below high watermark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Dams—new high watermark—title of state. The state of Iowa by erecting a permanent dam in the bed of its navigable river, and by maintaining said dam peaceably and uninterruptedly for a period of ten years, legally extends its title to the new high watermark resulting from the erection of the dam; and especially may a private deed holder not complain when his deed, executed after the dam was erected, simply calls for land "up to the river".

State v Sorenson, 222-1248; 271 NW 234

1818 Boundaries—adjustment.

Atty. Gen. Opinion. See '38 AG Op 352

1819 Leases.

Atty. Gen. Opinions. See '28 AG Op 118, 201; '36 AG Op 615; '38 AG Op 143, 352

1822 Management by municipalities.

Atty. Gen. Opinions. See '34 AG Op 306, 350

1822.1 Expenditure by cities.

Atty. Gen. Opinions. See '34 AG Op 306, 350, 414

1822.2 Limitation on expenditures.

Atty. Gen. Opinion. See '34 AG Op 306

1822.3 City funds available.

Atty. Gen. Opinion. See '34 AG Op 306

1823 Sale of islands.

Atty. Gen. Opinions. See '30 AG Op 300, 364; '36 AG Op 399; '38 AG Op 352

1824 Sale of park lands.

Atty. Gen. Opinions. See '34 AG Op 251; '36 AG Op 52; '38 AG Op 352, 897

1825 Form of conveyance.

Atty. Gen. Opinions. See '38 AG Op 352, 897

1827 Powers in municipalities.

Atty. Gen. Opinions. See '25-26 AG Op 415; '34 AG Op 306

CHAPTER 87.1

DAMS AND SPILLWAYS

Atty. Gen. Opinions. See '34 AG Op 480; AG Op Feb. 9, '39

CHAPTER 88

FENCES

Atty. Gen. Opinion See '34 AG Op 396

1829 Partition fences.

Estrays and trespassing animals. See under §§2979–3028

Discussion. See 7 ILB 176—Fencing laws

Injunction unallowable. In the absence of a division of a partition fence by agreement of the parties or by proper order of the fence viewers, either of the adjoining owners has the right to build and maintain all or any part of the fence; and an injunction which curtails such right is unallowable.

Sinnott v Dist. Court, 201-292; 207 NW 129

Maintenance—oral agreement. Principle reaffirmed that adjoining property owners may validly bind themselves by oral contract to maintain designated portions of partition fences.

Nichols v Fierce, 202-1358; 212 NW 151

Landowner's right to legal division. In a line fence controversy where the evidence shows there had never been any legal division of fences, the fact that the fences had been maintained by the respective owners of the real estate for many years does not bar the adjoining landowners from having a legal division made at any time they desire, and a finding that there had never been a legal division of fences, held sustained by evidence.

Morrison v Kipping, 227-1146; 290 NW 59

1831 Powers of fence viewers.

Atty. Gen. Opinion. See '34 AG Op 396

Admission in re jurisdiction — effect. An admission of record by a party, of the existence of a fact upon which jurisdiction of fence viewers depends, manifestly renders further testimony of such fact unnecessary.

Gavin v Linnane, 206-917; 221 NW 462

"Controversy" — jurisdiction. Written request by one landowner to an adjoining landowner to maintain his portion of a partition fence is essential, to create a "controversy" and to invest the fence viewers with jurisdiction to act.

Sinnott v Dist. Court, 201-292; 207 NW 129
Nichols v Fierce, 202-1358; 212 NW 151

Township trustees—right to divide fences not limited by property owner's notice. Where a property owner served notice on township trustees that adjoining owners had refused to maintain their share of division line fences, and the adjoining owners claimed no legal division of such fences had ever been made and asked that a division be made, trustees had authority under the statute to make a legal division and were not limited by the notice given by the complaining property owner.

Morrison v Kipping, 227-1146; 290 NW 59

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Morrison v Kipping, 227-1146; 290 NW 59

1832 Decision.

Township trustees—right to divide fences not limited by property owner's notice. Where a property owner served notice on township trustees that adjoining owners had refused to maintain their share of division line fences, and the adjoining owners claimed no legal division of such fences had ever been made and asked that a division be made, trustees had authority under the statute to make a legal division and were not limited by the notice given by the complaining property owner.

Morrison v Kipping, 227-1146; 290 NW 59

1834 Default—damages and fees collected as taxes.

Atty. Gen. Opinion. See '38 AG Op 473

1837 Notice.

Atty. Gen. Opinion. See '34 AG Op 396

1840 Division by agreement—record.

Landowner's right to legal division. In a line fence controversy where the evidence shows there had never been any legal division of fences, the fact that the fences had been maintained by the respective owners of the real estate for many years does not bar the adjoining landowners from having a legal division made at any time they desire, and a finding that there had never been a legal division of fences, held sustained by evidence.

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Township trustees—right to divide fences not limited by property owner's notice. Where a property owner served notice on township trustees that adjoining owners had refused to maintain their share of division line fences, and the adjoining owners claimed no legal division of such fences had ever been made and asked that a division be made, trustees had authority under the statute to make a legal division and were not limited by the notice given by the complaining property owner.

Morrison v Kipping, 227-1146; 290 NW 59

1841 Orders and agreements—effect.

Enforceable oral agreement — statute of frauds. An oral agreement to change a long established boundary fence is enforceable when taken out of the statute of frauds (1) by the mutual taking of a new survey, (2) by the building of a new fence in accordance with the said survey, and (3) by taking possession of the lands inclosed by such new fence.

Cheshire v McCoy, 205-474; 218 NW 329

Unenforceable oral agreement. A naked oral agreement to change an established boundary line is unenforceable.

Stone v Richardson, 206-419; 218 NW 332

1851 Appeal.

Fence viewers — appeal from confirming order. Only questions of law will be considered on appeal from an order by the trial court which confirms the decision of fence viewers.

In re Fence Dispute, 204-1072; 216 NW 673

Triable at law—trial court's findings—conclusiveness. Since an appeal to district court from decision of fence viewers is triable as a law action to a jury, if demanded, the supreme court will not interfere with verdict if there is substantial evidence to sustain it. Hence, where parties waived jury on trial of such appeal, the trial court's decision, supported by sufficient evidence, was necessarily affirmed.

Moore v Short, 227-380; 288 NW 407

Belated presentation of error point. On appeal from an order by the district court in fence-viewing proceedings, the appellant may not, for the first time, present the claim that the orders of the fence viewers relative to a tight fence were erroneous, and that the district court should have corrected the error.

Gavin v Linnane, 206-917; 221 NW 462

Certiorari. Certiorari will lie to review the proceedings of township trustees in acting as fence viewers without jurisdiction of the subject matter, even tho an appeal is provided for in such proceedings.

Sinnott v Dist. Court, 201-292; 207 NW 129

CHAPTER 89

CIVIL ENGINEERS

Atty. Gen. Opinions. See '32 AG Op 58; '34 AG Op 133; '36 AG Op 451

1854 Registered engineers and surveyors.

Atty. Gen. Opinions. See '32 AG Op 58; '34 AG Op 133, 477

Municipal corporation—engineer's opinion on construction of approach to sidewalk. A municipality is not bound to construct an approach from street to sidewalk differently because some engineer other than its own thought some other method would be better, so where a pedestrian, who was familiar with such approach, who admitted that there was plenty of room for a pedestrian to pass on meeting two other pedestrians in broad daylight, and who without thought or attention stepped off approach and fell, such pedestrian was guilty of contributory negligence precluding recovery for personal injuries.

Hoffman v Sioux City, 227-1131; 290 NW 62

1855 Terms defined.

Atty. Gen. Opinions. See '34 AG Op 133, 477

Limitation of actions—amendments containing "thread" of original claim not barred. In an action for compensation for professional engineering services involved in construction of a sewage disposal plant, profuse substitutions and amendments to a petition which keep a thread of thought identifying them with the claim in the original notice, tho not filed within the allowable period of the statute of limitations, come within the rule that commencement of the action tolls the statute.

Slippy Co. v Grinnell, 224-212; 276 NW 58

1861 Compensation and expenses.

Atty. Gen. Opinions. See '32 AG Op 258; '36 AG Op 35

1862 Organization of the board—meetings—quorum.

Atty. Gen. Opinions. See '36 AG Op 35; AG Op April 19, '39, May 9, '39

1863 Annual report.

Atty. Gen. Opinions. See '32 AG Op 258; '36 AG Op 35

1864 Secretary—duties of.

Atty. Gen. Opinions. See '30 AG Op 375; '36 AG Op 35

1865 Engineering examiners fund.

Atty. Gen. Opinion. See '36 AG Op 35

1868 Seal—certificate evidence of registration.

Atty. Gen. Opinion. See '36 AG Op 421

1869 Certificate.

Atty. Gen. Opinions. See '30 AG Op 375; '32 AG Op 58

1869.1 Expirations and renewals.

Atty. Gen. Opinions. See '30 AG Op 296, 375

1870 Land surveyor's certificate.

Atty. Gen. Opinions. See '30 AG Op 296; '32 AG Op 58

1872 Revocation of certificate.

Atty. Gen. Opinion. See '32 AG Op 266

1873 Procedure.

Atty. Gen. Opinions. See '32 AG Op 266; AG Op April 19, '39

1874 Expenditures.
Atty. Gen. Opinion. See '34 AG Op 168

1875 Injunction.
Atty. Gen. Opinions. See '28 AG Op 354; '30 AG Op 151; '36 AG Op 451

1875.1 Violations.
Atty. Gen. Opinion. See AG Op April 19, '39

1876 Applicability of chapter.
Atty. Gen. Opinions. See '28 AG Op 354; '32 AG Op 58; '34 AG Op 133

CHAPTER 90

CERTIFIED SHORTHAND REPORTERS

Atty. Gen. Opinion. See '36 AG Op 35

CHAPTER 91.1

ACCOUNTANCY

Atty. Gen. Opinions. See '30 AG Op 108, 189, 210

1905.04 No compensation—expenses.
Atty. Gen. Opinion. See '36 AG Op 35

1905.06 Definitions.
Atty. Gen. Opinion. See AG Op April 6, '39

1905.07 Other terms defined.
Atty. Gen. Opinion. See '30 AG Op 210

1905.08 Examination.
Atty. Gen. Opinions. See '30 AG Op 63; AG Op April 6, '39

1905.09 Qualifications for examination.
Atty. Gen. Opinion. See '38 AG Op 153

1905.17 Unlawful practice.
Atty. Gen. Opinion. See AG Op April 6, '39

CHAPTER 91.2

REAL ESTATE BROKERS

Atty. Gen. Opinions. See '34 AG Op 274, 744; '36 AG Op 361, 428; '38 AG Op 45, 77, 345, 687

1905.20 License required.
Atty. Gen. Opinions. See '34 AG Op 743; '36 AG Op 85, 428, 457; '38 AG Op 687

1905.21 License to legal entity.
Atty. Gen. Opinions. See '34 AG Op 209, 743; '36 AG Op 457

1905.22 "Salesman" defined.
Atty. Gen. Opinions. See '34 AG Op 455, 476; '36 AG Op 428, 457; '38 AG Op 687

Principal and agent—secret limitation on authority—estoppel to assert. A land agent for an insurance company, when his conduct and that of the company lead the public to believe that he has authority to contract to sell the company's land and in many instances does write such contracts, will not be permitted to avoid an obligation through a secret limitation on the power not known by a prospective purchaser.

Hotz v Equitable, 224-552; 276 NW 413

1905.23 Nonapplicability of chapter.
Atty. Gen. Opinions. See '34 AG Op 455, 476, 744; '36 AG Op 85, 428; '38 AG Op 687

1905.24 Real estate commissioner.
Atty. Gen. Opinions. See '34 AG Op 274; '38 AG Op 345

1905.26 Fees and expenses.
Atty. Gen. Opinion. See '38 AG Op 77

1905.30 Rules and regulations.
Atty. Gen. Opinion. See '34 AG Op 135

1905.31 Hearing.
Atty. Gen. Opinion. See '34 AG Op 135

1905.36 Re-investigation.
Atty. Gen. Opinion. See '34 AG Op 135

1905.41 Action for commission.
Brokers and commission contracts generally. See under Ch 420, note 1(XI)
Discussion. See 1 ILB 188—Revocability of parol license

Status as licensee—failure to allege—effect. The failure of a broker in his petition for the recovery of commission to allege his status as a duly licensed broker, is quite harmless (1) when the petition is not attacked because of such omission, and (2) when the evidence, received without objection, clearly establishes such status.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Prima facie right to a commission. A licensed real estate broker makes a prima facie showing for the recovery of a commission for effecting a sale of property on proof that he was employed by one of two owners of the property to find a purchaser at a stated price; that the other owner knew of such employment and assisted the broker in showing the property

to a prospect obtained by the broker; that the prospect offered to buy at said stated price; that thereupon one of the owners demanded an increased price to which the prospect finally acceded in part and actually bought the property.

Wareham v Atkinson, 215-1096; 247 NW 534

Employment—failure to show agency. A broker is not entitled to recover a commission on the ground that he procured a purchaser for property when he fails to show, expressly or impliedly, any agency to find such purchaser.

Reeve v Shoemaker, 200-983; 205 NW 742; 43 ALR 839

Dispute in evidence—jury question. Evidence that defendant orally agreed to pay plaintiff a commission to assist in the sale of gypsum lands upon which plaintiff held drill plats, that agents of purchaser conferred with plaintiff and examined the plats, coupled with a denial by defendant that plaintiff accepted the offer or assisted in consummating the sale, presents a question determinable by the jury.

Maher v Breen, 224-8; 276 NW 52

Powers of agent—apparent authority. An owner of land who authorizes his agent (1) to contract with a broker for sale of the land and (2) to pay the broker a specified and limited compensation is bound by the agreement of his agent to pay the broker a greater commission when the broker had no knowledge of such limited authority.

Boylan v Workman, 206-469; 220 NW 49

Authority—revocation by death of agent. The authority of a broker to find a purchaser for the owner of property is necessarily revoked by the death of the agent, and this is true when the broker is a partnership and a member thereof dies.

Reeve v Shoemaker, 200-983; 205 NW 742; 43 ALR 839

Agency revocation—nonpleaded issues—nonreview. In an action for real estate commission, contentions as to revocation of the agency arising from disposal of the subject matter of the agency and mental incapacity and death of one of the joint principals before the sale by the agent, will not be considered on appeal when the pleadings show no issue thereon but the action is on a contract allegedly personally made with the defendant.

Maher v Breen, 224-8; 276 NW 52

Broker as nonprocuring cause. A broker is not entitled to a commission when he was not the procuring cause of the sale.

Reeve v Shoemaker, 200-983; 205 NW 742; 43 ALR 839

Procuring cause—burden of proof. In an action by a real estate broker for commission he has burden to prove that he was the efficient and procuring cause of the sale.

Donahoe v Denman, 223-1273; 275 NW 154

Establishing "efficient and procuring cause" —presumption not jury question. In an action by a real estate broker for commission on the theory that he was the efficient and procuring cause for a sale, his showing that he was authorized to sell and had contacted a buyer who afterward purchased directly from the owner, raises no jury question but only a rebuttable presumption which defendant successfully rebuts by direct evidence to the contrary.

Donahoe v Denman, 223-1273; 275 NW 154

Finding sustained by evidence—intervening agent negotiating and consummating sale. In a law action by real estate agent to recover commission for negotiating sale of realty, which had been listed with several brokers, where another agent intervenes claiming such commission, and evidence shows both agents were empowered to dispose of land at reduced price, held, evidence sustained finding of trial court that intervening agent was entitled to commission where he had conducted the preliminary negotiations and also consummated the sale. Broker claiming commission must show he was the efficient and procuring cause of the sale.

Armstrong v Smith, 227-450; 288 NW 621

Listing property for sale—several brokers. In an action at law to recover a real estate commission, plaintiff, who was merely influential in bringing about a sale of land which had been listed with several brokers, was not entitled to commission where he never notified owner's agent of his activities and a sale was negotiated and consummated by another agent. The agent who first procured the consent of the purchaser to enter into the contract on terms satisfactory to the seller was entitled to the commission.

Armstrong v Smith, 227-450; 288 NW 621

Land purchaser obtained by real estate agent. Where the defendant had sent circular letters to real estate agents, listing farms for sale and stating the commission to be paid for any farm sold, and the plaintiff obtained a prospective buyer for a certain farm, but the sale was consummated by another real estate agent to whom the commission was paid, the defendant was entitled to a directed verdict in an action to collect the commission.

Santee v Lutheran Society, 226-1109; 285 NW 685

Procuring cause—jury question. Evidence held to present a jury question on the issue whether a plaintiff broker was the procuring cause of the leasing of premises when the lease was made, not to the individual produced by the broker, but to an unincorporated entity.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Contract to find purchaser—tentative offer—effect. The issue whether a broker found a purchaser ready, able, and willing to buy the prop-

erty of his principal is not affirmatively established by proof that the broker found one who made a tentative proposition to purchase, which was specifically dependent on a further investigation as to the legality and probable security of the property—an issue of bonds—which investigation the person making the offer never made.

MacVicar v Paving Corp., 201-355; 207 NW 378

Compensation—when earned. A broker's right to his commission for finding a purchaser attaches when the owner of the property, his principal, enters into an executory contract of sale with the purchaser, even tho the principal sees fit not to enforce the contract, or sees fit to modify it. Evidence held to establish such contract.

Scott v Realty Co., 206-1158; 221 NW 785

Instructions—burden of proof—issues correctly submitted. In a suit for breach of oral commission contract, instructions plainly stating that burden was on plaintiff to establish by a preponderance of evidence (1) the terms of his contract, and (2) that through his efforts a sale was "effected, obtained, and procured", reviewed and held to correctly submit the issues under the pleadings.

Maher v Breen, 224-8; 276 NW 52

Ambiguous clauses in contracts—interpretation. In an action at law to recover real estate commission under a written contract, which provided that commission would be due upon the signing of the agreement to which was added the words, "The commission being due and payable upon the transfer of properties," held, that the added phrase cannot be disregarded as being repugnant to the original provision providing for time of payment, but is interpreted as limiting earlier provision, and the payment of commission is due upon the execution of the contract together with a transfer of the properties.

Mealey v Kanealy, 226-1266; 286 NW 500

Sale by owner. An owner of property may in good faith effect a sale of his own property without liability to a broker with whom the owner has expressly or impliedly listed it.

Reeve v Shoemaker, 200-983; 205 NW 742; 43 ALR 839

Sale by owner. Contract reviewed, and held to obligate the owner of property to pay a commission in case the owner himself sold the property during the period for which the property was listed with the broker.

Milligan Co. v Claiborne, 213-1088; 240 NW 694

Reformation of broker's contract. A court of equity abuses its discretion when it refuses to reform a written contract wherein the owner of property lists it with a broker for sale and binds himself to pay a commission in case a sale is made, even by himself, when it is shown, by clear, satisfactory, and convincing testimony, that the oral preliminary contract which the parties attempted to reduce to writing embraced the definite, mutual understanding that no commission would be payable if the owner made a sale to his then tenant, and that said understanding was inadvertently omitted from said writing. (In this case the owner made a sale to his tenant and was later sued by the broker for a commission.)

Milligan Co. v Lott, 220-1043; 263 NW 262

Compensation—subterfuge to defeat. An owner of property who has contracted to sell to a purchaser found by his broker cannot defeat the broker's right to commission by selling to a third party and having such third party complete the deal with the original purchaser.

Scott v Realty Co., 206-1158; 221 NW 785

Compensation of agent—nondual employment. The fact that different property owners employ the same rental agent to obtain the same tenant does not constitute such a dual employment as to deprive the agent of his compensation from the owner for whom a lease is obtained.

Foley v Mathias, 211-160; 233 NW 106; 71 ALR 696

Quantum meruit—irrelevant testimony. In an action by a broker to recover commission on a basis of quantum meruit, evidence is properly rejected as to the compensation generally received by brokers when they work by the day, the actual evidence received fairly showing that the customary method of employment of brokers was on a commission basis.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Broker's claim against intervening broker—evidence warranting dismissal. In an action to recover real estate commission, the dismissal of one real estate broker's claim against an intervening real estate broker was proper under the evidence where no showing was made of any agreement for the payment of a definite amount.

Armstrong v Smith, 227-450; 288 NW 621

1905.42 Place of business.

Atty. Gen. Opinion. See AG Op Jan. 12, '39

1905.45 Revocation or suspension.

Atty. Gen. Opinion. See '36 AG Op 457

1905.46 Hearings.

Atty. Gen. Opinions. See '34 AG Op 135; '38 AG Op 38, 345

1905.47 Procedure.

Atty. Gen. Opinion. See '34 AG Op 274

1905.53 Findings of fact.

Atty. Gen. Opinions. See '38 AG Op 38, 345

1905.54 Nonresidents.

Atty. Gen. Opinions. See '36 AG Op 85; AG Op Jan. 12, '39

1905.56 Violations.

Atty. Gen. Opinions. See '36 AG Op 361; '38 AG Op 45

CHAPTER 91.3

REGISTERED ARCHITECTS

Atty. Gen. Opinions. See '28 AG Op 312; '36 AG Op 35

CHAPTER 93

ORGANIZATIONS SOLICITING PUBLIC DONATIONS

Atty. Gen. Opinions. See AG Op Jan 5, '39

TITLE VI

ALCOHOLIC BEVERAGES

Atty. Gen. Opinions. See '25-26 AG Op 201; '34 AG Op 418

CHAPTER 93.1

IOWA LIQUOR CONTROL ACT

Atty. Gen. Opinions. See '34 AG Op 577, 649, 682, 704, 707; '36 AG Op 5, 6, 76, 218, 349, 499, 566; '38 AG Op 117, 392

1921.001 Public policy declared.

Atty. Gen. Opinion. See AG Op Jan. 25, '39

History of Iowa beer law discussed.

State v Talerico, 227-1315; 290 NW 660

1921.003 General prohibition.

Atty. Gen. Opinions. See '34 AG Op 693; '36 AG Op 566; '38 AG Op 392

Illegal possession — containers without official seals. It is unlawful to possess in this state intoxicating liquors (except beer) in containers to which are not affixed the official seals or labels prescribed by the Iowa liquor control commission; and this is true irrespective whether said liquors were or were not bought or sold in Iowa.

State v Johnson, 222-1204; 271 NW 223

Intent to sell — possession as evidence. The possession of intoxicating liquors may be attended by such circumstances as to justify the jury in finding that such possession was with criminal intent on the part of the possessor to sell.

State v Arluno, 222-1; 268 NW 179

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Unlawful transportation—sufficiency of evidence. Examination of record on appeal from conviction for unlawful transportation of intoxicating liquor, as required by statute, disclosed sufficient evidence to sustain the conviction.

State v Korbel, 226-676; 284 NW 458

1921.005 Definitions.

Atty. Gen. Opinion. See '38 AG Op 392

Beer as intoxicating liquor. In prosecution for driving a motor vehicle while intoxicated, the refusal of accused's requested instruction that beer is not an intoxicating liquor held not error.

State v McGregor, (NOR); 266 NW 22

1921.015 Place of business.

Atty. Gen. Opinions. See '36 AG Op 349; '38 AG Op 277

1921.016 Powers.

Atty. Gen. Opinions. See '34 AG Op 649, 682; '36 AG Op 349; '38 AG Op 277

1921.017 Rules and regulations.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

1921.024 Restrictions on sales—seals—labeling.

Illegal possession — containers without official seals. It is unlawful to possess in this state intoxicating liquors (except beer) in containers to which are not affixed the official seals or labels prescribed by the Iowa liquor control commission; and this is true irrespective whether said liquors were or were not bought or sold in Iowa.

State v Johnson, 222-1204; 271 NW 223

1921.036 Manufacturer's license.

Atty. Gen. Opinion. See '38 AG Op 392

1921.050 Fund.

Atty. Gen. Opinions. See '36 AG Op 349; '38 AG Op 117

1921.054 State monopoly.

State monopoly over importation. In view of the Wilson Act, and of the Webb-Kenyon Act (27 USC, §§121, 122) and of the decisions of the federal supreme court thereunder, and especially in view of the 21st Amendment to the federal constitution (effective Dec. 5, 1933), it is futile to contend that the state, by investing the Iowa liquor control commission with the sole and exclusive right to import into the state alcoholic liquors, has transcended its police powers and thereby violated the due process, equal protection, and interstate commerce clauses of the federal constitution.

State v Arluno, 222-1; 268 NW 179

1921.056 Native wines.

Atty. Gen. Opinion. See AG Op May 19, '39

1921.058 Auditing.

Atty. Gen. Opinion. See '38 AG Op 117

1921.060 Nuisances.

Evidence—sufficiency. Record reviewed, and held to sustain a verdict of guilty of maintaining an intoxicating liquor nuisance, especially against the claim that the accused was not the proprietor of the place.

State v Olson, 200-660; 204 NW 278

Facts attending search warrant proceedings. Disputed questions of fact upon the determination of which depends the right of the jury to consider search warrant proceedings on the issue of the defendant's guilt of maintaining a nuisance are properly submitted to the jury for determination.

State v Bruns, 211-826; 232 NW 684

Intent to sell — instructions. Instructions reviewed at length, and as a whole, and held fully to protect the accused against a conviction regardless of criminal intent.

State v Arluno, 222-1; 268 NW 179

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

1921.062 Injunction.

Bootleggers, injunction. See under §§1927, 2017, 2031

Nonright of private citizen. A private citizen has no right—since the enactment of the liquor control act, Ch. 93-F1, C., '35 [Ch 93.1, C., '39]—to institute an action to enjoin the maintenance of an intoxicating liquor nuisance which affects him only as one of the general body of citizens.

Doebler v Dodge, 223-218; 272 NW 144

No reinstatement of nol-prossed indictment. An indictment against a corporation for maintaining a liquor nuisance, nol-prossed without fraud at the sole instance of the county attorney, on the mistaken assumption that defendant was not a corporation and, therefore, could not be held to answer, may not later be reinstated when it is discovered that defendant is in fact a corporation. (Keokuk v Schultz, 188 Iowa 937, overruled in part.)

State v Veterans, 223-1146; 274 NW 916; 112 ALR 383

State v Moose, 223-1146; 274 NW 918

1921.071 Injunction against bootlegger.

Bootleggers, injunction. See under §§1927, 2017, 2031

1921.092 Violations by members and employees—acceptance of bribe.

Indictment—fatal insufficiency. An indictment which alleges that a member of the Iowa liquor control commission knowingly and willingly permitted a named person unlawfully to possess intoxicating liquors (other than beer), charges no offense under §1921-f92, C., '35, in the absence of an allegation that said possessor was a member, or secretary, or officer, or employee of said commission. The term "such violation" in said section refers solely to violation by members, by the secretary, by officers, or by employees, of the commission.

State v Cooper, 221-658; 265 NW 915

1921.093 Duty of county attorney and peace officers.

Atty. Gen. Opinion. See '36 AG Op 459

CHAPTER 93.2

BEER AND MALT LIQUORS

Atty. Gen. Opinions. See '34 AG Op 474, 479, 499, 558, 571, 606, 607, 621, 636, 695; '36 AG Op 54, 178, 458; '38 AG Op 35, 110, 210, 232, 371, 392, 447, 522

1921.095 Permit required.

History of Iowa beer law discussed.

State v Talerico, 227-1315; 290 NW 660

1921.096 Definitions.

Atty. Gen. Opinions. See '34 AG Op 474, 636; '36 AG Op 189; '38 AG Op 178, 392

1921.097 Permits — classes of — state permit board.

Atty. Gen. Opinion. See '38 AG Op 210

1921.099 Power to issue permits.

Atty. Gen. Opinions. See '34 AG Op 491; '38 AG Op 210, 390, 452, 463, 479, 529; AG Op Feb. 9, '39, Sept. 14, '39

Permit — refusal — mandamus. The good-faith exercise of the discretion vested in a town council to refuse an application for a class "B" permit to sell beer on the ground that the applicant is not "of good moral character and repute" is not controllable by mandamus.

Madsen v Oakland, 219-216; 257 NW 549

Proceedings of council — ordinance — arbitrary action. A mayor, exercising his power under an ordinance to direct the nonissuance of a license, may not be said to act "arbitrarily" when he, in accordance with the ordinance, notifies the applicant of the time and place of hearing on the application and when the applicant ignores the notice.

Talarico v Davenport, 215-186; 244 NW 750

1921.100 Tenure—character of permittee.

Atty. Gen. Opinions. See '36 AG Op 302; '38 AG Op 178, 202; AG Op Sept. 20, '39

1921.101 Tenure.

Atty. Gen. Opinion. See '36 AG Op 159

1921.102 Prohibited interest.

Atty. Gen. Opinion. See '38 AG Op 447

1921.103 Class "A" application.

Atty. Gen. Opinion. See '38 AG Op 463

1921.104 Class "B" application.

Atty. Gen. Opinions. See '36 AG Op 190; '38 AG Op 178, 232, 293, 371, 463; AG Op Jan. 18, '39, March 9, '39, May 11, '39

1921.105 Class "C" application.

Atty. Gen. Opinions. See '38 AG Op 293, 463

1921.106 Authority under class "A" permit.

Atty. Gen. Opinion. See '38 AG Op 392

1921.107 Authority under class "B" permit.

Atty. Gen. Opinions. See '34 AG Op 479, 499, 558; '38 AG Op 335

1921.108 Authority under class "C" permit.

Atty. Gen. Opinions. See '34 AG Op 499; '38 AG Op 480

1921.109 Sale on trains—bond.

Atty. Gen. Opinion. See '36 AG Op 7

1921.110 Permits to clubs.

Atty. Gen. Opinions. See '36 AG Op 151, 153; '38 AG Op 335, 529; AG Op Dec. 20, '39

1921.111 Class "B" permits.

Atty. Gen. Opinions. See '34 AG Op 603; '36 AG Op 151, 153; '38 AG Op 202, 335, 344, 452, 529; AG Op Jan. 20, '39, Dec. 20, '39

1921.112 Application.

Atty. Gen. Opinions. See '36 AG Op 151, 153, 159

1921.114 Sales by hotels.

Atty. Gen. Opinion. See '36 AG Op 190

1921.115 Prohibited sales and advertisements.

Atty. Gen. Opinions. See '36 AG Op 190; '38 AG Op 480, 662

1921.117 Brewers, etc.—prohibited interest.

Atty. Gen. Opinion. See '38 AG Op 447

1921.119 Fees.

Atty. Gen. Opinions. See '36 AG Op 153, 159, 190; '38 AG Op 335, 350; AG Op Aug. 19, '39, Sept. 20, '39

1921.120 Barrel tax.

Atty. Gen. Opinion. See AG Op Jan. 18, '39

1921.123 Separate locations—class "A"

Constitutionality—title of act—sufficiency. Section 1921.126, C., '39, forbidding the keeping of intoxicating liquor where beer is sold, is not unconstitutional as violating constitutional provision requiring that the title of every legislative act embrace but one subject, since such subject is germane to an act relating to the sale of 4 percent beer.

State v Talerico, 227-1315; 290 NW 660

1921.124 Separate locations — class "B" or "C".

Atty. Gen. Opinions. See '38 AG Op 232, 522

1921.125 Mandatory revocation.

Atty. Gen. Opinion. See '38 AG Op 447

History of Iowa beer law discussed.

State v Talerico, 227-1315; 290 NW 660

1921.126 Alcoholic content.

Atty. Gen. Opinion. See '38 AG Op 232

History of Iowa beer law discussed.

State v Talerico, 227-1315; 290 NW 660

Constitutionality—title of act—sufficiency. Section 1921.126, C., '39, forbidding the keeping of intoxicating liquor where beer is sold, is not unconstitutional as violating constitutional provision requiring that the title of every legislative act embrace but one subject, since such subject is germane to an act relating to the sale of 4 percent beer.

State v Talerico, 227-1315; 290 NW 660

1921.129 Power of municipalities.

Atty. Gen. Opinions. See '38 AG Op 35, 110, 350, 371, 480, 522, 549; AG Op May 11, '39; AG Op April 24, '40

Permit—refusal—mandamus as remedy. The good-faith exercise of the discretion vested in a town council to refuse an application for a class "B" permit to sell beer, on the ground that the applicant is not "of good moral character and repute", is not controllable by mandamus.

Madsen v Oakland, 219-216; 257 NW 549

Proceedings of council—ordinance—arbitrary action. A mayor, exercising his power under an ordinance to direct the nonissuance of a license, may not be said to act "arbitrarily" when he, in accordance with the ordinance, notifies the applicant of the time and place of hearing on the application and when the applicant ignores the notice.

Talarico v Davenport, 215-186; 244 NW 750

1921.130 Closing hours.

Atty. Gen. Opinion. See AG Op Jan. 20, '39

1921.131 Bottling beer.

Atty. Gen. Opinion. See '36 AG Op 197

1921.132 Violations.

Atty. Gen. Opinion. See '38 AG Op 447

1921.133 Labels on bottles, barrels, etc.—conclusive evidence.

Atty. Gen. Opinions. See '34 AG Op 474; '38 AG Op 337

CHAPTER 94

GENERAL PROHIBITIONS

1922 Interpretation.

Discussion. See 3 ILB 145—Webb-Kenyon Law; 3 ILB 221—State Power; 15 ILR 120—Jones-Stalker Act; 17 ILR 76—Moral turpitude; 18 ILR 22—Volstead Act

Atty. Gen. Opinion. See '25-26 AG Op 201

Instructions proper. It is not erroneous to instruct in a prosecution under the intoxicating liquor statutes, in the language of the statute, "that courts and juries shall construe the laws in regard to intoxicating liquors so as to prevent evasions." (State v Parsons, 206-390; 220 NW 328 overruled.)

State v Matthes, 210-178; 230 NW 522

Construction of law by jurors. The statutory provision to the effect that courts and jurors shall construe the intoxicating liquor statutes so as to prevent evasions furnishes no justification whatever for instructing the jury to that effect.

State v Parsons, 206-390; 220 NW 328

Requested instruction refused. Requested instructions relative to the duty of courts and jurors so to construe the intoxicating liquor statutes as to prevent evasions are properly refused.

State v Dunham, 206-354; 220 NW 77

1923 Definition.

Atty. Gen. Opinions. See '34 AG Op 129, 138, 156, 621, 695

Beer not intoxicating liquor. In prosecution for driving a motor vehicle while intoxicated, the refusal of accused's requested instruction that beer is not an intoxicating liquor held not error.

State v McGregor, (NOR); 266 NW 22

1924 General prohibition.

Atty. Gen. Opinions. See '25-26 AG Op 92, 201, '34 AG Op 129, 138; '36 AG Op 566

Scope of statute. The words, "for any of the purposes herein prohibited" as employed in §1930, C., '27, embrace all the prohibitions enumerated in this section.

State v Bruns, 211-826; 232 NW 684

Indictment — surplusage. Under an indictment charging the unlawful possession of intoxicating liquors, the allegation that the possession was for certain unlawful purposes is pure surplusage.

State v Healy, 217-1155; 251 NW 649

Articles seized on search. In a prosecution for willful and unlawful possession of intoxicating liquors, a still seized, together with liquors, during a search of defendant's premises, is admissible over the general objections of incompetency, immateriality and irrelevancy.

State v Matthes, 210-178; 230 NW 522

Search without warrant. One who is shown to be a violator of the law relative to the sale and possession of intoxicating liquors will be accorded no standing in a court of equity in an action by him to enjoin peace officers from picketing his place of business, interfering

with his business, or searching his customers without a search warrant.

Dietz v Cavender, 201-989; 208 NW 354

Excusable or justifiable homicide — defense of intoxicating liquors. A person may validly resist an attempt to steal from him intoxicating liquors which are unlawfully in his possession, even tho the said liquor has no value in a commercial sense.

State v Shannon, 214-1098; 243 NW 507

Evidence—sufficiency. Evidence held ample to present a jury question on the issue of possession of intoxicating liquors; also of a still.

State v Trumbauer, 207-772; 223 NW 491
State v Bamsey, 208-796; 223 NW 873
State v Bruns, 211-826; 232 NW 684

Evidence—fatal insufficiency. Evidence that intoxicating liquors were found in the home of the head of a family is insufficient, in and of itself, on which to base a finding that a son, as a member of the family, was in possession of the liquor.

State v Friend, 207-742; 223 NW 546

Opinion evidence. The opinion of a properly qualified witness is admissible on the issue whether a certain liquid is alcohol.

State v Healy, 217-1155; 251 NW 649

Liquor exhibits admissible. On a prosecution for bootlegging, intoxicating liquors and the cans containing the same, seized at a house on premises not occupied by the accused, but from which the jury could find he had obtained like liquors the day previous with which to make an unlawful sale, are admissible as circumstances tending to support the main charge.

State v Madison, 215-182; 244 NW 868

Identification of liquors. An exhibit in the form of alleged intoxicating liquors which were seized under a search warrant, when otherwise fully identified, is not rendered inadmissible because the liquors were left for a very brief time with the justice of the peace under circumstances which render very remote the possibility of tampering.

State v Barton, 202-530; 210 NW 551

Failure to identify liquors. Exhibits, e. g., bottles and the contents thereof seized by the officers at the time of making a search of defendant's premises, are not admissible on the trial of the defendant unless they are properly identified and their integrity established.

State v Reid, 200-892; 205 NW 517

Exhibits—excluding evidentiary statements. Properly identified bottles and their intoxicating contents are not rendered inadmissible because the labels thereon contain evidentiary statements when the jury is instructed to disregard such statements.

State v Christensen, 205-849; 216 NW 710

Evidence—empty bottles, etc. On a charge of unlawful possession of intoxicating liquors, empty bottles are admissible in evidence when they were seized at the same time and place where other bottles of liquor were seized; likewise, what the accused said to the officers at the time of such seizure.

State v Bryant, 208-816; 225 NW 854
State v Salisbury, 209-139; 227 NW 589

Unlawful "dispensing." Evidence that an accused made known to others the location of a cache of intoxicating liquors, assisted in actually locating it, and thereupon, jointly with the other parties, consumed the liquors, presents a jury question on the issue of "unlawful dispensing" of such liquors.

State v Meyer, 203-694; 213 NW 220

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Possession—election between acts. The court need not require the state to elect, on an indictment charging illegal possession of intoxicating liquors, whether it will rely on possession in the defendant's shop or in his nearby chicken coop, the indictment not distinguishing between the different liquors in respect to the time or place of their possession.

State v Christensen, 205-849; 216 NW 710

Possession—futile defense. Justification of possession of one certain bottle of intoxicating liquor will not be justification of the possession of another and different bottle of such liquor.

State v Healy, 217-1155; 251 NW 649

Possession of liquor—third conviction—proof of prior convictions unnecessary under guilty plea. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pleaded guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

Possession of still—permissible inference. The finding of a still buried on defendant's premises justifies an inference that the possessor of the premises was in possession of the still, and the court may very properly so instruct the jury.

State v Trumbauer, 207-772; 223 NW 491

Unlawful "possession." The unlawful possession of intoxicating liquors is a misdemeanor.

State v Boever, 203-86; 210 NW 571
State v Wareham, 205-604; 218 NW 145
State v Bamsey, 208-796; 223 NW 873

Unlawful possession—corpus delicti. The corpus delicti is established and a jury question presented on the charge of unlawful possession of intoxicating liquors, by evidence that the accused, when approached, threw from an automobile in which he was sitting, a bottle of such liquors, but did not break it, even tho there was no evidence that he was operating the vehicle.

State v Kirkman, 206-364; 220 NW 57

Unlawful possession—control of premises—effect. In a prosecution for possessing liquors unlawfully, it is proper to instruct the jury to convict the accused if he willfully and unlawfully had such liquors in his possession, and that in law he had such liquors in his possession if he had possession and control of the building or place where they were kept.

State v Matthes, 210-178; 230 NW 522

Innocent possession—instructions. In a prosecution charging the unlawful possession of intoxicating liquors, the court must, without request, instruct on the supported issue whether defendant was consciously in possession of the liquors found on his person.

State v Wheeler, 216-433; 249 NW 162

Innocent possession—instructions. Instructions which, in effect, direct the jury not to convict unless the possession of intoxicating liquors was "willful and unlawful" on the part of defendant, adequately protect him from a conviction in case his possession was an innocent possession—in case he had no knowledge of the presence of such liquors.

State v Matthes, 210-178; 230 NW 522

Unusual quantity in residence. Instructions are unobjectionable when to the effect that the finding of intoxicating liquors in the residence of the accused in an unusual or unreasonable quantity might be sufficient, with all the other circumstances in the case, to justify a finding that such liquors were being kept for sale.

State v Burch, 202-348; 209 NW 474

Time of commission of offense. An instruction justifying a conviction for possessing intoxicating liquors at any time within three years prior to the return of the indictment is unobjectionable, when the indictment, proof, and trial were exclusively centered on one particular transaction occurring during said period.

State v Healy, 217-1155; 251 NW 649

Trial—misconduct of jurors. In a prosecution for illegal possession of intoxicating liquors, statements by jurors to other jurors during the deliberation of the jury that defendant "does nothing but bootleg," and "is the king of bootleggers," constitute such misconduct as to require a new trial.

State v Clark, 210-724; 231 NW 450

1927 "Bootlegger" defined.

Atty. Gen. Opinions. See '25-26 AG Op 92; '34 AG Op 156

"Carrying on person" defined. An indictment for unlawfully "carrying around liquor on the person" is not supported by evidence which simply shows that the accused, when solicited to sell intoxicating liquors, went to an oat bin, dug up a bottle of such liquor, and from such bottle filled another bottle which he sold to the prosecuting witness.

State v Kenne, 200-1239; 206 NW 247
State v Webb, 204-135; 214 NW 568

Purchaser not particeps criminis. Purchaser of liquor from bootlegger held not an accessory or accomplice.

State v McMahon, (NOR); 211 NW 409

Proper indictment. Under §13737, C., '39, an indictment charging the commission of the offense of bootlegging by any and all of the means denounced by §1927 is proper.

State v McMahon, (NOR); 211 NW 409

Indictment—nonessential allegation. An indictment charging the bootlegging of intoxicating liquors need not allege the place where defendant intended to sell the liquors.

State v Bamsey, 208-802; 226 NW 57

Bootlegging—surplusage allegation. In a prosecution for bootlegging by carrying around liquors on one's person, that portion of the information which charges an actual sale may be treated as surplusage.

State v Parsons, 209-540; 228 NW 307

Election between different sales. On a prosecution for strict bootlegging, viz: carrying around liquors with the intent to sell, the state may not be compelled to elect between actual sales shown by it.

State v Dillard, 205-430; 216 NW 610

Evidence—sufficiency. Evidence reviewed and held sufficient to establish the intoxicating character of liquors sold, and to identify the accused as the seller.

State v Cambridge, 216-1422; 250 NW 731

Evidence as to the delivery of bottles and money. Evidence tending to show the passing of bottles by the accused to others, and the passing of money from such others to the accused, is admissible on a charge of bootlegging even tho such testimony is somewhat equivocal.

State v Smalley, 211-109; 233 NW 55

Sales as evidence of intent. The element in a charge of bootlegging of intent to sell may

be established by showing sales of intoxicating liquors by the accused.

State v Bamsey, 208-802; 226 NW 57

Circumstantial evidence. An indictment for bootlegging may be sustained by circumstantial evidence.

State v Plew, 207-624; 223 NW 362

Evidence—taste or smell of liquor. A witness may be permitted to testify that certain liquor smelled or tasted like alcohol.

State v Eggleston, 201-1; 206 NW 281
State v Ferro, 211-910; 232 NW 127

Conflicting evidence. Conflicting evidence reviewed, and held to sustain a conviction for bootlegging.

State v Weber, 204-137; 214 NW 531

Possession not prima facie evidence of guilt. Under a specific charge of bootlegging, the fact that intoxicating liquors were found in the possession of the accused is not prima facie evidence of his guilt.

State v Bamsey, 208-802; 226 NW 57

Accomplice. A witness may not be deemed an accomplice in the crime of bootlegging from the mere fact that, while riding with the accused, he (the witness) directed the driver of the vehicle to stop at a point where the accused apparently obtained the liquor.

State v Brundage, 200-1394; 206 NW 607

Gifts — nonphysical delivery. The actual physical delivery of the vessel containing intoxicating liquors is not essential to constitute a "gift" of such liquors.

State v Wareham, 205-604; 218 NW 145

Bootlegging—submission of nuisance. On a simple charge of "bootlegging", it is reversible error to submit (along with said charge) the offense of maintaining a nuisance, even tho there be no evidence of the maintenance of a nuisance, and even tho the two offenses have common elements, and closely approach identity.

State v Moore, 210-743; 229 NW 701

Means and motives in effecting sale. It is proper to instruct that, if a sale of intoxicating liquors was in fact unlawful, then the means adopted by the buyer to effect the sale, and his motives, become quite immaterial.

State v Weber, 204-137; 214 NW 531

Limitation of prosecutions—instructions. In a prosecution for bootlegging, it is proper to instruct the jury that the exact date of guilt is not material provided it is shown that the offense was committed "at some time within three years" just prior to the filing of the trial information, even tho the evidence is such that if the defendant be guilty he is guilty as of a definite date.

State v Howard, 223-767; 273 NW 849

Instructions — presentation of particular theory. Comprehensive and correct instructions by the court render unnecessary, in the absence of a request, the submission of defendant's particular theory of the case.

State v Dillard, 205-430; 216 NW 610

Confusion of elements. An instruction which in defining the term "nuisance" (of the maintenance of which defendant is charged) makes elaborate and somewhat unnecessary recital of the statutes relative to "bootlegging" is not necessarily subject to the vice of confusing the jury as to the elements of the offense charged—nuisance.

State v Harrington, 220-1116; 264 NW 24

Submission of unsupported offense. When an offense may be committed in different ways, and there is no evidence of one of the ways, error results from copying the entire statute into the instructions and directing the jury to convict "if the accused did any one of the things as in these instructions explained."

State v Smalley, 211-109; 233 NW 55

Injunction—acts not constituting violation. An injunction solely against acts constituting bootlegging is not violated by the subsequent maintenance by the defendant of an intoxicating liquor nuisance.

Friend v Cummings, 207-1201; 224 NW 510

Nonexcessive judgment. Imprisonment for five months in the county jail and a fine of $600 for bootlegging will not be deemed excessive as to one who deliberately commits the offense with full knowledge of the law.

State v Weber, 204-137; 214 NW 531

Sentence—excessiveness. Sentences for violation of the intoxicating liquor statutes will not be disturbed in the absence of a substantial reason therefor.

State v Bamsey, 208-796; 223 NW 873

1928 Venue.

Offenses partly in county. See under §13451

1929 Nuisance.

Atty. Gen. Opinion. See '32 AG Op 160

Failure to question indictment. An accused who goes to trial without questioning the sufficiency of an indictment may not thereafter raise the question of sufficiency by objections to evidence.

State v Phillips, 212-1332; 236 NW 104

Former jeopardy—necessary identification of offense. Instructions that a defendant may be found guilty of maintaining a liquor nuisance if he committed the offense within three years prior to the return of the indictment will not be deemed to put the defendant on trial for an alleged liquor offense on which the defendant was acquitted within said three years when the specific nature of the latter offense is not made to appear.

State v Kelly, 217-1305; 253 NW 49

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Right to possess for own use. The court, in a prosecution for maintaining a liquor nuisance, is fully justified in failing to instruct as to the right of defendant to possess in his own home and for his own use, the liquors which were seized in his home, when defendant in his testimony positively asserted that he did not have said seized liquors in his possession for his own use.

State v Harrington, 220-1116; 264 NW 24

Nuisance—confusion of elements. An instruction which in defining the term "nuisance" (of the maintenance of which defendant is charged) makes elaborate and somewhat unnecessary recital of the statutes relative to "bootlegging" is not necessarily subject to the vice of confusing the jury as to the elements of the offense charged—nuisance.

State v Harrington, 220-1116; 264 NW 24

Jury question. Evidence held to present a jury question on the issue of maintaining a nuisance.

State v Phillips, 212-1332; 236 NW 104

Facts attending search warrant proceedings. Disputed questions of fact upon the determination of which depends the right of the jury to consider search warrant proceedings on the issue of the defendant's guilt of maintaining a nuisance are properly submitted to the jury for determination.

State v Bruns, 211-826; 232 NW 684

Evidence—sufficiency. Evidence held to support a verdict of guilty of maintaining a nuisance.

State v Heeren, 200-882; 205 NW 498
State v Burch, 202-348; 209 NW 474
State v Cahalan, 204-410; 214 NW 612
State v Tibbits, 207-1033; 222 NW 423
State v Salisbury, 209-139; 227 NW 589
State v Slycord, 210-1209; 232 NW 636
State v Kelly, 217-1305; 253 NW 49

Voir dire examination of juror—permissible range. The act of the county attorney, in a prosecution for maintaining a liquor nuisance, in asking a proposed juror (whose business was transporting beer) whether he would vote to convict the accused if the accused was proven guilty beyond all reasonable doubt, will not, in and of itself, be deemed prejudicial error.

State v Harrington, 220-1116; 264 NW 24

Cruel and inhuman punishment. Sentence of six months at hard labor for maintaining liquor nuisance held not such "cruel and inhuman punishment" as to violate Amendment 8 of the United States Constitution, when the maximum punishment for the offense was one year at hard labor.

State v Gasparia, (NOR); 214 NW 550

Mulct tax—knowledge of owner. The assessment of a mulct tax against property which the owner knows, or has reason to know, is being used as an intoxicating liquor nuisance is strictly in accordance with the statute.

State v Campbell, 204-147; 214 NW 550

1930 Penalty for nuisance.

Attorney's fee. See under §2023

Atty. Gen. Opinions. See '28 AG Op 259, 488; '32 AG Op 160, 231

Scope of statute. The words, "for any of the purposes herein prohibited" as employed in this section embrace all the prohibitions enumerated in §1924, C., '27.

State v Bruns, 211-826; 232 NW 684

"Place" defined. A "brush patch" is a place, within the meaning of the statute which prohibits the maintenance of a liquor nuisance in any place.

State v Cahalan, 204-410; 214 NW 612

Election as to "place". The state, upon making proof of an allegation of the maintenance of a liquor nuisance at a "dwelling house and brush patch", may not be required to elect as to which "place" it will rely on for a conviction, it appearing that both "places" were on the farm of the defendant and that the "brush patch" was only an additional hiding place.

State v Cahalan, 204-410; 214 NW 612

Location. The state need not, under a general charge of maintaining a nuisance, confine its proof of the keeping of liquors at any particular place.

State v Tibbits, 207-1033; 222 NW 423

Indictment—sufficiency. Information by county attorney for nuisance reviewed and held sufficient.

State v Japone, 202-450; 209 NW 468

Evidence—sufficiency. Evidence held sufficient to identify an accused as the keeper of an intoxicating liquor nuisance.

State v McGee, 207-334; 221 NW 556

Evidence—search warrant proceedings.

State v McGee, 207-334; 221 NW 556

Evidence—liquors seized. Duly identified liquors seized at the place of an alleged nuisance are admissible on the prosecution for maintaining such nuisance.

State v Salisbury, 209-139; 227 NW 589

Confessions—proof of corpus delicti. A naked confession made out of court will not sustain a conviction unless the corpus delicti is otherwise proven. So held as to a charge of maintaining an intoxicating liquor nuisance, there being no evidence that the accused had ever, directly or indirectly, been engaged in trafficking in such liquors.

State v Thomsen, 204-1160; 216 NW 616

Sale as element. An actual sale of intoxicating liquors is not a necessary element of the crime of maintaining an intoxicating liquor nuisance.

State v Friend, 206-615; 220 NW 59

Specifying acts constituting offense—effect. An indictment for nuisance which specifies the acts done by the accused limits the state to proof of the specific acts charged. In other words, the accused may rely on the specific acts charged as constituting the offense. So held where the state alleged the use of a building for the manufacture, sale, and keeping for sale of intoxicating liquors, and attempted to support the charge by proof of use of a building for repairing a still.

State v Schuling, 216-1425; 250 NW 588

Striking unnecessary allegation. A trial information by the county attorney for maintaining an intoxicating liquor nuisance in a named county "in the city of Cedar Rapids" may, after the jury is sworn, be amended by striking therefrom the clause "in the city of Cedar Rapids", it appearing that the said clause was a manifest error, and that the accused so knew, and requested no further time for trial.

State v Japone, 202-450; 209 NW 468

Nonnecessity to negative exception.

State v Japone, 202-450; 209 NW 468

Insufficient evidence. The maintenance of an intoxicating liquor nuisance at a certain place is not shown by evidence that the accused drove his conveyance containing the liquor up to, and stopped alongside of, the building in question with the unexecuted intent of making an unlawful delivery of liquor at said place.

State v Aliber, 204-144; 214 NW 610

Insufficient evidence. A conviction for maintaining a nuisance cannot be sustained on evidence which simply shows that the accused was on the premises of one who was engaged in the unlawful manufacture of intoxicating liquors, and was probably there for the purpose of buying liquors.

State v Marx, 200-884; 205 NW 518

Possession — evidence — fatal insufficiency. Evidence that intoxicating liquors were found in the home of the head of a family is insufficient, in and of itself, on which to base a finding that a son, as a member of the family, was in possession of the liquor.

State v Friend, 207-742; 223 NW 546

Instructions. An appellant may not complain of instructions which are in harmony with his contention that the accused was charged with maintaining an intoxicating liquor nuisance.

State v Bryant, 208-816; 225 NW 854

Essential instructions. Under an indictment for maintaining an intoxicating liquor nuisance, it is reversible error for the court in its instructions (1) to quote the statute which prohibits the mere "manufacture" of such liquors, (2) to tell the jury that the defendant was indicted thereunder, and (3) to fail to set out in some manner the elements of the statute prohibiting a nuisance.

State v Reid, 200-892; 205 NW 517

Character and use of utensils—instructions. In a prosecution for nuisance, a requested instruction by the defendant as to the effect of the possession, use, and character of utensils found in defendant's place of business may be so modified as to present both the theory of the defendant and of the state.

State v Barton, 202-530; 210 NW 551

Acquittal—nonbar to injunction. A verdict of "not guilty" under an indictment charging the keeping of an intoxicating liquor nuisance on certain property is no bar to an action to enjoin the same defendant from maintaining a liquor nuisance on the same property, and based on the same transaction on which the indictment was based.

State v Osborne, 207-636; 223 NW 363
See State v Boever, 203-86; 210 NW 571

Former jeopardy. An acquittal on an indictment which charges the maintenance of an intoxicating liquor nuisance does not constitute a bar to an indictment which charges the unlawful possession of such liquors, even tho the same liquors may appear as evidence in both cases.

State v Boever, 203-86; 210 NW 571
See Touche v Bonner, 201-466; 205 NW 751

Sealed verdict by agreement. Permitting the jury to return a sealed verdict and to separate and reassemble when the verdict is opened, is proper when the state and the defendant have agreed in writing to that effect; nor is it erroneous for the court to read such agreement to the jury.

State v Ferro, 211-910; 232 NW 127

Nonexcessive sentence. The maximum statutory penalty is not excessive under testimony showing the possession of a large quantity of liquor for immediate distribution.

State v Japone, 202-450; 209 NW 468

Reduction—record required. A sentence for violating the intoxicating liquor statutes will not, on appeal, be reduced in the absence of a record which shows a substantial reason for such reduction.

State v Nolta, 205-595; 218 NW 144

Sentence—impairment of defendant's right of appeal. After imposing, in a criminal case, a fine and imprisonment less than the maximum allowable limit, the court does not impair the defendant's right to appeal by embodying in the judgment a provision for the suspension of a portion of the sentence provided the defendant does not appeal.

State v Kelly, 217-1305; 253 NW 49

Punishment-increasing act. A county jail sentence under the latter part of this section for an offense committed prior to the enactment of such latter part is, of course, improper.

State v Marx, 200-884; 205 NW 518

1931 Intoxication punished.

Discussion. See 23 ILR 57—Scientific tests for intoxication

Atty. Gen. Opinion. See '34 AG Op 695

Opinion evidence. Opinion evidence is admissible on the issue of intoxication.

State v Jenkins, 203-251; 212 NW 475

Opinion evidence. A witness may testify whether a person was sober or intoxicated without first stating the facts on which the opinion is based.

State v Wheelock, 218-178; 254 NW 313

Instructions—nonexpert testimony. No instruction need be given in regard to nonexpert evidence in relation to intoxication.

State v Wheelock, 218-178; 254 NW 313

1932 Penalty remitted.

Atty. Gen. Opinion. See '34 AG Op 695

1934 False statements.

Atty. Gen. Opinion. See '25-26 AG Op 92

1936 Labeling shipments.

Atty. Gen. Opinion. See '25-26 AG Op 92

Scope of statute. The statute which punished the possession of intoxicating liquors which have been transported without being labeled as such liquor applies solely to a case where there is a consignor, a carrier, and a consignee.

State v Corey, 205-1042; 218 NW 957
State v Drain, 205-581; 218 NW 269
State v Wyatt, 207-319; 222 NW 866
State v Wyatt, 207-322; 222 NW 867

Information—essential elements. An information which charges the unlawful possession of intoxicating liquors which had theretofore been transported without being labeled, necessitates proof (1) of such prior unlawful transportation and (2) that the accused became party to such transportation by illegally receiving such liquors into his possession.

State v Edwards, 205-587; 218 NW 266
State v Drain, 205-581; 218 NW 269
State v Corey, 205-1042; 218 NW 957

Ignoring material allegations. The court may not, in the trial of a criminal case, ignore material allegations in the indictment or information and thereby place the accused on trial for a higher and more severely punishable offense than is charged in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Former jeopardy. The conviction of an accused in the court of a justice of the peace of the nonindictable offense of transporting intoxicating liquors without properly labeling the same is a bar to a subsequent prosecution based on the same transaction for the indictable offense of transporting intoxicating liquors (§1945-a1 et seq., C., '27 [§1945.2 et seq., C., '39]), the latter offense being necessarily embraced in the former.

State v Purdin, 206-1058; 221 NW 562

1939 Shipments unlawful—exception.

Insufficient evidence. A charge of illegal transportation of intoxicating liquors is not sustained by unquestioned testimony that the defendant was overtaken by the operator of an automobile and was invited to ride, accepted the invitation, and entered the car (in which he had no interest), where he later found a jug of whisky, in which he likewise had no interest, but which he threw out of the car when pursued by peace officers.

State v Duskin, 202-425; 210 NW 421

1945.2 Illegal transportation generally.

Atty. Gen. Opinion. See '34 AG Op 693

Scope of statute. The statutory prohibition against the illegal transportation of intoxicating liquors is not now limited to common carriers, as was the case under §2419, C., '97.

State v Casebolt, 201-574; 207 NW 566
State v Duskin, 202-425; 210 NW 421

Scope of statutes. Section 1936, C., '27, and this section discussed and differentiated.

State v Drain, 205-581; 218 NW 269

Illegal transportation—definition. The word "transportation" in the intoxicating liquor statutes is employed in its ordinary sense; that is, to convey from one place to another—any real carrying about.

State v Canalle, 206-1169; 221 NW 847
State v Near, 214-1083; 243 NW 519

Innocent possession—instructions. In a prosecution charging the unlawful possession of intoxicating liquors, the court must, without request, instruct on the supported issue whether defendant was consciously in possession of the liquors found on his person.

State v Wheeler, 216-433; 249 NW 162

Description of offense. An indictment for conspiracy to commit a crime need not set forth the various elements of said crime. Indictment held to charge properly a conspiracy

to engage in the unlawful transportation and sale of intoxicating liquors.

State v Terry, 207-916; 223 NW 870

Ignoring material allegations. The court may not, in the trial of a criminal case, ignore material allegations in the indictment or information and thereby place the accused on trial for a higher and more severely punishable offense than is charged in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Tracing movements of accused. On a charge of illegal transportation of intoxicating liquors, evidence relative to the actions and movements of the accused at the time of the transaction in question and to the subject matter of the charge is material and competent.

State v Canalle, 206-1169; 221 NW 847

Evidence—incriminating circumstance. On a charge of unlawful transportation of liquors, evidence is admissible that shortly before the accused was arrested with intoxicating liquors in his vehicle he was seen on a somewhat remote highway and near a cache containing such liquors.

State v Campbell, 209-519; 228 NW 22

Unlawful transportation—evidence. A jury is amply justified in finding that an accused was engaged in the unlawful transportation of intoxicating liquors when the evidence shows that he was found seated in the driver's seat of an automobile standing on a country road, with a loaded revolver by his side, and with 55 gallons of alcohol stored in the car.

State v Anderson, 216-887; 247 NW 306
See State v Canalle, 206-1169; 221 NW 847

Evidence—articles found in conveyance. The empty bottles, cartons, corks, and broken bottles taken from the automobile of a party who is accused of unlawful transportation of liquors, are admissible on the trial of said charge.

State v Campbell, 209-519; 228 NW 22

Inadvertent reception of immaterial testimony. On a charge of illegally transporting intoxicating liquors, the reception of evidence as to the search of an automobile of which the accused was not in possession, and as to the finding of such liquors therein, does not constitute reversible error when the evidence was first received because of a misunderstanding of the court as to which automobile was being referred to, and when the court pointedly directed the jury not to consider it.

State v Canalle, 206-1169; 221 NW 847

Former jeopardy. The conviction of an accused in the court of a justice of the peace of the nonindictable offense of transporting intoxicating liquors without properly labeling the same (§1936, C., '27), is a bar to a subsequent prosecution based on the same transaction for the indictable offense of transporting intoxicating liquors, the latter offense being necessarily embraced in the former.

State v Purdin, 206-1058; 221 NW 562

Aiding and abetting. Evidence held ample to justify the court in submitting to the jury the question whether the accused "aided and abetted" the illegal transportation of intoxicating liquors.

State v Canalle, 206-1169; 221 NW 847

Proof of corpus delicti. Proof relative to the alcoholic nature of certain liquors reviewed and held ample to show they could be used for beverage purposes.

State v Anderson, 216-887; 247 NW 306

Sentence—excessiveness. Sentence reviewed, and held not excessive, in view of the attending circumstances.

State v Van Klaveren, 208-867; 226 NW 81

Imprisonment for cost. There can be no legal imprisonment for the nonpayment of costs in a prosecution for the illegal transportation of intoxicating liquors.

State v Van Klaveren, 208-867; 226 NW 81
See Hammer v Utterback, 202-50; 209 NW 522

CHAPTER 95

INDICTMENT, EVIDENCE, AND PRACTICE

1952 Unnecessary allegations.

Indictment held sufficient.

State v Japone, 202-450; 209 NW 468

Negativing permit. An indictment or trial information for maintaining an intoxicating liquor nuisance need not negative the existence of a permit to the accused.

State v Japone, 202-450; 209 NW 468

Negativing exceptions. An indictment charging the unlawful possession of intoxicating liquors need not negative the exceptions which would render the possession legal. The accused must allege and prove the exonerating exceptions.

State v Healy, 217-1155; 251 NW 649

Criminal prosecutions—indictment—surplusage. Under an indictment charging the unlawful possession of intoxicating liquors, the allegation that the possession was for certain unlawful purposes is pure surplusage.

State v Healy, 217-1155; 251 NW 649

1954 Former conviction.

Sufficient particularity. A charge of former conviction is sufficient when it distinctly alleges the time and place of such conviction and the record and page thereof where it may be found.

State v Lambertti, 204-670; 215 NW 752

Method of trial. When the statute requires an allegation of former conviction to be inserted in the indictment, the resulting issue and the issue whether the present and former accused are one and the same person are properly submitted to the jury on supporting evidence, even tho the statute makes the record or a due authentication thereof prima facie evidence that a conviction has been had.

State v McGee, 207-334; 221 NW 556

Submission of unsupported issue—harmless error. The submission to the jury of the unsupported issue of former conviction and the unauthorized finding by the jury that the accused had been so convicted are quite harmless when the sentence imposed was less than the maximum provided for the substantive and proven offense charged in the indictment.

State v Lambertti, 204-670; 215 NW 752
See State v Bergman, 208-811; 225 NW 852

1956 Record of conviction.

Proof of identity of persons. Identity of names is not sufficient proof of identity of persons.

State v Logli, 204-116; 214 NW 490
State v Parsons, 206-390; 220 NW 328
State v Anderson, 216-887; 247 NW 306
See State v Franklin, 215-384; 245 NW 283

Evidence—judgment of former conviction. The record of a former conviction of an accused is admissible under an indictment which properly charges such conviction.

State v Lambertti, 204-670; 215 NW 752
State v McGee, 207-334; 221 NW 556

Permissible proof. Proof of former convictions of violations of the intoxicating liquor statutes, when pleaded in aggravation of a present like charge, is properly proven by the production and proper identification of the original charge, written plea of guilty, and judgment entry of sentence, together with proof that the person therein prosecuted and the defendant presently on trial are one and the same person.

State v Roberts, 222-117; 268 NW 27

1958 Purchaser as witness.

Taste or smell of liquor. A witness may be permitted to testify that certain liquor smelled or tasted like alcohol.

State v Eggleston, 201-1; 206 NW 281
State v Ferro, 211-910; 232 NW 127

1960 Judgment lien.

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

1961 Enforcement of lien.

Atty. Gen. Opinion. See '28 AG Op 433

1964 Second and subsequent conviction.

Atty. Gen. Opinion. See '32 AG Op 160

Ex post facto act.

State v Norris, 203-327; 210 NW 922

Successive offenses—scope of statute. The former convictions which this section authorizes the state to plead in aggravation of a subsequent offense must be convictions which have been had since said section became a law.

State v Kuhlman, 206-622; 220 NW 118

Guilty plea—proof of former convictions. After a plea of guilty to a third offense of unlawful possession of intoxicating liquor, to require proof of the prior convictions would be a useless act not contemplated by the legislature.

State v Erickson, 225-1261; 282 NW 728

Separate submission. On the trial of an indictment, the issue of former conviction should be separately submitted to the jury.

State v Parsons, 206-390; 220 NW 328

Nonpermissible amendment. An indictment which charges a first offense may not be so amended as to charge a second offense.

State v Herbert, 210-730; 231 NW 318

Former conviction—failure of proof—effect. An accused may very properly be convicted of the primary offense alleged in an indictment, even tho the allegation of a former conviction is unproven.

State v Parsons, 206-390; 220 NW 328

Unallowable former convictions—proper presentation. When an indictment charges a complete offense, and is, therefore, not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Allegations of former convictions—withdrawal from jury. In prosecution for illegal possession of intoxicating liquor, county attorney's action in seeking to place the federal convictions before the jury, such matters being entirely withdrawn from the considera-

tion of the jury, was not prejudicial to defendant and did not entitle him to a reversal when there was ample competent evidence to sustain the jury's verdict.

State v Caringello, 227-305; 288 NW 80

Unauthorized allegation of former conviction—effect. An unauthorized allegation in an indictment of a former conviction and the reception in evidence of proof thereof constitute reversible error, even tho, on conviction, the judgment imposed was within the limit provided for a first offense.

State v Bergman, 208-811; 225 NW 852
See State v Lambertti, 204-670; 215 NW 752

Review, scope of—waiver. An accused may not, for the first time on appeal, present the objection that the indictment pleads a former conviction which is legally unallowable.

State v McGee, 207-334; 221 NW 556

Sentence—excessiveness. Sentence reviewed, and held not excessive, in view of the attending circumstances.

State v Van Klaveren, 208-867; 226 NW 81

1965 Habitual violators.

Sufficiency—former conviction. A charge of former conviction is all-sufficient when it distinctly alleges the time and place of such conviction and the record and page thereof where it may be found.

State v Lambertti, 204-670; 215 NW 752

Judgment of former conviction. The record of a former conviction of an accused is admissible under an indictment which properly charges such conviction.

State v Lambertti, 204-670; 215 NW 752

Method of trial. When the statute requires an allegation of former conviction to be inserted in the indictment, the resulting issue and the issue whether the present and former accused are one and the same person, are properly submitted to the jury on supporting evidence, even tho the statute makes the record or a due authentication thereof prima facie evidence that a conviction has been had.

State v McGee, 207-334; 221 NW 556

1965.1 Duty of county attorney.

Allegations of former convictions — withdrawal from jury. In prosecution for illegal possession of intoxicating liquor, county attorney's action in seeking to place the federal convictions before the jury, such matter being entirely withdrawn from the consideration of the jury, was not prejudicial to defendant and did not entitle him to a reversal when there was ample competent evidence to sustain the jury's verdict.

State v Caringello, 227-305; 288 NW 80

1965.2 Duty of court.

Third conviction—proof of prior convictions under guilty plea. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pleaded guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

1966.1 Prima facie evidence.

Nonforfeited liquors. An adjudication that liquors seized on a search warrant are intoxicating and have been forfeited is not a condition precedent to the introduction of such liquors against the accused.

State v Boever, 203-86; 210 NW 571
State v Phillips, 212-1332; 236 NW 104
State v Arluno, 222-1; 268 NW 179

Search warrant proceedings. Search warrant proceedings are admissible on a prosecution for nuisance, in order to lay the foundation for the reception in evidence of liquors seized under such proceedings.

State v McGee, 207-334; 221 NW 556

Possession of still and accompanying exhibits. On the issue whether defendant was in possession of a still which was buried on defendant's premises, a coat and letters and documents therein, addressed to the defendant, and buried with the still, are admissible, there being some evidence that the coat belonged to defendant.

State v Trumbauer, 207-772; 223 NW 491

Bootlegging—possession as prima facie evidence of guilt. Under a specific charge of bootlegging, the fact that intoxicating liquors were found in the possession of the accused is not prima facie evidence of his guilt.

State v Bamsey, 208-802; 226 NW 57

Possession—empty bottles, etc. On a charge of unlawful possession of intoxicating liquors, empty bottles are admissible in evidence when they were seized at the same time and place where other bottles of liquor were seized; likewise, what the accused said to the officers at the time of such seizure.

State v Bryant, 208-816; 225 NW 854

Intent to sell—possession as evidence. The possession of intoxicating liquors may be attended by such circumstances as to justify the jury in finding that such possession was with criminal intent on the part of the possessor to sell.

State v Arluno, 222-1; 268 NW 179

Bootlegging—liquor exhibits admissible. On a prosecution for bootlegging, intoxicating liquors and the cans containing the same, seized

at a house on premises not occupied by the accused, but from which the jury could find he had obtained like liquors the day previous with which to make an unlawful sale, are admissible as circumstances tending to support the main charge.

State v Madison, 215-182; 244 NW 868

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Indictment—unlawful possession. Evidence held ample to establish unlawful possession of intoxicating liquors.

State v Boever, 203-86; 210 NW 571

Injunction—insufficient evidence. The finding on defendant's premises of two partly filled half-pint bottles of alcohol, one in the actual possession of defendant's wife, and one in the actual possession of the defendant's adult son—the defendant not being at the time on the premises—is insufficient to justify the enjoining of the defendant from the maintenance of a liquor nuisance.

Doebler v Cherpakov, 217-86; 250 NW 894

Searches—presumption of legality. Search warrant proceedings, regular on their face and shown to have been issued on a sworn information, and a separate oral examination of the informant, will, in the absence of any showing to the contrary, be presumed legal, even tho the facts or evidence showing probable cause do not actually appear in any of the proceedings leading up to the issuance of the warrant.

State v Bruns, 211-826; 232 NW 684

Facts attending search warrant proceedings. Disputed questions of fact, upon the determination of which depends the right of the jury to consider search warrant proceedings on the issue of the defendant's guilt of maintaining a nuisance, are properly submitted to the jury for determination.

State v Bruns, 211-826; 232 NW 684

Unlawful transportation—evidence. A jury is amply justified in finding that an accused was engaged in the unlawful transportation of intoxicating liquors when the evidence shows that he was found seated in the driver's seat of an automobile standing on a country road, with a loaded revolver by his side, and with 55 gallons of alcohol stored in the car.

State v Anderson, 216-887; 247 NW 306

Trial—instructions—ignoring lack of evidence. An instruction which ignores the effect of "want of evidence," but directs the jury to determine guilt solely on the evidence "admitted" is not erroneous when it is manifest the instruction was given solely with reference to the effect to be given certain exhibits received in evidence, and without reference to the instruction on reasonable doubt which is not questioned.

State v Madison, 215-182; 244 NW 868

1966.2 Defense.

Atty. Gen. Opinion. See '36 AG Op 218

Indictment — negativing exceptions. An indictment charging the unlawful possession of intoxicating liquors need not negative the exceptions which would render the possession legal. The accused must allege and prove the exonerating exceptions.

State v Healy, 217-1155; 251 NW 649

Right to possess for own use—failure to instruct. The court, in a prosecution for maintaining a liquor nuisance, is fully justified in failing to instruct as to the right of defendant to possess in his own home and for his own use, the liquors which were seized in his home, when defendant in his testimony positively asserted that he did not have said seized liquors in his possession for his own use.

State v Harrington, 220-1116; 264 NW 24

Criminal prosecutions—possession — futile defense. Justification of possession of one certain bottle of intoxicating liquor will not be justification of the possession of another and different bottle of such liquor.

State v Healy, 217-1155; 251 NW 649

1966.3 Attempt to destroy.

Atty. Gen. Opinion. See '36 AG Op 218

Attempt to destroy. The attempt on the part of a person to destroy a liquid while the officers are searching his premises under a warrant constitutes prima facie proof that the liquid was intoxicating and intended for unlawful purposes.

State v Barton, 202-530; 210 NW 551

Bottle thrown from automobile. The corpus delicti is established and a jury question is presented on the charge of unlawful possession of intoxicating liquors by evidence that the accused, when approached, threw from an automobile, in which he was sitting a bottle of such liquors, but did not break it, even tho there was no evidence that he was operating the vehicle.

State v Kirkman, 206-364; 220 NW 57

Instructions. No necessity exists for instructing as to the presumption which arises from an attempt to destroy liquor which is the subject of a search, when the destruction, if any, was accomplished by the wife of an accused.

State v Dunham, 206-354; 220 NW 77

Nonreversible error — unsupported instruction. In a prosecution for illegal possession of

intoxicating liquors, an instruction as to the statutory presumption attending an attempt, in the presence of peace officers, to destroy such liquors—as to which there was no supporting evidence—does not constitute reversible error, it appearing from the record that the defendant was, beyond question, guilty of the offense charged and, in addition, was an habitual violator of said liquor statutes.

State v Roberts, 222-117; 268 NW 27

CHAPTER 97

SEIZURE AND SALE OF CONVEYANCES

2001 Seizure under transportation.

Self-incrimination. The statutory declaration (§1966-a1, C., '27 [§1966.1, C., '39]) that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Forfeiture when no liquor found. There may be a legal forfeiture of a conveyance which has been used in the unlawful transportation of intoxicating liquors, even tho no such liquors are found in the conveyance at the time of the seizure.

State v Coupe, 205-597; 218 NW 346

2004 Release.

Atty. Gen. Opinion. See '28 AG Op 204

Bond not required. No bond is required by one who intervenes and asks for the possession through an order of court after due hearing.

State v Automobile, 204-1155; 216 NW 611

2005 Information.

Nature of proceeding. A proceeding for the forfeiture of a conveyance because of its use in the unlawful transportation of liquors is a special action, and not triable de novo on appeal.

State v Coupe, 205-597; 218 NW 346

2006 Forfeiture.

Non de novo hearing on appeal. A proceeding for the condemnation of an automobile because employed in the unlawful transportation of intoxicating liquors will not be tried de novo on appeal. Whether the statutory presumption of knowledge of such use by the claimant has been negatived rests with the trial court.

State v Coupe, 205-597; 218 NW 346
State v Wilson, 212-1341; 237 NW 511
State v Coupe, 215-1308; 245 NW 243; 247 NW 639

2010 Procedure.

Discussion. See 12 ILR 283—Forfeiture of lienor's rights

Atty. Gen. Opinions. See '25-26 AG Op 141, 341

Knowledge of unlawful use—evidence. Knowledge, express or implied, that a conveyance was being used in the unlawful transportation of intoxicating liquors, may be shown (1) by statutory presumption, arising from the finding of liquors in the conveyance when it is seized, or (2) by any competent evidence, in the absence of the presumption.

State v Coupe, 205-597; 218 NW 346

Negativing knowledge of unlawful use. The fact that a corporate claimant of an automobile did not know that the car was being employed in the unlawful transportation of intoxicating liquors may be deemed established, under some circumstances, by testimony less than the negative testimony of all the principal officers of the corporation.

State v Sedan, 209-791; 229 NW 173

Overcoming presumption. In proceedings to condemn an automobile a claimant under a conditional sale contract does not overcome the statutory presumption that claimant knew of the unlawful use to which the car was being put, by evidence of one of the managing officers of claimant that he possessed no such knowledge, when it appears that other officers and employees of claimant, not called as witnesses, had knowledge of the original sale of the car, of payments made thereon, and of the purchaser.

State v Sedan, 210-714; 231 NW 385

Overcoming presumption. Proof that a claimant to an automobile had purchased for value an outstanding, unsatisfied, recorded, conditional sale contract covering the car, and that claimant had no knowledge of the unlawful use to which the car was being put, entitles claimant to some form of relief.

State v Sedan, 209-791; 229 NW 173
State v Automobile, 214-1088; 243 NW 303

Following trial court method of trial. An appeal will be heard de novo when the parties mutually and without controversy tried the cause in equity in the trial court.

State v Automobile, 214-1088; 243 NW 303

Condemnation of automobile—non de novo hearing. A proceeding for the condemnation of an automobile because employed in the unlawful transportation of intoxicating liquors will not be tried de novo on appeal. Whether the statutory presumption of knowledge of

such use, by the claimant, has been negatived rests with the trial court.

State v Chrysler Coupe, 215-1308; 247 NW 639; 245 NW 243

2012 Orders as to claims.

Atty. Gen. Opinions. See '28 AG Op 204; '30 AG Op 134

Unrecorded claim—effect. A claimant of the conveyance under an unrecorded sales contract may not have the conveyance returned to him, and it is quite immaterial that such contract was executed in a foreign state in which claimant's lien would be valid against subsequent purchasers without recordation.

State v Kelsey, 206-356; 220 NW 324
State v Jennings, 206-361; 220 NW 327
State v Automobile, 208-794; 226 NW 48

2013 Notice.

Atty. Gen. Opinion. See '25-26 AG Op 341

2014 Proceeds.

Atty. Gen. Opinion. See '25-26 AG Op 341

Return to owner—costs. The court may very properly order an automobile to be returned, without the payment of costs, to an intervening owner who had sold the same under a conditional sale contract, and who had no knowledge, directly or indirectly, of such unlawful use by such vendee. The law does not contemplate an order of forfeiture in every proceeding against such a conveyance.

State v Automobile, 204-1155; 216 NW 611

Improper taxation of costs. In a proceeding to forfeit an automobile because used in the unlawful transportation of intoxicating liquors, and in which proceeding an order of forfeiture is entered, costs may not be taxed to an intervenor claiming the property. Costs must be paid from the proceeds of the sale.

State v Coupe, 215-1308; 245 NW 243; 247 NW 639

2015 School fund.

Value of car—burden of proof. When an enforceable money claim has been established against an automobile which has been employed in the unlawful transportation of intoxicating liquors, the state, if it desires a forfeiture of the car to the school fund in excess of the amount due claimant, has the burden to show the existence of such excess.

State v Sedan, 209-791; 229 NW 173

CHAPTER 98

INJUNCTION AND ABATEMENT

2017 Action to enjoin.

ANALYSIS

I ACTION IN GENERAL
II PARTIES PLAINTIFF
III PARTIES DEFENDANT
IV PETITION
V ANSWER
VI EVIDENCE
VII TRIAL
VIII DECREE
IX APPEAL

I ACTION IN GENERAL

Nonright of private citizen. A private citizen has no right—since the enactment of the liquor control act, Ch. 93-F1, C., '35 [Ch 93.2, C., '39]—to institute an action to enjoin the maintenance of an intoxicating liquor nuisance which affects him only as one of the general body of citizens. (See also §§1921-f2, -f62, C., '35 [§§1921.002, 1921.062, C., '39].

Doebler v Dodge, 223-218; 272 NW 144

Non-good-faith abatement. A non-good-faith abatement of a nuisance prior to the trial of injunction proceedings will not shield the guilty party from an injunction and the consequences thereof.

State v Riley, 202-1213; 211 NW 731
State v Jones, 202-640; 210 NW 784

Involuntary abatement. The keeper of an intoxicating liquor nuisance may not escape an injunction and an order of abatement and the assessment of a mulct tax on the claim that the nuisance was fully abated prior to the institution of injunction proceedings by the act of the officers in seizing the liquors and paraphernalia and removing the same from the premises under a search warrant.

State v Seipes, 202-1199; 211 NW 719
State v Tillotta, 202-1217; 211 NW 721
See State v Deeney, 202-742; 210 NW 909

Acquittal—nonbar to injunction. A verdict of "not guilty" under an indictment charging the keeping of an intoxicating liquor nuisance on certain property is no bar to an action to enjoin the same defendant from maintaining a liquor nuisance on the same property, and based on the same transaction on which the indictment was based.

State v Osborne, 207-636; 223 NW 363

II PARTIES PLAINTIFF

Abatement by private citizen. A private citizen has no right—since the enactment of the liquor control act, Ch 93-F1, C., '35 [Ch 93.1, C., '39]—to institute an action to enjoin the maintenance of an intoxicating liquor nuisance which affects him only as one of the general

body of citizens. (§§1921-f2, -f62, C., '35 [§§1921.002, 1921.062, C., '39].)

Doebler v Dodge, 223-218; 272 NW 144

III PARTIES DEFENDANT

Owner of property—knowledge. Irrespective of the knowledge of the owner of property, an order of abatement of an intoxicating liquor nuisance is mandatory whenever the existence of the nuisance is established in a civil or criminal proceeding. (§2032, C., '24.)

State v Deeney, 202-742; 210 NW 909

Owner of property—lack of knowledge. An injunction is properly decreed against the owner of real property even tho such owner had no knowledge of the violation of the law by his tenant.

State v DeLeon, 204-843; 215 NW 973

Owner of property—imputed knowledge. An owner of property may not escape injunction and the assessment of a mulct tax when from the attending circumstances he must have known that his property was being used for the unlawful sale, etc., of intoxicating liquors.

State v Jones, 202-640; 210 NW 784

IV PETITION

Invalidating amendment. A petition to enjoin a defendant from maintaining a nuisance may not be so amended, before appearance and before answer, as to convert the petition into one to enjoin the defendant from operating as a bootlegger (§1927, C., '27), unless the defendant is given due notice of such amendment.

De Witt v Dist. Court, 206-139; 220 NW 70

V ANSWER

No annotations in this volume

VI EVIDENCE

Nuisance. Evidence reviewed, and held ample to sustain a conviction for nuisance.

State v Japone, 202-450; 209 NW 468

Insufficient evidence. Evidence held insufficient to justify an injunction against the maintenance of an intoxicating liquor nuisance and consequently insufficient to justify the levy of a mulct tax on the premises in question.

State v Straka, 209-572; 227 NW 909
Doebler v Cherpakov, 217-86; 250 NW 894

Evidence—analysis of liquors. Error may not be predicated on the fact that, in an action to abate a nuisance, a chemical analysis of the liquors was made at the instance of the court and unbeknown to the other parties to the action.

State v Marker, 208-1001; 224 NW 588

VII TRIAL

Trial at first term—permissive, not mandatory. The provision of the statute (§2021, C., '24) for trial of injunction proceedings at the first term after due service is permissive only —not mandatory.

State v Johnson, 204-150; 214 NW 594

Contempt—procedure—jury trial. A party charged with contempt is not entitled to a jury trial.

Hammer v Utterback, 202-50; 209 NW 522

Chemical analysis at instance of court. Error may not be predicated on the fact that, in an action to abate a nuisance, a chemical analysis of the liquors was made at the instance of the court and without the knowledge of the other parties to the action.

State v Marker, 208-1001; 224 NW 588

Identity of persons. In contempt proceedings, the plaintiff must establish that the person formerly enjoined and the defendant on trial for contempt are one and the same person, even tho the names are identical.

State v Franklin, 215-384; 245 NW 283

VIII DECREE

Knowledge of owner. An injunction is properly decreed against the owner of real property even tho such owner had no knowledge of the violation of the law by his tenant.

State v DeLeon, 204-843; 215 NW 973

Notice of decree. A defendant who has been duly noticed into court on an application against him for an injunction against the unlawful sale of intoxicating liquors must take notice of the resulting decree against him.

Labozetta v Dist. Court, 200-1339; 206 NW 139
Benscoter v Utterback, 202-762; 211 NW 403

Injunction as adjudication. A duly rendered decree of injunction against a party for the unlawful trafficking in intoxicating liquors is a bar to another action for the same relief against the same party when premises are the same in both cases.

State v Talarico, 202-744; 210 NW 968

IX APPEAL

Incompetent evidence in equity proceedings. It must be presumed on appeal in an equity proceeding that the court disregarded incompetent testimony which was received under proper objection.

State v Dietz, 202-1202; 211 NW 727

IX APPEAL—concluded

Voluntary abatement—effect. The granting of an injunction, notwithstanding the voluntary abatement of the nuisance prior to trial, will not be disturbed on appeal.

State v James, 202-1137; 211 NW 372
State v Johnson, 204-150; 214 NW 594
State v Campbell, 204-147; 214 NW 550
State v Marker, 208-1001; 224 NW 588

Review. A decree of injunction, abatement, and assessment of mulct tax will not be disturbed on a record revealing proof of the existence of the nuisance.

State v Dietz, 202-1202; 211 NW 727

2020 Scope of injunction.

Injunction limited to particular premises. A party who is proceeded against only as owner, and is so enjoined as to specified premises, may not be adjudged guilty of contempt on evidence showing the mere existence of intoxicating liquors on other and different premises of which the party is owner.

Leonetti v Utterback, 202-923; 211 NW 403

2021 Immediate trial.

Trial term permissive. This section is permissive only—not mandatory.

State v Johnson, 204-150; 214 NW 594

2022 General reputation.

Nuisance—abatement—costs. The circumstances attending the nuisance and the bad reputation of the place may amply justify the court in taxing the costs and attorney fees against the property.

State v James, 202-1137; 211 NW 372

2023 Attorney fee.

Atty. Gen. Opinions. See '25-26 AG Op 269; '28 AG Op 259; '30 AG Op 42

Mulct tax—knowledge of owner. Neither a mulct tax nor the attorney fees and costs attending the proceedings can be properly imposed upon real property and against the owner thereof when the owner did not know and did not have reason to know of the existence of the liquor nuisance on his premises.

State v DeLeon, 204-843; 215 NW 973

2023.1 Limitation.

Atty. Gen. Opinion. See '28 AG Op 259

2023.2 Conditions of taxation.

Atty. Gen. Opinions. See '28 AG Op 259; '30 AG Op 68

2027 Violation.

ANALYSIS

I PROCEEDINGS IN GENERAL
II INFORMATION AND WARRANT
III VIOLATIONS IN GENERAL
IV CERTIORARI

I PROCEEDINGS IN GENERAL

Evidence—sufficiency. The evidence in contempt proceedings must clearly and satisfactorily establish the guilt of the accused.

Tuttle v Peters, 206-435; 220 NW 22

Identity of names. In contempt proceedings, the plaintiff must establish that the person formerly enjoined and the defendant on trial for contempt are one and the same person, even tho the names are identical.

State v Parsons, 206-390; 220 NW 328
State v Franklin, 215-384; 245 NW 283
State v Anderson, 216-887; 247 NW 306
See State v Logli, 204-116; 214 NW 490

Criminal prosecution as bar. A criminal prosecution for a violation of the intoxicating liquor statutes is not a bar to contempt proceedings based on the same act.

Touche v Bonner, 201-466; 205 NW 751

Nonforfeited liquors as evidence. Intoxicating liquors which are seized upon the premises of a defendant in contempt proceedings are receivable in evidence even tho they have not been "finally adjudicated and declared forfeited."

Norris v Utterback, 202-686; 210 NW 933

Chemical examination of liquors. The results of a chemical examination of duly identified liquors are admissible on an issue of contempt.

Harding v Dist. Court, 202-675; 210 NW 900

Contempt—evidence—sufficiency. Evidence reviewed, and held to justify a conviction of contempt in violating an injunction against the sale of intoxicating liquors.

Harding v Dist. Court, 202-675; 210 NW 900

II INFORMATION AND WARRANT

No annotations in this volume

III VIOLATIONS IN GENERAL

Contempt—evidence. Evidence tending to show repeated possession of intoxicating liquors by an accused, and likewise repeated efforts by the accused to destroy such liquors when his place was searched, furnishes ample evidence on which to base a conviction for contempt.

Benscoter v Utterback, 202-762; 211 NW 403

Acts not constituting violation. An injunction solely against acts constituting bootlegging is not violated by the subsequent maintenance by the defendant of an intoxicating liquor nuisance.

Friend v Cummings, 207-1201; 224 NW 510

Insufficient evidence. A landlord is not shown to have violated an intoxicating liquor injunction by proof that a bottle of alcohol was found in his house in the effects of a mere roomer to whom it belonged.

Dykes v Dist. Court, 216-284; 249 NW 163

IV CERTIORARI

Belated presentation of objection. On certiorari to review a conviction for contempt in violating an intoxicating liquor injunction, the petitioner will not be permitted to present the objection that testimony taken in the trial court should not be considered because taken in his absence, and under a stipulation entered into by an unauthorized attorney, such objection not having been presented in the trial court.

Hammer v Utterback, 202-50; 209 NW 552

2028 Method of trial.

Use of affidavits. Affidavits are admissible on the trial of a contempt proceeding, in the absence of a demand for the cross-examination of the affiant.

Harding v Dist. Court, 202-675; 210 NW 900

Review—de novo hearing. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

Review—extent of. A judgment of conviction of contempt in violating an intoxicating liquor injunction, even tho based on sharply conflicting testimony, will not be disturbed on certiorari if the testimony clearly sustains the action of the lower court.

Froah v Utterback, 202-610; 210 NW 791
Benscoter v Utterback, 202-762; 211 NW 403
Harding v Dist. Court, 202-675; 210 NW 900

Review—belated objection. On certiorari to review a conviction for contempt in violating an intoxicating liquor injunction, the petitioner will not be permitted to present the objection that testimony taken in the trial court should not be considered because taken in his absence, and under a stipulation entered into by an unauthorized attorney, such objection not having been presented in the trial court.

Hammer v Utterback, 202-50; 209 NW 522

2029 First conviction.

Imprisonment for costs. Imprisonment for nonpayment of costs in contempt proceedings is unauthorized.

Hammer v Utterback, 202-50; 209 NW 522
See State v Van Klaveren, 208-867; 226 NW 81

Fine satisfied by imprisonment. A judgment that an accused in a prosecution for contempt in violating an intoxicating liquor injunction "pay a fine of $300, or in lieu of payment * * * be committed to jail for three months" is satisfied in toto by serving the term of imprisonment.

State v Oliver, 203-458; 212 NW 572

Punishment — liquor injunction — imprisonment to satisfy fine. Section 13964, C., '39, authorizing imprisonment until fine is satisfied, is applicable to judgment imposing a fine as punishment for contempt of liquor injunction under §2029.

Scavo v Utterback, (NOR); 205 NW 858

Recovery of fine—satisfaction by serving sentence. Where judgment in prosecution for liquor injunction violation ordered defendant to pay a fine or in lieu thereof be committed for three months, held, in action on bond given on certiorari to recover the fine, that serving of sentence satisfied the fine.

State v Oliver, (NOR); 212 NW 572

2030 Subsequent convictions.

Excessive fines. A fine of $1,000 and, in default of payment, commitment to the county jail for ten months for the second offense of violating an injunction against the sale of intoxicating liquors is not constitutionally excessive.

Touche v Bonner, 201-466; 205 NW 751

2031 Bootleggers.

Venue. A bootlegger, irrespective of his legal residence, may be enjoined in any county in which it can be shown that he has been bootlegging.

State v Huntley, 210-732; 227 NW 337

Invalidating amendment. A petition to enjoin a defendant from maintaining a nuisance (§2017, C., '27), may not be so amended, before appearance and before answer, as to convert the petition into one to enjoin the defendant from operating as a bootlegger unless the defendant is given due notice of such amendment.

De Witt v Dist. Court, 206-139; 220 NW 70

Evidence to sustain violation of injunction. Evidence of finding in drawer in defendant's room numerous bottles, cans, and jugs containing certain form of liquor held to sustain conviction for contempt for violating bootlegger injunction.

Eden v Dist. Court, (NOR); 228 NW 14

Injunction. Tho the evidence fails to establish the keeping of a nuisance, yet the defendant is properly enjoined from trafficking in intoxicating liquors if the evidence shows that he is a bootlegger.

State v Aliber, 204-144; 214 NW 610

Acts not constituting violation. An injunction solely against acts constituting bootlegging is not violated by the subsequent maintenance by the defendant of an intoxicating liquor nuisance.

Friend v Cummings, 207-1201; 224 NW 510

Constitutionality of injunctional feature.

State v Fray, 214-53; 241 NW 663; 81 ALR 286
State v Howard, 214-60; 241 NW 682

Conflicting evidence. Conflicting evidence reviewed, and held to sustain a conviction for bootlegging.

State v Weber, 204-137; 214 NW 531

2032 Abatement.

Atty. Gen. Opinion. See '30 AG Op 68

Mandatory abatement. Irrespective of the knowledge of the owner of property, an order of abatement of an intoxicating liquor nuisance is mandatory whenever the existence of the nuisance is established in a civil or criminal proceeding.

State v Deeney, 202-742; 210 NW 909
State v Pickett, 202-1321; 210 NW 782
State v Riley, 202-1213; 211 NW 731

Abatement by decree. Even tho the owner of the property has abated the nuisance by excluding the offending tenant, yet the circumstances may be such as to justify the court in making assurance doubly sure by making the abatement a matter of decree.

State v James, 202-1137; 211 NW 372

Non-good-faith abatement. An owner of property may not escape injunction and the assessment of a mulct tax when from the attending circumstances he must have known that his property was being used for the unlawful sale, etc., of intoxicating liquors.

State v Jones, 202-640; 210 NW 784

Nonautomatic abatement. The fact that, when an action to abate an intoxicating liquor nuisance is brought, the building is closed and locked, under the levy of a landlord's attachment, does not constitute an ipso facto abatement of the nuisance.

State v Deeney, 202-742; 210 NW 909
State v Tillotta, 202-1217; 211 NW 721
See State v Seipes, 202-1199; 211 NW 719

Decree void in part—effect. An order of abatement based on a conviction on an indictment which charges an intoxicating liquor nuisance is void insofar as it directs the closing of premises which are wholly different from those specifically charged in the indictment, even tho they belong to the same party; and an abatement bond executed under threat to immediately close such other and different premises is likewise void.

Davidson v Bradford, 203-207; 212 NW 476

Jurisdiction to order destruction of liquors. The district court, in an action to abate an intoxicating liquor nuisance, has jurisdiction to order the destruction of liquors found upon the premises, even tho such liquors are being held under undetermined and untried search warrant proceedings in the office of a justice of the peace.

State v Marker, 208-1001; 224 NW 588

2050 Costs.

Atty. Gen. Opinion. See '32 AG Op 230

Improper taxation. Costs in contempt proceedings can be taxed to the individual petitioner only when the court finds that the proceedings were instituted maliciously and without probable cause.

State v Franklin, 215-384; 245 NW 283

2051 Mulct tax.

Atty. Gen. Opinions. See '25-26 AG Op 319; '28 AG Op 434

Nature of statute. The statute providing for the imposition of a mulct tax upon the entry of a permanent injunction against the maintenance of an intoxicating liquor nuisance is not a criminal statute.

State v Osborne, 207-636; 223 NW 363

Mandatory duty of court. The imposition of a mulct tax is mandatory on the court upon the ordering of a permanent injunction.

State v Marker, 208-1001; 224 NW 588

Evidence—sufficiency. Evidence held insufficient to justify an injunction against the maintenance of an intoxicating liquor nuisance and consequently insufficient to justify the levy of a mulct tax on the premises in question.

State v Straka, 209-572; 227 NW 909

Nonbasis for taxation. Failure to establish the alleged nuisance removes the basis for a mulct tax.

State v Aliber, 204-144; 214 NW 610

Unauthorized taxation. A mulct tax may be assessed only under the conditions expressly specified by statute.

State v Talarico, 202-744; 210 NW 968

Void tax. A mulct tax certified and levied some two years after a violation of the intoxicating liquor statutes, and after the repeal of the statutes authorizing the levy of such tax, and after the property affected had passed into the hands of an innocent party, is void as to such latter party.

Shriver v Polk County, 203-529; 212 NW 718

Justifiable assessment of mulct tax. Proof of the existence of a nuisance on the premises, plus evidence that such was the general reputation of the place, plus evidence of the renting to known bootleggers, and a suggestive reluctance on the part of the owner to make inquiries as to the business of his tenants, furnish ample justification for the imposition of a mulct tax.

State v Riley, 202-1213; 211 NW 731

Non-good-faith abatement. An owner of property may not escape injunction and the assessment of a mulct tax when from the attending circumstances he must have known

that his property was being used for the unlawful sale, etc., of intoxicating liquors.

State v Jones, 202-640; 210 NW 784

Knowledge of owner. The assessment of a mulct tax against property which the owner knows, or has reason to know, is being used as an intoxicating liquor nuisance, is strictly in accordance with the statute.

State v Campbell, 204-147; 214 NW 550

Knowledge of owner. Neither a mulct tax nor the attorney fees and costs attending the proceedings can be properly imposed upon real property and against the owner thereof when the owner did not know and did not have reason to know of the existence of the liquor nuisance on his premises.

State v DeLeon, 204-843; 215 NW 973

Presumption of coercion of wife. A wife and her property may not escape the assessment of a mulct tax consequent on the maintenance of a liquor nuisance on the premises, on the claim that the husband was maintaining the nuisance and that the wife was presumptively under the coercion of the husband, it appearing that the wife had done nothing to prevent the nuisance.

State v Tillotta, 202-1217; 211 NW 721

Review, scope of. A decree of injunction, abatement, and assessment of mulct tax will not be disturbed on a record revealing proof of the existence of the nuisance.

State v Dietz, 202-1202; 211 NW 727

2052 Amount.

Atty. Gen. Opinions. See '25-26 AG Op 319, '28 AG Op 434; '30 AG Op 199

2053 Evidence.

Evidence of knowledge. A mulct tax, attorney fees, and costs may not be assessed against property on testimony which simply tends to show (1) ownership of the property and (2) that, among a comparatively small class of people of the community, the place had the general reputation of being a place for the unlawful use and sale of intoxicating liquors.

State v Pickett, 202-1321; 210 NW 782

CHAPTER 99

CIVIL ACTIONS AND LIABILITY

2055 Civil action.

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

CHAPTER 100

PERMITS TO LICENSED PHARMACISTS

Atty. Gen. Opinions. See '34 AG Op 405, 418

2072 Permits.

Right of pharmacist. A registered pharmacist may legally have government alcohol in his possession, and, in his business as a pharmacist, use the same in compounding nonbeverage drugs and medicines and in the filling of prescriptions, even tho he has neither a state permit to keep and sell such liquor nor a state permit to manufacture.

Reppert v Utterback, 206-314; 217 NW 545

2073 Petition.

Atty. Gen. Opinions. See '30 AG Op 186; '34 AG Op 233, 347

2074 Verification.

Atty. Gen. Opinion. See '30 AG Op 186

2082 Limitation.

Atty. Gen. Opinion. See '30 AG Op 186

2093 Limitation on sales.

Atty. Gen. Opinions. See '32 AG Op 17, 36; '34 AG Op 418

2094 Request.

Atty. Gen. Opinion. See '32 AG Op 36

2110 Conviction in federal courts.

Legislative title—incongruous matter. A provision for the suspension of the license of a physician because of a conviction of a violation of the federal statutes relating to narcotics cannot be validly enacted under a title which professes "to amend, revise, and codify" certain statutes "relating to the sale and transportation of intoxicating liquors under permits."

In re Breen, 207-65; 222 NW 420

2118 Evidence.

See annotations under §§2159, 2162, Vol I

CHAPTER 101

PERMITS TO WHOLESALE DRUGGISTS

Atty. Gen. Opinions. See '34 AG Op 405, 418

2136 Permit and authority.

Atty. Gen. Opinions. See '28 AG Op 234; '32 AG Op 246, 285

2138 Interpretative clause.

See annotations under §1923, Vol I

2141 Form.

Atty. Gen. Opinion. See '36 AG Op 418

CHAPTER 102

REPORTS BY PERMIT HOLDERS

Atty. Gen. Opinion. See '34 AG Op 418

2159 Reports required.

See annotations under §2118, Vol I

Atty. Gen. Opinion. See '30 AG Op 360

2162 Return of requests.

See annotations under §2118, Vol I

CHAPTER 103

PERMITS TO MANUFACTURERS

Atty. Gen. Opinions. See '32 AG Op 68; '34 AG Op 418

2164 Patent and proprietary medicines.

Atty. Gen. Opinion. See '28 AG Op 234

Right of pharmacist. A registered pharmacist may legally have government alcohol in his possession and in his business as a pharmacist, use the same in compounding nonbeverage drugs and medicines and in the filling of prescriptions, even tho he has neither a state permit to keep and sell such liquor nor a state permit to manufacture.

Reppert v Utterback, 206-314; 217 NW 545

CHAPTER 104

PERMITS TO CLERGYMEN

Atty. Gen. Opinion. See '34 AG Op 418

TITLE VII

PUBLIC HEALTH

Atty. Gen. Opinion. See '25-26 AG Op 153

CHAPTER 105

STATE DEPARTMENT OF HEALTH

Atty. Gen. Opinion. See '36 AG Op 429

2181 Definitions.

Atty. Gen. Opinions. See '25-26 AG Op 256; '28 AG Op 253, 336; '30 AG Op 250; '34 AG Op 473; '36 AG Op 46

2182 Appointment.

Atty. Gen. Opinion. See '30 AG Op 52

2191 Powers and duties.

Atty. Gen. Opinions. See '25-26 AG Op 153; '28 AG Op 296; '34 AG Op 751; '36 AG Op 307, 429

Right to institute prosecution. Prosecutions for the enforcement of the laws regulatory of the practice of medicine and surgery may be instituted without any authority from the state department of health.

State v Hueser, 205-132; 215 NW 643

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

2198 Pollution of water.

Atty. Gen. Opinion. See '28 AG Op 328

2199 Time and place of hearing.

Atty. Gen. Opinion. See '28 AG Op 328

2200 Notice.

Atty. Gen. Opinion. See '28 AG Op 328

2201 Order.

Atty. Gen. Opinion. See '28 AG Op 328

2201.1 Limitation on expense.

Atty. Gen. Opinion. See '28 AG Op 328

2204 Appeal.

Method of service. As to proper method of service when statute simply requires the notice to be "served," and specifies no method of service, see

Casey (Town) v Hogue, 204-3; 214 NW 729

2212 Refusal of board to enforce rules.

Atty. Gen. Opinions. See '28 AG Op 296; '34 AG Op 751; AG Op July 10, '39

2213 Expenses for enforcing rules.

Atty. Gen. Opinion. See '34 AG Op 751

2217.1 Federal aid.

Atty. Gen. Opinion. See '36 AG Op 429

CHAPTER 106

STATE BOARD OF HEALTH

Atty. Gen. Opinion. See '36 AG Op 429

2220 Duties.

Administrative rules. Rules and regulations which have been adopted by the state department of health, and which are advisory only, are quite unobjectionable.

Craven v Bierring, 222-613; 269 NW 801

2226 Compensation and expenses.

Atty. Gen. Opinion. See '25-26 AG Op 140

CHAPTER 107

LOCAL BOARD OF HEALTH

Atty. Gen. Opinion. See '34 AG Op 751

2231 Health officer.
Atty. Gen. Opinions. See '28 AG Op 253; '34 AG Op 137

2232 Sanitation and quarantine officer.

Tenure. An appointment under this section is not for life tenure.

Young v Huff, 209-874; 227 NW 122

Civil service—sanitary inspector—nonsupervisory position. In certiorari action to annul decision of civil service commission ordering the reinstatement of a discharged sanitary inspector, evidence that his general duty was to investigate and pass upon complaints with only occasional control over incidental employees, held to support and sustain findings below that such position was "nonsupervisory" under civil service statute allowing a preference to certain employees who had worked a certain length of time.

Des Moines v Board, 227-66; 287 NW 288

2237 Special duties.
Atty. Gen. Opinions. See '28 AG Op 369; '30 AG Op 81, 82

2238 Additional duties.
Atty. Gen. Opinion. See '28 AG Op 369

2239 Right to enter premises.
Atty. Gen. Opinion. See '28 AG Op 296

2240 Abatement of nuisance.
Atty. Gen. Opinions. See '28 AG Op 291, 296; '36 AG Op 307; AG Op July 10, '39

2241 Closing of premises.
Atty. Gen. Opinions. See '28 AG Op 296; '36 AG Op 562

2242 Refusal of admittance.
Atty. Gen. Opinion. See '28 AG Op 296

2243 Costs for abating nuisance.
Atty. Gen. Opinions. See '28 AG Op 291, 296

2244 Peace officers to enforce.
Atty. Gen. Opinion. See '28 AG Op 296

2245 Interference with officers.
Atty. Gen. Opinion. See '28 AG Op 296

2246 Penalty.
Atty. Gen. Opinion. See '28 AG Op 296

CHAPTER 107.1

COUNTY BOARD OF HEALTH

Atty. Gen. Opinion. See AG Op June 21, '39

CHAPTER 108

CONTAGIOUS AND INFECTIOUS DISEASES

Atty. Gen. Opinions. See '28 AG Op 182, 327; '30 AG Op 373

2252 Quarantine.
Atty. Gen. Opinion. See '25-26 AG Op 154

2254 Warning signs.
Atty. Gen. Opinion. See '28 AG Op 327

2270 Medical attendance and supplies.
Atty. Gen. Opinions. See '28 AG Op 406; '30 AG Op 107, 125

2271 County liability for supplies.
Atty. Gen. Opinion. See AG Op Feb. 27, '40

2273 Supplies and services.
Atty. Gen. Opinion. See '28 AG Op 327

2274 Filing of bills.
Atty. Gen. Opinions. See '28 AG Op 327, 369; '30 AG Op 81, 107

2275 Allowing claims.
Atty. Gen. Opinion. See '30 AG Op 107

2276 Approval and payment of claims.
Atty. Gen. Opinion. See '30 AG Op 246

2279 Penalty.
Atty. Gen. Opinion. See '30 AG Op 107

CHAPTER 109

VENEREAL DISEASES

Atty. Gen. Opinions. See '28 AG Op 56, 141; '30 AG Op 107, 246

CHAPTER 110

DISPOSAL OF DEAD BODIES

Atty. Gen. Opinion. See '32 AG Op 263

2321 Particulars.

Atty. Gen. Opinions. See '32 AG Op 40, 263; AG Op Jan. 17, '39

2322 Deaths without medical attendance.

Atty. Gen. Opinions. See '32 AG Op 95, 263

2337 Disinterment for reburial.

Controlling principle. Equity will order the disinterment of a dead body for reburial only in cases of extreme necessity.

King v Frame, 204-1074; 216 NW 630

2338 Disinterment for autopsy.

Privileged communication—nonapplicable to physician performing autopsy. In an action to recover on an accident policy for the death of insured, where the court excluded testimony of a physician, who performed a post mortem examination but did not treat the patient before death, on the ground of privileged communication between patient and physician, held, court improperly excluded such testimony, since the privilege is purely statutory and for the purpose of encouraging patients to make full disclosure to the physician of all facts to enable him to prescribe and administer the proper treatment. A deceased body is not a patient and the relation of physician and patient ends when the death of the patient ensues.

Travelers Ins. v Bergeron, 25 F 2d, 680

CHAPTER 111

DEAD BODIES FOR SCIENTIFIC PURPOSES

Atty. Gen. Opinions. See '28 AG Op 276; '32 AG Op 38

CHAPTER 114

REGISTRATION OF VITAL STATISTICS

Atty. Gen. Opinion. See '38 AG Op 425

2389 Local registrars.

Atty. Gen. Opinion. See '34 AG Op 277

2393 Duties of state registrar.

Atty. Gen. Opinions. See '38 AG Op 425; AG Op Feb 22, '39

2405 Stillborn children.

Certificate as to "stillborn" infant. A certified copy of a return by a physician showing the delivery, by a Caesarean operation, of a "stillborn" infant, while proper evidence, may have but little bearing on the issue whether said "stillborn" possessed an independent circulation after being fully separated from the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Collateral heirs—burden of proof. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had been taken, by a Caesarean operation, from the womb of a dead mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Inheritable existence—criterion. An infant acquires existence capable of taking an inheritance only when it acquires an independent circulation of its blood after being fully separated from the body of the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

2426 Certified copies.

Atty. Gen. Opinions. See '38 AG Op 425; AG Op Feb. 22, '39

2427 Search of records—fee.

Atty. Gen. Opinion. See '38 AG Op 425

2428 Free certified copies.

Atty. Gen. Opinion. See '38 AG Op 425

2429 United States census bureau.

Atty. Gen. Opinions. See '25-26 AG Op 268, 393

2431 Copies of record as evidence.

Certificate of birth—evidentiary effect. That part of an official certificate of birth which states that the name of the father is unknown is not presumptive evidence of that fact in an action for damages for seduction, and does not contradict direct testimony as to the paternity of the child.

Gardner v Boland, 209-362; 227 NW 902

Official certificates of death—admissibility. A certificate of death not signed, executed, and certified in accordance with the laws governing the disposal of dead bodies is inadmissible as evidence in an action between private parties.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Certificate of death—admissibility. In an action to recover on a policy of insurance, a certificate of death of the insured, tho duly and legally executed by a coroner, is inadmissible as evidence insofar as said certificate assumes to state the cause of death as "suicide by hanging", said stated cause of death being simply the opinion or conclusion of the coroner and not a statement of fact.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

See Wilkinson v Assn., 203-960; 211 NW 238

Certificate as to "stillborn" infant. A certified copy of a return by a physician showing the delivery, by a Caesarean operation, of a "stillborn" infant, while proper evidence, may have but little bearing on the issue whether said "stillborn" possessed an independent circulation after being fully separated from the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

CHAPTER 114.1

STATE BOARD OF EUGENICS

2437.09 Order for sterilization.

Discussion. See 11 ILR 262—Sterilization statute; 15 ILR 238—New sterilization statute

2437.13 Consent to operation.

Atty. Gen. Opinion. See AG Op Jan. 16, '39

TITLE VIII

THE PRACTICE OF CERTAIN PROFESSIONS AFFECTING THE PUBLIC HEALTH

CHAPTER 114.2

BASIC SCIENCE LAW

Atty. Gen. Opinions. See '36 AG Op 173, 297, 400, 449, 680; '38 AG Op 361, 538

2437.29 Meetings—powers.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

CHAPTER 115

GENERAL PROVISIONS

Atty. Gen. Opinion. See '32 AG Op 109

2438 Definitions.

Atty. Gen. Opinion. See '34 AG Op 732

2439 License required.

Atty. Gen. Opinions. See '25-26 AG Op 256, 473; '32 AG Op 248; '34 AG Op 64

License—constitutionality. Constitutionality of statutes requiring certain qualifications and the procurement of licenses by members of the learned professions reaffirmed.

State v Optical Co., 216-1157; 248 NW 332

Dentistry—practice by corporation. A corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is, therefore, subject to injunction if it attempts so to do.

State v Bailey Co., 211-781; 234 NW 260

Unauthorized practitioner. A medical practitioner who is not duly licensed as required by law may not recover for medical services.

Hoxsey v Baker, 216-85; 246 NW 653

Optometry—when not unlawful practice—physician and optical company—reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the physician sent pa-

tients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

2440 Qualifications.

Atty. Gen. Opinion. See '25-26 AG Op 473

2441 Grounds for refusing.

Atty. Gen. Opinions. See '25-26 AG Op 473; '34 AG Op 492

Applicability of statute. Statute relative to refusal to grant license to practice a profession, e. g., dentistry, reviewed and held applicable solely to the granting of a license in the first instance.

Craven v Bierring, 222-613; 269 NW 801

2442 Form.

Atty. Gen. Opinions. See '30 AG Op 58; '36 AG Op 140

2444 Display of license.

Atty. Gen. Opinion. See '36 AG Op 330

2447 Renewal.

Atty. Gen. Opinions. See '25-26 AG Op 98; '34 AG Op 492

2448 Reinstatement.

Atty. Gen. Opinions. See '30 AG Op 327; '34 AG Op 492

Procedure for new license. It seems that one who has suffered a revocation of his license to practice medicine should not move for a reinstatement of his license but should commence anew by making an original application for a license.

Hanson v Board, 220-357; 260 NW 68

2449 Examining boards.

Atty. Gen. Opinion. See '36 AG Op 173

2450 Designation of boards.

Atty. Gen. Opinion. See '36 AG Op 136

2451 Composition of boards.

Atty. Gen. Opinion. See '36 AG Op 140

2455 Disqualifications.

Atty. Gen. Opinion. See '36 AG Op 173

2462 Appropriation.

Atty. Gen. Opinions. See '28 AG Op 131; '36 AG Op 268

2463 Supplies.

Atty. Gen. Opinions. See '28 AG Op 131; '36 AG Op 268

2464 Quarters.

Atty. Gen. Opinion. See '36 AG Op 268

2465.1 National organization.

Atty. Gen. Opinions. See '28 AG Op 239, 313; '36 AG Op 268; AG Op Feb. 20, '39

2471 Time of examination.

Atty. Gen. Opinion. See '28 AG Op 169

2473 Rules.

Atty. Gen. Opinion. See '34 AG Op 286

2477 Certification of applicants.

Atty. Gen. Opinion. See '34 AG Op 286

2479 Rules relative to partial examinations.

Atty. Gen. Opinion. See '30 AG Op 58

2482 States entitled to reciprocal relations.

Atty. Gen. Opinion. See '36 AG Op 296

2485 Termination of agreements.

Atty. Gen. Opinion. See '36 AG Op 296

2492 Grounds.

Atty. Gen. Opinions. See '25-26 AG Op 186, 473; '30 AG Op 327; '34 AG Op 492, 732

Evidence. Evidence held ample to justify a decree which revoked the license of a physician.

State v Knight, 204-819; 216 NW 104

Proof—sufficiency. In proceedings to revoke the license of a physician, ample proof of some of the grounds for revocation renders quite immaterial the fact that other grounds were not proved.

State v Hanson, 201-579; 207 NW 769

2493 Unprofessional conduct.

Atty. Gen. Opinions. See '30 AG Op 142; '34 AG Op 732

Examination of witness—statutory privilege. A female upon whom it is alleged a criminal abortion has been committed by a physician may, when called to testify as to what transpired between her and the physician, legally refuse, not on the ground that her answer might render her criminally liable, but on the ground that her answer would expose her to public ignominy.

State v Brown, 218-166; 253 NW 836

Revocation of license—criminal abortion as grounds. An equitable action by the state to revoke a license to practice medicine on the ground that the defendant procured or aided in procuring a criminal abortion, manifestly requires proof that the female in question was pregnant.

State v Brown, 218-166; 253 NW 836

2495 Jurisdiction of revocation.

Atty. Gen. Opinion. See '34 AG Op 492

Nonjurisdiction to reinstate. The state board of medical examiners having, under statutory authority, properly revoked a license to practice medicine, has no jurisdiction thereafter to reinstate said license when, in the meantime, jurisdiction over the revocation of such licenses has been vested solely in the district court.

Hanson v Board, 220-357; 260 NW 68

Revocation of license—procedure for new license. It seems that one who has suffered a revocation of his license to practice medicine should not move for a reinstatement of his license but should commence anew by making an original application for a license.

Hanson v Board, 220-357; 260 NW 68

2496 Petition for revocation.

Holding under former statute. The right of the county attorney to initiate proceedings for the revocation of the license of a practicing physician is not dependent on any authorization from the state board of health.

State v Knight, 204-819; 216 NW 104

2499 Rules governing petition.

Atty. Gen. Opinion. See '34 AG Op 492

Charges. Definite charges, tho informal, are sufficient in a proceeding to revoke the license of a physician.

State v Hanson, 201-579; 207 NW 769

2500 Trial.

Arbitrary refusal of continuance. The refusal of the board of medical examiners (§2578-a, S., '13), in proceedings for the revocation of a license of a physician, to grant a continuance until the accused had finished serving a sentence in the penitentiary is not necessarily arbitrary.

State v Hanson, 201-579; 207 NW 769

2501 Notice.

Notice—proper service. A statute which distinctly provides that a notice shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over fourteen years of age—when said party is not present in the county at the time of said service.

In re Sioux City Yards, 222-323; 268 NW 18

Defective service cured by appearance. Any defect in the service of the notice of the filing of charges in proceedings to revoke the license of a physician is cured by the appearance of the accused.

State v Hanson, 201-579; 207 NW 769

Substituted service of notice. The requirement that, in proceedings to revoke the license of a physician, the notice of the filing of the charges shall be served "in the manner provided for the service of an original notice in a civil action," authorizes substituted service on a proper member of the defendant's family, in case he cannot be found in the county.

State v Hanson, 201-579; 207 NW 769

2502 Nature of action.

Due process. A physician is not denied his constitutional right to "due process" by being denied a jury trial in proceedings before the board of medical examiners to revoke his license. (§2578-a, S., '13.)

State v Hanson, 201-579; 207 NW 769

Incompetent evidence—effect. In an equitable proceeding for the revocation of the license of a physician, the reception of immaterial or incompetent evidence will be deemed harmless, because it will be presumed that all such testimony was rejected in arriving at the final decision.

State v Knight, 204-819; 216 NW 104

Self-debasement. In an equitable action by the state to revoke the license of a physician, the defendant may not base a claim of error in the fact that, over his objections, the court permitted witnesses for the state to expose themselves to public disgrace and ignominy by their testimony.

State v Knight, 204-819; 216 NW 104

Tampering with witness. Evidence is admissible, in an equitable action for the revocation of the license of a physician, which tends to show that the defendant had tampered with a witness in an effort to induce her to change her testimony.

State v Knight, 204-819; 216 NW 104

2507 Hearing on appeal.

Transcript at expense of county. The statutory requirement that, in criminal cases, an impecunious defendant may, on appeal, have a transcript of the record at the expense of the county, has no application to an appeal by a defendant in an equitable action to revoke his professional license.

State v Knight, 204-819; 216 NW 104

2509 Professional titles and abbreviations.

Atty. Gen. Opinion. See '34 AG Op 424

2510.1 False representation.

Atty. Gen. Opinion. See '36 AG Op 207

2511 Itinerant defined.

Atty. Gen. Opinions. See '30 AG Op 136, 188; '36 AG Op 330; AG Op Feb. 27, '39

2512 License required.

Atty. Gen. Opinion. See '36 AG Op 330

2514 Exception.

Atty. Gen. Opinions. See '30 AG Op 136; '36 AG Op 330

2516 License—examination—renewal fees.

Atty. Gen. Opinion. See '38 AG Op 220, 339

2519 Injunction.

"Engaged in business." A person is "engaged in the business" of selling a drug when he has such drug for sale to any person who may apply for it for the seller's profit, irrespective of any other business carried on by the said seller.

State v Market Co., 209-567; 228 NW 288
See State v Howard, 216-545; 245 NW 871

Contempt proceedings—scope of inquiry. In contempt proceedings for the violation of an injunction against the practice of medicine and surgery without a license, the testimony may very properly cover the entire time from the issuance of the writ to the date of hearing.

State v Baker, 222-903; 270 NW 359

Intent to continue violation. A petition which seeks to permanently enjoin the practice of medicine without a license, and which clearly alleges such present practice by the defendant, need not necessarily allege that the defendant intends to continue such practice in the future.

State v Fray, 214-53; 241 NW 663; 81 ALR 286
State v Howard, 214-60; 241 NW 682

Estoppel—evidence—sufficiency. It is futile for the defendant, in an action by the state to enjoin the defendant from practicing medicine without a license, to plead that the state and its officers are estopped to question his right to so practice and assume to support such plea by the fact that the state had not, for twenty years, questioned his right so to practice tho he had never offered to take the statutory examination for any recognized system of practice.

State v Howard, 216-545; 245 NW 871

Presumption of continuance of condition. Proof that enjoinable acts were being committed at the time of the commencement of an action carries the presumption that the condition complained of existed at the time of the trial.

State v Optical Co., 216-1157; 248 NW 332

Enjoining criminal acts — constitutionality. The statute authorizing the entry of a permanent injunction against a person practicing medicine without a license even tho said person may be prosecuted criminally for so practicing, is not unconstitutional on the theory that injunction proceedings are simply a method of punishing the defendant for a crime without the intervention of a trial jury, and consequently denies the defendant due process of law.

State v Fray, 214-53; 241 NW 663; 81 ALR 286
State v Howard, 214-60; 241 NW 682

Allowable injunction. The fact that the state duly issues a license to practice osteopathy does not limit it to a criminal prosecution against the licensee should the latter enter upon the practice of "medicine." Injunction will lie.

State v Stoddard, 215-534; 245 NW 273; 86 ALR 616

Injunction — constitutionality. The statute authorizing injunction to restrain the practice of medicine and surgery without a license is constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances.

State v Howard, 214-60; 241 NW 682

Injunction — discontinuance of violations — effect. In an action to enjoin violations of the medical practice act, the all-important and material inquiry is whether the defendant was violating the law at the time the action was brought or during the pendency thereof, not whether the defendant had discontinued his violations at the time the decree was entered.

State v Stoddard, 215-534; 245 NW 273; 86 ALR 616

Practice by corporation. A corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is, therefore, subject to injunction if it attempts so to do.

State v Dental Co., 211-781; 234 NW 260

Practice by corporation. A corporation is practicing optometry when it equips, and publicly opens, carries on, manages, and controls, through its employee—a licensed optometrist—an office for the practice of said profession, even tho the name of the corporation does not publicly appear as such practitioner. And inasmuch as a corporation cannot legally practice optometry, such practice will be enjoined.

State v Optical Co., 216-1157; 248 NW 332
State v Ritholz, 226-70; 283 NW 268

Optometry—when not unlawful practice—physician and optical company — reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

Osteopath—injections. A person who, with the public profession on his part to cure and heal, treats hemorrhoids in the human body by hypodermic injections of a curative medicine—e. g., phenol—is "practicing medicine" and is subject to injunction against practicing.

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medicine, generally, without a license, even tho he is already a duly licensed osteopath.

State v McPheeters, 216-1359; 249 NW 349

Sale of aspirin. A corporation may be restrained by injunction from selling or offering or exposing for sale aspirin on proof that aspirin is a drug, and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Market Co., 209-567; 228NW 288

2522 Penalties.

Atty. Gen. Opinions. See '25-26 AG Op 473; '30 AG Op 174

Professional conduct—violation—undue penalty. The practitioner of a profession, e. g., dentistry, may be validly denied a renewal of his license so to practice as a penalty for his violation of a valid statutory standard of professional conduct—this section, C., '35, having no application to such violation.

Craven v Bierring, 222-613; 269 NW 801

2523.1 Department inspector and assistant.

Atty. Gen. Opinion. See '38 AG Op 170

2528 Prima facie evidence.

Practicing without authority — evidence. Evidence reviewed, and held ample to present a jury question on the issue whether the accused was practicing medicine.

State v Hueser, 205-132; 215 NW 643

Practice of dentistry. A corporation is practicing dentistry when it publicly opens an office and equips it for such practice, employs dentists to carry on such practice, and advertises its business in its corporate name accordingly.

State v Dental Co., 211-781; 234 NW 260

"Practicing medicine." A person owning and operating a hospital for the treatment of diseases is practicing medicine when he furnishes and personally and systematically causes, both directly and indirectly, a carefully guarded secret medical formula possessed, and apparently compounded, by himself to be prescribed for and to be administered to patients as the sole remedy for their ills by attendants who are not licensed physicians; and this is true even tho licensed physicians are employed to diagnose the ailments of patients.

State v Baker, 212-571; 235 NW 313

2530 Enforcement.

Atty. Gen. Opinion. See '38 AG Op 170

2531 Pharmacy examiners.

Atty. Gen. Opinion. See '38 AG Op 170

2534.1 Association fee collected.

Atty. Gen. Opinion. See '38 AG Op 339

2537.2 Duties.

Atty. Gen. Opinion. See '36 AG Op 140

2537.3 Applications—reciprocal agreements—fees.

Atty. Gen. Opinions. See '36 AG Op 140, 268

2537.4 Assistants—payment.

Atty. Gen. Opinions. See '36 AG Op 140, 268

CHAPTER 116

PRACTICE OF MEDICINE AND SURGERY

2538 Persons engaged in.

Atty. Gen. Opinion. See '38 AG Op 321

Constitutionality. Principle reaffirmed that the statutes regulating the practice of medicine and surgery are a proper exercise of the police power.

State v Hueser, 205-132; 215 NW 643
State v Howard, 216-545; 245 NW 871

"Practicing medicine"—acts constituting. A person who, with the public profession on his part to cure and heal, treats hemorrhoids in the human body by hypodermic injections of a curative medicine—e. g., phenol—is "practicing medicine" and is subject to injunction against practicing medicine, generally, without a license, even tho he is already a duly licensed osteopath.

State v McPheeters, 216-1359; 249 NW 349

"Practicing medicine"—acts constituting. A person owning and operating a hospital for the treatment of diseases is practicing medicine when he furnishes and personally and systematically causes, both directly and indirectly, a carefully guarded secret medical formula possessed, and apparently compounded, by himself to be prescribed for and to be administered to patients as the sole remedy for their ills by attendants who are not licensed physicians; and this is true even tho licensed physicians are employed to diagnose the ailments of patients.

State v Baker, 212-571; 235 NW 313

Not unlawful practice—physician and optical company—reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the

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physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

Practicing without authority—evidence. Evidence reviewed, and held ample to present a jury question on the issue whether the accused was practicing medicine.

State v Hueser, 205-132; 215 NW 643

Practicing without authority. Instructions which defined "prescribe" reviewed, and held unobjectionable.

State v Hueser, 205-132; 215 NW 643

Offense defined. One "who publicly professes to assume the duties incident to the practice of medicine", i. e., diagnosing human ailments and prescribing the proper treatment for such ailments, is "practicing medicine" even tho the treatment prescribed or applied consists solely of laying the hands of the practitioner upon the body of the person treated.

State v Hughey, 208-842; 226 NW 371
State v Howard, 216-545; 245 NW 871

Parties acting jointly and in cooperation. Several persons engaged jointly and in cooperation in the unlawful furnishing, prescribing, and administering of medicine without a license may be properly joined in one action for injunction.

State v Baker, 212-571; 235 NW 313

Medical services—unauthorized practitioner. A medical practitioner who is not duly licensed as required by law may not recover for medical services.

Hoxsey v Baker, 216-85; 246 NW 653

Faith healer. A naked showing by the state that a so-called faith healer in treating people simply laid his hands upon them or, at most, slightly massaged the back of the neck and head, is wholly insufficient to establish the practice of medicine and surgery, within the meaning of the statute, nor is the lack of proof supplied by a showing that some years prior to such treatment the defendant's name in a telephone directory was preceded by the title "Dr."

State v Miller, 216-806; 249 NW 141

Estoppel of state—evidence—sufficiency. It is futile for the defendant, in an action by the state to enjoin the defendant from practicing medicine without a license, to plead that the state and its officers are estopped to question his right to so practice, and assume to support such plea by the fact that the state had not, for twenty years, questioned his right so to practice tho he had never offered to take the statutory examination for any recognized system of practice.

State v Howard, 216-545; 245 NW 871

Arbitrary refusal. The refusal of the board of medical examiners (§2578-a, S., '13), in proceedings for the revocation of the license of a physician, to grant a continuance until the accused had finished serving a sentence in the penitentiary is not necessarily arbitrary.

State v Hanson, 201-579; 207 NW 769

Right to institute prosecution. Prosecutions for the enforcement of the laws regulatory of the practice of medicine and surgery may be instituted without any authority from the state department of health.

State v Hueser, 205-132; 215 NW 643

Compensation—implied agreement. One who calls upon a physician and hospital authorities to attend an injured person to whom he is under no legal obligation may, by his acts and conduct, give rise to an implied promise to pay for the services rendered.

Valentine v Morgan, 207-232; 222 NW 412

Words actionable—intoxication in connection with profession. The defamation of a physician by accusing him of having been drunk, and because thereof unable to attend a professional call, is actionable per se. Pleadings held sufficient to state such cause of action.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Taxation—charity and benevolence—nonexemption. Property consisting of town lots and the buildings situated thereon, owned by a corporation, and used in part for charitable and benevolent purposes, and in part for the private profit of one of the incorporators in the practice of his profession of medicine, is not exempt from taxation, to any extent, under §6944, subsec. 9, C., '35. And it is quite immaterial—under such state of facts—that the declared purposes of the corporation are solely charitable and benevolent.

Readlyn Hospital v Hoth, 223-341; 272 NW 90

Malpractice.

Hair v Sorensen, 215-1229; 247 NW 651

Dentist—tooth lodged in lung—malpractice.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice. In an action based on malpractice in sewing up in a wound a piece of gauze, instruction reviewed and held not subject to the objections (1) that it assumed the existence of an issuable fact and that such fact constituted negligence per se, and (2) that ordinary care was improperly defined.

Forrest v Abbott, 219-664; 259 NW 238

Evidence—usual and ordinary practice. The defendant in an action for damages for malpractice may always establish, even by his own testimony, the usual and ordinary practice of physicians and surgeons in treating, in the locality in question, the injury which is the subject matter of the action.

Wilcox v Crumpton, 219-389; 258 NW 704

Negligence—usual and ordinary treatment—competency of witness. A witness, his competency to testify being established, may testify as to what was the usual and ordinary practice at a named time and place among physicians and surgeons in the treatment of a specified injury.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Negligence—usual and ordinary treatment—evidence. Evidence that certain medical treatment was not employed on a patient may very properly be met by evidence that such treatment was not the usual and ordinary method of practice at the time and place in question.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Malpractice—res ipsa loquitur.

Whetstine v Moravec, 228- ; 291 NW 425

Negligence—evidence—sufficiency. Evidence held insufficient to present a jury question on the issue whether a physician was negligent in failing to discover and remove from the womb of plaintiff a portion of the placenta, and whether the retention of said placenta was the cause of septicemia.

McDaniels v Moth, 210-102; 230 NW 311

Malpractice—evidence. A physician does not impliedly guarantee that his treatment of a patient will be beneficial. He fully performs his duty when he, with due care, applies to his patient that treatment which is generally and ordinarily applied by physicians under like circumstances in the locality in question. Evidence held insufficient to show that the defendant had not performed his duty.

Nelson v Sandell, 202-109; 209 NW 440; 46 ALR 1447; 26 NCCA 99

Malpractice—nonjoint liability. The mere fact that a physician directs his patient to go to a named dentist for the extraction of a tooth, and agrees to and does administer the anesthetic, does not create such relation as will render the physician liable for the negligence of the dentist.

Nelson v Sandell, 202-109; 209 NW 440; 46 ALR 1447; 26 NCCA 99

Malpractice—recoverable and nonrecoverable damages—failure to differentiate. In an action for malpractice in that, after performing a successful operation except that the defendant negligently left a piece of gauze in the wound, which negligence necessitated a second operation, instructions relative to damages arising from (1) scars, (2) bodily and mental pain, and (3) expenses paid for household servants, must clearly differentiate, in view of the two operations, between such damages as are, under each heading, recoverable, and those that are not recoverable.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Negligence—evidence. In an action for malpractice, evidence which is narrative of the physical condition of the patient at a time and place in controversy is necessarily admissible.

Lemon v Kessel, 202-273; 209 NW 393

Negligence—proximate cause. In an action for malpractice, proof that the physician negligently failed to apply the proper treatment avails nothing when the effect of proper treatment, had it been applied, is shown by the evidence to be purely speculative—just a guess.

Thompson v Anderson, 217-1186; 252 NW 117

Negligence—proximate cause. In an action for malpractice, plaintiff does not make a jury question by proof that the defendant was negligent in the treatment or in the lack of treatment of the patient, but must go forward with his proof and establish by a preponderance of the testimony that such negligence, and not the original injury, was the proximate cause of death.

Ramberg v Morgan, 209-474; 218 NW 492

Malpractice—proximate cause of damage. In an operation for conization of the cervix, evidence held to clearly place the negligence of the defendants, if any, in failing to keep the canal open while healing, as the proximate cause of plaintiff's injury.

Kirchner v Dorsey & Dorsey, 226-283; 284 NW 171

Negligence—new condition subsequent to discharge. If, after the discharge of a patient, new conditions arise which are not the natural result of the previously existing condition of the patient, the physician must have due notification of such condition and an opportunity to treat it; and the jury must be so instructed, if an instruction is requested.

Lemon v Kessel, 202-273; 209 NW 393

Aggravation of injury by unskillful treatment—liability of original wrongdoer. It is a principle of law that one who negligently inflicts a personal injury on another is liable in damages for the aggravation of said injury resulting from the unskillful treatment of said injury by his physicians and surgeons, provided the injured party exercised reasonable care in selecting said physicians and surgeons, but to permit the application of said principle there must be a proper showing of causal connection between said wrongfully inflicted injury and the said unskillful treatment.

Johnson v Selindh, 221-378; 265 NW 622

Negligence—amputation without X-ray picture. The issue whether a surgeon was negligent in failing to have an X-ray picture taken of a broken arm before amputating it, does not become a jury question on general descriptive testimony of the arm by laymen opposed by unanimous expert testimony that the extent of the broken, crushed, and mangled arm was

plainly apparent without an X-ray picture, the issue being whether amputation was necessary.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

X-ray pictures. An X-ray picture of an arm of the human body taken several days after amputation and when the arm is admittedly in a materially different condition than it was in when amputated cannot be received for any other purpose than to show the condition of the arm when the picture was taken, the very material issue being as to the condition of the arm at the time of amputation.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Negligence—adverse result of X-ray treatment—jury question. While the adverse result attending X-ray treatment, e. g., a burn, is not in and of itself evidence of negligence, yet evidence that such result does not ordinarily follow reasonably skillful treatment, plus evidence that such result may result from too frequent treatment, or from treatment prolonged during a long period of time, and that plaintiff was so treated, may generate a jury question on the issue of negligence.

Berg v Willett, 212-1109; 232 NW 821; 38 NCCA 383

Hearsay—statement of stranger to action. The statement of a physician not a party to an action, relative to an X-ray picture exhibited to him, is hearsay and therefore incompetent.

Wilcox v Crumpton, 219-389; 258 NW 704

Negligence—evidence to rebut. On the issue why a reduced oblique fracture of a bone "slipped," evidence is admissible tending to show that in such fractures particles of flesh are liable to gather under the ends of the splintered bones and thus cause a slipping.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Poor result of treatment—nonpresumption of negligence. The exclusion of testimony (in an action of malpractice growing out of the reduction of a fracture of a broken leg) tending to show that the bone was not, after a certain period of treatment, in the condition in which it ordinarily would be in after the usual and customary treatment had been applied does not constitute error when there is no other evidence of negligence or want of proper treatment of the patient. In other words, no presumption of negligence can be drawn from the naked fact that the result of treatment was unsatisfactory.

Hair v Sorensen, 215-1229; 247 NW 651

Negligence—evidence—competency. Principle reaffirmed that the issue whether the treatment accorded to a patient by a physician was proper must be determined by expert testimony.

Ramberg v Morgan, 209-474; 218 NW 492

Expert testimony—success of treatment. An expert medical witness may not testify as to the success he has had in treating a specified injury in a specified manner.

Wilcox v Crumpton, 219-389; 258 NW 704

Medical works — examination concerning. Prejudicial error results from permitting a physician, defendant in an action for malpractice, to be cross-examined as to the contents and teaching of scientific works on medicine, when the witness has not testified directly or indirectly as to such works.

Wilcox v Crumpton, 219-389; 258 NW 704

Negligence — pain and suffering — rebuttal. In an action for malpractice, evidence of pain and suffering on the part of the patient is, of course, rebuttable.

Lemon v Kessel, 202-273; 209 NW 393

Negligence—damages—pain incident to injury. No recovery may be had, in an action for malpractice, for pain (1) incident to an injury, or (2) incident to the usual and ordinary treatment of an injury; and, on request, the court must clearly differentiate, in its instructions, between such pain and pain caused by the negligence of the physician.

Lemon v Kessel, 202-273; 209 NW 393

Amputation without consent of patient or parents. It is the duty of a physician or surgeon, in an emergency which endangers the life or health of his patient, to do that which the occasion demands within the usual and customary practice among physicians and surgeons in the locality in question, even without the consent of the patient or of those who have the right to speak for him. And in so doing the physician or surgeon is not liable for an honest error in judgment.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Negligence—undue shortening of limb—evidence. In an action for malpractice wherein it is shown that an injured limb, after treatment, was over three inches shorter than the uninjured limb, held that improperly formed questions tending to show that the ordinary results of such an injury would be a shortening of one or two inches were properly excluded.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Necessity for amputation — jury question. The issue whether a necessity existed for the amputation of an arm does not become a jury question on general descriptive testimony of laymen, bearing on the appearance of the arm, and tending to show no necessity for amputation, and unanimous expert testimony to the effect that amputation was necessary in order to save the life of the patient.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Negligence — jury question. Evidence reviewed, and held to present a jury question on the issue of negligence of a physician in failing to properly treat a traumatically injured patient.

Ramberg v Morgan, 209-474; 218 NW 492

Correct and incorrect instructions — effect. In an action for damages consequent on malpractice in sewing up a sponge in a wound, instructions which in part definitely confine the jury to the one ground of negligence alleged, and which in part fail so to confine them, constitute reversible error.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Malpractice—damages—verdict. Verdict of $20,000 for personal injury consequent on the malpractice of a physician held nonexcessive.

Legler v Clinic, 207-720; 223 NW 405

Release—joint wrongdoers. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525

CHAPTER 117

PRACTICE OF PODIATRY

Atty. Gen. Opinions. See '38 AG Op 443, 665

2542 Persons engaged in practice.

Atty. Gen. Opinion. See '38 AG Op 443

2543 Persons not required to qualify.

Atty. Gen. Opinion. See '38 AG Op 443

2544 License.

Atty. Gen. Opinion. See '38 AG Op 320

2545 Approved school.

Atty. Gen. Opinions. See '38 AG Op 320; AG Op Oct. 6, '39

2546 Amputations—general anesthetics.

Atty. Gen. Opinions. See '32 AG Op 40; '38 AG Op 665

CHAPTER 118

PRACTICE OF OSTEOPATHY AND SURGERY

Atty. Gen. Opinions. See '25-26 AG Op 268; '36 AG Op 46, 264

2554.01 Definitions.

Atty. Gen. Opinion. See '36 AG Op 264

2554.05 Requirements—osteopathy and surgery.

Atty. Gen. Opinion. See '34 AG Op 286; '36 AG Op 46

2554.08 Internal curative medicines—surgery.

Atty. Gen. Opinions. See '36 AG Op 264; AG Op Oct. 7, '39

"Internal curative medicine"—scope of term. The statutory prohibition against a duly licensed and practicing osteopath prescribing for, or giving to, a patient "internal curative medicines" is as much violated by prescribing or giving for internal use a medicine designed simply to relieve a diseased conditon of the human body as tho he prescribed or gave to the patient for such use a specific—a known cure for said diseased condition.

State v Stoddard, 215-534; 245 NW 273; 86 ALR 616

2554.09 County physician.

Atty. Gen. Opinion. See '38 AG Op 321

CHAPTER 119

PRACTICE OF CHIROPRACTIC

2555 "Chiropractic" defined.

Atty. Gen. Opinion. See '38 AG Op 321

Chiropractors—prohibited practices—use of medical and surgical accessories. The statute limiting the practice of chiropractic and in specific terms prohibiting the use of surgery, osteopathy, or drugs must be construed as prohibiting chiropractors from practicing adjuncts to these practices, such as physiotherapy, electrotherapy, colonic irrigation, ultraviolet rays, traction tables, vitalizers, vibrators, and the like, and also construed as prohibiting chiropractors from prescribing diet in the treatment of the sick.

State v Boston, 226-429; 278 NW 291; 284 NW 143

2557 License.

Atty. Gen. Opinion. See '25-26 AG Op 406

2559 Operative surgery—drugs.

Atty. Gen. Opinions. See '34 AG Op 236; '38 AG Op 321

Chiropractors—prohibited practices—use of medical and surgical accessories. The statute limiting the practice of chiropractic and in specific terms prohibiting the use of surgery, osteopathy, or drugs must be construed as prohibiting chiropractors from practicing adjuncts to these practices, such as physiotherapy, electrotherapy, colonic irrigation, ultraviolet rays, traction tables, vitalizers, vibrators, and the like, and also construed as prohibiting chiropractors from prescribing diet in the treatment of the sick.

State v Boston, 226-429; 278 NW 291; 284 NW 143

CHAPTER 120

PRACTICE OF NURSING

Atty. Gen. Opinion. See '36 AG Op 535

CHAPTER 121

PRACTICE OF DENTISTRY

2565 "Practice of dentistry" defined.

Malpractice cases, see under §2532

Atty. Gen. Opinion. See '34 AG Op 424

Dentistry — practice of. A corporation is practicing dentistry when it publicly opens an office and equips it for such practice, employs dentists to carry on such practice, and advertises its business in its corporate name accordingly.

State v Dental Co., 211-781; 234 NW 260

Practice by corporation. A corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is, therefore, subject to injunction if it attempts so to do.

State v Dental Co., 211-781; 234 NW 260

2567 License.

Certificate to practice—denial. Statute relative to refusal to grant license to practice a profession, e. g., dentistry, reviewed and held applicable solely to the granting of a license in the first instance.

Craven v Bierring, 222-613; 269 NW 801

2568 Names of employed dentists to be posted.

Atty. Gen. Opinion. See '34 AG Op 424

2569 Employment of unlicensed dentist.

Atty. Gen. Opinion. See '34 AG Op 424

2570 Practice under own name.

Atty. Gen. Opinions. See '28 AG Op 52; '34 AG Op 424

Dentistry. A corporation is practicing dentistry when it publicly opens an office and equips it for such practice, employs dentists to carry on such practice, and advertises its business in its corporate name accordingly.

State v Dental Co., 211-781; 234 NW 260

2573.02 Renewal of licenses.

Deprivation of certificate. The holder of a duly issued certificate to practice a profession, e. g., dentistry, cannot be deprived of said certificate without due process, to wit: notice, hearing, and right to appeal to the courts. Statutes reviewed and held ample to protect such holder.

Craven v Bierring, 222-613; 269 NW 801

2573.04 Renewal and notice of expiration.

Atty. Gen. Opinion. See '36 AG Op 207

2573.05 Determining right to renewal.

Denial — applicability of statute. Statute relative to refusal to grant license to practice a profession, e. g., dentistry, reviewed and held applicable solely to the granting of a license in the first instance.

Craven v Bierring, 222-613; 269 NW 801

Professional conduct—violation. The practitioner of a profession, e. g., dentistry, may be validly denied a renewal of his license so to practice as a penalty for his violation of a valid statutory standard of professional conduct—§2522, C., '35, having no application to such violation.

Craven v Bierring, 222-613; 269 NW 801

2573.09 Grounds for rejecting application.

Professional conduct—violation—undue penalty. The practitioner of a profession, e. g., dentistry, may be validly denied a renewal of his license so to practice as a penalty for his violation of a valid statutory standard of professional conduct—§2522, C., '35, having no application to such violation.

Craven v Bierring, 222-613; 269 NW 801

2573.16 Unprofessional conduct.

Limitation on advertising. The right of the state under its police power to regulate in the interest of the public health, morals, and welfare a medical profession, e. g., the practice of dentistry, embraces the right to place stringent limitations on the form and style of advertisement which the practitioner may legally employ in carrying on his said profession, even the right to prohibit the use of advertisements which, in themselves, are truthful. But the state must not act arbitrarily.

Craven v Bierring, 222-613; 269 NW 801

Constitutionality of statute. Injunction will lie to enjoin the enforcement of an alleged unconstitutional statute which fixes a standard of conduct for a professional practitioner, e. g., a dentist.

Craven v Bierring, 222-613; 269 NW 801

CHAPTER 122

PRACTICE OF OPTOMETRY

2574 "Optometry" defined.

Atty. Gen. Opinion. See '25-26 AG Op 308

Practice by corporation. A corporation is practicing optometry when it equips, and publicly opens, carries on, manages, and controls, through its employee—a licensed optometrist—an office for the practice of said profession, even tho the name of the corporation does not publicly appear as such practitioner. And, inasmuch as a corporation cannot legally practice optometry, such practice will be enjoined.

State v Optical Co., 216-1157; 248 NW 332

Optometry—corporation practicing through employee-physician. A corporation is practicing optometry when it employs a physician—a licensed optometrist—to carry on his business under the company's control, and such practice may be enjoined.

State v Ritholz, 226-70; 283 NW 268

Optometry—when not unlawful practice—physician and optical company—reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

2575 Persons not engaged in.

Optometry—when not unlawful practice—physician and optical company—reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

CHAPTER 123

PRACTICE OF PHARMACY

Atty. Gen. Opinion. See '36 AG Op 664

2578 Persons engaged in.

Atty. Gen. Opinions. See '34 AG Op 618, 732; '36 AG Op 664

Right of pharmacist. A registered pharmacist may legally have government alcohol in his possession and, in his business as a pharmacist, use the same in compounding nonbeverage drugs and medicines and in the filling of prescriptions, even tho he has neither a state permit to keep and sell such liquor nor a state permit to manufacture.

Reppert v Utterback, 206-314; 217 NW 545

Sale of aspirin—injunction. A corporation may be restrained by injunction from selling or offering or exposing for sale aspirin on proof that aspirin is a drug and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Market Co., 209-567; 228 NW 288

2579 Persons not engaged in.

Atty. Gen. Opinion. See '34 AG Op 618

2580 Definitions.

Atty. Gen. Opinion. See '36 AG Op 664

Class legislation—sale of drugs and medicines. Whether the statute (1) which defines "drugs and medicines" as including all substances and preparations for external or internal use recognized in the United States Pharmacopoeia or National Formulary, and (2) which prohibits the sale of "drugs and medicines" except by, or under the supervision

of, a licensed pharmacist, is unconstitutional on the ground that said publications embrace many harmless substances that are of common and domestic use, quaere.

State v Market Co., 209-567; 228 NW 288

Sale of aspirin—injunction. A corporation may be restrained by injunction from selling, or offering or exposing for sale, aspirin on proof that aspirin is a drug and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Market Co., 209-567; 228 NW 288

2582.2 Use of terms.

Atty. Gen. Opinion. See '32 AG Op 67

CHAPTER 124.1

PRACTICE OF EMBALMING

Atty. Gen. Opinion. See '30 AG Op 142

2585.01 "Embalming" defined.

Atty. Gen. Opinion. See '36 AG Op 226

Practice by corporation. An incorporation which purports to be a cooperative association may not legally practice the profession of embalming by furnishing its so-called members with the services of a licensed embalmer when, under its organization, no restriction is placed on its membership except that said members must reside within 35 miles of the association's place of business. Whether the association could so practice were its membership reasonably restricted, quaere.

State v Fremont Assn., 222-949; 270 NW 320

Private nuisance—funeral home. The operating of an undertaking business or so-called funeral home in a strictly residential section of a municipality under circumstances which bring to the families in the immediate neighborhood a constant reminder of death, a resulting feeling of mental depression, an appreciable lessening of their happiness and disease-resisting powers, and an appreciable depreciation of the value of their properties, constitutes a nuisance and is enjoinable as such.

Bevington v Otte, 223-509; 273 NW 98

2585.03 License.

Atty. Gen. Opinion. See '34 AG Op 584

Private nuisance—undertaking establishment. The operation under formal municipal permit of an undertaking and embalming establishment in a city, in a territory designated by a duly enacted zoning ordinance as a commercial district, will not be enjoined on the sole ground that, being adjacent to a residence, said operation will have a depressing mental effect on the occupant and owner of said residence and on the members of his family.

Kirk v Mabis, 215-769; 246 NW 759; 87 ALR 1055

CHAPTER 124.2

COSMETOLOGY

Atty. Gen. Opinions. See '30 AG Op 170, 174

2585.10 Definitions.

Atty. Gen. Opinion. See '32 AG Op 41

Cosmetology schools — charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

Burns by operator—specific negligence—res ipsa loquitur — separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used, the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65

2585.11 Exceptions.

Atty. Gen. Opinion. See '30 AG Op 174

2585.12 License.

Atty. Gen. Opinions. See '30 AG Op 170; AG Op Nov. 8, '39

2585.15 Rules—practice in home.

Atty. Gen. Opinion. See '34 AG Op 320

2585.17 Assistants.

Atty. Gen. Opinion. See AG Op Jan. 31, '39

2585.20 Temporary permits.

Atty. Gen. Opinion. See '30 AG Op 174

2585.21 Managers—license required.

Atty. Gen. Opinion. See '32 AG Op 41

2585.22 Employment restricted.

Cosmetology schools—charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

CHAPTER 124.3

BARBERING

Atty. Gen. Opinion. See '38 AG Op 220

TITLE IX

AGRICULTURE, HORTICULTURE, AND ANIMAL INDUSTRY

CHAPTER 125

DEPARTMENT OF AGRICULTURE

2590 Powers and duties.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

2596 Assessor.

Atty. Gen. Opinions. See '28 AG Op 74, 114

2597 Returns by assessor.

Atty. Gen. Opinions. See '28 AG Op 74, 114

CHAPTER 125.1

SOIL CONSERVATION

2603.04 Definitions.

Federal instrumentality — congress determines immunity from state laws. It is within discretion of congress to determine in what respects and to what extent its instrumentalities, for their proper functioning, shall be immune from legislation of state origin.

First Tr. JSL Bk. v Lehman, 225-1309; 283 NW 96

CHAPTER 126

FRUIT-TREE AND FOREST RESERVATIONS

Atty. Gen. Opinions. See '25-26 AG Op 371; '28 AG Op 125; '32 AG Op 21, 272; '38 AG Op 198

2605 Tax exemption.

Atty. Gen. Opinion. See '38 AG Op 738

2606 Reservations.

Atty. Gen. Opinions. See '28 AG Op 100; '30 AG Op 140, 306; '32 AG Op 198; '38 AG Op 738

2607 Forest reservation.

Atty. Gen. Opinion. See '30 AG Op 175

2611 Fruit-tree reservation.

Atty. Gen. Opinions. See '25-26 AG Op 282; '38 AG Op 738

2614 Restraint of livestock.

Atty. Gen. Opinion. See '38 AG Op 198

2615 Penalty.

Atty. Gen. Opinion. See '38 AG Op 198

2616 Assessor.

Atty. Gen. Opinion. See '38 AG Op 738

2617 County auditor.

Atty. Gen. Opinion. See '38 AG Op 738

CHAPTER 127

REGISTRATION OF ANIMALS

Atty. Gen. Opinion. See '34 AG Op 381

CHAPTER 128

INFECTIOUS AND CONTAGIOUS DISEASES AMONG ANIMALS

2643 Powers of department.

Atty. Gen. Opinion. See '25-26 AG Op 350

2652 Quarantining or killing animals.

Atty. Gen. Opinions. See '28 AG Op 218; '30 AG Op 312

Right to destroy if indemnifying funds ample. Tuberculosis-infected cattle may be destroyed without the consent of the owner even tho the county tuberculosis eradication fund is overdrawn, if the state allotment fund is ample to meet the resulting damage.

Peverill v Dept., 216-534; 245 NW 334

2661 Sale or exposure of infected animals.

Warranty — unallowable defense. The vendor of animals who actually warrants them to be "healthy and all right" may not avail himself of the claim that he had only recently purchased them, and that the vendee had equal knowledge with him as to their state of health.

Cavanaugh v Stock Co., 206-893; 221 NW 512

2663 Penalties.

Atty. Gen. Opinion. See '25-26 AG Op 350

CHAPTER 129

ERADICATION OF BOVINE TUBERCULOSIS

Atty. Gen. Opinion. See '30 AG Op 161

2665 Cooperation.

Discussion. See 15 ILR 509—Bovine tuberculosis statutes

Atty. Gen. Opinion. See '25-26 AG Op 298

Constitutionality reaffirmed. Constitutionality of bovine tuberculosis law reaffirmed.

Panther v Department, 211-868; 234 NW 560

Accredited area plan—enrollment—condition precedent. A county may not legally be enrolled under the accredited area plan for the eradication of bovine tuberculosis until the county has first been legally enrolled under the county area plan for such eradication.

Phelps v Thornburg, 206-1150; 221 NW 835

Enrollment of county—insufficient publication. A notice of the hearing before the board of supervisors on a petition for the enrollment of a county under the county area eradication plan relating to bovine tuberculosis is a nullity when the last newspaper publication was on August 13th and the hearing was had on August 17th.

Phelps v Thornburg, 206-1150; 221 NW 835

Accredited area plan—withdrawal of signatures—effect. Upon the filing with the secretary of agriculture of the required agreements for the enrollment of a county under the accredited area plan for the eradication of bovine tuberculosis, the jurisdiction in said secretary to act is not taken away by the subsequent withdrawal of signatures to such agreements.

Thede v Thornburg, 207-639; 223 NW 386

Permissible legalization. The legislature may validly legalize the act of the secretary of agriculture in enrolling a county under the accredited area plan for the eradication of bovine tuberculosis when the illegality of such enrollment is predicated on the doubt whether the petitions as a basis for such action contained the statutory number of signatures.

Peverill v Board, 208-94; 222 NW 535

Illegal enrollment of county—waiver and estoppel. Failure to properly publish a notice relative to the enrollment of a county for the eradication of bovine tuberculosis is not a mere irregularity, but is jurisdictional.

Phelps v Thornburg, 206-1150; 221 NW 835

Hearing—mandatory duty of secretary. The statutory requirement that the secretary of agriculture shall, on the basis of certain agreements filed with him, "hold a hearing" on the proposal to enroll a county under the accredited area plan for the eradication of bovine tuberculosis is mandatory, and the secretary has no power to substitute some other person to hold such hearing, even tho such hearing is reported in detail to the secretary, and later passed upon by him.

Thede v Thornburg, 207-639; 223 NW 386

Certification of petitions—sufficiency. Petitions for the enrollment of a county under the county-area-eradication plan for the control of bovine tuberculosis, after being passed upon by the board of supervisors, are properly transmitted by the county auditor to the secretary of agriculture by means of certified copies, such being the direction of the statute.

Thede v Thornburg, 207-639; 223 NW 386

2666 State as accredited area.

Class legislation—permissible agencies. The legislature may, generally speaking, choose any agency for the initiative and realization of the benefits of a public health measure.

Lausen v Board, 204-30; 214 NW 682

Due process as limitation on police power. The due process clause of the federal constitution is no limitation on a legitimate and reasonable exercise by the state of its police powers over bovine tuberculosis.

Peverill v Board, 208-94; 222 NW 535

Compulsory testing. An owner of breeding cattle who is validly required by statute to have them tested for tuberculosis or to submit to criminal prosecution may not complain that the law accords to him the right to enter into an agreement with the public authorities for his own protection.

Fevold v Board, 202-1019; 210 NW 139

Notice of time of testing unnecessary.

Peverill v Dept., 216-534; 245 NW 334

Justifiable and unjustifiable destruction. The constitutional requirement of due process of law—notice and hearing—is fully met by the bovine tuberculosis act (1) in depriving the owner of all notice and hearing prior to the destruction of cattle actually infected with tuberculosis, and (2) in impliedly and necessarily giving to said owner a right of action for damages against persons destroying his cattle when they are not so infected.

Loftus v Dept., 211-566; 232 NW 412

Scientific difference as to efficiency of health measure—effect. When it appears that there is a scientific difference of opinion as to the efficiency, desirability and reliability of a proposed public health measure, e. g., the tuberculin test for bovine tuberculosis, it necessarily follows that the door is open to the legislative department to adopt the theory to which it will apply its police power.

Loftus v Dept., 211-566; 232 NW 412
Panther v Dept., 211-868; 234 NW 560

Nonrequired bond by examiner. In applying the bovine tuberculosis test, the examiner need not, nor may he be required to, post a bond to indemnify the owner against loss in case cattle are wrongfully destroyed, because the statute does not expressly or impliedly require such bond.

Peverill v Dept., 216-534; 245 NW 334

2668 Appraisal.

Right to test prior to appraisement. Even tho the statute declares that "before being tested, such animals shall be appraised, etc.," nevertheless, an examination of the entire bovine tuberculosis act clearly demonstrates that "shall" is not used in a mandatory sense.

Peverill v Dept., 216-534; 245 NW 334

2669 Presence of tuberculosis.

Atty. Gen. Opinion. See '25-26 AG Op 350

Wrongful destruction by governmental agency. When animals are wrongfully destroyed by a governmental agency, the individual wrongdoer is liable in damages for such destruction.

Panther v Dept., 211-868; 234 NW 560

2670 Nonright to receive compensation.

Atty. Gen. Opinion. See '25-26 AG Op 327

2671 Amount of indemnity.

Atty. Gen. Opinions. See '25-26 AG Op 174, 315, 327, 359; '30 AG Op 92, 187

Noninjured complainant. A party may not question the constitutionality of this statute when he fails to show that he has been or will be injured by the statute. In other words, he may not borrow an objection from one who could complain, but does not complain.

Peverill v Board, 201-1050; 205 NW 543

2672 Pedigree.

Atty. Gen. Opinion. See '30 AG Op 92

2673 Right to receive pay.

Atty. Gen. Opinion. See '30 AG Op 312

2675 Examination by department.

Atty. Gen. Opinion. See '28 AG Op 218

2678 Tuberculin.

Atty. Gen. Opinion. See '25-26 AG Op 408

Regulation of curative agencies. The state may, under its police power, validly control the sale, distribution, and administration of an agency (e. g., tuberculin) which is the basis upon which rests the efforts of the state to eradicate bovine tuberculosis.

Fevold v Board, 202-1019; 210 NW 139

2679 Inspectors and assistants.

Atty. Gen. Opinion. See '25-26 AG Op 408

2680 Accredited veterinarian.

Atty. Gen. Opinion. See '25-26 AG Op 408

2683 Establishment by petition of breeders. (Repealed)

Due process.

Peverill v Board, 201-1050; 205 NW 543

Class legislation.

Lausen v Board, 204-30; 214 NW 682

Notice—insufficient publication.

Phelps v Thornburg, 206-1150; 221 NW 835

2684 Sufficiency of petition — enrollment. (Repealed)

Illegal enrollment of county.

Phelps v Thornburg, 206-1150; 221 NW 835

2685 Agreements filed with department. (Repealed)

Certification of petitions.
Thede v Thornburg, 207-639; 223 NW 386

2686 Eradication fund.
Atty. Gen. Opinion. See '30 AG Op 161

2689 Levy omitted.
Atty. Gen. Opinion. See '30 AG Op 161

2690 Availability of county fund.
Atty. Gen. Opinions. See '25-26 AG Op 327, 330

2693 Certification of claims.
Atty. Gen. Opinion. See '25-26 AG Op 330

2694 Accredited counties—notice—hearing. (Repealed)

Due process.
Fevold v Board, 202-1019; 210 NW 139

Enrollment—condition precedent.
Phelps v Thornburg, 206-1150; 221 NW 835

Fraud in enrollment of county.
Peverill v Board, 208-94; 222 NW 535

Hearing—mandatory personal duty of secretary.
Thede v Thornburg, 207-639; 223 NW 386

Legalization of illegal acts.
Peverill v Board, 201-1050; 205 NW 543

Substantial compliance with act.
Fevold v Board, 202-1019; 210 NW 139

Uniform operation.
Fevold v Board, 202-1019; 210 NW 139

Withdrawal of signatures—effect.
Thede v Thornburg, 207-639; 223 NW 386

2699 Permitting test.
Atty. Gen. Opinion. See '25-26 AG Op 271

2700 Penalty.
Atty. Gen. Opinion. See '25-26 AG Op 350

2701 Preventing test.
Atty. Gen. Opinion. See '25-26 AG Op 350

2702 Notice.
Atty. Gen. Opinion. See '25-26 AG Op 298

CHAPTER 130

HOG-CHOLERA VIRUS AND SERUM

2705 Definitions.
Atty. Gen. Opinion. See '34 AG Op 196

2710 Dealer's permit.
Atty. Gen. Opinions. See '34 AG Op 196; AG Op Feb. 28, '39

2713 Liability of manufacturer.

Loss or injury—evidence. Evidence tending to show that after a purported hog-cholera remedy was employed on hogs, they died of diseases which are prevalent and common among hogs, is not competent to prove that said remedy contained the germs of said diseases.

Howard v Serum Co., 202-822; 211 NW 419; 26 NCCA 921

Measure of care in manufacture. A manufacturer of hog-cholera virus and serum who, in a contract of sale, distinctly provides that he does not guarantee said product "further than that it will be manufactured strictly in accordance with the rules and regulations as laid down by the department of agriculture" of the federal government (which rules and regulations are distinctly comprehensive, in great detail, and mandatory on all manufacturers by fiat of the federal authorities) may not be held liable in damages resulting from the purchase and use of said product because he did not employ in the manufacture some additional precaution not required by said government regulations, e. g., a bacteriological testing laboratory.

Howard v Serum Co., 202-822; 211 NW 419; 26 NCCA 921

Proximate cause of death. Evidence held to present a jury question on the issue whether the feeding of a so-called hog remedy to hogs was the proximate cause of their death.

Crouch v Remedy Co., 205-51; 217 NW 557; 38 NCCA 80

CHAPTER 131

USE AND DISPOSAL OF DEAD ANIMALS

2745 Disposal of dead animals.
Atty. Gen. Opinions. See '36 AG Op 124; '38 AG Op 147

2746 "Disposing" defined.
Atty. Gen. Opinions. See '36 AG Op 124; '38 AG Op 147

2747 Application for license.
Atty. Gen. Opinion. See '38 AG Op 147

2748 Inspection of place.
Atty. Gen. Opinion. See '38 AG Op 147

2749 License.
Atty. Gen. Opinion. See '38 AG Op 147

2758 Transportation of dead animals.
Atty. Gen. Opinions. See '36 AG Op 124; '38 AG Op 147

2761 Duty to dispose of dead bodies.

Atty. Gen. Opinion. See '36 AG Op 124

Duplicity in indictment. The offense of permitting the carcass of a dead animal to lie about the premises of the owner or custodian undisposed of for more than 24 hours, is complete when the law is violated as to any one animal. It follows that an indictment charges more than one offense when it charges a violation as to more than one animal, dying "at sundry and various times".

State v Redlinger, 207-1114; 224 NW 83

CHAPTER 132

VETERINARY MEDICINE AND SURGERY

2764 Persons engaged in practice.

Atty. Gen. Opinions. See '25-26 AG Op 178; '30 AG Op 378; '36 AG Op 606

2765 Persons not engaged in practice.

Atty. Gen. Opinion. See '30 AG Op 378

2766 License.

Atty. Gen. Opinions. See '25-26 AG Op 178; '28 AG Op 84

2771 Unlawful use of degree.

Atty. Gen. Opinion. See '28 AG Op 84

CHAPTER 133

HOTELS, RESTAURANTS, AND FOOD ESTABLISHMENTS

2808 Definitions.

Atty. Gen. Opinions. See '34 AG Op 233, 347, 422, 474, 558; '36 AG Op 178; '38 AG Op 350

Public nuisance—nonapplicability of statute. Chapter 133, C., '31, has no application to a controversy wherein a private property owner seeks the abatement of a private nuisance.

Higgins v Prod. Co., 214-276; 242 NW 109; 81 ALR 1199

Documentary evidence—Coca-Cola advertisements—admissibility. In an action against a beverage bottler and wholesaler for damages caused by drinking unwholesome Coca-Cola, sold by the bottler to a retailer, the admission of Coca-Cola advertisements in evidence held nonprejudicial.

Anderson v Tyler, 223-1033; 274 NW 48

Sales on Sunday—unwholesome food—damages. Fact that beverage was sold on Sunday, in violation of §13227, C., '35, does not deprive plaintiff of right to recover proven damages.

Anderson v Tyler, 223-1033; 274 NW 48

2809 License required.

Atty. Gen. Opinions. See '28 AG Op 173; '30 AG Op 328

2824 Sanitary regulations.

Compensation act—casual employment. An employment to wash the kitchen walls of a restaurant is "for the purpose of the employer's trade or business", even tho the employment is purely casual.

Dial v Lunch, 217-945; 251 NW 33

2841 List of rooms and rates to be posted.

Atty. Gen. Opinion. See '25-26 AG Op 177

2842 Increase of rates.

Atty. Gen. Opinion. See '25-26 AG Op 177

2850 Elevator shafts.

Passenger elevator falling—safety device—nonliability elevator manufacturer. The builder of a passenger elevator is neither liable for a personal injury caused by the falling of the car where the safety device, designed to prevent such falling and stop the car, was of an approved pattern in general use and was not shown to have ever before failed to work efficiently, nor where it is disclosed by the accident a device could have been made which would have obviated the particular defect which caused the particular accident, unless it is further shown that reasonable prudence would have discovered this defect and remedied it. Due care, in a legal sense, does not require an uncanny foresight.

Hoskins v Otis Elev. Co., 16 F 2d, 220

2855 Injunction.

Constitutionality of injunctional feature.

State v Fray, 214-53; 241 NW 663; 81 ALR 286

State v Howard, 214-60; 241 NW 682

CHAPTER 135

STATE FAIR AND EXPOSITION

Atty. Gen. Opinions. See '34 AG Op 383, 725

2873 State fair board.

Atty. Gen. Opinions. See '34 AG Op 383, 725

2874 Convention.

Atty. Gen. Opinion. See '34 AG Op 383

2877 Elections to be made.

Atty. Gen. Opinion. See '34 AG Op 383

2883 Treasurer.

Atty. Gen. Opinion. See '32 AG Op 174

2886 Powers and duties of board.

Atty. Gen. Opinions. See '34 AG Op 329; AG Op June 19, '39

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

2888 Maintenance of state fair.

Atty. Gen. Opinion. See '28 AG Op 205

CHAPTER 136

COUNTY AND DISTRICT FAIRS

2894 Terms defined.

Atty. Gen. Opinions. See '30 AG Op 182; '36 AG Op 109; '38 AG Op 55, 813; AG Op July 19, '39

2895 Powers of society.

Atty. Gen. Opinion. See '38 AG Op 813

2896 Control of grounds.

Atty. Gen. Opinion. See '36 AG Op 339

Insurance—auto race—"no action clause"—effect. A policy of insurance indemnifying the insured from damages resulting from the holding of a hazardous automobile racing contest on a race track at a county fair, and which policy specifies that "No action shall be brought against the insurer * * * unless brought by and in the name of the insured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issues," is a contract of indemnity against loss, and not a contract of indemnity against liability, and gives no right of action on the policy to a person who was wrongfully injured as a result of holding said race; and this is true notwithstanding §8940, subsec. 5, par. "e", C., '24, '27, '31, giving, under certain conditions, an injured person a right of action on an automobile accident policy issued to the wrongdoer, said statute having application solely to policies on automobiles used on race tracks in racing contests.

Zieman v Fidelity Co., 214-468; 238 NW 100

Liability for negligence. Nonpecuniary incorporated county fair associations are not such governmental agencies as are exempt from liability for negligence.

Clark v Fair Assn., 203-1107; 212 NW 163; 33 NCCA 40

Negligence—reasonable care only required. It may not be said, as a matter of law, that a county fair association is under a legal duty to erect a fence along its race track sufficiently high to prevent a horse from jumping over such fence. The association is not an insurer. Reasonable care under varying circumstances is the full measure of its duty.

Clark v Fair Assn., 203-1107; 212 NW 163; 33 NCCA 40

2898 Appointment of police.

Atty. Gen. Opinion. See '36 AG Op 339

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

2901 Publication of financial statement.

Atty. Gen. Opinion. See '34 AG Op 727

2902 State aid.

Atty. Gen. Opinions. See '28 AG Op 145, 269, 285, 395; '34 AG Op 353, 727

2902.1 Appropriation—availability.

Atty. Gen. Opinion. See AG Op March 14, '39

2903 Amount allowed as state aid.

Atty. Gen. Opinions. See '28 AG Op 269; '34 AG Op 353

2904 Payment of state aid.

Atty. Gen. Opinion. See '34 AG Op 284

2905 County aid.

Atty. Gen. Opinions. See '25-26 AG Op 168; '28 AG Op 278, 285; '30 AG Op 182; '38 AG Op 55, 654; AG Op July 19, '39

2906 Additional county aid.

Atty. Gen. Opinion. See '38 AG Op 55

2907 Purchase and management.

Atty. Gen. Opinion. See '38 AG Op 55

2909 Tax aid.

Atty. Gen. Opinions. See '25-26 AG Op 168; '30 AG Op 369; '38 AG Op 55

2910 Expenditure of fund.

Atty. Gen. Opinions. See '25-26 AG Op 168; '30 AG Op 369

2911 Report to supervisors.

Atty. Gen. Opinions. See '25-26 AG Op 168; '30 AG Op 369

CHAPTER 138

FARM AID ASSOCIATIONS

Atty. Gen. Opinions. See '30 AG Op 152; '34 AG Op 71, 114, 225; '38 AG Op 314; AG Op March 27, '40

2926 Articles of incorporation.

Atty. Gen. Opinions. See '34 AG Op 62, 71, 115, 225; '38 AG Op 145

2926.1 Amendments to articles.

Inaccurate designation—effect. Amended articles of incorporation of a farm bureau association will be given the effect manifestly intended notwithstanding the fact that they are inaccurately designated.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

2930 Appropriation by board of supervisors.

Atty. Gen. Opinions. See '25-26 AG Op 132, 233, 252; '32 AG Op 217; '34 AG Op 62, 71, 93, 113, 177, 225; '38 AG Op 145, 314

Conclusiveness of certificate. The certificate of the proper officers of an incorporated farm bureau as to the number of bona fide members of the bureau, as a basis for an appropriation by the county, is conclusive on the board of supervisors.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

Certificate—sufficiency. The certificate filed by the proper officers of a farm bureau with the board of supervisors as a basis for county aid need not embrace statements of fact not required, expressly or impliedly, by the statute.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

When entitled to aid. The statutory provision that a farm bureau organization shall be entitled to financial aid from the county when the "yearly membership dues and pledges" amount to a certain sum, authorizes such aid when the "dues" alone amount to the required sum.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

When not entitled to public aid. An incorporated farm aid association which in its articles of incorporation fixes the annual dues at five dollars, instead of one dollar, as mandatorily required by statute, and which raises from its members no annual sum by way of subscription, as mandatorily required by statute, is not entitled to financial aid from the general fund of the county.

Jefferson etc. v Sherman, 208-614; 226 NW 182

Blume v Crawford Co., 217-545; 250 NW 733; 92ALR 757

Misappropriation — recovery — estoppel. Where, during a series of years, public funds have been appropriated by a county to a farm bureau organization under the good faith but mistaken belief that a statute authorized such appropriations, and where said funds have been expended in furtherance of the agricultural activities of said bureau, an action to recover such funds on behalf of the county will not lie by a taxpayer who has at all time had actual knowledge of the making of such appropriations and of the use to which they were being put, and took no action to question them.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Public aid—conditions precedent. A farm bureau organization is not entitled to an appropriation of county funds (1) until the bureau treasurer has first given and filed the bond required by statute, and (2) until the president and secretary of the bureau have certified to the board of supervisors the definite amount, if any, advanced to the said bureau by the federal government for the ensuing year.

Taylor Bureau v Board, 218-937; 252 NW 498

Governmental powers—nondelegation of authority. The statutory provision which requires the board of supervisors, under named conditions, to appropriate from the county general fund money to, and in aid of, a farm bureau organization, cannot be deemed a delegation to the said organization of the power to levy a tax on the public.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Matters specially pleaded. A plaintiff who seeks to enjoin the appropriation of county funds in aid of a farm bureau organization on the ground that the bureau was not organized to cooperate with stated governmental agencies, must specially plead and prove said fact.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Mandamus. Mandamus is the proper remedy to compel the board of supervisors to make an appropriation of public funds to a farm bureau organization, even tho the board must, as a preliminary matter, determine whether the facts exist justifying the appropriation.

Taylor Bureau v Board, 218-937; 252 NW 498

2931 Limitation on aid.

When entitled to aid. While a farm bureau organization is not entitled to financial aid

from the county unless it is organized "to cooperate" with stated federal and state agricultural agencies, yet such cooperation need not be specifically provided for in the articles of incorporation.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

2932 Funds advanced by federal government.

Mandamus—sufficiency of petition. In mandamus to compel an appropriation by a board of supervisors to a farm bureau association, the failure of the petition to state the amount of aid furnished the bureau by the federal government is not fatal when the petition was not attacked in the trial court.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

Public aid—conditions precedent. A farm bureau organization is not entitled to an appropriation of county funds (1) until the bureau treasurer has first given and filed the bond required by statute, and (2) until the president and secretary of the bureau have certified to the board of supervisors the definite amount, if any, advanced to the said bureau by the federal government for the ensuing year.

Taylor Bureau v Board, 218-937, 252 NW 498

2934 Bond of treasurer.

Public aid—conditions precedent. A farm bureau organization is not entitled to an appropriation of county funds (1) until the bureau treasurer has first given and filed the bond required by statute, and (2) until the president and secretary of the bureau have certified to the board of supervisors the definite amount, if any, advanced to the said bureau by the federal government for the ensuing year.

Taylor Bureau v Board, 218-937, 252 NW 498

2938 Annual reports.

Atty. Gen. Opinions. See '32 AG Op 141; '34 AG Op 62, 71, 114, 177

CHAPTER 142

POULTRY ASSOCIATIONS

Atty. Gen. Opinions. See '25-26 AG Op 243; '34 AG Op 121

CHAPTER 146

ESTRAYS AND TRESPASSING ANIMALS

2980 Restraint of animals.

Damages—thoroughbred cow served by nonthoroughbred bull. Principle reaffirmed that the measure of damages resulting from the serving of a thoroughbred cow by a nonthoroughbred bull is the difference between the value of said cow for breeding purposes before and after such serving.

Madison v Hood, 207-495; 223 NW 178

Duty to restrain. There is no longer any difference between the obligation to restrain male and female animals.

Wheeler v Woods, 205-1240; 219 NW 407

Presumption as to ownership. Proof that stock was on the premises of a defendant and under his control, both before and after it was at large in the public highway (where it was alleged to have caused a damage), and that the defendant had inferentially admitted that the stock was his, creates a jury question on the issue of the defendant's ownership.

Stewart v Wild, 202-357; 208 NW 303

Violation of statute—effect. The unrestrained presence of a domestic animal upon the public highway generates a presumption that the owner of the animal has been negligent in not restraining the animal from running at large, as commanded by statute; but the owner may show that, in view of all the circumstances, he was not, in fact, negligent. The doctrine of negligence per se arising out of the violation of a statute does not here apply.

Hansen v Kemmish, 201-1008; 208 NW 277; 45 ALR 498; 39 NCCA 400

See Riepe v Elting, 89-82; 56 NW 285

McElhinney v Knittle, 199-278; 201 NW 586

2981 Trespass on lawfully fenced land.

Failure to maintain fence—effect. A party may neither (1) distrain an animal which comes upon his premises, nor (2) maintain an independent action for damages done by the animal, if the animal comes upon complainant's premises because of his neglect to maintain his part of the partition fence.

Wheeler v Woods, 205-1240; 219 NW 407; 39 NCCA 392

3004 Taking up estray.

Estrays defined. See under §2979, Vol I

3018 Penalty against finder.

Vesting title in taker-up. The taker-up of an estray is under mandatory duty not to take it out of the state until he has complied with the statutory procedure for vesting in himself title to the animal; and this is true irrespective of the state of facts constituting the animal an estray.

State v Berryhill, 223-168; 272 NW 107

TITLE X

REGULATION AND INSPECTION OF FOODS, DRUGS, AND OTHER ARTICLES

Atty. Gen. Opinions. See '34 AG Op 422, 474; '36 AG Op 385, 602

CHAPTER 147

GENERAL PROVISIONS

Atty. Gen. Opinions. See '28 AG Op 119; '34 AG Op 474, 636

3029 Definitions.

Atty. Gen. Opinions. See '34 AG Op 422, 474

3030 Duties.

Atty. Gen. Opinion. See '36 AG Op 385

3037 Labeling.

Atty. Gen. Opinions. See '25-26 AG Op 217; '36 AG Op 385

3039 Labeling of mixtures.

Atty. Gen. Opinion. See '36 AG Op 385

3041 False labels—defacement.

Atty. Gen. Opinion. See '34 AG Op 422

3042 Mislabeled articles.

Atty. Gen. Opinions. See '34 AG Op 474; '36 AG Op 385

3046 Injunction.

Constitutionality of injunctional feature.

State v Fray, 214-53; 241 NW 663; 81 ALR 286

State v Howard, 214-60; 241 NW 682

Itinerant vendors — agents and employees. The statute which defines an itinerant vendor of drugs as "any person who, by himself, agent or employee, goes from place to place or from house to house, and sells, offers or exposes for sale any drug" etc. (§3148, C., '31) renders a person an "itinerant vendor" who goes from place to place or from house to house and does the specified acts, even tho he does such acts solely as the employee of an employer who is concededly an itinerant vendor.

State v Logsdon, 215-1297; 248 NW 4

3054 Goods for sale in other states.

Atty. Gen. Opinion. See '36 AG Op 602

CHAPTER 148

ADULTERATION OF FOODS

Atty. Gen. Opinions. See AG Op July 5, '39

CHAPTER 149

LABELING FOODS

Atty. Gen. Opinion. See '36 AG Op 385

CHAPTER 150

PRODUCTION AND SALE OF DAIRY PRODUCTS

3077 Purity.

Contract — incurable breach. A dairyman who contracts to have his cows tested for tuberculosis, and to sell his milk to a retailer at a price substantially in excess of the market price for other milk of the same butter-fat test, fatally breaches his contract by failing, for 12 months, to have his cows so tested, even tho a test, subsequent to the retailer's rescission, shows that the cows are free from tuberculosis.

Niederhauser v Dairy, 213-285; 237 NW 222

CHAPTER 150.3

CREAM GRADING

Atty. Gen. Opinion. See '36 AG Op 602

CHAPTER 151

PRODUCTION AND SALE OF EGGS

Atty. Gen. Opinions. See '30 AG Op 115; AG Op March 12, '40

CHAPTER 152

COMMERCIAL FEEDS

3113 Definitions.

Atty. Gen. Opinion. See '30 AG Op 348

Contributory negligence—overdose of poison. In an action for damages consequent on the death of animals caused by an overdose of copper sulphate, in part contained in a stock food, it is manifest that plaintiff cannot recover if, by his own conduct, he has contributed to his said injury.

Jensen v Moorman Co., 213-922; 239 NW 917

3118 Inspection fee — report under oath.

Atty. Gen. Opinion. See '28 AG Op 119

3119 Fee for stock tonic.

Atty. Gen. Opinion. See '28 AG Op 119

CHAPTER 154.2

COUNTY LIMESTONE QUARRIES

Atty. Gen. Opinions. See '38 AG Op 356; AG Op Aug. 22, '39

CHAPTER 155

ADULTERATION AND LABELING OF DRUGS

3143 Defined.

Atty. Gen. Opinion. See '30 AG Op 348

Class legislation—sale of drugs and medicines. Whether the statute (1) which defines "drugs and medicines" as including all substances and preparations for external or internal use recognized in the United States Pharmacopoeia or National Formulary, and (2) which prohibits the sale of "drugs and medicines" except by, or under the supervision of a licensed pharmacist, is unconstitutional on the ground that said publications embrace many harmless substances that are of common and domestic use, quaere.

State v Jewett Co., 209-567; 228 NW 288

Sale of aspirin—injunction. A corporation may be restrained by injunction from selling or offering or exposing for sale aspirin, on proof that aspirin is a drug and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Jewett Co., 209-567; 228 NW 288

3148 "Itinerant vendor of drugs" defined.

Atty. Gen. Opinions. See '30 AG Op 243, 348

Agents and employees. This section renders a person an "itinerant vendor" who goes from place to place or from house to house and does the specified acts, even tho he does such acts solely as the employee of an employer who is concededly an itinerant vendor.

State v Logsdon, 215-1297; 248 NW 4

3149 License required of itinerant — fee.

Atty. Gen. Opinion. See '30 AG Op 348

Constitutionality. The statutes requiring a license of an itinerant vendor of drugs are not discriminatory, do not effect double taxation, are not class legislation, were not enacted for any effect on trade or to remove competition, and are of uniform operation.

State v Logsdon, 215-1297; 248 NW 4

CHAPTER 155.1

UNIFORM NARCOTIC DRUG ACT

3169.01 Definitions.

Atty. Gen. Opinion. See '38 AG Op 665

3169.02 Acts prohibited.

Atty. Gen. Opinion. See '38 AG Op 665

Indictment—negativing exceptions. An indictment for the unlawful possession of narcotic drugs need not, in view of §3156, C., '35, negative the exception of the statute relative to possession under the prescription of named medical practitioners.

State v Bailey, 202-146; 209 NW 403

Indictment—sufficiency. An indictment alleging the illegal possession of morphine need not allege (1) the amount or quantity of the drug so possessed, (2) the form in which the morphine was found in the possession of the accused, nor (3) the time, place, and circumstances under which the offense was committed, other than an allegation of the county (and state) in which committed, and the year, month, and day of such commission.

State v Heeron, 208-1151; 226 NW 30

Negligent exposure of poisoned beverage. The act of a person in so negligently exposing a beverage which contains a narcotic in a deadly quantity as to be consumed by another may constitute involuntary manslaughter if the death of a human being results and the possession or use of such narcotic by the accused is unlawful. Evidence held insufficient to show that the accused placed the poison in the beverage in question, or knew of its presence therein.

State v Korth, 204-1360; 217 NW 236

3169.05 Sale on written orders.

Atty. Gen. Opinion. See '38 AG Op 665

3169.09 Record to be kept.

Atty. Gen. Opinion. See '38 AG Op 665

3169.11 Authorized possession of narcotic drugs by individuals.

Indictment—negativing exceptions. An indictment for the unlawful possession of narcotic drugs need not, in view of §3156, C., '24, negative the exception of the statute relative to possession under the prescription of named medical practitioners.

State v Bailey, 202-146; 209 NW 403

Indictment—sufficiency. An indictment alleging the illegal possession of morphine need not allege (1) the amount or quantity of the drug so possessed, (2) the form in which the morphine was found in the possession of the accused, nor (3) the time, place, and circumstances under which the offense was committed, other than an allegation of the county (and state) in which committed, and the year, month, and day of such commission.

State v Heeron, 208-1151; 226 NW 30

3169.21 Penalties.

Atty. Gen. Opinion. See '38 AG Op 334

Unlawful possession—sentence. A penitentiary sentence as punishment for the unlawful possession of narcotic drugs is not necessarily excessive.

State v Korth, 204-667; 215 NW 706

CHAPTER 160

MATTRESSES AND COMFORTS

Atty. Gen. Opinion. See AG Op March 10, '39

CHAPTER 161

STANDARD WEIGHTS AND MEASURES

3234 Sales of dry commodities.

Atty. Gen. Opinion. See '30 AG Op 201

3236 Bushel measure.

Atty. Gen. Opinion. See '30 AG Op 201

"Bushel" construed. The admeasurement to a landlord by an agreed arbitrator of a certain number of bushels of corn as rent for a certain year will not be construed as calling for that number of bushels of "shelled" corn when the parties knew at all times that the admeasurement was on the basis of crib measurement; and when the landlord receives in shelled corn all that was set aside to him "on the cob", the rent must be deemed fully paid.

Salinger v Elev. Co., 210-668; 231 NW 366

3244 Sales to be by standard weight or measure.

Atty. Gen. Opinion. See '25-26 AG Op 217

CHAPTER 163

STATE AND CITY SEALERS

3255 Sealer for cities and towns.

Atty. Gen. Opinion. See AG Op June 6, '39

Due process—ordinance requiring weighing of loads. A municipal ordinance requiring that merchandise sold in load lots by weight for delivery within the city be weighed by a public weighmaster whose certificate stating the gross, tare, and net weight must be delivered to the purchaser, such ordinance, although it necessitates that a person trucking coal into the city unload and reload, is not so unreasonable as to violate the due process clause of the constitution.

Huss v Creston, 224-844; 278 NW 196; 116 ALR 242

CHAPTER 164

PUBLIC SCALES AND GASOLINE PUMPS

3258 Definitions.

Atty. Gen. Opinion. See '38 AG Op 137

Filling station permit—ordinance amending restricted district. Under a restricted residence district ordinance, a city council may issue a permit for erection of a gasoline filling station on certain lots without a separate ordinance to remove the particular lots from the restricted district.

Scott v Waterloo, 223-1169; 274 NW 897

CHAPTER 165

INSPECTION OF WEIGHTS AND MEASURES

Atty. Gen. Opinions. See '34 AG Op 63; AG Op June 6, '39

CHAPTER 165.1

PRISON-MADE GOODS

Atty. Gen. Opinions. See '34 AG Op 336; '38 AG Op 259

3274.1 Branding, labeling, and marking.

Atty. Gen. Opinion. See '38 AG Op 259

3274.2 Penalty—effectiveness of act.

Atty. Gen. Opinion. See '38 AG Op 259

TITLE XI

SOCIAL WELFARE AND REHABILITATION

Atty. Gen. Opinion. See '38 AG Op 571

CHAPTER 166

BOARD OF CONTROL OF STATE INSTITUTIONS

Atty. Gen. Opinions. See '36 AG Op 107

3276 Appointment.

Atty. Gen. Opinion. See '30 AG Op 52

3279 Political activity.

Atty. Gen. Opinion. See '34 AG Op 668

3284 Trips to other states.

Atty. Gen. Opinion. See AG Op April 20, '39

CHAPTER 167

GOVERNMENT OF INSTITUTIONS

Atty. Gen. Opinions. See '28 AG Op 149; '36 AG Op 107, 455; '38 AG Op 559, 888

3287 Institutions controlled.

Atty. Gen. Opinions. See '25-26 AG Op 405; '28 AG Op 149; '36 AG Op 103, 107, 567, 573; '38 AG Op 106, 143, 373

3288 Powers of governor.

Atty. Gen. Opinions. See '36 AG Op 107; '38 AG Op 38

3290 Rules—fire—additional duties.

Atty. Gen. Opinion. See '36 AG Op 107

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

3292 Executive officers—tenure—removal.

Atty. Gen. Opinions. See '36 AG Op 381, 573

3293 Subordinate officers and employees.

Atty. Gen. Opinions. See '36 AG Op 103, 687; AG Op April 12, '38

Proper demand for accounting. Where the board of control of state institutions legally creates an official position, and charges the incumbent with the duty of collecting and accounting for certain state funds, a demand for an accounting, as a basis for a prosecution for embezzlement, is properly made by the treasurer of state, said latter official being the official ultimately entitled to the custody of said funds.

State v Conway, 219-1155; 260 NW 88

Informal creation of office — effect. The appointee to a public position who duly qualifies, gives bond and acts in the collection of public funds, is a public officer within the meaning of the statute prohibiting embezzlement by public officers even tho said position and the duties thereunder were very informally created at an unrecorded, impromptu meeting of a majority of the members of the official governing body.

State v Conway, 219-1155; 260 NW 88

Liability of officers. An employee of a state hospital for the insane may not recover of the executive officer of the institution the value of the use of the employee's automobile on behalf of the state, on the simple allegation that the said officer refused him the use of an automobile which belonged to the state, and that thereupon the employee used his own vehicle.

Cross v Donohoe, 202-484; 210 NW 532

3296 Salaries.

Atty. Gen. Opinion. See '36 AG Op 687

3297 Dwelling house and provisions.

Atty. Gen. Opinions. See '30 AG Op 173; '36 AG Op 103

3299 Vacations.

Atty. Gen. Opinion. See AG Op May 3, '39

Refusal to grant vacation. An employee of a state hospital for the insane may not maintain an action against the executive officer of the institution on the naked allegation that said officer deprived him of the annual vacation which is provided by law, especially when it appears that the employee has received his full annual salary and does not show wherein he was damaged.

Cross v Donohoe, 202-484; 210 NW 532

3317 State agents.
Atty. Gen. Opinion. See '38 AG Op 373

3319 Duties of agents.
Atty. Gen. Opinion. See '38 AG Op 373

3323 Services required.
Atty. Gen. Opinion. See '38 AG Op 106

3325 Wages of inmates.
Atty. Gen. Opinion. See '38 AG Op 94

3326 Deduction to pay court costs.
Atty. Gen. Opinion. See '38 AG Op 94

3330 Monthly report.
Atty. Gen. Opinion. See '36 AG Op 240

3345 State architect.
Atty. Gen. Opinion. See '38 AG Op 38

3346 Plans and specifications.
Atty. Gen. Opinion. See '38 AG Op 38

3347 Letting of contracts.
Atty. Gen. Opinion. See '38 AG Op 38

3348 Preliminary deposit.
Atty. Gen. Opinion. See '38 AG Op 38

3349 Improvements by day labor.
Atty. Gen. Opinion. See '38 AG Op 38

3350 Improvements at institutions.
Atty. Gen. Opinion. See '38 AG Op 38

3360 Industries.
Atty. Gen. Opinion. See '38 AG Op 259

CHAPTER 168.1

SOLDIERS HOME

Atty. Gen. Opinion. See '28 AG Op 323

CHAPTER 169

STATE SANATORIUM

Atty. Gen. Opinion. See '30 AG Op 274

3386 Object and purposes.
Atty. Gen. Opinions. See '30 AG Op 274, '38 AG Op 254

3390 Admission.
Atty. Gen. Opinions. See '25-26 AG Op 256; '38 AG Op 254

3391 Additional showing.
Atty. Gen. Opinion. See '38 AG Op 254

3395 Indigent patients.
Atty. Gen. Opinions. See '32 AG Op 165; '38 AG Op 97, 459

3396 Advancing transportation expense.
Atty. Gen. Opinions. See '38 AG Op 97, 459

3397 Certificates as to number of inmates.
Atty. Gen. Opinion. See '38 AG Op 97

3398 Certificate of monthly allowance.
Atty. Gen. Opinion. See '38 AG Op 97

3399 Liability of county.
Atty. Gen. Opinions. See '38 AG Op 97, 459; AG Op Feb. 13, '39

Tubercular patient's expense—county paying state—reimbursement. In an action by the county against a husband and wife for reimbursement for amount paid by county to the state for the wife's keep at state tubercular sanatorium, fact that wife was admitted to sanatorium through efforts of county soldiers and sailors relief commission would relieve neither her nor her husband from liability to the county for her expense at the sanatorium.

Woodbury County v Harbeck, 224-1142; 278 NW 918

3400 Liability of patients and others.
Atty. Gen. Opinion. See '38 AG Op 97

"Legally bound" person defined.

Iowa Co. v Amana Soc., 214-893; 243 NW 299

Tubercular patient's expense—county paying state—reimbursement. In an action by the county against a husband and wife for reimbursement for amount paid by county to the state for the wife's keep at state tubercular sanatorium, fact that wife was admitted to sanatorium through efforts of county soldiers and sailors relief commission would relieve neither her nor her husband from liability to the county for her expense at the sanatorium.

Woodbury County v Harbeck, 224-1142; 278 NW 918

3401 Patients and others liable.
Atty. Gen. Opinion. See '38 AG Op 97

Tubercular patient's expense—county paying state—reimbursement. In an action by the county against a husband and wife for reimbursement for amount paid by county to the state for the wife's keep at state tubercular sanatorium, fact that wife was admitted to sanatorium through efforts of county soldiers and sailors relief commission would relieve neither her nor her husband from liability to the county for her expense at the sanatorium.

Woodbury County v Harbeck, 224-1142; 278 NW 918

CHAPTER 170

GLENWOOD STATE SCHOOL

3405 Admission and discharge.
Atty. Gen. Opinion. See '30 AG Op 375

3406 Clothing.
Atty. Gen. Opinion. See '38 AG Op 97

3409 Liability of inmate.
Atty. Gen. Opinion. See '38 AG Op 97

"Legally bound" person defined.
Iowa Co. v Amana Soc., 214-893; 243 NW 299

3410 Release from liability.
Atty. Gen. Opinion. See '38 AG Op 97

CHAPTER 171

GUARDIANSHIP AND CUSTODY OF FEEBLE-MINDED

Atty. Gen. Opinion. See '30 AG Op 375

CHAPTER 172

HOSPITAL FOR EPILEPTICS AND SCHOOL FOR FEEBLE-MINDED

3466 Qualifications of superintendent —salary.
Atty. Gen. Opinion. See '34 AG Op 699

3471 Statutes applicable.
Atty. Gen. Opinion. See '38 AG Op 66

3477.1 Clothing.
Atty. Gen. Opinion. See '38 AG Op 97

CHAPTER 173

DRUG ADDICTS

Atty. Gen. Opinion. See '38 AG Op 93

3478 Commitment.

"Inebriacy" defined. Inebriacy is the state of drunkenness or habitual intoxication.
Maher v Brown, 225-341; 280 NW 553

Accused in state hospital—term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.
Maher v Brown, 225-341; 280 NW 553

3479 Statutes applicable.
Atty. Gen. Opinion. See '38 AG Op. 93

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.
Maher v Brown, 225-341; 280 NW 553

CHAPTER 173.1

PSYCHOPATHIC HOSPITAL

3482.02 Name—location.
Atty. Gen. Opinion. See '30 AG Op 219

3482.09 Voluntary private patients.
Atty. Gen. Opinion. See '28 AG Op 47

3482.33 Death of patient—disposal of body.
Atty. Gen. Opinion. See '32 AG Op 94

3482.34 Appropriation.
Atty. Gen. Opinion. See '32 AG Op 94

CHAPTER 174

STATE HOSPITALS FOR INSANE

3488 Duties of superintendent.

Atty. Gen. Opinion. See '38 AG Op 93

3500 Investigation as to sanity.

Funds to retry issue of sanity—discretion of court. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

3501 Discharge—certificate.

Atty. Gen. Opinion. See '36 AG Op 573

Adjudication of insanity—evidentiary effect. One who has been duly and legally adjudged to be insane, and seeks to regain his liberty under a writ of habeas corpus, has the burden to establish his sanity.

Bettenga v Stewart, 214-1284; 244 NW 279

Presumption of sanity—jury question. Presumptively a person is sane from and after the time such person is discharged from an insane asylum to which he has been committed for treatment. Evidence, expert and nonexpert, reviewed and held to present a jury question on the issue whether an insured was sane at the time a policy of insurance was issued notwithstanding the conceded fact that said insured had, some four years prior to the issuance of the policy, been adjudged insane and committed to an asylum for the insane and had remained there some three years before being granted a discharge.

Foy v Ins. Co., 220-628; 263 NW 14

3505 Harmless incurables.

Atty. Gen. Opinion. See '36 AG Op 573

3506 Certificate covering subsequent recovery.

Atty. Gen. Opinion. See '36 AG Op 573

3507 Certificate and effect thereof.

Atty. Gen. Opinion. See '36 AG Op 573

3508 Dangerous incurables.

Atty. Gen. Opinion. See '36 AG Op 573

3509 Patient accused of crime.

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.

Maher v Brown, 225-341; 280 NW 553

Term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.

Maher v Brown, 225-341; 280 NW 553

CHAPTER 175

COUNTY AND PRIVATE HOSPITALS FOR INSANE

3527 Transfers from state hospitals.

Atty. Gen. Opinion. See '36 AG Op 573

CHAPTER 176

COMMISSION OF INSANITY

Atty. Gen. Opinions. See '25-26 AG Op 342; '36 AG Op 573

3536 Organization.

Court clerk as commissioner of insanity. The clerk of the district court may not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity.

Baldwin v Stewart, 207-1135; 222 NW 348

3540 Jurisdiction — holding under criminal charge.

Atty. Gen. Opinion. See '25-26 AG Op 207

Exclusive jurisdiction of district court. The district court acquires exclusive jurisdiction to determine the sanity of an indicted person when he is taken into custody under an indictment, and, during the pendency of such indictment, such jurisdiction continues, and attaches under a subsequently returned indictment under which the person is taken into custody. It follows that an adjudication of insanity of such person by the commission of insanity subsequent to the first indictment and prior to the last indictment is a nullity.

State v Murphy, 205-1130; 217 NW 225

3541 Compensation and expenses.

Atty. Gen. Opinion. See '30 AG Op 177

3542 Costs—how paid.

Atty. Gen. Opinion. See '30 AG Op 177

CHAPTER 177

COMMITMENT AND DISCHARGE OF INSANE

Atty. Gen. Opinions. See '25-26 AG Op 207, 342; '36 AG Op 573

3544 Form of information.

Atty. Gen. Opinion. See '30 AG Op 178

Malicious prosecution — want of probable cause—discharge on insanity inquest. The discharge on an insanity inquest of the person alleged to be insane, does not furnish sufficient proof that the person signing the information did so without probable cause.

Dugan v Cap Co., 213-751; 239 NW 697

Want of probable cause—nonallowable presumption. Principle reaffirmed that while malice may be inferred from a total want of probable cause, yet a want of probable cause cannot be inferred from malice, however great.

Dugan v Cap Co., 213-751; 239 NW 697

3552 Findings and order.

Atty. Gen. Opinions. See '30 AG Op 178; '38 AG Op 365

Adjudication of insanity — nonretroactive presumption. An adjudication of insanity creates no presumption that the person in question was insane at any particular period of time prior to said adjudication.

Davidson v Piper, 221-171; 265 NW 107

Expert and lay opinions — which must yield. An expert opinion that a person was insane at a named time prior to the time when said person was judicially declared insane will not be permitted to outweigh overwhelming lay testimony which strongly tends to establish the contrary, when said expert opinion is based almost wholly on information obtained from said person after she was adjudged insane, and on information obtained from the relatives of said person. (Equity case)

Davidson v Piper, 221-171; 265 NW 107

Monomania — belief supported by evidence not illusion. Monomania is generally defined as a derangement of the mind on a single subject, but a belief ceases to be an illusion if there is any evidence to support it.

Mastain v Butschy, 224-68; 276 NW 79

Want of probable cause—discharge on insanity inquest—effect. The discharge on an insanity inquest of the person alleged to be insane, does not furnish sufficient proof that the person signing the information did so without probable cause.

Dugan v Cap Co., 213-751; 239 NW 697

3560 Appeal.

Inquisitions — appeal—special proceeding—no jury. An appeal to the district court from the finding of the county insanity commission is a special proceeding, and, since the legislature did not provide for a jury trial, the issue is triable to the court.

In re Brewer, 224-773; 276 NW 766

Insanity appeal — noncriminal — nonjury — constitutionality. No constitutional rights are violated in trying an appeal from the insanity commission to the court without a jury, since this is not in any way a criminal proceeding.

In re Brewer, 224-773; 276 NW 766

Nonexpert opinion as to insanity. Nonexpert opinion as to unsoundness of mind is inadmissible unless the nonexpert witness first details such facts as tend, in the judgment of the court, to show an abnormal state of mind of the person whose mentality is under investigation.

Campfield v Rutt, 211-1077; 235 NW 59

3562.1 Beneficiaries of the veterans bureau.

Atty. Gen. Opinion. See '32 AG Op 66

3564 Temporary custody in certain cases.

Atty. Gen. Opinion. See '36 AG Op 573

3567 Custody outside state hospitals.

Atty. Gen. Opinion. See '36 AG Op 573

3570 Discharge from custody.

Atty. Gen. Opinion. See '36 AG Op 573

3571 Commission of inquiry.

Atty. Gen. Opinion. See '25-26 AG Op 207

Funds to retry issue of sanity—discretion of court. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

3577 Habeas corpus.

Insanity — presumption — burden of proof. One judicially held to be insane has the burden to overthrow the presumption that such insane condition continues.

Hazen v Donahoe, 208-582; 226 NW 33
Bettenga v Stewart, 214-1284; 244 NW 279

CHAPTER 178

SUPPORT OF INSANE

Atty. Gen. Opinions. See '25-26, AG Op 342; '28 AG Op 406; '38 AG Op 66

3581 Liability of county and state.

Atty. Gen. Opinions. See '26 AG Op 54; '38 AG Op 66

County paying support of insane person—laches of officials imputed to county. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Continuing liability of county of legal settlement. A resident of a county who has no legal settlement therein continues, in case of his commitment to a state hospital for the insane, a legal charge upon that particular county of the state wherein he has such legal settlement, and such charge continues until, by the lapse of one year without notice to depart, his residence ripens into a legal settlement, after which he becomes a legal charge upon the county wherein he has both his residence and legal settlement.

State v Story County, 207-1117; 224 NW 232

Insane wife—acquiring legal settlement—county liable for support. Under a statute providing that "the residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto", when the mother of a family was committed as insane within a few months after moving to another county, the residence at the time of commitment was in the county to which she had moved, and since no warning to depart was served on her, she acquired a legal settlement in the new county at the end of a year, regardless of the residence of her husband at the time, and that county was liable for her support in the institution after the end of the year.

State v Clay County, 226-885; 285 NW 229

Pauper—insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

Legal settlement of pauper — failure of county to determine—liability for care. When a pauper moved to another county, the failure of the county from which she had moved to take steps to have her legal settlement determined did not estop it from claiming that she acquired a legal settlement in the other county, when it was liable for the care of the pauper for a year after moving, and during that time had no reason to dispute the settlement and did not misrepresent or conceal any facts to cause the other county to fail to serve a warning to depart.

State v Clay County, 226-885; 285 NW 229

3582 Finding of legal settlement.

Atty. Gen. Opinion. See '38 AG Op 365

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

Legal settlement of pauper — failure of county to determine—liability for care. When a pauper moved to another county, the failure of the county from which she had moved to take steps to have her legal settlement determined did not estop it from claiming that she acquired a legal settlement in the other county, when it was liable for the care of the pauper for a year after moving, and during that time had no reason to dispute the settlement and did not misrepresent or conceal any facts to cause the other county to fail to serve a warning to depart.

State v Clay County, 226-885; 285 NW 229

Insane wife—acquiring legal settlement—county liable for support. Under a statute providing that "the residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto", when the mother of a family was committed as insane within a few months after moving to another county, the residence at the time of commitment was in

the county to which she had moved, and since no warning to depart was served on her, she acquired a legal settlement in the new county at the end of a year, regardless of the residence of her husband at the time, and that county was liable for her support in the institution after the end of the year.

State v Clay County, 226-885; 285 NW 229

3583 Certification of settlement.

Atty. Gen. Opinions. See '30 AG Op 125, 275; '32 AG Op 49

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

3584 Certification to debtor county.

Atty. Gen. Opinion. See '30 AG Op 125

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

3586 Determination by board.

Atty. Gen. Opinion. See '25-26 AG Op 115

3587 Removal of nonresidents.

Atty. Gen. Opinion. See '38 AG Op 66

3589 Subsequent discovery of residence.

Atty. Gen. Opinion. See '28 AG Op 406

3590 Preliminary payment of costs.

Atty. Gen. Opinions. See '30 AG Op 275; '32 AG Op 66

3591 Recovery of costs from state.

Atty. Gen. Opinion. See '34 AG Op 92

3592 Action to determine legal settlement.

County paying support of insane person—laches of officials imputed to county. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

3593 Judgment when settlement found within state.

County paying support of insane person—laches of officials imputed to county. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

3594 Order when nonresidence or unknown settlement appears.

Appeal nonallowable. No appeal lies from a decision of the trial court on a duly joined issue as to the legal settlement of an insane inmate of a state hospital for the insane.

State v Webster County, 209-143; 227 NW 595

3595 Personal liability.

Atty. Gen. Opinions. See '30 AG Op 75, 356; '36 AG Op 383; '38 AG Op 785

Prior statute. Parents are not liable to a county for the support of their adult insane children in the state hospitals for the insane.

Wright Co. v Hagan, 210-795; 231 NW 298

Holding under former statute. Where a county has maintained in a state hospital an insane person who was a member of an incorporated religious and communistic society, the county's statutory right to recover the resulting expense from any person "legally liable" for the support of such insane person does not entitle it to recover such expense from the said society simply on proof that the society had obligated itself by contract to support said member for life. "Legal" liability under the statute is confined strictly to "common-law" liability.

Iowa Co. v Amana Soc., 214-893; 243 NW 299

County's claim for insane support—filing necessary. County's maintenance claim against estate of deceased who was inmate of state insane hospital is not a public rate or tax so as to make the filing of the claim against the estate unnecessary.

In re Wagner, 226-667; 284 NW 425

Compromise of claims by county — power of board. The board of supervisors, on a proper state of facts, has power to compromise the amount due on judgments obtained by the county for support rendered an incompetent in a state hospital for the insane, and to agree, in consideration of the payment of the compromised sum, that a specific tract of land standing in the name of the incompetent and the proceeds and accumulations of said proceeds, shall be exempt from all liability for the future support of said incompetent by the county in said hospital. So held where the land was encumbered (1) by judgment on mortgage foreclosure, (2) by a judgment other than those of the county, (3) by an outstanding tax sale certificate, and (4) by an apparently quite persuasive claim of both homestead rights and ownership in the wife of said incompetent.

Plymouth County v Koehler, 221-1022; 267 NW 106

Indigent's expense — county's reimbursement. In an action by the county against a husband and wife for reimbursement for amount paid by county to the state for the wife's keep at state tubercular sanatorium, fact that wife was admitted to sanatorium through efforts of county soldiers and sailors relief commission would relieve neither her nor her husband from liability to the county for her expense at the sanatorium.

Woodbury County v Harbeck, 224-1142; 278 NW 918

Unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally levied on the property of the ward and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

3597 Board may compromise lien.

Atty. Gen. Opinion. See '38 AG Op 785

3600 Expenses certified to counties.

Atty. Gen. Opinions. See '34 AG Op 526; '38 AG Op 421, 459

3603 Hospital support fund.

Atty. Gen. Opinion. See '34 AG Op 679

3604 County fund for insane.

Atty. Gen. Opinion. See '38 AG Op 97

3604.1 Lien of assistance.

Atty. Gen. Opinions. See AG Op July 11, '39, Sept. 23, '39

CHAPTER 179

JUVENILE COURT

Atty. Gen. Opinion. See '36 AG Op 345

3605 Jurisdiction.

Atty. Gen. Opinions. See '28 AG Op 309; '38 AG Op 464, 651

Jurisdiction over indictments. The juvenile court act has not deprived the district court of jurisdiction over indictments against persons under eighteen years of age.

State v Reed, 207-557; 218 NW 609

3606 How constituted.

Atty. Gen. Opinions. See '28 AG Op 309; '38 AG Op 464

Jurisdiction of judge. A judge of the district court is by statute ex officio judge of the juvenile court, even tho he has not been formally designated and assigned to such work by the district judges of the district.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

3607 Designation of judge.

Atty. Gen. Opinions. See '28 AG Op 309; '38 AG Op 464

3608 Effect.

Atty. Gen. Opinion. See '38 AG Op 464

3614 Powers and duties — office and supplies.

Irregular investigation. The fact that an investigation of a juvenile matter was, at the request of the judge, made by a person prior to the actual appointment of such person as probation officer, but presented to the court after appointment and on the final hearing of the matter, presents no element of illegality such as to disturb the jurisdiction of the court.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

Presence of probation officer. Proceedings in juvenile court are not rendered illegal because the duly appointed probation officer was not present in court to represent the child when the matter was first taken up and heard in part.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

3616 Salaries—expenses—how paid.

Atty. Gen. Opinion. See '32 AG Op 203

CHAPTER 180

CARE OF NEGLECTED, DEPENDENT, AND DELINQUENT CHILDREN

3617 Applicable to certain children.

Atty. Gen. Opinions. See '28 AG Op 142, 309; '34 AG Op 638; '36 AG Op 305; '38 AG Op 899

3618 "Dependent and neglected child" defined.

Atty. Gen. Opinions. See '25-26 AG Op 401; '34 AG Op 404

3620 "Child", "parent", and "institution" defined.

Atty. Gen. Opinion. See '36 AG Op 305

3621 Petitions—prior investigation.

Atty. Gen. Opinions. See '28 AG Op 309; '38 AG Op 899

3622 Petition may embrace several children.

Atty. Gen. Opinion. See '38 AG Op 899

3629 Hearing—continuance.

Trial by court. The juvenile court act is not violative of the due process clause of the federal and state constitution because no provision is made for a jury trial of juvenile delinquents.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

Appeal—absence of. The right of appeal is not a constitutional right, and it is wholly within the power of the legislature to grant, or deny it, in either civil or criminal cases. So held under the juvenile court act. (See also Const. Art. I, §9.)

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

3631 Appointment to represent child.

Compensation—attorney appointed by juvenile court. The court by statute has power and authority to appoint attorneys to represent juvenile delinquents in municipal court, unable to employ counsel, and an obligation arises on the part of the county to pay a reasonable attorney fee, altho statute makes no provision therefor.

Ferguson v Pottawattamie Co., 224-516; 278 NW 223

3632 Information charging crime.

Atty. Gen. Opinions. See '28 AG Op 309; '34 AG Op 639

Jurisdiction of district court. The juvenile court act has not deprived the district court of jurisdiction over indictments against persons under eighteen years of age.

State v Reed, 207-557; 218 NW 609

3634 Prosecutions transferred.

Atty. Gen. Opinions. See '34 AG Op 639; AG Op March 31, '39

3636 Conviction of crime—alternative procedure.

Atty. Gen. Opinions. See '28 AG Op 309; AG Op March 15, '39

Jurisdiction of district court. The juvenile court act has not deprived the district court of jurisdiction over indictments against persons under eighteen years of age.

State v Reed, 207-557; 218 NW 609

3637 Alternative commitments.

Atty. Gen. Opinions. See '25-26 AG Op 336; '38 AG Op 421, 571, 899

3638 Guardianship and adoption.

Atty. Gen. Opinions. See '25-26 AG Op 336; '34 AG Op 404; '38 AG Op 421, 899; AG Op April 25, '39

3639 Conditions attending commitment.

Atty. Gen. Opinions. See '25-26 AG Op 336; '32 AG Op 39; '38 AG Op 421, 899

3641 Aid to widow in care of child.

Atty. Gen. Opinions. See '25-26 AG Op 139, 476; '28 AG Op 257, 261, 406; '30 AG Op 154, 216; '32 AG Op 144, 146, 205, 207, 255; '38 AG Op 436, 651, 869; AG Op Feb. 8, '39, May 9, '39, Aug. 4, '39, Feb. 15, '40

Residence only essential. The jurisdiction of the juvenile court to adjudicate and order the payment by the county of a "pension" to the mother of indigent, dependent minor children depends, inter alia, not on a finding of legal settlement of the mother in the county, within the meaning of §5311, C., '24 [§3828.088, C., '39], but on a finding of residence in the county by the mother for one year.

Adams Co. v Maxwell, 202-1327; 212 NW 152

3642 Duration of order.

Atty. Gen. Opinion. See '38 AG Op 436

3643 Who considered widow.

Atty. Gen. Opinions. See '28 AG Op 257, 261; '30 AG Op 225; '38 AG Op 436, 651

3646 Mandatory commitments.

Atty. Gen. Opinions. See '25-26 AG Op 401; '28 AG Op 166, 304; '36 AG Op 305; '38 AG Op 421, 559, 571, 899

Adjudication of neglect and dependency—effect. The due commitment of a child to a proper state institution on a legal adjudication that the child is "neglected and dependent" permanently deprives the parent of all right to the custody or control of said child.

Stephens v Treat, 202-1077; 209 NW 282

3648 Right to transfer.

Atty. Gen. Opinion. See '28 AG Op 304

3649 Term of commitment—warrant.

Atty. Gen. Opinions. See '25-26 AG Op 401; '30 AG Op 367; '32 AG Op 39; '38 AG Op 89, 421, 899

3653 Detention home and school in certain counties.

Atty. Gen. Opinions. See '25-26 AG Op 59; '28 AG Op 142; '38 AG Op 181

3654 Tax.

Atty. Gen. Opinions. See '25-26 AG Op 59; '38 AG Op 181

3655 Approval of institutions.

Atty. Gen. Opinions. See '25-26 AG Op 59; '38 AG Op 373, 571

3656 Reports by court and institutions.

Atty. Gen. Opinions. See '38 AG Op 373, 571

CHAPTER 181

CONTRIBUTING TO JUVENILE DELINQUENCY

Atty. Gen. Opinions. See '34 AG Op 359; '38 AG Op 464

CHAPTER 181.1

SOCIAL WELFARE DEPARTMENT

3661.007 Powers and duties of the state board.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

3661.013 County board employees.

Atty. Gen. Opinions. See '38 AG Op 376; AG Op June 23, '39

3661.014 Compensation of county board employees.

Atty. Gen. Opinions. See '38 AG Op 376; AG Op Aug. 1, '39

CHAPTER 181.2

CHILD WELFARE

Atty. Gen. Opinions. See '34 AG Op 359, 647

CHAPTER 181.3

MATERNITY HOSPITALS

Atty. Gen. Opinions. See '38 AG Op 373, 477

CHAPTER 181.4

CHILDREN'S BOARDING HOMES

Atty. Gen. Opinions. See '38 AG Op 373, 477, 569, 571

CHAPTER 181.5

CHILD-PLACING AGENCIES

Atty. Gen. Opinions. See '25-26 AG Op 213; '34 AG Op 466; '38 AG Op 373, 571

3661.073 "Child-placing agency" defined.

Pupils of charitable institution. Statute providing that persons of school age who are residents of districts not having a four-year high school course shall be permitted to attend any public high school in the state, construed to extend to wards of a charitable institution—the legislature not intending to discriminate against private, denominational, or parochial schools, nor to bar them from the benefits of statutory provisions.

School Twp. v Nicholson, 227-290; 288 NW 123

School benefits applicable to charitable institutions. A charitable institution, concededly a home-finding agency under statutory authorization, which, however, did not engage in finding homes and did not comply with the law in accepting children and did not comply with

adoption law, was nevertheless properly held to be entitled to benefits of school law for the reason that violations of other statutes were immaterial issues.

School Twp. v Nicholson, 227-290; 288 NW 123

3661.074 Power to license.

Atty. Gen. Opinion. See '38 AG Op 477

3661.087 Rules and regulations.

Atty. Gen. Opinion. See '38 AG Op 477

3661.090 Inspection generally.

Atty. Gen. Opinion. See '38 AG Op 477

3661.094 Annual report.

Atty. Gen. Opinions. See '25-26 AG Op 214; '38 AG Op 477

3661.096 Assumption of care and custody.

Pseudo parent. On the issue of custody, the welfare of the child must control, especially when one of the contenders is a pseudo parent.

Tilton v Tilton, 206-998; 221 NW 552

3661.097 Relinquishment of rights and duties.

Atty. Gen. Opinion. See AG Op March 27, '40

3661.099 Relinquishment, parents not married.

Atty. Gen. Opinion. See AG Op March 27, '40

3661.103 Authority to agencies.

Atty. Gen. Opinions. See '38 AG Op 571; AG Op March 27, '40

3661.104 Importation of children.

Atty. Gen. Opinion. See '34 AG Op 143

CHAPTER 182

PRIVATE INSTITUTIONS FOR NEGLECTED, DEPENDENT, AND DELINQUENT CHILDREN

Atty. Gen. Opinions. See '38 AG Op 373, 464, 571

CHAPTER 182.1

AID FOR THE BLIND

3684.02 Eligibility for assistance to the needy blind.

Atty. Gen. Opinion. See '38 AG Op 139, 667; AG Op June 26, '39

Holding under prior statutes. The discretion of the board of supervisors to refuse public aid to a blind person may not be controlled by mandamus.

Addison v Loudon, 206-1358; 222 NW 406

3684.03 Amount of assistance.

Atty. Gen. Opinion. See '38 AG Op 408, 667

Decision under former statutes. Moneys appropriated by the board to a blind person, and not applied to the relief of such blind person, revert to the county upon the death of such person.

In re Hugus, 203-607; 213 NW 239

3684.06 Application for assistance.

Atty. Gen. Opinion. See '38 AG Op 139

3684.18 Reimbursement from estate.

Atty. Gen. Opinions. See '38 AG Op 609, 667

CHAPTER 183

TRAINING SCHOOLS

Atty. Gen. Opinion. See '38 AG Op 464

3685 Official designation.

Spur track to state institution—maintenance cost. After a contract placed the burden on the state to pay the cost of construction, maintenance, and operation of a spur track to the industrial school for boys at Eldora, a state institution, and in a later clause required the railway company to maintain the spur track, the contract as a whole was construed and the apparent ambiguity resolved in a finding that the railroad should do the maintenance work, but that the state should pay the cost.

State v Sprague, 225-766; 281 NW 349

3689 Procedure to commit.

Adjudication of neglect and dependency—effect. The due commitment of a child to a proper state institution on a legal adjudication that the child is "neglected and dependent" permanently deprives the parent of all right to the custody or control of said child.

Stephens v Treat, 202-1077; 209 NW 282

3696 Discharge or parole.

Atty. Gen. Opinion. See '38 AG Op 89

CHAPTER 184

IOWA JUVENILE HOME

Atty. Gen. Opinion. See '38 AG Op 464

3698 Objects.

Atty. Gen. Opinions. See '36 AG Op 567; '38 AG Op 421, 559

3699 Procedure for commitment.

Adjudication of neglect and dependency—effect. The due commitment of a child to a proper state institution on a legal adjudication that the child is "neglected and dependent" permanently deprives the parent of all right to the custody or control of said child.

Stephens v Treat, 202-1077; 209 NW 282

3702 Adoption or placing under contract.

Atty. Gen. Opinions. See '38 AG Op 421, 559

3703 Counties liable for support.

Atty. Gen. Opinions. See '28 AG Op 335; '36 AG Op 567; '38 AG Op 97

CHAPTER 185

IOWA SOLDIERS' ORPHANS HOME

Atty. Gen. Opinions. See '34 AG Op 359, 695; '38 AG Op 464

3706 Objects.

Atty. Gen. Opinions. See '28 AG Op 46; '34 AG Op 604

3708 Admissions.

Atty. Gen. Opinions. See '25-26 AG Op 162; '34 AG Op 695; '38 AG Op 421

Adjudication of neglect and dependency — effect. The due commitment of a child to a proper state institution on a legal adjudication that the child is "neglected and dependent" permanently deprives the parent of all right to the custody or control of said child.

Stephens v Treat, 202-1077; 209 NW 282

3709 Procedure.

Atty. Gen. Opinion. See '38 AG Op 421

3711 Profits and earnings.

Atty. Gen. Opinion. See '38 AG Op 166

3712 Regulations.

Atty. Gen. Opinions. See '30 AG Op 367; '38 AG Op 421, 559

3713 Enumeration of soldiers' orphans.

Atty. Gen. Opinions. See '25-26 AG Op 163; '38 AG Op 829

3715.1 Adoption.

Atty. Gen. Opinion. See '38 AG Op 421

3716 Placing child under contract.

Atty. Gen. Opinions. See '30 AG Op 367; '34 AG Op 359, 647; '38 AG Op 421, 458, 559

3717 Recovery of possession.

Atty. Gen. Opinions. See '25-26 AG Op 470; '30 AG Op 367

3720 Counties liable.

Atty. Gen. Opinions. See '25-26 AG Op 163, 401; '34 AG Op 695; '38 AG Op 97, 458

CHAPTER 186

WOMEN'S REFORMATORY

Atty. Gen. Opinions. See '36 AG Op 305; '38 AG Op 87, 888

CHAPTER 187

PENITENTIARY AND MEN'S REFORMATORY

3745 Household and domestic service.

Atty. Gen. Opinion. See '36 AG Op 103

3762 Purchase mandatory.

Atty. Gen. Opinion. See '28 AG Op 429

3763 Selling price.

Atty. Gen. Opinion. See '28 AG Op 429

3764.1 Industry revolving funds.

Atty. Gen. Opinion. See '28 AG Op 264

3764.2 Use of funds.

Atty. Gen. Opinion. See '28 AG Op 264

3764.3 Funds permanent.

Atty. Gen. Opinion. See '28 AG Op 264

3770 Escape of prisoner.

Atty. Gen. Opinions. See '30 AG Op 258; '34 AG Op 737; '38 AG Op 363, 888

3770.1 Payment of award—appropriation.

Reward. See under §13465

Atty. Gen. Opinions. See '34 AG Op 737; '38 AG Op 363

3772 Property of convict.

Atty. Gen. Opinion. See '38 AG Op 94

3773 Time to be served.

Atty. Gen. Opinions. See '25-26 AG Op 33; '38 AG Op 883; AG Op March 8, '39

Credit on federal sentence while in state reformatory—not commutation of sentence. A prisoner who is in the state reformatory serving a sentence imposed by the state court is to be considered a prisoner of the state, notwithstanding the fact that he may at the same time be obtaining credit on a sentence imposed by a federal court.

State v Thomason, 226-1057; 285 NW 636

3774 Reduction of sentence.

Atty. Gen. Opinions. See '25-26 AG Op 33; '38 AG Op 883

Indeterminate sentences not made concurrent—habeas corpus not available. That defendant's imprisonment, if he is compelled to serve full time for each offense, would cover 82 years affords no legal ground for discharge from custody under indeterminate sentences in habeas corpus proceedings, even tho defendant was only 18 years of age and had not been represented by counsel at time pleas of guilty were entered.

Randall v Hollowell, (NOR); 227 NW 139

3775 Records of prisoners.

Atty. Gen. Opinion. See '25-26 AG Op 33

3776 Forfeiture of reduction.

Atty. Gen. Opinion. See '25-26 AG Op 33

3777 Separate sentences.

Atty. Gen. Opinion. See '25-26 AG Op 33

3778 Special reduction.

Atty. Gen. Opinion. See '28 AG Op 268

3779 Discharge—transportation, clothing, and money.

Atty. Gen. Opinion. See '36 AG Op 113

CHAPTER 188

PAROLES

Atty. Gen. Opinions. See '34 AG Op 484; '38 AG Op 334

3783 Appointment—vacancies.

Atty. Gen. Opinion. See '30 AG Op 52

3784 Expenses.

Atty. Gen. Opinion. See '34 AG Op 484

3785 Trips to other states.

Atty. Gen. Opinion. See '25-26 AG Op 372

3786 Power to parole after commitment.

Atty. Gen. Opinions. See '28 AG Op 282; '32 AG Op 240; '34 AG Op 728, 751

3787 Rules.

Atty Gen. Opinion. See '34 AG Op 751

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

3788 Parole before commitment.

Atty. Gen. Opinions. See '32 AG Op 229; '34 AG Op 751

3790 Legal custody of paroled prisoners.

Atty. Gen. Opinion. See '30 AG Op 247

3800 Parole by board.

Atty. Gen. Opinions. See '28 AG Op 236, 433; '34 AG Op 241; AG Op Feb. 24, '39

Right to revoke without notice. A defendant who is granted a suspension of sentence must take it with the statutory burden accompanying it, to wit: the right of the court to revoke the suspension at any time without notice or opportunity to be heard.

Pagano v Bechly, 211-1294; 232 NW 798

Sentence—unlawful suspension. The court has no power in a criminal case to enter a suspension of sentence during good behavior and on payment of the costs.

State v Hamilton, 206-414; 220 NW 313

3801 Custody of court parolee.

Atty. Gen. Opinion. See '30 AG Op 258

3805 Revocation of parole.

Atty. Gen. Opinion. See AG Op June 5, '37

Right to revoke without notice. A defendant, granted a suspension of sentence, must take it with the statutory burden accompanying it, to wit: the right of the court to revoke the suspension at any time without notice or opportunity to be heard.

Pagano v Bechly, 211-1294; 232 NW 798

Suspended sentence—power to set aside. The suspension of a sentence by the court may be set aside by the court even after the lapse of the time covered by the sentence. In other words, the court may at any time reinstate a suspended sentence and order its enforcement.

Bennett v Bradley, 216-1267; 249 NW 651

CHAPTER 189

PARDONS, COMMUTATIONS, REMISSION OF FINES AND FORFEITURES, AND RESTORATION TO CITIZENSHIP

Atty. Gen. Opinions. See '34 AG Op 181; '38 AG Op 334

3812 Reprieves and pardons.

Annotations relative to pardons. See Const Art IV, §16, Vol I

Discussion. See 8 ILB 177—Judicial annulment of pardons

Atty. Gen. Opinions. See '28 AG Op 236; '34 AG Op 181; AG Op Feb. 9, '39

3813 Pardon.

Discussion. See 14 ILR 447—Pardons of contempts of court

Atty. Gen. Opinion. See '28 AG Op 236

3817 Conditions prerequisite to a pardon.

Atty. Gen. Opinions. See '34 AG Op 181, 372

3823 Restoration to citizenship

Atty. Gen. Opinions. See '36 AG Op 417, 461

3824 Fines and forfeitures

Annotations relative to fines and forfeitures. See Const Art IV, §16, Anno Vol I

Atty. Gen. Opinion. See '28 AG Op 236

CHAPTER 189.1

OLD-AGE ASSISTANCE

3828.001 Definitions.

Atty. Gen. Opinion. See '38 AG Op 389

3828.003 Powers and duties of the state board.

Atty. Gen. Opinion. See '38 AG Op 117

Social welfare board—executive functions—administrative duty in determining eligibility for relief—absence of fraud—appeal from findings.

Schneberger v Board, 228- ; 291 NW 859

3828.008 To whom granted.

Atty. Gen. Opinions. See '36 AG Op 461, 618, 676; '38 AG Op 157; AG Op June 26, '39

Voting as evidence of domicile. In determining domicile, fact that person voted in school election in Crawford county is not conclusive evidence that Crawford county was his residence.

Crawford County v Kock, 227-1235; 290 NW 682

3828.009 Amount of assistance.

Atty. Gen. Opinion. See AG Op Oct. 2, '39

3828.012 Property exclusions.

Atty. Gen. Opinions. See '36 AG Op 425; AG Op Jan. 29, '40

3828.015 Witnesses.

Atty. Gen. Opinion. See AG Op Sept. 12, '39

3828.016 Assistance certificate.

Atty. Gen. Opinion. See AG Op Mar. 23, '39

3828.021 Funeral expenses.

Atty. Gen. Opinions. See '38 AG Op 191, 424; AG Op Aug. 15, '39

3828.023 Transfer of property to the state.

Atty. Gen. Opinions. See '36 AG Op 425; '38 AG Op 400, 794; AG Op July 7, '39, July 10, '39, Aug. 15, '39, April 4, '40

3828.026 Assignment of insurance.

Atty. Gen. Opinions. See '36 AG Op 425; AG Op Jan. 29, '40

3828.029 When child's liability begins.

Atty. Gen. Opinion. See AG Op June 26, '39

3828.032 Recipient not to receive other assistance.

Atty. Gen. Opinions. See '36 AG Op 670; '38 AG Op 204; AG Op Aug. 23, '39, Oct. 2, '39

3828.035 Incapacity of applicant or recipient.

Atty. Gen. Opinions. See AG Op June 23, '39, Sept. 12, '39

3828.039 Assistance fund created.

Atty. Gen. Opinions. See '36 AG Op 403, 634; '38 AG Op 117, 157, 219, 434, 605; AG Op Mar. 18, '39, May 10, '39, Feb. 17, '40

Holding under prior statute. The actual and necessary expenses incurred by members of the old-age assistance board of a county are payable by the county but solely from the state old-age pension fund, such expenses being an "expenditure" within the meaning of §5296-f34, C., '35.

Jones v Dunkelberg, 221-1031; 265 NW 157

3828.042 Revolving fund created.

Atty. Gen. Opinion. See '36 AG Op 425

CHAPTER 189.2

RELIEF FOR SOLDIERS, SAILORS, AND MARINES

3828.051 Tax.

Atty. Gen. Opinions. See '30 AG Op 72, 234; '32 AG Op 163, 177, 201; '34 AG Op 708; '36 AG Op 105, 162; AG Op Jan. 31, '39, May 3, '39, May 10, '39, June 6, '39

3828.052 Control of fund.

Atty. Gen. Opinions. See '34 AG Op 708; AG Op June 14, '39

3828.053 Relief commission.

Discussion. See '28 AG Op 266; '36 AG Op 355

3828.056 Qualification—organization.

Atty. Gen. Opinions. See '28 AG Op 424; '34 AG Op 110

3828.057 Meetings—report—levy.

Atty. Gen. Opinions. See '30 AG Op 47; '36 AG Op 355

3828.059 Disbursements.

Atty. Gen. Opinions. See '34 AG Op 110, 242; '38 AG Op 5

3828.063 Expenses and audit thereof.

Atty. Gen. Opinion. See '30 AG Op 47

3828.065 Maintenance of graves.

Atty. Gen. Opinions. See '28 AG Op 380; '34 AG Op 510

3828.066 Payment—how made.

Atty. Gen. Opinion. See '28 AG Op 380

CHAPTER 189.3

EMERGENCY RELIEF ADMINISTRATION

3828.070 Duties of the county board of social welfare.

Atty. Gen. Opinion. See AG Op July 11, '39

CHAPTER 189.4

SUPPORT OF THE POOR

3828.073 "Poor person" defined.

Atty. Gen. Opinions. See '30 AG Op 356; '32 AG Op 192; '38 AG Op 204, 785

Applicability of statute. A person who is admittedly physically and financially unable to support himself is a "poor person" when it appears that he is sent to the county home by the township trustees in the exercise of a wise discretion, and especially is this true when the finding would be justified that the relatives had peremptorily refused longer to support such person.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

Poor person—evidence. Evidence held to show that a person was a "poor" person within the meaning of the statute.

Cherokee County v Smith, 219-490; 258 NW 182

3828.074 Parents and children liable.

Atty. Gen. Opinions. See '28 AG Op 276; '38 AG Op 327, 785, 864

Liability of "legally bound" persons.

Iowa Co. v Amana Soc., 214-893; 243 NW 299

Application—sufficiency. It is not necessary that a poor person personally make application to the township trustees for support in order to render the son liable for support furnished by the county.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

Recovery by county—condition. The county, in order to recover from the parents of a poor person who has been furnished poor relief, must establish that the said parents were able to support said child.

Cherokee County v Smith, 219-490; 258 NW 182

Holding under prior statutes. Parents are not liable for the support of their adult pauper children, unless such support is initiated by an application therefor by or to the township trustees. (§5328, C., '27, [§3828.105, C., '39]).

Wright County v Hagan, 210-795; 231 NW 298

3828.076 Who deemed trustee.

Atty. Gen. Opinion. See '34 AG Op 297

De facto trustees. The authority of de facto township trustees may not be questioned in a collateral proceeding.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

3828.077 Remote relatives.

Atty. Gen. Opinions. See '28 AG Op 276; '36 AG Op 562; '38 AG Op 327, 785; AG Op June 26, '39

3828.078 Enforcement of liability.

Atty. Gen. Opinions. See '30 AG Op 356; '32 AG Op 87; '38 AG Op 327, 785

Conditions precedent. In order for a county to recover of a son for support rendered to the pauper father, it is not necessary, as a condition precedent, that the township trustees first make application to the district court and obtain an adjudication of the son's liability.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

3828.079 Notice—hearing.

Necessaries for child—divorce—liability of parent. The father of a minor child is liable for necessary medical and hospital services rendered without his knowledge to the child in an emergency, even tho the mother has obtained a divorce and the custody of said child and has been paid the decreed alimony.

Stech v Holmes, 210-1136; 230 NW 326

Recovery by county — condition precedent. The county, in order to recover from the parents of a poor person who has been furnished poor relief, must establish that the said parents were able to support said child.

Cherokee County v Smith, 219-490; 258 NW 182

3828.084 Trial by jury.

Atty. Gen. Opinion. See '38 AG Op 785

3828.085 Recovery by county.

Atty. Gen. Opinions. See '32 AG Op 87; '38 AG Op 155, 327, 785

Limitation on recovery. This section limits the recovery to whatever amount has been actually paid during the two years immediately preceding the beginning of the action.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

Recovery by county—condition. The county, in order to recover from the parents of a poor person who has been furnished poor relief, must establish that the said parents were able to support said child.

Cherokee County v Smith, 219-490; 258 NW 182

3828.086 Homestead—when liable.

Atty. Gen. Opinions. See '38 AG Op 327, 609

3828.088 Settlement—how acquired.

Atty. Gen. Opinions. See '28 AG Op 196, 257; '30 AG Op 72, 118, 286; '32 AG Op 165, 205, 224, 276; '34 AG Op 631, 693, 694, 725; '36 AG Op 87, 162, 262, 332, 347, 384, 562, 670; '38 AG Op 132, 139, 142, 160, 254, 365, 667, 857, 869; AG Op July 18, '39, Aug. 4, '39, Oct. 2, '39, Feb. 15, '40, May 3, '40

Continuing liability of county of legal settlement. A resident of a county who has no legal settlement therein continues, in case of his commitment to a state hospital for the insane, a legal charge upon that particular county of the state wherein he has such legal settlement, and such charge continues until, by the lapse of one year without notice to depart, his residence ripens into a legal settlement, after which he becomes a legal charge upon the county wherein he has both his residence and his legal settlement.

State v Story County, 207-1117; 224 NW 232

Insane wife—county liable for support. Under a statute providing that "the residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto", when the mother of a family was committed as insane within a few months after moving to another county, the residence at the time of commitment was in the county to which she had moved, and since no warning to depart was served on her, she acquired a legal settlement in the new county at the end of a year, regardless of the residence of her husband at the time, and that county was liable for her support in the institution after the end of the year.

State v Clay County, 226-885; 285 NW 229

Intent to remain—county removal—support.

Audubon Co. v Vogessor, 228- ; 291 NW 135

Involuntary abandonment (?). The fact that an adult person having a legal settlement in one county is, on conviction in said county of a penitentiary offense, immediately paroled by the court on condition that he depart from said county and not return except on named condition, and the fact that he complies with said condition and removes with his family to another county, presents no obstacle to the acquisition by said person of a new legal settlement in the county to which he so removes. The assumption that the acceptance of the conditions of said parole was compulsory and deprived said party of all mental volition to acquire a new settlement is quite unjustified.

Cass Co. v Audubon Co., 221-1037; 266 NW 293

3828.089 Settlement continues.

Atty. Gen. Opinions. See '25-26 AG Op 476; '28 AG Op 257; '30 AG Op 283; '32 AG Op 224; '34 AG Op 631, 694; '36 AG Op 87; '38 AG Op 132, 142, 150, 160, 254, 869; AG Op Oct. 9, '39

3828.090 Foreign paupers.

Atty. Gen. Opinions. See '32 AG Op 146; '34 AG Op 631; '38 AG Op 132, 160; AG Op July 19, '39

3828.092 Notice to depart.

Atty. Gen. Opinions. See '25-26 AG Op 476; '28 AG Op 196, 257; '30 AG Op 283, 286; '32 AG Op 224, 253; '34 AG Op 406, 631; '36 AG Op 332; '38 AG Op 132, 139, 142, 160, 254, 685, 857, 869; AG Op Oct. 2, '39, Feb. 15, '40, May 13, '40

Notice not given to relief recipients.

Audubon Co. v Vogessor, 228- ; 291 NW 135

Continuing liability of county of legal settlement. A resident of a county who has no legal settlement therein continues, in case of his commitment to a state hospital for the insane, a legal charge upon that particular county of the state wherein he has such legal settlement, and such charge continues until, by the lapse of one year without notice to depart, his residence ripens into a legal settlement, after which he becomes a legal charge upon the county wherein he has both his residence and legal settlement.

State v Story County, 207-1117; 224 NW 232

Legal settlement of pauper — failure of county to determine—liability. When a pauper moved to another county, the failure of the county from which she had moved to take steps to have her legal settlement determined did not estop it from claiming that she acquired a legal settlement in the other county, when it was liable for the care of the pauper for a year after moving, and during that time had no reason to dispute the settlement and did not misrepresent or conceal any facts to cause the other county to fail to serve a warning to depart.

State v Clay County, 226-885; 285 NW 229

3828.093 Service of notice.

Atty. Gen. Opinions. See '28 AG Op 257; '34 AG Op 406; '38 AG Op 132, 685; AG Op May 13, '40

Notice to depart—invalidity. A notice to a nonresident poor person to depart from the county is a nullity unless officially authorized by the township trustees or board of supervisors. The mere fact that the members of the board individually discussed the matter in regular session and "told the chairman to sign the notice" does not constitute such official authorization.

Emmet County v Dally, 216-166; 248 NW 366

3828.094 Contest between counties.

Atty. Gen. Opinions. See '38 AG Op 862, 864, 869; AG Op July 19, '39

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

Removal by county—no notice—support.

Audubon Co. v Vogessor, 228- ; 291 NW 135

3828.095 Trial.

Atty. Gen. Opinions. See '38 AG Op 862, 864

3828.096 County of settlement liable.

Atty. Gen. Opinions. See '36 AG Op 670; '38 AG Op 139, 862

County paying support of insane person—laches of officials imputed to county. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

Insane wife—acquiring legal settlement. Under a statute providing that "the residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto", when the mother of a family was committed as insane within a few months after moving to another county, the residence at the time of commitment was in the county to which she had moved, and since no warning to depart was served on her, she acquired a legal settlement in the new county at the end of a year, regardless of the residence of her husband at the time, and that county was liable for her support in the institution after the end of the year.

State v Clay County, 226-885; 285 NW 229

Legal settlement of pauper—failure of county to determine—liability. When a pauper moved to another county, the failure of the county from which she had moved to take steps to have her legal settlement determined did not estop it from claiming that she acquired a legal settlement in the other county, when it was liable for the care of the pauper for a year after moving, and during that time had no reason to dispute the settlement and did not misrepresent or conceal any facts to

cause the other county to fail to serve a warning to depart.

State v Clay County, 226-885; 285 NW 229

No notice—persons involuntarily in county.

Audubon Co. v Vogessor, 228- ; 291 NW 135

3828.097 Relief by trustees.

Atty. Gen. Opinions. See '32 AG Op 225; '34 AG Op 406; '38 AG Op 864; AG Op May 13, '40

Warrant on "poor" fund — liability. The liability of a county on a warrant properly drawn on the "poor" fund of the county is not limited to the funds in said fund.

Council Bl. Bk. v County, 216-1123; 250 NW 233

3828.098 Overseer of poor.

Atty. Gen. Opinions. See '30 AG Op 341; '34 AG Op 406; '36 AG Op 452; '38 AG Op 685; AG Op May 13, '40

Application to overseer—effect. An application to the overseer of the poor by or on behalf of a poor person, for poor relief, and acted on by said overseer, has the same legal effect as an application to the township trustees.

Cherokee County v Smith, 219-490; 258 NW 182

3828.099 Form of relief—condition.

Atty. Gen. Opinions. See '32 AG Op 177; '36 AG Op 344; '38 AG Op 155, 204, 321, 609, 868; AG Op Sept. 13, '39, Feb. 27, '40

3828.100 Medical services.

Atty. Gen. Opinions. See '36 AG Op 344; '38 AG Op 204, 864; AG Op Jan. 16, '39

3828.101 Interest prohibited.

Atty. Gen. Opinion. See '36 AG Op 660

3828.102 Special privileges to soldiers and others.

Atty. Gen. Opinions. See '32 AG Op 180; AG Op May 10, '39

3828.103 County expense.

Atty. Gen. Opinions. See '30 AG Op 341; '34 AG Op 297; '38 AG Op 204, 868

3828.104 Township trustees—duty.

Atty. Gen. Opinions. See '25-26 AG Op 469; '34 AG Op 406; '38 AG Op 50

3828.105 Application for relief.

Atty. Gen. Opinions. See '32 AG Op 225; '36 AG Op 344; '38 AG Op 785, 864

Application—sufficiency. It is not necessary that a poor person personally make application to the township trustees for support, in order to render the son liable for support furnished by the county.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

Application to overseer—effect. An application to the overseer of the poor by or on behalf of a poor person, for poor relief, and acted on by said overseer, has the same legal effect as an application to the township trustees.

Cherokee County v Smith, 219-490; 258 NW 182

Holding under former statutes. A county furnishing relief to a poor person who has a settlement in another county cannot recover of such other county the value of such relief unless it is shown that the relief was initiated by an application to the township trustees of the township in which the poor person resided.

Cherokee Co. v County, 212-682; 237 NW 454

Holding under prior statutes. Parents are not liable for the support of their adult pauper children, unless such support is initiated by an application therefor by or to the township trustees, (§5298, C., '27 [§3828.074, C., '39]).

Wright County v Hagan, 210-795; 231 NW 298

3828.106 Allowance by board.

Atty. Gen. Opinions. See '32 AG Op 225; '38 AG Op 204, 864; AG Op Oct. 2, '39

3828.107 Payment of claims.

Atty. Gen. Opinion. See '38 AG Op 864

3828.109 Appeal to supervisors.

Atty. Gen. Opinions. See '32 AG Op 225; '38 AG Op 864

3828.110 Contracts for support.

Atty. Gen. Opinion. See '28 AG Op 215

3828.111 Medical and dental service.

Atty. Gen. Opinions. See '30 AG Op 310; '34 AG Op 189; '38 AG Op 50, 321

3828.114 Poor tax.

Atty. Gen. Opinions. See '36 AG Op 82; '38 AG Op 97, 327, 868; AG Op June 10, '39

Public debt—warrant on poor fund—liability. The liability of a county on a warrant properly drawn on the poor fund of the county is not limited to the funds in said fund.

Council Bl. Bk. v County, 216-1123; 250 NW 233

CHAPTER 189.5

COUNTY HOMES

3828.115 Establishment—submission to vote.

Atty. Gen. Opinion. See '34 AG Op 624

3828.116 Management.

Atty. Gen. Opinion. See AG Op Oct. 12, '39

3828.120 Order for admission.

Absence of formal order of commitment. The fact that a poor person was admitted to the county home without any formal written order, or without the making of any record

in relation thereto, does not relieve the son of such person from liability for the support furnished such poor person in such home.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

3828.123 Education of children.

Atty. Gen. Opinions. See '34 AG Op 343, 416; '36 AG Op 197; '38 AG Op 181, 846

Tuition for poor children. Where county furnished two families small homes rent free, the homes being located on county-owned land, but did not furnish any additional aid and did not attempt to have supervision of such homes nor provide any rules or regulations, the children of such families were not "poor children * * * cared for at a county home" under statute providing that the county should reimburse school districts for the cost of providing schooling for such school children.

School Dist. v Ida County, 226-1237; 286 NW 407

CHAPTER 189.6

INDIGENT TUBERCULAR PATIENTS

Atty. Gen. Opinion. See '38 AG Op 155

CHAPTER 189.7

MEDICAL AND SURGICAL TREATMENT OF INDIGENT PERSONS

3828.132 Complaint.

Atty. Gen. Opinions. See '30 AG Op 77, 153, 218; '36 AG Op 344, 429; '38 AG Op 160

3828.133 Duty of public officers and others.

Atty. Gen. Opinion. See '36 AG Op 429

3828.135 Examination by physician.

Atty. Gen. Opinions. See '28 AG Op 386; '34 AG Op 473, 729

3828.136 Report by physician.

Atty. Gen. Opinions. See '28 AG Op 386; '34 AG Op 729

3828.139 Hearing—order—emergency cases—cancellation of commitments.

Atty. Gen. Opinions. See '36 AG Op 344, 429

3828.142 Order in case of emergency.

Atty. Gen. Opinion. See '30 AG Op 153

3828.144 Attendant—physician—compensation.

Atty. Gen. Opinions. See '32 AG Op 190; '36 AG Op 342

3828.145 Expenses—how paid.

Atty. Gen. Opinion. See '32 AG Op 190

3828.147 County quotas.

Atty. Gen. Opinions. See '36 AG Op 419, 429; '38 AG Op 160

3828.150 Treatment of other patients.

Atty. Gen. Opinion. See '36 AG Op 419

3828.152 Treatment outside hospital—attendant.

Atty. Gen. Opinion. See '36 AG Op 429

3828.155 Record and report of expenses.

Atty. Gen. Opinion. See '36 AG Op 429

3828.156 Audit of accounts of hospital.

Atty. Gen. Opinions. See '30 AG Op 218; '32 AG Op 261; '36 AG Op 429

3828.157 Expenses—how paid—action to reimburse county.

Atty. Gen. Opinion. See '30 AG Op 218

3828.158 Faculty to prepare blanks—printing.

Atty. Gen. Opinion. See '36 AG Op 429

3828.159 Transfer of patients from state institutions.

Atty. Gen. Opinions. See '28 AG Op 58; '30 AG Op 232

TITLE XII

EDUCATION

CHAPTER 190

SUPERINTENDENT OF PUBLIC INSTRUCTION

Atty. Gen. Opinions. See '34 AG Op 528; '36 AG Op 381

CHAPTER 191

VOCATIONAL EDUCATION

Atty. Gen. Opinion. See '38 AG Op 636

CHAPTER 192

VOCATIONAL REHABILITATION

Atty. Gen. Opinion. See '32 AG Op 200

CHAPTER 193

BOARD OF EDUCATIONAL EXAMINERS

Atty. Gen. Opinions. See '34 AG Op 202; '36 AG Op 462

3876 First grade uniform county certificate.

Atty. Gen. Opinion. See '30 AG Op 168

3879 First grade certificate—renewal.

Atty. Gen. Opinion. See '30 AG Op 168

3888 Registration of certificates and diplomas.

Atty. Gen. Opinions. See '28 AG Op 85; AG Op Oct. 9, '39

3890 Provisional certificates.

Atty. Gen. Opinion. See AG Op Sept. 9, '39

3892 Revocation by board.

Atty. Gen. Opinion. See '30 AG Op 208

3893 Revocation by county superintendent.

Atty. Gen. Opinion. See '30 AG Op 208

3895 Appeal.

Atty. Gen. Opinion. See '30 AG Op 208

3896 Expenditures.

Atty. Gen. Opinion. See '36 AG Op 35

CHAPTER 194

NORMAL TRAINING OF TEACHERS

Atty. Gen. Opinions. See '38 AG Op 201, 660

CHAPTER 195

STATE BOARD OF EDUCATION

Atty. Gen. Opinions. See '36 AG Op 379, 429

3914 Appointment.

Atty. Gen. Opinion. See '30 AG Op 52

3919 Institutions governed.

Atty. Gen. Opinions. See '36 AG Op 419, 429, 445

3921 Powers and duties.

Atty. Gen. Opinions. See '28 AG Op 49, 129; '32 AG Op 113; '34 AG Op 635; '36 AG Op 220, 224, 240, 293, 377, 389, 393, 398, 419, 429, 497; '38 AG Op 143, 385, 771

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

3922 Purchases—prohibitions.

Atty. Gen. Opinions. See '28 AG Op 129; '36 AG Op 647, 660; '38 AG Op 185

3923 Record.

Atty. Gen. Opinions. See '32 AG Op 113; '36 AG Op 647

3926 Loans—conditions.

Atty. Gen. Opinions. See '34 AG Op 522, 527; '36 AG Op 382, 416, 429; '38 AG Op 257

3928 Satisfaction of mortgages.

Atty. Gen. Opinion. See '34 AG Op 322

3931 Actions not barred.

Atty. Gen. Opinion. See '36 AG Op 189

3933 Expenses—official residences.

Atty. Gen. Opinions. See '25-26 AG Op 372; '32 AG Op 155

3935 Duties of treasurer.

Atty. Gen. Opinions. See '32 AG Op 124; '34 AG Op 426, 718; '36 AG Op 429; '38 AG Op 905

3937 Reports of secretarial officers.

Atty. Gen. Opinion. See '36 AG Op 429

3938 Report of board.

Atty. Gen. Opinion. See '36 AG Op 429

3940 Appropriations—monthly installments.

Atty. Gen. Opinion. See '34 AG Op 219, 426

3941 Expenses—filing and audit.

Atty. Gen. Opinion. See '25-26 AG Op 372

3942 Contracts for training teachers.

Atty. Gen. Opinions. See '32 AG Op 108; '34 AG Op 341, 541

3945 Improvements — advertisement for bids.

Atty. Gen. Opinions. See '25-26 AG Op 110; '36 AG Op 632

3945.1 Dormitories at state educational institutions.

Atty. Gen. Opinions. See '36 AG Op 224; '38 AG Op 385

3945.4 Borrowing money and mortgaging property.

Atty. Gen. Opinion. See '38 AG Op 385

3945.5 Nature of obligation — discharge.

Atty. Gen. Opinion. See '38 AG Op 385

CHAPTER 196

STATE UNIVERSITY

Atty. Gen. Opinions. See '30 AG Op 96; '36 AG Op 419

CHAPTER 198

FEDERAL MATERNITY AND INFANCY ACT

Atty. Gen. Opinion. See '36 AG Op 429

CHAPTER 200

STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS

Atty. Gen. Opinions. See '34 AG Op 530; '38 AG Op 257

CHAPTER 201.1

IOWA CROP PEST ACT

Atty. Gen. Opinion. See '32 AG Op 96

CHAPTER 204

SCHOOL FOR THE DEAF

Atty. Gen. Opinion. See '25-26 AG Op 72

CHAPTER 206

COUNTY SUPERINTENDENT

4096 Term of office.

Certiorari. Neither a judge of the supreme court, nor the court itself, has jurisdiction to issue a writ of certiorari to other than an inferior judicial tribunal. So held where the writ was inadvertently issued to the superintendent of public instruction and to a county superintendent of schools.

School District v Samuelson, 220-170; 262 NW 169

4097 Qualifications.

Atty. Gen. Opinions. See '28 AG Op 67, 97; '30 AG Op 168; '32 AG Op 252; '36 AG Op 421

4098 Election by convention.

Atty. Gen. Opinion. See '28 AG Op 123

4099 Representatives at convention.

Atty. Gen. Opinion. See '28 AG Op 284

4101 Convention—quorum.

Atty. Gen. Opinion. See '28 AG Op 99

4106 Duties.

Atty. Gen. Opinion. See '28 AG Op 284

Appeal from original order of county superintendent. No appeal lies to the superintendent of public instruction from an original order or action of a county superintendent. In other words, the right of appeal to the state superintendent is strictly confined to those decisions or orders that originate with a board of directors of a school corporation.

Field v Samuelson, 212-786; 233 NW 687

CHAPTER 207

COUNTY BOARD OF EDUCATION

4119 Membership—election.

Atty. Gen. Opinions. See '30 AG Op 377; '34 AG Op 551

4121 Meetings—chairman—records.

Atty. Gen. Opinion. See '30 AG Op 377

4122 Duties.

Atty. Gen. Opinions. See '30 AG Op 74, 180

County officials — raising constitutionality of statutes not permitted. Ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94
Brunner v Floyd County, 226-583; 284 NW 814

CHAPTER 208

SCHOOL DISTRICTS IN GENERAL

4123 Powers and jurisdiction.

Atty. Gen. Opinions. See '36 AG Op 280, 474, 670; '38 AG Op 90, 234, 746, 764; AG Op April 12, '39

Action by teacher for compensation—pleading—intervention by taxpayer. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v Sch. Dist., 225-1272; 282 NW 754

School janitor—definite period of employment—removal without hearing—soldiers preference. An honorably discharged soldier employed as school janitor by a yearly contract had a definite tenure of appointment and could be removed by the school board at the end of the period of employment without the termination being effected in accordance with §1163 of the code.

Durst v Board, 228- ; 292 NW 73

Public officials—raising constitutionality of statutes not permitted. Ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94
Brunner v Floyd County, 226-583; 284 NW 814

District liabilities—torts. A school district, organized, existing, and acting under the laws of the state as a governmental agency, is not liable in damages consequent on the negligence of its employees, or in consequence of the maintenance by it, through its employees, of a nuisance.

Larsen v School Dist., 223-691; 272 NW 632

Division of township—effect. The division of a township by the board of supervisors, under §5531, C., '24, does not have the effect of dividing an existing school district.

Christensen v Board, 201-794; 208 NW 291

Equitable garnishment. A judgment plaintiff may not, as a matter of public policy, maintain against a school district an equitable proceeding to subject to the satisfaction of the judgment funds in the hands of such corporation and belonging to the judgment defendant.

Julander v Reynolds, 206-1115; 221 NW 807

School bus driver as independent contractor —nongovernmental function. A school bus driver, furnishing his own bus, under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

Governmental employees—personal liability for torts—no governmental immunity. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled).

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Governmental function — political corporations not suable for torts. Counties and school districts, being political or quasi corporations not clothed with full corporate powers as are cities and towns, cannot be sued for negligence, and the question of the exercise of a governmental function is immaterial.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Mandatory duty to transport pupils. A statute providing that a school board shall furnish transportation to children living two and one-half miles from the school creates a mandatory duty to transport pupils which is a governmental function, but whether the duty be considered as ministerial or governmental, the school district, being a quasi corporation, cannot be sued for failure to furnish such transportation when such right of action is not expressly given by statute.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Compelling transportation to be furnished to pupils. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute. The proper remedy of the plaintiff was mandamus to compel the school district to perform its mandatory duty.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Painting schoolhouse as governmental act—nonliability. A school district in causing its schoolhouse or the rooms thereof to be painted must be deemed as engaged in a governmental function with complete exemption from liability for negligence in so doing. So held where it was urged that the district had impliedly contracted to furnish the workman a "safe place" in which to work.

Ford v School Dist., 223-795; 273 NW 870

Real property—power to acquire. A school district has general power to acquire and hold real property for its legitimate purposes.

Smith v Maresh, 226-552; 284 NW 390

School sites—contract—rescission and cancellation. The purchase by a school board of a schoolhouse site after bonds for such purchase had been duly voted, but prior to any bond levy, and the due issuance of a warrant in payment for such site, are not canceled or rescinded by the subsequent action of the electors in voting to rescind their former action authorizing the bonds.

Looney v School Dist., 201-436; 205 NW 328

School site—title valid as to part—no injunction. A school district's title to its site for a high school is not wholly invalid simply because the size may be greater than the statutory limitation on the amount that can be obtained by condemnation. When the size of the building is not so great as to cover more ground than the statute allows, and when the title, if defective at all, is defective only as to the excess land, an injunction will not lie on the theory that the district had no title.

Smith v Maresh, 226-552; 284 NW 390

School property—assessability. A school district having lots assessable under a city contract for paving and curbing cannot be deemed a "municipality" entering "into a contract" within the meaning of the state budget law (Ch 23, C., '31). In such circumstances, the district is simply a property owner.

Schumacher v Clear Lake, 214-34; 239 NW 71

4123.1 General applicability.

Atty. Gen. Opinion. See '28 AG Op 102

Extension of consolidated district. Section 4141, C., '27, is available to a consolidated school district which wishes to extend its boundaries by adding thereto part of the territory of an adjoining consolidated school district. In other words, §4133, C., '27, does not provide the exclusive procedure.

Chambers v Housel, 211-314; 233 NW 502

4124 Names.

"Independent district" defined. A "consolidated" school district is an "independent school district" within the meaning of §4230, C., '24, authorizing the school board to elect a superintendent for a period not exceeding three years.

Cons. Dist. v Griffin, 201-63; 206 NW 86

Indictment—immaterial misdescription. In an indictment for the larceny of coal from a school district it is not a fatal defect that the district is described as Grove Township School District instead of the Grove School District Township.

State v Philpott, 222-1334; 271 NW 617

4125 Directors.

Atty. Gen. Opinions. See '34 AG Op 605; '38 AG Op 234, 746

Employment of counsel. The board of directors has implied power in good faith to employ attorneys to defend against a proceeding for the dissolution of the district and to contract for a reasonable compensation for such services.

Rural Dist. v Daly, 201-286; 207 NW 124

4126 Division of school township—alterations.

Atty. Gen. Opinion. See '25-26 AG Op 109

4130 New township—election—notice.

Division of township—effect. The division of a township by the board of supervisors, under §5531, C., '24, does not have the effect of dividing an existing school district.

Christensen v Board, 201-794; 208 NW 291

4131 Attaching territory to adjoining corporation.

Atty. Gen. Opinions. See '25-26 AG Op 204; '30 AG Op 127; '32 AG Op 270; '34 AG Op 342

Detaching territory — remaining territory. The statutory authorization for the formation of new rural independent school districts by detaching, in certain instances, territory from an existing independent school district (not consolidated), is not limited by the provisions of the consolidated school district act (§4173, C., '27) providing that the territory remaining after the detaching shall not be less than four sections, said last statute having no application to independent districts not consolidated.

Rural Dist. v McCracken, 212-1114; 233 NW 147

Necessary parties—school district. In an action to determine which of two school districts embraces certain land, both districts are absolutely necessary parties.

Whitmer v School Dist., 210-239; 230 NW 413

Unallowable amendment after remand. A party who attacks the constitutionality of a statute on specified grounds, and on appeal is defeated in his contentions, will not, after remand to the trial court, be permitted to file an amendment to his pleading attacking the constitutionality of the law on new and additional grounds.

Rural Dist. v McCracken, 215-55; 244 NW 711

4132 Restoration.

Atty. Gen. Opinions. See '25-26 AG Op 44, 149, 283

4133 Boundary lines changed—consolidation.

Atty. Gen. Opinions. See '25-26 AG Op 282; '28 AG Op 102, 218, 329; '30 AG Op 127, 141; '36 AG Op 336, 679

Extension of consolidated district. Section 4141, C., '27, is available to a consolidated school district which wishes to extend its boundaries by adding thereto part of the territory of an adjoining consolidated school district. In other words, this section does not provide the exclusive procedure.

Chambers v Housel, 211-314; 233 NW 502

Contiguous corporations combined by respective boards without submission to vote. In view of its legislative history and the apparent intention of the legislature, the enactment of §4191, C., '35 [§4144.1, C., '39], requiring that proposals to add territory to an existing district be approved separately by majority of voters in each territory affected, did not modify or repeal §4133, C., '35, providing that "* * * boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors * * * so * * * that one corporation shall be included with the other as a single corporation"; hence, respective boards of directors of contiguous school corporations had authority to combine such school corporations without approval of voters.

Peterson v Sch. Dist., 227-110; 287 NW 275

Limitation. When the boundary line between a school township and an independent school district is also the line between civil townships, the school boards have no power by concurrent action to change such boundary

line (§4135, C., '27), notwithstanding the broad and sweeping provisions of §4133 of said code.

Thomasson v Sch. Dist., 206-1183; 221 NW 776

4134 Board in new district—settlement.

Atty. Gen. Opinion. See 25-26 AG Op 282

4135 Corporation limits changed. (Repealed.)

Changes—limitation. When the boundary line between a school township and an independent school district is also the line between civil townships, the school boards have no power by concurrent action to change such boundary line notwithstanding the broad and sweeping provisions of §4133, C., '27.

Thomasson v Sch. Dist., 206-1183; 221 NW 776

4136 Board in new district—organization.

Atty. Gen. Opinions. See '28 AG Op 343; '34 AG Op 657

4137 Division of assets and distribution of liabilities.

Atty. Gen. Opinions. See '25-26 AG Op 282; '32 AG Op 107; '34 AG Op 342, 657

4138 Arbitration.

Atty. Gen. Opinions. See '25-26 AG Op 282; '32 AG Op 107; '34 AG Op 342

Method of service. As to proper method of service when statute simply requires the notice to be "served", and specifies no method of service, see

Casey (Town) v Hogue, 204-3; 214 NW 729

4140 Plats of school districts.

Atty. Gen. Opinion. See '32 AG Op 136

4141 Formation of independent district.

Extension of consolidated district. This section is available to a consolidated school district which wishes to extend its boundaries by adding thereto part of the territory of an adjoining consolidated school district. Section 4133, C., '27, does not provide the exclusive procedure.

Chambers v Housel, 211-314; 233 NW 502

Extension of consolidated district containing no town. Section 4141, C., '35, is not available to a rural consolidated school district wishing to annex part of territory of an adjoining district where such rural consolidated district contains no city, town, or village of over 100 inhabitants, and therefore cannot meet the requirements of such statute.

Independent Dist. v Consol. Dist., 227-707; 288 NW 920

4142 Vote by ballot—separate ballot boxes.

Majority vote in additional territory. An existing independent school district composed of the territory within a city or town and certain rural territory may not be formed into a new independent district composed of the existing territory and additional rural territory unless a majority of the voters in such additional territory vote in favor of such new district.

State v Van Peursem, 202-545; 210 NW 576

4143 Subdistrict into independent district.

Atty. Gen. Opinion. See '30 AG Op 184

4144 When district deemed formed.

Atty. Gen. Opinion. See '30 AG Op 184

4144.1 Additions and extensions—separate vote.

Discussion. See 25 ILR 832—Districts incorporated without vote

Atty. Gen. Opinions. See '28 AG Op 102; '30 AG Op 141, 340; '32 AG Op 136

Extension of consolidated district—procedure. Section 4141, C., '27, is available to a consolidated school district which wishes to extend its boundaries by adding thereto part of the territory of an adjoining consolidated school district. In other words, §4133 of the Code does not provide the exclusive procedure.

Chambers v Housel, 211-314; 233 NW 502

Extension of consolidated district containing no town. Section 4141, C., '35, is not available to a rural consolidated school district wishing to annex part of territory of an adjoining district where such rural consolidated district contains no city, town, or village of over 100 inhabitants, and therefore cannot meet the requirements of such statute.

Independent Dist. v Consol. Dist., 227-707; 288 NW 920

Contiguous corporations combined by respective boards without submission to vote. In view of its legislative history and the apparent intention of the legislature, the enactment of this section requiring that proposals to add territory to an existing district be approved separately by majority of voters in each territory affected, did not modify or repeal §4133, C., '35, providing that "* * * boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors * * * so * * * that one corporation shall be included with the other as a single corporation"; hence, respective boards of directors of contiguous school corporations had authority to combine such school corporations without approval of voters.

Peterson v Sch. Dist., 227-110; 287 NW 275

Majority vote in additional territory. An existing independent school district composed of the territory within a city or town and cer-

tain rural territory may not be formed into a new independent district composed of the existing territory and additional rural territory unless a majority of the voters in such additional territory vote in favor of such new district.

State v Van Peursem, 202-545; 210 NW 576

4144.2 Ex officio officers.

Atty. Gen. Opinion. See 28 AG Op 343

4153 Uniting independent districts.

Atty. Gen. Opinion. See '28 AG Op 343

CHAPTER 209

CONSOLIDATED SCHOOL DISTRICTS

Atty. Gen. Opinions. See '28 AG Op 329; '32 AG Op 92

4154 Consolidated corporations.

"Independent" district. A "consolidated" school district is an "independent school district" within the meaning of §4230, C., '24, authorizing the school board to elect a superintendent for a period not exceeding three years.

Cons. Dist. v Griffin, 201-63; 206 NW 86

"Government section" defined. The statutory provisions that consolidated school corporations shall not be organized with less than, nor reduced below, "sixteen government sections" of contiguous territory, do not mean "sixteen square sections" of land, but mean an area equal to sixteen government sections of land.

Chambers v Housel, 211-314; 233 NW 502

4155 Petition.

Lands included in district—unallowable impeachment. Voters' testimony that at an election to establish a consolidated school district they did not intend to include in said proposed district certain lands described in the petition for said district and in the ballot used at said election is wholly immaterial.

Dermit v School District, 220-344; 261 NW 636

4157 Objections—time of filing—notice.

Atty. Gen. Opinion. See '28 AG Op 146

4163 Interested parties as judges.

Atty. Gen. Opinion. See 30 AG Op 377

4166 Separate vote in urban territory.

Atty. Gen. Opinion. See '30 AG Op 340

4167 Separate vote in large territory.

Atty. Gen. Opinion. See '30 AG Op 340

4169 Canvass and return.

Irregularities in elections. See under §719

4173 Minimum territory.

Atty. Gen. Opinion. See '25-26 AG Op 70

Detaching territory—size of remaining territory. The statutory authorization (§4131-c1, C., '31) for the formation of new rural independent school districts by detaching, in certain instances, territory from an existing independent school district (not consolidated), is not limited by this section.

Rural Dist. v McCracken, 212-1114; 233 NW 147

"Government section" defined. "Sixteen government sections" of contiguous territory does not mean "sixteen square sections" of land, but means an area equal to sixteen government sections of land.

Chambers v Housel, 211-314; 233 NW 502

4174 Organization of remaining territory.

Atty. Gen. Opinion. See '25-26 AG Op 70

4177 School buildings — tax levy — special fund.

Atty. Gen. Opinions. See '25-26 AG Op 403; '28 AG Op 249; AG Op April 8, '39

4178 Location of school building.

Atty. Gen. Opinion. See '32 AG Op 92

4179 Transportation.

Atty. Gen. Opinions. See '32 AG Op 92; '36 AG Op 512, 603; '38 AG Op 566, 663

Duty of district—refusal—right of parent. When a state boundary river renders a portion of a consolidated school district inaccessible to the consolidated school, and the school authorities agree with the parent of grade pupils residing on such inaccessible lands to pay the tuition of said pupils in a school in a foreign state, but later refuse to pay for transporting said pupils to said school (a distance of five miles), the parent may supply the transportation in the foreign state and the district will be liable for the reasonable value thereof.

Dermit v Sch. Dist. 220-344; 261 NW 636
See Riecks v Sch. Dist., 219-101; 257 NW 546

Mandatory duty to transport pupils — governmental function. A statute providing that a school board shall furnish transportation to children living two and one-half miles from the school creates a mandatory duty to transport pupils which is a governmental function, but whether the duty be considered as ministerial or governmental, the school district, being a quasi corporation, cannot be sued for

failure to furnish such transportation when such right of action is not expressly given by statute.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Transportation furnished pupils—no implied contract by board to pay for services. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had taken the child to school, could not recover for his services on a theory of contract implied in fact when there was no meeting of the minds or agreement that he should be compensated for such transportation, as no promise to pay can be inferred from the refusal of the school to furnish transportation upon demand and the subsequent transportation of the child by the father, as the school was in no position to reject such services.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Compelling transportation to be furnished to pupils. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute. The proper remedy of the plaintiff was mandamus to compel the school district to perform its mandatory duty.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Mandamus—board's discretion—remedy by appeal. Mandamus will not lie to compel a consolidated school board to transport pupils when by statute it is also given a discretion to suspend service and to require a two mile transportation by the parent to the established bus route. A parent dissatisfied with the school board's procedure has an adequate law remedy by appeal to the county superintendent.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

Suspending service—parent's duty. A consolidated school board in providing transportation for pupils has a discretion to suspend service when roads are impassable and to require parent to transport children not more than two miles to the established bus route.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

Illegal use of busses. School busses of consolidated school districts may legally be employed, and funds for their operation may legally be expended, for the one purpose only of transporting to and from school, children of school age who live more than a mile from school.

Schmidt v Blair, 203-1016; 213 NW 593

Holding under prior statute. A consolidated school district, the former territory of which furnished no high school instruction, is liable for the reasonable cost of transporting children to the grade schools of another district pending the time during which the pupils are deprived of a grade school owing to delay in constructing the new central consolidated school building, but is not liable for the cost of transporting pupils similarly situated, but transported to the high school of another district.

Tow v Sch. Dist., 200-1254; 206 NW 94

4179.1 Extra curricular use.

Holding under prior statute. School busses of consolidated school districts may legally be employed, and funds for their operation may legally be expended, for the one purpose only of transporting to and from school, children of school age who live more than a mile from school.

Schmidt v Blair, 203-1016; 213 NW 593

4180 Transportation routes—suspension of service.

Atty. Gen. Opinion. See '38 AG Op 663

Mandamus—board's discretion—remedy by appeal. Mandamus will not lie to compel a consolidated school board to transport pupils when by statute it is also given a discretion to suspend service and to require a two mile transportation by the parent to the established bus route. A parent dissatisfied with the school board's procedure has an adequate law remedy by appeal to the county superintendent.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

4181 By parent—instruction in another school.

Atty. Gen. Opinion. See '38 AG Op 663

Transportation — suspending service — parent's duty. A consolidated school board in providing transportation for pupils has a discretion to suspend service when roads are impassable and to require parent to transport children not more than two miles to the established bus route.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

Mandamus—board's discretion—remedy by appeal. Mandamus will not lie to compel a consolidated school board to transport pupils when by statute it is also given a discretion to suspend service and to require a two mile transportation by the parent to the established bus route. A parent dissatisfied with the school board's procedure has an adequate law remedy by appeal to the county superintendent.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

4182 Contracts for transportation—rules.

Atty. Gen. Opinion. See '36 AG Op 413

Contracts — termination without cause. A contract for the transportation of pupils for an entire school year, but containing a reservation by the board of right to terminate the contract at any time, enables the board to terminate the contract peremptorily at its pleasure, and without assigning any reason for such action.

Black v School Dist., 206-1386; 222 NW 350

Liability in re performance of governmental acts. The principle that when the officers, servants, or agents of a municipality are engaged in performing a governmental act for and on behalf of the municipality they are not liable in damages consequent on their negligence in doing the act, applies to a person who, with the knowledge and acquiescence of a school board, was operating for the school district a bus in the transportation of children to and from school, even tho the person so operating the bus was acting at the time in lieu of the person with whom the district had actually contracted for the transportation. [Overruled, see Montanick v McMillin, 225-442; 280 NW 608.]

Hibbs v School Dist., 218-841; 251 NW 606; 34 NCCA 468; 37 NCCA 711

School bus driver as independent contractor —nongovernmental function. A school bus driver, furnishing his own bus, under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

4188 Dissolution of corporation.

Atty. Gen. Opinions. See '25-26 AG Op 41; '28 AG Op 126, 218

Powers of board—employment of counsel. The board of directors of a school corporation has implied power in good faith to employ attorneys to defend against a proceeding for the dissolution of the district and to contract for a reasonable compensation for such services.

Rural Dist. v Daly, 201-286; 207 NW 124

Outstanding bonds as basis for discretion. Refunding bonds issued by a consolidated school district for the purpose of paying off bonds originally issued by a district which was included in the consolidated district are bonds within the meaning of this section.

Sarby v Morey, 207-521; 221 NW 492

Absent voters law—implied power of superintendent. The county superintendent, under her statutory powers and duty to call elections in consolidated districts to vote on the question of dissolution of the district, has implied power to receive applications for ballots by, and to deliver ballots to, electors who wish to cast their ballots under the absent voters law.

Willis v Sch. Dist., 210-391; 227 NW 532

CHAPTER 211.1

SCHOOL ELECTIONS

4216.01 Regular election.

Atty. Gen. Opinions. See '38 AG Op 248; AG Op Sept. 21, '39

4216.02 Special election.

Atty. Gen. Opinions. See '30 AG Op 127, 304; '38 AG Op 248

4216.03 Notice of election.

Atty. Gen. Opinion. See '38 AG Op 670

4216.04 Nominations required.

Atty. Gen. Opinion. See '25-26 AG Op 303

4216.08 Printed ballots required.

Atty. Gen. Opinion. See '28 AG Op 93

4216.09 Opening polls.

Atty. Gen. Opinion. See '38 AG Op 670

4216.10 Judges of election.

Irregularities—effect. A school election will not be held invalid (in the absence of any showing of prejudice) because all of the members of the board acted as judges of election, instead of only the president, secretary, and one director, as provided by statute.

Mack v Sch. Dist., 200-1190; 206 NW 145

4216.12 Right to vote.

Elections and right to vote generally. See under chapter 39 et seq.

Residence—evidence—sufficiency.

Willis v Sch. Dist., 210-391; 227 NW 532

4216.17 Registrars appointed.

Atty. Gen. Opinion. See '25-26 AG Op 294

4216.19 Canvassing the votes.

Public canvass in private room. A canvass of an election required by statute to be made "publicly" cannot be made in a private room.

Steeves v New Market, 225-618; 281 NW 162

4216.22 Contested elections.

Atty. Gen. Opinion. See '34 AG Op 129

Appeal from consent judgment. An election contestant may not appeal from the judgment

of the contest board holding the election in question illegal and providing for the calling of a new election by said board, when he consented to the entry of such judgment; nor may an estoppel to question such appeal be based upon the fact that the official board of which appellees were members refused to recognize the validity of the new election called by the contest board.

Leslie v Barnes, 201-1159; 208 NW 725

4216.23 Directors—number.

Elections—when general election laws inapplicable. The mandatory statutory provisions as to the marking of ballots at general elections are not applicable to the election of subdirectors in school townships. Any ballot voted at such latter election for subdirector must be counted if it plainly reveals the intent of the voter.

Thompson v Roberts, 220-854; 263 NW 491

4216.24 Term of office.

Atty. Gen. Opinion. See '34 AG Op 605

4216.26 Treasurer.

Atty. Gen. Opinions. See '28 AG Op 89, 350

4216.27 Qualifications.

Atty. Gen. Opinions. See '28 AG Op 89, 350

4216.28 Oath required.

Atty. Gen. Opinion. See '36 AG Op 147

4216.29 Vacancies.

Atty. Gen. Opinions. See '34 AG Op 581, 685

4216.30 Vacancies filled by election.

Resignation—when effective. Three members of a board of school directors of five members constitute a legal quorum to elect a successor to one of said three members who had theretofore resigned, with the intent (shared in by his fellow members) that the resignation would not take effect until his successor had been elected and had qualified.

Cowles v Sch. Dist., 204-689; 216 NW 83

4216.32 Penalties.

Atty. Gen. Opinion. See '25-26 AG Op 73

4216.33 Application of general election laws.

Atty. Gen. Opinion. See '38 AG Op 670

When general election laws inapplicable. The mandatory statutory provisions as to the marking of ballots at general elections are not applicable to the election of subdirectors in school townships. Any ballot voted at such latter election for subdirector must be counted if it plainly reveals the intent of the voter.

Thompson v Roberts, 220-854; 263 NW 491

CHAPTER 212

POWERS OF ELECTORS

4217 Enumeration.

School elections. See under ch 211.1

Atty. Gen. Opinions. See '25-26 AG Op 403; '28 AG Op 79, 138, 159, 293, 394; '30 AG Op 54, 67, 127, 212, 244, 267, 269, 304; '32 AG Op 208; '34 AG Op 223; '36 AG Op 334; '38 AG Op 96, 167, 210, 676, 737, 746; AG Op March 21, '39

Course of study—discretion. The directors of a school district have a fair discretion as to the method to be employed in teaching a subject which the electors have directed to be taught—a discretion not controllable by mandamus.

Neilan v Board, 200-860; 205 NW 506

4218 Submission of proposition.

Irregularities in elections. See under §719

Atty. Gen. Opinions. See '30 AG Op 269; '34 AG Op 462

4219 Special subdistrict schoolhouse tax.

Atty. Gen. Opinion. See '25-26 AG Op 109

CHAPTER 213

DIRECTORS—POWERS AND DUTIES

Atty. Gen. Opinions. See '36 AG Op 464; '38 AG Op 167

4220 Organization.

Atty. Gen. Opinions. See '30 AG Op 140; '36 AG Op 147; '38 AG Op 362

Failure to notify director. The action of a school board at an annual meeting will not be invalidated because a member was not notified of the meeting because he was absent from the state and his whereabouts was not definitely known.

Cons. Dist. v Griffin, 201-63; 206 NW 86

4221 Special meetings.

Special meeting on oral notice. A special meeting of the board of directors of a school corporation is legally called on oral notice to the directors by the secretary, at the direction of the president.

Mershon v Sch. Dist., 204-221; 215 NW 235

4222 Appointment of secretary and treasurer.

Atty. Gen. Opinions. See '28 AG Op 164, 350

4223 Quorum.

Atty. Gen. Opinions. See '25-26 AG Op 502; '28 AG Op 89; '36 AG Op 173; '38 AG Op 362

Legal quorum. Three members of a board of school directors of five members constitute a legal quorum to elect a successor to one of said three members who had theretofore resigned, with the intent (shared in by his fellow members) that the resignation would not take effect until his successor had been elected and had qualified.

Cowles v Sch. Dist., 204-689; 216 NW 83

Majority of quorum. Vacancies on an official board (which is empowered to fill vacancies) may be filled by a majority of a quorum, in the absence of a statute which requires a majority of the entire membership of the board.

Cowles v Sch. Dist., 204-689; 216 NW 83

4223.2 Vacancies filled by board—qualification—tenure.

Atty. Gen. Opinion. See '36 AG Op 199

De facto officers—collateral attack. Members of a school board who are, in supposed compliance with the law and in good faith, elected to fill vacancies caused by resignations, and who in good faith act as such members, are at least directors de facto, and their official actions may not be collaterally assailed.

Cowles v Sch. Dist., 204-689; 216 NW 83

4224 General rules.

Atty. Gen. Opinions. See '28 AG Op 77, 112; '30 AG Op 337; '34 AG Op 657; '36 AG Op 373; 38 AG Op 230, 800; AG Op April 12, '39

4225 Use of tobacco.

Atty. Gen. Opinion. See '30 AG Op 337

4226 School year.

Atty. Gen. Opinion. See AG Op July 11, '39

4227 Number of schools—attendance—terms.

Atty. Gen. Opinion. See '28 AG Op 95

Compulsory attendance—power of board and duty of custodian. A school board may validly establish an ungraded school along with and as a part of the district's established system of graded schools, and may, so long as it does not act unreasonably, validly require the proper custodian of a child over 7 and under 16 years of age to cause said child to attend said ungraded school only, provided said child is continued in the public schools. So held as to a child who was in physical and mental condition to attend school but was unable to make the grades in the graded schools.

State v Ghrist, 222-1069; 270 NW 376

Directors — nonrevocation of official action. The official determination of school directors may not be deemed revoked because of the fact that the individual directors knew of a violation of such determination by one member of the board, and did not individually object to such violation.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

4228 Contracts—election of teachers.

Atty. Gen. Opinions. See '30 AG Op 375; '34 AG Op 269; '36 AG Op 119, 392, 474; '38 AG Op 241

Contract for supplies—permissible duration. School boards may validly bind their school districts by reasonable contracts for ordinary school supplies, tho such contracts are not fully performable during the school year in which they were executed or during the school year following.

Dodds Co. v Sch. Dist., 220-812; 263 NW 522

Janitor—soldiers' preference—removal.

Durst v Board, 228- ; 292 NW 73

Illegal action—nonduty to appeal. The oral employment by a subdirector, under authority from the school board, of a teacher, and the formal, written, statutory contract evidencing such employment signed by the president of the board and by the teacher, are not subject to review by the school board, and the assumption of such power by the board may be ignored by the teacher without appeal to the county superintendent.

Shill v School Twp., 209-1020; 227 NW 412

School board's discretion not controllable by mandamus. Re-employment of a teacher is a matter wholly within the discretionary power vested in the school board and may not be controlled through the courts by mandamus.

Driver v School Dist., 224-393; 276 NW 37

Nondisqualifying interest. The adoption by a school board of a resolution is not rendered nugatory because of the affirmative vote of a particular member, by the fact that, subsequent to the adoption, the private corporation of which the particular member of the board was an officer entered into a contract with a third party for the carrying out of the purposes and objects of said resolution.

Security Bk. v Bagley, 202-701; 210 NW 947; 49 ALR 705

Pension — employment prerequisite — no relief outside issues. A public school teacher, after 30 years service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment, and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

4229 Contracts with teachers.

Atty. Gen. Opinions. See '28 AG Op 345, 366; '30 AG Op 375; '32 AG Op 209; '34 AG Op 269, 341; '36 AG Op 119, 134, 392; '38 AG Op 241, 362

Oral extension. An oral extension of time for teaching under a teacher's contract (under

which no services were rendered) cannot be recognized.

Krutsinger v Sch. Twp., 219-291; 257 NW 797

Duty of president to sign contract. When a subdirector of a school township orally and under due authority from the school board employs a teacher, the president of the board has no discretion to refuse to sign the formal written contract required by statute.

Shill v School Twp., 209-1020; 227 NW 412

Employment — legality. The official action of a board of school directors in authorizing each subdirector to employ in his subdistrict the teacher of his choice necessarily constitutes no authority to a subdirector to hire a teacher in a district the school of which the board orders closed.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

Employment. Principle reaffirmed that valid employment of a teacher must be made through the medium of a written contract duly signed by the teacher and the president.

Shackelford v Dist. Twp., 203-243; 212 NW 467

Issue as to terms of contract. Evidence held to present a jury question on the issue whether a contract had been entered into with a teacher.

Krutsinger v Township, 219-291; 257 NW 797

Modification by extrinsic matters. In an action at law by a teacher upon a written contract of employment, the rights of the parties are necessarily determinable by the actual terms of the contract, unmodified by extraneous matters or circumstances.

Miner v Sch. Dist., 212-973; 234 NW 817

Nonattendance of teacher at school—effect. A duly employed teacher, in order to recover on her contract of employment, need not show that she was in daily attendance at the schoolhouse, when no pupils attended the school, and when she, in compliance with the direction of the board, held herself in readiness to teach whenever notified that pupils would attend the school.

James v School Twp., 210-1059; 229 NW 750

Nonduty to seek employment elsewhere. A duly employed teacher, who, in compliance with the direction of the board, holds herself in readiness to teach but is furnished no pupils, need not, in an action on her contract, show that she made any effort to secure employment elsewhere as a teacher.

James v School Twp., 210-1059; 229 NW 750
See Shill v School Twp., 209-1020; 227 NW 412

Ratification of contract. A contract of employment of a teacher in a public school, signed by the teacher but not signed by the president of the board is ratified for the full term of the contract by the action of the board in accepting the services of the teacher, and paying her therefor, with knowledge of said contract.

Smith v School Dist., 216-1047; 250 NW 126

Termination on notice. A provision in a public school contract authorizing either party to the contract to terminate it by giving written notice of such termination for a named number of days, is not violative of, nor inconsistent with either this section or §4237, C., '27. (Holding by minority of court.)

Miner v Sch. Dist., 212-973; 234 NW 817

Termination on notice — validity. A provision in a public school contract which authorizes the school district to terminate the contract on stated notice at any time and for any reason is valid, and if a termination is effected under such contract authorization and not under statutory authorization (§4237, C., '35), no appeal will lie to the county superintendent or, in turn, to the state superintendent. In other words, neither superintendent has jurisdiction to review such a discharge.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

4230 Superintendent—term.

Atty. Gen. Opinions. See '32 AG Op 209; '36 AG Op 119

Power to employ. A "consolidated" school district is an "independent school district" within the meaning of this section.

Cons. Dist. v Griffin, 201-63; 206 NW 86

4231 Nonemployment of teacher—when.

Atty. Gen. Opinions. See '28 AG Op 95, 106, 185; '30 AG Op 222; '34 AG Op 155; '38 AG Op 308, 681

Insufficient attendance—duty to close school. A school is legally closeable whenever the average attendance in said school the last preceding term was less than five pupils irrespective of the pupils who reside within the district, but who attend school outside the district.

Kruse v Sch. Dist., 209-64; 227 NW 594

Insufficient attendance—duty to provide school facilities. Where a resident of a school district does not send his grade school children to his home-district school, and the school is legally closed because, during the preceding term, the attendance was less than five pupils (§4231, C., '27), he may not compel the district to pay the cost of tuition and transportation of his said children to a school outside his district. (§4232, C., '27.)

Kruse v School Dist., 209-64; 227 NW 594

Legality. The official action of a board of school directors in authorizing each subdirector to employ in his subdistrict the teacher of his choice necessarily constitutes no authority to a

subdirector to hire a teacher in a district the school of which the board orders closed.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

Teachers—employment—mandamus. Principle reaffirmed that, in an action of mandamus against the president and secretary of a school board to compel the execution of a teacher's contract, the validity of the action of the directors in closing the school in question may not be inquired into.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

4233.1 School privileges when school closed.

Atty. Gen. Opinions. See '28 AG Op 248; '34 AG Op 321, 668; '38 AG Op 583, 584, 681

Duty to provide school facilities. Where a resident of a school district does not send his grade school children to his home district school, and the school is legally closed because during the preceding term the attendance was less than five pupils (§4231, C., '27), he may not compel the district to pay the cost of tuition and transportation of his said children to a school outside his district.

Kruse v Sch. Dist., 209-64; 227 NW 594

4233.2 County superintendent—duties.

Atty. Gen. Opinions. See 34 AG Op 321, 668; '38 AG Op 584

4233.3 Tuition.

Atty. Gen. Opinions. See '34 AG Op 668; '38 AG Op 583, 674

4233.4 Transportation.

Atty. Gen. Opinions. See '30 AG Op 212; '34 AG Op 321, 668; '36 AG Op 603; '38 AG Op 17, 234, 524, 566, 584

Liability in performance of governmental acts. The principle that when the officers, servants, or agents of a municipality are engaged in performing a governmental act for and on behalf of the municipality they are not liable in damages consequent on their negligence in doing the act, applies to a person who, with the knowledge and acquiescence of a school board, was operating for the school district a bus in the transportation of children to and from school, even tho the person so operating the bus was acting at the time in lieu of the person with whom the district had actually contracted for the transportation. [Overruled, see Montanick v McMillin, 225-442; 280 NW 608.]

Hibbs v School Dist., 218-841; 251 NW 606; 34 NCCA 468; 37 NCCA 711

School bus driver as independent contractor—nongovernmental function. A school bus driver furnishing his own bus under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

Power of board. The school board of a nonconsolidated school district has ample power to provide for the transportation to and from school of pupils living an unreasonable distance from the school. (Holding under §§4232, 4233, 4375, 4376, C., '31, now repealed.)

Hibbs v School Dist., 218-841; 251 NW 606; 4 NCCA (NS) 3

Refusal to furnish transportation. A school board which closes its school for want of the necessary five pupils is under a mandatory duty to provide transportation for its pupils, if any, to some other district as provided by statute, and in case of failure to perform such duty, the parent should seek relief in court, not by appeal to the county superintendent.

Riecks v School Dist., 219-101; 257 NW 546

Compelling transportation to be furnished to pupils. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute. The proper remedy of the plaintiff was mandamus to compel the school district to perform its mandatory duty.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Mandatory duty to transport pupils—governmental function. A statute providing that a school board shall furnish transportation to children living two and one-half miles from the school creates a mandatory duty to transport pupils which is a governmental function, but whether the duty be considered as ministerial or governmental, the school district, being a quasi corporation, cannot be sued for failure to furnish such transportation when such right of action is not expressly given by statute.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Transportation furnished pupils—no implied contract by board to pay for services. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had taken the child to school, could not recover for his services on a theory of contract implied in fact when there was no meeting of the minds or agreement that he should be compensated for such transportation, as no promise to pay can be inferred from the refusal of the school to furnish transportation upon demand and the subsequent transportation of the child by the father, as the school was in no position to reject such services.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

4233.5 Distance—how measured.

Atty. Gen. Opinions. See '34 AG Op 668; '38 AG Op 234

4236 Visiting schools.

Discussion. See 4 ILB 184—Authority of teachers over pupils outside of school

4237 Discharge of teacher.

Appeal as remedy. See under §4298

Atty. Gen. Opinions. See '28 AG Op 77; '30 AG Op 185

Discharge on notice—validity. A provision in a public school contract authorizing either party to the contract to terminate it by giving written notice of such termination for a named number of days, is not violative of, nor inconsistent with either §4229, C., '27, or this section. (Holding by minority of court.)

Miner v Sch. Dist., 212-973; 234 NW 817

Due process of law. A written contract between a teacher and a school board is necessarily accompanied by all statutory provisions which govern the original and appellate procedure for the discharge of such teacher. Having by the very act of contracting, legally consented to such procedure, the teacher may not assert that it does not afford him due process in a constitutional sense.

Chehock v Sch. Dist., 210-258; 228 NW 585

Jurisdiction of courts. A teacher who has been discharged by the board on charges of incompetency, after due notice to the teacher and hearing, may not maintain an action in the courts for damages consequent on such discharge.

Courtright v Sch. Dist., 203-26; 212 NW 368

Informal procedure—effect. A school board which has acquired jurisdiction in a proceeding for the discharge of a teacher, and over the teacher affected, does not lose such jurisdiction by conducting the hearing informally in the matter of evidence and procedure.

Chehock v Sch. Dist., 210-258; 228 NW 585

Informality of procedure—effect. The discharge of a teacher by the school board on supporting evidence will not be deemed illegal because of the marked informality of the proceedings, when the record reveals the presence of the elements of jurisdiction, to wit: charges before the board of incompetency on the part of the teacher, and a hearing on said charges at which the teacher was present and in which she participated.

Schrader v Sch. Dist., 221-799; 266 NW 473

Action for salary—insufficient defense. In an action by a teacher to recover salary accrued and unpaid at the time of her discharge by the board, it is no defense that the teacher did not make the report required of teachers at the close of the term (§4339, C., '35), said teacher having been discharged prior to the close of said term.

Schrader v Sch. Dist., 221-799; 266 NW 473

Contract—action on—demurrer. A petition which seeks recovery of the compensation arising under a contract for teaching, but which pleads a statutory discharge of plaintiff by the board of directors, is demurrable, even tho plaintiff also pleads that his appeal from the discharge to the superintendent of public instruction was dismissed for want of jurisdiction.

Streyffeler v Sch. Dist., 210-780; 231 NW 325

Contract of employment—termination on notice—validity. A provision in a public school contract which authorizes the school district to terminate the contract on stated notice at any time and for any reason, is valid, and if a termination is effected under such contract authorization and not under statutory authorization, no appeal will lie to the county superintendent or, in turn, to the state superintendent. In other words, neither superintendent has jurisdiction to review such a discharge.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

Illegal action—nonduty to appeal. The oral employment by a subdirector, under authority from the school board, of a teacher, and the formal, written, statutory contract evidencing such employment signed by the president of the board and by the school teacher are not subject to review by the school board; and the assumption of such power by the board may be ignored by the teacher without appeal to the county superintendent.

Shill v Sch. Twp., 209-1020; 227 NW 412

Wrongful discharge—duty to seek employment. A teacher wrongfully discharged is under obligation to exercise reasonable diligence to secure like employment in the same locality —not like employment at distant places, or similar employment of a lower or different grade.

Shill v Sch. Twp., 209-1020; 227 NW 412

See James v Sch. Twp., 210-1059; 229 NW 750

Appeal—dismissal—effect. Where a teacher appeals to the superintendent of public instruction from an order of the board of directors discharging the teacher, the dismissal of the appeal by said superintendent on the ground of want of jurisdiction cannot be given the legal effect of reversing the said order of discharge.

Streyffeler v Sch. Dist., 210-780; 231 NW 325

Appeal (?) or action in court (?). A teacher who is discharged by a school board, under proceedings over which it had jurisdiction, must seek relief by appeal to the county superintendent. On the other hand, if the board discharges a teacher under proceedings over which it had not acquired jurisdiction, the teacher may sue in the courts for breach of contract.

Schrader v Sch. Dist., 221-799; 266 NW 473

4238 Insurance—supplies—textbooks.

Atty. Gen. Opinions. See '28 AG Op 134; '34 AG Op 404, 462, 680; '36 AG Op 372

4239.3 Compensation of officers.

Atty. Gen. Opinions. See '30 AG Op 187; '34 AG Op 340, 344; AG Op Feb. 27, '39

4240 Annual settlements.

Atty. Gen. Opinions. See '38 AG Op 167, 210

4241 Transfer of funds.

Atty. Gen. Opinions. See '30 AG Op 54; '38 AG Op 167, 210; AG Op May 19, '39

4242 Financial statement — publication.

Atty. Gen. Opinions. See '30 AG Op 334, 336; '38 AG Op 154

4242.1 Other districts—filing statement.

Atty. Gen. Opinion. See '30 AG Op 336

4245 Employment of counsel.

Atty. Gen. Opinion. See AG Op Jan. 18, '39

Employment of counsel. A school board has legal authority to employ an attorney at the expense of the district to defend the action of the board in contracting with one teacher and in refusing to contract with another, even tho the actions in which the issue directly or indirectly arises are actions in form personally against the teacher and individual members of the board.

Cowles v Sch. Dist., 204-689; 216 NW 83

Powers of board. The board of directors of a school corporation has implied power in good faith to employ attorneys to defend against a proceeding for the dissolution of the district and to contract for a reasonable compensation for such services.

Rural Dist. v Daly, 201-286; 207 NW 124

Employment of county attorney. School boards are under no mandatory duty to secure the services of the county attorney in litigation affecting the corporate affairs of the school districts, even tho the statute (§5180, C., '24) does require such officers to give legal advice to such boards.

Rural Dist. v Daly, 201-286; 207 NW 124

Informal employment of attorney—ratification. An informal employment of attorneys by the directors of a school district in a matter as to which the district had a right to employ attorneys, is fully ratified by the good faith formal action of the board, with full knowledge of the facts, in allowing the claim of the attorneys.

Beers v Lasher, 209-1158; 229 NW 821

CHAPTER 214

COURSES OF STUDY

4250 Right to prescribe.

Atty. Gen. Opinions. See '28 AG Op 134, 213, 364, 413, 420; '32 AG Op 231; '36 AG Op 374, 375; '38 AG Op 230, 676, 737; AG Op May 22, '39, Oct. 9, '39

Course of study—discretion. The directors have a fair discretion as to the method to be employed in teaching a subject, which the electors have directed to be taught—a discretion not controllable by mandamus.

Neilan v Board, 200-860; 205 NW 506

Courses of study—discretion. The power of directors to prescribe courses of study embraces the discretion merely to authorize, without expense to the district or the pupils, the installation in the schools of a noncompulsory, copyrighted system of thrift instruction which necessarily contemplates the deposit of the child's savings in some bank or banks selected without dictation by the board.

Security Bk. v Bagley, 202-701; 210 NW 947; 49 ALR 705

4254 Medium of instruction.

Discussion. See 9 ILB 123—Foreign languages in private schools

Foreign language instruction. The right of a person to teach a foreign language in a private or parochial school, and the right of a parent to have his child so instructed in such schools, are constitutional rights guaranteed by the 14th amendment to the federal constitution. (191 Iowa 1060 reversed.)

Bartels v State of Iowa, 262 US 404

4256 Constitution of United States and state.

Atty. Gen. Opinion. See '30 AG Op 62

4257 American history and civics.

Atty. Gen. Opinion. See '30 AG Op 62

4258 Bible.

Atty. Gen. Opinions. See '28 AG Op 213; '36 AG Op 629

4259 Stimulants, narcotics, and poisons.

Atty. Gen. Opinion. See '28 AG Op 226

4262 Music.

Atty. Gen. Opinion. See '28 AG Op 413

4263 Physical education.

Atty. Gen. Opinions. See '28 AG Op 150, 243; '36 AG Op 375

4264 Length of course.

Atty. Gen. Opinions. See '28 AG Op 226, 243

4267 Higher and graded schools.

Atty. Gen. Opinions. See '28 AG Op 138, 165, 420; '32 AG Op 231; '36 AG Op 374, 375, 497; '38 AG Op 566, 676, 737; AG Op May 17, '39

Compulsory attendance — power of board and duty of custodian. A school board may validly establish an ungraded school along with and as a part of the district's established system of graded schools, and may, so long as

it does not act unreasonably, validly require the proper custodian of a child over 7 and under 16 years of age to cause said child to attend said ungraded school only, provided said child is continued in the public schools. So held as to a child who was in physical and mental condition to attend school but was unable to make the grades in the graded schools.

State v Ghrist, 222-1069; 270 NW 376

4267.1 Junior colleges.

Atty. Gen. Opinions. See '28 AG Op 138; '30 AG Op 67, 89

CHAPTER 215

SCHOOL ATTENDANCE AND TUITION

4268 School age—nonresidents.

Atty. Gen. Opinions. See '28 AG Op 186; '30 AG Op 377; AG Op Oct. 9, '39

4269 Offsetting tax.

Atty. Gen. Opinions. See '25-26 AG Op 491; '28 AG Op 210, 410; '30 AG Op 377; '32 AG Op 54; '34 AG Op 341, 466, 627; '36 AG Op 374, 422

4270 Right to exclude pupil.

Dismissal of appeal when question moot. An appeal from an order refusing to compel the public authorities to admit a child into the public schools (owing to certain health regulations) will be dismissed on a showing that the child has, prior to the taking of the appeal, been admitted to the school.

Saner v Sch. Bd., 211-1201; 235 NW 291

Unvaccinated school children. The appellate court will be slow to interfere with an order by the trial court refusing a temporary injunction against the enforcement by a school board of its order which temporarily excluded unvaccinated pupils from the public school; and especially will the appellate court decline to disturb such refusal when it affirmatively appears that the order of the board has expired ex vi termini.

Baehne v Sch. Dist., 201-625; 207 NW 755

4271 Majority vote—suspension.

Rules and violations thereof. See under §4224, Vol. I

4273 Tuition.

Atty. Gen. Opinions. See '25-26 AG Op 239; '28 AG Op 232, 238, 265, 376; '30 AG Op 67, 147, 377; '34 AG Op 627; '36 AG Op 567, 677; '38 AG Op 69, 95, 230, 846

Payment for tuition. Record reviewed and held that minor children moving into plaintiff school district and actually residing there with their parents had acquired a residence for school purposes, and that said district could not recover of the county tuition for said children.

Carbon Dist. v Adams Co., 221-1047; 267 NW 690

4274 Attending in another corporation—payment.

Atty. Gen. Opinions. See '25-26 AG Op 68, 189, 418; '28 AG Op 167, 387; '30 AG Op 377; '32 AG Op 73, 74, 271; '36 AG Op 250; '38 AG Op 122

Consent of superintendent—discretion. The county superintendent has discretion to refuse to consent that a pupil residing more than two miles from its home school may (at the expense of the pupil's home district) attend a much nearer school in an adjoining but different school corporation.

Moles v Daland, 220-1170; 264 NW 74

Nonconsent of superintendent—certiorari to review. Certiorari will lie to review the discretion of the county superintendent of schools in refusing to consent that a pupil, residing in one school corporation, may (at the expense of the pupil's district) attend school in an adjoining but different school corporation.

Moles v Daland, 220-1170; 264 NW 74

4274.01 Attending school outside state.

Atty. Gen. Opinion. See '38 AG Op 380

4274.03 Contract for school privileges.

Atty. Gen. Opinions. See '38 AG Op 566, 674

4274.04 Terms of contract.

Atty. Gen. Opinion. See '38 AG Op 674

4274.05 Transportation—two-mile limit.

Atty. Gen. Opinion. See '34 AG Op 321

4274.06 Transportation generally.

Atty. Gen. Opinions. See '34 AG Op 321; '38 AG Op 566

4274.09 Effect of contract.

Atty. Gen. Opinion. See '38 AG Op 674

4275 High school outside home district.

Atty. Gen. Opinions. See '25-26 AG Op 491; '28 AG Op 232, 357, 376; '30 AG Op 204; '32 AG Op 128; '34 AG Op 255, 541; '36 AG Op 146, 567, 604; '38 AG Op 69, 380, 516, 524, 674

No high school in district—attendance in other district—pupils of charitable institution. Statute providing that persons of school age who are residents of districts not having a four-year high school course shall be permitted to attend any public high school in the state construed to extend to wards of a charitable institution—the legislature not intending to discriminate against private, denominational, or parochial schools, nor to bar them from the benefits of statutory provisions.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

Residence for high school purposes. Children of school age who are so apprenticed to a charitable institution that such institution is

their only home until they reach the age of 21 years become residents of the school district in which such charitable institution is located; and if such district does not maintain a high school, such children may attend high school in some other district which does maintain such school and the tuition for such schooling shall be paid by the district of which the child is a resident, as aforesaid.

Salem Dist. v Kiel, 206-967; 221 NW 519

Pupils—duty of district to transport. When a state boundary river renders a portion of a consolidated school district inaccessible to the consolidated school, and the school authorities agree with the parent of grade pupils, residing on such inaccessible lands, to pay the tuition of said pupils in a school in a foreign state, but later refuse to pay for transporting said pupils to said school (a distance of five miles), the parent may supply the transportation in the foreign state and the district will be liable for the reasonable value thereof.

Dermit v Sch. Dist., 220-344; 261 NW 636

Wards of charitable institution from different district—tuition. In dispute over school district's liability for tuition of high school pupils who were wards of a charitable institution located in a school district which had no high school, and who attended high school in the district seeking to collect the tuition, the court properly held, under statute making the district of residence liable, that the children were residents of the school district in which the institution was located. (New statute, see '39 Code, section 4275.1)

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4275.1 Children from charitable institution.

Holding under prior statute. In dispute over school district's liability for tuition of high school pupils who were wards of a charitable institution located in a school district which had no high school, and who attended high school in the district seeking to collect the tuition, the court properly held, under statute making the district of residence liable, that the children were residents of the school district in which the institution was located.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4276 Requirements for admission.

Atty. Gen. Opinions. See '25-26 AG Op 424; '32 AG Op 56; '36 AG Op 145, 146, 188; '38 AG Op 632, 674; AG Op Jan. 27, '39

Statutes — construction — "shall" — when synonymous with "may". Statute providing that person applying for admission to high school shall present affidavit of parent or guardian construed to be directory rather than mandatory, the rule being that the word "shall" is generally construed to be mandatory, but where no right or benefit depends on its imperative use it may be, and often is, treated as synonymous with "may".

Sch. Twp. v Nicholson, 227-290; 288 NW 123

Liability for tuition — affidavit — failure to file. Where statute required person applying for admission to high school in another district to present affidavit that applicant is a resident of a school district of the state, and such affidavit was not filed, court properly held that such affidavit was not mandatory, and that school officials could waive such affidavit—the legislature not intending to allow a school district to escape liability for tuition because of failure to require such affidavit, particularly where statute was fully complied with in respect to filing certificate of proficiency.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4277 Tuition fees—payment.

Atty. Gen. Opinions. See '25-26 AG Op 217, 238; '28 AG Op 112, 210, 232; '30 AG Op 336; '32 AG Op 128, 172; '34 AG Op 255, 575, 668; '36 AG Op 146, 188, 604; '38 AG Op 69, 95, 516, 524, 566, 825, 828; AG Op Aug. 16, '39

Wards of charitable institution from different district. In dispute over school district's liability for tuition of high school pupils who were wards of a charitable institution located in a school district which had no high school, and who attended high school in the district seeking to collect the tuition, the court properly held, under statute making the district of residence liable, that the children were residents of the school district in which the institution was located. (New statute, see '39 Code, section 4275.1)

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4278 Collection of tuition fees.

Atty. Gen. Opinions. See '28 AG Op 429; '34 AG Op 600, 668; '36 AG Op 146, 567

Statutory tuition reimbursement without notice—due process. The statute providing for the collection of tuition fees by one school district from another is not unconstitutional under the due process clause because not requiring a notice and hearing, because a school district is not a person, as contemplated by the constitution. It is purely a creature of statute, having no power except that granted by the legislature, and so its funds are under legislative control.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Action — equity retaining jurisdiction on counterclaim—law issues. An action in equity by one school district to enjoin another school district and the county treasurer from transferring to the defendant school certain funds claimed to be due from the plaintiff school as tuition, remains in equity altho the defendant school files a cross-petition raising issues at law as to determination of the amount due, if any, and for judgment accordingly, since

equity, acquiring jurisdiction, may determine all issues.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Tuition transfer—county treasurer—joinder on cross-petition unnecessary. In an equitable action between school districts to prevent a statutory transfer by a county treasurer of funds in payment of tuition, a cross-petition of the defendant school district, not joined in by the county treasurer, may not be stricken therefrom, inasmuch as the county treasurer has no investment therein and is not a necessary party thereto.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Wards of charitable institution from different district. In dispute over school district's liability for tuition of high school pupils who were wards of a charitable institution located in a school district which had no high school, and who attended high school in the district seeking to collect the tuition, the court properly held, under statute making the district of residence liable, that the children were residents of the school district in which the institution was located. (New statute, see '39 Code, section 4275.1)

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4283 Tuition in charitable institutions.

Atty. Gen. Opinions. See '36 AG Op 567; '38 AG Op 569

Residence for high school purposes. Children of school age who are so apprenticed to a charitable institution that such institution is their only home until they reach the age of 21 years become residents of the school district in which such charitable institution is located; and if such district does not maintain a high school, such children may attend high school in some other district which does maintain such school (§4275, C., '27), and the tuition for such schooling shall be paid by the district of which the child is a resident, as aforesaid.

Salem Dist. v Kiel, 206-967; 221 NW 519

4283.01 Tuition when in boarding home.

Atty. Gen. Opinion. See '38 AG Op 569

Children in private charitable institution—not public charges. Statute providing that state shall pay tuition of public charges living in a children's boarding home is not available as a defense in school district's action for tuition when children were supported by Lutheran Society and neither the state nor any political subdivision contributed to their support.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

Payment of tuition—retroaction—intention of legislature. Statute enacted in 1937 providing for payment of tuition of wards of charitable institution attending public schools held not retroactive in action involving liability for tuition incurred for years prior to that date.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

CHAPTER 215.2

REIMBURSEMENT OF SCHOOL DISTRICTS FOR LOSS OF TAXES

Atty. Gen. Opinions. See '34 AG Op 395, 575; '36 AG Op 199

CHAPTER 217

EVENING SCHOOLS

4288 Evening schools authorized.

Atty. Gen. Opinions. See '25-26 AG Op 258; AG Op Oct. 9, '39

4289 When establishment mandatory.

Atty. Gen. Opinion. See '25-26 AG Op 258

4290 Supervision—who admitted.

Atty. Gen. Opinion. See '25-26 AG Op 258

CHAPTER 218

PART-TIME SCHOOLS

Atty. Gen. Opinion. See '30 AG Op 266

CHAPTER 219

APPEAL FROM DECISIONS OF BOARDS OF DIRECTORS

Atty. Gen. Opinions. See '34 AG Op 452; '38 AG Op 506

4298 Appeal to county superintendent.

Atty. Gen. Opinions. See '28 AG Op 249, 302; '30 AG Op 208; '32 AG Op 57

ANALYSIS

I APPEAL IN GENERAL
II APPEAL TO SUPERINTENDENT AS SOLE REMEDY
III PERMISSIBLE COURT ACTION

I APPEAL IN GENERAL

Jurisdiction—strict construction. The jurisdiction of the superintendent of public instruction over appeals from decisions and orders of a county superintendent cannot, by the conduct of a party to the appeal, be enlarged beyond the jurisdiction actually conferred by law.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

Illegal action—nonduty to appeal. The oral employment by a subdirector, under authority from the school board, of a teacher, and the formal, written, statutory contract evidencing such employment, signed by the president of the board and by the teacher, are not subject to review by the school board; and the assumption of such power by the board may be ignored by the teacher without appeal to the county superintendent.

Shill v School Twp., 209-1020; 227 NW 412

Location of school—no injunctive relief. The determination of the location of site of a new high school is within the power of the school board and its decision cannot be controlled by injunction.

Smith v Maresh, 226-552; 284 NW 390

Teachers — contract of employment — termination on notice — validity. A provision in a public school contract which authorizes the school district to terminate the contract on stated notice at any time and for any reason is valid, and if a termination is effected under such contract authorization and not under statutory authorization (§4237, C., '35), no appeal will lie to the county superintendent or in turn to the state superintendent. In other words, neither superintendent has jurisdiction to review such a discharge.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

II APPEAL TO SUPERINTENDENT AS SOLE REMEDY

Appeal — affidavit — sufficiency. The "affidavit" as the basis of an appeal to the county superintendent is sufficient even tho made by one who is a nonappellant and a nonresident of the subdistrict where the controversy exists, when he is a resident of the school district and a taxpayer in the subdistrict and a patron of the school therein and when the affidavit is filed with the county superintendent by the actual appellants.

Sanderson v Board, 211-768; 234 NW 216

Jurisdiction of courts. A teacher who has been discharged by the board of directors on charges of incompetency, after due notice to the teacher and hearing, may not maintain an action in the courts for damages consequent on such discharge.

Courtright v Sch. Dist., 203-26; 212 NW 368

Proper review of board action. When school directors are invested by statute with control over a named subject matter, their action with reference to such subject matter must be reviewed through an appeal to the county superintendent, and not through a resort to the courts; and this is true howsoever inexpedient, improper, and ill-advised the action may appear to be.

Security Bk. v Bagley, 202-701; 210 NW 947; 49 ALR 705

Transporting consolidated school pupils—board's discretion—remedy by appeal. Mandamus will not lie to compel a consolidated school board to transport pupils when by statute it is also given a discretion to suspend service and to require a two mile transportation by the parent to the established bus route. A parent dissatisfied with the school board's procedure has an adequate law remedy by appeal to the county superintendent.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

III PERMISSIBLE COURT ACTION

Teachers—discharge—appeal (?) or action in court (?). A teacher who is discharged by a school board under proceedings over which it had jurisdiction must seek relief by appeal to the county superintendent. On the other hand, if the board discharges a teacher under proceedings over which it had not acquired jurisdiction, the teacher may sue in the courts for breach of contract.

Schrader v School Dist., 221-799; 266 NW 473

Transportation—refusal to furnish—remedy. A school board which closes its school for want of the necessary five pupils is under a mandatory duty to provide transportation for its pupils, if any, to some other district as provided by statute, and in case of failure to perform such duty, the parent should seek relief in

court, not by appeal to the county superintendent.

Riecks v School Dist., 219-101; 257 NW 546
See Dermit v School Dist., 220-344; 261 NW 636

4299 Notice—transcript—hearing.

Appearance in lieu of notice. Failure of the county superintendent to fully comply with the statute relative to notifying adversely interested parties of an appeal is cured by the voluntary appearance of said parties.

Sanderson v Board, 211-768; 234 NW 216

4300 Hearing—shorthand reporter—decision.

Atty. Gen. Opinion. See '32 AG Op 57

4301 Witnesses—fees—collection.

Atty. Gen. Opinion. See '34 AG Op 452

4302 Appeal to state superintendent.

Atty. Gen. Opinions. See '25-26 AG Op 149; '30 AG Op 208; '32 AG Op 57

Jurisdiction—strict construction. The state superintendent's power over appeals cannot be enlarged beyond jurisdiction actually conferred by law.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

Appeal from original order. No appeal lies to the superintendent of public instruction from an original order or action of a county superintendent. In other words, the right of appeal to the state superintendent is strictly confined to those decisions or orders that originate with a board of directors of a school corporation.

Field v Samuelson, 212-786; 233 NW 687

Appeal—dismissal—effect. Where a teacher appeals to the superintendent of public instruction from an order of the board of directors discharging the teacher, the dismissal of the appeal by said superintendent on the ground of want of jurisdiction cannot be given the legal right of reversing the said order of discharge.

Streyffeler v Sch. Dist., 210-780; 231 NW 325

Sites—appeal—jurisdiction of state superintendent. The superintendent of public instruction on an appeal involving an order of a school board locating a schoolhouse site has no jurisdiction, after affirming the order of the board, to enter an order directing the school board to provide transportation for certain pupils, the matter of transportation not being mentioned in the order locating the site.

Reason: The jurisdiction of said officers on appeal is strictly appellate.

Albrecht v School Dist., 216-968; 250 NW 129

CHAPTER 220

PRESIDENT, SECRETARY, AND TREASURER

4304 President—duties.

Delegation of authority. A school board may very properly delegate to its president the authority to receive a deed to property purchased by the board and to deliver the warrant in payment for such property.

Looney v Sch. Dist., 201-436; 205 NW 328

4305 Bonds of secretary and treasurer.

Bonds—prima facie liability. Proof that a school treasurer drew a check upon the school district bank account in favor of another bank; that the check was duly cashed; that the payee bank did not credit the amount to any account of the school district; and that said treasurer on demand did not deliver said money to the district, constitutes prima facie evidence of the latter's default and of liability on his bond.

School District v Sass, 220-1; 261 NW 30

Indemnification of one of two sureties—effect. In an action against a public officer and his bondsmen to recover a shortage in public funds, it is quite immaterial as far as plaintiff is concerned that one of the sureties has received property from the public officer as partial indemnity.

School District v Sass, 220-1; 261 NW 30

Nonentertainable defense. In an action on the bond of a school treasurer to recover a shortage in his accounts, it is no defense that the plaintiff district has a cause of action against a third party who is unlawfully in possession of the funds constituting the shortage.

School District v Sass, 220-1; 261 NW 30

Rejected defensive plea. In an action on the bond of a school treasurer, the defensive plea (if it is a defense) that the treasurer was the innocent victim of another party's wrongdoing will be given no consideration when the wrongdoing of the treasurer is manifest.

School District v Sass, 220-1; 261 NW 30

4308 Duties of secretary.

Atty. Gen. Opinions. See '28 AG Op 164; '38 AG Op 800

4310 Warrants.

District debts—unavailable defense. In an action on a school warrant duly drawn on the schoolhouse fund, it is no defense that the warrant is, in effect, payable out of such fund as may be on deposit in a named bank.

Looney v School Dist., 201-436; 205 NW 328

4316 Duties of treasurer—payment of warrants.

Atty. Gen. Opinion. See '28 AG Op 152

4317 General and schoolhouse funds.

Atty. Gen. Opinions. See '28 AG Op 394; '34 AG Op 223; '38 AG Op 210

Trust property for educational purposes. Property transferred to a county in trust for the establishment of a prescribed seminary of learning, and duly accepted by the board of supervisors on behalf of the county, becomes a special part of the school fund of the county, and remains such, tho the legal title be transferred to court-appointed trustees for managerial purposes. It follows that, being county property and devoted to public use and not held for pecuniary profit, said property is exempt from taxation (§6944, par. 2, C., '35), even tho no action has been taken to actually execute the trust.

McColl v Dallas County, 220-434; 262 NW 824

Unavailable defense. In an action on a school warrant duly drawn on the schoolhouse fund, it is no defense that the warrant is in effect payable out of such fund as may be on deposit in a named bank.

Looney v Sch. Dist., 201-436; 205 NW 328

CHAPTER 221

COMMON SCHOOL LIBRARIES

Atty. Gen. Opinions. See '28 AG Op 157; '30 AG Op 186; '34 AG Op 404; AG Op Feb. 2. '39

CHAPTER 222

STANDARDIZATION AND STATE AID

Atty. Gen. Opinions. See '25-26 AG Op 126; '28 AG Op 165; '34 AG Op 247; '36 AG Op 195

CHAPTER 223

TEACHERS

4336 Qualifications — compensation prohibited.

Atty. Gen. Opinion. See AG Op Oct. 9, '39

Action by teacher for compensation—pleading—intervention by taxpayer. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v Sch. Dist., 225-1272; 282 NW 754

4339 Daily register.

Action for salary — insufficient defense. In an action by a teacher to recover salary accrued and unpaid at the time of her discharge by the board, it is no defense that the teacher did not make the report required of teachers at the close of the term, said teacher having been discharged prior to the close of said term.

Schrader v School Dist., 221-799; 266 NW 473

4341 Minimum teachers' wage.

Atty. Gen. Opinions. See '28 AG Op 85, 198; '32 AG Op 192; '36 AG Op 134

4345 Pension system.

Atty. Gen. Opinions. See '30 AG Op 86, 312, 334; '36 AG Op 599; '38 AG Op 248

4346 Fund.

Atty. Gen. Opinions. See '36 AG Op 599; '38 AG Op 248

4347 Management.

Atty. Gen. Opinions. See '36 AG Op 599; '38 AG Op 248; AG Op Jan. 19, '39

CHAPTER 224

INSTRUCTION OF DEAF

Atty. Gen. Opinions. See '25-26 AG Op 36, 37

CHAPTER 225

INDEBTEDNESS OF SCHOOL DISTRICTS

Atty. Gen. Opinions. See '36 AG Op 196; '38 AG Op 187

4353 Indebtedness authorized.

Atty. Gen. Opinions. See '28 AG Op 79, 249, 293

General obligations — trust fund. School warrants which are in form the general obligations of the district, and issued under a purported contract of the district providing for such unconditional issuance, are void if in excess of the constitutional limit of indebtedness, notwithstanding the fact that the said contract carries the inference that the warrants will be paid from a special fund arising from the sale of bonds.

Carstens Bros. v Sch. Dist., 218-812; 255 NW 702

4354 Petition for election.

Atty. Gen. Opinions. See '28 AG Op 79, 93, 249; '36 AG Op 196; '38 AG Op 167, 210

Legal sufficiency of petition. The determination by the board of directors of the legal sufficiency of a petition as regards the signatures thereon is sufficient, even tho the statute does not require the board to keep on file a record of the electors of the district.

Mershon v Sch. Dist., 204-221; 215 NW 235

4355 Election called.

Atty. Gen. Opinion. See '36 AG Op 196

Special meeting on oral notice. A special meeting of the board of directors of a school corporation is legally called on oral notice to the directors by the secretary, at the direction of the president.

Mershon v Sch. Dist., 204-221; 215 NW 235

CHAPTER 226

SCHOOLHOUSES AND SCHOOLHOUSE SITES

4359 Location.

Appeal to county superintendent. See under §4298

Atty. Gen. Opinion. See '34 AG Op 657

Nonprejudicial order of court. An order of court commanding the school board forthwith to erect a schoolhouse on a specified site is unobjectionable when such site had been already legally selected by the board.

Sanderson v Board, 211-768; 234 NW 216

Decision of school board—no injunctive relief. The determination of the location of site of a new high school is within the power of the school board and its decision cannot be controlled by injunction.

Smith v Maresh, 226-552; 284 NW 390

Order—sufficiency. An order fixing a schoolhouse site of at least one-half acre in the southeast corner of a named quarter section is not fatally indefinite on the theory that such order would require the location to be made in part in the contiguous public highway.

Sanderson v Board, 211-768; 234 NW 216

Purchase—rescission and cancellation. The purchase by a board of a schoolhouse site after bonds for such purchase had been duly voted, but prior to any bond levy, and the due issuance of a warrant in payment for such site, are not canceled or rescinded by the subsequent action of the electors in voting to rescind their former action authorizing the bonds.

Looney v Sch. Dist., 201-436; 205 NW 328

Relocation—record—sufficiency. School record reviewed, and, while quite informal, held to clearly show the official action of the board in relocating a schoolhouse site.

Sanderson v Board, 211-768; 234 NW 216

Appeal—jurisdiction of state superintendent. The superintendent of public instruction on an appeal involving an order of a school board locating a schoolhouse site has no jurisdiction, after affirming the order of the board, to enter an order directing the school board to provide transportation for certain pupils, the matter of transportation not being mentioned in the order locating the site.

Reason: The jurisdiction of said officers on appeal is strictly appellate.

Albrecht v School Dist., 216-968; 250 NW 129

District property — conveyance — review by courts. The courts will not, at the suit of a taxpayer, overturn and nullify the action of a school board in executing and receiving, on behalf of the district, deeds in order to adjust the boundaries of a schoolhouse site, and in finally conveying the site when no longer needed, when the transactions have stood unquestioned for many years, and when there is no allegation or proof that the directors refused to perform their duty, or acted illegally or fraudulently.

Beck v School Dist., 213-1282; 241 NW 427

4361 Five-acre limitation.

Atty. Gen. Opinions. See '34 AG Op 223; '38 AG Op 210

School site—title valid as to part—no injunction. A school district's title to its site for a high school is not wholly invalid simply because the size may be greater than the statutory

limitation on the amount that can be obtained by condemnation. When the size of the building is not so great as to cover more ground than the statute allows, and when the title, if defective at all, is defective only as to the excess land, an injunction will not lie on the theory that the district had no title.

Smith v Maresh, 226-552; 284 NW 390

Real property—power to acquire. A school district has general power to acquire and hold real property for its legitimate purposes.

Smith v Maresh, 226-552; 284 NW 390

4363 Tax.

Atty. Gen. Opinions. See '34 AG Op 223; '38 AG Op 210

4364 Condemnation.

Atty. Gen. Opinion. See '30 AG Op 146

4371 Uses for other than school purposes.

Discussion. See 1 ILB 85—Uses of school property

Atty. Gen. Opinions. See '25-26 AG Op 203; '28 AG Op 146, '32 AG Op 208; '36 AG Op 196; AG Op May 15, '39

4372 Compensation.

Atty. Gen. Opinion. See '36 AG Op 196

4373 Use forbidden.

Atty. Gen. Opinion. See '36 AG Op 196

4374 Renting schoolroom.

Atty. Gen. Opinions. See '28 AG Op 293, 413; '32 AG Op 231

4379 Reversion of schoolhouse site.

Atty. Gen. Opinions. See '34 AG Op 657; AG Op March 21, '39

4385 Sale of unnecessary schoolhouse sites.

Atty. Gen. Opinions. See '34 AG Op 657; AG Op March 21, '39

Conveyance—review by courts. The courts will not, at the suit of a taxpayer, overturn and nullify the action of a school board in executing and receiving, on behalf of the district, deeds in order to adjust the boundaries of a schoolhouse site and in finally conveying the site when no longer needed when the transactions have stood unquestioned for many years and when there is no allegation or proof that the directors refused to perform their duty or acted illegally or fraudulently.

Beck v Sch. Dist., 213-1282; 241 NW 427

CHAPTER 227

SCHOOL TAXES AND BONDS

4386 School taxes.

Atty. Gen. Opinions. See '28 AG Op 116; '30 AG Op 67, 89, 204

Venue—action where school district located—propriety. An action against the state appeal board to review its rulings affecting a school district under the local budget law is properly brought in the county where the school district was located and where proceedings on the levy involved were held from which resulted the board's ruling.

Board v Dist. Court, 225-296; 280 NW 525

4387 Additional taxes.

Atty. Gen. Opinions. See '28 AG Op 116; '30 AG Op 204

4388 Transportation fund—tax for free textbooks.

Atty. Gen. Opinion. See '28 AG Op 116

4391 Contract for use of library.

Atty. Gen. Opinion. See '28 AG Op 220

4393 Levy by board of supervisors.

Atty. Gen. Opinion. See '34 AG Op 661

4394 Special levies.

Atty. Gen. Opinion. See '34 AG Op 661

4395 General school levy.

Atty. Gen. Opinions. See '34 AG Op 342, 661; '36 AG Op 567

Venue—action where school district located—propriety. An action against the state appeal board to review its rulings affecting a school district under the local budget law is properly brought in the county where the school district was located and where proceedings on the levy involved were held from which resulted the board's ruling.

Board v Dist. Court, 225-296; 280 NW 525

4396 Apportionment of school funds.

Atty. Gen. Opinions. See '28 AG Op 157; '36 AG Op 567

Deposits—payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

4402 Judgment levy.

Limitation on schoolhouse levy. See under §4217, Vol. I

4403 Bond tax.

Atty. Gen. Opinions. See '25-26 AG Op 283; '28 AG Op 394; '36 AG Op 678

4405 Funding or refunding bonds.

Atty. Gen. Opinions. See '36 AG Op 121, 423

4406 School bonds.

Atty. Gen. Opinions. See '28 AG Op 394; '38 AG Op 234

General obligations — trust fund. School warrants which are in form the general obligations of the district and issued under a purported contract of the district providing for such unconditional issuance are void if in excess of the constitutional limit of indebtedness, notwithstanding the fact that the said contract carries the inference that the warrants will be paid from a special fund arising from the sale of bonds.

Carstens Bros. v Sch. Dist., 218-812; 255 NW 702

4407 Form—rate of interest—where registered.

Atty. Gen. Opinion. See '38 AG Op 200

4408 Redemption.

Atty. Gen. Opinions. See '38 AG Op 187, 200

CHAPTER 228

COMPULSORY EDUCATION

4410 Attendance requirement.

Atty. Gen. Opinions. See '28 AG Op 92, 186; '34 AG Op 627; '36 AG Op 512

Pupils — compulsory attendance — power of board and duty of custodian. A school board may validly establish an ungraded school along with and as a part of the district's established system of graded schools, and may, so long as it does not act unreasonably, validly require the proper custodian of a child over 7 and under 16 years of age to cause said child to attend said ungraded school only, provided said child is continued in the public schools. So held as to a child who was in physical and mental condition to attend school but was unable to make the grades in the graded schools.

State v Ghrist, 222-1069; 270 NW 376

4413 Reports as to private instruction.

Atty. Gen. Opinion. See '28 AG Op 293

4415 Violations.

Atty. Gen. Opinion. See '30 AG Op 329

CHAPTER 229

PUBLIC RECREATION AND PLAYGROUNDS

Atty. Gen. Opinion. See '30 AG Op 335

CHAPTER 231

TEXTBOOKS

4446 Adoption—purchase and sale.

Atty. Gen. Opinions. See '32 AG Op 78; '34 AG Op 462; '36 AG Op 280; '38 AG Op 601

4447 Custodian—bond.

Atty. Gen. Opinions. See '36 AG Op 280; '38 AG Op 601

4448 Payment—additional tax.

Atty. Gen. Opinions. See '28 AG Op 116; '36 AG Op 280

4452 Awarding contract.

Contract for supplies—permissible duration. School boards may validly bind their school districts by reasonable contracts for ordinary school supplies, tho such contracts are not fully performable during the school year in which they were executed or during the school year following.

Dodds Co. v School Dist., 220-812; 263 NW 522

4453 Change—election.

Atty. Gen. Opinion. See '32 AG Op 173

4461 Custody and accounting.

Atty. Gen. Opinion. See '28 AG Op 215

4464 Petition—election.

Atty. Gen. Opinions. See '32 AG Op 77, 128; '34 AG Op 461, 462

4468 Officers as agents.

Atty. Gen. Opinions. See '28 AG Op 74, 399; '30 AG Op 93, 336; '32 AG Op 110, 189; '36 AG Op 237, 660; '38 AG Op 185; AG Op Feb. 27, '39

CHAPTER 232
SCHOOL FUNDS

Atty. Gen. Opinions. See '34 AG Op 290; '38 AG Op 149

4469 Permanent fund.

School fund mortgage—state property—permanent school fund. A school fund mortgage is state property and the state has recognized its right to maintain a permanent school fund intact and inviolate for purpose to which dedicated.

Monona County v Waples, 226-1281; 286 NW 461

Trust property for educational purposes. Property transferred to a county in trust for the establishment of a prescribed seminary of learning, and duly accepted by the board of supervisors on behalf of the county, becomes a special part of the school fund of the county, and remains such, tho the legal title be transferred to court-appointed trustees for managerial purposes. It follows that, being county property and devoted to public use and not held for pecuniary profit, said property is exempt from taxation (§6944, par. 2, C., '35), even tho no action has been taken to actually execute the trust.

McColl v Dallas County, 220-434; 262 NW 824

4472 Division and appraisement.

Atty. Gen. Opinion. See '28 AG Op 181

4473 Notice—sale.

Atty. Gen. Opinion. See '25-26 AG Op 68

4476 Sale of lands bid in.

Atty. Gen. Opinions. See '25-26 AG Op 68; '38 AG Op 149

4483 Management.

Atty. Gen. Opinions. See '38 AG Op 396, 733

4484 Actions.

Atty. Gen. Opinion. See '38 AG Op 396

4485 Liability of county.

Atty. Gen. Opinions. See '38 AG Op 396; AG Op March 16, '39

4487 Loans—officers may not borrow.

Atty. Gen. Opinions. See '28 AG Op 431; '34 AG Op 645

4488 Terms—appraisement—fee.

Atty. Gen. Opinions. See '28 AG Op 294; '34 AG Op 536; '38 AG Op 418, 723

4489 Application for loan.

Atty. Gen. Opinion. See '38 AG Op 827

4494 Renewal.

Atty. Gen. Opinion. See '28 AG Op 294

4495 Statute of limitation.

Atty. Gen. Opinion. See '34 AG Op 59

School fund mortgage foreclosure—defenses. In an action to foreclose a school fund mortgage, where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until eleven years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien and that it was unpaid, and he could not rely on lapse of time, laches or negligence as against the state.

Monona County v Waples, 226-1281; 286 NW 461

4498 School fund account—settlement.

Atty. Gen. Opinion. See '34 AG Op 104

4499 Notice of default.

Atty. Gen. Opinion. See '34 AG Op 104

4500 Suit—attorney fee.

Atty. Gen. Opinions. See '25-26 AG Op 68; '34 AG Op 104

4501 Bid at execution sale.

Atty. Gen. Opinion. See '38 AG Op 396

4502 Sheriff's deed to state.

Atty. Gen. Opinion. See '34 AG Op 140

4503 Resale by state.

Atty. Gen. Opinions. See '38 AG Op 149; AG Op Feb. 9, '39

4505 Excess—loss borne by county.

Atty. Gen. Opinions. See '38 AG Op 104; AG Op March 16, '39

4506 Report as to sales—interest.

Atty. Gen. Opinion. See '38 AG Op 608

4507 Interest charged to counties.

Atty. Gen. Opinion. See '38 AG Op 418

CHAPTER 234.1
LAW, MEDICAL, AND TRAVELING LIBRARIES AND HISTORICAL DEPARTMENT

4541.02 Board of trustees.

Atty. Gen. Opinion. See '38 AG Op 146

4541.03 Powers and duties of the board.

Atty. Gen. Opinion. See '38 AG Op 146

4541.06 Duties of the curator of the department of history and archives.

Atty. Gen. Opinion. See '38 AG Op 669

4541.09 Archives.

Atty. Gen. Opinion. See AG Op Feb. 22, '39

4541.12 Certified copies—fees.

Atty. Gen. Opinions. See '38 AG Op 425; AG Op Feb. 22, '39; AG Op Nov. 13, '39

TITLE XIII

HIGHWAYS

CHAPTER 237

ESTABLISHMENT, ALTERATION, AND VACATION OF HIGHWAYS

Atty. Gen. Opinions. See '25-26 AG Op 125; '28 AG Op 435; '32 AG Op 100; '36 AG Op 215, 235; '38 AG Op 677

GENERAL PROVISIONS

4560 Jurisdiction.

Atty. Gen. Opinions. See '28 AG Op 246; '38 AG Op 677, 808

ANALYSIS

I HIGHWAYS IN GENERAL
II JURISDICTION
III DEDICATION

Adverse possession, prescriptive rights, abandonment, and estoppel in re highways. See under §§10175, 11007(VI, XXVIII)

I HIGHWAYS IN GENERAL

Unallowable alteration. A highway which was established substantially on a designated line, but which was actually opened and maintained by the public authorities and fenced by the various abutting property owners for more than a half century on a line variant from the established line, may not be summarily changed back to the established line and thereby made to embrace lands which were theretofore undisturbed.

Clarken v Lennon, 203-359; 212 NW 686

Bequest for paving roads—acceptance by county not enjoined. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Codicil creating charitable trust to county for paving roads—improper delegation of duties to executor. A first codicil devising an estate to trustees to be administered under county supervision in building roads and a second codicil appointing one executor to aid the county in building roads created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Abandonment of highway. Evidence reviewed and held insufficient to establish the claimed intentional abandonment by the public of a duly established highway.

Robinson v Board, 222-663; 269 NW 921

II JURISDICTION

Power lodged with supervisors under Revision 1860. Under the statutes in force on January 9, 1868, the time at which a highway, the boundaries of which are in question, was established, the county board of supervisors had general supervision and power to establish highways.

Davelaar v Marion Co., 224-669; 277 NW 744

Jurisdictional recital as prima facie showing. A recital made in 1868 by a board of supervisors when ordering the establishment of a highway to the effect, "The board being fully advised in the premises", states a prima facie presumption that they had jurisdiction and had complied with all statutory requirements.

Davelaar v Marion Co., 224-669; 277 NW 744

Dual procedure—effect. It is not fatal to the establishment of a highway that, owing to a change in the statutes, the procedure was in part before the court and in part before the board of supervisors.

Harbacheck v Tel. Co., 208-552; 226 NW 171

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.
2. As to secondary roads, in the board of supervisors on its own motion. (§§4607, 4755-b36, C., '27 [§§4607, 4755.33, C., '39]).

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change—will not be deemed an establishment of a road—the power to establish roads being a power not possessed by the state commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Discontinuance—disregard of statute—effect on right to damages. A board of supervisors cannot deprive a property owner of a

valid claim for damages consequent on the vacation or abandonment of a county road by wholly disregarding the statutory procedure governing such vacation or abandonment. The property owner may recognize the irregular procedure of the board by filing his claim with it and the board thereby acquires jurisdiction over the claim, a jurisdiction which it must exercise.

Furgason v County, 212-814; 237 NW 214

III DEDICATION

Implied dedication. An implied dedication of land for a public way and an implied acceptance thereof by the public will not be decreed on evidence tending to show a very perfunctory assumption of jurisdiction over the land by the public authorities, plus a use which is as consistent with the theory of mere permission by the owner as with the theory of rightful public use.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Prescription. A public way by prescription will not be decreed on evidence which is just as consistent with the theory of the owner that whatever use was made of the land as a road was purely permissive as with the theory that the use was hostile, adverse, and under a claim of right.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Evidence—old road records—use alone insufficient. In an action to establish a road by prescription, evidence in the form of a page from an old road record made in 1850, which was a copy of the surveyor's notes, and introduced as evidence of an adverse claim, is not sufficient when it does not show that such road as shown on the old record was the same as the road now in use. Without this, the road could not be established on the sole evidence of long continued use.

Slack v Herrick, 226-336; 283 NW 904

Right of way—deed—abandonment—effect. A deed to a strip of land for highway purposes is ipso facto annulled and rendered ineffective by the definite abandonment of the proposal to establish the highway. In other words, the municipality may not, years after definitely abandoning the project, establish the highway and claim anything under the deed.

Beim v Carlson, 209-1001; 227 NW 421

4561 Width.

Width of bridges. See §4667, Vol I

Atty. Gen. Opinions. See '25-26 AG Op 335; '30 AG Op 120

Ipso facto width. Principle reaffirmed that if, in the establishment of a highway, no width is designated, then the statutory width prevails.

Dickson v Davis County, 201-741; 205 NW 456

Presumption as to width of old road duly established. When the records of the establishment of a highway made many years ago are silent as to the width thereof, it must be presumed to be the statutory width, to wit, 66 feet.

Richardson v Derry, 226-178; 284 NW 82

"Statutory" width—definition. The "statutory" width of a road is the width (1) expressly fixed by the board of supervisors when the road is established, or (2) implied by statute if the board fixes no width, in no case less than 40 feet.

Carstens v Keating, 210-1326; 230 NW 432
McKinley v County, 215-46; 244 NW 663

Territorial road. The establishment of a highway by the legislature and the designation of it as a "territorial" highway are conclusive as to its width—70 feet.

Dickson v Davis Co., 201-741; 205 NW 456

Alteration — effect as to width. A material alteration in the location of a road constitutes the establishment of a new road, and the width thereof will be controlled by the then existing statutes.

Dickson v Davis Co., 201-741; 205 NW 456

Adjoining landowner—no title accrues from encroachment on highway. Encroachment by an adjoining landowner on an established public highway will not ripen into a title through any statute of limitations, doctrine of acquiescence, adverse possession, or estoppel—the establishment and maintenance of public highways being a governmental function.

Richardson v Derry, 226-178; 284 NW 82

4562 Petition.

Atty. Gen. Opinions. See '34 AG Op 125; '36 AG Op 214, 235

Optional procedure to make changes. The board of supervisors may proceed on its own motion under §4607 et seq., C., '27, to widen an established statutory road. It need not wait for the filing of a petition as in case of the original establishment of a road.

Carstens v Keating, 210-1326; 230 NW 432

"Petition presented" construed as "writing". The words "petition * * * and agreement were presented" appearing on the record of a highway established in 1868 can only mean the writing required by statute.

Davelaar v Marion Co., 224-669; 277 NW 744

Petition—location of road. Under the Code, '51, and R., '60, the petition for the establishment of a highway is sufficient as to the location of the highway if the township is indicated by the correct governmental description.

Harbacheck v Tel. Co., 208-552; 226 NW 171

Prohibition relative to "orchards". The statutory prohibition against establishing a high-

way through an orchard without the owner's consent (§4566, C., '24) applies whether the establishment is by the board of supervisors on petition or by such board on its own motion (§4607 et seq., C., '24).

Junkin v Knapp, 205-184; 217 NW 834

Unallowable plea to avoid damages. A county which through its board of supervisors takes out the bridges and culverts on a long established county road and permits the road to be plowed and cultivated, and thereby rendered impassable, may not avoid a claim for damages resulting to a property owner because of the vacation by the plea that it did not comply with the statute relative to vacation.

Furgason v County, 212-814; 237 NW 214

4563 Bond.

Atty. Gen. Opinions. See '36 AG Op 214, 235

Security—proof. Proof that security was given for the expense attending an application for the establishment of a highway may be established by a record recital to that effect, aided by the legal presumption that the officers acted regularly.

Harbacheck v Tel. Co., 208-552; 226 NW 171

4566 Property exempt.

Discussion. See 16 ILR 271—Construction of statute

Condemnation by state highway commission. The state highway commission has no authority to condemn for primary road purposes the ornamental grounds or orchard of an owner without his consent; and this is true notwithstanding §§4755-b27, 7803, C., '27 [§§4755.23, 7803, C., '39].

Hoover v Highway Com., 207-56; 222 NW 438

Prohibition relative to "orchards". The statutory prohibition against establishing a highway through an orchard without the owner's consent, applies whether the establishment is by the board of supervisors on petition (§4562 et seq., C., '24) or by such board on its own motion (§4607 et seq., C., '24).

Junkin v Knapp, 205-184; 217 NW 834

"Orchard" defined. A group of some 65 bearing fruit trees of different varieties, and maintained by continued replanting, constitutes an "orchard".

Junkin v Knapp, 205-184; 217 NW 834

Removal of building. A "small" privy is not a "substantial, permanent, and valuable building", within the meaning of this section.

Junkin v Knapp, 205-184; 217 NW 834

4568 Survey made — commissioner sworn.

Absence of survey. The absence of a survey is not fatal to the establishment of a highway when the record reveals the fact that the road was located equally on each side of a given section line.

Harbacheck v Tel. Co., 208-552; 226 NW 171

Burden to show government line. A landowner who concedes that a long existing highway was by agreement to be located equally upon both sides of the government line between adjoining tracts, but who disputes the accuracy of the location, has the burden to show the actual location of the government line.

Sedore v Turner, 202-1373; 212 NW 61

Location—evidence. Record reviewed, and held that the highway in question was legally established on a certain section line, but that, because of insufficient evidence, cause should be remanded for the purpose of taking evidence on the exact location of said line.

Harbacheck v Tel. Co., 208-552; 226 NW 171

4571 Plat and field notes.

Disregard of nonsubstantial defects. The fact that a commissioner in recommending the establishment of a highway "as petitioned for", files a plat which does not show a slight variant in the line as petitioned for, does not invalidate the proceeding and thereby deprive the board of supervisors of jurisdiction to establish said highway; and especially is this true when said slight defect was obviated by a detailed plat which was of record prior to the final order establishing the road.

Wheeler v Riggs, 222-1373; 271 NW 509

4575 Notice served.

Atty. Gen. Opinions. See '36 AG Op 214; '38 AG Op 808

Presumption of regularity—when jurisdiction must appear. The statutory presumption that the proceedings of inferior tribunals, e. g., the county board of supervisors, are presumed to be regular, does not extend to the acquisition of jurisdiction of the board—this must be shown.

Davelaar v Marion Co., 224-669; 277 NW 744

Notice—recital of record. Proof that the required preliminary notice of hearing on the petition for the establishment of a highway was given, may be established by the record recitals to that effect, aided by the legal presumption that the officers acted regularly.

Harbacheck v Tel. Co., 208-552; 226 NW 171

Notice as condition precedent. Notice of hearing, on the establishment of a highway and the service of such notice as required by statute (or the waiver of such notice), is an imperative condition precedent to the legal establishment of the road. And the fact that the highway records reveal a paper establishment will not justify the presumption that said notice was given.

McKinley v County, 215-46; 244 NW 663

Notice—waiver. A landowner who files a claim for damages to his land, in proceedings to establish a highway along said land, thereby waives his right to formal statutory notice of said proceedings.

McKinley v County, 215-46; 244 NW 663

4576 Form of notice.

Atty. Gen. Opinion. See '36 AG Op 214

Timely claim under fatally defective notice. A landowner who in eminent domain proceeding for a public road is entitled to a specified time after notice in which to file his claim for damages, and who appears in said proceeding in response to a fatally defective notice, is entitled to said specified time after he so appears, in which to file his claim for damages.

Witham v Union Co., 202-557; 210 NW 535

4577 Auditor may establish, alter, or vacate.

Atty. Gen. Opinion. See '34 AG Op 125

4580 Objections or claims.

Atty. Gen. Opinions. See '28 AG Op 435; '38 AG Op 808

4581 Appraisers appointed—vacancies—qualification.

Joinder—mandamus and damages. An action of mandamus to compel the board of supervisors to proceed to the assessment of damages consequent on the taking of land in order to effect a change in a highway is properly stricken on motion when joined with an action against the county for damages for the taking of said land.

Valentine v Board, 206-840; 221 NW 517

4586 Damages—conditional order.

Vacation—damages recoverable. A property owner who, by the vacation of a county highway, is deprived of reasonable access to his property may recover from the county the resulting damages.

Furgason v County, 212-814; 237 NW 214

Unallowable action. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union Co., 208-314; 223 NW 111

Damages do not embrace cost of fence. Evidence is admissible, in proceedings to condemn land for highway purposes, to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

Noncontiguous tracts as one farm. In the condemnation of land for highway purposes, the record may be such as to present a jury question whether noncontiguous tracts are being used as one farm so that the damages resulted to it as an entirety, or whether the land was in such separate tracts that the damages should be assessed to each tract separately.

Paulson v Highway Com., 210-651; 231 NW 296

Conditional establishment—effect. A highway which is ordered established on the condition that petitioners "pay the damages assessed within ninety days" is not legally established until the damages are so paid; and the court cannot presume that payment was so made even tho the way has been used as a public highway for a half century.

McKinley v County, 215-46; 244 NW 663

Notice—waiver. A landowner who files a claim for damages to his land, in proceedings to establish a highway along said land, thereby waives his right to formal statutory notice of said proceedings.

McKinley v County, 215-46; 244 NW 663

Compromise settlement. The acceptance by a property owner, after condemnation and assessment, and while the amount of damages was in controversy, and before the public authorities had taken possession of the land, of an amount less than had been assessed, and the execution of a deed to the right of way, in which deed the amount received is itemized as to (1) right of way, (2) fences, and (3) damages, constitute a full settlement, and preclude recovery of the difference between the assessment and the amount so accepted.

Burrow v County, 200-787; 205 NW 460

4591 Fences—crops.

Removal—nonimplication for compensation. The removal by an owner of land of fences across a public highway on the land, in compliance with a demand of the public authorities, gives rise to no implied contract on the part of the municipality to pay the value of the work and materials necessary in effecting such removal.

Hall v Union Co., 206-512; 219 NW 929

Damages do not embrace cost of fence. Evidence is admissible in proceedings to condemn land for highway purposes to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and

equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

4596 Consent highways.

Atty. Gen. Opinion. See '38 AG Op 808

Foreclosure certificate holder as "owner". A certificate holder under mortgage foreclosure is an "owner" of the land within the meaning of this statute. Establishment in such case without such consent is a nullity.

Vien v County, 209-580; 228 NW 19

Easements—records—different location in use—use alone insufficient. In an action to establish a road by prescription, evidence in the form of a page from an old road record made in 1850, which was a copy of the surveyor's notes, and introduced as evidence of an adverse claim, is not sufficient when it does not show that such road as shown on the old record was the same as the road now in use. Without this, the road could not be established on the sole evidence of long continued use.

Slack v Herrick, 226-336; 283 NW 904

4597 Appeal by damage claimant.

Unallowable appeal. The owner of land sought to be condemned for highway purposes who has never been made a party to the proceedings cannot appeal from the award of damages.

Gibson v Union Co., 208-314; 223 NW 111

4600 Trial on appeal.

Appeal—proper docket. An alleged owner of land who appeals to the district court from an award of damages may not complain of an order which transfers to the equity side of the calendar so much of said appeal as involves the issue whether the condemnor or the appellant owns part of the land sought to be condemned.

Montgomery Co. v Case, 204-1104; 216 NW 633

Condemnation award—separate tracts—joint award—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v Des Moines, 227-382; 288 NW 399

Public agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency were an individual.

Welton v Highway Com., 211-625; 233 NW 876

Damages do not embrace cost of fence. Evidence is admissible in proceedings to condemn land for highway purposes to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

4601 Costs.

Attorney fees. A statutory provision for the taxation in eminent domain proceedings of attorney fees in favor of a successful party is no authority for such taxation in another like proceeding under a separate and different statute which makes no provision for such taxation.

Nichol v Neighbour, 202-406; 210 NW 281

CHANGES IN ROADS, STREAMS, OR DRY RUNS

4607 Changes for safety, economy, and utility.

Atty. Gen. Opinions. See '32 AG Op 140; '34 AG Op 125; '36 AG Op 235; '38 AG Op 677, 808

Optional procedure to make changes. The board of supervisors may proceed on its own motion under this section to widen an established statutory road. It need not wait for the filing of a petition as in case of the original establishment of a road.

Carstens v Keating, 210-1326; 230 NW 432

"Statutory" width—definition. The "statutory" width of a road is the width (1) expressly fixed by the board of supervisors when the road is established, or (2) implied by statute if the board fixes no width, in no case less than 40 feet.

Carstens v Keating, 210-1326; 230 NW 432

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.
2. As to secondary roads, in the board of supervisors on its own motion.

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change—will not be deemed an establishment of a road—the power

to establish roads being a power not possessed by the state commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Drainage of surface waters. Road authorities will not be held estopped from carrying surface waters across a public highway in the course of natural drainage because of the fact that for more than ten years they have unsuccessfully attempted to divert such waters from said natural course of drainage, the landowner affected not having changed his position because of such unsuccessful efforts.

Schwartz v County, 208-1229; 227 NW 91

Percolating waters—damage to adjoining land—causal connection necessary. A city excavating a new creek channel and which thereby collects water on its own land, from which it percolates to adjoining land resulting in damage, is liable therefor, but there must be probative evidence to establish percolation as the cause of the damage.

Covell v Sioux City, 224-1060; 277 NW 447

4608 Costs.

Atty. Gen. Opinion. See '36 AG Op 235

4609 Report and survey.

Atty. Gen. Opinions. See '36 AG Op 235; '38 AG Op 808

4610 Appraisers.

Atty. Gen. Opinions. See '28 AG Op 42; '36 AG Op 214

Procedure—exclusiveness. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union Co., 208-314; 223 NW 111

4611 Notice.

Atty. Gen. Opinion. See '36 AG Op 214

Timely claim under fatally defective notice. A landowner who, in eminent domain proceeding for a public road, is entitled to a specified time after notice in which to file his claim for damages, and who appears in said proceeding in response to a fatally defective notice, is entitled to said specified time after he so appears, in which to file his claim for damages.

Witham v Union Co., 202-557; 210 NW 535

4612 Service of notice.

Atty. Gen. Opinion. See '36 AG Op 214

4614 Hearing—adjournment.

Jurisdiction—nonvoluntary appearance. An owner of land sought to be condemned for highway purposes cannot be said to submit himself to the jurisdiction of the condemnatory body by addressing to such body a signed communication denying the existence of any such jurisdiction.

Gibson v Union Co., 208-314; 223 NW 111

4616 Hearing on claims for damages.

Compromise settlement. The acceptance by a property owner, after condemnation and assessment, and while the amount of damages was in controversy, and before the public authorities had taken possession of the land, of an amount less than had been assessed, and the execution of a deed to the right of way, in which deed the amount received is itemized as to (1) right of way, (2) fences, and (3) damages, constitute a full settlement and preclude recovery of the difference between the assessment and the amount so accepted.

Burrow v County, 200-787; 205 NW 460

Noncontiguous tracts as one farm. In the condemnation of land for highway purposes, the record may be such as to present a jury question whether noncontiguous tracts are being used as one farm so that the damages resulted to it as an entirety, or whether the land was in such separate tracts that the damages should be assessed to each tract separately.

Paulson v Highway Com., 210-651; 231 NW 296

4617 Appeals.

Unallowable appeal. The owner of land sought to be condemned for highway purposes who has never been made a party to the proceedings cannot appeal from the award of damages.

Gibson v Union Co., 208-314; 223 NW 111

4618 Damages on appeal—rescission of order.

Damages do not embrace cost of fence. Evidence is admissible, in proceedings to condemn land for highway purposes, to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

4621 Abandonment of highway—notice to owner affected.

Atty. Gen. Opinions. See '32 AG Op 100; '36 AG Op 235; '38 AG Op 677, 808

4621.1 Duty to close and protect.

Atty. Gen. Opinion. See '38 AG Op 808

Abandonment of highway. Evidence reviewed and held insufficient to establish the claimed intentional abandonment by the public of a duly established highway.

Robinson v Board, 222-663; 269 NW 921

CHAPTER 238

STATE HIGHWAY COMMISSION

Atty. Gen. Opinions. See '38 AG Op 143

4622 Members—qualifications — term —location.

Atty. Gen. Opinion. See '36 AG Op 272

4623 Appointments.

Atty. Gen. Opinion. See '30 AG Op 52

4624 Vacancies.

Atty. Gen. Opinion. See '28 AG Op 49

4625 Compensation.

Atty. Gen. Opinion. See '25-26 AG Op 479

4626 Duties.

Atty. Gen. Opinions. See '25-26 AG Op 479, 480; '34 AG Op 168; '38 AG Op 143, 624, 814

Actions against. An action against the commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is in effect an action against the state and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

Legal discretion uncontrollable. The court cannot compel the state highway commission to expend county primary road funds in the improvement of the primary roads of the county; nor can the court control said commission in the legal expenditure of other funds under the control of the commission.

Scharnberg v Highway Com., 214-1041; 243 NW 334

Unallowable delegation of power. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.
2. As to secondary roads, in the board of supervisors on its own motion (§§4607, 4755-b36, C., '27 [§4755.33, C., '39]).

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change—will not be deemed an establishment of a road—the power to establish roads being a power not possessed by the state commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Governmental employee — personal liability for torts—governmental immunity denied. An employee of the state highway commission, in going from place to place to inspect bridges, and in doing so commits a tortious act which causes injury to another, in violation of a duty owed to the injured person, becomes, as an individual, personally liable for damages therefor.

Futter v Hout, 225-723; 281 NW 286

4626.2 Federal appropriations.

Atty. Gen. Opinions. See '38 AG Op 624, 769

4630.1 Special counsel.

Atty. Gen. Opinions. See '38 AG Op 814, AG Op Feb. 28, '40

CHAPTER 239

ROADS ON STATE LANDS

Atty. Gen. Opinion. See '36 AG Op 78

4631 Separate districts.

Atty. Gen. Opinions. See '32 AG Op 210; '34 AG Op 611

4632 Supervisor.

Atty. Gen. Opinion. See '34 AG Op 169

4633 Maintenance and improvement.

Atty. Gen. Opinions. See '25-26 AG Op 111; '34 AG Op 169; '36 AG Op 272; AG Op June 27, '39

4634 Improvement by city or county.

Atty. Gen. Opinions. See '25-26 AG Op 195, 318, 499; '28 AG Op 373; '32 AG Op 126; '36 AG Op 78; '38 AG Op 794

CHAPTER 240

SECONDARY ROADS

Atty. Gen. Opinions. See '30 AG Op 193, 215, 221, 257; '32 AG Op 26; '38 AG Op 49, 86, 188, 624, 711, 793, 794, 814, 838

SECONDARY ROAD AND BRIDGE SYSTEMS IN GENERAL

4644.01 Construction, repair, and maintenance.

Atty. Gen. Opinions. See '38 AG Op 27, 184, 445, 624, 640, 793, 814; AG Op Feb. 20, '39

Independent contractor—liability for negligence. One who as an independent contractor installs a culvert in a public highway is liable to a traveler in damages consequent on the negligence of said contractor in leaving the highway at the point in question in a condition unsafe for public travel, and without barriers.

Kehm v Dilts, 222-826; 270 NW 388; 3 NCCA (NS) 39

County highway maintenance workman—no representative capacity. A county highway maintenance workman stands in no representative capacity for the employer-county when his duties are ministerial only and when he could possess no authority to act for nor bind the county as its representative, since board of supervisors and county engineer cannot delegate their powers and duties to maintain roads except as those duties are ministerial in character.

Schroyer v Jasper Co., 224-1391; 279 NW 118

Injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open gutters in a street, constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Bequest for paving roads — acceptance by county not enjoined. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

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Codicil creating charitable trust to county for paving roads — improper delegation of duties to executor. A first codicil devising an estate to trustees to be administered under county supervision in building roads and a second codicil appointing one executor to aid the county in building roads created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

4644.02 Secondary road system.

Atty. Gen. Opinions. See '34 AG Op 169; '38 AG Op 27, 445

4644.03 Secondary bridge system.

Atty. Gen. Opinions. See '32 AG Op 134; '34 AG Op 169; '36 AG Op 278; '38 AG Op 445

Highway drainage easement — discretion. The authority to erect a bridge at a specified place in a public highway without limitation as to size of such bridge necessarily invests the public officials with a fair discretion as to such size.

Ehler v Stier, 205-678; 216 NW 637

Negligence — nonliability of county. The statutory duty of a town to keep its streets free from nuisances is not interrupted or suspended during the time when the county under an arrangement with the town is engaged in constructing a culvert in a street which is a continuation of a county road outside the town; and the county is under no legal obligation to reimburse the town for any sum voluntarily paid by it in settlement of suits jointly against the town and county for damages consequent on persons driving into an unguarded excavation made by the county authorities while constructing the culvert.

Norwalk v County, 210-1262; 232 NW 682

4644.04 Designation of roads.

Atty. Gen. Opinion. See '38 AG Op 793

Road as county trunk highway—stop signs.

Davis v Hoskinson, 228- ; 290 NW 497

4644.05 Modification of trunk roads.

Atty. Gen. Opinion. See '38 AG Op 793

4644.08 Secondary road construction fund.

Atty. Gen. Opinions. See '36 AG Op 230; '38 AG Op 27

4644.09 Pledge to local roads.

Atty. Gen. Opinions. See '30 AG Op 264; '36 AG Op 212, 483; '38 AG Op 27, 141, 445, 793; AG Op Sept. 25, '39

4644.10 General pledge.

Atty. Gen. Opinions. See '30 AG Op 200, 237, 251; '36 AG Op 212, 483; '38 AG Op 27, 445, 793

4644.11 Optional maintenance levies.

Atty. Gen. Opinion. See '34 AG Op 373

4644.12 Secondary road maintenance fund.

Atty. Gen. Opinions. See '30 AG Op 116; '36 AG Op 212

4644.13 Pledge of maintenance fund.

Atty. Gen. Opinions. See '30 AG Op 200, 237; '36 AG Op 212; '38 AG Op 640, 837

4644.15 Transfers generally.

Atty. Gen. Opinions. See '36 AG Op 275; AG Op Sept. 25, '39

COUNTY ENGINEER

4644.17 Engineer—term.

Atty. Gen. Opinion. See '34 AG Op 58

Discharge of engineer—conflicting statutes. A duly appointed county engineer who is an honorably discharged soldier may not be summarily discharged by the board of supervisors prior to the end of the term for which appointed, even tho the statute authorizing the appointment of such engineer provides that the "tenure of office may be terminated at any time by the board".

Hahn v County, 218-543; 255 NW 695

Employment binding on new board. Inasmuch as the board of supervisors has statutory authority to employ a county engineer for a period as long as three years, an employment of such engineer at the December meeting of the board for the ensuing calendar year is valid, even tho the personnel of the board changes in January following the meeting.

Hahn v County, 218-543; 255 NW 695

4644.18 Compensation.

Atty. Gen. Opinion. See AG Op May 17, '39

4644.19 Duties—bonds.

Damages—nonliability of highway engineer. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county, for a proper and lawful purpose, and in leaving the work in a condition which becomes dangerous, even tho, by leaving the work in said condition, he creates a public nuisance for which he may be punished.

Swartzwelter v Util. Corp., 216-1060; 250 NW 121; 34 NCCA 471

4644.21 Supervision of construction and maintenance work.

Atty. Gen. Opinion. See '38 AG Op 624

Nonliability of highway engineer. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county for a proper and lawful purpose, and in leaving the work in a condition which becomes dangerous, even tho, by leaving the work in said condition, he creates a public nuisance for which he may be punished. (§4841, C., '31.)

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121; 34 NCCA 471

Right of way—county engineer—signs. In the absence of signs indicating a different right of way rule, erected by authority not of county engineer but of the board of supervisors, the law giving right of way to traffic from the right applies to an intersection of county trunk roads.

Smithson v Mommsen, 224-307; 276 NW 47

CONSTRUCTION PROGRAM

4644.22 Construction program or project.

Atty. Gen. Opinions. See '34 AG Op 337; '36 AG Op 465, 483, 519, 529; '38 AG Op 42, 141, 445, 759, 793, 838

4644.23 Scope of program.

Atty. Gen. Opinions. See '34 AG Op 337; '38 AG Op 793; AG Op Jan. 19, '39

4644.32 Board's action final.

Atty. Gen. Opinions. See '32 AG Op 179; '38 AG Op 49, 86, 141, 600, 640, 793

Bridges—mandamus to compel. The statutory duty of the board of supervisors to construct bridges over public ditches at points where such ditches intersect secondary roads is enforceable by action of mandamus, such duty being in no manner limited or controlled by the statutory powers granted the county board of approval in adopting secondary road programs.

Robinson v Board, 222-663; 269 NW 921

4644.33 County trunk roads.

Atty. Gen. Opinion. See '34 AG Op 337

4644.35 Surveys required.

Atty. Gen. Opinions. See '38 AG Op 711, 768

4644.36 Nature of survey.

Atty. Gen. Opinion. See '38 AG Op 768

4644.37 Details of survey.

See annotations under §4644.44

Atty. Gen. Opinions. See '38 AG Op 711, 768

4644.39 Contracts and specifications.

Atty. Gen. Opinions. See '38 AG Op 184, 761

4644.40 Advertisement and letting.

Atty. Gen. Opinions. See '32 AG Op 67; '34 AG Op 81; '36 AG Op 45, 216; '38 AG Op 29, 115, 188, 711, 731; AG Op Jan. 30, '39

Avoiding estimates and public letting—effect. This statute cannot be avoided by the subterfuge of buying, in disregard of the statute, material in quantities much exceeding said amount, on the plea that the amount used on each subsequent individual work of repair will be much less than $1,000 in value.

State v Garretson, 207-627; 223 NW 390

Systematic disregard of law. The conduct of a member of the board of supervisors in

systematically disregarding, or by subterfuges avoiding this section evinces such "willfulness" as to render such acts ample ground for removal from office.

State v Garretson, 207-627; 223 NW 390

Competitive bids—void provision. A clause inserted in a public improvement contract, to the effect that if rock or quicksand is encountered, the contractor shall be paid on the basis of cost plus a named percentage, is void when both the specifications and the advertisement for bids are silent as to such contingency.

Gjellefald v Hunt, 202-212; 210 NW 122

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

4644.41 Optional advertisement and letting.

Atty. Gen. Opinion. See '38 AG Op 115

4644.42 Approval of road contracts.

Atty. Gen. Opinions. See '38 AG Op 27, 29, 838

4644.43 Record of bids.

Atty. Gen. Opinion. See '38 AG Op 179

4644.44 Trees—ingress or egress—drainage.

Atty. Gen. Opinion. See '38 AG Op 184

Trees in highway not property of adjoining owner. A property owner abutting and occupying a part of a highway has no rights in trees growing on such part of the highway, no matter how long his occupancy of the highway continued before public convenience and necessity required appropriation of the full highway width.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Improvement of highway—malice immaterial in performance of legal act. Removal of trees from a highway by county authorities for improvement, being a legal act, the question as to whether or not they were acting maliciously as alleged by an abutting property owner is immaterial.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Finding by county highway authorities of necessity for tree removal—conclusiveness. Conclusion by county authorities that a secondary road could not be improved without removing certain trees, when substantiated by the record, is conclusive on appeal.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Highways—tree removal—valid exercise of power—no injunction. Injunction will not lie to restrain county authorities from removing trees along a highway when they are acting strictly within their statutory powers.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Trees—removal for drainage—no injunction. In landowner's action to restrain county from cutting down seven trees in the construction of a highway, where evidence showed that trees were too far apart to constitute a windbreak, that trees were on the highway right of way, and that their destruction was necessary to provide a drainage ditch, lower court properly refused to enjoin destruction under statute prohibiting such destruction unless "materially interfering with improvement of the road".

Harrison v Hamilton County, (NOR); 284 NW 456

Special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Interference with ingress and egress. A highway improvement which compels a property owner to travel slightly farther in going to and from his farm may not be said to interfere substantially with his right of ingress and egress.

Lingo v Page County, 201-906; 208 NW 327

Unnecessary diversion of drainage. Injunction will lie to restrain highway officers from so improving a highway as to unnecessarily divert natural drainage to the substantial injury of a property owner.

Estes v Anderson, 204-288; 213 NW 566

Drainage of surface waters. Road authorities will not be held estopped from carrying surface waters across a public highway in the course of natural drainage because of the fact that for more than ten years they have unsuccessfully attempted to divert such waters from said natural course of drainage, the landowner affected not having changed his position because of such unsuccessful efforts.

Schwartz v County, 208-1229; 227 NW 91

Perpetuation of unlawful drainage by bridge. The board of supervisors may not, by the construction and maintenance of a culvert in the public highway, supplement, continue and per-

petuate an unlawful and material diversion of surface waters by a dominant estate holder, all to the substantial damage of the servient estate holder.

Anton v Stanke, 217-166; 251 NW 153

Prohibited obstruction. Principle reaffirmed that a property owner may not legally place obstructions within a public highway and thereby interfere with the drainage of surface waters across such highway.

Adams County v Rider, 205-137; 218 NW 60

Highway drainage easement — discretion. The authority to erect a bridge at a specified place in a public highway without limitation as to the size of such bridge, necessarily invests the public officials with a fair discretion as to such size.

Ehler v Stier, 205-678; 216 NW 637

4644.45 County trunk roads in cities and towns.

Atty. Gen. Opinions. See '38 AG Op 27, 346

Presumptions. When a board of supervisors proceeds to improve a town street which is a continuation of a county road, it will be presumed, nothing being shown to the contrary, that the board and the town council first entered into a written agreement covering the work as provided by statute.

Norwalk v County, 210-1262; 232 NW 682

Negligence in constructing culvert. The statutory duty of a town to keep its streets free from nuisances is not interrupted or suspended during the time when the county under an arrangement with the town is engaged in constructing a culvert in a street which is a continuation of a county road outside the town; and the county is under no legal obligation to reimburse the town for any sum voluntarily paid by it in settlement of suits, jointly against the town and county, for damages consequent on persons driving into an unguarded excavation made by the county authorities while constructing the culvert.

Norwalk v County, 210-1262; 232 NW 682

ANTICIPATION OF FUNDS

4644.46 Construction fund anticipated.

Atty. Gen. Opinions. See '32 AG Op 252; '38 AG Op 838; AG Op March 2, '39

4644.47 Anticipatory resolution.

Atty. Gen. Opinion. See '32 AG Op 252

4644.48 Recitals.

Atty. Gen. Opinion. See '32 AG Op 252

MISCELLANEOUS PROVISIONS

4645 Surveys and reports.

Atty. Gen. Opinion. See '25-26 AG Op 311

4653 Itemized and certified bills.

Atty. Gen. Opinion. See '36 AG Op 214

4655 Advance payment of pay rolls.

Atty. Gen. Opinion. See '28 AG Op 319

4657 Gravel beds.

Atty. Gen. Opinions. See '25-26 AG Op 199, 394, 420; '28 AG Op 370; '36 AG Op 214

Taking gravel—injury to mortgage security —measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt County, 224-841; 277 NW 715

4658 Procedure.

Atty. Gen. Opinions. See '28 AG Op 370; '36 AG Op 214

4658.1 Right to prospect.

Atty. Gen. Opinion. See '36 AG Op 214

4659 Use of gravel beds.

Atty. Gen. Opinions. See '25-26 AG Op 394; '32 AG Op 53; '38 AG Op 189, 837

4661 Intercounty highways.

Atty. Gen. Opinions. See '25-26 AG Op 106; '28 AG Op 375; '38 AG Op 346

4662 Enforcement of duty.

Atty. Gen. Opinions. See '25-26 AG Op 106; '38 AG Op 624, 769

4662.1 Construction by commission.

Atty. Gen. Opinions. See '28 AG Op 375; '38 AG Op 624, 769

4662.2 Payment.

Atty. Gen. Opinions. See '28 AG Op 375; '38 AG Op 624, 769

4663 Interstate highways.

Atty. Gen. Opinion. See '25-26 AG Op 76

4666 Bridges and culverts on city boundary line.

Atty. Gen. Opinion. See '38 AG Op 346

4667 Width of bridges and culverts.

Atty. Gen. Opinion. See '38 AG Op 115

4668 Definitions.

Atty. Gen. Opinion. See '28 AG Op 137

Perpetuation of unlawful drainage by bridge. The board of supervisors may not, by the construction and maintenance of a culvert in the public highway, supplement, continue and perpetuate an unlawful and material diversion of surface waters by a dominant estate holder, all to the substantial damage of the servient estate holder.

Anton v Stanke, 217-166; 251 NW 153

4671 Bridge specifications.

Atty. Gen. Opinions. See '25-26 AG Op 311, 480

4672 Approval of contract.

Atty. Gen. Opinions. See '25-26 AG Op 311, 480; '30 AG Op 285

4673 Record of plans.

Atty. Gen. Opinion. See '38 AG Op 711

Estimated quantities as basis for contract—variation with specifications not fatal. In awarding a construction contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices" as a means of payment for variations from the estimated quantities indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

4674 Record of final cost.

Atty. Gen. Opinion. See '38 AG Op 711

4678 Bridges over state boundary line streams.

Atty. Gen. Opinion. See '28 AG Op 418

Election for establishment—form of ballot. A petition for the submission of a proposition to the electors must substantially contain every matter required by the statute, in order that from the petition the ballot may be so framed that the entire proposition will be submitted to the electors.

O'Keefe v Hopp, 210-398; 228 NW 625

Petition—fatal omission. A statute which authorizes the submission to the electors of a proposition for the partial construction and maintenance by the county of a bridge across a boundary line river, on a petition clearly contemplating a statement of the cost of both construction and maintenance, is not substantially complied with by the filing of a petition:

1. Which fails to state the cost of maintenance, either in a definite lump sum, or in terms of an annual maximum tax rate, or
2. Which fails definitely to state that the sister state or one of its municipalities has or will legally obligate itself for the remaining construction costs.

O'Keefe v Hopp, 210-398; 228 NW 625

4679 Submission of question.

Atty. Gen. Opinion. See '28 AG Op 418

4682 Levy—bond.

Atty. Gen. Opinion. See '28 AG Op 418

4685 Interest in contracts.

Atty. Gen. Opinions. See '28 AG Op 296, 372; '36 AG Op 660; '38 AG Op 185

CHAPTER 240.1

FARM-TO-MARKET ROADS

4686.14 Bids—awards to officials prohibited.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

4686.20 Supervisors resolution to state treasurer.

Atty. Gen. Opinion. See AG Op Oct. 6, '39

4686.22 Right of way—how acquired.

Atty. Gen. Opinion. See AG Op July 24, '39

4686.23 Eminent domain applicable.

Procedure—exclusiveness. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union Co., 208-314; 223 NW 111

CHAPTER 241

FINANCING PRIMARY AND SECONDARY ROADS

Atty. Gen. Opinions. See '25-26 AG Op 299, 331; '28 AG Op 240, 281, 375; '30 AG Op 145; '32 AG Op 116; '36 AG Op 490, 580; '38 AG Op 794

4745 "Secondary road system" defined.

Atty. Gen. Opinion. See '25-26 AG Op 290

4745.1 Streets as extensions of secondary roads.

Municipal discharge of statutory liability. A contract between a county and a city wherein the city, in discharge of its statutory liability relative to one-half of the cost of paving a city boundary line road, agrees to issue to the county road certificates in anticipation of the collection of special assessments on benefited property, cannot be construed as an unconditional promise on the part of the city to pay said statutory liability.

Polk County v Des Moines, 210-342; 226 NW 718

4746 Assessment districts—survey and report—notice—hearing.

Atty. Gen. Opinions. See '25-26 AG Op 81, 88; '28 AG Op 136; '30 AG Op 220, 238; '32 AG Op 50, 87; '38 AG Op 54

Appearance in assessment proceedings. The voluntary appearance by a property owner in proceedings to assess his property as part of a road assessment district does not cure the fatal defect arising from want of jurisdiction to establish the district.

Johnson v Board, 213-988; 238 NW 66

Jurisdiction—estoppel. The fact that a property owner lived adjacent to a highway and knew that it was being improved does not estop him from questioning the jurisdiction of the public authorities to establish the district embracing his land.

Johnson v Board, 213-988; 238 NW 66

Fatally defective notice. The board of supervisors acquires no jurisdiction to establish a secondary road assessment district by the service of a notice which fails to state the "year" in which the hearing will be held.

Johnson v Board, 213-988; 238 NW 66

Assessment of tenants in common. Jurisdiction to establish an assessment district as to only one of two tenants in common does not embrace jurisdiction to levy an assessment against the farm as a whole.

Johnson v Board, 213-988; 238 NW 66

4748 Plans—bids.

Atty. Gen. Opinions. See '30 AG Op 220; '38 AG Op 731

4749 Inspection of work.

Atty. Gen. Opinions. See '30 AG Op 52, 123

4750 Payment for county road improvements.

Atty. Gen. Opinions. See '25-26 AG Op 88, 394; '30 AG Op 220

4751 Payment for township secondary roads—maintenance.

Atty. Gen. Opinions. See '25-26 AG Op 88, 394

4752 Advancing costs and reimbursement of funds.

Atty. Gen. Opinion. See '25-26 AG Op 81

4753.03 Hearing—levy of assessments—payment.

Atty. Gen. Opinions. See '28 AG Op 400; '38 AG Op 794

Appearance in assessment proceedings. The voluntary appearance by a property owner in proceedings to assess his property as part of a road assessment district does not cure the fatal defect arising from want of jurisdiction to establish the district.

Johnson v Board, 213-988; 238 NW 66

Assessment—tenants in common. Jurisdiction to establish an assessment district as to only one of two tenants in common does not embrace jurisdiction to levy an assessment against the farm as a whole.

Johnson v Board, 213-988; 238 NW 66

4753.05 Appeals—power of court—duty of clerk.

Abortive appeal. An appeal from an order levying an assessment within a secondary road district is not perfected (1) by the timely giving of notice of appeal, and (2) by the timely filing of a purported appeal bond which is not signed by the surety; nor is the defect cured by the filing, after the statutory time for appeal has expired, of an affidavit of qualification by a party who states "that I am surety in the above bond".

Johnson v Board, 213-988; 238 NW 66

4753.10 Election in re bonds—notice—form of proposition—canvass—procedure to test legality.

Discussion. See 15 ILR 235—State highway bonds

Atty. Gen. Opinions. See '30 AG Op 86; '36 AG Op 600

Primary road bonds—unlawful diversion. County primary road bonds voted for the purpose of improving "the primary roads of the county" cannot be legally issued except to improve those roads which were primary roads in the county on the date when the bonds were

authorized by the voters. For instance, where the state highway commission, after the election, abandoned a 12-mile strip, part of a pre-existing primary road, and substituted therefor a substantially equal mileage two miles distant, held, the bonds could not be legally issued for the purpose of paving the substitute.

Harding v Board, 213-560; 237 NW 625

Scharnberg v Highway Com., 214-1041; 243 NW 334

Plaintiffs—taxpayers. A taxpayer may maintain an action to enjoin the board of supervisors from issuing county bonds for a purpose not authorized by law.

Harding v Board, 213-560; 237 NW 625

4753.11 Bonds—form — denomination —interest—payment.

Atty. Gen. Opinion. See '30 AG Op 282

Vote required. This section insofar as it authorizes the issuance of primary road bonds on a majority vote was impliedly repealed by the subsequent enactment of §1171-d4, C., '31, [§1171.18, C., '39] requiring a favorable vote equal to 60 percent of all the votes cast.

Waugh v Shirer, 216-468; 249 NW 246

Primary road bonds—unlawful diversion. Roads and streets within cities and towns are not part of the primary road system, even tho such roads and streets are continuations of primary roads which are outside cities and towns. It follows that county bonds voted for the purpose of improving the primary roads of the county may not be legally issued nor may the proceeds thereof be legally employed for the improvement of roads and streets within cities and towns.

Wallace v Foster, 213-1151; 241 NW 9

Inadequate provision for payment. The court cannot assume that inadequate provision has been made for the payment of county primary road bonds and that, therefore, the bonds are void, in view of the fact that the state has underwritten every such bond through its primary road fund and has appropriated said fund to said purpose for the life of said bonds.

Harding v Board, 213-560; 237 NW 625

4753.12 Bond levy.

Atty. Gen. Opinions. See '28 AG Op 317; '36 AG Op 515

4753.13 Bonds—issuance — sale — retirement — terminating interest — exemption from taxation.

Atty. Gen. Opinions. See '28 AG Op 316; '36 AG Op 362

Taxation of interest on tax-exempt securities. Interest on tax-exempt municipal securities is not exempt from state income tax, tho the securities themselves are, by statute, exempt from general property tax. The statutory declaration that said securities "shall not be taxed" has reference solely to general property tax, and not to an excise tax—an income tax—on the interest collected on such securities.

Hale v Board, 223-321; 271 NW 168; 302 US 95

4753.14 Nature of bonds—refunding.

Atty. Gen. Opinions. See '30 AG Op 193, 353.

4753.17 Limitation on indebtedness.

Atty. Gen. Opinions. See '30 AG Op 123; '32 AG Op 226

4753.18 Penalty for violations.

Atty. Gen. Opinion. See '28 AG Op 316

4753.19 Refunding bonds—proceeds—management.

Atty. Gen. Opinions. See '36 AG Op 515, 577

CHAPTER 241.1

IMPROVEMENT OF PRIMARY ROADS

Atty. Gen. Opinions. See '28 AG Op 128, 281; '36 AG Op 491, 589, 600

4755.01 Federal and state cooperation.

Atty. Gen. Opinions. See '36 AG Op 548; '38 AG Op 518; AG Op May 17, '39

4755.02 "Road systems" defined.

Atty. Gen. Opinions. See '28 AG Op 240, 246; '32 AG Op 98, 116

Primary road bonds — unlawful diversion. County primary road bonds voted for the purpose of improving "the primary roads of the county" cannot be legally issued except to improve those roads which were primary roads in the county on the date when the bonds were authorized by the voters. For instance, where the state highway commission, after the election, abandoned a 12-mile strip, part of a pre-existing primary road, and substituted therefor a substantially equal mileage two miles distant, held, the bonds could not be legally issued for the purpose of paving the substitute.

Harding v Board, 213-560; 237 NW 625

Scharnberg v Highway Com., 214-1041; 243 NW 334

Improvement—primary road bonds—unlawful diversion. Roads and streets within cities and towns are not part of the primary road system, even tho such roads and streets are continuations of primary roads which are outside cities and towns. It follows that county bonds voted for the purpose of improving the primary roads of the county may not be legally issued nor may the proceeds thereof be

legally employed for the improvement of roads and streets within cities and towns.

Wallace v Foster, 213-1151; 241 NW 9

State commerce commission abandoning overhead crossing—street change resulting. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good faith motives, and certiorari will lie to prevent such invasion.

Huxley (Town) v Conway, 226-268; 284 NW 136

4755.03 Primary road fund.

Atty. Gen. Opinions. See '34 AG Op 151; '36 AG Op 258; '38 AG Op 624

4755.04 Disbursement of fund.

Atty. Gen. Opinions. See '28 AG Op 316; '30 AG Op 78; '36 AG Op 258, 515, 577, 580, 600; '38 AG Op 624; AG Op Feb. 28, '40

Crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction considered safe when built might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

4755.08 Improvement of primary system.

Primary road bonds—unlawful diversion. County primary road bonds voted for the purpose of improving "the primary roads of the county," cannot be legally issued except to improve those roads which were primary roads in the county on the date when the bonds were authorized by the voters. For instance where the state highway commission, after the election, abandoned a 12-mile strip, part of a pre-existing primary road, and substituted therefor a substantially equal mileage 2 miles distant, held, the bonds could not be legally issued for the purpose of paving the substitute.

Harding v Board, 213-560; 237 NW 625

Legal discretion uncontrollable. The court cannot compel the state highway commission to expend county primary road funds in the improvement of the primary roads of the county; nor can the court control said commission in the legal expenditure of other funds under the control of the commission.

Scharnberg v Highway Com., 214-1041; 243 NW 334

4755.09 Surveys, plans, and specifications.

Interference with ingress and egress. A highway improvement which compels a property owner to travel slightly farther in going to and from his farm may not be said to interfere substantially with his right of ingress and egress.

Lingo v Page County, 201-906; 208 NW 327

Unnecessary diversion of drainage. Injunction will lie to restrain highway officers from so improving a highway as to unnecessarily divert natural drainage to the substantial injury of a property owner.

Estes v Anderson, 204-288; 213 NW 566

Nonestoppel to drain surface waters in natural course.

Schwartz v County, 208-1229; 227 NW 91

Prohibited obstruction. Principle reaffirmed that a property owner may not legally place obstructions within a public highway and thereby interfere with the drainage of surface waters across such highway.

Adams Co. v Rider, 205-137; 218 NW 60

Highway drainage easement — discretion. The authority to erect a bridge at a specified place in a public highway without limitation as to the size of such bridge necessarily invests the public officials with a fair discretion as to such size.

Ehler v Stier, 205-678; 216 NW 637

Injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open gutters in a street, constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Engineer's plans accepted by city—no obvious defects — no imputation of negligence. Where engineer's plans for paving alley were not obviously defective in failing to show grade of alley, and the work was done in accordance with the plans, no negligence in adopting the plans can be imputed to the city, since engineering expertness is not within the province of the council members, and a lack of such expertness is the reason for employing a competent engineer and relying on his ability and plans for the construction of the improvement.

Russell v Sioux City, 227-1302; 290 NW 708

4755.10 Bids—contracts prohibited.

Atty. Gen. Opinions. See '34 AG Op 390; '38 AG Op 185; AG Op June 29, '39

4755.11 Award of contracts—bond.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

4755.20 Auditor—appointment—bond—duties.

Atty. Gen. Opinion. See '38 AG Op 814

4755.21 Improvements in cities and towns.

Atty. Gen. Opinions. See '38 AG Op 199, 518

4755.23 Jurisdiction to establish.

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.
2. As to secondary roads, in the board of supervisors on its own motion. (§§4607, 4755-b36, [§4755.33, C., '39], C., '27.)

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change—will not be deemed an establishment of a road, the power to establish roads being a power not possessed by the state commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

Condemnation of orchard, etc. The state highway commission has no authority to condemn for primary road purposes the ornamental grounds or orchard of an owner without his consent.

Hoover v Highway Com., 207-56; 222 NW 438

"Rounding corner." The statutory provision that, in condemning land for road purposes, no ground shall be taken "for the rounding of a corner" when the dwelling house, lawn, and ornamental trees connected therewith are located at such corner necessarily has no application when the condemnation is of land extending in a straight line.

Hoover v Highway Com., 210-1; 230 NW 561

"Rounding corner." The statutory provision that no ground shall be taken for a primary road "for the rounding of a corner" where certain named improvements are located, is violated by locating a primary road through a 40-acre tract on an arc which extends substantially from the southeast to the northwest corner of the tract, and which so bends convexly to the northeast corner of the tract as to leave approximately 4 acres at said corner where the said improvements are located.

Butterworth v Highway Com., 210-1231; 232 NW 760

"Rounding corner." The statutory provision, that in the establishment, relocation, and improvement of primary roads, no ground shall, without the consent of the owner, be taken "for the rounding of a corner where the dwelling house, * * * connected therewith are located", is violated by locating such road through a 14½-acre and substantially square tract of land, and on an arc which extends from the southeast corner to the northwest corner of said tract, and which arc so bends to the northeast corner of said tract as to cut off a segment of land of 5.22 acres in said latter corner, on which said improvements are located. This is true tho the public authorities propose to condemn for road purposes said entire segment of 5.22 acres in addition to said curved roadway.

Reed v Highway Com., 221-500; 266 NW 47
Hicks v Highway Com., 221-509; 266 NW 51

Review of condemnation proceedings. Certiorari will lie to review condemnation proceedings by the state highway commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Easements—evidence—old road records. In an action to establish a road by prescription, evidence in the form of a page from an old road record made in 1850, which was a copy of the surveyor's notes, and introduced as evidence of an adverse claim, is not sufficient when it does not show that such road as shown on the old record was the same as the road now in use. Without this, the road could not be established on the sole evidence of long continued use.

Slack v Herrick, 226-336; 283 NW 904

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the high-

way commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Noncontiguous tracts as one farm. In the condemnation of land for highway purposes, the record may be such as to present a jury question whether noncontiguous tracts are being used as one farm so that the damages resulted to it as an entirety, or whether the land was in such separate tracts that the damages should be assessed to each tract separately.

Paulson v Highway Com., 210-651; 231 NW 296

Governmental agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency was an individual.

Welton v Highway Com., 211-625; 233 NW 876

Damages do not embrace cost of fence. Evidence is admissible in proceedings to condemn land for highway purposes to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

Procedure—exclusiveness. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union Co., 208-314; 223 NW 111

4755.25 Bridges, viaducts, etc., on municipal primary extensions.

Atty. Gen. Opinion. See '38 AG Op 518

Crossings — safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction considered safe when built might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

4755.27 Maintenance.

Atty. Gen. Opinion. See '30 AG Op 175

4755.29 Completing improvement programs.

Atty. Gen. Opinions. See '28 AG Op 128; '34 AG Op 151; '36 AG Op 258, 515, 580, 600

Improvements—primary road bonds—unlawful diversion. Roads and streets within cities and towns are not part of the primary road system, even tho such roads and streets are continuations of primary roads which are outside cities and towns. It follows that county bonds voted for the purpose of improving the primary roads of the county may not be legally issued nor may the proceeds thereof be legally employed for the improvement of roads and streets within cities and towns.

Wallace v Foster, 213-1151; 241 NW 9

4755.33 Transfer of powers and duties.

Atty. Gen. Opinion. See '28 AG Op 361

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.
2. As to secondary roads, in the board of supervisors on its own motion.

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change, will not be deemed an establishment of a road, the power to establish roads being a power not possessed by the state commission. (Power to "establish" see §§4755-b27, 4755-c1, C., '31 [§§4755.23, 4755.24, C., '39]).

Jenkins v Highway Com., 205-523; 218 NW 258

Eminent domain—excessive award—farm already bisected. A $6,000 verdict, being one-fourth the value of a 212-acre farm, for taking 9.63 acres of land for highway purposes, at least part of which was permanently pasture land, from a farm already bisected by a railroad is so grossly excessive as to indicate passion and prejudice, and when so appearing will, in condemnation proceedings as in negligence cases, be set aside.

Luthi v Highway Com., 224-678; 276 NW 586

MARKINGS FOR MUNICIPALITIES

4755.34 Lateral or detour routes in cities and towns.

State commerce commission abandoning overhead crossing—street change resulting. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its

good-faith motives, and certiorari will lie to prevent such invasion.

Huxley (Town) v Conway, 226-268; 284 NW 136

VACATION OF PRIMARY ROADS

4755.37 Power to vacate.

Atty. Gen. Opinion. See '34 AG Op 611

4755.39 Notice—service.

Atty. Gen. Opinion. See '34 AG Op 611

4755.43 Damages—payment—appeal.

Atty. Gen. Opinion. See '34 AG Op 611

CHAPTER 241.2

FINANCING PRIMARY ROAD BONDS

Atty. Gen. Opinions. See '36 AG Op 258, 490, 515, 577, 580, 600

CHAPTER 242

IMPROVEMENT OF COUNTY AND PRIMARY ROADS

Atty. Gen. Opinions. See '25-26 AG Op 291, 299, 311; '30 AG Op 53; '36 AG Op 490

4756 Bonds and taxes.

Atty. Gen. Opinions. See '25-26 AG Op 293; '30 AG Op 353

4761 Form of submission.

Atty. Gen. Opinions. See '25-26 AG Op 309; '28 AG Op 334; '30 AG Op 53

Repeal of source of payment—effect. The repeal of a statute which provides the funds with which to retire duly authorized bonds as they are issued, without providing any new source of payment, necessarily precludes the further issuance of such bonds.

Dee v Tama Co., 209-1341; 230 NW 337

4762 Combining or separating proposition.

Atty. Gen. Opinion. See '25-26 AG Op 293

4763 Bonds—maturity—interest.

Atty. Gen. Opinion. See '30 AG Op 282

4767 Budget required.

Atty. Gen. Opinion. See '25-26 AG Op 309

4771 Statutes applicable.

Atty. Gen. Opinions. See '25-26 AG Op 299, 311; '30 AG Op 353

4773 Optional procedure.

Atty. Gen. Opinion. See '25-26 AG Op 293

CHAPTER 243

ROAD MAINTENANCE PATROL

4774 Road patrolmen.

Highway workman not "road patrolman"—not excluded from workmen's compensation by "official position". A county highway maintenance workman is not necessarily a patrolman under §4774, C., '35, and not a person holding an "official position" such as denies him the benefits of the workmen's compensation act, when there was no record of an appointment, no approval of a bond, no oath as an official nor as a peace officer, and when no badge of office had ever been furnished.

Schroyer v Jasper Co., 224-1391; 279 NW 118

4776 Bonds.

Liability. The statutory bond required of road patrolmen for the performance of their statutory duties in caring for the roads assigned to them, does not embrace liability to a traveler in damages consequent on the negligent handling of road machinery.

Bateson v County, 213-718; 239 NW 803

4778 Duties.

Atty. Gen. Opinions. See '25-26 AG Op 90, 413, 486; '30 AG Op 46

4779 Additional authority—badge—oath.

Atty. Gen. Opinions. See '25-26 AG Op 90, 383, '30 AG Op 46, 144

CHAPTER 246.1

WEEDS

Atty. Gen. Opinions. See '38 AG Op 408, 497

4829.01 Noxious weeds.

Atty. Gen. Opinion. See '28 AG Op 218

4829.03 Weed commissioner.

Atty. Gen. Opinion. See '30 AG Op 161

4829.05 Entering land—limitation.

Atty. Gen. Opinion. See AG Op April 26, '39

4829.06 Notice to owner.

Atty. Gen. Opinion. See AG Op April 22, '39

4829.09 Duty of board to enforce.

Atty. Gen. Opinion. See AG Op June 29, '39

4829.10 Duty of owner or tenant.

Atty. Gen. Opinions. See '28 AG Op 172; '30 AG Op 152, 179; '32 AG Op 56, 93

4829.13 Program of control.

Atty. Gen. Opinions. See '28 AG Op 172; AG Op Apr. 3, '39, Oct. 2, '39

4829.18 Order for destruction on roads.

Atty. Gen. Opinion. See AG Op Sept. 5, '39

4829.19 Cost of such destruction.

Atty. Gen. Opinions. See '30 AG Op 179; '38 AG Op 408

4829.20 Duty of highway maintenance men.

Atty. Gen. Opinion. See '38 AG Op 408

4829.22 Punishment of officer.

Atty. Gen. Opinions. See '38 AG Op 408, 762

CHAPTER 247

HEDGES ALONG HIGHWAYS

Atty. Gen. Opinions. See '25-26 AG Op 352; '34 AG Op 73

4830 Hedges and windbreaks—trimming.

Trees, secondary road construction. See under §4644.44

Special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

4831 Destruction by supervisors—tax.

Special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

4833 Exceptions.

Atty. Gen. Opinion. See '38 AG Op 181

Tree limb over electric wire—nonremoval.

Porter v Elec. Co., 228- ; 292 NW 231

CHAPTER 248

OBSTRUCTIONS IN HIGHWAYS

Atty. Gen. Opinions. See '28 AG Op 184; '30 AG Op 346; '36 AG Op 525

4834 Removal.

Obstructions as criminal offense. See under §13120, Vol I

Atty. Gen. Opinions. See '28 AG Op 297; '30 AG Op 332

Long-continued obstructions furnish no basis for legal right.

Dickson v Davis County, 201-741; 205 NW 456

Malice immaterial in performance of legal act. Removal of trees from a highway by county authorities for improvement being a legal act, the question as to whether or not they were acting maliciously as alleged by an abutting property owner is immaterial.

Rabiner v Humboldt County, 224-1190; 278 NW 612; 116 ALR 89

Duty to remove stalled vehicle from highway. Where a motor vehicle is stalled in a snowdrift and obstructs half of the highway, a motorist must use reasonable expedience to remove such vehicle.

Youngman v Sloan, 225-558; 281 NW 130

Damages—nonliability of highway engineer. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county, for a proper and lawful purpose, and in leaving the work in a condition which becomes dangerous, even tho, by leaving the work in said condition, he creates a public nuisance for which he may be punished.

Swartzwelter v Util. Corp., 216-1060; 250 NW 121; 34 NCCA 471

4835 Fences and electric transmission poles.

Road fenced less than established width. Injunction will not lie on behalf of a landowner to prevent a county from removing fences as obstructions in the highway—the fences having been built more than fifty years ago on a 40-foot width—when the road record shows not only a 66-foot road but all the mandatory prerequisites for establishment.

Davelaar v Marion County, 224-669; 277 NW 744

Encroachment on highway—supervisors removing landowner's fences. Injunction by landowner will not lie to prevent county supervisors from removing landowner's fences encroaching on highway even tho such fences have existed for seventy years.

Richardson v Derry, 226-178; 284 NW 82

Adjoining landowner—no title accrues from encroachment on highway. Encroachment by an adjoining landowner on an established public highway will not ripen into a title through any statute of limitations, doctrine of acquiescence, adverse possession, or estoppel—the establishment and maintenance of public highways being a governmental function.

Richardson v Derry, 226-178; 284 NW 82

4836 Notice.

Removal—injunction. Highway officials are properly enjoined from removing a fence from the highway and to the line of the highway (1) when the landowner has not had the full statutory 60-day notice to make the removal, and (2) when the said notice to the landowner was served by registered mail, instead of being served as an original notice of suit is required to be served.

Harbacheck v Tel. Co., 208-552; 226 NW 171

4838 New lines.

Atty. Gen. Opinions. See '30 AG Op 224; '36 AG Op 525; '38 AG Op 318; AG Op May 17, '39, Sept. 8, '39

Power of county engineer. A franchise issued by the board of railroad commissioners to operate an electric transmission line "over, along, and across" a specified highway, under specifications calling for a crossarm at the top of the poles, carries the right and power in the grantee so to erect its line that all parts thereof, including the superstructure, will be wholly within the lines of said highway. It follows that the general power of the county engineer under this section to locate such lines does not embrace the power so to locate the line that part of the superstructure will overhang land outside the highway. (Overruling Central States Elec. Co. v Pocahontas Co., 223 NW 236.)

Iowa Corp. v Lindsey, 211-544; 231 NW 461

Location of transmission poles—jurisdiction. A written application to the highway engineer for the location of transmission poles along a highway is not jurisdictional. In other words, a proper location may be made on an oral application.

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121

Lawfulness of action. In the absence of any evidence or showing to the contrary, it will not be presumed that a public service corporation is seeking the location of its lines along a highway without having procured a franchise or that the highway engineer is proceeding to mark such location without a written application therefor.

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121

Loaning servant to another. A utility corporation, seeking to set its transmission poles along a public highway, is not responsible for the acts of its employees in assisting the county highway engineer, under his absolute direction and control, in finding a lost section corner which, when found, enables the engineer, first, to locate the lines of the highway, and second, the line of the poles.

Reason: The utility employees in the search for the lost corner become the special employees of the highway engineer.

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121; 34 NCCA 471

4839 Cost of removal—liability.

Atty. Gen. Opinions. See '38 AG Op 318; AG Op Aug. 29, '39

Nonimplication for compensation. The removal by an owner of land of fences across a public highway on the land, in compliance with a demand of the public authorities, gives rise to no implied contract on the part of the municipality to pay the value of the work and materials necessary in effecting such removal.

Hall v Union Co., 206-512; 219 NW 929

4840 Duty of road officers.

Atty. Gen. Opinion. See '38 AG Op 318

4841 Nuisance.

Atty. Gen. Opinion. See '38 AG Op 318

Nonliability of highway engineer. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county for a proper and lawful purpose and in leaving the work in a condition which becomes dangerous, even tho by leaving the work in said condition he creates a public nuisance for which he may be punished.

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121; 34 NCCA 471

Aerial obstructions—justifiable assumption. The operator of a truck along a public street

has a right, in the absence of actual knowledge to the contrary, to assume that the street is free from aerial obstructions which may strike the top of his vehicle, e. g., a guy wire stretched across the street from a nearby building in process of construction. And especially is this true when the surface of the street along which the driver is moving is badly cluttered up with building material.

Hatfield v White Line, 223-7; 272 NW 99

4842 Injunction to restrain obstructions.

Obstructions—drainage. Principle reaffirmed that a property owner may not legally place obstructions within a public highway and thereby interfere with the drainage of surface waters across such highway.

Adams County v Rider, 205-137; 218 NW 60
Herman v Drew, 216-315; 249 NW 277

Trees—removal for drainage—no injunction. In landowner's action to restrain county from cutting down seven trees in the construction of a highway, where evidence showed that trees were too far apart to constitute a windbreak, that trees were on the highway right of way, and that their destruction was necessary to provide a drainage ditch, lower court properly refused to enjoin destruction under statute prohibiting such destruction unless "materially interfering with improvement of the road".

Harrison v Hamilton County, (NOR); 284 NW 456

4845 Enforcement.

Atty. Gen. Opinion. See AG Op April 14, '39

4846 Billboards and signs prohibited.

Atty. Gen. Opinion. See AG Op April 14, '39

CHAPTER 249

REGISTRATION OF HIGHWAY ROUTES

Atty. Gen. Opinion. See '30 AG Op 289

CHAPTER 250

USE OF HIGHWAYS

Atty. Gen. Opinion. See '30 AG Op 364

CHAPTER 251.1

MOTOR VEHICLES AND LAW OF ROAD

Atty. Gen. Opinions. See '34 AG Op 252, 258, 310; '36 AG Op 209, 444; '38 AG Op 703, 718

DEPARTMENT OF MOTOR VEHICLES

5000.01 Definitions of words and phrases.

Assured clear distance. See under §5023.01
Consent. See under §5037.09
Control. See under §5023.04
Guest. See under §5037.10
Intoxication, penal provision. See under §5022.02
Lookout. See under §5023.01
Negligence. See under §5037.09
Person. See also under §5038.02
Reckless driving, penal provision. See under §5022.04
Recklessness, guest statute. See under §5037.10
Words and phrases generally. See under §63 (IV)
Atty. Gen. Opinion. See AG Op July 11, '39

Horse as vehicle. A horse, saddled and bridled, and being used as a means of conveyance or transportation, is not a "vehicle," within the meaning of a policy of insurance which provides indemnity "sustained by the wrecking or disablement of any vehicle or car * * * in which the insured is riding, or by being accidentally thrown therefrom."

Riser v Ins. Co., 207-1101; 224 NW 67; 63 ALR 292

Former statute revised — legislative construction. When the motor vehicle statutes were completely revised, and exempted the vendor of a motor vehicle under a conditional sales contract from liability for negligent operation of the vehicle, such revision did not create a legislative construction that a former statute defining "owner" as the person with the use or control of a vehicle included such vendor within its definition, as a general revision of the laws creates no presumption of an intent to change the law, as is created when a particular section or a limited part of an act is re-enacted.

Hansen v Kuhn, 226-794; 285 NW 249

Conditional sales—ownership in vendee. When a motor vehicle is sold under a conditional sales contract, altho the seller retains legal title for the purpose of security, the ownership of the car passes to the buyer.

Hansen v Kuhn, 226-794; 285 NW 249

Assignee from conditional sale vendor not the owner of motor vehicle. The assignee from the vendor of a truck under a conditional

sales contract did not have either the "lawful ownership, use or control" or "the right to the use or control" of the truck, and could not be considered as "owner" under a former statute which said that any person coming within those specifications should be included in the term "owner".

Hansen v Kuhn, 226-794; 285 NW 249

"Commissioner" as agent for process.

Green v Brinegar, 228- ; 292 NW 229

Conditional seller not "owner"—nonliability. Statute making owner of automobile liable for damage caused by its operation when being driven with owner's consent, held not to extend to seller of automobile under conditional sales contract even when, under the contract of sale, seller retained title, for the buyer is the beneficial, equitable, and substantial owner, and the seller retains only naked title subject to complete divestation upon payment of the final installment of the purchase price.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Ownership of automobile. Evidence that the head of a family bought an automobile, paid for it, used it for the purpose of making a living, and has never parted with the possession, is sufficient to prove his ownership on the question of exemption.

Shepard v Findley, 204-107; 214 NW 676

"Owner" defined. When an automobile actually belongs to an employee, the employer is not also to be deemed an "owner" because in the contract of employment the employee contracts to hold the employer harmless in the operation of the car.

McLain v Armour & Co., 205-343; 218 NW 69

Ownership of car—futile evidence. Evidence that an automobile of a certain make was, at the time of a collision, occupied by a husband and wife, that it carried a registration plate of the county of which said parties were residents, and that said car was being operated by the husband, furnishes no prima facie proof of the wife's ownership of the car.

Putnam v Bussing, 221-871; 266 NW 559

Transfer—prima facie effect. An insurer against the theft of an automobile, defending on the ground that the insured was not the "unconditional and sole" owner, may not complain that the jury is instructed that a transfer of the certificate of registration is only prima facie evidence of change of title.

Abraham v Ins. Co., 215-1; 244 NW 675

Carrying pistol—operator — motor vehicle definition not controlling. The definition of an "operator" of a motor vehicle applicable to and contained in the motor vehicle law is not controlling in construing a criminal statute found in another, distinct part of the code.

State v Thomason, 224-499; 276 NW 619

"Chauffeur" defined. An employee of a business who is not known as a chauffeur, and who is solely employed and paid for services wholly distinct from the operation of a delivery truck, does not become a "chauffeur" within the meaning of §4943, C., '27, [§5013.01, C., '39] by operating the truck during the time the regular chauffeur operator is temporarily absent.

Des M. Rug Co. v Underwriters, 215-246; 245 NW 215

Highway traversing city street — highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA (NS) 724

Intersection—what constitutes—instructions. Where a north and south highway splits into two curves near an east and west highway, and connects with the latter at two points some 900 feet apart, it is not erroneous for the court to instruct that the intersection embraces the entire distance of 900 feet, (1) when the evidence tends to show that the authorized public authorities have treated said distance as the intersection, and (2) when the instruction is manifestly given for the sole purpose of guiding the jury in applying the statutory command that motorists shall reduce their speed to a reasonable and proper rate when approaching and traversing intersections of public highways.

Enfield v Butler, 221-615; 264 NW 546

Improper definition of "intersection" in motor vehicle case. There was no error nor abuse of discretion by the court in granting a new trial in a motor vehicle damage case on the ground that an incorrect definition of "intersection" was given to the jury, when the correct definition was a matter of statute, even tho both parties to the action during the trial used the wrong interpretation of the term as it was given by the court.

Hupp v Doolittle, 226-814; 285 NW 247

"Intersection" of highways—definition. In a damage action arising from a collision of motor vehicles at a highway intersection, where the question of negligence centered largely around the rights of the parties within the intersection, it was prejudicial error to instruct the jury that "intersection" is the area within the fence lines, if such fence lines were extended across the road, when a statute defines "intersection" as being the area within the lateral boundary lines of highways which join.

Hupp v Doolittle, 226-814; 285 NW 247

Automobile not "baggage". An automobile kept by the occupant of an apartment

house in a garage adjacent to the apartment is not "baggage" within the meaning of the hotelkeepers lien act.

Cedar Rapids Co. v Commodore Hotel, 205-736; 218 NW 510

"Dangerous instrumentality." The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

"Emergency" defined. An emergency is (1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; (3) a sudden or unexpected occasion for action; exigency; pressing necessity.

Young v Hendricks, 226-211; 283 NW 895

Change in classification of police patrol—effect. While the motor vehicle act in the Code of 1924, classified a "police patrol" as a "nonmotor vehicle", the later legislative classification of "police patrols" as "motor vehicles" was not intended to deprive a municipality of its exemption from liability for damages consequent on the negligent operation of a city-owned police patrol as a governmental agency.

Leckliter v City, 211-251; 233 NW 58

Registration—"special mobile equipment" includes portable mill. Statute exempting "special mobile equipment" from motor vehicle registration fees includes a portable grinding mill so mounted on the vehicle with such permanency that the vehicle and the equipment constitute an integral unit operated on the highways as a subordinate or subsidiary, tho necessary, feature in moving to locations where its primary use in grinding feed is to be performed.

State v Griswold, 225-237; 280 NW 489

Through highway—county trunk road.

Davis v Hoskinson, 228- ; 290 NW 497

Yielding half of "traveled way"—beaten path (?) or entire roadway (?). When the plaintiff's truck turned left at a blind corner, keeping to the right of the beaten path, but not to the right side of the graveled highway, and collided with the defendant's car which was approaching the corner on the right side of the road, it was not improper to instruct the jury that a car must yield half the traveled or graveled part of the road when meeting another car, and, that for the plaintiff to recover, it must be found that the truck was hit while on the right side of the road; or, for a recovery to be had by the defendant on a counterclaim, that the plaintiff was negligent in not yielding half the road.

Kiesau v Vangen, 226-824; 285 NW 181

5000.04 Rules and regulations.

Atty. Gen. Opinion. See '36 AG Op 444

Statutes—construction and operation — in pari materia. Statutes in pari materia are to be construed together, and harmonized, if possible, and especially when such statutes appear in the same chapter. So held as to different statutes relating to the right of way of travelers at highway intersections.

Dikel v Mathers, 213-76; 238 NW 615

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Unallowable delegation. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39

5000.10 Certified copies of records.

Ownership—incompetent evidence. On the issue of ownership of a motor vehicle (arising on the allegation that said vehicle was being operated with the consent of the owner), neither of the following is admissible:

1. A certified copy of a purported application for registration of said vehicle when said purported application is neither signed by nor sworn to by any person. For an added reason is this true when said certification fails to identify said application as a record of any public office.

2. An unauthenticated copy of a purported duplicate certificate of registration of said vehicle, especially when said certificate fails to carry the signature of the purported owner of said vehicle.

Putnam v Bussing, 221-871; 266 NW 559

ORIGINAL AND RENEWAL OF REGISTRATION

5001.01 Misdemeanor to violate registration provisions.

Atty. Gen. Opinion. See AG Op Jan. 17, '40

5001.02 Vehicles subject to registration—exception.

Unambiguous tax exemption statute—strict construction rule nonapplicable. Strict construction of statutes granting exemptions from taxation, altho being the rule, has no application to a plain, clear, and unambiguous statute affording no room for construction.

State v Griswold, 225-237; 280 NW 489

Registration—"special mobile equipment" includes portable mill. Statute exempting "special mobile equipment" from motor vehicle registration fees includes a portable grinding mill so mounted on the vehicle with such permanency that the vehicle and the equipment constitute an integral unit operated on the highways as a subordinate or subsidiary, tho necessary, feature in moving to locations where its primary use in grinding feed is to be performed.

State v Griswold, 225-237; 280 NW 489

5001.03 General exemptions.

Atty. Gen. Opinions. See '30 AG Op 42; '34 AG Op 257, 329, 595, 691

5001.05 Registration by treasurer.

Atty. Gen. Opinion. See '34 AG Op 160

5001.11 Cards furnished.

Atty. Gen. Opinion. See '34 AG Op 737

5001.18 Plates furnished.

Atty. Gen. Opinion. See '34 AG Op 160

Registration plate — judicial notice of the county of issuance. The court cannot, from the figures alone, take judicial notice that a registration number plate on an automobile was issued by the county treasurer of a certain county.

Putnam v Bussing, 221-871; 266 NW 559

TRANSFERS OF TITLE OR INTEREST

5002.01 Notice.

Atty. Gen. Opinion. See '36 AG Op 209

Implied warranty of title. The seller of an automobile impliedly warrants that he has a right to sell it.

Espe v McClelland, 208-512; 226 NW 130

Issue of ownership—instructions. On the issue of actual ownership, as between the vendor and vendee of an automobile, reversible error does not result from instructing, in effect, that the nonregistration of the vehicle with the county treasurer in the name of a prospective purchaser might be considered by the jury as a mere side light of the transaction.

Tigue Sales v Motor Co., 207-567; 221 NW 514

Transfer—right to contradict. On the issue whether plaintiff, in an action on a policy of insurance covering the theft of an automobile, was the "unconditional and sole" owner of the vehicle, plaintiff may testify to facts attending a written transfer of the certificate of registration tending to show that he, in fact, remained the owner of the vehicle notwithstanding said transfer.

Abraham v Ins. Co., 215-1; 244 NW 675

5002.02 Duty of purchaser.

Atty. Gen. Opinions. See '34 AG Op 257; '36 AG Op 209

Scope of statute. Section 4964, C., '35, simply means that no delivery or passing of title is valid against the public tax-collecting authorities until the required registration is consummated. It has no reference to a contract delivery and passing of title between the private parties to a sale.

Cerex Co. v Peterson, 203-355; 212 NW 890

5002.03 Registration and fee.

Atty. Gen. Opinions. See '28 AG Op 135; '34 AG Op 257; '36 AG Op 209

Failure to register auto transfer—passing title. Inference, from their failure to complete registration, that parties did not intend to pass ownership of an automobile sold under conditional sale is not sufficient to make a jury question when the parties at the time of the transaction clearly manifested an intent to immediately transfer ownership.

Craddock v Bickelhaupt, 227-202; 288 NW 109

5002.06 Penalty.

Atty. Gen. Opinion. See '34 AG Op 309

5002.07 Owner after transfer not liable for negligent operation.

Atty. Gen. Opinions. See '34 AG Op 309; '36 AG Op 209

Conditional sale vendor not liable for negligence of vendee. The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

Delivery and title—scope of statutory requirement. The provision of the motor vehicle act that delivery of a vehicle shall not be deemed made, nor title to a vehicle be deemed to pass, until the transferee shall receive and sign the certificate of registration, simply means that no delivery or passing of title is valid against the public tax-collecting authorities until the required registration is consummated. The provision has no reference to a contract delivery and passing of title between the private parties to a sale.

Cerex Co. v Peterson, 203-355; 212 NW 890

Conditional sales—motor vehicles—ownership. An instruction was erroneous in stating that a conditional sales contract, containing a clause that title remained in seller, left the ownership of an automobile in the seller. The buyer became the substantial and beneficial owner under the contract, and §4964, C., '35,

stating that title to motor vehicle shall not be deemed to pass until transferee has received and written his name on the registration certificate, is not construed to make seller liable as owner of the vehicle.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Registration statutes—contract rights unrestricted between parties. Purpose of §4964, C., '35, in the motor vehicle laws, providing that title does not pass until the registration provisions have been completed, is to enable officials to perform their duty, collect tax, and prevent fraud on state, and does not restrict the contract rights of parties as between themselves, which they would have had in the absence of such statute.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Issue of ownership—instructions. On the issue of actual ownership, as between the vendor and vendee of an automobile, reversible error does not result from instructing, in effect, that the nonregistration of the vehicle with the county treasurer in the name of a prospective purchaser might be considered by the jury, as a mere sidelight of the transaction.

Tigue Co. v Motor Co., 207-567; 221 NW 514

5002.08 Surrender of plates.

Atty. Gen. Opinion. See '36 AG Op 209

PERMITS TO NONRESIDENT OWNERS

5003.01 Nonresident owners exempt.

Atty. Gen. Opinions. See '28 AG Op 76, 389; '34 AG Op 583; '36 AG Op 626; AG Op Sept. 13, '39; AG Op Jan. 11, '40

5003.02 Nonresident carriers.

Atty. Gen. Opinion. See AG Op July 19, '39

5003.03 Nonresidents employed in state.

Atty. Gen. Opinions. See '32 AG Op 15; '34 AG Op 583, 595

5003.04 Scope of exemption.

Atty. Gen. Opinions. See '28 AG Op 76; '36 AG Op 628; AG Op Nov. 6, '39; AG Op Jan. 11, '40

SPECIAL PLATES TO MANUFACTURERS, TRANSPORTERS, AND DEALERS

5004.01 Operation under special plates.

Atty. Gen. Opinion. See AG Op Jan. 17, '40

5004.02 Application.

Atty. Gen. Opinions. See '30 AG Op 265; '34 AG Op 514

5004.04 Issuance of plates.

Atty. Gen. Opinion. See '30 AG Op 265

USED MOTOR VEHICLES

5005.03 Right to operate.

Atty. Gen. Opinion. See '34 AG Op 514

SPECIAL ANTITHEFT LAW

5006.05 Operating without consent.

Atty. Gen. Opinions. See '34 AG Op 415; '36 AG Op 690

5006.09 Vehicles without manufacturers' numbers.

Holding under prior statute. The possession of a motor vehicle the engine number of which has been altered is an offense, irrespective of the knowledge of the person possessing it.

State v Dunn, 202-1188; 211 NW 850

Prior statute. In an action to recover the money paid for an automobile the engine number of which had been changed, it is quite immaterial that there is no evidence that such change was wrongful or illegal.

Espe v McClelland, 208-512; 226 NW 130

Sale—total failure of consideration. The sale of an automobile the engine number of which has been defaced, altered, or tampered with, without an official certificate showing good and sufficient reasons for such change, presents a case of total failure of consideration, and no formal rescission of contract is necessary in order to recover the price paid.

Espe v McClelland, 208-512; 226 NW 130

Latent defects and equal opportunity to inspect. The rules of law pertaining to latent defects and equal opportunity to inspect do not apply to the sale of an article the possession of which the law unconditionally prohibits.

Espe v McClelland, 208-512; 226 NW 130

5006.11 Larceny of motor vehicle.

Unauthorized taking of motor vehicle—presumption of theft. When an owner of a motor vehicle establishes that his car was taken without his knowledge or consent from the place he left it, he has made a prima facie case of theft. The law raises a rebuttable presumption that the taking was with intent to steal the same.

Whisler v Ins. Co., 224-201; 276 NW 606

Intoxication subsequent to automobile theft—inadmissibility. Exclusion of evidence offered by an insurance company in an effort to escape liability on a theft policy, as to a thief's intoxicated condition an hour after the alleged theft of motor vehicles, as bearing on his condition at the time of the taking, held not prejudicial.

Whisler v Ins. Co., 224-201; 276 NW 606

Intoxication—defense to automobile theft insurance. Conflicting evidence as to whether one who took motor vehicles without owner's consent was intoxicated presents a jury question.

Whisler v Ins. Co., 224-201; 276 NW 606

Recent possession—justifiable inference. Unexplained possession of recently stolen property may justify the conviction of the possessor of the larceny in question; and especially when said possession is reinforced by proof of other incriminating circumstances with which the accused is connected.

State v Kenny, 222-279; 268 NW 505

5006.21 Altering or changing numbers.

Atty. Gen. Opinion. See '34 AG Op 415

5006.22 Defense.

Unpleaded defense. Reversible error results from submitting to the jury and requiring it to make a finding on a possible defense not presented by the defendant.

State v Dunn, 202-1188; 211 NW 850

OFFENSES AGAINST REGISTRATION LAWS AND SUSPENSION OR REVOCATION OF REGISTRATION

5007.01 Fraudulent applications.

Atty. Gen. Opinion. See '28 AG Op 59

5007.02 Operation without registration.

Discussion. See 17 ILR 94—Consequences of nonregistration

REGISTRATION FEES

5008.01 Annual fee required.

Atty. Gen. Opinions. See '34 AG Op 108, 183; AG Op Jan. 17, '40

License fee as nonproperty tax. A substantial charge placed by the legislature on motor trucks operated on the public highways, graduated on the weight of the load carried, conceding the same to be a tax, tho termed a "license fee", is not a property tax but a tax imposed for the privilege of using the highways as a place of business, and therefore not within the meaning of Art VII, §7, of the constitution.

Solberg v Davenport, 211-612; 232 NW 477
Towns v City, 214-76; 241 NW 658

5008.05 Motor vehicle fee.

Atty. Gen. Opinions. See '30 AG Op 265; '34 AG Op 464

5008.09 Automatic reduction.

Atty. Gen. Opinion. See '34 AG Op 595

5008.13 Motorcycle and hearse fees.

Atty. Gen. Opinion. See '34 AG Op 464

5008.14 Cornshellers and feed grinders.

Unambiguous tax exemption statute—strict construction rule nonapplicable. Strict construction of statutes granting exemptions from taxation, altho being the rule, has no application to a plain, clear, and unambiguous statute affording no room for construction.

State v Griswold, 225-237; 280 NW 489

Registration — "special mobile equipment" includes portable mill. Statute exempting "special mobile equipment" from motor vehicle registration fees includes a portable grinding mill so mounted on the vehicle with such permanency that the vehicle and the equipment constitute an integral unit operated on the highways as a subordinate or subsidiary, tho necessary, feature in moving to locations where its primary use in grinding feed is to be performed.

State v Griswold, 225-237; 280 NW 489

5008.15 Trucks with pneumatic tires.

Atty. Gen. Opinion. See '34 AG Op 464

License fee as nonproperty tax. A substantial charge placed by the legislature on motor trucks operated on the public highways, graduated on the weight of the load carried, if the same be conceded to be a tax, though termed a "license fee," is not a property tax, but a tax imposed for the privilege of using the highways as a place of business, and therefore is not within the meaning of Const. Art. VII, §7.

Solberg v Davenport, 211-612; 232 NW 477

5008.19 Trailers.

Atty. Gen. Opinion. See '34 AG Op 691

5008.24 Payment authorized.

Atty. Gen. Opinions. See '30 AG Op 251; '34 AG Op 275; '36 AG Op 133, 209

5008.26 Fees in lieu of taxes.

Atty. Gen. Opinions. See '30 AG Op 265; '34 AG Op 515; '38 AG Op 703

PENALTIES, COSTS, AND COLLECTIONS

5009.01 Methods of collection.

Atty. Gen. Opinion. See '25-26 AG Op 383

5009.03 When fees delinquent.

Atty. Gen. Opinion. See '25-26 AG Op 377

5009.06 Collection by sheriff.

Atty. Gen. Opinion. See '28 AG Op 59

FUNDS

5010.01 Disposition.

Atty. Gen. Opinions. See '34 AG Op 108, 369; AG Op Feb. 28, '40

5010.02 Unexpended balances.

Atty. Gen. Opinion. See AG Op Feb. 28, '40

5010.03 Cash balance.

Atty. Gen. Opinions. See '34 AG Op 108, 369

5010.04 Monthly estimate.

Atty. Gen. Opinion. See '34 AG Op 369

5010.07 Duty and liability of treasurer.

Atty. Gen. Opinions. See '34 AG Op 160, 183, 369

5010.08 Fee for county.

Atty. Gen. Opinion. See '28 AG Op 274

5010.09 Treasurer's report to department.

Atty. Gen. Opinion. See '34 AG Op 369

OPERATORS' AND CHAUFFEURS' LICENSES

ISSUANCE OF LICENSES, EXPIRATION, AND RENEWAL

5013.01 Operators and chauffeurs licensed.

Driving without driver's license—effect. The fact that the driver of an automobile had no driver's license at the time of an accident becomes inconsequential when the action is by a passenger and when there is no causal relation between the driver's violation of law and plaintiff's injuries.

Schuster v Gillispie, 217-386; 251 NW 735

"Chauffeur" defined. An employee of a business who is not known as a chauffeur, and who is solely employed and paid for services wholly distinct from the operation of a delivery truck, does not become a "chauffeur" within the meaning of §4943, C., '27, by operating the truck during the time the regular chauffeur operator is temporarily absent.

Des M. Rug Co. v Underwriters, 215-246; 245 NW 215

5013.03 Persons exempt.

Atty. Gen. Opinion. See AG Op Aug. 16, '39

5013.17 Disposal of fees.

Atty. Gen. Opinion. See '36 AG Op 576

CANCELLATION, SUSPENSION, OR REVOCATION OF LICENSES

5014.01 Authority to cancel license.

Atty. Gen. Opinions. See '34 AG Op 267; '36 AG Op 690; '38 AG Op 189

5014.06 Surrender of license—duty of court.

Atty. Gen. Opinion. See '34 AG Op 608

5014.10 Authority to suspend.

Atty. Gen. Opinion. See '36 AG Op 668

5014.11 Notice and hearing.

Atty. Gen. Opinion. See '36 AG Op 668

5014.12 Period of suspension or revocation.

Atty. Gen. Opinion. See '36 AG Op 668

VIOLATION OF LICENSE PROVISIONS

5015.07 Renting motor vehicle to another.

Liability of bailor. The bailor of an automobile is personally liable to a third person for damages consequent on the negligent operation of the car by the bailee.

Robinson v Bruce, 205-261; 215 NW 724; 61 ALR 851; 28 NCCA 626; 30 NCCA 90

Guest injured in rented car—burden of proof. In action by guest against lender of rented car and driven by borrower, for injuries sustained when car because of defective wheels goes into ditch, he must show, not only that car was defective at time of accident, but that it was defective at time of its delivery to borrower. Held burden of proof not sustained.

Gianopulos v Saunders System, (NOR) 242 NW 53; 32 NCCA 18

LAW OF THE ROAD

OBEDIENCE TO AND EFFECT OF TRAFFIC LAWS

5017.03 Public officers not exempt.

Public officers and agents—personal liability. A public officer while traveling upon the public highway in the performance of a governmental function, in the sense that he is attempting to reach a point where he can actually perform and consummate such function, is under the same duty to exercise care and subject to the same liability for want of such care as any other citizen.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Governmental employees—personally liable for torts—governmental immunity denied. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Governmental immunity — law question raised in reply—recognizing issue. The defense of "governmental immunity" of an employee, in a personal injury action, should properly be assailed by motion or demurrer. However, if the law question of sufficiency of this defense is raised in the reply and not challenged by the defendant, and the case tried on that theory, then the court is correct in recognizing the issue and instructing on the inadequacy of that defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Government employee's automobile collision —immunity as a defense. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Anderson v Moon, 225-70; 279 NW 396

Government nonliability for employee's tort —respondeat superior—exception. The exemption accorded counties and other governmental

bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Governmental function—negligent operation of road maintainer—nonliability. Neither a county as a quasi corporation nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Statute requiring lights on road machinery—violation—nonliability of county. Mandatory statutes requiring danger lights on road machinery and providing punishment for their violation do not create any liability on a county for negligent observance thereof.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Maintenance patrolmen — bonds — liability. The statutory bond required of road patrolmen for the performance of their statutory duties in caring for the roads assigned to them, does not embrace liability to a traveler, in damages consequent on the negligent handling of road machinery.

Bateson v Marshall County, 213-718; 239 NW 803

School bus driver as independent contractor — nongovernmental function. A school bus driver furnishing his own bus under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

Legislative change in classification of police patrol — effect on governmental exemption. While the motor vehicle act, C., '24, classified a "police patrol" as a "nonmotor vehicle," the later legislative classification of "police patrols" as "motor vehicles" was not intended to deprive a municipality of its exemption from liability for damages consequent on the negligent operation of a city-owned police patrol as a governmental agency.

Leckliter v Des Moines, 211-251; 233 NW 58

Operation of police patrol a governmental function. The operation of a plainly marked police patrol by a policeman in uniform, in conveying policemen in uniform from the police station to their patrol beats, all under orders from the chief of police, is a governmental function. It follows that the city is not liable for damages consequent on the negligent operation of the car by the driver.

Leckliter v Des Moines, 211-251; 233 NW 58; 38 NCCA 493

5017.06 Road workers exempted.

Person injured on highway construction work. In laborer's personal injury action arising because of truck backing into him while both were engaged in highway construction work, an instruction, that it is the duty of driver in moving a truck to exercise care and caution of ordinarily prudent person and to bring truck under proper control if he discovers, or in exercise of reasonable care should discover, a person in the path of truck, was neither erroneous as submitting to the jury a previously withdrawn issue as to whether defendant driver has truck under control, nor as permitting jury to speculate on defendant's negligence generally.

Rebmann v Heesch, 227-566; 288 NW 695

Co-worker—truck driver's duty. In a laborer's personal injury action against a truck driver for backing truck into laborer while both were engaged in highway construction, §5017.06, C., '39, exempting persons and motor vehicles actually engaged in work upon the highway from the motor vehicle law requirements, does not exempt a truck driver from using his horn if necessary in the exercise of ordinary care when backing from an intersection onto highway under construction. Question of defendant's negligence in not sounding horn nor observing plaintiff's presence when backing truck where men were working, and question of plaintiff's contributory negligence while working under foreman's instruction at outside edge of road were questions properly submitted to jury.

Rebmann v Heesch, 227-566; 288 NW 695

5017.07 Bicycles or animal-drawn vehicles.

Driving blind horse. It is not negligent per se to drive a blind horse in a narrow highway on a dark night, with the horse hitched to an unlighted buggy.

Lange v Bedell, 203-1194; 212 NW 354

Collision resulting in collision. The act of the driver of an automobile in negligently running into a wagon and team on the highway and causing the team to run away, may be the proximate cause of a later collision between said runaway team and another automobile, provided said latter collision was the natural or likely result of the first collision; and this

is true tho the first driver did not foresee or apprehend said second collision.

Dennis v Merrill, 218-1259; 257 NW 322; 1 NCCA(NS) 175

Res ipsa loquitur—ambiguous but not erroneous phrase. In an action against a motorist for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of each other, but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

Unnatural appearance and unnecessary noise as negligence. It is actionable negligence to operate a motor vehicle upon the public highway when said vehicle is so equipped as to take on such a strange and unnatural appearance and to emit such unusual and unnecessary noise as may reasonably result in fright to animals properly driven on such highway.

Buchanan v Cream Co., 215-415; 246 NW 41

Striking boy on bicycle—dispute as to lookout. Where a defendant county employee-trucker ran over a boy on a bicycle, an allegation of defendant's lack of proper lookout is clearly for the jury, when from the evidence, indicating the trucker may have struck the boy from the rear and should have seen him, the jury may well have found that defendant did not, in fact, keep such lookout.

Montanick v McMillin, 225-442; 280 NW 608

Contributory negligence as jury question—boy on bicycle warming ear with hand. Plaintiff riding a bicycle on the sidewalk, a place of comparative safety, observing the traffic ahead of him, cannot, as a matter of law, be said to be guilty of contributory negligence in not watching where he was going simply because he put a hand over his ear to warm it, when there is a sharp conflict in the evidence as to whether the truck which struck the boy turned sharply in ahead of him, or turned gradually and struck him from the rear.

Montanick v McMillin, 225-442; 280 NW 608

Bicycle lights — contributory negligence — jury question. In a damage action against a motorist for death of a bicycle rider, the jury, under the record, could properly find that cyclist was not traveling with bicycle lights required by statute and was not free from contributory negligence, despite fact that evidence showed a recent purchase of red reflector and lamp by an unidentified person on morning of accident; and the finding of a broken lamp, reflector, etc., by the sheriff at the scene of and some time after the accident does not compel a finding that the bicycle was properly equipped.

Reardon v Hermansen, 223-1207; 275 NW 6

Collision with bicycle — instructions — jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle properly working (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35) and failing to turn to left when passing vehicle (§5022, C., '35) reviewed and held to present correctly questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

POWERS OF LOCAL AUTHORITIES

5018.01 Powers of local authorities.

Annotations in Vol I, see under §4992

Violation of ordinance — presumption — instructions. While the violation of a city ordinance relative to the operation of an automobile is only prima facie evidence of negligence, yet, where the sole issue is whether the operator did violate such ordinance—when the operator makes no effort to excuse a violation —it is not erroneous for the court to instruct that if there was such violation the jury "would be warranted in finding the operator guilty of negligence".

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

Negligence under ordinance embodying statute. It is not error to submit to the jury the question of negligence based on the violation of a city ordinance with reference to control and speed of a motor vehicle when the ordinance merely embodies the provisions of a statute.

Womochil v Peters, 226-924; 285 NW 151

Unlawful parking — negligence. The parking of a motor vehicle at a place where parking is prohibited by a valid city ordinance constitutes negligence and, in case a collision occurs with the parked vehicle, the said negligence must be deemed to have contributed to the resulting damage.

Riley v Guthrie, 218-422; 255 NW 502; 35 NCCA 818

Parking on left side without tail light. Section 5056, C., '35, requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, and §5045, in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with an automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

Right of way at boulevard intersections. The mere legal designation by a city or town of a street as a boulevard or arterial highway, and the erection of stop signs on intersecting streets, does not impliedly give to the traveler on the boulevard or arterial highway the right of way over traffic on intersecting streets. In the absence of a statute giving such right of way, the traveler on the intersecting highway is first controlled by the boulevard stop sign, and thereafter by the statute regulating right of way at intersections generally.

Dikel v Mathers, 213-76; 238 NW 615

"Stop and go" signals—change after entering intersection—nonnegligence per se. A pedestrian who, in obedience to a municipally operated "go" signal, starts across the street on the pathway provided for pedestrians, and suddenly discovers that said "go" signal has changed to "stop", is not guilty of negligence per se in failing to look for, see, and avoid a vehicle which, under said change in signals, passes entirely across the intersection and hits and injures said pedestrian within less than two seconds after said change in signals occurs; especially is this true, (1) when said pedestrian has, by ordinance, the right of way over said vehicle because he was first properly to enter said intersection, and (2) when said pedestrian, at the very instant of said change in signals, was immediately approaching other stationary vehicles known to be awaiting release from a "stop" signal.

Dougherty v McFee, 221-391; 265 NW 176

Excluding travel from street. A city has no legal right to exclude ordinary travel from a public street in order that the street may be used exclusively for coasting.

Dennier v Johnson, 214-770; 240 NW 745

"Coasting" defined—sled hitched to vehicle excluded. A city ordinance prohibiting "coasting" in the streets applies only to vehicles or sleds moving by the force of gravity and not to sleds hitched to the rear of motor vehicles.

Samuelson v Sherrill, 225-421; 280 NW 596

Ordinance—violation—jury question. Whether the driver of a slowly moving vehicle was violating an ordinance which required him to keep as close as possible to the right-hand curb becomes a jury question on evidence that he was driving three feet from said curb, with adequate space for another vehicle to pass to his left.

Ege v Born, 212-1138; 236 NW 75

TRAFFIC SIGNS, SIGNALS, AND MARKINGS

5019.01 Highway commission to adopt sign manual.

Official highway markers presumed regular. A motorist has a right to assume that highway signs having the appearance of regularity have been erected by proper authority.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

Unallowable delegation. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39

5019.08 Unauthorized signs, signals, or markings.

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "Stop" and "Slow" signs, as they are found upon the public highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570; 4 NCCA(NS) 318

Official highway markers presumed regular. A motorist has a right to assume that highway signs having the appearance of regularity have been erected by proper authority.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

ACCIDENTS

5020.06 Reporting accidents.

Failure to report accident—negligence of injured person no defense. The fact that a person injured in an automobile accident was negligent does not excuse the operator from making a report.

State v Schenk, 220-511; 262 NW 129

Failure immediately to report accident. All accidents involving injury to a person must be reported "immediately", irrespective of the place of the accident.

State v Schenk, 220-511; 262 NW 129

5020.11 Reports confidential—without prejudice.

Patrolman's testimony—law inapplicable.

State v Weltha, 228- ; 292 NW 148

Remarks overheard—privileged communication. Evidence of witness who overheard statement of defendant in reporting accident, the witness being neither a peace officer nor an official, was properly excluded under statute requiring such report to be made and further providing that the report shall be confidential and not used as evidence in any trial, civil or criminal, arising out of the accident.

McBride v Stewart, 227-1273; 290 NW 700

ACCIDENT LIABILITY

5021.01 Suspension of licenses.

Discussion. See 16 ILR 267—Revocation—failure to pay judgment

Atty. Gen. Opinions. See '34 AG Op 309; '36 AG Op 352, 692; '38 AG Op 272, 718, 819; AG Op March 9, '39

DRIVING WHILE INTOXICATED AND RECKLESS DRIVING

5022.01 Assaults and homicide.

Manslaughter—nonapplicable statute. Section 5026-b1, C., '31 [§5037.10, C., '39], fixes civil liability in the operation of automobiles and has nothing to do with automobile operations resulting in manslaughter.

State v Richardson, 216-809; 249 NW 211

Manslaughter—wanton and reckless conduct. Instructions to the effect that, in order to constitute manslaughter, the operation of an automobile must be in such a wanton and reckless manner as to show utter disregard for the "safety" of others, are not erroneous because the court did not employ the phrase "safety and lives of others".

State v Richardson, 216-809; 249 NW 211

Manslaughter — unavoidable accident—failure to submit issue. Instructions, under a charge of manslaughter, which distinctly place on the state the burden to show beyond a reasonable doubt that the defendant was operating his automobile in a careless, reckless, and negligent manner in willful or wanton disregard of the safety of others, clearly protect the defendant from a conviction if the death was the result of unavoidable accident.

State v Richardson, 216-809; 249 NW 211

5022.02 Operating while intoxicated.

Annotations in Vol I, see under §5027

Discussion. See 23 ILR 57—Scientific tests for intoxication; 24 ILR 191—Medico-legal aspects

Constitutionality—cruel and unusual punishment.

State v Dowling, 204-977; 216 NW 271
State v Rayburn, 213-396; 238 NW 908

Statutory penalty replaced.

State v McDowell, 228- ; 290 NW 65

Indictment. An indictment for operating an automobile while the driver thereof is intoxicated need not allege that the operation was "on a public highway".

State v Dowling, 204-977; 216 NW 271; 29 NCCA 580

"Operation" defined. An intoxicated person is "operating" an automobile, when, preparatory to actually moving the car along the highway, he puts the engine in motion.

State v Webb, 202-633; 210 NW 751; 49 ALR 1389; 29 NCCA 560

"Operation" defined. The driving-while-intoxicated statute is violated by so operating a car while attempting to get it out of a ditch along the side of the road, into which ditch the car had inadvertently slid.

State v Overbay, 201-758; 206 NW 634; 29 NCCA 560

Accomplice. The owner of an automobile who causes another person to operate the car while such other person is intoxicated, because such other person is less drunk than the owner, becomes an accomplice in the offense of operating an automobile while intoxicated.

State v Myers, 207-555; 223 NW 166

Aggravation per se. On the plea that the punishment for operating an automobile on the public highways while the driver was intoxicated is excessive, it must be kept in mind that aggravation necessarily inheres in such an act.

State v Giles, 200-1232; 206 NW 133; 42 ALR 1496; 29 NCCA 578
State v Dillard, 207-831; 221 NW 817

Use of liquor—criminal negligence.

State v Weltha, 228- ; 292 NW 148

Burden of proof. In a prosecution for driving while intoxicated the state must prove beyond a reasonable doubt that (1) defendant was operating the motor vehicle and (2) defendant was intoxicated.

State v Hamer, 223-1129; 274 NW 885

Opinion evidence. Opinion evidence is admissible on the issue of intoxication.

State v Jenkins, 203-251; 212 NW 475

Opinion evidence. A witness may testify whether a person was sober or intoxicated without first stating the facts on which the opinion is based.

State v Wheelock, 218-178; 254 NW 313

Nonexpert testimony. No instruction need be given in regard to nonexpert evidence in relation to intoxication.

State v Wheelock, 218-178; 254 NW 313

Fatally remote evidence. Evidence that a party accused of operating an automobile while intoxicated was free from the odor of alcohol some sixteen hours after the occurrence in question is properly excluded.

State v Jenkins, 203-251; 212 NW 475

Insufficient evidence. Evidence which is not conclusive that an accused was intoxicated when arrested some three or four hours after he had operated an automobile, together with evidence that the accident which resulted from such operation might easily have happened to a sober man, is wholly insufficient to sustain a verdict of guilt of operating an automobile while intoxicated.

State v Liechti, 209-1119; 229 NW 743

Driving while intoxicated not presumed from later intoxication. The fact as established by the state's evidence that defendant was intoxicated some time after a motor vehicle accident

carries no presumption that he was intoxicated at the time of the accident, especially when considered with the testimony of another state witness that the defendant was not intoxicated at the time of the accident.

State v Hamer, 223-1129; 274 NW 885

Insufficient evidence. A verdict of guilty of operating an automobile while intoxicated is not sustainable on testimony all of which tends to show that the accused was sober while operating the car in question, and part of which tends to show that he was intoxicated shortly after the operation in question.

State v McKenzie, 204-833; 216 NW 29

No conviction on state's contradictory evidence. In a prosecution for operating a motor vehicle while intoxicated, a conviction based solely on the self-contradictory statements of the state's witnesses as to whether defendant was actually driving the vehicle cannot be sustained.

State v Hamer, 223-1129; 274 NW 885

Bias of witness. Fact that a doctor, the real instigator of the prosecution, as a witness in a criminal case showed considerable feeling and interest was a matter for the jury—not for the court.

State v Carlson, 224-1262; 276 NW 770

Fact cases.

State v Gillman, 202-428; 210 NW 435

State v Jenkins, 203-251; 212 NW 475; 29 NCCA 557

State v Sharpshair, 215-399; 245 NW 350

Acts and declarations of officer. Acts and declarations of an officer after searching the vehicle of an accused, which are not related to the issue on trial, are properly excluded.

State v Jenkins, 203-251; 212 NW 475

Demonstrative evidence. On the issue of intoxication, articles and things found at the scene of an automobile wreck may be relevant and admissible.

State v Jenkins, 203-251; 212 NW 475

Dazed condition from injury—opinion.

State v McDowell, 228- ; 290 NW 65

Second offense—unallowable evidence. On the issue of former conviction of driving an automobile while intoxicated, it is highly prejudicial to receive in evidence on the trial to the jury, the files of said former case. So held where said files consisted of (1) the information of the county attorney with minutes of testimony attached, (2) the indictment with the minutes of some 13 witnesses attached, (3) the bench warrant, and (4) mittimus.

State v De Bont, 223-721; 273 NW 873

Good character witness—cross-examination. A good character witness, who testifies that the general reputation of an accused (charged with operating an automobile while intoxicated) for moral character is good, may, on cross-examination, be asked whether he has heard within a stated recent time that the defendant, while operating a motor vehicle and while in an intoxicated condition, had been involved in certain specified accidents.

State v Wheelock, 218-178; 254 NW 313

Circumstantial evidence — weight and sufficiency. Principle reaffirmed that circumstantial evidence when exclusively relied on to support a verdict of guilt in a criminal cause must point to the guilt of the defendant beyond all reasonable doubt and be inconsistent with any reasonable theory of the defendant's innocence. So held as to a charge of operating an automobile while intoxicated.

State v Hooper, 222-481; 269 NW 431

Prosecutor's misconduct — admonition — court's discretion. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were not true, defendant's counsel would not jump up and squeal like a pig under a gate, and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

Evidentiary conflict—jury question. A sharp conflict in the testimony as to whether a motor vehicle driver was intoxicated generates a question of the credibility of the witnesses, which is a matter peculiarly for the jury.

State v Carlson, 224-1262; 276 NW 770

Physical facts considered by jury. Physical facts that a motorist drove over a sidewalk, into the front yard of a house, striking a child, together with certain remarks he made immediately after the accident which were inconsistent with sobriety, warrants the jury, trying to reconcile conflicting testimony, in finding the driver was intoxicated.

State v Carlson, 224-1262; 276 NW 770

Intoxication — degree. In a prosecution for operating an automobile while in an intoxicated condition, an instruction that a person is intoxicated when he is so far under the influence of intoxicating liquor that his passions are visibly excited, or his judgment is impaired by the liquor, is sufficient without any additional requirement that defendant's judgment must be "visibly impaired", or that his ability to drive must be affected by the liquor.

State v Wheelock, 218-178; 254 NW 313

Intoxication — evidence — sufficiency. In a prosecution for operating an automobile while in an intoxicated condition, the court need not instruct the jury that the presence of the odor

of liquor on defendant's breath after an accident would not of itself constitute proof of intoxication — the court having already adequately, but in a general way, apprised the jury of what constituted intoxication.

State v Wheelock, 218-178; 254 NW 313

Cross-examination of accused—use of liquor. Even tho an accused on trial for driving an automobile while intoxicated is not asked on direct examination whether he had used intoxicating liquors on the day in question or was then sober or drunk, yet on cross-examination the state may make inquiry of defendant concerning his use of intoxicating liquors on the occasion in question, for the purpose of enabling the jury to properly weigh the defendant's testimony.

State v Wheelock, 218-178; 254 NW 313

Evidence—sufficiency. Evidence held to present a jury question on the issue as to the operation of an automobile while the operator was intoxicated.

State v Kendall, 200-483; 203 NW 806

Evidence—sufficiency. Evidence held to sustain a verdict of guilty of operating a motor vehicle while intoxicated.

State v Fahey, 201-575; 207 NW 608

Intoxication—instructions. In a prosecution for driving an automobile while intoxicated, an instruction that intoxication was not established by evidence that defendant was at fault in the occurrence of a collision or that he drove negligently or recklessly, but that such matters should be given due consideration, neither needs nor requires elaboration as to what constitutes fault or negligence.

State v Wheelock, 218-178; 254 NW 313

Instructions—intoxication element of recklessness.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions—"upon a public highway". An allegation of the driving of an automobile "upon a public highway" while the driver was intoxicated is properly submitted to the jury by instructions which set forth the indictment and direct the jury to acquit unless, inter alia, the jury finds that the accused operated the automobile "at the place alleged."

State v Conklin, 204-1131; 216 NW 704; 29 NCCA 563

Instruction allowing recommendation of clemency — juror's affidavit of explanation. Where during its deliberations jury inquired of judge as to whether a verdict of guilty with recommendation of clemency would have any weight on sentence and judge instructed that any recommendations desired could be made on separate sheet of paper, signed and returned with verdict, held, instruction did not constitute error, and that jurors' affidavits stating that they were influenced by the instruction could not be considered by court in ruling on motion for new trial.

State v Cook, 227-1212; 290 NW 550

Defendant's theory of case—no requested instruction—no reviewable error. Where defendant, charged with operating a motor vehicle while intoxicated, requests no instruction on his theory of how he happened to lose control of his car because his trousers caught fire, the court did not err in failing to submit his theory to the jury.

State v Dale, 225-1254; 282 NW 715

Requested instruction—beer not intoxicating liquor—refusal not error. In prosecution for driving a motor vehicle while intoxicated, the refusal of accused's requested instruction that beer is not an intoxicating liquor held not error.

State v McGregor, (NOR); 266 NW 22

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.

Maher v Brown, 225-341; 280 NW 553

Excessive proof of fact. In a prosecution for driving an automobile while intoxicated, the fact that the gruesome details of a collision were oft detailed by a large number of witnesses furnishes no reason why the defendant should be given a new trial.

State v Wheelock, 218-178; 254 NW 313

Sentence—imprisonment for nonpayment of costs. One convicted for operating an automobile while intoxicated and sentenced to pay a fine and costs may not be imprisoned for the nonpayment of the costs.

State v Gillman, 202-428; 210 NW 435

5022.04 Reckless driving.

Annotations in Vol I, see under §5028

Atty. Gen. Opinions. See '30 AG Op 167; '36 AG Op 692

Recklessness—civil liability—definition not deducible from criminal statute. The enumeration in this section of certain acts and the denomination of said acts as "reckless driving", and imposing a criminal punishment for doing said acts, cannot be deemed as furnishing a definition as to what conduct constitutes "reckless operation" under §5026-b1, C., '31 [§5037.10, C., '39], which simply states a rule of civil liability.

Shenkle v Mains, 216-1324; 247 NW 635

Recklessness—civil definition.

State v Graff, 228- ; 282 NW 745; 290 NW 97

"Reckless operation" — plural definitions. Section 5028, C., '31, which, in effect, provides that the operation of a motor vehicle in specified ways shall be deemed "reckless driving", was not intended to define "reckless operation" as provided in the so-called "guest" statute—§5026-b1 [§5037.10, C., '39] of said code.

Fleming v Thornton, 217-183; 251 NW 158

Involuntary manslaughter—evidence—sufficiency. Testimony held to generate a jury question on the issue of manslaughter, arising from reckless driving.

State v Thomlinson, 209-555; 228 NW 80

SPEED RESTRICTIONS

5023.01 Speed restrictions.

Atty. Gen. Opinion. See 30 AG Op 167

ANALYSIS

I ASSURED CLEAR DISTANCE AHEAD
II CONDITION OF HIGHWAY—OBSTRUCTIONS
III LOOKOUT NOT MAINTAINED
IV OBSERVANCE OF LAWS BY OTHER PERSONS
V SPEED
(a) IN GENERAL
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Annotations in Vol I, see under §§5029, 5030
Control of vehicle. See under §5023.04
Evidence of speed. See under §5037.09
Excessive speed as negligence per se. See under §5037.09
General application of motor vehicle law. See under §5037.09
Guest statute. See under §5037.10
Instructions—trial. See under §5037.09
Negligence in general. See under §5037.09

I ASSURED CLEAR DISTANCE AHEAD

Discussion. See 19 ILR 580—Speed standard; 24 ILR 128—Assured clear distance

Definition. Assured clear distance ahead means the distance ahead that discernible objects may be seen.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Proper paraphrase. The statutory command so to drive as to be able to stop "within the assured clear distance ahead" is properly paraphrased in instructions as ability to stop "within the distance that discernible objects may be seen ahead".

Engle v Nelson, 220-771; 263 NW 505

Improper definition. Reversible error results from instructing that "assured clear distance ahead" as used in our statute means "the distance ahead within which the driver of an automobile is sure and certain that the highway is not occupied by other vehicles or persons".

Groshens v Lund, 222-49; 268 NW 496

Vehicle within town limits—no speed sign.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Requirements of rule. The assured clear distance ahead rule requires the driver of an automobile to drive at all times at a rate of speed that will enable him to stop his car within the distance that discernible objects ahead of it may be seen.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Operation after visibility ceases. The statutory command so to drive a vehicle on the highway as to be able to stop within the assured clear distance ahead requires an immediate stop when, for any reason, there is no visibility ahead.

Townsend v Armstrong, 220-396; 260 NW 17

Visibility as affecting speed. As visibility is reduced speed must be reduced accordingly, and when visibility is lost an automobile should be stopped.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Pleading negligence—sufficiency.

Janes v Roach, 228- ; 290 NW 87

Careful and prudent speed not a test. Circumstances indicating a violation of that part of this section requiring a motor vehicle to be driven at a careful and prudent speed would not necessarily also involve a violation of the other part of the section pertaining to the assured clear distance ahead.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Prohibited speed negligence per se. A violation of the statute that no person shall drive any vehicle on a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead permits of no escape from the imputation of negligence per se, except on plea and proof of a recognized legal excuse for so driving.

Swan v Auto Co., 221-842; 265 NW 143

Inability to stop as negligence. The driver of an automobile who pays no attention to objects ahead of him or who operates his car, without legal excuse for so doing, at a speed which will not enable him to stop within the assured clear distance ahead, is necessarily guilty of negligence.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Rebuttable presumption of negligence. The driving of a vehicle upon a highway at a speed greater than will permit the driver to stop within the assured clear distance ahead creates a rebuttable presumption of negligence only.

Sergeant v Challis, 213-57; 238 NW 442

Physical facts—no object ahead—error to submit. It is error to submit the issue of assured clear distance when the physical facts and plaintiff's testimony show that there was no discernible object ahead of defendant's car.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Jury question. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper outlook for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420
Altfilisch v Wessel, 208-361; 225 NW 862
Robertson v Carlgren, 211-963; 234 NW 824
Lorimer v Ice Cream Co., 216-384; 249 NW 220

I ASSURED CLEAR DISTANCE AHEAD —continued

Pedestrian accident — legal excuse — jury question. Where a pedestrian crossing the street is struck by a motorist after first being seen 180 feet away on the opposite curb, and could have been seen by the motorist at all times prior to the collision, motorist's showing that pedestrian "popped up" ahead of him as legal excuse for not stopping within the assured clear distance is evidence raising a jury question.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Jury question—sufficient evidence.

Janes v Roach, 228- ; 290 NW 87

Negligence — emergency as legal excuse. Evidence that a pedestrian walking along a shoulder of a highway suddenly stepped in front of an automobile, where he was struck, raises a jury question as to such emergency and as to legal excuse for failing to stop within the assured clear distance ahead.

Edwards v Perley, 223-1119; 274 NW 910

Approaching vehicles. The statutory duty of the driver of a vehicle to so drive as to be able to stop within the assured clear distance ahead applies to drivers approaching each other from opposite directions.

Hoegh v See, 215-733; 246 NW 787

Approaching vehicle turning to left. The statutory duty so to drive as to be able to stop within the assured clear distance ahead has no application to a situation where the driver has no reason to suppose, until practically instantaneous with the collision, that an approaching vehicle would be driven into his proper pathway of travel.

Howk v Anderson, 218-358; 253 NW 32

Young v Jacobsen Bros., 219-483; 258 NW 104

Vehicle on wrong side of road. The statutory duty of the driver of an automobile so to drive that he can stop within the assured clear distance ahead applies to a driver who is on the wrong side of the road when meeting another vehicle.

Albert v Maher Bros., 215-197; 243 NW 561

Stopping when meeting vehicle. The duty so to operate an automobile as to be able to stop it within the assured clear distance ahead does not necessarily require the operator to stop his car on approaching an oncoming vehicle which is under duty to yield one-half of the traveled way.

Schuster v Gillispie, 217-386; 251 NW 735

Wrong side of highway—violation. The fact that a motorist traveling on the right-hand side of the highway comes into collision with an approaching car traveling on the left-hand side of the highway (in other words, both cars traveling in the same pathway) does not, in and of itself, establish or even tend to establish a violation of the statutory command so to drive as to be able to stop within the assured clear distance ahead.

Jordan v Schantz, 220-1251; 264 NW 259

Plural assignment—justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the right of way, but also the issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Overtaking and passing—inapplicability. In action to recover for personal injuries resulting from an automobile collision occurring when the driver of an automobile attempted to pass a truck while the vehicles were traveling side by side, and the truck driver attempted a left turn into driveway of a farm, held, that the assured clear distance ahead rule was inapplicable.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Negligence per se — double passing. The operator of a motor vehicle, who, at a speed of forty miles per hour and in the nighttime, attempts to pass another vehicle which he is closely following, at the very time when the operator of such other vehicle is attempting to pass a vehicle which he has overtaken, is guilty of negligence per se; both because he (1) is manifestly driving at an imprudent rate of speed under the circumstances, and (2) is driving at a rate of speed which will not enable him to stop within the assured clear distance ahead.

Harvey v Knowles Co., 215-35; 244 NW 660

Parked truck—failure to slow down. The driver of a vehicle who, on a clear and unobstructed road, and at a distance of 250 feet, sees a substantial object on the right-hand side of the road ahead, and at a distance of 150 feet discovers that the object is a truck, and at a distance of 25 feet discovers that the truck is stationary, and thereupon, because of unslackened speed, is unable to avoid hitting the truck by turning to the left into the unobstructed part of the road, is guilty of a negligence which is the proximate cause of the resulting collision.

Albrecht v Constr. Co., 218-1205; 257 NW 183

Continuing travel after loss of visibility. When the driver of an automobile, on a dark and misty night, continues his course on a public street after the street lights and his car lights fail to reveal objects ahead, the proximate cause of running head-on into an invisible street curb must be deemed to be the loss of visibility and the driver's venture into the darkness.

Greenland v Des Moines, 206-1298; 221 NW 953

Failure to see obstruction — contributory negligence per se. The driver of an automobile who, in the nighttime, with his headlights burning, and while on the proper side of a straight, 20-foot-wide, paved highway, drives at the rate of 35 or 40 miles per hour, and under no materially diverting circumstances, squarely into the rear of a stationary, wholly unlighted truck which is directly in his pathway and which, from its build, color, and load, is reasonably discernible, must be deemed to have failed to maintain a proper lookout or to have been so driving as to be unable to stop within the assured clear distance ahead—in either event, negligent. (For some measurable period of time before the collision, said stationary truck was being simultaneously approached from the north by the lights of the colliding car and from the south by the lights of a car traveling northward, which latter car passed said stationary car almost at the instant of the collision.)

Shannahan v Produce Co., 220-702; 263 NW 39

Stalled vehicle—absence of signals—proximate cause. The fact that, upon the stalling of a vehicle in the public highway, no lights or signals were erected to show the presence and position of said vehicle cannot be deemed the proximate cause of a collision with the stalled vehicle when the driver of the colliding vehicle discovered the presence and position of the stalled car in ample time to stop had he been so driving as to be able to stop within the assured clear distance ahead.

Albrecht v Const. Co., 218-1205; 257 NW 183

Visibility of parked car at night.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Inability to stop—blinded by lights. The driver of an automobile is guilty of negligence per se in driving at such a rate of speed that he cannot stop within the distance that a discernible obstruction may be seen ahead of the car. So held as to a driver who, blinded by the lights of a stationary car by the roadside, nevertheless continued his speed for some material distance, and when too late to stop, discovered an unlighted truck in the highway.

Lindquist v Thierman, 216-170; 248 NW 504; 87 ALR 893

Stopping within radius of lights. The driver of an automobile, in the nighttime and on a public highway, when faced by no emergency or diverting circumstance, is guilty of negligence per se in so driving that he cannot stop within the radius of his lights.

Ellis v Bruce, 217-258; 252 NW 101; 36 NCCA 136; 1 NCCA(NS) 10

Driving into unlighted truck. The operator of an automobile is guilty of contributory negligence in colliding in the nighttime with a truck parked in the highway directly ahead of him, when his lights revealed objects ahead for a distance of from 75 to 100 feet; and he cannot avoid such imputation of negligence by the claim that just preceding the collision his attention was diverted by a light remote from the highway on which he was traveling.

Dearinger v Keller, 219-1; 257 NW 206; 36 NCCA 709

Meeting car without lights. An operator of an automobile does not necessarily violate the assured clear distance ahead statute when he has no reason to anticipate that he will meet another rapidly approaching car without lights, and therefore so drives on a foggy night that he cannot stop instantly when confronted by such nonanticipated event.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Inability to stop within range of visibility. The driving of an automobile on the public highway in the nighttime at a speed which will not permit the operator to stop within the range of visibility constitutes, in the absence of plea and proof of a legal excuse for so doing, negligence per se.

Hart v Stence, 219-55; 257 NW 434; 97 ALR 535; 36 NCCA 716; 1 NCCA(NS) 23

Absence of excuse—negligence per se. The failure of the driver of an automobile to drive at such speed as will permit him to bring the car to a stop within the assured clear distance ahead constitutes, in the absence of some legal excuse, negligence per se. And such excuse is not made to appear by evidence that the driver met a car and was temporarily blinded by the lights shining in his face but did not slacken his speed.

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Willemsen v Reedy, 215-193; 244 NW 691

Failure to see obstruction in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Fog—careful and prudent operation—jury question. Evidence held to present a jury question whether the operator of an automobile was, on a foggy night, proceeding in a careful and prudent manner, and whether he had such control over the car that he could avoid obstacles appearing within the range of his vision.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Accident at crossing—warnings additional to statutory warnings—duty to furnish. Conceded, arguendo, that a public railway crossing may be attended by such danger as to impose

I ASSURED CLEAR DISTANCE AHEAD —continued

on the railway company, in the exercise of reasonable care, the duty to furnish to the highway traveler warnings in addition to those required by statute, but such duty does not arise when the danger is avoidable by the exercise of ordinary care on the part of the traveler. So held, inter alia, as to a fog-shrouded crossing, the danger attending which could be avoided by the traveler so driving as to be able to stop within the range of his vision.

Dolan v Bremner, 220-1143; 263 NW 798

Inability to stop — slippery highway. The fact that the driver of an automobile in the nighttime suddenly comes to an unexpected, slippery spot in the highway without fault or negligence on his part may render inapplicable the statutory command so to drive as to be able to stop within the assured clear distance ahead.

Schwind v Gibson, 220-377; 260 NW 853

Range of visibility—instructions. Altho the driver of a truck which was following another truck on an icy street on which two cars were parked, could see past the truck and the cars and could have stopped within the distance he could see, when he ran into the truck ahead after it had skidded and turned around, there was a jury question as to whether he had been complying with the assured clear distance ahead rule, and it was proper to give an instruction imposing on him the duty to refrain from driving at a speed greater than would permit him to stop within the assured clear distance ahead.

Remer v Takin Bros., 227-903; 289 NW 477

Intersection—failure to reduce speed. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Driving at reasonable speed—reduction unnecessary. A motorist driving at a reasonable and proper speed need not reduce his speed when traversing an open intersection, and a speed of 30 or 35 miles per hour on a clear day and on a good road is not, as a matter of law, such a speed as violates the assured clear distance statute.

Rogers v Jefferson, 224-324; 275 NW 874

Predicating error solely on one's own evidence — impropriety. Predication of error based solely on defendant's own evidence and his own theory of the case is ineffective when other conflicting evidence clearly makes a jury question on contributory negligence regarding plaintiff's failure to have adequate brakes on his automobile, his failure to stop within the assured clear distance ahead, and his failure to slow down before crossing a bridge.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Vehicle emerging from behind truck. Whether a vehicle suddenly emerged from behind a stalled truck and moved into the pathway of an oncoming car, necessarily has a material bearing on the issue whether the driver of the oncoming car violated the assured clear distance statute. Evidence held to present a jury question.

McWilliams v Beck, 220-906; 262 NW 781

Jury question. Evidence reviewed at length and held to present a jury question on the issue whether a motorist so operated his car that he could not stop within the assured clear distance ahead.

Lukin v Marvel, 219-773; 259 NW 782; 1 NCCA(NS) 16

Failure to stop, look, or control speed. Unreconcilable evidence reviewed at length in an action for damages consequent on alleged negligence, and in view of the hopeless conflict therein and the permissible inferences to be drawn therefrom, held to justify the submission of the issue of failure (1) to stop, (2) to maintain a proper lookout, and (3) so to drive as to be able to stop within the assured clear distance ahead.

Bauer v Reavell, 219-1212; 260 NW 39

Negligence — jury question. Evidence held to present jury questions on the issues whether defendant (1) drove at a dangerous rate of speed, (2) did not have his car under control, and (3) failed to maintain a proper lookout.

Parrack v McGaffey, 217-368; 251 NW 871

Minks v Stenberg, 217-119; 250 NW 883; 1 NCCA(NS) 57

Right-side driving—peremptory instruction. Instructions that a party is in duty bound to drive on the right-hand side of a highway, or that he must so drive as to be able to stop within the assured clear distance ahead, without any qualification relative to the driver's right to show legal excuse for driving otherwise, are not erroneous when the driver offers no excuse.

Winter v Davis, 217-424; 251 NW 770

Instructions—"legal excuse" — unsupported issue. Instruction submitting "legal excuse" for violation of the assured clear distance statute is reversible error when neither party raises nor gives evidence upon this issue.

Keller v Dodds, 224-935; 277 NW 467

Instructions—ability to stop under all conditions. Instruction reviewed and held not to impose on defendant the absolute duty to oper-

ate his automobile at such a speed as to be able to bring it to a stop under any and all conditions.

Shutes v Weeks, 220-616; 262 NW 518

Erroneous instructions. Instructions relative to the statutory duties of the operator of an automobile (1) to have the vehicle under control, and (2) to so drive as to be able to stop within the assured clear distance ahead, reviewed and held prejudicially misleading and erroneous.

Swan v Auto Co., 221-842; 265 NW 143

Instruction—reducing speed at intersection.

Davis v Hoskinson, 228- ; 290 NW 497

Instructions — unsupported theory. Principle reaffirmed that instructions on a theory not supported by the evidence are erroneous. So held as to instructions relative to the duty of the driver of a vehicle so to drive as to be able to stop within the assured clear distance ahead.

Dougherty v McFee, 221-391; 265 NW 176

Travel in fog—oncoming vehicles. Since as to oncoming vehicles, assured clear distance statute applies only to motorist not traveling on his right-hand side of the road, in an action involving a collision between oncoming vehicles on a foggy night, when vehicle in which plaintiff was riding was traveling on the right-hand side of the road, a requested instruction applying the assured clear distance statute to the plaintiff was properly refused.

Gregory v Suhr, 224-954; 277 NW 721

Right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles, (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right,—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

II CONDITION OF HIGHWAY—OBSTRUCTIONS

Railroad crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

Unsupported issue. The submission of the issue of speed of a vehicle in excess of that fixed by statute when the view is obstructed, is necessarily erroneous when there is no evidence that the view was obstructed.

Stoner v Hutzell, 212-1061; 237 NW 487

Speed limit—construction of statute. A statute which in effect provides that when the view along a highway is obstructed the speed of a vehicle shall not exceed a named rate, has no reference to obstruction of view by a car ahead of a rear driver.

Stoner v Hutzell, 212-1061; 237 NW 487

Failure to see unlighted truck—legal excuse. The failure of the driver of an automobile to see, in time to stop, an unlighted truck standing ahead of him in the highway and within the radius of his lights, may be legally excused by plea and proof that the truck was not reasonably discernible sooner (1) because of its color, (2) because of shadows cast over it by nearby trees, and (3) because his attention was momentarily diverted by a car and the lights thereon which he was about to meet and pass at a lawful rate of speed.

Kadlec v Const. Co., 217-299; 252 NW 103; 35 NCCA 764; 1 NCCA(NS) 3

Failure to see obstruction — contributory negligence per se. The driver of an automobile who, in the nighttime, with his headlights burning, and while on the proper side of a straight, 20 foot wide, paved highway, drives at the rate of 35 or 40 miles per hour, and under no materially diverting circumstances, squarely into the rear of a stationary, wholly unlighted truck which is directly in his pathway and which, from its build, color, and load, is reasonably discernible, must be deemed to have failed to maintain a proper lookout or to have been so driving as to be unable to stop within the assured clear distance ahead—in either event, negligent. (For some measurable period of time before the collision, said stationary truck was being simultaneously approached from the north by the lights of the colliding car, and from the south by the lights of a car traveling northward, which latter car passed said stationary car almost at the instant of collision.)

Shannahan v Produce Co., 220-702; 263 NW 39; 1 NCCA(NS) 16

Parked truck — nondiverting circumstance. The operator of an automobile is guilty of contributory negligence in colliding in the nighttime with a truck parked in the highway directly ahead of him when his lights revealed objects ahead for a distance of from 75 to 100 feet, and he cannot avoid such imputation of negligence by the claim that just preceding the collision his attention was diverted by a light remote from the highway on which he was traveling.

Dearinger v Keller, 219-1; 257 NW 206; 36 NCCA 709

Unlighted truck — blinding lights. The driver of an automobile is guilty of negligence per se in driving at such a rate of speed that

II CONDITION OF HIGHWAY—OBSTRUCTIONS—continued

he cannot stop within the distance that a discernible obstruction may be seen ahead of the car. So held as to a driver who, blinded by the lights of a stationary car by the roadside, nevertheless continued his speed for some material distance, and when too late to stop, discovered an unlighted truck in the highway.

Lindquist v Thierman, 216-170; 248 NW 504; 87 ALR 893; 1 NCCA(NS) 38

Taillight of parked car obscured.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Driving into side of train—proximate cause. Evidence which is solely to the effect that on a misty and foggy night a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

Fog and mist-obscured track. An occupant of an automobile is not necessarily guilty of negligence per se in not seeing a railroad track which intersected the highway until the automobile was entering upon the track, when the presence of the tracks was unknown to him, and when the windshield was covered with fog and mist, even tho he testifies to the opinion that objects could be seen for a distance of from 50 to 75 feet in front of the automobile.

Gilliam v Railway, 206-1291; 222 NW 12

Crossing accident—"physical facts" rule—inapplicability. The so-called "physical facts" rule which is often applied in negligence cases —the rule that when the operator of a vehicle at a known railroad crossing possesses ordinary sense of sight he is conclusively presumed, in the absence of diverting circumstances, to have seen an approaching train which was in plain view — necessarily has no application when the train is not in plain view, owing to a temporary obstruction which the railroad company has interposed to his view, e. g., freight cars on a side track.

Bush v Railway, 216-788; 247 NW 645

Traveling highway in fog—keeping lookout —instructions. Where defendant alleges failure to keep a lookout and contributory negligence on account of plaintiff's travel on the highway in a fog, instructions correctly but generally charging as to negligence and contributory negligence and requiring consideration of all conditions and circumstances are, in the absence of requested instructions thereon, sufficient to require the jury to consider the circumstance of the fog.

Gregory v Suhr, 224-954; 277 NW 721

Operating during fog. The operation of an automobile on the highway in the nighttime at a speed of 25 miles per hour and in a fog with ability to see from 25 to 75 feet ahead is not necessarily negligence.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Failure to see obstruction in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Failure to see obstruction in fog—proximate cause. When, on a foggy night, a car ran into another car which was parked on the highway, and the proof did not show that the stalled car was plainly visible, it was error for the court on motion to rule that the negligence of the driver of the car which ran into the other car was the sole proximate cause of injuries sustained by an occupant of the moving car.

Newman v Hotz, 226-834; 285 NW 287

Fog—stopping automobile not necessary for due care. The driver of an automobile, encountering a fog, is not bound as a matter of law to stop and wait for the fog to lift in order to escape the charge of negligence. He must, however, exercise a degree of care consistent with the existing conditions.

Rabenold v Hutt, 226-321; 283 NW 865

Contributory negligence—matter of law—stalled motorist—poor visibility in snowstorm. A plaintiff motorist who during a snowstorm becomes stalled in a snowdrift is not, as a matter of law, guilty of contributory negligence because in attempting to extricate his car he must at times place himself with his back to oncoming traffic alongside his vehicle, tho meanwhile making occasional attempts to observe traffic in that direction, especially when before the vehicle struck him he observed it when it was about 50 feet away, such distance under the undisputed evidence being the extreme extent of visibility.

Youngman v Sloan, 225-558; 281 NW 130

Yielding one-half of road—assuming compliance with law—snowstorm. Where two motorists approach each other in a snowstorm—one driving into the face of the storm which has obliterated the pavement outlines and the dividing mark thereon—the other motorist has a right to assume that he will be accorded one-half the traveled way until he sees or until, in view of the storm conditions and added driving difficulties, he should, in using ordinary care, realize that half the highway was not being yielded, under which facts a jury question is presented as to whether his continued reliance

on the assumption excused him from the charge of negligence.

Futter v Hout, 225-723; 281 NW 286

Passenger suing both drivers—concurring negligence—jury question. In an action by a passenger against the drivers of both automobiles involved in a collision, where the vehicle in which he was riding was being driven 50 to 60 miles per hour in a snowstorm, with an oncoming automobile crowding toward the wrong side of the road, a jury question is created as to whether the conduct of the driver with whom the plaintiff was riding was a concurring proximate cause of the passenger's injuries.

Futter v Hout, 225-723; 281 NW 286

Frost on train—visibility—when jury question on plaintiff's care. Plaintiff's contention that a snowy landscape and frost on a train so camouflaged it that the question of his negligence in driving upon an unobstructed crossing in front of the train was for the jury is not substantiated by a record devoid of any evidence of frost on the front of the engine or that he was in any way blinded by the sun or glare of the sun on the snow.

Russell v Scandrett, 225-1129; 281 NW 782

Railroad crossing accident—snow glare affecting visibility. Where a passenger riding in a truck was killed in a crossing collision between truck and train, a contention that sun shining on snow and reflecting into truck constituted such obstruction to view of oncoming train that it raised a jury question on issue of deceased's contributory negligence in failing to see approaching train, held not established by his evidence.

Russell v Scandrett, 225-1129; 281 NW 782

Limb of tree as street obstruction. One who, in broad daylight and without diverting circumstances, drives along a public street with which he is familiar, and permits his vehicle to come in contact with a perfectly visible limb of a tree overhanging the traveled part of the street is guilty of negligence per se.

Abraham v Sioux City, 218-1068; 250 NW 461

Telephone pole in parking. The presence of an unused telephone pole in the parking bordering a traveled street may not be said to be the proximate cause of an accident caused by the driving of an automobile, on a dark and misty night, head-on into a street curb, because the driver did not know that the street on which he was traveling materially jogged at the place in question to one side of a straight line of travel; and this is true tho the pole did enhance the damages suffered.

Greenland v Des Moines, 206-1298; 221 NW 953

Aerial obstructions — justifiable assumption. The operator of a truck along a public street has a right, in the absence of actual knowledge to the contrary, to assume that the street is free from aerial obstructions which may strike the top of his vehicle, e. g., a guy wire stretched across the street from a nearby building in process of construction. And especially is this true when the surface of the street along which the driver is moving is badly cluttered up with building material.

Hatfield v White Line, 223-7; 272 NW 99

Negligence per se in colliding with traffic signal. An experienced driver of an automobile is guilty of negligence per se when, near midnight, while traveling in the center of a 26-foot wide, brilliantly lighted, paved street with which he was familiar, he drives squarely head-on in the center of the street against a railroad traffic signal consisting of a concrete base 4 feet wide, 2 feet high, and 5 feet long, surmounted by an iron pole several feet high and noticeably painted with black and white diagonal stripes, on which pole at the time were crossarms bearing in large letters the words "railroad crossing" and two burning lights.

Van Gorden v City, 216-209; 245 NW 736; 4 NCCA(NS) 291

Slippery pavement. The fact that the driver of an automobile in the nighttime suddenly comes to an unexpected, slippery spot in the highway, without fault or negligence on his part, may render inapplicable the statutory command so to drive as to be able to stop within the assured clear distance ahead.

Schwind v Gibson, 220-377; 260 NW 853

Use of ice-covered street. An ice-covered, sloping street may be in such an extreme condition of slipperiness as to render its use negligent by one who knows its condition, and especially when other streets are safe and convenient.

McDowell v Oil Co., 212-1314; 237 NW 456; 31 NCCA 305; 38 NCCA 383

Acts constituting negligence—use of street. Whether the driver of a conveyance is negligent in even attempting to use a street necessarily depends on the peculiar conditions facing him. Evidence held insufficient to show negligence.

McDowell v Interstate Co., 208-641; 224 NW 58; 31 NCCA 282

Collision because of skidding—icy street not legal excuse per se. Where one of two motor vehicles which are approaching each other skids across the street and collides with the other vehicle which had almost stopped at the curb, the existence of ice on a city street, tho a condition over which a motorist has no control, yet is a condition whose presence is not legal excuse to relieve him from his duty to use care commensurate with the existing conditions when he is responsible for the control of his car.

Young v Hendricks, 226-211; 283 NW 895

II CONDITION OF HIGHWAY—OBSTRUCTIONS—concluded

Striking car ahead on icy street. Instructions involving the negligence of the defendant in failing to drive around another truck and in failing to stop when he could see, or should have seen, that he was about to collide with the other truck, properly presented the question of keeping a proper lookout and were justified by evidence that the defendant ran into another truck which had skidded and turned around on the icy pavement at a time when the defendant's truck was 150 or 200 feet away.

Remer v Takin Bros., 227-903; 289 NW 477

Truck skidding on icy pavement. A defendant truck driver's explanation in argument that icy pavement and locked brakes made his truck slide and should excuse his presence on the wrong side of the road, where his truck collided with plaintiff's automobile, will not sustain a directed verdict in his favor since question of plaintiff's contributory negligence, defendant's violation of statute, the sufficiency of his excuse, and whether his negligence, if any, was the proximate cause of plaintiff's injuries, being questions on which reasonable minds might differ, are for the jury.

McIntyre v West Co., 225-739; 281 NW 353

Stalled truck—imputed negligence. Where a car collided with a stalled tractor-trailer, jackknifed on an icy hill at night, the question of plaintiff's contributory negligence was properly submitted to the jury, wherein it is shown the tractor, with lighted headlamps, standing on the right side of the highway, diverted plaintiff's and husband-driver's attention, and, there being no reasonable apparent cause to suspect that trailer blocked the left side of highway, and, where jury could find that car in which plaintiff was riding was proceeding at less than twenty miles per hour, and, that plaintiff and husband-driver were looking straight ahead, there is no warrant for saying plaintiff was contributorily negligent as a matter of law; however, under the record, the negligence of the husband-driver, if any, could not be imputed to plaintiff.

Johnson v Transp. Co., 227-487; 288 NW 601

Animals on highway—violation of statute. The unrestrained presence of a domestic animal upon the public highway generates a presumption that the owner of the animal has been negligent in not restraining the animal from running at large, as commanded by statute; but the owner may show that, in view of all the circumstances, he was not, in fact, negligent. The doctrine of negligence per se arising out of the violation of a statute does not here apply.

Hansen v Kemmish, 201-1008; 208 NW 277; 45 ALR 498; 29 NCCA 326; 33 NCCA 100; 39 NCCA 400

III LOOKOUT NOT MAINTAINED

Absolute duty to see what is manifest. The driver of an automobile on a much traveled street is properly held to actually see vehicles immediately ahead of him, and traveling in the same direction, when there is no impediment to vision and no diverting circumstance except one created by the driver himself; especially so when the driver offers no allowable explanation for not seeing.

Ege v Born, 212-1138; 236 NW 75

Negligence—jury question. Evidence held to present jury questions on the issues whether defendant (1) drove at a dangerous rate of speed, (2) did not have his car under control, and (3) failed to maintain a proper lookout.

Minks v Stenberg, 217-119; 250 NW 883; 1 NCCA (NS) 57
Parrack v McGaffey, 217-368; 251 NW 871
Bauer v Reavell, 219-1212; 260 NW 39
McWilliams v Beck, 220-906; 262 NW 781

Failure to watch road. The driver of an automobile who pays no attention to objects ahead of him or who operates his car without legal excuse for so doing, at a speed which will not enable him to stop within the assured clear distance ahead, is necessarily guilty of negligence.

Peckinpaugh v Engelke, 215-1248; 247 NW 822; 33 NCCA 103; 35 NCCA 765; 1 NCCA (NS) 41

Watching road—jury question. In action for damages resulting from automobile collision, where the only pertinent evidence on the question was that of the plaintiff and his witnesses that plaintiff was at all times watching the road, court properly refused to direct the jury, as a matter of law, to find plaintiff negligent in respect to keeping a lookout.

Simmering v Hutt, 226-648; 284 NW 459

Striking boy on bicycle—jury question. Where a defendant county employee-trucker ran over a boy on a bicycle, an allegation of defendant's lack of proper lookout is clearly for the jury, when from the evidence, indicating the trucker may have struck the boy from the rear and should have seen him, the jury may well have found that defendant did not, in fact, keep such lookout.

Montanick v McMillin, 225-442; 280 NW 608

Car running in reverse—failure to discover. One who, on a fairly clear day, and with no obstruction to vision, and with nothing to distract attention is operating an automobile at the rate of some 25 miles per hour, on the proper side of a straight and level, paved highway, is not guilty of contributory negligence per se in failing to discover, until too late to avoid a collision, that another automobile directly ahead of him (and some 40 rods distant

when first seen) was slowly running backward, it appearing that said latter car carried no sign or signal, other than its movement, that it was running in reverse.

Baldwin v Rusbult, 220-725; 263 NW 279; 39 NCCA 339

Failure to see unlighted truck—contributory negligence per se. The driver of an automobile who, in the nighttime, with his headlights burning, and while on the proper side of a straight, 20 foot wide, paved highway, drives at the rate of 35 or 40 miles per hour, and under no materially diverting circumstances, squarely into the rear of a stationary, wholly unlighted truck which is directly in his pathway and which, from its build, color, and load, is reasonably discernible, must be deemed to have failed to maintain a proper lookout or to have been so driving as to be unable to stop within the assured clear distance ahead—in either event, negligent. (For some measurable period of time before the collision, said stationary truck was being simultaneously approached from the north by the lights of the colliding car and from the south by the lights of a car traveling northward, which latter car passed said stationary car almost at the instant of collision.)

Shannahan v Produce Co., 220-702; 263 NW 39; 1 NCCA(NS) 16

Jury question—plaintiff's car rammed from rear. The issues, whether defendant failed (1) to maintain a proper lookout, or (2) to have his car under control, are properly submitted to the jury on evidence that plaintiff, on a clear day, while immediately approaching an intersecting crossroad and while other cars were closely approaching from the opposite direction, was slowly driving his car in the immediate rear of several other forward-moving cars on the right-hand side of an 18 foot dry, paved road with level shoulders and no accompanying ditches and was suddenly and very unexpectedly rammed from the rear by defendant's truck.

Luther v Jones, 220-95; 261 NW 817; 39 NCCA 139

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Proof of facts not alleged. Evidence that lights were not burning on defendant's truck should have been admitted, even tho not alleged as a ground of negligence in plaintiff's petition, in order to enable plaintiff to show he was maintaining a proper lookout and was therefore free from contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Unobserved person. The driver of an automobile is not, broadly speaking, under a duty, before putting the vehicle in motion, to look around or under it, in order to discover the possible presence of persons in a position of danger. A plaintiff seeking personal damages consequent upon a person's being run over is under an imperative necessity to show the location of the injured person just preceding the injury, or such a state of facts with reference thereto as will justify a finding that the driver (1) saw the person, or (2) ought, in the exercise of ordinary care, to have seen him.

Williams v Cohn, 201-1121; 206 NW 823

Child running in front of car. Evidence reviewed and held insufficient to present a jury question on the issue whether the operator of an automobile maintained a proper lookout preceding the time when a small child suddenly emerged from behind an obstruction and ran into the pathway of the approaching car.

Howk v Anderson, 218-358; 253 NW 32

Child on sled—view obstructed by snowbank —negligence—directed verdict. In an action for death of seven-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Pedestrian crossing street — contributory negligence—jury question. A pedestrian crossing a street need not anticipate another's negligence, nor keep a constant lookout in both directions at the same time, nor wait for all approaching vehicles from both directions, and, moreover, he is not as a matter of law contributorily negligent merely in running while crossing a street altho not seeing an approaching motor vehicle 180 feet away, but in any case whether he could rightly assume he could cross in safety is a question of contributory negligence for the jury.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Negligence — pedestrians at intersection. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing in-

III LOOKOUT NOT MAINTAINED — continued

stead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Jury question—pedestrians. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper lookout for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420

Altfilisch v Wessel, 208-361; 225 NW 862; 32 NCCA 482; 34 NCCA 150

Robertson v Carlgren, 211-963; 234 NW 824

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 1 NCCA(NS) 57

Pedestrian on highway. Record reviewed, in an action for damages for death of a pedestrian who was killed by being hit by an automobile on the public highway, and held to justify the court in refusing, for want of evidence, to submit to the jury the issue of the defendant's alleged failure to maintain proper lookout. (Concededly a close case.)

Hartman v Lee, 223-32; 272 NW 140

Proper lookout for pedestrian—jury question. After motorist had seen pedestrian 180 feet away standing on the curb and when pedestrian has almost reached the opposite side of the street before being struck by the motor vehicle, which meanwhile had traveled the 180 feet, during which time pedestrian was plainly visible, and when motorist claims he did not again see pedestrian until just before striking him, the evidence raises a jury question as to whether motorist kept proper lookout, and directing a verdict is improper.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Failure to keep lookout alleged—substituting last clear chance—not permitted. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine on the theory that motorist, being under duty to keep a lookout, presumably performed such duty; but after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825

Unsupported issues—stepping from car on highway. Unsupported issues are very properly and necessarily excluded from the jury. So held as to the issues (1) whether the operator of an automobile failed to maintain a proper lookout, (2) whether he was negligent in stepping out of the car and upon the running board preparatory to cleaning the sleet from the windshield, and (3) whether the snowy and icy condition of the pavement was the proximate cause of an accident.

Winter v Davis, 217-424; 251 NW 770; 39 NCCA 308

Contributory negligence per se—intersection. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left, (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Obscured view of travel at intersection—failure to look or signal. The operator of an automobile in approaching and entering an intersecting country highway, when the view of travel approaching from his right is obstructed, is guilty of negligence (1) if he fails to signal his approach and entry, and also (2) if he fails to look for such travel at a point from which he can see such travel.

Smith v Lamb, 220-835; 263 NW 311

Failure to look to left on entering intersection—not contributory negligence as a matter of law. Principle reaffirmed that vehicle driver's failure to look to the left when entering highway intersection does not constitute contributory negligence as a matter of law.

Rogers v Jefferson, 226-1047; 285 NW 701

Contributory negligence when not determined as matter of law. In action for personal injuries and damage to automobile resulting from collision with defendant's automobile, plaintiff is not guilty of contributory negligence as a matter of law for failure to maintain lookout, yield right of way, and make proper stop before entering arterial highway, when evidence discloses that as plaintiff was about to cross an arterial highway, he looked to the right and saw defendant's automobile at a distance of 150 feet and then proceeded across intersection at speed of between 5 and 10 miles per hour until defendant's automobile collided with right rear wheel of plaintiff's automobile—more than half of plaintiff's automobile being out of the intersection.

Cowles v Joelson, 226-1202; 286 NW 419

Streetcar operator—failure to stop—excuse. Negligence on the part of the operator of a streetcar cannot be predicated on his failure (1) to maintain a lookout for an injured party, or (2) to stop or slacken the speed of the car, when both parties were aware of the presence of each other long prior to any suggestion of a collision, and when, after the danger of a

collision arose, stopping or slackening of speed was not only out of the question but would have been futile.

Bowers v Railway, 219-944; 259 NW 244

Collision with streetcar—negligence per se. The operator of an automobile who, without diverting circumstances, approaches and drives upon streetcar tracks and looks for an approaching streetcar at a place where he knows his view is very limited because of an intervening embankment and fails to look at a point where he would still be within a zone of safety and where his view would be unobstructed, is guilty of negligence per se.

Pender v Railway, 217-1152; 251 NW 55

Negligence per se in driving upon car tracks. The driver of a conveyance is guilty of negligence per se when, upon reaching a street intersection on a clear day, he has positive knowledge that a nearby streetcar is rapidly approaching the same intersection from a side street, and when he, without again looking at the approaching streetcar and confronted by no emergency, continues his journey into the intersection at a speed which would enable him to stop his conveyance instantly and turns and enters upon the streetcar tracks in the direction in which the streetcar is moving.

Middleton v Railway, 209-1278; 227 NW 915

Contributory negligence—guest's lookout at railroad crossing—jury question. A guest in a motor vehicle is not, as a reasonably prudent person, under the same obligation as the driver to keep a lookout, but whether or not, under the circumstances, a guest was lacking in ordinary care in committing his safety to the motor vehicle driver while crossing a railroad is a question for the jury.

Finley v Lowden, 224-999; 277 NW 487

Accident at crossing. A traveler in approaching a railway crossing with which he is familiar, and while he is beset by no diverting circumstance, is guilty of negligence in failing to look at some place from where he knows he can see approaching trains and thus avoid injury.

Glessner v Railway, 216-850; 249 NW 138

Nondiverting circumstance—railway crossing. The fact that a party in crossing railway tracks was compelled, owing to the coldness of the weather, to manipulate the choke on the automobile cannot be deemed a diverting circumstance such as to excuse him from exercising his senses of sight and hearing.

Rosenberg v Railway, 213-152; 238 NW 703

"Physical facts" rule — diverting circumstance. A requested instruction should be given, when the testimony is supporting, to the effect that, if the view of a railway track is unobstructed for a long distance while a traveler is knowingly approaching it, he will be held to have seen the train approaching thereon, there being no diverting circumstance.

Langham v Railway, 201-897; 208 NW 356; 27 NCCA 68; 27 NCCA 69

Accident at railway crossing — negligence per se. The driver of a vehicle who, while approaching a railway crossing, knows that his view along the track is obscured by an intervening embankment, and enters upon said crossing, is guilty of contributory negligence per se when, without dispute, his unobstructed view along the track from a point 25 feet distant from the crossing and up to a point 10 feet distant from the crossing enlarged from 360 feet to 954 feet. Under such circumstances the testimony of the driver that he was constantly looking and listening and saw and heard nothing, must be wholly rejected.

Darden v Railway, 213-583; 239 NW 531

Contributory negligence as matter of law—railroad crossing — motorist not looking. A motorist who approaches a railroad crossing on a clear day over a good road, with no obstructions and no diverting circumstances, and who drives upon the tracks where he is struck by a train and killed, when, had he looked, he must have seen the approaching train, which from a point 141 feet from the crossing was visible 2500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant-railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Crossing railroad in front of oncoming train —directed verdict. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed and with the train plainly to be seen had he looked, or, if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

Unsustained issue—negligence of engineer. Reversible error results from submitting the issue whether the engineer of a railway train was negligent in not maintaining a proper lookout for automobiles approaching a public crossing, when the evidence shows to the contrary and that the approaching automobile was discovered at the earliest reasonable opportunity, which was too late to prevent the accident.

Simmons v Railway, 217-1277; 252 NW 516

Speed—lookout—turning to right—presumption. If there be applicable evidence the court must instruct (at least on request), (1) as to the duty of drivers of cars, on meeting, to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

III LOOKOUT NOT MAINTAINED — concluded

Traveling highway in fog—contributory negligence—instructions. Where defendant alleges failure to keep a lookout and contributory negligence on account of plaintiff's travel on the highway in a fog, instructions correctly but generally charging as to negligence and contributory negligence and requiring consideration of all conditions and circumstances are, in the absence of requested instructions thereon, sufficient to require the jury to consider the circumstance of the fog.

Gregory v Suhr, 224-954; 277 NW 721

Running into truck—instructions. Instructions involving the negligence of the defendant in failing to drive around another truck and in failing to stop when he could see, or should have seen, that he was about to collide with the other truck, properly presented the question of keeping a proper lookout and were justified by evidence that the defendant ran into another truck which had skidded and turned around on the icy pavement at a time when the defendant's truck was 150 or 200 feet away.

Remer v Takin Bros., 227-903; 289 NW 477

Intersecting highways—imposing undue care. An instruction which, after directing the jury that the operator of a vehicle on approaching intersecting highways must keep a lookout for approaching vehicles, imposes on the operator, if there be danger of a collision, the duty to "reduce his speed" or to "bring his vehicle to a stop", is erroneous.

Reason: Such instruction imposes on the operator a greater duty than to exercise reasonable or ordinary care.

Knutson v Lurie, 217-192; 251 NW 147; 37 NCCA 62

Compelling jury to draw certain inference. Where plaintiff and defendant were, under conditions which rendered visibility poor, approaching the same intersection approximately at the same time, the court cannot properly instruct the jury that if plaintiff could see several hundred feet in the direction from which defendant was approaching, then the jury must conclude either (1) that plaintiff did not look for defendant as was his duty, or (2) that plaintiff did see the defendant.

Appleby v Cass, 211-1145; 234 NW 477

IV OBSERVANCE OF LAWS BY OTHER PERSONS

Reliance on assumption limited. Assumption that others using the highways will obey the law may be relied on only until the contrary is known, or until in the exercise of ordinary care it should be known.

Futter v Hout, 225-723; 281 NW 286

Precautions for safety must be taken. While the operator of an automobile has a legal right to act on the assumption that other operators will obey the law, yet this does not necessarily mean that he need take no other precaution for his own safety.

Jeck v Const. Co., 216-516; 246 NW 595; 1 NCCA (NS) 71

Exercising right of way—other motorist's ignorance thereof—no negligence. A motorist approaching an intersection from the west, knowing he has statutory right of way over traffic from the north, and knowing a stop sign is erected on the highway intersecting from the north, may not be charged with negligence because a motorist on his left approaching from the north has no knowledge of the intersection and therefore drives past the stop sign into such intersection, resulting in a collision.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

Farfetched construction on use of words. An instruction that each of two operators of automobiles had the right "to assume" that the other would comply with the laws of the road (as correctly stated by the court) is not subject to the farfetched and hypercritical construction that thereby an operator was authorized to assume such compliance when he knew there had been a violation.

Shutes v Weeks, 220-616; 262 NW 518

Right to assume care and nonviolation of law of road. After correctly instructing as to the law of the road, it is not erroneous to instruct that each of the operators of the two automobiles in question had the right to assume that the other would not violate such laws, and would exercise ordinary care for the safety of himself and others.

Shutes v Weeks, 220-616; 262 NW 518

Refusal of instruction as error. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

Speed — lookout — turning to right — presumption. If there be applicable evidence the court must instruct (at least on request) (1) as to the duty of drivers of cars, on meeting, to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

Obeying statute — presumption. Principle reaffirmed that a motor vehicle driver in attempting to make a left-hand turn into an intersecting road has a right to proceed on the assumption (unless he has knowledge to the contrary) that another driver, approaching from his right, will obey the law (§5031, C., '35) by reducing his speed to a reasonable and proper rate when approaching and traversing said intersection.

Enfield v Butler, 221-615; 264 NW 546

Intersection — danger obvious — jury question. Where plaintiff, riding with his son, approaches an intersection of county trunk roads and on his left observes defendant also approaching the intersection, altho plaintiff may assume that defendant will obey the right of way law, he must not place himself in a position of obvious danger avoidable by the exercise of ordinary care, and whether or not he did so place himself is a jury question.

Rogers v Jefferson, 224-324; 275 NW 874

Yielding roadway — requested instruction. The operators of automobiles have the right to assume, when they meet on the highway, that the other will yield one-half of the traveled way by turning to the right; and it is erroneous to refuse a request for such instruction.

Muirhead v Challis, 213-1108; 240 NW 912

Yielding one-half of road—assuming compliance with law—reasonable care rule. Where two motorists approach each other in a snowstorm—one driving into the face of the storm which has obliterated the pavement outlines and the dividing mark thereon—the other motorist has a right to assume that he will be accorded one-half the traveled way until he sees or until, in view of the storm conditions and added driving difficulties, he should, in using ordinary care, realize that half the highway was not being yielded, under which facts a jury question is presented as to whether his continued reliance on the assumption excused him from the charge of negligence.

Futter v Hout, 225-723; 281 NW 286

Knowledge that law is not complied with. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

Instructions—following statute enacted after accident. Where an automobile collides at night with a truck displaying no lights, it is error to instruct in the language of this section that plaintiff had a right to assume that others using the highway would obey the law, when such collision causing the injuries complained of occurred before this right of assumption was added by the legislature, and the statute had previously been construed that a driver had no such right.

Gookin v Baker & Son, 224-967; 276 NW 418

Correct but inapplicable instructions refused. Requested instructions that a motorist had a right to assume that a taxi driver would obey the law as to speed and lookout, altho correct as abstract propositions of law, are properly refused when not supported by the evidence.

Reed v Pape, 226-170; 284 NW 106

New trial—conflicting instructions. Doubt and uncertainty consequent on conflicting instructions relative to the right of the operator of an automobile to assume that another operator would not use the highway unlawfully present ample justification for granting the prejudiced party a new trial.

Jelsma v English, 210-1065; 231 NW 304

V SPEED

(a) IN GENERAL

Discussion. See 16 ILR 548—Effect of statute

Pleading under common law (?) or statute (?). An allegation that a defendant "was driving at an excessive, illegal, and negligent rate of speed" must be deemed, in the absence of an attack by motion, as an allegation not at common law, but under the statute regulating speed.

Danner v Cooper, 215-1354; 246 NW 223

Witnesses—competency—speed. One may be a competent witness as to the speed of a motor vehicle on a showing that he has observed such vehicles while in operation with a view of determining their speed.

Becvar v Batesole, 218-858; 256 NW 297

Circumstantial evidence. Circumstances are oftentimes more persuasive on the issue of speed than direct testimony is.

Starry v Hanold, 202-1180; 211 NW 696

Careful and prudent speed not a test of assured clear distance. Circumstances indicating a violation of that part of this section requiring a motor vehicle to be driven at a careful and prudent speed would not necessarily also involve a violation of the other part of the section pertaining to the assured clear distance ahead.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Speed determined from skid marks. A witness in an automobile accident case may describe skid marks, but may not base an opinion of the speed of an automobile on them, as it is solely within the province of the jury to draw an inference of speed from skid marks.

Ward v Zerzanek, 227-918; 289 NW 443

V SPEED—continued
(a) IN GENERAL—continued

Speed remote from accident—admissibility. Where a motorcycle coming over a viaduct at high speed collides with an automobile leaving and making a left-hand turn at the foot of the viaduct, speed of the motorcycle at the instant of or immediately before the collision is admissible, but with nothing to indicate to the trial court the materiality of speed some distance away, the exclusion of such evidence will not be disturbed.

Thomas v Charter, 224-1278; 278 NW 920

Stepping into path of vehicle. A rate of speed which is not negligence per se cannot be deemed the proximate cause of an accident when the act of the injured party in stepping into the pathway of the car was so sudden and unexpected as to render impossible the stopping of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Stepping into path of automobile—rate of speed immaterial. The negligence of a pedestrian, who left a position of safety on a curb and walked directly into the path of an automobile which struck him, was the proximate cause of the accident, and under the circumstances the rate of speed of the car was not material.

Ward v Zerzanek, 227-918; 289 NW 443

Unlawful but inconsequential speed. Operating an automobile on the public highway at a speed prohibited by statute becomes quite immaterial when such speed is not the proximate cause of the injury in question.

McDowell v Oil Co., 208-641; 224 NW 58; 35 NCCA 21

Crutchley v Bruce, 214-731; 240 NW 238; 35 NCCA 25

Negligence per se. Operating an automobile upon the public highway at a speed prohibited by law constitutes negligence per se, and error results from instructing that such operation creates a presumption of negligence.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Driving beside streetcar—hitting pedestrian. The operation of an automobile, even at an excessive speed, alongside a moving streetcar and in the direction in which the streetcar is moving, is not the proximate cause of an injury to a pedestrian who suddenly darts across the streetcar track ahead of the moving streetcar and into the line of automobile travel, and is hit by the automobile.

Pettijohn v Weede, 209-902; 227 NW 824; 35 NCCA 5

Speed at intersection—jury question. A motor vehicle operator who materially and intentionally increases the speed of his vehicle "when approaching and traversing a highway intersection", seemingly in violation of §5031, C., '35, is not necessarily guilty of negligence per se.

Carpenter v Wolfe, 223-417; 272 NW 169

Collision with left-turning vehicle—contributory negligence. The driver of a rear-moving vehicle is not necessarily guilty of contributory negligence because, at high speed, he collides with another vehicle while it is making an abrupt left turn.

McManus v Co-op. Creamery, 219-860; 259 NW 921

Passing vehicle—subsequent accident. The act of passing a vehicle at an illegal rate of speed may not be declared negligence per se as to a collision which occurred after the passing had been completely effected.

Berridge v Pray, 202-663; 210 NW 916

Being struck by faster-moving vehicle. It may not be said that the unlawful speed of a vehicle constitutes contributory negligence per se as to a collision which results from such vehicle being overtaken by a faster-moving vehicle.

Berridge v Pray, 202-663; 210 NW 916

Icy street—jury question. Jury was warranted in finding from conflicting testimony that the defendant's truck was traveling at a speed of 20 to 25 miles an hour and that the speed was excessive and dangerous in view of the icy condition of the street.

Remer v Takin Bros., 227-903; 289 NW 477

Intersection collision—complex facts—jury question. An intersection collision involving disputed facts, fractional seconds, speeds of 40 to 50 miles an hour, and failure to see an approaching automobile presents, not a matter of law for the courts, but a question for the jury to determine blame.

Eby v Sanford, 223-805; 273 NW 918

Speed as element of recklessness—other factors—jury question. Altho speed alone will not be considered recklessness, yet, when combined with such evidence as the car's swerving from side to side, the wetness of the street, the late hour (two o'clock in the morning), the presence of cross streets, and the lack of defendant's effort to check his speed when the view was obstructed, a jury question on the issue of recklessness is created.

Reed v Pape, 226-170; 284 NW 106

Evidence of recklessness—sufficiency—jury question. In an action by a guest against the driver and owner of a motor vehicle for injuries sustained as a result of a collision with an oncoming vehicle, where it is shown that the collision occurred on the left side of the road while automobile, with defective brakes, was being driven at an excessive rate of speed through a well-traveled intersection in a town

over a slope or hill which limited visibility, and on the left side of the highway in face of visible oncoming traffic, such evidence, on the issue of whether or not collision was caused by driver's recklessness, presented a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Approaching intersection—instruction—jury question. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Collision with bicycle — instructions — jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle properly working (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35 [§5023.01, C., '39]) and failing to turn to left when passing vehicle (§5022, C., '35 [§5024.03, C., '39]) reviewed and held to present correctly questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Submission of issues. Instructions reviewed and held adequately to present the issue of excessive speed and lack of control in the operation of an automobile.

Schuster v Gillispie, 217-386; 251 NW 735

Instructions — ability to stop under all conditions. Instruction reviewed and held not to impose on defendant the absolute duty to operate his automobile at such a speed as to be able to bring it to a stop under any and all conditions.

Shutes v Weeks, 220-616; 262 NW 518

Speed as negligence irrespective of conditions. Instruction reviewed and held not to submit to the jury the question whether speed, in and of itself, was the proximate cause of an accident, irrespective of the attending conditions and circumstances.

Jarvis v Stone, 216-27; 247 NW 393

Careful and prudent operation — granting jury undue license. The court is—to say the least—perilously close to committing reversible error when it instructs the jury, even in the literal words of the statute (§5029, C., '35 [§5023.01, C., '39]) that it should determine whether an automobile was driven "at a careful and prudent speed * * *, having due regard to the traffic, the surface and width of the highway, and of any other conditions then existing". The vice of the instruction is its failure affirmatively to limit the jury to a consideration of conditions as shown by the evidence.

Groshens v Lund, 222-49; 268 NW 496

Turning to right—instructions. If there be applicable evidence the court must instruct (at least on request), (1) as to the duty of drivers of cars, on meeting, to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

Negligence per se—instruction. It is correct to instruct the jury that a driver of an automobile is guilty of negligence if he drives "at a high and dangerous rate", such being the allegation of the petition and the evidence tending to show a speed materially in excess of the maximum speed allowed by statute.

Albert v Maher Bros., 215-197; 243 NW 561

Collision with overtaking and passing vehicle—instruction on speed not necessary. In a personal injury action arising out of an automobile-truck collision occurring when the automobile in which plaintiff was riding with husband-driver was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, and when the automobile driver, attempting to avoid an accident by speeding ahead of truck, collided therewith, held, that statute relating to speed, which requires reasonable speed with due regard to existing conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Speed—distance. In intersection collision, evidence of speeds and distances raises jury question and directed verdict was error.

Short v Powell, 228- ; 291 NW 406

V SPEED—concluded

(b) SPEED RESTRICTIONS

Speeding—unsworn information—no basis to support conviction. An unsworn municipal court information charging defendant with speeding will not support a conviction.

State v Weston, 225-1377; 282 NW 774

Unsworn information first challenged on appeal—no waiver. Where a municipal court information charging speeding was not sworn to, defendant did not waive his right to challenge its sufficiency to sustain a conviction nor lose his right to raise such objection on appeal in supreme court by failure to question the sufficiency of information before the trial.

State v Weston, 225-1377; 282 NW 774

Speed in suburban district. It is not negligent to operate an automobile in a "suburban district" in a city or town at 40 miles per hour on the proper side of a level, paved street and at a place remote from a street intersection and when the street is apparently free of vehicles and persons except a nearby mail truck traveling in the opposite direction on the proper side of the street.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Vehicle within town limits—no speed sign.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Statute violation—per se negligence must contribute to bar recovery. As involved in a motor vehicle collision, the act of driving a motor vehicle at a speed of more than 25 miles an hour in a residence district, being in violation of statute, is negligence as a matter of law, but unless such negligence contributes to the injuries, it will not defeat recovery.

McIntyre v West Co., 225-739; 281 NW 353

Speeding in residence district—sufficiency of evidence—jury question. Evidence that accident occurred on main street of town about four or five blocks from the business district, that defendant was driving 50 miles per hour, that there were a number of dwellings on both sides of the street, and that defendant had passed a sign which read, "Slow down, speed limit 25 miles per hour", was sufficient to raise jury question on issue of whether car was being driven in a residence district in excess of 25 miles per hour.

Doherty v Edwards, 227-1264; 290 NW 672

Business district intersection—jury question. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Reckless operation—jury question. A jury question on the issue of reckless operation of an automobile is made by evidence that the car was being operated (1) over a wide, well-settled, graveled highway with which the operator was wholly unfamiliar, (2) at a speed of some 65 miles per hour, (3) during the nighttime when visibility was materially limited, and (4) at a turn in the road so belatedly anticipated and discovered that the driver was unable to negotiate it and was compelled to turn his car into the side ditch.

Mescher v Brogan, 223-573; 272 NW 645

Absence of evidence to support. Instructions which submit to the jury the questions whether a defendant has shown legal excuses (1) for exceeding a statutory speed limit, or (2) for not having yielded one-half of the traveled way are erroneous when there is no evidence supporting an affirmative finding on either proposition.

Deweese v Tr. Lines, 218-1327; 256 NW 428

5023.02 Truck speed limits.

Noncausal negligence. Excessive or negligent speed of motor vehicle becomes immaterial when it is not the proximate cause of the injury in question.

McDowell v Oil Co., 208-641; 224 NW 58

Speed statute — instructions. Instruction relative to the speed of a truck reviewed, and held not subject to the vice of being indefinite as to the particular statute violated.

Rogers v Lagomarcino-Grupe Co., 215-1270; 248 NW 1

Collision — jury questions. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence.
2. Whether defendant was driving his truck without lights.
3. Whether defendant was driving on the wrong side of the road.
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed.
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 93

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the

issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

5023.03 Bus speed limits.

Atty. Gen. Opinion. See '30 AG Op 167

ANALYSIS

I SCOPE OF SECTION IN GENERAL
II TAXICABS GENERALLY

General application of motor vehicle law. See under §5037.09
Negligence generally. See under §5037.09
Rented cars. See under §5015.07
Taxicabs, municipal regulation, authority. See under §5970

I SCOPE OF SECTION IN GENERAL

No annotations in this volume

II TAXICABS GENERALLY

Negligence—taxicab door striking eye—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab, and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendants' motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Responsibility between defendants—jury question. In an action for injuries sustained by a passenger riding in a taxicab, the question of responsibility for the accident between the owner of the cab, the driver, and a party to an agreement under which the cab was operated, was a jury question.

Womochil v Peters, 226-924; 285 NW 151

Intersection collision—jury question. In a damage case resulting from a collision between a taxicab and an automobile at an intersection, when the record does not conclusively show negligence, that question and how the accident occurred are for the jury.

Womochil v Peters, 226-924; 285 NW 151

Taxicab — carrier's liability — instructions. In an action for injuries sustained in an accident at an intersection while riding in a taxicab, an instruction which held the defendant to the liability of a common carrier of passengers for hire was not error in view of other instructions defining a common carrier and making a high degree of care dependent on a finding that the taxi was a common carrier.

Womochil v Peters, 226-924; 285 NW 151

Assuming other motorist will obey law. Requested instructions that a motorist had a right to assume that a taxi driver would obey the law as to speed and lookout, altho correct as abstract propositions of law, are properly refused when not supported by the evidence.

Reed v Pape, 226-98; 284 NW 106

Excessive verdict—$3,500 for broken collarbone. For injuries sustained by a passenger in a taxicab accident, when a verdict of $3,500 was nearly $3,000 over the damages subject to calculation for a broken collarbone, pain and suffering, hospitalization, and loss of about three months work, the amount should be reduced to $2,500.

Womochil v Peters, 226-924; 285 NW 151

5023.04 Control of vehicle.

ANALYSIS

I SCOPE OF SECTION IN GENERAL
II CONTROL OF VEHICLES
III REDUCING SPEED
IV MOTORCYCLES

Annotations in Vol I, see under §5031
Animal-drawn vehicles. See under §5017.07
Assured clear distance ahead. See under §5023.01
Bridges. See under §5023.11
Curves and hills. See under §5031.03
Horns, signaling. See under §5031.03
Intersections. See under §§5026.01–5026.04
Pedestrians generally. See under §5027.05
Speed generally. See under §5023.01(V)

I SCOPE OF SECTION IN GENERAL

Negligence per se—noncompliance with statutes. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Anticipating child coasting—barricades removed—negligence. Where defendant knew that for many years a certain street was barricaded while children were coasting, and that there had been coasting there recently, but where the snow had melted somewhat so that the middle portion of the paving on the hill was bare of snow, and the barricades had been taken down the day before the accident, the defendant was not bound to anticipate and prepare for some child coasting on the hill.

McBride v Stewart, 227-1273; 290 NW 700

II CONTROL OF VEHICLES

Definition. Principle recognized that a car is "under control" when the driver has the mechanism and power thereof under such control that, in view of the rate at which the car is moving, it can be brought to a reasonably quick stop.

Hanson v Manning, 213-625; 239 NW 793

II CONTROL OF VEHICLES—continued

Excessive requirement. The driver of an automobile is not under a duty to maintain such control over the vehicle as will avoid a collision.

Looney v Parker, 210-85; 230 NW 570

Imputed negligence—fundamental basis of doctrine. The negligence of a husband in the operation of an automobile cannot be deemed the contributory negligence of his wife who rides with him—cannot be imputed to the wife —simply because the husband and wife at the time of the negligence in question are engaged in a common enterprise, unless the wife has the right in some manner at the time in question to control the operation of said car.

Carpenter v Wolfe, 223-417; 272 NW 169

Joint enterprise between driver and passenger—giving directions to reach destination insufficient. A joint enterprise is not shown between a driver of an automobile and his passenger when the passenger neither drove the car at any time nor exercised any control over its operation, but merely directed the driver which way to go so that the driver might view a team of mules which he was interested in buying.

Churchill v Briggs, 225-1187; 282 NW 280

Passing children—care required. A motorist in approaching and passing, on the highway, children of apparently immature age who are in plain sight, is under duty, even tho the children are in a place of apparent safety near the margin of the traveled way, to bring and keep his vehicle under such control that he will be able, by ordinary care, to prevent injury to a child should the child suddenly, and without warning, leave its place of safety and place itself in a place of danger in the pathway of the oncoming car. Pre-eminently is this true when the motorist knows, or ought to know, from the time he first sees the children that they are preparing to cross said highway in front of his car.

Darr v Porte, 220-751; 263 NW 240

Passing children—nonright to assume care. Testimony in an action against a motorist for striking and killing a 10-year-old child on the highway, supported by the physical facts, from which the jury could find that the child's position on the shoulder could have been seen by defendant when more than 300 feet away, justifies an instruction on the nonright of a motorist to assume that a child under 14, in a place of apparent safety, will remain there, and on his duty to so control his machine as to avoid hitting her if she does not.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Child on sled—view obstructed by snowbank —negligence. In an action for death of a seven-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Jury question—care toward pedestrians. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper lookout for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420

Altfilisch v Wessel, 208-361; 225 NW 862; 32 NCCA 482; 34 NCCA 150

Robertson v Carlgren, 211-963; 234 NW 824

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Negligence at intersection—jury question. Evidence reviewed and held to present a jury question on the issues whether the operator of an automobile (1) had his car under proper control in approaching and entering a busy street intersection, (2) kept a proper lookout ahead, (3) operated his car at an excessive rate of speed, or (4) so operated the car that he could stop it within the assured clear distance ahead.

Minks v Stenberg, 217-119; 250 NW 883; 1 NCCA(NS) 57

Approaching intersection—instruction—jury question. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Plaintiff's car struck from behind. The issues whether defendant failed (1) to maintain a proper lookout, or (2) to have his car under control, are properly submitted to the jury on evidence that plaintiff, on a clear day, while immediately approaching an intersecting crossroad, and while other cars were closely approaching from the opposite direction, was slowly driving his car in the immediate rear of several other forward-moving cars on the right-hand side of an 18-foot dry, paved road with level shoulders and no accompanying ditches, and was suddenly and very unexpect-

edly rammed from the rear by defendant's truck.

Luther v Jones, 220-95; 261 NW 817

Fog—careful and prudent operation—jury question. Evidence held to present a jury question whether the operator of an automobile was, on a foggy night, proceeding in a careful and prudent manner, and whether he had such control over the car that he could avoid obstacles appearing within the range of his vision.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Negligence—jury question. Evidence held to present jury questions on the issues whether defendant (1) drove at a dangerous rate of speed, (2) did not have his car under control, and (3) failed to maintain a proper lookout.

Parrack v McGaffey, 217-368; 251 NW 871

Passing vehicle—jury question. Manifestly the court cannot find that a motorist did not have his car under control while attempting to pass another car, and was therefore guilty of negligence per se, when the position and speed of the cars at the time of the collision are in sharp dispute.

Jordan v Schantz, 220-1251; 264 NW 259

Truck crossing bridge—care as jury question. The question of a trucker's speed and control while crossing a bridge is properly one to be considered by the jury as bearing on his negligence, when the truck was wide and the bridge was narrow and somehow the truck collided with an oncoming vehicle.

Hawkins v Burton, 225-707; 281 NW 342

Striking jackknifed truck on icy hill. Where a car collided with a truck-trailer which had stalled on an icy hill at night on a country highway and had jackknifed across the left side of the highway on which plaintiff's husband was driving, the question of the husband's negligence in braking his car to such extent that it slid on the ice and collided with the side of the trailer, in the absence of any other evidence that car went out of control, held, that question of negligence of the husband as the sole proximate cause of the collision was properly submitted to the jury, and even tho it may be conceded that husband was negligent, it cannot be said, as a matter of law, that such negligence was the sole proximate cause of the injury.

Johnson v Transp. Co., 227-487; 288 NW 601

Instructions—"control" construed in its practical sense. Common words in instructions must generally be understood by the jury in their ordinary and practical sense, and, if a more specific definition is desired, it must be requested. So held as to the word "control" in connection with operating a motor vehicle.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Definition not requested. Failure of the court to define the term "under control" does not constitute error in the absence of a request for such defining.

Altfilisch v Wessel, 208-361; 225 NW 862; 29 NCCA 95

Instruction—definition. Ordinarily, it is not erroneous for the court to instruct the jury that the driver of an automobile has it under control when he has the ability to guide and direct its course of movement, to fix its speed, and bring it to a stop within a reasonable time.

Duncan v Rhomberg, 212-389; 236 NW 638

Instructions justified. Evidence held to justify instructions relative to the speed of an automobile and to the control which the driver had over the car.

Altfilisch v Wessel, 208-361; 225 NW 862; 29 NCCA 95

Submission of issues. Instructions reviewed and held adequately to present the issue of excessive speed and lack of control in the operation of an automobile.

Schuster v Gillispie, 217-386; 251 NW 735

Instructions — negligence under ordinance embodying statute. It was not error to submit to the jury the question of negligence based on the violation of a city ordinance with reference to control and speed of a motor vehicle when the ordinance merely embodied the provisions of a statute.

Womochil v Peters, 226-924; 285 NW 151

Dragnet instructions under dragnet allegations. A dragnet allegation that defendant drove his automobile in a "careless, negligent and reckless manner without due regard of the safety of others in excess of 25 miles an hour" and "not under proper control", does not justify or permit dragnet instructions which largely cover the statutory law respecting the operation of automobiles, and which thereby places before the jury the duty to determine whether said statutes or some of them have been violated.

Holub v Fitzgerald, 214-857; 243 NW 575

Paraphrasing allegation of negligence. It is quite proper for the court to paraphrase an allegation charging negligence in that defendant "lost control of his car", and to submit the charge in the paraphrased form.

Danner v Cooper, 215-1354; 246 NW 223

Res ipsa loquitur—ambiguous but not erroneous phrase. In an action against a motorist for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of

II CONTROL OF VEHICLES—concluded

each other, but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

Instructions—speed considered on issue of control. On the issue whether the operator of a motor vehicle had it under control, the court may very properly instruct the jury that it may consider the rate of speed and the attendant circumstances, even tho there is no dispute in the testimony as to the rate of speed.

Comparet v Coal Co., 200-922; 205 NW 779

Blowing out tire—legal excuse instruction. An instruction, stating " * * * The blowing out of a tire is a legal excuse to a driver for losing control of his or her automobile * * *", and also stating conditions for recovering control of the car, was not erroneous in that the grounds of negligence alleged and submitted to the jury were referable to the conduct of the driver, not at the time of the blowout, but thereafter—bearing in mind that instructions must be read as a whole and that it is unfair to pick out parts of instructions and give them a forced or strained construction.

Band v Reinke, 227-458; 288 NW 629

Right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles, (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

Erroneous instructions. Instructions relative to the statutory duties of the operator of an automobile (1) to have the vehicle under control, and (2) to so drive as to be able to stop within the assured clear distance ahead, reviewed and held prejudicially misleading and erroneous.

Swan v Auto Co., 221-842; 265 NW 143; 1 NCCA(NS) 58

Undue degree of care. An instruction which in effect imposes upon the operator of an automobile an absolute duty to have his car under such control as to avoid injury to others under all circumstances is fundamentally erroneous because imposing an undue degree of care, and necessarily justifies an order for new trial.

Gregory v Suhr, 221-1283; 268 NW 14

Undue burden of care—incurable error. An instruction which places on the operator of an automobile the absolute duty to maintain a constant lookout and to use all his senses to avoid the danger of a collision is erroneous as imposing an undue burden, and the error is not necessarily cured by subsequent statements limiting the operator's duty to reasonable care and diligence.

Fry v Smith, 217-1295; 253 NW 147

III REDUCING SPEED

Arterial highway — negligence per se. The operator of an automobile on a county trunk arterial highway (on which no "stop" or "slow" signs had been erected at points intersected by county local roads) is guilty of negligence per se in knowingly approaching an obscured intersection without either (1) slacking his speed (of some 25 or 30 miles per hour) as required by this section, or (2) giving some warning signal of his approach as required by §5043, C., '31 [§5031.03, C., '39]. (But see Dikel v Mathers, 213 Iowa 76.)

Lang v Kollasch, 218-391; 255 NW 493; 37 NCCA 74

Contributory negligence per se. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of (statute since revised), said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Intersection—what constitutes—instructions. Where a north and south highway splits into two curves near an east and west highway, and connects with the latter at two points some 900 feet apart, it is not erroneous for the court to instruct that the intersection embraces the entire distance of 900 feet (1) when the evidence tends to show that the authorized public authorities have treated said distance as the intersection, and (2) when the instruction is manifestly given for the sole purpose of guiding the jury in applying the statutory command that motorists shall reduce their speed to a reasonable and proper rate when approaching and traversing intersections of public highways.

Enfield v Butler, 221-615; 264 NW 546

Approaching intersection—instruction—jury question. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

IV MOTORCYCLES

Motorcycle-automobile collision — speed remote from accident—admissibility in evidence. Where a motorcycle coming over a viaduct at high speed collides with an automobile leaving and making a left-hand turn at the foot of the viaduct, speed of the motorcycle at the instant of or immediately before the collision is admissible, but, with nothing to indicate to the trial court the materiality of speed some distance away, the exclusion of such evidence will not be disturbed.

Thomas v Charter, 224-1278; 278 NW 920

Two vehicles approaching on same side—assumption. Where a motorcycle traveling east and an automobile traveling west approach each other, both driving on the south half of the highway, held, that as long as the automobile driver had sufficient time to return to his right, the north, side of the highway, he had a right to assume that the motorcyclist would not attempt to drive to the north half of the highway for the purpose of passing on the north, the wrong side, of the automobile.

Jakeway v Allen, 226-13; 282 NW 374

Motorcycle passenger riding behind driver—care required. A girl riding on a motorcycle directly behind the driver, and unable to see the road ahead without standing up, thereby endangering the operation of the vehicle, cannot as a matter of law be under duty to warn the driver of impending danger in order to avoid the driver's negligence being imputed to her.

Williams v Kearney, 224-1006; 278 NW 180

Motorcycle passenger vs automobile owner—nonassumption of risk—sudden danger. In action to recover for death of 13-year-old boy resulting from collision between motorcycle, on which he was riding as a passenger, and defendant's automobile, allegation in defendant's answer that decedent assumed risk of motorcycle driver's negligence was properly stricken where pleaded facts and common knowledge justified conclusion that danger of the collision could not have been apparent more than a few seconds of time so that there was no time for deliberation and voluntary assumption of such risk.

Edwards v Kirk, 227-684; 288 NW 875

Order striking defense of assumption of risk. In an action to recover for death of motorcycle passenger resulting from motorcycle collision with automobile, an order striking allegation of defendant-car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Defendant driving on wrong side—no sudden emergency instruction for defendant. In an action for injuries sustained in a collision between a motorcycle driven east by plaintiff on his right, the south, side of the road and an approaching automobile operated by the defendant, allegedly on the left, or south, side of road, there was no occasion for court giving instruction to effect that defendant was faced with an emergency, when defendant maintained that he was at all times on his own right side of the road, because, if he were on the left, or south, side of highway, the emergency was of his own making.

Jakeway v Allen, 226-13; 282 NW 374

5023.05 Speed signs—duty to install.

Absence of signs—effect. The statutory limitation on speed within "residence districts" as provided in §5030, C., '31 [§5023.01, C., '39], applies even tho the speed limit signs provided by this section have not been erected within said district.

Waldman v Motor Co., 214-1139; 243 NW 555

Vehicle within town limits—no speed sign.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Presumption of officer's performance of duty. In the absence of proof to the contrary, it will be presumed that town officers properly performed the mandatory duty imposed on them by statute in the erection and maintenance of speed limit signs.

Doherty v Edwards, 227-1264; 290 NW 672

5023.06 Special restrictions.

Atty. Gen. Opinion. See AG Op July 12, '39

5023.11 Limitation on elevated structures.

Speed remote from accident—admissibility. Where a motorcycle coming over a viaduct at high speed collides with an automobile leaving and making a left-hand turn at the foot of the viaduct, speed of the motorcycle at the instant of or immediately before the collision is admissible, but, with nothing to indicate to the trial court the materiality of speed some distance away, the exclusion of such evidence will not be disturbed.

Thomas v Charter, 224-1278; 278 NW 920

Control and speed of truck crossing bridge—care as jury question. The question of a trucker's speed and control while crossing a bridge is properly one to be considered by the jury as bearing on his negligence, when the truck was wide and the bridge was narrow, and somehow the truck collided with an oncoming vehicle.

Hawkins v Burton, 225-707; 281 NW 342

Contributory negligence—inadequate brakes—jury question. Evidence that a plaintiff motorist approached a bridge at 15 miles per hour and proceeded to cross, keeping his car within 6 inches of the right-hand side, before defendant came on the bridge, and that plain-

tiff was two-thirds across before defendant swung across the center line and struck him, makes a jury question as to whether the fact of plaintiff's negligence in not having adequate brakes contributed to the collision.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Predicating error solely on one's own evidence—impropriety. Predication of error based solely on defendant's own evidence and his own theory of the case is ineffective when other conflicting evidence clearly makes a jury question on contributory negligence regarding plaintiff's failure to have adequate brakes on his automobile, his failure to stop within the assured clear distance ahead, and his failure to slow down before crossing a bridge.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Reckless operation—insufficient proof. The reckless operation of an automobile, within the meaning of §5026-b1, C., '35, is not shown by proof that a motorist, in the daytime and without obstruction to view ahead, and while approaching a bridge on a country highway, was traveling at the rate of some forty-odd miles per hour, and a-straddle the black lines in the center of an 18-foot wide, level, 10-degree curve; that, while so traveling, he confined his view solely to said black lines as they came into view immediately ahead of the fender or hood of his car; that he did not "look up" and see an approaching truck on the bridge until 75 feet therefrom; and that thereupon he swerved his car to the right but not quite far enough to avoid side-swiping the rear part of the truck while the two vehicles were passing on the bridge.

Wilson v Oxborrow, 220-1135; 264 NW 1

DRIVING ON RIGHT SIDE OF ROADWAY—OVERTAKING AND PASSING, ETC.

5024.01 Traveling on right-hand side.

Annotations in Vol I, see under §5019

Atty. Gen. Opinion. See '25-26 AG Op 32

Failure to keep to right in city—statute controlling. In an action for negligence on account of an automobile collision occurring in a suburban district of a city, the statute requiring travel on the right-hand side of the street (this section) rather than the statute giving one-half of the traveled way (§5020, Code, 35 [§5024.02, C., '39]) is controlling.

Rusch v Hoffman, 223-895; 274 NW 96

Left-side driving—negligence per se. The operator of a motor vehicle in cities and towns is guilty of negligence per se in driving on the left-hand side of a street without legal excuse.

Winter v Davis, 217-424; 251 NW 770

Justifiable travel beyond center of street. A traveler, in order to avoid an obstruction in the line of his travel, may, if he exercises due care, encroach upon that part of the street which is beyond the center line thereof; and the mere fact that the approaching vehicle is, at the same time, on that half of the highway which the statute has assigned to him does not necessarily show that he is not guilty of actionable negligence.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Operating automobile outside vehicular roadway. The statute which requires the operator of a motor vehicle in cities and towns to travel at all times on the right-hand side of the center of the street has no application to the operation of such vehicle on a driveway which is a part of the street, but which is outside of the vehicular part thereof.

Dickeson v Lzicar, 208-275; 225 NW 406

Nonapplicability of statute—action against city. This section has no application to a controversy between the municipality as a defendant and a plaintiff who was the sole traveler upon the street at the time in question.

Smith v Town, 202-300; 207 NW 340

Facts surrounding automobile accident—right-hand travel. In an action arising out of an automobile collision an allegation as to negligence in failing to travel the right-hand side of the street may be supported by both testimony of witnesses and all the surrounding circumstances.

Rusch v Hoffman, 223-895; 274 NW 96

Evidence of automobile tracks—undue limitation. The action of the trial court in unduly limiting litigants in the introduction of testimony having direct bearing on a vital and material issue constitutes reversible error. So held as to evidence relative to the tracks of colliding automobiles.

Harness v Tehel, 221-403; 263 NW 843

Icy street—skidding not unforeseen. A motorist driving on icy pavement cannot excuse his presence on the wrong side of a city street, in violation of law, on the ground that he thought an approaching vehicle might skid into him, when the approaching vehicle remained at all times on its proper side of the street. Skidding on an icy street could neither be an unforeseen circumstance nor unexpected happening.

Young v Hendricks, 226-211; 283 NW 895

Collision because of skidding—icy street not legal excuse per se. Where one of two motor vehicles, which are approaching each other, skids across the street and collides with the other vehicle which had almost stopped at the curb, and while the existence of ice on a city street is a condition over which a motorist has no control, yet its presence is not legal excuse to relieve him from his duty to use care commensurate with the existing conditions when he is responsible for the control of his car.

Young v Hendricks, 226-211; 283 NW 895

Icy pavement and locked brakes as excuse—jury question. A defendant truck driver's explanation in argument that icy pavement and locked brakes made his truck slide and should excuse his presence on the wrong side of the road, where his truck collided with plaintiff's automobile, will not sustain a directed verdict in his favor, since question of plaintiff's contributory negligence, defendant's violation of statute, the sufficiency of his excuse, and whether his negligence, if any, was the proximate cause of plaintiff's injuries, being questions on which reasonable minds might differ, are for the jury.

McIntyre v West Co., 225-739; 281 NW 353

Evidence of recklessness—sufficiency—jury question. In an action by a guest against the driver and owner of a motor vehicle for injuries sustained as a result of a collision with an oncoming vehicle, where it is shown that the collision occurred on the left side of the road while automobile, with defective brakes, was being driven at an excessive rate of speed through a well-traveled intersection in a town over a slope or hill which limited visibility, and on the left side of the highway in face of visible oncoming traffic, such evidence, on the issue of whether or not collision was caused by driver's recklessness, presented a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Equal use of street—instruction. An instruction that drivers of different vehicles are entitled to an "equal use of the street", with elucidating qualifications relative to the duty of one of the drivers under a valid regulatory city ordinance, is quite unobjectionable.

Ege v Born, 212-1138; 236 NW 75

Instructions neutralizing effect—rejection. Instructions which wholly neutralize the effect of driving on the left-hand side of a street are properly rejected when the jury might find that such driving contributed to the injury in question.

Waldman v Motor Co., 214-1139; 243 NW 555

Others' compliance with law assumed—when presumption fails—no instruction. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

Place of accident—nonapplicability of circumstantial evidence instruction. In a death claim action for negligence arising from an automobile collision occurring in a suburban district of a city where the negligence alleged was in failing to travel on the right-hand side of the street, and where along with the physical facts there was direct evidence by the driver of the car wherein decedent was riding as to decedent's travel on the right-hand side of the street, it was error to give an instruction, applicable only to cases based entirely on circumstantial evidence, when such instruction prevented the jury from properly considering the direct evidence as to where the accident occurred.

Rusch v Hoffman, 223-895; 274 NW 96

Compliance with law assumed—when presumption fails. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and he then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

5024.02 Meeting and turning to right.

Annotations in Vol I, see under §5020

Atty. Gen. Opinion. See '25-26 AG Op 32

"Traveled way" defined. A single track made by vehicles in the snow on an 18-foot pavement is properly treated as the "traveled way", within the meaning of the statute, especially when the parties mutually try their case on such theory.

Rudd v Jackson, 203-661; 213 NW 428

Controlling statute. In an action for negligence on account of an automobile collision occurring in a suburban district of a city, the statute requiring travel on the right-hand side of the street (§5019, Code, 35 [§5024.01, C., '39]) rather than the statute giving one-half of the traveled way (this section) is controlling.

Rusch v Hoffman, 223-895; 274 NW 96

Right to use any part of highway. Principle reaffirmed that a traveler has the right to travel upon the left-hand side of the highway so long as he has no reason to apprehend meeting another conveyance.

Sergeant v Challis, 213-57; 238 NW 442

Stopping when meeting car not required. The duty so to operate an automobile as to be able to stop it within the assured clear distance ahead does not necessarily require the operator to stop his car on approaching an oncoming vehicle which is under duty to yield one-half of the traveled way.

Schuster v Gillispie, 217-386; 251 NW 735

Stationary vehicle—inapplicability of statute. The statute relative to the duty of the driver of a vehicle on the public highway, on meeting another vehicle, to yield one-half of the traveled way may, manifestly, have no

application to the driver of a vehicle which, to the timely knowledge of an oncoming driver, is standing stationary in such highway.

Engle v Nelson, 220-771; 263 NW 505

Preference at intersections—statutes inapplicable. Statutory requirements relative (1) to drivers turning "to the right" when meeting, and (2) to preference accorded drivers at highway intersections (§5035, C., '35 [§5026.01, C., '39]) can, from the very nature of the transaction, have no application to an occurrence where the driver of a westbound car in making, or instantly after making, a left-hand turn into an intersecting road came into collision with an eastbound car traveling on or near the highway from which the left-hand turn was made.

Enfield v Butler, 221-615; 264 NW 546

Pleading—using wrong side of road. An allegation that defendant's car at the time of a collision was "over the center of the pavement, and over on plaintiff's side of the pavement" may be very material and not subject to a motion to strike.

Harriman v Roberts, 211-1372; 235 NW 751

Sufficient allegation of negligence. An allegation (1) that defendant drove his vehicle to the left of the center of the traveled way, or (what is practically the same thing) (2) that defendant drove his vehicle upon the wrong or left side of the public highway, tenders a sufficiently definite issue of fact, at least in the absence of any pleaded attack thereon.

Muirhead v Challis, 213-1108; 240 NW 912

Equivalent allegation. Plaintiff's allegation that defendant, on meeting plaintiff's car on the highway, negligently usurped plaintiff's side of the highway, is, in effect, an allegation that defendant failed, on meeting plaintiff, to yield one-half of the traveled way by turning to the right, and under supporting evidence justifies an instruction accordingly.

Foster v Flaugh, 223-40; 271 NW 503

Sufficient allegation—interpretation by court. An allegation, that "defendant negligently drove his car in a northerly direction and allowed it to travel to the west of the center of the highway and encroached upon the line of travel of the plaintiff" (who was traveling in a southerly direction), is properly interpreted by the court as simply charging that defendant failed to yield one-half of the traveled way to plaintiff.

Keller v Gartin, 220-78; 261 NW 776

Negligence—prima facie (?) or per se (?). Where an accident happens upon a public highway outside a city or town, the fact that the vehicle is on the wrong side of the road is only prima facie evidence of negligence. On the other hand, subject to the above, the violation without legal excuse of a standard of care for the operation or equipment of vehicles, whether fixed by statute or ordinance, constitutes negligence per se.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207
Lange v Bedell, 203-1194; 212 NW 354
McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405
Sergeant v Challis, 213-57; 238 NW 442
Lane v Varlamos, 213-795; 239 NW 689
Muirhead v Challis, 213-1108; 240 NW 912
Hollingsworth v Hall, 214-285; 242 NW 39
Holub v Fitzgerald, 214-857; 243 NW 575
Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494
Waldman v Motor Co., 214-1139; 243 NW 555
Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50
Wood v Banning, 215-59; 244 NW 658; 32 NCCA 255
Willemsen v Reedy, 215-193; 244 NW 691
Albert v Maher Bros., 215-197; 243 NW 561
Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747
Dillon v Diamond Co., 215-440; 245 NW 725
Peckinpaugh v Engelke, 215-1248; 247 NW 822; 33 NCCA 103; 35 NCCA 765; 1 NCCA (NS) 41
Danner v Cooper, 215-1354; 246 NW 223
Hogan v Nesbit, 216-75; 246 NW 270
Grover v Neibauer, 216-631; 247 NW 298
See Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44; Voiles v Hunt, 213-1234; 240 NW 703; 31 NCCA 59; 32 NCCA 458

Negligence—prima facie evidence. Driving on the wrong side of a country highway, or failing to give one-half of such road by turning to the right, constitutes prima facie evidence of negligence—not negligence per se.

Cooley v Killingsworth, 209-646; 228 NW 880
Lang v Siddall, 218-263; 254 NW 783
Despain v Ballard, 218-863; 256 NW 426
Hobbs v Traut, 218-1265; 257 NW 320
Rainey v Riese, 219-164; 257 NW 346
McManus v Creamery Co., 219-860; 259 NW 921
Hoover v Haggard, 219-1232; 260 NW 540
Bobst v Hoxie Line, 221-823; 267 NW 673

Collision not proof of statute violation. The fact that a motorist traveling on the right-hand side of the highway comes into collision with an approaching car traveling on the left-hand side of the highway (in other words, both cars traveling in the same pathway) does not, in and of itself, establish or even tend to establish a violation of the statutory command so to drive as to be able to stop "within the assured clear distance ahead".

Jordan v Schantz, 220-1251; 264 NW 259; 1 NCCA(NS) 51

Evidence—colloquy following accident. In an action for damages consequent on a collision of automobiles, prejudicial error results from receiving against defendant evidence of a

heated colloquy between defendant and the other driver, occurring within a very few minutes after the collision, and wherein each driver asserted that he was on the right side of the highway, and wherein the defendant refused to examine certain tracks as bearing on the dispute and applied scandalously opprobrius epithets to the other driver; this because said testimony is neither a part of the res gestae nor does it reveal any admission on the part of the defendant.

Muirhead v Challis, 213-1108; 240 NW 912

Surrounding circumstances—jury question. Circumstances surrounding an accident, viz: the condition of the vehicles, the location of dead bodies and debris, the blood and brains splattered on one side of a bridge, are circumstances for the jury to consider in determining whether a truck driver gave one half of the traveled way by turning to the right.

Hawkins v Burton, 225-707; 281 NW 342

Instructions—failure to yield one half traveled way—other circumstances mentioned. In action by automobile passenger, arising out of collision between a bus and approaching automobile wherein the only ground of negligence submitted was bus driver's failure to yield one half of traveled way, instructions relating to speed and control of bus and to rights and duties of bus driver in general relating to fact pavement was wet, relating to a car parked in path of bus, and other circumstances, when read with other instructions, that failure to yield one half of highway was only prima facie negligence and could be justified, explained, or excused, and that parked car on highway might be an emergency creating an excuse, were not erroneous as submitting additional grounds of negligence.

Staggs v Bartovsky, 228- ; 291 NW 443

Assumption that half the roadway will be yielded. Where vehicles are approaching each other on a highway, they each have a right to assume that the other will give one-half the traveled way by turning to the right, until, in the exercise of ordinary care, it becomes apparent that this assumption can no longer be indulged in.

Jakeway v Allen, 226-13; 282 NW 374

Justifiable assumption—instruction. The operators of automobiles have the right to assume, when they meet on the highway, that the other will yield one-half of the traveled way by turning to the right; and it is erroneous to refuse a request for such instruction.

Muirhead v Challis, 213-1108; 240 NW 912

Motorcycle approaching on left side—assumption. Where a motorcycle traveling east and an automobile traveling west approach each other, both driving on the south half of the highway, held, that as long as the automobile driver had sufficient time to return to his right, the north, side of the highway, he had a right to assume that the motorcyclist would not attempt to drive to the north half of the highway for the purpose of passing on the north, the wrong side, of the automobile.

Jakeway v Allen, 226-13; 282 NW 374

Instructions—emergencies—jury question. Instruction that emergency rule would apply in a case "where it reasonably seemed to him, acting as an ordinarily careful and prudent person would act under like circumstances, that he could not safely turn to the right", properly presents question for jury's determination and is not open to objection that it gauges the excuse of emergency by driver's own judgment or impulse.

Jakeway v Allen, 227-1182; 290 NW 507

Turning to left in emergency. The driver of a conveyance is not necessarily guilty of negligence when, faced by a sudden and dangerous emergency, he turns to the left of an approaching vehicle in an effort to avoid a collision.

Lein v Morrell & Co., 207-1271; 224 NW 576; 31 NCCA 165

Emergency—failure to turn to right—effect. Failure of the operator of an automobile to turn to the right in an emergency is not necessarily negligent, and especially when the complaining party was the author of the emergency.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Legal excuse—jury question. The act of the operator of a vehicle in turning to the left-hand side of a country highway when meeting another vehicle is presumptively negligent, but testimony that the immediately approaching vehicle was weaving from side to side of the road, and that the turn to the left was made in order to avoid a collision, presents a jury question whether he was, in turning to the left, exercising reasonable care.

Babendure v Baker, 218-31; 253 NW 834; 2 NCCA(NS) 650

Emergency instruction — conflict of testimony. In an action for injuries sustained in a collision between a motorcycle driven east by plaintiff on his right, the south, side of the road and an approaching automobile operated by the defendant allegedly on the left, or south, side of road, there was no occasion for court giving instruction to effect that defendant was faced with an emergency, when defendant maintained that he was at all times on his own right side of the road, because if he were on the left, or south, side of highway, the emergency was of his own making.

Jakeway v Allen, 226-13; 282 NW 374

Confusion resulting from accident not negligence. A motorist who, while operating his car easterly on the south or right-hand side

of a paved road at 50 miles per hour (tho the night is misty and visibility is poor), is unexpectedly, violently, and negligently so hit by the car of another motorist as to be deflected to the north or left-hand side of the road and into collision with an oncoming, westbound car, cannot, as to said latter collision, be deemed negligent because instantly when so deflected his hand involuntarily dropped from his steering wheel and his foot unintentionally reached the accelerator of his car instead of the brake.

Rich v Herny, 222-465; 269 NW 489

Legal excuse—instruction on statute. An instruction, tho in the language of the statute, e. g., that "motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right", may constitute reversible error when unaccompanied by any reference to a sudden emergency which is presented as an excuse for a car actually being on the wrong side of the road at the time of a collision.

Christenson v Tel. Co., 222-808; 270 NW 394

Occupying right side of highway—jury question. A specification of negligence that defendant did not keep his truck on the right-hand side of the highway when struck from the rear could not be withdrawn and was properly submitted to the jury when there was evidence to sustain the specification. Evidence did not show that collision would have occurred even tho truck had been wholly on right-hand side of the highway.

Gookin v Baker & Son, 224-967; 276 NW 418

Passing parked truck—excuse—jury question. The length of a vehicle (34 feet), its load (7 tons), and the space required in which to make a turn (20 to 30 feet) may, especially on a dark night, have a very material bearing on the issue whether the driver, by proof of an attempt to pass around a stalled truck, had legally excused his presumptive negligence in being on the left-hand side of the traveled way at the time of a collision with an oncoming vehicle. Evidence held to present jury question.

McWilliams v Beck, 220-906; 262 NW 781

Yielding right of way—jury question. Evidence held to present a jury question on the issue whether the operator of an automobile yielded, to an oncoming vehicle, one-half of a traveled way.

Ryan v Amodeo, 216-752; 249 NW 656
Schuster v Gillispie, 217-386; 251 NW 735
Lukin v Marvel, 219-773; 259 NW 782

Proximate cause—jury question. Evidence held to present jury question whether defendant's failure to give half of the traveled highway was the proximate cause of an accident.

Henriksen v Stages, 216-643; 246 NW 913

Crossing black line to pass automobile—jury question. Eyewitness testimony, that a defendant motorist crossed the black line to the left side of the pavement preparatory to passing an automobile, then, observing an approaching vehicle, swung back in again, and in so doing struck this latter vehicle, deflecting his own automobile so as to collide with a second approaching vehicle in which plaintiff was riding, makes a jury question as to defendant's acts being negligence.

Echternacht v Herny, 224-317; 275 NW 576

Collision—jury questions. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence.
2. Whether defendant was driving his truck without lights.
3. Whether defendant was driving on the wrong side of the road.
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed.
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 93

Collision on bridge—inadequate brakes—jury question. Evidence that a plaintiff motorist approached a bridge at 15 miles per hour, proceeded to cross, keeping his car within 6 inches of the right-hand side, before defendant came on the bridge, and that plaintiff was two-thirds across before defendant swung across the center line and struck him, makes a jury question as to whether the fact of plaintiff's negligence in not having adequate brakes contributed to the collision.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Passenger suing both drivers — concurring negligence—jury question. In an action by a passenger against the drivers of both automobiles involved in a collision, where the vehicle in which he was riding was being driven 50 to 60 miles per hour in a snowstorm, with an oncoming automobile crowding toward the wrong side of the road, a jury question is created as to whether the conduct of the driver with whom the plaintiff was riding was a concurring proximate cause of the passenger's injuries.

Futter v Hout, 225-723; 281 NW 286

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the issues (2) of defendant's failure to maintain

a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Collision with bicycle—negligence—instructions—jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on his vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35 [§5023.01, C., '39]) and failing to turn to left when passing vehicle (§5022, C., '35 [§5024.03, C., '39]) reviewed and held to correctly present questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Directed verdict—defendant's excuse for negligence—jury question. In argument, a defendant truck driver's explanation that icy pavement and locked brakes made his truck slide and should excuse his presence on the wrong side of the road where his truck collided with plaintiff's automobile will not sustain a directed verdict in his favor, since question of plaintiff's contributory negligence, defendant's violation of statute, the sufficiency of his excuse, and whether his negligence, if any, was the proximate cause of plaintiff's injuries, being questions on which reasonable minds might differ, are for the jury.

McIntyre v West Co., 225-739; 281 NW 353

Directed verdict—improper unless per se negligence also contributory—jury question. A plaintiff motorist, against whom a directed verdict was rendered because in violating a speed statute he was negligent per se, still should have had the benefit of the best possible view of the evidence, and, moreover, a record showing that he remained at all times on his own side of the road, but that a truck driver, for no apparent reason, drove across the pavement center line, resulting in a head-on collision, makes a jury question as to whether or not plaintiff's per se negligence contributed to his injury.

McIntyre v West Co., 225-739; 281 NW 353

Reckless operation—insufficient proof. The reckless operation of an automobile, within the meaning of section 5026-b1, C., '35, is not shown by proof that a motorist, in the daytime and without obstruction to view ahead, and while approaching a bridge on a country highway, was traveling at the rate of some forty-odd miles per hour, and a-straddle the black lines in the center of an 18-foot wide, level, 10-degree curve; that, while so traveling, he confined his view solely to said black lines as they came into view immediately ahead of the fender or hood of his car; that he did not "look up" and see an approaching truck on the bridge until 75 feet therefrom; and that thereupon he swerved his car to the right but not quite far enough to avoid side-swiping the rear part of the truck while the two vehicles were passing on the bridge.

Wilson v Oxborrow, 220-1135; 264 NW 1

Instruction justified by allegation. Instructions relative to the duty of vehicle drivers to turn to the right, on meeting, are justified by an allegation of negligence in driving on the wrong side of the road at the time of meeting.

Lange v Bedell, 203-1194; 212 NW 354

Instructions—acts of negligence set out. In submitting to the jury the alleged negligence of driving to the left of the center of a traveled way, or driving upon the wrong or left side of the highway, the court must specifically define to the jury what acts would constitute negligence under said allegations.

Muirhead v Challis, 213-1108; 240 NW 912
Jakeway v Allen, 226-13; 282 NW 374

No presumption of fault when on wrong side of highway. It is erroneous to instruct that where a collision occurs between two vehicles, at a time when one of the vehicles is on the wrong side of the road, the presumption is that the collision was caused by the negligence of the driver who was on the wrong side of the road.

Fry v Smith, 217-1295; 253 NW 147

Instruction—violation as presumption of negligence. An instruction that negligence may consist in the failure to do that which the law commands, in connection with an instruction that the statute requires drivers of vehicles to turn to the right when meeting, in effect directs the jury that the failure to turn to the right constitutes negligence in and of itself, and is erroneous because the failure to obey said statute creates a presumption, only, of negligence.

Ryan v Rendering Wks., 215-363; 245 NW 301

Excuse not presented—peremptory instruction. Instructions that a party is in duty bound to drive on the right-hand side of a highway or that he must so drive as to be able to stop within the assured clear distance ahead, without any qualification relative to the driver's right to show legal excuse for driving otherwise, are not erroneous when the driver offers no excuse.

Winter v Davis, 217-424; 251 NW 770

Nonprejudicial instructions—excuse. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Instructions—failure to yield half of traveled way—justification. Instruction as to defendant's duty to yield one half of traveled highway and that violation of such duty would be presumptive evidence of negligence and would warrant finding of negligence unless it was shown by "the greater weight or preponderance of the evidence" that under the circumstances defendant's failure was justified and in exercise of ordinary care, held not prejudicial since no evidence of justification was adduced, altho use of quoted words is not to be approved. Instruction as to plaintiff's duty to yield one half of traveled way also reviewed and held sufficient.

Jakeway v Allen, 227-1182; 290 NW 507

Improper burden of proof—excuse presented under general denial. Reversible error results from an instruction that defendant's failure, on meeting plaintiff, to yield half of the traveled way would be prima facie evidence of negligence unless defendant has established by a preponderance of the evidence his excuse for not so yielding, when defendant did not plead said excuse as an affirmative defense, but, under a general denial, presented it in his evidence.

Rich v Herny, 222-465; 269 NW 489

Assumption that laws will be obeyed—instruction. If there be applicable evidence the court must instruct (at least on request), (1) as to the duty of drivers of cars, on meeting, to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

Snowstorm—assuming compliance with law—reasonable care rule. Where two motorists approach each other in a snowstorm—one driving into the face of the storm which has obliterated the pavement outlines and the dividing mark thereon—the other motorist has a right to assume that he will be accorded one-half the traveled way until he sees or until, in view of the storm conditions and added driving difficulties, he should, in using ordinary care, realize that half the highway was not being yielded, under which facts a jury question is presented as to whether his continued reliance on the assumption excused him from the charge of negligence.

Futter v Hout, 225-723; 281 NW 286

Instructions—absence of evidence to support. Instructions which submit to the jury the questions whether a defendant has shown legal excuses, (1) for exceeding a statutory speed limit, or (2) for not having yielded one-half of the traveled way, are erroneous when there is no evidence supporting an affirmative finding on either proposition.

Deweese v Transit Lines, 218-1327; 256 NW 428

Requested instructions—refusal when otherwise favorably covered—nonerroneous. In action arising out of injuries sustained in collision between a bus and approaching automobile, a refusal to give bus owner's requested instruction concerning the discovery of parked car on paved highway in the path of bus as a circumstance bearing on question of bus driver's negligence in failing to yield one half of traveled way, was not prejudicial error where other instructions given at bus owner's request were at least as favorable to bus owner as refused instruction.

Staggs v Bartovsky, 228- ; 291 NW 443

Absence of rear reflectors—nonproximate cause—instruction without issue. A "sideswipe" collision between two head-on approaching automobiles could not proximately result from the absence of red reflectors on the rear of the body and no instruction involving this negligence should be given.

Keller v Dodds, 224-935; 277 NW 467

Instructions—noncompliance — unsupported issue. Instruction dealing with contributory negligence and presenting to the jury a situation involving plaintiff's duty to yield one-half of traveled roadway and turning to the right unless impossible to do so is reversibly erroneous when neither allegations nor evidence raise this question.

Keller v Dodds, 224-935; 277 NW 467

Unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pavement when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

Failure to turn to right as negligence—nonprejudicial error. An instruction to the effect that the failure of the operator of an automobile on a country road to turn to the right on meeting another vehicle constitutes negligence, if erroneous, is error without prejudice when the record reveals beyond question that said operator was guilty of proximate negligence in other respects.

Scott v Hinman, 216-1126; 249 NW 249

Travel in fog—assured clear distance—oncoming vehicles. Since as to oncoming vehicles, "assured clear distance" statute applies only to motorist not traveling on his right-hand side of the road, in an action involving a collision between oncoming vehicles on a foggy night when vehicle in which plaintiff was riding was traveling on the right-hand side of the road, a requested instruction applying the

"assured clear distance" statute to the plaintiff was properly refused.

Gregory v Suhr, 224-954; 277 NW 721

Unbalanced instruction — unallowable limitation on materiality of evidence. Reversible error results to an unsuccessful plaintiff (in an action pivoted on the issue whether defendant traveling northward yielded half of the traveled way to plaintiff traveling southward) from instructions to the effect that "evidence that defendant just preceding the collision swerved his car to the west is material on the issue whether plaintiff was guilty of contributory negligence, even tho plaintiff had not alleged such swerving as a specific act of negligence on the part of defendant". The vice is not in what the court does say but in what the court does not say, to wit: that said evidence is material on the issue of defendant's negligence.

Keller v Gartin, 220-78; 261 NW 776

Fatally confusing instruction. The presentation to the jury of an assignment of negligence to the specific effect that the two automobiles in question, moving in opposite directions on the highway and immediately before they collided, were each on the left-hand side of the highway, is so confusing as to constitute reversible error.

Balik v Flacker, 212-1381; 238 NW 467

Erroneously refused instruction—right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles, (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

Yielding half of traveled way—beaten path (?) or entire roadway (?). When the plaintiff's truck turned left at a blind corner, keeping to the right of the beaten path, but not to the right side of the graveled highway, and collided with the defendant's car which was approaching the corner on the right side of the road, it was not improper to instruct the jury that a car must yield half the traveled or graveled part of the road when meeting another car, and, that for the plaintiff to recover, it must be found that the truck was hit while on the right side of the road; or, for a recovery to be had by the defendant on a counterclaim, that the plaintiff was negligent in not yielding half the road.

Kiesau v Vangen, 226-824; 285 NW 181

Ruts in snow on highway—collision—explanatory instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

5024.03 Overtaking a vehicle.

Atty. Gen. Opinion. See '30 AG Op 167

Nonright to assume compliance with law. The operator of an automobile while attempting to pass another car going in the same direction has no right to assume that the car sought to be passed will keep to the right of the center of the highway when the highway is so occupied at the time by another car that the car sought to be passed cannot turn to the right.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Left turn by car ahead—"assured clear distance ahead" rule—inapplicability. In action to recover for personal injuries resulting from an automobile collision occurring when the driver of an automobile attempted to pass a truck while the vehicles were traveling side by side, and the truck driver attempted a left turn into driveway of a farm, held, that the "assured clear distance ahead" rule was inapplicable.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Racing as proximate cause—evidence. On the issue whether two automobiles were racing and whether such race was the proximate cause of an injury to a third party, the court may, in its discretion, refuse to receive evidence of racing remote in point of time unless evidence of racing immediately before the accident is first introduced.

Glass v Hutchinson Co., 214-825; 243 NW 352

Use of entire pavement—permissible until signal received. The driver of a truck proceeding down the highway had the right to make use of the entire pavement when there was no vehicle approaching from in front, until he received some signal or in some way acquired knowledge that a truck in the rear desired to pass.

Glover v Vernon, 226-1089; 285 NW 652

Driving past stationary vehicle. Driving past and within four feet of a stationary vehicle in the public highway, at a rate of 35 miles per hour and without giving any warning signal, when much more than said four feet was afforded by the highway, may constitute negligence.

Jarvis v Stone, 216-27; 247 NW 393

Turning to right when overtaking vehicle. Turning to the right on approaching from the rear a stationary vehicle in the highway may not, in an emergency, constitute negligence.

Jeck v Const. Co., 216-516; 246 NW 595; 35 NCCA 766

Passing pedestrian—contributory negligence —jury question. When a truck slowed down and turned out to the left to avoid a pedestrian walking along the traveled portion of the highway, and was struck by another truck proceeding from the rear, the court properly submitted the question of contributory negligence to the jury.

Glover v Vernon, 226-1089; 285 NW 652

Conflicting evidence re control. Manifestly the court cannot find that a motorist did not have his car under control while attempting to pass another car, and was therefore guilty of negligence per se, when the position and speed of the cars at the time of the collision are in sharp dispute.

Jordan v Schantz, 220-1251; 264 NW 259

Jury question — contributory negligence. Record reviewed and held to present a jury question on the issue of the contributory negligence of plaintiff in attempting to pass another car traveling in the same direction.

McCoy v Cole, 216-1320; 249 NW 213

Failure to yield right of way. Record reviewed and held to justify the submission to the jury of the assignment of negligence to the effect that the operator of an automobile failed to yield the right of way to a passing car.

McCoy v Cole, 216-1320; 249 NW 213; 33 NCCA 347

Negligence per se—double passing. The operator of a motor vehicle, who, at a speed of forty miles per hour and in the nighttime, attempts to pass another vehicle which he is closely following, at the very time when the operator of such other vehicle is attempting to pass a vehicle which he has overtaken, is guilty of negligence per se; both because he (1) is manifestly driving at an imprudent rate of speed under the circumstances, and (2) is driving at a rate of speed which will not enable him to stop within the assured clear distance ahead.

Harvey v Knowles Co., 215-35; 244 NW 660

"Double passing." Evidence relative to the facts attending a "double passing" reviewed and held to present a jury question on the issue of contributory negligence.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Repealed statute. Requested instruction in re repealed statute, previously governing overtaking automobiles, properly refused.

Jones v Krambeck, 228- ; 290 NW 56

Negligence—truck struck from the rear—jury question. A specification of negligence that defendant did not keep his truck on the right-hand side of the highway when struck from the rear could not be withdrawn and was properly submitted to the jury when there was evidence to sustain the specification. Evidence did not show that collision would have occurred, even tho truck had been wholly on right-hand side of the highway.

Gookin v Baker & Son, 224-967; 276 NW 418

Negligence—jury question. Evidence reviewed, and held to present a jury question on the issue whether the driver of a vehicle was negligent in attempting to pass on the left of a forward-moving vehicle.

Starry v Hanold, 202-1180; 211 NW 696; 33 NCCA 506

Anticipated negligence—repairing car on highway. Prejudicial error results from instructing, in effect, that a person who has stopped his car at a proper place in the highway in order to repair it must anticipate and guard himself against the possibility that the operator of some passing car may be negligent by passing the stationary car on the wrong side.

Hanson v Manning, 213-625; 239 NW 793

Left turn into passing vehicle—instruction on speed not necessary. In a personal injury action arising out of an automobile-truck collision occurring when the automobile, in which plaintiff was riding with husband-driver, was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, and when the automobile driver, attempting to avoid an accident by speeding ahead of truck, collided therewith, held, that statute relating to speed, which requires reasonable speed with due regard to existing conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Care by driver being overtaken—instructions. Instructions relative to the care required by the driver of a car which is overtaken by another car are proper when such care is in issue under conflicting evidence.

Kuhn v Kjose, 216-36; 248 NW 230

Duty to reduce speed. An allegation that defendant drove his vehicle past a stationary vehicle at an excessive and dangerous rate of speed renders proper, on supporting proof, an instruction as to the duty of the defendant to reduce his speed to a reasonable rate when approaching and passing the stationary vehicle.

Jarvis v Stone, 216-27; 247 NW 393

Failure to signal. Instructions relative to the duty of the driver of an automobile, in attempting to pass a slower moving vehicle, to sound his horn, may be justified even tho the driver of the slower moving vehicle had knowledge that the other party was attempting to pass.

Johnson v McVicker, 216-654; 247 NW 488

Negligence—improper submission. Only supported grounds of negligence should be submitted to the jury. So held where the court submitted the negligence of the driver of an automobile (1) in failing to turn to the right when signaled by an overtaking car, and (2) in increasing his speed when so signaled, when on the record the only possible proximate negligence was the act of the said driver in overtaking the passing car, after it had passed, and then bringing about a collision.

Berridge v Pray, 202-663; 210 NW 916

5024.06 Overtaking on the right.

Turning to right when overtaking vehicle—effect. Turning to the right on approaching from the rear a stationary vehicle in the highway may not, in an emergency, constitute negligence.

Jeck v Const. Co., 216-516; 246 NW 595; 35 NCCA 766

Failure to lessen speed or signal approach. A jury question on the issue of negligence of the operator of an automobile is generated by evidence tending to show that said operator was driving easterly on a straight road at 50 miles per hour; that he plainly could have seen, while at a distance of 80 rods, two well-lighted cars, and that they were standing together on the south side of the highway, one headed west and one headed east, with all headlights burning; and that, without slacking his speed or giving signal of his approach, he passed to the south of said stationary cars and so close thereto as to strike and break an open door on one of said cars.

Hanson v Manning, 213-625; 239 NW 793; 2 NCCA(NS) 446

5024.07 Limitations on overtaking on the left.

Precautions before passing vehicle. The operator of a vehicle is under duty, before attempting to pass to the left of and around another vehicle moving in the same direction, to make reasonable observation as to the presence, in front, of other vehicles moving in the opposite direction on the highway, and to attempt such passage only when, in the exercise of reasonable care, it appears that he can (1) effect such passage in safety to the vehicle which is to be passed, and (2) properly return to the right-hand side of the road before meeting oncoming vehicles. A violation of this duty may be the proximate cause of a third vehicle being deflected into the vehicle which had been passed.

Bobst v Hoxie Line, 221-823; 267 NW 673

Proximate cause. The act of passing a vehicle at an illegal rate of speed may not be declared negligence per se as to a collision which occurred after the passing had been completely effected.

Berridge v Pray, 202-663; 210 NW 916

Last clear chance—jury question. When a truck driven by plaintiff's intestate slowed down and turned to the left to avoid a crippled pedestrian who was walking along the highway, whether the defendant's truck, coming from the rear at a greater speed, after discovering the peril of the truck in front in having turned out into his path, should have pulled further to the left on the shoulder of the road to avoid a collision, was a question of last clear chance for the jury.

Glover v Vernon, 226-1089; 285 NW 652

Collision with bicycle—instructions — jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35) and failing to turn to left when passing vehicle (§5022, C., '35) reviewed and held to present correctly questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

Negligence per se. The operator of a motor vehicle, who, at a speed of 40 miles per hour and in the nighttime, attempts to pass another

vehicle which he is closely following, at the very time when the operator of such other vehicle is attempting to pass a vehicle which he has overtaken, is guilty of negligence per se; both because he (1) is manifestly driving at an imprudent rate of speed under the circumstances, and (2) is driving at a rate of speed which will not enable him to stop within the assured clear distance ahead.

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Holding under former statute. The operator of a vehicle is guilty of negligence per se when, after passing another vehicle moving in the same direction, he returns to the right-hand side of the highway and in front of the vehicle just passed, within a shorter distance than that provided by law—30 feet.

Bobst v Hoxie Line, 221-823; 267 NW 673

Passing on curve—negligence—jury question. Evidence held to present a jury question on the issue of negligence of the operator of an automobile in passing another vehicle on a curve and returning to the right side of the traveled way within 30 feet of the car which had been passed.

Andersen v Christensen, 222-177; 268 NW 527

5024.08 Prohibited passing.

Passing on curve—negligence—jury question. Evidence held to present a jury question on the issue of negligence of the operator of an automobile in passing another vehicle on a curve, and returning to the right side of the traveled way within 30 feet of the car which had been passed.

Andersen v Christensen, 222-177; 268 NW 527

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

5024.11 Following too closely.

Last clear chance—jury question. When a truck driven by plaintiff's intestate slowed down and turned to the left to avoid a crippled pedestrian who was walking along the highway, whether the defendant's truck, coming from the rear at a greater speed, after discovering the peril of the truck in front in having turned out into his path, should have pulled further to the left on the shoulder of the road to avoid a collision, was a question of last clear chance for the jury.

Glover v Vernon, 226-1089; 285 NW 652

TURNING AND STARTING AND SIGNALS ON STOPPING AND TURNING

5025.01 Turning at intersections.

Annotations in Vol I, see under §5033
Intersection collisions generally. See under §§5026.01–5026.05
Atty. Gen. Opinion. See '30 AG Op 355

Cutting corners—inapplicability of statute. The statutory prohibition against "cutting corners" in making left-hand turns is not applicable when no one is approaching on the road into which such turn is made.

Enfield v Butler, 221-615; 264 NW 546

Cutting corner. A left-hand "cutting of the corner" while passing from one street into another is ipso facto negligent.

Lein v Morrell & Co., 207-1271; 224 NW 576; 32 NCCA 417

Cutting corner—jury question. Evidence held to present a jury question on the issue whether an automobile driver's failure to pass to the right of and beyond the center of a highway intersection was the proximate cause of an injury.

Sexauer v Dunlap, 207-1018; 222 NW 420

Turning or changing course—conditions precedent. The operator of a motor vehicle cannot be deemed guilty of negligence in attempting to turn to the right and into an intersecting road, if he believed and as a reasonably prudent person had a right to believe, in view of all the circumstances, that he could make said turn in safety.

Harmon v Gilligan, 221-605; 266 NW 288

Justifiably attempted left turn. A motor vehicle driver cannot be deemed negligent in attempting a left-hand turn into an intersecting highway when, acting as a reasonably cautious and prudent person, he believes and has a right to believe that vehicles approaching from his right during the turn are at such distance that he can safely make the turn.

Enfield v Butler, 221-615; 264 NW 546

Obeying statute—presumption. Principle reaffirmed that a motor vehicle driver in attempting to make a left-hand turn into an intersecting road has a right to proceed on the assumption (unless he has knowledge to the contrary) that another driver, approaching from his right, will obey the law (§5031, C., '35) by reducing his speed to a reasonable and proper rate when approaching and traversing said intersection.

Enfield v Butler, 221-615; 264 NW 546

Holding under former statute. In making a left-hand turn into an intersecting road, negligence on the part of a westbound driver (1) in failing to drive to the right and beyond the center before turning, or (2) in failing to note whether he could make the turn in safety, is not the proximate cause of injuries received by him by being hit by an eastbound car after he had completed the turn and was wholly on the intersecting road.

Enfield v Butler, 221-615; 264 NW 546

Prior statute. The failure of the owner of a truck, before making a left turn into an intersecting highway, to drive to the right of and beyond the center of the intersection, constitutes negligence per se and if such owner is injured his negligence will be classified as contributory negligence per se if such conclusion is the only one to which reasonable minds could arrive.

Mansfield v Summers, 222-837; 270 NW 417

Holding under prior statute. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Negligence per se—improper left-hand turn. A left-hand turn from one highway into another highway contrary to the direction of the statute constitutes negligence per se in the absence of plea and proof of a valid excuse.

Wilson v Long, 221-668; 266 NW 482

Turn at intersection—negligence per se. The operator of a westbound automobile, who makes a left-hand turn at an intersecting street and thereupon increases his speed in order to escape a collision with an eastbound car which he knows is but some forty feet west of the intersection and approaching it at a speed twice his own speed, is guilty of negligence per se.

Parrack v McGaffey, 217-368; 251 NW 871

Collision with left-turning vehicle—contributory negligence. The driver of a rear-moving vehicle is not necessarily guilty of contributory negligence because, at high speed, he collides with a forward-moving vehicle while it is making an abrupt left turn.

McManus v Creamery Co., 219-860; 259 NW 921

Negligence per se—prejudicial submission. Prejudicial error results from submitting to the jury whether a motorist was negligent in so making a left-hand turn as to run into the side of another motorist properly operating his car on the road from which the turn was made, because such a turn with such result is negligence per se in the absence of proof of legal excuse.

Rich v Herny, 222-465; 269 NW 489

Overtaking and passing—car ahead turning to left. In action to recover for personal injuries resulting from an automobile collision occurring when the driver of an automobile attempted to pass a truck while the vehicles were traveling side by side, and the truck driver attempted a left turn into driveway of a farm, held, that the "assured clear distance ahead" rule was inapplicable.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Turning or changing course—negligence. Evidence reviewed, and held to present a jury question on the issue whether a motorist was negligent in suddenly turning from the right side to the left side of a paved, rural highway (in order to enter a private driveway on the latter side of said road), and whether, if negligent, said negligence was the proximate cause of a collision with another vehicle which he knew he was about to meet.

McKinnon v Guthrie, 221-400; 265 NW 620

Turning to right into intersecting road—contributory negligence—jury question. Record reviewed and held to present a jury question on the issue whether plaintiff, traveling on the right-hand side of the highway, with knowledge that she was being closely followed by a truck, was guilty of contributory negligence in changing her course by turning to the right and entering an intersecting highway—the collision occurring between said turning car and said truck.

Harmon v Gilligan, 221-605; 266 NW 288

Collision with overtaking and passing vehicle—instruction on speed not necessary. In a personal injury action arising out of an automobile-truck collision occurring when the automobile in which plaintiff was riding with husband-driver was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, and when the automobile driver, attempting to avoid an accident by speeding ahead of truck, collided therewith, held, that statute relating to speed, which requires reasonable speed with due regard to existing conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Intersecting highways—jury question. The intersection formed by the junction of two

highways may be such that the center thereof may be a question for the jury.

Wambeam v Hayes, 205-1394; 219 NW 813; 31 NCCA 71; 32 NCCA 437

Actions—unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pavement when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

5025.03 Starting parked vehicle.

Motorist anticipating dangerous position of one aiding—jury question. Where a stalled motorist heard one of several bystanders say, "Let's give him a push", whereupon they arranged themselves in positions to push the automobile, and one called, "Let's go ahead", a directed verdict is properly denied, and a jury question is presented as to whether or not the motorist might have known that a person was directly behind the automobile and would be injured if the car moved backward.

Huston v Lindsay, 224-281; 276 NW 201

Instructions—moving automobile backward—warning person in perilous position. Instructions covering motorist's right to move his car backward and his duty to give warning of his intention to so move the automobile when people are pushing and trying to extricate it from stalled position on icy street, and whether he knew or ought to have known of one in a position of peril at the rear of the automobile, reviewed, and held to correctly present the issues.

Huston v Lindsay, 224-281; 276 NW 201

Truck in reverse gear—negligent starting. Evidence reviewed and held to present jury questions on the issues:

1. Whether the operator of a truck which he had left in reverse gear was negligent in starting the engine when he had reason to know that another person was in the near vicinity of the rear of the truck, and,
2. Whether the deceased was injured by being crushed between the rear of said truck and a building.

Laudner v James, 221-863; 266 NW 15

Nonduty to apprehend remote danger. The driver of a loaded truck, which is standing with the rear end against a building, is under no duty, when starting the truck, to apprehend that a person then standing beside the truck and some four feet from it and in a position of perfect safety, will, after the truck is started, suddenly run in behind the truck and be caught in a dangerous position provided the engine should unexpectedly stall and the truck "back up" against the building.

Nelson v Mitten, 218-914; 255 NW 662; 39 NCCA 353

Unobserved person. The driver of an automobile is not, broadly speaking, under a duty, before putting the vehicle in motion, to look around or under it in order to discover the possible presence of persons in a position of danger. A plaintiff seeking personal damages consequent upon a person's being run over is under an imperative necessity to show the location of the injured person just preceding the injury, or such a state of facts with reference thereto as will justify a finding that the driver (1) saw the person, or (2) ought, in the exercise of ordinary care, to have seen him.

Williams v Cohn, 201-1121; 206 NW 823

Caterpillar tractor started while man standing on track. Where a gasoline tank-wagon operator, engaged in filling the gas tank on a caterpillar tractor owned by a road construction company, and, while standing on the tractor's endless track, is thrown, by a sudden movement of the tractor, in front of another such tractor, company cannot say that first tractor operator may be negligent but second operator was not and so accident was unavoidable.

O'Meara v Green Const. Co., 225-1365; 283 NW 735

5025.04 When signal required.

Signals—when unnecessary. One may not complain of the absence of a signal of intention to turn at an intersection when he already has all the knowledge that a signal would have given him.

Ryan v Trenkle, 203-443; 212 NW 888; 30 NCCA 113; 31 NCCA 389; 35 NCCA 59; 3 NCCA(NS) 103

Knowledge by other driver. A charge that an operator of an automobile failed, prior to making a turn, to see that there was sufficient space in which to turn becomes inconsequential when the record reveals the fact that plaintiff and defendant were the only persons present at the intersection and that each was aware of the actions of the other.

Ryan v Trenkle, 203-443; 212 NW 888

Holding under prior statute—effect of signal. The operator of a motor vehicle who "raises and extends his hand" in effect warns the operator of a vehicle immediately following that there is to be a change in the condition then existing, that the signaling driver intends to stop, turn, or change the course of his vehicle, and said operator to the rear must note said warning and exercise ordinary care to safely meet said change in condition.

Harmon v Gilligan, 221-605; 266 NW 288

Signaling turns—evidence in re custom—effect. Testimony relative to the custom of automobile drivers of this state and surrounding territory, in signaling turns, reviewed, and held too inconsequential to justify a reversal, even tho the inadmissibility of such testimony be conceded.

Harmon v Gilligan, 221-605; 266 NW 288

Dual negligence in turning into side road. The operator of an automobile who turns into a side road (1) without first noting whether there is sufficient space in which to make the turn with reasonable safety to himself and to all other persons on the highway, and (2) without first signaling such proposed turn, is guilty of dual statutory negligence.

Miller v Lowe, 220-105; 261 NW 822

Turning into side road—failure to signal—effect. The driver of an automobile who turns abruptly into a side road without first seeing that there is sufficient space in which to make such turn in safety, and without making some proper signal to indicate his intention to make such turn is guilty of negligence—not prima facie evidence of negligence.

Kisling v Thierman, 214-911; 243 NW 552
Dillon v Diamond Co., 215-440; 245 NW 725
See Voiles v Hunt, 213-1234; 240 NW 703; 31 NCCA 59; 32 NCCA 458

Left turn—negligence of truck driver. A jury question on the issue of negligence is made by testimony from which the jury might have found that a truck driver made an abrupt left turn when he could not, from his seat, see to the rear because of the manner in which the truck was loaded, and did not otherwise look to the rear, and that, owing to the wide rack on the truck, his signal (if he made one) by extending his arm could not be seen from the rear.

McManus v Creamery Co., 219-860; 259 NW 921

5025.06 Stopping.

Holding under prior statute—effect of signal. The operator of a motor vehicle who "raises and extends his hand" in effect warns the operator of a vehicle immediately following that there is to be a change in the condition then existing—that the signaling driver intends to stop, turn, or change the course of his vehicle, and said operator to the rear must note said warning and exercise ordinary care to safely meet said change in condition.

Harmon v Gilligan, 221-605; 266 NW 288

"Sudden" stop — legitimate suggestion by counsel. When the word "suddenly" was never used by witnesses to describe how a truck slowed down and turned out to the left to avoid a pedestrian before it was hit by another truck proceeding from the rear, but the word was put into their mouths by legitimate suggestion of counsel, the weight and credibility to be given the word is for the jury.

Glover v Vernon, 226-1089; 285 NW 652

Failure to signal "stop" — nonproximate cause. Failure of the driver of a truck to give a visible signal of his intention to stop is not the proximate cause of a collision with an automobile approaching from the rear when the driver of the oncoming rear car did not see the truck until an instant before the collision, and, therefore, had not regulated or gauged his speed with the speed of the truck ahead.

Isaacs v Bruce, 218-759; 254 NW 57

Signaling passing cars—no duty to anticipate negligence. A motorist stalled on the highway has a right to assume that the driver of a passing automobile to whom he signals to stop will use ordinary care in so doing.

McDaniel v Stitsworth, 224-289; 275 NW 572

Disabled vehicle—daytime stopping on highway—signaling. Stopping a disabled motor truck in the daytime upon the right-hand side of a 26-foot graveled road, within 4 feet of a guard rail, where it was visible for 225 feet, and signaling to passing cars do not constitute negligence.

McDaniel v Stitsworth, 224-289; 275 NW 572

Failure to signal "stop"—unsupported submission of issue. The submission to the jury of the issue whether the driver of a truck failed to give a signal of his intention to stop cannot be justified on the naked statement of a witness who was riding with the driver that he did not "see or hear" the driver give any such signal.

Isaacs v Bruce, 218-759; 254 NW 57

Slowing down for pedestrian—jury question. When a truck slowed down and turned out to the left to avoid a pedestrian walking along the traveled portion of the highway, and was struck by another truck proceeding from the rear, the court properly submitted to the jury the question of contributory negligence.

Glover v Vernon, 226-1089; 285 NW 652

5025.07 Signals by hand and arm or signal device.

Holding under former statute—effect of signal. The operator of a motor vehicle who "raises and extends his hand" in effect warns the operator of a vehicle immediately following that there is to be a change in the condition then existing, that the signaling driver intends to stop, turn, or change the course of his vehicle, and said operator to the rear must note said warning and exercise ordinary care to safely meet said change in condition.

Harmon v Gilligan, 221-605; 266 NW 288

Left turn—signal hidden by truck box. A jury question on the issue of negligence is made by testimony from which the jury might

have found that a truck driver made an abrupt left turn when he could not, from his seat, see to the rear because of the manner in which the truck was loaded, and did not otherwise look to the rear, and that, owing to the wide rack on the truck, his signal (if he made one) by extending his arm could not be seen from the rear.

McManus v Creamery Co., 219-860; 259 NW 921

RIGHT OF WAY

5026.01 Approaching or entering intersections.

Annotations in Vol. I. See under §5035

Statutes in pari materia—construction. Statutes in pari materia are to be construed together, and harmonized, if possible, and especially when such statutes appear in the same chapter. So held as to different statutes relating to the right of way of travelers at highway intersections.

Dikel v Mathers, 213-76; 238 NW 615

Cutting corners not permitted. This section does not authorize the vehicle having the right of way to "cut the corner" or otherwise unlawfully use the highway.

Lein v Morrell & Co., 207-1271; 224 NW 576; 32 NCCA 417

Pleading—sufficiency. A pleader is entitled to claim as many grounds of actionable negligence as flow from his pleaded statements of facts. Pleadings as to the facts attending a collision at an intersection of highways reviewed, and held to warrant the instructions given.

Sutton v Moreland, 214-337; 242 NW 75

Yielding right of way—what constitutes. The statutory duty of the operator of a vehicle to yield the right of way, at intersecting streets or highways, to the vehicle approaching from the right, is not performed by yielding one-half of said street or highway in favor of the vehicle which has the right of way.

Reason: The yielding must be at the point where the paths of the two vehicles intersect.

Newland v McClelland, 217-568; 250 NW 229

Boulevard intersections. The mere legal designation by a city or town of a street as a boulevard or arterial highway, and the erection of stop signs on intersecting streets (§4995, C., '31 [§5018.01, C., '39]), does not impliedly give to the traveler on the boulevard or arterial highway the right of way over traffic on intersecting streets. In the absence of a statute giving such right of way, the traveler on the intersecting highway is first controlled by the boulevard stop sign, and thereafter by the statute regulating right of way at intersections generally.

Dikel v Mathers, 213-76; 238 NW 615

Entering intersection at same time. The naked fact that an eastbound car and a northbound car approach an intersection at substantially the same time and in such manner that their paths will ultimately intersect does not necessarily mean that the latter car has the statutory right of way over the intersection. The statute only applies when, under all the facts and circumstances, danger of a collision may reasonably be apprehended.

Becvar v Batesole, 218-858; 256 NW 297

Crossing intersection before oncoming vehicle.

Davis v Hoskinson, 228- ; 290 NW 497

Failure to grant right of way—justification. The driver of a vehicle upon reaching a street intersection is under no legal duty to stop and wait or yield the right of way to another vehicle which is approaching his right-hand side when such approaching vehicle is so far away that, in view of all attending circumstances, and assuming legal and proper speed on the part of the approaching vehicle, no danger of collision reasonably appears.

Shuck v Keefe, 205-365; 218 NW 31; 30 NCCA 134; 33 NCCA 405; 4 NCCA(NS) 383, 397

Wolfson v Lumber Co., 210-244; 227 NW 608

Turning to right—preference at intersections—statutes inapplicable. Statutory requirements relative (1) to drivers turning "to the right" when meeting (§5020, C., '35 [§5024.02, C., '39]) and (2) to preference accorded drivers at highway intersections can, from the very nature of the transaction, have no application to an occurrence where the driver of a westbound car in making, or instantly after making, a left-hand turn into an intersecting road came into collision with an eastbound car traveling on or near the highway from which the left-hand turn was made.

Enfield v Butler, 221-615; 264 NW 546

Collision on icy intersection—facts sufficient to sustain verdict. In an action for damages to plaintiff's automobile, evidence held sufficient to warrant recovery from truck owner where it is shown that the collision occurred on a winter day at an icy intersection which plaintiff entered first.

Schenk v Moore, 226-1313; 286 NW 445

Failure to yield right of way—hidden crossroad. The driver of an automobile may not be said to be negligent per se for failure to yield the right of way to a car approaching him from the right on an unknown and absolutely hidden road.

Sexauer v Dunlap, 207-1018; 222 NW 420

Exercising right of way—other motorist's ignorance of stop sign. A motorist approaching an intersection from the west, knowing he has statutory right of way over traffic from the north, and knowing a stop sign is erected on the highway intersecting from the north, may not be charged with negligence because a motorist on his left, approaching from the

north, has no knowledge of the intersection and therefore drives past the stop sign into such intersection, resulting in a collision.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

County trunk road intersections—applicability. In the absence of signs indicating a different right-of-way rule, erected by authority not of county engineer but of the board of supervisors, the law giving right of way to traffic from the right applies to an intersection of county trunk roads.

Smithson v Mommsen, 224-307; 276 NW 47
Rogers v Jefferson, 224-324; 275 NW 874; 4 NCCA (NS) 318

Primary and trunk road intersection—preference in re right of way. A northbound motorist on a primary road cannot be deemed guilty of negligence proximately causing a collision with an eastbound car traveling on an intersecting county trunk road:

1. When each car as it approached the intersection was in plain view of the driver of the other car for several hundred feet,
2. When the driver on the trunk road ignored the "stop" sign on said road, and by his rate of speed justified the belief that he intended to turn to the right on entering the primary road,
3. When the motorist on the primary road was, prior to, and at the time of, entering the intersection, traveling on the right-hand side of the road and at the uniform rate of some 30 miles per hour, and
4. When the motorist on the primary road discovered for the first time when near the center of the intersection that the driver on the trunk road was driving straight through the intersection.

May v Hall, 221-609; 266 NW 297

Turning or changing course — conditions precedent. The operator of a motor vehicle cannot be deemed guilty of negligence in attempting to turn to the right and into an intersecting road if he believed and as a reasonably prudent person had a right to believe, in view of all the circumstances, that he could make said turn in safety.

Harmon v Gilligan, 221-605; 266 NW 288

Failure to look to left. The mere fact that the operator of an automobile in approaching on a rainy day, and at a moderate rate of speed, an intersection which afforded a clear view to all travelers, fails to look to his left for approaching vehicles, does not constitute negligence per se.

Roe v Kurtz, 203-906; 210 NW 550; 33 NCCA 409
Rogers v Jefferson, 224-324; 275 NW 874
Rogers v Jefferson, 226-1047; 285 NW 701

Obscured view of travel at intersection—failure to look or signal. The operator of an automobile in approaching and entering an intersecting country highway, when the view of travel approaching from his right is obstructed, is guilty of negligence (1) if he fails to signal his approach and entry, and also (2) if he fails to look for such travel at a point from which he can see such travel.

Smith v Lamb, 220-835; 263 NW 311; 4 NCCA(NS) 368

Negligence per se in approaching crossing. Negligence per se is revealed in the act of the driver of an automobile in approaching and entering an obscured public crossing (with which he was familiar) with knowledge that another vehicle was also rapidly and immediately approaching said intersection from his right, and failing either (1) to sound his horn or (2) to yield the right of way. (See Vol. I, §5028 et seq.)

Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44

Street intersection—stopping in front of other vehicle. The driver of an automobile who drives into a known, much traveled street intersection and stops in the pathway of an oncoming car which has the right of way, and which he has ample opportunity to see and does see before entering the intersection, and who is not misled by any fact or circumstance attending the entire transaction, is guilty of negligence per se.

Hollingsworth v Hall, 214-285; 242 NW 39

Negligence per se—physical facts. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Failure to see car on side road. The operator of an automobile on a county trunk road (an arterial highway), having the right of way over traffic on an intersecting local county road, is not guilty of negligence per se in entering such an intersection with his car under apparent control and without seeing a car approaching from his right at a high and dangerous rate of speed.

Arends v DeBruyn, 217-529; 252 NW 249; 37 NCCA 78

Driving at reasonable speed—reduction unnecessary. A motorist driving at a reasonable and proper speed need not reduce his speed when traversing an open intersection, and a speed of 30 or 35 miles per hour on a clear day and on a good road is not, as a matter of law, such a speed as violates the assured clear distance statute.

Rogers v Jefferson, 224-324; 275 NW 874

Other car not near to intersection. The court cannot say that the operator of a northbound car is guilty of contributory negligence per se in entering an intersection when a westbound car was three-quarters of a block distant.

Leckliter v City, 211-251; 233 NW 58; 38 NCCA 493

Right turn when followed by truck—contributory negligence—jury question. Record reviewed and held to present a jury question on the issue whether plaintiff, traveling on the right-hand side of the highway, with knowledge that she was being closely followed by a truck, was guilty of contributory negligence in changing her course by turning to the right and entering an intersecting highway—the collision occurring between said turning car and said truck.

Harmon v Gilligan, 221-605; 266 NW 288

Contributory negligence—passenger. Record reviewed relative to the facts and circumstances attending the unobscured and simultaneous approach, on a clear day, of northbound and of eastbound automobiles, to an intersection of arterial highways (where a collision occurred), and held insufficient to establish contributory negligence per se on the part of a passenger who was traveling in the northbound car and who was injured in said collision.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570

Contributory negligence per se—street intersection. The occupants of an eastbound automobile were guilty of contributory negligence per se under testimony that upon arriving at an intersecting north and south street, on a clear day, they looked to the south without obstruction for a distance of at least 225 feet, and saw no approaching car, and thereupon entered the intersection and moved across the same at ten miles per hour, but before they had fully cleared the intersection were hit by a northbound car traveling at the rate of 40 or 50 miles per hour.

Hewitt v Ogle, 219-46; 256 NW 755

Contributory negligence—looking to left and right. The driver of an automobile, moving easterly at the rate of 20 miles per hour, who, when some 140 feet from an intersection, looks and sees no vehicle approaching from the north within a distance of 290 feet, is not guilty of negligence per se in not again looking to the north until after he had satisfied himself, as soon as possible, when near the intersection that no one was approaching from the south.

Liddle v Hyde, 216-1311; 247 NW 827; 33 NCCA 433

Failure to look to left on entering intersection—not contributory negligence as matter of law. Principle reaffirmed that vehicle driver's failure to look to the left when entering highway intersection does not constitute contributory negligence as a matter of law.

Rogers v Jefferson, 226-1047; 285 NW 701

Contributory negligence when not determined as matter of law. In action for personal injuries and damage to automobile resulting from collision with defendant's automobile, plaintiff is not guilty of contributory negligence as a matter of law for failure to maintain lookout, yield right of way, and make proper stop before entering arterial highway when evidence discloses that as plaintiff was about to cross an arterial highway he looked to the right and saw defendant's automobile at a distance of 150 feet and then proceeded across intersection at speed of between 5 and 10 miles per hour until defendant's automobile collided with right rear wheel of plaintiff's automobile—more than half of plaintiff's automobile being out of the intersection.

Cowles v Joelson, 226-1202; 286 NW 419

Jury question. Evidence held to present jury question on the issue of negligence at a street intersection.

Hartman v Red Ball, 211-64; 233 NW 23
Appleby v Cass, 211-1145; 234 NW 477
Wheeler v Peterson, 213-1239; 240 NW 683; 33 NCCA 451
Branch v Railway, 214-689; 243 NW 379

Negligence—jury question — pedestrians in business district. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Intersection collision—complex facts—jury question. An intersection collision involving disputed facts, fractional seconds, speeds of 40 to 50 miles an hour, and failure to see an approaching automobile presents, not a matter of law for the courts, but a question for the jury to determine blame.

Eby v Sanford, 223-805; 273 NW 918

Negligence—jury question of fact and negligence. In a damage case resulting from a collision between a taxicab and an automobile at an intersection, when the record does not conclusively show negligence, that question and how the accident occurred is for the jury.

Womochil v Peters, 226-924; 285 NW 151

Speed—distance. In intersection collision, evidence of speeds and distances raises jury question and directed verdict was error.

Short v Powell, 228- ; 291 NW 406

Increasing speed at intersection—jury question. A motor vehicle operator who materially and intentionally increases the speed of his vehicle "when approaching and traversing a highway intersection", seemingly in violation of §5031, C., '35, is not necessarily guilty of negligence per se.

Carpenter v Wolfe, 223-417; 272 NW 169

Assuming compliance with law when danger obvious—jury question. Where plaintiff, riding with his son, approaches an intersection of county trunk roads and on his left observes defendant also approaching the intersection, altho plaintiff may assume that defendant will obey the right of way law, he must not place himself in a position of obvious danger avoidable by the exercise of ordinary care, and whether or not he did so place himself is a jury question.

Rogers v Jefferson, 224-324; 275 NW 874

Prior statute—failure to yield right of way—directing verdict improper. The right-of-way law imposes on a person approaching an intersection from the left the duty to yield the way, a violation of which, under ordinary circumstances, constitutes negligence, and in such a case the defendant is not entitled to a directed verdict.

Bletzer v Wilson, 224-884; 276 NW 836

Unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pavement when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

Intersection—what constitutes—instructions. Where a north and south highway splits into two curves near an east and west highway, and connects with the latter at two points some 900 feet apart, it is not erroneous for the court to instruct that the intersection embraces the entire distance of 900 feet (1) when the evidence tends to show that the authorized public authorities have treated said distance as the intersection, and (2) when the instruction is manifestly given for the sole purpose of guiding the jury in applying the statutory command that motorists shall reduce their speed to a reasonable and proper rate when approaching and traversing intersections of public highways.

Enfield v Butler, 221-615; 264 NW 546

"Intersection" of highways—definition. In a damage action arising from a collision of motor vehicles at a highway intersection, where the question of negligence centered largely around the rights of the parties within the intersection, it was prejudicial error to instruct the jury that "intersection" is the area within the fence lines if such fence lines were extended across the road, when a statute defines "intersection" as being the area within the lateral boundary lines of highways which join.

Hupp v Doolittle, 226-814; 285 NW 247

Instructions considered as a whole. In an action for injuries sustained by driver of a motor vehicle in collision with an automobile approaching an intersection from the left, an instruction which in part states, "If a traveler comes to an intersection and finds no one approaching from the right upon the other highway within such distance and approaching at such a rate of speed as to reasonably indicate danger of a collision, he may proceed as a matter of right to use the intersection, unless from his observation he is apprised to the contrary", when considered with remainder of instruction, was not prejudicial. Instructions must be taken together, and especially must all parts of one instruction be considered as a whole.

Rogers v Jefferson, 226-1047; 285 NW 701

Rights and duties at intersection—instructions. Instructions relative to the rights and duties of operators of automobiles at an intersection reviewed and held authorized under the pleadings.

Melsha v Dillon, 214-1324; 243 NW 295

Compelling jury to draw certain inference. Where plaintiff and defendant were, under conditions which rendered visibility poor, approaching the same intersection approximately at the same time, the court cannot properly instruct the jury that if plaintiff could see several hundred feet in the direction from which defendant was approaching, then the jury must conclude either (1) that plaintiff did not look for defendant as was his duty, or (2) that plaintiff did see the defendant.

Appleby v Cass, 211-1145; 234 NW 477

Instruction similar to request—yielding right of way—justifiable assumption. The court may refuse a requested instruction and give the fair equivalent thereof in its own language. So held as to an instruction relative to the duty of the operator of an automobile to yield the right of way at an intersection.

Appleby v Cass, 211-1145; 234 NW 477

Assumption of issuable fact. Instructions are properly refused when they assume that one of the parties to an accident had the superior right to enter a street intersection, such right being a matter of dispute.

Waldman v Motor Co., 214-1139; 243 NW 555

Instructions—assumption of fact. Instruction relative to a collision between automobiles at a street intersection reviewed, and held not to assume that one of the cars first entered the intersection.

Becvar v Batesole, 218-858; 256 NW 297

Instruction—reducing speed at intersection.

Davis v Hoskinson, 228- ; 290 NW 497

Presentation of conflicting theories—non-assumption of fact issue. Instructions presenting the conflicting theories of the plaintiff and defendant as to a collision between motor vehicles reviewed, and held, when viewed as a whole, not to assume that the collision occurred in the center of an intersection, said point of collision being in issue.

Ballain v Brazelton, 221-806; 266 NW 522

Instruction—imposing undue care. An instruction which, after directing the jury that the operator of a vehicle on approaching intersecting highways must keep a lookout for approaching vehicles, imposes on the operator, if there be danger of a collision, the duty to "reduce his speed" or to "bring his vehicle to a stop", is erroneous.

Reason: Such instruction imposes on the operator a greater duty than to exercise reasonable or ordinary care.

Knutson v Lurie, 217-192; 251 NW 147; 37 NCCA 62

5026.02 Turning left at intersection.

Obeying statute — presumption. Principle reaffirmed that a motor vehicle driver in attempting to make a left-hand turn into an intersecting road has a right to proceed on the assumption (unless he has knowledge to the contrary) that another driver, approaching from his right, will obey the law (§5031, C., '35) by reducing his speed to a reasonable and proper rate when approaching and traversing said intersection.

Enfield v Butler, 221-615; 264 NW 546

Justifiably attempted left turn. A motor vehicle driver cannot be deemed negligent in attempting a left-hand turn into an intersecting highway when, acting as a reasonably cautious and prudent person, he believes and has a right to believe that vehicles approaching from his right during the turn are at such distance that he can safely make the turn.

Enfield v Butler, 221-615; 264 NW 546

Turning to right—preference at intersections—statutes inapplicable. Statutory requirements relative (1) to drivers turning "to the right" when meeting (§5020, C., '35 [§5024.02, C., '39]), and (2) to preference accorded drivers at highway intersections (§5035, C., '35 [§5026.01, C., '39]), can, from the very nature of the transaction, have no application to an occurrence where the driver of a westbound car in making, or instantly after making, a left-hand turn into an intersecting road came into collision with an eastbound car traveling on or near the highway from which the left-hand turn was made.

Enfield v Butler, 221-615; 264 NW 546

Turn at intersection—increasing speed—negligence per se. The operator of a westbound automobile, who makes a left-hand turn at an intersecting street, and thereupon increases his speed, in order to escape a collision with an eastbound car which he knows is but some forty feet west of the intersection and approaching it at a speed twice his own speed, is guilty of negligence per se.

Parrack v McGaffey, 217-368; 251 NW 871

Contributory negligence per se. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Left-hand turn—conflicting testimony. Evidence reviewed in detail in an action involving a left-hand turn, during the nighttime, of a westbound car, and its collision with an eastbound car near the point of intersection, and held, because of the conflict in testimony, to present a jury question on the issue whether plaintiff had established his freedom from contributory negligence.

Enfield v Butler, 221-615; 264 NW 546

Holding under former statute. In making a left-hand turn into an intersecting road, negligence on the part of a westbound driver, (1) in failing to drive to the right and beyond the center before turning, or (2) in failing to note whether he could make the turn in safety, is not the proximate cause of injuries received by him by being hit by an eastbound car after he had completed the turn and was wholly on the intersecting road.

Enfield v Butler, 221-615; 264 NW 546

Instructions—yielding half of traveled way—beaten path (?) or entire roadway (?). When the plaintiff's truck turned left at a blind corner, keeping to the right of the beaten path, but not to the right side of the graveled highway, and collided with the defendant's car which was approaching the corner on the right side of the road, it was not improper to instruct the jury that a car must yield half the traveled or graveled part of the road when meeting another car, and, that for the plaintiff to recover, it must be found that the truck was hit while on the right side of the road; or, for a recovery to be had by the defendant on a counterclaim, that the plaintiff was negligent in not yielding half the road.

Kiesau v Vangen, 226-824; 285 NW 181

Unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pave-

ment when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

5026.03 Entering through highways.

Discussion. See 25 ILR 834—Failure to stop at arterial highway when no stop sign

Right of way—county trunk roads. The right-of-way law (§5035, C., '35) applies to an intersection of county trunk roads unless traffic is regulated by signs erected by the supervisors under authority of law indicating a different rule.

Rogers v Jefferson, 224-324; 275 NW 874; 4 NCCA(NS) 318

Right of way—county engineer—signs. In the absence of signs, indicating a different right-of-way rule, erected by authority not of county engineer but of the board of supervisors, the law giving right of way to traffic from the right applies to an intersection of county trunk roads.

Smithson v Mommsen, 224-307; 276 NW 47

Intersecting county roads—negligence per se. The operator of an automobile on a county trunk road (an arterial highway), having the right of way over traffic on an intersecting local county road, is not guilty of negligence per se in entering such an intersection with his car under apparent control and without seeing a car approaching from his right at a high and dangerous rate of speed.

Arends v DeBruyn, 217-529; 252 NW 249; 37 NCCA 78

Primary roads—right of way. Inasmuch as vehicles traveling on a primary road have right of way at intersections with nonprimary roads, the operator of a vehicle on a nonprimary road is guilty of negligence per se when he attempts to cross an intersection with a primary road, at a speed of 10 miles per hour, when he knows or ought to know that another vehicle on the primary road is, at a distance of 80 or 90 feet, approaching the intersection at a speed very greatly in excess of 10 miles per hour.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

County trunk road without stop signs.

Davis v Hoskinson, 228- ; 290 NW 497

Arterial highway—negligence per se. The operator of an automobile on a county trunk arterial highway (on which no "stop" or "slow" signs had been erected at points intersected by county local roads) is guilty of negligence per se in knowingly approaching an obscured intersection without either (1) slacking his speed (of some 25 or 30 miles per hour) as required by §5031, C., '31 [§5023.04, C., '39], or (2) giving some warning signal of his approach as required by §5043, C., '31 [§5031.03, C., '39]. (But see Dikel v Mathers, 213 Iowa 76.)

Lang v Kollasch, 218-391; 255 NW 493; 37 NCCA 74

Contributory negligence — jury question. Evidence reviewed, in detail, relative to the stoppage of an automobile before entering a curving boulevard (on which traffic had the right of way) and held to present a jury question on the issue of the contributory negligence of the operator, and not a case of contributory negligence per se.

Shutes v Weeks, 220-616; 262 NW 518

Contributory negligence when not determined as matter of law. In action for personal injuries and damage to automobile resulting from collision with defendant's automobile, plaintiff is not guilty of contributory negligence as a matter of law for failure to maintain lookout, yield right of way, and make proper stop before entering arterial highway, when evidence discloses that as plaintiff was about to cross an arterial highway, he looked to the right and saw defendant's automobile at a distance of 150 feet and then proceeded across intersection at speed of between 5 and 10 miles per hour until defendant's automobile collided with right rear wheel of plaintiff's automobile—more than half of plaintiff's automobile being out of the intersection.

Cowles v Joelson, 226-1202; 286 NW 419

5026.04 Entering stop intersection.

Disregarding "stop" sign — elements of offense. Defendant in a criminal prosecution for failure to stop his automobile at intersecting roads in obedience to a duly and lawfully erected "stop" sign may be properly convicted tho there is no evidence of careless driving, intent, willfulness, or wantonness except such as may be deduced from the failure to stop, the defendant at the time acting under no compulsion.

State v Wilson, 222-572; 269 NW 205

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "stop" and "slow" signs, as they are found upon the public highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570; 4 NCCA(NS) 318

Ignoring statutory "stop" sign—effect. Failure of the operator of an automobile on a highway outside a city or town to comply, before entering an arterial highway, with a duly erected, statutory "stop" sign, constitutes negligence.

Willemsen v Reedy, 215-193; 244 NW 691
Hogan v Nesbit, 216-75; 246 NW 270

Right of way on primary roads. A traveler on a nonprimary road in approaching an intersection with a primary road does not fulfill his full duty of care by stopping at the

statutory "stop" sign erected outside the primary road. He must not only so stop and observe the travel on the primary road, but must continue so to observe until he reaches the intersection and until he has passed the point where danger may reasonably be apprehended.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Obeying law—right to assume. The operator of a motor vehicle on an arterial (primary) highway in approaching an intersection with a side road has the legal right to act on the assumption that a driver who is immediately approaching on a side road, will stop at and before entering the intersection in obedience to a statutory "stop" sign there erected.

Hogan v Nesbit, 216-75; 246 NW 270

Exercising right of way—other motorist's ignorance of stop sign. A motorist approaching an intersection from the west, knowing he has statutory right of way over traffic from the north and knowing a stop sign is erected on the highway intersecting from the north, may not be charged with negligence because a motorist on his left, approaching from the north, has no knowledge of the intersection and therefore drives past the stop sign into such intersection, resulting in a collision.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

Primary and trunk road intersection—preference in re right of way. A northbound motorist on a primary road cannot be deemed guilty of negligence proximately causing a collision with an eastbound car traveling on an intersecting county trunk road:

1. When each car as it approached the intersection was in plain view of the driver of the other car for several hundred feet,
2. When the driver on the trunk road ignored the "stop" sign on said road, and, by his rate of speed, justified the belief that he intended to turn to the right on entering the primary road,
3. When the motorist on the primary road was, prior to, and at the time of, entering the intersection, traveling on the right-hand side of the road and at the uniform rate of some 30 miles per hour, and
4. When the motorist on the primary road discovered for the first time when near the center of the intersection that the driver on the trunk road was driving straight through the intersection.

May v Hall, 221-609; 266 NW 297

Parking—view of stop sign obstructed—others' imputed knowledge of stop sign no defense. Where defendant's truck was parked so as to obscure the view of a stop sign at an intersection, and where motorist proceeded into intersection without stopping and collided with an automobile on intersecting street, defendant will not be exempt from liability on ground that knowledge would be imputed to motorist that intersecting street was an arterial highway, because of statute as to posting signs.

Blessing v Welding, 226-1178; 286 NW 436

Recklessness. The act of a motorist in the nighttime in driving into a highway intersection without stopping in obedience to a statutory "stop" sign, when shortly theretofore he had seen an automobile approaching said intersection on the intersecting highway, manifestly does not necessarily constitute "recklessness" within the meaning of the guest statute (§5026-b1, C., '35 [§5037.10, C., '39]). Evidence exhaustively analyzed (in a light as favorable to plaintiff as is reasonably possible), and held per se insufficient to support an allegation of recklessness in the operation of an automobile.

Hansen v Dall, 220-817; 263 NW 530

5026.05 Entering from private driveway.

Failure to yield right of way—hidden road. The driver of an automobile may not be said to be negligent per se for failure to yield the right of way to a car approaching him from the right on an unknown and absolutely hidden road.

Sexauer v Dunlap, 207-1018; 222 NW 420

Contributory negligence—jury question. Evidence relative to the act of driving from a private driveway into a public highway in front of an approaching car reviewed, and held to present a jury question on the issue of contributory negligence.

Tinley v Implement Co., 216-458; 249 NW 390

View unobstructed. The statute which requires the driver of a vehicle on a private driveway to stop before entering a public highway does not apply when the view of the driver in the direction of vehicles approaching on the public highway is unobstructed for a distance of a thousand feet.

Tinley v Implement Co., 216-458; 249 NW 390

Backing out of private driveway. Tho the driver of a motor vehicle in driving or backing from a private driveway into a public highway where the view along the public highway is not obstructed, is not by statute required to stop before entering the public highway, yet he is required as a matter of ordinary care and prudence to look for vehicles approaching on the public highway and to act with ordinary care in view of what he sees or should see.

Carstensen v Thomsen, 215-427; 245 NW 734

Emerging from private drive—failure to stop. The issue of negligence on the part of the operator of an automobile in driving out of a private driveway and upon a main traveled road without stopping and looking for

approaching vehicles is properly submitted to the jury on supporting testimony.

Olson v Shafer, 207-1001; 221 NW 949; 32 NCCA 252

Tinley v Implement Co., 216-458; 249 NW 390

View obstructed—duty to stop. Driving from a private driveway into a public highway without stopping immediately before entering said highway constitutes negligence when, from the private driveway, the view of nearby and approaching travel on the public highway is obstructed.

Wood v Branning, 215-59; 244 NW 658

Hunter v Irwin, 220-693; 263 NW 34

Physical facts—negligence. Where a car approaching a public highway from a private driveway, traveling in neutral at only 3 miles per hour, and while still 12 feet from such highway, driver saw defendant's truck approaching at a rapid rate, the fact that car was out in the highway when collision occurred would either show that brakes were inadequate or that driver was negligent in the operation of car.

Hermon v Egy, (NOR); 207 NW 116; 31 NCCA 409

Backing vehicle out of private driveway. The driver of a truck who is nonnegligently traveling on the north side of a straight and level public highway in plain and unobstructed view of an automobile standing outside the public highway and in a private driveway on the same side of the highway, has the right to assume that the automobile will not without warning be suddenly backed out of the private driveway and immediately in front of his oncoming truck, and if said automobile is so backed out and in his immediate front, he cannot be deemed negligent because, in such sudden emergency, he turns to his left and unintentionally strikes a person whom he theretofore knew was on the south side of the highway.

Carstensen v Thomsen, 215-427; 245 NW 734; 32 NCCA 300; 34 NCCA 326; 39 NCCA 369

Knowledge of party's predicament. The fact that a defendant drove his automobile from his private driveway upon the public highway with knowledge that plaintiff was rapidly approaching, and had to some extent lost control of his car because of the icy condition of the highway, may have a bearing on the issue of defendant's due care.

Stilson v Ellis, 208-1157; 225 NW 346; 32 NCCA 258; 35 NCCA 111

Turning or changing course. Evidence reviewed, and held to present a jury question on the issue whether a motorist was negligent in suddenly turning from the right side to the left side of a paved rural highway (in order to enter a private driveway on the latter side of said road), and whether, if negligent, said negligence was the proximate cause of a collision with another vehicle which he knew he was about to meet.

McKinnon v Guthrie, 221-400; 265 NW 620

PEDESTRIANS' RIGHTS AND DUTIES

5027.01 Pedestrians subject to signals.

"Stop and go" signals—change after entering intersection—nonnegligence per se. A pedestrian who, in obedience to a municipally operated "go" signal, starts across the street on the pathway provided for pedestrians and suddenly discovers that said "go" signal has changed to "stop", is not guilty of negligence per se in failing to look for, see, and avoid a vehicle which, under said change in signals, passes entirely across the intersection and hits and injures said pedestrian within less than two seconds after said change in signals occurs; especially is this true (1) when said pedestrian has, by ordinance, the right of way over said vehicle because he was first properly to enter said intersection, and (2) when said pedestrian, at the very instant of said change in signals, was immediately approaching other stationary vehicles known to be awaiting release from a "stop" signal.

Dougherty v McFee, 221-391; 265 NW 176

5027.02 Pedestrians on left.

Highway traversing city street—highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 724

Minor walking on wrong side of highway—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about 4 or 5 feet from west side of highway, and failing to make observations to oncoming traffic from the rear, while walking after dark on a street traversed by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Negligence per se—walking in center of highway. A pedestrian who, with normal sight and hearing, travels on a clear night in a space which is substantially two feet wide and which is marked by parallel black lines drawn along the center of a straight, 18-foot, paved highway, with an unobstructed view both to his front and rear of more than a quarter of a mile, with full opportunity to walk on the smooth, 6-foot-wide dirt shoulders bordering the pavement, is guilty of negligence per se.

Lindloff v Duecker, 217-326; 251 NW 698; 34 NCCA 234; 35 NCCA 819; 39 NCCA 308

Pedestrian—duty to leave highway when danger impending—contributory negligence. A pedestrian wearing dark clothes and walking at night along a heavily traveled arterial street should, in the exercise of reasonable care and prudence, ascertain his immediate danger when two automobiles—one from in front and one from behind—are approaching at the same time, and when he fails to remove himself as speedily as possible from the place of danger, he is contributorily negligent.

Armbruster v Gray, 225-1226; 282 NW 342

Ordinary care—undue limitation on jury. Reversible error results from instructing the jury that a pedestrian on the highway need not, in the exercise of due and ordinary care, continuously look backward and forward.

(The injured party, on a dark night, had ascended a hill and passed the crest thereof and was, when injured by a car approaching from his rear, walking down the sharply descending slope, either near the middle line of the 18-foot pavement or near the right-hand side thereof. The car which did the injury met and passed another car momentarily before the pedestrian was hit.)

Taylor v Wistey, 218-785; 254 NW 50

Vehicles approaching from rear—pedestrian's duty. An instruction relative to the duty of a pedestrian traveling in the public highway to keep a reasonable lookout for vehicles approaching from the rear as well as from the front need not necessarily be modified on request to the effect that such duty does not require him to turn about "constantly and repeatedly" to observe the possible approach of vehicles from his rear.

Kessel v Hunt, 215-117; 244 NW 714; 34 NCCA 247

Failure to keep lookout. The foreman of a paving outfit is guilty of negligence per se in walking along the unpaved portion of a rough road for a distance of some 200 feet without making any observations to his rear for trucks which he knew were being backed along said road and in his immediate direction at the rate of one truck each 90 seconds.

Hedberg v Lester, 222-1025; 270 NW 447

5027.03 Pedestrians' right of way.

Negligence—dual view of evidence. A jury question on the issue of negligence arises (1) when the evidence is conflicting as to what the injured party did or did not do, and (2) when there may be a fair difference of opinion whether that which the injured party admittedly did do or omitted to do constituted negligence. Evidence as to what an elderly lady did in crossing a public street after nightfall presented a jury question on the issue of contributory negligence.

Robertson v Carlgren, 211-963; 234 NW 824

Contributory negligence as jury or law question. The court has no right to rule that a pedestrian—injured while attempting to cross a public street at the place provided for such crossing and by coming into collision with a moving vehicle—is guilty of negligence contributing to his own injury unless the facts and circumstances, after viewing them in the light most favorable to the pedestrian, are such that all reasonable minds must arrive at the same conclusion, to wit, negligence upon the part of the pedestrian. Evidence held to present jury, not law, question.

Huffman v King, 222-150; 268 NW 144

Attempting to dodge car. The act of a pedestrian, while crossing a street, in attempting to dodge an oncoming car, may constitute the proximate cause of the injuries suffered by him. So held where the pedestrian evidently stepped or turned back directly in front of said car.

Kortright v Strater, 222-603; 269 NW 745

Duty to pedestrians at intersection. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Instructions — unsupported assumption of fact. A requested instruction which erroneously assumes that there is a marked place on a street pavement for the crossing by pedestrians is properly refused.

Minks v Stenberg, 217-119; 250 NW 883

5027.04 Crossing at other than crosswalk.

Negligence per se in crossing street. A pedestrian who attempts to cross a street in the middle of a block without looking for a plainly approaching vehicle or who sees said oncoming vehicle when it is only a few feet distant and attempts to pass in front of it is guilty of contributory negligence per se.

Whitman v Pilmer, 214-461; 239 NW 686; 35 NCCA 693

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Crossing traffic-congested street—negligence per se. A pedestrian who, while crossing a traffic-congested street at a place other than the place specifically provided for such crossing, fails to look for approaching vehicles, or voluntarily steps in front of an immediately approaching vehicle which he does see, is guilty of negligence per se.

Spaulding v Miller, 216-948; 249 NW 642; 35 NCCA 676

Crossing highway without looking. An adult person, after alighting from an automobile which had been stopped substantially astraddle the north edge of an 18-foot pavement on a heavily traveled country highway, is guilty of negligence per se in attempting to walk to the south and across said pavement without making any observations to his unobstructed right for eastbound vehicles.

Zuck v Larson, 222-842; 270 NW 384

Diagonal crossing of street—contributory negligence. It cannot be said that a pedestrian is guilty of negligence per se when he looks both at the street curb and in the middle of the street for approaching vehicles and sees a vehicle at a distance of some 150 feet; and this is true tho he was proceeding diagonally across a street intersection of peculiar shape, in order to board an approaching streetcar, there being, apparently, nothing in the movements of the approaching vehicle to fairly suggest danger.

Minks v Stenberg, 217-119; 250 NW 883; 35 NCCA 589

Instructions—right of way—precautions—crosswalks defined—custom.

Scott v McKelvey, 228- ; 290 NW 729

5027.05 Duty of driver.

ANALYSIS

I PEDESTRIANS GENERALLY
II CHILDREN
III INCAPACITATED PERSONS

Children, contributory negligence generally. See under §5037.09(III)
General application of motor vehicle law. See under §5037.09
Imputed negligence generally. See under §5037.09(IV)

I PEDESTRIANS GENERALLY

Opinion evidence — allowable conclusion. When the actions and conduct of a witness at a certain time are material and there is no other adequate way of placing the matter before the jury, then the witness should be permitted to describe what he saw, even tho his description consists of a mixed statement of fact and conclusion. So held as to the statement "It seemed as tho the man jumped right in front of the car, and we hit him."

Wieneke v Steinke, 211-477; 233 NW 535

Evidence—harmless error. Evidence concerning a path leading from a sidewalk to a curb line, and traveled by an injured person just before he stepped into a street and was injured by an automobile, is quite harmless when the driver of the automobile admittedly saw the injured party at all times while he was crossing the street.

O'Hara v Chaplin, 211-404; 233 NW 516

Evidence—most favorable view—plaintiff's contention rebutted. Even when the most favorable view of the evidence is taken, plaintiff's contention, that he was struck by defendant's automobile at a street intersection after the automobile had approached the intersection from a side street, was not established when the testimony of the witness on whom the plaintiff relied was inherently inconsistent and was disproved by skid marks and other testimony showing that the automobile had not been on the side street.

Ward v Zerzanek, 227-918; 289 NW 443

"No eyewitness" rule—nonapplicability. In a pedestrian-automobile accident, where a motorist testifies that he saw deceased just prior to striking and killing him, the rule that in the absence of eyewitnesses the deceased is presumed to have exercised due care has no application.

Edwards v Perley, 223-1119; 274 NW 910

Res ipsa loquitur—negligence inferred by jury from circumstances. Pleading specific acts of negligence precludes recovery under the doctrine of res ipsa loquitur, and as no inference of negligence arises from the mere fact of a collision, a pedestrian's action to recover damages from a motorist may not be submitted to the jury on the theory that the jury might reasonably infer negligence from the circumstances. A case may be submitted on this theory only when there may be drawn from the circumstances no other reasonable conclusion than the existence of negligence.

Armbruster v Gray, 225-1226; 282 NW 342

Negligence—emergency as legal excuse. Evidence that a pedestrian walking along a shoulder of a highway suddenly stepped in front of an automobile, where he was struck, raises a jury question as to such emergency and as to legal excuse for failing to stop within the assured clear distance ahead.

Edwards v Perley, 223-1119; 274 NW 910

Assured clear distance—legal excuse—jury question. Where a pedestrian crossing the street is struck by a motorist after having first been seen 180 feet away on the opposite curb and could have been seen by the motorist at all times prior to the collision, motorist's showing that pedestrian "popped up" ahead of him as legal excuse for not stopping within the assured clear distance is evidence raising a jury question.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Stopping within assured clear distance—scope of duty. Principle reaffirmed that the duty so to operate an automobile as to be able to stop within the assured clear distance ahead does not embrace a duty to so operate as to be able to stop immediately should a person unexpectedly and without warning step into the path of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

I PEDESTRIANS GENERALLY—continued

Failure to sound horn—nonproximate cause. Failure to sound the horn on an automobile is quite inconsequential when there was no occasion to give such signal until the injured party, suddenly and without previous warning, ran into the immediate pathway of the car at a time when it was impossible to stop the car and avoid the accident.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Attempting to dodge car. The act of a pedestrian, while crossing a street, in attempting to dodge an oncoming car, may constitute the proximate cause of the injuries suffered by him. So held where the pedestrian evidently stepped or turned back directly in front of said car.

Kortright v Strater, 222-603; 269 NW 745

Last clear chance. The physical facts and circumstances attending an accident may present a jury question on the issue whether defendant actually discovered plaintiff's negligently assumed position of peril in such time that defendant, by the exercise of reasonable care, might have avoided said accident.

Groves v Webster City, 222-849; 270 NW 329

"Last clear chance"—erroneous submission. The submission to the jury of the issue of "last clear chance" is improper on undisputed testimony that, while an automobile was moving along a traffic-congested street at a speed of from five to ten miles an hour, a pedestrian negligently placed himself in a position of danger in front of said car, but that the operator of said car did not discover said position of danger until his car was only seven feet from said pedestrian, and that thereupon said operator applied or attempted to apply his brakes but not in time to avoid injuring said pedestrian.

Spaulding v Miller, 220-1107; 264 NW 8

Last clear chance doctrine. A plaintiff, who stepped directly into the path of the defendant's automobile from a position of safety on a curb, could not rely on the last clear chance doctrine when there was no evidence that the defendant could have avoided the accident by exercising reasonable care after discovering that the plaintiff was in a perilous position.

Ward v Zerzanek, 227-918; 289 NW 443

Speed as nonproximate cause. A rate of speed which is not negligence per se cannot be deemed the proximate cause of an accident when the act of the injured party in stepping into the pathway of the car was so sudden and unexpected as to render impossible the stopping of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Stepping into path of automobile—rate of speed immaterial. The negligence of a pedestrian, who left a position of safety on a curb and walked directly into the path of an automobile which struck him, was the proximate cause of the accident, and under the circumstances the rate of speed of the car was not material.

Ward v Zerzanek, 227-918; 289 NW 443

Speed—when nonproximate cause. The operation of an automobile, even at an excessive speed, alongside a moving streetcar and in the direction in which the streetcar is moving, is not the proximate cause of an injury to a pedestrian who suddenly darts across the streetcar track ahead of the moving streetcar, and into the line of automobile travel and is hit by the automobile.

Pettijohn v Weede, 209-902; 227 NW 824; 35 NCCA 5

Failure to stop for streetcar—proximate cause. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Truck thrown against plaintiff. Conflicting testimony as to the speed of the defendant's truck while following pick-up truck on an icy street, and as to the distance between the trucks when the one in front skidded and turned around, presented a jury question as to whether the driver of the defendant's truck was guilty of negligence in colliding with the pick-up truck, forcing it over a curb where it struck the plaintiff, and whether such negligence, if any, was the proximate cause of the plaintiff's injuries.

Remer v Takin Bros., 227-903; 289 NW 477

Collision—trucker struck while retrieving goods scattered on highway. A defendant-motorist's negligence in striking a truck stopped on the highway is not the proximate cause of a later injury to the trucker by another motorist, who struck him while he was attempting to remove his merchandise spilled on the highway. The latter intervening cause was the proximate cause of his injury.

McClure v Richard, 225-949; 282 NW 312

Aiding stalled motorist—automobile moving backward—no duty to anticipate negligence. A bystander, offering to help extricate a motorist's car from an icy parking place, who steps behind the car, other people being on each side, in order to push, and who calls to the motorist, "Let's go ahead," cannot as a matter of law be held to anticipate that the automobile was in reverse gear and would move backward instead of forward, causing him injury.

Huston v Lindsay, 224-281; 276 NW 201

Acts constituting negligence—backing up truck—losing control. It cannot be held as a matter of law that plaintiff failed to establish any negligence on the part of the defendant when the record shows that truck driver, after backing an intended 2 or 3 feet and almost stopping, suddenly moved back an additional 12 feet, crushing plaintiff against a pile of bricks

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Person in comparative safety—no duty to anticipate negligence. Plaintiff, standing between a truck and a pile of brick 15 feet away, who, after requesting the truck driver to back up 2 or 3 feet, is crushed against the pile of brick by the truck suddenly backing over the entire distance, is not contributorily negligent as a matter of law, but question is for jury as to plaintiff's right to rely on presumption that truck driver would use due care in backing up and would not suddenly back over the entire distance.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Negligence—assumption that law will be obeyed. Principle reaffirmed that just what acts of care must be taken by a pedestrian on the highway in order to save himself from the imputation of negligence may be very materially influenced and controlled by his right to assume that others using the highway will obey the law of the road.

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Driving outside traveled roadway. An allegation that a motorist, without warning, ran his car outside the traveled part of the highway, and injured plaintiff, constitutes an adequate charge of negligence, and must, if supported by evidence, be submitted to the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Lack of precaution for safety—plaintiff's own proof. A person riding with a trucker and struck by an automobile while helping put on tire chains after dark, having placed himself in a perilous position on the traffic side of the truck stopped astraddle the center of the highway, fails to prove his freedom from contributory negligence where there is no evidence that he kept any lookout or took any precautions for his own safety.

Denny v Augustine, 223-1202; 275 NW 117

Contributory negligence—stalled motorist—poor visibility in snowstorm. A plaintiff motorist who during a snowstorm becomes stalled in a snowdrift is not, as a matter of law, guilty of contributory negligence because, in attempting to extricate his car, he must at times place himself with his back to oncoming traffic alongside his vehicle, tho meanwhile making occasional attempts to observe traffic in that direction, especially when before the vehicle struck him he observed it when it was about 50 feet away, such distance under the undisputed evidence being the extreme extent of visibility.

Youngman v Sloan, 225-558; 281 NW 130

Standing on shoulder—standard of care.

Janes v Roach, 228- ; 290 NW 87

Failure to signal approach to stationary truck. The operator of an automobile, driving in broad daylight on the proper side of a country highway where the view is wholly unobstructed, is not guilty of negligence in failing to signal his approach to an open, stationary milk truck with a person standing beside it (which is also on the proper side of the highway) when said operator has no reason to suppose or apprehend that someone may be in or about said truck and may suddenly emerge therefrom and into the pathway of said oncoming automobile.

Crutchley v Bruce, 214-731; 240 NW 238; 31 NCCA 376

Person standing behind tail light of car.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Standing in path of truck. One who is standing substantially on the very edge of a passageway through which an approaching truck on a downgrade had to pass and knows that the truck operator is having difficulty to control the truck owing to the slippery condition of the road and does not step out of the way tho he has ample opportunity to do so, is guilty of contributory negligence.

Norris v Lough, 217-362; 251 NW 646

Walking in middle of highway. A pedestrian who, with normal sight and hearing, travels, on a clear night, in a space which is substantially two feet wide and which is marked by parallel black lines drawn along the center of a straight, 18-foot, paved highway, with an unobstructed view both to his front and rear of more than a quarter of a mile, with full opportunity to walk on the smooth, six-foot-wide dirt shoulders bordering the pavement, is guilty of negligence per se.

Lindloff v Duecker, 217-326; 251 NW 698; 34 NCCA 234

Pedestrian on highway. The rule that a pedestrian and an automobile have equal rights upon the highway does not authorize a highway employee to stand on the edge of the pavement watching an oncoming automobile travel a distance of 200 feet on the same side of the pavement, knowing the pavement is in an icy condition, knowing that the driver of the oncoming automobile is having difficulty controlling it, from which facts it is, or to a reasonably prudent man it would have been, apparent that he was occupying a position of danger, and consequently, in remaining there, he was guilty of contributory negligence. De-

I PEDESTRIANS GENERALLY—continued

fendant's motion for a directed verdict was properly sustained.

Cumming v Dosland, 227-470; 288 NW 647

Pedestrian crossing street — contributory negligence—jury question. A pedestrian crossing a street need not anticipate another's negligence, nor keep a constant lookout in both directions at the same time, nor wait for all approaching vehicles from both directions, and, moreover, he is not as a matter of law contributorily negligent merely in running while crossing a street altho not seeing an approaching motor vehicle 180 feet away; but in any case whether he could rightly assume he could cross in safety is a question of contributory negligence for the jury.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Contributory negligence—failure to look for cars in street. A pedestrian who, while crossing a public street, stops because of a car approaching from his immediate right, is guilty of contributory negligence when, observing that said car had also stopped, he at once moves forward without looking to his left or right, and is instantly hit by another car coming from said latter direction.

Stawsky v Wheaton, 220-981; 263 NW 313

Stepping into street in path of automobile. Plaintiff was guilty of contributory negligence as a matter of law in stepping from a curb into the path of an oncoming automobile which was in plain sight where it would have been seen by the plaintiff if he had looked.

Ward v Zerzanek, 227-918; 289 NW 443

Duty to pedestrians at intersection. Evidence reviewed and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Jury question. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper lookout for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420

Altfilisch v Wessel, 208-361; 225 NW 862; 32 NCCA 482; 34 NCCA 150

Robertson v Carlgren, 211-963; 234 NW 824

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 1 NCCA(NS) 57

Proper lookout for pedestrian—jury question. After motorist had seen pedestrian 180 feet away standing on the curb, and when pedestrian had almost reached the opposite side of the street before being struck by the motor vehicle, which meanwhile had traveled the 180 feet, during which time pedestrian was plainly visible, and when motorist claims he did not again see pedestrian until just before striking him, the evidence raises a jury question as to whether motorist kept proper lookout, and directing a verdict is improper.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Knowledge dispensing with signals. Whether the operator of an automobile failed to give proper signal on approaching a crossing should not be submitted to the jury when admittedly the complaining pedestrian had full and explicit knowledge of the immediate presence and approach of said car.

Wilkinson v Lbr. Co., 203-476; 212 NW 682; 31 NCCA 345

Irregular crossing of street — negligence. Record held to present a jury question on the issue whether a pedestrian was guilty of contributory negligence in crossing a street in the middle of a block; likewise whether the driver of an automobile was guilty of proximate negligence in injuring said pedestrian.

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Right of way instruction—crossing highway.

Scott v McKelvey, 228- ; 290 NW 729

Driving outside traveled roadway. An allegation that a motorist, without warning, ran his car outside the traveled part of the highway and injured plaintiff, constitutes an adequate charge of negligence, and must, of course, if supported by evidence, be submitted to the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Hitting pedestrian on shoulder of highway. Direct evidence of negligence which is insufficient, in and of itself, to generate a jury question may be sufficient when aided by such fair and reasonable inferences as are legally permissible for the jury to draw from such direct evidence and the attending circumstances. So held on the issue whether the driver of an automobile, in pursuance of a concerted plan between himself and others riding with him, negligently drove the car so close to a woman walking on the shoulder of the pavement that when the door of the car was opened she was hit thereby.

Tissue v Durin, 216-709; 246 NW 806; 2 NCCA(NS) 447

Withdrawal of issue supported by evidence —pedestrian off pavement. Under a record in a motor vehicle pedestrian accident case showing that the jury could have found from the evidence that decedent was more off the pavement than on it, it is error to withdraw from the jury plaintiff's allegation that his intestate had reached a place of comparative safety on the shoulder of the highway and that defendant left the highway without warning the pedestrian.

McCormick v Kennedy, 224-983; 277 NW 576

Failure to maintain lookout—proper failure to submit. Record reviewed in an action for damages for death of a pedestrian who was killed by being hit by an automobile on the public highway, and held to justify the court in refusing, for want of evidence, to submit to the jury the issue of the defendant's alleged failure to maintain proper lookout.

Hartman v Lee, 223-32; 272 NW 140

Failure to keep lookout alleged—substituting last clear chance—not permitted. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout, and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 140

Departure from pleaded theory. A plaintiff who predicates negligence in the operation of an automobile solely on the fact that defendant failed to give a warning signal after discovering plaintiff's position of danger may not complain that the court failed to instruct on the statutory duty to give a warning signal "on approaching tops of hills and intersecting highways."

Ryan v Shirk, 207-1327; 224 NW 824

Negativing defendant's plea. In an action for damages consequent on plaintiff being negligently struck and injured by defendant's automobile [in which action defendant pleads (1) a denial that his car struck plaintiff, and (2) that plaintiff was struck and injured by some other vehicle], the court commits reversible error by instructing that plaintiff cannot recover unless plaintiff establishes by a preponderance of the evidence not only (1) that defendant's car struck and injured plaintiff, but (2) that no other car struck and injured plaintiff.

Griffin v Stuart, 222-815; 270 NW 442

Stalled motorist—freedom from negligence—requested instruction—jury question. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and who, having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is not entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Person injured on highway construction work. In laborer's personal injury action arising because of truck backing into him while both were engaged in highway construction work, an instruction, that it is the duty of driver in moving a truck to exercise care and caution of ordinarily prudent person and to bring truck under proper control if he discovers, or in exercise of reasonable care should discover, a person in the path of truck, was neither erroneous as submitting to the jury a previously withdrawn issue as to whether defendant driver has truck under control, nor as permitting jury to speculate on defendant's negligence generally.

Rebmann v Heesch, 227-566; 288 NW 695

Reliance on another's duty—knowledge of breach no excuse for negligence. A plaintiff, injured by a passing automobile while helping defendant's employee-driver put on tire chains, may not excuse his own lack of due care by testifying that he relied on the driver to place out flares, when as a fact he knew both that the driver had no such intention and that no flares were so placed.

Denny v Augustine, 223-1202; 275 NW 117

Sudden and unexpected appearance of person. The operator of an automobile on a straight, open, and unobstructed public highway cannot be held to anticipate that some one will, without warning, suddenly emerge from behind a stationary object and place himself in the immediate pathway of the vehicle.

Watson v Ins. Assn., 215-670; 246 NW 655; 3 NCCA(NS) 333

Backing vehicle out of private driveway. The driver of a truck who is nonnegligently traveling on the north side of a straight and level public highway in plain and unobstructed view of an automobile standing outside the public highway and in a private driveway on the same side of the highway, has the right to assume that the automobile will not, without warning, be suddenly backed out of the private driveway and immediately in front of his oncoming truck, and if said automobile is so backed out and in his immediate front, he cannot be deemed negligent because, in such sudden emergency, he turns to his left and unintentionally strikes a person whom he theretofore knew was on the south side of the highway.

Carstensen v Thomsen, 215-427; 245 NW 734; 32 NCCA 300; 34 NCCA 326; 39 NCCA 369

II CHILDREN

Discussion. See 21 ILR 803—Anticipating conduct of children.

Passing children—care required. A motorist, in approaching and passing on the highway children who are in plain sight and apparently under 14 years of age, must, even tho said children are in a place of apparent safety along the margin of the traveled way, bring and keep his vehicle under such control that he will be able by ordinary care to prevent injury to a child should the child suddenly, unexpectedly, and without warning leave its place of apparent safety and place itself in a place of danger in front of the oncoming car.

Webster v Luckow, 219-1048; 258 NW 685
Darr v Porte, 220-751; 263 NW 240

Passing children—nonright to assume care. Testimony in an action against a motorist for striking and killing a 10-year-old child on the highway supported by the physical facts, from which the jury could find that the child's position on the shoulder could have been seen by defendant when more than 300 feet away, justifies an instruction on the nonright of a motorist to assume that a child under 14, in a place of apparent safety, will remain there, and on his duty to so control his machine as to avoid hitting her if she does not.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Proper lookout—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue whether the operator of an automobile maintained a proper lookout preceding the time when a small child suddenly emerged from behind an obstruction and ran into the pathway of the approaching car.

Howk v Anderson, 218-358; 253 NW 32

Anticipating child coasting—barricades removed—negligence. Where defendant knew that for many years a certain street was barricaded while children were coasting, and that there had been coasting there recently, but where the snow had melted somewhat so that the middle portion of the paving on the hill was bare of snow, and the barricades had been taken down the day before the accident, the defendant was not bound to anticipate and prepare for some child coasting on the hill.

McBride v Stewart, 227-1273; 290 NW 700

Unavoidable accident. Evidence reviewed and held to reveal per se no act of negligence on the part of a motorist in coming into collision with a child who, suddenly and unexpectedly darted from a hidden cover into the pathway of the car.

Chipokas v Peterson, 219-1072; 260 NW 37; 113 ALR 524; 3 NCCA(NS) 761

Inevitable accident. No actionable negligence is shown on a record which reveals that a small child suddenly ran from a place of safety directly and immediately into the path of an approaching automobile while the vehicle was proceeding at a lawful rate of speed, and when the driver did not know and had no reason to know, until almost the instant of impact, that the child was even present on or near the highway.

Klink v Bany, 207-1241; 224 NW 540; 65 ALR 187; 31 NCCA 112; 3 NCCA(NS) 332

Emergency—turning to right to avoid pedestrian. The driver of an automobile who is driving south on the right-hand side of a north and south highway is not guilty of negligence per se because, in order to avoid hitting a child running across the highway from the east side, he turns still farther to the right, even tho it later appears that had he kept his course or had turned to the left he might have avoided hitting the child.

Garmoe v Colthurst, 215-729; 246 NW 767

Nonnegligence per se. Evidence reviewed and held affirmatively to show no negligence on the part of the driver of an automobile, the injured party being an infant incapable of contributory negligence.

Kessler v Robbins, 215-327; 245 NW 284

Proximate cause — noncausal negligence. Failure of the driver of a conveyance to keep a proper lookout for other persons using the highway, or to keep his windshield clean, is quite inconsequential when the proximate cause of an injury to a boy on a sled was the icy condition of the street.

McDowell v Interstate Oil Co., 208-641; 224 NW 58; 31 NCCA 282; 32 NCCA 486

Contributory negligence—child under 14—burden to overthrow presumption. The presumption is that children under 14 are incapable of contributory negligence. A motorist striking a child of 10 must prove from all the facts and circumstances that the child did not exercise the degree of care ordinarily exercised by a child of like age. Held that the question of whether he had sustained his burden was clearly for the jury.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Minor walking on wrong side of highway—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about 4 or 5 feet from west side of highway, and failing to make observations to oncoming traffic from the rear, while walking after dark on a street traversed by a thru highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Improper submission of issue. The issue of the alleged negligence of a truck driver in running over and killing a person cannot be properly submitted to the jury on evidence which fails to reveal the facts and circumstances immediately attending the accident itself—which leaves to mere conjecture the manner in which the fatal accident occurred. So held as to a fatal injury to a child.

Westenburg v Johnson, 221-134; 264 NW 18

Requested instruction on absent issue properly refused. A defendant-motorist's requested instruction, which deals with the question of sudden emergency arising because, as he alleges, a child suddenly darted from hiding and ran across the path of his car, is properly refused when the issue of error in judgment after the emergency arose was not in the case, and the theory of how and when the child got in his path was otherwise covered by instructions.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

III INCAPACITATED PERSONS

Last clear chance—jury question. When a truck driven by plaintiff's intestate slowed down and turned to the left to avoid a crippled pedestrian who was walking along the highway, whether the defendant's truck, coming from the rear at a greater speed, after discovering the peril of the truck in front in having turned out into his path, should have pulled further to the left on the shoulder of the road to avoid a collision, was a question of last clear chance for the jury.

Glover v Vernon, 226-1089; 285 NW 652

STREETCARS AND SAFETY ZONES

5028.03 Stopping at streetcar.

Negligence—concurrent or intervening cause. Record reviewed, relative to a passenger's alighting from a moving streetcar and being almost immediately hit or touched by a passing automobile, and held to present a jury question on the issues whether the injury was caused (1) solely by the operation of the streetcar, or (2) solely by the operation of the automobile, or (3) by the concurrent movement of both the streetcar and the automobile.

Fitzgerald v Railway, 201-1302; 207 NW 602

Negligence—proximate cause. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Stopping streetcar in intersection and failure to warn. The operator of a streetcar is not negligent (1) in stopping, on signal, the car in the middle of a smoothly paved street intersection rather than at the near side thereof, and (2) in failing to warn a passenger that he might encounter peril in the street from passing vehicles.

MacLearn v Utilities Co., 212-555; 234 NW 851; 2 NCCA (NS) 551

5028.04 Driving on streetcar tracks.

Negligence per se in driving upon car tracks. The driver of an automobile is guilty of negligence per se when, upon entering during the daytime a private crossing over much-used interurban railway tracks located on a curve, he knows when some 25 feet from the track in question that his view of an apprehended approaching car is limited to 300 feet, and when he avails himself of such view and sees no approaching car, and thereupon proceeds to attempt, under no diverting circumstances, to cross the tracks at a rate of three miles per hour without looking or listening for the apprehended car, tho his view of the track materially enlarged as he proceeded.

Rosenberg v Railway, 213-152; 238 NW 703

Negligence per se in crossing street. A pedestrian who, from a place of perfect safety, suddenly hastens across a streetcar track in front of an immediately approaching streetcar, with full knowledge that as soon as he had passed the said track he would be directly in line with the automobile travel moving with the streetcar, is guilty of contributory negligence per se, even tho the automobile which hit him was being operated at an excessive speed.

Pettijohn v Weede, 209-902; 227 NW 824

Driving into streetcar. The driver of a truck is guilty of negligence per se when, without any apparent necessity for so doing, he attempts to steer his vehicle out of a groove or rut in the street, with the result that the vehicle suddenly responded to his efforts, bounded out of the rut, and darted diagonally across the street for a distance of twenty feet, and into an oncoming streetcar, of the prior presence and actions of which he had the fullest knowledge.

Bowers v Railway, 219-944; 259 NW 244

Avoiding contributory negligence. A streetcar motorman who plainly sees that the driver of another conveyance is negligently placing himself in a position of danger on the tracks, or is about to do so, and by ordinary care can avoid an accident and fails to do so, must be deemed guilty of negligence which is the proximate cause of the accident, irrespective of the negligence of the injured party.

Lynch v Railway, 215-1119; 245 NW 219

"Last clear chance"—unallowable submission. Evidence relative to collision between a streetcar and an automobile reviewed and held wholly insufficient to justify the submission

to the jury of the "last clear chance" doctrine.

Elliott v Railway, 223-46; 271 NW 507; 5 NCCA(NS) 169

Streetcar operator — failure to maintain lookout—failure to stop—excuse. Negligence on the part of the operator of a streetcar cannot be predicated on his failure (1) to maintain a lookout for an injured party, or (2) to stop or slacken the speed of the car, when both parties were aware of the presence of each other long prior to any suggestion of a collision, and when, after the danger of a collision arose, stopping or slackening of speed was not only out of the question but would have been futile.

Bowers v Railway, 219-944; 259 NW 244

Instructions relative to nonpleaded negligence. Instructions that the jury should not consider the failure to ring a bell on a streetcar as a ground of negligence are properly refused (1) when plaintiff pleads no such ground of negligence, (2) when no such ground was submitted to the jury, and (3) when the testimony relative to such failure was received without objection.

Watson v Railway, 217-1194; 251 NW 31

Instructions — undue burden. No undue burden is imposed on a defending street railway company by requiring it to keep its car "under proper control and to use ordinary care," to operate its car "in a careful manner and not at a dangerous rate of speed," and to give notice of its approach "by ringing the gong or bell or otherwise," when the pleaded assignment of negligence embraces (1) excessive speed, (2) want of proper control of the car, and (3) failure to give warning of the approach of the car.

Johnson v Railway, 201-1044; 207 NW 984

5028.05 Driving in front of streetcar.

Precedence to streetcar. Principle reaffirmed that a streetcar at a street intersection may have precedence over an approaching motorist.

Moss v Railway, 217-354; 251 NW 627

Negligence—proximate cause. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Negligence per se — driving in front of streetcar. The operator of an automobile is guilty of negligence per se when, in the nighttime, and without diverting circumstances, and at a speed such that he could have stopped within two feet, he drives upon a streetcar track and immediately in front of an approaching and lighted streetcar which was at all material time in unobstructed view.

Crull v Railway, 217-83; 250 NW 905

Streetcar intersection — negligence per se. The operator of an automobile cannot be said to be negligent per se in driving into an intersection on a dark night in front of a rapidly oncoming streetcar with no headlight and with the entire front end of the streetcar unlighted, when, immediately before entering the intersection, he stops and listens and looks both ways for streetcars, and sees none (so he testifies) because of the glare of oil station lights immediately to his left, from which side the streetcar was approaching, and especially when there is evidence that the streetcar was approaching without audible signals.

Deiling v Railway, 217-687; 251 NW 622

Negligence per se in driving upon car tracks. The driver of a conveyance is guilty of negligence per se when, upon reaching a street intersection on a clear day, he has positive knowledge that a nearby streetcar is rapidly approaching the same intersection from a side street, and when he, without again looking at the approaching streetcar, and confronted by no emergency, continues his journey into the intersection at a speed which would enable him to stop his conveyance instantly and turns and enters upon the streetcar tracks in the direction in which the streetcar is moving.

Middleton v Railway, 209-1278; 227 NW 915

Collision with streetcar—obstructed view. The operator of an automobile who, without diverting circumstances, approaches and drives upon streetcar tracks and looks for an approaching streetcar at a place where he knows his view is very limited because of an intervening embankment, and fails to look at a point where he would still be within a zone of safety and where his view would be unobstructed, is guilty of negligence per se.

Pender v Railway, 217-1152; 251 NW 55

Negligence per se in crossing tracks. A party will not be permitted to excuse his contributory negligence, consequent on his attempt to cross streetcar tracks without using his senses of sight and hearing, by the simple assumption that the streetcars will not be negligently operated.

Rosenberg v Railway, 213-152; 238 NW 703

SPECIAL STOPS REQUIRED

5029.01 Obedience to signal of train.

Accidents at railroad crossings. See under §§8011, 8018

5029.05 Stop at through highways.

Entering stop intersections. See under §5026.04

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "Stop" and "Slow" signs, as they are found upon the public

highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570; 4 NCCA(NS) 318

Presumption—signs erected by county. On appeal the appellate court will, in the absence of proof to the contrary, assume that the board of supervisors has performed its mandatory duty to erect and maintain proper signs on local county roads where they intersect with county trunk roads.

Arends v DeBruyn, 217-529; 252 NW 249

Ignoring statutory "Stop" sign—effect. Failure of the operator of an automobile on a highway outside a city or town to comply, before entering an arterial highway, with a duly erected, statutory "Stop" sign constitutes negligence.

Willemsen v Reedy, 215-193; 244 NW 691

Disregarding "Stop" sign. Defendant, in a criminal prosecution for failure to stop his automobile at intersecting roads in obedience to a duly and lawfully erected "Stop" sign, may be properly convicted tho there is no evidence of careless driving, intent, willfulness or wantonness except such as may be deduced from the failure to stop, the defendant at the time acting under no compulsion.

State v Wilson, 222-572; 269 NW 205

No stop sign at county trunk highway.
Davis v Hoskinson, 228- ; 290 NW 497

Right of way on primary roads—duty of side traveler. A traveler on a nonprimary road in approaching an intersection with a primary road does not fulfill his full duty of care by stopping at the statutory "Stop" sign erected outside the primary road. He must not only so stop, and observe the travel on the primary road, but must continue so to observe until he reaches the intersection, and until he has passed the point where danger may reasonably be apprehended.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

5029.10 Primary roads as through highways.

Primary roads—right of way—contributory negligence per se. Inasmuch as vehicles traveling on a primary road have right of way at intersections with nonprimary roads, the operator of a vehicle on a nonprimary road is guilty of negligence per se when he attempts to cross an intersection with a primary road, at a speed of 10 miles per hour, when he knows or ought to know that another vehicle on the primary road is, at a distance of 80 or 90 feet, approaching the intersection at a speed very greatly in excess of 10 miles per hour.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Right of way on primary roads—duty of side traveler. A traveler on a nonprimary road in approaching an intersection with a primary road does not fulfill his full duty of care by stopping at the statutory "Stop" sign erected outside the primary road. He must not only so stop, and observe the travel on the primary road, but must continue so to observe until he reaches the intersection, and until he has passed the point where danger may reasonably be apprehended.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Highway traversing city street—highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 724

5029.11 County trunk roads as through highways.

Intersecting county roads—negligence per se. The operator of an automobile on a county trunk road (an arterial highway), having the right of way over traffic on an intersecting local county road, is not guilty of negligence per se in entering such an intersection, with his car under apparent control, and without seeing a car approaching from his right at a high and dangerous rate of speed.

Arends v DeBruyn, 217-529; 252 NW 249; 37 NCCA 78

Evidence—instructions—county trunk road.
Davis v Hoskinson, 228- ; 290 NW 497

5029.12 Additional signs—cost.

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "Stop" and "Slow" signs, as they are found upon the public highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570; 4 NCCA(NS) 318

STOPPING, STANDING, AND PARKING

5030.01 Stopping on traveled way.

Stopping on highway. Stopping a vehicle on the public highway is not, ordinarily at least, an act of negligence.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Duty to stop and make repairs. It is not only the right but the duty of the operator of an automobile temporarily to stop on the proper side of a highway for the purpose of making necessary repairs, when a failure so to stop would be negligence.

Winter v Davis, 217-424; 251 NW 770

Highway as place of repair. Principle recognized that the driver of an automobile has the

right to stop in a public highway, even during the nighttime, and there repair his car, provided he exercises reasonable care in view of all the circumstances.

Hanson v Manning, 213-625; 239 NW 793

Stalled truck—place where stopped. Evidence reviewed and held to present a jury question on the issue whether the driver of a truck, who suddenly and without warning discovered that his engine had stalled, was negligent in failing to turn his truck farther to the right of the pavement and onto the shoulder of the road before stopping it.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Stopping on highway rather than muddy shoulder. It is not negligence per se for a motorist, on a moonlit, foggy night, with his rear lights burning and discernible for a distance of 30 rods, to stop for a period of from 2 to 5 minutes on the extreme right-hand side of a long, straight, level stretch of an 18-foot wide paved road, for the purpose of removing the loose or broken chains on his tires, even tho he might have stopped on a 6-foot wide slippery and muddy dirt shoulder.

Goodlove v Logan, 219-1380; 261 NW 496

Stopping on highway rather than soft shoulder. Stopping a motor vehicle directly on a public highway at night, because of the soft condition of the shoulder of the highway, in order to make unavoidable repairs on the vehicle necessitated by the unexpected blowing out of tires, does not, in and of itself, constitute negligence at common law.

Harvey v Knowles Co., 215-35; 244 NW 660; 36 NCCA 102

Stepping into highway from vehicle. It is not negligence per se for a motorist traveling on a dark, misty, and foggy night, on the proper side of a dark, 28-foot wide roadway, to stop, with his lights in full operation, and immediately to step from the car and into the traveled way.

Lukin v Marvel, 219-773; 259 NW 782; 1 NCCA 157

Stepping from vehicle in order to clean windshield. The driver of an automobile cannot be deemed negligent per se (1) in stopping his car on the right-hand side of the road with the major part of the car on the dirt shoulder bordering the pavement for the purpose of restoring visibility by cleaning the sleet from his windshield nor (2) in stepping out of the car and upon the running board—he, up to the time of said act, not having seen an approaching car.

Winter v Davis, 217-424; 251 NW 770; 35 NCCA 819; 39 NCCA 308

Collision—trucker struck while retrieving goods scattered on highway. A defendant motorist's negligence in striking a truck stopped on the highway is not the proximate cause of a later injury to the trucker by another motorist, who struck him while he was attempting to remove his merchandise spilled on the highway. The latter intervening cause was the proximate cause of his injury.

McClure v Richard, 225-949; 282 NW 312

Stalled motorist—freedom from negligence—requested instruction—jury question. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is neither entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Failure to lessen speed or signal approach. A jury question on the issue of negligence of the operator of an automobile is generated by evidence tending to show that said operator was driving easterly on a straight road at 50 miles per hour; that he plainly could have seen, while at a distance of 80 rods, two well-lighted cars, and that they were standing together on the south side of the highway, one headed west and one headed east, with all headlights burning; and that, without slacking his speed, or giving signal of his approach, he passed to the south of said stationary cars, and so close thereto as to strike and break an open door on one of said cars.

Hanson v Manning, 213-625; 239 NW 793; 2 NCCA(NS) 446

Anticipated negligence—passing on wrong side. Prejudicial error results from instructing, in effect, that a person who has stopped his car at a proper place in the highway in order to repair it must anticipate and guard himself against the possibility that the operator of some passing car may be negligent by passing the stationary car on the wrong side.

Hanson v Manning, 213-625; 239 NW 793

Driving past stationary vehicle. Driving past and within four feet of a stationary vehicle in the public highway, at a rate of 35 miles per hour and without giving any warning signal, when much more than said four feet was afforded by the highway, may constitute negligence.

Jarvis v Stone, 216-27; 247 NW 393

Duty to reduce speed while passing vehicle. An allegation that defendant drove his vehicle

past a stationary vehicle at an excessive and dangerous rate of speed renders proper, on supporting proof, an instruction as to the duty of the defendant to reduce his speed to a reasonable rate when approaching and passing the stationary vehicle.

Jarvis v Stone, 216-27; 247 NW 393

Parked cars—accident between other vehicles. Evidence held affirmatively to show that the stopping of three cars on the highway was not the proximate cause of a collision between a fourth car and a car traveling in the opposite direction from the three stationary cars.

Foster v Flaugh, 223-40; 271 NW 503

Knowledge of parked car—nonproximate cause. A general allegation of negligence in leaving a stalled automobile in the highway unattended is not available to a traveler who had the fullest knowledge of the presence of the automobile long before he reached and collided with it; especially when the leaving of said car in the highway was not the proximate cause of the injury that was suffered.

Scoville v Bakery, 213-534; 239 NW 110; 35 NCCA 719; 36 NCCA 94

Contributory negligence—failure of lights—as jury question. Where a truck is being operated in a fog with 35 feet visibility ahead, under speed and road conditions permitting a stop within 25 feet, and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range so that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision, but the question is for the jury.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Failure to see parked car in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Tail light of car concealed by person's body.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Yielding half of traveled way—inapplicability. The statute relative to the duty of the driver of a vehicle on the public highway, on meeting another vehicle, to yield one-half of the traveled way, may, manifestly, have no application to the driver of a vehicle which, to the timely knowledge of an oncoming driver, is standing stationary in such highway.

Engle v Nelson, 220-771; 263 NW 505

Passing stalled truck. The length of a vehicle (34 feet), its load (7 tons), and the space required in which to make a turn (20 to 30 feet) may, especially on a dark night, have a very material bearing on the issue whether the driver, by proof of an attempt to pass around a stalled truck, had legally excused his presumptive negligence in being on the left-hand side of the traveled way at the time of a collision with an oncoming vehicle. Evidence held to present jury question.

McWilliams v Beck, 220-906; 262 NW 781

Parking in highway—absence of lights. Negligence, alleged to have been the proximate cause of a collision, and asserted in the plea that defendant's truck (1) was parked, in the nighttime, diagonally across the entire right-hand side of a paved highway, and (2) without lights, with substantial evidence pro and con, both as to the position of the truck and as to the lights, necessarily presents a jury question.

Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 496, 640

5030.02 Disabled vehicle.

Signaling passing cars—no duty to anticipate negligence. A motorist stalled on the highway has a right to assume that the driver of a passing automobile to whom he signals to stop will use ordinary care in so doing.

McDaniel v Stitsworth, 224-289; 275 NW 572

Place of stopping truck—negligence. Evidence reviewed and held to present a jury question on the issue whether the driver of a truck who suddenly and without warning discovered that his engine had stalled was negligent in failing to turn his truck farther to the right of the pavement and onto the shoulder of the road before stopping it.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Disabled vehicle—daytime stopping on highway—signaling. Stopping a disabled motor truck in the daytime upon the right-hand side of a 26-foot graveled road within 4 feet of a guardrail, where it was visible for 225 feet, and signaling to passing cars does not constitute negligence.

McDaniel v Stitsworth, 224-289; 275 NW 572

Stopping on highway when shoulder soft. Stopping a motor vehicle directly on a public highway because of the soft condition of the shoulder of the highway in order to make unavoidable repairs on the vehicle necessitated by the unexpected blowing out of tires does not, in and of itself, constitute negligence at common law.

Harvey v Knowles Co., 215-35; 244 NW 660; 36 NCCA 102

Contributory negligence—matter of law—stalled motorist—poor visibility in snowstorm. A plaintiff motorist who during a snowstorm becomes stalled in a snowdrift is not, as a matter of law, guilty of contributory negligence because, in attempting to extricate his car, he must at times place himself with his back to oncoming traffic alongside his vehicle, tho meanwhile making occasional attempts to observe traffic in that direction, especially when before the vehicle struck him he observed it when it was about 50 feet away, such distance under the undisputed evidence being the extreme extent of visibility.

Youngman v Sloan, 225-558; 281 NW 130

Duty to remove stalled vehicle from highway. Where a motor vehicle is stalled in a snowdrift and obstructs half of the highway, a motorist must use reasonable efforts to remove such vehicle.

Youngman v Sloan, 225-558; 281 NW 130

Failure to see parked vehicle in fog—jury question. In an action for damages resulting from injuries sustained when the car in which the plaintiff and her husband were riding on a foggy evening ran into a car which the defendant had left standing on the highway after an unsuccessful attempt to tow it away, it was error for the lower court to direct a verdict for the defendant, as the question of liability should have gone to the jury.

Newman v Hotz, 226-834; 285 NW 287

Stalled truck — contributory negligence. Where a car collided with a stalled tractor-trailer, jackknifed on an icy hill at night, the question of plaintiff's contributory negligence was properly submitted to the jury, where it is shown the tractor, with lighted headlamps, standing on the right side of the highway, diverted plaintiff's and husband-driver's attention, and, there being no reasonable apparent cause to suspect that trailer blocked the left side of highway, and, where jury could find that car in which the plaintiff was riding was proceeding at less than 20 miles per hour, and that plaintiff and husband-driver were looking straight ahead, there is no warrant for saying plaintiff was contributorily negligent as a matter of law; however, under the record, the negligence of the husband-driver, if any, could not be imputed to plaintiff.

Johnson v Transp. Co., 227-487; 288 NW 601

5030.05 Stopping, standing, or parking.

Discussion. See 22 ILR 713—Parking meters

Petition stating cause of action as against demurrer—stop sign—obstructed view. Where petition alleges defendants' truck was parked on curbing or sidewalk so as to obstruct view of stop sign for a motorist who proceeded into intersection and collided with another car, petition held to state a cause of action as against demurrer.

Blessing v Welding, 226-1178; 286 NW 436

Pleading ordinance and statute violations—assumed for purpose of demurrer. In an action for injuries resulting from a motor vehicle collision at an intersection, where defendants' truck is alleged to have been parked so as to obscure the view of a stop sign, and where the violations of both city ordinance and state law are pleaded, the supreme court will assume, for the purpose of demurrer, that truck was parked within prohibited distance and did obscure the sign.

Blessing v Welding, 226-1178; 286 NW 436

Unlawful parking—negligence. The parking of a motor vehicle at a place where parking is prohibited by a valid city ordinance constitutes negligence and, in case a collision occurs with the parked vehicle, the said negligence must be deemed to have contributed to the resulting damage.

Riley v Guthrie, 218-422; 255 NW 502; 35 NCCA 818

Parking—view of stop sign obstructed—others' imputed knowledge of stop sign no defense. Where defendants' truck was parked so as to obscure the view of a stop sign at an intersection, and where motorist proceeded into intersection without stopping and collided with an automobile on intersecting street, defendant will not be exempt from liability on ground that knowledge would be imputed to motorist that intersecting street was an arterial highway because of statute as to posting signs.

Blessing v Welding, 226-1178; 286 NW 436

5030.08 Parking at right-hand curb.

Municipal corporations — torts — proximate cause. A truck which is legally parked alongside the curb of a public street is not the proximate cause of an injury to a child whose sled was deflected into the truck by a bump in the street.

Dennier v Johnson, 214-770; 240 NW 745; 35 NCCA 717

Parking on left side without tail light. Section 5056, C., '35, requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, and §5045, in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with an automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

MISCELLANEOUS RULES

5031.03 Control of vehicle—signals.

ANALYSIS

I WARNING SIGNALS GENERALLY
II CURVES
III HILLS

Annotations Vol I, see under §§5040, 5043
Control of vehicle generally. See under §5023.04

I WARNING SIGNALS GENERALLY

Failure to signal approach to stationary truck. The operator of an automobile, driving in broad daylight on the proper side of a country highway where the view is wholly unobstructed, is not guilty of negligence in failing to signal his approach to an open, stationary milk truck with a person standing beside it (which is also on the proper side of the highway) when said operator has no reason to suppose or apprehend that some one may be in or about said truck and may suddenly emerge therefrom and into the pathway of said oncoming automobile.

Crutchley v Bruce, 214-731; 240 NW 238; 31 NCCA 376

Negligence per se—entering obscured crossing. Negligence per se is revealed in the act of the driver of an automobile in approaching and entering an obscured public crossing (with which he was familiar) with knowledge that another vehicle was also rapidly and immediately approaching said intersection from his right, and failing either (1) to sound his horn or (2) to yield the right of way. (See Vol. I, §5028 et seq.)

Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44

Arterial highway—negligence per se. The operator of an automobile on a county trunk arterial highway (on which no "stop" or "slow" signs had been erected at points intersected by county local roads) is guilty of negligence per se in knowingly approaching an obscured intersection without either (1) slacking his speed (of some 25 or 30 miles per hour) as required by §5031, C., '31 [§5023.04, C., '39] or (2) giving some warning signal of his approach. (But see Dikel v Mathers, 213 Iowa 76.)

Lang v Kollasch, 218-391; 255 NW 493; 37 NCCA 74

Child on sled—view obstructed by snowbank—negligence—directed verdict. In an action for death of 7-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Obscured view of travel at intersection—failure to look or signal. The operator of an automobile in approaching and entering an intersecting country highway, when the view of travel approaching from his right is obstructed, is guilty of negligence (1) if he fails to signal his approach and entry, and also (2) if he fails to look for such travel at a point from which he can see such travel.

Smith v Lamb, 220-835; 263 NW 311; 4 NCCA(NS) 368

Plaintiff's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son who enters an obscured intersection without sounding his horn, (§5043, C., '35), is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury, when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

Contributory negligence—failure to sound horn. In action involving collision between car and motorcycle, plaintiff was not guilty of contributory negligence as a matter of law for failure to sound horn where vehicles were in plain view of each other for more than 200 feet and there was no apparent danger of any collision.

Jakeway v Allen, 227-1182; 290 NW 507

Failure to signal at intersection—jury question. Evidence reviewed on the issues whether the driver of an automobile (1) was driving on the wrong side of the street, (2) "cut the corner" of an intersection, and (3) gave no signal of his approach, and held to present a jury question.

Handlon v Henshaw, 206-771; 221 NW 489; 32 NCCA 433; 35 NCCA 649

Failure to signal—knowledge of approach. The submission to a jury of the issue of negligence on the part of the operator of an automobile in not sounding a warning of his approach to an intersection of streets is reversible error when the undisputed evidence shows that the injured party saw the approaching automobile when it was more than a block from said intersection.

Lauxman v Tisher, 213-654; 239 NW 675

Failure to signal at unknown intersection. The driver of an automobile may not be said to be negligent per se for failure to sound a signaling device upon approaching an intersecting and completely hidden highway, of the existence of which he had no knowledge in fact or reason.

Sexauer v Dunlap, 207-1018; 222 NW 420

I WARNING SIGNALS GENERALLY—concluded

Construction as a whole. An instruction which properly directs the jury that the defendant would be guilty of negligence if, under named circumstances, he failed to signal his approach to the scene of an accident is not rendered erroneous because the court does not, in said instruction, make any reference to the law of direct and proximate cause—said latter subject matter being properly covered elsewhere in the instructions.

Engle v Nelson, 220-771; 263 NW 505

Failure to sound horn—pedestrian ran in front of car. Failure to sound the horn on an automobile is quite inconsequential when there was no occasion to give such signal until the injured party, suddenly and without previous warning, ran into the immediate pathway of the car at a time when it was impossible to stop the car and avoid the accident.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Persons working on highway—truck driver's duty. In a laborer's personal injury action against a truck driver for backing truck into laborer while both were engaged in highway construction, §5017.06, C., '39, exempting persons and motor vehicles actually engaged in work upon the highway from the motor vehicle law requirements, does not exempt a truck driver from using his horn if necessary in the exercise of ordinary care when backing from an intersection onto highway under construction. Question of defendant's negligence in not sounding horn or observing plaintiff's presence when backing truck where men were working, and question of plaintiff's contributory negligence while working under foreman's instruction at outside edge of road were questions properly submitted to jury.

Rebmann v Heesch, 227-566; 288 NW 695

II CURVES

Negligence—sudden stopping of car on curve. The driver of an automobile who is on the right-hand side of the road at a curve and driving at a proper speed is not guilty of negligence in suddenly applying the brakes in order to avoid hitting an overtaking and passing car which unexpectedly swerved in front of him, and in order to prevent his own car going into a ditch, tho by so doing the wheels of his car locked and the momentum skidded the car across the road and into another car.

Klaaren v Shadley, 215-1043; 247 NW 301

Passing on curve—negligence—jury question. Evidence held to present a jury question on the issue of negligence of the operator of an automobile in passing another vehicle on a curve, and returning to the right side of the traveled way within 30 feet of the car which had been passed.

Andersen v Christensen, 222-177; 268 NW 527

Guest statute—speed as recklessness. Where an automobile, traveling 40 miles an hour around a curve that was neither a sharp turn nor a long sweeping curve, ran off the pavement and turned over, injuring plaintiff guest, this evidence did not raise a jury question on whether defendant was reckless within scope of guest statute.

Crabb v Shanks, 226-589; 284 NW 446

Reckless operation—jury question. A jury question on the issue of reckless operation of an automobile is made by evidence that the car was being operated (1) over a wide, well-settled graveled highway with which the operator was wholly unfamiliar, (2) at a speed of some 65 miles per hour, (3) during the nighttime when visibility was materially limited, and (4) at a sharp turn in the road so belatedly anticipated and discovered that the driver was unable to negotiate it and was compelled to turn his car into the side ditch.

Mescher v Brogan, 223-573; 272 NW 645

III HILLS

Failure to signal approach—effect. Failure to sound some signaling device when an automobile is approaching the top of a hill may constitute no more than presumptive negligence.

Lane v Varlamos, 213-795; 239 NW 689

Ruts in snow on highway—collision—explanatory instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

Signaling on approaching hilltop—statute inapplicable. The statutory requirement that an adequate signaling device be sounded when a motor vehicle approaches the top of a hill has no application to an accident which happened on a level road, and at a point over 250 feet beyond the top of the hill in question.

Heacock v Baule, 216-311; 249 NW 437; 93 ALR 151

Departure from pleaded theory. A plaintiff who predicates negligence in the operation of an automobile solely on the fact that defendant failed to give a warning signal after dis-

covering plaintiff's position of danger may not complain that the court failed to instruct on the statutory duty to give a warning signal "on approaching tops of hills and intersecting highways."

Ryan v Shirk, 207-1327; 224 NW 824

SCHOOL BUSSES

5032.04 Drivers.

School bus driver as independent contractor—nongovernmental function. A school bus driver furnishing his own bus under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

EQUIPMENT

5033.01 Scope and effect of regulations.

Use of known dangerous vehicle. One who continues to ride in an automobile after he knows it is dangerous to do so, and without availing himself of the opportunity to have the vehicle repaired, is guilty of negligence; especially may he not complain when he happens to occupy such relation to the vehicle as renders it his duty to have repairs made.

Helming v Bank, 206-1213; 220 NW 45

Circumstantial evidence — defectively attached wheel. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrrell v Skelly Co., 222-1257; 270 NW 857

Res ipsa loquitur—nonapplicability. In an automobile damage action the doctrine of res ipsa loquitur is not applicable when the automobile was not under the exclusive control of the defendant nor when the jury must speculate from the evidence whether the injury was caused by a defect in the automobile or by the negligence of the driver.

Sproll v Burkett Co., 223-902; 274 NW 63

Guest injured in rented car—burden of proof. In action by guest against lender of rented car and driven by borrower, for injuries sustained when car, because of defective wheels, goes into ditch, he must show, not only that car was defective at time of accident, but that it was defective at time of its delivery to borrower. Held burden of proof not sustained.

Gianopulos v Saunders System, (NOR); 242 NW 53; 32 NCCA 18

5033.04 When lighted lamps required.

Atty. Gen. Opinion. See '36 AG Op 51

Absence of lights—inferential evidence to support issue. Testimony by a plaintiff to the effect that as he entered an intersection he looked along the intersecting highway to his right (which was the proper direction) and saw no approaching automobile or automobile lights, may be sufficient to justify the court in submitting to the jury the question whether the defendant was operating his car without lights.

Appleby v Cass, 211-1145; 234 NW 477

Striking admissible testimony. Excluding evidence that lights on defendant's truck were not burning, plaintiff having failed to allege such fact in petition, held, prejudicial error when such fact had direct bearing on question of plaintiff's contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Nonproximate cause. The operation of an automobile with lights which do not measure up to statutory requirements becomes quite immaterial in a civil action if such shortcoming in no manner contributes to the damage.

Hansen v Kemmish, 201-1008; 208 NW 277; 45 ALR 498; 29 NCCA 326; 33 NCCA 100

Violation of statute—avoidance by contributory negligence. Failure of defendant, the driver of an automobile, to have the headlights on his car displayed at a time required by statute, becomes inconsequential when the contributory negligence of the plaintiff was the proximate cause of the injury resulting from the collision.

Sheridan v Limbrecht, 205-573; 218 NW 278; 29 NCCA 300; 35 NCCA 661; 2 NCCA (NS) 417

Contributory negligence—insufficient showing. Evidence held insufficient to show contributory negligence per se in not seeing, in the nighttime, an unlighted approaching vehicle.

Carlson v Decker & Sons, 216-581; 247 NW 296; 36 NCCA 91

Driving without lights. The act of driving an automobile without lights on the wrong side of highway on a dark night is per se not careful and prudent.

Lange v Bedell, 203-1194; 212 NW 354

Driving blind horse—buggy without lights. It is not negligent per se to drive a blind horse in a narrow highway on a dark night, with the horse hitched to an unlighted buggy.

Lange v Bedell, 203-1194; 212 NW 354

Absence of lights—negligence per se. The operator of an automobile who, on a dark and foggy night, operates his car without lights because he believes he can see better without them, is guilty of negligence per se.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Jury question. Evidence held to present a jury question whether an automobile was negligently operated (1) without lights, (2) at a dangerous rate of speed, and (3) on the wrong side of the highway.

Carlson v Decker & Sons, 216-581; 247 NW 296; 36 NCCA 91

Collision — jury questions. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence.
2. Whether defendant was driving his truck without lights.
3. Whether defendant was driving on the wrong side of the road.
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed.
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 91

Contributory negligence—failure of lights —jury question. Where a truck is being operated in a fog with 35 feet visibility ahead under speed and road conditions permitting a stop within 25 feet, and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range so that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision, but the question is for the jury.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Absence of lights—instructions—sufficiency. An instruction that plaintiff would be guilty of contributory negligence if his automobile was not equipped with two white lights on the front is all-sufficient on that particular subject matter.

Winter v Davis, 217-424; 251 NW 770

Insufficient headlights—erroneous submission of issue. The submission to the jury of the issue whether an automobile was being operated with lights which were insufficient to reveal a person or object 75 feet ahead of the lights, without any evidence that the lights did not meet the statutory requirements, constitutes reversible error.

Grover v Neibauer, 216-631; 247 NW 298; 36 NCCA 133

Failure of lights—right to proceed—instructions. The court should, on supporting testimony, instruct as to the right of a traveler to proceed cautiously toward his destination in case of the failure of his lights to operate.

Sergeant v Challis, 213-57; 238 NW 442

Necessary instructions. The operation of an automobile during the nighttime without the required number of lights is not necessarily negligent; and in submitting such issue the court must clearly state to the jury the circumstances under which the operator would, under the statute, be negligent and the circumstances under which he would not, under the statute, be negligent.

Muirhead v Challis, 213-1108; 240 NW 912

Taking obviously dangerous position on highway. A motorist is guilty of negligence per se when, with darkness rapidly falling, and with his unlighted car stalled on a substantial up-grade, and substantially across the right-hand side of a known heavily-traveled, ice-covered street, he deliberately places himself on that side of his car toward which traffic would be directly moving, and, with his back to such oncoming traffic, attempts to back his car into a private driveway, knowing at the time that the view of an approaching driver would be seriously impaired by the lights of a car which at that moment had passed him, and which was moving toward said approaching driver.

Fortman v McBride, 220-1003; 263 NW 345; 39 NCCA 330

Lights on road machinery—statute violation —nonliability of county. Mandatory statutes requiring danger lights on road machinery and providing punishment for their violation do not create any liability on a county for negligent observance thereof.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 827; 4 NCCA(NS) 4

5033.05 Head lamps on motor vehicles.

Absence of lights—instructions—sufficiency. An instruction that plaintiff would be guilty of contributory negligence if his automobile was not equipped with two white lights on the front is all-sufficient on that particular subject matter.

Winter v Davis, 217-424; 251 NW 770

Holding under former statute. The operation of an automobile during the nighttime without the required number of lights is not necessarily negligent; and in submitting such

issue the court must (especially when requested) clearly state to the jury the circumstances under which the operator would under the statute be negligent and the circumstances under which he would not under the statute be negligent.

Muirhead v Challis, 213-1108; 240 NW 912

5033.07 Rear lamps and reflectors.

Tail lights—when not required. (Holding under prior statute.)

Leete v Hays, 211-379; 233 NW 481

Improper argument. An argument to the effect that plaintiff could not have known at the time of an accident of the existence of an ordinance relative to rear signal lights on vehicles, because defendant's counsel did not know such fact until long after the accident, is improper.

DeMoss v Cab Co., 218-77; 254 NW 17

Absence of tail lights and reflectors—jury question. Testimony reviewed and held that the court could not say as a matter of law that the truck in question was not, at the time of a collision, equipped with tail lights and reflectors.

Isaacs v Bruce, 218-759; 254 NW 57; 36 NCCA 93

Parking on left side without tail light. Section 5056, C., '35, requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, and §5045, in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with an automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

5033.09 Reflectors additional.

Absence of rear reflectors—nonproximate cause—instruction without issue. A "sideswipe" collision between two head-on approaching automobiles could not proximately result from the absence of red reflectors on the rear of the body, and no instruction involving this negligence should be given.

Keller v Dodds, 224-935; 277 NW 467

CLEARANCE AND IDENTIFICATION LIGHTS

5034.01 Kinds and placement of lights.

Atty. Gen. Opinion. See '36 AG Op 262

Absence of tail lights and reflectors—jury question. Testimony reviewed and held that the court could not say as a matter of law that the truck in question was not, at the time of a collision, equipped with tail lights and reflectors.

Isaacs v Bruce, 218-759; 254 NW 57; 36 NCCA 93

Lack of proper lamps on trucks or trailers. In an action at law to recover damages for personal injuries sustained by plaintiff when car in which she was riding collided with a tractor-trailer which had stalled on an icy hill on a country highway at night and had jackknifed across the highway, the question of owners' and operators' negligence in failing to comply with statutes prescribing number and place of lamps required on truck or trailer, and whether such negligence, if any, had proximate causal connection with injury sustained by plaintiff, held, under the evidence, properly submitted to the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Failure to submit supported issue. Error results from the failure of the court, in a personal damage action, to submit to the jury a supported issue of negligence as to the absence of sidelights on a truck.

Jordan v Schantz, 220-1251; 264 NW 259

5034.04 Lamps on parked vehicles.

Truck flares. See under §5034.57

Absence of tail light—effect. The parking, during the nighttime, of a motor vehicle upon a paved highway outside a city or town, with the tail lights extinguished, constitutes negligence per se, in the absence of a showing of legal excuse.

Harvey v Knowles Co., 215-35; 244 NW 660

Evidence—positive vs. negative. Positive evidence of the existence of lights in full operation on a parked automobile is in no degree detracted from by evidence of a witness that he did not see any lights at a material time when his view was obstructed by an intervening object.

Harvey v Knowles Co., 215-35; 244 NW 660

Truck trailer jackknifed across road—sufficiency of time to set out flares. In an action at law to recover damages for personal injuries received when car in which plaintiff was riding collided with the trailer of a tractor-trailer unit which had stalled on an icy hill at night on a country highway, and had jackknifed across highway, and where it is claimed the operators of the trailer unit failed to comply with statute requiring such standing vehicles to set out flares, and where operators claimed a warning was given by waving an ordinary flash light from inside or just outside cab of tractor, the question as to whether operators of trailer unit had sufficient time to set out warning signals, and whether the warning by waving an ordinary flash light was sufficient to afford a warning of presence of truck and trailer blocking motorists' pass-

age, were proper questions of fact for the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Unlighted truck in highway. Evidence which would justify a finding that the driver of a truck left it where it obstructed one-half of the highway and with the rear end unlighted presents a jury question on the issue of such assigned negligence.

Kimmel v Mitchell, 216-366; 249 NW 151; 35 NCCA 790; 36 NCCA 106

Stalled vehicle—absence of signals—proximate cause. The fact that, upon the stalling of a vehicle in the public highway, no lights or signals were erected to show the presence and position of said vehicle cannot be deemed the proximate cause of a collision with the stalled vehicle when the driver of the colliding vehicle discovered the presence and position of the stalled car in ample time to stop had he been so driving as to be able to stop within the assured clear distance ahead.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Collision with stationary truck—negligence. The position of an unlighted truck parked in the highway and the diverting circumstances occurring just preceding a collision with the truck may have a very material bearing on the issue of plaintiff's contributory negligence and the assured clear distance rule.

Kimmel v Mitchell, 216-366; 249 NW 151; 1 NCCA(NS) 42

Failure to see unlighted truck. The driver of an automobile who, in the nighttime, with his headlights burning, and while on the proper side of a straight, 20-foot-wide, paved highway, drives at the rate of 35 or 40 miles per hour, and under no materially diverting circumstances, squarely into the rear of a stationary, wholly unlighted truck which is directly in his pathway and which, from its build, color, and load, is reasonably discernible, must be deemed to have failed to maintain a proper lookout, or to have been so driving as to be unable to stop within the assured clear distance ahead—in either event, negligent.

Shannahan v Borden Co., 220-702; 263 NW 69; 1 NCCA(NS) 16

Failure to see unlighted truck—legal excuse. The failure of the driver of an automobile to see, in time to stop, an unlighted truck standing ahead of him in the highway and within the radius of his lights, may be legally excused by plea and proof that the truck was not reasonably discernible sooner (1) because of its color, (2) because of shadows cast over it by nearby trees, and (3) because his attention was momentarily diverted by a car and the lights thereon which he was about to meet and pass at a lawful rate of speed.

Kadlec v Const. Co., 217-299; 252 NW 103; 35 NCCA 764; 1 NCCA(NS) 3

Parking in highway — absence of lights. Negligence alleged to have been the proximate cause of a collision and asserted in the plea that defendant's truck (1) was parked in the nighttime, diagonally across the entire right-hand side of a paved highway, and (2) without lights, with substantial evidence pro and con, both as to the position of the truck and as to the lights, necessarily presents a jury question.

Schwind v Gibson, 220-377; 260 NW 853

Lack of proper lamps on trucks or trailers. In an action to recover damages for personal injuries sustained by plaintiff when car in which she was riding collided with a tractor-trailer which had stalled on an icy hill on a country highway at night and had jackknifed across the highway, the question of owners' and operators' negligence in failing to comply with statutes prescribing number and place of lamps required on truck or trailer, and whether such negligence, if any, had proximate causal connection with injury sustained by plaintiff, held, under the evidence, properly submitted to the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Tail light concealed by body of person.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions — following statute enacted after accident. Where an automobile collides at night with a truck displaying no lights, it is error to instruct in the language of §5029, C., '35, that plaintiff had a right to assume that others using the highway would obey the law, when such collision causing the injuries complained of occurred before this right of assumption was added by the legislature and the statute had previously been construed that a driver had no such right.

Gookin v Baker & Son, 224-967; 276 NW 418

5034.06 Lamps on bicycles.

Bicycle lights—contributory negligence—jury question. In a damage action against a motorist for death of a bicycle rider, the jury, under the record, could properly find that cyclist was not traveling with bicycle lights required by statute and was not free from contributory negligence, despite fact that evidence showed a recent purchase of red reflector and lamp by an unidentified person on morning of accident; and the finding of a broken lamp, reflector, etc., by the sheriff at the scene of and sometime after the accident does not compel a finding that the bicycle was properly equipped.

Reardon v Hermansen, 223-1207; 275 NW 6

5034.07 Lamps on other vehicles and equipment.

Driving blind horse—unlighted buggy. It is not negligent per se to drive a blind horse in a narrow highway on a dark night, with the horse hitched to an unlighted buggy.

Lange v Bedell, 203-1194; 212 NW 354

Safety precautions — violation — negligence per se. The operation of a horse-drawn vehicle on the highway during the nighttime without displaying on said vehicle one or more white or tinted lights or red reflector or reflectors constitutes negligence per se, notwithstanding the substitution at the time by the operator of an ordinary flashlight which lay in the lap of the operator and was pointed rearward.

Kneppe v Huismann, 223-569; 272 NW 602

5034.08 Road machinery—lights required.

Atty. Gen. Opinion. See '36 AG Op 51

5034.09 Number of lights—duty to maintain.

Atty. Gen. Opinion. See '36 AG Op 51

5034.10 Duty to enforce.

Atty. Gen. Opinion. See '36 AG Op 51

Road grader—failure to carry signals—effect. The naked fact that a road patrolman fails to carry on a road grader operated by him on the highway the statutory red danger lights does not ipso facto constitute a breach of statutory duty by the board of supervisors to enforce the law requiring the carrying of such lights.

Bateson v County, 213-718; 239 NW 803

5034.39 Brake equipment.

Driver of injured vehicle held negligent. Where a car approaching a public highway from a private driveway, traveling in neutral at only 3 miles per hour, and while still 12 feet from such highway, driver saw defendant's truck approaching at a rapid rate, the fact that car was out in the highway when collision occurred would either show that brakes were inadequate or that driver was negligent in the operation of car.

Hermon v Egy, (NOR); 207 NW 116; 31 NCCA 76

Negligence — sudden stopping of car on curve. The driver of an automobile who is on the right-hand side of the road at a curve and driving at a proper speed is not guilty of negligence in suddenly applying the brakes in order to avoid hitting an overtaking and passing car which unexpectedly swerved in front of him and in order to prevent his own car going into a ditch, tho by so doing the wheels of his car locked and the momentum skidded the car across the road and into another car.

Klaaren v Shadley, 215-1043; 247 NW 301

Operation without brakes—proximate cause. Record reviewed and held that the proximate cause of an accident was not the condition in which a railway crossing was maintained, but was the speed at which an overloaded truck was operated without brakes.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Directing verdict—inadequate. brakes must contribute to injuries. Before a plaintiff motorist can be held guilty of contributory negligence as a matter of law it must conclusively appear, from a consideration of the evidence in the light most favorable to him, that his negligence in having inadequate brakes contributed in some way or in some degree to the accident and injuries for which he seeks a recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Conflict as to use of brakes—jury question. A conflict in the evidence in a motor vehicle accident case as to whether defendant did or did not apply his brakes is properly a matter for the jury.

Reed v Pape, 226-170; 284 NW 106

Predicating error solely on one's own evidence—impropriety. Predication of error based solely on defendant's own evidence and his own theory of the case is ineffective when other conflicting evidence clearly makes a jury question on contributory negligence regarding plaintiff's failure to have adequate brakes on his automobile, his failure to stop within the assured clear distance ahead, and his failure to slow down before crossing a bridge.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Contributory negligence—inadequate brakes —jury question. Evidence that a plaintiff motorist approached a bridge at 15 miles per hour and proceeded to cross, keeping his car within 6 inches of the right-hand side, before defendant came on the bridge, and that plaintiff was two-thirds across before defendant swung across the center line and struck him, makes a jury question as to whether the fact of plaintiff's negligence in not having adequate brakes contributed to the collision.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Car sliding into stalled truck. Where a car collided with a truck-trailer which had stalled on an icy hill at night on a country highway and had jackknifed across the left side of the highway on which plaintiff's husband was driving, the question of the husband's negligence in braking his car to such extent that it slid on the ice and collided with the side of the trailer, in the absence of any other evidence that car went out of control, held, that question of negligence of the husband as the sole proximate cause of the collision was properly submitted to the jury, and even tho it may be conceded that husband was negligent, it cannot be said, as a matter of law, that such negligence was the sole proximate cause of the injury.

Johnson v Transp. Co., 227-487; 288 NW 601

Inadequate brakes immaterial unless negligence contributory. An exception to an in-

struction because the fact question of plaintiff's contributory negligence was erroneously submitted is not an exception to the submission of the sole fact of his negligence, and even if plaintiff's negligence in not having brakes is established beyond question, the fact question of its contributory nature is still for the jury.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

5034.41 Horns and warning devices.

Sounding horn—driver's discretion—jury question. In an automobile damage action, a driver of an automobile is not guilty of negligence as a matter of law for failure to sound horn as he approaches an intersection, since the statute does not require the sounding of the horn under any and all conditions. The propriety of using the horn is left to the reasonable discretion of the driver, and is a fact rather than a law question. The jury determines whether the sounding of a horn would have avoided the accident.

Short v Powell, 228- ; 291 NW 406

5034.47 Windshields unobstructed.

Accident at crossing. The operator of a vehicle is guilty of negligence in driving upon a railway crossing in front of an approaching train (1) when he knows the train is approaching the crossing, (2) when the train is in plain sight for a material distance from the crossing, and (3) when his failure to see the train, at best, was because of a known obstruction on his own vehicle.

Sodemann v Railway, 215-827; 244 NW 865

Parking vehicle in order to clean windshield. The driver of an automobile cannot be deemed negligent per se (1) in stopping his car on the right-hand side of the road with the major part of the car on the dirt shoulder bordering the pavement for the purpose of restoring visibility by cleaning the sleet from his windshield nor (2) in stepping out of the car and upon the running board—he, up to the time of said act, not having seen an approaching car.

Winter v Davis, 217-424; 251 NW 770; 35 NCCA 819; 39 NCCA 308

5034.49 Restrictions as to tire equipment.

Stopping on highway. Stopping a motor vehicle directly on a public highway because of the soft condition of the shoulder of the highway, in order to make unavoidable repairs on the vehicle necessitated by the unexpected blowing out of tires, does not, in and of itself, constitute negligence at common law.

Harvey v Knowles Co., 215-35; 244 NW 660; 36 NCCA 102

Tire blowout as sole and only cause of injury—proper instruction. In a personal injury action against an automobile owner, where plaintiff complained of instruction denying a recovery if the blowing out of the tire was the sole and only cause of the damage for the alleged reason that the instruction was not warranted by evidence showing that the car, after swerving to the left, veered back and forth, eventually going into the ditch on right side of the road, as this evidence refuted the driver's testimony that she was excited and did nothing to gain control of the car, held, the question of driver's negligence was before the jury, and the instruction was proper.

Band v Reinke, 227-458; 288 NW 629

5034.56 Trucks to carry flares.

"Motor trucks and combinations thereof"—scope of term. A service car consisting of an ordinary touring automobile with the rear part of the body removed, and a wrecking crane substituted therefor, is not a "truck or combination thereof" within the meaning of §5067-e1, C., '35, which, under named conditions, requires "motor trucks or combinations thereof" to carry and display portable flares.

Engle v Nelson, 220-771; 263 NW 505; 39 NCCA 302

5034.57 Display of flares.

Lamps on parked vehicles. See under §5034.04

Violation of statute—when inconsequential. The violation by a motorist of the statute relative to setting out a "flare" beside a truck standing on the highway constitutes inconsequential negligence as to another motorist who, without the flare, had timely knowledge of every fact that a flare would have furnished.

Engle v Nelson, 220-771; 263 NW 505; 39 NCCA 326

Truck trailer jackknifed across road—sufficiency of time to set out flares. In an action at law to recover damages for personal injuries received when car in which plaintiff was riding collided with the trailer of a tractor-trailer unit which had stalled on an icy hill at night on a country highway, and had jackknifed across highway, and where it is claimed the operators of the trailer unit failed to com-

ply with statute requiring such standing vehicles to set out flares, and where operators claimed a warning was given by waving an ordinary flashlight from inside or just outside cab of tractor, the question as to whether operators of trailer unit had sufficient time to set out warning signals, and whether the warning by waving an ordinary flashlight was sufficient to afford a warning of presence of truck and trailer blocking motorists' passage, were proper questions of fact for the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Reliance on another's duty—knowledge of breach no excuse for negligence. A plaintiff, injured by a passing automobile while helping defendant's employee-driver put on tire chains, may not excuse his own lack of due care by testifying that he relied on the driver to place out flares, when as a fact he knew both that the driver had no such intention and that no flares were so placed.

Denny v Augustine, 223-1202; 275 NW 117

SIZE, WEIGHT, AND LOAD

5035.02 Exceptions.

Atty. Gen. Opinions. See AG Op July 11, '39, July 13, '39

5035.06 Maximum length.

Atty. Gen. Opinion. See '32 AG Op 239

Injuries from operation, or use of highway. The length of a vehicle (34 feet), its load (7 tons), and the space required in which to make a turn (20 to 30 feet) may, especially on a dark night, have a very material bearing on the issue whether the driver, by proof of an attempt to pass around a stalled truck, had legally excused his presumptive negligence in being on the left-hand side of the traveled way at the time of a collision with an oncoming vehicle. Evidence held to present jury question.

McWilliams v Beck, 220-906; 262 NW 781

5035.15 Loading capacity.

Atty. Gen. Opinions. See '30 AG Op 165; '34 AG Op 691

License fee as nonproperty tax. A substantial charge placed by the legislature on motor trucks operated on the public highways, graduated on the weight of the load carried, conceding the same to be a tax, tho termed a "license fee", is not a property tax but a tax imposed for the privilege of using the highways as a place of business, and therefore not within the meaning of Const. Art. VII, §7.

Solberg v Davenport, 211-612; 232 NW 477
Towns v City, 214-76; 241 NW 658

5035.16 Permits for excess size and weight.

Atty. Gen. Opinions. See '32 AG Op 186; AG Op July 11, '39, July 13, '39

5035.20 Local authorities may restrict.

Excluding travel from street. A city has no legal right to exclude ordinary travel from a public street in order that the street may be used exclusively for coasting.

Dennier v Johnson, 214-770; 240 NW 745

Unguarded street set aside for coasting. A city which temporarily sets aside a public street for coasting purposes is not liable in damages for an injury resulting to a person so using the street, from his coming in contact with an automobile which the city had failed to exclude from the street.

Harris v Des Moines, 202-53; 209 NW 454; 46 ALR 1429; 26 NCCA 753

5035.23 Highway commission may restrict.

Unallowable delegation. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39
See State v Van Trump, 224-504; 275 NW 569

Predicating negligence on unlawful rule. Negligence in the operation of a motor vehicle on the public highway may not be predicated on the violation of a rule adopted without legal authority by the state highway commission.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

PENALTIES

5036.01 Penalties for misdemeanor.

Atty. Gen. Opinion. See '36 AG Op 626

Disregarding "stop" sign—elements of offense. Defendant in a criminal prosecution for failure to stop his automobile at intersecting roads in obedience to a duly and lawfully erected "stop" sign may be properly convicted tho there is no evidence of careless driving, intent, willfulness, or wantonness except such as may be deduced from the failure to stop, the defendant at the time acting under no compulsion.

State v Wilson, 222-572; 269 NW 205

PARTIES, PROCEDURE UPON ARREST, AND REPORTS IN CRIMINAL CASES

5037.05 Procedure not exclusive.

Speeding charge—unsworn information first challenged on appeal—no waiver. Where a municipal court information charging speeding was not sworn to, defendant did not waive his right to challenge its sufficiency to sustain a

conviction, or lose his right to raise such objection on appeal in supreme court by failure to question the sufficiency of information before the trial.

State v Weston, 225-1377; 282 NW 774

Verdict set aside—criminal more readily than civil. Where the verdict is clearly against the weight of evidence, a new trial should be granted, and the appellate court will interfere more readily in a criminal case than in a civil one.

State v Carlson, 224-1262; 276 NW 770

No request for elaboration of instructions. The instructions must be considered as a whole, and if a criminal defendant asks for no elaboration, he is in no position to complain.

State v Carlson, 224-1262; 276 NW 770

5037.08 Convictions to be reported.

Atty. Gen. Opinions. See '25-26 AG Op 296; '34 AG Op 696

5037.09 Liability for damages.

Atty. Gen. Opinion. See '38 AG Op 620

ANALYSIS

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Turning, starting, stopping—signals. See under §§5025.01–5025.07

I NEGLIGENCE IN GENERAL

(a) ACTS CONSTITUTING

1. In General

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

Ordinary care—definition reaffirmed. The standard definition of ordinary care need not be augmented by adding an extra word "ordinarily" to the phrases "would do" or "would not do under the circumstances".

Schalk v Smith, 224-904; 277 NW 303
Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Imprudent operation—essential proof. The operator of an automobile cannot be deemed to have operated his car "in a careless and imprudent manner" unless it is shown that he operated it in a manner different from the manner in which an ordinarily prudent person would have operated it under the circumstances.

Crutchley v Bruce, 214-731; 240 NW 238; 3 NCCA(NS) 332

Predicating negligence on unlawful rule. Negligence in the operation of a motor vehicle on the public highway may not be predicated on the violation of a rule adopted, without legal authority, by the state highway commission.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Definition of negligence approved. Instruction defining "negligence" and otherwise correct is not rendered erroneous because it includes the statement that "such care is proportionate to the apparent danger involved; where the apparent danger is great, a greater care is required than where such apparent danger is slight". So held against the contention that degrees of negligence are not recognized in this state.

Wolfe v Decker, 221-600; 266 NW 4

Use of known dangerous vehicle. One who continues to ride in an automobile after he knows it is dangerous to do so and without availing himself of the opportunity to have the vehicle repaired is guilty of negligence; especially may he not complain when he happens to occupy such relation to the vehicle as renders it his duty to have repairs made.

Helming v Bank, 206-1213; 220 NW 45

Negligent speed—evidence—sufficiency. Evidence held wholly insufficient to show that a truck on the running board of which a boy was riding was operated at a dangerous rate of speed, or that the roadway was rough and uneven.

Nicolino v Const. Co., 211-1190; 235 NW 297

Driving on wrong side of road—effect. Proof that the driver of a motor vehicle was, at the time of meeting and passing another vehicle on a country road, operating his vehicle on the left-hand, or wrong side of the road, establishes, not that the driver was actually negligent, but that he was presumptively negligent.

Despain v Ballard, 218-863; 256 NW 426

Failure to yield right of way—directing verdict improper. The right-of-way law imposes on a person approaching an intersection from the left the duty to yield the way, a violation of which, under ordinary circumstances, constitutes negligence, and in such a case the defendant is not entitled to a directed verdict.

Bletzer v Wilson, 224-884; 276 NW 836

Child on sled—view obstructed by snowbank—negligence. In an action for death of 7-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Dual negligence in turning into side road. The operator of an automobile who turns into a side road (1) without first noting whether there is sufficient space in which to make the turn with reasonable safety to himself and to all other persons on the highway, and (2) without first signaling such proposed turn, is guilty of dual statutory negligence.

Miller v Lowe, 220-105; 261 NW 822

Unlawful parking. The parking of a motor vehicle at a place where parking is prohibited by a valid city ordinance constitutes negligence and in case a collision occurs with the parked vehicle the said negligence must be deemed to have contributed to the resulting damage.

Riley v Guthrie, 218-422; 255 NW 502; 35 NCCA 818

Violation of statute—when inconsequential. The violation by a motorist of the statute relative to setting out a "flare" beside a truck standing on the highway constitutes inconsequential negligence as to another motorist who, without the flare, had timely knowledge of every fact that a flare would have furnished.

Engle v Nelson, 220-771; 263 NW 505; 39 NCCA 326; 1 NCCA(NS) 163

Driving without driver's license. The fact that the driver of an automobile had no driv-

I NEGLIGENCE IN GENERAL—concluded
(a) ACTS CONSTITUTING—concluded
1. In General—concluded

er's license at the time of an accident becomes inconsequential when the action is by a passenger and when there is no causal relation between the driver's violation of law and plaintiff's injuries.

Schuster v Gillispie, 217-386; 251 NW 735

Predicating negligence on unlawful rule. Negligence in the operation of a motor vehicle on the public highway may not be predicated on the violation of a rule adopted without legal authority by the state highway commission.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Law of road—excuse for violation. Failure to instruct that defendant may excuse his apparent violation of a law of the road is proper when such instruction, if given, would have no support in the evidence.

Jarvis v Stone, 216-27; 247 NW 393

Instructions regarding open car door—proper evidence necessary. Submission to jury of a ground of negligence not supported by the evidence is erroneous. So held where trial court submitted specification of negligence that left rear door of defendant's car was open at time of collision with approaching motorcycle, whereas only testimony on this question came from witnesses who were not present until after accident occurred.

Jakeway v Allen, 227-1182; 290 NW 507

Anticipating child coasting—barricades removed—negligence. Where defendant knew that for many years a certain street was barricaded while children were coasting, and that there had been coasting there recently, but where the snow had melted somewhat so that the middle portion of the paving on the hill was bare of snow, and the barricades had been taken down the day before the accident, the defendant was not bound to anticipate and prepare for some child coasting on the hill.

McBride v Stewart, 227-1273; 290 NW 700

2. Driver's Physical Condition

Discussion. See 22 ILR 525—Sleeping at the wheel

(b) RECKLESSNESS DISTINGUISHED

"Reckless operation" defined. To constitute "reckless operation" of a motor vehicle, the plea and proof must be such as to justify a finding that the operator was "proceeding without heed of, or concern for, consequences". Plea and proof of negligent operation only is wholly insufficient.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

McQuillen v Meyers, 213-1366; 241 NW 442; 34 NCCA 348

Passenger as mere guest (?) or otherwise (?). A passenger riding in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator of the car; or
2. For the definite and tangible benefit of the owner or operator; or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand.

Knutson v Lurie, 217-192; 251 NW 157; 36 NCCA 275; 37 NCCA 62

Passenger as mere guest (?) or otherwise (?). A passenger in an automobile operated by the owner thereof may be a mere guest or invitee with right to recover for damages consequent on the reckless operation, only, of the car; but he may be a passenger (1) for hire, or (2) for the benefit of said operator, or (3) for the mutual benefit of both operator and himself, with right to recover for damages consequent on mere negligent operation by the driver.

Clendenning v Simerman, 220-739; 263 NW 248

II NEGLIGENCE PER SE

(a) IN GENERAL

Negligence—prima facie (?) or per se (?). Where an accident happens upon a public highway outside a city or town, the fact that the vehicle is on the wrong side of the road is only prima facie evidence of negligence. On the other hand, subject to the above, the violation without legal excuse of a standard of care for the operation or equipment of vehicles, whether fixed by statute or ordinance, constitutes negligence per se.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Lange v Bedell, 203-1194; 212 NW 354

McDougal v Borman, 211-950; 234 NW 807; 32 NCCA 405

Sergeant v Challis, 213-57; 238 NW 442

Lane v Varlamos, 213-795; 239 NW 689

Muirhead v Challis, 213-1108; 240 NW 912

Hollingsworth v Hall, 214-285; 242 NW 39

Holub v Fitzgerald, 214-857; 243 NW 575

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Waldman v Motor Co., 214-1139; 243 NW 555

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Wood v Banning, 215-59; 244 NW 658; 32 NCCA 255

Willemsen v Reedy, 215-193; 244 NW 691

Albert v Maher Bros., 215-197; 243 NW 561

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Dillon v Diamond Co., 215-440; 245 NW 725

Peckinpaugh v Engelke, 215-1248; 247 NW 822; 33 NCCA 103; 35 NCCA 765; 1 NCCA (NS) 41

Danner v Cooper, 215-1354; 246 NW 223

Hogan v Nesbit, 216-75; 246 NW 270
Grover v Neibauer, 216-631; 247 NW 298
See Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44; Voiles v Hunt, 213-1234; 240 NW 703; 31 NCCA 59; 32 NCCA 458

Traveling on wrong side of road. Failure of the driver of an automobile on meeting another vehicle on the highway outside cities and towns, to yield one-half of the traveled way by turning to the right does not constitute negligence per se, but prima facie evidence of negligence only.

Cooley v Killingsworth, 209-646; 228 NW 880
Lang v Siddall, 218-263; 254 NW 783
Despain v Ballard, 218-863; 256 NW 426
Hobbs v Traut, 218-1265; 257 NW 320
Rainey v Riese, 219-164; 257 NW 346
McManus v Creamery Co., 219-860; 259 NW 921
Hoover v Haggard, 219-1232; 260 NW 540
Bobst v Hoxie Line, 221-823; 267 NW 673

Negligence per se (?) or prima facie (?). An instruction that negligence may consist in the failure to do that which the law commands, in connection with an instruction that the statute requires drivers of vehicles to turn to the right when meeting, in effect directs the jury that the failure to turn to the right constitutes negligence in and of itself, and such instruction is erroneous because the failure to obey said statute creates a presumption, only, of negligence.

Ryan v Perry Works, 215-363; 245 NW 301

Left-side driving in municipalities. The operator of a motor vehicle in cities and towns is guilty of negligence per se in driving on the left-hand side of a street without legal excuse.

Winter v Davis, 217-424; 251 NW 770

Control of car. Manifestly the court cannot find that a motorist did not have his car under control while attempting to pass another car, and was therefore guilty of negligence per se, when the position and speed of the cars at the time of the collision are in sharp dispute.

Jordan v Schantz, 220-1251; 264 NW 259

Passing vehicle—premature return to traveled path. The operator of a vehicle is guilty of negligence per se when, after passing another vehicle moving in the same direction, he returns to the right-hand side of the highway and in front of the vehicle just passed, within a shorter distance than that provided by law.

Bobst v Hoxie Line, 221-823; 267 NW 673

Turn at intersection. The operator of a westbound automobile, who makes a left-hand turn at an intersecting street, and thereupon increases his speed, in order to escape a collision with an eastbound car which he knows is but some 40 feet west of the intersection and approaching it at a speed twice his own speed, is guilty of negligence per se.

Parrack v McGaffey, 217-368; 251 NW 871

Improper left-hand turn. A left-hand turn from one highway into another highway contrary to the direction of the statute (§5033, C., '35 [§5025.01, C., '39]) constitutes negligence per se in the absence of plea and proof of a valid excuse.

Wilson v Long, 221-668; 266 NW 482

Prior statute. The failure of the owner of a truck, before making a left turn into an intersecting highway, to drive to the right of and beyond the center of the intersection, constitutes negligence per se and if such owner is injured his negligence will be classified as contributory negligence per se if such conclusion is the only one to which reasonable minds could arrive.

Mansfield v Summers, 222-837; 270 NW 417

Failure to signal at unknown intersection—effect. The driver of an automobile may not be said to be negligent per se for failure to sound a signaling device upon approaching an intersecting and completely hidden highway, of the existence of which he had no knowledge, in fact or reason.

Sexauer v Dunlap, 207-1018; 222 NW 420

Plaintiff's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son who enters an obscured intersection without sounding his horn, (§5043, C., '35 [§5031.03, C., '39]), is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

Negligence per se in approaching crossing. Negligence per se is revealed in the act of the driver of an automobile in approaching and entering an obscured public crossing (with which he was familiar) with knowledge that another vehicle was also rapidly and immediately approaching said intersection from his right, and failing either (1) to sound his horn or (2) to yield the right of way. (See Vol. I, §5028 et seq.)

Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44

Approaching arterial highway. The operator of an automobile on a county trunk arterial highway (on which no "stop" or "slow" signs had been erected at points intersected by county local roads) is guilty of negligence per se in knowingly approaching an obscured intersection without either (1) slacking his speed (of some 25 or 30 miles per hour), or (2) giving some warning signal of his approach as required by §5043, C., '31 [§5031.03, C., '39]. (But see Dikel v Mathers, 213 Iowa 76.)

Lang v Kollasch, 218-391; 255 NW 493; 37 NCCA 74

II NEGLIGENCE PER SE—continued
(a) IN GENERAL—continued

Approaching intersection—failure to look to left. The mere fact that the operator of an automobile in approaching, on a rainy day, and at a moderate rate of speed, an intersection which afforded a clear view to all travelers, fails to look to his left for approaching vehicles, does not constitute negligence per se.

Roe v Kurtz, 203-906; 210 NW 550; 33 NCCA 409

Rogers v Jefferson, 224-324; 275 NW 874
Rogers v Jefferson, 226-1047; 285 NW 701

Intersecting county roads. The operator of an automobile on a county trunk road (an arterial highway), having the right of way over traffic on an intersecting local county road, is not guilty of negligence per se in entering such an intersection, with his car under apparent control, and without seeing a car approaching from his right at a high and dangerous rate of speed.

Arends v DeBruyn, 217-529; 252 NW 249; 37 NCCA 78

Primary roads—right of way—contributory negligence per se. Inasmuch as vehicles traveling on a primary road have right of way at intersections with nonprimary roads, the operator of a vehicle on a nonprimary road is guilty of negligence per se when he attempts to cross an intersection with a primary road, at a speed of 10 miles per hour, when he knows or ought to know that another vehicle on the primary road is, at a distance of 80 or 90 feet, approaching the intersection at a speed very greatly in excess of 10 miles per hour.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Failure to yield right of way—directed verdict. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection, and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Accidents at crossings. The driver of a conveyance is guilty of negligence per se when, in approaching an unobscured railway crossing with which he is perfectly familiar, in full possession of his faculties, and with no distracting circumstance or emergency facing him, he, when 20 feet from the crossing, sees an engine approaching at a distance of 175 feet, and knows that the bell is not ringing, and thereafter drives upon the crossing without in any manner observing or judging of the speed of the engine; and this is true even tho the engine is in fact running in violation of an ordinance relative to the speed of trains and to the ringing of the engine bell.

Erlich v Davis, 202-317; 208 NW 515; 27 NCCA 164

Driving upon car tracks. The driver of a conveyance is guilty of negligence per se when, upon reaching a street intersection on a clear day, he has positive knowledge that a nearby streetcar is rapidly approaching the same intersection from a side street, and when he, without again looking at the approaching streetcar and confronted by no emergency, continues his journey into the intersection at a speed which would enable him to stop his conveyance instantly, and turns and enters upon the streetcar tracks in the direction in which the streetcar is moving.

Middleton v Railway, 209-1278; 227 NW 915

Negligence per se in driving upon car tracks. The driver of an automobile is guilty of negligence per se when, upon entering during the daytime a private crossing over much-used interurban railway tracks located on a curve, he knows when some 25 feet from the track in question that his view of an apprehended approaching car is limited to 300 feet, and when he avails himself of such view and sees no approaching car, and thereupon proceeds to attempt, under no diverting circumstances, to cross the tracks at a rate of three miles per hour without looking or listening for the apprehended car, tho his view of the track materially enlarged as he proceeded.

Rosenberg v Railway, 213-152; 238 NW 703

Driving upon unobstructed streetcar tracks. The operator of an automobile is guilty of negligence per se when, in the nighttime, and without diverting circumstances, and at a speed such that he could have stopped within 2 feet, he drives upon a streetcar track and immediately in front of an approaching and lighted streetcar which was at all material time in unobstructed view.

Crull v Railway, 217-83; 250 NW 905

Streetcar intersection—negligence per se. The operator of an automobile cannot be said to be negligent per se in driving into an intersection on a dark night in front of a rapidly oncoming streetcar with no headlight and with the entire front end of the streetcar unlighted, when, immediately before entering the intersection, he stops and listens, and looks both ways for streetcars, and sees none (so he testifies) because of the glare of oil station lights immediately to his left from which side the streetcar was approaching, and especially when there is evidence that the streetcar was approaching without audible signals.

Deiling v Railway, 217-687; 251 NW 622

Collision with streetcar. The operator of an automobile who, without diverting circum-

stances, approaches and drives upon streetcar tracks, and looks for an approaching streetcar at a place where he knows his view is very limited because of an intervening embankment, and fails to look at a point where he would still be within a zone of safety and where his view would be unobstructed, is guilty of negligence per se.

Pender v Railway, 217-1152; 251 NW 55

Driving into streetcar. The driver of a truck is guilty of negligence per se when, without any apparent necessity for so doing, he attempts to steer his vehicle out of a groove or rut in the street, with the result that the vehicle suddenly responded to his efforts, bounded out of the rut, and darted diagonally across the street for a distance of 20 feet, and into an oncoming streetcar, of the prior presence and actions of which he had the fullest knowledge.

Bowers v Railway, 219-944; 259 NW 244

Colliding with traffic signal. An experienced driver of an automobile is guilty of negligence per se when, near midnight, while traveling in the center of a 26-foot wide, brilliantly lighted, paved street with which he was familiar, he drives squarely head-on in the center of the street against a railroad traffic signal consisting of a concrete base 4 feet wide, 2 feet high, and 5 feet long, surmounted by an iron pole several feet high and noticeably painted with black and white diagonal stripes, on which pole at the time were crossarms bearing in large letters the words "railroad crossing" and two burning lights.

Van Gorden v City, 216-209; 245 NW 736; 4 NCCA(NS) 291

Limb of tree as street obstruction. One who, in broad daylight and without diverting circumstances, drives along a public street with which he is familiar, and permits his vehicle to come in contact with a perfectly visible limb of a tree overhanging the traveled part of the street is guilty of negligence per se.

Abraham v Sioux City, 218-1068; 250 NW 461

Riding in exposed position. The act of a person in riding on the rear, rounded surface of a coupe, and in such a position that he cannot see what is happening ahead of the car, does not constitute negligence per se when the injury to such person arose out of a collision with another car.

Hamilton v Boyd, 218-885; 256 NW 290; 37 NCCA 664

Arm out of window. The driver of an automobile is not necessarily guilty of negligence per se in driving with his left arm slightly protruding through the left window of his car.

Olson v Tyner, 219-251; 257 NW 538

Taking obviously dangerous position on highway. A motorist is guilty of negligence per se when, with darkness rapidly falling, and with his unlighted car stalled on a substantial upgrade, and substantially across the right-hand side of a known heavily-traveled, ice-covered street, he deliberately places himself on that side of his car toward which traffic would be directly moving, and, with his back to such oncoming traffic, attempts to back his car into a private driveway, knowing at the time that the view of an approaching driver would be seriously impaired by the lights of a car which at that moment had passed him, and which was moving toward said approaching driver.

Fortman v McBride, 220-1003; 263 NW 345; 39 NCCA 330

Place of stopping on highway. It is not negligence per se for a motorist, on a moonlit, foggy night, with his rear lights burning and discernible for a distance of 30 rods, to stop, for a period of from 2 to 5 minutes on the extreme right-hand side of a long, straight, level stretch of an 18-foot wide paved road, for the purpose of removing the loose or broken chains on his tires, even tho he might have stopped on a 6-foot wide slippery and muddy dirt shoulder.

Goodlove v Logan, 219-1380; 261 NW 496

Stopping on highway to clean windshield. The driver of an automobile cannot be deemed negligent per se (1) in stopping his car on the right-hand side of the road with the major part of the car on the dirt shoulder bordering the pavement for the purpose of restoring visibility by cleaning the sleet from his windshield, nor (2) in stepping out of the car and upon the running board—he, up to the time of said act, not having seen an approaching car.

Winter v Davis, 217-424; 251 NW 770; 35 NCCA 819; 39 NCCA 308

Stopping on highway at night. It is not negligence per se for a motorist, traveling on a dark, misty, and foggy night, on the proper side of a dark, 28-foot wide roadway, to stop, with his lights in full operation, and immediately to step from the car and into the traveled way.

Lukin v Marvel, 219-773; 259 NW 782; 1 NCCA(NS) 157

Emergency—turning to right to avoid pedestrian. The driver of an automobile who is driving south on the right-hand side of a north and south highway is not guilty of negligence per se because, in order to avoid hitting a child running across the highway from the east side, he turns still farther to the right, even tho it later appears that had he kept his course or had turned to the left he might have avoided hitting the child.

Garmoe v Colthurst, 215-729; 246 NW 767

Unavoidable accident. Evidence reviewed and held to reveal per se no act of negligence

II NEGLIGENCE PER SE—continued
(a) IN GENERAL—continued

on the part of a motorist in coming into collision with a child who suddenly and unexpectedly darted from a hidden cover into the pathway of the car.

Chipokas v Peterson, 219-1072; 260 NW 37; 113 ALR 524; 3 NCCA(NS) 334

Pedestrian in center of highway. A pedestrian who, with normal sight and hearing, travels on a clear night in a space which is substantially 2 feet wide and which is marked by parallel black lines drawn along the center of a straight, 18-foot, paved highway, with an unobstructed view both to his front and rear of more than a quarter of a mile, with full opportunity to walk on the smooth, 6-foot-wide dirt shoulders bordering the pavement, is guilty of negligence per se.

Lindloff v Duecker, 217-326; 251 NW 698; 34 NCCA 234

Pedestrian—failure to keep lookout to rear. The foreman of a paving outfit is guilty of negligence per se in walking along the unpaved portion of a rough road for a distance of some 200 feet without making any observations to his rear for trucks which he knew were being backed along said road and in his immediate direction at the rate of one truck each 90 seconds.

Hedberg v Lester, 222-1025; 270 NW 447

Crossing highway without looking. An adult person, after alighting from an automobile which had been stopped substantially astraddle the north edge of an 18-foot pavement on a heavily traveled country highway, is guilty of negligence per se in attempting to walk to the south and across said pavement without making any observations to his unobstructed right for eastbound vehicles.

Zuck v Larson, 222-842; 270 NW 384

Minor walking on wrong side of highway—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway, by walking along right side about 4 or 5 feet from west side of highway, and failing to make observations as to oncoming traffic from the rear while walking after dark on a street traversed by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

"Stop and go" signals—change after entering intersection. A pedestrian who, in obedience to a municipally operated "go" signal, starts across the street on the pathway provided for pedestrians, and suddenly discovers that said "go" signal has changed to "stop", is not guilty of negligence per se in failing to look for, see, and avoid a vehicle which, under said change in signals, passes entirely across the intersection and hits and injures said pedestrian within less than two seconds after said change in signals occurs; especially is this true (1) when said pedestrian has, by ordinance, the right of way over said vehicle because he was first properly to enter said intersection, and (2) when said pedestrian, at the very instant of said change in signals, was immediately approaching other stationary vehicles known to be awaiting release from a "stop" signal.

Dougherty v McFee, 221-391; 265 NW 176

Crossing traffic-congested street. A pedestrian who, while crossing a traffic-congested street at a place other than the place specifically provided for such crossing, fails to look for approaching vehicles, or voluntarily steps in front of an immediately approaching vehicle which he does see, is guilty of negligence per se.

Spaulding v Miller, 216-948; 249 NW 642; 35 NCCA 676

Legal avoidance. The operator of a vehicle who has failed to comply with a statutory or ordinance standard of care governing the operation or equipment of his vehicle may excuse such failure, and thereby avoid the legal imputation of negligence per se, by establishing (1) any excuse specifically provided by statute, or (2) that, without his fault, circumstances rendered compliance with the law impossible.

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Legal excuse—what constitutes. The operator of a vehicle who has failed to comply with a statutory standard of care may avoid the consequences thereof by establishing as legal excuse (1) anything making it impossible to comply, (2) anything over which he has no control which places his vehicle in a position contrary to the law, (3) that he was confronted with an emergency not of his own making, or (4) any excuse specifically provided by statute.

Young v Hendricks, 226-211; 283 NW 895

Violating statute without legal excuse—burden of proof. An instruction stating that if a defendant motorist failed to comply with the requirements of a statute "without legal excuse", then the verdict should be for the plaintiff, does not shift plaintiff's burden of proof on the defendant.

Schalk v Smith, 224-913; 277 NW 303

Assured clear distance ahead. The driver of an automobile, in the nighttime and on a public highway, when faced by no emergency or diverting circumstance, is guilty of negligence per se in so driving that he cannot stop within the radius of his lights.

Ellis v Bruce, 217-258; 252 NW 101; 36 NCCA 136; 1 NCCA(NS) 10

Absence of lights. The operator of an automobile who, on a dark and foggy night, operates his car without lights, because he believes he can see better without them, is guilty of negligence per se.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Absence of tail light. The parking, during the nighttime, of a motor vehicle upon a paved highway outside a city or town, with the tail lights extinguished, constitutes negligence per se, in the absence of a showing of legal excuse.

Harvey v Knowles Co., 215-35; 244 NW 660

(b) EXCESSIVE SPEED

Instruction—presumption of negligence—error. Operating an automobile upon the public highway at a speed prohibited by law constitutes negligence per se, and error results from instructing that such operation creates a presumption of negligence.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Holub v Fitzgerald, 214-857; 243 NW 575

Waldman v Motor Co., 214-1139; 243 NW 555

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Albert v Maher Bros., 215-197; 243 NW 561

Danner v Cooper, 215-1354; 246 NW 223

Grover v Neibauer, 216-631; 247 NW 298

Prohibited speed negligence per se. A violation of the statute that no person shall drive any vehicle on a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead permits of no escape from the imputation of negligence per se, except on plea and proof of a recognized legal excuse for so driving.

Ellis v Bruce, 217-258; 252 NW 101; 36 NCCA 136; 1 NCCA(NS) 10

Hart v Stence, 219-55; 257 NW 434; 97 ALR 535; 36 NCCA 716; 1 NCCA(NS) 23

Swan v Auto Co., 221-842; 265 NW 143; 1 NCCA(NS) 58

Inability to stop within assured clear distance. The driver of an automobile is guilty of negligence per se in driving at such a rate of speed that he cannot stop within the distance that a discernible obstruction may be seen ahead of the car. So held as to a driver who, blinded by the lights of a stationary car by the roadside, nevertheless continued his speed for some material distance, and, when too late to stop, discovered an unlighted truck in the highway.

Lindquist v Thierman, 216-170; 248 NW 504; 87 ALR 893; 1 NCCA(NS) 38

Assured clear distance—negligence. The failure of the driver of an automobile to drive at such speed as will permit him to bring the car to a stop within the assured clear distance ahead constitutes, in the absence of some legal excuse, negligence per se. And such excuse is not made to appear by evidence that the driver met a car and was temporarily blinded by the lights shining in his face but did not slacken his speed.

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Willemsen v Reedy, 215-193; 244 NW 691

Overtaking and passing—circumstances controlling. The operator of a motor vehicle, who, at a speed of 40 miles per hour and in the nighttime, attempts to pass another vehicle which he is closely following, at the very time when the operator of such other vehicle is attempting to pass a vehicle which he has overtaken, is guilty of negligence per se, both because he (1) is manifestly driving at an imprudent rate of speed under the circumstances, and (2) is driving at a rate of speed which will not enable him to stop within the assured clear distance ahead.

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Proximate cause. The act of passing a vehicle at an illegal rate of speed may not be declared negligence per se as to a collision which occurred after the passing had been completely effected.

Berridge v Pray, 202-663; 210 NW 916; 29 NCCA 560

Proximate cause—noncausal negligence. Excessive or negligent speed of an automobile becomes immaterial when it is not the proximate cause of the injury in question.

McDowell v Interstate Co., 208-641; 224 NW 58; 35 NCCA 21

Speed as nonproximate cause. A rate of speed which is not negligence per se cannot be deemed the proximate cause of an accident when the act of the injured party in stepping into the pathway of the car was so sudden and unexpected as to render impossible the stopping of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Directed verdict—improper unless per se negligence also contributory. A plaintiff motorist, against whom a directed verdict was rendered because in violating a speed statute he was negligent per se, still should have had the benefit of the best possible view of the evidence, and, moreover, a record showing that he remained at all times on his own side of the road, but that a truck driver, for no apparent reason, drove across the pavement center line, resulting in a head-on collision, makes a jury question as to whether or not plaintiff's per se negligence contributed to his injury.

McIntyre v West Co., 225-739; 281 NW 353

Speed statute violation—per se negligence must contribute to bar recovery. As involved

II NEGLIGENCE PER SE—concluded
(b) EXCESSIVE SPEED—concluded

in a motor vehicle collision, the act of driving a motor vehicle at a speed of more than 25 miles an hour in a residence district, being in violation of statute, is negligence as a matter of law, but unless such negligence contributes to the injuries, it will not defeat recovery.

McIntyre v West Co., 225-739; 281 NW 353

Speed at intersection—jury question. A motor vehicle operator who materially and intentionally increases the speed of his vehicle "when approaching and traversing a highway intersection"—seemingly in violation of §5031, C., '35 [5023.04, C., '39], is not necessarily guilty of negligence per se.

Carpenter v Wolfe, 223-417; 272 NW 169

Insufficient evidence. Evidence held wholly insufficient to show that a truck, on the running board of which a boy was riding, was operated at a dangerous rate of speed, or that the roadway was rough and uneven.

Nicolino v Const. Co., 211-1190; 235 NW 297

Excess of statutory rate. It is correct to instruct the jury that a driver of an automobile is guilty of negligence if he drives "at a high and dangerous rate", such being the allegation of the petition and the evidence tending to show a speed materially in excess of the maximum speed allowed by statute.

Albert v Maher Bros., 215-197; 243 NW 561

III CONTRIBUTORY NEGLIGENCE

(a) IN GENERAL

Plaintiff's conduct—conflict in evidence. The presence or absence of contributory negligence is generally a jury question, and two elements are involved, (1) what plaintiff did, and (2) the effect of his action; if either or both of said propositions present uncertainty, there is a jury question.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Model instruction. Courts, in instructing as to contributory negligence which will bar recovery, should employ the model instruction approved by the appellate court, viz: "If the injured party contributed in any way or in any degree directly to the injury complained of there can be no recovery", but it is not erroneous to substitute "cooperated" or an equivalent term for "contributed".

Hoegh v See, 215-733; 246 NW 787

Correct definition. Preferably, the court should instruct that contributory negligence which will defeat a recovery by plaintiff is that negligence which "directly contributes to the damage in any degree or in anyway", but, of course, the court may employ any other clearly equivalent expression.

Rogers v Lagomarcino-Grupe Co., 215-1270; 248 NW 1

Degree or extent barring recovery—model instruction. It is strictly accurate to instruct, in an action for damages for negligently inflicted injuries, that before plaintiff can recover, he must establish as a fact that he, himself, "was not guilty of any negligence that contributed in any manner or degree directly to his own injury".

Engle v Nelson, 220-771; 263 NW 505; 1 NCCA(NS) 166

Adequate definition. An instruction which defines "contributory negligence" as such negligence as "helps" to produce the injury complained of is not erroneous when accompanied by a correct definition of negligence generally.

Swan v Dailey Co., 221-842; 265 NW 143

"Cause of injury"—language approved. A contributory negligence instruction in a motor vehicle collision case stating that if such negligence "became or constituted * * * a cause of the injury" reviewed and held correct.

Smithson v Mommsen, 224-307; 276 NW 47

Negligence must "directly" contribute. Instruction reaffirmed requiring plaintiff's negligence to contribute "directly" to the injuries before it will defeat recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Sole cause of injury. An instruction that "where a party is injured and such injury is due to his own negligence he cannot recover", tho incorporated in a paragraph defining contributory negligence, does not have the effect of declaring that the contributory negligence which will bar an injured party from recovering must be a negligence which is the sole cause of the injury.

Ryan v Rendering Wks., 215-363; 245 NW 301

Need not be proximate cause of injury. Contributory negligence in order to defeat recovery need not be the proximate cause of the injury in question. It is only necessary that such negligence contributes to the injury in some degree or in some manner.

Hogan v Nesbit, 216-75; 246 NW 270
Schuster v Gillispie, 217-386; 251 NW 735

Proximate cause. The contributory negligence which will defeat a plaintiff is such negligence as contributes to the injury in any way or in any degree. Error results from instructing that such negligence must contribute proximately to the injury.

Hamilton v Boyd, 218-885; 256 NW 290

Instructions — proximate cause — incurable error. An instruction that, before plaintiff can recover for alleged negligently inflicted injuries, he must establish that he "was free from contributory negligence that contributed to, or was the proximate cause of such injuries", is entirely erroneous insofar as refer-

ence is made to "proximate cause", and the error is not cured by another instruction to the effect that the instructions should be construed "as a whole".

Bobst v Hoxie Line, 221-823; 267 NW 673

Freedom from contributory negligence—failure to instruct. An instruction which summarizes all the elements that plaintiff must prove to make a case, and directs the jury that if these elements and conditions existed, the plaintiff is entitled to recover, is fatally defective when no reference whatever is made to plaintiff's freedom from contributory negligence. And, in such case, the error is not cured by the fact that in other instructions the jury is instructed that plaintiff must be free from contributory negligence.

Bobst v Hoxie Line, 221-823; 267 NW 673

Contributory negligence—fatally inconsistent instructions. After properly instructing that plaintiff, before she could recover, must establish her entire freedom from contributory negligence, the court commits a fatal inconsistency by instructing that plaintiff could not be charged with negligence in not choosing some other highway than the one in question on which to travel, unless defendant has proven that plaintiff knew or ought to have known that the highway on which she was traveling was in a dangerous condition.

Kehm v Dilts, 222-826; 270 NW 388

Instructions—error in quoting statute only. In submitting specifications of alleged contributory negligence, the court commits error in simply quoting the statute relating to these grounds without defining just what acts of plaintiff, under the evidence, would constitute contributory negligence, and without applying the law to the facts.

Jakeway v Allen, 226-13; 282 NW 374

Lack of evidence—effect. An instruction which properly directs the jury, in determining the issue of contributory negligence of an injured party, to take into consideration certain enumerated matters as shown by the evidence is not necessarily erroneous because it makes no reference to the effect of a lack of evidence on the subject.

Engle v Nelson, 220-771; 263 NW 505

Nonduty to anticipate negligence. An instruction on the subject of contributory negligence is erroneous when it, in effect, requires the person in question to anticipate negligence on the part of the driver of an approaching vehicle.

Townsend v Armstrong, 220-396; 260 NW 17

Requests—right to assume care by plaintiff. A requested instruction in a personal injury action, to the effect that defendant had a right to assume that plaintiff would commit no act of negligence contributing to his own injury, is properly refused (1) when defendant in driving as he did was not influenced by plaintiff's actions, and (2) when the record shows that the jury found that plaintiff was not guilty of any act of contributory negligence.

Orr v Hart, 219-408; 258 NW 84

Most favorable view rule. On motion for directed verdict in determining whether plaintiff was guilty of contributory negligence as a matter of law, the evidence must be considered in the light most favorable to him.

Trailer v Schelm, 227-780; 288 NW 865

Defendant's negligence also considered—directing verdict. In a personal injury action on account of the negligent operation of a motor vehicle, the court, on a motion for directed verdict, should, before considering contributory negligence of the plaintiff, consider the evidence as to negligence on the part of the defendant being a proximate cause of the injury.

Youngman v Sloan, 225-558; 281 NW 130

Law of case. A holding on appeal, that plaintiff in a personal injury action based on alleged negligence was himself guilty of contributory negligence, is the absolute law of the case on retrial on the same state of facts.

Spaulding v Miller, 220-1107; 264 NW 8

Driving from private driveway. Evidence relative to the act of driving from a private driveway into a public highway in front of an approaching car reviewed, and held to present a jury question on the issue of contributory negligence.

Tinley v Implement Co., 216-458; 249 NW 390

Failure to see or hear. Principle reaffirmed that he who failed either to see what was plainly visible or to hear what was clearly audible must be deemed not to have looked or listened at all.

Sodemann v Railway, 215-827; 244 NW 865

Entering highway without looking. The occupants of an eastbound automobile were guilty of contributory negligence per se under testimony that upon arriving at an intersecting north and south street, on a clear day, they looked to the south without obstruction for a distance of at least 225 feet, and saw no approaching car, and thereupon entered the intersection and moved across the same at 10 miles per hour, but before they had fully cleared the intersection were hit by a northbound car traveling at the rate of 40 or 50 miles per hour.

Hewitt v Ogle, 219-46; 256 NW 755

Contributory negligence per se. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had

III CONTRIBUTORY NEGLIGENCE—continued

(a) IN GENERAL—continued

sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

When not determined as matter of law. In action for personal injuries and damage to automobile resulting from collision with defendant's automobile, plaintiff is not guilty of contributory negligence as a matter of law for failure to maintain lookout, yield right of way, and make proper stop before entering arterial highway, when evidence discloses that as plaintiff was about to cross an arterial highway, he looked to the right and saw defendant's automobile at a distance of 150 feet and then proceeded across intersection at speed of between 5 and 10 miles per hour until defendant's automobile collided with right rear wheel of plaintiff's automobile—more than half of plaintiff's automobile being out of the intersection.

Cowles v Joelson, 226-1202; 286 NW 419

Diverting circumstances. The operator of an automobile when entering upon a known railway crossing is held to know that he is entering a zone of danger; yet (1) the absence of statutory signals, (2) the obscured nature of the crossing, and (3) the distracting influence of other passing vehicles and of nearby objects may save the operator from the imputation of contributory negligence per se.

Nederhiser v Railway, 202-285; 208 NW 856; 27 NCCA 86

"Double passing." Evidence relative to the facts attending a "double passing" reviewed and held to present a jury question on the issue of contributory negligence.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Standing on endless track of tractor to fill gas tank. Where defendant, engaged in road construction work, was using caterpillar tractor-pulled dump wagons, and while plaintiff, a gasoline tank-wagon operator, was standing on the caterpillar's endless track filling the gasoline tank, the tractor suddenly started moving, throwing plaintiff in path of another oncoming tractor-towed dirt wagon which ran over and injured him, and altho defendant claims that plaintiff was on the tractor at his own peril, even when the peril was created by defendant, the question as to whether plaintiff acted as ordinarily prudent person or was guilty of contributory negligence was for jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Insufficient showing. Evidence held insufficient to show contributory negligence per se in not seeing, in the nighttime, an unlighted approaching vehicle.

Carlson v Decker, 216-581; 247 NW 296; 36 NCCA 91

Collision with stationary truck. The position of an unlighted truck parked in the highway, and the diverting circumstances occurring just preceding a collision with the truck, may have a very material bearing on the issue of plaintiff's contributory negligence, and the assured clear distance rule.

Kimmel v Mitchell, 216-366; 249 NW 151; 1 NCCA(NS) 42

Persons working on highway. In a laborer's personal injury action against a truck driver for backing truck into laborer while both were engaged in highway construction, §5017.06, C., '39, exempting persons and motor vehicles actually engaged in work upon the highway from the motor vehicle law requirements, does not exempt a truck driver from using his horn if necessary in the exercise of ordinary care when backing from an intersection onto highway under construction. Question of defendant's negligence in not sounding horn nor observing plaintiff's presence when backing truck where men were working, and question of plaintiff's contributory negligence while working under foreman's instruction at outside edge of road were questions properly submitted to jury.

Rebmann v Heesch, 227-566; 288 NW 695

Injuries to child—improper direction of verdict. Record reviewed relative to the facts attending the alleged negligent infliction of injuries on a child, and held to be such as to render improper the direction of a verdict for defendant, especially as said child was of such tender years as to be, presumptively, incapable of negligence.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Bicyclist's observation of parked car in time to avoid collision. Where a minor bicyclist collided with a car unlawfully parked on left side of city street without tail light, when he pulled over to his right to avoid an approaching car, the question of his contributory negligence, which depended on whether or not he should have observed the parked car in time to avoid the collision, was for the jury.

Trailer v Schelm, 227-780; 288 NW 865

Foreign statutes—right to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of defendant in operating an automobile in said foreign state, plaintiff may plead those statutes and rules of law of said foreign state from which actionable negligence, under the facts of the case, are deducible, e. g., those (1) which declare the

degree of care required of defendant in such operation in said foreign state, and (2) the nature and degree of plaintiff's contributory negligence which will bar his action, said pleaded statutes and laws being of the very essence of plaintiff's cause of action, and not contrary to the public policy of this state, even tho they exact a greater degree of care than would be exacted by the law of this state had the injury occurred in this state.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Evidence sufficiency. Evidence held to establish contributory negligence per se in the operation of an automobile.

Plummer v Wright, 214-318; 242 NW 28

Insufficient evidence. Evidence held insufficient to establish contributory negligence per se.

Wambeam v Hayes, 205-1394; 219 NW 813
Riddle v Frankl, 215-1083; 247 NW 493

Sudden emergency. Evidence reviewed and held insufficient to establish contributory negligence per se on the part of a motorist, especially in view of the fact that he was faced by a sudden, almost instantaneous emergency which was not of his making.

McKinnon v Guthrie, 221-400; 265 NW 620

Jury question. Record reviewed relative to a fatal accident at a highway intersection, and held that plaintiff had not shown that the deceased was free from contributory negligence.

Nyswander v Gonser, 218-136; 253 NW 829

(b) DEFINITION

Instruction. No particular or fixed phraseology is required in conveying to a jury, in a case founded on negligence, the idea that plaintiff cannot recover if he has, by his own negligence, contributed in any degree to his own injury.

Bauer v Reavell, 219-1212; 260 NW 39

Contributory negligence — degree barring recovery. In an action for damages based on actionable negligence of the defendant, the quantum of contributory negligence on the part of plaintiff which will absolutely bar recovery is any negligence which directly contributes to said injury "in any way or in any degree". Any material departure in the instructions from this statement of the law must be deemed reversible error.

Albert v Maher Bros., 215-197; 243 NW 561
Rogers v Lagomarcino Co., 215-1270; 248 NW 1
Hellberg v Lund, 217-1; 250 NW 192
Becvar v Batesole, 218-858; 256 NW 297
Hamilton v Boyd, 218-885; 256 NW 290
Bauer v Reavell, 219-1212; 260 NW 39
Meggers v Kinley, 221-383; 265 NW 614
Swan v Auto Co., 221-842; 265 NW 143
Clark v Berry Seed Co., 225-262; 280 NW 505

Contributory negligence defined. It is not reversible error to define contributory negligence as negligence which proximately causes an injury or which in some degree contributes to the bringing about of such injury.

Stilson v Ellis, 208-1157; 225 NW 346
O'Hara v Chaplin, 211-404; 233 NW 516
McDougal v Bormann, 211-950; 234 NW 807

Adequate definition. Instructions defining contributory negligence as negligence which contributes to cause the injury and stating that before plaintiff could recover he must establish by a preponderance of the evidence that he was not guilty of any negligence that in any degree contributed to cause of collision were not erroneous and did not tell jury such negligence must be a proximate cause before it would prevent recovery.

Jakeway v Allen, 227-1182; 290 NW 507

Degree—fundamental error. An unobjectionable definition of contributory negligence is converted into fundamental error by the addition of the clause "and but for such negligence on the part of the person injured the injury would not have occurred."

Ryan v Rendering Wks., 215-363; 245 NW 301

Direct contribution to injury. Principle reasserted that negligence is not contributory unless it contributes directly to plaintiff's injury.

Engle v Ungles, 223-780; 273 NW 879

(c) DRIVER

Speed statute violation—per se negligence must contribute to bar recovery. As involved in a motor vehicle collision, the act of driving a motor vehicle at a speed of more than 25 miles an hour in a residence district, being in violation of statute, is negligence as a matter of law, but unless such negligence contributes to the injuries, it will not defeat recovery.

McIntyre v West Co., 225-739; 281 NW 353

Absence of lights—instructions—sufficiency. An instruction that plaintiff would be guilty of contributory negligence if his automobile was not equipped with two white lights on the front is all-sufficient on that particular subject matter.

Winter v Davis, 217-424; 251 NW 770

Striking admissible testimony. Excluding evidence that lights on defendant's truck were not burning, plaintiff having failed to allege such fact in petition, held prejudicial error when such fact had direct bearing on question of plaintiff's contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Proof of facts not alleged. Evidence that lights were not burning on defendant's truck should have been admitted, even tho not alleged

III CONTRIBUTORY NEGLIGENCE—continued

(c) DRIVER—continued

as a ground of negligence in plaintiff's petition, in order to enable plaintiff to show he was maintaining a proper lookout and was therefore free from contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Assured clear distance ahead—nondiverting circumstances. The operator of an automobile is guilty of contributory negligence in colliding, in the nighttime, with a truck parked in the highway directly ahead of him, when his lights revealed objects ahead for a distance of from 75 to 100 feet; and he cannot avoid such imputation of negligence by the claim that just preceding the collision, his attention was diverted by a light remote from the highway on which he was traveling.

Dearinger v Keller, 219-1; 257 NW 206; 36 NCCA 709

Sounding horn — driver's discretion — jury question. In an automobile damage action, a driver of an automobile is not guilty of negligence as a matter of law for failure to sound horn as he approaches an intersection, since the statute does not require the sounding of the horn under any and all conditions. The propriety of using the horn is left to the reasonable discretion of the driver, and is a fact rather than a law question. The jury determines whether the sounding of a horn would have avoided the accident.

Short v Powell, 228- ; 291 NW 406

Entering highway from private driveway. Where a car, traveling in neutral at only 3 miles per hour, approaches a public highway from a private driveway, and when the driver, while the car is still 12 feet from such highway, sees defendant's truck approaching at a rapid rate, then the fact that the car was out in the highway when the collision occurred would show either that the brakes were inadequate or that the driver was negligent in the operation of his car.

Hermon v Egy, (NOR); 207 NW 116; 26 NCCA 270

Failure to stop at stop sign—jury question. The alleged failure of plaintiff to stop before entering a paved primary highway, in view of evidence that defendant's truck was several hundred feet away from the intersection and traveling on the left side of pavement at a time when plaintiff's automobile was entirely across the black line and on his right-hand side of the road, cannot, where the evidence conflicts and reasonable men might differ, be, as a matter of law, negligence contributing to the collision.

Russell v Leschensky, 224-334; 276 NW 608

Physical facts—statute violation. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection, and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Failure to look to left on entering intersection. Principle reaffirmed that vehicle driver's failure to look to the left when entering highway intersection does not constitute contributory negligence as a matter of law.

Roe v Kurtz, 203-906; 210 NW 550; 33 NCCA 409

Rogers v Jefferson, 224-324; 275 NW 874

Rogers v Jefferson, 226-1047; 285 NW 701

Left turn—prior statute. The failure of the owner of a truck, before making a left turn into an intersecting highway, to drive to the right of and beyond the center of the intersection, constitutes negligence per se and if such owner is injured his negligence will be classified as contributory negligence per se if such conclusion is the only one to which reasonable minds could arrive.

Mansfield v Summers, 222-837; 270 NW 417

Crossing intersection before oncoming car.

Davis v Hoskinson, 228- ; 290 NW 497

Contributory negligence per se. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate,—a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Maintaining lookout — jury question. In action for damages resulting from automobile collision, where the only pertinent evidence on the question was that of the plaintiff and his witnesses that plaintiff was at all times watching the road, court properly refused to direct the jury, as a matter of law, to find plaintiff negligent in respect to keeping a lookout.

Simmering v Hutt, 226-648; 284 NW 459

Failure to see parked car in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from con-

tributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Instructions compelling jury to draw certain inference. Where plaintiff and defendant were, under conditions which rendered visibility poor, approaching the same intersection approximately at the same time, the court cannot properly instruct the jury that, if plaintiff could see several hundred feet in the direction from which defendant was approaching, then the jury must conclude, either (1) that plaintiff did not look for defendant, as was his duty, or (2) that plaintiff did see the defendant.

Appleby v Cass, 211-1145; 234 NW 477

Nonnegligent lookout. The driver of an automobile, moving easterly at the rate of 20 miles per hour, who, when some 140 feet from an intersection, looks and sees no vehicle approaching from the north within a distance of 290 feet, is not guilty of negligence per se in not again looking to the north until after he had satisfied himself, as soon as possible, when near the intersection that no one was approaching from the south.

Liddle v Hyde, 216-1311; 247 NW 827; 33 NCCA 433

Car running in reverse—failure to discover. One who, on a fairly clear day, and with no obstruction to vision, and with nothing to distract attention, is operating an automobile at the rate of some 25 miles per hour on the proper side of a straight and level, paved highway, is not guilty of contributory negligence per se in failing to discover, until too late to avoid a collision, that another automobile directly ahead of him (and some 40 rods distant when first seen) was slowly runing backward, it appearing that said latter car carried no sign or signal, other than its movement, that it was running in reverse.

Baldwin v Rusbult, 220-725; 263 NW 279

Passing car traveling in same direction. Record reviewed and held to present a jury question on the issue of the contributory negligence of plaintiff in attempting to pass another car traveling in the same direction.

McCoy v Cole, 216-1320; 249 NW 213

Proximate cause. It may not be said that the unlawful speed of a vehicle constitutes contributory negligence per se as to a collision which results from such vehicle being overtaken by a faster-moving vehicle.

Berridge v Pray, 202-663; 210 NW 916

Unbalanced instruction — unallowable limitation on materiality of evidence. Reversible error results to an unsuccessful plaintiff (in an action pivoted on the issue whether defendant traveling northward yielded half of the traveled way to plaintiff traveling southward) from instructions to the effect that "evidence that defendant just preceding the collision swerved his car to the west is material on the issue whether plaintiff was guilty of contributory negligence, even tho plaintiff had not alleged such swerving as a specific act of negligence on the part of the defendant". The vice is not in what the court does say but in what the court does not say, to wit: that said evidence is material on the issue of defendant's negligence.

Keller v Gartin, 220-78; 261 NW 776

Crossing streetcar tracks. A party will not be permitted to excuse his contributory negligence, consequent on his attempt to cross streetcar tracks without using his senses of sight and hearing, by the simple assumption that the streetcars will not be negligently operated.

Rosenberg v Railway, 213-152; 238 NW 703

Accident at railway crossing—negligence per se. The driver of a vehicle who, while approaching a railway crossing, knows that his view along the track is obscured by an intervening embankment, and enters upon said crossing, is guilty of contributory negligence per se when, without dispute, his unobstructed view along the track from a point 25 feet distant from the crossing and up to a point 10 feet distant from the crossing enlarged from 360 feet to 954 feet. Under such circumstances the testimony of the driver that he was constantly looking and listening and saw and heard nothing, must be wholly rejected.

Darden v Railway, 213-583; 239 NW 531

Accident at crossing. The operator of a vehicle is guilty of negligence in driving upon a railway crossing in front of an approaching train (1) when he knows the train is approaching the crossing, (2) when the train is in plain sight for a material distance from the crossing, and (3) when his failure to see the train, at best, was because of a known obstruction on his own vehicle.

Sodemann v Railway, 215-827; 244 NW 865

Accident at crossing. A traveler in approaching a railway crossing with which he is familiar, and while he is beset by no diverting circumstance, is guilty of negligence in failing to look at some place from where he knows he can see approaching trains and thus avoid injury.

Glessner v Railway, 216-850; 249 NW 138

Failure to see approaching train. A traveler who, when some 15 feet from a railway crossing, looks for but fails to see a train which is in plain sight on a straight track and rapidly approaching the crossing from a point some 230 feet distant, and thereupon drives upon the crossing, is guilty of contributory negligence.

Cashman v Railway, 217-469; 250 NW 111

Railroad crossing—motorist not looking. A motorist who approaches a railroad crossing

III CONTRIBUTORY NEGLIGENCE—continued

(c) DRIVER—concluded

on a clear day, over a good road, with no obstructions and no diverting circumstances, and who drives upon the tracks where he is struck by a train and killed, when, had he looked, he must have seen the approaching train which from a point 141 feet from the crossing was visible 2500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant-railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Absence of signs and signals at railroad—nonproximate cause. The failure of a railway company to erect statutory warning signs on both sides of a railway crossing (assuming such duty to exist) or the failure of its engineer, when approaching a crossing, to give the statutory signals, becomes quite inconsequential where the operator of an automobile and his guest saw the crossing and the immediately approaching train when they were 100 feet from said crossing, and while they were traveling at a speed not exceeding 25 miles per hour.

Wright v Railway, 222-583; 268 NW 915

Sudden emergency. Evidence reviewed and held insufficient to establish contributory negligence per se on the part of a motorist, especially in view of the fact that he was faced by a sudden, almost instantaneous emergency which was not of his making.

McKinnon v Guthrie, 221-400; 265 NW 620

Common enterprise. The negligence of the driver of an automobile cannot be deemed the contributory negligence of a passenger, on the claim that the driver and passenger were engaged in a common enterprise, unless the passenger has the right in some manner to control the operation of the automobile.

Stingley v Crawford, 219-509; 258 NW 316

Assignment of claim of passenger—effect. The driver of an automobile involved in an accident may take from his passenger an assignment of the passenger's cause of action and recover thereon even tho he—the driver—was guilty of contributory negligence, provided the passenger was not guilty of such negligence. The driver's contributory negligence simply defeats his own individual claim for damages.

Albert v Maher Bros., 215-197; 243 NW 561

(d) PERSONS OTHER THAN DRIVER

Inferential allegation of nonnegligence. An allegation by plaintiff, that a collision between automobiles was caused solely by the negligence of the defendant, inferentially charges that a passenger riding with plaintiff at the time was not guilty of contributory negligence—at least when the sufficiency of the petition is not attacked and when the parties treat the negligence of the passenger as at issue.

Keller v Gartin, 220-78; 261 NW 776

Passenger's duty. A passenger in the front seat of an automobile, with opportunity equal to that of the driver to see what is to be seen, and free from any diverting circumstances, cannot surrender himself to the care of the driver, and then successfully contend that he (the passenger) was in the exercise of ordinary care.

Hutchinson v Service Co., 210-9; 230 NW 387; 33 NCCA 170

Holding prior to guest statute. The court must not instruct that a mere passenger in an automobile (under duty, of course, to exercise reasonable and ordinary care) will be guilty of negligence if he fails to do some particular thing, e. g., attempt in some manner to check the speed of the car.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Instruction—care required of passenger. An instruction that a passenger in an automobile must be deemed negligent if he fails to warn the driver of "any situation" that may be dangerous, does not correctly state the law, because requiring more than ordinary care.

Muirhead v Challis, 213-1108; 240 NW 912

Failure to warn driver. The court cannot say that an aged woman passenger riding in the rear seat of an automobile on a dark night with the auto lights turned on was guilty of contributory negligence in not seeing an approaching truck and warning her driver thereof when the said driver saw said truck as soon as the passenger could have seen it, and when the jury found that the driver was not negligent.

Albert v Maher Bros., 215-197; 243 NW 561

Instructions—care required of passenger. It is correct to say that a passenger on a vehicle may be found free of contributory negligence if he acted as a person of ordinary prudence would act under like circumstances. Requested instructions reviewed and held properly refused.

Newland v McClelland, 217-568; 250 NW 229

Passenger's duty. A passenger in an automobile is under no duty to exercise care for his own safety except to exercise ordinary care in view of the circumstances. Manifestly, this duty does not require that the passenger maintain a constant attitude of watchfulness and warning and protests to the driver of possible dangers.

Stingley v Crawford, 219-509; 258 NW 316; 37 NCCA 652

Wife riding with husband—nonduty to warn. A wife while riding in an automobile owned and operated by her husband, and over the

movements of which automobile she neither has nor attempts to have control, is under duty to exercise, for her own safety, ordinary care in view of the circumstances, but this duty does not require the wife, in order to escape the imputation of contributory negligence, to maintain an attitude of watchfulness and warning and protest to the husband of possible dangers.

Carpenter v Wolfe, 223-417; 272 NW 169

Motorcycle passenger—care required. A girl riding on a motorcycle directly behind the driver, and being unable to see the road ahead without standing up, thereby endangering the operation of the vehicle, cannot as a matter of law be under duty to warn the driver of impending danger in order to avoid the driver's negligence being imputed to her.

Williams v Kearney, 224-1006; 278 NW 180

Negligence of driver not imputable to passenger. The negligence of the driver of a car is not imputable to a passenger who has no right to control the operation of the car.

Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 640

Driver's negligence not imputed to passenger. The negligence of a motor vehicle driver is not ordinarily imputed to a passenger; however, such passenger must show the exercise of ordinary care.

Williams v Kearney, 224-1006; 278 NW 180

Assignment of claim of passenger—effect. The driver of an automobile involved in an accident may take from his passenger an assignment of the passenger's cause of action and recover thereon even tho he—the driver—was guilty of contributory negligence, provided the passenger was not guilty of such negligence. The driver's contributory negligence simply defeats his own individual claim for damages.

Albert v Maher Bros., 215-197; 243 NW 561

Host's action on assignment of passenger's claim. The passenger in an automobile who is injured in a collision with another car may, notwithstanding the contributory negligence of the driver-host, recover his damages from the owner and operator of said other car on proof (1) that said owner and operator were proximately negligent, (2) that he—the passenger—had no control over his driver-host, and (3) that he—the passenger—was free from contributory negligence; and the assignee of such damages, even tho he be the driver-host, may recover on such assignment on the same conditions, and the court must so instruct, even tho said driver-host could not, because of his contributory negligence, recover damages personal to himself.

Keller v Gartin, 220-78; 261 NW 776

Contributory negligence of passenger—jury question. Whether a passenger who had no control over the operation of a car was guilty of contributory negligence must almost inevitably be a jury question.

Schwind v Gibson, 220-377; 260 NW 853

Passenger's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son who enters an obscured intersection without sounding his horn (§5043, C., '35 [§5031.03, C., '39]), is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury, when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

Negligence of borrower imputable to lender. One who borrows an automobile becomes, by force of our statute, the agent of the lender, in the operation of the car. It necessarily follows that the negligence of the borrower is imputable to the lender, and is a bar to the recovery of damages by the lender in an action against a third party, if such negligence contributed to the injury and resulting damages.

Secured Fin. Co. v Railway, 207-1105; 224 NW 88; 30 NCCA 90

Declarations of passenger. Testimony by a passenger in an automobile to the effect that shortly before an accident he called the attention of the driver to the approaching car is admissible on the issue of the contributory negligence of the passenger.

Waldman v Motor Co., 214-1139; 243 NW 555

Contributory negligence of passenger as jury question. Evidence that a passenger riding in an automobile, when 100 feet from a railway crossing, observed and called the attention of the operator to an approaching train, and that thereupon the operator of the car commenced to reduce and continued to reduce the speed of the car until it was hit by the oncoming locomotive, precludes the court from saying that the passenger was guilty of contributory negligence per se.

Wright v Railway, 222-583; 268 NW 915

Negligence of passenger—insufficient evidence. Record reviewed relative to the facts and circumstances attending the unobscured and simultaneous approach, on a clear day, of northbound and of eastbound automobiles to an intersection of arterial highways (where a collision occurred), and held insufficient to establish contributory negligence per se on the part of a passenger who was traveling in the northbound car and who was injured in said collision.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570

Passenger — instructions — reversible error. Reversible error results from instructing that

III CONTRIBUTORY NEGLIGENCE—continued

the jury may find that a passenger in an automobile was free of contributory negligence from the fact that the passenger neither exercised nor had the right to exercise control over the car in question.

Waldman v Motor Co., 214-1139; 243 NW 555

(e) CHILDREN

Discussion. See 21 ILR 803—Duty to anticipate conduct of children

Child incapable of contributory negligence. Evidence reviewed and held affirmatively to show no negligence on the part of the driver of an automobile, the injured party being an infant incapable of contributory negligence.

Kessler v Robbins, 215-327; 245 NW 284

Negligent infliction of injuries on child—improper direction of verdict. Record reviewed relative to the facts attending the alleged negligent infliction of injuries on a child, and held to be such as to render improper the direction of a verdict for defendant, especially as said child was of such tender years as to be, presumptively, incapable of negligence.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Child of 10—presumption. Plaintiff, in an action for damages for negligently inflicted injuries, establishes prima facie freedom from contributory negligence by proof that when he suffered the injuries in question he was only 10 years of age, thereby availing himself of the common-law presumption arising from such proof. And the case would be quite rare where defendant's rebutting testimony would be so convincing and overwhelming as per se to overthrow said prima facie showing.

Flickinger v Phillips, 221-837; 267 NW 101

Child of 10—overthrowing presumption. In an action for damages for the alleged negligent killing of a child, prima facie absence of contributory negligence on the part of the child is established by simply proving that the child was only 10 years of age; but evidence that said child, apparently without reason for so doing, suddenly and without warning ran from a place of safety into a place of danger in front of an oncoming vehicle, creates a jury question on the issue whether said child exercised that degree of care ordinarily exercised by children of a like age.

Webster v Luckow, 219-1048; 258 NW 685

Child under 14—burden to overthrow presumption. The presumption is that children under 14 are incapable of contributory negligence. A motorist striking a child of 10 must prove from all the facts and circumstances that the child did not exercise the degree of care ordinarily exercised by a child of like age. Held that the question of whether he had sustained his burden was clearly for the jury.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Contributory negligence—12-year-old child—presumption. A child between the ages of 7 and 14 is presumed to be free from contributory negligence, and where a plaintiff is between those ages a prima facie case of nonnegligence on his part is established.

Samuelson v Sherrill, 225-421; 280 NW 596

Minor walking on wrong side of highway—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about 4 or 5 feet from west side of highway, and failing to make observations as to oncoming traffic from the rear while walking after dark on a street traversed by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Bicyclist's observation of parked car in time to avoid collision. Where a minor bicyclist collided with a car unlawfully parked on left side of city street without tail light when he pulled over to his right to avoid an approaching car, the question of his contributory negligence, which depended on whether or not he should have observed the parked car in time to avoid the collision, was for the jury.

Trailer v Schelm, 227-780; 288 NW 865

Children on sleds hooked to vehicle—ordinary care a jury question. A jury must determine whether a motorist has used ordinary care commensurate with the surrounding circumstances when he drives his automobile over icy streets at a speed of 25 miles per hour, knowing that children of a tender age are in a hazardous position on sleds hooked to the rear of his vehicle.

Samuelson v Sherrill, 225-421; 280 NW 596

Children on sleds hooked to vehicle—speed as proximate cause of injury. Where children on sleds hooked to the rear of a moving automobile became frightened at the speed of the car, released their sleds, and in so doing turned aside into the path of an oncoming vehicle, whereby they were injured, such turning aside by the children did not prevent the motor vehicle operator's negligence from being the proximate cause of their injury.

Samuelson v Sherrill, 225-421; 280 NW 596

Employee's unauthorized use. In a damage action arising out of a collision between the defendant's truck and a motorcycle upon which plaintiff was riding as a guest, in which action it was alleged that the corporation-defendant's truck was being driven by a person "in the

course of his employment for * * * his employer"—the employer denying both this allegation and his consent to use of truck—and when the evidence showed that the corporation employed the truck driver for making deliveries during the week, excluding Sunday, on which day the collision occurred while the truck driver was assisting a personal friend tow a stalled car, held, after plaintiff alleged liability under the master and servant theory rather than under the statute making the owner of the motor vehicle liable, a directed verdict for the corporation was proper when plaintiff's evidence failed to support his theory.

Alcock v Kearney, 227-650; 288 NW 785

(f) PEDESTRIANS

Crossing street in middle of block. A pedestrian who attempts to cross a street in the middle of a block without looking for a plainly approaching vehicle, or who sees said oncoming vehicle when it is only a few feet distant, and attempts to pass in front of it is guilty of contributory negligence per se.

Whitman v Pilmer, 214-461; 239 NW 686; 35 NCCA 693

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Crossing traffic-congested street. A pedestrian who, while crossing a traffic-congested street at a place other than the place specifically provided for such crossing, fails to look for approaching vehicles or voluntarily steps in front of an immediately approaching vehicle which he does see, is guilty of negligence per se.

Spaulding v Miller, 216-948; 249 NW 642; 35 NCCA 676

Stepping in front of vehicle. Instructions to the effect that a pedestrian is guilty of negligence per se if he suddenly steps in front of an automobile reviewed, and held proper, under the circumstances.

Ryan v Shirk, 207-1327; 224 NW 824

Stepping into street in path of automobile. Plaintiff was guilty of contributory negligence as a matter of law in stepping from a curb into the path of an oncoming automobile which was in plain sight where it would have been seen by the plaintiff if he had looked.

Ward v Zerzanek, 227-918; 289 NW 443

Attempting to dodge car. The act of a pedestrian, while crossing a street, in attempting to dodge an oncoming car, may constitute the proximate cause of the injuries suffered by him. So held where the pedestrian evidently stepped or turned back directly in front of said car.

Kortright v Strater, 222-603; 269 NW 745

Failure to look for cars. A pedestrian who, while crossing a public street, stops because of a car approaching from his immediate right, is guilty of contributory negligence when, observing that said car had also stopped, he at once moves forward without looking to his left or right, and is instantly hit by another car coming from said latter direction.

Stawsky v Wheaton, 220-981; 263 NW 313

"Stop and go" signals—change after entering intersection. A pedestrian who, in obedience to a municipally operated "go" signal, starts across the street on the pathway provided for pedestrians and suddenly discovers that said "go" signal has changed to "stop", is not guilty of negligence per se in failing to look for, see, and avoid a vehicle which, under said change in signals, passes entirely across the intersection and hits and injures said pedestrian within less than two seconds after said change in signals occurs; especially is this true (1) when said pedestrian has by ordinance the right of way over said vehicle because he was first properly to enter said intersection, and (2) when said pedestrian, at the very instant of said change in signals, was immediately approaching other stationary vehicles known to be waiting release from a "stop" signal.

Dougherty v McFee, 221-391; 265 NW 176

Pedestrian crossing street—duties. A pedestrian crossing a street need not anticipate another's negligence, nor keep a constant lookout in both directions at the same time, nor wait for all approaching vehicles from both directions, and, moreover, he is not as a matter of law contributorily negligent merely in running while crossing a street altho not seeing an approaching motor vehicle 180 feet away, but in any case whether he could rightly assume he could cross in safety is a question of contributory negligence for the jury.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Assumption that law will be obeyed. Principle reaffirmed that just what acts of care must be taken by a pedestrian on the highway in order to save himself from the imputation of negligence, may be very materially influenced and controlled by his right to assume that others using the highway will obey the law of the road.

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Crossing streetcar track. A pedestrian who, from a place of perfect safety, suddenly hastens across a streetcar track in front of an immediately approaching streetcar, with full knowledge that as soon as he had passed the said track he would be directly in line with the automobile travel moving with the streetcar, is guilty of contributory negligence per se, even tho the automobile which hit him was being operated at an excessive speed.

Pettijohn v Weede, 209-902; 227 NW 824

Crossing near intersection—jury question.

Scott v McKelvey, 228- ; 290 NW 729

Diagonal crossing of street. It cannot be said that a pedestrian is guilty of negligence per se when he looks both at the street curb

III CONTRIBUTORY NEGLIGENCE—continued

(f) PEDESTRIANS—continued

and in the middle of the street for approaching vehicles and sees a vehicle at a distance of some 150 feet; and this is true tho he was proceeding diagonally across a street intersection of peculiar shape, in order to board an approaching streetcar, there being, apparently, nothing in the movements of the approaching vehicle to fairly suggest danger.

Minks v Stenberg, 217-119; 250 NW 883; 35 NCCA 589

Reason for not looking for danger. The reason why a pedestrian while crossing a street did not look in the direction of an oncoming vehicle which injured him is relevant and material, and the injured party may testify as to such reason.

Orr v Hart, 219-408; 258 NW 84

Walking in highway. One who walks around the end of a stationary vehicle in the public highway and thereupon turns and walks along the side of the car in the direction of, and directly in line with, an oncoming vehicle which is wholly unobstructed is guilty of negligence per se.

Jarvis v Stone, 216-27; 247 NW 393; 39 NCCA 309

Duty to leave highway when danger impending. A pedestrian wearing dark clothes and walking at night along a heavily traveled arterial street should, in the exercise of reasonable care and prudence, ascertain his immediate danger when two automobiles—one from in front and one from behind—are approaching at the same time, and when he fails to remove himself as speedily as possible from the place of danger, he is contributorily negligent.

Armbruster v Gray, 225-1226; 282 NW 342

Minor walking on wrong side of highway—violating statute—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about 4 or 5 feet from west side of highway, and failing to make observations as to oncoming traffic from the rear, while walking after dark on a street traversed by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Crossing highway without looking. An adult person, after alighting from an automobile which had been stopped substantially astraddle the north edge of an 18-foot pavement on a heavily traveled country highway, is guilty of negligence per se in attempting to walk to the south and across said pavement without making any observations to his unobstructed right for eastbound vehicles.

Zuck v Larson, 222-842; 270 NW 384

Failure to keep lookout to rear. The foreman of a paving outfit is guilty of negligence per se in walking along the unpaved portion of a rough road for a distance of some 200 feet without making any observations to his rear for trucks which he knew were being backed along said road and in his immediate direction at the rate of one truck each 90 seconds.

Hedberg v Lester, 222-1025; 270 NW 447

Standing on shoulder of pavement—care.

Janes v Roach, 228- ; 290 NW 87

Standing in path of truck. One who is standing substantially on the very edge of a passageway through which an approaching truck on a downgrade had to pass and knows that the truck operator is having difficulty to control the truck owing to the slippery condition of the road and does not step out of the way tho he has ample opportunity to do so, is guilty of contributory negligence.

Norris v Lough, 217-362; 251 NW 646

Disregarding apparent danger. The rule that a pedestrian and an automobile have equal rights upon the highway does not authorize a highway employee to stand on the edge of the pavement watching an oncoming automobile travel a distance of 200 feet on the same side of the pavement, knowing the pavement is in an icy condition, knowing that the driver of the oncoming automobile is having difficulty controlling it, from which facts it is, or to a reasonably prudent man it would have been, apparent that he was occupying a position of danger, and consequently, in remaining there, he was guilty of contributory negligence. Defendant's motion for a directed verdict was properly sustained.

Cumming v Dosland, 227-470; 288 NW 647

Stalled motorist—freedom from negligence—requested instruction. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is not entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Lack of precaution for safety—plaintiff's own proof. A person riding with a trucker and struck by an automobile while helping

put on tire chains after dark, having placed himself in a perilous position on the traffic side of the truck stopped astraddle the center of the highway, fails to prove his freedom from contributory negligence where there is no evidence that he kept any lookout or took any precautions for his own safety.

Denny v Augustine, 223-1202; 275 NW 117

Reliance on another's duty—knowledge of breach no excuse for negligence. A plaintiff, injured by a passing automobile while helping defendant's employee-driver put on tire chains, may not excuse his own lack of due care by testifying that he relied on the driver to place out flares, when as a fact he knew both that the driver had no such intention and that no flares were so placed.

Denny v Augustine, 223-1202; 275 NW 117

Proximate cause—violation of statute. Failure of a defendant, the driver of an automobile, to have the headlights on his car displayed at a time required by statute becomes inconsequential when the contributory negligence of the plaintiff-pedestrian was the proximate cause of the injury resulting from the collision.

Sheridan v Limbrecht, 205-573; 218 NW 278; 29 NCCA 300; 35 NCCA 661; 2 NCCA(NS) 417

Eyewitness testimony—custom of injured party immaterial. Evidence tending to show the usual custom of a person in approaching a highway intersection—where he was killed in a collision—is inadmissible on the issue of negligence—it appearing that there were eyewitnesses to the entire transaction resulting in the collision.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

No-eyewitness rule—nonapplicability. In a pedestrian-automobile accident, where a motorist testifies that he saw deceased just prior to striking and killing him, the rule that in the absence of eyewitnesses the deceased is presumed to have exercised due care has no application.

Edwards v Perley, 223-1119; 274 NW 910

"No-eyewitness rule" inapplicable. Where pedestrian crossing highway is killed by automobile, and in action for death where plaintiff's witness clearly observed decedent's conduct for some time immediately prior to accident and did not see him look for approaching car, the "no-eyewitness rule" establishing presumption of freedom from contributory negligence was inapplicable.

Spooner v Wisecup, 227-768; 288 NW 894

Jury or law question. The court has no right to rule that a pedestrian—injured while attempting to cross a public street at the place provided for such crossing and by coming into collision with a moving vehicle—is guilty of negligence contributing to his own injury, unless the facts and circumstances, after viewing them in the light most favorable to the pedestrian, are such that all reasonable minds must arrive at the same conclusion, to wit, negligence upon the part of the pedestrian. Evidence held to present jury, not law, question.

Huffman v King, 222-150; 268 NW 144

Elderly lady crossing street at night. A jury question on the issue of negligence arises (1) when the evidence is conflicting as to what the injured party did or did not do, and (2) when there may be a fair difference of opinion whether that which the injured party admittedly did do or omitted to do, constituted negligence. Evidence as to what an elderly lady did in crossing a public street after nightfall presented a jury question on the issue of contributory negligence.

Robertson v Carlgren, 211-963; 234 NW 824
Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Sudden fright—trial theory. The abstract proposition that a pedestrian who steps suddenly in front of a moving vehicle is guilty of negligence per se need not be limited by the effect of sudden fright or surprise on the part of the pedestrian when no such claim is made in the pleadings or evidence.

Ryan v Shirk, 207-1327; 224 NW 824

Position of danger—last clear chance. The submission to the jury of the issue of "last clear chance" is improper on undisputed testimony that, while an automobile was moving along a traffic-congested street at a speed of from five to ten miles an hour, a pedestrian negligently placed himself in a position of danger in front of said car, but that the operator of said car did not discover said position of danger until his car was only seven feet from said pedestrian, and that thereupon said operator applied or attempted to apply his brakes but not in time to avoid injuring said pedestrian.

Spaulding v Miller, 220-1107; 264 NW 8

Pedestrian in voluntary position of appreciable danger—instruction. In action for death of pedestrian struck by automobile, instruction that decedent's contributory negligence barred recovery unless last clear chance doctrine could be invoked, was not erroneous on theory that such contributory negligence must be proximate cause of accident in order to defeat recovery. Moreover, such instruction was justified under the record showing that decedent voluntarily placed himself in a position of evident danger.

Spooner v Wisecup, 227-768; 288 NW 894

Failure to keep lookout alleged—no submission of last clear chance. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to

III CONTRIBUTORY NEGLIGENCE—continued

keep a proper lookout and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine, on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825

(g) WHEN LAW OR JURY QUESTION

Jury question unless all minds concur. Contributory negligence is for the jury, and a directed verdict should be denied except in cases where the facts are clear and undisputed and the cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn.

In re Green, 224-1268; 278 NW 285

As jury question. The presence or absence of contributory negligence is, as a general rule, a question for the jury.

Wheeler v Peterson, 213-1239; 240 NW 683; 33 NCCA 451

Grounds for new trial—court mistakenly directing verdict. Ordinarily the question of contributory negligence is peculiarly for the jury, and where the trial court mistakenly directs a verdict for defendant on the ground of plaintiff's negligence, the court does not err in later granting a new trial.

Williams v Kearney, 224-1006; 278 NW 180

Inadequate submission. Defendant's specific allegations as to contributory negligence on the part of plaintiff should be specifically submitted to the jury when they have adequate support in the evidence.

Lang v Siddall, 218-263; 254 NW 783

Instructions—error in quoting statute only. In submitting specifications of alleged contributory negligence, the court commits error in simply quoting the statute relating to these grounds without defining just what acts of plaintiff, under the evidence, would constitute contributory negligence, and without applying the law to the facts.

Jakeway v Allen, 226-13; 282 NW 374

Jury question. Evidence held to present a jury question on the issue whether there was negligence in the operation of automobiles by the drivers thereof; likewise, whether there was contributory negligence on the part of an injured party.

Shuck v Keefe, 205-365; 218 NW 31
Dickeson v Lzicar, 208-275; 225 NW 406
Stilson v Ellis, 208-1157; 225 NW 346
Vass v Martin, 209-870; 226 NW 920; 39 NCCA 325; 1 NCCA(NS) 162
O'Hara v Chaplin, 211-404; 233 NW 516; 35 NCCA 573
Rogers v Lagomarcino Co., 215-1270; 248 NW 1
Orr v Hart, 219-408; 258 NW 84

Directed verdict—improper unless per se negligence also contributory. A plaintiff motorist, against whom a directed verdict was rendered because in violating a speed statute he was negligent per se, still should have had the benefit of the best possible view of the evidence, and, moreover, under a record showing that he remained at all times on his own side of the road, but that a truck driver, for no apparent reason, drove across the pavement center line resulting in a head-on collision, makes a jury question as to whether or not plaintiff's per se negligence contributed to his injury.

McIntyre v West Co., 225-739; 281 NW 353

Failure to sound horn. In action involving collision between car and motorcycle, plaintiff was not guilty of contributory negligence as a matter of law for failure to sound horn where vehicles were in plain view of each other for more than 200 feet and there was no apparent danger of any collision.

Jakeway v Allen, 227-1182; 290 NW 507

Sounding horn — driver's discretion — jury question. In an automobile damage action, a driver of an automobile is not guilty of negligence as a matter of law for failure to sound horn as he approaches an intersection, since the statute does not require the sounding of the horn under any and all conditions. The propriety of using the horn is left to the reasonable discretion of the driver, and is a fact rather than a law question. The jury determines whether the sounding of a horn would have avoided the accident.

Short v Powell, 228- ; 291 NW 406

Pedestrian at crossing. The court has no right to rule that a pedestrian—injured while attempting to cross a public street at the place provided for such crossing and by coming into collision with a moving vehicle—is guilty of negligence contributing to his own injury, unless the facts and circumstances, after viewing them in the light most favorable to the pedestrian, are such that all reasonable minds must arrive at the same conclusion, to wit, negligence upon the part of the pedestrian. Evidence held to present jury, not law, question.

Huffman v King, 222-150; 268 NW 144

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Elderly lady crossing street at night. A jury question on the issue of negligence arises (1) when the evidence is conflicting as to what the injured party did or did not do, and (2) when there may be a fair difference of opinion whether that which the injured party admittedly did do or omitted to do, constituted negligence. Evidence as to what an elderly lady

did in crossing a public street after nightfall presented a jury question on the issue of contributory negligence.

Robertson v Carlgren, 211-963; 234 NW 824
Hittle v Jones, 217-598; 250 NW 689

Truck turning to left to avoid pedestrian. When a truck slowed down and turned out to the left to avoid a pedestrian walking along the traveled portion of the highway, and was struck by another truck proceeding from the rear, the court properly submitted to the jury the question of contributory negligence.

Glover v Vernon, 226-1089; 285 NW 652

Car striking person standing on street—jury question. In personal injury action for being struck by automobile while plaintiff was standing at night on city street discussing question of blame for another collision, plaintiff's contributory negligence was question for jury.

Yale v Hanson, 227-813; 288 NW 905

Accident at intersection. Evidence held to present a jury question on the issue whether the driver of an eastbound car was guilty of contributory negligence in entering and attempting to cross the intersection while a northbound car was approaching said intersection.

Hartman v Trans. Co., 211-64; 233 NW 23

Preference at intersecting points. The court cannot say that the operator of a northbound car is guilty of contributory negligence per se in entering an intersection when a westbound car was three-quarters of a block distant.

Leckliter v Des Moines, 211-251; 233 NW 58; 38 NCCA 493

For jury. In damage suit arising from a motor vehicle accident at a highway intersection, the question of contributory negligence was for the jury.

Hupp v Doolittle, 226-814; 285 NW 247

Approaching intersection—instruction. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Stopping before entering boulevard. Evidence reviewed in detail relative to the stoppage of an automobile before entering a curving boulevard (on which traffic had the right of way) and held to present a jury question on the issue of the contributory negligence of the operator and not a case of contributory negligence per se.

Shutes v Weeks, 220-616; 262 NW 518

Driving from private driveway. Evidence relative to the act of driving from a private driveway into a public highway in front of an approaching car reviewed, and held to present a jury question on the issue of contributory negligence.

Tinley v Implement Co., 216-458; 249 NW 390

Left-hand turn—conflicting testimony. Evidence reviewed in detail in an action involving a left-hand turn, during the nighttime, of a westbound car, and its collision with an eastbound car near the point of intersection, and held, because of the conflict in testimony, to present a jury question on the issue whether plaintiff had established his freedom from contributory negligence.

Enfield v Butler, 221-615; 264 NW 546

Turning to right into intersecting road. Record reviewed and held to present a jury question on the issue whether plaintiff, traveling on the right-hand side of the highway, with knowledge that she was being closely followed by a truck, was guilty of contributory negligence in changing her course by turning to the right and entering an intersecting highway, the collision occurring between said turning car and said truck.

Harmon v Gilligan, 221-605; 266 NW 288

Contributory negligence of passenger—jury question. What a decedent, a passenger in a vehicle, did do, or could have done, for his own safety during the very few seconds during which danger arose, is for the jury to decide.

Newland v McClelland, 217-568; 250 NW 229

Passenger. Evidence which discloses, on the part of a passenger in an automobile, no act or omission to act which contributed in any manner to an accident, justifies the submission to the jury of the issue of contributory negligence of said passenger.

Schuster v Gillispie, 217-386; 251 NW 735

Contributory negligence of passenger as jury question. Evidence which discloses on the part of plaintiff, riding as a passenger in an automobile, no act or omission to act which contributed in any manner to an accident, justifies the submission to the jury of plaintiff's contributory negligence.

Miller v Lowe, 220-105; 261 NW 822

Contributory negligence of passenger as jury question. Whether a passenger who had no control over the operation of a car was guilty of contributory negligence must almost inevitably be a jury question.

Schwind v Gibson, 220-377; 260 NW 853

III CONTRIBUTORY NEGLIGENCE—continued

(g) WHEN LAW OR JURY QUESTION—continued

Contributory negligence of passenger as jury question. Whether an invited passenger in an automobile, over which the passenger has no control, is guilty of contributory negligence can rarely, if ever, be a question of law.

Kehm v Dilts, 222-826; 270 NW 388; 3 NCCA(NS) 39

Instructions—ignoring supported issue. In an action for damages based on the alleged negligence of the defendant in operating an automobile which collided with an automobile in which plaintiff was riding, the court commits reversible error by wholly ignoring in its instructions the duly joined issue as to the contributory negligence of the plaintiff, the evidence being such as to present a jury question on said issue.

Schelldorf v Cherry, 220-1101; 264 NW 54

Passenger's lookout at railroad crossing. A passenger in a motor vehicle is not, as a reasonably prudent person, under the same obligation as the driver to keep a lookout, but whether or not, under the circumstances, a passenger was lacking in ordinary care in committing his safety to the motor vehicle driver while crossing a railroad is a question for the jury.

Finley v Lowden, 224-999; 277 NW 487

Railroad crossing accident—snow glare affecting visibility. Where a passenger riding in a truck was killed in a crossing collision between truck and train, a contention that sun shining on snow and reflecting into truck constituted such obstruction to view of oncoming train that it raised a jury question on issue of deceased's contributory negligence in failing to see approaching train held not established by his evidence.

Russell v Scandrett, 225-1129; 281 NW 782

Tracks creating hidden danger. A jury question as to the negligent operation of a streetcar and as to the contributory negligence of the driver of an automobile is presented by evidence (1) that the streetcar tracks were so laid that, as they approached a turn at a street intersection, they imperceptibly approached the street curb until, near the intersection, insufficient space remained for the passage of an automobile between a passing streetcar and the curb, and (2) that the driver of the automobile, without knowledge of such condition of the tracks, and without warning from the streetcar employee who was present, was caught at said point of danger, and was not only "wedged in" between the streetcar and curb by the front end of the streetcar, but was crushed by the oversweep of the rear end of the car as it turned away from the auto at the intersection.

Knudson v Railway, 209-429; 228 NW 470

Crossing accident—boxcars hiding view. Evidence tending to show that the driver of a vehicle stopped some twelve feet from a railroad crossing, and reconnoitered for an approaching train, and saw none, owing to a string of cars on a side track, and heard no warning signals of an approaching train, and thereupon drove upon the crossing, presents a jury question on the issue of his negligence.

Bush v Railway, 216-788; 247 NW 645

Crossing—lookout—failure to see train. Evidence tending to show that the driver of a vehicle stopped some 10 or 15 feet from a railroad crossing and reconnoitered for an approaching train and saw none because of dirt elevations and weeds along the side of the track, and heard no warning signals of an approaching train, and thereupon drove upon the crossing, presents a jury question on the issue of his negligence, even tho, had he stopped some few feet nearer the track he would have seen the approaching train.

Markle v Railway, 219-301; 257 NW 771

"Double passing". Evidence relative to the facts attending a "double passing" reviewed and held to present a jury question on the issue of contributory negligence.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Failure of lights. Where a truck is being operated in a fog with 35 feet visibility ahead under speed and road conditions permitting a stop within 25 feet and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range such that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision but the question is for the jury.

Mueller v State Assn., 223-888; 274 NW 106; 113 ALR 1256

Collision—jury questions. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence.
2. Whether defendant was driving his truck without lights.
3. Whether defendant was driving on the wrong side of the road.
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed.
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 93

Boy on bicycle warming ear with hand. Plaintiff riding a bicycle on the sidewalk, a place of comparative safety, observing the traffic ahead of him, cannot, as a matter of law, be said to be guilty of contributory negligence in not watching where he was going simply because he put a hand over his ear to warm it, when there is a sharp conflict in the evidence as to whether the truck which struck the boy turned sharply in ahead of him, or turned gradually and struck him from the rear.

Montanick v McMillin, 225-442; 280 NW 608

Directing verdict—inadequate brakes must contribute to injuries. Before a plaintiff motorist can be held guilty of contributory negligence as a matter of law it must conclusively appear, from a consideration of the evidence in the light most favorable to him, that his negligence in having inadequate brakes contributed in some way or in some degree to the accident and injuries for which he seeks a recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Inadequate brakes immaterial unless negligence contributory. An exception to an instruction because the fact question of plaintiff's contributory negligence was erroneously submitted is not an exception to the submission of the sole fact of his negligence, and even if plaintiff's negligence in not having brakes is established beyond question, the fact question of its contributory nature is still for the jury.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Predicating error solely on one's own evidence—impropriety. Predication of error based solely on defendant's own evidence and his own theory of the case is ineffective when other conflicting evidence clearly makes a jury question on contributory negligence regarding plaintiff's failure to have adequate brakes on his automobile, his failure to stop within the assured clear distance ahead, and his failure to slow down before crossing a bridge.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

New trial to plaintiff—propriety. In a case involving a truck and passenger car collision on a bridge, when the defendant contended that he was entitled to a directed verdict and that therefore it was error to grant a new trial after a verdict had been returned in his favor, his contention was without merit when the evidence was such that the jury could have found the defendant negligent, that his negligence was the proximate cause of the accident, and that neither plaintiff nor plaintiff's driver was contributorily negligent.

Hawkins v Burton, 225-1138; 281 NW 790

Racing car at fair. Evidence held to present a jury question on the issue of the contributory negligence of a party injured by a racing automobile at a county fair.

Zieman v Amusement Assn., 209-1298; 228 NW 48

(h) AVOIDANCE—LAST CLEAR CHANCE

Doctrine must be pleaded. The doctrine of the last clear chance is not available unless distinctly pleaded.

Steele v Brada, 213-708; 239 NW 538

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Doctrine inherent in pleading. The elements of the doctrine of last clear chance may be deemed as inherently attending an allegation which, in effect, charges defendant with proximate negligence up to the very time of the infliction of the injury, even tho said allegation carries no reference to the last clear chance or to the doctrine thereof. It follows that after trial and reversal thereof, such allegation may be amended and amplified by alleging facts which, if proven, will specifically present the issue of the last clear chance.

Spaulding v Miller, 220-1107; 264 NW 8

Burden of proof. A plaintiff who contends for the applicability of the doctrine of the last clear chance has the burden of proof to show that the defendant discovered plaintiff's negligence in such time that defendant, by the exercise of reasonable care, might have avoided injuring plaintiff.

Hogan v Nesbit, 216-75; 246 NW 270

Applicability of doctrine. The doctrine of last clear chance applies only where defendant had actual knowledge of plaintiff's peril, and after acquiring such knowledge, could have avoided the injury by the exercise of due care, but failed to do so.

Steele v Brada, 213-708; 239 NW 538

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 335

Inapplicability of doctrine. The doctrine of the last clear chance has no application to a record which shows (1) that the plaintiff was confessedly negligent, and (2) that the accident of which plaintiff complains occurred instantly and inevitably after plaintiff's negligence was discovered.

Albrecht v Berry, 202-250; 208 NW 205; 32 NCCA 108

Discovery of danger—inapplicability of doctrine. The doctrine of the last clear chance can have no application when the nonnegligent driver of a conveyance, after he discovers the danger, does everything in his power to prevent an accident.

Middleton v Railway, 209-1278; 227 NW 915

Discovery of danger—erroneous submission. The submission of the last clear chance doctrine under a record which unquestionably

III CONTRIBUTORY NEGLIGENCE—concluded

(h) AVOIDANCE—LAST CLEAR CHANCE—concl'd'd

shows that the accident of which plaintiff complains occurred instantly and inevitably after plaintiff's position of danger was discovered by defendant, constitutes reversible error.

Rutherford v Gilchrist, 218-1169; 255 NW 516

Highway blocked—jury question. When a truck driven by plaintiff's intestate slowed down and turned to the left to avoid a crippled pedestrian who was walking along the highway, whether the defendant's truck, coming from the rear at a greater speed, after discovering the peril of the truck in front in having turned out into his path, should have pulled further to the left on the shoulder of the road to avoid a collision, was a question of last clear chance for the jury.

Glover v Vernon, 226-1089; 285 NW 652

Railroad crossing accident. The doctrine of last clear chance is not applicable unless peril of injured party is actually discovered and appreciated in time to prevent his injury by the exercise of ordinary care. So where plaintiff drives his truck at a speed of 4 or 5 miles per hour onto a railroad track and is struck by a train going 4 or 5 miles per hour, and it is shown engineer of train felt a jar and, looking out of cab, saw some object in front of locomotive and immediately applied brakes and placed locomotive in reverse, held, evidence insufficient to submit to jury, and a motion for directed verdict was rightfully sustained.

Kinney v Railway, 17 F 2d, 708

Streetcar collision. Evidence relative to collision between a streetcar and an automobile reviewed, and held wholly insufficient to justify the submission to the jury of the last clear chance doctrine.

Elliott v Railway, 223-46; 271 NW 507; 5 NCCA(NS) 169

Stepping into path of automobile. A plaintiff, who stepped directly into the path of the defendant's automobile from a position of safety on a curb, could not rely on the last clear chance doctrine when there was no evidence that the defendant could have avoided the accident by exercising reasonable care after discovering that the plaintiff was in a perilous position.

Ward v Zerzanek, 227-918; 289 NW 443

Pedestrian in voluntary position of appreciable danger—instruction. In action for death of pedestrian struck by automobile, instruction that decedent's contributory negligence barred recovery unless last clear chance doctrine could be invoked, was not erroneous on theory that such contributory negligence must be proximate cause of accident in order to defeat recovery. Moreover, such instruction was justified under the record showing that decedent voluntarily placed himself in a position of evident danger.

Spooner v Wisecup, 227-768; 288 NW 894

Evidence—erroneous submission. The submission to the jury of the issue of last clear chance is improper on undisputed testimony that, while an automobile was moving along a traffic-congested street at a speed of from 5 to 10 miles an hour, a pedestrian negligently placed himself in a position of danger in front of said car, but that the operator of said car did not discover said position of danger until his car was only seven feet from said pedestrian, and that thereupon said operator applied or attempted to apply his brakes but not in time to avoid injuring said pedestrian.

Spaulding v Miller, 220-1107; 264 NW 8

Evidence—time element. The application of the principle of the last clear chance necessitates some adequate evidence that the party against whom the doctrine is sought to be applied discovered the negligence in question in such time as enabled him to avoid it by the exercise of reasonable care.

Reid v Brooke, 221-808; 266 NW 477

Last clear chance—jury question. Jury must consider all the evidence, and where it tends to show that defendant, after discovering plaintiff's perilous position, might by the exercise of ordinary care have avoided a collision, it is not error to submit the doctrine of last clear chance.

Pettijohn v Weede, 219-465; 258 NW 72
Groves v Webster City, 222-849; 270 NW 329
Russell v Leschensky, 224-334; 276 NW 608

Erroneous and confusing instructions. An instruction, in effect, that if defendant, after he discovered plaintiff's peril, was negligent in the doing of certain acts which resulted in the striking of plaintiff, then "defendant would still be liable even tho plaintiff was negligent", is prejudicially erroneous; also prejudicially confusing and inconsistent in view of repeated instructions that plaintiff could not recover if he was guilty of contributory negligence.

Steele v Brada, 213-708; 239 NW 538

Avoiding contributory negligence. A streetcar motorman who plainly sees that the driver of another conveyance is negligently placing himself in a position of danger on the tracks, or is about to do so, and by ordinary care can avoid an accident and fails to do so, must be deemed guilty of negligence which is the proximate cause of the accident, irrespective of the negligence of the injured party.

Lynch v Railway, 215-1119; 245 NW 219

IV IMPUTED NEGLIGENCE

(a) IN GENERAL

Harmless error. Instruction on the subject of imputed negligence held nonprejudicial.

Sutton v Moreland, 214-337; 242 NW 75

(b) DEFINITION

Fundamental basis of doctrine. If two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, express or implied, to act for all in respect to the conduct or the means of agency employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others.

This doctrine is based on the relation of agency existing between the parties engaged in the common enterprise.

Carpenter v Wolfe, 223-417; 273 NW 169

(c) TO OWNER-PASSENGER

Common purpose. The negligence of the driver of an automobile who, because of his skill as a driver, is selected by the owners to operate the car on a pleasure trip, is imputable to such owners, even tho such driver was the guest of such owners. (See Vol. I, §5028, Anno. 13)

Wiley v Dobbins, 204-174; 214 NW 529; 62 ALR 432; 28 NCCA 593

Harmless assumption of fact. The assumption in instructions of the fact that an automobile was being operated with the consent of the owner does not constitute reversible error when the evidence bearing on the element of consent was the one persuasive and unquestioned fact that the owner was riding in the car with the driver thereof at the time of the accident.

Hoover v Haggard, 219-1232; 260 NW 540

Son's negligence imputed to father-owner. The negligence of a son driving an automobile in which the father-owner is riding is imputed to the father.

Rogers v Jefferson, 224-324; 275 NW 874

Plaintiff's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son, who enters an obscured intersection without sounding his horn, is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

(d) OWNER'S CONSENT TO OPERATION

Discussion. See 13 ILR 336—Liability of owner; 21 ILR 804—Wife's recovery against owner of car operated by husband

Literal words limited by intent. Tho a thing is within the literal words of a statute, it will not be deemed in the statute when it is clearly not within the intention of the statute. Applied in the construction of the statute relative to the liability of the owner of an automobile who consents to its operation by another.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Stating cause of action. A cause of action is stated by allegations (1) that the driver of an automobile was negligent in operating it, (2) that plaintiff suffered damages thereby, and (3) that the car was then being operated with the consent of the owner.

Seleine v Wisner, 200-1389; 206 NW 130; 25 NCCA 714

Pleading — nonallowable amendment. A timely brought action based solely on the common-law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee in due course of employment may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Constr. Co., 219-1017; 257 NW 426

Cross complaint—when allowable. In an action by an administrator for damages consequent on the alleged negligent killing by defendant of the intestate in a collision between automobiles, the defendant may cross-petition for damages against the administrator personally under the allegation that the deceased at the time of said collision was negligently operating an automobile which was personally owned by said administrator and was so doing with the consent of said owner. And this is true irrespective of the personal residence of the administrator.

Ryan v Amodeo, 216-752; 249 NW 656

Conditional sales—ownership in vendee. When a motor vehicle is sold under a conditional sales contract, altho the seller retains legal title for the purpose of security, the ownership of the car passes to the buyer.

Hansen v Kuhn, 226-794; 285 NW 249

Conditional sales—motor vehicles—ownership. An instruction was erroneous in stating that a conditional sales contract, containing a clause that title remained in seller, left the ownership of an automobile in the seller. The buyer became the substantial and beneficial owner under the contract, and §4964, C., '35 [§5002.07, C., '39], stating that title to motor vehicle shall not be deemed to pass until transferee has received and written his name on the registration certificate, is not construed to make seller liable as owner of the vehicle.

Craddock v Bickelhaupt, 227-202; 288 NW 109

IV IMPUTED NEGLIGENCE—continued
(d) OWNER'S CONSENT TO OPERATION—continu'd

Former statute revised—legislative construction. When the motor vehicle statutes were completely revised and exempted the vendor of a motor vehicle, under a conditional sales contract, from liability for negligent operation of the vehicle, such revision did not create a legislative construction that a former statute defining "owner" as the person with the use or control of a vehicle included such vendor within its definition, as a general revision of the laws creates no presumption of an intent to change the law, as is created when a particular section or a limited part of an act is re-enacted.

Hansen v Kuhn, 226-794; 285 NW 249

Assignee from conditional sale vendor not the owner of motor vehicle. The assignee from the vendor of a truck under a conditional sales contract did not have either the "lawful ownership, use or control" or "the right to the use or control" of the truck, and could not be considered as "owner" under a former statute which said that any person coming within those specifications should be included in the term "owner".

Hansen v Kuhn, 226-794; 285 NW 249

Conditional seller not "owner"—nonliability. Statute making owner of automobile liable for damage caused by its operation when being driven with owner's consent, held not to extend to seller of automobile under conditional sales contract even when, under the contract of sale, seller retained title, for the buyer is the beneficial, equitable, and substantial owner, and the seller retains only naked title subject to complete divestation upon payment of the final installment of the purchase price.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Conditional sale vendor not liable for negligence of vendee. The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

Ownership—relevant proof. On the issue of the ownership of an automobile, the contract of sale to the alleged owner is relevant and material.

Kimmel v Mitchell, 216-366; 249 NW 151

Ownership of car—futile evidence. Evidence that an automobile of a certain make was, at the time of a collision, occupied by a husband and wife, that it carried a registration plate of the county of which said parties were residents, and that said car was being operated by the husband, furnishes no prima facie proof of the wife's ownership of the car.

Putnam v Bussing, 221-871; 266 NW 559

Ownership—incompetent evidence. On the issue of ownership of a motor vehicle (arising on the allegation that said vehicle was being operated with the consent of the owner), neither of the following is admissible:

1. A certified copy of a purported application for registration of said vehicle when said purported application is neither signed by nor sworn to by any person. For an added reason is this true when said certification fails to identify said application as a record of any public office; nor

2. An unauthenticated copy of a purported duplicate certificate of registration of said vehicle, especially when said certificate fails to carry the signature of the purported owner of said vehicle.

Putnam v Bussing, 221-871; 266 NW 559

Ownership—Missouri certificate of ownership—conclusiveness. A duly issued and outstanding certificate of ownership of a motor vehicle, issued by the secretary of state of the state of Missouri under the statute law thereof (§3, Art. 16, Public Acts of 1923), is absolutely conclusive in said state as to such ownership, and will be recognized and accorded the same force and effect in this state, said statutes not being violative of the public policy of this state.

Enfield v Butler, 221-615; 264 NW 546

Indispensable element. The consent of such owner to such operation is an indispensable element of the owner's liability.

McLain v Armour & Co., 205-343; 218 NW 69

Presumption from ownership—evidence to refute. Admission of ownership of a motor vehicle involved in a collision establishes, prima facie, that the vehicle was being operated with the consent of the owner and to avoid such finding there must be some showing to the contrary.

Wolfson v Lumber Co., 210-244; 227 NW 608
Enfield v Butler, 221-615; 264 NW 546
Mitchell v Underwriters, 225-906; 281 NW 832

Consent of owner—harmless assumption. The assumption in instructions of the fact that an automobile was being operated with the consent of the owner does not constitute reversible error when the evidence bearing on the element of consent was the one persuasive and unquestioned fact that the owner was riding in the car with the driver thereof at the time of the accident.

Hoover v Haggard, 219-1232; 260 NW 540

Presumption. Presumptively, the owner of an automobile is in control of his own car, but he may rebut the presumption and show that

the car was being operated without his consent.

Waldman v Motor Co., 214-1139; 243 NW 555

Inference—burden of proof. An inference arises from the ownership of an automobile that it was operated with the owner's consent, or under his direction, and the owner has the burden of establishing that such was not the case.

McCann v Downey, 227-1277; 290 NW 690

Custom of driver—jury question. A jury question is created on the issue whether an automobile was being operated with the consent of the owner by testimony that the driver had habitually used the car for business and pleasure both before and after the accident, even tho the counter testimony of the owner that he had expressly forbidden the use of the car on the occasion in question was not directly contradicted.

Lange v Bedell, 203-1194; 212 NW 354; 27 NCCA 531; 29 NCCA 323

See Tigue Sales v Motor Co., 207-567; 221 NW 514

Presumption from ownership—force and effect. Proof by plaintiff, in an action for damages consequent on the negligent operation of an automobile, that said vehicle, on the occasion in question, was driven by one of the defendants and was owned by the other defendant, generates a presumption that said driving was "by consent" of said owner; but said presumption, while all-sufficient in the first instance, cannot prevail against positive, unimpeached evidence to the contrary unless plaintiff reinforces it with additional evidence sufficient to make a jury question.

Hunter v Irwin, 220-693; 263 NW 34

Brother allowed to keep car—consent presumed. Where the owner of a car allowed his brother to keep the car much of the time and use it and the brother allowed a third person to use the car and the third party had an accident, the proof of ownership established, prima facie, that the car was being operated for the owner, and this inference could not be overcome by vague testimony.

Olinger v Tiefenthaler, 226-847; 285 NW 137

Overcoming inference of consent. The inference that an automobile operated by one person and owned by another person was operated with the consent of the owner is wholly overcome by uncontradicted evidence that the car was being operated against the positive command of said owner, and compels the court, in such a case, to direct a verdict against the plaintiff.

Robinson v Shell Corp., 217-1252; 251 NW 613

Consent to operation—jury question. Proof that an automobile at the time of a collision (1) was operated by one defendant, (2) was owned by another defendant, and (3) was under lease exceeding ten days to yet another defendant generates a jury question on the issue whether the car was operated with the consent of the owner, and also with the consent of the lessee; and such jury question survives as to the owner and as to the lessee until each, for himself, negatives such consent by undisputed and uncontroverted testimony. And the most positive denials of consent cannot be deemed "undisputed and uncontroverted" when the facts and circumstances attending the operation of the car tend to prove that the owner and lessee did consent.

Greene v Lagerquist, 217-718; 252 NW 94

"Family-car" doctrine inapplicable to foster son. The naked fact that the driver of an automobile is the foster son of the owner of the car, affords no basis, in and of itself, for an inference or presumption that said driving was "by consent" of said owner, when the foster son has attained his majority and is dependent on himself for support.

Hunter v Irwin, 220-693; 263 NW 34

Evidence—jury question. Evidence that 15-year-old son, who often drove family car, had permission to drive the car to choir practice and also to a high school pep meeting, raised a jury question as to whether or not the son was driving with his father's consent at the time of the accident which occurred after the pep meeting.

McCann v Downey, 227-1277; 290 NW 690

Erroneous instructions. In a joint action against the owner of an automobile and against the driver thereof based on the alleged negligent operation of the car, it is erroneous to require the jury to find for both defendants, or against both defendants, when the consent of the owner to the operation in question is distinctly in issue.

Jarvis v Stone, 216-27; 247 NW 393

Joint action against owner and operator—erroneous instructions. In a joint action against the owner and operator of an automobile the evidence, manifestly, may be such as to justify a verdict against the operator and in favor of the owner, and in such cases instructions holding the owner liable in case the jury finds the operator liable are fundamentally erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Unallowable verdicts. In a joint action for damages against the driver and owner of an automobile, based, as to the driver, on his negligence, and as to the owner, on his consent to the driving (as to which consent the proof is substantially conclusive), there cannot legally be separate verdicts, one holding the driver liable, and one holding the owner nonliable.

Hoover v Haggard, 219-1232; 260 NW 540

IV IMPUTED NEGLIGENCE—continued
(d) OWNER'S CONSENT TO OPERATION—concluded

Responsibility between defendants — jury question. In an action for injuries sustained by a passenger riding in a taxicab, the question of responsibility for the accident between the owner of the cab, the driver, and a party to an agreement under which the cab was operated, was a jury question.

Womochil v Peters, 226-924; 285 NW 151

Liability of bailor. The bailor of an automobile is personally liable to a third person for damages consequent on the negligent operation of the car by the bailee. (§5026, C., '24.)

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851; 28 NCCA 626; 30 NCCA 90

Due process—liability of bailor. The statute which renders the bailor of an automobile liable to third persons for damages consequent on the negligent operation of the car by the bailee is not violative of the due process clause of the constitution.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851; 28 NCCA 626; 30 NCCA 90

Liability of owner. The owner of an automobile by consenting to its operation by another renders himself liable in damages consequent on either a negligent or reckless operation by such other person.

White v Center, 218-1027; 254 NW 90

Joint negligence. The owner of an automobile who permits another person to drive it is liable for the joint negligence of the driver and a third party riding with said driver.

Tissue v Durin, 216-709; 246 NW 806

Negligence of borrower imputable to lender. One who borrows an automobile becomes, by force of our statute, the agent of the lender in the operation of the car. It necessarily follows that the negligence of the borrower is imputable to the lender and is a bar to the recovery of damages by the lender in an action against a third party, if such negligence contributed to the injury and resulting damages.

Secured Fin. Co. v Railway, 207-1105; 224 NW 88; 61 ALR 855; 30 NCCA 90

Loan for specific purpose. Unquestioned evidence that an automobile was loaned by the owner to a party for a specific purpose, and that said party wrongfully used said car for a specifically different purpose, and that the injury in question occurred in the operation of the car while it was being so wrongfully used, establishes the nonliability of the owner as a matter of law.

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

Nonliability of owner. The owner of an automobile is not liable for damages done by his car consequent on the negligent operation of the car by the proprietor of a garage who, without the knowledge of said owner, and as an independent contractor, was towing said car to his place of business in order to repair it; nor is a nonowner of the car, who directed the garageman to take the car and repair it, liable for said damages.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Operation by nonowner—unnecessary proof. In an action for damages consequent on the operation of an automobile by nonowner thereof, plaintiff need not show that such nonowner was in the employ of the owner, or was the agent of the owner or was transacting the business of the owner.

Tigue Sales v Motor Co., 207-567; 221 NW 514

Owner liability—negligence of driver—truck operated by wife. An owner permitting and directing his wife, in driving a truck, to back up the truck 2 or 3 feet is liable in damages if she does so negligently.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Municipally owned automobiles. This section does not embrace the ownership of public property used solely for governmental purposes.

Bateson v County, 213-718; 239 NW 803

Road grader not a "car". A caterpillar road grader belonging to a county and operated on the public highway is not a "car" within the meaning of the statutory declaration that the owner of a "car" is liable for damages done by the car when it is operated with his consent.

Bateson v County, 213-718; 239 NW 803

(e) COMMON ENTERPRISE

Fundamental basis of doctrine. If two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, express or implied, to act for all in respect to the conduct or the means of agency employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others.

This doctrine is based on the relation of agency existing between the parties engaged in the common enterprise.

Carpenter v Wolfe, 223-417; 273 NW 169

Common enterprise. The contributory negligence of a husband will be imputed to his wife when they are engaged in a joint or common enterprise.

Lindquist v Thierman, 216-170; 248 NW 504; 87 ALR 893; 34 NCCA 309

Negligence of husband imputable to wife. Proof that a husband and wife, riding together

in an automobile on the highway, were engaged in a common enterprise is insufficient to justify the imputation of the husband's negligence to the wife. The proof should further show that the wife had some control over the car and the driver thereof.

Fry v Smith, 217-1295; 253 NW 147
Hough v Freight Service, 222-548; 269 NW 1
Carpenter v Wolfe, 223-417; 273 NW 169

Passenger—common enterprise—limitation. The negligence of the driver of an automobile cannot be deemed the contributory negligence of a passenger, on the claim that the driver and passenger were engaged in a common enterprise, unless the passenger has the right, in some manner, to control the operation of the automobile.

Stingley v Crawford, 219-509; 258 NW 316

Joint adventure or common enterprise. The doctrine that when parties are engaged in a joint adventure or common enterprise each is the agent of the other for the purpose of executing the adventure or enterprise, and that the negligence of one is the negligence of all other co-adventurers, has no application to an action by one joint adventurer against another joint adventurer based on the negligence of the latter.

White v McVicker, 216-90; 246 NW 385; 34 NCCA 416
White v McVicker, 219-834; 259 NW 465

Joint enterprise between driver and passenger—giving directions to reach destination insufficient. A joint enterprise is not shown between a driver of an automobile and his passenger when the passenger neither drove the car at any time nor exercised any control over its operation, but merely directed the driver which way to go so that the driver might view a team of mules which he was interested in buying.

Churchill v Briggs, 225-1187; 282 NW 280

Erroneous direction of verdict. An order for a new trial is, of course, proper when the judgment entered was ordered by the court on an erroneous theory of the law on a material point. So held where the court treated both plaintiff and defendant as joint adventurers and directed a verdict against plaintiff on the erroneous theory that defendant's negligence was imputable to the plaintiff.

Thompson v Farrand, 217-160; 251 NW 44; 34 NCCA 398

(f) TO PASSENGER IN ACTION AGAINST THIRD PARTY

Driver's negligence not imputed to passenger. The negligence of a motor vehicle driver is not ordinarily imputed to a passenger; however, such passenger must show the exercise of ordinary care.

Williams v Kearney, 224-1006; 278 NW 180

Common enterprise. The negligence of the driver of an automobile cannot be deemed the contributory negligence of a passenger, on the claim that the driver and passenger were engaged in a common enterprise, unless the passenger has the right in some manner to control the operation of the automobile.

Stingley v Crawford, 219-509; 258 NW 316

Negligence of driver not imputed to passenger. The negligence of the driver of an automobile—he having full management, control, and supervision of it—is not imputable to his passenger.

Meggers v Kinley, 221-383; 265 NW 614
Kehm v Dilts, 222-826; 270 NW 388

Contributory negligence of driver-host not imputed to passenger. The passenger in an automobile who is injured in a collision with another car may, notwithstanding the contributory negligence of the driver-host, recover his damages from the owner and operator of said other car on proof, (1) that said owner and operator were proximately negligent, (2) that he—the passenger—had no control over his driver-host, and (3) that he—the passenger—was free from contributory negligence; and the assignee of such damages, even tho he be the driver-host, may recover on such assignment on the same conditions, and the court must so instruct, even tho said driver-host could not, because of his contributory negligence, recover damages personal to himself.

Keller v Gartin, 220-78; 261 NW 776
Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 640

Passenger. The negligence of the driver of an automobile is not imputable to his passenger, they not being engaged in a joint or common enterprise. And the court should not instruct that such negligence is imputable simply because defendant pleads that the driver's negligence was the sole cause of the injury sued for.

Albert v Maher Bros., 215-197; 243 NW 561

Child passenger. The negligence of the driver of a conveyance in which a child is riding is, in an action by the child against a third party for damages, wholly immaterial as far as said child is concerned unless said negligence is the sole cause of the damages. (See Vol. I, §5028, Anno. 13.)

Armstrong v Waffle, 212-335; 236 NW 507; 5 NCCA(NS) 763

Collision with overtaking and passing vehicle. In a personal injury action arising out of a collision occurring when the automobile in which plaintiff was riding with husband-driver was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, held, that statute relating to speed, which requires reasonable speed with due regard to existing

IV IMPUTED NEGLIGENCE—continued
(f) TO PASSENGER IN ACTION AGAINST THIRD PARTY—continued

conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Wife riding with husband—nonduty to warn. A wife, while riding in an automobile owned and operated by her husband, and over the movements of which automobile she neither has nor attempts to have control, is under duty to exercise, for her own safety, ordinary care in view of the circumstances, but this duty does not require the wife, in order to escape the imputation of contributory negligence, to maintain an attitude of watchfulness and warning and protest to the husband of possible dangers.

Carpenter v Wolfe, 223-417; 272 NW 169

Imputing husband's negligence to wife. A wife who was riding in the front seat of a car driven by her husband did not have such control or right to direct the movements of the car that the negligence of the husband should be imputed to her, even tho she may have suggested that he should not drive faster than 35 miles an hour.

Newman v Hotz, 226-834; 285 NW 287

Husband and wife. The negligence, if any, of a husband in the operation of an automobile owned by him and used on the occasion of a funeral of one of his relatives is not imputable to his wife who was riding with him. (See Vol. I, §5028.)

Stilson v Ellis, 208-1157; 225 NW 346

Negligence of husband not imputable to wife. Proof that a husband and wife, riding together in an automobile on the highway, were engaged in a common enterprise is insufficient to justify the imputation of the husband's negligence to the wife. The proof should further show that the wife had some control over the car and the driver thereof.

Fry v Smith, 217-1295; 253 NW 147
Hough v Freight Service, 222-548; 269 NW 1

Occupant injured — imputed negligence of driver. Where a car collided with a stalled tractor-trailer, jackknifed on an icy hill at night, the question of plaintiff's contributory negligence was properly submitted to the jury, where it is shown the tractor, with lighted head lamps, standing on the right side of the highway, diverted plaintiff's and husband-driver's attention, and, there being no reasonable apparent cause to suspect that trailer blocked the left side of highway, and, where jury could find that car in which plaintiff was riding was proceeding at less than 20 miles per hour, and, that plaintiff and husband-driver were looking straight ahead, there is no warrant for saying plaintiff was contributorily negligent as a matter of law; however, under the record, the negligence of the husband-driver, if any, could not be imputed to plaintiff.

Johnson v Transp. Co., 227-487; 288 NW 601

Collision with stalled truck. Where a car collided with a truck-trailer which had stalled on an icy hill at night on a country highway and had jackknifed across the left side of the highway on which plaintiff's husband was driving, the question of the husband's negligence in braking his car to such extent that it slid on the ice and collided with the side of the trailer, in the absence of any other evidence that car went out of control, held, that question of negligence of the husband as the sole proximate cause of the collision was properly submitted to the jury, and even tho it may be conceded that husband was negligent, it cannot be said, as a matter of law, that such negligence was the sole proximate cause of the injury.

Johnson v Transp. Co., 227-487; 288 NW 601

Fundamental basis of doctrine. The negligence of a husband in the operation of an automobile cannot be deemed the contributory negligence of his wife who rides with him—cannot be imputed to the wife—simply because the husband and wife at the time of the negligence in question are engaged in a common enterprise, unless the wife has the right in some manner at the time in question to control the operation of said car.

Carpenter v Wolfe, 223-417; 272 NW 169

Motorcycle passenger riding behind driver—care required. A girl riding on a motorcycle directly behind the driver, and unable to see the road ahead without standing up, thereby endangering the operation of the vehicle, cannot as a matter of law be under duty to warn the driver of impending danger in order to avoid the driver's negligence being imputed to her.

Williams v Kearney, 224-1006; 278 NW 180

Negligence of host—proximate cause. The submission to the jury of interrogatories bearing on the negligence of the driver of a conveyance (in an action by a passenger against a third party for damages) is not erroneous when the negligence of the driver was material on, and strictly confined to, the issue of proximate cause.

Schlinkert v Skaalia, 203-672; 213 NW 219

Imputed negligence—instructions construed. In an unsuccessful action against a railway company for negligently causing the death of a passenger riding in a truck, an instruction as to what acts of the said driver would constitute negligence cannot be deemed to impute

the negligence, if any, of said driver to the passenger when other instructions specifically state, in effect, that the negligence of the driver would be no defense if the negligence of the defendant was found to be the sole proximate cause of said death.

Reidy v Railway, 220-1386; 258 NW 675

Injuries actionable tho driver negligent. An occupant of a car is not deprived of the right to recover for injuries sustained in an accident even tho the driver of the car in which she was riding and also the defendant, who left another car on the highway where it was run into, were both guilty of proximate negligence.

Newman v Hotz, 226-834; 285 NW 287

Unsupported instructions. In a damage action where a truck traversing the crest of a hill on a snow-drifted highway, sideswipes a passenger automobile, the question of contributory negligence of a plaintiff motorist riding in the back seat should not be submitted to the jury in the absence of any claim that plaintiff's driver's negligence, if any, was imputable to the plaintiff or was the sole proximate cause of the accident.

Schalk v Smith, 224-904; 277 NW 303

Consideration of nonimputable negligence. An instruction to the effect that even tho the negligence of a husband with whom the wife was riding could not be imputed to the wife, nevertheless the negligence of the husband could be considered by the jury on the issue whether the negligence of the defendant—the driver of another car—was the proximate cause of plaintiff's injuries, is a correct statement of law, and if plaintiff wishes such instruction modified by a statement as to the law governing the concurrent negligence of different parties, she must request such instruction.

Kuhn v Kjose, 216-36; 248 NW 230

Passenger going to sleep. The fact that a passenger is asleep in an automobile at the time of an accident does not prevent a recovery of damages by him unless there exists some causal connection between the fact of sleep and the accident.

Fry v Smith, 217-1295; 253 NW 147; 36 NCCA 316

Injuries from defects or obstructions in highways and other public places. A passenger in the front seat of an automobile, with opportunity equal to that of the driver to see what is to be seen, and free from any diverting circumstances, cannot surrender himself to the care of the driver and then successfully contend that he (the passenger) was in the exercise of ordinary care.

Hutchinson v Service Co., 210-9; 230 NW 387; 33 NCCA 170

Passenger nonapprehensive of danger. A passenger in an automobile is not guilty of negligence per se, nor is the negligence of the driver imputable to such passenger simply from the fact that the passenger implicitly trusts the driver, when the passenger had no occasion to apprehend any danger until the very instant of the accident. (See Vol. I, §5028, Anno. 13.)

Johnson v Railway, 201-1044; 207 NW 984

Motorcycle passenger vs automobile owner —nonassumption of risk—sudden danger. In action to recover for death of 13-year-old boy resulting from collision between motorcycle, on which he was riding as a passenger, and defendant's automobile, allegation in defendant's answer that decedent assumed risk of motorcycle driver's negligence was properly stricken where pleaded facts and common knowledge justified conclusion that danger of the collision could not have been apparent more than a few seconds of time so that there was no time for deliberation and voluntary assumption of such risk.

Edwards v Kirk, 227-684; 288 NW 875

Passenger—nonassumption of risk. A passenger in an automobile cannot be held to assume the risks arising out of the incompetency, inexperience, or recklessness of the driver unless knowledge on the part of the passenger of such condition or conditions is adequately shown.

Stingley v Crawford, 219-509; 258 NW 316

(g) EMPLOYER AND EMPLOYEE

"Owner" defined. When an automobile actually belongs to an employee, the employer is not also to be deemed an "owner" because in the contract of employment the employee contracts to hold the employer harmless in the operation of the car.

McLain v Armour & Co., 205-343; 218 NW 69

Operation by nonowner—unnecessary proof. In an action for damages consequent on the operation of an automobile by nonowner thereof, plaintiff need not show that such nonowner was in the employ of the owner, or was the agent of the owner, or was transacting the business of the owner.

Tigue Sales v Motor Co., 207-567; 221 NW 514

Negligence of garageman—nonliability of owner. The owner of an automobile is not liable for damages done by his car consequent on the negligent operation of the car by the proprietor of a garage who, without the knowledge of said owner, and as an independent contractor, was towing said car to his place of business in order to repair it; nor is a nonowner of the car, who directed the garageman to take the car and repair it, liable for said damages.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

IV IMPUTED NEGLIGENCE—continued
(g) EMPLOYER AND EMPLOYEE—continued

Pleading—nonallowable amendment. A timely brought action based solely on the common-law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee, in due course of employment, may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Constr. Co., 219-1017; 257 NW 426

Consent of owner-employer—effect. An employer, whose automobile is being operated with his consent, is not liable, under this section, to his own employee, for an injury suffered by said employee in consequence of the actionable negligence of said operator of the car, provided said injury is compensable under the workmen's compensation act.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Discharge of employer's liability—effect on third party wrongdoer. Where an injury which is mandatorily compensable under the workmen's compensation act is received by an employee in consequence of the actionable negligence of the operator of an automobile owned by, and operated with the consent of, the employer, the fact that the employer fully discharges his statutory liability to the employee does not ipso facto discharge the legal liability of the said negligent operator to said employee.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Scope of employment. In an action against the owner of an automobile on the theory that the car was being operated by the owner's agent and with the owner's consent, the court may very properly instruct that there could not be a recovery unless the driver was, at the time in question, driving within the scope of his employment—such instruction being directly applicable to the supported claim of said owner.

Ege v Born, 212-1138; 236 NW 75

Abandonment of employment—jury question. Evidence reviewed and held to present a jury question on the issue whether a servant had temporarily abandoned his employment and had not returned thereto at the time of the commission by him of an alleged negligent act.

Heintz v Packing Co., 222-517; 268 NW 607

Employee exceeding authority. Where an employee, contrary to general and specific instructions, drove gas company's truck five miles outside city to take a co-employee home, instead of driving directly to company's shop, there was no such "consent" to use the truck as would make the company liable for its employee's negligence when a collision occurred during the trip.

Usher v Stafford, 227-443; 288 NW 432

Departure of servant from zone of service. When the range or zone of service of an employee embraced the taking of a truck to a place of storage for the night, the act of the employee in temporarily using the truck for his own personal use will not per se absolve the employer from liability for a negligent act by the employee occurring after the employee had resumed his duty to take the truck to its storage place, and while he was pursuing a proper route in the immediate vicinity thereof.

Orris v Tolerton, 201-1344; 207 NW 365; 25 NCCA 549; 34 NCCA 192, 213

Agent borrowing automobile. A telegraph company is not responsible for the act of its messenger in borrowing an automobile with which to make a delivery of a message, when the usual and ordinary way of making delivery was by means of a bicycle, and when the borrowing aforesaid was wholly unauthorized by, and unknown to, the company.

Hughes v Tel. Co., 211-1391; 236 NW 8; 31 NCCA 423

Use of automobile—authority of servant. Evidence reviewed and held to present a jury question on the issue whether a master had impliedly authorized his salesman, in order to perform his duties, to travel about the country by means of the salesman's individually owned automobile.

Heintz v Packing Co., 222-517; 268 NW 607

Employee (?) or independent contractor (?). A salesman who, when traveling from place to place about the country in behalf of the business of another party, employs his own automobile, and does so with the implied authority of said other party, cannot be deemed an independent contractor as to said matter of transportation when he is at all times subject to summary discharge by said other party, and also subject to the orders of said other party as to what he shall do, and when and where he shall do it.

Heintz v Packing Co., 222-517; 268 NW 607

Servant (?) or independent contractor (?)—test. One who is employed to do a certain work is a servant of the employer and not an independent contractor, when he—the one doing the work—is subject to the direction and control of the employer as to the details and method to be followed in the performance of the work. So held as to one operating an automobile oil truck on commission.

Lembke v Fritz, 223-261; 272 NW 300

Dual independent contractors. Where the primary contractor on a highway improvement

sublets the hauling to a second party, and retains no substantial control over said second party except in case of the latter's default, and where said second party in turn sublets to a third party under contract terms substantially similar in effect, neither said third party nor his employees are employees either of said primary contractor or of said second party.

Page v Const. Co., 215-1388; 245 NW 208

Government nonliability for employee's tort —respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

School bus driver as independent contractor —nongovernmental function. A school bus driver furnishing his own bus under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

Injuries to third persons—liability basis. Every case which allows recovery against a servant can be based not upon any relationship growing out of the employment but upon the fundamental proposition that the servant violated some duty that he owed to the person injured. It may be an act of misfeasance, nonfeasance, or malfeasance.

Montanick v McMillin, 225-442; 280 NW 608

Declarations inadmissible against master. In a joint action against a master and his servant for damages consequent on the negligent operation of the car by the servant, declarations or statements by the servant made several days after the accident and tending to show the negligence of the servant are, while admissible against the servant, not admissible against the master; and the court must by proper instruction, if requested, limit the testimony accordingly.

Droullard v Rudolph, 207-367; 223 NW 100
Wilkinson v Lbr. Co., 208-933; 226 NW 43
Looney v Parker, 210-85; 230 NW 570
Glass v Hutchinson Co., 214-825; 243 NW 352

Subagency—essentials. A subagency cannot arise without the knowledge or consent of either the principal or his agent.

McLain v Armour & Co., 205-343; 218 NW 69

Acting without permit—connivance at violation—effect. A shipper of goods will be deemed as participating in the doing of an illegal act when he enters into a contract with a motor vehicle freight operator for the transportation of freight over the highways of this state by said operator as an independent contractor, and knows, at the time of so contracting, that said operator has no right to carry on his said business because of the failure of said operator (1) to obtain from the board of railroad commissioners (now commerce commission) the legally required official permit to carry on said business, and (2) to file with said board the legally required bond. It follows that said operator will not be deemed an independent contractor but simply the agent of said shipper.

Hough v Freight Service, 222-548; 269 NW 1

V PROXIMATE CAUSE

(a) IN GENERAL

Question of fact—general rules applicable. The question of proximate cause, as a general rule, is a question of fact, and the same rules apply as in other questions of fact.

Blessing v Welding, 226-1178; 286 NW 436

No evidence of other cause. The question whether a certain negligent act was the moving or producing cause—the proximate cause—of an injury is properly submitted to the jury when the record contains evidence which establishes an act which could fairly be such proximate cause and contains no evidence tending to establish any other cause.

Buchanan v Cream Co., 215-415; 246 NW 41

Proximate cause tho not sole cause—instructions. Instructions involving the thought that negligence in the operation of an automobile might be the proximate cause of an injury even tho it was not the sole cause, reviewed, and held not to permit a recovery for negligence which was not the proximate cause of the injury.

Duncan v Rhomberg, 212-389; 236 NW 638

Instructions—"a proximate cause"—nonprejudicial error. In an automobile collision negligence case where plaintiff's son was driving automobile in which plaintiff was riding, an instruction that plaintiff need only prove defendant's negligence to be "a proximate cause" is not prejudicial error when court also instructed that negligence of plaintiff or plaintiff's son barred recovery and the instructions were to be read as a whole.

Rogers v Jefferson, 224-324; 275 NW 874

Proximate cause. The contributory negligence which will defeat a plaintiff is such negligence as contributes to the injury in any way or in any degree. Error results from instructing that such negligence must contribute proximately to the injury.

Hamilton v Boyd, 218-885; 256 NW 290

V PROXIMATE CAUSE—continued
(a) IN GENERAL—continued

Need not be proximate cause of injury. Contributory negligence in order to defeat recovery need not be the proximate cause of the injury in question. It is only necessary that such negligence contributes to the injury in some degree or in some manner.

Hogan v Nesbit, 216-75; 246 NW 270

Negligence of host—proximate cause. The submission to the jury of interrogatories bearing on the negligence of the driver of a conveyance (in an action by a passenger against a third party for damages) is not erroneous when the negligence of the driver was material on, and strictly confined to, the issue of proximate cause.

Schlinkert v Skaalia, 203-672; 213 NW 219

Proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant might be proximately negligent.

Newland v McClelland & Son, 217-568; 250 NW 229

Negligence of outsider as proximate cause. The court must submit to the jury the supported plea that the proximate cause of an accident was the negligence of an outsider—a person not a party to the action.

Hoover v Haggard, 219-1232; 260 NW 540

Third person's negligence. Under instructions properly stating that a plaintiff cannot recover unless defendant's negligence was the proximate cause of his injuries, and in the absence of a requested instruction, there is no error in failing to instruct that if the sole proximate cause of the injury was the negligence of a third person, plaintiff could not recover.

Gregory v Suhr, 224-954; 277 NW 721

Icy highway. The icy condition of a highway may not be said to be the proximate cause of an accident unless it can be said that such icy condition would have brought about the accident irrespective of the negligence assigned in the pleadings and supported by the proofs.

Stilson v Ellis, 208-1157; 225 NW 346

Noncausal negligence. Failure of the driver of a conveyance to keep a proper lookout for other persons using the highway or to keep his windshield clean is quite inconsequential when the proximate cause of the injury in question was the icy condition of the street.

McDowell v Interstate Co., 208-641; 224 NW 58; 31 NCCA 282; 32 NCCA 486

Negligence — unsupported issues. Unsupported issues are very properly and necessarily excluded from the jury. So held as to the issues (1) whether the operator of an automobile failed to maintain a proper lookout, (2) whether he was negligent in stepping out of the car and upon the running board preparatory to cleaning the sleet from the windshield, and (3) whether the snowy and icy condition of the pavement was the proximate cause of an accident.

Winter v Davis, 217-424; 251 NW 770; 39 NCCA 308

Operation without brakes. Record reviewed and held that the proximate cause of an accident was not the condition in which a railway crossing was maintained, but the speed at which an overloaded truck was operated without brakes.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Insufficient lighting—effect. The operation of an automobile with lights which do not measure up to statutory requirements becomes quite immaterial, in a civil action, if such shortcoming in no manner contributes to the damage.

Hansen v Kemmish, 201-1008; 208 NW 277; 45 ALR 498; 29 NCCA 326; 33 NCCA 100

Violation of statute—avoidance by contributory negligence. Failure of a defendant, the driver of an automobile, to have the headlights on his car displayed at a time required by statute becomes inconsequential when the contributory negligence of the plaintiff was the proximate cause of the injury resulting from the collision.

Sheridan v Limbrecht, 205-573; 218 NW 278; 29 NCCA 300; 35 NCCA 661; 2 NCCA(NS) 417

Lack of proper lamps on trucks or trailers. In an action at law to recover damages for personal injuries sustained by plaintiff when car in which she was riding collided with a tractor-trailer which had stalled on an icy hill on a country highway at night and had jackknifed across the highway, the question of owners' and operators' negligence in failing to comply with statutes prescribing number and place of lamps required on truck or trailer, and whether such negligence, if any, had proximate causal connection with injury sustained by plaintiff, held, under the evidence, properly submitted to the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Stalled vehicle—absence of signals. The fact that, upon the stalling of a vehicle in the public highway, no lights or signals were erected to show the presence and position of said vehicle cannot be deemed the proximate cause of a collision with the stalled vehicle when the driver of the colliding vehicle discovered the presence and position of the stalled car in ample time

to stop had he been so driving as to be able to stop within the assured clear distance ahead.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Parking in highway—absence of lights. Negligence alleged to have been the proximate cause of a collision and asserted in the plea that defendant's truck (1) was parked, in the nighttime, diagonally across the entire right-hand side of a paved highway, and (2) without lights, with substantial evidence pro and con, both as to the position of the truck and as to the lights, necessarily presents a jury question.

Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 496

Parking on left side without tail light—bicyclist colliding. Section 5056, C., '35 [§5030.08, C., '39], requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, C., '35 [§5018.01, C., '39], and §5045, C., '35 [§§5033.07, 5033.08, C., '39], in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with an automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

Unavailable negligence. A general allegation of negligence in leaving a stalled automobile in the highway unattended is not available to a traveler who had the fullest knowledge of the presence of the automobile long before he reached and collided with it; and especially when the leaving of said car in the highway was not the proximate cause of the injury that was suffered.

Scoville v Bakery, 213-534; 239 NW 110; 35 NCCA 719; 36 NCCA 94

Stalled motorist—freedom from negligence—requested instruction—jury question. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is neither entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Collision with stalled truck. Where a car collided with a truck-trailer which had stalled on an icy hill at night on a country highway and had jackknifed across the left side of the highway on which plaintiff's husband was driving, the question of the husband's negligence in braking his car to such extent that it slid on the ice and collided with the side of the trailer, in the absence of any other evidence that car went out of control, held, that question of negligence of the husband as the sole proximate cause of the collision was properly submitted to the jury; and even tho it may be conceded that husband was negligent, it cannot be said, as a matter of law, that such negligence was the sole proximate cause of the injury.

Johnson v Transp. Co., 227-487; 288 NW 601

Child on sled—parked truck. A truck which is legally parked alongside the curb of a public street is not the proximate cause of an injury to a child whose sled was deflected into the truck by a bump in the street.

Dennier v Johnson, 214-770; 240 NW 745; 35 NCCA 717

Avoiding contributory negligence. A streetcar motorman who plainly sees that the driver of another conveyance is negligently placing himself in a position of danger on the tracks, or is about to do so, and by ordinary care can avoid an accident and fails to do so, must be deemed guilty of negligence which is the proximate cause of the accident, irrespective of the negligence of the injured party.

Lynch v Railway, 215-1119; 245 NW 219

Turning to left—streetcar. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Speed—when nonproximate cause. The operation of an automobile, even at an excessive speed, alongside a moving streetcar and in the direction in which the streetcar is moving, is not the proximate cause of an injury to a pedestrian who suddenly darts across the streetcar track ahead of the moving streetcar, and into the line of automobile travel, and is hit by the automobile.

Pettijohn v Weede, 209-902; 227 NW 824; 35 NCCA 5

Speed as nonproximate cause. A rate of speed which is not negligence per se cannot be deemed the proximate cause of an accident when the act of the injured party in stepping into the pathway of the car was so sudden and unexpected as to render impossible the stopping of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

V PROXIMATE CAUSE—continued
(a) IN GENERAL—concluded

Stepping into path of automobile. The negligence of a pedestrian, who left a position of safety on a curb and walked directly into the path of an automobile which struck him, was the proximate cause of the accident, and under the circumstances the rate of speed of the car was not material.

Ward v Zerzanek, 227-918; 289 NW 443

Noncausal negligence. Excessive or negligent speed of an automobile becomes immaterial when it is not the proximate cause of the injury in question.

McDowell v Interstate Co., 208-641; 224 NW 58; 35 NCCA 21
Crutchley v Bruce, 214-731; 240 NW 238; 35 NCCA 25

Attempting to dodge car. The act of a pedestrian, while crossing a street, in attempting to dodge an oncoming car, may constitute the proximate cause of the injuries suffered by him. So held where the pedestrian evidently stepped or turned back directly in front of said car.

Kortright v Strater, 222-603; 269 NW 745

Jury question on proximate cause. Conflicting testimony as to the speed of the defendant's truck while following pick-up truck on an icy street, and as to the distance between the trucks when the one in front skidded and turned around, presented a jury question as to whether the driver of the defendant's truck was guilty of negligence in colliding with the pick-up truck, forcing it over a curb where it struck the plaintiff, and whether such negligence, if any, was the proximate cause of the plaintiff's injuries.

Remer v Takin Bros., 227-903; 289 NW 477

Racing as proximate cause—evidence. On the issue whether two automobiles were racing and whether such race was the proximate cause of an injury to a third party, the court may, in its discretion, refuse to receive evidence of racing remote in point of time unless evidence of racing immediately before the accident is first introduced.

Glass v Hutchinson Co., 214-825; 243 NW 352

Sudden stopping of cars—proximate cause. Evidence held affirmatively to show that the stopping of three cars on the highway was not the proximate cause of a collision between a fourth car and a car traveling in the opposite direction from the three stationary cars.

Foster v Flaugh, 223-40; 271 NW 503

Failure to signal "stop" — nonproximate cause. Failure of the driver of a truck to give a visible signal of his intention to stop is not the proximate cause of a collision with an automobile approaching from the rear when the driver of the oncoming rear car did not see the truck until an instant before the collision, and, therefore, had not regulated or gauged his speed with the speed of the truck ahead.

Isaacs v Bruce, 218-759; 254 NW 57

Assured clear distance ahead—proximate negligence. The driver of a vehicle who, on a clear and unobstructed road, and at a distance of 250 feet, sees a substantial object on the right-hand side of the road ahead, and at a distance of 150 feet discovers that the object is a truck, and at a distance of 25 feet discovers that the truck is stationary, and thereupon, because of unslackened speed, is unable to avoid hitting the truck by turning to the left into the unobstructed part of the road, is guilty of a negligence which is the proximate cause of the resulting collision.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713; 1 NCCA(NS) 15

Failure to see stalled car in fog. When, on a foggy night, a car ran into another car which was parked on the highway, and the proof did not show that the stalled car was plainly visible, it was error for the court on motion to rule that the negligence of the driver of the car which ran into the other car was the sole proximate cause of injuries sustained by an occupant of the moving car.

Newman v Hotz, 226-834; 285 NW 287

Driving into side of train. Evidence which is solely to the effect that, on a misty and foggy night, a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

(b) DEFINITION

Proximate cause defined. Negligence is the proximate cause of an injury which follows such negligent act, if it can be fairly said that in the absence of such negligence the injury or damage complained of would not have occurred.

Buchanan v Creamery Co., 215-415; 246 NW 41
Dennis v Merrill, 218-1259; 257 NW 322
Gray v Des Moines, 221-596; 265 NW 612

(c) INTERVENING CAUSE

Negligence—intervention of second force—determining liability. Where an injury results through the operation of a second force, ordinarily liability depends upon whether or not that second force may be anticipated to be

the natural and probable consequence of the negligent act of the first party.

Blessing v Welding, 226-1178; 286 NW 436

Negligence—intervening third party's act. Where the act of a third party, even if it is negligent, intervenes between the original negligence of defendant and the injury, there is "proximate cause" if, under the circumstances, an ordinarily prudent man could or should have anticipated that such intervening act, or a similar intervening act, would occur.

Blessing v Welding, 226-1178; 286 NW 436

Negligence—"superseding cause"—liability—effect. The fact that an intervening act of a third party is negligent in itself, or is done in a negligent manner, does not make it a "superseding cause" of harm to another if the actor should have realized that a third person might so act, or a reasonable man knowing the situation would not regard it as highly extraordinary that the third person had so acted, or the intervening act is a normal response to the situation created by actor's conduct and manner in which it is done is not extraordinarily negligent.

Blessing v Welding, 226-1178; 286 NW 436

Third person's hazardous acts—liability of first person. If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes a person negligent, such act whether innocent, negligent, intentionally tortious, or criminal does not prevent the first person from being liable for injury caused thereby.

Blessing v Welding, 226-1178; 286 NW 436

Speed of train—driving upon crossing. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

Streetcar turning to left. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Negligence—proximate cause (?)—intervening cause (?). In making a left-hand turn into an intersecting road, negligence on the part of a westbound driver, (1) in failing to drive to the right and beyond the center before turning, or (2) in failing to note whether he could make the turn in safety, is not the proximate cause of injuries received by him by being hit by an eastbound car after he had completed the turn and was wholly on the intersecting road.

Enfield v Butler, 221-615; 264 NW 546

Street defect as cause of collision. The proximate cause of a collision between motor vehicles on a public street may be the defective condition which the city has long permitted to exist in a portion of its street, provided said condition, in view of all the relevant facts, was such as to reasonably charge the city with knowledge that some accident would probably result therefrom to motor vehicles and to the occupants thereof traveling over said defect. Phrased otherwise, where a city has long maintained in and on one side of its street a defect of such nature that an automobile passing over the defect was thereby swerved out of its course and onto the opposite side of the street where it collided with another vehicle properly moving in the opposite direction, the city cannot properly contend that said collision was an independent, intervening, and efficient cause which prevented the negligence of the city from being the proximate cause of the resulting injuries, when the jury might justly find that said defect, in view of all the relevant facts, was such as to reasonably charge the city with knowledge that some accident would probably result therefrom to motor vehicles and to the occupants thereof traveling over said defect.

Gray v Des Moines, 221-596; 265 NW 612; 104 ALR 1228

Accident causing injury—death following—jury question. Where a healthy, normal boy of 17 dies from an ear infection and mastoid involvement, the symptoms of which began shortly after the upsetting of a school bus in which he was riding, a jury question is created as to whether such accident was the moving or producing—the proximate—cause of the injury and death.

Olson v Cushman, 224-974; 276 NW 777

Children on sleds hooked to vehicle—speed as proximate cause of injury. Where children on sleds hooked to the rear of a moving automobile became frightened at the speed of the car, released their sleds, and in so doing turned aside into the path of an oncoming vehicle, whereby they were injured, such turning aside by the children did not prevent the motor vehicle operator's negligence from being the proximate cause of their injury.

Samuelson v Sherrill, 225-421; 280 NW 596

Collision—trucker struck while retrieving goods scattered on highway. A defendant-motorist's negligence in striking a truck stop-

V PROXIMATE CAUSE—continued
(c) INTERVENING CAUSE—concluded

ped on the highway is not the proximate cause of a later injury to the trucker by another motorist, who struck him while he was attempting to remove his merchandise spilled on the highway. The latter intervening cause was the proximate cause of his injury.

McClure v Richard, 225-949; 282 NW 312

Sudden emergency — nonnegligence. A motorist who, while operating his car easterly on the south or right-hand side of a paved road at 50 miles per hour (tho the night is misty and visibility is poor), is unexpectedly, violently, and negligently so hit by the car of another motorist as to be deflected to the north or left-hand side of the road and into collision with an oncoming westbound car, cannot, as to said latter collision, be deemed negligent because instantly when so deflected his hand involuntarily dropped from his steering wheel and his foot unintentionally reached the accelerator of his car instead of the brake.

Rich v Herny, 222-465; 269 NW 489

(d) CONCURRENT AGENCIES

Negligence liability. Principle reaffirmed that when two parties by their concurrent negligence injure a nonnegligent third party, both of said two parties are liable for the resulting damages suffered by said third party.

Andersen v Christensen, 222-177; 268 NW 527

Concurring negligence—no directed verdict. A defendant whose negligence operates proximately to produce an injury to a passenger in another car is not entitled to a directed verdict because the host of such injured party was guilty of negligence which also operated proximately to produce said injury.

Wolfson v Lumber Co., 210-244; 227 NW 608

Proximate cause not sole cause. Principle reaffirmed that certain negligent acts on the part of one party may be the proximate cause of an injury even tho they concurred with certain negligent acts of another party.

Duncan v Rhomberg, 212-389; 236 NW 638

Proximate and concurring cause. If the negligence of the operator of an automobile proximately operates to produce a damage, he is liable therefor, even tho another concurring cause operates at the same time to bring about said damages; and in such case it is quite immaterial whether the concurring cause was or was not negligently put into operation.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174; 1 NCCA(NS) 184

Proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant was proximately negligent.

Reason: Both defendants might be proximately negligent.

Newland v McClelland, 217-568; 250 NW 229

Collision resulting in collision. The act of the driver of an automobile in negligently running into a wagon and team on the highway and causing the team to run away may be the proximate cause of a later collision between said runaway team and another automobile, provided said latter collision was the natural or likely result of the first collision; and this is true tho the first driver did not foresee or apprehend said second collision.

Dennis v Merrill, 218-1259; 257 NW 322; 1 NCCA(NS) 175

Consideration of nonimputable negligence. An instruction to the effect that even tho the negligence of a husband with whom the wife was riding could not be imputed to the wife, nevertheless the negligence of the husband could be considered by the jury on the issue whether the negligence of the defendant—the driver of another car—was the proximate cause of plaintiff's injuries, is a correct statement of law, and if plaintiff wishes such instruction modified by a statement as to the law governing the concurrent negligence of different parties, she must request such instruction.

Kuhn v Kjose, 216-36; 248 NW 230

Negligence of different agencies—jury question. Where the evidence demonstrates that an injury resulted from the negligence of two agencies, the question of proximate cause is peculiarly one for the jury.

Schwind v Gibson, 220-377; 260 NW 853

Passenger—injuries actionable tho driver negligent. An occupant of a car is not deprived of the right to recover for injuries sustained in an accident even tho the driver of the car in which she was riding and also the defendant who left another car on the highway where it was run into were both guilty of proximate negligence.

Newman v Hotz, 226-834; 285 NW 287

Sudden stopping of car on curve. The driver of an automobile who is on the right-hand side of the road at a curve and driving at a proper speed is not guilty of negligence in suddenly applying the brakes in order to avoid hitting an overtaking and passing car which unexpectedly swerved in front of him, and in order to prevent his own car going into a ditch, tho by so doing the wheels of his car locked and the momentum skidded the car across the road and into another car.

Klaaren v Shadley, 215-1043; 247 NW 301

Concurrent negligence—erroneous instruction. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

(e) INEVITABLE ACCIDENT

Absence of evidence. An instruction on the subject of "inevitable" accident is wholly improper when there is no evidence whatever supporting such a theory.

Orr v Hart, 219-408; 258 NW 84

Confusing and unsupported instructions. Instructions with reference to an "inevitable" accident and defendant's nonliability therefor are wholly out of place when there is no applicable evidence in the record.

Keller v Gartin, 220-78; 261 NW 776

Supplanting issue of negligence with inevitable accident. When the record testimony shows that a collision between automobiles and the resulting damage was caused (1) by the negligence of the plaintiff, or (2) by the negligence of the defendant, or (3) by the negligence of both parties, the court must not in its instructions depart from the issues of negligence and inject into the instructions the theory of inevitable accident.

Christenson v Tel. Co., 222-808; 270 NW 394

Jury question. When the evidence presents a jury question on the issue of defendant's negligence and plaintiff's contributory negligence, the court cannot, of course, sustain defendant's motion to dismiss on his claim of unavoidable accident.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Person thrown from one tractor under another. Where plaintiff fell from one tractor and was injured by another tractor, whether the accident was unavoidable on the part of the construction company operating the tractors was a jury question.

O'Meara v Green Const. Co., 225-1365; 283 NW 735

VI DEFENSES

(a) IN GENERAL

Collision with stationary truck—diverting circumstances. The position of an unlighted truck parked in the highway, and the diverting circumstances occurring just preceding a collision with the truck, may have a very material bearing on the issue of plaintiff's contributory negligence, and the assured clear distance rule.

Kimmel v Mitchell, 216-366; 249 NW 151; 1 NCCA(NS) 42

Conversation as diverting circumstance—insufficiency. A brief and apparently inconsequential conversation between an employer and an employee relative to the work of the employee, and occurring very shortly before the employee placed himself in a position of peril, cannot be deemed a diverting circumstance within the meaning of the law of negligence.

Zuck v Larson, 222-842; 270 NW 384

Light remote from highway—nondiverting circumstance. The operator of an automobile is guilty of contributory negligence in colliding, in the nighttime, with a truck parked in the highway directly ahead of him, when his lights revealed objects ahead for a distance of from 75 to 100 feet; and he cannot avoid such imputation of negligence by the claim that, just preceding the collision, his attention was diverted by a light remote from the highway on which he was traveling.

Dearinger v Keller, 219-1; 257 NW 206; 36 NCCA 709

Government employee's automobile collision—immunity. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Anderson v Moon, 225-70; 279 NW 396

Negativing defendant's plea. In an action for damages consequent on plaintiff being negligently struck and injured by defendant's automobile [in which action defendant pleads (1) a denial that his car struck plaintiff, and (2) that plaintiff was struck and injured by some other vehicle], the court commits reversible error by instructing that plaintiff cannot recover unless plaintiff establishes by a preponderance of the evidence not only (1) that defendant's car struck and injured plaintiff, but (2) that no other car struck and injured plaintiff.

Griffin v Stuart, 222-815; 270 NW 442

View of stop sign obstructed—others' imputed knowledge of stop sign no defense. Where defendant's truck was parked so as to obscure the view of a stop sign at an intersection, and where motorist proceeded into intersection without stopping and collided with an automobile on intersecting street, defendant will not be exempt from liability on ground that knowledge would be imputed to motorist that intersecting street was an arterial highway, because of statute as to posting signs.

Blessing v Welding, 226-1178; 286 NW 436

Anticipating child coasting—barricades removed—negligence. Where defendant knew

VI DEFENSES—continued
(a) IN GENERAL—concluded

that for many years a certain street was barricaded while children were coasting, and that there had been coasting there recently, but where the snow had melted somewhat so that the middle portion of the paving on the hill was bare of snow, and the barricades had been taken down the day before the accident, the defendant was not bound to anticipate and prepare for some child coasting on the hill.

McBride v Stewart, 227-1273; 290 NW 700

Employer paying doctor bills — negligent person still liable. Payment of an injured truck driver's doctor bills by his employer, whether the motive be philanthropy or contract, constitutes a bounty from which a negligent defendant-motorist can derive no benefit in reduction of his liability, inasmuch as he owes compensation for all damages as to which his negligence was the proximate cause.

Clark v Berry Seed Co., 225-262; 280 NW 505

(b) LEGAL EXCUSE

Legal excuse defined. The operator of a vehicle who has failed to comply with a statutory standard of care may avoid the consequences thereof by establishing as legal excuse (1) anything making it impossible to comply, (2) anything over which he has no control which places his vehicle in a position contrary to the law, (3) that he was confronted with an emergency not of his own making, or (4) any excuse specifically provided by statute.

Young v Hendricks, 226-211; 283 NW 895

Negligence—legal avoidance. The operator of a vehicle who has failed to comply with a statutory or ordinance standard of care governing the operation or equipment of his vehicle may excuse such failure, and thereby avoid the legal imputation of negligence per se, by establishing (1) any excuse specifically provided by statute, or (2) that, without his fault, circumstances rendered compliance with the law impossible.

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Statutory noncompliance without legal excuse—burden of proof. An instruction stating that if a defendant motorist failed to comply with the requirements of a statute "without legal excuse", then the verdict should be for the plaintiff, does not shift plaintiff's burden of proof on the defendant.

Schalk v Smith, 224-913; 277 NW 303

Excuse—proof under general denial. Proof of legal excuse for failure to comply with a statutory standard of care in operating or equipping an automobile is admissible under a general denial of negligence.

Townsend v Armstrong, 220-396; 260 NW 17

Instructions—unsupported issue. Instruction submitting "legal excuse" for violation of the assured clear distance statute is reversible error when neither party raises, nor gives evidence, upon this issue.

Keller v Dodds, 224-935; 277 NW 467

Instructions—paraphrasing "legal excuse." The phrase, "explained or justified by the evidence", used as a substitute in instructions for the term "legal excuse" should be avoided as possibly permitting the jury to consider evidence which would not constitute a legal excuse as defined in another instruction, but under the evidence and considered with other instruction, held no reversible error.

Edwards v Perley, 223-1119; 274 NW 910

Nonprejudicial instructions. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Instructions—failure to yield half of traveled way—justification. Instruction as to defendant's duty to yield one half of traveled highway and that violation of such duty would be presumptive evidence of negligence and would warrant finding of negligence unless it was shown by "the greater weight or preponderance of the evidence" that under the circumstances defendant's failure was justified and in exercise of ordinary care, held not prejudicial since no evidence of justification was adduced, altho use of quoted words is not to be approved. Instruction as to plaintiff's duty to yield one half of traveled way also reviewed and held sufficient.

Jakeway v Allen, 227-1182; 290 NW 507

Instructions—emergency as legal excuse—evidentiary support. Question of emergency as being legal excuse should not be submitted to the jury without competent evidence to support it. Held, instruction amply supported in instant case.

Edwards v Perley, 223-1119; 274 NW 910

Excusing violation of statute—absence of evidence. While a motorist may plead and establish any recognized legal excuse for having violated a statutory standard of care for the operation of an automobile, yet he is manifestly not entitled to any instruction to the jury on the subject of "excuse" when he wholly fails to establish any excusatory fact.

Lukin v Marvel, 219-773; 259 NW 782

Violation of statute—excuse—required instruction. When the violation of a particular law of the road is pleaded by plaintiff as a ground for recovery of damages and such violation is treated as in issue (tho the applicability of the statute be quite doubtful), the court commits error in failing to instruct as to the effect of defendant's evidence tending to legally excuse such alleged violation.

Rich v Herny, 222-465; 269 NW 489

Blowing out tire—losing control of car. An instruction, stating "* * * The blowing out of a tire is a legal excuse to a driver for losing control of his or her automobile * * *", and also stating conditions for recovering control of the car was not erroneous in that the grounds of negligence alleged and submitted to the jury were referable to the conduct of the driver, not at the time of the blowout, but thereafter—bearing in mind that instructions must be read as a whole and that it is unfair to pick out parts of instructions and give them a forced or strained construction.

Band v Reinke, 227-458; 288 NW 629

Collision because of skidding—icy street not legal excuse per se. Where one of two motor vehicles which are approaching each other skids across the street and collides with the other vehicle which had almost stopped at the curb, the existence of ice on a city street, tho a condition over which a motorist has no control, yet is a condition whose presence is not legal excuse to relieve him from his duty to use care commensurate with the existing conditions when he is responsible for the control of his car.

Young v Hendricks, 226-211; 283 NW 895

Icy street—skidding not unforeseen. A motorist driving on icy pavement cannot excuse his presence on the wrong side of a city street, in violation of law, on the ground that he thought an approaching vehicle might skid into him, when the approaching vehicle remained at all times on its proper side of the street. Skidding on an icy street could neither be an unforeseen circumstance nor an unexpected happening.

Young v Hendricks, 226-211; 283 NW 895

Meeting car without lights—assured clear distance. An operator of an automobile does not necessarily violate the assured clear distance ahead statute when he has no reason to anticipate that he will meet another rapidly approaching car without lights, and, therefore, so drives on a foggy night that he cannot stop instantly when confronted by such nonanticipated event.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Blinded by lights—assured clear distance. The failure of the driver of an automobile to drive at such speed as will permit him to bring the car to a stop "within the assured clear distance ahead" constitutes, in the absence of some legal excuse, negligence per se. And such excuse is not made to appear by evidence that the driver met a car and was temporarily blinded by the lights shining in his face, but did not slacken his speed.

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Failure to see unlighted truck. The failure of the driver of an automobile to see, in time to stop, an unlighted truck standing ahead of him in the highway and within the radius of his lights, may be legally excused by plea and proof that the truck was not reasonably discernible sooner (1) because of its color, (2) because of shadows cast over it by nearby trees, and (3) because his attention was momentarily diverted by a car and the lights thereon which he was about to meet and pass at a lawful rate of speed.

Kadlec v Const. Co., 217-299; 252 NW 103; 35 NCCA 764, 1 NCCA(NS) 3

Pedestrians—assured clear distance—jury question. Where a pedestrian crossing the street is struck by a motorist after first being seen 180 feet away on the opposite curb and could have been seen by the motorist at all times prior to the collision, motorist's showing that pedestrian "popped up" ahead of him as legal excuse for not stopping within the assured clear distance is evidence raising a jury question.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Person injured on highway construction work. In laborer's personal injury action arising because of truck backing into him while both were engaged in highway construction work, an instruction, that it is the duty of driver in moving a truck to exercise care and caution of ordinarily prudent person and to bring truck under proper control if he discovers, or in exercise of reasonable care should discover, a person in the path of truck, was neither erroneous as submitting to the jury a previously withdrawn issue as to whether defendant driver has truck under control, nor as permitting jury to speculate on defendant's negligence generally.

Rebmann v Heesch, 227-566; 288 NW 695

Prohibited speed negligence per se. A violation of the statute that no person shall drive any vehicle on a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead permits of no escape from the imputation of negligence per se, except on plea and proof of a recognized legal excuse for so driving.

Swan v Auto Co., 221-842; 265 NW 143; 1 NCCA(NS) 58

(c) SUDDEN EMERGENCY

"Emergency" defined. An emergency is (1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; (3) a sudden or unexpected occasion for action; exigency; pressing necessity.

Young v Hendricks, 226-211; 283 NW 895

VI DEFENSES—continued
(c) SUDDEN EMERGENCY—continued

Element of legal excuse. The operator of a vehicle who has failed to comply with a statutory standard of care may avoid the consequences thereof by establishing as legal excuse (1) anything making it impossible to comply, (2) anything over which he has no control which places his vehicle in a position contrary to the law, (3) that he was confronted with an emergency not of his own making, or (4) any excuse specifically provided by statute.

Young v Hendricks, 226-211; 283 NW 895

Conduct under impulse of the moment. In a personal injury action arising from an automobile accident, an instruction is correct which states that a person in a position of peril in an emergency is not required imperatively to do that which, after the emergency is ended, would seem could have been done to avoid the injury.

Band v Reinke, 227-458; 288 NW 629

Instructions—emergencies — jury question. Instruction that emergency rule would apply in a case "where it reasonably seemed to him, acting as an ordinarily careful and prudent person would act under like circumstances, that he could not safely turn to the right", properly presents question for jury's determination and is not open to objection that it gauges the excuse of emergency by driver's own judgment or impulse.

Jakeway v Allen, 227-1182; 290 NW 507

Burden of proof. The fact that the evidence in an action for damages reveals a claim by defendant that the accident happened under the circumstances of an unexpected emergency furnishes no justification for an instruction that defendant has the burden to establish the existence of such emergency.

McKeever v Batcheler, 219-93; 257 NW 567

Erroneous instruction on burden of proof. Defendant's contention that he acted as he did because faced with a sudden emergency will not place the burden on the plaintiff to prove there was no such emergency when, if it did exist, it was created by the defendant himself, and an instruction placing on plaintiff the burden of proving nonexistence of the emergency is erroneous.

Bletzer v Wilson, 224-884; 276 NW 836

Sudden and unexpected appearance of person. The operator of an automobile on a straight, open, and unobstructed public highway cannot be held to anticipate that some one will, without warning, suddenly emerge from behind a stationary object and place himself in the immediate pathway of the vehicle.

Watson v Ins. Assn., 215-670; 246 NW 655; 3 NCCA(NS) 333

Pedestrian stepping in front of car. Evidence that a pedestrian walking along a shoulder of a highway suddenly stepped in front of an automobile, where he was struck, raises a jury question as to such emergency and as to legal excuse for failing to stop within the assured clear distance ahead.

Edwards v Perley, 223-1119; 274 NW 910

Turning to right to avoid pedestrian. The driver of an automobile who is driving south on the right-hand side of a north and south highway is not guilty of negligence per se because, in order to avoid hitting a child running across the highway from the east side, he turns still farther to the right, even tho it later appears that had he kept his course or had turned to the left he might have avoided hitting the child.

Garmoe v Colthurst, 215-729; 246 NW 767

Inevitable accident. No actionable negligence is shown on a record which reveals that a small child suddenly ran from a place of safety directly and immediately into the path of an approaching automobile while the vehicle was proceeding at a lawful rate of speed, and when the driver did not know and had no reason to know, until almost the instant of impact, that the child was even present on or near the highway.

Klink v Bany, 207-1241; 224 NW 540; 65 ALR 187; 31 NCCA 112; 3 NCCA(NS) 332

Backing vehicle out of private driveway. The driver of a truck who is nonnegligently traveling on the north side of a straight and level public highway in plain and unobstructed view of an automobile standing outside the public highway and in a private driveway on the same side of the highway has the right to assume that the automobile will not, without warning, be suddenly backed out of the private driveway and immediately in front of his oncoming truck, and if said automobile is so backed out and in his immediate front, he cannot be deemed negligent because, in such sudden emergency, he turns to his left and unintentionally strikes a person whom he theretofore knew was on the south side of the highway.

Carstensen v Thomsen, 215-427; 245 NW 734; 32 NCCA 300; 34 NCCA 326; 39 NCCA 369

Double collision—nonnegligence. A motorist who, while operating his car easterly on the south or right-hand side of a paved road at 50 miles per hour (tho the night is misty and visibility is poor), is unexpectedly, violently, and negligently so hit by the car of another motorist as to be deflected to the north or left-hand side of the road and into collision with an oncoming, westbound car, cannot, as to said latter collision, be deemed negligent because instantly when so deflected his hand involuntarily dropped from his steering wheel and his foot unintentionally reached the accelerator of his car instead of the brake.

Rich v Herny, 222-465; 269 NW 489

Sudden stopping of car on curve. The driver of an automobile who is on the right-hand side of the road at a curve and driving at a proper speed is not guilty of negligence in suddenly applying the brakes in order to avoid hitting an overtaking and passing car which unexpectedly swerved in front of him, and in order to prevent his own car going into a ditch, tho by so doing the wheels of his car locked and the momentum skidded the car across the road and into another car.

Klaaren v Shadley, 215-1043; 247 NW 301

Failure of lights. Where a truck is being operated in a fog with 35 feet visibility ahead, under speed and road conditions permitting a stop within 25 feet, and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range so that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision, but the question is for the jury.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Failure to see parked car in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Yielding half of highway. An instruction, tho in the language of the statute, e. g., that "motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right", may constitute reversible error when unaccompanied by any reference to a sudden emergency which is presented as an excuse for a car actually being on the wrong side of the road at the time of a collision.

Christenson v Tel. Co., 222-808; 270 NW 394

Failure to turn to right—effect. Failure of the operator of an automobile to turn to the right in an emergency is not necessarily negligent, and especially when the complaining party was the author of the emergency.

Caudle v Zenor, 217-77; 251 NW 69

Defendant driving on wrong side—no sudden emergency instruction for defendant. In an action for injuries sustained in a collision between a motorcycle driven east by plaintiff on his right, the south, side of the road and an approaching automobile operated by the defendant, allegedly on the left, or south, side of road, there was no occasion for court giving instruction to effect that defendant was faced with an emergency, when defendant maintained that he was at all times on his own right side of the road, because, if he were on the left, or south, side of highway, the emergency was of his own making.

Jakeway v Allen, 226-13; 282 NW 374

Requested instruction on absent issue properly refused. A defendant motorist's requested instruction, which deals with the question of sudden emergency arising because, as he alleges, a child suddenly darted from hiding and ran across the path of his car, is properly refused when the issue of error in judgment after the emergency arose was not in the case, and the theory of how and when the child got in his path was otherwise covered by instructions.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Requested instruction. In the absence of a request therefor, defendant may not complain that the jury was not instructed on the question of sudden emergency, especially where, if it did exist, it was of the defendant's own making.

Schalk v Smith, 224-904; 277 NW 303

(d) ASSUMPTION OF RISK

"Volenti non fit injuria" defined. The maxim "Volenti non fit injuria" means: "That to which a person assents is not esteemed in law an injury" or "He who consents cannot receive an injury."

Edwards v Kirk, 227-684; 288 NW 875

Special defense. The defense of "assumption of risk" must be specially pleaded in order to justify the submission of the issue to the jury.

Johnson v McVicker, 216-654; 247 NW 48

Order striking defense of assumption of risk. In an action to recover for death of motorcycle passenger resulting from motorcycle collision with automobile, an order striking allegation of defendant car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Fog on highway—driver using due care—inapplicability. A passenger in a motor vehicle is not negligent on the theory of assumption of risk, simply because he failed to advise the driver or protest the continuation of the trip on a foggy highway, when no other apparent dangers existed and there was evidence that the driver was using care commensurate with the conditions existing.

Rabenold v Hutt, 226-321; 283 NW 865

VI DEFENSES—concluded

(d) ASSUMPTION OF RISK—concluded

Jury question — directed verdict improper. Motion for directed verdict based on contributory negligence and assumption of risk because of travel on highway under foggy atmospheric conditions properly denied as being jury question.

Gregory v Suhr, 224-954; 277 NW 721

Passenger's assumption of risk of riding with aged driver. While riding in the rear seat of an automobile being demonstrated to her employer as a prospective purchaser, an aged lady who protests against the salesman permitting her employer, also an aged person, to drive the automobile and who, altho she cannot get out of the automobile, is assured of safety by the salesman, does not as a matter of law assume the risk incident to her employer's driving, since reasonable minds could differ, and a jury must determine if it was unreasonable for her to rely on the salesman's assurances of safety.

Wittrock v Newcom, 224-925; 277 NW 286

Incompetency—knowledge of passenger. A passenger in an automobile cannot be held to assume the risks arising out of the incompetency, inexperience, or recklessness of the driver unless knowledge on the part of the passenger of such condition or conditions is adequately shown.

Stingley v Crawford, 219-509; 258 NW 316

Motorcycle passenger — sudden danger. In action to recover for death of 13-year-old boy resulting from collision between motorcycle on which he was riding as a passenger and defendant's automobile, allegation in defendant's answer that decedent assumed risk of motorcycle driver's negligence was properly stricken where pleaded facts and common knowledge justified conclusion that danger of the collision could not have been apparent more than a few seconds of time so that there was no time for deliberation and voluntary assumption of such risk.

Edwards v Kirk, 227-684; 288 NW 875

(e) RELEASE

Covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the injured party agreed not to sue such other party—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

Release of joint tort-feasor. An injured party, who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Joint wrongdoers. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525; 39 NCCA 574

Avoidance—mutual mistake. A general release of a claim for personal injuries may, under proper circumstances, be avoided on the ground of mutual mistake as to the nature or seriousness of the injury.

Jordan v Brady Co., 226-137; 284 NW 73

Doctor's belief in recovery—mutual mistake —rescission. A contract for settlement of damages for personal injury in a motor vehicle accident and for release of further liability will be set aside when it is shown that both the injured party and the agent of the defendant relied on the physician's good faith statement that the injury was healing and the patient would soon recover, tho it later developed that the doctor was mistaken—such mistake is a mutual mistake of fact by both parties to the contract.

Jordan v Brady Co., 226-137; 284 NW 73

Signing a release without reading. A signed release and settlement of a claim for damages is conclusive on the signer, even tho he signed it, because of a false statement of its contents, when he had ample time and ability to read, and was in no manner prevented from reading.

Crum v McCollum, 211-319; 233 NW 678; 4 NCCA(NS) 142

Fraud in settlement—burden. A plaintiff, injured when the automobile in which she is riding in a snowstorm is struck from the rear by another automobile, and who, in the presence of her husband and sister, makes a written settlement with the insurance company for such injuries, and who delays two years thereafter before attacking as fraudulent the validity of such settlement, does not meet her burden to overcome the written instruments by giving her own self-contradictory testimony with no proof of actual fraud or misrepresentations.

Mosher v Snyder, 224-896; 276 NW 582; 4 NCCA(NS) 132

VII TRIAL

(a) IN GENERAL

Reinstating excluded ground of negligence —waiver. If the court, at the close of plaintiff's testimony, withdraws one of plaintiff's alleged grounds of negligence, but reinstates

it after the close of defendant's testimony, defendant waives the error, if any, by failing to move to reopen the case for additional testimony.

Deiling v Railway, 217-687; 251 NW 622

Striking allegation (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Curing error. Error in striking, at the close of all the evidence, an adequate and supported allegation of negligence, is cured by adequately submitting the issue notwithstanding the striking order.

Townsend v Armstrong, 220-396; 260 NW 17

View of object by jurors — instructions. Principle reaffirmed that when jurors are permitted to view an object which is the subject of the action, they must be instructed that they must base their verdict solely on the evidence received judged in the light of their observation of the object.

Gehlbach v McCann, 216-296; 249 NW 144

Inconsistent findings by jury. Findings by the jury, in response to special interrogatories, (1) that the negligence of the operator of an automobile was the proximate cause of an accident, and (2) that the recklessness of said operator was the proximate cause of the accident, are fatally inconsistent.

Stanbery v Johnson, 218-160; 254 NW 303

Counterclaim — instruction to disregard. Where plaintiff sued (1) for damages to his car, and (2) on an assignment of the claim of his injured guest, and defendant counterclaimed for damages to his car, no error occurs in instructing the jury to disregard defendant's claim if a finding is returned for plaintiff, and such finding is so returned.

Albert v Maher Bros., 215-197; 243 NW 561

Remote speed—materiality first presented on appeal. Defendant's claim that plaintiff's speed remote from the collision was material as showing that at the time defendant looked back, before making a left turn, plaintiff was too far distant to be seen over a viaduct may not, when such evidence is excluded, be urged first on appeal as ground for reversal when such purpose for introducing such evidence was not stated to the trial court.

Thomas v Charter, 224-1278; 278 NW 920

(b) INJECTING INSURANCE

Discussion. See 17 ILR 501—Voir dire

Voir dire—interest in insurance companies. The wide discretion of the trial court to permit counsel to ask jurors on their voir dire whether they are stockholders, officers, or directors in any insurance company writing automobile liability insurance will not be interfered with in the absence of an abuse of such discretion. But the purpose of such questions must be solely to guide counsel in exercising his peremptory challenges.

Kaufman v Borg, 214-293; 242 NW 104
Holub v Fitzgerald, 214-857; 243 NW 575
Tissue v Durin, 216-709; 246 NW 806

Voir dire examination. In an action for damages arising out of a collision between automobiles, plaintiff, in the selection of the jury, has the right, in a proper manner, to ask each prospective juror whether he is in any manner interested in any liability insurance company.

Olson v Tyner, 219-251; 257 NW 538

Questioning prospective jurors as insurance stockholders. Counsel, when actuated by good faith and the sole purpose of acquiring information which will control the exercise of his peremptory challenges, may very properly be permitted, in a personal injury action, to ask a juror on his voir dire whether he or any member of his family is a stockholder in any insurance company.

Montanick v McMillin, 225-442; 280 NW 608

Voir dire examination as to insurance. In examining jurors for an automobile accident case, where counsel asked two or three jurors if they had insurance in a certain company, and the court then learned that the plaintiff was not insured in a mutual company and so informed the counsel, such allowance of questions was not an abuse of discretion of the trial court, when no improper motive or bad faith was shown, and no other mention of insurance was made.

Kiesau v Vangen, 226-824; 285 NW 181

Injecting insurance on voir dire—discretion of court. Control of voir dire examination on the subject of liability insurance is largely within the discretion of the trial court and will not be interfered with without a showing of prejudicial abuse.

Hawkins v Burton, 225-707; 281 NW 342

Appellant's jury examination inducing insurance discussion. Jury-room discussion of liability insurance suggested by plaintiff's examination of the jurors is not misconduct of which plaintiff can complain.

Tharp v Rees, 224-962; 277 NW 758

Trucker's statutory insurance requirement—jurors' discussion not misconduct. Jurors' discussion of statutory requirement that certain truckers carry liability insurance—being a discussion of law that all were presumed to know—is neither misconduct nor justification for a new trial.

Keller v Dodds, 224-935; 277 NW 467

VII TRIAL—continued
(b) INJECTING INSURANCE—continued

Reference to insured liability. The rule of law, in actions for personal injuries, that reversible error results from the willful injection, by plaintiff, into the record and before the jury, of the fact that defendant is carrying insurance against the liability sued on, is not violated:

1. By asking in good faith a juror on voir dire whether he is interested in any such insurance company; or
2. By asking a witness, in good faith, for legitimate testimony, and receiving an answer which, inter alia, reveals the fact of such insurance. (And especially when defendant's cross-examination accentuates the objectionable answer.)

Bauer v Reavell, 219-1212; 260 NW 39

Cross-examination of witness. The fact that during a material cross-examination by plaintiff, in a personal injury action arising out of a collision between automobiles, the witness unexpectedly injects an indefinite remark relative to "insurance" from which the jury might conjecture that defendant was protected by liability insurance, is wholly insufficient to reveal prejudicial error.

Albert v Maher Bros., 215-197; 243 NW 561

Withdrawal of incompetent testimony—effect. The incidental reception in evidence of testimony tending to show that defendant in an action for damages growing out of a collision of vehicles carried indemnity insurance, when the same is withdrawn by the court, will not constitute reversible error.

Stilson v Ellis, 208-1157; 225 NW 346

Improper reference to insured liability. In an action for damages consequent on a collision between vehicles, error does not result when, on the proper examination of witnesses, and without design on the part of plaintiff, the fact is revealed that the defendant is, by insurance, indemnified against loss.

Wolfe v Decker, 221-600; 266 NW 4

Injecting into trial fact of insurance. The unintentional or inadvertent injection into the trial of an action for damages of the fact that one of the parties had insured his loss or liability does not necessarily require the granting of a new trial.

Priest v Hogan, 218-1371; 257 NW 403

Incidental reference to indemnity insurance. Plaintiff in an action for damages consequent on an automobile collision has a clear right to show that defendant admitted his negligence and liability therefor, even tho said admission incidentally discloses that defendant was protected by indemnity insurance; and especially no error occurs when the reference to insurance is innocently brought out and was at once withdrawn by the court from the jury.

Liddle v Hyde, 216-1311; 247 NW 827

Cross-examination as to indemnity insurance. Reversible error results, in a personal damage action, from purposely carrying a cross-examination to the extent of revealing the fact that the defendant is protected by insurance from ultimate liability.

Rudd v Jackson, 203-661; 213 NW 428

Admissions—separation of relevant and irrelevant matter. When a conversation relates to two distinct and easily separated subject matters, one relevant and one irrelevant, the latter cannot be deemed admissible simply because it is a part of the conversation as a whole. So held where the conversation related (1) to the manner in which an accident happened and (2) to the insurance carried by the defendant.

Kuhn v Kjose, 216-36; 248 NW 230

Liability insurance—cross-examination. In an automobile accident case where plaintiff's witness was asked to relate a particular conversation with one of the defendants, objection that it was incompetent, irrelevant, and immaterial was properly overruled. However, when answer to such question revealed that conversation concerned insurance, motion to strike as immaterial should have been sustained. Likewise, on cross-examination of same defendant, testimony elicited concerning payments of insurance premium, which subject had not been brought out in examination in chief, was immaterial and not proper cross-examination, and refusal to sustain objection on that ground was prejudicial error.

Floy v Hibbard, 227-149; 287 NW 829

Showing insurance against liability. The fact that in the trial of an action for damages the information is brought out that the defendant is carrying indemnity or other insurance against said damages does not constitute reversible error in the absence of some showing or appearance of bad faith on the part of counsel.

McCoy v Cole, 216-1320; 249 NW 213

Liability insurance—improper reference to as grounds for new trial.

Ryan v Trenkle, 199-636; 200 NW 318
Stilson v Ellis, 208-1157; 225 NW 346
Ryan v Simeons, 209-1090; 229 NW 667
Raines v Wilson, 213-1251; 239 NW 36
Holub v Fitzgerald, 214-857; 243 NW 575
Albert v Maher Bros., 215-197; 243 NW 561
Bauer v Reavell, 219-1212; 260 NW 39

Asserting damages insured against. In an action for damages resulting from a collision of vehicles, prejudicial misconduct may result from asserting, in effect, before the jury, that the damages sued for have been insured against.

Berridge v Pray, 202-663; 210 NW 916

Insured claim. The act of counsel in persistently keeping before the jury the fact that the defendant carried casualty insurance

against the claim sued on constitutes reversible error—an error which is not cured by an instruction to disregard such fact of insurance.

Miller v Kooker, 208-687; 224 NW 46

Liability insurance. The reception of evidence, that the defendant in an action for damages consequent on a collision between automobiles carried liability insurance, constitutes reversible error.

Rutherford v Gilchrist, 218-1169; 255 NW 516

Attorney injecting insurance by innuendo—error. It is reversible error for an attorney in an action for personal injuries to remark to the jury in argument that the defendant will not have to pay if they bring in a verdict for the plaintiff and to state, "You people know exactly who will pay that verdict."

McCornack v Pickerell, 225-1076; 283 NW 899

Misconduct of counsel—injecting "liability insurance". In an automobile accident case where, in argument to jury, plaintiff's counsel developed an idea that the only party interested in preventing a verdict was the insurance company, the court recognized such tactics as being misconduct on the part of counsel.

Floy v Hibbard, 227-149; 287 NW 829

Failure to strike evidence not cured by instructions. Evidence that the owner of an automobile had stated that he did not go out to the scene of the accident after a collision in which the automobile was involved because the car was insured and he would let the insurance company take care of it, improperly injected the question of insurance in an action for damages resulting from the collision. The failure to strike such evidence was error which was not cured by the court's direction to the jury to disregard it.

Floy v Hibbard, 227-154; 289 NW 905

(c) FOREIGN STATUTES GOVERNING LIABILITY

Foreign statutes — right to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of defendant in operating an automobile in said foreign state, plaintiff may plead those statutes and rules of law of said foreign state from which actionable negligence, under the facts of the case, are deducible, e. g., those (1) which declare the degree of care required of defendant in such operation in said foreign state, and (2) the nature and degree of plaintiff's contributory negligence which will bar his action, said pleaded statutes and laws being of the very essence of plaintiff's cause of action and not contrary to the public policy of this state, even tho they exact a greater degree of care than would be exacted by the law of this state had the injury occurred in this state.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Foreign procedural statutes — nonright to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of the defendant in operating an automobile in said foreign state, plaintiff has no right to plead the procedural statutes and rules of law of said foreign state. For example, those pertaining:

1. To what matters would be presumptive evidence of negligence;
2. To the burden of proof in the trial of the action; or
3. To the right of plaintiff to submit his action on different theories of the evidence.

Reason: All said matters are purely procedural.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Lex fori procedure. While, as a matter of comity, the courts of this state will, under proper pleading, recognize and enforce the civil rights and liabilities of parties to a tort committed in a foreign state—if not contrary to the public policy of this state—yet in determining all issues of fact on which such rights and liabilities depend, the judicial procedure of the courts of this state must be followed.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Separate specifications submitted—joined by "and"—harmless error. In an action under the Illinois guest statute for damages arising out of injuries received in a motor vehicle collision in Illinois, separate specifications of negligence, based on one charge of excessive speed, but, nevertheless, submitted in the language of the petition, are not rendered prejudicially erroneous because joined together with the word "and".

Moran v Kean, 225-329; 280 NW 543

Ownership — Missouri certificate of ownership—conclusiveness. A duly issued and outstanding certificate of ownership of a motor vehicle, issued by the secretary of state of the state of Missouri under the statute law thereof (§3, Art. 16, Public Acts of 1923), is absolutely conclusive in said state as to such ownership, and will be recognized and accorded the same force and effect in this state, said statutes not being violative of the public policy of this state.

Enfield v Butler, 221-615; 264 NW 546

(d) IMPROPER CONDUCT AT TRIAL

Offer of false testimony. The fact that a party to an action has made a statement out

VII TRIAL—continued
(d) IMPROPER CONDUCT AT TRIAL—concluded

of court inconsistent with his statements in court does not, manifestly, justify the conclusion that his statements in court are false and perjured.

Danner v Cooper, 215-1354; 246 NW 223

Counsel — belittling injuries — retaliatory statements. Counsel who, in argument, belittles the personal injuries of the opposing party, may not complain if opposing counsel in reply figuratively magnifies said injuries.

Hoegh v See, 215-733; 246 NW 787

Misconduct of counsel in argument to jury. In an automobile accident case where, in argument to jury, plaintiff's counsel developed an idea that the only party interested in preventing a verdict was the insurance company, the court recognized such tactics as being misconduct on the part of counsel.

Floy v Hibbard, 227-149; 287 NW 829

Order striking defense of assumption of risk. In an action to recover for death of passenger resulting from motorcycle collision with automobile, an order striking allegation of defendant car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

New trial — grounds — misconduct of jury. The rule of law (206 Iowa 1263) that the trial court should not set aside the verdict of the jury and grant a new trial, when such verdict is the verdict which the court erroneously refused to direct at the close of the evidence, is not applicable when the grounds for new trial are predicated solely on the grounds of (1) misconduct of the jury, and (2) exceptions to the instructions.

Jordan v Schantz, 220-1251; 264 NW 259

(e) DIRECTING VERDICT

Most favorable view of evidence. On a motion for a directed verdict, the court must view the evidence in the light which is most favorable to the party against whom the motion is aimed.

Robertson v Carlgren, 211-963; 234 NW 824; 35 NCCA 555
Harvey v Knowles Co., 215-35; 244 NW 660
Lynch v Railway, 215-1119; 245 NW 219
Schwind v Gibson, 220-377; 260 NW 853
McWilliams v Beck, 220-906; 262 NW 781
Youngman v Sloan, 225-558; 281 NW 130

Most favorable view rule. On motion for directed verdict in determining whether plaintiff was guilty of contributory negligence as a matter of law, the evidence must be considered in the light most favorable to him.

Trailer v Schelm, 227-780; 288 NW 865

Defendant's negligence as proximate cause. In a personal injury action on account of the negligent operation of a motor vehicle, the court, on a motion for directed verdict, should, before considering contributory negligence of the plaintiff, consider the evidence as to negligence on the part of the defendant being a proximate cause of the injury.

Youngman v Sloan, 225-558; 281 NW 130

Force accorded testimony. Principle reaffirmed that the court in ruling on defendant's motion for a directed verdict must treat plaintiff's evidence exactly as the jury would have the right to treat it, viz: that said evidence and all reasonable deductions therefrom are true.

Heintz v Packing Co., 222-517; 268 NW 607

Absence of jurors—effect. When the court sustains a motion for a directed verdict, it is quite immaterial that all the jurors were not present.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Reasonable minds differing as to conclusions. If reasonable men may differ as to conclusions drawn from the evidence, the question is one for the jury.

Yale v Hanson, 227-813; 288 NW 905

Taking case from jury—plaintiff's burden. A plaintiff's failure to carry the burden of proving at least some of his allegations of negligence properly results in a directed verdict against him.

King v Gold, 224-890; 276 NW 774

Directed verdict at close of defendant's evidence. If there is sufficient evidence to take a case to a jury at the close of the plaintiff's testimony, a defendant cannot claim at the close of his evidence that there is nothing for the jury to determine, except when the testimony by the party having the burden of proof is in conflict with undisputed facts, or is such that under the circumstances it cannot be true, or shows that the witnesses must have been mistaken.

Ward v Zerzanek, 227-918; 289 NW 443

Overcoming inference of consent. The inference that an automobile operated by one person and owned by another person was operated with the consent of the owner is wholly overcome by uncontradicted evidence that the car was being operated against the positive command of said owner, and compels the court, in such case, to direct a verdict against the plaintiff.

Robinson v Shell Corp., 217-1252; 251 NW 613

Taxicab door striking eye—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab,

and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendants' motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Violating right-of-way law—jury question. The right-of-way law imposes on a person approaching an intersection from the left the duty to yield the way, a violation of which, under ordinary circumstances, constitutes negligence, and in such a case the defendant is not entitled to a directed verdict.

Bletzer v Wilson, 224-884; 276 NW 836

Negligence per se. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection, and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Failure to stop at stop sign—jury question. The alleged failure of plaintiff to stop before entering a paved primary highway, in view of evidence that defendant's truck was several hundred feet away from the intersection and traveling on the left side of pavement at a time when plaintiff's automobile was entirely across the black line and on his own right-hand side of the road, cannot, where the evidence conflicts and reasonable men might differ, be, as a matter of law, negligence contributing to the collision.

Russell v Leschensky, 224-334; 276 NW 608

Injuries to child—improper direction of verdict. Record reviewed relative to the facts attending the alleged negligent infliction of injuries on a child, and held to be such as to render improper the direction of a verdict for defendant, especially as said child was of such tender years as to be, presumptively, incapable of negligence.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Motorist anticipating dangerous position of one aiding—jury question. Where a stalled motorist heard one of several bystanders say, "Let's give him a push," whereupon they arranged themselves in positions to push the automobile and one called, "Let's go ahead," a directed verdict is properly denied and a jury question is presented as to whether or not the motorist might have known that a person was directly behind the automobile and would be injured if the car moved backward.

Huston v Lindsay, 224-281; 276 NW 201

Motorist keeping proper lookout for pedestrian—jury question. After motorist had seen pedestrian 180 feet away standing on the curb and when pedestrian had almost reached the opposite side of the street before being struck by the motor vehicle, which meanwhile had traveled the 180 feet, during which time pedestrian was plainly visible, and when motorist claims he did not again see pedestrian until just before striking him, the evidence raises a jury question as to whether motorist kept proper lookout, and directing a verdict is improper.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Child on sled—view obstructed by snowbank—negligence. In an action for death of seven-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Pedestrian on highway—disregarding apparent danger. The rule that a pedestrian and an automobile have equal rights upon the highway does not authorize a highway employee to stand on the edge of the pavement watching an oncoming automobile travel a distance of 200 feet on the same side of the pavement, knowing the pavement is in an icy condition, knowing that the driver of the oncoming automobile is having difficulty controlling it, from which facts it is, or to a reasonably prudent man it would have been, apparent that he was occupying a position of danger, and consequently, in remaining there, he was guilty of contributory negligence. Defendant's motion for a directed verdict was properly sustained.

Cumming v Dosland, 227-470; 288 NW 647

Stalled motorist—freedom from negligence—jury question. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence; hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is not entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

VII TRIAL—continued
(e) DIRECTING VERDICT—continued

Failure to see parked car in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Failure to see obstruction in fog—jury question. In an action for damages resulting from injuries sustained when the car in which the plaintiff and her husband were riding on a foggy evening ran into a car which the defendant had left standing on the highway after an unsuccessful attempt to tow it away, it was error for the lower court to direct a verdict for the defendant, as the question of liability should have gone to the jury.

Newman v Hotz, 226-834; 285 NW 287

Contributory negligence — assumption of risk—jury question. Motion for directed verdict based on contributory negligence and assumption of risk because of travel on highway under foggy atmospheric conditions properly denied as being jury question.

Gregory v Suhr, 224-954; 277 NW 721

Contributory negligence per se—conclusiveness. Before a plaintiff motorist can be held guilty of contributory negligence as a matter of law it must conclusively appear, from a consideration of the evidence in the light most favorable to him, that his negligence in having inadequate brakes contributed in some way or in some degree to the accident and injuries for which he seeks a recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Head-on collision—plaintiff's per se negligence contributing to injury. A plaintiff motorist, against whom a directed verdict was rendered because in violating a speed statute he was negligent per se, still should have had the benefit of the best possible view of the evidence, and, moreover, a record showing that he remained at all times on his own side of the road, but that a truck driver, for no apparent reason, drove across the pavement center line, resulting in a head-on collision, makes a jury question as to whether or not plaintiff's per se negligence contributed to his injury.

McIntyre v West Co., 225-739; 281 NW 353

Concurring negligence. A defendant whose negligence operates proximately to produce an injury to a passenger in another car is not entitled to a directed verdict because the host of such injured party was guilty of negligence which also operated proximately to produce said injury.

Wolfson v Lumber Co., 210-244; 227 NW 608

Concurrent negligence — effect. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

Crossing railroad in front of oncoming train. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed and with the train plainly to be seen had he looked, or, if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

Crossing highway in front of oncoming car.

Davis v Hoskinson, 228- ; 290 NW 497

Place of collision uncertain—physical facts—rule inapplicable. Under the physical facts rule, a conclusion cannot be established as a matter of law unless the physical facts and circumstances lead to but one conclusion to the exclusion of all others, and so certain indecisive physical facts will not conclusively rebut direct testimony, indicating the position on the pavement of a motor vehicle collision, so as to sustain a directed verdict thereon.

Clark v Berry Seed Co., 225-262; 280 NW 505

Failure to direct verdict—new trial to plaintiff allowable. A defendant truck driver's contention, in a case involving a truck and passenger automobile collision on a bridge, that under the evidence a verdict should have been directed for him and that therefore when a verdict was returned in his favor, the granting of a new trial was error, is a contention without merit, when the evidence was such that the jury could have found the defendant negligent, that his negligence was the proximate cause of the accident, and that neither plaintiff nor plaintiff's driver was contributorily negligent.

Hawkins v Burton, 225-1138; 281 NW 790

New trial—court mistakenly directing verdict. Ordinarily the question of contributory negligence is peculiarly for the jury, and, where the trial court mistakenly directs a verdict for defendant on the ground of plaintiff's negligence, the court does not err in later granting a new trial.

Williams v Kearney, 224-1006; 278 NW 180

Erroneous direction of verdict. An order for a new trial is, of course, proper when the judgment entered was ordered by the court on an erroneous theory of the law on a material point. So held where the court treated both plaintiff and defendant as joint adventurers and directed a verdict against plaintiff on the erroneous theory that defendant's negligence was imputable to the plaintiff.

Thompson v Farrand, 217-160; 251 NW 44; 34 NCCA 398

Erroneous instructions cured where directed verdict proper. Errors in instructions made by the trial court are not prejudicial to the appellant when appellee is entitled to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Unduly comprehensive request. Instructions which are so comprehensive as to authorize and direct a verdict in favor of all defendants are properly rejected when one of the defendants would be liable in any event.

Waldman v Motor Co., 214-1139; 243 NW 555

(f) RETRIAL

Witnesses—credibility—contradictory previous testimony. Inconsistent testimony by a witness at one trial as to certain facts in an automobile accident cannot as a matter of law negative his testimony in a later trial, inasmuch as the jury is the sole judge of the credibility of a witness and the weight of his testimony.

Echternacht v Herny, 224-317; 275 NW 576

New trial to plaintiff—propriety. In a case involving a truck and passenger car collision on a bridge, when the defendant contended that he was entitled to a directed verdict and that therefore it was error to grant a new trial after a verdict had been returned in his favor, his contention was without merit when the evidence was such that the jury could have found the defendant negligent, that his negligence was the proximate cause of the accident, and that neither plaintiff nor plaintiff's driver was contributorily negligent.

Hawkins v Burton, 225-1138; 281 NW 790

(g) PLEADINGS

Petition in two counts—(1) guest and (2) not a guest. A passenger in an automobile receiving injuries in a collision may not be required to elect between counts when his petition contains (1) a count alleging recklessness based on theory he was a guest and (2) a count alleging negligence based on theory he was not a guest where plaintiff's cause of action is for a single wrong and he seeks in each count damages for the same injuries arising out of the same act of deceased defendant-driver.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Petition—allegations in one count not admissions as to another count. Different theories of recovery contained in separate counts of a petition are not admissions by which the plaintiff is bound under the rule that he may not controvert his own pleading.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Stating cause of action. A cause of action is stated by allegations (1) that the driver of an automobile was negligent in operating it, (2) that plaintiff suffered damages thereby, and (3) that the car was then being operated with the consent of the owner.

Seleine v Wisner, 200-1389; 206 NW 130; 25 NCCA 714

Pleading—sufficiency. A pleader is entitled to claim as many grounds of actionable negligence as flow from his pleaded statements of facts. Pleadings as to the facts attending a collision at an intersection of highways reviewed, and held to warrant the instructions given.

Sutton v Moreland, 214-337; 242 NW 75

General and specific allegations. The refusal to strike a count confined to general allegations of negligence is of no consequence when the specific allegations of the remaining count simply elaborated the general allegations.

Tissue v Durin, 216-709; 246 NW 806

General and specific allegation of negligence. A general allegation of negligence on the part of a named party is not supplanted by a later specific allegation of negligence on the part of the same party when there is evidence supporting both the general and specific allegations and when it is manifest that the sole purpose of the specific allegation was to obtain the benefit of a particular rule of statute law.

Newland v McClelland, 217-568; 250 NW 229

General and specific allegations—belated attack. Except in res ipsa loquitur cases a specific allegation will not waive a general allegation of negligence, which general allegation must be assailed by motion, if timely, before answer and without such motion is properly submitted to the jury if sustained by the evidence.

Gookin v Baker & Son, 224-967; 276 NW 418

General or dragnet assignment. A general or dragnet allegation of negligence is properly submitted to the jury in accordance with the supporting evidence when such allegation is neither attacked (1) by motion for more specific allegation, nor (2) by motion to strike or withdraw.

Watson v Railway, 217-1194; 251 NW 31

Allowable conclusion. An allegation of fact which is sufficient, if proven, to constitute negligence, is none the less sufficient because the pleader adds thereto his conclusion of negligence.

Townsend v Armstrong, 220-396; 260 NW 17

VII TRIAL—continued
(g) PLEADINGS—continued

Sufficient allegation of negligence. An allegation (1) that defendant drove his vehicle to the left of the center of the traveled way, or (what is practically the same thing) (2) that defendant drove his vehicle upon the wrong or left side of the public highway, tenders a sufficiently definite issue of fact—at least in the absence of any pleaded attack thereon.

Muirhead v Challis, 213-1108; 240 NW 912

Pleading under common law (?) or statute (?). An allegation that a defendant "was driving at an excessive, illegal, and negligent rate of speed" must be deemed, in the absence of an attack by motion, as an allegation not at common law, but under the statute regulating speed.

Danner v Cooper, 215-1354; 246 NW 223

Predicating negligence solely on speed. An allegation predicating negligence in the operation of an automobile solely on speed is wholly insufficient.

Townsend v Armstrong, 220-396; 260 NW 17

Assured clear distance allegation.

Janes v Roach, 228- ; 290 NW 87

Statements of facts—sufficiency. Assignments of negligence reviewed and held to constitute sufficient statements of ultimate facts pertaining to a collision between vehicles.

Ege v Born, 212-1138; 236 NW 75

Negligence in re yielding half of highway—interpretation by court of allegation. An allegation, that "defendant negligently drove his car in a northerly direction and allowed it to travel to the west of the center of the highway and encroached upon the line of travel of the plaintiff" (who was traveling in a southerly direction), is properly interpreted by the court as simply charging that defendant failed to yield one-half of the traveled way to plaintiff.

Keller v Gartin, 220-78; 261 NW 776

Driving outside traveled roadway. An allegation that a motorist, without warning, ran his car outside the traveled part of the highway, and injured plaintiff, constitutes an adequate charge of negligence, and must, of course, if supported by evidence, be submitted to the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Governmental function—negligent operation of road maintainer. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence, demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Inferential allegation of nonnegligence. An allegation by plaintiff that a collision between automobiles was caused solely by the negligence of the defendant, inferentially charges that a passenger riding with plaintiff at the time was not guilty of contributory negligence —at least when the sufficiency of the petition is not attacked, and when the parties treat the negligence of the passenger as at issue.

Keller v Gartin, 220-78; 261 NW 776

Indirect admission. An answer may, by indirection, clearly admit the truth of an allegation contained in the petition.

Arends v DeBruyn, 217-529; 252 NW 249

Petition stating cause of action as against demurrer—stop sign—obstructed view. Where petition alleges defendant's truck was parked on curbing or sidewalk so as to obstruct view of stop sign for a motorist who proceeded into intersection and collided with another car, petition held to state a cause of action as against demurrer.

Blessing v Welding, 226-1178; 286 NW 436

Pleading ordinance and statute violations—assumed for purpose of demurrer. In an action for injuries resulting from a motor vehicle collision at an intersection, where defendant's truck is alleged to have been parked so as to obscure the view of a stop sign, and where the violations of both city ordinance and state law are pleaded, the supreme court will assume, for the purpose of demurrer, that truck was parked within prohibited distance and did obscure the sign.

Blessing v Welding, 226-1178; 286 NW 436

Motion to correct improper joinder. Where causes of action against different defendants are unallowably joined in the same action, a defendant wishing to correct the error should move to strike from the petition the cause of action not affecting himself.

Ellis v Bruce, 215-308; 245 NW 320

Specific reliance on res ipsa loquitur. A plaintiff who sues in tort and alleges generally (1) that defendant was guilty of negligence which was the proximate cause of her injuries, and (2) that she relies on the doctrine of res ipsa loquitur, cannot be compelled, by motion for more specific statement, to state the particular acts of negligence of which she complains.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Motion to dismiss—unavoidable accident. When the evidence presents a jury question on the issue of defendant's negligence and plaintiff's contributory negligence, the court cannot, of course, sustain defendant's motion to dismiss on his claim of unavoidable accident.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Amending pleadings—substituting specific negligence for general negligence. A plaintiff who, on one trial, rests on a general allegation of negligence, does not plead a new cause of action within the meaning of the statute of limitation, when on retrial he, by amendment, withdraws his general allegation and substitutes a specific allegation of negligence which, if proven, will furnish basis for the doctrine of the last clear chance.

Reason: The latter allegation was always embraced within the former general allegation.

Pettijohn v Weede, 219-465; 258 NW 72
Spaulding v Miller, 220-1107; 264 NW 8

Pleading — nonallowable amendment. A timely brought action based solely on the common-law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee, in due course of employment, may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Const. Co., 219-1017; 257 NW 426

Belated and unsupported amendment. It is doubly erroneous for the court, after argument has closed, (1) to permit an amendment assigning a new ground of negligence which is without support in the evidence, and (2) to submit such alleged negligence to the jury.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Counterclaim—damages growing out of transaction. Joint defendants in an action for damages consequent on a collision of two automobiles may each separately plead as a counterclaim any damages suffered by them in the collision in question.

Harriman v Roberts, 211-1372; 235 NW 751

Counterclaim—malicious prosecution. Defendant in an action for damages consequent on a collision between automobiles may not plead as a counterclaim damages consequent on a malicious prosecution instituted by the plaintiff against defendant for reckless driving at the time of the collision.

Harriman v Roberts, 211-1372; 235 NW 751

Counterclaim as admission. Where corporation, within its agency for an insurance association, insured its own automobile, and when sued along with the driver thereof on account of a collision involving the automobile, and when the corporation counterclaims therein, alleging that it and driver were free from negligence, which counterclaim was subsequently dismissed, then in a later action against corporation to recover on the policy, the corporation was bound by such allegation as an admission of its consent to use the vehicle, and the pleading was admissible in evidence therefor.

Mitchell v Underwriters, 225-906; 281 NW 832

(h) JOINT DEFENDANTS

Release of joint tort-feasor. An injured party who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the injured party agreed not to sue such other party—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

Requiring defendant to prove allegations of co-defendant. In damage action, by one riding in an automobile, against a truck driver and his employer where defense was conducted jointly and where, in respect to negligence, the question was whether negligence of the automobile driver or the negligence of the truck driver was the sole proximate cause of the accident, it was not prejudicial error to instruct jury that burden was upon both defendants to prove negligence of automobile driver, affirmatively alleged by the employer alone.

Usher v Stafford, 227-443; 288 NW 432

Proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant was proximately negligent.

Reason: Both defendants might be proximately negligent.

Newland v McClelland, 217-568; 250 NW 229

Separate forms of verdicts. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted, if requested.

Broderick v Barry, 212-672; 237 NW 481

Verdicts—submission of separate forms. In an action against the driver and owner of a

VII TRIAL—concluded
(h) JOINT DEFENDANTS—concluded

truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error—the court having specifically and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker & Sons, 218-54; 253 NW 923

Res gestae—admissibility. The declaration of the driver of an automobile almost immediately after a collision had occurred and before or while an injured person was being removed from one of the cars, to the effect that "I know I was driving fast", is part of the res gestae, and admissible against both defendants, to wit, the driver of the car and the owner thereof.

Duncan v Rhomberg, 212-389; 236 NW 638

Non res gestae statements of driver. Non res gestae statements of the driver of an automobile tending to show his negligence are not competent against the owner of the vehicle, nor are such statements of the owner competent evidence against the driver, and the court must clearly and definitely so instruct. In addition the court must submit separate forms of verdict if requested.

Broderick v Barry, 212-672; 237 NW 481

Non res gestae statements. When a plaintiff seeks to recover damages from the owner of an automobile because of the negligence of the driver, he must prove such negligence by evidence other and different than the non res gestae statements and declarations of the driver, and where the owner and the driver are co-defendants the court must exercise meticulous care to instruct the jury accordingly.

Cooley v Killingsworth, 209-646; 228 NW 880
Wieneke v Steinke, 211-477; 233 NW 535
Ege v Born, 212-1138; 236 NW 75

Erroneous instructions. In a joint action against the owner of an automobile and against the driver thereof based on the alleged negligent operation of the car, it is erroneous to require the jury to find for both defendants, or against both defendants, when the consent of the owner to the operation in question is distinctly in issue.

Jarvis v Stone, 216-27; 247 NW 393

Joint action against owner and operator—erroneous instruction. In a joint action against the owner and operator of an automobile the evidence, manifestly, may be such as to justify a verdict against the operator and in favor of the owner, and in such cases instructions holding the owner liable in case the jury finds the operator liable are fundamentally erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Unallowable verdicts. In a joint action for damages against the driver and owner of an automobile, based, as to the driver, on his negligence, and as to the owner, on his consent to the driving (as to which consent the proof is substantially conclusive), there cannot legally be separate verdicts, one holding the driver liable, and one holding the owner nonliable.

Hoover v Haggard, 219-1232; 260 NW 540

Granting separate trial. Reversible error results from refusing a separate trial to a defendant who is sued jointly with another for damages consequent on his alleged negligence, and on the alleged recklessness of his co-defendant, the defensive issues of the two defendants being wholly hostile to each other, and the opportunity existing for collusion between the plaintiff and such other defendant.

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Tort of one and contract of another. A joint action (1) against a wrongdoer upon his tort consequent on the negligent operation of a motor vehicle, and (2) against a surety company upon its policy to indemnify the wrongdoer from loss because of said tort, even tho but one recovery is sought, presents two different causes of action, and the joinder thereof is wholly unallowable. And this is true whether the policy is simply a private, optional contract between the insured and insurer, or a policy mandatorily required by statute to be filed with and approved by the railroad commission as a condition precedent to the obtaining of a permit to operate said vehicle.

Ellis v Bruce, 215-308; 245 NW 320

VIII PRESUMPTIONS, EVIDENCE, AND PROOF

(a) IN GENERAL

Plaintiff's burden—proving negligence allegations. A plaintiff's failure to carry the burden of proving at least some of his allegations of negligence properly results in a directed verdict against him.

King v Gold, 224-890; 276 NW 774

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

Circumstantial evidence—sufficiency to establish theory. A theory cannot be established by circumstantial evidence, even in a civil action, unless the facts relied upon are

of such a nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them, and it is not sufficient that they be consistent merely with that theory.

Jakeway v Allen, 227-1182; 290 NW 507

Witnesses—impeachment—shorthand notes. The shorthand notes taken upon the trial of an action may be used for impeaching purposes.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Presumptions act prospectively only. Principle recognized that presumptions do not travel backward. They look forward only.

State v Liechti, 209-1119; 229 NW 743

Speed signs—presumption of officer's performance of duty. In the absence of proof to the contrary, it will be presumed that town officers properly performed the mandatory duty imposed on them by statute in the erection and maintenance of speed limit signs.

Doherty v Edwards, 227-1264; 290 NW 672

Right to assume care by plaintiff. A requested instruction in a personal injury action, to the effect that defendant had a right to assume that plaintiff would commit no act of negligence contributing to his own injury, is properly refused (1) when defendant in driving as he did was not influenced by plaintiff's actions, and (2) when the record shows that the jury found that plaintiff was not guilty of any act of contributory negligence.

Orr v Hart, 219-408; 258 NW 84

Remote speed—materiality of evidence. Defendant's claim that plaintiff's speed remote from the collision was material as showing that at the time defendant looked back, before making a left turn, plaintiff was too far distant to be seen over a viaduct may not, when such evidence is excluded, be urged first on appeal as ground for reversal when such purpose for introducing such evidence was not stated to the trial court.

Thomas v Charter, 224-1278; 278 NW 920

Violation of ordinance—presumption—instructions. While the violation of a city ordinance relative to the operation of an automobile is only prima facie evidence of negligence, yet, where the sole issue is whether the operator did violate such ordinance—when the operator makes no effort to excuse a violation —it is not erroneous for the court to instruct that if there was such violation the jury "would be warranted in finding the operator guilty of negligence".

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

See Kisling v Thierman, 214-911; 243 NW 552

Negligence—prima facie (?) or per se (?). Where an accident happens upon a public highway outside a city or town, the fact that the vehicle is on the wrong side of the road is only prima facie evidence of negligence.

On the other hand, subject to the above, the violation, without legal excuse, of a standard of care for the operation or equipment of vehicles, whether fixed by statute or ordinance, constitutes negligence per se.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Lange v Bedell, 203-1194; 212 NW 354

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

Sergeant v Challis, 213-57; 238 NW 442

Lane v Varlamos, 213-795; 239 NW 689

Muirhead v Challis, 213-1108; 240 NW 912

Hollingsworth v Hall, 214-285; 242 NW 39

Holub v Fitzgerald, 214-857; 243 NW 575

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Waldman v Motor Co., 214-1139; 243 NW 555

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Wood v Banning, 215-59; 244 NW 658; 32 NCCA 255

Willemsen v Reedy, 215-193; 244 NW 691

Albert v Maher Bros., 215-197; 243 NW 561

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Dillon v Diamond Co., 215-440; 245 NW 725

Peckinpaugh v Engelke, 215-1248; 247 NW 822; 33 NCCA 103; 35 NCCA 765; 1 NCCA (NS) 41

Danner v Cooper, 215-1354; 246 NW 223

Hogan v Nesbit, 216-75; 246 NW 270

Grover v Neibauer, 216-631; 247 NW 298

See Masonholder v O'Toole, 203-884; 210 NW 778; Voiles v Hunt, 213-1234; 240 NW 703; 31 NCCA 59; 32 NCCA 458

Presumption that lookout was maintained. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout, and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine, on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 140

Declarations of passenger—issue of contributory negligence. Testimony by a passenger in an automobile to the effect that shortly before an accident he called the attention of the driver to the approaching car is admissible on the issue of the contributory negligence of the passenger.

Waldman v Motor Co., 214-1139; 243 NW 555

Report of accident—remarks overheard—privileged communication. Evidence of wit-

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(a) IN GENERAL—continued

ness who overheard statement of defendant in reporting accident, the witness being neither a peace officer nor an official, was properly excluded under statute requiring such report to be made and further providing that the report shall be confidential and not used as evidence in any trial, civil or criminal, arising out of the accident.

McBride v Stewart, 227-1273; 290 NW 700

Animals at large—presumption of negligence.

Hansen v Kemmish, 201-1008; 208 NW 277; 39 NCCA 400

Appointment of guardian—irrelevant testimony. In an action for damages consequent on the alleged negligent operation by defendant of an automobile, evidence of the appointment and discharge of a temporary guardian for plaintiff and of the various orders granted to said guardian are wholly irrelevant.

Jarvis v Stone, 216-27; 247 NW 393

Absence of bicycle lights. In a damage action against a motorist for death of a bicycle rider, the jury, under the record, could properly find that cyclist was not traveling with bicycle lights required by statute and was not free from contributory negligence, despite fact that evidence showed a recent purchase of red reflector and lamp by an unidentified person on morning of accident; and the finding of a broken lamp, reflector, etc., by the sheriff at the scene of and some time after the accident does not compel a finding that the bicycle was properly equipped.

Reardon v Hermansen, 223-1207; 275 NW 6

Careless habits. The carelessness and incompetency of a person as the operator of an automobile may neither be shown by his reputation, nor by specific instances of carelessness and incompetency having no similarity with the occasion in question.

In re Hill, 202-1038; 208 NW 334; 210 NW 241

Wheel coming off—circumstantial evidence. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrrell v Skelly Co., 222-1257; 270 NW 857

Lights not burning—failure to allege—admissibility. Evidence that lights were not burning on defendant's truck should have been admitted, even tho not alleged as a ground of negligence in plaintiff's petition, in order to enable plaintiff to show he was maintaining a proper lookout and was therefore free from contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Lights not burning—exclusion of evidence. Excluding evidence that lights on defendant's truck were not burning, plaintiff having failed to allege such fact in petition, held prejudicial error when such fact had direct bearing on question of plaintiff's contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Visibility of parked car at night.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Contributory negligence of child — duty to negative. Plaintiff, in an action for damages for negligently inflicted injuries, establishes prima facie freedom from contributory negligence by proof that when he suffered the injuries in question he was only 10 years of age, thereby availing himself of the common-law presumption arising from such proof. And the case would be quite rare where defendant's rebutting testimony would be so convincing and overwhelming as per se to overthrow said prima facie showing.

Flickinger v Phillips, 221-837; 267 NW 101

Inconsistent testimony at previous trial. Inconsistent testimony by a witness at one trial as to certain facts in an automobile accident cannot as a matter of law negative his testimony in a later trial, inasmuch as the jury is the sole judge of the credibility of a witness and the weight of his testimony.

Echternacht v Herny, 224-317; 275 NW 576

Hospital expenses—evidence of reasonableness. In an action for personal injury no recovery can be had for hospital expenses when there is no evidence of any kind bearing on the reasonableness of the charge—not even in the form of an itemized bill or that the bill had been paid.

Ege v Born, 212-1138; 236 NW 75

Failure to yield half of road. Reversible error results from an instruction that defendant's failure, on meeting plaintiff, to yield half of the traveled way would be prima facie evidence of negligence unless defendant has established by a preponderance of the evidence his excuse for not so yielding, when defendant did not plead said excuse as an affirmative defense, but, under a general denial, presented it in his evidence.

Rich v Herny, 222-465; 269 NW 489

Identification of defendant. In a personal injury action arising out of a collision of vehicles, a conversation between plaintiff and defendant relative to the collision may be admissible for the purpose of identifying the defendant as the wrongdoer.

Harvey v Borg, 218-1228; 257 NW 190

Incompetency of driver. Evidence held insufficient to present a jury question on the issue of the incompetency of the driver of an automobile.

Helming v Bank, 206-1213; 220 NW 45

Judicial notice — ability to stop car. The court will take judicial notice of the fact that an automobile in good mechanical condition, with good brakes, and traveling at a speed not greater than 25 miles per hour on a highway which is in good condition, can be stopped in a less distance than 100 feet.

Wright v Railway, 222-583; 268 NW 915

Skid marks as rebutting testimony. Even when the most favorable view of the evidence is taken, plaintiff's contention, that he was struck by defendant's automobile at a street intersection after the automobile had approached the intersection from a side street, was not established when the testimony of the witness on whom the plaintiff relied was inherently inconsistent and was disproved by skid marks and other testimony showing that the automobile had not been on the side street.

Ward v Zerzanek, 227-918; 289 NW 443

Consent presumed from fact or ownership. Where the owner of a car allowed his brother to keep the car much of the time and use it, and the brother allowed a third person to use the car and the third party had an accident, the proof of ownership established, prima facie, that the car was being operated for the owner, and this inference could not be overcome by vague testimony.

Olinger v Tiefenthaler, 226-847; 285 NW 137

Operation by nonowner—unnecessary proof. In an action for damages consequent on the operation of an automobile by a nonowner thereof, plaintiff need not show that such nonowner was in the employ of the owner or was the agent of the owner or was transacting the business of the owner.

Tigue Co. v Motor Co., 207-567; 221 NW 514

Owner's consent—burden of proof. The inference which arises from ownership places upon the owner of an automobile the burden of proof to show that it was not used with his knowledge or consent, express or implied.

Wolfson v Lumber Co., 210-244; 227 NW 608
Waldman v Motor Co., 214-1139; 243 NW 555
Hunter v Irwin, 220-693; 263 NW 34
Enfield v Butler, 221-615; 264 NW 546

Ownership of car — futile evidence. Evidence that an automobile of a certain make was, at the time of a collision, occupied by a husband and wife; that it carried a registration plate of the county of which said parties were residents, and that said car was being operated by the husband, furnishes no prima facie proof of the wife's ownership of the car.

Putnam v Bussing, 221-871; 266 NW 559

Ownership — incompetent evidence. On the issue of ownership of a motor vehicle (arising on the allegation that said vehicle was being operated with the consent of the owner), neither of the following is admissible:

1. A certified copy of a purported application for registration of said vehicle when said purported application is neither signed by nor sworn to by any person. For an added reason is this true when said certification fails to identify said application as a record of any public office; nor
2. An unauthenticated copy of a purported duplicate certificate of registration of said vehicle, especially when said certificate fails to carry the signature of the purported owner of said vehicle.

Putnam v Bussing, 221-871; 266 NW 559

Ownership—contract of sale. On the issue of the ownership of an automobile, the contract of sale to the alleged owner is relevant and material.

Kimmel v Mitchell, 216-366; 249 NW 151

Missouri certificate of ownership — conclusiveness. A duly issued and outstanding certificate of ownership of a motor vehicle, issued by the secretary of state of the state of Missouri under the statute law thereof (§3, Art. 16, Public Acts of 1923), is absolutely conclusive in said state as to such ownership, and will be recognized and accorded the same force and effect in this state, said statutes not being violative of the public policy of this state.

Enfield v Butler, 221-615; 264 NW 546

Registration plate — judicial notice of the county of issuance. The court cannot, from the figures alone, take judicial notice that a registration number plate on an automobile was issued by the county treasurer of a certain county.

Putnam v Bussing, 221-871; 266 NW 559

Control of car—obeying statute—presumption. Principle reaffirmed that a motor vehicle driver in attempting to make a left-hand turn into an intersecting road has a right to proceed on the assumption (unless he has knowledge to the contrary) that another driver, approaching from his right, will obey the law (§5031, C., '35 [§5023.04, C., '39]) by reducing his speed to a reasonable and proper rate when approaching and traversing said intersection.

Enfield v Butler, 221-615; 264 NW 546

Customary place of crossing street.

Scott v McKelvey, 228- ; 290 NW 729

Reason for not looking for danger. The reason why a pedestrian while crossing a street did not look in the direction of an oncoming vehicle which injured him is relevant and material, and the injured party may testify as to such reason.

Orr v Hart, 219-408; 258 NW 84

Signaling turns—evidence in re custom—effect. Testimony relative to the custom of automobile drivers of this state and surround-

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(a) IN GENERAL—concluded

ing territory, in signaling turns, reviewed, and held too inconsequential to justify a reversal, even tho the inadmissibility of such testimony be conceded.

Harmon v Gilligan, 221-605; 266 NW 288

Tracks of colliding vehicles. The action of the trial court in unduly limiting litigants in the introduction of testimony having direct bearing on a vital and material issue constitutes reversible error. So held as to evidence relative to the tracks of colliding automobiles.

Harness v Tehel, 221-403; 263 NW 843

Damages for death—evidence. In an action for damages for wrongful death, evidence is admissible of the recent purchase, solely on credit, by decedent, of a business, and of the marked reduction by decedent of his indebtedness subsequent to such purchase, together with evidence of his ability, health, and other kindred matters.

Scott v Hinman, 216-1126; 249 NW 249

Intemperate habits bearing on damages. In an action for damages consequent on wrongful death, evidence is admissible tending to show the intemperate habits of the deceased.

Townsend v Armstrong, 220-396; 260 NW 17

Occupation and earnings of parent. The occupation and earnings of the father of a minor child may be shown, in an action for the wrongful death of the child, as an element to be considered by the jury on the issue of damages to the child's estate.

McDowell v Oil Co., 212-1314; 237 NW 456

(b) NO-EYEWITNESS RULE

Positive testimony vs. presumption. In a pedestrian-automobile accident the presumption attending the no-eyewitness rule will not overcome actual testimony of eyewitnesses.

Edwards v Perley, 223-1119; 274 NW 910

Presence of eyewitnesses. The no-eyewitness rule has no application when there is evidence of what the deceased was doing immediately prior and up to the very time of the accident.

Lindloff v Duecker, 217-326; 251 NW 698

Eyewitness testimony — custom of injured party immaterial. Evidence tending to show the usual custom of a person in approaching a highway intersection—where he was killed in a collision—is inadmissible on the issue of negligence—it appearing that there were eyewitnesses to the entire transaction resulting in the collision.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Nonapplicability. In a pedestrian-automobile accident, where a motorist testifies that he saw deceased just prior to striking and killing him, the rule that in the absence of eyewitnesses the deceased is presumed to have exercised due care has no application.

Edwards v Perley, 223-1119; 274 NW 910

Direct evidence of decedent's conduct. Where pedestrian crossing highway is killed by automobile, and in action for death where plaintiff's witness clearly observed decedent's conduct for some time immediately prior to accident and did not see him look for approaching car, the "no-eyewitness rule" establishing presumption of freedom from contributory negligence was inapplicable.

Spooner v Wisecup, 227-768; 288 NW 894

Presumption of care in absence of witnesses —nonapplicability. The presumption that a deceased was, at the time of a fatal accident, exercising reasonable and ordinary care for his own safety, cannot be indulged when there are eyewitnesses who fully testify as to the conduct of the deceased at the time in question, nor when the physical facts of a transaction negative such presumption.

Shannahan v Produce Co., 220-702; 263 NW 39

Applicability. The no-eyewitness rule—the presumption or inference that a fatally injured person was, at the time of being so injured, exercising reasonable care—may be applicable even tho there be a witness as to the actions of said party except during a very short but material period of time during which he received the fatal injuries.

Laudner v James, 221-863; 266 NW 15

Jury question. Principle reaffirmed that when there is no witness to a fatal injury, or when there is no witness as to just what the decedent did or did not do just immediately preceding the injury, a jury question may be presented on the issue of the negligence of the deceased because of the jury's right to infer due care under such state of the record; otherwise when the physical facts and surrounding circumstances negative due care.

Hittle v Jones, 217-598; 250 NW 689

Death — no-eyewitness rule—nonapplicability. When there are no eyewitnesses to a fatal accident, no presumption can be indulged that the deceased was, at the time, exercising due care when the mute facts attending the accident negative such presumption.

Van Gorden v City, 216-209; 245 NW 736

Allowable and unallowable scope. The right of a jury, under the no-eyewitness principle, to draw the inference that a fatally injured party exercised due care in approaching an intersection of highways, may justify the jury in presuming that the party at the time made due observations as to the existing travel on the intersecting highways; otherwise as to

presuming the truth of affirmative excuses offered for the negligence of the deceased.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Existence of eyewitnesses—not jury question. In a pedestrian-automobile accident involving the no-eyewitness rule, it is not for the jury to decide whether or not there were eyewitnesses.

Edwards v Perley, 223-1119; 274 NW 910

Contributory negligence for jury. Evidence, in connection with the presumption of due care in the absence of eyewitnesses, reviewed and held to present a jury question on the issue of contributory negligence.

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 35 NCCA 709

Railway accidents at crossings—obstructions. On the issue whether the view of a railway track was so obstructed at the time of an accident that an approaching train could not be seen, testimony by an eyewitness is manifestly admissible to the effect that he immediately stationed himself at the point of accident and could plainly see the entire track over which a train would approach.

Langham v Railway, 201-897; 208 NW 356

(c) OPINION EVIDENCE

Allowable conclusion. When the actions and conduct of a witness at a certain time are material and there is no other adequate way of placing the matter before the jury, then the witness should be permitted to describe what he saw, even tho his description consists of a mixed statement of fact and conclusion. So held as to the statement "It seemed as tho the man jumped right in front of the car, and we hit him."

Wieneke v Steinke, 211-477; 233 NW 535

Careful driver. A person riding on an automobile and injured in a collision with another car may not properly testify that the driver with whom he was riding "was a careful driver".

Hamilton v Boyd, 218-885; 256 NW 290

Habits of person—conclusion. An opinion, as to "what kind of a driver" the operator of an automobile was, is an unallowable conclusion.

In re Hill, 202-1038; 208 NW 334; 210 NW 241; 26 NCCA 193

General custom—immateriality. Evidence of the manner in which a party usually or customarily drove from a private driveway upon a public highway is quite immaterial.

Stilson v Ellis, 208-1157; 225 NW 346; 32 NCCA 258

Competency of witness. A witness is competent to testify to the value of an automobile before and after an accident when it appears that he has seen cars of that make sold, and also second-hand cars bought and sold.

Anderson v U. S. Ry. Adm., 203-715; 211 NW 872

Distance in which car can be stopped. A properly qualified witness may testify as to the distance in which an automobile may be stopped under given conditions.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Form of hypothetical question. Record reviewed and held that a hypothetical question was not subject to the vice of assuming the existence of a fact not shown by the evidence.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Identity of automobile tracks. A witness should not be permitted to testify that certain tracks seen by him at the scene of an accident were the identical tracks which he has heard described by other witnesses at the trial.

McKeever v Batcheler, 219-93; 257 NW 567

Physical ability. A nonexpert witness who first recites what he observed about the physical condition of an injured party may testify whether the injured party was able to get out of bed.

Stilson v Ellis, 208-1157; 225 NW 346

Radiograph (X-ray)—oral explanation. A radiograph may be explained or interpreted to a jury by an expert, insofar as the radiograph does not interpret itself to the mere observation of a nonexpert.

Appleby v Cass, 211-1145; 234 NW 477

Res gestae—proper exclusion. The exclusion of declarations of unidentified bystanders, made shortly after an accident, to the effect that, "the boys ran between the cars", does not constitute reversible error when ample evidence bearing on the same point was received in evidence, and when the said declarations were, in view of the entire record, quite inconsequential.

Riddle v Frankl, 215-1083; 247 NW 493

Rate of speed. A witness may, under proper circumstances, testify in effect that a vehicle "sounded like it was traveling fast".

Lane v Varlamos, 213-795; 239 NW 689

Speed—competency. The driver of an automobile seeing another car approaching him around a curve at a distance of 80 feet is competent to estimate the speed of the approaching car.

Albert v Maher Bros., 215-197; 243 NW 561

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(c) OPINION EVIDENCE—concluded

Direct evidence of speed—surrounding circumstances considered—jury question. A truck driver's direct testimony as to speed will not be taken as a verity, but will generate a jury question when considered with the other facts and circumstances of the accident tending to overcome the direct evidence as to speed.

Hawkins v Burton, 225-707; 281 NW 342

Eyewitnesses' estimate of speed, location, distance. The testimony of eyewitnesses to an automobile accident as to speed, location, and distance is only their judgment and estimation, which the jury must consider with other evidence in order to arrive at the truth.

Glover v Vernon, 226-1089; 285 NW 652

Inadmissible opinion evidence. Tho a witness may be competent to give his opinion, generally, of the rate of speed of a vehicle, yet the circumstances of a transaction may be such, and the position of the offered witness may be such as to render the opinion valueless and, therefore, wholly inadmissible.

Klaaren v Shadley, 215-1043; 247 NW 301

Rate of speed—striking testimony. The refusal to strike testimony to the effect that "the car sounded like it was going fast" constitutes no prejudicial error, when the witness (1) actually saw the car in question, and (2) elsewhere gave similar testimony without objection.

Lane v Varlamos, 213-795; 239 NW 689

Speed of automobile. A witness who has operated an automobile for several years and whose business necessitates extensive travel by him over the country, mostly by automobile, is competent to give an opinion as to speed at which an automobile was being operated on a certain occasion.

State v Thomlinson, 209-555; 228 NW 80

Speed determined from skid marks. A witness in an automobile accident case may describe skid marks, but may not base an opinion of the speed of an automobile on them, as it is solely within the province of the jury to draw an inference of speed from skid marks.

Ward v Zerzanek, 227-918; 289 NW 443

Witnesses—competency—speed. One may be a competent witness as to the speed of a motor vehicle on a showing that he has observed such vehicles while in operation with a view of determining their speed.

Becvar v Batesole, 218-858; 256 NW 297

(d) PHYSICAL FACTS

Cause and effect—jury question or matter of law. So many elements enter into the physical results produced by motor vehicle collisions that when fact questions are presented, the supreme court cannot substitute its judgment for that of the jury and say, as a matter of law, that a particular result was produced because certain factors constituted the cause.

Echternacht v Herny, 224-317; 275 NW 576
Rabenold v Hutt, 226-321; 283 NW 865

"Physical facts" rule—inapplicability. The so-called "physical facts" rule which is often applied in negligence cases—the rule that when the operator of a vehicle at a known railroad crossing possesses ordinary sense of sight he is conclusively presumed, in the absence of diverting circumstances, to have seen an approaching train which was in plain view—necessarily has no application when the train is not in plain view, owing to a temporary obstruction which the railroad company has interposed to his view, e. g., freight cars on a side track.

Bush v Railway, 216-788; 247 NW 645

Exception to most favorable evidence rule. On appeal from an order overruling defendant's motion for directed verdict, the supreme court need not follow the most favorable evidence rule, as urged by plaintiff, to the exclusion of the physical facts and other uncontradicted matters which plaintiff not only conceded, but affirmatively and intentionally established.

Scott v Hansen, 228- ; 289 NW 710

Assured clear distance—error to submit. It is error to submit the issue of assured clear distance when the physical facts and plaintiff's testimony show that there was no discernible object ahead of defendant's car.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Assured clear distance.

Janes v Roach, 228- ; 290 NW 87

Circumstantial evidence as sole proof. Negligence cannot be deemed established by circumstantial evidence alone unless the facts constituting such circumstances are of such a nature and so related that the conclusion of negligence is the only conclusion to which the mind can fairly and reasonably arrive. So held where the location and condition of wrecked automobiles and marks on the pavement were relied on to show negligence.

Reimer v Musel, 217-377; 251 NW 863

Contributory negligence per se. The occupants of an eastbound automobile were guilty of contributory negligence per se under testimony that upon arriving at an intersecting north and south street, on a clear day, they looked to the south without obstruction for a distance of at least 225 feet, and saw no approaching car, and thereupon entered the intersection and moved across the same at 10 miles per hour, but before they had fully cleared the intersection were hit by a northbound car traveling at the rate of 40 or 50 miles per hour.

Hewitt v Ogle, 219-46; 256 NW 755

Place of collision uncertain—physical facts rule inapplicable. Under the physical facts rule, a conclusion cannot be established as a matter of law unless the physical facts and circumstances lead to but one conclusion, to the exclusion of all others, and so certain indecisive physical facts will not conclusively rebut direct testimony, indicating the place on the pavement of a motor vehicle collision, so as to sustain a directed verdict thereon.

Clark v Berry Seed Co., 225-262; 280 NW 505

Excessive speed. Circumstances are oftentimes more persuasive on the issue of speed than direct testimony is.

Starry v Hanold, 202-1180; 211 NW 696

Last clear chance—jury question. The physical facts and circumstances attending an accident may present a jury question on the issue whether defendant actually discovered plaintiff's negligently assumed position of peril in such time that defendant, by the exercise of reasonable care, might have avoided said accident.

Groves v Webster City, 222-849; 270 NW 329

Law of case—location of tracks. A holding on appeal that a jury question on the issue of negligence in operating an automobile was not generated by record evidence relative to the location and condition of wrecked automobiles, and as to marks and broken glass on the highway, is necessarily conclusive on the court on retrial on substantially the same evidence.

Reimer v Musel, 220-1095; 264 NW 47

Intersection collision. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection, and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

No-eyewitness rule — when nonapplicable. Principle reaffirmed that when there is no witness to a fatal injury, or when there is no witness as to just what the decedent did or did not do just immediately preceding the injury, a jury question may be presented on the issue of the negligence of the deceased because of the jury's right to infer due care under such state of the record; otherwise when the physical facts and surrounding circumstances negative due care.

Hittle v Jones, 217-598; 250 NW 689

Presumption of care in absence of witnesses —nonapplicability. The presumption that a deceased was, at the time of a fatal accident, exercising reasonable and ordinary care for his own safety, cannot be indulged when there are eyewitnesses who fully testify as to the conduct of the deceased at the time in question, nor when the physical facts of a transaction negative such presumption.

Shannahan v Produce Co., 220-702; 263 NW 39

Direct evidence—nonapplicability of circumstantial evidence instruction. In a death claim action for negligence arising from an automobile collision occurring in a suburban district of a city where the negligence alleged was in failing to travel on the right-hand side of the street and where along with the physical facts there was direct evidence by the driver of the car wherein decedent was riding as to decedent's travel on the right-hand side of the street, it was error to give an instruction, applicable only to cases based entirely on circumstantial evidence, when such instruction prevented the jury from considering the direct evidence as to where the accident occurred.

Rusch v Hoffman, 223-895; 274 NW 96

Skid marks—intersection collision. Even when the most favorable view of the evidence is taken, plaintiff's contention, that he was struck by defendant's automobile at a street intersection after the automobile had approached the intersection from a side street, was not established when the testimony of the witness on whom the plaintiff relied was inherently inconsistent and was disproved by skid marks and other testimony showing that the automobile had not been on the side street.

Ward v Zerzanek, 227-918; 289 NW 443

Yielding one-half of road—surrounding circumstances — jury question. Circumstances surrounding an accident, viz: the condition of the vehicles, the location of dead bodies and debris, the blood and brains splattered on one side of a bridge, are circumstances for the jury to consider in determining whether a truck driver gave one-half of the traveled way by turning to the right.

Hawkins v Burton, 225-707; 281 NW 342

(e) RES IPSA LOQUITUR

Res ipsa loquitur as rule of evidence. The doctrine of res ipsa loquitur is a rule of evidence not applicable where specific allegations of negligence are pleaded but only where general allegations of negligence are wholly relied upon.

Olson v Cushman, 224-974; 276 NW 777

Passenger injured in motorbus accident. Plaintiff, under a general allegation of negligence on the part of a common carrier of passengers, to wit, a motorbus company, generates, under the doctrine of res ipsa loquitur, a jury question on the issue of the negligence of such carrier by proof (1) that he was a passenger on said bus; (2) that a collision

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(e) RES IPSA LOQUITUR—concluded

occurred between said bus and an automobile; (3) that in said collision said bus was overturned; and (4) that plaintiff was injured.

Crozier v Stages, 209-313; 228 NW 320; 29 NCCA 20

Car run into from rear. The doctrine of res ipsa loquitur is applicable to an occurrence wherein plaintiff in the daytime is driving a vehicle at a moderate rate of speed, and looking ahead, on the right-hand side of a wide and wholly unobstructed highway and is suddenly and unexpectedly run into from the rear by another vehicle.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Collision with rear of horse-drawn vehicle. In an action against a motorist for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of each other, but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

Inconclusive evidence. In an automobile damage action the doctrine of res ipsa loquitur is not applicable when the automobile was not under the exclusive control of the defendant or when the jury must speculate from the evidence whether the injury was caused by a defect in the automobile or by the negligence of the driver.

Sproll v Burkett Co., 223-902; 274 NW 63; 2 NCCA(NS) 424

Waiver. One who pleads specific acts of negligence on the part of defendant thereby waives the right to rely on the doctrine of res ipsa loquitur.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Luther v Jones, 220-95; 261 NW 817; 39 NCCA 139

Negligence pleaded specifically. The doctrine of res ipsa loquitur may be applicable under one unquestioned count of a petition which alleges negligence generally, notwithstanding the fact that the same cause of action is pleaded in another count under specific allegations of negligence.

Crozier v Stages, 209-313; 228 NW 320; 32 NCCA 46; 34 NCCA 678

Specific reliance on res ipsa loquitur. A plaintiff who sues in tort and alleges generally (1) that defendant was guilty of negligence which was the proximate cause of her injuries, and (2) that she relies on the doctrine of res ipsa loquitur, cannot be compelled by motion for more specific statement to state the particular acts of negligence of which she complains.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Negligence inferred by jury from circumstances. Pleading specific acts of negligence precludes recovery under the doctrine of res ipsa loquitur, and as no inference of negligence arises from the mere fact of a collision, a pedestrian's action to recover damages from a motorist may not be submitted to the jury on the theory that the jury might reasonably infer negligence from the circumstances. A case may be submitted on this theory only when there may be drawn from the circumstances no other reasonable conclusion than the existence of negligence.

Armbruster v Gray, 225-1226; 282 NW 342

Passenger injured in rented car. In an action by passenger against a lender of car for injuries sustained when car driven by borrower went into ditch, res ipsa loquitur doctrine held inapplicable.

Gianopulos v Saunders System, (NOR); 242 NW 53; 32 NCCA 18

(f) JURY QUESTIONS

Conflicting evidence. On conflicting testimony, the jury is to determine the credibility of the witnesses and to ascertain the facts, and on appeal the supreme court is to determine not what the facts were, but solely what the jury was warranted in finding them to be, reviewing the evidence in the light most favorable to the party in whose favor the verdict was returned.

Remer v Takin Bros., 227-903; 289 NW 477

Contributory negligence—reasonable minds differing. Principle reaffirmed that a jury question exists on the issue of negligence whenever on the record reasonable minds might reasonably differ as to the effect of what was done or not done under the circumstances.

Rosenberg v Railway, 213-152; 238 NW 703

Reasonable minds reaching different conclusions. Where reasonable minds may reach different conclusions from the facts presented, the case is one for the jury.

Short v Powell, 228- ; 291 NW 406

Physical facts—cause and effect. So many elements enter into the physical results produced by motor vehicle collisions that when fact questions are presented, the supreme court cannot substitute its judgment for that of the jury and say, as a matter of law, that a particular result was produced because certain factors constituted the cause.

Rabenold v Hutt, 226-321; 283 NW 865

Jury question (?) or law question (?). Principle reaffirmed that no jury question arises on the issue of the negligence of an injured party when all reasonable minds would agree that the injured party was negligent in what he did or did not do just immediately preceding and at the time when he was injured.

Hittle v Jones, 217-598; 250 NW 689

Abandonment of employment. Evidence reviewed and held to present a jury question on the issue whether a servant had temporarily abandoned his employment and had not returned thereto at the time of the commission by him of an alleged negligent act.

Heintz v Packing Co., 222-517; 268 NW 607

Accident on driveway. Evidence held to present a jury question on the issue of negligence of both parties to an accident on a driveway contiguous to the vehicular roadway of a street.

Dickeson v Lzicar, 208-275; 225 NW 406

Unavoidable accident. When the evidence presents a jury question on the issue of defendant's negligence and plaintiff's contributory negligence, the court cannot, of course, sustain defendant's motion to dismiss on his claim of unavoidable accident.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Authority of servant. Evidence reviewed and held to present a jury question on the issue whether a master had impliedly authorized his salesman, in order to perform his duties, to travel about the country by means of the salesman's individually owned automobile.

Heintz v Packing Co., 222-517; 268 NW 607

Assured clear distance statute—jury question. Whether a vehicle suddenly emerged from behind a stalled truck and moved into the pathway of an oncoming car, necessarily has a material bearing on the issue whether the driver of the oncoming car violated the "assured clear distance" statute. Evidence held to present a jury question.

McWilliams v Beck, 220-906; 262 NW 781

Assured clear distance—error to submit. It is error to submit the issue of assured clear distance when the physical facts and plaintiff's testimony show that there was no discernible object ahead of defendant's car.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Speed—clear distance ahead statute. Evidence reviewed at length and held to present a jury question on the issue whether a motorist so operated his car that he could not stop within the assured clear distance ahead.

Lukin v Marvel, 219-773; 259 NW 782; 1 NCCA(NS) 16

Range of visibility. Altho the driver of a truck, which was following another truck on an icy street on which two cars were parked, could see past the truck and the cars and could have stopped within the distance he could see, when he ran into the truck ahead after it had skidded and turned around, there was a jury question as to whether he had been complying with the assured clear distance ahead rule, and it was proper to give an instruction imposing on him the duty to refrain from driving at a speed greater than would permit him to stop within the assured clear distance ahead.

Remer v Takin Bros., 227-903; 289 NW 477

Pedestrian—assured clear distance—legal excuse. Where a pedestrian crossing the street is struck by a motorist after first being seen 180 feet away on the opposite curb, and could have been seen by the motorist at all times prior to the collision, motorist's showing that pedestrian "popped up" ahead of him as legal excuse for not stopping within the assured clear distance is evidence raising a jury question.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Pedestrian crossing near intersection.

Scott v McKelvey, 228- ; 290 NW 729

Careful operation. Evidence held to present a jury question on the issue whether an automobile was operated with due care.

Sexauer v Dunlap, 207-1018; 222 NW 420

Wheel becoming detached — circumstantial evidence. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrrell v Skelly Co., 222-1257; 270 NW 857

Collision. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence;
2. Whether defendant was driving his truck without lights;
3. Whether defendant was driving on the wrong side of the road;
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed; or
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 93

Collision with bicycle. Where a motorist driving east 40 to 50 miles per hour at night

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

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on a paved highway, the lights on vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35) and failing to turn to left when passing vehicle (§5022, C., '35) reviewed and held to correctly present questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Conflict as to use of brakes. A conflict in the evidence in a motor vehicle accident case as to whether defendant did or did not apply his brakes is properly a matter for the jury.

Reed v Pape, 226-170; 284 NW 106

Icy pavement as excuse for negligence. In argument, a defendant truck driver's explanation that icy pavement and locked brakes made his truck slide and should excuse his presence on the wrong side of the road where his truck collided with plaintiff's automobile will not sustain a directed verdict in his favor, since question of plaintiff's contributory negligence, defendant's violation of statute, the sufficiency of his excuse, and whether his negligence, if any, was the proximate cause of plaintiff's injuries, being questions on which reasonable minds might differ, are for the jury.

McIntyre v West Co., 225-739; 281 NW 353

Emergency as legal excuse — evidentiary support. Question of emergency as being legal excuse should not be submitted to the jury without competent evidence to support it. Held, instruction amply supported in instant case.

Edwards v Perley, 223-1119; 274 NW 910

Evidence—legitimate suggestion by counsel. When the word "suddenly" was never used by witnesses to describe how a truck slowed down and turned out to the left to avoid a pedestrian before it was hit by another truck proceeding from the rear, but the word was put into their mouths by legitimate suggestion of counsel, the weight and credibility to be given the word is for the jury.

Glover v Vernon, 226-1089; 285 NW 652

Consent to operation. Proof that an automobile at the time of a collision (1) was operated by one defendant, (2) was owned by another defendant, and (3) was under lease exceeding ten days to yet another defendant, generates a jury question on the issue whether the car was operated with the consent of the owner, and also with the consent of the lessee; and such jury question survives as to the owner and as to the lessee until each, for himself, negatives such consent by undisputed and uncontroverted testimony. And the most positive denials of consent cannot be deemed "undisputed and uncontroverted" when the facts and circumstances attending the operation of the car tend to prove that the owner and lessee did consent.

Greene v Lagerquist, 217-718; 252 NW 94

Contributory negligence of passenger. Whether a passenger who had no control over the operation of a car was guilty of contributory negligence must almost inevitably be a jury question.

Schwind v Gibson, 220-377; 260 NW 853

Plaintiff's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son, who enters an obscured intersection without sounding his horn (§5043, C., '35), is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury, when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

Negligence—contributory negligence. Evidence held to present a jury question on the issue whether there was negligence in the operation of automobiles by the drivers thereof; likewise, whether there was contributory negligence on the part of an injured party.

Shuck v Keefe, 205-365; 218 NW 31

Stilson v Ellis, 208-1157; 225 NW 346

Dickeson v Lzicar, 208-275; 225 NW 406

Vass v Martin, 209-870; 226 NW 920; 39 NCCA 325; 1 NCCA(NS) 162

O'Hara v Chaplin, 211-404; 233 NW 516; 35 NCCA 573

Rogers v Lagomarcino Co., 215-1270; 248 NW 1

Car striking person standing on street. In personal injury action for being struck by automobile while plaintiff was standing at night on city street discussing question of blame for another collision, plaintiff's contributory negligence was question for jury.

Yale v Hanson, 227-813; 288 NW 905

Standing on endless track of tractor to fill gas tank — contributory negligence. Where defendant, engaged in road construction work, was using caterpillar tractor-pulled dump wagons, and while plaintiff, a gasoline tank wagon operator, was standing on the caterpillar's endless track filling the gasoline tank, the tractor suddenly started moving, throwing plaintiff in path of another oncoming tractor-towed dirt wagon which ran over and injured him, and altho defendant claims that plaintiff was on the tractor at his own peril, even when the peril was created by defendant, the question, as to whether plaintiff acted as ordinarily prudent person or was guilty of contributory negligence, was for jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Bicyclist colliding with unlighted car. Where a minor bicyclist collided with a car unlawfully parked on left side of city street without tail light, when he pulled over to his right to avoid an approaching car the question of his contributory negligence, which depended on whether or not he should have observed the parked car in time to avoid the collision, was for the jury.

Trailer v Schelm, 227-780; 288 NW 865

Contributory negligence—child under 14—burden to overthrow presumption. The presumption is that children under 14 are incapable of contributory negligence. A motorist striking a child of 10 must prove from all the facts and circumstances that the child did not exercise the degree of care ordinarily exercised by a child of like age. Held that the question of whether he had sustained his burden was clearly for the jury.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

"Double passing"—contributory negligence. Evidence relative to the facts attending a "double passing" reviewed and held to present a jury question on the issue of contributory negligence.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Contributory negligence—failure of lights. Where a truck is being operated in a fog with 35 feet visibility ahead, under speed and road conditions permitting a stop within 25 feet, and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range so that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision, but the question is for the jury.

Mueller v State Assn., 223-888; 274 NW 106; 113 ALR 1256

Care—pedestrian on shoulder of highway.

Janes v Roach, 228- · ; 290 NW 87

Dual view of evidence. A jury question on the issue of negligence arises (1) when the evidence is conflicting as to what the injured party did or did not do, and (2) when there may be a fair difference of opinion whether that which the injured party admittedly did do or omitted to do constituted negligence. Evidence as to what an elderly lady did in crossing a public street after nightfall presented a jury question on the issue of contributory negligence.

Robertson v Carlgren, 211-963; 234 NW 824

Plaintiff's conduct—conflict in evidence. The presence or absence of contributory negligence is generally a jury question, and two elements are involved, (1) what plaintiff did, and (2) the effect of his action; if either or both of said propositions present uncertainty, there is a jury question.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Contributory negligence—inadequate brakes. Evidence that a plaintiff motorist approached a bridge at 15 miles per hour and proceeded to cross, keeping his car within 6 inches of the right-hand side, before defendant came on the bridge, and that plaintiff was two-thirds across before defendant swung across the center line and struck him, makes a jury question as to whether the fact of plaintiff's negligence in not having adequate brakes contributed to the collision.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Contributory negligence—jury question unless all minds concur. Contributory negligence is for the jury, and a directed verdict should be denied except in cases where the facts are clear and undisputed and the cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn.

In re Green, 224-1268; 278 NW 285

Person in comparative safety—no duty to anticipate negligence. Plaintiff, standing between a truck and a pile of brick 15 feet away, who, after requesting the truck driver to back up 2 or 3 feet, is crushed against the pile of brick by the truck suddenly backing over the entire distance, is not contributorily negligent as a matter of law, but question is for jury as to plaintiff's right to rely on presumption that truck driver would use due care in backing up and would not suddenly back over the entire distance.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Failure of proof — incompetent witness. Where plaintiff, a motor vehicle passenger, predicates his action on two theories, viz: (1) he was not a guest, and (2) he was a guest, and as to the first his proof fails because of witness's incompetency under dead man statute, and as to the second he offers no evidence, there is nothing to be submitted to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Intoxication of motorist—evidentiary conflict. A sharp conflict in the testimony, as to whether a motor vehicle driver was intoxicated, generates a question of the credibility of the witnesses, which is a matter peculiarly for the jury.

State v Carlson, 224-1262; 276 NW 770

Last clear chance doctrine—nonapplicability. The submission of the last clear chance doctrine, under a record which unquestionably shows that the accident of which plaintiff com-

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plains occurred instantly and inevitably after plaintiff's position of danger was discovered by defendant, constitutes reversible error.

Rutherford v Gilchrist, 218-1169; 255 NW 516

Last clear chance. Jury must consider all the evidence and where it tends to show that defendant, after discovering plaintiff's perilous position, might by the exercise of ordinary care have avoided a collision, it is not error to submit the doctrine of last clear chance.

Pettijohn v Weede, 219-465; 258 NW 72
Groves v Webster City, 222-849; 270 NW 329
Russell v Leschensky, 224-334; 276 NW 608

Lookout for pedestrians. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper lookout for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420
Altfilisch v Wessel, 208-361; 225 NW 862; 32 NCCA 482; 34 NCCA 150
Robertson v Carlgren, 211-963; 234 NW 824; 35 NCCA 555
Lorimer v Ice Cream Co., 216-384; 249 NW 220; 1 NCCA(NS) 57

Hitting pedestrian on shoulder of highway. Direct evidence of negligence which is insufficient, in and of itself, to generate a jury question may be sufficient when aided by such fair and reasonable inferences as are legally permissible for the jury to draw from such direct evidence and the attending circumstances. So held on the issue whether the driver of an automobile, in pursuance of a concerted plan between himself and others riding with him, negligently drove the car so close to a woman walking on the shoulder of the pavement that when the door of the car was opened she was hit thereby.

Tissue v Durin, 216-709; 246 NW 806; 2 NCCA(NS) 447

Proper lookout for pedestrian. After motorist had seen pedestrian 180 feet away standing on the curb, and when pedestrian had almost reached the opposite side of the street before being struck by the motor vehicle, which meanwhile had traveled the 180 feet, during which time pedestrian was plainly visible, and when motorist claims he did not again see pedestrian until just before striking him, the evidence raises a jury question as to whether motorist kept proper lookout, and directing a verdict is improper.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Failure to maintain lookout—proper failure to submit. Record reviewed, in an action for damages for death of a pedestrian who was killed by being hit by an automobile on the public highway, and held to justify the court in refusing, for want of evidence, to submit to the jury the issue of the defendant's alleged failure to maintain proper lookout.

Hartman v Lee, 223-32; 272 NW 140

Taillight of parked car concealed by body.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Control—lookout—speed. Evidence reviewed and held to present a jury question on the issues whether the operator of an automobile (1) had his car under proper control in approaching and entering a busy street intersection, (2) kept a proper lookout ahead, (3) operated his car at an excessive rate of speed, or (4) so operated the car that he could stop it within the assured clear distance ahead.

Minks v Stenberg, 217-119; 250 NW 883; 1 NCCA (NS) 57
Parrack v McGaffey, 217-368; 251 NW 871

Failure to stop, look, or control speed. Unreconcilable evidence reviewed at length in an action for damages consequent on alleged negligence, and, in view of the hopeless conflict therein, and the permissible inferences to be drawn therefrom, held to justify the submission of the issue of failure (1) to stop, (2) to maintain a proper lookout, and (3) so to drive as to be able to stop within the assured clear distance ahead.

Bauer v Reavell, 219-1212; 260 NW 39

Lookout—control—car rammed from rear. The issues whether defendant failed (1) to maintain a proper lookout, or (2) to have his car under control, are properly submitted to the jury on evidence that plaintiff, on a clear day, while immediately approaching an intersecting crossroad, and while other cars were closely approaching from the opposite direction, was slowly driving his car in the immediate rear of several other forward-moving cars on the right-hand side of an 18-foot dry, paved road with level shoulders and no accompanying ditches and was suddenly and very unexpectedly rammed from the rear by defendant's truck.

Luther v Jones, 220-95; 261 NW 817

Maintaining lookout. Evidence reviewed and held to present jury question on issue whether a motorist had maintained a proper lookout preceding a collision.

McWilliams v Beck, 220-906; 262 NW 781

Negligence—speed. Evidence held to present jury questions on the issues whether defendant (1) drove at a dangerous rate of speed, (2) did not have his car under control, and (3) failed to maintain a proper lookout.

Parrack v McGaffey, 217-368; 251 NW 871

Proper lookout—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue whether the operator of an automobile maintained a proper look-

out preceding the time when a small child suddenly emerged from behind an obstruction and ran into the pathway of the approaching car.

Howk v Anderson, 218-358; 253 NW 32

Striking boy on bicycle—dispute as to lookout. Where a defendant county-employee-trucker ran over a boy on a bicycle, an allegation of defendant's lack of proper lookout is clearly for the jury, when from the evidence, indicating the trucker may have struck the boy from the rear and should have seen him, the jury may well have found that defendant did not, in fact, keep such lookout.

Montanick v McMillin, 225-442; 280 NW 608

Motorist anticipating dangerous position of one aiding. Where a stalled motorist heard one of several bystanders say, "Let's give him a push", whereupon they arranged themselves in positions to push the automobile, and one called, "Let's go ahead", a directed verdict is properly denied, and a jury question is presented as to whether or not the motorist might have known that a person was directly behind the automobile and would be injured if the car moved backward.

Huston v Lindsay, 224-281; 276 NW 201

Truck in reverse gear—negligent starting. Evidence reviewed and held to present jury questions on the issues:

1. Whether the operator of a truck which he had left in reverse gear was negligent in starting the engine when he had reason to know that another person was in the near vicinity of the rear of the truck; and
2. Whether the deceased was injured by being crushed between the rear of said truck and a building.

Laudner v James, 221-863; 266 NW 15

Backing up truck—control. It cannot be held as a matter of law that plaintiff failed to establish any negligence on the part of the defendant when the record shows that truck driver, after backing an intended 2 or 3 feet and almost stopping, suddenly moved back an additional 12 feet, crushing plaintiff against a pile of bricks.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Supported assignments of negligence. Pleaded and supported assignments of negligence, which the jury might find was the proximate cause of the accident and resulting injury, must necessarily be submitted to the jury.

Muirhead v Challis, 213-1108; 240 NW 912

General and specific allegations—belated attack. Except in res ipsa loquitur cases a specific allegation will not waive a general allegation of negligence, which general allegation must be assailed by motion, if timely, before answer and without such motion is properly submitted to the jury if sustained by the evidence.

Gookin v Baker & Son, 224-967; 276 NW 418

Driving on wrong side of highway—evidence. Evidence on the issue whether the operator of an automobile was driving on the wrong side of the highway reviewed, and held to present a jury question.

Ryan v Amodeo, 216-752; 249 NW 656
Henriksen v Stages, 216-643; 246 NW 913
McCoy v Cole, 216-1320; 249 NW 213; 33 NCCA 524
Schuster v Gillispie, 217-386; 251 NW 735

Statutory negligence—evidence. Evidence reviewed, on the issues whether the driver of an automobile (1) was driving on the wrong side of the street, (2) "cut the corner" of an intersection, and (3) gave no signal of his approach, and held to present a jury question.

Handlon v Henshaw, 206-771; 221 NW 489; 32 NCCA 433; 35 NCCA 649

Crossing black line on pavement. Eyewitness testimony that a defendant-motorist crossed the black line to the left side of the pavement preparatory to passing an automobile, then, observing an approaching vehicle, swung back in again, and in so doing struck this latter vehicle, deflecting his own automobile so as to collide with a second approaching vehicle in which plaintiff was riding, makes a jury question as to defendant's acts being negligence.

Echternacht v Herny, 224-317; 275 NW 576

Operation on wrong side of road—legal excuse. The act of the operator of a vehicle in turning to the left-hand side of a country highway when meeting another vehicle is presumptively negligent, but testimony that the immediately approaching vehicle was weaving from side to side of the road, and that the turn to the left was made in order to avoid a collision, presents a jury question whether he was, in turning to the left, exercising reasonable care.

Babendure v Baker, 218-31; 253 NW 834; 2 NCCA(NS) 650

Driving outside traveled roadway. An allegation that a motorist, without warning, ran his car outside the traveled part of the highway and injured plaintiff, constitutes an adequate charge of negligence, and must, of course, if supported by evidence, be submitted to the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Negligence—occupying right side of highway. A specification of negligence that defendant did not keep his truck on the right-hand side of the highway when struck from the rear could not be withdrawn and was properly submitted to the jury when there was evidence to sustain the specification. Evidence did not show that collision would have oc-

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curred, even tho truck had been wholly on right-hand side of the highway.

Gookin v Baker & Son, 224-967; 276 NW 418

Emergency as legal excuse. Evidence that a pedestrian walking along a shoulder of a highway suddenly stepped in front of an automobile, where he was struck, raises a jury question as to such emergency and as to legal excuse for failing to stop within the assured clear distance ahead.

Edwards v Perley, 223-1119; 274 NW 910

Fog—careful and prudent operation. Evidence held to present a jury question whether the operator of an automobile was, on a foggy night, proceeding in a careful and prudent manner, and whether he had such control over the car that he could avoid obstacles appearing within the range of his vision.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Failure to see obstruction in fog. In an action for damages resulting from injuries sustained when the car, in which the plaintiff and her husband were riding on a foggy evening, ran into a car which the defendant had left standing on the highway after an unsuccessful attempt to tow it away, it was error for the lower court to direct a verdict for the defendant, as the question of liability should have gone to the jury.

Newman v Hotz, 226-834; 285 NW 287

Negligence—intersection collision. In a damage case resulting from a collision between a taxicab and an automobile at an intersection, when the record does not conclusively show negligence, that question and how the accident occurred are for the jury.

Womochil v Peters, 226-924; 285 NW 151

Negligence of both plaintiff and defendant—jury question. Evidence held to present a jury question on the issue of the negligence of both plaintiff and defendant in a collision at a street intersection.

Branch v Railway, 214-689; 243 NW 379

Negligence at intersection. Evidence held to present jury question on the issue of negligence at a street intersection.

Appleby v Cass, 211-1145; 234 NW 477

Approaching intersection—instruction. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Intersection collision—complex facts. An intersection collision involving disputed facts, fractional seconds, speeds of 40 to 50 miles an hour, and failure to see an approaching automobile presents, not a matter of law for the courts, but a question for the jury to determine blame.

Eby v Sanford, 223-805; 273 NW 918

Assuming compliance with law when danger obvious. Where plaintiff, riding with his son, approaches an intersection of county trunk roads and on his left observes defendant also approaching the intersection, altho plaintiff may assume that defendant will obey the right-of-way law, he must not place himself in a position of obvious danger avoidable by the exercise of ordinary care, and whether or not he did so place himself is a jury question.

Rogers v Jefferson, 224-324; 275 NW 874

Yielding one-half of road—assuming compliance with law limited. Where two motorists approach each other in a snowstorm, one driving into the face of the storm, which has obliterated the pavement outlines and the dividing mark thereon, the other motorist has a right to assume that he will be accorded one-half the traveled way, until he sees, or until, in view of the storm conditions and added driving difficulties, he should, in using ordinary care, realize that half the highway was not being yielded, under which facts a jury question is presented as to whether his continued reliance on the assumption excused him from the charge of negligence.

Futter v Hout, 225-723; 281 NW 286

Justifiable ignoring of issues. Grounds of negligence which, if proven, would not establish a cause of action, are properly withheld from the jury.

Fleming v Thornton, 217-183; 251 NW 158

Law of case—location of tracks. A holding on appeal that a jury question on the issue of negligence in operating an automobile was not generated by record evidence relative to the location and condition of wrecked automobiles, and as to marks and broken glass on the highway is necessarily conclusive on the court on retrial on substantially the same evidence.

Reimer v Musel, 220-1095; 264 NW 47

Absence of tail lights and reflectors—statement by court. Testimony reviewed and held that the court could not say, as a matter of law, that the truck in question was not, at the time of a collision, equipped with tail lights and reflectors.

Isaacs v Bruce, 218-759; 254 NW 57; 36 NCCA 93

No lights—high speed—wrong side. Evidence held to present a jury question whether an automobile was negligently operated (1) without lights, (2) at a dangerous rate of speed, and (3) on the wrong side of the highway.

Carlson v Decker, 216-581; 247 NW 296; 36 NCCA 91

Unlighted truck in highway. Evidence which would justify a finding that the driver of a truck left it where it obstructed one-half of the highway and with the rear end unlighted, presents a jury question on the issue of such assigned negligence.

Kimmel v Mitchell, 216-366; 249 NW 151; 35 NCCA 790; 36 NCCA 106

Parking in highway — absence of lights. Negligence alleged to have been the proximate cause of a collision and asserted in the plea that defendant's truck (1) was parked, in the nighttime, diagonally across the entire right-hand side of a paved highway, and (2) without lights, with substantial evidence pro and con, both as to the position of the truck and as to the lights, necessarily presents a jury question.

Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 496

Proximate cause—question of fact—general rules applicable. The question of proximate cause, as a general rule, is a question of fact, and the same rules apply as in other questions of fact.

Blessing v Welding, 226-1178; 286 NW 436

Proximate cause of injury. The question whether a certain negligent act was the moving or producing cause—the proximate cause—of an injury is properly submitted to the jury when the record contains evidence which establishes an act which could fairly be such proximate cause and contains no evidence tending to establish any other cause.

Buchanan v Cream Co., 215-415; 246 NW 41

Negligence of different agencies—proximate cause. Where the evidence demonstrates that an injury resulted from the negligence of two agencies, the question of proximate cause is peculiarly one for the jury.

Schwind v Gibson, 220-377; 260 NW 853

Proximate cause. Section 5056, C., '35, [§5030.08, C., '39], requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, C., '35 [§5018.01, C., '39], and §5045, C., '35 [§§5033.07, 5033.08, C., '39], in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with ar automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

Lack of proper lamps on trucks or trailers—proximate cause. In an action at law to recover damages for personal injuries sustained by plaintiff when car in which she was riding collided with a tractor-trailer which had stalled on an icy hill on a country highway at night and had jackknifed across the highway, the question of owners' and operators' negligence in failing to comply with statutes prescribing number and place of lamps required on truck or trailer, and whether such negligence, if any, had proximate causal connection with injury sustained by plaintiff, held, under the evidence, properly submitted to the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Turning or changing course — proximate cause. Evidence reviewed, and held to present a jury question on the issue whether a motorist was negligent in suddenly turning from the right side to the left side of a paved rural highway (in order to enter a private driveway on the latter side of said road), and whether, if negligent, said negligence was the proximate cause of a collision with another vehicle which he knew he was about to meet.

McKinnon v Guthrie, 221-400; 265 NW 620

Proximate cause. Conflicting testimony as to the speed of the defendant's truck while following pick-up truck on an icy street, and as to the distance between the trucks when the one in front skidded and turned around, presented a jury question as to whether the driver of the defendant's truck was guilty of negligence in colliding with the pick-up truck, forcing it over a curb where it struck the plaintiff, and whether such negligence, if any, was the proximate cause of the plaintiff's injuries.

Remer v Takin Bros., 227-903; 289 NW 477

Proximate cause—accident causing injury—death following. Where a healthy, normal boy of 17 dies from an ear infection and mastoid involvement, the symptoms of which began shortly after the upsetting of a school bus in which he was riding, a jury question is created as to whether such accident was the moving or producing—the proximate—cause of the injury and death.

Olson v Cushman, 224-974; 276 NW 777

Negligence of outsider as proximate cause. The court must submit to the jury the supported plea that the proximate cause of an accident was the negligence of an outsider—a person not a party to the action.

Hoover v Haggard, 219-1232; 260 NW 540

Occupant injured—imputed negligence of driver. Where a car collided with a stalled tractor-trailer, jackknifed on an icy hill at night, the question of plaintiff's contributory negligence was properly submitted to the jury.

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(f) JURY QUESTIONS—continued

wherein it is shown the tractor, with lighted headlamps, standing on the right side of the highway, diverted plaintiff's and husband-driver's attention, and, there being no reasonable apparent cause to suspect that trailer blocked the left side of highway, and, where jury could find that car in which plaintiff was riding was proceeding at less than 20 miles per hour, and, that plaintiff and husband-driver were looking straight ahead, there is no warrant for saying plaintiff was contributorily negligent as a matter of law; however, under the record, the negligence of the husband-driver, if any, could not be imputed to plaintiff.

Johnson v Transp. Co., 227-487; 288 NW 601

Passing on curve — negligence. Evidence held to present a jury question on the issue of negligence of the operator of an automobile in passing another vehicle on a curve, and returning to the right side of the traveled way within 30 feet of the car which had been passed.

Andersen v Christensen, 222-177; 268 NW 527

Persons working on highway—truck driver's duty. In a laborer's personal injury action against a truck driver for backing truck into laborer while both were engaged in highway construction, §5017.06, C., '39, exempting persons and motor vehicles actually engaged in work upon the highway from the motor vehicle law requirements, does not exempt a truck driver from using his horn if necessary in the exercise of ordinary care when backing from an intersection onto highway under construction. Question of defendant's negligence in not sounding horn nor observing plaintiff's presence when backing truck where men were working, and question of plaintiff's contributory negligence while working under foreman's instruction at outside edge of road were questions properly submitted to jury.

Rebmann v Heesch, 227-566; 288 NW 695

Specification of negligence—evidentiary support. Evidence held to support the specifications of negligence submitted to the jury.

O'Hara v Chaplin, 211-404; 233 NW 516

Assured clear distance.

Janes v Roach, 228- ; 290 NW 87

Negligence — speed in city. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Speeding in residence district—sufficiency of evidence—jury question. Evidence that accident occurred on main street of town about four or five blocks from the business district, that defendant was driving 50 miles per hour, that there were a number of dwellings on both sides of the street, and that defendant had passed a sign which read, "Slow down, speed limit 25 miles per hour", was sufficient to raise jury question on issue of whether car was being driven in a residence district in excess of 25 miles per hour.

Doherty v Edwards, 227-1264; 290 NW 672

Speed determined by jury. Jury was warranted in finding from conflicting testimony that the defendant's truck was traveling at a speed of 20 to 25 miles an hour and that the speed was excessive and dangerous in view of the icy condition of the street.

Remer v Takin Bros., 227-903; 289 NW 477

Speed and distance as jury questions. In automobile damage action, where collision occurred about 8:30 a. m. at the intersection of two country highways, and where plaintiff, driving west, allegedly entered the intersection first at about 20 miles per hour and had the right of way, and defendant, driving south about 40 miles per hour in a truck loaded with seven head of cattle, collided with plaintiff's automobile about six or seven feet west of the center of (statutory) intersection, the trial court, deciding the issues as a matter of law by directing a verdict for defendant, was in error, since the question of speeds and distances, being estimates rather than certainties, raises a jury question on evidence submitted.

Short v Powell, 228- ; 291 NW 406

Speed determined from skid marks. A witness in an automobile accident case may describe skid marks, but may not base an opinion of the speed of an automobile on them, as it is solely within the province of the jury to draw an inference of speed from skid marks.

Ward v Zerzanek, 227-918; 289 NW 443

Control and speed of truck crossing bridge. The question of a trucker's speed and control while crossing a bridge is properly one to be considered by the jury as bearing on his negligence, when the truck was wide and the bridge was narrow, and somehow the truck collided with an oncoming vehicle.

Hawkins v Burton, 225-707; 281 NW 342

Direct evidence of speed—surrounding circumstances considered. A truck driver's direct testimony as to speed will not be taken as a verity, but will generate a jury question when considered with the other facts and circumstances of the accident tending to overcome the direct evidence as to speed.

Hawkins v Burton, 225-707; 281 NW 342

Failure to lessen speed or signal approach. A jury question on the issue of negligence of the operator of an automobile is generated by evidence tending to show that said operator was driving easterly on a straight road at 50 miles per hour; that he plainly could have seen, while at a distance of 80 rods, two well-lighted cars, and that they were standing together on the south side of the highway, one headed west and one headed east with all headlights burning; and that, without slacking his speed, or giving signal of his approach, he passed to the south of said stationary cars, and so close thereto as to strike and break an open door on one of said cars.

Hanson v Manning, 213-625; 239 NW 793; 2 NCCA(NS) 446

Passenger's assumption of risk of riding with aged driver. While riding in the rear seat of an automobile being demonstrated to her employer as a prospective purchaser, an aged lady who protests against the salesman permitting her employer, also an aged person, to drive the automobile and who, altho she cannot get out of the automobile, is assured of safety by the salesman, does not as a matter of law assume the risk incident to her employer's driving, since reasonable minds could differ, and a jury must determine if it was unreasonable for her to rely on the salesman's assurances of safety.

Wittrock v Newcom, 224-925; 277 NW 286

Submitting both negligence and recklessness. Both questions of negligence and of recklessness may in a proper case be submitted together to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

General or dragnet assignment. A general or dragnet allegation of negligence is properly submitted to the jury in accordance with the supporting evidence when such allegation is neither attacked (1) by motion for more specific allegation, nor (2) by motion to strike or withdraw.

Watson v Railway, 217-1194; 251 NW 31

Unallowable dragnet assignment. It is erroneous to submit to a jury, over proper objection, a pleaded assignment of negligence to the effect that a defendant operated his automobile "without regard for the rights and safety of the lives and property of others rightfully upon and using said highway, and of plaintiff in particular."

Cooley v Killingsworth, 209-646; 228 NW 880

Improper submission of issue. The issue of the alleged negligence of a truck driver in running over and killing a person cannot be properly submitted to the jury on evidence which fails to reveal the facts and circumstances immediately attending the accident itself—which leaves to mere conjecture the manner in which the fatal accident occurred. So held as to a fatal injury to a child.

Westenburg v Johnson, 221-134; 264 NW 18

Operation—improper submission. Only supported grounds of negligence should be submitted to the jury. So held where the court submitted the negligence of the driver of an automobile (1) in failing to turn to the right, when signaled by an overtaking car, and (2) in increasing his speed when so signaled, when, on the record, the only possible proximate negligence was the act of the said driver in overtaking the passing car, after it had passed, and then bringing about a collision.

Berridge v Pray, 202-663; 210 NW 916

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Withdrawal of issue supported by evidence —pedestrian off pavement. Under a record in a motor vehicle-pedestrian accident case showing that the jury could have found from the evidence that decedent was more off the pavement than on it, it is error to withdraw from the jury plaintiff's allegation that his intestate had reached a place of comparative safety on the shoulder of the highway and that defendant left the highway without warning the pedestrian.

McCormick v Kennedy, 224-983; 277 NW 576

Truck trailer jackknifed across road—sufficiency of time to set out flares. In an action at law to recover damages for personal injuries received when car in which plaintiff was riding collided with the trailer of a tractor-trailer unit which had stalled on an icy hill at night on a country highway, and had jackknifed across highway, and where it is claimed the operators of the trailer unit failed to comply with statute requiring such standing vehicles to set out flares, and where operators claimed a warning was given by waving an ordinary flash light from inside or just outside cab of tractor, the question as to whether operators of trailer unit had sufficient time to set out warning signals, and whether the warning by waving an ordinary flash light was sufficient to afford a warning of presence of truck and trailer blocking motorists' passage, were proper questions of fact for the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Violation of ordinance. Whether the driver of a slowly moving vehicle was violating an ordinance which required him to keep as close

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(f) JURY QUESTIONS—concluded

as possible to the right-hand curb becomes a jury question on evidence that he was driving three feet from said curb, with adequate space for another vehicle to pass to his left.

Ege v Born, 212-1138; 236 NW 75

Eyewitnesses' estimate of speed, location, distance. The testimony of eyewitnesses to an automobile accident as to speed, location, and distance is only their judgment and estimation, which the jury must consider with other evidence in order to arrive at the truth.

Glover v Vernon, 226-1089; 285 NW 652

No-eyewitness rule. Evidence in connection with the presumption of due care in the absence of eyewitnesses reviewed and held to present a jury question on the issue of contributory negligence.

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 35 NCCA 709

Existence of eyewitnesses—not jury question. In a pedestrian-automobile accident involving the no-eyewitness rule, it is not for the jury to decide whether or not there were eyewitnesses.

Edwards v Perley, 223-1119; 274 NW 910

Personal injuries. Evidence held to present a jury question on the issue whether injuries were permanent and whether they were the proximate result of an accident or resulted from a former diseased condition of the injured party.

Dickeson v Lzicar, 208-275; 225 NW 406

Pain and suffering—instruction. In an action to recover for personal injuries sustained in an automobile collision where plaintiff testified that headaches causing much suffering affected him since the accident, and when an expert witness testified that plaintiff's injury might have caused headaches and that the injury might be permanent, an instruction permitting recovery for future pain and suffering from headaches was not erroneous and properly submitted the question to the jury.

Rogers v Jefferson, 226-1047; 285 NW 701

Damages—future pain as incident to permanent injury. Even without a claim for damages for future pain and suffering, allegations and proof of permanent injuries from which future pain and suffering are reasonably certain to follow warrant the submission to the jury of this question.

Keller v Dodds, 224-935; 277 NW 467

Res ipsa loquitur—negligence inferred from circumstances. Pleading specific acts of negligence precludes recovery under the doctrine of res ipsa loquitur, and as no inference of negligence arises from the mere fact of a collision, a pedestrian's action to recover damages from a motorist may not be submitted to the jury on the theory that the jury might reasonably infer negligence from the circumstances. A case may be submitted on this theory only when there may be drawn from the circumstances no other reasonable conclusion than the existence of negligence.

Armbruster v Gray, 225-1226; 282 NW 342

Weight of evidence—credibility of witnesses. In action for damages to plaintiff's automobile wherein there is a dispute in the testimony, the weight of evidence and credibility of witnesses are for the jury.

Schenk v Moore, 226-1313; 286 NW 445

Credibility — contradictory previous testimony. Inconsistent testimony by a witness at one trial as to certain facts in an automobile accident cannot as a matter of law negative his testimony in a later trial, inasmuch as the jury is the sole judge of the credibility of a witness and the weight of his testimony.

Echternacht v Herny, 224-317; 275 NW 576

Responsibility between defendants. In an action for injuries sustained by a passenger riding in a taxicab, the question of responsibility for the accident between the owner of the cab, the driver, and a party to an agreement under which the cab was operated was a jury question.

Womochil v Peters, 226-924; 285 NW 151

(g) DECLARATIONS AND ADMISSIONS

Petition—allegations in one count not admissions as to another count. Different theories of recovery contained in separate counts of a petition are not admissions by which the plaintiff is bound under the rule that he may not controvert his own pleading.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Caution—weight to be given admission. A cautionary instruction pertaining to the weight to be given an alleged oral admission of defendant to plaintiff, following a motor vehicle accident, should include a counterbalancing statement that, if the admission were deliberately made or often repeated, it might be the most satisfactory evidence.

White v Zell, 224-359; 276 NW 76

Contributory negligence — declarations of passenger. Testimony by a passenger in an automobile to the effect that shortly before an accident he called the attention of the driver to the approaching car is admissible on the issue of the contributory negligence of the passenger.

Waldman v Motor Co., 214-1139; 243 NW 555

Damaging statements—failure to deny as admission. Evidence of the failure of a person to reply to material statements made in his presence and hearing, concerning facts affecting his rights, is competent if the statements are of such character and are made under such conditions that a denial would have been

natural had the statements been untrue and incorrect.

Doherty v Edwards, 227-1264; 290 NW 672

Declarations inadmissible against master. In a joint action against a master and his servant for damages consequent on the negligent operation of the car by the servant, declarations or statements by the servant made several days after the accident tending to show the negligence of the servant are, while admissible against the servant, not admissible against the master; and the court must by proper instruction, if requested, limit the testimony accordingly.

Droullard v Rudolph, 207-367; 223 NW 100
Wilkinson v Lbr. Co., 208-933; 226 NW 43
Glass v Hutchinson Co., 214-825; 243 NW 352

Non res gestae statements. When a plaintiff seeks to recover damages from the owner of an automobile because of the negligence of the driver, he must prove such negligence by evidence other and different than the non res gestae statements and declarations of the driver, and where the owner and the driver are co-defendants the court must exercise meticulous care to instruct the jury accordingly.

Cooley v Killingsworth, 209-646; 228 NW 880
Ege v Born, 212-1138; 236 NW 75

Non res gestae statements by agent. Non res gestae statements by the driver of an automobile, tending to show the negligence of the driver, are not admissible against the owner of the car; and if the owner and the driver are co-defendants, the court should receive the statements only as to the driver, and must clearly instruct the jury that such statements must not be considered in determining the liability of the owner. Whether failure of the owner to ask any instructions would obviate the error in failing so to instruct, quaere.

Wieneke v Steinke, 211-477; 233 NW 535

Non res gestae statements of driver. Non res gestae statements of the driver of an automobile tending to show his negligence are not competent against the owner of the vehicle, nor are such statements of the owner competent evidence against the driver, and the court must clearly and definitely so instruct. In addition the court must submit separate forms of verdict if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Statement made at scene of accident.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Opinion evidence—allowable conclusion. The statement of a witness to the effect that, when his vehicle was hit, "he was headed right into" another vehicle, is an allowable conclusion.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Owner and operator as joint defendants—instructions. In a joint action against the owner and the operator of an automobile for damages consequent on the negligent operation of the automobile, wherein there is evidence of declarations and statements by the driver immediately following the accident (but not part of the res gestae), tending to establish the operator's negligence, instructions which permit or require the jury to consider such declarations and statements in determining the liability of said owner are prejudicially erroneous.

Looney v Parker, 210-85; 230 NW 570

Separate forms of verdicts. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted, if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Incidental reference to indemnity insurance. Plaintiff in an action for damages consequent on an automobile collision has a clear right to show that defendant admitted his negligence and liability therefor, even tho said admission incidentally discloses that defendant was protected by indemnity insurance; and especially no error occurs when the reference to insurance is innocently brought out and was at once withdrawn by the court from the jury.

Liddle v Hyde, 216-1311; 247 NW 827

Separation of relevant and irrelevant matter. When a conversation relates to two distinct and easily separated subject matters, one relevant and one irrelevant, the latter cannot be deemed admissible simply because it is a part of the conversation as a whole. So held where the conversation related (1) to the manner in which an accident happened and (2) to the insurance carried by the defendant.

Kuhn v Kjose, 216-36; 248 NW 230

(h) RES GESTAE

Evidence—gruesome recital. The res gestae of an accident are admissible even tho the recital is gruesome.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Nonconsequential statements—reception discretionary with court. The admissibility of res gestae statements rests in the sound discretion of the trial court. So held as to nonconsequential statements attending an accident.

Fortman v McBride, 220-1003; 263 NW 345

Evidence—colloquy following accident. In an action for damages consequent on a colli-

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—concluded

(h) RES GESTAE—concluded

sion of automobiles, prejudicial error results from receiving against defendant evidence of a heated colloquy between defendant and the other driver, occurring within a very few minutes after the collision, and wherein each driver asserted that he was on the right side of the highway, and wherein the defendant refused to examine certain tracks as bearing on the dispute and applied scandalously opprobrious epithets to the other driver; this because said testimony is neither a part of the res gestae nor does it reveal any admission on the part of the defendant.

Muirhead v Challis, 213-1108; 240 NW 912

Admissibility of declaration. The declaration of the driver of an automobile almost immediately after a collision had occurred and before or while an injured person was being removed from one of the cars, to the effect that "I know I was driving fast", is part of the res gestae, and admissible against both defendants, to wit, the driver of the car and the owner thereof.

Duncan v Rhomberg, 212-389; 236 NW 638

Declarations by bystanders—proper exclusion. The exclusion of declarations of unidentified bystanders, made shortly after an accident, to the effect that "the boys ran between the cars" does not constitute reversible error when ample evidence bearing on the same point was received in evidence, and when the said declarations were, in view of the entire record, quite inconsequential.

Riddle v Frankl, 215-1083; 247 NW 493

Non res gestae statements of driver. In a joint action against the driver and owner of an automobile, evidence of the non res gestae statements of the driver tending to show his negligence is receivable provided the court properly protects the owner of the automobile from the effect of such statements.

Ege v Born, 212-1138; 236 NW 75

Non res gestae statements. When a plaintiff seeks to recover damages from the owner of an automobile because of the negligence of the driver, he must prove such negligence by evidence other and different than the non res gestae statements and declarations of the driver, and where the owner and the driver are co-defendants the court must exercise meticulous care to instruct the jury accordingly.

Cooley v Killingsworth, 209-646; 228 NW 880
Wieneke v Steinke, 211-477; 233 NW 535
Ege v Born, 212-1138; 236 NW 75

Non res gestae statements of driver. Non res gestae statements of the driver of an automobile tending to show his negligence are not competent against the owner of the vehicle, nor are such statements of the owner competent evidence against the driver, and the court must clearly and definitely so instruct. In addition the court must submit separate forms of verdict if requested.

Broderick v Barry, 212-672; 237 NW 481

(i) DEMONSTRATIVE EVIDENCE

Appearance of automobile lights. Demonstrations in court as to the appearance of automobile lights on the occasion of a collision in the public highway are properly rejected when the time and conditions of the demonstration are not shown to be the same as at the collision in question.

State v Fahey, 201-575; 207 NW 608

Exhibiting wounds to jury. During the final arguments in a personal injury case, the court may permit the plaintiff to seat himself alongside the jury in order that the jury may have a close-up view of wounds which, during the taking of testimony, have been fully described and exhibited to the jurors while some of them were 20 feet from the witnesses.

Mizner v Lohr, 213-1182; 238 NW 584

Contract of sale. On the issue of the ownership of an automobile, the contract of sale to the alleged owner is relevant and material.

Kimmel v Mitchell, 216-366; 249 NW 151

X-ray sciagraphs—sufficient foundation. Proof that certain X-ray sciagraphs were taken, for the use of the attending physician, by an expert in that science, and other circumstantial evidence tending to show the correctness of such sciagraphs, furnish sufficient basis for their introduction as evidence, even tho no witness specifically asserts that they "correctly portray the condition of the body affected."

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

IX INSTRUCTIONS

(a) IN GENERAL

Incomplete record. Alleged errors in instructions will not be considered on appeal when the record contains only part of the instructions and when those contained in the record announce correct abstract propositions of law.

McDowell v Oil Co., 212-1314; 237 NW 456
Reardon v Hermansen, 223-1207; 275 NW 6

Questions not raised in trial court—no review. Assignments of error relating to instructions not raised or passed upon by the lower court will not be considered on appeal.

Simmering v Hutt, 226-648; 284 NW 459

Proper assumption of fact. An instruction may properly assume as true a fact which the record unquestionably reveals.

Engle v Nelson, 220-771; 263 NW 505

Invading province of jury. An instruction which deprives the jury of the right to pass on a jury question is, of course, unthinkable.

Stingley v Crawford, 219-509; 258 NW 316

Impeachment—effect. The ordinary instructions as to the credibility of witnesses are all-sufficient in the absence of a request for a specific instruction as to the effect of impeaching testimony.

Altfilisch v Wessel, 208-361; 225 NW 862

Undenied statement as admission—cautionary instruction—failure to request. Court did not err in failing to give a cautionary instruction concerning evidence of damaging statements against defendant, made in his presence, to which he failed to reply or deny, when no such instruction was requested, nor when such claimed error was not raised in the trial court.

Doherty v Edwards, 227-1264; 290 NW 672

Erroneous instructions cured where directed verdict proper. Errors in instructions made by the trial court are not prejudicial to the appellant when appellee is entitled to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Harmless error—error in favor of complainant. A litigant may not complain of instructions which gave him an unjustifiable chance for a verdict in his own favor.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Correct and incorrect instruction on same subject matter. A correct and an incorrect instruction on the same subject matter presents a hopeless contradiction to the jury.

Hoover v Haggard, 219-1232; 260 NW 540

View of object by jurors. Principle reaffirmed that when jurors are permitted to view an object which is the subject of the action, they must be instructed that they must base their verdict solely on the evidence received judged in the light of their observation of the object.

Gehlbach v McCann, 216-296; 249 NW 144

Equal degree of care. Any basis in the instructions for claiming that a greater degree of care was required of one party than of the other is fully effaced when the court otherwise instructs definitely to the contrary.

Stilson v Ellis, 208-1157; 225 NW 346

Equal right to use. The abstract statement that "all persons have an equal right to use the highways in an equal manner", without qualification as to the right of way in specific instances, is manifestly incorrect.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Droullard v Rudolph, 207-367; 223 NW 100

Equal use of highway—right qualified by ordinance. An instruction that drivers of different vehicles are entitled to an "equal use of the street," with elucidating qualifications relative to the duty of one of the drivers under a valid regulatory city ordinance, is quite unobjectionable.

Ege v Born, 212-1138; 236 NW 75

Limiting issues. Issues of negligence submitted to the jury should be specifically limited to those supported acts of commission or omission alleged in the petition.

Parrack v McGaffey, 217-368; 251 NW 871

Pleading—sufficiency. A pleader is entitled to claim as many grounds of actionable negligence as flow from his pleaded statements of facts. Pleadings as to the facts attending a collision at an intersection of highways reviewed, and held to warrant the instructions given.

Sutton v Moreland, 214-337; 242 NW 75

Intermingling general and specific allegations. Instructions which refer the jury to the general allegations of negligence and not to the specific allegations are of harmless consequence when the latter are simply an elaboration of the former.

Tissue v Durin, 216-709; 246 NW 806

Instructions—conformity to general allegation—nonerror. An assignment of error that a general allegation of negligence specifying, "In not operating and driving said truck in a careful and prudent manner on a public highway", should not have been submitted to the jury, because such phraseology implied a moving vehicle, is without merit when there is substantial evidentiary conflict as to whether the truck was moving or stopped.

Gookin v Baker & Son, 224-967; 276 NW 418

Care required. Instructions reviewed, and held correctly to state the degree of care which is incumbent on a person using the highway.

Ryan v Shirk, 207-1327; 224 NW 824

Failure to exercise undue care. Error results from instructing that the driver of an automobile is negligent if he fails "to adopt such means as are within his power to avoid a collision". He performs his full duty if he exercises "ordinary care" to avoid the collision.

Jarvis v Stone, 216-27; 247 NW 393

Control of car—undue degree of care. An instruction, which, in effect, imposes upon the operator of an automobile an absolute duty to have his car under such control as to avoid injury to others, under all circumstances, is fundamentally erroneous because imposing an undue degree of care, and necessarily justifies an order for new trial.

Gregory v Suhr, 221-1283; 268 NW 14

IX INSTRUCTIONS—continued
(a) IN GENERAL—continued

Duty to use ordinary care. The court may very properly tell the jury that the driver of an automobile must exercise ordinary care even tho, at the time in question, a motorcycle officer was assisting the driver in testing the speedometer.

Ege v Born, 212-1138; 236 NW 75

Undue burden of care—incurable error. An instruction which places on the operator of an automobile the absolute duty to maintain a constant lookout and to use all his senses to avoid the danger of a collision is erroneous as imposing an undue burden, and the error is not necessarily cured by subsequent statements limiting the operator's duty to reasonable care and diligence.

Fry v Smith, 217-1295; 253 NW 147

Imposing undue care. An instruction which, after directing the jury that the operator of a vehicle on approaching intersecting highways must keep a lookout for approaching vehicles, imposes on the operator, if there be danger of a collision, the duty to "reduce his speed" or to "bring his vehicle to a stop", is erroneous.

Reason: Such instruction imposes on the operator a greater duty than to exercise reasonable or ordinary care.

Knutson v Lurie, 217-192; 251 NW 147; 37 NCCA 62

Instructions—ability to stop under all conditions. Instruction reviewed and held not to impose on defendant the absolute duty to operate his automobile at such a speed as to be able to bring it to a stop under any and all conditions.

Shutes v Weeks, 220-616; 262 NW 518

Avoiding injury by ordinary care. An instruction that a motorman on a streetcar must keep a "constant" lookout for drivers of vehicles on the street, is not subject to the exception that it requires an undue degree of care, when the sole issue on trial is whether the motorman, being fully aware of the dangerous position of the vehicle in question, could have avoided the injury by ordinary care.

Lynch v Railway, 215-1119; 245 NW 219

Conflicting instructions. Doubt and uncertainty consequent on conflicting instructions relative to the right of the operator of an automobile to assume that another operator would not use the highway unlawfully present ample justification for granting the prejudiced party a new trial.

Jelsma v English, 210-1065; 231 NW 304

Right to assume care and nonviolation of law of road. After correctly instructing as to the law of the road, it is not erroneous to instruct that each of the operators of the two automobiles in question had the right to assume that the other would not violate such laws, and would exercise ordinary care for the safety of himself and others.

Shutes v Weeks, 220-616; 262 NW 518

Right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles, (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

Violation of ordinance — presumption — instructions. While the violation of a city ordinance relative to the operation of an automobile is only prima facie evidence of negligence, yet, where the sole issue is whether the operator did violate such ordinance—when the operator makes no effort to excuse a violation —it is not erroneous for the court to instruct that if there was such violation the jury "would be warranted in finding the operator guilty of negligence".

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

See Kisling v Thierman, 214-911; 243 NW 552

Passenger—care required. An instruction that a passenger in an automobile must be deemed negligent if he fails to warn the driver of "any situation" that may be dangerous, does not correctly state the law, because requiring more than ordinary care.

Muirhead v Challis, 213-1108; 240 NW 912

Passenger—control over car. Reversible error results from instructing that the jury may find that a passenger in an automobile was free of contributory negligence from the fact that the passenger neither exercised nor had the right to exercise control over the car in question.

Waldman v Motor Co., 214-1139; 243 NW 555

Invading province of jury. The court must not instruct that a mere passenger in an automobile (under duty, of course, to exercise reasonable and ordinary care) will be guilty of negligence if he fails to do some particular thing, e. g., attempt in some manner to check the speed of the car.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Contributory negligence—instructions — ignoring supported issue. In an action for damages based on the alleged negligence of the defendant in operating an automobile which collided with an automobile in which plaintiff was riding, the court commits reversible error

by wholly ignoring in its instructions the duly joined issue as to the contributory negligence of the plaintiff, the evidence being such as to present a jury question on said issue.

Schelldorf v Cherry, 220-1101; 264 NW 54

Contributory negligence—fatally inconsistent instructions. After properly instructing that plaintiff, before she could recover, must establish her entire freedom from contributory negligence, the court commits a fatal inconsistency by instructing that plaintiff could not be charged with negligence in not choosing some other highway than the one in question on which to travel, unless defendant has proven that plaintiff knew or ought to have known that the highway on which she was traveling was in a dangerous condition.

Kehm v Dilts, 222-826; 270 NW 388

Contributory negligence—"cause of injury" —language approved. A contributory negligence instruction in a motor vehicle collision case stating that if such negligence "became or constituted, * * * a cause of the injury" reviewed and held correct.

Smithson v Mommsen, 224-307; 276 NW 47

Contributory negligence—contributing "directly" to injuries—instruction correct. In a motor vehicle collision case, a contributory negligence instruction stating, "If the injured party by any negligence on his part contributed in any way or in any degree directly to the injuries of which he complains;" follows the form approved by the supreme court and is correct.

Clark v Berry Seed Co., 225-262; 280 NW 505

Contributory negligence—degree or extent barring recovery—model instruction. It is strictly accurate to instruct, in an action for damages for negligently inflicted injuries, that, before plaintiff can recover, he must establish as a fact that he, himself, "was not guilty of any negligence that contributed in any manner or degree directly to his own injury".

Engle v Nelson, 220-771; 263 NW 505; 1 NCCA(NS) 166

Instructions—sufficiency. Instructions reviewed and held properly to present the issue of contributory negligence.

Becvar v Batesole, 218-858; 256 NW 297

Stalled motorist—freedom from negligence —requested instruction. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence.

Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety, when she sees the approaching motorist apparently will crash into her stalled automobile, is not entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Proximate cause. The contributory negligence which will defeat a plaintiff is such negligence as contributes to the injury in any way or in any degree. Error results from instructing that such negligence must contribute proximately to the injury.

Hamilton v Boyd, 218-885; 256 NW 290

Submitting nonproximate cause. The submission to a jury of the issue of negligence on the part of the operator of an automobile in not sounding a warning of his approach to an intersection of streets is reversible error when the undisputed evidence shows that the injured party saw the approaching automobile when it was more than a block from said intersection. Nonproximate causes of an injury should not be submitted.

Lauxman v Tisher, 213-654; 239 NW 675

Proximate cause tho not sole cause. Instruction involving the thought that negligence in the operation of an automobile might be the proximate cause of an injury even tho it was not the sole cause, reviewed, and held not to permit a recovery for negligence which was not the proximate cause of the injury.

Duncan v Rhomberg, 212-389; 236 NW 638

Proximate cause—requiring excessive proof. Instructions reviewed and held not subject to the objections that plaintiff was required to prove (1) not only that the negligence of defendant was the proximate cause of plaintiff's injuries, but (2) that said negligence was the sole cause of said injuries.

Rainey v Riese, 219-164; 257 NW 346

Unnecessary amplification. Instructions which fully and correctly instruct the jury as to negligence and proximate cause need not (especially in the absence of a request) be amplified by the specific submission of defendant's plea that some certain act or failure to act on the part of plaintiff was the proximate cause of the injury, said latter matters having been otherwise adequately presented to the jury.

Lang v Siddall, 218-263; 254 NW 783

Imputed negligence—instructions construed. In an unsuccessful action against a railway company for negligently causing the death of a passenger riding in a truck, an instruction as to what acts of the said driver would constitute negligence cannot be deemed to impute the negligence, if any, of said driver to the passenger when other instructions specifically state, in effect, that the negligence of the driver would be no defense if the negligence of

IX INSTRUCTIONS—continued
(a) IN GENERAL—continued

the defendant was found to be the sole proximate cause of said death.

Reidy v Railway, 220-1386; 258 NW 675

"Independent proximate cause". In a motor vehicle collision case, an instruction stating that defendant claimed the negligence of plaintiff's driver was the "independent, proximate cause of the collision", together with other instructions covering plaintiff's burden of proof held to properly submit to the jury defenses specially pleaded as to "sole proximate cause" being the negligence of plaintiff's driver.

Smithson v Mommsen, 224-307; 276 NW 47

Personal injuries—proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant might be proximately negligent.

Newland v McClelland & Son, 217-568; 250 NW 229

Proximate cause—third person's negligence. Under instructions properly stating that a plaintiff cannot recover unless defendant's negligence was the proximate cause of his injuries, and in the absence of a requested instruction, there is no error in failing to instruct that if the sole proximate cause of the injury was the negligence of a third person, plaintiff could not recover.

Gregory v Suhr, 224-954; 277 NW 721

Third party nondefendant — instructions. Where, under the pleadings and evidence, the jury might find that plaintiff's injuries were caused (1) by defendant's negligence, or (2) solely by the negligence of a third party nondefendant, the court must, on proper request, fully instruct as to the negligence of said third party.

Dennis v Merrill, 218-1259; 257 NW 322

Dual proximate liability—instructions. The court, manifestly, cannot properly instruct in a personal injury action based on negligence, that defendant would not be liable if the injuries were caused by the negligence of a third party, when, under the pleadings and evidence, the jury could find that both defendant and said third party were proximately liable.

Dennis v Merrill, 218-1259; 257 NW 322; 1 NCCA(NS) 175

Negativing defendant's plea. In an action for damages consequent on plaintiff being negligently struck and injured by defendant's automobile [in which action defendant pleads (1) a denial that his car struck plaintiff, and (2) that plaintiff was struck and injured by some other vehicle], the court commits reversible error by instructing that plaintiff cannot recover unless plaintiff establishes by a preponderance of the evidence not only (1) that defendant's car struck and injured plaintiff, but (2) that no other car struck and injured plaintiff.

Griffin v Stuart, 222-815; 270 NW 442

Contributory negligence—consideration of nonimputable negligence. An instruction to the effect that even tho the negligence of a husband with whom the wife was riding could not be imputed to the wife, nevertheless the negligence of the husband could be considered by the jury on the issue whether the negligence of the defendant—the driver of another car—was the proximate cause of plaintiff's injuries, is a correct statement of law, and if plaintiff wishes such instruction modified by a statement as to the law governing the concurrent negligence of different parties, she must request such instruction.

Kuhn v Kjose, 216-36; 248 NW 230

Subsequent elaboration curing former omission. Any error by the court in one instruction in omitting to tell the jury that the mere happening of an accident or the mere failure of defendant to stop his vehicle on a certain occasion would not constitute negligence per se may be effaced by subsequent elaboration on the general subject of negligence.

Comparet v Coal Co., 200-922; 205 NW 779

Negligence per se—prejudicial submission. Prejudicial error results from submitting to the jury whether a motorist was negligent in so making a left-hand turn as to run into the side of another motorist properly operating his car on the road from which the turn was made, because such a turn with such result is negligence per se in the absence of proof of legal excuse.

Rich v Herny, 222-465; 269 NW 489

Instructions—"last clear chance"—erroneous and confusing. An instruction, in effect, that if defendant, after he discovered plaintiff's peril, was negligent in the doing of certain acts which resulted in the striking of plaintiff, then "defendant would still be liable even tho plaintiff was negligent", is prejudicially erroneous; also prejudicially confusing and inconsistent in view of repeated instructions that plaintiff could not recover if he was guilty of contributory negligence.

Steele v Brada, 213-708; 239 NW 538

Pedestrian in voluntary position of appreciable danger. In action for death of pedestrian struck by automobile, instruction that decedent's contributory negligence barred recovery unless last clear chance doctrine could be invoked, was not erroneous on theory that such contributory negligence must be proximate cause of accident in order to defeat re-

covery. Moreover, such instruction was justified under the record showing that decedent voluntarily placed himself in a position of evident danger.

Spooner v Wisecup, 227-768; 288 NW 894

Ordinary care—undue limitation on jury. Reversible error results from instructing the jury that a pedestrian on the highway need not, in the exercise of due and ordinary care, continuously look backward and forward.

(The injured party, on a dark night, had ascended a hill and passed the crest thereof and was, when injured by a car approaching from his rear, walking down the sharply descending slope, either near the middle line of the 18-foot pavement or near the right-hand side thereof. The car which did the injury met and passed another car momentarily before the pedestrian was hit.)

Taylor v Wistey, 218-785; 254 NW 50

Pedestrian at crosswalk—right of way—precautions.

Scott v McKelvey, 228- ; 290 NW 729

Pedestrian—vehicle approaching from rear. An instruction relative to the duty of a pedestrian traveling in the public highway to keep a reasonable lookout for vehicles approaching from the rear as well as from the front need not necessarily be modified on request to the effect that such duty does not require him to turn about "constantly and repeatedly" to observe the possible approach of vehicles from his rear.

Kessel v Hunt, 215-117; 244 NW 714; 34 NCCA 247

Sudden fright—trial theory. The abstract proposition that a pedestrian who steps suddenly in front of a moving vehicle is guilty of negligence per se need not be limited by the effect of sudden fright or surprise on the part of the pedestrian when no such claim is made in the pleadings or evidence.

Ryan v Shirk, 207-1327; 224 NW 824

Moving automobile backward—warning person in perilous position. Instructions covering motorist's right to move his car backward and his duty to give warning of his intention to so move the automobile when people are pushing and trying to extricate it from stalled position on icy street, and whether he knew or ought to have known of one in a position of peril at the rear of the automobile, reviewed, and held to correctly present the issues.

Huston v Lindsay, 224-281; 276 NW 201

Person injured on highway construction work. In laborer's personal injury action arising because of truck backing into him while both were engaged in highway construction work, an instruction, that it is the duty of driver in moving a truck to exercise care and caution of ordinarily prudent person and to bring truck under proper control if he discovers, or in exercise of reasonable care should discover, a person in the path of truck, was neither erroneous as submitting to the jury a previously withdrawn issue as to whether defendant driver has truck under control, nor as permitting jury to speculate on defendant's negligence generally.

Rebmann v Heesch, 227-566; 288 NW 695

Passing children—nonright to assume care. Testimony in an action against a motorist for striking and killing a 10-year-old child on the highway supported by the physical facts, from which the jury could find that the child's position on the shoulder could have been seen by defendant when more than 300 feet away, justifies an instruction on the nonright of a motorist to assume that a child under 14, in a place of apparent safety, will remain there, and on his duty to control his machine so as to avoid hitting her if she does not.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Speed as negligence irrespective of conditions. Instruction reviewed and held not to submit to the jury the question whether speed, in and of itself, was the proximate cause of an accident, irrespective of the attending conditions and circumstances.

Jarvis v Stone, 216-27; 247 NW 393

Requiring excessive proof of alleged negligence. An instruction is erroneous when it requires negligence to be established "in the respects charged in the petition," and the negligence so charged is (1) excessive speed, (2) excessive speed after warning, and (3) excessive speed while traveling on loose gravel.

Codner v Stowe, 201-800; 208 NW 330

Ignoring grounds of negligence. The trial court is within its legal discretion in granting a new trial to plaintiff because the instructions, in fact, ignored a material allegation by the plaintiff as to the speed of defendant's car.

Lewellen v Haynes, 215-132; 244 NW 701

Reference to speed—granting new trial. A reference in an instruction to a motor vehicle speed of 60 miles per hour when the allegation in the petition of such speed was coerced by a ruling of the court, while not in itself sufficient to warrant a reversal, still justifies the trial court in granting a new trial when considered along with other alleged errors.

White v Zell, 224-359; 276 NW 76

Collision with bicycle — negligence — jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35 [§5023.01, C., '39]) and failing to turn to left when passing vehicle (§5022, C., '35 [§5024.03,

IX INSTRUCTIONS—continued
(a) IN GENERAL—continued

C., '39]) reviewed and held to correctly present questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Driving on wrong side—unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pavement when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

Collision at intersection. Instructions relative to the rights and duties of operators of automobiles at an intersection reviewed and held authorized under the pleadings.

Melsha v Dillon, 214-1324; 243 NW 295

Rights at through highway intersection.

Davis v Hoskinson, 228- ; 290 NW 497

Assumption of fact. Instruction relative to a collision between automobiles at a street intersection reviewed, and held not to assume that one of the cars first entered the intersection.

Becvar v Batesole, 218-858; 256 NW 297

Instructions compelling jury to draw certain inference. Where plaintiff and defendant were, under conditions which rendered visibility poor, approaching the same intersection approximately at the same time, the court cannot properly instruct the jury that if plaintiff could see several hundred feet in the direction from which defendant was approaching, then the jury must conclude either (1) that plaintiff did not look for defendant as was his duty, or (2) that plaintiff did see the defendant.

Appleby v Cass, 211-1145; 234 NW 477

Driving on left-hand side—instruction. Instructions which wholly neutralize the effect of driving on the left-hand side of a street are properly rejected when the jury might find that such driving contributed to the injury in question.

Waldman v Motor Co., 214-1139; 243 NW 555

Failure to yield half of traveled way—prima facie negligence only. Failure of the driver of a vehicle on highways outside cities and towns to yield one-half of the traveled way to a vehicle traveling in the opposite direction is only prima facie evidence of negligence. Instruction reviewed and held, when read as a whole, violative of this rule of law.

Bobst v Hoxie Line, 221-823; 267 NW 673

Failure to turn to right as negligence—nonprejudicial error. An instruction to the effect that the failure of the operator of an automobile on a country road to turn to the right on meeting another vehicle constitutes negligence, if erroneous, is error without prejudice when the record reveals beyond question that said operator was guilty of proximate negligence in other respects.

Scott v Hinman, 216-1126; 249 NW 249

Driver on wrong side of highway—collision—presumption. It is erroneous to instruct that where a collision occurs between two vehicles, at a time when one of the vehicles is on the wrong side of the road, the presumption is that the collision was caused by the negligence of the driver who was on the wrong side of the road.

Fry v Smith, 217-1295; 253 NW 147

Occupying right side of highway—jury question. A specification of negligence that defendant did not keep his truck on the right-hand side of the highway when struck from the rear could not be withdrawn and was properly submitted to the jury when there was evidence to sustain the specification. Evidence did not show that collision would have occurred even tho truck had been wholly on right-hand side of the highway.

Gookin v Baker & Son, 224-967; 276 NW 418

Nonprejudicial instructions. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Fatally confusing instruction. The presentation to the jury of an assignment of negligence to the specific effect that the two automobiles in question, moving in opposite directions on the highway and immediately before they collided, were each on the left-hand side of the highway, is so confusing as to constitute reversible error.

Balik v Flacker, 212-1381; 238 NW 467

Passing slower moving vehicle—failure to signal. Instructions relative to the duty of the driver of an automobile, in attempting to pass a slower moving vehicle, to sound his horn, may be justified even tho the driver of the slower moving vehicle had knowledge that the other party was attempting to pass.

Johnson v McVicker, 216-654; 247 NW 488

Nonduty to anticipate negligence. An instruction on the subject of contributory negligence is erroneous when it, in effect, requires the person in question to anticipate negligence on the part of the driver of an approaching vehicle.

Townsend v Armstrong, 220-396; 260 NW 17

Anticipated negligence. Prejudicial error results from instructing, in effect, that a person

who has stopped his car at a proper place in the highway in order to repair it must anticipate and guard himself against the possibility that the operator of some passing car may be negligent by passing the stationary car on the wrong side.

Hanson v Manning, 213-625; 239 NW 793

Harmless error. Instruction on the subject of imputed negligence held nonprejudicial.

Sutton v Moreland, 214-337; 242 NW 75

Violation of statute—excuse—required instruction. When the violation of a particular law of the road is pleaded by plaintiff as a ground for recovery of damages and such violation is treated as in issue (tho the applicability of the statute be quite doubtful), the court commits error in failing to instruct as to the effect of defendant's evidence tending to legally excuse such alleged violation.

Rich v Herny, 222-465; 269 NW 489

Emergency—conduct under impulse of the moment. In a personal injury action arising from an automobile accident, an instruction is correct which states that a person in a position of peril in an emergency is not required imperatively to do that which, after the emergency is ended, it would appear could have been done to avoid the injury.

Band v Reinke, 227-458; 288 NW 629

Inappropriate term as error. The use in an instruction of a wholly inappropriate and confusing term may constitute error. So held in an action for damages growing out of a collision between automobiles, in which action the court instructed that "defendant is liable to plaintiffs for any liability if any, of the driver of said truck".

Christenson v Tel. Co., 222-808; 270 NW 394

Ignoring supported issue. Error results from the failure of the court, in a personal damage action, to submit to the jury a supported issue of negligence as to the absence of sidelights on a truck.

Jordan v Schantz, 220-1251; 264 NW 259

Absence of lights—instructions—sufficiency. An instruction that plaintiff would be guilty of contributory negligence if his automobile was not equipped with two white lights on the front is all-sufficient on that particular subject matter.

Winter v Davis, 217-424; 251 NW 770

Defining terms. Where an accident occurred on a street but outside the vehicular part thereof, it is not important that the court failed to designate the scene of the accident either as a "street" or as a "sidewalk".

Dickeson v Lzicar, 208-275; 225 NW 406

Res ipsa loquitur—ambiguous but not erroneous phrase. In an action against a motorist, for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of each other but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

Joint action against owner and operator—erroneous instruction. In a joint action against the owner and operator of an automobile the evidence, manifestly, may be such as to justify a verdict against the operator and in favor of the owner, and in such cases instructions holding the owner liable in case the jury finds the operator liable are fundamentally erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Declarations inadmissible against master. In a joint action against a master and his servant for damages consequent on the negligent operation of the car by the servant, declarations or statements by the servant made several days after the accident and tending to show the negligence of the servant are, while admissible against the servant, not admissible against the master; and the court must by proper instruction, if requested, limit the testimony accordingly.

Droullard v Rudolph, 207-367; 223 NW 100
Wilkinson v Lbr. Co., 208-933; 226 NW 43
Looney v Parker, 210-85; 230 NW 570
Glass v Hutchinson Co., 214-825; 243 NW 352

Non res gestae statements. When a plaintiff seeks to recover damages from the owner of an automobile because of the negligence of the driver, he must prove such negligence by evidence other and different than the non res gestae statements and declarations of the driver, and where the owner and the driver are co-defendants the court must exercise meticulous care to instruct the jury accordingly.

Cooley v Killingsworth, 209-646; 228 NW 880
Wieneke v Steinke, 211-477; 233 NW 535
Ege v Born, 212-1138; 236 NW 75

Non res gestae statements of drivers. Non res gestae statements of the driver of an automobile tending to show his negligence are not competent against the owner of the vehicle, nor are such statements of the owner competent evidence against the driver, and the court must clearly and definitely so instruct. In addition the court must submit separate forms of verdict if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Verdicts—submission of separate forms. In an action against the driver and owner of a truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error—the court having specifically

IX INSTRUCTIONS—continued
(a) IN GENERAL—continued

and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker & Sons, 218-54; 253 NW 923

Separate forms of verdicts. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted, if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Counterclaim — instruction to disregard. Where plaintiff sued (1) for damages to his car, and (2) on an assignment of the claim of his injured passenger, and defendant counterclaimed for damages to his car, no error occurs in instructing the jury to disregard defendant's claim if a finding is returned for plaintiff, and such finding is so returned.

Albert v Maher Bros., 215-197; 243 NW 561

Operation with consent of owner—scope of employment. In an action against the owner of an automobile on the theory that the car was being operated by the owner's agent and with the owner's consent, the court may very properly instruct that there could not be a recovery unless the driver was, at the time in question, driving within the scope of his employment—such instruction being directly applicable to the supported claim of said owner.

Ege v Born, 212-1138; 236 NW 75

Harmless assumption of fact. The assumption in instructions of the fact that an automobile was being operated with the consent of the owner does not constitute reversible error when the evidence bearing on the element of consent was the one persuasive and unquestioned fact that the owner was riding in the car with the driver thereof at the time of the accident.

Hoover v Haggard, 219-1232; 260 NW 540

Insured claim. The act of plaintiff in persistently keeping before the jury the fact that the defendant carried casualty insurance against the claim sued on constitutes reversible error—an error which is not cured by an instruction to disregard such fact of insurance.

Miller v Kooker, 208-687; 224 NW 46

Evidence of insurance—failure to strike not cured by instructions. Evidence that the owner of an automobile had stated that he did not go out to the scene of the accident after a collision in which the automobile was involved because the car was insured and he would let the insurance company take care of it, improperly injected the question of insurance in an action for damages resulting from the collision. The failure to strike such evidence was error which was not cured by the court's direction to the jury to disregard it.

Floy v Hibbard, 227-154; 289 NW 905

Incompetent testimony incidentally received —withdrawal. The incidental reception in evidence of testimony tending to show that defendant in an action for damages growing out of a collision of vehicles carried indemnity insurance, when the same is withdrawn by the court, will not constitute reversible error.

Stilson v Ellis, 208-1157; 225 NW 346

Double recovery. The submission to the jury of duplicate counts—counts praying recovery on the same elements of damages—and permitting recovery on both such counts is clearly erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Loss and injury—failure to limit. Instructions which direct the jury to allow damages for such loss and injuries as necessarily resulted from the accident complained of are too broad because not limited to the loss and injuries properly set out in the petition, and sustained by the evidence.

Balik v Flacker, 212-1381; 238 NW 467

Instruction—sufficiency. Instructions to the effect that the jury should determine from the evidence the amount due plaintiff for injuries to person and property, and allow him such sum as would fairly compensate him, reviewed and held to reveal no error.

Winter v Davis, 217-424; 251 NW 770

Future pain—instructions — adequacy. An instruction to the effect that a recovery would be limited to "the fair and reasonable compensation for personal injury, pain and suffering, past and future * * * as shown by the evidence", is sufficient on the subject of future pain and suffering in the absence of a request for elaboration.

Duncan v Rhomberg, 212-389; 236 NW 638

Permanent cripple—future pain—correct instruction. In a personal injury action arising from a motor vehicle collision, an allegation that plaintiff has been crippled for life, sustained by some evidence, justifies an instruction that the jury may allow such sum as in their judgment will fairly compensate plaintiff for future pain and for being crippled.

Clark v Berry Seed Co., 225-262; 280 NW 505

Instructions limiting damages. An instruction in a personal injury action limiting recovery to medical, hospital, nursing, and ambulance service, permanent disfigurement, and for pain and suffering, cannot be deemed in

any sense to submit the question of damages for loss of time.

Carlson v Decker, 216-581; 247 NW 296

Headaches—pain and suffering—instruction. In an action to recover for personal injuries sustained in an automobile collision where plaintiff testified that headaches causing much suffering affected him since the accident, and when an expert witness testified that plaintiff's injury might have caused headaches and that the injury might be permanent, an instruction permitting recovery for future pain and suffering from headaches was not erroneous and properly submitted the question to the jury.

Rogers v Jefferson, 226-1047; 285 NW 701

Instruction on future and anticipatory damages. In an action to recover damages for personal injuries resulting from an automobile collision where petition alleged damages for future medical expenses and the evidence showed plaintiff received severe permanent injuries to his back and spine, suffered intense pain, and received two hernias, together with other injuries, an instruction on future and anticipatory expenses was held proper and supported by the evidence.

Kramer v Henely, 227-504; 288 NW 610

Separating personal injury damage claims. Instructions limiting the amount of total recovery which could be allowed the plaintiff, but not advising how much was claimed for pain and suffering and for permanent disability, were erroneous, and, being erroneous, prejudice is presumed unless the record is such as to overcome the presumption.

Remer v Takin Bros., 227-903; 289 NW 477

Damages—ten percent permanent injury to arm. Where a petition alleges ten percent injury to an arm and asks $1,000 damages therefor, it is not error to permit the jury to return a verdict for the full amount when the evidence shows some permanent injury to the arm and the court in another instruction limited the recovery to the damages sustained.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

(b) DEFINING TERMS

Confused use of word "accident". The use in instruction of the word "accident", both (1) in the sense of an occurrence that was inevitable, and (2) in the sense of an occurrence happening because of negligence, is not necessarily confusing.

Keller v Gartin, 220-78; 261 NW 776

Inevitable accident—failure to define. Failure to define the term "inevitable accident" does not result in error when the instruction is correct as far as it goes and when a request for a definition is not made.

Hamilton v Boyd, 218-885; 256 NW 290

"Assured clear distance ahead"—improper definition. Reversible error results from instructing that "assured clear distance ahead" as used in our statute "means the distance ahead within which the driver of an automobile is sure and certain that the highway is not occupied by other vehicles or persons".

Groshens v Lund, 222-49; 268 NW 496

Crosswalks.

Scott v McKelvey, 228- ; 290 NW 729

Contributory negligence—sole cause of injury. An instruction that "where a party is injured and such injury is due to his own negligence he cannot recover," tho incorporated in a paragraph defining contributory negligence, does not have the effect of declaring that the contributory negligence which will bar an injured party from recovering must be a negligence which is the sole cause of the injury.

Ryan v Rendering Works, 215-363; 245 NW 301

Instruction. No particular or fixed phraseology is required in conveying to a jury, in a case founded on negligence, the idea that plaintiff cannot recover if he has, by his own negligence, contributed in any degree to his own injury.

Bauer v Reavell, 219-1212; 260 NW 39

Model instruction. Courts, in instructing as to contributory negligence which will bar recovery, should employ the model instruction approved by the appellate court, viz.: "If the injured party contributed in any way or in any degree directly to the injury complained of there can be no recovery," but it is not erroneous to substitute "cooperated" or an equivalent term for "contributed".

Hoegh v See, 215-733; 246 NW 787

Contributory negligence—degree barring recovery. In an action for damages based on actionable negligence of the defendant, the quantum of contributory negligence on the part of plaintiff which will absolutely bar recovery is any negligence which directly contributes to said injury "in any way or in any degree". Any material departure in the instructions from this statement of the law must be deemed reversible error.

Albert v Maher Bros., 215-197; 243 NW 561
Rogers v Lagomarcino Co., 215-1270; 248 NW 1
Hellberg v Lund, 217-1; 250 NW 192
Becvar v Batesole, 218-858; 256 NW 297
Hamilton v Boyd, 218-885; 256 NW 290
Bauer v Reavell, 219-1212; 260 NW 39
Meggers v Kinley, 221-383; 265 NW 614
Swan v Auto Co., 221-842; 265 NW 143
Clark v Seed Co., 225-262; 280 NW 505

Contributory negligence—adequate definition. An instruction which defines "contributory negligence" as such negligence as "helps" to produce the injury complained of is not

IX INSTRUCTIONS—continued
(b) DEFINING TERMS—continued

erroneous when accompanied by a correct definition of negligence generally.

Swan v Auto Co., 221-842; 265 NW 143

Contributory negligence — negligence must "directly" contribute. Instruction reaffirmed requiring plaintiff's negligence to contribute "directly" to the injuries before it will defeat recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Contributory negligence. Instructions relative to contributory negligence reviewed, and held sufficient.

McDougal v Bormann, 211-950; 234 NW 807

Contributory negligence—definition—fundamental error. An unobjectionable definition of contributory negligence is converted into fundamental error by the addition of the clause "and but for such negligence on the part of the person injured the injury would not have occurred."

Ryan v Perry Works, 215-363; 245 NW 301

"Control" of car—definition. Ordinarily, it is not erroneous for the court to instruct the jury that the driver of an automobile has it under control when he has the ability to guide and direct its course of movement, to fix its speed, and bring it to a stop within a reasonable time.

Duncan v Rhomberg, 212-389; 236 NW 638

Control of car. Failure of the court to define the term "under control" (as employed in the statutory duty of the operator of an automobile to have his car "under control") does not constitute error, in the absence of a request for such defining.

Altfilisch v Wessel, 208-361; 225 NW 862; 29 NCCA 95

Failure to define "prima facie". An instruction characterizing certain acts of omission and commission, if found by the jury, as prima facie evidence of negligence, is not necessarily rendered erroneous because the court failed to define said term "prima facie".

Wolfe v Decker, 221-600; 266 NW 4

Intersection of highway — instructions. Where a north and south highway splits into two curves near an east and west highway, and connects with the latter at two points some 900 feet apart, it is not erroneous for the court to instruct that the intersection embraces the entire distance of 900 feet (1) when the evidence tends to show that the authorized public authorities have treated said distance as the intersection, and (2) when the instruction is manifestly given for the sole purpose of guiding the jury in applying the statutory command (§5031, C., '35) that motorists shall reduce their speed to a reasonable and proper rate when approaching and traversing intersections of public highways.

Enfield v Butler, 221-615; 264 NW 546

Improper definition of "intersection". There was no error nor abuse of discretion by the court in granting a new trial in a motor vehicle damage case on the ground that an incorrect definition of "intersection" was given to the jury, when the correct definition was a matter of statute, even tho both parties to the action during the trial used the wrong interpretation of the term as it was given by the court.

Hupp v Doolittle, 226-814; 285 NW 247

"Intersection" of highways—definition. In a damage action arising from a collision of motor vehicles at a highway intersection, where the question of negligence centered largely around the rights of the parties within the intersection, it was prejudicial error to instruct the jury that "intersection" is the area within the fence lines, if such fence lines were extended across the road, when a statute defines "intersection" as being the area within the lateral boundary lines of highways which join.

Hupp v Doolittle, 226-814; 285 NW 247

Instructions—paraphrasing "legal excuse". The phrase, "explained or justified by the evidence", used as a substitute in instructions for the term "legal excuse", should be avoided as possibly permitting the jury to consider evidence which would not constitute a legal excuse as defined in another instruction, but under the evidence and considered with other instructions held no reversible error.

Edwards v Perley, 223-1119; 274 NW 910

Definition of negligence approved. Instruction defining "negligence" and otherwise correct is not rendered erroneous because it includes the statement that "such care is proportionate to the apparent danger involved; where the apparent danger is great, a greater care is required than where such apparent danger is slight." So held against the contention that degrees of negligence are not recognized in this state.

Wolfe v Decker, 221-600; 266 NW 4

Negligence — correct definition. Instruction reviewed and held to constitute a correct definition of actionable negligence.

Engle v Nelson, 220-771; 263 NW 505

Negligence—erroneous definition. A definition of "negligence" which is so broad as to permit the jury to predicate a finding of negligence on the violation of a statute law of the road when the facts rendering such statute applicable are neither pleaded nor proven is necessarily erroneous and prejudicial.

Gross v Bakery, 209-40; 227 NW 620

Negligence—explanatory instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other, collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions, and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

Obscure definition of "ordinary care". An instruction which, somewhat obscurely, defines ordinary care as such care as is commensurate with the danger to be apprehended from the circumstances surrounding or facing the actor may nevertheless be adequate.

Orr v Hart, 219-408; 258 NW 84

Ordinary care—definition reaffirmed. The standard definition of ordinary care need not be augmented by adding an extra word "ordinarily" to the phrases "would do" or "would not do under the circumstances".

Schalk v Smith, 224-904; 277 NW 303

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Use of highway—care. Instructions reviewed and held correctly to state the degree of care which is incumbent on a person using a highway.

Ryan v Shirk, 207-1327; 224 NW 824

Preponderance of evidence. In defining "preponderance of evidence" as evidence which is "more convincing as to its truth", the court does not, in effect, say that evidence cannot constitute a preponderance unless the jury is satisfied that it is true.

Priest v Hogan, 218-1371; 257 NW 403

Preponderance of evidence erroneously defined. It is error to define "preponderance of the credible evidence" as the testimony which best satisfies the juror's mind "that it is true", because it implies that the jury must be fully convinced of the truth of the testimony which controls the decision on an issue.

Heacock v Baule, 216-311; 249 NW 437; 93 ALR 151; 36 NCCA 25

Res ipsa loquitur. In an action against a motorist for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of each other, but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

"Street" or "sidewalk". Where an accident occurred on a street, but outside the vehicular part thereof, it is not important that the court failed to designate the scene of the accident either as a "street" or as a "sidewalk."

Dickeson v Lzicar, 208-275; 225 NW 406

Yielding half of traveled way—beaten path (?) or entire roadway (?). When the plaintiff's truck turned left at a blind corner, keeping to the right of the beaten path, but not to the right side of the graveled highway, and collided with the defendant's car which was approaching the corner on the right side of the road, it was not improper to instruct the jury that a car must yield half the traveled or graveled part of the road when meeting another car, and that for the plaintiff to recover, it must be found that the truck was hit while on the right side of the road; or, for a recovery to be had by the defendant on a counterclaim, that the plaintiff was negligent in not yielding half the road.

Kiesau v Vangen, 226-824; 285 NW 181

(c) BALANCING INSTRUCTIONS

Fact of collision—negligence. A general allegation that defendant was negligent "in driving his truck against plaintiff's automobile" should not be submitted to the jury unless the jury is properly guarded against finding negligence from the naked fact that defendant's truck came into collision with plaintiff's automobile.

Lang v Siddall, 218-263; 254 NW 783

Unallowable limitation on materiality of evidence. Reversible error results to an unsuccessful plaintiff (in an action pivoted on the issue whether defendant traveling northward yielded half of the traveled way to plaintiff traveling southward) from instructions to the effect that "evidence that defendant just preceding the collision swerved his car to the west is material on the issue whether plaintiff was guilty of contributory negligence, even tho plaintiff had not alleged such swerving as a specific act of negligence on the part of defendant". The vice is not in what the court does say but in what the court does not say, to wit: that said evidence is material on the issue of defendant's negligence.

Keller v Gartin, 220-78; 261 NW 776

Explanatory instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other, collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions, and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

IX INSTRUCTIONS—continued

(c) BALANCING INSTRUCTIONS—concluded

Weight to be given admission. A cautionary instruction pertaining to the weight to be given an alleged oral admission of defendant to plaintiff following a motor vehicle accident should include a counterbalancing statement that if the admission were deliberately made or often repeated, it might be the most satisfactory evidence.

White v Zell, 224-359; 276 NW 76

(d) PARAPHRASING PLEADINGS, STATUTES

Copying pleadings. Literally copying portions of the pleadings into the instructions is unobjectionable if the issues are thereby fairly and concisely stated.

Hoegh v See, 215-733; 246 NW 787

Copying pleadings. The appellate court again, quite pointedly, expresses its surprise that occasionally some trial courts, in attempting to state the issues to the jury, do not recognize the impropriety of copying verbose pleadings into the instructions.

But error and the resulting confusion in copying pleadings will be deemed cured by the later action of the court in the instructions, in clearly and definitely confining the jury to the proper issues.

Young v Jacobsen Bros., 219-483; 258 NW 104

Copying pleadings — when nonprejudicial. Practice of stating case in language of pleadings, except where pleadings concisely and clearly state the substance of the controversy, condemned by court.

Jakeway v Allen, 227-1182; 290 NW 507

Fact of collision—negligence. A general allegation that defendant was negligent "in driving his truck against plaintiff's automobile" should not be submitted to the jury unless the jury is properly guarded against finding negligence from the naked fact that defendant's truck came into collision with plaintiff's automobile.

Lang v Siddall, 218-263; 254 NW 783

Repealed statute — requested instruction properly refused. In automobile guest's personal injury action resulting in jury verdict for defendant, plaintiff's request for new trial because of refusal to give an instruction to the effect that it was the duty of a driver of an overtaken automobile, upon signal, to drive to the "right center of the traveled way" and remain there until overtaking automobile shall have "safely passed" was properly refused, since such statute was repealed at time plaintiff was injured, and new statute only required such driver to "give way to the right" until overtaking vehicle had "completely passed".

Jones v Krambeck, 228- ; 290 NW 56

Following statute enacted after accident. Where an automobile collides at night with a truck displaying no lights, it is error to instruct in the language of §5029, C., '35 [§§5023.01, 5023.02, C., '39], that plaintiff had a right to assume that others using the highway would obey the law, when such collision causing the injuries complained of occurred before this right of assumption was added by the legislature, and the statute had previously been construed that a driver had no such right.

Gookin v Baker & Son, 224-967; 276 NW 418

Others' compliance with law assumed—when presumption fails. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and he then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

Undue paraphrasing of pleadings. The paraphrasing by the court in the instructions of pleaded negligence must not go to the extent of wholly omitting a material assignment of negligence. So held where the omitted assignment charged "reckless driving on a wet and slippery road".

Rainey v Riese, 219-164; 257 NW 346

Inadequate submission of grounds of negligence. Prejudicial error results from failure to submit to the jury all well-pleaded, separate specifications of negligence which have been established as jury questions and as the alleged compound negligence attending a given transaction, it appearing that the plaintiff has been defeated on an inadequate submission.

Hanson v Manning, 213-625; 239 NW 793

Negligence — justifiable paraphrase of grounds. Both of two grounds of negligence are properly submitted to the jury (1) when the pleadings fairly justify such action, (2) when the court so paraphrased the pleadings, and (3) when the cause was tried on the theory that both grounds were involved.

Buchanan v Cream. Co., 215-415; 246 NW 41

Dragnet instructions under dragnet allegations. A dragnet allegation that defendant drove his automobile in a "careless, negligent and reckless manner without due regard of the safety of others in excess of 25 miles an hour" and "not under proper control", does not justify or permit dragnet instructions which largely cover the statutory law respecting the operation of automobiles, and which thereby places before the jury the duty to determine whether said statutes or some of them have been violated.

Holub v Fitzgerald, 214-857; 243 NW 575

Contributory negligence—error in quoting statute only. In submitting specifications of alleged contributory negligence, the court commits error in simply quoting the statute relating to these grounds without defining just what acts of plaintiff, under the evidence, would constitute contributory negligence, and without applying the law to the facts.

Jakeway v Allen, 226-13; 282 NW 374

Law of road—justifiable assumption. The operators of automobiles have the right to assume, when they meet on the highway, that the other will yield one-half of the traveled way by turning to the right; and it is erroneous to refuse a request for such instruction.

Muirhead v Challis, 213-1108; 240 NW 912

Right-side driving—peremptory instruction. Instructions that a party is in duty bound to drive on the right-hand side of a highway, or that he must so drive as to be able to stop within the assured clear distance ahead, without any qualification relative to the driver's right to show legal excuse for driving otherwise, are not erroneous when the driver offers no excuse.

Winter v Davis, 217-424; 251 NW 770

Yielding half of highway—abstract instruction as reversible error. An instruction, tho in the language of the statute, e. g., that "motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right", may constitute reversible error when unaccompanied by any reference to a sudden emergency which is presented as an excuse for a car actually being on the wrong side of the road at the time of a collision.

Christenson v Tel. Co., 222-808; 270 NW 394

Violation of statute—excuse—required instruction. When the violation of a particular law of the road is pleaded by plaintiff as a ground for recovery of damages and such violation is treated as in issue (tho the applicability of the statute be quite doubtful), the court commits error in failing to instruct as to the effect of defendant's evidence tending to legally excuse such alleged violation.

Rich v Herny, 222-465; 269 NW 489

Negligence in re yielding half of highway—interpretation by court of allegation. An allegation, that "defendant negligently drove his car in a northerly direction and allowed it to travel to the west of the center of the highway and encroached upon the line of travel of the plaintiff" (who was traveling in a southerly direction), is properly interpreted by the court as simply charging that defendant failed to yield one-half of the traveled way to plaintiff.

Keller v Gartin, 220-78; 261 NW 776

Failure to yield half of way—equivalent allegation. Plaintiff's allegation that defendant, on meeting plaintiff's car on the highway, negligently usurped plaintiff's side of the highway is, in effect, an allegation that defendant failed, on meeting plaintiff, to yield one-half of the traveled way by turning to the right, and, under supporting evidence justifies an instruction accordingly.

Foster v Flaugh, 223-40; 271 NW 503

Driving on wrong side—necessary instructions. In submitting to the jury the alleged negligence of driving to the left of the center of a traveled way, or driving upon the wrong or left side of the highway, the court must specifically define to the jury what acts would constitute negligence under said allegations.

Muirhead v Challis, 213-1108; 240 NW 912

Driving on wrong side—quoting statute insufficient. In submitting to the jury the alleged negligence of driving to the left of the center of the traveled way, or driving upon the wrong side of the highway, the court must specifically define what acts would constitute negligence under such allegations, and this may not be done by simply quoting the statute

Jakeway v Allen, 226-13; 282 NW 374

Paraphrasing allegation of negligence. An allegation that defendant drove his vehicle past a stationary vehicle at an excessive and dangerous rate of speed renders proper, on supporting proof, an instruction as to the duty of the defendant to reduce his speed to a reasonable rate when approaching and passing the stationary vehicle.

Jarvis v Stone, 216-27; 247 NW 393

Collision with bicycle—failure to turn to left when passing. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35) and failing to turn to left when passing vehicle (§5022, C., '35) reviewed and held to present correctly questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Instructions—granting jury undue license. The court is, to say the least, perilously close to committing reversible error when it instructs the jury, even in the literal words of the statute that it should determine whether an automobile was driven "at a careful and prudent speed * * *, having due regard to the traffic, the surface and width of the highway, and of any other conditions then existing". The vice of the instruction is its failure affirm-

IX INSTRUCTIONS—continued
(d) PARAPHRASING PLEADINGS, STATUTES—continued

atively to limit the jury to a consideration of conditions as shown by the evidence.

Groshens v Lund, 222-49; 268 NW 496

Left turn—collision with overtaking and passing vehicle. In a personal injury action arising out of an automobile-truck collision occurring when the automobile in which plaintiff was riding with husband-driver was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, and when the automobile driver, attempting to avoid an accident by speeding ahead of truck, collided therewith, held, that statute relating to speed, which requires reasonable speed with due regard to existing conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Paraphrasing allegation of control. It is quite proper for the court to paraphrase an allegation charging negligence in that defendant "lost control of his car", and to submit the charge in the paraphrased form.

Danner v Cooper, 215-1354; 246 NW 223

Negligence under control and speed ordinance. It was not error to submit to the jury the question of negligence based on the violation of a city ordinance with reference to control and speed of a motor vehicle when the ordinance merely embodied the provisions of a statute.

Womochil v Peters, 226-924; 285 NW 151

Undue burden. No undue burden is imposed on a defending street railway company by requiring it to keep its car "under proper control and to use ordinary care", to operate its car "in a careful manner and not at a dangerous rate of speed", and to give notice of its approach "by ringing the gong or bell or otherwise", when the pleaded assignment of negligence embraces (1) excessive speed, (2) want of proper control of the car, and (3) failure to give warning of the approach of the car.

Johnson v Railway, 201-1044; 207 NW 984

Approaching intersection — reducing speed. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Requiring excessive proof of speed. An instruction is erroneous when it requires negligence to be established "in the respects charged in the petition", and the negligence so charged is (1) excessive speed, (2) excessive speed after warning, and (3) excessive speed while traveling on loose gravel.

Codner v Stowe, 201-800; 208 NW 330

Departure from pleaded theory. A plaintiff who predicates negligence in the operation of an automobile solely on the fact that defendant failed to give a warning signal after discovering plaintiff's position of danger, may not complain that the court failed to instruct on the statutory duty to give a warning signal "on approaching tops of hills and intersecting highways".

Ryan v Shirk, 207-1327; 224 NW 824

Assured clear distance—erroneous instructions. Instructions relative to the statutory duties of the operator of an automobile, (1) to have the vehicle under control, and (2) to so drive as to be able to stop within the assured clear distance ahead, reviewed and held prejudicially misleading and erroneous.

Swan v Auto Co., 221-842; 265 NW 143; 1 NCCA(NS) 58

Assured clear distance ahead—proper paraphrase. The statutory command so to drive as to be able to stop "within the assured clear distance ahead" is properly paraphrased in instructions as ability to stop "within the distance that discernible objects may be seen ahead".

Engle v Nelson, 220-771; 263 NW 505; 1 NCCA(NS) 63, 80

Assured clear distance ahead. Altho the driver of a truck which was following another truck on an icy street on which two cars were parked, could see past the truck and the cars and could have stopped within the distance he could see, when he ran into the truck ahead after it had skidded and turned around, there was a jury question as to whether he had been complying with the assured clear distance ahead rule, and it was proper to give an instruction imposing on him the duty to refrain from driving at a speed greater than would permit him to stop within the assured clear distance ahead.

Remer v Takin Bros., 227-903; 289 NW 477

Assured clear distance.

Janes v Roach, 228- ; 290 NW 87

Failure of lights — necessary instructions. The operation of an automobile during the nighttime without the required number of lights is not necessarily negligent; and in sub-

mitting such issue the court must (especially when requested) clearly state to the jury the circumstances under which the operator would under the statute be negligent and the circumstances under which he would not under the statute be negligent.

Muirhead v Challis, 213-1108; 240 NW 912

Paraphrasing allegations of injuries. The court, in stating the issues to the jury, may very properly paraphrase an allegation as to the injuries which plaintiff claims to have suffered.

McCoy v Cole, 216-1320; 249 NW 213

(e) BURDEN OF PROOF

Statutory noncompliance without legal excuse. An instruction stating that if a defendant motorist failed to comply with the requirements of a statute "without legal excuse", then the verdict should be for the plaintiff, does not shift the plaintiff's burden of proof on the defendant.

Schalk v Smith, 224-904; 277 NW 303

Excuse—improper burden of proof. Reversible error results from an instruction that defendant's failure, on meeting plaintiff, to yield half of the traveled way would be prima facie evidence of negligence unless defendant has established by a preponderance of the evidence his excuse for not so yielding, when defendant did not plead said excuse as an affirmative defense, but, under a general denial, presented it in his evidence.

Rich v Herny, 222-465; 269 NW 489

Emergency—burden of proof. The fact that the evidence in an action for damages reveals a claim by defendant that the accident happened under the circumstances of an unexpected emergency furnishes no justification for an instruction that defendant has the burden to establish the existence of such emergency.

McKeever v Batcheler, 219-93; 257 NW 567

Person creating sudden emergency—negligence not excused. Defendant's contention that he acted as he did because faced with a sudden emergency will not place the burden on the plaintiff to prove there was no such emergency when, if it did exist, it was created by the defendant himself, and an instruction placing on plaintiff the burden of proving nonexistence of the emergency is erroneous.

Bletzer v Wilson, 224-884; 276 NW 836

Driver on wrong side of highway—presumption. It is erroneous to instruct that where a collision occurs between two vehicles at a time when one of the vehicles is on the wrong side of the road, the presumption is that the collision was caused by the negligence of the driver who was on the wrong side of the road.

Fry v Smith, 217-1295; 253 NW 147

Negligence per se. Operating an automobile upon the public highway at a speed prohibited by law constitutes negligence per se, and error results from instructing that such operation creates a presumption of negligence.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207
Holub v Fitzgerald, 214-857; 243 NW 575
Waldman v Motor Co., 214-1139; 243 NW 555
Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50
Albert v Maher Bros., 215-197; 243 NW 561
Danner v Cooper, 215-1354; 246 NW 223
Grover v Neibauer, 216-631; 247 NW 298

No-eyewitness rule — inapplicability under direct evidence. Where a motorist and other eyewitnesses testify as to deceased's conduct just prior to his driving into the side of a moving train, it is error to instruct on the presumption that defendant's natural instinct of self-preservation would prompt him not to run into a moving train, when direct evidence as to his conduct is obtainable.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Negligence directly contributing to one's injury. Instructions are correct which, as a whole, direct the jury that plaintiff must show that he did not, by any negligence on his part, directly contribute in any degree to his injury, even tho one of the instructions does not carry the limiting clause "in any degree."

O'Hara v Chaplin, 211-404; 233 NW 516

Contributory negligence. It is strictly accurate to instruct, in an action for damages for negligently inflicted injuries, that, before plaintiff can recover, he must establish as a fact that he, himself, "was not guilty of any negligence that contributed in any manner or degree directly to his own injury".

Engle v Nelson, 220-771; 263 NW 505; 1 NCCA(NS) 166

Requiring defendant to prove allegations of co-defendant. In damage action, by one riding in an automobile, against a truck driver and his employer where defense was conducted jointly and where, in respect to negligence, the question was whether negligence of the automobile driver or the negligence of the truck driver was the sole proximate cause of the accident, it was not prejudicial error to instruct jury that burden was upon both defendants to prove negligence of automobile driver, affirmatively alleged by the employer alone.

Usher v Stafford, 227-443; 288 NW 432

Third party negligence as defense. A defendant who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant establishes that such negligence was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

IX INSTRUCTIONS—continued
(e) BURDEN OF PROOF—concluded

Negativing defendant's plea. In an action for damages consequent on plaintiff being negligently struck and injured by defendant's automobile [in which action defendant pleads (1) a denial that his car struck plaintiff, and (2) that plaintiff was struck and injured by some other vehicle], the court commits reversible error by instructing that the plaintiff cannot recover unless plaintiff establishes by a preponderance of the evidence not only (1) that defendant's car struck and injured plaintiff, but (2) that no other car struck and injured plaintiff.

Griffin v Stuart, 222-815; 270 NW 442

(f) UNSUPPORTED ISSUES

Plea and proof as basis. Instructions without plea or proof as a basis thereof are erroneous.

Dickeson v Lzicar, 208-275; 225 NW 406
Townsend v Armstrong, 220-396; 260 NW 17
Engle v Nelson, 220-771; 263 NW 505
Enfield v Butler, 221-615; 264 NW 546

Unsupported charge of negligence. Unsupported charges of negligence should not be submitted to the jury.

Wilkinson v Lumber Co., 203-476; 212 NW 682

Instructions regarding open car door—proper evidence necessary. Submission to jury of a ground of negligence not supported by the evidence is erroneous. So held where trial court submitted specification of negligence that left rear door of defendant's car was open at time of collision with approaching motorcycle, whereas only testimony on this question came from witnesses who were not present until after accident occurred.

Jakeway v Allen, 227-1182; 290 NW 507

Unsupported issues. Presumptively, prejudicial error results from submitting unsupported issues to the jury; but record reviewed and held to support the submission of all assignments of negligence in an automobile accident case.

Sergeant v Challis, 213-57; 238 NW 442

Unsupported issue of general negligence. Instruction injecting unpleaded and unproved specification of general negligence is reversible error.

Keller v Dodds, 224-935; 277 NW 467

Conformity to general allegation—nonerror. An assignment of error that a general allegation of negligence specifying "In not operating and driving said truck in a careful and prudent manner on a public highway" should not have been submitted to the jury, because such phraseology implied a moving vehicle, is without merit when there is substantial evidentiary conflict as to whether the truck was moving or stopped.

Gookin v Baker & Son, 224-967; 276 NW 418

Assuming other motorist will obey law—inapplicable instructions refused. Requested instructions that a motorist had a right to assume that taxi driver would obey the law as to speed and lookout, altho correct as abstract propositions of law, are properly refused when not supported by the evidence.

Reed v Pape, 226-170; 284 NW 106

Others' compliance with law assumed—when presumption fails. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

Lookout—negligence—proximate cause. Unsupported issues are very properly and necessarily excluded from the jury. So held as to the issues (1) whether the operator of an automobile failed to maintain a proper lookout, (2) whether he was negligent in stepping out of the car and upon the running board preparatory to cleaning the sleet from the windshield, and (3) whether the snowy and icy condition of the pavement was the proximate cause of an accident.

Winter v Davis, 217-424; 251 NW 770; 39 NCCA 308

Passenger's contributory negligence—imputing from driver. In a damage action where a truck, traversing the crest of a hill on a snow-drifted highway, sideswipes a passenger automobile, the question of contributory negligence of a plaintiff motorist riding in the back seat should not be submitted to the jury in the absence of any claim that plaintiff's driver's negligence, if any, was imputable to the plaintiff or was the sole proximate cause of the accident.

Schalk v Smith, 224-904; 277 NW 303

Absence of rear reflectors—nonproximate cause. A "sideswipe" collision between two head-on approaching automobiles could not proximately result from the absence of red reflectors on the rear of the body, and no instruction involving this negligence should be given.

Keller v Dodds, 224-935; 277 NW 467

Tire blowout as sole and only cause of injury. In a personal injury action against an automobile owner, where plaintiff complained of instruction denying a recovery if the blowing out of the tire was the sole and only cause of

the damage, for the alleged reason that the instruction was not warranted by evidence showing that the car, after swerving to the left, veered back and forth, eventually going into the ditch on right side of the road, as this evidence refuted the driver's testimony that she was excited and did nothing to gain control of the car, held, the question of driver's negligence was before the jury, and the instruction was proper.

Band v Reinke, 227-458; 288 NW 629

Nonpleaded negligence. Instructions that the jury should not consider the failure to ring a bell on a streetcar as a ground of negligence are properly refused (1) when plaintiff pleads no such ground of negligence, (2) when no such ground was submitted to the jury, and (3) when the testimony relative to such failure was received without objection.

Watson v Railway, 217-1194; 251 NW 31

Undue care—instructions harmless. An instruction that a motorman on a streetcar must keep a "constant" lookout for drivers of vehicles on the street is not subject to the exception that it requires an undue degree of care, when the sole issue on trial is whether the motorman, being fully aware of the dangerous position of the vehicle in question, could have avoided the injury by ordinary care.

Lynch v Railway, 215-1119; 245 NW 219

Unsupported negligence. An instruction authorizing a finding of negligence on the part of a railroad company if an employee thereof discovered the danger of an approaching vehicle and did not in the exercise of ordinary care report such danger to the engineer is wholly inapplicable to a record which clearly reveals the fact that when the employee aforesaid discovered the danger no ordinary care could have prevented the accident.

Gilliam v Railway, 206-1291; 222 NW 12

Unavoidable accident. Reversible error results from submitting the issue whether the engineer of a railway train was negligent in not maintaining a proper lookout for automobiles approaching a public crossing, when the evidence shows to the contrary and that the approaching automobile was discovered at the earliest reasonable opportunity, which was too late to prevent the accident.

Simmons v Railway, 217-1277; 252 NW 516

Supplanting issue of negligence with inevitable accident. When the record testimony shows that a collision between automobiles and the resulting damage was caused (1) by the negligence of the plaintiff, or (2) by the negligence of the defendant, or (3) by the negligence of both parties, the court must not in its instructions depart from the issues of negligence and inject into the instructions the theory of inevitable accident.

Christenson v Tel. Co., 222-808; 270 NW 394

"Inevitable" accident—absence of evidence. An instruction on the subject of "inevitable" accident is wholly improper when there is no evidence whatever supporting such a theory.

Orr v Hart, 219-408; 258 NW 84

Confusing and unsupported instructions in re "inevitable accident". Instructions with reference to an "inevitable" accident and defendant's nonliability therefor are wholly out of place when there is no applicable evidence in the record.

Keller v Gartin, 220-78; 261 NW 776

Last clear chance—erroneous submission. The submission to the jury of the issue of last clear chance is improper on undisputed testimony that, while an automobile was moving along a traffic-congested street at a speed of from five to ten miles an hour, a pedestrian negligently placed himself in a position of danger in front of said car, but that the operator of said car did not discover said position of danger until his car was only seven feet from said pedestrian, and that thereupon said operator applied or attempted to apply his brakes but not in time to avoid injuring said pedestrian.

Spaulding v Miller, 220-1107; 264 NW 8

Excessive speed—view obstructed. The submission of the issue of speed of a vehicle, in excess of that fixed by statute when the view is obstructed, is necessarily erroneous when there is no evidence that the view was obstructed.

Stoner v Hutzell, 212-1061; 237 NW 487

Unpleaded and unsupported qualification. The abstract proposition that a pedestrian who steps suddenly in front of a moving vehicle is guilty of negligence per se need not be limited by the effect of sudden fright or surprise on the part of the pedestrian when no such claim is made in the pleadings or evidence.

Ryan v Shirk, 207-1327; 224 NW 824

Failure to signal. Whether the operator of an automobile failed to give proper signal on approaching a crossing should not be submitted to the jury when admittedly the complaining pedestrian had full and explicit knowledge of the immediate presence and approach of said car.

Wilkinson v Lbr. Co., 203-476; 212 NW 682; 31 NCCA 345

Failure to signal "stop". The submission to the jury of the issue whether the driver of a truck failed to give a signal of his intention to stop cannot be justified on the naked statement of a witness who was riding with the driver that he did not "see or hear" the driver give any such signal.

Isaacs v Bruce, 218-759; 254 NW 57

Negligence—absence of evidence re accident. The issue of the alleged negligence of a truck

IX INSTRUCTIONS—continued
(f) UNSUPPORTED ISSUES—continued

driver in running over and killing a person cannot be properly submitted to the jury on evidence which fails to reveal the facts and circumstances immediately attending the accident itself—which leaves to mere conjecture the manner in which the fatal accident occurred. So held as to a fatal injury to a child.

Westenburg v Johnson, 221-134; 264 NW 18

Unsupported assumption of fact. A requested instruction which erroneously assumes that there is a marked place on a street pavement for the crossing by pedestrians is properly refused.

Minks v Stenberg, 217-119; 250 NW 883

Turning to left of overtaken vehicle. The court manifestly commits no error in failing to instruct that a vehicle approaching another vehicle from the rear should pass to the left of the overtaken vehicle, when such was not the theory upon which the trial was had.

Olson v Shafer, 207-1001; 221 NW 949

Law of road—excuse for violation. Failure to instruct that defendant may excuse his apparent violation of a law of the road is proper when such instruction, if given, would have no support in the evidence.

Jarvis v Stone, 216-27; 247 NW 393

Legal excuse. Instruction submitting "legal excuse" for violation of the assured clear distance statute is reversible error when neither party raises nor gives evidence upon this issue.

Keller v Dodds, 224-935; 277 NW 437

Excusing violation of statute—absence of evidence. While a motorist may plead and establish any recognized legal excuse for having violated a statutory standard of care for the operation of an automobile, yet he is manifestly not entitled to any instruction to the jury on the subject of "excuse" when he wholly fails to establish any excusatory fact.

Lukin v Marvel, 219-773; 259 NW 782

Emergency as legal excuse—evidentiary support. Question of emergency as being legal excuse should not be submitted to the jury without competent evidence to support it. Held, instruction amply supported in instant case.

Edwards v Perley, 223-1119; 274 NW 910

Sudden emergency—requested instruction. In the absence of a request therefor, defendant may not complain that the jury was not instructed on the question of sudden emergency, especially where, if it did exist, it was of the defendant's own making.

Schalk v Smith, 224-904; 277 NW 303

Defendant driving on wrong side—no sudden emergency instruction for defendant. In an action for injuries sustained in a collision between a motorcycle driven east by plaintiff on his right, the south, side of the road and an approaching automobile operated by the defendant allegedly on the left, or south, side of road, there was no occasion for court giving instruction to effect that defendant was faced with an emergency, when defendant maintained that he was at all times on his own right side of the road, because if he was on the left, or south, side of highway, the emergency was of his own making.

Jakeway v Allen, 226-13; 282 NW 374

Insufficient headlights—erroneous submission of issue. The submission to the jury of the issue whether an automobile was being operated with lights which were insufficient to reveal a person or object 75 feet ahead of the lights, without any evidence that the lights did not meet the statutory requirements, constitutes reversible error.

Grover v Neibauer, 216-631; 247 NW 298; 36 NCCA 133

Alleged absence of lights. Testimony by a plaintiff to the effect that, as he entered an intersection, he looked along the intersecting highway to his right (which was the proper direction), and saw no approaching automobile or automobile lights, may be sufficient to justify the court in submitting to the jury the question whether the defendant was operating his car without lights.

Appleby v Cass, 211-1145; 234 NW 477

Reducing speed at intersection.

Davis v Hoskinson, 228- ; 290 NW 497

Assured clear distance instructions. Principle reaffirmed that instructions on a theory not supported by the evidence are erroneous. So held as to instructions relative to the duty of the driver of a vehicle so to drive as to be able to stop within the assured clear distance ahead.

Dougherty v McFee, 221-391; 265 NW 176

Assured clear distance—oncoming vehicles. Since as to oncoming vehicles, assured clear distance statute applies only to motorist not traveling on his right-hand side of the road, in an action involving a collision between oncoming vehicles on a foggy night when vehicle in which plaintiff was riding was traveling on the right-hand side of the road, a requested instruction applying the assured clear distance statute to the plaintiff was properly refused.

Gregory v Suhr, 224-954; 277 NW 721

Circumstantial evidence instruction. In a death claim action for negligence arising from an automobile collision occurring in a suburban district of a city where the negligence alleged was in failing to travel on the right-hand side of the street and where along with the physical facts there was direct evidence by the driver of the car wherein decedent was riding, as to decedent's travel on the right-hand side of the street, it was error to give an instruction, applicable only to cases based entirely on circumstantial evidence, when such instruc-

tion prevented the jury from properly considering the direct evidence as to where the accident occurred.

Rusch v Hoffman, 223-895; 274 NW 96

Half of traveled way. Instruction dealing with contributory negligence and presenting to the jury a situation involving plaintiff's duty to yield one-half of traveled roadway and to turn to the right unless impossible to do so is reversibly erroneous when neither allegations nor evidence raise this question.

Keller v Dodds, 224-935; 277 NW 467

Yielding half of traveled way. Instructions which submit to the jury the questions whether a defendant has shown legal excuses (1) for exceeding a statutory speed limit, or (2) for not having yielded one-half of the traveled way are erroneous when there is no evidence supporting an affirmative finding on either proposition.

Deweese v Transit Lines, 218-1327; 256 NW 428

Intoxication. The inclusion, in the court's recital of the issues, of the defendant's wholly unsupported allegation that the deceased was intoxicated at the time of the collision in question, without any withdrawal of said issue, justifies the court in granting plaintiff, against whom verdict was rendered, a new trial.

Fort v Ferguson, 218-756; 255 NW 501

Failure to limit. Instructions which direct the jury to allow damages for such loss and injuries as necessarily resulted from the accident complained of are too broad because not limited to the loss and injuries properly set out in the petition and sustained by the evidence.

Balik v Flacker, 212-1381; 238 NW 467

Failure to limit damages—fatal error. An instruction which fails to limit the jury in its return of damages (1) to the amount claimed for each item of damages, and (2) to such amount only as shown by the evidence, is prejudicially erroneous.

Andersen v Christensen, 222-177; 268 NW 527

Permanent injuries. Instructions relative to damages for permanent injuries are improper where there is no testimony tending to show permanent injuries.

Wilkinson v Lbr. Co., 203-476; 212 NW 682

Unsupported issue of permanent injuries. In an action for physical injuries sustained by the plaintiff when he was struck by the defendant's automobile, it was reversible error to submit to the jury the question of permanent injuries as a measure of damages when there was no evidence of permanent injuries to support such submission.

Street v Stewart, 226-960; 285 NW 204

Permanent injury. Instructions reviewed, and held not subject to the vice of submitting an unsupported issue of permanent injury.

Groshens v Lund, 222-49; 268 NW 496

Earning capacity of child. Elements of damage not sustained by evidence should not be submitted, which applies to the earning capacity of a 10-year-old school girl in the absence of supporting evidence, but in the instant case the error was harmless, as the jury's possibility of considering such element was very remote.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Unduly comprehensive request. Instructions which are so comprehensive as to authorize and direct a verdict in favor of all defendants are properly rejected when one of the defendants would be liable in any event.

Waldman v Motor Co., 214-1139; 243 NW 555

Failure to except. Failure to except to an instruction which submits an unsupported issue is fatal to the right of review on appeal.

Lange v Bedell, 203-1194; 212 NW 354

(g) CONSTRUCTION AS A WHOLE

Principle stated. Principle reaffirmed that instructions must be construed as a whole.

Starry v Hanold, 202-1180; 211 NW 696
Raines v Wilson, 213-1251; 239 NW 36
Tallmon v Larson, 226-564; 284 NW 367

Cautionary instruction not necessary. A cautionary instruction to the jury that court did not attempt to embody all applicable law in any one instruction, but in considering any one instruction jury should consider each in light of and in harmony with all other given instructions and apply them as a whole to the evidence would be proper; however, a failure to do so would not be reversible error.

Churchill v Briggs, 225-1187; 282 NW 280

Presentation of conflicting theories—nonassumption of fact issue. Instructions presenting the conflicting theories of the plaintiff and defendant as to a collision between motor vehicles, reviewed, and held, when viewed as a whole, not to assume that the collision occurred in the center of an intersection, said point of collision being in issue.

Ballain v Brazelton, 221-806; 266 NW 522

Approaching or entering intersections—right to proceed. In an action for injuries sustained by driver of a motor vehicle in collision with an automobile approaching an intersection from the left, an instruction which in part states, "If a traveler comes to an intersection and finds no one approaching from the right upon the other highway within such distance and approaching at such a rate of speed as to reasonably indicate danger of a collision, he may proceed as a matter of right to use the intersection, unless from his observation he is

IX INSTRUCTIONS—continued
(g) CONSTRUCTION AS A WHOLE—continued

apprised to the contrary", when considered with remainder of instruction, was not prejudicial. Instructions must be taken together, and especially must all parts of one instruction be considered as a whole.

Rogers v Jefferson, 226-1047; 285 NW 701

Farfetched construction on use of words. An instruction that each of two operators of automobiles had the right "to assume" that the other would comply with the laws of the road (as correctly stated by the court) is not subject to the farfetched and hypercritical construction that thereby an operator was authorized to assume such compliance when he knew there had been a violation.

Shutes v Weeks, 220-616; 262 NW 518

Sole cause of injury. An instruction that "where a party is injured and such injury is due to his own negligence he cannot recover", tho incorporated in a paragraph defining contributory negligence, does not have the effect of declaring that the contributory negligence which will bar an injured party from recovering must be a negligence which is the sole cause of the injury.

Ryan v Rendering Wks., 215-363; 245 NW 301

Contributory negligence—lack of evidence—effect. An instruction which properly directs the jury, in determining the issue of contributory negligence of an injured party, to take into consideration certain enumerated matters as shown by the evidence, is not necessarily erroneous because it makes no reference to the effect of a lack of evidence on the subject.

Engle v Nelson, 220-771; 263 NW 505

Contributory negligence — fatally inconsistent instructions. After properly instructing that plaintiff, before she could recover, must establish her entire freedom from contributory negligence, the court commits a fatal inconsistency by instructing that plaintiff could not be charged with negligence in not choosing some other highway than the one in question on which to travel, unless defendant has proven that plaintiff knew or ought to have known that the highway on which she was traveling was in a dangerous condition.

Kehm v Dilts, 222-826; 270 NW 388

Contributory negligence — incurable error. An instruction which summarizes all the elements that plaintiff must prove to make a case, and directs the jury that if these elements and conditions existed, the plaintiff is entitled to recover, is fatally defective when no reference whatever is made to plaintiff's freedom from contributory negligence. And, in such case, the error is not cured by the fact that in other instructions the jury is instructed that plaintiff must be free from contributory negligence.

Bobst v Hoxie Line, 221-823; 267 NW 673

Traveling highway in fog—keeping lookout—instructions. Where a defendant alleges failure to keep a lookout and contributory negligence on account of plaintiff's travel on the highway in a fog, instructions correctly but generally charging as to negligence and contributory negligence and requiring consideration of all conditions and circumstances are, in the absence of requested instructions thereon, sufficient to require the jury to consider the circumstance of the fog.

Gregory v Suhr, 224-954; 277 NW 721

Negligence—instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions, and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

Lookout—instructions. Instructions involving the negligence of the defendant in failing to drive around another truck and in failing to stop when he could see, or should have seen, that he was about to collide with the other truck, properly presented the question of keeping a proper lookout and were justified by evidence that the defendant ran into another truck which had skidded and turned around on the icy pavement at a time when the defendant's truck was 150 or 200 feet away.

Remer v Takin Bros., 227-903; 289 NW 477

Unallowable limitation on materiality of evidence. Reversible error results to an unsuccessful plaintiff (in an action pivoted on the issue whether defendant traveling northward yielded half of the traveled way to plaintiff traveling southward) from instructions to the effect that "evidence that defendant just preceding the collision swerved his car to the west is material on the issue whether plaintiff was guilty of contributory negligence, even tho plaintiff had not alleged such swerving as a specific act of negligence on the part of the defendant". The vice is not in what the court does say but in what the court does not say, to wit: that said evidence is material on the issue of defendant's negligence.

Keller v Gartin, 220-78; 261 NW 776

Instructions — "a proximate cause" — nonprejudicial error. In an automobile collision negligence case where plaintiff's son was driving automobile in which plaintiff was riding, an instruction that plaintiff need only prove

defendant's negligence to be "a proximate cause" is not prejudicial error when court also instructed that negligence of plaintiff or plaintiff's son barred recovery and the instructions were to be read as a whole.

Rogers v Jefferson, 224-324; 275 NW 874

Contributory negligence—reference to proximate cause—error. An instruction that before plaintiff can recover for alleged negligently inflicted injuries, he must establish that he "was free from contributory negligence, that contributed to, or was the proximate cause of such injuries", is entirely erroneous insofar as reference is made to "proximate cause", and the error is not cured by another instruction to the effect that the instructions should be construed "as a whole".

Bobst v Hoxie Line, 221-823; 267 NW 673

Failure to signal approach. An instruction, which properly directs the jury that the defendant would be guilty of negligence if, under named circumstances, he failed to signal his approach to the scene of an accident, is not rendered erroneous because the court does not, in said instruction, make any reference to the law of direct and proximate cause—said latter subject matter being properly covered elsewhere in the instructions.

Engle v Nelson, 220-771; 263 NW 505

Proximate negligence not superseded by concurrent negligence. If the jury might justifiably find that the defendant railway company operated its train over one of its crossings at an excessive and unlawful rate of speed and that said speed was the proximate cause of the collision of the train with an automobile and of the injury to an occupant of the automobile, the court must not so instruct as to permit the jury to find that the negligence of the driver of the automobile in approaching and driving upon the crossing was an intervening cause which wholly superseded the said negligence of the defendant railway company.

Dedina v Railway, 220-1336; 264 NW 566

Duty to look and listen—instructions. An instruction to the effect that, in determining the care exercised by a traveler at a railroad crossing, the jury should consider whether obstructions to one's view were such as to require the traveler to look and listen, is quite harmless when the jury was elsewhere correctly instructed as to the duty to look and listen.

Love v Railway, 207-1278; 224 NW 815

Blowing out tire—losing control of car. Where an instruction stating, "* * * the blowing out of a tire is a legal excuse to a driver for losing control of his or her automobile * * *", and also stating conditions for recovering control of the car, is challenged because this quoted part withdrew from the jury the question of whether driver was negligent in losing control of car and decided the issue erroneously as a matter of law, such instruction was not erroneous in that the grounds of negligence alleged and submitted to the jury were referable to the conduct of the driver, not at the time of the blowout, but thereafter—bearing in mind that instructions must be read as a whole and that it is unfair to pick out parts of instructions and give them a forced or strained construction.

Band v Reinke, 227-458; 288 NW 629

Carrier's liability. In an action for injuries sustained in an accident at an intersection while riding in a taxicab, an instruction which held the defendant to the liability of a common carrier of passengers for hire was not error in view of other instructions defining a common carrier and making a high degree of care dependent on a finding that the taxi was a common carrier.

Womochil v Peters, 226-924; 285 NW 151

Omitting reference to defendant's omission to act. An instruction that the jury, in determining an issue of negligence, should take into consideration "what the defendant did", need not be accompanied by any instruction for the jury to consider what the defendant omitted to do, when the jury is fully instructed to consider all the facts and circumstances bearing on the issue.

Leete v Hays, 211-379; 233 NW 481

Grouping distinct grounds. Reversible error results from grouping separate and distinct grounds of negligence and so instructing as to lead the jury to understand that plaintiff, before he can recover, must establish the truth of an entire group.

Leete v Hays, 211-379; 233 NW 481

Failure to yield one-half traveled way—other circumstances mentioned. In action by automobile passenger, arising out of collision between a bus and approaching automobile, wherein the only ground of negligence submitted was bus driver's failure to yield one-half of traveled way, instructions relating to speed and control of bus and to rights and duties of bus driver in general relating to fact pavement was wet, relating to a car parked in path of bus, and other circumstances, when read with other instructions, that failure to yield one-half of highway was only prima facie negligence and could be justified, explained, or excused, and that parked car on highway might be an emergency creating an excuse, were not erroneous as submitting additional grounds of negligence.

Staggs v Bartovsky, 228- ; 291 NW 443

Damages—submission of pleaded but unsupported amount. No error results from instructing that no recovery can be allowed plaintiff in excess of the pleaded amount for a named element of damages (the evidence concededly showing that plaintiff had not suffered said maximum amount) when other in-

IX INSTRUCTIONS—continued

structions definitely charged the jury to base damages solely on the evidence.

Danner v Cooper, 215-1354; 246 NW 223

(h) REQUESTING INSTRUCTIONS

Refusal not error when subject matter covered. Refusal to give requested instructions is not error when the subject matter is covered by instructions given on the court's own motion.

Womochil v Peters, 226-924; 285 NW 151

Refusal nonerroneous when otherwise favorably covered. In action arising out of injuries sustained in collision between a bus and approaching automobile, a refusal to give bus owner's requested instruction concerning the discovery of parked car on paved highway in the path of bus as a circumstance bearing on question of bus driver's negligence in failing to yield one-half the traveled way, was not prejudicial error where other instructions given at bus owner's request were at least as favorable to bus owner as refused instruction.

Staggs v Bartovsky, 228- ; 291 NW 443

Covering requested instructions. When three similar instructions were requested, it was not error to refuse to give two of them, and give but one embodying the propositions of the other two.

Remer v Takin Bros., 227-903; 289 NW 477

Contributory negligence of passenger. It is correct to say that a passenger on a vehicle may be found free of contributory negligence if he acted as a person of ordinary prudence would act under like circumstances. Requested instructions reviewed and held properly refused.

Newland v McClelland & Son, 217-568; 250 NW 229

Instructions in conformity with requests—estoppel to urge error. Defendant in an automobile case could not complain of an instruction on speed, lookout, and control given in conformity with instruction requested.

Usher v Stafford, 227-443; 288 NW 432

Requests—right to assume care by plaintiff. A requested instruction in a personal injury action, to the effect that defendant had a right to assume that plaintiff would commit no act of negligence contributing to his own injury, is properly refused (1) when defendant in driving as he did was not influenced by plaintiff's actions, and (2) when the record shows that the jury found that plaintiff was not guilty of any act of contributory negligence.

Orr v Hart, 219-408; 258 NW 84

Speed—lookout—turning to right—presumption. If there be applicable evidence the court must instruct (at least on request) (1) as to the duty of drivers of cars on meeting to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

Right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

"Control" construed in its practical sense. Common words in instructions must generally be understood by the jury in their ordinary and practical sense, and, if a more specific definition is desired, it must be requested. So held as to the word "control" in connection with operating a motor vehicle.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Submitting issue notwithstanding negligence per se. It is not necessarily reversible error for the court to fail to instruct the jury that the defendant was negligent as a matter of law, even tho had the court so instructed, the appellate court would not reverse because of such instruction.

Townsend v Armstrong, 220-396; 260 NW 17

Assured clear distance—oncoming vehicles. Since, as to oncoming vehicles, assured clear distance statute applies only to motorist not traveling on his right-hand side of the road, in an action involving a collision between oncoming vehicles on a foggy night, when vehicle in which plaintiff was riding was traveling on the right-hand side of the road, a requested instruction applying the assured clear distance statute to the plaintiff was properly refused.

Gregory v Suhr, 224-954; 277 NW 721

Assuming issuable facts—refusal. When it assumes disputed questions of fact as established, a requested instruction may be properly refused, even tho the request embodies a correct statement of law.

Usher v Stafford, 227-443; 288 NW 432

Assuming right to enter intersection. Instructions are properly refused when they assume that one of the parties to an accident had the superior right to enter a street intersection—such right being a matter of dispute.

Waldman v Motor Co., 214-1139; 243 NW 555

Yielding right of way—justifiable assumption. The court may refuse a requested instruction and give the fair equivalent thereof in its own language. So held as to an instruction relative to the duty of the operator of an automobile to yield the right of way at an intersection.

Appleby v Cass, 211-1145; 234 NW 477

Vehicles approaching from rear—pedestrian's duty. An instruction relative to the duty of a pedestrian traveling in the public highway, to keep a reasonable lookout for vehicles approaching from the rear as well as from the front, need not necessarily be modified on request to the effect that such duty does not require him to turn about "constantly and repeatedly" to observe the possible approach of vehicles from his rear.

Kessel v Hunt, 215-117; 244 NW 714; 34 NCCA 247

Consideration of nonimputable negligence. An instruction to the effect that even tho the negligence of a husband with whom the wife was riding could not be imputed to the wife, nevertheless the negligence of the husband could be considered by the jury on the issue whether the negligence of the defendant—the driver of another car—was the proximate cause of plaintiff's injuries, is a correct statement of law, and if plaintiff wishes such instruction modified by a statement as to the law governing the concurrent negligence of different parties, she must request such instruction.

Kuhn v Kjose, 216-36; 248 NW 230

Proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant was proximately negligent.

Reason: Both defendants might be proximately negligent.

Newland v McClelland, 217-568; 250 NW 229

Sudden emergency instruction properly refused. A defendant-motorist's requested instruction, which deals with the question of sudden emergency arising because, as he alleges, a child suddenly darted from hiding and ran across the path of his car, is properly refused when the issue of error in judgment after the emergency arose was not in the case, and the theory of how and when the child got in his path was otherwise covered by instructions.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Stalled motorist—freedom from negligence. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is neither entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

"Physical facts" rule. A requested instruction should be given, when the testimony is supporting, to the effect that, if the view of a railway track is unobstructed for a long distance while a traveler is knowingly approaching it, he will be held to have seen the train approaching thereon, there being no diverting circumstances.

Langham v Railway, 201-897; 208 NW 356; 27 NCCA 68; 27 NCCA 69

Separate forms of verdicts. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Error not waived by requesting instruction. Where a motion for a directed verdict is erroneously overruled, the defeated party does not waive said error by asking instructions which correctly state the law of the case as fixed by the ruling of the court on the motion.

(Overruling Martens v Martens, 181-350, and McDermott v Ida County, 186-736)

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

X DAMAGES

(a) IN GENERAL

Assessment—double recovery. The submission to the jury of duplicate counts—counts praying recovery on the same elements of damages—and permitting recovery on both such counts is clearly erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Failure to limit damages. Instructions which direct the jury to allow damages for such loss and injuries as necessarily resulted from the accident complained of are too broad because not limited to the loss and injuries properly set out in the petition and sustained by the evidence.

Balik v Flacker, 212-1381; 238 NW 467

X DAMAGES—continued
(a) IN GENERAL—continued

Failure to limit damages—fatal error. An instruction which fails to limit the jury in its return of damages (1) to the amount claimed for each item of damages, and (2) to such amount only as shown by the evidence, is prejudicially erroneous.

Andersen v Christensen, 222-177; 268 NW 527

Direct damages only recoverable. It is mandatory on the court to instruct that damages recoverable because of a defendant's negligence are limited to those damages which the evidence shows directly resulted from such negligence.

Schelldorf v Cherry, 220-1101; 264 NW 54

Instruction as to allowable damages. Instruction, specifying that damages should be such as were rendered necessary by the injuries as disclosed by the evidence and which the evidence shows that plaintiff sustained and endured, sufficiently informed the jury that only such damages could be allowed as were caused by, and the direct result of, injuries sustained because of defendant's negligence.

Jakeway v Allen, 227-1182; 290 NW 507

Erroneous limitation on verdict. A general instruction, in a personal injury case, to the effect that the jury must not return a verdict in excess of the sum total of all the damages claimed by plaintiff is prejudicially erroneous when the plaintiff has alleged a particular amount of damages for each element of damages.

Sergeant v Challis, 213-57; 238 NW 442

Death—measure of damages. The measure of damages for death is the reasonable present value of the life of the deceased to his estate.

Droullard v Rudolph, 207-367; 223 NW 100

Occupation and earnings of parent. The occupation and earnings of the father of a minor child may be shown, in an action for the wrongful death of the child, as an element to be considered by the jury on the issue of damages to the child's estate.

McDowell v Oil Co., 212-1314; 237 NW 456

Harmless error—submitting earning capacity of child. Elements of damage not sustained by evidence should not be submitted, which applies to the earning capacity of a 10-year-old schoolgirl in the absence of supporting evidence, but in the instant case the error was harmless, as the jury's possibility of considering such element was very remote.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Wrongful death—purchase of business. In an action for damages for wrongful death, evidence is admissible of the recent purchase, solely on credit, by decedent, of a business, and of the marked reduction by decedent of his indebtedness subsequent to such purchase, together with evidence of his ability, health, and other kindred matters.

Scott v Hinman, 216-1126; 249 NW 249

Medical services. It is error to permit the recovery of expense for medical services necessitated by a personal injury when there is no evidence of the reasonable value of such services and no showing that the amount in question has been paid.

Melsha v Dillon, 214-1324; 243 NW 295

Earnings in discarded business. Evidence by an injured party as to the amount of his earnings in a business which he had, at the time of his injury, abandoned, is incompetent, when the amount of his future earnings in such business, were he to re-engage in it, is conjectural and speculative.

Dickeson v Lzicar, 208-275; 225 NW 406

Hospital expenses—absence of evidence. In an action for personal injury, no recovery can be had for hospital expenses when there is no evidence of any kind bearing on the reasonableness of the charge—not even in the form of an itemized bill or that the bill had been paid.

Ege v Born, 212-1138; 236 NW 75

Hospital expense—board and lodging—when allowable. In personal injury action, allowance of board and lodging in hospital is not error where such items are inseparably tied up with treatment.

Jakeway v Allen, 227-1182; 290 NW 507

Employer paying doctor bills—negligent person still liable. Payment of an injured truck driver's doctor bills by his employer, whether the motive be philanthropy or contract, constitutes a bounty from which a negligent defendant-motorist can derive no benefit in reduction of his liability, inasmuch as he owes compensation for all damages as to which his negligence was the proximate cause.

Clark v Berry Seed Co., 225-262; 280 NW 505

Release—fraud. A jury question as to the validity of a release of personal injury damages is made by proof that the releasee represented that the doctor's charges would be "about" $10, and that the representation was materially false and was made to the releasor and acted on by him when he was alone and practically helpless from his injuries.

Robinson v Meek, 203-185; 210 NW 762; 5 NCCA(NS) 434

Release of joint tort-feasor. An injured party who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an

action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the injured party agreed not to sue such other party—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

(b) PHYSICAL DAMAGES—TO PERSON OR PROPERTY

Reparable and irreparable injury. The measure of damages for injury to an article is: (1) for total destruction, the reasonable value at the time of destruction; (2) for a fully reparable injury, the reasonable cost of the repairs, plus the reasonable value of the use of the article during a reasonable time for repair; (3) for a partially reparable injury, the difference in the reasonable value of the article before and after the injury.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Measure of damages—fully reparable injury. If the injury to an article is fully reparable, then the measure of damages is the reasonable cost of the repairs, not the difference between the reasonable value of the article before and after the injury.

Looney v Parker, 210-85; 230 NW 570

Reparable injury to article. The measure of damages for negligent injury to an article is the reasonable cost of restoring the article to the condition it was in immediately before the injury, not exceeding in any case the reasonable value of the article at the time of injury.

Laizure v Railway, 214-918; 241 NW 480

Measure of damages—total destruction. The measure of damages for the total destruction of an article is the reasonable market value of the article immediately before its destruction.

Bush v Railway, 216-788; 247 NW 645

Failure to limit damages—fatal error. An instruction which fails to limit the jury in its return of damages (1) to the amount claimed for each item of damages, and (2) to such amount only as shown by the evidence, is prejudicially erroneous.

Andersen v Christensen, 222-177; 268 NW 527

Direct damages only recoverable. It is mandatory on the court to instruct that damages recoverable because of a defendant's negligence are limited to those damages which the evidence shows directly resulted from such negligence.

Schelldorf v Cherry, 220-1101; 264 NW 54

Failure to limit findings. An instruction which directs the jury, in determining the damages to an article, "to consider" its value before the injury and its value after injury is erroneous because it fails to confine the jury in its findings of damages.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Instruction—sufficiency. Instructions to the effect that the jury should determine from the evidence the amount due plaintiff for injuries to person and property, and allow him such sum as would fairly compensate him, reviewed and held to reveal no error.

Winter v Davis, 217-424; 251 NW 770

Hospital expenses. In an action for personal injury no recovery can be had for hospital expenses when there is no evidence of any kind bearing on the reasonableness of the charge—not even in the form of an itemized bill or that the bill had been paid.

Ege v Born, 212-1138; 236 NW 75

Nervous injury—evidence—sufficiency. There may be recovery of damages consequent upon nervous injury even tho there is no medical testimony showing the connection between the injury and the nervous disturbance.

McDougal v Bormann, 211-950; 234 NW 807

Nonpermanent recovery—submission. Record reviewed and held that the issue of nonpermanent recovery from a personal injury was properly submitted on supporting expert testimony.

Albert v Trans. Co., 215-197; 243 NW 561

Permanent injuries—evidence. Evidence held sufficient to justify the submission to the jury of the issue whether certain personal injuries were permanent.

Stilson v Ellis, 208-1157; 225 NW 346

Personal injuries—evidence. Evidence held to present a jury question on the issue whether injuries were permanent and whether they were the proximate result of an accident or resulted from a former diseased condition of the injured party.

Dickeson v Lzicar, 208-275; 225 NW 406

Damages—permanent cripple—future pain—correct instruction. In a personal injury action arising from a motor vehicle collision, an allegation that plaintiff has been crippled for life, sustained by some evidence, justifies an instruction that the jury may allow such sum as in their judgment will fairly compensate plaintiff for future pain and for being crippled.

Clark v Berry Seed Co., 225-262; 280 NW 505

X DAMAGES—continued

(b) PHYSICAL DAMAGES—TO PERSON OR PROPERTY—concluded

Permanent injury to back and spine—$6,500 not excessive. In an action for damages as a result of automobile collision, a verdict of $6,500 was held not to be excessive where plaintiff received severe permanent injuries to his back and spine and could not work or sleep on account of intense pain, and where, prior to the accident, plaintiff's earnings were around $5 per day, but after the accident not over fifty cents per day, and where plaintiff, prior to the trial, lost two years earnings amounting to $2,500.

Kramer v Henely, 227-504; 288 NW 610

Ten percent permanent injury to arm—nonspeculative verdict. Where a petition alleges ten percent injury to an arm and asks $1,000 damages therefor, it is not error to permit the jury to return a verdict for the full amount when the evidence shows some permanent injury to the arm and the court in another instruction limited the recovery to the damages sustained.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Unsupported issue of permanent injury. Instructions reviewed, and held not subject to the vice of submitting an unsupported issue of permanent injury.

Groshens v Lund, 222-49; 268 NW 496

Unsupported issue of permanent injuries—submission to jury improper. In an action for physical injuries sustained by the plaintiff when he was struck by the defendant's automobile, it was reversible error to submit to the jury the question of permanent injuries as a measure of damages when there was no evidence of permanent injuries to support such submission.

Street v Stewart, 226-960; 285 NW 204

Interest on funeral expenses. The measure of damages for wrongful death, while not including reasonable funeral expenses, does include simple interest at a legal rate on such expenses for the time intervening between the premature death and the time when, in the ordinary course of events, the deceased would have died.

Lukin v Marvel, 219-773; 259 NW 782

(c) PAIN AND SUFFERING

Future pain — instructions—adequacy. An instruction to the effect that a recovery would be limited to "the fair and reasonable compensation for personal injury, pain and suffering, past and future * * * as shown by the evidence", is sufficient on the subject of future pain and suffering in the absence of a request for elaboration.

Duncan v Rhomberg, 212-389; 236 NW 638

Limiting recovery to sum of separate claims. Limiting a recovery of damages to the sum of one amount claimed for present and future physical pain and one amount claimed for mental pain will not be deemed erroneous when the verdict demonstrates that less was allowed than claimed.

Danner v Cooper, 215-1354; 246 NW 223

Mental pain and anguish. An injured plaintiff may recover for mental pain resulting from personal physical injury, even tho no special claim for such recovery is made in the petition; especially may he so recover when the petition fairly presents such claim.

Lang v Siddall, 218-263; 254 NW 783

Future pain—justifiable assumption. Where there is evidence of a permanent injury, and of present pain produced thereby, the jury may very properly conclude that future pain may be suffered even tho no witness specifically so testifies.

Danner v Cooper, 215-1354; 246 NW 223

Permanent cripple—future pain. In a personal injury action arising from a motor vehicle collision, an allegation that plaintiff has been crippled for life, sustained by some evidence, justifies an instruction that the jury may allow such sum as in their judgment will fairly compensate plaintiff for future pain and for being crippled.

Clark v Berry Seed Co., 225-262; 280 NW 505

Future pain as incident to permanent injury. Even without a claim for damages for future pain and suffering, allegations and proof of permanent injuries from which future pain and suffering are reasonably certain to follow warrant the submission to the jury of this question.

Keller v Dodds, 224-935; 277 NW 467

Headaches—pain and suffering. In an action to recover for personal injuries sustained in an automobile collision where plaintiff testified that headaches causing much suffering affected him since the accident, and when an expert witness testified that plaintiff's injury might have caused headaches and that the injury might be permanent, an instruction permitting recovery for future pain and suffering from headaches was not erroneous and properly submitted the question to the jury.

Rogers v Jefferson, 226-1047; 285 NW 701

Instructions — separating personal injury claims. Instructions limiting the amount of total recovery which could be allowed the plaintiff, but not advising how much was claimed for pain and suffering and for permanent disability, were erroneous, and, being erroneous, prejudice is presumed unless the record is such as to overcome the presumption.

Remer v Takin Bros., 227-903; 289 NW 477

Expressions of pain. The reception of evidence tending to show pain and suffering on the part of a deceased for whose death the action has been brought is not erroneous.

Droullard v Rudolph, 207-367; 223 NW 100

(d) AGGRAVATION OF INJURY

Aggravation of disease—liability in general. One who is predisposed to disease which is aggravated or accelerated by motorist's negligence is entitled to recover damages necessarily and proximately resulting from such aggravation or acceleration.

Hackley v Robinson, (NOR); 219 NW 398

Aggravation of injury by unskillful treatment — liability of original wrongdoer. It is a principle of law that one who negligently inflicts a personal injury on another is liable in damages for the aggravation of said injury resulting from the unskillful treatment of said injury by his physicians and surgeons, provided the injured party exercised reasonable care in selecting said physicians and surgeons, but to permit the application of said principle there must be a proper showing of causal connection between said wrongfully inflicted injury and the said unskillful treatment.

Johnson v Selindh, 221-378; 265 NW 622

Release—joint wrongdoers. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525; 39 NCCA 574

(e) INADEQUATE OR EXCESSIVE

When court will interfere. It is not the province of a court to interfere with the amount of a verdict in a personal injury action unless it is clearly made to appear that the verdict is the result of passion or prejudice or of a palpable disregard of the evidence. Verdict of $10,000 held nonreviewable.

Engle v Nelson, 220-771; 263 NW 505

Option to remit excessive part of verdict. It is proper for the court to give plaintiff the option to remit that portion of a verdict which the court deems excessive, and refuse a new trial (on that ground) if the remittitur is filed.

Bobst v Hoxie Line, 221-823; 267 NW 673

Excessive verdicts.

$2,130 for personal injuries.

Kimmel v Mitchell, 216-366; 249 NW 151

$7,500 for wrongful death.

Lorimer v Hutchinson Co., 216-384; 249 NW 220

$2,500 for personal injury.

Tissue v Durin, 216-709; 246 NW 806

$17,000 for wrongful death.

Scott v Hinman, 216-1126; 249 NW 249

$30,000 for wrongful death.

Shutes v Weeks, 220-616; 262 NW 518

$6,000 for death of child.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

$3,500 for broken collarbone. For injuries sustained by a passenger in a taxicab accident, when a verdict of $3,500 was nearly $3,000 over the damages subject to calculation for a broken collarbone, pain and suffering, hospitalization, and loss of about three months work, the amount should be reduced to $2,500.

Womochil v Peters, 226-924; 285 NW 151

Slightly excessive recovery. The reception in evidence in a personal injury action of a hospital bill which includes a charge for "board" for the patient, is not reversible error when the amount of the nonrecoverable item is not shown, and when, apparently, the matter was not called to the attention of the trial court.

Sutton v Moreland, 214-337; 242 NW 75

Nonexcessive verdicts.

$2,800 for personal injuries.

O'Hara v Chaplin, 211-404; 233 NW 516

$5,950 for personal injuries.

Mizner v Lohr, 213-1182; 238 NW 584

$3,500 for personal injury.

Raines v Wilson, 213-1251; 239 NW 36

$1,000 for personal injury.

Hoegh v See, 215-733; 246 NW 787

$1,825 for personal injury.

Danner v Cooper, 215-1354; 246 NW 223

$12,000 for personal injury.

Henriksen v Stages, 216-643; 246 NW 913

$8,000 for personal injuries.

McCoy v Cole, 216-1320; 249 NW 213

$5,170 for personal injury and property damage.

Winter v Davis, 217-424; 251 NW 770

$1,328 for personal injury and property loss.

Wolfe v Decker, 221-600; 266 NW 4

$5,091.26 for personal injury.

Janes v Roach, 228- ; 290 NW 87

$3,750 for personal injury—new trial. Damages are generally within the province of the jury and an appellate court hesitates to interfere with the amount unless it is so grossly excessive as to indicate passion or prejudice, or some other reason appears, and ordinarily the trial court's granting or refusing a new trial on the ground of excessiveness of a verdict will not be disturbed on appeal unless an abuse of discretion is shown. Held, a $3,750

X DAMAGES—concluded
(e) INADEQUATE OR EXCESSIVE—concluded

personal injury verdict was not excessive when based on a fracture of the skull, broken left shoulder, four broken ribs, eye and ear injuries, unconsciousness for five days, and severe headaches.

Rogers v Jefferson, 226-1047; 285 NW 701

$2,500 increase on retrial of personal injury case—nonexcessiveness. A verdict of $10,000 on second trial of automobile accident case, altho $2,500 larger than first verdict, did not under the circumstances indicate passion or prejudice and was not excessive.

Jakeway v Allen, 227-1182; 290 NW 507

$600 for injuries resulting in loss of eight weeks work. When an automobile accident resulted in damages amounting to $90 to the car and bodily injuries including broken ribs which kept the injured person from work for eight weeks and with continued pain, a verdict of $600 was not excessive.

Kiesau v Vangen, 226-824; 285 NW 181

5037.10 Guest statute.

Discussion. See 18 ILR 78—Legislation

ANALYSIS

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General application of motor vehicle law. See under §5037.09

I SCOPE OF SECTION IN GENERAL

Nonretroactive statute.

Thomas v Disbrow, 208-873; 224 NW 36; 30 NCCA 195

Nonapplicable to manslaughter. This section fixes civil liability in the operation of automobiles and has nothing to do with automobile operations resulting in manslaughter.

State v Richardson, 216-809; 249 NW 211

Nonrevival of right to recover for negligence. The right of a guest in an automobile to recover damages consequent on the negligence of the operator, having been supplanted by the statute permitting a recovery only in case of "reckless operation", has not been restored by the enactment of §5028, C., '31 [§5022.04, C., '39], wherein, inter alia, the driving of a motor vehicle "without due caution and circumspection" is characterized as "reckless driving", and made punishable as a crime.

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Negligence—liability—exception to rule. The motor vehicle guest statute precluding recovery by a passenger for injuries received while riding in a vehicle, unless the damage is caused by the intoxication or recklessness of the operator, is an exception to the rule as to liability for negligence.

Paulson v Hanson, 226-858; 285 NW 189

Exceptions not to supplant general rule. Interpretation of automobile guest statute should be consistent with the intention of the legislature and its mandate in making a host not liable for injuries to guest, except under exceptions of driver being reckless or intoxicated, and the statute should not be so interpreted as to supplant the general rule with the exceptions.

Crabb v Shanks, 226-589; 284 NW 446

Who is not guest. A person while attempting to enter an unoccupied automobile, for the purpose of commencing a journey as a guest, and on the invitation of the owner of the car, is not a "passenger or person riding in said motor vehicle", within the meaning of this section.

Puckett v Pailthorpe, 207-613; 223 NW 254; 30 NCCA 194; 36 NCCA 255

Child on sled being towed not "riding" in vehicle. A person, to be within the provisions of the Iowa guest statute, must be "riding" in the motor vehicle, which excludes a child on a sled hooked to the rear of a moving automobile.

Samuelson v Sherrill, 225-421; 280 NW 596

Exclusive liability of owner. The liability of the owner of an automobile to a guest when the owner is operating the vehicle himself is identical with his liability to a guest when the vehicle is being operated by someone else with his—the owner's—consent.

Stanbery v Johnson, 218-160; 254 NW 303

Consent to use of vehicle denied by defendant —nonconclusiveness. In an action for injuries resulting from a motor vehicle collision, the positive testimony of a defendant that no consent was given to use the automobile is not conclusive and can be rebutted by circumstances, together with the reasonable or unreasonable character of the testimony.

Allbaugh v Ashby, 226-574; 284 NW 816

Question of father's consent to son's use of vehicle. Where a guest, injured in an automobile collision, seeks damages from a son and father, as driver and owner, respectively, of a motor vehicle, question of father's consent to son's use of automobile, procured especially for and used exclusively by the son, so as to render the father liable for guest's injuries resulting from son's reckless operation, is a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Ethical objection to recovery. In an action by a guest to recover of her host damages for injuries inflicted by the reckless operation of an automobile, it is not reversible error to instruct: "Nor is she bound by any ethical rule to the effect that one who is a guest of another should not seek recovery in a proper case", it appearing that the full burden of proving a legal right to recover was plainly imposed on plaintiff.

McQuillen v Meyers, 213-1366; 241 NW 442

Injury in foreign state—"guest statute" not applicable. The statutory declaration that the guest of the owner or operator of a motor vehicle is entitled to recover damages only when the damages are the proximate result of the intoxication or reckless operation of the driver is declaratory of the substantive rights of the guest; therefore, said statute has no application to an action in this state to recover damages consequent on an accident occurring in a foreign state in which the common-law rule of liability for negligence exists.

Redfern v Redfern, 212-454; 236 NW 399; 1 NCCA(NS) 291

Federal governmental employee—personal liability for tort. A governmental employee, committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. So held as to recklessness resulting in death of a guest riding in an automobile with agent of Federal Resettlement Administration.

Doherty v Edwards, 226-249; 284 NW 159

II GUEST OR INVITEE AND EXCEPTIONS

(a) IN GENERAL

Discussion. See 18 ILR 358—Persons included

"Guest" defined. A person is a guest while riding gratuitously in an automobile owned, managed, controlled, and directed by the driver.

Kaplan v Kaplan, 213-646; 239 NW 682

Pleading—sufficiency. An allegation that plaintiff was invited by defendant to accompany defendant in the latter's automobile and that plaintiff accepted the invitation and did accompany defendant, is a sufficient allegation that plaintiff was the guest of defendant.

White v McVicker, 219-834; 259 NW 465

"Guest" — evidence — sufficiency. Evidence held insufficient to show that a plaintiff in an action for damages was a "guest" in an automobile.

Thompson v Farrand, 217-160; 251 NW 44

Guest (?) or otherwise—jury question. Evidence reviewed and held to present a jury question on the issue whether plaintiff, at the time he was injured in a collision, was riding in an automobile as a "guest" or as an employee.

Porter v Decker, 222-1109; 270 NW 897

Guest (?) or otherwise. Issues which are without support in the evidence must not be submitted. So held where on the question whether plaintiff when he was injured was a guest in an automobile, the court submitted the unsupported issues whether plaintiff accompanied defendant (1) for the definite benefit of defendant, or (2) for the mutual benefit of plaintiff and defendant.

Porter v Decker, 222-1109; 270 NW 897

"Guest" or mere "invitee"—negativing relation. A passenger riding in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator of the car; or
2. For the definite and tangible benefit of the owner or operator; or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand.

Necessarily, a jury question is generated by a substantial conflict of testimony.

Knutson v Lurie, 217-192; 251 NW 147; 36 NCCA 275

Guest (?) or for hire, etc. (?)—evidence. A passenger in an automobile operated by the owner thereof may be a mere guest or invitee with right to recover for damages consequent on the reckless operation, only, of the car; but he may be a passenger (1) for hire, or (2) for the benefit of said operator, or (3) for the mutual benefit of both operator and himself,

II GUEST OR INVITEE AND EXCEPTIONS—continued

(a) IN GENERAL—concluded

with right to recover for damages consequent on mere negligent operation by the driver. Evidence held wholly insufficient to establish the status of the passenger to be other than a mere guest.

Clendenning v Simerman, 220-739; 263 NW 248

Witness riding to motorist's wedding. Where a person is invited by the groom to be witness at his wedding, and when such person is injured in an automobile collision while riding with the groom to the wedding, such person is a guest, even tho she took her own lunch for the trip and offered to pay part of the travel expense. Agreeing to become a witness and furnishing some incidentals do not constitute such consideration for the ride as to render the witness a passenger for hire.

McCornack v Pickerell, 225-1076; 283 NW 899

Passenger receiving expenses nevertheless a guest. A situation where a motorist making a trip offers to take a friend, who objects to the expense but is reassured that the motorist will pay expenses, and which friend is desired, but not required, to relieve the motorist of driving part of the way, is not a transaction amounting to the dignity of a contract nor making the friend a passenger for hire instead of a guest.

Sullivan v Harris, 224-345; 276 NW 88

Companionship and society—contributing to expenses—helping drive. Under guest statute where the only benefits conferred upon the person extending the invitation are those incidental to hospitality, companionship, or society, the passenger is ordinarily held to be a guest. This is also true even if the guest contributes something toward the expenses of the journey and is expected to help drive.

Doherty v Edwards, 227-1264; 290 NW 672

Who is not guest. A person while attempting to enter an unoccupied automobile, for the purpose of commencing a journey as a guest, and on the invitation of the owner of the car, is not a "passenger or person riding in said motor vehicle", within the meaning of this section.

Puckett v Pailthorpe, 207-613; 223 NW 254; 30 NCCA 194; 36 NCCA 255

Who is not guest. A person who contemplates the purchase of an automobile, and, on the invitation of the salesman, enters the car in order to observe the operation of the car by the salesman, is neither a guest nor is he a gratuitous passenger within the meaning of the so-called guest statute.

(Modified, Knutson v Lurie, 217-192; 251 NW 147; 36 NCCA 275)

Bookhart v Motor Co., 215-8; 244 NW 721; 82 ALR 1359; 32 NCCA 587; 34 NCCA 279; 36 NCCA 264; 2 NCCA(NS) 301, 599

Prospective purchaser's passenger—guest (?) or passenger for hire (?). Where a prospective purchaser driving a used automobile belonging to an automobile dealer takes as a passenger a person familiar with automobiles to advise as to its value, and while so driving has an accident wherein the passenger is injured, such passenger is not a passenger for hire, but only a guest, insofar as the automobile dealer's liability for the passenger's injury is concerned.

Sproll v Burkett Co., 223-902; 274 NW 63; 2 NCCA(NS) 424

Transporting passenger for hire. The owner of an automobile who uses it in transporting, from place to place, an orchestra of which he is a member, and who on each trip, by mutual agreement of the members, receives from the earnings of the common enterprise four and one-half cents for each mile traveled, cannot be deemed as transporting his associates as passengers for hire or for a consideration, it appearing that said payment was made for the sole and only purpose of reimbursing said car owner for the actual cost of operating said car, and that said payment did not exceed said actual cost.

Park v Casualty Co., 222-861; 270 NW 23

Burden of proof. Whether the burden of proof is upon a plaintiff administrator seeking to recover damages for death consequent on the reckless operation of an automobile by the defendant, to prove that the deceased was riding in the car by invitation and not for hire, quaere.

Neessen v Armstrong, 213-378; 239 NW 56

Failure of proof—incompetent witness—dead man statute. Where plaintiff, a motor vehicle passenger, predicates his action on two theories, viz: (1) he was not a guest, and (2) he was a guest, and as to the first his proof fails because of witness' incompetency under dead man statute, and as to the second he offers no evidence, there is nothing to be submitted to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Unpleaded issues—"unwilling guest" interpretation unwarranted. Instruction reviewed and held not open to the vice of injecting an issue not in the pleadings, to wit, that plaintiff was an unwilling guest in defendant's automobile.

Reed v Pape, 226-170; 284 NW 106

(b) EMPLOYEES

Guest (?) or otherwise—jury question. Evidence reviewed and held to present a jury question on the issue whether plaintiff, at the time he was injured in a collision, was riding

in an automobile as a "guest" or as an employee.

Porter v Decker, 222-1109; 270 NW 897

Guest or employee as pivotal question—duty of court. When, under the pleading and evidence, the pivotal question is whether plaintiff when injured in defendant's car was a guest or an employee of defendant, the court should not refuse instructions which require the jury to determine such question.

Porter v Decker, 222-1109; 270 NW 897

"Guest" or mere "invitee"—negativing relation. A passenger riding in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator of the car, or
2. For the definite and tangible benefit of the owner or operator, or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand. Necessarily, a jury question is generated by a substantial conflict of testimony.

Knutson v Lurie, 217-192; 251 NW 147; 36 NCCA 275

(c) MEMBERS OF FAMILY

Adult daughter—statute applicability. The guest statute is applicable to an adult, emancipated daughter living in the home of her father, but paying for her board and room, when injured while riding in an automobile driven, managed, and controlled by her father.

Kaplan v Kaplan, 213-646; 239 NW 682

(d) JOINT ENTERPRISE

"Guest" or mere "invitee"—negativing relation. A passenger riding in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator of the car, or
2. For the definite and tangible benefit of the owner or operator, or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand. Necessarily, a jury question is generated by a substantial conflict of testimony.

Knutson v Lurie, 217-192; 251 NW 147; 36 NCCA 275

Passenger riding with loan agent—mutual benefit. Under the rule that passenger is neither a guest nor a mere invitee when he is riding with driver for the mutual, tangible, and definite benefit of both parties, a passenger in an automobile driven by a representative of the Federal Resettlement Administration is not a "guest" when both parties are on their way to a bank to secure a temporary loan for passenger until such time as a loan could be completed with the Federal Resettlement Administration.

Doherty v Edwards, 227-1264; 290 NW 672

Guest (?) or for hire, etc. (?)—evidence. A passenger in an automobile operated by the owner thereof may be a mere guest or invitee with right to recover for damages consequent on the reckless operation, only, of the car; but he may be a passenger (1) for hire, or (2) for the benefit of said operator, or (3) for the mutual benefit of both operator and himself, with right to recover for damages consequent on mere negligent operation by the driver. Evidence held wholly insufficient to establish the status of the passenger to be other than a mere guest.

Clendenning v Simerman, 220-739; 268 NW 248

Guest (?) or otherwise. Issues which are without support in the evidence must not be submitted. So held where on the question whether plaintiff when he was injured was a guest in an automobile, the court submitted the unsupported issues whether plaintiff accompanied defendant (1) for the definite benefit of defendant, or (2) for the mutual benefit of plaintiff and defendant.

Porter v Decker, 222-1109; 270 NW 897

Passenger in automobile demonstrator—mutual benefits. Where an automobile salesman, demonstrating a car to a prospective purchaser, and at the same time, among other things, to further his chances of making a sale, transports an employee of the prospective purchaser to her place of employment, such employee, being transported for the mutual benefit of all concerned, is not a guest.

Wittrock v Newcom, 224-925; 277 NW 286

(e) PASSENGERS FOR HIRE

Passenger for hire—division of expenses. The mere division of expenses among members of a party riding in an automobile does not render the person so contributing a passenger for hire.

McCornack v Pickerell, 225-1076; 283 NW 899

Transporting orchestra members. The owner of an automobile who uses it in transporting, from place to place, an orchestra of which he is a member, and who on each trip, by mutual agreement of the members, receives from the earnings of the common enterprise four and one-half cents for each mile traveled, cannot be deemed as transporting his associates as passengers for hire or for a consideration, it appearing that said payment was made for the sole and only purpose of reimbursing said car owner for the actual cost of operating said car, and that said payment did not exceed said actual cost.

Park v Casualty Co., 222-861; 270 NW 23

II GUEST OR INVITEE AND EXCEPTIONS—concluded

(e) PASSENGERS FOR HIRE—concluded

Witness riding to motorist's wedding. Where a person is invited by the groom to be witness at his wedding, and when such person is injured in an automobile collision while riding with the groom to the wedding, such person is a guest, even tho she took her own lunch for the trip and offered to pay part of the travel expense. Agreeing to become a witness and furnishing some incidentals do not constitute such consideration for the ride as to render the witness a passenger for hire.

McCornack v Pickerell, 225-1076; 283 NW 899

III INTOXICATION

Assumption of risk—jury question. Where motorist and guest had been drinking, and automobile was driven off road, wrecked, and guest was killed, the question of assumption of risk was for the jury.

White v Zell, 224-359; 276 NW 76

Intoxication as jury question. In a guest case where the evidence shows all the occupants of the motor vehicle had been drinking whisky, the issue of intoxication should not be withdrawn from the jury.

White v Zell, 224-359; 276 NW 76

IV RECKLESSNESS

(a) IN GENERAL

Discussion. See 16 ILR 265—Meaning of "reckless"

Exception to negligence liability rule. The motor vehicle guest statute precluding recovery by a passenger for injuries received while riding in a vehicle, unless the damage is caused by the intoxication or recklessness of the operator, is an exception to the rule as to liability for negligence.

Paulson v Hanson, 226-858; 285 NW 189

Nonrevival of right to recover for negligence. The right of a guest in an automobile to recover damages consequent on the negligence of the operator, having been supplanted by the statute permitting a recovery only in case of "reckless operation", has not been restored by the enactment of §5028, C., '31 [§5022.04, C., '39], wherein, inter alia, the driving of a motor vehicle "without due caution and circumspection" is characterized as "reckless driving", and made punishable as a crime.

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Civil liability—definition not deducible from criminal statute. The enumeration in §5028, C., '31 [§5022.04, C., '39] of certain acts, and the denomination of said acts as "reckless driving", and imposing a criminal punishment for doing said acts, cannot be deemed as furnishing a definition as to what conduct constitutes "reckless operation" under §5026-b1, C., '31 [§5037.10, C., '39], which simply states a rule of civil liability.

Shenkle v Mains, 216-1324; 247 NW 635; 34 NCCA 347

"Reckless operation" — plural definitions. Section 5028, C., '31 [§5022.04, C., '39], which, in effect, provides that the operation of a motor vehicle in specified ways shall be deemed "reckless driving", was not intended to define "reckless operation" as provided in the so-called "guest" statute.

Fleming v Thornton, 217-183; 251 NW 158

Recklessness—manslaughter case.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Improper definition. The approved definition of "recklessness" as "implying no care—a proceeding without heed of or concern for consequences"—is rendered erroneous by the addition thereto of the elements of "desperation" and "foolishly heedless of danger".

White v McVicker, 216-90; 246 NW 385

Instructions defining recklessness but not negligence—no error. Definition of recklessness stating that "recklessness is more than negligence" is not erroneous because of failure to also define negligence.

Claussen v Johnson's Est., 224-990; 278 NW 297

Recklessness instruction — construing instructions as a whole. An instruction, stating that if defendant's recklessness caused plaintiff's injury the defendant would be liable, is not error when accompanied by other instructions which limit recovery to proof of specific grounds of recklessness.

Reed v Pape, 226-170; 284 NW 106

Recklessness—instructions as a whole. Instructions clearly and accurately defining "recklessness" in the operation of an automobile and definitely placing on plaintiff the burden to establish such "recklessness", neutralize the evil effect of a particular instruction which might, in and of itself, possibly lead the jury to understand that recklessness might consist of the doing of certain acts irrespective of the conditions or circumstances under which they might be done.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Balancing instructions. Instructions to a jury that a motorist is not at his peril required to comply with the protests and warnings of his guest should, if requested by the plaintiff and shown by the evidence, be followed with the converse of this proposition, that if the jury finds the driver was warned some distance from a railroad crossing of imminent danger and, then, if the driver made no attempt to stop or reduce his speed, he is guilty of recklessness as a matter of law.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Sleeping driver. Recklessness goes beyond mere negligence and means proceeding without concern for consequences, with a heedless disregard for the rights of others. Recklessness under the motor vehicle guest statute is not found from evidence that the driver of a car went to sleep, where there was little evidence that he was conscious of the approach of sleep.

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105; 34 NCCA 113; 38 NCCA 696

Paulson v Hanson, 226-858; 285 NW 189

Falling asleep not recklessness. In an action based on the motor vehicle guest statute, evidence showing that the defendant driver of the car fell asleep and the car ran into a bridge causing the death of the plaintiff's intestate, failed to establish recklessness, and a directed verdict for the defendant would have been justified.

Paulson v Hanson, 226-858; 285 NW 189

Insufficient plea. In an action for damages consequent on the operation of an automobile instructions which predicate recovery on proof of "reckless" operation cannot be sustained when the pleadings neither allege reckless driving nor facts from which recklessness is a necessary deduction.

Redfern v Redfern, 212-454; 236 NW 399

Res ipsa loquitur. The doctrine of res ipsa loquitur is never applicable to establish a presumption of recklessness.

Phillips v Briggs, 215-461; 245 NW 720; 34 NCCA 364; 39 NCCA 126

Admission of fault. On the issue of reckless operation of an automobile evidence that shortly after a collision the driver being asked what was the matter with him replied, "Just a little reckless", is admissible against the driver as tending to show his admitted fault for the collision.

White v Center, 218-1027; 254 NW 90

Signed statement by plaintiff—legal effect. Plaintiff who seeks to establish the reckless operation of an automobile, at a time when he was riding therein as a guest, is not legally precluded by a written statement theretofore signed by him, and introduced as part of his cross-examination, and which statement tended, perhaps conclusively, to disprove said alleged reckless operation, plaintiff not admitting that the statements contained in said signed writing were true for the purposes of said trial.

Wright v Mahaffa, 222-872; 270 NW 402

Defense—third party negligence. A defendant-host who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant-host establishes that such negligence, and not his own recklessness, was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

Concurring cause—effect. The reckless operation of an automobile need not be the sole and only cause of an accident and resulting damage in order to justify a recovery. In other words, the mere fact that some other cause operated with defendant's recklessness to produce the injury does not relieve the defendant.

Johnson v McVicker, 216-654; 247 NW 488

Concurrent acts of negligence showing recklessness. In an action by a guest in an automobile against the driver of the car, for damages consequent on the operation of the car, evidence reviewed at length relative to several alleged concurrent acts of negligence on the part of said driver, and held insufficient, when viewed collectively, to establish prima facie evidence of recklessness.

Wion v Hayes, 220-156; 261 NW 531

Reckless operation—negativing possibilities. In order to make a jury question on the issue of reckless operation of an automobile, plaintiff need not negative every possibility which might exculpate the defendant.

White v Center, 218-1027; 254 NW 90

Insufficient evidence. In an action for damages consequent on the alleged reckless operation of the car in which plaintiff was riding as a guest, evidence reviewed and held per se insufficient to establish reckless operation within the repeated holdings of this court.

Popham v Case, 223-52; 271 NW 226

Evidence—insufficiency. Evidence reviewed and held insufficient to justify submission to the jury of the issue of recklessness in the operation of an automobile.

Wright v What Cheer Co., 221-1292; 267 NW 92

Evidence—sufficiency—jury question. In an action by a guest against the driver and owner of a motor vehicle for injuries sustained as a result of a collision with an oncoming vehicle, where it is shown that the collision occurred on the left side of the road while automobile, with defective brakes, was being driven at an excessive rate of speed through a well-traveled intersection in a town over a slope or hill which limited visibility, and on the left side of the highway in face of visible oncoming traffic, such evidence, on the issue of whether or not collision was caused by driver's recklessness, presented a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when

IV RECKLESSNESS—continued
(a) IN GENERAL—concluded

tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most favorable view of evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

Physical facts—warranting directed verdict for defendant. Where a guest in defendant's automobile sustains injuries resulting from defendant's alleged recklessness in traveling at a high rate of speed and striking a cow on a paved highway, and where guest recovers judgment in a damage action wherein defendant appeals from an order overruling his motion for directed verdict, evidence reviewed showing that plaintiff's own uncontradicted factual situation, developed on direct examination, failed to sustain his specifications of recklessness in that defendant failed to reduce the speed of the car as he approached the cattle, and held the court erred in not sustaining the motion for a directed verdict.

Scott v Hansen, 228- ; 289 NW 710

(b) RECKLESS AND NONRECKLESS ACTS

Discussion. See 22 ILR 525—Sleeping at the wheel

Recklessness. Recklessness goes beyond mere negligence and means proceeding without concern for consequences, with a heedless disregard for the rights of others. Recklessness under the motor vehicle guest statute is not found from evidence that the driver of a car went to sleep, where there was little evidence that he was conscious of the approach of sleep.

Paulson v Hanson, 226-858; 285 NW 189

Driving while asleep. An automobile may not be said to be operated "recklessly" within the meaning of the guest statute when the operator involuntarily falls asleep during said operation, even tho the sleep results in a grave accident.

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105; 34 NCCA 113; 38 NCCA 696
Paulson v Hanson, 226-858; 285 NW 189

Falling asleep not reckless. In an action based on the motor vehicle guest statute, evidence showing that the defendant driver of the car fell asleep and the car ran into a bridge, causing the death of the plaintiff's intestate, failed to establish recklessness, and a directed verdict for the defendant would have been justified.

Paulson v Hanson, 226-858; 285 NW 189

Evidence—insufficiency. A jury question on the issue whether an automobile was recklessly operated is not made by proof that the car was being operated on a straight, level, and unobstructed paved road at a speed of some 50 miles per hour by a person who was somewhat weary from loss of sleep, and somewhat unnerved by an accident happening earlier in the day, and that suddenly and without warning the car swerved and went into a ditch and overturned, notwithstanding the evident good-faith efforts of the driver to control the car.

Duncan v Lowe, 221-1278; 268 NW 10

Speed at danger point. The driver of an automobile may be guilty of statutory "recklessness" by operating his vehicle over a graveled highway, in the nighttime, at a high rate of speed, and at a point where he knows he must make abrupt and successive changes in direction of travel.

Hart v Hinkley, 215-915; 247 NW 258; 34 NCCA 359

Speed as recklessness. Where an automobile, traveling 40 miles an hour around a curve that was neither a sharp turn nor a long sweeping curve, ran off the pavement and turned over, injuring plaintiff guest, this evidence did not raise a jury question on whether defendant was reckless within scope of guest statute.

Crabb v Shanks, 226-589; 284 NW 446

Speed at sharp turn. A jury question on the issue of reckless operation of an automobile is made by evidence that the car was being operated (1) over a wide, well-settled graveled highway with which the operator was wholly unfamiliar, (2) at a speed of some 65 miles per hour, (3) during the nighttime when visibility was materially limited, and (4) at a sharp turn in the road so belatedly anticipated and discovered that the driver was unable to negotiate it and was compelled to turn his car into the side ditch.

Mescher v Brogan, 223-573; 272 NW 645

Speed plus surrounding circumstances—jury question. High speed, while not alone decisive of recklessness, yet when coupled with surrounding circumstances such as approaching darkness, difficult visibility, heavy primary road traffic, and a double collision with the rear of an unlighted trailer and an oncoming truck, presents a question on which reasonable minds would differ, and should be submitted to the jury.

Claussen v Johnson's Est., 224-990; 278 NW 297

Speed as element of recklessness — other factors. Altho speed alone will not be considered recklessness, yet, when combined with such evidence as the car's swerving from side to side, the wetness of the street, the late hour (two o'clock in the morning), the presence of cross streets, and the lack of defendant's effort to check his speed when the view was obstructed, a jury question on the issue of recklessness is created.

Reed v Pape, 226-170; 284 NW 106

Speed—car out of control. Evidence tending to show that an inexperienced driver operated his automobile for a half mile on a downgrade on a perfectly good, broad, graveled highway at a speed of 55 miles per hour in violation of the statutory speed standard, with the car out of control and swaying from side to side, and that thereupon he inadvertently stepped on the gas instead of the brake and went into a ditch on the wrong side of the road, justifies the submission to the jury of the issue of recklessness.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Speed on downgrade. A jury question on the issue whether an automobile was operated recklessly, that is, in heedless disregard of consequences, is made by testimony that the driver, faced by no emergency, operated the car on the downgrade of a straight, well-conditioned, 18-foot wide, graveled road, for a distance of over 1500 feet, and at a speed of 75 miles per hour (110 feet per second), and in the direction of a somewhat elevated railway grade crossing, and that in the near vicinity of said crossing, the car, after repeatedly weaving from one side of the roadway to the other, left said roadway, plunged into a ditch and overturned two or three times.

Wright v Mahaffa, 222-872; 270 NW 402

Car running into rear of wagon. A jury question on the issue of reckless operation of an automobile may be made by testimony that the driver, on a straight, level stretch of paved road, and on the right-hand side thereof, and at a time when he could see substantial objects on the road at least one-quarter mile ahead and easily pass them, operated his car at 70 miles per hour and crashed into the rear of and substantially annihilated a wagon and team on the extreme right-hand side of the road and moving in the same direction as the automobile.

White v Center, 218-1027; 254 NW 90; 36 NCCA 339

Warning of danger—no reduction of speed. Instructions to a jury that a motorist is not at his peril required to comply with the protests and warnings of his guest should, if requested by the plaintiff and shown by the evidence, be followed with the converse of this proposition, that if the jury finds the driver was warned some distance from a railroad crossing of imminent danger and, then, if the driver made no attempt to stop or reduce his speed, he is guilty of recklessness as a matter of law.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Condition of highway—evidence insufficiency. Evidence reviewed in detail relative (1) to the operation of an automobile upon a paved road, and upon a straightaway graveled road connecting therewith, (2) to the warning signs upon said paved road, (3) to the condition of said graveled road and to the visibility of the somewhat rough and rutted condition thereof, and (4) to the twice overturning of said automobile almost immediately after it entered upon said graveled road, and held insufficient per se to establish recklessness in the operation of said automobile.

Brown v Martin, 216-1272; 248 NW 368; 34 NCCA 354

Car sliding into ditch. Evidence that the driver of an automobile on a straight, smooth, graveled road was traveling 45 miles per hour in an attempt to pass other automobiles does not, in and of itself, furnish a jury question on the issue of reckless operation; otherwise as to evidence that after the car slipped and entered a ditch along the roadside the speed materially increased for a distance of 160 feet at which latter point the car collided with an intersecting grade, turned over twice, and came to a stop some 105 feet farther on.

White v McVicker, 216-90; 246 NW 385; 34 NCCA 371

See Cerny v Secor, 211-1232; 234 NW 193

Failure to keep lookout. The reckless operation of an automobile, within the meaning of the "guest" statute is not shown by proof that a motorist, in the daytime and without obstruction to view ahead, and while approaching a bridge on a country highway, was traveling at the rate of some forty-odd miles per hour, and astraddle the black lines in the center of an 18-foot wide, level, 10-degree curve; that, while so traveling, he confined his view solely to said black lines as they came into view immediately ahead of the fender or hood of his car; that he did not "look up" and see an approaching truck on the bridge until 75 feet therefrom; and that thereupon he swerved his car to the right but not quite far enough to avoid sideswiping the rear part of the truck while the two vehicles were passing on the bridge.

Wilson v Oxborrow, 220-1135; 264 NW 1

Car running into ditch. Evidence that an automobile was driven over a straight pavement at from 30 to 35 miles per hour; that the wheels on one side ran off the pavement and upon an unfinished dirt shoulder; that in the effort to stop the car, the operator's foot slipped from the brake pedal to the gas pedal and that the car ran into a side ditch for a distance of 100 feet, reveals no basis for a finding of "reckless" operation.

Thompson v Farrand, 217-160; 251 NW 44; 34 NCCA 369

Speed—unsafe inner tube. Evidence that the operator of an automobile ran it at the rate of 55 miles per hour on a paved highway, with a spare tire which inclosed a patched inner tube, is insufficient on which to base a finding that the car was operated recklessly—there being no evidence that he knew the inner

IV RECKLESSNESS—continued
(b) RECKLESS AND NONRECKLESS ACTS—concluded

tube was unsafe when he placed the same on the car.

Newville v Weller, 217-1144; 251 NW 21; 34 NCCA 379; 39 NCCA 529

Defective steering gear. "Reckless" operation of an automobile is not established as a jury question by proof that it was operated at a time when the operator knew the steering mechanism was in such condition that when the brakes were applied the vehicle would turn to one side.

Stanbery v Johnson, 218-160; 254 NW 303

Inadequate brakes. The court cannot say as a matter of law that an operator of an automobile is guilty of recklessness in attempting to ascend an 18½ percent grade with knowledge that his brakes were not efficient.

Fleming v Thornton, 217-183; 251 NW 158; 34 NCCA 379; 36 NCCA 175

Tire blowout—emergency. A host sued by his guest for damages consequent on the alleged reckless operation of an automobile may very properly plead that at the time of the accident in question he was overtaken by an emergency, e. g., the blowing out of a tire, and that said emergency was the sole cause of the injury, and that after he became aware of said emergency he did not act recklessly.

Kaufman v Borg, 214-293; 242 NW 104; 34 NCCA 377

Failure to stop at sign. The act of a motorist in the nighttime in driving into a highway intersection without stopping in obedience to a statutory "stop" sign, when shortly theretofore he had seen an automobile approaching said intersection on the intersecting highway, manifestly does not necessarily constitute "recklessness" within the meaning of the guest statute. Evidence exhaustively analyzed (in a light as favorable to plaintiff as is reasonably possible), and held per se insufficient to support an allegation of recklessness in the operation of an automobile.

Hansen v Dall, 220-817; 263 NW 530

(c) NEGLIGENCE DISTINGUISHED

"Reckless operation" defined. To constitute "reckless operation" of a motor vehicle, the plea and proof must be such as to justify a finding that the operator was "proceeding without heed of, or concern for, consequences". Plea and proof of negligent operation only is wholly insufficient.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

McQuillen v Meyers, 213-1366; 241 NW 442

Negligence insufficient to show "recklessness". Testimony which, at the best, only shows that the operator of an automobile was negligent in the operation of the car, is per se wholly insufficient to support a plea of "reckless operation" within the meaning of the "guest" statute.

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Wilde v Griffel, 214-1177; 243 NW 159; 31 NCCA 78; 34 NCCA 496

Levinson v Hagerman, 214-1296; 244 NW 307; 34 NCCA 367

Koch v Roehrig, 215-43; 244 NW 677; 34 NCCA 374

Phillips v Briggs, 215-461; 245 NW 720

Whether jury case is made. In an action for damages based on the plea of reckless operation of the vehicle, the court must determine whether substantially uncontradicted testimony presents, when judged in the light most favorable to plaintiff, no more, at the best, than a case of simple negligence on the part of the operator, or whether said testimony presents a jury question on the issue of recklessness.

Welch v Minkel, 215-848; 246 NW 775; 34 NCCA 384

Shenkle v Mains, 216-1324; 247 NW 635

Reckless operation — degree of proof. Principle reaffirmed that proof of the negligent operation of an automobile will not support an allegation that the automobile was operated recklessly.

Petersen v Detwiller, 218-418; 255 NW 529; 36 NCCA 358

Concurrent acts of negligence showing recklessness. In an action by a guest in an automobile against the driver of the car for damages consequent on the operation of the car, evidence reviewed at length relative to several alleged concurrent acts of negligence on the part of said driver, and held insufficient, when viewed collectively, to establish prima facie evidence of recklessness.

Wion v Hayes, 220-156; 261 NW 531

Avoiding reference to negligent acts. In an action based solely on "reckless" operation of an automobile, the failure of the court to explain and define various acts of negligence covered by the motor vehicle statutes, is eminently proper.

McQuillen v Meyers, 213-1366; 241 NW 442

Improper reference to negligence. In an action based solely on the reckless operation of an automobile, the court must not confuse the jury by reciting in its instructions the law governing liability for negligence.

Kaufman v Borg, 214-293; 242 NW 104

Pleadings—"reckless and negligent"—more specific statement required. Where two motor vehicles collide and plaintiff, riding in the back seat of one of the vehicles, sues both drivers, alleging "concurrent, reckless, and negligent

conduct", the petition is subject to motion for more specific statement as to whether or not plaintiff was a guest and whether both defendants were charged with both reckless and negligent acts.

Fay v Dorow, 224-275; 276 NW 31

Joint tort-feasors with different defenses—separate trials. Altho joint tort-feasors may be joined in one action, a petition charging two colliding motorists generally with negligence and recklessness and only alleging that plaintiff was riding in one of the vehicles, with no averment as to his status as a guest or otherwise, presents to the jury such complex and confusing issues as to entitle defendants to separate trials.

Fay v Dorow, 224-275; 276 NW 31

Instructions defining recklessness but not negligence—no error. Definition of recklessness stating that "recklessness is more than negligence" is not erroneous because of failure to also define negligence.

Claussen v Johnson's Est., 224-990; 278 NW 297

Instructions—duty of court. In an action under the guest statute, it is the court's duty to plainly point out to the jury the distinction between negligence and recklessness, and the court, in so doing, by saying "that recklessness means more than negligence", does not unduly emphasize matters in defense or confuse the jury.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

(d) CONTRIBUTORY NEGLIGENCE OF GUEST

Contributory negligence. In an action based on "reckless operation" of a motor vehicle contributory negligence is not an element to be considered or dealt with, either by pleading, proof or instructions.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105

McQuillen v Meyers, 213-1366; 241 NW 442

Holding under prior statute. The court must not instruct that a mere guest in an automobile (under duty, of course, to exercise reasonable and ordinary care) will be guilty of negligence if he fails to do some particular thing, e. g., attempt in some manner to check the speed of the car.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Contributory negligence. The refusal of the court to instruct as to just what a guest in an automobile must do in order to escape the imputation of contributory negligence is proper, especially in view of the fact that contributory negligence is not an element to be considered in an action for reckless driving.

McQuillen v Meyers, 213-1366; 241 NW 442

V DEFENSES

(a) IN GENERAL

Tire blowout—emergency. A host sued by his guest for damages consequent on the alleged reckless operation of an automobile may very properly plead that at the time of the accident in question he was overtaken by an emergency, e. g., the blowing out of a tire, and that said emergency was the sole cause of the injury, and that after he became aware of said emergency he did not act recklessly.

Kaufman v Borg, 214-293; 242 NW 104; 34 NCCA 377

Consent denied by defendant—nonconclusiveness. In an action for injuries resulting from a motor vehicle collision, the positive testimony of a defendant that no consent was given to use the automobile is not conclusive and can be rebutted by circumstances, together with the reasonable or unreasonable character of the testimony.

Allbaugh v Ashby, 226-574; 284 NW 816

Father's consent to son's use of vehicle—jury question. Where a guest, injured in an automobile collision, seeks damages from a son and father, as driver and owner, respectively, of a motor vehicle, question of father's consent to son's use of automobile, procured especially for and used exclusively by the son, so as to render the father liable for guest's injuries resulting from son's reckless operation, is a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Instructions—father's consent to son's use of vehicle. In a guest's action against a father and son on account of son's reckless operation of automobile, instructions to the jury setting out elements required for recovery against both father and son should have included element that proof of father's consent to son's use of automobile was required to justify a verdict against the father, and any instruction which was intended to refer to son only should have been so stated.

Allbaugh v Ashby, 226-574; 284 NW 816

Interrogatory seeking "knowledge and consent" of owner—proper refusal. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "con-

V DEFENSES—concluded
(a) IN GENERAL—concluded

sent", even tho allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

Vehicle driven without owner's consent—burden of proof. Where jury is instructed that the law implies that a car being driven by one other than its owner is being driven with the owner's consent, "and this places the burden upon the owner to prove, by a preponderance of the evidence, that the car was not being driven with his consent", this quoted portion of instruction is reversible error as it places undue burden on owner; the inference from ownership does not change the burden of proof which continues on the complaining party throughout the trial.

Allbaugh v Ashby, 226-574; 284 NW 816

(b) ASSUMPTION OF RISK

Knowledge of danger. One who voluntarily becomes a guest in an automobile when he knows the driver is incompetent, inexperienced, reckless, or intoxicated, or who later acquires such knowledge, and thereupon, with knowledge of the nature and extent of the danger, aids, encourages, cooperates or acquiesces in the operation of the car in a reckless manner, must be held to assume the risk of a resulting accident.

White v McVicker, 216-90; 246 NW 385

Absence of knowledge. A guest in an automobile cannot be deemed to have assumed the risk incident to the reckless operation of the automobile unless there is evidence that he had knowledge of the acts constituting recklessness on the part of the driver and acquiesced in such acts.

White v Center, 218-1027; 254 NW 90

Knowledge of mechanical faults. A guest in an automobile cannot be held to assume the risk attending a defective condition of the vehicle when he had no knowledge of such condition.

Stanbery v Johnson, 218-160; 254 NW 303

Drinking driver—jury question. Where motorist and guest had been drinking, and automobile was driven off road, wrecked, and guest was killed, the question of assumption of risk was for the jury.

White v Zell, 224-359; 276 NW 76; 36 NCCA 359

Risk of riding with aged driver—jury question. While riding in the rear seat of an automobile being demonstrated to her employer as a prospective purchaser, an aged lady, who protests against the salesman permitting her employer, also an aged person, to drive the automobile, and who, altho she cannot get out of the automobile, is assured of safety by the salesman, does not as a matter of law assume the risk incident to her employer's driving, since reasonable minds could differ, and a jury must determine if it was unreasonable for her to rely on the salesman's assurances of safety.

Wittrock v Newcom, 224-925; 277 NW 286

Assignment of error — fatal indefiniteness. Assignments of error to the effect (1) that "the jury was informed of liability insurance," and (2) that the appellee "knew of defendant's inexperience in driving, and that the court permitted evidence thereof to go to the jury," are fatally indefinite.

Siesseger v Puth, 211-775; 234 NW 540

Order striking defense of assumption of risk. In an action to recover for death of guest resulting from motorcycle collision with automobile, an order striking allegation of defendant car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Affirmative defense—burden on pleader. The jury in a personal injury or death claim action where the defendant pleads "assumption of risk" should be plainly instructed that one pleading an affirmative defense must assume the burden of proving it.

White v Zell, 224-359; 276 NW 76

VI TRIAL

(a) IN GENERAL

Instructions — recklessness particulars unchallenged before answer—submitting as alleged. Error may not be predicated on the submission of certain particulars alleging recklessness when their sufficiency is not raised before answer filed and when evidence exists to sustain them.

Claussen v Johnson's Est., 224-990; 278 NW 297

Injury in foreign state—"guest" statute not applicable. The statutory declaration that the guest of the owner or operator of a motor vehicle is entitled to recover damages only when the damages are the proximate result of the intoxication or reckless operation of the driver is declaratory of the substantive rights of the guest; therefore, said statute has no application to an action in this state to recover damages consequent on an accident occurring in a foreign state in which the common-law rule of liability for negligence exists.

Redfern v Redfern, 212-454; 236 NW 399; 1 NCCA(NS) 291

(b) DIRECTING VERDICT

Recklessness—jury (?) or court (?) question. A jury question and not a court question arises (1) when one or more of a series of undisputed facts tend to establish recklessness in the operation of an automobile, and (2)

when different minds might reasonably differ on the question whether recklessness was, in fact, established.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Speed as recklessness. Where an automobile, traveling 40 miles an hour around a curve that was neither a sharp turn nor a long sweeping curve, ran off the pavement and turned over, injuring plaintiff guest, this evidence did not raise a jury question on whether defendant was reckless within scope of guest statute.

Crabb v Shanks, 226-589; 284 NW 446

Falling asleep not recklessness. In an action based on the motor vehicle guest statute, evidence showing that the defendant driver of the car fell asleep and the car ran into a bridge, causing the death of the plaintiff's intestate, failed to establish recklessness, and a directed verdict for the defendant would have been justified.

Paulson v Hanson, 226-858; 285 NW 189

Sustainable and unsustainable grounds. Principle reaffirmed that the sustaining of a motion to direct a verdict must be upheld if one of the grounds is legally good tho other grounds may be legally unsustainable.

Phillips v Briggs, 215-461; 245 NW 720

Refusal to direct verdict—nullifying error. The act of the court in wholly withdrawing the issue of "reckless" operation of an automobile nullifies any former error of the court in refusing to direct a verdict on the ground of absence of evidence of reckless operation.

Thompson v Farrand, 217-160; 251 NW 44

Law of case. A holding on appeal that the record created a jury question, on the issue of reckless operation of an automobile, is absolutely binding on the trial court on retrial on substantially the same evidence.

White v McVicker, 219-834; 259 NW 465

Physical facts — unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most favorable view of evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

(c) PLEADINGS

Petition in two counts—(1) guest and (2) not a guest. A passenger in an automobile receiving injuries in a collision may not be required to elect between counts when his petition contains (1) a count alleging recklessness based on theory he was a guest and (2) a count alleging negligence based on theory he was not a guest where plaintiff's cause of action is for a single wrong and he seeks in each count damages for the same injuries arising out of the same act of deceased defendant-driver.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Pleading — sufficiency. An allegation that plaintiff was invited by defendant to accompany defendant in the latter's automobile and that plaintiff accepted the invitation, and did accompany defendant, is a sufficient allegation that plaintiff was the guest of defendant.

White v McVicker, 219-834; 259 NW 465

"Reckless and negligent"—single allegation —more specific statement required. Where two motor vehicles collide, and plaintiff, riding in the back seat of one of the vehicles, sues both drivers, alleging "concurrent, reckless, and negligent conduct", the petition is subject to motion for more specific statement as to whether or not plaintiff was a guest and whether both defendants were charged with both reckless and negligent acts.

Fay v Dorow, 224-275; 276 NW 31

"Reckless operation" defined. To constitute "reckless operation" of a motor vehicle, the plea and proof must be such as to justify a finding that the operator was "proceeding without heed of, or concern for, consequences". Plea and proof of negligent operation only is wholly insufficient.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

McQuillen v Meyers, 213-1366; 241 NW 442

Petersen v Detwiller, 218-418; 255 NW 529; 36 NCCA 358

Insufficient plea. In an action for damages consequent on the operation of an automobile instructions which predicate recovery on proof of "reckless" operation cannot be sustained when the pleadings neither allege reckless driving nor facts from which recklessness is a necessary deduction.

Redfern v Redfern, 212-454; 236 NW 399

Defense — emergency. A host sued by his guest for damages consequent on the alleged reckless operation of an automobile may very properly plead that at the time of the accident in question he was overtaken by an emergency, e. g., the blowing out of a tire, and that said emergency was the sole cause of the injury, and that after he became aware of said emergency he did not act recklessly.

Kaufman v Borg, 214-293; 242 NW 104; 34 NCCA 377

VI TRIAL—concluded

(c) PLEADINGS—concluded

Physical facts—warranting directed verdict for defendant. Where a guest in defendant's automobile sustains injuries resulting from defendant's alleged recklessness in traveling at a high rate of speed and striking a cow on a paved highway, and where guest recovers judgment in a damage action wherein defendant appeals from an order overruling his motion for directed verdict, evidence reviewed showing that plaintiff's own uncontradicted factual situation, developed on direct examination, failed to sustain his specifications of recklessness in that defendant failed to reduce the speed of the car as he approached the cattle, and held the court erred in not sustaining the motion for a directed verdict.

Scott v Hansen, 228- ; 289 NW 710

Physical facts—exception to most favorable evidence rule. On appeal from an order overruling defendant's motion for directed verdict, the supreme court need not follow the most favorable evidence rule, as urged by plaintiff, to the exclusion of the physical facts and other uncontradicted matters which plaintiff not only conceded, but affirmatively and intentionally established.

Scott v Hansen, 228- ; 289 NW 710

Separate trial—right to. Reversible error results from refusing a separate trial to a defendant who is sued jointly with another for damages consequent on his alleged negligence, and on the alleged recklessness of his codefendant, the defensive issues of the two defendants being wholly hostile to each other, and the opportunity existing for collusion between the plaintiff and such other defendant.

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Joint tort-feasors with different defenses—separate trials. Altho joint tort-feasors may be joined in one action, a petition charging two colliding motorists generally with negligence and recklessness and only alleging that plaintiff was riding in one of the vehicles, with no averment as to his status as a guest or otherwise, presents to the jury such complex and confusing issues as to entitle defendants to separate trials.

Fay v Dorow, 224-275; 276 NW 31

Defense—third party negligence. A defendant-host who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant-host establishes that such negligence, and not his own recklessness, was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

Separate specifications submitted—joined by "and"—harmless error. In an action under the Illinois guest statute for damages arising out of injuries received in a motor vehicle collision in Illinois, separate specifications of negligence, based on one charge of excessive speed, but, nevertheless, submitted in the language of the petition, are not rendered prejudicially erroneous because joined together with the word "and".

Moran v Kean, 225-329; 280 NW 543

Admissions of fact—conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Instructions—reference to speed—granting new trial. A reference in an instruction to a motor vehicle speed of 60 miles per hour when the allegation in the petition of such speed was coerced by a ruling of the court, while not in itself sufficient to warrant a reversal, still justifies the trial court in granting a new trial when considered along with other alleged errors.

White v Zell, 224-359; 276 NW 76

VII PRESUMPTIONS, EVIDENCE, AND PROOF

(a) IN GENERAL

Speed signs—presumption of officer's performance of duty. In the absence of proof to the contrary, it will be presumed that town officers properly performed the mandatory duty imposed on them by statute in the erection and maintenance of speed limit signs.

Doherty v Edwards, 227-1264; 290 NW 672

"Reckless operation" defined. To constitute "reckless operation" of a motor vehicle, the plea and proof must be such as to justify a finding that the operator was "proceeding without heed of, or concern for, consequences". Plea and proof of negligent operation only is wholly insufficient.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

McQuillen v Meyers, 213-1366; 241 NW 442

Petersen v Detwiller, 218-418; 255 NW 529; 36 NCCA 358

Burden of proof. Whether the burden of proof is upon a plaintiff-administrator seeking to recover damages for death consequent on the reckless operation of an automobile by the defendant, to prove that the deceased was riding in the car by invitation and not for hire, quaere.

Neessen v Armstrong, 213-378; 239 NW 56

Concurrent acts of negligence showing recklessness. In an action by a guest in an automobile against the driver of the car for damages consequent on the operation of the car,

evidence reviewed at length relative to several alleged concurrent acts of negligence on the part of said driver, and held insufficient, when viewed collectively, to establish prima facie evidence of recklessness.

Wion v Hayes, 220-156; 261 NW 531

Contributory negligence. In an action based on "reckless operation" of a motor vehicle contributory negligence is not an element to be considered or dealt with, either by pleading, proof or instructions.

Siesseger v Puth; 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105

Recklessness — evidence insufficiency. Evidence reviewed in detail relative (1) to the operation of an automobile upon a paved road, and upon a straightaway graveled road connecting therewith, (2) to the warning signs upon said paved road, (3) to the condition of said graveled road and to the visibility of the somewhat rough and rutted condition thereof, and (4) to the twice overturning of said automobile almost immediately after it entered upon said graveled road, and held insufficient per se to establish recklessness in the operation of said automobile.

Brown v Martin, 216-1272; 248 NW 368; 34 NCCA 354

Physical facts — unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most favorable view of evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

Issue whether owner driving—circumstantial evidence. On the issue supported by circumstantial evidence as to whether a car owner was driving at the time of an accident, a mere showing that another person was in the front seat creates only a possibility that he was driving, when opposed by facts supporting the probability and more plausible presumption that the owner was driving, arising from evidence that also being in the front seat, seated behind the wheel, the owner was driving the automobile a short time before the accident.

Claussen v Johnson's Est., 224-990; 278 NW 297

Impeachment of witness—allowable contradiction. A party may not impeach his own witness but he may offer testimony of other witnesses in contradiction thereof.

White v Zell, 224-359; 276 NW 76

Dead man statute—circumventing by indirection. A witness is not permitted to do by indirection that which the law forbids. So held where a passenger in a motor vehicle attempted to circumvent the dead man statute by testifying that he was hired by someone to make the trip, who was no other person than the deceased driver.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

(b) NO-EYEWITNESS RULE

Inapplicability of rule under direct evidence. Where a motorist and other eyewitnesses testify as to defendant's conduct just prior to his driving into the side of a moving train, it is error to instruct on the presumption that defendant's natural instinct of self-preservation would prompt him not to run into a moving train, when direct evidence as to his conduct is obtainable.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

(c) OPINION EVIDENCE

Qualified mechanic's testimony as to brakes and lights. It is not error to permit testimony of expert witnesses when there is a sufficient showing of their qualifications to give such testimony. So held as to a mechanic's testimony regarding brakes and lights.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

(d) PHYSICAL FACTS

Determining cause from effect—rarely matter of law. So many elements enter into the physical results produced by motor vehicle collisions that it is very seldom that a court can say as a matter of law that a particular result was produced because certain factors constituted the cause.

Echternacht v Herny, 224-317; 275 NW 576

Unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most favorable view of evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

Physical facts—warranting directed verdict for defendant. Where a guest in defendant's automobile sustains injuries resulting from defendant's alleged recklessness in traveling at a high rate of speed and striking a cow on a paved highway, and where guest recovers judgment in a damage action wherein defendant appeals from an order overruling his motion for directed verdict, evidence reviewed

VII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(d) PHYSICAL FACTS—concluded

showing that plaintiff's own uncontradicted factual situation, developed on direct examination, failed to sustain his specifications of recklessness in that defendant failed to reduce the speed of the car as he approached the cattle, and held the court erred in not sustaining the motion for a directed verdict.

Scott v Hansen, 228- ; 289 NW 710

Physical facts—exception to most favorable evidence rule. On appeal from an order overruling defendant's motion for directed verdict, the supreme court need not follow the most favorable evidence rule, as urged by plaintiff, to the exclusion of the physical facts and other uncontradicted matters which plaintiff not only conceded, but affirmatively and intentionally established.

Scott v Hansen, 228- ; 289 NW 710

(e) RES IPSA LOQUITUR

Doctrine never applicable. The doctrine of res ipsa loquitur is never applicable to establish a presumption of recklessness.

Phillips v Briggs, 215-461; 245 NW 720; 34 NCCA 364; 39 NCCA 126

(f) JURY QUESTIONS

Submitting both negligence and recklessness. Both questions of negligence and of recklessness may in a proper case be submitted together to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Reckless operation—negativing possibilities. In order to make a jury question on the issue of reckless operation of an automobile, plaintiff need not negative every possibility which might exculpate the defendant.

White v Center, 218-1027; 254 NW 90

Whether jury case is made. In an action for damages based on the plea of reckless operation of the vehicle, the court must determine whether substantially uncontradicted testimony presents, when judged in the light most favorable to plaintiff, no more, at the best, than a case of simple negligence on the part of the operator, or whether said testimony presents a jury question on the issue of recklessness.

Welch v Minkel, 215-848; 246 NW 775; 34 NCCA 384

Shenkle v Mains, 216-1324; 247 NW 635

Recklessness—jury (?) or court (?) question. A jury question and not a court question arises (1) when one or more of a series of undisputed facts tend to establish recklessness in the operation of an automobile, and (2) when different minds might reasonably differ on the question whether recklessness was, in fact, established.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Evidence — insufficiency. Evidence reviewed and held insufficient to justify submission to the jury of the issue of recklessness in the operation of an automobile.

Wright v What Cheer Co., 221-1292; 267 NW 92

Recklessness particulars unchallenged before answer—submitting as alleged. Error may not be predicated on the submission of certain particulars alleging recklessness when their sufficiency is not raised before answer filed and when evidence exists to sustain them.

Claussen v Johnson's Est., 224-990; 278 NW 297

Defective steering gear — recklessness. "Reckless" operation of an automobile is not established as a jury question by proof that it was operated at a time when the operator knew the steering mechanism was in such condition that when the brakes were applied the vehicle would turn to one side.

Stanbery v Johnson, 218-160; 254 NW 303

Reckless operation—car swerving into ditch. A jury question on the issue whether an automobile was recklessly operated is not made by proof that the car was being operated on a straight, level, and unobstructed paved road at a speed of some 50 miles per hour by a person who was somewhat weary from loss of sleep, and somewhat unnerved by an accident happening earlier in the day, and that suddenly and without warning the car swerved and went into a ditch and overturned, notwithstanding the evident good-faith efforts of the driver to control the car.

Duncan v Lowe, 221-1278; 268 NW 10

Car slipping into ditch. Evidence that the driver of an automobile on a straight, smooth, graveled road was traveling 45 miles per hour in an attempt to pass other automobiles does not, in and of itself, furnish a jury question on the issue of reckless operation; otherwise as to evidence that after the car slipped and entered a ditch along the roadside the speed materially increased for a distance of 160 feet at which latter point the car collided with an intersecting grade, turned over twice, and came to a stop some 105 feet farther on.

White v McVicker, 216-90; 246 NW 385; 34 NCCA 371; 37 NCCA 126

See Cerny v Secor, 211-1232; 234 NW 193

Reckless operation — driving in middle of road at high speed. In an action under the guest statute, evidence that the car was being driven down the middle of a graveled road at a high speed, when it collided with an oncoming car on a hill, held insufficient to present a

jury question on the issue of reckless operation.

Mayer v Sheetz, 223-582; 273 NW 138

Speed—car out of control. Evidence tending to show that an inexperienced driver operated his automobile for a half mile on a downgrade on a perfectly good, broad, graveled highway at a speed of 55 miles per hour in violation of the statutory speed standard, with the car out of control and swaying from side to side, and that thereupon he inadvertently stepped on the gas instead of the brake and went into a ditch on the wrong side of the road, justifies the submission to the jury of the issue of recklessness.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Speed on downgrade. A jury question on the issue whether an automobile was operated recklessly, that is, in heedless disregard of consequences, is made by testimony that the driver, faced by no emergency, operated the car on the downgrade of a straight, good-conditioned, 18-foot wide, graveled road, for a distance of over 1500 feet, and at a speed of 75 miles per hour (110 feet per second), and in the direction of a somewhat elevated railway grade crossing, and that in the near vicinity of said crossing, the car, after repeatedly weaving from one side of the roadway to the other, left said roadway, plunged into a ditch, and overturned two or three times.

Wright v Mahaffa, 222-872; 270 NW 402

Speed. A jury question on the issue of reckless operation of an automobile may be made by testimony that the driver, on a straight, level stretch of paved road, and on the right-hand side thereof, and at a time when he could see substantial objects on the road at least one-quarter mile ahead and easily pass them, operated his car at 70 miles per hour and crashed into the rear of and substantially annihilated a wagon and team on the extreme right-hand side of the road and moving in the same direction as the automobile.

White v Center, 218-1027; 254 NW 90; 36 NCCA 339

Recklessness—speed plus surrounding circumstances. High speed, while not alone decisive of recklessness, yet when coupled with surrounding circumstances such as approaching darkness, difficult visibility, heavy primary road traffic, and a double collision with the rear of an unlighted trailer and an oncoming truck, presents a question on which reasonable minds would differ and should be submitted to the jury.

Claussen v Johnson's Est., 224-990; 278 NW 297

Speed on unfamiliar road. A jury question on the issue of reckless operation of an automobile is made by evidence that the car was being operated (1) over a wide, well-settled, graveled highway with which the operator was wholly unfamiliar, (2) at a speed of some 65 miles per hour, (3) during the nighttime when visibility was materially limited, and (4) at a turn in the road so belatedly anticipated and discovered that the driver was unable to negotiate it and was compelled to turn his car into the side ditch.

Mescher v Brogan, 223-573; 272 NW 645

Excessive speed at intersection. In an action by a guest against the driver and owner of a motor vehicle for injuries sustained as a result of a collision with an oncoming vehicle, where it is shown that the collision occurred on the left side of the road while automobile, with defective brakes, was being driven at an excessive rate of speed through a well-traveled intersection in a town over a slope or hill which limited visibility, and on the left side of the highway in face of visible oncoming traffic, such evidence, on the issue of whether or not collision was caused by driver's recklessness, presented a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Speeding in residence district—sufficiency of evidence. Evidence that accident occurred on main street of town about four or five blocks from the business district, that defendant was driving 50 miles per hour, that there were a number of dwellings on both sides of the street, and that defendant had passed a sign which read, "Slow down, speed limit 25 miles per hour", was sufficient to raise jury question on issue of whether car was being driven in a residence district in excess of 25 miles per hour.

Doherty v Edwards, 227-1264; 290 NW 672

"Guest" or mere "invitee"—negativing relation. A passenger in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator; or
2. For the definite and tangible benefit of the owner or operator; or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand.

Necessarily, a jury question is generated by a substantial conflict of testimony.

Knutson v Lurie, 217-192; 251 NW 157; 36 NCCA 275

Guest or employee as pivotal question—duty of court. When, under the pleading and evidence, the pivotal question is whether plaintiff when injured in defendant's car was a guest or an employee of defendant, the court should not refuse instructions which require the jury to determine such question.

Porter v Decker, 222-1109; 270 NW 897

VII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(f) JURY QUESTIONS—concluded

Guest (?) or otherwise—jury question. Evidence reviewed and held to present a jury question on the issue whether plaintiff, at the time he was injured in a collision, was riding in an automobile as a "guest" or as an employee.

Porter v Decker, 222-1109; 270 NW 897

Failure to support one theory of case. Where plaintiff, a motor vehicle passenger, predicates his action on two theories, viz: (1) he was not a guest, and (2) he was a guest, and as to the first his proof fails because of witness' incompetency under dead man statute, and as to the second he offers no evidence, there is nothing to be submitted to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Pleading as controlling applicability of guest statute. Even when there is evidence indicating that deceased may not have been a guest, yet when an action is based and tried on the theory of "recklessness", the court may on its own motion properly instruct that deceased was a guest.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Assumption of risk. Where motorist and guest had been drinking and automobile was driven off road, wrecked, and guest was killed, the question of assumption of risk was for the jury.

White v Zell, 224-359; 276 NW 76

Intoxication. In a guest case where the evidence shows all the occupants of the motor vehicle had been drinking whisky, the issue of intoxication should not be withdrawn from the jury.

White v Zell, 224-359; 276 NW 76

Conflict as to use of brakes. A conflict in the evidence in a motor vehicle accident case as to whether defendant did or did not apply his brakes is properly a matter for the jury.

Reed v Pape, 226-170; 284 NW 106

Father's consent to son's use of vehicle. Where a guest, injured in an automobile collision, seeks damages from a son and father, as driver and owner, respectively, of a motor vehicle, question of father's consent to son's use of automobile, procured especially for and used exclusively by the son, so as to render the father liable for guest's injuries resulting from son's reckless operation, is a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Interrogatory seeking "knowledge and consent"—proper refusal. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "consent", even tho allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

Passenger suing both drivers—concurring negligence. In an action by a passenger against the drivers of both automobiles involved in a collision, where the vehicle in which he was riding was being driven 50 to 60 miles per hour in a snowstorm, with an oncoming automobile crowding toward the wrong side of the road, a jury question is created as to whether the conduct of the driver with whom the plaintiff was riding was a concurring proximate cause of the passenger's injuries.

Futter v Hout, 225-723; 281 NW 286

(g) DECLARATIONS AND ADMISSIONS

Admissions of fact—conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Weight to be given admission. A cautionary instruction pertaining to the weight to be given an alleged oral admission of defendant to plaintiff following a motor vehicle accident should include a counterbalancing statement that if the admission were deliberately made or often repeated, it might be the most satisfactory evidence.

White v Zell, 224-359; 276 NW 76

Admission of fault. On the issue of reckless operation of an automobile evidence that shortly after a collision the driver being asked what was the matter with him replied, "Just a little reckless", is admissible against the driver as tending to show his admitted fault for the collision.

White v Center, 218-1027; 254 NW 90

Damaging statements—failure to deny as admission. Evidence of the failure of a person to reply to material statements made in his presence and hearing, concerning facts affecting his rights, is competent if the statements are of such character and are made under such conditions that a denial would have been natural had the statements been untrue and incorrect.

Doherty v Edwards, 227-1264; 290 NW 672

Whole of writing offered—must be on same subject as part offered. In automobile damage action for injuries sustained by plaintiff while riding as a guest of defendant's deceased husband, where, on cross-examination of plaintiff,

he was interrogated for impeachment purposes concerning statements made by him as witness in coroner's investigation, and admitted making certain statements, but claimed he was mistaken as to facts, and defendant offered such statements found in coroner's transcript as admission against interest, whereupon plaintiff offered the transcript in its entirety under statute providing the whole of a writing on the same subject may be inquired into, exclusion of transcript by the court was rightful since transcript contained statements made by plaintiff that were not on the same subject as were the answers offered by defendant, as well as being self-serving in character.

Jones v Krambeck, 228- ; 290 NW 56

(h) RES GESTAE

Reckless operation—admission of fault. On the issue of reckless operation of an automobile evidence that shortly after a collision the driver being asked what was the matter with him replied, "Just a little reckless", is admissible against the driver as tending to show his admitted fault for the collision.

White v Center, 218-1027; 254 NW 90

(i) DEMONSTRATIVE EVIDENCE

Signed statement by plaintiff—legal effect. Plaintiff who seeks to establish the reckless operation of an automobile at a time when he was riding therein as a guest is not legally precluded by a written statement theretofore signed by him, and introduced as part of his cross-examination, and which statement tended, perhaps conclusively, to disprove said alleged reckless operation, plaintiff not admitting that the statements contained in said signed writing were true for the purposes of said trial.

Wright v Mahaffa, 222-872; 270 NW 402

VIII INSTRUCTIONS

(a) IN GENERAL

Pleading as controlling applicability of guest statute. Even when there is evidence indicating that deceased may not have been a guest, yet when an action is based and tried on the theory of "recklessness", the court may on its own motion properly instruct that deceased was a guest.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Guest or employee as pivotal question—duty of court. When, under the pleading and evidence, the pivotal question is whether plaintiff when injured in defendant's car was a guest or an employee of defendant, the court should not refuse instructions which require the jury to determine such question.

Porter v Decker, 222-1109; 270 NW 897

Ethical objection to recovery. In an action by a guest to recover of her host damages for injuries inflicted by the reckless operation of an automobile, it is not reversible error to instruct: "Nor is she bound by any ethical rule to the effect that one who is a guest of another should not seek recovery in a proper case", it appearing that the full burden of proving a legal right to recover was plainly imposed on plaintiff.

McQuillen v Meyers, 213-1366; 241 NW 442

Law of case—guest — evidence sufficiency. An instruction to the effect that claimant under the "guest" statute, in order to recover, must prove by a preponderance of the evidence that his decedent was a guest, when unobjected to and not appealed from, remains the law of the case, and evidence that automobile trip, like similar prior trips, with operator as host to friends for purpose of attending a school function, was sufficient to sustain jury finding that passenger was a "guest".

Claussen v Johnson's Est., 224-990; 278 NW 297

Contributory negligence. In an action based on "reckless operation" of a motor vehicle contributory negligence is not an element to be considered or dealt with, either by pleading, proof or instructions.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105

Contributory negligence. The refusal of the court to instruct as to just what a guest in an automobile must do in order to escape the imputation of contributory negligence is proper, especially in view of the fact that contributory negligence is not an element to be considered in an action for reckless driving.

McQuillen v Meyers, 213-1366; 241 NW 442

Holding under prior statute. The court must not instruct that a mere guest in an automobile (under duty, of course, to exercise reasonable and ordinary care) will be guilty of negligence if he fails to do some particular thing, e. g., attempt in some manner to check the speed of the car.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Improper reference to negligence. In an action based solely on the reckless operation of an automobile, the court must not confuse the jury by reciting in its instructions the law governing liability for negligence.

Kaufman v Borg, 214-293; 242 NW 104

Avoiding reference to negligent acts. In an action based solely on "reckless" operation of an automobile, the failure of the court to explain and define various acts of negligence covered by the motor vehicle statutes, is eminently proper.

McQuillen v Meyers, 213-1366; 241 NW 442

VIII INSTRUCTIONS—continued
(a) IN GENERAL—concluded

Reference to speed—granting new trial. A reference in an instruction to a motor vehicle speed of 60 miles per hour when the allegation in the petition of such speed was coerced by a ruling of the court, while not in itself sufficient to warrant a reversal, still justifies the trial court in granting a new trial when considered along with other alleged errors.

White v Zell, 224-359; 276 NW 76

(b) DEFINING TERMS

Recklessness—instructions as a whole. Instructions clearly and accurately defining "recklessness" in the operation of an automobile and definitely placing on plaintiff the burden to establish such "recklessness", neutralize the evil effect of a particular instruction which might, in and of itself, possibly lead the jury to understand that recklessness might consist of the doing of certain acts irrespective of the conditions or circumstances under which they might be done.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Statute distinctions—duty of court. In an action under the guest statute, it is the court's duty to plainly point out to the jury the distinction between negligence and recklessness, and the court, in so doing, by saying "that recklessness means more than negligence", does not unduly emphasize matters in defense or confuse the jury.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Defining recklessness but not negligence—no error. Definition of recklessness stating that "recklessness is more than negligence" is not erroneous because of failure to also define negligence.

Claussen v Johnson's Est., 224-990; 278 NW 297

Improper definition of recklessness. The approved definition of "recklessness" as "implying no care—a proceeding without heed or concern for consequences"—is rendered erroneous by the addition thereto of the elements of "desperation" and "foolishly heedless of danger".

White v McVicker, 216-90; 246 NW 385

Correct but not explicit. Instructions which are correct statements of applicable law, but which are not accompanied by definitions of quite commonplace terms, e. g. "express or implied consent," are nevertheless all-sufficient in the absence of a request for such definitions.

McQuillen v Meyers, 213-1366; 241 NW 442

Failure to define "issue". It is not erroneous for the court to fail to define the term "issue".

McQuillen v Meyers, 213-1366; 241 NW 442

(c) BALANCING INSTRUCTIONS

Protests and warnings by guest. Instructions to a jury that a motorist is not at his peril required to comply with the protests and warnings of his guest should, if requested by the plaintiff and shown by the evidence, be followed with the converse of this proposition, that if the jury finds the driver was warned, some distance from a railroad crossing, of imminent danger and, then, if the driver made no attempt to stop or reduce his speed, he is guilty of recklessness as a matter of law.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Weight to be given admission. A cautionary instruction pertaining to the weight to be given an alleged oral admission of defendant to plaintiff following a motor vehicle accident should include a counterbalancing statement that if the admission were deliberately made or often repeated, it might be the most satisfactory evidence.

White v Zell, 224-359; 276 NW 76

(d) PARAPHRASING PLEADINGS, STATUTES

Paraphrasing grounds of recklessness. An accurate paraphrase of various grounds of recovery is all-sufficient for submission to the jury.

Fleming v Thornton, 217-183; 251 NW 158

Repealed statute — requested instruction properly refused. In automobile guest's personal injury action resulting in jury verdict for defendant, plaintiff's request for new trial because of refusal to give an instruction to the effect that it was the duty of a driver of an overtaken automobile, upon signal, to drive to the "right center of the traveled way" and remain there until overtaking automobile shall have "safely passed" was properly refused, since such statute was repealed at time plaintiff was injured, and new statute only required such driver to "give way to the right" until overtaking vehicle had "completely passed".

Jones v Krambeck, 228- ; 290 NW 56

Separate specifications of wanton misconduct submitted—joined by "and"—harmless error. In an action under the Illinois guest statute, for damages arising out of injuries received in a motor vehicle collision in Illinois, separate specifications of wanton misconduct, based on one charge of excessive speed, but, nevertheless, submitted in the language of the petition, are not rendered prejudicially erroneous because joined together with the word "and".

Moran v Kean, 225-329; 280 NW 543

(e) BURDEN OF PROOF

Affirmative defense—burden on pleader. The jury in a personal injury or death claim action where the defendant pleads "assumption of risk" should be plainly instructed that one

pleading an affirmative defense must assume the burden of proving it.

White v Zell, 224-359; 276 NW 76

Ethical objection to recovery. In an action by a guest to recover of her host damages for injuries inflicted by the reckless operation of an automobile, it is not reversible error to instruct: "Nor is she bound by any ethical rule to the effect that one who is a guest of another should not seek recovery in a proper case," it appearing that the full burden of proving a legal right to recover was plainly imposed on plaintiff.

McQuillen v Meyers, 213-1366; 241 NW 442

Guest—evidence sufficiency. An instruction to the effect that claimant under the guest statute, in order to recover, must prove by a preponderance of the evidence that his decedent was a guest, when unobjected to and not appealed from, remains the law of the case, and evidence that automobile trip, like similar prior trips, with operator as host to friends for purpose of attending a school function, was sufficient to sustain jury finding that passenger was a "guest".

Claussen v Johnson's Est., 224-990; 278 NW 297

Father's consent to son's use of vehicle. In a guest's action against a father and son on account of son's reckless operation of automobile, instructions to the jury setting out elements required for recovery against both father and son should have included element that proof of father's consent to son's use of automobile was required to justify a verdict against the father, and any instruction which was intended to refer to son only should have been so stated.

Allbaugh v Ashby, 226-574; 284 NW 816

Vehicle driven without owner's consent. Where jury is instructed that the law implies that a car being driven by one other than its owner is being driven with the owner's consent "and this places the burden upon the owner to prove, by a preponderance of the evidence, that the car was not being driven with his consent", this quoted portion of instruction is reversible error as it places undue burden on owner; the inference from ownership does not change the burden of proof which continues on the complaining party throughout the trial.

Allbaugh v Ashby, 226-574; 284 NW 816

(f) UNSUPPORTED ISSUES

Submission of evidentiary issue. Issues having no basis in the pleadings need not be submitted to the jury.

Hart v Hinkley, 215-915; 247 NW 258

Insufficient plea. In an action for damages consequent on the operation of an automobile instructions which predicate recovery on proof of "reckless" operation cannot be sustained when the pleadings neither allege reckless driving nor facts from which recklessness is a necessary deduction.

Redfern v Redfern, 212-454; 236 NW 399

Guest (?) or otherwise. Issues which are without support in the evidence must not be submitted. So held where on the question whether plaintiff when he was injured was a guest in an automobile, the court submitted the unsupported issues whether plaintiff accompanied defendant (1) for the definite benefit of defendant, or (2) for the mutual benefit of plaintiff and defendant.

Porter v Decker, 222-1109; 270 NW 897

"Unwilling guest" interpretation unwarranted. Instruction reviewed and held not open to the vice of injecting an issue not in the pleadings, to wit, that plaintiff was an unwilling guest in defendant's automobile.

Reed v Pape, 226-170; 284 NW 106

Assuming other motorist will obey law. Requested instructions that a motorist had a right to assume that a taxi driver would obey the law as to speed and lookout, altho correct as abstract propositions of law, are properly refused when not supported by the evidence.

Reed v Pape, 226-170; 284 NW 106

"No-eyewitness" rule. Where a motorist and other eyewitnesses testify as to deceased's conduct just prior to his driving into the side of a moving train, it is error to instruct on the presumption that defendant's natural instinct of self-preservation would prompt him not to run into a moving train, when direct evidence as to his conduct is obtainable.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Defense—third party negligence. A defendant-host who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant-host establishes that such negligence, and not his own recklessness, was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

(g) CONSTRUCTION AS A WHOLE

Limiting recovery to proof. An instruction stating that if defendant's recklessness caused plaintiff's injury the defendant would be liable, is not error when accompanied by other instructions which limit recovery to proof of specific grounds of recklessness.

Reed v Pape, 226-170; 284 NW 106

Neutralizing evil of one instruction. Instructions clearly and accurately defining "recklessness" in the operation of an automobile and definitely placing on plaintiff the burden to establish such "recklessness", neutral-

VIII INSTRUCTIONS—concluded

(g) CONSTRUCTION AS A WHOLE—concluded

ize the evil effect of a particular instruction which might, in and of itself, possibly lead the jury to understand that recklessness might consist of the doing of certain acts irrespective of the conditions or circumstances under which they might be done.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Bad effect of one instruction neutralized by repeating good instruction. Repeated instructions, to the effect that plaintiff must, in order to recover, establish that defendant recklessly operated the automobile in question, neutralize the evil effects of a particular instruction which inferentially told the jury that defendant admitted such recklessness.

Siesseger v Puth, 216-916; 248 NW 352

Ethical objection to recovery. In an action by a guest to recover of her host damages for injuries inflicted by the reckless operation of an automobile, it is not reversible error to instruct: "Nor is she bound by any ethical rule to the effect that one who is a guest of another should not seek recovery in a proper case", it appearing that the full burden of proving a legal right to recover was plainly imposed on plaintiff.

McQuillen v Meyers, 213-1366; 241 NW 442

(h) REQUESTING INSTRUCTIONS

Guest or employee as pivotal question — duty of court. When, under the pleading and evidence, the pivotal question is whether plaintiff when injured in defendant's car was a guest or an employee of defendant, the court should not refuse instructions which require the jury to determine such question.

Porter v Decker, 222-1109; 270 NW 897

Protests and warnings by guest—balancing instructions. Instructions to a jury that a motorist is not at his peril required to comply with the protests and warnings of his guest should, if requested by the plaintiff and shown by the evidence, be followed with the converse of this proposition, that if the jury finds the driver was warned some distance from a railroad crossing of imminent danger and, then, if the driver made no attempt to stop or reduce his speed, he is guilty of recklessness as a matter of law.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Interrogatory seeking more than statutory requirements—proper refusal. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "consent", even tho allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

IX DAMAGES

Submission of excess recovery. The submission to the jury of a possible amount of recovery slightly in excess of what is legally recoverable does not constitute error when the final result is not affected thereby.

McQuillen v Meyers, 213-1366; 241 NW 442

Harmless error—instructions inviting excess recovery. Instructions allowing the jury to return damages in excess of statutory limitation are harmless when the jury returns a verdict for less than the statutory limit.

Siesseger v Puth, 211-775; 234 NW 540

Present worth of estate—inadequate instructions. In an action for damages to the estate of 17-year-old minor consequent on his wrongful death, the court should instruct that the present worth of said estate must be based on the minor's expectancy at the time of his majority. But a substantial reduction of the verdict may cure the error.

Hart v Hinkley, 215-915; 247 NW 258

Verdicts—unallowable impeachment. In a personal injury action, a verdict may not be impeached by the affidavits of jurors to the effect that a certain allowance was made for an element of damages as to which there was no evidence.

McQuillen v Meyers, 213-1366; 241 NW 442

Visible disfigurement. A visible and lifelong personal disfigurement is necessarily a very persuasive element of damages. Verdict of $5,000 held nonexcessive.

Siesseger v Puth, 216-916; 248 NW 352

Verdict due to passion and prejudice. Verdict of $17,000 for wrongfully caused death held to show passion and prejudice, and optionally reduced to $7,000.

Cerny v Secor, 211-1232; 234 NW 193

Fatal personal injury—$15,000—excessiveness. Verdict for $15,000 for death of a 17-year-old boy, reduced by trial court to $10,000, held subject to a further reduction to $7,500.

Hart v Hinkley, 215-915; 247 NW 258

ACTIONS AGAINST NONRESIDENTS

5038.01 Legal effect of use and operation.

Discussion. See 20 ILR 654—Nonresident motorists; 25 ILR 810—Nonresident plaintiff

Foreign decisions.

Horvath v Brettschneider, 227 N. Y. S. 109
Hendrick v State, 235 US 610
Kane v State, 242 US 160
Hess v Pawloski, 274 US 352
Wuchter v Pizzutti, 276 US 13
State v Belden, 193 Wis., 145
Pawloski v Hess, 250 Mass., 22
Harvard Law Review, Vol. 39 p. 563

Substituted service statute—strict adherence. Statutes providing for substituted service of original notice present a method of procedure that is extraordinary in character and allowed only because specially authorized. Because such statutes are the only authority for the procedure, the facts required in the statute must appear.

Jermaine v Graf, 225-1063; 283 NW 428

Substituted service on nonresident defendants in automobile cases—availability to nonresident plaintiffs. The provisions of the Iowa motor vehicle law relative to substituted service upon nonresident defendants are available to nonresident plaintiffs.

Welsh v Ruopp, 228- ; 289 NW 760

Original notice—service on nonresidents—showing nonresidence at time of accident. Where an attack by special appearance and motion to quash is made upon use of special method of securing service on nonresidents provided for in motor vehicle law, a showing is required of facts essential to jurisdiction, and one of such basic facts is nonresidence of defendant at the time of the use and operation of the vehicle allegedly causing the damage upon which suit is brought. Accordingly, proof of nonresidence at the time suit is started would not be sufficient where accident in question occurred one and one-half years earlier.

Welsh v Ruopp, 228- ; 289 NW 760

Substituted service on nonresident corporation—plaintiff's burden. In a motor vehicle accident action wherein plaintiff obtained service of notice upon a nonresident corporation by serving the commissioner of motor vehicles and wherein the defendant attacked such service by special appearance on the ground that it was not a person within the purview of the statute, the burden was on the plaintiff to make such showing that defendant was a person under the statute. Held, burden not met.

Jermaine v Graf, 225-1063; 283 NW 428

5038.03 Original notice—form.

Substituted service on nonresidents—contents of notice. Provision in motor vehicle law invoking special method of service on nonresidents does not require that the original notice set out facts which warrant use of such method and which might be necessary to sustain jurisdiction. Notice which complies with this section and §11055, C., '39, is sufficient.

Welsh v Ruopp, 228- ; 289 NW 760

5038.04 Manner of service.

Substituted service on nonresidents. Statutes relative to securing substituted service on nonresidents in motor vehicle accident cases do not require that motor vehicle commissioner or his deputy make affidavit proving filing of original notice with the commissioner and proving mailing of notification to nonresidents. Such proof may be made by plaintiff, his attorney, or someone acting in his behalf.

Welsh v Ruopp, 228- ; 289 NW 760

"Commissioner" as process agent.

Green v Brinegar, 228- ; 292 NW 229

5038.08 Proof of service.

Original notice—service on nonresidents—showing nonresidence at time of accident. Where an attack by special appearance and motion to quash is made upon use of special method of securing service on nonresidents provided for in motor vehicle law, a showing is required of facts essential to jurisdiction, and one of such basic facts is nonresidence of defendant at the time of the use and operation of the vehicle allegedly causing the damage upon which suit is brought. Accordingly, proof of nonresidence at time suit is started would not be sufficient where accident in question occurred one and one-half years earlier.

Welsh v Ruopp, 228- ; 289 NW 760

Substituted service on nonresidents. Statutes relative to securing substituted service on nonresidents in motor vehicle accident cases do not require that motor vehicle commissioner or his deputy make affidavit proving filing of original notice with the commissioner and proving mailing of notification to nonresidents. Such proof may be made by plaintiff, his attorney, or someone acting in his behalf.

Welsh v Ruopp, 228- ; 289 NW 760

5038.10 Venue of actions.

Substituted service on nonresident defendants—availability to nonresident plaintiffs. The provisions of the Iowa motor vehicle law relative to substituted service upon nonresident defendants are available to nonresident plaintiffs.

Welsh v Ruopp, 228- ; 289 NW 760

5038.12 Duty of commissioner.

Substituted service on nonresidents—proof of service. Statutes relative to securing substituted service on nonresidents in motor vehicle accident cases do not require that motor vehicle commissioner or his deputy make affidavit proving filing of original notice with the commissioner and proving mailing of notification to nonresidents. Such proof may be made by plaintiff, his attorney, or someone acting in his behalf.

Welsh v Ruopp, 228- ; 289 NW 760

CHAPTER 251.2

MOTOR VEHICLE DEALERS

5039.02 Definitions.

Conditional sale vendor not liable for negligence of vendee. The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

5048 Failure of lights. (Repealed.)

Right to proceed—instructions. The court should, on supporting testimony, instruct as to the right of a traveler to proceed cautiously toward his destination in case of the failure of his lights to operate.

Sergeant v Challis, 213-57; 238 NW 442

Necessary instructions. The operation of an automobile during the nighttime without the required number of lights is not necessarily negligent; and in submitting such issue the court must clearly state to the jury the circumstances under which the operator would, under the statute, be negligent and the circumstances under which he would not, under the statute, be negligent.

Muirhead v Challis, 213-1108; 240 NW 912

CHAPTER 251.3

MOTOR VEHICLE FUEL TAX

Atty. Gen. Opinions. See '36 AG Op 450, 539, 541, 543; '38 AG Op 294

5093.01 Purpose.

Atty. Gen. Opinion. See '36 AG Op 613

5093.02 Definition of terms.

Discussion. See 17 ILR 272—Gasoline for interstate airplanes

Atty. Gen. Opinions. See '38 AG Op 294, 551

"Gasoline" does not embrace "benzol" or "naphtha".

State v Oil Co., 209-980; 229 NW 214
Lineberger v Johnson, 213-800; 239 NW 679

Liability of county. A county becomes, within the scope and meaning of chapter 251-F1, C., '35, [Ch 251.3, C., '39] a distributor of motor vehicle fuel when it imports the same from without the state solely for the purpose of operating its power maintainers and trucks in the construction and maintenance of its highways and is under obligation to obtain a license as such distributor and to pay the state the statutory excise charge (without penalty) on such importations.

State v Woodbury County, 222-488; 269 NW 449

Liability of municipality. A municipal corporation becomes, within the scope and meaning of chapter 251-F1, C., '35, [Ch 251.3, C., '39] a "distributor" of motor vehicle fuel when it imports the same from without the state for its own use and is under obligation to obtain a license as such distributor and to pay to the state the statutory excise charge on such importations.

State v Des Moines, 221-642; 266 NW 41

Definition of terms—power of general assembly. The general assembly in exercising its constitutional power over an authorized subject matter may be its own lexicographer—may use its own terms and declare what entities shall be embraced therein. So held where in the enactment of this chapter it defined the term "person" and, in effect, declared such term to include a municipal corporation.

State v Des Moines, 221-642; 266 NW 41

5093.03 Tax imposed.

Atty. Gen. Opinions. See '38 AG Op 72, 438, 548, 551, 555

"Gasoline" does not embrace "benzol" or "naphtha".

State v Oil Co., 209-980; 229 NW 214
Lineberger v Johnson, 213-800; 239 NW 679

Nonburden on interstate commerce. Principle reaffirmed that the so-called motor vehicle fuel tax is not a direct tax on said fuel imported, but is an excise on the use of the fuel for the propulsion of vehicles on the highways of the state, and is in no sense a burden on interstate commerce.

State v Standard Oil, 222-1209; 271 NW 185

Motor vehicle fuel tax—constitutional. The Iowa motor vehicle fuel tax was obviously not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it came to rest in Iowa, and the requirement that the distributor as shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls, imposes no unconstitutional burden, either upon interstate commerce or upon the distributor.

Monamotor Oil Co. v Johnson, 292 US 86

5093.04 Tax payable by whom.

Atty. Gen. Opinions. See '38 AG Op 438, 453, 548, AG Op July 15, '39

Price-posting statute. The statute providing that every seller of motor vehicle fuel or fuel oil shall post prices and sell at not less than such prices does not infringe on right of contract or unjustly discriminate against motor vehicle fuel dealers.

State v Woitha, 227-1; 287 NW 99
State v Hardy, 227-12; 287 NW 104

Motor vehicle fuel tax—constitutional. The Iowa motor vehicle fuel tax was obviously not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it came to rest in Iowa, and the requirement that the distributor as shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls, imposes no unconstitutional burden, either upon interstate commerce or upon the distributor.

Monamotor Oil Co. v Johnson, 292 US 86

5093.09 Monthly reports of distributors.

Atty. Gen. Opinions. See '36 AG Op 450; '38 AG Op 294, 502

Unallowable refunds. A distributor of motor vehicle fuel imported into the state who under this statute pays the tax on the "invoiced gallonage"—the number of gallons placed in the car at the refinery—less the statutory gallonage allowed by statute for "loss and evaporation" (3%), is not entitled to a refund of the tax on the difference in gallonage between said invoiced gallonage and the actual unloaded gallonage—a difference arising from the fact that the fuel was loaded when it was at a much higher temperature than at the time it was unloaded.

State v Standard Oil, 222-1209; 271 NW 185

5093.10 Cancellation of distributor's license.

Atty. Gen. Opinion. See '38 AG Op 294

5093.11 Treasurer may assess amount of license fees due.

Atty. Gen. Opinion. See '36 AG Op 450

5093.14 Permits to sell fuel oil tax-free.

Atty. Gen. Opinions. See '36 AG Op 539, 543; AG Op May 18, '39

5093.26 Records open to inspection of treasurer.

Atty. Gen. Opinion. See '36 AG Op 613

5093.29 Refund.

Atty. Gen. Opinions. See '38 AG Op 72, 438, 551; AG Op March 23, '39

When tax or license refundable. Where the general public is by proper authority excluded from a public highway during its construction, the operation thereon by the contractor of his motor vehicle road construction machinery in carrying out his contract for the construction of said highway is not an "operation upon the public highway" within the meaning of the statute which denies a refund of tax on gasoline used for said latter purpose. Gasoline used in operating said machinery under said circumstances is used for a "commercial" purpose and the tax paid thereon must be refunded.

D. M. Co. v Johnson, 213-594; 239 NW 575

Unallowable refunds. A distributor of motor vehicle fuel imported into the state who under this statute pays the tax on the "invoiced gallonage"—the number of gallons placed in the car at the refinery—less the statutory gallonage allowed by statute for "loss and evaporation" (3%), is not entitled to a refund of the tax on the difference in gallonage between said invoiced gallonage and the actual unloaded gallonage—a difference arising from the fact that the fuel was loaded when it was at a much higher temperature than at the time it was unloaded.

State v Standard Oil, 222-1209; 271 NW 185

Mistaken refunds—recovery of interest. The state treasurer who, under a mistaken interpretation of the law, refunds to a distributor of motor vehicle fuel a portion of the excise properly paid on account of said fuel, may, on behalf of the state, legally recover the amount of said mistaken refund, but with interest only from the date of the judgment.

State v Oil Co., 222-1209; 271 NW 185

5093.31 Certain acts made unlawful.

Atty. Gen. Opinion. See AG Op May 25, '39

Indictment—short form — erroneous designation of section. A "short-form" indictment for obtaining money by false pretenses, even tho it specifically purports to be found under §13045, C., '31, but which, by the bill of particulars, is manifestly based on false pretenses on obtaining a refund of tax paid on motor vehicle fuel as provided by §5093-a8, C., '31, is sufficient to support a conviction under the latter section and a sentence solely thereunder.

State v Wall, 218-171; 254 NW 71

CHAPTER 251.4

MOTOR VEHICLE FUEL

Atty. Gen. Opinion. See '34 AG Op 190

5095.01 Definitions.

Atty. Gen. Opinion. See '34 AG Op 190

5095.02 Tests and standards.

Atty. Gen. Opinions. See '32 AG Op 250; '34 AG Op 190

5095.05 Sales slip on demand.

Atty. Gen. Opinions. See '32 AG Op 45; '38 AG Op 502

5095.08 Prohibition.

Atty. Gen. Opinions. See '28 AG Op 264; '32 AG Op 284; '34 AG Op 63

5095.09 Poster showing analysis.

Atty. Gen. Opinion. See '32 AG Op 115

5095.11 Violations.

Atty. Gen. Opinion. See '32 AG Op 259

CHAPTER 252.1

MOTOR VEHICLE CERTIFICATED CARRIERS

Atty. Gen. Opinion. See '34 AG Op 305

5100.01 Definitions.

Atty. Gen. Opinions. See '25-26 AG Op 192, 314; '34 AG Op 190

Common carrier—acts constituting. The contention of a trucker that he is a private carrier solely of a particular line of goods and exclusively for the members of an unincorporated association cannot be sustained when he operates his truck (1) between fixed termini, (2) over a regular route, (3) at stated, regular times, and (4) for compensation with the purpose of offering his services to all persons within said territory having need for the same particular line of carriage, the so-called "association" being a mere subterfuge to hide his real character as a carrier.

State v Rosenstein, 217-985; 252 NW 251

Constitutionality of act. Chapters 252-A1 and 252-A2, C., '31, providing for the regulation and taxation of motor vehicle carriers held constitutional by the federal court.

Grolbert v Bd. of R. R. Com., 60 F 2d, 321

"Operation between fixed termini." A trucker cannot be said to operate "between fixed termini, or over a regular route" when, during the time he is not engaged in his regular business of carrying the government mail, he does odd jobs of trucking and of manual labor, and at irregular times and over irregular routes carries goods from a wholesale center to merchants of his own and of nearby towns, provided he can arrange his time so to do.

State v Thompson, 217-994; 252 NW 256

Nonfixed termini — change in business — effect. A duly issued permit under chapter 252-C1, C., '31 [Ch 252.3, C., 39], authorizing a "truck operator" to transport freight for compensation between nonfixed termini and over nonregular routes ceases to afford protection to the holder of the permit whenever his business concentrates upon a regular route and two fixed termini within the meaning of chapters 252-A1 and 252-A2, C., '31 [Chs 252.1, 252.2, C., '39].

State v Mercer, 215-611; 246 NW 406

Status—voluntary change. A "truck operator" within the meaning of chapter 252-C1, C., '35 [Ch 252.3, C., '39] (one not operating between fixed termini nor over a regular route), immediately becomes a "motor vehicle carrier" (one operating between fixed termini, or over a regular route), and governed accordingly, whenever he so changes the course of his business as to take on the status of the latter and leave off the status of the former.

State v Lischer Bros., 223-588; 272 NW 604

Property damaged while in storage—liability. When motor vehicle carriers utilized the terminal facilities of a third party, who provided pickup and delivery service from the terminal, and had individual spaces rented to each trucker for the storage of that trucker's shipments, it was held that control and possession of the shipments of goods was in the truck carriers during the storage period, and when a fire destroyed the terminal, the terminal owner was acting as agent for the truckers, who were liable to the owners of the property in transit for the losses occasioned by the fire.

Crouse v Cadwell, 226-1083; 285 NW 623

Motor freight terminal operator's liability to carrier. When motor carrier operators stored goods belonging to third parties in a motor freight terminal and were held liable when the goods were destroyed in a fire through no negligence on the part of the terminal operator, the carriers were not entitled to recoupment from the terminal operator who acted as their agent in storing the goods, in the absence of an agreement that he be liable for losses not caused by his own negligence.

Crouse v Cadwell, 226-1083; 285 NW 623

5100.02 Special powers of commission.

Discussion. See 9 ILB 268—Motorbus competition; 9 ILB 26—Motorbus regulation; 14 ILR 201—Constitutionality of motorbus tax

5100.03 General powers.

Discussion. See 19 ILR 453—Truck classification

5100.04 Statutes applicable.

Injunction. Injunction will lie by the state on the relation of the board of railroad commissioners to enjoin the operation of a motor carrier over the public highways contrary to the orders of said board.

State v Holdcroft, 207-564; 221 NW 191

Injunction—burden of proof. In an action by the board to enjoin a trucker from operating upon the public highway "between fixed termini or over a regular route" without the legally required certificate and payment of the statutory tax, the board has the burden of proof to establish that the defendant is so operating.

State v Ooten, 215-543; 243 NW 329

5100.06 Certificate of convenience and necessity.

Injunction—burden of proof. In an action by the board of railroad commissioners to enjoin a trucker from operating upon the public highway "between fixed termini or over a regular route" without the legally required certificate and payment of the statutory tax, the board has the burden of proof to establish that the defendant is so operating. Evidence held insufficient.

State v Ooten, 215-543; 243 NW 329

Applicability of statutes. A truck operator who, under a permit duly granted under chapter 252-C1, C., '31 [Ch 252.3, C., '39], and by means of his motor truck, transports for hire freight from place to place at irregular times and on no schedule of service, and only when he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31, '[Chs 252.1, 252.2, C., '39] and, therefore, is under no obligation to obtain a certificate of necessity or convenience or to pay the tax required by said chapters.

State v Transfer, 213-1269; 239 NW 125
State v Lischer, 215-607; 246 NW 264
State v Lischer, (NOR); 261 NW 634

5100.15 Objections to application.

Authorized objectors. The legal owner by assignment of a certificate of necessity and convenience for the operation of a motor carrier line is a party authorized to enter objections to the granting of a certificate for a competing line.

Campbell v Eldridge, 206-224; 220 NW 304

5100.21 Appeal.

Appearance by commerce counsel. The commerce counsel has a right to appear for and on behalf of the board of railroad commissioners on an appeal from orders granting or refusing an application for the operation of a motor carrier line.

Campbell v Eldridge, 206-224; 220 NW 304

5100.23 Trial on appeal.

Granting of certificate—review. A determination by the board of railroad commissioners, on supporting evidence, that the operation of a motor carrier line would promote the public convenience and necessity is constitutionally beyond review by the courts.

In re Beasley Bros., 206-229; 220 NW 306

Orders of railroad commissioners—judicial review. The authority of the court to review the finding and order of the board of railroad commissioners in granting or refusing a certificate of convenience and necessity for the operation of a motor carrier is strictly limited to questions of law.

In re Waterloo Railway, 206-238; 220 NW 310

Conclusiveness of orders. The board of railroad commissioners has legal authority, on supporting testimony, to grant in part only an application for authority to operate a motor carrier line, and in such case the orders of the board are conclusive on the courts.

Campbell v Eldridge, 206-224; 220 NW 304

5100.24 Appeal to supreme court.

Atty. Gen. Opinion. See '30 AG Op 165

5100.26 Liability bond.

Scope of bond. A liability insurance bond under this section imposes no liability on the surety for injuries to persons except for injuries for which the motor vehicle carrier would be legally liable.

Crozier v Stages, 209-313; 228 NW 320

Action against surety on bond. A party injured in person and property by the operation of a motor vehicle carrier may bring his action directly against the carrier and the statutory surety on the bond filed with the board of railroad commissioners, even tho no service is had on the carrier and even tho the bond provides, in effect, for an action against the surety in event the injured party first obtains a judgment against the carrier and fails to collect thereon.

Curtis v Michaelson, 206-111; 219 NW 49; 1 NCCA (NS) 336

Regulation—construction and application of statute. An interstate motor vehicle carrier will not be permitted to justify a total disre-

gard of the motor vehicle carrier acts of this state on the plea that said acts (applicable in a general way to both interstate and intrastate carriers) if literally construed, would require him to execute to the state a bond which would be violative of the interstate commerce clause of the federal constitution, because said acts vest the board of railroad commissioners with ample power and duty so to construe and apply said acts that, when applied to an interstate carrier, they will not violate said interstate commerce clause.

State v Martin, 210-207; 230 NW 540

Right of injured party. When the owner or operator of a motor vehicle has insured his liability for damages consequent on the operation of his vehicle, an injured party may not sue directly on the policy which indemnifies the wrongdoer—the insured—until he has obtained a judgment against the wrongdoer—the insured—and until an execution on the judgment has been returned unsatisfied (§8940, C., '31). There is one exception to this statutory rule, to wit: When the policy is one obtained by a motor vehicle carrier as a mandatory statutory condition precedent to obtaining a certificate to operate as such carrier, an injured party may maintain an action on the policy when service of notice of suit cannot be had on the carrier within this state.

Ellis v Bruce, 215-308; 245 NW 320

Joinder—tort of one and contract of another. A joint action (1) against a wrongdoer upon his tort consequent on the negligent operation of a motor vehicle, and (2) against a surety company upon its policy to indemnify the wrongdoer from loss because of said tort, even tho but one recovery is sought, presents two different causes of action, and the joinder thereof is wholly unallowable. And this is true whether the policy is simply a private, optional contract between the insured and insurer, or a policy mandatorily required by statute to be filed with and approved by the railroad commission as a condition precedent to the obtaining of a permit to operate said vehicle.

Ellis v Bruce, 215-308; 245 NW 320

"Resulting from." An injury to a passenger on a motor vehicle bus may not be said to "result from" the operation of the bus when the proximate cause of such injury was the negligence of a third party.

Crozier v Stages, 209-313; 228 NW 320

Res ipsa loquitur—applicability of doctrine. Plaintiff, under a general allegation of negligence on the part of a common carrier of passengers, to wit, a motor bus company, generates, under the doctrine of res ipsa loquitur, a jury question on the issue of the negligence of such carrier by proof (1) that he was a passenger on said bus; (2) that a collision occurred between said bus and an automobile; (3) that in said collision said bus was overturned; and (4) that plaintiff was injured.

Crozier v Stages, 209-313; 228 NW 320; 29 NCCA 20

Res ipsa loquitur—applicability. Principle recognized that the doctrine of res ipsa loquitur is, under appropriate facts, applicable to common carriers.

Preston v Railway, 214-156; 241 NW 648

Hand baggage—condition to liability. A carrier of passengers is not liable as an insurer for the loss of hand baggage of the passenger unless said baggage is definitely surrendered into the exclusive possession and control of the carrier. If liability is predicated on negligence, such ground must be pleaded and, of course, proven. Evidence held to show no such surrender of custody.

Jensen v Transit Lines, 221-513; 266 NW 9

Injuries to livestock—directed verdict—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until 3 hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

Property damaged while in storage—liability. When motor vehicle carriers utilized the terminal facilities of a third party, who provided pickup and delivery service from the terminal, and had individual spaces rented to each trucker for the storage of that trucker's shipments, it was held that control and possession of the shipments of goods was in the truck carriers during the storage period, and when a fire destroyed the terminal, the terminal owner was acting as agent for the truckers, who were liable to the owners of the property in transit for the losses occasioned by the fire.

Crouse v Cadwell Co., 226-1083; 285 NW 623

Motor freight terminal operator's liability to carrier. When motor carrier operators stored goods belonging to third parties in a motor freight terminal, and were held liable when the goods were destroyed in a fire through no negligence on the part of the terminal operator, the carriers were not entitled to recoupment from the terminal operator who acted as their agent in storing the goods, in the absence of an agreement that he be liable for losses not caused by his own negligence.

Crouse v Cadwell Co., 226-1083; 285 NW 623

Destruction of property—evidence of value—pleading. In motor carrier's action on liability insurance policy for loss of property destroyed by fire in freight terminal, plaintiff has burden of proof as to its "custody and control" of goods within policy provisions, also as to value thereof, and stipulation as to value

of certain goods on which claims had been paid by insured does not admit value of other goods in absence of competent proof thereof.

Amer. Alliance Ins. v Brady Co., 101 F 2d, 144

New trial—trucker's statutory insurance requirement—jurors' discussion not misconduct. Jurors' discussion of statutory requirement that certain truckers carry liability insurance —being a discussion of law that all were presumed to know—is neither misconduct nor justification for a new trial.

Keller v Dodds, 224-935; 277 NW 467

5100.34 Misdemeanor—penalty.

Atty. Gen. Opinion. See '34 AG Op 305

CHAPTER 252.2

TAXATION OF MOTOR VEHICLE CERTIFICATED CARRIERS

Atty. Gen. Opinion. See '34 AG Op 89

5103.01 Definitions.

Atty. Gen. Opinion. See '25-26 AG Op 192

Constitutionality of act. Chapters 252-A1 and 252-A2, C., '31, providing for the regulation and taxation of motor vehicle carriers held constitutional by the federal court.

Grolbert v Bd. of R. R. Com., 60 F 2d, 321

Permissible classification. The motor vehicle carrier taxation act is not clearly, plainly, and palpably arbitrary, unreasonable, and unlawfully discriminatory because it provides that those who shall pay the tax shall be those only who operate motor vehicles not upon fixed rails, and as common carriers of freight and passengers, over regular routes, on scheduled trips, and between fixed termini.

Iowa Motor v Board, 207-461; 221 NW 364; 75 ALR 1

Status—voluntary change. A "truck operator" within the meaning of Ch 252-C1, C., '35 [Ch 252.3, C., '39] (one not operating between fixed termini nor over a regular route), immediately becomes a "motor vehicle carrier" (one operating between fixed termini, or over a regular route), and governed accordingly, whenever he so changes the course of his business as to take on the status of the latter and leave off the status of the former.

State v Lischer Bros., 223-588; 272 NW 604

Truck operator between nonfixed termini—change in business—effect. A duly issued permit under chapter 252-C1, C., '31, authorizing a "truck operator" to transport freight for compensation between nonfixed termini and over nonregular routes ceases to afford protection to the holder of the permit whenever his business concentrates upon a regular route and two fixed termini within the meaning of chapters 252-A1 and 252-A2, C., '31. Evidence held to show such concentration.

State v Mercer, 215-611; 246 NW 406

Common carrier—acts constituting. The contention of a trucker that he is a private carrier solely of a particular line of goods and exclusively for the members of an unincorporated association cannot be sustained when he operates his truck (1) between fixed termini, (2) over a regular route, (3) at stated, regular times, and (4) for compensation—with the purpose of offering his services to all persons within said territory having need for the same particular line of carriage, the so-called "association" being a mere subterfuge to hide his real character as a carrier.

State v Rosenstein, 217-985; 252 NW 251

"Operation between fixed termini"—scope. A trucker cannot be said to operate "between fixed termini nor over a regular route" when, during the time he is not engaged in his regular business of carrying the government mail, he does odd jobs of trucking and of manual labor, and, at irregular times and over irregular routes carries goods from a wholesale center to merchants of his own and of nearby towns, provided he can arrange his time so to do.

State v Thompson, 217-994; 252 NW 256

Injunction—burden of proof. In an action by the board of railroad commissioners to enjoin a trucker from operating upon the public highway "between fixed termini or over a regular route" without the legally required certificate and payment of the statutory tax, the board has the burden of proof to establish that the defendant is so operating. Evidence held insufficient.

State v Ooten, 215-543; 243 NW 329

5103.02 Compensation tax.

Atty. Gen. Opinion. See AG Op Jan. 11, '40

Applicability of statutes. A truck operator who, under a permit duly granted under chapter 252-C1, C., '31 [Ch 252.3, C., '39], and by means of his motor truck, transports for hire freight from place to place, at irregular times, and on no schedule of service, and only when he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31 [Chs 252.1, 252.2, C., '39], and, therefore, is under no obligation to obtain a

certificate of necessity or convenience or to pay the tax required by said chapters.

State v Transfer, 213-1269; 239 NW 125
State v Lischer, 215-607; 246 NW 264
State v Lischer, (NQR); 261 NW 634

Bond to pay taxes "incurred"—scope. A bond (1) reciting that the principal therein had been licensed as a motor carrier under named statutes of the state, and (2) conditioned to pay "the taxes and penalties incurred" under said statutes—a positive liability—embraces liability to pay taxes and penalties incurred before, as well as after, the date of said bond.

State v U. S. F. & G. Co., 221-880; 266 NW 501

5103.08 Sale of property.

Tax—nonliability of vehicle. An automobile truck purchased under an ordinary conditional sale contract and operated by a motor vehicle carrier as such under a certificate of authority issued by the board of railroad commissioners is not subject to levy for the payment of the statutory motor vehicle carrier tax under a tax warrant issued by the commissioners after the vendor had repossessed himself of said truck for default in payment of the purchase price.

Universal Credit v Mamminga, 214-1135; 243 NW 513

5103.12 Distribution of proceeds.

Atty. Gen. Opinions. See '34 AG Op 88; '36 AG Op 35

Special act—what is not. A legislative act which first makes a permissible classification of those who must pay the tax (one not arbitrary, unreasonable, and unlawfully discriminatory), and then provides that the resulting tax shall, inter alia, be used for the maintenance and repair of certain public highways, is not a "special law for road purposes", within the meaning of Art. III, §30, of the state constitution.

Iowa Motor v Board, 207-461; 221 NW 364; 75 ALR 1

CHAPTER 252.3

MOTOR VEHICLE TRUCK OPERATORS

Atty. Gen. Opinion. See '34 AG Op 88

5105.01 Definitions.

Applicability of statutes. A truck operator who, under a permit duly granted under chapter 252-C1, C., '31 [Ch 252.3, C., '39], and by means of his motor truck, transports for hire freight from place to place, at irregular times, and on no schedule of service, and only when he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31 [Chs 252.1, 252.2, C., '39], and, therefore, is under no obligation to obtain a certificate of necessity or convenience or to pay the tax required by said chapters.

State v Transfer, 213-1269; 239 NW 125
State v Lischer, 215-607; 246 NW 264
State v Lischer, (NOR); 261 NW 634

"Operation between fixed termini." A trucker cannot be said to operate "between fixed termini, or over a regular route" when, during the time he is not engaged in his regular business of carrying the government mail, he does odd jobs of trucking and of manual labor, and at irregular times and over irregular routes carries goods from a wholesale center to merchants of his own and of nearby towns, provided he can arrange his time so to do.

State v Thompson, 217-994; 252 NW 256

Nonfixed termini — change in business — effect. A duly issued permit under chapter 252-C1, C., '31 [Ch 252.3, C., '39], authorizing a "truck operator" to transport freight for compensation between nonfixed termini and over nonregular routes ceases to afford protection to the holder of the permit whenever his business concentrates upon a regular route and two fixed termini within the meaning of chapters 252-A1 and 252-A2, C., '31 [Chs 252.1, 252.2, C., '39].

State v Mercer, 215-611; 246 NW 406

Status—voluntary change. A "truck operator" within the meaning of chapter 252-C1, C., '35 [Ch 252.3, C., '39] (one not operating between fixed termini nor over a regular route), immediately becomes a "motor vehicle carrier" (one operating between fixed termini, or over a regular route), and governed accordingly, whenever he so changes the course of his business as to take on the status of the latter and leave off the status of the former.

State v Lischer Bros., 223-588; 272 NW 604

"Public transportation"—insufficient proof. A deliveryman who, in a city and for compensation, makes deliveries of goods by motor vehicle truck, but only for merchants with whom he chooses to contract—who has never held himself out as a common carrier—is not engaged in the "public transportation" of freight within the meaning of this chapter.

State v Carlson, 217-854; 251 NW 160

Property damaged while in storage—liability. When motor vehicle carriers utilized the terminal facilities of a third party, who provided pickup and delivery service from the terminal, and had individual spaces rented to

each trucker for the storage of that trucker's shipments, it was held that control and possession of the shipments of goods was in the truck carriers during the storage period, and when a fire destroyed the terminal, the terminal owner was acting as agent for the truckers, who were liable to the owners of the property in transit for the losses occasioned by the fire.

Crouse v Cadwell, 226-1083; 285 NW 623

Motor freight terminal operator's liability to carrier. When motor carrier operators stored goods belonging to third parties in a motor freight terminal and were held liable when the goods were destroyed in a fire through no negligence on the part of the terminal operator, the carriers were not entitled to recoupment from the terminal operator who acted as their agent in storing the goods, in the absence of an agreement that he be liable for losses not caused by his own negligence.

Crouse v Cadwell, 226-1083; 285 NW 623

Injunction—burden of proof. In an action by the board of railroad commissioners to enjoin a trucker from operating upon the public highway "between fixed termini or over a regular route" without the legally required certificate and payment of the statutory tax, the board has the burden of proof to establish that the defendant is so operating. Evidence held insufficient.

State v Ooten, 215-543; 243 NW 329

Road construction—method of work. Evidence reviewed and held quite insufficient to establish a "rule" as to where trucks should be operated in the course of paving operations.

Hedberg v Lester, 222-1025; 270 NW 447

5105.02 Jurisdiction.

Discussion. See 15 ILR 379—Truck operator statute

Atty. Gen. Opinion. See '30 AG Op 285

5105.04 Powers.

Discussion. See 19 ILR 453—Truck classification

5105.06 Permit.

Applicability of statutes. A truck operator who, under a permit duly granted under chapter 252-C1, C., '31, [Ch 252.3, C., '39] and by means of his motor truck, transports for hire freight from place to place, at irregular times, and on no schedule of service, and only when he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31, [Chs 252.1, 252.2, C., '39] and, therefore, is under no obligation to obtain a certificate of necessity or convenience or to pay the tax required by said chapters.

State v Blecha, 213-1269; 239 NW 125
State v Lischer, 215-607; 246 NW 264
State v Lischer, (NOR); 261 NW 634

Acting without permit—connivance at violation—effect. A shipper of goods will be deemed as participating in the doing of an illegal act when he enters into a contract with a motor vehicle freight operator for the transportation of freight over the highways of this state by said operator as an independent contractor and knows, at the time of so contracting, that said operator has no right to carry on his said business because of the failure of said operator (1) to obtain from the board of railroad commissioners the legally required official permit to carry on said business, and (2) to file with said board the legally required bond. It follows that said operator will not be deemed an independent contractor but simply the agent of said shipper.

Hough v Freight Service, 222-548; 269 NW 1

5105.09 Fee.

Atty. Gen. Opinion. See AG Op Nov. 6, '39

License fee as occupation tax. The permit fee required of a truck operator under chapter 252-C1, C., '31 [Ch 252.3, C., '39] constitutes an occupation or privilege tax.

Towns v City, 214-76; 241 NW 658
See Solberg v Davenport, 211-612; 232 NW 477

Municipal license of trucks—nonrepeal by state law. The legislature by the enactment of chapter 252-C1, C., '31 [Ch 252.3, C., '39], and thereby requiring of truck operators a privilege or occupation tax when not operating between fixed termini nor over a regular route, on any and all highways of the state, did not impliedly repeal that part of §5970, C., '31, which empowers cities and towns to license a truck operator whose business is limited to the municipality—there being no substantial conflict between said statutes.

Towns v City, 214-76; 241 NW 658

5105.13 Expenditure of funds.

Atty. Gen. Opinions. See '34 AG Op 88; '36 AG Op 35

5105.15 Insurance or bond.

New trial—trucker's statutory insurance requirement—jurors' discussion not misconduct. Jurors' discussion of statutory requirement that certain truckers carry liability insurance —being a discussion of law that all were presumed to know—is neither misconduct nor justification for a new trial.

Keller v Dodds, 224-935; 277 NW 467

Acting without permit—connivance at violation. A shipper of goods will be deemed as participating in the doing of an illegal act when he enters into a contract with a motor vehicle freight operator for the transportation of freight over the highways of this state by said operator as an independent contractor, and knows, at the time of so contracting, that said operator has no right to carry on his said business because of the failure of said operator (1) to obtain from the board of railroad commissioners the legally required official permit to carry on said business, and (2) to file with said board the legally required bond. It follows that said operator will not be deemed an independent contractor but simply the agent of said shipper.

Hough v Freight Service, 222-548; 269 NW 1

Injuries to livestock—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until three hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

TITLE XIV

COUNTY AND TOWNSHIP GOVERNMENT

CHAPTER 253

BOARD OF SUPERVISORS

5106 Number of members.

Atty. Gen. Opinion. See '30 AG Op 140

5107 Number increased by vote.

Atty. Gen. Opinions. See '32 AG Op 271; '34 AG Op 690

5108 Number reduced by vote.

Atty. Gen. Opinions. See '32 AG Op 194; '34 AG Op 691; AG Op May 17, '39

5110 Election of new members.

Atty. Gen. Opinion. See '32 AG Op 194

5111 Supervisor districts.

Atty. Gen. Opinion. See '38 AG Op 777

5112 How formed.

Atty. Gen. Opinion. See '38 AG Op 777

5118 Meetings.

Atty. Gen. Opinion. See '38 AG Op 134

5119 Special sessions.

Atty. Gen. Opinions. See '34 AG Op 136; '38 AG Op 134

5120 Notice.

Atty. Gen. Opinion. See '38 AG Op 134

5121 Acts requiring majority.

Atty. Gen. Opinion. See '32 AG OP 132

Sale—contract without official action. Proof that a writing purporting to be a contract for the sale by the board of supervisors of county-owned land, signed by the purported purchaser and by one member of the board as "acting chairman", together with proof that the board never took any official action in regard to the said matter, is quite insufficient to show a valid and enforceable contract.

Smith v Standard Oil, 218-709; 255 NW 674

5122 Books to be kept.

Failure to record proceedings—effect.

State v Pierson, 204-837; 216 NW43

5123 Claims generally.

Atty. Gen. Opinion. See '30 AG Op 257

5124 Unliquidated claims.

Allowance of claims. See under §5130

Atty. Gen. Opinion. See '32 AG Op 158

"Unliquidated". An "unliquidated claim" is one the amount of which has not been ascertained and agreed upon by the parties, or has not been fixed by law.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Action on warrants. The liability of a county on a warrant issued by it on its poor fund may be determined and established in an action at law against the county.

Council Bluffs Bk. v County, 216-1123; 250 NW 233

Claims—rescission of allowance—effect. The action of a board of supervisors in formally rescinding its former allowance of an unquestionably legal claim, long after the commencement of an action to compel the issuance of a warrant on the allowed claim, is futile.

Miller Tractor v Hope, 218-1235; 257 NW 312

County hospital claims—ministerial duty of supervisors. The act of the board of trustees of a county-owned public hospital in certifying to the correctness of claims arising out of their legal management and operation of the hospital is conclusive on the board of supervisors and leaves said latter board with no power or

duty except to direct the auditor to issue the necessary warrants.

Phinney v Montgomery, 218-1240; 257 NW 208

Accord and satisfaction. The allowance by the board of supervisors of a lump sum on a claim consisting of several unliquidated items, and the taking and cashing by claimant of a warrant for said allowed amount, constitute a final accord and satisfaction.

Smith v Cherokee Co., 219-475; 257 NW 788

Allowing unverified unliquidated claims—effect. Grounds for ousting a public official may not be predicated on the fact that he, apparently in perfectly good faith, allowed unliquidated but bona fide claims when such claims were not verified as provided by statute; at any rate, the state must clearly show that the claims were unliquidated.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

5125 Compensation of supervisors.

Atty. Gen. Opinions. See '28 AG Op 306; '32 AG Op 10, 197; 34 AG Op 136

Removal from office — grounds — mileage charge. Allegations that a public officer drew statutory mileage on account of official journeys when the travel (1) was without cost to himself, or (2) was by means of a conveyance owned and supplied by the public, do not state facts constituting grounds for removal from office. (See §1225-d3, C., '31 [§1225.03, C., '39])

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Conniving for unlawful mileage. Evidence in ouster proceedings relative to a charge that a member of the board of supervisors connived at so separating a continuous session of the board as to make one day appear as committee work, and thereby permit the drawing of unallowable mileage, reviewed and held the state had failed to carry its burden to show that the conduct of the member was willful.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Good-faith but erroneous construction of statute. A good-faith construction by the members of the board of supervisors of the statute relative to allowable mileage, even tho erroneous, does not constitute grounds for ouster of such officers.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

CHAPTER 254

POWERS AND DUTIES OF BOARD OF SUPERVISORS

Atty. Gen. Opinions. See '36 AG Op 217; '38 AG Op 586

5128 Body corporate.

Discussion. See 10 ILB 16—Liability of counties

Atty. Gen. Opinion. See '28 AG Op 305

Vested interest. A county has no standing to question the constitutionality of a legislative act relative to its governmental powers.

Scott County v Johnson, 209-213; 222 NW 378

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

Equitable estoppel—against governmental agency. A county which accepts and for some 30 years retains the financial benefits arising from a particular action of its governing body, will not be permitted, as to said transaction, to question the legal authority of its governing body to act as it did act.

Plymouth County v Koehler, 221-1022; 267 NW 106

Equitable estoppel—when inapplicable to public. A county is not estopped to recover unlawful excess mileage paid a grand juror, even tho the payment was made under an ex parte order of court.

Park v Polk County, 220-120; 261 NW 508

Action on warrants. The liability of a county on a warrant issued by it on its poor fund may be determined and established in an action at law against the county.

Council Bl. Bk. v County, 216-1123; 250 NW 233

Negligence—unauthorized contract. A county is not liable for negligence in executing its duly granted governmental powers; a fortiori it is not liable for negligence in executing a wholly unauthorized contract. (See Vol. I, §4635)

Hilgers v County, 200-1318; 206 NW 660

Governmental function — political corporations not suable for torts. Counties and school districts, being political or quasi corporations not clothed with full corporate powers as are cities and towns, cannot be sued for negligence, and the question of the exercise of a governmental function is immaterial.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Statute violation—nonliability. Mandatory statutes requiring danger lights on road machinery and providing punishment for their violation do not create any liability on a county for negligent observance thereof.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Negligent operation of road maintainer—nonliability—demurrer. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837

Motor vehicle fuel license — liability of county. A county becomes, within the scope and meaning of chapter 251-F1, Code, '35 [Ch 251.3, C., '39], a distributor of motor vehicle fuel when it imports the same from without the state solely for the purpose of operating its power maintainers and trucks in the construction and maintenance of its highways, and is under obligation to obtain a license as such distributor and to pay the state the statutory excise charge (without penalty) on such importations.

State v Woodbury County, 222-488; 269 NW 449

Governmental employees—personal liability for torts—no governmental immunity. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218-841, overruled.)

Futter v Hout, 225-723; 281 NW 286

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Nonliability for negligence in constructing culvert. The statutory duty of a town to keep its streets free from nuisances is not interrupted or suspended during the time when the county under an arrangement with the town is engaged in constructing a culvert in a street which is a continuation of a county road outside the town; and the county is under no legal obligation to reimburse the town for any sum voluntarily paid by it in settlement of suits, jointly against the town and county, for damages consequent on persons driving into an unguarded excavation made by the county authorities while constructing the culvert.

Norwalk v County, 210-1262; 232 NW 682

Nonliability of highway engineer in damages. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county, for a proper and lawful purpose, and in leaving the work in a condition which becomes dangerous, even tho, by leaving the work in said condition, he creates a public nuisance for which he may be punished. (§4841, C., '31)

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121

Highway improvement—malice immaterial in performance of legal act. Removal of trees from a highway by county authorities for improvement being a legal act, the question as to whether or not they were acting maliciously as alleged by an abutting property owner is immaterial.

Rabiner v Humboldt County, 224-1190; 278 NW 612; 116 ALR 89

Drains — assessments — nonliability of county. A county, as a body corporate, is not liable in damages consequent on the failure of the board of supervisors to levy an adequate assessment against a drainage district to pay the bonds of the district. It follows that the county treasurer and his surety, when sued by the county for damages consequent on the act of said treasurer in using county funds in paying said bonds, cannot be subrogated to any right of the bondholder to proceed against the county—because the bondholder has no such right.

Mitchell County v Odden, 219-793; 259 NW 774

Nonsuperiority over state. When the state, under a given condition of law and fact, is not entitled to a certain right, it necessarily follows that a county, under the same conditions, is not entitled to such right. So held under the preferential bank deposit law.

Leach v Bank, 205-987; 213 NW 528

5130 General powers.

Atty. Gen. Opinions. See '25-26 AG Op 181, 182, 188; '28 AG Op 109, 203, 304, 305, 348, 424, 442; '30 AG Op 317; '32 AG Op 42, 112, 132, 231; '34 AG Op 241, 306, 421, 592, 645, 713, 735, 747; '36 AG Op 252, 474, 521; '38 AG Op 2, 90, 181, 314, 328, 338, 714, 780; AG Op Jan. 17, '39; Jan. 27, '39; Feb. 9, '39; Feb. 20, '39; June 20, '39; June 29, '39; Sept. 13, '39; Oct. 9, '39; Nov. 1, '39; AG Op Feb. 2, '40

ANALYSIS

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Presentation of claims. See under §5124

I POWERS IN GENERAL

When jurisdiction must appear. The statutory presumption that the proceedings of inferior tribunals, e. g., the county board of supervisors, are presumed to be regular, does not extend to the acquisition of jurisdiction of the board—this must be shown.

Davelaar v Marion County, 224-669; 277 NW 744

Limited power of individual member. A single member of a board of supervisors has no power to bind the board or to bind the county, unless specifically authorized by the board to act for the whole board, or unless an agreement made by him for the county is approved or ratified by the board.

Greusel v O'Brien County, 223-747; 273 NW 853

County supervisor-elect—death before qualifying—vacancy. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office, to be filled in the manner provided by §1152, subsec. 5, C., '35.

State v Best, 225-338; 280 NW 551

Nonsuperiority over state. When the state, under a given condition of law and fact, is not entitled to a certain right, it necessarily follows that a county, under the same conditions, is not entitled to such right. So held under the preferential bank deposit law.

Leach v Bank, 205-987; 213 NW 528

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutional authority nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

County supervisors—duties imposed by law—effect. A statute requiring the board of supervisors to remit unpaid taxes on the capital stock of a bank which fails, imposes a positive duty on board of supervisors to comply with statute irrespective of any demand or notice, and the fact that the stockholders petitioned for a refund of taxes already paid, which is not contemplated by such statute, in addition to remission of unpaid taxes, does not excuse the failure of the board to remit such taxes as come within the purview of the statute, since the performance of this duty is imposed upon the board by law.

Brunner v Floyd County, 226-583; 284 NW 814

Official newspapers — number — nondiscretionary power of supervisors. Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

County highway maintenance workman—no representative capacity. A county highway maintenance workman stands in no representative capacity for the employer-county when his duties are ministerial only and when he could possess no authority to act for nor bind the county as its representative, since board of supervisors and county engineer cannot delegate their powers and duties to maintain roads except as those duties are ministerial in character.

Schroyer v Jasper County, 224-1391; 279 NW 118

Drains—assessments—nonliability of county. A county, as a body corporate, is not

I POWERS IN GENERAL—concluded

liable in damages consequent on the failure of the board of supervisors to levy an adequate assessment against a drainage district to pay the bonds of the district. It follows that the county treasurer and his surety, when sued by the county for damages consequent on the act of said treasurer in using county funds in paying said bonds, cannot be subrogated to any right of the bondholder to proceed against the county—because the bondholder has no such right.

Mitchell County v Odden, 219-793; 259 NW 774

Employment of counsel to defend assessment. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871.

Malice immaterial in performance of legal act. Removal of trees from a highway by county authorities for improvement, being a legal act, the question as to whether or not they were acting maliciously as alleged by an abutting property owner is immaterial.

Rabiner v Humboldt County, 224-1190; 278 NW 612

Motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law to submit the question of municipal ownership of a public utility are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

II ACCOUNTS AND CLAIMS

Claims—rescission of allowance—effect. The action of a board of supervisors in formally rescinding its former allowance of an unquestionably legal claim, long after the commencement of an action to compel the issuance of a warrant on the allowed claim, is futile.

Miller Tractor v Hope, 218-1235; 257 NW 312

Compromise of claims—power of board. The board of supervisors on a proper state of facts has power to compromise the amount due on judgments obtained by the county for support rendered an incompetent in a state hospital for the insane, and to agree, in consideration of the payment of the compromised sum, that a specific tract of land standing in the name of the incompetent and the proceeds and accumulations of said proceeds shall be exempt from all liability for the future support of said incompetent by the county in said hospital. So held where the land was encumbered (1) by judgment on mortgage foreclosure, (2) by a judgment other than those of the county, (3) by an outstanding tax sale certificate, and (4) by an apparently quite persuasive claim of both homestead rights, and ownership in the wife of said incompetent.

Plymouth County v Koehler, 221-1022; 267 NW 106

County old-age assistance board—expenses—how paid. The actual and necessary expenses incurred by members of the old-age assistance board of a county are payable by the county but solely from the state old-age pension fund, such expenses being an "expenditure" within the meaning of §5296-f34, C., '35 [§3828.039, C., '39].

Jones v Dunkelberg, 221-1031; 265 NW 157

Compensation—attorney appointed by juvenile court. The court by statute has power and authority to appoint attorneys to represent juvenile delinquents in municipal court, unable to employ counsel, and an obligation arises on the part of the county to pay a reasonable attorney fee, altho statute makes no provision therefor.

Ferguson v Pottawattamie Co., 224-516; 278 NW 223

III BUILDINGS AND MAINTENANCE

Lease for private use. The board of supervisors may not lease portions of the courthouse to private parties.

Hilgers v County, 200-1318; 206 NW 660

IV REAL ESTATE—PURCHASE AND SALE—SITES

Contract without official action. Proof that a writing purporting to be a contract for the sale by the board of supervisors of county-owned land, signed by the purported purchaser and by one member of the board as "acting chairman", together with proof that the board never took any official action in regard to the said matter, is quite insufficient to show a valid and enforceable contract.

Smith v Oil Co., 218-709; 255 NW 674

V GENERAL COUNTY MANAGEMENT

(a) IN GENERAL

Right to secure deposits. The officers of a savings bank which is a duly selected and acting depository of county funds under a statutory depository bond, may, in addition to the security afforded by said previously executed bond, validly transfer to the county, and the county through its fiscal officers may validly accept, notes and mortgages of the bank

as additional collateral security for said deposits.

Andrew v Bank, 203-1335; 214 NW 559

Agreements in re county deposits—right of taxpayer. The statutory discretion of the board of supervisors to enter into an agreement with legally reorganized and approved banks, with reference to the county's deposits in said banks, cannot be questioned by a taxpayer except on proof of fraud or arbitrary abuse of said discretion.

Pugh v Polk County, 220-794; 263 NW 315

Publishing supervisors' proceedings—homestead exemption—application numbers sufficient. Statute requiring publication of proceedings of board of supervisors is substantially complied with, insofar as the action taken on homestead exemption applications is concerned, by publishing the numbers of the applications as allowed or disallowed.

Choate Co. v Schade, 225-324; 280 NW 540

(b) OFFICERS APPOINTED AND REMOVED

Employment binding on new board. Inasmuch as the board of supervisors has statutory authority to employ a county engineer for a period as long as three years (§4644-c19, C., '31 [§4644.17, C., '39]), an employment of such engineer at the December meeting of the board for the ensuing calendar year is valid, even tho the personnel of the board changes in January following the meeting.

Hahn v Clayton County, 218-543; 255 NW 695

District court clerk—vacancy filled by board. The district court has neither exclusive nor concurrent authority with the board of supervisors to fill a vacancy in the office of clerk of the court (a county office) by appointment; the court's power is confined to the appointment of a temporary clerk until the board fills the vacancy as provided by law.

State v Larson, 224-509; 275 NW 566

Abolishing office of deputy. The board of supervisors, after approving the appointment and bond of a deputy county officer, and after the appointee has qualified and entered upon his duties, has no power to abolish the office of such deputy.

Kellogg v Story County, 218-224; 253 NW 915

(c) OFFICERS' AND EMPLOYEES' COMPENSATION

Employees—discretion to limit term of appointment. The board of supervisors, in appointing a janitor of the courthouse, cannot be said to abuse its discretion by limiting the appointment to a term of one year.

Sorenson v Andrews, 221-44; 264 NW 562

Salary—conclusive fixing of. The board of supervisors having once officially fixed the salary of a public office may not, later and during the term of office in question, reduce said salary.

Kellogg v Story County, 219-399; 257 NW 778

(d) OWNING AND OPERATING MOTOR VEHICLES

Road grader not a "car". A caterpillar road grader belonging to a county, and operated on the public highway, is not a "car" within the meaning of the statutory declaration that the owner of a "car" is liable for damages done by the car when it is operated with his consent.

Bateson v County, 213-718; 239 NW 803

Governmental function—negligent operation of road maintainer—nonliability—demurrer. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Governmental employees—personal liability for torts—no governmental immunity. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Government nonliability for employee's tort—respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Road grader — workmen's compensation — nonagricultural pursuit. A workman who is employed by a county as a member of the county highway department, and is paid by the county an hourly wage for driving a heavy tractor road grader in the construction and maintenance of county roads—for which work said grader was exclusively designed—is not,

as regards the county, the employer, deprived of the benefits of the workmen's compensation law because, when injured in the operation of said grader, he was, under the orders from the board of supervisors, engaged in the construction on a farm and for the benefit of the owner thereof, of a trench silo, such construction not being an engagement by said workman "in an agricultural pursuit or any operation immediately connected therewith" within the meaning of §1361, subsec. 5, C., '35.

Trullinger v Fremont County, 223-677; 273 NW 124

VI SCHOOL FUND

No annotations in this volume

VII RULES AND REGULATIONS

No annotations in this volume

5131 Contracts and bids required.

Atty. Gen. Opinions. See '28 AG Op 304; '32 AG Op 132; '38 AG Op 38, 731

Estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract to build an electric plant, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices" as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

Systematic disregard of law by officer. The conduct of a member of the board of supervisors in systematically disregarding, or by subterfuges avoiding, the law which requires estimates by the county engineer and advertisement of public contracts for work and supplies evinces such "willfulness" as to render such acts ample ground for removal from office.

State v Garretson, 207-627; 223 NW 390

5133 Offices furnished.

Atty. Gen. Opinions. See '28 AG Op 307, 342; '38 AG Op 714; AG Op Jan. 24, '39, Feb. 9, '39; AG Op Sept. 13, '39

5134 Supplies.

Atty. Gen. Opinions. See '28 AG Op 307; '34 AG Op 551; '38 AG Op 338, 714; AG Op Feb. 7, '39

5136 Compromise authorized.

Atty. Gen. Opinion. See '32 AG Op 132

5140 Neglect of duty.

Public official personally liable for negligence. See under §§2, 5738

CHAPTER 255

COUNTY AUDITOR

5141 Duties.

Atty. Gen. Opinion. See '25-26 AG Op 181

Costs—persons acting officially. Costs should not be taxed against a county auditor in a matter in which he acts officially, in good faith, and on the advice of counsel.

Northwestern Bank v Van Roekel, 202-237; 207 NW 345

Paupers—notice to depart—invalidity. A notice to a nonresident poor person to depart from the county is a nullity unless officially authorized by the township trustees or board of supervisors. The mere fact that the members of the board individually discussed the matter in regular session and "told the chairman to sign the notice" does not constitute such official authorization.

Emmet County v Dally, 216-166; 248 NW 366

Warrant—mandamus—issuance of county warrant. Mandamus is the proper remedy to compel the county auditor to issue a warrant in payment of legal claims against the county.

Miller Tractor v Hope, 218-1235; 257 NW 312

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutional authority nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Redemption from tax sale—subsequent taxes—filing of receipts. The act of a tax-sale purchaser in personally delivering to the county auditor at the auditor's office, a duplicate tax receipt for subsequent accruing taxes, constitutes a legal filing in said office, even tho the auditor did not indorse any filing mark on the receipt, and even tho the auditor later returned said receipt to the said purchaser. (§7266, C., '31.)

Peterson v Barnett, 213-514; 239 NW 77

Correcting assessment of private banker. The county auditor may, on proper notice and hearing, and before a tax is paid, correct the erroneous action of the assessor in deducting the debts of a private banker from the value of the banker's taxable property. (§1321, S., '13.)

Mannings Bank v Armstrong, 204-512; 211 NW 485

5142 Issuance of warrants.

Action on warrants. The liability of a county on a warrant issued by it on its poor

fund may be determined and established in an action at law against the county.

Council Bl. Bk. v County, 216-1123; 250 NW 233

Duty to issue warrants. The county auditor is under duty to issue and to continue to issue during the calendar year, on the proper fund or funds, warrants in payment of all claims allowed by the board of supervisors on said fund or funds so long as the total of said warrants does not exceed the collectible and available revenues in said fund or funds for said year.

Miller Tractor v Hope, 218-1235; 257 NW 312

Equitable set-off against insolvent county treasurer — unliquidated demand — pleading. Where an insolvent county treasurer brought mandamus action to secure salary warrant, and another suit was pending against the treasurer and his surety wherein county sought to recover for shortage in treasurer's office, the fact that county's claim was unliquidated would not prevent pleading the same as an equitable set-off, in view of the fact that the treasurer was insolvent.

Briley v Board, 227-55; 287 NW 242

Issuance of treasurer's salary warrant—equitable relief. In mandamus suit by county treasurer to obtain warrant for salary, defendant's answer alleging, in effect, that treasurer owed county money for which a right of set-off existed, that treasurer was insolvent, and that he was not the head of a family and had not offered to do equity, raised issue as to treasurer's right to equitable relief.

Briley v Board, 227-55; 287 NW 242

5143 Issuance of warrants without audit.

Atty. Gen. Opinions. See '38 AG Op 577; AG Op Feb. 27, '40

5146 Form of warrants.

Atty. Gen. Opinion. See '36 AG Op 521

5149 Collection of moneys.

Liability for funds. See under §1059

5151 Financial report.

Atty. Gen. Opinions. See '25-26 AG Op 208; '38 AG Op 166

5155 Fees to be collected.

Atty. Gen. Opinions. See '25-26 AG Op 153, 241; AG Op Sept. 12, '39

CHAPTER 256

COUNTY TREASURER

5156 Duties.

Liability for funds. See under §1059

Atty. Gen. Opinions. See '25-26 AG Op 176; '38 AG Op 354; AG Op Aug. 1, '39

Illegal handling of public funds—election of remedies. The fact that a city institutes an action against its treasurer to recover its public funds is not an election of remedies such as will preclude the city from maintaining an action against a county treasurer to recover its funds illegally paid to the city treasurer.

State v Hanson, 210-773; 231 NW 428

Using public funds for private use. The acts of a county treasurer in wrongfully and repeatedly taking and using, for his own private purposes, public funds in his possession, ipso facto constitutes "willful misconduct and maladministration in office", notwithstanding the fact (1) that, prior to the commencement of an action to remove him from office, he returns, to the public treasury, the amount of his peculations, and (2) that his bondsmen are liable for his wrongdoing; a priori is this true when he also knowingly connives at and permits like conduct by his official employee.

State v Smith, 219-5; 257 NW 181

Right to secure deposits. The officers of a savings bank which is a duly selected and acting depository of county funds under a statutory depository bond may, in addition to the security afforded by said previously executed bond, validly transfer to the county, and the county through its fiscal officers may validly accept, notes and mortgages of the bank as additional collateral security for said deposits.

Andrew v Bank, 203-1335; 214 NW 559

Liability on official bonds—estoppel—waiver. A county treasurer breaches his official bond by using county funds in paying drainage district bonds, and the county cannot be deemed estopped to insist on said breach, or be held to have waived said breach, because of the fact that the treasurer acted with the knowledge and consent of, or in obedience to the express direction of the board of supervisors.

Mitchell County v Odden, 219-793; 259 NW 774

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Treasurer—statutory duty—possession and control of county funds. Under the Iowa

statutes the county treasurer is the only person who has the possession and control of the money of the county.

U. S. v Brechtel, 90 F 2d, 516

5157 Official seal.

Atty. Gen. Opinion. See '38 AG Op 431

5158 Warrants—indorsement.

Atty. Gen. Opinion. See '32 AG Op 232

5162 Warrants partially paid.

Atty. Gen. Opinion. See '32 AG Op 232

5165 Funds—separate account.

Treasurer—statutory duty—possession and control of county funds. Under the Iowa statutes the county treasurer is the only person who has the possession and control of the money of the county.

U. S. v Brechtel, 90 F 2d, 516

5167 Payment to state treasurer.

Atty. Gen. Opinions. See '25-26 AG Op 220; '34 AG Op 95

5169 Unclaimed money.

Atty. Gen. Opinion. See '25-26 AG Op 177

REPLACEMENT OF LOSSES

5169.01 Losses.

Atty. Gen. Opinions. See '30 AG Op 86; '34 AG Op 100

5169.10 Limitation.

Atty. Gen. Opinions. See '30 AG Op 86; '34 AG Op 100

CHAPTER 257

COUNTY RECORDER

5171 General duties.

Atty. Gen. Opinions. See '28 AG Op 218; '38 AG Op 129

Mandamus. A mortgage (1) on chattels on certain described real estate and (2) on all crops "sown, planted, raised, growing, or grown" on said real estate for two specified years following the execution of said instrument, being an instrument which "relates to real estate", is recordable as a real estate mortgage, and such recording may be enforced by mandamus.

Weyrauch v Johnson, 201-1197; 208 NW 706

Reservation of homestead right—evidence. Where a form book used for the recordation of warranty deeds in the office of the recorder of deeds contained a printed relinquishment by a spouse of "dower and homestead", the fact that in a certain instance the word "homestead" has been erased furnishes no evidence that the grantors had orally reserved a homestead right in the conveyed property.

Clark v Chapman, 213-737; 239 NW 797

5173 Military discharge.

Atty. Gen. Opinion. See '36 AG Op 424

5175 Free copies.

Atty. Gen. Opinion. See '34 AG Op 161

5177 Fees.

Atty. Gen. Opinions. See '25-26 AG Op 98; '32 AG Op 176, 225; '34 AG Op 57, 98, 588; AG Op May 24, '39, Aug. 25, '39, Sept. 12, '39, May 3, '40

CHAPTER 258

COUNTY ATTORNEY

5179 Qualifications.

Atty. Gen. Opinion. See '34 AG Op 511

5180 Duties.

Atty. Gen. Opinions. See '28 AG Op 342, 442; '34 AG Op 53, 86; '36 AG Op 521; '38 AG Op 50, 203, 586, 621, 827; AG Op Jan. 6, '39, March 2, '39, May 2, '39, May 4, '40

School board—employment of county attorney. School boards are under no mandatory duty to secure the services of the county attorney in litigation affecting the corporate affairs of the school districts, even tho the statute does require such officers to give legal advice to such boards.

Rural Dist. v Daly, 201-286; 207 NW 124

Powers—reinstatement of action. A county attorney who, in his official capacity, brings an action in behalf of the state, and later, by amendment, changes said action to a personal action by himself and others, may not, after he ceases to be such officer, reinstate said action as one on behalf of the state. Nor may the court reinstate said action as an official action in the name of said ex-county attorney. Especially is this true when the official county attorney objects to such procedure.

State v Power Co., 214-1109; 243 NW 149

Improper presence of county attorney before grand jury. The presence of the county attorney before the grand jury during its investigation of certain charges of criminality, when he is confessedly disqualified from so appearing, necessitates the quashing of all indictments returned by said jury as a result of said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

5180.1 Absence of county attorney—substitute—compensation.

Atty. Gen. Opinion. See '32 AG Op 14

5180.2 Substitute—notice before appointment.

Atty. Gen. Opinion. See '32 AG Op 14

5180.3 County attorney—prohibitions—disqualified assistants.

Improper appearance before grand jury. An assistant county attorney (in this instance a special prosecutor) by accepting from a private person compensation for services rendered and to be rendered before the grand jury, in its investigation of certain pending charges of criminality, thereby ipso facto disqualifies himself henceforth from being present before said jury during said investigation. And his further presence before said jury during said investigation, in disregard of said disqualification, mandatorily necessitates the quashing, on proper motion, of all indictments returned by said jury on said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

Private assistant. A privately employed attorney may assist the county attorney in the trial of a criminal action, even tho, at a time prior to his connection with such criminal action, such assisting attorney had been interested in a civil action which involved the matters and things involved in the criminal action, but had severed all connection with such civil action prior to any connection with the criminal action. It is a present interest which disqualifies.

State v Lounsbury, 178-555; 159 NW 998

CHAPTER 259

SHERIFF

5182 Authority to summon aid.

Atty. Gen. Opinion. See '36 AG Op 116

5184 Investigation on order of county attorney.

Atty. Gen. Opinions. See '28 AG Op 377; '32 AG Op 117, 254; '36 AG Op 521; AG Op April 26, '39

5187 Bailiffs—appointment—duties.

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

5191 Fees.

Atty. Gen. Opinions. See '25-26 AG Op 207, 456; '28 AG Op 36, 194, 270, 287; '30 AG Op 196; '32 AG Op 117, 188, 197; '34 AG Op 103, 296, 747; '36 AG Op 165, 372; '38 AG Op 87, 139, 207, 240, 326, 491, 558, 734; AG Op Feb. 9, '39, Feb. 20, '39, Oct. 12, '39; AG Op March 22, '40, May 3, '40

Recovery of payments—rule—exception as to officer. Where a sheriff not knowing that a statute has been repealed collects fees thereunder, he acts not under a mistake of fact but under a mistake of law, and such fees when paid to an officer of court, even tho voluntarily, are recoverable, this being an exception to the general rule that voluntary payments under a mistake of law are not recoverable.

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

5191.1 Costs—when payable by county.

Atty. Gen. Opinion. See '32 AG Op 230

Discontinuance—death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

5192 Fees in addition to salary.

Atty. Gen. Opinions. See '28 AG Op 287; '36 AG Op 165; '38 AG Op 558, 734; AG Op May 3, '40

5194 Unadjudicated condemnation funds.

Delivery of funds to successor—effect. An outgoing sheriff and his bondsmen are absolved from all liability as to funds held by the sheriff in unadjudicated condemnation proceedings by delivering said funds to his successor in office.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

5196 Record of funds.

Time deposit works conversion. A sheriff is guilty of instant conversion and a breach of his bond when he deposits in a bank funds properly coming into his hands in unadjudicated condemnation proceedings and takes from the bank a certificate of deposit which is payable at a definite time in the future, because he thereby fails so to "hold" said funds as commanded by statute as to enable himself to account for such funds whenever the proceedings are finally determined; and in such case the question of due care or negligence in making the deposit is quite immaterial.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

5197 Liability of sheriff.

Atty. Gen. Opinion. See '38 AG Op 734

CHAPTER 259.1

CARE OF PRISONERS IN CERTAIN COUNTIES

Atty. Gen. Opinions. See '38 AG Op 207, 734

CHAPTER 260

CORONER

Atty. Gen. Opinions. See '28 AG Op 62; '36 AG Op 336; '38 AG Op 683

5200 Inquest—jury.

Atty. Gen. Opinions. See '32 AG Op 263; '36 AG Op 336; '38 AG Op 196, 218, 252; AG Op Jan. 17, '39

5201 Person killed in mine.

Atty. Gen. Opinions. See '38 AG Op 196, 218, 252

5205 Witnesses and jurors.

Evidence—before coroner's jury—best evidence rule. Oral proof of the testimony given by a witness at a coroner's inquest is not properly subject to the objection that it is not the best evidence.

State v Johnston, 221-933; 267 NW 698

5206 Shorthand reporter.

Transcript of coroner's investigation. In automobile damage action for injuries sustained by plaintiff while riding as a guest of defendant's deceased husband, where, on cross-examination of plaintiff, he was interrogated for impeachment purposes concerning statements made by him as witness in coroner's investigation, and admitted making certain statements, but claimed he was mistaken as to facts, and defendant offered such statements found in coroner's transcript as admission against interest, whereupon plaintiff offered the transcript in its entirety under statute providing the whole of a writing on the same subject may be inquired into, exclusion of transcript by the court was rightful since transcript contained statements made by plaintiff that were not on the same subject as were the answers offered by defendant, as well as being self-serving in character.

Jones v Krambeck, 228- ; 290 NW 56

5208 Verdict.

Atty. Gen. Opinion. See '38 AG Op 252

Certificate of death—admissibility. In an action to recover on a policy of insurance, a certificate of death of the insured, tho duly and legally executed by a coroner, is inadmissible as evidence insofar as said certificate assumes to state the cause of death.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

See Wilkinson v Life Assn., 203-960; 211 NW 238

5214 Reports.

Atty. Gen. Opinions. See '32 AG Op 263; '38 AG Op 196, 683

5214.1 Violent deaths.

Atty. Gen. Opinions. See '32 AG Op 263; '38 AG Op 196, 683

5218 Physician employed—fees.

Atty. Gen. Opinions. See '28 AG Op 197, 300, 305; '34 AG Op 119; '36 AG Op 336; '38 AG Op 196, 218

Blood test by coroner from another county.

State v Weltha, 228- ; 292 NW 148

Privileged communication—nonapplicable to physician performing autopsy. In an action to recover on an accident policy for the death of insured, where the court excluded testimony of a physician, who performed a post mortem examination but did not treat the patient before death, on the ground of privileged communication between patient and physician, held, court improperly excluded such testimony, since the privilege is purely statutory and for the purpose of encouraging patients to make full disclosure to the physician of all facts to enable him to prescribe and administer the proper treatment. A deceased body is not a patient and the relation of physician and patient ends when the death of the patient ensues.

Travelers Ins. v Bergeron, 25 F 2d, 680

CHAPTER 261

COMPENSATION OF COUNTY OFFICERS, DEPUTIES, AND CLERKS

Atty. Gen. Opinions. See '25-26 AG Op 83; '32 AG Op 162, 171; '36 AG Op 162; '38 AG Op 121

5220 County auditor.

Atty. Gen. Opinions. See '34 AG Op 662; '36 AG Op 161; AG Op Aug. 9, '39

5221 Deputy auditor and clerks.

Atty. Gen. Opinions. See '34 AG Op 115; '36 AG Op 161; AG Op Feb. 2, '40

5222 County treasurer.

Atty. Gen. Opinions. See AG Op Aug. 1, '39, Aug. 9, '39

Mandamus—issuance of treasurer's salary warrant. In mandamus suit by county treasurer to obtain warrant for salary, defendant's

answer alleging, in effect, that treasurer owed county money for which a right of set-off existed, that treasurer was insolvent, and that he was not the head of a family and had not offered to do equity, raised issue as to treasurer's right to equitable relief.

Briley v Board, 227-55; 287 NW 242

Set-off against insolvent county treasurer. Where an insolvent county treasurer brought mandamus action to secure salary warrant, and another suit was pending against the treasurer and his surety wherein county sought to recover for shortage in treasurer's office, the fact that county's claim was unliquidated would not prevent pleading the same as an equitable set-off, in view of the fact that the treasurer was insolvent.

Briley v Board, 227-55; 287 NW 242

5223 Deputy treasurer and clerks.

Atty. Gen. Opinions. See '36 AG Op 149; AG Op Feb. 2, '40

5225 Deputy recorder and clerks.

Atty. Gen. Opinions. See '38 AG Op 6; AG Op Feb. 2, '40

5226 Sheriff.

Atty. Gen. Opinions. See '25-26 AG Op 460; '30 AG Op 380; '36 AG Op 165; '38 AG Op 12, 240, 338; AG Op Jan. 27, '39

5227 Deputy sheriff.

Atty. Gen. Opinions. See '25-26 AG Op 300; '38 AG Op 12; AG Op Jan. 27, '39, Aug. 9, '39; AG Op Feb. 2, '40

5228 County attorney.

Atty. Gen. Opinions. See '25-26 AG Op 117, 176, 197, 207; '28 AG Op 45, 342; '30 AG Op 54, 192, 198; '36 AG Op 160, 359; '38 AG Op 55, 203, 780; AG Op Jan. 6, '39, Feb. 6, '39, Feb. 8, '39, April 14, 39, May 5, '39, Aug. 1, '39, Sept. 12, '39; AG Op Dec. 27, '39

Percentage on fines. A statute which provides that a county attorney shall receive "attorney fees allowed in criminal cases" may not be construed as meaning the same as a former statute which provided that he should receive a percentage on "all fines collected where he appears for the state, and not otherwise".

Gabrielson v County, 202-673; 210 NW 912

5229 Assistant county attorney.

Atty. Gen. Opinion. See '34 AG Op 53

5230 Clerk of district court.

Atty. Gen. Opinion. See '34 AG Op 283

Clerk as commissioner of insanity. The clerk of the district court may not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity.

Baldwin v Stewart, 207-1135; 222 NW 348

5231 Deputy clerk.

Atty. Gen. Opinions. See '30 AG Op 205; AG Op Jan. 11, '39, June 26, '39; AG Op Feb. 2, '40

5232 County superintendent.

Atty. Gen. Opinions. See '32 AG Op 178; '34 AG Op 66; '36 AG Op 252; AG Op April 5, '39

Salary—conclusive fixing of. The board of supervisors having once officially fixed the salary of a public office (§5130, subsec. 10, C., '31) may not, later and during the term of office in question, reduce said salary.

Kellogg v Story County, 219-399; 257 NW 778

5233 Expenses of county superintendent.

Atty. Gen. Opinions. See '30 AG Op 148; '32 AG Op 91; '38 AG Op 13; AG Op April 5, '39

5234 Deputy county superintendent.

Atty. Gen. Opinion. See '34 AG Op 296

5236 Dual county seats.

Atty. Gen. Opinions. See '30 AG Op 205; '38 AG Op 6; AG Op June 26, '39

5237 Coroner—fees.

Atty. Gen. Opinions. See '28 AG Op 197; '32 AG Op 132, 162, 263; '38 AG Op 138, 218, 683; AG Op Jan. 17, '39

CHAPTER 262

DEPUTY OFFICERS, ASSISTANTS, AND CLERKS

Atty. Gen. Opinion. See '38 AG Op 714

5238 Appointment.

Atty. Gen. Opinions. See '28 AG Op 58, 209, 274, 342; '30 AG Op 379; '32 AG Op 1, 162, 222; '34 AG Op 53, 65, 100, 115, 445; '36 AG Op 149; '38 AG Op 208, 714; AG Op Jan. 10, '39; AG Op Feb. 2, 6, '40

Nepotism—approval of appointment—effect. The appointment by a county superintendent of his wife as deputy superintendent cannot be legally questioned when the appointment was legally approved by the board of supervisors.

Kellogg v County, 218-224; 253 NW 915

Appointment—approval — want of — effect. The failure of the board of supervisors to approve, by formal resolution, the appointment of a deputy county officer is inconsequential when it appears that the deputy duly qualified, that the board approved his bond, and that he thereafter acted as such deputy.

Kellogg v County, 218-224; 253 NW 915

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

5239 Certificate of appointment.

Atty. Gen. Opinions. See '28 AG Op 58; '32 AG Op 1; '34 AG Op 445; '38 AG Op 714; AG Op Feb. 2, '40

Failure to file certificate—effect. The appointment of a deputy county officer is not invalidated by the failure of the appointing officer to issue and file with the auditor a formal certificate of appointment when the deputy, after approval by the board, duly qualified and acted as such deputy.

Kellogg v County, 218-224; 253 NW 915

5240 Revocation of appointment.

Atty. Gen. Opinions. See '28 AG Op 246; '34 AG Op 445; AG Op Feb. 2, '40

Abolishing office of deputy. The board of supervisors, after approving the appointment and bond of a deputy county officer, and after the appointee has qualified and entered upon his duties, has no power to abolish the office of such deputy.

Kellogg v County, 218-224; 253 NW 915

5241 Qualifications.

Atty. Gen. Opinions. See '32 AG Op 282; '36 AG Op 149; AG Op Feb. 6, '40

5242 Powers and duties.

Atty. Gen. Opinions. See '30 AG Op 84; '32 AG Op 252; '34 AG Op 672; '36 AG Op 149; '38 AG Op 714; AG Op Feb. 6, '40

5243 Temporary assistance for county attorney.

Atty. Gen. Opinions. See '34 AG Op 651; '36 AG Op 383; '38 AG Op 50

Disqualification of attorney—improper appearance before grand jury—quashing indictments. An assistant county attorney (in this instance a special prosecutor) by accepting from a private person compensation for services rendered and to be rendered before the grand jury, in its investigation of certain pending charges of criminality, thereby ipso facto disqualifies himself henceforth from being present before said jury during said investigation. And his further presence before said jury during said investigation, in disregard of said disqualification, mandatorily necessitates the quashing, on proper motion, of all indictments returned by said jury on said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

Presence of assistant county attorney. The presence of a duly appointed assistant county attorney in the grand jury room while the question of indictment was being considered did not render the indictment defective.

State v Coleman, 226-968; 285 NW 269

CHAPTER 263

COLLECTION AND ACCOUNTING OF FEES

5245 Fees belong to county.

Atty. Gen. Opinions. See '28 AG Op 252; '38 AG Op 208, 558, 734; AG Op Jan. 10, '39, Jan. 24, '39, Sept. 13, '39

Clerk as commissioner of insanity. The clerk of the district court may not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity.

Baldwin v Stewart, 207-1135; 222 NW 348

5247 Quarterly reports and payments.

Atty. Gen. Opinions. See '28 AG Op 252; '30 AG Op 191

CHAPTER 264

GENERAL DUTIES OF COUNTY OFFICERS

5256 Money for sectarian purposes.

Atty. Gen. Opinions. See '25-26 AG Op 59, 417; '28 AG Op 104, 146, 174, 286, 410; '34 AG Op 680; '36 AG Op 512, 629

5257 Violations.

Atty. Gen. Opinions. See '25-26 AG Op 59; '34 AG Op 680; '36 AG Op 512

5258 Expenditures confined to receipts.

Atty. Gen. Opinions. See '25-26 AG Op 67, 88, 136, 200, 221, 373; '28 AG Op 187, 247, 359; '30 AG Op 74, 253, 292; '32 AG Op 237, 252; '34 AG Op 59, 92, 300, 679; '36 AG Op 230, 532; '38 AG Op 77, AG Op Feb. 8, '39

Excessive expenditures—effect. The validity of obligations incurred by a county, at a time during a calendar year when the collectible and available revenue in the proper fund or funds for said year is sufficient to pay said obligations, is not affected by the subsequent attempt of the county to incur further obligations which, when added to the former obligations, would exceed said collectible and available revenues.

Miller Tractor v Hope, 218-1235; 257 NW 312

Duty to issue warrants. The county auditor is under duty to issue and to continue to issue, during the calendar year, on the proper fund or funds, warrants in payment of all claims allowed by the board of supervisors on said fund or funds so long as the total of said warrants does not exceed the collectible and avail-

able revenues in said fund or funds for said year.

Miller Tractor v Hope, 218-1235; 257 NW 312

Misuse of funds — estoppel — waiver. A county treasurer breaches his official bond by using county funds in paying drainage district bonds, and the county cannot be deemed estopped to insist on said breach, or be held to have waived said breach, because of the fact that the treasurer acted with the knowledge and consent of, or in obedience to the express direction of the board of supervisors.

Mitchell County v Odden, 219-793; 259 NW 774

5259 Exceptions.

Atty. Gen. Opinions. See '25-26 AG Op 67, 88, 136, 200, 221, 373; '28 AG Op 247, 359; '30 AG Op 74, 253; '32 AG Op 237; '34 AG Op 59, 92, 242, 300, 679; '36 AG Op 230, 278, 355, 532; '38 AG Op 21; AG Op Feb. 8, '39, Aug. 25, '39, Oct. 25, '39

Warrant on poor fund—liability. The liability of a county on a warrant properly drawn on the poor fund of the county is not limited to the funds in said fund.

Council Bl. Bk. v County, 216-1123; 250 NW 233

5260 Unallowable claims.

Atty. Gen. Opinions. See '34 AG Op 158; '38 AG Op 44, 112; AG Op Sept. 29, '39

CHAPTER 264.1

COUNTY BUDGET

Atty. Gen. Opinions. See '36 AG Op 532; '38 AG Op 19, 21, 77

5260.01 Annual itemized estimates.

Atty. Gen. Opinion. See '32 AG Op 184

5260.02 Appropriation.

Misappropriation — recovery — estoppel. Where, during a series of years, public funds have been appropriated by a county to a farm bureau organization under the good faith but mistaken belief that a statute authorized such appropriations, and where said funds have been expended in furtherance of the agricultural activities of said bureau, an action to recover such funds on behalf of the county will not lie by a taxpayer who has at all times had actual knowledge of the making of such appropriations and of the use to which they were being put, and took no action to question them.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

5260.03 Contingent fund.

Atty. Gen. Opinion. See '34 AG Op 302

5260.06 Supplemental appropriation.

Atty. Gen. Opinion. See '34 AG Op 302

5260.10 Expenditures exceeding appropriation.

Atty. Gen. Opinion. See '38 AG Op 77

CHAPTER 265

SUBMISSION OF QUESTIONS TO VOTERS

Atty. Gen. Opinion. See '36 AG Op 490

5261 Expenditures—when vote necessary.

Atty. Gen. Opinions. See '25-26 AG Op 216; '28 AG Op 187; '30 AG Op 181; '32 AG Op 52, 169; '34 AG Op 326; '38 AG Op 11, 164, 181, 841

5263 Questions submitted to voters.

Atty. Gen. Opinion. See '38 AG Op 841

5265 Manner of submitting questions.

Atty. Gen. Opinions. See '28 AG Op 418; '32 AG Op 271; '34 AG Op 125; '36 AG Op 490

5266 Voting of tax—when required.

Atty. Gen. Opinions. See '28 AG Op 319; '36 AG Op 490

5272 Board must submit questions.

Atty. Gen. Opinions. See '36 AG Op 490; '38 AG Op 841

Establishment of bridge—election—form of ballot. A petition for the submission of a proposition to the electors must substantially contain every matter required by the statute, in order that from the petition the ballot may be so framed that the entire proposition will be submitted to the electors.

O'Keefe v Hopp, 210-398; 228 NW 625

CHAPTER 266

COUNTY BONDS

Atty. Gen. Opinions. See '32 AG Op 269; AG Op March 8, '40

5275 Funding and refunding bonds.

Atty. Gen. Opinions. See '30 AG Op 353; '32 AG Op 23; '34 AG Op 639; AG Op March 8, '40

Exchanging bonds for valid indebtedness—effect. Even tho a county, because of a sudden drop in the value of its taxable property, may find itself indebted beyond the constitutional limit, yet it may fund or refund its valid outstanding indebtedness by an issue of bonds in exchange for such indebtedness. So held as to outstanding unpaid warrants on the poor fund.

Hibbs v Fenton, 218-553; 255 NW 688

5276 Refunding bridge bonds.

Atty. Gen. Opinions. See '25-26 AG Op 136; '30 AG Op 193

5277 Rate of interest—form of bond.

Unauthorized pledge. A pledge of "the faith and resources of the county" for the payment of a drainage bond, issued by the board of supervisors on behalf of a drainage district, is without force or effect because wholly unauthorized.

Mitchell County v Odden, 219-793; 259 NW 774

5278 Provisions applicable.

Atty. Gen. Opinion. See '32 AG Op 269

5279 Bonds—negotiation of—duties of treasurer.

Atty. Gen. Opinion. See '34 AG Op 640

Exchanging bonds for valid indebtedness—effect. Even tho a county, because of a sudden drop in the value of its taxable property, may find itself indebted beyond the constitutional limit, yet it may fund or refund its valid outstanding indebtedness by an issue of bonds in exchange for such indebtedness.

Hibbs v Fenton, 218-553; 255 NW 688

5283 Unconstitutional issue.

Nonapplicability of statute. The statute imposing personal liability on a member of the board of supervisors when voting for the issuance of bonds in excess of the constitutional limit has no application to the voting of bonds in exchange of valid outstanding indebtedness, even tho at the time of so voting the county was indebted beyond the said allowable limit.

Hibbs v Fenton, 218-553; 255 NW 688

5284 Tax for bonded indebtedness.

Atty. Gen. Opinion. See AG Op March 8, '40

5286 Bond fund—separate account.

Atty. Gen. Opinion. See AG Op June 2, '39

5289 Balance to general fund.

Atty. Gen. Opinions. See '28 AG Op 316; '30 AG Op 78

CHAPTER 269

COUNTY PUBLIC HOSPITALS

Atty. Gen. Opinions. See '25-26 AG Op 181; '28 AG Op 132, 210, 215; '30 AG Op 274; '34 AG Op 387; '38 AG Op 181

5353 Tax levy.

Atty. Gen. Opinions. See '28 AG Op 132, 210, 215; '30 AG Op 320; '38 AG Op 251

5354 Sale of bonds.

Atty. Gen. Opinion. See '32 AG Op 257

5358 County treasurer.

Atty. Gen. Opinions. See '28 AG Op 132; '30 AG Op 96, 320; '32 AG Op 103, 201; '34 AG Op 387

County hospital claims—ministerial duty of supervisors. The act of the board of trustees of a county-owned public hospital in certifying to the correctness of claims arising out of their legal management and operation of the hospital is conclusive on the board of supervisors and leaves said latter board with no power or duty except to direct the auditor to issue the necessary warrants.

Phinney v Montgomery, 218-1240; 257 NW 208

5359 Powers and duties.

Atty. Gen. Opinions. See '28 AG Op 132, 210; '32 AG Op 257; '34 AG Op 387; '38 AG Op 321; AG Op Feb. 24, '39

5360 Optional powers and duties.

Atty. Gen. Opinions. See '30 AG Op 274; '38 AG Op 321

5361 Pecuniary interest prohibited.

Atty. Gen. Opinion. See '34 AG Op 357

5362 Hospital benefits—terms.

Atty. Gen. Opinions. See '28 AG Op 215; '32 AG Op 257; '38 AG Op 251

5364 Discrimination.

Atty. Gen. Opinions. See '30 AG Op 250; '38 AG Op 321

5367 County wards in public or private hospitals—levy.

Atty. Gen. Opinion. See '28 AG Op 215

5368 Occupancy of county wards.

Atty. Gen. Opinions. See '28 AG Op 210, 215

CHAPTER 274

OFFICIAL NEWSPAPERS

Atty. Gen. Opinions. See '34 AG Op 76, 437; '38 AG Op 448

5397 Time of selection.

Atty. Gen. Opinions. See '34 AG Op 283, 437; '38 AG Op 448

Number—nondiscretionary power of supervisors—mandamus. Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

Mandamus—proprietor as proper party to compel selection. The rule is now well established that the proprietor of a newspaper has such interest in the selection of official newspapers that he can maintain an action of mandamus in his own name to compel the selection by the county supervisors.

Bredt v Franklin County, 227-1230; 290 NW 669

5398 Source of selection.

Atty. Gen. Opinions. See '34 AG Op 76, 437; '38 AG Op 448; AG Op Jan. 5, '39, June 20, '39

5399 Number.

Atty. Gen. Opinions. See '34 AG Op 283, 437; '38 AG Op 448

Number—nondiscretionary power of supervisors. Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

5400 Application—contest.

Atty. Gen. Opinion. See '34 AG Op 437

Form and sufficiency of application for appointment. Under statute requiring that application shall be made to county supervisors for appointment as an official newspaper, an application which avers the qualifications of the newspaper in the words of the statute is sufficient. The application need not be in any particular form, and any written application by the publisher which apprises the board of the desire of the newspaper to be selected is sufficient to require the board to take cognizance of it.

Bredt v Franklin County, 227-1230; 290 NW 669

Mandamus—speedy and adequate remedy—jurisdiction. Mandamus to compel county supervisors to select petitioner's newspaper as one of three official newspapers was a proper procedure where petitioner was one of three applicants and had no plain, speedy, and adequate remedy at law, since there was no contest in the selection from which an appeal would lie under §5406, C., '39.

Bredt v Franklin County, 227-1230; 290 NW 669

Mandamus—proprietor as proper party to compel selection. The rule is now well established that the proprietor of a newspaper has such interest in the selection of official newspapers that he can maintain an action of mandamus in his own name to compel the selection by the county supervisors.

Bredt v Franklin County, 227-1230; 290 NW 669

5401 Contest—verified statements.

Atty. Gen. Opinion. See '34 AG Op 437

Sealed envelopes for subscription list. The depositing with the county auditor of a sealed pasteboard box of cards containing the names of the subscribers of a newspaper which is sought to be selected as a county official newspaper is a sufficient compliance with the statute.

Bloomfield Messenger v Democrat, 201-196; 205 NW 345

Who are subscribers. Two publishers who in good faith consolidate their newspaper plants and subscription lists into one establishment and one subscription list, and issue their respective newspapers separately and mail them to each subscriber on the combined list, without objection by the subscribers, may each, in a contest for selection as county official newspapers, appropriate to himself and against other contestants the entire list of subscribers appearing on the combined list.

Bloomfield Messenger v Democrat, 201-196; 205 NW 345

"Bona fide yearly subscribers" defined. On the question whether a newspaper is entitled to be selected as an "official newspaper" of the county for a certain year, the following persons cannot be deemed "bona fide yearly subscribers", tho the newspaper is being sent to and received by them, in the county, viz:

1. Those whose subscriptions have expired prior to the year in question.
2. Those who have not subscribed for the newspaper for several years prior to the year in question.
3. Those who have never subscribed for the newspaper.

Van der Burg v Bailey, 209-991; 229 NW 253

5402.1 Subscribers—how determined.

"General circulation"—general test. A "newspaper of general circulation" is determined not by the number of its subscribers, but by the diversity of its subscribers, and is such newspaper if it contains news, tho of limited amount, of a general nature, even tho it makes a specialty of news of a particular kind.

Burak v Ditson, 209-926; 229 NW 227; 68 ALR 538

Official newspapers—"bona fide yearly subscribers" defined. On the question whether a newspaper is entitled to be selected as an "official newspaper" of the county for a certain year, the following persons cannot be deemed "bona fide yearly subscribers," tho the newspaper is being sent to and received by them in the county, viz.:

1. Those whose subscriptions have expired prior to the year in question.
2. Those who have not subscribed for the newspaper for several years prior to the year in question.
3. Those who have never subscribed for the newspaper.

Van der Burg v Bailey, 209-991; 229 NW 253

Official newspapers—division of compensation. A newspaper which is entitled to be selected as an official newspaper for a county may agree with a newspaper which is not entitled to be so selected for a division of the compensation for official publications, and in such case both newspapers will be designated as official publications, but for one compensation only.

Van der Burg v Bailey, 209-991; 229 NW 253

5404 Fraudulent lists.

Insufficient showing. No inference of fraud is necessarily deducible in a contest for selection of county official newspapers because a contestant fails to indicate on his filed list of subscribers the times when the various subscriptions expire.

Bloomfield Messenger v Democrat, 201-196; 205 NW 345

Nonwillful subscription list. A publisher who makes application to have his newspaper selected as a county official newspaper is not deprived of standing in the contest because of the nonwillful insertion in his list of subscribers of names of persons who are not bona fide subscribers.

Bloomfield Messenger v Democrat, 201-196; 205 NW 345

5406 Appeal.

Mandamus—speedy and adequate remedy—jurisdiction. Mandamus to compel county supervisors to select petitioner's newspaper as one of three official newspapers was a proper procedure where petitioner was one of three applicants and had no plain, speedy, and adequate remedy at law, since there was no contest in the selection from which an appeal would lie under §5406, C., '39.

Bredt v Franklin County, 227-1230; 290 NW 669

Unallowable service of notice. Notice of appeal from the decision of the board of supervisors in selecting official newspapers must be served on the applicant whose selection appellant desires to contest. Service on the attorneys who appeared for said applicant in the hearing before the board is a nullity.

Van der Burg v Bailey, 207-797; 223 NW 515

5410 Division of compensation.

Atty. Gen. Opinion. See '38 AG Op 34

Permissible division. A newspaper which is entitled to be selected as an official newspaper for a county may agree with a newspaper which is not entitled to be so selected, for a division of the compensation for official publications, and in such case both newspapers will be designated as official publications but for one compensation only.

Van der Burg v Bailey, 209-991; 229 NW 253

5411 What published.

Atty. Gen. Opinions. See '25-26 AG Op 394; '32 AG Op 261; '34 AG Op 437; '38 AG Op 413, 448, 472, 731

Officers—publishing supervisors' proceedings—homestead exemption—application numbers sufficient. Statute requiring publication of proceedings of the board of supervisors is substantially complied with, insofar as the action taken on homestead exemption applications is concerned, by publishing the numbers of the applications as allowed or disallowed.

Choate Co. v Schade, 225-324; 280 NW 540

5412.1 Supervisors' proceedings—each payee listed—publication.

Atty. Gen. Opinions. See '38 AG Op 448, 472; AG Op Aug. 25, '39

CHAPTER 275

BOUNTIES ON WILD ANIMALS

Atty. Gen. Opinions. See '25-26 AG Op 343; '38 AG Op 104; AG Op Jan. 27, '39

CHAPTER 276

DOGS AND LICENSING THEREOF

Atty. Gen. Opinions. See '25-26 AG Op 320; '34 AG Op 589

5420 Annual license.

Atty. Gen. Opinions. See '25-26 AG Op 320; '34 AG Op 589

5421 "Owner" defined.

"Owner" defined. A person who "keeps or harbors" a dog is an "owner", whether the subject matter is the taxation of the dog or damages done by the dog.

Bigelow v Saylor, 209-294; 228 NW 279

5422 Application by owner.

Atty. Gen. Opinion. See '34 AG Op 154

5434 Assessors to list dogs—fees.

Atty. Gen. Opinion. See '34 AG Op 154

5435 Delinquency.

Atty. Gen. Opinion. See '32 AG Op 244

5441 Entry of tax.

Atty. Gen. Opinion. See '34 AG Op 589

5446 Taxation of dogs—municipal license.

Atty. Gen. Opinion. See '34 AG Op 72

5448 Right and duty to kill unlicensed dog.

Limitation. The statutory authority to kill a dog, when such dog is not wearing a collar with license tag attached, does not embrace the right to invade the premises and residence of the owner of the dog, in order to effect such killing.

Mendenhall v Struck, 207-1094; 224 NW 95

Absence of hunter's license—effect. On the issue whether a defendant had a legal right to kill an unlicensed dog, the fact that the defendant possessed no hunter's license is quite immaterial.

Mendenhall v Struck, 207-1094; 224 NW 95

5449 Right to kill licensed dog.

"Worrying animal" defined. Evidence that a dog barked at and ran after a horse, even tho for only a short time, and that the reaction of the horse indicated that he was frightened, may present a jury question on the issue whether the dog was "worrying" the animal.

Luick v Sondrol, 200-728; 205 NW 331

5450 Liability for damages.

Optional remedies. See under §5452, Vol I

Vicious character. In an action at common law for damages caused by a dog, the vicious character of the dog is an indispensable element. Not so when the action is based on the statute.

Luick v Sondrol, 200-728; 205 NW 331

Common-law and statutory liability distinguished. Principle reaffirmed that, while one who harbors a dog may be liable at common law, statutory liability rests only on the owner.

Luick v Sondrol, 200-728; 205 NW 331

Personal injury by dog—"owner" defined. A person who "keeps or harbors" a dog is an "owner", whether the subject matter is the taxation of the dog or damages done by the dog.

Bigelow v Saylor, 209-294; 228 NW 279

Confining jury to evidence. Instructions should expressly or in effect confine the jury to the evidence. When the sole charge against a dog was that he was worrying an animal, it is error to instruct that the dog had a right to be on the highway "if he behaved properly."

Luick v Sondrol, 200-728; 205 NW 331

CHAPTER 277

DOMESTIC ANIMAL FUND

Atty. Gen. Opinions. See '28 AG Op 306; '32 AG Op 147, 283; '34 AG Op 72, 589

5452 Claims.

Atty. Gen. Opinions. See '28 AG Op 253, 281, 288, 306; '32 AG Op 13, 283; '34 AG Op 72, 75; AG Op Jan. 25, '39

5454 Allowance of claims.

Atty. Gen. Opinion. See '32 AG Op 13

5457 Transfer of funds.

Atty. Gen. Opinions. See '25-26 AG Op 320; '34 AG Op 589

CHAPTER 278

RELOCATION OF COUNTY SEATS

Atty. Gen. Opinion. See '32 AG Op 147

CHAPTER 280

LAND SURVEYS

5482 County surveyor—appointment and duties.

Atty. Gen. Opinion. See '38 AG Op 318

5483 Field notes of original survey.

Federal survey conclusive. A section corner established by a government survey is conclusive.

Fair v Ida County, 204-1046; 216 NW 952

CHAPTER 281

JAILS

5497 How used.

Atty. Gen. Opinions. See '30 AG Op 327; '36 AG Op 411

5499 Minors separately confined.

Atty. Gen. Opinion. See '28 AG Op 142

5501 Keeper's duty.

Atty. Gen. Opinions. See '36 AG Op 411; AG Op Nov. 1, '39

5505 Ex officio inspectors.

Atty. Gen. Opinion. See '28 AG Op 235

5506 Visitation.

Atty. Gen. Opinion. See '28 AG Op 235

5507 Report.

Atty. Gen. Opinion. See '28 AG Op 235

5508 Right to inspect.

Atty. Gen. Opinion. See '28 AG Op 235

5509 Officers examined.

Atty. Gen. Opinion. See '28 AG Op 235

5511 Expenses.

Atty. Gen. Opinions. See '36 AG Op 411; '38 AG Op 491, 734; AG Op Jan. 23, '39, Feb. 20, '39

5513 Labor on public works.

Atty. Gen. Opinion. See '28 AG Op 427

CHAPTER 282.1

BENEFITED WATER DISTRICTS

5526.01 Petition.

Water district 1/3 larger than petition—not "approximate". A proposal to establish a benefited water district, almost one-third larger than that petitioned for, is not a substantial compliance with a statute that requires that the petition shall state the "approximate" district to be served.

Fiesel v Bennett, 225-98; 280 NW 482

Amendment to petition not signed by original petitioners—invalidity. A statute, requiring the signatures of 25 percent of the property owners to establish a benefited water district, is not complied with where the original petition describing the district was so signed, and an amendment adding new territory was subscribed by 25 percent of the owners of the added territory, but the signers of the original petition did not subscribe to the enlarged district.

Fiesel v Bennett, 225-98; 280 NW 482

Amendment not complying with statute. The requisite statutory statements in the original petition for a benefited water district as to (1) the need of the water supply, (2) the approximate district to be served, (3) the approximate number of families in the district, (4) the source of supply, and (5) the type of service, will not serve to cover a subsequent amendment adding about 30 percent more territory and in which such statements were omitted.

Fiesel v Bennett, 225-98; 280 NW 482

5526.14 Bids for construction.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

CHAPTER 283

TOWNSHIPS AND TOWNSHIP OFFICERS

DIVISION, BOUNDARIES, AND CHANGE OF NAMES

5527 Division authorized.

Workmen's compensation act—township not employer. A civil township is not an "employer," within the meaning of the workmen's compensation act, such township being but an unincorporated district. It necessarily follows that a township road superintendent is not an "employee," within the meaning of said act.

Hop v Brink, 205-74; 217 NW 551

5529 Boundaries conterminous with city.

Atty. Gen. Opinion. See '25-26 AG Op 166

5531 Divisions where city included.

Atty. Gen. Opinion. See '28 AG Op 208

Division of township—effect. The division of a township does not have the effect of dividing an existing school district.

Christensen v Board, 201-794; 208 NW 291

Board of supervisors—division of township—mandatory duty. The board of supervisors has no discretion to refuse to divide a township which contains a city of 1,500, upon the proper presentation of the required statutory petition.

Christensen v Board, 201-794; 208 NW 291

5534 Division—effect.

Mandatory duty. The board of supervisors has no discretion to refuse to divide a township which contains a city of 1,500, upon the proper presentation of the required statutory petition. (§5531, C., '24.)

Christensen v Board, 201-794; 208 NW 291

5542 Petition dismissed.

Atty. Gen. Opinions. See '28 AG Op 382; '34 AG Op 72

TRUSTEES

5543 Trustees—duties—meetings.

Atty. Gen. Opinions. See '28 AG Op 208, 382

De facto trustees. The authority of de facto township trustees may not be questioned in a collateral proceeding.

Bremer County v Schroeder, 200-1285; 206 NW 303

Fences—right to divide not limited by property owner's notice. Where a property owner served notice on township trustees that adjoining owners had refused to maintain their share of division line fences, and the adjoining owners claimed no legal division of such fences had ever been made and asked that a division be made, trustees had authority under the statute to make a legal division and were not limited by the notice given by the complaining property owner.

Morrison v Kipping, 227-1146; 290 NW 59

5544 County attorney as counsel.

Atty. Gen. Opinions. See '32 AG Op 14; AG Op July 31, '39

5545 Employment of counsel.

Atty. Gen. Opinions. See '32 AG Op 14; AG Op Nov. 1, '39

CLERK

5546 Clerk to keep record.

Paupers—notice to depart—invalidity. A notice to a nonresident poor person to depart from the county is a nullity unless officially authorized by the township trustees or board of supervisors. The mere fact that the members of the board individually discussed the matter in regular session and "told the chairman to sign the notice" does not constitute such official authorization.

Emmet County v Dally, 216-166; 248 NW 366

5547 Custody of funds.

Atty. Gen. Opinion. See '30 AG Op 247

OFFICES ABOLISHED

5553 Clerk and trustees abolished.

Atty. Gen. Opinion. See '28 AG Op 208

5554 Clerk and council to act.

Atty. Gen. Opinion. See '28 AG Op 208

CEMETERIES

5558 Cemeteries—condemnation.

City and town cemeteries. See under §5750, Vol I

Atty. Gen. Opinions. See '28 AG Op 378; AG Op April 10, '40

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

5559 Gifts and donations.

Atty. Gen. Opinions. See '30 AG Op 76; '38 AG Op 814; AG Op April 11, '40

5560 Cemetery and park tax.

Atty. Gen. Opinions. See '28 AG Op 378; AG Op April 10, '40

5562 Tax for nonowned cemetery.

Atty. Gen. Opinions. See '30 AG Op 76; AG Op Sept. 1, '39, April 10, '40

5563 Scope of levy.

Atty. Gen. Opinions. See '30 AG Op 247; AG Op April 26, '39

5564 Cemetery funds—use.

Atty. Gen. Opinion. See '30 AG Op 232

5565 Joint boards.

Atty. Gen. Opinions. See '28 AG Op 378; '30 AG Op 233

5566 Regulations.

Atty. Gen. Opinion. See '30 AG Op 232

5570 Conveyance of lots.

Atty. Gen. Opinion. See AG Op June 7, '39

Conflicting purchases—priority. One who in good faith, purchases a vacant and wholly unoccupied lot in a township-controlled cemetery, and proceeds to bury his dead thereon, without actual or constructive notice that the lot had been previously sold to another, acquires rights superior to such prior purchaser. And this is true whether the deed to such prior purchaser was or was not recorded, because the statute fails to declare that the legal effect of recording such a deed is to impart constructive notice to subsequent purchasers.

King v Frame, 204-1074; 216 NW 630

FIRE EQUIPMENT

5570.1 Authorization.

Atty. Gen. Opinion. See AG Op Aug. 4, '39

5570.3 Election.

Atty. Gen. Opinion. See AG Op Sept. 29, '39

COMPENSATION

5571 Compensation of trustees.

Atty. Gen. Opinions. See '28 AG Op 280; '30 AG Op 103; '38 AG Op 473

5573 Compensation of assessor.

Atty. Gen. Opinions. See '25-26 AG Op 345; '30 AG Op 115; '32 AG Op 184; '38 AG Op 123, 461

CHAPTER 284

TOWNSHIP HALLS

Atty. Gen. Opinions. See '28 AG Op 98; '30 AG Op 257; '38 AG Op 498

CHAPTER 285

TOWNSHIP LICENSES

Atty. Gen. Opinion. See '34 AG Op 292

5582 License required.

Atty. Gen. Opinions. See '32 AG Op 130; '34 AG Op 111, 292; '36 AG Op 279; AG Op Jan. 17, '40

"Fun house"—concealed amusement device. The maintenance and operation of an amusement device may constitute actionable negligence as to one from whom the maintenance and operation were concealed, even though it might be otherwise as to one who had full knowledge.

Dahna v Fun House Co., 204-922; 216 NW 262

5582.1 "Roadhouse" defined.

Atty. Gen. Opinions. See '30 AG Op 157; '34 AG Op 111, 292; '36 AG Op 279; AG Op Jan. 30, '39, Feb. 9, '39; AG Op Jan. 17, '40

5583 Limitations and conditions.

Atty. Gen. Opinion. See AG Op Feb. 9, '39

5584 Record.

Atty. Gen. Opinion. See '32 AG Op 130

TITLE XV

CITY AND TOWN GOVERNMENT

CHAPTER 286

INCORPORATION

GENERAL PROVISIONS

5588 How effected.

Municipal utility—power to make profits. Municipal corporations owe their origin to, and derive their powers from, the legislature and can exercise only such powers as are granted in express words or fairly implied from, or incident to, the powers expressly granted, or such powers as are essential to purposes of corporation, and, under the Simmer law, permitting cities to pay for public utilities from future earnings, a municipal corporation has statutory power to make profits in excess of statutory demands.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

CONSOLIDATION

5605 How effected.

Discussion. See 21 ILR 128—Annexation of territory

ANNEXATION OR SEVERANCE

5612 Platted territory.

Discussion. See 21 ILR 128—Annexation of territory

Atty. Gen. Opinion. See '25-26 AG Op 353

5613 Unplatted territory.

Enlargement of boundaries not a "taking" for public use.

Wertz v City, 201-947; 208 NW 511

Nonjudicial review. The extension of the limits of a municipal corporation in strict compliance with a constitutional statute is conclusive on the courts, even tho the statute is, to a degree, arbitrary.

State v Altoona, 201-730; 207 NW 789

5614 Annexation by resolution.

Constitutionality.

Wertz v City, 201-947; 208 NW 511

Enlargement of boundaries—constitutional objections. The enlargement of the boundaries of a municipality, under an enabling statute, without any notice to property owners within the territory annexed, is not violative of the "due-process" clause of the constitution on the theory that such property owners will assuredly be subject to increased taxation in the future.

Wertz v City, 201-947; 208 NW 511

5617 Severance of territory.

Material considerations. Territory is properly detached from a municipality when such territory is very severely isolated from the main body of the city, when the inhabitants on such territory never have derived, and probably never will derive, any material benefit from the municipal government, when the municipality does not need, and never will need, such territory for any legitimate purpose, and, finally, when the municipality has never made any substantial use of the territory except to levy taxes thereon.

McKeon v City, 206-556; 221 NW 351; 62 ALR 1006

Unallowable defense. The fact that territory has remained within a municipality for some half century without the institution of proceedings to have it detached, furnishes no basis, when such proceedings are instituted, for the defensive plea of laches, equitable estoppel or acquiescence.

McKeon v City, 206-556; 221 NW 351; 62 ALR 1006

Unallowable severance. Built-up, residential territory of a city will not be severed or detached therefrom when reasonably needed for sanitary purposes, and for police and fire protection and regulation, especially when such severance would reduce the area of the city by substantially one-half.

Creery v Okoboji, 217-1312; 253 NW 810

Method of trial. Proceedings for the severance and detaching of territory from a municipality, being now purely equitable, are triable de novo on appeal.

McKeon v City, 206-556; 221 NW 351; 62 ALR 1006

CHAPTER 287

ORGANIZATION AND OFFICERS

5623 Classes of cities — towns — villages.

Atty. Gen. Opinions. See '25-26 AG Op 59; '34 AG Op 111, 492, 520, 575; '38 AG Op 346; AG Op Sept. 14, '39

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

5624 Change of class—loss of population.

Atty. Gen. Opinion. See '25-26 AG Op 266

5628 Residence in precinct—exception.

Discussion. See 4 ILB 3—Residence and domicile

Atty. Gen. Opinions. See '32 AG Op 227; '38 AG Op 748, 832; AG Op Apr. 23, '40

5629 Tie votes—contesting elections.

Place of filing contest and bond. In an election contest over a city office, the written statement of intention to contest and bond are properly filed with a county auditor. (§1024, C., '27.)

Jenkins v Furgeson, 212-640; 233 NW 741

Ballots—preservation—showing required—admissibility. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

5631 Council — how composed — election.

Atty. Gen. Opinion. See '25-26 AG Op 161

5632 Officers elected at large.

Atty. Gen. Opinions. See '30 AG Op 299; '34 AG Op 94; '36 AG Op 351; '38 AG Op 319

5633 Officers appointed by council.

Atty. Gen. Opinions. See '30 AG Op 299; '38 AG Op 265

5633.1 Optional election or appointment.

Atty. Gen. Opinion. See '38 AG Op 319

5634 Officers appointed by the mayor.

Watchman—nonauthority to appoint. A mayor of a town has no authority, in the absence of an ordinance so empowering him, to contract for and appoint a night watchman for the municipality—a limitation on the authority of the mayor of which all persons must take notice.

Peterson v Panora, 222-1236; 271 NW 317

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

5636 Other officers.

Atty. Gen. Opinion. See '30 AG Op 299

5638 Removal of officers.

Atty. Gen. Opinion. See '38 AG Op 290

Civil service—right to abolish office. A city may in good faith—without fraud, sham, subterfuge or arbitrariness—abolish an office or official position which it has theretofore duly placed under municipal civil service, and peremptorily dismiss the occupant of such office.

Kern v Des Moines, 213-510; 239 NW 104

5639 Mayor—powers and duties.

Atty. Gen. Opinions. See '25-26 AG Op 113, 161, 489; '32 AG Op 36; '36 AG Op 68, 311

Council—mayor not member—no vote on contract. Where the four members of a city council vote two in favor of and two against employing a superintendent of the municipal power plant, under a statute requiring a majority vote of the members elected to the council, a contract employing such superintendent entered into after the mayor votes "yes" by virtue of a statute giving him the right to vote in case of a tie, is not a binding contract on the city, the mayor not being a member of the council.

Doonan v Winterset, 224-365; 275 NW 640

5640 Clerk—duties.

Atty. Gen. Opinions. See '25-26 AG Op 207; '30 AG Op 299

Burden of proof—public official's receipt of money as issue—plea of full accounting—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk, the clerk's answer, denying receipt of such funds, and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll v Arts, 225-487; 280 NW 869

5641 Warrants—how drawn.

Atty. Gen. Opinion. See '30 AG Op 299

5644 Treasurer—general duties.

Illegal handling of public funds—election of remedies. The fact that a city institutes an action against its treasurer to recover its public funds is not an election of remedies such as will preclude the city from maintaining an action against a county treasurer to recover its funds illegally paid to the city treasurer.

State v Hanson, 210-773; 231 NW 428

Public debt—recovery—partly void warrants. There can be no recovery on municipal warrants given in payment of part of a total purported indebtedness, part of which is void because in excess of constitutional debt limitation. In other words, recovery, insofar as permissible, must be had in some proceedings other than on said warrants.

Trepp v School Dist., 213-944; 240 NW 247

5654.1 Bond—amount.

Atty. Gen. Opinion. See '36 AG Op 172

5655 Expense of bond.

Atty. Gen. Opinion. See '36 AG Op 172

5656 Assessor—duties—deputies—returns.

Atty. Gen. Opinion. See '36 AG Op 68

5657 Marshal—duties.

Atty. Gen. Opinions. See '36 AG Op 537; AG Op Jan. 16, '39

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

Workmen's compensation act—city marshal—noncompensable injuries. The statutory provision (editorially classified as part of the workmen's compensation act, §1422, C., '31) which, inter alia, grants compensation to a city marshal when injured "while performing such official duties where there is peril or hazard peculiar to the work of his office", does not authorize compensation for an injury received by a marshal from the accidental discharge of his revolver as it dropped from his pocket while cleaning the floor of the city jail.

Roberts v City, 219-1136; 260 NW 57; 37 NCCA 807

Workmen's compensation act—officer (?) or employee (?) of city. A city marshal who is appointed by the mayor, and who qualifies by taking the usual oath, and by giving an official bond, all as required by a city ordinance, is a city officer and not a city employee within the scope of the workmen's compensation act.

Roberts v City, 219-1136; 260 NW 57

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

False imprisonment — justification — jury question. In an action for wrongful arrest

and false imprisonment, where defendants, Polk county sheriff and deputies acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury, hence court erred in sustaining motion for directed verdict.

Drake v Keeling, (NOR); 287 NW 596

Consent to extradition—no waiver of illegal arrest and detention. In an action for wrongful arrest and false imprisonment of plaintiff by Omaha, Nebr., police upon request of defendants, Polk county, Iowa, sheriff and deputies, where plaintiff waived extradition and was taken to Polk county, altho protesting he did not commit alleged offense, and where imprisonment continued in Iowa even after one of the defendant deputies stated that he was satisfied they had the wrong man, the waiver of extradition did not as a matter of law constitute a relinquishment of plaintiff's right to claim such arrest and detention to be unlawful.

Drake v Keeling, (NOR); 287 NW 596

5658 Policemen—powers and duties.

Operation of police patrol a governmental function. The operation of a plainly marked police patrol by a policeman in uniform, in conveying policemen in uniform from the police station to their patrol beats, all under orders from the chief of police, is a governmental function. It follows that the city is not liable for damages consequent on the negligent operation of the car by the driver.

Leckliter v City, 211-251; 233 NW 58; 38 NCCA 493

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

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False imprisonment — justification — jury question. In an action for wrongful arrest and false imprisonment, where defendants, Polk county sheriff and deputies acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury, hence court erred in sustaining motion for directed verdict.

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Drake v Keeling, (NOR); 287 NW 596

5659 Police matrons.

Atty. Gen. Opinion. See '25-26 AG Op 147

5662 Executive and legislative functions.

Atty. Gen. Opinion. See '28 AG Op 349

5663 City and town councils.

Atty. Gen. Opinions. See '25-26 AG Op 384; '28 AG Op 262; '30 AG Op 48; '32 AG Op 119; '34 AG Op 94, 360; '36 AG Op 446

Rules—power to waive. A city or town council may waive a rule adopted by it for its own guidance, e. g., a rule that a member shall not incur an indebtedness against the city in excess of a named sum.

Carlson v City, 212-373; 236 NW 421

Employment of assistants. The superintendent of a department of municipal government under the so-called commission plan may himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof; and this is true notwithstanding an additional existing ordinance which provides, in effect, that all contracts shall be entered into or approved by the council as a whole, it being held that the latter ordinance is not a limitation on the former.

Loran v City, 201-543; 207 NW 529

Officers—limitation on power to contract—dealing at peril. One contracting with a municipal corporation is bound to take notice of

limitations on the power of the particular officers to make such contract.

Doonan v Winterset, 224-365; 275 NW 640

Contract—absence of funds—evidence. Record reviewed on the contention that a contract for grading was invalid because no funds existed from which to pay the contractor, and held the contention was untenable in view of the pleadings in the case and the fact findings of the court.

Carlson v City, 212-373; 236 NW 421

5664 Compensation of councilmen.

Atty. Gen. Opinions. See '25-26 AG Op 161, 207; '28 AG Op 405

5665 Fees of mayor.

Atty. Gen. Opinions. See '25-26 AG Op 252; '32 AG Op 255; '34 AG Op 363; '36 AG Op 311; '38 AG Op 342

5666 Fees of police judge.

Atty. Gen. Opinions. See '25-26 AG Op 252; '28 AG Op 445

5668 Fees of marshal and deputy.

Atty. Gen. Opinion. See '38 AG Op 342

Ordinance fixing monthly salaries excludes fees. A city ordinance, which, under section 5670, C., '31, fixes the salary of the city marshal at a stated sum per month, necessarily fixes said salary "in lieu of all other compensation" (such as fees) even tho said ordinance does not specifically so declare.

King v Eldora, 220-568; 261 NW 602

Salary deficiency—payment by overdraft on different fund. A town marshal employed at a sum fixed by ordinance, but paid each month only a part of that sum from the general fund, may not recover the difference between this sum and the rate fixed by ordinance when he had in fact been paid this difference by an overdraft on the waterworks fund. No supplemental contract of any validity may be inferred from the town so acting contrary to statute.

Clark v Goldfield, 224-1012; 278 NW 341

5669 Compensation of assessors and deputies.

Atty. Gen. Opinions. See '30 AG Op 56; '32 AG Op 136; '36 AG Op 166; '38 AG Op 123, 534, 829

Per diem compensation of assessor. When the compensation of an assessor is fixed on a per diem basis, the board of supervisors has power to fix the maximum time for which the per diem will be allowed.

Alderdice v County, 202-759; 210 NW 242

5670 Salaries in lieu of fees.

Atty. Gen. Opinions. See '25-26 AG Op 252, 431; '28 AG Op 445, '34 AG Op 78, 363; '36 AG Op 311; '38 AG Op 342

Ordinance fixing monthly salaries excludes fees. A city ordinance, which, under this section fixes the salary of the city marshal at a stated sum per month, necessarily fixes said salary "in lieu of all other compensation" (such as fees) even tho said ordinance does not specifically so declare.

King v Eldora, 220-568; 261 NW 602

Inequitable demand for legal salary. A city officer, who has not, for a series of months, received his full salary as legally fixed by ordinance, may not, in an equitable action, compel the city to pay him the deficiency when, during said time, he has properly received an unknown amount of fees belonging to the city (or county) but has illegally retained them as salary and makes no offer to return said fees.

King v Eldora, 220-568; 261 NW 602

5671 Compensation of other officers.

Atty. Gen. Opinions. See '25-26 AG Op 150, 252; '34 AG Op 78; '36 AG Op 68, 311; '38 AG Op 28, 342

Employment of assistants. The superintendent of a department of municipal government under the so-called commission plan may himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof; and this is true notwithstanding an additional existing ordinance which provides, in effect, that all contracts shall be entered into or approved by the council as a whole, it being held that the latter ordinance is not a limitation on the former.

Loran v City, 201-543; 207 NW 529

5672 Ineligibility—change of compensation.

Atty. Gen. Opinions. See '25-26 AG Op 150; '28 AG Op 398; '32 AG Op 110; '38 AG Op 28, 151, 265

Salary deficiency—payment by overdraft on different fund. A town marshal employed at a sum fixed by ordinance, but paid each month only a part of that sum from the general fund, may not recover the difference between this sum and the rate fixed by ordinance when he had in fact been paid this difference by an overdraft on the waterworks fund. No supplemental contract of any validity may be inferred from the town so acting contrary to statute.

Clark v Goldfield, 224-1012; 278 NW 341

5673 Interest in contracts.

Atty. Gen. Opinions. See '28 AG Op 399; '30 AG Op 196; '32 AG Op 198; '34 AG Op 323; '36 AG Op 660; '38 AG Op 185; AG Op May 9, '39

Nondisqualifying interest. The adoption of a resolution is not rendered nugatory because of the affirmative vote of a particular member, by the fact that, subsequent to the adoption, the private corporation of which the particular member of the board was an officer

entered into a contract with a third party for the carrying out of the purposes and objects of said resolution.

Security Bk. v Bagley, 202-701; 210 NW 947; 49 ALR 705

Interest of councilman. The mere fact that a member of a city council has leased cement mixers to a contractor under an agreement that the rental shall be paid out of the profits arising from the use of such machinery creates no such interest in the councilman in a contract between the city and said contractor as invalidates the contract, even tho the contract contemplated the use of said machinery in the execution of the contract.

Wayman v City, 204-675; 215 NW 655

Fatally delayed objection. A property owner may not, after a permanent sidewalk has been fully completed, enjoin the collection of a special assessment on his property on the ground that the sidewalk was constructed by an officer of the city.

Perrott v Balkema, 211-764; 234 NW 240

Officers—election bribery by third person—disqualifying effect. A candidate having been elected to office is not disqualified, merely because some third person may have given or offered a bribe to the voters for the purpose of securing the election of said candidate, unless the candidate actually participated in and approved thereof.

Van Der Zee v Means, 225-871; 281 NW 460

5677 Annual report.

Atty. Gen. Opinion. See '30 AG Op 262

5677.1 Enforcement of duty.

Atty. Gen. Opinion. See '30 AG Op 262

5679 Publication.

Atty. Gen. Opinion. See '30 AG Op 262

5683 League of municipalities.

Atty. Gen. Opinion. See '38 AG Op 33

CHAPTER 288

DEPARTMENT OF PUBLICITY, DEVELOPMENT, AND GENERAL WELFARE

Atty. Gen. Opinion. See '34 AG Op 664

CHAPTER 289

CIVIL SERVICE

Atty. Gen. Opinions. See '36 AG Op 537, 538; '38 AG Op 190, 313

5689 Appointment of commission.

Nature of commission. The civil service commission is a special tribunal of wide discretion within the jurisdictional field confided to it, and entitled to pursue a procedure unshackled by mere formality and technicality.

Substantial compliance with the statute governing it is all-sufficient.

Jenney v Com., 200-1042; 205 NW 958
Dickey v Com., 201-1135; 205 NW 961

5690 Qualifications.

Atty. Gen. Opinion. See AG Op Feb. 7, '39

5694 Applicability—exceptions.

Atty. Gen. Opinions. See '32 AG Op 202; '38 AG Op 112, 264, 290, 347

Illegal order—when nonparty may question. An appointee to a public position who has been deprived of said position by the action of the civil service commission may maintain in the district court certiorari to review said action, even tho he was not a party to the proceedings which resulted in said action.

Ash v Board, 215-908; 247 NW 264

Janitors not under civil service. A municipal employee who performs the ordinary and usual manual labor of a janitor must be classified as a "laborer whose occupation requires no special skill or fitness" and, therefore, not within the purview of the civil service law.

Ash v Board, 215-908; 247 NW 264

5695 Preference by service.

Atty. Gen. Opinions. See '36 AG Op 537; '38 AG Op 290, 728

Holding under former statute. A municipal civil service commission has no jurisdiction over the discharge of a municipal employee who has never taken the civil service examination provided by the commission.

Walling v Commission, 214-1156; 243 NW 178

Holding under former statute. The statutory provision in the civil service act to the effect that persons "who have rendered long and efficient service shall retain their positions without further examination" does not embrace any officer or appointee who is specifically excepted from the benefits of said act.

Ash v Board, 215-908; 247 NW 264

Holding under prior statute. On mandamus to compel a city to comply with an order of

the civil service commission, plaintiff must, of course, establish jurisdiction in said commission to enter said order. So held where the order was entered for the reinstatement of an employee who had never taken an examination and had no civil service rights.

Larson v Des Moines, 216-42; 247 NW 38

Employees—who may appeal. Principle reaffirmed that "long and efficient service" by a discharged city employee does not give said employee the right of appeal to the civil service commission.

Larson v Des Moines, 216-42; 247 NW 38

Civil service—sanitary inspector—nonsupervisory position. In certiorari action to annul decision of civil service commission ordering the reinstatement of a discharged sanitary inspector, evidence, that his general duty was to investigate and pass upon complaints with only occasional control over incidental employees, held to support and sustain findings below that such position was "nonsupervisory" under civil service statute allowing a preference to certain employees who had worked a certain length of time.

Des Moines v Board, 227-66; 287 NW 288

Civil service — preference by service — five year provision construed—taking examination not admission of necessity. A Sioux City policeman who served as a patrolman for about 14 years and was then promoted to rank of detective, in which capacity he served for about 4 years until demoted to former position of patrolman, came within purview of statute enacted during his service as a detective providing that any person having "* * * five years of service in a position or positions, shall retain his position and have full civil service rights * * *" without examination. Hence his demotion without cause was improper, and the fact that he had taken examinations for position of detective did not amount to an admission that an examination was necessary in his case.

Brown v Sturgeon, 227-136; 287 NW 834

Civil service — only original appointments probationary. Section 5696, C., '35, providing for examinations by civil service commission and making appointments probationary for a period of not to exceed six months, refers to original appointments and not to old appointees who have later qualified for their position by examination, in view of §5695, C., '35, concerning preference by service.

Des Moines v Board, 227-66; 287 NW 288

5696 Original entrance examination—appointments.

Soldiers preference law—not superseded by civil service law. Where a position occupied by a war veteran, such as license collector for a city, was treated by the council as a continuing one and not for a definite term, the fact that the city conducted a civil service examination (which the veteran failed to pass) will not permit the city to oust the veteran and appoint another without charges, notice, and hearing, as provided by the soldiers preference law.

Jones v Des Moines, 225-1342; 283 NW 924

No waiver by taking civil service examination. A war veteran holding a continuing position for a city does not waive his rights under the soldiers preference law, by taking a civil service examination as to the position he holds. He is secure in the position so long as he is capable and efficient altho he may fail in the examination.

Jones v Des Moines, 225-1342; 283 NW 924

Civil service — only original appointments probationary. This section providing for examinations by civil service commission and making appointments probationary for a period of not to exceed six months, refers to original appointments and not to old appointees who have later qualified for their position by examination, in view of §5695, C., '35, concerning preference by service.

Des Moines v Board, 227-66; 287 NW 288

5697 Preferences.

Atty. Gen. Opinions. See '36 AG Op 538; '38 AG Op 190

Soldiers preference law — purpose of act. The intent of the soldiers preference law is to make veterans secure in their positions in public service and to prevent their removal except for misconduct, and it is not intended for the purpose of retaining in office one who violates his duty.

Edwards v Civil Service, 227-74; 287 NW 285

Soldiers preference law—no waiver by taking civil service examination. A war veteran holding a continuing position for a city does not waive his rights under the soldiers preference law, by taking a civil service examination as to the position he holds. He is secure in the position so long as he is capable and efficient altho he may fail in the examination.

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Jones v Des Moines, 225-1342; 283 NW 924

5698 Names certified—temporary appointment.

Atty. Gen. Opinion. See '38 AG Op 290

5698.1 Seniority.

Atty. Gen. Opinions. See '38 AG Op 292, 728

Civil service commission—power to determine seniority rights. Where a sanitary inspector, upon being discharged by a city council, took an appeal to civil service commission, it had jurisdiction to determine his seniority rights.

Des Moines v Board, 227-66; 287 NW 288

5699 Chief of police and chief of fire department.

Atty. Gen. Opinion. See '38 AG Op 290

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

5700 Qualifications.

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

5701 Employees under civil service—qualifications.

Atty. Gen. Opinion. See '36 AG Op 537

5702 Removal, demotion, or suspension.

Civil service and soldiers preference laws—purpose. Civil service and soldiers preference laws were not intended as a cloak or shield to cover misconduct, incompetency, or failure to perform official duties, but to provide protection and safeguard against arbitrary action of superior officers in removing such employees for reasons other than those named in the statutes.

Anderson v Board, 227-1164; 290 NW 493

Discharge by commission—findings—reviewability. Supreme court will not review findings of civil service commission which are supported by competent evidence, where commission has jurisdiction and has otherwise acted legally; but, where evidence is entirely lacking to support the findings, the question becomes one of law and the action of the commission would not only be erroneous, but would amount to an illegality reviewable by certiorari.

Anderson v Board, 227-1164; 290 NW 493

Jurisdiction to discharge. Informal charges against a policeman of misconduct, recited in and recognized tentatively by the city council by resolution filed with the civil service commission, furnish jurisdictional basis for the commission, on proper notice to the accused of the charges, to proceed to a hearing and, in a proper case, to enter an order of discharge.

Dickey v Com., 201-1135; 205 NW 961

Discharge by commission—jurisdiction on appeal. The municipal civil service commission has jurisdiction, on appeal to it by an "indefinitely suspended" policeman as per order of the chief of police, (1) to receive formal written charges of misconduct on the part of appellant, (2) to hold legal hearing thereon, and, on proper proof, (3) to enter an order peremptorily discharging appellant; and such action is, in effect, legally accomplished by an order of the commission "dismissing the appeal and affirming the discharge" by the chief of police.

Fetters v Guth, 221-359; 265 NW 625

Discharge—burden of proof. Burden is on civil service commission to prove statutory grounds for removal of police officer who is entitled to soldiers preference.

Anderson v Board, 227-1164; 290 NW 493

Discharge—nonjurisdiction of civil service commission. A municipal civil service commission has no jurisdiction over the discharge of a municipal employee who has never taken the civil service examination provided by the commission.

Walling v Civil Service, 214-1156; 243 NW 178

Right to abolish office. A city may in good faith—without fraud, sham, subterfuge or arbitrariness—abolish an office or official position which it has theretofore duly placed under municipal civil service, and peremptorily dismiss the occupant of such office.

Kern v Council, 213-510; 239 NW 104

"Hearing and determination"—what constitutes. In certiorari to determine the legality of proceedings of civil service commission in removing a city employee, the commission's statutory duty to "hear and determine" is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony by both sides, from a consideration of which the relief

sought by the moving party is either granted or denied.

Sandahl v Des Moines, 227-1310; 290 NW 697

Fair and impartial hearing. A city employee who has been removed from office cannot be said to have had a fair and impartial hearing before the civil service commission under a record disclosing that the commission, after investigation, unsuccessfully sought to have the employee indicted, that charges against the employee were filed by the commission itself, which then proceeded to "hear and determine" the case, and that a member of the commission stated "We had Paul Sandahl convicted before he ever went before us for trial."

Sandahl v Des Moines, 227-1310; 290 NW 697

Review—scope and extent. A writ of certiorari presents only a question of law, and does not entitle the petitioner to have a review of the facts, unless the return reveals such an absence of facts as to present a law question of arbitrary action.

Dickey v Com., 201-1135; 205 NW 961

Discharge of policeman for nonpayment of debts—nonpermissibility. Civil service commission's removal of police officer, an honorably discharged soldier, on sole ground that he failed to pay his creditors, held arbitrary and void despite fact that police department suffered inconvenience because of creditor's demands for assistance in collection, where such officer made good-faith efforts to meet his obligations which accrued as result of sickness in family.

Anderson v Board, 227-1164; 290 NW 493

Policeman assaulting prisoner—discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

5703 Removal or discharge of subordinates.

Policeman assaulting prisoner—discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

5704 Appeal.

Jurisdiction of commission. The civil service commission has jurisdiction, on appeal by an officer of the police department from an order of discharge, to determine, on an appropriate record, (1) whether said officer is simply a special or temporary officer, and dischargeable at pleasure, or (2) whether said officer has acquired the civil service rights of a regular policeman, and, on the latter finding, to order his reinstatement—no charges being filed against him.

Jenney v Com., 200-1042; 205 NW 958

Nonjurisdiction of commission. A municipal civil service commission has no jurisdiction over the discharge of a municipal employee who has never taken the civil service examination provided by the commission.

Walling v Commission, 214-1156; 243 NW 178

Larson v Des Moines, 216-42; 247 NW 38

Employees—who may appeal. Principle reaffirmed that "long and efficient service" by a discharged city employee (under §5695, C., '31) does not give said employee the right of appeal to the civil service commission.

Larson v Des Moines, 216-42; 247 NW 38

Certiorari—competent sustaining evidence necessary—hearsay ignored on review. Where, in a proceeding before the civil service commission, incompetent hearsay evidence, in the form of minutes of testimony before a grand jury, is considered on the question of whether suspended police officers should be reinstated, the supreme court on review in certiorari must examine the record to ascertain if there is other competent evidence to support the commission's ruling.

Luke v Civil Service, 225-189; 279 NW 443

5711 Jurisdiction—attorney—decision.

Certiorari—civil service commission ruling—remedy. No appeal being allowed from a ruling of the civil service commission, and there being no other plain, speedy, and adequate remedy if the commission exceeded its proper jurisdiction, or otherwise acted illegally, a writ of certiorari will lie.

Luke v Civil Service, 225-189; 279 NW 443

Fair and impartial hearing. A city employee who has been removed from office cannot be said to have had a fair and impartial

hearing before the civil service commission under a record disclosing that the commission, after investigation, unsuccessfully sought to have the employee indicted, that charges against the employee were filed by the commission itself, which then proceeded to "hear and determine" the case, and that a member of the commission stated "We had Paul Sandahl convicted before he ever went before us for trial."

Sandahl v Des Moines, 227-1310; 290 NW 697

"Hearing and determination"—what constitutes. In certiorari to determine the legality of proceedings of civil service commission in removing a city employee, the commission's statutory duty to "hear and determine" is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony by both sides, from a consideration of which the relief sought by the moving party is either granted or denied.

Sandahl v Des Moines, 227-1310; 290 NW 697

Civil service commission findings—conclusiveness. The ruling of a civil service commission as to the discharge of a veteran under soldiers preference law, altho not conclusive, should not be lightly set aside, it being the general rule that where there is compliance in good faith with all requirements as to hearings, the courts will not usually interfere to direct or control the discretion of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Findings of fact—when reviewed. In certiorari action by city to annul decision of civil service commission, it is not the court's duty to review findings of fact if sustained by any competent and substantial evidence, unless such lower tribunal otherwise acted illegally and there is no other plain, speedy and adequate remedy at law. However, a lack of such evidence constitutes such illegality as would warrant a review of the findings below.

Des Moines v Board, 227-66; 287 NW 288

Certiorari to review veteran's discharge. Under soldiers preference law affording veterans the right of hearing and review by certiorari, in the event of discharge from public employment, the scope of the review is not, as in ordinary cases of certiorari, limited to evidence on question of jurisdiction or other illegality, but is enlarged to allow a review of all proceedings had before a civil service commission.

Edwards v Civil Service, 227-74; 287 NW 285

Policeman assaulting prisoner — discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Civil service commission fixing penalty—record of employee considered. It is the right and duty of a commission or magistrate to take into consideration the record of a guilty person in fixing a penalty.

Edwards v Civil Service, 227-74; 287 NW 285

Jurisdiction to discharge. Informal charges against a policeman of misconduct, recited in and recognized tentatively by the city council by resolution filed with the civil service commission, furnish jurisdictional basis for the commission, on proper notice to the accused of the charges, to proceed to a hearing and, in a proper case, to enter an order of discharge.

Dickey v Com., 201-1135; 205 NW 961

Power to determine seniority rights. Where a sanitary inspector, upon being discharged by a city council, took an appeal to civil service commission, it had jurisdiction to determine his seniority rights.

Des Moines v Board, 227-66; 287 NW 288

Allowance of compensation to employee during discharge. On an appeal by a discharged employee to civil service commission, the allowance of compensation during period of discharge is within discretion of commission.

Des Moines v Board, 227-66; 287 NW 288

Reinstating suspended policeman—back salary denied. A suspended police officer, upon being reinstated by the civil service commission, may be denied his compensation for the time of his suspension, the matter being entirely discretionary with the commission.

Luke v Civil Service, 225-189; 279 NW 443

5712 Employees—number diminished.

Atty. Gen. Opinions. See '38 AG Op 264, 728

Discharge. The city council has plenary power by appropriate resolution to order a good-faith reduction in the number of employees in a municipal department operating under civil service regulations, and may validly delegate to the chief officer of such department the administrative duty to designate, on the basis of efficiency, competency, and length of service, and without the preferring of charges, the employees who shall be discharged; and this is true tho the employees be ex-soldiers, as the soldiers preference act has no application to a case where an office is abolished.

Lyon v Com., 203-1203; 212 NW 579

Right to abolish office. A city may in good faith—without fraud, sham, subterfuge or arbitrariness—abolish an office or official position which it has theretofore duly placed under municipal civil service, and peremptorily dismiss the occupant of such office.

Kern v Council, 213-510; 239 NW 104

How abolished—effect of transfer. The abolishment of a position under civil service can be accomplished only by compliance with statutory requirements relating to the diminution of employees, and the mere transfer of the duties of a position to another department will not amount to an abolishment.

Des Moines v Board, 227-66; 287 NW 288

Transfer of position—evidence incompetent to prove. In certiorari action to annul decision of civil service commission ordering reinstatement of a discharged sanitary inspector, where it was claimed that this position had been transferred from one department to another, evidence to that effect, consisting of (1) only a reference in the certification to a report of the commission, and (2) an appointment made by the city council, was incompetent.

Des Moines v Board, 227-66; 287 NW 288

Power to determine seniority rights. Where a sanitary inspector, upon being discharged by a city council, took an appeal to civil service commission, it had jurisdiction to determine his seniority rights.

Des Moines v Board, 227-66; 287 NW 288

CHAPTER 290

ORDINANCES

Atty. Gen. Opinions. See '34 AG Op 230, 231

5714 Power to pass.

Discussion. See 22 ILR 713—Parking meters
Atty. Gen. Opinions. See '34 AG Op 229, 664; '38 AG Op 309, 371; AG Op May 18, '39.

ANALYSIS

I ORDINANCES IN GENERAL
II VALIDITY IN GENERAL
III GENERAL WELFARE CLAUSE
IV ENFORCEMENT

I ORDINANCES IN GENERAL

Nonfraudulent exercise of granted power not reviewable by courts.

Lytle Co. v Gilman, 201-603; 206 NW 108

Approval by voters does not create franchise. The approval, by a majority vote of the electors of a city or town, of a proposed franchise for the use of the streets by a private public utility, does not create a franchise. Such franchise comes into existence only when the city or town council sees fit, after the favorable vote, to enact, and does enact, such franchise in the form of an ordinance.

Schnieders v Town, 213-807; 234 NW 207

Construction. An ordinance must be construed as a whole.

Talarico v City, 215-186; 244 NW 750

Construction—franchise (?) or regulation (?). Ordinance construed in the light of its terms and of the facts attending its enactment, and held, to constitute a franchise to the grantee therein named to operate a telephone exchange, and not to constitute a mere regulatory ordinance imposing a license fee on said business.

Pella v Fowler, 215-90; 244 NW 734

"Coasting" defined—sled hitched to vehicle excluded. A city ordinance, prohibiting "coasting" in the streets, applies only to vehicles or sleds moving by the force of gravity and not to sleds hitched to the rear of motor vehicles.

Samuelson v Sherrill, 225-421; 280 NW 596

Simmer law—filing contract but not resolution—ordinance unnecessary. In establishing municipal ownership of a waterworks plant, it is the contract and not the resolutions calling an election that must be on file with the city clerk for one week before adoption, and an ordinance establishing the municipal waterworks plant is unnecessary.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Employees—compensation. The determination of the salary of a fireman is the exercise of an administrative power and need not be made by ordinance. (§6519, C., '24.)

Murphy v Gilman, 204-58; 214 NW 679

Transmission line—construction—negligence. The owner of a high-voltage electric transmission line may not be said to be negligent in failing to cover the wires with an insulating material when its said line is constructed in full compliance with the law and is guarded from doing injury by every practical device and expedient known and recognized by those who are expert in such construction and use; and one who unwittingly and wrongfully places himself in contact with such a line must be held to be the sole author of the resulting injury.

Dilley v Iowa Co., 210-1332; 227 NW 173

Election bribery—electric rate reduction—fulfillment after trial immaterial. Where the court, after hearing an election contest, finds that candidates to municipal office did not par-

I ORDINANCES IN GENERAL—concluded

ticipate in an illegal bribe by a local electric company offering a rate reduction and a rebate of impounded charges if the municipal ownership opponents were elected, the fact that, after the trial, the council repeals the municipal ownership ordinance, and the company does reduce rates and repay impounded funds to consumers, adds nothing new to the proof of participation and does not warrant a new trial.

Van Der Zee v Means, 225-871; 281 NW 460

Citizens—challenging officers' official acts. Public welfare lodges in citizens of a community the right to challenge the validity of an electric plant construction contract and to enjoin a municipal corporation and its officers from violating their duties and abusing corporate powers, if such construction contract is consummated without competitive bidding, made mandatory by statute.

Miller v Milford, 224-753; 276 NW 826

II VALIDITY IN GENERAL

Ordinance—effect of obsolete or repealed provisions. An ordinance may be perfectly valid as to a distinct subject matter therein, even tho the provisions relative to other subject matters have been repealed or have become obsolete.

Towns v City, 214-76; 241 NW 658

Drastic and invalidating penalties. Drastic penalties may, in view of the nature of the acts punished, and in view of the circumstances attending the commission of such acts, nullify an entire ordinance. So held where each day's continuance of each of various acts was declared a separate offense and punished by fine or imprisonment.

Edwards v City, 213-1027; 240 NW 711

Discretionary power. Discretionary power may, in proper cases, be conferred upon the mayor of a city.

Talarico v City, 215-186; 244 NW 750

Delegation of power. Ordinance held not to confer power on the mayor to issue a license.

Talarico v City, 215-186; 244 NW 750

License fees presumptively reasonable. License fees duly fixed by an authorized ordinance will be deemed reasonable unless the contrary appears on the face of the ordinance or on proper evidence.

Towns v City, 214-76; 241 NW 658

Unreasonableness per se. Under statutory authority "to regulate and license" sales by transient merchants, an ordinance which empowers the mayor not only to fix the license fee at any sum from $5 to $100 per day, but also the tenure of the license, is per se arbitrary, unreasonable, and void.

Creston v Mezvinsky, 213-1212; 240 NW 676

Taxation under power to regulate or license. Statutory power in a city to regulate or license a business does not embrace the power to tax the business; and the court will be quick to note whether the revenue derivable is out of proportion to the expense entailed by the regulations; also whether the language of the ordinance purporting to be a police measure is but a subterfuge to hide an actual purpose to tax.

Edwards v City, 213-1027; 240 NW 711

Police powers—consent of property owners—effect. General principle recognized that an ordinance which requires the consent of abutting and adjacent property owners for the erection of a building is invalid on constitutional grounds.

Downey v City, 208-1273; 227 NW 125

Due process—ordinance requiring weighing of loads. A municipal ordinance requiring that merchandise sold in load lots by weight for delivery within the city be weighed by a public weighmaster whose certificate stating the gross, tare, and net weight must be delivered to the purchaser, such ordinance, altho it necessitates that a person trucking coal into the city unload and reload, is not so unreasonable as to violate the due process clause of the constitution.

Huss v Creston, 224-844; 278 NW 196

Fireproof construction—unallowable restriction. Statutory authority to municipalities to prohibit the erection of buildings unless the outer walls be made of "brick, iron, stone, mortar, or other noncombustible materials," will not authorize an ordinance which prohibits the erection of outer walls unless made of "brick and mortar or of iron and stone and mortar"—in other words, an ordinance which excludes the right to use "other noncombustible materials."

Boehner v Williams, 213-578; 239 NW 545

Alley—vacating by ordinance—invalidity for nondescription. An ordinance to vacate an alley is invalid insofar as it affects a certain block in the city plat not mentioned nor described in the ordinance.

Pederson v Radcliffe, 226-166; 284 NW 145

Penal ordinance void for uncertainty. An ordinance which requires storage tanks for inflammable oils and the accessories of such tanks to "be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous" (sic), and penalizing violations, is void for uncertainty and unenforceability.

Edwards v City, 213-1027; 240 NW 711

Regulatory ordinance—absence of specifications—effect. An ordinance purporting to safeguard the public by regulating storage tanks for inflammable oils must, in order to

be valid and enforceable, contain such rules and specifications as will enable the property owner to know, definitely, just what is required of him in order to comply with the ordinance and thereby safeguard himself. It is quite insufficient to enact the dragnet command that said tanks and appurtenant accessories "must be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous".

Edwards v City, 213-1027; 240 NW 711

Storage of gasoline—vested right. A person who has the right, under an ordinance, to store gasoline in a certain quantity without a permit from the city, and the right to store gasoline in excess of said quantity only with such permit, and who is refused a permit for such excess storage, does not, by thereafter erecting his storage tanks, acquire a vested right to store gasoline in said lesser quantity without a permit. In other words, the ordinance may validly be amended by reducing the quantity which may be stored without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

Inflammable oils—regulations—permit required. An ordinance regulatory of inflammable oils may validly prohibit the erection and maintenance within the city of gasoline filling stations unless the city council, in the exercise of its legal discretion, first grants a permit for such erection and maintenance. (§5764, C., '27.)

Cecil v Toenjes, 210-407; 228 NW 874

Equal protection of laws—ordinance—arbitrary classification. An ordinance which provides safety regulations over tanks wherein inflammable oils are stored for sale is null and void when in the same municipality there are large numbers of other tanks identical with those embraced in the ordinance and used for the same purpose except the stored oil is not for sale. Especially is this an arbitrary classification when it is made to appear that a material number of the exempted tanks are more dangerous than the tanks to which the ordinance is made applicable.

Edwards v City, 213-1027; 240 NW 711

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

III GENERAL WELFARE CLAUSE

"Construction" as imposing continuous duty. An ordinance which requires all rain spouts on buildings to be so "constructed that water will not be cast upon the sidewalks" imposes a continuing duty upon the property owner—a duty not only to "construct" the spouting as required but to maintain the spouting in such required condition.

Updegraff v City, 210-382; 226 NW 928

Regulatory ordinance—absence of specifications—effect. An ordinance purporting to safeguard the public by regulating storage tanks for inflammable oils must, in order to be valid and enforceable, contain such rules and specifications as will enable the property owner to know, definitely, just what is required of him in order to comply with the ordinance and thereby safeguard himself. It is quite insufficient to enact the dragnet command that said tanks and appurtenant accessories "must be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous".

Edwards v City, 213-1027; 240 NW 711

IV ENFORCEMENT

Arbitrary action. A mayor, exercising his power under an ordinance to direct the nonissuance of a license, may not be said to act "arbitrarily" when he, in accordance with the ordinance, notifies the applicant of the time and place of hearing on the application and when the applicant ignores the notice.

Talarico v City, 215-186; 244 NW 750

Enforcement of ordinance. A permanent injunction against a mayor and his successor to enjoin the enforcement, against plaintiff's nonresident employees, of a penal ordinance, on the theory that such employees are transient peddlers, will not be entered at a time when it does not appear that said transient employees are in the city in question, or that plaintiff's property rights will be invaded, or that plaintiff will be irreparably injured by enforcement.

Cook v Davis, 218-335; 252 NW 754

5715 General requirements.

Atty. Gen. Opinion. See '36 AG Op 132

5716 Reading.

Atty. Gen. Opinion. See '38 AG Op 151

5717 Majority vote.

Atty. Gen. Opinion. See '30 AG Op 288

Council — mayor not member — no vote on contract. Where the four members of a city council vote two in favor of and two against employing a superintendent of the municipal power plant, under a statute requiring a majority vote of the members elected to the council, a contract employing such superintendent entered into after the mayor votes "yes" by virtue of a statute giving him the right to vote in case of a tie, is not a binding contract on the city, the mayor not being a member of the council.

Doonan v Winterset, 224-365; 275 NW 640

Permanent sidewalk—sufficient showing of jurisdiction. Jurisdiction to construct a permanent sidewalk and to assess property therefor is made to appear by unquestioned proof (1) that the city or town council by resolution ordered such construction, and (2) that the mayor later signed the record of such meeting and the resolution, even tho the record fails to show a three-fourths affirmative vote of all members and fails to show that the yeas and nays were called on the resolution.

Perrott v Balkema, 211-764; 234 NW 240

5720 Publication.

Atty. Gen. Opinions. See '28 AG Op 262, 398; '36 AG Op 177; '38 AG Op 151, 265, 536; AG Op Jan. 26, '39

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

5721 Book form.

Atty. Gen. Opinion. See '38 AG Op 536

Ordinance as evidence. A book purporting to be the ordinances of a municipality and duly certified as such by the city clerk is admissible, so far as material, without further showing.

Hollingsworth v Hall, 214-285; 242 NW 39

City ordinance — sufficient "offer". A book purporting to have been issued by a city or town and to contain the ordinances thereof, as of a certain date, need not be formally offered as such. Counsel need only produce or bring the volume into court for the inspection of the court and thereupon formally offer such portions thereof as he may see fit.

Orr v Hart, 219-408; 258 NW 84

Insufficient publication "in pamphlet form". The publication "in pamphlet form", by a city, of the proceedings of the city council for the preceding month (§6581, C., '31), in which pamphlet appears a duly enacted ordinance, does not constitute the publication "in pamphlet form" of said ordinance as contemplated by this section.

Des Moines v Miller, 219-632; 259 NW 205

5722 Proceedings published or posted.

Atty. Gen. Opinions. See '28 AG Op 108, 262; '30 AG Op 262

5723 Cost of publishing.

Atty. Gen. Opinions. See '28 AG Op 262; AG Op Jan. 25, '39, Oct. 11, '39

CHAPTER 291

MAYORS' AND POLICE COURTS

5728 Police court.

Atty. Gen. Opinion. See '36 AG Op 313

5732 Jurisdiction of mayor.

Discussion. See 12 ILR 393—Mayor's court and due process

Atty. Gen. Opinions. See '32 AG Op 253; AG Op March 31, '39

In re recovery of license fee.

Scranton v Henderson, 163-457; 144 NW 1024

5735 Procedure—appeal—judicial notice.

Certiorari. The refusal of a mayor to grant defendant a change of venue, in a prosecution for assault and battery, on the ground "that the mayor was prejudiced against him", constitutes an illegality reviewable on certiorari, an appeal from the judgment of the mayor on the merits not being a plain, speedy, and adequate remedy.

Shearer v Sayre, 207-203; 222 NW 445

Nonpermissible appeal. A city, in a criminal prosecution for the violation of its own ordinance, may not appeal from a judgment of conviction in the district court.

Creston v Kessler, 202-372; 210 NW 464

CHAPTER 292

GENERAL POWERS

Atty. Gen. Opinion. See '36 AG Op 427

5738 Bodies corporate — name — authority.

Discussion. See 22 ILR 713—Parking meters; 23 ILR 392—Municipal tort liability

Atty. Gen. Opinions. See '25-26 AG Op 165, 387; '28 AG Op 109, 208; '34 AG Op 664; '36 AG Op 474, 652; '38 AG Op 90, 408

ANALYSIS

I GOVERNMENTAL POWERS AND FUNCTIONS
(a) IN GENERAL
(b) GOVERNMENTAL FUNCTIONS
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II CONTRACTS IN GENERAL
III TORTS

Airports, city's liability. See under §5903.11
County—governmental functions. See under §5128
Liability in re streets. See under §5945
School district—governmental functions. See under §4123
State — sovereignty and governmental functions. See under §2
Township—governmental functions. See under §5527

I GOVERNMENTAL POWERS AND FUNCTIONS

(a) IN GENERAL

Powers conferred by legislature. A municipal corporation possesses only such powers as are conferred upon it by the legislature—that is, such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those necessarily essential to the identical objects and purposes of the corporation as by statute provided, and not those which are simply convenient.

Iowa Electric v Cascade, 227-480; 288 NW 633

Express or implied power. Principle reaffirmed that no city may exercise any police power unless such police power is expressly or impliedly granted to it by the general assembly.

Downey v City, 208-1273; 227 NW 125

Governmental powers. Principle reaffirmed that what a city does within the zone of its granted powers is not subject to review by the courts, in the absence of plea and proof of fraud.

Lytle Co. v Gilman, 201-603; 206 NW 108

Sale of milk—incidental powers. The statutory power of cities and towns (§5747, C., '31) "to establish and enforce sanitary requirements for the production, handling, and distribution of milk" (and certain milk products) necessarily embraces the power to create, by ordinance, all reasonable administrative machinery for specifically exercising said general power. For example, the ordinance may validly make the legal sale of said products dependent on the seller obtaining a municipal permit, provided the refusal of the permit be not arbitrary.

Des Moines v Fowler, 218-504; 255 NW 880

Power to fix rates. The legislature having graciously granted cities and towns the power to fix public utility rates may, at its pleasure, curtail or limit the power.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Taxation — source of power. The power of a city to tax is strictly statutory—never implied.

Clark v Des Moines, 222-317; 267 NW 97

Taxpayer—right to maintain action.

Collins v Davis, 57-256; 10 NW 643
Ind. Dist. v Gookin, 72-387; 34 NW 174
Brockman v Creston, 79-587; 44 NW 822
Goetzman v Whitaker, 81-527; 46 NW 1058

Police powers—emergency measure. The attempt of a city to exercise by ordinance an ungranted police power cannot be justified on the plea of emergency.

Downey v City, 208-1273; 227 NW 125

Police powers—consent of property owners—effect. General principle recognized that an ordinance which requires the consent of abutting and adjacent property owners for the erection of a building is invalid on constitutional grounds.

Downey v City, 208-1273; 227 NW 125

Gasoline service station. Principle reaffirmed that the location and regulation of gasoline service stations are clearly within the police powers of municipal corporations.

Yeanos v Oil Co., 220-1317; 263 NW 834

Construction as to employment of assistants. The superintendent of a department of municipal government under the so-called commission plan may himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof.

Loran v City, 201-543; 207 NW 529

Water company in which city owns stock—not "governmental agency"—exempt from federal tax. A private corporation furnishing water to city under arrangement whereby dividends and financial expenditures were limited, and city owned one-third of voting stock with

I GOVERNMENTAL POWERS AND FUNCTIONS—continued

(a) IN GENERAL—concluded

right of representation on board of directors, right of purchase, and right to compel retirement of preferred stock from surplus earnings, held not immune from federal taxation as "governmental agency", since surplus earnings from water tax did not become property of city.

Citizens Water Co. v Com. of Int. Rev., 87 F 2d, 874

Authority to erect public utility—insufficient funds—effect. A city or town which has been authorized by popular election to establish and erect a system of waterworks by issuing bonds to a specified amount, and which discovers, after said funds have been applied, that the system is so incomplete as to be unusable, has no authority, in the absence of a reauthorization by the electorate, to issue additional warrants to complete the system.

Mote v Carlisle, 211-392; 233 NW 695

Municipal utilities—discrimination against privately owned plants. Statutory authority to municipalities to erect, in their proprietary capacity, electric light and power plants, and to pay the entire initial cost thereof from the net profits of said plants, and to this end to fix such rates as will effect such payment, is not void as an unconstitutional discrimination against privately owned plants of the same kind.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

City election favoring utility—no implied obligation to construct utility. Under the Simmer law an action by an engineering company for a general judgment against a city for engineering services cannot be maintained, based on an implied obligation of the city to erect light and power plant, even after repeal of the enabling ordinance, and altho the special election therefor had carried. Such would be unlawful and contrary to public policy and beyond powers of city council. Persons dealing with a municipality are bound to take notice of legislative restrictions upon its authority.

Burns & McDonnell Co. v Iowa City, 225-1241; 282 NW 708

Wrongful exercise of judicial function. A city is not liable for damages consequent on the wrongful attempt of the city council to revoke a permit granted by it for the erection of a store building; nor are the individual members of the council liable for such damages, it appearing that they acted in good faith but under a misapprehension of their legal power.

Rehmann v City, 204-798; 215 NW 957; 55 ALR 430; 34 NCCA 480

Ratification of illegal acts. Assuming that it is legally possible for a city to ratify an illegal payment of city funds to the city treasurer, yet such ratification cannot be based on acts of the city done on inadequate information as to the relevant and material facts.

State v Hanson, 210-773; 231 NW 428

Unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Town, 215-82; 244 NW 707

Torts—dedicating part of street to travel—effect. A city or town has the right to divide a street and to set apart a certain part thereof for vehicular traffic, and when it does so, the part thus dedicated to that purpose is the part which falls within the provisions of the statute that the city or town must use reasonable diligence to keep the same free from obstructions and pitfalls.

Morse v Castana, 213-1225; 241 NW 304

Statutes of limitations—nonapplicability to nonaccepted street. In a quiet title action where land was dedicated but never accepted as street in unincorporated village, the rule that statute of limitations will not run against a municipality exercising a governmental function does not apply.

Brewer v Claypool, 223-1235; 275 NW 34

(b) GOVERNMENTAL FUNCTIONS

Strict construction of power. On the question whether a municipal corporation possesses a certain power, all reasonable doubts must be resolved against the existence of such power.

Van Eaton v Town, 211-986; 231 NW 475; 71 ALR 820

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826

Operation of police patrol a governmental function. The operation of a plainly marked police patrol by a policeman in uniform, in conveying policemen in uniform from the police station to their patrol beats, all under orders from the chief of police, is a governmental function. It follows that the city is not liable for damages consequent on the negligent operation of the car by the driver.

Leckliter v City, 211-251; 233 NW 58; 38 NCCA 493

Lauxman v Tisher, 213-654; 239 NW 675

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him; therefore, the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Governmental function — negligence. The maintenance by a municipality of a bathing beach or a city park constitutes the exercise of a governmental function, with consequent nonliability of the municipality for injuries connected with such maintenance.

Norman v City, 201-279; 207 NW 134; 25 NCCA 675

Hensley v Town, 203-388; 212 NW 714; 34 NCCA 559

Mocha v City, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

Injuries from defects—plans by competent engineer—nonliability. When municipal improvements are constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective.

Dodds v West Liberty, 225-506; 281 NW 476

School bus driver as independent contractor —nongovernmental function. A school bus driver, furnishing his own bus, under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

School districts—mandatory duty to transport pupils. A statute providing that a school board shall furnish transportation to children living two and one-half miles from the school creates a mandatory duty to transport pupils which is a governmental function, but whether the duty be considered as ministerial or governmental, the school district, being a quasi corporation, cannot be sued for failure to furnish such transportation when such right of action is not expressly given by statute.

Bruggeman v School Dist., 227-661; 289 NW 5

Special plea in re governmental function. The nonliability of a municipality, for the negligence of an employee in the performance of a governmental function, is a special defense and must be pleaded as such.

Groves v Webster City, 222-849; 270 NW 329

Anderson v Moon, 225-70; 279 NW 396

Slander—governmental capacity. A demurrer to a petition in an action for slander will not lie solely on the ground that the petition shows on its face that defendant, at the time of speaking the words in question, was acting in a governmental capacity, because defendant's right to assert the privileged character of the spoken words is not an absolute right but a qualified right only. The demurrer—if employed under such circumstances—must point out wherein said petition fails to state a cause of action against defendant.

Brown v Cochran, 222-34; 268 NW 585

Torts — government nonliability for employee's tort—respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior, and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Governmental employees—personal liability for torts. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Overruling Hibbs v School Dist., 218 Iowa 841; 34 NCCA 468; 37 NCCA 711).

Montanick v McMillin, 225-442; 280 NW 608

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837

Doherty v Edwards, 226-249; 284 NW 159

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

See Anderson v Moon, 225-70; 279 NW 396

Special assessments — collection — county treasurer as agent. The county treasurer is a statutory agent of a city in the collection of special assessments for street improvements and sewers.

Hauge v Des Moines, 207-1209; 224 NW 520

(c) MINISTERIAL FUNCTIONS

Pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or ministerial (the only acts for which the municipality would be liable), and not governmental.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Judicial supervision—council's judgment—filling station permit. The wisdom, judgment, or lack thereof, on the part of a city council

I GOVERNMENTAL POWERS AND FUNCTIONS—concluded

(c) MINISTERIAL FUNCTIONS—concluded

in issuing a permit to erect a "filling station" is not reviewable by the courts unless the action taken was arbitrary, oppressive, or capricious. Evidence reviewed and permit held valid.

Scott v Waterloo, 223-1169; 274 NW 897

Soldiers preference appointments. The soldiers preference law cannot be objected to on the grounds that it deprives the city of self-government when the powers of the municipality are derived solely from the legislature which has power under the constitution and under statute to prescribe rules governing municipalities.

Maddy v City Council, 226-941; 285 NW 208

Police power—restricted residence district—valid regulation. An ordinance, based upon a statute valid under the police power of the state, authorizing establishment of restricted residence districts is not a prohibition but a regulation and as such is a legitimate and reasonable exercise of the city's police power.

Scott v Waterloo, 223-1169; 274 NW 897

Rights, powers, duties, and liabilities—motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law, to submit the question of municipal ownership of a public utility, are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutional authority nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Failure to maintain pension fund—proper remedy. An action at law against a city for judgment consequent upon the failure of the council to perform its mandatory duty to levy a tax sufficient to meet and pay pensions for firemen and policemen will not lie either on the theory of contract or damages. Mandamus is the proper remedy.

Lage v Marshalltown, 212-53; 235 NW 761

Raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

II CONTRACTS IN GENERAL

Contracts generally. See under Ch 420, Note 1

Legislative control—capacity. The contention that a city or town may not be limited by the state in contracting in its private or municipal capacity is quite unallowable.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Consideration in nature of public benefit. Principle recognized that the contract of a municipal corporation must be supported by a consideration in the nature of a public benefit.

Love v City, 210-90; 230 NW 373

Invalid contracts—liability of city. Principle reaffirmed that a city may be held liable for public benefits received and retained pursuant to a purported contract which the city had power to enter into, but which failed in validity because of defective procedure by the city.

Love v City, 210-90; 230 NW 373

Compromise of illegal claim—effect. A compromise in the amount of a claim which a municipal corporation has no legal authority to pay in any amount affords no consideration for the agreement to pay the lesser sum.

Love v City, 210-90; 230 NW 373

Prohibited express contract excludes implied. Absolute lack of authority in a municipality to enter into an express contract relative to a given subject matter necessarily excludes the possibility of an implied contract on the same subject matter.

Roland Co. v Town, 215-82; 244 NW 707

Implied contracts. A city may, in the absence of a prohibiting statute, validly enter into an implied contract for the grading of its streets preparatory to the construction of permanent sidewalks.

Carlson v City, 212-373; 236 NW 421

Unallowable implied contract. Inasmuch as a city has no statutory authority to expressly contract for a rental for the use of its streets, there can be no implied contract that a telephone company will pay reasonable rental for the space occupied by its equipment in such streets.

Pella v Fowler, 215-90; 244 NW 734

Void contract—nonliability of city as on implied contract. A municipal contract for the repair of a street improvement is void when entered into in disregard of the statute requiring competitive bidding. And after it is decreed that special assessments on benefited property may not be levied, the contractor or his assignee may not, on the theory of an im-

plied contract, recover against the city in its corporate capacity, either at law or in equity (1) for the contract price, or (2) for the reasonable value of the materials and labor furnished under the void contract and retained by the city.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Paving contract—contractor's duty to investigate statutory prerequisites. Sound public policy requires a contractor proposing performance of construction work for a city, to ascertain whether the council has sufficiently complied with statutory prerequisites so as to possess power to execute the proposed contract.

Lytle v Ames, 225-199; 279 NW 453

Illegal reimbursement of contractor for loss. A municipal corporation can be given by the general assembly no constitutional legal authority to pay or contract to pay its contractor, after performance of a contract and after settlement therefor, an added sum to reimburse the contractor for loss sustained by him because the federal government commandeered him and his equipment as a war measure, and thereby delayed the performance of the contract in question.

Love v City, 210-90; 230 NW 373

Modification of contract without competitive bidding. A city which has so breached a valid paving contract that the contractor is under no duty to perform, may, without submitting the matter to competitive bidding, validly contract in good faith with the contractor for reasonably enlarged compensation (to be paid from the general fund) as a consideration for the performance of the contract notwithstanding the breach, and the execution of the contract on such basis is beyond attack.

Des Moines v Horrabin, 204-683; 215 NW 967

Public improvements—void contract—sweeping deprivation of rights. A contract for the repair or reconstruction of a street pavement, entered into in total disregard of the mandatory statute requiring competitive bidding (§6004, C., '31), is void ab initio, and, if performed it follows as a matter of public policy and irrespective of the motives of the parties:

1. That special assessments may not be legally levied to defray the cost of such performance, and

2. That the contractor may not, either, (1) on the theory of a contract implied in fact, or (2) on the theory of quasi contract or contract implied in law (unjust enrichment), recover against the city for the expenditures made by him even tho all profit be excluded therefrom.

Especially is the foregoing true when the record reveals a contract manipulation which emits an unmistakable odor of fraud and evasion.

Horrabin Co. v Creston, 221-1237; 262 NW 480

Public improvements—assessments—failure to substantially perform contract—effect. The appellate court will not invalidate an entire assessment for paving because of the nonfraudulent failure of the contractor to substantially comply with the construction of some minor part of the work, i. e., a 6- or 8-inch longitudinal expansion joint along the curb; nor will the court attempt to readjust the assessment because of such default when the record contains no data from which such readjustment can be intelligently arrived at.

Cardell v Perry, 201-628; 207 NW 775

Public improvements — unauthorized contracts. A judicial holding that municipal warrants issued for the erection of a municipal waterworks are void because the erection had not been authorized by the voters is necessarily a holding that the contract under which the warrants are issued is also void.

Roland Co. v Carlisle, 215-82; 244 NW 707

Public improvements—void warrants—legalizing act—construction. A legalizing act purporting to legalize specified void municipal warrants then in litigation, but which act was held in said litigation inapplicable to said warrants because of a proviso in said act that it should not affect pending litigation, is not subject to the construction in later litigation that the act is applicable to the extent of legalizing the contract under which said former warrants were issued even tho the warrants were not legalized.

Roland Co. v Carlisle, 215-82; 244 NW 707

Paving—suing city on express contract—other theories excluded. Where a holder of invalid paving assessment certificates elects to base his recovery solely on an express written contract, no question of estoppel, waiver, ratification, or accord and satisfaction is involved.

Lytle v Ames, 225-199; 279 NW 453

Contracts in general—officers—limitation on power—dealing at peril. One contracting with a municipal corporation is bound to take notice of limitations on the power of the particular officers to make such contract.

Doonan v Winterset, 224-365; 275 NW 640

Watchman — nonauthority to appoint. A mayor of a town has no authority, in the absence of an ordinance so empowering him, to contract for and appoint a night watchman for the municipality—a limitation on the authority of the mayor of which all persons must take notice. (§5634, C., '35.)

Peterson v Panora, 222-1236; 271 NW 317

Employees—salary deficiency—payment by overdraft on different fund. A town marshal employed at a sum fixed by ordinance, but paid each month only a part of that sum from the general fund, may not recover the difference between this sum and the rate fixed by ordi-

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nance when he had in fact been paid this difference by an overdraft on the waterworks fund. No supplemental contract of any validity may be inferred from the town so acting contrary to statute.

Clark v Goldfield, 224-1012; 278 NW 341

Council—mayor not member—no vote on contract. Where the four members of a city council vote two in favor of and two against employing a superintendent of the municipal power plant, under a statute requiring a majority vote of the members elected to the council, a contract employing such superintendent entered into after the mayor votes "yes" by virtue of a statute giving him the right to vote in case of a tie, is not a binding contract on the city, the mayor not being a member of the council.

Doonan v Winterset, 224-365; 275 NW 640

Power to bind future councils. A city council, under legislative authority, may validly enter into a contract which will be binding on future city councils.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Fiscal management — unauthorized debt — curing illegality in contract. Any invalidity in a contract for the construction of a street improvement arising from the fact that the contract contains a clause which might be construed as imposing on the city an absolute indebtedness beyond its legal power to contract is cured by the act of the city council and its contractor in mutually agreeing, before any part of the contract has been performed, that said clause should be deemed wholly eliminated, and by the subsequent execution of said contract in strict accord with said agreement and the statute.

Waller v Pritchard, 201-1364; 202 NW 770

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract, e. g., (1) that he owns property which will be specially assessed, or (2) that he is a taxpayer and must contribute to the improvement fund from which payment of a deficit must be made.

Donovan Co. v City, 211-506; 231 NW 499

Power to acquire property—burden of proof. A municipality as defendant in an action for specific performance of its alleged contract for the purchase of land, has the burden to establish its plea that its attempted purchase of said land was for a purpose not authorized by law. Record reviewed and held said burden had not been met.

Golf View Co. v City, 222-433; 269 NW 451

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Officers and agents—personal liability for misfeasance. A public officer, while traveling upon the public highway in the performance of a governmental function, in the sense that he is attempting to reach a point where he can actually perform and consummate such function, is under the same duty to exercise care, and subject to the same liability for want of such care, as any other citizen.

Rowley v Cedar Rapids, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Officers and agents — pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or ministerial (the only acts for which the municipality would be liable), and not governmental.

Rowley v Cedar Rapids, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Attractive nuisance—basis of theory. In this state, the doctrine of attractive nuisance has its foundation in an implied invitation of the landlord on the theory that the temptation of an attractive plaything to a child of tender years is equivalent to an express invitation to an adult.

Harriman v Afton, 225-659; 281 NW 183

Attractive nuisance—limited applicability. The attractive nuisance doctrine applies only to children at an age where they are incapable of appreciating the dangers incidental to the instrumentality in question, and while not necessarily inapplicable to a boy of 13, yet cannot be extended to a situation where a boy 13 years old is drowned after jumping into the water from a raft on a city reservoir, and the evidence shows he was aware of the dangers involved.

Harriman v Afton, 225-659; 281 NW 183

Park instrumentality—attractive nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

Pool of water not "attractive nuisance". A small, but deep and unguarded, pond or pool of water, permitted to form at the outlet of a municipal storm-water sewer, will not be

deemed an "attractive nuisance", within the law of negligence.

Raeside v Sioux City, 209-975; 229 NW 216; 30 NCCA 299; 2 NCCA(NS) 734

Requirements for attractive nuisance. To come within the doctrine of attractive nuisance, an instrumentality must be both attractive and dangerous. A raft maintained by a city on its reservoir for the purpose of measuring the depth of water cannot be deemed a dangerous instrumentality per se.

Harriman v Afton, 225-659; 281 NW 183

Torts—city reservoir and raft thereon—attractive nuisance doctrine not applicable. Neither a reservoir maintained by a city on private ground isolated from any public place or playground nor a raft thereon, capable of supporting a man, used to measure the water depth, being inherently an attractive nuisance, a combination of the two will not invoke a different rule.

Harriman v Afton, 225-659; 281 NW 183

Legislative change in classification of police patrol—effect on governmental exemption. While the motor vehicle act, C., '24, classified a "police patrol" as a "nonmotor vehicle," the later legislative classification of "police patrols" as "motor vehicles" was not intended to deprive a municipality of its exemption from liability for damages consequent on the negligent operation of a city-owned police patrol as a governmental agency.

Leckliter v Des Moines, 211-251; 233 NW 58

Condition of building—trespasser. A municipality is not liable in damages to a person who is injured in a municipal market place by falling through an open manhole while he is on an errand distinctly personal to himself, and not as a customer of the market, and when the manhole is located at a place where he is neither expected nor invited to be.

Knote v Des Moines, 204-948; 216 NW 52

Negligent maintenance of public park. A city in exercising its governmental power through a park board to acquire and maintain public parks is not liable in damages consequent on the negligent failure to keep the instrumentalities in said parks in repair; nor are the members of the park board individually liable for such nonfeasance on their part.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

Sidewalks and intersections—different degree of care. The standard of care that a city owes to a pedestrian in respect to a sidewalk differs from the degree owed where an intersection is involved.

Russell v Sioux City, 227-1302; 290 NW 708

Defects in streets—notice—evidence. A city sued for alleged neglect to maintain its streets may show the date when notice of the injury was served upon it.

Smith v Sioux City, 200-1100; 205 NW 956

Law of case—defect in street. A holding on appeal that a certain defect in a public street was not of such nature as to charge the municipality with negligence is the law of the case on retrial on substantially the same evidence. (See Annos. under §12871.)

Norman v Sioux City, 200-1343; 206 NW 112

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to recover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit, (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff, consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Torts—cause of loss of rentals—construction work (?) or business depression (?). Question as to whether rentals from property are lost because of construction of a bridge and new creek channel by a city, which construction occasioned some inconvenience to tenants in egress or ingress to the property, or because of depression in business conditions, is a question for the jury.

Edmond v Sioux City, 225-1058; 283 NW 260

Torts—storm waters into sanitary sewer—negligence—jury question. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the

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city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

Surface waters — increased flowage consequent on nonnegligent execution of expert plans. Damages to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria, especially when the damage occurs at the converging point of natural watercourses.

Cole v City, 212-1270; 232 NW 800

Temporary obstruction of access to property —damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

5739 Nuisances—action to abate.

Atty. Gen. Opinions. See '36 AG Op 307; '38 AG Op 408

Obstruction of street. An obstruction of a street or highway is a nuisance.

Pederson v Radcliffe, 226-166; 284 NW 145

Alley — vacating by ordinance — invalidity for nondescription. An ordinance to vacate an alley is invalid insofar as it affects a certain block in the city plat not mentioned nor described in the ordinance.

Pederson v Radcliffe, 226-166; 284 NW 145

Gasoline service station. Principle reaffirmed that the location and regulation of gasoline service stations are clearly within the police powers of municipal corporations.

Yeanos v Oil Co., 220-1317; 263 NW 834

Filling stations—nuisance per se—no presumption on appeal. A court will not assume that a gasoline filling station is a nuisance per se nor that it will be installed in such a manner as to be a nuisance in fact.

Scott v Waterloo, 223-1169; 274 NW 897

Gasoline service station—evidence. A gasoline service station located in a city is not a nuisance per se. Evidence reviewed and held the station in question was not a nuisance in fact.

Yeanos v Oil Co., 220-1317; 263 NW 834

Storage of gasoline—vested right. A person who has the right, under an ordinance, to store gasoline in a certain quantity without a permit from the city, and the right to store gasoline in excess of said quantity only with such permit, and who is refused a permit for such excess storage, does not, by thereafter erecting his storage tanks, acquire a vested right to store gasoline in said lesser quantity without a permit. In other words, the ordinance may validly be amended by reducing the quantity which may be stored without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

5741 Smoke.

Federal constitution. So far as the federal constitution is concerned, the state may, by itself or through authorized municipalities, declare the emission of dense smoke in cities a nuisance and subject to restraint as such; and the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections.

Northwestern Laundry v City, 239 US 486

5743 Power to regulate and license.

Reasonableness of ordinances. See under §5714

Atty. Gen. Opinions. See '28 AG Op 64; '38 AG Op 238

Unreasonableness per se. Under statutory authority "to regulate and license" sales by transient merchants, an ordinance which empowers the mayor not only to fix the license fee at any sum from $5.00 to $100.00 per day, but also the tenure of the license, is per se arbitrary, unreasonable, and void.

Creston v Mezvinsky, 213-1212; 240 NW 676

5744 Power to restrain and prohibit.

Reasonableness of ordinances. See under §5714

Atty. Gen. Opinion. See '34 AG Op 396

5745 Power to regulate, license, or prohibit.

Dogs and licensing thereof. See chapter 276
Reasonableness of ordinances. See under §5714

Atty. Gen. Opinions. See '30 AG Op 61; '34 AG Op 72, 187; '36 AG Op 311, 493

Taxation under power to regulate or license. Statutory power in a city to regulate or license a business does not embrace the power to tax the business; and the court will be quick to note whether the revenue derivable is out of proportion to the expense entailed by the regulations; also whether the language of the ordinance purporting to be a police measure is but a subterfuge to hide an actual purpose to tax.

Edwards v Sioux City, 213-1027; 240 NW 711

Restricted residence districts — discrimination—exemption to existing business. An ordinance establishing a restricted residence district and prohibiting the subsequent erec-

tion and maintenance therein of gasoline filling stations without a permit is not unconstitutional because the ordinance exempts from its operation an already established and maintained gasoline filling station.

Marquis v Waterloo, 210-439; 228 NW 870

Filling station permit—ordinance amending restricted district. Under a restricted residence district ordinance, a city council may issue a permit for erection of a gasoline filling station on certain lots without a separate ordinance to remove the particular lots from the restricted district.

Scott v Waterloo, 223-1169; 274 NW 897

Necessity for ordinance. The statutory power granted cities and towns "to limit the number of, regulate, license, or prohibit" gasoline curb pumps in streets, must be exercised under a duly enacted ordinance.

Lamoni v Smith, 217-264; 251 NW 706

Enjoining maintenance of nuisance. A gasoline pump erected in the parking of a public street is not only an "incumbrance" on the street, but, when erected without legal authority, is ipso facto a nuisance and, because of the mandatory duty of the municipality to keep its streets free from nuisances, is enjoinable by the city or town.

Lamoni v Smith, 217-264; 251 NW 706

Filling stations—nuisance per se—no presumption on appeal. A court will not assume that a gasoline filling station is a nuisance per se nor that it will be installed in such a manner as to be a nuisance in fact.

Scott v Waterloo, 223-1169; 274 NW 897

5746 Power to establish and regulate.

Atty. Gen. Opinions. See '34 AG Op 644; '38 AG Op 63; AG Op Feb. 8, '39

Negligence—depositing refuse on city dump. A person who deposits, on dump grounds provided by a city, discarded materials containing acid or capable of generating acid by a process of decomposition, becomes, henceforth, a stranger to such materials. In other words, he cannot be deemed negligent, toward persons frequenting said grounds, either in making the original deposit or in leaving it unguarded on the grounds.

Cabrnosh v Penick & F., 218-972; 252 NW 88

Boy drowning in swimming pool at boys' camp—owners of pool—liability. In an action to recover damages for the drowning of an 11-year-old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about 100 boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

Hecht v D. M. Assn., 227-81; 287 NW 259

Drowning in swimming pool—failure to advise as to depth—signs. A corporation, operating a swimming pool in which an 11-year-old boy drowned, was not negligent in not personally informing the deceased of the depth of the water in the pool and in failing to inquire of him as to whether he could swim, where there were many signs, plainly visible about the pool indicating the various depths, and the age, intelligence, and experience of the deceased were sufficient to advise him of the inherent dangers of entering a body of water deeper than his height, especially when he was under the supervision of adults who had more direct and complete control over him than the agents and employees operating the pool.

Hecht v D. M. Assn., 227-81; 287 NW 259

Swimming pool not an "attractive nuisance". A swimming pool, either natural or artificial, is not an attractive nuisance.

Hecht v D. M. Assn., 227-81; 287 NW 259

Drowning in swimming pool—life guards—sufficiency. Negligence of a corporation operating a swimming pool in which an 11-year-old boy drowned, could not be grounded upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v D. M. Assn., 227-81; 287 NW 259

Swimming pool—drowning—res ipsa loquitur—nonapplicability. The mere fact a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v D. M. Assn., 227-81; 287 NW 259

Swimming pool proprietors—degree of care required. The general rule that the proprietor of a bathhouse or swimming pool for profit is bound to use ordinary care to guard against injury to his patrons held applicable to nonprofit corporation operating a swimming pool.

Hecht v D. M. Assn., 227-81; 287 NW 259

5747 Dairy herds and milk.

Atty. Gen. Opinions. See '25-26 AG Op 407; '34 AG Op 460

Sale of milk—incidental powers. The statutory power of cities and towns "to establish and enforce sanitary requirements for the pro-

duction, handling, and distribution of milk" (and certain milk products) necessarily embraces the power to create, by ordinance, all reasonable administrative machinery for specifically exercising said general power. For example, the ordinance may validly make the legal sale of said products dependent on the seller obtaining a municipal permit, provided the refusal of the permit be not arbitrary.

Des Moines v Fowler, 218-504; 255 NW 880

5750 Burials — cemeteries — crematories.

Atty. Gen. Opinion. •See AG Op April 26, '39

Township cemeteries. See under §§5558-5570

5752 Drainage preserved.

Increased flowage consequent on nonnegligent execution of expert plans. Damages to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria; especially when the damage occurs at the converging point of natural watercourses.

Cole v City, 212-1270; 232 NW 800

5756 Building code.

Wrongful exercise of judicial function. A city is not liable for damages consequent on the wrongful attempt of the city council to revoke a permit granted by it for the erection of a store building; nor are the individual members of the council liable for such damages, it appearing that they acted in good faith but under a misapprehension of their legal power. (See Annos. under §5738.)

Rehmann v City, 204-798; 215 NW 957; 55 ALR 430; 34 NCCA 480

"Construction" as imposing continuous duty. An ordinance which requires all rain spouts on buildings to be so "constructed" that water will not be cast upon sidewalks imposes a continuing duty upon the property owner—a duty not only to "construct" the spouting as required but to maintain the spouting in such required condition.

Updegraff v City, 210-382; 226 NW 928

Prohibiting erection of building. The legislative grant of power to regulate the erection of buildings does not embrace the power to prohibit the erection of buildings, and the power to prohibit will not be deemed supplied because of the existence of the power in other statutes (Chs 324, 325, C., '27), of which the city has never availed itself.

Downey v City, 208-1273; 227 NW 125

Illegal building permit—nonestoppel to question. The holder of an illegal building permit may not, in an action by injured property owners to restrain operations under the permit, successfully contend that his permit is beyond judicial cancellation because he has already expended a substantial sum in reliance on said permit.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

Unpermitted furnace installation — lawful and unlawful acts—performance—effect. A contract to install an oil burner, being a lawful act, is not rendered void on account of a failure to first secure an installation permit required by a city ordinance, inasmuch as this wrongful omission, not inhering in the contract, does not make an otherwise valid contract void. A distinction exists between doing a per se unlawful and prohibited thing, and doing a lawful thing in a prohibited manner.

Keith Co. v Mac Vicar, 225-246; 280 NW 496

Performance of illegal contract—recovery thereunder barred. A contract to do an illegal act, which cannot be performed without violating the constitution, a constitutional statute or ordinance, is illegal and void, even in some cases when no penalty is provided for the violation.

Keith Co. v Mac Vicar, 225-246; 280 NW 496

5760 Fires — electric apparatus — fire limits.

Fire proof construction — unallowable restriction. Statutory authority to municipalities to prohibit the erection of buildings unless the outer walls be made of "brick, iron, stone, mortar, or other noncombustible materials", will not authorize an ordinance which prohibits the erection of outer walls unless made of "brick and mortar or of iron and stone and mortar"—in other words, an ordinance which excludes the right to use "other noncombustible materials".

Boehner v Williams, 213-578; 239 NW 545

Parties—municipal property owner. A property owner who owns property adjacent to a building being erected in violation of a town ordinance relating to constructions within the fire limits of the town, has such interest as will entitle him to an injunction against the erection and maintenance of such building.

Boehner v Williams, 213-578; 239 NW 545

5761 Electric installation.

Trespassers and "attractive nuisances". An owner of property may so negligently use it as to become liable in damages for a resulting injury to a trespasser. A jury question, both as to negligence and contributory negligence, is presented by testimony tending to show that an owner, without full compliance with city ordinance requirements, erected and maintained, on his own uninclosed, populously surrounded, and promiscuously frequented premises, which abutted upon an uninclosed and much frequented public park and fishing resort, a pole with a ladder thereon in the form of spikes driven therein, and with a crossarm on the pole, some 25 feet from the ground, carrying wires heavily charged with electricity, and that a trespassing boy of 14 years of age, and of ordinary intelligence, climbed the pole and, upon reaching the crossarm, was killed by an electric shock.

McKiddy v Elec. Co., 202-225; 206 NW 815; 29 NCCA 886

5762 Fire protection.

Permitting discharge of fireworks. A city or town is not liable for damages to a pedestrian consequent on the discharge on the public streets of explosives attending a Fourth of July celebration.

Reinart v Manning, 210-664; 231 NW 326

5763 Steam boilers and magazines.

Atty. Gen. Opinions. See '28 AG Op 88; '34 AG Op 61

5764 Gunpowder—combustibles.

Atty. Gen. Opinions. See '30 AG Op 371; '34 AG Op 61

Taxation under power to regulate or license. Statutory power in a city to regulate or license a business does not embrace the power to tax the business; and the court will be quick to note whether the revenue derivable is out of proportion to the expense entailed by the regulations; also whether the language of the ordinance purporting to be a police measure is but a subterfuge to hide an actual purpose to tax.

Edwards v City, 213-1027; 240 NW 711

Gasoline service station. Principle reaffirmed that the location and regulation of gasoline service stations are clearly within the police powers of municipal corporations.

Yeanos v Oil Co., 220-1317; 263 NW 834

Gasoline service station—evidence. A gasoline service station located in a city is not a nuisance per se. Evidence reviewed and held the station in question was not a nuisance in fact.

Yeanos v Oil Co., 220-1317; 263 NW 834

Penal ordinance void for uncertainty. An ordinance which requires storage tanks for inflammable oils and the accessories of such tanks to "be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous" (sic), and penalizing violations, is void for uncertainty and unenforceability.

Edwards v City, 213-1027; 240 NW 711

Absence of specifications—effect. An ordinance purporting to safeguard the public by regulating storage tanks for inflammable oils must, in order to be valid and enforceable, contain such rules and specifications as will enable the property owner to know, definitely, just what is required of him in order to comply with the ordinance and thereby safeguard himself. It is quite insufficient to enact the dragnet command that said tanks and appurtenant accessories "must be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous".

Edwards v City, 213-1027; 240 NW 711

Arbitrary classification. An ordinance which provides safety regulations over tanks wherein inflammable oils are stored for sale, is null and void when in the same municipality there are large numbers of other tanks identical with those embraced in the ordinance and used for the same purpose except the stored oil is not for sale; especially is this an arbitrary classification when it is made to appear that a material number of the exempted tanks are more dangerous than the tanks to which the ordinance is made applicable.

Edwards v City, 213-1027; 240 NW 711

Regulations—permit required. An ordinance regulatory of inflammable oils may validly prohibit the erection and maintenance within the city of gasoline filling stations unless the city council, in the exercise of its legal discretion, first grants a permit for such erection and maintenance. (§5714, C., '27.)

Cecil v Toenjes, 210-407; 228 NW 874

Permits—failure to specify rules. An ordinance, regulatory of inflammable oils, which prohibits the erection and maintenance of gasoline filling stations without a permit therefor will not be deemed unreasonable, uncertain, and arbitrary because the ordinance fails to contain rules and regulations or any specified plan under which such permit can be obtained.

Cecil v Toenjes, 210-407; 228 NW 874

Storage of gasoline—vested right. A person who has the right, under an ordinance, to store gasoline in a certain quantity without a permit from the city, and the right to store gasoline in excess of said quantity only with such permit, and who is refused a per-

mit for such excess storage, does not, by thereafter erecting his storage tanks, acquire a vested right to store gasoline in said lesser quantity without a permit. In other words, the ordinance may validly be amended by reducing the quantity which may be stored without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

Regulation—nonarbitrary action. Record reviewed and held affirmatively to show that the action of a city council in refusing a permit for a gasoline filling station was not arbitrary.

Cecil v Toenjes, 210-407; 228 NW 874
Marquis v City, 210-439; 228 NW 870

Mandamus—nonavailability of writ. Mandamus will not lie to compel a city council to grant a permit for the erection and maintenance of a gasoline filling station when the council, in the exercise of its legal discretion, has refused such permit.

Cecil v Toenjes, 210-407; 228 NW 874

5766 Fire department.

Atty. Gen. Opinions. See '28 AG Op 426; '32 AG Op 51

5767 Levy—percentage—maturity.

Atty. Gen. Opinions. See '28 AG Op 202; '32 AG Op 33, 51

5768 Markets.

Atty. Gen. Opinion. See AG Op June 6, '39

Due process—ordinance requiring weighing of loads. A municipal ordinance requiring that merchandise sold in load lots by weight for delivery within the city be weighed by a public weighmaster whose certificate stating the gross, tare, and net weight must be delivered to the purchaser, such ordinance, altho it necessitates that a person trucking coal into the city unload and reload, is not so unreasonable as to violate the due process clause of the constitution.

Huss v Creston, 224-844; 278 NW 196; 116 ALR 242

5769 Wharves, docks, and piers.

Paramount right of state. The construction by the state of a wharf below high watermark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

5771 Infirmary—outdoor relief.

Atty. Gen. Opinion. See '34 AG Op 297

5772 Jail—station house.

Atty. Gen. Opinions. See '30 AG Op 217, 327; AG Op Jan. 23, '39, Feb. 20, '39

5773 City hall.

Atty. Gen. Opinions. See '25-26 AG Op 368; '38 AG Op 498

5775 Plumbing—inspector.

Atty. Gen. Opinion. See '25-26 AG Op 398

5776 License—board of examiners.

Atty. Gen. Opinion. See '25-26 AG Op 398

5777 Regulations.

Atty. Gen. Opinion. See '25-26 AG Op 398

5784 Sanitary toilets.

Atty. Gen. Opinion. See AG Op April 2, '40

5785 Action by local board of health.

Atty. Gen. Opinion. See AG Op April 2, '40

5786 Special assessment.

Atty. Gen. Opinion. See '28 AG Op 109

CHAPTER 292.1

PERSONAL SERVICE TRADES

5786.1 Emergency and purpose declared.

Prohibited laws — emergency — effect. No legislative declaration or recital of the existence of an emergency can justify the enactment of a statute which is clearly prohibited by the constitution. So held as to an act fixing prices.

Duncan v Des Moines, 222-218; 268 NW 547

5786.3 Application for ordinance.

Regulation of business — price fixing. Legislative authority to municipalities to adopt ordinances which provide for "fair competition" in personal service trades—trades in which services are rendered upon the person of an individual without necessarily involving the sale of merchandise—cannot constitutionally embrace authority to include in such ordi-

nances a provision fixing the minimum price which may be charged for said services, because neither the state nor the municipality has constitutional power to fix such charges in view of amendment 14, federal constitution and of Art. I, §9, Constitution of Iowa. So held as to the business of barbering. And this is true tho the trade in question be subject to the police power of the state.

Duncan v Des Moines, 222-218; 268 NW 547

CHAPTER 293

PARK COMMISSIONERS

5787 Election—appointment.

Atty. Gen. Opinion. See AG Op Jan. 24, '39

5792 Tax levy.

Atty. Gen. Opinions. See '28 AG Op 364; '30 AG Op 196

5793 Additional tax levy.

Atty. Gen. Opinion. See '28 AG Op 364

5794 Certification and collection.

Atty. Gen. Opinion. See '30 AG Op 196

5795 Anticipation of taxes.

Atty. Gen. Opinions. See '28 AG Op 364; '30 AG Op 196

5796 Park fund—how expended.

Governmental function — negligence. The construction and maintenance by a municipal corporation of a public park constitute the exercise of a governmental function, and therefore the municipality is not liable for damages consequent on the negligence of its employees employed on such construction and maintenance. (See Annos. under §5738.)

Norman v City, 201-279; 207 NW 134; 25 NCCA 675

Hensley v Town, 203-388; 212 NW 714; 34 NCCA 559

Mocha v City, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

Negligent maintenance of public park. A city in exercising its governmental power thru a park board to acquire and maintain public parks is not liable in damages consequent on the negligent failure to keep the instrumentalities in said parks in repair; nor are the members of the park board individually liable for such nonfeasance on their part.

Smith v City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

Park instrumentality as nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

5797 Acquisition of real estate.

Atty. Gen. Opinions. See '34 AG Op 306, 414

Powers not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

5798 General powers.

Atty. Gen. Opinions. See '34 AG Op 414; '36 AG Op 348

5800 Bonds.

Atty. Gen. Opinions. See '28 AG Op 364; '34 AG Op 306, 414

5805 Jurisdiction.

Atty. Gen. Opinion. See '36 AG Op 348

5807 Rules and regulations.

Atty. Gen. Opinion. See AG Op Feb. 8, '39

5810 Appropriation.

Atty. Gen. Opinion. See '28 AG Op 287

5811 How expended.

Atty. Gen. Opinion. See '28 AG Op 287

CHAPTER 293.1

PERMANENT PARK BOARDS

5813.1 Applicability of chapter.

Applicability of act. A title which recites that the act "creates a park board in cities having a population of 125,000 or more" sufficiently indicates that the act is designed to apply to cities subsequently acquiring the required population.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Class legislation — classification based on population. The general assembly may constitutionally make a law applicable to cities having a certain population and not applicable to cities having a lesser population, provided the subject matter of the law suggests some reasonable necessity for said distinction. So held in sustaining the constitutionality of an act providing for the government and management of municipal parks by a park board of ten members.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Class legislation—general and local acts contrasted. Assuming that a supportable reason exists for classifying on the basis of population, a statute applicable to cities "now or hereafter having a population of" a named number, cannot be deemed "a local or special law" even tho when enacted it can apply to only one city, and even tho the creation of the official machinery for putting the act into effect in cities thereafter attaining said population is only implied.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Illegal interference with management and control. An act creating an appointive board and empowering it to manage and govern the numerous public parks of a city does not constitute an invalid interference with the right of the city to manage and control its own proprietary interests, it appearing that all of said parks, with three exceptions, were open to the public without charge, while, as to said three parks, a charge was made for the use of certain particular conveniences.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

5813.6 Powers and duties.

Right of self-government. A statute which creates an appointive board and invests it with power to manage and govern the parks of certain cities, and to this end to expend the public revenues appropriated therefor, but with no power to levy or collect such revenues, is not violative of any right of municipal self-government.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

CHAPTER 294

RIVER-FRONT IMPROVEMENT COMMISSION

Atty. Gen. Opinion. See '28 AG Op 161

5814 Cities affected.

Atty. Gen. Opinion. See '25-26 AG Op 466

5821 Profiles and specifications — approval.

Atty. Gen. Opinion. See '32 AG Op 121

5822 Additional powers — annual report—tax.

Instructions—right of governmental agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency was an individual.

Welton v Highway Com., 211-625; 233 NW 876

5824 Cities may aid.

Atty. Gen Opinion. See '34 AG Op 297

5827 Wharves—landing places.

Governmental functions. The construction and operation by a city of public facilities is the exercise of a governmental function, and the city is not liable in damages for negligence in such construction and operation, and the charging of a nominal fee for their use does not change the rule.

Hensley v Town, 203-388; 212 NW 714; 34 NCCA 559

Mocha v City, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA (NS) 459

See Norman v City, 201-279; 207 NW 134; 25 NCCA 675

Paramount right of state. The construction by the state of a wharf below high-water mark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution

of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

5828 What prohibited.

Atty. Gen. Opinions. See '36 AG Op 660; '38 AG Op 185

CHAPTER 294.1

CITY PLAN COMMISSION

Atty. Gen. Opinion. See '34 AG Op 699

CHAPTER 296

MUNICIPAL BANDS

Atty. Gen. Opinions. See '25-26 AG Op 366, 367; '32 AG Op 89, 105, 134; '34 AG Op 112, 125, 264, 624, '36 AG Op 60; '38 AG Op 289, 429

CHAPTER 298

JUVENILE PLAYGROUNDS

5844 Authorization.

Bathing beaches. The construction and operation by a city of a bathing beach is the exercise of a governmental function, and the city is not liable in damages for negligence in such construction and operation; and the charging of a nominal fee for the use of the beach does not change the rule.

Mocha v Cedar Rapids, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

Torts — park instrumentality as nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

CHAPTER 299

PUBLIC LIBRARIES

Atty. Gen. Opinions. See '32 AG Op 148; '38 AG Op 264, 443, 721

5849 Formation—maintenance.

Atty. Gen. Opinions. See '36 AG Op 174, 274

5850 Donations.

Atty. Gen. Opinion. See '38 AG Op 443

Devise for charity—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good." Will construed, and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library, were conditions subsequent and not conditions precedent, to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

5851 Library trustees.

Atty. Gen. Opinion. See '38 AG Op 721

5858 Powers.

Atty. Gen. Opinions. See '25-26 AG Op 49, 392; '30 AG Op 65; '36 AG Op 174, 274; '38 AG Op 264, 443, 721

5859 Power to contract.

Atty. Gen. Opinions. See '25-26 AG Op 48, 392; '32 AG Op 105

5861 Rate of tax.

Atty. Gen. Opinion. See '25-26 AG Op 392

5865 Fund—treasurer.

Atty. Gen. Opinions. See '38 AG Op 443, 721

"Public funds" defined. Funds raised by general taxation for the maintenance of public libraries are public funds, and within the protection of the state sinking fund act. (§1090-a2, C., '27 [§7420.10, C., '39])

Andrew v Bank, 203-349; 212 NW 742

CHAPTER 300

MUNICIPAL HOSPITALS

Atty. Gen. Opinions. See '36 AG Op 331, 427; '38 AG Op 321; AG Op Feb. 16, '39; May 10, '39; May 18, '39

CHAPTER 301

BRIDGES

5874 Construction and repair.

Atty. Gen. Opinion. See '25-26 AG Op 265

Operation—crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

5875 Cities controlling bridge fund.

Liability of city for improper construction and maintenance. See notes under §5945

Atty. Gen. Opinion. See '30 AG Op 236

CHAPTER 302

INTERSTATE BRIDGES

Atty. Gen. Opinion. See '30 AG Op 372

CHAPTER 302.1

INTERSTATE BRIDGES (ADDITIONAL ACT)

5899.07 Existing bridge—condemnation.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

5899.18 Condemnation of property by commission.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

CHAPTER 303

DOCKS

5902 Powers and duties.

Atty. Gen. Opinion. See '30 AG Op 109

Powers not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

CHAPTER 303.1

AIRPORTS

5903.05 Expenditures—levy of tax.

Atty. Gen. Opinion. See '32 AG Op 3

5903.11 Deemed as public use.

City's liability, governmental function. See under §5738

CHAPTER 303.2

ARMORIES

Atty. Gen. Opinion. See '38 AG Op 838

CHAPTER 304

ELECTRIC UTILITIES AND MOTORBUS LINES

5904 Regulations.

Rates in special charter cities. See under §6817, Vol I

Ordinance—construction—franchise (?) or regulation (?). Ordinance construed in the light of its terms and of the facts attending its enactment, and held, to constitute a franchise to the grantee therein named to operate a telephone exchange, and not to constitute a mere regulatory ordinance imposing a license fee on said business.

Pella v Fowler, 215-90; 244 NW 734

Perpetual franchise—grantees. A telephone company which, prior to October 1, 1897 (when the Code of 1897 took effect), had constructed a toll line and local telephone system in a city or town, thereby acquired a perpetual legislative franchise subject to the reserved power of the state, and said franchise necessarily passes to the holder's grantee.

Osceola v Utilities, 219-192; 257 NW 340

Unallowable implied contract. Inasmuch as a city has no statutory authority to expressly contract for a rental for the use of its streets, there can be no implied contract that a telephone company will pay reasonable rental for the space occupied by its equipment in such streets.

Pella v Fowler, 215-90; 244 NW 734

Enjoining unauthorized maintenance of wires. The maintenance of electric transmission lines across the streets and alleys of a city or town without a franchise right so to do, constitutes not only a nuisance, but a trespass upon the property of the municipality, and may be enjoined by the municipality, irrespective of the fact whether it has been damaged by such maintenance.

Ackley v Elec. Co., 204-1246; 214 NW 879; 54 ALR 474

5905 Franchise—election.

Franchise—definition. A franchise is a privilege or authority vested in certain persons by grant of the sovereign, to exercise powers or to do or perform acts which, without such grant, they could not legally do or perform.

Mapleton v Iowa Co., 206-9; 216 NW 683

Franchise ordinance—submission to electors. A proposition to grant a franchise to a private party to operate a telephone exchange, initiated by a city council, necessitates the submission to the voters of the franchise ordinance in literal fullness; otherwise, when the proposition is initiated by the private party through petition of votors.

Pella v Fowler, 215-90; 244 NW 734

Approval by voters of proposed utility franchise does not create franchise. The approval, by a majority vote of the electors of a city or town, of a proposed franchise for the use of the streets by a private public utility, does not create a franchise. Such franchise comes into existence only when the city or town council sees fit, after the favorable vote, to enact, and does enact, such franchise in the form of an ordinance.

Schneiders v Town, 213-807; 234 NW 207

Franchise—intentional abandonment. Evidence held quite insufficient to establish an intention to abandon a legislative-acquired franchise.

Osceola v Utilities, 219-192; 257 NW 340

Incomplete franchise — power of council. Where a proposition relative to the granting of a telephone franchise (initiated by petitions to the council), as submitted to the electors, contained no time limitation on the franchise, the council may validly fix and determine said limitation in the subsequently adopted ordinance.

Pella v Fowler, 215-90; 244 NW 734

Adjudication—mandamus to compel calling of election. A judicial holding to the effect that a petition for the calling of an election to vote on the question of granting an electric light and power franchise was in due form

and substance, and that mandamus should issue to compel the calling of such election, is res judicata of a subsequent petition by the same petitioner for the same relief.

Iowa Co. v Tourgee, 208-198; 225 NW 372

When ordinance not necessary. The passage of an ordinance and the printing of the same on the ballots are not necessary in those cases where the proposal to grant a franchise to a private party for the erection and operation of an electric light and power franchise is not initiated by the city or town council, but is initiated by the voters, through a statutory petition addressed to the mayor. (See §6555, C., '27, for law governing certain cities.)

Mapleton v Iowa Co., 206-9; 216 NW 683

"Property owners" defined.

Groenendyke v Fowler, 204-598; 215 NW 718

Rates—nonpower to contract for. A city or town which has not been granted the power to fix rates has no power to contract for rates.

Osceola v Utilities, 219-192; 257 NW 340

CHAPTER 305

VIADUCTS

5910 Authorization.

Crossings — safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

5913 Procedure.

Powers not subject of contract. A municipal arm of the government may not deprive itself by contract—even on a valid consideration—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

5916 Specifications.

Crossings — safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

CHAPTER 306

JITNEY BUSSES

Atty. Gen. Opinions. See '30 AG Op 145; '34 Ag Op 229

CHAPTER 307

STREETS AND PUBLIC GROUNDS

Atty. Gen. Opinions. See '30 AG Op 145; '34 AG Op 229

GENERAL POWERS

5938 Establishment—improvement.

Atty. Gen. Opinions. See '28 AG Op 400; '32 AG Op 97

ANALYSIS

I WHARVES
II ESTABLISHMENT OF STREETS
III SALE AND DISPOSAL OF STREETS
IV VACATION

Adverse possession, estoppel. See under §11007
City's liability generally. See under §§5738, 5945
Proprietary interest of city in streets. See under §6277
Proprietary interest of property owner in streets. See under §6277
Vacation of street by vacation of plat. See under §§6282–6286

I WHARVES

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid

to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Construction of wharf—paramount right of state. The construction by the state of a wharf below high-water mark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

II ESTABLISHMENT OF STREETS

Implied contracts. A city may, in the absence of a prohibiting statute, validly enter into an implied contract for the grading of its streets preparatory to the construction of permanent sidewalks.

Carlson v City, 212-373; 236 NW 421

Change of grade—validity of ordinance. The court cannot say that an ordinance is so arbitrary and unreasonable as to be void per se when it provides for the widening of a street and for a 4-foot change of grade thereon for a distance of some 400 feet, even tho it be conceded that the present grade is far less than other heavily traveled streets on which no change is proposed.

Des M. Ry. v City, 205-495; 216 NW 284

Slope of alley—city not insurer of pedestrian's safety. In action by pedestrian injured by a fall in alley intersection, where city was charged with negligence in paving alley with too steep a slope, the degree of safety to pedestrian is concededly lessened, but pedestrian still owes to himself the duty of exercising ordinary care, and the city's duty is of like character, i.e., such care as characterizes an ordinarily prudent person. In no instance is the city an insurer of the pedestrian's safety.

Russell v Sioux City, 227-1302; 290 NW 708

Increased flowage consequent on nonnegligent execution of expert plans. Damages to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria; especially when the damage occurs at the converging point of natural watercourses.

Cole v City, 212-1270; 232 NW 800

Vibrolithic pavement—smoothness inherent in construction—nonliability of city. In action by pedestrian for injuries sustained in fall on paving, evidence that the paving was a "vibrolithic" type composed of granite and concrete chips, that the pavement was dry, that there had been no rain or mist, and that there was no foreign substance on the paving does not present a question for the jury on issue of city's negligence in construction, even tho the pavement was "pretty smooth", the smoothness being a quality inherent in the material.

Russell v Sioux City, 227-1302; 290 NW 708

Construction of alley—slope—negligence of city. In determining negligence of city in constructing alley intersection with a steep grade, evidence that the paving sloped 7½ inches in the first 3 feet, 2 inches in the next foot, and 1½ inches in the remaining 4 feet to the center of the intersection, held, not to constitute jury question when the drop and slope were necessary to provide a sufficient means of escape for the surface water.

Russell v Sioux City, 227-1302; 290 NW 708

Power to contract for paving — statutory compliance mandatory. A city council has power to enter into a contract to pave streets and pay the cost either entirely from the general fund, or partly therefrom and partly by levy of special assessments, but, before it may lawfully so contract, it must comply with the necessary statutory provisions.

Lytle v Ames, 225-199; 279 NW 453

Paving contract—contractor's duty to investigate statutory prerequisites. Sound public policy requires a contractor, proposing performance of construction work for a city, to ascertain whether the council has sufficiently complied with statutory prerequisites so as to possess power to execute the proposed contract.

Lytle v Ames, 225-199; 279 NW 453

Street improvements—railroad crossing construction—council's power to require—findings —conclusiveness. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing merely made such request by personal letter to railroad official.

Call Bd. & Mtg. v Railway, 227-142; 287 NW 832

Torts—injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open

II ESTABLISHMENT OF STREETS—concluded

gutter in a street, constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Adoption of engineer's plans—nonliability for tort unless obviously defective. In adopting plans for pavement of alley intersection, the city was acting in a "judicial capacity" and was not liable for defects in engineer's plans unless as a matter of law the plans were obviously defective.

Russell v Sioux City, 227-1302; 290 NW 708

Engineer's plans accepted by city—no obvious defects—no imputation of negligence. Where engineer's plans for paving alley were not obviously defective in failing to show grade of alley, and the work was done in accordance with the plans, no negligence in adopting the plans can be imputed to the city, since engineering expertness is not within the province of the council members, and a lack of such expertness is the reason for employing a competent engineer and relying on his ability and plans for the construction of the improvement.

Russell v Sioux City, 227-1302; 290 NW 708

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

Conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

III SALE AND DISPOSAL OF STREETS

See annotations under §6206

IV VACATION

Discussion. See 2 ILB 32—Abutter's right in a street

Vacating alley — adjoining owner's rights. Action by city in vacating alley and conveying it to grantee, who closed the alley by fencing it as a part of his adjoining land, which still gave adjoining property owner ingress and egress to his property at both front and rear, and where only interference with public right was use of alley by children going to and from school, was not an abuse of city's discretion, and such action did not deprive such adjoining property owner of convenient and reasonable access to and from his property or its use.

Stoessel v Ottumwa, 227-1021; 289 NW 718

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

Arbitrarily vacating street to make defense to injunction. In an action to enjoin a town from maintaining a nuisance in a street or alley by allowing an adjoining owner to fence and use the street or alley, the action of the town council in arbitrarily vacating the street and the alley, without regard to the interests of the public, for the obvious purpose of creating a defense to the injunction suit, will be declared invalid.

Pederson v Radcliffe, 226-166; 284 NW 145

Temporary obstruction of access to property—damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

Judicial review—extent. Cities and towns possess a wide, tho not unlimited, discretion in opening, controlling and vacating streets and alleys, and courts will not interfere except in a clear case of arbitrary and unjust exercise of such power.

Stoessel v Ottumwa, 227-1021; 289 NW 718

5939 Acceptance of dedication.

Dedication and acceptance. See under §6277

Streets—conveyance of title after acceptance and vacation. In an action involving the title

to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

Torts—unsafe place in partially opened street—instructions. Reversible error results from submitting whether a city was negligent in not filling depressions and tamping soft places in a street (1) when, owing to an unusual unfitness of the street for travel, the city had opened it only to the extent of a narrow roadway and there is no evidence that the failure to fill and tamp said opened roadway was the cause of the injury, and (2) when, under the evidence, the injury may have occurred at a place in the street where the city was under no duty to fill and tamp—at a place which the city had never assumed to put in condition for use.

McKeehan v Des Moines, 213-1351; 242 NW 43

5940 Optional payments.

Power to contract for paving—statutory compliance mandatory. A city council has power to enter into a contract to pave streets and pay the cost either entirely from the general fund, or partly therefrom and partly by levy of special assessments, but, before it may lawfully so contract, it must comply with the necessary statutory provisions.

Lytle v Ames, 225-199; 279 NW 453

Modification of contract without competitive bidding. A city which has so breached a valid paving contract that the contractor is under no duty to perform, may, without submitting the matter to competitive bidding, validly contract in good faith with the contractor for reasonably enlarged compensation (to be paid from the general fund) as a consideration for the performance of the contract notwithstanding the breach; and the execution of the contract on such basis is beyond attack.

Des Moines v Horrabin, 204-683; 215 NW 967

5942.1 Acquisition of lands.

Materially destroying access to property. A substantial interference by a city with access to property by means of a public street constitutes a taking of private property for public use, even tho no part of the physical property of the property owner is taken, and the city must respond in damages for such taking.

Nalon v Sioux City, 216-1041; 250 NW 166

5942.2 Plat and schedule—resolution of necessity.

Justifiable inclusion of "adjacent" property. In designating an improvement district for the purpose of defraying the cost of establishing and opening a municipal street, the council may legally include as "adjacent" land property which will receive special benefits by reason of the improvement, e. g., greater convenience of access to the property and a centralization and stabilization of business in the immediate locality where the property is situated; and it is immaterial in such case that the property is situated a substantial distance from the street in question, to wit, some 2,000 feet.

In re Hume, 202-969; 208 NW 285

5942.3 Levy—certificates or bonds.

Pro rata payment nonpermissible. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

5942.5 Applicable provisions.

Atty. Gen. Opinion. See '28 AG Op 400

5945 Duty to supervise.

Atty. Gen. Opinions. See '32 AG Op 97; AG Op April 14, '39

ANALYSIS

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I CONTROL IN GENERAL

Rights, powers, duties, and liabilities—motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law, to submit the question of municipal ownership of a public utility, are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under section 5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Franchise not prerequisite to street lighting contract. The fact that a power company had a franchise and had established poles and lines in the streets to transmit electricity does not preclude the company from maintaining such poles and wires, after the franchise has expired, in order to fulfill its contract to furnish street lights to the city because a franchise is not a prerequisite to a city or town contracting to light its streets.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Use of public places—expired franchise—unexpired street light contract—poles in streets lawful. Electric company's occupancy of town streets to supply street lighting under a valid contract is not a trespass nor a nuisance merely because its franchise has expired.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Expired franchise—service furnished and suit maintained thereafter. A privately owned public utility must after expiration of its franchise continue under contract or otherwise supplying electricity to a city until some other source is available, but its use of the city streets may be discontinued after reasonable notice, and the expiration of the franchise will not prevent it from maintaining an action to enjoin the establishment of a municipal light plant, nor need special personal damages be shown as a condition therefor.

Abbott v Iowa City, 224-698; 277 NW 437

Unallowable implied contract. Inasmuch as a city has no statutory authority to expressly contract for a rental for the use of its streets, there can be no implied contract that a telephone company will pay reasonable rental for the space occupied by its equipment in such streets.

Pella v Fowler, 215-90; 244 NW 734

"Construction" as imposing continuous duty. An ordinance which requires all rain spouts on buildings to be so "constructed" that water will not be cast upon sidewalks imposes a continuing duty upon the property owner—a duty not only to "construct" the spouting as required but to maintain the spouting in such required condition.

Updegraff v City, 210-382; 226 NW 928

Village streets. All highways appearing on a village plat become streets and belong to the municipality as soon as legal incorporation is effected.

Ackley v Elec. Co., 206-533; 220 NW 315

Dedicating part of street to travel—effect. A city or town has the right to divide a street and to set apart a certain part thereof for vehicular traffic, and when it does so, the part thus dedicated to that purpose is the part which falls within the provisions of the statute that the city or town must use reasonable diligence to keep the same free from obstructions and pitfalls.

Morse v Town, 213-1225; 241 NW 304

Excluding travel from street. A city has no legal right to exclude ordinary travel from a public street in order that the street may be used exclusively for coasting.

Dennier v Johnson, 214-770; 240 NW 745

Arbitrarily vacating street to make defense to injunction. In an action to enjoin a town from maintaining a nuisance in a street or alley by allowing an adjoining owner to fence and use the street or alley, the action of the town council in arbitrarily vacating the street and the alley, without regard to the interests of the public, for the obvious purpose of creating a defense to the injunction suit, will be declared invalid.

Pederson v Radcliffe, 226-166; 284 NW 145

Deed—effect as to subsequently laid out streets. An ordinary railroad right of way deed simply grants to the railroad an easement, and works no impediment to the vesting in a municipality, subject to such easement, of streets subsequently laid out across such right of way; and especially so when the railroad company acquiesces in and recognizes the statutory dedication to the public.

Ackley v Elec. Co., 206-533; 220 NW 315

II LIABILITY IN GENERAL

Liability to pedestrians—precedents of little value. Principle reaffirmed that in determining municipality's liability for injuries to pedestrian, precedents are of little value, each

case must be determined upon its own peculiar facts.

Hoffman v Sioux City, 227-1131; 290 NW 62

Rule of care. Principle reaffirmed that the obligation of a city or town to exercise reasonable diligence to maintain its streets in a reasonably safe condition extends, not merely to the surface of the walk, but to those things within its control which endanger the safety of people properly using the walk.

Krska v Town, 200-594; 203 NW 39; 37 NCCA 440

City's liability—degree of care required. Liability of a municipal corporation for injuries arising from defects or obstructions in the streets is for negligence only, and the city is not liable for consequences which could not have been foreseen, but is required to exercise ordinary or reasonable care to maintain its streets and sidewalks in a reasonably safe condition.

Bird v Keokuk, 226-456; 284 NW 438

Slope of alley—city not insurer of pedestrian's safety. In action by pedestrian injured by a fall in alley intersection, where city was charged with negligence in paving alley with too steep a slope, the degree of safety to pedestrian is concededly lessened, but pedestrian still owes to himself the duty of exercising ordinary care, and the city's duty is of like character, i.e., such care as characterizes an ordinarily prudent person. In no instance is the city an insurer of the pedestrian's safety.

Russell v Sioux City, 227-1302; 290 NW 708

Defects in streets or highway—liability—jury (?) or law (?) question. In determining municipality's liability for injuries from defective streets or highways, if reasonable or prudent men could reasonably differ as to whether accident could and should have been reasonably anticipated from the existence of the defect, then the case is generally one for the jury, but if careful or prudent men would not reasonably anticipate any danger from the existence of the defect, but still an accident happens which could have been guarded against, the question of liability is one of law.

Bird v Keokuk, 226-456; 284 NW 438

Torts—street defects—actual or constructive notice—reasonable care duty. City streets need not be kept in a condition of absolute safety so as to insure the safety of travelers, but it must use ordinary care, and as a prerequisite to liability it must have actual notice of a dangerous defect, or the condition must have existed a sufficient time to enable the city, using ordinary care, to discover and repair the same.

Thomas v Fort Madison, 225-822; 281 NW 748

Torts—injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open gutter in a street, constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Engineer's opinion on construction of approach to sidewalk. A municipality is not bound to construct an approach from street to sidewalk differently because some engineer other than its own thought some other method would be better, so where a pedestrian, who was familiar with such approach, who admitted that there was plenty of room for a pedestrian to pass on meeting two other pedestrians in broad daylight, and who without thought or attention stepped off approach and fell, such pedestrian was guilty of contributory negligence precluding recovery for personal injuries.

Hoffman v Sioux City, 227-1131; 290 NW 62

Unallowable defense. The dangerous condition of the streets of a city cannot be excused on the plea that the street funds are overdrawn.

Thompson v City, 212-1348; 237 NW 366

Private road—nonliability of city. A city is not legally responsible for the condition of a road located by private parties for their own convenience diagonally and haphazardly across unoccupied platted lots, and connecting with two public streets, even tho at one time the city, by a small amount of labor, smoothed down said road at its junction with one of the public streets, and even tho the city, in improving its public street, removed dirt in a material amount from said road at said junction point and failed to barricade said private way.

Archip v City, 213-1198; 241 NW 300

Duty to repair sidewalk. A city is under a duty to repair its defective sidewalk, and the claim in such case that the city was originally under no obligation to build the walk is quite immaterial.

Thompson v City, 212-1348; 237 NW 366

Vibrolithic pavement—smoothness inherent in construction—nonliability. In action by pedestrian for injuries sustained in fall on paving, evidence that the paving was a "vibrolithic" type composed of granite and concrete chips, that the pavement was dry, that there had been no rain or mist, and that there was no foreign substance on the paving does not present a question for the jury on issue of

II LIABILITY IN GENERAL—concluded

city's negligence in construction, even tho the pavement was "pretty smooth", the smoothness being a quality inherent in the material.

Russell v Sioux City, 227-1302; 290 NW 708

Condition of title irrelevant. In an action for damages consequent on the defective condition of a sidewalk where it crosses an alley, it is wholly irrelevant that the title of the city to the alley was defective.

Thompson v City, 212-1348; 237 NW 366

Nonliability for negligence in constructing culvert in town street. The statutory duty of a town to keep its streets free from nuisances is not interrupted or suspended during the time when the county under an arrangement with the town is engaged in constructing a culvert in a street which is a continuation of a county road outside the town; and the county is under no legal obligation to reimburse the town for any sum voluntarily paid by it in settlement of suits, jointly against the town and county, for damages consequent on persons driving into an unguarded excavation made by the county authorities while constructing the culvert.

Norwalk v County, 210-1262; 232 NW 682

Unguarded street set aside for coasting. A city which temporarily sets aside a public street for coasting purposes is not liable in damages for an injury resulting to a person so using the street, from his coming in contact with an automobile which the city had failed to exclude from the street.

Harris v City, 202-53; 209 NW 454; 46 ALR 1429; 26 NCCA 753

Permitting discharge of fireworks, etc. A city or town is not liable for damages to a pedestrian consequent on the discharge on the public streets of explosives attending a Fourth of July celebration.

Reinart v Town, 210-664; 231 NW 326

Felling tree into street. A city is not liable in damages consequent on the act of a property owner or his contractor in felling into a street a tree standing in the parking; in other words, the city is not liable because of its failure to exercise its governmental power to police the street at the place and time when the tree was felled,—it knowing that the property owner intended to cut and fell said tree.

Armstrong v Waffle, 212-335; 236 NW 507

Claim of undue submission of issues. A preliminary recital in the language of an unquestioned pleading, of an issue of negligence in maintaining a sidewalk, which embraces statements of the method by which and the source from which the alleged nuisance was created on the walk, reveals no error when the definite legal issue was alone actually submitted to the jury.

Fosselman v City, 211-1213; 233 NW 491

Instructions—hopeless conflict. An instruction from which the jury would be wholly unable to determine whether a city was bound to maintain a reasonably safe traveled way to the full width of the street, or to the full width of the graded portion of the street, is prejudicially erroneous.

Morse v Town, 213-1225; 241 NW 304

Instructions — nonapplicability. Reversible error results from instructing a jury that plaintiff, in an action against a city for damages consequent on a defect in a sidewalk, need not show that the city had actual knowledge of the defect if the defect resulted from the original defective construction of the walk, when neither pleading nor evidence presented such issue.

Ritter v City, 212-564; 234 NW 814

III NUISANCES IN GENERAL

Nuisance—essential elements. In order that a construction or erection may properly be classified as a nuisance, there must be something in its nature and in its relation to its surroundings and to the use of such surroundings which foreshadows dangerous possibilities. So held as to a fountain in a public park.

Hensley v Town, 203-388; 212 NW 714; 34 NCCA 559; 3 NCCA(NS) 438

Attractive nuisance. A small, but deep and unguarded pond or pool of water, permitted to form at the outlet of a municipal storm water sewer, will not be deemed an "attractive nuisance" within the law of negligence.

Raeside v City, 209-975; 229 NW 216

See Cox v Elec. Co., 209-931; 229 NW 244; 36 NCCA 160

Torts — park instrumentality as nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468, 553; 3 NCCA(NS) 432

Attractive nuisance — basis of theory. In this state, the doctrine of attractive nuisance has its foundation in an implied invitation of the landlord on the theory that the temptation of an attractive plaything to a child of tender years is equivalent to an express invitation to an adult.

Harriman v Afton, 225-659; 281 NW 183

Cornice on building as nuisance. Evidence that a building built flush with the street line was surmounted by a cornice which overhung the street for a material distance and which

for several years, through some defect, cast water upon the sidewalk, and at times caused a dangerous accumulation of ice on the sidewalk, furnishes ample basis for a jury finding that the city had not and was not keeping its street free from nuisance.

Wright v A. & P. Tea Co., 216-565; 246 NW 846; 32 NCCA 509

Nuisances—obstruction of street. An obstruction of a street or highway is a nuisance.

Pederson v Radcliffe, 226-166; 284 NW 145

Enjoining maintenance of nuisance. A gasoline pump erected in the parking of a public street is not only an "incumbrance" on the street, but, when erected without legal authority, is ipso facto a nuisance and, because of the mandatory duty of the municipality to keep its streets free from nuisances, is enjoinable by the city or town.

Lamoni v Smith, 217-264; 251 NW 706

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Sidewalks and intersections—different degree of care. The standard of care that a city owes to a pedestrian in respect to a sidewalk differs from the degree owed where an intersection is involved.

Russell v Sioux City, 227-1302; 290 NW 708

Negligence—degree of care required. Liability of a municipal corporation for injuries arising from defects or obstructions in the streets is for negligence only, and the city is not liable for consequences which could not have been foreseen, but is required to exercise ordinary or reasonable care to maintain its streets and sidewalks in a reasonably safe condition.

Bird v Keokuk, 226-456; 284 NW 438

Adoption of engineer's plans — nonliability unless obviously defective. In adopting plans for pavement of alley intersection, the city was acting in a "judicial capacity" and was not liable for defects in engineer's plans unless as a matter of law the plans were obviously defective.

Russell v Sioux City, 227-1302; 290 NW 708

Slant in pavement. The fact that a street pavement, as it approached a manhole, was on a slant of four inches in three feet affords, in itself, no basis for a charge of negligence against the city.

Corbin v City, 207-1168; 224 NW 828

Tolerating nondangerous condition. An injured person who establishes that the hole or depression in which she fell, and over which she had repeatedly passed, during many months, was not dangerous, is in no position to claim that the city was negligent in knowingly permitting the nondangerous defect to exist.

Geringer v Town, 203-41; 212 NW 365

Trespasser. A municipality is not liable in damages to a person who is injured in a municipal market place by falling through an open manhole while he is on an errand distinctly personal to himself, and not as a customer of the market, and when the manhole is located at a place where he is neither expected nor invited to be.

Knote v City, 204-948; 216 NW 52

Streets—danger in close proximity to sidewalk—guard rails. Where six year old child had to climb over a solid steel girder 34 inches high, located between the sidewalk and the opening in the bridge through which she fell, and the opening being only 3 or 3½ inches at its top and 10 inches at the bottom, there was no dangerous place in such "close proximity" to sidewalk as to imperil use and require guard rails, and no reasonably prudent man would have anticipated that even a child would have climbed over the guard rail and fallen through the opening.

Bird v Keokuk, 226-456; 284 NW 438

City's negligence — guarding against accidents. In action by next friend to recover for child's injuries in falling through opening in bridge when opening was so narrow that it was seemingly impossible for child to fall through it, the city could not be charged with negligence for failure to guard against such a rare, unexpected, and unforeseeable accident.

Bird v Keokuk, 226-456; 284 NW 438

Sidewalk defect—city's negligence—jury question—evidence sufficiency. Where a woman sustains injuries by falling on pavement at intersection, when her heel caught in crevice, between the sidewalk and curb, as she stepped off sidewalk, a jury question on the liability of the city was created under evidence showing the injuries were sustained in nighttime while plaintiff was slowly and carefully walking in a strange part of city, and when this condition of the street had been created by the city ten years before and never remedied, altho considered so unsafe by pedestrians in neighborhood that beaten paths were formed on either side in avoiding it.

Thomas v Fort Madison, 225-822; 281 NW 748

Construction of alley—slope—negligence of city. In determining negligence of city in constructing alley intersection with a steep grade, evidence that the paving sloped 7½ inches in the first 3 feet, 2 inches in the next foot, and 1½ inches in the remaining 4 feet to the center of the intersection, held, not to constitute jury question when the drop and slope were necessary to provide a sufficient means of escape for the surface water.

Russell v Sioux City, 227-1302; 290 NW 708

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to re-

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cover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit, (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff, consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

V OBSTRUCTIONS, ELEVATIONS, DEPRESSIONS, AND EXCAVATIONS

Liability to pedestrians—precedents of little value. Principle reaffirmed that in determining municipality's liability for injuries to pedestrian, precedents are of little value. Each case must be determined upon its own peculiar facts.

Hoffman v Sioux City, 227-1131; 290 NW 62

Depression in sidewalk with ice therein. It is reversible error to grant a new trial because the court had omitted to submit to the jury the question whether the city was negligent in permitting an alley-crossing to remain in a slightly sunken, saucer-shaped condition, and in permitting water to accumulate in the depression and to freeze in a smooth condition, such acts, if done, not being such as to render the city liable in case of an accident.

Turner v City, 210-458; 229 NW 229; 37 NCCA 524

Stepping into depressed street. A pedestrian on a public street who steps from a sidewalk into the street proper at a place other than at a crossing, without in any manner giving heed to the distance from the top of the sidewalk to the level of the street pavement, is guilty of negligence.

Corbin v City, 207-1168; 224 NW 828

Engineer's opinion on construction of approach to sidewalk. A municipality is not bound to construct an approach from street to sidewalk differently because some engineer other than its own thought some other method would be better, so where a pedestrian, who was familiar with such approach, who admitted that there was plenty of room for a pedestrian to pass on meeting two other pedestrians in broad daylight, and who without thought or attention stepped off approach and fell, such pedestrian was guilty of contributory negligence precluding recovery for personal injuries.

Hoffman v Sioux City, 227-1131; 290 NW 62

Engineer's plans accepted by city—no obvious defects—no imputation of negligence. Where engineer's plans for paving alley were not obviously defective in failing to show grade of alley, and the work was done in accordance with the plans, no negligence in adopting the plans can be imputed to the city, since engineering expertness is not within the province of the council members, and a lack of such expertness is the reason for employing a competent engineer and relying on his ability and plans for the construction of the improvement.

Russell v Sioux City, 227-1302; 290 NW 708

Dangerous depression in walk. A jury question on the issue of actionable negligence is presented by evidence tending to show that a city had for some two years allowed a portion of a block of cement on a sidewalk to remain in a sunken condition of from 1¾ to 2¼ inches below the level of the abutting blocks, and that, on the edge of this sunken condition, but on a level with the abutting blocks, there existed a rough, protruding, and overhanging slab of cement under which the toe of a foot might be caught.

Howard v City, 206-1109; 221 NW 812

Unseen depression. A pedestrian who, in an ordinary way, walks along a cement sidewalk over which he had not passed for about two years prior thereto, is not guilty of negligence per se because he did not see a depression of some two inches in the walk and other conditions which rendered the depression possibly dangerous.

Howard v City, 206-1109; 221 NW 812

Defective sidewalk—duty to see defect. A person is not exercising reasonable care, as a matter of law, when, immediately after emerging from a store, she walks directly across an 8-foot cement sidewalk, of which she had a general knowledge, and fails to see that the extreme inner edge of the walk, elevated some 8 inches above the vehicular part of the street, has been broken away for a distance of some 30 inches, and to an irregular depth not exceeding 8 inches, when the unobscured opening is directly in front of her, and when she is walking under perfect conditions of weather, light, and sight, and attended by no mental abstraction except a voluntary conversation with her companion.

Seiser v Redfield, 211-1035; 232 NW 129

Negligence—jury question. Evidence relative to an unguarded and unlighted excavation in a public street reviewed, and held to present jury questions on the issues of negligence of both plaintiff and defendant.

Smith v Town, 202-300; 207 NW 340

Unsafe place in partially opened street. Reversible error results from submitting whether a city was negligent in not filling depressions and tamping soft places in a street (1) when, owing to an unusual unfitness of the street for travel, the city had opened it only to the

extent of a narrow roadway and there is no evidence that the failure to fill and tamp said opened roadway was the cause of the injury, and (2) when, under the evidence, the injury may have occurred at a place in the street where the city was under no duty to fill and tamp—at a place which the city had never assumed to put in condition for use.

McKeehan v City, 213-1351; 242 NW 42

Proximate cause of injury — intervening cause—legal measure of. The proximate cause of a collision between motor vehicles on a public street may be the defective condition which the city has long permitted to exist in a portion of its street, provided said condition, in view of all the relevant facts, was such as to reasonably charge the city with knowledge that some accident would probably result therefrom to motor vehicles and to the occupants thereof traveling over said defect. Phrased otherwise, where a city has long maintained in and on one side of its street a defect of such nature that an automobile passing over the defect was thereby swerved out of its course and onto the opposite side of the street where it collided with another vehicle properly moving in the opposite direction, the city cannot properly contend that said collision was an independent, intervening and efficient cause which prevented the negligence of the city from being the proximate cause of the resulting injuries, when the jury might justly find that said defect, in view of all the relevant facts, was such as to reasonably charge the city with knowledge that some accident would probably result therefrom to motor vehicles and to the occupants thereof traveling over said defect.

Gray v Des Moines, 221-596; 265 NW 612; 104 ALR 1228

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Aerial obstructions—justifiable assumption. The operator of a truck along a public street has a right, in the absence of actual knowledge to the contrary, to assume that the street is free from aerial obstructions which may strike the top of his vehicle, e. g., a guy wire stretched across the street from a nearby building in process of construction. And especially is this true when the surface of the street along which the driver is moving is badly cluttered up with building material.

Hatfield v Freight Co., 223-7; 272 NW 99

Enjoining unauthorized maintenance of wires. The maintenance of electric transmission lines across the streets and alleys of a city or town without a franchise right so to do, constitutes not only a nuisance, but a trespass upon the property of the municipality, and may be enjoined by the municipality, irrespective of the fact whether it has been damaged by such maintenance.

Ackley v Elec. Co., 204-1246; 214 NW 879; 54 ALR 474

Ackley v Elec. Co., 206-533; 220 NW 315

Limb of tree as street obstruction. One who in broad daylight, and without diverting circumstances, drives along a public street with which he is familiar, and permits his vehicle to come in contact with a perfectly visible limb of a tree overhanging the traveled part of the street, is guilty of negligence per se.

Abraham v City, 218-1068; 250 NW 461

Proximate cause. A truck which is legally parked alongside the curb of a public street is not the proximate cause of an injury to a child whose sled was deflected into the truck by a bump in the street.

Dennier v Johnson, 214-770; 240 NW 745; 35 NCCA 717

Temporary obstruction of access to property —damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

VI SNOW AND ICE

Negligence. The act of a city in leaving snow upon its streets for a period of four days after it had first melted and then frozen into a rough and irregular condition constitutes negligence.

Tollackson v City, 203-696; 213 NW 222; 37 NCCA 527

Care of vehicular part of street. A city is not negligent in failing to remove snow and ice naturally accumulating on that part of a public street designed for ordinary vehicular travel. If the accumulation is consequent on some defect in the construction of the street at the point of injury, the injured plaintiff must so show.

Workman v Sioux City, 218-217; 253 NW 909

Dangerous condition of ice between curb lines. No actionable negligence is shown by

VI SNOW AND ICE—concluded

proof that an entire city had for several weeks been covered by successive snow falls which had become packed and congealed into a blanket of ice between the curb lines, and that during said times vehicular travel had worn abrupt and dangerous ruts into such ice to a depth of from 7 to 10 inches, and that a person alighting from a street car fell into one of said ruts and was severely injured.

Ritchie v Des Moines, 211-1026; 233 NW 43

Burden of proof. An injured person suing for damages consequent upon the dangerous condition of ice and snow on a public street between the curb lines has the burden of proof to show what reasonable action the city might have taken to avoid the said dangerous condition.

Ritchie v Des Moines, 211-1026; 233 NW 43

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to recover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit, (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff, consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

Unknown recent formation. A city may not be held liable for injury consequent on a fall on an icy sidewalk covered with snow when the ice had formed so recently prior to the accident that no one knew of its existence, —not even plaintiff until he fell.

Wilson v City, 204-1183; 216 NW 698; 37 NCCA 515

Change of temperature — effect. Principle recognized that, when cold weather follows the depositing of moisture on a walk, causing a film of ice to form, which is practically impossible to remove, the city may wait for a change of temperature to remedy the condition, without being subject to the charge of negligence.

Burke v Town, 207-585; 223 NW 397

Defects or obstructions in streets. When negligence is predicated on the unsafe condition of a path made by the town authorities through the snow on a crosswalk, evidence tending to show that said path never was safe necessarily presents a jury question.

Beardmore v New Albin, 203-721; 211 NW 430; 37 NCCA 528

Icy condition of walk—negligence per se. Evidence that a person, on emerging from a building, stepped carefully upon the sidewalk because he knew of the icy and slippery condition of the walk, and that he fell, upon taking the first step, does not per se disclose contributory negligence.

Fosselman v Dubuque, 211-1213; 233 NW 491

Ice-incrusted walk. A pedestrian may, by his testimony as to the manner in which he walked along a rough, ice-incrusted, and dangerous walk, create a jury question on the issue of his contributory negligence.

Burke v Town, 207-585; 223 NW 397; 37 NCCA 522

Rough and uneven ice—instructions. Instructions held to confine the jury strictly to the proposition that plaintiff could recover for an injury only in case he established that the ice in question on the public street had become rough and uneven.

Casper v City, 213-69; 238 NW 591

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Instructions. Instructions reviewed, and held to state correctly the liability of the city for the accumulation of snow and ice upon the public streets.

Smith v City, 200-1100; 205 NW 956; 37 NCCA 511

Torts—failure to sand and gravel. It is a jury question whether a city was negligent in not spreading sand and gravel over a street crossing which, for several days, by the falling and melting and freezing of snow thereon, and by the travel thereover, had become rough and uneven and corrugated with ice, when the city had, at the time, provided itself with said materials for said purpose and with employees to do and perform the work.

Staples v Spencer, 222-1241; 271 NW 200

VII NOTICE OR KNOWLEDGE OF DEFECT

(a) IN GENERAL

Defect in street—knowledge by city all-essential to liability. In an action against a

city for damages for personal injury consequent on a defect in wooden steps maintained by the city in a public street, failure to prove that the city had either actual or constructive knowledge of the defect is fatal to plaintiff's right to recover.

Jeffers v Sioux City, 221-236; 265 NW 521

Notice of defect — inadequate instruction. Instructions which might lead the jury to understand that a plaintiff had a right to recover without proof of knowledge, on the part of the city, of the defect in question, constitute reversible error.

Jensen v Magnolia, 219-209; 257 NW 584

Constructive notice. A city must be held, as a matter of law, to have at least constructive notice of a defect in a public street when such defect had openly and visibly existed for a period of two years.

Howard v City, 206-1109; 221 NW 812

Notice — jury question. Record reviewed and held to present a jury question on the issue whether the city had actual notice of the rough and uneven condition of snow and ice on a public street for some four days prior to an accident; likewise whether the city had constructive notice of such condition for a somewhat longer period.

Casper v City, 213-69; 238 NW 591

(b) EVIDENCE

City's liability for nuisance continued over period of years. Evidence that a building built flush with the street line was surmounted by a cornice which overhung the street for a material distance and which for several years, through some defect, cast water upon the sidewalk, and at times caused a dangerous accumulation of ice on the sidewalk, furnishes ample basis for a jury finding that the city had not and was not keeping its street free from nuisance.

Wright v A. & P. Tea Co., 216-565; 246 NW 846; 32 NCCA 509

VIII CONTRIBUTORY NEGLIGENCE

(a) IN GENERAL

Knowledge generally. The court cannot say that an injured party was negligent per se because she had, generally speaking, been long familiar with all the streets of the municipality, when she was aged, did not know of the particular defect in the street which caused her injury, and when, just prior to the accident, her mind was excusably diverted from the walk in question.

Greenlee v City, 204-1055; 216 NW 774

Choosing imprudent way—effect. The doctrine that a pedestrian may, under some circumstances, be deemed negligent in traveling a path which it is imprudent to travel, necessarily can have no application when the traveler had no knowledge of any defect in the way traveled by him.

Greenlee v City, 204-1055; 216 NW 774

Torts—obstructions in street. Evidence reviewed relative to the act of plaintiff (injured by coming in contact with a wire stretched across a public street) in running, in semi-darkness, along the street and outside a crowded sidewalk, in order to reach shelter from a sudden and rapidly gathering thunderstorm, and held to present a jury question on the issue of contributory negligence on the part of plaintiff.

Cuvelier v Dumont, 221-1016; 266 NW 517

(b) KNOWLEDGE OF DANGER

Knowledge of danger. Use of a walk by a pedestrian, with knowledge that it is in an unsafe condition, is not, in and of itself, sufficient to constitute contributory negligence.

Tollackson v City, 203-696; 213 NW 222

Knowledge of danger. A pedestrian who attempts to pass over an abrupt decline, known to be dangerous, in a public street, in the belief that he can do so in safety, will be deemed guilty of negligence per se, in the absence of any showing of acts of care on his part.

Lundy v City, 202-100; 209 NW 427

Knowledge of obstructions. A pedestrian who, on a dark and rainy night, passes over a parking in a public street in close proximity to a pile of broken cement, with full knowledge of the presence of such obstruction and of its dangerous character, and is injured by stumbling over a detached piece of the cement, is guilty of contributory negligence per se when it appears that a very slight deviation in his course would have placed him in a zone of perfect safety.

Roppel v City, 208-117; 224 NW 579

Duty to see defect. A person is not exercising reasonable care as a matter of law when, immediately after emerging from a store, she walks directly across an eight foot cement sidewalk, of which she had a general knowledge, and fails to see that the extreme inner edge of the walk, elevated, some eight inches above the vehicular part of the street, had been broken away for a distance of some thirty inches and to an irregular depth not exceeding eight inches, when the unobscured opening is directly in front of her, and when she is walking under perfect conditions of weather, light, and sight, and attended by no mental abstraction except a voluntary conversation with her companion.

Seiser v Town, 211-1035; 232 NW 129

Nondiverting circumstance. The fact that an injured pedestrian forgot that an obstruction was in his pathway is not a diverting circumstance which will relieve him from re-

VIII CONTRIBUTORY NEGLIGENCE—concluded

(b) KNOWLEDGE OF DANGER—concluded

sponsibility for the knowledge which he did have.

Davis v City, 209-1324; 230 NW 421

Attempt to use known defective walk. Mere knowledge of a pedestrian that a walk was defective does not establish negligence in attempting to use it, especially when the walk had undergone severe usage since he last saw it.

Thompson v City, 212-1348; 237 NW 366

Icy condition of walk—negligence per se. Evidence that a person on emerging from a building stepped carefully upon the sidewalk because he knew of the icy and slippery condition of the walk, and that he fell upon taking the first step, does not per se disclose contributory negligence.

Fosselman v City, 211-1213; 233 NW 491

Passing along known slippery sidewalk. A pedestrian is not guilty of negligence per se in attempting to walk along a freshly snow-covered sidewalk bounded by a foot or two of snow, even tho he knows that the walk is rough, uneven, and slippery from an accumulation of ice, when he had prepared his feet with rubbers in order to avoid slipping, and, upon reaching the walk, thoughtfully slackened his speed, and was proceeding cautiously in order to avoid a fall.

Smith v City, 212-1022; 237 NW 330

Negligence per se. A pedestrian who discovers in his pathway on a public sidewalk a substantial obstruction of frozen straw and other refuse and unnecessarily attempts to walk over the same is guilty of negligence per se.

Wells v City, 212-1095; 235 NW 322

IX EVIDENCE

Negligence—noncompetent evidence to excuse. In an action based on alleged negligence in maintaining a sidewalk in front of privately owned property, testimony to the effect that the janitor of the building was under a duty to keep the walk clean is incompetent.

Smith v City, 200-1100; 205 NW 956

X PLEADING AND PROOF

Pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or ministerial (the only acts for which the municipality would be liable), and not governmental.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Defect in street—notice—pleading. In an action in tort against a municipality, a plea that the city had notice of the defect in the street may be adequate tho such plea be subject to a motion for more specific statement.

Jensen v Magnolia, 219-209; 257 NW 584

More specific statement—waiver of error. Error of the trial court in overruling a motion for a more specific statement as to where an accident happened is waived by answering over.

McKeehan v Des Moines, 213-1351; 242 NW 43

Allowable amendment to pleading. Plaintiff in an action for damages consequent on the dangerous condition of a sidewalk pleads no new cause of action by so amending his petition as to amplify the facts which brought about said dangerous condition.

Casper v Sioux City, 213-69; 238 NW 591

Burden of proof. An injured person suing for damages consequent on the dangerous condition of ice and snow on a public street between the curb lines has the burden of proof to show what reasonable action the city might have taken to avoid the said dangerous condition.

Ritchie v City, 211-1026; 233 NW 43

XI LIABILITY OF PROPERTY OWNER OR OTHER WRONGDOER

Property owner. Principle recognized that a property owner may be liable in damages for creating or permitting to exist a nuisance upon a public sidewalk even tho the municipality rests by statute under substantially the same liability.

Updegraff v City, 210-382; 226 NW 928

Tenant. The tenant of a building which abuts upon a public street is not liable for personal injuries resulting to a pedestrian from falling on account of stepping into a one-and-one-half-inch curved depression in the sidewalk adjacent to said building, when said depression was not occasioned by any affirmative act of the tenant, but had, from ordinary travel, been gradually forming through a series of years, it not appearing that the tenant was under any statutory or ordinance duty to repair.

Atkinson v Motor Co., 203-195; 212 NW 484

Governmental employees—personally liable for torts—governmental immunity denied. A governmental employee committing a tortious act which causes injury to another in viola-

tion of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled).

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837

Lenth v Schug, 226-1; 281 NW 150; 287 NW 596

XII PUBLIC GROUNDS IN GENERAL

Negligence—unsupported issue. An unsupported issue of negligence must not be submitted to the jury. So held on the issue whether a city had negligently maintained its dump grounds.

Nichols Co. v Des Moines, 215-894; 245 NW 358

Depositing refuse on city dump. A person who deposits, on dump grounds provided by a city, discarded materials containing acid or capable of generating acid by a process of decomposition, becomes, henceforth, a stranger to such materials. In other words, he cannot be deemed negligent, toward persons frequenting said grounds, either in making the original deposit or in leaving it unguarded on the grounds. But evidence reviewed and held insufficient to sustain plaintiff's action even on a contrary theory.

Cabrnosh v Penick, 218-972; 252 NW 88

5949 Lighting.

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under this section without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Use of public places—expired franchise—unexpired street light contract—poles in streets lawful. Electric company's occupancy of town streets to supply street lighting under a valid contract is not a trespass nor a nuisance merely because its franchise has expired.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Electricity—franchise not prerequisite to street lighting contract. The fact that a power company had a franchise and had established poles and lines in the streets to transmit electricity does not preclude the company from maintaining such poles and wires, after the franchise has expired, in order to fulfill its contract to furnish street lights to the city because a franchise is not a prerequisite to a city or town contracting to light its streets.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

GRADE OF STREETS

5951 Grades and grading.

Atty. Gen. Opinion. See '38 AG Op 746

ANALYSIS

I GRADES IN GENERAL
II LIABILITY OF CITY

I GRADES IN GENERAL

Validity of ordinance. The court cannot say that an ordinance is so arbitrary and unreasonable as to be void per se when it provides for the widening of a street and for a 4-foot change of grade thereon for a distance of some 400 feet, even tho it be conceded that the present grade is far less than other heavily traveled streets on which no change is proposed.

Des M. Ry. v City, 205-495; 216 NW 284

Construction of alley—slope—negligence of city. In determining negligence of city in constructing alley intersection with a steep grade, evidence that the paving sloped 7½ inches in the first 3 feet, 2 inches in the next foot, and 1½ inches in the remaining 4 feet to the center of the intersection, held, not to constitute jury question when the drop and slope were necessary to provide a sufficient means of escape for the surface water.

Russell v Sioux City, 227-1302; 290 NW 708

II LIABILITY OF CITY

Sidewalks and intersections—different degree of care. The standard of care that a city owes to a pedestrian in respect to a sidewalk differs from the degree owed where an intersection is involved.

Russell v Sioux City, 227-1302; 290 NW 708

Slope of alley—city not insurer of pedestrian's safety. In action by pedestrian injured by a fall in alley intersection, where city was charged with negligence in paving alley with too steep a slope, the degree of safety to pedestrian is concededly lessened, but pedestrian still owes to himself the duty of exercising ordinary care, and the city's duty is of like character, i.e., such care as characterizes an ordinarily prudent person. In no instance is the city an insurer of the pedestrian's safety.

Russell v Sioux City, 227-1302; 290 NW 708

Torts—injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open gutter in a street, constructed according to

II LIABILITY OF CITY—concluded

plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Engineer's plans accepted by city—no obvious defects—no imputation of negligence. Where engineer's plans for paving alley were not obviously defective in failing to show grade of alley, and the work was done in accordance with the plans, no negligence in adopting the plans can be imputed to the city, since engineering expertness is not within the province of the council members, and a lack of such expertness is the reason for employing a competent engineer and relying on his ability and plans for the construction of the improvement.

Russell v Sioux City, 227-1302; 290 NW 708

Vibrolithic pavement—smoothness inherent in construction—nonliability of city. In action by pedestrian for injuries sustained in fall on paving, evidence that the paving was a "vibrolithic" type composed of granite and concrete chips, that the pavement was dry, that there had been no rain or mist, and that there was no foreign substance on the paving does not present a question for the jury on issue of city's negligence in construction, even tho the pavement was "pretty smooth", the smoothness being a quality inherent in the material.

Russell v Sioux City, 227-1302; 290 NW 708

5953 Change.

Atty. Gen. Opinions. See '28 AG Op 430; '38 AG Op 746

ANALYSIS

I CHANGE OF GRADE IN GENERAL
II DAMAGES

I CHANGE OF GRADE IN GENERAL

Street railway not "improvement". A street railway is not an "improvement" on the streets of cities and towns, within the meaning of this statute.

Des M. Ry. v City, 205-495; 216 NW 284

II DAMAGES

Accrual of action. An action by a property owner against a city for damages consequent on a long delayed but finally completed street improvement which, while somewhat various in its operations, is one project, and which substantially destroys the owner's means of passing to and from his property, does not accrue until the improvement is completed.

Ashman v City, 209-1247; 228 NW 316; 229 NW 907

Unallowable evidence of damage. In an action for damages consequent on a change of grade in a street, evidence of the cost of entirely rebuilding a building on the property and of the cost of new pavement and new sidewalks is inadmissible.

Corcoran v City, 205-405; 215 NW 948

5954 Appraisers.

Atty. Gen. Opinion. See '38 AG Op 746

5959 Appeal.

Method of service. As to proper method of service when statute simply requires the notice to be "served", and specifies no method of service, see

Casey v Hogue, 204-3; 214 NW 729

SIDEWALKS

5962 Permanent sidewalks.

Implied contracts. A city may, in the absence of a prohibiting statute, validly enter into an implied contract for the grading of its streets preparatory to the construction of permanent sidewalks.

Carlson v City, 212-373; 236 NW 421

Sufficient showing of jurisdiction. Jurisdiction to construct a permanent sidewalk, and to assess property therefor is made to appear by unquestioned proof (1) that the city or town council by resolution ordered such construction, and (2) that the mayor later signed the record of such meeting and the resolution, even tho the record fails to show a three-fourths affirmative vote of all members, and fails to show that the yeas and nays were called on the resolution.

Perrott v Balkema, 211-764; 234 NW 240

Necessity—review. Courts may not, in the absence of a plea of fraud or oppression, review the municipal determination that an improvement is necessary.

Brush v Town, 202-1155; 211 NW 856

5963 Objections.

Fatally delayed objection. A property owner may not, after a permanent sidewalk has been fully completed, enjoin the collection of a special assessment on his property on the ground that the sidewalk was constructed by an officer of the city. (§5673, C., '27.)

Perrott v Balkema, 211-764; 234 NW 240

When injunction unallowable. Injunction will not lie to enjoin the collection of a special assessment for a permanent sidewalk when the city or town council had acquired juris-

diction over such construction and assessment, even tho the procedure leading up to such jurisdiction was somewhat indefinite.

Perrott v Balkema, 211-764; 234 NW 240

5964 Payment under waiver.

Atty. Gen. Opinion. See '28 AG Op 400

5966 Certificates of levy—lien.

Tax sales enjoined—error as to non-parties. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

USE OF STREETS

5970 Conveyances—transportation.

Atty. Gen. Opinion. See '36 AG Op 493

License fees presumptively reasonable. License fees duly fixed by an authorized ordinance will be deemed reasonable unless the contrary appears on the face of the ordinance or on proper evidence.

Towns v City, 214-76; 241 NW 658

Exclusive grant of cab stand privileges. A railway company may grant exclusive rights to a cab stand on its own premises when such grant is not arbitrary or unreasonable.

Red Top Cab Co. v McGlashing, 204-791; 213 NW 791

Municipal license of trucks—nonrepeal by state law. The legislature by the enactment of chapter 252-C1, C., '31 [ch 252.3, C., '39], and thereby requiring of truck operators a privilege or occupation tax when not operating between fixed termini nor over a regular route, on any and all highways of the state, did not impliedly repeal that part of this section which empowers cities and towns to license a truck operator whose business is limited to the municipality—there being no substantial conflict between said statutes.

Towns v City, 214-76; 241 NW 658

5972 Flagmen and gates.

City ordinance—lack of relevancy. A city ordinance which requires a railway company, during certain hours, to maintain a flagman at one of its street crossings, is neither relevant nor material when the accident did not occur during said hours, but at a time substantially thereafter.

Miller v Railway, 223-316; 272 NW 96

Absence of flagmen, gates, etc.—effect. The failure of a railway company to maintain flagmen, gates, or warning devices at crossings does not constitute negligence in the absence of proof that the crossing is unusually dangerous and hazardous.

O'Brien v Railway, 203-1301; 214 NW 608

Absence of flagman or signal device—effect. The submission to the jury of the issue of negligence, based on the absence at a railway crossing of a flagman or signaling device, tho not required by ordinance, is justified when the crossing is more than ordinarily dangerous.

Williams v Railway, 205-446; 214 NW 692

Private crossing—nonduty to maintain flagmen. A railroad company is under no obligation to maintain a flagman at a private farm crossing.

Graves v Railway, 207-30; 222 NW 344

Accident at crossing—failure to ring bell. Tho a traveler on a public street has timely knowledge that an engine and a couple of cars are standing immediately outside the curb line of said street, and on a track which crosses said street, yet the failure to ring the bell on said engine may be the proximate cause of an injury to said traveler should the train be suddenly backed into the street without ringing said bell.

Hanrahan v Sprague, 220-867; 263 NW 514

5973 Speed of trains.

Speed—statute or reasonable care controls. No amount of speed of a railroad train is in and of itself negligence unless in violation of statute or ordinance; likewise, any speed may be negligence if, under the circumstances, a slower rate is called for in the exercise of reasonable care.

Finley v Lowden, 224-999; 277 NW 487

Inapplicability of speed ordinance. A city ordinance which limits the speed of railway trains under given conditions is properly excluded, in the absence of any evidence that the ordinance was violated.

Newman v Railway, 202-1059; 206 NW 831

Negligence per se. The driver of a conveyance is guilty of negligence per se when, in approaching an unobscured railway crossing, with which he is perfectly familiar, in full possession of his faculties, and with no distracting circumstances or emergency facing him, he, when 20 feet from the crossing, sees an engine approaching at a distance of 175 feet, and knows that the bell is not ringing, and thereafter drives upon the crossing, without in any manner observing or judging of the speed of the engine; and this is true even though the engine is in fact running in violation of an ordinance relative to the speed of trains and to the ringing of the engine bell.

Erlich v Davis, 202-317; 208 NW 515; 27 NCCA 164

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

CHAPTER 308

STREET IMPROVEMENTS, SEWERS, AND SPECIAL ASSESSMENTS

Atty. Gen. Opinions. See '28 AG Op 400; '30 AG Op 145; '34 AG Op 399, 412; '38 AG Op 333, 794

5975 Street improvements.

Atty. Gen. Opinions. See '25-26 AG Op 331; '32 AG Op 195

ANALYSIS

I IMPROVEMENTS IN GENERAL
II IMPROVEMENTS SPECIALLY ASSESSABLE
III PRIVATE CONTRACTS RELATIVE TO PAYMENT OF ASSESSMENTS

I IMPROVEMENTS IN GENERAL

"Oiling"—what constitutes. The resurfacing to a substantially level condition of an uneven, cracked, and rutted pavement by the application of an oleaginous substance in combination with sand, and of a thickness varying from a quarter to a half inch, does not constitute the improvement of a street "by oiling".

Jackson v City, 206-244; 220 NW 92

Paving contract—contractor's duty to investigate statutory prerequisites. Sound public policy requires a contractor, proposing performance of construction work for a city, to ascertain whether the council has sufficiently complied with statutory prerequisites so as to possess power to execute the proposed contract.

Lytle v Ames, 225-199; 279 NW 453

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Bond Co. v Railway, 227-142; 287 NW 832

Temporary obstruction of access to property—damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

II IMPROVEMENTS SPECIALLY ASSESSABLE

Paving cost deficiency from general fund—invalid assessment not "deficiency". A city's paving contract providing payment to the contractor in assessment certificates, and any resulting deficiency from the general fund, does not obligate the city to pay the amount represented by the certificates from the general fund when such certificates are declared void. "Deficiency" in such case refers solely to that portion of the cost not lawfully assessable against property.

Lytle v Ames, 225-199; 279 NW 453

III PRIVATE CONTRACTS RELATIVE TO PAYMENT OF ASSESSMENTS

Invalid resolution of necessity—procedural requisites to paving contract—demurrer. After the supreme court has adjudged certain paving assessments and the procedural requisites to a paving contract invalid because the resolution of necessity lacked the necessary three-fourths vote of the city council, an assignee of the paving assessment certificates may not rely on said contract as an express written agreement to pay for the paving from the general fund on account of a clause in the contract requiring deficiencies to be so paid, hence a cause of action thereon is subject to demurrer.

Lytle v Ames, 225-199; 279 NW 453

5976 Grading required.

Failure to establish grade—effect. A city council has no jurisdiction to assess property for the paving of an alley unless it has, by ordinance, established the grade of the alley.

Walter v City, 203-1068; 213 NW 935

Absence of grade nonjurisdictional. The due establishment of a permanent grade on a street is not a jurisdictional condition precedent to graveling said street, and assessing the cost thereof to abutting and adjacent property. It follows that the property owner, when duly notified of the proposed assessment, must present to the city council the objection that no

permanent grade has been established, or said objection will be irrevocably waived.

Peoples Inv. v City, 213-1378; 241 NW 464; 79 ALR 1310

5979 Use of old material.

Atty. Gen. Opinion. See '38 AG Op 199

5980 Sale of salvage.

Atty. Gen. Opinion. See '38 AG Op 199

5981 Gas, water, and other connections.

Sewer and water connections—illegal assessment. When a city, on default of the property owner, installs water and sewer connections, no assessment can be legally made therefor when the city gives to the property owner no rules or directions whatever as to the location and manner of construction of such connections by the owner; especially is this true when the number of connections made by the city is apparently excessive.

Seymour v Ames, 218-615; 255 NW 874

5984 Sewers.

Avoidance of peremptory abatement by city. A sewer system which is being maintained by a municipality for sanitary purposes, but which is a nuisance, should not be peremptorily and finally abated, but the court should (while retaining jurisdiction) enter an interlocutory order of abatement and give the municipality a reasonable time in which to effect the abatement.

Stovern v Town, 204-983; 216 NW 112

Torts—storm waters into sanitary sewer—negligence—jury question. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

5985 Outlets and purifying plants.

Atty. Gen. Opinion. See '38 AG Op 333

5988 State building.

Atty. Gen. Opinion. See '38 AG Op 794

5991 Resolution of necessity — contents.

Atty. Gen. Opinion. See '38 AG Op 769

ANALYSIS

I Resolution in General
II Materials and Method of Construction
III Property Assessable
IV Location and Termini

I RESOLUTION IN GENERAL

Existing but noneffective statute—effect. A city, in acquiring jurisdiction to construct a public improvement, need only comply with existing effective statutes. In other words, it need not comply with a statute which then exists, but which has not yet taken effect.

Butters v City, 202-30; 209 NW 401

Width of paving. A resolution of necessity is not rendered invalid because it fixes the width of the proposed paving at a figure which is in excess of the then ordinance-fixed distance between the curb lines, it appearing that, subsequent to the resolution, the curb lines were so adjusted by ordinance as to correspond with the width of the proposed paving.

Turley v Town, 202-1221; 211 NW 723

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Bond Co. v Railway, 227-142; 287 NW 832

Invalid resolution of necessity—procedural requisites to paving contract—demurrer. After the supreme court has adjudged certain paving assessments and the procedural requisites to a paving contract invalid because the resolution of necessity lacked the necessary three-fourths vote of the city council, an assignee of the paving assessment certificates may not rely on said contract as an express written agreement to pay for the paving from the general fund on account of a clause in the contract requiring deficiencies to be so paid, hence a cause of action thereon is subject to demurrer.

Lytle v Ames, 225-199; 279 NW 453

Necessity—review. Courts may not, in the absence of a plea of fraud or oppression, review the municipal determination that an improvement is necessary.

Brush v Town, 202-1155; 211 NW 856

II MATERIALS AND METHOD OF CONSTRUCTION

Details in re materials. A statement of the kinds of materials to be used in a paving project is sufficient if the public is so apprised of the general character of the materials that

it may intelligently investigate and intelligently object if found necessary.

Cardell v City, 201-628; 207 NW 775

III PROPERTY ASSESSABLE

Assessments—belated objections. The objection that a resolution of necessity did not state whether "abutting or adjacent" property would be assessed for a sewer may not be made for the first time on appeal (1) when the entire municipality had been formed into a sewer district, and (2) when the resolution of necessity specified alternate modes of payment, among which was a special assessment against "all the property in said town."

Chicago, RI Ry. v Dysart, 208-422; 223 NW 371

IV LOCATION AND TERMINI

Width of paving—validity of resolution of necessity. A resolution of necessity is not rendered invalid because it fixes the width of the proposed paving at a figure which is in excess of the then ordinance-fixed distance between the curb lines, it appearing that, subsequent to the resolution, the curb lines were so adjusted by ordinance as to correspond with the width of the proposed paving.

Turley v Dyersville, 202-1221; 211 NW 723

5992 Additional contents.

Failure to object to estimated assessment. The right of a property owner to object to an assessment for paving on the ground that said assessment is in excess of 25 percent of the value of the lot at the time of the levy is not waived by failure to interpose said objection before the resolution of necessity is adopted, even tho the said resolution and the plat and schedule filed in connection therewith show (1) the valuation fixed by the council on the lot, (2) the estimated assessment on the lot, and (3) a notification that objection to the amount of the estimated assessment shall be deemed waived unless interposed before the resolution was adopted.

Smith Co. v City, 210-700; 231 NW 370

5993 Plat and schedule.

Atty. Gen. Opinion. See '25-26 AG Op 61

Unallowable exemption. A tract of ground which abuts upon an improvement may not be exempted from assessment simply because the owner contemplates a possible future donation of the tract to the city for a street.

Johnson v City, 202-617; 210 NW 755

5994 Cost of schedule.

Atty. Gen. Opinion. See '25-26 AG Op 61

5995 Time of hearing—objections permitted.

Adjournment without date—effect. Jurisdiction over a resolution of necessity for paving and curbing of streets is not lost because the city council, after full hearing on the resolution, adjourned without date, to wit: "to the call of the mayor".

Schumacher v City, 214-34; 239 NW 71

5996 Remonstrance—vote required—amendment.

Atty. Gen. Opinion. See '25-26 AG Op 61

5997 Notice.

Atty. Gen. Opinions. See '28 AG Op 190, 262

Assessments—how made lienable. A filing by the city clerk with a county auditor of a copy of the published notice of the resolution of necessity covering a sewer improvement is sufficient (under §816, S., '13), if accompanied by proof of publication in one of the required newspapers. (Note change in §6007, C., '24.)

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

5999 Record—vote required.

Initiation by council—vote required. An assessment for paving cannot be legally made against property when the improvement was initiated by the council by a vote of less than three-fourths of its membership and when the property owner has not estopped himself from objecting to the proceedings.

Seymour v Ames, 218-615; 255 NW 874

Excessive assessment—nonestoppel. A property owner is not estopped to assert that his property has been assessed in excess of 25 percent of its value, because he (along with a majority of the property owners) had petitioned for the improvement and in the petition had waived the 25 percent limitation, when the record made by the city council shows that the petition was ignored, and that the improvement was ordered solely on the motion of the council.

Nelson v City, 208-709; 226 NW 41

Invalid resolution of necessity—procedural requisites to paving contract—demurrer. After the supreme court has adjudged certain paving assessments and the procedural requisites to a paving contract invalid because the resolution of necessity lacked the necessary three-fourths vote of the city council, an assignee of the paving assessment certificates may not rely on said contract as an express written agreement to pay for the paving from the general fund on account of a clause in the contract requiring deficiencies to be so paid, hence a cause of action thereon is subject to demurrer.

Lytle v Ames, 225-199; 279 NW 453

6001 Contract.

Atty. Gen. Opinions. See '28 AG Op 46; '32 AG Op 44

Curing invalidity in contract.

Waller v Pritchard, 201-1364; 202 NW 770

Prohibited express contract excludes implied. Absolute lack of authority in a municipality to enter into an express contract relative to a given subject matter necessarily excludes the possibility of an implied contract on the same subject matter.

Roland Co. v Town, 215-82; 244 NW 707

Negligence of contractor — unanticipated event. A contractor who, while constructing a sewer under the direction of and in accordance with the plans prescribed by the city, is unexpectedly interrupted in his work by the failure of the city to acquire a continuous right of way for the sewer, is under no legal obligation to a property owner to leave his uncompleted work in such condition as will avoid damages which no reasonable foresight would anticipate.

Newton Auto v Herrick, 203-424; 212 NW 680

Illegal reimbursement of contractor for loss. A municipal corporation has no legal authority, and can be given by the general assembly no constitutional legal authority, to pay or contract to pay its contractor, after performance of a contract and after settlement therefor, an added sum to reimburse the contractor for loss sustained by him because the federal government commandeered him and his equipment as a war measure, and thereby delayed the performance of the contract in question.

Love v City, 210-90; 230 NW 373

Acceptance—avoidance by proof of fraud. A nonfraudulently induced acceptance by a city council of a street pavement estops the city thereafter to plead nonperformance of the contract, but not so when the city pleads and proves that, at the time of said acceptance, the contractor, unbeknown to the council and in collusion with city employees, had constructed said pavement of a thickness substantially less than the thickness required by the contract.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Bond — breach — allowable and unallowable action by city. A city, tho named as obligee in a bond for the construction of a street pavement, may not—assuming fraud-induced acceptance by the city of the work—maintain in its own right and for its sole benefit an action at law on the bond for damages consequent on the failure of the contractor to construct the pavement of the thickness required by contract.

But the city may maintain such action in its own name as representative of the assessed property owners, and to recover for itself its own proper outlay (§10968, C., '35).

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Pavement—insufficient thickness — quantity of material purchased. On the issue whether a pavement was constructed of the thickness required by the contract, evidence of the quantity of material sold and delivered to the contractor is quite immaterial, he making no effort to show the quantity of material that actually went into the structure.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Pavement — noncontract tolerance in re thickness. Contract and accompanying specifications reviewed and held not to authorize a tolerance in the thickness of a concrete pavement applicable to the type of paving contracted for.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Substantial failure to perform—nonallowable recovery. Principle reaffirmed that a contractor who, in the construction of a street pavement, substantially fails to comply with the contract specifications, and is thereby barred from recovering the contract price, may not recover on quantum meruit, either from the city or from the property owners—and especially is this true when the contractor is guilty of fraud in the construction work.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Decree—nullification of contract and enjoining payment thereunder—scope. A decree to the effect that a contract between a contractor and a city was void, and enjoining the city from in any manner making any further payment under the contract, is not an adjudication of another action then pending at law wherein the contractor was seeking to recover on the same subject matter, irrespective of the contract; especially is this true when the decree shows that the court excluded such pending action from the scope of its decree.

Hargrave v City, 208-559; 223 NW 274

Nonjurisdiction of budget director. A contract for street improvements, e. g., paving and curbing, to be paid for by special assessments, is entirely outside the purview and purpose of that part of the Budget Act (Ch 23, C., '31) giving the director of the budget jurisdiction on appeal over proposed contracts for the construction of municipal improvements payable in whole or in part from the funds of the municipality; and this is true tho, in the final adjustment, a portion of the costs is paid from general municipal funds.

Schumacher v City, 214-34; 239 NW 71

6003 Agreement to repair—exception.

Bond to repair—construction. A statutory bond "to keep in good repair" a pavement covers repairs necessitated by defective workmanship and defective materials, not repairs necessitated by ordinary wear and tear.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

Breach—right to maintain immediate action. An action on a contractor's bond to repair a street may be maintained without allegation and proof that the city has made the repairs.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

6004 Bids—notice.

Atty. Gen. Opinions. See '28 AG Op 262; '30 AG Op 102

ANALYSIS

I LETTING CONTRACT
II PROPOSALS FOR BIDS AND NOTICE
III BIDS

I LETTING CONTRACT

Statute mandatory. The statute requiring contracts for the repair of a street improvement to be let on competitive bids is mandatory even tho special assessments on benefited property are not within the contemplation of the contract.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Modification of contract without competitive bidding. A city which has so breached a valid paving contract that the contractor is under no duty to perform, may, without submitting the matter to competitive bidding, validly contract in good faith with the contractor for reasonably enlarged compensation (to be paid from the general fund) as a consideration for the performance of the contract notwithstanding the breach; and the execution of the contract on such basis is beyond attack.

Des Moines v Horrabin, 204-683; 215 NW 967

Competitive bidding—unallowable contract. Competitive bidding on municipal public works is mandatory, but is not obtained when bids under specifications prescribed by the city are rejected, and the contract is awarded to a bidder who bids under his own specifications which are materially and substantially different than the specifications prescribed by the city.

Iowa Co. v Town, 216-1301; 250 NW 136

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

Belated objection. Failure to present in the trial court the proposition that a contract for grading was invalid because not let to the lowest bidder, cannot be presented for the first time on appeal.

Carlson v City, 212-373; 236 NW 421

Void contract—nonliability of city as on implied contract. A municipal contract for the repair of a street pavement is void when entered into in disregard of the statute requiring competitive bidding. And after it is decreed that special assessments on benefited property may not be levied, the contractor or his assignee may not, on the theory of an implied contract, recover against the city in its corporate capacity, either at law or in equity (1) for the contract price, or (2) for the reasonable value of the materials and labor furnished under the void contract and retained by the city.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Void contract—sweeping deprivation of rights. A contract for the repair or reconstruction of a street pavement, entered into in total disregard of the mandatory statute requiring competitive bidding, is void ab initio, and, if performed, it follows as a matter of public policy and irrespective of the motives of the parties:

1. That special assessments may not be legally levied to defray the cost of such performance, and
2. That the contractor may not, either, (1) on the theory of a contract implied in fact, or (2) on the theory of quasi-contract or contract implied in law (unjust enrichment) recover against the city for the expenditures made by him even tho all profit be excluded therefrom.

Especially is the foregoing true when the record reveals a contract manipulation which emits an unmistakable odor of fraud and evasion.

Horrabin Co. v Creston, 221-1237; 262 NW 480

Contract—assignment as releasing surety—inadequate proof. A surety on a bond for the construction of a city pavement who claims release from liability because the city consented to an assignment of the contract to a third party, must, at the least, establish such consent by evidence of some action on the part of the city council. Proof of consent by the city auditor, alone, to such assignment, is not sufficient. Especially is this true when the record otherwise shows that the original contractor was the only contractor recognized by the city.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

II PROPOSALS FOR BIDS AND NOTICE

Failure to submit to bids. Failure to submit a contract for a street improvement (other than for oiling or chloriding) to competitive bids renders the entire proceedings invalid,

and, of course, precludes the right to assess property for the cost thereof.

Jackson v City, 206-244; 220 NW 92

Competitive bids—void provision. A clause inserted in a public improvement contract, to the effect that, if rock or quicksand is encountered, the contractor shall be paid on the basis of cost plus a named percentage, is void when both the specifications and the advertisement for bids are silent as to such contingency. (See annos. under §7463.)

Gjellefald v Hunt, 202-212; 210 NW 122

Paving contract—contractor's duty to investigate statutory prerequisites. Sound public policy requires a contractor, proposing performance of construction work for a city, to ascertain whether the council has sufficiently complied with statutory prerequisites so as to possess power to execute the proposed contract.

Lytle v Ames, 225-199; 279 NW 453

III BIDS

Competitive bidding—patentee as bidder—legality of bid. When the city calls for competitive bids on four different kinds of paving mixtures, all of substantially the same utility, desirability, and cost of commercial materials, three of which mixtures are unpatented and one of which is patented, the bid of the patentee, tho the only bid on the patented article, to furnish and lay the patented mixture for one cent per square yard above the price (not shown to be exorbitant) at which he had agreed simply to furnish it to all other bidders, is not fraudulent and void as stifling competition, tho the cost of laying the mixture is some twenty-eight cents per square yard.

Hoffman v City, 212-867; 232 NW 430; 77 ALR 680

6006 Bond.

Hidden fraud—nonestoppel by use. A city, by using a pavement for some three and a half years, does not estop itself from legally moving against the contractor because of a hidden-from-view, fraudulent defect in the work for which the contractor was responsible.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

6007 Certification to county auditor—record book.

Atty. Gen. Opinion. See '32 AG Op 65

Special assessments—when lien or incumbrance. A special assessment for a street improvement which has been undertaken by the city without the letting of a contract does not become a lien or incumbrance on the land from the point of time when the assessment is finally approved by the council.

Frankel v Blank, 205-1; 213 NW 597

How made lienable. A filing by the city clerk with a county auditor of a copy of the published notice of the resolution of necessity covering a sewer improvement is sufficient (under §816, S., '13 [§6007, C., '39]), if accompanied by proof of publication in one of the required newspapers.

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Certificates—special procedure for collection exclusive. A municipal, improvement certificate may not be foreclosed by an action in court, because, (1) the statutes confer no such authority, and (2) the statutes provide a special procedure for collection along with the collection of ordinary taxes. See §7193-d1, C., '31 [§7193.01, C., '39].

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

6008 Lien generally.

Atty. Gen. Opinions. See '32 AG Op 265, 267

Applicability of statute. Principle reaffirmed that §7202 et seq., C., '24, relative to the lien of taxes, have applicability only to general taxes, not to special assessments for street improvements.

Frankel v Blank, 205-1; 213 NW 597

Special assessments—when lien or incumbrance. A special assessment for a street improvement which has been undertaken by the city without the letting of a contract does not become a lien or incumbrance on the land from the point of time when the assessment is finally approved by the council.

Frankel v Blank, 205-1; 213 NW 597

When lien or incumbrance. A covenant against "liens and incumbrances" is not broken by the naked fact that at the time thereof the records of the city show that the city council had finally approved a special assessment on the land for a street improvement which the city had undertaken without the letting of a contract therefor; and this is true even tho the covenantor had appeared in said assessment proceedings and waived irregularities therein.

Frankel v Blank, 205-1; 213 NW 597

Priority. The fully perfected lien of a special assessment for sewer is prior in right to the lien of a subsequent special assessment by the board of supervisors for a public drainage improvement, even tho the latter improvement was initiated prior to the sewer proceedings.

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Equal equities—which shall prevail. Principle reaffirmed that as between equal equities, the first in time shall prevail—that the first in time shall be first in right. Applied as between special assessment certificates issued at

different times against the same lots or land for different improvements.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Loss of lien. The lien of delinquent special assessments for street improvements is irrevocably lost by the failure of the county treasurer to enter such assessments on the current general tax list. And this is true even tho the property owner has formally waived all illegalities in the assessments, and has agreed to pay them, and even tho the county treasurer has kept his books on forms prescribed by the state auditor.

Wallace v Gilmore, 216-1070; 250 NW 105

Tax deed destroys lien of special assessment. A tax sale for general or ordinary taxes and a tax deed issued thereon displaces unmatured special assessment liens which attached prior to said sale.

Iowa Co. v Barrett, 210-53; 230 NW 528
Western Sec. Co. v Bank, 211-1304; 231 NW 317

Tax deed nullifies special assessments. A tax deed issued on a sale for ordinary regular taxes nullifies the lien of all special assessments levied on the land by a city after the sale and before the execution of the deed.

Means v City, 214-948; 241 NW 671

Special assessment liens ended by resale.
Tesdell v Greenwalt, 228- ; 290 NW 676

When deed extinguishes drainage taxes. The lien on land of unmatured installments of duly levied district-drainage taxes is extinguished by a tax deed which is issued on a sale of said land for general (ordinary) taxes levied subsequent to the levy of the drainage taxes.

Fergason v Aitken, 220-1154; 263 NW 850

Certificates—paramount right of holder. The holder of special paving assessment certificates who obtains an assignment of a tax sale certificate, issued on a sale of the lots or land for general taxes, may be compelled by mandamus to reassign said tax sale certificate (on proper payment) to the holder of special sewer assessment certificates which affect the same lots or land and which latter certificates are legally prior in point of time and right to said paving certificates.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Judgment—persons not parties or privies. A party who purchases a municipal, improvement certificate, lienable on certain property, is not privy to (and therefore not bound by) a subsequently instituted action to quiet title, and the decree entered therein, when he is not made a party to said action.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

6012 Cost of improvements.

Special assessments—discrepancies—effect. Relatively small discrepancies in assessments on different sides of the street improved, and on nonabutting properties having the same relative location, will not invalidate an entire assessment, no relief in such special instances being asked.

In re Fourth St., 203-298; 211 NW 375

Void assessment. A street improvement assessment under the nondistrict method, on property separated by a parallel street from the street improved, is void.

Bates v City, 201-1233; 207 NW 793

6014 Cost of paved roadway.

Atty. Gen. Opinion. See '34 AG Op 399

6015 Cost of sewers.

Atty. Gen. Opinion. See '38 AG Op 333

Payment from sewer fund—effect. When public storm sewers are constructed by a city and paid for out of the city sewer fund, no compliance need be had with the law (Ch 308, C., '27) which controls such construction when the cost is assessed to adjacent property.

Dunn v City, 206-908; 221 NW 571

6017 Deficiencies—nonassessable property.

Paving cost deficiency from general fund—invalid assessment not "deficiency". A city's paving contract providing payment to the contractor in assessment certificates, and any resulting deficiency from the general fund, does not obligate the city to pay the amount represented by the certificates from the general fund when such certificates are declared void. "Deficiency" in such case refers solely to that portion of the cost not lawfully assessable against property.

Lytle v Ames, 225-199; 279 NW 453

6018 Assessment.

ANALYSIS

I PERFORMANCE OF CONTRACT
II ACCEPTANCE OR REJECTION OF WORK
III ASCERTAINMENTS OF COSTS, AMOUNTS ASSESSABLE, ETC.

I PERFORMANCE OF CONTRACT

School property—assessability. A school district having lots assessable under a city contract for paving and curbing cannot be deemed a "municipality" entering "into a contract" within the meaning of the state budget act (Ch 23, C., '31). In such circumstances, the district is simply a property owner.

Schumacher v City, 214-34; 239 NW 71

Corporate liability of city. When a paving contract has, in fact, been performed and the work has, in fact, been accepted by the city and assessments made on private property, the conduct of the city in fraudulently conniving, on appeal by property owners, in the

entry of a decree that the contract had not been substantially performed, renders the city personally responsible for the loss suffered by the contractor or his assignee.

Western Corp. v City, 203-1324; 214 NW 687

Failure to substantially perform contract. The appellate court will not invalidate an entire assessment for paving, because of the nonfraudulent failure of the contractor to substantially comply with the construction of some minor part of the work, i. e., a six or eight-inch longitudinal expansion joint along the curb; nor will the court attempt to readjust the assessment because of such default when the record contains no data from which such readjustment can be intelligently arrived at.

Cardell v City, 201-628; 207 NW 775

II ACCEPTANCE OR REJECTION OF WORK

Acceptance of completed construction work —undiscoverable defects—recovery. In the absence of fraud or mistake, the acceptance of construction work by a city bars recovery on the contractor's bond, except as to defects undiscoverable or unknown at the time of acceptance; however, the fraud or mistake necessary to overcome the acceptance must be alleged and proven.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Contractor's bond—implied condition — no acceptance of hidden defects. A bond filed by a contractor, assuming the sole responsibility of constructing a water-tight dam for a city reservoir, contains the implied condition that acceptance by the city of the work will not bar recovery by the city on account of defects unknown and undiscovered at the time of acceptance.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Special assessments—fraudulent failure of city to defend assessments—effect. When a paving contract has in fact been performed, and the work has in fact been accepted by the city and assessments made on private property, the conduct of the city in fraudulently conniving, on appeal by property owners, in the entry of a decree that the contract had not been substantially performed, renders the city personally responsible for the loss suffered by the contractor or his assignee.

Western Pav. Corp. v Marshalltown, 203-1324; 214 NW 687

III ASCERTAINMENTS OF COSTS, AMOUNTS ASSESSABLE, ETC.

Cost of sewer embraced in cost of paving. The cost of a storm sewer, rendered necessary in connection with a paving project, may be included in the assessable cost of said paving; but not a charge for attorney fees.

Turley v Town, 202-1221; 211 NW 723

Bonds—corporate liability. A city which legally issues bonds in the form provided by statute, and on the basis of special assessments for street improvements or sewers, must not only make and maintain valid special assessments on the benefited property sufficient to pay the principal of the bonds and all interest accruing thereon, but must, by the due exercise of its own statutory powers relative to the collection of special assessments, supplement, if necessary, the efforts of the county treasurer to collect and realize on such assessments; and for any deficiency which is traceable to the neglect of the city to perform either of such duties, the city is liable in its corporate capacity.

Hauge v City, 207-1209; 224 NW 520
First N. Bk. v Town, 211-341; 233 NW 712

Assessment certificates create no trust relationship. A city or town in issuing valid special assessment certificates for street improvements and in levying valid assessments for the payment of the certificates, does not constitute itself a trustee for said certificate holders.

Stockholders Inv. v Town, 216-693; 246 NW 826

Certificates—nonliability of city. A city or town which issues a valid special assessment certificate against specific property, for paving, and legally levies an adequate assessment against the property to pay the certificate, does not thereby obligate itself to pay the certificate in case the property owner does not pay it, and in case the property in question remains unsold at tax sale.

Morrison v Culver Est., 216-676; 248 NW 237

Special assessments—nonduty to collect and apply. Neither the statutes relative to special assessments nor the certificates issued in connection with such assessments impose on the city or town any right or duty to collect the assessments and to apply the proceeds thereof.

Stockholders Inv. v Town, 216-693; 246 NW 826

Nonduty to create special fund for payment. A city or town is under no obligation to provide or create a special fund for the payment of special assessment certificates other than the fund resulting from valid assessments on the property involved.

Stockholders Inv. v Town, 216-693; 246 NW 826

Limitation of actions — special assessment certificates. A cause of action accrues against a city or town on special assessment certificates issued and delivered by it for street improvements, at the point of time when it fails

to levy valid assessments for the payment of said certificates, and such cause of action is barred in ten years after said accrual.

Stockholders Inv. v Town, 216-693; 246 NW 826

6019 "Privately owned property" defined.

Atty. Gen. Opinion. See '38 AG Op 794

6021 Assessment—rate.

Atty. Gen. Opinion. See '25-26 AG Op 323

ANALYSIS

I LIMITATION IN GENERAL
II VALUE OF PROPERTY
III BENEFITS

I LIMITATION IN GENERAL

Ordinance—failure to include statute. An ordinance which provides for an authorized public improvement and for the assessment of the cost thereof on specified property is not invalid because it does not embrace or repeat therein the statutory limitations on such assessment.

Brush v Town, 202-1155; 211 NW 856

Dual systems of improvements. Two paving contracts initiated and carried on in good faith under separate resolutions do not constitute one system of improvement, even tho they in part affect the same property.

Curtis v Town, 202-588; 210 NW 800

Inequitable assessment—insufficient basis. Evidence of the relative values of different properties is not, in itself, sufficient basis on which to determine whether an assessment is inequitable.

Walter v City, 203-1068; 213 NW 935

Fatally inadequate record on appeal.

Cardell v City, 201-628; 207 NW 775

II VALUE OF PROPERTY

Value of property—elements. In determining the value of real property as the basis for a special assessment, due consideration should be given to its location and adaptability for residence or business purposes, its assessed value, offers made for it, if any, at a public auction, along with the past, present, and future prospects of the city or town.

Turley v Town, 202-1221; 211 NW 723

Valuing agricultural lands. The value of agricultural lands within a municipality must not be determined for special assessment purposes on the basis that the lands will be abandoned for agricultural purposes, and will be platted into blocks and lots; but reasonable future prospects may be given due consideration. Evidence reviewed and values held excessive.

Gronbech v Town, 213-358; 239 NW 26

Selling price as evidence of value. The actual selling price of specially assessed property is not necessarily conclusive on the owner as to its actual value. The terms of the sale are a very material consideration.

Johnson v City, 202-617; 210 NW 755

Improvement—value at time of levy. On a special assessment levied against property for curb and gutter, future prospects of property must be considered only in determining its value, with improvement, at the time of levy.

Nash v Ames, (NOR); 282 NW 340

Personal property not assessable. Only real estate is assessable for a municipal pavement. In other words, in determining the value of a tract of land in order to fix an assessment as high as one-fourth of the actual value, the value of buildings and other improvements belonging solely to lessees must be excluded.

Chi. RI Ry. v Reinbeck, 201-126; 206 NW 664

Presumption. Special assessments for street improvements are presumptively just and correct.

Curtis v Town, 202-588; 210 NW 800
In re Hume, 202-969; 208 NW 285

Assessment in excess of statutory permission. A special assessment in excess of 25 percent of the value of the property is perfectly valid when the property owner fails to enter any objections thereto, as provided by statute. (See annos. under §6029.)

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Paving assessments over 25 percent—reduction. In an appeal by a city from a ruling by the trial court that an assessment for paving was more than 25 percent of the value of the adjoining lot and from the resulting order reducing the assessment, evidence reviewed and held that the court's finding was sustained by the weight of the evidence.

Lee v Ames, 225-1061; 283 NW 427

Excessive assessment—nonestoppel. A property owner is not estopped to assert that his property has been assessed in excess of 25 percent of its value, because he (along with a majority of the property owners) had petitioned for the improvement and in the petition had waived the 25 percent limitation, when the record made by the city council shows that the petition was ignored, and that the improvement was ordered solely on the motion of the council.

Nelson v City, 208-709; 226 NW 41

Failure to object to estimated assessment. The right of a property owner to object to an assessment for paving on the ground that said assessment is in excess of 25 percent of the value of the lot at the time of the levy is not waived by failure to interpose said objection before the resolution of necessity is

adopted, even tho the said resolution and the plat and schedule filed in connection therewith show (1) the valuation fixed by the council on the lot, (2) the estimated assessment on the lot, and (3) a notification that objection to the amount of the estimated assessment shall be deemed waived unless interposed before the resolution was adopted.

Smith, etc. Co. v City, 210-700; 231 NW 370

Assessments exceeding statutory limitation —city council's nonfraudulent judgment final. Altho refunding bonds contain a certification that the city has done all things as required by law, such certification is not a misrepresentation, and a city incurs no liability by reason of a claim that certain properties were assessed in excess of the 25 percent statutory limitation, for the reason that having been set up by the legislature to make such determination, the city council's discretion and judgment respecting property values, in the absence of fraud or other sufficient grounds, are not subject to this attack in the courts.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Excessive assessment—when evidence admissible. In an action against a city in its corporate capacity to recover a deficiency on a street improvement or sewer bond, it may be shown that the special assessment for the purpose of paying the bond was in excess of 25 percent of the value of the property, and that such fact resulted in the property's selling at tax sale for a less sum than the assessment.

Hauge v City, 207-1209; 224 NW 520

Excessive assessments—inadequate proof. The failure of property to sell at tax sale for the amount of the special assessment levied against it for paving does not establish the contention that the property was assessed in excess of 25 percent of its value.

Morrison v Culver Est., 216-676; 248 NW 237

Excessiveness—evidence. Evidence held to justify a materially higher assessment for paving than the assessment fixed by the trial court.

Nelson v City, 208-709; 226 NW 41
Verlinden v City, 208-892; 226 NW 42

Good faith excessive assessments. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers, by the various property owners, of illegalities and irregularities in the proceedings and the promises of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the assessments, without fraud or collusion, exceeded 25 percent of the value of each of the various properties.

Stockholders Inv. v Town, 216-693; 246 NW 826

Intentionally excessive assessment—liability of city. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers by property owners of illegalities and irregularities in the proceedings, and the written promise of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the council knowingly and intentionally levied the assessments in excess of 25 percent of the value of each of the various properties.

Inter-Ocean Co. v Sioux City, 219-998; 258 NW 907

III BENEFITS

Computation—method employed. The manner in which the amount of a special assessment is arrived at is quite immaterial if such amount is just and equitable and is in proportion to and not in excess of the benefits conferred.

In re Fourth St., 203-298; 211 NW 375

Future prospects—evidence. Future prospects of property and reasonable anticipations concerning it may be given consideration (1) in fixing the benefits which result to the property by reason of the construction of a public improvement, and (2) in determining the actual value. Evidence reviewed, and held both to sustain and not to sustain the ruling of the trial court as to different tracts.

Finkle v City, 205-918; 218 NW 618

Present use of property. The fact that the owner of real estate is, at the time of a public improvement, using it for such a particular purpose that the land derives little or no benefit from the improvement presents no legal obstacle to allowing the public authorities to view the land in its general relations and apart from its particular use and justly and equitably assess it accordingly.

In re Fourth St., 203-298; 211 NW 375

Presumption—failure to overcome. An assessment for sewer must stand when appellant fails to establish his objections: to wit, that the assessment exceeds benefits and exceeds 25 percent of the value of the property.

Chi. RI Ry. v Town, 208-422; 223 NW 371

Excessive assessments — burden to overthrow. When the record reveals both by presumption and by actual proof that property has been benefited by the construction of a sewer improvement, the complaining property owner must, with reasonable definiteness, es-

III BENEFITS—concluded

tablish the extent that the assessments exceed the amount of said benefits.

Brenton v Des Moines, 219-267; 257 NW 794

Assessment—evidence. Evidence relative to the location, topography, and surroundings of municipal acreage, and the extent to which it was supplied with municipal facilities and advantages reviewed; and held that a street paving assessment against it of $900 was approximately correct, in view of the statutory prohibition against assessing property in excess of 25 percent of its value.

Adams v Town, 205-456; 218 NW 468

6025 City engineer—duties.

Adoption of engineer's plans—nonliability for tort unless obviously defective. In adopting plans for pavement of alley intersection, the city was acting in a "judicial capacity" and was not liable for defects in engineer's plans unless as a matter of law the plans were obviously defective.

Russell v Sioux City, 227-1302; 290 NW 708

6026 Notice of assessment.

Atty. Gen. Opinion. See '28 AG Op 262

Special assessments—timely objections. Objections to a proposed special assessment by a city council for paving are timely when filed by the property owner prior to the date for filing such objections, as specified in the published notice of the proposed assessment, even tho such filing was more than 20 days after the first publication.

Western Corp. v City, 203-1324; 214 NW 687

6028 Hearing and decision.

Special assessments—discrepancies — effect. Relatively small discrepancies in assessments on different sides of the street improved, and on nonabutting properties having the same relative location, will not invalidate an entire assessment, no relief in such special instances being asked.

In re Fourth St., 203-298; 211 NW 375

6029 Objections waived.

ANALYSIS

I REMEDIES IN GENERAL
II OBJECTIONS
III ESTOPPEL TO OBJECT

I REMEDIES IN GENERAL

Void assessment—remedies available. A void assessment for a street improvement may be annulled either (1) on appeal or (2) by an independent action in equity, even tho no objections to the assessment are filed with the city council.

Bates v City, 201-1233; 207 NW 793

Objections as exclusive remedy. Property owners who unsuccessfully file objections before the city council as to an assessment may not thereafter maintain an action in equity, when the proceedings leading up to and culminating in the assessment are prima facie regular, tho long drawn out and delayed and perhaps irregular.

Franquemont v Munn, 208-528; 224 NW 39

Jurisdictional objections. The objection that an assessment for sewer is void because the work was let on a cost-plus contract when the specifications and notice to bidders were silent as to any such contract goes to the jurisdiction of the council to make the assessment, and may be raised for the first time on appeal.

Chi. RI Ry. v Town, 208-422; 223 NW 371

When sufficiency immaterial. The question whether objections filed before a city council against the confirmation of a special assessment are sufficiently specific becomes quite immaterial when it is made to appear that the council was wholly without jurisdiction to make the assessment.

Rivers v City, 202-940; 211 NW 415

Void assessment. The act of a city in taking possession of a strip of ground and paving it as a street, and assessing the cost thereof on the abutting land, without having in any manner acquired the paved land for street purposes, is absolutely void.

Beim v Carlson, 209-1001; 227 NW 421

Nonvoid assessment. The inclusion in an assessment for a street improvement of unallowable items of expense does not render the assessment fraudulent and void; and consequently an independent action in equity to cancel the assessment will not lie, objection before the council and appeal being the proper remedy.

Meijerink v Lindsay, 203-1031; 213 NW 934
Walter v City, 203-1068; 213 NW 935

II OBJECTIONS

Timely objections. Objections to a proposed special assessment by a city council for paving are timely when filed by the property owner prior to the date for filing such objections, as specified in the published notice of the proposed assessment, even tho such filing was more than 20 days after the first publication. (§6026, C., '24.)

Western Corp. v City, 203-1324; 214 NW 687

Inadequate objection. An objection before a city council that a sewer assessment was excessive cannot possibly be construed as an attack on the jurisdiction of the council to make the assessment.

Chi. RI Ry. v Town, 208-422; 223 NW 371

Fatally indefinite objection. An objection to a special assessment must be explicit

enough to fairly call to the attention of the city council the nature of the property owner's complaint and to enable the council to investigate. "I object" is quite insufficient.

Downing v City, 203-216; 212 NW 549

Noncomprehensive objection. An objection on appeal that a special assessment was not "ratably and proportionately distributed over all the property in the district" is not embraced within an objection filed with the council to the effect that the assessment "is in excess of benefits, confiscatory, oppressive."

Walter v Ida Grove, 203-1068; 213 NW 935

III ESTOPPEL TO OBJECT

Failure to object—effect. A special assessment in excess of 25 percent of the value of the property is perfectly valid when the property owner fails to enter any objections thereto, as provided by statute. (See annos. under §6021.)

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Schumacher v City, 214-34; 239 NW 71

Failure to object—waiver. The right of a property owner to object to an assessment for paving on the ground that said assessment is in excess of 25 percent of the value of the lot at the time of the levy, is not waived by failure to interpose said objection before the resolution of necessity is adopted, even tho the said resolution and the plat and schedule filed in connection therewith show (1) the valuation fixed by the council on the lot, (2) the estimated assessment on the lot, and (3) a notification that objection to the amount of the estimated assessment shall be deemed waived unless interposed before the resolution was adopted. (§§5992, 5993, 5995, 6021, 6023, 6026, C., '27.)

Smith v City, 210-700; 231 NW 370

Belated objections. The objection that a resolution of necessity did not state whether "abutting or adjacent" property would be assessed for a sewer may not be made for the first time on appeal (1) when the entire municipality had been formed into a sewer district, and (2) when the resolution of necessity specified alternate modes of payment, among which was a special assessment against "all the property in said town".

Chi. RI Ry. v Town, 208-422; 223 NW 371

Fatally delayed objection. A property owner may not, after a permanent sidewalk has been fully completed, enjoin the collection of a special assessment on his property on the ground that the sidewalk was constructed by an officer of the city. (§5673, C., '27.)

Perrott v Balkema, 211-764; 234 NW 240

Absence of grade nonjurisdictional. The due establishment of a permanent grade on a street is not a jurisdictional condition precedent to graveling said street, and assessing the cost thereof to abutting and adjacent property. It follows that the property owner, when duly notified of the proposed assessment, must present to the city council the objection that no permanent grade has been established, or said objection will be irrevocably waived.

Peoples Inv. v City, 213-1378; 241 NW 464; 79 ALR 1310

6030 Levy.

Atty. Gen. Opinion. See '28 AG Op 400

6031 Maturity when no waiver made.

Atty. Gen. Opinions. See '25-26 AG Op 27; '32 AG Op 65

6032 Maturity under implied waiver.

Atty. Gen. Opinions. See '25-26 AG Op 27, 295; '28 AG Op 400; '30 AG Op 145; '34 AG Op 412

Graveling street—absence of grade nonjurisdictional. The due establishment of a permanent grade on a street is not a jurisdictional condition precedent to graveling said street, and assessing the cost thereof to abutting and adjacent property. It follows that the property owner, when duly notified of the proposed assessment, must present to the city council the objection that no permanent grade has been established, or said objections will be irrevocably waived.

Peoples Co. v Des Moines, 213-1378; 241 NW 464; 79 ALR 1310

6033 Installments — payment — delinquency.

Atty. Gen. Opinions. See '25-26 AG Op 27, 222, 295; '28 AG Op 400; '30 AG Op 50, 145; '32 AG Op 65; '34 AG Op 399, 412, 554; '36 AG Op 96; '38 AG Op 851

County treasurer as agent. The county treasurer is a statutory agent of a city in the collection of special assessments for street improvements and sewers.

Hauge v City, 207-1209; 224 NW 520

Duty to discharge assessments. As between life tenants and remaindermen, the former, during their tenancy, should pay the interest on special assessments, and the latter should pay the principal; and refunds on such assessments should be distributed in the same proportions.

Cooper v Barton, 208-447; 226 NW 70

6034 Certification of levy.

Atty. Gen. Opinion. See '30 AG Op 369

6035 Right of payment.

Atty. Gen. Opinions. See '25-26 AG Op 222; '30 AG Op 262

6036 Division of property.

Atty. Gen. Opinion. See '30 AG Op 369

6037 Tax sale.

Atty. Gen. Opinions. See '28 AG Op 226, 425

Inadequate payment. It is idle for one to assert that he has paid all taxes due against

real estate when he concededly has not paid matured special assessments on the land.

Wren v Berry, 214-1191; 243 NW 375

Public improvements—excessive assessments—inadequate proof. The failure of property to sell at tax sale for the amount of the special assessment levied against it for paving does not establish the contention that the property was assessed in excess of 25 percent of its value.

Morrison v Culver Est., 216-676; 248 NW 237

Statutes part of certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax sale certificate assignment—installment redemption act. An assignment of a tax sale certificate of purchase by county to city was not premature under chapter 191 of the 47th GA authorizing redemption in installments from public bidder where owner of property failed to take advantage of such act within the 6 months period prescribed therein, and the city was entitled to such assignment because of special assessment due and unpaid on the property.

Fleck v Duro, 227-356; 288 NW 426

Specials included in tax sale. The inclusion in tax sale of an installment on a special assessment bond was permissible under this section and did not render sale void where county bid only the amount of the general taxes, interest, penalty and costs pursuant to §7255.1, C., '39, authorizing purchase by county.

Fleck v Duro, 227-356; 288 NW 426

Tax sale—error in name of owner. A tax sale is not void because the real estate was advertised and sold as belonging to one who owned only a minor part thereof.

Wren v Berry, 214-1191; 243 NW 375

Tax sales enjoined—error as to nonparties. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

Resale to correct previous error.

Tesdell v Greenwalt, 228- ; 290 NW 676

Taxes suspended by appeal—effect. There cannot be a valid sale of real estate for taxes, a part of which consists of special assessments for paving, and which part has been suspended by an appeal to the district court.

Fidelity Inv. v White, 208-519; 223 NW 884

Mandamus to cancel sale. Mandamus (assuming the propriety of the remedy) will not lie to wholly cancel a tax sale which is only partially void.

Wren v Berry, 214-1191; 243 NW 375

6039 City as purchaser.

Atty. Gen. Opinion. See '34 AG Op 144

Deficiency—corporate liability. A city which legally issues bonds in the form provided by statute, and on the basis of special assessments for street improvements or sewers, must not only make and maintain valid special assessments on the benefited property sufficient to pay the principal of the bonds and all interest accruing thereon, but must, by the due exercise of its own statutory powers relative to the collection of special assessments, supplement, if necessary, the efforts of the county treasurer to collect and realize on such assessments; and for any deficiency which is traceable to the neglect of the city to perform either of such duties, the city is liable in its corporate capacity.

Hauge v City, 207-1209; 224 NW 520
First N. Bk. v Town, 211-341; 233 NW 712

Redemption — nonright in town. A town which had no title to real estate when it was sold for nonpayment of special assessments levied by the town, and has acquired no title since said sale, may not redeem after the issuance of tax deed to the tax sale purchaser; and if equitable circumstances are relied on as a basis for redemption, the proof of such circumstances must be substantial.

Story City v Hadley, 214-132; 241 NW 649

Public improvements — assessment certificates—nonliability of city. A city or town which issues a valid special assessment certificate against specific property, for paving, and legally levies an adequate assessment against the property to pay the certificate, does not thereby obligate itself to pay the certificate in case the property owner does not pay it, and in case the property in question remains unsold at tax sale.

Morrison v Culver Est., 216-676; 248 NW 237

6041 Assignment of certificate.

Atty. Gen. Opinions. See '30 AG Op 280; '32 AG Op 265, 267; '34 AG Op 165; '36 AG Op 56, 341; '38 AG Op 2, 266

Certificate as chattel—transferableness. A tax sale certificate of purchase is a mere chattel subject to sale by assignment and indorsement and delivery, and the owner of such certificate who presents the same at the expiration of redemption period is entitled to a deed.

Fleck v Duro, 227-356; 288 NW 426

Paramount right of holder. The holder of special paving assessment certificates who obtains an assignment of a tax sale certificate, issued on a sale of the lots or land for general taxes, may be compelled by mandamus to reassign said tax sale certificate (on proper payment) to the holder of special sewer assessment certificates which affect the same lots or land and which latter certificates are legally prior in point of time and right to said paving certificates.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Duty enjoined from "station". Mandamus is a proper remedy to compel the holder of a tax sale certificate to assign the same to a party who has a prior, paramount, legal right to such certificate. This is true because of the "station" which said obligated party has legally taken upon himself. (§12440, C., '35.)

Inter-Ocean Co. v Dickey, 222-995; 270|NW 29

Tax deed nullifies special assessments. A tax deed issued on a sale for ordinary regular taxes nullifies the lien of all special assessments levied on the land by a city after the sale and before the execution of the deed.

Means v City, 214-948; 241 NW 671

Specials included in tax sale. The inclusion in tax sale of an installment on a special assessment bond was permissible under §6037, C., '39, and did not render sale void where county bid only the amount of the general taxes, interest, penalty and costs pursuant to §7255.1, C., '39, authorizing purchase by county.

Fleck v Duro, 227-356; 288 NW 426

Certificate assignment—failure to enter on tax sale register. In the statute providing that tax sale certificate of purchase shall be assignable by indorsement and by entry in tax sale register, and that "when such assignment is so entered" it shall vest in assignee all right of assignor, the legislature did not intend by the use of such quoted words to bar other means of proving ownership of such a certificate. Hence assignments of certificate made by indorsement alone without entry upon tax sale register were not void.

Fleck v Duro, 227-356; 288 NW 426

Tax sale certificate assignment. An assignment of a tax sale certificate of purchase by county to city was not premature under chapter 191 of the 47th GA authorizing redemption in installments from public bidder where owner of property failed to take advantage of such act within the 6 months period prescribed therein, and the city was entitled to such assignment because of special assessment due and unpaid on the property.

Fleck v Duro, 227-356; 288 NW 426

Redemption from tax sale. A town which had no title to real estate when it was sold for nonpayment of special assessments levied by the town, and has acquired no title since said sale, may not redeem after the issuance of tax deed to the tax sale purchaser; and if equitable circumstances are relied on as a basis for redemption, the proof of such circumstances must be substantial.

Story City v Hadley, 214-132; 241 NW 649

Redemption from sale—notice. Where notice of expiration of right of redemption from tax sale was filed with, attached to, and made a part of affidavit of proof of service, and where treasurer made an entry which read, "Notice for deed filed Nov. 10, 1937", opposite the record entry of the sale on his sale register, and the auditor, upon written communication from treasurer, made a similar entry in sale book in his office, there was substantial and sufficient compliance with statutory requirements relating thereto.

Fleck v Duro, 227-356; 288 NW 426

Notice by assignor of certificate. Where the assignor of a tax sale certificate of purchase has given notice of expiration of redemption right, assignee is not required to give another such notice.

Fleck v Duro, 227-356; 288 NW 426

Notice—affidavit of service. Under statute prescribing method of making affidavit to prove service of notice of expiration of right of redemption from tax sale, it is not necessary for affiant to state method and manner in which the holder of certificate of purchase authorized and directed him to serve the notice. Hence an affidavit stating that agent made service on behalf of and "under the direction of Polk county, Iowa" was sufficient.

Fleck v Duro, 227-356; 288 NW 426

Affidavit of service—holder's duty to make. The holder of a tax sale certificate of purchase must give the notice of expiration of right of redemption, and either he or his agent or attorney must make the affidavit of service of such notice.

Fleck v Duro, 227-356; 288 NW 426

6042 Improvement fund.

Atty. Gen. Opinion. See '25-26 AG Op 444

6043 Roadway district fund.

Atty. Gen. Opinion. See '25-26 AG Op 444

Agricultural lands—conflicting statutes. The general statutory declaration that designated

agricultural lands within the limits of a city or town shall not be taxed "for any city or town purpose" (§6210, C., '27), must be deemed modified by a contemporaneous specific statute to the effect that a tax may be levied "upon all the taxable property in such city" for the purpose of paying the cost of paving arterial highways into and out of the city.

McKinney v McClure, 206-285; 220 NW 354

6044 Payment from primary road fund.

Atty. Gen. Opinion. See '32 AG Op 194

6051.1 Improvements by street railways.

Street railways—fundamental purpose of statute. The fundamental purpose of the statute relative to the assessment of street railways for paving in connection with their tracks (§6051-c1, C., '31 [§6051.1, C., '39]) is to cover the entire subject and declare a basic rule for the government of the same.

In re Walnut Bridge, 220-55; 261 NW 781

Assessments—"public place" includes bridge. The term "public place", as used in the statute relative to the obligation of street car companies to construct, reconstruct and maintain paving between and outside the rails of their tracks, embraces a public bridge.

In re Walnut Bridge, 220-55; 261 NW 781

Assessments — when franchise ordinance must yield to statute. A street railway franchise ordinance which specifies, in effect, that, until the state statutes otherwise provide, the obligation of the company to construct and reconstruct paving between and outside the rails of its tracks shall be thus and so, manifestly must yield to such later enacted state statute.

In re Walnut Bridge, 220-55; 261 NW 781

6052 Improvements by railways.

Atty. Gen. Opinion. See '34 AG Op 362

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Bond Co. v Railway, 227-142; 287 NW 832

6059 Relevy.

Reassessment—basis. A city or town cannot be held to be under obligation to reassess property, which is subject to assessment for the cost of an improvement, in the absence of some showing of inadequacy in the assessment already made.

Morrison v Culver Est., 216-676; 248 NW 237

6061 Correction of assessments.

Deficiency—corporate liability. A city which legally issues bonds in the form provided by statute, and on the basis of special assessments for street improvements or sewers, must not only make and maintain valid special assessments on the benefited property sufficient to pay the principal of the bonds and all interest accruing thereon, but must, by the due exercise of its own statutory powers relative to the collection of special assessments, supplement, if necessary, the efforts of the county treasurer to collect and realize on such assessments; and for any deficiency which is traceable to the neglect of the city to perform either of such duties, the city is liable in its corporate capacity.

Hauge v City, 207-1209; 224 NW 520
First N. Bk. v Town, 211-341; 233 NW 712

6063 Appeal on assessment.

Appeal as sole remedy. The objection that the board of supervisors levied an assessment for a highway improvement against an entire 40-acre tract, instead of that part only which was at right angles to the improvement, must be presented on appeal from the assessment, and not by an independent action in equity.

Paul v Marshall County, 204-1114; 216 NW 736

Equitable action treated as appeal. An apparently independent action in equity to correct nonjurisdictional defects in a special assessment may be treated as an appeal from the adverse action of the council when so mutually treated by the litigants.

Walter v City, 203-1068; 213 NW 935

Unauthorized appeal. One who has no interest in the title to property may not appeal from a special assessment levied thereon.

Wright Const. v City, 202-661; 210 NW 809

Taxes suspended by appeal—effect. There cannot be a valid sale of real estate for taxes, a part of which consists of special assessments for paving, which part has been suspended by an appeal to the district court.

Fidelity Inv. v White, 208-519; 223 NW 884

Objections—sufficiency. An objection on appeal that a special assessment was not "ratably and proportionately distributed over all

the property in the district", is not embraced within an objection filed with the council to the effect that the assessment "is in excess of benefits, confiscatory, oppressive". (See under §6029.)

Walter v City, 203-1068; 213 NW 935

Special assessments—inclusion of improper expense—effect. The inclusion in an assessment for a street improvement of unallowable items of expense does not render the assessment fraudulent and void; and consequently an independent action in equity to cancel the assessment will not lie, objection before the council and appeal being the proper remedy.

Meijerink Estate v Lindsay, 203-1031; 213 NW 934

Appeal—effect on assignee of prematurely issued certificates. The assignee of paving assessment certificates who takes his assignment during the pendency of an appeal by the property owners (the certificates being prematurely issued) is bound, so far as the property owners are concerned, by the final decree on appeal, even tho said assignee was not a party to such appeal.

Western Corp. v City, 203-1324; 214 NW 687

6064 Perfecting appeal.

See §12759.1

Fatally defective notice. Where statute required notice of appeal on assessment to be directed to the city or town as defendant, and notice was directed to the "Clerk of the incorporated town", a special appearance was properly sustained—the district court having no jurisdiction to hear the appeal because of the defective notice.

Fuller v Town, 226-604; 284 NW 455

Proper addressee. A notice of appeal to the supreme court addressed to a municipal corporation by name as the sole adverse party is all-sufficient, and service of such notice on the mayor of the city is likewise all-sufficient, even tho the notice is in no manner addressed to the mayor. (See under §12837.)

Lundy v City, 201-186; 206 NW 954
Western Corp. v City, 203-1324; 214 NW 687

Informal approval of bond. In an appeal from a special assessment for a street improvement, an appeal bond otherwise proper, which has been in fact approved by the clerk of the district court, is not rendered insufficient because of the failure of the said clerk to formally enter his approval on the bond.

Bates v City, 201-1233; 207 NW 793
Dickinson v City, 202-782; 211 NW 417
Rivers v City, 202-940; 211 NW 415

Inadequate bond nonamendable. The filing of an appeal bond in the full amount required by statute, and within 15 days from the date of a special assessment for paving being jurisdictional, it follows that a bond inadequate in amount cannot be rectified by an amendment after the lapse of said 15 days.

Woodard v City, 212-326; 232 NW 806

6065 Trial, judgment, and costs.

Failure to substantially perform contract—effect. The appellate court will not invalidate an entire assessment for paving because of the nonfraudulent failure of the contractor to substantially comply with the construction of some minor part of the work, i. e., a six or eight-inch longitudinal expansion joint along the curb; nor will the court attempt to readjust the assessment because of such default when the record contains no data from which such readjustment can be intelligently arrived at. (See under §6018.)

Cardell v City, 201-628; 207 NW 775

Decree as to special assessment not adjudication of damages. A decree fixing the amount of special assessment on property consequent on a street improvement cannot be deemed an adjudication of the damages suffered by the property owner consequent on the improvement's cutting off the owner's ingress to and egress from the property, even tho the decree markedly reduced the assessment made by the city council.

Ashman v City, 209-1247; 228 NW 316; 229 NW 907

CHAPTER 308.1

JOINT USE OF MUNICIPAL SEWERS

Atty. Gen. Opinion. See '28 AG Op 400

CHAPTER 308.2

SEWER RENTALS

Atty. Gen. Opinions. See '32 AG Op 89; '38 AG Op 340

CHAPTER 308.3

SELF-LIQUIDATING IMPROVEMENTS

Atty. Gen. Opinions. See '34 AG Op 294, 644; '36 AG Op 233

6066.24 Sewage treatment plants—acquisition—bonds.

Swimming pool proprietors—degree of care required. The general rule that the proprietor of a bathhouse or swimming pool for profit is bound to use ordinary care to guard against injury to his patrons held applicable to nonprofit corporation operating a swimming pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—liability. In an action to recover damages for the drowning of an eleven year old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about one hundred boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool—drowning—res ipso loquitur—nonapplicable. The mere fact a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool not an "attractive nuisance". A swimming pool, either natural or artificial, is not an attractive nuisance.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—failure to advise as to depth. A corporation, operating a swimming pool in which an eleven year old boy drowned, was not negligent in not personally informing the deceased of the depth of the water in the pool and in failing to inquire of him as to whether he could swim, where there were many signs, plainly visible about the pool indicating the various depths, and the age, intelligence, and experience of the deceased were sufficient to advise him of the inherent dangers of entering a body of water deeper than his height, especially when he was under the supervision of adults, who had more direct and complete control over him than the agents and employees operating the pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—life guards—sufficiency. Negligence of a corporation operating a swimming pool in which an eleven-year-old boy drowned, could not be grounded upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v Playground Assn., 227-81; 287 NW 259

Parks—scope of power. Statutory power to acquire land for parks embraces the power to acquire land for golf courses.

Golf View Co. v Sioux City, 222-433; 269 NW 451

CHAPTER 309

JOINT MUNICIPAL IMPROVEMENT OF HIGHWAYS

Atty. Gen. Opinion. See '28 AG Op 400

CHAPTER 310

PROTECTION FROM FLOODS

Atty. Gen. Opinion. See '25-26 AG Op 245

6080 Authorization.

Atty. Gen. Opinion. See '25-26 AG Op 246

Temporary obstruction of access to property—damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

Torts—storm waters into sanitary sewer—negligence—jury question. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

6089 Assessment.

Intentionally excessive assessment—liability of city. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers by property owners of illegalities and irregularities in the proceedings, and the written promise of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the council knowingly and intentionally levied the assessments in excess of 25 percent of the value of each of the various properties.

Inter-Ocean Co. v Sioux City, 219-998; 258 NW 907

6090 Statutes governing.

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

6094 Duty to construct.

Atty. Gen. Opinion. See '25-26 AG Op 246

6096 Condemnation.

Atty. Gen. Opinion. See '25-26 AG Op 246

CHAPTER 311

BONDS AND CERTIFICATES FOR STREET IMPROVEMENTS AND SEWERS

Atty. Gen. Opinions. See '34 AG Op 399; '38 AG Op 333

6104 Certificates authorized.

Certificates—special procedure for collection exclusive. A municipal improvement certificate may not be foreclosed by an action in court, because, (1) the statutes confer no such authority, and (2) the statutes provide a special procedure for collection along with the collection of ordinary taxes. See §6007 et seq., §7193-d1, C., '31 [§7193.01, C., '39].

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Paving—suing city on express contract—other theories excluded. Where a holder of invalid paving assessment certificates elects to base his recovery solely on an express written contract, no question of estoppel, waiver, ratification, or accord and satisfaction is involved.

Lytle v Ames, 225-199; 279 NW 453

Certificates — assignment — nonnecessity to record. Conceding arguendo, that municipal improvement certificates and assignments thereof are instruments which require filing and recordation under §10105, C., '31, yet the failure to so file and record is quite inconsequential as to parties who had full knowledge that the certificates were outstanding.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Judgment — persons not parties or privies. A party who purchases a municipal improvement certificate, lienable on certain property, is not privy to (and therefore not bound by) a subsequently instituted action to quiet title, and the decree entered therein, when he is not made a party to said action.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Primary road bonds — unlawful diversion. Roads and streets within cities and towns are not part of the primary road system, even tho such roads and streets are continuations of primary roads which are outside cities and towns. It follows that county bonds voted for the purpose of improving the primary roads of the county may not be legally issued nor may the proceeds thereof be legally employed for

the improvement of roads and streets within cities and towns.

Wallace v Foster, 213-1151; 241 NW 9

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

6105 Requirements.

Personal liability of property owner. Special assessment certificates for paving held to impose no personal obligation on the property owner to pay the assessment.

Morrison v Culver Est., 216-676; 248 NW 237

Certificate — lien — noninvalidating defects. Record reviewed, and held that a municipal special assessment certificate for paving was not invalidated because the name of the owner of the land assessed did not appear therein; nor was the lien of certain installments of said assessment lost because of the failure of the proper county officials to bring forward on the tax books, at the time of tax sale, said unpaid installments (§7193, C., '35).

Hawkeye Ins. v Munn, 223-302; 272 NW 85

6106 Payment.

Atty. Gen. Opinion. See '34 AG Op 198

Special assessments — collection — county treasurer as agent. The county treasurer is a statutory agent of a city in the collection of special assessments for street improvements and sewers.

Hauge v Des Moines, 207-1209; 224 NW 520

Liability of property owner. Special assessment certificates for paving held to impose no personal obligation on the property owner to pay the assessment.

Morrison v Culver Est., 216-676; 248 NW 237

6107 Rights of bearer.

Atty. Gen. Opinion. See '34 AG Op 399

Appeal — effect on assignee of prematurely issued certificates. The assignee of paving assessment certificates who takes his assignment during the pendency of an appeal by the property owners (the certificates being prematurely issued) is bound, so far as the property owners are concerned, by the final decree on appeal, even tho said assignee was not a party to such appeal.

Western Corp. v City, 203-1324; 214 NW 687

6109 Bonds authorized.

Atty. Gen. Opinion. See '38 AG Op 333

6112 Bonds—series.

Pro rata payment nonpermissible. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6113 Maturity—name of street—interest.

Successively due special assessment bonds—payment. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6114 Form.

Right to modify. A statute which, in prescribing the form of a street improvement bond, provides for a promise to pay on a specified date, but also provides that the bond shall be "subject to changes that will conform them to the ordinances or resolution of the council", fairly authorizes the insertion in the bond of an option to pay on or before said specified date.

Ballard-Hassett v City, 207-1351; 224 NW 793

Legal acceleration of payment. A municipal improvement bond which provides for payment (1) on a specified date "or prior thereto at the option of the city", and (2) solely from the proceeds of special property assessments, is, nevertheless, legally payable, at the option of the city, prior to said specified maturity date, from the proceeds of a refund of the bond, even tho such refunding was authorized by a statute enacted subsequent to the issuance of the bond in question.

Ballard-Hassett v City, 207-1351; 224 NW 793

Special improvement bonds not general obligations. Refunding bonds for improvements payable from special assessments are not general obligations of the city.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Successively due special assessment bonds —payment. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

6121 Payment from special fund.

Atty. Gen. Opinion. See '28 AG Op 301

Special improvement bonds not general obligations. Refunding bonds for improvements payable from special assessments are not general obligations of the city.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Nonduty to create special fund for payment. A city or town is under no obligation to provide or create a special fund for the payment of special assessment certificates other than the fund resulting from valid assessments on the property involved.

Stockholders Inv. Co. v Brooklyn, 216-693; 246 NW 826

Deficiency in special taxes—statutory noncontemplation—city's nonliability. Fact that amount realized from special taxes is insufficient to pay all bonds for certain improvements will not establish liability on the part of the city, since the statutes provide and limit to the cost of the improvement the amount of the special assessments which the city may levy, since the deficiency in the special taxes resulted in part from a nation-wide depression, and since there was a defect inherent in the statute which made no provision for any shortage.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Fund insufficient—pro rata payment. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6122 Limitation on issue.

Successively due special assessment bonds—fund insufficient. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6123 Liability of city.

Atty. Gen. Opinion. See '28 AG Op 301

Bonds — corporate liability. A city which legally issues bonds in the form provided by statute, and on the basis of special assessments for street improvements or sewers, must not only make and maintain valid special assessments on the benefited property sufficient to pay the principal of the bonds and all interest accruing thereon, but must, by the due exercise of its own statutory powers relative to the collection of special assessments, supplement, if necessary, the efforts of the county treasurer to collect and realize on such assessments; and for any deficiency which is traceable to the neglect of the city to perform either of such duties the city is liable in its corporate capacity.

Hauge v City, 207-1209; 224 NW 520
First N. Bk. v Town, 211-341; 233 NW 712

Certificates—nonliability of city. A city or town which issues a valid special assessment certificate against specific property, for paving, and legally levies an adequate assessment against the property to pay the certificate, does not thereby obligate itself to pay the certificate in case the property owner does not pay it, and in case the property in question remains unsold at tax sale.

Morrison v Culver Est., 216-676; 248 NW 237

Certificates create no trust relationship. A city or town in issuing valid special assessment certificates for street improvements and in levying valid assessments for the payment of the certificates, does not constitute itself a trustee for said certificate holders.

Stockholders Inv. v Town, 216-693; 246 NW 826

Nonduty to create special fund for payment. A city or town is under no obligation to provide or create a special fund for the payment of special assessment certificates other than the fund resulting from valid assessments on the property involved.

Stockholders Inv. v Town, 216-693; 246 NW 826

Assessments—nonduty to collect and apply. Neither the statutes relative to special assessments nor the certificates issued in connection with such assessments impose on the city or town any right or duty to collect the assessments and to apply the proceeds thereof.

Stockholders Inv. v Town, 216-693; 246 NW 826

Intentionally excessive assessment—liability of city. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers by property owners of illegalities and irregularities in the proceedings, and the written promise of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the council knowingly and intentionally levied the assessments in excess of 25 percent of the value of each of the various properties.

Inter-Ocean Co. v Sioux City, 219-998; 258 NW 907

Good faith excessive assessments—liability of city. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers, by the various property owners, of illegalities and irregularities in the proceedings and the promises of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the assessments, without fraud or collusion, exceeded 25 percent of the value of each of the various properties.

Stockholders Inv. v Town, 216-693; 246 NW 826

Void contract—nonliability of city as on implied contract. A municipal contract for the repair of a public street is void when entered into in disregard of the statute requiring competitive bidding. And after it is decreed that special assessments on benefited property may not be levied, the contractor or his assignee may not, on the theory of an implied contract, recover against the city in its corporate capacity, either at law or in equity (1) for the contract price, or (2) for the reasonable value of the materials and labor furnished under the void contract and retained by the city.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Prohibited express contract excludes implied. Absolute lack of authority in a municipality to enter into an express contract relative to a given subject matter necessarily excludes the possibility of an implied contract on the same subject matter.

Roland Co. v Town, 215-82; 244 NW 707

Void contract — unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Town, 215-82; 244 NW 707

Limitation of action. A cause of action accrues against a city or town on special assessment certificates issued and delivered by it for street improvements, at the point of time when it fails to levy valid assessments for the payment of said certificates, and such cause of action is barred in ten years after said accrual.

Stockholders Inv. v Town, 216-693; 246 NW 826

Fund insufficient—pro rata payment nonpermissible. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6124 Interest—temporary loan.

Fund insufficient—pro rata payment. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6125 Sewer bonds authorized—form.

Atty. Gen. Opinion. See AG Op Sept. 21, '39

REFUNDING BONDS

6126.1 Issuance—interest.

Legal acceleration of payment. A municipal improvement bond which provides for payment (1) on a specified date "or prior thereto at the option of the city", and (2) solely from the proceeds of special property assessments, is, nevertheless, legally payable, at the option of the city, prior to said specified maturity date, from the proceeds of a refund of the bond, even tho such refunding was authorized by a statute enacted subsequent to the issuance of the bond in question.

Ballard-Hassett v City, 207-1351; 224 NW 793

6126.2 Form and amount.

Special improvement refunding bonds—issuance in excess of statutory limit—liability. Where a city issues refunding bonds for certain special improvements without limiting them to the amount of the unpaid special assessments, a liability to the bondholders arises for the amount of the deficiency plus interest carried by the special assessment from the date bonds were issued, plus interest on each unpaid annual interest installment on the bond at the rate carried by the bond from the date each interest installment became due.

Bankers Life v Spirit Lake, 224-1304; 278 NW 320

Refunding bonds for assessments not carried forward—city nonliable. Where a city issues refunding bonds for street and sewer improvements in an amount equal to "unpaid special assessments" including therein "unpaid special assessments" which the county treasurer failed to carry forward on his tax lists, a theory that "unpaid special assessments" meant only those supported by a valid lien, and therefore such bonds exceeded the statutory limit to the extent of those assessments not carried forward, will not make a city liable to the bondholders, inasmuch as those assessments not carried forward are not void but only voidable at the option of the property holder.

Bankers Life v Spirit Lake, 224-1304; 278 NW 320

Delinquent taxes not brought forward—effect on bonds retired by special assessments. County treasurer's failure to bring forward delinquent special assessments, an irregularity rendering the assessments only voidable and not void, will not create a cause of action against the city on refunding bonds based on the claim that such special assessments, not brought forward, may not be included in determining the amount of the "unpaid special assessments."

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

6126.5 Retirement.

Securities—special improvement bonds not general obligations. Refunding bonds for improvements payable from special assessments are not general obligations of the city.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

6126.6 Liability of city or town.

Securities and taxation—diligence in collection of assessments—acquired property tendered to bondholders. Lack of due diligence in the collection of special assessments to retire refunding bonds is not shown where the record discloses, among other things, the city's acquisition of property by tax deeds, and in one instance by deed from the owner, using general funds therefor, and thereafter tendering these acquisitions to the bondholders.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Deficiency in special taxes—statutory noncontemplation—city's nonliability. Fact that amount realized from special taxes is insufficient to pay all bonds for certain improvements will not establish liability on the part of the city, since the statutes provide and limit to the cost of the improvement the amount of the special assessments which the city may levy, since the deficiency in the special taxes resulted in part from a nation-wide depression, and since there was a defect inherent in the statute which made no provision for any shortage.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

CHAPTER 312

HEATING PLANTS, WATER OR GAS WORKS, AND ELECTRIC PLANTS

Atty. Gen. Opinions. See '25-26 AG Op 289, 490; '34 AG Op 345; '36 AG Op 652; '38 AG Op 63

6127 Cities and towns may purchase.

Reservoir not attractive nuisance. See under §5738 (III)

Atty. Gen. Opinions. See '25-26 AG Op 211, 438; '36 AG Op 470

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under §5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Powers conferred by legislature. A municipal corporation possesses only such powers as are conferred upon it by the legislature—that is, such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly con-

ferred, or those necessarily essential to the identical objects and purposes of the corporation as by statute provided, and not those which are simply convenient.

Iowa Electric v Cascade, 227-480; 288 NW 633

Pledge of income of electric light plant. The specific statutory power of a city or town to establish an electric light plant and to pay for the same by issuing bonds, does not embrace the implied power to contract to pay for said plant by pledging the income from said plant for an indefinite period of time; and this is true tho it may be convenient or advantageous for the municipality to make payment in said latter way.

Van Eaton v Town, 211-986; 231 NW 475; 71 ALR 820

Christensen v Town, 212-384; 236 NW 406

Unallowable implied contract. Inasmuch as a city has no statutory authority to expressly contract for a rental for the use of its streets, there can be no implied contract that a telephone company will pay reasonable rental for the space occupied by its equipment in such streets.

Pella v Fowler, 215-90; 244 NW 734

Franchise (?) or regulation (?). Ordinance construed in the light of its terms and of the facts attending its enactment, and held, to constitute a franchise to the grantee therein named to operate a telephone exchange, and not to constitute a mere regulatory ordinance imposing a license fee on said business.

Pella v Fowler, 215-90; 244 NW 734

Competitive bidding — object. Under the Simmer law a contract for the construction of improvements by a municipality, such as a municipal electric light and power plant, should be let by competitive bidding, the purpose being to enable the municipal corporation to secure the best bargain for the least money.

Iowa Electric v Cascade, 227-480; 288 NW 633

Advertisements for bids—irregular compliance with mandatory duty. The irregularity of municipal authorities in advertising for, receiving, and opening, bids for the construction of a municipal light and power plant before instead of after the director of the budget had, on appeal, overruled objections to the plans, specifications, and proposed form of contract, (§357, C., '31) does not invalidate the contract entered into after said ruling and specifically approved by said director. But the duty to "advertise for bids" is mandatory in case an appeal is taken to the budget director.

Johnson v Town, 215-1033; 247 NW 552

Rejection of bids—subsequent contract with rejected bidder. After advertising for bids for the construction of a municipal electric light and power plant, and after the rejection of all bids because excessive, the council may, subsequently, in the absence of fraud or bad faith, and without re-advertisement, validly enter into a contract with one of the rejected bidders at a figure substantially less than any of the former bids.

Johnson v Town, 215-1033; 247 NW 552

Damages — superior replacement construction — contractor nonliable. A contractor should not be required to pay in damages for a quality and quantity of replacement construction superior to what he originally contracted to do.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Subjects of damages—municipal light plant earnings—anticipated profits neither nominal nor speculative. In a city's action on a public utility's injunction bond indemnifying city's loss on account of delayed construction of a municipal light plant, even tho plant had not been in operation, loss of profits and loss of use of the plant not in being, are not too speculative nor nominal, and anticipated profits, if established with reasonable certainty, may be recovered as damages.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Real estate without rental value — "use value" as measure of damages. When real property has no rental value, upon dissolution of a wrongful injunction restraining erection of a municipal light plant thereon, the measure of damages is the use value, including net profits.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

City engineer supervising construction—no abrogation of contract duty. The fact that a city had an engineer directing the construction of a dam does not relieve the contractor of his specified duty to make a water-tight dam when contractor practically concedes that, had he followed the specifications, the dam would hold water.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Acceptance of completed construction work — undiscoverable defects — recovery. In the absence of fraud or mistake, the acceptance of construction work by a city bars recovery on the contractor's bond, except as to defects undiscoverable or unknown at the time of acceptance; however, the fraud or mistake necessary to overcome the acceptance must be alleged and proven.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Eminent domain—compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the

following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water;

2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts;

3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v Fairfield, 213-1187; 240 NW 628

Federal grant for constructing municipal plant. Under §10188, C., '39, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

Simmer law — federal money grants. The words "maximum amount to be expended" in the so-called "Simmer law" refer not to the size of the plant but to the amount to be paid from the earnings. It follows that the construction fund may be enlarged by other funds that do not have to be repaid from taxes or from earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system, to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract: e. g. (1) that he owns property which will be specially assessed; or (2) that he is a taxpayer, and must contribute to the improvement fund from which payment of a deficit must be made.

Donovan Co. v Waterloo, 211-506; 231 NW 499

Stockholder's action to establish interest in city waterworks. A stockholder in a waterworks company, who advocated purchase of its waterworks by city and assisted in carrying an election authorizing the same, and who did not disclose to the city his claim to an interest in or lien upon the property, was estopped to assert as against the city, which purchased the property and made improvements, that city's grantors did not have good title and were trustees ex maleficio, or that the city took property burdened with a trust for his benefit.

Shaver v Des Moines, 227-411; 288 NW 412

6128 Franchise may be granted.

Franchise ordinance—submission to electors. A proposition to grant a franchise to a private party to operate a telephone exchange, initiated by a city council, necessitates the submission to the voters of the franchise ordinance in literal fullness; otherwise, when the proposition is initiated by the private party through petition of voters.

Pella v Fowler, 215-90; 244 NW 734

When ordinance not necessary. The passage of an ordinance and the printing of the same on the ballots is not necessary in those cases where the proposal to grant a franchise to a private party for the erection and operation of an electric light and power plant is not initiated by the city or town council, but is initiated by the voters through a statutory petition addressed to the mayor. (See §6555, C., '27, for law governing certain cities.)

Mapleton v Iowa Co., 206-9; 216 NW 683

Approval by voters of proposed utility franchise does not create franchise. The approval, by a majority vote of the electors of a city or town, of a proposed franchise for the use of the streets by a private public utility, does not create a franchise. Such franchise comes into existence only when the city or town council sees fit, after the favorable vote, to enact, and does enact, such franchise in the form of an ordinance.

Schnieders v Pocahontas, 213-807; 237 NW 207

Contract termination — right of franchise holder. A city which terminates a franchise under a power reserved in the franchise ordinance may maintain an action to enjoin the franchise holder from operating under the franchise and to oust such holder; but if the city has agreed in said ordinance to purchase the property of the franchise holder in case of ouster, no writ of removal should issue until the purchase price of such property is determined.

Sac City v Iowa Co., 203-1364; 214 NW 571

Franchise — construction. The terms and provisions of an ordinance together with the mutual construction which the city and grantee have placed upon it, may reveal the fact that the grantee has the right to maintain within the city a transmission line of high electrical voltage as distinguished from an ordinary lighting system, even tho the ordinance does not expressly permit such high voltage line.

Dilley v Service Co., 210-1332; 227 NW 173

Waiver of franchise provision — effect. A valid franchise to establish and operate an electric light, heat, and power plant is not rendered invalid by the fact that the city council waived that part of the original ordinance which pertained (1) to the place of manufacture within the municipality and (2) to the assignability of the franchise right.

Mapleton v Iowa Co., 206-9; 216 NW 683

Incomplete franchise — power of council. Where a proposition relative to the granting of a telephone franchise (initiated by petitions to the council), as submitted to the electors, contained no time limitation on the franchise, the council may validly fix and determine said limitation in the subsequently adopted ordinance.

Pella v Fowler, 215-90; 244 NW 734

Limitations — public not barred by. An action to oust an alleged franchise holder from public streets because of the invalidity of the alleged franchise, tho brought by the county attorney in quo warranto, cannot be barred by the lapse of time.

State v Munn, 216-1232; 250 NW 471

Illegal franchise — nonestoppel on public. The fact that an alleged franchise holder has, with the knowledge of a municipality, expended large sums of money under said franchise, does not bar or estop the municipality from questioning the legality of said franchise and from legally excluding the alleged franchise holder from the public streets.

State v Munn, 216-1232; 250 NW 471

Foreclosure — title acquired. The purchaser of a municipal electric light and power plant, under a foreclosure of a pledge thereof, does not automatically acquire a franchise to operate the plant.

Greaves v City, 217-590; 251 NW 766

Expired franchise — service furnished and suit maintained thereafter. A privately owned public utility must after expiration of its franchise continue under contract or otherwise supplying electricity to a city until some other source is available, but its use of the city streets may be discontinued after reasonable notice, and the expiration of the franchise will not prevent it from maintaining an action to enjoin the establishment of a municipal light plant, nor need special personal damages be shown as a condition therefor.

Abbott v Iowa City, 224-698; 277 NW 437

Leaky gas pipes—res ipsa loquitur. Basis for the application of the doctrine of res ipsa loquitur is established by proof that pipes and appliances for conducting inflammable gas into a place of business were under the full control of the party furnishing the gas; that gas leaked from said pipes and appliances before it entered the meter; and that a violent explosion resulted from such leakage.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Duty as to unowned pipes and fixtures. A gas company engaged in furnishing inflammable gas for domestic or for other like or similar purposes, is under legal obligation to exercise a degree of care, commensurate with the danger, to maintain in a safe condition the pipes and fixtures over which it has full control, and through which its gas passes into the meter, even tho the company does not own said pipes or fixtures and did not originally install them.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Judgment—on trial of issues—reservation of unpleaded issue. In an action to enjoin a public utility company from maintaining an electric light and power plant within a city, the reservation in the final decree of the question of the right of the company to maintain a similar plant running through the city and supplying points outside the city—a plant distinct from the company's city plant—is proper when the pleadings do not fairly embrace said latter plant.

Iowa Light Co. v Grand Junction, 217-291; 251 NW 609

6130 Purchase of utility products.

Atty. Gen. Opinions. See '25-26 AG Op 211; '32 AG Op 18, 81; '36 AG Op 652

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under §5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Use of public places—expired franchise—unexpired street light contract — poles in streets lawful. Electric company's occupancy of town streets to supply street lighting under a valid contract is not a trespass nor a nuisance merely because its franchise has expired.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Franchise not prerequisite to street lighting contract. The fact that a power company had a franchise and had established poles and lines in the streets to transmit electricity does not preclude the company from maintaining such

poles and wires, after the franchise has expired, in order to fulfill its contract to furnish street lights to the city because a franchise is not a prerequisite to a city or town contracting to light its streets.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

6131 Election required.

Atty. Gen. Opinion. See '25-26 AG Op 211

Ballots—substantial compliance with statutory ballot. Form of ballot used in election for establishment of a municipal electric light or power plant reviewed, and held to substantially comply with statute and to be unambiguous.

Lahn v Primghar, 225-686; 281 NW 214

Fatally defective ballot. A ballot is fatally defective when it fails to clearly indicate to the voter whether a proposed municipal electric light and power plant is to be financed, (1) by ordinary taxation or, (2) by pledging the plant and the net earnings thereof; and this is true tho the ballot states the maximum amount of money to be expended.

Pennington v Fairbanks, M. & Co., 217-1117; 253 NW 60

Ballots—validity of form—Simmer law—municipal electric plant. In an election to establish a municipal electric plant under the Simmer law, the ballot held to comply with statute.

Interstate Co. v Forest City, 225-490; 281 NW 207

Simmer law ballot showing "electric light or power"—"or" synonymous with "and". Since an electric plant produces energy which may be used for either light or power, a ballot, which states the question as to whether a city should establish an "electric light or power plant", would be readily understood by the voters that the city was seeking to establish an "electric light and power plant".

Lahn v Primghar, 225-686; 281 NW 214

Simmer law—expenditure shown on ballot, not on petition for election. The petition authorized by statute (§6132, C., '35) requesting submission to the voters the question of municipal ownership of an electric plant to be paid for from earnings need not state the maximum amount to be expended, but this amount must be stated on the ballot. (§6134-d3, C., '35 [§6134.07, C., '39]).

Abbott v Iowa City, 224-698; 277 NW 437

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under §5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Power to pledge plant. Due authorization to a municipality by the electors thereof to establish and erect an electric light and power plant at a stated maximum cost payable only out of the earnings of said newly acquired plant without the municipality itself incurring any indebtedness legally invests the council with power to pledge both the plant and its earnings as security for the payment of the resulting cost.

Greaves v City, 217-590; 251 NW 766

City election favoring utility—no implied obligation to construct utility. Under the Simmer law an action by an engineering company for a general judgment against a city for engineering services cannot be maintained, based on an implied obligation of the city to erect light and power plant, even after repeal of the enabling ordinance, and altho the special election therefor had carried. Such would be unlawful and contrary to public policy and beyond powers of city council. Persons dealing with a municipality are bound to take notice of legislative restrictions upon its authority.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Citizen's right to challenge council's official acts. A citizen of a community has the right to challenge the validity of the actions of his city council in proceeding to establish a municipal electric plant and to apply for injunctive relief where by no other proceedings can public or private interests be fully protected.

Abbott v Iowa City, 224-698; 277 NW 437

Election—statements, public and private, of public officials—effect. Statements by public municipal authorities, made during the pendency of an election contest relative to the authorization of the construction of a public improvement, reviewed and held insufficient to invalidate said election.

Johnson v Town, 215-1033; 247 NW 552

Conduct of election—candidates' statements. Statements made by candidates for municipal office as to what they intended to do in acquiring a public utility plant will not vitiate an election on the proposition of municipal control of said plant without a showing that the election was affected thereby.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Election—surplusage in stating proposition. When no electric light and power plant exists in a municipality in which an election is held to authorize the municipality to "establish and erect" such plant, the stating of the proposition on the ballot as one "to extend" as well as to "establish and erect" is harmless surplusage.

Johnson v Town, 215-1033; 247 NW 552

Dual methods to acquire utility ownership—single purpose. A proposition submitted to

the voters to establish a municipal utility plant "by purchase * * * or by construction" is not dual but relates only to the single purpose of acquiring municipal ownership of a public utility.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Expiration of franchise—effect. An electric light and power company which permits its franchise in a city to expire without securing a new franchise, or a renewal of the old one, must be deemed to occupy the streets and public places of the city without color of right or authority, and to rest under a legal obligation to remove its property from the streets within a reasonable time.

Iowa Co. v Town, 216-1301; 250 NW 136

Authority to erect public utility—insufficient funds—effect. A city or town which has been authorized, by popular election, to establish and erect a system of waterworks by issuing bonds to a specified amount, and which discovers, after said funds have been applied, that the system is so incomplete as to be unusable, has no authority, in the absence of a reauthorization by the electorate, to issue additional warrants to complete the system.

Mote v Town, 211-392; 233 NW 695

Unauthorized contracts. A judicial holding that municipal warrants issued for the erection of a municipal waterworks are void because the erection had not been authorized by the voters, is necessarily a holding that the contract under which the warrants are issued is also void.

Roland Co. v Town, 215-82; 244 NW 707

Prohibited express contract excludes implied. Absolute lack of authority in a municipality to enter into an express contract relative to a given subject matter necessarily excludes the possibility of an implied contract on the same subject matter.

Roland Co. v Town, 215-82; 244 NW 707

Legality—immaterial questions. On the narrow question of the legality of a called election to vote on the erection of a municipal light and power plant, the question whether the plant if authorized and erected would create an unlawful indebtedness is quite immaterial.

Hogan v Corning, 217-504; 250 NW 134

6132 Question submitted.

Atty. Gen. Opinions. See '25-26 AG Op 212; '32 AG Op 18, 81

Different methods of calling. This section and §6242, C., '31, provide optional methods for submitting to the people the question whether a municipal light and power plant shall be erected and paid for out of the earnings of the plant.

Hogan v Corning, 217-504; 250 NW 134

Election called by council on own motion. An election to vote on the question whether a city shall erect an electric light and power plant and pay for the same out of the earnings of said plant, may be validly called by the city council on its own motion, in accordance with this section.

Hogan v Corning, 217-504; 250 NW 134
Wyatt v Manning, 217-929; 250 NW 141

Petition for election — verification not required. A petition for the calling of an election in a city or town, to vote on the proposition whether the municipality shall construct an electric light and power plant, need not be accompanied by an affidavit as to the electorial qualifications of the signers. The statute (ch 319, C., '31) contains no such requirement.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition for election—insufficiency—burden of proof. He who alleges the insufficiency of a duly filed petition for the calling of a municipal election, to vote on the proposition whether the municipality shall erect an electric light and power plant, has the burden to sustain his allegation when the petition is apparently sufficient and apparently in conformity with the statute.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition—noninvalidating matter. A petition to the mayor of a city for the submission to the people of the question of granting a public utility franchise is not rendered invalid because a proposed or suggested ordinance is included in the petition.

Iowa Co. v Tourgee, 208-36; 222 NW 882

Petition for election—forged signatures. The fact that a petition to a city council for an election to vote on the proposition whether the city shall construct a specified public utility plant contains both forged signatures of electors and signatures of nonresidents of the city will not invalidate the petition if it be otherwise sufficient after the objectionable signatures are excluded.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Nondiscretionary duty of mayor. Upon the filing with the mayor of a legally sufficient petition for the calling of an election and after the lapse of a reasonable time for a canvass of the legal sufficiency of the petition, a mandatory and nondiscretionary duty, enforceable by mandamus, devolves on the mayor to call the election and make the submission.

Iowa Co. v Tourgee, 208-36; 222 NW 882

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby

disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Simmer law—expenditure shown on ballot, not on petition for election. The petition authorized by statute requesting submission to the voters the question of municipal ownership of an electric plant to be paid for from earnings need not state the maximum amount to be expended, but this amount must be stated on the ballot. (§6134-d3, C., '35 [§6134.07, C., '39]).

Abbott v Iowa City, 224-698; 277 NW 437

Ballot — sufficiency. A ballot which sets forth whether the city or town shall "establish, erect, maintain, and operate" an electric light and power plant, and pay for the same solely from the earnings of said plant, and definitely limits the expenditures for establishment, is all-sufficient without any reference (1) to the maximum rate to be charged consumers, or (2) to the interest rate to be paid on the expenditure, or (3) whether past or future earnings are to be so employed, or (4) whether the plant is to be pledged.

Wyatt v Town, 217-929; 250 NW 141

Contents of ballot. At an election called by a city council on its own motion on the question whether the city shall erect an electric light and power plant and pay for the same out of the earnings of the plant, the ballot need only contain (1) the main proposition, and (2) a statement of the maximum amount to be expended. Manifestly, the law does not contemplate the setting forth of a contract which can only be entered into after the election grants the authority for such a contract.

Hogan v Corning, 217-504; 250 NW 134

Sufficient reference to statute in ballot.

Weiss v Woodbine, 228- ; 289 NW 469

Ballots — preservation—showing required—admissibility. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

6134 General powers granted.

Atty. Gen. Opinions. See '25-26 AG Op 438; '32 AG Op 18

Bonds—express authority required. Power "to borrow" money does not embrace the power to issue negotiable bonds.

Muscatine Co. v City, 205-82; 217 NW 468

Bonds—extension of existing plant. A city has no power to issue bonds to provide for the cost of extensions and enlargement of an existing municipally constructed electric light and power plant.

Muscatine Co. v City, 205-82; 217 NW 468

Bonds—validity. Bonds issued under a procedure which is, on its face, apparently authorized by law, are, nevertheless, invalid if the record shows that such procedure was simply a subterfuge for the purpose of evading the law and to accomplish an illegal purpose.

Muscatine Co. v City, 205-82; 217 NW 468

Compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water.
2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts.
3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v City, 213-1187; 240 NW 628

PAYMENT FROM EARNINGS

6134.01 Contract authorized.

Discussion. See 17 ILR 397—Utilities purchased from income; 20 ILR 493—"Simmer law"—electric utilities; 25 ILR 828—Restrictions on bidding

Atty. Gen. Opinions. See '32 AG Op 133, '34 AG Op 345, 385, 429; '36 AG Op 82

ANALYSIS

I GENERAL SCOPE OF SIMMER LAW
II POWER OF COUNCIL GENERALLY
III PLEDGE OF PROPERTY AND EARNINGS
IV INJUNCTIONS—OBJECTIONS

I GENERAL SCOPE OF SIMMER LAW

Holding prior to statute.

Van Eaton v Town, 211-986; 231 NW 475; 71 ALR 820

Christensen v Town, 212-384; 236 NW 406

Nonduality in subject matter. Neither the title of an act nor the act itself is dual in subject matter in a constitutional sense:

1. When the title declares a purpose, (a) to amend a section of an existing statutory chapter governing the acquisition by cities and towns of named public utilities, (b) to provide additional methods of paying for said plants, and (c) outlines in a general way said proposed additional methods, and;
2. When the text of the act follows the title with congruous provisions.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Illogically placed amendment—effect. An act, additional to existing statutes on the same subject, is not invalid simply because it is declared to be an amendment to a section which, tho

I GENERAL SCOPE OF SIMMER LAW—concluded

on the same subject, is not, perhaps, the most logical section to carry such amendment.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Nullity because of unworkableness. Whether the purchase by a city or town of electrical energy may be financed under this section [§6134-d1], C., '31, or whether the provisions of sections 6134-d5 and 6134-d6 of said code [§§6134.09, 6134.10, C., '39] relative to competitive bidding for furnishing electrical energy are a nullity because of indefiniteness, uncertainty or unworkableness, quaere.

Brutsche v Town, 218-1073; 256 NW 914

Discrimination against privately owned plants. Statutory authority to municipalities to erect, in their proprietary capacity, electric light and power plants, and to pay the entire initial cost thereof from the net profits of said plants, and to this end to fix such rates as will effect such payment, is not void as an unconstitutional discrimination against privately owned plants of the same kind.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Waterworks — extension without election. The trustees of a municipally owned and established waterworks plant may, without an authorizing election, validly contract for improving and extending said plant, and may obtain the funds therefor by issuing bonds payable solely out of the future net earnings of the plant and secured by a lien on said earnings and on said improvements and extensions.

Chitwood v Lanning, 218-1256; 257 NW 345

Allowable "local and special" legalizing act. The general assembly has plenary constitutional power to validate, by a strictly local and special act, the proceedings under which a municipal electric light and power plant (payable from plant earnings) has been constructed and placed in operation,—it appearing that the contract under which said proceedings were had, had been judicially declared void because said contract was not let on competitive bids as mandatorily required by statute,—the constitution ex vi termini (Art. III, §30) clearly recognizing the inapplicability of a general validating act to meet such a situation.

Iowa E. L. & P. Co. v Grand Junction, 221-441; 264 NW 84

Construction of statutes—duty of court to make effective. It is the duty of the court, in construing statutes, to seek the object and purpose of the law and then give it force and effect if not contrary to established legal precedents.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Bond statute not included in title of act. Sufficient reference to statutes in ballot.

Weiss v Woodbine, 228- ; 289 NW 469

Grants of power to cities—manner of exercising—nonstrict construction. Since there is no inherent power vested in a municipality, statutes purporting to grant such power are to be strictly construed; however, this rule does not apply in construing statutes relating to the manner of exercising expressly granted power.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Rights, powers, duties, and liabilities—motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law, to submit the question of municipal ownership of a public utility, are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

Electric plant under Simmer law—"net earnings"—reserve not necessary. No fraud or misrepresentation is shown where it is proven that a proposed municipally owned public utility is amply adequate and can be built within the amount proposed, altho no sum is included as a reserve for depreciation, etc. The term "net earnings" in the statute does not include such reserve.

Interstate Co. v Forest City, 225-490; 281 NW 207

Not a "debt". The expenditure which is necessary to establish a municipal electric light and power plant and which is to be paid solely from the earnings of the said plant, is not a "debt" within the constitutional and statutory limitation on indebtedness.

Wyatt v Manning, 217-929; 250 NW 141

Competitive bidding required. Under the Simmer law a contract for the construction of improvements by a municipality, such as a municipal electric light and power plant, should be let by competitive bidding, the purpose being to enable the municipal corporation to secure the best bargain for the least money.

Iowa Electric v Cascade, 227-480; 288 NW 633

Federal grant for constructing municipal plant. Under §10188, C., '39, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

II POWER OF COUNCIL GENERALLY

Powers conferred by legislature. A municipal corporation possesses only such powers as are conferred upon it by the legislature—

that is, such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those necessarily essential to the identical objects and purposes of the corporation as by statute provided, and not those which are simply convenient.

Iowa Electric v Cascade, 227-480; 288 NW 633

Grants of power to cities—manner of exercising—nonstrict construction. Since there is no inherent power vested in a municipality, statutes purporting to grant such power are to be strictly construed; however, this rule does not apply in construing statutes relating to the manner of exercising expressly granted power.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Power to bind future councils. A city council, under legislative authority, may validly enter into a contract which will be binding on future city councils.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Simmer law—municipal utility—power to make profits. Municipal corporations owe their origin to, and derive their powers from, the legislature and can exercise only such powers as are granted in express words or fairly implied from, or incident to, the powers expressly granted, or such powers as are essential to purposes of corporation, and, under the Simmer law, permitting cities to pay for public utilities from future earnings, a municipal corporation has statutory power to make profits in excess of statutory demands.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

City election favoring utility—no implied obligation to construct utility. Under the Simmer law an action by an engineering company for a general judgment against a city for engineering services cannot be maintained, based on an implied obligation of the city to erect light and power plant, even after repeal of the enabling ordinance, and altho the special election therefor had carried. Such would be unlawful and contrary to public policy and beyond powers of city council. Persons dealing with a municipality are bound to take notice of legislative restrictions upon its authority.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Plants payable out of earnings—bids—sufficiency. After the electors of a city or town have duly authorized the construction of an electric light and power plant to be paid for out of the future earnings of the plant, the call for bids need only be for the carrying out of that which the electors have authorized, to wit: The erection of a complete electric generating and distributing system. Sections 6134-d5 and 6134-d6, C., '31 [§§6134.09, 6134.10, C., '39], in providing for competitive bidding for "furnishing" electrical energy do not have the effect of requiring, in addition to bids on the specific authorization, bids on various other constructions and outlays in order to enable the city council to enter into a contract for electrical energy without erecting a complete plant as authorized by the electors.

Brutsche v Coon Rapids, 218-1073; 256 NW 914

III PLEDGE OF PROPERTY AND EARNINGS

Power to pledge plant. Due authorization to a municipality by the electors thereof to establish and erect an electric light and power plant at a stated maximum cost payable only out of the earnings of said newly acquired plant without the municipality itself incurring any indebtedness legally invests the council with power to pledge both the plant and its earnings as security for the payment of the resulting cost.

Greaves v City, 217-590; 251 NW 766

Foreclosure—title acquired. The purchaser of a municipal electric light and power plant, under a foreclosure of a pledge thereof, does not automatically acquire a franchise to operate the plant.

Greaves v City, 217-590; 251 NW 766

IV INJUNCTIONS—OBJECTIONS

Electric plant under Simmer law—attack by taxpayer—nonright. An action, by a taxpayer, to enjoin the operation of a municipal electric plant, payable from the earnings, does not lie because such plants do not impose any additional burden on the taxpayers.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Citizens—challenging officers' official acts. Public welfare lodges in citizens of a community the right to challenge the validity of an electric plant construction contract and to enjoin a municipal corporation and its officers from violating their duties and abusing corporate powers if such construction contract is consummated without competitive bidding made mandatory by statute.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Enjoining electric plant operation—taxpayer or citizen—moot question. Altho the federal court on application of a taxpayer holds that it will not enjoin an act already done, to wit, to enjoin the construction of a municipal electric plant already built, such holding will not bar a citizen from bringing action to enjoin the operation of the plant.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

IV INJUNCTIONS — OBJECTIONS—concluded

Completely constructed electric plant—operation enjoined—nonmoot question. Fact that a municipal electric plant has been built does not preclude, as a moot question, citizens from bringing action to restrain its operation if the contract is void, since question is not moot if there remains anything on which a decision of the court can operate.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Taxpayer must show adverse interest to enjoin city erecting light plant. One suing to enjoin town's contract for purchase of machinery for electric lighting plant must show interest adversely affected.

Christensen v Kimballton, (NOR); 231 NW 502

Plaintiffs—uninjured taxpayer. A public utility corporation, operating in a city under a duly granted franchise, may not, solely as a taxpayer, maintain injunction to test the legality of an ordinance granting a franchise to a competitor, on the grounds (1) that the ordinance rates for private consumers are unreasonable, and (2) that the city has an option, under the ordinance, to take over the ownership of the plant after it has paid for itself out of its own earnings, when it appears that such possible "taking over" will be without the creation of any debt on the part of the city and without resort to any taxation,—in other words, when it appears that there is no present or threatened danger to the plaintiff, except the danger of competition.

Iowa Co. v Emmetsburg, 210-300; 227 NW 514

Injunction—city officers exceeding authority. To warrant an injunction against the officers of a city or town, there must be some present, tangible, existent infraction or threatened infraction of legal power and authority, with resultant injury and damage to the petitioners.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, although plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

Contract invalidated by procedure. A contract for the construction of an improvement to a municipally owned waterworks (expenditures thereunder payable from the earnings of the plant) is invalid and therefore enjoinable, (1) when the city council first advertises for bids on plans and specifications (prepared by the ultimately successful bidder) which were so lacking in details as to furnish no common standard for competitive bids, and (2) when, on the day for letting the contract, the council caps the climax of its efforts by letting the contract to one of the bidders on his newly proposed and then-filed plans and specifications which contained many variations from those on which bids had been invited.

Northwestern Co. v Grundy Center, 220-108; 261 NW 604

Noncompetitive bidding on contract.

Weiss v Woodbine, 228- ; 289 NW 469

Seeming illegality—explanatory amendment. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Res judicata plea—inapplicability—stricken on motion. In an action by citizens against the town council to enjoin the operation of a municipal electric plant, the trial court is correct in striking, on motion, that portion of defendant's answer which pleads res judicata, when it appears that a former action in the United States district court for the same purpose was by a private electric company in its individual capacity to enjoin the construction of the plant and that no judgment on the merits was rendered.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Electric plant earnings—fact findings in trial to court—conclusive on appeal. Where an injunction wrongfully restrained and delayed, for 11 months, construction of a municipal light plant and in an action on the injunction bonds, tried without a jury, where the trial court had evidence to determine the plant's net earnings for first year of operation and there was sufficient evidence to support his findings that earnings during 11 months lost by delay would have been substantially same, damages in that amount for such period are not too speculative, remote, and uncertain, and such findings are conclusive on appeal.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

6134.02 Bonds.

Bonds—extension of existing plant. A city has no power to issue bonds to provide for the cost of extensions and enlargement of an existing municipally constructed electric light and power plant.

Muscatine Co. v Muscatine, 205-82; 217 NW 468

Exemption from registration. Securities issued by cities or towns, even tho not constituting general obligations of the city or town, e. g., "pledge orders" payable solely from the net income of a municipally owned utility, are exempt from registration or qualification under the Iowa securities law.

Ballard-Hassett Co. v Miller, 219-1066; 260 NW 65

Simmer law — rates in contract — unnecessary when cash is paid. A contractor who is paid in cash for building a municipal public utility plant is not interested in the electric rates the city proposes to charge nor in the rate of interest on the bonds sold to provide the cash, nor does the statute contemplate that these items be inserted in the construction contract when such contractor is to be paid in cash.

Interstate Co. v Forest City, 225-490; 281 NW 207

Simmer law — payment — dual methods — interest rate. In letting contracts for public utilities under the Simmer law the council determines the method of payment, and, if payment is made as earnings accumulate, the interest rate must be specified in the contract, but not when payment is made at once by negotiable revenue bonds.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

6134.03 Refunding bonds.

Simmer law—duration of maximum electric rates—bonds and refunding bonds retired. A contract for a municipal electric plant is not invalid on the ground that it limits the operation of the maximum electric rate therein to the life of the original bonds, for maximum rates need not be in effect after the cost of the plant has been fully paid; but refunding bonds being merely substitutes for the original bonds the original indebtedness would remain, and maximum rates would apply until such obligation was paid.

Lahn v Primghar, 225-686; 281 NW 214

6134.06 Nature and requirements of contract.

Atty. Gen. Opinion. See '36 AG Op 82

Grant of power to fix rates — discretion to modify. The legislature having graciously granted cities and towns the power to fix public utility rates may, at its pleasure, curtail or limit the power.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Utility plants maintained by taxation—Simmer law not applicable. The statutory provisions for taxation to maintain and operate utility plants, contained in sections 6142 and 6211, C., '35, have no application to plants established under the Simmer law which are paid for from net earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Seeming contradiction—effect. The fact that the so-called Simmer law provides that no part of the cost of light and power plants erected thereunder (1) shall be payable by taxation, yet also provides, (2) that the city shall pay for current used by it—which payment necessarily must be made from funds derived from taxation—presents no such contradiction or unworkable condition as to invalidate the law.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Domestic products preference—not applicable to Simmer law. Sections 1171-b1 and 1171-b2, C., '35 [§§1171.01, 1171.02, C., '39], have no application to contracts let for construction of municipal public utility plants payable from the earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Simmer law—payment—dual methods—interest rate. In letting contracts for public utilities under the Simmer law the council determines the method of payment, and, if payment is made as earnings accumulate, the interest rate must be specified in the contract, but not when payment is made at once by negotiable revenue bonds.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Simmer law—rates in contract—unnecessary when cash is paid. A contractor who is paid in cash for building a municipal public utility plant is not interested in the electric rates the city proposes to charge nor in the rate of interest on the bonds sold to provide the cash, nor does the statute contemplate that these items be inserted in the construction contract when such contractor is to be paid in cash.

Interstate Co. v Forest City, 225-490; 281 NW 207

Simmer law—duration of maximum electric rates—bonds and refunding bonds retired. A contract for a municipal electric plant is not invalid on the ground that it limits the operation of the maximum electric rate therein to the life of the original bonds, for maximum rates need not be in effect after the cost of the plant has been fully paid; but refunding bonds being merely substitutes for the original bonds the original indebtedness would remain,

and maximum rates would apply until such obligation was paid.

Lahn v Primghar, 225-686; 281 NW 214

Public contracts—engineering cost of public utility under Simmer law—no general judgment—directing verdict. Simmer law prohibits payment of construction cost of a municipal electric plant from taxation, and precludes rendering a general judgment for such cost, including a judgment for cost of engineering services in preparing plans and specifications for construction of such public utility, when such services were performed under contract subsequent to the election and passage of the ordinance providing for construction payment from future earnings. Consequently, in an action by the engineers against a city to recover compensation for their services, a directed verdict for the city was proper.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

"Net earnings" in statute — public utility plants. In a contract for construction of municipal electric plant payable solely out of earnings, contract provision defining "net earnings" as balance of gross receipts after payment solely of necessary expenses of operation and maintenance, and making no provision for reduction of depreciation reserve, does not violate statute providing that city should not be liable because of insufficiency of "net earnings".

Iowa So. Utilities v Cassill, 69 F 2d, 703

Electric plant payable out of earnings — contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, altho plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

6134.07 Interpretative clause — election requirement.

ANALYSIS

I ELECTIONS IN GENERAL
II BALLOTS

I ELECTIONS IN GENERAL

Election — validity. An election to vote on the question whether the city shall erect an electric light and power plant and pay for the same out of the earnings of said plant may be validly called by the city council on its own motion, in accordance with §6132, C., '31.

Hogan v City, 217-504; 250 NW 134
Wyatt v Town, 217-929; 250 NW 141

Extension without election. The trustees of a municipally owned and established waterworks plant may, without an authorizing election, validly contract for improving and extending said plant, and may obtain the funds therefor by issuing bonds payable solely out of the future net earnings of the plant and secured by a lien on said earnings and on said improvements and extensions.

Chitwood v Lanning, 218-1256; 257 NW 345

Simmer law—nonapplicable statutes. Elections to establish municipally owned public utilities payable from the earnings are controlled by chapter 312, C., '35, and sections 1171-d4 [§1171.18, C., '39] and 6246, C., '35, have no application.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291
Interstate Co. v Forest City, 225-490; 281 NW 207

Power to pledge plant. Due authorization to a municipality by the electors thereof to establish and erect an electric light and power plant at a stated maximum cost payable only out of the earnings of said newly acquired plant without the municipality itself incurring any indebtedness legally invests the council with power to pledge both the plant and its earnings as security for the payment of the resulting cost.

Greaves v Villisca, 217-590; 251 NW 766

Election laws applicable. Statutory requirements as to canvass of votes, preservation of ballots, and care of poll books apply to elections for establishment of a municipal electric plant payable from earnings.

Steeves v New Market, 225-618; 281 NW 162

Simmer law — federal money grants. The words "maximum amount to be expended" in the so-called "Simmer law" refer not to the size of the plant but to the amount to be paid from the earnings. It follows that the construction fund may be enlarged by other funds that do not have to be repaid from taxes or from earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Simmer law—substituting for adequate present service—immateriality. The people of a city or town have a right, under the statute, to vote on the question of establishing a municipally owned public utility, to be paid for from the earnings, which right is unaffected by fact that such a plant would substitute its services for a privately owned plant that has been furnishing adequate and satisfactory service.

Interstate Co. v Forest City, 225-490; 281 NW 207

Conduct of election—"municipal ownership issue" — candidates' statements. Statements made by candidates for municipal office as to what they intended to do in acquiring a public utility plant will not vitiate an election on the proposition of municipal control of said plant without a showing that the election was affected thereby.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

II BALLOTS

Ballot—contents of. At an election called by a city council on its own motion on the question whether the city shall erect an electric light and power plant and pay for the same out of the earnings of the plant, the ballot need only contain (1) the main proposition, and (2) a statement of the maximum amount to be expended. Manifestly, the law does not contemplate the setting forth of a contract which can only be entered into after the election grants the authority for such a contract.

Hogan v City, 217-504; 250 NW 134

Substantial compliance with statutory ballot. Form of ballot used in election for establishment of a municipal electric light or power plant reviewed, and held to substantially comply with statute and to be unambiguous.

Lahn v Primghar, 225-686; 281 NW 214

Authority—form of ballot. On the question whether a municipality shall erect a light and power plant and pay for the plant from the earnings thereof, the ballot is not fatally defective because it describes the proposed plant as a "municipal light and power plant" instead of a "municipal electric light and power plant".

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Statement of proposal—completeness required. Section 761, C., '35, (requiring certain proposed public measures, when submitted to the people for adoption or rejection, to be printed in full on the ballot) has no application when the question submitted is whether a municipality shall erect an electric light and power plant and pay for the same solely from the earnings thereof.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Ballot—duality. A ballot which definitely limits the expenditure for establishing an electric plant is not subject to the objection that said amount embraces both (1) establishment, and (2) maintenance and operation.

Wyatt v Town, 217-929; 250 NW 141

Dual methods to acquire utility ownership—single purpose. A proposition submitted to the voters to establish a municipal utility plant "by purchase * * * or by construction" is not dual but relates only to the single purpose of acquiring municipal ownership of a public utility.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Ballot—sufficiency. A ballot which sets forth whether the city or town shall "establish, erect, maintain, and operate" an electric light and power plant, and pay for the same solely from the earnings of said plant, and definitely limits the expenditures for establishment, is all-sufficient without any reference (1) to the maximum rate to be charged consumers, or (2) to the interest rate to be paid on the expenditure, or (3) whether past or future earnings are to be so employed, or (4) whether the plant is to be pledged.

Wyatt v Town, 217-929; 250 NW 141

Fatally defective ballot. A ballot is fatally defective when it fails to clearly indicate to the voter whether a proposed municipal electric light and power plant is to be financed, (1) by ordinary taxation or, (2) by pledging the plant and the net earnings thereof; and this is true tho the ballot states the maximum amount of money to be expended.

Pennington v Fairbanks & Co., 217-1117; 253 NW 60

Expenditure shown on ballot, not on petition for election. The petition authorized by statute (§6132, C., '35) requesting submission to the voters the question of municipal ownership of an electric plant to be paid for from earnings need not state the maximum amount to be expended, but this amount must be stated on the ballot.

Abbott v Iowa City, 224-698; 277 NW 437

"Maximum expenditure" requirement defined. At an election to determine whether a city shall erect a light and power plant and pay therefor from the earnings of said plant, the statutory requirement that the ballot "shall state the maximum amount which may be expended" has reference to the initial cost of the completed plant and not to the total of all payments of principal and interest to be made from future earnings.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Ballot showing "electric light or power"—"or" synonymous with "and". Since an electric plant produces energy which may be used for either light or power, a ballot, which states the question as to whether a city should establish an "electric light or power plant", would be readily understood by the voters that the city was seeking to establish an "electric light and power plant".

Lahn v Primghar, 225-686; 281 NW 214

6134.08 Notice of proposed contract—publication.

Contract invalidated by procedure in re competitive bids. A contract for the construction of an improvement to a municipally-owned waterworks (expenditures thereunder payable from the earnings of the plant) is invalid and therefore enjoinable, (1) when the city council first advertises for bids on plans and specifications (prepared by the ultimately successful bidder) which were so lacking in details as to furnish no common standard for competitive bids, and (2) when, on the day for letting the contract, the council caps the climax of its efforts by letting the contract to one of the bidders on his newly proposed and then filed plans and specifications which contained many variations from those on which bids had been invited.

Northwestern Co. v Grundy Center, 220-108; 261 NW 604

6134.09 Contents of notice.

Citizens' right to challenge validity. Public welfare lodges in citizens of a community the right to challenge the validity of an electric plant construction contract and to enjoin a municipal corporation and its officers from violating their duties and abusing corporate powers if such construction contract is consummated without competitive bidding, made mandatory by statute.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Plants payable out of earnings—bids—sufficiency. After the electors of a city or town have duly authorized the construction of an electric light and power plant to be paid for out of the future earnings of the plant, the call for bids need only be for the carrying out of that which the electors have authorized, to wit: the erection of a complete electric generating and distributing system. This section [§6134-d5] and section 6134-d6, C., '31 [§§6134.09, 6134.10, C., '39], in providing for competitive bidding for "furnishing" electrical energy do not have the effect of requiring, in addition to bids on the specific authorization, bids on various other constructions and outlays in order to enable the city council to enter into a contract for electrical energy without erecting a complete plant as authorized by the electors.

Brutsche v Town, 218-1073; 256 NW 914

Competitive bidding required—object. Under the Simmer law a contract for the construction of improvements by a municipality, such as a municipal electric light and power plant, should be let by competitive bidding, the purpose being to enable the municipal corporation to secure the best bargain for the least money.

Iowa Electric v Cascade, 227-480; 288 NW 633

Avoidance of competitive bidding. To sustain contracts for the construction of municipal utility plants and for payment therefor from plant earnings, when said contracts substantially fail to comply with the requirements of the plans and specifications on which bids are invited, would work a complete avoidance of that part of the statute which mandatorily requires competitive bidding. (Specifications called for a 375 hp engine of a type which had been in a specified use sufficiently long to prove its ability to generate said power without overcrowding. The contract called for a type of engine rated at 375 hp, but which, until shortly prior to the contract, had been rated at 350 hp. The evidence affirmatively showed that said engine had not had the actual service test required by the specifications.) Held, contract illegal.

Greaves v Villisca, 221-776; 266 NW 805

Noncompetitive bidding—injunction.

Weiss v Woodbine, 228- ; 289 NW 469

Call for bids—reference to plans—extension of time—validity. A call for construction bids which states that the work must be completed by a certain date, but refers to the plans and specifications on file, giving to all bidders the same privileges as given to the successful bidder, who had an extension of time clause in his contract, the inclusion of which, in many public contracts, the court will take judicial notice, is not a restriction on competitive bidding, and the bid and contract containing the extension clause was responsive to the call for bids.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Unresponsive bidding — unallowable contract. When a contract for the construction of a proposed public improvement is required by statute to be let on competitive bids, such contract cannot be legally entered into on the basis and in accordance with a bid which fails in any material respect to respond to the proposal for bids. Held, contract illegal because based on, and in accordance with, a bid which failed to respond to the legal proposals:

1. In re time of commencing and completing the work, and
2. In re testing the improvement as a condition to acceptance.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

Bidder making own specifications—unallowable contract. Competitive bidding on municipal public works is mandatory, but is not obtained when bids under specifications prescribed by the city are rejected, and the contract is awarded to a bidder who bids under his own specifications which are materially and substantially different than the specifications prescribed by the city.

Iowa Co. v Town, 216-1301; 250 NW 136

Bids — illegal contract on modified plans. When competitive bids for the construction of a municipal electric light plant are manda-

torily required, and all bids duly advertised for and received are in excess of the authorized expenditure, no legal contract can be let by the simple expedient of substantially reducing the requirements of the plans and specifications, and, without re-advertising, letting the contract to one of the former bidders at a price within the authorized expenditure.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Specifications—controlling location. Specifications for the construction of an electric plant —payable from plant earnings only—may specify the particular lot on which the plant shall be erected and what shall be paid therefor, the municipality having an option thereon for a reasonable price.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract to build an electric plant, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

Specifying trade named articles. A call for bids under the Simmer law may specify articles by trade name when followed by the words "or equal" and, if a few minor items omit these words, the entire contract is not vitiated when it appears that these particular items were available to all bidders.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Plans and specifications—undue particularity. Specifications for a contemplated municipal electric light and power plant (payable from plant earnings only) should, manifestly, not be in such minute detail as will practically defeat competitive bidding.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Nullity because of unworkableness. Whether the purchase by a city or town of electrical energy may be financed under section 6134-d1, C., '31 [§6134.01, C., '39], or whether the provisions of this section [§6134-d5] and section 6134-d6 of said code [§§6134.09, 6134.10, C., '39] relative to competitive bidding for furnishing electrical energy are a nullity because of indefiniteness, uncertainty or unworkableness, quaere.

Brutsche v Town, 218-1073; 256 NW 914

Federal grant for constructing municipal plant. Under §10188, C., '39, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

6134.10 Execution of contract.

Form of contract — sufficiency. In proceedings by a municipality preliminary to the letting of a contract for the construction of a light and power plant, an important feature of the "form of contract" which the city is required to prepare and have on file is a definite statement that the plant is to be paid for solely from the earnings of the plant, but the law does not contemplate that said "form of contract" be complete in and of itself.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Objections—public hearing—scope of. The statutory public hearing on objections to a municipality entering into a contract for the erection of an electric plant—payable from plant earnings only—does not contemplate or authorize the introduction of evidence and a trial in re said objections.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Utility plant—contract and specifications variation first alleged on appeal. A contended variation between the contract for a municipal public utility plant and the specifications, in that the contract omitted the right to call bonds at a certain time, will not be considered on appeal, when such variation, if any, was not an issue in the lower court.

Lahn v Primghar, 225-686; 281 NW 214

Specifications—allowable general provisions. Specifications for the construction of a municipal improvement (e. g., the construction of an electric light plant) may very properly contain a provision requiring the bidders to specify the amount that would be deducted from or added to the bid for supplying specified things by way of substitution, omission, or addition.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Call for bids on alternate engines—proposals offering several makes of engines—validity. A call for bids on engines to conform to specification sizes designated by "A" and "B" is responded to by a bidder who submits five sizes and makes of engines designated as proposals "A" to "E", inclusive, when all five

makes of engines fit the specification classes of "A" or "B".

Lahn v Primghar, 225-686; 281 NW 214

Ordinance repealed and federal application withdrawn—no estoppel to deny general liability for engineering services. Where a city contracted for engineering services necessary to construct a municipal electric light and power plant to be paid for, under the Simmer law, out of plant's future earnings, and then later repealed the ordinance authorizing its construction and adopted a resolution withdrawing the application for the federal loan therefor, yet the city was not estopped to deny a general liability for the engineering services performed, when it was known to the engineering company, when the services were commenced, that no money derived from taxation was payable for any services it might render, and there was no showing of reliance by the plaintiff company on alleged implied obligation to erect the plant.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Federal grant for constructing municipal plant. Under §10188, C., '39, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

Completely constructed plant—operation enjoined—nonmoot question. Fact that a municipal electric plant has been built does not preclude, as a moot question, citizens from bringing action to restrain its operation if the contract is void, since question is not moot if there remains anything on which a decision of the court can operate.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

CONDEMNATION OF EXISTING PLANTS

6135 Special condemnation proceedings —limitation.

Power not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

JURISDICTION, SALE OF PRODUCTS, AND RATES

6141 Jurisdiction of city.

Atty. Gen. Opinions. See '30 AG Op 300; '36 AG Op 307

Natural watercourses—pollution—limitation on right. The right of a riparian owner to cast refuse into a natural stream may be quite materially limited after a portion of his land has been condemned for a public purpose.

Wheatley v City, 213-1187; 240 NW 628

Eminent domain—compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water;
2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts;
3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v Fairfield, 213-1187; 240 NW 628

6142 Sale of products—rates—taxes—equipment.

Atty. Gen. Opinion. See '25-26 AG Op 490

Personal liability of property owner. Statutory power in a city or town to "assess reasonable rates upon each tenement" supplied by the municipality with electric light or power does not authorize an ordinance which renders the owner of premises personally liable for electric light or power furnished by the municipality to the owner's tenant.

Onawa v Oil Co., 217-1042; 252 NW 544

Extra-territorial extension of municipal light and power lines—constitutional taxation. Sections 6142 and 8310, C., '31, are constitutional insofar as they authorize cities and towns to levy taxes for extending, beyond their corporate limits, the transmission lines of their municipally owned electric light and power plants.

Carroll v Cedar Falls, 221-277; 261 NW 652

Power to sell excess products. Cities and towns need no statutory authority in order validly to sell the excess products of their municipally owned utility plants. It follows that the unconstitutionality of a statute which authorizes a city, having 7500 people, and owning its electric light plant, to furnish electricity to a town of 400 people is, at the least, very doubtful, and, being doubtful, the statute must be deemed constitutional.

Carroll v Cedar Falls, 221-277; 261 NW 652

Grant of power to fix rates—discretion to modify. The legislature having graciously granted cities and towns the power to fix public utility rates may, at its pleasure, curtail or limit the power.

Iowa-Neb. L. & P. Co. v Villisca, 220-238; 261 NW 423

Allowable discrimination. In fixing rates for a municipally owned water plant, the classification of apartment houses as residences will not be deemed an unlawful discrimination simply on a showing that such classification deprives a complainant of the benefit of a rate granted to department stores, office buildings, and similarly conditioned businesses.

Knotts v Nollen, 206-261; 218 NW 563

Utility plants maintained by taxation—Simmer law not applicable. The statutory provisions for taxation to maintain and operate utility plants, contained in this section and section 6211, have no application to plants established under the Simmer law which are paid for from net earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

6143 Regulation of rates and service.

Discussion. See 9 ILB 49—Rate making; 12 ILR 249—Public utility rates; 13 ILR 145—Regulation and management; 13 ILR 369—Federal regulation; 18 ILR 354—Municipal unit as base for rates; 20 ILR 128—Federal court jurisdiction; 25 ILR 801—Temporary statutes in expediting rate litigation

Atty. Gen. Opinions. See '34 AG Op 65; '36 AG Op 470

Municipal rates—effect. A reasonable rate for electricity, duly fixed by a municipality is both a maximum and a minimum rate. In other words, a public utility may not legally charge more or less than the prescribed rate.

Mapleton v Serv. Co., 209-400; 223 NW 476; 68 ALR 993

Reserved power over rates. An ordinance drawn in form of a contract, to be accepted by the franchisee, becomes a contract when accepted and is subject to the reserved power specified in this section. 144 Iowa 426 affirmed.

Cedar Rapids Gas Lt. Co. v City, 223 US 655

Inadequate contract rate. An inadequate rate for public-utility services under this section cannot be enforced even tho cloaked in the garb of a franchise contract. 256 Fed. Rep. 929 reversed.

Southern Ia. El. Co. v City, 255 US 539

Rates—ordinance construed. An ordinance which definitely fixes the rate per kilowatt hour which may be charged for electricity must be deemed to fix a rate above which and below which the utility company cannot legally charge, and not a mere fixing of a maximum rate below which legal charges may be made, even tho the ordinance assumes to declare that the rate shall not be exceeded.

In re Ransom, 219-284; 258 NW 78

Rates—violation—recovery denied. Recovery cannot be had for electricity furnished under an oral contract providing a flat rate per month, irrespective of the amount of electricity used, when a municipal ordinance under which the claimant is operating definitely fixes the legal rate at a stated sum per kilowatt hour; nor may recovery be had on quantum meruit when the quantity used is unknown and therefore there is nothing to which to apply the ordinance rate.

In re. Ransom, 219-284; 258 NW 78

Minimum monthly ordinance charge—recovery. Recovery on contract for electricity furnished having been denied a utility company, because of a violation of the rate-fixing ordinance, nevertheless recovery may be possible under a minimum monthly charge clause of the ordinance.

In re Ransom, 219-284; 258 NW 78

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under §5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Justifiable refusal to furnish product. A public utility company is within its rights in refusing to furnish its product—electric energy—to one who fails to pay his current bill for such product, and it is not sufficient that the customer tenders payment for future service.

Bailey v Power Co., 209-631; 228 NW 644

MANAGEMENT BY TRUSTEES

6144 Management by board of trustees.

Atty. Gen. Opinions. See '32 AG Op 275; '36 AG Op 446

6149 Powers of trustees.

Atty. Gen. Opinion. See '36 AG Op 446

6149.1 Bonds.

Issuance of bonds without authorizing vote. A legislative act authorizing boards of trustees of municipally owned waterworks in cities conditioned in a specified way to issue bonds for the purpose of extending or improving said waterworks does not authorize the trustees to issue said bonds without an authorizing vote of the electors of the municipality when, without such act, an authorizing vote of the electors would be necessary under other statutes which were in no manner repealed.

Fowler v Board, 214-395; 238 NW 618

SURPLUS EARNINGS

6151.1 Transfer of surplus earnings.

Atty. Gen. Opinions. See '34 AG Op 643; '38 AG Op 63

Simmer law—municipal utility—power to make profits. Municipal corporations owe

their origin to, and derive their powers from, the legislature and can exercise only such powers as are granted in express words or fairly implied from, or incident to, the powers expressly granted, or such powers as are essential to purposes of corporation, and, under the Simmer law, permitting cities to pay for public utilities from future earnings, a municipal corporation has statutory power to make profits in excess of statutory demands.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

6151.2 General transfer.

Atty. Gen. Opinions. See '34 AG Op 643; '38 AG Op 63

6151.3 Exceptions.

Atty. Gen. Opinion. See '34 AG Op 643

6151.5 Acquiring property and building thereon.

"Surplus earned" defined. A municipally owned water plant may not be said to have "a surplus earned from the operation" of the said plant within the meaning of this section, unless in the operation of said plant the income from water rentals and the like, other than taxation, exceeds the cost of operation.

Saltzman v City, 214-1033; 243 NW 161

CHAPTER 313

PURCHASE AND CONSTRUCTION OF WATERWORKS IN CERTAIN CITIES

Atty. Gen. Opinion. See '25-26 AG Op 289

6155 Contracts—bonds—purchase of waterworks.

Breach of contract to build. In an action for damages based on alleged breach of a written contract for the erection, under written specifications, of a structure (especially when it is of magnitude and complexity), general conclusion allegations by plaintiff of the use by defendant of defective materials and workmanship must, on proper motion, be accompanied and supported by fact allegations showing with reasonable certainty, (1) wherein said material and workmanship were defective, (2) the location of the several alleged defects, and (under some circumstances) when each of said defects became manifest, and (3) the particular specification which was violated by using such material and workmanship.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Stockholder's action to establish interest in city waterworks. A stockholder in a waterworks company, who advocated purchase of its waterworks by city and assisted in carrying an election authorizing the same, and who did not disclose to the city his claim to an interest in or lien upon the property, was estopped to assert as against the city, which purchased the property and made improvements, that city's grantors did not have good title and were trustees ex maleficio, or that the city took property burdened with a trust for his benefit.

Shaver v Des Moines, 227-411; 288 NW 412

6158 Powers—waterworks fund—how disbursed.

Atty. Gen. Opinion. See '36 AG Op 446

6159 Fixing rates.

Allowable discrimination. In fixing rates for a municipally owned water plant, the classification of apartment houses as residences will not be deemed an unlawful discrimination simply on a showing that such classification deprives a complainant of the benefit of a rate granted to department stores, office buildings, and similarly conditioned businesses.

Knotts v Nollen, 206-261; 218 NW 563

CHAPTER 314

PURCHASE OF WATERWORKS BY CITIES OF FIFTY THOUSAND OR OVER

6162 Purchase—condemnation.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

Stockholder's action to establish interest in city waterworks. A stockholder in a waterworks company, who advocated purchase of its waterworks by city and assisted in carrying an election authorizing the same, and who did not disclose to the city his claim to an interest in or lien upon the property, was estopped to assert as against the city, which purchased the property and made improvements, that city's grantors did not have good title and were trustees ex maleficio, or that the city took property burdened with a trust for his benefit.

Shaver v Des Moines, 227-411; 288 NW 412

6175 Bond.

Atty. Gen. Opinion. See '25-26 AG Op 281

6177 Rules — records — accounts — financial statement.

Atty. Gen. Opinions. See '28 AG Op 178; '36 AG Op 415

6177.1 Audit of accounts.

Atty. Gen. Opinion. See '36 AG Op 415

6180 Rates generally.

Allowable discrimination. In fixing rates for a municipally owned water plant, the classification of apartment houses as residences will not be deemed an unlawful discrimination simply on a showing that such classification deprives a complainant of the benefit of a rate granted to department stores, office buildings, and similarly conditioned businesses.

Knotts v Nollen, 206-261; 218 NW 563

CHAPTER 314.1

EXTENSION OF WATER MAINS

Atty. Gen. Opinions. See '25-26 AG Op 114; '34 AG Op 165

CHAPTER 315

STREET RAILWAY REGULATIONS

6191 General powers.

Collisions with motor vehicles. See under §8156 (III)

Contracts—legality. A contract between a street railway company and a local labor union representing the employees will not be decreed illegal by a court of equity on the ground that the contract requires the company, against public policy, to maintain two employees on each car (1) when the city has not exercised its undoubted power over such subject matter, (2) when the city is not a party to the action, and (3) when the object of the action seems to be to obtain a declaratory decree only.

D. M. Railway v Assn., 204-1195; 213 NW 264

6193 Vestibules—brakes—transparent shields.

Res ipsa loquitur—applicability. Principle recognized that the doctrine of res ipsa loquitur is, under appropriate facts, applicable to common carriers.

Preston v Railway, 214-156; 241 NW 648

CHAPTER 316

CONDEMNATION, PURCHASE, AND DISPOSAL OF LANDS

CONDEMNATION

6195 Purposes.

Atty. Gen. Opinion. See '28 AG Op 255

Power not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

Governmental agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency were an individual.

Welton v Highway Com., 211-625; 233 NW 876

Construction of wharf—paramount right of state. The construction by the state of a wharf below high watermark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Acquisition for parks—scope of power. Statutory power to acquire land for parks embraces the power to acquire land for golf courses.

Golf View Co. v City, 222-433; 269 NW 451

Presumptive power to acquire—burden of proof. A municipality as defendant in an ac-

tion for specific performance of its alleged contract for the purchase of land, has the burden to establish its plea that its attempted purchase of said land was for a purpose not authorized by law. Record reviewed and held said burden had not been met.

Golf View Co. v City, 222-433; 269 NW 451

6201 Streets—conditions prescribed.

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

PURCHASE AND DISPOSAL

6205 Disposal of unsuitable lands.

Atty. Gen. Opinion. See '30 AG Op 151

6206 Disposal of lands and streets.

Atty. Gen. Opinion. See '30 AG Op 151

City's supervision. Cities and towns possess a wide, tho not unlimited, discretion in opening, controlling and vacating streets and alleys, and courts will not interfere except in a clear case of arbitrary and unjust exercise of such power.

Stoessel v Ottumwa, 227-1021; 289 NW 718

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

Vacation and conveyance—effect. A city has no property rights in a cab stand established on land vacated by the city and conveyed to a railway company.

Red Top v McGlashing, 204-791; 213 NW 791

Vacating alley—adjoining owner's rights. Action by city in vacating alley and conveying it to grantee, who closed the alley by fencing it as a part of his adjoining land, which still gave adjoining property owner ingress and egress to his property at both front and rear, and where only interference with public right was use of alley by children going to and from school, was not an abuse of city's discretion, and such action did not deprive such adjoining property owner of convenient and reasonable access to and from his property or its use.

Stoessel v Ottumwa, 227-1021; 289 NW 718

CHAPTER 317

TAXATION

6207 General fund.

Discussion. See 18 ILR 342—Tariffs—occupation taxes

Atty. Gen. Opinions. See '25-26 AG Op 83; '28 AG Op 60

Source of power. The power of a city to tax is strictly statutory—never implied.

Clark v Des Moines, 222-317; 267 NW 97

6209 City bridge fund.

Atty. Gen. Opinion. See '30 AG Op 236

6210 Agricultural lands.

Atty. Gen. Opinions. See '25-26 AG Op 127, 340, 496; '28 AG Op 65, 189, 331, 427; '30 AG Op 236; '32 AG Op 59; '38 AG Op 127, 305

Taxation and assessment—conflicting statutes. The general statutory declaration that designated agricultural lands within the limits of a city or town shall not be taxed "for any city or town purpose" must be deemed modified by a contemporaneous specific statute to the effect that a tax may be levied "upon all the taxable property in such city" for the purpose of paying the cost of paving arterial highways into and out of the city. (Ch. 308, C., '27.)

McKinney v McClure, 206-285; 220 NW 354

6211 Taxes for particular purposes.

Atty. Gen. Opinions. See '25-26 AG Op 83, 256, 339, 392, 432, 438, 442; '28 AG Op 48, 60, 202, 207, 250, 287; '30 AG Op 214, 297; '32 AG Op 18; '34 AG Op 362; '36 AG Op 328, 331, 424; '38 AG Op 427, 696, 721; AG Op April 26, '39

Utility plants maintained by taxation—Simmer law not applicable. The statutory provisions for taxation to maintain and operate utility plants, contained in this section and section 6142, C., '35, have no application to plants established under the Simmer law which are paid for from net earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

6212 Limitation of certain taxes.

Atty. Gen. Opinion. See '25-26 AG Op 442

6215 Transfer of funds.

Atty. Gen. Opinions. See '25-26 AG Op 377, 410

6216 Notice of hearing—limitation.

Atty. Gen. Opinion. See '25-26 AG Op 411

6217 Consolidated tax levy.

Atty. Gen. Opinions. See '25-26 AG Op 193; '30 AG Op 288, 352; '32 AG Op 119, 256

6218 Budget—publication—objections.

Atty. Gen. Opinions. See '25-26 AG Op 119, 193; '32 AG Op 119

6223 Anticipation of revenue.

Atty. Gen. Opinions. See '25-26 AG Op 182, 439; '28 AG Op 127

6224 Aiding outside highway.

Atty. Gen. Opinion. See '28 AG Op 155

6225 Question submitted.

Atty. Gen. Opinions. See '28 AG Op 155; '38 AG Op 346

6226 Limit on aid.

Atty. Gen. Opinion. See '28 AG Op 155

6227 Certification of taxes and assessments—collection.

Atty. Gen. Opinions. See '28 AG Op 251; '36 AG Op 303, 486; '38 AG Op 266

6228 Tax sales.

Atty. Gen. Opinions. See '36 AG Op 303; '38 AG Op 266

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

6229 Taxes paid over.

Atty. Gen. Opinions. See '28 AG Op 241; '36 AG Op 303

Paying over city taxes—mandatory procedure. The statutory requirement that the county treasurer shall pay collected municipal taxes to the city treasurer only on a written order signed by the mayor and city clerk or auditor is mandatory.

State v Hanson, 210-773; 231 NW 428

Illegal payment of funds to city with resulting loss. The act of a county treasurer in illegally paying collected municipal taxes to the city treasurer is the proximate cause of the loss of said funds consequent on the deposit of said funds in an insolvent bank by the city treasurer,—it being assumed that the question of negligence and proximate cause is a material inquiry in such a case.

State v Hanson, 210-773; 231 NW 428

6230 Diversion of funds.

Atty. Gen. Opinions. See '25-26 AG Op 377; '38 AG Op 427

CHAPTER 318

ROAD POLL TAX

Atty. Gen. Opinion. See '30 AG Op 150

6231 Tax authorized.

Atty. Gen. Opinions. See '25-26 AG Op 224; '30 AG Op 150; '32 AG Op 69; '34 AG Op 331

6233 Action to recover.

Atty. Gen. Opinions. See '30 AG Op 150; AG Op Sept. 1, '39

6236 Certification of unpaid tax.

Atty. Gen. Opinion. See AG Op Feb. 7, '39

6237 Action.

Atty. Gen. Opinion. See AG Op Sept. 1, '39

CHAPTER 319

INDEBTEDNESS

Atty. Gen. Opinions. See '25-26 AG Op 438; '32 AG Op 3; '38 AG Op 63, 498

6238 Limitation.

Atty. Gen. Opinions. See '25-26 AG Op 438; '28 AG Op 120; '30 AG Op 181; '36 AG Op 82; '38 AG Op 77; AG Op Jan. 24, '39

"Taxable property" defined. "Taxable property" embraces "moneys and credits", within the meaning of the constitutional provision which limits municipal indebtedness. (Const., Art. XI, §3.)

Mack v Sch. Dist., 200-1190; 206 NW 145

General obligations exceeding limit—invalidity—trust fund. School warrants which are in form the general obligations of the district, and issued under a purported contract of the district providing for such unconditional issuance, are void if in excess of the constitutional limit of indebtedness, notwithstanding the fact that the said contract carries the inference that the warrants will be paid from a special fund arising from the sale of bonds.

Carstens v Sch. Dist., 218-812; 255 NW 702

Obligation of contracts—tax as asset. In the marshaling of the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of constitutional limitation, a duly levied and collectible tax must be deemed a municipal asset, in the absence of proof showing the definite purpose of the tax, and, if for current expenses, that legal obligations have been or necessarily will be created, sufficient to offset said tax fund.

Holst v Sch. Dist., 203-288; 211 NW 398

Obligation of contracts—what constitutes a debt. A contract between an architect and a municipal corporation, which contract imposes a financial obligation on the corporation only in case the corporation enters into a further contract for the erection of the building which the architect has planned, is properly classified as a liability of the corporation's from the moment the building contract is entered into. So held on the issue whether the municipal debt was in excess of constitutional limitation.

Holst v Sch. Dist., 203-288; 211 NW 398

Construction of contract. The specific amount for which a municipal corporation obligates itself in a written contract for the construction of a schoolhouse in return for the contractor's agreement to "provide all the material and perform all of the work," etc., is in no wise lessened by a contract clause that said price "includes five thousand dollar figure for millwork".

Holst v Sch. Dist., 203-288; 211 NW 398

Computation of assets and liabilities. In the marshaling of the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of constitutional limitation, collected and uncollected taxes and tuition due the municipality cannot be deemed an asset when it is shown that the current expenses of the municipality will consume the entire amount of said taxes and tuition; otherwise as to municipal property available for sale.

Trepp v Sch. Dist., 213-944; 240 NW 247

Obligation of contracts—unconstitutional indebtedness not curable. The legislature has no constitutional power to authorize a tax levy or a bond issue to pay, in whole or in part, a constitutionally prohibited indebtedness. More concretely, if a municipality creates an indebtedness which is in part valid, and in part constitutionally invalid, the invalid part may not be cured (1) by the voting of a tax to pay or reduce the indebtedness, or (2) by the issuance of bonds, and the application of the proceeds thereof to the same purpose.

Trepp v Sch. Dist., 213-944; 240 NW 247

Funding bonds create no additional debt. A county whose valid bonded indebtedness is beyond the constitutional limitation (because of a drop in property valuations) may, under an authorizing statute, validly refund said bonds, without creating any additional indebtedness in a constitutional sense, by issuing and selling at par and for cash, refunding bonds, and by irrevocably placing the proceeds of said sale in a separate and distinct trust fund which is also irrevocably pledged for the sole purpose of discharging the particularly designated bonds which are being refunded.

Banta v Clarke County, 219-1195; 260 NW 329

Obligations payable out of earnings. The expenditure which is necessary to establish a municipal electric light and power plant and which is to be paid solely from the earnings of the said plant, is not a "debt" within the constitutional and statutory limitation on indebtedness.

Wyatt v Town, 217-929; 250 NW 141

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, altho plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

Simmer law—federal money grants. The words "maximum amount to be expended" in the so-called "Simmer law" refer not to the size of the plant but to the amount to be paid from the earnings. It follows that the construction fund may be enlarged by other funds that do not have to be repaid from taxes or from earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Election — legality — immaterial questions. On the narrow question of the legality of a called election to vote on the erection of a municipal light and power plant, the question whether the plant if authorized and erected would create an unlawful indebtedness is quite immaterial.

Hogan v City, 217-504; 250 NW 134

Prior indebtedness—supported findings—conclusiveness. On the issue whether the indebtedness of a municipal corporation exceeded the constitutional limit, the supported finding of the trial court that a certain indebtedness was created prior to the indebtedness in question, or that the indebtedness in question "did not precede" said other indebtedness, is not reviewable by the appellate court.

Trepp v Sch. Dist., 213-944; 240 NW 247

Tax list conclusive. On the issue whether the indebtedness of a municipal corporation exceeds the constitutional limitation, the court cannot add other property to the "last state and county tax list."

Trepp v Sch. Dist., 213-944; 240 NW 247

6239 Purposes.

Cities, attractive nuisance liability. See under §5738 (III)

City's exercise of governmental function. See under §5738 (I)

Atty. Gen. Opinions. See '28 AG Op 250; '36 AG Op 82, 331; '38 AG Op 63, 721

6240 Application of limitation.

Atty. Gen. Opinion. See '36 AG Op 82

Valid authorization. The legislature may authorize municipalities to incur, with or without an election, a debt when the debt does not exceed constitutional limitations.

Chitwood v Lanning, 218-1256; 257 NW 345

6241 Election required.

Atty. Gen. Opinions. See '28 AG Op 250; '38 AG Op 63

Issuance of bonds without authorizing vote. A legislative act authorizing boards of trustees of municipally owned waterworks in cities conditioned in a specified way to issue bonds for the purpose of extending or improving said waterworks does not authorize the trustees to issue said bonds without an authorizing vote of the electors of the municipality when, without such act, an authorizing vote of the electors would be necessary under other statutes which were in no manner repealed; especially is this true in view of the legislative history of the state.

Fowler v Board, 214-395; 238 NW 618

6242 Initiation of proceedings.

Atty. Gen. Opinion. See '28 AG Op 250

Election—different methods of calling. Section 6132 and this section, C., '31, provide optional methods for submitting to the people the question whether a municipal light and power plant shall be erected and paid for out of the earnings of the plant.

Hogan v City, 217-504; 250 NW 134

Petition—sufficiency. A statutory provision that a petition for an election to vote authorization for a public utility shall state that such plant cannot be "purchased, erected, built, or furnished" within the limits of a certain percentage on the property valuation is complied with by stating that such plant cannot be "established" within the limits of such percentage, it appearing that no such plant then existed within the municipality.

Iowa Service v City, 203-610; 213 NW 401

Petitioners for election—qualifications. The electors of a city or town who are such under the constitution of this state, even tho their names do not appear on the official books of registered voters of the city or town, are qualified to petition for the calling of an election to vote on the proposition whether the municipality shall erect an electric light and power plant.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition — forged signatures — effect. The fact that a petition to a city council for an election to vote on the proposition whether the city shall construct a specified public utility plant contains both forged signatures of electors and signatures of nonresidents of the city will not invalidate the petition if it be otherwise sufficient after the objectionable signatures are excluded.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition—verification not required. A petition for the calling of an election in a city or town to vote on the proposition whether the municipality shall construct an electric light and power plant, need not be accompanied by an affidavit as to the electoral qualifications of the signers. This chapter contains no such requirement.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition for election—insufficiency—burden of proof. He who alleges the insufficiency of a duly filed petition for the calling of a municipal election to vote on the proposition whether the municipality shall erect an electric light and power plant, has the burden to sustain his allegation when the petition is apparently sufficient and apparently in conformity with the statute.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

6245 Questions submitted—manner of submission.

Election—ballot—sufficiency. A ballot which sets forth whether the city or town shall "establish, erect, maintain, and operate" an electric light and power plant, and pay for the same solely from the earnings of said plant, and definitely limits the expenditures for establishment, is all-sufficient without any reference (1) to the maximum rate to be charged consumers, or (2) to the interest rate to be paid on the expenditure, or (3) whether past

or future earnings are to be so employed, or (4) whether the plant is to be pledged.

Wyatt v Town, 217-929; 250 NW 141

6246 Majorities required.

Atty. Gen. Opinion. See '34 AG Op 244

Public improvements—Simmer law—nonapplicable statute. Elections to establish municipally owned public utilities payable from the earnings are controlled by chapter 312, C., '35, and this section has no application.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

CHAPTER 320

BONDS

6252 Funding.

Bonds—evasive procedure—validity. Bonds issued under a procedure which is, on its face, apparently authorized by law, are nevertheless invalid if the record shows that such procedure was simply a subterfuge for the purpose of evading the law and to accomplish an illegal purpose.

Muscatine County v City, 205-82; 217 NW 468

6258 Sale or exchange.

Application without sale. A city which offers for sale bonds voted for the erection of a public utility and receives no bids may not thereupon enter into a contract which provides that the contractor shall receive the bonds at par in payment of the contract price.

Iowa Service v City, 203-610; 213 NW 401

"Indebtedness"—payment from future taxes.

Brunk v Des Moines, 228- ; 291 NW 395

6261 Anticipation of special taxes.

Atty. Gen. Opinions. See '25-26 AG Op 31, 365; '28 AG Op 202, 206; '32 AG Op 89; AG Op Sept. 21, '39

Bonds to contractor—noncompetitive bidding.

Weiss v Woodbine, 228- ; 289 NW 469

6262 How denominated.

Discussion. See 13 ILR 81—Liability of city upon paving certificates

6263 Assessments and levies pledged.

Atty. Gen. Opinions. See '25-26 AG Op 31; '28 AG Op 206; '36 AG Op 327

Special procedure for collection exclusive. A municipal improvement certificate may not be foreclosed by an action in court, because, (1) the statutes confer no such authority, and (2) the statutes provide a special procedure for collection along with the collection of ordinary taxes. See §6007 et seq., §7193-d1, C., '31 [§7193.01, C., '39].

Hawkeye Ins. v Valley-D. M. Co., 220-556; 260 NW 669; 105 ALR 1018

6264 Limitation of action.

Time limit to question legality of bonds.

Waller v Pritchard, 201-1364; 202 NW 770

CHAPTER 321

PLATS

6266 Subdivisions or additions.

Parol as affecting writings — ambiguous plat. A town plat which is ambiguous in its descriptions and recitals is subject to parol explanation.

Shuler v Sand Co., 203-134; 209 NW 731

6269 Streets and blocks.

Plat — nonconformity with statutes — proof. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments the nonconformity of plat to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Co., 223-987; 274 NW 103

6277 Record—filing.

Atty. Gen. Opinion. See '25-26 AG Op 240

ANALYSIS

I COMMON-LAW DEDICATION
II STATUTORY DEDICATION
(a) IN GENERAL
(b) CONSTRUCTION OF DEDICATION
(c) INTENTION TO DEDICATE
(d) REVOCATION OF DEDICATION
III ACCEPTANCE OF DEDICATION
IV PROPRIETARY INTEREST OF CITY OR TOWN
V PROPRIETARY INTEREST OF PROPERTY OWNER

I COMMON-LAW DEDICATION

Fundamental requirements. The mere use of a roadway, howsoever long continued, will not ripen into an irrevocable private easement in favor of the private user, nor into a dedicated public highway in favor of the public generally, unless, in the case of a claim of private easement, the fact is established, independent of the evidence of use, that the private user has, for at least ten years, and to the knowledge of the landowner, asserted or claimed a hostile right to use such way, and

unless, in the case of a claimed public dedication, the fact is established that the land owner has, by deliberate, unequivocal, and decisive acts and declarations, manifested a positive intention permanently to abandon the land in question to the public for highway purposes.

Culver v Converse, 207-1173; 224 NW 834

Implied dedication. An implied dedication of land for a public way and an implied acceptance thereof by the public will not be decreed on evidence tending to show a very perfunctory assumption of jurisdiction over the land by the public authorities, plus a use which is as consistent with the theory of mere permission by the owner as with the theory of rightful public use.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Establishment of highway—prescription. A public way by prescription will not be decreed on evidence which is just as consistent with the theory of the owner that whatever use was made of the land as a road was purely permissive as with the theory that the use was hostile, adverse, and under a claim of right.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Evidence — sufficiency. Evidence that the public highway authorities had, on at least one occasion, worked a roadway, coupled with evidence of use of the roadway by the public for many years, may furnish sufficient evidence of a dedication and the acceptance thereof.

Dillon v Fehd, 207-351; 222 NW 881

II STATUTORY DEDICATION

(a) IN GENERAL

Fatally indefinite deed. A deed to a strip of land is insufficient, in and of itself, to constitute a dedication of land for highway purposes when the deed is void for uncertainty in the description.

Beim v Carlson, 209-1001; 227 NW 421

Deed — effect as to subsequently laid out streets. An ordinary railroad right of way deed simply grants to the railroad an easement, and works no impediment to the vesting in a municipality, subject to such easement, of streets subsequently laid out across such right of way; and especially so when the railroad company acquiesces in and recognizes the statutory dedication to the public.

Ackley v Elec. Co., 206-533; 220 NW 315

(b) CONSTRUCTION OF DEDICATION

Evidence—sufficiency. Plat of a municipal addition reviewed, in the light of explanatory testimony, and held insufficient to show that an irregular tract therein had been dedicated as a public street.

Shuler v Sand Co., 203-134; 209 NW 731

(c) INTENTION TO DEDICATE

Conclusiveness. The recorded plat of an addition must be held to control boundary lines, in the absence of evidence sufficient to establish the acquiescence of the interested parties in other boundary lines. (See under §12306.)

Jackson v Snyder, 202-262; 208 NW 321

(d) REVOCATION OF DEDICATION

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

III ACCEPTANCE OF DEDICATION

Adverse possession — unaccepted platted street applicability. Where parties claim land dedicated in plat as a street, but not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

Use of part of street—access to properties —no vacation of street. Where plaintiffs and defendants, as property owners, abutting on a dedicated but unaccepted street, have for years used a part of the street in entering and leaving their respective properties, thereby acquiring an easement in such part of the street, and where defendants acquired title to the other part of the street by adverse possession and acquiescence, the plaintiffs are not entitled to vacate such street.

Brewer v Claypool, 223-1235; 275 NW 34

Platted streets—nonacceptance—effect. Acceptance of dedication being essential to establishment of a street, where a municipality never accepted a certain plat, the streets remain private property. Purchasers of lots may acquire an easement thereon for access to their premises.

Brewer v Claypool, 223-1235; 275 NW 34

Statutes of limitations—nonapplicability to nonaccepted street. In a quiet title action where land was dedicated but never accepted as street in unincorporated village, the rule that statute of limitations will not run against a municipality exercising a governmental function, does not apply.

Brewer v Claypool, 223-1235; 275 NW 34

IV PROPRIETARY INTEREST OF CITY OR TOWN

Village streets — ownership. All highways appearing on a village plat become streets and belong to the municipality as soon as legal incorporation is effected.

Ackley v Elec. Co., 206-533; 220 NW 315

Right of way deed—abandonment—effect. A deed to a strip of land for highway purposes is ipso facto annulled and rendered ineffective by the definite abandonment of the proposal to establish the highway. In other words, the municipality may not, years after definitely abandoning the project, establish the highway and claim anything under the deed.

Beim v Carlson, 209-1001; 227 NW 421

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

V PROPRIETARY INTEREST OF PROPERTY OWNER

Performance of contract—partial failure of title—alley as nonincumbrance. A vendor who seeks to recover the entire contract price of land which he had contracted to convey, even tho a portion thereof proves to be a public alley, cannot support his claim on the theory that the public alley was a benefit to that portion of the land to which he had good title, and was not an incumbrance.

Van Duzer v Engeldinger, 209-150; 227 NW 591

6282 Streets, alleys, and public grounds.

Streets — nonuser — adverse possession — estoppel. Tho a street be legally established, yet where (1) the municipality does not open up the street, or there is nonuser for the statutory period, and (2) private rights have been acquired by adverse possession, then abandonment may be presumed, the public estopped from asserting any rights therein, and public rights in street extinguished.

Brewer v Claypool, 223-1235; 275 NW 34

Use of part of street—access to properties—no vacation of street. Where plaintiffs and defendants, as property owners, abutting on a dedicated but unaccepted street, have for years used a part of the street in entering and leaving their respective properties, thereby acquiring an easement in such part of the street, and where defendants acquired title to the other part of the street by adverse possession and acquiescence, the plaintiffs are not entitled to vacate such street.

Brewer v Claypool, 223-1235; 275 NW 34

6284 Vacation by lot owners—petition—notice.

Action to vacate municipal plat. In an action for the vacation of a county auditor's plat of land within a city or town, the county auditor is not a necessary party.

Schemmel v Town, 214-321; 242 NW 89

Vacation of plat by court. A county auditor's plat may be vacated by a court of equity at the instance of a plaintiff who, since the plat was duly executed, has become the owner of all the various tracts embraced in said plat.

Schemmel v Town, 214-321; 242 NW 89

Vacation of plat—when city may not object. A city or town may not justly complain of the vacation of an auditor's plat of land within the municipality when no public property of any kind is located on the land, and when legitimate and authorized municipal taxation is in no manner limited.

Schemmel v Town, 214-321; 242 NW 89

Use of part of street—access to properties—no vacation of street. Where plaintiffs and defendants, as property owners, abutting on a dedicated but unaccepted street, have for years used a part of the street in entering and leaving their respective properties, thereby acquiring an easement in such part of the street, and where defendants acquired title to the other part of the street by adverse possession and acquiescence, the plaintiffs are not entitled to vacate such street.

Brewer v Claypool, 223-1235; 275 NW 34

6286 Decree.

Use of part of street—access to properties—no vacation of street. Where plaintiffs and defendants, as property owners, abutting on a dedicated but unaccepted street, have for years used a part of the street in entering and leaving their respective properties, thereby acquiring an easement in such part of the street, and where defendants acquired title to the other part of the street by adverse possession and acquiescence, the plaintiffs are not entitled to vacate such street.

Brewer v Claypool, 223-1235; 275 NW 34

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

6293 Platting for assessment and taxation.

Atty. Gen. Opinion. See '34 AG Op 520

CHAPTER 322

DISABLED AND RETIRED FIREMEN AND POLICEMEN

6310 Pension funds.

Atty. Gen. Opinions. See '25-26 AG Op 232; '32 AG Op 120; 153; '34 AG Op 613

Failure to maintain pension fund—proper remedy. An action at law against a city for judgment consequent on the failure of the council to perform its mandatory duty to levy a tax sufficient to meet and pay pensions for firemen and policemen, will not lie either on the theory of contract or damages. Mandamus is the proper remedy.

Lage v City, 212-53; 235 NW 761

Fireman—pension—service prior to adoption of pension plan. Any city or town having an organized fire department must pay to a retired fireman, who was on a monthly salary, his statutory pension when he becomes eligible, if it has become a pension-paying department prior thereto, altho it may not have been such a department for all of the 22 years that the pensioner was in service.

Mathewson v Board, 226-61; 283 NW 256

Deposit of funds—nonpreference. The trustees of a municipal fireman's pension fund may validly make a bank deposit of its funds in an amount sufficient to meet current pension demands. It follows that if the bank becomes insolvent the trustees are simply depositors and no preference over other depositors exists.

Andrew v Bank, 214-105; 241 NW 412

Wrongful deposit defined—preference. A deposit in a bank of municipal firemen's pension funds under conditions which deprive the trustees of the power to immediately withdraw said funds, is wrongful and being wrongful the trustees do not lose title to said funds. It follows that in case the bank becomes insolvent the deposit is entitled to preferential payment from the cash on hand at the time of insolvency; and it matters not that the trustees and bank are in pari delicto.

Andrew v Bank, 214-105; 241 NW 412
Andrew v Union Bank, 222-881; 270 NW 465

6311 Boards of trustees—officers.

Atty. Gen. Opinions. See '28 AG Op 227; '32 AG Op 153

6312 Investment of surplus.

Atty. Gen. Opinion. See '28 AG Op 227

6313 Gifts, devises, or bequests.

Atty. Gen. Opinion. See '25-26 AG Op 431

6314 Membership fee—assessments.

Atty. Gen. Opinion. See '32 AG Op 120

6315 Who entitled to pension—conditions.

Atty. Gen. Opinion. See '32 AG Op 153

Nature of right. The right to a pension becomes a vested and enforceable right, upon the happening of the statutory facts which mature the right.

Gaffney v Young, 200-1030; 205 NW 865

Nonbar by lapse of time. The right to make application for and to enforce the allowance of a pension which has actually accrued is barred by no lapse of time.

Gaffney v Young, 200-1030; 205 NW 865

Sanitation officer. The sanitation and quarantine officer appointed by the mayor from the police force of a city (§2232, C., '27) is within the benefits of the statutory policemen's pension fund.

Dempsey v Alber, 212-1134; 236 NW 86; 238 NW 33

Fireman serving prior to adoption of pension plan. Any city or town having an organized fire department must pay to a retired fireman, who was on a monthly salary, his statutory pension when he becomes eligible, if it has become a pension-paying department prior thereto, altho it may not have been such a department for all of the 22 years that the pensioner was in service.

Mathewson v Board, 226-61; 283 NW 256

6318 Pensions—widow—children—dependents.

Atty. Gen. Opinion. See '28 AG Op 373

Workmen's compensation—when denied. The minor children of a deceased policeman who was a member of an organized police department and contributing to the statutory pension fund of said department, and who was killed while attempting to effect an arrest and at a time when he was not actually "pensioned", are not entitled to compensation under the workmen's compensation act, notwithstanding section 1422, Code, 1927. (§1361, par. 4, C., '27.)

Ogilvie v City, 212-117; 233 NW 526

6320 Volunteer or call firemen.

Atty. Gen. Opinion. See '32 AG Op 120

6322 Decision of board.

Certiorari (?) or mandamus (?). Certiorari and not mandamus is the proper remedy to test the legality of the action of the trustees in denying a pension to an applicant.

Gaffney v Young, 200-1030; 205 NW 865
Riley v City, 203-1240; 212 NW 716

Review on question of facts. Certiorari will lie to review the action of the trustees of a statutory pension fund in denying relief to an applicant when the conceded or proven

facts mandatorily require the granting of such relief.

Dempsey v Alber, 212-1134; 236 NW 86; 238 NW 33

Findings and orders—conclusiveness. An unquestioned, nonfraudulent order or finding by the board of trustees of the policemen's pension fund, on a due application for retirement on a pension, that the applicant was not entitled to such pension, constitutes a conclusive adjudication of the right to such pension, even tho the board did not act on the advice of a physician as required by statute, and even tho the board otherwise acted irregularly.

Riley v Board, 210-449; 228 NW 578

Conclusiveness. The official decision of the board of trustees of the firemen's pension fund that an applicant was not entitled to a pension on account of an alleged injury, is final and conclusive in the absence of fraud, and fraud will not be presumed in the absence of proof thereof. So held as to a claimed injury which had, apparently, been concealed for some nine years before being presented as a ground for pension.

Fehrman v Sioux City, 223-308; 271 NW 500

CHAPTER 322.1

RETIREMENT SYSTEMS FOR POLICEMEN AND FIREMEN

6326.03 Definitions controlling.

Atty. Gen. Opinion. See AG Op Feb. 23, '39

6326.05 Membership.

Atty. Gen. Opinion. See '36 AG Op 634

CHAPTER 323

HOUSING LAW

GENERAL PROVISIONS

6329 Definitions.

Atty Gen. Opinions. See '30 AG Op 56; '36 AG Op 178

Nuisance—repair shop in connection with garage—injunction. A repair shop in connection with a garage, situated in what is in fact a residential district, may be attended with such noise, smoke, gases, and odors as to constitute an abatable private nuisance, provided such shop cannot be so operated as to avoid such objectionable conditions.

Pauly v Montgomery, 209-699; 228 NW 648

LIGHT AND VENTILATION

6339 Rear yards.

Atty. Gen. Opinion. See '30 AG Op 56

MAINTENANCE

6392 Repair of dwelling.

Injury to tenant—common law rules. The housing law (ch 323, C., '31) providing that "Every dwelling and all the parts thereof shall be kept in good repair by the owner", does not change the common law rule of tort liability of the lessor to the lessee.

Johnson v Carter, 218-587; 255 NW 864; 93 ALR 774

Negligence of tenant—liability of landlord. Principle recognized that a property owner who has parted with full possession and control of his premises by lease is not liable to third persons for injuries caused by the negligence of the tenant.

Updegraff v City, 210-382; 226 NW 928

Leased premises—liability—res ipsa loquitur. With respect to trapdoor in coliseum leased by one defendant to another for circus conducted by a third party, doctrine of res ipsa loquitur held not to apply to injury to one falling into opening, especially where the trapdoor was not wholly under the control of defendants.

Work v Coliseum Co., (NOR); 207 NW 679

Causal connection with injury necessary—no conjecture and speculation in verdict. There must be causal connection between an injury caused by falling from a fire escape because of an alleged defect in the top step. When the allegation is not substantiated by the evidence, any more than by the plaintiff's testimony, stating that "something moved", that he "caught his heel on the step", it would be mere conjecture and speculation to base a verdict thereon, and verdicts must rest on something more substantial.

Gowing v Field, 225-729; 281 NW 281

Negligence—trespassing children. The owner or occupier of real property is under no legal obligation to make or keep the premises safe for trespassers or bare licensees. So held where a child fell through an opening in the floor of a building which was undergoing reconstruction after a fire.

Battin v Cornwall, 218-42; 253 NW 842

Independent contractor as invitee—known danger revealed—otherwise reasonable care. Person, employing an independent contractor to put steam pipes in downspouting, owes only the duty to such invitee to use reasonable care for his safety, and to warn the contractor as to defects or dangers known to the employer and not apparent to the contractor. The employer is not responsible to the contractor for injuries from defects that the contractor knew of or, in the exercise of ordinary care, ought to have known of.

Gowing v Field, 225-729; 281 NW 281

REQUIREMENTS AND REMEDIES

6440 Injunction.

Proper party plaintiff. The proper officer charged with the enforcement of the "Housing Law" may maintain an action to enjoin the storage of gasoline on residence property without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

CHAPTER 324

MUNICIPAL ZONING

6452 Building restrictions — powers granted.

Discussion. See 13 ILR 78—Zoning—police power; 25 ILR 830—Residential property surrounded by business properties

ANALYSIS

I IN GENERAL
II RESTRICTIONS IN DEEDS

I IN GENERAL

Discussion. See 11 ILR 152—Zoning ordinances

Prohibiting erection of building. The legislative grant of power in §5756, C., '27, to regulate the erection of buildings, does not embrace the power to prohibit the erection of buildings, and the power to prohibit will not be deemed supplied because of the existence of the power in other statutes (chs 324, 325, C., '27), of which the city has never availed itself.

Downey v City, 208-1273; 227 NW 125

Building restrictions—abrogation by ordinance. Building restrictions which constitute covenants running with the land are not abrogated by a subsequently enacted municipal zoning ordinance which is contrary to such building restrictions but which distinctly disclaims any intent to abrogate any existing contract restrictions.

Burgess v Magarian, 214-694; 243 NW 356

Building restrictions—enforcement. Building restrictions prohibiting the erection of a gasoline filling station within a certain addition should be enforced on a proper showing even tho immediately outside said addition a gaso line filling station has been erected.

Burgess v Magarian, 214-694; 243 NW 356

Illegal building permit—nonestoppel to question. The holder of an illegal building permit may not, in an action by injured property owners to restrain operations under the permit, successfully contend that his permit is beyond judicial cancellation because he has already expended a substantial sum in reliance on said permit.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

Undertaking establishment. The operation, under formal municipal permit, of an undertaking and embalming establishment in a city, in a territory designated by a duly enacted zoning ordinance as a commercial district, will not be enjoined on the sole ground that, being adjacent to a residence, said operation will have a depressing mental effect on the occupant and owner of said residence and on the members of his family.

Kirk v Mabis, 215-769; 246 NW 759; 87 ALR 1055

Wrongful exercise of judicial function. A city is not liable for damages consequent on the wrongful attempt of the city council to revoke a permit granted by it for the erection of a store building; nor are the individual members of the council liable for such damages, it appearing that they acted in good faith, but under a misapprehension of their legal power. (See under §5738.)

Rehmann v City, 204-798; 215 NW 957; 55 ALR 430; 34 NCCA 480

II RESTRICTIONS IN DEEDS

Covenants—construction—"buildings"—intent of parties. The word "building" as used in restrictive covenants in deeds of conveyance will be so construed as to give effect to the manifest intention and purposes of the parties. Held, inter alia, that structures for screening sand, and a derrick with hoisting machinery were "buildings" within the meaning of restrictive covenants against the erection of buildings which would cut off a view.

Curtis v Schmidt, 212-1279; 237 NW 463

Building restrictions—knowledge of. A grantee of land who, at the time of purchasing knows, generally, that there are building restrictions running with the land, is bound by such restrictions even tho they are omitted from the deed taken by him.

Burgess v Magarian, 214-694; 243 NW 356

Tax deed destroys prior chain. A valid tax deed issued on a sale for nonpayment of general taxes extinguishes all restrictive covenants in the chain of title of previous owners. So held as to a restriction against erecting or placing a business or store building on the lot in question.

Nedderman v Des Moines, 221-1352; 268 NW 36

6458 Board of adjustment.

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

6461 Appeals.

Revocation—exclusive remedy. When a building permit has been nonarbitrarily revoked by the city building inspector who issued it, the sole and exclusive remedy of the permittee is to appeal to the board of adjustment which is specifically provided for that and other related purposes.

Call Co. v City, 219-572; 259 NW 33

6463 Powers.

Arbitrary exercise of power. A board of adjustment, whose powers under a zoning ordinance are substantially identical with the powers granted such boards by this statute, acts wholly without legal authority when it grants to one of many property owners, similarly or identically situated as regards their property, the right to so structurally alter his residence as to convert said residence into a duplex in admitted disregard of the ordinance requirement as to area of lot per family, and to the damage of all property owners within the district.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Nonarbitrary revocation. The revocation by a building inspector of a building permit issued by him, on the ground of illegality of the original issuance, cannot be deemed an arbitrary revocation when it is made to appear that the legality of the original issuance is very questionable.

Call Co. v City, 219-572; 259 NW 33

Permissible revocation. A building permit issued by a city building inspector is revocable by the nonarbitrary action of the inspector when the permittee has not materially and detrimentally altered his position in reliance on the permit.

Call Co. v City, 219-572; 259 NW 33

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

6464 Decision on appeal.

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

6466 Petition for certiorari.

Illegal modification in zoning ordinance. A detrimentally affected property owner may maintain injunction to restrain the carrying out of a wholly illegal modification of a zoning ordinance when he had no notice of such modi-

fication until after the expiration of the thirty days provided by statute for certiorari.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

6469 Trial—judgment—costs.

Certiorari—procedure. Certiorari to review an order by the board of adjustment in re municipal zoning is not necessarily triable de novo on the return to the writ. Plaintiff, on proper allegation, has the legal right to introduce testimony (when it is not already in the return, or when the facts are in dispute) to show that the order of the board is (1) clearly arbitrary and unreasonable, or (2) is contrary to the public interest and to the spirit of the zoning ordinance. (See under §12464.)

Anderson v Jester, 206-452; 221 NW 354

CHAPTER 325

RESTRICTED RESIDENCE DISTRICTS

6475 Ordinance—scope.

Police power and regulations — restricted residence district—valid regulation. An ordinance, based upon a statute valid under the police power of the state, authorizing establishment of restricted residence districts is not a prohibition but a regulation and as such is a legitimate and reasonable exercise of the city's police power.

Scott v Waterloo, 223-1169; 274 NW 897

Prohibiting erection of building. The legislative grant of power in section 5756, C., '27, to regulate the erection of buildings does not embrace the power to prohibit the erection of buildings, and the power to prohibit will not be deemed supplied because of the existence of the power in other statutes (chs 324, 325, C., '27), of which the city has never availed itself.

Downey v City, 208-1273; 227 NW 125

Vesting permit power in council. An ordinance establishing a restricted residence district and prohibiting the erection and maintenance therein of gasoline filling stations without obtaining a permit therefor is not unconstitutional because the power to grant or refuse the permit is lodged in the city council —the same body which enacted the ordinance.

Marquis v City, 210-439; 228 NW 870
Cecil v Toenjes, 210-407; 228 NW 874

Failure to specify rules. An ordinance establishing a restricted residence district and prohibiting the erection and maintenance therein of gasoline filling stations without obtaining from the city council a permit therefor, is not unconstitutional because the ordinance fails to specify the rules and regulations governing the granting or refusal of such permit.

Marquis v City, 210-439; 228 NW 870
Cecil v Toenjes, 210-407; 228 NW 874

Discrimination—exemption to existing business. An ordinance establishing a restricted residence district, and prohibiting the subsequent erection and maintenance therein of gasoline filling stations without a permit, is not unconstitutional because the ordinance exempts from its operation an already established and maintained gasoline filling station.

Marquis v City, 210-439; 228 NW 870

Filling station permit—ordinance amending restricted district. Under a restricted residence district ordinance, a city council may issue a permit for erection of a gasoline filling station on certain lots without a separate ordinance to remove the particular lots from the restricted district.

Scott v Waterloo, 223-1169; 274 NW 897

Judicial supervision—council's judgment—filling station permit. The wisdom, judgment, or lack thereof, on the part of a city council in issuing a permit to erect a "filling station" is not reviewable by the courts unless the action taken was arbitrary, oppressive, or capricious. Evidence reviewed and permit held valid.

Scott v Waterloo, 223-1169; 274 NW 897

Building permit—permissible revocation. A building permit issued by a city building inspector is revocable by the nonarbitrary action of the inspector when the permittee has not materially and detrimentally altered his position in reliance on the permit.

Call Co. v City, 219-572; 259 NW 33

Permit—nonarbitrary revocation. The revocation by a building inspector of a building permit issued by him, on the ground of illegality of the original issuance, cannot be deemed an arbitrary revocation when it is made to

appear that the legality of the original issuance is very questionable.

Call Co. v City, 219-572; 259 NW 33

Building restrictions — abrogation by ordinance. Building restrictions which constitute covenants running with the land are not abrogated by a subsequently enacted municipal zoning ordinance which is contrary to such building restrictions but which distinctly disclaims any intent to abrogate any existing contract restrictions.

Burgess v Magarian, 214-694; 243 NW 356

CHAPTER 326

GOVERNMENT OF CITIES BY COMMISSION

THE COUNCIL

6495 Affidavit of candidacy.

Atty. Gen. Opinion. See AG Op Jan. 24, '39

6516 Bribery and illegal voting.

Conduct of election—municipal public utility ownership — candidates' statements. Statements made by candidates for municipal office as to their intentions respecting the acquisition of a public utility will not vitiate the election deciding the question of municipal ownership without a showing that the election was affected thereby.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291

Contests—electric company offering rate reduction — not candidates' bribery — election valid. Evidence held insufficient to establish bribery and an illegal election in that candidates for municipal office acquiesced in or ratified an advertised plan by which the local electric company offered to reduce its rates, and pay back to its subscribers an accumulating sum as a rebate, in the event the voters would elect council members opposed to municipal ownership.

Van Der Zee v Means, 225-871; 281 NW 460

Officers—election bribery by third person—disqualifying effect. A candidate having been elected to office is not disqualified, merely because some third person may have given or offered a bribe to the voters for the purpose of securing the election of said candidate, unless the candidate actually participated in and approved thereof.

Van Der Zee v Means, 225-871; 281 NW 460

6517 Salaries.

Atty. Gen. Opinion. See '25-26 AG Op 241

6519 Salaries of minor officers.

Fireman as "employee". The definition of the term "employee", as embodied in §1421, C., '24, is quite immaterial on the issue whether a fireman is an employee under this section.

Murphy v Gilman, 204-58; 214 NW 679

Ordinance not required. The determination of the salary of a fireman is the exercise of an administrative power and need not be made by ordinance.

Murphy v Gilman, 204-58; 214 NW 679

6528 Minor officers and assistants.

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

6530 Police judge.

Atty. Gen. Opinion. See '38 AG Op 319

Appointment—no implied repeal. A statute providing that in certain cities the council shall appoint a police judge is not impliedly repealed by the soldiers preference law, which merely places a limitation on the power of appointment.

Maddy v City Council, 226-941; 285 NW 208

Soldiers preference case—findings by district court. In an appeal under the soldiers preference law, the district court may direct a city council to appoint a war veteran to the position of police judge and to cancel all action taken in appointing a nonveteran with the same qualifications for the office, rather than remand the case for further consideration by the city council.

Maddy v City Council, 226-941; 285 NW 208

Soldiers preference law. In an action to compel the appointment of the plaintiff war veteran as city police judge, where it was shown that both the plaintiff and the nonveteran appointed by the city council were qualified for the position, a finding by the district court in favor of the veteran should not be disturbed.

Maddy v City Council, 226-941; 285 NW 208

6532 Removal of officers.

Atty. Gen. Opinion. See '38 AG Op 290

6533 Create and discontinue offices.

Atty. Gen. Opinion. See '38 AG Op 290

Employees—soldiers preference act—justifiable discharge. An order of a city council to reduce the number of employees in a named department justifies the discharge of an ex-soldier employee whose duties are apparently inseparably connected with said department.

Rounds v Des Moines, 213-52; 238 NW 428

6534 Interest in contracts.

Atty. Gen. Opinion. See '36 AG Op 660

ORDINANCES AND RESOLUTIONS

6553 Time limit on enactment.

Contracts—Simmer law—filing contract but not resolution—ordinance unnecessary. In establishing municipal ownership of a waterworks plant, it is the contract and not the resolutions calling an election that must be on file with the city clerk for one week before adoption, and an ordinance establishing the municipal waterworks plant is unnecessary.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

6556 Petitions for ordinances.

Initiative and referendum—scope. The initiative and referendum applies only to such acts as are legislative in character, as distinguished from those that are of an administrative or executive character. Held that submission of an ordinance which fixed the compensation of firemen was nugatory, even tho the submission was in the form of an amendment to an existing ordinance which fixed such salaries.

Murphy v Gilman, 204-58; 214 NW 679

6557 Ordinance passed or election called.

Atty. Gen. Opinion. See '28 AG Op 422

GENERAL POWERS AND DUTIES

6566 Department superintendents.

Employment of assistants. The superintendent of a department of municipal government under the so-called commission plan may himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof; and this is true notwithstanding an additional existing ordinance which provides, in effect, that all contracts shall be entered into or approved by the council as a whole, it being held that the latter ordinance is not a limitation on the former.

Loran v City, 201-543; 207 NW 529

6567 Statutes applicable.

Atty. Gen. Opinion. See '30 AG Op 92

6569 Existing limits, rights, property.

Statute governing action for damages. In a city which has abandoned its special charter and become organized under the commission form of municipal government, actions for damages consequent on defective streets are governed by §11007, par. 1, C., '27, and not by §6734, C., '27, such reorganized city having no "vested right" in said latter section within the meaning of this section.

Wilson v City, 210-790; 231 NW 495

6571 Discretionary powers.

Civil service employees—discharge. The city council has plenary power by appropriate resolution to order a good-faith reduction in the number of employees in a municipal department operating under civil service regulations, and may validly delegate to the chief officer of such department the administrative duty to designate, on the basis of efficiency, competency, and length of service, and without the preferring of charges, the employees who shall be discharged; and this is true tho the employees be ex-soldiers, as the soldier preference act has no application to a case where an office is abolished.

Lyon v Com., 203-1203; 212 NW 579

6574 Flood protection—division of work—levy.

Torts—storm waters into sanitary sewer—negligence—jury question. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

6575 Special assessments.

Graveling street—absence of grade nonjurisdictional. The due establishment of a permanent grade on a street is not a jurisdictional condition precedent to graveling said street, and assessing the cost thereof to abutting and adjacent property. It follows that the property owner, when duly notified of the proposed assessment, must present to the city council the objection that no permanent grade has been established, or said objection will be irrevocably waived.

Peoples Inv. Co. v Des Moines, 213-1378; 241 NW 464; 79 ALR 1310

6577 Repairs by street railway companies.

Assessment of street railways—fundamental purpose of statute. The fundamental purpose of the statute relative to the assessment of street railways for paving in connection with their tracks (§6051-c1, C., '31 [§6051.1, C., '39]) is to cover the entire subject and declare a basic rule for the government of the same.

In re Walnut Bridge, 220-55; 261 NW 781

Assessments — when franchise ordinance must yield to statute. A street railway franchise ordinance which specifies, in effect, that, until the state statutes otherwise provide, the obligation of the company to construct and reconstruct paving between and outside the rails of its tracks shall be thus and so, manifestly must yield to such later enacted state statute.

In re Walnut Bridge, 220-55; 261 NW 781

6579 Fund for cemeteries.

Atty. Gen. Opinions. See '32 AG Op 126; '34 AG Op 683

6581 Itemized statements.

Atty. Gen. Opinion. See '30 AG Op 262

Ordinance—insufficient publication "in pamphlet form". The publication "in pamphlet form", by a city, of the proceedings of the city council for the preceding month in which pamphlet appears a duly enacted ordinance, does not constitute the publication "in pamphlet form" of said ordinance as contemplated by §5721, C., '31.

Des Moines v Miller, 219-632; 259 NW 205

6582 Annual examination.

Atty. Gen. Opinion. See '30 AG Op 92

POLICE EQUIPMENT IN CERTAIN CITIES

6588 Equipment authorized.

Operation of police patrol a governmental function. The operation of a plainly marked police patrol by a policeman in uniform, in conveying policemen in uniform from the police station to their patrol beats, all under orders from the chief of police, is a governmental function. It follows that the city is not liable for damages consequent on the negligent operation of the car by the driver.

Leckliter v City, 211-251; 233 NW 58; 38 NCCA 493

RIVER FRONT COMMISSION AND FIRE DEPARTMENT IN CERTAIN CITIES

6596 Transfer of powers.

Atty. Gen. Opinions. See '25-26 AG Op 156; '38 AG Op 791

6597 Meandered streams.

Atty. Gen. Opinions. See '30 AG Op 300; '38 AG Op 791

Dams—new high watermark—title of state. The state of Iowa by erecting a permanent dam in the bed of its navigable river, and by maintaining said dam peaceably and uninterruptedly for a period of ten years, legally extends its title to the new high watermark resulting from the erection of the dam; and especially may a private deed holder not complain when his deed, executed after the dam was erected, simply calls for land "up to the river".

State v Sorenson, 222-1248; 271 NW 234

6598 Tax sales—redemptions.

Tax titles—mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract, allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

6600 Tax for fire department.

Atty. Gen. Opinion. See '25-26 AG Op 156

PARKS, SWIMMING POOLS, ETC., IN CERTAIN CITIES

6606 Powers granted.

Governmental functions. The construction and operation by a city of a bathing beach or water fountain is the exercise of a governmental function, and the city is not liable in damages for negligence in such construction and operation; and the charging of a nominal fee for the use of the beach does not change the rule.

Hensley v Towne, 203-388; 212 NW 714; 34 NCCA 559

Mocha v City, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

See Norman v City, 201-279; 207 NW 134; 25 NCCA 675

Drowning in swimming pool—liability. In an action to recover damages for the drowning of an eleven-year-old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about one hundred boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool not an "attractive nuisance". A swimming pool, either natural or artificial, is not an attractive nuisance.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool—drowning—res ipsa loquitur nonapplicable. The mere fact a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool proprietors—degree of care required. The general rule that the proprietor of a bathhouse or swimming pool for profit is bound to use ordinary care to guard against injury to his patrons held applicable to nonprofit corporation operating a swimming pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—failure to advise as to depth. A corporation, operating a swimming pool in which an eleven-year-old boy drowned, was not negligent in not personally informing the deceased of the depth of the water in the pool and in failing to inquire of him as to whether he could swim, where there were many signs, plainly visible about the pool indicating the various depths, and the age, intelligence, and experience of the deceased were sufficient to advise him of the inherent dangers of entering a body of water deeper than his height, especially when he was under the supervision of adults, who had more direct and complete control over him than the agents and employees operating the pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—life guards—sufficiency. Negligence of a corporation operating a swimming pool in which an eleven-year-old boy drowned, could not be grounded upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v Playground Assn., 227-81; 287 NW 259

CHAPTER 326.1

STREET IMPROVEMENTS AND SEWERS IN CITIES UNDER COMMISSION FORM OF GOVERNMENT

6610.04 Proceedings—plans.

Railroad crossing construction — council's power to require. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

6610.13 Private initiation of improvement plan.

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

6610.28 Final determination.

Railroad crossing construction — council's findings—conclusiveness. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

6610.49 Bids—advertisement—letting of contract.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

6610.57 Railways and street railways.

Railroad crossing construction — council's power to require. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

CHAPTER 328

CITY MANAGER PLAN BY POPULAR ELECTION

6630 Tenure by council.

Atty. Gen. Opinion. See '38 AG Op 290

6631 Tenure by manager.

Atty. Gen. Opinion. See '38 AG Op 290

6651 Appointments by council.

Atty. Gen. Opinion. See 38 AG Op 319

6678 General powers conferred.

Drowning in swimming pool—liability. In an action to recover damages for the drowning of an eleven-year-old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about one hundred boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

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Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—failure to advise as to depth. A corporation, operating a swimming pool in which an eleven-year-old boy drowned, was not negligent in not personally informing the deceased of the depth of the water in the pool and in failing to inquire of him as to whether he could swim, where there were many signs, plainly visible about the pool indicating the various depths, and the age, intelligence, and experience of the deceased were sufficient to advise him of the inherent dangers of entering a body of water deeper than his height, especially when he was under the supervision of adults, who had more direct and complete control over him than the agents and employees operating the pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—life guards—sufficiency. Negligence of a corporation operating a swimming pool in which an eleven-year-old boy drowned, could not be grounded

upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v Playground Assn., 227-81; 287 NW 259

6687 Procedure—petition—election.

Atty. Gen. Opinion. See '34 AG Op 294

CHAPTER 329

CITIES UNDER SPECIAL CHARTER

OFFICERS AND EMPLOYEES

6700 Marshal—policemen.

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

Policeman assaulting prisoner — discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

6706 Compensation of other officers—report.

Atty. Gen. Opinion. See '36 AG Op 313

6707 Change of compensation.

Atty. Gen. Opinion. See '34 AG Op 215

6710 Interest in contract.

Atty. Gen. Opinion. See '36 AG Op 660

MISCELLANEOUS OFFICIAL DUTIES

6718 Annual financial report.

Atty. Gen. Opinion. See '30 AG Op 262

ORDINANCES

6720 Ordinances—fines.

Atty. Gen. Opinions. See '34 AG Op 229; '38 AG Op 309

GENERAL PROVISIONS AND POWERS

6730 Applicability of provisions.

Atty. Gen. Opinions. See '38 AG Op 112, 313, 732

6731 Definition.

Atty. Gen. Opinion. See '34 AG Op 277

6732 Application of certain terms.

Atty. Gen. Opinion. See '36 AG Op 303

6734 Claims for personal injury—limitation.

Actions against cities generally. See under §5738

Actions against cities—streets—defects—notice. See under §5945

Condition precedent. This section prescribes a condition precedent to the right to maintain an action.

Luke v City, 202-1123; 211 NW 583

Notice—fatal inaccuracy. A statutory notice designed to avoid the three months statute of limitation on an action against a city for damages consequent on a defective street (§11007, C., '31) is fatally defective when it designates the place of injury at a point on a street some 3000 feet distant from the place or point on said street where the injury was actually received.

Tredwell v Waterloo, 218-243; 251 NW 37

Failure to state time. A statement that the injury occurred on "March 22d" is a nullity.

Luke v City, 202-1123; 211 NW 583

Notice—proof of service. Evidence of service of notice of injury in consequence of defective street, in order to prevent the attaching of the "three month" statute of limitation, held sufficient to justify submission to jury of the issue of such service.

Cuvelier v Dumont, 221-1016; 266 NW 517

Reorganization—statute governing action for damages. In a city which has abandoned its special charter and become organized under the commission form of government, actions

for damages consequent on defective streets are governed by §11007, par. 1, C., '27, and not by this section, such reorganized city having no "vested right" in said latter section within the meaning of §6569, C., '27.

Wilson v City, 210-790; 231 NW 495

6743 Smoke nuisance.

Repair shop in connection with garage—injunction. A repair shop in connection with a garage, situated in what is in fact a residential district, may be attended with such noise, smoke, gases, and odors as to constitute an abatable private nuisance, provided such shop cannot be so operated as to avoid such objectionable conditions.

Pauly v Montgomery, 209-699; 228 NW 648

6748 Changing watercourses—condemnation.

Percolating waters—damage to adjoining land—causal connection necessary. A city excavating a new creek channel and which thereby collects water on its own land, from which it percolates to adjoining land resulting in damage, is liable therefor, but there must be probative evidence to establish percolation as the cause of the damage.

Covell v Sioux City, 224-1060; 277 NW 447

GENERAL STATUTES MADE APPLICABLE

6758 Civil service.

Atty. Gen. Opinions. See '38 AG Op 112, 313

6759 General powers.

Atty. Gen. Opinion. See '25-26 AG Op 387

6772 Outside highways—aid.

Atty. Gen. Opinion. See '38 AG Op 346

6779 Limitation of action.

Time limit to question legality of bonds.

Waller v Pritchard, 201-1364; 202 NW 770

PUBLIC UTILITIES

6789 Establishment of utilities.

Bonds—express authority required. Power "to borrow" money does not embrace the power to issue negotiable bonds.

Muscatine Co. v City, 205-82; 217 NW 468

Bonds—extension of existing plant. A city has no power to issue bonds to provide for the cost of extensions and enlargement of an existing municipally constructed electric light and power plant.

Muscatine Co. v City, 205-82; 217 NW 468

Bonds—validity. Bonds issued under a procedure which is, on its face, apparently authorized by law, are, nevertheless, invalid if the record shows that such procedure was simply a subterfuge for the purpose of evading the law and to accomplish an illegal purpose.

Muscatine Co. v City, 205-82; 217 NW 468

6817 Regulation of electric wires.

Similar provision. See §5904

RIVER-FRONT AND LEVEE IMPROVEMENTS

6823 Water-front improvement—fund.

Atty. Gen. Opinion. See '30 AG Op 300

BOARD OF HEALTH

6834 Officers appointed—quorum.

Sanitary inspector—nonsupervisory position. In certiorari action to annul decision of civil service commission ordering the reinstatement of a discharged sanitary inspector, evidence, that his general duty was to investigate and pass upon complaints with only occasional control over incidental employees, held to support and sustain findings below that such position was "nonsupervisory" under civil service statute allowing a preference to certain employees who had worked a certain length of time.

Des Moines v Board, 227-66; 287 NW 288

6846 Contagious diseases.

Unvaccinated school children. The appellate court will be slow to interfere with an order by the trial court refusing a temporary injunction against the enforcement by a school board of its order which temporarily excluded unvaccinated pupils from the public school; and especially will the appellate court decline to disturb such refusal when it affirmatively appears that the order of the board has expired ex vi termini.

Baehne v Sch. Dist., 201-625; 207 NW 755

GENERAL TAXATION

6856 Special levies.

Atty. Gen. Opinion. See '25-26 AG Op 387

Extra-territorial extension of municipal light and power lines—constitutional taxation. Sections 6142 and 8310, C., '31, are constitutional insofar as they authorize cities and towns to levy taxes for extending, beyond their corporate limits, the transmission lines of their municipally owned electric light and power plants.

Carroll v Cedar Falls, 221-277; 261 NW 652

6863 Anticipating revenue.

Similar statute. See §6223, Vol I

6867.1 Taxation in general.

Atty. Gen. Opinion. See '36 AG Op 303

6871 Collection through county.

Atty. Gen. Opinion. See '36 AG Op 303

6880 Lien on real estate.

Similar statute. See §§7202–7205

STREET IMPROVEMENTS AND SEWERS

6901 Notice and levy of assessments.

Similar provisions. See §6026, Vol I

6907 When delinquent.

Atty. Gen. Opinion. See '28 AG Op 400

6912 Street improvements.

Railroad crossing construction — council's power to require. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

6913 Plat and estimate.

Similar provision. See §5993

6914 Publication of notice.

Analogous procedure. See §§5991, 5997

6915 Passage of resolution.

Analogous provision. See §5995

6920 Relevy.

Analogous provision. See §6060, Vol I

6921 Correction.

Analogous provision. See §6061

6923 Interest—delinquency.

Atty. Gen. Opinion. See '28 AG Op 400

6927 Requirements of bonds.

Successively due special assessment bonds—pro rata payment nonpermissible. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

TITLE XVI

TAXATION

CHAPTER 329.2

STATE TAX COMMISSION

6943.023 Rules and regulations.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

6943.026 Powers.

Atty. Gen. Opinions. See '32 AG Op 158; '34 AG Op 446; '38 AG Op 109, 558; AG Op Jan. 10, '39

Assessment irregularities—remedy—review by board. If a tax assessment is otherwise valid and legal, a property owner's remedy for an irregularity, such as indefinite description or overlapping assessment, is to appear before the board of review.

Jones v Mills County, 224-1375; 279 NW 96

Appeal — county treasurer not "aggrieved party". The county treasurer may not appeal to the district court from an order of the state board of assessment and review nullifying an assessment made by the said treasurer against alleged omitted property of a taxpayer, said treasurer not being a "party aggrieved" within the meaning of the statute. (§6943-c27, par. 9a, C., '31 [§6943.026, C., '39, (par. 9a repealed by 47 GA, ch 188, §7)]).

In re Lytle Inv. Co., 219-1099; 260 NW 538

Assessment—wrongful classification—statutory remedy must be pursued. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bk. v Mitts, 220-271; 261 NW 625

Duties—supervision. The state board of assessment and review must as one of its duties exercise supervision over the administration of

the tax list, advise with taxing officials, and aid in securing equitable and just enforcement of the tax list.

Trustees v Board, 226-1353; 286 NW 483

Taxation supervision—"cubical content" and "zone" assessments. The state board of assessment and review, under §6943-c27, C., '35 [§6943.026, C., '39], still has authority to control, regulate, and supervise the administration of the assessments and the tax laws of the state and to correct assessments made under the "cubical content" and "zone" method of assessing, notwithstanding a repeal of part of said section allowing it other revisory powers over local boards.

State v Local Board, 225-855; 283 NW 87

Arbitrary "zone" reductions—correcting local board. The state board of assessment and review has "supervision" over, and power to direct, the local board and the city assessor of Des Moines, Iowa, to correct an arbitrary and discriminatory practice as to "cubical content" and "zone" of assessments, and in a mandamus action may enforce its order for the correction of such discrimination as may already have resulted. Such an order is not a reassessment nor a revision of individual assessments of individual owners, since it dealt with aggregate valuation in several zones.

State v Local Board, 225-855; 283 NW 87

Levy and assessment—nullification—jurisdiction of state board. Assuming the legal right of the county treasurer to enter an assessment against the alleged omitted property of a taxpayer (§7155 et seq., C., '31), yet the state board of assessment and review has, on proper hearing and order, plenary jurisdiction, subject to appeal to the district court, wholly to nullify such assessment. (§6943-c27, par. 9a, C., '31 [§6943.026, C., '39, (par. 9a repealed by 47 GA, ch 188, §7)]).

Smith v Sioux City Yards, 219-1142; 260 NW 531

Reduction in assessment—power of board. The state board of assessment and review has power, in an even numbered year, and for the purpose of attaining a new basis for the computation of taxes in and for said year, to order the county board of equalization with notice to lower the assessed valuation of the real property in a township, tho it be true, of course, that said assessed valuation was made and legally confirmed in the preceding odd numbered year.

State v Board, 211-1116; 235 NW 303

Order for reduction—discretion. A valid order by the state board of assessment and review to a board of supervisors to reduce certain assessed valuations, leaves said board of supervisors with no discretion as to compliance with the order.

State v Board, 211-1116; 235 NW 303

Valuation—order of reduction. Where the taxable value to be placed on property in 1931 was fixed by the court, and was acquiesced in by all parties and neither appealed, it is considered a fair assessable value where the evidence does not indicate that property was to any considerable degree different in value in 1931 and 1933, and the state board of assessment and review recommends a 20% reduction of the 1931 tax assessment as an equalization of tax assessments for the year 1933, held, the taxpayer is entitled to the full 20% reduction rather than 10.08% reduction allowed by the assessor.

Trustees v Board, 226-1353; 286 NW 483

Statute authorizing reduction in assessed valuation without notice. It is inferentially suggested that the statute which authorizes the state board of assessment and review to order a reduction in the assessed valuation of property is not unconstitutional because the statute assumed to grant such power without notice.

State v Board, 211-1116; 235 NW 303

Voluntary payment on excessive assessment—later reduction by state board—effect. A taxpayer who makes no objection to the local board of review as to the valuation which has been duly placed on his real estate by the assessor for assessment purposes, and voluntarily pays the taxes duly levied during the two following years on said valuation, may not later, and after obtaining an order from the state board of assessment and review reducing said assessed valuation, successfully contend that any part of said voluntarily paid taxes was "erroneously or illegally exacted or paid" within the meaning of the refund statute, §7235, C., '35.

Cedar Rapids Co. v Stirm, 222-206; 268 NW 562

Mandamus proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of section 7164, C., '35. The state board of assessment and review has no power to correct this failure.

Hewitt v Keller, 223-1372; 275 NW 94

CHAPTER 329.3

INCOME, CORPORATION, AND SALES TAX

DIVISION I

INTRODUCTORY PROVISIONS

6943.035 Definitions controlling chapter.

Atty. Gen. Opinions. See '38 AG Op 56, 655

DIVISION II

PERSONAL NET INCOME TAX

6943.037 Tax imposed—applicable to federal employees.

Discussion. See 20 ILR 825—Personal net income tax; 22 ILR 292—Jurisdiction to tax income; 22 ILR 390—Constructive receipt of income; 22 ILR 430—Employees of federal agencies

6943.038 Income from estates or trusts.

Discussion. See 22 ILR 268—Tax on trust income

6943.040 "Gross income" defined—exceptions.

Discussion. See 18 ILR 320—Exemptions and deductions; 22 ILR 246—Progressive tax on gross income; 22 ILR 268—Tax on trust income; 22 ILR 411—Income from tax-exempt securities; 22 ILR 430—Employees of federal agencies; 24 ILR 343—Iowa and Federal law

Atty. Gen. Opinions. See '38 AG Op 46, 56, 723

Construction—ambiguity as prerequisite. A statute is not to be read as tho open to construction as a matter of course; but construction is invoked only when a statute contains such ambiguities or obscurities that reasonable minds may disagree as to their meaning.

Palmer v Board, 226-92; 283 NW 415

Tax statute—construed against taxing body. A proviso or exemption in a taxing statute in derogation of its general enacting clause must be strictly construed. However, as to contention that an income tax statute does not include out-of-state rent, not because of an exception, but by its terms, if open to construction at all, must fall within the general rule that tax statutes are construed strictly against the taxing body.

Palmer v Board, 226-92; 283 NW 415

Rent received on the land in another state taxable. Income tax statutes held to be so plain and certain as to require no construction and to patently indicate a legislative intent to tax all personal income whether originating in the state or without the state, and to plainly include rent received in the state from property located in another state.

Palmer v Board, 226-92; 283 NW 415

Interest on tax-exempt securities. Interest on tax-exempt municipal securities is not exempt from state income tax, tho the securities themselves are, by statute, exempt from general property tax. The statutory declaration that said securities "shall not be taxed" has reference solely to general property tax, and not to an excise tax—an income tax—on the interest collected on such securities.

Hale v Board, 223-321; 271 NW 168; 302 US 95

Income tax on dividends—time of payment controlling—when earned immaterial. Since income tax is not a tax on property but a tax on the individual, income received as dividends paid during the tax year constitutes taxable income for the year, where the return of the taxpayer is made on a cash receipt and disbursement basis for the calendar year, notwithstanding such dividends were accumulated by the corporation before the income tax law became effective.

Martin v Board, 225-1319; 283 NW 418; 120 ALR 1273

Stock market profits as capital investment. Transactions involving the sale of stocks and grain may be in the nature of a capital investment rather than stock in trade and, in the absence of a proper showing that they constituted the latter, the profits would not be taxable under the state income tax statutes.

Martin v Board, 225-1319; 283 NW 418; 120 ALR 1273

Stock market profits—when not taxable—refunds—stipulated record. In an action to cancel and secure a refund of income taxes submitted on a stipulated record, stock market transactions involved therein would be illegal and void as based on a gaming transaction if the buyer neither intended nor contemplated taking actual delivery but intended that the profits or losses should be settled on the market quotations; however, illegality is not presumed, and without illegality appearing in the record, profits accruing from such transactions must be held to be profits from the sale of capital assets, and not taxable as income, hence taxes paid thereon must be refunded.

Martin v Board, 225-1319; 283 NW 418; 120 ALR 1273

6943.041 Allowable deductions on gross income.

Federal income tax from receiver—burden of sustaining deductions. In an action involving a claim for federal income tax from an insolvent corporation, the assessment by the internal revenue collector must be treated as prima facie evidence of the amount due, and the state statutes do not control the matter of deduction for attorney fees, referee fees, court costs, and other expenses, but the burden is on the receiver to establish these deductions.

State v American Co., 225-638; 281 NW 172

6943.045 Return by individual.

Federal income tax—statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American Co., 225-638; 281 NW 172

6943.046 Return by fiduciary.

Federal income tax—statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American Co., 225-638; 281 NW 172

6943.057 Computation of tax, interest and penalties.

Atty. Gen. Opinion. See '38 AG Op 558

6943.058 Lien of tax—collection—action authorized.

Atty. Gen. Opinions. See '38 AG Op 164; AG Op Dec. 20, '39, May 3, '40

Income tax paid by surety. A surety whose bond was held for a compromise of corporate federal income taxes holds no lien upon the corporate assets, but has merely a right to be paid from assets held by receiver before payment to other claimants, and a receiver authorized to continue a business is not personally liable to such surety for diminishment of assets during receivership, tho such assets at the time of receiver's appointment would have been sufficient to pay the surety.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

6943.060 Revision of tax.

Defect of notice of commencement of action —noninterruption of running of limitations. In action to recover erroneous refund of income tax, summons addressed to marshal only and commanding him to summon named defendants to appear on specific date "to answer to a complaint filed by the United States of America" was defective as not addressed to defendants, not stating cause of action, and not describing consequences of failure to defend, and hence did not interrupt running of limitations as of date of service.

U. S. v French, 95 F 2d, 922

DIVISION III

BUSINESS TAX ON CORPORATIONS

6943.065 Corporate tax imposed.

Discussion. See 10 ILR 44—Federal income tax on municipal utilities

Income tax — discriminations — absence of evidence. The state income tax act (Ch 329-F1, C., '35 [Ch 329.3, C., '39]) will not be declared unconstitutionally discriminatory (1) because it exempts domestic corporations, and not individuals, partnerships and fiduciaries, from paying a tax on that part of their income derived from activities carried on outside the state of Iowa, or (2) because the graduate rate of tax (§6943-f5, C., '35 [§6943.037, C., '39]) is not uniform between corporations, individuals and partnerships.

Courts will not assume, in the absence of competent evidence, that no state of facts could reasonably be conceived which could afford a rational basis for distinguishing, for purpose of taxation, between income of an individual and that of a domestic corporation derived from business carried on outside the state.

Vilas v Board, 223-604; 273 NW 338

6943.068 Returns.

Federal income tax—statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American Co., 225-638; 281 NW 172

DIVISION IV

RETAIL SALES TAX

6943.074 Definitions.

Atty. Gen. Opinion. See AG Op Aug. 16, '39

Legislative definition binding on court—"sale"—"retail sale". The legislature having defined certain terms, the court will follow that definition. So held as to "sale" and "retail sale" used in the sales tax act.

Kistner v Board, 225-404; 280 NW 587

Shoe repair materials—shoe repairman is "consumer or user". A shoe repairman is a "consumer or user" of the material used in repairing shoes, within the legislative definition of those terms in the sales tax act, and in charging for such repair he is not primarily reselling those materials, but selling his services, wherefore, the one from whom he buys

those materials makes the retail sale subject to the tax.

Sandberg Co. v Board, 225-103; 278 NW 643; 281 NW 197

Shoe repairmen as consumers—taxation uniformity—delegation of power—constitutionality. Taxation uniformity, being an equal distribution of taxation burdens upon all persons of a given class, is impossible of perfect application, and a sales tax rule promulgated under valid legislative authority classifying shoe repairmen as consumers of materials used in shoe repairing, within the meaning of the sales tax act, is not arbitrary but uniform and consistent with the law imposing the tax and not a delegation of power.

Sandberg Co. v Board, 225-103; 278 NW 643; 281 NW 197

Undertaker's services—fee including casket—"sale" of casket. The fact that an undertaker makes a contract, wherein he furnishes a casket and a vault, tho called a contract for services, does not change the legal character of the transaction nor preclude it from being a sale of personal property nor prevent a transfer of title of said property to the purchaser.

Kistner v Board, 225-404; 280 NW 587

Undertaker as retailer. A funeral director becomes a retailer when he transfers title to personal property, the casket, vault, etc., to relatives of the deceased, by contract for his services in which such articles are used, and as such is liable for the retail sales tax on such articles.

Kistner v Board, 225-404; 280 NW 587

Fertilizer—processing exemption not applicable. The exemption from taxation in the sales tax statute of materials used in processing does not, in the absence of a declaration of legislative intent, include fertilizer used in growing vegetables. (Holding prior to amendment.)

Kennedy v Board, 224-405; 276 NW 205

Fertilizer—nonretroactive exemption. Taxation being the rule rather than the exception, it cannot be said that a later amendment to the sales tax statute, exempting fertilizers, is retroactive and explanatory of the exemption in the original statute of materials used in processing.

Kennedy v Board, 224-405; 276 NW 205

6943.075 Tax imposed.

Atty. Gen. Opinion. See '38 AG Op 72

Board's rule for undertakers — reasonableness. Rule 49 of the Board of Assessment and Review, applying to sales tax collectible from undertakers, is clearly reasonable and valid, being promulgated under proper legislative authority and containing alternate methods of computing the tax to fit varying methods of conducting such business.

Kistner v Board, 225-404; 280 NW 587

6943.076 Exemptions.

Atty. Gen. Opinions. See '38 AG Op 72, 629; AG Op Feb. 2, '39

6943.082 Return of gross receipts.

Federal income tax—statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American Co., 225-638; 281 NW 172

6943.083 Payment of tax—bond.

Atty. Gen. Opinion. See '38 AG Op 72

6943.087 Statute applicable to sales tax.

Atty. Gen. Opinion. See '38 AG Op 164

DIVISION V

ADMINISTRATION

6943.091 Generally—bond—approval.

Atty. Gen. Opinion. See '38 AG Op 558

6943.092 Powers and duties.

Sales tax rule for undertakers—reasonableness. Rule 49 of the Board of Assessment and Review, applying to sales tax collectible from undertakers, is clearly reasonable and valid, being promulgated under proper legislative authority and containing alternate methods of computing the tax to fit varying methods of conducting such business.

Kistner v Board, 225-404; 280 NW 587

6943.093 Funds.

Atty. Gen. Opinion. See '38 AG Op 235

6943.094 General powers—hearings.

Unreasonable searches and seizures—what is not. The unreasonable search and seizure clause of the Iowa Constitution (Art I, §8) is not violated by the Iowa income tax act arming the state board with power to examine, under judicial procedure, the books and papers of the taxpayer in order to determine the correctness or fraudulent nature of the taxpayer's return of income.

Vilas v Board, 223-604; 273 NW 338

False tax returns—corporation books admissible evidence. In a prosecution of corporate officers for conspiracy to defraud government by filing false income tax return of corporation, the books of the corporation, together

with summaries obtained by expert accountants, are admissible as tending to show what the taxable income of the corporation was represented to be, where such books were present and available for cross-examination.

Cooper v United States, 9 F 2d, 216

DIVISION VI

ALLOCATION OF REVENUES

6943.100 Generally.

Atty. Gen. Opinions. See '38 AG Op 434, 456, 540

CHAPTER 329.4

USE TAX

6943.104 Exemptions.

Atty. Gen. Opinion. See AG Op March 13, '40

CHAPTER 329.5

CHAIN STORE TAX

6943.126 Title.

Discussion. See 16 ILR 427—Constitutionality of statutes; 17 ILR 72—Validity of tax

6943.127 Definitions.

Atty. Gen. Opinion. See '36 AG Op 435

6943.128 Exemptions.

Atty. Gen. Opinion. See '36 AG Op 435

6943.129 Tax imposed.

Discussion. See 22 ILR 246—Progressive tax on gross income

Atty. Gen. Opinion. See '36 AG Op 435

Constitutionality—allowable classifications. The general assembly in the enactment of the chain store tax act did not go beyond its concededly broad power to classify:

1. By classifying chain stores, generally, as proper subjects for an occupational tax.
2. By classifying certain of said stores as not subject to said tax.
3. By classifying the tax-paying stores into groups of ten or multiples thereof and graduating the tax progressively on each group—it appearing that none of said classifications were arbitrary—that the reason for each was manifest or reasonably discernible—that all owners of chain stores similarly situated were treated alike.

Tolerton v Board, 222-908; 270 NW 427

Ruling of federal court—conclusiveness. The chain store tax act is in violation of the equal protection clause of the federal constitution insofar as it attempts to levy an annual tax solely on the basis of the gross receipts of said stores, such being the holding of the federal supreme court and such holding necessarily being conclusive on the courts of this state.

Tolerton v Board, 222-908; 270 NW 427

Chain store tax based on receipts on graduated scale—unconstitutional. Iowa chain store tax of 1935, section 4 (b), held unconstitutional, as imposing a tax on gross receipts from sales according to an accumulative graduated scale, and invalid under equal protection clause of the 14th amendment to federal constitution, as creating an arbitrary discrimination.

Valentine v A. & P. Tea Co., 299 US 32

6943.130 Failure to file return—incorrect return.

Atty. Gen. Opinion. See '36 AG Op 435

CHAPTER 329.6

HOMESTEAD TAX CREDIT

6943.142 Ratio and manner of distribution.

Discussion. See 22 ILR 633—Homestead tax reduction; 23 ILR 67—Homestead tax relief

Atty. Gen. Opinions. See '38 AG Op 540; AG Op Jan. 10, '39

Publishing supervisors' proceedings—homestead exemption—application numbers sufficient. Statute requiring publication of proceedings of the board of supervisors is substantially complied with, insofar as the action taken on homestead exemption applications is concerned, by publishing the numbers of the applications as allowed or disallowed.

Choate Co. v Schade, 225-324; 280 NW 540

6943.143 Qualifying for credit.

Atty. Gen. Opinions. See '38 AG Op 193, 242, 247, 272, 288, 305, 311, 428

Homestead exemption strictly construed. Ambiguities and obscurities in the homestead tax exemption statutes should be strictly construed since taxation is the rule and the exemption therefrom the exception.

Ahrweiler v Board, 226-229; 283 NW 889

Construction—resorting to entire act. In construing a particular statute to arrive at the legislative intention the court should consider the entire act, and, so far as possible,

construe its various provisions in the light of their relation to the whole.

Ahrweiler v Board, 226-229; 283 NW 889

Homestead credit to property not to owner—theory of law. The homestead tax exemption law was adopted on the premise of benefit to the people as a whole through the encouragement of home ownership and not as a gift or bonus to the owner. The tax credit is not a credit to the owner, but to the homestead.

Ahrweiler v Board, 226-229; 283 NW 889

6943.144 Verification by board.

Atty. Gen. Opinions. See '38 AG Op 312, 413

Publishing supervisors' proceedings—homestead exemption—application numbers sufficient. Statute requiring publication of proceedings of the board of supervisors is substantially complied with, insofar as the action taken on homestead exemption applications is concerned, by publishing the numbers of the applications as allowed or disallowed.

Choate Co. v Schade, 225-324; 280 NW 540

6943.152 Definitions.

Homestead credit to property not to owner—theory of law. The homestead tax exemption law was adopted on the premise of benefit to the people as a whole through the encouragement of home ownership and not as a gift or bonus to the owner. The tax credit is not a credit to the owner, but to the homestead.

Ahrweiler v Board, 226-229; 283 NW 889

Homestead exemption strictly construed. Ambiguities and obscurities in the homestead tax exemption statutes should be strictly construed since taxation is the rule and the exemption therefrom the exception.

Ahrweiler v Board, 226-229; 283 NW 889

Homestead exemption—waiver of residence relates to year of homestead acquisition. The provision in the homestead tax exemption statute waiving the six months requirement for residence, for the first year of a newly acquired homestead, is not sufficient to extend the exemption back to taxes levied a year previous to the year in which it was acquired.

Ahrweiler v Board, 226-229; 283 NW 889

Homestead exemption—"and" may be both conjunctive and disjunctive. The word "and", used in the homestead exemption act allowing an owner credit on his taxes "for the 1936 taxes payable in 1937 and for the 1937 taxes payable in 1938", construed to be used as a conjunctive with reference to a homestead eligible to benefits for both of said years, and when used with reference to a homestead not eligible in both years to be used as a disjunctive, equivalent to the word "or".

Ahrweiler v Board, 226-229; 283 NW 889

CHAPTER 330

PROPERTY EXEMPT AND TAXABLE

6944 Exemptions.

Atty. Gen. Opinions. See '25-26 AG Op 349, 353, 446, 493; '28 AG Op 61, 79, 98, 279, 295, 338; '30 AG Op 45, 83, 117, 373; '32 AG Op 12, 53, 69, 204, 235; '34 AG Op 110, 116, 602, 750; '36 AG Op 48, 114, 362, 404, 439; '38 AG Op 176, 329, 400, 692; AG Op Jan. 18, '39, Jan. 19, '39, Jan. 26, '39; AG Op March 27, '40

ANALYSIS

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I EXEMPTIONS IN GENERAL

Unambiguous tax exemption statute—strict construction rule nonapplicable. Strict construction of statutes granting exemptions from taxation, altho being the rule, has no application to a plain, clear, and unambiguous statute affording no room for construction.

State v Griswold, 225-237; 280 NW 489

I EXEMPTIONS IN GENERAL—concluded

Homestead exemption strictly construed. Ambiguities and obscurities in the homestead tax exemption statutes should be strictly construed since taxation is the rule and the exemption therefrom the exception.

Ahrweiler v Board, 226-229; 283 NW 889

"Accumulations and funds" of beneficiary association. The statutory exemption from taxation of the "accumulations and funds" of a fraternal beneficiary association does not embrace an exemption from taxation of lands acquired by such association through a mortgage foreclosure deed, even tho loan in question was made from the "funds" of the association.

Grand Lodge v Madigan, 207-24; 222 NW 545

Reservation of grounds of review. When the sole question before the trial court was whether a certain section of the statute (consisting of many separately numbered paragraphs) exempts certain property from taxation, the appellate court in its review will consider and construe all relevant paragraphs of the section, even tho it appears probable that one of said paragraphs was not called to the attention of the trial court.

McColl v Dallas County, 220-434; 262 NW 824

II PAR. 2 MUNICIPAL AND MILITARY PROPERTY

Property of municipality—excise charge. The statutory exemption from taxation of city property is not violated by the imposition of an excise charge.

State v Des Moines, 221-642; 266 NW 41

Trust property for educational purposes. Property transferred to a county in trust for the establishment of a prescribed seminary of learning, and duly accepted by the board of supervisors on behalf of the county, becomes a special part of the school fund of the county, and remains such tho the legal title be transferred to court-appointed trustees for managerial purposes. It follows that, being county property and devoted to public use and not held for pecuniary profit, said property is exempt from taxation (subsec. 2 this section, C., '35), even tho no action has been taken to actually execute the trust.

McColl v Dallas Co., 220-434; 262 NW 824

Interest on tax-exempt securities. Interest on tax-exempt municipal securities is not exempt from state income tax, tho the securities themselves are, by statute, exempt from general property tax. The statutory declaration that said securities "shall not be taxed" has reference solely to general property tax, and not to an excise tax—an income tax—on the interest collected on such securities.

Hale v Board, 223-321; 271 NW 168; 302 US 95

III PAR. 3 PUBLIC GROUNDS AND CEMETERIES

Atty. Gen. Opinions. See '32 AG Op 69; '38 AG Op 329

IV PAR. 8 LIBRARIES AND ART GALLERIES

Lands devised to library—essential proof. Where a will provides that the residue of the estate shall pass to a public library, exemption from taxation on the lands devised will not be granted until there is a judicial showing that (1) the estate is settled, and (2) that the devised lands constitute part of the residue and belong, legally or equitably, to the institution.

Wapello Bank v Keokuk County, 209-1127; 229 NW 721

V PAR. 9 PROPERTY OF RELIGIOUS, LITERARY, AND CHARITABLE SOCIETIES

Funds devoted to charity. Funds in the hands of a personal trustee, tho the income of such funds is, under a testamentary bequest, devoted solely to charitable purposes, are subject to taxation, said trustee not being an "institution" within the meaning of subsec. 9 of this section, and taxation being the rule and exemption from taxation the exception.

Samuelson v Horn, 221-208; 265 NW 168

Charity and benevolence—nonexemption. Property consisting of town lots and the buildings situated thereon, owned by a corporation, and used in part for charitable and benevolent purposes, and in part for the private profit of one of the incorporators in the practice of his profession of medicine, is not exempt from taxation, to any extent, under subsec. 9 of this section, C, '35. And it is quite immaterial—under such state of facts—that the declared purposes of the corporation are solely charitable and benevolent.

Readlyn Hosp. v Hoth, 223-341; 272 NW 90

Benevolent societies contrasted. The exemption from taxation accorded to certain insurance associations by §7025, C., '35, is determined by the kind or character of the association, whereas the exemption provided by this section, subsec. 9, is determined by the use made of the property by the institutions within its provisions.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

Fraternity house nonexempt. The property of a college fraternity is not exempt from taxation when the dominant use during the college year, to which the property is put is that of a dormitory, boarding house, home and place of social and fraternal intercourse for

its members and when the use of the property for literary or scientific purposes is merely incidental.

Theta Xi v Board, 217-1181; 251 NW 76

VI PAR. 11 PROPERTY OF EDUCATIONAL INSTITUTIONS

Discussion. See 19 ILR 71—Federal tax on private business of state educational institutions

Educational institution—acquisition prior to levy. The act of assessing land to the individual owner thereof does not deprive an educational institution of its statutory exemption from taxation when the title subsequently passed to the educational institution prior to the levy of any tax on the land.

Iowa College v Knight, 207-1238; 224 NW 502

Educational institution—essential proof. Where a will provides that the residue of the estate shall pass to an educational institution of this state as a part of its endowment fund, exemption from taxation on lands will not be granted except on the production in evidence of the probate records showing judicially (1) that the estate has been fully settled, and (2) that the lands in question constitute part of the residue of said estate, and, as a consequence, belong, legally or equitably, to said institution.

Wapello Bk. v County, 209-1127; 229 NW 721

County school system as "educational institution"—exemption. The school system of a county is "an educational institution" within the meaning of subsec. 11 of this section. It follows that lands held by a county in trust for a specified educational purpose, and not exceeding 160 acres in a township, are exempt from taxation.

McColl v Dallas Co., 220-434; 262 NW 824

VII PAR. 17 FARM EQUIPMENT—DRAYS—TOOLS

No annotations in this volume

VIII PAR. 18 GOVERNMENT LANDS

Atty. Gen. Opinion. See AG Op April 23, '40

6945 Roads and drainage rights of way.

Atty. Gen. Opinions. See '28 AG Op 200; '34 AG Op 299; '38 AG Op 860

6946 Military service—exemptions.

Atty. Gen. Opinions. See '25-26 AG Op 310, 395; '28 AG Op 50, 69, 80, 86, 244, 303, 307, 318, 322, 338, 340; '30 AG Op 81, 135, 274; '32 AG Op 69, 133, 199, 200, 241, 242, 247, 272; '34 AG Op 66, 112, 161, 510, 703, 728; '36 AG Op 116, 281; '38 AG Op 126, 130, 180, 195, 221, 391, 394, 418, 531, 550; AG Op March 25, '40

Claim for exemption—yearly filing.

Lewis v Vanier, 228- ; 290 NW 684

6947 Reduction—noted by assessor—limitation.

Atty. Gen. Opinions. See '28 AG Op 244, 420; '30 AG Op 321; '36 AG Op 116; '38 AG Op 126, 130, 180, 221, 394, 418, 531

6948 Listing by assessors.

Atty. Gen. Opinions. See '28 AG Op 244, 267, 420; '30 AG Op 374; '38 AG Op 43, 394

6949 Exemption by board of supervisors.

Atty. Gen. Opinions. See '25-26 AG Op 338; '28 AG Op 244, 267, 321, 420; '30 AG Op 374; '38 AG Op 43, 394

6950 Petition for exemption.

Atty. Gen. Opinions. See '28 AG Op 244, 407; '30 AG Op 231, 350; '32 AG Op 119, 183; '34 AG Op 398, 642; '36 AG Op 303; '38 AG Op 43, 227, 288, 400, 437

6950.1 Suspension of taxes.

Atty. Gen. Opinions. See '38 AG Op 227, 288, 400; AG Op June 5, '39, Oct. 10, '39, April 4, '40

6951 Additional order.

Atty. Gen. Opinions. See '28 AG Op 407; '30 AG Op 231, 350; '32 AG Op 221; '36 AG Op 303; '38 AG Op 437

6952 Grantee or devisee to pay tax.

Atty. Gen. Opinions. See '28 AG Op 407; '30 AG Op 350; '34 AG Op 398; '38 AG Op 14, 227, 288; AG Op June 5, '39

6953 What taxable.

"Credits" defined. See also Vol I under §6984

Atty. Gen. Opinions. See '28 AG Op 68, 278; '32 AG Op 22; '36 AG Op 439; '38 AG Op 400; AG Op Feb. 6, '39

Merchandise accounts belonging to nonresident. Book accounts which belong to a nonresident corporation, but which grow out of a business in this state and are held in this state by the agent of the nonresident owner, may acquire such a "business situs" in this state as to be legally taxable in this state; but a statute (§6958, C., '27) which authorizes the taxation of credits which are in the hands of an agent "with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit" does not authorize the taxation of ordinary current merchandise sale accounts held by the agent of a nonresident owner for collection and use in the merchandise business of such owner.

Crane Co. v Council, 208-164; 225 NW 344; 76 ALR 801

Property temporarily absent from state. The temporary absence from this state of tangible personal property belonging to a corporation of this state, presents no obstacle to the taxation in this state of said property.

Capital Co. v City, 211-1228; 235 NW 476

6955 Interest of lessee.

Atty. Gen. Opinion. See '28 AG Op 190

CHAPTER 331

LISTING IN GENERAL

6956 Listing—by whom.

Atty. Gen. Opinions. See '25-26 AG Op 233, 250, 422; '28 AG Op 177, 190, 225; '30 AG Op 104; '34 AG Op 602; '36 AG Op 439; '38 AG Op 114, 400, 781; AG Op Dec. 21, '39, April 11, '40, April 26, '40

Life tenant—duty to pay taxes. It is the duty of a life tenant to pay taxes.

Rich v Allen, 226-1304; 286 NW 434

6957 Listing property of another.

See annotations under §6963

Atty. Gen. Opinions. See '25-26 AG Op 422; '28 AG Op 177, 190; '30 AG Op 104; '38 AG Op 781; AG Op Dec. 21, '39, April 11, '40

6958 Agent personally liable.

Atty. Gen. Opinions. See 25-26 AG Op 422; '28 AG Op 185; '30 AG Op 283

Merchandise accounts belonging to nonresident. This section does not authorize the taxation of ordinary current merchandise sale accounts held by an agent of a nonresident owner for collection and use in the merchandise business of such owner.

Crane Co. v City, 208-164; 225 NW 344; 76 ALR 801

6959 Personal property—real estate—buildings.

Discussion. See 17 ILR 512—Situs of intangibles

Atty. Gen. Opinions. See '25-26 AG Op 137, 152; '30 AG Op 110; '34 AG Op 749; '38 AG Op 114, 135, 509, 738; AG Op April 26, '40, May 8, '40

Equalization—evidence—recitals of consideration. The recitals of consideration in deeds of conveyances are not admissible to prove the value of real estate for the purpose of taxation.

Iowa Corp. v Board, 209-687; 228 NW 623

6962 Description of tracts—manner.

Atty. Gen. Opinion. See '38 AG Op 509

Forty-acre assessment requirement — sole applicability—unknown owners. The statute which provides that assessment of land shall be made by forty-acre tracts applies only to cases where the ownership is unknown.

Jones v Mills County, 224-1375; 279 NW 96

Actual value—limitation on board. The board of review, in readjusting the value of land for assessment purposes, must not go beyond the actual, independent value of the 40-acre tract in question. It may not add to such value on the ground that the owner owns other improved contiguous lands.

Davison v Board, 209-1332; 230 NW 304

6963 Place of listing.

Additional annotations. See under §6957, Vol I

Atty. Gen. Opinions. See '25-26 AG Op 262, 422; AG Op Dec. 21, '39, April 11, '40

Legal situs of tangible personal property. Tangible personal property belonging to a corporation is assessable in the taxing district in which the principal place of business of the corporation is located, even tho said property has never been in such taxing district, unless the owner shows that said property has been kept in another assessment district during the major part of the year preceding January first.

Capital Co. v City, 211-1228; 235 NW 476

6964 "Owner" defined.

Atty. Gen. Opinion. See AG Op Dec. 21, '39

6965 Grain, ice, and coal dealers.

Atty. Gen. Opinion. See '30 AG Op 63

6966 Business in different districts.

Atty. Gen. Opinions. See '30 AG Op 63; '38 AG Op 135

Place of taxation—business in different districts. A corporation is not "doing business in more than one assessment district" simply because it keeps some of its corporate records, books and accounts in a taxing district other than the one which embraces its corporate principal place of business.

Iowa Co. v Cook, 211-534; 233 NW 682

6970 Partners.

Atty. Gen. Opinion. See '25-26 AG Op 199

6971 "Merchant" defined.

Atty. Gen. Opinions. See '25-26 AG Op 40; '30 AG Op 83; '36 AG Op 370, 439

6972 Stocks of merchandise.

Atty. Gen. Opinions. See '25-26 AG Op 40, 134; '28 AG Op 65, 324, 335; '36 AG Op 439; AG Op Jan. 18, '39

6973 Warehouseman to file list.

Atty. Gen. Opinion. See '30 AG Op 63

6974 Warehouseman deemed owner.

Atty. Gen. Opinion. See '30 AG Op 63

6975 "Manufacturer" defined—duty to list.

Atty. Gen. Opinions. See '25-26 AG Op 40, 259; '28 AG Op 63, 65, 324; '30 AG Op 83

Blaster and crusher of stone. One who blasts stone from a quarry and breaks it into merchantable size and sells such resulting product, is not a manufacturer within the taxation statute.

Iowa Co. v Cook, 211-534; 233 NW 682

Constructing paving not "manufacturing". One who combines different materials and spreads the resulting product upon public highways as permanent paving is not a "manufacturer" within the meaning of the taxation statute, said statute not embracing constructions which become a permanent part of the realty.

In re Koss, 214-125; 241 NW 495

6976 Assessment—how made.

Atty. Gen. Opinions. See '25-26 AG Op 40, 259; '28 AG Op 63, 65, 324

6977 Machinery deemed real estate.

Atty. Gen. Opinions. See '25-26 AG Op 259; '28 AG Op 65

6978 Manufacturer to list.

Atty. Gen. Opinions. See '25-26 AG Op 259; '28 AG Op 65

6979 Public utility plants.

Discussion. See 9 ILB 36—Valuing public utility properties; 15 ILR 198—Reproduction cost and original prudent investment; 15 ILR 401—Ascertainment of value

Atty. Gen. Opinions. See '28 AG Op 129, 388; '34 AG Op 174

6980 Property in different districts.

Atty. Gen. Opinions. See '28 AG Op 129, 388

6981 Personal property.

Atty. Gen. Opinion. See '34 AG Op 174

6983 Real estate of corporations.

Atty. Gen. Opinions. See '25-26 AG Op 469; '28 AG Op 439; '36 AG Op 439

CHAPTER 332

MONEYS AND CREDITS

6984 "Credits" defined.

See annotations under §6953

Atty. Gen. Opinions. See '25-26 AG Op 445; '28 AG Op 68, 338, 375; '36 AG Op 114

6985 Moneys — credits — annuities — bank notes—stock.

Atty. Gen. Opinions. See '25-26 AG Op 272, 445; '28 AG Op 394; '30 AG Op 336; '32 AG Op 76; '34 AG Op 385; '36 AG Op 370, 439; AG Op April 11, '40

Merchandise accounts belonging to nonresident. Book accounts which belong to a nonresident corporation, but which grow out of a business in this state and are held in this state by the agent of the nonresident owner, may acquire such a "business situs" in this state as to be legally taxable in this state; but a statute (§6958, C., '27) which authorizes the taxation of credits which are in the hands of an agent "with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit" does not authorize the taxation of ordinary current merchandise sale accounts held by the agent of a nonresident owner for collection and use in the merchandise business of such owner.

Crane Co. v Council, 208-164; 225 NW 344; 76 ALR 801

"Loading" charge of mutual insurance company. A surplus, known as a "loading" charge, accumulated by a mutual legal reserve life insurance company by crediting thereto, annually, a portion of the gross premiums, even tho such surplus is not required by law, is not assessable as moneys and credits when such surplus is used to defray the expense of carrying and fulfilling policies during the various life expectancies, and when such surplus cannot be legally used for any other purpose.

Central Life v City, 212-1254; 238 NW 535; 78 ALR 551

Mistaken classification—waiver. An insurance company which lists its corporate stock to itself as personal property, and at an inadequate value which it induces the assessor to accept,—all on the assumption that it was subject to the consolidated levy,—and thereafter interposes no counter objection, may neither obtain a refund for taxes paid nor enjoin the collection of taxes unpaid, on the theory that the property was in fact only subject to a five-mill levy, as moneys and credits.

Farmers Ins. v County, 202-444; 208 NW 929

Unauthorized classification. Whether certain securities shall be assessed as moneys and credits or as moneyed capital, within the meaning of the federal statutes, must, in the first instance, be determined by the judgment of the assessor and lastly by the judgment of the board of review; and the county auditor has no power to change such determination.

Ft. Madison Sec. v Maxwell, 202-1346; 212 NW 131

Assessment — wrongful classification. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bank v Mitts, 220-271; 261 NW 625

Moneyed capital used in small loan business. Moneyed capital employed, under §9410 et seq., C., '24 [§9438.01, C., '39], in the making of small loans of $300 or less on personal or chattel security is taxable as moneys and

credits, and not at the rate at which national bank stock is taxable, when the evidence shows that such moneyed capital does not come into competition with the business of national banks.

Welfare Loan v City, 205-1400; 219 NW 534
Universal Loan v Board, 205-1391; 219 NW 536

Taxation of national banks—illegal change by auditor of assessment—effect. The act of a county auditor, on his own motion, and without the connivance of any other official charged with duties pertaining to taxation, in changing a duly made and approved assessment of corporate stock of concerns competing with national, state, and savings banks from its proper classification of "corporate stock" to the classification of "moneys and credits" and computing the tax thereon as provided for moneys and credits is absolutely void, and furnishes no basis for the claim by national, state, and savings banks that they have been discriminated against, in that the consolidated levy has been applied to 20 percent of the value of their stock, while the favored concerns have been taxed on the basis of 5 mills on the dollar of the actual value of their stock. (Reversed by U. S. Sup. Ct.)

Iowa Bank v Stewart, 214-1229; 232 NW 445; 284 US 239

Bank shares—discrimination—violating constitutional rights—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Munn v Bank, 18 F 2d, 269
Knowles v Bank, 58 F 2d, 232
First N. Bk. v Anderson, 269 US 341
Iowa Bank v Stewart, 214-1229; 232 NW 445; 284 US 239

Articles of incorporation may control place of taxation. The personal property and moneys and credits of a corporation engaged in blasting and crushing stone are taxable in the taxing district which embraces the place where its principal business is transacted, as declared in its articles of incorporation.

Iowa Co. v Cook, 211-534; 233 NW 682

Failure to return notes for assessment. Failure of the alleged grantee in a conveyance to list for assessment the notes which he claims were satisfied by the conveyance is material on the issue of fraud.

Oelke v Howey, 210-1296; 232 NW 666

Failure to list gift for taxation—effect. The naked fact that a donee fails to list the gift (a substantial sum in cash) for taxation cannot have such evidentiary force as to overthrow other evidence which persuasively shows that the gift was actually made and executed.

Humphrey v Norwood, 213-912; 240 NW 232

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v Bank, 42 F 2d, 30
Crawford Bk. v Crawford County, 66 F 2d, 971

6986 Levy — division of money collected.

Atty. Gen. Opinion. See '32 AG Op 226

6987 Bonus bond levy.

Atty. Gen. Opinion. See '36 AG Op 439

6988 Deduction of debts.

Atty. Gen. Opinions. See '25-26 AG Op 382; '30 AG Op 113; '32 AG Op 64; '38 AG Op 405

Mutual insurance—surplus fund—nonassessable. Mutual life insurance company's surplus fund, known as loading charge, held nonassessable for taxation.

Central Life v Des Moines, (NOR); 236 NW 426

6989 Good-faith debt required.

Atty. Gen. Opinion. See AG Op Jan. 18, '39

Burden of proof. The property owner must establish the validity and good faith of the indebtedness which he seeks to set off.

Vanderpluijm v Morris, 200-776; 205 NW 341

6994 Loan corporations.

Atty. Gen. Opinions. See '28 AG Op 252; '32 AG Op 64

State auditor's action affecting stockholder's contractual rights. Fact that auditor of state approved building and loan association's refusal to honor applications for withdrawal of funds does not affect stockholder's contractual rights with the association for such withdrawal.

O'Connor v Home Assn., 224-1127; 278 NW 636

6995 Examinations—expense.

Atty. Gen. Opinion. See '28 AG Op 252

6996 Millage tax.

Atty. Gen. Opinion. See '28 AG Op 252

CHAPTER 333

BANKS

6997 Private banks.

Atty. Gen. Opinion. See '28 AG Op 41

Assessment correct but violative of statute. An assessment of bank stock which correctly arrives at the value of the bank credits is unassailable even tho the statute is not strictly complied with—is, in fact, violated. So held where the listing of the credits was excessive, in that it showed the entire face value of the credits, from which was deducted a specific sum for debts owed by the bank (for which deduction there was no authority), instead of reducing the face value of the credits by the amount for which certain credits had been hypothecated.

In re Stacyville Bank, 202-221; 210 NW 126

Allowable correction of void act without notice.

First N. Bk. v Burke, 201-994; 196 NW 287

Unallowable correction. The county auditor may not, under the guise of correcting the assessment of a private banker, impose an assessment on bills receivable which the banker had rediscounted for full value to his correspondent bank, even tho the rediscounts were, in a sense, held by the correspondent as collateral, because of the mutual contemplation of the banker and the correspondent that the banker would in time redeem said discounts.

Northwestern Bk. v Van Roekel, 202-237; 207 NW 345

Correcting assessment of private banker. The county auditor may, on proper notice and hearing, and before a tax is paid, correct the erroneous action of the assessor in deducting the debts of a private banker from the value of the banker's taxable property. (§1321, S., '13.)

Mannings Bank v Armstrong, 204-512; 211 NW 485

Irregularities not invalidating assessment of capital stock of bank. It cannot be said that no valid assessment of the capital stock and surplus and undivided profits of a bank is effected because of irregularities in that:

1. The bank officials in furnishing the law-required statement, filled out that part of the official blank which the law contemplates will be filled out by the assessor, to wit, the "valuation" sheet showing the actual figures on which the several assessments should be computed,
2. The assessor failed either to sign or verify said valuation sheet as so made out, and
3. The assessor's books, when delivered to the county auditor contained no formal entry of assessments of said items of taxable property,—

when the evidence shows that said "valuation" sheet, as so made out, (1) was examined and approved by the assessor, (2) was duly placed before the review board, (3) was by said board examined and left without change, (4) was later, with other assessment records, duly filed with the county auditor, and (5) when no error is claimed in any record figures.

Security Bank v Mitts, 220-271; 261 NW 625

6998 National and state bank stock—place of assessment.

Valuation of bank stock. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

Permissible change. When the shares of stock of a bank are assessed to the bank, the county auditor may, at any time before the tax is paid, and without notice, change the assessment to the individual stockholders.

Ludeman v County, 204-1100; 216 NW 712

7001 Statement furnished.

Atty. Gen. Opinion. See '34 AG Op 654

Constitutionality of statute.

First N. Bk. v Burke, 201-994; 196 NW 287

7002 Deductions on account of real estate.

Atty. Gen. Opinions. See '25-26 AG Op 292; '28 AG Op 41, 153; '30 AG Op 351, 240; '32 AG Op 62; '34 AG Op 654

Unauthorized deduction of federal securities not adjudication.

First N. Bk. v Burke, 201-994; 196 NW 287

7003 Rule of actual and taxable value.

Atty. Gen. Opinions. See '28 AG Op 41; '30 AG Op 110; '32 AG Op 62; '34 AG Op 654; '36 AG Op 213, 276

Discrimination as to deductions. No unallowable discrimination is worked by a statute which, in the assessment of the stock of an incorporated bank, authorizes a deduction for certain liabilities, and does not allow such

deduction in the assessment of the bank assets of a private banker.

Mannings Bk. v Armstrong, 204-512; 211 NW 485

Tax-exempt securities. Shares of stock of national banks may be valued and taxed to the stockholders on the basis of the sum total of the capital, surplus and undivided profits of the bank without deducting the amount of tax-exempt securities owned by the bank, even tho in the assessment of a private banker his tax-exempt securities would not be included in the sum total of his property. 191 Iowa 1240 affirmed.

Des M. Nat. Bk. v Fairweather, 263 US 103

Federal question. The claim that an assessment of national bank stock is in excess of the value of the stock, exorbitant, unjust, and not in proportion with other like property, presents no federal question for review on writ of error from the federal court. 136 Iowa 203, in effect, affirmed.

First N. Bk. v Council, 215 US 341

Valuation of bank stock. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

7004 Refusal to furnish information.

Atty. Gen. Opinion. See 25-26 AG Op 416

7004.1 Stock of insolvent bank—remission.

Atty. Gen. Opinions. See '36 AG Op 669; '38 AG Op 9, 14, 102; AG Op Feb. 16, '39

County supervisors—duties imposed by law—effect. A statute, requiring the board of supervisors to remit unpaid taxes on the capital stock of a bank which fails, imposes a positive duty on board of supervisors to comply with statute irrespective of any demand or notice, and the fact that the stockholders petitioned for a refund of taxes already paid, which is not contemplated by such statute, in addition to remission of unpaid taxes, does not excuse the failure of the board to remit such taxes as come within the purview of the statute, since the performance of this duty is imposed upon the board by law.

Brunner v County, 226-583; 284 NW 814

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

7005 Moneyed capital.

Atty. Gen. Opinion. See '32 AG Op 62

Reference to other law to fix tax. This section does not violate the constitutional requirement that in the imposition of a tax "it shall not be sufficient to refer to any other law to fix such tax".

Ballard-Hassett v Board, 215-556; 246 NW 277

Applicable statute. Section 1322-1a, S., '13, (now repealed) was not applicable to the assessment of the banking assets of a private banker.

Mannings Bk. v Armstrong, 204-512; 211 NW 485

Unauthorized classification. Whether certain securities shall be assessed as moneys and credits or as moneyed capital, within the meaning of the federal statutes, must, in the first instance, be determined by the judgment of the assessor, and lastly by the judgment of the board of review; and the county auditor has no power to change such determination.

Ft. Madison Sec. v Maxwell, 202-1346; 212 NW 131

Illegal change of assessment by auditor—effect. The act of the county auditor, on his own motion, and without the connivance of any other official charged with duties pertaining to taxation, in changing a duly made and approved assessment of corporate stock of concerns competing with national, state and savings banks, from its proper classification of "corporate stock" to the classification of "moneys and credits" and computing the tax thereon as provided for moneys and credits, is absolutely void, and furnishes no basis for the claim by national, state and savings banks that they have been discriminated against, in that the consolidated levy has been applied to 20 percent of the value of their stock while the favored concerns have been taxed on the basis of 5 mills on the dollar of the actual value of their stock.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445
Reversed, 284 US 239

Bank shares—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Munn v Bank, 18 F 2d, 269
Knowles v Bank, 58 F 2d, 232
First N. Bk. v Anderson, 269 US 341
Iowa N. Bk. v Stewart, 214-1229; 232 NW 445; 284 US 239

Statutory remedy must be pursued. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bk. v Mitts, 220-271; 261 NW 625

7007.1 Liability of corporation for tax.

Nonliability of insolvent corporation. The statutory liability of a corporation to pay taxes assessed and levied on its corporate shares of stock and against the individual owners thereof, does not apply to taxes assessed and levied in a year during which, and before the taxes become payable, the corporation becomes insolvent and passes into the hands of a receiver.

Wilcoxen v Munn, 206-1194; 221 NW 823

Lien—corporate bank stock. Taxes on corporate bank stock and against the individual owners thereof are not a lien on the real estate holdings of the corporation in the hands of a receiver, notwithstanding the fact that the statute assumes to make the corporation personally liable therefor.

Andrew v Munn, 205-723; 218 NW 526

Jurisdictional amount—bank combining several protested illegal assessments. Under the statute imposing taxes upon bank stockholders, which makes the bank liable therefor, the bank can maintain an equity action in federal court for taxes paid under protest by several stockholders, where jurisdictional amount was involved, notwithstanding amount paid for any one stockholder would not give the federal court jurisdiction.

Crawford Bank v Crawford County, 63 F 2d, 342

CHAPTER 334

CORPORATION STOCK

7008 Shares of stock.

Atty. Gen. Opinions. See '25-26 AG Op 39, 445, 453; '36 AG Op 370, 439

Articles of incorporation may control place of taxation. The personal property and moneys and credits of a corporation engaged in blasting and crushing stone are taxable in the taxing district which embraces the place where its principal business is transacted as declared in its articles of incorporation.

Iowa Co. v Cook, 211-534; 233 NW 682

Unallowable computation. An assessor, in computing the value of the shares of stock of a corporation for the purpose of assessing them to the stockholder, has no right to include an item of cash accumulated by the corporation for the good-faith and actual purpose of paying the taxes of the corporation.

Equitable Life v City, 207-879; 223 NW 744

Mistaken classification—waiver. An insurance company which lists its corporate stock to itself as personal property, and at an inadequate value which it induces the assessor to accept,—all on the assumption that it was subject to the consolidated levy,—and thereafter interposes no counter objection, may neither obtain a refund for taxes paid nor enjoin the collection of taxes unpaid, on the theory that the property was in fact only subject to a five-mill levy, as moneys and credits.

Farmers Ins. v County, 202-444; 208 NW 929

Valuation of bank stock. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

Abstract books and equipment of corporation. The abstract books and office equipment of a corporation engaged in making abstracts of title to real estate are so assessable as to come under and be subject to the general tax levy. In other words, such property is not to

be included in the value of the corporate shares of stock and assessed as moneys and credits.

Mills Abstract v Board, 216-398; 249 NW 235

Levy and assessment—board of supervisors as objectors—trial de novo. The board of supervisors as objectors to the assessment of a stockyards company may properly appeal to the supreme court from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

7010 Valuation of stock.

Atty. Gen. Opinions. See '25-26 AG Op 453; '36 AG Op 439

Valuation of bank stock—method. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

7013 Corporations liable to pay tax.

Nonliability of insolvent corporation. The statutory liability of a corporation to pay taxes assessed and levied on its corporate shares of stock and against the individual owners thereof does not apply to taxes assessed and levied in a year during which, and before the taxes become payable, the corporation becomes insolvent and passes into the hands of a receiver.

Wilcoxen v Munn, 206-1194; 221 NW 823

BUILDING, SAVINGS AND LOAN ASSOCIATIONS

7017.01 Shares assessed against association.

Atty. Gen. Opinion. See '32 AG Op 126

7017.02 Sworn statement required.

Atty. Gen. Opinion. See '32 AG Op 126

7017.04 Determination of value.

Atty. Gen. Opinions. See '32 AG Op 126; AG Op March 11, '40

Valuation of bank stock—method. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

CHAPTER 335

INSURANCE COMPANIES

7022 Foreign companies—tax on gross premiums.

Atty. Gen. Opinions. See '25-26 AG Op 459; '36 AG Op 204

Unallowable deductions. The statutory provision which requires a foreign insurance company to pay a stated tax on "the gross amount of premiums received by it for business done in this state", permits of no deductions for "dividends" which the company may declare, or for so-called "deferred dividends", or for surrender values of policies, on its Iowa business. Especially is this true in view of the fact that such has been the unquestioned administrative construction of the law for over half a century.

New Y. Life v Burbank, 209-199; 216 NW 742

When payable—legislative intent. Legislative intent being the cardinal rule of statutory construction, the plain intent of statute taxing gross premiums of foreign corporations is a tax computed on and payable at the end of the year.

State v Ins. Co., 223-1301; 275 NW 26

Excise tax. The gross premiums tax on foreign corporations is an excise tax in the nature of a franchise or privilege tax.

State v Ins. Co., 223-1301; 275 NW 26

Revenue measure — withholding certificate immaterial. A tax on gross premiums of a foreign insurance corporation is neither dependent on, nor satisfied by, the withholding of an annual certificate to do business, but is a revenue measure and a statutory tax owed to and collectible by the state on business done prior to dissolution.

State v Ins. Co., 223-1301; 275 NW 26

Annuity contracts. This section requires payment of a tax on sums of money received by an insurance company during the year in payment of annuity contracts, even tho said contracts are not insurance contracts.

Northwestern Ins. v Murphy, 223-333; 271 NW 899; 109 ALR 1054

Fraternal benefit societies—gross premium tax inapplicable. Fraternal benefit societies doing business in this state including one organized under foreign nation are not subject to gross premium tax levied on foreign insurance companies, in view of executive and departmental construction of taxing statute and acquiesced in by legislature.

State v Ind. Foresters, 226-1339; 286 NW 425

Receiverships—gross premiums tax as preferred claim. In estate and receivership proceedings, taxes have preference over other claims. Held, foreign corporations gross premiums tax allowable in receivership as preferred claim without interest.

State v Ins. Co., 223-1301; 275 NW 26

Illinois receiver—Iowa insurance assets removed—Iowa laws controlling. Where an Illinois receiver was permitted as a matter of comity to take charge of an insurance company's assets held under ancillary receivership in Iowa and remove them, it does not follow that Illinois laws are controlling on question of gross premium taxes due from foreign corporation to the State of Iowa.

State v Ins. Co., 223-1301; 275 NW 26

Attorney general's opinion—not precedent. Attorney general's opinion that payment of gross premiums tax is "condition precedent to a foreign corporation's obtaining any recognition" is not precedent binding on Supreme Court.

State v Ins. Co., 223-1301; 275 NW 26

7023 Receipts—certificate of authority.

Gross premiums tax as privilege tax—annual certificate. A statute (§7025, C., '35) requiring proof of payment by foreign corporation of gross premiums tax when annual certificate is issued refers to the tax levy on the premiums at the close of a year's business and not for the ensuing year. Tax imposed not for privilege of continuing, but for the privilege of engaging in business for the year at the end of which the tax is collected.

State v Ins. Co., 223-1301; 275 NW 26

As revenue measure—withholding certificate immaterial. A tax on gross premiums of a foreign insurance corporation is neither dependent on, nor satisfied by, the withholding of an annual certificate to do business, but is a revenue measure and a statutory tax owed to and collectible by the state on business done prior to dissolution.

State v Ins. Co., 223-1301; 275 NW 26

Withholding certificate—penalty. A statute allowing annual certificate to be withheld for nonpayment of gross premiums tax on foreign corporations is not a method of collecting but a penalty imposed.

State v Ins. Co., 223-1301; 275 NW 26

7025 Domestic companies — tax on gross premiums.

Atty. Gen. Opinions. See '25-26 AG Op 459; '32 AG Op 86

Liability of property—exemptions—benevolent societies contrasted. The exemption from taxation accorded to certain insurance associations by this section is determined by the kind or character of the association, whereas the exemption provided by section 6944, subsec. 9, is determined by the use made of the property by the institutions within its provisions.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

Mutual benefit insurance — nontaxation of undivided profits — purpose of organization controls. A fraternal beneficiary association organized under chapter 402 of the Code, 1935, "not for profit" is not subject to a tax on gross premiums under this section, and even tho such association does accumulate a surplus and a profit. Violations of chapter 402 by any such association are punishable as provided but such offenses do not change its organizational character.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

Fraternal beneficiary certificates—not taxable after reorganization. A fraternal beneficiary association may reorganize into an old line company, but the amounts the new organization collects under the original certificates, which it has assumed, are not taxable under the gross premium tax provision of this section.

Yeomen Ins. v Murphy, 223-1315; 275 NW 127

Commissioner—power of suspension not lodged. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute.

Homesteaders Life v Murphy, 224-173; 275 NW 146

7026 Domestic companies—shares of stock.

Unallowable computation. An assessor, in computing the value of the shares of stock of

a corporation for the purpose of assessing them to the stockholder, has no right to include an item of cash accumulated by the corporation for the good faith and actual purpose of paying the taxes of the corporation.

Equitable v City, 207-879; 223 NW 744

Mistaken classification—waiver. An insurance company which lists its corporate stock to itself as personal property, and at an inadequate value which it induces the assessor to accept,—all on the assumption that it was subject to the consolidated levy,—and thereafter interposes no counter objection, may neither obtain a refund for taxes paid nor enjoin the collection of taxes unpaid on the theory that the property was in fact only subject to a five-mill levy, as moneys and credits.

Farmers Ins. v County, 202-444; 208 NW 929

7029 Moneys and credits.

Mutual insurance—surplus fund—nonassessable. Mutual life insurance company's surplus fund, known as loading charge, held nonassessable for taxation.

Central Life v Des Moines, (NOR); 236 NW 426

7030 Debts deductible.

"Loading" charge of mutual insurance company. A surplus, known as a "loading" charge, accumulated by a mutual legal reserve life insurance company by crediting thereto, annually, a portion of the gross premiums, even tho such surplus is not required by law, is not assessable as moneys and credits when such surplus is used to defray the expense of carrying and fulfilling policies during the various life expectancies, and when such surplus cannot be legally used for any other purpose.

Central Life v City, 212-1254; 238 NW 535; 78 ALR 551

Mutual insurance—surplus fund—nonassessable. Mutual life insurance company's surplus fund, known as loading charge, held nonassessable for taxation.

Central Life v Des Moines, (NOR); 236 NW 426

CHAPTER 336

TELEGRAPH AND TELEPHONE COMPANIES

7031 Statement required.

Atty. Gen. Opinions. See '28 AG Op 180; '30 AG Op 83; '38 AG Op 690

7034 Assessment.

Atty. Gen. Opinions. See '30 AG Op 83; '38 AG Op 433, 690

7035 Actual value per mile.

Atty. Gen. Opinions. See '38 AG Op 433, 690

7038 Assessment in each county—how certified.

Atty. Gen. Opinion. See '38 AG Op 690

7042 "Company" defined.

Borrowing automobile to deliver telegraph message. A telegraph company is not responsible for the act of its messenger in borrowing an automobile with which to make a delivery of a message when the usual and ordinary way of making delivery was by means of a bicycle, and when the borrowing aforesaid was wholly unauthorized by and unknown to the company.

Hughes v Western Union, 211-1391; 236 NW 8; 31 NCCA 423

7044 Maps required.

Atty. Gen. Opinion. See '38 AG Op 690

CHAPTER 337

RAILWAY COMPANIES

7046 When assessed — statement required.

Taxation of interstate bridges. See §7065, Vol I
Atty. Gen. Opinion. See AG Op May 8, '40

7047 Real estate holdings—statement required.

Atty. Gen. Opinion. See '28 AG Op 230

7060 Assessment of railways.

Atty. Gen. Opinion. See '28 AG Op 230

Federal interference. The charge, as a basis for federal injunctional interference, that the executive council (now state tax commission) has discriminated against a nonresident railway company in valuing its property for assessment purposes, as compared with other dissimilar properties, must be supported by a clear and affirmative showing that the discrimination does in fact exist, has been adopted as a practice, and is necessarily intentional.

Chicago, GW Ry. v Kendall, 266 US 94

7065 Property assessed by local authorities.

Atty. Gen. Opinion. See '30 AG Op 93

Invalid sale of railway property. A sale of property for nonpayment of taxes assessed by the local authorities is a nullity when the property is used exclusively in the operation of a railway and has been assessed by the state executive council.

Minn. St. L. Ry. v Pugh, 201-208; 205 NW 758

CHAPTER 340

ELECTRIC TRANSMISSION LINES

7089 "Company" defined.

Atty. Gen. Opinion. See '28 AG Op 180

7090 Statement required.

Atty. Gen. Opinion. See '28 AG Op 129

7101 Local assessment.

Atty. Gen. Opinion. See '28 AG Op 388

7102 Interest of cooperative members.

Atty. Gen. Opinions. See '25-26 AG Op 29, 39, 453; '36 AG Op 370

CHAPTER 340.1

PIPE-LINE COMPANIES

7103.13 Basis of valuation and assessment.

Atty. Gen. Opinion. See AG Op May 8, '40

CHAPTER 342

LOCAL ASSESSOR

7106 Listing and valuation.

Atty. Gen. Opinion. See '32 AG Op 196

ANALYSIS

I ASSESSMENTS IN GENERAL
II DESCRIPTION OF PROPERTY

I ASSESSMENTS IN GENERAL

Statutory requirements—approximate compliance. In determining assessments where the formula used by the assessor allows depreciation upon the same annual basis for all buildings, and does not take into account all the elements mentioned in the statutes, but does achieve approximate uniformity, and reasonable equality of assessment, and where assessed value is conceded to be less than actual value, assessment is proper.

Crary v Board, 226-1197; 286 NW 428

Assessor's statutory duty—noncompliance—reduction allowed. In a proceeding for reduction of a city tax assessment, where evidence shows that an old frame house, assessed separately from lots, was out of date and not adaptable to use as a residence, was located in a zoning district which limits the property to residential purposes, where petitioner's witnesses agree that on account of such factors the only value that can be fairly attributed to the improvements is a salvage value fixed at $3,000 and where assessor admits that he had no idea what the market value was, nor what the rental or income value would be, and further admits he gave no consideration to rental or income value and that assessment was made on the basis of cubic content or cubic foot replacement, somewhere between 16 and 50 cents per foot, which is not disclosed by the record, and that he allowed only a 25 percent depreciation on 45- or 50-year-old residence, held, assessor did not perform the duties imposed by statute, and assessment reduced to $3,000.

Call v Board, 227-1116; 290 NW 109

Valuation—factors considered. The valuation of property for tax purposes cannot be determined by mathematical formulae alone. While the statute requires that the productive and earning capacity, past, present, and prospective, must be taken into consideration, it is also necessary that the element of the assessor's judgment properly estimating the influence of the various relevant factors must enter in the assessment.

Trustees v Board, 226-1353; 286 NW 483

Valuation—equitableness—assessor's duty. In determining values it is the duty of the assessor to fix such values equitably in comparison with other like property.

Trustees v Board, 226-1353; 286 NW 483

Assessment—disproportionate and discriminatory—evidence insufficient. On complaint of inequality of assessment and contention that assessment is disproportionate and discriminatory, the trial court properly found, "com-

I ASSESSMENTS IN GENERAL—concluded

parison with but one other property in a city the size of Boone, is insufficient to afford relief".

Crary v Board, 226-1197; 286 NW 428

Assessor's valuation—presumptions—burden of proof. The presumption is that the valuation placed by the assessor upon any particular property is correct, and the burden of proof is upon the person challenging that estimate to prove otherwise, as provided by statute, yet the opinion of the assessor is not conclusive, but when properly based and apparently not erroneous, excessive, or out of proportion, it is to be held as the true value of the property.

Trustees v Board, 226-1353; 286 NW 483

Presumption in favor of assessor's valuation—burden of proving assessment inequitable. There is a strong presumption in favor of the valuation fixed by the assessor which will not be disturbed on appeal, unless the presumption is overcome by proof, and altho the assessment is less than the value of the property, if it is inequitable when compared with assessments on similar property, it will be reduced to an equitable basis; so, where petition for reduction of city tax assessment on petitioner's lots did not allege that it was inequitable, where evidence showed lots were assessed pursuant to uniform system and reason for petitioner's witnesses' disagreement with assessor as to value did not appear, and, where assessments on similar lots in same amount were not challenged, the presumption in favor of assessment was not overcome and petitioner failed to sustain statutory burden of proving that assessor's valuation was inequitable.

Call v Board, 227-1116; 290 NW 109

Assessment—presumption of correctness. The strong presumption of correctness which attends an official assessment of property (especially after it has been confirmed by the official board of review) cannot be overcome except by very definite and persuasive testimony to the contrary.

Butler v Des Moines, 219-956; 258 NW 755

Assessor's valuation—conclusiveness. It is the judgment of the assessor which the statute requires in making assessments. So long as his action is not arbitrary or capricious or so inconsistent with the actual values as to give rise to the inference that for some reason he has not properly discharged his duty, the assessments made by him and confirmed by the local board of review should not be disturbed by the court.

Crary v Board, 226-1197; 286 NW 428

Void assessment voids tax. Under a void tax assessment no valid tax is due.

Jones v Mills County, 224-1375; 279 NW 96

Irregularities in assessment of capital stock of bank. It cannot be said that no valid assessment of the capital stock and surplus and undivided profits of a bank is effected because of irregularities in that:

1. The bank officials, in furnishing the law-required statement, correctly filled out that part of the official blank which the law contemplates will be filled out by the assessor, to wit, the "valuation" sheet showing the actual figures on which the several assessments should be computed,
2. The assessor failed either to sign or verify said valuation sheet as so made out, and
3. The assessor's books, when delivered to the county auditor contained no formal entry of assessments of said items of taxable property,—

when the evidence shows that said "valuation" sheet, as so made out, (1) was examined and approved by the assessor, (2) was duly placed before the review board, (3) was by said board examined and left without change, and (4) was later, with other assessment records, duly filed with the county auditor.

Security Bank v Mitts, 220-271; 261 NW 625

Bar of causes of action—decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

II DESCRIPTION OF PROPERTY

Indefinite description or overlapping assessment—remedy. If a tax assessment is otherwise valid and legal, a property owner's remedy for an irregularity, such as indefinite description or overlapping assessment, is to appear before the board of review.

Jones v Mills County, 224-1375; 279 NW 96

Forty-acre assessment requirement—limited applicability. The statute (§6962, C., '35) which provides that assessment of land shall be made by 40-acre tracts applies only to cases where the ownership is unknown.

Jones v Mills County, 224-1375; 279 NW 96

7108 Oath.

Sworn assessment roll competent for impeaching purposes. The defendant in eminent domain proceedings has the right, on the cross-examination of the plaintiff and for the purpose of contradicting and impeaching him, to show the sworn statement made by the plaintiff to the assessor as to the value of the farm in question and as to the number and value of the livestock kept on said farm.

Welton v Highway Com., 211-625; 233 NW 876

7109 Actual, assessed, and taxable value.

Atty. Gen. Opinion. See '38 AG Op 509

ANALYSIS

I VALUATION IN GENERAL
II TAXABLE VALUE

I VALUATION IN GENERAL

"Actual" and "market" value. The terms "actual" and "market" value, as employed in the law of taxation, ordinarily mean the same thing.

Hawkeye Co. v Board, 205-161; 217 NW 837

"Value" and "market value"—interchangeable and equivalent to "actual value". By "value", in common parlance, is meant "market value", which is no other than the fair value of property as between one who wants to purchase and another who desires to sell—both terms being used interchangeably and being the equivalent of "actual value" at which the statute requires assessment of property for taxation.

Lincoln JSL Bank v Board, 227-1136; 290 NW 94

Actual value—evidence. On the issue of the actual value of property for purposes of general taxation for a certain year, the prior tax records of the court are inadmissible.

Board v Board, 215-876; 244 NW 855

Assessment at less than actual value—justification. Tho the statute directs property to be assessed at its actual value, it should not be so assessed if other property of a like or similar kind in the same assessment district is assessed at less than its actual value.

Talbott v Des Moines, 218-1397; 257 NW 393

Actual value—limitation on board. The board of review, in readjusting the value of land for assessment purposes must not go beyond the actual, independent value of the 40-acre tract in question. It may not add to such value on the ground that the owner owns other improved contiguous lands.

Davison v Board, 209-1332; 230 NW 304

Assessors—statutory requirements. In determining assessments where the formula used by the assessor allows depreciation upon the same annual basis for all buildings, and does not take into account all the elements mentioned in the statutes, but does achieve approximate uniformity, and reasonable equality of assessment, and where assessed value is conceded to be less than actual value, assessment is proper.

Crary v Board, 226-1197; 286 NW 428

Valuation— equitableness— assessor's duty. In determining values it is the duty of the assessor to fix such values equitably in comparison with other like property.

Trustees v Board, 226-1353; 286 NW 483

Levy and assessment—when discriminatory. An assessment is not discriminatory unless it stands out above the general levy.

Crary v Board, 226-1197; 286 NW 428

Discrimination between similar properties—reduction. Tho property is not assessed at its actual value as required by law, nevertheless, if it is assessed for more in proportion to its actual value than other similar properties in the same assessment district, the property owner is entitled to an equalizing reduction.

Chapman Bros. v Board, 209-304; 228 NW 28

Assessment—disproportionate and discriminatory. On complaint of inequality of assessment and contention that assessment is disproportionate and discriminatory, the trial court properly found, "comparison with but one other property in a city the size of Boone, is insufficient to afford relief."

Crary v Board, 226-1197; 286 NW 428

State board of review—supervision. The state board of assessment and review must as one of its duties exercise supervision over the administration of the tax list, advise with taxing officials, and aid in securing equitable and just enforcement of the tax list.

Trustees v Board, 226-1353; 286 NW 483

Presumption as to actual value. The court must presume, until the contrary is made to appear, that an assessment of property for general taxation purposes has been made and equalized on the sole basis of actual value as commanded by this section.

Board v Board, 215-876; 244 NW 855

Assessments — presumption of correctness. Evidence held insufficient to overcome presumption of correctness of tax assessments, where two properties, similar in construction and producing about the same income, are claimed to be disproportionate to respective values.

Crary v Board, 226-1197; 286 NW 428

Assessor's valuation — presumption. The presumption is that the valuation placed by the assessor upon any particular property is correct, and the burden of proof is upon the person challenging that estimate to prove otherwise, as provided by statute, yet the opinion of the assessor is not conclusive, but when properly based and apparently not erroneous, excessive, or out of proportion, it is to be held as the true value of the property.

Trustees v Board, 226-1353; 286 NW 483

Presumption in favor of assessor's valuation —burden of proving assessment inequitable. There is a strong presumption in favor of the

I VALUATION IN GENERAL—concluded

valuation fixed by the assessor which will not be disturbed on appeal, unless the presumption is overcome by proof, and altho the assessment is less than the value of the property, if it is inequitable when compared with assessments on similar property, it will be reduced to an equitable basis; so, where petition for reduction of city tax assessment on petitioner's lots did not allege that it was inequitable, where evidence showed lots were assessed pursuant to uniform system and reason for petitioner's witnesses' disagreement with assessor as to value did not appear, and, where assessments on similar lots in same amount were not challenged, the presumption in favor of assessment was not overcome and petitioner failed to sustain statutory burden of proving that assessor's valuation was inequitable.

Call v Board, 227-1116; 290 NW 109

Assessor's valuation—conclusiveness. It is the judgment of the assessor which the statute requires in making assessments. So long as his action is not arbitrary or capricious or so inconsistent with the actual values as to give rise to the inference that for some reason he has not properly discharged his duty, the assessments made by him and confirmed by the local board of review should not be disturbed by the court.

Crary v Board, 226-1197; 286 NW 428

Presumptions—correctness of assessment—complainant's burden of proof. One who complains of a tax assessment has burden of proof of overcoming the presumption of correctness of assessments.

Crary v Board, 226-1197; 286 NW 428

Assessment — correction — burden of proof. A property owner who attacks an assessment which has been confirmed by the board of review must overthrow the presumption that such assessment is equitable, just, and nondiscriminatory when compared with other like property within the taxing district.

Hawkeye Co. v Board, 205-161; 217 NW 837

Burden of proof. A property owner has the burden of proof to show that the valuation placed upon his property by the board of review, for taxation purposes, is excessive or inequitable.

Appeal of Blank, 214-863; 243 NW 173

Farm land within city—evidence warranting reduction in actual value. Where a 371.51-acre farm within the corporate limits of a city was very rough, the top soil washed off, the fertility gone, a third of the land infested with weeds rendering it impossible to raise even grass crops, and where the taxes exceeded the income, and qualified witnesses fixed its value at between $10 and $15 per acre, as against the tax assessor's value fixed at $65.58 per acre, on same basis as adjoining lands, tho there was no other similar land in the district, the supreme court fixed the actual value thereof for taxation at $30 per acre.

Lincoln JSL Bank v Board, 227-1136; 290 NW 94

Federal interference. The charge, as a basis for a federal injunctional interference, that the executive council (now state tax commission) has discriminated against a nonresident railway company in valuing its property for assessment purposes, as compared with other dissimilar properties, must be supported by a clear and affirmative showing that the discrimination does in fact exist, has been adopted as a practice, and is necessarily intentional.

Chicago, GW Ry. v Kendall, 266 US 94

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

II TAXABLE VALUE

Taxable value—determined—60 percent rule. The assessor having determined the actual value and the equitable valuation of the property proportionately with other properties of the district, the value for tax purposes is determined by the 60 percent rule.

Trustees v Board, 226-1353; 286 NW 483

Assessors—statutory requirements—approximate compliance. In determining assessments where the formula used by the assessor allows depreciation upon the same annual basis for all buildings, and does not take into account all the elements mentioned in the statutes, but does achieve approximate uniformity, and reasonable equality of assessment, and where assessed value is conceded to be less than actual value, assessment is proper.

Crary v Board, 226-1197; 286 NW 428

Assessor's statutory duty—noncompliance—reduction allowed. In a proceeding for reduction of a city tax assessment, where evidence shows that an old frame house, assessed separately from lots, was out of date and not adaptable to use as a residence, was located in a zoning district which limits the property to residential purposes, where petitioner's witnesses agree that on account of such factors the only value that can be fairly attributed to the improvements is a salvage value fixed at $3,000 and where assessor admits that he had no idea what the market value was, nor what the rental or income value would be, and further admits he gave no consideration to rental or income value and that assessment was made on the basis of cubic content or

cubic foot replacement, somewhere between 16 and 50 cents per foot, which is not disclosed by the record, and that he allowed only a 25 percent depreciation on 45- or 50-year-old residence, held, assessor did not perform the duties imposed by statute, and assessment reduced to $3,000.

Call v Board, 227-1116; 290 NW 109

Valuation—factors considered. The valuation of property for tax purposes cannot be determined by mathematical formulae alone. While the statute requires that the productive and earning capacity, past, present, and prospective, must be taken into consideration, it is also necessary that the element of the assessor's judgment properly estimating the influence of the various relevant factors must enter in the assessment.

Trustees v Board, 226-1353; 286 NW 483

Valuation—key property reduction—other property—effect. In an action for reduction in valuation of a taxpayer's business property where it is based in part on the valuation of key property selected in the district, upon which the board of assessment and review allows a reduction of valuation of street frontage on one street adjoining key property, held, a corresponding percentage reduction in front foot valuations of taxpayer's property located on another street is not required in absence of any showing that valuation of street frontage of taxpayer's property is fixed solely on account of proximity of key property.

Trustees v Board, 226-1353; 286 NW 483

Valuation—order of reduction. Where the taxable value to be placed on property in 1931 was fixed by the court, and was acquiesced in by all parties and neither appealed, it is considered a fair assessable value where the evidence does not indicate that property was to any considerable degree different in value in 1931 and 1933, and the state board of assessment and review recommends a 20 percent reduction of the 1931 tax assessment as an equalization of tax assessments for the year 1933, held, the taxpayer is entitled to the full 20 percent reduction rather than 10.08 percent reduction allowed by the assessor.

Trustees v Board, 226-1353; 286 NW 483

Decisions involving former assessments not res judicata. The assessment of property for taxation is separate for each year, being based on a separate valuation, and an adjudication for one year cannot definitely fix the value for succeeding years.

Trustees v Board, 226-1353; 286 NW 483

Special legislative act—reduction—nonapplicable. Chapter 244 Special Acts of the Forty-fourth General Assembly, providing for reduction in tax rates for years 1931 and 1932, is not applicable as a basis for reduction in a tax valuation for the year 1933.

Trustees v Board, 226-1353; 286 NW 483

7110 Forest and fruit-tree reservations.

Atty. Gen. Opinions. See '28 AG Op 125; '30 AG Op 217; '32 AG Op 21; '38 AG Op 198, 738

7111 Notice of valuation.

Atty. Gen. Opinion. See AG Op Feb. 16, '39

7112 Refusal to furnish statement.

Atty. Gen. Opinion. See '30 AG Op 281

7114 Meeting of assessors.

Atty. Gen. Opinion. See '38 AG Op 583

7115 Assessment rolls and books.

Atty. Gen. Opinions. See AG Op April 26, '40, May 8, '40

Contradictory statements. Assessment rolls covering personal property of the taxpayer and the total value thereof, and introduced for purpose of impeachment, are not also receivable for the purpose of showing the value placed on a particular article when the owner demonstrates that the article was not given in for taxation.

Hall v Ins. Co., 217-1005; 252 NW 763

Eminent domain—assessment rolls as evidence. In eminent domain proceedings, the duly signed assessment roll of the property in question is admissible for the purpose of showing the assessed value.

Duggan v State, 214-230; 242 NW 98

7119 Uniform assessment rolls.

Atty. Gen. Opinions. See '38 AG Op 509, 558

7120 Plat book.

Atty. Gen. Opinion. See AG Op May 8, '40

7121 Completion of assessment—oath.

Atty. Gen. Opinions. See '25-26 AG Op 415; '38 AG Op 509

Failure to attach oath—effect. Whether a tax is invalidated because the assessor failed to attach to the assessment rolls the affidavit required by law, quaere.

Fidelity Inv. v White, 208-519; 223 NW 884

Incomplete affidavit by assessor. An assessment, accompanied by the affidavit of the owner of the property, and acquiesced in by him, and duly presented to, passed upon, and approved by, the local board of review and certified by its clerk, is not rendered invalid because the signature of the assessor to the affidavit attached to the assessment roll is not attested by an officer qualified to administer oaths.

Johnson v Miller, 217-295; 251 NW 747

7122 Rolls returned to local board.

Atty. Gen. Opinions. See '30 AG Op 110; '38 AG Op 509

7123 Assessment book — preparation and return.

Atty. Gen. Opinion. See '30 AG Op 110

Loss of rolls—effect. A tax is not invalidated because the assessment rolls were belatedly turned over by the assessor to the county auditor and later lost.

Fidelity Inv. v White, 208-519; 223 NW 884

Irregularities in assessment of capital stock of bank. It cannot be said that no valid assessment of the capital stock and surplus and undivided profits of a bank is effected because of irregularities in that:

1. The bank officials, in furnishing the law-required statement, correctly filled out that part of the official blank which the law contemplates will be filled out by the assessor, to wit, the "valuation" sheet showing the actual figures on which the several assessments should be computed,

2. The assessor failed either to sign or verify said valuation sheet as so made out, and

3. The assessor's books, when delivered to the county auditor contained no formal entry of assessments of said items of taxable property,—

when the evidence shows that said "valuation" sheet, as so made out, (1) was examined and approved by the assessor, (2) was duly placed before the review board, (3) was by said board examined and left without change, and (4) was later, with other assessment records, duly filed with the county auditor.

Security Bank v Mitts, 220-271; 261 NW 625

CHAPTER 343

BOARDS OF REVIEW

7129 Local board of review.

Atty. Gen. Opinions. See '25-26 AG Op 161, 207, 226; '30 AG Op 110; '38 AG Op 509, 561, 730

Levy and assessment—unauthorized review—effect. The unauthorized act of the county board of review in assuming to offset against an assessment of bank stock the amount of federal tax-exempt securities held by the bank does not constitute an adjudication against the proper county officials to correct the error.

First N. Bank v Burke, 201-994; 196 NW 287

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v Bank, 42 F 2d, 30

Crawford Bk. v Crawford County, 66 F 2d, 971

7129.1 Revaluation and reassessment of real estate.

Atty. Gen. Opinions. See '38 AG Op 702, 730

7131 Notice of assessments raised.

Atty. Gen. Opinions. See '30 AG Op 195, 325; '38 AG Op 730

7132 Complaint to board of review.

Atty. Gen. Opinions. See '30 AG Op 110, 308, 325; '32 AG Op 196; '38 AG Op 509, 561

Discrimination—exclusive remedy. The exclusive remedy of a taxpayer who claims that he has been discriminated against in an assessment of his property is to point out, even informally, to the board of review the facts showing such discrimination, and to appeal in case he feels aggrieved by the ruling of the board.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445

See 284 US 239

Assessment — irregularities — remedy—review by board. If a tax assessment is otherwise valid and legal, a property owner's remedy for an irregularity, such as indefinite description or overlapping assessment, is to appear before the board of review.

Jones v Mills County, 224-1375; 279 NW 96

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v First N. Bk., 42 F 2d, 30

Crawford Bk. v Crawford County, 66 F 2d, 971

Right of lessee. A lessee of real estate who has contracted to pay, as part of the rent, all taxes on the land, and who has the right under the lease to contest the validity of any assessment on the land, may institute and maintain such contest in his own name, even tho he might under the lease make such contest in the name of the landlord.

Chapman Bros. v Board, 209-304; 228 NW 28

Assessment at less than actual value—justification. Tho the statute directs property to be assessed at its actual value, it should not be so assessed if other property of a like or similar kind in the same assessment district is assessed at less than its actual value.

Talbott v Des Moines, 218-1397; 257 NW 393

Assessment—wrongful classification—statutory remedy must be pursued. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bk. v Mitts, 220-271; 261 NW 625

National bank stock taxed in excess of other monéyed capital—discrimination. The action of taxing officials in classifying a national bank's shares of stock as "moneyed capital" under the state laws, while placing competing capital of individuals in class of "moneys and credits", resulting in higher tax rates on banks, held, prohibited discrimination against national bank, and entitled bank to an injunction against the county treasurer restraining collection of discriminatory tax, notwithstanding bank's alleged failure to seek a hearing before state board of review.

Knowles v Bank, 58 F 2d, 232

Voluntary payment on excessive assessment —later reduction by state board—effect. A taxpayer who makes no objection to the local board of review as to the valuation which has been duly placed on his real estate by the assessor for assessment purposes, and voluntarily pays the taxes duly levied during the two following years on said valuation, may not later, and after obtaining an order from the state board of assessment and review reducing said assessed valuation, successfully contend that any part of said voluntarily paid taxes was "erroneously or illegally exacted or paid" within the meaning of the refund statute, §7235, C., '35.

Cedar Rapids Co. v Stirm, 222-206; 268 NW 562

Limitation on relief. A property owner may not, in the adjustment of his assessment, be granted greater relief than that prayed for by him.

Talbott v Des Moines, 218-1397; 257 NW 393

Burden of proof. A property owner has the burden of proof to show that the valuation placed upon his property by the board of review, for taxation purposes, is excessive or inequitable.

Appeal of Blank, 214-863; 243 NW 173

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

Petition to board of review on excessive tax assessment—not exclusion of federal court. Bank's petition to board of review, held, not to constitute a selection of statutory remedy for adjudication of alleged excessive assessment to exclusion of remedy in federal court of equity.

Munn v Bank, 18 F 2d, 269

7133 Appeal.

Atty. Gen. Opinions. See '32 AG Op 196; '38 AG Op 509, 561; AG Op April 24, '39

Invalid amendment. Amendment changing "board" (C., '27) to "county board of review" (43 GA, Ch 205) invalid.

Davidson Co. v Mulock, 212-730; 235 NW 45

Notice of—proper service. A statute which distinctly provides that a notice, e.g., a notice of appeal, shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over fourteen years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under this section.

In re Sioux City Yards, 222-323; 268 NW 18

Defective notice — appearance — effect. A notice of appeal from a refusal of the board of review to lower an assessment, and the form, contents, and service of such notice become quite immaterial when the board enters a general appearance and contests the appeal.

Chapman Bros. v Board, 209-304; 228 NW 28

Fatally defective notice. A notice of appeal to the district court from the action of the local board of review, addressed "To the Honorable Mayor and the City Council of Des Moines sitting as a board of review", is wholly insufficient to confer jurisdiction on the district court.

Midwest. Realty v City, 210-942; 231 NW 459

Fatally defective notice—appearance — effect. A fatal defect in a notice of appeal to the district court from the action of the board of review in a city, is not cured by the entry in the district court of a general appearance by the city through its attorney.

Midwest. Realty v City, 210-942; 231 NW 459

Discrimination—exclusive remedy. The exclusive remedy of a taxpayer who claims that he has been discriminated against in an assessment of his property is to point out, even informally, to the board of review the facts showing such discrimination, and to appeal in case he feels aggrieved by the ruling of the board.

Iowa Bank v Stewart, 214-1229; 232 NW 445
See 284 US 239

Decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

Review—transcript defined. For a tax appeal, the transcript from the board of review consists of the assessment, the objections thereto, and the board's ruling on the objections.

Board v Sioux City Yards, 223-1066; 274 NW 17

Appeal to supreme court—limited to questions before board of review. Where taxpayer appealed from board of review complaining of two items of assessment, city and board of review on further appeal to supreme court could not have other controverted items reviewed.

Central Life v Des Moines, (NOR); 236 NW 426

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

7134 Trial on appeal.

Atty. Gen. Opinions. See '32 AG Op 158; '38 AG Op 509; AG Op July 31, '39

Appeal—scope. The public may complain, on an appeal from the district court to the supreme court, because the court below decreased the valuation approved by the local board of review.

Appeal of Blank, 214-863; 243 NW 173

Decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

Actual value—evidence. On the issue of the actual value of property for purposes of general taxation for a certain year, the prior tax records are inadmissible.

Board v Board, 215-876; 244 NW 855

Presumption of correctness. The strong presumption of correctness which attends an official assessment of property (especially after it has been confirmed by the official board of review) cannot be overcome except by very definite and persuasive testimony to the contrary. Evidence held insufficient to overcome presumption.

Butler v Des Moines, 219-956; 258 NW 755

Assessment—correction — burden of proof. A property owner who attacks an assessment which has been confirmed by the board of review must overthrow the presumption that such assessment is equitable, just, and nondiscriminatory when compared with other like property within the taxing district. Evidence held ample to overthrow such presumption and to justify a reduction by the court.

Hawkeye Co. v Board, 205-161; 217 NW 837

Board of supervisors as objectors—trial de novo. The board of supervisors as objectors to the assessment of a stock yards company may properly appeal to the supreme court from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

Appeal to supreme court—limited to questions before board of review. Where taxpayer appealed from board of review complaining of two items of assessment, city and board of review on further appeal to supreme court could not have other controverted items reviewed.

Central Life v Des Moines, (NOR); 236 NW 426

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d 269

7135 Appeal on behalf of public.

Board of supervisors as objectors—trial de novo. The board of supervisors as objectors to the assessment of a stock yards company may properly appeal to the supreme court

from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

7136 Power of court.

Discrimination between similar properties—reduction. Tho property is not assessed at its actual value as required by law, nevertheless, if it is assessed for more in proportion to its actual value than other similar properties in the same assessment district, the property owner is entitled to an equalizing reduction.

Chapman Bros. v Board, 209-304; 228 NW 28

Nonpower of court to increase assessment. On appeal by a taxpayer from an assessment against him, the court cannot increase the assessment. The court has power to increase an assessment only in those cases where the appeal is taken by an officer of an interested county, city, town, township or school district. So held where the local board of review based its assessment against an insurance company solely on two items of moneys and credits, thereby conceding the nonassessability of all other items of moneys and credits of the company as shown by its report to the assessor, and where on appeal by the taxpayer it was sought to increase the assessment by other and additional items of moneys and credits as shown by said report.

Central Life v City, 212-1254; 238 NW 535; 78 ALR 551

Appeal by taxpayer—district court cannot increase assessment. Statute authorizing district court on appeal from board of review to increase assessments does not apply to taxpayer's appeal.

Central Life v Des Moines, (NOR); 236 NW 426

Appeal to supreme court—limited to questions before board of review. Where taxpayer appealed from board of review complaining of two items of assessment, city and board of review on further appeal to supreme court could not have other controverted items reviewed.

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State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

7137 County board of review.

Atty. Gen. Opinions. See '25-26 AG Op 82, 467; '28 AG Op 358; '38 AG Op 509

Presumption as to actual value. The court must presume, until the contrary is made to appear, that an assessment of property for general taxation purposes has been made and equalized on the sole basis of actual value as commanded by section 7109, C., '31.

Board v Board, 215-876; 244 NW 855

7138 Appeals.

Atty. Gen. Opinion. See '38 AG Op 509

7139 Abstract to state commission.

Atty. Gen. Opinions. See '25-26 AG Op 152; '38 AG Op 509

7140 State board of review.

Atty. Gen. Opinions. See '25-26 AG Op 152; '38 AG Op 558

7141 Adjusting county valuations.

Atty. Gen. Opinion. See '25-26 AG Op 82

7142 Notice of increase.

Atty. Gen. Opinion. See '25-26 AG Op 82

CHAPTER 344

TAX LIST

7144 Consolidated tax.

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chicago, RI Ry. v Slate, 213-1294; 241 NW 393

7145 Tax list.

Atty. Gen. Opinions. See '28 AG Op 115; '36 AG Op 486

Approval of assessment—necessarily resulting levy. A duly made and approved assessment on specific property necessarily takes that rate of tax which the law has provided for such property, and the duty of the auditor to compute the tax on such basis is purely ministerial.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445

See 284 US 239

Tax sale register as evidence. In an action to enjoin a county treasurer from selling at tax sale land on which the county held either certificates of tax sale or tax deeds, books designated as "tax sale registers" containing the county record of tax sales were competent evidence of the issuance of tax certificates to the county, although not evidence of the county's alleged tax deeds.

Bennett v Greenwalt, 226-1113; 286 NW 722

7146 Correction—tax apportioned.

Atty. Gen. Opinion. See '28 AG Op 115

7147 Tax list delivered — informality and delay.

Delinquent and unpaid taxes—bringing forward—time limit. The duty of the county treasurer to bring forward and enter on a tax list all delinquent and unpaid taxes against each tract of land (in order to preserve the lien of said taxes) is legally discharged if said bringing forward and entry is done as rapidly as is possible within a reasonable time after said list is received from the county auditor.

Murphy v Smith, 222-780; 269 NW 748

7149 Corrections by auditor.

Atty. Gen. Opinions. See '25-26 AG Op 134, 453; '28 AG Op 244; '30 AG Op 85; '34 AG Op 446; '36 AG Op 486; AG Op Nov. 6, '39, April 26, '39, May 24, '39

Delegation of authority. The authority of the county auditor to correct errors in assessments cannot be delegated to the county treasurer.

Muscatine Co. v Pitchforth, 214-952; 243 NW 292

Correction—time limit. The error of the assessor in deducting from the assessment of a private bank the amount of money borrowed by the banker may be corrected by the county auditor after the payment of the first installment and before the payment of the last installment of taxes.

Elliott v Rhoads, 203-218; 212 NW 468

No current year limitation. The auditor's power to assess omitted property is not limited to the so-called current year.

Blondel v County, 203-1099; 212 NW 335

Assessment after nullification of tax. The county auditor has power to assess real estate as "omitted" property when the ordinary tax thereon has been decreed void because of an omission by the regular assessor, even tho the county treasurer possibly had the same power.

Blondel v County, 203-1099; 212 NW 335

Correcting assessment of private banker. The county auditor may, on proper notice and hearing, and before a tax is paid, correct the erroneous action of the assessor in deducting the debts of a private banker from the value of the banker's taxable property. (§1321, S., '13 [§6997, C., '39]).

Mannings Bk. v Armstrong, 204-512; 211 NW 485

Bank shares—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Munn v Bank, 18 F 2d, 269
Knowles v Bank, 58 F 2d, 232
First N. Bk. v Anderson, 269 US 341
Iowa N. Bk. v Stewart, 214-1229; 232 NW 445; 284 US 239

Levy and assessment—bank stock—correction of error without notice. The act of the county board of review in setting off against an assessment of bank stock the amount of federal tax-exempt securities held by the bank, and thereby wholly canceling the assessment, is not only an error, but is a nullity; and the county auditor may, without notice to the bank, correct the error by entering the proper assessment on the tax books on the basis of the conceded capital, surplus, and undivided profits, less the real estate, of the bank. (See §§1322, 1385-b, S., '13.)

First N. Bank v Burke, 201-994; 196 NW 287

Unallowable corrrection. The county auditor may not, under the guise of correcting the assessment of a private banker, impose an assessment on bills receivable which the banker had rediscounted for full value to his correspondent bank, even tho the rediscounts were, in a sense, held by the correspondent as collateral, because of the mutual contemplation of the banker and the correspondent that the banker would in time redeem said discounts.

Northwestern Bk. v Van Roekel, 202-237; 207 NW 345

Illegal change by auditor of assessment — effect. The act of a county auditor, on his own motion, and without the connivance of any other official charged with duties pertaining to taxation, in changing a duly made and approved assessment of corporate stock of concerns competing with national, state and savings banks, from its proper classification of "corporate stock" to the classification of "moneys and credits" and computing the tax thereon as provided for moneys and credits, is absolutely void, and furnishes no basis for the claim by national, state and savings banks that they have been discriminated against, in that the consolidated levy has been applied to 20 percent of the value of their stock while the favored concerns have been taxed on the basis

of 5 mills on the dollar of the actual value of their stock.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445
Reversed, 284 US 239

Unauthorized classification. Whether certain securities shall be assessed as moneys and credits or as moneyed capital, within the meaning of the federal statutes, must, in the first instance, be determined by the judgment of the assessor, and lastly by the judgment of the board of review; and the county auditor has no power to change such determination.

Ft. Madison Sec. v Maxwell, 202-1346; 212 NW 131

7150 Notice.

Allowable correction without notice.

First N. Bk. v Burke, 201-994; 196 NW 287

Permissible change without notice. When the shares of stock of a bank are assessed to the bank, the county auditor may, at any time before the tax is paid, and without notice, change the assessment to the individual stockholders.

Ludeman v County, 204-1100; 216 NW 712

7152 Adjustment of accounts.

Atty. Gen. Opinion. See '25-26 AG Op 134

7154 Procedure on appeal.

Decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

7155 Corrections by treasurer.

Atty. Gen. Opinions. See '25-26 AG Op 226, 453; '28 AG Op 196, 332, 414; '34 AG Op 653; '38 AG Op 603; AG Op May 24, '39

Corrections by auditor—delegation of authority. The authority of the county auditor to correct errors in assessments cannot be delegated to the county treasurer.

Muscatine Co. v Pitchforth, 214-952; 243 NW 292

Unauthorized change. The county treasurer is wholly without authority to change the amount of a duly made assessment which appears on the tax books in the amount as fixed by the assessor and as modified and approved by the various equalization boards. The property so assessed cannot be deemed omitted property within the meaning of this section.

Muscatine Co. v Pitchforth, 214-952; 243 NW 292

Appeal—county treasurer not "aggrieved party". The county treasurer may not appeal to the district court from an order of the state board of assessment and review nullifying an assessment made by the said treasurer against alleged omitted property of a taxpayer, said treasurer not being a "party aggrieved" within the meaning of the statute. (§6943-c27, par. 9a, C., '31 [§6943.026, C., '39 (par. 9a repealed by 47 GA, Ch 188, §7)]).

In re Lytle Inv. Co., 219-1099; 260 NW 538

7156 Action by treasurer—apportionment.

Atty. Gen. Opinions. See '28 AG Op 414; '38 AG Op 603

Nullification—jurisdiction of state board. Assuming the legal right of the county treasurer to enter an assessment against the alleged omitted property of a taxpayer (§7155 et seq., C., '31), yet the state board of assessment and review has, on proper hearing and order, plenary jurisdiction, subject to appeal to the district court, wholly to nullify such assessment. (§6943-c27, par. 9a, C., '31 [§6943.026, C., '39 (par. 9a repealed by 47 GA, Ch 188, §7)]).

Smith v City Yards, 219-1142; 260 NW 531

7157 Duty of treasurer.

Atty. Gen. Opinion. See '38 AG Op 603

7158 Time limit.

Atty. Gen. Opinion. See '28 AG Op 332

7161 Discovery of property not listed.

Atty. Gen. Opinions. See '28 AG Op 170; '36 AG Op 167; '38 AG Op 586; AG Op Feb. 17, '40

CHAPTER 345

TAX LEVIES

CERTIFICATION OF TAXES

7162 Basis for amount of tax.

Discussion. See 17 ILR 374—Taxation for public buildings

Atty. Gen. Opinions. See '25-26 AG Op 415; '32 AG Op 51; '38 AG Op 77

7163 Amounts certified in dollars.

Atty. Gen. Opinion. See '30 AG Op 86

7164 Computation of rate.

Atty. Gen. Opinion. See '30 AG Op 86

Recovery of tax paid—mandamus as remedy—voluntary payment—effect. Taxes illegally exacted through county auditor's failure to comply with statute requiring budget deduction of moneys and credits tax may be recovered in a mandamus action against the

board of supervisors, even tho paid voluntarily and without protest.

Hewitt v Keller, 223-1372; 275 NW 94

Mandamus proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of this section. The state board of assessment and review has no power to correct this failure.

Hewitt v Keller, 223-1372; 275 NW 94

7169 Excessive tax prohibited.

Atty. Gen. Opinion. See '32 AG Op 105

COUNTY LEVIES

7171 Annual levies.

Atty. Gen. Opinions. See '28 AG Op 86; '32 AG Op 69; '36 AG Op 202; AG Op June 10, '39, July 10, '39

7172 Court expense.

Atty. Gen. Opinions. See '25-26 AG Op 58, 207; '28 AG Op 404; '32 AG Op 81; '38 AG Op 166

PEDDLERS

7174 Peddlers.

Atty. Gen. Opinions. See '38 AG Op 238, 661

7176 "Peddlers" defined.

Atty. Gen. Opinions. See '36 AG Op 271; '38 AG Op 239, 661

7177 Exceptions.

Atty. Gen. Opinions. See '25-26 AG Op 497; '32 AG Op 94, 144; '34 AG Op 301; '36 AG Op 271; '38 AG Op 256, 661; AG Op Feb. 2, '39

LEVIES BY STATE TAX COMMISSION

7182 Annual levy.

Atty. Gen. Opinion. See '34 AG Op 676

7183 Rate certified to county auditor.

Atty. Gen. Opinion. See '34 AG Op 676

CHAPTER 346

COLLECTION OF TAXES

7184 Duty of treasurer.

Atty. Gen. Opinion. See '34 AG Op 324

Special method—when followed. A special statutory method for collecting a special tax must be followed, but in the absence of such method, the right which inheres in sovereignty to enforce collection of taxes would apply.

State v Ins. Co., 223-1301; 275 NW 26

Failure to pay legally assessed tax—presumption. On the naked showing that a party has not paid in full a tax legally assessed against him, the presumption must be indulged that the public authorities not only have the right to collect in full but will collect in full.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445

See 284 US 239

Collection—court lending aid. The supreme court will, within the limits of the power conferred by the legislature, lend its aid to the collection of the revenues upon which the state must depend.

Bittle v Cain, 224-1332; 278 NW 608

7186 Actions authorized.

Atty. Gen. Opinions. See '25-26 AG Op 77; '28 AG Op 221; '30 AG Op 101

Personal liability of stockholder who appropriates corporate assets. A stockholder who appropriates to his own personal use substantially all the assets of the corporation becomes personally liable for the taxes theretofore levied against the corporation, the appropriation being in excess of said taxes.

Manning v Auto Co., 210-1182; 232 NW 501

7187 Statutes applicable—attachment—damages.

Atty. Gen. Opinion. See '30 AG Op 101

7188 Receipt.

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chi. RI Ry. v Slate, 213-1294; 241 NW 398

7189 Distress and sale.

Atty. Gen. Opinions. See '25-26 AG Op 115; '28 AG Op 221; '30 AG Op 132; '34 AG Op 158, 568; '38 AG Op 164; AG Op Feb. 8, '39, Dec. 20, '39, May 3, '40

Special method—when followed. A special statutory method for collecting a special tax must be followed, but in the absence of such method, the right which inheres in sovereignty to enforce collection of taxes would apply.

State v Ins. Co., 223-1301; 275 NW 26

7189.1 Distress warrant—form.

Atty. Gen. Opinions. See '38 AG Op 164; AG Op Dec. 20, '39, May 3, '40

7190 Delinquent personal tax list.

Atty. Gen. Opinions. See '25-26 AG Op 434; '28 AG Op 88, 275, 434

Lienability. The entry of taxes on personal property in the delinquent personal tax book

as such taxes accrue from year to year constitutes such taxes a lien on the real estate of the delinquent taxpayer.

Hayes v Kemp, 207-53; 222 NW 392

Sale for tax for one year discharges lien of tax for prior years. A sale of land for taxes thereon for a certain year discharges the lien of personal taxes levied against the owner for prior years.

In re Hager, 212-851; 235 NW 563

Personal property tax lien on homestead. A tax on bank stock duly entered on the delinquent personal tax list is a lien on the homestead of the owner of the stock.

Hampe v Philipp, 210-1243; 232 NW 648

7191 Record—contents.

Atty. Gen. Opinion. See '28 AG Op 275

7193 Former delinquent real estate taxes.

Atty. Gen. Opinions. See '25-26 AG Op 80; '28 AG Op 221; '30 AG Op 87, 231; '38 AG Op 553

Lien and priority—sale for tax for one year discharges lien of tax for prior years. A sale of land for taxes thereon for a certain year discharges the lien of personal taxes levied against the owner for prior years.

In re Hager, 212-851; 235 NW 563

Special assessments—loss of lien. The lien of delinquent special assessments for street improvements is irrevocably lost by the failure of the county treasurer to enter such assessments on the current general tax list. And this is true even tho the property owner has formally waived all illegalities in the assessments and has agreed to pay them, and even tho the county treasurer has kept his books on forms prescribed by the state auditor.

Wallace v Gilmore, 216-1070; 250 NW 105

Sale for current tax and tax not brought forward. A tax sale for a special assessment maturing during the year of sale is not rendered wholly void because the sale is also made for delinquent special assessments for prior years, not brought forward by the treasurer on the tax books.

Wren v Berry, 214-1191; 243 NW 375

Bringing forward on tax list—time limit. The duty of the county treasurer to bring forward and enter on a tax list all delinquent and unpaid taxes against each tract of land (in order to preserve the lien of said taxes) is legally discharged if said bringing forward and entry is done as rapidly as is possible within a reasonable time after said list is received from the county auditor.

Murphy v Smith, 222-780; 269 NW 748

Sale for delinquent taxes not carried forward—setting aside — insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

Sale for delinquent taxes not brought forward—deed invalidity. A tax deed is invalid as a basis for a quiet title action against the legal titleholder who asks no relief except undisturbed possession where, prior to the sale, the delinquent taxes supporting such deed have not been brought forward by the treasurer and entered on the current tax list opposite the property on which it is a lien.

Bittle v Cain, 224-1332; 278 NW 608

Delinquent taxes not brought forward—effect on bonds retired by special assessments. County treasurer's failure to bring forward delinquent special assessments, an irregularity rendering the assessments only voidable and not void, will not create a cause of action against the city on refunding bonds based on the claim that such special assessments, not brought forward, may not be included in determining the amount of the "unpaid special assessments."

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Lien—refunding bonds for assessments not carried forward—city nonliable. Where a city issues refunding bonds for street and sewer improvements in an amount equal to "unpaid special assessments" including therein "unpaid special assessments" which the county treasurer failed to carry forward on his tax lists, a theory that "unpaid special assessments" meant only those supported by a valid lien, and therefore such bonds exceeded the statutory limit to the extent of those assessments not carried forward, will not make a city liable to the bondholders, inasmuch as those assessments not carried forward are not void but only voidable at the option of the property holder.

Bankers Life v Spirit Lake, 224-1304; 278 NW 320

Bringing forward special taxes—omission—county treasurer not city's agent. A county treasurer's failure to bring forward special assessments on his tax list does not constitute a delinqency on part of the city, and he is no agent for that purpose.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Delinquent personal tax—failure to enter on list—effect. A sale of real estate for a delinquent personal tax not entered on the delinquent personal tax list is void because of the provisions of §7192, C., '27, even tho §7203, C., '27, '31, declares, generally, that personal

taxes are a lien on the taxpayer's real estate for a period of ten years after December 31 of the year of levy. (Section 7192, C., '27, now repealed.)

Schoenwetter v Oxley, 213-528; 239 NW 118

Mortgagee as subsequent titleholder denying tax deed validity—delinquent tax tender unnecessary. A mortgagee, being required only to pay the taxes levied on his mortgage, not being the realty titleholder when certain delinquent real estate taxes were levied, and being under no legal obligation to pay such delinquent taxes, is not, after having acquired the land by deed from the mortgagor subsequent to an invalid tax sale, required to tender such delinquent taxes as a condition to defending and denying in a quiet title action the validity of the tax deed issued for such taxes.

Bittle v Cain, 224-1332; 278 NW 608

Tax sale register as evidence. In an action to enjoin a county treasurer from selling at tax sale land on which the county held either certificates of tax sale or tax deeds, books designated as "tax sale registers" containing the county record of tax sales were competent evidence of the issuance of tax certificates to the county, altho not evidence of the county's alleged tax deeds.

Bennett v Greenwalt, 226-1113; 286 NW 722

Certificate — lien — noninvalidating defects. Record reviewed, and held that a municipal special assessment certificate for paving was not invalidated because the name of the owner of the land assessed did not appear therein (§6105, C., '35); nor was the lien of certain installments of said assessment lost because of the failure of the proper county officials to bring forward on the tax books, at the time of tax sale, said unpaid installments.

Hawkeye Ins. v Munn, 223-302; 272 NW 85

7193.04 Entries on general tax list.

Special assessments—loss of lien. The lien of delinquent special assessments for street improvements is irrevocably lost by the failure of the county treasurer to enter such assessments on the current general tax list. And this is true even tho the property owner has formally waived all illegalities in the assessments and has agreed to pay them, and even tho the county treasurer has kept his books on forms prescribed by the state auditor.

Wallace v Gilmore, 216-1070; 250 NW 105

Special procedure for collection exclusive. A municipal improvement certificate may not be foreclosed by an action in court, because (1) the statutes confer no such authority, and (2) the statutes provide a special procedure for collection along with the collection of ordinary taxes. See §6007 et seq., §7193-d1 [§7193.01, C., '39], C., '31.

Hawkeye Ins. v Valley-Des M. Co., 220-556; 260 NW 669; 105 ALR 1018

7193.05 Limitations.

Whether this and the four preceding sections change the rule in Fitzgerald v City, 125-396; 101 NW 268, quaere.

7193.06 Compromising tax.

Atty. Gen. Opinions. See '28 AG Op 226, 275, 308; '32 AG Op 183; '36 AG Op 164, 255, 319; '38 AG Op 699

7193.09 Compromising tax on personal property.

Atty. Gen. Opinions. See '28 AG Op 275, 308, 320; '32 AG Op 183; '38 AG Op 123

7194 Penalty and interest limited—unavailable taxes.

Atty. Gen. Opinions. See '25-26 AG Op 172, 342, 347; '36 AG Op 530; '38 AG Op 14, 851

7195 County credited.

Atty. Gen. Opinion. See '25-26 AG Op 322

7196 Subsequent collection.

Atty. Gen. Opinions. See '25-26 AG Op 322; '36 AG Op 530

7202 Lien of taxes on real estate.

Similar provision. See under §6880

Atty. Gen. Opinions. See '32 AG Op 204; '36 AG Op 202; '38 AG Op 692

Applicability of statute. Principle reaffirmed that this section relative to the lien of taxes has applicability only to general taxes, not to special assessments for street improvements.

Frankel v Blank, 205-1; 213 NW 597

Special assessments—lien and priority. A tax sale for general taxes and a tax deed duly issued thereon extinguishes the lien of all existing special assessments for paving or sewer.

Iowa Co. v Barrett, 210-53; 230 NW 528

Western Sec. v Bank, 211-1304; 231 NW 317

Priority between different special assessments. The fully perfected lien of a special assessment for sewer is prior in right to the lien of a subsequent special assessment by the board of supervisors for a public drainage improvement, even tho the latter improvement was initiated prior to the sewer proceedings.

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Statute declares lien—priority. Unless so expressed by statute, taxes are neither a lien on property assessed nor on taxpayer's other property and this cannot be enlarged by judicial construction, but whether such a lien is paramount to other liens depends on legislative intent ascertained or implied from the statute, which need not contain specific words indicating a "first lien" in order to create priority.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

Tax deed nullifies special assessments. A tax deed issued on a sale for ordinary regular taxes nullifies the lien of all special assess-

ments levied on the land by a city after the sale and before the execution of the deed.

Means v City, 214-948; 241 NW 671

Tax sale—school fund mortgage. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage foreclosure. In an action to foreclose a school fund mortgage, where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until eleven years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien, and that it was unpaid, and he could not rely on lapse of time, laches or negligence, as against the state.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage paramount—treasurer exceeding authority. In an action to foreclose a duly recorded mortgage to secure a loan from the permanent school fund, the priority of lien granted by statute can neither be defeated by a tax sale purchaser of such realty on ground of mutual mistake of purchaser and county treasurer in connection with tax sale, nor that the county treasurer exceeded his authority and sold more than the interest of person holding fee in such realty, as the taxes on the realty mortgaged to secure loan from permanent school fund are not a lien against the state and the purchaser at such sale acquired only the right to redeem from mortgage and does not acquire a lien superior to lien of mortgage.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage paramount. The statutes providing, that where real estate is incumbered to school fund the interest of the person holding the fee shall alone be sold for taxes and that lien of state shall not be affected by the tax sale, will be construed as meaning that lien of mortgage given to the state for land bought on credit and lien of a real estate mortgage to school fund will be paramount to a tax lien.

Monona County v Waples, 226-1281; 286 NW 461

Duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

Tax sale—school, agricultural college, or university land. In construing statute which provides in substance, that in the sale of school, agricultural college or university land sold on credit which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

7203 Lien of personal taxes.

Atty. Gen. Opinions. See '25-26 AG Op 188, 233, 320; '28 AG Op 384; '32 AG Op 204; '34 AG Op 722; '38 AG Op 15, 65, 595, 697

Delinquent taxes—entry. The entry of taxes on personal property in the delinquent personal tax book as such taxes accrue from year to year constitutes such taxes a lien on the real estate of the delinquent taxpayer.

Hayes v Kemp, 207-53; 222 NW 392

Delinquent personal tax—failure to enter on list—effect. A sale of real estate for a delinquent personal tax not entered on the delinquent personal tax list is void because of the provisions of §7192, C., '27, even tho §7203, C., '27, '31, declares, generally, that personal taxes are a lien on the taxpayer's real estate for a period of 10 years after December 31 of the year of levy. (§7192, C., '27, now repealed.)

Schoenwetter v Oxley, 213-528; 239 NW 118

Sale for tax for one year discharges lien of tax for prior years. A sale of land for taxes thereon for a certain year discharges the lien of personal taxes levied against the owner for prior years.

In re Hager, 212-851; 235 NW 563

Corporate bank stock. Taxes on corporate bank stock and against the individual owners thereof are not a lien on the real estate holdings of the corporation in the hands of a receiver, notwithstanding the fact that the statute assumes to make the corporation personally liable therefor.

Andrew v Munn, 205-723; 218 NW 526

Personal property tax lien on homestead. A tax on bank stock, duly entered on the delinquent personal tax list, is a lien on the homestead of the owner of the stock.

Hampe v Philipp, 210-1243; 232 NW 648

7204 Lien between vendor and purchaser.

Atty. Gen. Opinions. See '32 AG Op 204; '36 AG Op 202; '38 AG Op 692; AG Op April 26, '40

Taxes maturing December 31—obligation to pay. A vendor who, prior to December 31,

sells real estate "free of all incumbrances to date of sale" must, as between himself and the vendee, pay the taxes falling due on December 31 of said year.

Moore v Trust Co., 210-1020; 229 NW 666

7205 Lien follows certain personal property.

Atty. Gen. Opinions. See '28 AG Op 295; '30 AG Op 64; '32 AG Op 170, 276; '38 AG Op 35; AG Op Aug. 23, '39

Statutory declaration of lien—effect. A statutory declaration that taxes are a lien does not necessarily mean that they are a first lien.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Statute declares lien—priority. Unless so expressed by statute, taxes are neither a lien on property assessed nor on taxpayer's other property and this cannot be enlarged by judicial construction, but whether such a lien is paramount to other liens depends on legislative intent ascertained or implied from the statute, which need not contain specific words indicating a "first lien" in order to create priority.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

Lien and priority—conditional sale lien—superiority of tax lien. Taxes assessed (§§7205, 7206, C., '35) after execution of a conditional sale contract on a stock of goods and other personalty are superior to the lien of such contract inasmuch as (1) historically these sections were contained in a single section; (2) one section already carries a construction creating a lien paramount to all other liens; (3) necessarily security of the revenue is an incident of sovereignty; and (4) the above sections contain language which by necessarily implied legislative intent creates liens continuing and paramount to all other liens.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

7206 Lien follows building assessed as personalty.

Statute declares lien—priority. Unless so expressed by statute, taxes are neither a lien on property assessed nor on taxpayer's other property and this cannot be enlarged by judicial construction, but whether such a lien is paramount to other liens depends on legislative intent ascertained or implied from the statute, which need not contain specific words indicating a "first lien" in order to create priority.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

Lien and priority—conditional sale lien—superiority of tax lien. Taxes assessed (§§7205, 7206, C., '35) after execution of a conditional sale contract on a stock of goods and other personalty are superior to the lien of such contract inasmuch as (1) historically these sections were contained in a single section; (2) one section already carries a construction creating a lien paramount to all other liens; (3) necessarily security of the revenue is an incident of sovereignty; and (4) the above sections contain language which by necessarily implied legislative intent creates liens continuing and paramount to all other liens.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

7207 Payment—what receivable.

Atty. Gen. Opinion. See '34 AG Op 324

What constitutes legal payment. The act of a county treasurer in forwarding to a banker officially signed tax receipts, with implied authority to the banker to deliver the receipts to the various taxpayers on payment to the banker of the amount called for by the respective receipts, and the act of the taxpayer in paying the amount and receiving his receipt, constitute a legal payment of the taxes, even tho, because of the insolvency of the bank, the county treasurer never actually received the money.

Rundell v Boone Co., 204-965; 216 NW 122

Uncashed check. The uncashed check of a taxpayer to the county treasurer in payment of taxes does not constitute such payment, even tho said check would have been paid had it been properly presented, and even tho the treasurer, as a matter of bookkeeping, treated said check as cash and prepared receipts accordingly.

Morgan v Gilbert, 207-725; 223 NW 483

7208 Certain warrants receivable.

Atty. Gen. Opinions. See '32 AG Op 258; '34 AG Op 324

7209 Warrants not receivable.

Atty. Gen. Opinion. See '34 AG Op 324

7210 Payment—installments.

Atty. Gen. Opinions. See '34 AG Op 324; AG Op Nov. 6, '39, March 13, '40

ANALYSIS

I PAYMENT IN GENERAL
II RIGHT OR DUTY OF PARTICULAR PARTIES TO PAY
III CONTRACT TO PAY
IV PAYMENT BY NONOWNER AND REIMBURSEMENT THEREFOR

I PAYMENT IN GENERAL

Inadequate payment. It is idle for one to assert that he has paid all taxes due against real estate when he concededly has not paid matured special assessments on the land.

Wren v Berry, 214-1191; 243 NW 375

Uncashed check. The uncashed check of a taxpayer to the county treasurer in payment of taxes does not constitute such payment, even tho said check would have been paid, had

it been properly presented, and even tho the treasurer, as a matter of bookkeeping, treated said check as cash, and prepared receipts accordingly.

Morgan v Gilbert, 207-725; 223 NW 483

Recovery of tax paid—mandamus as remedy—voluntary payment—effect. Taxes illegally exacted through county auditor's failure to comply with statute requiring budget deduction of moneys and credits tax may be recovered in a mandamus action against the board of supervisors, even tho paid voluntarily and without protest.

Hewitt v Keller, 223-1372; 275 NW 94

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chi. RI Ry. v Slate, 213-1294; 241 NW 398

II RIGHT OR DUTY OF PARTICULAR PARTIES TO PAY

Discussion. See 22 ILR 39—State taxation and federal agencies

General taxes—life tenant to pay. Principle recognized that a life tenant is under primary duty to pay general taxes.

Kinnett v Ritchie, 223-543; 273 NW 175

When taxes "due". An obligation on the part of a receiver to pay taxes on mortgaged property "as they become due" embraces taxes which are owing on and after the first Monday in January following the levy, even tho they are not delinquent. In other words, nondelinquent taxes are due in the sense that they are owing.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Foreclosure sale—protection of mortgagee against taxes. A mortgagee who bids in the property under a deficiency bid at foreclosure sale without at any time protecting himself against delinquent taxes as he might have done under the mortgage and foreclosure decree, and later takes a sheriff's deed to the property, may not have the rents collected during the redemption period applied to the discharge of said taxes.

Hartford Ins. v Alexander, 215-573; 246 NW 204

Redemption—law remedy to remove tax sale cloud—equity unavailing. A property owner, presumed to have been informed of his tax assessments, knowing that they will become due and payable without demand, yet allowing the taxes to become delinquent and the property to go to tax sale, may not resort to equity to remove the cloud on his title when he has by redemption a plain, speedy, and adequate remedy at law.

Jones v Mills County, 224-1375; 279 NW 96

Paying taxes before attacking tax deed—valid tender sufficient. Statute requiring payment of taxes as a prerequisite to attacking a tax deed, §7290, C., '35, does not preclude questioning the title by a person who repeatedly offers to do equity by tendering the whole of the taxes legally and rightfully due together with interest and penalties thereon.

Jordan v Beeson, 225-460; 280 NW 625

III CONTRACT TO PAY

Recovery of taxes paid for another. Instruction requiring proof of defendant's oral request that plaintiff pay taxes, promise to repay and payment by plaintiff in reliance thereon was proper under the pleading and proof.

Nelson v Hemminger, (NOR); 224 NW 49

IV PAYMENT BY NONOWNER AND REIMBURSEMENT THEREFOR

Assignment pending action—right of grantee. One who becomes an assignee of a real estate mortgage after the commencement of a successful action to set aside the mortgage as fraudulent (the action being legally lis pendens by proper index) and who, during the trial of said action, to which he had been made a party, redeems the land from tax sale, must be deemed a mere volunteer payer of taxes with no right to have the amount paid by him made a lien on the land.

Clarkson v McCoy, 215-1008; 247 NW 270

7211 When delinquent.

Atty. Gen. Opinions. See '28 AG Op 315; AG Op March 13, '40

Conditional limitation — obligation to pay taxes. A testamentary proviso which provides that if the life tenant "neglects to pay the taxes on said real estate within six months after they become delinquent", the life estate shall automatically terminate, must be deemed to refer to all the taxes payable during a given year and not to an installment thereof. It follows that a six months delinquency on the first yearly installment of taxes works no forfeiture.

Churchill v Bank, 211-1168; 235 NW 480

Payment — intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test

suit he is liable for interest or penalty on the untendered tax only.

Chicago, RI Ry. v Slate, 213-1294; 241 NW 393

7214 Interest as penalty.

Atty. Gen. Opinions. See '25-26 AG Op 27, 115; '28 AG Op 355, 400; '34 AG Op 79, 180; '38 AG Op 568; AG Op Sept. 1, '39, March 13, '40

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chicago, RI Ry. v Slate, 213-1294; 241 NW 393

When taxes "due". An obligation on the part of a receiver to pay taxes on mortgaged property "as they become due" embraces taxes which are owing on and after the first Monday in January following the levy, even tho they are not delinquent. In other words, nondelinquent taxes are due in the sense that they are owing.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

7215 Penalty on personal taxes.

Atty. Gen. Opinions. See '28 AG Op 230, 400; '34 AG Op 106, 711; AG Op Jan. 18, '39, March 27, '40

Penalties accruing during unsuccessful litigation to defeat tax. A taxpayer is chargeable with the statutory penalties accruing during the pendency of his unsuccessful litigation to defeat the tax.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445

See 284 US 239

7217 Assessment of migratory property of nonresident.

Atty. Gen. Opinion. See '30 AG Op 101

7222 Collectors—appointment.

Atty. Gen. Opinions. See '25-26 AG Op 77; '34 AG Op 711; '36 AG Op 167; AG Op March 27, '40

7223 Compensation and accounting.

Atty. Gen. Opinions. See '28 AG Op 220; '30 AG Op 324; '34 AG Op 711; '36 AG Op 167; '38 AG Op 164, 558; AG Op Jan. 18, '39

7224 Sheriff or constable as collector.

Atty. Gen. Opinions. See '38 AG Op 164; AG Op Dec. 20, '39, March 27, '40, May 3, '40

7225 Personal property tax collectors.

Atty. Gen. Opinions. See '28 AG Op 314; '32 AG Op 51; '34 AG Op 711; '36 AG Op 164; '38 AG Op 586; AG Op Aug. 1, '39; AG Op March 27, '40

7226 Current taxes—when delivered for collection.

Atty. Gen. Opinions. See '28 AG Op 314; '30 AG Op 324; '38 AG Op 586

7227 Interest and penalties — apportionment—compensation of collectors.

Atty. Gen. Opinions. See '25-26 AG Op 118; '28 AG Op 170

7232 Monthly apportionment.

Atty. Gen. Opinions. See '25-26 AG Op 118; '36 AG Op 530

7233 Misapplied interest or penalty.

Atty. Gen. Opinions. See '25-26 AG Op 118, 126

7235 Refunding erroneous tax.

Atty. Gen. Opinions. See '28 AG Op 50, 177, 331; '30 AG Op 51, 87, 171, 206, 321; '32 AG Op 196; '34 AG Op 275, 580, 589; '38 AG Op 14, 109, 174, 405, 414, 697; AG Op Feb. 1, '39, Feb. 16, '39, Nov. 6, '39

ANALYSIS

I REFUND IN GENERAL
II RIGHT TO REFUND
III NONRIGHT TO REFUND
IV SOURCE OF REFUND

Purchaser indemnified for wrongful sale. See under §7293

I REFUND IN GENERAL

Discussion. See 16 ILR 381—Restraint and recovery of taxes

Refunding erroneous tax — administrative remedies must be exhausted before resorting to court. Under the statute providing for refunding erroneous tax, stockholders of a national bank are not entitled to money judgment in alternative of statute. All adequate administrative remedies must be exhausted to recover tax illegally collected before resorting to the courts.

First Nat. Bk. v Harrison County, 57 F 2d, 56
Hammerstrom v Bank, 81 F 2d, 628

New action after failure of former action. An action in equity to mandamus the board of supervisors to order the refund of a tax which has been illegally exacted from plaintiff may not be deemed a continuation of a former action at law by the same plaintiff against the county and its treasurer for a personal judgment for the amount of said illegally exacted tax.

Murphy v Board, 205-256; 215 NW 744

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chi. RI Ry. v Slate, 213-1294; 241 NW 398

Legalizing tax levy after invalidating ruling by court. A legislative act which legalizes a tax levy after the appellate court has ruled (but before entry of judgment) that the taxpayer is entitled to a refund of the tax paid, because the tax levy was void, owing to the absence of an authorizing statute, neither disturbs any vested interest of the taxpayer's nor constitutes an unconstitutional interference with the judiciary.

Chi. RI Ry. v Streepy, 211-1334; 236 NW 24

II RIGHT TO REFUND

Recovery of tax paid—mandamus as remedy—voluntary payment—effect. Taxes illegally exacted through county auditor's failure to comply with statute requiring budget deduction of moneys and credits tax may be recovered in a mandamus action against the board of supervisors, even tho paid voluntarily and without protest.

Hewitt v Keller, 223-1372; 275 NW 94

Mandamus as exclusive remedy. A taxpayer may not maintain an action for a general money judgment against a county, arising out of the fact that he has paid in the same year and on the same property an illegal bridge tax levied by a city and a legal bridge tax levied by the board of supervisors. Whatever remedy he has against the county, if any, must be worked out through mandamus to compel a refund.

Murphy v Berry, 200-974; 205 NW 777
Schoenwetter v Oxley, 213-528; 239 NW 118

Unallowable joinder of law and mandamus. An action at law against a county for judgment for taxes illegally exacted may not be joined with an equitable action of mandamus for an order on the board of supervisors directing the county treasurer to refund such taxes.

First N. Bk. v Board, 217-702; 247 NW 617; 250 NW 887

Holder of illegal certificate. The holder of a tax sale certificate issued at an illegal sale of real estate for personal taxes not entered on the delinquent personal tax list, is a "taxpayer" within the statute giving a taxpayer the right to a refund of the money paid.

Schoenwetter v Oxley, 213-528; 239 NW 118

III NONRIGHT TO REFUND

Refund — waiver. An insurance company which lists its corporate stock to itself as personal property, and at an inadequate value which it induces the assessor to accept, all on the assumption that it was subject to the consolidated levy, and thereafter interposes no counter objection, may neither obtain a refund for taxes paid nor enjoin the collection of taxes unpaid, on the theory that the property was in fact only subject to a five-mill levy as moneys and credits.

Farmers Ins. v County, 202-444; 208 NW 929

Voluntary payment on excessive assessment—later reduction by state board—effect. A taxpayer who makes no objection to the local board of review as to the valuation which has been duly placed on his real estate by the assessor for assessment purposes, and voluntarily pays the taxes duly levied during the two following years on said valuation, may not later, and after obtaining an order from the state board of assessment and review reducing said assessed valuation, successfully contend that any part of said voluntarily paid taxes was "erroneously or illegally exacted or paid" within the meaning of this section.

Cedar Rapids Co. v Stirm, 222-206; 268 NW 562

School fund estimates under local budget law omitting money on hand—taxes valid—no refund. School districts, in submitting their budgets for their fiscal year beginning July 1, are not required to include money on hand derived from taxes levied and estimated two years before and collected a year later to be expended during the current school year, and taxes collected accordingly will not be refunded in a mandamus action.

Lowden v Woods, 226-425; 284 NW 155

IV SOURCE OF REFUND

No annotations in this volume

7236 Sale for erroneous tax.

Atty. Gen. Opinions. See '32 AG Op 29; '38 AG Op 65, 109

7237 Remission in case of loss.

Atty. Gen. Opinions. See '25-26 AG Op 333; '28 AG Op 244; '30 AG Op 101, 136, 290, 352; '34 AG Op 555; '36 AG Op 48; '38 AG Op 9, 14

CHAPTER 347

TAX SALE

7242 Time of sale—adjournment.

Atty. Gen. Opinion. See '32 AG Op 147

7244 Annual tax sale.

Atty. Gen. Opinions. See '28 AG Op 48, 268, 434; '32 AG Op 147, 267, 278; '34 AG Op 79, 465; '36 AG Op 319; '38 AG Op 227, 697, 699; AG Op Nov. 6, '39

ANALYSIS

I SALES UNDER PRIOR STATUTES
II SALES GENERALLY
III PUBLIC SALE
IV IRREGULAR OR VOID SALES

I SALES UNDER PRIOR STATUTES

Statutes part of special assessment certificate holder's contract—no effect by amending tax sale statute. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

II SALES GENERALLY

Sale for tax for one year discharges lien of tax for prior years. A sale of land for taxes thereon for a certain year discharges the lien of personal taxes levied against the owner for prior years.

In re Hager, 212-851; 235 NW 563

Continuing tax sale under statute. A county treasurer may, under the statute, without setting a specific date, continue a tax sale for cause from the date first advertised and the later sale will be valid.

Freemyer v Taylor County, 224-401; 275 NW 718

Good cause for continuing—economic emergency—governor's proclamation. Good cause for continuing a tax sale is shown by the governor's proclamation of the existence of a great economic emergency also recognized by the legislative and judicial branches of the government.

Freemyer v Taylor County, 224-401; 275 NW 718

Judgment—substitution of county treasurer as defendant without notice—effect. A default judgment entered against a county treasurer who had been substituted as defendant in lieu of a former treasurer, in an action to enjoin the sale of land for taxes, must be set aside when the substitution is made without the service of original notice upon him and without knowledge on his part, even tho the former treasurer had been negligent in not entering an appearance; and especially is this true when the application to set aside is timely and accompanied by an affidavit of merit and an apparently good answer.

Dewell v Suddick, 211-1352; 232 NW 118

Tax sale register as evidence of tax certificates—not evidence of tax deeds. In an action to enjoin a county treasurer from selling at tax sale land on which the county held either certificates of tax sale or tax deeds, books designated as "tax sale registers" containing the county record of tax sales were competent evidence of the issuance of tax certificates to the county, altho not evidence of the county's alleged tax deeds.

Bennett v Greenwalt, 226-1113; 286 NW 722

Special assessment tax sales—injunction decree not justified by pleadings. When the petition asked for an injunction restraining the county treasurer from selling at tax sale lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Amendment of tax sale statute—no implied amendment of special assessment sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Drainage assessments—tax sale for nonpayment. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

III PUBLIC SALE

No annotations in this volume

IV IRREGULAR OR VOID SALES

Partially void tax sale. Mandamus (assuming the propriety of the remedy) will not lie to wholly cancel a tax sale which is only partially void.

Wren v Berry, 214-1191; 243 NW 375

Voidable sale—terms on which set aside. A tax sale, tho legally voidable, will not be set aside in equity at the instance of the property owner unless he pays, or binds himself to pay, the taxes legally assessed against the property.

Witmer v Polk Co., 222-1075; 270 NW 323

Sale for delinquent taxes not carried forward—setting aside—insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

Mortgagee as subsequent titleholder denying tax deed validity—delinquent tax tender unnecessary. A mortgagee, being required only to pay the taxes levied on his mortgage, not being the realty titleholder when certain delinquent real estate taxes were levied, and being under no legal obligation to pay such delinquent taxes, is not, after having acquired the land by deed from the mortgagor subsequent to an invalid tax sale, required to tender such delinquent taxes as a condition to defending and denying in a quiet title action the validity of the tax deed issued for such taxes.

Bittle v Cain, 224-1332; 278 NW 608

Tax sales enjoined—error as to persons not parties to action. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

Sale for delinquent taxes not brought forward—deed invalidity. A tax deed is invalid as a basis for a quiet title action against the legal titleholder who asks no relief except undisturbed possession where, prior to the sale, the delinquent taxes supporting such deed have not been brought forward by the treasurer and entered on the current tax list opposite the property on which it is a lien.

Bittle v Cain, 224-1332; 278 NW 608

7246 Notice of sale—service.

Atty. Gen. Opinions. See '25-26 AG Op 213; '32 AG Op 185; AG Op Sept. 1, '39, Oct. 10, '39

Error in name of owner. A tax sale is not void because the real estate was advertised and sold as belonging to one who owned only a minor part thereof.

Wren v Berry, 214-1191; 243 NW 375

Tax sale—general and special taxes—single sale—en masse sale rule not applicable. An en masse sale of different tracts of land for taxes is void, but land in one tract is not divided into separate tracts for tax sale purposes by virtue of separate assessments of general and special taxes, altho the specials covered only part of the tract.

White v Hammerstrom, 224-1041; 277 NW 483

Correction by resale at adjourned sale.

Tesdell v Greenwalt, 228- ; 290 NW 676

Sale—tax tender as doing equity before enjoining deed issuance. One who allows his property to go to tax sale and later seeks to enjoin the county from issuing a tax deed claiming a void sale must, if seeking equity, do equity by tendering the amount of the taxes due and attempt to make redemption as by statute provided.

Jones v Mills County, 224-1375; 279 NW 96

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

7247 Costs.

Atty. Gen. Opinion. See '32 AG Op 185

7250 Method of describing lands, etc.

Additional annotations. See under §7106, Vol I

Fatally indefinite description of land. Principle reaffirmed that a tax deed is void when the land is so defectively described as not to identify the land.

Geil v Babb, 214-263; 242 NW 34

7251 Irregularities in advertisement.

Error in name of owner—effect. A tax sale is not void because the real estate was advertised and sold as belonging to one who owned only a minor part thereof.

Wren v Berry, 214-1191; 243 NW 375

7252 Offer for sale.

Atty. Gen. Opinions. See '28 AG Op 295; AG Op May 4, '39

Taxes suspended by appeal—effect. There cannot be a valid sale of real estate for taxes a part of which consists of special assessments for paving, and which part has been suspended by an appeal to the district court.

Fidelity Inv. v White, 208-519; 223 NW 884

Tax sale—general and special taxes—single sale—en masse sale rule not applicable. An en masse sale of different tracts of land for taxes is void, but land in one tract is not divided into separate tracts for tax sale purposes by virtue of separate assessments of general and special taxes, altho the specials covered only part of the tract.

White v Hammerstrom, 224-1041; 277 NW 483

Tax sale—en masse sale of separate tracts—deed recitals conclusive. The sale of more than one tract or parcel of real estate en masse, for the gross sum of taxes thereon, being contrary to the mandatory provisions of statute, voids the entire sale and deeds based thereon. Tax deed recitals relating to whether the sale was separately or en masse are conclusive evidence thereof.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—separate tracts—lots with street between used as single unit. A tax deed, issued pursuant to an en masse sale of land, describes two separate tracts of land, when it lists land on two sides of a dedicated street, and the separateness of the tracts is neither affected by fact that the entire tract, including the street, has been used as a pasture for 37 years, nor by the circumstance that the street may never have been accepted, or, if so, had been abandoned, because the tax deed did not convey the land occupied by the street.

Jordan v Beeson, 225-460; 280 NW 625

Tax sale—mandatory sale method governs public bidder law. The mandatory directions as to the manner of offering and selling real estate for taxes, control the public bidder law, §7255, C., '35, where the treasurer is likewise directed to offer and sell.

Jordan v Beeson, 225-460; 280 NW 625

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

7253 Bid—purchaser.

Atty. Gen. Opinions. See '32 AG Op 142; '36 AG Op 319; '38 AG Op 10; AG Op Feb. 8, '39

Collusive deed—effect. A landowner who permits his land to be sold at tax sale, pursuant to an understanding with the purchaser that the latter will, after obtaining a tax deed, quitclaim to said landowner, neither acquires by the carrying out of said understanding, a new title, nor any betterment of his old title. By such transaction the landowner has simply paid his taxes.

Harrington v Foster, 220-1066; 264 NW 51

Invalid tax sale and deed in interest of mortgagee. A mortgagor and mortgagee who enter into and execute a scheme to have one of their employees bid in the property at tax sale and secure a tax deed and assign it to the mortgagee in the effort to cut out other lienholders, will be held to have accomplished no more than a payment of the taxes. A tax certificate and a deed issued under such circumstances are void.

Hawkeye Ins. v Valley-Des M. Co., 220-556; 260 NW 669; 105 ALR 1018

Tax sales—who may purchase. Under the statutes of this state any person may become a purchaser at tax sale, and the only statutory exception is found in §7261, C., '39.

Teget v Lambach, 226-1346; 286 NW 522

Tax sales—who may not purchase. Persons who by reason of their interest in the premises and their relationship to others interested therein, that may not for equitable reasons become purchasers at a tax sale, include persons whose duty it is to pay the taxes or who have such an interest in the property that they might redeem the same from tax sale and save themselves from loss or injury, or those lienholders who may pay the taxes and are given a preferred lien over other lienholders and the titleholder for the amount of taxes paid, and persons occupying fiduciary relation-

ships, such as agents, attorneys, guardians, trustees, etc., who may not violate their trust by becoming purchasers at tax sale of the trust property.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder — permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7255 "Scavenger sale"—notice.

Atty. Gen. Opinions. See '25-26 AG Op 231, 474; '28 AG Op 270, 425; '32 AG Op 185; '36 AG Op 319; '38 AG Op 103, 542, 575, 699; AG Op Feb. 8, '39

Presumption of regularity. When a county treasurer sells lands to the highest bidder at "scavenger" tax sale it will be presumed, in the absence of any showing to the contrary, that said lands were duly and unsuccessfully offered for sale at prior tax sales as required by statute.

Board v Stone, 212-660; 237 NW 478

Notice—sufficiency. A general notice by a county treasurer, duly published as provided by statute, to the effect that he will, at a named regular tax sale, "sell all real estate which shall have been previously advertised and unsuccessfully offered for sale for two years or more" is all-sufficient.

Board v Stone, 212-660; 237 NW 478

Inadequacy of bid. A bona fide sale of land at "scavenger" sale for delinquent tax will not be deemed void as against public policy because of inadequacy of the bid, in view of the fact (1) that the public authorities have a legal right to bid at said sale, and (2) that the treasurer is under a mandatory duty to sell.

Board v Stone, 212-660; 237 NW 478

Drains—nonduty of supervisors to purchase certificate. The statutory provision, that the board of supervisors or the drainage trustees "may" purchase an outstanding certificate evidencing a sale of land for the nonpayment of drainage assessments, simply invests the board or trustees with discretion so to purchase. No mandatory duty so to purchase in order to protect the bondholder is imposed, even tho the bondholder must look solely to assessments for payment of his bond.

Bechtel v Board, 217-251; 251 NW 633

Tax sale—mandatory sale method governs public bidder law. The mandatory directions of §7252, C., '35, as to the manner of offering and selling real estate for taxes, control the public bidder law, §7255, C., '35, where the treasurer is likewise directed to offer and sell.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—prerequisite to defeat deed—nonapplicability without valid sale. Statute specifying prerequisites to defeat tax title, §7289, subsec. 4, will not bar recovery by one claiming title adverse to the treasurer's deed, when there has been no valid tax sale.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—paying taxes before attacking tax deed—valid tender sufficient. Statute requiring payment of taxes as a prerequisite to attacking a tax deed, §7290, does not preclude questioning the title by a person who repeatedly offers to do equity by tendering the whole of the taxes legally and rightfully due together with interest and penalties thereon.

Jordan v Beeson, 225-460; 280 NW 625

7255.1 County as purchaser.

Atty. Gen. Opinions. See '32 AG Op 32; '36 AG Op 260; '38 AG Op 10, 97, 111, 153, 203, 266, 287, 354, 396, 417, 489, 534, 542, 575, 621, 699; AG Op May 24, '39

Title of act. The provisions of the so-called "public bidder law" (46 GA, ch 83) were properly classified in the title to the act as "relating to taxes and the collection thereof" without any reference in the title to chapter 449 of the Code, tho the act itself did make reference to and did effect some change in said chapter.

Witmer v Polk County, 222-1075; 270 NW 323

Tax sale—mandatory sale method governs public bidder law. The mandatory directions of §7252, C., '35, as to the manner of offering and selling real estate for taxes, control the public bidder law, §7255, C., '35, where the treasurer is likewise directed to offer and sell.

Jordan v Beeson, 225-460; 280 NW 625

Tax sale—en masse sale of separate tracts—deed recitals conclusive. The sale of more than one tract or parcel of real estate en masse, for the gross sum of taxes thereon, being contrary to the mandatory provisions of statute, voids the entire sale and deeds based thereon. Tax deed recitals relating to whether the sale was separately or en masse are conclusive evidence thereof.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—separate tracts—lots with street between used as single unit. A tax deed, issued pursuant to an en masse sale of land, describes two separate tracts of land, when it lists land on two sides of a dedicated street, and the separateness of the tracts is neither affected by fact that the entire tract, including the street, has been used as a pasture for 37 years, nor by the circumstance that the street may never have been accepted, or, if so, had been abandoned, because the tax deed did not convey the land occupied by the street.

Jordan v Beeson, 225-460; 280 NW 625

Purchase by county—amount of bid. The inclusion in tax sale of an installment on a special assessment bond was permissible under §6037, C., '39, and did not render sale void where county bid only the amount of the general taxes, interest, penalty and costs pursuant to §7255.1, C., '39, authorizing purchase by county.

Fleck v Duro, 227-356; 288 NW 426

7255.2 In special charter cities.

City as assignee for specials. An assignment of a tax sale certificate of purchase by county to city was not premature under chapter 191 of the 47th GA authorizing redemption in installments from public bidder where owner of property failed to take advantage of such act within the 6-months period prescribed therein, and the city was entitled to such assignment because of special assessment due and unpaid on the property.

Fleck v Duro, 227-356; 288 NW 426

7255.3 Applicable statute.

Tax sale certificate assignment—city as assignee. An assignment of a tax sale certificate of purchase by county to city was not premature under chapter 191 of the 47th GA authorizing redemption in installments from public bidder where owner of property failed to take advantage of such act within the 6-months period prescribed therein, and the city was entitled to such assignment because of special assessment due and unpaid on the property.

Fleck v Duro, 227-356; 288 NW 426

7256 Unavailable tax—credit given.

Atty. Gen. Opinions. See '28 AG Op 290; '30 AG Op 255; '36 AG Op 530

7257 Resale.

Atty. Gen. Opinion. See '34 AG Op 98

Resale to correct previous error.

Tesdell v Greenwalt, 228- ; 290 NW 676

Timely payment of bid. The statutory requirement that the successful bidder at tax sale shall "forthwith" pay the amount of his bid is complied with by making payment when the treasurer issues the certificate of purchase.

Board v Stone, 212-660; 237 NW 478

7258 Record of sales.

Atty. Gen. Opinion. See '38 AG Op 111

Unlawful record invalidates deed. Tax-sale entries required by law to be made by the county auditor in the "sales book" must be made in ink (§7276-c1, C., '31 [§7276.1, C., '39]) and if not so made the right to redeem continues. It follows that tax deeds issued at a time when the right to redeem exists are void.

Huiskamp v Breen, 220-29; 260 NW 70

7261 Fraud of officers.

Tax sales—who may purchase. Under the statutes of this state any person may become a purchaser at tax sale, and the only statutory exception is found in this section.

Teget v Lambach, 226-1346; 286 NW 522

Tax sales—who may not purchase. Persons who by reason of their interest in the premises and their relationship to others interested therein, that may not for equitable reasons become purchasers at a tax sale, include persons whose duty it is to pay the taxes or who have such an interest in the property that they might redeem the same from tax sale and save themselves from loss or injury, or those lienholders who may pay the taxes and are given a preferred lien over other lienholders and the titleholder for the amount of taxes paid, and persons occupying fiduciary relationships, such as agents, attorneys, guardians, trustees, etc., who may not violate their trust by becoming purchasers at tax sale of the trust property.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder—permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7262 Subsequent sale.

Atty. Gen. Opinions. See '32 AG Op 278; '34 AG Op 465; '38 AG Op 890; AG Op Nov. 6, '39

Continuing under statute. A county treasurer may, under the statute, without setting a specific date, continue a tax sale for cause from the date first advertised and the later sale will be valid.

Freemyer v Taylor County, 224-401; 275 NW 718

Good cause for continuing—economic emergency—governor's proclamation. Good cause for continuing a tax sale is shown by the governor's proclamation of the existence of a great economic emergency also recognized by the legislative and judicial branches of the government.

Freemyer v Taylor County, 224-401; 275 NW 718

7263 Certificate of purchase.

Certificate holder protected against waste. See §12410, Vol I

Atty. Gen. Opinions. See '36 AG Op 319; AG Op May 4, '39

Setting aside—inadequate ground. The purchaser of real estate at execution sale may not have certificates of tax sale of the property set aside, and the issuance of tax deed enjoined on allegation and proof that the owner of the

property conspired with another to permit the property to go to tax sale and ultimate deed, because such conspiracy was quite harmless in view of the right of the execution purchaser to redeem from the tax sale.

Hanby v Snyder, 212-845; 237 NW 339

Certificate not merged by quitclaim deed. A tax sale certificate is not merged in a subsequently acquired quitclaim deed from the owner of the property.

Hanby v Snyder, 212-845; 237 NW 339

Right to impeach action of trustee. The act of a trustee in individually buying in property at tax sale and receiving a tax sale certificate when a mortgage on the property constituted part of the trust fund, is unimpeachable except by the cestui que trust; in other words, the subsequent purchaser of said property at foreclosure sale may not impeach such act, especially when such purchaser had both actual and constructive knowledge when he purchased that the taxes had not been paid.

Eyres v Koehler, 212-1290; 237 NW 351

Invalid tax sale and deed in interest of mortgagee. A mortgagor and mortgagee who enter into and execute a scheme to have one of their employees bid in the property at tax sale and secure a tax deed and assign it to the mortgagee in the effort to cut out other lienholders, will be held to have accomplished no more than a payment of the taxes. A tax certificate and a deed issued under such circumstances are void.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Tax certificate priority waived—extension of time of payment of mortgage—sufficient consideration. Extension of the time of payment on bonds secured by mortgage held sufficient consideration to support waiver of priority of tax certificate owned by mortgagor's daughter.

Beal v Milliron, (NOR); 267 NW 83

Collusive deed—effect. A landowner who permits his land to be sold at tax sale, pursuant to an understanding with the purchaser that the latter will, after obtaining a tax deed, quitclaim to said landowner, neither acquires by the carrying out of said understanding, a new title, nor any betterment of his old title. By such transaction the landowner has simply paid his taxes.

Harrington v Foster, 220-1066; 264 NW 51

Mandamus—defect of parties—effect. In mandamus to obtain an order canceling a tax sale and the certificate issued thereunder (assuming the propriety of such action) the court manifestly cannot disturb the certificate holder when he is not a party to the action.

Wren v Berry, 214-1191; 243 NW 375

7265 Assignment—presumption from deed recitals.

Paramount right of holder. The holder of special paving assessment certificates who obtains an assignment of a tax sale certificate, issued on a sale of the lots or land for general taxes, may be compelled by mandamus to reassign said tax sale certificate (on proper payment) to the holder of special sewer assessment certificates which affect the same lots or land and which latter certificates are legally prior in point of time and right to said paving certificates.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Tax titles—mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract, allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

Certificate assignment — validity. In the statute providing that tax sale certificate of purchase shall be assignable by indorsement and by entry in tax sale register, and that "when such assignment is so entered" it shall vest in assignee all right of assignor, the legislature did not intend by the use of such quoted words to bar other means of proving ownership of such a certificate. Hence assignments of certificate made by indorsement alone without entry upon tax sale register were not void.

Fleck v Duro, 227-356; 288 NW 426

Certificate as chattel—transferableness. A tax sale certificate of purchase is a mere chattel subject to sale by assignment and indorsement and delivery, and the owner of such certificate who presents the same at the expiration of redemption period is entitled to a deed.

Fleck v Duro, 227-356; 288 NW 426

Notice by assignor of certificate. Where the assignor of a tax sale certificate of purchase has given notice of expiration of redemption right, assignee is not required to give another such notice.

Fleck v Duro, 227-356; 288 NW 426

7266 Payment of subsequent taxes by purchaser.

Atty. Gen. Opinions. See '30 AG Op 43; '34 AG Op 398; '38 AG Op 697; AG Op Nov. 6, '39

Subsequent taxes—filing of receipts. The act of a tax-sale purchaser in personally delivering

to the county auditor at the auditor's office, a duplicate tax receipt for subsequent accruing taxes, constitutes a legal filing in said office, even tho the auditor did not indorse any filing mark on the receipt, and even tho the auditor later returned said receipt to the said purchaser.

Peterson v Barnett, 213-514; 239 NW 77

7267 Failure to file duplicate receipt.

Atty. Gen. Opinion. See '30 AG Op 43

7268 School, agricultural college, or university land.

Atty. Gen. Opinions. See '34 AG Op 59, 602; '38 AG Op 109, 396, 400, 692

Tax sale—school, agricultural college, or university land. In construing statute which provides in substance, that in the sale of school, agricultural college or university land sold on credit which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage. A school fund mortgage is state property and the state has recognized its right to maintain a permanent school fund intact and inviolate for purpose to which dedicated.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage paramount. The statutes providing, that where real estate is incumbered to school fund the interest of the person holding the fee shall alone be sold for taxes and that lien of state shall not be affected by the tax sale, will be construed as meaning that lien of mortgage given to the state for land bought on credit and lien of a real estate mortgage to school fund will be paramount to a tax lien.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage paramount. In an action to foreclose a duly recorded mortgage to secure a loan from the permanent school fund the priority of lien granted by statute can neither be defeated by a tax sale purchaser of such realty on ground of mutual mistake of purchaser and county treasurer in connection with tax sale, especially where purchaser relies upon legality of tax sale to sustain his claim of priority, nor that the county treasurer exceeds his authority and sells more than the interest of person holding fee in such realty, as the taxes on the realty mortgaged to secure loan from permanent school fund are not a lien against the state and the purchaser at such sale acquired only the right to redeem from mortgage and does not acquire a lien superior to lien of mortgage.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage foreclosure. In an action to foreclose a school fund mortgage, where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until 11 years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien, and that it was unpaid, and he could not rely on lapse of time, laches or negligence, as against the state.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage unpaid. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

7271 Failure to obtain deed—cancellation of sale.

Atty. Gen. Opinions. See '25-26 AG Op 487; '30 AG Op 187; '36 AG Op 273

CHAPTER 348

TAX REDEMPTION

7272 Redemption—terms.

Atty. Gen. Opinions. See '28 AG Op 37; '34 AG Op 157, 180; '36 AG Op 118; '38 AG Op 697

ANALYSIS

I Redemption in General
II Who May Redeem
III Who May Not Redeem
IV Manner of Redemption
V Effect of Redemption

I REDEMPTION IN GENERAL

Setting aside—inadequate ground. The purchaser of real estate at execution sale may not have certificates of tax sale of the property set aside, and the issuance of tax deed enjoined on allegation and proof that the owner of the property conspired with another to permit the property to go to tax sale and ultimate deed, because such conspiracy was quite harm-

less in view of the right of the execution purchaser to redeem from the tax sale.

Hanby v Snyder, 212-845; 237 NW 339

Amount necessary to effect tax redemption. A holding on appeal as to the amount which the owner of land must pay in order to effect redemption from tax sale is necessarily conclusive on the parties.

Fidelity Inv. v White, 212-782; 237 NW 518

Redemption—law remedy to remove tax sale cloud—equity unavailing. A property owner, presumed to have been informed of his tax assessments, knowing that they will become due and payable without demand, yet allowing the taxes to become delinquent and the property to go to tax sale, may not resort to equity to remove the cloud on his title when he has by redemption a plain, speedy, and adequate remedy at law.

Jones v Mills County, 224-1375; 279 NW 96

Sale—tax tender as doing equity before enjoining deed issuance. One who allows his property to go to tax sale and later seeks to enjoin the county from issuing a tax deed claiming a void sale must, if seeking equity, do equity by tendering the amount of the taxes due and attempt to make redemption as by statute provided.

Jones v Mills County, 224-1375; 279 NW 96

Sale for delinquent taxes not carried forward—setting aside—insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

II WHO MAY REDEEM

Mortgagee as redemptioner. The holder of a mortgage on land has a legal right to redeem from tax sale; and if tax deed be improperly issued, he may maintain the equitable action to redeem provided by §7278.

Bates v Pabst, 223-534; 273 NW 151

Redemption from tax sale—tax deed terminates prior certificate holder's rights. Tax deed being new and independent grant from the state barring all prior liens, a holder of a tax sale certificate issued prior to the certificate sustaining the deed had the right only to redeem from such and subsequent sales and only before the deed was issued.

White v Hammerstrom, 224-1041; 277 NW 483

III WHO MAY NOT REDEEM

Tax title—voidable only by person holding title at time of sale. Under statute requiring challenger of tax deed to have been titleholder at time of sale and to have paid all taxes, where two persons hold tax sale certificates for different years and the later holder takes a deed, it may not be questioned by the holder of the earlier certificate.

White v Hammerstrom, 224-1041; 277 NW 483

IV MANNER OF REDEMPTION

Terms. Redemption from tax sale necessitates a repayment of the legal taxes due at the time of sale, plus all subsequent legal taxes and proper interest and penalties thereon.

Fidelity Inv. v White, 208-519; 223 NW 884; 225 NW 868

Acts not constituting. The act of a testamentary trustee in individually buying in property at tax sale and receiving a tax sale certificate when a mortgage on the property constituted a part of the trust funds cannot be deemed a redemption of the property from the taxes for the benefit of a subsequent purchaser of the property at mortgage foreclosure sale.

Eyres v Koehler, 212-1290; 237 NW 351

V EFFECT OF REDEMPTION

Acquisition by owner—effect. An owner of land who takes a tax deed to his own land simply effects a redemption from the tax sale. He acquires no better title than he before possessed.

Taylor v Olmstead, 201-760; 206 NW 88

Redemption by volunteer. One who becomes the assignee of a mortgage on land during the pendency of a lis pendens action to invalidate the mortgage as fraudulent, and who during the trial of the action (to which he had been made a party) redeems from a tax sale of the premises, will not, upon the entry of a decree invalidating the mortgage, be entitled to a lien on the land for the amount expended in effecting said redemption.

Clarkson v McCoy, 215-1008; 247 NW 270

Redemption from tax sales. One who redeemed land from tax sale for nonpayment of drainage assessment installments and who acquiesced in drainage proceedings during years in which her land received benefits of the improvement is estopped from questioning establishment of the drainage district.

Whisenand v Van Clark, 227-800; 288 NW 915

7273 Nonallowable penalties.

Atty. Gen. Opinions. See '34 AG Op 157, 180; '36 AG Op 118

7275 Redemption from sale for part of tax.

Atty. Gen. Opinions. See '25-26 AG Op 472, 474; '36 AG Op 56, 341; '38 AG Op 75; AG Op May 24,, '39

7276.1 Erasures prohibited.

Atty. Gen. Opinion. See '38 AG Op 2

Unlawful record invalidates deed. Tax-sale entries required by law to be made by the county auditor in the "sales book" must be made in ink and if not so made the right to redeem continues. It follows that tax deeds issued at a time when the right to redeem exists are void.

Huiskamp v Breen, 220-29; 260 NW 70

7278 Redemption after delivery of deed.

Action to redeem—noninterested party. A noninterested party may not maintain an action to redeem from a tax deed.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Mortgagee as redemptioner. The holder of a mortgage on land has a legal right to redeem from tax sale; and if tax deed be improperly issued, he may maintain the equitable action to redeem provided by this section.

Bates v Pabst, 223-534; 273 NW 151

Violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

Action to redeem—showing of payment excused. In an action to redeem from a void tax deed, plaintiff need not show that he has paid all taxes due on the property.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Invalid deed—redemption—form of decree. The decree in an action to redeem from an invalid tax sale and deed may very properly require the titleholder, as a condition precedent to his right to redeem, to pay into court for the benefit of the tax deed holder a sum equal to that which the deed holder has paid in the way of taxes, interest, and penalties under the tax sale certificate. No authority exists for a decree which simply makes said reimbursement sum a lien on the land.

Grandy v Adams, 219-51; 256 NW 684

Invalid deed—reimbursement of deed holder—evidence. Record held to sustain a finding of the court in an action to redeem from an invalid tax sale and deed as to the amount necessary to be paid by the titleholder in order to reimburse the tax sale purchaser.

Grandy v Adams, 219-51; 256 NW 684

Redemption notice to residents—personal service mandatory—deed on publication void. A tax deed issued after service of notice of redemption upon residents by publication instead of by personal service contrary to the statutory method provided in §§7279-7282, C., '35, is void as to persons having the right to redeem.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Redemption after tax deed—defective notice—reimbursing tax deed holder. Purchaser and holder of a deed from the receiver of an insolvent bank, for property quitclaimed to the bank by the owners after the property had gone to tax sale, may redeem even after tax deed has issued, tho on defective affidavit of service of the ninety-day notice of expiration of redemption, if then he offers to do equity by completely reimbursing tax deed holder; and a claim that he purchased only for speculation held ineffective.

Weideman v Pocahontas, 225-141; 279 NW 146

Review on appeal—de novo. The appellate court may review all legal propositions presented by the record in an equitable action even tho the trial court considered only one proposition which it deemed controlling.

Geil v Babb, 214-263; 242 NW 34

Payment of taxes not shown—objection. The objection that plaintiff in an action to redeem from a tax deed has not shown that all taxes on the property have been paid will not be considered when raised for the first time on appeal.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

7279 Notice of expiration of right of redemption.

Atty. Gen. Opinions. See '34 AG Op 105; '36 AG Op 360; '38 AG Op 68, 172, 575, 621; AG Op Nov. 7, '39

ANALYSIS

I REDEMPTION IN GENERAL
II TIME FOR REDEMPTION
III PARTIES ENTITLED TO OR REQUIRED TO GIVE NOTICE
IV NOTICE IN GENERAL
V NOTICE TO PERSON IN POSSESSION
VI NOTICE TO PERSON TAXED AS OWNER
VII SUFFICIENCY AND REQUIREMENTS OF NOTICE
VIII MANNER OF SERVICE

Proof of service. See under §7282

I REDEMPTION IN GENERAL

Liberal construction. The right of redemption from a sale will be liberally construed in favor of the taxpayer.

Murphy v Hatter, 227-1286; 290 NW 695

Strict statutory compliance mandatory. The requirements of this section, providing for steps necessary to cut off right of redemption from tax sale, are absolute, and the court is without power or authority to dispense with these positive requirements on the ground that they are unnecessary.

Murphy v Hatter, 227-1286; 290 NW 695

Law governing at time of sale. The time in which redemption may be made from tax sale is absolutely governed by the law in force at the time of the sale. It follows that a legislative amendment shortening the redemption period cannot apply to pre-existing sales.

Lockie v Hammerstrom, 222-451; 269 NW 507

II TIME FOR REDEMPTION

Redemption from tax sale—notice of expiration of period—refusal to file. The county treasurer is under no obligation to receive and file notices of expiration of period for redemption from a tax sale when the fact is manifest that said notices have been prematurely served.

Lockie v Hammerstrom, 222-451; 269 NW 507

III PARTIES ENTITLED TO OR REQUIRED TO GIVE NOTICE

Redemption from sale—notice—affidavit of service—holder's duty to make. The holder of a tax sale certificate of purchase must give the notice of expiration of right of redemption, and either he or his agent or attorney must make the affidavit of service of such notice.

Fleck v Duro, 227-356; 288 NW 426

Notice by assignor of certificate. Where the assignor of a tax sale certificate of purchase has given notice of expiration of redemption right, assignee is not required to give another such notice.

Fleck v Duro, 227-356; 288 NW 426

IV NOTICE IN GENERAL

Redemption from tax sale—notice of expiration of period—refusal to file. The county treasurer is under no obligation to receive and file notices of expiration of period for redemption from tax sale when the fact is manifest that said notices have been prematurely served.

Lockie v Hammerstrom, 222-451; 269 NW 507

Tax deed on invalid redemption notice—abstract insufficient. The test as to whether an abstract shows a good, merchantable title depends upon whether or not a reasonably prudent person, familiar with the facts and apprised of the question of law involved, would accept such title in the ordinary course of business; and a tax title upon an invalid redemption notice is not such a title.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Title to real estate—nonparties not bound by judgment. In an action between parties to a contract for the conveyance of real estate, a judgment determining the question as to whether the seller, whose title was based upon a tax deed, had a good and merchantable title when the validity of the statutory notice of redemption is attacked, would not be binding on the former titleholders not parties to the action.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Supplemental petition after answer—pleading valid second tax deed—first deed defective. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without reserving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

V NOTICE TO PERSON IN POSSESSION

Mandatory service. The requirement that notice shall be personally served on the party in possession, if he is a resident, is mandatory.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Necessity of service on wife of tenant. In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

Deed—redemption not terminated without proper service of notice. The holder of a tax certificate has no right to a deed until he has served the statutory notices on the person in possession and the person in whose name the land is taxed.

White v Hammerstrom, 224-1041; 277 NW 483

VI NOTICE TO PERSON TAXED AS OWNER

Mandatory service. The requirement that notice be personally served on the person in whose name the property is taxed, is absolute, and it is quite immaterial that the name of such person is indicated on the tax books by letter abbreviations, when the tax certificate

VI NOTICE TO PERSON TAXED AS OWNER—concluded

holder knows exactly who was intended by the abbreviations.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Notice—service on owner unnecessary. Notice of redemption from a tax sale need not be served on the owner of the property when he is not the person (1) in possession, or (2) in whose name the property is taxed.

Gray v Morin, 218-540; 255 NW 631

Deed—redemption not terminated without proper service of notice. The holder of a tax certificate has no right to a deed until he has served the statutory notices on the person in possession and the person in whose name the land is taxed.

White v Hammerstrom, 224-1041; 277 NW 483

VII SUFFICIENCY AND REQUIREMENTS OF NOTICE

Sale—notice of deed—mandatory requirement. The failure to state, in an affidavit of the service of the notice of the expiration of the right of redemption from tax sale, "under whose direction" the service was made, is fatal to the validity of the subsequently executed tax deed, even tho the affiant states that he is the "agent" of the certificate holder.

Fidelity Inv. Co. v White, 208-519; 223 NW 884; 225 NW 868

VIII MANNER OF SERVICE

Affidavit of service—sufficiency. An affidavit showing the manner of making service of notice of expiration of right to redeem from tax sale is not rendered invalid because said affidavit fails to state that said notice was read to the parties named in the notice in their presence and hearing.

Johnson v Miller, 217-295; 251 NW 747

Affidavit of service—requirements. Under statute prescribing method of making affidavit to prove service of notice of expiration of right of redemption from tax sale, it is not necessary for affiant to state method and manner in which the holder of certificate of purchase authorized and directed him to serve the notice. Hence an affidavit stating that agent made service on behalf of and "under the direction of Polk county, Iowa" was sufficient.

Fleck v Duro, 227-356; 288 NW 426

Tax titles—redemption notice to residents—personal service mandatory—deed on publication void. A tax deed issued after service of notice of redemption upon residents by publication instead of by personal service contrary to the statutory method provided in §§7279-7282, C., '35, is void as to persons having the right to redeem.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

7280 Service on nonresidents except mortgagees.

Atty. Gen. Opinions. See '38 AG Op 122; AG Op Nov. 7, '39

Unallowable publication. Service by publication of notice of expiration of the right of redemption from tax sale is wholly nugatory when the domestic corporation in whose name the property is taxed has a resident secretary capable of receiving personal notice.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Tax titles—redemption notice to residents—personal service mandatory—deed on publication void. A tax deed issued after service of notice of redemption upon residents by publication instead of by personal service contrary to the statutory method provided in §§7279-7282, C., '35, is void as to persons having the right to redeem.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

7282 When service deemed complete—presumption.

ANALYSIS

I AFFIDAVIT AND PROOF OF SERVICE
II EXPIRATION OF TIME OF REDEMPTION

I AFFIDAVIT AND PROOF OF SERVICE

Mandatory requirement. The failure to state, in an affidavit of the service of the notice of the expiration of the right of redemption from tax sale, "under whose direction" the service was made, is fatal to the validity of the subsequently executed tax deed, even tho the affiant states that he is the "agent" of the certificate holder.

Fidelity Inv. v White, 208-519; 223 NW 884

Fatally defective affidavit of service. When the actual service of a notice of expiration of redemption from tax sale is made by some one other than the holder of the certificate of purchase, the affidavit designed to fully complete the service must show that the party actually making the service was the agent or attorney of the certificate holder; and a tax deed issued on an affidavit not so showing is void.

Geil v Babb, 214-263; 242 NW 34
Galleger v Duhigg, 218-521; 255 NW 867

Notice—affidavit of service—sufficiency. An affidavit showing the manner of making service of notice of expiration of right to redeem from tax sale is not rendered invalid because said affidavit fails to state that said notice was read to the parties named in the notice in their presence and hearing.

Johnson v Miller, 217-295; 251 NW 747

Redemption—90-day notice—sheriff serving for certificate holder's attorney—defective return of service. An affidavit of service of the

90-day notice to redeem from tax sale is insufficient when served by a sheriff at the instance of the certificate holder's attorney, thereby failing to show that the person who made the service was the certificate holder's agent or attorney, and, consequently, the period of redemption was not terminated.

Weideman v Pocahontas, 225-141; 279 NW 146

Affidavit of service—sufficiency. Where notice of expiration of right of redemption from tax sale was filed with, attached to, and made a part of affidavit of proof of service, and where treasurer made an entry which read, "Notice for deed filed Nov. 10, 1937", opposite the record entry of the sale on his sale register, and the auditor, upon written communication from treasurer, made a similar entry in sale book in his office, there was substantial and sufficient compliance with statutory requirements relating thereto.

Fleck v Duro, 227-356; 288 NW 426

Affidavit of service—holder's duty to make. The holder of a tax sale certificate of purchase must give the notice of expiration of right of redemption, and either he or his agent or attorney must make the affidavit of service of such notice.

Fleck v Duro, 227-356; 288 NW 426

Affidavit of service—requirements. Under statute prescribing method of making affidavit to prove service of notice of expiration of right of redemption from tax sale, it is not necessary for affiant to state method and manner in which the holder of certificate of purchase authorized and directed him to serve the notice. Hence an affidavit stating that agent made service on behalf of and "under the direction of Polk county, Iowa" was sufficient.

Fleck v Duro, 227-356; 288 NW 426

Refusal to file premature notice. The county treasurer is under no obligation to receive and file notices of expiration of period for redemption from tax sale when the fact is manifest that said notices have been prematurely served.

Lockie v Hammerstrom, 222-451; 269 NW 507

II EXPIRATION OF TIME OF REDEMPTION

Estoppel to dispute landlord's title—exception. One who mistakenly supposes that he has lost his property by the issuance of a tax deed (which in fact is void) and, under the influence of legal duress, becomes the tenant of the deed holder, is not estopped to dispute the latter's title.

Galleger v Duhigg, 218-521; 255 NW 867

Deed—redemption not terminated without proper service of notice. The holder of a tax certificate has no right to a deed until he has served the statutory notices on the person in possession and the person in whose name the land is taxed.

White v Hammerstrom, 224-1041; 277 NW 483

Tax titles—redemption after tax deed—defective 90-day redemption expiration notice—reimbursing tax deed holder. Purchaser and holder of a deed from the receiver of an insolvent bank, for property quitclaimed to the bank by the owners after the property had gone to tax sale, may redeem even after tax deed has issued, tho on defective affidavit of service of the 90-day notice of expiration of redemption, if then he offers to do equity by completely reimbursing tax deed holder; and a claim that he purchased only for speculation held ineffective.

Weideman v Pocahontas, 225-141; 279 NW 146

7283 Cost—fee—report.

Atty. Gen. Opinions. See '38 AG Op 621; AG Op July 17, '39

Failure to report proofs of service. The county treasurer, upon receiving proof of service of notice of expiration of redemption from tax sale and the accompanying statement of cost, must report such fact to the county auditor, who, in turn, must enter such report on the sale book against the proper tract of land, and a tax deed issued without said preliminaries does not terminate the right to redeem.

Geil v Babb, 214-263; 242 NW 34

CHAPTER 349

TAX DEED

7284 Deed executed.

Method of describing land. See under §7250

Redemption—liberal construction. The right of redemption from a sale will be liberally construed in favor of the taxpayer.

Murphy v Hatter, 227-1286; 290 NW 695

Statutory notice to redeem—strict compliance mandatory. The requirements of §7279, C., '35, providing for steps necessary to cut off right of redemption from tax sale, are absolute, and the court is without power or authority to dispense with these positive requirements on the ground that they are unnecessary.

Murphy v Hatter, 227-1286; 290 NW 695

Deed—redemption not terminated without proper service of notice. The holder of a tax certificate has no right to a deed until he has

served the statutory notices on the person in possession and the person in whose name the land is taxed.

White v Hammerstrom, 224-1041; 277 NW 483

Tax titles—mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract, allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

Notice to redeem—necessity of service on wife of tenant. In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

Tax titles—second tax deed by treasurer—when proper. When the county treasurer has executed a valid deed in accordance with the sale, his power is exhausted and he cannot, by the execution of a second deed, divest, nor in any manner affect, the title thus conveyed, but if the first deed was an insufficient execution, the treasurer does not lose power to execute a valid and sufficient deed.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Injunction—inadequate ground. The purchaser of real estate at execution sale may not have certificates of tax sale of the property set aside, and the issuance of tax deed enjoined on allegation and proof that the owner of the property conspired with another to permit the property to go to tax sale and ultimate deed, because such conspiracy was quite harmless in view of the right of the execution purchaser to redeem from the tax sale.

Hanby v Snyder, 212-845; 237 NW 339

Special assessment tax sales—injunction. When the petition asked for an injunction restraining the county treasurer from selling at tax sale lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Doing equity before enjoining deed. One who allows his property to go to tax sale and later seeks to enjoin the county from issuing a tax deed claiming a void sale must, if seeking equity, do equity by tendering the amount of taxes due and attempt to make redemption as by statute provided.

Jones v Mills County, 224-1375; 279 NW 96

Issuance of tax deed enjoined and tax sale certificates cancelled.

Means v Boone, 214-948; 241 NW 671

7285 Form.

Deed—substantial conformance to statute. A tax deed needs only to substantially follow the form set out in the statute.

White v Hammerstrom, 224-1041; 277 NW 483

Tax titles—second tax deed by treasurer—when proper. When the county treasurer has executed a valid deed in accordance with the sale, his power is exhausted and he cannot, by the execution of a second deed, divest, nor in any manner affect, the title thus conveyed, but if the first deed was an insufficient execution, the treasurer does not lose power to execute a valid and sufficient deed.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

7286 Execution and effect of deed.

Discussion. See 25 ILR 135 — Disqualified claimants

ANALYSIS

I ACKNOWLEDGMENT AND RECORDATION
II NATURE OF TITLE
III RIGHTS ACQUIRED

I ACKNOWLEDGMENT AND RECORDATION

Unlawful record invalidates deed. Tax sale entries required by law to be made by the county auditor in the "sales book" must be made in ink (§7276-c1, C., '31 [§7276.1, C., '39]) and if not so made the right to redeem continues. It follows that tax deeds issued at a time when the right to redeem exists are void.

Huiskamp v Breen, 220-29; 260 NW 70

II NATURE OF TITLE

Color of title—deed from tax title holder. One who is in possession of real property under deed from a tax deed holder has color of title.

Mann v Nies, 213-121; 238 NW 601

Tax deed—new and independent grant from sovereign—rights of former owner vest in grantee. A tax title is not a derivative title, but is a new and independent grant from the sovereign, and upon the execution and recording of the tax deed, all the right, title, interest, and estate of the former owner becomes vested in the grantee named in the tax deed.

Teget v Lambach, 226-1346; 286 NW 522

Recording of tax deed vests title in purchaser. When a statute provides that the proper execution and recording of a tax deed shall vest title to the property in the purchaser at a tax sale, it follows, as a corollary, that until title is so vested in the purchaser no interest adverse to him will be divested.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax deed as evidence—construction in favor of holder. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Recovery of real property—abstract of title. The holder of a tax deed need not, in an action to recover the property, attach to his petition an abstract of title showing the chain of title which antedated the tax deed.

Shaffer v Marshall, 206-336; 218 NW 292

III RIGHTS ACQUIRED

Tax deed—independent grant from sovereign. A tax title is not a derivative title, but is a new and independent grant from the sovereign, and upon the execution and recording of the tax deed, all the right, title, interest, and estate of the former owner becomes vested in the grantee named in the tax deed.

Teget v Lambach, 226-1346; 286 NW 522

Tax title—acquisition by owner—effect. An owner of land who takes a tax deed to his own land simply effects a redemption from the tax sale. He acquires no better title than he before possessed.

Taylor v Olmstead, 201-760; 206 NW 88

Tax deed destroys prior chain. A valid tax deed issued on a sale for nonpayment of general taxes extinguishes all restrictive covenants in the chain of title of previous owners. So held as to a restriction against erecting or placing a business or store building on the lot in question. (But see 47 GA, ch 192)

Nedderman v Des Moines, 221-1352; 268 NW 36

See Iowa Co. v Barrett, 210-53; 230 NW 528

Tax deed nullifies special assessments. A tax deed issued on a sale for ordinary regular taxes nullifies the lien of all special assessments levied on the land by a city after the sale and before the execution of the deed.

Means v City, 214-948; 241 NW 671

Special assessments—lien and priority. A tax sale for general taxes and a tax deed duly issued thereon extinguish the lien of all existing special assessments for paving or sewer.

Western Sec. v Bank, 211-1304; 231 NW 317

When deed extinguishes drainage taxes. The lien on land of unmatured installments of duly levied district-drainage taxes is extinguished by a tax deed which is issued on a sale of said land for general (ordinary) taxes levied subsequent to the levy of the drainage taxes.

Fergason v Aitken, 220-1154; 263 NW 850

Injunction against tax sales—tax deed extinguishing special assessment lien. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax deed terminates prior certificate holder's rights. Tax deed being new and independent grant from the state barring all prior liens, a holder of a tax sale certificate issued prior to the certificate sustaining the deed had the right only to redeem from such and subsequent sales and only before the deed was issued.

White v Hammerstrom, 224-1041; 277 NW 483

Tax sale—school fund mortgage unpaid. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

Invalid tax sale and deed in interest of mortgagee. A mortgagor and mortgagee who enter into and execute a scheme to have one of their employees bid in the property at tax sale and secure a tax deed and assign it to the mortgagee, in the effort to cut out other lienholders, will be held to have accomplished no more than a payment of the taxes. A tax certificate and a deed issued under such circumstances are void.

Hawkeye Ins. v Valley-D. M. Co., 220-556; 260 NW 669; 105 ALR 1018

III RIGHTS ACQUIRED—concluded

Collusive deed—effect. A landowner who permits his land to be sold at tax sale, pursuant to an understanding with the purchaser that the latter will, after obtaining a tax deed, quitclaim to said landowner, neither acquires by the carrying out of said understanding, a new title, nor any betterment of his old title. By such transaction the landowner has simply paid his taxes.

Harrington v Foster, 220-1066; 264 NW 51

Error corrected by resale at adjourned sale.

Tesdell v Greenwalt, 228- ; 290 NW 676

Subsequent tax deed—purchase by wife who joined in mortgage—effect. A wife who joins with her husband in a mortgage on the husband's land, but who assumes no obligation, contractual or otherwise, to pay subsequently accruing taxes on the land, may, after the land has gone to tax deed to a stranger without collusion with her and while she was not in possession, purchase the land of the tax deed holder and acquire his title, viz, a fee simple indefeasible title—a title free from the lien of said mortgage.

Wood v Schwartz, 212-462; 236 NW 491

Homestead possession—effect. An heir cannot successfully claim that he is the owner of premises because his father continuously occupied said premises for some 35 years and until his death, as a homestead, when it appears that during said time the premises went to tax deed, and that thereupon the mother reacquired title from the tax deed holder and thereunder adversely occupied said premises under said newly acquired deed for more than 10 years.

Mann v Nies, 213-121; 238 NW 601

Tax title on invalid redemption notice not merchantable — contract unenforceable. The supreme court will not compel a land purchaser under contract to accept, as good and merchantable, a title based on a tax deed where the record shows the former titleholders have not been notified in the statutory manner of the expiration of their right of redemption.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Tax deed on invalid redemption notice—abstract insufficient. The test as to whether an abstract shows a good, merchantable title depends upon whether or not a reasonably prudent person, familiar with the facts and apprised of the question of law involved, would accept such title in the ordinary course of business; and a tax title upon an invalid redemption notice is not such a title.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

7287 Presumptive evidence.

ANALYSIS

I PRESUMPTIONS IN GENERAL
II PRIMA FACIE EVIDENCE

I PRESUMPTIONS IN GENERAL

Deed—presumption. A tax teed is presumptively unassailable.

Fidelity Inv. v White, 208-519; 223 NW 884

Tax deed as evidence under statute—construction in favor of holder. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Statutory presumption of validity to tax deeds—no abandonment by pleading later corrective deeds. A defendant in a quiet title action may not claim that the plaintiff by first pleading title by invalid tax deeds, and then amending by pleading second corrective tax deeds, had abandoned the statutory presumption of their validity, nor must he, therefore, resort to the common law to prove his title.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Presumption in favor of tax deed holder. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Recognizing invalid tax deed—effect. An owner of land who, for his own advantage, recognizes the validity of a tax deed to his land, and thereby causes another to change his position, may not thereafter plead invalidating irregularities in the deed.

First N. Bk. v Barthell, 201-857; 208 NW 286

II PRIMA FACIE EVIDENCE

Tax sale—issuance of deeds prima facie evidence of regularity. The issuance by the county treasurer of tax deeds is prima facie evi-

dence that proper notice of tax sale had been given.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Supplemental petition after answer—pleading valid second tax deed—first deed defective. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without re-serving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

The deed as evidence under statute—construction in favor of holder. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Quieting title—tax deed as evidence.

Tesdell v Greenwalt, 228- ; 290 NW 676

7288 Conclusive evidence.

Estoppel to dispute landlord's title—exception. One who mistakenly supposes that he has lost his property by the issuance of a tax deed (which in fact is void) and, under the influence of legal duress, becomes the tenant of the deedholder, is not estopped to dispute the latter's title.

Galleger v Duhigg, 218-521; 255 NW 867

Tax sale—en masse sale of separate tracts—deed recitals conclusive. The sale of more than one tract or parcel of real estate en masse, for the gross sum of taxes thereon, being contrary to the mandatory provisions of statute, voids the entire sale and deeds based thereon. Tax deed recitals relating to whether the sale was separately or en masse are conclusive evidence thereof.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—separate tracts—lots with street between used as single unit. A tax deed, issued pursuant to an en masse sale of land, describes two separate tracts of land, when it lists land on two sides of a dedicated street, and the separateness of the tracts is neither affected by fact that the entire tract, including the street, has been used as a pasture for 37 years, nor by the circumstances that the street may never have been accepted, or, if so, had been abandoned, because the tax deed did not convey the land occupied by the street.

Jordan v Beeson, 225-460; 280 NW 625

Statutory presumption of validity of tax deeds—no abandonment by pleading later corrective deeds. A defendant in a quiet title action may not claim that the plaintiff by first pleading title by invalid tax deeds, and then amending by pleading second corrective tax deeds, had abandoned the statutory presumption of their validity, nor must he, therefore, resort to the common law to prove his title.

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Tax titles—second tax deed by treasurer—when proper. When the county treasurer has executed a valid deed in accordance with the sale, his power is exhausted and he cannot, by the execution of a second deed, divest, nor in any manner affect, the title thus conveyed, but if the first deed was an insufficient execution, the treasurer does not lose power to execute a valid and sufficient deed.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

7289 Facts necessary to defeat deed.

Redemption—liberal construction. The right of redemption from a sale will be liberally construed in favor of the taxpayer.

Murphy v Hatter, 227-1286; 290 NW 695

Statutory notice to redeem—strict compliance mandatory. The requirements of §7279, C., '35, providing for steps necessary to cut off right of redemption from tax sale, are absolute, and the court is without power or authority to dispense with these positive requirements on the ground that they are unnecessary.

Murphy v Hatter, 227-1286; 290 NW 695

Tax titles—prerequisite to defeat deed—nonapplicability without valid sale. Statute specifying prerequisites to defeat tax title will not bar recovery by one claiming title adverse to the treasurer's deed, when there has been no valid tax sale.

Jordan v Beeson, 225-460; 280 NW 625

Redemption notice to residents—personal service mandatory—deed on publication void. A tax deed issued after service of notice of redemption upon residents by publication in-

stead of by personal service contrary to the statutory method provided in §§7279–7282, C., '35, is void as to persons having the right to redeem.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Notice to redeem—necessity of service on wife of tenant. In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

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Unlawful record invalidates deed. Tax-sale entries required by law to be made by the county auditor in the "sales book" must be made in ink (§7276-c1, C., '31 [§7276.1, C., '39]), and if not so made the right to redeem continues. It follows that tax deeds issued at a time when the right to redeem exists are void.

Huiskamp v Breen, 220-29; 260 NW 70

Estoppel to dispute landlord's title—exception. One who mistakenly supposes that he has lost his property by the issuance of a tax deed (which in fact is void) and, under the influence of legal duress, becomes the tenant of the deedholder, is not estopped to dispute the latter's title.

Galleger v Duhigg, 218-521; 255 NW 867

Purchase by drainage district bondholder—validity—tender of tax necessary. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

Tax titles—mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract, allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

Cancellation—evidence. Evidence held insufficient to show that a mortgagee had, in taking his mortgage, agreed inter alia to pay a tax sale certificate under which he subsequently took a tax deed.

Proctor v Williamson, 205-127; 215 NW 593

Statute of limitations—owner's possession—effect. When the owner of the fee title continued in possession with rights subservient to the rights of the tax title owner after land was sold for nonpayment of taxes, and the owner's right to bring an action for recovery of the real estate was barred by a statute of limitations, one who claimed title under the owner was not entitled to succeed in an action to quiet title against the tax title owner.

McCormick v Anderson, 227-888; 289 NW 440

7290 Additional facts necessary.

ANALYSIS

I TITLE REQUIRED
II PAYMENT OF TAXES

I TITLE REQUIRED

Noninterested party. A noninterested party may not maintain an action to redeem from a tax deed.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Who may question. The holder of a special assessment certificate against property may not question the title conveyed by a tax deed to said property.

Gray v Morin, 218-540; 255 NW 631

Void deed. The statutory provision that no person shall be permitted to question a tax deed unless he first makes a prescribed showing as to title in himself, has no application when the tax deed which is questioned is wholly void.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Redemption from tax sale—nonright in town. A town which had no title to real estate when it was sold for nonpayment of special assessments levied by the town, and has acquired no title since said sale, may not redeem after the issuance of tax deed to the tax sale purchaser; and if equitable circumstances are relied on as a basis for redemption, the proof of such circumstances must be substantial.

Story City v Hadley, 214-132; 241 NW 649

Tax title—voidable only by person holding title at time of sale. Under statute requiring challenger of tax deed to have been titleholder at time of sale and to have paid all taxes,

where two persons hold tax sale certificates for different years and the later holder takes a deed, it may not be questioned by the holder of the earlier certificate.

White v Hammerstrom, 224-1041; 277 NW 483

Deed to ancestor—previous and subsequent chain of title lacking—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant received and recorded a deed to the land from another is insufficient to overthrow plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Adverse possession of land by owner. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Tax titles—second tax deed by treasurer—when proper. When the county treasurer has executed a valid deed in accordance with the sale, his power is exhausted and he cannot, by the execution of a second deed, divest, nor in any manner affect, the title thus conveyed, but if the first deed was an insufficient execution, the treasurer does not lose power to execute a valid and sufficient deed.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Injunction against tax sales—tax deed extinguishing special assesment lien. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

II PAYMENT OF TAXES

Tender and offer to pay taxes. Tender and offer by plaintiff to pay all taxes found due is equivalent to payment within the meaning of this section.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758
Jordan v Beeson, 225-460; 280 NW 625

Sufficiency—offer in pleadings. An offer by a litigant in an equitable pleading to pay whatever sums are legally necessary to effect a redemption constitutes a sufficient tender.

Fidelity Inv. Co. v White, 208-519; 223 NW 884; 225 NW 868

Showing of payment excused. In an action to redeem from a void tax deed, plaintiff need not show that he has paid all taxes due on the property.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Redemption—form of decree. The decree in an action to redeem from an invalid tax sale and deed may very properly require the title holder, as a condition precedent to his right to redeem, to pay into court, for the benefit of the tax deed holder, a sum equal to that which the deed holder has paid in the way of taxes, interest, and penalties under the tax sale certificate. No authority exists for a decree which simply makes said reimbursement sum a lien on the land.

Grandy v Adams, 219-51; 256 NW 684

Invalid deed—reimbursement of deed holder—evidence. Record held to sustain a finding of the court, in an action to redeem from an invalid tax sale and deed, as to the amount necessary to be paid by the title holder in order to reimburse the tax sale purchaser.

Grandy v Adams, 219-51; 256 NW 684

7292 Fraudulent sale.

ANALYSIS

I FRAUD IN GENERAL
II INNOCENT PURCHASERS

I FRAUD IN GENERAL

Collusive deed—effect. A landowner who permits his land to be sold at tax sale, pursuant to an understanding with the purchaser that the latter will, after obtaining a tax deed, quitclaim to said landowner, neither acquires by the carrying out of said understanding, a new title, nor any betterment of his old title. By such transaction the landowner has simply paid his taxes.

Harrington v Foster, 220-1066; 264 NW 51

Invalid tax sale and deed in interest of mortgagee. A mortgagor and mortgagee who enter into and execute a scheme to have one of their employees bid in the property at tax sale and secure a tax deed and assign it to the mortgagee in the effort to cut out other lien holders, will be held to have accomplished no more than a payment of the taxes. A tax cer-

I FRAUD IN GENERAL—concluded

tificate and a deed issued under such circumstances are void.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

II INNOCENT PURCHASERS

No annotations in this volume

7293 Wrongful sales—purchaser indemnified.

Refunding erroneous tax. See under §7235

Ineffective sale—who entitled to money. The holder of an avoided tax deed is the proper party to receive from the owner of the land the legal taxes paid by the deed holder subsequent to the ineffective sale.

Fidelity Inv. v White, 208-519; 223 NW 884

Delinquent personal tax—failure to enter on list—effect. A sale of real estate for a delinquent personal tax not entered on the delinquent personal tax list is void because of the provisions of §7192, C., '27, even tho §7203, C., '27, '31, declares, generally, that personal taxes are a lien on the taxpayer's real estate for a period of ten years after December 31 of the year of levy. (Section 7192, C., '27, now repealed.)

Schoenwetter v Oxley, 213-528; 239 NW 118

Refund of erroneously exacted tax. Mandamus is the proper remedy to compel the board of supervisors to refund to a tax certificate holder the amount paid on an illegal sale of real estate for personal taxes not entered on delinquent personal tax list.

Schoenwetter v Oxley, 213-528; 239 NW 118

Holder of illegal certificate. The holder of a tax sale certificate issued at an illegal sale of real estate for personal taxes not entered on the delinquent personal tax list, is a "taxpayer" within the statute (§7235, C., '31) giving a taxpayer the right to a refund of the money paid.

Schoenwetter v Oxley, 213-528; 239 NW 118

7294 Correcting wrongful sale.

Atty. Gen. Opinion. See '30 AG Op 307

7295 Limitation of actions.

ANALYSIS

I LIMITATION IN GENERAL
II APPLICABILITY OF SECTION
III NONAPPLICABILITY OF SECTION
IV WHEN PERIOD COMMENCES TO RUN
V QUIETING TITLE

I LIMITATION IN GENERAL

Title to real estate—nonparties not bound by judgment. In an action between parties to a contract for the conveyance of real estate, a judgment determining the question as to whether the seller, whose title was based upon a tax deed, had a good and merchantable title when the validity of the statutory notice of redemption is attacked, would not be binding on the former titleholders not parties to the action.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

II APPLICABILITY OF SECTION

Void and voidable tax deeds—how statute applied. The statutory five-year limitation on actions for recovery of real estate held by tax deed applies not to void but only to voidable deeds and also applies to the holder as well as the one attacking the deed.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

III NONAPPLICABILITY OF SECTION

Limitation of action—failure to plead—no question of laches presented. In action to quiet title by owner of land against a tax deed which had been issued on an insufficient affidavit of service of notice of expiration of redemption from tax sale, where the right to redeem had not expired, and no claim of statute of limitations was made, no question of laches was presented.

Weideman v Pocahontas, 225-141; 279 NW 146

IV WHEN PERIOD COMMENCES TO RUN

Action for possession barred. A tax deed holder is barred from maintaining an action for the possession of the land after the lapse of five years from the execution and recordation of the deed.

Wallis v Clinkenbeard, 214-343; 242 NW 86

V QUIETING TITLE

Owner's possession—effect. When the owner of the fee title continued in possession with rights subservient to the rights of the tax title owner after land was sold for nonpayment of taxes, and the owner's right to bring an action for recovery of the real estate was barred by a statute of limitations, one who claimed title under the owner was not en-

titled to succeed in an action to quiet title against the tax title owner.

McCormick v Anderson, 227-888; 289 NW 440

Adverse possession of land by owner. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Possession which will bar action. Under a statute limiting the time in which an action may be brought for the recovery of real estate sold for taxes, the possession by the owner necessary to bar an action by the tax title holder is ordinarily not the possession required under the general statute of limitations and need not be adverse, but need be only such possession as would entitle the tax title holder to maintain an action against the owner.

McCormick v Anderson, 227-888; 289 NW 440

CHAPTER 350

APPORTIONMENT OF TAXES

Atty. Gen. Opinion. See AG Op Feb. 1, '40

CHAPTER 351

INHERITANCE TAX

7306 Estates taxable.

Discussion. See 12 ILR 14—Progress in inheritance tax law; 17 ILR 258—Amendments

Double succession tax on intangibles. A state may not enforce a succession tax on intangible personal property, consisting of mortgages on lands within such state, when a like tax has been enforced on the same property by the foreign state in which the deceased had his domicile.

In re Smith, 209-685; 228 NW 638

Unconstitutional levy. Remaindermen are not subject to a succession tax when, prior to the enactment of the succession-tax law, the property in question was irrevocably trusteed by the trustor for his own personal benefit for life, with remainder to designated persons. Such tax would be violative of the clauses of the federal constitution, relative (1) to the impairment of contracts, and (2) to due process.

Coolidge v Long, 282 US 582

Inheritance tax—proceeds of realty sale in foreign state. When testator's realty is sold pursuant to will in probate proceedings in foreign state where property is located, and inheritance tax paid by executor in said state, the same cannot be included in computing Iowa inheritance tax.

In re Marx, 226-1260; 286 NW 422

Foreign realty sold pursuant to will—proceeds remain tangible property. When testator's realty in a foreign state is sold pursuant to will, the proceeds will not be subject to Iowa inheritance tax under doctrine of equitable conversion, since even tho the realty takes the form of cash it remains tangible property.

In re Marx, 226-1260; 286 NW 422

Proceeds from sale of realty in foreign state by probate—inheritance tax inapplicable on theory of support of government for protection. When testator's realty located in foreign state is sold pursuant to will in probate proceedings in such state and inheritance tax on legacies there paid, proceeds will not be subject to Iowa inheritance tax under the theory that property is obligated to contribute to the support of government giving it protection.

In re Marx, 226-1260; 286 NW 422

7307 Property included.

Discussion. See 22 ILR 268—Tax on trust income

"Transfers in contemplation of death" defined. A transfer of property "in contemplation of death", within the meaning of the inheritance tax law, is a transfer, the impelling cause of which is the thought of death, but not necessarily of immediate or impending death.

In re Mann, 219-597; 258 NW 904

Transfers in contemplation of death—presumption. Transfers of property made within two years prior to the death of the grantor are presumptively made "in contemplation of death". Evidence held insufficient to overcome the presumption attending a transfer some three months prior to death.

In re Mann, 219-597; 258 NW 904

Findings in probate. The finding by the trial court, on supporting testimony, that a transfer of real property was made "in contemplation of death" will not be disturbed on appeal.

In re Mann, 219-597; 258 NW 904

Life reservation, by grantor, of income—effect. This section embraces property which passes by a conveyance in trust in which the grantor or donor reserves unto himself, during his lifetime, the net annual income of the conveyed property; and this is true even tho said section is later so amended as to specifically declare the above to be the effect of such a reservation.

In re Toy, 220-825; 263 NW 501

Approval of executor's report not construction of will. The fact that the court had approved an executor's report, wherein he had attempted to relieve an estate of inheritance tax on the ground that all devises in the will were contingent, does not mean that such holding is a construction of the will, since the construction of the will was not in issue.

Flanagan v Spalti, 225-1231; 282 NW 347

7308 Exemptions.

Public charities. A trust for the purpose of aiding young men and women of the Protestant faith in obtaining an education in the colleges or universities of this state is a public charity, within the meaning of this statute.

Heald v Johnson, 204-1067; 216 NW 772

7312 Transfers in contemplation of death.

Additional annotations. See under §7307
Gifts causa mortis. See Ch 445, note 1

Transfer without consideration. A bona fide transfer of property for a fair consideration, sufficient to render the property nontaxable under the inheritance tax law, is not established by evidence that the instruments of transfer—concededly executed in contemplation of death and to take effect after death—were, at the most, supported only by a past and wholly executed consideration.

McEvoy v Wegman, 216-395; 249 NW 263

"Transfers in contemplation of death" defined. A transfer of property "in contemplation of death", within the meaning of the inheritance tax act, is a transfer, the impelling cause of which is the thought of death, but not necessarily of immediate or impending death.

In re Mann, 219-597; 258 NW 904

7315 Alien beneficiaries.

Discrimination against nonresident alien. The state, in the imposition of an inheritance tax, may validly discriminate in favor of a resident alien and against a nonresident alien.

In re Anderson, 205-324; 218 NW 140

Treaty in re droit de detraction. The clause of a treaty prohibiting discrimination in taxes and charges on the removal of property from the countries of the contracting parties has no reference to inheritance taxes.

In re Anderson, 205-324; 218 NW 140
(Reversed. Nielson v Johnson, 279 US 47.)

Droit de detraction. That paragraph of the treaty between this country and Denmark dealing with droit de detraction does not apply to or govern the imposition of an inheritance tax on property situated in this state and owned by a resident, naturalized citizen. 166 Iowa 617 affirmed.

Petersen v State, 245 US 170

Alien beneficiaries—inheritance tax prohibited by treaty with Denmark. A state inheritance tax as to property of a Denmark citizen residing in Iowa, imposed upon alien beneficiaries before it can pass to his heirs in Denmark, when no such tax is imposed on citizens of this state by Denmark under like circumstances, is prohibited by virtue of a reciprocity treaty between the United States and Denmark.

Nielsen v Johnson, 279 US 47

7317 Deductions of debts.

Dual tax within two-year period.

In re Nilson, 201-1033; 204 NW 244

7332 Notice of appraisement.

Atty. Gen. Opinion. See AG Op Aug. 17, '39

7334 Property in different counties.

Atty. Gen. Opinion. See '30 AG Op 275

7335 Objections.

Time limit for objections. The duty to file objections to an appraisement of property for inheritance tax purposes within twenty days from the filing of the appraisement with the clerk is mandatory, and failure to file objections within said time ipso facto works an approval of the appraisement.

Insel v Wright County, 208-295; 225 NW 378

7336 Hearing—order.

Evidence—sufficiency. Evidence held on de novo hearing, insufficient to support an appraisement of land for inheritance tax purposes.

In re Seibel, 207-100; 222 NW 361

7339 Cancellation of lien.

Time limit for objections. The duty to file objections to an appraisement of property for inheritance tax purposes within 20 days from the filing of the appraisement with the clerk is mandatory, and failure to file objections within said time ipso facto works an approval of the appraisement.

Insel v Wright County, 208-295; 225 NW 378

7358 Duty of executor to pay tax.

Failure of executor to pay tax—effect. When the state allows an estate to be fully settled and the executor to be duly and finally discharged without the payment of an inheritance tax, and makes no application to open up the accounts of the executor, it may not thereafter enforce the statutory personal liability of the executor to pay said tax. This is true on two fundamental propositions, to wit: (1) that the court, being prohibited by statute from discharging the executor until the tax is paid, must be presumed, in entering such discharge, to have found that no tax was due, and (2) that the state, by designating the court as its special statutory representative, will not be permitted to deny such presumption.

In re Meinert, 204-355; 213 NW 938

Right of testator to pay on bequest. A testator may validly provide that the inheritance tax on a specific devise or bequest made by him in his will shall be paid from the residuary part of his estate, provided he clearly expresses his intention to that effect. Will construed and held clearly so to provide.

In re Johnson, 220-424; 262 NW 811

7392 Foreign estates—deduction of debts.

Discussion. See 10 ILB 66—Inheritance tax on nonresident's stock

7393.1 Foreign estates—reciprocity—personal property.

Discussion. See 16 ILR 415—Double taxation of intangibles; 17 ILR 512—Single taxable situs

Atty. Gen. Opinion. See AG Op Nov. 7, '39

7394 Compromise settlement.

Atty. Gen. Opinion. See AG Op Oct. 11, '39

7396 Refund of tax improperly paid.

Timely action to recover. It is not necessary that an action against the treasurer of state to recover inheritance taxes illegally exacted be both brought and adjudicated within the five years following the payment. It is only necessary that the action be brought within said period—the ambiguity in this section to the contrary notwithstanding.

In re Van Vechten, 218-229; 251 NW 729

CHAPTER 352

SECURITY OF THE REVENUE

7398 County responsible to state.

Atty. Gen. Opinions. See '34 AG Op 95, 183

7402 Loans by county treasurer.

Liability on official bond. See under §1059

Using public funds for private use. The acts of a county treasurer in wrongfully and repeatedly taking and using, for his own private purposes, public funds in his possession, ipso facto constitutes "willful misconduct and maladministration in office", notwithstanding the fact (1) that, prior to the commencement of an action to remove him from office, he returns, to the public treasury, the amount of his peculations, and (2) that his bondsmen are liable for his wrongdoing; a priori is this true when he also knowingly connives at and permits like conduct by his official employee.

State v Smith, 219-5; 257 NW 181

7405 Bond required. (Repealed)

Contract limitations — statutory bonds. Whether parties to a statutory bond will be permitted by contract to specify the time before which or after which an action can be maintained, quaere.

Page County v Fidelity Co., 205-798; 216 NW 957

7408 Settlement with treasurer.

Bonds of officials. See under §§1057, 1060

7412 Custody of public funds.

Atty. Gen. Opinions. See '34 AG Op 67; '36 AG Op 409

7417 Official delinquency.

Deposits—payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Taking assignment of claim. Where, because of the peculations of a county auditor, a depositary bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

7420 Delivery to treasurer.

Atty. Gen. Opinion. See '36 AG Op 474

CHAPTER 352.1

DEPOSIT OF PUBLIC FUNDS

7420.01 Deposits in general.

Atty. Gen. Opinions. See '25-26 AG Op 363; '32 AG Op 147, 244; '34 AG Op 67, 431, 523, 601, 735; '36 AG Op 50, 220, 240, 257, 409, 423, 497, 515; '38 AG Op 354

Wrongful deposits—effect.

New Hampton v Leach, 201-316; 207 NW 348
Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679
Leach v Bank, 205-1345; 219 NW 483
Leach v Bank, 207-478; 223 NW 171

Wrongful deposit of public funds. A deposit in a bank of municipal pension funds (police and firemen) under conditions which deprive the trustees of the power to immediately withdraw said funds is wrongful, and being wrongful the trustees do not lose title to said funds. It follows that in case the bank becomes insolvent, the deposit is entitled to preferential payment from the cash on hand at the time of insolvency.

Andrew v Bank, 214-105; 241 NW 412
Andrew v Bank, 222-881; 270 NW 465

Right to secure deposits.

Andrew v Bank, 203-1335; 214 NW 559

Bonds and sureties under prior statutes.

Andrew v Bank, 205-878; 219 NW 34
Dallas Co. v Bank, 205-672; 216 NW 119
Ind. Dist. v Morris, 208-588; 226 NW 66

Excessive bank deposits—effect.

State v Carney, 208-133; 217 NW 472

Bank as depositor. A bank may lawfully become a depositor in another bank. So held where a bank was the sole depositary of the funds of a municipality, and upon receipt of such funds, deposited a part thereof with other banks, under a so-called "gentlemen's agreement" with reference thereto.

Leach v Bank, 206-265; 217 NW 865

Bank dissolution—nonpreference in deposits. Principle reaffirmed that, in the settlement of the affairs of an insolvent state bank, the deposit of a municipal corporation has no preference over other deposits. (§9239, C., '24.)

Leach v Bank, 201-346; 207 NW 331

Subrogation—preferential deposit law. Principle reaffirmed (1) that a surety on a public depositary bond is not, on payment of the bond, entitled to be subrogated to the preferential rights of the municipality existing when the bond was given, when, at the time of such payment, the statute granting such payment had been repealed; and (2) that the repeal of such statute impaired no contract obligation and violated no vested right of such surety.

Andrew v Bank, 205-883; 213 NW 531

Nonpreference to firemen's funds. The trustees of a municipal firemen's pension fund may validly make a bank deposit of its funds in an amount sufficient to meet current pension demands. It follows that if the bank becomes insolvent the trustees are simply depositors and no preference over other depositors exists.

Andrew v Bank, 214-105; 241 NW 412

Statutory bond—acts constituting breach. A statutory bond conditioned to secure the prompt paying over to the proper authorities of public funds on deposit in a bank is breached on the failure to promptly make such payment, and not from the time when the authorities suffer an actual loss.

Leach v Bank, 205-987; 213 NW 528

Statutory bonds—unallowable limitation on liability. A statutory bond which is given for the express purpose of securing public deposits in a bank may not be limited in liability to less than the liability called for by the statute; and any such attempt will be deemed nugatory, even tho such bond is approved by the public governing board. (See §§10300, 10982.)

Leach v Bank, 205-1154; 213 NW 517

Statutory bonds—unauthorized substitution—release—effect. Public officers who are authorized to deposit in banks public funds only on the due execution of an indemnifying bond have no authority to accept collateral security in lieu of a statutory bond; and, if taken, the same may be released and the sureties on the statutory bonds may not complain.

Leach v Bank, 205-975; 213 NW 612

Statutory bonds—oral modification—legality. An agreement between the state treasurer and the accommodation sureties on a statutory bank deposit guaranty bond, to the effect that such bond shall be deemed automatically canceled when the deposit of state funds in the bank drops below the amount of existing nonaccommodation surety bonds, is invalid both as to the state and as to nonaccommodation sureties who are seeking contribution. (See §12751.)

Leach v Bank, 205-975; 213 NW 612

Payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

School district as depositor. A school district is the depositor of school funds which are placed by the school treasurer in a legally selected depositary.

Runyan v Bank, 210-147; 230 NW 418

Bonds—prima facie liability. Proof that a school treasurer drew a check upon the school district bank account in favor of another bank; that the check was duly cashed; that the payee-bank did not credit the amount to any account of the school district; and that said treasurer, on demand, did not deliver said money to the district, constitutes prima facie evidence of the latter's default and of liability on his bond.

School District v Sass, 220-1; 261 NW 30

Burden of proof. Proof that a municipality had deposited public funds to a named amount in an authorized public depositary casts the burden on the depositary, or on the receiver therefor, to show what payments were made from such deposits and the legality of such payments. And such burden is not met by the introduction of unexplained ledger entries.

Winnebago County v Horton, 204-1186; 216 NW 769

Rescinding authority. The action of the governing board (1) in rescinding its former action authorizing its treasurer to deposit public funds in a named depositary to a named amount, and (2) in authorizing such deposits in said depositary in a lesser amount, renders all existing deposits in said depositary in excess of the latter authorization, after the lapse of a reasonable time, unlawful and unauthorized, and to that extent deprives the municipality of the right to reimbursement from the state sinking fund for public deposits.

Andrew v Bank, 203-1089; 213 NW 232

Rescinding authority. The act of a city council in rescinding its authority to the city treasurer to deposit municipal funds in a named bank to a named amount, and in authorizing deposits in a lesser amount, does not render an existing deposit unlawful and unauthorized to the extent that it exceeds the latter authorization, when the treasurer is wholly unable to withdraw said excess from said bank because of the distressed financial condition of the bank.

Andrew v Bank, 206-464; 221 NW 342

Rescinding authority. Even tho the county treasurer deposits public funds in a depositary bank in an amount authorized by a resolution of the board of supervisors, yet if the board later, by resolution, reduces the amount authorized to be deposited, the treasurer and his surety are liable for a loss resulting from the failure of the treasurer to exercise reasonable diligence to reduce his deposit to the amount authorized in the latter resolution. So held where the treasurer might have withdrawn the excess in the ordinary course of business but failed to do so.

State v Surety Co., 210-215; 230 NW 308

Bond—nonapproval by board of supervisors—effect. A bond given by a bank and by sureties interested in the bank, and given for the purpose of inducing the county treasurer to make deposit of public funds in said bank, and which did induce such deposits, is enforceable even tho the board of supervisors did not formally approve it.

Floyd County v Ramsay, 210-1161; 230 NW 404

Agreements in re county deposits—right of taxpayer. The statutory discretion of the board of supervisors to enter into an agreement with legally and approved reorganized banks, with reference to the county's deposits in said banks, cannot be questioned by a taxpayer except on proof of fraud or arbitrary abuse of said discretion.

Pugh v Polk County, 220-794; 263 NW 315

7420.02 Approval—requirements.

Atty. Gen. Opinions. See '32 AG Op 244; '34 AG Op 235, 431; '36 AG Op 409

7420.03 Increase conditionally prohibited.

Atty. Gen. Opinion. See '36 AG Op 409

7420.04 Location of depositories.

Atty. Gen. Opinions. See '32 AG Op 152; '34 AG Op 304; '36 AG Op 423

7420.05 Refusal of deposits—procedure.

Atty. Gen. Opinions. See '34 AG Op 218, 523; '36 AG Op 497

7420.06 Passbook entry.

Atty. Gen. Opinions. See '32 AG Op 244; '34 AG Op 218, 235, 244, 523; '36 AG Op 157, 220, 240, 423, 497; '38 AG Op 771

7420.07 Interest prohibited to public officer.

Atty. Gen. Opinions. See '36 AG Op 220, 240; '38 AG Op 771

7420.08 Liability of public officers.

Atty. Gen. Opinions. See '34 AG Op 198; '38 AG Op 354

Official liability for funds.

Prudential v Hart, 205-801; 218 NW 529

Northwestern etc. v Bassett, 205-999; 218 NW 932

Andrew v Bank, 214-105; 241 NW 412

CHAPTER 352.2

STATE SINKING FUND FOR PUBLIC DEPOSITS

7420-a6 Interest diverted. (Repealed by 47 GA, ch 194, §4)

Power to divert. The general assembly has ample authority to divert from the county general fund to the state sinking fund for public deposits interest accruing on deposits of public funds in the hands of the county treasurer.

Scott County v Johnson, 209-213; 222 NW 378

Trust funds—diversion of interest. This section has no application to interest on a trust fund which the school district does not own but is administering.

Boyd v Johnson, 212-1201; 238 NW 61

Right to question constitutionality. Neither a school district nor a taxpayer thereof has any standing to question the constitutionality of the act which diverts the future-accruing interest on school funds to the state sinking fund for public deposits (Ch 352-A1, C., '31 [Ch 352.2, C., '39]), for the reason that they have no such thing as a vested right in said interest.

Boyd v Johnson, 212-1201; 238 NW 61

7420.09 State sinking fund.

Atty. Gen. Opinions. See '25-26 AG Op 430; '34 AG Op 600; '36 AG Op 474; '38 AG Op 354; AG Op March 22, '39

7420.10 Purpose of fund.

See annotations under chapter 352.1

"Public funds" defined. Funds raised by general taxation for the maintenance of public libraries are public funds, and within the protection of this chapter.

Andrew v Bank, 203-349; 212 NW 742

Illegal deposit. A deposit in a bank of the public funds of a school district is not a legally authorized deposit, within the meaning of this chapter, when made simply on the individual and nonofficial written direction of the several members of the board of directors to the school treasurer to make such deposit, nor will such deposit be rendered legal by the fact (1) that the board of directors, after the deposit was made, had knowledge thereof, or (2) that interest was paid on said deposit.

Andrew v Bank, 204-570; 215 NW 807

Embezzlement by depository. School funds duly deposited in a bank under legal authorization of the directors, and embezzled by an officer of the bank, are a legal charge against the state sinking fund for public deposits, in case the bank becomes insolvent.

Runyan v Bank, 210-147; 230 NW 418

7420.15 Certification of deposits.

Atty. Gen. Opinions. See '34 AG Op 97, 210, 235; '36 AG Op 474

7420.17 Assessment rate.

Atty. Gen. Opinion. See '32 AG Op 244

7420.20 Liability of depository.

Atty. Gen. Opinions. See '32 AG Op 244; '34 AG Op 523

7420.21 Liability of public officers.

Atty. Gen. Opinions. See '32 AG Op 244; '34 AG Op 523

7420.22 Amount of deposit — determination—effect—objections.

Atty. Gen. Opinions. See '34 AG Op 97, 431

Rescinding authority—effect. The action of the governing board of a municipality (1) in rescinding its former action authorizing its treasurer to deposit public funds in a named depositary to a named amount, and (2) in authorizing such deposits in said depositary in a lesser amount, renders all existing deposits in said depositary in excess of the latter authorization, after the lapse of a reasonable time, unlawful and unauthorized, and to that extent deprives the municipality of the right to reimbursement from the state sinking fund for public deposits.

Andrew v Bank, 203-1089; 213 NW 232

Judgments appealable. An appeal lies from an order of court which adjudges the amount of public funds on deposit in an insolvent bank for the purpose of payment out of the state sinking fund.

Winnebago County v Horton, 204-1186; 216 NW 769

7420.25 Warrant — payment — subrogation.

Atty. Gen. Opinion. See '34 AG Op 735

7420.26 Bonds—subrogation.

Waiver of subrogation. The state, after reimbursing a county for the loss of county deposits in an insolvent bank, may validly prohibit an action in its own favor on the depositary bond to which it was legally subrogated by the process of reimbursing the county.

State v Bartlett, 207-208; 222 NW 529

Improper parties. A county and its treasurer are not proper parties to an action by the treasurer of state to recover on a depositary bond in which the county and its treasurer no longer have any interest.

State v Bartlett, 207-208; 222 NW 529

7420.27 Anticipatory warrants.

Atty. Gen. Opinions. See '34 AG Op 727; '36 AG Op 10, 71; '38 AG Op 70

7420.30 Public sale—interest.

Atty. Gen. Opinion. See '36 AG Op 71

7420.41 Termination of interest.

Atty. Gen. Opinion. See '36 AG Op 10

7420.43 Investment of sinking fund.

Atty. Gen. Opinions. See '28 AG Op 441; '30 AG Op 229; '38 AG Op 70, 209, 443

TITLE XVII

CERTAIN INTERNAL IMPROVEMENTS

CHAPTER 353

LEVEE AND DRAINAGE DISTRICTS AND IMPROVEMENTS ON PETITION OR BY MUTUAL AGREEMENT

7421 Jurisdiction to establish.

Atty. Gen. Opinion. See '28 AG Op 365

Interested but nondeciding vote. Drainage proceedings are not rendered illegal by the nondeciding vote of a supervisor who is financially interested in the proposed improvement.

Monona County v Gray, 200-1133; 206 NW 26

Abuse of discretion. It is beyond the discretionary power of the board to establish a drainage improvement which (1) is of no substantial present value, (2) is admittedly incomplete, (3) will entail a heavy financial burden on the taxpayers, and possible confiscation, and (4) furnishes no assurance that benefits will equal assessments.

Dean v District, 200-1162; 206 NW 245
Anderson v Board, 203-1023; 213 NW 623

Failure to obtain jurisdiction. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment and filed objections thereto and did not appeal from the adverse ruling thereon.

Chicago, NW Ry. v Sedgwick, 203-726; 213 NW 435

Protection from erosion—delegation of authority. In the establishment of a district for the protection of the banks of a stream from erosion, the board of supervisors may validly delegate to the engineer in charge the duty to determine, in good faith, the number, size, and location of the various retards, when, at the time of the filing of the petition for the district, and up to the time the construction is inaugurated, the condition of the river is such that the exact number, size, and location of the said retards cannot be determined.

Dashner v Const. Co., 205-64; 217 NW 464

Injunction as remedy. Injunction is the proper remedy to restrain the board of supervisors from proceeding with a drainage improvement over which it has no jurisdiction.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

Mandamus as remedy. Mandamus will not lie to compel the board of supervisors to proceed with the construction of a drainage improvement which, in effect, the board has never established.

Eller v Board, 208-285; 225 NW 375

Supervisors nonrepresentative of county. The board of supervisors of a county in establishing a drainage district, and in maintaining the improvement therein, acts as a special tribunal in an official or governmental capacity, and does not in any way represent the county as a body corporate.

Mitchell County v Odden, 219-793; 259 NW 774

7423 "Levee" defined — bank protection.

Delegation of authority. In the establishment of a district for the protection of the banks of a stream from erosion, the board of supervisors may validly delegate to the engineer in charge the duty to determine, in good faith, the number, size, and location of the various retards, when, at the time of the filing of the petition for the district, and up to the time the construction is inaugurated, the condition of the river is such that the exact number, size, and location of the said retards cannot be determined.

Dashner v Const. Co., 205-64; 217 NW 464

7428 Straightening creek or river.

Repairs (?) or original construction (?). Drainage work which consists in the abandonment of a material portion of an existing drain in order to straighten a river, and the substitution therefor of a new channel at a substantial expense and which work, in fact, is a

change in the plan under which the ditch was first constructed, must be deemed an original construction, and not a repair. Especially is this true when the said expense exceeds ten per cent of original cost of construction. It follows that the comprehensive procedure for an original construction must be followed, and not the limited procedure governing repairs.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

7430 Bond.

Conditional signing. Knowledge on the part of a member of a board (1) of the conditions on which sureties signed a drainage improvement bond, and (2) of the violation of such conditions, will not be imputed to the county in accepting the bond, when said member of the board was a landowner within the proposed district, and therefore wholly disqualified, under the statutes, to act in the proceedings.

Monona County v Gray, 200-1133; 206 NW 26

Unallowable defense. In an action on a drainage bond conditioned to pay all expenses incurred by the county in case the district be not established, the plea that the survey departed from the plan proposed in the petition will be disregarded (1) when the petition was unusually comprehensive in its proposal, and assumed to and did invest the board with full statutory jurisdiction over the proposal, and (2) when the survey was not beyond the call of the statute.

Monona County v Gray, 200-1133; 206 NW 26

Estoppel. Sureties on a drainage improvement bond are estopped to plead nonliability on the bond because the conditions on which they signed had been violated, when they filed the bond, or caused it to be filed, with knowledge, or with ready means of knowing, that said conditions had been violated, and stood by in silence while the county, at large expense, acted thereon.

Monona County v Gray, 200-1133; 206 NW 26

Sufficiency of proof. In an action by a county to recover, on bond given in an abortive drainage proceeding, for items paid by the county, proof of the due audit and payment of the claims by the county authorities is conclusive, in the absence of proof of fraud.

Monona County v Gray, 200-1133; 206 NW 26

Evidence—immateriality. In an action on a drainage bond conditioned to pay all expenses incurred by the county in case the district be not established, testimony to the effect that the engineer, after his employment, estimated the cost of the contemplated survey at a certain amount, is immaterial.

Monona County v Gray, 200-1133; 206 NW 26

7438 Report.

Subsequent exclusion of lands—effect. The board of supervisors has no power or jurisdiction to exclude lands from a drainage district subsequent to the final establishment thereof.

Estes v Board, 204-1043; 217 NW 81

7440 Notice of hearing.

Award by board. See under §7451, Vol I

Foreclosure certificate holder as necessary party.

Vien v Harrison County, 209-580; 228 NW 19

Drainage record book admissible—nonjurisdictional defect. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend through or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

7442 Service on agent.

Failure to serve designated agent. Failure to serve notice of a proposed drainage assessment on a railway company by serving its agent as designated by it under the statute deprives the board of all jurisdiction to levy such assessment against the company; and no estoppel to plead such failure of service arises from the fact that the company was served (1) by publication and (2) by service on a nondesignated agent of the company, and that the company interposed no objection to the proceedings.

Chi. NW Ry. v Sedgwick, 202-33; 209 NW 456

Failure to serve notice. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment and filed objections thereto and did not appeal from the adverse ruling thereon.

Chi. NW Ry. v Sedgwick, 203-726; 213 NW 435

7444 Waiver of notice.

Failure to obtain jurisdiction—enjoining assessment. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment and filed objections thereto, and did not appeal from the adverse ruling thereon.

Chi. NW Ry. v Sedgwick, 203-726; 213 NW 435

7445 Waiver of objections and damages.

Assessments—estoppel. Principle reaffirmed that, when property owners stand by and see a drainage improvement made, and take no steps of legal interference, they are estopped to raise the question of validity when called upon to pay their assessments.

Dashner v Woods Co., 205-64; 217 NW 464

Establishment—estoppel to question validity. One who redeemed land from tax sale for nonpayment of drainage assessment installments and who acquiesced in drainage proceedings during years in which her land received benefits of the improvement is estopped from questioning establishment of the drainage district.

Whisenand v Van Clark, 227-800; 288 NW 915

7447 Hearing of petition—dismissal.

Refusal to establish—nonpermissible appeal. An appeal will not lie to the district court from the refusal of the board of supervisors to establish a proposed drainage ditch when such refusal is based on a finding by the board (1) that another and existing ditch is sufficient, and (2) that the public benefit, utility, health, convenience, and welfare would not be promoted by establishing said proposed improvement.

Christensen v Agan, 209-1315; 230 NW 800

7448 Establishment—further investigation.

"Public benefit, utility, health, etc."—effect of former finding. A finding that the establishing of a drainage improvement covering certain lands would be conducive to public benefit, utility, health, convenience, and welfare does not constitute a finding that another and subsequently proposed drainage improvement entirely or partially embracing the same land would be conducive to public benefit, utility, health, convenience, and welfare.

Christensen v Agan, 209-1315; 230 NW 800

7454 Dissolution.

Atty. Gen. Opinion. See '30 AG Op 306

7459 Advertisement for bids.

Atty. Gen. Opinion. See '38 AG Op 731

7460 Bids—letting of work.

Public improvements — estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v City, 225-490; 281 NW 207

7462 Performance bond — return of check.

Performance by surety — proper charges. Evidence reviewed relative to certain charges debited against the contract price of a drainage improvement by a surety who had taken over the work of the defaulting contractor, and held proper, and in some instances improper.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Subrogation—priority. A surety who takes over the work of a defaulting public drainage contractor and proceeds to pay off claims which are statutorily lienable against the funds due under the contract acquires a right of subrogation superior to that of a prior assignee of said funds.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Nonlienable claims. Claims for labor and materials furnished to a contractor on a public drainage improvement in repairing the machinery which the contractor employed on the work are not lienable on the drainage funds. (§1989-a57, S., '13; Ch 347, 38 GA, now repealed. See Ch 452, C., '24.)

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

7463 Contracts.

Reformation of contract. A written contract between a drainage contractor and the board which inadvertently departs from the terms of the bid and the acceptance by the board will be reformed on an application in equity.

Gjellefald v District, 203-1144; 212 NW 691

Extra contract work. While a contractor may not recover for cleaning out a ditch, consequent on his own fault, yet he may recover

for extra contract excavation after so cleaning out, on order of the proper authorities.

Gjellefald v District, 203-1144; 212 NW 691

Construction aside contract. A public drainage contractor may not recover for construction work which is neither provided for in his contract nor ordered nor approved by the board, even tho it was ordered by the engineer in charge.

Gjellefald v District, 203-1144; 212 NW 691

Void provision. A clause inserted in a public improvement contract, to the effect that, if rock or quicksand is encountered the contractor shall be paid on the basis of cost plus a named percentage, is void when both the specifications and the advertisement for bids are silent as to such contingency.

Gjellefald v Hunt, 202-212; 210 NW 122

7465 Duties—time for performance—scale of benefits.

Assessments—evidentiary showing sufficient to overcome. A landowner, who claims that his lands have been inequitably assessed, must demonstrate the truth of his claim by presenting to the court such an evidentiary picture of every separate tract of land within the district, or of a determining portion thereof, distinctly reflecting every material fact and element bearing on a legal and proper classification, as will enable the court intelligently to weigh relative benefits, and to weigh them in complainant's favor. If the picture be uncertain or indistinct in material parts or if it fails to show important facts, such, for instance, as pre-existing public drainage improvements and the consideration due such improvements, then it must be held insufficient to overcome the presumed correctness of the assessment.

Fulton v Sherman, 212-1218; 238 NW 88

Employment of counsel to defend assessment. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

Good faith presumption. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

7466 Classification as basis for future assessments. (Repealed.)

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral, as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

7468 Assessment for lateral ditches.

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral, as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that, in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

7470 Public highways.

Atty. Gen. Opinions. See '25-26 AG Op 278, 492; '30 AG Op 240

7471 Report of commissioners.

Statute governing. The assessment procedure to cover the cost of remodeling a public drainage improvement is controlled by the statute in effect when the contract is let.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Accretions. When the high-water mark or line of a river is a boundary line of a drainage district, accretions to the land are not assessable for drainage improvements.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Existing improvements as credit. In arriving at the amount of a drainage assessment, due credit should be given for existing drainage improvements on the land. Assessment reviewed, and held excessive.

Petersen v Board, 208-748; 226 NW 1

7472 Notice of hearing.

Assessments—estoppel. Principle reaffirmed that, when property owners stand by and see a drainage improvement made, and take no steps of legal interference, they are estopped to raise the question of validity when called upon to pay their assessments.

Dashner v Woods Co., 205-64; 217 NW 464

Notice of hearing—affidavit lacking seal of court clerk. Affidavit of publication of notice of hearing on drainage assessment was sufficient altho court seal was not attached by court clerk before whom the affidavit was made. Moreover, statute did not require that proof of service be by affidavit.

Whisenand v Van Clark, 227-800; 288 NW 915

7473 Hearing and determination.

Existing improvements as credit. In arriving at the amount of a drainage assessment, due credit should be given for existing drainage improvements on the land. Assessment reviewed, and held excessive.

Petersen v Board, 208-748; 226 NW 1

Objections—technical formality unnecessary. Technical formality in presenting to the board of supervisors matters bearing on a drainage assessment is not required. So held where the matter in question was presented through the medium of a so-called "petition", instead of through the medium of formal objections.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Assessments—errors in acreage—computation. Where board has jurisdiction to make drainage assessment, errors in (1) acreage of benefited land, (2) method of computing amount of assessment, and (3) using a nonstatutory installment plan of payment do not render the assessment void, but are only irregularities not reviewable in a collateral proceeding.

Whisenand v Van Clark, 227-800; 288 NW 915

7474 Evidence — conclusive presumption.

Validity—estoppel. A property owner cannot be deemed estopped to question the illegality of a drainage improvement because of the action of a former owner of the land on which no one relied; nor because the property owner, after he discovered that the work had been substantially completed, entered a formal complaint as to certain defects in the work.

Kelleher v Drainage Dist., 216-348; 249 NW 401

7476 Classification as basis for future assessments.

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that, in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

Reclassification—proper basis. A reclassification of lands within a drainage district for an improvement made subsequent to the construction of other improvements within the district should be made on the basis of the condition of the land as it existed just prior to and at the time of the construction of the improvement for which the assessment is made.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

7477 Levy—interest.

Atty. Gen. Opinion. See '30 AG Op 113

Assessments—nonliability of county. A county, as a body corporate, is not liable in damages consequent on the failure of the board of supervisors to levy an adequate assessment against a drainage district to pay the bonds of the district. It follows that the county treasurer and his surety, when sued by the county for damages consequent on the act of said treasurer in using county funds in paying said bonds, cannot be subrogated to any right of the bondholder to proceed against the county, —because the bondholder has no such right.

Mitchell County v Odden, 219-793; 259 NW 774

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Tax assessment constitutes lien on land—bond not lien. Under statute providing for issuance of drainage district bonds the tax assessments levied by the district, and not the bond, constitute the lien against the land.

Teget v Lambach, 226-1346; 286 NW 522

Bond—lien on entire proceeds of special assessment—exclusive remedy. Bond issued by drainage district under statute is a lien upon the entire proceeds of the special assessment and not on any particular tract of land. The whole process being statutory, is exclusive of all other remedies.

Teget v Lambach, 226-1346; 286 NW 522

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal

question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder—permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7478 Lien of tax.

Atty. Gen. Opinion. See '30 AG Op 113
Additional annotations. See under §6008

Priority between different special assessments. The fully perfected lien of a special assessment for a city sewer is prior in right to the lien of a subsequent special assessment by the board of supervisors for a public drainage improvement, even tho the latter improvement was initiated prior to the sewer proceedings.

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

When deed extinguishes drainage taxes. The lien on land of unmatured installments of duly levied district-drainage taxes is extinguished by a tax deed which is issued on a sale of said land for general (ordinary) taxes levied subsequent to the levy of the drainage taxes.

Fergason v Aitken, 220-1154; 263 NW 850

Tax assessment constitutes lien on land—bond not lien. Under statute providing for issuance of drainage district bonds the tax assessments levied by the district, and not the bond, constitute the lien against the land.

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Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

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Teget v Lambach, 226-1346; 286 NW 522

Tax sale for nonpayment—duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

7479 Levy for deficiency.

Unallowable item of expense. The boards of supervisors in charge of an intercounty drainage improvement are wholly without jurisdiction to include in a deficiency assessment on all the lands within the district an item of expense which had been contracted in one county by the board of supervisors thereof in the employment of a fiscal agent to sell the bonds which had been issued in such particular county.

Haferman v District, 204-936; 216 NW 257

Limitation of actions. The statute of limitation commences to run against an action of mandamus to compel the board of supervisors to levy an additional assessment to pay drainage warrants even tho the board had not levied or otherwise provided for the additional assessment to complete the fund from which the warrants are to be paid.

Lenehan v Drainage Dist., 219-294; 258 NW 91

Assessments—inability to meet bonds—mandamus not remedy. Where a drainage district was created and a sufficient assessment to pay all bonds was levied and collected but not at all times carried in a separate account by the county treasurer, with the result that on maturity date of the bonds no sufficient balance was available to retire them, a mandamus action on the theory of an insufficient assessment (§7509, C., '35) brought by the bondholders to require the drainage district trustees to make an additional levy was properly denied.

Western Assn. v Barrett, 223-932; 274 NW 55

7480 Record of drainage taxes.

Atty. Gen. Opinion. See '30 AG Op 113

7481 Funds—disbursement—interest.

Atty. Gen. Opinions. See '25-26 AG Op 428; '28 AG Op 195

Contract for lobbying. The action of a board on behalf of a public drainage district in employing attorneys to induce the state legislature to make an appropriation with which to pay the assessment on state-owned lands within the district is not violative of public policy, and the allowance of a claim for such services is proper, it appearing that the contract was carried out without the employment of any improper influence whatever.

Kemble v Weaver, 200-1333; 206 NW 83

Failure to file brief and argument—estoppel to assert claim. In action by subcontractor against principal and drainage district jointly to establish claim as a lien on the district's fund, where drainage district filed no brief or argument, court need give no attention to its plea that subcontractor was estopped from asserting claim by his action in accepting auditor's warrant for a lesser amount than that to which he was entitled.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

7482 Assessments—maturity and collection.

Atty. Gen. Opinions. See '30 AG Op 113; '34 AG Op 412

Correction of description. Mandamus will lie, by one landowner within a drainage district, to compel the board to so correct the description of other assessed lands that the latter may be sold under the assessment against them.

Plumer v Board, 203-643; 213 NW 257

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Drainage district bondholder — permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

Estoppel to question validity—redemption from tax sales. One who redeemed land from tax sale for nonpayment of drainage assessment installments and who acquiesced in drainage proceedings during years in which her land received benefits of the improvement is estopped from questioning establishment of the drainage district.

Whisenand v Van Clark, 227-800; 288 NW 915

Assessments—tax sale for nonpayment. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

7483 Payment before bonds or certificates issued.

Atty. Gen. Opinion. See '32 AG Op 104

7484 Installment payments—waiver.

Atty. Gen. Opinion. See '32 AG Op 104

Implication to pay in certain county—effect. A mere implication arising from a writing that payments maturing under the writing will be made at a certain place in a certain county furnishes no legal basis for bringing action in said county when defendant is an actual resident of some other county. Basis for such action in a county other than that of defendant's residence must be found in the express terms of the writing. So held in an action by a holder of drainage bonds to recover assessments on land to pay the bonds.

Bechtel v Dist. Court, 215-295; 245 NW 299

Assessments — nonstatutory plan of payment. Where board has jurisdiction to make drainage assessment, errors in (1) acreage of benefited land, (2) method of computing amount of assessment, and (3) using a nonstatutory installment plan of payment do not render the assessment void, but are only irregularities not reviewable in a collateral proceeding.

Whisenand v Van Clark, 227-800; 288 NW 915

7488 Lien of deferred installments.

Warranty and incumbrance. A covenant against incumbrance is not broken by the existence of a public drainage improvement on the land, nor is a general covenant of warranty breached by the fact that subsequent to the deed an additional assessment is levied on the land for such improvement.

Kleinmeyer v Willenbrock, 202-1049; 210 NW 447

Duty to discharge. As between life tenants and remaindermen, the former, during their tenancy, should pay the interest on special assessments and the latter should pay the principal; and refunds on such assessments should be distributed in the same proportions.

Cooper v Barton, 208-447; 226 NW 70

Statute of limitations—duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

7492 Reclassification.

Proper basis. A reclassification of lands within a drainage district for an improvement made subsequent to the construction of other improvements within the district should be made on the basis of the condition of the land as it existed just prior to and at the time of the construction of the improvement for which the assessment is made.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral, as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that, in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

7495 Drainage warrants received for assessments.

Assignment — absolute (?) or conditional (?). Record reviewed and held that a written assignment of a drainage warrant must be deemed to have deprived the assignor of all interest therein.

Simmons v Tatham, 219-1407; 261 NW 434

7495.1 Bonds received for assessments.

Atty. Gen. Opinion. See AG Op May 18, '39

7499 Improvement certificates.

Atty. Gen. Opinion. See '30 AG Op 106

Implication to pay in certain county—effect. A mere implication arising from a writing that payments maturing under the writing will be made at a certain place in a certain county furnishes no legal basis for bringing action in said county when defendant is an actual resident of some other county. Basis for such action in a county other than that of defendant's residence must be found in the express terms of the writing. So held in an action by a holder of drainage bonds to recover assessments on land to pay the bonds.

Bechtel v Dist. Court, 215-295; 245 NW 299

7500 Form, negotiability, and effect.

Atty. Gen. Opinion. See '30 AG Op 106

7502 Sale at par—right to pay.

Atty. Gen. Opinion. See '30 AG Op 106

7503 Drainage bonds.

Atty. Gen. Opinions. See '30 AG Op 73, 108

Violation of conditions—good faith of board. The fact that not all signers of a petition for a drainage improvement signed the bond, in accordance with an agreement between the parties who initiated the proceedings, will not affect the enforceability of the bond, when the bond was received and accepted by the county in good faith and without knowledge of said agreement and of the violation thereof.

Monona County v Gray, 200-1133; 206 NW 26

7504 Form.

Nonallowable judgment at law. The holder of a drainage bond issued by a county is not entitled to a personal judgment at law against the county, its board of supervisors, or the drainage district, for the amount due on the bond, the drainage district not being a legal entity, and the county and its supervisors acting only in an official or representative capacity.

Board v Dist. Court, 209-1030; 229 NW 711

Assessments—proper application to bonds. The holder of a matured drainage bond is entitled to have said bond paid in full if funds to that extent are available in the hands of the county treasurer, irrespective of the time when said funds were paid to the treasurer. In other words, the treasurer is not compelled to apply tax collections of a given year solely on bonds maturing in that year.

Bechtel v Mostrom, 214-623; 243 NW 361

Bonds—unauthorized pledge. A pledge of "the faith and resources of the county" for the payment of a drainage bond, issued by the board of supervisors on behalf of a drainage district, is without force or effect because wholly unauthorized.

Mitchell County v Odden, 219-793; 259 NW 774

Misuse of funds — estoppel — waiver. A county treasurer breaches his official bond by using county funds in paying drainage district bonds, and the county cannot be deemed estopped to insist on said breach, or be held to have waived said breach, because of the fact that the treasurer acted with the knowledge and consent of, or in obedience to the express direction of the board of supervisors.

Mitchell County v Odden, 219-793; 259 NW 774

Nonliability of county. A county, as a body corporate, is not liable in damages consequent on the failure of the board of supervisors to levy an adequate assessment against a drainage district to pay the bonds of the district. It follows that the county treasurer and his surety, when sued by the county for damages consequent on the act of said treasurer in using county funds in paying said bonds, cannot be

subrogated to any right of the bondholder to proceed against the county,—because the bondholder has no such right.

Mitchell County v Odden, 219-793; 259 NW 774

Bond—lien on entire proceeds of special assessment. Bond issued by drainage district under statute is a lien upon the entire proceeds of the special assessment and not on any particular tract of land. The whole process being statutory, is exclusive of all other remedies.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder — permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

Tax assessment constitutes lien on land—bond not lien. Under statute providing for issuance of drainage district bonds the tax assessments levied by the district, and not the bond, constitute the lien against the land.

Teget v Lambach, 226-1346; 286 NW 522

7509 Deficiency levy—additional bonds.

Atty. Gen. Opinions. See '30 AG Op 131; '32 AG Op 104, 232

Unallowable item of expense. The boards of supervisors in charge of an intercounty drainage improvement are wholly without jurisdiction to include in a deficiency assessment on all the lands within the district an item of expense which had been contracted in one county by the board of supervisors thereof in the employment of a fiscal agent to sell the bonds which had been issued in such particular county.

Haferman v District, 204-936; 216 NW 257
See Kemble v Weaver, 200-1333; 206 NW 83

Assessments—inability to meet bonds—mandamus not remedy. Where a drainage district was created and a sufficient assessment to pay all bonds was levied and collected but not at all times carried in a separate account by the county treasurer, with the result that on maturity date of the bonds no sufficient balance was available to retire them, a mandamus action on the theory of an insufficient assessment brought by the bondholders to require the drainage district trustees to make an additional levy was properly denied.

Western Assn. v Barrett, 223-932; 274 NW 55

7509.1 Funding or refunding indebtedness.

Atty. Gen. Opinions. See '28 AG Op 346; '32 AG Op 140; '38 AG Op 67

7512 Payment before bonds issued.

Atty. Gen. Opinion. See '30 AG Op 73

7513 Appeals.

Atty. Gen. Opinion. See '30 AG Op 289

Appeal as sole remedy. The objection that the board of supervisors levied an assessment for a highway improvement against an entire 40-acre tract, instead of that part only which was at right angles to the improvement, must be presented on appeal from the assessment, and not by an independent action in equity.

Paul v Marshall County, 204-1114; 216 NW 736

Appeal as non-exclusive remedy. Either certiorari or appeal will lie to review the action of the board of supervisors in attempting to exclude lands from a drainage district after its establishment and construction, such attempted action being wholly beyond the jurisdiction of the board.

Estes v Board, 204-1043; 217 NW 81

Nonpermissible appeal. An appeal will not lie to the district court from the refusal of the board of supervisors to establish a proposed drainage ditch when such refusal is based on a finding by the board (1) that another and existing ditch is sufficient, and (2) that the public benefit, utility, health, convenience, and welfare would not be promoted by establishing said proposed improvement.

Christensen v Agan, 209-1315; 230 NW 800

Appeal by petitioners for district. Petitioners for the establishment of a drainage district may not maintain an appeal from an order by the district court setting aside the establishment by the board of supervisors of a drainage district, when, up to the time of the entry of the said order of the district court, the board of supervisors and the drainage district were the sole defendants in the proceedings.

Chi., Burl. Ry. v Board, 206-488; 221 NW 223

Assessments—errors nonreviewable in collateral action. Where board has jurisdiction to make drainage assessment, errors in (1) acreage of benefited land, (2) method of com-

puting amount of assessment, and (3) using a nonstatutory installment plan of payment do not render the assessment void, but are only irregularities not reviewable in a collateral proceeding.

Whisenand v Van Clark, 227-800; 288 NW 915

7515 Time and manner.

Appeal notice—proper filing notwithstanding auditor's failure to mark "filed". The statutory requirement of "filing with the auditor" a notice of appeal from the action of the county board of supervisors, with respect to classification and assessment of land in a drainage district, was satisfied when attorney for owner delivered notice of appeal and appeal bond to auditor with instructions to file them, notwithstanding auditor failed to mark papers "filed". A paper is said to be "filed" when it is delivered to the proper officer and by him received to be kept on file.

Mills v Board, 227-1141; 290 NW 50

Appeal bond—filing—statutory presumption of approval. Where, on appeal from action of county board of supervisors with respect to classification and assessment of land in drainage district, the board urges that failure of the auditor to approve the appeal bond constituted a fatal defect and it is shown attorney for property owner delivered the notice of appeal and appeal bond to county auditor with instructions to file them, the delivery to and receipt by the auditor of the tendered appeal bond constituted a "filing" and generated statutory presumption that auditor approved the bond, sufficient to uphold appeal, in absence of evidence to overcome presumption.

Mills v Board, 227-1141; 290 NW 50

7517 Petition—docket fee—waiver—dismissal.

Substantial compliance with statute—sufficiency. On appeal from action of county board of supervisors with respect to classification and assessment of land in drainage district, a motion to dismiss the appeal for alleged failure to fully set out in petition everything required by statute was properly overruled where petition substantially complied with statute.

Mills v Board, 227-1141; 290 NW 50

7519 Proper parties — employment of counsel.

Atty. Gen. Opinion. See AG Op March 2, '39

Legal representative. The board of supervisors is the proper legal representative of all parties interested in public drainage proceedings except adversary parties.

Chi., Burl. Ry. v Board, 206-488; 221 NW 223

Decree on appeal—conclusiveness. A decree which sustains objections of property owners to a proposed drainage assessment on the assigned ground that certain specified contracts are illegal and void is conclusive on the contractor and his assignees, even tho they are not in fact represented at such hearing; because in law the board of supervisors is, in such proceeding, made the representative, not only of the district, but of every interested party except the adversary parties.

First N. Bk. v County, 204-720; 216 NW 8

Employment of counsel to defend assessment. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

Supervisors representing drainage district. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

7521 Right of board and district to sue.

District not legal entity.

Board v Dist. Court, 209-1030; 229 NW 711

Houghton v Bonnicksen, 212-902; 237 NW 313

Nonallowable judgment at law. The holder of a drainage bond issued by a county is not entitled to a personal judgment at law against the county, its board of supervisors, or the drainage district, for the amount due on the bond, the drainage district not being a legal entity, and the county and its supervisors acting only in an official or representative capacity.

Board v Dist. Court, 209-1030; 229 NW 711

7522 Trial on appeal—consolidation.

Excessive assessment—evidence sustaining reduction. On appeal from action of county board of supervisors with respect to assessment of land in drainage district, it may be shown that the amount of assessment as recommended by second report of county commissioners was greatly in excess of amount

recommended in first report, as a circumstance entitled to consideration in determining whether second report was excessive. Evidence sustained finding that assessments on certain land were excessive and inequitable and should be reduced by 30 percent.

Mills v Board, 227-1141; 290 NW 50

Petition—substantial compliance with statute—sufficiency. On appeal from action of county board of supervisors with respect to classification and assessment of land in drainage district, a motion to dismiss the appeal for alleged failure to fully set out in petition everything required by statute was properly overruled where petition substantially complied with statute.

Mills v Board, 227-1141; 290 NW 50

Excessive assessment — findings of trial court—effect on appeal. Where the trial court, which saw and heard the witnesses, makes a finding that classification and assessment of certain lands in drainage district were excessive and inequitable and should be reduced by 30 percent, such finding is entitled to some weight on appeal to the supreme court.

Mills v Board, 227-1141; 290 NW 50

7523 Conclusive presumption on appeal.

See annotations under §7474

7526 Decree as to establishing district or including lands.

Annexing additional lands. An order by joint boards of supervisors, annexing additional lands to an already established intercounty drainage district, is appealable to the district court for the purpose of trying anew the quasi judicial issue whether such additional lands will be benefited by the proposed improvement; and on such appeal the court has power to exclude such lands from the district, in case it is clearly shown that they cannot be benefited in any degree by the proposed improvement.

Thompson v Board, 201-1099; 206 NW 624

Impossible project. The setting aside by the district court of an order by the board of supervisors establishing a drainage district is proper when it is made to appear that the project is impossible,—when the sum total of the plan would be to redeem certain lands and unavoidably submerge other lands.

Dean v District, 200-1162; 206 NW 245

Anderson v Board, 203-1023; 213 NW 623

7527 Appeal as exclusive remedy—nonappellants.

Enjoining assessment. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment and filed objections thereto and did not appeal from the adverse ruling thereon.

Chi. NW Ry. v Sedgwick, 202-33; 209 NW 456

Chi. NW Ry. v Sedgwick, 203-726; 213 NW 435

Estoppel. Principle reaffirmed that, when property owners stand by and see a drainage improvement made, and take no steps of legal interference, they are estopped to raise the question of validity when called upon to pay their assessments.

Dashner v Const. Co., 205-64; 217 NW 464

Injunction to restrain irregularities. Injunction will not lie to restrain a mere irregularity in the levying of a drainage assessment.

Seabury v Adams, 208-1332; 225 NW 264

Injunction—absence of jurisdiction. Principle reaffirmed that injunction is the proper remedy to restrain the board of supervisors from proceeding with a drainage improvement over which it has no jurisdiction.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

Objection to assessments—remedy. When the board of supervisors exercises discretion in repairing a drainage ditch and their action in levying an assessment is not absolutely void for lack of jurisdiction, the proper remedy for one aggrieved by such action is by appeal to the district court, and not by injunction against the assessment levy.

Baldozier v Mayberry, 226-693; 285 NW 140

Establishment—nonjurisdictional defect. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor, and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend thru or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

Errors nonreviewable in collateral action. Where board has jurisdiction to make drainage assessment, errors in (1) acreage of bene-

fited land, (2) method of computing amount of assessment, and (3) using a nonstatutory installment plan of payment do not render the assessment void, but are only irregularities not reviewable in a collateral proceeding.

Whisenand v Van Clark, 227-800; 288 NW 915

7531 Monthly estimate—payment.

Interest on deferred payment. Interest on long deferred payments due to a contractor may properly be ordered.

Gjellefald v District, 203-1144; 212 NW 691

Dual conflicting contracts—procedure in re warrants. An action in equity praying for the adjudication of the amount due on certain drainage warrants will not be entertained when the petition reveals the fact that the warrants were issued under one of two materially different contracts covering the same subject matter, and that as a consequence the warrants in question were wholly valid or wholly invalid.

Houghton v Bonnicksen, 212-902; 237 NW 313

7534 Final settlement.

Acceptance of work—effect. The good-faith final acceptance by the duly constituted authorities of the work performed under a drainage improvement is final.

Dashner v Const. Co., 205-64; 217 NW 464

Failure to file brief and argument—estoppel to assert claim. In action by subcontractor against principal and drainage district jointly to establish claim as a lien on the district's fund, where drainage district filed no brief or argument, court need give no attention to its plea that subcontractor was estopped from asserting claim by his action in accepting auditor's warrant for a lesser amount than that to which he was entitled.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

7537 Construction on or along highway.

Nonappropriation for new purpose. The fact that a public drainage ditch is so laid out and constructed that in places it encroaches, to some extent, upon a public highway, does not per se justify the conclusion that thereby the highway has been legally appropriated for a new public purpose, to wit: drainage.

Robinson v Board, 222-663; 269 NW 921

7539 Bridges.

Atty. Gen. Opinion. See '38 AG Op 445

Nonperformance. Mandamus to compel the board to erect a bridge on an established and existing highway at the point where the highway is crossed by a public drainage improvement is not barred by the lapse of time.

Perley v Heath, 201-1163; 208 NW 721

Mandamus—construction over ditches. The statutory duty of the board of supervisors to construct bridges over public ditches at points where such ditches intersect secondary roads is enforceable by action of mandamus, such duty being in no manner limited or controlled by the statutory powers granted the county board of approval in adopting secondary road programs.

Robinson v Board, 222-663; 269 NW 921

Nonappropriation for new purpose. The fact that a public drainage ditch is so laid out and constructed that in places it encroaches, to some extent, upon a public highway, does not per se justify the conclusion that thereby the highway has been legally appropriated for a new public purpose, to wit: drainage.

Robinson v Board, 222-663; 269 NW 921

7540 Construction across railroad.

Atty. Gen. Opinion. See '28 AG Op 191

Notice from maintenance of bridge. The existence, on a minor fractional part of a government 40-acre tract, of permanent improvements in the form of a railway bridge spanning a public drainage ditch constitutes implied notice to the purchaser of the remaining part of the said 40-acre tract of the unrecorded written contract right of the railway company to maintain said bridge in its then length and elevation without liability in damages to the owner of the abutting land.

Johnson v Railway, 202-1282; 211 NW 842

Overflow damage. In landowner's action against railroad for damage to crops, resulting from overflow, where record showed plans and specifications for drainage ditch did not require railroad to lengthen bridge span, railroad's full compliance with requirements barred recovery.

Kellogg v Railway, (NOR); 239 NW 557

7541 Duty to construct.

Inadequate opening — compulsory construction—effect. Negligence may not be predicated on the insufficient length or height of a railroad bridge within a public drainage district when the bridge was constructed strictly in accordance with the plans and specifications prescribed by the public drainage authorities.

Hunter v Railway, 206-655; 221 NW 360

7549 Annexation of additional lands.

Additional lands in foreign county. A board of supervisors has no jurisdiction to annex to an intracounty drainage improvement lands situated in a foreign county.

Glenn v County, 201-1003; 206 NW 802

Subsequent exclusion of lands. The board of supervisors has no power or jurisdiction to exclude lands from a drainage district subsequent to the final establishment thereof.

Estes v Board, 204-1043; 217 NW 81

Nonpermissible annexation. The power of joint boards of supervisors to annex lands to an existing intercounty drainage district does not extend to lands which are embraced in an existing intracounty drainage district.

Farley Dist. v Drainage Dist., 207-970; 221 NW 589

7550 Proceedings on report.

Annexing additional lands—appeal. An order by joint boards of supervisors, annexing additional lands to an already established intercounty drainage district, is appealable to the district court for the purpose of trying anew the quasi judicial issue whether such additional lands will be benefited by the proposed improvement; and on such appeal the court has power to exclude such lands from the district, in case it is clearly shown that they cannot be benefited in any degree by the proposed improvement.

Thompson v Board, 201-1099; 206 NW 624

7554 New district including old district.

"New construction" (?) or "repair" (?). In the effort to correct the inadequacy of an established public drainage improvement, the construction of an entirely different and substituted system of drainage—one costing several times the cost of the inadequate drain, of materially increased capacity, differently located, affecting additional lands, and one which, in fact, is the result of an entirely new plan—must be deemed a "new construction" and not a "repair". It follows that such "new construction" must be preceded by the establishment of an entirely new district.

Kelleher v Drainage Dist., 216-348; 249 NW 401

7556 Repair.

Atty Gen. Opinions. See '30 AG Op 45, 194; '32 AG Op 235, 274; '38 AG Op 482; AG Op Jan. 11, '39

"Constructed" drain defined. A drainage improvement is "constructed", within the meaning of this section, whenever the physical work is completed and the governing body has accepted the same, even tho a supplemental improvement governed by a different contract remains unfinished.

Board v Paine, 203-263; 210 NW 929

"Remodeling" not "repair". The remodeling of a public drain or ditch in order to care for and obviate an undue burden of waters cast into it by other like ditches may not be deemed a repair.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Repair (?) or original construction (?). Drainage work which consists in the abandonment of a material portion of an existing drain in order to straighten a river, and the substitution therefor of a new channel at a substantial expense and which work, in fact, is a change in the plan under which the ditch was first constructed, must be deemed an original construction, and not a repair. Especially is this true when the said expense exceeds ten per cent of original cost of construction. It follows that the comprehensive procedure for an original construction must be followed, and not the limited procedure governing repairs.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

"New construction" (?) or "repair" (?). In the effort to correct the inadequacy of an established public drainage improvement, the construction of an entirely different and substituted system of drainage—one costing several times the cost of the inadequate drain, of materially increased capacity, differently located, affecting additional lands, and one which, in fact, is the result of an entirely new plan—must be deemed a "new construction" and not a "repair". It follows that such "new construction" must be preceded by the establishment of an entirely new district.

Kelleher v Drainage Dist., 216-348; 249 NW 401

Erosion of banks and depositing of silt. The authority of the board of supervisors to keep a constructed drainage improvement "in repair" embraced the authority to contract for the placing of pipes through the waste banks, in order to prevent erosion of the banks and the depositing of silt in the ditch.

Board v Paine, 203-263; 210 NW 929

New settling basin as repair. The repair of a drainage system may include, inter alia, the providing of an entirely new settling basin in lieu of an old one which has become so silted as to cease to function.

Payne v Drainage Dist., 223-634; 272 NW 618

Changing course of water—effect. The fact that, in repairing a public ditch or drain, certain waters are passed to their final outlet differently than under the condition formerly existing, does not necessarily show an unallowable change in the plan of the improvement.

Payne v Drainage Dist., 223-634; 272 NW 618

Repairs may incidentally benefit adjacent road. Work on a drainage ditch which prevented erosion and prevented an overflow on

reclaimed lands was "repair" work within the statutory authority of the board of supervisors to repair drainage ditches even tho there was an incidental benefit to bridges and to a township road at the side of the ditch.

Baldozier v Mayberry, 226-693; 285 NW 140

Evidence that purpose of repairs was to benefit ditch. Evidence of claims filed against a drainage district for labor and materials was a sufficient record of the board of supervisors' proceedings to show that the work was considered from the beginning as being repair work on the ditch.

Baldozier v Mayberry, 226-693; 285 NW 140

Assessments for repairs—levy without notice. If the cost of repairs to drainage ditches amounts to less than 10 percent of the original cost, the county board of supervisors may levy assessments for such repairs without giving notice.

Baldozier v Mayberry, 226-693; 285 NW 140

Notice and hearing not necessary.

Breiholtz v Board, 257 US 118

Taking of land—who entitled to notice. If, in the repair of a public ditch or drain, new land be taken for use by the public, the owners thereof only need be served with notice of eminent domain proceedings.

Payne v Drainage Dist., 223-634; 272 NW 618

Trespass not a "taking". A landowner may not say that his land was taken for public use because in cleaning out a public ditch as a repair thereof, the contractor wrongfully distributed the dirt beyond the right of way line of the ditch as originally constructed.

Payne v Drainage Dist., 223-634; 272 NW 618

Employment of counsel to defend assessment. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

Supervisors representing drainage district. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

7558 Assessment without notice.

Atty. Gen. Opinion. See '32 AG Op 235

Repairing without notice. A statute is valid which authorizes the governing board of a duly established and constructed drainage improvement to clean out and repair the improvement, when necessary, and without notice to the property owners, to assess the cost of such repairs in the proportion in which the original cost was apportioned, as provided by said statute. 186 Iowa 1147 affirmed.

Breiholtz v Board, 257 US 118

Assessments for repairs — levy without notice. If the cost of repairs to drainage ditches amounts to less than 10 percent of the original cost, the county board of supervisors may levy assessments for such repairs without giving notice.

Baldozier v Mayberry, 226-693; 285 NW 140

7559 Assessment with notice.

Atty. Gen. Opinions. See '32 AG Op 235; '38 AG Op 483

7560 Additional land.

Who entitled to notice. If in the repair of a public ditch or drain, new land be taken for use by the public, the owners thereof only need to be served with notice of condemnation proceedings.

Payne v Drainage Dist., 223-634; 272 NW 618

Trespass not taking. A landowner may not say that his land was taken for public use because in cleaning out a public ditch as a repair thereof, the contractor wrongfully distributed the dirt beyond the right of way line of the ditch as originally constructed.

Payne v Drainage Dist., 223-634; 272 NW 618

7561 Separate assessments for main ditch and laterals.

Atty. Gen. Opinions. See '30 AG Op 45, 194, 283; '32 AG Op 274

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral, as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that, in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

7562 Reclassification required.

Atty. Gen. Opinion. See '30 AG Op 283

7563 Improvement of common outlet.

Common outlet—what constitutes. A natural watercourse, through the sinuous course of which several adjoining drainage districts separately run their main ditch, must be considered the common outlet of all of said districts notwithstanding the fact that said watercourse remains in its natural condition for a considerable distance between two of the upper districts.

Board v Board, 214-655; 241 NW 14

Common outlet costs—mandatory duty. Principle reaffirmed that when the cost of cleaning out or enlarging the common outlet of two or more drainage districts has been properly apportioned among the several districts, a mandatory duty rests on the governing bodies of the several districts to make the proper levies in their respective counties.

Board v Board, 214-655; 241 NW 14

Mandamus—remand in equity. Where, on appeal in an equitable action of mandamus to compel the levy of assessments to defray the cost of maintaining the common outlet of several drainage districts, it appears that the trial court erroneously denied relief as to one of two expenditures, and the record so blends and combines the allowable and unallowable expenditures that the appellate court is unable to determine the matter, a reversal and remand may be entered with order to the trial court to receive additional testimony and determine the amount of the allowable expenditure.

Board v Board, 214-655; 241 NW 14

Common outlet—new right of way—notice. Statutory power "to enlarge, deepen or widen" a public drain in order to carry the combined waters of several districts using said drain as a common outlet, includes the power by necessary implication to acquire a new right of way for the purpose of effecting such enlargement, deepening or widening, and no one is entitled to notice of such acquisition or taking except the owner of the land taken, such taking being analogous to the taking of new right of way in case of repairs generally on constructed ditches.

Board v Board, 214-655; 241 NW 14

Assessments—improvement of common outlet—absence of notice—effect. The statutes (§1989-a24, S., '13; 38 GA, ch. 332), authorizing certain improvements on the common outlet of two or more drainage districts, and an apportionment of the cost thereof among the several districts by means of assessments on the basis of water discharged by each district, are not unconstitutional because said statutes fail to provide for notice to interested parties prior to the making of said improvements, said improvements being analogous to repairs on ditches generally, subsequent to their construction.

Board v Board, 214-655; 241 NW 14

Assessments—unconstitutional basis—burden of proof. The court will not declare a drainage statute unconstitutional because it fixes a ratio of water discharged as the basis for computing assessments between districts, when the record reveals the legal fact that the district does receive a benefit because of the improvement in question and is assessable therefor, and when there is no proof by complainant that the said statutory basis is not the equivalent of benefits.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Assessment under repealed statute. An apportionment or assessment of drainage improvement costs under a statute which fixed "volume-of-water-discharged" as a basis, but which, before the improvement in question had been initiated, had been repealed and supplanted by a statute which fixed "benefits" as a basis, is prejudicially erroneous unless the prejudice is obviated by a showing that an apportionment or assessment on either basis would be the same.

Board v Board, 214-655; 241 NW 14

Assessment—remodeling common outlet. The cost consequent on the cleaning out, enlarging, deepening, or widening of a public drain or ditch which receives the combined waters from two or more such districts must be assessed against the lands in all of said districts in the ratio provided by statute. (Holding under 38th GA, ch. 332.)

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Assessments—for common outlet—constitutionality. Whether statutes authorizing the cost of certain improvements on the common outlet of several districts to be apportioned by the board doing the work to each of said districts in the ratio of water discharged by each district, are unconstitutional because said statutes fail to provide interested parties, in districts other than the district embracing the common outlet, with notice of and opportunity to contest said apportionment, quaere. But said interested parties may not complain of the absence of such notice and opportunity when they admit that the apportionment in question was correctly made in accordance with the said statutory ratio.

Board v Board, 214-655; 241 NW 14

Assessments for common outlet—basis of benefits. Ample basis for assessing lands within a public drainage district for benefits in order to defray the cost of maintaining or enlarging an outlet which is the common outlet of said district and of other districts, is found in the fact that, by the statutory establishment

of said district, the landowners within the district acquire an extraordinary right which they could not acquire under any other statute or have under the common law, to wit: The right to gather together the surface waters on said lands, and to cast them, through a materially shortened and straightened ditch, and in abnormally increased volume, and with abnormally increased velocity, upon the servient lands of lower districts; to the substantial damage of said latter lands.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Assessments for after-accruing benefits. A statute authorizing certain improvements on the common outlet of several districts and the apportionment of the cost thereof among said several districts receiving the benefit of such improvements, is applicable to a district organized prior to the enactment of said statute, and is not unconstitutional in failing to provide for notice to the landowners of the latter district before said improvements are made.

Ward v Board, 214-1162; 241 NW 26

Judgment—nonparty and nonprivy. A judgment to the effect that drainage improvement costs (designed ultimately to be apportioned among several separate districts) must be assessed in accordance with a specified statute, is not conclusive in a subsequent proceeding against a district which was not a party to the first proceedings and which was not privy to any party to said first proceeding.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Nonpresumption of benefits. There is no presumption that improvements within a drainage district confer any benefit on the lands within an adjoining district, even tho said improvements are made in the vicinity of the common outlet of both districts. It follows that no assessment, on account of such an improvement, can be legally made against another district in the absence of proof of benefit to such other district.

Mayne v Board, 215-221; 241 NW 29

Contribution—statute of limitation. The legal right of the governing body of a drainage district located in one county to compel a drainage district located in another county, thru its governing body, to contribute to the cost of cleaning out, deepening, enlarging, extending or straightening of the outlet which is common to both of said districts, accrues when the actual cost of said work is legally apportionable to the different districts; and action to enforce said right, unless instituted within five years after said accrual, is barred by the statute of limitation. And the making of an erroneous apportionment will not toll said statute.

Board v Board, 221-337; 264 NW 702

7567 Levy under original classification.

Common outlet costs — mandatory duty. Principle reaffirmed that when the cost of cleaning out or enlarging the common outlet of two or more drainage districts has been properly apportioned among the several districts, a mandatory duty rests on the governing bodies of the several districts to make the proper levies in their respective counties.

Board v Board, 214-655; 241 NW 14

7568 Levy under reclassification.

Atty. Gen. Opinion. See '38 AG Op 483

7569 Removal of obstructions.

Atty. Gen. Opinion. See '28 AG Op 365

7571 Outlet for lateral drains—specifications.

Statutory right to use. A landowner who has been assessed for the cost of a drainage improvement may construct, wholly upon his own land, ditches for the purpose of carrying his surface waters into a lateral which has been located upon his land, even tho said lateral may be overtaxed by said surface waters, to the damage of lower landowners.

Dullard v Phelan, 204-716; 215 NW 965

7576 Procedure.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v City, 225-490; 281 NW 207

7585 Employment of counsel.

Implied power. Boards acting on behalf of public drainage districts have implied power to contract with attorneys to appear before the legislature and by proper means seek to induce the legislature to so legislate that a moral obligation on the part of the state with reference to the district will be fulfilled.

Kemble v Weaver, 200-1333; 206 NW 83

Illegal employment of attorneys, etc. The board of supervisors after refusing to establish a proposed drainage improvement because such establishment would not be conducive to public benefit, utility, health, convenience, and welfare, has no power to employ attorneys and an engineer to defend on appeal the action of the board. Such employment being a nul-

lity, the resulting expense may not be taxed to the petitioners.

Christensen v Agan, 209-1315; 230 NW 800

7589 Purchase at tax sale.

Inadequacy of bid. A bona fide sale of land at "scavenger" sale for delinquent tax will not be deemed void as against public policy because of inadequacy of the bid, in view of the fact (1) that the public authorities have a legal right to bid at said sale, and (2) that the treasurer is under a mandatory duty to sell.

Board v Stone, 212-660; 237 NW 478

7590 Tax deed—sale or lease.

Drainage district bondholder—permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7590.1 Purchase of tax certificate.

Atty. Gen. Opinion. See '36 AG Op 256

Tax sale—nonduty of supervisors to purchase certificate. The statutory provision, that the board of supervisors or the drainage trustees "may" purchase an outstanding certificate evidencing a sale of land for the nonpayment of drainage assessments, simply invests the board or trustees with discretion so to purchase. No mandatory duty so to purchase in order to protect the bondholder is imposed, even tho the bondholder must look solely to assessments for payment of his bond.

Bechtel v Board, 217-251; 251 NW 633

7590.2 Terms of redemption.

Atty. Gen. Opinions. See '36 AG Op 256; AG Op May 18, '39, May 19, '39

7590.7 Purchase by bondholder.

Tax sales—who may purchase. Under the statutes of this state any person may become a purchaser at tax sale, and the only statutory exception is found in §7261, C., '39.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder — permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7597 Drainage record.

Drainage record book admissible. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor, and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend through or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

CHAPTER 354

INTERCOUNTY LEVEE OR DRAINAGE DISTRICTS

7599 Petition and bond.

Jurisdictional facts. The filing of a petition and bond with the county auditor of each county is mandatory, in order to confer jurisdiction to establish an intercounty drainage improvement.

Glenn v County, 201-1033; 206 NW 802

7614 Levies—certificates and bonds.

Unallowable item of expense. The boards of supervisors in charge of an intercounty drainage improvement are wholly without jurisdiction to include in a deficiency assessment on all the lands within the district an item of expense which had been contracted in one county by the board of supervisors thereof in the employment of a fiscal agent to sell the bonds which had been issued in such particular county.

Haferman v District, 204-936; 216 NW 257

Impressing unpaid warrant on excess assessment—necessary parties. Where two counties, by contract between both boards of

supervisors and the contractors, issued warrants for construction of an intercounty drain and one county had a balance remaining from its assessments after paying all its drainage warrants but the other county after exhausting all funds from its assessments still owed outstanding unpaid warrants, an action in equity by an assignee of one of the unpaid warrants of the latter county to impress a trust for the amount of his warrant on the excess balance of the assessment in the former county, cannot be maintained against the former county alone because the other unpaid warrant holders and the landowners who paid the excess assessment are necessary parties.

Straub v Board, 223-1099; 274 NW 84

7623 Transfer to district court.

Applicability of statute. This section has no application to an intracounty drain.

Glenn v County, 201-1033; 206 NW 802

7626 Law applicable.

Nonpermissible annexation. The power of joint boards of supervisors to annex lands to an existing intercounty drainage district does not extend to lands which are embraced in an existing intracounty drainage district.

Farley Dist. v Drainage Dist., 207-970; 221 NW 589

CHAPTER 354.1

CONVERTING INTRACOUNTY DISTRICTS INTO INTERCOUNTY DISTRICT

7626.1 Intracounty districts converted into intercounty district.

Annexation of lands—when nonpermissible. The power of joint boards of supervisors to annex lands to an existing intercounty drainage district does not extend to lands which are embraced in an existing intracounty drainage district.

Farley Dist. v Drain. Dist., 207-970; 221 NW 589

CHAPTER 355

DRAINAGE DISTRICTS EMBRACING PART OR WHOLE OF CITY OR TOWN

Atty. Gen. Opinion. See '32 AG Op 273

CHAPTER 356

HIGHWAY DRAINAGE DISTRICTS

7639 Powers.

Atty. Gen. Opinion. See '38 AG Op 445

7643 Assessment—report.

Reduction of assessment. Record reviewed in detail, and held that a thirty-three and one-third percent reduction by the trial court of an assessment on agricultural lands, to defray the cost of a highway drainage improvement was justified.

Held v Board, 201-418; 205 NW 529

7649 Removal of trees from highway.

Improvement — special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt County, 224-1190; 278 NW 612; 116 ALR 89

7650 Trees outside of highways.

Improvement — special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt County, 224-1190; 278 NW 612; 116 ALR 89

CHAPTER 357

DRAINAGE AND LEVEE DISTRICTS WITH PUMPING STATIONS

7663 Funding bonds.

Atty. Gen. Opinion. See '28 AG Op 346

7673 Limitation of actions.

Time limit to question legality of bonds.

Waller v Pritchard, 201-1364; 202 NW 770

CHAPTER 358

MANAGEMENT OF DRAINAGE OR LEVEE DISTRICTS BY TRUSTEES

Atty. Gen. Opinion. See AG Op Feb. 28, '40

7674 Trustees authorized.

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Trustees taking control of district. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

7699 Organization.

Atty. Gen. Opinion. See AG Op Feb. 28, '40

7700 Power and duties of trustees.

Good faith presumption. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

Trustees taking control of district—effect. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

CHAPTER 358.1

DRAINAGE REFUNDING BONDS

7714.23 Limitation of action.

Time limit to question legality of bonds.

Waller v Pritchard, 201-1364; 202 NW 770

7714.25 Interpretative clause.

Atty. Gen. Opinion. See '28 AG Op 346

CHAPTER 359

INDIVIDUAL DRAINAGE RIGHTS

7723 Appeal—notice.

Proper service. A statute which distinctly provides that a notice, e. g., a notice of appeal, shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over fourteen years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under §7133.

In re Sioux City Yards, 222-323; 268 NW 18

7736 Drainage in course of natural drainage.

Surface waters, city's power to regulate. See under §5752

Scope of section. This section has no reference to, nor does it purport to limit, the right of contract for private drainage.

Salinger v Winthouser, 200-755; 205 NW 309

Right of discharge. Principle asserted that a landowner may freely avail himself of the topography of his land, and may discharge his surface waters wherever gravitation naturally carries them, without further concern or obligation on his part.

Thompson v Board, 201-1099; 206 NW 624

Private drainage—pleadings. On the issue whether a dominant estate holder may maintain a tile drainage system on his land, and by means thereof discharge waters on the land of

a servient estate holder, a plea should not be stricken which asserts, in substance, that the tile system in question was constructed at large cost, under an agreement with a former owner of the servient estate, and was open, visible, and notorious to all subsequent purchasers of the latter estate.

Salinger v Winthouser, 200-755; 205 NW 309

Relative rights of dominant and servient landowners. Principle reaffirmed that the owner of servient lands may not substantially interfere with the natural passage of water from dominant lands, but that, after such water has passed upon the servient lands, the owner of such latter lands may handle the water as he pleases, so long as no damage results to the dominant land.

Miller v Perkins, 204-782; 216 NW 27

Natural watercourses—duty to maintain. It is the duty of the owner of a servient estate to maintain free from obstruction the natural watercourses even tho they have no well defined banks.

Heinse v Thorborg, 210-435; 230 NW 881

Unlawful diversion on one's own land. The owner of a dominant estate may not legally divert material quantities of surface waters from one natural watercourse on his land to another natural watercourse on his land, and thereby ultimately cast such diverted waters upon a public highway at a point where they would not naturally flow, nor may the board of supervisors, in order to dispose of said diverted waters, legally construct and maintain a culvert in said highway at said point of diversion, and thereby cause said diverted waters to pass through the highway and upon the land of the servient estate (to its substantial damage), at places where it would not naturally flow.

Anton v Stanke, 217-166; 251 NW 153

Damages by surface waters—flowage increased by tile. Surface water collected by one landowner and drained by tile to the land of another's servient estate, where it is there conveyed by the latter's tile to the lands of a second servient estate, all through the natural course of drainage, is not such subject of damages as to entitle the third estate owner to equitable relief; especially when it is not shown that he was substantially damaged thereby.

Johannsen v Otto, 225-976; 282 NW 334

Artificial channel—maintenance on own land. A landowner cannot be enjoined from maintaining a ditch constructed wholly upon his own land and which expedites flow of water and discharges it at practically the same point where the water was discharged under its natural course.

Fennema v Nolin, (NOR); 212 NW 702

Diverting surface water—injunction. In equity action to enjoin defendant from diverting surface water from its alleged natural course onto lands of plaintiff, evidence held to show that plaintiff failed to sustain burden of establishing case by preponderance of evidence, in that he failed to establish that water from defendant's land, judged from the natural topography of said land, would flow onto the land of plaintiff.

Schemmel v Kramer, (NOR); 228 NW 561

Surface waters—dominant and servient estates—artificial ditch—injunction. The owner of the dominant estate has the right to have the surface waters accumulating thereon flow unobstructed in the usual and natural course of drainage upon the adjoining lower or subservient estate, but he may not create an artificial ditch on the servient estate, nor enjoin the servient owner from filling such artificial ditch.

Clark v Pierce, 224-1068; 277 NW 711

Obstruction of tile—damages. Evidence held insufficient to establish a claim for damages consequent on the obstruction of a drainage tile.

Besler v Greenwood, 202-1330; 212 NW 120

Enjoining obstructed tile. A landowner who lays his tile in the general course of natural drainage and discharges the same at his boundary line into a natural watercourse, may enjoin the adjoining landowner from so obstructing said natural watercourse as to impede the flow of water from the tile.

Besler v Greenwood, 202-1330; 212 NW 120

Obstructions—mandatory removal—limitations. A mandatory injunction requiring the removal of obstructions from a watercourse should be limited to removal of what the enjoined party placed therein.

Fennema v Nolin, (NOR); 212 NW 702

Obstructions—effect. Principle recognized that the appreciable raising of the water level of streams by dams constitutes an invasion of the rights of an injured landowner.

Whittington v City, 202-442; 210 NW 460

Indemnity for operation of dam. A contract which provides that one joint owner of a dam to whom it is turned over for joint mutual use shall hold the other joint owner harmless from any damages arising from the "operation" thereof imposes upon the operator of the dam, as between said joint owners, liability for damages to overflowed property owners, consequent on the general maintenance of the dam above the authorized level, even tho the other joint owner does reserve some control over the movable parts of said dam in order to avoid such damages.

Ellis Co. v Iowa Co., 204-1325; 217 NW 262

Injunction. Highway authorities may cause a property owner to be enjoined from main-

taining on his premises a dam which obstructs the free flow of surface waters in their natural course across the highway.

Herman v Drew, 216-315; 249 NW 277

Levee construction—injunction denied—evidence. Evidence justified denying to landowner a decree for injunction against construction and maintenance by private persons of levee on adjoining property when landowner's claims were that levee would result in essential interference with flood waters or appreciably increase their volume or height along owner's property or, that levee would prevent any flood water overflowing the dike protecting landowner's property, from running back to river when flood waters receded.

Kellogg v Hottman, 226-1256; 286 NW 415

Repair of dike—estoppel. In an action to enjoin the repair of a dike originally constructed in connection with drainage system created jointly by adjoining landowners, including plaintiff's predecessor in title, and used with knowledge of plaintiff for over 20 years without objection, principles reaffirmed (1) that where there is proof of more than mere user, the statute providing that an easement cannot be established by proof of mere user alone does not apply, and (2) that the owner of a dominant estate may by consent, express or implied, estop himself from insisting upon adherence to the principle that the owner of a servient estate has no right to interfere with the natural flow of water in a well-defined course so as to cast it back upon the dominant estate.

Dodd v Aitken, 227-679; 288 NW 898

Interference with surface drainage. The maintenance of a dike along lands for the purpose of warding off backwater from a river may not be enjoined by an adjoining landowner unless he shows (1) that his lands constitute the dominant estate and the diked lands the servient estate, and (2) that the dike materially and substantially interferes with surface drainage; and high lands which are last covered by backwater from the river are not servient to adjoining low lands which are first covered by such backwater.

Downey v Phelps, 201-826; 208 NW 499

Perpetuation of unlawful drainage by bridge. The board of supervisors may not, by the construction and maintenance of a culvert in the public highway, supplement, continue and perpetuate an unlawful and material diversion of surface waters by a dominant estate holder, all to the substantial damage of the servient estate holder.

Anton v Stanke, 217-166; 251 NW 153

Drainage of surface waters. Road authorities will not be held estopped from carrying surface waters across a public highway in the course of natural drainage because of the fact that for more than ten years they have unsuccessfully attempted to divert such waters from said natural course of drainage, the landowner affected not having changed his position because of such unsuccessful efforts.

Schwartz v County, 208-1229; 227 NW 91

Damages—original or continuing. Where a bridge which spanned a natural watercourse or drain across a public highway was removed and replaced by the public authorities with a solid and permanent earth embankment, the injury or hurt to nearby lands, from flood water consequent on said change in the highway, must be deemed original damages which mature upon completion of the embankment—or at least on the occurrence of substantial damages consequent on the change. It follows that the maintenance of said embankment may not be legally questioned by action commenced after the lapse of five years from the maturity of said damages.

Thomas v Cedar Falls, 223-229; 272 NW 79

Nonestoppel to abandon artificial course of drainage. A railway company which, for a great number of years, has unsuccessfully attempted to drain surface waters along the line of its right of way (which was slightly counter to the natural course of drainage) is under no legal obligation to continue to maintain such unsuccessful drain, but may abandon it, and conduct such waters under its tracks in the natural course of drainage.

Hinkle v Railway, 208-1366; 227 NW 419

Overflow damage. In landowner's action against railroad for damage to crops, resulting from overflow, where record showed plans and specifications for drainage ditch did not require railroad to lengthen bridge span, railroad's full compliance with requirements barred recovery.

Kellogg v Railway, (NOR); 239 NW 557

Natural flow—contract to change. Adjoining landowners, as between themselves, may validly contract for ditches and dikes which will free the servient estate from the burden of natural drainage, and the right, if not abandoned, to have such ditches and dikes maintained will pass to subsequent owners of the land. But he who alleges such contract must establish the same by clear and satisfactory evidence.

Young v Scott, 216-1253; 250 NW 484

Increased flowage consequent on nonnegligent execution of expert plans. Damages to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria; especially when the damage occurs at the converging point of natural watercourses.

Cole v City, 212-1270; 232 NW 800

Eminent domain—compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water;
2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts;
3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v Fairfield, 213-1187; 240 NW 628

Assessments for common outlet—basis of benefits. Ample basis for assessing lands within a public drainage district for benefits in order to defray the cost of maintaining or enlarging an outlet which is the common outlet of said district and of other districts, is found in the fact that, by the statutory establishment of said district, the landowners within the district acquired an extraordinary right which they could not acquire under any other statute or have under the common law, to wit: The right to gather together the surface waters on said lands, and to cast them, through a materially shortened and straightened ditch, and in abnormally increased volume, and with abnormally increased velocity, upon the servient lands of lower districts, to the substantial damage of said latter lands.

Ward v Board, 214-1162; 241 NW 26

Laterals—statutory right to use. A landowner who has been assessed for the cost of a drainage improvement may construct, wholly upon his own land, ditches for the purpose of carrying his surface waters into a lateral which has been located upon his land, even tho said lateral may be overtaxed by said surface waters to the damage of lower landowners.

Dullard v Phelan, 204-716; 215 NW 965

Creation by ancient grantors—effect. An owner of land may not, except with the consent of all interested parties, question a visible and permanent drainage easement imposed upon the land by his ancient grantors.

Ehler v Stier, 205-678; 216 NW 637

Pollution—limitation on right. Principle recognized that the right of a riparian owner to cast refuse into a natural stream may be quite materially limited after a portion of his land has been condemned for a public purpose.

Wheatley v City, 213-1187; 240 NW 628

Surface waters—damages—evidence. Evidence held to justify the court in submitting to the jury the question of damages resulting from the seepage of surface waters into the wall of a building.

Dravis v Sawyer, 218-742; 254 NW 920

7737 Drainage connection with highway.

Obstructions. Principle reaffirmed that a property owner may not legally place obstructions within a public highway and thereby interfere with the drainage of surface waters across such highway.

Adams County v Rider, 205-137; 218 NW 60

CHAPTER 363

MILLDAMS AND RACES

7767 Prohibition—permit.

Atty. Gen. Opinions. See '28 AG Op 272, 333; '32 AG Op 121; '34 AG Op 489; '36 AG Op 109

7768 Application for permit.

Atty. Gen. Opinion. See '25-26 AG Op 466

7769 Notice of hearing.

Atty. Gen. Opinion. See '32 AG Op 121

7775 Permit fee—annual license.

Atty. Gen. Opinions. See '28 AG Op 415; '30 AG Op 284; '34 AG Op 489

7776 Construction and operation.

Atty. Gen. Opinion. See '36 AG Op 109

7780 Action to collect fees.

Atty. Gen. Opinion. See '30 AG Op 284

7782 Nuisance.

Atty. Gen. Opinion. See '36 AG Op 109

7783 Condemnation—petition.

Atty. Gen. Opinion. See '25-26 AG Op 466

Compensation—protection of right. Injunction will lie to enjoin the construction of a dam and the consequent taking by overflow of private property for the public use, until the damages are paid; and this is true even tho the taker is solvent.

Scott v Price Bros. Co., 207-191; 217 NW 75

7787 Oath—assessment of damages—costs.

Indemnity for operation of dam. A contract which provides that one joint owner of a dam to whom it is turned over for joint mutual use, shall hold the other joint owner harmless from any damages arising from the "operation" thereof, imposes upon the operator of the dam, as between said joint owners,

liability for damages to overflowed property owners consequent on the general maintenance of the dam above the authorized level, even tho the other joint owner does reserve some control over the movable parts of said dam, in order to avoid such damages.

Ellis Park v Iowa Co., 204-1325; 217 NW 262

7792 Revocation or forfeiture of permit.

Atty. Gen. Opinions. See '30 AG Op 77; '36 AG Op 109

7793 Legislative control.

Atty. Gen. Opinion. See '36 AG Op 109

CHAPTER 364

WATER-POWER IMPROVEMENTS

7797 Eminent domain.

Conveyance in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

CHAPTER 365

EMINENT DOMAIN

7803 Exercise of power by state.

Discussion. See 17 ILR 374—Public building construction

Atty. Gen. Opinion. See '34 AG Op 667

Condemnation by state highway commission. The state highway commission has no authority to condemn for primary road purposes the ornamental grounds or orchard of an owner, without his consent.

Hoover v Highway Com., 207-56; 222 NW 438

Construction of wharf—paramount right of state. The construction by the state of a wharf below high watermark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Compensation — abutting tract — connected farming operation—instruction. In a condemnation action where an 80-acre tract abutting and farmed in connection with, but only partly owned by the owner of the farm involved in condemnation, an instruction that no damage to the abutting 80 acres could be assessed, but that the jury could consider the farming control advantage of the two tracts, while not approved, held not prejudicial.

Cutler v State, 224-686; 278 NW 327

Liberal condemnation verdict — supporting evidence—finality on appeal. A verdict of $4,000, in condemnation of a small tract of land, including the buildings, improvements, and shade trees, for purpose of rounding a highway corner, while perhaps liberal, will not, when evidence exists to support it, be interfered with on appeal as excessive.

Cutler v State, 224-686; 278 NW 327

Compensation—instructions— jurors' experience. An instruction in eminent domain proceedings that jurors have the right to weigh the testimony of experts as to values in the light of their own experience is not subject to the vice that they were told to substitute their own knowledge of values.

Cutler v State, 224-686; 278 NW 327

Instructions—condemnation—highway used for lawful purpose—unsupported issue. A requested instruction to the effect that in arriving at compensation the law presumes that the highway to be built would be used for a lawful purpose is properly refused when there is no claim that the highway would be unlawfully used.

Cutler v State, 224-686; 278 NW 327

Necessity for condemnation — instructions. In the absence of an issue thereon, there is no occasion whatever for the court, in eminent domain proceedings, to instruct on the subject of the necessity for such condemnation.

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled

to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7804 On behalf of federal government.

Atty. Gen. Opinion. See '34 AG Op 667

7806 Right conferred.

Atty. Gen. Opinion. See '32 AG Op 100

Public property taken for public use. The public property of the state may, under proper circumstances, constitute private property within the meaning of the federal constitution prohibiting the taking of private property for public use without just compensation; and it does not matter that the taking is by one exclusively engaged in interstate commerce. Whether the mere "use" of such public property is "a taking", quaere.

State v Pipe Line, 216-436; 249 NW 366

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

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Keokuk County v Reinier, 227-499; 288 NW 676

7807 Right to purchase.

Compromise settlement. The acceptance by a property owner, after condemnation and assessment, and while the amount of damages was in controversy, and before the public authorities had taken possession of the land, of an amount less than had been assessed, and the execution of a deed to the right of way, in which deed the amount received is itemized as to (1) right of way, (2) fences, and (3) damages, constitute a full settlement, and preclude recovery of the difference between the assessment and the amount so accepted.

Burrow v County, 200-787; 205 NW 460

7808 Railways.

ANALYSIS

I CONDEMNATION OR ACQUISITION IN GENERAL

II RIGHTS ACQUIRED AND NATURE THEREOF

I CONDEMNATION OR ACQUISITION IN GENERAL

Deed—effect as to subsequently laid out streets. An ordinary railroad right of way deed simply grants to the railroad an easement, and works no impediment to the vesting in a municipality, subject to such easement, of streets subsequently laid out across such right of way; and especially so when the railroad company acquiesces in and recognizes the statutory dedication to the public.

Ackley v Elec. Co., 206-533; 220 NW 315

II RIGHTS ACQUIRED AND NATURE THEREOF

Nonreversion of right of way obtained by deed. A railway right of way obtained from the owner by full warranty deed and not by condemnation does not, by nonuser for the statutory eight years, revert to the owner of the tract from which such right of way was taken.

Montgomery County v Case, 212-73; 232 NW 150

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7810 Limitation on right of way.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

CHAPTER 366

PROCEDURE UNDER POWER OF EMINENT DOMAIN

7822 Procedure provided.

ANALYSIS

I CONDEMNATION IN GENERAL
II PROPERTY SUBJECT TO CONDEMNATION
III PROCEDURE IN GENERAL

I CONDEMNATION IN GENERAL

Power not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

Inadvertent but harmless misdescription of land. Inadvertently omitting from instructions, in eminent domain proceedings, a minor portion of the land involved, does not constitute reversible error when otherwise the entire integral tract was consistently and persistently treated throughout the trial as the land in controversy, and when it is obvious that the jury never discovered the inadvertent error of the court.

Sherwood v Reynolds, 213-539; 239 NW 137

Materially destroying access to property. A substantial interference by a city with access to property by means of a public street constitutes a taking of private property for public use, even tho no part of the physical property of the property owner is taken, and the city must respond in damages for such taking.

Nalon v City, 216-1041; 250 NW 166

Trespass not a "taking". A landowner may not say that his land was taken for public use because in cleaning out a public ditch as a repair thereof, the contractor wrongfully distributed the dirt beyond the right of way line of the ditch as originally constructed.

Payne v Drainage Dist., 223-634; 272 NW 618

II PROPERTY SUBJECT TO CONDEMNATION

Highway establishment—removal of building. A "small" privy is not a "substantial, permanent, and valuable building" such as to render property exempt from condemnation.

Junkin v Knapp, 205-184; 217 NW 834

III PROCEDURE IN GENERAL

Appeal—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v City, 227-382; 288 NW 399

7824 Application for condemnation.

Joint application. A joint application by different owners is allowable when the municipality seeking to condemn does not object to such joinder on appeal. (Under §1999, C., '97.)

Longstreet v Town, 200-723; 205 NW 343

"Owner" defined. The purchaser of land under an executory contract is an "owner".

Millard v Mfg. Co., 200-1063; 205 NW 979

Person entitled to compensation—burden to show title. A party who claims title to land and consequently the right to compensation for its appropriation to a public use, must establish good title in himself irrespective of the weakness of the title of the appropriating municipality which also claims title to the land.

Montgomery County v Case, 212-73; 232 NW 150

7825 Commission to assess damages.

Atty. Gen. Opinion. See '30 AG Op 184

Protection of right—injunction. Injunction will lie to enjoin the construction of a dam and the consequent taking by overflow of private property for the public use, until the damages are paid; and this is true even tho the taker is solvent.

Scott v Price Bros., 207-191; 217 NW 75

Compensation—excessive verdict. Evidence held to reveal a grossly excessive verdict on a condemnation for highway purposes.

Jenkins v Highway Com., 208-620; 224 NW 66

7829 Notice of assessment.

Taking of new land—who entitled to notice. If in the repair of a public ditch or drain, new land be taken for use by the public, the owners thereof only need to be served with notice of condemnation proceedings.

Payne v Drainage Dist., 223-634; 272 NW 618

7830 Form of notice.

Timely claim. A landowner who, in eminent domain proceeding for a public road, is entitled to a specified time after notice in which to file his claim for damages, and who appears in said proceeding in response to a fatally de-

fective notice, is entitled to said specified time after he so appears, in which to file his claim for damages.

Witham v Union Co., 202-557; 210 NW 535

7835 Appraisement—report.

ANALYSIS

I ASSESSMENTS IN GENERAL
II DAMAGES IN GENERAL
III RECOVERABLE ELEMENTS OF DAMAGES
IV NONRECOVERABLE ELEMENTS OF DAMAGES
V MEASURE OF DAMAGES
VI EVIDENCE AND WITNESSES IN GENERAL

I ASSESSMENTS IN GENERAL

Governmental agency to be treated as individual.

Welton v Highway Com., 211-625; 233 NW 876

Assessment rolls as evidence. In eminent domain proceedings, the duly signed assessment roll of the property in question is admissible for the purpose of showing the assessed value.

Duggan v State, 214-230; 242 NW 98

Presumptively lawful use — instructions. Damages in eminent domain proceedings for a public road must be assessed on the presumption that the highway will be lawfully used, and the court should, on request, so instruct.

Duggan v State, 214-230; 242 NW 98

Sworn assessment roll competent for impeaching purposes.

Welton v Highway Com., 211-625; 233 NW 876

Duggan v State, 214-230; 242 NW 98

II DAMAGES IN GENERAL

Location of crossing. Whether an underground crossing placed in a grade was placed at the only feasible point is quite immaterial on the issue of damages in condemnation proceedings.

Kemmerer v Highway Com., 214-136; 241 NW 693

Inadequacy of crossing. In eminent domain proceedings for a public highway, the inadequacy of an underground cattleway placed in the grade, by the condemnor, may be shown.

Kemmerer v Highway Com., 214-136; 241 NW 693

Instructions in re speculative damages. Instructions in eminent domain proceedings held not subject to the vice that they emphasized evidence tending to prove speculative damages.

Kemmerer v Highway Com., 214-136; 241 NW 693

Finality of award. An award of damages in condemnation proceedings is conclusively presumed to include all damages, present and future, which may be sustained by reason of the proper use of the condemned land.

Wheatley v City, 213-1187; 240 NW 628

Improper addition of interest. It is improper for the court in the trial of an appeal in eminent domain proceedings to direct the jury to add to their verdict interest from the date of the taking, such direction being an assumption by the court that the jury would return a verdict for damages in excess of the damages awarded by the condemnation jury.

Welton v Highway Com., 211-625; 233 NW 876

Compensation—dual methods to determine. Damages (or compensation) for land condemned under eminent domain, and belonging to the same person, are determinable:

1. When the condemnation is from one distinct tract, on the basis of the difference between the reasonable market value of said entire tract immediately before and after the condemnation.
2. When the condemnation is from two (tho contiguous) tracts, each of which is used independently of the other and for a purpose not common to both, on the same basis except that the damage to each independent tract is determined separately.

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

Nonexcessive verdict. Verdict of $5,733 in eminent domain proceedings held nonexcessive.

Sherwood v Reynolds, 213-539; 239 NW 137

Compensation—nonexcessive verdict. In a condemnation proceeding where the evidence shows a strip of land containing 8.12 acres lying parallel and adjacent to a railroad running diagonally across a quarter section of land is taken for highway right of way and which strip includes a well, part of a feed lot, and other improvements, a verdict for damages in the sum of $4,750 cannot be held excessive by the supreme court without substituting its judgment for that of the jury.

Moran v Highway Com., 223-936; 274 NW 59

Taking gravel—injury to mortgage security —measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt County, 224-841; 277 NW 715

Assessment of damage. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed

for the land appropriated is peculiarly one for the jury.

Stoner v Highway Com., 227-115; 287 NW 269

Verdict not excessive for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80-acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Highway Com., 227-115; 287 NW 269

Proceedings to take property—power of court. The verdict of a common-law jury in eminent domain proceedings is subject to the same review by the court for inadequacy or excessiveness as other verdicts in other proceedings. Record in highway condemnation proceedings reviewed, and held verdict so grossly excessive as to evidence passion and prejudice.

Campbell v Highway Com., 222-544; 269 NW 20

Highway construction—interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

III RECOVERABLE ELEMENTS OF DAMAGES

Discussion. See 12 ILR 286—Attorney fees as just compensation

Compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water.
2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts.
3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v City, 213-1187; 240 NW 628

"Inconvenience" as element. The inconvenience of driving stock across a highway, consequent of the condemnation of said highway through the farm, is an element which should be given due consideration in determining the market value of the farm as a whole immediately following the condemnation.

Cory v State, 214-222; 242 NW 100

Disturbance of peace and quiet as element. In condemnation proceeding to acquire ground for highway purposes where trees taken from plaintiff were left standing along highway, testimony showing that peace and quiet of plaintiff's home was disturbed by passers-by who stopped under trees, was not incompetent on the ground that it was not a proper element of damage, it being a well-settled rule that the landowner may show all detrimental elements affecting value and that he may also show the condition the property would be in after the condemned strip had been appropriated and used for the purposes for which it was taken.

Stoner v Highway Com., 227-115; 287 NW 269

Cost of driving stock across highway. While a claimant for damages in eminent domain proceedings for the widening of an existing highway may show the fact, if it be a fact, that an additional burden will be cast on the land in the difficulty of driving stock across the highway, yet he may not show a definite sum which this additional burden will annually entail as cost in the future.

Randell v Highway Com., 214-1; 241 NW 685

Cost of removing weeds from highway. While a claimant for damages in eminent domain proceedings for the condemnation of a highway may show the fact that there will be an additional burden on the land arising from the statutory duty to destroy the weeds on the highway, yet he may not show, without any foundation therefor, a definite sum which in his opinion represents the cost of removing such weeds from the highway in the future.

Randell v Highway Com., 214-1; 241 NW 685

Verdict not excessive for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80-acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Highway Com., 227-115; 287 NW 269

IV NONRECOVERABLE ELEMENTS OF DAMAGES

Noncontiguous tracts as one farm. In the condemnation of land for highway purposes, the record may be such as to present a jury question whether noncontiguous tracts are being used as one farm, so that the damages resulted to it as an entirety, or whether the land was in such separate tracts that the damages should be assessed to each tract separately.

Paulson v Highway Com., 210-651; 231 NW 296

Diversely owned tracts. In condemnation of land for a right of way solely through land owned by two parties jointly, the damages must not be computed on the basis of treating as one farm said jointly owned tract and another adjoining tract owned by one of the parties, individually, even tho both of said tracts are then, and for a number of years have been, leased and used as one farm.

Duggan v State, 214-230; 242 NW 98

Evidence of amount and cost of fencing incompetent. In establishing the damages for the taking of part of a farm for highway purposes, evidence of the amount of fencing which the landowner claims will be necessary because of the taking and the original and maintenance cost of such fencing is incompetent.

Dean v State, 211-143; 233 NW 36
Welton v Highway Com., 211-625; 233 NW 876
Randell v Highway Com., 214-1; 241 NW 685

Cost of removing and rebuilding existing fence. A claimant for damages in eminent domain proceedings for a public highway may show the reasonable cost of removing and rebuilding a definitely described existing fence when such removal and rebuilding is made necessary by the condemnation; but the jury must be distinctly told that the evidence of such costs is in the case solely (1) to indicate, if it does, that the damages to the land are substantial, and (2) to assist, if it will, in explaining, supporting, or denying the estimates made of the value of the property, and not to be added to the damages otherwise found by the jury as the difference between the value of the farm as a whole before and after the condemnation.

Randell v Highway Com., 214-1; 241 NW 685

Destruction of, or necessity to build, fences. Instructions to the effect that the destruction of fences, and the necessity to build new fences consequent on eminent domain proceedings are proper elements to be considered in determining the market value of the remaining farm, are not subject to the construction that the jury is thereby given the right to add to the otherwise determined market value some sum as compensation for the destruction of fences and for the necessity to build new fences.

Cory v State, 214-222; 242 NW 100

Inconvenience resulting from taking—unallowable damages. The jury must be instructed, on request, in eminent domain proceedings for highway purposes, that damages must not be allowed on the theory that the highway through the landowner's farm will be used illegally, with resulting inconvenience to the landowner; likewise an instruction to the effect that the jury must assess the damages on the presumption that the use would be lawful.

Welton v Highway Com., 211-625; 233 NW 876

V MEASURE OF DAMAGES

Excessive award. An award of damages in condemnation proceedings will not be disturbed on appeal from the trial court unless such award is so extravagant as to be wholly unfair and unreasonable.

Longstreet v Town, 200-723; 205 NW 343
Wheatley v City, 213-1187; 240 NW 628

Excessive allowance — evidence. Evidence held insufficient to justify a holding that an allowance of $11,755 as damages for land taken for highway purposes was the result of passion and prejudice.

Shimerda v Highway Com., 210-154; 230 NW 335

Compromise settlement. The acceptance by a property owner, after condemnation and assessment, and while the amount of damages was in controversy, and before the public authorities had taken possession of the land, of an amount less than had been assessed, and the execution of a deed to the right of way, in which deed the amount received is itemized as to (1) right of way, (2) fences, and (3) damages, constitute a full settlement, and preclude recovery of the difference between the assessment and the amount so accepted.

Burrow v County, 200-787; 205 NW 460

Verdict—conclusiveness. In condemnation proceedings, a verdict for damages which is fairly within the range of the legitimate testimony is ordinarily conclusive on the appellate court, even tho the amount is concededly larger than a court itself would have granted, and even tho it appears that the jury substantially split the difference between the witnesses in their estimate of damages.

Cory v State, 214-222; 242 NW 100

Measure of damages. The measure of damages for injury resulting from the exercise of the right of eminent domain is the difference in value of the land as a whole immediately before and immediately after the injury occurs.

Millard v Mfg. Co., 200-1063; 205 NW 979
Welton v Highway Com., 211-625; 233 NW 876
Wheatley v City, 213-1187; 240 NW 628

Condemnation—measure of damages. Principle reaffirmed that the measure of damages for land condemned for right of way for an electric power line is the difference in the market value of the tract from which the land is taken, before and after the condemnation.

Evans v Iowa Co., 205-283; 218 NW 66

Compensation—measure of. The recoverable measure of damages to a farm, consequent on the condemnation of a highway right of way therethrough, is the difference in value of the farm as a whole before condemnation and the value immediately thereafter. It follows that the trial court on appeal cannot limit the jury solely to a consideration of the items of damages specifically alleged by the landowner in the petition filed under §7841-c1, C., '35 [§7841.1, C., '39].

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Taking gravel—injury to mortgage security—measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt Co., 224-841; 277 NW 715

Excessive condemnation award—jury verdict—reviewability. Generally the question of compensation in an eminent domain case is for the jury, but the supreme court will not hesitate to reverse where the record clearly shows excessive damages.

Luthi v Highway Com., 224-678; 276 NW 586

Liberal condemnation verdict — supporting evidence—finality on appeal. A verdict of $4,000, in condemnation of a small tract of land, including the buildings, improvements, and shade trees, for purpose of rounding a highway corner, while perhaps liberal, will not, when evidence exists to support it, be interfered with on appeal as excessive.

Cutler v State, 224-686; 278 NW 327

Disturbance of peace and quiet as element. In condemnation proceedings to acquire ground for highway purposes where trees taken from plaintiff were left standing along highway, testimony showing that peace and quiet of plaintiff's home was disturbed by passers-by who stopped under trees, was not incompetent on the ground that it was not a proper element of damage, it being a well settled rule that the landowner may show all detrimental elements affecting value and that he may also show the condition the property would be in after the condemned strip had been appropriated and used for the purposes for which it was taken.

Stoner v Highway Com., 227-115; 287 NW 269

Advantage not considered. In condemnation proceeding where land was taken for highway purposes, under the principle that advantage resulting from improvement of property taken by condemnation may not be taken into consideration in determining amount of plaintiff's damage, the defendant had no right to plead and prove matters relating to the manner of construction of the improvement which would tend to ameliorate damages.

Stoner v Highway Com., 227-115; 287 NW 269

Jury considering cost of bridges. Instruction on measure of damages for constructing drainage ditch, which instruction permitted jury to consider cost of bridges where such ditch bisects claimant's land, was not erroneous, and an allowance of $1,050 damages from construction of such ditch to a farm of 55 acres held not excessive.

Kerr v Tysseling, (NOR); 239 NW 233

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

VI EVIDENCE AND WITNESSES IN GENERAL

Conflicting evidence. The depreciation in the value of a farm as a whole because of the condemnation of a right of way thereover is necessarily a matter of estimation, and a verdict on supporting and conflicting testimony will not be disturbed. The amount of land taken is by no means the sole criterion.

Besco v Mahaska County, 200-684; 205 NW 459

Jurisdiction—insufficient showing of estoppel. Record reviewed, in eminent domain proceedings, and held insufficient to show that the county, through its board of supervisors, was estopped to assert that it had jurisdiction over an objector.

Witham v Union County, 202-557; 210 NW 535

Accessibility of farm to market. The defendant in eminent domain proceedings has the legal right, on the cross-examination of plaintiff's witnesses as to value, to show the distance of plaintiff's farm from the market and the kind of roads leading to such market.

Welton v Highway Com., 211-625; 233 NW 876

VI EVIDENCE AND WITNESSES IN GENERAL—concluded

Evidence—distance to markets. In a condemnation action, evidence as to distance from market centers and condition of old roads not admissible in determining damages.

Moran v Highway Com., 223-936; 274 NW 59

Evidence of value of separate parcels of single farm incompetent. A landowner will not be permitted, when part of his farm is being taken for highway purposes, to prove the value of different parcels of his farm before and after the taking.

Welton v Highway Com., 211-625; 233 NW 876

Evidence—benefits to mitigate damages. Where a strip of land lying parallel and adjacent to a railroad diagonally across a quarter section of land was condemned for highway right of way purposes, it was not error to exclude evidence of the beneficial final condition of the construction with reference to culverts, drains and water pipes from a well, offered for the purpose of mitigating damages, especially when such evidence proves only a favor of uncertain tenure granted to the landowner rather than a matter of absolute right.

Moran v Highway Com., 223-936; 274 NW 59

Examination of witness—form of question—valuation without benefits. In a condemnation proceeding, question propounded by landowner as to valuation immediately after condemnation, without referring in the question to benefits, is not prejudicial to condemnor and not erroneous, especially when court states correct measure of damages.

Moran v Highway Com., 223-936; 274 NW 59

Evidence—similar land sale prices. In a condemnation action, excluding evidence from one witness as to similar land sale prices but admitting the like evidence from another witness held not reversible error where both had testified as to values generally.

Moran v Highway Com., 223-936; 274 NW 59

Evidence—driving stock across highway. In condemnation proceeding to acquire ground to widen highway which divided plaintiff's farm, a hypothetical question asked of one witness as to whether the additional trouble experienced by plaintiff in driving his stock across highway, since it had been widened, would affect the values of the farm—although being a question of doubtful propriety, was related to a matter so simple and self-evident that the opinion of the witness could add no force or prejudicial effect thereto.

Stoner v Highway Com., 227-115; 287 NW 269

Witnesses—need for fence. In a condemnation action, denial of cross-examination of landowner by condemnor as to necessity of fencing held not reversible error when plat of property already in evidence settled question.

Moran v Highway Com., 223-936; 274 NW 59

Assessment as commissioner's personal judgment—cross-examination. In a condemnation action, permitting landowner to cross-examine a condemnation commissioner regarding the sworn assessment of damages as expressing his personal judgment held not error. (Distinguishing Winkelmans v Des Moines N.W. Ry. Co., 62 Iowa 11.)

Moran v Highway Com., 223-936; 274 NW 59

7839 Appeal.

ANALYSIS

I APPEAL IN GENERAL
II PARTIES TO APPEAL
III NOTICE

I APPEAL IN GENERAL

Consolidation of appeals. Separate appeals to the district court in eminent domain proceedings relative to the same award are properly consolidated.

Cenco v Northwestern Co., 203-1390; 214 NW 545

Appeal—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v City, 227-382; 288 NW 399

II PARTIES TO APPEAL

Defendants—eminent domain—bringing in necessary parties. In eminent domain proceedings on appeal from the award of the sheriff's jury, the court may permit the appellant landowner to amend, and bring in, and join equitable issue of ownership as to a portion of the property involved, with a stranger to the proceedings, and to try out such issue prior to trying out the issue of damages.

McCall v Highway Com., 217-1054; 252 NW 546

III NOTICE

Sufficiency of notice. A written notice of appeal from an award in eminent domain proceedings is sufficient, under this section, if it is addressed to the condemnor and to the sheriff and simply states that the landowner has taken an appeal to the district court of the county

in question from the award of the appraisers. The particularity required in an original notice of suit is by no means required.

O'Neal v State, 214-977; 243 NW 601

7841 Appeals—how docketed and tried.

Filing petition not jurisdictional. On appeal from an award in condemnation proceedings, the filing of a petition in the appellate court, at the time required by statute, is not jurisdictional.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

Erroneous docketing—effect. An applicant for condemnation of realty who erroneously causes its appeal from the award of the sheriff's jury to be docketed in the name of itself as plaintiff, and in the name of the landowner as defendant, and files petition, and thereby induces the landowner to file answer thereto, is in no position, after causing its own error to be corrected by a proper redocketing, either to demand the entry of judgment in accordance with its own offer to confess judgment, or to object to the action of the court in granting to the landowner (the proper plaintiff) a continuance over the term in which to file a proper petition.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

Appeal—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v City, 227-382; 288 NW 399

Burden of proof. A claimant for damages in eminent domain proceedings, who appeals to the district court from the award of the appraisers, has the burden of proof to establish his damages, and reversible error results from a failure so to instruct.

Randell v Highway Com., 214-1; 241 NW 685

Proceedings to take property — instructions in re benefits. In eminent domain proceedings, an instruction that the compensation allowed should not leave the landowner "poorer off or worse off or better off" because of the taking, is not subject to the vice of leading the jury to understand that in computing compensation, benefits accruing to the landowner because of the taking should be deducted, when the jury is repeatedly and explicitly told elsewhere in the instructions that they should not consider benefits.

Witt v State, 223-156; 272 NW 419

Assessment of damage—jury question. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed for the land appropriated is peculiarly one for the jury.

Stoner v Highway Com., 227-115; 287 NW 269

Disputed fact questions as to value. In a condemnation proceeding to acquire ground for highway purposes, the right of the jury to decide disputed fact questions as to value will not be interfered with by the supreme court, if there is evidence upon which the jury could reach the verdict it did reach.

Stoner v Highway Com., 227-115; 287 NW 269

7841.1 Pleadings on appeal.

Requirements. The petition need not state, on the subject of damages, anything more than the total amount of damages claimed.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Filing petition not jurisdictional. The filing by an appellant in eminent domain proceedings "on or before the first day of the term to which the appeal is taken" of a petition specifying the items of damages claimed and the amount thereof is purely procedural and, therefore, not jurisdictional.

O'Neal v State, 214-977; 243 NW 601

Filing petition not jurisdictional. On appeal from an award in condemnation proceedings, the filing of a petition in the appellate court, at the time required by statute, is not jurisdictional.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

Appeal to district court—damages pleaded specifically. In an appeal to district court from award of condemnation jury, the plaintiff must state specifically the items of damage and the amount thereof.

Stoner v Highway Com., 227-115; 287 NW 269

Right to amend pleading. A claimant for damages in condemnation proceedings may amend his pleadings and increase his demand for damages as in other actions.

Kemmerer v Highway Com., 214-136; 241 NW 693

Erroneous docketing — effect. An applicant for condemnation of realty who erroneously causes its appeal from the award of the sheriff's jury to be docketed in the name of itself as plaintiff, and in the name of the landowner as defendant, and files petition, and thereby induces the landowner to file answer thereto, is in no position, after causing its own error to be corrected by a proper redocketing, either to demand the entry of judgment in accordance with its own offer to confess judgment, or to object to the action of the court in granting to the landowner (the proper plaintiff) a con-

tinuance over the term in which to file a proper petition.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

Compensation — measure of. The recoverable measure of damages to a farm, consequent on the condemnation of a highway right of way therethrough, is the difference in value of the farm as a whole before condemnation and the value immediately thereafter. It follows that the trial court on appeal cannot limit the jury solely to a consideration of the items of damages specifically alleged by the landowner in the petition.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

7842 Question determined.

Verdict—passion and prejudice. A verdict in eminent domain proceedings will not be disturbed, even tho the amount suggests excessiveness, if it is well within the supporting evidence.

Kemmerer v Highway Com., 214-136; 241 NW 693

Judgment — insufficiency. Record entry in proceedings relative to eminent domain proceedings reviewed, and held, notwithstanding its recitals, not to constitute a judgment for damages, but to specify the conditions under which the plaintiff property owner would be entitled to a provisional injunction.

Wheatley v Fairfield, 221-66; 264 NW 906

Matters actually and potentially in issue. Two proceedings were consolidated for trial only, viz:

1. An action for injunction, general equitable relief, and specifically enumerated damages consequent on a trespass by a city in overflowing plaintiff's land, and

2. An appeal from an award in proceedings by the city to condemn said land. On the trial, plaintiff was awarded no judgment for the damages claimed by him in his equitable action because he made no attempt to establish them —probably on the assumption that he would be made whole by the payment of the final award in the condemnation proceedings.

But the city refused to pay the final award in the condemnation proceeding and abandoned said proceeding.

Plaintiff then commenced a new action for damages, including, inter alia, the identical damages formerly claimed in said equitable action. Held, all damages which plaintiff had suffered prior to the trial of said equitable action, whether they were then in issue or not, were res judicata.

Wheatley v Fairfield, 221-66; 264 NW 906

Value of land—selling price as evidence. The value of farm land, through which a highway right of way is sought to be condemned, cannot be competently shown by evidence of the recent sale price of similar land in a nearby community.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Value of land — amount of insurance. The amount of insurance carried on farm improvements, situated on a farm through which a highway right of way is sought to be condemned, does not constitute substantive evidence of the value of said farm, and is quite inadmissible for such purpose.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Disputed fact questions as to value. In a condemnation proceeding to acquire ground for highway purposes, the right of the jury to decide disputed fact questions as to value will not be interfered with by the supreme court, if there is evidence upon which the jury could reach the verdict it did reach.

Stoner v Highway Com., 227-115; 287 NW 269

Instruction—inadvisable but harmless. An instruction in eminent domain proceedings that the real right of which the property owner is deprived, and for which he is entitled to compensation, is the right to remain in undisturbed possession of his property, while ill-advised, may be quite harmless.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Condemnation — highway used for lawful purpose—unsupported issue. A requested instruction to the effect that in arriving at compensation the law presumes that the highway to be built would be used for a lawful purpose is properly refused when there is no claim that the highway would be unlawfully used.

Cutler v State, 224-686; 278 NW 327

Assessment of damage. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed for the land appropriated is peculiarly one for the jury.

Stoner v Highway Com., 227-115; 287 NW 269

Excessive condemnation award—jury verdict—reviewability. Generally the question of compensation in an eminent domain case is for the jury, but the supreme court will not hesitate to reverse where the record clearly shows excessive damages.

Luthi v Highway Com., 224-678; 276 NW 586

Compensation — abutting tract — connected farming operation—instruction. In a condemnation action where an 80-acre tract abutting and farmed in connection with, but only partly owned by the owner of the farm involved in condemnation, an instruction that no damage

to the abutting 80 acres could be assessed, but that the jury could consider the farming control advantage of the two tracts, while not approved, held not prejudicial.

Cutler v State, 224-686; 278 NW 327

Excessive award—farm already bisected. A $6,000 verdict, being one-fourth the value of a 212-acre farm, for taking 9.63 acres of land for highway purposes, at least part of which was permanently pasture land, from a farm already bisected by a railroad, is so grossly excessive as to indicate passion and prejudice, and when so appearing will, in condemnation proceedings, as in negligence cases, be set aside.

Luthi v Highway Com., 224-678; 276 NW 586

Liberal condemnation verdict — supporting evidence — finality on appeal. A verdict of $4,000, in condemnation of a small tract of land, including the buildings, improvements, and shade trees, for purpose of rounding a highway corner, while perhaps liberal, will not, when evidence exists to support it, be interfered with on appeal as excessive.

Cutler v State, 224-686; 278 NW 327

Compensation—instructions—jurors' experience. An instruction in eminent domain proceedings that jurors have the right to weigh the testimony of experts as to values in the light of their own experience is not subject to the vice that they were told to substitute their own knowledge of values.

Cutler v State, 224-686; 278 NW 327

Appeal—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v City, 227-382; 288 NW 399

7844 Right to take possession of lands.

Right to interest. In eminent domain proceedings where the property owner recovers on appeal more than was awarded by the sheriff's jury, interest should be allowed on the verdict from the date when the condemnor takes possession of the land.

Beal v Highway Com., 209-1308; 230 NW 302; 36 NCCA 196

7847 Deposit pending appeal.

Time deposit works conversion. A sheriff is guilty of instant conversion and a breach of his bond when he deposits in a bank funds properly coming into his hands in unadjudicated condemnation proceedings and takes from the bank a certificate of deposit which is payable at a definite time in the future, because he thereby fails so to "hold" said funds as commanded by statute as to enable himself to account for such funds whenever the proceedings are finally determined; and in such case the question of due care or negligence in making the deposit is quite immaterial.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

7851 Removal of condemnor.

Injunction — conditional order for — compliance—effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

7852 Costs and attorney fees.

Atty. Gen. Opinion. See '36 AG Op 240

ANALYSIS

I Costs in General
II Attorney Fees

I COSTS IN GENERAL

No annotations in this volume

II ATTORNEY FEES

Attorney fees. A statutory provision for the taxation, in eminent domain proceedings, of attorney fees in favor of a successful party, is no authority for such taxation in another like proceeding under a separate and different statute which makes no provision for such taxation.

Nichol v Neighbour, 202-406; 210 NW 281

Prejudicial error—affirmative showing. Affirmative prejudicial error appears from a record which shows that the trial court, acting without a jury, in a law action involving the allowance of attorney fees, received evidence of both allowable and unallowable services.

Iowa Co. v Scott, 206-1217; 220 NW 333

II ATTORNEY FEES—concluded

Prohibition of taxation of attorney fees—retroactive application. A statute prohibiting the taxation of attorney fees in eminent domain proceedings instituted by the state applies to a proceeding pending but undetermined at the time of the enactment.

Welton v Highway Com., 211-625; 233 NW 876

Condemnation by state — attorney fees unallowable. Attorney fees are unallowable in eminent domain proceedings instituted by the state.

Welton v Highway Com., 211-625; 233 NW 876

Attorney fees not allowable against state. Attorney fees cannot be taxed against the state in any eminent domain proceedings wherein the state is an applicant.

Fitzgerald v State, 220-547; 260 NW 681

7853 Refusal to pay final award.

Atty. Gen. Opinion. See '36 AG Op 240

Attorney fees—limitation. One who seeks to condemn private property for a public use, but who, after appeals are taken from the award of the sheriff's jury, and before trial thereof, dismisses his condemnation proceedings and abandons all claim to the property, remains liable to a taxation of reasonable attorney's fees in favor of property owners; but such fees must be based solely on services rendered on the appeal.

Iowa Elec. v Scott, 206-1217; 220 NW 333

Injunction—conditional order for—compliance—effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

Abandonment of proceedings—attorney fees as damages—recovery. A condemnor who appeals from the district court award, and, on affirmance, refuses to pay the award and take the property, may very properly be held liable to the property owner for the latter's reasonable attorney fees in the supreme court as a part of the actual damages suffered by the landowner because of the futile procedure.

Wheatley v Fairfield, 221-66; 264 NW 906

Abandonment of proceedings—acts constituting. Proceedings by a city for the condemnation of privately owned lands, which the city had overflowed by the erection of a dam on its own property, must be deemed wholly abandoned by the acts of the city, (1) in refusing to pay the adjudged damages, (2) in passing a resolution of abandonment, and (3) in ordering the water drained from said land.

Wheatley v Fairfield, 221-66; 264 NW 906

CHAPTER 367

REVERSION

7861 Relocation of railway.

Statutory reversion. Where a deed conveyed a strip of land to a railroad company "to have and to hold for all purposes incident and necessary to the construction and operation of a railroad * * * thereon", and where the statute provides that if a railway right of way is abandoned for railway purposes by relocation of the line of railway, it shall revert to the persons who, at the time of the abandonment, are owners of the tract from which such abandoned right of way was taken, and tho a railway under such circumstances deeded the property to an individual, such conveyance by the railway company conveyed nothing to the grantee and the fee title reverted to the owners of the land from which right of way was originally taken, and such owners may quiet title in themselves.

Keokuk County v Reinier, 227-499; 288 NW 676

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the land owner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7862 Failure to operate or construct railway.

Nonreversion of right of way obtained by deed. A railway right of way obtained from the owner by full warranty deed and not by condemnation does not, by nonuser for the statutory eight years, revert to the owner of the tract from which such right of way was taken.

Montgomery Co. v Case, 212-73; 232 NW 150

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7863 Quasi-public roads and rights of way.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7864 Lands for highway improvement.

Atty. Gen. Opinion. See '32 AG Op 67

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

TITLE XVIII

PUBLIC UTILITIES

CHAPTER 368

IOWA STATE COMMERCE COMMISSION

7869 Rules, forms, and service.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

7873 Free transportation.

Atty. Gen. Opinion. See '36 AG Op 148

7874 General jurisdiction.

Discussion. See 8 ILB 12—A study of the railroad commission in the state of Iowa

Powers given to state commerce commission —limitation. The state commerce commission (board of railroad commissioners) has no powers except those expressly given and those incidental to or implied in the power given.

Huxley v Conway, 226-268; 284 NW 136

Injunction. Injunction will lie by the state on the relation of the board of railroad commissioners to enjoin the operation of a motor carrier over the public highways, contrary to the orders of said board.

State v Holdcroft, 207-564; 221 NW 191

Continuing shipment. An order requiring a railway to accept in this state loaded cars which have arrived from another state through a terminated interstate shipment, and to transport said cars without reloading, is valid and enforceable. 152 Iowa 317 affirmed.

Chicago, Mil. Ry. Co. v State, 233 US 334

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

7875 Inspection—notice to repair.

Powers given to state commerce commission —limitation. The state commerce commission (board of railroad commissioners) has no powers except those expressly given and those incidental to or implied in the power given.

Huxley v Conway, 226-268; 284 NW 136

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in alter-

ing the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

7877 Changes in operation and improvements.

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

7883 Jurisdiction of courts to enforce order.

Constitutionality of injunctional feature.

State v Fray, 214-53; 241 NW 663; 81 ALR 286

State v Howard, 214-60; 241 NW 682

Injunction. Injunction will lie by the state on the relation of the board of railroad commissioners to enjoin the operation of a motor carrier over the public highways, contrary to the orders of said board.

State v Holdcroft, 207-564; 221 NW 191

7888 Remitting penalty.

Powers given to commerce commission—limitation. The commerce commission (board of railroad commissioners) has no powers except those expressly given and those incidental to or implied in the power given.

Huxley v Conway, 226-268; 284 NW 136

7890 Interstate freight rates.

Discussion. See 20 ILR 128—Federal court jurisdiction

7904 Rights and remedies not exclusive.

Pleading carrier's degree of care and res ipsa loquitur. A general allegation of negligence in a petition followed by a further allegation of negligence, dealing with the degree of care required of carriers, did not prevent application of the doctrine of res ipsa loquitur.

Peterson v De Luxe Co., 225-809; 281 NW 737

CHAPTER 369

COMMERCE COUNSEL

7913 Appointment—term.

Atty. Gen. Opinion. See '34 AG Op 478

7916 Political activity.

Atty. Gen. Opinion. See '34 AG Op 669

7919 Duties.

Appeal—appearance. The commerce counsel has a right to appear for and on behalf of the board of railroad commissioners on an appeal from orders granting or refusing an application for the operation of a motor carrier line.

Campbell v Eldridge, 206-224; 220 NW 304

CHAPTER 370

GENERAL POWERS OF RAILWAY CORPORATIONS

7928 Duties and liabilities of lessees.

Liability to fence. See under §8001, Vol I
Liability for negligence. See under §8156

CHAPTER 371

CONSTRUCTION AND OPERATION OF RAILWAYS

7947 Maintenance of bridges — damages.

Inadequate opening—compulsory construction—effect. Negligence may not be predicated on the insufficient length or height of a railroad bridge within a public drainage district when the bridge was constructed strictly in accordance with the plans and specifications prescribed by the public drainage authorities.

Hunter v Ry. Co., 206-655; 221 NW 360

Trestle as licensed place. It will not be lightly inferred that a railway company knowingly consented to the use of its trestle as a footway for pedestrians when such use, under

the peculiar circumstances existing, was not only perilous but literally foolhardy.

Brimeyer v Railway, 213-1289; 241 NW 409

7948 Rights of riparian owners.

Discussion. See 9 ILB 236—Navigability of streams meandered by government survey

7961 Nonassumption of risk.

Assumption of risk defined. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

CHAPTER 372

CATTLE GUARDS, FENCES, CROSSINGS, AND INTERLOCKING SWITCHES

8000 Cattle guards—crossings—signs.

Atty. Gen. Opinion. See '28 AG Op 191

ANALYSIS

I STATUTE IN GENERAL
II CATTLE GUARDS
III CROSSINGS
IV WARNING SIGNS

Accidents at private crossings. See also under §8011
Accidents at public crossings. See also under §8018
Liability for negligence generally. See also under §8156

I STATUTE IN GENERAL

Negligence per se in failing to stop. A traveler who knows that a railway crossing is so badly obstructed that he will not be able, by looking and listening, to know of the approach of a train until he is substantially on the tracks, is guilty of negligence per se if he does not stop.

Dean v Ry. Co., 211-1347; 229 NW 223

Driving into side of train—proximate cause. Evidence which is solely to the effect that, on a misty and foggy night, a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

Guest in automobile—contributory negligence—jury question. Evidence that a guest riding in an automobile, when 100 feet from a railway crossing, observed, and called the attention of the operator to, an approaching train, and that thereupon the operator of the car commenced to reduce and continued to reduce the speed of the car until it was hit by the oncoming locomotive, precludes the court from saying that the guest was guilty of contributory negligence per se.

Wright v Railway, 222-583; 268 NW 915

Driving upon crossing negligence per se. The operator of an automobile is guilty of negligence per se when he drives upon an open, city, railway crossing, with which he is familiar, and with timely knowledge that a moving train is in the immediate vicinity and that the said crossing may at any moment be occupied by said train or another train.

Miller v Railway, 223-316; 272 NW 96

Contributory negligence as matter of law—motorist not looking. A motorist, who approaches a railroad crossing on a clear day, over a good road, with no obstructions and no diverting circumstances, and who, had he looked, must have seen but nevertheless is struck and killed by an approaching train which from a point 141 feet from the crossing was visible 2500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Crossing railroad in front of oncoming train—contributory negligence—directed verdict. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed and with the train plainly to be seen had he looked, or if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

Operation—frost on train—visibility—when jury question on plaintiff's care. Plaintiff's contention, that a snowy landscape and frost on a train so camouflaged it that the question of his negligence in driving upon an unobstructed crossing in front of the train was for the jury, is not substantiated by a record devoid of any evidence of frost on the front of the engine or that he was in any way blinded by the sun or glare of the sun on the snow.

Russell v Scandrett, 225-1129; 281 NW 782

Judicial notice—change in mode of transportation. Court will take judicial notice of the changes in the mode of transportation occur-

ring during the last preceding twenty-five years.

Harris v Railway, 224-1319; 278 NW 338

II CATTLE GUARDS

Maintenance of dangerous cattle guard—negligence. A railway company is not negligent in maintaining at a private crossing on its track a cattle guard which is actually dangerous to the feet of stock which persist in going upon it. Evidence held quite insufficient to show that the guard in question was unnecessarily dangerous.

Harsch v Railway, 211-1377; 232 NW 144; 75 ALR 927

Open gates—negligence. Evidence (1) that a railway company maintained a gate in its right-of-way fence with attachments suitable for securely keeping the gate closed, (2) that late in the afternoon the gate was closed after being used, (3) that on the following morning the gate was found open, and (4) that certain animals from the adjoining field were then found dead on the railway right of way, having evidently been killed by a passing train, is insufficient to establish any negligence on the part of the railway company.

Hughes v Ry. Co., 215-741; 246 NW 769

III CROSSINGS

Accidents at crossings — negligence — evidence. Evidence reviewed in law action for damages tried to the court alone, and held to support a finding of negligence in the maintenance of a railway crossing; that said negligence was the proximate cause of an injury; and that plaintiff's negligence, if any, did not contribute to said injury.

Warren v Railway, 219-723; 259 NW 115

Accidents at crossings—"cupped out" depression as negligence. Proof that a three or four inch "cupped out" depression existed in a railway crossing over a public road, does not, in and of itself, present a jury question on the issue of the negligent maintenance of said railway crossing.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Accident at crossing—proximate negligence not superseded by concurrent negligence. If the jury might justifiably find that the defendant railway company operated its train over one of its crossings at an excessive and unlawful rate of speed and that said speed was the proximate cause of the collision of the train with an automobile and of the injury to an occupant of the automobile, the court must not so instruct as to permit the jury to find that the negligence of the driver of the automobile in approaching and driving upon the crossing was an intervening cause which wholly superseded the said negligence of the defendant railway company.

Dedina v Railway, 220-1336; 264 NW 566

Operation of automobile without brakes—proximate cause. Record reviewed and held that the proximate cause of an accident was not the condition in which a railway crossing was maintained, but was the speed at which an overloaded truck was operated without brakes.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Accidents at crossings—duty to construct crossing—scope. The statutory duty of a railway company to construct and maintain a "good, sufficient and safe crossing" at all points where its tracks cross public roads, is fully complied with when, in crossing a level public road, the railway ties and rails and the proper planking between said rails and on the ends of the ties immediately outside said rails, are so placed that the level of the public road is maintained.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

Railway crossing—injuries from jolting—causal negligence necessary. Plaintiff has the burden to show wherein a railway was negligent in maintaining a viaduct crossing, since jury's verdict may not rest upon surmise, speculation, or guess, and this burden is not met when plaintiff fails to show that injuries received from being thrown against top of car while going over viaduct were caused by a condition of the viaduct resulting from negligence.

Harris v Railway, 224-1319; 278 NW 338

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Bond Co. v Railway, 227-142; 287 NW 832

IV WARNING SIGNS

Warnings additional to statutory warnings—duty to furnish. Conceded, arguendo, that a public railway crossing may be attended by such danger as to impose on the railway company, in the exercise of reasonable care, the duty to furnish to the highway traveler warnings in addition to those required by statute, but such duty does not arise when the danger is avoidable by the exercise of ordinary care on the part of the traveler. So held, inter alia, as to a fog-shrouded crossing, the danger attending which could be avoided by the traveler so driving as to be able to stop within the range of his vision.

Dolan v Bremner, 220-1143; 263 NW 798

Accident at crossing—absence of signs and signals—nonproximate cause. The failure of a railway company to erect statutory warning signs on both sides of a railway crossing (assuming such duty to exist) or the failure of its engineer, when approaching a crossing, to give the statutory signals, becomes quite inconsequential where the operator of an automobile and his guest saw the crossing and the immediately approaching train when they were 100 feet from said crossing, and while they were traveling at a speed not exceeding 25 miles per hour.

Wright v Railway, 222-583; 268 NW 915

8005 Failure to fence.

Absence of cattle guard—scope of statute. This section contemplates injuries caused by the operation of trains, not injuries caused by the manner in which a cattle guard may be constructed and maintained.

Harsch v Ry. Co., 211-1377; 232 NW 144; 75 ALR 927

Injuries to animals—open gate—negligence. Evidence (1) that a railway company maintained a gate in its right-of-way fence with attachments suitable for securely keeping the gate closed, (2) that late in the afternoon the gate was closed after being used, (3) that on the following morning the gate was found open, and (4) that certain animals from the adjoining field were then found dead on the railway right of way, having evidently been killed by a passing train, is insufficient to establish any negligence on the part of the railway company.

Hughes v Railway, 215-741; 246 NW 769

Cow killed by interurban—entry where fence down—evidence sufficiency. Railroads being required by statute to fence right of way against livestock, where judgment was rendered for loss of cow killed by an interurban, evidence, that cow was kept in pasture along right of way and that right-of-way fence was down near place where cow was killed, justified a finding that cow entered right of way at such place.

McSweyn v Railway, (NOR); 288 NW 398

8008 Depot grounds—speed limit.

Proximate negligence not superseded by concurrent negligence. If the jury might justifiably find that the defendant railway company operated its train over one of its crossings at an excessive and unlawful rate of speed and that said speed was the proximate cause of the collision of the train with an automobile and of the injury to an occupant of the automobile, the court must not so instruct as to permit the jury to find that the negligence of the driver of the automobile in approaching and driving upon the crossing was an intervening cause which wholly superseded the said negligence of the defendant railway company.

Dedina v Railway, 220-1336; 264 NW 566

8011 Private crossings.

ANALYSIS

I PRIVATE CROSSINGS IN GENERAL
II GATES AT PRIVATE CROSSINGS
III ACCIDENTS AT CROSSINGS

Accidents at public crossings. See under §8018

I PRIVATE CROSSINGS IN GENERAL

Flag protection—instructions. Error does not result from instructing that plaintiff, in moving machinery across a private crossing, would not be negligent in failing to request flag protection unless he knew that a rule of the company required the section foreman to furnish such protection when requested.

Graves v Railway, 207-30; 222 NW 344

Speed as basis for negligence. Reversible error results from so instructing as to permit the jury to base negligence on the speed of a train at a private farm crossing, irrespective of the safe or dangerous condition of such crossing.

Graves v Railway, 207-30; 222 NW 344

Nonduty to maintain flagmen. A railroad company is under no obligation to maintain a flagman at a private farm crossing.

Graves v Railway, 207-30; 222 NW 344

Adequacy—jury question. Evidence held to create a jury question on the issue whether a railroad company had constructed and was maintaining a safe and adequate private farm crossing.

Graves v Railway, 207-30; 222 NW 344

Private crossings—nonduty to maintain. A railway company is under no legal duty to construct and maintain in a city or town a crossing or roadway over its right of way, or under its tracks in order to afford to a landowner access from his nonfarm land abutting one side of the right of way to his nonfarm land of trifling quantity and value abutting the other side of the right of way.

Chicago, Mil. Ry. v Cross, 212-218; 234 NW 569

I PRIVATE CROSSINGS IN GENERAL—concluded

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

II GATES AT PRIVATE CROSSINGS

Maintenance of dangerous cattle guard—negligence. A railway company is not negligent in maintaining at a private crossing on its track a cattle guard which is actually dangerous to the feet of stock which persist in going upon it. Evidence held quite insufficient to show that the guard in question was unnecessarily dangerous.

Harsch v Railway, 211-1377; 232 NW 144; 75 ALR 927

III ACCIDENTS AT CROSSINGS

Contributory negligence per se. The driver of an automobile is guilty of negligence per se when, upon entering during the daytime a private crossing over much-used interurban railway tracks located on a curve, he knows when some 25 feet from the track in question that his view of an apprehended approaching car is limited to 300 feet, and when he avails himself of such view and sees no approaching car, and thereupon proceeds to attempt, under no diverting circumstances, to cross the tracks at a rate of three miles per hour without looking or listening for the apprehended car, tho his view of the track materially enlarged as he proceeded.

Rosenberg v Railway, 213-152; 238 NW 703

Inapplicability of speed ordinance. A city ordinance which limits the speed of railway trains under given conditions is properly excluded, in the absence of any evidence that the ordinance was violated.

Newman v Railway, 202-1059; 206 NW 831

Negligence—nondiverting circumstance. The fact that a party in crossing railway tracks was compelled, owing to the coldness of the weather, to manipulate the choke on the automobile cannot be deemed a diverting circumstance such as to excuse him from exercising his senses of sight and hearing.

Rosenberg v Railway, 213-152; 238 NW 703

Contributory negligence—nonexcuse. A party will not be permitted to excuse his contributory negligence consequent on his attempt to cross streetcar tracks without using his senses of sight and hearing, by the simple assumption that the streetcars will not be negligently operated.

Rosenberg v Railway, 213-152; 238 NW 703

8015 Stopping of trains.

Sleeping passenger—duty to awaken—jury question. Where trainmen know that a passenger is asleep as the train is closely approaching the passenger's destination, the question whether, under all the circumstances, the carrier owes the sleeping passenger the duty to awaken him in time to enable him to leave the train at the station is for the jury.

Vanderbeck v Railway, 210-230; 230 NW 390

Trespasser—failure to leave train—effect. A passenger does not become a trespasser and subject to rightful expulsion from the train from the naked fact that he failed to leave the train at his destination.

Vanderbeck v Railway, 210-230; 230 NW 390

Failure to leave train—tender of fare—judicial notice. A passenger failing to leave the train at his destination does not render himself subject to immediate ejection from the train because he fails to tender the fare to another destination. Judicial notice is taken of the fact that it is the duty of the conductor to demand the fare.

Vanderbeck v Railway, 210-230; 230 NW 390

8018 Signals at road crossings.

ANALYSIS

I STATUTE IN GENERAL
II PROXIMATE CAUSE
III CONTRIBUTORY NEGLIGENCE
IV EVIDENCE AND INSTRUCTIONS

Accidents at private crossings. See under §8011

I STATUTE IN GENERAL

Absence of flagmen, gates, etc. The failure of a railway company to maintain flagmen, gates, or warning devices at crossings does not constitute negligence, in the absence of proof that the crossing is unusually dangerous and hazardous.

O'Brien v Railway, 203-1301; 214 NW 608

No warning signal at crossing—statute violations—negligence. The failure of compliance with a statutory standard of care is negligence. In an action for personal injuries sustained by an automobile passenger in collision in Illinois between an automobile and railway motorcar, where petition alleged that railway employees failed to ring bell or sound whistle of motorcar while approaching a crossing, as required by Illinois statute, such allegations were sufficient to state a cause of action based on negligence of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

View obstructed—duty to give timely warning. Where a railroad motorcar, which had been standing still, obscured from view of motorist by shrubbery at the side of a crossing, gave no warning that it was about to cross the intersection, resulting in the motorist's automobile colliding with front end of motorcar, the presence of motorcar near the crossing was not sufficient warning to motorist that crossing was occupied. There must not only be a warning, but it must be timely.

Smith v Railway, 227-1404; 291 NW 417

Damages—total destruction. The measure of damages for the total destruction of an article is the reasonable market value of the article immediately before its destruction.

Bush v Railway, 216-788; 247 NW 645

"Flying switch." Principle recognized that the act of making a "flying switch" does not necessarily constitute negligence.

Love v Railway, 207-1278; 224 NW 815

Insufficient assignment of negligence. A general plea that a railway was negligent in surveying, building, maintaining and operating its railway at the place of an accident, without pleading or proving any standard by which to determine negligence, is quite insufficient.

Lenning v Railway, 209-890; 227 NW 828

Recklessness of railway employees—insufficient pleading to establish. In action for personal injuries sustained by automobile passenger in collision between automobile and railway motorcar, where petition alleged that railway motorcar had been standing a short distance from crossing, obscured from view of motorist by shrubbery along railway right of way, and was driven onto crossing and into the course of oncoming automobile without warning, and that railway motorcar could have been stopped by applying brakes, such allegations were insufficient to state a cause of action based upon recklessness of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

No-eyewitness rule—nonapplicability. The presumption of care which may be indulged in case of an accident of which there is no eyewitness has no application when the record affirmatively shows that the accident would not have happened, had the injured party exercised reasonable care.

Tegtmeyer v Byram, 204-1169; 216 NW 613
Lenning v Railway, 209-890; 227 NW 828

"Physical fact" rule—inapplicability. The so-called "physical fact" rule which is often applied in negligence cases—the rule that when the operator of a vehicle at a known railroad crossing possesses ordinary sense of sight he is conclusively presumed, in the absence of diverting circumstances, to have seen an approaching train which was in plain view—necessarily has no application when the train is not in plain view, owing to a temporary obstruction which the railroad company has interposed to his view, e. g., freight cars on a side track.

Bush v Railway, 216-788; 247NW 645

Positive and negative testimony. Witnesses may testify, on the issue whether a train in approaching a crossing gave the statutory signals, that they could have heard such signals, had such signals been given, and that none were given, it appearing that the witnesses were in a mental attitude to hear such signals.

Anderson v Railway, 203-715; 211 NW 872

Standing railroad motorcar obscured from view—motorist rightfully entering crossing. Where railroad motorcar was standing still, obscured from view of motorist by shrubbery along railroad right of way, motorist was within his rights in attempting to pass over the crossing.

Smith v Railway, 227-1404; 291 NW 417

Presumption arising from human instinct. The presumption that the instinct of self-preservation caused a traveler who was killed by a train at a crossing to look for a train before he went upon the crossing has no application when it affirmatively appears that, had he looked at any time while he was in the zone of danger, he must have seen the train.

Wasson v Railway, 203-705; 213 NW 388

Ringing of bell—limit of duty. The statutory requirement that after the whistle on a railway engine is sounded and approaching a crossing, the bell shall be rung "continuously until the crossing is passed," imposes no duty after the engine has passed over the crossing to continue the ringing of the bell until the entire train has passed the crossing.

Butters v Railway, 214-700; 243 NW 597

Signals irrespective of statute. The failure of train operators in nearing a public crossing to signal the approach of the train may constitute negligence, irrespective of any statute so requiring.

Anderson v Railway, 203-715; 211 NW 872

Trestle as licensed place. It will not be lightly inferred that a railway company knowingly consented to the use of its trestle as a footway for pedestrians when such use, under the peculiar circumstances existing, was not only perilous but literally foolhardy.

Brimeyer v Railway, 213-1289; 241 NW 409

II PROXIMATE CAUSE

Avoiding contributory negligence. A street car motorman who plainly sees that the driver of another conveyance is negligently placing himself in a position of danger on the tracks, or is about to do so, and by ordinary care can avoid an accident and fails to do so, must be deemed guilty of negligence which is the prox-

II PROXIMATE CAUSE—concluded

imate cause of the accident, irrespective of the negligence of the injured party.

Lynch v Railway, 215-1119; 245 NW 219

Concurrent negligence—effect. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

Driving into side of train—proximate cause. Evidence which is solely to the effect that, on a misty and foggy night, a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

Failure to ring bell—proximate cause. Tho a traveler on a public street has timely knowledge that an engine and a couple of cars are standing immediately outside the curb line of said street, and on a track which crosses said street, yet the failure to ring the bell on said engine may be the proximate cause of an injury to said traveler should the train be suddenly backed into the street without ringing said bell.

Hanrahan v Sprague, 220-867; 263 NW 514

Absence of nonproximate cause. The failure of a railway company to erect statutory warning signs on both sides of a railway crossing (assuming such duty to exist) or the failure of its engineer, when approaching a crossing, to give the statutory signals, becomes quite inconsequential where the operator of an automobile and his guest saw the crossing and the immediately approaching train when they were 100 feet from said crossing, and while they were traveling at a speed not exceeding 25 miles per hour.

Wright v Railway, 222-583; 268 NW 915

Pleading negligence of employees operating railway motorcar—sufficiency. In action for personal injuries sustained by an automobile passenger in collision between automobile and railroad motorcar, where petition alleged that motorcar had been standing at crossing obscured from view of motorist by shrubbery along railroad right of way, and was driven into course of the oncoming automobile without any warning and that it could have been stopped by applying the brakes, such allegations were sufficient to state a cause of action based upon negligence of railroad employees.

Smith v Railway, 227-1404; 291 NW 417

Failure to give signals as nonproximate cause. Failure of a train crew to give the statutory signals on approaching a public crossing is manifestly not the proximate cause of an accident (1) when the driver on the public highway intended, regardless of the absence of signals, to stop before entering upon the crossing and reconnoiter for approaching trains, and (2) when he discovered the approaching train in ample time to make an ordinary stop, but was unable to do so because his brakes, tho successfully applied, did not sufficiently retard the momentum of his car in the loose gravel on the highway.

Pifer v Railway, 215-1258; 247 NW 625

Non-working signal device—effect. The presence and silence, at a railway crossing, of an automatic railway signaling device may be quite influential in saving a traveler from the imputation of negligence per se in approaching and going upon the crossing, when he is faced by two closely adjacent parallel tracks, and when the immediate possible danger is on the first track, tho he was actually injured on the second track.

Crowley v Railway, 204-1385; 213 NW 403; 53 ALR 964; 27 NCCA 618

Proximate negligence not superseded by concurrent negligence. If the jury might justifiably find that the defendant railway company operated its train over one of its crossings at an excessive and unlawful rate of speed and that said speed was the proximate cause of the collision of the train with an automobile and of the injury to an occupant of the automobile, the court must not so instruct as to permit the jury to find that the negligence of the driver of the automobile in approaching and driving upon the crossing was an intervening cause which wholly superseded the said negligence of the defendant railway company.

Dedina v Railway, 220-1336; 264 NW 566

III CONTRIBUTORY NEGLIGENCE

Absence of signals—effect. The failure of trainmen to give the required statutory signals when approaching and passing over a public highway crossing may have material bearing on the issue whether the plaintiff was guilty of contributory negligence.

Rastede v Railway, 203-430; 212 NW 751

Accident at crossing. The operator of a vehicle is guilty of negligence in driving upon a railway crossing in front of an approaching train (1) when he knows the train is approaching the crossing, (2) when the train is in plain sight for a material distance from the

crossing, and (3) when his failure to see the train, at best, was because of a known obstruction on his own vehicle.

Sodemann v Railway, 215-827; 244 NW 865

Nonrequired precautions. Principle recognized that a traveler is not, as a matter of law, required to stop and alight from his conveyance at a railroad crossing and make observations as to possible danger.

Love v Railway, 207-1278; 224 NW 815

Erroneous definition. Defining contributory negligence as including only acts of omission does not necessarily constitute reversible error, especially when such definition is in harmony with the trial theory.

Williams v Railway, 205-446; 214 NW 692

Contributory negligence — jury question. Record relative to conduct, conditions, and circumstances attending an injured party at a railroad crossing reviewed, and held, in view of obstructions and distracting circumstances, to present a jury question on the issue of contributory negligence.

Williams v Railway, 205-446; 214 NW 692

Jury question. Evidence tending to show that the driver of a vehicle stopped some twelve feet from a railroad crossing, and reconnoitered for an approaching train, and saw none, owing to a string of cars on a side track, and heard no warning signals of an approaching train, and thereupon drove upon the crossing, presents a jury question on the issue of his negligence.

Bush v Railway, 216-788; 247 NW 645

Jury question. Evidence tending to show that the driver of a vehicle stopped some ten or fifteen feet from a railroad crossing and reconnoitered for an approaching train and saw none because of dirt elevations and weeds along the side of the track, and heard no warning signals of an approaching train, and thereupon drove upon the crossing, presents a jury question on the issue of his negligence, even tho, had he stopped some few feet nearer the track he would have seen the approaching train.

Markle v Railway, 219-301; 257 NW 771

Contributory negligence per se (fact cases).

Albright v Ry. Co., 200-678; 205 NW 462

Erlich v Davis, 202-317; 208 NW 515; 27 NCCA 164

Wasson v Ry. Co., 203-705; 213 NW 388

Tegtmeyer v Byram, 204-1169; 216 NW 613; 27 NCCA 67; 34 NCCA 424

Russell v Ry. Co., 204-810; 216 NW 47; 27 NCCA 11

Darden v Ry. Co., 213-583; 239 NW 531

Sodemann v Ry. Co., 215-827; 244 NW 865

Railroads—negligence per se—fog and mist-obscured track. An occupant of an automobile is not necessarily guilty of negligence per se in not seeing a railroad track which intersected the highway until the automobile was entering upon the track, when the presence of the tracks was unknown to him, and when the windshield was covered with fog and mist, even tho he testifies to the opinion that objects could be seen for a distance of from 50 to 75 feet in front of the automobile.

Gilliam v Railway, 206-1291; 222 NW 12

Contributory negligence per se. A traveler in approaching a railway crossing with which he is familiar, and while he is beset by no diverting circumstance, is guilty of negligence in failing to look at some place from where he knows he can see approaching trains and thus avoid injury. It will avail him nothing to look when at places where he knows his view will be largely obstructed.

Glessner v Railway, 216-850; 249 NW 138

Negligence per se in colliding with traffic signal. An experienced driver of an automobile is guilty of negligence per se when, near midnight, while traveling in the center of a 26-foot wide, brilliantly lighted, paved street, with which he was familiar, he drives squarely head-on in the center of the street against a railroad traffic signal consisting of a concrete base 4 feet wide, 2 feet high, and 5 feet long, surmounted by an iron pole several feet high and noticeably painted with black and white diagonal stripes, on which pole at the time were crossarms bearing in large letters the words "railroad crossing" and two burning lights.

Van Gorden v City, 216-209; 245 NW 736; 4 NCCA(NS) 291

Driving upon crossing negligence per se. The operator of an automobile is guilty of contributory negligence as a matter of law when he drives upon an open, city, railway crossing, with which he is familiar, and with timely knowledge that a moving train is in the immediate vicinity and that the said crossing may at any moment be occupied by said train or another train.

Miller v Railway, 223-316; 272 NW 96

Contributory negligence per se. A traveler who, when some fifteen feet from a railway crossing, looks for but fails to see a train which is in plain sight on a straight track, and rapidly approaching the crossing from a point some 230 feet distant, and thereupon drives upon the crossing, is guilty of contributory negligence.

Cashman v Railway, 217-469; 250 NW 111

Crossing railroad in front of oncoming train — contributory negligence — directed verdict. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed

III CONTRIBUTORY NEGLIGENCE—continued

and with the train plainly to be seen had he looked, or, if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

Failure to stop. A traveler who knows that a railway crossing is so badly obstructed that he will not be able, by looking and listening, to know of the approach of a train until he is substantially on the tracks is guilty of negligence per se if he does not stop.

Dean v Railway, 211-1347; 229 NW 223

Failure to see or hear. Principle reaffirmed that he who failed either to see what was plainly visible or to hear what was clearly audible must be deemed not to have looked or listened at all.

Sodemann v Railway, 215-827; 244 NW 865

Contributory negligence—crossing railroad with train in view. A motorist approaching a railroad crossing has a duty to look for trains and to see a train if it is in plain sight, and, if he goes upon a crossing in front of a train that was in plain view as he approached and is struck thereby, he is guilty of contributory negligence as a matter of law.

Russell v Scandrett, 225-1129; 281 NW 782

Contributory negligence as matter of law—motorist not looking. A motorist, who approaches a railroad crossing on a clear day, over a good road, with no obstructions and no diverting circumstances, and who, had he looked, must have seen but nevertheless is struck and killed by an approaching train which from a point 141 feet from the crossing was visible 2500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Contributory negligence of guest as jury question. Evidence that a guest riding in an automobile, when 100 feet from a railway crossing, observed and called the attention of the operator to an approaching train, and that thereupon the operator of the car commenced to reduce and continued to reduce the speed of the car until it was hit by the oncoming locomotive, precludes the court from saying that the guest was guilty of contributory negligence per se.

Wright v Railway, 222-583; 268 NW 915

Contributory negligence—guest's lookout at railroad crossing—jury question. A guest in a motor vehicle is not, as a reasonably prudent person, under the same obligation as the driver to keep a lookout, but whether or not, under the circumstances, a guest was lacking in ordinary care in committing his safety to the motor vehicle driver while crossing a railroad is a question for the jury.

Finley v Lowden, 224-999; 277 NW 487

Imputed negligence—instructions construed. In an unsuccessful action against a railway company for negligently causing the death of a guest riding in a truck, an instruction, as to what acts of the said driver would constitute negligence, cannot be deemed to impute the negligence, if any, of said driver to the guest when other instructions specifically state, in effect, that the negligence of the driver would be no defense if the negligence of the defendant was found to be the sole proximate cause of said death.

Reidy v Railway, 220-1386; 258 NW 675

Diverting circumstances. The operator of an automobile when entering upon a known railway crossing is held to know that he is entering a zone of danger; yet (1) the absence of statutory signals, (2) the obscured nature of the crossing, and (3) the distracting influence of other passing vehicles and of nearby objects, may save the operator from the imputation of contributory negligence per se.

Nederhiser v Railway, 202-285; 208 NW 856; 27 NCCA 86

Nondiverting circumstance. The fact that a party in crossing railway tracks was compelled, owing to the coldness of the weather, to manipulate the choke on the automobile cannot be deemed a diverting circumstance such as to excuse him from exercising his senses of sight and hearing.

Rosenberg v Railway, 213-152; 238 NW 703

Driving into side of train. Evidence which is solely to the effect that, on a misty and foggy night, a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

Emergency — attempt to avoid train. The driver of a conveyance who, in an emergency, attempts to pass in front of an immediately approaching railway train is not necessarily guilty of contributory negligence.

Anderson v Railway, 203-715; 211 NW 872; 27 NCCA 155; 27 NCCA 304; 31 NCCA 221

Failure to slow down or stop train. When a railway train and a traveler on the public highway are approaching a railway crossing in the country at the same time, and the train is within the unobstructed view of the traveler for a distance of several hundred feet before he reaches the crossing, the engineer of the train may not be said to be negligent in failing to slow down or stop the train when he has no reason to suppose that the traveler is unaware of the approaching train.

Lenning v Railway, 209-890; 227 NW 828

Red light on tender. The fact that an engine was, in the nighttime, and at the time of an accident, running backwards, and across a public crossing, with a red light on the tender may quite persuasively demonstrate that the injured party was not guilty of contributory negligence per se.

Rastede v Railway, 203-430; 212 NW 751

Snow glare affecting visibility. Where a passenger riding in a truck was killed in a crossing collision between truck and train, a contention that sun shining on snow and reflecting into truck constituted such obstruction to view of oncoming train that it raised a jury question on issue of deceased's contributory negligence in failing to see approaching train held not established by his evidence.

Russell v Scandrett, 225-1129; 281 NW 782

Warnings additional to statutory warnings. Conceded, arguendo, that a public railway crossing may be attended by such danger as to impose on the railway company, in the exercise of reasonable care, the duty to furnish to the highway traveler warnings in addition to those required by statute, but such duty does not arise when the danger is avoidable by the exercise of ordinary care on the part of the traveler. So held, inter alia, as to a fog-shrouded crossing, the danger attending which could be avoided by the traveler so driving as to be able to stop within the range of his vision.

Dolan v Bremner, 220-1143; 263 NW 798

IV EVIDENCE AND INSTRUCTIONS

Accidents at crossings—inapplicability of speed ordinance. A city ordinance which limits the speed of railway trains under given conditions is properly excluded, in the absence of any evidence that the ordinance was violated.

Newman v Railway, 202-1059; 206 NW 831

Habitual negligence of engineer. On the issue of the negligence of an engineer in operating his train on a certain occasion, evidence of his conduct on prior and similar occasions, is inadmissible.

Darden v Railway, 213-583; 239 NW 531

Frost on train—visibility—when jury question on plaintiff's care. Plaintiff's contention that a snowy landscape and frost on a train so camouflaged it that the question of his negligence in driving upon an unobstructed crossing in front of the train was for the jury is not substantiated by a record devoid of any evidence of frost on the front of the engine or that he was in any way blinded by the sun or glare of the sun on the snow.

Russell v Scandrett, 225-1129; 281 NW 782

Jury question. Evidence reviewed and held that a traveler whose view was somewhat obstructed was not guilty of negligence per se in driving upon railway tracks after the passage of a train and after the crossing watchman had lowered his "stop" sign and started in the direction of his station abode.

Love v Railway, 207-1278; 224 NW 815

Last clear chance—justifiable submission. The mere fact that a train operator on the rear of a backing train saw a party approaching a public crossing, at a time when the party was 100 or more feet distant, affords no basis for submitting to the jury the issue of the "last clear chance"; but such basis is furnished by testimony tending to show (1) that, to the knowledge of the operator, the party continued to approach said crossing and was in a position of peril when 30 feet therefrom, and (2) that the train could have been stopped within 20 feet.

Williams v Railway, 205-446; 214 NW 692; 27 NCCA 666

Negative testimony. Testimony that certain witnesses "did not hear" any warning signals from an approaching train is intrinsically without probative value when unaccompanied by any proof that such witnesses were in a position and mental attitude to have heard such signals, had they been given.

Chilcote v Railway, 206-1093; 221 NW 771

Negligence — evidence. Evidence reviewed in law action for damages tried to the court alone, and held to support a finding of negligence in the maintenance of a railway crossing; that said negligence was the proximate cause of an injury; and that plaintiff's negligence, if any, did not contribute to said injury.

Warren v Railway, 219-723; 259 NW 115

"No-eyewitness" rule—inapplicability under direct evidence. Where a motorist and other eyewitnesses testify as to deceased's conduct just prior to his driving into the side of a moving train, it is error to instruct on the presumption that defendant's natural instinct of self-preservation would prompt him not to run into a moving train, when direct evidence as to his conduct is obtainable.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Obstructions—evidence pro and con. On the issue whether the view of a railway track was so obstructed at the time of an accident that an approaching train could not be seen, testimony by an eyewitness is manifestly admissible, to the effect that he immediately stationed himself at the point of accident and could plainly see the entire track over which a train would approach.

Langham v Railway, 201-897; 208 NW 356

Positive and negative evidence. Testimony of witnesses to the effect that they did not hear or notice any signals, when the witnesses were in no mental attitude to hear or notice such signals, creates no conflict with positive testimony that such signals were given.

Lenning v Railway, 209-890; 227 NW 828

IV EVIDENCE AND INSTRUCTIONS—concluded

Precautions in addition to statute. A railway crossing may be so unusually dangerous as to justify a jury in finding that the railway company was negligent in not providing warnings and safeguards in addition to those required by statute. But record reviewed and held wholly insufficient to justify the submission of such issue to the jury.

Butters v Railway, 214-700; 243 NW 597

Warning unheard — negative evidence not valueless as matter of law. In an action involving an automobile railroad crossing accident, statements of witnesses as to not hearing a bell nor whistle warning were not as a matter of law of such negative character as to lack all probative force.

Finley v Lowden, 224-999; 277 NW 487

Instruction without basis in evidence. An instruction authorizing a finding of negligence on the part of a railroad company if an employee thereof discovered the danger of an approaching vehicle and did not, in the exercise of ordinary care, report such danger to the engineer is wholly inapplicable to a record which clearly reveals the fact that, when the employee aforesaid discovered the danger, no ordinary care could have prevented the accident.

Gilliam v Railway, 206-1291; 222 NW 12

Absence of flagman or signal device. The submission to the jury of the issue of negligence, based on the absence at a railway crossing of a flagman or signaling device, tho not required by ordinance, is justified when the crossing is more than ordinarily dangerous.

Williams v Railway, 205-446; 214 NW 692

Duty to look and listen. An instruction to the effect that, in determining the care exercised by a traveler at a railroad crossing, the jury should consider whether obstructions to one's view were such as to require the traveler to look and listen, is quite harmless when the jury was elsewhere correctly instructed as to the duty to look and listen.

Love v Railway, 207-1278; 224 NW 815

Failure to stop and look. Instructions are properly refused when they impute contributory negligence to the driver of a vehicle in approaching and going upon a materially obstructed railway crossing without stopping and looking, when it is conceded that the obstructions were such that no stopping and looking would have discovered the approaching train except substantially at the point of collision.

Anderson v Railway, 203-715; 211 NW 872

Absence of lookout. Instructions held properly to authorize the jury to consider the absence of a lookout and other lack of warning on the question of negligence.

Love v Railway, 207-1278; 224 NW 815

Accident at crossing—maintaining lookout—unsustained issue. Reversible error results from submitting the issue whether the engineer of a railway train was negligent in not maintaining a proper lookout for automobiles approaching a public crossing, when the evidence shows to the contrary and that the approaching automobile was discovered at the earliest reasonable opportunity, which was too late to prevent the accident.

Simmons v Railway, 217-1277; 252 NW 516

"Physical fact" rule. A requested instruction should be given, when the testimony is supporting, to the effect that, if the view of a railway track is unobstructed for a long distance while a traveler is knowingly approaching it, he will be held to have seen the train approaching thereon, there being no diverting circumstance.

Langham v Railway, 201-897; 208 NW 356; 27 NCCA 68; 27 NCCA 69

Sodemann v Railway, 215-827; 244 NW 865

8020 Railway and highway crossing at grade.

Atty. Gen. Opinion. See '25-26 AG Op 369

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284NW 136

8021 Disagreement—application—notice.

Atty. Gen. Opinion. See '25-26 AG Op 369

8022 Hearing—order.

Atty. Gen. Opinion. See '25-26 AG Op 369

8024 Repairs—aid by court.

Crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 289 NW 338

CHAPTER 373

REGULATION OF CARRIERS

General Provisions

8038 Duty to furnish cars and transport freight.

Noninsurer of perishable goods. A carrier is not, under the common law, an insurer against the freezing of articles which are subject to being frozen.

Dye Co. v Davis, 202-1008; 209 NW 744

Ignoring specific allegations of negligence and relying on breach of contract. In an action against a common carrier for damages to a shipment of stock, plaintiff may ignore his specific allegations of negligence, and rely on his general allegation of breach of contract to carry safely.

McCoy v Railway, 210-1075; 231 NW 353

Cause of death as question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

Overloading cars. The court is in error in holding as a matter of law that a carrier of livestock knew or ought to have known that the cars were overloaded, when the testimony shows that the agent of the carrier was necessarily compelled to inspect the cars after dark, and with a flash light, and when he could not clearly see the animals.

Wiersma v Railway, 213-223; 238 NW 579

Presumption from good and bad delivery. A showing that goods were in good condition when received by a carrier and in bad condition when delivered, presumptively establishes, in and of itself, the carrier's negligence. Error necessarily results from instructing that the shipper must show specific acts of negligence on the part of the carrier.

Dye Co. v Davis, 202-1008; 209 NW 744

Delivery in good condition—presumption—jury question. Evidence that animals were in good condition when delivered to a carrier; that an unusual number died during the shipment; that the surviving hogs were in good condition at the end of the shipment; coupled with uncertain testimony as to the amount of water furnished by the carrier to the animals for drinking purposes in very hot weather, presents a jury question on the issue whether the said deaths were the result of human agency.

McCoy v Railway, 210-1075; 231 NW 353

Prima facie case for recovery. Evidence tending to show that stock (1) was delivered to a carrier in good, healthy condition, (2) was turned over to the consignee in a damaged condition, (3) was insufficiently fed and watered during the shipment, and (4) was unaccompanied by a caretaker, makes a jury question on the issue of the carrier's liability for the damage.

Brower v Railway, 218-317; 252 NW 755
See Hall v Ins. Co., 217-1005; 252 NW 763

Unfrozen condition—jury question. A jury question is made on the issue whether goods were unfrozen when delivered to the carrier by testimony tending to show (1) that no freezing temperature had existed at the place of initial shipment at and for some substantial time prior to the delivery, and (2) that the goods near the doorway, along the sides, and at the ends of the car were frozen when delivered.

Dye Co. v Davis, 202-1008; 209 NW 744

Rule requiring written orders for cars. The rule of a carrier requiring orders by a shipper for cars to be in writing, and being a part of its freight-rate schedules on file with the board of railroad commissioners, is mandatory, and compliance therewith is not shown by evidence that the station agent, upon receiving an oral order, made a written memorandum thereof for his own convenience. Such rule is manifestly admissible as evidence in a proper case.

Jackson v Railway, 213-365; 238 NW 912

Continuing shipment. An order requiring a railway to accept in this state loaded cars which have arrived from another state through a terminated interstate shipment, and to transport said cars without reloading, is valid and enforceable. 152 Iowa 317 affirmed.

Chicago, Mil. Ry. Co. v State, 233 US 334

Special damages. A carrier is not liable for special damages consequent on its negligent delay in delivering a shipment unless, at or before the time of shipment, the carrier is notified of the special purpose for which the shipment is intended and of the necessity for prompt shipment. So held as to a shipment of cans by the consignor to itself, followed by damages to corn which the ultimate consignee was unable to can, owing to negligent delay in delivering shipment.

Percy v Railway, 207-889; 223 NW 879; 28 NCCA 717

When mistaken delivery absolves carrier. A carrier is not responsible for a loss which results from delivering a shipment to a person who is not the agent of the consignee for the purpose of such shipment, when the carrier justifiably believed such person to be such agent, and when such person was the very person to whom the consignor intended delivery

to be made, because of a like belief on his part as to such agency.

Malvern Storage v Ry. Exp. Co., 206-292; 220 NW 322

8039 Cars of connecting roads.

Liability of initial and connecting carriers. See under §10980

8042 Limitation on liability.

ANALYSIS

I LIMITATIONS IN GENERAL
II INTERSTATE COMMERCE

I LIMITATIONS IN GENERAL

Carrier's "burden of proof"—instruction—nonprejudicial error. In an action for damages against a railroad for the value of a stallion which died in transit, where the court clearly defined those matters and facts as to which the burden of proof was on plaintiff, and in substance charged the jury that, upon plaintiff having successfully carried this burden, the "burden of proof" would be on defendant to show, by a preponderance of the evidence, the excepted cause, held, the use of the phrase "burden of proof" as quoted in second instruction was not error.

Vander Beek v Railway, 226-1363; 286 NW 452

Damages—condition of livestock at end of route—no determination of recovery. In an action against railroad ex contractu for value of livestock shipped, whether animal's condition at the end of the route would lead a reasonable man to believe that such condition was caused by railroad's act was not determinative of recovery.

Vander Beek v Railway, 226-1363; 286 NW 452

Delay of shipment—special damages. A carrier is not liable for special damages consequent on its negligent delay in delivering a shipment unless at or before the time of shipment the carrier is notified of the special purpose for which the shipment is intended and of the necessity for prompt shipment. So held as to a shipment of cans by the consignor to itself, followed by damages to corn which the ultimate consignee was unable to can, owing to negligent delay in delivering shipment.

Percy v Railway, 207-889; 223 NW 879; 28 NCCA 717

Instruction—"act or omission"—not erroneous. In an action for damages against a railroad for value of stallion which died in transit, an instruction placing on the railroad the burden of proving that its failure to transport stallion to destination "was not due to any act or omission upon the part of the railway company" will not be erroneous because of failure to use the words "negligent act or omission".

Vander Beek v Railway, 226-1363; 286 NW 452

Liability as insurer. In an action for damages against a carrier for loss of livestock, the liability of carrier is not only that of bailee, but as insurer against all risks incident to the transportation, save such losses as might result from the act of God or some other excepted cause.

Vander Beek v Railway, 226-1363; 286 NW 452

Newsboys as passengers. Newsboys on railway passenger trains are, in a legal sense, passengers, even tho they travel on free transportation furnished by the railway company for a consideration under a contract between their employer and the said company, which contract, unbeknown to them, stipulates that they shall not be considered passengers.

Shadduck v Railway, 218-281; 252 NW 772

When person not "passenger". A person while walking in the street toward a street car for the purpose of entering the car for passage thereon cannot be deemed a "passenger", and the carrier operating the car owes such person that degree of care only, which it owes to all people in the street, to wit, ordinary care.

Moss v Railway, 217-354; 251 NW 627

Pleading affirmative defense—instruction on preponderance of evidence. In an action to recover damages from a railroad for value of stallion which died during transportation, wherein an excepted cause of death is pleaded and relied on as an affirmative defense, railroad will be entitled only to instruction that verdict must be for railroad if such cause should appear from a preponderance of the evidence.

Vander Beek v Railway, 226-1363; 286 NW 452

Injuries to livestock—directed verdict—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until 3 hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

Shipment unaccompanied — action ex contractu—affirmatively showing negligence unnecessary. In an action against a railroad for damages, where plaintiff does not accompany shipment, he will not be bound to support his action, brought ex contractu, by affirmative showing of negligence by the carrier, nor will he be bound by a showing that a human agency

caused the loss since this would merely establish negligence.

Vander Beek v Railway, 226-1363; 286 NW 452

II INTERSTATE COMMERCE

Discussion. See 2 ILB 194—Sale and delivery as interstate commerce; 12 ILR 30—The "local transaction" in interstate commerce

Applicability. This section is not applicable to interstate commerce. 153 Iowa 103 reversed.

Chicago, RI Ry. Co. v Cramer, 232 US 490

Interstate commerce — unallowable burden on. A foreign corporation seeking to operate in this state an exclusive interstate pipe-line system may not be constitutionally required by a state statute, as a condition precedent to the construction of its line and to the transacting of its said business, even on its own private right of way:

1. To apply for, obtain, and pay for a permit to carry on said business, and pay all expenses attending the hearing on said application; or
2. To consent to any and all statutes then or thereafter in force regulatory of said business; or
3. To consent that the state may levy on it such general property taxes and/or taxes on gross receipts, and/or taxes on net income as the general assembly may thereafter prescribe; or
4. To consent to and pay an annual license fee.

Reason: Each of said requirements imposes an unallowable burden on interstate commerce.

State v Stanolind Co., 216-436; 249 NW 366

8044 Preference prohibited — exception.

Exclusive grant of cab stand privileges. A railway company may grant exclusive rights to a cab stand on its own premises when such grant is not arbitrary or unreasonable.

Red Top v McGlashing, 204-791; 213 NW 791

8046 Unjust discrimination — exceptions.

Discussion. See 1 ILB 33—Preferential passenger rates; 2 ILB 71—Damages at common law; 2 ILB 202—Damages as rebate

8048 Charges to be reasonable.

Discussion. See 17 ILR 394—Interstate commerce commission authority

8049 Long and short haul—fair rate.

Shipping over long route—recovery of excess charge. Where a carrier on his own motion and without proffering any reason therefor carries an interstate shipment over the longer of two routes and collects the published rate for said longer route, the shipper may, without resort to the interstate commerce commission, recover of the carrier the freight rates paid by him in excess of the published rate for the shorter route.

Miller v Davis, 213-1091; 240 NW 743; 78 ALR 1541

JOINT RATES

8069.1 Routing intrastate shipments.

Shipping over long route—recovery of excess charge. Where a carrier on his own motion and without proffering any reason therefor carries an interstate shipment over the longer of two routes and collects the published rate for said longer route, the shipper may, without resort to the interstate commerce commission, recover of the carrier the freight rates paid by him in excess of the published rate for the shorter route.

Miller v Davis, 213-1091; 240 NW 743; 78 ALR 1541

RATE SCHEDULES

8082 Definitions.

Discussion. See 11 ILR 354—Rate-making, ownership and financing

8084 Detailed requirements.

Rule requiring written orders for cars. The rule of a carrier requiring orders by a shipper for cars to be in writing, and being a part of its freight-rate schedules on file with the board of railroad commissioners, is mandatory, and compliance therewith is not shown by evidence that the station agent, upon receiving an oral order, made a written memorandum thereof for his own convenience. Such rule is manifestly admissible as evidence in a proper case.

Jackson v Railway, 213-365; 238 NW 912

LIVESTOCK

8109 Shipment—free transportation.

Negligence—burden of proof. Shipper of livestock who accompanies shipment as caretaker has burden to establish the negligence alleged to have injured the stock.

Wiederin v Railway, 212-1103; 237 NW 344

8114 Movement of livestock—burden of proof.

ANALYSIS

I LIABILITY IN GENERAL
II DELAY IN SHIPMENT

Liability of initial and connecting carriers. See under §10980

I LIABILITY IN GENERAL

Action ex contractu—affirmatively showing negligence unnecessary. In an action against a railroad for damages, where plaintiff does not accompany shipment, he will not be bound to support his action, brought ex contractu, by

I LIABILITY IN GENERAL—continued

affirmative showing of negligence by the carrier, nor will he be bound by a showing that a human agency caused the loss since this would merely establish negligence.

Vander Beek v Railway, 226-1363; 286 NW 452

Carrier's "burden of proof." In an action for damages against a railroad for the value of a stallion which died in transit, where the court clearly defined those matters and facts as to which the burden of proof was on plaintiff, and in substance charged the jury that, upon plaintiff having successfully carried this burden, the "burden of proof" would be on defendant to show, by a preponderance of the evidence, the excepted cause, held, the use of the phrase "burden of proof" as quoted in second instruction was not error.

Vander Beek v Railway, 226-1363; 286 NW 452

Cause of death as question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

Construction of statute. This section does not justify an instruction which, in effect, submits to the jury the question of the reasonableness of a freight train schedule. These statutes contemplate the fixing of livestock-shipping schedules by the railroad commission, with the attending presumption that such schedules will be reasonable.

Siegel v Railway, 201-712; 208 NW 78

Damages—condition of livestock. In an action against railroad ex contractu for value of livestock shipped, whether animal's condition at the end of the route would lead a reasonable man to believe that such condition was caused by railroad's act was not determinative of recovery.

Vander Beek v Railway, 226-1363; 286 NW 452

Injuries—directed verdict—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until 3 hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

Speculative verdict for damages. A verdict for damages consequent on the death from congestion of the lungs of stock during shipment will not be permitted to stand when, on the record, the cause of said congestion can be equally attributed either (1) to the act of the shipper in unduly exerting the hogs prior to the complete loading of the stock, or (2) to the rough handling of the train while the stock was being transported.

Wiederin v Railway, 212-1103; 237 NW 344

Delivery in good condition—presumption—jury question. Evidence that animals were in good condition when delivered to a carrier; that an unusual number died during the shipment; that the surviving hogs were in good condition at the end of the shipment; coupled with uncertain testimony as to the amount of water furnished by the carrier to the animals for drinking purposes in very hot weather, presents a jury question on the issue whether the said deaths were the result of human agency.

McCoy v Railway, 210-1075; 231 NW 353

Ignoring specific allegations of negligence and relying on breach of contract. In an action against a common carrier for damages to a shipment of stock, plaintiff may ignore his specific allegations of negligence, and rely on his general allegation of breach of contract to carry safely.

McCoy v Railway, 210-1075; 231NW 353

Instruction—"act or omission." In an action for damages against a railroad for value of stallion which died in transit, an instruction placing on the railroad the burden of proving that its failure to transport stallion to destination "was not due to any act or omission upon the part of the railway company" will not be erroneous because of failure to use the words "negligent act or omission".

Vander Beek v Railway, 226-1363; 286 NW 452

Liability as insurer. In an action for damages against a carrier for loss of livestock, the liability of carrier is not only that of bailee, but as insurer against all risks incident to the transportation, save such losses as might result from the act of God or some other excepted cause.

Vander Beek v Railway, 226-1363; 286 NW 452

Negligence—burden of proof. Shipper of livestock who accompanies shipment as caretaker has burden to establish the negligence alleged to have injured the stock.

Wiederin v Railway, 212-1103; 237 NW 344

Overloading cars—jury question. The court is in error in holding as a matter of law that a carrier of livestock knew or ought to have known that the cars were overloaded, when the testimony shows that the agent of the carrier was necessarily compelled to inspect the cars after dark, and with a flashlight, and when he could not clearly see the animals.

Wiersma v Railway, 213-223; 238 NW 579

Pleading affirmative defense. In an action to recover damages from railroad for value of stallion which died during transportation, wherein an excepted cause of death is pleaded and relied on as an affirmative defense, railroad will be entitled only to instruction that verdict must be for railroad if such cause should appear from a preponderance of the evidence.

Vander Beek v Railway, 226-1363; 286 NW 452

Prima facie case for recovery. Evidence tending to show that stock (1) was delivered to a carrier in good, healthy condition, (2) was turned over to the consignee in a damaged condition, (3) was insufficiently fed and watered during the shipment, and (4) was unaccompanied by a caretaker, makes a jury question on the issue of the carrier's liability for the damage.

Brower v Railway, 218-317; 252 NW 755
See Hall v Ins. Co., 217-1005; 252 NW 763

II DELAY IN SHIPMENT

Damages—double measure. A shipper may be entitled to recover of a carrier for a delayed shipment damages measured by the difference in value of the shipment immediately after the transportation, and such value as it would have been if the transportation had been without negligence; but he is not entitled, in addition, to any amount for care, feed, or medical services expended in order to render the shipment fit for the market.

Siegel v Railway, 201-712; 208 NW 78

Nonrecoverable damages. In an action against a common carrier for damages to livestock, based solely on the claim that the carrier had been guilty of negligent delay in the shipment and that the delay had resulted in sickness of the stock, recovery may not be had for damages to other stock, strangers to the shipment, because such other stock contracted the same sickness by intermingling with the stock which had been shipped.

Siegel v Railway, 201-712; 208 NW 78

Assumed burden of proof. A carrier which pleads that, as to a shipment of livestock, it was under the necessity to keep, hold, and feed the stock under the shipper's direction, and that it made every effort to discharge that duty, may not, on appeal, contend that the shipper should be held to the burden of showing that the injury did not result from his negligence.

Riddle v Railway, 203-1232; 210 NW 770

Instructions—correct but inexplicit. A correct instruction as to the responsibility of a carrier for the acts of its different agencies employed in transporting and delivering a shipment is sufficient, in the absence of a request for particular limitations thereon.

Riddle v Railway, 203-1232; 210 NW 770

Negligence in unloading. A carrier is not negligent in unloading and caring for stock at a station specially equipped for such service, even tho it might have carried the stock to a more distant point on the line of its destination before unloading, and thereby have avoided a washout on its line and a resulting delay, when to have so done would have been likely to involve the carrier in a violation of the federal stock-shipping law.

Canady v Railway, 203-12; 212 NW 322

Strike as defense. The plea that a carrier of livestock was prevented from making delivery because of a strike among stockyards employees must fail when the jury might well find that, if the carrier had exercised reasonable diligence, delivery would have been made notwithstanding the strike.

Riddle v Railway, 203-1232; 210 NW 770

Value of livestock. Competent oral testimony of the value of livestock is admissible even tho a recognized market journal is in evidence showing such values.

Riddle v Railway, 203-1232; 210 NW 770

CLASSIFICATION AND PASSENGER RATES

8126 Passenger rates—limitation.

Limitation on interstate ticket. A passenger in the use of an interstate excursion ticket, issued under a schedule filed with and approved by the interstate commerce commission, is conclusively held to know that he has no right to travel on any train except on the train specified in said schedule, even tho he has been otherwise informed by the carrier's agent, has never seen the schedule, and even the ticket itself shows no limitation to any particular train. It follows that damages consequent on being ejected from the train on which the passenger has no right to ride are nonrecoverable, whether the action sound in contract or tort.

Foley v Railway, 205-72; 217 NW 563

8128 Exceptions.

Atty. Gen. Opinion. See '32 AG Op 20

WEIGHING OF COAL

8137 Coal in car lots.

Loss by evaporation. In an action against a carrier for a shortage in the shipment of coal, the trial court may very properly refuse to deduct from the apparent weight any percentage or amount for evaporation, when the testimony relative thereto simply consists of federal bulletins of the department of mines, tending to show that in such shipments there is, at times, and under different conditions, a variable loss of weight by evaporation.

Smith v Railway, 202-292; 209 NW 465

8138 Where weighed—bills of lading.

Bills of lading—identification. A bill of lading is amply identified as issued by the initial carrier by a showing that it was in the hands of the consignee and was by him delivered to and accepted by the delivering carrier when the consignee received the goods.

Smith v Railway, 202-292; 209 NW 465

8141 Prima facie evidence.

Measure of damages. In an action against a carrier for a shortage in the delivery of a shipment of coal, the value of the shortage at the point of shipment is not an improper measure of damages.

Smith v Railway, 202-292; 209 NW 465

Value at distant market. A coal dealer who has for a long time purchased coal at points in a foreign state is competent to testify to the value of such commodity at said foreign points.

Smith v Railway, 202-292; 209 NW 465

Variation in scale weights. In an action against a carrier for a shortage in the shipment of coal, the weights at the point of shipment and destination are presumptively correct, and the trial court may very properly disregard testimony tending to show, in substance, that scales frequently disagree as to the weight of such commodity.

Smith v Railway, 202-292; 209 NW 465

APPROPRIATION OF FUEL

8143 Fuel in transit.

Atty. Gen. Opinion. See '32 AG Op 171

NEGLIGENCE OF EMPLOYEES

8156 Liability for negligence of employees.

Discussion. See 3 ILB 195—Judicial relaxation of carrier's liability; 3 ILB 197—In England; 4 ILB 21—United States; 4 ILB 86—Statutes

ANALYSIS

I STATUTE IN GENERAL
II LIABILITY IN GENERAL
III NEGLIGENCE IN GENERAL
IV EMPLOYEES PROTECTED
V FEDERAL EMPLOYERS' LIABILITY ACT

I STATUTE IN GENERAL

Carrier—state (?) or interstate (?). An employee is not engaged in interstate commerce while working for an interstate carrier in the construction of an entirely new, incomplete, and wholly unused telegraph line.

Chi. RI Ry. v Lundquist, 206-499; 221 NW 228; 30 NCCA 255

Interstate carrier — lex loci contractus. A contract of employment for and on behalf of an interstate commerce carrier is consummated in this state when the conditional offer of employment is accepted in this state by a resident thereof, even tho the offer is made in a foreign state.

Chi. RI Ry. v Lundquist, 206-499; 221 NW 228

"Last clear chance." The doctrine of "last clear chance" can have no possible application when the danger of the injured person was discovered at a time when manifestly nothing could be done to prevent the injury.

Albright v Railway, 200-678; 205 NW 462; 27 NCCA 176; 27 NCCA 651

Recklessness of railway employees—insufficient pleading to establish. In action for personal injuries sustained by automobile passenger in collision between automobile and railway motorcar, where petition alleged that railway motorcar had been standing a short distance from crossing, obscured from view of motorist by shrubbery along railway right of way, and was driven onto crossing and into the course of oncoming automobile without warning, and that railway motorcar could have been stopped by applying brakes, such allegations were insufficient to state a cause of action based upon recklessness of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

II LIABILITY IN GENERAL

Discussion. See 9 ILB 291—Clauses giving carrier the benefit of shipper's insurance; 10 ILB 322—Liability of carrier for delay

License—revocation. An implied license to pedestrians on a railway right of way to use a path alongside a railway track is impliedly repealed by the act of the railway in substantially obstructing such path.

Radenhausen v Railway, 205-547; 218 NW 316

Damage to privately owned car. An action by a shipper to recover of an initial carrier damages to the shipper's own car which had been delivered to the said carrier, fully loaded, for transportation to a connecting carrier, and injured by the connecting carrier while returning the car to the initial carrier, cannot be maintained in the absence of some showing as to the contract or arrangement governing the return of the car.

Bott Co. v Railway, 215-16; 244 NW 679

Injury not reasonably to be anticipated. A carrier is not liable in damages to a passenger for failure to guard against an injury or occurrence which human foresight would not reasonably anticipate. So held where a passenger fainted in the toilet room of a coach and was severely burned by falling on uncovered steam pipes near the wall.

Hauser v Railway, 205-940; 219 NW 60; 58 ALR 687

Limitation on interstate ticket. A passenger, in the use of an interstate excursion ticket issued under a schedule filed with and approved

by the interstate commerce commission, is conclusively held to know that he has no right to travel on any train except on the train specified in said schedule, even tho he has been otherwise informed by the carrier's agent, has never seen the schedule, and even tho the ticket itself shows no limitation to any particular train. It follows that damages consequent on being ejected from the train on which the passenger has no right to ride are nonrecoverable, whether the action sound in contract or tort.

Foley v Railway, 205-72; 217 NW 563

Starting streetcar. Question whether conductor started streetcar when passenger, who was injured by being thrown to the floor of car, was in position of peril and such fact was apparent to the conductor, held for jury determination.

Havens v Railway, (NOR); 207 NW 677; 32 NCCA 680

Carriage of passengers—termination of relation. Principle reaffirmed that a passenger on a streetcar ceases to be such the moment he completes his step from the car into the street.

MacLearn v Utilities Co., 212-555; 234 NW 851; 2 NCCA(NS) 551

Trestle as licensed place. It will not be lightly inferred that a railway company knowingly consented to the use of its trestle as a footway for pedestrians when such use, under the peculiar circumstances existing, was not only perilous but literally foolhardy.

Brimeyer v Railway, 213-1289; 241 NW 409

Failure to maintain lookout. Failure of the operatives of a train to keep a lookout for pedestrians near the tracks does not constitute negligence when such failure had nothing whatever to do with the resulting accident.

Radenhausen v Railway, 205-547; 218 NW 316

III NEGLIGENCE IN GENERAL

Safe tools and place to work—reasonable care required. A master is required to exercise reasonable care to furnish reasonably safe tools, appliances, and instrumentalities for use in the work which the servant is expected to perform and the same degree of care in furnishing a reasonably safe place in which to work.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Attractive nuisance. Evidence that cinders were piled along a railroad track, and that a 7-year-old boy was suffered to walk thereon in going on an errand for his mother, furnishes no possible application for the doctrine of "attractive nuisances".

Radenhausen v Railway, 205-547; 218 NW 316; 37 NCCA 15

Railroad turntable. A turntable, owned by the defendant, which was situated within four or five hundred feet of its depot, near a public highway, and in the vicinity of a ball ground, and a stream of water to which boys were accustomed to resort for fishing and skating, was fastened by a pair of iron clamps, connecting the ends of the rails on the table, by means of a loop and pin, with the corresponding ends of the rails on the embankment adjacent thereto. After a number of boys, under 12 years of age, had removed said fastenings, and had set the table in motion by pushing, they were joined by the plaintiff, a lad of 13 years, who jumped upon the table while in motion, lay down thereon with his head toward the center, and his legs projecting over the end, and was immediately injured by having his legs caught between the table and the embankment. In an action to recover for such injury, the plaintiff admitted that he knew that the space between the ends of the table and the embankment was but one and one-half inches, and that if his leg was caught between them it would be crushed, and that if he had thought of the danger he could and would have avoided it, but that he did not think of it because he was having fun. Held, that the plaintiff was guilty of negligence contributing to the injury, and the evidence being uncontroverted, the court properly instructed the jury to find for the defendant.

Merryman v Railway, 85-634; 52 NW 545

Contributory negligence. A boy 12 years old, of good ability and usually well informed, who is injured by catching his foot between the end of a moving turntable and the side of the pit while attempting to step from it on a dark night, is guilty of contributory negligence as a matter of law.

Carson v Railway Co., 96-583; 65 NW 831

Turntable in neighborhood of street—negligence. A railroad company maintaining a turntable on an unfenced lot, near a public alley, and which was from 80 to 300 feet from the street, is liable for injuries received by a seven-year-old child while playing thereon, caused by the company's failure to use reasonable care to so guard and fasten the turntable as to prevent injuries to children tempted to play on it.

Edgington v Railway Co., 116-410; 90 NW 95

Sufficiency of fastening turntable. Where, in an action against a railroad company for injuries received by a child while playing on defendant's turntable, it was shown that the turntable was unfastened by one of the children with plaintiff, the question of the sufficiency of the fastening used was one of fact for the jury.

Edgington v Railway Co., 116-410; 90 NW 95

Capacity to appreciate danger. A child seven years and eight months old cannot be considered, as a matter of law, of sufficient age and

III NEGLIGENCE IN GENERAL—continued

intelligence to appreciate the danger to which she exposed herself in playing on a railroad turntable, and such question was properly left to the jury in determining the question of contributory negligence.

Edgington v Railway Co., 116-410; 90 NW 95

Contribution of playmates to injury. The fact that injuries received by a child while playing on a railroad turntable were immediately caused by the child's playmates unfastening and operating the turntable, does not relieve the company from liability, the gist of the action being the keeping of a dangerous machine in a place where children might reasonably be expected to resort and to play thereon.

Edgington v Railway Co., 116-410; 90 NW 95

Trespassing boy—jumping from freight car to building. There are cases where the owner of premises will be held liable for injury to a child too young to understand the fact or meaning of trespass, or to care for his own safety when attracted to the premises by some act or omission of the owner which he knows, or as a reasonably prudent person ought to apprehend, would render the premises dangerous. But where, as in this case, a boy 13 years of age climbed upon a freight car standing at defendant's railway station and from there jumped to the roof of a storage building for electric cars, and when about to jump back to the car was injured by contact with an uninsulated power wire passing above the roof of the building, and it appeared that plaintiff knew he was a trespasser, that the railway was operated by electricity and that electric wires were dangerous; that the roof could only be reached by climbing the cars; that this was the first incident of the kind and no necessity for guards or signs had been indicated to the owner, the plaintiff was guilty of such negligence as to preclude recovery for the injury.

Anderson v Railway, 150-465; 130 NW 391

Railroad wreck—not attractive nuisance. An owner or occupant of premises owes no duty to an infant who, without the knowledge or invitation, express or implied, of such owner or occupant, goes, out of idle curiosity, upon such premises, and is injured by some dangerous agency. And the existence of a railway wreck, consisting of two overturned box cars and promiscuously interwoven trackage, does not constitute such a known, attractive and dangerous agency as to amount to an implied invitation to children to come upon the premises, out of idle curiosity, to view it, and thus bring the child within the "law of attractive agencies".

Wilmes v Railway, 175-101; 156 NW 877

Artificial pond—nonattractive nuisance. An ordinary pond of water, unguarded and unfenced, within the corporate limits of a city, and entirely within a railway right of way, and formed by natural drainage from surrounding land, which settled into a borrow pit, and around which children habitually played, is not an attractive nuisance, in such sense as to render the railway company liable in damages because an immature child met death by falling therein.

Blough v Railway, 189-1256; 179 NW 840

Plank shelf along cofferdam—not attractive nuisance. A plank shelf along the side of a cofferdam, adjacent to a bridge abutment which was securely inclosed by a substantial barbed wire fence, located in the open country and fairly removed from habitation, is not an "attractive nuisance" in such sense as to render the owner responsible for the death of an immature child, who, as a mere licensee, at the best, went upon the shelf and fell therefrom into the water.

Massingham v Railway, 189-1288; 179 NW 832

Accident at crossing—habitual negligence of engineer. On the issue of negligence of an engineer in operating his train on a certain occasion, evidence of his conduct on prior and similar occasions, is inadmissible.

Darden v Railway, 213-583; 239 NW 531

Action ex contractu—affirmatively showing negligence unnecessary. In an action against a railroad for damages, where plaintiff does not accompany shipment, he will not be bound to support his action, brought ex contractu, by affirmative showing of negligence by the carrier, nor will he be bound by a showing that a human agency caused the loss since this would merely establish negligence.

Vander Beek v Railway, 226-1363; 286 NW 452

Alighting from moving train. Negligence may be found in the act of a brakeman of a train in advising a passenger to alight from a moving train, and it is not necessarily negligence for the passenger to follow the advice.

Bersie v Railway, 202-1090; 211 NW 250

Baggage in aisle—negligence. Negligence on the part of a carrier may not be predicated on the presence of baggage in the aisle of a passenger coach when there is no evidence that the carrier knew, or ought in reason to have known, of the presence of such baggage.

Costello v Railway, 205-1077; 217 NW 434; 28 NCCA 82

Carriage of livestock—overloading cars—jury question. The court is in error in holding as a matter of law that a carrier of livestock knew or ought to have known that the cars were overloaded, when the testimony shows that the agent of the carrier was necessarily compelled to inspect the cars after dark, and with a flash light, and when he could not clearly see the animals.

Wiersma v Railway, 213-223; 238 NW 579

Injuries to livestock—directed verdict—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until 3 hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

Exoneration of servant—effect on master's liability. When a master is liable, if at all, because of the negligence of his servant, a verdict exonerating the servant from the alleged negligence, and a judgment of dismissal entered thereon, from which no appeal is taken, necessarily exonerates the master.

Lahr v Railway, 212-544; 234 NW 223
Hall v Miller, 212-835; 235 NW 298

Pleading negligence of employees operating railway motorcar—sufficiency. In action for personal injuries sustained by an automobile passenger in collision between automobile and railroad motorcar, where petition alleged that motorcar had been standing at crossing obscured from view of motorist by shrubbery along railroad right of way, and was driven into course of the oncoming automobile without any warning and that it could have been stopped by applying the brakes, such allegations were sufficient to state a cause of action based upon negligence of railroad employees.

Smith v Railway, 227-1404; 291 NW 417

Instruction without basis in evidence. An instruction authorizing a finding of negligence on the part of a railroad company if an employee thereof discovered the danger of an approaching vehicle and did not, in the exercise of ordinary care, report such danger to the engineer is wholly inapplicable to a record which clearly reveals the fact that, when the employee aforesaid discovered the danger, no ordinary care could have prevented the accident.

Gilliam v Railway, 206-1291; 222 NW 12

Injuries to persons on tracks—no-eyewitness rule. In an action against a railway company for damages for negligently running over and killing, during the nighttime, and within its switching yard, a pedestrian, the all-important and indispensable fact that said pedestrian was, when hit, on a nearby public sidewalk—where he had a right to be—will not be presumed from the fact that there was no eyewitness to the fatal accident, the "no-eyewitness rule" having no such function.

Young v Railway, 223-773; 273 NW 885

"Last clear chance" doctrine—applicability. The "last clear chance" doctrine has no application except in those cases only where defendant actually discovers plaintiff's position of peril in time to prevent injury by the exercise of ordinary care, and fails to exercise such care.

Graves v Railway, 207-30; 222 NW 344

"Last clear chance" doctrine—applicability. The "last clear chance" doctrine can have no application unless it be found that defendant discovered the negligence of the plaintiff at a time such that, by the exercise of reasonable care, defendant might have avoided injuring plaintiff.

Steele v Brada, 213-708; 239 NW 538

"Last clear chance"—evidence—insufficiency. The doctrine of "last clear chance" is not applicable unless peril of injured party is actually discovered and appreciated in time to prevent his injury by the exercise of ordinary care. So where plaintiff drives his truck at a speed of 4 or 5 miles per hour onto a railroad track, and is struck by a train going 4 or 5 miles per hour, and it is shown engineer of train felt a jar and, looking out of cab, saw some object in front of locomotive and immediately applied brakes and placed locomotive in reverse, held, evidence insufficient to submit to jury, and a motion for directed verdict was rightfully sustained.

Kinney v Railway, 17 F 2d, 708

"Last clear chance"—justifiable submission. The mere fact that a train operator on the rear of a backing train saw a party approaching a public crossing, at a time when the party was 100 or more feet distant, affords no basis for submitting to the jury the issue of the "last clear chance"; but such basis is furnished by testimony tending to show (1) that, to the knowledge of the operator, the party continued to approach said crossing and was in a position of peril when 30 feet therefrom, and (2) that the train could have been stopped within 20 feet.

Williams v Railway, 205-446; 214 NW 692; 27 NCCA 666

See Brimeyer v Railway, 213-1289; 241 NW 409

Licensor and licensee. A railway company may not be said to be guilty of actionable negligence because it habitually permits or suffers pedestrians on its right of way to use a path alongside, but well removed from the rails of its track.

Radenhausen v Railway, 205-547; 218 NW 316; 39 NCCA 36

Negligence—failure of coemployee to do his share of lifting. A coemployee is not shown to have been negligent by proof that while loading heavy rails upon a flat car he lifted less at times than at other times.

Kempe v Railway, 211-812; 232 NW 657; 74 ALR 148

Nonapprehended danger. Negligence may not be predicated on the failure of the operatives of a train to stop and remove a 7-year-old

III NEGLIGENCE IN GENERAL—continued

child from a pile of cinders near the track when there is no occasion to apprehend danger to the child.

Radenhausen v Railway, 205-547; 218 NW 316

Person under car—contributory negligence. A person who seeks shelter from a rain by going under a stationary railroad car, with full knowledge that the car might be moved at any time, is guilty of negligence; and it is no answer that he relied on a train crew sounding the engine whistle and ringing the engine bell before moving the car, the train crew having no reason to anticipate that anyone was under the car.

Anderson v Railway, 216-230; 249 NW 256

Private crossing—speed as basis for negligence. Reversible error results from so instructing as to permit the jury to base negligence on the speed of a train at a private farm crossing, irrespective of the safe or dangerous condition of such crossing.

Graves v Railway, 207-30; 222 NW 344

Proximate cause of injury—noncausal relation. Principle reaffirmed that negligence becomes quite inconsequential when it has no causal relation to the accident in question.

Simmons v Railway, 217-1277; 252 NW 516

Remand—right to amend. A plaintiff manifestly does not set up a new and different cause of action when, after remand on appeal in a law action based on negligence, he, by allowable pleadings, rephrases and elaborates an unadjudicated ground of negligence which was embraced in his pleadings at the time of the original trial.

Lahr v Railway, 218-1155; 252 NW 525

Remand—utilizing unadjudicated ground of negligence. Plaintiff, in an action based on negligence, who fails on appeal to sustain a verdict in his favor against an employer based solely on the doctrine of respondeat superior, may, on remand and retrial, avail himself of a ground of negligence which was alleged by him on the original trial, but which was unadjudicated, and which, if established, would render the defendant liable irrespective of the doctrine of respondeat superior.

Lahr v Railway, 218-1155; 252 NW 525

Res ipsa loquitur—applicability. Principle recognized that the doctrine of res ipsa loquitur is, under appropriate facts, applicable to common carriers.

Preston v Railway, 214-156; 241 NW 648

Res ipsa loquitur—scope. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence, not that such facts compel the jury to draw such inference in the absence of explanatory evidence. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Preston v Railway, 214-156; 241 NW 648

Street railway — contributory negligence — alighting from moving streetcar. Alighting from a slowly moving streetcar is not necessarily negligence per se.

Fitzgerald v Railway, 201-1302; 207 NW 602; 2 NCCA(NS) 540

Concurrent or intervening cause. Record reviewed, relative to a passenger's alighting from a moving streetcar and being almost immediately hit or touched by a passing automobile, and held to present a jury question on the issues whether the injury was caused (1) solely by the operation of the streetcar, or (2) solely by the operation of the automobile, or (3) by the concurrent movement of both the streetcar and the automobile.

Fitzgerald v Railway, 201-1302; 207 NW 602

Excessive speed—lack of control—jury question. Evidence held to present jury questions on the issues whether a motorman was, in view of the presence of children in the street, operating his streetcar at an excessive rate of speed; also whether he had his car under proper control.

Allen v Railway, 218-286; 253 NW 143

Failure to give warning—jury question. Evidence held to present a jury question on the issue whether a motorman in the operation of a streetcar failed to give warning of the approach of the car.

Allen v Railway, 218-286; 253 NW 143

Failure to maintain lookout—jury question. Evidence held to present a jury question on the issue whether a motorman in the operation of a streetcar maintained a proper lookout for pedestrians.

Allen v Railway, 218-286; 253 NW 143

No warning signal at crossing—statute violations—negligence. The failure of compliance with a statutory standard of care is negligence. In an action for personal injuries sustained by an automobile passenger in collision in Illinois between an automobile and railway motorcar, where petition alleged that railway employees failed to ring bell or sound whistle of motorcar while approaching a crossing, as required by Illinois statute, such allegations were sufficient to state a cause of action based on negligence of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

Injury to person near tracks—"oversweep" of car turning corner. The operator of a streetcar may not assume that a pedestrian who is intercepted by a streetcar at inter-

secting streets will avoid being hit by the "oversweep" of the car as it passes around the corner, when such operator has reason to know that the pedestrian is unaware of the impending danger.

Mangan v Railway, 200-597; 203 NW 705; 41 ALR 368

Injury from "oversweep" of streetcar turning corner. A jury question on the issue of negligence of a streetcar company and the contributory negligence of an injured plaintiff-pedestrian is presented by evidence tending to show that the plaintiff, in crossing a streetcar track at a point where streets intersected, and where the general traffic was congested, was intercepted by a passing streetcar, and, not knowing that the car was going to turn at said intersection, took up a position for his own safety within the limits of a safety zone marked out by the company on the street pavement immediately adjacent to the tracks, and used exclusively for taking on and discharging passengers; and that the motorman, knowing the position of plaintiff, and without any warning of danger to him, turned the car into the intersecting street, with resulting injury to plaintiff by being hit by the "oversweep" of the rear end of the car.

Mangan v Railway, 200-597; 203 NW 705; 41 ALR 368; 28 NCCA 622

Streetcar intersection—negligence per se. The operator of an automobile cannot be said to be negligent per se in driving into an intersection on a dark night in front of a rapidly oncoming streetcar with no headlight and with the entire front end of the streetcar unlighted, when, immediately before entering the intersection, he stops and listens, and looks both ways for streetcars, and sees none (so he testifies) because of the glare of oil station lights immediately to his left from which side the streetcar was approaching, and especially when there is evidence that the streetcar was approaching without audible signals.

Deiling v Railway, 217-687; 251 NW 622

Opening streetcar door as invitation to alight. Evidence that the conductor of a streetcar called the street, and, at a point very close to the customary place for discharging passengers, opened the exit door, after a stop signal had been given, and after he saw the passenger standing in front of the closed door, presents a jury question on the issue whether the opening of the door was an invitation to the passenger forthwith to alight, even tho unknown to the passenger, the car had not fully stopped.

Fitzgerald v Railway, 201-1302; 207 NW 602; 2 NCCA(NS) 540

Opinion evidence — unallowable questions. Whether a motorman could have done anything which would have stopped his streetcar sooner than it was stopped is properly excluded because the question calls for an unallowable conclusion, and also invades the province of the jury.

Allen v Railway, 218-286; 253 NW 143

Stopping streetcar in intersection and failure to warn. The operator of a streetcar is not negligent (1) in stopping, on signal, the car in the middle of a smoothly paved street intersection rather than at the near side thereof, and (2) in failing to warn a passenger that he might encounter peril in the street from passing vehicles.

MacLearn v Utilities Co., 212-555; 234 NW 851; 2 NCCA(NS) 551

Sudden stopping of streetcar. Evidence that a street railway car was put in motion in order to carry it around a corner at two intersecting streets, and was momentarily thereafter brought to a sudden stop because of the unexpected act of an automobile driver in attempting to pass the streetcar and in being caught by the overswing of the rear end of the streetcar, presents no jury question on the issue of negligence in operating the streetcar.

Wheeler v Railway, 205-439; 215 NW 950; 55 ALR 473

Tracks creating hidden danger. A jury question as to the negligent operation of a streetcar and as to the contributory negligence of the driver of an automobile is presented by evidence (1) that the streetcar tracks were so laid that, as they approached a turn at a street intersection, they imperceptibly approached the street curb until, near the intersection, insufficient space remained for the passage of an automobile between a passing streetcar and the curb, and (2) that the driver of the automobile, without knowledge of such condition of the tracks, and without warning from the streetcar employee who was present, was caught at said point of danger, and was not only "wedged in" between the streetcar and curb by the front end of the streetcar, but was crushed by the oversweep of the rear end of the car as it turned away from the auto at the intersection.

Knudson v Railway, 209-429; 228 NW 470

IV EMPLOYEES PROTECTED

Assumption of risk—failure of co-employee to do his share of lifting. An experienced railway employee who knows or learns during the work of loading heavy railway rails upon a flat car that a co-employee was in the habit of lifting less at times than at other times, and who understood and appreciated that in working under such conditions he might be compelled at any time to carry or lift an increased load with danger of injury to himself, must quit the work, or he will be deemed to have assumed the appreciated and understood danger.

Kempe v Railway, 211-812; 232 NW 657; 74 ALR 148; 31 NCCA 758

IV EMPLOYEES PROTECTED—concluded

Assumption of risk—overtaxing oneself. An employee assumes the risk of overtaxing himself by lifting.

Kempe v Railway, 211-812; 232 NW 657; 74 ALR 148

Fraudulent release. A written release of all damages suffered by an injured party is fraudulent and void when it was in fact mutually intended as a receipt for wages only, and was signed by the injured party without negligence on his part; and the failure of the injured person, who was himself unable to read, to have such instrument read to him does not necessarily constitute negligence per se.

Farwark v Railway, 202-1229; 211 NW 875

Inadvertent self-inflicted injury. One may not recover damages for an injury arising out of his own act, and under circumstances under his exclusive control. So held where the party in removing a prop under a loading chute was injured by the prop falling against his face.

Rogers v Railway, 214-1018; 243 NW 351

V FEDERAL EMPLOYERS' LIABILITY ACT

Applicability of state and federal acts. Injuries received by an employee of a common carrier, engaged in the transportation of both intrastate and interstate freight, are compensable under the state workmen's compensation act, and not under the corresponding federal act, when the employment, in the course of which and out of which the injuries arose, consists solely of the duty to patrol the railroad yards of the employer against thieves, trespassers, and fires.

Califore v Railway, 220-676; 263 NW 29

Assumption of risk incident to nature of work. Under the Federal Employers' Liability Act, a sectionman while inspecting a railway track assumes the risk of danger from passing trains.

Hamilton v Railway, 211-924; 234 NW 810; 31 NCCA 762

Fellow servants—nonassumption of risk. Under the Federal Employers' Liability Act, an employee does not assume the risk of an injury due to the negligence of a fellow servant.

Farwark v Railway, 202-1229; 211 NW 875; 26 NCCA 231; 31 NCCA 759

Contributory negligence by violating rule. The deliberate violation by a section foreman of a rule that, while inspecting his track on a motor car, he should cause one of his men to face to the rear and look for trains constitutes negligence.

Hamilton v Railway, 211-924; 234 NW 810

Injuries to servant—assumption of risk and negligence. In an action under the Federal Employers' Liability Act for damages for the death of a sectionman run down by a fast mail train, the plaintiff must affirmatively show (1) that the defendant was proximately negligent, and (2) that the plaintiff's decedent was not guilty of contributory negligence. Evidence held to show that plaintiff had failed on both fundamental requirements.

Hamilton v Railway, 211-924; 234 NW 810; 31 NCCA 762

Negligence—loading rails by hand. Record held to show that a railway company was not negligent, under the Federal Employers' Liability Act, in causing rails to be loaded by hand rather than by a hoisting machine or derrick.

Kempe v Railway, 211-812; 232 NW 657; 74 ALR 148

Negligence of fellow servant — evidence — sufficiency. Evidence reviewed, and held insufficient to establish negligence on the part of a fellow servant.

Baird v Railway, 209-1026; 229 NW 759

Rapid speed in open country. In an action for the death of a section foreman while inspecting a railway track in the open country, the rapid speed of the train may not be assigned as negligence upon the part of the railway company.

Hamilton v Railway, 211-924; 234 NW 810

8159 Unallowable pleas.

Assumption of risk defined. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

"Vice-principal" or "fellow servant"—master's liability. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he was a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

8160 Damages by fire.

ANALYSIS

I STATUTE IN GENERAL
II EVIDENCE
III DAMAGES AND MEASURE THEREOF

I STATUTE IN GENERAL

Presumption of negligence. To instruct that a railroad company must overcome a presumption of negligence in setting out a fire "by negativing every fact that would justify a finding of negligence on defendant's part" is not misleading when defendant is, by the instructions, fully exempted from liability on proof that its engine was properly equipped and properly operated.

Stickling v Railway, 215-1312; 247 NW 642

II EVIDENCE

Burden of proof. Evidence reviewed and held quite insufficient to show that the fire which destroyed plaintiff's property was set out by a railway company.

Beck v Railway, 214-628; 243 NW 154
See Stickling v Railway, 215-1312; 247 NW 642

Evidence of other fires set by other engines. In an action to recover damages consequent on a fire alleged to have been set out by a certain passing engine, evidence of other fires set out by other engines on other occasions near the place in question may be admissible, not on the issue of negligence, but on the issue as to how far an engine would throw burning embers.

Stickling v Railway, 212-149; 232 NW 677

Fire damage—evidence sufficiency. In an action against a railroad for loss of property by fire, the state court's construction of statute, respecting presumption against railroad causing fire damage, is binding on federal courts. So where a prima facie case is established by plaintiff and no rebuttal thereto is offered, evidence held sufficient to make case for jury.

Turner v Bremner, 40 F 2d, 368

III DAMAGES AND MEASURE THEREOF

Damages—unallowable evidence. On the issue as to the general damage to meadow land consequent on a fire set out by a passing railroad engine, evidence of the amount of grass seed which would have been realized had the grass been threshed instead of being used as hay, is wholly inadmissible,—the measure of damages in such case being the difference in value of the affected land before and after the fire.

Baird v Railway, 214-611; 243 NW 515

Other fires at time in question. Plaintiff in an action for damages consequent on a fire alleged to have been set by a passing engine, may show that the engine in question emitted sparks and burning embers which set fire to other combustible materials immediately preceding the fire in question.

Stickling v Railway, 212-149; 232 NW 677

8161 Baggage—liability.

Discussion. See 2 ILB 34—Liability for baggage

CHAPTER 374

RELOCATION OF LINE

8164 Conditions.

Abandonment and dismantlement—claims of donors. In proceedings for the abandonment and dismantlement of a railway, the measure of recovery by those who have made donations for the construction of the road cannot be less than the value of the railway when dismantlement was begun, if said claims equal such value.

State v Beaton, 209-1291; 228NW 111

Appointment of receiver. The fact that a party purchases property at a receiver's sale does not exhaust the power of the court to appoint a second receiver of the property so purchased, in order to protect rights relative to said property which accrued after said sale and by reason of the wrongful acts of said purchaser.

State v Beaton, 205-1139; 217 NW 255

8165 Order of court.

Abandonment and dismantlement—claims—judgment defendants. In the determination of claims against the owner of a railroad preliminary to the dismantlement of the road, judgment should be rendered against both the original purchaser and against his vendee when the original purchase was made with the purpose in view of immediate dismantlement and when said original purchaser and his vendee have, during the entire proceedings, treated themselves as owners.

State v Beaton, 209-1291; 228 NW 111

CHAPTER 375

PRIVATE BUILDINGS AND SPUR TRACKS

8169 Buildings on railroad lands.

Right of way for private business site. The board of railroad commissioners has no constitutional power to order a railway company to furnish a private party with a site on its right of way, and to fix the rental for such site, in order to enable such party to erect and maintain on such site a coal shed in which he may store his coal and from which he may sell his coal for private gain.

Ferguson v Railway, 202-508; 210 NW 604; 54 ALR 1

8170 Destruction of buildings.

Entire or severable contract. A contract provision which is valid when standing alone is not necessarily rendered invalid by the fact that in the contract in question it is interwoven with other contract provisions which may be violative of a statute. So held where a lease sought to exempt the lessor, a railroad company, from liability to the lessee for negligence, but provided that, if such exemption legally failed, "the lessor shall have full benefit of any insurance effected by the lessee on structures erected on the premises".

Queen Ins. v Railway, 201-1072; 206 NW 804

8171 Spur tracks.

Spur track to state institution—maintenance cost. After a contract placed the burden on the state to pay the cost of construction, maintenance, and operation of a spur track to the industrial school for boys at Eldora, a state institution, and in a later clause required the railway company to maintain the spur track, the contract as a whole was construed and the apparent ambiguity resolved in a finding that the railroad should do the maintenance work, but that the state should pay the cost.

State v Sprague, 225-766; 281 NW 349

CHAPTER 378

INTERURBAN RAILWAYS

8201 Definition.

Discussion. See 1 ILB 40—Status of interurban railways

8211 Franchises.

Valuation for rate-making purposes.

United Railways v West, 280 US 234

When franchise must yield to statute. A street-railway franchise ordinance which specifies, in effect, that, until the state statutes otherwise provide, the obligation of the company to construct and reconstruct paving between and outside the rails of its tracks shall be thus and so, manifestly must yield to such later enacted state statute.

In re Walnut St. Bridge, 220-55; 261 NW 781

Street railway granted relief—city's confiscatory rates. Under the statute, §767, C., '97 [§§6191, 6192, C., '39], granting cities and towns the power to authorize street railways where it is shown that under ordinance a contract was entered into providing maximum rates to be charged for carrying passengers, which limited the city to change of rates not oftener than once in 15 years, a sufficient showing was made in the court of original jurisdiction to warrant the granting of a temporary injunction against the city preventing a confiscation of property on account of low rate, and such temporary injunction will not be disturbed by appellate court until after the matter has been fully heard and determined in the lower court, unless an abuse of discretion is shown. The fact the railroad operated on the same rate for 20 years did not amount to an estoppel to secure relief from confiscatory rates by reason of long acquiescence.

City v Railway, 9 F 2d, 246

8212 Contracts and rates.

Street railway granted relief—city's confiscatory rates. Under the statute, §767, C., '97, [§§6191, 6192, C., '39], granting cities and towns the power to authorize street railways where it is shown that under ordinance a contract was entered into providing maximum rates to be charged for carrying passengers, which limited the city to change of rates not oftener than once in 15 years, a sufficient showing was made in the court of original jurisdiction to warrant the granting of a temporary injunction against the city preventing a confiscation of property on account of low rate, and such temporary injunction will not be disturbed by appellate court until after the matter has been fully heard and determined in the lower court, unless an abuse of discretion is shown. The fact the railroad operated on the same rate for 20 years did not amount to an estoppel to secure relief from confiscatory rates by reason of long acquiescence.

City v Railway, 9 F 2d, 246

CHAPTER 381

UNIFORM BILLS OF LADING LAW

PART II

OBLIGATIONS AND RIGHTS OF CARRIERS UPON THEIR BILLS OF LADING

8268[§24] Attachment or levy upon goods for which a negotiable bill has been issued.

Discussion. See 2 ILB 200—Garnishment of goods under bill of lading

CHAPTER 382

TELEGRAPH AND TELEPHONE LINES AND COMPANIES

8300 Right of way.

Atty. Gen. Opinion. See '30 AG Op 364

Franchise—intentional abandonment. Evidence held quite insufficient to establish an intention to abandon a legislative-acquired franchise.

Osceola v Utilities, 219-192; 257 NW 340

Perpetual franchise—grantees. A telephone company which, prior to October 1, 1897 (when the Code of 1897 took effect), had constructed a toll line and local telephone system in a city or town, thereby acquired a perpetual legislative franchise subject to the reserved power of the state, and said franchise necessarily passes to the holder's grantee.

Osceola v Utilities, 219-192; 257 NW 340

8304 Equal facilities—delay.

Physical connection. This section does not require a telephone company to permit another like company to physically connect the lines of the two companies.

State v Tel. Co., 214-1100; 240 NW 252

Physical connection. A telephone company that has contracted for and is maintaining physical connection with the lines of another telephone company is under no common law obligation to contract on the same terms, or on any terms, with another telephone company for physical connection with the lines of the latter. (The doctrine that a public utility is under a common law obligation to furnish equal facilities to the public contemplates no one except those who see fit to become the subscribers or patrons of the company.)

State v Tel. Co., 214-1100; 240 NW 252

RECIPROCAL SERVICE

8308.2 Facilities to local exchange.

Duty to furnish service—physical connection. A telephone company that has contracted for and is maintaining physical connection with the lines of another telephone company is under no common law obligation to contract on the same terms, or on any terms, with another telephone company for physical connection with the lines of the latter. (The doctrine that a public utility is under a common law obligation to furnish equal facilities to the public contemplates no one except those who see fit to become the subscribers or patrons of the company.)

State v Tel. Co., 214-1100; 240 NW 252

Physical connection between lines. A telephone company is not under statutory obligation to permit its lines to be physically connected with the lines of another company, by a statute (§8304, C., '31) which withdraws from the company certain legal rights if it "refuses to furnish equal facilities to the public and to all connecting lines for the transmission of communications * * *."

State v Tel. Co., 214-1100; 240 NW 252

CHAPTER 383

ELECTRIC TRANSMISSION LINES

8309 Franchise.

Scope of statute. This chapter applies solely to electric transmission lines outside cities and towns.

Anderson v Railway, 208-369; 226 NW 151

Location of line—power of county engineer. A franchise issued by the board of railroad commissioners to operate an electric transmission line "over, along, and across" a specified highway, under specifications calling for cross arms at the top of the poles, carries the right and power in the grantee so to erect its line that all parts thereof, including the superstructure, will be wholly within the lines of said highway. It follows that the general power of the county engineer, under §4838, C., '27, to

locate such lines does not embrace the power so to locate the line that part of the superstructure will overhang land outside the highway.

Iowa Corp. v. Lindsey, 211-544; 231 NW 461

8310 Petition for franchise.

Extra-territorial extension of municipal light and power lines—constitutional taxation. Sections 6142 and 8310, C., '31, are constitutional insofar as they authorize cities and towns to levy taxes for extending, beyond their corporate limits, the transmission lines of their municipally owned electric light and power plants.

Carroll v Cedar Falls, 221-277; 261 NW 652

8313 Objections—hearing.

Atty. Gen. Opinion. See '30 AG Op 122

8315 Valuation of franchise.

Valuation for rate-making purposes.

United Railways v West, 280 US 234

8319 Acceptance of franchise.

Location of line—power of county engineer. A franchise issued by the board of railroad commissioners to operate an electric transmission line "over, along, and across" a specified highway, under specifications calling for a cross-arm at the top of the poles, carries the right and power in the grantee so to erect its line that all parts thereof, including the superstructure, will be wholly within the lines of said highway. It follows that the general power of the county engineer, under section 4838, C., '27, to locate such lines does not embrace the power so to locate the line that part of the superstructure will overhang land outside the highway.

Iowa Corp. v Lindsey, 211-544; 231 NW 461

8322 Eminent domain—procedure.

Elements bearing on market value. The fact that the condemnor of an electric power line in maintaining the line would be compelled to go upon the land, and might cause damages to crops, etc., may have proper bearing on the issue of market value of the tract of land, even tho the statutes give the landowner a right of action for damages to crops and the like.

Evans v Utilities Co., 205-283; 218 NW 66

Measure of damages. Principle reaffirmed that the measure of damages for land condemned for right of way for an electric power line is the difference in the market value of the tract from which the land is taken, before and after the condemnation.

Evans v Utilities Co., 205-283; 218 NW 66

Trial theory as to right of way. The condemnor of land for an electric power line may not complain that witnesses on the issue of damages assumed that the right of way would be 100 feet in width, when such assumption was in harmony with the condemnor's petition for such right of way.

Evans v Utilities Co., 205-283; 218 NW 66

Value on condemnation proceedings. A landowner who knows the value of land sought to be condemned for an electric power line is competent to testify to the amount of damages caused to the tract by such condemnation, even tho he does not qualify as an electrical expert.

Evans v Utilities Co., 205-283; 218 NW 66

8323 Injury to person or property.

Electricity generally, liability. See under Ch 484, note 2 (VIII)

Admissibility of contract in action sounding in tort. In an action sounding in tort only, against alleged joint tort-feasors, a contract entered into by one of the defendants with a third party and conversations between said parties relative to matters arising under said contract, may be material, not for the purpose of permitting plaintiff to recover on the contract, but for the purpose of showing the defendant's relation to a certain subject matter, and thereby establishing a basis for the applicable law of tort.

Hanna v Electric Co., 210-864; 232 NW 421

Instructions—correct but not elaborate.

Hanna v Elec. Co., 210-864; 232 NW 421

Negligence—evidence—sufficiency. Evidence held insufficient to show negligence in the installation of electrical fixtures.

Anderson v Railway, 208-369; 226 NW 151

Contributory negligence per se. A person is guilty of contributory negligence per se when, knowing that a wire at the top of a pole carries a very dangerous voltage of electricity, and faced by no emergency requiring or excusing a relaxation of due care, he attempts to get another wire out of his way by swinging it upward in the form of a rainbow, in order to hook it over a spike which had been driven into the pole some two feet below the dangerously charged wire.

Murphy v Electric Co., 206-567; 220 NW 360

See Russell v Gas & Elec. Co., 215-1405; 245 NW 705

Contributory negligence of 11-year-old boy—jury question. In an action for personal injuries sustained by an 11-year-old boy, who, while playing in a tree in a public street fell into wires of public utility company, sustaining severe burns, the question of contributory negligence of the boy together with question of whether defendant company had knowledge of the use of the tree by the boys in the neighborhood in playing, and the question of proximate cause of the injury should have been submitted to the jury.

Reynolds v Iowa Utilities Co., 21 F 2d, 958

Person knowing of danger—handling broken wire—contributory negligence. It is well set-

tled as a general rule that where a person with knowledge of the dangerous character of an electric wire purposely comes in contact with it, he is guilty of contributory negligence and cannot recover for the resulting injury. So where plaintiff, with knowledge of the danger and using a table napkin as insulator, picks up an electric wire lying in the street where there is no imminent danger to others, a finding that he was contributorily negligent as a matter of law was not erroneous.

Barnett v D. M. Elec. Co., 10 F 2d, 111

Contributory negligence nullifies statutory presumption—transmission line injuries. When a person is injured by transmission line, the statutory presumption of defendant's negligence need not be rebutted when plaintiff fails to establish freedom from contributory negligence.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

Drawing wire cable against power line. Farmer attempting to connect wire cable from hay carrier on barn to pole 50 or 55 feet distant is contributorily negligent in drawing cable against power line when he saw or should have seen the power line and knew that it was not insulated.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

Limb hanging over wire—failure to remove.

Porter v Elec. Co., 228- ; 292 NW 231

Electric poles and wires—not inherently attractive nuisance. An electric power pole and wires and a fence of ten strands of barbed wire around the same are not agencies or instrumentalities reasonably calculated or likely to attract small children, and are not attractive agencies, such as to make the owner of the premises liable for the death of a child who climbed on the fence and reached over and touched one of the electric wires.

Davis v Malvern L. & P. Co., 186-884; 173 NW 252

Sagging wires on highway after storm—knowledge. In a case where a woman is burned by contacting a high tension electric line, sagging over a highway after a storm, and who testifies she had no knowledge it was there, newly discovered evidence to show that she was seen stepping over the broken poles prior to the accident, is not cumulative but tends directly to establish a material fact affecting the result of the case on retrial.

Wilbur v Iowa P. & L. Co., 223-1349; 275 NW 43

Noninsulated wires. Evidence held to present a jury question on the issue of the negligence of a utility company in maintaining noninsulated electric wiring in close proximity to machinery.

Beman v Electric Co., 205-730; 218 NW 343

Noninsulated wires—trespassers. The owner of a high voltage electric transmission line may not be said to be negligent in failing to cover the wires with an insulating material when its said line is constructed in full compliance with the law, and is guarded from injury therefrom by every practical device and expedient known and recognized by those who are expert in such construction and use; and one who unwittingly and wrongfully places himself in contact with such a line must be held to be the sole author of the resulting injury.

Dilley v Service Co., 210-1332; 227 NW 173

Presumption. An allegation of negligent construction or maintenance of an electrical transmission line is unnecessary, and if made, need not be proved, in an action for damages caused by fire set out by such line. Proof that fire was communicated to property by said line, and proof of the amount of damages resulting, plus the statutory presumption of negligence on the part of the operator of the line, make a prima facie case for recovery.

Walters v Elec. Co., 203-471; 212 NW 884; 38 NCCA 551

Proximate cause — evidence — sufficiency. Evidence held insufficient to show that certain acts of omission and commission were the proximate cause of an excess voltage of electricity reaching and entering a building.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Res ipsa loquitur—scope. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence; not that such facts compel the jury to draw such inference. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Preston v Railway, 214-156; 241 NW 648

Res ipsa loquitur. Evidence tending to show that decedent came to his death from an electric shock consequent on handling an ordinary electric lighting fixture, charged with electricity by the defendant, and that the ordinary lighting voltage was harmless, even tho there is evidence to the contrary as to the last proposition, furnishes basis for the application of the doctrine of res ipsa loquitur, and creates a jury question on the issue of the defendant's negligence.

Orr v Elec. Co., 213-127; 238 NW 604

Trespassers and "attractive nuisances". An owner of property may so negligently use it as to become liable in damages for a resulting injury to a trespasser. A jury question, both as to negligence and contributory negligence, is presented by testimony tending to show that an owner, without full compliance with city ordinance requirements, erected and maintained, on his own uninclosed, populously surrounded, and promiscuously frequented premises, which abutted upon an uninclosed

and much frequented public park and fishing resort, a pole with a ladder thereon in the form of spikes driven therein, and with a cross-arm on the pole, some 25 feet from the ground, carrying wires heavily charged with electricity, and that a trespassing boy of 14 years of age, and of ordinary intelligence, climbed the pole and, upon reaching the cross-arm, was killed by an electric shock.

McKiddy v Elec. Co., 202-225; 206 NW 815; 29 NCCA 886

Trespassing as defense. The fact that a person injured by coming in contact with a high-voltage wire was a trespasser on the land of a third party upon whose land the wire was erected, is no defense to an action for damages for said injury.

Lipovac v Iowa Co., 202-517; 210 NW 573

Cox v Elec. Co., 209-931; 229 NW 244; 36 NCCA 160

Waiver of presumption. A litigant who in the trial court relies solely on specific acts of negligence as a basis for his cause of action, may not be heard on appeal to assert that he has a right to rely on a statutory presumption of negligence.

Dilley v Service Co., 210-1332; 227 NW 173

Waiver of presumption. Failure to instruct on the statutory presumption of negligence in an action for wrongful injury from electricity, is not erroneous (1) when plaintiff has seemingly ignored such presumption by alleging and attempting to prove specific acts of negligence, and (2) when plaintiff requests no such instruction.

Hanna v Electric Co., 210-864; 232 NW 421

8325 Supervision of construction—location.

Atty. Gen. Opinion. See AG Op Aug. 29, '39

Location of line—power of county engineer. A franchise issued by the board of railroad commissioners to operate an electric transmission line "over, along, and across" a specified highway, under specifications calling for cross arms at the top of the poles, carries the right and power in the grantee so to erect its line that all parts thereof, including the superstructure, will be wholly within the lines of said highway. It follows that the general power of the county engineer, under §4838, C., '27, to locate such lines does not embrace the power so to locate the line that part of the superstructure will overhang land outside the highway.

Iowa Corp. v Lindsey, 211-544; 231 NW 461

8326 Manner of construction.

Manner of construction of lines—pleading violation of statute or ordinance—insufficiency. In an action against an electric company whose transmission line was so close to plaintiff's building that firemen could not throw water on a fire until current was turned off, which delay caused destruction of building and contents, a complaint alleging violation of town ordinance and a state statute respecting construction of transmission lines held insufficient to state a cause of action.

Bowen v Iowa Public Service, 35 F 2d, 616

8327 Distance from buildings.

Agreement. Statute requiring transmission lines to be 100 feet from building except by agreement held not to be violated when line was constructed 17 feet above ground and 18 or 19 feet from barn by agreement with the farm owner and former tenant.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

8328 Lines along or crossing highway —danger label.

Danger signs—posting—sufficient evidence. Evidence sufficient to justify finding that electric company had complied with statute requiring danger signs to be posted on poles or towers along highway.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

8329 Nonuser.

Atty. Gen. Opinion. See '36 AG Op 648

8330 Forfeiture for violations.

Atty. Gen. Opinions. See '25-26 AG Op 150; '36 AG Op 648

8338 Crossing highway.

Atty. Gen. Opinion. See '36 AG Op 525

CHAPTER 383.2

AERIAL TRANSPORTATION

8338.20 Rules.

Discussion. See 16 ILR 169—Ownership of air above land

Atty. Gen. Opinion. See '34 AG Op 521

Governmental functions—nonliability in performance. The statutory-prescribed rules of the state governing aerial navigation have no application to the state in its sovereign capacity, nor to its governmental agencies, nor to the officials of said agencies when exclusively engaged in performing the duties of said agencies.

De Votie v Cameron, 221-354; 265 NW 637

State fair board as defendant. The Iowa state fair board is an arm or agency of the state, and, therefore, not suable.

De Votie v Board, 216-281; 249 NW 429

CHAPTER 383.3

PIPE LINES

8338.24 Conditions attending operation.

Interstate commerce — unallowable burden on. A foreign corporation seeking to operate in this state an exclusive interstate pipe line system may not be constitutionally required by a state statute, as a condition precedent to the construction of its line and to the transacting of its said business, even on its own private right of way,

1. To apply for, obtain, and pay for a permit to carry on said business, and pay all expenses attending the hearing on said application, or
2. To consent to any and all statutes then or thereafter in force regulatory of said business, or
3. To consent that the state may levy on it such general property taxes and/or taxes on gross receipts, and/or taxes on net income as the general assembly may thereafter prescribe, or
4. To consent to and pay an annual license fee.

Reason: Each of said requirements imposes an unallowable burden on interstate commerce.

State v Pipe Line, 216-436; 249 NW 366

Interstate commerce—unconstitutional control—auxiliary provisions. When sections of a statute seeking to control interstate commerce are unconstitutional because imposing unallowable burdens on such commerce, all auxiliary sections of the same statute which prescribe the procedure thru which said unconstitutional control is sought to be attained, are likewise unconstitutional. (So held as to §§8338-d4 to 8338-d11, inclusive, C., '31 [§§8338.27-8338.34, C., '39].)

State v Pipe Line, 216-436; 249 NW 366

8338.41 Limitation on grant.

Strip mining—coal lease subject to pipe-line easement—lateral support. Where a pipe-line company has an easement across land and an option to buy a designated strip of land along the pipe line if a strip coal mine should be opened on the land, a subsequent strip mine coal lease, subject to the pipe-line easement and option, gives the coal lessee no rights to strip mine coal on the land covered by the purchase option and thus destroy the lateral support of the pipe line, nor is such lessee entitled to any part of the purchase price for such strip of land.

Penn v Pipe Line Co., 225-680; 281 NW 194

8338.46 Eminent domain.

Compensation—fixtures on mortgaged premises—res judicata. In a proceeding to condemn right of way for a gas pipe line, the fact that the pipe was already installed under an easement which was held in a foreclosure action to be inferior to a prior mortgage, did not thereby give the mortgagee through his foreclosure decree title and ownership of the pipe and fixtures installed on the mortgaged premises, nor is such foreclosure decree res judicata as to title to such pipe and fixtures without trying the issue thereon.

Titus Co. v Natural Gas, 223-944; 274 NW 68

8338.47 Damages.

Liability of principal and independent contractors. A contract granting the right of way over land for an underground pipe line, on payment of a certain sum per rod, and on payment of "damages to growing crops, fences, or improvements occasioned in laying, repairing, or removing lines", does not constitute an agreement by grantee that he will pay damages consequent on the negligent act—tort —of an independent contractor in injuring grantor's private bridge which was located wholly outside said right of way.

Asher v Construction Co., 216-977; 250 NW 179

Compensation rate—conflicting contracts.

Vorthmann v Pipe Line, 228- ; 289 NW 746

TITLE XIX

CORPORATIONS

CHAPTER 384

CORPORATIONS FOR PECUNIARY PROFIT

8339 Who may incorporate.

De facto corporations. See under §8401
Atty. Gen. Opinion. See '32 AG Op 4

Belated presentation of illegal incorporation. The objection or point that an alleged incorporation never became such in fact may not be presented for the first time on appeal.

State v Packing Co., 206-405; 220 NW 6

Collateral attack as unallowable defense to action. A foreign de facto corporation cannot be defeated in its action to prevent an injury to its property by the plea that it has no valid corporate existence, in that it has attempted in its incorporation to effect a combination of powers prohibited by the laws of the state of its attempted incorporation.

First T. & S. Co. v Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Corporate entity—unallowable disregard of. Where collaterally secured bonds, owned by a corporation, were depreciated in value by the wrongful act of the collateral-holding trustee in permitting worthless collaterals to be substituted for valuable collaterals, the resulting damages belong solely to the corporation. In other words, a stockholder may not maintain an action against the trustee for alleged special damages suffered by said stockholder consequent on the fact that said depreciation so impaired the capital of the corporation that an assessment on the corporate shares became necessary, and that the stockholder was unable to pay said assessment and thereby lost his said stock.

Grimes v Brammer, 214-405; 239 NW 550

Corporate governmental agencies—immunity from legal process and taxation. Immunity of corporate governmental agencies from suits and judicial process, and their incidents, is less readily implied than immunity from taxation.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Incorporation denied by state—partnership formed—agreement to furnish stock not excused. Promoters of a corporation are liable to an investor for money received as the agreed purchase price for stock in a corporation, even tho the failure to deliver stock occurred because the state denied the right to incorporate, and they are not relieved by a partnership agreement, signed by the investor, who nowhere waives nor abandons the agreement for delivery of the corporate stock.

Smith v Secor, 225-650; 281 NW 178

De facto corporation defined. Principle reaffirmed that a de facto corporation is one formed and acting as such under an authorizing statute, tho its incorporation may be defective.

First T. & S. Co. v Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Dentistry—practice by corporation. A corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is, therefore, subject to injunction if it attempts so to do.

State v Bailey Co., 211-781; 234 NW 260

Proof of incorporation. A copy of the articles of incorporation of a banking corporation, duly certified by the secretary of state, is sufficient proof of such incorporation.

State v Niehaus, 209-533; 228 NW 308

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced, unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason. Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or in fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Water company in which city owns stock—not "governmental agency"—exempt from federal tax. A private corporation furnishing water to city under arrangement whereby dividends and financial expenditures were limited, and city owned one-third of voting stock with right of representation on board of directors, right of purchase, and right to compel retirement of preferred stock from surplus earnings, held not immune from federal taxation as "governmental agency", since surplus earnings from water tax did not become property of city.

Citizens Water Co. v Com. of Int. Rev., 87 F 2d, 874

8341 Powers.

Atty. Gen. Opinion. See '32 AG Op 219

ANALYSIS

I POWERS IN GENERAL
II PARTICULAR POWERS AND OBLIGATIONS
III RIGHT TO SUE AND BE SUED
IV EXEMPTION OF PRIVATE PROPERTY
V BYLAWS

I POWERS IN GENERAL

Discussion. See 17 ILR 83—Practice of law

Articles—statutes as part of. The statutes and constitutional provisions of a state relative to corporations must be deemed a part of the articles of incorporation of a corporation tho not physically copied therein.

Ontjes v Bagley, 217-1200; 250 NW 17

Statutes and articles as part of contracts. The corporation charter and the statutes of the state of domicile of the corporation become a part of any contract between the corporation and a purchaser of its stock.

Bishop v Middle States Co., 225-941; 282 NW 305

Acting through agent—apparent authority. A corporation must act through an agent and as to third parties is bound by acts within the apparent scope of the agent's authority.

Wright v Iowa P. & L. Co., 223-1192; 274 NW 892

Action on insurance policy—real party in interest — authority to make admission in pleading. A defendant corporation, formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers, is the real party in interest in an action to enforce a judgment against the corporation. The group of subscribers is not a legal entity, and when the corporation is the only legal entity of the two, an admission of an important fact by the corporation made in a counterclaim in the action in which judgment was obtained is binding on it in the later action.

Mitchell v Underwriters, 225-906; 281 NW 832

Assignment of rents by dummy corporation. On the issue, in mortgage foreclosure, whether an assignment of the rents of the mortgaged premises placed the rents beyond the power of the receiver, if one were appointed, evidence reviewed and held insufficient, in the absence of any showing of fraud, to justify the court in holding that the assignor corporation and the assignee corporation were in fact one corporation,—that the assignor corporation was a mere dummy.

First Tr. JSL Bk. v Galagan, 220-173; 261 NW 920

Corporation judgment compromised — former stockholder—no authority. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Discretion in re managerial expenses. An insurance company which is conducting the business of assessment and level premium life insurance will not bé controlled by the courts in its allotment between the two classes of insurance, of the managerial expenses, so long as such allotment is not violative of law, is reasonable, and is not arbitrary.

Wall v Bankers Life, 208-1053; 223 NW 257

Injunction — "balance-of-convenience" rule. The consummation of a perfectly legal reorganization of a corporation will not be held up by injunction pending the determination of the value of the interest of a dissenting stockholder when said stockholder can be amply protected by a deposit of money or bond by the corporation.

Ontjes v Bagley, 217-1200; 250 NW 17

Life insurance—insurable interest—corporation as beneficiary of policy on officer. A corporation which, for its own general benefit, is the beneficiary in a policy of life insurance on the life of one of its officers, is unconditionally entitled to the proceeds of the policy, even tho the insured had, at the time of his death, severed his official relation with the corporation.

Reilly v Ins. Co., 201-555; 207 NW 583

Reorganization—authorized method. The stockholders of a corporation, or a part thereof, may, in good faith, reorganize it (1) by causing its entire assets and liabilities to be transferred to a newly formed corporation, and (2) by surrendering their old stock and in lieu thereof receiving stock of the new corporation—provided the laws of the states under which the corporations are organized sanction and authorize such reorganization.

Ontjes v Bagley, 217-1200; 250 NW 17

Reorganization—dissenting stockholder—arbitrary determination of value of stock. The plans for the reorganization of a corporation may not arbitrarily fix the value of the stock of a dissenting stockholder.

Ontjes v Bagley, 217-1200; 250 NW 17

Sale of assets (?) or consolidation (?). Record relative to the transfer of corporate assets reviewed, and held legally to constitute but a sale of the assets of certain existing

I POWERS IN GENERAL—concluded

corporations to a newly formed corporation, and not a consolidation at common law.

Graeser v Finance Co., 218-1112; 254 NW 859

Sale of entire assets—effect. A sale of the entire assets of different corporations to a newly formed corporation, and consummated in good faith and in conformity with the articles of incorporation of said corporations, and with the laws of the state under which said incorporations were effected, is binding and conclusive on the selling and buying corporations and on the stockholders thereof.

Graeser v Finance Co., 218-1112; 254 NW 859

Seal—duty to affix—scope of requirement. A writing granting to a party a mere option to repurchase land from a corporation within a named time and at a named price, is not an instrument such as is contemplated by the statute which requires the corporate seal to be affixed to instruments "conveying, incumbering or affecting real estate", nor as is contemplated by substantially similar requirements in articles of incorporation.

Shanda v Clutier Bank, 220-290; 260 NW 841

Stock—wrongful issuance—cancellation in equity. Where a corporation which succeeds to the business of two partners agrees to pay all outstanding debts of the partnership, a hypothecation of corporate stock of one of the two stockholders as security for one of said debts, manifestly works no transfer of title to said stock to the corporation, and where the debt is paid with corporate funds, and the stock certificate is returned, the wrongful act of the nonhypothecating stockholder in causing a new stock certificate to be issued to himself for one-half of the returned shares will be canceled by proper action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Ultra vires acts. Where corporation directors borrowed money from bank to purchase stock in manufacturing corporation, taking over of such indebtedness by corporation was ultra vires, and where bank participated therein with knowledge, corporation indebtedness to bank and directors' notes to corporation should be canceled, and new notes delivered to bank by directors.

Waters v Disbrow & Co., 70 F 2d, 572

Ultra vires acts. Borrowing of money from manufacturing corporation by directors to purchase stock from others, and switching of indebtedness from corporation to bank and from bank to corporation with knowledge of bank, held ultra vires for which directors were liable to corporation for advancements with interest made within period of limitation for money received, but increase of corporation indebtedness to bank should stand where money obtained from bank was used by corporation.

Waters v Disbrow & Co., 70 F 2d, 572

II PARTICULAR POWERS AND OBLIGATIONS

Action on behalf of corporation—when demand unnecessary. Demand on an incorporated fraternal order to institute an action against a former officer of the order to recover money belonging to the order and unlawfully expended by such officer, is not a condition precedent to the commencement of such action by a member of the order, when the record reveals the fact that such demand if made would have been met by a peremptory refusal.

Outing v Plum, 212-1169; 235 NW 559

Agreement as to dividends—want of consideration—effect. An agreement that one of two stockholders shall draw all dividends up to a certain time, unsupported by any consideration, is properly canceled in an action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Consolidation, merger, and sale of assets distinguished. Consolidation of corporations, merger of corporations, and sale of assets of one corporation to another defined and distinguished.

Graeser v Finance Co., 218-1112; 254 NW 859

Disposal of assets. Principle recognized that, at common law, neither the board of directors of a corporation nor a majority of the stockholders thereof, can, against the dissent of a single stockholder, dispose of all the assets of the corporation when the corporation is conducting a prosperous business.

Graeser v Finance Co., 218-1112; 254 NW 859

Sale of entire assets. The board of directors of an insolvent banking corporation which is on the verge of a complete financial collapse has power to sell en masse the assets of the corporation without the consent of the stockholders, especially when the directors own a majority of the stock.

Oskaloosa Bk. v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Equitable estoppel—ultra vires in re corporate accommodation note. A corporation is not estopped to plead ultra vires in becoming the maker of an accommodation promissory note, from the fact that its officers knew that the payee (who was not the accommodated party) was making advances to the party actually accommodated, when the payee knew (1) that the note was an accommodation solely to the party receiving the advances, and (2) that the note was not executed in conformity with the authority which the corporation had granted to its officers.

Black Hawk Bk. v Monarch Co., 201-240; 207 NW 121

Partnership—mutual rights, duties and liabilities of partners. The members of a partnership (or the stockholders of a corporation) may validly authorize a partner (or an officer of the corporation as the case may be) to privately engage in the same business for the transaction of which the partnership (or corporation) was formed, and in such cases no partner (or stockholder) will be permitted to lay claim, on behalf of the partnership (or corporation), to any profits accruing under such private contracts,—no rights of third parties being involved.

Anderson v Dunnegan, 217-672; 250 NW 115

Officers — resolution deferring delinquent salary—contractual validity. Where a father and son, the sole owners of a corporation, as officers, and having delinquent salary due them, pass a resolution deferring payment until after death of both, such resolution became a contract, supported by a consideration and accepted by and binding upon both the corporation and the executing officers, who having personally conducted the transaction are bound thereby and estopped from denying its validity.

Bankers Trust v Economy Coal, 224-36; 276 NW 16

Stock—limitation on transfer. A provision in the duly recorded articles of incorporation of a corporation for profit to the effect that the corporate shares of stock shall not be transferred to persons who are not then owners of stock, unless the proposed new stockholder is recommended by two directors, is neither violative of statute nor of public policy.

Mason v Tel. Co., 213-1076; 240 NW 671

Issuance of unpaid stock—pledge to innocent party—estoppel. A corporation which issues and delivers its corporate shares of stock, without receiving payment therefor, estops itself to question such issuance and delivery after the stock has been pledged by the holder thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Stock—rights of equitable owner. The legal rights of an equitable owner of corporate shares of stock (stock not duly transferred to him on the books of the corporation) are, in many respects, very limited, but, among such rights, is the right to maintain an action against the corporation to establish and protect the interest of such equitable owner in the corporate property.

Graeser v Finance Co., 218-1112; 254 NW 859

Stock—restricting sale—corporation having first option to buy. Provisions in articles of incorporation requiring stockholders to give the corporation opportunity to purchase, before selling to outsiders, are generally held to be valid and apply to investment stock as well as voting stock.

McDonald v Farley et al. Co., 226-53; 283 NW 261

Stock—corporation having first option to buy—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock, and mandamus will lie to compel the transfer of said stock on its records.

McDonald v Farley et al. Co., 226-53; 283 NW 261

Water company in which city owns stock—not "governmental agency"—exempt from federal tax. A private corporation furnishing water to city under arrangement whereby dividends and financial expenditures were limited, and city owned one-third of voting stock with right of representation on board of directors, right of purchase, and right to compel retirement of preferred stock from surplus earnings, held not immune from federal taxation as "governmental agency", since surplus earnings from water tax did not become property of city.

Citizens Water Co. v Com. of Int. Rev., 87 F 2d, 874

III RIGHT TO SUE AND BE SUED

Contract to repurchase stock—equitable issues not presented—no review. On appeal from a ruling sustaining plaintiff's demurrer to answer of a foreign corporation, in suit for breach of contract to repurchase from plaintiff its own stock, setting up defense that such purchase would impair its capital, which was prohibited under the statute of the state of its domicile, the supreme court could not exercise its inherent equitable power or give consideration to estoppel, ratification, implied contract, or theory that contract was loan, when proper pleading or proof relating thereto was lacking.

Bishop v Middle States Co., 225-941; 282 NW 305

Libel—corporation as plaintiff. A corporation may maintain an action for libel.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Corporate entity—unallowable disregard of. Where collaterally secured bonds, owned by a corporation, were depreciated in value by the wrongful act of the collateral-holding trustee in permitting worthless collaterals to be substituted for valuable collaterals, the resulting damages belong solely to the corporation. In other words, a stockholder may not

III RIGHT TO SUE AND BE SUED—continued

maintain an action against the trustee for alleged special damages suffered by said stockholder consequent on the fact that said depreciation so impaired the capital of the corporation that an assessment on the corporate shares became necessary, and that the stockholder was unable to pay said assessment and thereby lost his said stock.

Grimes v Brammer, 214-405; 239 NW 550

Court control in lieu of corporate control. Where the officers and directors of a corporation settle and compromise a dispute in which the corporation is involved, and the settlement is intra vires, minority stockholders will not be permitted to displace corporate authority and control by substituting court control, except in plain cases of fraud or maladministration.

Independent Order v Scott, 223-105; 272NW 68

Decisions reviewable—misjoinder of corporate parties—ruling on motion to strike—nonreviewable fact question. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Central Co., 227-427; 288 NW 441

Foreign corporation—interference with internal affairs. Where a foreign corporation receives, as a consideration for the legal sale of its entire assets, a certain amount in money and the balance in the bonds, and in the preferred and participating stock of the purchaser, the courts of this state will not, in an action against the corporation, adjudicate the question whether a dissenting stockholder should be paid in cash the value of his stock, as such adjudication would be an unallowable interference with the internal affairs of said foreign corporation.

Graeser v Finance Co., 218-1112; 254 NW 859

Foreign corporation without business permit — action on contract barred. A foreign stock corporation which, through its president while personally present in Iowa, sells on contract, accepts payment, part in cash and part in notes, and makes delivery of a machine, is doing business in the state, and not having first secured a permit to do business may not maintain an action on such contract.

Actino Lab. v Lamb, 224-573; 278 NW 234

Fraud—joinder of corporations and officers. Two corporations, each organized by the same promoters, for identically the same purpose, and officered by the same officers, may be joined with the common president, in an action based upon a single joint transaction wherein the said president in the sale of corporate stock of both corporations made false representations in the interest of and for the benefit of both corporations.

McCarthy v Dixon, 219-15; 257 NW 327

Joint stock land banks—legal status. Joint stock land banks, tho organized under federal statutes, are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages, are not governmental instrumentalities, and are suable in the proper state courts.

Higdon v Lincoln JSL Bk., 223-57; 272 NW 93

Judgment—fatal inadequacy of proof. The court has no legal right to enter judgment against a corporation on promissory notes purporting to be signed by the corporation by its president (1) when there is no proof as to the actual or apparent authority of the president, and (2) no evidentiary explanation as to the nature of the transaction.

Schooler v Avon Lakes Corp., 216-1419; 250 NW 629

Optometry—corporation practicing through employee-physician. A corporation is practicing optometry when it employs a physician —a licensed optometrist—to carry on his business under the company's control, and such practice may be enjoined.

State v Ritholz, 226-70; 283 NW 268

Restraint of vexatious suits. Restraint by injunction of one claiming to have cause of action against another should be granted only when the purpose of it is shown clearly to have been in bad faith and for the purpose of vexation and annoyance. Rule applied where successive actions were brought by stockholders against corporation.

Strasburger v Witousek, (NOR); 211 NW 713

Ultra vires and lack of authority—ratification. A corporation is estopped to plead that the contract of its vice president on behalf of the corporation to repurchase a note and mortgage, at face value, was neither expressly nor impliedly authorized and was ultra vires, when the corporation with full knowledge of all the facts elects to retain the consideration paid it for the paper.

Hawkeye Ins. v Tr. Co., 210-284; 227 NW 637

Unauthorized expenditures—ratification. A member of a fraternal order may not maintain an action against a former officer of the order

to recover, on behalf of the order, money belonging to the order and expended by said officer for unauthorized purposes, when the governing body of the order has formally and explicitly ratified such expenditures.

Outing v Plum, 212-1169; 235 NW 559

IV EXEMPTION OF PRIVATE PROPERTY

Authorization of corporate indebtedness—effect. The stockholders of a legal incorporation do not, by authorizing their board of directors to incur corporate obligations, render themselves personally liable to contribute to the loss suffered by the directors who incurred personal liability by executing their personal notes.

Fulton v Farmers Exch., 207-371; 222 NW 889

V BYLAWS

Authority of president—insufficient showing. A contract is not binding on a corporation, tho entered into in its name by its president, to the effect that the corporation shall be and remain liable on promissory notes negotiated by it without recourse, when authority to the president to enter into such contract cannot be found in the articles of incorporation, in the bylaws, in the proceedings of the directors in any act of corporate ratification, or in the customs and practices of the corporation.

First N. Bk. v Prod. Co., 209-358; 227 NW 908

Employment under delegated authority. The board of directors of a corporation, when not prohibited from so doing by the articles of incorporation or bylaws, may delegate in good faith to the corporate manager power to hire employees and to fix and pay salaries; and under such delegation, the manager may, in good faith, legally employ a director to perform duties which are separate and distinct from those of a director.

Schulte v Ideal Co., 208-767; 226 NW 174

8342 Index book.

Landlord's contractual lien—recording articles and assignments—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

8343 Articles adopted and recorded.

De facto corporations. See under §8401

Articles—statutes as part of. The statutes and constitutional provisions of a state relative to corporations must be deemed a part of the articles of incorporation of a corporation tho not physically copied therein.

Ontjes v Bagley, 217-1200; 250 NW 17

Statutes and articles as part of contracts. The corporation charter and the statutes of the state of domicile of the corporation become a part of any contract between the corporation and a purchaser of its stock.

Bishop v Middle States Co., 225-941; 282 NW 305

Mutual rights. The members of a partnership (or the stockholders of a corporation) may validly authorize a partner (or an officer of the corporation as the case may be) to privately engage in the same business for the transaction of which the partnership (or corporation) was formed, and in such cases no partner (nor a stockholder) will be permitted to lay claim, on behalf of the partnership (or corporation), to any profits accruing under such private contracts,—no rights of third parties being involved.

Anderson v Dunnegan, 217-672; 250 NW 115

Brokers compensation—insufficient proof. It is a far-fetched proposition that a broker employed to effect a sale of all the capital stock of a corporation has established his right to a commission by proof that he contacted a party in the effort to effect such sale but was unsuccessful, and that some two years later, without any further effort on his part, the party so contacted and said corporation effected a reorganization of the corporation on the basis of a stock issue entirely different than that formerly existing.

Jackley-Wiedman Co. v Washer Co., 220-486; 262 NW 97; 101 ALR 1216

Preferred stockholders' rights—subject to general creditors' claims. Rights of preferred stockholders in a bankrupt corporation's assets are subject to all debts of the corporation, including general creditors, and instruments having attributes commonly attached to preferred stock are construed as stock unless contrary intention clearly appears, in which respect the articles of incorporation are held competent to prove meaning and legal effect of certificates purporting to be issued under such articles.

In re Hicks-Fuller Co., 9 F 2d, 492

8344 Filing or refusal to file.

Atty. Gen. Opinions. See '30 AG Op 304; '32 AG Op 130

8345 Question of legality submitted.

Stock—limitation on transfer. A provision in the duly recorded articles of incorporation of a corporation for profit to the effect that the corporate shares of stock shall not be transferred to persons who are not then owners of stock unless the proposed new stockholder

is recommended by two directors, is neither violative of statute nor of public policy.

Mason v Mallard Co., 213-1076; 240 NW 671

8347 Submission to executive council.

Atty. Gen. Opinion. See '36 AG Op 528

8348 Interpretative clause.

Atty. Gen. Opinion. See '36 AG Op 528

8351 Limit of indebtedness. (Repealed)

Debts beyond lawful limit—status. A debt contracted by a corporation in excess of the maximum limitation prescribed by law is not void.

German Bk. v Bank, 203-276; 211 NW 386

Noncreation of debt. A corporation which sells its holdings and receives in payment a transfer of junior mortgages on other property, without agreement to pay the senior mortgages, necessarily creates no indebtedness against itself.

Boyd v Bank, 205-465; 218 NW 321

Authorization of corporate indebtedness—effect. The stockholders of a legal incorporation do not, by authorizing their board of directors to incur corporate obligations, render themselves personally liable to contribute to the loss suffered by the directors who incurred personal liability by executing their personal notes.

Fulton v Exchange, 207-371; 222 NW 889

8357 Notice of incorporation.

ANALYSIS

I NOTICE
II OFFICERS IN GENERAL
III CORPORATE STOCK IN GENERAL

I NOTICE

Notice—sufficiency. A notice of incorporation sufficiently states the time of the commencement and termination of the corporation, and the amount of capital stock authorized, and the time and conditions in which it is to be paid in, (1) by a recital that the business should begin on the date of the issuance of the official certificate of incorporation and continue for a named time, and (2) by a recital of the amount of capital stock, and that it should be fully paid before the corporation began business.

Comstock v Wood, 204-1027; 216 NW 640

Landlord's contractual lien—recording articles and assignments—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

II OFFICERS IN GENERAL

Identity of partnership and corporation. A bona fide corporation which is engaged in one business, and a bona fide partnership which is engaged in a different business may not, even in equity, be deemed identical—one and the same entity—even tho the corporate stock of the corporation is owned entirely by the partnership entity and by the individual partners, and even tho the individual partners of the partnership constitute the board of directors of the corporation. So held on the plea that a contract of the corporation worked a change in a former contract of the partnership, and thereby released the surety.

Weitz v Guar. Co., 206-1025; 219 NW 411

Partner's (or stockholder's) right to compete with partnership (or corporation). The members of a partnership (or the stockholders of a corporation) may validly authorize a partner (or an officer of the corporation as the case may be) to privately engage in the same business for the transaction of which the partnership (or corporation) was formed, and in such cases no partner (or stockholder) will be permitted to lay claim, on behalf of the partnership (or corporation), to any profits accruing under such private contracts,—no rights of third parties being involved.

Anderson v Dunnegan, 217-672; 250 NW 115

Apparent authority of manager sufficient to bind corporation to tenancy. Corporation held liable for rent as tenant at will, based on correspondence and telephone conversations with corporation's manager, as against contention that manager was not authorized to enter into arrangement made—principal being bound by apparent authority of its agent.

Daly Co. v Brunswick Co., (NOR); 263 NW 234

Directors—nonimputed knowledge. Actual knowledge of the business transactions of a corporation is not imputable to a director simply because of such directorship.

Commercial Bank v Kietges, 206-90; 219 NW 44

Knowledge of insolvency of bank—not imputable to nonactive director. Knowledge that a bank is insolvent is not imputed to one who is a director and minor stockholder of the bank, when he takes no active part in its management and has no actual knowledge of the insolvency.

In re Smith, 228- ; 289 NW 694

Liability of officer for corporate tort. The managing officer of a corporation who causes the corporation of which he is such officer

wrongfully to withhold personal property from a person who is entitled to the immediate possession of said property, is guilty of a tort, and is personally liable for said tort along with his said corporation.

Luther v Investment Co., 222-305; 268 NW 589

Nonpermissible joinder. An action against a corporation on its obligation and an action against the directors to enforce a statutory liability relative to such obligation may not be joined.

McPherson v Commercial Co., 206-562; 218 NW 306

Sales contract—offer or order—insufficient acceptance by corporation. A contract for the purchase of an article from a corporation is not established by the simple, naked showing that the purported buyer signed an order addressed to the corporation for the article, and that said order carries an acceptance signed individually by a person who was, in fact, the vice president and general manager of the corporation.

Birum-Olson Co. v Johnson, 213-439; 239 NW 123

Check—indorsement by corporate payee. An indorsement on a negotiable check payable to the "order of" a corporate payee, tho consisting simply of the name of said corporation, effects a prima facie transfer of absolute ownership of the check to the bank to which the check is delivered by the said corporation as a deposit; and especially so when it appears that said indorsement is in the handwriting of a general, managerial officer of the corporation.

Bureau Service v Lewis, 220-662; 263 NW 7

Corporate president's authority to write checks—burden of proof. In action by payee of check drawn by president of corporation for interest on officer's note, it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

Good faith holdership of note—calling officers. The corporate holder of a promissory note sufficiently establishes its holdership in good faith and for value by calling those of its officers only who participated in the purchase of said note.

Grimes Bank v McHarg, 213-969; 236 NW 418

Payment of mortgage—authority of president. Principle reaffirmed that the president of an investment corporation has no implied authority to agree on behalf of the company that a real estate mortgage held by the company shall be considered as an absolute deed, and that the company will accept the equity of redemption of the mortgagors as full payment of the mortgage debt.

Central Co. v Estes, 206-83; 218 NW 480

Release or subordination of mortgage—authority of president. A corporation is bound by the act of its president in subordinating its mortgage to another mortgage (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached, and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Right as bondholder. An officer of a corporation who, as surety, signs a corporate note for borrowed money which the corporation employs in its business, and in good faith receives bonds of the corporation to indemnify him in case he is compelled to pay the note, will, upon payment of the note, be accorded the same rights under a trust deed or mortgage executed to secure the payment of said bonds as will be accorded to good-faith purchasers of other portions of said bonds.

Gunn v Gould Co., 206-172; 218 NW 895; 220 NW 127

III CORPORATE STOCK IN GENERAL

Discussion. See 17 ILR 313—Minority stockholder

Authority of depositary—assessment on corporate stock. The holder in escrow of corporate stock has no implied authority to pay an assessment on said stock.

Harris v Bills, 203-1034; 213 NW 929

Divorced stockholders—disposition of property—nonallowable subsequent modification. Where parties to a divorce proceeding owned the entire capital stock of a corporation, and said stock was decreed to the parties in equal shares, a subsequent modification of the decree will not be entered because of the doing of acts in the course of the corporate management in which each acquiesced, nor because one of the parties now apprehends that said equal division of stock will ultimately result in a deadlock in corporate management.

Parker v Parker, 214-1327; 241 NW 497

Issuance of unpaid stock—pledge to innocent party—estoppel. A corporation which issues and delivers its corporate shares of stock without receiving payment therefor, estops itself to question such issuance and deliv-

III CORPORATE STOCK IN GENERAL—concluded

ery after the stock has been pledged by the holder thereof to a good-faith pledgee for value and without notice of the fact of non-payment.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Oral contract to repurchase. An oral contract by one who effects a sale of corporate shares of stock as agent of the owner thereof, that he will repurchase the shares on demand of the purchaser, is within the statute of frauds.

Thomas v Elec. Co., 220-850; 263 NW 499

Preferred stock—lien—nature of. Where articles of an incorporation for the purchase and sale of real estate grant to the holders of preferred stock a first lien on all the assets of the incorporation, the lien is a blanket lien upon all the assets, whatever their form, and not a lien upon particular items of property.

Boyd v Bank, 205-465; 218 NW 321

8360 Amendments—fees.

Amendment to articles—inaccurate designation—effect. Amended articles of incorporation of a farm bureau association will be given the effect manifestly intended notwithstanding the fact that they are inaccurately designated.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

Collateral attack on corporate existence after change of name. When a corporation changed its name by amending its articles of incorporation, and published notice of the amendment only one week instead of four, as required by statute, it continued to exist as either a de jure or de facto corporation, and its corporate existence could be attacked only by direct action, and not collaterally.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Landlord's contractual lien—recording articles and assignments—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

8362 Individual property liable.

ANALYSIS

I PERSONAL LIABILITY IN GENERAL
II WHEN PERSONAL LIABILITY ATTACHES
III WHEN PERSONAL LIABILITY DOES NOT ATTACH

I PERSONAL LIABILITY IN GENERAL

Burden of proof. Persons who are in good faith contracted with and extended credit as partners are personally liable for the resulting debt, in the absence of evidence by them that they are stockholders in a corporation which is at least a de facto corporation.

Wilkin Co. v Co-op., 208-921; 223 NW 899

Substantial failure to effect incorporation. This section has no application to a case where no steps whatever are taken to effect an incorporation beyond securing subscriptions for stock in the contemplated incorporation and assuming to issue such stock, there being no holding out of an incorporation.

Kinney v Bank, 213-267; 236 NW 31

Waiver of statutory right—public policy. A waiver by a corporate creditor of his statutory right (now repealed) to hold officers and directors personally responsible for prohibited excess corporate indebtedness is not violative of public policy.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

II WHEN PERSONAL LIABILITY ATTACHES

Liability of stockholders—burden of proof. Persons who are in good faith contracted with and extended credit as partners are personally liable for the resulting debt, in the absence of evidence by them that they are stockholders in a corporation which is at least a de facto corporation.

Wilkin Co. v Co-op., 208-921; 223 NW 899

Personal liability of stockholder who appropriates corporate assets. A stockholder who appropriates to his own personal use substantially all the assets of the corporation becomes personally liable for the taxes theretofore levied against the corporation, the appropriation being in excess of said taxes.

Manning v Ottumwa Auto Co., 210-1182; 232 NW 501

Corporate resolution deferring delinquent salary—contractual validity. Where a father and son, the sole owners of a corporation, as officers, and having delinquent salary due them, pass a resolution deferring payment until after death of both, such resolution became a contract, supported by a consideration and accepted by and binding upon both the corporation and the executing officers, who having personally conducted the transaction are bound thereby and estopped from denying its validity.

Bankers Trust v Economy Coal, 224-36; 276 NW 16

III WHEN PERSONAL LIABILITY DOES NOT ATTACH

Authorization of corporate indebtedness—effect. The stockholders of a legal incorporation do not, by authorizing their board of directors to incur corporate obligations, render themselves personally liable to contribute to the loss suffered by the directors who incurred personal liability by executing their personal notes.

Fulton v Exch., 207-371; 222 NW 889

Liability for excess corporate debts—waiver. The purchaser of a corporate bond effectively waives his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, when he accepts the bond with an agreement therein consenting to all the terms of an indenture of trust securing said bond, and when he had full opportunity to discover that said indenture specifically embraced such waiver.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Liability for excess indebtedness—waiver—consideration. Ample consideration for a contract waiver by the purchaser of corporate bonds, of his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, may be found in the fact that the corporation has withdrawn a large amount of its assets and specifically pledged them with a trustee for the purpose of paying said bonds.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Liability of stockholders—de facto corporation. A creditor who knowingly contracts with, and extends credit to, a corporation as such tho it is only a de facto corporation, may not, in the absence of a statute to the contrary, hold the stockholders personally liable for the resulting debt.

Wilkin Co. v Co-op., 208-921; 223 NW 899

Nonpersonal liability under defective notice. The fact that a published notice of amendment to the articles of incorporation of a validly organized corporation does not state the terms and conditions upon which an issue of increased capital stock is to be paid, does not render a stockholder personally liable for the corporate debts, as regards a creditor who, at the time of extending credit, had explicit knowledge of such terms and conditions.

Comstock v Wood, 204-1027; 216 NW 640

8363 Dissolution—notice of.

Atty. Gen. Opinions. See '28 AG Op 368, 371

When preferred stockholder may not complain. A preferred stockholder whose stock has fully matured has no legal interest in the continuation of the corporation, provided his right of priority to the assets be protected.

Boyd v Bank, 205-465; 218 NW 321

8364 Duration.

Discussion. See 2 ILB 84—Repeal of corporation franchise

Atty. Gen. Opinions. See '25-26 AG Op 43; '30 AG Op 95, 141

8365 Renewal—conditions.

Atty. Gen. Opinions. See '28 AG Op 130, 368; '30 AG Op 141, 190, 238; '32 AG Op 122; '34 AG Op 620

Arbitrary determination of value of stock. The plans for the reorganization of a corporation may not arbitrarily fix the value of the stock of a dissenting stockholder.

Ontjes v Bagley, 217-1200; 250 NW 17

Collateral holder of stock—nonpermissible contract. A national bank which holds as collateral to an individual loan a majority of the corporate stock of a manufacturing corporation has no power to enter into a contract with minority stockholders to the effect that said minority stockholders shall, under the renewal of said corporation, hold certain lucrative positions with the said renewed corporation.

Clark v Bank, 219-637; 259 NW 211

Contracts—waiver by inconsistent conduct. When minority and majority stockholders agree that the former will withdraw their objections to the renewal of the corporation and the latter will vote for such directors as will employ the minority in certain corporate positions, the minority waives all rights under the contract by subsequently joining with all the other stockholders in the adoption of renewal articles which wholly ignore the said contract.

Clark v Bank, 219-637; 259 NW 211

Franchise renewal — purchase of objecting stockholders' stock — no corporate obligation nor lien. Statute requiring majority stockholders, voting for renewal of corporate franchise, to purchase objecting stockholders' stock creates no liability against the corporation nor lien on its assets.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Franchise renewal statute—objecting stockholders selling to majority—action within 3 years premature—dismissal. At the termination of a mutual telephone company franchise, stockholders voting against renewal of franchise may not maintain an action against the majority stockholders to require purchase of their stock by such stockholders voting in favor thereof, until after 3 years from date of voting, under this section, permitting such franchise renewal, if the majority stockhold-

ers voting renewal purchase the stock of those voting against renewal within 3 years from date of voting, and an action commenced within such 3-year period, being premature, will be dismissed on motion.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Constitutional question—first raised on appeal—no review. Constitutionality of statute requiring majority stockholders voting for franchise renewal to purchase stock of those voting against renewal, within three years from date of voting, will not be considered on appeal when such question has not been raised in the lower court.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Reorganization — authorized method. The stockholders of a corporation, or a part thereof, may, in good faith, reorganize it (1) by causing its entire assets and liabilities to be transferred to a newly formed corporation, and (2) by surrendering their old stock and in lieu thereof receiving stock of the new corporation—provided the laws of the states under which the corporations are organized sanction and authorize such reorganization.

Ontjes v Bagley, 217-1200; 250 NW 17

8366 Computation and duration.

Atty. Gen. Opinion. See '28 AG Op 160

8367 Execution of renewal—record required.

Atty. Gen. Opinions. See '30 AG Op 95; '38 AG Op 250

8368 Filing with secretary of state—fees—certificate of renewal.

Atty. Gen. Opinions. See '25-26 AG Op 195, 202; '30 AG Op 95

8369 Exemption from fee.

Atty. Gen. Opinions. See '25-26 AG Op 195, 202

8371 Renewal of banks—conditions.

Atty. Gen. Opinions. See '25-26 AG Op 325; '30 AG Op 141; '32 AG Op 122; '36 AG Op 128

8372 Meeting and notice thereof.

Atty. Gen. Opinions. See '28 AG Op 130; '32 AG Op 122; '36 AG Op 128

8374 Amendments to articles.

Collateral attack on corporate existence after change of name. When a corporation changed its name by amending its articles of incorporation, and published notice of the amendment only one week instead of four, as required by statute, it continued to exist as either a de jure or de facto corporation, and its corporate existence could be attacked only by direct action, and not collaterally.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

8376 Legislative control.

Atty. Gen. Opinion. See '36 AG Op 64

Mutual assessment company — statutory change—constitutionality. Article VIII, §12, Constitution of Iowa, and this section are constitutional and statutory authority for a legislative act authorizing the board of directors of a mutual benefit life assessment company to transform said company into a legal reserve or level premium company, even tho such transformation results in leaving the old assessment certificate holders to carry their own assessments for death losses without further addition to their membership.

Wall v Bankers Life, 208-1053; 223 NW 257

8377 Fraud—penalty for.

Discussion. See 20 ILR 808—Director as fiduciary

Compensation — unallowable determination. A corporate director may not have his salary fixed by his own deciding vote.

Bennett v Klipto Co., 201-236; 207 NW 228

Contracting against one's own wrong. Corporate officers will not be permitted to write into a trust deed provisions which will shield them from personal responsibility for their illegal conversion of corporate property in their charge, or for any other willful wrong.

Walker v Howell, 209-823; 226 NW 85

Dissolution by state—corporate officer's lien denied—mining property. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Exline Co., 224-466; 276 NW 41

Dissipation of assets—liability. The act of the directors of a financially embarrassed corporation in selling their individually owned corporate shares of stock to a third party, and in receiving pay therefor out of the partly frozen bank deposits of the corporation under an understanding that said third party would replace said dissipated deposits with securities of equal value, is per se fraudulent, and necessarily violative of the law-imposed trust relationship of the directors to existing and future contemplated corporate creditors; and this

is true irrespective of the plea that the directors in good faith believed that said third party would carry out the said understanding. It follows that the receiver of the corporation may repudiate such transaction and recover the dissipated assets from the directors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

Employment under delegated authority. The board of directors of a corporation, when not prohibited from so doing by the articles of incorporation or bylaws, may delegate in good faith to the corporate manager power to hire employees and to fix and pay salaries; and under such delegation the manager may, in good faith, legally employ a director to perform duties which are separate and distinct from those of a director.

Schulte v Ideal Co., 208-767; 226 NW 174

Evidence—sufficiency. Evidence held ample to sustain a charge of conspiracy on the part of the officers of a corporation in the sale of the shares of stock.

Pullan v Struthers, 201-1179; 207 NW 235

Fraudulent stock issue. The consent of stockholders to fraudulent issuance of bonds by corporation, which consent is obtained without disclosure of circumstances, does not excuse or ratify the fraud.

First Tr. Bank v Bridge Co., 98 F 2d, 416

Nonliability for naked nonfeasance. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

Purchase of corporate stock by officers—fiduciary relation. Principle recognized that an officer or director of a corporation occupies a fiduciary relation towards a fellow stockholder in the purchase of the latter's corporate stock, and is under duty to disclose to the selling stockholder evidence which has bearing on the value of the stock and which has come to him as such officer or director. Held, principle not applicable under certain facts.

Humphrey v Baron, 223-735; 273 NW 856

Responsibility for worthless loans. The president of a bank is personally liable to the bank for loaning the funds of the bank to persons known by him to be financially irresponsible, and especially so when he secures the approval of the directors as to such loans on the repeated assurance that he is back of said loans and will see that they are paid.

Farmers Bk. v Kaufmann, 201-651; 207 NW 764

Unauthorized transfer of collateral—conversion. The act of a trustee, holding collateral as security for a particular bond issue, in transferring, without authority, the collateral so held to another and different series of bonds, in order that the said latter bonds may be better secured, or the transfer of such collateral to any other foreign purpose, constitutes a conversion, and renders the trustee and the corporate officers who connive thereat personally responsible to the bondholders for the loss suffered by them.

Walker v Howell, 209-823; 226 NW 85

8378 Diversion of funds — unlawful dividends.

Discussion. See 18 ILR 516—Recovery of dividends

Corporate president's authority to write checks—burden of proof. In action by payee of check drawn by president of corporation for interest on officer's note it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

Dissolution by state—corporate officer's lien denied—mining property. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Exline Fuel Co., 224-466; 276 NW 41

General manager—power to deposit and withdraw funds. The general manager of an incorporated, cooperative, dairy company who, for years, and to the general knowledge of the banking and business interest of the locality in question, is in unrestricted management of the entire business of the company, must be deemed to have both actual and ostensible authority to select banks of deposit for the corporate funds, and like authority to withdraw said funds—an authority as to which, both as to the making of deposits and as to the withdrawal thereof, the bank need ask no questions, assuming, of course, it acts at all times in perfect good faith.

Fidelity Co. v Bank, 223-446; 273 NW 141

Liability of capital stock not considered—lawful payment of dividends—presumption. Under the statute providing for the remedy of a creditor who is damaged by the wrongful diversion of funds of a corporation, it is held, the word "liability", as used in the statute, of a corporation on its capital stock is not an indebtedness to be considered in determining whether or not a corporation may lawfully pay dividends. In the absence of a showing to the contrary the presumption is that the payment of dividends is lawful.

Majestic Co. v Orpheum Circuit, 21 F 2d, 720

Nonobligation of stockholder to return. Stockholders who, while their corporation is solvent and so remains, in good faith receive dividends which, unbeknown to them, are paid from corporate capital and not from corporate profits or surplus, are not, in case the corporation subsequently becomes insolvent, liable, in an action at law, to corporate creditors for the amount of such dividends. And it is quite immaterial whether the claimed liability is predicated on the statutes (§§8377, 8378, C., '35) or on and under the so-called corporate "trust fund" doctrine of the common law.

Bates v Brooks, 222-1128; 270 NW 867; 109 ALR 1371

Policyholder as creditor.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

Trust fund doctrine. The transfer by an insolvent bank, while in the hands of a receiver, of all or of a part of its assets to another bank which pays nothing therefor, but assumes the payment of certain liabilities of the insolvent's, does not deprive a judgment creditor of the insolvent's of the right to follow said assets into the hands of the transferee and to impress a lien thereon on the basis of the pro-rata value of the assets transferred; and this is true tho the transferee bank had no knowledge of the creditor's claim when it accepted the transfer.

German Bk. v Bank, 203-276; 211 NW 386

8380 Liability on excessive indebtedness. (Repealed.)

Excess indebtedness—basis of liability. A statute (now repealed) placing personal liability on the officers and directors of a corporation for prohibited excess indebtedness of the corporation, "knowingly consented to" by them, necessarily excludes liability (1) on mere proof that the officers or directors were negligent in performing their duties, and (2) as to corporate debts contracted after the officer or director ceased to be such.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140; 38 NCCA 133

Liability for excess corporate debts—waiver. The purchaser of a corporate bond effectively waives his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, when he accepts the bond with an agreement therein consenting to all the terms of an indenture of trust securing said bond, and when he had full opportunity to discover that said indenture specifically embraced such waiver.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Liability for excess indebtedness—waiver—consideration. Ample consideration for a contract waiver by the purchaser of corporate bonds, of his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, may be found in the fact that the corporation has withdrawn a large amount of its assets and specifically pledged them with a trustee for the purpose of paying said bonds.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Procedure against officers and directors. The personal and individual liability imposed by this statute is a liability which is enforceable, not by action at law by each creditor in piecemeal, and against one or more or all offending officers and directors, but by an action in equity for and on behalf of all creditors, wherein may be adjudicated, once for all, the extent of liability of each defendant and the extent of right of each creditor.

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Recovery on excess corporate indebtedness—proper party plaintiff. A trustee in bankruptcy of a corporate bankrupt cannot maintain an action against the directors and officers of the corporation to enforce the statutory individual liability attaching to such directors and officers consequent on their act in knowingly consenting to a corporate indebtedness in excess of that permitted by law; such right of action never, in any sense, belongs to the corporation, but on the contrary is a right extended to the corporate creditors, and is enforceable solely by such creditors, if necessary, irrespective of the bankruptcy proceedings.

Hicklin v Cummings, 211-687; 234 NW 530; 72 ALR 822

Statute of limitation—statutory liability. A cause of action to enforce the statutory-declared personal liability of corporate officers and directors for prohibited, excess corporate indebtedness (now repealed) is barred after the lapse of five years from the creation of the indebtedness.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Stock—rights of equitable owner. The legal rights of an equitable owner of corporate

shares of stock (stock not duly transferred to him on the books of the corporation) are, in many respects, very limited, but, among such rights, is the right to maintain an action against the corporation to establish and protect the interest of such equitable owner in the corporate property.

Graeser v Finance Co., 218-1112; 254 NW 859

Waiver of statutory right—public policy. A waiver by a corporate creditor of his statutory right (now repealed) to hold officers and directors personally responsible for prohibited excess corporate indebtedness is not violative of public policy.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

8382 Bylaws posted.

Bylaws—insufficient proof. A bylaw may not be deemed established by the mere introduction in evidence of the minute book of the corporation which reveals the presence of the alleged bylaw on pages of the book prior to the commencement of the official minutes of the corporation, which minutes contain no reference to bylaws.

Home Bk. v Ratcliffe, 206-201; 220 NW 36

8384 Stockholders entitled to names of stockholders.

Issuance of unpaid stock—pledge to innocent party—estoppel. A corporation which issues and delivers its corporate shares of stock, without receiving payment therefor, estops itself to question such issuance and delivery after the stock has been pledged by the holder thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Right to examine books and records. An administrator and the heirs at law of a deceased stockholder in a corporation, when refused an examination by the corporation, have the right, without any plea of good faith, to an order of court, in an appropriate proceeding, permitting them and their necessary assistants to examine the books and records of the corporation in order to determine the financial condition of the corporation and the value of its stock.

Becker v Trust Co., 217-17; 250 NW 644

Right to examine records. A stockholder of a corporation has a right, solely on the basis of his stockholdership, in good faith to inspect, examine, and copy the corporate stock records and records pertaining to the financial condition of the corporation, and if his application for such purpose is not in good faith, the corporation must so allege and prove.

Ontjes v Harrer, 208-1217; 227 NW 101

8385 Stock book and transfers.

Discussion. See 16 ILR 430—Mandamus to inspect books

Arbitrary determination of value of stock. The plans for the reorganization of a corporation may not arbitrarily fix the value of the stock of a dissenting stockholder.

Ontjes v Bagley, 217-1200; 250 NW 17

Banks—surrender of management to superintendent—scope of act. The right of a stockholder in a bank, or his representative, to have or make an examination of the books and records of the bank in order to determine its financial condition and the value of its corporate stock, is not negatived or suspended by an emergency act of the legislature providing for the taking over of the bank and of its management by the superintendent of banking on application of the bank directors and suspending legal and equitable remedies during the time of such management.

Becker v Trust Co., 217-17; 250 NW 644

Dissolution—receiver's general sale power in decree without further order—validity—stock transfer compelled. A receiver in a partnership dissolution, while having no inherent powers but only those conferred by the appointing decree and subsequent orders, may, nevertheless, under a decree definitely granting general power to sell property without prior application to the court, make a sale of stock at an adequate price involving no bad faith, which sale, being by an officer of the court requiring court approval, is, when set out in and approved as part of an annual report, a completed valid sale entitling purchaser to a stock transfer on the proper corporation records.

Van Alstine v Bank, 224-1311; 278 NW 604

Evidence—competency. The duly identified stock book and stubs thereof of a corporation are admissible on the issue whether the person to whom the stock was issued was, in fact, a stockholder.

Gruetzmacher v Quevli, 208-537; 226 NW 5

Failure to transfer bank stock—estoppel to deny ownership. The appearance on the corporate stock record of a person's name as owner will not of itself estop such person to deny ownership of stock to escape a "double liability" assessment.

Bates v Bank, 223-1215; 275 NW 91

Genuineness of corporate records. In an action against the secretary of a corporation individually, the record proceedings of the corporation are admissible against him, when material, upon an admission by such secretary that he believed them to be such records, even tho he states such belief as a conclusion, or bases his belief on hearsay, and even tho he states that he does not know that they were correctly kept.

Helberg v Zuck, 201-860; 208 NW 209

Knowledge of falsity—opportunity to learn truth. The purchaser of corporate shares of stock will not be permitted to say that he relied to his damage on false representations as to the assets of the corporation and the value thereof, and as to amount originally paid in on the stock and the dividends declared, when, at the time the representations were made, he personally knew that some of the representations were false, and when, at said time, he had equal opportunity with the seller to know and learn the actual truth of the remaining representations but did not avail himself of said opportunity.

Wead v Ganzhorn, 216-478; 249 NW 271

Right to examine. Principle reaffirmed that a person has no right to examine the stock books and transfer records of a corporation in furtherance of a purpose which is inimical to the corporation.

Drennan v Ins. Co., 200-931; 205 NW 735

Mandamus—proper party plaintiff. One who, as an attorney in fact (tho not an attorney at law), is in good faith interested on behalf of his principal in a transfer of corporate stock, and who will become entitled to a compensation if he succeeds in collecting his client's claim, has such interest as will enable him to maintain mandamus to compel the corporation to permit an examination of the stock books and transfer records of the corporation.

Drennan v Ins. Co., 200-931; 205 NW 735

Right to examine records. A stockholder of a corporation has a right, solely on the basis of his stockholdership, in good faith to inspect, examine, and copy the corporate stock records and records pertaining to the financial condition of the corporation, and if his application for such purpose is not in good faith, the corporation must so allege and prove.

Ontjes v Harrer, 208-1217; 227 NW 101

Order for examination. An order by the trial court commanding a corporation to permit an examination of its "stock books and records" will be modified on appeal by expunging the reference to the "records".

Drennan v Ins. Co., 200-931; 205 NW 735

Partnership—corporation as part of assets. Where a corporation is the exclusive property of a partnership, its affairs are subject, in an accounting between the surviving partners and the representatives of a deceased partner, to investigation, correction, and review.

Fleming v Fleming, 211-1251; 230 NW 359

Stock—wrongful issuance — cancellation in equity. Where a corporation which succeeds to the business of two partners agrees to pay all outstanding debts of the partnership, a hypothecation of corporate stock of one of the two stockholders as security for one of said debts manifestly works no transfer of title to said stock to the corporation, and where the debt is paid with corporate funds and the stock certificate is returned, the wrongful act of the nonhypothecating stockholder in causing a new stock certificate to be issued to himself for one-half of the returned shares will be cancelled by proper action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Subscriptions—burden of proof. In an action by a corporation on a stock subscription contract for stock in an unorganized but contemplated corporation, plaintiff has the burden to establish every nonadmitted fact entitling it to recover, even tho defendant, in addition to a limited general denial, pleads in great detail that plaintiff's corporate organization was wholly beyond the contemplation of his subscription contract.

Cedar R. Amu. Assn. v Wymer, 213-1012; 240 NW 644

8386 Transfer of shares.

Effect on other stockholders. Transaction reviewed wherein the majority stockholder of a bank in good faith purchased certain frozen assets of the bank in the form of preferred and common corporate stock, and wherein the remaining stockholders of the bank likewise purchased the bank stock of the majority stockholder, and held in no manner to prejudice the rights of other holders of like preferred stock or to furnish any grounds for judgment either against the bank or against the majority stockholder in favor of such other preferred stockholders.

Boyd v Bank, 205-465; 218 NW 321

Assessment—when estate beneficiary liable. One who, in the final settlement of an estate, receives the corporate bank stock of the deceased intestate as his or her share of the estate, becomes a "stockholder", and is subject to assessment like other stockholders, even tho the stock has not been transferred on the stock books of the bank.

Bates v Bank, 218-1320; 256 NW 286

Bank official's wife—stock transfer to husband. Where a wife transfers her bank stock to her husband, a bank officer, who informed other bank officials thereof, who contributed to the insolvent bank on a basis including this stock and who personally, instead of by proxy as previously, voted this stock, he was in fact the actual owner of bank stock, even tho it had not been transferred to him on the bank's books, and the double liability assessment is not recoverable from the wife.

Bates v Bank, 223-1215; 275 NW 91

Contract for equality in stock holdings—violation—injunction. Equity will, by injunction and other proper orders, protect a stockholder of a corporation from a violation of his contract with another stockholder under which

equality of stockholdings of the two stockholders was clearly intended.

Holsinger v Herring, 207-1218; 224 NW 766

Disposal of assets. Principle recognized that, at common law, neither the board of directors of a corporation nor a majority of the stockholders thereof, can, against the dissent of a single stockholder, dispose of all the assets of the corporation when the corporation is conducting a prosperous business.

Graeser v Finance Co., 218-1112; 254 NW 859

Failure to transfer bank stock—estoppel to deny ownership. The appearance on the corporate stock record of a person's name as owner will not of itself estop such person to deny ownership of stock to escape a "double liability" assessment.

Bates v Bank, 223-1215; 275 NW 91

Former stockholder—no authority. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Limitation on transfer. A provision in the duly recorded articles of incorporation of a corporation for profit to the effect that the corporate shares of stock shall not be transferred to persons who are not then owners of stock, unless the proposed new stockholder is recommended by two directors, is neither violative of statute nor of public policy.

Mason v Tel. Co., 213-1076; 240 NW 671

Notice to agent—effect. The fact that an officer of a bank, during the administration of an estate, acted as an appraiser of corporation shares of stock standing in the name of the deceased is no notice to him or to the bank that corporate stock of the same kind hypothecated to the bank several years later belonged to the estate, and not to the corporate record owner thereof.

Klatt v Bank, 206-252; 220 NW 318

Officers—purchase of corporate stock by officers—fiduciary relation. Principle recognized that an officer or director of a corporation occupies a fiduciary relation towards a fellow stockholder in the purchase of the latter's corporate stock, and is under duty to disclose to the selling stockholder evidence which has bearing on the value of the stock and which has come to him as such officer or director. Held, principle not applicable under certain facts.

Humphrey v Baron, 223-735; 273 NW 856

Pledgee of stock and foreclosure purchaser entitled to record transfer. A good-faith pledgee of corporate shares of stock, for value and without notice that the pledgor has not paid the corporation for the stock, and the purchaser of said stock on foreclosure of the pledge, are both entitled to have said stock transferred on the records of the corporation in order to show their respective ownership.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Right to corporate transfer of stock — laches—effect. Delay of some seven years, by a pledgee of corporate shares of stock, to enforce his right to have the stock transferred on the corporate stock records, will not bar the enforcement of said right when there are no unprotected rights of third parties intervening, and when the corporation has not been harmed by the delay.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Right to corporate transfer of stock—when barred. The right of the pledgee of corporate shares of stock to have said stock transferred on the corporate stock records is based on a written contract arising out of the articles of incorporation, bylaws, certificates of stock, and statute, and consequently such right may be enforced at any time within the ten-year period following a written demand for such transfer, unless the enforcement of such right is barred by laches.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Statutes and articles as part of contracts. The corporation charter and the statutes of the state of domicile of the corporation become a part of any contract between the corporation and a purchaser of its stock.

Bishop v Middle States Co., 225-941; 282 NW 305

Stock—assignment without delivery of certificate. A written assignment by the owner of corporate shares of stock of all his right, title and interest therein conveys good title, (1) even tho the owner places the assignment in escrow and causes it, together with the stock certificate, to be delivered to the assignee after his death, and (2) even tho the assignor, prior to his death, pledges the said stock certificate as security for a personal loan, which his estate later paid.

Leedham v Leedham, 218-767; 254 NW 61

Stock — corporation having first option to buy—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock, and manda-

mus will lie to compel the transfer of said stock on its records.

McDonald v Farley, 226-53; 283 NW 261

Stock—restraint on transfer—strictly construed. Restraints on powers to transfer corporate stock, or to assign leases, must be strictly construed.

McDonald v Farley, 226-53; 283 NW 261

Stockholder — who is — wholly inadequate evidence. In an equitable action to enforce, against an estate, "double" liability on bank stock, a finding and decree (based almost exclusively on the testimony of the record owner of said stock), that the deceased had actually owned said stock for some thirty years and was such owner at the time of his death, will (notwithstanding the deference accorded to the trial court in judging of the credibility of witnesses) be annulled on appeal as without adequate support in the evidence when the actions and conduct of said record owner during substantially all of said time in asserting exclusive ownership in himself, even after the death of the deceased, is wholly at war with his present testimony that he had never owned said stock and that the deceased had always owned it.

Andrew v Citizens Bank, 220-219; 261 NW 810

Transfer of shares — bona fide purchaser pending litigation. A purchaser in good faith and for value of corporate shares of stock will be protected in his ownership even tho the purchase was made pending litigation over the stock, when at the time of purchase there was no lien on or against the stock, and when the purchaser had no knowledge of said pending litigation.

Hewitt v Cas. Co., 212-316; 232 NW 835

Transfer of stock after expiration of charter —effect. When the charter of a bank expires, the legal existence of the corporation terminates; likewise terminates the legal right to transfer the stock in such sense that the transferer ceases to be a stockholder.

Andrew v Bank, 211-649; 234 NW 542

8387 Transfer of shares as collateral.

Belated notice. A levy on corporate shares of stock is not affected by the fact that, shortly after the levy was made, an officer of the corporation orally informed the levying officer that the stock had been transferred as collateral security.

Reimers v Tonne, 207-1011; 221 NW 574

Collateral holder of stock—nonpermissible contract. A national bank which holds as collateral to an individual loan a majority of the corporate stock of a manufacturing corporation has no power to enter into a contract with minority stockholders to the effect that said minority stockholders shall, under the renewal of said corporation, hold certain lucrative positions with the said renewed corporation.

Clark v Bank, 219-637; 259 NW 211

Failure to give notice. One who holds corporate shares of stock as collateral must, in order to preserve his lien on the stock, give to the secretary of the corporation whose stock is so held the statutory written notice of the fact that he holds said stock as collateral security; and it is quite immaterial that the secretary has acquired knowledge of such collateral holding from sources other than from the collateral holder.

Maloney v Storjohann, 206-721; 221 NW 208
Reimers v Tonne, 207-1011; 221 NW 574

Improper payments—assessment on bank stock. An executor will not be given credit for estate funds voluntarily used by him in discharging an assessment on bank stock which is held by the estate solely as collateral security.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Ineffectual notice. Writing reviewed, and held wholly insufficient to constitute written notice to the secretary of a corporation that certain of its corporate stock had been collaterally hypothecated.

Reimers v Tonne, 207-1011; 221 NW 574

Pledge of stock—practical construction of parties. A pledge of corporate shares of stock as collateral security will not be deemed novated into subsequently taken security and by an agreement in connection therewith, when such novation was never discussed between the parties, when the collateral holder never intended such novation, when pledgor's claim of novation was very belated, and when the parties had by their practical conduct negatived such novation.

Winfield Bk. v Snell, 208-1086; 226 NW 774

Sale of pledge—legality. A good faith sale by a pledgee to his son of corporate stock pledged as collateral security for a debt is valid, no relation of principal and agent existing.

Williams v Herman, 216-499; 249 NW 215

8390 Liability of collateral holder.

Authority of depositary — assessment on corporate stock. The holder in escrow of corporate stock has no implied authority to pay an assessment on said stock.

Harris v Bills, 203-1034; 213 NW 929

8392 Expiration and closing of business.

Atty. Gen. Opinion. See '28 AG Op 368

Receivership. The court has a discretion as to the appointment of a receiver to close up the affairs of the corporation.

McCarthy Co. v Dist. Ct., 201-912; 208 NW 505

8394 Liability of stockholders.

Discussion. See 2 ILB 1—Stockholder's liability; 3 ILB 130—Issuance of corporate stock for property; 19 ILR 101—Rescission by subscriber

ANALYSIS

I LIABILITY IN GENERAL
II LIABILITY TO CREDITORS

I LIABILITY IN GENERAL

Discussion. See 11 ILR 369—Liability of subscribers to corporate stock

Accommodation and interested guarantors distinguished. Principle reaffirmed that guarantors, who become such solely as an accommodation, occupy a very materially different position in the law than guarantors who become such in order to protect matters in which they have a financial interest. Stockholders, for instance, in guaranteeing payment of the debts of the corporation are not favorites of the law.

West Branch Bank v Farmers Exc., 221-1382; 268 NW 155

Assessment—nonpower of superintendent. The superintendent of banking has no power to order an assessment on the stockholders of an insolvent bank.

Home Bank v Berggren, 211-697; 234 NW 573

Assessment on stockholders—allowance of claims—conclusiveness. On appeal from an order of assessment on stockholders who have not paid for their stock, the court will not, on the plea of the nonappealing receiver, determine whether the allowance of a claim against the corporation is conclusive on the said stockholders.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Assessment on unpaid stock subscriptions—"incorporation" as basis for order. An incorporation apparently effected by legal and regular steps, but actually permeated from its very inception by gross fraud, nevertheless creates a "corporation" in the sense that an assessment by the court on unpaid stock subscription contracts will not be set aside on the ground that there never was a corporation de jure or de facto.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Authorization of corporate indebtedness—effect. The stockholders of a legal incorporation do not, by authorizing their board of directors to incur corporate obligations, render themselves personally liable to contribute to the loss suffered by the directors who incurred personal liability by executing their personal notes.

Fulton v Farmers Exch., 207-371; 222 NW 889

Double liability—credit by amount of former assessment unallowable. One who purchases corporate bank stock by paying an existing assessment thereon (and but little in addition thereto) will not be permitted, after the bank has become insolvent, to assert that said assessment was coercive as to him, and that the amount of such assessment should be credited on his "double liability."

Andrew v Bank, 211-649; 234 NW 542

Payment in property other than money. Where due authorization is obtained to pay for corporate stock with personal property other than money, the unquestioned assumption by the corporation, upon the issuance of stock, of full ownership of such personal property is equivalent to a formal bill of sale of such property.

Comstock v Wood, 204-1027; 216 NW 640

Personal liability of stockholder who appropriates corporate assets. A stockholder who appropriates to his own personal use substantially all the assets of the corporation becomes personally liable for the taxes theretofore levied against the corporation, the appropriation being in excess of said taxes.

Manning v Auto Co., 210-1182; 232 NW 501

Knowledge of insolvency of bank—not imputable to nonactive director. Knowledge that a bank is insolvent is not imputed to one who is a director and minor stockholder of the bank, when he takes no active part in its management and has no actual knowledge of the insolvency.

In re Smith, 228- ; 289 NW 694

Stockholders—acts constituting. One who buys corporate bank stock necessarily becomes a stockholder even tho the bank officials in good faith, but mistakenly, represented that such purchase would rehabilitate the impaired capital of the bank.

Andrew v Bank, 211-649; 234 NW 542

Subscriptions—burden of proof. In an action by a corporation on a stock subscription contract for stock in an unorganized but contemplated corporation, plaintiff has the burden to establish every nonadmitted fact entitling it to recover, even tho defendant, in addition to a limited general denial, pleads in great detail that plaintiff's corporate organization was wholly beyond the contemplation of his subscription contract.

Cedar Rapids Co. v Wymer, 213-1012; 240 NW 644

Subscription — liability. A subscriber for corporate stock on specified terms of payment is liable on his contract of subscription (except in those cases where the defensive plea of fraud is available), even tho no certificate of stock has been or can be legally issued to him until payment has been made in full,

I LIABILITY IN GENERAL—concluded

and even tho he is not deemed a "stockholder" until he has paid in full; and this is true irrespective of the statute which declares the stockholder's liability for unpaid installments on stock "owned by him".

Lex v Selway Corp., 203-792; 206 NW 586

Subscriptions—unexecuted rescission. A subscriber for corporate shares of stock who, while the corporation is a going concern, enters into a bona fide agreement with the corporation for the complete rescission of the stock-subscription contract, will be entitled to judgment against a subsequently appointed receiver for the amount of the stock-subscription notes executed by him and transferred by the corporation and not returned to him as provided in the contract of rescission.

Lex v Selway Corp., 203-792; 206 NW 586

Unallowable plea of satisfaction. A subscriber for corporate shares of stock may not avoid a judgment for the amount due on his subscription by a showing that he had indorsed to the corporation the note of a third party under an agreement that the corporation would collect the note and pay to the subscriber the balance remaining after satisfying the stock-subscription contract.

Lex v Selway Corp., 203-792; 206 NW 586

II LIABILITY TO CREDITORS

Determination of corporate debts—conclusiveness. For the purpose of determining the probable debts of an insolvent corporation as a basis for an assessment on unpaid stock subscriptions, the allowance of a claim is conclusive on the receiver of the corporation.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Foreign receiver—comity. A foreign receiver may maintain in this state an action to recover of a corporate stockholder a statutory liability on stockholdings.

Gruetzmacher v Quevli, 208-537; 226 NW 5

Fraud in incorporation—effect on title of receiver. Even tho the court in proceedings for the dissolution of a so-called corporation found and decreed, in effect, that the concern was conceived, born, and nurtured in fraud, nevertheless, in receivership proceedings for the ordering of an assessment on those who had contracted for stock in the concern and had not paid therefor, the receiver will be deemed to have prima facie title to such contracts of subscriptions.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Fraud pleadable against corporate creditors. One who is fraudulently induced to subscribe for corporate stock and to execute his negotiable promissory note in payment therefor may plead said fraud against a creditor of the corporation who, by indorsement, became a collateral security holder of the note, with full knowledge that it was given in payment for stock, (1) whether the creditor sues on the note or (2) whether the creditor sues on the theory (conceding, arguendo, its legal permissibility) that the indorsement of the note worked an assignment to him of the corporation's right of action against the subscriber for unpaid installments of stock.

Arnd v Grell, 200-1272; 206 NW 613

Fraudulent subscriptions — belated rescission. A party who has been fraudulently induced to subscribe for corporate shares of stock may not, after the corporation has been dissolved, and after a receiver has been appointed to close up its affairs, have his contract of subscription cancelled and rescinded and the status quo restored by the court in the receivership proceedings.

Lex v Selway Corp., 203-792; 206 NW 586
State v Packing Co., 206-405; 220 NW 6

Subscriptions—fraud in avoidance. A subscriber for corporate shares of stock whose contract of subscription has been fraudulently induced by the corporation or by its agents may avail himself of such fraud and avoid all liability on such contract:

1. By properly and with due diligence rescinding such contract while the corporation is a going concern, tho insolvent, or
2. By pleading said fraud (assuming due diligence) as a complete defense to an action by the receiver of the insolvent corporation to recover on such contract for the benefit of corporate creditors, unless the receiver avoids the plea by proof of the existence of unpaid corporate debts contracted subsequent to the said contract of subscription.

Lex v Selway Corp., 203-792; 206 NW 586
State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Issuance of stock—estoppel to question. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank & Trust, 219-939; 258 NW 925

Merger and bar of defenses—nonbar or estoppel. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in de-

fense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Order for assessment—limitation of action. The power of the court to enter an order of assessment on unpaid written contracts of subscription for corporate stock in a corporation which has become insolvent and is under receivership, is not barred from and after the lapse of five years from the time the attorney general brought the action for dissolution and alleged the insolvency of the corporation, nor from and after the lapse of five years from the time when the insolvency of the corporation was definitely determined.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Subscription contract—when rescission unallowable. Principle reaffirmed that a contract of subscription for corporate shares of stock cannot be rescinded after the insolvency of the corporation, there being corporate creditors who became such after the subscription was executed.

Andrew v Bank & Trust Co., 219-921; 258 NW 911

"Trust fund doctrine"—applicability to dissolved corporation. The "Trust Fund Doctrine" —the equitable rule that the entire property of a corporation, including unpaid subscriptions to its capital stock, becomes a trust fund in the hands of the receiver for the payment of the claims of innocent creditors, applies to cases or instances where the corporation has been dissolved because of fraud, as well as to cases or instances where the corporation has simply become insolvent.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason: Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Unpaid subscriptions—enforcement by receiver. The statutory liability of a corporate stockholder on the unpaid installments of his stock is not enforceable, after the corporation has passed into the hands of a trustee in bankruptcy, by an individual corporate creditor for his own sole benefit, but by an appropriate action for the benefit of all creditors.

Arnd v Grell, 200-1272; 206 NW 613

Unpaid subscriptions—law (?) or equity (?). An action by a receiver of a dissolved corporation to collect on the unpaid stock subscriptions of various parties must be by separate, ordinary proceedings at law, and not jointly in equity, when the demand is solely for a money judgment; and this is true even tho in equity a multiplicity of suits would be avoided.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Unpaid stock subscriptions—duty of receiver. A receiver who has so far acted in behalf of all creditors and against all parties adversely interested to the creditors, may proceed, and will be permitted to proceed, under an order of court, against stockholders who have not paid for their stock, notwithstanding the possibility that at some time in the future it may become necessary for the court to adjust the conflicting rights and equities between creditors or between creditors and stockholders.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Voidable subscription contract. A stock-subscription contract to the effect that the corporation will accept, in payment for its stock, future services of undetermined value to be rendered by the subscriber is voidable by the corporate receiver who is seeking to recover for the benefit of creditors the amount due on the stock subscription.

Lex v Selway Corp., 203-792; 206 NW 586

Wrongful payment of dividends—nonobligation to return. Stockholders who, while their corporation is solvent and so remains, in good faith receive dividends which, unbeknown to them, are paid from corporate capital and not from corporate profits or surplus, are not, in case the corporation subsequently becomes insolvent, liable, in an action at law, to corporate creditors for the amount of such dividends. And it is quite immaterial whether the claimed liability is predicated on the statutes (§§8377, 8378, C., '35) or on and under the so-called corporate "trust fund" doctrine of the common law.

Bates v Brooks, 222-1128; 270 NW 867; 109 ALR 1371

8398 Indemnity—contribution.

Right to contribution. Corporate stockholders who have fully paid for their stock may, upon the insolvency of the corporation, maintain an action for contribution against stockholders who have not fully paid for their stock, in order that, in the final settlement of the corporate affairs, the burden of discharging

corporate obligations may rest upon all stockholders in proportion to their respective stock holdings or obligations; and it is immaterial that all the stockholders were fraudulently induced by the corporation to subscribe for the stock.

Lex v Selway Corp., 203-792; 206 NW 586

8400 Production of books.

See annotations under §11316 et seq.

Essential purposes of writ of certiorari. On certiorari to review an order of the district court relative to the production of books and papers, the sole inquiry is whether the lower court had jurisdiction to enter the order in question, not whether the lower court made errors in exercising its jurisdiction which were correctible on appeal.

Independent Order v Scott, 223-105; 272 NW 68

Foreign corporations—visitatorial power of state. A foreign corporation transacting business within this state is subject to all the remedies available against a domestic corporation. So held under an application for an order for the production of papers and documents.

Independent Order v Scott, 223-105; 272 NW 68

Insufficient authentication. A purported financial statement of a corporation is manifestly inadmissible, in the absence of testimony as to its authenticity or as to the author thereof and the circumstances of its preparation.

Helberg v Zuck, 201-860; 208 NW 209

Minority stockholders — right to inspect books. The minority stockholders of a dissolved corporation have the right, (in an action for an accounting against another corporation which has succeeded to the business, assets, books, and papers of the dissolved corporation) on a proper petition therefor, to an order for the production and inspection of the material books, records, and papers of the dissolved corporation and of the succeeding corporation.

National Co. v Dist. Court, 214-960; 243 NW 727

Order on strangers to action. The jurisdiction of the court, on a proper petition, to order a party to an action to produce books, papers, etc., does not embrace the jurisdiction to enter such order against one who is not a party to the litigation. And an amendment to the petition for such order which does no more than to insert in the caption the names of various parties as defendants does not make such parties defendants in the statutory sense.

National Co. v Dist. Court, 214-960; 243 NW 727

Order for production—inability to enforce —effect. That a foreign corporation doing business in this state may not comply with an order for the production of documents and papers and that the court may be unable to enforce its order, is no adequate reason for refusing the order or for annulling such order when made.

Independent Order v Scott, 223-105; 272 NW 68

Place of inspection—balance of convenience. A foreign corporation, doing business in this state, has no absolute right to demand that its documents and papers be inspected at its home office in the foreign state. So held as to documents and papers which did not pertain to the daily operations of a foreign insurance company.

Independent Order v Scott, 223-105; 272 NW 68

Place of inspection of books. One ordered to produce books for inspection may have the right to insist that said inspection be made at his principal place of business, and not at a place where said books will pass, temporarily, entirely out of his possession.

National Co. v Dist. Court, 214-960; 243 NW 727

Protection of private papers. A party defendant may not be required to expose to his adversary or the public, his private business affairs which have no relation to the matters in litigation. If his books contain matters relevant to the litigation, and also purely nonrelevant personal matters, the order for the production and inspection of the books must, by some proper provision, protect the latter.

National Co. v Dist. Court, 214-960; 243 NW 727

Relevancy—determination of issue. The affidavit of one against whom an order for the production of books is sought, to the effect that said books are wholly irrelevant to the matter in litigation, will be deemed presumptively true.

National Co. v Dist. Court, 214-960; 243 NW 727

Subpoena duces tecum—office. The remedy of a party to an action who desires the production of books, papers, etc., in the possession of a stranger to the action is to cause to be issued and served a subpoena duces tecum.

National Co. v Dist. Court, 214-960; 243 NW 727

8401 Estoppel.

Assessment on unpaid stock subscriptions—"incorporation" as basis for order. An incorporation apparently effected by legal and regular steps, but actually permeated from its very inception by gross fraud, nevertheless creates a "corporation" in the sense that an

assessment by the court on unpaid stock subscription contracts will not be set aside on the ground that there never was a corporation de jure or de facto.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Burden of proof. Persons who are in good faith contracted with and extended credit as partners are personally liable for the resulting debt, in the absence of evidence by them that they are stockholders in a corporation which is at least a de facto corporation.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

Cancellation of deed—statements to attorney subsequent to execution—incompetency. In an action by a grantor to set aside deed, testimony as to the contents of statements made by grantor to his attorneys eight days after execution of deed, was incompetent and inadmissible.

Lawson v Boo, 227-100; 287 NW 282

Collateral attack as unallowable defense to action. A foreign de facto corporation cannot be defeated in its action to prevent an injury to its property by the plea that it has no valid corporate existence in that it has attempted in its incorporation to effect a combination of powers prohibited by the laws of the state of its attempted incorporation.

First T. & S. Co. v U. S. Gypsum, 211-1019; 233 NW 137; 73 ALR 1196

Collateral attack on corporate existence after change of name. When a corporation changed its name by amending its articles of incorporation, and published notice of the amendment only one week instead of four, as required by statute, it continued to exist as either a de jure or de facto corporation, and its corporate existence could be attacked only by direct action, and not collaterally.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

De facto corporation defined. A de facto corporation is one formed and acting as such under an authorizing statute, tho its incorporation may be defective.

First T. & S. Co. v U. S. Gypsum, 211-1019; 233 NW 137; 73 ALR 1196

De facto corporation. A de facto corporation results from (1) the good-faith execution of articles of incorporation under an authorizing statute, (2) the filing of said articles with the officer designated by the statute, (3) the imperfect certification of said articles by the secretary of state to the recording officer, (4) the due recording of said articles, (5) the due issuance of a permit to transact business as a corporation, and (6) the actual transaction of such business.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

De jure corporation. A statute which provides that "no corporation shall have legal existence until such [certified] articles be left for record", does not mean that a failure to strictly comply with the statute prevents a de facto corporation from coming into existence.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

Liability of stockholders—de facto corporation. A creditor who knowingly contracts with and extends credit to a corporation as such, tho it is only a de facto corporation, may not, in the absence of a statute to the contrary, hold the stockholders personally liable for the resulting debt.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

Discrimination as to permissible defense to action. The statute prohibiting the defensive plea of want of legal incorporation to collateral actions by or against an acting corporation is not unconstitutional on the ground that it is arbitrary and discriminatory.

First T. & S. Co. v U. S. Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Estoppel to plead invalidity—scope of statute. This statute applies to all corporations, domestic or foreign.

First T. & S. Co. v U. S. Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Joint stock land banks—legal status. Joint stock land banks, tho organized under federal statutes, are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages, are not governmental instrumentalities, and are suable in the proper state courts.

Higdon v Lincoln JSL Bk., 223-57; 272 NW 93

Unincorporated association—validity of contracts—estoppel. One who contracts with an association as a legal entity capable of transacting business, and receives money or other valuable consideration therefrom, may not deny the validity of the contract on the ground that the association has no legal existence.

Lamm v Stoen, 226-622; 284 NW 465

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason: Such purported corporation, having been conceived, born, and nur-

tured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

8402 Dissolution—receivership.

Discussion. See 19 ILR 95—Power of equity; 20 ILR 113—Foreign assets; 22 ILR 60—Tort claims in receiverships

"Corporation" defined. The filing of articles of incorporation and the due issuance by the secretary of state of a certificate of incorporation, constitutes a "corporation" within the meaning of this section.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Attorney general as "adverse party". A liquidator (or receiver) was appointed in a foreign state to liquidate an insolvent insurance company chartered in said state, and doing business in Iowa. The attorney general of Iowa, in his official capacity, at once instituted ancillary receivership proceedings in Iowa, and, in time, certain claims were duly allowed, in said ancillary proceedings, in favor of creditors of the insolvent. The Iowa court later ruled, on intervention by the foreign liquidator, that funds in the hands of the ancillary receiver should be retained by him and distributed under the ancillary receivership.

Held, an appeal by the foreign liquidator from said latter ruling imperatively necessitated service of notice of appeal on the attorney general or on his successor in office.

State v Southern Surety, 223-558; 273 NW 129

Claims—lapsed time for hearing—reopening discretionary. Trial court administering receiverships has a discretion dependent upon equitable circumstances and not a mandatory duty to permit a claim to be presented and heard after the time fixed therefor.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Claims—order approving disallowance construed. An order of court in an insolvent corporation receivership proceedings in the language, "The claims filed * * * be and the same are hereby allowed as classified by the receiver herein * * *", construed to mean an approval of the disallowance of a claim by the receiver.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Cross-petition defense—state as proper party—belated objections. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross petition, which question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Exline Co., 224-466; 276 NW 41

Dissolution and annulment of incorporation—effect. Even tho a so-called incorporation is dissolved and its life wholly annulled, nevertheless, the receiver appointed for the purpose of winding up its affairs must be deemed to represent the corporation for said purpose.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Dissolution by state—corporate officer's lien denied—mining property. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Exline Co., 224-466; 276 NW 41

Effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement, (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Existing garnishment—priority over receivership. The receiver of a defunct corporation takes the property of the corporation subject to the prior positive rights acquired by a creditor under a duly perfected garnishment of the admitted debtors of the corporation.

Watts v Surety Co., 216-150; 248 NW 347

Federal income tax on operating receiverships—nature of business. The federal statute requiring operating receiverships to pay income tax applies to a receiver, where a substantial part of business both before and after the appointment was the investment of corporation funds in securities and the collection of rents and profits, even tho the receiver was appointed to liquidate the business.

State v American B. & C. Co., 225-638; 281 NW 172

Foreign corporations—dissolution and receivership—effect. A foreign decree of disso-

lution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Fraud-induced subscriptions for stock—liability of subscribers. Principle reaffirmed that, under the "Trust Fund Doctrine," the receiver of an insolvent corporation may recover on an unpaid contract of subscription for stock of the corporation fraudulently obtained from the subscriber, provided that the receiver shows the existence of unpaid corporate debts which were contracted subsequent to the said contract of subscription.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Good cause. "Good cause" for total ouster may consist of any grounds which would support quo warranto.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Material considerations. On the issue whether a temporary receiver should be appointed, in an action by minority stockholders to liquidate the affairs of a corporation whose charter had expired, the court, always proceeding cautiously, will, inter alia, give due consideration to the following matters: (1) The fact that ordinarily such liquidation is effected through the corporate organization; (2) the relative financial holdings of the contending parties; (3) the fact that the parties agree that the inherent nature of the business requires a temporary continuation of the business as a part of the liquidation; (4) whether, from the nature of the business, the court would be practically compelled to choose a receiver from the management which is under attack; (5) the integrity of the past and present corporate management; (6) whether liquidation has been unduly delayed, in view of general economic conditions; (7) the probability of loss or impairment of assets under the present corporate management; (8) the solvency or insolvency of the corporation.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

Optional remedies. When the state demands the complete ouster of a corporation, it may proceed in equity under this section, or at law in the form of quo warranto under §12417.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Order of payment. Serial bonds of different maturity dates must, in case of insolvency of the issuing company, be paid pro rata, and not pro tanto, when they are issued under a trust agreement under which the issuing company is obligated to keep on deposit with the trustee collateral securities to the full amount and value of the entire issue of that particular series.

Central Bank v Commercial Co., 206-75; 218 NW 622

Permissible defendants. All stockholders of a corporation are proper parties to an action by the state to dissolve the corporation.

Lex v Selway Corp., 203-792; 206 NW 586

Preferred stockholder may not complain. A preferred stockholder whose stock has fully matured has no legal interest in the continuation of the corporation, provided his right of priority to the assets be protected.

Boyd v Bank, 205-465; 218 NW 321

Receivers—dissolution of corporation—federal income tax liability. The state, not owning the property, has no such interest in a corporation under receivership as to prevent the federal government from collecting income tax therefrom, even tho the receivership arose out of the state's action in its governmental capacity for a dissolution of the corporation.

State v American B. & C. Co., 225-638; 281 NW 172

Right of minority stockholders. A receiver may, in an action by minority stockholders, very properly be appointed for a solvent corporation which is no longer a going concern, and is in process of liquidation, on a showing that the management is inefficient, negligent, and fraudulent, to the manifest detriment of the plaintiffs.

Crow v Bond & M. Co., 202-38; 209 NW 410

Right to question corporate management. The corporate management of a corporation may not be questioned by stockholders who became such subsequent to the acts in question.

Pomeroy v Bank, 203-524; 211 NW 219

"Trust Fund Doctrine"—applicability. The "Trust Fund Doctrine"—the equitable rule that the entire property of a corporation, including unpaid subscriptions to its capital stock, becomes a trust fund in the hands of the receiver, for the payment of the claims of innocent creditors—applies to cases or instances where the corporation has been dissolved because of fraud, as well as to cases or instances where the corporation has simply become insolvent.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Unpaid stock subscriptions — liability determined in receivership proceedings. An ancillary bill by a receiver of insolvent corporation to enforce collection upon unpaid stock subscriptions cannot be maintained in equity in the same court where receivership proceedings are pending, since the stockholders are not necessary parties to the receivership ac-

tion as they are represented by the corporation, itself, which is a party to the action, and the liability of such stockholders can be determined in the receivership action after which the receiver may proceed by action at law against the various subscribers for the unpaid stock subscriptions.

Britton v Andrews, 8 F 2d, 950

8404 False statements or pretenses.

Fidelity insurance—construction. The conduct of an officer of a bank in intentionally and deceitfully omitting to make any entry on the books of the bank of payments made on the bills receivable of the bank (other than a memorandum slip, hung on a spindle), with resulting loss to the bank, is covered by a bond or policy of insurance which guarantees indemnity against "dishonest or criminal acts or omissions" of said officers.

Andrew v Ind. Co., 207-652; 223 NW 529

Opinion evidence—assets of bank. A qualified expert accountant is competent to testify that certain proven payments of money to a bank "did not come into the assets of the bank as shown by the books and records of the bank".

Andrew v Ind. Co., 207-652; 223 NW 529

CHAPTER 385

CAPITAL STOCK

8408 Indorsement of amount paid.

Capital stock—money paid for stock—hemp production—effect of joint promotion. Tho only one of two persons jointly interested in processing hemp holds from a foreign corporation a contract for certain hemp production rights in Iowa and they induce another person to invest money for stock in an Iowa hemp corporation to be formed, the money will be considered as paid to both.

Smith v Secor, 225-650; 281 NW 178

Certificate reciting absolute ownership of stock—effect. A certificate of corporate stock which certifies that the holder "is the owner" of said stock cannot be deemed to give the transferee notice that the holder has not paid the corporation for the stock, even tho the certificate carries no indorsement as to "what amount or portion of the par value has been paid to the corporation issuing the same, and whether such payment has been in money or property".

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Money advanced on joint representations—suing jointly. Where money is invested with several persons representing themselves to be jointly interested in a hemp production scheme, such joint promoters may be sued jointly, notwithstanding one of them asserts that he was not in fact so interested,—he is estopped from denying his interest.

Smith v Secor, 225-650; 281 NW 178

Payment—trust relation. One who subscribes for corporate shares of stock, pays therefor, and receives a valid receipt evidencing such payment may not claim that he continued to retain title to the money because no certificate of stock was issued to him.

Andrew v Bk. & Tr. Co., 219-921; 258 NW 911

Rescission by stockholder unallowable. A stockholder may not rescind a contract entered into by the corporation of which he is a stockholder and another corporation.

Andrew v Bk. & Tr. Co., 219-921; 258 NW 911

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason: Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Voidable subscription contract. A stock-subscription contract to the effect that the corporation will accept, in payment for its stock, future services of undetermined value to be rendered by the subscriber is voidable by the corporate receiver who is seeking to recover for the benefit of creditors the amount due on the stock subscription.

Lex v Selway Corp., 203-792; 206 NW 586

8409 Effect of violation.

Issuance of unpaid stock—pledge to innocent party—estoppel. A corporation which issues and delivers its corporate shares of stock without receiving payment therefor estops itself to question such issuance and delivery after the stock has been pledged by the holder

thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. v Rood, 211-289; 233 NW 794; 73 ALR 1421

8412 Par value required.

Additional annotations. See under §8394

Atty. Gen. Opinions. See '25-26, AG Op 289; '30 AG Op 119; '32 AG Op 25; '34 AG Op 334; '36 AG Op 572, 622; '38 AG Op 641

Liability on unpaid installments. A subscriber for corporate shares of stock who executes to the corporation his negotiable promissory note therefor may not be said to owe an "unpaid installment" on his stock after the corporation has negotiated the note to a holder in due course.

Arnd v Grell, 200-1272; 206 NW 613

Subscription to stock—liability. A subscriber for corporate stock on specified terms of payment is liable on his contract of subscription (except in those cases where the defensive plea of fraud is available), even tho no certificate of stock has been or can be legally issued to him until payment has been made in full, and even tho he is not deemed a "stockholder" until he has paid in full; and this is true irrespective of the statute (§8394, C., '24) which declares the stockholder's liability for unpaid installments on stock "owned by him".

Lex v Selway Corp., 203-792; 206 NW 586

8413 Payment in property other than cash.

Atty. Gen. Opinions. See '25-26 AG Op 289; '28 AG Op 108; '30 AG Op 149, 298; '32 AG Op 25, 254; '36 AG Op 113, 236, 572, 622; '38 AG Op 641; AG Op June 8, '39

Payment in property other than money. Where due authorization is obtained to pay for corporate stock with personal property other than money, the unquestioned assumption by the corporation, upon the issuance of stock, of full ownership of such personal property is equivalent to a formal bill of sale of such property.

Comstock v Wood, 204-1027; 216 NW 640

8414 Executive council to fix amount.

Atty. Gen. Opinions. See '25-26 AG Op 332; '28 AG Op 108; '32 AG Op 25, 254; '34 AG Op 334; '36 AG Op 113, 236, 572, 622; '38 AG Op 641

8415 Elements considered in fixing amount.

Atty. Gen. Opinion. See '34 AG Op 334

8417 Cancellation of stock—reimbursement.

Stock issued without payment is voidable only. Corporate stock issued in return for the subscriber's promissory note which was never paid is not void but voidable.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

CHAPTER 385.1

CORPORATION STOCK WITHOUT PAR VALUE

Atty. Gen. Opinion. See '34 AG Op 710

8419.01 Authorization.

Atty. Gen. Opinion. See '34 AG Op 710

8419.10 Convertibility.

Atty. Gen. Opinion. See '36 AG Op 622

CHAPTER 386

PERMITS TO FOREIGN CORPORATIONS

8420 Application for permit.

Atty. Gen. Opinions. See '25-26 AG Op 404; '34 AG Op 209, 334

Certificate of authority. A foreign life insurance company which holds an annual certificate from the commissioner of insurance authorizing it to transact its business in this state (§8657, C., '31) is not subject to the provision of chapter 386, C., '31, requiring foreign corporations generally to obtain a permit from the secretary of state in order to transact business in this state. It is not the intent to require two permits.

John Hancock Ins. v Lookingbill, 218-373; 253 NW 604

Doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

Foreign corporation doing business without permit — actions barred — presumptions from nature of business. A necessary statutory prerequisite, to the right of a foreign corporation for pecuniary profit to sue on an Iowa contract, is that it first have a permit to transact business in Iowa, and the very nature of its business may raise the presumption that such corporation is one for pecuniary profit.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Testamentary power. A statute which limits the power of corporations which are organized under the laws of this state to take a testamentary devise will not be extended by the courts to include foreign corporations.

Ross v Seminary, 204-648; 215 NW 710

8421 Details of application—secretary of state as process agent.

Atty. Gen. Opinion. See '25-26 AG Op 384

Discharged employee. Service of an original notice on a foreign corporation which has wholly withdrawn from the state may not be legally made on one who was never an officer or acting officer of the corporation, and who, at the time of service, was simply a discharged former employee.

Reliance Co. v Craig, 206-804; 221 NW 499

Implied process agent. Whether a foreign corporation which enters the state and transacts business therein without obtaining a permit so to do is subject to service of an original notice on the secretary of state, quaere.

Reliance Co. v Craig, 206-804; 221 NW 499

Nonpermissible personal judgment on foreign service. A corporation organized under federal law, with its principal place of business or domicile in a foreign state, does not become a "resident" of this state by doing business in this state. It follows that service outside this state of an original notice on the corporation, it having no officer or agent in this state, does not authorize the entry in this state of a personal judgment against the corporation.

Van Gilder v Bank, 210-531; 231 NW 671; 69 ALR 1340

Service on soliciting agent. A foreign corporation which has no permit from this state to transact business in this state, and which maintains no office in this state, is not subjected to the jurisdiction of the courts of this state by service in this state of process on the corporation's traveling agent whose authority begins and ends in soliciting and receiving at his own expense in this state orders for goods, and in forwarding said orders to the corporation in the foreign state for approval or disapproval.

Burnham Co. v Stove Works, 214-112; 241 NW 405

Foreign corporations—doing business—original notice—quashing service. A foreign corporation that has no office, no representative, and at most only one transaction in Iowa is not "doing business" in the state so as to give Iowa courts jurisdiction thereof by service of original notice on the secretary of state and a motion to quash the service was properly sustained.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

8422 Secretary of state to determine values.

Atty. Gen. Opinion. See '34 AG Op 209

8423 Fees.

Atty. Gen. Opinions. See '25-26 AG Op 404; '34 AG Op 209

8424 Increase of capital—blanks.

Atty. Gen. Opinions. See '25-26 AG Op 404; '34 AG Op 237; AG Op Sept. 28, '39

8425 Exemption.

Atty. Gen. Opinion. See '25-26 AG Op 404

8426 Issuance of permit—effect.

Foreign corporation's contract to install pipe organ—interstate commerce. In an action on contract by a Connecticut corporation doing business in New Jersey to build, deliver, and install a pipe organ in a theater in Iowa, held, the transaction was in "interstate commerce", and therefore local statutes governing foreign corporations doing business within this state were inapplicable.

Palmer v Aeolian Co., 46 F 2d, 746

Foreign corporation doing business without permit — actions barred — presumptions from nature of business. A necessary statutory prerequisite, to the right of a foreign corporation for pecuniary profit to sue on an Iowa contract, is that it first have a permit to transact business in Iowa, and the very nature of its business may raise the presumption that such corporation is one for pecuniary profit.

Johnson Co. v Hamilton, 225-551; 281 NW 127

8427 Denial of right to sue.

Discussion. See 14 ILR 372—Actions by foreign corporations

Atty. Gen. Opinions. See '32 AG Op 130; '34 AG Op 209, 390

Absence of permit—individual liability. Individuals are personally liable on contracts entered into by them in the name of a foreign corporation which they know has not been authorized by the state to transact business in this state.

Peacock Co. v Coal Co., 206-1228; 219 NW 24

Answer—foreign corporation—right to sue raised by general denial. A general denial will put in issue a foreign corporation's right to sue in Iowa when so alleged, dependent upon securing the statutory permit therefor.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Foreign corporation doing business without permit — actions barred — presumptions from nature of business. A necessary statutory prerequisite, to the right of a foreign corporation for pecuniary profit to sue on an Iowa contract, is that it first have a permit to transact business in Iowa, and the very nature of its business may raise the presumption that such corporation is one for pecuniary profit.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Foreign corporation's permit to do business —burden of proof—directing verdict. A for-

eign corporation for pecuniary profit, suing on an Iowa contract, has the burden to plead and prove its compliance with the statutes requiring permit to do business herein, without which a directed verdict in its favor is error.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Foreign corporation without business permit —action on contract barred. A foreign stock corporation which, through its president while personally present in Iowa, sells on contract, accepts payment, part in cash and part in notes, and makes delivery of a machine, is doing business in the state, and not having first secured a permit to do business may not maintain an action on such contract.

Actino Lab. v Lamb, 224-573; 278 NW 234

Nonretroactive effect.

Foster v Bellows, 204-1052; 216 NW 956

Order in this state and acceptance in foreign state. The execution in this state by a proposed vendee of a naked order for goods, and the oral acceptance of such order by the vendor at his place of business in a foreign state, does not constitute the making of a contract in this state.

Anderson Bros. v Monument Co., 210-1226; 232 NW 689

Parol evidence to show acceptance. Parol evidence is admissible to show that a naked order for goods was accepted and, when material, that such acceptance was at a certain place.

Anderson Bros. v Monument Co., 210-1226; 232 NW 689

Right to sue. A foreign corporation which has not complied with the laws of this state and obtained a permit to transact business herein, may nevertheless maintain an action in this state on a contract which was consummated in a foreign state.

Service Sys. v Johns, 206-1164; 221 NW 777
Standard Co. v Detroit, F. & S. Co., 207-619; 223 NW 365
Ryerson v Schraag, 211-558; 229 NW 733

Shipment by foreign corporation to its officer—interstate character lost. A machine sold by a foreign corporation to an Iowa resident, when shipped to the corporation president, temporarily in Iowa, to be delivered to the purchaser, loses its interstate character upon delivery in Iowa to such president.

Actino Lab. v Lamb, 224-573; 278 NW 234

"Transacting business" defined. A foreign corporation, even tho it has no permit to do business in this state, and even tho neither it nor its agents maintain an office in this state, is, nevertheless, "transacting business" within this state, and subject to service of notice of suit on its resident agent, when, as a continuous and systematic course of business, it, in part at its own expense, maintains in this state an agent with powers limited strictly to the solicitation of orders which the corporation approves or disapproves, and on which, in case of approval, it makes its own collections.

American Corp. v Shankland, 205-862; 219 NW 28; 60 ALR 986

When "doing business" in this state. A foreign corporation which, by mail, enters into a contract in this state with a party, and performs the contract wholly outside this state, may not be said, because of said acts, to be "doing business" in this state.

Internat. Transp. v Morris Plan, 215-268; 245 NW 244

When offer becomes contract. An unconditional offer by mail to enter into a specified contract becomes a contract in fact at the time and place at which a duly stamped and addressed acceptance is mailed.

Internat. Transp. v Morris Plan, 215-268; 245 NW 244

8429 Powers denied.

Atty. Gen. Opinion. See '34 AG Op 390

Foreign corporation's contract to install pipe organ—interstate commerce. In an action on contract by a Connecticut corporation doing business in New Jersey to build, deliver, and install a pipe organ in a theater in Iowa, held, the transaction was in "interstate commerce", and therefore local statutes governing foreign corporations doing business within this state were inapplicable.

Palmer v Aeolian Co., 46 F 2d, 746

8430 Violations by corporation.

Atty. Gen. Opinion. See '34 AG Op 209

8431 Violations by officers.

Absence of permit—individual liability. Individuals are personally liable on contracts entered into by them in the name of a foreign corporation which they know has not been authorized by the state to transact business in this state.

Peacock Co. v Coal Co., 206-1228; 219 NW 24

8432 Status of corporation and officers.

Discussion. See 15 ILR 285—Liability of individuals—unauthorized corporation

Atty. Gen. Opinions. See '28 AG Op 148; '34 AG Op 620

Foreign corporations—visitatorial power of state. A foreign corporation transacting business within this state is subject to all the remedies available against a domestic corporation. So held under an application for an order for the production of papers and documents.

Independent Order v Scott, 223-105; 272 NW 68

CHAPTER 387

FOREIGN PUBLIC UTILITY CORPORATIONS

Atty. Gen. Opinions. See '34 AG Op 334; '36 AG Op 622

CHAPTER 388

ANNUAL REPORTS OF CORPORATIONS

Atty. Gen. Opinion. See '25-26 AG Op 486

CHAPTER 389

COOPERATIVE ASSOCIATIONS

8459 Plan authorized.

Atty. Gen. Opinion. See '36 AG Op 226

8461 Filing—certificate of incorporation.

De jure corporation. A statute which provides that "no corporation shall have legal existence until such [certified] articles be left for record", does not mean that a failure to strictly comply with the statute prevents a de facto corporation from coming into existence.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

Liability of stockholders—de facto corporation. A creditor who knowingly contracts with and extends credit to a corporation as such, tho it is only a de facto corporation, may not, in the absence of a statute to the contrary, hold the stockholders personally liable for the resulting debt.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

8463 Board of directors.

General manager—power to deposit and withdraw funds. The general manager of an incorporated, cooperative, dairy company who, for years, and to the general knowledge of the banking and business interest of the locality in question, is in unrestricted management of the entire business of the company, must be deemed to have both actual and ostensible authority to select banks of deposit for the corporate funds, and like authority to withdraw said funds—an authority as to which, both as to the making of deposits and as to the withdrawal thereof, the bank need ask no questions, assuming, of course, it acts at all times in perfect good faith.

Fidelity Co. v Merchants Bk., 223-446; 273 NW 141

8470 Stockholding.

Atty. Gen. Opinion. See '28 AG Op 182

8475 Reserve fund.

Atty. Gen. Opinion. See '25-26 AG Op 375

8480 Annual report—penalty.

Atty. Gen. Opinion. See '25-26 AG Op 486

8481 Chapter extended to former companies.

Atty. Gen. Opinion. See '36 AG Op 205

8482 Use of term "cooperative" restricted.

Atty. Gen. Opinion. See '36 AG Op 226

CHAPTER 390

NONPROFIT-SHARING COOPERATIVE ASSOCIATIONS

8486 Organization.

Atty. Gen. Opinions. See '28 AG Op 81, 383; '36 AG Op 226

Corporate powers—practice of profession. An incorporation which purports to be a cooperative association may not legally practice the profession of embalming by furnishing its so-called members with the services of a licensed embalmer when, under its organization, no restriction is placed on its membership except that said members must reside within 35 miles of the association's place of business. Whether the association could so practice were its membership reasonably restricted, quaere.

State v Fremont Assn., 222-949; 270 NW 320

8487 Terms defined—products of nonmember.

Atty. Gen. Opinion. See '28 AG Op 383

8499 Combinations of local associations.

Atty. Gen. Opinion. See '28 AG Op 182

8503 Power to compel sales and purchases—liquidated damages.

Class legislation. This section is not violative of Art. I, §6, of the Constitution, no ele-

ment of arbitrary or unreasonable classification or discrimination being discernible therein.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Ambiguous contract—mutual interpretation. A cooperative marketing association, which, by written contract separately binds each member of the association to sell and deliver exclusively to the association the milk produced by the member—impliedly from day to day—or "pay as liquidated damages $25 for each and every such failure and breach of contract", will not be permitted to recover from a member said amount for each and every day there is a failure so to deliver, when such interpretation is absolutely contrary to the uniform, mutual interpretation theretofore placed on the contract during a long series of years. Especially is this true because otherwise the court would be compelled to construe the said damage clause as a penalty.

Fort Dodge Assn. v Ainsworth, 217-712; 251 NW 85

Cumulative and exclusive remedy. A contract provision to the effect that, if damages accrue to one party, he may apply to the payment thereof any money in his hands belonging to the other party, is permissive only, and additional to the usual remedy by action in court.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Implied repeal because of repugnancy. It may not be successfully contended that a statute is invalid because repugnant to a prior and existing statute, since, as between repugnant statutes, the later in enactment must prevail. So held as to an alleged repugnancy between ch. 390 and §9915, C., '24.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Liquidated damages—contract—sufficiency. A contract for liquidated damages is sufficient if the contract provides for such damages and the bylaws of the association provide the schedule therefor.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

8507 Reserve and educational funds—patronage dividends.

Atty. Gen. Opinion. See '28 AG Op 298

8508 Annual report—penalty.

Atty. Gen. Opinions. See '25-26 AG Op 486; '36 AG Op 136

8508.1 Exemption from report.

Atty. Gen. Opinion. See '36 AG Op 136

8509 Chapter extended to former associations.

Atty. Gen. Opinion. See '36 AG Op 205

CHAPTER 390.1

COOPERATIVE ASSOCIATIONS (NEWLY ORGANIZED)

8512.05 Permissible organizers.

Atty. Gen. Opinion. See '38 AG Op 120

8512.06 Objects.

Atty. Gen. Opinion. See '38 AG Op 120

Authorized purposes and powers—generating electricity. Where several purposes were listed in the articles of incorporation of a cooperative association, the first being the primary purpose to manufacture electricity and to sell it, with the others only powers incidental to the primary purpose, there was compliance with a statute enumerating purposes for which associations could be formed, when the statute used the terms "purposes" and "powers" interchangeably and allowed the association to exercise any power necessary or incidental to accomplish its purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

Conjunctive or disjunctive use of "or"—technical rules disregarded. Under a statute permitting the formation of associations to conduct a manufacturing business or to construct or operate electric transmission lines, the words "or to construct or operate * * * electric transmission lines" could be eliminated where the manufacturing business was the operation of an electric power plant, as the right to use such lines is implied as essential to the manufacture of electricity, so whether "or" was used in a conjunctive or disjunctive sense made no difference, as courts will disregard technical rules of grammar and punctuation to arrive at the intent of a statute.

State v Hardin County Co-op., 226-896; 285 NW 219

Generating electricity as "manufacturing or mechanical business". The generation or production of electricity is a manufacturing or mechanical business within the scope of a statute permitting the formation of cooperative associations to conduct a manufacturing or mechanical business.

State v Hardin County Co-op., 226-896; 285 NW 219

Liberal construction of powers after incorporation. Statutes under which a cooperative association was organized to manufacture electricity for rural use should be liberally construed, in view of recent promotion of rural electrification and under the principle that stat-

utes should be liberally construed to find the intent of the legislature, this being especially true as to statute under which corporations are formed, and when it is necesary to sustain the legality of a corporation which has gone into operation after being organized in good faith for a legitimate purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

Power to manufacture electricity—implied power to purchase current. A cooperative association organized for the purpose of generating and distributing electricity to county cooperative associations and their members has the right to purchase electricity as a necessary adjunct to its main purpose, as in case of emergency it is necessary to purchase current in order to supply customers with uninterrupted service.

State v Hardin County Co-op., 226-896; 285 NW 219

8512.07 Powers.

Atty. Gen. Opinion. See '38 AG Op 120

Authorized purposes and powers. Where several purposes were listed in the articles of incorporation of a cooperative association, the first being the primary purpose to manufacture electricity and to sell it, with the others only powers incidental to the primary purpose, there was compliance with a statute enumerating purposes for which associations could be formed, when the statute used the terms "purposes" and "powers" interchangeably and allowed the association to exercise any power necessary or incidental to accomplish its purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

Liberal construction after incorporation. Statutes under which a cooperative association was organized to manufacture electricity for rural use should be liberally construed, in view of recent promotion of rural electrification and under the principle that statutes should be liberally construed to find the intent of the legislature, this being especially true as to statute under which corporations are formed, and when it is necessary to sustain the legality of a corporation which has gone into operation after being organized in good faith for a legitimate purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

Power to manufacture electricity—implied power to purchase current. A cooperative association organized for the purpose of generating and distributing electricity to county cooperative associations and their members has the right to purchase electricity as a necessary adjunct to its main purpose, as in case of emergency it is necessary to purchase current in order to supply customers with uninterrupted service.

State v Hardin County Co-op., 226-896; 285 NW 219

8512.10 Cooperative agreements.

Atty. Gen. Opinion. See '38 AG Op 120

Power to manufacture electricity—implied power to purchase current. A cooperative association organized for the purpose of generating and distributing electricity to county cooperative associations and their members has the right to purchase electricity as a necessary adjunct to its main purpose, as in case of emergency it is necessary to purchase current in order to supply customers with uninterrupted service.

State v Hardin County Co-op., 226-896; 285 NW 219

8512.11 Legality declared.

Atty. Gen. Opinion. See '38 AG Op 120

8512.13 Membership—eligibility.

Atty. Gen. Opinion. See '38 AG Op 120

8512.36 Directors.

Atty. Gen. Opinion. See '38 AG Op 120

8512.40 Articles.

Authorized purposes and powers. Where several purposes were listed in the articles of incorporation of a cooperative association, the first being the primary purpose to manufacture electricity and to sell it, with the others only powers incidental to the primary purpose, there was compliance with a statute enumerating purposes for which associations could be formed, when the statute used the terms "purposes" and "powers" interchangeably and allowed the association to exercise any power necessary or incidental to accomplish its purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

8512.53 Quo warranto.

Authorized purposes and powers. Where several purposes were listed in the articles of incorporation of a cooperative association, the first being the primary purpose to manufacture electricity and to sell it, with the others only powers incidental to the primary purpose, there was compliance with a statute enumerating purposes for which associations could be formed, when the statute used the terms "purposes" and "powers" interchangeably and allowed the association to exercise any power necessary or incidental to accomplish its purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

CHAPTER 391

COLLECTIVE MARKETING

8513 Authorization.

Discussion. See 8 ILB 193—Cooperative marketing; 9 ILB 6—Cooperative marketing; 11 ILR 375—Constitutionality

CHAPTER 392

SALE OF STOCK ON INSTALLMENT PLAN

8517 Terms defined.

Atty. Gen. Opinions. See '28 AG Op 201; '30 AG Op 119; '34 AG Op 458; '38 AG Op 32

8518 Certificate—how obtained.

Atty. Gen. Opinions. See '30 AG Op 291; '32 AG Op 73; '34 AG Op 458

8521 Bonds or securities deposited.

Atty. Gen. Opinion. See '30 AG Op 129

8524 Examination.

State auditor's action affecting stockholder's contractual rights. Fact that auditor of state approved building and loan association's refusal to honor applications for withdrawal of funds does not affect stockholder's contractual rights with the association for such withdrawal.

O'Connor v Ins. Assn., 224-1127; 278 NW 636

CHAPTER 393

INVESTMENT COMPANIES

Repealed by 43GA, Ch 10, and Ch 393.1 enacted in lieu thereof

8573 Appeal to executive council. (Repealed.)

Method of service. As to proper method of service when statute simply requires the notice to be "served", and specifies no method of service, see

Casey v Hogue, 204-3; 214 NW 729

CHAPTER 393.1

IOWA SECURITIES ACT

8581.01 Title.

Constitutionality. The "Blue Sky Law" is not subject to the constitutional objection that it (1) deprives citizens of their property without due process, (2) denies equal protection of the law, (3) takes property without just compensation, (4) grants special privileges and immunities, or (5) denies an accused the right to be advised of the nature of the charge preferred against him.

State v Soeder, 216-815; 249 NW 412

8581.02 Administration.

Information required of license applicant. An applicant for a license to promote an investment trust was properly required, by the state department which issues such licenses, to furnish information concerning the financial status of the foreign trustee who was to hold the trust assets, as it would have been a neglect of duty to assume that the condition of the foreign trustee did not require investigation.

Ind. Fund v Miller, 226-1101; 285 NW 629

8581.03 Definitions.

Discussion. See 23 ILR 102—Blue sky legislation

Atty. Gen. Opinions. See '30 AG Op 176; '32 AG Op 73; '34 AG Op 127, 159, 348, 698; '36 AG Op 125; '38 AG Op 92

Stock—agreement to repurchase—agency—jury question. The existence of authority, actual or apparent, for an agreement made by an agent on behalf of a corporation to repurchase its own stock sold by the agent to a third person, being within his apparent authority, being neither denied nor repudiated by the corporation, and altho being based on circumstantial evidence, is not a question of law but a question for the jury.

Wright v Iowa P. & L. Co., 223-1192; 274 NW 892

8581.04 Exempt securities.

Atty. Gen. Opinions. See '30 AG Op 311; '34 AG Op 345, 629; '36 AG Op 125, 287; '38 AG Op 92

Exemption from registration. Securities issued by cities or towns, even tho not constituting general obligations of the city or town, e.g., "pledge orders" payable solely from the

net income of a municipally owned utility, are exempt from registration or qualification under the Iowa securities law.

Ballard-Hassett Co. v Miller, 219-1066; 260 NW 65

"Or"—"and". Statute construed and held, not permissible to substitute "and" for "or".

Ballard-Hassett Co. v Miller, 219-1066; 260 NW 65

8581.05 Exempt transactions.

Atty. Gen. Opinions. See '32 AG Op 73; '34 AG Op 127, 159, 249, 345, 348, 457, 561

8581.06 Registration of securities.

Atty. Gen. Opinions. See '30 AG Op 223; '32 AG Op 73

8581.07 Registration by qualification.

Atty. Gen. Opinion. See '38 AG Op 214

Delegation of powers by legislature—Iowa securities act. Because the Iowa securities act covers such a broad field of transactions that it cannot cover each particular case in detail, it was proper for the legislature to delegate to an officer certain discretionary powers in administering the statute and in making such rules as were necessary to carry out the purposes of the law within the general policy set forth by the legislature.

Ind. Fund v Miller, 226-1101; 285 NW 629

Information required of license applicant. An applicant for a license to promote an investment trust was properly required by the state department which issued such licenses to furnish information concerning the financial status of the foreign trustee who was to hold the trust assets, as it would have been a neglect of duty to assume that the condition of the foreign trustee did not require investigation.

Ind. Fund v Miller, 226-1101; 285 NW 629

Registration refusal based on issuing officer's rule. Statutory authority granted to a state officer to find out whether the sale of a security would tend to work a fraud and to forbid sales of securities which would be unfair to purchasers, was sufficient authority to justify an order made by him limiting the percentage of "loading charges" on investment trusts, when his restriction was based on the computations of a statistician, and for his refusal to register securities which violated this order.

Ind. Fund v Miller, 226-1101; 285 NW 629

8581.08 May limit price and commission.

Compensation—unallowable defense. In an action by a broker for a commission, it is no defense that the plaintiff had an arrangement with another broker for the sharing of the commission in return for services rendered in effecting a sale for defendant.

Lowery Co. v Lamp, 200-853; 205 NW 538

8581.10 Revocation of registration of securities.

Atty. Gen. Opinions. See '32 AG Op 73; '34 AG Op 629

8581.11 Registration of dealers and salesmen.

Atty. Gen. Opinion. See '36 AG Op 59

False representations—liability under Iowa securities act. A corporation's false representations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid, with attorney's fees, for violation of such act.

Associated Mfr. Corp. v De Jong, 64 F 2d, 64

Information not furnished by applicant upon request. When an applicant for a license failed to furnish information when so ordered by the officer issuing the license, there was no waiver of the right to object to the failure to furnish such information when additional demands for it were not made.

Ind. Fund v Miller, 226-1101; 285 NW 629

Registration refusal based on issuing officer's rule. Statutory authority granted to a state officer to find out whether the sale of a security would tend to work a fraud and to forbid sales of securities which would be unfair to purchasers, was sufficient authority to justify an order made by him limiting the percentage of "loading charges" on investment trusts, when his restriction was based on the computations of a statistician, and for his refusal to register securities which violated this order.

Ind. Fund v Miller, 226-1101; 285 NW 629

Security dealer's license refusal. An "issuer-dealer's" license to deal in securities should not have been refused on the ground that the affairs of the applicant corporation were in an unsound condition due to previous financial losses, when additional capital had later been secured to make the applicant apparently solvent and the securities to be issued were not those of the applicant, which was to be manager of an investment trust, with a third party to have possession of the assets invested.

Ind. Fund v Miller, 226-1101; 285 NW 629

8581.12 Deposits for special examinations.

Atty. Gen. Opinions. See '36 AG Op 35, 59

8581.18 Bond and conditions.

Action on bond—joinder of causes. An action on a bond, brought against both the principal and surety, presents no question of misjoinder of causes of action. So held as to a bond given under this section.

Kellogg v Bell, 222-510; 268 NW 534

Bond—dual liability. Statutory bonds under the Iowa securities act cover a dual liability, viz:

1. A failure properly to account for any moneys or securities received from or belonging to another, and
2. A failure to pay any judgment against the dealer in consequence of unlawfully sold securities.

Dickson v Fidelity Co., 223-518; 273 NW 102

Breach of condition—judgment as condition precedent. A bond executed under the Iowa securities act, and conditioned to "pay * * * any judgment * * * that may be rendered against such dealer" is not breached until the injured party first obtains a judgment against the principal in the bond—the dealer in securities—and until said dealer fails to pay said judgment.

Kellogg v Bell, 222-510; 268 NW 534

Maximum liability. The surety on the bond of a dealer in securities under the Iowa securities act (Ch 393-C1, C., '31 [Ch 393.1, C., '39]) is not liable beyond the statutory amount of the bond—$5,000—irrespective of the number or amount of the claims sought to be enforced against it. Order impounding a bond as a trust fund for the pro rata benefit of numerous claimants affirmed.

Witter v Ins. Co., 215-1322; 247 NW 831; 89 ALR 1065

Unallowable action by stranger. A bond which, in effect, is limited to the indemnification of the obligee only, for pecuniary loss sustained by the obligee through the dishonest acts of his officers or employees, is a contract of indemnity. In other words, such bond does not cover liability to a third party for loss sustained by said third party through the dishonesty of the officers or employees of the said obligee.

Allen v Bonding Co., 218-294; 253 NW 498

8581.19 Burden of proof.

Indictment — requisites and sufficiency — negativing exceptions—nonnecessity. An indictment charging violation of securities act is not defective on ground that it fails to negative exceptions legalized by the act.

State v Dunley, 227-1085; 290 NW 41

Negativing exceptions in indictment—lack of basis for attack on validity. As respects statute providing that exceptions to securities act need not be negatived in an indictment thereunder, a contention that such statute deprived defendant of information as to the nature of charge against him, and was therefore unconstitutional, could not be sustained on record showing that defendant was in fact provided with such information when summary of evidence to be introduced at trial was served on him.

State v Dunley, 227-1085; 290 NW 41

Burden of proving exceptions—lack of basis for attack on validity. In prosecution for violation of securities act wherein defendant attacked validity of statute requiring that burden of proving exceptions to the act shall be on party seeking benefit thereof, and contended that such burden should be placed on state, held, defendant's contention was without merit in view of trial court's instructions which in fact did place such burden on the state.

State v Dunley, 227-1085; 290 NW 41

8581.23 Remedies.

Concert of action—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue of concert of action between the officers and directors of a corporation for the purpose of defrauding plaintiff in the purchase of stock, except as to two defendants.

Stambaugh v Haffa, 217-1161; 253 NW 137; 38 NCCA 114

False representations—liability under Iowa securities act. A corporation's false representations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid, with attorney's fees, for violation of such act.

Assoc. Mfr. Corp. v De Jong, 64 F 2d, 64

Recovery of purchase price—sales in violation of securities law—tender of securities necessary. Purchaser suing to recover price paid for securities sold in violation of Iowa securities law must at least tender to seller securities equivalent in value to those purchased.

Huglin v Byllesby, 72 F 2d, 341

8581.26 False statements, entries, and representations.

Evidence—corporate books and records. In a prosecution, under the securities act, of an officer of a corporation for having made, before the secretary of state, a false statement relative to the financial condition of the corporation, the corporate books and a tabulated statement and summary thereof, properly identified, are admissible, even tho there is no showing (1) that said books were made in the ordinary course of business, or (2) that they were true or correct, or (3) that they were books of original entry, or (4) that the accused made or directed their making,—it appearing that the examination of the books was made in the office of the corporation and largely in the immediate presence of the accused.

State v Dobry, 217-858; 250 NW 702

False representations—liability under Iowa securities act. A corporation's false represen-

tations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid, with attorney's fees, for violation of such act.

Assoc. Mfr. Corp. v De Jong, 64 F 2d, 64

Fraud in incorporation—effect on title of receiver. Even tho the court, in proceedings for the dissolution of a so-called corporation, found and decreed, in effect, that the concern was conceived, born, and nurtured in fraud, nevertheless, in receivership proceedings for the ordering of an assessment on those who had contracted for stock in the concern and had not paid therefor, the receiver will be deemed to have prima facie title to such contracts of subscriptions.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

When knowledge immaterial. Under the Iowa securities act, the provision that the making of a "false" statement before the secretary of state relative to the financial condition of a corporation is a felony, renders immaterial testimony that the accused did not know that the statement was false.

Reason: The legislature may declare an act criminal irrespective of the knowledge or intent of the doer.

State v Dobry, 217-858; 250 NW 702

8581.28 False representations.

False representations—liability under Iowa securities act. A corporation's false representations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid, with attorney's fees, for violation of such act.

Assoc. Mfr. Corp. v De Jong, 64 F 2d, 64

CHAPTER 394

CORPORATIONS NOT FOR PECUNIARY PROFIT

GENERAL PROVISIONS

8582 Articles.

Gifts generally. See under Ch 445, Note 1

Labor unions and disputes. See under Ch 74, Note 1

Discussion. See 14 ILR 212—Liability to beneficiaries for negligence

Atty. Gen. Opinion. See '34 AG Op 205

Charitable institutions liable to strangers, invitees, or employees. Public policy has never demanded nor has the legislature adopted any immunity to charitable institutions from liability to strangers, invitees, or employees arising because of negligence of the servants of such institutions, and the court will not grant such immunity.

Andrews v Y. M. C. A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Charitable institutions—nonliability to beneficiaries for employees' negligence — WPA worker not beneficiary. Tho as between benefactor and beneficiary, an institution conducted solely for doing charity may not be liable for the negligence of its employees to a person receiving the benefits of that charity; however, a WPA worker doing work on the premises of a Y. M. C. A. was not a beneficiary of the charitable work of the institution, so as to be within this rule.

Andrews v Y. M. C. A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Constructing a grotto for charitable organization. Since a license is a permission to do particular acts on another's land without possessing an interest therein, revocable at licensor's pleasure except where coupled with an expenditure of money or labor, an individual constructing a grotto on the land of a charitable organization under an agreement containing a provision for entry on the land for purposes of the agreement, has a personal privilege of going on the land to complete the undertaking.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Cy pres doctrine invoked by state in equity court. A public charity, created by trust, about to fail, is properly represented in court of equity to invoke jurisdiction to apply cy pres doctrine by the state or some authorized agency thereof.

Schell v Leander Clark College, 10 F 2d, 542

Contributory negligence — WPA worker crushed in Y. M. C. A. elevator shaft—place of danger—elevator operator violating instructions. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y M. C. A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter, that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Negligence — immunity rule — basis. Such immunity as is granted a public charity insti-

tution for its negligence has been sustained by the courts on (1) the trust fund theory, or (2) the nonapplicability of the rule of respondeat superior, or (3) the waiver theory, or (4) the public policy theory.

Andrews v Y. M. C. A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Y. M. C. A.—charitable institution. The Young Men's Christian Association is a charitable institution.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Inheritance tax—exemptions—public charities. A trust for the purpose of aiding young men and women of the Protestant faith in obtaining an education in the colleges or universities of this state is a public charity, within the meaning of the statute which exempts such charities from an inheritance tax.

Heald v Johnson, 204-1067; 216 NW 772

County fair associations — negligence. It may not be said, as a matter of law, that a county fair association is under a legal duty to erect a fence along its race track sufficiently high to prevent a horse from jumping over such fence. The association is not an insurer. Reasonable care under varying circumstances is the full measure of its duty.

Clark v Fair Assn., 203-1107; 212 NW 163; 33 NCCA 40

County fair associations—liability for negligence. Nonpecuniary incorporated county fair associations are not such governmental agencies as are exempt from liability for negligence.

Clark v Fair Assn., 203-1107; 212 NW 163

Offer of reward by nonlegal entity—liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

Property—right of possession. A religious organization is not entitled to the unconditional possession of real property of which it is the equitable owner, but the legal title of which is vested in trustees, when the property and the income therefrom are being used and employed, and the property improved, by a duly organized federation of different churches, all with the knowledge, approval, and express authorization of the said equitable owner.

Church v Gardner, 204-907; 215 NW 970

Race associations—powers. Articles, rules, and regulations of a horse-racing association reviewed, and held to invest no power in the secretary to suspend members or to revoke the licenses of drivers.

Davis v Howard Soc., 208-957; 226 NW 90

8583 Powers—duration.

"Church purposes". A broad and comprehensive meaning must be accorded to the term "church purposes" in a conveyance of land to trustees "so long as used for church purposes".

Presbyterian Church v Johnson, 213-49; 238 NW 456

Express trusts — validity. A testamentary trust will be sustained when the intent of testator is evident, even tho the bequest runs to an unincorporated entity.

Meeker v Lawrence, 203-409; 212 NW 688

Plaintiffs—trustees of unincorporated association. The trustees of a voluntary unincorporated association, and not the association itself, are proper plaintiffs in an action to quiet title to real estate of which the association is the beneficial owner.

Presbyterian Church v Johnson, 213-49; 238 NW 456

8587 When society deemed extinct.

Extinct society — legal control of property. When a local church organization becomes extinct, the larger organization of which the local organization is a part may assume control over the property of the defunct church, and validly cause to be issued conveyances and assignments of said property.

Board v Rader, 210-482; 231 NW 329

8589 Trustees or managers.

Vacancies — power to fill — majority of quorum. Vacancies on an official board (which is empowered to fill vacancies) may be filled by a majority of a quorum, in the absence of a statute which requires a majority of the entire membership of the board.

Cowles v School Dist., 204-689; 216 NW 83

8599 Contract and rights not affected.

Abandoned property — right of mother church. The statutory authorization to a mother church organization to take over the abandoned property of a local church organization of the same denomination has no application to cases in which property rights in the property have been acquired prior to the passage of the statute.

Church v Gardner, 204-907; 215 NW 970

TITLE XX

INSURANCE

CHAPTER 395

INSURANCE DEPARTMENT

8605 Appointment and term.

Atty. Gen. Opinions. See '30 AG Op 52; '34 AG Op 734

8608 Deputy—assistants—bond.

Atty. Gen. Opinion. See '36 AG Op 612

Original notice — service — deputy commissioner may accept. Valid service of an original notice of suit against a foreign insurance company doing business in this state, is made by the act of the deputy commissioner of insurance in accepting, in writing and in the name of said commissioner, service of said notice for and on behalf of said company, tho the authority filed by the company only authorized the commissioner to accept such service.

Woodmen v Dist. Court, 219-1326; 260 NW 713; 98 ALR 1431

8612 Fees.

Atty. Gen. Opinion. See '34 AG Op 734

8612.1 Discrimination against Iowa companies.

Doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

8613 General powers and duties.

Atty. Gen. Opinion. See '32 AG Op 116

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

Nonimpeachable officer. The commissioner of insurance, being only an appointive, ministerial agency of the executive department of the state is not an impeachable officer.

Clark v Herring, 221-1224; 260 NW 436

CHAPTER 396

ORGANIZATION OF DOMESTIC INSURANCE COMPANIES

8623 Appeal.

Method of service. As to proper method of service when statute simply requires the notice to be "served", and specifies no method of service, see

Casey (Town) v Hogue, 204-3; 214 NW 729

CHAPTER 397

EXAMINATION OF INSURANCE COMPANIES

8634 Suspension or revocation of certificate—receivership.

Allowance and payment of claims by receiver —unallowable claims. Attorney fees, disbursements, and costs incurred by a policyholder on his own behalf with reference to a policy of insurance, after the insurer had passed into the hands of a receiver, are not allowable against the receiver.

State v Cas. Co., 213-197; 238 NW 731

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

Dissipation of assets—liability. The act of the directors of a financially embarrassed corporation in selling their individually owned corporate shares of stock to a third party and in receiving pay therefor out of the partly frozen bank deposits of the corporation, under an understanding that said third party would replace said dissipated deposits with securities of equal value, is per se fraudulent and necessarily violative of the law-imposed trust relationship of the directors to existing and future-contemplated corporate creditors; and this is true irrespective of the plea that the directors in good faith believed that said third party would carry out the said understanding. It follows that the receiver of the corporation may repudiate such transaction and recover the dissipated assets from the directors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

CHAPTER 398

LIFE INSURANCE COMPANIES

8643 Level premium plan companies.

Foreign corporations—doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

8652 Foreign companies — capital or surplus—investments.

Foreign corporations—doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

8655 Deposit to cover valuation—policy loan agreements.

Atty. Gen. Opinions. See '25-26 AG Op 452; '32 AG Op 79; '34 AG Op 147

8657 Annual certificate of authority.

Certificate of authority. A foreign life insurance company which holds an annual certificate from the commissioner of insurance authorizing it to transact its business in this state is not subject to the provision of chapter 386, C., '31, requiring foreign corporations generally to obtain a permit from the secretary of state in order to transact business in this state. It is not the intent to require two permits.

John Hancock Ins. v Lookingbill, 218-373; 253 NW 604

Foreign corporations—doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

8658 Violation by domestic company.

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

8663 Securities.

Insolvency—assets transferred to obtain reinsurance—propriety. The trial court has power to cause assets of insolvent insurance company to be transferred and used to obtain reinsurance for policyholders without subjecting assets to judicial sale, and under proceedings where it is shown that it is impossible for company to function any longer, the trial court is justified in finding that value of assets upon a fair basis of valuation was insufficient to pay its obligations, and that the interest of policyholders would best be served by obtaining reinsurance.

Royal Ins. v Gross, 76 F 2d, 219

8666 Discriminations—rebates.

Atty. Gen. Opinions. See '28 AG Op 279; '34 AG Op 432; '36 AG Op 4; '38 AG Op 262

Forfeiture of policy—nonpayment premium lien note—discriminatory provisions. In an action by beneficiary to recover insurance on a policy which, at the expiration of an extension permitted by a premium lien note, the insured had allowed to lapse, and which policy contained certain provisions as to "cash surrender value" and "participating paid up insurance" granting to an insured three months after default in any premium payment to elect to surrender his policy for cash, thereby contains an unlawful discrimination providing longer insurance in favor of a more delinquent insured, and under above circumstances the failure to pay the premium lien note resulted in cancelling the policy subject to the terms of the policy itself, which giving insured a specified amount of insurance for a limited time, which having expired at the time of his death, it follows that the policy having lapsed, a recovery should be denied.

Clausen v Ins. Co., 224-802; 276 NW 427

Permissible collateral agreements. The act of an insurer in granting to the insured through the medium of a promissory note an extension of time in which to pay an accrued annual premium on condition that the nonpayment of the note at maturity shall ipso facto void the policy, is not violative of this statute.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

Reinstatement revives lapsed policy—suicide clause. Reinstatement of an insurance policy four years after it was originally written does not create a new contract as of date of reinstatement but revives the lapsed policy, and a clause in the original policy excluding liability for suicide for two years from date of contract is not revived to mean two years from date of reinstatement.

Johnson v Ins. Co., 224-797; 276 NW 595

Self-adjusting benefit provisions — effect. Where a policy of accident insurance, which has lapsed because of the nonpayment of premiums, is self-adjusting as regards death benefits in case death occurs while the insured is pursuing an occupation which is more hazardous than the one specified in the policy, such self-adjusting provisions are in no manner changed by the act of the insurer in reinstating the policy by accepting and retaining the past due premium with full knowledge that the insured was then pursuing a more hazardous occupation than the one specified in the policy. Especially is this true if a contrary construction would result in a discrimination between policyholders which is prohibited by statute.

Stephan v Ins. Co., 209-576; 221 NW 57

8668 Policy forms—approval.

Construction—ambiguity. A clause in a life insurance policy which is ambiguous, in that insanity (1) might not, under a given state of facts, release the insurer from liability, or (2) might, under the same state of facts, very materially reduce the insurer's liability, will be given that construction which is most favorable to the insured.

Crowe v Cas. Co., 202-43; 209 NW 406

Inconsistent and repugnant provisions. A provision in a health policy that sick benefits will be paid provided the sickness is contracted thirty days after the date of the policy, and a distinct and separate provision that said benefits will be paid for every sickness contracted subsequent to the issuance of the policy, are so inconsistent and repugnant that the court will reject the first provision and apply the latter.

Schmith v Cas. Co., 216-936; 247 NW 655

Incontestability and suicide clauses compared. A clause, in an insurance reinstatement agreement, providing for incontestability after two years from reinstatement, is a limitation on contestability and on the company's rights and is opposite in character to a suicide clause which affords additional contestability and adds to the company's rights.

Johnson v Ins. Co., 224-797; 276 NW 595

Nonpayment of premium—effect of custom. An insured cannot excuse the nonpayment of his premium on the plea that the insurer customarily notified the policyholder of the maturity date, but failed so to do in his case when said policyholder did not know of the custom at the time in question and necessarily did not rely thereon.

Wall v Ins. Co., 217-1106; 253 NW 46

Forfeiture of policy—nonpayment premium lien note—discriminatory provisions. In an action by beneficiary to recover insurance on a policy which, at the expiration of an extension permitted by a premium lien note, the insured had allowed to lapse, and which policy contained certain provisions as to "cash surrender value" and "participating paid up insurance" granting to an insured three months after default in any premium payment to elect to surrender his policy for cash, thereby contains an unlawful discrimination providing longer insurance in favor of a more delinquent insured, and under above circumstances the failure to pay the premium lien note resulted in cancelling the policy subject to the terms of the policy itself, which giving insured a specified amount of insurance for a limited time, which having expired at the time of his death, it follows that the policy having lapsed, a recovery should be denied.

Clausen v Ins. Co., 224-802; 276 NW 427

"Void" for nonpayment of premiums means "voidable". An insurance policy written as a unilateral contract, containing a provision that the policy will be void upon default in premium payment, means in effect that the policy is "voidable"—said clause being for the exclusive benefit of the insurer.

Pennebaker v Ins. Co., 226-314; 284 NW 147

Waiver—no release by insured without consideration. A purported release by one party to a contract of the other party's obligations is without effect unless duly supported by a consideration. So held where an insured accepted the return of his premium upon the statement that the policy had lapsed and thereupon the insurer claimed a waiver of its obligations.

Pennebaker v Ins. Co., 226-314; 284 NW 147

8671 Policy provision for medical examination.

Atty. Gen. Opinion. See '32 AG Op 41

Conditions precedent to taking effect of policy. The insurer and insured in a life policy may validly contract that the policy shall not take effect unless, during the continuance in good health of the insured,

1. The policy has been delivered, and
2. The first premium has been paid,—

and such agreement imposes on the insured, as conditions precedent to any recovery, affirmative proof that the policy was delivered, and the first premium paid.

Range v Ins. Co., 216-410; 249 NW 268

8673 Liability.

Failure to pay premium—effect. A combined life and accident policy of insurance becomes void in accordance with its terms, to wit:

"on failure to pay the premium at maturity", without any notice from the insurer that the premium is due or when it will be due. In other words, §8959, as supplemented by this section, has no application to such a policy.

Wall v Ins. Co., 217-1106; 253 NW 46

See Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Premium—application of dividends. An insured is not entitled to notice from the insurer as to the amount of dividends due under the policy in order to determine how much cash, in addition, is necessary to pay his premium when, under the policy, the condition does not yet exist under which he would have the right to apply the dividends on the premium.

Wall v Ins. Co., 217-1106; 253 NW 46

Waiver—no release by insured without consideration. A purported release by one party to a contract of the other party's obligations is without effect unless duly supported by a consideration. So held where an insured accepted the return of his premium upon the statement that the policy had lapsed and thereupon the insurer claimed a waiver of its obligations.

Pennebaker v Ins. Co., 226-314; 284 NW 147

8673.1 Annuities.

Annuity contract as "wager." An annuity contract, entered into in good faith, under which the annuitant, for a lump sum payment determined by skilled actuaries, is promised a definite annual payment during the lifetime of the annuitant, does not offend against public policy—is not a "wager" contract.

Hult v Ins. Co., 213-890; 240 NW 218

Death of annuitant—balance due. The executor of a deceased annuitant is entitled to recover the balance of the annuity due at the time of the annuitant's death.

Peterson v Floberg, 214-1398; 242 NW 18

When annuity vests. A testamentary life annuity becomes vested on the date when the annuity becomes due.

In re Hekel, 205-521; 218 NW 297

Release of dower for annuity—fraud—evidence. Evidence held insufficient to show that a contract by which a surviving spouse accepted an annuity in lieu of distributive share was fraudulently obtained.

In re Silkett, 209-417; 227 NW 905

Unambiguous life income trust—annuity policy substitution nonpermissible. Under a clear, unambiguous will setting up a trust fund and providing for a $30 a month bequest to be paid therefrom to a beneficiary as long as she lived, a different method of paying said bequest, by purchase of an annuity for said beneficiary, not permitted.

First Methodist Church v Hull, 225-306; 280 NW 531

CHAPTER 399.1

GROUP INSURANCE

8684.05 Life policy—requirements.

Group insurance—construction in re employment. A provision in a group life insurance policy to the effect that the insurance on an employee shall terminate when the employment terminates is, of course, valid and enforceable, but when the policy also provides that the employer may elect that any insured employee temporarily laid off shall be considered in his (the employer's) employment, the beneficiary of a deceased employee may show that a summary and unconditional written dismissal of the employee from the service of the employer was intended by the employer as a "temporary lay-off".

Zeigler v Assur. Soc., 219-872; 259 NW 769

8684.13 Exemption.

Discussion. See 21 ILR 153—Property purchased with proceeds

Statutes—applicability. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

CHAPTER 400

ASSESSMENT LIFE INSURANCE

8686 Assessment plan of life insurance defined.

Assessment accident insurance—rules of life insurance inapplicable. The statute defining assessment plan of life insurance does not require that the rules applicable to life insurance shall be applicable to accident insurance.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

8688 Articles—approval.

Atty. Gen. Opinion. See '36 AG Op 64

Acts of administrative officers. Certiorari may be the proper remedy to review the action of the commissioner of insurance and attorney general in refusing to approve amended articles of incorporation of an assessment association.

National Assn., v Murphy, 222-98; 269 NW 15

Judgment in certiorari — improper form. Upon sustaining a writ of certiorari relative to the alleged illegal act of the commissioner of insurance in refusing to approve amended articles of incorporation of an insurance company, the trial court has no authority by its judgment to decree such approval, other than to substantially direct the defendant to take such action as will give full force and effect to the decision of the court.

National Assn. v Murphy, 222-98; 269 NW 15

8693 Assessments—diversion of funds.

Assessments in fraternal organizations. See under §8784

Change to level premium—assessment—estoppel. A mutual benefit life assessment company has no legal right, after transforming itself, under statutory authority, into a legal reserve or level premium company, to represent or state to the public insurance authorities or to its old assessment members that such members would not be placed in a class by themselves and compelled to pay their own death losses without future acquisition to their membership, but that both the old assessment members and the level premium members would be treated as one class for the purpose of arriving at the basis of mortality costs; and the making of such representations furnishes no basis for an estoppel against the transformed company to deny its right to levy assessment on level premium policyholders for the benefit of the old assessment members. Such representations cannot be deemed a plan for the handling of "operating expenses".

Wall v Life Co., 208-1053; 223 NW 257

8694 Insurable age — beneficiary and change thereof—assignment.

See also annotations under §8785, et seq., Vol I

Assignment of policy as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Change in beneficiary — justifiable and unjustifiable payment. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Change of beneficiaries. A policy method of changing beneficiaries under life insurance policies is admittedly exclusive; but a testamentary bequest of the proceeds of such policies, payable to the estate of the insured or to his executors or administrators, does not constitute a "change of beneficiaries", but constitutes a disposal of that much of the estate left by the insured.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Changing beneficiary—following policy—exceptions—effect of death. Death vests interests in insurance, and the method provided in a benefit certificate to change a beneficiary during lifetime of insured is exclusive, except (1) where the company has waived strict compliance and issued a new certificate, (2) where it is beyond the power of insured to comply literally, equity will consider the change made, and (3) where insured has performed all necessary prerequisites, but dies before a new certificate is actually issued. Held in instant case beneficiary change not accomplished.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary — mere "clear intention" ineffectual. Insured's actions merely indicating a "clear intention to change the beneficiary" are not sufficient. Required acts to effect a change are neither directory nor ministerial but essential, subject only to equitable exceptions.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary—where policy silent. Where a benefit certificate is silent as to the manner of change, such change of beneficiary may be effected in any manner clearly indicating insured's intention.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Conclusiveness — insurance rights — beneficiaries not parties. A decree establishing rights to insurance does not adjudicate rights of a beneficiary not a party to the action.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Contract provision—effect. The rule of law that when the insured in a policy of life insurance makes a series of changes of beneficiary, and the last beneficiary is legally ineligible, the next preceding, designated, eligible beneficiary is entitled to the proceeds of the policy, does not apply when the policy, by bylaw or otherwise, distinctly provides who, in such circumstances, shall be entitled to the proceeds.

Farrens v Benefit Dept., 213-608; 239 NW 544

Fraternal benefit certificate—changing beneficiary—complying with certificate—necessity. A change of beneficiary on a fraternal benefit society certificate, executed by insured on the day of her death, delivered to an attorney and kept until the next day, then delivered to the company's agent and forwarded to the company, not being in compliance with the certificate requirement, was ineffective.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Right to change beneficiary. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

8695 Business year—annual report—fees.

Discretion in re managerial expenses. An insurance company which is conducting the business of assessment, and level premium life insurance will not be controlled by the courts in its allotment between the two classes of insurance, of the managerial expenses so long as such allotment is not violative of law, is reasonable and is not arbitrary.

Wall v Life Co., 208-1053; 223 NW 257

8716 Distribution of surplus.

Default—no duty to apply surrender value. Under a policy which provides that default in the payment of a premium shall forfeit the policy, the insurer is under no obligation, upon the happening of such default, to apply the cash surrender value to the payment of such premium, when, under the policy and governing statutes, the insured controlled the disposition of such surrender value and had never exercised any option with reference thereto.

Rogers v Ins. Co., 204-804; 213 NW 757

8718 Assessment associations prohibited.

Atty. Gen. Opinions. See '34 AG Op 205, '36 AG Op 64

Act in excess of title—effect. A legislative act entitled "An act to provide a method whereby assessment life associations may be reincorporated as legal reserve life insurance companies", is void insofar as said act assumes to cover an additional subject matter not mentioned or referred to in the title, e.g., provisions prohibiting designated insurance companies or associations from writing life insurance on the assessment plan. (This section re-enacted by 47 GA, ch 217.)

National Assn. v Murphy, 222-98; 269 NW 15

8724 Reincorporation.

Act in excess of title. A legislative act entitled "An act to provide a method whereby assessment life associations may be reincorporated as legal reserve life insurance companies", is void insofar as said act assumes to cover an additional subject matter not mentioned or referred to in the title, e.g., provisions prohibiting designated insurance companies or associations from writing life insurance on the assessment plan.

National Assn. v Murphy, 222-98; 269 NW 15

Change to level premium—assessment—estoppel. A mutual benefit life assessment company has no legal right, after transforming itself, under statutory authority, into a legal

reserve or level premium company, to represent or state to the public insurance authorities or to its old assessment members that such members would not be placed in a class by themselves and compelled to pay their own death losses without future acquisition to their membership, but that both the old assessment members and the level premium members would be treated as one class for the purpose of arriving at the basis of mortality costs; and the making of such representations furnishes no basis for an estoppel against the transformed company to deny its right to levy assessment on level premium policyholders for the benefit of the old assessment members. Such representations cannot be deemed a plan for the handling of "operating expenses".

Wall v Life Co., 208-1053; 223 NW 257

Change to level premium plan—right of assessment. A statute which authorizes the directors of a mutual benefit life assessment company to transform the company into a legal reserve or level premium company, and which declares that, after such transformation, the company "shall incur the obligations and enjoy the benefits thereof, the same as though originally thus incorporated", clearly eliminates any legislative intention to incumber the level premium policyholders with any assessments to pay death losses of the old assessment certificate holders, even tho the statute does provide that such transformation "shall not affect existing rights or contracts", because the perpetual existence of the assessment insurance scheme is not a contractual right of the assessment certificate holders'.

Wall v Life Co., 208-1053; 223 NW 257

Mutual assessment company—change to level premium—right of policyholder. Where the certificate of a mutual benefit life assessment company provides that the contribution made by the holder to a guarantee fund shall, if he dies in good standing, be repaid to his beneficiary, but be forfeited to the assessment emergency reserve fund if he does not so die, and where the company is, under statutory authority, transformed into a legal reserve or level premium company, and assessment certificate holder and the transformed company may validly contract for the cancellation and surrender of the assessment certificate and for the substitution of a level premium policy in lieu thereof, and may therein validly contract as was formerly contracted in the assessment certificate, to wit: that, if the new policyholder dies in good standing, his former contribution to said guarantee fund will be repaid to the beneficiary, and if he does not so die, said contribution shall be forfeited to the old assessment emergency reserve fund.

Wall v Life Co., 208-1053; 223 NW 257

Statutory change—constitutionality. Article VIII, §12, Constitution of Iowa and §1090, C., '73 (§8376, C., '27), are constitutional and statutory authority for a legislative act authorizing the board of directors of a mutual benefit life assessment company to transform said company into a legal reserve or level premium company, even tho such transformation results in leaving the old assessment certificate holders to carry their own assessments for death losses without further addition to their membership.

Wall v Life Co., 208-1053; 223 NW 257

CHAPTER 401

PROVISIONS APPLYING TO LIFE INSURANCE COMPANIES AND ASSOCIATIONS

Life insurance generally. See Note 1 at end of chapter

8728 Annual statement of foreign companies.

Gross premiums tax—when payable—legislative intent. Legislative intent being the cardinal rule of statutory construction, the plain intent of statute taxing gross premiums of foreign corporations is a tax computed on and payable at the end of the year.

State v Ins. Co., 223-1301; 275 NW 26

8731 Advertisements — who deemed agent.

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent, nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

8732 Agent's certificate to act.

Unlicensed agents—noneffect on insurer—statements regarding effective date of policy. Where an accident policy is to become effect-

ive at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured, while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22, while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statements to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

8737 Investment of funds.

Atty. Gen. Opinions. See '25-26 AG Op 449; '30 AG Op 129, 158, '32 AG Op 79, 280; '34 AG Op 601

8739 Real estate as deposit of legal reserve.

Atty. Gen. Opinion. See '34 AG Op 147

8741 Securities deposited.

Atty. Gen. Opinions. See '30 AG Op 40; '32 AG Op 117

Mistaken view of law. Securities deposited by an insurance company with the commissioner of insurance for the specific purpose of protecting the policyholders constitute a trust fund for said specified purpose, both in the hands of the commissioner and, in case of insolvency, in the hands of the receiver of the company, even tho said deposit was made on demand of the commissioner, acquiesced in by the company, in the mutually mistaken but good-faith belief that the statute required such deposit before a license to transact business could legally issue to the company.

State v Cas. Co., 206-988; 221 NW 585

8744 Purpose of withdrawal.

Atty. Gen. Opinion. See '34 AG Op 147

8756 Contracts void—recovery—damages—attorney fees.

Misrepresentation—when unallowable as a defense. False and fraudulent representations on the part of an insured, in his original application for a policy of insurance, are not available as a defense to an action on the policy, when the policy provides that it is incontestable except as provided in named paragraphs which, on examination, reveal no grounds of contest whatever, but only matters of which the insurer could avail himself in the enforcement of the contract.

Wilson v Ins. Co., 220-321; 262 NW 525

8757 Fraud in procuring insurance.

Avoidance of policy. The insurer in an accident insurance policy has the burden of proof to establish the defense that the policy is wholly avoided because the insured, in obtaining the policy, had falsely represented that his habits of life were "correct and temperate", and had thereby intentionally deceived the insurer.

Olson v Surety Co., 201-1334; 208 NW 213

Unallowable cancellation in equity of insurance policy. Equity will not, after the death of the insured in a life insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

8766 Commissioner as process agent.

Original notice — service — deputy commissioner may accept. Valid service of an original notice of suit against a foreign insurance company doing business in this state, is made by the act of the deputy commissioner of insurance in accepting, in writing and in the name of said commissioner, service of said notice for and on behalf of said company, tho the authority filed by the company only authorized the commissioner to accept such service.

Woodmen v Dist. Court, 219-1326; 260 NW 713; 98 ALR 1431

8769 Intoxication as defense.

Avoidance of policy. The insurer in an accident insurance policy has the burden of proof to establish the defense that the policy is wholly avoided because the insured, in obtaining the policy, had falsely represented that his habits of life were "correct and temperate", and had thereby intentionally deceived the insurer.

Olson v Surety Co., 201-1334; 208 NW 213

8770 Physician's certificate — conclusiveness.

Nonapplicability of statute. This section relative to the conclusiveness on a life insurance company or association of a certificate of insurability issued by its own physician, is not applicable to fraternal societies acting under chapter 402 of the code.

Bukowski v Security Assn., 221-416; 265 NW 132

Accident insurance—estoppel by conclusiveness of physician's certificate—nonapplicability. The statute which provides for the conclusiveness of a physician's certificate of

health or declaring an applicant a fit subject for life insurance after medical examination, and thereafter estops an insurance company from setting up as a defense to an action on policy, that insured was not in the condition of health required by policy, unless policy was procured by fraud, is not applicable to an accident insurance policy, since the characteristics of the risks are so different that it would not seem reasonable, nor would there be any necessity for any such rule in cases where the provisions of the policy are solely as to injury by accident.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Nonestoppel to question insurability. This section does not apply when there has been no delivery of the policy because of the insured's noninsurability.

Range v Ins. Co., 216-410; 249 NW 268

Certification of health or insurability—what constitutes. The questions which an insurer requires his own medical examiner to answer relative to an applicant for life insurance, and the answers of said examiner thereto, may, in connection with the questions put by said examiner to said applicant and the latter's answers thereto, constitute a "certificate of health" or "declaration of applicant's insurability", within the meaning, purpose, and intent of this section.

Faber v Ins. Co., 221-740; 265 NW 305

Delivery—estoppel to question. The actual delivery of a policy of life insurance after the insured has, without fraud, been examined by the insurer's medical examiner and reported insurable, precludes the insurer from questioning the effectiveness of such delivery, on the ground that, after the said examination and report, and before the delivery of the policy, the insured had, unbeknown to the insurer, contracted a fatal disease; and this is true even tho the application distinctly provides that the policy shall not take effect unless the insured is in good health at the time of delivery.

Mickel v Ins. Co., 204-1266; 213 NW 765

Estoppel to question. An insurer against total, permanent disability is, in the absence of plea and proof of fraud on the part of the insured, conclusively bound by a certificate of the health insurability of the insured issued by the insurer's examining physician as a basis for the issuance of the policy.

Foy v Ins. Co., 220-628; 263 NW 14

False answers to medical examiner—effect. The giving to a medical examiner by an applicant for insurance of absolutely false answers relative to the past medical history of the applicant, will not avoid the conclusive effect of the physician's favorable certificate unless the physician was deceived and misled by the false answers into issuing a certificate which he would not have issued, had true answers been given. Evidence reviewed, and held to present a jury question on this latter issue.

Boos v Ins. Co., 205-653; 216 NW 50

Fraud—jury question. Fraud or deceit in obtaining from the medical examiner of an insurance company a certificate of life insurability is not established per se by proof that the applicant for insurance, in response to an all-inclusive and comprehensive question, omitted any reference to the fact that, on one occasion, a physician had prescribed a tonic for him, and that on another occasion an oculist had prescribed glasses for him as a corrective of a defect of vision.

Colver v Continental Co., 220-407; 262 NW 791

Fraud and false warranty—evidence—insufficiency. An insurer who, in an action on a policy of insurance, presents the intermingled defense of fraud and false warranty has the burden to establish such defense. Evidence reviewed and held to present no jury question.

Post v Lodge, 211-786; 232 NW 140

Medical examination—effect. There may be a valid compromise and settlement of liability under a life insurance policy, prior to the death of the insured, even tho the policy was issued on a medical examination made by the insurer.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Misrepresentation—jury question. On the issue whether a policy of life insurance had been obtained by the insured by means of false and fraudulent representations relative to the prior and present state of health of the insured, record reviewed in detail and held to present a jury question.

Getsinger v Ins. Co., 216-610; 247 NW 260

Misrepresentation—in re sanity. Presumptively, a person is sane from and after such person is discharged from an asylum for the insane to which the person has been committed for treatment for insanity. Evidence, expert and nonexpert, reviewed and held to present a jury question on the issue whether an insured was sane at the time a policy of insurance was issued notwithstanding the conceded fact that said insured had, some four years prior to the issuance of the policy, been adjudged insane and committed to an asylum for the insane and had remained there some three years before being granted a discharge.

Foy v Ins. Co., 220-628; 263 NW 14

Physician's certificate—conclusiveness—estoppel—absence of fraud. An Iowa statute providing that medical examiner's certificate of health issued to insured would estop insurer from setting up in defense of action on policy that insured was not in condition of health required by policy at time of issuance or delivery

thereof, unless certificate was procured by fraud of insured, had the effect of changing contract through estoppel. A statute of this character does not limit the equitable jurisdiction of federal court and is enforceable therein, whether statute had been construed by Iowa supreme court as being rule of substantive law passing into contract, or as being merely a remedial right.

Mutual Ins. v Cunningham, 87 F 2d, 842

Statements by medical examiner. The positive testimony of a medical examiner that he, in the examination of an applicant (now deceased) for life insurance, correctly recorded the answers of the applicant, may be so weakened on cross-examination and by the attending circumstances, as to present a jury question whether the examiner did, in fact, correctly record said answers. So held where the examiner, (1) had no independent recollection of the answers given, (2) did not in all instances record the answers in the exact words of the applicant, and (3) in at least one instance, himself inserted his own answer to a question not stated to the applicant.

Faber v Ins. Co., 221-740; 265 NW 305

Willful deception as to health—jury question. Record reviewed on the issue whether an insured had knowingly deceived the insurer in stating his condition of health during the preceding five years, and held to present a jury question.

Parker v Ins. Co., 218-145; 254 NW 31

8772 Application for insurance—duty to attach to policy.

Similar provisions. See under §8974

Application—failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

Application attached to policy—illegibly reduced photo copy—not "true copy." In action on life policies, where defense was based on false representations in application for policy, and it is shown original application is plainly printed in legible letters of fair size, while copy furnished and attached to policy is so reduced in size and so dim or blurred that it can only be read by persons with normal vision by use of a strong magnifying glass, the statute requiring "true copy" of application to be attached to policy is not complied with, and the submission of question to the jury as to legibility under an instruction that a true copy must be readable was not erroneous.

New York Ins. v Miller, 73 F 2d, 350

Delivery date of policy—other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Delivery date—evidence—admissibility. In an action to recover on a life policy of a daughter, an exhibit showing that a son's policy was delivered on September 14 was admissible to contradict testimony of father and mother that the daughter's policy was delivered August 23 and that son's policy was delivered previously.

Luce v Ins. Co., 227-532; 288 NW 681

Fraud in securing release—burden of proof. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Nondelivery because of death. A life insurance policy which, pursuant to an application, is promptly prepared (prior to the death of the insured), and delivered to the agent of the insurer, who forthwith returned the policy to the insurer because the insured was then dead, cannot be deemed in effect when the application distinctly provided that no obligation should exist against the insurer until the policy was delivered to the insured.

Hruska v Ins. Co., 203-1165; 211 NW 858

Presumption. It will be presumed that a copy of the application was attached to the policy or certificate, in the absence of evidence to the contrary.

Foley v Brotherhood, 203-39; 210 NW 585

Right to deduct unpaid annual premium. An insurer has the right, when discharging his liability under a policy of life insurance, to deduct the amount of one full annual premium, even tho, when the insured died, only the first

quarterly installment of the premium for the insurance year was due, the policy providing for such deduction and in addition providing that all premiums for an insurance year were due and payable in advance, with option to pay quarterly.

Andrews v Ins. Co., 220-719; 263 NW 255

8773 Failure to attach — defenses — estoppel.

Similar provisions. See §§8794, 8975

Application—failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

8774 Limitation on proofs of loss.

Inapplicability. This section is not applicable to a certificate of insurance issued by a fraternal beneficiary association under §8777, C., '24.

Peters v Order, 203-428; 212 NW 576

Letters tending to prove inquiry. On the issue whether due and proper inquires as to the whereabouts of an insured person had been made, evidence in the form of identified letters replying to such inquiries are admissible.

Rodskier v Ins. Co., 216-121; 248 NW 295

Cause of death—testimony of attending physician nonconclusive. The testimony of a physician as to the cause of death of a person whom the physician personally attended shortly prior to said death is not conclusive, especially when the physician was, at the time of the examination, uncertain as to the cause of death. In other words, expert testimony, on proper hypothetical facts, is admissible to show a cause of death other than that testified to by the attending physician.

Dawson v Life Ins. Co., 216-586; 247 NW 279

Proofs of loss—estoppel. Statements of fact in proofs of loss are rebuttable so long as the insurer has not acted thereon.

Harrington v Surety Co., 206-925; 221 NW 577

Proofs of loss—statements rebuttable. Statements made by the insured in making a proof of loss under a policy, and also statements made by the beneficiary of the policy who testified as an eyewitness, could be relied on by the insurer, but were only prima facie proof and were subject to contradiction or explanation.

Dykes v Ins. Co., 226-771; 285 NW 201

Loss—proofs—estoppel. An insurer may not complain that proofs of loss were fatally lacking in definiteness when the proofs were on a blank furnished by the insurer and were in compliance with such blank.

Elmore v Surety Co., 207-872; 224 NW 32

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e.g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Ineffective proof by executrix. Under a policy providing for the payment, (1) of total disability benefits to the insured himself, and (2) of death benefits to another, the disability benefits alleged to have accrued to the insured prior to his death may not be recovered by the executrix of the insured when the insured, tho physically and mentally able so to do, failed to furnish during his lifetime, to the insurer, proofs of such disability, the furnishing of such proofs being clearly contemplated and required by the policy as a condition precedent to the attaching of liability on the part of the insurer.

Kantor v Ins. Co., 219-1005; 258 NW 759

Mental incapacity to furnish proofs—effect. A clear and unequivocal contract that an insured shall furnish due proofs of disability, as a condition precedent to the attaching of any liability on the part of the insurer, must be construed as assuming mental and physical capacity to furnish the proofs when due. It follows that the furnishing of such proofs will be excused if, when the disability occurs, and the policy is in force, the insured is insane, and, therefore, wholly unable to furnish said proofs.

McCoy v Ins. Co., 219-514; 258 NW 320

Notice and proof of loss—waiver. An insurer who is furnished proofs showing death from disease, and later, and within the time for furnishing proofs, is furnished amended proofs showing death from accident, waives all further proofs by refusing to furnish blanks on which to make additional proof and by peremptorily denying all liability for death by accident.

Dawson v Life Co., 216-586; 247 NW 279

Notice and proof of loss—waiver. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Waiver—sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

Privileged communication—waived in proof of loss. In an action on a life policy where the beneficiary signed a proof of loss which contained an express waiver of the statute protecting communications in professional confidence, the testimony of a nurse who attended deceased-insured should not have been excluded, as such testimony was within the scope of the waiver.

Luce v Ins. Co., 227-532; 288 NW 681

Proof of loss—waiver by denying liability. A life insurance company's denial of liability, on grounds other than failure to furnish proofs of loss, is a waiver of their right to require proofs, if the policy was in force and proofs could have been furnished at the time of such denial, but insured, relying on the company's notice, believed the policy had lapsed.

Wood v Ins. Co., 224-179; 277 NW 241

Result of inquiries. On the issue whether due and proper inquiries as to the whereabouts of an insured person had been made, a person may testify as to the inquiries made by him and as to the results of such inquiries.

Rodskier v Ins. Co., 216-121; 248 NW 295

8775 Limitation under health and accident.

Contract limitation—validity. An agreement in a policy of insurance against total and permanent disability, specifically providing that all claim shall be forfeited if proof of such disability is not furnished the insurer "within ninety days after the happening of the total and permanent disability", is valid and enforceable, such time limit being more favorable to the insured than the statutory limit.

Fairgrave v Ins. Assn., 211-329; 233 NW 714

Inconsistent and repugnant provisions—construction against insurer. A provision in a health policy that sick benefits will be paid provided the sickness is contracted thirty days after the date of the policy, and a distinct and separate provision that said benefits will be paid for every sickness contracted subsequent to the issuance of the policy, are so inconsistent and repugnant that the court will reject the first provision and apply the latter.

Schmith v Cas. Co., 216-936; 247 NW 655

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Death by accident (?) or suicide (?) — directed verdict. In an action on a policy of insurance covering death by accident but excluding liability in case of suicide, the court, in view of the legal presumption against suicide, cannot properly direct a verdict on the theory of suicide unless the record is such as to conclusively establish the fact of suicide.

Jovich v Benefit Assn., 221-945; 265 NW 632

Denial of liability not constituting waiver. A denial of liability on a policy of insurance does not constitute a waiver of proofs of loss when the validity of the claim under the policy depends solely on the furnishing of proofs of loss within a specified contract time, and when said denial of liability was made long after said time had expired.

Fairgrave v Life Assn., 211-329; 233 NW 714

"Driving," "adjusting," or "explosion of" automobile—jury question. Evidence that a party successively ran two automobiles into his garage, leaving the motor of the first car running, and thereupon closed the garage doors, and was later found dead on the running board of the second car, is wholly insufficient to establish that the deceased met his death "while driving," or "while adjusting," or "by an explosion of," an automobile, it appearing that the direct cause of the death was the inhalation of carbon monoxide gas.

Field v Sur. Co., 211-1239; 235 NW 571

Riding or driving motor vehicle—insured on running board. In an action on an insurance policy, there was sufficient evidence for a jury question on whether an accident came within terms of the policy insuring against injuries received in an accident of a vehicle in which the insured was riding or driving, when it was shown that the car started moving down a grade, and the insured was thrown to the ground from a position partly in the car and

partly on the running board, while attempting to stop the car.

Dykes v Ins. Co., 226-771; 285 NW 201

Notice and proof of loss—extent and sufficiency. A policy of insurance which, inter alia, provides for indemnity "if the insured shall furnish satisfactory proof that he has been wholly disabled * * * for a period of not less than sixty days, and that such disability is presumably permanent, and that he will be wholly and continuously prevented thereby from pursuing any gainful occupation", does not require the proofs for initial indemnity to show that the disability is and will remain absolutely permanent and continuous.

Kurth v Ins. Co., 211-736; 234 NW 201

"As soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

"Immediate" notice—jury question. Record reviewed and held to present a jury question on the issue whether preliminary notice to an insurer, of death, was "immediate" within the meaning of the policy.

Nelson v Acc. Soc., 212-989; 237 NW 341

Ineffective proof by executrix. Under a policy providing for the payment, (1) of total disability benefits to the insured himself, and (2) of death benefits to another, the disability benefits alleged to have accrued to the insured prior to his death may not be recovered by the executrix of the insured when the insured, tho physically and mentally able so to do, failed to furnish during his lifetime, to the insurer, proofs of such disability, the furnishing of such proofs being clearly contemplated and required by the policy as a condition precedent to the attaching of liability on the part of the insurer.

Kantor v Ins. Co., 219-1005; 258 NW 759

Proof of inability to pursue gainful occupation. Policy of insurance construed and held that proof of absolute helplessness was not necessary in order to show that the insured had been prevented by his disabilities "from pursuing any gainful occupation".

Kurth v Ins. Co., 211-736; 234 NW 201

Statements rebuttable. Statements made by the insured in making a proof of loss under a policy, and also statements made by the beneficiary of the policy who testified as an eyewitness, could be relied on by the insurer, but were only prima facie proof and were subject to contradiction or explanation.

Dykes v Ins. Co., 226-771; 285 NW 201

"Permanent" disability. A policy which provides for benefits if the insured becomes "wholly and permanently disabled" does not embrace recovery for a disability which has been total for years, but which has terminated at the time action for recovery is instituted.

Hawkins v Ins. Co., 205-760; 218 NW 313

Permanent disability — scope. Under a policy providing monthly disability benefits if insured becomes, and remains for ninety days, so physically incapacitated as to be wholly and permanently unable to engage in any occupation or work for profit, the insured, in order to recover, need carry his proofs on the issue of permanency of disability no farther than to establish (1) present permanency, and (2) a reasonable presumption that such disability will continue for an indefinite period of time. (The policy herein provides for future proofs of continuance of disability.)

Garden v Ins. Co., 218-1094; 254 NW 287

Permanent disability — ascertainment by comparative standard in policy. In weighing the evidence as to a permanent disability claim, heed must be given to the other policy provisions wherein the company of its own volition has set a comparative standard for measuring total and permanent disability as respects the insured's ability to pursue any gainful occupation, and, being so measured, the question is for the jury.

Wood v Ins. Co., 224-179; 277 NW 241

Total and permanent disability — proofs. Preliminary proofs of total and permanent disability are sufficient when prepared and furnished by the insured on and in accordance with blank forms furnished by the insurer for such purpose.

Garden v Ins. Co., 218-1094; 254 NW 287

8776 Policy exempt from execution.

Discussion. See 21 ILR 153—Property purchased with proceeds

Atty. Gen. Opinion. See '32 AG Op 161

Exemption statutes — applicability. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

Avails of life insurance. The avails of a life or accident policy of insurance inuring or passing to the surviving wife of the insured are exempt from her prior debts, even tho she was not designated in the policy as a beneficiary, and received such avails by operation of law only.

Scott v Wamsley, 218-670; 253 NW 524

Computation of amount of exemption. Where a widow as beneficiary in life insurance policies on her husband received some $11,200 and disposed of some $7,300 before any proceedings were commenced to subject said fund

in excess of the $5,000 statutory exemption to the payment of a debt of the widow antedating the death of the husband, the said statutory exemption of $5,000 must be computed on the basis of the unexpended fund. In other words, her exemption cannot be deemed to be embraced within the $7,300 expenditure.

Booth v Propp, 214-208; 242 NW 60; 81 ALR 919

Funeral expenses nonallowable against insurance proceeds. Claims for funeral expenses consequent on the burial of the intestate deceased are not allowable against funds in the hands of the administrator when said funds constitute the proceeds of insurance on the life of deceased, the latter being survived by a minor son.

In re Galloway, 222-159; 269 NW 7

Life insurance to widow — termination of exemption by death. The unexpended proceeds of a policy of life insurance payable to a surviving widow are not exempt, after her death, from liability for debts contracted by her prior to the death of the insured husband. In other words, the exemption accorded to her does not survive her death.

In re Tellier, 210-20; 230 NW 545

Testamentary power over life insurance. A testator may validly dispose by will of the proceeds of life insurance payable to his estate, and make such proceeds subject to the payment of his debts. Such result is effected by a will (1) which provides for the payment of testator's debts, and (2) which devises the life insurance proceeds subject to such debt proviso.

In re Caldwell, 204-606; 215 NW 615

See Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Testamentary power over life insurance. The formal statement in a will that testator's debts shall be paid out of his estate, is wholly insufficient to justify the conclusion that testator intended to appropriate to the payment of his debts the avails of life insurance payable to his personal representatives or to his estate, even tho as a matter of law such avails do become a part of his estate.

In re Grilk, 210-587; 231 NW 327

Construction—exemption—disposal of insurance payable to estate—specific legacy. When life insurance is payable to an insured's estate, he may specifically dispose of the proceeds other than as provided by statute, but there must be an agreement or assignment to contrary; however, a specific disposition of insurance proceeds by terms of a will, satisfies such requirement.

In re Clemens', 226-31; 282 NW 730

Dead man statute — failure to prosecute claim or disclaimer of interest ineffective. A divorced wife of a deceased may not become a competent witness to an oral contract made jointly between herself, her mother, and the deceased, in order to subject his insurance to payment of her mother's valid probate claim, merely by failing to prosecute a similar claim of her own and disclaiming any interest in the claim in litigation, since she still has her claim and may enforce payment if the contract is established.

In re Hazeldine, 225-369; 280 NW 568

Deceased's insurance as security—oral contract — original holder incompetent witness tho debt assigned. Altho having assigned his claim and altho the claim is duly allowed in probate, the original party to an oral contract with a deceased is incompetent as a witness, when the assignee of such contract seeks to subject the proceeds of the deceased's life insurance to payment thereof by reason of an oral contract claimed to have been entered into with the deceased.

In re Hazeldine, 225-369; 280 NW 568

Proceeds payable to estate — trusteed for statutory beneficiaries—exemption. Where a testator willed to his second wife all of his property requiring legal transmission but made no mention of his life insurance, payable to his second wife if she survived him, otherwise to his estate; and, when testator's second wife predeceased him, then upon his death, his surviving children, being a daughter by his first marriage and a son by his second marriage, became entitled under the statute to the proceeds of the insurance, and such proceeds passed into the hands of his personal representative or estate, only as a trust fund, to be distributed equally to such daughter and son.

In re Clemens', 226-31; 282 NW 730

Subjecting insurance to probate claim—dismissing as to policy in foreign court not allowable. A claimant in probate, alleging an oral contract assigning all decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

Life policy payable in Iowa pledged in another state—Iowa jurisdiction. Tho a life policy payable to the estate of a deceased Iowa resident is deposited in a foreign state, as security for a debt, the proceeds are not beyond the jurisdiction of the Iowa probate court, inasmuch as the right to such proceeds depends, not upon their location, but upon the terms of the policy, supplemented by any contract relating thereto.

In re Hazeldine, 225-369; 280 NW 568

Proceeds of insurance. In mortgage receivership proceedings, and on the issue whether a wife, one of the obligated mortgagors, is solvent, no consideration can be given to the proceeds of life insurance (up to $5,000) on

the life of the husband, and in the hands of the wife as a beneficiary, the mortgage debt antedating the death of the husband.

Interstate Acc. Assn. v Nichols, 213-12; 238 NW 435

Proceeds inure to separate use of beneficiaries independently of creditors. Proceeds of life insurance policy deposited by insurer in registry of federal district court and awarded to administrator appointed by Iowa court were not subject to claims of creditors under Iowa statute.

Cramer v Phoenix Mut. Life, 91 F 2d, 141

Right to proceeds—estate as beneficiary—exempt as to creditors. Policies of life insurance made payable to insured's estate, or to the administrator thereof, are not subject to the claims of creditors, unless the insured during his lifetime agreed, orally or in writing, to the contrary.

In re Hazeldine, 225-369; 280 NW 568

Right to proceeds—assignment by deceased—convincing evidence necessary. An oral contract assigning insurance, made with a deceased, must be established by clear, satisfactory, and convincing evidence and leave no doubt as to the sufficiency of the consideration.

In re Hazeldine, 225-369; 280 NW 568

Note 1 Life insurance generally.

ANALYSIS

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I LIFE INSURANCE POLICIES GENERALLY

(a) IN GENERAL

Contract in general—what law governs. A policy of insurance issued in Iowa to a resident thereof is an Iowa contract, even tho the insurer, as a matter of practice, collects the premiums in a foreign state.

Ragan v Ins. Co., 209-1075; 229 NW 702

Negligence—evidence—sufficiency. Evidence reviewed in an action for damages consequent on the alleged negligence of an insurer in passing on, prior to the death of the applicant, an application for industrial insurance, and held quite insufficient to establish such negligence.

Winn v Ins. Co., 216-1249; 250 NW 459

Negligence in passing on application—damages. In an action for damages consequent on the alleged negligence of an insurer in passing on an application for insurance, the plaintiff must fail, irrespective of his evidence of negligence, unless he establishes, to the extent of furnishing a measure for his damages, the substance of the contract into which he was prevented from entering.

Winn v Ins. Co., 216-1249; 250 NW 459

Presumption attending possession. Possession by an insured, at the time of his death, of a policy of life or accident insurance creates a presumption, born of necessity and based on the experience of mankind, that the policy was delivered to the insured as an effective instrument; and this presumption prevails until the court can say, as a matter of law, that the presumption has been conclusively negatived by other evidence. Applied where the issue was whether the first premium had been paid.

Beggs v Ins. Co., 219-24; 257 NW 445; 95 ALR 863

(b) WHEN POLICY BECOMES EFFECTIVE

Conditions precedent to taking effect of policy. The insurer and insured in a life policy may validly contract that the policy shall not take effect unless, during the continuance in good health of the insured,

1. The policy has been delivered, and
2. The first premium has been paid,—and

such agreement imposes on the insured, as conditions precedent to any recovery, affirmative proof that the policy was delivered, and the first premium paid.

Range v Ins. Co., 216-410; 249 NW 268

Nondelivery because of death. A life insurance policy which, pursuant to an application, is promptly prepared (prior to the death of the insured), and delivered to the agent of the insurer, who forthwith returned the policy to the insurer because the insured was then dead, cannot be deemed in effect when the application distinctly provided that no obligation should exist against the insurer until the policy was delivered to the insured.

Hruska v Ins. Co., 203-1165; 211 NW 858

Premiums—payment mailed — nonreceipt — jury question. Evidence that an insurance premium had been mailed, against a claim of nonreceipt by the company, raises a jury question, especially when the company admits that in its office routine it made no note of the contents of envelopes until after they had passed through the hands of several clerks.

Wood v Ins. Co., 224-179; 277 NW 241

Unlicensed agent—noneffect on insurer—statements regarding effective date of policy. Where an accident policy is to become effective at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured, while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22, while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statements to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

II BENEFICIARIES AND INSURABLE INTEREST

(a) IN GENERAL

Forfeiture of policy for breach of warranty, covenant, or condition subsequent—statutory notice of nonpayment of premium—applicability. The statute (§8959, C., '27) requiring the insurer to give 30 days notice of his purpose to forfeit a policy for the nonpayment of a premium applies to a policy of accident insurance which specifies no exact date for the payment of the premium.

Ragan v Ins. Co., 209-1075; 229 NW 702

Performance by beneficiary—vested interest. The named beneficiary in a policy of life insurance acquires a vested interest in the proceeds of said policy when said beneficiary is so named in consideration of an agreement on the part of said beneficiary, (1) to furnish life-support to her parents (which she thereafter performed), and (2) to act as trustee for the protection of an acknowledged interest of said parents in said proceeds; and said vested interest must prevail over the subsequently acquired interest of another person, especially when such latter interest is based on a past consideration and evidenced by no change in the policy, but by simply a manual delivery thereof.

Aetna Ins. v Morlan, 221-110; 264 NW 58

(b) INSURABLE INTEREST

Corporation as beneficiary of policy on officer. A corporation which, for its own general benefit, is the beneficiary in a policy of life insurance on the life of one of its officers, is unconditionally entitled to the proceeds of the policy, even tho the insured had, at the time of his death, severed his official relation with the corporation.

Reilly v Ins. Co., 201-555; 207 NW 583

(c) BENEFICIARIES GENERALLY

Assignment of policy as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Bankers Life, 214-573; 240 NW 215

Change of beneficiaries. A policy method of changing beneficiaries under life insurance

II BENEFICIARIES AND INSURABLE INTEREST—continued

(c) BENEFICIARIES GENERALLY—concluded

policies is admittedly exclusive; but a testamentary bequest of the proceeds of such policies, payable to the estate of the insured or to his executors or administrators, does not constitute a "change of beneficiaries", but constitutes a disposal of that much of the estate left by the insured.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Change in beneficiary — justifiable and unjustifiable payment. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Right to change beneficiary. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. Co. v Mulvaney, 221-925; 265 NW 889

Changing beneficiary—where policy silent. Where a benefit certificate is silent as to the manner of change, such change of beneficiary may be effected in any manner clearly indicating insured's intention.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary — mere "clear intention" ineffectual. Insured's actions merely indicating a "clear intention to change the beneficiary" are not sufficient. Required acts to effect a change are neither directory nor ministerial but essential, subject only to equitable exceptions.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary — following policy — exceptions—effect of death. Death vests interests in insurance, and the method provided in a benefit certificate to change a beneficiary during lifetime of insured is exclusive, except (1) where the company has waived strict compliance and issued a new certificate, (2) where it is beyond the power of insured to comply literally, equity will consider the change made, and (3) where insured has performed all necessary prerequisites, but dies before a new certificate is actually issued. Held in instant case beneficiary change not accomplished.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Conclusiveness — insurance rights — beneficiaries not parties. A decree establishing rights to insurance does not adjudicate rights of a beneficiary not a party to the action.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Contract provision—effect. The rule of law that when the insured in a policy of life insurance makes a series of changes of beneficiary, and the last beneficiary is legally ineligible, the next preceding, designated, eligible beneficiary is entitled to the proceeds of the policy, does not apply when the policy, by bylaw or otherwise, distinctly provides who, in such circumstances, shall be entitled to the proceeds.

Farrens v Benefit Dept., 213-608; 239 NW 544

Corporation as beneficiary of policy on officer. A corporation which, for its own general benefit, is the beneficiary in a policy of life insurance on the life of one of its officers, is unconditionally entitled to the proceeds of the policy, even tho the insured had, at the time of his death, severed his official relation with the corporation.

Reilly v Ins. Co., 201-555; 207 NW 583

Pledge of collateral — consideration. The naming of a surety as beneficiary in a life insurance policy and the pledging of the policy in order to indemnify the said surety on signing a renewal note are supported by a sufficient consideration.

Beed v Beed, 207-954; 222 NW 442

Surety as beneficiary—secret change—effect. A debtor who, pursuant to an agreement with his surety, makes the surety a beneficiary in a life policy in order to indemnify the surety against loss on the suretyship, and agrees not to change such beneficiary during the life of the suretyship, may not later secretly change such beneficiary and endow such new beneficiary with right to the proceeds of the policy, when the new beneficiary knew at all times of the suretyship and of the pledging of the policy as indemnity; and it matters not that the new beneficiary actually kept the policy alive by paying the premium.

Beed v Beed, 207-954; 222 NW 442

(d) RIGHT TO PROCEEDS

Discussion. See 16 ILR 419—Minor beneficiary

Assignment after loss. Principle reaffirmed that after a loss occurs under a policy of insurance, the beneficiary may assign his right

of action against the insurer without the consent of the insurer.

Welch v Taylor, 218-209; 254 NW 299

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Beneficiary with vested interest—effect. The named beneficiary in a policy of life insurance acquires a vested interest in the proceeds of said policy when said beneficiary is so named in consideration of an agreement on the part of said beneficiary (1) to furnish life-support to her parents (which she thereafter performed), and (2) to act as trustee for the protection of an acknowledged interest of said parents in said proceeds; and said vested interest must prevail over the subsequently acquired interest of another person, especially when such latter interest is based on a past consideration and evidenced by no change in the policy, but by simply a manual delivery thereof.

Aetna Ins. v Morlan, 221-110; 264 NW 58

Ineligible beneficiary—contract provision—effect. The rule of law that when the insured in a policy of life insurance makes a series of changes of beneficiary, and the last beneficiary is legally ineligible, the next preceding, designated, eligible beneficiary is entitled to the proceeds of the policy, does not apply when the policy, by bylaw or otherwise, distinctly provides who, in such circumstances, shall be entitled to the proceeds.

Farrens v Ben. Dept., 213-608; 239 NW 544

Life policy payable in Iowa pledged in another state — Iowa jurisdiction. Tho a life policy payable to the estate of a deceased Iowa resident is deposited in a foreign state, as security for a debt, the proceeds are not beyond the jurisdiction of the Iowa probate court, inasmuch as the right to such proceeds depends, not upon their location, but upon the terms of the policy, supplemented by any contract relating thereto.

In re Hazeldine, 225-369; 280 NW 568

Notice—claim in probate—legatees unnecessary parties. In an appeal from a holding that a claim in probate was not payable from life insurance funds, notice of appeal is all-sufficient when served solely on the executor, the legatees not being parties to the controversy.

In re Caldwell, 204-606; 215 NW 615

Surety as beneficiary—secret change—effect. A debtor who, pursuant to an agreement with his surety, makes the surety a beneficiary in a life policy in order to indemnify the surety against loss on the suretyship, and agrees not to change such beneficiary during the life of the suretyship, may not later secretly change such beneficiary and endow the new beneficiary with right to the proceeds of the policy, when the new beneficiary knew at all times of the suretyship and of the pledging of the policy as indemnity; and it matters not that the new beneficiary actually kept the policy alive by paying the premium.

Beed v Beed, 207-954; 222 NW 442

Testamentary power—proceeds of life insurance. A testator may validly dispose by will of the proceeds of life insurance payable to his estate and make such proceeds subject to the payment of his debts. Such result is effected by a will (1) which provides for the payment of testator's debts, and (2) which devises the life insurance proceeds subject to such debt proviso.

In re Caldwell, 204-606; 215 NW 615

III CONSTRUCTION AND OPERATION OF POLICIES

Ambiguous language — construction. Ambiguous language employed in an insurance policy must be construed most strongly against the insurer and in favor of the beneficiary of the policy.

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

Ambiguity against insurer. Principle reaffirmed that, in the construction of a policy of insurance, the court will look to all parts thereof and, guarding against making a new contract for the parties, will construe ambiguous parts thereof most strongly against the insurer who dictated the language of the instrument.

Kantor v Ins. Co., 219-1005; 258 NW 759

Discriminations, etc.—permissible collateral agreements. The act of an insurer in granting to the insured, through the medium of a promissory note, an extension of time in which to pay an accrued annual premium, on condition that the nonpayment of the note at maturity shall ipso facto void the policy, is not violative of the statutes (1) which prohibit discriminations among policyholders, (2) which require the entire contract to be inserted in the policy, and (3) which require all forms of policy or contracts of insurance to be filed with and approved by the commissioner of insurance.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

Liberal construction—reformation.

Wall v Ins. Co., 228- ; 289 NW 901

Equivocal provision. A policy of insurance is equivocal in providing for double indemnity if the insured dies while "a passenger within

III CONSTRUCTION AND OPERATION OF POLICIES—continued

a passenger elevator" because the term "elevator" may mean:

1. The platform or cage on which or in which the passenger rides; or

2. The entire structure, including the cage or platform, hoisting machinery and shaft in which the cage or platform operates.

The insurer being responsible for this equivocation, that construction must prevail which is most favorable to the insured. Held, therefore, that the insured was "a passenger within a passenger elevator" when, intending to be a passenger, he stepped into the elevator shaft and was killed.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

New policy for old—conclusiveness.

Knott v Ins. Co., 228- ; 290 NW 91

Extending period for insurance. A recording or policy-issuing agent has authority to agree to an extension of the life of a policy, as written, in order to cover an additional period equal to that during which the insurer claimed the policy stood suspended and for which the insured had paid the premium.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Forfeiture of policy—nonpayment premium lien note—discriminatory provisions. In an action by beneficiary to recover insurance on a policy which, at the expiration of an extension permitted by a premium lien note, the insured had allowed to lapse, and which policy contained certain provisions as to "cash surrender value" and "participating paid up insurance" granting to an insured three months after default in any premium payment to elect to surrender his policy for cash, thereby contains an unlawful discrimination providing longer insurance in favor of a more delinquent insured, and under above circumstances the failure to pay the premium lien note resulted in cancelling the policy subject to the terms of the policy itself, which giving insured a specified amount of insurance for a limited time, which having expired at the time of his death, it follows that the policy having lapsed a recovery should be denied.

Clausen v Ins. Co., 224-802; 276 NW 427

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e.g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Unlicensed agent—noneffect on insurer—statements regarding effective date of policy. Where an accident policy is to become effective at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22 while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statement to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Nonpayment of premium. In case of ambiguity, a policy of insurance will be construed most strongly against the insurer who, of course, wrote the policy. So held on the question whether a provision granting a period of grace in the payment of premiums applied to both death and disability benefits provided for in the policy.

Murphy v Ins. Co., 219-609; 258 NW 749

"Passenger"—construction of term. Principle recognized and reasserted that there is a vast difference between the facts which constitute a person a passenger in a common carrier conveyance and what facts constitute a person a passenger on an ordinary elevator.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

"Permanent" disability. A policy which provides for benefits if the insured becomes "wholly and permanently disabled" does not embrace recovery for a disability which has been total for years, but which has terminated at the time action for recovery is instituted.

Hawkins v Ins. Co., 205-760; 218 NW 313

Premiums—default—"paid-up" insurance as automatic result. A policy of insurance may not be deemed a policy for extended insurance upon the happening of a default in the payment of a premium (1) when, under the terms of the policy and governing statutes, such default automatically rendered the policy a policy for paid-up insurance, unless the insured elected to take extended insurance, and (2) when the insured had never exercised any such election, and moreover had, long after the default, ineffectually attempted to pay the premium.

Rogers v Ins. Co., 204-804; 213 NW 757

Varying contract by evidence of custom. Principle recognized that a clearly expressed

and unambiguous contract cannot be varied by evidence of a custom.

Wall v Ins. Co., 217-1106; 253 NW 46

IV PREMIUMS, DUES AND ASSESSMENTS

Failure to pay premium—effect. A combined life and accident policy of insurance becomes void in accordance with its terms, to wit: "on failure to pay the premium at maturity", without any notice from the insurer that the premium is due or when it will be due. In other words, section 8959, as supplemented by section 8673, has no application to such a policy.

Wall v Ins. Co., 217-1106; 253 NW 46
See Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Forfeiture of policy—nonpayment of premium. An insured will not be deemed in default in the payment of premiums at the time of his death (1) when the premium is payable in installments, (2) when no specified date is fixed for payment, (3) when the policy provides that the payment of an installment shall continue the policy in force for a stated time, and (4) when the insured dies prior to the expiration of said stated time after the last payment; and this is true tho the premiums earned exceed the premiums paid.

Ragan v Ins. Co., 209-1075; 229 NW 702

Premiums—maturity—date of policy governs. In computing the future accruing premium paying periods under a policy of life insurance, the date of the policy as voluntarily selected by the insured, governs, (1) even tho said date is an antedate representing the date of the application for the insurance, and (2) even tho the policy provides that it shall be effective only from date of delivery to the insured.

Timmer v Ins. Co., 222-1193; 270 NW 421; 111 ALR 1412

Premium payable from wages—quitting service—effect. Where a premium is payable in installments and from the wages of the insured earned with a named employer, the abandonment of said service by the insured does not constitute a breach of the contract, when the policy provides for just such a contingency.

Ragan v Ins. Co., 209-1075; 229 NW 702

Policy date for premiums—time of lapse.

Wall v Ins. Co., 228- ; 289 NW 901

Nonpayment of premium—effect of custom. An insured cannot excuse the nonpayment of his premium on the plea that the insurer customarily notified the policyholder of the maturity date, but failed so to do in his case when said policyholder did not know of the custom at the time in question and necessarily did not rely thereon.

Wall v Ins. Co., 217-1106; 253 NW 46

Failure to pay note—lapse of policy. A policy of insurance unqualifiedly lapses upon the failure of the insured to pay at maturity a promissory note which he has given for an annual premium, such effect being expressly provided for in the application and in the policy and in the said note, and the note clearly providing that it was not given as payment.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

Nonright to grace in payment of note. An insured who has the policy right to 30 days grace in which to pay a premium after its maturity, before the policy lapses, but who applies for and is granted a much longer time, through the medium of a promissory note, in which to pay may not insist that the 30-day policy grace shall be added to the maturity date of the note.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

Nonpayment of premium. In case of ambiguity, a policy of insurance will be construed most strongly against the insurer who, of course, wrote the policy. So held on the question whether a provision granting a period of grace in the payment of premiums applied to both death and disability benefits provided for in the policy.

Murphy v Ins. Co., 219-609; 258 NW 749

Nonpayment of premium—period of grace. A policy of life insurance, in providing that a failure to pay a premium shall not void the policy until a thirty days notice is mailed to the last known address of the insured, contemplates and requires, not a notice that a premium will become due at a named date in the future, but a thirty days notice that a premium is due and unpaid; and until the thirty days have fully elapsed after the mailing of a proper notice, the policy continues in force.

Andrews v Ins. Co., 220-719; 263 NW 255

Payment in disregard of contract—waiver. A provision in the constitution and bylaws of an insurer to the effect that the failure of the insured, for three months, to pay the required monthly dues shall, without notice, automatically terminate his membership and deprive him of all benefits must be deemed to have been waived in favor of an insured who, for many years and up to the time of his death, fully paid his dues, but not in accordance with said constitutional requirement,—the insurer necessarily having knowledge of said method of payment, and having accepted and retained said payments without objection.

Sawyer v Union, 220-806; 263 NW 236

Liability of insurer—premium check received as "cash"—no lapse by nonpayment. Where an insurer notifies its insured that his premium lien note is due, but his new note and remittance mailed on or before a certain Saturday on which his policy lapses, will prevent any such lapse, the insurer knowing that

IV PREMIUMS, DUES AND ASSESSMENTS—concluded

thereby payment could not reach its office in another city before the policy lapse date, but, nevertheless, when the payment check arrives, receipts for it as cash, and when the insured shortly thereafter dies, and the check meanwhile being returned unpaid, and the insured altho then dead being notified that the policy had lapsed, is a situation justifying a finding that the check was received as payment and a repudiation of such payment to escape liability on the policy will not be permitted.

Hockert v Ins. Co., 224-789; 276 NW 422

"Void" for nonpayment of premiums means "voidable". An insurance policy written as a unilateral contract, containing a provision that the policy will be void upon default in premium payment, means in effect that the policy is "voidable"—said clause being for the exclusive benefit of the insurer.

Pennebaker v Ins. Co., 226-314; 284 NW 147

Premium—application of dividends. An insured is not entitled to notice from the insurer as to the amount of dividends due under the policy in order to determine how much cash, in addition, is necessary to pay his premium when, under the policy, the condition does not yet exist under which he would have the right to apply the dividends on the premium.

Wall v Ins. Co., 217-1106; 253 NW 46

Unpaid premiums—nonright to apply dividends. The insurer in a dividend-participating policy has no right on his own initiative—let alone being under a duty—to so apply a cash dividend belonging to the insured and in the possession of the insurer, as to furnish extended insurance and prevent a lapse of the policy, the policy granting no such right to the insurer, and vesting the insured, under the exercise of his own option, with absolute control over said dividend.

Baker v Ins. Co., 222-184; 268 NW 556

Conditionally delivered note—purchaser with knowledge not "holder in due course". Where insurance agent takes an application for life insurance, and as a part of the same transaction notes are executed and delivered conditionally, or for specific purpose of paying insurance premium, and a party takes the notes, as security for a loan to the agent, with knowledge that application has not been approved, such party is not a "holder in due course" and cannot enforce payment of the note after application has been rejected.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Conversion of premium by agent—liability of insurer. Where insurance agent taking an application for life insurance had authority to collect premiums on behalf of the insurer and where proceeds of check given with application for payment of premium were partly converted while in authorized possession of insurer's agent, and the application was thereafter rejected by insurer, the conversion was an act for which the insurer was liable.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Deceased insurance agent's liability for insurance premium. In action to cancel insurance premium notes where evidence, clearly admissible against administrator of deceased insurance agent, established that check and two notes were delivered to agent for payment of premium and that insurer rejected application for insurance, such evidence warranted cancellation of the notes and established agent's liability for the unaccounted part of the check as against administrator of the agent's estate.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

V ASSIGNMENT OR TRANSFER

Absence of consideration. An assignment of the proceeds of a life insurance policy is a nullity when not supported by a consideration.

Mutual Ins. v Schubert, 201-697; 207 NW 741

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Assignment as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

Consideration—assignment to trustee. A written assignment of a fractional interest in a life insurance policy to a trustee, made for the purpose of protecting the attorneys for the agreed value of their services in prosecuting an action on the policy, is supported by adequate consideration, especially when it appears that the trustee was to receive compensation for his services.

Welch v Taylor, 218-209; 254 NW 299

Assignee of policy—venue. The assignee of a fractional interest in a life insurance policy

may, in conjunction with the original beneficiary (who retains the remaining fractional interest), maintain an action on the policy in the county of which the assignee is a resident, even tho said county is not the county of which the original beneficiary is a resident.

Welch v Taylor, 218-209; 254 NW 299

Right to proceeds—assignment after loss. Principle reaffirmed that after a loss occurs under a policy of insurance, the beneficiary may assign his right of action against the insurer without the consent of the insurer.

Welch v Taylor, 218-209; 254 NW 299

Insurable interest—corporation as beneficiary of policy on officer. A corporation which, for its own general benefit, is the beneficiary in a policy of life insurance on the life of one of its officers, is unconditionally entitled to the proceeds of the policy, even tho the insured had, at the time of his death, severed his official relation with the corporation.

Reilly v Ins. Co., 201-555; 207 NW 583

Subjecting insurance to probate claim—dismissing as to policy in foreign court not allowable. A claimant in probate, alleging an oral contract assigning all decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

VI CANCELLATION, SURRENDER, RESCISSION AND REFORMATION

Cancellation in equity. Equity will not, after the death of the insured in a life insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

Fraud as defense in law action. A defendant in an action at law on a policy of insurance is not entitled to a transfer of the action to the equity calendar simply because he pleads fraudulent representation as a defense and prays a cancellation of the policy.

Beeman v Life Co., 215-1163; 247 NW 673

Reformation—age when policy exchanged—mutual mistake

Knott v Ins. Co., 228- ; 290 NW 91

Date of lapse—construction—reformation.

Wall v Ins. Co., 228- ; 289 NW 901

VII RENEWAL, REVIVAL AND REINSTATEMENT

Belated receipt of check—effect. Under a policy providing that the nonpayment of a premium shall forfeit the policy, but that the insured may be reinstated, the receipt by the insurer thru the mail, long after the maturity of a premium, of insured's check for the premium, does not constitute payment, when the insurer promptly replied by mail that the insured must first be reinstated, and when, without effort to collect the check, the insurer made proper tender thereof; and it matters not that the insured died before the insurer's letter reached him.

Rogers v Ins. Co., 204-804; 213 NW 757

Incontestability and suicide clauses compared. A clause, in an insurance reinstatement agreement, providing for incontestability after two years from reinstatement, is a limitation on contestability and on the company's rights and is opposite in character to a suicide clause which affords additional contestability and adds to the company's rights.

Johnson v Ins. Co., 224-797; 276 NW 595

Ipso facto lapse of policy—formal forfeiture unnecessary. Under an ordinary life insurance policy, a provision that default in payment of a premium shall forfeit the policy requires no formal notice of forfeiture in case of such default.

Rogers v Ins. Co., 204-804; 213 NW 757

Reinstatement revives lapsed policy—suicide clause. Reinstatement of an insurance policy four years after it was originally written does not create a new contract as of date of reinstatement but revives the lapsed policy, and a clause in the original policy excluding liability for suicide for two years from date of contract is not revived to mean two years from date of reinstatement.

Johnson v Ins. Co., 224-797; 276 NW 595

Self-adjusting benefit provisions — effect. Where a policy of accident insurance, which has lapsed because of the nonpayment of premiums, is self-adjusting as regards death benefits in case death occurs while the insured is pursuing an occupation which is more hazardous than the one specified in the policy, such self-adjusting provisions are in no manner changed by the act of the insurer in reinstating the policy by accepting and retaining the past due premium with full knowledge that the insured was then pursuing a more hazardous occupation than the one specified in the policy. Especially is this true if a contrary construction would result in a discrimination between policyholders which is prohibited by statute.

Stephan v Ins. Co., 209-576; 221 NW 57

VIII AVOIDANCE AND FORFEITURE OF POLICIES

(a) IN GENERAL

Directed verdict on defensive plea. A defendant insurance company is entitled to a directed verdict on its defensive plea that the policy sued on had, because of the nonpayment of premiums, etc., become forfeited prior to the death of the insured, when, at the close of

VIII AVOIDANCE AND FORFEITURE OF POLICIES—continued

(a) IN GENERAL—concluded

all testimony, the record reveals clear and convincing proof of such forfeiture by competent and satisfactory testimony which is wholly uncontradicted and unimpeached, directly or indirectly, by any fact, circumstance, or condition. And this is true tho it be assumed that defendant has the burden to establish his said plea.

Baker v Ins. Co., 222-184; 268 NW 556

Misrepresentation in re sanity. Presumptively, a person is sane from and after such person is discharged from an asylum for the insane to which the person has been committed for treatment for insanity. Evidence, expert and nonexpert, reviewed and held to present a jury question on the issue whether an insured was sane at the time a policy of insurance was issued notwithstanding the conceded fact that said insured had, some four years prior to the issuance of the policy, been adjudged insane and committed to an asylum for the insane and had remained there some three years before being granted a discharge.

Foy v Ins. Co., 220-628; 263 NW 14

Bylaws part of policy—nonwaiver.

Richardson v Trav. Assn., 228- ; 291 NW 408

(b) MISREPRESENTATION AND CONCEALMENT

Actions on policies—law of case—directed verdict. An insurer may not have a directed verdict on the ground that the insured had, in his application, incorrectly stated his occupation (1) when, on a former appeal, the law of the case had been settled to the effect that recovery might be had if the insurer had full knowledge of such occupation notwithstanding such incorrect statement, and (2) when the record presents a jury question on such issue of knowledge.

Murray v Ins. Co., 204-1108; 216 NW 702

False answers to medical examiner—effect. The giving to a medical examiner by an applicant for insurance of absolutely false answers relative to the past medical history of the applicant, will not avoid the conclusive effect of the physician's favorable certificate unless the physician was deceived and misled by the false answers into issuing a certificate which he would not have issued, had true answers been given. Evidence reviewed, and held to present a jury question on this latter issue.

Boos v Ins. Co., 205-653; 216 NW 50

Fraud and false warranty—evidence—insufficiency. An insurer who, in an action on a policy of insurance, presents the intermingled defense of fraud and false warranty has the burden to establish such defense. Evidence reviewed and held to present no jury question.

Post v Lodge, 211-786; 232 NW 140

Fraud—jury question. Fraud or deceit in obtaining from the medical examiner of an insurance company a certificate of life insurability is not established per se by proof that the applicant for insurance, in response to an all-inclusive and comprehensive question, omitted any reference to the fact that, on one occasion, a physician had prescribed a tonic for him, and that on another occasion an oculist had prescribed glasses for him as a corrective of a defect of vision.

Colver v Continental Co., 220-407; 262 NW 791

Misrepresentation—jury question. On the issue whether a policy of life insurance had been obtained by the insured by means of false and fraudulent representations relative to the prior and present state of health of the insured, record reviewed in detail and held to present a jury question.

Getsinger v Ins. Co., 216-610; 247 NW 260

Misrepresentation—when unallowable as a defense. False and fraudulent representations on the part of an insured, in his original application for a policy of insurance, are not available as a defense to an action on the policy, when the policy provides that it is incontestable except as provided in named paragraphs which, on examination, reveal no grounds of contest whatever, but only matters of which the insurer could avail himself in the enforcement of the contract.

Wilson v Equitable Life, 220-321; 262 NW 525

Willful deception as to health—jury question. Record reviewed on the issue whether an insured had knowingly deceived the insurer in stating his condition of health during the preceding five years, and held to present a jury question.

Parker v Ins. Co., 218-145; 254 NW 31

(c) NONFULFILLMENT OF WARRANTIES AND CONDITIONS

Contract remedies for collection—failure to comply with. The beneficiary (and his assignee), in a certificate of insurance of a mutual benefit association, is bound by the bylaws which provide that no resort shall be had to the courts to enforce payment of said certificate until said beneficiary has first exhausted the contract remedies provided by the bylaws for the allowance and payment of said claim.

Ater v Ben. Dept., 222-1390; 271 NW 517

Incapacity excusing payment. Evidence reviewed, and held insufficient to establish that an insured was "wholly and permanently" disabled within the meaning of a policy which excused nonpayment of the annual premium in case of such incapacity.

Corsuat v Assur. Soc., 203-741; 211 NW 222; 51 ALR 1035

Nonpayment of dues—automatic forfeiture. A policy or certificate holder in a fraternal insurance society who, at different times, and in violation of his contract of insurance, has escaped an automatic forfeiture of his policy by having his policy dues or assessments paid and accepted after they were wholly delinquent, must comply with a due and timely notice from the society that said practice will no longer be tolerated and that said dues and assessments must be paid strictly within the time provided by the policy contract.

If he does not so comply, and dies while in arrears, his beneficiary will not be permitted to avoid the automatic forfeiture of the policy by a then tender of the dues.

Wry v Woodmen, 222-1179; 271 NW 300

Premiums—default—no duty to apply surrender value. Under a policy which provides that default in the payment of a premium shall forfeit the policy, the insurer is under no obligation, upon the happening of such default, to apply the cash surrender value to the payment of such premium when, under the policy and governing statutes, the insured controlled the disposition of such surrender value and had never exercised any option with reference thereto.

Rogers v Ins. Co., 204-804; 213 NW 757

IX WAIVER AND ESTOPPEL

Discussion. See 13 ILR 129—Waiver

Assignment of policy. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Delivery of policy. The actual delivery of a policy of life insurance after the insured has, without fraud, been examined by the insurer's medical examiner and reported insurable precludes the insurer from questioning the effectiveness of such delivery on the ground that after the said examination and report, and before the delivery of the policy, the insured had, without the knowledge of the insurer, contracted a fatal disease; and this is true even though the application distinctly provides that the policy shall not take effect unless the insured is in good health at the time of delivery, such proviso being ineffective under §8770, C., '24, in those cases where the insurer makes delivery.

Mickel v Ins. Co., 204-1266; 213 NW 765

Estoppel to dispute power of agent. An insurance company estops itself from asserting that its agent is other than a recording or policy-issuing agent when it furnishes the agent with all blanks and supplies necessary for the actual execution and issuance by him of policies and otherwise recognizes his broad powers, and when a policyholder has relied on the agreement and representation of said agent.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Estoppel to avoid or forfeit policy—medical examination—effect. There may be a valid compromise and settlement of liability under a life insurance policy, prior to the death of the insured, even tho the policy was issued on a medical examination made by the insurer. (§8770, C., '31.)

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Nonestoppel to question insurability. The statutory provision (§8770, C., '31) which estops an insurer from questioning the insurability of an insured after the insurer's medical examiner has certified to the insurability of the insured, does not apply when there has been no delivery of the policy because of the insured's noninsurability.

Range v Ins. Co., 216-410; 249 NW 268

Forfeiture of policy—nonpayment of premiums. The plea that the nonpayment of premiums on a policy was waived because the policy provided for such waiver in case the insured became "wholly and permanently disabled" is manifestly not established by proving that the insured was only partially disabled.

Corsuat v Assur. Soc., 203-741; 211 NW 222; 51 ALR 1035

Proof of loss—denial of liability not constituting waiver. A denial of liability on a policy of insurance does not constitute a waiver of proofs of loss when the validity of the claim under the policy depends solely on the furnishing of proofs of loss within a specified contract time, and when said denial of liability was made long after said time had expired.

Fairgrave v Life Assn., 211-329; 233 NW 714

Privileged communications—waiver of statute—scope of. A waiver, in a policy of accident insurance, of the statute which forbids a physician when testifying to reveal a professional or privileged communication, is operative whether the particular communication be favorable or unfavorable to the insurer.

Miser v Trav. Assn., 223-662; 273 NW 155

Bylaws part of policy—nonwaiver.

Richardson v Trav. Assn., 228- ; 291 NW 408

Waiver—no release by insured without consideration. A purported release by one party to a contract of the other party's obligations is without effect unless duly supported by a consideration. So held where an insured accepted the return of his premium upon the statement that the policy had lapsed and there-

upon the insurer claimed a waiver of its obligations.

Pennebaker v Ins. Co., 226-314; 284 NW 147

X CAUSES OF DEATH AS AFFECTING RECOVERY

(a) IN GENERAL

Assault to rob—jury question. The limited liability provided in a policy of insurance in case of "injuries intentionally inflicted upon the insured by another person except in the perpetration of a robbery," cannot be deemed established as a matter of law by evidence which would justify a finding either (1) that the assault was not made in the perpetration of a robbery, or (2) that it was made in the perpetration of a robbery, or (3) that the assault was the result of mistaken identity—and, therefore, not intentional within the meaning of the policy.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

(b) ACCIDENTAL DEATH AND DOUBLE INDEMNITY

Drinking liquor as "accidental means". Proof that an insured drank liquor of some nature, and died from the effects thereof, without any evidence that the liquor was taken (1) unintentionally, or (2) under a mistaken notion as to amount taken, or (3) under a mistaken notion as to the character of the liquor, does not establish that the death was caused by accidental means.

Naggy v Provident Ins., 218-694; 255 NW 526

Accidental cause producing death—evidence. Evidence held sufficient to present a jury question on the issue whether an insured became accidentally infected with gas bacillus at the time of an injury to his hand, and whether said infection resulted in his death.

Martin v Bankers Life, 216-1022; 250 NW 220

"Accident" and "accidental means" defined. An "accident" is an event which, under the circumstances, is unusual and unexpected by the person to whom it happens; the happening of an event without the concurrence of the will of the person by whose agency it was caused.

The term "accidental means" signifies those means, the effect of which does not ordinarily follow, and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing.

Miser v Trav. Assn., 223-662; 273 NW 155

Accidental death—proof of exact manner unnecessary. In an action at law by beneficiary to recover upon a policy of life insurance containing provision for an additional benefit in event of death of insured by accidental means, it is not necessary that beneficiary set up or prove any particular theory of the exact manner of the insured's accidental death.

Waddell v Ins. Co., 227-604; 288 NW 643

Discharge of firearms. Proof by an insurer that the insured was murdered by being shot by some unknown person does not establish the defense that a limited liability is provided by the policy if the insured is killed by the discharge of firearms and there is no actual witness to the transaction "except the insured himself", because such proof establishes that there was an eyewitness other than the insured, to wit, the assailant.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

Death by accident (?) or suicide (?)—directed verdict. In an action on a policy of insurance covering death by accident but excluding liability in case of suicide, the court, in view of the legal presumption against suicide, cannot properly direct a verdict on the theory of suicide unless the record is such as to conclusively establish the fact of suicide.

Jovich v Benefit Assn., 221-945; 265 NW 632

Death following disease caused by injury. A physical injury to a person must, within the meaning of the ordinary accident insurance policy, be deemed the proximate cause of the death of said person, even tho said person actually dies of bronchial pneumonia, provided said disease was precipitated or caused by said physical injury. Evidence held to present jury question.

Dewey v Ins. Co., 218-1220; 257 NW 308

Death by accidental means. In a law action by beneficiary to recover for death of insured on a policy containing additional benefits for death resulting from accidental means, the defendant insurer complaining that the court erred in submitting to the jury the question of whether or not plaintiff had successfully carried her burden of proof that death resulted from accidental means, held, there being circumstantial evidence tending to establish that the discharge of a gun was accidental, creating a presumption having probative value in favor of the theory of accident, the question was properly submitted to the jury.

Waddell v Ins. Co., 227-604; 288 NW 643

Parachute jump—"in aerial conveyance"—not covered by policy.

Richardson v Trav. Assn., 228- ; 291 NW 408

Inhaling "gas"—scope of term. An unambiguous policy provision which exempts the insurer from liability when death ensues from inhaling "any gas" embraces a death from inhaling a combination or collection of gases as well as death from inhaling a single gas.

Lamar v Traveling Men, 216-371; 249 NW 149; 92 ALR 159

"Immediate" disablement. A policy of accident insurance which provides for a death loss only when the accident "immediately, continuously, and wholly disables the insured from the date of the accident" does not cover

a loss for death where the insured, after being injured, continued to perform the usual and ordinary labors of his occupation for some twenty days, before total disablement took place as a result of the accidental injury.

Walters v Acc. Assn., 208-894; 224 NW 494

Disablement of automobile—condition constituting. Insurance against accidental loss of life from "disablement" of an automobile embraces such loss consequent on the carburetor of the car being in such defective condition that gas is ignited from the engine, and forced into the cab, with fatal results to the operator of the car.

Thomas v Ins. Co., 223-761; 273 NW 862

"Freight" elevator as "passenger" elevator. Under a policy of insurance providing double indemnity for death while the insured is "a passenger within a passenger elevator", a jury question may arise whether an ordinary freight elevator may not also be a passenger elevator within the meaning of the policy and in view of the use of said elevator for the carrying of passengers.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

Contractor as passenger. On the question whether an insured under an accident insurance policy was a "passenger" in an elevator at the time of his death, the fact that he was an independent contractor of the work then being carried on is quite immaterial.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

"Passenger"—construction of term. Principle recognized and reasserted that there is a vast difference between the facts which constitute a person a passenger in a common carrier conveyance and what facts constitute a person a passenger on an ordinary elevator.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

"Riding in" or "driving" automobile—proof—sufficiency. On the issue (under an insurance policy) whether an insured died while "riding in", or while "driving" an automobile, no recovery can be had on proof only that the insured, shortly after he was expecting to start on a journey, was found dead in his securely closed garage and in his automobile (the engine of which had manifestly been very recently running) and behind the steering wheel, with the left front door partly open, and his left foot resting on the running board and his right foot near the accelerator; and especially is this true when the attending circumstances clearly indicate that before the car could be put into actual motion other acts must be done which would necessitate the absence of the deceased from the car.

Mould v Cas. Co., 219-16; 257 NW 349

Equivocal provision. A policy of insurance is equivocal in providing for double indemnity if the insured dies while "a passenger within a passenger elevator" because the term "elevator" may mean:

1. The platform or cage on which or in which the passenger rides, or
2. The entire structure, including the cage or platform, hoisting machinery and shaft in which the cage or platform operates.

The insurer being responsible for this equivocation, that construction must prevail which is most favorable to the insured. Held, therefore, that the insured was "a passenger within a passenger elevator" when, intending to be a passenger, he stepped into the elevator shaft and was killed.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

Directed verdict—war of expert testimony. Whether a death resulted from an accident "independent of all other causes" is necessarily a jury question under a war of conflicting and contradictory expert testimony.

Martin v Life Co., 216-1022; 250 NW 220

Finding by court—conclusiveness. The finding of the court in a trial to the court on supporting evidence on the issue whether an insured died "solely through external, violent, and accidental means" or from disease, is conclusive on the appellate court. And it is immaterial that the court determines its findings by sustaining a motion to dismiss at the close of all the evidence or by overruling such motion and later dismissing the action on its own motion.

Cherokee v Ins. Co., 215-1000; 247 NW 495

Forfeiture of policy—violation of law as sole or proximate cause of death. A policy of accident insurance which provides, in effect, that it does not cover or embrace loss "resulting from or in consequence of" any act of the insured's while engaged in any violation of law, does not justify an instruction to the effect that the violation of law must be the sole cause of the loss. Proximate cause, not sole cause, is the legal test.

Whyte v Cas. Co., 209-917; 227 NW 518

Mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikable on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc., 222-1269; 271 NW 220

(c) DISEASE

Death following disease caused by injury. A physical injury to a person must, within the meaning of the ordinary accident insurance policy, be deemed the proximate cause of the death of said person, even tho said person actually dies of bronchial pneumonia, provided said disease was precipitated or caused by said physical injury. Evidence held to present jury question.

Dewey v Ins. Co., 218-1220; 257 NW 308

X CAUSES OF DEATH AS AFFECTING RECOVERY—concluded

(d) SUICIDE

Certificate of death—admissibility. In an action to recover on a policy of insurance, a certificate of death of the insured, tho duly and legally executed by a coroner, is inadmissible as evidence insofar as said certificate assumes to state the cause of death as "suicide by hanging", said stated cause of death being simply the opinion or conclusion of the coroner and not a statement of fact.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Directed verdict. An insurer is not entitled to a directed verdict on its defensive plea of suicide unless the facts and circumstances preclude every reasonable hypothesis except that of suicide. Evidence held insufficient to overcome presumption of nonsuicide.

Wilkinson v Life Assn., 203-960; 211 NW 238

Accidental death—presumption against suicide. Under a policy providing for additional payment in case of death from accidental means, the beneficiary has burden of showing that insured shot himself accidentally, which need not be proved by direct evidence, but may be proved by proper inferences and presumptions from facts, and the beneficiary is aided in carrying this burden of proof by the presumption that death was not the result of suicide. Such presumption, however, is a rebuttable one and ordinarily a question of fact to be determined by the jury. So where evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question was properly held for the jury.

Mutual Ins. v Hatten, 17 F 2d, 889

Presumption as basis of jury question. The common law presumption that a death was not a suicide does not necessarily create a jury question, because the presumption may be wholly negatived by the attending facts and circumstances.

Warner v Ins. Co., 219-916; 258 NW 75

Death by accident (?) or suicide (?)—directed verdict. In an action on a policy of insurance covering death by accident but excluding liability in case of suicide, the court, in view of the legal presumption against suicide, cannot properly direct a verdict on the theory of suicide unless the record is such as to conclusively establish the fact of suicide.

Jovich v Benefit Assn., 221-945; 265 NW 632

Evidence of suicide as affirmative defense. In a law action by a beneficiary to recover for the death of the insured on a policy containing additional benefits on account of accidental death, to which defendant insurer pleaded an affirmative defense of suicide and at the close of testimony moved for a directed verdict in favor of plaintiff beneficiary for amount of premiums paid, such motion was properly overruled where the question decided was that the results of insured's own actions, as reconstructed from the circumstances and surroundings, may have been intentional or may have been accidental, the evidence not being of such weight as to make it appear conclusively on the whole record that insured died by suicide.

Waddell v Ins. Co., 227-604; 288 NW 643

XI ADJUSTMENT, SETTLEMENT, PAYMENT AND DISCHARGE OF LOSS

Discussion. See 21 ILR 642—Undue influence to secure release

Application—failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

Change of occupation—self-adjusting benefit provisions—effect. Where a policy of accident insurance which has lapsed because of the nonpayment of premiums is self-adjusting as regards death benefits in case death occurs while the insured is pursuing an occupation which is more hazardous than the one specified in the policy, such self-adjusting provisions are in no manner changed by the act of the insurer in reinstating the policy by accepting and retaining the past-due premium with full knowledge that the insured was then pursuing a more hazardous occupation than the one specified in the policy. Especially is this true if a contrary construction would result in a discrimination between policyholders, which is prohibited by statute.

Stephan v Ins. Co., 209-576; 221 NW 57

Compromise and settlement—fraud. Evidence reviewed on the issue of fraud in the settlement of the amount due under a life insurance policy and held to present a jury question.

Colver v Assur. Co., 220-407; 262 NW 791

Executory contracts—bona fide dispute. A policy of life insurance may, prior to the death of the insured, be validly compromised, settled, and released irrespective of the existence or nonexistence of any bona fide dispute or controversy between the parties. After the death of the insured, the rule is otherwise.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Impeachment—burden of proof. He who seeks to avoid a duly proven compromise, settlement and release must establish:

1. That the release was procured by fraud, or

2. That the contention or claim on which the compromise and settlement was based was wholly unfounded, and, therefore, could not support a compromise and settlement.

Evidence reviewed and held wholly insufficient to impeach a compromise and settlement of liability under a policy of life insurance.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Medical examination—effect. There may be a valid compromise and settlement of liability under a life insurance policy, prior to the death of the insured, even tho the policy was issued on a medical examination made by the insurer.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Right to deduct unpaid annual premium. An insurer has the right, when discharging his liability under a policy of life insurance, to deduct the amount of one full annual premium, even tho, when the insured died, only the first quarterly installment of the premium for the insurance year was due, the policy providing for such deduction and in addition providing that all premiums for an insurance year were due and payable in advance, with option to pay quarterly.

Andrews v Ins. Co., 220-719; 263 NW 255

XII ACTIONS ON POLICIES

Assignee of policy—venue. The assignee of a fractional interest in a life insurance policy may, in conjunction with the original beneficiary (who retains the remaining fractional interest), maintain an action on the policy in the county of which the assignee is a resident, even tho said county is not the county of which the original beneficiary is a resident.

Welch v Taylor, 218-209; 254 NW 299

Enjoining action in foreign state. A defendant who is a resident of this state may, even after he has filed formal answer, enjoin a plaintiff who is a resident of this state from maintaining in a foreign state an action on a contract arising in this state, when said action is sought to be maintained for the purpose of vexatiously harassing the defendant and subjecting him to unnecessary costs, part of which are untaxable as costs.

Bankers Life v Loring, 217-534; 250 NW 8

Right to interpleader. The pre-code, equitable action of "Interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution against him of separate actions on the policy by said warring parties.

Equitable v Johnston, 222-687; 269 NW 767; 108 ALR 257

Delivery date—evidence. In an action to recover on a life policy of a daughter, an exhibit showing that a son's policy was delivered on September 14 was admissible to contradict testimony of father and mother that the daughter's policy was delivered August 23, and that son's policy was delivered previously.

Luce v Ins. Co., 227-532; 288 NW 681

Delivery date of policy — other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Unlicensed agent—noneffect on insurer—statements regarding effective date of policy. Where an accident policy is to become effective at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured, while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22, while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statement to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Application attached to policy—illegibly reduced photo copy—not "true copy". In action on life policies, where defense was based on false representations in application for policy, and it is shown original application is plainly printed in legible letters of fair size, while copy furnished and attached to policy is so reduced in size and so dim or blurred that it can only be read by persons with normal vision by use of a strong magnifying glass,

XII ACTIONS ON POLICIES—continued

the statute requiring "true copy" of application to be attached to policy is not complied with, and the submission of question to the jury as to legibility under an instruction that a true copy must be readable was not erroneous.

New York Ins. v Miller, 73 F 2d, 350

Directed verdict for insurer. In an action on a fraternal life insurance policy, when evidence did not show complete payment of premiums, and there was no waiver of terms of the policy providing for lapse for nonpayment of premiums, nor reinstatement after lapse of the policy, a motion for a directed verdict for the insurer should have been sustained.

Craddock v Fidelity Life, 226-744; 285 NW 169

Suicide—directed verdict. An insurer is not entitled to a directed verdict on its defensive plea of suicide unless the facts and circumstances preclude every reasonable hypothesis except that of suicide. Evidence held insufficient to overcome presumption of nonsuicide.

Wilkinson v Life Assn., 203-960; 211 NW 238

Fraud and false warranty—evidence—insufficiency to generate jury question. An insurer who, in an action on a policy of insurance, presents the intermingled defense of fraud and false warranty has the burden to establish such defense. Evidence reviewed, and held to present no jury question on such issue.

Post v Grand Lodge, 211-786; 232 NW 140

Fraud in securing release—burden of proof. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Future payments—total disability. In action on life insurance policy for total disability payments, where supreme court ordered insurance company in prior case decided in 1931 to pay annual benefits up to that time, the decision of the trial court in a subsequent action on the same policy ordering payments up to 1937 and thereafter, was erroneous as to that part requiring future payments, particularly since opinion in first appeal is binding not only under the doctrine of stare decisis, but also under the rule of res adjudicata, when the first opinion held that "continuance of such disability must be established by later proofs".

Kurth v Ins. Co., 227-242; 288 NW 90

Liability of insurer—total and permanent disability. A policy which provides for compensation, only in the event of total and permanent disability, necessarily excludes compensation for a disability which is total for the time being but not permanent.

Petersen v Ins. Co., 217-1122; 253 NW 63

Negligence—evidence—sufficiency. Evidence reviewed in an action for damages consequent on the alleged negligence of an insurer in passing on, prior to the death of the applicant, an application for industrial insurance, and held quite insufficient to establish such negligence.

Winn v Ins. Co., 216-1249; 250 NW 459

Negligence in passing on application. In an action for damages consequent on the alleged negligence of an insurer in passing on an application for insurance, the plaintiff must fail, irrespective of his evidence of negligence, unless he establishes, to the extent of furnishing a measure for his damages, the substance of the contract which he was prevented from entering into.

Winn v Ins. Co., 216-1249; 250 NW 459

Proof of loss—contract limitation—validity. An agreement in a policy of insurance against total and permanent disability, specifically providing that all claim shall be forfeited if proof of such disability is not furnished the insurer "within 90 days after the happening of the total and permanent disability," is valid and enforceable, such time limit being more favorable to the insured than the statutory limit.

Fairgrave v Life Assn., 211-329; 233 NW 714

Proof of loss—extent and sufficiency under "permanent disability" clause. A policy of insurance which, inter alia, provides for indemnity "if the insured shall furnish satisfactory proof that he has been wholly disabled * * * for a period of not less than 60 days, and that such disability is presumably permanent, and that he will be wholly and continuously prevented thereby from pursuing any gainful occupation" does not require the proofs for initial indemnity to show that the disability is and will remain absolutely permanent and continuous.

Kurth v Ins. Co., 211-736; 234 NW 201

Risks and causes of loss—violation of law. Proof that an insured, at the time of his death, was riding in a railroad freight car reveals no violation of a statute against "climbing upon or holding to" a moving railroad freight car.

Ragan v Ins. Co., 209-1075; 229 NW 702

Time of lapse—construction—reformation.
Wall v Ins. Co., 228- ; 289 NW 901

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

CHAPTER 402

FRATERNAL BENEFICIARY SOCIETIES, ORDERS, OR ASSOCIATIONS

Atty. Gen. Opinion. See '34 AG Op 146

GENERAL PROVISIONS

8777 Definition.

"Homestead" as lodge — Brotherhood of American Yeomen. Where the Brotherhood of American Yeomen used the word "homestead" to denote a local lodge, had no capital stock, no dividends from earnings, and established a home for orphans of members, held to be a fraternal beneficiary association.

Yeomen Ins. v Murphy, 223-1315; 275 NW 127

Violations of statutory requirements—noneffect on organizational character—premium tax. A fraternal beneficiary association organized under this chapter "not for profit" is not subject to a tax on gross premiums under §7025, C., '35, even tho such association does accumulate a surplus and a profit. Violations of this chapter by any such association are punishable as provided but such offenses do not change its organizational character.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

Gross premium tax inapplicable. Fraternal benefit societies doing business in this state including one organized under foreign nation are not subject to gross premium tax levied on foreign insurance companies, in view of executive and departmental construction of taxing statute and acquiesced in by legislature.

State v Ind. Foresters, 226-1339; 286 NW 425

Certificates—not taxable after reorganization. A fraternal beneficiary association may reorganize into an old line company, but the amounts the new organization collects under the original certificates, which it has assumed, are not taxable under the gross premium tax provision of §7025, C., '35.

Yeomen Ins. v Murphy, 223-1315; 275 NW 127

Manager's promise—association not bound. A personal promise by the district manager of a fraternal benefit association that he would take care of premiums on the life policy of a member of the society was not binding on the association and did not excuse the failure of the insured to pay such premiums.

Craddock v Life Assn., 226-744; 285 NW 169

Automatic suspension of members. A provision in a policy of fraternal insurance that the insured member "shall stand suspended" in case he, in effect, violates a specified policy agreement, is self-executing. Such violation automatically works a suspension of membership without further action on the part of the association.

Smith v Bagmen Fund, 222-958; 270 NW 13

Nonpayment of premiums—automatic suspension. When fraternal beneficiary association bylaws, which were part of a policy of insurance, provide that on failure to pay monthly premiums the policy shall "be and stand suspended" without notice or action by the association, the failure to pay premiums works an automatic suspension of the policy.

Craddock v Life Assn., 226-744; 285 NW 169

Violation of membership agreement. No recovery can be had on the life policy of a benefit association when the insured has violated his agreement in his application for the policy and in the policy itself to continuously maintain his membership in a named other association.

Smith v Bagmen Fund, 222-958; 270 NW 13

Suspension from membership—validity. The members of a fraternal insurance association are bound by the method provided in the articles of incorporation and bylaws for the suspension of the membership of the members. Record reviewed and held to show a proper suspension for nonpayment of dues.

Smith v Bagmen Fund, 222-958; 270 NW 13

Lapse of policy waived by accepting premiums. Provisions of a policy and the bylaws of a fraternal insurance association that the policy shall lapse if premiums are not paid on time, are for the benefit of the association and may be waived by the acceptance of further premiums after the insured has defaulted in his payments.

Craddock v Life Assn., 226-744; 285 NW 169

Forfeiture—nonwaiver by accepting premiums. A fraternal insurance association by accepting premiums due on a forfeited policy does not waive its right to plead the forfeiture when, at the time of accepting said premiums, it had no knowledge of said acts of forfeiture.

Smith v Bagmen Fund, 222-958; 270 NW 13

Lapsed policy—reinstatement—pleading and proof. When a fraternal life insurance policy had lapsed for nonpayment of premiums and there was no waiver of the lapse by the company, there could be no recovery on the policy without both pleading and proving that it had been reinstated.

Craddock v Life Assn., 226-744; 285 NW 169

Mistake in date of lapse. When the terms of a fraternal life insurance policy provided for ipso facto suspension of the policy for failure to pay dues timely, a mistake of one or two months by the association in naming the date when lapse occurred because of nonpayment, did not waive the provisions and estop the insurer from asserting the lapse.

Craddock v Life Assn., 226-744; 285 NW 169

Actions on policies—shifting defense not permitted. An insurance company which asserts a specific defense which it has to a claim on a policy, and has knowledge of another defense, will not be permitted thereafter to shift its ground and assert the other defense after expense of suit has been incurred.

Craddock v Life Assn., 226-744; 285 NW 169

Action on life policy—directed verdict for insurer. In an action on a fraternal life insurance policy when evidence did not show complete payment of premiums and there was no waiver of terms of the policy providing for lapse for nonpayment of premiums, nor reinstatement after lapse of the policy, a motion for a directed verdict for the insurer should have been sustained.

Craddock v Life Assn., 226-744; 285 NW 169

Limitation of action. Section 8774, C., '24, which nullifies the provisions of a policy or contract of insurance insofar as it limits the time to less than one year in which notice or proofs of death or the occurrence of other contingency may be given, is not applicable to a certificate of insurance issued by a fraternal beneficiary association under this section.

Peters v Order, 203-428; 212 NW 576

Right to proceeds—change of beneficiary. The original beneficiary, interpleaded in an action on a fraternal insurance policy, acquires no vested interest in benefit as against the subsequent beneficiary designated as such in accordance with bylaws of insurer and statute of this state, notwithstanding insured member's agreement with such original beneficiary that she should remain beneficiary.

Kohler v Kohler, 104 F 2d, 38

8778 Death, sick, and disability benefits.

Insurance premiums accepted by lodge. When a grand lodge accepted insurance premiums from a member, leading him to believe that he would receive death benefits, the grand lodge was estopped to deny the effects of its acts.

Phillips v Brotherhood Ry. Clerks, 226-864; 285 NW 159

Secretary of local lodge as agent of grand lodge in collecting premiums. A secretary of a local lodge who accepted insurance premiums from a lodge member who was ill during a time when dues were suspended because of the illness, and forwarded the full amount of dues and premium to the grand lodge without informing it of the illness, acted as agent of the grand lodge, charging it with accceptance of the premiums, with knowledge of the illness, and with knowledge that the member had not applied for membership in the lodge's "death benefit department".

Phillips v Brotherhood Ry. Clerks, 226-864; 285 NW 159

Nonextension of term. A certificate or policy of insurance in a fraternal association, providing for benefits in case death occurs prior to the insured's attaining the age of sixty years, cannot be deemed extended beyond the contracted termination date, because of the fact that the association had received a premium for the full year during which the insured attained the age of sixty years, it appearing that the excess part of said premium had been duly tendered back.

Pierce v Life Assn., 223-211; 272 NW 543

Limited term insurance—burden of proof. In an action on a fraternal, beneficiary certificate which promises benefits in case of death, "provided death occurs prior to the member attaining the age of sixty years", plaintiff must plead and prove, as a condition precedent to any recovery, that the insured had not attained the age of sixty years at the time of death.

Pierce v Life Assn., 223-211; 272 NW 543

Policy limitation on actions not condition precedent. An insurance certificate issued by a mutual benefit society, containing a statement, that any action thereon shall be barred

unless commenced within 6 months from final rejection of the claim by the highest tribunal of the brotherhood, is purely a clause of limitation and not a condition precedent to commencing action.

Duncan v Brotherhood, 225-539; 281 NW 121

Mutual benefit—"applicant" in constitution not equivalent to "beneficiary". In a fraternal insurance association's constitution, incorporated by reference in its beneficiary certificate, the word "applicant", when used in a paragraph limiting such applicant's right to sue after disapproval of a claim without first exhausting his remedy of appeal to the highest tribunal of the brotherhood, construed as not equivalent to the word "beneficiary".

Duncan v Brotherhood, 225-539; 281 NW 121

Actions on policies—failure of lodge member to apply for death benefits as defense. In an action to collect death benefits, a lodge which maintained a death benefit department into which lodge members were admitted on written application, but collected insurance premiums as well as dues from all members whether or not they had made such application, was entitled to use the defense of failure to apply for membership in the department in the absence of avoidance of the defense by the plaintiff.

Phillips v Brotherhood Ry. Clerks, 226-864; 285 NW 159

8780 Sick and funeral benefits only.

Atty. Gen. Opinion. See '34 AG Op 205

8781 Certificates permitted.

Additional annotations. See under §8688

Presumption attending possession of policy. Possession by an insured, at the time of his death, of a policy of life or accident insurance creates a presumption, born of necessity and based on the experience of mankind, that the policy was delivered to the insured as an effective instrument; and this presumption prevails until the court can say, as a matter of law, that the presumption has been conclusively negatived by other evidence.

Beggs v Ins. Co., 219-24; 257 NW 445; 95 ALR 863

Dues—payment to authorized agent. The requirement of a certificate of insurance, that premium dues shall be paid to a named officer of the local camp, is not a limitation on the insured's right to pay to some other officer who has been authorized by the association to receive such dues.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Dues—application of payments—right of debtor to control. An insured in paying his premium dues to an officer authorized to receive them may direct that the money be applied on said dues, and arbitrarily enforce such direction.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Premiums on life policy—nonpayment—automatic suspension. When fraternal beneficiary association bylaws, which were part of a policy of insurance, provide that on failure to pay monthly premiums the policy shall "be and stand suspended" without notice or action by the association, the failure to pay premiums works an automatic suspension of the policy.

Craddock v Life Assn., 226-744; 285 NW 169

Lapse of policy waived by accepting premiums. Provisions of a policy and the bylaws of a fraternal insurance association that the policy shall lapse if premiums are not paid on time, are for the benefit of the association and may be waived by the acceptance of further premiums after the insured has defaulted in his payments.

Craddock v Life Assn., 226-744; 285 NW 169

Mistake in stating date of lapse—no estoppel. When the terms of a fraternal life insurance policy provided for ipso facto suspension of the policy for failure to pay dues timely, a mistake of one or two months by the association in naming the date when lapse occurred because of nonpayment, did not waive the provisions and estop the insurer from asserting the lapse.

Craddock v Life Assn., 226-744; 285 NW 169

"Legal reserve" not available to carry certificate after failure to pay assessments. The statutory "legal reserve" on a fraternal beneficiary certificate of insurance is not available for carrying the certificate past forfeiture consequent on the nonpayment of assessment and dues.

Plumley v Ins. Co., 210-1104; 229 NW 727

Mutual benefit—"applicant" in constitution not equivalent to "beneficiary". In a fraternal insurance association's constitution, incorporated by reference in its beneficiary certificate, the word "applicant", when used in a paragraph limiting such applicant's right to sue after disapproval of a claim without first exhausting his remedy of appeal to the highest tribunal of the brotherhood, construed as not equivalent to the word "beneficiary".

Duncan v Brotherhood, 225-539; 281 NW 121

Evidentiary effect of disappearance—validity. An agreement in a mutual benefit insurance certificate to the effect that the unexplained disappearance or long continued absence of the insured from his family or place of residence, shall not be regarded as evidence of the death of the insured, or of any right to recover under the certificate, until after the expiration of the life expectancy of the in-

sured, is reasonable, valid, and binding on the beneficiary.

Lunt v Grand Lodge, 209-1138; 229 NW 323

Findings of fraud—conclusiveness. Supported findings by the court of material facts, in a law action submitted to the court under a waiver of jury, are as conclusive as like findings by the jury. So held as to findings relative to fraud and misrepresentation in obtaining a policy of life insurance.

Bukowski v Security Assn., 221-416; 265 NW 132

8782 Benefits.

Exercise of option—effect. Where the insured in a fraternal beneficiary policy of insurance is limited to the exercise of one of several options, and elects to take the option known as "loan value", and thereafter is automatically suspended because of the nonpayment of assessment and dues, the beneficiary may not claim that the policy was kept in force under another option which the insured might have elected to take.

Plumley v Ins. Co., 210-1104; 229 NW 727

8784 Assessments.

Additional annotations. See under §8693

Prompt payment of dues—waiver. The contract right of an insurer to demand prompt payment of dues and to avail himself of an automatic suspension of the insured in case such payment is not made, is waived by habitually accepting such dues after the insured has become delinquent in making payment.

Clark v Council, 200-699; 205 NW 355

Nonpayment—automatic suspension. When fraternal beneficiary association bylaws, which were part of a policy of insurance, provide that on failure to pay monthly premiums the policy shall "be and stand suspended" without notice or action by the association, the failure to pay premiums works an automatic suspension of the policy.

Craddock v Life Assn., 226-744; 285 NW 169

Nonpayment — automatic forfeiture — nonavoidance. A policy or certificate holder in a fraternal insurance society who, at different times, and in violation of his contract of insurance, has escaped an automatic forfeiture of his policy by having his policy dues or assessments paid and accepted after they were wholly delinquent, must comply with a due and timely notice from the society that said practice will no longer be tolerated and that said dues and assessments must be paid strictly within the time provided by the policy contract.

If he does not so comply, and dies while in arrears, his beneficiary will not be permitted to avoid the automatic forfeiture of the policy by a then tender of the dues.

Wry v Modern Woodmen, 222-1179; 271 NW 300

Acceptance of premiums—waiver of insurance application. A lodge which collected insurance premiums from all members but required a written application for admission into its death benefit department waived the requirement for such application by repeated acceptance of monthly premiums from a member.

Phillips v Brotherhood Ry. Clerks, 226-864; 285 NW 159

Payment in disregard of contract—waiver. A provision in the constitution and bylaws of an insurer to the effect that the failure of the insured, for three months, to pay the required monthly dues shall, without notice, automatically terminate his membership and deprive him of all benefits must be deemed to have been waived in favor of an insured who, for many years and up to the time of his death, fully paid his dues, but not in accordance with said constitutional requirement,—the insurer necessarily having knowledge of said method of payment, and having accepted and retained said payments without objection.

Sawyer v Iowa Conference, 220-806; 263 NW 236

Lapse of policy waived by accepting premiums. Provisions of a policy and the bylaws of a fraternal insurance association that the policy shall lapse if premiums are not paid on time, are for the benefit of the association and may be waived by the acceptance of further premiums after the insured has defaulted in his payments.

Craddock v Life Assn., 226-744; 285 NW 169

Mistake in date of lapse—no estoppel. When the terms of a fraternal life insurance policy provided for ipso facto suspension of the policy for failure to pay dues timely, a mistake of one or two months by the association in naming the date when lapse occurred because of nonpayment, did not waive the provisions and estop the insurer from asserting the lapse.

Craddock v Life Assn., 226-744; 285 NW 169

Unpaid dividends and advance interest on loan not available to avoid forfeiture. Unpaid dividends on a fraternal certificate of insurance, and interest paid in advance on a loan on the certificate are not available to carry the certificate past a forfeiture consequent on the nonpayment of assessments.

Plumley v Ins. Co., 210-1104; 229 NW 727

"Arrearages" not available to carry certificate after failure to pay assessments. Arrearages in assessments paid by a suspended insured in a fraternal certificate of insurance in order to effect a reinstatement, even tho such assessments covered a period when the certificate was wholly suspended, are not available for carrying the certificate past a subsequent forfeiture consequent on the nonpayment of assessments.

Plumley v Ins. Co., 210-1104; 229 NW 727

Ineffective payment of assessment. The payment of an assessment on a fraternal certificate of insurance does not avoid a forfeiture of the certificate when the assessment was paid on an application for reinstatement which was not granted, the insured then being on her death bed, and the bylaws providing there could be no reinstatement unless the insured was in good health.

Plumley v Ins. Co., 210-1104; 229 NW 727

Reinstatement of member on payment of arrearages. A fraternal beneficiary insurance association may validly provide, by bylaw, that the reinstatement of a suspended member shall be conditioned upon payment of all arrearages in assessments and dues, even tho such assessments and dues cover a period when the certificate was wholly suspended.

Plumley v Ins. Co., 210-1104; 229 NW 727

8789.2 Beneficiaries—vested interest.

Right to change. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Changing beneficiary—complying with certificate—necessity. A change of beneficiary on a fraternal benefit society certificate, executed by insured on the day of her death, delivered to an attorney and kept until the next day, then delivered to the company's agent and forwarded to the company, not being in compliance with the certificate requirement, was ineffective.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary where policy silent. Where a benefit certificate is silent as to the manner of change, such change of beneficiary may be effected in any manner clearly indicating insured's intention.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary — mere "clear intention" ineffectual. Insured's actions merely indicating a "clear intention to change the beneficiary" are not sufficient. Required acts to effect a change are neither directory nor ministerial but essential, subject only to equitable exceptions.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary—effect of death. Death vests interests in insurance, and the method provided in a benefit certificate to change a beneficiary during lifetime of insured is exclusive, except (1) where the company has waived strict compliance and issued a new certificate, (2) where it is beyond the power of insured to comply literally, equity will consider the change made, and (3) where insured has performed all necessary prerequisites, but dies before a new certificate is actually issued. Held in instant case beneficiary change not accomplished.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Change of beneficiaries by will. A policy method of changing beneficiaries under life insurance policies is admittedly exclusive; but a testamentary bequest of the proceeds of such policies, payable to the estate of the insured or to his executors or administrators, does not constitute a "change of beneficiaries", but constitutes a disposal of that much of the estate left by the insured.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Assignment as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Ineligible beneficiary—contract provision—effect. The rule of law that when the insured in a policy of life insurance makes a series of changes of beneficiary, and the last beneficiary is legally ineligible, the next preceding, designated, eligible beneficiary is entitled to the proceeds of the policy, does not apply when the policy, by bylaw or otherwise, distinctly provides who, in such circumstances, shall be entitled to the proceeds.

Farrens v Benefit Dept., 213-608; 239 NW 544

Mutual benefit—"applicant" in constitution not equivalent to "beneficiary". In a fraternal insurance association's constitution, incorporated by reference in its beneficiary certificate, the word "applicant", when used in a para-

graph limiting such applicant's right to sue after disapproval of a claim without first exhausting his remedy of appeal to the highest tribunal of the brotherhood, construed as not equivalent to the word "beneficiary".

Duncan v Brotherhood, 225-539; 281 NW 121

Conclusiveness — insurance rights — beneficiaries not parties. A decree establishing rights to insurance does not adjudicate rights of a beneficiary not a party to the action.

Jacobs v Ins. Co., 223-1157; 274 NW 879

8792 Change in beneficiary notwithstanding contract.

Beneficiary — right to change. A contract between the insured and one of two beneficiaries in a fraternal policy of life insurance to the effect that said contracting beneficiary will pay the future accruing assessments, and that in consideration of such payments the insured will not make any change in said beneficiary, does not deprive the insured of his statutory right subsequently to change his beneficiary and exclude the contracting beneficiary from all benefit under the policy, even tho the excluded beneficiary has, for many years, paid the said assessments.

Sovereign Camp v Russell, 214-39; 241 NW 395

Change in beneficiary—justifiable and unjustifiable payment. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Agreement not to change—effect. The original beneficiary, interpleaded in an action on a fraternal insurance policy, acquires no vested interest in benefit as against the subsequent beneficiary designated as such in accordance with bylaws of insurer and statute of this state, notwithstanding insured member's agreement with such original beneficiary that she should remain beneficiary.

Kohler v Kohler, 104 F 2d, 38

Beneficiary with vested interest — change nonallowable. The named beneficiary in a policy of life insurance acquires a vested interest in the proceeds of said policy when said beneficiary is so named in consideration of an agreement on the part of said beneficiary, (1) to furnish life-support to her parents (which she thereafter performed), and (2) to act as trustee for the protection of an acknowledged interest of said parents in said proceeds; and said vested interest must prevail over the subsequently acquired interest of another person, especially when such latter interest is based on a past consideration and evidenced by no change in the policy, but by simply a manual delivery thereof.

Aetna Ins. v Morlan, 221-110; 264 NW 58

8793 Duty to attach copy of application.

Similar provisions. See under §§8772, 8974

Applicability. The duty of an insurer to attach to a beneficiary certificate a copy of the insured's application, or lose the right to plead fraudulent representations in the certificate or application, applies to a policy issued by a foreign beneficiary association, as well as to a domestic association.

Baldwin v Tribe, 203-198; 212 NW 562

Presumption. It will be presumed that a copy of the application for insurance was attached to the policy or certificate, in the absence of evidence to the contrary.

Foley v Brotherhood, 203-39; 210 NW 585

8794 Failure to attach.

Similar provisions. See under §§8773, 8975, Vol I

Failure to attach—effect. An insurer who fails to attach to a beneficiary certificate of insurance a copy of the insured's application may not prove fraudulent representations in the application or certificate as a basis for the cancellation of the certificate.

Baldwin v Tribe, 203-198; 212 NW 562

Failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

Misrepresentation—when unallowable as a defense. False and fraudulent representations on the part of an insured, in his original application for a policy of insurance, are not available as a defense to an action on the policy, when the policy provides that it is incontestable except as provided in named paragraphs which, on examination, reveal no grounds of contest whatever, but only matters of which the insurer could avail himself in the enforcement of the contract.

Wilson v Ins. Co., 220-321; 262 NW 525

Settlement—impeachment. A plaintiff who attacks a compromise settlement of the amount due under a policy of insurance on the ground that it was fraud induced has the burden to show that the representations inducing the settlement were knowingly false, and that he innocently relied thereon.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

8795 Where suable.

Contract remedies for collection—failure to comply with—fatal effect. The beneficiary (and his assignor), in a certificate of insurance of a mutual benefit association, is bound by the bylaws which provide that no resort shall be had to the courts to enforce payment of said certificate until said beneficiary has first exhausted the contract remedies provided by the bylaws for the allowance and payment of said claim.

Ater v Mutual Dept., 222-1390; 271 NW 517

8796 Exemption of proceeds.

Exemption of proceeds of other insurance. See under §§8776, 11919

Discussion. See 21 ILR 153—Property purchased with proceeds

Applicability to nonresidents. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

Computation of amount of exemption. Where a widow as beneficiary in life insurance policies on her husband received some $11,200 and disposed of some $7,300 before any proceedings were commenced to subject said fund in excess of the $5,000 statutory exemption to the payment of a debt of the widow antedating the death of the husband, the said statutory exemption of $5,000 must be computed on the basis of the unexpended fund. In other words, her exemption cannot be deemed to be embraced within the $7,300 expenditure.

Booth v Propp, 214-208; 242 NW 60; 81 ALR 919

Funeral expenses nonallowable against insurance proceeds. Claims for funeral expenses consequent on the burial of the intestate deceased are not allowable against funds in the hands of the administrator when said funds constitute the proceeds of insurance on the life of deceased, the latter being survived by a minor son.

In re Galloway, 222-159; 269 NW 7

Proceeds payable to estate—trusteed for beneficiaries. Where a testator willed to his second wife, all of his property requiring legal transmission but made no mention of his life insurance, payable to his second wife if she survived him, otherwise to his estate; and, when testator's second wife predeceased him, then upon his death, his surviving children, being a daughter by his first marriage and a son by his second marriage, became entitled under the statute, to the proceeds of the insurance, and such proceeds passed into the hands of his personal representative or estate, only as a trust fund, to be distributed equally to such daughter and son.

In re Clemens, 226-31; 282 NW 730

8801 Commissioner as process agent.

Relevant annotations. See under §§8766, 8767

8808 Permit—fees.

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

8812 Employment of agents.

Manager's promise to take care of premiums—association not bound. A personal promise by the district manager of a fraternal benefit association that he would take care of premiums on the life policy of a member of the society was not binding on the association and did not excuse the failure of the insured to pay such premiums.

Craddock v Life Assn., 226-744; 285 NW 169

8816 Delinquency reported — injunction.

Violations of statutory requirements—effect. A fraternal beneficiary association organized under chapter 402, C., '35, "not for profit" is not subject to a tax on gross premiums under §7025, C., '35, even tho such association does accumulate a surplus and a profit. Violations of chapter 402 by any such association are punishable as provided but such offenses do not change its organizational character.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

RATES

8823 Mortuary assessment rates.

Discussion. See 15 ILR 76—Admissibility of tables

Evidence—tables of life expectancy. The introduction of tables of life expectancy is not a condition precedent to the recovery of damages for future pain.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Evidence—life tables. Life tables are not conclusive on the subject of life expectancy

and instructions should carefully elucidate such fact.

Droullard v Rudolph, 207-367; 223 NW 100
Bauer v Reavell, 219-1212; 260 NW 39

Mortality tables. Instructions held not subject to the vice of treating mortality tables as conclusive on the jury.

Rulison v X-ray Corp., 207-895; 223 NW 745

INVESTMENTS

8826 Real estate for home office.

Atty. Gen. Opinion. See '25-26 AG Op 137

8828 Conveyance to commissioner—valuation.

Atty. Gen. Opinion. See '25-26 AG Op 137

8829 Schedule of investments.

Atty. Gen. Opinions. See '30 AG Op 264; '32 AG Op 280

Exemptions—"accumulations and funds" of beneficiary association. The statutory exemption from taxation of the "accumulations and funds" of a fraternal beneficiary association does not embrace an exemption from taxation of lands acquired by such association through a mortgage foreclosure deed, even tho loan in question was made from the "funds" of the association.

Grand Lodge v Madigan, 207-24; 222 NW 545

Conspiracy—evidence—sufficiency. Evidence held to sustain a conviction for conspiracy to defraud a fraternal beneficiary society by making fraudulent loans of its funds.

State v Blackledge, 216-199; 243 NW 534

Conspiracy — evidence — nature and sufficiency. Conspiracy may be established by circumstantial evidence only. Evidence held sufficient to support a verdict of guilt of conspiracy to defraud a fraternal beneficiary society of its funds.

State v Lowenberg, 216-222; 243 NW 538

BENEFITS ON LIVES OF CHILDREN

8845 No vested interest in new certificate.

Additional annotations. See under §§8789.2, 8792

Right to change beneficiary. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Assignment of policy as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

REORGANIZATION

8869 Authorization.

Atty. Gen. Opinion. See '32 AG Op 79

8880 Conditions precedent.

Atty. Gen. Opinion. See '32 AG Op 79

8881 Effect of reorganization—officers.

Certificates—not taxable after reorganization. A fraternal beneficiary association may reorganize into an old line company, but the amounts the new organization collects under the original certificates, which it has assumed, are not taxable under the gross premium tax provision of §7025, C., '35.

Yeomen Ins. v Murphy, 223-1315; 275 NW 127

EXAMINATION AND RECEIVERSHIP

8888 Revocation or suspension of authority—action by attorney general.

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

CHAPTER 404

INSURANCE OTHER THAN LIFE

Atty. Gen. Opinions. See '32 AG Op 86, 220, 285; '36 AG Op 115

8896 Incorporation.

Policyholder as creditor. The policyholders of an insurance company organized on the stock plan are "creditors" of the corporation from the date of their policies, within the meaning of the legal principle that an unlawful dissipation of the funds of the corporation is constructively fraudulent as to existing creditors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

8907 Membership in mutuals.

Atty. Gen. Opinions. See '32 AG Op 42; '36 AG Op 115

8909 Maximum premium.

Contract basis for recovery. In an action by an insurer to recover of the insured premiums under a policy indemnifying the insured against injury to his workmen, there is a total failure of proof when the premium is, by contract, computable at a certain rate on the amount paid by the insured to his workmen in a limited and specified class of work, and the insurer wholly fails to present any evidence as to the amount so paid.

Globe Ind. Co. v Anderson-Deering Co., 200-1035; 205 NW 845

Action to recover—proof of condition precedent. In an action by an insurer to recover premiums due on an insurance rider which by its terms is valid only "when signed by an authorized representative", a failure of proof results from the failure of the insurer to prove that the rider was signed as required.

Globe Ind. Co. v Anderson-Deering Co., 200-1035; 205 NW 845

8915 Existing companies.

Refusal to approve articles. Certiorari may be the proper remedy to review the action of the commissioner of insurance and attorney general (§8688, C., '35) in refusing to approve amended articles of incorporation of an assessment association.

National Assn. v Murphy, 222-98; 269 NW 15

8918 Directors.

Dissipation of assets—liability. The act of the directors of a financially embarrassed corporation in selling their individually owned corporate shares of stock to a third party, and in receiving pay therefor out of the partly frozen bank deposits of the corporation, under an understanding that said third party would replace said dissipated deposits with securities of equal value, is per se fraudulent, and necessarily violative of the law-imposed trust relationship of the directors to existing and future contemplated corporate creditors; and this is true irrespective of the plea that the directors in good faith believed that said third party would carry out the said understanding. It follows that the receiver of the corporation may repudiate such transaction and recover the dissipated assets from the directors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

8927 Investments.

Atty. Gen. Opinions. See '34 AG Op 645; AG Op Feb. 28, '39

8937 Reserve fund required.

Unearned premiums—trust fund—construction. A trust fund "for the protection of policyholders" is for the protection of the claims of policyholders for unearned premiums under their policies, equally with the claims of policyholders for loss under their policies.

State v Cas. Co., 206-988; 221 NW 585

Unearned premiums—unallowable theory of damages. A policyholder's claim, under the express terms of his policy, for unearned premiums consequent on the legal termination of his policy may not be deemed damages for breach of the contract.

State v Cas. Co., 206-988; 221 NW 585

Nonexistent reserve to pay—effect. The statutory requirement that an insurance company shall, before declaring a dividend, set aside a specified reserve for the purpose of paying unearned premiums, is no impediment to a stockholder enforcing his claim for unearned premiums against a special trust fund created, inter alia, for the payment of such claims against a company which never had occasion to set aside such reserve because it had never made a dollar of profit.

State v Cas. Co., 206-988; 221 NW 585

8940 Kinds of insurance.

ANALYSIS

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Accident and health policies, proof of loss. See under §8775
Accidental death. See under Ch 401, Note 1 (X)
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Inurement of legal liability policies. See under §9024.1
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Reinsurance. See under §9115

I CONTRACT OF INSURANCE AND POLICY GENERALLY

Assessment accident insurance—rules of life insurance inapplicable. The statute defining assessment plan of life insurance does not require that the rules applicable to life insurance shall be applicable to accident insurance.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Voluntary insertion of nonrequired agreement. The fact that one class of insurance companies is required, by statute, to insert in its policies a provision that an injured third party shall have a right of action against the insurer, does not prevent other insurance companies from inserting such provision in their policies even tho they are not required so to do, and when the provision is so inserted the company is bound thereby.

Venz v Ins. Assn., 217-662; 251 NW 27

Delivery—presumption attending possession. Possession by an insured, at the time of his death, of a policy of life or accident insurance creates a presumption, born of necessity and based on the experience of mankind, that the policy was delivered to the insured as an effective instrument; and this presumption prevails until the court can say, as a matter of law, that the presumption has been conclusively negatived by other evidence.

Beggs v Ins. Co., 219-24; 257 NW 445; 95 ALR 863

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

Acceptance of policy—acts constituting. A provision in a delivered policy of insurance giving the insured a named time in which to accept and retain the policy, or to reject and return it, is for the sole benefit of the insured; and when the insured not only retains the policy after the lapse of said time, but forwards his check for the premium (which the insurer retains), the said act of the insured in so retaining the policy and the act of the insurer in retaining the check render the policy effective from the date thereof.

Schmith v Cas. Co., 216-936; 247 NW 655

Implied authority of agent. An insurance company which, in the issuance of policies against loss by hail, customarily dates said policies from the date of the insured's written application therefor, and not from the date of the acceptance by the company of such applications, must, notwithstanding provisions in said applications to the contrary, be deemed to have impliedly authorized its soliciting agents, on taking such applications, to validly enter into oral, preliminary contracts of insurance covering the period from the date of said applications to the date of their acceptance or rejection.

Boever v Ins. Co., 221-566; 266 NW 276

Agent's cancellation of policy—nonconsenting insured unaffected. Under an agreed statement of facts tried to the court, an insured, by transferring his insurance from one company to another at the former's request, cannot, as a matter of law, be said to have mutually consented that his first insurance be canceled before he received his insurance from the second company, when there is evidence he contemplated continued protection, altho the agent for both companies notified the first to cancel as of a certain date, which was before the second policy was issued and before a loss occurred.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Accident insurance—estoppel by conclusiveness of physician's certificate—nonapplicability. The statute which provides for the conclusiveness of a physician's certificate of health or declaring an applicant a fit subject for life insurance after medical examination, and thereafter estops an insurance company from setting up as a defense to an action on policy, that insured was not in the condition of health required by policy, unless policy was procured by fraud, is not applicable to an accident insurance policy, since the characteristics of the risks are so different that it would not seem reasonable, nor would there be any necessity for any such rule in cases

where the provisions of the policy are solely as to injury by accident.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Construction—absence of ambiguity. When the terms employed in a policy of insurance are plain and unambiguous, there is no room for the application of the oft-quoted rule that the policy must be construed most strongly against the insurer.

Field v Sur. Co., 211-1239; 235 NW 571

Ambiguities construed against insurer. Ambiguous language employed in an insurance policy will generally be construed most strongly against the insurer.

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

Kantor v Ins. Co., 219-1005; 258 NW 759

Parker v Ins. Assn., 220-262; 260 NW 844

Iowa Bond. Co. v Cram, 209-424; 228 NW 24

Word applicable to either insurer or insured —not strictly construed. Word, e.g., "representative", in an insurance policy, not wholly for the insurer's benefit, should not be strictly construed against the insurer.

Eller v Guthrie, 226-467; 284 NW 412

"Total disability" clauses — liberal construction required. In policies of insurance against loss of time consequent on accidentally inflicted injuries, "total disability" clauses must be given a liberal construction in favor of the insured. So held where the policy required the injuries to be such as to "totally disable and prevent the insured from transacting any and every duty pertaining to any and every business and occupation". Evidence held to present jury question on the issue of the insured's total disablement.

Prusiner v Ins. Co., 221-572; 265 NW 919; 2 NCCA(NS) 87

"Burning or explosion of automobile". Insurance against injury "caused by the burning or explosion of an automobile" does not embrace injury caused by the inhalation of carbon monoxide gas thrown off by the ordinary explosion of motor vehicle fuel in the engine of the car.

Field v Sur. Co., 211-1239; 235 NW 571

Title insurance—refusal by insurer to defend—effect. An insurer who gives a bond to indemnify against loss consequent on defect of title (with certain exceptions), and agrees to defend actions which attack the title, and is given the opportunity to defend, and refuses to defend, on the mistaken ground that the defect alleged is not covered by the bond, thereby authorizes the insured to conduct the defense in good faith and to make any reasonable compromise of the action, with resultant liability on the part of the insurer for the damages suffered and for the value of the services rendered by insured's attorneys.

Jones v Sur. Co., 210-61; 230 NW 381

Title insurance—burden of proof. A title insurer has the burden to show that a defect of title is within the exceptions provided by the policy.

Jones v Sur. Co., 210-61; 230 NW 381

Exemption from liability—burden of proof. The insurer has the burden to establish a contract exception which exempts him from liability.

Lamar v Trav. Assn., 216-371; 249 NW 149; 92 ALR 159

II INSURABLE INTEREST

Discussion. See 8 ILB 181—Purchaser's insurable interest in stolen automobile; 12 ILR 235—Insurance of interests—conditional sales; 15 ILR 481—Interest in property of spouse

Naked titleholder. One who holds the legal title to land in trust for another, and who personally executes his note and secures it by mortgage on the land for the benefit of such other person, has an insurable interest in the buildings on the land.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Crop insurance—landlord's interest. A statement in an application for crop insurance to the effect that applicant has "full interest in the crop" when his only interest was in the cash rentals due him as a landlord, furnishes no basis for avoiding liability when both the insurer and its agent had full knowledge, from a prior application which was in their possession, that applicant's interest was that of landlord only.

Boever v Ins. Co., 221-566; 266 NW 276

Right to redeem from foreclosure. A mortgagor's insurable interest in the mortgaged property does not terminate until the period for redemption has expired.

Parker v Ins. Assn., 220-262; 260 NW 844

III PREMIUMS, DUES, AND ASSESSMENTS

Quarterly periods—nonretroactive premium. A policy of accident insurance which provides a scheme for quarterly periods of insurance and for quarterly payments of premiums in advance, but provides that the acceptance of a premium after it is due shall reinstate the policy only as to injuries received after such acceptance, does not cover an injury received after the beginning of a quarterly period and before payment of premium for that quarter is made.

Hiatt v Cas. Co., 208-974; 224 NW 53

IV ASSIGNMENT OF POLICY AND RIGHT TO PROCEEDS

Discussion. See 16 ILR 419—Proceeds payable to minor

Assignment after loss—effect. The assignment of a policy after loss, without the consent of the insurer, does not invalidate a policy under the usual policy provision prohibiting assignments.

Parker v Ins. Assn., 220-262; 260 NW 844

Right to proceeds—defaulting vendor (?) or nondefaulting purchaser (?). The vendor of real estate (and necessarily his assignee of the contract) has no basis for claiming the proceeds of a noncontested policy of fire insurance taken out on the property by the nondefaulting purchaser in his own name long after the vendor was in hopeless default under the contract of sale, even tho the said contract provided that the puchaser should take out insurance for the benefit of the vendor.

Reason: Neither the vendor nor his assignee can, under the circumstances, enforce the contract clause for insurance for their benefit.

Martinsen v Ins. Assn., 217-335; 251 NW 503

V NOTICE AND PROOFS OF LOSS

"Immediate" notice—jury question. Record reviewed and held to present a jury question on the issue whether a preliminary notice of death, to an insurer, was "immediate" within the meaning of the policy.

Nelson v Acc. Soc., 212-989; 237 NW 341

"As soon as practicable" construed. A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

Delay—effect. Even tho it be conceded that particular facts and circumstances may excuse delay on the part of an insured policyholder in making proofs of loss, yet such facts and circumstances cannot excuse the total failure to make any such proofs.

Woodard v Ins. Co., 201-378; 207 NW 351

Mental incapacity to furnish proofs—effect. A clear and unequivocal contract that an insured shall furnish due proofs of disability, as a condition precedent to the attaching of any liability on the part of the insurer, must be construed as assuming mental and physical capacity to furnish the proofs when due. It follows that the furnishing of such proofs will be excused if, when the disability occurs, and the policy is in force, the insured is insane, and, therefore, wholly unable to furnish said proofs.

McCoy v Ins. Co., 219-514; 258 NW 320

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be endorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e. g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Insufficient proof. The letter of an insured to an insurer may not be deemed to constitute proof of loss when there is no evidence that insured so intended the letter, and, on the contrary, inquired therein as to what proof he should make.

Woodard v Ins. Co., 201-378; 207 NW 351

Total and permanent disability—proofs. Preliminary proofs of total and permanent disability are sufficient when prepared and furnished by the insured on and in accordance with blank forms furnished by the insurer for such purpose.

Garden v Ins. Co., 218-1094; 254 NW 287

Waiver by denial of liability. An insurer who is furnished proofs showing death from disease, and later, and within the time for furnishing proofs, is furnished amended proofs showing death from accident, waives all further proofs by refusing to furnish blanks on which to make additional proof and by peremptorily denying all liability for death by accident.

Dawson v Life Co., 216-586; 247 NW 279

Denial of liability—waiver. An insurer who, upon the happening of a loss, promptly asserts that the policy has been cancelled long prior to the loss, thereby denies all liability, and waives proofs of loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Denial of liability—waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

Examination of premises after loss—effect. The act of the insurer in examining the insured premises after loss and thereupon denying all liability, constitutes a waiver of proofs of loss, even tho the insurer makes an offer of settlement.

Lee v Ins. Co., 214-932; 241 NW 403

Waiver of bylaw. Section 9045, C., '27, fixing the requirements of notice and proof of loss under mutual insurance policies, does not prevent the company from waiving in its bylaws such notice and proof except when it may see fit to demand them.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Insufficient waiver. The letter of an insured to an insurer, making inquiry as to what proof of loss he should make, and the letter of the insurer in reply, in which the insured is referred to the requirements of the policy, will not constitute a waiver of proof of loss, the insured not claiming that he was misled by the correspondence or that he in any manner changed his position by reason thereof.

Woodard v Ins. Co., 201-378; 207 NW 351

Waiver—pleading—sufficiency. Waiver of proofs of loss is sufficiently presented by pleading the facts constituting waiver, even tho the pleader does not allege the legal conclusion of waiver; and especially so when the pleadings are unquestioned in the trial court.

Lee v Ins. Co., 214-932; 241 NW 403

Waiver—sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

VI SURRENDER, RESCISSION AND REFORMATION OF POLICY

Inconsistent and repugnant provisions—construction against insurer. A provision in a health policy that sick benefits will be paid provided the sickness is contracted thirty days after the date of the policy, and a distinct and separate provision that said benefits will be paid for every sickness contracted subsequent to the issuance of the policy, are so inconsistent and repugnant that the court will reject the first provision and apply the latter.

Schmith v Cas. Co., 216-936; 247 NW 655

Nonpayment of premiums — "suspension" and "cancellation" of policy distinguished. Section 9054, C., '24, providing that a policy of insurance issued by an assessment insurance association may be canceled by the association on a five-day notice to the insured, has no application to a policy provision which suspends the membership of the policyholder and denies him right of recovery for loss while he is delinquent in the payment of assessments.

Early v Ins. Assn., 201-263; 207 NW 117

Knowledge of agent. The knowledge of a soliciting agent that the insured understood that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Indemnity converted into liability. A policy of insurance which is otherwise strictly a contract of indemnity against loss is converted into a contract of indemnity against liability by the insertion therein of a provision which, in effect, provides that the policy shall, under named conditions, inure to the benefit of an injured third party.

Venz v Ins. Assn., 217-662; 251 NW 27

VII RENEWAL, REVIVAL AND REINSTATEMENT

Accident insurance — quarterly periods — nonretroactive premium. A policy of accident insurance which provides a scheme for quarterly periods of insurance and for quarterly payments of premiums in advance, but provides that the acceptance of a premium after it is due shall reinstate the policy only as to injuries received after such acceptance, does not cover an injury received after the beginning of a quarterly period and before payment of premium for that quarter is made.

Hiatt v Cas. Co., 208-974; 224 NW 53

Suspension—unliquidated set-off in favor of insured—effect. Whether the existence of an unliquidated disputed right of set-off may be made use of by an insured to obviate the suspension of a policy of insurance due to nonpayment of premiums or assessments, quaere.

Hart v Ins. Assn., 208-1020; 226 NW 777

Change in title—nonassignment of policy—waiver. An insurer who knows, through his agent, that the property covered by the policy has been transferred to another, and continues to treat the policy as in force by collecting and retaining the premiums, may not thereafter defensively assert such change of title or that no formal transfer of the policy had been made.

Neiman v Ins. Co., 202-1172; 211 NW 710

VIII AVOIDANCE OF POLICIES, MISREPRESENTATION

False statement as to responsibility. An insured may not recover on an indemnity bond which is given for the performance of a building contract when, in or in connection with the application for the bond, he willfully gives the insurer a false statement relative to the contractor's financial responsibility, and the insurer innocently relies thereon. This is especially true when the insured is, at the time, acting as the agent of the insurer.

Cook v Heinbaugh, 202-1002; 210 NW 129

VIII AVOIDANCE OF POLICIES, MISREPRESENTATION—concluded

Failure to reveal mortgages. A policy of insurance is not invalidated because the insured did not, in his written application, reveal the existence of mortgages on the property when he was not questioned concerning the mortgages.

Parker v Ins. Assn., 220-262; 260 NW 844

Reinsurance—disclosure of material facts—duties—presumptions. In an action on a reinsurance contract against reinsurer, held, not breached on account of original insurer's failure to retain full amount of liability agreed upon where original insurer was liable on another contract with the same principal and the evidence was insufficient to show any wrongful or fraudulent concealment of material facts, since the same principles of law as to false representations and concealments govern in reinsurance as in original insurance. Altho insured and reinsured have duty to exercise good faith and disclose all material facts, a presumption must be based on facts, not upon other presumptions. The mere nondisclosure of facts possibly known is not fraudulent concealment of facts, so reinsurer, to establish concealment of facts, must show intentional concealment or bad faith in ascertaining facts.

General Reins. v Surety Co., 27 F 2d, 265

IX WAIVER AND ESTOPPEL

Discussion. See 13 ILR 129—Waiver

Company's waiver of provision—insured's burden of proof. In action against an insurance company to recover on a policy covering tractors destroyed by fire, where defense was that plaintiff's ownership was not unconditional and that the property was not kept on the described location as the policy required, plaintiff was required to prove that, with full knowledge of facts disclosed to its agent by plaintiff, the defendant admitted its liability and waived those provisions of policy.

Buettner v Ins. Assn., 225-847; 282 NW 733

Maintenance of status quo—effect. A stipulation entered into by an insured and insurer relative to the employment of attorneys by the insurer to defend an action brought against the insured by a third party, and designed to maintain the status quo of the stipulating parties, cannot be deemed to have any bearing on a waiver of a policy provision already effected by the insurer.

Venz v Ins. Assn., 217-662; 251 NW 27

Bylaws part of policy—nonwaiver.

Richardson v Trav. Assn., 228- ; 291 NW 408

Notice and proof of loss—waiver by denial of liability. An insurer who is furnished proofs showing death from disease, and later, and within the time for furnishing proofs, is furnished amended proofs showing death from accident, waives all further proofs by refusing to furnish blanks on which to make additional proof and by peremptorily denying all liability for death by accident.

Dawson v Life Co., 216-586; 247 NW 279

Retention of premiums—effect. Where an automobile insurance policy exempts the insurer from liability while the car is being operated by a person under 16 years of age and where the monthly premiums are based on a named sum for each trip of the car occurring during the preceding month, the act of the insurer in demanding, receiving and retaining the premium for a particular trip with knowledge that the car on the trip in question had been operated by a person under 16 years of age, works a waiver of said exemption as to said trip.

Venz v Ins. Assn., 217-662; 251 NW 27

X ADJUSTMENT, SETTLEMENT, PAYMENT AND DISCHARGE OF LOSS

Discussion. See 21 ILR 642—Undue influence to secure release

Compromise and settlement—justifiable representation of defense. An officer of an insurance company is amply justified in believing that his company has a good defense to an action on a policy and in so stating to the insured in negotiations for a compromise settlement when the application for the insurance contained false representations of a material nature and an agreement that "the right to recover * * * should be barred" if any of the statements in the application "material either to the acceptance of the risk or the hazard assumed by the company is false and made with the intent to deceive."

Bockes v Cas. Co., 212-499; 232 NW 156

Check not necessarily payment. A check issued by an insurer for the amount of an adjusted loss and payable to a mortgagor and mortgagee, jointly, and never cashed because the mortgagor refused to indorse it, cannot be deemed a payment of the loss when there was no express or implied agreement to that effect—when the insurer-drawer first asserted such claim after the bank on which the check was drawn failed.

Union Ins. v Ins. Co., 216-762; 249 NW 653

Breach of condition subsequent—indemnity policy—failure to cooperate. An insured in an automobile indemnity policy of insurance has no right arbitrarily or unreasonably to refuse to substantially comply with his policy agreement to cooperate in specified ways with the insurer in protecting the rights of said insurer, but any default in so cooperating must be such as to prejudice the insurer in order to absolve him from liability.

Glade v Ins. Assn., 216-622; 246 NW 794

XI SUBROGATION AND CONTRIBUTION

Discussion. See 9 ILB 291—Clauses giving carrier the benefit of shipper's insurance

Subrogation contract by carrier. A contract provision to the effect that a lessor railway

company "shall have full benefit of any insurance effected by the lessee on structures erected on the leased premises" is valid and enforceable if the lessor has an insurable interest in the property.

Queen Ins. Co. v Railway, 201-1072; 206 NW 804

Rule for prorating. Between coinsurers, the liability of each under the standard pro rata clause is not the amount which he may pay the insured by way of settlement, but is such fractional part of the loss as the total amount of his policy bears to the total amount of all the valid and collectible coinsurance policies.

Globe Ins. v Bonding & Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Pro rata clause—valid and collectible insurance. In the application of the standard pro rata clause, the validity and collectibility of a policy are prima facie established by evidence that the insurer was solvent, did not question the validity of the policy, and, after suit, compromised the action and paid the judgment.

Globe Ins. v Bonding & Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Pro rata clause—effect on reinsurers. The lessened liability which an insurer automatically acquires (as regards a coinsurer) under the standard pro rata coinsurance clause, automatically works a pro rata reduction in the liability of his reinsurers who have contracted that the total loss under the policy shall likewise be prorated among the reinsurers.

Globe Ins. v Bonding & Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Action based on forged indorsement of checks and drafts. Where an employee wrongfully possessed himself of checks and drafts belonging to his employer, and by forged indorsements caused a bank to pay them, the act of a surety company in paying the employer the amount of his loss does not discharge the bank from its liability to the employer for having paid the checks and drafts on forged indorsements. The employer, upon being so indemnified, may assign his cause of action against the bank to the surety, and the surety may maintain the action against the bank.

National Surety Co. v Bankers Tr. Co., 210-323; 228 NW 635

XII ACTIONS ON POLICIES GENERALLY

Insured's remedy—law (?) or equity (?)—law action on contract proper. An insured under an accident policy has a plain, speedy, and adequate remedy at law, to wit: action on the contract, and, unless the insurer makes unreasonable and bad-faith demands on insured, he is not entitled to relief in equity.

Eller v Guthrie, 226-467; 284 NW 412

Avoidance of multiplicity of law actions. A strict action at law may not be brought and maintained in equity on the mere allegation that thereby a multiplicity of actions will be avoided. So held where plaintiff sought, in equity, to recover not only presently accrued but future possibly accruing weekly total disability benefits under a policy of accident insurance.

Gephardt v Ins. Co., 213-354; 239 NW 235

Multiple actions—multiple defenses and physical examinations proper. An insured, under an accident policy, who elects to try his disputed claims in a multiple series of suits, may not complain if the insurer prepares his defense in the same way and requires a separate physical examination before each suit.

Eller v Guthrie, 226-467; 284 NW 412

Premature action—defect cured. Defendant's right to complain because an action on a policy of insurance was prematurely commenced is lost by delaying the complaint until a time when an action, if then commenced, would not have been premature and when the action stood for trial on a substituted petition.

Slinger v Ins. Assn., 219-329; 258 NW 101

Nonpremature action. An action brought some eleven months after loss is not premature when the insurer has by his conduct waived proofs of loss.

Lee v Ins. Co., 214-932; 241 NW 403

Special appearance and motion to dismiss. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Specific performance. An action to compel the specific issuance of a policy of insurance against loss of income on a named occasion and for judgment on the policy, or in lieu, for judgment for damages, must be dismissed when it is made to appear that, in view of the amount of income actually received by the plaintiff on the occasion in question, and in view of the conditions of the usual and ordinary policy had one been issued, no recovery could have been had on the policy.

Amer. Legion v Ins. Co., 212-1371; 238 NW 458

Wrongful refusal to defend—attorney fees. A title insurer who wrongfully refuses to comply with his contract to defend an action hostile to the title is liable to the insured for

XII ACTIONS ON POLICIES GENERALLY—concluded

reasonable attorney fees, whether such fees have or have not been paid by the insured.

Jones v Sur. Co., 210-61; 230 NW 381

Burden of proof—affirmative elaboration of general denial—effect. The beneficiary in an accident insurance policy has the burden of proof to establish that the insured was killed under the particular condition covered by the policy and alleged in the petition, notwithstanding elaborate affirmative assertions by the defendant in addition to a general denial.

Nelson v Acc. Soc., 212-989; 237 NW 341

Exemption from liability—burden of proof. The insurer has the burden to establish a contract exception which exempts him from liability.

Lamar v Trav. Assn., 216-371; 249 NW 149; 92 ALR 159

Accidental death—burden of proof. In order to recover on the ordinary accident insurance policy, claimant must show by a preponderance of the evidence that the injury or death resulted solely from bodily injury received through accidental means. Evidence held to present a jury question.

Dawson v Life Co., 216-586; 247 NW 279

Evidence—accidental cause producing death. Evidence held sufficient to present a jury question on the issue whether an insured became accidentally infected with gas bacillus at the time of an injury to his hand, and whether said infection resulted in his death.

Martin v Life Co., 216-1022; 250 NW 220

Accidental means—allowable inference. Evidence that an insured in passing through an opening in a building knocked a piece of skin from his hand, coupled with the legal presumption that he did not intend such injury (there being no evidence tending to negative such presumption) justifies the inference or conclusion that the injury was caused by accidental means.

Martin v Life Co., 216-1022; 250 NW 220

Cause of death—testimony of attending physician nonconclusive. The testimony of a physician as to the cause of death of a person whom the physician personally attended shortly prior to said death is not conclusive, especially when the physician was, at the time of the examination, uncertain as to the cause of death. In other words, expert testimony, on proper hypothetical facts, is admissible to show a cause of death other than that testified to by the attending physician.

Dawson v Life Co., 216-586; 247 NW 279

Causes of loss—explosion—evidence. Under a policy of insurance against damages "caused by explosion occurring in the structure, provided the explosion results from the hazard inherent in the occupancy", a judgment against the insurer has ample support in evidence that an ordinary furnace was refueled and left in a normal condition with the feed door closed, the pipe to the chimney intact and in place and the fire burning; that during the following two and one-half hours no person was in the house; that upon the return of the owner the furnace door was open, the smoke pipe on the floor and the house filled with smoke and soot; and that there was no fire outside the furnace.

Sargent v Ins. Co., 216-688; 247 NW 267

Excluding evidence of fraud. Excluding a letter offered by a defendant insurer, in connection with a claim of fraud, is harmless error when all question of fraud was withdrawn from the jury.

Eller v Ins. Co., 226-474; 284 NW 406

Directed verdicts—function of court. It is not the function of the court to determine which of a series of irreconcilable theories of experts, as to the death of a person, is correct. All the court can do or is permitted to do is (1) to consider the war of testimony in the permissible light most favorable to the party on whom rests the burden of proof, and (2) to determine whether a verdict in favor of such party would be adequately supported by the testimony.

Martin v Life Co., 216-1022; 250 NW 220

Directed verdict—war of expert testimony. Whether a death resulted from an accident "independent of all other causes" is necessarily a jury question under a war of conflicting and contradictory expert testimony.

Martin v Life Co., 216-1022; 250 NW 220

Partial disability—jury question. Evidence held to justify the submission to the jury of the issue of partial disability.

Vorpahl v Surety Co., 208-348; 223 NW 366

Reversal with order to dismiss—when justifiable. The appellate court, on entering an order of reversal in a law action, may, in the exercise of its broad statutory discretion, terminate long protracted litigation, by ordering the trial court to dismiss plaintiff's action. So ordered where an action on a policy of insurance had been four times tried and had been three times reversed on defendant's appeal.

Stoner v Ins. Co., 220-984; 263 NW 46

XIII RISKS AND CAUSES OF LOSS

(a) IN GENERAL

Indemnity converted into liability. A policy of insurance which is otherwise strictly a contract of indemnity against loss is converted into a contract of indemnity against liability by the insertion therein of a provision which, in effect, provides that the policy shall, under named conditions, inure to the benefit of an injured third party.

Venz v Ins. Assn., 217-662; 251 NW 27

"No action clause"—effect. A policy of insurance indemnifying the insured from damages resulting from the holding of a hazardous automobile racing contest on a race track at a county fair, and which policy specifies that "No action shall be brought against the insurer * * * unless brought by and in the name of the insured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issues," is a contract of indemnity against loss, and not a contract of indemnity against liability, and gives no right of action on the policy to a person who was wrongfully injured as a result of holding said race; and this is true notwithstanding subsec. 5-e, §8940, C., '24, '27, '31, giving, under certain conditions, an injured person a right of action on an automobile accident policy issued to the wrongdoer, said statute having application solely to automobiles used in the usual course on highways, and not to use on race tracks in racing contests.

Zieman v Ins. Co., 214-468; 238 NW 100

Explosion—evidence. Under a policy of insurance against damages "caused by explosion occurring in the structure, provided the explosion results from the hazard inherent in the occupancy", a judgment against the insurer has ample support in evidence that an ordinary furnace was refueled and left in a normal condition with the feed door closed, the pipe to the chimney intact and in place and the fire burning; that during the following two and one-half hours no person was in the house; that upon the return of the owner the furnace door was open, the smoke pipe on the floor and the house filled with smoke and soot; and that there was no fire outside the furnace.

Sargent v Ins. Co., 216-688; 247 NW 267

(b) ACCIDENT OR HEALTH INSURANCE

Discussion. See 10 ILB 64—Total disability in accident policies; 16 ILR 251—Anticipatory breach

Acceptance of policy—acts constituting. A provision in a delivered policy of insurance giving the insured a named time in which to accept and retain the policy, or to reject and return it, is for the sole benefit of the insured; and when the insured not only retains the policy after the lapse of said time, but forwards his check for the premium (which the insurer retains), the said act of the insured in so retaining the policy and the act of the insurer in retaining the check render the policy effective from the date thereof.

Schmith v Cas. Co., 216-936; 247 NW 655

Nonretroactive premium. A policy of accident insurance which provides a scheme for quarterly periods of insurance and for quarterly payments of premiums in advance, but provides that the acceptance of a premium after due shall reinstate the policy only as to injuries received after such acceptance, does not cover an injury received after the beginning of a quarterly period and before payment of premium for that quarter is made.

Hiatt v Cas. Co., 208-974; 224 NW 53

Prorating clause. Divers accident insurance policies issued to the same insured may not be deemed to cover the "same loss", within the meaning of an attempted prorating clause concerning death benefits, when the recipients of said benefits under each policy are different from the recipients under any other policy.

Wahl v Acc. Assn., 201-1355; 207 NW 395; 50 ALR 1374

Death benefit not proratable. A death benefit is not proratable, under a policy of accident insurance against death, specified injuries, loss of time, surgeon's fees, etc., which contains a clause (violated by the insured) that, if the insured, without written notice to the insurer, carry other insurance in other companies, covering the same loss, the insurer "shall be liable only for such portion of the indemnity promised as said indemnity bears to the total amount of like indemnity in all policies covering such loss".

Wahl v Acc. Assn., 201-1355; 207 NW 395; 50 ALR 1374

Health insurance—liberal construction of policy. Principle reaffirmed that a health insurance policy must be construed liberally in favor of the insured.

Garvin v Cas. Co., 207-977; 222 NW 25; 61 ALR 633

Health insurance—confinement "within the house". An agreement by an insurer to pay sick benefits during such time as the insured "shall be strictly and continuously confined within the house" embraces time spent in hospitals on advice of physicians; also, necessary time spent in going to and from said physicians and hospitals if the sickness of the insured is, during said time, of such grave and serious nature that the time so spent is purely incidental to the necessary resumption of confinement "within the house". But said agreement does not embrace time spent by the insured in traveling about the country on his own motion in quest of health.

Garvin v Cas. Co., 207-977; 222 NW 25; 61 ALR 633

Inconsistent and repugnant provisions. A provision in a health policy that sick benefits will be paid provided the sickness is contracted 30 days after the date of the policy, and a distinct and separate provision that said benefits will be paid for every sickness contracted subsequent to the issuance of the policy, are so inconsistent and repugnant that the court will reject the first provision and apply the latter.

Schmith v Cas. Co., 216-936; 247 NW 655

Carpenter v Trav. Assn., 213-1001; 240 NW 639

XIII RISKS AND CAUSES OF LOSS—continued

(b) ACCIDENT OR HEALTH INSURANCE—continued

Certificate of health insurability—effect. An insurer against total, permanent disability is, in the absence of plea and proof of fraud on the part of the insured, conclusively bound by a certificate of the health insurability of the insured issued by the insurer's examining physician as a basis for the issuance of the policy.

Foy v Ins. Co., 220-628; 263 NW 14

"Accident" and "accidental means" defined. An "accident" is an event which, under the circumstances, is unusual and unexpected by the person to whom it happens; the happening of an event without the concurrence of the will of the person by whose agency it was caused.

The term "accidental means" signifies those means, the effect of which does not ordinarily follow, and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing.

Miser v Trav. Assn., 223-662; 273 NW 155

"Accidental means" defined. An injury caused by the intentional lifting of a log upon a wagon is one resulting from "accidental means" when such resulting injury was unexpected, undesigned, and not the usual or natural result of such an act.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Accidental means—allowable inference. Evidence that an insured in passing through an opening in a building knocked a piece of skin from his hand, coupled with the legal presumption that he did not intend such injury (there being no evidence tending to negative such presumption) justifies the inference or conclusion that the injury was caused by accidental means.

Martin v Life Co., 216-1022; 250 NW 220

Accidental discharge of firearm. A requirement in a policy of accident insurance that the accidental cause of the discharge of a firearm shall be proven by a particular class of witnesses "who saw the cause in operation at the time of the discharge" simply requires the testimony of witnesses of such class who, by reason of their presence, can personally speak of such competent and attending facts and circumstances as will fairly justify the jury in finding from such testimony and from the inferences justifiably deducible therefrom, that the cause of the discharge was accidental.

Pride v Acc. Assn., 207-167; 216 NW 62; 62 ALR 31

Ballplayer sliding to base. Proof tending to show that a ballplayer was internally injured by sliding to a base, with proof that such act is ordinarily attended by no serious consequences, justifies a finding that the injury was accidental.

Dawson v Life Co., 216-586; 247 NW 279

"Burning or explosion of automobile." Insurance against injury "caused by the burning or explosion of an automobile" does not embrace injury caused by the inhalation of carbon monoxide gas thrown off by the ordinary explosion of motor vehicle fuel in the engine of the car.

Field v Sur. Co., 211-1239; 235 NW 571

"Driving," "adjusting," or "explosion of" automobile—jury question. Evidence that a party successively ran two automobiles into his garage, leaving the motor of the first car running, and thereupon closed the garage doors, and was later found dead on the running board of the second car, is wholly insufficient to establish that the deceased met his death "while driving," or "while adjusting," or "by an explosion of," an automobile, it appearing that the direct cause of the death was the inhalation of carbon monoxide gas.

Field v Sur. Co., 211-1239; 235 NW 571

Air travel—forced jump—risk not covered. Richardson v Trav. Assn., 228- ; 291 NW 408

Horse not a "vehicle". A horse, saddled and bridled, and being used as a means of conveyance or transportation, is not a "vehicle" within the meaning of a policy of insurance which provides indemnity "sustained by the wrecking or disablement of any vehicle or car * * * in which the insured is riding, or by being accidentally thrown therefrom".

Riser v Ins. Co., 207-1101; 224 NW 67; 63 ALR 292

Inhaling "gas"—scope of term. An unambiguous policy provision which exempts the insurer from liability when death ensues from inhaling "any gas" embraces a death from inhaling a combination or collection of gases as well as a death from inhaling a single gas. Such is the ordinary and popular understanding of the term "gas" and so the term must be construed.

Lamar v Trav. Assn., 216-371; 249 NW 149; 92 ALR 159

Policy—construction—"train wreck". The smashing in of a portion of one side of a passenger coach by swinging a loading bucket against the coach as it was passing constitutes a "train wreck" within the meaning of a policy of accident insurance, even tho the coach (the only one injured) was not derailed, and was not taken from the train for repairs until a division point on the line was reached.

Mochel v Trav. Assn., 203-623; 213 NW 259; 51 ALR 1327

Violation of law. A policy of accident insurance which provides, in effect, that it does not cover or embrace loss "resulting from or in consequence of" any act of the insured while engaged in any violation of the law, does not justify an instruction to the effect that the

violation of law must be the sole cause of the loss. Proximate cause, not sole cause, is the legal test.

Whyte v Cas. Co., 209-917; 227 NW 518

Presumption that injuries are accidental. In the absence of direct or circumstantial evidence to the contrary, physical injuries to a person are presumed accidental.

Dewey v Ins. Co., 218-1220; 257 NW 308

Intentionally inflicted injuries. The limited liability provided in a policy of insurance in case of "injuries intentionally inflicted upon the insured by another person except in the perpetration of a robbery", cannot be deemed established as a matter of law by evidence which would justify a finding either (1) that the assault was not made in the perpetration of a robbery, or (2) that it was made in the perpetration of a robbery, or (3) that the assault was the result of mistaken identity—and, therefore, not intentional within the meaning of the policy.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

Intentional acts—presumption. Under a policy of accident insurance which exempts the insurer from liability for injuries sustained by the insured by reason of "intentional" acts, the presumption will be indulged that injuries inflicted upon the insured by another person were not intentional.

Olson v Surety Co., 201-1334; 208 NW 213

Declarations of insured. Declarations, not part of the res gestae, of an insured under an accident policy of insurance, tending to prove that an injury to the insured was self-inflicted, are not admissible against the beneficiary of the policy.

Pride v Acc. Assn., 207-167; 216 NW 62; 62 ALR 31

Accident as jury question. Evidence reviewed and held properly to present a jury question on the issue whether an injury was caused by accidental means.

Miser v Trav. Assn., 223-662; 273 NW 155

Injuries resulting from accident complained of—jury question. Record held replete with evidence that an insured's injuries and loss of time were caused directly and exclusively by the accident in issue and held to justify a refusal to direct a verdict for insurer on the ground that there was no competent evidence that the injuries were caused by the accident.

Eller v Ins. Co., 226-474; 284 NW 406

Noncausal relation. In an action on a policy of accident insurance covering death "by being accidentally thrown from a wrecked or disabled horsedrawn vehicle", plaintiff must, in order to present a prima facie case for recovery, show (1) that the vehicle was a "wrecked or disabled" vehicle when the insured was thrown therefrom, and (2) that said wreckage or disablement bore some causal relation to the accidental throwing of the insured from the vehicle. In other words, plaintiff fails to show a cause of action by establishing a disablement which had nothing to do with throwing the insured from the vehicle.

Slaughter v Ins. Co., 214-451; 240 NW 229

Total and permanent disability. A policy which provides for compensation, only in the event of total and permanent disability, necessarily excludes compensation for a disability which is total for the time being but not permanent.

Petersen v Ins. Co., 217-1122; 253 NW 63

Permanent disability—scope. Under a policy providing monthly disability benefits if insured becomes, and remains for 90 days, so physically incapacitated as to be wholly and permanently unable to engage in any occupation or work for profit, the insured, in order to recover, need carry his proofs on the issue of permanency of disability no further than to establish (1) present permanency, and (2) a reasonable presumption that such disability will continue for an indefinite period of time. (The policy herein provides for future proofs of continuance of disability.)

Garden v Ins. Co., 218-1094; 254 NW 287

Permanent disability—ascertainment by comparative standard in policy. In weighing the evidence as to a permanent disability claim, heed must be given to the other policy provisions wherein the company of its own volition has set a comparative standard for measuring total and permanent disability as respects the insured's ability to pursue any gainful occupation, and, being so measured, the question is for the jury.

Wood v Ins. Co., 224-179; 277 NW 241

Permanent disability — when recovery denied. A policy which provides, (1) for stated benefits in event insured becomes "wholly and permanently disabled", and (2) that "such total disability shall be presumed to be permanent when it is present and has existed continuously for not less than 3 months," does not authorize recovery for a disability which has been total for a continuous period of some 10 months, but which, when action for recovery of said benefits is commenced, has proven to be only temporary.

Graham v Assur. Soc., 221-748; 266 NW 820

Total disability clauses—liberal construction required. In policies of insurance against loss of time consequent on accidentally inflicted injuries, "total disability" clauses must be given a liberal construction in favor of the insured. So held where the policy required the injuries to be such as to "totally disable and prevent the insured from transacting any and every duty pertaining to any and every business and occupation". Evidence held to

XIII RISKS AND CAUSES OF LOSS—continued

(b) ACCIDENT OR HEALTH INSURANCE—continued

present jury question on the issue of the insured's total disablement.

Prusiner v Ins. Co., 221-572; 265 NW 919; 2 NCCA(NS) 87

Total disability—reasonable construction. "Total disability" as used in accident insurance policies does not mean a state of absolute helplessness but, rather, inability to do all the substantial and material acts necessary to the prosecution of the business or occupation of the insured, or some other business or occupation which he might enter, in a customary and usual manner.

Eller v Ins. Co., 226-474; 284 NW 406

Total disability—reasonable construction. Where a life insurance policy provides for monthly payments as disability benefits to an insured, total disability, which was defined therein as disability preventing insured "from engaging in any occupation or performing any work for compensation of financial value", does not mean a state of absolute helplessness, but, rather, inability to do all the substantial and material acts necessary to the prosecution of the business or occupation of the insured, or some other business or occupation which he might enter, in a customary and usual manner.

Hoover v Ins. Co., 225-1034; 282 NW 781

Disability benefits—conditional payment. A policy which provides that total disability benefits are payable "on each anniversary (of the policy) during the lifetime and continued disability of the insured", imposes no obligation to pay such benefits, or any part thereof, when the insured dies prior to such anniversary date. And this is true when the annual premium is payable in advance, but when it is impossible to determine what part of such premium is the consideration for the agreement to pay disability benefits.

Peek v Ins. Co., 206-1237; 219 NW 487

Instructions—disability continuing to time of trial. When an insurance policy provides that, in order to recover permanent disability benefits, an insured must be disabled "for life", an instruction that the jury must find insured disabled at the time of trial is correct.

Wood v Ins. Co., 224-179; 277 NW 241

Permanent disability—jury question. In an action on a life insurance policy providing against "total and permanent disability", evidence that insured, afflicted with an incurable condition of osteomyelitis of the vertebrae, was able to do a few hours bookkeeping, drive an automobile occasionally and enrolled in the State University for a short time, will not necessarily negative permanent disability but presents a question properly submitted to the jury.

Wood v Ins. Co., 224-179; 277 NW 241

Total disability—jury question. Where the insured, a farmer afflicted with arthritis, brings an action on a life insurance policy providing monthly payments for total disability, which was defined as disability preventing insured "from engaging in any occupation or performing any work for compensation of financial value", and where the insured farmer was unable to perform the labor on his farm, but still was able to direct the farming operations of his hired men, it was a jury question whether or not insured was totally and permanently disabled under terms of policy.

Hoover v Ins. Co., 225-1034; 282 NW 781

Total disability—evidence. Evidence reviewed, and held to show that plaintiff was "immediately, continuously and wholly disabled" by an accident, and from the date thereof.

Harrington v Surety Co., 206-925; 221 NW 577

Adjudication of physical condition—not binding in later action. Where an insured's claim is embodied in a series of suits, an adjudication of a plaintiff-insured's physical condition, determined in one action, does not adjudicate said condition in a subsequent independent action.

Eller v Guthrie, 226-467; 284 NW 412

Accepting payment for partial disability but reserving claim for total. An insured by accepting payment under an accident policy for three weeks total disability and two weeks partial disability, does not preclude himself from claiming further total disability when the payment was accepted with the distinct understanding with the insurer that such acceptance was without prejudice to any future claim for total disability.

Eller v Ins. Co., 226-474; 284 NW 406

Hospital expense—confinement in different hospitals permissible. A requirement in an accident policy, that in order for an insured to recover for hospitalization he must be confined in a hospital within 90 days of the accident, does not require that he must be confined in the same hospital for the entire time pending his recovery.

Eller v Ins. Co., 226-474; 284 NW 406

Pleading special limitations. Special limitations on the right to recover under a policy of accident insurance, inserted in the policy after the general insurance clause, must be pleaded and established by the insurer.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

Accident insurance—burden of proof. Under an accident policy against bodily injury

through accidental means, resulting directly, independently, and exclusively of all other causes, the insured must necesarily meet the burden of showing that the injuries received resulted solely from accidental means. Evidence held insufficient.

Michener v Cas Co., 200-476; 203 NW 14

Burden of proof. In order to recover on the ordinary accident insurance policy, claimant must show by a preponderance of the evidence that the injury or death resulted solely from bodily injury received through accidental means.

Dawson v Life Co., 216-586; 247 NW 279

Avoidance of policy—burden of proof. The insurer in an accident insurance policy has the burden of proof to establish the defense that the policy is wholly avoided because the insured, in obtaining the policy, had falsely represented that his habits of life were "correct and temperate", and had thereby intentionally deceived the insurer.

Olson v Surety Co., 201-1334; 208 NW 213

Avoidance—burden of proof. An accident insurance policy (against injury sustained solely through external, violent, and accidental means) which provides, in effect, that it does not cover injuries sustained by reason of the intentional act of any person except assaults upon the insured by a person committing or attempting to commit robbery, casts upon the insurer the burden to establish (1) that the insured was injured by the intentional acts of another person, (2) that the injury was intentional, and (3) that such other person was not committing or attempting to commit robbery.

Olson v Surety Co., 201-1334; 208 NW 213

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intracranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Ineffective proof by executrix. Under a policy providing for the payment, (1) of total disability benefits to the insured himself, and (2) of death benefits to another, the disability benefits alleged to have accrued to the insured prior to his death may not be recovered by the executrix of the insured when the insured, tho physically and mentally able so to do, failed to furnish during his lifetime, to the insurer, proofs of such disability, the furnishing of such proofs being clearly contemplated and required by the policy as a condition precedent to the attaching of liability on the part of the insurer.

Kantor v Ins. Co., 219-1005; 258 NW 759

Finding by court—conclusiveness. The finding of the court in a trial to the court on supporting evidence on the issue whether an insured died "solely through external, violent, and accidental means" or from disease is conclusive on the appellate court; and it is immaterial that the court determines its findings by sustaining a motion to dismiss at close of all the evidence, or by overruling such motion and later dismissing the action on its own motion.

Cherokee v Ins. Co., 215-1000; 247 NW 495

(c) AUTOMOBILE INSURANCE

Discussion. See 9 ILB 196—Collision insurance—protection; 15 ILR 73—Recovery from insurer

Scope of policy. Insurance on a distinctly described automobile does not, of course, cover any other automobile.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Merger of prior oral contracts. An oral contract that a policy on an automobile should automatically apply to any other car which the insured might subsequently acquire, entered into at the time the policy was applied for, will not support an action—said contract not being inserted in the policy.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Oral contract—estoppel. Even tho the agent of an insurer, when receiving an application for insurance on an automobile, represents that the insured will have a policy automatically applicable to any car which the insured may acquire in the future, yet the insurer is not estopped to deny the existence of any such oral contract when the policy delivered and accepted contained no such provision.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Transfer—prima facie effect. An insurer against the theft of an automobile, defending on the ground that the insured was not the "unconditional and sole" owner, may not complain that the jury is instructed that a transfer of the certificate of registration is only prima facie evidence of change of title.

Abraham v Ins. Co., 215-1; 244 NW 675

Transfer—right to contradict. On the issue whether plaintiff, in an action on a policy of insurance covering the theft of an automobile, was the "unconditional and sole" owner of the vehicle, plaintiff may testify to facts attending a written transfer of the certificate of regis-

XIII RISKS AND CAUSES OF LOSS—continued

(c) AUTOMOBILE INSURANCE—continued

tration tending to show that he, in fact, remained the owner of the vehicle notwithstanding said transfer.

Abraham v Ins. Co., 215-1; 244 NW 675

Company knowledge of automobile conditional sale—instructions. Where claim is made against an automobile insurance company under the collision clause of a policy transferred from one automobile to another on which a conditional sale is outstanding, knowledge of which conditional sale is denied by the company, instructions reviewed and held to properly submit question of company's knowledge and waiver of the conditional sale lien.

Mougin v Ins. Assn., 224-1202; 278 NW 336

Wrong motor numbers not invalidating liability policy. Motor numbers in an automobile insurance policy are only for the purpose of aiding in identifying the car, and, tho the numbers be wrong, a liability policy will not be invalidated if the car is otherwise properly identified, for which purpose other evidence may be resorted to, and, if sufficient, will cure the error without resort to a proceeding in equity to reform the policy.

Fucaloro v Cas. Co., 225-437; 280 NW 605

Indemnity insurance—law governing. A policy of insurance issued under subsec. 5-e of this section, insuring the ordinary operation of an automobile necessarily embraces the statutory provision that said policy shall inure to the benefit of a party who obtains a judgment against the insured, even tho said policy purports to be an indemnity policy only. (Zieman case, 214 Iowa 468 overruled in part.)

Schmid v Underwriters, 215-170; 244 NW 729

Indemnity (?) or liability (?)—legality. Either indemnity or liability insurance covering the operation of an automobile may be validly written by mutual associations under §9029 or by reciprocal or interinsurance concerns under §9083, C., '31, even tho subsec. 5-e, §8940, of said code prohibits the companies there designated from writing anything but liability insurance, the latter section not controlling the two former sections.

Schmid v Underwriters, 215-170; 244 NW 729

Indemnity policy—right of injured party. When the owner or operator of a motor vehicle has insured his liability for damages consequent on the operation of his vehicle, an injured party may not sue directly on the policy which indemnifies the wrongdoer—the insured—until he has obtained a judgment against the wrongdoer—the insured—and until an execution on the judgment has been returned unsatisfied. There is one exception to this statutory rule, to wit: When the policy is one obtained by a motor vehicle carrier as a mandatory statutory condition precedent to obtaining a certificate to operate as such carrier, an injured party may maintain an action on the policy when service of notice of suit cannot be had on the carrier within this state. (§5105-a26, C., '31 [§5100.26, C., '39]).

Ellis v Bruce, 215-308; 245 NW 320

Evidence of insurance—failure to strike not cured by instructions. Evidence that the owner of an automobile had stated that he did not go out to the scene of the accident after a collision in which the automobile was involved because the car was insured and he would let the insurance company take care of it, improperly injected the question of insurance in an action for damages resulting from the collision. The failure to strike such evidence was error which was not cured by the court's direction to the jury to disregard it.

Floy v Hibbard, 227-154; 289 NW 905

Indemnity policy—failure to cooperate. An insured in an automobile indemnity policy of insurance has no right arbitrarily or unreasonably to refuse to substantially comply with his policy agreement to cooperate in specified ways with the insurer in protecting the rights of said insurer, but any default in so cooperating must be such as to prejudice the insurer in order to absolve him from liability.

Glade v Ins. Assn., 216-622; 246 NW 794

Retention of premiums—effect. Where an automobile insurance policy exempts the insurer from liability while the car is being operated by a person under 16 years of age and where the monthly premiums are based on a named sum for each trip of the car occurring during the preceding month, the act of the insurer in demanding, receiving and retaining the premium for a particular trip with knowledge that the car on the trip in question had been operated by a person under 16 years of age, works a waiver of said exemption as to said trip.

Venz v Ins. Assn., 217-662; 251 NW 27

Chauffeur defined. An employee of a business who is not known as a chauffeur, and who is solely employed and paid for services wholly distinct from the operation of a delivery truck, does not become a "chauffeur" within the meaning of §4943, C., '27, by operating the truck during the time the regular chauffeur operator is temporarily absent.

Des Moines Co. v Underwriters, 215-246; 245 NW 215

"Driving", "adjusting", or "explosion" of automobile. Evidence that a party successively ran two automobiles into his garage, leaving the motor of the first car running, and thereupon closed the garage doors, and was later found dead on the running board of the second car, is wholly insufficient to establish that

the deceased met his death "while driving", or "while adjusting" or "by an explosion", of an automobile, it appearing that the direct cause of the death was the inhalation of carbon monoxide gas.

Field v Surety Co., 211-1239; 235 NW 571

"Riding in" or "driving" automobile—proof—sufficiency. On the issue (under an insurance policy) whether an insured died while "riding in", or while "driving" an automobile, no recovery can be had on proof only that the insured, shortly after he was expecting to start on a journey, was found dead in his securely closed garage and in his automobile (the engine of which had manifestly been very recently running) and behind the steering wheel, with the left front door partly open, and his left foot resting on the running board and his right foot near the accelerator; and especially is this true when the attending circumstances clearly indicate that before the car could be put into actual motion other acts must be done which would necessitate the absence of the deceased from the car.

Mould v Cas. Co., 219-16; 257 NW 349

Riding or driving motor vehicle—insured on running board. In an action on an insurance policy, there was sufficient evidence for a jury question on whether an accident came within terms of the policy insuring against injuries received in an accident of a vehicle in which the insured was riding or driving, when it was shown that the car started moving down a grade, and the insured was thrown to the ground from a position partly in the car and partly on the running board, while attempting to stop the car.

Dykes v Ins. Co., 226-771; 285 NW 201

"Person of same household"—scope of term. Where an insurance policy insured the assured against liability arising or resulting from automobile accidents, but excepted liability for injuries to "the assured or persons of the same household as the assured", held that a married woman who furnished the assured a room and board for a stated compensation could not be deemed a "person of the same household as the assured."

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

Fire as proximate cause of breakage. If an automobile takes fire while traveling upon the highway, and said fire is the proximate cause of the car's swerving and going into the ditch and overturning, then a policy of insurance against direct loss or damage from fire covers not only the parts of the car actually burned by the fire, but the parts of the car which were broken or injured by the overturning.

Tracy v Ins. Co., 207-1042; 222 NW 447; 1 NCCA(NS) 313, 319

Action on insurance policy—real party in interest—authority to make admission in pleading. A defendant corporation formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers is the real party in interest in an action to enforce a judgment against the corporation. The group of subscribers is not a legal entity and, when the corporation is the only legal entity of the two, an admission of an important fact by the corporation made in a counterclaim in the action in which judgment was obtained is binding on it in the later action.

Mitchell v Underwriters, 225-906; 281 NW 832

"No action clause"—effect. A policy of insurance indemnifying the insured from damages resulting from the holding of a hazardous automobile racing contest on a race track at a county fair, and which policy specifies that "No action shall be brought against the insurer * * * unless brought by and in the name of the insured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issues," is a contract of indemnity against loss, and not a contract of indemnity against liability, and gives no right of action on the policy to a person who was wrongfully injured as a result of holding said race; and this is true notwithstanding subsec. 5-e of this section, giving, under certain conditions, an injured person a right of action on an automobile accident policy issued to the wrongdoer, said statute having application solely to policies on automobiles used on race tracks in racing contests.

Zieman v Fidelity Co., 214-468; 238 NW 100

Joinder—tort of one and contract of another. A joint action (1) against a wrongdoer upon his tort consequent on the negligent operation of a motor vehicle, and (2) against a surety company upon its policy to indemnify the wrongdoer from loss because of said tort, even tho but one recovery is sought, presents two different causes of action, and the joinder thereof is wholly unallowable. And this is true whether the policy is simply a private, optional contract between the insured and insurer, or a policy mandatorily required by statute to be filed with and approved by the railroad commission as a condition precedent to the obtaining of a permit to operate said vehicle.

Ellis v Bruce, 215-308; 245 NW 320

Pleading—sufficiency. An unpleaded claim that an oral contract existed for the transfer of a policy of insurance on one automobile to a subsequently acquired automobile amounts to nothing.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Inadequate instructions. In an action on a policy of insurance against theft, the court, after properly placing the burden on plaintiff to show that the taker intended to steal the insured property, must also instruct that plain-

XIII RISKS AND CAUSES OF LOSS—continued

(c) AUTOMOBILE INSURANCE—concluded

tiff supplies that element of proof, prima facie, by testimony that the insured property disappeared from the place where plaintiff left it, without the knowledge or consent of plaintiff or of any other person having control of the property.

Tullar v Ins. Co., 214-166; 239 NW 534

Contract measure of damages—effect. A contract measure of damages in case of loss under a policy of insurance against theft precludes the court from instructing as to another and different measure of damages.

Salinger v Ins. Corp., 214-1021; 243 NW 183

Extent of loss—collision damage to automobile. In an action on an automobile collision insurance policy, the measure of damages is (1) the reasonable cost to repair or replace the damaged parts with others of like kind and quality, if the evidence shows it can be so repaired, or (2) if the evidence shows it cannot be repaired, then the difference between the fair and reasonable market value before and such value after the collision—and fact that insured advantageously traded the wrecked automobile to a dealer on a new automobile does not affect the measure of damage.

Kellogg v Ins. Co., 225-230; 280 NW 485

Judgment against insured — conclusive against insurer. A judgment determining liability of insured for damages for death resulting from use of automobile was conclusive against liability insurance company as to its liability on policy where there was no fraud or collusion in obtaining the judgment and insurance company had timely notice of suit and elected to make no defense, in view of provision of policy and of statute permitting injured person to maintain action against insurance company for amount of judgment against insured after return of execution unsatisfied, irrespective of insured's insolvency.

International Co. v Steil, 30 F 2d, 654

(d) FIDELITY INSURANCE

Fidelity insurance—construction. The conduct of an officer of a bank in intentionally and deceitfully omitting to make any entry on the books of the bank of payments made on the bills receivable of the bank (other than a memorandum slip, hung on a spindle), with resulting loss to the bank, is covered by a bond or policy of insurance which guarantees indemnity against "dishonest or criminal acts or omissions" of said officers.

Andrew v Ind. Co., 207-652; 223 NW 529

Fidelity insurance—loss to bank—construction. Proof that an officer of a bank received money of the bank and made no entry of the receipt on the books of the bank necessarily presents a prima facie showing of financial loss to the bank.

Andrew v Ind. Co., 207-652; 223 NW 529

Unallowable action by stranger. A bond which, in effect, is limited to the indemnification of the obligee only, for pecuniary loss sustained by the obligee through the dishonest acts of his officers or employees, is a contract of indemnity. In other words, such bond does not cover liability to a third party for loss sustained by said third party through the dishonesty of the officers or employees of the said obligee. (See §8581-c14, C., '31 [§8581.18, C., '39], for bonds covering liability.)

Allen v Ins. Co., 218-294; 253 NW 498

(e) HAIL INSURANCE

Avoidance of policy for misrepresentation, etc.—knowledge of insurer and agent—effect. A statement in an application for crop insurance to the effect that applicant has "full interest in the crop" when his only interest was in the cash rentals due him as a landlord furnishes no basis for avoiding liability when both the insurer and its agent had full knowledge, from a prior application which was in their possession, that applicant's interest was that of landlord only.

Boever v Ins. Co., 221-566; 266 NW 276

Computation of damages—instructions. Instructions relative to the computation of damages to crops by hail reviewed, and held sufficiently clear in view of the ambiguous provision of the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

Damage by hail—improper measure. The percentage of crop destruction due to hail cannot be measured by a comparison between the ultimate crop after damage by hail, and the amount of yield in an average year, when the record affirmatively shows that the year in which the damage occurred was not, because of drought conditions, an average year.

Slinger v Ins. Assn., 219-329; 258 NW 101

Notice and proof of loss—waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

(f) THEFT INSURANCE

Impossible performance—when no excuse. A person is not legally excused from performing an act which he has unconditionally contracted to perform, but is prevented from performing because of the happening of a contingency of which he had knowledge when he contracted, and against which he might have

protected himself. For instance, an insurer may not rely on a contract that he will, in full satisfaction of his liability, repossess a stolen automobile and properly repair it, and return it to the insured, when such return to the insured was prevented by the act of the seller of the car rightfully seizing the car, while it was in the possession of the insurance company, for nonpayment of installments due on the car, such possible seizure being well known to the insurance company when it so contracted.

Salinger v Ins. Corp., 217-560; 250 NW 13

Theft—prima facie showing—shifting of burden. In an action on a policy of insurance against theft, plaintiff generates a prima facie showing for recovery by testimony that the insured automobile disappeared from the place where plaintiff had left it, without the knowledge or consent of plaintiff or of any other person having control over said vehicle. Defendant must then overcome the presumption, if he can, that the taker took the car with intent to steal it.

Tullar v Ins. Co., 214-166; 239 NW 534

Evidence—sufficiency. Principle reaffirmed, in an action on a policy of insurance against theft, that the possession of recently stolen property may be sufficient to establish the larceny of the property.

Tullar v Ins. Co., 214-166; 239 NW 534

Unauthorized taking of motor vehicle—presumption of theft. When an owner of a motor vehicle establishes that his car was taken without his knowledge or consent from the place he left it, he has made a prima facie case of theft. The law raises a rebuttable presumption that the taking was with intent to steal the same.

Whisler v Ins. Co., 224-201; 276 NW 606

Intoxication subsequent to automobile theft—inadmissibility. Exclusion of evidence offered by an insurance company, in an effort to escape liability on a theft policy, as to a thief's intoxicated condition an hour after the alleged theft of motor vehicles, as bearing on his condition at the time of the taking, held not prejudicial.

Whisler v Ins. Co., 224-201; 276 NW 606

Relevancy of insured's settlement offer—inadmissibility. A letter written by plaintiff's attorney before trial offering settlement without expense of litigation is inadmissible in a trial on the merits seeking recovery on an automobile theft insurance policy.

Whisler v Ins. Co., 224-201; 276 NW 606

(g) TORNADO AND WINDSTORM INSURANCE

Notice and proof of loss. Proof of loss under a policy of insurance is all-sufficient when executed and furnished to the insurer by the insured's duly appointed receiver.

Parker v Ins. Assn., 220-262; 260 NW 844

8941 Limitation on risks.

Loss—rule for prorating. Between coinsurers, the liability of each under the standard pro rata clause is not the amount which he may pay the insured by way of settlement, but is such fractional part of the loss as the total amount of his policy bears to the total amount of all the valid and collectible coinsurance policies.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Coinsurance—solvent and insolvent insurers. Separate insurers of the same loss are coinsurers, even tho one of the insurers issued his policy at a time when the other insurers had gone into the hands of a receiver and the extent of their ability to pay losses had become problematical.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

8943 Execution of policies.

Delivery—presumption attending possession. Possession by an insured, at the time of his death, of a policy of life or accident insurance creates a presumption, born of necessity and based on the experience of mankind, that the policy was delivered to the insured as an effective instrument; and this presumption prevails until the court can say, as a matter of law, that the presumption has been conclusively negatived by other evidence.

Beggs v Ins. Co., 219-24; 257 NW 445; 95 ALR 863

8952 Commissioner as process agent.

Original notice—service—deputy commissioner may accept. Valid service of an original notice of suit against a foreign insurance company doing business in this state, is made by the act of the deputy commissioner of insurance in accepting, in writing and in the name of said commissioner, service of said notice for and on behalf of said company, tho the authority filed by the company only authorized the commissioner to accept such service.

Woodmen v Dist. Court, 219-1326; 260 NW 713; 98 ALR 1431

8958 Notes taken for insurance.

Discussion. See 15 ILR 389—Statement that note is given for insurance

"Unless". The term "unless", as employed in this section, is used in the sense of "if it be not a fact that".

Plunkett v Hopley, 208-1042; 226 NW 772

Noncollectibility. A promissory note which is given for the premium on a policy of life insurance is not void or noncollectible because such fact is not stated upon the face of the note.

Plunkett v Hopley, 208-1042; 226 NW 772

Failure to pay note—lapse of policy. A policy of insurance unqualifiedly lapses upon the failure of the insured to pay at maturity a promissory note which he has given for an annual premium, such effect being expressly provided for in the application and in the policy and in the said note, and the note clearly providing that it was not given as payment.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

8959 Forfeiture of policies—notice.

Applicability. The statute requiring the insurer to give 30 days notice of his purpose to forfeit a policy for the nonpayment of a premium applies to a policy of accident insurance which specifies no exact date for the payment of the premium.

Ragan v Ins. Co., 209-1075; 229 NW 702

Dual statutes governing. Cancellation of an insurance policy for nonpayment of premium is governed by this section; other cancellations by §9018, par. XI, C., '31.

Ryerson v Ins. Co., 213-524; 239 NW 64

Reciprocal insurance contracts not controlled by general statutes. The specific provisions of an application for a policy of reciprocal insurance, of which provisions the applicant had notice, to the effect that the policy will not be in force, (1) until the application is approved by the insurer, and (2) until the premium is paid, cannot be waived by the insurer's agent entering into a different arrangement relative to said acceptance and payment of premium; this section and section 9004, C., '31, relative to the power of agents, not being applicable to reciprocal insurance contracts.

Gisin v Ins. Exch., 219-1373; 261 NW 618

Nonapplicable procedure. The procedure for the forfeiture or suspension of a nonmutual fire insurance policy of insurance is not applicable to policies issued by mutual assessment companies. (Ch. 406, C., '27.)

Hart v Ins. Assn., 208-1020; 226 NW 777

Nonstatutory cancellation of policy. A reciprocal or interinsurance policy of insurance is effectively canceled by complying with the contract method for cancellation even tho such method is materially different than the statutory method provided by this section, because this section does not apply to such policies.

Schmid v Underwriters, 215-170; 244 NW 729

Attempted cancellation contrary to bylaws. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter", and which in its attempt to cancel a policy ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insured, and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insured are of equal probative force; therefore, the insurer has not established the receipt of said notice by the insured.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Ipso facto lapse of policy. Under an ordinary life insurance policy, a provision that default in payment of a premium shall forfeit the policy requires no formal notice of forfeiture in case of such default.

Rogers v Ins. Co., 204-804; 213 NW 757

Failure to pay illegal assessment—nonforfeiture. An assessment on the policyholders of a mutual insurance association, made by the board of directors at a duly called meeting, is not a legal assessment and no forfeiture of a policy can be based on the nonpayment of such assessment, when the articles of incorporation provide that an executive committee consisting of the president, vice president, secretary, and treasurer shall meet quarterly (and specially on call of the president) and make all assessments; and this is true even tho all said officers were present at said directors' meeting but as directors.

Maasdam v Ins. Assn., 222-162; 268 NW 491

Nonpayment of premium. An insured will not be deemed in default in the payment of premiums at the time of his death (1) when the premium is payable in installments, (2) when no specified date is fixed for payment, (3) when the policy provides that the payment of an installment shall continue the policy in force for a stated time, and (4) when the insured dies prior to the expiration of said stated time after the last payment; and this is true tho the premiums earned exceed the premiums paid.

Ragan v Ins. Co., 209-1075; 229 NW 702

Failure to pay premium—effect. A combined life and accident policy of insurance becomes void in accordance with its terms, to wit: "on failure to pay the premium at maturity", without any notice from the insurer that the premium is due or when it will be due. In other words, this section, as supplemented by section 8673, C., '31, has no application to such a policy.

Wall v Ins. Co., 217-1106; 253 NW 46

See Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Premiums—payment mailed—nonreceipt—jury question. Evidence that an insurance premium had been mailed, against a claim of nonreceipt by the company, raises a jury question, especially when the company admits that in its office routine it made no note of the con-

tents of envelopes until after they had passed through the hands of several clerks.

Wood v Ins. Co., 224-179; 277 NW 241

Premium—application of dividends. An insured is not entitled to notice from the insurer as to the amount of dividends due under the policy in order to determine how much cash, in addition, is necessary to pay his premium when, under the policy, the condition does not yet exist under which he would have the right to apply the dividends on the premium.

Wall v Ins. Co., 217-1106; 253 NW 46

Belated receipt of check—effect. Under a policy providing that the nonpayment of a premium shall forfeit the policy, but that the insured may be reinstated, the receipt by the insurer through the mail, long after the maturity of a premium, of insured's check for the premium does not constitute payment when the insurer promptly replied by mail that the insured must first be reinstated, and when, without effort to collect the check, the insurer made proper tender thereof; and it matters not that the insured died before the insurer's letter reached him.

Rogers v Ins. Co., 204-804; 213 NW 757

Ineffectual notice. A policy of fire insurance, silent as to the post-office address of the insured, is not canceled, for nonpayment of a premium note, by a registered notice of cancellation addressed to the insured at the post-office address employed in dating the policy, when such place had never been the post-office address of the insured, and when, owing to no fault of the insured, said notice was never delivered to him; and this is true tho the postal authorities forwarded said mail matter to the post office through which the insured received mail by rural delivery.

Ryerson v Ins. Co., 213-524; 239 NW 64

Fatally defective notice. A notice of forfeiture of a policy of insurance for nonpayment of a premium note is fatally defective when it infers that the payment of the customary short rates is necessary if the insured wished to cancel the policy, but wholly fails to state the amount of such rates; and this is true even tho at said time the unearned premium is less in amount than the sum already paid by the insured.

Nolte v Ins. Co., 208-716; 224 NW 50

Proof of loss—waiver by denying liability. A life insurance company's denial of liability, on grounds other than failure to furnish proofs of loss, is a waiver of their right to require proofs, if the policy was in force and proofs could have been furnished at the time of such denial, but insured, relying on the company's notice, believed the policy had lapsed.

Wood v Ins. Co., 224-179; 277 NW 241

Suspension of policy—waiver—effect. Conceding, arguendo, that the levy of an assessment on a policy of insurance worked a waiver of the suspension of the policy for nonpayment of a prior assessment, yet such waiver becomes immaterial when the policy is legally suspended for nonpayment of the last assessment.

Hart v Ins. Assn., 208-1020; 226 NW 777

8960 Cancellation of policy.

Mutual cancellation by parties—policy method not exclusive. An insurance policy may be canceled by mutual consent of the parties, without resorting to the method provided in the policy.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Unallowable in equity. Equity will not, after the death of the insured in a life insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

Agent's cancellation of policy—nonconsenting insured unaffected. Under an agreed statement of facts tried to the court, an insured, by transferring his insurance from one company to another at the former's request, cannot, as a matter of law, be said to have mutually consented that his first insurance be canceled before he received his insurance from the second company, when there is evidence he contemplated continued protection, altho the agent for both companies notified the first to cancel as of a certain date, which was before the second policy was issued and before a loss occurred.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Hail insurance—failure to read settlement—cancellation—nonestoppel. An insurer may not cancel a hail insurance policy nor avoid payment for a second hail loss by predicating an estoppel upon the negligent failure of the insured to read a written settlement where the insured reposed confidence in the agent who, on a busy threshing day, negotiated the settlement for the first hail damage and then added a policy cancellation clause not discussed in settlement.

Conrad v Ins. Assn., 223-828; 273 NW 913

Cancellation—burden of proof on insurer. The burden of proving cancellation of a fire insurance policy is on the insurer who denies liability thereunder.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Notice and proof of loss—waiver by cancellation. An insurer who, after a loss occurs, assumes to cancel the policy, and denies all li-

ability, waives his right to formal notice and proofs of loss.

Parker v Ins. Assn., 220-262; 260 NW 844

Unearned premiums—establishment against trust fund. A policyholder who has actually paid the premium under an Iowa standard form of insurance policy has a right, upon the insolvency of the company, and upon the conceded cancellation of the policy by the appointment of a permanent receiver, to have his claim for unearned premiums established against a trust fund which has been created "for the protection of policyholders".

State v Cas. Co., 206-988; 221 NW 585

8964 Examination—dissolution.

Consolidation—right of creditors. Where a domestic consolidated insurance company unconditionally assumed the obligations of both a domestic and a foreign company, and where the courts of the foreign state ordered that certain assets of the foreign company be administered on by receivership proceedings in said foreign state, the creditors of the foreign company have the right, after establishing their claims in the foreign receivership and being paid a percentage of their claims, to establish the balance of their claims against the assets in the hands of the domestic consolidated company (it having become insolvent) even tho a portion of said assets consists of a trust fund originally deposited with the state by the original domestic company "for the protection of its policyholders"; but dividends must be equalized by the domestic receiver among all creditors of the same class.

State v Cas. Co., 213-200; 238 NW 726

Unearned premiums—establishment against trust fund. A policyholder who has actually paid the premium under an Iowa standard-form-of-insurance policy has a right, upon the insolvency of the company, and upon the conceded cancellation of the policy by the appointment of a permanent receiver, to have his claim for unearned premiums established against a trust fund which has been created "for the protection of policyholders".

State v Cas. Co., 206-988; 221 NW 585

8974 Copy of application—duty to attach.

Attaching copy of premium note—insufficiency. A premium note for $100 which does not show the policy number is not a true copy of a premium note for $128 which does show the policy number, even tho the maker of the note was entitled to and was given a credit on the note for $28.

Nolte v Ins. Co., 208-716; 224 NW 50

Unauthorized mortgage. A standard fire insurance policy is wholly voided as to a subject matter therein covered by the policy, if said subject matter is, subsequent to the issuance of the policy, voluntarily mortgaged by the insured without the consent of the insurer; and in such case it is quite immaterial that the insured made no formal, written application for the policy.

Greco v Ins. Co., 219-150; 257 NW 201

8975 Failure to attach—effect.

Application—failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

Misrepresentation—when unallowable as a defense. False and fraudulent representations on the part of an insured, in his original application for a policy of insurance, are not available as a defense to an action on the policy, when the policy provides that it is incontestable except as provided in named paragraphs which, on examination, reveal no grounds of contest whatever, but only matters of which the insurer could avail himself in the enforcement of the contract.

Wilson v Ins. Co., 220-321; 262 NW 525

8976 Presumption as to value.

See annotations under §9018

8977 Value of building—liability.

See annotations under §9018

8978 Prima facie right of recovery.

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that

"no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e. g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Hail insurance—failure to read settlement—cancellation—nonestoppel. An insurer may not cancel a hail insurance policy nor avoid payment for a second hail loss by predicating an estoppel upon the negligent failure of the insured to read a written settlement where the insured reposed confidence in the agent who, on a busy threshing day, negotiated the settlement for the first hail damage and then added a policy cancellation clause not discussed in settlement.

Conrad v Ins. Assn., 223-828; 273 NW 913

Notice and proof of loss—"as soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

Notice by receiver adequate. Proof of loss under a policy of insurance is all-sufficient when executed and furnished to the insurer by the insured's duly appointed receiver.

Parker v Ins. Assn., 220-262; 260 NW 844

Mental incapacity to furnish proofs—effect. A clear and unequivocal contract that an insured shall furnish due proofs of disability, as a condition precedent to the attaching of any liability on the part of the insurer, must be construed as assuming mental and physical capacity to furnish the proofs when due. It follows that the furnishing of such proofs will be excused if, when the disability occurs, and the policy is in force, the insured is insane, and, therefore, wholly unable to furnish said proofs.

McCoy v Ins. Co., 219-514; 258 NW 320

Insufficient proof. The letter of an insured to an insurer may not be deemed to constitute proof of loss when there is no evidence that insured so intended the letter, and, on the contrary, inquired therein as to what proof he should make.

Woodard v Ins. Co., 201-378; 207 NW 351

Proofs of loss—waiver. Statutory proof of loss need not be furnished by an insured when the policy provides a definite and ample scheme for determining the actual loss, and the insured complies therewith.

Glandon v Ins. Assn., 207-1068; 224 NW 65

Waiver. The act of an insurer in receiving and taking under advisement proofs of loss after the time for filing such proofs had expired may, with other facts of an equivocal nature, constitute a waiver by the insurer of formal, timely filing of such proofs.

Jack v Ins. Assn., 205-1294; 217 NW 816

Insufficient waiver. The letter of an insured to an insurer, making inquiry as to what proof of loss he should make, and the letter of the insurer in reply, in which the insured is referred to the requirements of the policy, will not constitute a waiver of proof of loss, the insured not claiming that he was misled by the correspondence, or that he in any manner changed his position by reason thereof.

Woodard v Ins. Co., 201-378; 207 NW 351

Waiver—sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

Waiver—declaration of apparent adjuster. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver by denying liability. An insurer who, after a loss occurs, assumes to cancel the policy, and denies all liability, waives his right to formal notice and proofs of loss.

Parker v Ins. Assn., 220-262; 260 NW 844

Denial of liability as waiver. A denial by the insurer of all liability under a policy of insurance operates as a waiver of notice and proof of loss.

Green v Ins. Co., 218-1131; 253 NW 36

Nonexcuse for failure to give. The requirement of a statutory form of fire insurance policy that proof of loss shall be given in a specified time and manner is not abrogated by a statute which declares that the policy shall be deemed a valued policy,—that is, a policy on which, in case of loss, the entire amount of the policy is collectible.

Woodard v Ins. Co., 201-378; 207 NW 351

Delay—effect. Even tho it be conceded that particular facts and circumstances may excuse delay on the part of an insured policyholder in making proofs of loss, yet such facts and circumstances cannot excuse the total failure to make any such proofs.

Woodard v Ins. Co., 201-378; 207 NW 351

Proofs of loss—estoppel. Statements of fact in proofs of loss are rebuttable so long as the insurer has not acted thereon.

Harrington v Surety Co., 206-925; 221 NW 577

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Affidavit of fact—waiver. Failure of an insured to accompany his notice of loss with an affidavit as to the facts of loss becomes quite immaterial if the insurer waives such affidavit.

Stoner v Ins. Co., 215-665; 246 NW 615

Waiver—jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

Pleading — construction. Answer held to plead properly the total failure of an insured to furnish proofs of loss.

Woodard v Ins. Co., 201-378; 207 NW 351

Forfeiture of policy for breach of condition subsequent—burden of proof. The grantee of property insured under a statutory, standard policy of fire insurance (§9018, C., '35) and the assignee of said policy, before loss, has the burden, in an action on the policy in his own behalf, to prove that said conveyance of the property and assignment of the policy were consented to or acquiesced in by the insurer thru some agent of the insurer who had authority so to consent or acquiesce.

Stoner v Ins. Co., 220-984; 263 NW 46

Incendiary fire—jury question. Circumstantial evidence reviewed at length, and held to present a jury question both, (1) on the incendiary nature of a fire, and (2) on the insured's connection therewith.

Natalini v Ins. Co., 219-806; 259 NW 577

8979 Proofs of loss of personal property.

Proofs of loss—estoppel. Statements of fact in proofs of loss are rebuttable so long as the insurer has not acted thereon.

Harrington v Surety Co., 206-925; 221 NW 577

Proofs—estoppel. An insurer may not complain that proofs of loss were fatally lacking in definiteness when the proofs were on a blank furnished by the insurer and were in compliance with such blank.

Elmore v Surety Co., 207-872; 224 NW 32

Waiver. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Waiver. The act of the insurer in examining the insured premises after loss and thereupon denying all liability, constitutes a waiver of proofs of loss, even tho the insurer makes an offer of settlement.

Lee v Ins. Assn., 214-932; 241 NW 403

Waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

Offer and acceptance—effect. An agreement of settlement of a loss under a policy of insurance, consummated thru an offer by the insured in his proofs of loss, and by an acceptance of the offer by the insurer, and relied and acted on by the latter, is conclusive on the parties in the absence of fraud or mistake.

Williams v Ins. Assn., 204-991; 216 NW 269

Waiver—pleading. Waiver of proofs of loss is sufficiently presented by pleading the facts constituting waiver, even tho the pleader does not allege the legal conclusion of waiver; and especially so when the pleadings are unquestioned in the trial court.

Lee v Ins. Assn., 214-932; 241 NW 403

Sufficiency of proofs. Proofs of loss held sufficient; also the manner in which accounts of loss were kept even tho not wholly accurate.

Hansell v Ins. Assn., 209-378; 228 NW 88

8980 Invalidating stipulations—avoidance.

Transfer of property. In equitable action against mutual insurance association where defendant admitted that property in question was

insured under a fire policy, defendant's contention that a certain transfer of the property had invalidated the policy, having not been pleaded as a special defense, was not in issue under the pleadings.

Webber v Ins. Assn., 227-793; 288 NW 868

Change of title. A conveyance, without consideration, by a husband to his wife of a stock of insured goods with the intent to place the goods beyond the reach of his apprehended creditors, without any actual change of possession or use taking place, followed later by a reconveyance, without consideration, by the wife to the husband, constitutes no such change in the interest or title of the insured as will void the policy, the wife never having had any financial interest in the property.

McVay v Ins. Co., 218-402; 252 NW 548

Change in location—negligence. An insurer may estop himself from pleading nonliability on the policy, because of a change in location of the insured property, by negligently delaying (until after the fire, and after an authorized and favorable examination) the execution of the written consent to such change in location.

Bemisdarfer v Ins. Assn., 217-770; 252 NW 551

Concealment of unrecorded mortgage. The concealment by the insured, in his application for fire insurance on property, of the existence of an unrecorded mortgage on the property, of which mortgage the insurer had no knowledge, is fatal to recovery on the policy in case of loss.

Moore v Ins. Assn., 221-953; 266 NW 12

Knowledge of insurer and agent—effect. A statement in an application for crop insurance to the effect that applicant has "full interest in the crop" when his only interest was in the cash rentals due him as a landlord, furnishes no basis for avoiding liability when both the insurer and its agent had full knowledge, from a prior application which was in their possession, that applicant's interest was that of landlord only.

Boever v Ins. Co., 221-566; 266 NW 276

Waiver. Forfeiture clauses and conditions against transfer of title, encumbrance, and assignment of policies are for the protection of the insurance company against increase of hazard without their knowledge and consent, and therefore may be waived.

Webber v Ins. Assn., 227-793; 288 NW 868

Estoppel—recognizing transfer. In equitable action against a mutual insurance association to require the completion of an assignment of a policy and to recover for fire loss, the association was, under the evidence, estopped from asserting that policy was not properly assigned, where plaintiff's grantor delivered policy to office of association's secretary for purpose of having the assignment completed and where the association recognized transfer of property to plaintiff and his ownership in the policy by mailing to him a notice of assessment thereon.

Webber v Ins. Assn., 227-793; 288 NW 868

Condition subsequent—burden of proof. In an action on a policy of fire insurance which excepts loss "by theft or neglect", the burden to establish the theft or neglect is on the insurer.

Hall v Ins. Co., 217-1005; 252 NW 763

8981 Conditions invalidating policy.

Conditions invalidating fire insurance. See under §9018

Strict construction required. Principle applied that forfeiture provisions in a policy of insurance must be strictly construed against the insurer.

Kiser v Ins. Assn., 216-928; 249 NW 753

Sale—what constitutes. A policy provision to the effect that any "selling or transferring" of the insured property shall, in the absence of a specified notice to the insurer "after transfer of the property", automatically cancel the insurance is not violated by the mere execution of a contract of sale of said property providing for delivery of possession at a specified future date—the loss occurring prior to said date.

Kiser v Ins. Assn., 216-928; 249 NW 753

Sale and assignment of policy—consent of insurer. The grantee of property insured under a statutory, standard policy of fire insurance (§9018, C., '35) and the assignee of said policy, before loss, has the burden, in an action on the policy in his own behalf, to prove that said conveyance of the property and assignment of the policy were consented to or acquiesced in by the insurer through some agent of the insurer who had authority so to consent or acquiesce.

Stoner v Ins. Co., 220-984; 263 NW 46

Sale by partner—effect. Assuming that one partner has no authority to sell the partnership property without the consent of the other partner, and thereby invalidate the insurance, yet where such sale was not rescinded it must necessarily be deemed a legally completed sale.

Larsen & Son v Ins. Co., 212-943; 237 NW 468

Appointment of receiver not "sale". The appointment of a receiver of the property of an insured, and the possession of the property by the receiver, does not constitute a "sale" of the property within the meaning of a clause invalidating the policy in case of a sale.

Parker v Ins. Assn., 220-262; 260 NW 844

Assignment after loss—effect. The assignment of a policy after loss, without the consent of the insurer, does not invalidate a policy

under the usual policy provision prohibiting assignments.

Parker v Ins. Assn., 220-262; 260 NW 844

Misrepresentation—mortgages. A truthful representation in an application for insurance as to the mortgages existing on the specifically described land on which the insured building is located, is not rendered a misrepresentation by showing the existence of other mortgages on other and separately described tracts on the same farm.

Hart v Ins. Assn., 208-1030; 226 NW 781

Failure to reveal mortgages when not asked. A policy of insurance is not invalidated because the insured did not, in his written application, reveal the existence of mortgages on the property when he was not questioned concerning the mortgages.

Parker v Ins. Assn., 220-262; 260 NW 844

Recordation of mortgage—effect. The due recordation of a mortgage on insured property does not, in and of itself, carry to the insurer any notice or knowledge which can thereafter have any bearing on the acceptance of premiums on the insurance.

Hart v Ins. Assn., 208-1030; 226 NW 781

Renewal of mortgage. As to how far an insured may go in allowing interest and taxes to accumulate on a mortgage and in executing a new mortgage in renewal of the old mortgage without thereby increasing the hazard of carrying the insurance and avoiding the policy, quaere.

Hart v Ins. Assn., 208-1030; 226 NW 781

Renewing existing mortgage — burden of proof. A policyholder who claims that a mortgage executed on the insured property subsequent to the issuance of the policy was but a renewal of a smaller mortgage mentioned in the application for insurance must, in his evidence, so account for the increased amount of the mortgage as to show that there was no increase of hazard in carrying the insurance.

Hart v Ins. Assn., 208-1030; 226 NW 781

Company knowledge of automobile conditional sale. Where claim is made against an automobile insurance company under the collision clause of a policy transferred from one automobile to another on which a conditional sale is outstanding, knowledge of which conditional sale is denied by the company, instructions reviewed and held to properly submit question of company's knowledge and waiver of the conditional sale lien.

Mougin v Ins. Assn., 224-1202; 278 NW 336

Increase of hazard. The provision of a fire insurance policy providing invalidation "if there be a change in the occupancy or use of the property, making the risk more hazardous", is not violated if the building becomes vacant and the hazard is thereby increased.

Danels v Ins. Assn., 213-352; 239 NW 24

Insurable interest—right to redeem from foreclosure. A mortgagor's insurable interest in the mortgaged property does not terminate until the period for redemption has expired.

Parker v Ins. Assn., 220-262; 260 NW 844

Waiver. Forfeiture clauses and conditions against transfer of title, encumbrance, and assignment of policies are for the protection of the insurance company against increase of hazard without their knowledge and consent, and therefore may be waived.

Webber v Ins. Assn., 227-793; 288 NW 868

Estoppel, waiver, or agreement affecting right to forfeit policy. The retention by an insurer of the unearned premium paid on a fire insurance policy does not estop the insurer from pleading the invalidity of the policy consequent on the sale of the insured property and the assignment of the policy before loss without the knowledge of the insurer, when such knowledge came to the insurer only after loss had occurred.

Stoner v Ins. Co., 220-984; 263 NW 46

Estoppel—recognizing transfer. In equitable action against a mutual insurance association to require the completion of an assignment of a policy and to recover for fire loss, the association was, under the evidence, estopped from asserting that policy was not properly assigned, where plaintiff's grantor delivered policy to office of association's secretary for purpose of having the assignment completed and where the association recognized transfer of property to plaintiff and his ownership in the policy by mailing to him a notice of assessment thereon.

Webber v Ins. Assn., 227-793; 288 NW 868

Cancellation in equity. Equity will not, after a claim has arisen on an insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer.

Bankers Life v Bennett, 220-922; 263 NW 44

Invalidating conditions—specially pleaded. In equitable action against mutual insurance association where defendant admitted that property in question was insured under a fire policy, defendant's contention that a certain transfer of the property had invalidated the policy, having not been pleaded as a special defense, was not in issue under the pleadings.

Webber v Ins. Assn., 227-793; 288 NW 868

8982 Arbitration agreements.

Agreement for appraisal. See under §8976, Vol I

Optional arbitration—nonpremature action. When the provision for arbitration in a policy of insurance is purely optional, an action on the policy, brought immediately after the arbitrators have failed to agree as to the loss, is not premature even tho the bylaws provide that the loss is not payable until 30 days after the arbitrators have rendered their decision.

Hansell v Ins. Assn., 209-378; 228 NW 88

Inadequate award — fraud — effect. Equity will vacate a grossly inadequate award by arbitrators, especially when an element of fraud exists in the appointment and proceedings of the arbitrators.

Koopman v Ins. Assn., 209-958; 229 NW 221

8983 Right to rebuild.

Election to rebuild — effect. Principle reaffirmed that an insurer converts a fire insurance policy into a building contract by electing, under the policy, to rebuild the damaged property.

Cocklin v Ins. Assn., 207-4; 222 NW 368

Default in rebuilding—measure of damages. An insurer who elects to rebuild a fire-damaged building, and so substantially fails to restore the building to its condition just prior to the fire that the insured must tear down and rebuild the structure, must respond in damages to the extent of the difference between the value of the structure before the fire and its value as defectively reconstructed; but the insurer may not, in addition, be mulcted in damages for loss of rentals.

Cocklin v Ins. Assn., 207-4; 222 NW 368

Substantial replacement—evidence. On the issue whether an insurance company, in rebuilding a fire-damaged building, had substantially restored it to the condition existing before the fire, evidence of the condition of the building just prior to the fire is manifestly material.

Cocklin v Ins. Assn., 207-4; 222 NW 368

8984 Pleadings.

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

8986 Notice and proof of loss—limitation of actions.

Contract limitations — unreasonableness. A provision in a contract of insurance which prohibits the bringing of an action earlier than 60 days or later than 90 days after loss is unreasonable per se and void.

Page Co. v Deposit Co., 205-798; 216 NW 957

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e. g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Nonpremature action. An action brought some 11 months after loss is not premature when the insurer has by his conduct waived proofs of loss.

Lee v Ins. Assn., 214-932; 241 NW 403

Notice and proof of loss—"as soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

Notice and proof of loss — waiver. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Waiver. The act of the insurer in examining the insured premises after loss and thereupon denying all liability, constitutes a waiver of proofs of loss, even tho the insurer makes an offer of settlement.

Lee v Ins. Assn., 214-932; 241 NW 403

Waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Larsen & Son v Ins. Co., 212-943; 237 NW 468
Richardson v Ins. Assn., 214-30; 241 NW 414

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver—pleading. Waiver of proofs of loss is sufficiently presented by pleading the facts constituting waiver, even tho the pleader does not allege the legal conclusion of waiver; and especially so when the pleadings are unquestioned in the trial court.

Lee v Ins. Assn., 214-932; 241 NW 403

Waiver — sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

Waiver — jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

Delay in pleading—abatement. Defendant's right to plead in abatement is wholly lost when delayed until the plaintiff might legally have brought his action.

Larsen & Son v Ins. Co., 212-943; 237 NW 468

8994 Signing of rider.

Unsigned rider. A coinsurance rider which is not signed by the insured is a nullity though it is attached to the policy.

Neiman v Ins. Co., 202-1172; 211 NW 710

8996 Stipulation as to prorating.

Proration of fire losses. See under §9018 (XVI)

Burden of proof on insurer to show right to prorate.

Cole v Ins. Co., 201-979; 205 NW 3

Accident insurance—death benefit not proratable. A death benefit is not proratable, under a policy of accident insurance against death, specified injuries, loss of time, surgeon's fees, etc., which contains a clause (violated by the insured) that, if the insured, without written notice to the insurer, carry other insurance in other companies, covering the same loss, the insurer "shall be liable only for such portion of the indemnity promised as said indemnity bears to the total amount of like indemnity in all policies covering such loss".

Wahl v Acc. Assn., 201-1355; 207 NW 395; 50 ALR 1374

Accident insurance — prorating clause — "same loss" negatively defined. Divers accident insurance policies issued to the same insured may not be deemed to cover the "same loss", within the meaning of an attempted prorating clause concerning death benefits, when the recipients of said benefits under each policy are different from the recipients under any other policy.

Wahl v Acc. Assn., 201-1355; 207 NW 395; 50 ALR 1374

9002 "Soliciting agent" defined.

Implied authority. The act of an insurance company at its policy-issuing office, and in response to the request of its soliciting agent, in attaching a "loss payable" clause to a theretofore issued policy of fire insurance, and in returning said policy to its said agent with said clause unsigned, impliedly authorizes said agent to sign said clause on behalf of said insurer.

Stoner v Ins. Co., 220-984; 263 NW 46

Authority of agent—burden. Plaintiff as the assignee before loss of a policy of fire insurance has the burden, in case of loss and action on the policy, to show that the insurer consented to the assignment. If the consent is in the form of a writing signed by a purported agent of the insurer said assignee must show the agent's authority. Of course, the insurer may negative such showing of authority.

Stoner v Ins. Co., 215-665; 246 NW 615

Authority—evidence. Evidence held to show that the authority of an agent ceased upon the delivery of a policy, and that his subsequent knowledge of the execution of a mortgage on the insured premises would not be imputed to the insurer.

Hart v Ins. Assn., 208-1030; 226 NW 781

Knowledge of agent. The knowledge of a soliciting agent that the insured understood

that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Agents—imputable and nonimputable knowledge. Knowledge on the part of a mere soliciting agent of an insurance company is imputable to his principal when such knowledge is acquired in connection with an application for insurance. Knowledge acquired by such agent subsequent to the issuance of the policy, and relative to an act which invalidates the policy, is not so imputable.

Green v Ins. Co., 215-1220; 247 NW 660

Nonimputed knowledge and promises. The knowledge and promises of an agent employed, paid by, and working for a general agent of an insurance company, with no authority except to solicit insurance for his principal, the general agent, may not be imputed to the insurance company.

Neiman v Ins. Co., 205-119; 217 NW 258

When knowledge imputed to insurer. The information imparted to the soliciting agent of an insurer by the applicant for insurance, as to the particular kind of insurance required by the applicant, will be imputed to the insurer.

Green v Ins. Co., 218-1131; 253 NW 36

Removal of property to new location. A standard policy of insurance on personal property at a specified location, issued in strict accord with the application for such insurance, does not cover a loss of the same property at another location to which it is removed without the consent of the insurer; and testimony that the soliciting agent through whom the policy was obtained orally promised that he would have the policy so issued as to cover the property at either location is wholly inadmissible.

Garton v Ins. Co., 215-1213; 247 NW 639

Sale and assignment of policy—consent of insurer. The grantee of property insured under a statutory, standard policy of fire insurance (§9018, C., '35) and the assignee of said policy, before loss, has the burden, in an action on the policy in his own behalf, to prove that said conveyance of the property and assignment of the policy were consented to or acquiesced in by the insurer through some agent of the insurer who had authority so to consent or acquiesce.

Stoner v Ins. Co., 220-984; 263 NW 46

Extending period for insurance. A recording or policy-issuing agent has authority to agree to an extension of the life of a policy, as written, in order to cover an additional period equal to that during which the insurer claimed the policy stood suspended and for which the insured had paid the premium.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Oral application. An oral application for additional insurance under an existing policy and the payment of the premium for such additional insurance to an agent whose authority is limited to the taking and forwarding of applications do not render the additional insurance effective until the insurer in the orderly and timely course of its business approves the said application.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

9003 Agent—general definition.

License—admissibility. The written request of an insurance company to the commissioner of insurance for a license for a named agent "to transact its authorized business" is admissible for the purpose of showing that said person was the company's agent, but not for the purpose of showing the scope of the powers of such agent.

Stoner v Ins. Co., 218-720; 253 NW 821

9004 Agent—specific definition.

Oral contract—authority. The statutory provision that a soliciting agent of an insurer shall be deemed to have authority to transact all business within the scope of his employment, does not render the insurer liable on an oral contract which said agent, in fact, had no authority to make.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Oral contract—implied authority of agent. An insurance company which, in the issuance of policies against loss by hail, customarily dates said policies from the date of the insured's written application therefor, and not from the date of the acceptance by the company of such applications, must, notwithstanding provisions in said applications to the contrary, be deemed to have impliedly authorized its soliciting agents, on taking such applications, to validly enter into oral, preliminary contracts of insurance covering the period from the date of said applications to the date of their acceptance or rejection.

Boever v Ins. Co., 221-566; 266 NW 276

Assignment of policy—notice to company—consent. Where owner transferred insured property and fire policy to trustee for creditors, the insurance company was not liable to trustee for fire loss on mere notice to insurer of change of ownership, and while the insurance company may consent to carry risk notwithstanding change of ownership or may waive right to assert forfeiture of its policy, its soliciting agent is not authorized to waive terms or conditions of policy, and insurance company must consent to assignment of policy to be liable for loss.

Neiman v Ins. Co., (NOR); 215 NW 244

Effect of agent's mistake or negligence. In negotiations an insured may ordinarily rely

upon the integrity of the agent and the insurer cannot take advantage of mistakes or the negligence of its agent not involving fraud or bad faith on the part of the insured.

Conrad v Ins. Assn., 223-828; 273 NW 913

Failure to repudiate unauthorized act. An insurer is bound by the unauthorized act of his agent when he fails to repudiate such act promptly when it comes to his knowledge, and permits and invites the insured to act upon the assumption that the policy is in force.

Terry v Ins. Co., 202-1291; 211 NW 716

Estoppel to dispute power of agent. An insurance company estops itself from asserting that its agent is other than a recording or policy-issuing agent when it furnishes the agent with all blanks and supplies necessary for the actual execution and issuance by him of policies and otherwise recognizes his broad powers, and when a policyholder has relied on the agreement and representation of said agent.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Authority to waive policy provisions. An insurer which permits its agents to issue a policy in the name of the insurer, to collect the premiums, and to attach riders to the policy, under which it claims advantages, may not say that said agent did not have authority to waive policy provisions.

Neiman v Ins. Co., 202-1172; 211 NW 710

Waiver—declaration of apparent adjuster. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver per se. Whether an insurance company has waived the unauthorized act of its agent becomes a question of law, on nonconflicting testimony.

Terry v Ins. Co., 202-1291; 211 NW 716

Waiver—jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

Enlarged power—jury question. Record reviewed and held to present a jury question whether an insurance company had held out its purported soliciting agent as really having the powers of a recording agent.

Stoner v Ins. Co., 218-720; 253 NW 821

Nonimputed knowledge and promises. The knowledge and promises of an agent employed, paid by, and working for, a general agent of an insurance company, with no authority except to solicit insurance for the general agent, may not be imputed to the insurance company.

Neiman v Ins. Co., 205-119; 217 NW 258

Dual agency—effect. In an action on a policy, a defensive plea that the agent who issued the policy was, without the knowledge of the insurer, interested in the property insured, becomes quite immaterial when it appears that, subsequent to the issuance of the policy and at a time when the issuing agent had been discharged, the insured, for a new consideration, materially modified the contract.

Hawkeye Works v Ins. Co., 202-1270; 211 NW 860

Reciprocal insurance contracts. The specific provisions of an application for a policy of reciprocal insurance, of which provisions the applicant had notice, to the effect that the policy will not be in force, (1) until the application is approved by the insurer, and (2) until the premium is paid, cannot be waived by the insurer's agent entering into a different arrangement relative to said acceptance and payment of premium; §8959 with reference to the procedure in case of nonpayment of premiums and this section not being applicable to reciprocal insurance contracts.

Gisin v Ins. Exch., 219-1373; 261 NW 618

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent, nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to examine claimants and to report as to accidental injuries received by claimants—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had

done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

9018 Form of standard policy.

ANALYSIS

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Proof of loss—other insurance. See under §§8774, 8775, 8978, 8979, 8986

I PAR. I OF POLICY

(a) FIRE INSURANCE IN GENERAL

Construction of policy—construction against insurer. Principle reaffirmed that an insurance policy will, speaking generally, be construed most favorably to the insured.

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Ambiguous language — construction. Ambiguous language employed in an insurance policy must be construed most strongly against the insurer and in favor of the beneficiary of the policy.

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

Parker v Ins. Assn., 220-262; 260 NW 844

Burning of property by insured—effect on loss-payable clause of mortgage. A condition in a policy of fire insurance that the insurer shall not be liable for loss caused by the design of the insured applies to a mortgagee and prevents recovery by him when his loss-payable clause is made subject to all the conditions of the policy, and when the insured designedly sets fire to the buildings and destroys them.

Carlile v Ins. Assn., 218-248; 254 NW 805

Incendiary fire—jury question. Circumstantial evidence reviewed at length, and held to present a jury question both, (1) on the incendiary nature of a fire, and (2) on the insured's connection therewith.

Natalini v Ins. Co., 219-806; 259 NW 577

"Friendly fires." Insurance against loss and damage "by fire" does not cover loss and damage to eggs consequent on the wick of an oil heating stove in the storage room burning too high, and thereby throwing off a quantity of smoke and soot, and generating excess heat in the storage room—nothing in the room being burned except said wick.

Sigourney Prod. Co. v Ins. Co., 211-1203; 235 NW 284

Waiver of conditions generally. Forfeiture clauses and conditions against transfer of title, encumbrance, and assignment of policies are for the protection of the insurance company against increase of hazard without their knowledge and consent, and therefore may be waived.

Webber v Ins. Assn., 227-793; 288 NW 868

Details of conversation—legal limits. Details of a conversation between the soliciting agent of an insurance company and the insured, after the issuance of the policy, with reference to a letter to be written by the agent

I PAR. I OF POLICY—concluded

(a) FIRE INSURANCE IN GENERAL—concluded

to the company concerning a loss, are not competent when they extend beyond reference to the subject-matter of the letter.

Miller v Fire Assn., 219-689; 259 NW 572

Right to proceeds—sheriff's deed holder. A second mortgagee who forecloses, and, after redeeming from a first mortgage foreclosure, takes a sheriff's deed, is entitled to the proceeds of a fire insurance policy taken out by the mortgagor for the benefit of the first mortgagee; and this is true even tho the fire occurred during the period for redemption from the second mortgage.

In re Hackbart, 203-763; 210 NW 544; 52 ALR 895

Right to proceeds—title holder (?) or mortgagee (?). A title holder who, for his own personal protection, and at his own expense, takes out insurance, and who is in no manner a party to a mortgage on the premises, except that he has, by deed in escrow, conveyed the property to the mortgagee, on condition that the deed be surrendered to him if he pays the mortgage by a named date, is entitled, in case of loss prior to said named date, to the proceeds of the policy, even tho, subsequent to the loss, he fails to pay the mortgage, and thereby loses the property to the mortgagee.

Canavan v Coleman, 204-901; 216 NW 292

Application of proceeds. The proceeds of fire insurance under a policy payable to the vendor and purchaser of real estate, "as their interests may appear", is not payable to the vendor when, at the time of the loss, the purchaser is in no manner in default on his contract. Such proceeds may be impounded and utilized, on the application of the purchaser, in the rebuilding of the burned structure.

Hatch v Ins. Co., 216-860; 249 NW 164

"Real party in interest"—partial loss paid—insurer's rights. The circuit court of appeals is bound by decisions of federal court in construing a state statute, in the absence of state court's construction on similar facts, so on question of construction of statute providing for the prosecution of an action in the name of the "real party in interest" held, an insurer cannot maintain an action against a defendant causing loss for amount paid insured, after a judgment has been rendered against defendant and in favor of insured for total amount of loss less insurance received, since the right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss.

Fireman's Ins. v Bremner, 25 F 2d, 75

Negligence in issuing policy. An insurance company, even tho it be but a mutual association which resorts to assessments on its members for funds with which to pay losses "and necessary expenses", must respond in damages for its tort in negligently failing to issue a policy which had been duly contracted for.

Mortimer v Ins. Assn., 217-1246; 249 NW 405; 35 NCCA 134

(b) PROPERTY INSURED

Property covered. Under a policy which provides that it covers a stock of merchandise "consisting chiefly of groceries", it may be shown that certain articles which were not groceries were carried as part of the stock, and that such carrying was customary in like stores in the locality in question.

Larsen v Ins. Co., 212-943; 237 NW 468

Location of property—evidence. When the description of the location of insured personal property as inserted in a fire insurance policy is wholly indefinite, evidence is admissible as to the location contemplated by the parties when the policy was executed.

Hall v Ins. Co., 217-1005; 252 NW 763

(c) ADDITIONAL INSURANCE

"Additional" and "existing" insurance. A policy which stipulates for its invalidity in case the insured without permission obtains additional insurance is rendered void by the issuance of a second policy which stipulates for its invalidity in case there is existing insurance on the property, when it is made to appear that the second insurer had knowledge of the existence of the first policy when the second policy was issued.

Cornett v Ins. Assn., 208-450; 224 NW 524

Commencement of risk—oral application. An oral application for additional insurance under an existing policy and the payment of the premium for such additional insurance to an agent whose authority is limited to the taking and forwarding of applications do not render the additional insurance effective until the insurer in the orderly and timely course of its business approves the said application.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

II PAR. II OF POLICY

(a) LIABILITY LIMITED TO CASH VALUE OF PROPERTY

Fire as proximate cause of breakage. If an automobile takes fire while traveling upon the highway, and said fire is the proximate cause of the car's swerving and going into the ditch and overturning, then a policy of insurance against direct loss or damage from fire covers not only the parts of the car actually burned by the fire, but the parts of the car which were broken or injured by the overturning.

Tracy v Ins. Co., 207-1042; 222 NW 447; 1 NCCA (NS) 313, 319

Damages—evidence supporting trial court's finding. In action on fire insurance policy to recover for damages to dwelling, evidence sup-

ported trial court's finding as to amount of damages allowed.

Horn v Ins. Co., 227-1045; 290 NW 8

Water between plastered and outer walls—judicial notice of wood deterioration. It is a matter of common knowledge and one of which the court has a right to take judicial notice, that, when water is confined in a space as between the plastered and outer walls of a building where the air cannot circulate, many times the water will cause a deterioration of the lumber and sometimes cause rotting of the wood.

Horn v Ins. Co., 227-1045; 290 NW 8

(b) TIME OF PAYMENT FOR LOSS

No annotations in this volume

III PAR. III MISREPRESENTATION OR CONCEALMENT

Misrepresentation—mortgages. A truthful representation in an application for insurance as to the mortgages existing on the specifically described land on which the insured building is located, is not rendered a misrepresentation by showing the existence of other mortgages on other and separately described tracts of the same farm.

Hart v Ins. Assn., 208-1030; 226 NW 781

Concealment of unrecorded mortgage. The concealment by the insured, in his application for fire insurance on property, of the existence of an unrecorded mortgage on the property, of which mortgage the insurer had no knowledge, is fatal to recovery on the policy in case of loss.

Moore v Ins. Assn., 221-953; 266 NW 12

Knowledge of agent. The knowledge of a soliciting agent that the insured understood that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Agent—when knowledge imputed to insurer. The information imparted to the soliciting agent of an insurer by the applicant for insurance, as to the particular kind of insurance required by the applicant, will be imputed to the insurer.

Green v Ins. Co., 218-1131; 253 NW 36

Agents—imputable and nonimputable knowledge. Knowledge on the part of a mere soliciting agent of an insurance company is imputable to his principal when such knowledge is acquired in connection with an application for insurance. Knowledge acquired by such agent subsequent to the issuance of the policy, and relative to an act which invalidates the policy, is not so imputable.

Green v Ins. Co., 215-1220; 247 NW 660

IV PAR. IV OF POLICY

Discussion. See 11 ILR 73—Third party rights—fire insurance

(a) OTHER INSURANCE

Other or double insurance. The prohibition in a liability insurance policy against other or double insurance applies to additional insurance on the same interest in the same property.

Amer. Alliance Ins. v Brady Co., 101 F 2d, 144

Additional and existing insurance. A policy which stipulates for its invalidity in case the insured without permission obtains additional insurance is rendered void by the issuance of a second policy which stipulates for its invalidity in case there is existing insurance on the property, when it is made to appear that the second insurer had knowledge of the existence of the first policy when the second policy was issued.

Cornett v Ins. Assn., 208-450; 224 NW 524

Policy of insurance and contract with mortgagee—construed together. A contract by which an insurance company agreed to insure all property on which a mortgagee held mortgages, and a certificate issued by the company when a policy was issued in compliance with the contract, when both referred to an open policy, must be construed together with the open policy so that a statutory provision of the open policy preventing the insured from obtaining additional insurance on his property becomes a part of his contract of insurance.

Calendro v Ins. Co., 227-829; 289 NW 485

Insurance obtained by mortgagee—assignment to insurer when policy voided by insured—mortgage not extinguished. When an insurance company, in addition to insuring property mortgaged to a certain mortgagee, agreed that if any property owner should by any act void the insurance as to himself, the insurance company would purchase from the mortgagee the note and mortgage on the property and obtain an assignment of the mortgagee's rights against the property owner, the company's payment of the amount of a note and mortgage to the mortgagee to obtain an assignment according to the agreement did not extinguish the note and mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

Validity of policies. Where property was covered by fire insurance policy containing a clause that the policy would be void if other insurance on the property was procured, and where, after obtaining a second policy, the insured sustained a fire loss which the second company compromised and paid the amount thereof into court, the second policy was valid as to the insured to the extent of the amount paid into court, and the first policy which had been obtained to protect a mortgagee was valid as to an assignee of the mortgagee to the extent of the amount paid to obtain an assignment of the mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

IV PAR. IV OF POLICY—continued
(a) OTHER INSURANCE—concluded

Additional insurance obtained without insurer's consent. An insurance policy containing statutory standard fire policy clause providing that if the insured obtains other insurance the first policy is void, was voided as to the insured when he obtained other insurance on the property without the consent of the insurer, even tho the act of the insured was not an intentional breach of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

Insurance to protect mortgagee—assignee of mortgagee has no right to proceeds of second policy. When a mortgagor complied with the terms of a mortgage and obtained insurance on property to protect the mortgagee, and then procured another policy, in the absence of a provision in the mortgage or in the second policy making its proceeds payable to the mortgagee, the mortgagee had no interest in funds paid into court as a compromise payment of a fire loss on the second policy. So an assignee from the mortgagee could not collect from the fund the amount paid in obtaining the assignment, as the assignee's rights could rise no higher than those of the assignor.

Calendro v Ins. Co., 227-829; 289 NW 485

Other insurance—invalidity as to one policy, validity as to other. When there are two policies on the same property, and one policy is voided because of prohibited incumbrance, the remaining policy containing no such provision must pay the entire loss.

Mosher v Ins. Co., 212-85; 235 NW 743

Existing, known insurance—waiver. Principle reaffirmed that an insurer may not predicate the invalidity of a policy on the existence of other insurance of which he had knowledge through his agents.

Cornett v Ins. Assn., 208-450; 224 NW 524

(b) NONOPERATION OF MANUFACTURING PLANT

Failure to operate plant. Policy provision reviewed, and held clearly to avoid the effect of the nonoperation of a manufacturing plant.

Hawkeye Works v Ins. Co., 202-1270; 211 NW 860

(c) VACANT OR UNOCCUPIED BUILDING

Policy clause—vacancy—increase of hazard. The provision of a fire insurance policy providing invalidation "if there be a change in the occupancy or use of the property, making the risk more hazardous", is not violated if the building becomes vacant and the hazard is thereby increased.

Danels v Ins. Assn., 213-352; 239 NW 24

(d) UNCONDITIONAL AND SOLE OWNERSHIP

Insurable interest. One who holds the legal title to land in trust for another, and who personally executes his note and secures it by mortgage on the land for the benefit of such other person, has an insurable interest in the buildings on the land.

Boyce v Ins. Assn., 209-11; 227 NW 523
Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Insurable interest—right to redeem from foreclosure. A mortgagor's insurable interest in the mortgaged property does not terminate until the period for redemption has expired.

Parker v Ins. Assn., 220-262; 260 NW 844

Change of title—undelivered or void deed. The unconditional and sole ownership of insured property is not changed by the execution and recording by the insured and his wife of a deed of conveyance which is never delivered to the grantee or followed by any change in possession or dominion; nor by the execution and delivery by the said grantee to the insured and to his wife jointly, of a deed of conveyance to the insured property which was executed without consideration and therefore void.

Mosher v Ins. Co., 212-85; 235 NW 743

Evidence of ownership in insured—nominal title in wife. In an action on a fire policy to recover for damages to dwelling where the uncontradicted evidence shows the contract for the purchase of the property was with insured and that he was grantee in the deed and he and his wife substituted her name in the deed to enable them to secure a loan on the premises, there being personal taxes against the insured, and where insured paid the entire purchase price and the wife never claimed to be the owner, the title of the wife being merely nominal, held, there being no change in title in fact, the provision in policy requiring unconditional sole ownership in the insured was not violated.

Horn v Ins. Co., 227-1045; 290 NW 8

Negativing presumptive effect of conveyance. Any "presumption" that all "insurable interest" in property is terminated by a conveyance of the property by the insured by warranty deed, tho the consideration named be nominal, is wholly overcome by uncontradicted testimony which is explanatory of the transaction, to wit: that at said time a mortgage debt which had matured on the property was renewed, and that the deed was then executed and delivered, with an oral agreement that the mortgagor-grantor should remain in possession and have a stated time in which to redeem. Especially is this true inasmuch as the law would, under such circumstances, create a presumption substantially equivalent to the said oral agreement.

Morton Ins. v Farquhar, 200-1206; 206 NW 123

Title—waiver and estoppel. An insured is estopped to plead that a policy issued to an administrator was void for lack of insurable

interest when such insurer knew, when the policy was issued, and when the premiums were paid, that the policy was for the sole benefit of the estate.

Jack v Ins. Assn., 205-1294; 217 NW 816

Ownership—inadvertent plea. An inadvertent pleading to the effect that a person other than plaintiff had an interest in the insured property, becomes of no consequence when the pleading was duly corrected and when the proofs conclusively establish sole ownership in plaintiff.

Havirland v Ins. Co., 204-335; 213 NW 762

Subrogation—contract for by carrier. A contract provision to the effect that a lessor railway company "shall have full benefit of any insurance effected by the lessee on structures erected on the leased premises" is valid and enforceable if the lessor has an insurable interest in the property.

Queen Ins. v Railway, 201-1072; 206 NW 804

(e) NONINTEREST OF INSURED IN REALTY

Change in title—nullifying effect. A standard fire insurance policy is wholly voided by a conveyance of the insured property by the owner thereof, after the execution of the policy, and without the knowledge or consent of the insurer, even tho the conveying owner had no knowledge of said insurance. So held in an action at law on a policy taken out in the name of the owner by a mortgagee on his own motion to protect said mortgagee's interest.

Green v Ins. Co., 215-1220; 247 NW 660

Contract of sale not sale. A policy provision to the effect that any "selling or transferring" of the insured property shall, in the absence of a specified notice to the insurer "after transfer of the property", automatically cancel the insurance is not violated by the mere execution of a contract of sale of said property providing for delivery of possession at a specified future date—the loss occurring prior to said date.

Kiser v Ins. Assn., 216-928; 249 NW 753

Change in ownership—failure to give notice—effect. The contract duty of a mortgagee under a so-called standard or New York mortgage payment clause (attached to a policy of fire insurance) to give the insurer notice of a "change in ownership" of the insured property has no application to a transaction wherein the mortgagee takes absolute deed to the insured property in satisfaction of the secured debt. Such deed works no "change in ownership" but simply an increase in the mortgagee's interest.

Union Ins. Co. v County Assn., 222-964; 270 NW 398

Appointment of receiver not "sale". The appointment of a receiver of the property of an insured, and the possession of the property by the receiver, do not constitute a "sale" of the property within the meaning of a clause invalidating the policy in case of a sale.

Parker v Ins. Assn., 220-262; 260 NW 844

Insurable interest—right to redeem from foreclosure. A mortgagor's insurable interest in the mortgaged property does not terminate until the period for redemption has expired.

Parker v Ins. Assn., 220-262; 260 NW 844

(f) CHANGE IN INTEREST, TITLE, POSSESSION, OR USE

Forfeiture — strict construction required. Principle applied that forfeiture provisions in a policy of insurance must be strictly construed against the insurer.

Kiser v Ins. Assn., 216-928; 249 NW 753

Increase of hazard. The provision of a fire insurance policy providing invalidation "if there be a change in the occupancy or use of the property, making the risk more hazardous", is not violated if the building becomes vacant and the hazard is thereby increased.

Danels v Ins. Assn., 213-352; 239 NW 24

Change in title—nullifying effect. A standard fire insurance policy is wholly voided by a conveyance of the insured property by the owner thereof, after the execution of the policy, and without the knowledge or consent of the insurer, even tho the conveying owner had no knowledge of said insurance. So held in an action at law on a policy taken out in the name of the owner by a mortgagee on his own motion to protect said mortgagee's interest.

Green v Ins. Co., 215-1220; 247 NW 660

Conveyance and reconveyance — noninvalidating. A conveyance, without consideration, by a husband to his wife of a stock of insured goods with the intent to place the goods beyond the reach of his apprehended creditors, without any actual change of possession or use taking place, followed later by a reconveyance, without consideration, by the wife to the husband, constitutes no such change in the interest or title of the insured as will void the policy, the wife never having had any financial interest in the property.

McVay v Ins. Co., 218-402; 252 NW 548

Sale of part of property—effect. The sale of a part of the stock of insured goods does not invalidate the insurance on the part not sold.

Larsen v Ins. Co., 212-943; 237 NW 468

Sale by partner—effect. Assuming that one partner has no authority to sell the partnership property without the consent of the other partner, and thereby invalidate the insurance, yet where such sale was not rescinded it must necessarily be deemed a legally completed sale.

Larsen v Ins. Co., 212-943; 237 NW 468

IV PAR. IV OF POLICY—continued
(f) CHANGE IN INTEREST, TITLE, POSSESSION, OR USE—continued

Change in ownership—failure to give notice—effect. The contract duty of a mortgagee under a so-called standard or New York mortgage payment clause (attached to a policy of fire insurance) to give the insurer notice of a "change in ownership" of the insured property has no application to a transaction wherein the mortgagee takes absolute deed to the insured property in satisfaction of the secured debt. Such deed works no "change in ownership" but simply an increase in the mortgagee's interest.

Union Ins. v Ins. Assn., 222-964; 270 NW 398

Change of ownership—deed to mortgagee not such change. In a fire insurance policy with an attached uniform standard Iowa mortgage clause providing for loss payment to a mortgagee as such interest appears, a provision requiring notice to the insurer of a "change of ownership" of the insured property has no application when the mortgagor quitclaims to the mortgagee in satisfaction of the mortgage debt, for such deed is not an ownership change but only an increase in mortgagee's interest.

Guaranty Ins. v Ins. Assn., 224-1207; 278 NW 913

Change in title—nonassignment of policy. An insurer who knows, through his agent, that the property covered by the policy has been transferred to another, and continues to treat the policy as in force by collecting and retaining the premiums, may not thereafter defensively assert such change of title or that no formal transfer of the policy had been made.

Neiman v Ins. Co., 202-1172; 211 NW 710

Executory contract of sale. A policy provision to the effect that any "selling or transferring" of the insured property shall, in the absence of a specified notice to the insurer "after transfer of the property", automatically cancel the insurance is not violated by the mere execution of a contract of sale of said property providing for delivery of possession at a specified future date—the loss occurring prior to said date.

Kiser v Ins. Assn., 216-928; 249 NW 753

Nonintent to pass title. Proof that an insured, after the issuance of a policy, and without notice to the insurer, executed, physically delivered, and permitted to be recorded an unqualified warranty deed to the insured property, establishes, prima facie, an automatic forfeiture of the policy when the policy provides that such forfeiture shall follow any "sale or transfer" of the property without notice; but evidence is admissible, under proper plea, in avoidance of the apparent forfeiture, to show that there was no completed sale or transfer in fact—that the insured-grantor and grantee mutually understood and agreed that such execution, delivery, and recording should not have the effect to pass title until a future date; but ordinarily such evidence can only generate a jury question on the issue of intent to pass title.

Kiser v Ins. Assn., 213-18; 237 NW 328

Appointment of receiver not "sale". The appointment of a receiver of the property of an insured, and the possession of the property by the receiver, do not constitute a "sale" of the property within the meaning of a clause invalidating the policy in case of a sale.

Parker v Ins. Assn., 220-262; 260 NW 844

Transfer to creditors' trustee. Where owner transferred insured property and fire policy to trustee for creditors, the insurance company was not liable to trustee for fire loss on mere notice to insurer of change of ownership, and while the insurance company may consent to carry risk notwithstanding change of ownership or may waive right to assert forfeiture of its policy, its soliciting agent is not authorized to waive terms or conditions of policy, and insurance company must consent to assignment of policy to be liable for loss.

Neiman v Ins. Co., (NOR); 215 NW 244

Change in title—nonimputed knowledge and promises. The knowledge and promises of an agent employed, paid by, and working for, a general agent of an insurance company, with no authority except to solicit insurance for his principal, the general agent, may not be imputed to the insurance company.

Neiman v Ins. Co., 205-119; 217 NW 258

Waiver of conditions generally. Forfeiture clauses and conditions against transfer of title, encumbrance, and assignment of policies are for the protection of the insurance company against increase of hazard without their knowledge and consent, and therefore may be waived.

Webber v Ins. Assn., 227-793; 288 NW 868

Estoppel—recognizing transfer. In equitable action against a mutual insurance association to require the completion of an assignment of a policy and to recover for fire loss, the association was, under the evidence, estopped from asserting that policy was not properly assigned, where plaintiff's grantor delivered policy to office of association's secretary for purpose of having the assignment completed and where the association recognized transfer of property to plaintiff and his ownership in the policy by mailing to him a notice of assessment thereon.

Webber v Ins. Assn., 227-793; 288 NW 868

Pursuing noninconsistent remedies. A policyholder who, in an action at law, pleads that the insurer has waived that provision of the policy which invalidates the insurance in case of a change in the title to the insured property, and is unsuccessful on appeal in sustaining said plea, does not thereby make such an elec-

tion of remedies as will prevent him, after remand, from amending and praying in equity that the policy be so reformed as to eliminate the invalidating provision.

Green v Ins. Co., 218-1131; 253 NW 36

Transfer of property—specially pleaded. In equitable action against mutual insurance association where defendant admitted that property in question was insured under a fire policy, defendant's contention that a certain transfer of the property had invalidated the policy, having not been pleaded as a special defense, was not in issue under the pleadings.

Webber v Ins. Assn., 227-793; 288 NW 868

Conveyance—retention of premiums—effect. The retention by an insurer of all premiums paid on a policy of fire insurance does not work a waiver of, or estoppel to plead, the defense that the policy was invalidated by a conveyance of the insured property without the knowledge of the insurer until after loss had occurred.

Green v Ins. Co., 215-1220; 247 NW 660

(g) INCUMBRANCES OR LIENS PROHIBITED

Unauthorized mortgage. A standard fire insurance policy is wholly voided as to a subject matter therein covered by the policy, if said subject matter is, subsequent to the issuance of the policy, voluntarily mortgaged by the insured without the consent of the insurer; and in such case it is quite immaterial that the insured made no formal, written application for the policy.

Greco v Ins. Co., 219-150; 257 NW 201

Mortgage—noninvalidating effect. A provision to the effect that a policy shall be invalidated by the creation of a lien on the insured property without the consent of the insurer is not violated by the execution of a mortgage as security for claims which are already liens on the property by operation of statutory law.

Jack v Ins. Assn., 205-1294; 217 NW 816

Recordation of mortgage—effect. The due recordation of a mortgage on insured property does not, in and of itself, carry to the insurer any notice or knowledge which can thereafter have any bearing on the acceptance of premiums on the insurance.

Hart v Ins. Assn., 208-1030; 226 NW 781

Renewal of mortgage. As to how far an insured may go in allowing interest and taxes to accumulate on a mortgage and in executing a new mortgage in renewal of the old mortgage without thereby increasing the hazard of carrying the insurance and avoiding the policy, quaere.

Hart v Ins. Assn., 208-1030; 226 NW 781

Renewal of mortgage—effect on forfeiture. The fact that a mortgage executed on the subject-matter of the insurance after the policy was issued was a renewal of a former mortgage is, on the question of forfeiture of the policy, quite immaterial when the insurer has no knowledge of either mortgage.

Greco v Ins. Co., 219-150; 257 NW 201

Renewing existing mortgage — burden of proof. A policyholder who claims that a mortgage executed on the insured property subsequent to the issuance of the policy was but a renewal of a smaller mortgage mentioned in the application for insurance must, in his evidence, so account for the increased amount of the mortgage as to show that there was no increase of hazard in carrying the insurance.

Hart v Ins. Assn., 208-1030; 226 NW 781

Failure to reveal mortgages when not asked. A policy of insurance is not invalidated because the insured did not, in his written application, reveal the existence of mortgages on the property when he was not questioned concerning the mortgages.

Parker v Ins. Assn., 220-262; 260 NW 844

Concealment of unrecorded mortgage. The concealment by the insured, in his application for fire insurance on property, of the existence of an unrecorded mortgage on the property, of which mortgage the insurer had no knowledge, is fatal to recovery on the policy in case of loss.

Moore v Ins. Assn., 221-953; 266 NW 12

Delivery of mortgage—actual or constructive delivery. The delivery of a mortgage on insured property, in order to have the effect of invalidating the insurance on the property, may be actual or constructive, and reversible error results from requiring the jury to find an actual delivery when the record might justify a finding of constructive delivery.

Hoover v Ins. Co., 218-559; 255 NW 705

Delivery of mortgages—jury question. Record held to present a jury question whether mortgages, alleged to have voided a policy of insurance, had been delivered.

Hoover v Ins. Co., 218-559; 255 NW 705

Invalidating mortgage — burden of proof. Proof by an insurer that a mortgage on the insured property was, without his consent, signed and recorded subsequent to the issuance of the policy presumptively establishes the execution and delivery of said mortgage, yet, the insurer is not entitled to an instruction that the burden of proof is, by such proof, shifted to the insured; but the insurer would, on request, be entitled to an instruction that, in view of such proof, the insured would not be entitled to recover unless he proceeds to negative the presumption aforesaid.

Hoover v Ins. Co., 218-559; 255 NW 705

IV PAR. IV OF POLICY—concluded

(g) INCUMBRANCES OR LIENS PROHIBITED—concluded

Mortgage — instruction — amplification. Instruction as to the effect of knowledge, on the part of an insurance agent, of an existing mortgage on the insured property held correct as far as it went, and to impose on defendant the obligation to request amplification relative to the effect of knowledge acquired by the agent when he was not transacting the business of defendant.

Hoover v Ins. Co., 218-559; 255 NW 705

(h) REMOVAL OF PROPERTY PROHIBITED

Removal of property to new location. A standard policy of insurance on personal property at a specified location, issued in strict accord with the application for such insurance, does not cover a loss of the same property at another location to which it is removed without the consent of the insurer; and testimony that the soliciting agent through whom the policy was obtained orally promised that he would have the policy so issued as to cover the property at either location is wholly inadmissible.

Garton v Ins. Co., 215-1213; 247 NW 639

Change in location—negligence. An insurer may estop himself from pleading nonliability on the policy, because of a change in location of the insured property, by negligently delaying (until after the fire, and after an authorized and favorable examination) the execution of the written consent to such change in location.

Bemisdarfer v Ins. Assn., 217-770; 252 NW 551

(i) ASSIGNMENT OF POLICY

Oral assignment—validity. An oral assignment of a policy of fire insurance is valid (especially when the insurer consents thereto) and is prior in right to a subsequent assignment.

Boyce v Ins. Assn., 209-11; 227 NW 523

Sale and assignment of policy—consent of insurer—burden of proof. The grantee of property insured under a statutory, standard policy of fire insurance and the assignee of said policy, before loss, has the burden, in an action on the policy in his own behalf, to prove that said conveyance of the property and assignment of the policy were consented to or acquiesced in by the insurer thru some agent of the insurer who had authority so to consent or acquiesce.

Stoner v Ins. Co., 215-665; 246 NW 615
Stoner v Ins. Co., 220-984; 263 NW 46

Notice to company—consent. Where owner transferred insured property and fire policy to trustee for creditors, the insurance company was not liable to trustee for fire loss on mere notice to insurer of change of ownership, and while the insurance company may consent to carry risk notwithstanding change of ownership or may waive right to assert forfeiture of its policy, its soliciting agent is not authorized to waive terms or conditions of policy, and insurance company must consent to assignment of policy to be liable for loss.

Neiman v Ins. Co., (NOR); 215 NW 244

Assignment after loss—effect. Principle reaffirmed that after a loss occurs under a policy of insurance, the beneficiary may assign his right of action against the insurer without the consent of the insurer.

Welch v Taylor, 218-209; 254 NW 299
Parker v Ins. Assn., 220-262; 260 NW 844

Sheriff's deed holder — mortgagor's insurance. A second mortgagee who forecloses and, after redeeming from a first mortgage foreclosure, takes a sheriff's deed, is entitled to the proceeds of a fire insurance policy taken out by the mortgagor for the benefit of the first mortgagee; and this is true even tho the fire occurred during the period for redemption from the second mortgage.

In re Hackbart, 203-763; 210 NW 544; 53 ALR 895

Retention of premium may work no estoppel. The retention by an insurer of the unearned premium paid on a fire insurance policy does not estop the insurer from pleading the invalidity of the policy consequent on the sale of the insured property and the assignment of the policy before loss without the knowledge of the insurer, when such knowledge came to the insurer only after loss had occurred.

Stoner v Ins. Co., 220-984; 263 NW 46

V PAR. V OF POLICY

Damage "by fire"—expanding force of ignited gas. A policy of insurance against damage by fire (and which does not except damage by explosion) covers a damage resulting solely from the expanding force of a sheet of flame caused by the accidental ignition of inflammable gas in the basement of the insured building. And this is true tho no part of the building itself was burned.

Scully v Ins. Assn., 215-368; 245 NW 280

Unpleaded defense—evidence. In an action on policy of fire insurance, evidence that the fire was of incendiary origin and that the property was, at the time of the fire, being used for an unlawful purpose, is inadmissible in the absence of a defensive plea to that effect.

Basta v Ins. Assn., 217-240; 252 NW 125

VI PAR. VI OF POLICY

(a) ACTS OF VIOLENCE, WAR, OR THEFT

Condition subsequent—burden of proof. In an action on a policy of fire insurance which excepts loss "by theft or neglect", the burden to establish the theft or neglect is on the insurer.

Hall v Ins. Co., 217-1005; 252 NW 763

(b) NEGLECT OF INSURED

No annotations in this volume

(c) EXPLOSION OR LIGHTNING

Explosion caused by hostile fire. Damages resulting solely from an explosion which is caused by a hostile fire in an insured building are recoverable under a policy which insures "against all direct loss or damages by fire", even tho the policy exempts the insurer from "loss caused directly or indirectly by explosion of any kind unless fire ensues, and in that event for damages by fire only".

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Actions on policies—evidence. Evidence that partly burned garments were found in a room adjoining that part of the building injured by an explosion may be admissible as bearing on the issue whether a fire existed in the attic of the injured building and whether such fire caused the explosion in question.

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

VII PAR. VII PREMIUMS, FAILURE TO PAY

Additional annotations. See under §8959

Unliquidated set-off in favor of insured—effect. Whether the existence of an unliquidated disputed right of set-off may be made use of by an insured to obviate the suspension of a policy of insurance due to nonpayment of premiums or assessments, quaere.

Hart v Ins. Assn., 208-1020; 226 NW 777

Evidence of levy and nonpayment. Evidence held insufficient to establish either that an assessment had been levied or that the assessment had not been paid, if levied.

Hart v Ins. Assn., 208-1030; 226 NW 781

VIII PAR. VIII FALLING BUILDINGS

No annotations in this volume

IX PAR. IX PERSONAL PROPERTY—COVERAGE

Location of property—evidence. When the description of the location of insured personal property as inserted in a fire insurance policy is wholly indefinite, evidence is admissible as to the location contemplated by the parties when the policy was executed.

Hall v Ins. Co., 217-1005; 252 NW 763

X PAR. X COPIES REFERRED TO IN POLICY—REPRESENTATION—NONWARRANTY

Attaching copy of premium note—insufficiency. A premium note for $100 which does not show the policy number is not a true copy of a premium note for $128 which does show the policy number, even tho the maker of the note was entitled to and was given a credit on the note for $28.

Nolte v Ins. Co., 208-716; 224 NW 50

XI PAR. XI CANCELLATION, SURRENDER, RESCISSION, OR REFORMATION

Additional annotations. See under §§8959, 8960

Reformation—evidence to be clear and satisfactory. A court of equity will only reform a written instrument when it is moved to do so by clear and satisfactory evidence of a mutual mistake or other reason for reformation.

Knott v Ins. Co., 228- ; 290 NW 91

Forfeiture of policy—dual statutes governing. Cancellation of an insurance policy for nonpayment of premium is governed by §8959, C., '31; other cancellations by this section.

Ryerson v Ins. Co., 213-524; 239 NW 64

Burden of proof. The burden of proving cancellation of a fire insurance policy is on the insurer who denies liability thereunder.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Mutual cancellation by parties—policy method not exclusive. An insurance policy may be canceled by mutual consent of the parties, without resorting to the method provided in the policy.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Cancellation contrary to bylaws. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter", and which in its attempt to cancel a policy ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insuree, and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insuree are of equal probative force; therefore, the insurer has not established the receipt of said notice by the insuree.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Cancellation—ineffectual notice. A policy of fire insurance, silent as to the post-office address of the insured, is not canceled, for nonpayment of a premium note, by a registered notice of cancellation addressed to the insured at the post-office address employed in dating

XI PAR. XI CANCELLATION, SURRENDER, RESCISSION, OR REFORMATION—continued

the policy, when such place had never been the post-office address of the insured, and when, owing to no fault of the insured, said notice was never delivered to him; and this is true tho the postal authorities forwarded said mail matter to the post office through which the insured received mail by rural delivery.

Ryerson v Ins. Co., 213-524; 239 NW 64

Cancellation—10-day requirement—shorter demand on mortgagee ineffectual. As affecting a mortgagee's interest in a fire insurance policy containing a cancellation clause upon 10 days notice, the insurer's written request upon mortgagee to return the policy, occurring less than 10 days before a fire loss, is not a cancellation barring recovery thereunder.

Guaranty Ins. v Ins. Assn., 224-1207; 278 NW 913

Failure to pay illegal assessment—nonforfeiture. An assessment on the policyholders of a mutual insurance association, made by the board of directors at a duly called meeting, is not a legal assessment and no forfeiture of a policy can be based on the nonpayment of such assessment, when the articles of incorporation provide that an executive committee consisting of the president, vice president, secretary, and treasurer shall meet quarterly (and specially on call of the president) and make all assessments; and this is true even tho all said officers were present at said directors' meeting but as directors.

Maasdam v Ins. Assn., 222-162; 268 NW 491

Status after termination of policy. Upon the insolvency of an insurance company, and upon the cancellation of its policies by the permanent appointment of a receiver, the policyholders remain policyholders as to every right then accrued to them under their policies.

State v Cas. Co., 206-988; 221 NW 585

Unearned premiums—establishment against trust fund. A policyholder who has actually paid the premium under an Iowa standard form of insurance policy has a right, upon the insolvency of the company, and upon the conceded cancellation of the policy by the appointment of a permanent receiver, to have his claim for unearned premiums established against a trust fund which has been created "for the protection of policyholders".

State v Cas. Co., 206-988; 221 NW 585

"Suspension" and "cancellation" compared. The suspension of a policy of insurance is not synonymous with cancellation of the policy.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Suspension — nonpayment of assessment — waiver. Evidence held insufficient to establish waiver of the suspension of a policy because of nonpayment of an assessment.

Hart v Ins. Assn., 208-1020; 226 NW 777

Nonpayment of premiums—effect. A policy of fire insurance for a named period in a mutual company is not automatically suspended by the nonpayment of an assessment when the policy contains no provision for suspension, but simply a declaration that the association shall not be liable for any loss if the insured fails to pay any assessment when due "provided the association shall give the insured notice as required by law". In other words, the insurer, in order to escape liability because of such nonpayment, must cancel the policy under §9054, C., '31.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Agents—extending period for insurance. A recording or policy-issuing agent has authority to agree to an extension of the life of a policy, as written, in order to cover an additional period equal to that during which the insurer claimed the policy stood suspended and for which the insured had paid the premium.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Policy reformable. A mutual mistake as to the location of insured buildings is reformable.

Jack v Ins. Assn., 205-1294; 217 NW 816

Reformation of policy—knowledge of agent. The knowledge of a soliciting agent that the insured understood that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Reformation for mutual mistake. Proof that in the execution of two policies of insurance the insurer and insured intended one policy to cover a set of farm buildings on one tract of land, and the other policy to cover a set of farm buildings on another tract of land, but that in the execution of the policies the descriptions of the two sets of buildings were inadvertently interchanged, establishes mutual mistake with resulting right to a reformation of the policies, even after loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Evidence — sufficiency. Evidence held to clearly and convincingly show a mutual mistake in the execution of a policy of insurance.

Sargent v Ins. Co., 218-430; 253 NW 613

Evidence — sufficiency. Evidence held to justify the reformation of a policy of fire insurance by eliminating therefrom the provision which invalidated the insurance in case of a change in the title to the insured property.

Green v Ins. Co., 218-1131; 253 NW 36

Absence of required plea. A plea of fraud, accident, or mistake, is a condition precedent to the right to reform any written instrument.

Sargent v Ins. Co., 217-225; 251 NW 71

Moot questions. Questions with reference to the reformation of a policy of insurance will not be reviewed on appeal when it appears that the policy has expired by its own terms, and without loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

XII PAR. XII INTEREST OF THIRD PARTY IN PROPERTY

Covenant for insurance does not run with land. A covenant by a mortgagor to keep the buildings on the mortgaged premises insured for the benefit of the mortgagee is entirely personal in character, and does not run with the land. Where a mortgagor obtained a policy payable to himself, and later sold the premises to one who did not assume the mortgage, and assigned the policy, held that the grantee, upon discovering that the policy had lapsed because of nonpayment of premiums, might reinstate the policy by paying the premiums, and henceforth carry the policy solely for his own benefit, and free from any equitable claim of the mortgagee.

First JSL Bk. v Duroe, 212-795; 237 NW 319

Vendor and purchaser—application of proceeds. The proceeds of fire insurance under a policy payable to the vendor and purchaser of real estate, "as their interests may appear", is not payable to the vendor when, at the time of the loss, the purchaser is in no manner in default on his contract. Such proceeds may be impounded and utilized, on the application of the purchaser, in the rebuilding of the burned structure.

Hatch v Ins. Co., 216-860; 249 NW 164; 249 NW 824

Defaulting vendor (?) or nondefaulting purchaser (?). The vendor of real estate (and necessarily his assignee of the contract) has no basis for claiming the proceeds of a noncontested policy of fire insurance taken out on the property by the nondefaulting purchaser in his own name long after the vendor was in hopeless default under the contract of sale, even tho the said contract provided that the purchaser should take out insurance for the benefit of the vendor.

Reason: Neither the vendor nor his assignee can, under the circumstances, enforce the contract clause for insurance for their benefit.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Quitclaim to avoid foreclosure—effect of existing junior liens—insurance unaffected. A mortgagee's status as such, as affecting his rights under a fire insurance policy, is not lost by merger when he takes a quitclaim deed from mortgagor, agreeing to dismiss his foreclosure action only in event no junior liens existed against the property, when thereafter it is found that such liens do exist the presence of which would cause a merger to be against the interest and inconsistent with the intention of the mortgagee.

Guaranty Ins. v Ins. Assn., 224-1207; 278 NW 913

XIII PAR. XIII PROPERTY ENDANGERED BY FIRE—REMOVAL—COVERAGE

No annotations in this volume

XIV PAR. XIV NOTICE OF LOSS—DUTIES OF INSURED

Notice and proof of loss—failure to give. The requirement of a statutory form of fire insurance policy that proof of loss shall be given in a specified time and manner is not abrogated by a statute which declares that the policy shall be deemed a valued policy,—that is, a policy on which, in case of loss, the entire amount of the policy is collectible.

Woodard v Ins. Co., 201-378; 207 NW 351

Mental incapacity to furnish proofs—effect. A clear and unequivocal contract that an insured shall furnish due proofs of disability, as a condition precedent to the attaching of any liability on the part of the insurer, must be construed as assuming mental and physical capacity to furnish the proofs when due. It follows that the furnishing of such proofs will be excused if, when the disability occurs, and the policy is in force, the insured is insane, and, therefore, wholly unable to furnish said proofs.

McCoy v Ins. Co., 219-514; 258 NW 320

Delay—effect. Even tho it be conceded that particular facts and circumstances may excuse delay on the part of an insured policyholder in making proofs of loss, yet such facts and circumstances cannot excuse the total failure to make any such proofs.

Woodard v Ins. Co., 201-378; 207 NW 351

Pleading in re proofs. Answer reviewed, and held to plead properly the total failure of an insured to furnish proofs of loss.

Woodard v Ins. Co., 201-378; 207 NW 351

Notice and proof of loss—insufficiency. The letter of an insured to an insurer may not be deemed to constitute proof of loss when there is no evidence that insured so intended the letter, and, on the contrary, inquired therein as to what proof he should make.

Woodard v Ins. Co., 201-378; 207 NW 351

Notice by receiver adequate. Proof of loss under a policy of insurance is all-sufficient when executed and furnished to the insurer by the insured's duly appointed receiver.

Parker v Ins. Assn., 220-262; 260 NW 844

XIV PAR. XIV NOTICE OF LOSS — DUTIES OF INSURED—continued

Notice of loss without affidavit of fact—waiver. Failure of an insured to accompany his notice of loss with an affidavit as to the facts of loss becomes quite immaterial if the insurer waives such affidavit.

Stoner v Ins. Co., 215-665; 246 NW 615

Waiver—apparent authority to waive—instructions. Instructions relative to the duty of an insured to furnish proofs of loss, and to the burden resting on him in case he relied on a waiver of such proofs; also relative to the actual or apparent authority of the insurer's agent to bind the company by a waiver, reviewed and held correct.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver of bylaw. Section 9045, C., '27, fixing the requirements of notice and proof of loss under mutual insurance policies does not prevent the company from waiving in its bylaws such notice and proof except when it may see fit to demand them.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Waiver of statutory proof. Statutory proof of loss need not be furnished by an insured when the policy provides a definite and ample scheme for determining the actual loss, and the insured complies therewith.

Glandon v Ins. Assn., 207-1068; 224 NW 65

Waiver by denying liability. An insurer who, after a loss occurs, assumes to cancel the policy, and denies all liability, waives his right to formal notice and proofs of loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153
Larsen v Ins. Co., 212-943; 237 NW 468
Green v Ins. Co., 218-1131; 253 NW 36
Parker v Ins. Assn., 220-262; 260 NW 844

Proofs of loss—waiver. The act of an insurer in receiving and taking under advisement proofs of loss after the time for filing such proofs had expired may, with other facts of an equivocal nature, constitute a waiver by the insurer of formal, timely filing of such proofs.

Jack v Ins. Assn., 205-1294; 217 NW 816

Waiver—promise to pay loss. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Waiver—letter of inquiry. The letter of an insured to an insurer, making inquiry as to what proof of loss he should make, and the letter of the insurer in reply, in which the insured is referred to the requirements of the policy, will not constitute a waiver of proof of loss, the insured not claiming that he was misled by the correspondence or that he in any manner changed his position by reason thereof.

Woodard v Ins. Co., 201-378; 207 NW 351

Waiver—declaration of apparent adjuster. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver—jury question. Evidence to the effect that an insured, in a talk with the adjuster of the insurance company, was informed that the loss was being investigated by the state fire marshal, and that there was nothing for the insured to do until she heard from the company, is sufficient to present a jury question on the issue of waiver of sworn proofs of loss, especially when the adjuster was somewhat evasive in his talk with the insured.

Havirland v Ins. Co., 204-335; 213 NW 762

Waiver—jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

Insufficient basis for waiver. Conceded arguendo, that an insurance company through its adjuster promised to pay a claim under a policy, yet such promise furnishes no support whatever for a plea that the company waived the sworn proofs of loss required both by the statutes and the policy, when such promise (if made) was made after the insured was in hopeless default in furnishing said sworn proofs.

Miller v Fire Assn., 219-689; 259 NW 572

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e.g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Silence of insurer — insufficient basis for waiver. The fact that an insurance company failed to answer letters from the insured, notifying the company in a general way that he

had suffered a loss under a policy, furnishes no support whatever for the plea that the company had waived the sworn proofs of loss required both by the statutes and by the policy.

Miller v Fire Assn., 219-689; 259 NW 572

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Submission of unsupported issue. The submission, in an action on a policy of insurance, of the insured's pleaded claim that he had "offered to furnish additional proofs of loss", is erroneous when said claim was wholly without support in the evidence.

Miller v Fire Assn., 219-689; 259 NW 572

XV PAR. XV EXAMINATION OF LOSS OR DAMAGE

Water between plastered and outer walls—judicial notice of wood deterioration. It is a matter of common knowledge and one of which the court has a right to take judicial notice, that, when water is confined in a space as between the plastered and outer walls of a building where the air cannot circulate, many times the water will cause a deterioration of the lumber and sometimes cause rotting of the wood.

Horn v Ins. Co., 227-1045; 290 NW 8

XVI PAR. XVI APPORTIONMENT OF LOSS BY INSURERS

Rule for prorating. Between coinsurers, the liability of each under the standard pro rata clause is not the amount which he may pay the insured by way of settlement, but is such fractional part of the loss as the total amount of his policy bears to the total amount of all the valid and collectible coinsurance policies.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Prorating loss—burden of proof. An insurer who pleads that the loss should be prorated with another policy must assume the burden to show indubitably that such other policy was "valid and collectible".

Cole v Ins. Co., 201-979; 205 NW 3

Pro rata clause—valid and collectible insurance. In the application of the standard pro rata clause, the validity and collectibility of a policy are prima facie established by evidence that the insurer was solvent, did not question the validity of the policy, and, after suit, compromised the action and paid the judgment.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Pro rata clause—effect on reinsurers. The lessened liability which an insurer automatically acquires (as regards a coinsurer) under the standard pro rata coinsurance clause, automatically works a pro rata reduction in the liability of his reinsurers who have contracted that the total loss under the policy shall likewise be prorated among the reinsurers.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Reinsurance—insolvency of original insurer—effect on pro rata clause. The fact that an original insurer becomes insolvent after he has, in part, reinsured his risk, does not deprive his reinsurers of the benefit of the pro rata clause in their contract.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Facts provable since trial. No procedure exists under which an insurance company may show, on appeal from a judgment against it on a policy, that since the appeal was taken judgment on another policy issued by another company on the same loss has been affirmed by the supreme court and paid, and that, therefore, appellant should be granted a reversal so that the loss may be prorated on the basis of all valid and collectible insurance.

Sargent v Ins. Co., 218-430; 253 NW 613

XVII PAR. XVII LIMITATION OF ACTION

Amendment for new relief after action barred. A timely action to set aside the cancellation of a policy of insurance may be amended by asking for a reformation of the policy even tho the amendment is filed at a time which would have barred the original action.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Action—amendments after expiration of allowable period. The right to reform a policy of insurance (if such right exists) and to recover on it as reformed, is incident to the right to recover on the instrument in its original form. It follows that where plaintiff is unsuccessful on appeal in his effort to recover on the instrument in its original form, he may, after remand, amend and tender the issue of reformation, even tho when the amendment is filed an original action would have been barred by the statute of limitation.

Green v Ins. Co., 218-1131; 253 NW 36

XVIII PAR. XVIII DEFINITIONS, "INSURED"—"LOSS"

Proximate loss. Proximate loss includes not only losses which are directly caused by the

XVIII PAR. XVIII DEFINITIONS, "INSURED"—"LOSS"—concluded

fire itself, but also losses of which the fire is the efficient cause, by setting in motion other agencies.

Tracy v Ins. Co., 207-1042; 222 NW 447

Scope of insurance—"friendly fires". Insurance against loss and damage "by fire" does not cover loss and damage to eggs consequent on the wick of an oil heating stove in the storage room burning too high, and thereby throwing off a quantity of smoke and soot, and generating excess heat in the storage room —nothing in the room being burned except said wick.

Sigourney Prod. Co. v Ins. Co., 211-1203; 235 NW 284

Explosion caused by hostile fire. Damages resulting solely from an explosion which is caused by a hostile fire in an insured building are recoverable under a policy which insures "against all direct loss or damages by fire", even tho the policy exempts the insurer from "loss caused directly or indirectly by explosion of any kind unless fire ensues, and in that event for damages by fire only".

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Damage "by fire"—expanding force of ignited gas. A policy of insurance against damage by fire (and which does not except damage by explosion) covers a damage resulting solely from the expanding force of a sheet of flame caused by the accidental ignition of inflammable gas in the basement of the insured building. And this is true tho no part of the building itself was burned.

Scully v Ins. Assn., 215-368; 245 NW 280

XIX PAR. XIX PROVISIONS, AGREEMENTS, OR CONDITIONS

Immaterial rearrangement of provisions. The provisions of the statutory standard fire insurance policy need not necessarily be arranged in the policy in the same consecutive form as set forth in the statute. It is all-sufficient to set forth the major portion of said form on the reverse side of the policy proper, with proper reference in said policy to the reverse provisions as part of the policy as a whole.

Green v Ins. Co., 215-1220; 247 NW 660

CHAPTER 404.1

LIABILITY POLICIES—UNSATISFIED JUDGMENTS

9024.1 Inurement of policy.

Discussion. See 15 ILR 73—Torts—recovery from insurer

Judgment against insured — conclusive against insurer. A judgment determining liability of insured for damages for death resulting from use of automobile was conclusive against liability insurance company as to its liability on policy where there was no fraud or collusion in obtaining the judgment and insurance company had timely notice of suit and elected to make no defense, in view of provision of policy and of statute permitting injured person to maintain action against insurance company for amount of judgment against insured after return of execution unsatisfied, irrespective of insured's insolvency.

International Co. v Steil, 30 F 2d, 654

Wrong motor numbers not invalidating liability policy. Motor numbers in an automobile insurance policy are only for the purpose of aiding in identifying the car, and, tho the numbers be wrong, a liability policy will not be invalidated if the car is otherwise properly identified, for which purpose other evidence may be resorted to, and, if sufficient, will cure the error without resort to a proceeding in equity to reform the policy.

Fucaloro v Cas. Co., 225-437; 280 NW 605

Consent to operate vehicle — admission in pleading. In an action against an insurance carrier to collect an unsatisfied judgment arising out of an automobile collision, and where the insurance carrier raises the question of consent to operate the vehicle, its admission of this fact in a pleading in a previous action is sufficient to carry to the jury such question of consent to operation.

Mitchell v Underwriters, 225-906; 281 NW 832

Automobile policy—evidence sufficient for jury and to sustain verdict. In action against automobile liability insurer to recover on judgment previously obtained against insured who owned two trucks, evidence that truck which struck plaintiff was the truck which was covered by defendant's policy held to be jury question and to sustain verdict for plaintiff.

Cunningham v Cas. Co., (NOR); 258 NW 681

CHAPTER 406

MUTUAL FIRE, TORNADO, HAILSTORM AND OTHER ASSESSMENT INSURANCE ASSOCIATIONS

9029 Organization—purpose and powers.

Atty. Gen. Opinions. See '30 AG Op 294; '36 AG Op 115

Indemnity (?) or liability (?)—legality. Either indemnity or liability insurance covering the operation of an automobile may be validly written by mutual associations under this section or by reciprocal or interinsurance concerns under §9083, C., '31, even tho subsec. 5-e, §8940, of said code prohibits the companies there designated from writing anything but liability insurance, the latter section not controlling the two former sections.

Schmid v Underwriters, 215-170; 244 NW 729

Indemnity insurance—law governing. A policy of insurance issued under subsec. 5-e, §8940, C., '31, insuring the ordinary operation of an automobile necessarily embraces the statutory provision that said policy shall inure to the benefit of a party who obtains a judgment against the insured, even tho said policy purports to be an indemnity policy only. (Zieman case, 214 Iowa, 468 overruled in part.)

Schmid v Underwriters, 215-170; 244 NW 729

Negligence in issuing policy. An insurance company, even tho it be but a mutual association which resorts to assessments on its members for funds with which to pay losses "and necessary expenses", must respond in damages for its tort in negligently failing to issue a policy which had been duly contracted for.

Mortimer v Ins. Assn., 217-1246; 249 NW 405; 35 NCCA 134

Special appearance and motion to dismiss—attacking only part of jurisdiction improper. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

9036 Approval by commissioner.

Atty. Gen. Opinion. See '38 AG Op. 649

9037 Allowable assessments and fees.

Atty. Gen. Opinion. See '30 AG Op 294

Assessments—validity. An assessment by a mutual hail association may be valid even tho the minutes of the board of directors do not affirmatively show compliance with all requirements of the articles and bylaws relating to assessments.

Hauge v Ins. Assn., 205-1099; 212 NW 473

Illegal assessment. An assessment on the policyholders of a mutual insurance association, made by the board of directors at a duly called meeting, is not a legal assessment and no forfeiture of a policy can be based on the nonpayment of such assessment, when the articles of incorporation provide that an executive committee consisting of the president, vice president, secretary and treasurer shall meet quarterly (and specially on call of the president) and make all assessments; and this is true even tho all said officers were present at said directors' meeting but as directors.

Maasdam v Ins. Assn., 222-162; 268 NW 491

Oral evidence. Oral testimony may be admissible as to the manner in which an assessment was made when such testimony bears on matters not revealed by the minutes of the board of directors or is explanatory of such minutes.

Hauge v Ins. Assn., 205-1099; 212 NW 473

Evidence of levy and nonpayment. Evidence held insufficient to establish either that an assessment had been levied, or that the assessment had not been paid, if levied.

Hart v Ins. Assn., 208-1030; 226 NW 781

9040 Emergency fund.

Atty. Gen. Opinion. See '30 AG Op 294

9041 Policies with fixed premiums.

Atty. Gen. Opinions. See '25-26 AG Op 379; '30 AG Op 294

9043 Hail assessments—payment of losses.

Assessments—validity. An assessment by a mutual hail association may be valid even

tho the minutes of the board of directors do not affirmatively show compliance with all requirements of the articles and bylaws relating to assessments.

Hauge v Ins. Assn., 205-1099; 212 NW 473

Agent signing in representative capacity—nonliability. In an action to recover hail insurance premium under a policy to which was attached an application with a promise to pay and signed by defendant, alleged to be a member of a partnership, and who used the symbol "%" in signing partnership name, such defendant is not liable individually where it is shown that defendant received commission for selling property and merely acted as agent for the partnership.

Inter-Ocean Co. v Gabrielson, 226-1242; 286 NW 514

9045 Proof of loss—sixty-day limit.

Contract limitation—validity. An agreement in a policy of insurance against total and permanent disability, specifically providing that all claim shall be forfeited if proof of such disability is not furnished the insurer "within ninety days after the happening of the total and permanent disability", is valid and enforceable, such time limit being more favorable to the insured than the statutory limit.

Fairgrave v Life Assn., 211-329; 233 NW 714

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e.g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Sufficiency of proofs. Proofs of loss held sufficient; also the manner in which accounts of loss were kept even tho not wholly accurate.

Hansell v Ins. Assn., 209-378; 228 NW 88

Notice and proof of loss—"as soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

Waiver of statutory proof. Statutory proof of loss need not be furnished by an insured when the policy provides a definite and ample scheme for determining the actual loss, and the insured complies therewith.

Glandon v Ins. Assn., 207-1068; 224 NW 65

Bylaw waiver. This section does not prevent the company from waiving, in its bylaws, such notice and proof except when it may see fit to demand them.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Waiver—denial of liability—effect. An insurer who, upon the happening of a loss, promptly asserts that the policy had been canceled long prior to the loss thereby denies all liability and waives proofs of loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Denial of liability as waiver. A denial by the insurer of all liability under a policy of insurance operates as a waiver of notice and proof of loss.

Green v Ins. Co., 218-1131; 253 NW 36

Denial of liability for crop loss—waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Larsen & Son v Ins. Co., 212-943; 237 NW 468

Richardson v Ins. Assn., 214-30; 241 NW 414

Lee v Ins. Assn., 214-932; 241 NW 403

Denial of liability not constituting waiver. A denial of liability on a policy of insurance does not constitute a waiver of proofs of loss when the validity of the claim under the policy depends solely on the furnishing of proofs of loss within a specified contract time, and when said denial of liability was made long after said time had expired.

Fairgrave v Life Assn., 211-329; 233 NW 714

Promise to pay claim—insufficient basis for waiver. Conceded arguendo, that an insurance company through its adjuster promised to pay a claim under a policy, yet such promise furnishes no support whatever for a plea that the company waived the sworn proofs of loss required both by the statutes and the policy, when such promise (if made) was made after the insured was in hopeless default in furnishing said sworn proofs.

Miller v Fire Assn., 219-689; 259 NW 572

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Silence of insurer—insufficient basis for waiver. The fact that an insurance company failed to answer letters from the insured, notifying the company in a general way that he had suffered a loss under a policy, furnishes no support whatever for the plea that the company had waived the sworn proofs of loss required both by the statutes and by the policy.

Miller v Fire Assn., 219-689; 259 NW 572

Waiver—declaration of apparent adjuster. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver—pleading—sufficiency. Waiver of proofs of loss is sufficiently presented by pleading the facts constituting waiver, even tho the pleader does not allege the legal conclusion of waiver; and especially so when the pleadings are unquestioned in the trial court.

Lee v Ins. Assn., 214-932; 241 NW 403

Waiver—sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

When allegation and proof unnecessary. There need be no allegation or proof of the furnishing of proofs of loss under a policy which by its terms waives such proofs.

Glandon v Ins. Assn., 211-60; 232 NW 804

Waiver—jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

9048 Limitation of action.

Limitation of nonlife actions generally. See under §8986

Premature action—action prior to due date of loss. The statutory command that no action shall be brought on a policy until the date when the loss is due in accordance with the articles of incorporation or bylaws of the insurer, has no application when the said articles and bylaws contain no provision as to the date when the loss is due.

Hansell v Ins. Assn., 209-378; 228 NW 88

Nonpremature action. An action brought some 11 months after loss is not premature when the insurer has by his conduct waived proofs of loss.

Lee v Ins. Assn., 214-932; 241 NW 403

9051 Value of personal property—value of crops.

Computation of damages—instructions. Instructions relative to the computation of damages to crops by hail, reviewed, and held sufficiently clear in view of the ambiguous provision of the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

Damage by hail—improper measure. The percentage of crop destruction due to hail cannot be measured by a comparison between the ultimate crop after damage by hail, and the amount of yield in an average year, when the record affirmatively shows that the year in which the damage occurred was not, because of drouth conditions, an average year.

Slinger v Ins. Assn., 219-329; 258 NW 101

Interest recoverable. Interest is allowable, on the amount recovered under a hail insurance policy, from the date when the loss occurred.

Glandon v Ins. Assn., 211-60; 232 NW 804

Similar facts—competency. A witness should not be permitted to testify to the crop yield of his land as bearing on the probable yield of another farm in the same vicinity unless it appears that the two farms possess similar soil conditions.

Slinger v Ins. Assn., 219-329; 258 NW 101

9051.1 Arbitration.

Inadequate award — fraud — effect. Equity will vacate a grossly inadequate award by arbitrators, especially when an element of fraud exists in the appointment and proceedings of the arbitrators.

Koopman v Ins. Assn., 209-958; 229 NW 221

9054 Cancellation by association — notice.

"Suspension" and "cancellation" of policy distinguished. The statutory provision that

a policy of insurance issued by an assessment insurance association may be canceled by the association on a five-day notice to the insured has no application to a policy provision which suspends the membership of the policyholder and denies him right of recovery for loss while he is delinquent in the payment of assessments.

Early v Ins. Assn., 201-263; 207 NW 117

"Suspension" and "cancellation" compared. The suspension of a policy of insurance is not synonymous with cancellation of the policy.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Suspension — nonapplicable procedure. The procedure for the forfeiture or suspension of a nonmutual fire insurance policy of insurance (§8959, C., '27) is not applicable to policies issued by mutual assessment companies.

Hart v Ins. Assn., 208-1020; 226 NW 777

Cancellation in equity. Equity will not, after the death of the insured in a life insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

Cancellation—statutory and contract provisions. In an action on an insurance policy to recover damages for loss by hail, held, that statutory provisions for benefit of insured cannot be contracted away and terms of contract are only binding upon the insured if not contrary to applicable statutes. A policy is construed to give the insured his indemnity in questions of cancellation or forfeiture.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Actions—bylaws and statutes in conflict. In an action to recover damages for loss by hail, bylaws of mutual hail insurance association which are inconsistent with statute relating to notice of cancellation must give way to statute.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Attempted cancellation contrary to bylaws —effect. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter", and which in its attempt to cancel a policy ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insured, and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insured are of equal probative force; therefore, the insurer has not established the receipt of said notice by the insured.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Notice of cancellation — sufficiency. In an action on an insurance policy for damages as a result of hail, on appeal from ruling sustaining a demurrer to defendant's answer, in which one defense is cancellation of the policy in accordance with the terms of the contract, by giving five days notice, "mailed to the address of the assured", and the statute provides notice may be given, "by the association giving five days written notice thereof to the insured", held that the statute leaves the parties free to meet its requirements in such manner as to them seem best adapted to their purpose and the policy provided a reasonable way of termination. It was a method to which both parties agreed and not being in conflict with the statute, the court was in error in sustaining the demurrer.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Mailing notice of cancellation—presumption of receipt by addressee. In an action on an insurance policy to recover damages for loss by hail and where the answer alleges cancellation of policy by mailing five days written notice to insured, receipt of which notice plaintiff denies, it may be presumed or inferred by the supreme court in reviewing a decision on demurrer, that the letter properly addressed and mailed reached the plaintiff in due time.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Refusal to accept and failure to cancel—effect. A policy of hail insurance (issued by a mutual association) once in force remains in force even tho the insured refuses to accept it, and the association fails to cancel the policy in the manner provided by statute.

Murchison v Ins. Co., 204-528; 215 NW 598

Nonpayment of premium—effect. A policy of fire insurance for a named period in a mutual company is not automatically suspended by the nonpayment of an assessment when the policy contains no provision for suspension, but simply a declaration that the association shall not be liable for any loss if the insured fails to pay any assessment when due "provided the association shall give the insured notice as required by law". In other words, the insurer, in order to escape liability because of such nonpayment, must cancel the policy under this section.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

See Wall v Ins. Co., 217-1106; 253 NW 46

Waiver — effect. Even if it be conceded, arguendo, that the levy of an assessment on a policy of insurance worked a waiver of the suspension of the policy for nonpayment of a prior assessment, yet such waiver becomes

immaterial when the policy is legally suspended for nonpayment of the last assessment.

Hart v Ins. Assn., 208-1020; 226 NW 777

Acquiescence. A statement by the insured to the insurer to the effect that he (the insured) did not like the steps taken by the insurer in canceling a policy does not constitute an acquiescence in such cancellation, the truth being that the cancellation was a nullity, tho this fact was unknown to the insured.

Harrington v Ins. Assn., 203-282; 211 NW 383

Hail insurance—failure to read settlement—cancellation—nonestoppel. An insurer may not cancel a hail insurance policy nor avoid payment for a second hail loss by predicating an estoppel upon the negligent failure of the insured to read a written settlement where the insured reposed confidence in the agent who, on a busy threshing day, negotiated the settlement for the first hail damage and then added a policy cancellation clause not discussed in settlement.

Conrad v Ins. Assn., 223-828; 273 NW 913

9057 When pro rata assessment retained.

Abortive attempt to cancel. An attempted cancellation by the insurer of a policy of insurance in a mutual fire insurance association is a nullity when the insurer neither returns nor tenders to the insured all advance assessments less the insurer's pro rata part thereof.

Harrington v Ins. Assn., 203-282; 211 NW 383

CHAPTER 407

LIABILITY INSURANCE—CERTAIN PROFESSIONS

9077 Cancellation of policy.

Attempted cancellation contrary to bylaws—effect. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter", and which in its attempt to cancel a policy ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insured, and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insured are of equal probative force; therefore, the insurer has not established the receipt of said notice by the insured.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

CHAPTER 408

RECIPROCAL OR INTERINSURANCE CONTRACTS

9083 Authorization.

Atty. Gen. Opinion. See '32 AG Op 220

Indemnity insurance—law governing. A policy of insurance issued under subsec. 5-e, §8940, C., '31, insuring the ordinary operation of an automobile necessarily embraces the statutory provision that said policy shall inure to the benefit of a party who obtains a judgment against the insured, even tho said policy purports to be an indemnity policy only. (Zieman case, 214 Iowa 468 overruled in part.)

Schmid v Underwriters, 215-170; 244 NW 729

Indemnity (?) or liability (?) — legality. Either indemnity or liability insurance covering the operation of an automobile may be validly written by mutual associations under §9029 or by reciprocal or interinsurance concerns under this section, even tho subsec. 5-e, §8940, C., '31, prohibits the companies there designated from writing anything but liability insurance, the latter section not controlling the two former sections.

Schmid v Underwriters, 215-170; 244 NW 729

9087 Actions—venue—commissioner as process agent.

Real party in interest—authority to make admission in pleading. A defendant corporation formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers is the real party in interest in an action to enforce a judgment against the corporation. The group of subscribers is not a legal entity and, when the corporation is the only legal entity of the two, an admission of an important fact by the corporation made in a counterclaim in the action in which judgment was obtained is binding on it in the later action.

Mitchell v Underwriters, 225-906; 281 NW 832

9103 Laws applicable.

Reciprocal insurance contracts not controlled by general statutes. The specific provisions of an application for a policy of reciprocal insurance, of which provisions the applicant had notice, to the effect that the policy will not be

in force, (1) until the application is approved by the insurer, and (2) until the premium is paid, cannot be waived by the insurer's agent entering into a different arrangement relative to said acceptance and payment of premium; §8959 with reference to the procedure in case of nonpayment of premiums and §9004, C., '31, relative to the power of agents, not being applicable to reciprocal insurance contracts.

Gisin v Ins. Exch., 219-1373; 261 NW 618

Voluntary insertion of nonrequired agreement. The fact that one class of insurance companies is required, by statute, to insert in its policies a provision that an injured third party shall have a right of action against the insurer, does not prevent other insurance companies from inserting such provision in their policies even tho they are not required so to do, and when the provision is so inserted the company is bound thereby.

Venz v Ins. Assn., 217-662; 251 NW 27

Nonstatutory cancellation of policy. A reciprocal or interinsurance policy of insurance is effectively canceled by complying with the contract method for cancellation even tho such method is materially different than the statutory method provided by §8959, C., '31, because said section does not apply to such policies.

Schmid v Underwriters, 215-170; 244 NW 729

CHAPTER 409

CONSOLIDATION AND REINSURANCE

9105 Life companies — consolidation and reinsurance.

Insolvency—assets transferred to obtain reinsurance — propriety. The trial court has power to cause assets of insolvent insurance company to be transferred and used to obtain reinsurance for policyholders without subjecting assets to judicial sale, and under proceedings where it is shown that it is impossible for company to function any longer, the trial court is justified in finding that value of assets upon a fair basis of valuation was insufficient to pay its obligations, and that the interest of policyholders would best be served by obtaining reinsurance.

Royal Ins. v Gross, 76 F 2d, 219

Reinsurance—disclosure of material facts—duties—presumptions. In an action on a reinsurance contract against reinsurer, held, not breached on account of original insurer's failure to retain full amount of liability agreed upon where original insurer was liable on another contract with the same principal and the evidence was insufficient to show any wrongful or fraudulent concealment of material facts, since the same principles of law as to false representations and concealments govern in reinsurance as in original insurance. Altho insured and reinsured have duty to exercise good faith and disclose all material facts, a presumption must be based on facts, not upon other presumptions. The mere nondisclosure of facts possibly known is not fraudulent concealment of facts, so reinsurer, to establish concealment of facts, must show intentional concealment or bad faith in ascertaining facts.

General Co. v Surety Co., 27 F 2d, 265

9106 Submission of plan.

Acts of administrative officers. Certiorari may be the proper remedy to review the action of the commissioner of insurance and attorney general (§8688, C., '35) in refusing to approve amended articles of incorporation of an assessment association.

National Assn. v Murphy, 222-98; 269 NW 15

9115 Companies other than life—approval of plan.

Consolidation—assumption of obligations—consideration. The assumption by a consolidating company of the obligations of the companies consolidated will not be rendered nugatory by mere inadequacy of consideration. At any rate, it is not for the court to pass on the sufficiency of the consideration growing out of a consolidation approved by the companies consolidated, by their stockholders, and by duly empowered public officials.

State v Cas. Co., 213-200; 238 NW 726

Consolidation—right of creditors. Where a domestic consolidated insurance company unconditionally assumed the obligations of both a domestic and a foreign company, and where the courts of the foreign state ordered that certain assets of the foreign company be administered on by receivership proceedings in said foreign state, the creditors of the foreign company have the right, after establishing their claims in the foreign receivership and being paid a percentage of their claims, to establish the balance of their claims against the assets in the hands of the domestic consolidated company (it having become insolvent) even tho a portion of said assets consists of a trust fund originally deposited with the state by the original domestic company "for the protection of its policyholders"; but dividends must be equalized by the domestic receiver among all creditors of the same class.

State v Cas. Co., 213-200; 238 NW 726

Loss—pro rata clause—effect on reinsurers. The lessened liability which an insurer automatically acquires (as regards a coinsurer) under the standard pro rata coinsurance clause, automatically works a pro rata reduction in the liability of his reinsurers who have con-

tracted that the total loss under the policy shall likewise be prorated among the reinsurers.

Globe Ins. v American Co., 205-1085; 217 NW 268; 56 ALR 463

Coinsurance—solvent and insolvent insurers. Separate insurers of the same loss are coinsurers, even tho one of the insurers issued its policy at a time when the other insurers had gone into the hands of a receiver and the extent of their ability to pay losses had become problematical.

Globe Ins. v American Co., 205-1085; 217 NW 268; 56 ALR 463

CHAPTER 410

LICENSING OF AGENTS

9119 License required.

License—admissibility. The written request of an insurance company to the commissioner of insurance for a license for a named agent "to transact its authorized business" is admissible for the purpose of showing that said person was the company's agent, but not for the purpose of showing the scope of the powers of such agent.

Stoner v Ins. Co., 218-720; 253 NW 821

License not possessed by agent. An application for registration of securities and for an "issuer-dealer's" license was properly refused to a corporation which proposed to issue investment trusts in which the buyer would obtain life insurance through a foreign insurance company to cover unpaid balances on his contract, when such provision would violate the insurance laws because the corporation was to procure such insurance for the buyer, and neither it nor its salesmen had qualified as insurance agents.

Ind. Fund v Miller, 226-1101; 285 NW 629

Soliciting agent—implied authority. The act of an insurance company at its policy-issuing office, and in response to the request of its soliciting agent, in attaching a "loss payable" clause to a theretofore issued policy of fire insurance, and in returning said policy to its said agent with said clause unsigned, impliedly authorizes said agent to sign said clause on behalf of said insurer.

Stoner v Ins. Co., 220-984; 263 NW 46

TITLE XXI

BANKS

CHAPTER 412

BANKING DEPARTMENT

9130 Superintendent of banking — term.

Atty. Gen. Opinion. See '36 AG Op 28

Banking superintendent as good-faith plaintiff—attorney fees—nonliability. The superintendent of banking as a good-faith, tho unsuccessful, plaintiff in a quiet title action is not liable to the defendant for attorney fees.

Bates v Mullins, 223-1000; 274 NW 117

9131 Appointment—qualifications.

Atty. Gen. Opinions. See '30 AG Op 52; '36 AG Op 28

9134 Removal of superintendent.

Atty. Gen. Opinion. See '36 AG Op 28

9137 Salaries.

Initial power to fix salary. The superintendent of banking has the initial power to fix the salary of a bank examiner appointed by him to assist in the liquidation of an insolvent bank of which the superintendent is receiver. The district court has no right to grant a greater salary.

In re City Bank, 210-581; 231 NW 342

9140 Duties and powers.

Discussion. See 15 ILR 511—New banking legislation

Atty. Gen. Opinions. See '36 AG Op 28, 666

Affected with public interest. Principle affirmed that the business of banking is affected with a public interest.

Priest v Whitney Co., 219-1281; 261 NW 374

Assessment—nonpower of superintendent. The superintendent of banking has no power to order an assessment on the stockholders of an insolvent bank.

Home Bank v Berggren, 211-697; 234 NW 573

Guaranty of solvency of bank. A contract between the state superintendent of banking and the officers and directors of a state bank,

wherein the said officers and directors guarantee that the bank "is at this time solvent", and wherein the contract "to keep and maintain the bank in a solvent" condition, in consideration that the superintendent will permit the bank to continue business, tho the superintendent questions its solvency, is a nullity, because gravely inconsistent with the statutory powers and duties of said superintendent, and therefore against public policy.

Andrew v Breon, 208-385; 226 NW 75

Guaranty by officers — effective delivery. Delivery of a written guaranty of payment, by officers and directors of a bank, of questionable assets of the bank, is shown by evidence that a state bank examiner took the guaranty into his possession with the consent of the guarantors and delivered it to the state superintendent of banking.

Boyd v Miller, 210-829; 230 NW 851

Survival of service of notice. Service on the superintendent of banking, as such, of an original notice of mortgage foreclosure, survives the retirement of said official from office—is valid and binding on his duly appointed successor.

Greenleaf v Bates, 223-274; 271 NW 614

9143 Fees for examination.

Atty. Gen. Opinion. See '36 AG Op 28

9144 Expenses.

Atty. Gen. Opinion. See '25-26 AG Op 372

9145 Payment.

Atty. Gen. Opinions. See '36 AG Op 28, 35

PRIVATE BANKS

9151 Use of banking terms prohibited.

Atty. Gen. Opinion. See AG Op May 8, '39

Stockholders operating subsidiary unincorporated bank—greater liability than partners. Bank directors, who start unincorporated subsidiary banks owned by stockholders of the parent bank in the same ratio as they hold stock in the parent bank, create more than a simple partnership, and thereunder a deceased stockholder's liability, arising out of the subsidiary banking operations, unlike that of a mere partner, does not cease upon death.

Daniel v Best, 224-1348; 279 NW 374

9153 Exceptions.

Nonpartnership tho sharing profits. Where it is contemplated that a private unincorporated bank will be reorganized by incorporating the business (apparently in the same name as the private bank) and where stock in the contemplated incorporation is subscribed for, paid, and issued in a name identical with that of the private bank, and where the plans for incorporation are later wholly abandoned, the subscribers do not become partners in the private business when they never intended such relation, or held themselves out as such partners, or as having any interest in said bank; and this is true even tho said private bank continues for several years to pay said subscribers annual dividends out of its earnings.

Kinney v Bank, 213-267; 236 NW 31

Stockholders operating subsidiary unincorporated bank—greater liability than partners. Bank directors, who start unincorporated subsidiary banks owned by stockholders of the parent bank in the same ratio as they hold stock in the parent bank, create more than a simple partnership, and thereunder a deceased stockholder's liability, arising out of the subsidiary banking operations, unlike that of a mere partner, does not cease upon death.

Daniel v Best, 224-1348; 279 NW 374

9154.03 Administration—receivership.

Remedies of creditors—creditor's bill—conditions. The obtaining of a judgment against a purported partner in an insolvent private bank is a condition precedent to the right of the receiver to maintain a general equitable action to set aside an alleged fraudulent conveyance by the partner.

Cooper v Erickson, 213-448; 239 NW 87

Allowance and payment of claims—property available. Where an estate consists of two general classes of assets, to wit, (1) assets employed by a decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is temporarily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

Joining law and equity. It is not permissible for the receiver of an insolvent private bank to join (1) a law action to obtain a judgment against an alleged partner in the bank, and (2) an equitable action against the partner and his grantee to set aside a conveyance alleged to be fraudulent.

Cooper v Erickson, 213-448; 239 NW 87

CHAPTER 413

SAVINGS BANKS

Atty. Gen. Opinions. See '28 AG Op 233; '34 AG Op 76

9155 Organization.

Atty. Gen. Opinion. See '25-26 AG Op 43

9156 Banking powers.

Discussion. See 17 ILR 505—Access to safety deposit boxes

Right to contract for payment of debts. A good-faith contract by the board of directors of a state bank, for and on behalf of the bank, and providing for the payment of the bank's debts incurred in the operation of the bank, is valid without any approval by the stockholders of the bank.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Corporate powers and liabilities—ultra vires and lack of authority—ratification. A corporation is estopped to plead that the contract of its vice president on behalf of the corporation to repurchase a note and mortgage at face value was neither expressly nor impliedly authorized, and was ultra vires, when the corporation, with full knowledge of all the facts, elects to retain the consideration paid it for the paper.

Hawkeye Ins. v Cent. Trust, 210-284; 227 NW 637

Deposits received on condition—violation—effect. A bank which receives cash, checks, and notes on the agreed condition that said receipts will be held intact, and not placed in the general assets of the bank, and will be returned intact on the happening of a named event, must respect and comply with the condition, even tho at the time the bank has enforceable financial obligations against the parties delivering the property. And, in case of violation of the condition and in case of insolvency, the claimants will be entitled to an order on the receiver for restitution, or for preferred payment out of the funds on hand at the time of insolvency, or for such other relief as will be equitable and possible under the circumstances.

Andrew v Bank, 218-1313; 256 NW 292

Deposits — general (?) or special (?). Whether a bank deposit be general or special necessarily depends on the use to which the depositor puts it.

Andrew v Bank, 218-489; 255 NW 871

Deposits—bank's general right to set-off. The fact that a bank unlawfully invests its funds in securities not permitted by law as proper bank investments, does not prevent the receiver of the bank from offsetting the amount of said securities against the deposit of the party who is obligated to pay said securities; and this is true even tho the bank was a mortgagee for the benefit of holders generally of said securities.

Andrew v Bank, 218-489; 255 NW 871

Special deposit superior to garnishment. Money deposited or caused to be deposited by a depositor in a bank for the sole use and benefit of a bona fide creditor of the depositor, and under an agreement to that effect between the depositor and said creditor, of which arrangement the bank had full knowledge, constitutes a special deposit. It follows that a subsequent garnishment of the fund is subject to the prior rights of the creditor for whom the deposit was made.

Hamilton v Imes, 216-855; 249 NW 135

General manager—power to deposit and withdraw funds. The general manager of an incorporated, cooperative, dairy company who, for years, and to the general knowledge of the banking and business interest of the locality in question, is in unrestricted management of the entire business of the company, must be deemed to have both actual and ostensible authority to select banks of deposit for the corporate funds, and like authority to withdraw said funds—an authority as to which, both as to the making of deposits and as to the withdrawal thereof, the bank need ask no questions, assuming, of course, it acts at all times in perfect good faith.

Fidelity Co. v Bank, 223-446; 273 NW 141

Rediscounting—estoppel to deny authority of officers. A savings bank, notwithstanding statutory limitations on the power of bank officers, will not be permitted to deny the authority of its officers to rediscount the bank's paper by indorsing said paper "without recourse" but accompanying such indorsement with formal, written agreement binding the bank to repurchase said paper prior to or at a named time, when the party advancing the credit relied thereon, and when said bank received, retained, and availed itself of the entire fruits of the said rediscounting.

Bates v Bank, 219-1358; 261 NW 797

Agreement to repurchase—demand for performance unnecessary. When a bank, (1) rediscounts its paper under indorsements "without recourse", but (2) accompanies the indorsement with a formal written agreement to repurchase the said paper on a named date, demand for performance on said date, or on any date, is unnecessary.

Bates v Bank, 219-1358; 261 NW 797

Question of fact—finding by court—conclusiveness. A finding by the trial court on supporting testimony in an action tried to it that a nondrawee-bank was not, and that the

drawee-bank was, negligent in cashing a check is conclusive on the appellate court.

Bank of Pulaski v Bloomfield, 210-817; 232 NW 124

9157 Articles of incorporation.

Atty. Gen. Opinions. See '25-26 AG Op 43; '28 AG Op 233; '34 AG Op 351

Proof of incorporation. A copy of the articles of incorporation of a banking corporation, duly certified by the secretary of state, is sufficient proof of such incorporation.

State v Niehaus, 209-533; 228 NW 308

Joint stock land banks—legal status. Joint stock land banks, tho organized under federal statutes, are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages, are not governmental instrumentalities, and are suable in the proper state courts.

Higdon v Bank, 223-57; 272 NW 93

Insolvency — assessment on stock — expiration of charter—effect. The liability of stockholders of a state bank to assessment on their stock is not terminated by the expiration of the charter of the bank.

Bates v Bank, 218-1320; 256 NW 286

9159 Notice of incorporation.

Atty. Gen. Opinions. See '25-26 AG Op 43, 488; AG Op June 29, '39

9161 Commencement of business—conditions.

Atty. Gen. Opinion. See '25-26 AG Op 488

9162 Powers.

Right to question corporate management. The corporate management of a corporation may not be questioned by stockholders who became such subsequent to the acts in question.

Pomeroy v Bank, 203-524; 211 NW 219

Unauthorized assignment of mortgage—ratification. An unauthorized assignment by bank officials of a note and mortgage belonging to the bank is ratified and confirmed by the act of the bank in receiving and retaining the consideration paid by the purchaser for said note and mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

Ratification equal to express authorization. A contract under which a debtor-bank agrees to transfer certain assets to a creditor-bank in payment of an indebtedness entered into on behalf of the debtor-bank by its cashier, but without authorization from his board of directors, is valid and enforceable if the debtor-bank, through its board of directors, had full knowledge of the contract, caused or permitted it to be executed, and availed itself of the full benefits thereof.

In re Johnson, 210-891; 232 NW 282

Collections—subagency. A bank which receives a blank-indorsed check from its correspondent bank, with directions to "collect and credit" the correspondent bank, and thereupon conditionally credits the correspondent bank with the amount of the check, and allows the correspondent bank to later withdraw the credit, in the course of business, cannot be deemed the subagent of the original depositor of the check even tho the original depositor, in depositing the check with the first bank, expressly or impliedly authorized said first bank to select a subagent to do the actual collecting; and, on the question of subagency, it is quite immaterial that the check was nonnegotiable.

Thompson v Bank, 207-786; 223 NW 517; 31 NCCA 493

Officer acting in private and personal matter. The acts of an officer of a bank, tho he be a managing officer, in receiving the funds of a relative, and in managing the investment thereof, purely as a personal matter between himself and said relative, imposes no obligation on the bank, even tho the funds are carried on the books of the bank as a matter of convenient bookkeeping. It follows that, upon the insolvency of the bank, the tender to the relative of the investments belonging to him, and found in the bank, carries down any claim of preferential trust against the bank and its receiver.

Andrew v Bank, 212-649; 235 NW 735

Officers—authority—burden of proof. In an action for preferential payment of funds passing through a bank, the plaintiff, if the issue be raised, has the burden to show that the officer receiving the funds was acting in his official capacity and not in a private capacity.

Andrew v Bank, 212-649; 235 NW 735

Collections—negligence—measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks. Substantial but conflicting testimony reviewed and held to present a jury question.

Schooler Motor Co. v Bankers Trust, 216-1147; 247 NW 628

9163 Directors—citizenship.

Insolvency—knowledge of officers presumed. Principle reaffirmed that for many purposes the managing officers of a bank will be conclusively presumed to have knowledge of the insolvent condition of their bank.

Leach v Beazley, 201-337; 207 NW 374

Evidence insufficient to establish relation. Agency arises out of contract, express or implied. Stockholder of bank held not bound by

purchase of stock for him by cashier, and charging his account therefor, in view of showing as to cashier's authority.

Andrew v Bank, (NOR); 239 NW 551

Authority to sell realty—jury question. Evidence reviewed and held to present a jury question on the issue whether the cashier of a savings bank had been given actual authority by the board of directors to sell certain real estate belonging to the bank.

Chismore v Bank, 221-1256; 268 NW 137

Cashier—nonimplied authority. A five-year contract involving an expenditure of $500 for advertising a small village bank in a bank directory is not an ordinary contract within the duties of the cashier, but an extraordinary one requiring the authority of the board of directors in order to bind the bank.

Ashland Corp. v Bank, 216-780; 248 NW 336

Director—violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

9169 Officers and employees—bonds.

Atty. Gen. Opinion. See AG Op May 10, '39

Authority. An agreement by the president of a bank to pay the note of another party to the bank does not preclude the bank from maintaining an action against the maker of the note, it appearing that the transaction between the president and the maker of the note was purely personal, and was concerning a matter in which the bank had no interest.

McRoberts v Ordway, 206-947; 221 NW 507

Cashier's authority. The cashier of a state bank has no authority to bind the bank by representations to a bank director as to the value of bank assets personally taken over by the director and replaced by the director's personal promissory note.

Andrew v Shimerda, 218-27; 253 NW 845

Authority — presumption. The cashier and general manager of a private bank will be presumed to have authority to enter into a contract of rescission relative to the indorsement of negotiable paper.

Runge v Benton, 205-845; 216 NW 737

Estoppel to dispute president's authority. A bank may not dispute the authority of its president in making or causing to be made an unauthorized charge against a depositor's account, and at the same time claim the benefit of the charge.

Dow v Bank, 202-594; 210 NW 815

Inactive president. The president of an insolvent bank cannot escape the legal consequence of her trusteeship because she was inactive and permitted most of the business to be transacted by other officers.

Andrew v Bank, 207-386; 221 NW 954

Officers and agents—duty to protect assets —filing probate claim. A duty is imposed on bank officers and directors to file a claim against the estate of a deceased bank director when the bank's bills receivable are covered by a guaranty agreement executed by such deceased director.

In re Sterner, 224-617; 278 NW 216

Sale of entire assets of bank.

Oskaloosa Bk. v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Responsibility for worthless loans. The president of a bank is personally liable to the bank for loaning the funds of the bank to persons known by him to be financially irresponsible, and especially so when he secures the approval of the directors as to such loans on the repeated assurance that he is back of said loans and will see that they are paid.

Farmers Bk. v Kaufmann, 201-651; 207 NW 764

Investment for customer—burden of proof. A customer who seeks to hold a bank liable for an investment made for and on his behalf has the burden to show that the officers of the bank through whom he dealt were acting for the bank, and not in their individual or private capacity.

Mehaffy v Bank, 210-116; 230 NW 557; 31 NCCA 728

Guaranty of described bank notes—erroneous description—effect. An officer of a bank who, on demand of the state banking department, guarantees in writing the payment of certain separately described bills receivable belonging to the bank, is not liable on a bill receivable which does not strictly correspond to that described in the guaranty. So held where the difference between the bill receivable in the bank and that described in the guaranty was (1) as to amount, or (2) as to name of debtor, or (3) as to the aggregate amount of several bills receivable.

Andrew v Austin, 213-963; 232 NW 79

Fidelity required — violation. The scrupulous fidelity required by law of an agent to his principal is such that one holding the position of vice president and general manager of a bank and who is personally liable as surety on a discounted promissory note, held by the bank as part of its assets, may not cancel his said liability by the simple expedient of surrendering said note to the principal makers thereof and accepting in renewal a new note executed by all the original parties except himself as surety.

Clapp v Wallace, 221-672; 266 NW 493

Fraudulent abstraction of assets. The president of a bank who, knowing that the bank is insolvent, takes the promissory note of the bank for the amount of her personal deposit plus the amount of an actual loan to the bank, will not be permitted to take and retain assets of the bank as collateral security for the payment of the note, except insofar as said note represents said loan.

Andrew v Bank, 207-386; 221 NW 954

Cashier's shortage—acceptance of benefits. Community Bk. v Gaughen, 228- ; 289 NW 727

Directors — nonviolation of trust relationship. A bank director who, while the bank is a going concern but allegedly insolvent, transfers and sells his certificate of deposit in the bank to the president thereof, and long subsequent thereto receives payment therefor from said president, or who, under the same conditions, transfers a like certificate to another bank and receives a new certificate in such other bank—the transferred certificate in each instance being promptly cashed by the issuing bank—violates no trust duty which he owes to his bank or to the depositors thereof, there being no evidence whatever that either transaction was other than one in the ordinary course of business.

Andrew v Kelly, 215-408; 245 NW 755; 84 ALR 1488

9175 Voting of stock—stockholder disqualified.

Atty. Gen. Opinions. See '34 AG Op 76, 351

9176 Deposits.

General deposit. The depositing in a bank of money and checks which are at once entered upon the customer's pass book with right to immediately draw against the amount constitutes a general deposit.

Andrew v Bank, 204-1190; 216 NW 723

General deposit—effect. A general deposit of money in a bank necessarily passes to the bank title to the money.

Andrew v Bank, 205-872; 219 NW 62

Deposits — general (?) or special (?). Whether a bank deposit be general or special necessarily depends on the use to which the depositor puts it. Evidence held to show that a deposit was general.

Andrew v Bank, 218-489; 255 NW 871

Deposits—application to debt due bank. The fact that a bank agreed to carry and did carry a portion of a deposit as a special deposit, for the purpose of paying certain contingent prizes offered by the depositor in his business, does not deprive the bank of the right to apply said special deposit on its matured claim against the depositor—subject, of course, to the rights of the prize winners, if any.

Peterson v Bank & Trust, 219-699; 259 NW 199

Deposits received on condition—violation—effect. A bank which receives cash, checks, and notes on the agreed condition that said receipts will be held intact, and not placed in the general assets of the bank, and will be returned intact on the happening of a named event, must respect and comply with the condition, even tho at the time the bank has enforceable financial obligations against the parties delivering the property. And, in case of violation of the condition and in case of insolvency, the claimants will be entitled to an order on the receiver for restitution, or for preferred payment out of the funds on hand at the time of insolvency, or for such other relief as will be equitable and possible under the circumstances.

Andrew v Bank, 218-1313; 256 NW 292

Bank deposit for particular purpose. A trust fund is created by depositing money in a bank with the definite understanding and agreement at the time between the depositor and the bank that said deposit is for the specific purpose of paying a certain check thereafter to be drawn in a named amount.

Townsend v Bank, 212-1078; 237 NW 356

Deposit account for contest winners—nontrust. A "special account" is not a "special deposit" and does not change the relationship of debtor and creditor existing between a corporation and its banker and does not constitute a trust for the benefit of undetermined contest winners, who, however, had they been so determined, would merely have a prior lien on said deposit.

Bielen v Bank, 224-19; 276 NW 25

Deposit may constitute loan. A deposit of money in a bank for a fixed period of time constitutes a loan.

In re Fahlin, 218-121; 254 NW 296

Bank deposits bonded—time deposits excluded—nonliability. A surety on a bond covering bank deposits, but excluding "indebtedness not subject at all times to immediate withdrawal", held not liable for amount of depositor's savings account, where depositor also had checking account and bank's bylaws reserved right to notice of withdrawals of savings deposits as provided by state statute.

U. S. Guarantee Co. v Walsh Const. Co., 67 F 2d, 679

Title to deposited drafts. The act of a consignor in drawing against a consignee a draft (with bill of lading attached) in favor of a bank, and depositing the same in said bank and receiving credit on his checking account to the full amount thereof, constitutes the bank the unqualified owner of the draft and of the proceeds thereof, notwithstanding the fact that at a later time the consignor recognized the right

of the consignee-drawee to a reduction on the draft, and requested the bank to make such reduction, and the bank voluntarily complied with the request.

Dubuque Fruit Co. v Emerson & Co., 201-129; 206 NW 672

Termination of trust relationship. Where a bank deposit was made for the sole purpose of enabling the depositor to procure a certified check for use in bidding on a public improvement, with the understanding that if the depositor was not awarded the contract he would surrender the certified check and receive a draft for the amount of the deposit, held, that no trust relationship existed after the depositor surrendered his certified check and in return received a draft for the amount of his deposit.

Andrew v Bank, 215-1336; 245 NW 226

Management and disposal of trust property —legal deposit (?) or illegal investment (?). A deposit by a trustee of trust funds in a savings bank, at a stated rate of interest but with the legal right to withdraw said deposit at any time, does not constitute an "investment" within the meaning of §12772, C., '31.

In re Moylan, 219-624; 258 NW 766

Trusts—pleading—essential allegation. In an action to establish a bank deposit as a trust fund, an allegation as to the trust character of the deposit is all-essential.

Peterson v Bank & Trust, 219-699; 259 NW 199

Change in relation between bank and depositor. A bank depositor wholly ceases to be the creditor of the bank when he turns over his deposit to one of the officers of the bank in furtherance of a personal undertaking in which the bank has no interest whatever.

Leach v Bank, 200-954; 205 NW 790

Wrongful deposit of public funds—preference. A deposit in a bank of municipal pension funds (police and firemen) under conditions which deprive the trustees of the power to immediately withdraw said funds is wrongful, and being wrongful the trustees do not lose title to said funds. It follows that in case the bank becomes insolvent, the deposit is entitled to preferential payment from the cash on hand at the time of insolvency.

Andrew v Bank, 222-881; 270 NW 465

Nonpreferential deposits. Record reviewed and held that bank deposits in an insolvent bank were attended by no circumstances that justified a preference in payment.

Bates v Bank, 222-1323; 271 NW 638

Nonright to charge back. A bank which credits its depositor with the amount of a check on another bank, and on clearance surrenders such check to the drawee-bank, and receives in payment thereof the drawee's draft, may not, on the nonpayment of the draft, charge back to the depositor any part of said check, even tho said bank had posted a rule authorizing it so to do, but of which rule the depositor had no knowledge.

Virtue v Bank, 205-392; 218 NW 58; 31 NCCA 461

Deposits—best and secondary evidence. The books of a bank constitute the best evidence of the deposits of estate funds by the administrator—not what appears to be deposit slips and letters of the bank relative thereto.

Varga v Guar. Co., 215-499; 245 NW 765

Bank charged with converted receipts.

Peterson v Citizens Bk., 228- ; 290 NW 546

9177 Payment.

Discussion. See 2 ILB 36—Deposits—unmatured claims set off

Fictitious payee. The absolute duty of a bank, before it pays its depositor's check, to know that the payee's indorsement is genuine, and to pay only on such genuine indorsement, applies to a check which the depositor has unwittingly and without negligence made payable to a fictitious person.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Unintended payee. When a check is unwittingly made payable to a fictitious payee, and delivered to the assumed and supposed agent of such fictitious payee, and the supposed agent indorses the check in the name of the payee and receives the money thereon, it may not be said that the money was paid to the very person to whom the drawer intended it to be paid.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Unintended payee. The drawer of a check who unwittingly and without negligence makes it payable to a fictitious person to whom he supposed he was making a loan may not be said to have intended payment to be made to the supposed agent of the named payee (to whom it was delivered) because said supposed agent was, without the knowledge of said drawer, doing business in the name of such fictitious payee.

McCornack v Bank, 203-877; 211 NW 561

Payment on forged indorsement. Evidence reviewed, in an action by a depositor against a bank to recover the amount paid by the bank on a forged indorsement and charged to the depositor's account, and held amply to support a finding that the depositor was not guilty of any negligence which prejudiced the bank.

McCornack v Bank, 207-274; 222 NW 851

Negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee-bank the amount paid by the

bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amst. Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Inadvertently paid check. A drawee of a check may recover of the payee the amount inadvertently paid on the check at a time when the payee knew that the drawer had no funds on deposit with the drawee—knew that the drawer had gone into the hands of a receiver and that his deposit had been transferred to the receiver.

Bankers Tr. Co. v Reg. Co., 200-1014; 205 NW 838

Excessive interest-bearing certificates. A certificate of deposit issued by a savings bank is not illegal because made to draw an apparently very high rate of interest, to wit, seven and one-half percent, nor because part of the interest is paid the depositor in advance, the directors never having fixed any rate of interest on such certificates.

Murray v Bank, 201-1325; 207 NW 781
See Partch v Krogman, 202-524; 210 NW 612

Interest paid in advance—receivership—effect. In case interest is paid a depositor in advance, the termination of the accrual of all interest by the appointment of a receiver necessitates the charging of the deposit with the amount of unearned interest.

Murray v Bank, 201-1325; 207 NW 781

Pass book—ambiguity—parol to explain. A pass book issued by a savings bank to a depositor and containing certain printed provisions governing deposits, but silent as to the date when the deposit was payable, and carrying the indorsement "Maytag Employee's Special Savings Account", creates such ambiguity (assuming that the printed provisions embraced the full agreement) as to justify the reception of parol evidence to explain the ambiguity.

Popofsky v Wearmouth, 216-114; 248 NW 358
See In re Olson, 206-706; 219 NW 401

Manipulation of deposit not constituting payment. Evidence relative to the surrender by a depositor to his bank of certificates of deposit issued by the bank, reviewed and held not to reveal payment of said certificates; also held that a subsequently dated certificate of deposit issued by the bank to said depositor was intended to be, and was, but a continuation of the former unpaid deposit.

Bates v Bank, 221-1251; 268 NW 74

Certificate of deposit—permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith, bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Unauthorized charge against deposit. A bank must pay out its depositors' funds strictly as directed by the depositor. Evidence reviewed, relative to an unauthorized charge against a deposit, and held that the depositor was not estopped to question such charge, nor was he negligent in reference thereto, nor had he ratified said charge.

Dow v Bank, 202-594; 210 NW 815

Unauthorized payment. A depositor is not bound to anticipate that his banker will wrongfully make payment from the deposit, and is under no obligation to call for his pass book in order to determine whether such payment has been made.

Dow v Bank, 202-594; 210 NW 815

Acquiescence in bank statements—effect.
State Bank v Cooper, 201-225; 205 NW 333

9178 Regulations—posting.

Failure to post—effect. Tho rules and regulations relative to the payment by a bank of deposits are not conspicuously posted in the office of the bank, as required by statute, yet, if the depositor in question has personal knowledge of the unposted rules, he will be bound thereby.

Andrew v Bank, 222-881; 270 NW 465

Deposits—nonright to charge back. A bank which credits its depositor with the amount of a check on another bank, and on clearance surrenders such check to the drawee-bank, and receives in payment thereof the drawee's draft, may not, on the nonpayment of the draft, charge back to the depositor any part of said check, even tho said bank had posted a rule authorizing it so to do, but the depositor had no knowledge of this rule.

Virtue v Bank, 205-392; 218 NW 58; 31 NCCA 461

9179 Notice of withdrawal.

Deposits payable on demand—exception. A deposit of trust funds in a savings bank, tho at a stated rate of interest, is legally with-

drawable at the pleasure of the trustee unless the bank, prior to the deposit, has adopted and promulgated a rule requiring a 60-day notice of withdrawal as authorized by this section.

In re Moylan, 219-624; 258 NW 766

Bank deposits bonded—time deposits excluded—nonliability. A surety on a bond covering bank deposits, but excluding "indebtedness not subject at all times to immediate withdrawal", held not liable for amount of depositor's savings account, where depositor also had checking account and bank's bylaws reserved right to notice of withdrawals of savings deposits as provided by state statute.

U. S. Guarantee Co. v Walsh Const. Co., 67 F 2d, 679

9181 Demand certificates.

Authority to issue. The issuance of time certificates of deposit by savings banks is clearly contemplated by our statutes.

Murray v Bank, 201-1325; 207 NW 781

Wrongful issuance—timely repudiation. A party to whom a bank, without authority, has issued a certificate of deposit in payment of a claim due from the bank, may not be deemed estopped to repudiate such certificate, or be deemed to have ratified the issuance of such certificate, when his repudiation was reasonably prompt, and when no injury resulted to the bank or to its receiver from any delay in repudiating.

Andrew v Bank, 217-232; 251 NW 860

Illegal issuance. Certificates of deposit issued by a savings bank in payment or exchange for promissory notes when the bank has no funds with which to pay for the notes are absolutely void in the hands of any holder.

Sweet v Bank, 200-895; 205 NW 470

9183 Investment of funds.

Atty. Gen. Opinions. See '25-26 AG Op 191; '34 AG Op 228, 645

Unlawful investment—bank's general right to set-off. The fact that a bank unlawfully invests its funds in securities not permitted by law as proper bank investments does not prevent the receiver of the bank from offsetting the amount of said securities against the deposit of the party who is obligated to pay said securities; and this is true even tho the bank was a mortgagee for the benefit of holders generally of said securities.

Andrew v Bank, 218-489; 255 NW 871

9183.3 Investments by state banks and trust companies.

Atty. Gen. Opinion. See '34 AG Op 228

9184 Commercial paper.

Discussion. See 16 ILR 85—Drafts taken in payment of checks; 19 ILR 338—Bank as purchaser of paper

Atty. Gen. Opinions. See '25-26 AG Op 158; '34 AG Op 228

Public policy—agreement to repurchase note and mortgage. A contract on the part of a trust company to repurchase a note and mortgage sold by it is not against public policy, it appearing that the company was organized to deal in commercial paper and, inter alia, to receive time deposits and issue drafts on its depositories.

Hawkeye Ins. v Cent. Trust, 210-284; 227 NW 637

Rights and liabilities on indorsement or transfer—negotiable certificate of deposit as payment. A bank which issues and delivers its negotiable certificate of deposit in exchange for an unmatured negotiable promissory note then and thereby effects full payment for the note, within the meaning of the negotiable instrument law.

People's Bank v Smith, 210-136; 230 NW 565; 69 ALR 399

Insolvency—right to transfer note. A bank which is a going concern, but insolvent, and known by all its officers to be insolvent, may, for full value, validly transfer a promissory note held by it, to a transferee who knows of such insolvency, even tho the incidental effect of such transfer may be to deprive the maker of said note of his right to offset against said note the amount of his deposit in said insolvent bank at the time of the transfer.

Ottumwa Bank v Crawford, 215-1386; 244 NW 674

Issuance of certificate of deposit in payment of note—validity. A certificate of deposit issued by a savings bank in payment of a negotiable promissory note constitutes a payment of value for the note, it appearing that the bank at the time had ample funds on hand for the purchase of said note; and this is true tho the directors had never authorized the purchase in such manner.

Andrew v Peterson, 214-582; 243 NW 340

Bank's obligation on depositor's check. A bank which agrees to pay checks issued from time to time by an insolvent livestock dealer for stock purchased, and to reimburse itself from the sight drafts drawn from time to time by the dealer when reselling the stock, and which, for a time, carries out the arrangement and encourages its continuance, and, in part, applies the proceeds of such sight drafts to the discharge of other obligations of the dealer in which the bank is financially interested, may not, after taking over sight drafts covering certain resales with knowledge that unpaid checks for said stock were outstanding, apply

the proceeds of said drafts to an overdraft against the dealer, and thereby shift the loss to the unpaid check holder. On the contrary, the bank must be held, impliedly, to have agreed to loan to the dealer money sufficient to pay said outstanding checks. In other words the bank is obligated to pay said checks.

Pascoe v Bank, 217-205; 251 NW 63

Payment of funds to one with apparent authority to collect. When the plaintiff gave a third party his passbook to be used to withdraw an account from an Italian bank, and the third party used the passbook to secure a personal note given to the defendant bank through which the exchange transaction was made, the bank was not liable for using the funds received from the Italian bank as payment of the note, when it might have thought that the note was given to obtain an advance for the plaintiff, and had no knowledge of wrongdoing, and previous transactions indicated an apparent authority to transact the business in such manner.

Matalone v Bank, 226-1031; 285 NW 648

9192 Shares—transfers.

Atty. Gen. Opinions. See '25-26 AG Op 272; '34 AG Op 710

Guaranty—long-continued mutual construction. The mutual construction which parties have for years placed on a guaranty against loss on bank stock, arising from the uncollectibility of bank loans, is very, very influential with the court, especially when the definite and comprehensive terms of the guaranty support said mutual construction.

Nelson v Hamilton, 213-1231; 240 NW 738

Stock, subscription for—payment—trust relation. One who subscribes for corporate shares of stock, pays therefor, and receives a valid receipt evidencing such payment may not claim that he continued to retain title to the money because no certificate of stock was issued to him.

Andrew v Bank, 219-921; 258 NW 911

Issuance of stock—estoppel. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank, 219-939; 258 NW 925

Double liability—bank official's wife—stock transfer to husband. Where a wife transfers her bank stock to her husband, a bank officer, who informed other bank officials thereof, who contributed to the insolvent bank on a basis including this stock and who personally, instead of by proxy as previously, voted this stock, he was in fact the actual owner of bank stock, even tho it had not been transferred to him on the bank's books, and the double liability assessment is not recoverable from the wife.

Bates v Bank, 223-1215; 275 NW 91

9193 Deposits—to whom payable.

Relation between bank and depositor. Principle reaffirmed that the deposit of money in a bank creates the relation of debtor and creditor, and not that of borrower and lender.

Leach v Beazley, 201-337; 207 NW 374

Deposit may constitute loan. A deposit of money in a bank for a fixed period of time constitutes a loan.

In re Fahlin, 218-121; 254 NW 296

General deposit—effect. A general deposit of money in a bank necessarily passes to the bank title to the money.

Andrew v Bank, 205-872; 219 NW 62

What constitutes general deposit. A general, and not a special or specific, deposit is shown by proof that a buyer and shipper of stock (who was also engaged in two other different lines of business) had but one bank deposit account, and that in buying stock he simply delivered his bank check to the seller, and then, as a general course of business, shipped the stock in the name of his bank, which thereupon at his direction, drew on the consignee, and credited the shipper's deposit with the amount of the draft, thereby creating a deposit credit out of which any and all checks issued by the shipper, whether for stock purchases or otherwise, would be paid, if and when presented; and this is true even tho the bank knew that the particular purpose in the mind of the shipper was to protect his outstanding checks for purchases of stock.

Andrew v Bank, 205-888; 219 NW 53

Deposits — general (?) or special (?). Whether a bank deposit be general or special necessarily depends on the use to which the depositor puts it.

Andrew v Bank, 218-489; 255 NW 871

Presumption. Deposits are presumed to be general, in the absence of testimony to the contrary.

Andrew v Bank, 205-872; 219 NW 62

Pension money as special or specific deposit. A deposit in a bank may not be deemed either a "special" or a "specific" deposit, and therefore entitled to a preference in payment, from the naked fact that the subject-matter of the deposit was pension money of the depositor's, especially when the deposit was evidenced by a time certificate.

Andrew v Bank, 205-872; 219 NW 62

Special deposit superior to garnishment. Money deposited or caused to be deposited by a depositor in a bank for the sole use and

benefit of a bona fide creditor of the depositor, and under an agreement to that effect between the depositor and said creditor, of which arrangement the bank had full knowledge, constitutes a special deposit. It follows that a subsequent garnishment of the fund is subject to the prior rights of the creditor for whom the deposit was made.

Hamilton v Imes, 216-855; 249 NW 135

Special deposits—evidence—sufficiency. Evidence held insufficient to show that a deposit was made for the special purpose of meeting payment on a particular draft, or was made under such circumstances that the issuance of the draft effected a pro tanto equitable assignment of the deposit.

Heckman v Bank, 208-322; 223 NW 164

Certificate of deposit. Parol evidence is admissible to show that a time certificate of deposit was accompanied by a collateral oral agreement between the depositor and the bank to the effect that the bank would pay the certificate on demand.

In re Olson, 206-706; 219 NW 401

See Popofsky v Wearmouth, 216-114; 248 NW 358

Purchase price—escrow deposit—ownership. The purchaser of land who, on the day of performance, and with the knowledge and acquiescence of the vendor, and pending the perfecting and delivering of the deed, goes into possession, and deposits the purchase money in a bank, on condition that it be paid to the vendor when the deed is perfected and delivered, and himself retains the evidence of such deposit until he receives the deed, must be held to be the owner of the deposit and to suffer the loss which results from the subsequently discovered fact that the bank, immediately after receiving the deposit, dissipated it, the bank being then, without the knowledge of both parties, insolvent.

Bolte v Schenk, 205-834; 210 NW 797

Deposits—stated account. Principle reaffirmed that the monthly and customary statement of a bank to its customer of the condition of the customer's account becomes an account stated after the lapse of a reasonable time without objection by the customer.

Pierce & Gamet v Bank, 213-1388; 239 NW 580

Certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

Administrator—surety—liability—disobeying order of court. An administrator and the surety on his bond are liable for a shortage in estate funds occasioned by the failure of the administrator's own private bank in which the funds were deposited, the administrator having been ordered by the court prior to the insolvency of said bank to remove the funds to another depository, and, while able to comply with said order, had neglected so to do.

In re Kendrick, 214-873; 243 NW 168

Administrator—disobeying order of court—unallowable defense. An administrator who disobeys an order of court as to the bank in which he should deposit estate funds may not, in case of loss, plead in defense that, had he complied with the order, his own private bank in which the funds in fact were on deposit would have been rendered insolvent.

In re Kendrick, 214-873; 243 NW 168

Administrator's bank account — decedent's debt—no offset. Receiver of insolvent bank held unauthorized to set off amount of checking account standing in name of administrator against indebtedness owing to bank by intestate where, immediately on appointment of administrator, checking account passed to administrator who added to account by deposits at various times and drew checks against account until closing of bank.

In re Schwarting, (NOR); 257 NW 189

Right to offset on debt to bank. A bank may apply the deposit of a deceased depositor on the promissory note of the depositor to the bank, even tho such note is barred by the statute of limitation.

Merritt v Peterson, 208-672; 222 NW 853

Deposits by guardian without order of court —effect. A deposit in a bank by a guardian of guardianship funds, as a loan, without a directing or approving order of court, is wrongful, and the bank at once becomes a trustee of the fund for the benefit of the ward.

Andrew v Bank, 207-394; 223 NW 249

Guardian—proper plaintiff. The guardian is the proper plaintiff in an action to recover the property of the minor, even tho the matter is one in which the minor had assumed to act for himself.

McFerren v Bank, 214-198; 238 NW 914

Payment of funds to one with apparent authority to collect. When the plaintiff gave a third party his passbook to be used to withdraw an account from an Italian bank, and the third party used the passbook to secure a personal note given to the defendant bank through which the exchange transaction was made, the bank was not liable for using the funds re-

ceived from the Italian bank as payment of the note, when it might have thought that the note was given to obtain an advance for the plaintiff, and had no knowledge of wrongdoing, and previous transactions indicated an apparent authority to transact the business in such manner.

Matalone v Bank, 226-1031; 285 NW 648

Forged indorsement—burden of proof. A drawee-bank, when sued for paying a check on a forged indorsement, must affirmatively establish prejudice as a result of the failure of the drawer to give notice of the forged indorsement upon the discovery thereof.

New Amst. Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Fraudulent dissipation—nonliability of bank. A bank is not responsible to its depositor for the fraudulent conduct of the depositor's employee, aided by an employee of the bank, in fraudulently withdrawing from the bank the funds of the depositor, on checks which the depositor's employee had specific written authority to draw to himself personally, when the bank had no knowledge or reason to know of any of said wrongdoings.

Pierce & Gamet v Bank, 213-1388; 239 NW 580

Wrongful issuance of certificate—repudiation. A party to whom a bank, without authority, has issued a certificate of deposit, in payment of a claim due from the bank, may not be deemed estopped to repudiate such certificate, or be deemed to have ratified the issuance of such certificate, when his repudiation was reasonably prompt, and when no injury resulted to the bank or to its receiver from any delay in repudiating.

Andrew v Bank, 217-232; 251 NW 860

Dissolution — nonpreference in deposits. Principle reaffirmed that, in the settlement of the affairs of an insolvent state bank, the deposit of a municipal corporation has no preference over other deposits. (§9239, C., '24.)

Leach v Bank, 201-346; 207 NW 331

Insolvency—claims — general deposit—nontrust relationship. Where receipts from sale of livestock in Chicago were remitted to local bank, which in turn entered the remittance as a deposit for local livestock shipping association, held that association was not entitled to preference on its claim in receivership proceeding of the local bank, there being no element of trust involved in the transaction and the fund being simply a general deposit.

Leach v Bank, (NOR); 212 NW 390

Notice—coparties. In an action by a municipality against the receiver of an insolvent bank and its surety, to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Independent Dist. v Bank, 204-1; 213 NW 397

Waiver by depositors—effect on nonsigners. The act of a majority of the depositors of a bank (owning a large majority of the deposits) in signing waivers deferring payment of their deposits, in order to preserve the bank as a going concern, cannot be deemed the legal equivalent of an express agreement on their part that the depositors who do not sign such waivers shall be paid in full before such signers are paid; nor can such signing be deemed prejudicial to the nonsigners; nor, by such signing, can said signers be deemed to have lost their status as depositors and thereby become mere lenders of money to the bank.

Andrew v Bank, 216-739; 249 NW 768; 88 ALR 1003

Bank deposits bonded—time deposits excluded—nonliability. A surety on a bond covering bank deposits, but excluding "indebtedness not subject at all times to immediate withdrawal", held not liable for amount of depositor's savings account, where depositor also had checking account and bank's bylaws reserved right to notice of withdrawals of savings deposits as provided by state statute.

U. S. Guarantee Co. v Walsh Const. Co., 67 F 2d, 679

9199 Pre-existing obligations.

Dissolution—wholesale transfer of assets—right of creditors. A good-faith transfer by a going bank of substantially all its assets, and a good-faith acceptance of such transfer by the transferee under an agreement by the transferee to pay all record depositors, do not impose on the transferee liability to pay a nonrecord depositor when the transferred assets prove insufficient to pay the record depositors, and the transferor is not shown to have been insolvent at the time of the transfer.

Garvey v Trust Co., 214-401; 239 NW 518

CHAPTER 414

STATE BANKS

Atty. Gen. Opinions. See '36 AG Op 28, 213, 666

9202 "State banks" defined.

Insolvency—right to transfer note. A bank which is a going concern, but insolvent, and known by all its officers to be insolvent, may, for full value, validly transfer a promissory note held by it, to a transferee who knows of such insolvency, even tho the incidental effect of such transfer may be to deprive the maker of said note of his right to offset against said note the amount of his deposit in said insolvent bank at the time of the transfer.

Ottumwa Bank v Crawford, 215-1386; 244 NW 674

Deposits received on condition—violation—effect. A bank which receives cash, checks, and notes on the agreed condition that said receipts will be held intact, and not placed in the general assets of the bank, and will be returned intact on the happening of a named event, must respect and comply with the condition, even tho at the time the bank has enforceable financial obligations against the parties delivering the property. And, in case of violation of the condition and in case of insolvency, the claimants will be entitled to an order on the receiver for restitution, or for preferred payment out of the funds on hand at the time of insolvency, or for such other relief as will be equitable and possible under the circumstances.

Andrew v Bank, 218-1313; 256 NW 292

Certificate of deposit—permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith, bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Transfer of stock after expiration of charter—effect. When the charter of a bank expires, the legal existence of the corporation terminates. Likewise terminates the legal right to transfer the stock in such sense that the transferor ceases to be a stockholder.

Andrew v Bank, 211-649; 234 NW 542

9203 Other use of name prohibited.

Atty. Gen. Opinion. See '30 AG Op 162

9204 Incorporation — articles — contents.

Right to question corporate management. The corporate management of a corporation may not be questioned by stockholders who became such subsequent to the acts in question.

Pomeroy v Bank, 203-524; 211 NW 219

Proof of incorporation. A copy of the articles of incorporation of a banking corporation, duly certified by the secretary of state, is sufficient proof of such incorporation.

State v Niehaus, 209-533; 228 NW 308

Authority—presumption. The cashier and general manager of a private bank will be presumed to have authority to enter into a contract of rescission relative to the indorsement of negotiable paper.

Runge v Benton, 205-845; 216 NW 737

Joint stock land banks—legal status. Joint stock land banks, tho organized under federal statutes, are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages, are not governmental instrumentalities, and are suable in the proper state courts.

Higdon v Bank, 223-57; 272 NW 93

Officers—authority—burden of proof. In an action for preferential payment of funds passing through a bank, the plaintiff, if the issue be raised, has the burden to show that the officer receiving the funds was acting in his official capacity and not in a private capacity.

Andrew v Bank, 212-649; 235 NW 735

Officer acting in private and personal matter. The acts of an officer of a bank, tho he be a managing officer, in receiving the funds of a relative, and in managing the investment thereof, purely as a personal matter between himself and said relative, imposes no obligation on the bank, even tho the funds are carried on the books of the bank as a matter of convenient bookkeeping. It follows that, upon the insolvency of the bank, the tender to the relative of the investments belonging to him, and found in the bank, carries down any claim of preferential trust against the bank and its receiver.

Andrew v Bank, 212-649; 235 NW 735

Release or subordination of mortgage—authority of president. A corporation is bound by the act of its president in subordinating its

mortgage to another mortgage, (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached, and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

9205 Record and notice of incorporation.

Atty. Gen. Opinion. See AG Op June 29, '39

9209 Shares.

Atty. Gen. Opinion. See '34 AG Op 710

Issuance of stock—estoppel to question. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank, 219-939; 258 NW 925

Subscription for—payment—trust relation. One who subscribes for corporate shares of stock, pays therefor, and receives a valid receipt evidencing such payment may not claim that he continued to retain title to the money because no certificate of stock was issued to him.

Andrew v Bank, 219-921; 258 NW 911

9210 Directors.

Cashier—nonimplied authority. A 5-year contract involving an expenditure of $500 for advertising a small village bank in a bank directory is not an ordinary contract within the duties of the cashier, but an extraordinary one requiring the authority of the board of directors in order to bind the bank.

Ashland Towson v Bank, 216-780; 248 NW 336

Corporate contract—unallowable rescission. A stockholder may not rescind a contract entered into by the corporation of which he is a stockholder and another corporation.

Andrew v Bank, 219-921; 258 NW 911

Directors—nonliability. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

Directors—nonviolation of trust relationship. A bank director who, while the bank is a going concern but allegedly insolvent, transfers and sells his certificate of deposit in the bank to the president thereof, and long subsequent thereto receives payment therefor from said president, or who, under the same conditions, transfers a like certificate to another bank and receives a new certificate in such other bank,—the transferred certificate in each instance being promptly cashed by the issuing bank,—violates no trust duty which he owes to his bank or to the depositors thereof, there being no evidence whatever that either transaction was other than one in the ordinary course of business.

Andrew v Kelly, 215-408; 245 NW 755; 84 ALR 1488

Director—violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

Fraudulent abstraction of assets. The president of a bank who, knowing that the bank is insolvent, takes the promissory note of the bank for the amount of her personal deposit plus the amount of an actual loan to the bank, will not be permitted to take and retain assets of the bank as collateral security for the payment of the note, except insofar as said note represents said loan.

Andrew v Bank, 207-386; 221 NW 954

Inactive president. The president of an insolvent bank cannot escape the legal consequence of her trusteeship because she was inactive and permitted most of the business to be transacted by other officers.

Andrew v Bank, 207-386; 221 NW 954

Liability of bank president. The board of directors of a state bank, not the president of the bank, is the statutory governing body of the bank. Evidence reviewed in detail and held to reveal no neglect of the president which rendered him personally liable to the bank for damages suffered by the bank consequent on customers being permitted, to the knowledge of the directors, to overdraw their accounts, it appearing, inter alia, that the president's efforts to prevent such overdrafts were secretly frustrated by other officers of the bank, appointed by the board.

Bates v Seeds, 223-70; 272 NW 515

Right to contract for payment of debts. A good-faith contract by the board of directors of a state bank, for and on behalf of the bank, and providing for the payment of the bank's

debts incurred in the operation of the bank, is valid without any approval by the stockholders of the bank.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Sale of entire assets. The board of directors of an insolvent banking corporation which is on the verge of complete financial collapse has power to sell en masse the assets of the corporation without the consent of the stockholders, and especially when the directors own a majority of the stock.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

CHAPTER 415

GENERAL PROVISIONS RELATING TO BANKS AND TRUST COMPANIES

Atty. Gen. Opinions. See '28 AG Op 233; '32 AG Op 46; '34 AG Op 117

9217.2 Directors—eligibility.

Mortgage of director—guaranty by bank. Evidence quite exhaustively reviewed and held insufficient to establish a contract of guaranty of payment by a bank of the personal mortgage of a director.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Knowledge of insolvency—not imputable to nonactive director. Knowledge that a bank is insolvent is not imputed to one who is a director and minor stockholder of the bank, when he takes no active part in its management and has no actual knowledge of the insolvency.

In re Smith, 228- ; 289 NW 694

Certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

9217.3 Bonds of officers and employees.

Director's personal note. The cashier of a state bank has no authority to bind the bank by representations to a bank director as to the value of bank assets personally taken over by the director and replaced by the director's personal promissory note.

Andrew v Shimerda, 218-27; 253 NW 845

Guaranty of described bank notes—erroneous description—effect. An officer of a bank who, on demand of the state banking department, guarantees in writing the payment of certain separately described bills receivable belonging to the bank, is not liable on a bill receivable which does not strictly correspond to that described in the guaranty. So held where the difference between the bill receivable in the bank and that described in the guaranty was (1) as to amount, or (2) as to name of debtor, or (3) as to the aggregate amount of several bills receivable.

Andrew v Austin, 213-963; 232 NW 79

Bank charged with converted receipts.

Peterson v Citizens Bk., 228- ; 290 NW 546

Fidelity required — violation. The scrupulous fidelity required by law of an agent to his principal is such that one holding the position of vice president and general manager of a bank and who is personally liable as surety on a discounted promissory note, held by the bank as part of its assets, may not cancel his said liability by the simple expedient of surrendering said note to the principal makers thereof and accepting in renewal a new note executed by all the original parties except himself as surety.

Clapp v Wallace, 221-672; 266 NW 493

Unallowable defense. It is no defense on the part of one of two sureties on the bond of a public officer that said officer, while so acting, was also acting as cashier of a bank; that, as cashier, he was short in his account with the bank; that said other surety was also surety on the private bond of the cashier; and that said other surety and said cashier conspired to use and did use the public funds with which to make good the cashier's shortage to the bank.

School Dist. v Sass, 220-1; 261 NW 30

9220 Loans to officers or employees—use of funds.

Oral guaranty by bank of payment of director's mortgage. Testimony that a bank, acting through its board of directors, orally guaranteed the payment of the personal mortgage of one of said directors, is incompetent under the statute of frauds.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

9221.1 Unsecured loans—conditions.

Money lent—contract for repayment. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

9221.2 Owning or loaning on its own stock—prior lien of bank.

Payment of voluntary assessment on bank stock owned by estate. An administrator is properly given credit for paying a voluntary assessment on bank stock owned by the estate when such payment was in the interest of the estate and was necessary in order to reorganize the bank and to maintain it as a going concern.

In re Atkinson, 210-1245; 232 NW 640

9221.3 Loans—conditions—gratuities.

Instruction requested—loan to be approved by loan committee—properly refused. In action on fidelity bond of a bank cashier, a request that the court inform jury that statute required that loans be made by executive officer and not by a loan committee was properly refused, since requirement that loan be approved by loan committee was lawful.

Fidelity Co. v Bates, 76 F 2d, 160

9222 Indebtedness. (Repealed)

Additional annotations. See under §9239

Assumption of liabilities. The written agreement by a bank to take over the assets of an insolvent bank and apparently to assume the payment of all the liabilities of the insolvent will be controlled, in its general terms, by the official bank resolution pertaining to the matter. Held, under this rule, that the assumption in a certain case embraced liabilities appearing only on the books of the insolvent bank.

German Amer. Bank v Bank, 203-276; 211 NW 386

Assumption of mortgage. A bank, as grantee in a deed of conveyance, may validly assume and agree to pay an existing mortgage on the land, it appearing that the board of directors had, with full knowledge of all the facts, formally authorized the receipt of such deed.

Sheley v Engle, 204-1283; 213 NW 617

Assumption of mortgage. The action of the directors of a bank in authorizing the receipt by the bank of a deed "as additional security" does not have the effect of overcoming the effect of a clause in the deed whereby grantee assumed and agreed to pay an existing mortgage on the land, when such clause was inserted in the deed as the result of a valid agreement between the bank and the mortgagor, of which the directors had full knowledge.

Sheley v Engle, 204-1283; 213 NW 617

Change in relation between bank and depositor. A bank depositor wholly ceases to be the creditor of the bank when he turns over his deposit to one of the officers of the bank in furtherance of a personal undertaking in which the bank has no interest whatever.

Leach v Bank, 200-954; 205 NW 790

Issuance of certificate of deposit in payment for note—validity. A certificate of deposit issued by a savings bank in payment of a negotiable promissory note constitutes a payment of value for the note, it appearing that the bank at the time had ample funds on hand for the purchase of said note; and this is true tho the directors had never authorized the purchase in such manner.

Andrew v Peterson, 214-582; 243 NW 340

Nonliability of bank for personal deal of officers. A bank is not responsible for the acts of an officer of the bank in misappropriating the proceeds of a draft when said draft, tho payable to the officer in his official capacity, was received by him, not as an officer of the bank, but in his individual capacity, and in the furtherance of a private transaction between himself and others with whom he was associated.

Security Bk. v Bigelow, 205-695; 216 NW 96

Right to secure deposits. The officers of a savings bank which is a duly selected and acting depository of county funds under a statutory depository bond may, in addition to the security afforded by said previously executed bond, validly transfer to the county, and the county through its fiscal officers may validly accept, notes and mortgages of the bank as additional collateral security for said deposits.

Andrew v Bank, 203-1335; 214 NW 559

Unallowable guaranty. A state bank is wholly without authority to guarantee the payment of a credit which has no relation to the ordinary functions of the bank.

Dewey Wks. v Ryan, 206-1100; 221 NW 800

9222.1 Interest on time deposits.

Atty. Gen. Opinion. See '30 AG Op 266

9222.2 Pledge of bank assets.

Agreement to repurchase—demand for performance unnecessary. When a bank, (1) rediscounts its paper under indorsements "without recourse", but (2) accompanies the indorsement with a formal written agreement to repurchase the said paper on a named date, demand for performance on said date, or on any date, is unnecessary.

Bates v Bank, 219-1358; 261 NW 797

Authority of cashier-director. Authority from the board of directors of a bank to its cashier (who was one of the directors) to secure a loan to the bank and to pledge such securities of the bank's as might be necessary embraces power in the cashier to pledge such securities, not only for the payment of the loan then obtained, but for the payment of a preexisting indebtedness of the bank's to another party with whom the loaner was affiliated in business, when the cashier-director had full knowledge, prior to obtaining authority to se-

cure the loan, that the loaner would not loan under any other conditions.

Leach v Bank, 206-265; 217 NW 865

Hypothecating assets—legality. The statutory prohibition that no "cashier or other officer or employee" of a state bank shall hypothecate any asset of the bank unless authority so to do is granted at least annually by recorded resolution of the board of directors does not prohibit the board from legally ordering the cashier, with the approval of the superintendent of banking, to hypothecate bank assets in order to secure a legal indebtedness of the bank, even tho no formal, written resolution to that effect was actually passed by the board. (§§9222-c3, 9297, C., '31 [§§9222.3, 9297, C., '39]).

Andrew v Bank, 216-1170; 250 NW 492

Hypothecating assets—legality. The statutory prohibition that no "cashier or other officer or employee" of a state bank shall hypothecate any asset of the bank, unless authority so to do is granted at least annually by recorded resolution of the board of directors, does not prohibit the board itself from legally ordering the president and cashier to hypothecate bank assets in order to secure the bank's legal indebtedness, even tho no formal written record of the order is entered. (§§9222-c2, 9297, C., '31 [§§9222.2, 9297, C., '39].)

In re Hannahs, 217-1016, 252 NW 539

Right to contract for payment of debts. A good-faith contract by the board of directors of a state bank, for and on behalf of the bank, and providing for the payment of the bank's debts incurred in the operation of the bank, is valid without any approval by the stockholders of the bank.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Rediscounting—estoppel to deny authority of officers. A savings bank, notwithstanding statutory limitations on the power of bank officers, will not be permitted to deny the authority of its officers to rediscount the bank's paper by indorsing said paper "without recourse" but accompanying such indorsement with formal, written agreement binding the bank to repurchase said paper prior to or at a named time, when the party advancing the credit relied thereon, and when said bank received, retained, and availed itself of the entire fruits of the said rediscounting.

Bates v Bank, 219-1358; 261 NW 797

Unauthorized assignment of mortgage—ratification. An unauthorized assignment by bank officials of a note and mortgage belonging to the bank is ratified and confirmed by the act of the bank in receiving and retaining the consideration paid by the purchaser for said note and mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

9222.3 Pledge to secure public funds.

Atty. Gen. Opinions. See '32 AG Op 150; '34 AG Op 109, 403; '36 AG Op 169, 446, 666

9223 Limit of liabilities.

Atty. Gen. Opinion. See '25-26 AG Op 478

Authority of cashier-director. Authority from the board of directors of a bank to its cashier (who was one of the directors) to secure a loan to the bank and to pledge such securities of the bank as might be necessary, embraces power in the cashier to pledge such securities, not only for the payment of the loan then obtained, but for the payment of a pre-existing indebtedness of the bank to another party with whom the loaner was affiliated in business, when the cashier-director had full knowledge, prior to obtaining authority to secure the loan, that the loaner would not loan under any other conditions.

Leach v Bank, 206-265; 217 NW 865

Debts beyond lawful limit. A debt contracted by a corporation in excess of the maximum limitation prescribed by law is not void.

German Amer. Bk. v Bank, 203-276; 211 NW 386

Dragnet security agreement. A bank which, upon making a loan, exacts from the borrower certain collateral security and an agreement, in effect, that such security may be applied to the discharge of any other liability of the borrower, either to said bank or to a named affiliated bank, arms the said affiliated bank with legal right to apply any remaining balance of said collateral to the discharge of the borrower's pre-existing obligation to such affiliated bank.

Leach v Bank, 206-265; 217 NW 865

Excess loans—note of third party to conceal. One who, in order to enable a state banking institution to conceal the fact that it has made loans to a borrower in excess of the amount permitted by law, executes and delivers to the bank his promissory note in lieu of such excess loans, is entitled, when the said excess notes are paid by the borrower, to a surrender of his note and the collateral pledged therewith.

Pomeroy v Bank, 203-524; 211 NW 219

Certificates of deposit—illegal issuance. Certificates of deposit issued by a savings bank in payment or exchange for promissory notes when the bank has no funds with which to pay for the notes are absolutely void in the hands of any holder.

Sweet v Bank, 200-895; 205 NW 470

Guaranty of payment of rediscounts. A written, individual guaranty by the officers of a bank of the payment of all promissory notes which the bank or its officers might take and rediscount with the guarantee is supported by ample consideration, it appearing that the

taking and rediscounting of the notes were part of a plan under which the bank could continue to accommodate its customers with loans which it could not otherwise make because of statutory restrictions on loans.

Bankers Tr. v Hill, 207-1375; 221 NW 916

Officers as guarantors—nonright to set-off. The officers of a bank who, to further the interest of their bank, enter into an individual guaranty of the payment of all promissory notes which their bank or its officers may rediscount with the guarantee, are not entitled, when sued on the guaranty, to offset against their liability the amount of a deposit which their bank had with the guarantee at the time it became insolvent and passed into the hands of a receiver, and which deposit the guarantee surrendered to the receiver on his demand.

Bankers Tr. v Hill, 207-1375; 221 NW 916

Rewards—liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

9224 Oath of directors.

Directors — nonliability for naked nonfeasance. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

Director—violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

9224.1 Meetings—examining committee.

Directors—nonliability for mere neglect. The directors of a bank are not personally liable for the loss of bonds in the possession of the bank as bailee, consequent on the wrongful act of other officers of the bank in hypothecating said bonds as security for a loan to the bank, and consequent on the neglect of the directors to exercise reasonable diligence to learn of said wrongful act and to prevent or correct it.

Cornick v Weir, 212-715; 237 NW 245; 32 NCCA 616

9228 Statements.

Banking corporations — officers — presumed knowledge. The active managing officers of a bank will not be permitted to say that they did not know the condition of the bank when the condition was a mere matter of computation.

Baumchen v Donahoe, 215-512; 242 NW 533

9235 Illegal practices—insolvency.

Atty. Gen. Opinion. See '28 AG Op 38

Indemnity to bank—construction. An instrument in writing, though addressed to the state superintendent of banking, entered into by the stockholders of a bank in order to avoid an impairment of the capital stock of the bank, wherein the stockholders "guarantee the said bank against loss" in a named amount on certain bills receivable, is a contract of indemnity to the bank; and the bank may maintain an action thereon, its acceptance of the instrument being presumed. (§10982, C., '24.)

In re Prunty, 201-670; 207 NW 785

Insolvency—presumption. Principle reaffirmed that for many purposes the managing officers of a bank will be conclusively presumed to have knowledge of the insolvent condition of their bank.

Leach v Beazley, 201-337; 207 NW 374

When bank insolvent. It is not true that a bank is insolvent only when it is unable to pay its obligations in the ordinary and usual course of business.

Andrew v Bank, 207-386; 221 NW 954

Invalid guaranty of solvency of bank. A contract between the state superintendent of banking and the officers and directors of a state bank, wherein the said officers and directors guarantee that the bank "is at this time solvent", and wherein they contract "to keep and maintain the bank in a solvent" condition, in consideration that the superintendent will permit the bank to continue business, tho the superintendent questions its solvency, is a nullity, because gravely inconsistent with the statutory powers and duties of said superintendent, and therefore against public policy.

Andrew v Breon, 208-385; 226 NW 75

9236 Examination—oath—evidence.

Atty. Gen. Opinion. See '36 AG Op 28

9238 Liquidation—right of levy suspended.

Atty. Gen. Opinions. See '25-26 AG Op 325; '28 AG Op 38, '32 AG Op 211; '36 AG Op 28, 666; AG Op Feb. 16, '39

Permissible or optional liquidations. The successful liquidation of the deposit liabilities

of a failing bank by a transfer of assets to a stronger financial institution, under a good faith contract approved by the superintendent of banking, constitutes no bar to a final liquidation of the remaining indebtedness of the failing bank by said superintendent, and to the enforcement by said officer of the stockholders' double liability on their stock.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Guaranty by officers—effective delivery. Delivery of a written guaranty of payment, by officers and directors of a bank, of questionable assets of the bank, is shown by evidence that a state bank examiner took the guaranty into his possession with the consent of the guarantors and delivered it to the state superintendent of banking.

Boyd v Miller, 210-829; 230 NW 851

9239 Receivership—distribution.

Discussion. See 19 ILR 90—Drafts—cashier's checks; 20 ILR 113—Foreign assets; 20 ILR 140—Collection of deposited items

Atty. Gen. Opinions. See '32 AG Op 211; '36 AG Op 28, 666; AG Op June 29, '39

ANALYSIS

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I LIQUIDATION IN GENERAL

Assets augmentation theory. The assets of an insolvent may be said to have been augmented by a trust fund whenever the trust owner is able to point out the trust property, either by actual proof or by legal presumption of fact.

Andrew v Bank, 204-565; 215 NW 742

Fraudulent abstraction of assets. The president of a bank who, knowing that the bank is insolvent, takes the promissory note of the bank for the amount of her personal deposit plus the amount of an actual loan to the bank, will not be permitted to take and retain assets of the bank as collateral security for the payment of the note, except insofar as said note represents said loan.

Andrew v Bank, 207-386; 221 NW 954

Transfer of assets—trust fund doctrine. The transfer by an insolvent bank, while in the hands of a receiver, of all or of a part of its assets to another bank which pays nothing therefor, but assumes the payment of certain liabilities of the insolvent, does not deprive a judgment creditor of the insolvent of the right to follow said assets into the hands of the transferee and to impress a lien thereon on the basis of the pro rata value of the assets transferred; and this is true tho the transferee bank had no knowledge of the creditor's claim when it accepted the transfer.

German Amer. Bk. v Bank, 203-276; 211 NW 386

Assignment of promissory notes carries pledged collateral securities. An assignment by the receiver of an insolvent bank, duly ordered by the court, of bank assets in the form of promissory notes, automatically carries to the assignee the right to the possession of, and right to enforce, all collateral legally pledged to the bank for the payment of said notes.

Bates v Bank, 219-1358; 261 NW 797

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Clapp, 221-1270; 268 NW 56

Commercial paper held for collection. The receiver of an insolvent bank takes no title to commercial paper coming into his hands and received by the bank for collection only.

Leach v Bank, 201-349; 207 NW 332

Receiver after unsuccessful attempt to liquidate. An unsuccessful attempt, under a good-faith contract, to liquidate, out of court, the deposit liability of a failing state bank by a transfer of assets to stronger financial institutions, constitutes no bar to the appointment of the superintendent of banking as receiver to make final and complete liquidation.

Bates v Bank, 218-1320; 256 NW 286

Receiver—borrowing from federal agency. The superintendent of banking, as a duly appointed statutory receiver of an insolvent bank, has legal right to make application to the district court for authority to borrow money from the Reconstruction Finance Corporation, and the court has jurisdiction in directing the "affairs" of said bank to grant or reject such application.

Andrew v Bank, 214-1337; 244 NW 394

I LIQUIDATION IN GENERAL—continu'd

Current statutory law applicable. Receivership proceedings and the method of distribution thereunder are governed by the statute in force at the time of the appointment of the receiver.

Dickinson County v Leach, (NOR); 211 NW 542

Liens and equities unchanged. The title to property is not changed by the appointment of a receiver, as he takes it subject to existing liens and equities, and his taking exclusive possession thereof does not interfere with or disturb any pre-existing liens, preferences, or priorities.

Andrew v Union B. & T., 225-929; 282 NW 299

Nonabatement of action. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bank v McHarg, 217-636; 251 NW 51

Nonestoppel in enforcing liabilities. The receiver of an insolvent bank by the mere institution of an action on a promissory note, which had (apparently without the then knowledge of the receiver) been taken through a breach of duty by the managing officer of the bank, does not thereby estop himself from proceeding against the parties on a prior improperly surrendered note payable to the bank.

Clapp v Wallace, 221-672; 266 NW 493

Ratification of unlawful acts. The receiver of an insolvent bank has no power to ratify wrongful acts of the officers of the bank committed while the bank was a going concern.

Clapp v Wallace, 221-672; 266 NW 493

Trust funds — augmentation. Funds passing into the hands of the receiver of an insolvent bank must be deemed augmented by the amount of a trust fund in the hands of the bank, when, at all times since the creation of the trust, the cash in the bank exceeded the amount of the trust fund.

McCue v Foster, 219-89; 257 NW 559

Knowledge of insolvency—not imputable to nonactive director. Knowledge that a bank is insolvent is not imputed to one who is a director and minor stockholder of the bank, when he takes no active part in its management and has no actual knowledge of the insolvency.

In re Smith, 228- ; 289 NW 694

Certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

Unallowable preference to bank officials. A president or director of an insolvent banking corporation will not be permitted to surrender his personal deposits in the bank and to take the good assets of the bank in payment therefor; otherwise, if the deposits represent the funds of an estate of which the bank official is administrator, and the exchange involves no element of personal gain to the administrator.

Leach v Beazley, 201-337; 207 NW 374

Cashier's authority. The cashier of a state bank has no authority to bind the bank by representations to a bank director as to the value of bank assets personally taken over by the director and replaced by the director's personal promissory note.

Andrew v Shimerda, 218-27; 253 NW 845

Checks—conflicting claims to proceeds. The holder of a check who, before payment thereof is stopped, indorses the same to a nondrawee private banker, and unwittingly receives in exchange therefor the worthless draft of said private banker, is entitled, in a subsequent action on the check, to the amount recovered thereon, in preference to the receiver for the private banker. Especially is this true when the banker was insolvent when he issued the draft.

Runge v Benton, 205-845; 216 NW 737

Subrogation accorded to check holder. When a drawee-bank receives for collection a check drawn upon itself and at once charges the drawer's checking account with the amount thereof, the owner of the check will be subrogated to the rights of said depositor to the amount of the check.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Claim for conversion—priority. A claim against an insolvent bank for conversion must await the payment of the expense attending liquidation and the payment of depositors.

Bailey v Bank, 200-1147; 206 NW 126

Claims—allowance and payment—property available for payment. Where an estate consists of two general classes of assets, to wit, (1) assets employed by decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is tempor-

arily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

Belated filing of claims—effect. The belated filing of a claim against a receiver is not necessarily fatal to the claim.

Andrew v Bank, 218-1313; 256 NW 292

Builders' loan department—crediting payments after insolvency. A borrower in a so-called "builders' loan department" of a trust company whose monthly payments on the loan are seemingly carried by the trust company as deposits and not indorsed on the note, has the right, after the trust company has become insolvent, to have his payments credited on his note, and to pay the balance due and to receive a discharge irrespective of the rights of creditors of the company.

In re Wash. Loan Co., 214-884; 241 NW 308

Estoppel to present claim. Plea of estoppel to present a claim in bank receivership reviewed and held not sustained.

Andrew v Bank, 218-1313; 256 NW 292

Failure to object to claim. A receiver may contest the allowance of a claim filed with him, even tho he files no formal objections to the claim.

Leach v Bank, 207-471; 220 NW 10
Andrew v Church, 216-1134; 249 NW 274

Fatal delay in filing claim. A secured creditor of an insolvent bank who fails to file with the receiver, within the time fixed by the court, his claim for a contemplated deficiency, may very properly be refused the right, after the receiver has been discharged, to file such claim with and against trustees of the assets of the bank who are such under an order of court entered in accordance with an agreement of unsecured creditors.

Spooner v Blair, 209-1113; 229 NW 826

Filing claims—fatal delay. A depositor in an insolvent bank has no right to have his account corrected so as to exclude therefrom an erroneous debit, when he delays his application for such correction until long after the time has elapsed for the filing of claims as provided by a duly published order of the court.

Andrew v Bank, 209-277; 227 NW 899

Liberality in pleadings. In the adjudication of claims pending in receivership proceedings, compliance with the strict rules of pleadings will not ordinarily be demanded.

Andrew v Bank, 207-948; 222 NW 8

Setting aside order. The court in bank receivership proceedings has discretionary power to set aside an order relative to the classification of claims as general or preferential.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Consideration—director's note to bank. The directors of a financially embarrassed bank who execute their individual promissory notes to the bank, and receive in return certain assets of the bank to which the state banking department had objected, may not say that the notes were executed without consideration.

Andrew v Shimerda, 218-27; 253 NW 845

Conversion by officer—effect. The fraudulent conversion by an officer of a bank of a promissory note which had been sent to the bank for collection by the bank renders the bank liable for the conversion, and the owner of the note must be given the status of a general creditor of the bank.

Andrew v Bank, 204-1317; 217 NW 438

Debts due federal government—preference. Bank deposits made by federal trustees in bankruptcy and belonging to pending estates in bankruptcy are not, in case of insolvency of the bank, within the scope of the federal statutes which require a preference in the payment of debts due to the United States, even tho such deposits are secured by bonds running to the United States.

Andrew v Bank, 208-1248; 224 NW 499

Partnership—action to enforce partner's liability—waiver. The liquidating receiver of a private bank, when appointed with power to bring action against the partners on their individual liability, may, with the approval of the court, and notwithstanding the objections of a creditor, settle and compromise the liability of a partner when the creditor has appeared in the receivership proceedings and secured the allowance of his claim.

Ellis v Bank, 218-750; 251 NW 744

Action against partners—receivership—effect. A creditor of an insolvent banking partnership who, under an authorizing order of court, files proof of his claim with a duly appointed and unquestioned receiver of the partnership will not be permitted thereafter to maintain an independent action against the partners until after the receivership has been closed, when the receiver, under an order of court, has already instituted an action against all the partners to collect the amount necessary to settle the indebtedness of said bank; especially is this true when a multiplicity of suits is avoided.

Bierma v Ellis, 212-366; 236 NW 402

I LIQUIDATION IN GENERAL—continu'd

Adjusting debits and credits. When a partnership is indebted to a bank, and the bank fails, an individual deposit in the bank belonging to one of the partners of said partnership, should be credited on the partnership debt to the bank.

Boeger v Hagen, 204-435; 215 NW 597; 55 ALR 562

See In re Trusteeship, 214-884; 241 NW 308

Authorizing suit against partners. In an action for the dissolution of an insolvent partnership, a court of equity has power to authorize its receiver to bring suit against the partners to collect the funds necessary to pay the debts of the partnership in full.

Bierma v Ellis, 212-366; 236 NW 402

Preference—nonapplicability of statute. The statute which gives depositors in insolvent banks a preference in payment does not apply to private banks.

In re Thomas, 203-174; 210 NW 747

Nonpreference as to private banks. The statutory right of depositors in insolvent incorporated banking institutions to be first paid, in preference to general creditors, does not apply to depositors in private banks.

Mowatt v Bank, 204-1106; 216 NW 760

Appeal from orders in re preference. Depositors and creditors in a bank receivership have a right to appeal from an order of court which grants to a depositor an unallowable preference in the payment of his deposits.

Schubert v Andrew, 205-353; 218 NW 78

Interest on preferred claims. The holder of a preferential claim, for public funds, which has been allowed against the receiver of an insolvent bank, is not entitled to interest on the claim, tho payment be long delayed on account of litigation.

Leach v Bank, 210-613; 231 NW 497; 69 ALR 1206

Municipal preference. Principle reaffirmed that in the settlement of the affairs of an insolvent state bank the deposit of a municipal corporation has no preference over other deposits.

Leach v Bank, 201-346; 207 NW 331

Conclusiveness of judgment—nonparty to action. A decree or order to the effect that a deposit in an insolvent bank belonged to a municipality, but was not entitled to an equitable preference in the liquidation of the assets of the bank, is not binding on a party who actually made the deposit, but who was in no manner made a party to, or had any control over, the proceeding which resulted in said decree or order, tho he had requested the municipality and its treasurer to apply to the court for an order granting said preference.

Leach v Bank, 206-265; 217 NW 865

Notice—coparties. In an action by a municipality against the receiver of an insolvent bank and its surety, to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Independent Dist. v Bank, 204-1; 213 NW 397

Municipal preference—vested right. A municipal corporation which, at the time an insolvent bank is placed under receivership, is entitled, under a statute as construed by the supreme court, to a priority in the payment of its municipal deposit, is not deprived of such priority by a subsequently enacted statute which denies such priority.

Murray v Bank, 202-281; 208 NW 212

Pension funds—preference. The fact that the subject-matter of a time certificate of deposit in a bank is the pension money of the depositor furnishes no legal basis for a preference in payment in settling up the affairs of the insolvent bank, even tho the federal and state statutes exempt pension money from seizure for the debts of the pensioner.

Andrew v Bank, 205-872; 219 NW 62

Tax claims—nonpreference. Taxes on corporate bank stock and against the individual owners thereof may not be collected from the receiver of a bank which is insolvent to the extent that it cannot pay its depositors.

Andrew v Munn, 205-723; 218 NW 526

Set-offs unallowable. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off not applicable.

Parker v Schultz, 219-100; 257 NW 570

Administrator's bank account — decedent's debt—no offset. Receiver of insolvent bank held unauthorized to set off amount of checking account standing in name of administrator against indebtedness owing to bank by intestate where, immediately on appointment of administrator, checking account passed to administrator who added to account by deposits at various times and drew checks against account until closing of bank.

In re Schwarting, (NOR); 257 NW 189

Bank's general right to set-off. The fact that a bank unlawfully invests its funds in securities not permitted by law does not prevent the receiver of the bank from offsetting the amount of said securities against the deposit of the party who is obligated to pay said securities; and this is true even tho the bank was a mortgagee for the benefit of holders generally of said securities.

Andrew v Bank, 218-489; 255 NW 871

Deposit as set-off. Where, prior to the insolvency of a bank, said bank and a depositor became irrevocably obligated under a letter of credit issued to said depositor to enable him to make a purchase of goods in a foreign country, and where the drafts drawn in the foreign country under said letter of credit did not mature until after the insolvency of said bank, and where the receiver of said bank paid said drafts in full on their maturity, the claim of said receiver against said depositor for reimbursement is subject to an offset to the extent of the depositor's deposit in said insolvent bank.

Andrew v Trust Co., 217-657; 251 NW 48

Equitable set-off—nature and scope. The doctrine of equitable set-off is a rule of equity, and is applied quite independently of the limitations which attach to a so-called legal or statutory offset.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Right of set-off. In receivership matters the rights of all parties as to set-off are to be determined as of the date of the appointment of the receiver.

Andrew v Trust Co., 217-657; 251 NW 48

Right of set-off. An order of court approving the report of the receiver of an insolvent bank as to the amount of various deposits owing by the bank does not constitute an adjudication against the receiver precluding him from later setting off against a particular deposit the amount owing by the depositor to the bank, it appearing that the approving order was entered without the joining of any issue as to the right of set-off.

Andrew v Bank, 218-489; 255 NW 871

Stockholders—double liability — change of venue. A stockholder in an insolvent bank who is sued by the receiver, on his "double liability", in the forum of the receivership, in one equitable action, along with all other stockholders, is not entitled to a change of venue in case the county of suit is not the county of his residence in this state.

Broulik v Henderson, 218-640; 254 NW 63

Stock held in trust—double assessment liability. Under decree of an Iowa equity court assessing statutory liability on stock in a closed Iowa bank against a national bank as trustee under an identified trust, the bank does not become personally liable, under laws of Iowa, for such assessment. Neither could the receiver of the Iowa closed bank, in a common-law action, charge the trust property with such statutory liability.

Bates v Bank, 101 F 2d, 278

Double liability—national bank as stockholder. A resident national bank as a stockholder in an insolvent state bank of this state is subject to suit in equity by the receiver in the county of the receivership forum, along with all other stockholders, to enforce the statutory double liability of stockholders, even tho the county of said forum is not the county of which the national bank is a resident.

Merchants Bank v Henderson, 218-657; 254 NW 65

Double liability not subject to offset. Funds voluntarily paid into a bank by a stockholder thereof, in order to repair or make good the impaired capital of the bank while it is a going concern, may not later, after the bank has gone into the hands of a receiver for liquidation because of insolvency, be set off by the stockholder against the demand of the receiver for a 100 percent statutory assessment on the stock for the benefit of creditors.

Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Double liability—application of assets as condition precedent. The application of the assets of an insolvent bank to the payment of the debts of the bank is not a condition precedent to the right of the receiver to maintain an action to enforce the double liability of stockholders.

Andrew v Bank, 206-1070; 221 NW 809

Basis for assessment. A showing that the assets of a state bank plus a 100 percent assessment on the stock will not be sufficient to pay the debts of the bank furnishes abundant basis for an assessment on the stock, even tho there be no showing as to the amount of claims filed and approved.

Bates v Bank, 218-1320; 256 NW 286

Deprivation of jury—constitutionality. An action by the receiver of an insolvent bank against stockholders for the purpose of determining the necessity for an assessment on stock holdings, and adjudicating the amount of such assessment, is not inherently a law action and, therefore, the legislature may provide that the action shall be brought in equity.

Broulik v Henderson, 218-640; 254 NW 63

Insolvency—stock assessments nonassignable. An assessment against a holder of corporate bank stock in an insolvent bank, ordered by the court under the so-called "double liability" statute (§9251, C., '31, now repealed), even tho said assessment is in the form of a judgment, is nonassignable by the receiver, even under an authorizing order of court, and if formally assigned, is nonenforceable by the assignee, said attempted assignment being for a purpose other than the payment of creditors.

Roe v King, 217-213; 251 NW 81

II DEPOSITORS

Discussion. See 2 ILB 36—Deposit—unmatured claims set off

"Depositor" defined. The act of a bank, while a going concern, in receiving money for and

II DEPOSITORS—continued

on behalf of a customer, and entering the same as a deposit, constitutes the customer a "depositor", which relation is not lost by the subsequent insolvency of the bank.

Leach v Bank, 202-265; 209 NW 422

Depositor (?) or creditor (?). A certificate of deposit does not necessarily carry a conclusive presumption that the holder is a mere lender of money to the bank.

Partch v Krogman, 202-524; 210 NW 612

Depositor (?) or money loaner (?). An actual depositor in a savings bank under interest-drawing time certificates of deposit does not cease to be a depositor because of the fact that, when he demanded his existing deposit for the purpose of re-investing in securities drawing an increase of interest over his existing certificates, he was, in good faith on his part, induced to accept from the bank new and long-time certificates of deposit drawing legal interest (part of which was paid in advance) at the rate desired by him, with an oral understanding that he might have his money on demand by a proportional refund of interest advanced; and it is immaterial that the bank officials, without his knowledge, were not acting in good faith.

Murray v Bank, 201-1325; 207 NW 781

Bank as depositor. A bank may lawfully become a depositor of another bank. So held where a bank was the sole depository of the funds of a municipality, and upon receipt of such funds deposited a part thereof with other banks under a so-called "gentlemen's agreement" with reference thereto.

Leach v Bank, 206-265; 217 NW 865

Bank deposits of public funds. Principle reaffirmed that a good-faith, nonnegligent deposit by a public officer of public funds in a bank for temporary safekeeping does not constitute a conversion of said funds by said officer.

Andrew v Bank, 214-105; 241 NW 412

Effect of usury. The act of a depositor in accepting a certificate of deposit which is tainted with usury does not destroy his status as a depositor.

Partch v Krogman, 202-524; 210 NW 612

Holder of bank's note. One who sells land to a party and receives in return the promissory note of a private bank which is operated by said party may not be said to be a depositor in the bank.

In re Thomas, 203-174; 210 NW 747

Manipulation of deposit not constituting payment. Evidence relative to the surrender by a depositor to his bank of certificates of deposit issued by the bank, reviewed and held not to reveal payment of said certificates; also held that a subsequently dated certificate of deposit issued by the bank to said depositor was intended to be, and was, but a continuation of the former unpaid deposit.

Bates v Bank, 221-1251; 268 NW 74

Relation between bank and depositor. Principle reaffirmed that the deposit of money in a bank creates the relation of debtor and creditor, and not that of borrower and lender.

Leach v Beazley, 201-337; 207 NW 374

Withdrawals—debtor—creditor relationship. Each new deposit creates a new or additional indebtedness to the depositor, and each withdrawal operates as a payment of such indebtedness to the extent of the amount received.

Duckworth v Manning's Estate, (NOR); 252 NW 559

Deposits—"notice" in pass book—effect. The deposit in a bank of unrestrictedly indorsed checks and the crediting of the depositor's checking account with the amount of the checks creates, in the absence of any contract to the contrary, the relation of debtor and creditor, and the contrary is not shown by a "notice" printed in the customer's pass book that "In receiving items for deposit or collection this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care" (with added provision for charging back uncollected items). The sole function of such notice, in view of the terms thereof, and of the intention of the parties as reflected in the attending facts and circumstances, is to confirm the right of the bank to charge back bad items, and to exempt the bank from the negligence of its corresponding collecting banks.

Andrew v Bank, 214-1199; 243 NW 542

Assignment of deposit. An executed agreement between a bank depositor and an administrator (who was cashier of the bank) and an estate debtor that, in order to discharge the estate debtor, the depositor will surrender his pass book to the administrator and accept the note of the estate debtor for the full amount of the deposit, works a complete assignment of said deposit to the estate, and gives said estate the status of a general depositor to the full amount of the assigned deposit; and this is true even tho the bank books fail to show the full amount of the assigned deposit or any formal transfer thereof to the estate.

Leach v Bank, 203-988; 213 NW 601

Holder of cashier's check. The holder of cashier's checks, in case of the subsequent insolvency of the bank, is properly classified as a depositor when he has been permitted without objection to show by oral testimony that the said checks were in fact intended to evidence a deposit of money.

Townsend v Andrew, 206-1006; 221 NW 572

Inconsistent remedies—holder of draft. One who receives a check from his debtor and, on presenting it, receives in payment from the drawee-bank a draft which is dishonored because of the insolvency of the bank, and who thereupon seeks to be decreed the status of a preferential trust holder to the amount of the draft, but is decreed the status of a general creditor only, may not later reshape and refile his claim and be decreed subrogated to the rights of the depositor who originally drew the check; and especially is this true when the latter remedy was alternatively sought in the prior litigation.

Becker v Leach, 208-1347; 227 NW 344

Interest paid in advance. In case interest is paid a depositor in advance, the termination of the accrual of all interest by the appointment of a receiver necessitates the charging of the deposit with the amount of unearned interest.

Murray v Bank, 201-1325; 207 NW 781

Payment—check in escrow—effect. A vendor who causes the vendee to make payment of matured interest in the form of an interest-bearing certificate of deposit payable to himself, which certificate is placed in escrow with the issuing bank, pending the vendor's effort to make the title merchantable, must bear the loss resulting from the subsequent failure of the issuing bank.

Downey v Gifford, 206-848; 218 NW 488

Set-off by depositor. Where notes are executed and delivered to a bank, and the bank in return executes its certificates of deposit for a like amount to the maker of the notes, the transaction being simply a paper one, the certificates aforesaid will be set off against the notes aforesaid.

Andrew v Bank, 211-483; 231 NW 293

Depositor by subrogation. In settling and adjusting the affairs of an insolvent bank, a claimant who is not a depositor in fact may not be decreed to be subrogated to the rights of certain depositors who are not parties to the controversy over the claim in question.

Leach v Bank, 207-471; 220 NW 10

Notes for collection only—not bank's property. Notes of depositors pledged as collateral with the Reconstruction Finance Corporation for a bank loan and, upon insolvency of the bank, sent to examiner for collection and remittance to the corporation, do not thereupon become assets of the bank; therefore, depositors would not be entitled to offset their deposits against their indebtedness thereunder.

Andrew v Bank, 225-929; 282 NW 299

Collateral — holder in due course — set-off against holder denied. Where commercial paper is rediscounted or put up as collateral, the holder is a bona fide holder in due course and the plea of set-off is not available against such holder.

Andrew v Bank, 225-929; 282 NW 299

Offsetting deposit against note. A bank depositor who, after the bank becomes insolvent, pays to a collateral holder his outstanding note to the bank, may not compel the receiver to refund to him an amount equal to that part of his deposit which he would have had the right to offset against his note had it remained in the hands of the bank. And this is true tho the payment is under protest and is made because of the fraudulent representations of the collateral holder.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Depositor's right to set-off—receiver refunding amount paid on note. A bank depositor, who, after the bank becomes insolvent, pays to one holding as collateral such depositor's outstanding note to the bank, may not compel the receiver to refund to him an amount equal to his deposit which he would have been allowed to offset against his note, had it remained in the hands of the bank.

Andrew v Bank, 225-929; 282 NW 299

Wrongful issuance of certificate of deposit —timely repudiation. A party to whom a bank, without authority, has issued a certificate of deposit in payment of a claim due from the bank, may not be deemed estopped to repudiate such certificate, or be deemed to have ratified the issuance of such certificate, when his repudiation was reasonably prompt, and when no injury resulted to the bank or to its receiver from any delay in repudiating.

Andrew v Bank, 217-232; 251 NW 860

Right of review—receivers. The receiver of an insolvent bank has a right to appeal from an order which grants to a depositor an equitable preference over all other creditors in the payment of his claim.

Andrew v Bank, 205-1248; 218 NW 24

Claims arising out of extrinsic transactions. A defendant sued by the receiver of an insolvent bank on indebtedness due the bank may not, in order to establish a set-off, plead an interest in certain deposits in the bank, and interest in extraneous transactions when such interests can only be determined by bringing in total strangers to the transactions sued on, and adjudicating their interests.

Foster v Read, 212-803; 237 NW 634

Equitable set-off—surety of insolvent. In an action by the receiver of an insolvent, the defendant may set off, against the obligation sued on, the amount which the defendant, as surety for the insolvent, has been compelled to pay on the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

II DEPOSITORS—concluded

Equitable set-off. Where an insolvent bank in the hands of a receiver owes an estate on a deposit, an heir who owes the bank, tho he is the executor of the estate, may have his interest in the deposit set off against his indebtedness to the bank, subject, of course, to claims which may be filed against the estate.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Husband's deposit in wife's name—set off against indebtedness. It may be shown that a deposit in an insolvent bank, solely in the name of a wife, is, in truth and fact, the money of the husband, and upon such proof being made, the husband may have the deposit applied on his indebtedness to the bank.

Andrew v Bank, 216-777; 249 NW 276

Waiver by depositors—effect on nonsigners. The act of a majority of the depositors of a bank (owning a large majority of the deposits) in signing waivers deferring payment of their deposits, in order to preserve the bank as a going concern, cannot be deemed the legal equivalent of an express agreement on their part that the depositors who do not sign such waivers shall be paid in full before such signers are paid; nor can such signing be deemed prejudicial to the nonsigners; nor, by such signing, can said signers be deemed to have lost their status as depositors and thereby become mere lenders of money to the bank.

Andrew v Bank, 216-739; 249 NW 768; 88 ALR 1003

III NONTRUST RELATIONSHIPS

Discussion. See 14 ILR 206—Establishment of preference; 15 ILR 195—Checks sent to drawee-bank for collection

Banking corporations—nonpreferential deposits. Record reviewed and held that bank deposits in an insolvent bank were attended by no circumstances that justified a preference in payment.

Bates v Bank, 222-1323; 271 NW 638

Claims—general deposit. Where receipts from sale of livestock in Chicago were remitted to local bank, which in turn entered the remittance as a deposit for local livestock shipping association, held that association was not entitled to preference on its claim in receivership proceeding of the local bank, there being no element of trust involved in the transaction and the fund being simply a general deposit.

Leach v Bank, (NOR); 212 NW 390

Deposits—nonequitable preference. A temporary deposit of money in a bank for safekeeping by parties who had accumulated it for a special purpose does not constitute a trust fund (entitled to an equitable preference in payment in case of the insolvency of the bank) simply because the bank had knowledge, when it accepted the deposit, of the nature of the fund, and of the manner in which, and purposes for which, it would be withdrawn by check.

Andrew v Bank, 217-684; 251 NW 508

Deposit of trust funds as general deposit—effect. A deposit in a bank of actual trust funds in a manner identical with that pursued in making a general deposit subject to check, creates the relation of debtor and creditor and not that of trustee and trustor.

Andrew v Bank, 209-271; 228 NW 55

Trust funds—nonpreference. The title to a testamentary fund perpetually bequeathed as a saving deposit to a bank as trustee with direction to pay the interest thereon to a church organization, for the sole purpose of repairing the church, necessarily passes to the trustee, and becomes a general deposit, with result that the fund is not entitled to an equitable preference in payment when the bank becomes insolvent.

Andrew v Church, 216-1134; 249 NW 274

Trust funds treated as private deposit. A trustee who deposits trust funds in his individual name is not entitled to a preference in the settlement of the affairs of the insolvent depository.

In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910

Resulting trusts—fraud—elements. The plea that a trust resulted against one who fraudulently obtained the property necessitates proof of representation, reliance thereon, falsity thereof, scienter, deception, and injury.

Andrew v Bank, 205-244; 216 NW 551

Issuance of cashier's check. The mere issuance and delivery of a cashier's check to a depositor creates no trust relation whatever.

Leach v Bank, 202-879; 211 NW 526

Deposits—when deemed made. A deposit in a bank cannot be deemed a trust fund and entitled to an equitable preference in payment because of the fact that the books of the bank show that the deposit was made after the bank had permanently closed its doors, when in truth the deposit was made before the bank so closed its doors.

Andrew v Bank, 204-1190; 216 NW 723

General deposit. The depositing in a bank of money and checks which are at once entered upon the customer's pass book with right to immediately draw against the amount constitutes a general deposit.

Andrew v Bank, 204-1190; 216 NW 723

What constitutes general deposit. A general and not a special or specific deposit is shown by proof that a buyer and shipper of stock (who was also engaged in two other different lines of business) had but one bank

deposit account, and that in buying stock he simply delivered his bank check to the seller, and then, as a general course of business, shipped the stock in the name of his bank, which thereupon, at his direction, drew on the consignee, and credited the shipper's deposit with the amount of the draft, thereby creating a deposit credit out of which any and all checks issued by the shipper, whether for stock purchases or otherwise, would be paid, if and when presented; and this is true even tho the bank knew that the particular purpose in the mind of the shipper was to protect his outstanding checks for purchases of stock.

Andrew v Bank, 205-888; 219 NW 53

Deposit—fraud in reception. The fact that a deposit in a bank was made only two hours prior to the permanent closing of the bank does not necessarily show that the bank was insolvent when the deposit was received, and that the officers must have known of such insolvency, and that, therefore, the deposit was fraudulently obtained and should be decreed to be a trust fund.

Andrew v Bank, 204-1190; 216 NW 723

Deposit of check—presumptive passing of title. The depositing in a bank of duly indorsed checks and the entry of the amount thereof on the customer's pass book with right to immediately draw against the same presumptively constitutes the bank the owner of the checks, and the depositor has the burden to overcome the presumption.

Andrew v Bank, 204-1190; 216 NW 723

Deposit of official funds. A deposit in a bank by a clerk of the district court of his official funds (known to be such by the bank) does not make the bank a trustee of the county or of its treasurer.

Andrew v Bank, 204-878; 216 NW 1

Deposit of public funds—nonpreference. The trustees of a municipal firemen's pension fund may validly make a bank deposit of its funds in an amount sufficient to meet current pension demands. It follows that if the bank becomes insolvent the trustees are simply depositors and no preference over other depositors exists.

Andrew v Bank, 214-105; 241 NW 412

Denial of deposit. The fact that a banker falsely states to an administrator that the deceased had no deposit in the bank furnishes no basis for decreeing the administrator a preference in the settlement of the affairs of the insolvent bank.

In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910

Changing general deposit into special trust deposit. A seizure, by garnishment proceedings, of a general bank deposit, followed, (1) by a direction by the garnishing plaintiff to the garnishee bank to hold said deposit in a named amount (which was 150 percent of the amount sued for), and (2) by an answer by the garnishee in accordance with said direction, does not have the legal effect of changing said sum from the status of a general deposit to the status of a special deposit,—to the status of a trust fund,—with consequent right to preferential payment in case the bank becomes insolvent.

Andrew v Bank, 220-712; 263 NW 495

Draft by insolvent drawer. The rule that a trust relation is created by the act of an insolvent in drawing a draft which he knows will not be paid, has no application on a record revealing the fact that the payee of the draft long delayed presentation, and that, in the meantime, numerous drafts subsequently issued by the same drawer were paid by the same drawee.

Leach v Bank, 203-790; 211 NW 516

Drafts—purchase from insolvent. On the issue whether the purchase of drafts at different times from an insolvent bank created the relation of debtor and creditor or a trust relation, knowledge on the part of the officers of such insolvency (as a basis for fraud) will not be presumed from proof that, when the drafts were issued, the account of the drawer-bank with the drawee-bank was overdrawn, but that the drawer-bank had, almost simultaneously with the issuance of the drafts, made a remittance to replenish said account, which remittance proved abortive because of the sudden closing of the bank.

Andrew v Bank, 206-65; 218 NW 957

Nondrawee bank cashing checks. No trust relation results from the act of one bank in cashing checks drawn upon another bank and presenting and having them accepted by the drawee-bank and receiving in payment a draft on a third bank, which draft was never paid.

Danbury Bk. v Leach, 201-321; 207 NW 336

Nonpayment of draft. The fact that a depositor in an insolvent but going bank causes a draft to be drawn upon himself, through his said bank, and directs the bank to pay the same upon presentation, out of his general deposit, which direction the bank fails to comply with, creates no trust relationship which will, in liquidating the affairs of the bank, give the depositor a preference to the amount of the draft.

Border v Bank, 202-27; 209 NW 302

Preference under worthless collection. The remittance of a draft to a bank with direction to "collect and remit", and the act of the collecting bank in receiving a worthless draft in payment, present no possible basis for a preference in payment in case the collecting bank becomes insolvent.

Andrew v Bank, 203-1014; 212 NW 124

III NONTRUST RELATIONSHIPS — continued

Purchase of draft—effect. The purchase of a draft on a drawee which has ample funds of the drawer's is but the purchase of the credit of the drawer. In other words, the purchaser of such a draft voluntarily makes himself one of the general creditors of the drawer.

Leach v Bank, 203-790; 211 NW 516

Draft works no assignment. A bank which pays checks drawn on foreign banks and remits said checks to its correspondent bank for collection is not entitled to be preferred in the payment of its claim (the collecting bank having become insolvent) on the naked showing that it holds the unpaid draft of the collecting bank for the amount of said collection.

Leach v Bank, 202-871; 211 NW 519

Draft works no assignment. The issuance of a draft works no equitable assignment to the payee of the funds of the drawer in the hands of the drawee, and consequently, in case of the subsequent insolvency of the drawer, the payee is not a preferred creditor, (1) even though the drawer at once charges himself and credits the drawee with the amount of the draft, (2) even tho the draft was issued by the drawer in payment of checks drawn upon himself by his depositors, whom he at once charges with the amounts of their checks, and (3) even tho the controversy over the funds is solely between the receiver of the insolvent drawer of the draft and the payee of the draft.

Leach v Bank, 202-894; 211 NW 517

Leach v Bank, 202-899; 211 NW 506; 50 ALR 888

Leach v Bank, 203-507; 211 NW 520; 212 NW 760

Leach v Bank, 203-782; 211 NW 522

Drawee-bank as agent to collect from self. The act of the indorsee of a check in sending it to the drawee-bank for collection and remittance, and the act of the drawee-bank in charging the account of the drawer of the check with the amount thereof, creates no relation of principal and agent and consequently no trust relationship.

Leach v Bank, 207-471; 220 NW 10

Drawee-bank as agent to collect from self. The holder of a bank check in sending it to the drawee-bank for "collection and remittance" does not create the relation of principal and agent or any trust relation sufficient to support a claim of preference in case the draft of the said drawee-bank in payment of the check is not paid because of the insolvency of the bank.

Leach v Burton & Co., 205-973; 219 NW 43

Directors—nonviolation of trust relationship. A bank director who, while the bank is a going concern but allegedly insolvent, transfers and sells his certificate of deposit in the bank to the president thereof, and long subsequent thereto receives payment therefor from said president, or who, under the same conditions, transfers a like certificate to another bank and receives a new certificate in such other bank —the transferred certificate in each instance being promptly cashed by the issuing bank —violates no trust duty which he owes to his bank or to the depositors thereof, there being no evidence whatever that either transaction was other than one in the ordinary course of business.

Andrew v Kelly, 215-408; 245 NW 755; 84 ALR 1488

Officer acting in private and personal matter —liability of bank. The acts of an officer of a bank, tho he be a managing officer, in receiving the funds of a relative, and in managing the investment thereof, purely as a personal matter between himself and said relative, imposes no obligation on the bank, even tho the funds are carried on the books of the bank as a matter of convenient bookkeeping. It follows that, upon the insolvency of the bank, the tender to the relative of the investments belonging to him, and found in the bank, carries down any claim of preferential trust against the bank and its receiver.

Andrew v Bank, 212-649; 235 NW 735

Conversion by officer of bank—effect. The act of an officer of a bank in fraudulently converting to his own use a promissory note which had been sent to the bank for collection by the bank furnishes no basis for decreeing to the owner of the note an equitable preference in payment out of the assets of the insolvent bank.

Andrew v Bank, 204-1317; 217 NW 438

Payment of note — acts constituting. The acts of a bank (1) in receiving, without authority, payment of its customer's notes at a time when said bank had either rediscounted or collaterally pledged and indorsed said notes to another bank, and (2) in forwarding to the then holder a draft and other remittances sufficient to cover the amount of the notes, and the act of the then holder (1) in accepting the remittances, (2) in marking the notes "paid", and (3) in returning them, work a complete payment of the notes, even tho the draft was not paid, owing to the failure of the drawer-bank, it appearing that, at the time of each transaction, both parties had entered the proper debits and credits on their mutual accounts in harmony with the theory of payment. No right of preference was created by reason of the issuance or nonpayment of the draft.

Leach v Bank, 204-493; 215 NW 617

Pension money as special or specific deposit. A deposit in a bank may not be deemed either a "special" or a "specific" deposit, and therefore entitled to a preference in payment, from the naked fact that the subject-matter of the deposit was pension money of the depositor's,

especially when the deposit was evidenced by a time certificate.

Andrew v Bank, 205-872; 219 NW 62

Relation of debtor and creditor. The act of the indorsee of a check in sending it to the drawee-bank for "collection and remittance" creates no relation of principal and agent. The result is that, if the drawee-bank becomes insolvent, the indorsee's claim on account of the check is not a preferred claim.

Leach v Bank, 203-782; 211 NW 522; 38 NCCA 426

Relation of debtor and creditor. The act of a bank in forwarding a collection made by it for another, in the form of a draft, in accordance with an agreement to that effect, creates the relation of debtor and creditor and consequently no trust relationship.

Leach v Bank, 207-471; 220 NW 10

Relation of debtor and creditor. When a bank pays checks on foreign banks and remits said checks to its correspondent for "collection and remittance", and when the understanding and course of dealing between said banks is for the remittance to be by draft, and such draft is executed and delivered, no trust relation is created, but the relation of general debtor and creditor is created, and there can be no preference in payment to the draft holder in the subsequent settlement of the affairs of the insolvent drawer.

Leach v Bank, 202-894; 211 NW 517

Relation of debtor and creditor. When the understanding and general course of dealing between two banks are that each will cash checks drawn on the other and that the daily balance will be paid by draft in favor of the bank to which the balance is due, and such draft is issued and delivered, no trust relation is created, but the relation of general debtor and creditor is created, with the result that no preference in payment may be demanded by the payee of the draft in the subsequent settlement of the affairs of the insolvent drawer.

Leach v Bank, 203-507; 211 NW 520; 212 NW 760

Relation of debtor and creditor. When the general course of dealing between two banks is for each to cash checks drawn upon the other and then to exchange the checks and adjust the same by mutual credits and debits, they thereby voluntarily create a shifting relation of debtor and creditor, and the one who is the final creditor will not be entitled to a preference in payment out of the assets of the debtor if he becomes insolvent.

Leach v Bank, 202-871; 211 NW 519

Relation of debtor and creditor. The act of the officers of a local fraternal order in executing in favor of the grand lodge a warrant on the local lodge funds, and therewith purchasing an ordinary bank draft in favor of the grand lodge, creates no trust relation and furnishes no basis for a claim of preference to the assets of the drawer-bank in case the latter becomes insolvent.

Leach v Bank, 203-235; 212 NW 485

Relation of debtor and creditor. The mere purchase of a draft gives rise to no trust relation between the purchaser and the bank issuing the draft.

Leach v Bank, 203-782; 211 NW 522

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Relation of debtor and creditor. Principal reaffirmed that no relation of principal and agent—in other words, no trust relation—is created by the act of the transferee of a draft in sending it to the drawer for payment.

Leach v Bank, 202-894; 211 NW 517

Relation of debtor and creditor. A bank which cashes checks drawn upon another bank, and in payment receives from the latter a draft (which is not paid), will not be accorded a preference in the settlement of the affairs of the insolvent drawee-bank.

Leach v Bank, 202-95; 209 NW 279

Relation of debtor and creditor. A bank which pays a series of checks on foreign banks and remits the checks to its correspondent with direction to collect and "to credit" the paying and remitting bank, thereby makes itself one of the general creditors of the collecting bank and deprives itself of the right of preference which it otherwise would have had, had the relation of principal and agent been created (the collecting bank having subsequently become insolvent).

Leach v Bank, 202-871; 211 NW 519

Temporary deposit by guardian. A temporary deposit by a guardian of guardianship funds in a bank for safekeeping does not constitute a trust fund (entitled to an equitable preference in payment in case of the insolvency of the bank) simply because the bank had knowledge of the nature of the funds and of the manner in which they would be withdrawn.

Andrew v Bank, 205-1248; 218 NW 24

Unlawful relation. A federal reserve bank may not predicate a claim for preferential payment out of the assets of an insolvent bank on the plea that a federal reserve bank may not legally become the creditor of a nonmember bank.

Leach v Bank, 207-471; 220 NW 10

IV TRUST RELATIONSHIPS

Discussion. See 18 ILR 362—Pension money

Trust relation—insufficient showing. The receipt by a bank of money with full knowledge

IV TRUST RELATIONSHIPS—continued

that the money constituted trust funds in the hands of the depositor, and the issuance to the depositor of cashier's checks for the amount thereof, in lieu of an ordinary deposit, do not, in and of themselves, constitute the bank a trustee of the fund. Under such circumstances, it must be shown that the bank expressly or impliedly agreed to act as agent or bailee either of the depositor or of the beneficiary of the trust.

Townsend v Andrew, 206-1006; 221 NW 572

Trust treated as general deposit — effect. The carrying on the books of a bank of an admitted express trust as a general deposit in no manner changes the nature of the trust.

Andrew v Bank, 203-546; 213 NW 245

Trust funds—presumption—insufficient basis. The court cannot, in the face of affirmative evidence to the contrary, presume that trust funds over and above the amount of cash on hand in the trustee-bank when it closed its doors were embraced in the bills receivable or in the cash in the hands of correspondent banks, on the somewhat specious basis that, inasmuch as there was not cash enough in the bank when the trust was created to pay the trustor in full, therefore the balance of the trust fund must have been embraced in assets of the bank other than the cash in the bank.

In re American Bank, 210-568; 231 NW 311

Augmentation of bank funds. An augmentation in the funds of a bank may result from what might, to the layman, seem to amount to nothing more than naked bookkeeping entries in the books of the bank; for instance, such augmentation is shown by proof that a bank as agent made a collection (1) by loaning to the debtor on his note and from its actual, existing funds, an amount sufficient to enable the debtor to pay the claim, (2) by crediting the checking account of the borrower with the amount of the loan, (3) by accepting the latter's check for the amount of the claim, and (4) by marking the check "paid" and charging the checkmaker's account with the amount of the check.

Andrew v Bank, 217-232; 251 NW 860

Dissipated trust funds—nonliability of receiver. The receiver of an insolvent bank may not be charged with that part of a trust fund which has been wrongfully and unlawfully dissipated prior to the time when the balance of the fund came into his hands.

Leach v Bank, 206-675; 220 NW 113

Dissipation of trust funds. Proof that a bank collected certain checks as agent for the holder thereof, but that in so doing the entire amount of the collection was applied in the payment of the general obligations of the collecting bank, conclusively negatives any augmentation of the assets of the collecting bank.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Want of authority—effect. Want of authority in a bank to assume a trusteeship in no manner changes the nature of the trust and in no manner gives the bank title to the subject-matter of the trust.

Andrew v Bank, 203-546; 213 NW 245

Transfer of property—effect. Property impressed by a trust and received by a bank with full knowledge of that fact continues to retain its trust character in the hands of the bank and its subsequent receiver.

Andrew v Bank, 209-1149; 229 NW 819

Liability of bank. A bank will be deemed the trustee of an express trust when such was the understanding, even tho an officer of the bank was treated on the books of the bank as trustee.

Andrew v Bank, 203-546; 213 NW 245

Directors — nonliability for naked nonfeasance. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

Wrongful act of trustee—right to ratify. A bank which, as guardian, wrongfully treats the guardianship funds as its own property (by carrying said funds as a general deposit with itself) may not complain if, after the failure of the bank, the succeeding guardian ratifies the former wrongful act, and elects to retain the position of an ordinary depositor.

Bates v Bank, 219-258; 257 NW 806

Bank as involuntary trustee. A bank may, because of the wrongful conduct of its cashier, become the trustee of a trust fund, and especially so when the misconduct is in the interest of the bank and hostile to the interest of the owner of the trust fund. So held where the clerk of an auction sale, in bad faith, converted the proceeds of the sale into a cashier's check issued by himself as cashier to himself as clerk in an insolvent bank of which he was cashier, said conversion being without the knowledge, consent, or subsequent ratification of his principal, the owner of said funds.

Andrew v Bank, 217-780; 253 NW 133

Trust fund—bookkeeping—effect. An actual trust fund is not changed into a nontrust fund by the fact that the bank receiving the fund

credited the owner's general deposit account with the amount of the fund.

Miller v Andrew, 206-957; 221 NW 543

Receipt of funds after closing of bank. The receiver of an insolvent bank, who, after the closing of the bank, receives the proceeds of a shipment of stock, with knowledge of the ownership thereof, must be deemed to hold said proceeds as a trust fund.

Leach v Bank, 206-675; 220 NW 113

Agent of court only—trustee of funds. A receiver is not an agent of anyone except the court appointing him, but he holds any fund at least as quasi-trustee for the benefit of whoever may eventually establish title thereto.

Andrew v Bank, 225-929; 282 NW 299

Sales contract—court approval as condition. A definite written offer by the superintendent of banking of this state to sell to a foreign administrator Iowa real estate, belonging to a bank receivership, and the written acceptance of the offer, by said foreign administrator, may constitute a valid and specifically enforceable contract tho the offer and the acceptance be both conditioned on the approval of the respective state courts.

Bates v Bank, 223-385; 272 NW 412

Draft fraudulently procured. The drawer of a draft who receives in payment therefor a draft which the payee has no reasonable grounds to believe will be paid, may enforce an equitable preference against the receiver of the wrongdoer for the full amount of his —the drawer's—loss, it appearing that the draft issued by the said drawer has been paid and that the proceeds thereof are in the hands of the receiver.

Leach v Trust Co., 203-1060; 213 NW 777; 57 ALR 1165

Bank as executor—merger and subsequent insolvency. Funds which were held by a bank as executor of an estate, and which belonged to such estate at the time of merger of such bank with another bank, were "trust funds" and did not constitute part of assets of bank, with respect to whether such funds were payable as preferred claim against such merged bank which subsequently became insolvent.

Bates v Bank, (NOR); 269 NW 346

Estate funds as preferential deposit. Estate funds on deposit in a bank which has been appointed executor, administrator or trustee of the estate, even tho carried in the name of the estate, constitute a trust fund, and, in case of insolvency of the bank, must be paid in full on a showing that, after the trust deposit was made, the deposit in the bank has never been less than the amount of said trust funds. (Ch 416, C., '24.)

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Andrew v Bank, 208-252; 225 NW 379

Estate funds as preferential deposit. Estate funds on deposit in a bank which has been appointed trustee or guardian of the estate constitute a trust fund, and in case of insolvency of the bank, are entitled to preference in payment; and an order of court entered without notice to interested parties, and authorizing the appointee-bank to deposit the estate funds with itself, cannot change this rule of preference. (§9285, C., '27.)

Andrew v Bank, 208-392; 226 NW 73

Estate—deposits without order of court. A deposit in a bank by a guardian of guardianship funds, as a loan, without a directing or approving order of court, is wrongful, and the bank at once becomes a trustee of the fund for the benefit of the ward.

Andrew v Bank, 207-394; 223 NW 249

Insolvent estates—unallowable payment in full. The act of the administratrix of an insolvent estate in applying estate funds to the full payment of a debt, which is the personal obligation of both the deceased and the administratrix, is fundamentally unallowable. It follows that the creditor, by receiving such payment, becomes a trustee of the fund for the use and benefit of the estate, especially when he knew that the estate was insolvent.

Reason: The administratrix could not legally make such payment, even on an authorizing order of the court.

Andrew v Bank, 217-69; 251 NW 23

Express trusts. The deposit of funds with a bank under an agreement that the bank will keep the same invested and pay the interest income to a named beneficiary necessarily constitutes an express trust.

Andrew v Bank, 203-546; 213 NW 245

Bank deposit for particular purpose. A trust fund is created by depositing money in a bank with the definite understanding and agreement at the time between the depositor and the bank that said deposit is for the specific purpose of paying a certain check thereafter to be drawn in a named amount.

Townsend v Bank, 212-1078; 237 NW 356

Special deposit as part of real estate deal. A cash deposit in a bank, understood by all parties, including the bank, to be made for the purpose of paying a vendor for land sold, and which, with accompanying papers, was held in escrow pending completion of title, must be deemed a special deposit and entitled to preferential payment on the insolvency of the bank, even tho a certificate of deposit, payable to the vendor, was issued by the bank and retained among the papers evidencing the deal.

Gillett v Bank, 219-497; 258 NW 99

Special deposit as trust fund. A special deposit (and consequently a trust fund) is created in favor of an administrator by the

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action of bank directors in waiving the interest of the bank in a particular fund in its possession, and owned jointly by the bank and a guardian, and doing so in order to enable the guardian to have the entire fund for the immediate payment of his liability to the administrator of the deceased ward, and by the action of the guardian carrying out the arrangement by taking a check to himself for the entire fund, and by immediately issuing and delivering (after banking hours) to the administrator a check for the same amount.

Rime v Andrew, 217-1030; 252 NW 542

Special deposits — evidence — sufficiency. Evidence held insufficient to show that a deposit was made for the special purpose of meeting payment on a particular draft, or was made under such circumstances that the issuance of the draft effected a pro tanto equitable assignment of the deposit.

Heckman v Bank, 208-322; 223 NW 164

Deposit as trust fund. Cash and checks deposited by the owner thereof in a bank, under a written instrument which provides that the receipt is "in trust for the purpose only of transmittal to" the owner in another locality, and which instrument is utilized solely for the purpose of effecting such transmittal, constitutes a trust fund and entitles the holder of the instrument to a preference in payment, in case the bank fails, provided such trust fund is traced into the hands of the receiver, even tho in some minor respects the deposits were made, and carried on the bank books as ordinary deposits.

Standard Oil v Andrew, 218-438; 255 NW 497

Deposits received on condition—violation—effect. A bank which receives cash, checks, and notes on the agreed condition that said receipts will be held intact, and not placed in the general assets of the bank, and will be returned intact on the happening of a named event, must respect and comply with the condition, even tho at the time the bank has enforceable financial obligations against the parties delivering the property. And, in case of violation of the condition and in case of insolvency, the claimants will be entitled to an order on the receiver for restitution, or for preferred payment out of the funds on hand at the time of insolvency, or for such other relief as will be equitable and possible under the circumstances.

Andrew v Bank, 218-1313; 256 NW 292

Relation of principal and agent. The act of a county treasurer in sending tax receipts to a bank with the implied understanding that the bank would collect the amount thereof and then deliver the receipts, and the act of the bank in so doing, create the relation of principal and agent, and give the funds in the hands of the bank and the receiver thereof the character of a preferred claim, it appearing (1) that the treasurer had no lawful authority to make deposit of such funds in said bank, and (2) that the treasurer gave no direction as to the manner of remitting said fund to him.

Leach v Bank, 202-881; 211 NW 536

Principal and agent. Principle reaffirmed that the act of the owner of a draft in forwarding the same to a bank for collection, and the act of the bank in making the collection, create the relation of principal and agent, and not that of debtor and creditor.

Andrew v Bank, 207-403; 223 NW 176

Receipt by agent for special purpose. A bank which, as agent either of the lender or the borrower, receives the proceeds of a loan for the specific purpose of discharging certain incumbrances on property, holds said proceeds in a trust capacity.

Leach v Bank, 202-265; 209 NW 422

Second Bk. v Millbrandt, 211-1299; 235 NW 577

Collections—resulting trusts. A bank upon making a collection for its implied principal, under authority to "collect and remit", takes no title to the collected funds, but immediately becomes a trustee thereof and remains such trustee until said funds are paid over to the principal. It follows that such relationship is not affected in the least by the unauthorized act of the bank in issuing and mailing to the principal a certificate of deposit for the amount of the collection.

Andrew v Bank, 217-232; 251 NW 860

Funds received for investment. A bank which makes a collection for a customer, under instructions immediately to invest the proceeds in a specified and agreed way, must be deemed to hold such proceeds in trust for the customer. It follows that, in case the bank becomes insolvent, the customer may reclaim his money from the funds which passed into the hands of the receiver, provided the cash bank balance at all times since the collection was made equaled or exceeded the collection.

Miller v Andrew, 206-957; 221 NW 543

Instructions to "collect and return" — effect of custom. The direction of a sending bank to a collecting bank to "collect and return" the items inclosed conclusively implies a collection and return in cash or its equivalent, and a return by draft does not terminate the relation of principal and agent; and this is true even tho a general custom exists among banks to return such collections by draft.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Collection of draft. A bank which, as agent, receives for collection a draft, with orders to collect in cash only, and to remit to the owner

of the draft, and which accepts in payment of the draft the amply protected check of the drawee upon itself, must be deemed to have collected the draft in cash, even tho it fails either (1) to cancel the said check, or (2) to charge the account of the drawer of the check with the amount thereof. It follows that the collection belongs to the principal, is impressed with a trust character, and, upon the insolvency of the bank, is entitled to preferential payment out of the appropriate cash balance passing to the receiver.

Andrew v Bank, 204-565; 215 NW 742

Bailment—nondissipation—effect. The deposit in a bank of specifically identified bonds with the mutual understanding between the depositor and the officers of the bank that the identical bonds will be returned on demand, creates a trust, even tho the bank carried said bonds as a part of its assets and liabilities.

Leach v Bank, 202-887; 211 NW 529
Leach v Bank, 202-885; 211 NW 535
In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910
Andrew v Bank, 203-345; 212 NW 745; 51 ALR 906

Unidentified bailments. When the subject matter of various bailments with the same bailee is identical in kind—e. g., government bonds—and becomes so intermingled that the owners are unable to identify their separate property, the entire series of bailments must, in case of the insolvency of the bailee, be ratably distributed among the bailors.

In re Bank, 202-859; 211 NW 532; 51 ALR 910

Bailment—preferential order. The deposit of government bonds with a bank for safekeeping only, creates the relation of bailor and bailee; but the bailor may not have a preferential order against the receiver of the bank for the return of his bonds or the proceeds thereof when he is wholly unable to identify any bond as belonging to him, and equally unable to identify any property in the hands of the receiver as the proceeds of his bonds.

Leach v Bank, 206-675; 220 NW 113

No fraud by bank—no constructive trust.

Community Bk. v Gaughen, 228- ; 289 NW 727

Trust funds—facts showing. A bank which through its officers manages a public sale as agent for a party, and holds the cash proceeds thereof in the bank without settlement with the said party, will be deemed to hold the money as trustee, and in case of insolvency the trust funds will be presumed embraced in a final cash balance which is in excess of the trust; and it is immaterial how or in what manner the bank, on its own motion, treated said cash on its books.

Andrew v Bank, 209-1147; 229 NW 907

Wrongful hypothecation—effect. A trust is not destroyed by the fact that the insolvent trustee, without the knowledge of the beneficiary of the trust, has wrongfully pledged the subject-matter of the trust and other securities of his own as collateral to his personal debt, and by the fact that the subject-matter of the trust has been actually sold by the collateral holder, with the consent of the insolvent's receiver, when the receiver had unhampered opportunity to direct the sale of the insolvent's personally owned collateral (which was ample), and thus save and protect the subject-matter of the trust.

Leach v Bank, 202-887; 211 NW 529

Reinstating trust after wrongful dissipation. A trust which has been inadvertently or wrongfully converted and dissipated by the trustee to his own use is effectually reinstated by the subsequent act of the trustee, while solvent, in repurchasing with his own funds the subject-matter of said trust, with the specific intent to effect such reinstatement.

Leach v Bank, 202-887; 211 NW 529

Wrongful deposits. A bank acquires no title to wrongfully deposited funds, and consequently becomes a trustee for the actual owner.

Leach v Bank, 207-478; 223 NW 171

Wrongful deposit basis of trust. Principle reaffirmed that the wrongful deposit in a bank of the funds of a municipality gives rise to a trust relation between the bank and the municipality.

Leach v Bank, 205-971; 219 NW 59

Wrongful deposit of public funds. The deposit in a state bank by a city treasurer of municipal funds without the execution and delivery of the indemnifying bond required by statute is wrongful, and brings into existence a constructive trust, which is enforceable against the receiver of said bank when it is made to appear, by presumption or proof, that said fund has passed into his hands to the augmentation of the assets of the bank.

New Hampton v Leach, 201-316; 207 NW 348

Wrongful deposit of public funds. A deposit in a bank of municipal firemen's pension funds under conditions which deprive the trustees of the power to immediately withdraw said funds, is wrongful and being wrongful the trustees do not lose title to said funds. It follows that in case the bank becomes insolvent the deposit is entitled to preferential payment from the cash on hand at the time of insolvency; and it matters not that the trustees and bank are in pari delicto.

Andrew v Bank, 214-105; 241 NW 412
Andrew v Bank, 222-881; 270 NW 465

Wrongful deposit — presumption. Public funds, unlawfully deposited in a bank because no statutory bond guaranteeing the return of

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the deposits was given by the bank, constitute a trust fund which presumptively is included in the cash, if any, which comes into the hands of the receiver upon the insolvency of the bank. Evidence held to overcome the presumption.

Poweshiek Co. v Bank, 209-467; 228 NW 32; 82 ALR 39

Estoppel. Where the funds of a municipality have been wrongfully deposited in a bank, the municipality will not be deemed estopped from insisting that the deposit constitutes a trust fund simply on the assumption that the municipality received statutory interest on the deposit.

Leach v Bank, 205-971; 219 NW 59

Wrongful deposit—estoppel. Where school funds have been wrongfully deposited in a bank, the fact that such funds draw interest works no estoppel on the school district to insist that such funds constitute a trust.

Leach v Bank, 205-1345; 219 NW 483

Wrongful deposit of public funds. School funds deposited in a bank by a school treasurer without authority from the school board constitute a trust fund, which presumptively exists and remains in the cash on hand when the bank passes into the hands of a receiver.

Leach v Bank, 205-1345; 219 NW 483

Wrongful deposits—resulting trust. A deposit of school funds in a bank is wrongful when made without the filing of a depository bond and the approval thereof by the school treasurer and the board of directors. Held that the finding of a bond not formally approved, in the desk of the president of the school board after the failure of the bank, and the evidence in connection therewith, were insufficient to show an implied approval of the bond.

Leach v Bank, 207-478; 223 NW 171

Wrongful deposits. Deposits by a city treasurer of city funds in a bank are wrongful and title to such deposits does not pass to the bank when the city council had simply "designated" the bank as a city depository, without specifying the amount of deposits authorized and without requiring or receiving any bond as required by statute. (§5651, C., '27 [§7420.01 et seq., C., '39]).

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

V TERMINATION OF TRUST RELATIONSHIPS

Trust relation terminated by accepting draft. Trust funds in a bank lose their trust character and become general assets of the bank when the bank, under authority from the owner of the trust funds, remits to the owner its draft against existing funds, for the amount of the trust funds. The loss of said trust character necessarily precludes any claim of preference in case of the subsequent insolvency of the drawer-bank.

Leach v Bank, 203-398; 212 NW 746

Andrew v Bank, 203-343; 212 NW 744

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Trust relation — termination. The relation of principal and agent which exists between a collecting bank and the party who remits a claim for collection, terminates (and necessarily the trust relationship) when the collecting bank remits the proceeds of the collection by draft, in accordance with the instructions of the principal.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Remittance by draft—termination of trust relation. The act of a bank which had made a collection for the owner of a claim, in forwarding the proceeds to the owner by draft, as the owner had directed, terminates any trust relation which may have attended the collection and substitutes therefor the relation of debtor and creditor.

Andrew v Bank, 204-870; 216 NW 553

Trust relation terminated by accepting draft. The act of the holder of a promissory note in forwarding it to a bank for collection from the maker (not the bank) creates the trust relation of principal and agent, but such relation is ipso facto terminated and the relation of debtor and creditor substituted by the act of the bank in issuing and forwarding to said holder its draft for the proceeds of said collection strictly in accordance with the holder's direction.

Leach v Bank, 202-875; 211 NW 527

Trust deposit — termination of trust relationship. Where a bank deposit was made for the sole purpose of enabling the depositor to procure a certified check for use in bidding on a public improvement, with the understanding that if the depositor was not awarded the contract he would surrender the certified check and receive a draft for the amount of the deposit, held, that no trust relationship existed after the depositor surrendered his certified check and in return received a draft for the amount of his deposit.

Andrew v Bank, 215-1336; 245 NW 226

Fatal delay in enforcing unknown trust. A trust fund created without the knowledge of the cestui que trust, in the form of a bank deposit in a national bank, and carried on the books of the bank for many years, and then dropped, may not, after the bank has become insolvent, a receiver appointed, its affairs liquidated, and its charter surrendered and canceled, be enforced against a bank which took over certain assets of the old insolvent bank

and assumed certain of its obligations, not including, however, the trust fund in question.

Short v Bank, 210-1202; 232 NW 507

Acceptance of draft—effect. A cestui que trust who accepts from the trustee a certificate of deposit in lieu of the actual trust funds, and later accepts a draft in lieu of the certificate of deposit, thereby cancels the trust relation, and substitutes therefor the relation of debtor and creditor.

Leach v Bank, 204-954; 216 NW 267

Loss of trust relation. A principal who, instead of demanding cash of his collecting agent, his bank, accepts the certificates of deposit of the latter, thereby terminates the trust relation, becomes a simple depositor, and loses any right of preference in case of the insolvency of the bank; and this result is not overcome by oral testimony to the effect that no such result was intended.

Valentine v Andrew, 203-463; 212 NW 674

Estoppel to set up trust. A chattel mortgagee who, knowing that the mortgaged property has been sold without his consent, and that the proceeds of the sale have been deposited in a bank to the mortgagor's credit, accepts the mortgagor's check on said deposited proceeds for the amount due under the mortgage, together with security for the payment of said check in the form of an assignment by the mortgagor of the balance of said deposit in the bank (which had failed), thereby estops himself from asserting that said deposited proceeds have always belonged to him and therefore constitute a trust fund in his favor.

Andrew v Bank, 209-273; 228 NW 12

Check on trust fund—delayed presentation. Where a check is drawn on a special deposit or trust fund, the act of the payee in withholding presentation for a few days, and until the bank had become insolvent and closed its doors, does not nullify the trust.

Rime v Andrew, 217-1030; 252 NW 542

Non-change in trust funds. The unauthorized act of a bank in drawing in favor of the owner of trust funds in its possession a cashier's check for the amount of such funds, and its act in placing said check among the papers of said owner, cannot change the trust character of said funds.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Noninference as to manner of remitting funds. Authority to a banker to remit trust funds to the owner thereof by means of a draft may not be inferred from the simple fact that said owner expected the remittance to be made in that manner, the actual fact being that the owner had never given any direction as to the manner of remitting.

Andrew v Bank, 204-870; 216 NW 553

Unauthorized draft or check remittance. Trust funds in the possession of a bank do not lose their trust character by the unauthorized issuance by the bank of drafts or cashier's checks to the trust owner for the amount of the fund.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

VI PRESUMPTION OF PRESERVATION

Presumption. The presumption that a trustee has preserved a cash trust fund in his cash balance applies solely to the lowest cash balance subsequent to the creation of the trust and prior to insolvency.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Presumption of preservation — limitation. The presumption of fact that a trustee has preserved a cash trust fund in his cash balances applies exclusively to the lowest cash balance possessed by him subsequent to the receipt of the trust funds; and, upon proof that all other cash balances prior to such low balance have been used in the payment of the debts of the trustee, the trustor must find his

VI PRESUMPTION OF PRESERVATION —continued

funds in such low balance, or not find them at all.

Andrew v Bank, 205-1064; 217 NW 250

Presumption. Presumptively, a cash trust fund in the hands of a bank has been preserved intact, and exists in the cash balance of the bank on hand when the bank becomes insolvent; and said presumption is applicable even tho the bank originally received the trust fund through a check drawn upon itself at a time when it had insufficient funds with which to pay the check, when it is stipulated that, at a later time, the bank did receive the entire amount.

Andrew v Bank, 207-394; 223 NW 249

Following trust funds — presumption. An established trust in a bank is presumed to be embraced in the final balance turned over to the receiver (in case of insolvency) provided the cash balance in the bank at all times since the trust was created has not dropped below the amount of the trust fund.

Andrew v Bank, 217-232; 251 NW 860

Presumption as to preservation. Upon the establishment of a trust in cash funds in the hands of an insolvent bank, the rebuttable presumption is not that the bank preserved the trust in the general mass of bank assets, but that the bank preserved the trust in the smallest cash bank balance existing between the creation of the trust and the time of enforcing the trust.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Limit on preference. When a cestui que trust fails to trace a cash trust fund into the assets of the bank other than the cash assets, an order of preference in payment against the receiver must not exceed a sum coming into the hands of the receiver in excess of the lowest cash balance existing in the bank after the trust came into existence.

Leach v Bank, 205-971; 219 NW 59

Intermingled funds—presumption—scope of. The presumption that the cash on hand in an insolvent bank and coming into the hands of the receiver embraces a cash trust fund with which the bank has been intrusted is a rigidly limited presumption—a presumption having no application beyond its literal terms. If the trustor lays claim to other non-cash items of bank assets he must, by evidence, trace his trust funds into such items, even tho the receiver has in the meantime converted such non-cash items into cash.

Townsend v Bank, 212-1078; 237 NW 356

Intermingled trust and private funds. Upon the insolvency of a trustee, it cannot be presumed that trust funds were preserved in the cash and loan notes taken over by the receiver when the proof shows (1) that the trustee received trust funds in the form of checks and, instead of cashing the checks and holding the cash for application on certain bonds as was his sole duty, he converted said checks by indorsing and depositing them in a bank in his personally owned deposit account, and thereby promiscuously intermingled both classes of funds, (2) that, from time to time, he drew checks against said intermingled funds for the purpose of carrying on his own private loan business, or so drew checks and placed the proceeds in his cash drawer for the same purpose, (3) that during all said time said private business was carried on at a heavy loss, and (4) that at one time after the trust funds were received the trustee's deposit account was materially overdrawn.

Andrew v Trust Co., 217-464; 250 NW 177

Presumption—right to rebut. The presumption that a cash trust fund was preserved in the trustee's cash balance may be rebutted by the receiver of the insolvent trustee.

Andrew v Bank, 204-1317; 217 NW 438

Presumption as to cash balance. Presumptively a cash trust fund in the hands of a bank has been preserved in the actual cash on hand in the bank at the time it closes and passes into the hands of a receiver, and when the presumption is not rebutted the beneficiary of the trust is entitled to receive his property out of said cash balance or to share therein pro rata with other preferred creditors.

Andrew v Bank, 217-69; 251 NW 23

Preservation—presumption. Trust funds in the form of cash are presumptively preserved in the cash balance which passed into the hands of the receiver for the insolvent trustee.

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Negativing preservation. Proof that a bank used cash trust funds in the payment of the debts of the bank necessarily proves that the bank did not preserve said funds in the non-cash assets of the bank.

Andrew v Bank, 205-1064; 217 NW 250

Nullifying presumption. Even if it be conceded, arguendo, that the agreement of a bank was to hold the trust funds in "liquid assets" and to return to the trustor "in kind all cash or its equivalent", and that said agreement authorized the bank to convert the trust funds into bills receivable or to deposit them with correspondent banks, yet the court cannot presume that said trust funds, over and above the amount of cash on hand in the bank when it closed its doors, were embraced in the bank's

bills receivable or in the bank's deposits in correspondent banks, when the receiver affirmatively shows not only that the trust funds were not invested in bills receivable or deposited with correspondent banks, but that from the time the trust was created the bills receivable and the deposits with correspondent banks steadily declined.

In re American Bank, 210-568; 231 NW 311

Wrongful deposits—presumption. Presumptively a bank retains intact a wrongful deposit of money, and has it on hand in its cash balance on the day of insolvency, a presumption which becomes conclusive in the absence of contrary evidence by the receiver.

Leach v Bank, 207-478; 223 NW 171

Presumption. It will be presumed, in the absence of a counter showing, that a bank receiving a wrongful deposit of municipal funds retained the same in its possession, and that the same passed to its receiver.

New Hampton v Leach, 201-316; 207 NW 348

Unallowable presumption. No presumption exists that a bank which has wrongfully received an ordinary deposit of money, has converted the same into other non-cash items of property belonging to the bank at the time of insolvency.

Leach v Bank, 207-478; 223 NW 171
Andrew v Bank, 207-394; 223 NW 249

Limited equitable preference. A bank which, in making collection on a draft sent to it "for collection", receives in payment the check of the drawee on itself for the full amount of the draft cannot, in a proceeding between the drawer of the draft and the subsequently appointed receiver of the bank, be deemed to have collected the draft, except to the extent that the check drawer then had money in his checking account in the collecting bank. Resultantly, an equitable preference to the funds in the hands of the receiver is limited to the amount so on deposit.

Andrew v Bank, 207-948; 222 NW 8

Presumption—evidence to overcome. It will be presumed that a bank acting as trustee has preserved the subject-matter of the trust; and in case of insolvency, the receiver does not establish dissipation of the trust by a mere showing that he, when appointed, received in money much less than the amount of the trust, it appearing that the amount of the trust had passed into the general assets of the bank.

Andrew v Bank, 203-546; 213 NW 245

Tracing trust property — requirements. No presumption exists that a cash trust fund in the hands of a bank was preserved in any or all of the many general, non-cash assets of the bank, nor in the cash deposits of the bank in other banks. In other words, while the beneficiary of the trust may trace his property into such items of assets, yet this can be done only by definite evidence and by proof that the assets have been augmented and the extent of such augmentation.

Andrew v Bank, 217-69; 251 NW 23

Essential allegation—presumption. The presumption that a trustee has preserved the subject-matter of the trust cannot exist, in the absence of an allegation that said subject-matter came into the hands of the representative of the trustee, and some proof to sustain the allegation.

Andrew v Bank, 204-431; 215 NW 623

Presumption as to retaining. The act of a banker, after collecting a trust fund, in issuing and retaining in his own possession, on his own motion, a demand certificate of deposit payable to the owner of the fund will not, of itself, overcome the presumption that he did in fact retain the actual trust funds.

Andrew v Bank, 204-870; 216 NW 553

VII ENFORCEMENT OF TRUST

Discussion. See 16 ILR 256—Recovery of trust assets

Fundamental requirements. A trust may not be impressed upon funds in the hands of the receiver of an insolvent unless it is established (1) that the insolvent received in a trust capacity the particular funds in question, and (2) that the receiver also received said particular funds either in specie or by way of augmentation of the assets which did come into his hands.

Leach v Bank, 202-265; 209 NW 422
Andrew v Bank, 204-870; 216 NW 553

Following trust funds. A cestui que trust owns the property into which he can trace dissipated trust funds.

Mandel v Siverly, 213-109; 238 NW 596

Necessary proof to enforce. A trust deposit in an insolvent bank cannot be enforced as such against the receiver of the bank when the proof is silent on the issue whether the receiver, actually or presumptively, received said trust fund.

Andrew v Bank, 215-1336; 245 NW 226

Insufficient tracing of funds. A trust fund is not traced into the hands of a collecting bank by simply showing that the bank, in collecting a draft as agent of the owner, accepted (1) an unnamed amount in cash, and (2) checks on various other local banks; and this is true even tho the cash on hand in the bank on the day of insolvency exceeded the amount of the trust fund.

Andrew v Bank, 207-403; 223 NW 176

Check as working augmentation of assets. The act of a bank in receiving and accepting an amply protected check on itself in payment

VII ENFORCEMENT OF TRUST—cont.

of a collection for its principal works a legal augmentation of the assets of the bank, even tho the account of the check drawer is not charged with the amount of the check.

Leach v Bank, 204-1343; 217 NW 445

Augmentation of assets—acts constituting. The act of a bank in accepting a surrender of its outstanding general certificate of deposit, and in issuing in lieu thereof, and for the same amount, a special certificate of deposit, wherein it specifically recognized that it was holding said amount in a named trust capacity, constitutes an augmentation of the assets of the bank, even tho no money was actually handled in the transaction.

Dugan v Bank, 205-171; 217 NW 831

Augmentation of assets — nonpresumption. An equitable preference in the payment of trust funds may not be decreed against the receiver of the insolvent trustee when there is no evidence whatever as to the property taken over by the receiver except the concession by the receiver that he had "assets sufficient to pay" the claims if the court decreed an equitable preference in payment.

Leach v Bank, 204-760; 216 NW 16
Andrew v Bank, 205-237; 216 NW 12

Presumption in re augmentation of assets. Mere proof that a check payable to a bank was paid by the remotely located drawee will not warrant the presumption that the amount of such payment actually reached the payee bank and became a part of its cash assets.

Andrew v Bank, 207-407; 219 NW 929

Presumption as to payment. The law will presume that a check was paid on proof that the check was, subsequent to its execution, (1) stamped "Paid", and (2) charged by the drawee to the account of the drawer.

Andrew v Bank, 207-407; 219 NW 929

Charging and crediting accounts—augmentation of assets. The act of a bank which is the common depository of both the drawer and payee of a check in charging the amount of the check to the account of the drawer and in crediting the same amount to the account of the payee constitutes an augmentation of the assets of the bank.

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Nonaugmentation of assets. Proof that a bank to which checks were sent for collection put them through the clearing house on a day when the clearance was against said bank affirmatively shows that the assets of the bank were not augmented by the amount of said checks because such handling of the checks amounted to applying them to the bank's own debt; otherwise, if the clearance was in favor of said bank and the amount thereof is paid in cash.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Nonaugmentation of assets. When a trust fund in an insolvent bank is wrongfully deposited with the bank's correspondent and is used in the general operations of the depositing bank, it may not be said that the funds of the depositing bank were "augmented" because the corresponding bank returned to the depositing bank a larger amount of collateral than it would have returned had the wrongful deposit not been made.

Ronna v Bank, 213-855; 236 NW 68

Negativing augmentation of assets. The fact that the cash balance in a bank after the receipt by the bank of trust funds never dropped below the amount of such trust is of no avail to the beneficiary of the trust when the further fact affirmatively appears that the trust funds were, immediately upon their receipt, used by the bank in the payment of its debts.

Andrew v Bank, 204-878; 216 NW 1

Trust fund—improper allowance against assets. The allowance of a trust fund as a preferred claim should be against the fund properly traced into the hands of the receiver, not against the assets of the bank.

Standard Oil v Andrew, 218-438; 255 NW 497

Trust fund—interest. Interest is not allowable on an established trust fund against an insolvent bank.

Standard Oil v Andrew, 218-438; 255 NW 497

Interest as affecting status. A testamentary trust fund deposited as an investment in a saving account under the terms of the will does not lose its preferential character because of the payment of interest on the deposit.

Bates v Bank, 222-370; 269 NW 341

Intermingled funds—cash in excess of trust—effect. A bank, having been appointed trustee of testamentary trust funds, deposited said funds with itself, and intermingled said trust funds with its general funds, but carried the trust funds in an account which clearly revealed their trust character. The bank was merged into another bank. The trust account, and all other deposit accounts (general and special), and the entire cash balance, of the bank, were transferred to the merging bank, the latter agreeing to pay all deposit liabilities of the merged bank. The transferred deposit accounts were thereafter carried in the merging bank as theretofore carried in the merged bank. The merging bank became insolvent. The cash balances of the respective banks were always in excess of said trust funds.

Held, said trust funds were intact, and were entitled to preference in payment over the general creditors of the merging bank.

Bates v Bank, 222-370; 269 NW 341

Bailment—dissipation—effect. Even tho a trust relation is clearly established in relation to the deposit of government bonds with a bank as a bailment, yet the receiver of such insolvent bank may defeat a plea of preference in payment by showing that, prior to his appointment, the bank had wholly dissipated the bailment and that, therefore, no part of the same came in any form into his possession.

Leach v Bank, 203-401; 212 NW 694; 51 ALR 900

Bailment—dissipation—effect. A bailor who asks that his claim against the receiver of an insolvent bailee be decreed preferred, on the plea that the insolvent wrongfully converted the subject-matter of the bailment by hypothecating the same for a loan, must trace the proceeds of the conversion into the hands of the insolvent to the augmentation of the assets coming into the hands of the receiver.

In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910

Leach v Bank, 202-885; 211 NW 535

Affirmative showing of misappropriation. An affirmative showing that a bank, prior to its failure, used trust funds in part in the payment of the obligations of the bank and in part in the payment of the personal obligations of one of the officers of the bank necessarily precludes any equitable preference in payment of such trust funds from the assets of the insolvent bank.

Andrew v Bank, 204-870; 216 NW 553

Mowatt v Bank, 204-1106; 216 NW 760

Presumption of misappropriation. The act of a bank in actively, for several months, concealing from the owner of trust funds the receipt of such funds, and later in making remittance of small amounts thereof, justifies the legal presumption that the bank had wholly misappropriated said fund, especially when no effort is made to trace the funds into the hands of a subsequently appointed receiver for the bank.

Andrew v Bank, 204-870; 216 NW 553

Check as equivalent of cash—presumption. When the deposit of a county treasurer in an insolvent bank consists merely of transfers of credit from the accounts of private depositors in the same bank to the account of said treasurer, made on the basis of checks drawn by the private depositors on said bank (in order to enable the bank to pay the taxes due from the drawers to the treasurer), the law cannot presume that said checks were the equivalent of cash, in the absence of evidence as to the cash on hand in the bank at the various times; nor can the law presume under such circumstances that the bank, on receipt of a check, would, if requested, have forthwith paid said taxes to the treasurer in cash.

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Wrongful sale of mortgaged property—dissipation of proceeds. Conceding, arguendo, that when mortgaged personal property is sold without the consent of the mortgagee, and the proceeds are deposited in a bank to the mortgagor's credit, said proceeds constitute a trust fund of which the mortgagee is the beneficiary, yet such trust is dissolved if such proceeds are wholly dissipated in the payment of the debts of the bank.

Andrew v Bank, 209-273; 228 NW 12

VIII PAYMENT OF TRUST

Depleted fund. If a cash trust fund is duly established, and successfully traced into the final cash balance of an insolvent bank, and paid from said balance under an order of court, a subsequently established trust, which is likewise traced into said balance, can be enforced only against the amount remaining when the subsequent trust is established; and even then, such latter trust beneficiary may be compelled to prorate said remaining amount with other trust beneficiaries.

Andrew v Bank, 207-394; 223 NW 249

Equitable preference in payment—limitation. An equitable preference in the payment of cash trust funds may not be allowed against all the assets of an insolvent bank, but only against the cash balance which passed to the receiver, there being no claim that such trust funds have been preserved in the non-cash assets of the bank.

Leach v Bank, 204-1343; 217 NW 445

Preference — from what moneys payable. The money actually on hand in an insolvent bank at the time it closes its doors is the only fund from which preferred claims may be paid,—in the absence of a successful attempt to trace trust funds into other moneys or property.

Andrew v Bank, 208-392; 226 NW 73

Prorating. An inadequate common trust fund to which various claimants have traced their trust funds must be prorated between the established claims.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Leach v Bank, 204-1343; 217 NW 445

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Andrew v Bank, 205-1064; 217 NW 250

Leach v Bank, 205-1345; 219 NW 483

Leach v Bank, 205-971; 219 NW 59

Leach v Bank, 207-478; 223 NW 171

Prorating trust funds. A decree which provides for the payment of trust funds from the cash on hand in an insolvent bank when it closed its doors, must provide for prorating said cash among all established trust claimants if the amount is insufficient to pay all such claimants in full.

In re American Bank, 210-568; 231 NW 311

VIII PAYMENT OF TRUST—concluded

Tracing trust funds. A solvent bank, which, in due course of business, comes into possession of a trust fund of which its correspondent bank is trustee, effects full delivery of said fund to the said trustee by crediting said trustee with the amount of said fund, and notifying the trustee accordingly.

McCue v Foster, 219-89; 257 NW 559

9239.1 Clearings, and purchasers of drafts preferred.

Holdings prior to statute.

Leach v Bank, 202-879; 211 NW 526

Leach v Bank, 203-782; 211 NW 522; 38 NCCA 426

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Andrew v Bank, 206-65; 218 NW 957

Townsend v Andrew, 206-1006; 221 NW 572

Applicability of statute. This statute does not apply to drafts issued by private banks.

Ellis v Bank, 211-1082; 234 NW 849

Shifflett v Bank, 215-823; 246 NW 757

Galvin v Citizens Bank, 217-494; 250 NW 729

Failure to argue vital statutory question. Where the holder of a cashier's check on an insolvent bank is given by the receiver, the preferential classification of a "depositor", the appellate court will not accord an enlarged preference under this section, when said statute manifestly presents a grave problem of construction and is in no manner argued.

Andrew v Bank, 214-590; 243 NW 152

"Clearings" defined. The word "clearings" in banking parlance relates only to transactions between banks.

Andrew v Bank, 215-1336; 245 NW 226

Collections—insolvency of collecting bank. The drawer of drafts which were paid by drawees by checks drawn on bank to which drafts had been sent for collection was not entitled to preference on failure of bank on theory of trust relationship, since there was no increase in bank's funds, and where another draft sent to such collecting bank was paid by drawee by check on another bank, which check was used in exchange of checks between collecting bank and such other bank, the drawer was not entitled to preference on insolvency of such collecting bank since its funds were not augmented by payment of draft.

Rorebeck v Benedict Co., 26 F 2d, 440

Draftholder — when not entitled to preference. Where a bank, instead of paying a certificate of deposit from its cash on hand, issued and delivered to the certificate holder a draft in order to enable the latter to obtain the cash from the drawee, it may not be said that the draft was issued "for the bona fide transfer of funds" within the meaning of this section. It follows that, if the draft is not paid, the holder is not entitled, under said section, to a preference in payment over other creditors of the bank.

Andrew v Bank, 215-290; 245 NW 329

Draft as preferred claim. Delay in cashing a draft purchased by the holder and payable to himself for the purpose of transferring his funds from the drawer-bank to another bank will not deprive the holder of his statutory right to a preferential repayment of the money paid for the draft in case the drawer-bank becomes insolvent before the draft is cashed, when such delay was induced by the conduct of the officers of the drawer-bank.

Andrew v Bank, 212-1375; 238 NW 425

Draft for clearances. The payee of a draft given for bank clearances and unpaid because of the insolvency of the drawer is entitled to be paid in full before the payment of any general claim or of any depositor.

Andrew v Bank, 215-1150; 247 NW 797

Draft for clearings. A draft drawn and issued, in payment of clearings at a time when the drawer's account with the drawee is overdrawn, is not drawn "against actual existing values", even tho the drawee holds, on another transaction with the drawer, excess collateral belonging to the drawer sufficient to pay said draft, the drawee never having agreed that the drawer might draw drafts against said excess collateral. (Statute since amended.)

Andrew v Bank, 216-972; 250 NW 152

Purchase of draft — nonpreference. Record reviewed and held that the purchase of a draft was for the purpose of more safely preserving the money, and for the purpose of concealing the money from the holder's creditors, with resulting consequence that the holder, when the bank became insolvent, was entitled to no preference over other creditors.

Iiams v Andrew, 215-923; 247 NW 277

Insolvency—draft as preferred claim. One who, in good faith and for the bona fide purpose of meeting an obligation, long prior thereto contracted, buys a draft of his bank of deposit, and pays therefor with a check drawn by him on his deposit in said bank, will hold said draft as a preferred claim in case the drawer-bank becomes insolvent, it being shown that at the time the bank possessed ample funds to pay said check.

In re Bank, 220-61; 261 NW 807; 101 ALR 627

"Money paid for draft". A bank depositor who holds unpaid certified checks to the full amount of his deposit, and surrenders the checks to the certifying bank at a time when the bank does not have sufficient funds with which to pay the checks, and then receives in return, from the bank, a draft for the amount

of the checks, may not be said to have paid money for the draft.

Andrew v Bank, 215-1336; 245 NW 226

Preference for clearance drafts. The statutory provision that the payee of a draft drawn and issued "against actual existing values", for bank clearances, is entitled to a preference in payment in case the drawer-bank becomes insolvent, imposes an obligation on the payee bank to establish that the draft was drawn against values which the drawer-bank then had on deposit with the drawee-bank. (Statute now changed.)

Andrew v Bank, 214-204; 242 NW 80

Transfer of funds by draft—statutory preference. A bank depositor who, with the bona fide intent to transfer his deposit to a new depository, presents to his bank of deposit a check for the full amount of his deposit, and receives a draft therefor (the bank having cash funds with which to pay the check), thereby in legal effect "pays money" for the draft, and acquires a statutory preferred claim against all the assets of the draft-issuing bank, irrespective of the amount of cash on hand in said bank when it failed.

Bates v Bank, 219-78; 257 NW 578

Transfer of funds by check. Where, "for the bona fide transfer of funds" a cashier's check is purchased by one who supposed he was receiving a draft (and the bank official so knew), the court may treat the check as a draft in order to afford the check holder a preference in case the bank becomes insolvent before the check is paid.

Reason: So treating the check constitutes, in effect, a proper reformation of the check to comply with the mutual understanding of the parties.

Andrew v Bank, 216-1165; 250 NW 487

Trust relationship — pleading. The claim that the purchase price of a bank draft which was not paid constitutes a trust fund because the bank was insolvent at the time of the receipt of the money and the issuance of the draft, must, manifestly, be presented by definite plea and supported by sufficient proof.

Shifflett v Bank, 215-823; 246 NW 757

9239.2 Agreement as to reorganization, consolidation, or sale.

Atty. Gen. Opinions. See '32 AG Op 211; '34 AG Op 88, 93, 592

Granting discretionary power to administrative officer. The statutory grant of discretionary power to the superintendent of banking in re reorganization of banks is not a violation of due process.

Priest v Whitney Co., 219-1281; 261 NW 374

Reorganization—waiver—estoppel. A general waiver by a depositor and creditor of an insolvent bank of a percentage of "any and all claims" which he may have against the bank, in return for which he receives an agreement from a reorganizing bank for payment of the balance of his claims, is final and conclusive when he knows the full purpose of such waiver, and acquiesces therein until the reorganization is effected.

Ronna v Bank, 213-855; 236 NW 68

Waiver by depositors—effect on nonsigners. The act of a majority of the depositors of a bank (owning a large majority of the deposits) in signing waivers deferring payment of their deposits, in order to preserve the bank as a going concern, cannot be deemed the legal equivalent of an express agreement on their part that the depositors who do not sign such waivers shall be paid in full before such signers are paid; nor can such signing be deemed prejudicial to the nonsigners; nor, by such signing, can said signers be deemed to have lost their status as depositors and thereby become mere lenders of money to the bank.

Andrew v Bank, 216-739; 249 NW 768; 88 ALR 1003

Depositor's agreement—conditions. An order of the probate court, authorizing a national bank acting as executor of an estate to execute a depositor's agreement relative to the estate funds, should specifically provide that said order is entered on the condition that the same shall not prejudice the right of the heirs, (1) to a lien upon any securities in possession of the executor, (2) to the right of action against the executor to recover the amount due, and (3) to any existing rights under federal law.

In re McElfresh, 218-97; 254 NW 84

Collection and management of estate—compounding claim. An application in probate by a national bank as executor of an estate for authority to execute a depositor's agreement on behalf of the estate presents no question of the compounding of a claim against a debtor of the estate within the meaning of §11928, C., '31.

In re McElfresh, 218-97; 254 NW 84

Deception constituting fraud and liability therefor. False representations by the managing officers of a reorganized bank to the effect that all objectionable assets of the old bank had been eliminated from the new bank are actionable if relied on to one's damage.

Baumchen v Donahoe, 215-512; 242 NW 533

Novation—substitution of new debtor—consent. A creditor may, by his actions and conduct, consent to the substitution of a new debtor.

Andrew v Trust Co., 219-1059; 258 NW 921

Dissolution—wholesale transfer of assets—right of creditors. A good-faith transfer by a going bank of substantially all its assets, and a good-faith acceptance of such transfer

by the transferee under an agreement by the transferee to pay all record depositors, does not impose on the transferee liability to pay a nonrecord depositor when the transferred assets prove insufficient to pay the record depositors, and the transferor is not shown to have been insolvent at the time of the transfer.

Garvey v Trust Co., 214-401; 239 NW 518

Reorganization—classifying claims. In the reorganization of an insolvent bank under statutory authority, the small claims, such as $10 and less, may be constitutionally placed in a class by themselves and paid in full while larger claims are accorded less favorable terms of payment.

Priest v Whitney Co., 219-1281; 261 NW 374

Certificate of deposit — permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith, bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Insolvency—assumption of liabilities—construction. The written agreement by a bank to take over the assets of an insolvent bank and apparently to assume the payment of all the liabilities of the insolvent will be controlled, in its general terms, by the official bank resolution pertaining to the matter. Held, under this rule, that the assumption in a certain case embraced liabilities appearing only on the books of the insolvent bank.

German Bank v Bank, 203-276; 211 NW 386

Merger—creditor's right to follow assets. A creditor of a banking corporation may, for the satisfaction of his claim, follow the assets of the corporation into the hands of another like corporation which has bodily taken over said assets and paid therefor by an issuance of its corporate shares of stock—it appearing that the latter corporation had assumed the liabilities of the former but had become insolvent.

Andrew v Bank & Trust, 219-1059; 258 NW 921

Merger—nontrust relation. Under a valid agreement between two banking institutions to the effect that one should be merged into the other, the title of the bank receiving the assets of the merged bank and the title of said receiving bank to the money paid to it by the stockholders of the merged bank must be deemed absolute and not in trust, when every material term of the agreement affecting the financial interest of the stockholders of the merged bank has been substantially fulfilled.

Andrew v Bank & Trust, 219-921; 258 NW 911

Merger — immaterial failure to perform — trust relation. On the question whether a merger contract between two banks had been so far performed that the bank receiving the assets of the merged bank (and other moneys) took absolute title or only in trust, it will be deemed immaterial that said receiving bank failed to comply with a provision which was, in truth and fact, no part of the consideration for the merger and which was not performed because the superintendent of banking legally refused his approval.

Andrew v Bank & Trust, 219-921; 258 NW 911

Merger contract—nonrescission. A contract for the merger of two banking corporations must be deemed final and irrevocable, even tho there has not been full compliance with every provision thereof, (1) when the corporation receiving the merger has passed into insolvency, (2) when, prior to such insolvency, substantial and good-faith acts were performed by both parties in fulfillment of the contract, (3) when neither corporation ever attempted to rescind, and (4) when the restoration of the status quo would probably be impossible.

Andrew v Bank & Trust, 219-921; 258 NW 911

9239.3 Agreement by public bodies.

Atty. Gen. Opinions. See '32 AG Op 151; '34 AG Op 88, 139, 142, 153, 188

9239.4 Hearing—notice.

Atty. Gen. Opinion. See '32 AG Op 211

9239.6 Receivership concluded—report.

Bank examiner's final report vacated—procedure. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by Ch 552 of the code—the statutory procedure to vacate and modify judgments—which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan Co., 227-1347; 291 NW 184

Vacating final report of receiver—jurisdiction of court. After approval of the final report of the receiver of a closed bank which discharged both the receiver and the examiner

in charge, an application by the receiver for vacation of the order consented to the jurisdiction of the court only as to the receiver, but the court had jurisdiction to deal summarily with the examiner by prescribing the form of notice to be served on him and to set the time for his appearance so long as the statutory provisions for vacating and modifying judgments were complied with and the application filed within one year from the date of rendition of the order attacked.

Bates v Loan Co., 227-1347; 291 NW 184

Appearance date agreed on — waiver of notice. Where the parties in a proceeding to vacate an order of court approving the final report of a bank receiver stipulate that the court may set a date for appearance later than the second day of the term, and that the bank examiner will file an appearance or pleading on or before that date, and that no other or further notice to him shall be necessary, the examiner may not assert the departure from the statutory requirements as to the appearance date as a ground for challenging the jurisdiction of the court by a special appearance.

Bates v Loan Co., 227-1347; 291 NW 184

9239.7 Secured creditors — contracts with third parties.

Insolvency—transfer of assets—trust fund doctrine. The transfer by an insolvent bank, while in the hands of a receiver, of all or of a part of its assets to another bank which pays nothing therefor, but assumes the payment of certain of the liabilities of the insolvent, does not deprive a judgment creditor of the insolvent's of the right to follow said assets into the hands of the transferee and to impress a lien thereon on the basis of the pro rata value of the assets transferred; and this is true tho the transferee bank had no knowledge of the creditor's claim when it accepted the transfer.

German Bank v Bank, 203-276; 211 NW 386

9242 Superintendent as receiver.

Atty. Gen. Opinions. See '25-26 AG Op 325; '32 AG Op 211; '36 AG Op 28, 666

Nonretrospective statute. A statute which provides that "the superintendent of banking henceforth shall be the sole and only receiver" for state banks and trust companies in no manner displaces a then qualified and acting receiver.

Andrew v Bank, 206-869; 221 NW 668

Superintendent as sole receiver—exceptions. The statutory declaration that the superintendent of banking shall be the sole and only receiver or liquidating officer for state incorporated banks has no application (1) when the receiver is prayed for, not by said superintendent, but by private parties, and for a bank which has largely closed out its business as a bank, and is preparing to dissolve, and (2) when the receiver is prayed for as an auxiliary remedy in an action for the adjudication of matters in which the superintendent of banking is interested adversely to plaintiff.

Harris Est. v Bank, 207-41; 217 NW 477

Liability of banking superintendent. The superintendent of banking in his official capacities as superintendent and as bank receiver is, in law, two persons, and may be held responsible for his own acts or those of his assistants.

Bates v Niles, 226-1077; 285 NW 626

Liability of bank superintendent for failure to collect claims. When there was no evidence of wrongdoing on the part of the superintendent of banking in his capacity as bank receiver, nor sufficient evidence to show negligence on the part of the bank examiner, a previous decision that the superintendent was negligent in not filing claims within the statutory time for filing in order to collect them, does not control when an objection was made because there was no accounting of these claims in the final report of the receiver when neither the issues nor parties are identical with the previously decided case.

Bates v Niles, 226-1077; 285 NW 626

Compromise of claims. A receiver may not compromise claims except under prior authority of, or under subsequent ratification by, the court.

Sherman v Linderson, 204-532; 215 NW 501

Waiver of valuable rights. A chancery receiver may not waive a valuable right without the authority of the court, nor may an agent of a statutory receiver waive such valuable right without the authority of such statutory receiver.

Andrew v Rivers, 207-343; 223 NW 102

Rents—priority over receiver. The receiver of an insolvent bank who, pending receivership, acquires, on behalf of the insolvent, a deed to real estate "subject to" a specified first mortgage, holds the rent notes and the proceeds thereof, covering the redemption period, subject to the said mortgagee's right thereto under his mortgage pledge thereof.

Connecticut Ins. v Stahle, 215-1188; 247 NW 648

Rents—priority over receiver. The receiver of an insolvent bank who forecloses a second mortgage belonging to the insolvent and receives a sheriff's deed, acquires by said deed simply the rights formerly possessed by the mortgagor-owner. It follows that the receiver holds said land subject to the right of the first mortgagee subsequently to perfect and enforce a pledge of the undisposed of rents, in order to satisfy a deficiency judgment, as provided in the first mortgage. (Schlesselman v Martin, 207 Iowa 907, overruled.)

Northwestern Ins. v Gross, 215-963; 247 NW 286

Metropolitan v Smith, 215-1052; 247 NW 503

Rents—priority over receiver. The receiver of an insolvent bank must be deemed to hold the insolvent's mortgaged land subject to the right of the mortgagee, in order to satisfy a deficiency judgment, to perfect and enforce a pledge of the undisposed of rents as provided in the mortgage. In other words, the receiver may no more deny the mortgagee's right to said rents than might the insolvent deny such right.

Metropolitan v Sheldon, 215-955; 247 NW 291
Willey v Andrew, 215-1104; 247 NW 501
Lincoln Bank v Barlow, 217-323; 251 NW 501

Receiver not protected by dead man statute. In an action by the receiver of an insolvent bank to recover on promissory notes allegedly due the bank, wherein defendant pleaded payment, held that the receiver was not within the class protected by the dead man statute.

Bates v Zehnpfennig, 220-164; 262 NW 141

Compromise — approval by court — review. The action of the court in bank receivership proceedings in approving a compromise on a written guaranty by the directors of payment of certain assets of the bank will not be set aside in the absence of a showing that such approval is not in the interest of the depositors; and especially is this true when an element of uncertainty exists as to the extent of the legal recovery under the guaranty.

Andrew v Bank, 205-712; 218 NW 520

Bank examiner's final report vacated—procedure. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by Ch 552 of the code—the statutory procedure to vacate and modify judgments—which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan Co., 227-1347; 291 NW 184

9243 Expenses of liquidation.

Atty. Gen. Opinions. See '36 AG Op 28, 666

Assistant examiner—initial power to fix salary. The superintendent of banking has the initial power to fix the salary of a bank examiner appointed by him to assist in the liquidation of an insolvent bank of which the superintendent is receiver. The district court has no right to grant a greater salary.

In re City Bank, 210-581; 231 NW 342

Fees of bank receiver—review. When objections were made to the salaries and expenses of bank examiners as set forth in the final report of the receiver it was proper for the court to refuse to examine whether the fees were excessive when they were fixed by statute and approved at a court hearing, which was ex parte in accordance with the general practice in such hearings, when there was no evidence to show that the court was misled in making the approval.

Bates v Niles, 226-1077; 285 NW 626

9246 Impairment of capital stock—assessments. (Repealed)

Assessment—purpose. An assessment on the stock of a bank in order to restore the impaired capital, and in order to enable the bank to continue as a going concern, and followed by a continuation of the bank's business, cannot be deemed an assessment for liquidating purposes, even tho the bank, within a very short time, becomes insolvent and passes into the hands of a receiver.

Andrew v Bank, 206-869; 221 NW 668

Double liability not subject to off-set. Funds voluntarily paid into a bank by a stockholder thereof, in order to repair or make good the impaired capital of the bank while it is a going concern, may not later, and after the bank has become insolvent and has passed into the hands of a receiver, be offset by the stockholder against the demand of the receiver for a 100 percent assessment on the stock for the benefit of the creditors.

Leach v Bank, 203-1052; 213 NW 772
Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Bank deposits—no set-off against assessment irregularly made. A purported assessment by the directors of a bank is not chargeable against the deposit of a deceased stockholder in the bank, when, under the record, the payments to be made were purely voluntary in nature as distinguished from enforceable statutory assessments by order of the state banking department.

Younkin v Bank, 226-343; 284 NW 151

Legal and equitable owners differentiated. The legal owners of corporate shares of stock may be legally liable to assessments, while one who simply has an equitable interest in said shares of stock may not be so liable.

Andrew v Bank & Trust, 219-921; 258 NW 911

Stockholders' assessment to replace impaired capital—jury question. Conflicting evidence reviewed and held to present a jury question on the issue whether an assessment on bank stockholders was for the purpose of making good the impaired capital of the bank, or whether it was a voluntary arrangement among the stockholders to form a pool and purchase from the bank certain assets of doubtful value and thereby to relieve, in part, the individual guarantors thereon.

Andrew v Austin, 213-963; 232 NW 79

Assessment — nonpower of superintendent. The superintendent of banking has no power

to order an assessment on the stockholders of an insolvent bank.

Home Bk. v Berggren, 211-697; 234 NW 573

Improper payment — assessment on bank stock. An executor will not be given credit for estate funds voluntarily used by him, in discharging an assessment on bank stock which is held by the estate solely as collateral security.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Corporate entity—unallowable disregard of. Where collaterally secured bonds, owned by a corporation, were depreciated in value by the wrongful act of the collateral-holding trustee in permitting worthless collaterals to be substituted for valuable collaterals, the resulting damages belong solely to the corporation. In other words, a stockholder may not maintain an action against the trustee for alleged special damages suffered by said stockholder consequent on the fact that said depreciation so impaired the capital of the corporation that an assessment on the corporate shares became necessary, and that the stockholder was unable to pay said assessment and thereby lost his said stock.

Grimes v Brammer, 214-405; 239 NW 550

9248 Assessment enforced. (Repealed.)

Issuance of stock—estoppel to question. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank & Trust, 219-939; 258 NW 925

9248-a1 Liability for deficiency. (Repealed.)

Additional remedy to enforce. A statutory assessment against a holder of bank stock in order to restore the impaired capital of the bank creates a personal liability on the part of the stockholder, and the statutory remedy for enforcing such personal liability by a sale of the stockholder's stock may, after the stockholder acquires his stock, be constitutionally supplemented by an additional statutory remedy, to wit: an action at law to recover of the stockholder the balance due on said assessment after selling said stock. The granting of such additional remedy does not impair the stockholder's contract in a constitutional sense.

Woodbine Bk. v Shriver, 212-196; 236 NW 10

Sale of stock for payment of assessment—common-law or statutory right of action. As to a stockholder who acquired his stock prior to the enactment of a statute permitting the sale of stock to enforce payment of a stockholder's assessment to reimburse an impairment of the bank capital, such statute does not necessarily exclude a common-law remedy by action when not so construed by the highest state court, and such statute declaring that the stockholder shall be liable for any deficiency after applying the proceeds of such sale, and providing for its collection by suit, is not a deprivation of property without due process by impairing a contract obligation.

Shriver v Bank, 285 US 467

9250 Liability of directors. (Repealed.)

Directors' right to contract for payment of debts. A good-faith contract by the board of directors of a state bank, for and on behalf of the bank, and providing for the payment of the bank's debts incurred in the operation of the bank, is valid without any approval by the stockholders of the bank.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Personal liability. The directors of a bank who personally know of, and connive at, the investment of the funds of a cemetery association (in the hands of the president of said bank as trustee) in the time certificates of deposit of the bank—in violation of §10202, C., '35—are personally liable, ex maleficio, for the loss of said funds consequent on the insolvency of said bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

9251 Liability of stockholders. (Repealed.)

Discussion. See 21 ILR 611—Scope of statute; 21 ILR 630—Corporate device to avoid liability

Improper plaintiff. An insolvent bank may not maintain an action against its stockholders to enforce and collect the superadded double liability imposed by this section.

Home Bk. v Berggren, 211-697; 234 NW 573

Foreign receiver as plaintiff.

Gruetzmacher v Quevli, 208-537; 226 NW 5

Enforcement of liability. The successful liquidation of the deposit liabilities of a failing bank by a transfer of assets to a stronger financial institution, under a good-faith contract approved by the superintendent of banking, constitutes no bar to a final liquidation of the remaining indebtedness of the failing bank by said superintendent, and to the enforcement by said officer of the stockholders' double liability on their stock.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Heirs as owners of corporate shares. The heirs of an intestate may not be said to own the corporate shares of stock of the intestate, and may not, therefore, be said to be stockholders, (1) when they have never held themselves out as such owners, (2) when there has been

no administration on the estate, and (3) when there is no showing as to the extent or distribution of the estate, or as to the debts and the discharge thereof.

Andrew v Dunn, 202-364; 210 NW 425

Stockholders—acts constituting. One who buys corporate bank stock necessarily becomes a stockholder even tho the bank officials in good faith but mistakenly represented that such purchase would rehabilitate the impaired capital of the bank.

Andrew v Bank, 211-649; 234 NW 542

Voluntary purchase of stock to rehabilitate bank. Persons who, in an effort to rehabilitate a financially embarrassed bank and make good its impaired capital, voluntarily purchase of the bank corporate stock which had been surrendered to the bank by impecunious stockholders, must be deemed full-fledged stockholders, on ample consideration, and subject to an assessment on said stock in case the bank later becomes insolvent and passes into the hands of the superintendent of banking.

Andrew v Bank, 209-1153; 229 NW 905

Acts constituting transfer. A stockholder in a bank who has never held a formal certificate for his stock and who, having made a bona fide sale of his stock, notifies an officer of the bank of such sale, and requests a transfer of the stock on the books of the bank, and is told that such transfer would be made, ceases to be a stockholder even tho no transfer is entered on the stock book of the bank.

Andrew v Sanford, 212-300; 233 NW 529

Stockholder—who is—wholly inadequate evidence. In an equitable action to enforce, against an estate, "double" liability on bank stock, a finding and decree (based almost exclusively on the testimony of the record owner of said stock) that the deceased had actually owned said stock for some thirty years and was such owner at the time of his death, will (notwithstanding the deference accorded to the trial court in judging of the credibility of witnesses) be annulled on appeal as without adequate support in the evidence when the actions and conduct of said record owner during substantially all of said time in asserting exclusive ownership in himself, even after the death of the deceased, is wholly at war with his present testimony that he had never owned said stock and that the deceased had always owned it.

Andrew v Bank, 220-219; 261 NW 810

Who are not stockholders. A person does not, within the meaning of this section, become the owner of bank stock when, in supposedly buying the stock, he is designedly led by the president of the bank to believe and does believe that the purchase is of stock owned by the bank when in truth and fact the stock was owned by the president himself.

Bates v Bank, 222-407; 269 NW 437

Nonrecord stockholder. The statutory "double" liability of stockholders in banks is enforceable against all actual owners of stock whether they are or are not recorded on the stock book of the bank as such owners.

Andrew v Bank, 220-219; 261 NW 810

Insufficient sale. An absolute and good-faith transfer by a failing bank of part of its assets to a stronger financial institution, under a contract by which the latter agreed to discharge the deposit liabilities of the former (which contract was fulfilled) does not constitute such a "sale" or "transaction" as to relieve stockholders of their stock liability on the final liquidation of the remaining liabilities.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Transfer of stock after expiration of charter —effect. When the charter of a bank expires, the legal existence of the corporation terminates; likewise terminates the legal right to transfer the stock in such sense that the transferor ceases to be a stockholder.

Andrew v Bank, 211-649; 234 NW 542

Expiration of charter—effect. The liability of stockholders of a state bank to assessment on their stock is not terminated by the expiration of the charter of the bank.

Bates v Bank, 218-1320; 256 NW 286

"Trustee" not subject to double liability. The holder of corporate bank stock as "trustee" is not personally subject to double liability on the stock in case the bank becomes insolvent.

Andrew v Bank, 205-42; 217 NW 431; 57 ALR 767

Stock held in trust—double assessment liability. Under decree of an Iowa equity court assessing statutory liability on stock in a closed Iowa bank against a national bank as trustee under an identified trust, the bank does not become personally liable, under laws of Iowa, for such assessment. Neither could the receiver of the Iowa closed bank, in a common-law action, charge the trust property with such statutory liability.

Bates v Bank, 101 F 2d, 278

"Accruing" defined. The statutory provision that the stockholders of a bank are under a double liability as to "liabilities accruing while they remain such stockholders" means that such liability, in case of the insolvency of the bank, embraces any liability within the purview of the statute which exists while a stockholder remains a stockholder.

Andrew v Bank, 206-1070; 221 NW 809

"Accruing" defined. The statutory double liability of stockholders on bank stock owned by them for all liabilities "accruing while they remained such stockholders" embraces all lia-

bilities "incurred" by the bank during said period of ownership.

Andrew v Bank, 217-447; 252 NW 245

Double liability—bank official's wife—stock transfer to husband. Where a wife transfers her bank stock to her husband, a bank officer, who informed other bank officials thereof, who contributed to the insolvent bank on a basis including this stock and who personally, instead of by proxy as previously, voted this stock, he was in fact the actual owner of bank stock, even tho it had not been transferred to him on the bank's books, and the double liability assessment is not recoverable from the wife.

Bates v Bank, 223-1215; 275 NW 91

Indebtedness to pay depositors—assessment of stockholders. An insolvent bank may, under §9297, C., '31, and under authority of a majority of its stockholders, legally take the written agreement of a solvent bank to pay in full the depositors of said insolvent bank, and in return for such agreement legally transfer its assets to said solvent bank, and legally obligate itself to pay to said solvent bank any deficiency existing after said transferred assets are liquidated and applied. It follows that if said solvent bank pays said depositors in full, notwithstanding the fact that the said liquidating receipts are insufficient so to do, the stockholders of the insolvent bank, even tho they did not consent to said arrangement, must submit to an assessment to pay the unsatisfied obligations of their bank.

Andrew v Bank, 215-627; 246 NW 618

Depositors — assessment to pay. A state bank, through its directors, may validly create an indebtedness for the good-faith purpose of paying its depositors, and the stockholders must submit to an assessment for the purpose of discharging said indebtedness, even tho they had no knowledge of said proposed indebtedness at the time it was entered into.

Bates v Bank, 218-1320; 256 NW 286

Basis for assessment. A showing that the assets of a state bank plus a 100 percent assessment on the stock will not be sufficient to pay the debts of the bank furnishes abundant basis for an assessment on the stock, even tho there be no showing as to the amount of claims filed and approved.

Bates v Bank, 218-1320; 256 NW 286

Stock liability assessment—100 percent not mandatory. Statute imposing liability assessment on a bank stockholder does not mandatorily require a 100 percent levy in every instance, but the assessment is determined by ascertaining the deficiency between the assets and the liabilities proportioned to the amount of stock owned.

Bates v Bank, 225-232; 280 NW 487

Assessment—amount necessary—fact question. The question as to what amount of assessment on the stockholders of a bank is necessary to repair the bank's assets is one of fact to be determined by the court from evidence of the bank's assets and liabilities.

Bates v Bank, 225-232; 280 NW 487

Unauthorized assessment. A stockholder in an insolvent bank is not liable to an assessment on his stock to discharge the personal obligations of other stockholders that were contracted in effecting a consolidation with a solvent bank, when the stockholder proposed to be assessed did not participate in the said consolidation.

Andrew v Dunn, 202-364; 210 NW 425

Bank deposits—no set-off against assessment irregularly made. A purported assessment by the directors of a bank is not chargeable against the deposit of a deceased stockholder in the bank, when, under the record, the payments to be made were purely voluntary in nature as distinguished from enforceable statutory assessments by order of the state banking department.

Younkin v Bank, 226-343; 284 NW 151

Successive assessments. An assessment on stockholders and the payment of the same for the purpose of restoring the impaired capital of the bank is no impediment to the subsequent assessment on stockholders to pay the debts of the insolvent bank.

Andrew v Bank, 206-869; 221 NW 668

Liability survives. The cause of action for the enforcement of an assessment on corporate bank stock survives the death of the stockholder, the stock continuing to stand in his name on the books of the bank until the necessity for, and right to, the assessment arose.

Andrew v Bank, 219-1244; 260 NW 849

Nonallowable set-off. Advancements made by a stockholder in a bank for the purpose of enabling the bank to continue as a going concern cannot be offset against the receiver's demand for judgment against the stockholder on his "double" liability to creditors on his stock, even tho the advancements were so fraudulently induced by the bank that the bank, itself, might be held as a trustee.

Bates v Bank, 217-741; 252 NW 138

Nonallowable set-off. Stockholders of an insolvent savings bank may not offset against their "double" liability on stock, (1) the amount of their deposits in the bank and other sums due them from the bank, or (2) the amount of assessments voluntarily or involuntarily paid by them to the bank while it was a going concern and made for the purpose of restoring the impaired capital of the bank; and this is true tho the proceeds of said assessments were used to pay depositors.

Andrew v Bank, 221-98; 265 NW 113

Double liability not subject to off-set. Funds voluntarily paid into a bank by a stockholder thereof, in order to repair or make good the impaired capital of the bank while it is a going concern, may not later, and after the bank has become insolvent and has passed into the hands of a receiver, be offset by the stockholder against the demand of the receiver for a 100 percent assessment on the stock for the benefit of the creditors.

Leach v Bank, 203-1052; 213 NW 772

Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Credit by amount of former assessment unallowable. One who purchases corporate bank stock by paying an existing assessment thereon (and but little in addition thereto) will not be permitted, after the bank has become insolvent, to assert that said assessment was coercive as to him and that the amount of such assessment should be credited on his "double liability".

Andrew v Bank, 211-649; 234 NW 542

Double liability of stockholders—nonassignability. The statutory "double liability" of a stockholder in an insolvent state bank to all the creditors of the bank is not of such nature that a sale or assignment thereof by the receiver, even under an order of court, will vest in the vendee or assignee the right to enforce such liability exclusively for his own use and benefit.

Andrew v Bank, 214-1339; 242 NW 62; 82 ALR 1280

Fraud-induced purchase of stock—damages. The measure of damages for false representations inducing the purchase of corporate bank stock is the price paid for the stock; also, in addition, the amount of assessments subsequently paid on the stock if said assessments are the proximate results of the cause which brought about the original loss.

Baumchen v Donahoe, 215-512; 242 NW 533

Liability of life tenants. Life tenants of substantially all of testator's property, which consists in part of certain shares of corporate bank stock, are liable to a judgment, payable from said property, in satisfaction of the statutory "double" liability on such stock.

Andrew v Bank, 219-1334; 261 NW 815

Nonliability of children of deceased stockholder. The children of a deceased stockholder in a state bank, which has become insolvent since the death of the deceased and the probate of his will, are not personally subject to judgment on an assessment on said stock, (1) when the will of the deceased granted to his widow a life estate in his entire estate with power to sell any part of the corpus of the estate if necessary for her support, and with remainder to said children, (2) when the widow has taken possession of said estate after probating the will (tho the stock still stands in the name of the deceased), and (3) when said children have not in any manner whatever indicated a willingness to become stockholders in said bank.

Andrew v Bank, 219-1244; 260 NW 849

Life-estate holder nonliable. The holder of a testamentary life estate in corporate bank stock standing on the books of the insolvent bank in testator's name, is not personally liable for an assessment on the stock, even tho said holder would have power, under the will, to sell said stock if such sale was necessary for her support.

Andrew v Bank, 219-1244; 260 NW 849

Statutory double liability repealed. After the effective date of chapter 219 of the 47th GA, the act repealing the statutory double assessment liability on bank stock, a closed bank's receiver may not maintain against the executor and beneficiaries under the will an action to enforce the double liability as to stock issued prior to December 1, 1933, and formerly owned by decedent.

Bates v Bank, 227-925; 289 NW 735

When estate beneficiary liable. One who, in the final settlement of an estate, receives the corporate bank stock of the deceased intestate as his or her share of the estate, becomes a "stockholder", and is subject to assessment like other stockholders, even tho the stock has not been transferred on the stock books of the bank.

Bates v Bank, 218-1320; 256 NW 286

When heir not liable. An heir is not liable to a statutory assessment on state bank stock owned by his deceased, intestate ancestor when, in the final settlement of the ancestor's estate, said heir, under contract with other heirs, receives his share solely in property other than said stock.

Bates v Bank, 218-1320; 256 NW 286

Liability of assets of settled estate. An assessment on corporate bank stock standing on the corporate bank books in the name of a deceased stockholder may, by an action in equity, be enforced against the assets comprising the estate of the deceased stockholder, tho the estate has been legally settled and closed, and the said assets have passed into the hands of a testamentary devisee, when the necessity for, and right to said assessment arose, and the assessment was made, long after the settlement of said estate.

Andrew v Bank, 219-1244; 260 NW 849

Bank stock assessment claim—judgment—conclusiveness. State superintendent of banking, who in a final decree in equity was denied right of recovery on stock assessment against executor and beneficiaries under will of decedent, could not thereafter recover the same assessment by way of a claim filed in the

estate, even tho in the latter instance he acted in statutory capacity as receiver. So held in reaffirming principles that one not a party to a suit, who assumes control of the litigation, employs counsel and has a right to control and conduct the same, is bound by the judgment, and that a judgment is conclusive as to all parties to a suit and all parties in privity.

In re Lyman, 227-1191; 290 NW 537

Double liability—change of venue. A stockholder in an insolvent bank who is sued by the receiver, on his "double liability", in the forum of the receivership, in one equitable action, along with all other stockholders, is not entitled to a change of venue in case the county of suit is not the county of his residence in this state.

Broulik v Henderson, 218-640; 254 NW 63

Double liability—national bank as stockholder. A resident national bank as a stockholder in an insolvent state bank of this state is subject to suit in equity by the receiver in the county of the receivership forum, along with all other stockholders, to enforce the statutory double liability of stockholders, even tho the county of said forum is not the county of which the national bank is a resident.

Merchants Bank v Henderson, 218-657; 254 NW 65

Assessment to discharge receiver's certificates. In an action against the stockholders of an insolvent bank on an assessment on their corporate shares of stock, it is no defense that the proceeds of the assessment will be used in discharging the amount due on certificates of indebtedness issued and sold by the receiver and used by him in discharging the original debts of the bank.

Andrew v Bank, 206-869; 221 NW 668

Subrogation. The holder of certificates of indebtedness issued and sold by the receiver of an insolvent bank in order to raise funds with which to pay the debts of the bank will, in an action by the receiver to enforce an assessment on corporate stock in order to pay the certificates, be deemed to stand in the shoes of the original creditors of the bank.

Andrew v Bank, 206-869; 221 NW 668

Double liability—liability of homestead. The very act of acquiring the ownership of corporate bank stock ipso facto creates a contract "debt" for the statutory double liability on the stock. It follows that a judgment against the stockholder on such double liability may (the debtor having no other leviable property) be enforced against the stockholder's subsequently acquired homestead, even tho the judgment was rendered subsequent to the acquisition of the homestead.

Smith v Andrew, 209-99; 227 NW 587

Voluntary, nonfraudulent conveyance—valid against judgment on subsequent bank stock assessment. Altho wholly voluntary, a conveyance executed when the grantor has no fraudulent intent cannot be impeached by a subsequent creditor, so a real estate conveyance by a husband to his wife many years before he becomes a bank stockholder cannot be invalidated by the creditors of the bank, seeking to collect a judgment on stock liability assessment.

Bates v Kleve, 225-255; 280 NW 501

Allowable defense. The receiver of an insolvent bank may not recover of a stockholder on the latter's superadded liability on his stock (1) when, at a time when it was believed the bank would continue as a going concern, the said stockholder had, under a contract approved by the state banking department, surrendered his stock to the bank and turned over to the bank a fund equal to the amount of his surrendered stock for the sole and specific purpose of discharging said superadded liability, should necessity arise therefor, and (2) when said fund, intact, came into the hands of said receiver. In other words, the receiver must treat said fund as a trust and therewith discharge the stockholder's superadded liability.

Andrew v Bank, 216-830; 249 NW 373

Unallowable defense. An unperformed agreement between a bank and its stockholders to the effect that an assessment to repair the depreciated capital of the bank would be returned to the stockholders, in case the bank could not continue as a going concern, constitutes no defense to an action by the receiver against the stockholders after the bank has become insolvent to collect an assessment for the benefit of the creditors of the bank.

Andrew v Bank, 212-329; 236 NW 392

Laches as bar. Record reviewed and held insufficient to show such laches as would bar an action to enforce, against the estate of a stockholder, the latter's statutory, superadded liability on capital stock.

Bates v McGill, 223-62; 272 NW 535

How enforced. A claim by the receiver of an insolvent state bank for the statutory, superadded, contingent liability on capital stock need not, as to the liability of a stockholder who has died prior to the insolvency of the bank, be filed as a claim against the stockholder's estate. Such claim may be enforced by action against the executor or administrator as such.

Bates v McGill, 223-62; 272 NW 535

Statute of limitations. An action by the receiver of an insolvent state bank, to enforce the statutory, superadded, contingent liability on capital stock, is not necessarily barred by the statute of limitation because not commenced within five years after the stockholder ceased to own the stock.

Bates v McGill, 223-62; 272 NW 535

Stock assessments nonassignable. An assessment against a holder of corporate bank stock in an insolvent bank, ordered by the court under the so-called "double liability" statute, even tho said assessment is in the form of a judgment, is nonassignable by the receiver, even under an authorizing order of court, and if formally assigned, is nonenforceable by the assignee, said attempted assignment being for a purpose other than the payment of creditors.

Roe v King, 217-213; 251 NW 81

Payments of prior assessments no defense. Payment of assessments on bank stock prior to insolvency is no defense to an action after insolvency to enforce the statutory "double" liability.

Bates v Bank, 219-1356; 261 NW 614

9252 Enforcement. (Repealed.)

Application of assets as condition precedent. The application of the assets of an insolvent bank to the payment of the debts of the bank is not a condition precedent to the right of the receiver to maintain an action to enforce the double liability of stockholders.

Andrew v Bank, 206-1070; 221 NW 809

Assessment—amount necessary—fact question. The question as to what amount of assessment on the stockholders of a bank is necessary to repair the bank's assets is one of fact to be determined by the court from evidence of the bank's assets and liabilities.

Bates v Bank, 225-232; 280 NW 487

Stock liability assessment—100 percent not mandatory. Statute imposing liability assessment on a bank stockholder does not mandatorily require a 100 percent levy in every instance, but the assessment is determined by ascertaining the deficiency between the assets and the liabilities proportioned to the amount of stock owned.

Bates v Bank, 225-232; 280 NW 487

Stock held in trust—double assessment liability. Under decree of an Iowa equity court assessing statutory liability on stock in a closed Iowa bank against a national bank as trustee under an identified trust, the bank does not become personally liable, under laws of Iowa, for such assessment. Neither could the receiver of the Iowa closed bank, in a common-law action, charge the trust property with such statutory liability.

Bates v Bank, 101 F 2d, 278

9253 Action by creditor. (Repealed.)

Title constitutional. The constitutional provision (Art. III, §29) which provides that "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title" is not violated by the title preceding this section, to wit: "Action by creditor", even tho said section does provide for action by three different parties, viz: action by an assignee, action by a receiver, and action by a creditor.

Andrew v Bank, 216-244; 249 NW 377

Deprivation of jury—constitutionality. An action by the receiver of an insolvent bank against stockholders for the purpose of determining the necessity for an assessment on stock holdings, and adjudicating the amount of such assessment, is not inherently a law action and, therefore, the legislature may provide that the action shall be brought in equity.

Broulik v Henderson, 218-640; 254 NW 63

Procedure. The question whether an assessment on the stockholders of an insolvent banking institution is necessary and, if necessary, the legal amount of such assessment on each stockholder, must be determined in one equitable action, instituted by the receiver in the forum of the receivership, against all the stockholders. No change of venue is allowable to a defendant who is not a resident of the county where suit is properly brought.

Williams v McCord, 204-851; 214 NW 702

National bank as stockholder. A resident national bank as a stockholder in an insolvent state bank of this state is subject to suit in equity by the receiver in the county of the receivership forum, along with all other stockholders, to enforce the statutory double liability of stockholders, even tho the county of said forum is not the county of which the national bank is a resident.

Merchants Bank v Henderson, 218-657; 254 NW 65

Change of venue. A stockholder in an insolvent bank who is sued by the receiver, on his "double liability", in the forum of the receivership, in one equitable action, along with all other stockholders, is not entitled to a change of venue in case the county of suit is not the county of his residence in this state.

Broulik v Henderson, 218-640; 254 NW 63

Petition—sufficiency. A foreign bank receiver, in an action in this state to collect "double" stock liability, need not allege that the defendant stockholder had notice of the hearing on the necessity for such assessment; nor need the petition set forth a copy of the order entered by the foreign court on such hearing.

Baird v Cole, 207-664; 223 NW 514

Proper joinder. The various stockholders of an insolvent bank are all proper defendants in an action to enforce the statutory "double" liability of such stockholders.

Andrew v Bank, 206-1070; 221 NW 809

Personal judgment. In an action to enforce the double liability of the stockholders of an insolvent bank, a personal judgment neces-

sarily follows a successful prosecution of the action.

Andrew v Bank, 206-1070; 221 NW 809

9255 List of officers, stockholders, and holdings.

Atty. Gen. Opinion. See '25-26 AG Op 272

Double liability of nonrecord stockholder. The statutory "double" liability of stockholders in banks is enforceable against all actual owners of stock whether they are or are not recorded on the stock book of the bank as such owners.

Andrew v Bank, 220-219; 261 NW 810

9257 Lists filed with superintendent.

Atty. Gen. Opinion. See '25-26 AG Op 272

9258.1 Branch banking prohibited—exceptions.

Atty. Gen. Opinion. See '32 AG Op 46

Several banks—one owner—when not branch banks. Unincorporated banks in different towns operated independently under different names, but owned by the stockholders of an incorporated bank, do not constitute branch banks as contemplated by the prohibitory statute.

Daniel v Best, 224-1348; 279 NW 374

9259 Loan and trust companies.

Atty. Gen. Opinions. See '30 AG Op 209; '34 AG Op 175, 351

9261.1 Shares.

Atty. Gen. Opinions. See '34 AG Op 351, 710

9266 Forged or raised checks—liability of bank.

Scope of statute. The statute which relieves a bank from liability for paying a forged check unless it is notified of the forgery within six months after it has returned to the depositor the voucher showing payment has no application to the payment of a genuine check on a forged indorsement.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Fictitious payee. The absolute duty of a bank, before it pays its depositor's check, to know that the payee's indorsement is genuine, and to pay only on such genuine indorsement, applies to a check which the depositor has unwittingly and without negligence made payable to a fictitious person.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Intent of drawer. The drawer of a check who unwittingly and without negligence makes it payable to a fictitious person to whom he supposed he was making a loan may not be said to have intended payment to be made to the supposed agent of the named payee (to whom it was delivered) because said supposed agent was, without the knowledge of said drawer, doing business in the name of such fictitious payee.

McCornack v Bank, 203-877; 211 NW 561

Unintended payee. When a check is unwittingly made payable to a fictitious payee, and delivered to the assumed and supposed agent of such fictitious payee, and the supposed agent indorses the check in the name of the payee and receives the money thereon, it may not be said that the money was paid to the very person to whom the drawer intended it to be paid.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Unauthorized payment. A depositor is not bound to anticipate that his banker will wrongfully make payment from the deposit, and is under no obligation to call for his pass book in order to determine whether such payment has been made.

Dow v Bank, 202-594; 210 NW 815

Unauthorized charge against deposit. A bank must pay out its depositor's fund strictly as directed by the depositor. Evidence reviewed, relative to an unauthorized charge against a deposit, and held that the depositor was not estopped to question such charge, nor was he negligent in reference thereto, nor had he ratified said charge.

Dow v Bank, 202-594; 210 NW 815

Inadvertently paid check. A drawee of a check may recover of the payee the amount inadvertently paid on the check at a time when the payee knew that the drawer had no funds on deposit with the drawee—knew that the drawer had gone into the hands of a receiver and that his deposit had been transferred to the receiver.

Bankers Tr. v Reg. Co., 200-1014; 205 NW 838

Check paid on forged indorsement—negligence of drawer—effect. Tho a drawee-bank is under an absolute duty to pay its depositor's check only to a holder thereof under a genuine indorsement, yet the depositor is estopped to question the payment of a check on a forged indorsement when he, by his own negligence or by the negligence of his authorized agents, materially misleads the drawee-bank into the justifiable belief that the indorsement on the check is genuine.

Erickson Co. v Bank, 211-495; 230 NW 342

Deposits—estoppel to question payment. The right of the drawer of a check to question the payment of the check on a forged indorsement is lost by such negligent delay as deprives the drawee of the opportunity to recoup his loss from the party committing the forgery.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Failure to examine monthly statement—effect. The failure of a depositor to examine the monthly statement furnished to him by the bank and the paid checks accompanying the same, may have a material bearing on the issue whether the depositor's negligence has materially misled the bank, to its loss, into paying checks on forged indorsements.

Erickson Co. v Bank, 211-495; 230 NW 342

Deposits—stated account. Principle reaffirmed that the monthly and customary statement of a bank to its customer of the condition of the customer's account becomes an account stated after the lapse of a reasonable time without objection by the customer.

Pierce & Gamet v Bank, 213-1388; 239 NW 580

Payment on forged indorsement—recovery—negligence. Evidence reviewed, in an action by a depositor against a bank to recover the amount paid by the bank on a forged indorsement and charged to the depositor's account, and held amply to support a finding that the depositor was not guilty of any negligence which prejudiced the bank.

McCornack v Bank, 207-274; 222 NW 851

Forged indorsement—prejudice—burden of proof. A drawee-bank, when sued for paying a check on a forged indorsement, must affirmatively establish prejudice as a result of the failure of the drawer to give notice of the forged indorsement upon the discovery thereof.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Surety—taking assignment of claim. Where, because of the peculations of a county auditor, a depository bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee-bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Action based on forged indorsement of checks and drafts. Where an employee wrongfully possessed himself of checks and drafts belonging to his employer, and by forged indorsements caused a bank to pay them, the act of a surety company in paying the employer the amount of his loss does not discharge the bank from its liability to the employer for having paid the checks and drafts on forged indorsements. The employer, upon being so indemnified, may assign his cause of action against the bank to the surety, and the surety may maintain the action against the bank.

National Co. v Bank, 210-323; 228 NW 635

9266.1 Stop-order on checks and drafts—requirements.

Deposit for collection—ill-advised indorsement. The payee of a negotiable check, who, when depositing it with a nondrawee bank, intends to retain title to the proceeds of the check, should indorse "for collection only" or words of similar import; should he indorse in blank he thereby presumptively vests said bank with unrestricted ownership of the check, and should said bank forward said check to its correspondent bank with direction to collect "and credit" the account of the forwarding bank, and should said correspondent enter said credit and, in reliance thereon, pay the drafts drawn on it by said forwarding bank to the full amount of said credit, and does so in good faith and without knowledge of any defect in the title of said forwarding bank or that said forwarding bank had ceased to be a going concern, then said correspondent bank will thereby acquire an unimpeachable title to said check, even tho the drawer thereof has assumed to stop payment thereon because of the insolvency of said forwarding bank.

Bureau Service v Lewis, 220-662; 263 NW 7

9267 Deposit in names of two persons.

Alternate payees—effect. A certificate of deposit taken out by a mother, and "payable to the order of self or Hazel Pent, daughter" may be treated as a gift to the daughter when the mother dies without change in the certificate, and when there is no evidence to the contrary as to the intent of the mother.

Andrew v Bank, 205-237; 216 NW 12

What constitutes general deposit. A general, and not a special or specific, deposit is shown by proof that a buyer and shipper of stock (who was also engaged in two other different lines of business) had but one bank deposit account, and that in buying stock he simply delivered his bank check to the seller, and then, as a general course of business, shipped the stock in the name of his bank, which thereupon, at his direction, drew on the consignee, and credited the shipper's deposit with the amount of the draft, thereby creating a deposit credit out of which any and all checks

issued by the shipper, whether for stock purchases or otherwise, would be paid, if and when presented; and this is true even tho the bank knew that the particular purpose in the mind of the shipper was to protect his outstanding checks for purchases of stock.

Andrew v Bank, 205-888; 219 NW 53
See Andrew v Bank, 204-1190; 216 NW 723

Gifts inter vivos—evidence—sufficiency. Evidence that bonds had donee's name added, were turned over to her, and she kept them in a safety deposit box registered in her name but rented by donor, that donee had the key, coupled with other testimony of disinterested persons, shows a conclusive intention of a completed gift inter vivos.

Reeves v Lyon, 224-659; 277 NW 749

Personal earnings represented by bank deposit. A joint bank deposit in the name of a husband and wife which represents the earnings of the husband for his personal services at any time within 90 days preceding a levy is exempt from an execution against both husband and wife, the wife being made a joint depositor as a matter of convenience in the payment of bills.

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200

Muniment of title—right to bank deposits. In an action by a son against a bank to recover funds which the son claimed his father had deposited for him, a previous adjudication that the funds belonged to the father and not to the son, rendered in an action by the father against the bank and the son, was not res judicata, but constituted a muniment of title showing that the son had no title to the funds, and barred the present action.

Bennett v Bank, 226-705; 285 NW 266

Survivor as owner of balance. Upon the death of one of two joint bank depositors, the survivor is entitled to the balance in the account, when the money originally belonged to said survivor, and was deposited under an agreement with the bank (1) that withdrawals should be on the joint order of both depositors, and (2) that the balance should be paid to the survivor.

Hollingsworth v Hollingsworth, 212-1165; 235 NW 726

Gifts inter vivos—joint (?) bank account. The mere opening of a joint bank account is insufficient to create a gift and claimant has the burden to prove by clear, convincing evidence that depositor had present intention to (1) make a gift, and (2) divest himself of all control and dominion over the subject of the gift.

Taylor v Grimes, 223-821; 273 NW 898

Fraudulent dissipation—nonliability of bank. A bank is not responsible to its depositor for the fraudulent conduct of the depositor's employee, aided by an employee of the bank, in fraudulently withdrawing from the bank the funds of the depositor, on checks which the depositor's employee had specific written authority to draw to himself personally, when the bank had no knowledge or reason to know of any of said wrongdoings.

Pierce & Gamet v Bank, 213-1388; 239 NW 580

Husband's deposit in wife's name. It may be shown that a deposit in an insolvent bank, solely in the name of a wife, is, in truth and fact, the money of the husband, and upon such proof being made, the husband may have the deposit applied on his indebtedness to the bank.

Andrew v Bank, 216-777; 249 NW 276

9267.1 Safe-deposit boxes—liability.

Trust officer's brokerage account—husband pledging wife's securities. Where a husband having a general agency, acquiesced in and ratified by the wife, to transact the wife's business, has a key to her bank deposit box, and personally removes certain securities therefrom which he pledges as collateral for a brokerage account in the name of the bank's assistant trust officer, of which transaction the wife receives knowledge, the fact that the brokerage account is in the name of such trust officer will not impose liability on the bank for a breach of a fiduciary relation, because, the husband having authority to pledge the stock, the account for which he pledged it would not matter.

Clark v Bank, 223-1176; 274 NW 919

9268 Securities—deposit with federal treasurer.

Atty. Gen. Opinions. See '25-26 AG Op 401; '28 AG Op 269; '30 AG Op 133

9272 Acceptance of drafts.

Payment by check. A draft is paid (1) by the act of the drawee in delivering to the collecting bank his personal check for the amount of the draft on his ample checking account in said bank, without knowledge that the bank was then insolvent, and (2) by the act of the bank in surrendering the draft to the drawee, and in marking the check "paid" and charging the amount thereof to the check drawer's account, the bank then having on hand ample funds with which to pay said check.

Wells Co. v Marcus Co., 206-1010; 221 NW 547; 65 ALR 1145

Deposit for collection—ill-advised indorsement. The payee of a negotiable check, who, when depositing it with a nondrawee bank, intends to retain title to the proceeds of the check, should indorse "for collection only" or words of similar import; should he indorse in blank he thereby presumptively vests said bank

with unrestricted ownership of the check, and should said bank forward said check to its correspondent bank with direction to collect "and credit" the account of the forwarding bank, and should said correspondent enter said credit and, in reliance thereon, pay the drafts drawn on it by said forwarding bank to the full amount of said credit, and does so in good faith and without knowledge of any defect in the title of said forwarding bank or that said forwarding bank had ceased to be a going concern, then said correspondent bank will thereby acquire an unimpeachable title to said check, even tho the drawer thereof has assumed to stop payment thereon because of the insolvency of said forwarding bank.

Bureau Service v Lewis, 220-662; 263 NW 7

9273 Acceptances limited.

Excess loans—note of third party to conceal—effect. One who, in order to enable a state banking institution to conceal the fact that it has made loans to a borrower in excess of the amount permitted by law, executes and delivers to the bank his promissory note in lieu of such excess loans, is entitled, when the said excess notes are paid by the borrower, to a surrender of his note and the collateral pledged therewith.

Pomeroy v Bank, 203-524; 211 NW 219

9278.3 Method—court approval.

Stock—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock, and mandamus will lie to compel the transfer of said stock on its records.

McDonald v Farley Co., 226-53; 283 NW 261

9279 Receiving deposits when insolvent.

Federal court's jurisdiction limited—persons detained by state. The federal court, in the absence of exceptional circumstances or emergencies, held without jurisdiction on habeas corpus action to determine constitutionality of Iowa statutes as applying to state banks on receiving deposits while insolvent and providing penalty therefor. The supreme court of Iowa has jurisdiction therein.

Ketcham v State, 41 F 2d, 38

Unconstitutional application of valid statute. The holding by the federal supreme court that the statute of this state prohibiting the receipt of deposits by insolvent banks and bankers generally, was constitutionally inapplicable to national banks and bankers, did not have the effect of carrying down the statute in toto—did not have the effect of thereafter rendering said statute inapplicable to state banks and bankers, even tho the state legislature did not, after said holding, re-enact said sections.

State v Bevins, 210-1031; 230 NW 865

Definition of offense—ascertainable standard of guilt or innocence. The statute which prohibits banks and bankers from receiving deposits when they know they are insolvent, and the interpretation by the courts and by the legislature of the term "insolvency" to mean "inability to pay, through their own agencies, all liabilities within a reasonable time, and in the ordinary course of business" presents no instance of prescribing or fixing an unascertainable standard of guilt or innocence, violative of the due-process clauses of the federal and state constitutions.

State v Bevins, 210-1031; 230 NW 865

Indictment—duplicity. In a prosecution for receiving bank deposits with knowledge of the bank's insolvency, separate and distinct deposits by separate and distinct individuals may not be charged, even in separate counts. (§13737, C., '24.)

State v McCarty, 202-162; 209 NW 288

General allegation of intent. An indictment for fraudulent banking need not specifically allege the name of the person whom the defendant intended to defraud by receiving the deposit in question; but nevertheless, an allegation that defendant (a private banker), knowing of his insolvency, received a named deposit from a named person, with intent to defraud, is, in effect, an allegation to defraud the named person.

State v Boysen, 214-46; 238 NW 581

Harmless error—action favorable to accused. In a prosecution for fraudulent banking, the action of the court in withdrawing that part of the indictment which charges an "intent to receive a financial benefit" constitutes no error of which the accused may complain.

State v Boysen, 214-46; 238 NW 581

"Deposit" defined. The act of a drawee-bank in charging the amount of a check to the drawer's existing money deposit and in crediting the payee's deposit in the same bank with a like amount constitutes a deposit, within the meaning of this statute.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

When bank insolvent. It is not true that a bank is insolvent only when it is unable to pay its obligations in the ordinary and usual course of business.

Andrew v Bank, 207-386; 221 NW 954

Solvency of partners. The state, in prosecuting a managing officer of an unincorporated bank owned by various persons as partners, for receiving deposits at a time when the

bank was knowingly insolvent, is under no obligation to show that the various individual partners were insolvent; but the solvency of said partners may be admissible on the issue whether the defendant had knowledge of the insolvency of the bank when the deposits were received by him.

State v Childers, 202-1377; 212 NW 63

Unallowable defense. On an indictment for receiving deposits from a partnership while the bank was insolvent, it is no defense that one of the members of the partnership was a director of the bank, and that said deposit was made with his approval and with full knowledge on his part of the financial condition of the bank.

State v Pierson, 204-837; 216 NW 43

Insolvency subsequent to receipt of deposit. On the issue whether a bank was insolvent when a deposit was received, evidence of the conduct of the accused tending to show that the bank was insolvent on a subsequent day is admissible when accompanied by other evidence that, in the meantime, no substantial change had taken place in the financial condition of the bank.

State v Bevins, 210-1031; 230 NW 865

Evidence—other deposits. Upon a prosecution for receiving deposits while insolvent, testimony of deposits other than that alleged in the indictment is admissible over the objection of incompetency, irrelevancy, immateriality, and failure to lay proper foundation.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

Subsequent deposits. Under an indictment for fraudulent banking, and on the issue of the bank's solvency or insolvency, evidence is admissible of deposits other than, and subsequent to, the specific deposit on which the indictment is based.

State v Boysen, 214-46; 238 NW 581

Proof of going concern. Testimony tending to show that deposits were made in an insolvent bank on the day when it closed its doors or on the day preceding such closing, is admissible to show that the bank was then a going concern.

State v Niehaus, 209-533; 228 NW 308

Admissions of insolvency. In a prosecution for receiving bank deposits with knowledge that the bank was insolvent, evidence is admissible that the accused some two weeks prior to the closing of the bank admitted in effect that the bank was cramped for funds.

State v Niehaus, 209-533; 228 NW 308

Other offenses. In a prosecution for receiving bank deposits when the bank is insolvent, testimony tending to show a criminal diversion by the defendant of the funds of the bank, subsequent to the occurrence of the specific charge on which the indictment is based, is wholly inadmissible as bearing on the question of the solvency or insolvency of the bank on the prior date alleged in the indictment.

State v Brown, 215-600; 246 NW 258

Evidence—subsequent deposits. On a prosecution for receiving a specific deposit, evidence tending to show all of the existing deposits in the bank, both prior and subsequent to the specific deposit in question, is, as to the prior deposits, admissible as bearing on the liabilities of the bank, and, as to the subsequent deposits, as bearing on the status of the bank's solvency or insolvency.

State v Bevins, 210-1031; 230 NW 865

Declarations subsequent to receipt of deposit. On the issue whether a bank deposit was received by the accused with knowledge of the bank's insolvency, declarations of the accused subsequent to the receipt of the deposit tending to show that he then and at the time of the deposit, knew that the bank was insolvent, is admissible.

State v Bevins, 210-1031; 230 NW 865

Knowledge of insolvency — evidence. The statement of a mere employee of a bank, made long prior to the closing of the bank, and inferentially reflecting his belief that the bank was insolvent, is wholly inadmissible against an accused on the issue of knowledge of the accused of the insolvency of the bank, no attempt being made to connect the accused with the statement.

State v Childers, 202-1377; 212 NW 63

Opinion evidence. In a prosecution for receiving deposits with knowledge that the bank was insolvent, the value of the assets of the bank may be proven by any witness who is familiar with such assets and knows the value thereof.

State v Childers, 202-1377; 212 NW 63

Itemized tabulation or summary of bank books. A correct, itemized tabulation or summary of bank books is admissible in a prosecution for fraudulent banking.

State v Niehaus, 209-533; 228 NW 308

Banking corporations — incompetent evidence. In a prosecution for receiving a bank deposit when the bank was insolvent, an unsigned written report by an employee of the state banking department, covering an examination of the bank a year prior to the date on which the prosecution is based, and consisting of the opinion of the author of the report concerning various features of the business and assets of the bank, is inadmissible either to show the insolvency of the bank or the defendant's knowledge of such insolvency.

State v Henderson, 212-144; 232 NW 172

Opinion evidence — solvency of note-maker. A witness who has made a personal investigation as to the solvency of the maker of a promissory note, and has personal knowledge of the property owned by such maker, is competent to express an opinion as to such solvency.

State v Niehaus, 209-533; 228 NW 308

Bankruptcy proceedings as evidence. On the issue of the insolvency of a bank on the date when a deposit was accepted, the state may show by means of bankruptcy proceedings that certain debtors of the bank have listed their obligations to the bank and been discharged therefrom.

State v Henderson, 212-144; 232 NW 172

Incompetency of witness—excessive motion to strike. A motion to strike the entire testimony of a bank examiner as to the value of the assets of an alleged insolvent bank, should not be sustained simply because it appears that, as to some of many particular assets, he was not competent to express an opinion.

State v Niehaus, 209-533; 228 NW 308

Former jeopardy as rebuttal. When the state, in a prosecution for receiving deposits while the bank was insolvent, seeks to establish the insolvency by proof which tends to show that the accused had both embezzled funds of the bank and had made false reports concerning the assets of the bank, the accused may show, in rebuttal, that he has been indicted for both of said alleged offenses and acquitted.

State v Pierson, 204-837; 216 NW 43

Intent — instructions. Instructions relative to intent to defraud and to the conditions under which it might be inferred, and to the presumption that a person intends the reasonable and natural consequences of acts deliberately and intentionally done by him, reviewed and held to reveal no error.

State v Boysen, 214-46; 238 NW 581

Instructions — popular designation of offense. Designating an offense in instructions by its popular name is quite unobjectionable when the specific elements of the offense are correctly set forth.

State v Bevins, 210-1031; 230 NW 865

9280 Violations.

Adding new element of criminal offense—effect as pardon. The amendment of a criminal statute by adding a new and additional element of the offense does not, because of the saving clause in subsec. 1, §63, C., '31, have the effect of pardoning all unconvicted violators of the statute as it existed prior to the enactment of the additional element, unless the act which adds the new element evinces an intent to pardon.

State v Brown, 215-600; 246 NW 258

"Renewal" of certificate of deposit. A certificate of deposit cannot be said to be "renewed" within the meaning of the fraudulent banking act (§9279 et seq., C., '27) when the holder presents the certificate to the bank, causes it to be canceled, is paid a substantial part thereof, and receives a new certificate of deposit for the balance.

State v Niehaus, 209-533; 228 NW 308

Violation of constitutional right. The constitutional right of an accused in a criminal case to be confronted by the witnesses against him is violated, in a criminal case wherein the value of various items of property is material, by an instruction to the effect that the jurors "have the right to use their own knowledge of values * * * in connection with the testimony as to values which have been given by the different witnesses".

State v Henderson, 217-402; 251 NW 640

9281 Official neglect of officers.

Directors — nonliability for naked nonfeasance. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

9282 False statements or entries—diversion of funds.

Bank responsible for converted receipts.

Peterson v Citizens Bk., 228- ; 290 NW 546

Fidelity bond—fraud in extension of credit by overdrafts—evidence. In action on fidelity bond of bank cashier the exclusion of evidence of bank's custom of deferring posting of checks creating an overdraft was not erroneous where the dishonest acts complained of were the extension of credit by means of overdrafts in violation of statute.

Fidelity Co. v Bates, 76 F 2d, 160

Fidelity insurance—construction. The conduct of an officer of a bank in intentionally and deceitfully omitting to make any entry on the books of the bank of payments made on the bills receivable of the bank (other than a memorandum slip hung on a spindle), with resulting loss to the bank, is covered by a bond or policy of insurance which guarantees indemnity against "dishonest or criminal acts or omissions" of said officers.

Andrew v Ind. Co., 207-652; 223 NW 529

Opinion evidence—assets of bank. A qualified expert accountant is competent to testify that certain proven payments of money to a

bank "did not come into the assets of the bank as shown by the books and records of the bank".

Andrew v Ind. Co., 207-652; 223 NW 529

False return—verdict set aside. Judgments of conviction in criminal cases will be set aside when they are clearly against the weight of the evidence and the instructions of the court. So held where, in a prosecution for making a false bank return, the issue turned on whether certain notes were accommodation paper.

State v Klein, 218-1060; 256 NW 741

Cashier's shortage—drafts on other bank—no constructive trust—inconsistent contentions.

Community Bk. v Gaughen, 228- ; 289 NW 727

9283 Intentional fraud—unlawful dividends.

Acts constituting fraud—legal opinion. A representation, tho false, that a bank and the directors thereof are personally liable, as a matter of law, on certain paper rediscounted by the bank cannot constitute a fraud when the parties concerned stand on equal footing as to all the material facts. Otherwise when such equality does not exist, and when the statement is made for the purpose of being relied on as a statement of fact, and is justifiably so relied on by the party to whom made. And instructions must make this distinction clear to the jury.

Commercial Bk. v Kietges, 206-90; 219 NW 44

Responsibility for worthless loans. The president of a bank is personally liable to the bank for loaning the funds of the bank to persons known by him to be financially irresponsible, and especially so when he secures the approval of the directors as to such loans on the repeated assurance that he is back of said loans and will see that they are paid.

Farmers Bk. v Kaufmann, 201-651; 207 NW 764

9283.01 Unauthorized sale of real estate or securities.

Scope of prohibition. The statutory prohibition against officers and employees of a bank offering for sale or promoting the sale of real estate etc., unless such acts are sanctioned and approved of record by the directors, has no application whatever to lands owned by the bank.

Shanda v Bank, 220-290; 260 NW 841

9283.03 False statements for credit.

Discussion. See 21 ILR 151—False representation

MANAGEMENT BY SUPERINTENDENT

9283.05 Management by superintendent—legal and equitable remedies suspended.

Atty. Gen. Opinions. See '34 AG Op 77, 82, 87, 88, 97, 105, 108, 116, 118, 120, 139, 141, 142, 144, 155, 168, 182, 185, 198, 205, 210, 212, 218, 235, 282, 369, 408, 456, 469, 471, 523, 592; '36 AG Op 74, 166, 474

Surrender of management to superintendent. The right of a stockholder in a bank, or his representative, to have or make an examination of the books and records of the bank in order to determine its financial condition and the value of its corporate stock, is not negatived or suspended by an emergency act of the legislature providing for the taking over of the bank and of its management by the superintendent of banking on application of the bank directors and suspending legal and equitable remedies during the time of such management.

Becker v Trust Co., 217-17; 250 NW 644

Bank deposits—no set-off against assessment irregularly made. A purported assessment by the directors of a bank is not chargeable against the deposit of a deceased stockholder in the bank, when, under the record, the payments to be made were purely voluntary in nature as distinguished from enforceable statutory assessments by order of the state banking department.

Younkin v Bank, 226-343; 284 NW 151

Banker's conveyance—balancing sister's false entries—no consideration. Transfers of land to the superintendent of banking as receiver of an insolvent bank by a banker in order to balance false entries made by sister as cashier, on the bank books, are, in an action by trustee in bankruptcy to set the deeds aside, fraudulent as to creditors of the banker because lacking consideration, when it is shown that the banker's sister and not the banker himself was personally indebted to the bank on account of the false entries.

Bagley v Bates, 224-637; 276 NW 797

9283.07 Power to reorganize.

Discussion. See 17 ILR 384—Merger—transfer of assets

Right of depositor to question. A depositor in a bank may not question the reorganization of the bank unless he shows that he will be substantially injured by said reorganization.

Pugh v Polk County, 220-794; 263 NW 315

DEPOSITORS AGREEMENTS

9283.10 Power to enter into.

Atty. Gen. Opinions. See '34 AG Op 183, 188, 205, 210, 212, 214, 281, 369, 456, 469, 523, 592

Agreements in re county deposits—right of taxpayer. The statutory discretion of the board of supervisors to enter into an agreement with legally and approved reorganized banks, with reference to the county's deposits in said banks, cannot be questioned by a taxpayer except on proof of fraud or arbitrary abuse of said discretion.

Pugh v Polk County, 220-794; 263 NW 315

9283.11 Depositors agreement—effect.

Depositor's agreement—conditions. An order of the probate court, authorizing a national bank acting as executor of an estate to exe-

cute a depositor's agreement relative to the estate funds, should specifically provide that said order is entered on the condition that the same shall not prejudice the right of the heirs, (1) to a lien upon any securities in possession of the executor, (2) to the right of action against the executor to recover the amount due, and (3) to any existing rights under federal law.

In re McElfresh, 218-97; 254 NW 84

9283.14 Conditions precedent to reorganization.

Discussion. See 21 ILR 633—Constitutionality

Atty. Gen. Opinions. See '34 AG Op 197, 211, 244, 369, 456, 469, 739

Certificate of deposit—permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith, bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Compliance with statute—sufficiency. Record, relative to the reorganization of an incorporated bank, reviewed, and held to show compliance with the governing statute.

Timmons v Bank, 221-102; 264 NW 708

Action on certificate of deposit unallowable. After the legal reorganization, under state supervision, of a financially embarrassed banking institution, the holder of a prior-issued certificate of deposit in said bank may not maintain an action for a money judgment on said certificate, even tho he did not consent to said reorganization.

Timmons v Bank, 221-102; 264 NW 708

Statutory reorganization—constitutionality. Constitutionality of this and following sections on bank reorganization reaffirmed.

Timmons v Bank, 221-102; 264 NW 708

9283.23 Majority agreement governs minority.

Reorganization—majority binding minority. In the reorganization of an insolvent bank, an equitable plan proposed by the majority of claimants as required by statute may be validly approved and made binding on the minority when it appears that the minority claimants are not deprived of any assets of the bank.

Priest v Whitney Co., 219-1281; 261 NW 374

DEPOSITORS SUPPLEMENTAL AGREEMENTS

9283.29 Method of reorganization—approval.

Merger—agreement to pay deposit liabilities—scope. An agreement by a merging bank to pay the deposit liabilities of the merged bank must be deemed to include liability for all deposits, special as well as general.

Bates v Bank, 222-370; 269 NW 341

CAPITAL STOCK—CLASSES—NONASSESSABILITY

9283.43 Assessment limitations.

Nonpower of superintendent. The superintendent of banking has no power to order an assessment on the stockholders of an insolvent bank.

Home Bk. v Berggren, 211-697; 234 NW 573

Successive assessments. An assessment on stockholders and the payment of the same for the purpose of restoring the impaired capital of the bank is no impediment to the subsequent assessment on stockholders to pay the debts of the insolvent bank.

Andrew v Bank, 206-869; 221 NW 668

Stockholders—acts constituting. One who buys corporate bank stock necessarily becomes a stockholder even tho the bank officials in good faith, but mistakenly, represented that such purchase would rehabilitate the impaired capital of the bank.

Andrew v Bank, 211-649; 234 NW 542

Credit by amount of former assessment unallowable. One who purchases corporate bank stock by paying an existing assessment thereon (and but little in addition thereto) will not be permitted, after the bank has become insolvent, to assert that said assessment was coercive as to him, and that the amount of such assessment should be credited on his "double liability".

Andrew v Bank, 211-649; 234 NW 542

Stockholders assessment to replace impaired capital—jury question. Conflicting evidence reviewed, and held to present a jury question on the issue whether an assessment on bank stockholders was for the purpose of making good the impaired capital of bank or whether it was a voluntary arrangement among the stockholders to form a pool and purchase from the bank certain assets of doubtful value and thereby to relieve, in part, the individual guarantors thereon.

Andrew v Austin, 213-963; 232 NW 79

Assessment on stock—receiver's certificates. In an action against the stockholders of an insolvent bank on an assessment on their corporate shares of stock, it is no defense that the proceeds of the assessment will be used in discharging the amount due on certificates of indebtedness issued and sold by the receiver and used by him in discharging the original debts of the bank.

Andrew v Bank, 206-869; 221 NW 668

Purpose of assessment. An assessment on the stock of a bank, in order to restore the impaired capital and in order to enable the bank to continue as a going concern, followed by a continuation of the bank's business, cannot be deemed an assessment for liquidating purposes, even tho the bank, within a very short time, becomes insolvent and passes into the hands of a receiver.

Andrew v Bank, 206-869; 221 NW 668

Double liability—"accruing" defined. The statutory provision that the stockholders of a bank are under a double liability as to "liabilities accruing while they remain such stockholders" means that such liability, in case of the insolvency of the bank, embraces any liability within the purview of the statute which exists while a stockholder remains a stockholder.

Andrew v Bank, 206-1070; 221 NW 809

Double liability—proper joinder. The various stockholders of an insolvent bank are all proper defendants in an action to enforce the statutory "double" liability of such stockholders.

Andrew v Bank, 206-1070; 221 NW 809

Double liability—personal judgment. In an action to enforce the double liability of the stockholders of an insolvent bank, a personal judgment necessarily follows a successful prosecution of the action.

Andrew v Bank, 206-1070; 221 NW 809

Superadded double liability—improper plaintiff. An insolvent bank may not maintain an action against its stockholders to enforce and collect the superadded double liability imposed by §9251, C., '27 (now repealed).

Home Bk. v Berggren, 211-697; 234 NW 573

CHAPTER 415.2

COOPERATIVE BANKS

9283.58 Loans and investments.

Money lent. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

CHAPTER 416

BANKS AND TRUST COMPANIES ADDITIONAL POWERS AS FIDUCIARIES

Atty. Gen. Opinion. See '30 AG Op 209

9284 Authorization—additional powers.

Trust relations. See under §9239

Atty. Gen. Opinions. See '25-26 AG Op 478; '28 AG Op 233

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Objections to executor's final report—failure to dispose of securities. Objections to the final report of a trust company are not subject to

a motion for more specific statement when officers of the trust company have equal or better knowledge of the facts called for by the motion, especially where the motion calls for evidentiary facts. Held, also, that trustee was charged with maladministration and not fraud.

In re Carson, 227-941; 289 NW 30

Accounting by trustee—bank inducing lien release—proof. Where a bank holds a chattel mortgage on horses, executed as part of an arrangement with the mechanic lienholder for payment of his lien, the release of which was induced by the execution of the chattel mortgage, a sale of the horses by the bank, under a subsequent chattel mortgage, would constitute the bank a trustee required to account to the mechanic lienholder, but, without proof that the horses sold were the same ones in both mortgages, no showing is made of trust funds to be accounted for.

Shimp Bros. v Place, 225-1098; 281 NW 471

Payment of funds to one with apparent authority to collect. When the plaintiff gave a third party his passbook to be used to withdraw an account from an Italian bank, and the third party used the passbook to secure a personal note given to the defendant bank through which the exchange transaction was made, the bank was not liable for using the funds received from the Italian bank as payment of the note, when it might have thought that the note was given to obtain an advance for the plaintiff, and had no knowledge of wrongdoing, and previous transactions indicated an apparent authority to transact the business in such manner.

Matalone v Bank, 226-1031; 285 NW 648

Trust officer's brokerage account—husband pledging wife's securities. Where a husband having a general agency, acquiesced in and ratified by the wife, to transact the wife's business, has a key to her bank deposit box, and personally removes certain securities therefrom which he pledges as collateral for a brokerage account in the name of the bank's assistant trust officer, of which transaction the wife receives knowledge, the fact that the brokerage account is in the name of such trust officer will not impose liability on the bank for a breach of a fiduciary relation, because, the husband having authority to pledge the stock, the account for which he pledged it would not matter.

Clark v Bank, 223-1176; 274 NW 919

Trusteed special assessment certificates—pro rata distribution. Where a corporation, dealing in securities, owns a group of special assessment certificates for public improvements, and places them in a trust, against which trust are sold certain "ownership certificates" issued in numerical order as representing an interest therein and redeemable in their numerical order, and when, subsequently, it becomes apparent that the trust is insolvent, an application by the trustee to the court for instructions as to whether payment was to be made in numerical order or pro rata was properly decided for the pro rata method on the equity rule of equality and proportionate distribution of the remaining assets.

Iowa-Des Moines Bank v Dietz, 225-566; 281 NW 134

9285 Deposit of trust funds—payment.

Estate funds as preferential deposit. Estate funds on deposit in a bank which has been appointed trustee or guardian of the estate constitute a trust fund and, in case of insolvency of the bank, are entitled to preference in payment; and an order of court entered without notice to interested parties, and authorizing the appointee-bank to deposit the estate funds with itself, cannot change this rule of preference.

Andrew v Bank, 208-392; 226 NW 73

Administrator's bank account—decedent's debt—no offset. Receiver of insolvent bank held unauthorized to set off amount of checking account standing in name of administrator against indebtedness owing to bank by intestate where, immediately on appointment of administrator, checking account passed to administrator who added to account by deposits at various times and drew checks against account until closing of bank.

In re Schwarting, (NOR); 257 NW 189

Keeping funds in insolvent bank. An executor or administrator who, on his own motion and authority, deposits and keeps estate funds in an insolvent bank of which he is cashier must account for the resulting loss.

In re Foster, 218-1202; 256 NW 744

Surety—liability—disobeying order of court. An administrator and the surety on his bond are liable for a shortage in estate funds occasioned by the failure of the administrator's own private bank in which the funds were deposited, the administrator having been ordered by the court prior to the insolvency of said bank to remove the funds to another depository, and, while able to comply with said order, had neglected so to do.

In re Kendrick, 214-873; 243 NW 168

Administrator disobeying order of court—unallowable defense. An administrator who disobeys an order of court as to the bank in which he should deposit estate funds may not, in case of loss, plead in defense that, had he complied with the order, his own private bank in which the funds in fact were on deposit would have been rendered insolvent.

In re Kendrick, 214-873; 243 NW 168

Management of estate—unauthorized bank deposit. An executor who, on his own motion and without any authorizing order of court, deposits the funds of the estate in a financially

embarrassed bank of which he was president, in which he was heavily interested, and which later failed, must account to the estate in cash for the loss. The president of a bank must be held to have knowledge of the general financial condition of the bank.

In re Rorick, 218-107; 253 NW 916

Trust property—legal deposit (?) or illegal investment (?). A deposit by a trustee of trust funds in a savings bank, at a stated rate of interest but with the legal right to withdraw said deposit at any time, does not constitute an "investment" within the meaning of §12772, C., '31.

In re Moylan, 219-624; 258 NW 766

Wrongful act of trustee — right to ratify. A bank which, as guardian, wrongfully treats the guardianship funds as its own property (by carrying said funds as a general deposit with itself) may not complain if, after the failure of the bank, the succeeding guardian ratifies the former wrongful act, and elects to retain the position of an ordinary depositor.

Bates v Bank, 219-258; 257 NW 806

Inferential authorization of deposit. The due approval by the probate court of a guardian's report wherein he recited that he had deposited the funds of the ward in a bank and had received a stated amount of interest on such deposit, is in legal effect an authorization to the guardian to continue the deposit, with resulting consequence that, irrespective of this section, the guardian is relieved of personal responsibility in case the bank subsequently becomes insolvent.

Robinson v Irwin, 204-98; 214 NW 696

Deposit in bank—subsequent approval by court. The rule of law that the approval by the probate court or a judge thereof of a guardian's report showing the depository of the ward's funds is in legal effect an authorization to deposit said funds with said depository is a rule which necessitates a showing that said report was actually called to the attention of the court.

Snyder v Ind. Co., 214-1055; 243 NW 343

Depositing funds with itself. A corporate guardian and its surety will not be permitted to escape liability for guardianship funds on the plea that the guardian on its own motion but in good faith deposited said funds with itself.

Snyder v Ind. Co., 214-1055; 243 NW 343

Loss notwithstanding reasonable care—liability of assignee. An assignee for the benefit of creditors, who deposits in a bank trust funds coming into his hands and loses them because the bank subsequently closes its doors in consequence of insolvency, while not protected from loss under an ex parte order of court authorizing such deposit yet he is protected from such loss if, in making such deposit, and in looking after and caring for said funds, he exercised that degree of care which a person of ordinary care and prudence would exercise under the same or similar circumstances.

In re Stone, 220-1341; 264 NW 604

Bank deposit without authority of court. The temporary deposit by a guardian of guardianship funds in a bank for safekeeping is not rendered wrongful because made without an authorizing order of the court or judge, such deposit not being within the scope of either this section or section 12581, C., '24.

Andrew v Bank, 205-1248; 218 NW 24

Unambiguous life income trust—annuity policy substitution nonpermissible. Under a clear, unambiguous will setting up a trust fund and providing for a $30 a month bequest to be paid therefrom to a beneficiary as long as she lived, a different method of paying said bequest, by purchase of an annuity for said beneficiary, not permitted.

First Methodist Church v Hull, 225-306; 280 NW 531

9287 Payment of deposited funds.

No failure of trust for want of trustee. A trust estate will not fail for want of a trustee. So held where the bank, named as trustee in a will, failed.

First Methodist Church v Hull, 225-306; 280 NW 531

9288 National banks.

Statutory reward applicable to national banks. The statute which obligates the owner of lost goods, money, etc., to compensate the finder of such property, is applicable to a national bank as owner, even tho the federal statutes are silent on the subject, as said statute does not impair the efficiency of said bank as a federal, governmental agency.

Flood v Bank, 220-935; 263 NW 321

9290 Separation of funds—liability.

Estate funds as preferential deposit. Estate funds on deposit in a bank which has been appointed executor, administrator, or trustee of the estate, even tho carried in the name of the estate, constitute a trust fund, and in case of insolvency of the bank, must be paid in full on a showing that, after the trust deposit was made, the deposit in the bank has never been less than the amount of said trust funds.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801
Andrew v Bank, 208-252; 225 NW 379
Andrew v Bank, 208-392; 226 NW 73

Bank as executor—merger and subsequent insolvency. Funds which were held by a bank as executor of an estate, and which belonged to such estate at the time of merger of such bank with another bank, were "trust funds"

and did not constitute part of assets of bank, with respect to whether such funds were payable as preferred claim against such merged bank which subsequently became insolvent.

Bates v Bank, (NOR); 269 NW 346

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Intermingled funds—cash in excess of trust—effect. A bank, having been appointed trustee of testamentary trust funds, deposited said funds with itself, and intermingled said trust funds with its general funds, but carried the trust funds in an account which clearly revealed their trust character. The bank was merged into another bank. The trust account, and all other deposit accounts (general and special), and the entire cash balance, of the bank, were transferred to the merging bank, the latter agreeing to pay all deposit liabilities of the merged bank. The transferred deposit accounts were thereafter carried in the merging bank as theretofore carried in the merged bank. The merging bank became insolvent. The cash balances of the respective banks were always in excess of said trust funds.

Held, said trust funds were intact, and were entitled to preference in payment over the general creditors of the merging bank.

Bates v Bank, 222-370; 269 NW 341

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

Bank as executor and depositor. A state or savings bank when acting as an administrator or executor and carrying the estate funds in its own bank does not sustain the relation of a general depositor of funds in a banking corporation.

In re McElfresh, 218-97; 254 NW 84

Interest as affecting status. A testamentary trust fund deposited as an investment in a savings account under the terms of the will does not lose its preferential character because of the payment of interest on the deposit.

Bates v Bank, 222-370; 269 NW 341

Wrongful act of trustee—right to ratify. A bank which, as guardian, wrongfully treats the guardianship funds as its own property (by carrying said funds as a general deposit with itself) may not complain if, after the failure of the bank, the succeeding guardian ratifies the former wrongful act, and elects to retain the position of an ordinary depositor.

Bates v Bank, 219-258; 257 NW 806

9291 Analogous rights and duties—compensation—bonds.

Receiver—liens and equities unchanged. The title to property is not changed by the appointment of a receiver, as he takes it subject to existing liens and equities, and his taking exclusive possession thereof does not interfere with or disturb any pre-existing liens, preferences, or priorities.

Andrew v Bank & Trust, 225-929; 282 NW 299

Receiver—agent of court only—trustee of funds. A receiver is not an agent of anyone except the court appointing him, but he holds any fund at least as quasi-trustee for the benefit of whoever may eventually establish title thereto.

Andrew v Bank & Trust, 225-929; 282 NW 299

9292 Appointment of successor.

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

9293 Release from liability.

Discussion. See 10 ILB 319—Preference of claims against banks

9297 Indebtedness or liability—exceptions.

Unallowable guaranty. A state bank is wholly without authority to guarantee the payment of a credit which has no relation to the ordinary functions of the bank.

Dewey Works v Ryan et al, 206-1100; 221 NW 800

Issuance of certificate of deposit to pay note —validity. A certificate of deposit issued by a savings bank in payment of a negotiable promissory note constitutes a payment of value for the note, it appearing that the bank at the time had ample funds on hand for the purchase of said note; and this is true tho the directors had never authorized the purchase in such manner.

Andrew v Peterson, 214-582; 243 NW 340

Indebtedness to pay depositors—assessment of stockholders. An insolvent bank may, under this section and under authority of a majority of its stockholders, legally take the written agreement of a solvent bank to pay in full the depositors of said insolvent bank, and in return for such agreement legally transfer its assets to said solvent bank, and legally obligate itself to pay to said solvent bank any deficiency existing after said transferred assets are liquidated and applied. It follows that if said solvent bank pays said depositors in full, notwithstanding the fact that the said liquidating receipts are insufficient so to do, the stockholders of the insolvent bank, even tho they did not consent to said arrangement, must submit to an assessment to pay the unsatisfied obligations of their bank.

Andrew v Bank, 215-627; 246 NW 618

Assessment to pay. A state bank, through its directors, may validly create an indebtedness for the good-faith purpose of paying its depositors, and the stockholders must submit to an assessment for the purpose of discharging said indebtedness, even tho they had no knowledge of said proposed indebtedness at the time it was entered into.

Bates v Bank, 218-1320; 256 NW 286

Hypothecating assets—legality. The statutory prohibition that no "cashier or other officer or employee" of a state bank shall hypothecate any asset of the bank, unless authority so to do is granted at least annually by recorded resolution of the board of directors, does not prohibit the board itself from legally ordering the president and cashier to hypothecate bank assets in order to secure the bank's legal indebtedness, even tho no formal written record of the order is entered (§9222-c2, C., '31 [§9222.2, C., '39]).

In re Hannahs, 217-1016; 252 NW 539

Hypothecating assets. The statutory prohibition that no "cashier or other officer or employee" of a state bank shall hypothecate any asset of the bank unless authority so to do is granted at least annually by recorded resolution of the board of directors (§9222-c2, C., '31, [§9222.2, C., '39]) does not prohibit the board from legally ordering the cashier, with the approval of the superintendent of banking, to hypothecate bank assets in order to secure a legal indebtedness of the bank, even tho no formal, written resolution to that effect was actually passed by the board. (§9222-c3, C., '31 [§9222.3, C., '39]).

Andrew v Bank, 216-1170; 250 NW 492

Rediscounting—agreement to repurchase—demand for performance unnecessary. When a bank, (1) rediscounts its paper under indorsements "without recourse", but (2) accompanies the indorsement with a formal written agreement to repurchase the said paper on a named date, demand for performance on said date, or on any date, is unnecessary.

Bates v Bank, 219-1358; 261 NW 797

Estoppel to deny authority of officers. A savings bank, notwithstanding statutory limitations on the power of bank officers, will not be permitted to deny the authority of its officers to rediscount the bank's paper by indorsing said paper "without recourse" but accompanying such indorsement with formal, written agreement binding the bank to repurchase said paper prior to or at a named time, when the party advancing the credit relied thereon, and when said bank received, retained, and availed itself of the entire fruits of the said rediscounting.

Bates v Bank, 219-1358; 261 NW 797

9304 Applicable provisions.

Atty. Gen. Opinions. See '25-26 AG Op 43, 478; '34 AG Op 175

CHAPTER 416.1

CREDIT UNIONS

9305.16 Loans.

Money lent—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

TITLE XXII

BUILDING AND LOAN ASSOCIATIONS

CHAPTER 417

ORGANIZATION AND GENERAL REGULATIONS

Atty. Gen. Opinions. See '25-26 AG Op 229; '32 AG Op 219; '38 AG Op 472

INCORPORATED ASSOCIATIONS

9306 Defined generally.

Atty. Gen. Opinion. See '28 AG Op 351

9310 Organization.

Atty. Gen. Opinion. See '36 AG Op 528

9313 Articles.

Atty. Gen. Opinions. See '25-26 AG Op 229; '36 AG Op 306

Stockholder's contractual right of withdrawal of funds—unalterable by amendments or bylaws. A stockholder contracting with a building and loan association, a financially sound going concern, for withdrawal of funds on specified terms, has an unqualified vested right of withdrawal not subject to the association's subsequent modification through amendment or bylaw changes.

O'Connor v Home Assn., 224-1127; 278 NW 636

Contract with stockholders for withdrawal of funds—essentials. Where a right of withdrawal of funds is involved, a contract between stockholders and a building and loan association consists of the certificates, the charter, the bylaws, and the statute, but right of withdrawal afforded therein is applicable only to a going concern.

O'Connor v Home Assn., 224-1127; 278 NW 636

State auditor's action affecting stockholder's contractual rights. Fact that auditor of state approved building and loan association's refusal to honor applications for withdrawal of funds does not affect stockholder's contractual rights with the association for such withdrawal.

O'Connor v Home Assn., 224-1127; 278 NW 636

9315 Approval of articles—certificate of authority.

Atty. Gen. Opinions. See '36 AG Op 528; '38 AG Op 100

9316 Amendments—approval.

Atty. Gen. Opinion. See '38 AG Op 100

9319 Domestic companies — bonds — custody.

Atty. Gen. Opinion. See '34 AG Op 155

9328 Banking prohibited.

Atty. Gen. Opinion. See '28 AG Op 224

9329 Powers.

Atty. Gen. Opinions. See '25-26 AG Op 229; '28 AG Op 224, 409; '32 AG Op 124, 219; '38 AG Op 324, 535

9331 Foreclosure—debit and credit.

Atty. Gen. Opinion. See '38 AG Op 535

9335 Foreclosure—debits and credits. (Repealed.)

Crediting payments after insolvency. A borrower in a so-called "builders' loan department" of a trust company, whose monthly payments on the loan are seemingly carried by the trust company as deposits and not indorsed on the note, has the right, after the trust company has become insolvent, to have his payments credited on his note, and to pay the balance due and to receive a discharge irrespective of the rights of creditors of the company.

In re Trusteeship, 214-884; 241 NW 308

9340.01 Investments.

Atty. Gen. Opinions. See '34 AG Op 355; '36 AG Op 8; '38 AG Op 324

9340.02 Deposit of funds.

Atty. Gen. Opinion. See '34 AG Op 155

9340.08 Requirements for loan.

Money lent—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

9340.13 Interest rates variable.

Atty. Gen. Opinions. See '28 AG Op 318; '36 AG Op 317

9342 Voting shares of stock.

Atty. Gen. Opinions. See '36 AG Op 68, 306; '38 AG Op 472

9346 Membership fee—"expenses" defined.

Atty. Gen. Opinion. See '25-26 AG Op 225

9347 Dividends.

Atty. Gen. Opinion. See '25-26 AG Op 225

9348 Expenditures and expenses.

Atty. Gen. Opinion. See '25-26 AG Op 225

9352 Withdrawals.

Atty. Gen. Opinions. See '38 AG Op 100, 535

9356 Expenses and per diem.

Atty. Gen. Opinion. See AG Op May 9, '39

9362 Quo warranto—receiver.

Quo warranto statute inapplicable to breach of contract. The statutory authority, by which the attorney general on complaint of the auditor of the state is permitted for specified causes to wind up the affairs of a building and loan association, is not applicable to a breach of contract occurring between a stockholder and the association—such a controversy not being determinable by the auditor of state.

O'Connor v Home Assn., 224-1127; 278 NW 636

UNINCORPORATED ASSOCIATIONS

9390 Statutes applicable.

Rewards—liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

TITLE XXIII

TRADE AND COMMERCE

CHAPTER 418

MONEY AND INTEREST

9403 Denominations of money.

Economic conditions and fluctuations in values. Equity cannot refuse to foreclose a mortgage because of a depressed economic condition existing throughout the country, nor, in foreclosing, may it assume to adjust the judgment to the fluctuating value of the legal tender as declared by the federal government.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Money given to obstruct justice—recovery denied. The courts will not aid one to recover money that has been given to another to be used in obstructing or interfering with the orderly course of justice, nor will they protect one who obtains the money of another for a particular lawful purpose when he fails to so use it and refuses to return it.

Sarico v Romano, (NOR); 205 NW 862

9404 Rate of interest.

Atty. Gen. Opinions. See '36 AG Op 253, 479; '38 AG Op 387

ANALYSIS

I INTEREST RECOVERABLE
II INTEREST UPON INTEREST
III TIME INTEREST COMMENCES TO RUN
IV RATE OF INTEREST

I INTEREST RECOVERABLE

Interest on claims not necessarily allowable. An assignee for the benefit of creditors of an insolvent estate pays interest on claims at his peril. The court may wholly or partially disapprove of such payments, but where a fund belonging to a claimant has been drawing interest as a bank deposit, claimant is entitled to the interest.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Unallowable interest. Interest on claims of laborers and materialmen on public improvements will not be allowed when the fund from which payment must be made is insufficient to pay the principal of all allowed claims.

Southern Sur. v Jenner, 212-1027; 237 NW 500

Interest on compromise agreement. Creditors who, in a composition agreement with their debtor, contract to accept specified sums in settlement of their respective demands, are not entitled to interest on said sums during the time required to carry out the agreement.

Bailey v Ins. Co., 221-1195; 268 NW 173

Administratrix — accounting — interest on security. A widow to whom support allowance is awarded in the form of a bond or security, belonging to the estate, is under no duty as administratrix to account for the interest subsequently accruing on said bond.

In re Paulson, 221-706; 266 NW 563

Fraud—disallowance of interest. Where in setting aside a conveyance as fraudulent the court decrees grantee a lien for the amount which grantor was owing grantee, the failure of the court to allow interest on the claim will not be disturbed on a record showing that

I INTEREST RECOVERABLE—continued

grantee has been in possession of the land for some two years without accounting to grantor for the rents, and that the trial court deemed said rents ample to meet the said interest, said interest being a matter of future adjustment on any balance remaining after satisfying the creditor's claim.

Lietz v Grieme, 212-1305; 236 NW 395

Nonrecoverable interest. A guardian, in a successful action to cancel an exchange of property which the minor ward assumed to enter into, may not recover of the other party to the exchange interest on money which was never in the hands of such other party, and from which he derived no interest, but which was held by a third party as custodian, pending the litigation, especially when the deposit was made with the custodian without any arrangement as to interest.

Cloud v Burnett, 207-593; 223 NW 379

Compensation—interest. Interest on a long delayed award of compensation will not be allowed when the delay was consequent on the applicant's neglect to perfect her petition for review of the decision of the board of arbitration.

Bushing v Railway, 208-1010; 226 NW 719

Deposits—interest paid in advance—receivership—effect. In case interest is paid a depositor in advance, the termination of the accrual of all interest by the appointment of a receiver necessitates the charging of the deposit with the amount of unearned interest.

Murray v Bank, 201-1325; 207 NW 781

Receivers—interest. Where allowed claims in a receivership are all general claims and of the same class, any balance of funds remaining after paying said claims in full and costs of administration will be applied as interest on a pro rata basis among said claimants.

State v Cas. Co., 216-1221; 250 NW 496

Tender—nonproduction of money. A litigant who admits his indebtedness and is able and willing to pay it, and who, in order to protect himself, equitably interpleads warring claimants to the fund, and therein tenders the sum to whomsoever it is adjudged to belong, may not be held liable for interest because he does not actually bring the money into court until after the issues are determined.

Kelly v Bank, 217-725; 248 NW 9; 250 NW 171

Interest on deferred payment. Interest on long deferred payments due to a contractor may properly be ordered.

Gjellefald v Drain. Dist., 203-1144; 212 NW 691

Interest on unpaid legacy. Interest, but not compound interest, should be allowed on a legacy not paid when due.

In re Mann, 212-17; 235 NW 733

Interest on unpaid legacy. An executor may be chargeable with interest on an unpaid cash legacy to a minor, even tho his actions have been in perfect good faith.

Irwin v Bank & Trust, 218-477; 255 NW 671

Trust fund—interest. Interest is not allowable on an established trust fund against an insolvent bank.

Standard Oil v Andrew, 218-438; 255 NW 497

Advance by executor of his own funds—repayment and interest. An executor who, because of a temporary shortage in estate funds, advances sums from his own private funds and therewith pays legal claims against the estate, rather than to sell, on a poor market, assets of the estate, is properly allowed interest on the amount so advanced.

In re Shepherd, 220-12; 261 NW 35

Executor's indebtedness to estate—interest charged. In probate proceedings on objections to executor's final report, where the executor owed a note to the estate bearing interest which was not added to principal, held, interest should be charged in the absence of any evidence to warrant a finding for the principal only.

In re Sheeler, 226-650; 284 NW 799

Funds used by executor—interest chargeable. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at six percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

Advancement (?) or debt (?)—interest. An ordinary promissory note executed by an heir to his ancestor, and representing money received by the heir from the ancestor, must, in the settlement of the estate, be deemed, presumptively, a debt and not an advancement; consequently, interest is chargeable as provided in the note.

In re Manatt, 214-432; 239 NW 524

Interest on purchase price. Interest on the purchase price is properly decreed from the time the purchase price was due and payable.

In re Hager, 212-851; 235 NW 563

Interest on preferred claims. The holder of a preferential claim, for public funds, which has been allowed against the receiver of an insolvent bank, is not entitled to interest on the claim, tho payment be long delayed on account of litigation.

Leach v Bank, 210-613; 231 NW 497; 69 ALR 1206

Eminent domain—improper addition of interest. It is improper for the court in the trial

of an appeal in eminent domain proceedings to direct the jury to add to their verdict interest from the date of the taking, such direction being an assumption by the court that the jury would return a verdict for damages in excess of the damages awarded by the condemnation jury.

Welton v Highway Com., 211-625; 233 NW 876

Recovery dependent on pleading. In an action on a nonnegotiable promissory note, by a transferee thereof, defendant's plea that he be given a set-off in a stated sum, because of an account held by defendant against the original payee, will not be construed as embracing a demand for interest on said "stated sum".

Lewis v Grain Co., 214-143; 241 NW 469

Promissory note—severability of interest—when barred. Unless the maker and payee on a promissory note agree to sever the promise to pay interest installments from the promise to pay principal so as to make each promise separate and independent of the other, the interest is an incident to the principal debt and as such is barred when the statute of limitations has run against the principal debt.

Yeadon v Farmers Co., 224-829; 277 NW 709; 115 ALR 725

Verdicts—responsive to issues—sufficiency. A verdict, in an action on promissory notes, for "$5000 and interest dollars" is all-sufficient to authorize the court to compute the interest, add it to the principal, and enter judgment accordingly.

Grimes Bank v McHarg, 213-969; 236 NW 418; 36 NCCA 205

II INTEREST UPON INTEREST

Executor chargeable with compound interest. An executor who wrongfully fails to close an estate within the statutory three-year period and uses the estate funds for his personal enrichment is properly charged with interest at six percent, with annual rests, from the expiration of said three years, even tho the net interest would only have been four percent had the executor closed the estate within the time required by statute and turned the remaining assets over to a trustee as directed by the will.

In re Mowrey, 210-923; 232 NW 82

Compound interest. Interest on interest may not be compounded, in the absence of an agreement to that effect.

Riggs v Gish, 201-148; 205 NW 833

Mutual construction of parties. The maker of a promissory note who is unable to pay at maturity because of an unapprehended and long-continued change of condition, for which the payee is not responsible, and who repeatedly and voluntarily renews his note by including in each renewal the amount of principal and legal interest then due, may not claim that he was improperly charged with interest upon interest, when such renewals appear to have been the mutual and practical construction by the parties of the contract out of which the original note arose.

Frank Cram v Trust Co., 205-408; 216 NW 71

III TIME INTEREST COMMENCES TO RUN

Right in general. Interest is recoverable on any claim from the date when the damages become complete, whether the claim arises out of express or implied contract, or in tort.

Olson v Shuler, 203-518; 210 NW 453

Ambiguous provision as to interest. A certificate of deposit payable "on the return of this certificate properly indorsed 12 months after date with interest at 5 percent or six months after date with interest at 5 percent per annum", is payable on demand, (1) with interest at 5 percent if presented in 12 months or later, (2) with interest at 5 percent if presented in six months or later, and (3) with no interest if presented within six months.

Partch v Krogman, 202-524; 210 NW 612

Compensation—interest. Interest on a long delayed award of compensation will not be allowed when the delay was consequent on the applicant's neglect to perfect her petition for review of the decision of the board of arbitration.

Bushing v Railway, 208-1010; 226 NW 719

Excise taxes—mistaken refunds—recovery interest. The state treasurer who, under a mistaken interpretation of the law, refunds to a distributor of motor vehicle fuel a portion of the excise properly paid on account of said fuel, may, on behalf of the state, legally recover the amount of said mistaken refund, but with interest only from the date of the judgment.

State v Standard Oil Co., 222-1209; 271 NW 185

Foreclosure—interest on accelerated debt. Where a mortgage provides for an increased but legal rate of interest on all sums due and unpaid, and foreclosure is instituted (1) on sums due and in default, and (2) because of an acceleration clause, on the balance called for by the mortgage, interest on the accelerated part of the debt can only be computed from the date when foreclosure was commenced.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Increased rate of interest—when effective. A mortgage clause to the effect that upon the exercise by the mortgagee of his right to declare the entire debt due because of default in payment of any part of the matured debt the mortgage debt shall bear an increased rate of interest, is valid, and such increased

III TIME INTEREST COMMENCES TO RUN—concluded

rate commences to run from the date of action to foreclose.

Whitney v Krasne, 209-236; 225 NW 245

Interest on antenuptial-contract allowance. A provision in an antenuptial contract that the wife shall be paid a named sum within a named time after the death of the husband contemplates interest on said sum from the maturity date, even tho said contract also provides that the widow shall be paid a monthly sum until the former main sum is paid.

In re Shepherd, 220-12; 261 NW 35

Policies of insurance. Interest is allowable, on the amount recovered under a hail insurance policy, from the date when the loss occurred.

Glandon v Ins. Assn., 211-60; 232 NW 804

Rentals for successive seasons. In an action to recover the rental of lands for successive seasons, interest is properly computed from the end of each annual period on each item of annual rent.

Bigelow v Ins. Co., 206-884; 221 NW 661

Abandonment and dismantlement of railroad—claims of donors. In the establishment against the owner of a railroad of claims for donations made for the construction of the road, interest should be allowed only from the date when the claims were established.

State v Beaton, 209-1291; 228 NW 111

Unliquidated set-off. In an action on a note executed with the mutual understanding that the maker and payee would, at some future date, agree on and adjust certain set-offs against the note, interest on the set-offs may very properly be allowed from the date of filing the answer pleading such set-offs.

Riggs v Gish, 201-148; 205 NW 833

IV RATE OF INTEREST

Increased rate after default. Interest on a note and mortgage is necessarily computable, after default in payment, at the increased rate provided by the mortgage, for such a contingency, provided said rate does not exceed the maximum legal rate.

Penn Ins. v. Orr, 217-1022; 252 NW 745

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

When foreign law governs. In an action on a foreign contract to recover a money judgment, it is proper to allow interest at the rate authorized by the laws of such foreign state.

Benson v Sawyer, 216-841; 249 NW 424

Funds used by executor—interest chargeable. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at 6 percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

Improper interest. Tho the lien of a materialman may, in a certain case, be superior to the lien of a prior mortgage on the land, yet the court is in error in computing interest at a rate in excess of 6 percent and in allowing an attorney's fee and taxing it as costs and decree a lien for such excess interest and costs, even tho the claim of the materialman is evidenced by a promissory note calling for such excess interest and attorney fees.

Spieker v Fair Assn., 216-424; 249 NW 415

Mortgages—increased interest rate—penalty. A mortgage provision empowering the mortgagee to declare the entire debt due and payable in case of nonpayment of an installment of principal, or of interest, taxes, etc., imposes no penalty on the mortgagor, likewise a provision fixing one rate of interest on unmatured sums, and a different and higher rate on matured and unpaid sums, provided the legal rate is not exceeded.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Savings banks—deposits—excessive interest-bearing certificates. A certificate of deposit issued by a savings bank is not illegal because made to draw an apparently very high rate of interest to wit, 7½ percent, nor because part of the interest is paid the depositor in advance, the directors never having fixed any rate of interest on such certificates.

Murray v Bank, 201-1325; 207 NW 781

9405 Interest on judgments and decrees.

Atty. Gen. Opinion. See '36 AG Op 253

Amount in controversy—including interest on judgment. In determining the amount in controversy under the statute limiting supreme court appeals to cases involving over one hundred dollars, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy, but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35,

amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

Interest under condemnation proceedings. In eminent domain proceedings where the property owner recovers on appeal more than was awarded by the sheriff's jury, interest should be allowed on the verdict from the date when the condemnor takes possession of the land.

Beal v Highway Com., 209-1308; 230 NW 302; 36 NCCA 196

9406 Illegal rate prohibited—usury.

Atty. Gen. Opinions. See '25-26 AG Op 146; '38 AG Op 387

ANALYSIS

I USURY IN GENERAL
II TRANSACTIONS CONSTITUTING USURY
III COMMISSIONS FOR NEGOTIATING LOANS
IV USURY BY AGENTS
V USURIOUS PAYMENTS
VI PURGING CONTRACT OF USURY
VII CONFLICT OF LAWS

Building and loan associations. See under §9329, Vol I
Interest on interest. See under §9404, Vol I

I USURY IN GENERAL

Interest in advance—effect. A bank certificate of deposit which is payable on demand, and on which the interest is in part paid in advance, will not be declared usurious, in the absence of evidence tending to establish an express or an implied agreement for the payment of usurious interest.

Partch v Krogman, 202-524; 210 NW 612

Seeking and doing equity — unconscionable mortgage. Equity will not foreclose an unconscionable mortgage—i. e., a mortgage pyramided with usury, and given as additional security for part of a debt already secured by mortgage; and especially is this true when the mortgagee is manifestly seeking to sequester the property situated in a foreign state and covered by the original security without accounting for the value thereof.

Tansil v McCumber, 201-20; 206 NW 680

II TRANSACTIONS CONSTITUTING USURY

Usurious transactions. Notes and mortgages which are untainted with usury are not so tainted by subsequent contracts by which forbearance of the holder to insist upon an accelerated maturity is secured.

Squire Co. v Hedges, 200-877; 205 NW 525

Usurious transactions. A note and mortgage which calls for less than the maximum legal rate of interest, but requires the mortgagor to pay in addition certain known charges, and taxes assessable to the mortgagee, will not be deemed usurious in the absence of proof that the interest contracted for, plus the added exactions, when computed over the full term of the note and mortgage, will exceed the said maximum legal rate.

Penn Ins. v Orr, 217-1022; 252NW 745

Usurious transactions — rule to determine (Nebraska contract). A Nebraska note and accompanying mortgage calling for interest at six and one-half percent, when the maximum legal rate is ten percent, is not rendered usurious by the additional provision that the maker-mortgagor will pay all taxes on the mortgage debt, the Nebraska law being that such contracts are not usurious unless it is made affirmatively to appear that the borrower intended to give and the lender intended to receive interest in excess of the legal limit.

Federal Trust v Nelson, 221-759; 266 NW 509

III COMMISSIONS FOR NEGOTIATING LOANS

Full period of loan used in determining usury. When mortgagor is required to pay a commission for securing the loan, the note and mortgage which call for less than the maximum legal rate of interest are not usurious when the interest, plus the amount of the commission, when computed over the full term of the note and mortgage, does not exceed the maximum legal rate.

Penn Ins. Co. v Orr, 217-1022; 252 NW 745

IV USURY BY AGENTS

Attorney and client—fraud—illegal interest charge. Evidence held insufficient to show fraud on the part of an attorney in charging interest in excess of the legal rate on certain obligations.

Tobin v Budd, 217-904; 251 NW 720

V USURIOUS PAYMENTS

Usury—interest in advance—effect. A bank certificate of deposit which is payable on demand, and on which the interest is in part paid in advance, will not be declared usurious in the absence of evidence tending to establish an express or an implied agreement for the payment of usurious interest.

Partch v Krogman, 202-524; 210 NW 612

VI PURGING CONTRACT OF USURY

Rights to nonusurious item of indebtedness. When foreclosure of a mortgage is refused in toto because of the fact that unconscionable usury permeated the entire debt except as to one item, and when the court separates such item from the rest of the contract and, without objection, renders personal judgment against the mortgagor therefor, it should grant the plaintiff legal interest thereon. In other words,

it is not justified in rendering judgment for interest on such item in favor of the school fund.

Tansil v McCumber, 201-20; 206 NW 680

VII CONFLICT OF LAWS

Usurious transactions — rule to determine (Nebraska contract). A Nebraska note and accompanying mortgage calling for interest at six and one-half percent, when the maximum legal rate is ten percent, is not rendered usurious by the additional provision that the maker-mortgagor will pay all the taxes on the mortgage debt, the Nebraska law being that such contracts are not usurious unless it is made affirmatively to appear that the borrower intended to give and the lender intended to receive interest in excess of the legal limit.

Federal Trust Co. v Nelson, 221-759; 266 NW 509

9407 Penalty for usury.

Discussion. See 17 ILR 402—"Void" and "voidable"—usury statutes

Atty. Gen. Opinion. See '38 AG Op 387

ANALYSIS

I USURY AS DEFENSE AND AS AFFIRMATIVE RELIEF
(a) DEFENSE
(b) AFFIRMATIVE RELIEF
(c) PLEADING USURY
(d) EVIDENCE
II USURY AS AFFECTING RIGHTS OF THIRD PARTIES
III FORFEITURES
IV JUDGMENTS

I USURY AS DEFENSE AND AS AFFIRMATIVE RELIEF

(a) DEFENSE

Defense not available to third party. The plea of usury is not available to one who is a stranger to the contract attacked.

Squire Co. v Hedges, 200-877; 205 NW 525

(b) AFFIRMATIVE RELIEF

Rights and remedies—nonusurious item of indebtedness. When foreclosure of a mortgage is refused in toto because of the fact that unconscionable usury permeated the entire debt except as to one item, and when the court separates such item from the rest of the contract and, without objection, renders personal judgment against the mortgagor therefor, it should grant the plaintiff legal interest thereon. In other words, it is not justified in rendering judgment for interest on such item in favor of the school fund.

Tansil v McCumber, 201-20; 206 NW 680

Repossessed motor vehicles—no retaking by replevin on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

Seeking and doing equity—unconscionable mortgage. Equity will not foreclose an unconscionable mortgage—i. e., a mortgage pyramided with usury, and given as additional security for part of a debt already secured by mortgage; and especially is this true when the mortgagee is manifestly seeking to sequester the property situated in a foreign state and covered by the original security without accounting for the value thereof.

Tansil v McCumber, 201-20; 206 NW 680

(c) PLEADING USURY

Unconscionable action—pleadings — waiver. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (i. e., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

Nonavailable to stranger. The plea that a promissory note is usurious cannot be raised by an entire stranger to the note.

Capital Loan v Keeling, 219-969; 259 NW 194

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

(d) EVIDENCE

Usury as defense—burden of proof. The burden of proving that a note is usurious is on the defendant.

Penn Ins. Co. v Orr, 217-1022; 252 NW 745

II USURY AS AFFECTING RIGHTS OF THIRD PARTIES

Defense not available to third party. The plea of usury is not available to one who is a stranger to the contract attacked.

Squire Co. v Hedges, 200-877; 205 NW 525

Usurious transactions — nonavailable to stranger. The plea that a promissory note is usurious cannot be raised by an entire stranger to the note.

Capital Loan v Keeling, 219-969; 259 NW 194

III FORFEITURES

Interest in advance—effect. A bank certificate of deposit which is payable on demand, and on which the interest is in part paid in advance, will not be declared usurious in the absence of evidence tending to establish an express or an implied agreement for the payment of usurious interest.

Partch v Krogman, 202-524; 210 NW 612

IV JUDGMENTS

Nonusurious item of indebtedness. When foreclosure of a mortgage is refused in toto because of the fact that unconscionable usury permeated the entire debt except as to one item, and when the court separates such item from the rest of the contract and, without objection, renders personal judgment against the mortgagor therefor, it should grant the plaintiff legal interest thereon. In other words, it is not justified in rendering judgment for interest on such item in favor of the school fund.

Tansil v McCumber, 201-20; 206 NW 680

9408 Interest in excess of two percent per month.

Atty. Gen. Opinion. See '38 AG Op 387

CHAPTER 419.1

CHATTEL LOANS

Atty. Gen. Opinion. See '38 AG Op 137

9438.01 License and rights thereunder.

Legislative power to regulate. Regulation and control of the small loan business is a proper field for legislation.

Miller v Schuster, 227-1005; 289 NW 702

Disclaiming agency—effect. If a loan company and a party through whom loans are made occupy, in truth and fact, the relation of principal and agent, it matters not that, in their contract, they positively disclaim such relation, or provide that the party through whom loans are made shall be deemed the agent of the borrower, or otherwise studiously seek to disguise such relation.

Burlington Bk. v Ins. Co., 206-475; 218 NW 949

Moneyed capital used in small loan business. Moneyed capital employed, under this section, in the making of small loans of $300 or less on personal or chattel security is taxable as moneys and credits, and not at the rate at which national bank stock is taxable, when the evidence shows that such moneyed capital does not come into competition with the business of national banks.

Univ. Corp. v Board, 205-1391; 219 NW 536
Welfare Soc. v City, 205-1400; 219 NW 534

9438.02 Application—fees.

Atty. Gen. Opinions. See '36 AG Op 61, 254; '38 AG Op 387, 406, 717

9438.05 License—form—posting.

Atty. Gen. Opinion. See '38 AG Op 137

9438.07 Separate license—change of place of business.

Atty. Gen. Opinion. See '38 AG Op 406

9438.13 Banking board—report—additional restrictions.

Delegation of powers to executive. A statute, which delegates to the state banking board authority to determine and fix by regulation such maximum rate of interest or charges upon each class of small loans as will induce efficiently managed commercial capital to enter such business in sufficient amounts to make available adequate credit facilities to persons without the security usually required by commercial banks, is not an invalid delegation of legislative power because the standards fixed by the legislature are sufficiently definite and carefully defined to warrant conferring on such board the power to adopt rules and regulations and give effect to the legislative policy.

Miller v Schuster, 227-1005; 289 NW 702

9438.15 Usury—limitation on principal loan.

Usury—nonavailable to stranger. The plea that a promissory note is usurious cannot be raised by an entire stranger to the note.

Capital Loan v Keeling, 219-969; 259 NW 194

9438.16 Loan—what constitutes.

Money lent—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

9438.17 Assignment of wages.

Incumbrance of exempt property—invalidity because of failure of consideration. A chattel mortgage on the exempt property of a husband and wife is void when the wife is in no manner indebted to the mortgagee, and concurs in and signs said mortgage with her husband solely because of the explicit promise of the mortgagee that he would advance certain funds to the mortgagors for use in their business, which promise the mortgagee subsequently wholly failed to perform.

Whittier Bank v Smith, 214-171; 241 NW 481

9438.18 Interest limited—violation—effect.

Atty. Gen. Opinion. See AG Op Sept. 28, '39

9438.19 Violations.

Atty. Gen. Opinion. See AG Op Sept. 28, '39

CHAPTER 420

CONTRACTS

Contracts in general. See Note 1 at end of chapter

9439 Seals abolished.

Instruments not under corporate seal—legality. Principle recognized that corporations may be bound by written contracts which are not executed under their corporate seals.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Authority of corporate president. A corporation is bound by the act of its president in subordinating its mortgage to another mortgage (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached, and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

9440 Consideration implied.

Additional annotations. See §9484 et seq.

ANALYSIS

I IMPLIED CONSIDERATION IN GENERAL
II DEEDS

I IMPLIED CONSIDERATION IN GENERAL

Implied in written contracts. The presumption created by statute providing that all contracts in writing, signed by the party to be bound, should import consideration is sufficient to cast burden upon defendant asserting lack of consideration to overcome such presumption.

Beal v Milliron, (NOR); 267 NW 83

Presumption. Presumptively a written contract is supported by a sufficient consideration, and the burden of proof rests on him who asserts to the contrary.

Krcmar v Krcmar, 202-1166; 211 NW 699

Presumption. A written contract of guaranty carries an evidentiary presumption that it was entered into on adequate consideration, and he who contends to the contrary has the burden to establish his contention, and he does not do so by showing that the recited nominal money consideration was not paid.

Boyd v Miller, 210-829; 230 NW 851

Conclusive presumption. A specifically recited consideration must be treated as correct, in the absence of any counter showing.

Burrow v County, 200-787; 205 NW 460
Y. M. C. A. v Caward, 213-408; 239 NW41

Tax certificate priority waived—extension of time of payment of mortgage. Extension of the time of payment on bonds secured by mortgage held sufficient consideration to support waiver of priority of tax certificate owned by mortgagor's daughter.

Beal v Milliron, (NOR); 267 NW 83

Requisites and validity—compromise and settlement as consideration. A promissory note executed without fraud and in compromise and settlement of a disputed but honestly asserted claim—which may have been unfounded—must be deemed supported by an adequate consideration. Evidence held to support such a finding.

Booth v Johnston, 223-724; 273 NW 847

Signature of surety obtained by fraudulent representations — nonliability. Extension of mortgage debt would be sufficient consideration to support signature of mortgagor's daughter to extension agreement if extension were granted on condition that such daughter sign, but where such signature of the daughter is obtained by fraudulent misrepresentations, it is without consideration and void as to the daughter.

Beal v Milliron, (NOR); 267 NW 83

Joint adventure. The requisites of an ordinary contract, and of a contract of joint adventure, as to form and validity, are substantially the same.

Smith, et al. v Hollingsworth, 218-920; 251 NW 749

Antenuptial contract — when acknowledgment unnecessary. A simple antenuptial contract, not involving the conveyance of real property, needs no acknowledgment to be valid.

Finn v Grant, 224-527; 278 NW 225

Construction—entire or severable. Principle recognized that, if the consideration for a contract is single and not apportionable, the contract is single or entire, and not apportionable.

Peek Est. v Ins. Co., 206-1237; 219 NW 487

Breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Evidence of custom and usage—contract prevails. Evidence of custom and usage cannot prevail against an express contract to the contrary.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Director's note to bank. The directors of a financially embarrassed bank who execute their individual promissory notes to the bank and receive in return certain assets of the bank to which the state banking department had objected, may not say that the notes were executed without consideration.

Andrew v Shimerda, 218-27; 253 NW 845

See North Side Bank v Schreiber, 219-380; 258 NW 690

Officers and agents—liability for excess indebtedness. Ample consideration for a contract waiver by the purchaser of corporate bonds, of his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, may be found in the fact that the corporation has withdrawn a large amount of its assets and specifically pledged them with a trustee for the purpose of paying said bonds.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Waiver—no release by insured without consideration. A purported release by one party to a contract of the other party's obligations is without effect unless duly supported by a consideration. So held where an insured accepted the return of his premium upon the statement that the policy had lapsed and thereupon the insurer claimed a waiver of its obligations.

Pennebaker v Ins. Co., 226-314; 284 NW 147

Assignment in payment of pre-existing debt. The assignment of funds by the legal owner thereof in payment of a pre-existing debt is not effective against the equitable owner of said funds.

Stegemann v Bendixen, 219-1190; 260 NW 14

Assignment to trustee. A written assignment of a fractional interest in a life insurance policy to a trustee, made for the purpose of protecting the attorneys for the agreed value of their services in prosecuting an action on the policy, is supported by adequate consideration, especially when it appears that the trustee was to receive compensation for his services.

Welsh v Taylor, 218-209; 254 NW 299

Gifts inter vivos—consideration—presumption—burden. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

Father promising son's creditor not to change son's legacy. Simply because a testator contracts with a bank not to change his will bequeathing $10,000 to a son who was indebted to the bank, and when the father did not contract to pay the son's debt, there is no "unjust enrichment" of devisees and legatees who accept property willed to them, altho father during his lifetime had depleted his estate by property transfers and conveyances to his other children.

Evans v Cole, 225-756; 281 NW 230

Devise and bequest—consideration unnecessary—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

Voluntary gratuitous services—recovery for. Services, tho valuable and continued for years, when voluntarily rendered as a gratuity, and accepted as such, furnish no basis for a later action in quantum meruit.

Equitable v Crosley, 221-1129; 265 NW 137

Marriage as high consideration. Marriage is a good consideration for a contract—one of the highest known to the law.

In re Shepherd, 220-12; 261 NW 35

Consideration—claim in probate. On a wife's claim against her deceased, divorced husband's estate, a promissory note expressly stating a consideration, which, however, is invalid to support the claim, will not under this section import a valid consideration, so as to generate a jury question. This section was not intended to furnish the consideration but only import it when not stated, which in any event could not be different than that stated in the contract.

In re Straka, 224-109; 275 NW 490

Consideration for wife's signature. The signature of a wife to her husband's note and mortgage is supported by ample consideration

I IMPLIED CONSIDERATION IN GENERAL—concluded

when her signature was a condition precedent to obtaining the loan represented by the note.

Andrew v Ingvoldstad, 218-8; 254 NW 334

Wife signing to release dower — inadequate evidence to show lack of consideration. The presumption of consideration for a promissory note and mortgage, signed jointly by a husband and wife but evidencing and securing an originally created debt of the husband only, is not overcome, as to the wife, by evidence that she was a stranger to the negotiations for the loan, received no part of the loan, had no interest in the mortgaged lands except a contingent dower interest, signed the instruments without reading them and solely at the request of the husband and solely to release said contingent interest. The fatal defect in such evidence is its failure to establish the fact that the loan would have been made without the wife's signature—that the payee-mortgagee did not part with the money in reliance on the wife's signature.

Northern Trust v Anderson, 222-590; 262 NW529

Liability of wife on husband's note. A wife, after signing promissory notes which represent the husband's indebtedness only, may not avoid personal liability on the ground of absence of consideration flowing to her when it appears that the notes were so signed on demand of the payee and as a condition precedent to the granting by payee of an extension of time of payment.

First N. Bank v Mether, 217-695; 251 NW 505

Bates v Green, 219-136; 257 NW 198

II DEEDS

Future support—when not consideration. A conveyance of property in consideration of future support is voluntary as to existing creditors.

Grimes Bank v McHarg, 224-644; 276 NW 781

Overthrowing presumption. The statutory presumption that a deed of conveyance was supported by a consideration is not overcome by the naked testimony of the grantor that he was never paid anything for the conveyance.

Carr v McCauley, 215-298; 245 NW 290

Exception. A written clause in a deed of conveyance, to the effect that the grantee assumes and agrees to pay an existing mortgage on the land does not import a consideration.

Sheley v Engle, 204-1283; 213 NW 617

Assumption of mortgage—burden of proof. A mortgagee who, in foreclosure proceedings, asks for judgment on an assumption clause in a subsequent deed of conveyance not signed by the assumptor, and pleads a specified consideration for said assumption, must, if met by a denial, establish said consideration by a preponderance of the evidence.

Peilecke v Cartwright, 213-144; 238 NW 621

Cancellation—want of consideration not a ground. Want of consideration in itself will not warrant the setting aside of a deed, it being competent for a grantor to make a gift of his property and, altho want of consideration is a good defense to an executory contract, a deed is not such a contract, but instead represents a contract executed and a conveyance fully accomplished.

Lawson v Boo, 227-100; 287 NW 282

Wife's deed for husband's debt—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Adequacy. A deed of conveyance which recites (1) that it is in payment for services performed by grantee in caring for her mother in her lifetime and (2) that grantee will support and care for grantor during his lifetime, is supported by an adequate consideration.

Ellis v Allman, 217-483; 250 NW 172

Setting aside fraudulent deed on condition. The grantee in a deed of conveyance executed for the primary purpose of preserving a means of support for the aged grantor (tho not so expressed in the deed) has a right, in an equitable action by grantor's executor to set aside the deed, to demand that his reasonable claim for furnishing the grantor a very substantial support be first paid as a condition precedent to any judgment setting aside the deed; and this is true tho said deed would have been declared fraudulent and invalid had it been attacked by the grantor's existing creditors.

Meyers v Schmidt, 220-370; 261 NW 502

Fraud—burden of proof. A creditor, seeking to set aside an alleged fraudulent conveyance which recites a consideration which is apparently valid and substantial tho indefinite in amount, must carry his proof beyond showing that the grantor and grantee were husband and wife and that the grantor was insolvent when he delivered the conveyance. In other words, such proof does not cast upon grantee the burden (1) to sustain the adequacy of the consid-

eration, and (2) to negative bad faith in the transaction, or (3) to show that the grantor at the time retained sufficient other property to pay his creditors.

First N. Bank v Currier, 218-1041; 256 NW 734

Evidence insufficient to show fraud. Evidence held sufficient to sustain a judgment refusing to set aside a conveyance of realty by devisee thereof to claimant against estate on ground of lack of consideration or fraud in making conveyance.

First N. Bank v Adams, (NOR); 266 NW 484

9441 Failure of consideration.

ANALYSIS

I PLEADING AND PROOF OF CONSIDERATION
II SUFFICIENCY OF CONSIDERATION

Negotiable instruments. See under §§9484, 9485

Consideration in promissory notes. See under §§9484, 9485

Discussion. See 21 ILR 621—Gratuitous promises

I PLEADING AND PROOF OF CONSIDERATION

Pleading. The all-essential element of a plea of failure of consideration is the facts. There need not necessarily be any formal statement "that there was a total failure of consideration".

Miller v Laing, 212-437; 236 NW 378

Parol evidence to establish. Principle reaffirmed that parol evidence may be admissible to establish lack of consideration for a written instrument.

Northern Trust v Anderson, 222-590; 262 NW 529

Evidence of assumption of note—discharge of maker—insufficient. Evidence held insufficient to establish oral agreement discharging makers from liability on note and substituting purchaser of property for maker.

Citizens Bank v Probasco, (NOR); 233 NW 510

Parol as affecting writings—clearly expressed consideration. The clearly expressed consideration recited in an unambiguous written instrument cannot be contradicted by parol evidence.

Burrier v Sheriff, 207-692; 223 NW 395

Parol or extrinsic evidence affecting writings —"exceptions" catalogued. The so-called "exceptions" to the parol evidence rule may be stated thus: Parol evidence is admissible,

1. To establish grounds for the reformation of a written contract.
2. To establish the unnamed consideration for a unilateral written contract.
3. To establish a distinctly separate and complete contract contemporaneous with, and noncontradictory of, a written contract.
4. To establish the conditional delivery of a written contract, and the failure of said condition.
5. To complete a written contract which shows on its face that it is fragmentary and incomplete.

In re Simplot, 215-578; 246 NW 396

Conclusiveness of one's own plea. A plaintiff who, in an action on a promissory note, specifically pleads a definite consideration, must stand or fall thereon. Having fallen, he will not be permitted to advantage himself of a consideration possibly reflected in the record, but not embraced within his own chosen plea.

Persia Bk. v Wilson, 214-993; 243 NW 581

Unallowable conclusion plea. An allegation that the transferee of a negotiable promissory note received it without consideration,—that said transferee was not a bona fide holder for value,—is a conclusion plea, and is not justified by the additional allegation of fact that said transferee took the note as a "donation or gift".

Benton v College, 202-15; 209 NW 516

Failure to plead—effect. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Unavailable plea of want of consideration. The purchaser of corporate stock in praesenti by cash and by delivering his promissory note to the corporation for the balance, which note is sold by the corporation for cash, may not plead want of consideration when sued on the note, because, by such transaction, he has acquired the status of a stockholder, even tho no stock has been formally issued to him.

Conover v Hasselman, 206-100; 220 NW 42

Estoppel to plead. The maker of a promissory note may not plead failure of consideration when his own fraud brought about such failure.

Cloud v Burnett, 201-733; 206 NW 283

Estoppel to plead. One who signs a promissory note as surety, and also a renewal thereof, in order to secure a dismissal of an action on a prior note for the same debt, and in order to increase the security of the note, may not plead want of consideration for his signing.

Castelline v Pray, 200-695; 205 NW 339

Nonestoppel to plead. The maker of a promissory note is not estopped to plead failure of consideration for the note as to him because of the fact that, subsequent to the sign-

I PLEADING AND PROOF OF CONSIDERATION—continued

ing, he was a party to a contract under which there was a novation of security.

Insell v McDaniels, 201-533; 207 NW 533

When consideration operative on all original makers. The consideration which supports a strictly original promissory note operates, in the absence of fraud or mistake, upon all the original and contemporaneous signers of said note; and especially must this be true when a maker who pleads want of consideration signs as a prospective participant in the enterprise.

Starry v Starry, 212-274; 234 NW 281

When consideration unnecessary. One who obtains from the owner of real estate a written permission to erect improvements on the property and agrees that he will look solely to a third party for compensation, and not to the owner, may not, after the improvements have been erected, plead want of consideration for said writing.

Coen & Conway v Bank, 205-483; 218 NW 325

Statutory bond. The surety on the statutory bond of an executor may not plead want of consideration for signing the bond.

New Amsterdam Cas. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Burden of proof. A husband who signs a note and mortgage along with his wife has the burden to show failure of consideration for his signature, and he does not meet such burden by proof that his wife received all of the money borrowed and that he signed the mortgage in order to waive his dower interest.

Penn Ins. v Orr, 217-1022; 252 NW 745

Insufficient proof of failure of consideration. In an action for the balance due on a contract of subscription, a denial that the amount already paid was applied to the purpose for which the subscription was executed, availeth nothing.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Assumption of obligations of insolvent estate. Where heirs of a deceased take up the outstanding obligations of the latter and execute their personal note for the same, their plea of want of consideration, when sued on the note, imposes on them the burden to show that the estate of the said deceased was insolvent.

Alpha Bank v Ostrander, 214-563; 243 NW 198

Rent—eviction by foreclosure decree. Even tho a wife who had joined with her husband in the execution of rent obligations was not made a party to subsequent mortgage foreclosure wherein her husband and the landlord were evicted by the appointment of a receiver, yet she may, when sued on the rent obligations by the landlord or by his assignee, plead the foreclosure decree as establishing a total failure of consideration.

Miller v Laing, 212-437; 236 NW 378

Inadequate consideration. A creditor may be unable to prove actual fraud in a conveyance carrying substantially all of the debtor's property, but may be able to prove a constructive fraud in said conveyance, to wit: that the consideration paid by the grantee was substantially inadequate in view of the value of the property conveyed. And, on such proof, the power of a court of equity is so boundless as to justify the entry of most any decree which will equitably protect both the grantee in the conveyance, the complaining creditor, and all other parties involved.

McFarland v Johnston, 219-1108; 260 NW 32

Impeaching recited consideration. The general recital in a deed of conveyance of a valuable consideration may be impeached, in an action to cancel the deed for fraud, by showing that no consideration passed, and by showing that the only relation of grantor and grantee was that of aunt and niece.

Guenther v Kurtz, 204-732; 216 NW 39

Failure of consideration—facts showing. The signer of a promissory note (no holdership in due course being involved) may plead want of consideration (1) when the note grew out of a transaction with which he was in no manner connected, (2) when he was under no possible obligation to sign the note, and (3) when he received nothing of value for so signing.

Insell v McDaniels, 201-533; 207 NW 533

Lack of mutuality and consideration—agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

Suretyship—want of consideration. A plea of want of consideration, interposed by a gratuitous surety on a promissory note may be very properly ignored in the instructions of the court when the record shows (1) that

the surety signed the note without fraud imposed upon him, and (2) that there was a consideration between the principal and the payee.

Granner v Byam, 218-535; 255 NW 653

Want of consideration—burden of proof. The beneficiaries of a trust, defendants in an action on a note and mortgage executed by their authorized agent, have the burden to show want of consideration.

Daries v Hart, 214-1312; 243 NW 527

Payment—jury question. The issue of accord and satisfaction is for the jury when the evidence is not clear whether one party tendered the sum in full settlement, or, if he did so tender it, whether the other party so accepted the sum.

Zabawa v Osman, 202-561; 210 NW 602

Verdicts on conflicting evidence—conclusive. A jury verdict on competent, but conflicting testimony, relative to the consideration—if any—for a chattel mortgage, is conclusive on the appellate court.

McDonald v Webb, 222-1402; 271 NW 521

II SUFFICIENCY OF CONSIDERATION

Discussion. See 13 ILR 332—Promissory estoppel; 17 ILR 233—Antecedent debt; 18 ILR 445—Restatement and decisions; 19 ILR 395—Past and moral consideration

Statutory presumption — when conclusive. A consideration specifically recited in a written contract signed by the defendant must be treated as correct in the absence of any counter showing.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Consideration—who may not question. A plaintiff has no standing to attack a conveyance of land for want of consideration when, if he be successful, his only interest in the land would be that of an heir of the grantor.

O'Neil v Morrison, 211-416; 233 NW 708

Consideration — adequacy. Evidence reviewed relative to an assignment of a note and mortgage for $5,000, and held that a life annuity of $200 per year to the assignor was sufficiently adequate to prevent any imputation of fraud, actual or constructive.

Scott v Seabury, 220-655; 262 NW 804

Default of loan agent. A mortgagor may not assert failure of consideration for the mortgage because his own duly authorized agent to procure the loan and receipt for the proceeds did not remit the proceeds to him.

Hedges Co. v Holland, 203-1149; 212 NW 480

Rendering consideration worthless. The consideration for a contract to purchase a nonnegotiable promissory note necessarily fails when the vendor-holder of the note cancels the contract out of which the note arose, and thereby renders the note worthless.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Mutual enlargement of business. Where parties are carrying on a business under written contract, a subsequent and additional oral contract under which they mutually enlarge their operations, obligations, and prospective benefits manifestly cannot be deemed without consideration.

Fisher v Nicola, 214-801; 241 NW 478

Absence of consideration. An assignment of the proceeds of a life insurance policy is a nullity when not supported by a consideration.

Mutual Ins. v Schubert, 201-697; 207 NW 741

Illegal sale. The sale of an automobile, the engine number of which has been defaced, altered, or tampered with, without an official certificate showing good and sufficient reasons for such change, presents a case of total failure of consideration, and no formal rescission of contract is necessary in order to recover the price paid.

Espe v McClelland, 208-512; 226 NW 130

Compounding offense as consideration.

Cotten v Halverson, 201-636; 207 NW 795

See Queen Ins. v Railway, 201-1072; 206 NW 804

Remote consideration. A bank may not be said to have received the benefit of a loan transaction between parties not connected with the bank, simply because the proceeds of the loan were used by one of the parties in purchasing the treasury stock of the bank.

McRoberts v Ordway, 206-947; 221 NW 507

Assumption of mortgage. Consideration for an agreement by a subsequent grantee of mortgaged premises to pay the mortgage is found in the fact that such agreement is the result of a settlement of the good-faith contention of the mortgagee that said grantee had, by the modification of a deed, wrongfully obliterated all evidence that the mortgagor ever had any interest in the land, to the damage of said mortgagee.

Sheley v Engle, 204-1283; 213 NW 617

Assumption of mortgage. The grantee of mortgage-incumbered land by absolute deed of conveyance but for the purpose of effecting security only, is not liable on his agreement to assume and pay the existing mortgage unless a consideration for such assumption and agreement is made to appear.

Herbold v Sheley, 209-384; 224 NW 781

Assumption of mortgage. An oral agreement by the grantee of land to assume and pay an existing mortgage on the land, whether made before or after the execution of a written contract of sale which was silent as to such

II SUFFICIENCY OF CONSIDERATION—continued

assumption, is without consideration when, in the final closing of the sale, the grantor was paid not only the full and conceded value of his equity in the land, but the amount of said mortgage.

Crane v Leclere, 206-1270; 221 NW 925

Assumption and agreement to pay. Consideration for an agreement to pay an existing mortgage on land is prima facie shown by proof (1) that the grantee accepted a deed which recited such agreement to pay "as part of the consideration" for the land, and (2) that he went into full possession under such deed.

First N. Bank v McDonough, 205-1329; 219 NW 329

Conveyance—consideration. Evidence held to show that the consideration for a conveyance of land was the satisfaction both of a mortgage indebtedness and also of certain judgments against the grantors.

Taylor v Heiny, 210-1320; 232 NW 695

Unjust enrichment. Where the purchaser of land was at no time delinquent in his payments or other conditions to be performed on his part, it would be unjust and inequitable to allow the vendor to retain the payments when, through his own fault, he failed to perform his part of the contract.

Trammel v Kemler, 226-918; 285 NW 196

Subordination in favor of other mortgages. The act of a corporation in waiving its priority and subordinating its mortgage to a mortgage held by another party, finds ample consideration in the fact that such waiver and subordination enabled the creditor of the corporation to obtain a new loan and to so refinance his obligations as to avoid foreclosures, and thereby protect the corporation from the necessity of paying off prior mortgages in order to protect its own mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Vendor's inability to perform—purchaser's tender unnecessary. When the vendor had put it out of his power to perform a contract to sell realty by permitting a mortgage on the property to be foreclosed, it was not necessary for the purchaser to tender the unpaid part of the purchase price before commencing suit for the amounts paid.

Trammel v Kemler, 226-918; 285 NW 196

Pre-existing debt. A pre-existing indebtedness is ample consideration, as between the debtor and creditor, for the execution of a mortgage securing its payment.

Charlson v Bank, 201-120; 206 NW 812

Equitable estoppel—detriment and change of position. A chattel mortgage on property which the mortgagor does not own cannot prevail against the claim of the actual owner, even tho the latter has permitted the mortgagor to treat the property as his own, when the mortgagee takes such mortgage as additional security to a pre-existing debt, and without parting with anything of value, and without in any manner changing his position to his detriment.

People's Bank v McCarthy, 206-28; 217 NW 453

Pre-existing debt. A pre-existing indebtedness furnishes ample consideration for a transfer by a mortgagor of rent notes.

First Tr. JSL Bk. v Conway, 215-1031; 247 NW 253

Hypothecation to secure extension. The hypothecation of corporate stock as collateral security to a note, in order to secure an extension of time of payment, is supported by ample consideration.

Klatt v Bank, 206-252; 220 NW 318

Agreement extending time—consideration. The extension of the time for the payment of the debt was sufficient consideration for an agreement extending a mortgage, even tho the holder reserved the right to sue at any time any person who did not consent in writing to the extension.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Extending time on mortgage as consideration—burden of proof. In an action by a bank to foreclose a mortgage on land, the defendants had the burden of proving their defenses of fraud and want of consideration, and altho there was testimony that the mortgage was given to enable the bank to make a good showing to bank examiners and that there had been a promise that it would never be foreclosed, the court was justified in finding from other evidence that there was no fraud and that the consideration was the granting of an extension of time, on a past-due mortgage on other land.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Promise to answer for debt, default, or miscarriage of another—extension of time—insufficient consideration. An oral promise to pay the debt of another person if the creditor will give such other person—the original debtor—an extension of time in which to pay is within the statute of frauds.

Leytham v McHenry, 209-692; 228 NW 639

Consideration for chattel mortgage—credit on debt—extension of time. A vendor of a house whose vendee had not completed the payments on the contract of purchase gave valuable consideration for two mortgages on an automobile owned by the vendee by taking the mortgages in return for payments advanced on the contract, by paying cash to the

chattel mortgagee, and by extending the time on the payments for the house.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Consideration — mutuality — constructing a grotto. An agreement between an individual and a charitable organization for the construction of a grotto is neither lacking in consideration, nor in mutuality where the parties clearly intended and provided for corresponding mutual obligations.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Reconveyance of land. A contract cannot rest on a past consideration, but has ample support in a consideration consisting of the doing of something of value which the promisor was under no legal duty to do. So held where the mortgagor of land, in order to escape obligation on the mortgage, contracted to reconvey the land and to assume and pay the attorney fees of the mortgagee.

Anderson v Lundt, 200-1265; 206 NW 657

Consideration—adequacy. A deed of conveyance which recites (1) that it is in payment for services performed by grantee in caring for her mother in her lifetime and (2) that grantee will support and care for grantor during his lifetime, is supported by an adequate consideration.

Ellis v Allman, 217-483; 250 NW 172

Consideration—nonconclusiveness. The consideration named in a deed of conveyance is only prima facie evidence of the amount, and as to the fact of payment.

Gilbert v Plowman, 218-1345; 256 NW 746

Novation. A contract of novation under a contract for the sale of real estate is supported by ample consideration when the vendor agrees to divide the original contract and to have it executed by different parties and in a different manner than as provided in said original contract.

Montgomery v Beller, 207-278; 222 NW 846

Nonmoney agreement — justifiable refusal. A servant who agrees to accept corporate stock in a contemplated corporation in payment of his wages is justified in refusing the stock at a time when, without his consent, the corporation has become heavily encumbered by mortgage.

Tracey v Judy, 202-646; 210 NW 793

Agreement to pay in other than money—refusal—effect. An agreement to receive corporate stock in payment of wages is converted into a money demand by a failure to deliver the stock.

Tracey v Judy, 202-646; 210 NW 793

Past services or past indebtedness as consideration for contract to will property. Altho past services or past indebtedness may be a lawful consideration for an agreement, the parol evidence of such past services or indebtedness will not establish a contract by which the debtor agrees to sell or transfer his property by will in satisfaction of such services or debt.

Fairall v Arnold, 226-977; 285 NW 664

Mutual expectations — presumption. The rendition on one hand and the acceptance on the other of valuable services (board and lodging) for a series of years generates a presumption that the one rendering was to receive pay and that the one receiving was to pay; and this is true tho the receiver and the giver were lifelong associates, and related, but were not members of the same family.

Peterson v Johnson, 205-16; 212 NW 138

Future support—when not consideration. A conveyance of property in consideration of future support is voluntary as to existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Consideration and revocability. An executed, delivered, and accepted gift needs no consideration for its support, and is irrevocable.

Stonewall v Danielson, 204-1367; 217 NW 456

Love and affection—when not consideration. A conveyance of property in consideration of love and affection is voluntary as against existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Naming child. A promise by grandfather to will property to grandson, if the parents name the grandson after the grandfather, is void for lack of legal consideration when such promise was made over three months after grandson had already been named after the grandfather.

Lanfier v Lanfier, 227-258; 288 NW 104

Love and affection — consideration — sufficiency. In an action to enforce grandfather's oral promise to will property to grandson in return for naming grandson after him, court held that love and affection, while being a "good" consideration, was not a sufficient consideration when unsupported by a pecuniary or material benefit, and created, at most, a bare moral obligation.

Lanfier v Lanfier, 227-258; 288 NW 104

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land

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owned by her husband who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Care and nursing. An oral contract for a deed of conveyance is supported by ample consideration,—if any consideration be necessary,—in the agreement of the grantee to care for and nurse the aged grantor during his lifetime, whether such time be long or short.

Kissling v Bank, 203-62; 212 NW 314

Contract for care and support. A contract for the support of an aged person during his lifetime will not be deemed to be without adequate support simply because death follows quickly in the wake of the execution of the contract.

Burmeister v Hamann, 208-412; 226 NW 10

Agreement to support grantor. Principle recognized that ample consideration for a deed of conveyance may be found in the agreement of the grantee to support the grantor for life, even tho it may ultimately develop that the value of the property materially exceeds the value of the support.

In re O'Hara, 204-1331; 217 NW 245

Honest but inadequate consideration. Even tho a conveyance of land by an insolvent father to his son may not be actually fraudulent, yet it may be constructively fraudulent to the extent of the substantial difference between the actual value of the land and the lesser price paid therefor by the son; and in such case a court of equity may make such order as will protect both the grantee and the complaining creditor.

Williams Bk. v Murphy, 219-839; 259 NW 467

Fraudulent conveyance—repaying grantee's consideration. In an action by a bankruptcy trustee, where property was conveyed to a brother by a sister, who thereafter took bankruptcy and such property was considerably in excess of consideration therefor, the deeds were only constructively fraudulent as to grantee, and the setting aside of such deeds required that grantee be paid amount he gave as consideration for the conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Foreclosure—transfer of rents—consideration. Record reviewed and held that a written transfer of the right to the use and occupancy of mortgaged premises during the period of redemption was supported by adequate consideration and was free from fraud.

Andrew v Miller, 218-301; 255 NW 492

Chattel mortgage foreclosure—defense. The right of a mortgagee to foreclose a chattel mortgage by notice and sale (1) under the statute (Ch 523, C., '31), or (2) under the terms of the mortgage itself, may not be transferred to the district court on the application of the mortgagor on the ground of fraud and want of consideration in obtaining the mortgage, when an action of replevin involving the mortgaged chattels, and pending against the mortgagor furnishes him ample opportunity to test the mortgagee's right to foreclose by interposing said plea of fraud and want of consideration.

McDonald v Johnston, 218-1352; 256 NW 676

Mortgage without consideration as to wife. A mortgage on homestead property duly signed by both husband and wife cannot be enforced against the wife when it appears that there was no consideration for the wife's signature.

Greenland v Abben, 218-255; 254 NW 830

Wife signing mortgage and note to release dower. Evidence to the effect that a wife signed, not only the mortgage of her husband, but also the promissory note, and did so in order to enable the husband to obtain the loan and complete the deal, does not establish that the note was without consideration as to her, even tho she asserts that she signed solely to release her dower interest.

Des Moines JSL Bank v Allen, 220-448; 261 NW 912

First Tr. JSL Bank v Diercks, 222-534; 267 NW 708

Consideration—avoiding execution levy. A deed for 120 acres of land which recites "$2,300 and other valuable consideration", the payment of which is otherwise sustained by evidence, is supported by a sufficient consideration when the transaction was made at a time when land values were depressed and the grantor needed to make the sale to satisfy a judgment creditor who was threatening to levy an execution on grantor's real estate.

Gilligan v Jones, 226-86; 283 NW 434

Husband to wife—"one dollar and other valuable consideration"—sufficiency. A deed from husband to wife, executed two years prior to

the rendition of a judgment against the husband and which deed recites a consideration of "one dollar and other valuable consideration", is not fraudulent as against such judgment creditor of the grantor-husband, when it is shown that the "other consideration" consisted of $3,000 actually paid by the wife.

Donovan v White, 224-138; 275 NW 889

Consideration—definition—resolution deferring corporate salary. Consideration being a benefit or advantage accruing to one party or a loss or disadvantage incurred by the other, a corporation resolution deferring salary payment is a benefit to the corporation and a detriment to the employees constituting a valid consideration.

Bankers Trust Co. v Economy Coal Co., 224-36; 276 NW 16

Public benefit. Principle recognized that the contract of a municipal corporation must be supported by a consideration in the nature of a public benefit.

Love v City, 210-90; 230 NW 373

Revival of discharged debt. Principle recognized that the moral obligation to pay a debt which has been discharged in bankruptcy will support an oral promise to pay the discharged debt.

Fierce v Fleming, 205-1281; 217 NW 806

Moral obligation. Principle recognized that a moral obligation is not sufficient consideration to support a subsequent promise.

Northwest. Bk. v Muilenburg, 209-1223; 229 NW 813

Settlement of action. A stipulation of settlement of an action is supported by an adequate consideration.

Salinger v Elev. Co., 210-668; 231 NW 366

Contract of reguaranty. A guarantor who, in a new written contract, reguarantees the payment of the amount past due on a former contract on which he is guarantor, and also guarantees the payment of future accruing indebtedness, will not be heard to say that there was no consideration for the guaranty in the new contract of the old indebtedness when by the new contract an extension of time of payment of the old indebtedness was secured.

Watkins Co. v Peterson, 210-661; 231 NW 489

Assignment of expectancy as security. An assignment of an expectancy, in a contemplated estate, as security for a debt is supported by adequate consideration.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Burk v Morain, 223-399; 272 NW 441

Contract to relinquish part of devise. A written agreement between devisees that they would so divide the devised property that certain nondevisees would also share in the property is supported by a sufficient consideration in that the agreeing devisees suffered a detriment by relinquishing part of the devise, and the nondevisees acquired a benefit.

Clayman v Bibler, 210-497; 231 NW 334

Pledge of collateral — consideration. The naming of a surety as beneficiary in a life insurance policy, and the pledging of the policy in order to indemnify the said surety on signing a renewal note, are supported by a sufficient consideration.

Beed v Beed, 207-954; 222 NW 442

Part payment of debt in discharge of whole. An executed agreement between a debtor and a creditor to the effect that the debtor will, before any part of the indebtedness is legally due, pay a part thereof in full satisfaction of the entire indebtedness, is supported by ample consideration, and is, therefore, enforceable.

Fisher Co. v Gravel Co., 216-909; 249 NW 664

Recovery of consideration paid. A vendee of land who is and always has been in undisturbed possession of the land, and who has never rescinded the contract of purchase, but is distinctly standing thereon, may not recover the consideration paid because the vendor is unable to convey good title.

Weech v Read, 208-1083; 226 NW 768

Contemporaneous collateral contract. An oral contract contemporaneous with the execution of a written contract cannot be deemed collateral to said written contract unless said oral contract has a supporting consideration separate and distinct from the consideration which supports the written contract.

In re Simplot, 215-578; 246 NW 396

Subscriptions—validity. A written undertaking to pay a named sum for the purpose of discharging the debts of a Young Men's Christian Association is an enforceable obligation.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Bona fide dispute. The settlement of a bona fide dispute as to the amount of an account is ample consideration for an accord and satisfaction.

Minn. Paper Co. v Register, 205-1228; 219 NW 321

Compromise and settlement. A written contract of compromise and settlement of a bona fide controversy between parties is supported by adequate consideration.

Kilts v Read, 216-356; 249 NW 157

Unsupported promise. An oral compromise and settlement of a bona fide controversy between parties relative to a claim of one of the

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parties is not established by evidence which affirmatively shows that no controversy existed between the parties, but that one of the parties made a promise to the other for which promise no consideration appears.

Marron v Lynch, 215-341; 245 NW 346

Promise to pay legal debt. A promise to pay a part of what one is legally owing cannot furnish a consideration for a contract which is collateral to said promise.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Compromise of illegal claim. A compromise in the amount of a claim which a municipal corporation has no legal authority to pay, in any amount, affords no consideration for the agreement to pay the lesser sum.

Love v City, 210-90; 230 NW 373

Barred claim as consideration. A conveyance by a husband to his wife will not be set aside on the sole ground that the conveyance was in satisfaction of an indebtedness against which the statute of limitation had fully run.

Cover v Wyland, 205-915; 218 NW 915

Past or moral consideration. Past or moral consideration is not sufficient to support an executory contract.

Lanfier v Lanfier, 227-258; 288 NW 104

Inheritance tax—transfer without consideration. A bona fide transfer of property for a fair consideration, sufficient to render the property nontaxable under the inheritance tax law, is not established by evidence that the instruments of transfer—concededly executed in contemplation of death and to take effect after death—were, at the most, supported only by a past and wholly executed consideration.

McEvoy v Wegman, 216-395; 249 NW 263

Past consideration. Where plaintiff agreed to construct, at his own expense, an electric power line from his residence to defendant's power plant, a subsequent promise by defendant, without a new consideration, to pay the expense of constructing said line is nudum pactum.

Heggen v Clover Leaf Co., 217-820; 253 NW 140

Cancellation of nudum pactum. An agreement that one of two stockholders shall draw all dividends up to a certain time, unsupported by any consideration, is properly canceled in an action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Promise to pay debt of another—consideration. Tho the vendee of a stock of goods did not, in making the purchase, assume the payment of an outstanding account for goods, yet his later written promise to pay said bill if the creditor would extend the time of payment and furnish additional stock for the store—which was done—is supported by ample consideration.

Smith Bros. Co. v Carmichael, 221-301; 264 NW 65

Earnings of minor as consideration. The fact that a parent has received the earnings of his unemancipated minor child will not support a conveyance to the minor when the conveyance leaves the parent without property sufficient to pay his debts.

Scovel v Pierce, 208-776; 226 NW 133

Wages of minor as consideration. A deed from a father to a son of a $2,500 town property for admittedly no consideration, and a deed of a $12,000, partly encumbered farm, in fulfillment of an alleged contract that the son (at the time of contract, an unemancipated, unmarried, nineteen-year-old minor) should, when married, be given said farm if he remained on, and helped in the management of said farm, are, irrespective of any actual fraud, constructively fraudulent as to a prior existing creditor of the grantor, because of want of, or grossly inadequate, consideration, it appearing that the son married within a month after attaining majority; and grantee must, in order to sustain said deeds, prove that grantor still continued to retain sufficient property to pay his said creditor.

Commercial Bank v Balderston, 219-1250; 260 NW 728

Waiver of tax sale certificates—detriment to promisee. The holder of tax sale certificates covering mortgaged real estate who, in writing, waives the priority of said certificates over the lien of said mortgage, in order to enable the mortgagor to ward off foreclosure by obtaining an extension of time in which to pay the mortgage debt, may not, after the mortgagor has obtained said extension on the strength of the waiver, successfully assert that said waiver was without consideration.

Goff v Milliron, 221-998; 266 NW 526

Unilateral contract as to wage scale. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral,—when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Coal Co., 215-855; 246 NW 753

Bank night — consideration for unilateral contract. Where the promoter of a motion picture bank night drawing voluntarily makes certain requirements to qualify for the prize which is promised, he does not merely extend an offer to make a gift, but a unilateral con-

tract is created in which the promoter determines the adequacy of the consideration for his promise, and when a person is induced to accept the promise and perform the specified act which was bargained for, it does not matter how insignificant the benefit of the performance may apparently be to the promoter, the promise can be enforced by the winner of the drawing.

St. Peter v Theatre, 227-1391; 291 NW 164

Lottery—bank night—value of consideration in contract. A bank night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Theatre, 227-1391; 291 NW 164

Consolidation — assumption of obligations. The assumption by a consolidating company of the obligations of the companies consolidated will not be rendered nugatory by mere inadequacy of consideration. At any rate, it is not for the court to pass on the sufficiency of the consideration growing out of a consolidation approved by the companies consolidated, by their stockholders, and by duly empowered public officials.

State v Cas. Co., 213-200; 238 NW 726

Adequacy of executed consideration. The court will not pass upon the adequacy of a fully executed consideration.

Kisor v Litzenberg, 203-1183; 212 NW 343

Surrender of legal right. The execution of an obligation to make good the embezzlement of a relative is supported by adequate consideration when, in return for the obligation, the obligee waives or surrenders his right to proceed against the embezzler's surety bond.

Smith v Morgan, 214-555; 240 NW 257

Fraudulent conveyance. Consideration for a conveyance of land by a son to his mother is found in the fact that the mother is executrix under a will which gives her the personal property subject to the debts of the estate, and that she agrees, in return for the land, to pay off all the debts of the estate and, on so doing, to cancel and return to the son all his direct and indirect liabilities to the estate.

Cherokee Auto v Stratton, 210-1236; 232 NW 646

Exchange of property. Instruments duly executed in exchange of property cannot be impeached without convincing proof of fraud, and values of exchanged properties are liberally regarded in determining adequacy of consideration.

Ragan v Lehman, (NOR); 216 NW 717

Antenuptial contracts — consideration marriage—validity. Antenuptial contracts the same as other contracts, if fair and free from fraud, are valid, binding, and enforceable, being based upon the consideration of marriage which is of the very highest known to the law.

In re Onstot, 224-520; 277 NW 563

Antenuptial contract. The consideration for an antenuptial contract necessarily inheres in the resulting marriage.

Kalsem v Froland, 207-994; 222 NW 3

Marriage settlements — validity. A marriage settlement, duly and in good faith executed, and confirmed by the subsequent marriage of the parties, is valid against the creditors of the husband when not grossly out of proportion to the husband's station and circumstances.

Benson v Burgess, 214-1220; 243 NW 188

Withholding action. The fact that the obligee in a bond of indemnity withheld action for failure of title furnishes ample consideration for the bond.

Duke v Tyler, 209-1345; 230 NW 319

Forbearance to sue. Forbearance on the part of a creditor to institute an action may furnish ample consideration to pay a claim.

Heflen v Brown, 208-325; 223 NW 763

Rent—payment in advance—ouster—right to recover. A tenant who pays the rent in advance to the landlord, and is legally evicted by foreclosure proceedings before the commencement of the term, may recover of the landlord the sum so paid as for a total failure of consideration.

Ransier v Worrell, 211-606; 229 NW 663

Individual mortgages by bank directors. Bank directors may not question the legality of individual mortgages executed by them when, through such execution, they obtain (1) the surrender of their formerly executed guaranty in behalf of their bank, (2) an extension of time in which to pay the guaranteed obligations, and (3) the surrender by the mortgagee of assets of which the director-mortgagors individually avail themselves.

Live Stock Bk. v Irwin, 207-1083; 224 NW 76

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale

is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

9442 Gaming contracts void.

Discussion. See 17 ILR 524—"Void" and "voidable"

ANALYSIS

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I IN GENERAL

Annuity contract as "wager". An annuity contract, entered into in good faith, under which the annuitant, for a lump sum payment determined by skilled actuaries, is promised a definite annual payment during the lifetime of the annuitant, does not offend against public policy—is not a "wager" contract.

Hult v Ins. Co., 213-890; 240 NW 218

Connivance at violation of commerce statutes —effect. A shipper of goods will be deemed as participating in the doing of an illegal act when he enters into a contract with a motor vehicle freight operator for the transportation of freight over the highways of this state by said operator as an independent contractor, and knows, at the time of so contracting, that said operator has no right to carry on his said business because of the failure of said operator (1) to obtain from the board of railroad commissioners (now commerce commission) the legally required official permit to carry on said business, and (2) to file with said board the legally required bond. It follows that said operator will not be deemed an independent contractor but simply the agent of said shipper.

Hough v Freight Service, 222-548; 269 NW 1

Dealing in "futures"—implied or apparent authority of agent—unallowable plea. A commission firm was prohibited by the mandatory rules of the board of trade of which it was a member from dealing in so-called "futures" for and on behalf of a nonmember corporation unless the firm first obtained from said nonmember corporation a writing authorizing the latter's manager to contract for such "futures". The firm disregarded said rule and accepted orders for such "futures" from a manager who had been expressly forbidden to exercise such power. Held, that said firm, when sued by the injured corporation for the resulting loss, would not be permitted to defend on the ground that said manager had implied or apparent power to issue said orders.

Watkins Co. v Smith Co., 221-1164; 267 NW 115

II ACTION ON WAGERING CONTRACT

Property sold in furtherance of gambling. A vendor of property susceptible of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon Co. v Benakis, 213-136; 238 NW 611

Contracts and transactions — presumption. The presumption under the bucket shop act that grain, the subject matter of a purported contract of sale, was never intended to be delivered by the broker is not overcome by the simple expedient of having the broker testify that he intended to deliver the grain unless he had sooner sold it prior to the date of delivery.

Yoerg v Geneser, 219-132; 257 NW 541

Bank night—value of consideration in contract. A bank-night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Theatre, 227-1391; 291 NW 164

III NEGOTIABLE INSTRUMENTS

Dealing in margins—illegality—jury question. Evidence that promissory notes sued on were furnished for illegal transactions in dealing in margins on corn on the board of trade, and that the parties had no intention of having the corn delivered, was sufficient to make a case for the jury.

Hamilton v Wilson, (NOR), 240 NW 685

IV MONEY PAID ON WAGER

No annotations in this volume

V MONEY DEPOSITED WITH STAKEHOLDER

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Third party beneficiaries, actions. See under §10968 (II)
Understanding of parties to agreement. See under §11275
Vendor and purchaser. See under §12389 (II)
Waiver in life insurance cases. See Ch 401, Note 1 (IX)
Warranties. See under §9941

I REQUISITES AND VALIDITY IN GENERAL

(a) IN GENERAL

Power of courts. Courts may not make contracts for the parties.

Beal v Milliron, (NOR); 267 NW 83

Valid statutes read into contracts. Principle affirmed that contracts are conclusively presumed to have been entered into in view of the valid statutes then existing and controlling the subject-matter.

Priest v Whitney Co., 219-1281; 261 NW 374

Requirements generally—express contract. To constitute an "express contract" there must have been an offer and acceptance as to the same thing. Usually an agreement is arrived at by means of an expressed or implied proposal or offer from one side, expressly or impliedly accepted on the other, but formality in proposing and accepting is not required, providing there is an intention to assume legal liability as distinguished from a mere ebullition of emotion or expression of intention to do an act of generosity. A promissory expression without intention to contract is not sufficient.

In re McKeon, 227-1050; 289 NW 915

Execution—signing of duplicates. There may be a valid written contract altho one party signs one duplicate original of the contract, and the other party signs a different duplicate original.

Hunt, Hill & Betts v Moore, 213-1323; 239 NW 112

Execution—unreasonableness of contract—effect. It would require a very clear showing which would justify the court in holding as a matter of law that a contract was not entered into because some of its terms were unreasonable.

Goben v Paving Co., 214-834; 239 NW 62

Signing without knowing contents. A party may not dispute the binding force of a contract which, without fraud, he freely signs without informing himself of its contents.

Proctor v Hansel, 205-542; 218 NW 255; 58 ALR 153

Unilateral contract. A simple order for goods constitutes a unilateral contract—one in which the promisor receives no promise in return for his promise.

Port Huron Co. v Wohlers, 207-826; 221 NW 843

I REQUISITES AND VALIDITY IN GENERAL—continued

(a) IN GENERAL—continued

Joint adventure. The requisites of an ordinary contract, and of a contract of joint adventure, as to form and validity, are substantially the same. Evidence held to establish such adventure.

Smith & Co. v Hollingsworth, 218-920; 251 NW 749

Place of contract—order in this state and acceptance in foreign state. The execution in this state by a proposed vendee of a naked order for goods, and the oral acceptance of such order by the vendor at his place of business in a foreign state, do not constitute the making of a contract in this state.

Anderson & Co. v Monument Co., 210-1226; 232 NW 689

Interstate carrier — employment — lex loci contractus. A contract of employment for and on behalf of an interstate commerce carrier is consummated in this state when the conditional offer of employment is accepted in this state by a resident thereof, even tho the offer is made in a foreign state.

Chicago, Burl. Ry. v Lundquist, 206-499; 221 NW 228

Sales contract—court approval as condition. A definite written offer by the superintendent of banking of this state to sell to a foreign administrator Iowa real estate, belonging to a bank receivership, and the written acceptance of the offer, by said foreign administrator, may constitute a valid and specifically enforceable contract tho the offer and the acceptance be both conditioned on the approval of the respective state courts.

Bates v Bank, 223-385; 272 NW 412

Consideration—benefit to third person. A written agreement between devisees to divide the devised property in such proportions that certain nondevisees will also share in the property is supported by a sufficient consideration in that the agreeing devisees suffer a detriment by relinquishing part of the devise and the nondevisees acquire a benefit.

Clayman v Bibler, 210-497; 231 NW 334

Contract for benefit of third party. Principle reaffirmed that two parties may validly contract for the benefit of a third party, and that the third party may accept, and avail himself of, said contract.

Hunt, Hill & Betts v Moore, 213-1323; 239 NW 112

Evidence—weight and sufficiency. Evidence reviewed and held to establish the making of a contract for the benefit of a third party.

Climan v Lepley, 218-1038; 256 NW 739

Fiduciary relation — evidence — sufficiency. Evidence held insufficient to show that a fiduciary relation existed between a minister and a member of his church.

Felton v Thompson, 209-29; 227 NW 529

Delivery—intent of parties. An effective delivery of an instrument is made to the grantee by the naked execution of the instrument and by simply leaving said instrument at the place of execution, if such was the actual intent of the parties. Evidence relative to the delivery of a chattel mortgage held to present jury question.

Beery v Glynn, 214-635; 243 NW 365

Offer—ineffectual acceptance. An offer by a mortgagor to deed the mortgaged land to the mortgagee on condition that the mortgage notes would be deemed canceled from the time the deed was received is not accepted by the act of the mortgagee in forwarding for execution a blank deed on condition that the mortgage notes would be deemed canceled from the time the deed was recorded.

O'Brien v Fitzhugh, 204-787; 215 NW 944

Corporate powers and liabilities—authority of president—insufficient showing. A contract is not binding on a corporation, tho entered into in its name by its president, to the effect that the corporation shall be and remain liable on promissory notes negotiated by it without recourse, when authority to the president to enter into such contract cannot be found in the articles of incorporation, in the bylaws, in the proceedings of the directors, in any act of corporate ratification, or in the customs and practices of the corporation.

First N. Bank v Cement Co., 209-358; 227 NW 908

Contracts partly written, partly oral. Parol evidence is admissible to show that a building contract was partly in writing and partly oral.

Golwitzer v Hummel, 201-751; 206 NW 254

Municipal utility—rates in contract. A contractor who is paid in cash for building a municipal public utility plant is not interested in the electric rates the city proposes to charge nor in the rate of interest on the bonds sold to provide the cash, nor does the statute contemplate that these items be inserted in the construction contract when such contractor is to be paid in cash.

Interstate Co. v Forest City, 225-490; 281 NW 207

Power to bind future councils. A city council, under legislative authority, may validly enter into a contract which will be binding on future city councils.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

When offer becomes contract. An unconditional offer by mail to enter into a specified contract becomes a contract in fact at the time and place at which a duly stamped and addressed acceptance is mailed.

International Assn. v Des Moines Co., 215-268; 245 NW 244

Proposal and acceptance—use of mails. An offer by mail invites a reply by mail.

Rogers v Ins. Co., 204-804; 213 NW 757

Offer and acceptance not necessarily consummated contract. Principle reaffirmed that a contract of purchase of real estate is not necessarily completely consummated when the buyer asserts that he will pay a certain sum, and the seller says he will accept said sum, when it is manifest that the parties contemplated the execution of a writing as such consummated contract.

Starry v Starry & Lynch, 212-274; 234 NW 281

Offer to pay attorney fees not accepted. When an attorney, who had received a retainer fee of $100 to represent the insured in a criminal case arising from an automobile accident, received a letter from the attorney for the insurer requesting him to tell the insured that the insurer was willing to take care of attorney fees, such letter was admissible to show an offer to pay such fees, but was insufficient to show that such offer was authorized by the insurer, and his reply that he would look to the company for payment of only those fees exceeding $100, did not amount to an acceptance of the offer.

Gipp v Lynch, 226-1020; 285 NW 659

Consideration—part payment of debt in discharge of whole. An executed agreement between a debtor and a creditor to the effect that the debtor will, before any part of the indebtedness is legally due, pay a part thereof in full satisfaction of the entire indebtedness, is supported by ample consideration, and is, therefore, enforceable.

Fisher Co. v Northwestern Co., 216-909; 249 NW 664

Promise to pay debt of another—consideration. Tho the vendee of a stock of goods did not, in making the purchase, assume the payment of an outstanding account for goods, yet his later written promise to pay said bill if the creditor would extend the time of payment and furnish additional stock for the store—which was done—is supported by ample consideration.

Smith Co. v Carmichael, 221-301; 264 NW 65

Offer and acceptance—disregard of conditions—effect. One who enters into a word-building contest for an award or prize for the largest list, and intentionally and materially violates the rules of the contest, cannot be said to create any contract relation with the party who made the offer, even tho such contestant furnishes the largest list of words.

Scott v People's Monthly Co., 209-503; 228 NW 263; 67 ALR 413

Prize money deposit—insolvency of sponsor—availability. Where, after starting a contest to place small "R's" within a large "R", the sponsor company became insolvent and its receiver under agreement with defendant bank set up a special bank account as prize contest payment money,—which account was later applied by the bank on a note of the insolvent sponsor company,—an individual contestant, altho complying with all contest rules, may not, without being declared to be the winner according to the contest rules, recover against the bank the amount of the first prize from such special account.

Bielen v Bank, 224-19; 276 NW 25

Bank night — consideration for unilateral contract. Where the promoter of a motion picture bank-night drawing voluntarily makes certain requirements to qualify for the prize which is promised, he does not merely extend an offer to make a gift, but a unilateral contract is created in which the promoter determines the adequacy of the consideration for his promise, and when a person is induced to accept the promise and perform the specified act which was bargained for, it does not matter how insignificant the benefit of the performance may apparently be to the promoter, the promise can be enforced by the winner of the drawing.

St. Peter v Theatre, 227-1391; 291 NW 164

Lottery—bank night—value of consideration in contract. A bank-night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Theatre, 227-1391; 291 NW 164

Allowable restraint of trade — newspaper publications. An agreement, entered into on the sale of a newspaper, to the effect that the seller will not in any manner engage, either alone or with others, in the publication or circulation of a newspaper in the locality specified for a period of fifteen years, is not invalid as being in restraint of trade.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Taxes not contract — decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes

I REQUISITES AND VALIDITY IN GENERAL—continued

(a) IN GENERAL—concluded

constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

Unincorporated associations — noncapacity to contract or sue. Strictly speaking, a voluntary unincorporated association organized for literary and social purposes has no right to contract and cannot maintain a suit in the name of such voluntary unincorporated association alone.

Lamm v Stoen, 226-622; 284 NW 465

(b) MUTUALITY

Discussion. See 1 ILB 65—Doctrine of mutuality; 6 ILB 129, 209—"Illusory" promises and options; 15 ILR 42—Enforceable promises

Executed contracts unassailable. An executed contract may not be assailed on the ground of want of mutuality.

Burmeister v Hamann, 208-412; 226 NW 10

Unilateral wage agreement—effect of intervention. A wage agreement which is void as to plaintiff who seeks to enforce it (because wholly lacking in mutuality of obligation and remedy) is necessarily void as to interveners who join in the prayer of plaintiff.

Wilson v Airline Co., 215-855; 246 NW 753

Unilateral contract as to wage scale. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral—when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Airline Co., 215-855; 246 NW 753

Unilateral contract—when promise binding. An order for the shipment of goods and a promise to pay therefor become a binding promise when the order is filled and shipped.

Port Huron Co. v Wohlers, 207-826; 221 NW 843

Noninconsistency. Manifestly there is no inconsistency in a contract that services should be rendered for a specified present compensation, and for an enlarged and additional compensation to be paid in the future, under specified conditions.

In re Newson, 206-514; 219 NW 305

Acceptance—conclusive presumption. It must be presumed that an advantageous contract, entered into by an uncle for and on behalf of his motherless and paternally abandoned infant nephew and niece, has been accepted by the beneficiaries, when for some 40 years they have been fulfilling their part of the contract.

Kisor v Litzenberg, 203-1183; 212 NW 343

Belated and unallowable withdrawal. An offerer may not withdraw his offer after having received an acceptance thereof, even tho the offerer imposed as a condition that the deal should be closed "at once", it appearing that the parties manifestly intended that "at once" meant a reasonable time, in view of the circumstances.

Harris v Bills, 203-1034; 213 NW 929

Proposal and acceptance—imposing implied law condition. An offer by mail of certain lands and of a certain sum of money in exchange for certain corporate stock, followed by a timely acceptance by mail if the land was free of incumbrance, constitutes a binding contract, as the condition imposed exactly what the law would impose; and it is quite immaterial that, in the subsequent dealings between the parties, the party ultimately denying the existence of a contract injected conditions to which the other party did not object.

Harris v Bills, 203-1034; 213 NW 929

Transportation furnished pupils—no implied contract by board to pay for services. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father who had taken the child to school could not recover for his services on a theory of contract implied in fact when there was no meeting of the minds or agreement that he should be compensated for such transportation, as no promise to pay can be inferred from the refusal of the school to furnish transportation upon demand and the subsequent transportation of the child by the father, as the school was in no position to reject such services.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Third parties. A contract between a mortgagor and a mortgagee by which the former purchased his freedom from a deficiency judgment on foreclosure sale cannot work an obligation on the part of a grantee of the premises who was in no manner a party to the contract.

Marx v Clark, 201-1219; 207 NW 357

Antenuptial contract—validity. Antenuptial contract reviewed, and held not invalid on the grounds of unfairness, unconscionableness, and nonmutuality, or because it contained an invalid provision in relation to property interest and the right to children, which in no manner affected the consideration actually received by the wife.

Kalsem v Froland, 207-994; 222 NW 3

Merchandise sold—seller determining quantity—unenforceability. In an action for damages where an alleged contract was to sell surplus stock of merchandise, to be subsequently listed, a list previously sent merely as information in response to a request from buyer to the seller is inadmissible to complete a contract, under statute of frauds, §4625, C., '97 [§11285, C., '39]. Where such list could only be made a part of contract by proof of distinct oral contract, no connection appearing between the two papers by comparison or surrounding circumstances of parties, the contract leaving the quantity to be delivered to buyer to be determined by the will, want, or wish of the seller, makes the contract unenforceable because of lack of mutuality.

Midland Co. v Waterloo Co., 9 F 2d, 250

Lack of mutuality and consideration—agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

(c) IMPLIED AND QUASI-CONTRACTS AND QUANTUM MERUIT

1 In General

Implied contracts distinguished. Implied contracts are of two kinds:

First, those implied in law, irrespective of the consent of the parties, on the principle that one will not be permitted to unjustly enrich himself at the expense of another without making compensation therefor, and

Second, those implied in fact from the consenting acts of the parties.

Pella v Fowler, 215-90; 244 NW 734

Power of city. A city may, in the absence of a prohibiting statute, validly enter into an implied contract for the grading of its streets preparatory to the construction of permanent sidewalks.

Carlson v Marshalltown, 212-373; 236 NW 421

Petition—separate counts required. A plaintiff who pleads both quantum meruit, and express contract in the same count should be compelled, on motion, to separate his cause of action into separate counts.

Donahoe v Gagen, 217-88; 250 NW 892

Voluntary nonpaper issues—sufficiency. In an action to recover quantum meruit for the use of machinery, the court, in submitting defendant's nonpaper issue (acquiesced in by plaintiff) whether the use was under a contract for an agreed rental entered into with plaintiff's employee, must submit the question of the authority of the employee to enter into such a contract, there being evidence of the lack of such authority.

Des Moines Co. v Lincoln Co., 201-502; 207 NW 563

Pleading—contract and quantum meruit value. Evidence of both the reasonable and contract value of services is admissible when so pleaded, even tho the pleading is embraced in one slovenly drawn but unquestioned count.

Pressley v Stone, 214-449; 239 NW 567

Alleging quantum meruit and proving express contract. An allegation of quantum meruit cannot be supported by proof of an express contract.

Wayman v Cherokee, 208-905; 225 NW 950

Commission—express contract. A broker may plead in different counts (1) an express contract to pay a specified commission and (2) an implied contract to pay a reasonable commission, and may insist on the submission of both issues to the jury if the evidence supports both. It follows that evidence may be admissible on the issue of quantum meruit, even tho plaintiff produces evidence of an agreement to pay the specifically named commission.

Ransom-Ellis Co. v Eppelsheimer, 205-809; 218 NW 566

Pleading quantum meruit and proving express contract. A fatal variance between allegation and proof results from pleading quantum meruit and proving an express contract for compensation.

Sammon v Roach, 211-1104; 235 NW 78

Express contract excludes implied contract, and vice versa. There cannot be an express and an implied contract embracing the same subject-matter.

Hodgson v Keppel, 211-795; 232 NW 725

Implied from conduct—express contract contrasted. A contract implied in fact, differing from an express contract only in the method of proof, may be inferred under certain circumstances from acts and conduct justifying a promisee in understanding a promisor intended to contract.

Snell v Kresge, 223-911; 274 NW 35

Joint ownership — accounting — division of receipts. When it happens that only one of two joint, equal, equitable owners of real estate is personally obligated on the contract for a deed under which the land is held, it is

I REQUISITES AND VALIDITY IN GENERAL—continued
(c) IMPLIED AND QUASI CONTRACTS AND QUANTUM MERUIT—continued
1. In General—continued

quite manifest that the law cannot presume, without supporting evidence, that forfeited payments received by said parties as the result of a futile attempt at sale of said premises, belong wholly to said nonobligated party; and equally manifest that the law cannot, on such circumstances, rear a so-called quasi contract to the same effect, in the absence of like evidence.

In re Kelly, 221-1067; 267 NW 667

Contract price (?) or quantum meruit (?). A plaintiff who pleads that he partially performed an express contract for services and thereupon abandoned the work because of a breach of the contract by defendant must not be permitted to recover the contract price for the work actually performed unless he establishes his pleaded justifiable abandonment; and if he fails to establish justifiable abandonment, he may not recover on the basis of a quantum meruit which does not exceed the contract price when he neither pleads nor proves a quantum meruit.

Goben v Paving Co., 208-1113; 224 NW 785

Liability of school district to transport pupils. When a state boundary river renders a portion of a consolidated school district inaccessible to the consolidated school, and the school authorities agree with the parent of grade pupils, residing on such inaccessible lands, to pay the tuition of said pupils in a school in a foreign state, but later refuse to pay for transporting said pupils to said school (a distance of five miles), the parent may supply the transportation in the foreign state and the district will be liable for the reasonable value thereof.

Dermit v School Dist., 220-344; 261 NW 636

Breach—damages (?) or quantum meruit (?). An action for damages for breach of a contract of employment may be supported by evidence of the reasonable value of the services rendered, when the pleadings present such sum as the damages.

Westerfield v Oil Co., 208-912; 223 NW 894

Acceptance of offer—implication. Principle recognized that the conduct of parties to an alleged contract may furnish ample evidence that an offer by one party of certain terms was accepted by the other party.

Breen v Central L. Co., 207-1161; 224 NW 562

Proposal or offer—implied acceptance. One who is, in writing, offered work at a specified price and proceeds to perform the work without further negotiation necessarily agrees to do the work for the offered compensation.

Commercial Bank v Broadhead, 212-688; 235 NW 299

Offers—when implied acceptance not recognized. Proof that a party made an offer to pay a stated sum for services to be performed and that the offeree thereafter proceeded to perform the services, creates a presumption that the offeree accepted all the terms of the offer; not so, however, when such offer is made after a large part of the services has been rendered on the basis of a quantum meruit, and the offeree continues to perform the remaining services. In the latter instance, the quantum meruit contract will be deemed to continue unless an acceptance of the offer is actually proven.

Kelly, etc. v Trust Co., 217-725; 248 NW 9

Compensation—implied agreement. One who calls upon a physician and hospital authorities to attend an injured person to whom he is under no legal obligation may, by his acts and conduct, give rise to an implied promise to pay for the services rendered.

Valentine v Morgan, 207-232; 222 NW 412

Contract for services—question of quantum meruit—insufficient for jury. In an action against city for engineering services rendered in reconstruction of sewage disposal plant wherein plaintiff bases his claim on quantum meruit, and city contends services were contemplated by contract providing for lump sum compensation, question of liability of city for services on quantum meruit basis held insufficient for jury.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Public improvements—contract—substantial failure to perform—nonallowable recovery. Principle reaffirmed that a contractor who, in the construction of a street pavement, substantially fails to comply with the contract specifications, and is thereby barred from recovering the contract price, may not recover on quantum meruit, either from the city or from the property owners — and especially is this true when the contractor is guilty of fraud in the construction work.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Obstructions—removal. The removal by an owner of land of fences across a public highway on the land, in compliance with a demand by the public authorities, gives rise to no implied contract on the part of the municipality to pay the value of the work and materials necessary in effecting such removal.

Hall v Union County, 206-512; 219 NW 929

Renewal of written contract by conduct. Where a heating plant owner contracted to furnish to a storekeeper heat for a period of one year at the termination of which no new written nor verbal contract was made, but for seven years more the heat was furnished and accepted at the same price as in the original agreement, until discontinued at nearly the end of the 1933-34 season, in an action to recover the contract price for the 1933-34 year's heat, a contract would be implied from the storekeeper's conduct, to pay the contract price regardless of fact that storekeeper shut off some of the radiators.

Snell v Kresge Co., 223-911; 274 NW 35

Allowance and payment of estate claims—persons in family relation. A daughter-in-law who enters the home of her father-in-law and cares for him for many years while performing the duties of a housewife, as had formerly been done by other relatives, cannot recover from the estate of the father-in-law for said services in the absence of an express or implied contract; and an implied contract is not established by proof that on occasions the father-in-law expressed appreciation for the personal care rendered him, and a purpose to pay therefor.

In re Unangst, 213-1064; 240 NW 618

Services in family — evidence — sufficiency. An agreement to pay for services rendered by a member of a family is established by testimony which shows that the one rendering the services justifiably expected pay therefor, and that the one receiving such services equally expected to make such payment.

In re Newson, 206-514; 219 NW 305

Compensation—nonliability. The theory that a party is personally liable for an improvement for which he has in no manner contracted, because he has received the full benefit thereof (if its correctness be assumed, as a proposition of law), can have no application when the party has received exactly what he contracted for with a third party.

Coen v Bank, 205-483; 218 NW 325

Independent contractor—burden of proof. One who claims that labor and services accepted by him were performed by an independent contractor has the burden to prove such claim.

Buescher v Schmidt, 209-300; 228 NW 26

Deeds—delivery—presumption attending acceptance. Principle reaffirmed that the acceptance of a deed of conveyance implies an agreement by the grantee to perform legal conditions imposed on him by the deed, e.g., the payment of stated sums to named persons.

Carlson v Hamilton, 221-529; 265 NW 906

Relevancy, materiality, and competency. On the issue of quantum meruit for services rendered, a former contract between the same parties for similar services performed under like conditions, and specifying the compensation, is admissible as a circumstance for the jury's consideration.

Olson v Shuler, 203-518; 210 NW 453
Olson v Shuler, 208-70; 221 NW 941

Compensation of brokers. Under the issue of quantum meruit, evidence of the commission usually and customarily paid as reasonable in the community in question is admissible.

Northrup v Herrick, 206-1225; 219 NW 419

Services of partner—value. In action for accounting and dissolution of partnership, reasonable value of services of partner managing garage held properly fixed at $30 per week.

Boldrini v Beneventi, (NOR); 240 NW 680

Compensation of brokers—independent judgment of jurors. A jury may be instructed that, in determining the reasonable value of services rendered, they may give due heed to their own knowledge and experience on the subject at issue.

Northrup v Herrick, 206-1225; 219 NW 419

Uncertainty as to compensation. The fact that a contract of employment is fatally uncertain in its inception as to the compensation to be paid is no ground for denying a quantum meruit after the services have been fully performed.

Olson v Shuler, 203-518; 210 NW 453

School district—compelling transportation to be furnished to pupils. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

City election favoring utility—no implied obligation to construct. Under the Simmer law an action by an engineering company for a general judgment against a city for engineering services cannot be maintained, based on an implied obligation of the city to erect light and power plant, even after repeal of the enabling ordinance, and altho the special election therefor had carried. Such would be unlawful and contrary to public policy and beyond powers of city council. Persons dealing with a municipality are bound to take notice of legislative restrictions upon its authority.

Burns & McDonnell Co. v Iowa City, 225-1241; 282 NW 708

Contractual prerequisites—burden of proof. In an action against a husband and wife on a

I REQUISITES AND VALIDITY IN GENERAL—continued
(c) IMPLIED AND QUASI CONTRACTS AND QUANTUM MERUIT—continued
1. In General—concluded

promissory note signed only by the husband, and involving the wife on a theory that both were engaged in a joint adventure for which the money was used, liability of the wife may be predicated only upon a joint adventure contract, either express or implied, and plaintiff has the burden to prove the existence of such contract.

Valley Bank v Staves, 224-1197; 278 NW 346

Contract of indemnity—implied agreement. An agreement by a defendant to indemnify plaintiff if plaintiff would sign a promissory note with defendant's son is not per se fatally incomplete because the agreement did not embrace any reference to the time the note was to run or to the rate of interest it should bear.

Kladivo v Melberg, 210-306; 227 NW 833

Inducing third party to perform one's covenants. An owner of mortgaged premises who leases the same and agrees with the lessee to erect certain improvements on the land, and who pledges the lease with the mortgagee as additional collateral security for the mortgage debt, and who, in the foreclosure of the mortgage, fully acquiesces in and approves and ratifies an application by the receiver for authority to borrow money and therewith to make the improvements which the lessor had obligated himself to make, thereby impliedly empowers the mortgagee, who advanced the funds with which to make the improvements, to reimburse himself out of the rentals accruing under the lease and collected prior to the expiration of the period for redemption from the mortgage sale. Under such state of facts, it is quite immaterial that the mortgagee bought in the property at foreclosure sale for the full amount of the mortgage debt.

Quaintance v Bank, 201-457; 205 NW739

Failure to enter formal judgment on collateral order. The failure of the court, following a dismissal of a quantum meruit count by plaintiff, to enter a formal judgment of dismissal of the said count cannot possibly detrimentally affect the defendant on his appeal from a judgment against him on the remaining count.

Hunt v Moore, 213-1323; 239 NW 112

2 Right of Contribution

Contribution—nature of doctrine. The doctrine of contribution applies in a proper case even tho there was no contract between the parties to the effect that each would make contribution.

Licht v Klipp, 213-1071; 240 NW 722; 1 NCCA (NS) 419

Contribution between husband and wife. Husband cannot secure contribution from divorced wife for payment of notes signed by both and paid by husband when wife signed as surety only.

Hall v Brownlee, (NOR); 216 NW 953

Property rights of joint adventurers. Property and profits of joint adventure after division between participants therein become separate and distinct property of joint adventurers. However, joint adventurer sustaining loss through transactions involving mortgage received in settlement and division of property and profits held not entitled to contribution.

Scott v McEvoy, (NOR); 228 NW 16

Co-obligors on note. Joint obligor on note was obliged to reimburse co-obligor for amount paid on common obligation in excess of co-obligor's share.

Carter v Lechty, 72 F 2d, 320

Tenants in common—contribution for taxes, interest, repairs, and tiling. A surviving mother, in partition of lands left by the deceased husband, is entitled to proper contribution from the children for money paid by her for taxes, interest on mortgages, and necessary repairs, but not (under certain facts) for tiling of the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Sale—redemption by co-tenant. One who, during the period for redemption from mortgage foreclosure and sale en masse, purchases by quitclaim the undivided interests in the land of a part of the personal judgment defendants, can redeem only by paying the full amount of the sheriff's certificate of purchase, plus interest and costs, the remedy of such redemptioner being to enforce contribution from his co-tenants.

Kupper v Schlegel, 207-1248; 224 NW 813

Tenants in common—accounting—limitation of action. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common property, until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

Tenants in common—purchase of outstanding lease, etc. One of several tenants in common of the fee to land who, on his own behalf, purchases of a lessee both an outstanding long-time lease on the said land and the building thereon, erected and owned by the lessee under said lease, may not enforce contribution from his co-tenants for his outlay; neither may said co-tenants legally demand the right to make contribution to the purchasing tenant and become tenants in common of the building.

Fleming v Casady, 202-1094; 211 NW 488

Costs—persons liable—right to contribution. Principle recognized that a coparty paying all the costs taxed against coparties may enforce contribution from other coparties.

Read v Gregg, 215-792; 247 NW 199

Bank directors' note. Evidence held sufficient to present a jury question on the issue whether bank directors had entered into an agreement as to what each, as between themselves, should pay on a promissory note given for the benefit of the bank.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Heirs—decedent's debt—election of remedies. In an action to compel certain heirs to contribute a share of a judgment arising out of a decedent's ownership of bank stock, a petition that alleges defendants' liability as individuals is not an election of remedies so as to prevent an amendment thereto setting up liability against an estate as an additional party, since there was no change in the nature of relief asked and no choice was made between inconsistent remedies at the time of the election.

Daniel v Best, 224-1348; 279 NW 374

(d) PARTIES

Transacting business in assumed or trade name. Contracts which are otherwise valid are not rendered invalid because entered into by one of the parties in an assumed or trade name without having complied with the statutory command to file with the county recorder a statement of the names and addresses of the persons so carrying on the business. Such statutes are regulatory only, even tho they declare it to be "unlawful" to carry on business in an assumed or trade name without the filing of said statement.

Ambro Agency v Speed-way Co., 211-276; 233 NW 499

Ratification by stranger to contract. A contract cannot be "ratified" by a party who is a total stranger thereto.

Fitch v Stephenson, 217-458; 252 NW 130

Privity of contract. A lessee who has contracted with his lessor to erect, at his own expense, permanent improvements on the property, but who, with the consent of his lessor, subleases to a subtenant who agrees to erect such improvements at his own expense, is not personally liable to the contractor who erects such improvements under a contract exclusively with the subtenant.

Coen v Bank, 205-483; 218 NW 325

Real party in interest—equitable owner. An equitable owner of land who effects a sale of the land through an agent, but permits the contract of sale to be made between the purchaser and the legal titleholder in order to secure to the latter the amount due him, remains the real party in interest in an action against the agent to compel him to account for a consideration received by him in the sale of the land and concealed from the said equitable owner.

Hiller v Betts, 204-197; 215 NW 533

Signing in representative capacity. The principle that an agent is not personally liable on a contract when the writing shows that another person is the principal is necessarily not applicable when the signer intended to make the contract his own.

Vance v Sowden, 205-389; 217 NW 874

General rule of liability. Persons of unsound mind will be held liable as to executed contracts when the transaction is in the ordinary course of business, when it is reasonable, when the mental condition was not known to the other party, and when the parties cannot be put in statu quo.

Farmers Ins. v Ryg, 209-330; 228 NW 63

Disaffirmance—estoppel. A minor may estop himself by his conduct from disaffirming or questioning the legality of his contract.

First Bk. v Torkelson, 209-659; 228 NW 655

Written contract not signed by wife—ineffectual as to wife. Where a husband and wife had an oral agreement for the sale of farm personalty in which they had a joint interest, and a written contract, specifying manner of disposition of proceeds of sale, which was signed by the husband but not by wife, she was not bound by written contract.

Russell v Moeller, (NOR); 268 NW 60

Construction—joint contracts. A contract wherein two parties, for one and the same consideration, agree to pay to another party a named sum in stated proportions is a joint contract.

Lockie v Baker, 206-21; 218 NW 483

Associations—unincorporated—noncapacity to contract or sue. Strictly speaking, a voluntary unincorporated association organized for literary and social purposes has no right to contract and cannot maintain a suit in the name of such voluntary unincorporated association alone.

Lamm v Stoen, 226-622; 284 NW 465

Merger and consolidation—liability on contracts. A contract with a public utility corporation which has apparently gone out of business, with the advent in the same place of another corporation of identically the same nature, is not enforceable against the latter corporation, in the absence of some adequate allegation and proof of merger and consolidation.

Hess v Iowa Co., 207-820; 221 NW 194

I REQUISITES AND VALIDITY IN GENERAL—continued

(e) UNDUE INFLUENCE, DURESS, FRAUD, MISTAKE, ASSENT GENERALLY

Discussion. See 24 ILR 337—Mistake of law

Undue influence—showing required. Influence, to be undue, must be such as to destroy the free agency of the person influenced, and substitute the will of the influencer for the will of the person influenced. Evidence reviewed in detail, and held quite insufficient.

Hult v Ins. Co., 213-890; 240 NW 218

Gifts—undue influence—destroying free will. Undue influence necessary to set aside a conveyance must be enough to destroy the free agency of the grantor. Evidence reviewed and found insufficient to establish undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Undue influence—burden of proof. The mental incompetency of a grantor to execute a deed of conveyance, or the obtaining of said conveyance by the grantee by undue influence, when assigned as ground for setting aside said conveyance, must be established by plaintiff and by clear, satisfactory and convincing evidence—there being no proof that a confidential relationship existed. Evidence reviewed and held insufficient to meet said burden of proof.

Foster v Foster, 223-455; 273 NW 165

Fraud—undue influence as phase. Undue influence, a phase of actual fraud, will invalidate a transaction between persons in a confidential relationship.

Merritt v Easterly, 226-514; 284 NW 397

Nonpresumption and burden of proof. Principle reaffirmed (1) that no presumption of fiduciary relationship arises from the fact of kinship, and (2) that in the absence of proof of such relationship, plaintiff in an action to set aside a conveyance because of undue influence, has the burden to establish such fraud by convincing evidence. Evidence held quite insufficient.

Craig v Craig, 222-782; 269 NW 743

Monomania and undue influence unproved. Where a daughter, among other things, testified against her father in a divorce action and left him to live with her mother, she furnished the evidence for his belief of her lack of filial affection, and conveyances of his property executed pursuant to his intention to disinherit her upheld over her contentions that he was a monomaniac and that the conveyances resulted from the use of undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Cancellation of instruments—duress—required showing. A contract obtained by so oppressing a person, by threats regarding his personal safety or liberty as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress. So held in case of mortgages and notes.

Guttenfelder v Iebsen, 222-1116; 270 NW 900

Long acquiescence. Long recognition of a contract by a party thereto has material bearing on a subsequently raised issue of duress.

Krcmar v Krcmar, 202-1166; 211 NW 699

Duress—threat of prosecution. The execution of an obligation to make good the embezzlement of a relative cannot be deemed the result of duress when the signer is motivated, without threats, solely by a purpose to save the good name of his family, and to protect the estate of the embezzler from financial demands, and especially by a purpose to prevent a demand on the embezzler's surety bond and a criminal prosecution which would probably result from such demand.

Smith v Morgan, 214-555; 240 NW 257

Duress—pleading—conclusiveness. A party must stand or fall on the particular threat alleged by him as constituting duress. Reversible error results from permitting the jury to base its finding of duress on unpleaded matters.

Gray v Shell Corp., 212-825; 237 NW 460

Execution of note—duress. Evidence held insufficient to establish duress in the execution of a promissory note.

Mohler v Andrew, 206-297; 218 NW 71

Duress—estoppel to assert. The plea that an obligation was signed under duress must fall when the signer, during a long time following the execution of said obligation, recognized it as legally binding, and caused others to act on such recognition to their detriment.

Smith v Morgan, 214-555; 240 NW 257

Duress—inadequate instructions. On the issue whether a settlement was invalid because of duress in the form of threats to arrest and imprison, it is not sufficient to define "duress" as "compulsion or restraint by which a person is illegally forced to do an act". The jury must be told, in effect, that the duress must be such as to deprive the party of the power to enter into a contract.

Gray v Shell Corp., 212-825; 237 NW 460

Fraud pleas—status in court. In fraud actions, courts are reluctant to permit a cheater to profit by his own wrongdoing, tho at the same time courts are constrained by another consideration—that it is for the public welfare not to afford parties to written agreements such ready avenues of escape from their obligations that the purpose of lastingly recording such obligations in writing would be quite indifferently attained—the aim being to minimize both evils without accentuating either of them.

Griffiths v Brooks, 227-966; 289 NW 715

Deception constituting fraud—essential elements. The defense of fraudulent representations inducing a contract must fall when the alleged victim fails to show that he had a right to rely on, and did rely on, and was misled by, the said representations.

Boyd v Miller, 210-829; 230 NW 851

Fraud—absurd representations—reliance on —effect. It is no defense to liability for false representations, actually made with intent to deceive, and actually relied on by the one to whom made, that said representations were too unreasonable to deceive an ordinarily sensible person. The credulity of humankind remains yet unmeasured.

McTee & Co. v Ryder, 221-407; 265 NW 636

Knowledge of fraud—effect. One who knows that he is being defrauded and voluntarily submits thereto and consummates the transaction waives the fraud.

Loots v Knoke, 209-447; 228 NW 45

Validity of assent—fraudulently induced signature—negligence. A party may, by his own negligence, be precluded from relying on a fraud which induced him to sign an instrument.

State Bank v Deal, 200-490; 203 NW 293

Essential elements. A jury question is presented by testimony which tends to show that defendants, with the intent to defraud, falsely represented the value and ownership of corporate stock and its great desirability as an investment, and that the victim thereof justifiably relied thereon to his damage.

Faust v Parker, 204-297; 213 NW 794

Contracts performable. A fraudulently obtained contract will not be specifically enforced, but will, on proper plea and proof, be canceled.

Boyle v Geling, 206-1208; 218 NW 506

Deception constituting fraud. The purchaser of corporate shares of stock will not be permitted to say that he relied to his damage on false representations as to the assets of the corporation and the value thereof, and as to amount originally paid in on the stock and the dividends declared, when, at the time the representations were made, he personally knew that some of the representations were false, and when, at said time, he had equal opportunity with the seller to know and learn the actual truth of the remaining representations but did not avail himself of said opportunity.

Wead v Ganzhorn, 216-478; 249 NW 271

Negativing fraud. The plea of fraudulent representation as to the value of property must necessarily fall in the face of testimony that the complainant was a person of unusual business ability and experience and had had long, personal and intimate knowledge of the property in question far superior to that of the alleged wrongdoer.

Tobin, Tobin & Tobin v Budd, 217-904; 251 NW 720

Rescission for fraud—general denial. Where plaintiff alleges rescission of a contract of sale because of defendant's fraud, and seeks to recover the money paid, a general denial does not raise the issue that plaintiff, after discovering the fraud, elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Fraud as defense to law action—nonright to transfer. A defendant who is sued at law for damages for breach of contract, and who defensively pleads that he was fraudulently induced to enter into the contract, and prays for the cancellation of the contract, is not entitled to an order transferring the action to the equity calendar.

Randolph v Ins. Co., 216-1414; 250 NW 639

Intrinsic and extrinsic fraud. A default judgment on a promissory note is justifiably set aside and a new trial ordered on proof that the execution of the note was induced by false representations as to the consideration therefor, and that said fraud was repeated shortly prior to the entry of said judgment and the maker thereby induced to believe, until after judgment was entered, that he had no defense to said note.

Rock Island Co. v Brunkan, 215-1264; 248 NW 32

Fraud-induced signing. The peculiar arrangement of the various subject-matters of a writing, and the various sizes of the type in which said subject-matters are printed, together with the subtle manner in which the writing is presented to one who signs without reading, may justify a finding by the court or jury that the entire transaction was an intentionally fraudulent scheme to induce such signing without thought on the part of the signer that he was entering into a contract.

International Assn. v Atlantic Co., 216-339; 249 NW 240

Fraudulently procured release. Evidence reviewed at length relative to a written release of damages consequent on shockingly severe injuries, and held to present a jury question on the issues (1) of defendant's fraudulent procurement of the release, and (2) of plaintiff's negligence in signing said release.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Avoiding release for fraud. The burden of proof to avoid a written release of damages, on the ground that said release was obtained by fraud, rests on the party who alleges the fraud. Instructions reviewed and held adequately to impose such burden in substance

I REQUISITES AND VALIDITY IN GENERAL—continued

(e) UNDUE INFLUENCE, DURESS, FRAUD, MISTAKE, ASSENT GENERALLY—continued

tho not in words, assuming ordinary intelligence on the part of the jury.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Release — false representation — jury question. A jury question as to the validity of a release of personal injury damages is made by proof that the releasee represented that the doctor's charges would be "about" $10, and that the representation was materially false and was made to the releasor and acted on by him when he was alone and practically helpless from his injuries.

Robinson v Meek, 203-185; 210 NW 762; 5 NCCA(NS) 434

False promise not to sue. A statement to the effect that, if a party will sign an obligation, "he will never be sued thereon," is fraudulent when made for the purpose of deceiving the party to whom made, and when the latter justifiably relies thereon.

Commercial Bank v Kietges, 206-90; 219 NW 44

Note—jury question. Evidence held to generate a jury question on the issue whether a promissory note was signed as the result of a good-faith, nonfraudulent compromise and settlement.

Rounds v Butler, 207-735; 223 NW 487

Will contests—contract of settlement. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

Fraud by seller—future promises—opinions. In an action for the purchase price of a tradenamed beer dispenser bought for resale, purchaser, altho same may have been an inducement to buy, may neither predicate fraud on seller's promise to procure for purchaser future resales, unless the promise is made with a secret intent to disavow, nor upon statements amounting to an opinion as to superior design; however, the jury should determine whether a statement as to merchantableness is an opinion or representation of fact.

Rowe Co. v Curtis-Straub Co., 223-858; 273 NW 895

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Fraud in lease. In action for rent, answer alleging fraudulent representations regarding condition of leased building held to charge fraud, tho not alleging lessee had not examined premises.

Gamble-Robinson Co. v Buzzard, 65 F 2d, 950

Making restoration. Where defrauded party is suing to rescind, he must do equity by restoring whatever he received from wrongdoer; but, when wrongdoer as plaintiff is attempting to enforce tainted contract, he can have no relief.

First Tr. Bank v Bridge Co., 98 F 2d, 416

Bridges. In suit to foreclose trust deed securing bridge company's bonds, evidence supported findings of fraud in transfer of almost 90 percent of bonds to corporations controlled by bridge corporation's president, where transfer of bonds was partly in exchange for bridge corporation's stock contrary to statute, and partly in liquidation of pretended indebtedness.

First Tr. Bank v Bridge Co., 98 F 2d, 416

Combination of fraudulent transactions. In suit by trustees and finance corporation to foreclose fraudulent trust deed securing bridge company's bonds, most of which were fraudulently issued to such finance corporation or its successor, plaintiffs were not entitled to such modification of decree denying foreclosure as would command reissuing of certain stock to finance corporation, which canceled stock when fraudulently obtaining bonds, where court found that all of transactions leading up to issuance of bonds were steps in single fraudulent enterprise to obtain ownership of bridge after a foreclosure.

First Tr. Bank v Bridge Co., 98 F 2d, 416

Fraud in compromise. A party who compromises and settles his claim for damages consequent on an alleged fraudulent sale, and voluntarily and under no additional fraud does so on the basis of his then knowledge of the claimed fraud, may not have the compromise set aside on the claim that he later discovered an additional element of fraud in the sale not known to him when he compromised.

Williams v Herman, 216-499; 249 NW 215

Public improvements — acceptance — avoidance by proof of fraud. A nonfraudulently induced acceptance by a city council of a street pavement estops the city thereafter to plead nonperformance of the contract, but not so when the city pleads and proves that, at the time of said acceptance, the contractor, unbeknown to the council and in collusion with city employees, had constructed said pavement of a thickness substantially less than the thickness required by the contract.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Fraud—cancellation. Evidence reviewed, and held wholly insufficient to warrant cancellation of a contract for fraud in its execution.

Anders v Crowl, 210-469; 229 NW 744

Failure to read contract—effect. A party will not, in an action on a contract, be permitted to defend on the ground that his signature to the writing was obtained by false and fraudulent representations as to the contents of such writing when he is fully able to read, but does not read, and when the other party to the contract does nothing whatever to prevent such reading.

Bixler Co. v Argyros, 206-1081; 221 NW 828

Legler v West Side Assn., 214-937; 243 NW 157

Mutual mistake and fraud—proof necessary. To entitle a person to reformation of a contract, there must be some showing of fraud, ambiguity, or mutual mistake, and the general rule is that proof must be clear, satisfactory, and convincing. A contract cannot be reformed on grounds of both mutual mistake and fraud, as such claims would be mutually destructive. Evidence insufficient to warrant finding of fraud or mutual mistake.

Wall v Ins. Co., 228- ; 289 NW 901

Public improvements—void contract—sweeping deprivation of rights. A contract for the repair or reconstruction of a street pavement, entered into in total disregard of the mandatory statute requiring competitive bidding (§6004, C., '31), is void ab initio, and, if performed, it follows as a matter of public policy and irrespective of the motives of the parties:

1. That special assessments may not be legally levied to defray the cost of such performance, and

2. That the contractor may not, either, (1) on the theory of a contract implied in fact, or (2) on the theory of quasi contract or contract implied in law (unjust enrichment), recover against the city for the expenditures made by him even tho all profit be excluded therefrom.

Especially is the foregoing true when the record reveals a contract manipulation which emits an unmistakable odor of fraud and evasion.

Horrabin Co. v Creston, 221-1237; 262 NW 480

Husband and wife—property-settlement contract. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Notes—fraud—failure to establish per se. Evidence held insufficient to show as a matter of law that promissory notes were obtained by false representations.

Andrew v Peterson, 214-582; 243 NW 340

Parol—proof of fraud. The parol evidence rule is not an obstacle to the proof of fraud in obtaining a contract.

Schmidt v Twedt, 219-128; 257 NW 325

Fraud—burden of proof. A plaintiff who attacks a compromise settlement of the amount due under a policy of insurance on the ground that it was fraud-induced has the burden to show that the representations inducing the settlement were knowingly false and that he innocently relied thereon; and plaintiff must, of course, fail on a record showing that the representations were true, and that he knew they were true.

Bockes v Cas. Co., 212-499; 232 NW 156

Burden of proof. He who pleads fraud must prove it by a preponderance of the evidence.

Klatt v Bank, 206-252; 220 NW 318

I REQUISITES AND VALIDITY IN GENERAL—continued

(e) UNDUE INFLUENCE, DURESS, FRAUD, MISTAKE, ASSENT GENERALLY—continued

Evidence—weight and sufficiency. Principle reaffirmed that proof of fraud must be clear, satisfactory, and convincing.

Goff v Milliron, 221-998; 266 NW 526

Elements and degree of proof. An action to set aside a contract of compromise and settlement because of alleged fraudulent representations must be supported by proof which clearly, satisfactorily and convincingly establishes (1) the actual making of the material representations, (2) the falsity thereof, (3) the defendant's knowledge of the falsity, (4) the plaintiff's ignorance of the falsity, and (5) plaintiff's reliance thereon. If plaintiff fails to show by the required amount of proof the actual making of the representations, the court, of course, need proceed no farther, except to enter a dismissal.

Kilts v Read, 216-356; 249 NW 157

Evidence of intent to defraud—sufficiency. In an action to cancel an alleged fraud-induced compromise settlement of indebtedness, proof that in the negotiations leading up to said settlement defendant made to plaintiff inducing and material statements as of fact but which defendant, at the time, knew to be false, justifies the finding, without further proof, that defendant made said statements with intent to defraud and deceive the plaintiff.

Andrew v Baird, 221-83; 265 NW 170

Evidence required to establish fraud. Principle reaffirmed that fraud, actual or constructive, duress, and undue influence must be established by clear, convincing, and satisfactory evidence. Evidence held wholly insufficient to show such fraud in the assignment by a grandmother to a grandson of a note and mortgage.

Scott v Seabury, 220-655; 262 NW 804

Presumption and burden of proof. Fraud is never presumed. He who alleges its existence must establish it by clear, convincing and satisfactory evidence. Principle applied in an equitable action to set aside and cancel certain financial obligations allegedly obtained by fraud.

Eckhardt v Trust Co., 223-471; 273 NW 347

Signing without reading—fraud. A signed release and settlement of a claim for damages is conclusive on the signer, even tho he signed it because of a false statement of its contents, when he had ample time and ability to read, and was in no manner prevented from reading.

Crum v McCollum, 211-319; 233 NW 678

Mental unsoundness — fraud — degree of proof. A deed of conveyance will be set aside on the ground of fraud or grantor's mental unsoundness, only on clear and convincing evidence in support of the charge. Evidence held insufficient.

Ellis v Allman, 217-483; 250 NW 172

Mistake and fraud—evidence. Evidence reviewed, and held ample to justify the reformation of a deed because of the mistaken, and fraudulently induced, omission therefrom of a clause reserving to grantors a life estate in the land in question.

Foote v Soukup, 221-1218; 266 NW 904

Recovery of payments—mutual mistake—evidence—sufficiency. Evidence reviewed in an action to recover back money alleged to have been paid under a mutual mistake for heat furnished, and held insufficient to establish such mistake.

Thomas v Central Co., 217-899; 251 NW 616

Reformation of instruments—assumption of mortgage debt—mistake. Where an instrument is executed without consideration on the part of a grantee, to assume and pay the mortgage debt, the contract is not binding upon him, or if the deed is delivered in blank, or the conveyance made as security only, or if a clause if inserted by fraud, inadvertance, or mistake, without the knowledge or acquiescense of the grantee, he may have the instrument reformed in equity so as to make it express the true intent and understanding of the parties.

Guarantee Co. v Cox, 201-598; 206 NW 278

Validity—failure to read. A party may not avoid the binding effect of a contract by the plea that he did not know what he was signing, when he could read, and was not prevented from reading.

Williams v Ins. Assn., 204-991; 216 NW 269

Assent—mental weakness. Mere weakness of mental power will not constitute mental incapacity if the person retains mind enough to know and comprehend in a general way the nature and extent of his estate, the natural objects of his bounty, and the distribution he desires to make of his property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Mental capacity—existence—burden to disprove. Mental weakness from disease does not deprive a person of capacity to dispose of property until the power of intelligent action is destroyed, and executor relying thereon to recover gift made by decedent to sister has burden of proof.

Wilson v Findley, 223-1281; 275 NW 47

Adjudication of insanity—nonretroactive presumption. An adjudication of insanity creates no presumption that the person in question was insane at any particular period of time prior to said adjudication.

Davidson v Piper, 221-171; 265 NW 107

Deeds—mental incapacity—proof required to set aside. In order to set aside conveyances on the grounds of mental incapacity and undue influence, the burden is on the plaintiff to establish same by evidence which is clear, satisfactory, and convincing.

Merritt v Easterly, 226-514; 284 NW 397

Insane persons — contracts — validity — demand for accounting—burden of proof. In an action by the guardian of an insane ward to compel defendant to account for property paid or delivered by the ward to defendant, without consideration, and at various periods of time prior to the time the ward was adjudged insane, the guardian must establish the insanity of the ward at each particular transaction, or must establish such fact condition as compels an accounting. Evidence held insufficient to meet the burden of proof as to one transaction.

Davidson v Piper, 221-171; 265 NW 107

Mental incompetent—degree of proof. Evidence of mental incompetency sufficient to invalidate a contract must be clear, satisfactory, and convincing.

Hult v Ins. Co., 213-890; 240 NW 218

Insane delusion—insufficiency. The plea that a contract of purchase was impelled by an "insane" delusion, and therefore invalid, signally fails when it appears that said purchaser had some basis in fact for entertaining the belief which he did entertain, even tho it be conceded that said belief was erroneous.

Hult v Ins. Co., 213-890; 240 NW 218

Insane person—expert and lay opinions—which must yield. An expert opinion, that a person was insane at a named time prior to the time when said person was judicially declared insane, will not be permitted to outweigh overwhelming lay testimony which strongly tends to establish the contrary,—when said expert opinion is based almost wholly on information obtained from said person after she was adjudged insane, and on information obtained from the relatives of said person. (Equity case.)

Davidson v Piper, 221-171; 265 NW 107

Validity of assent—mental weakness and mental incapacity contrasted. Capacity to enter into a contract does not necessarily require entire soundness of mind.

Dunlop v Wever, 209-590; 228 NW 562

Insane person — contracts — legality. An adjudicated incompetent may not, while under guardianship, execute a valid and binding contract, since such person is under protection of the court. Contract of incompetent is voidable, not void, and facts and circumstances of each case are controlling.

Dean v Est. of Atwood, (NOR); 212 NW 371

Insane persons — guardianship — advancing funds to retry issue of sanity—discretion of court. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

(f) LEGALITY OF OBJECT

Statutes against public policy. See under Const Art XII, §1 (II)

Discussion. See 21 ILR 149—Agreements not to compete

Performance illegal—recovery thereunder barred. A contract to do an illegal act, which cannot be performed without violating the constitution, a constitutional statute or ordinance, is illegal and void, even in some cases when no penalty is provided for the violation.

Keith Co. v MacVicar, 225-246; 280 NW 496

Public policy—inducing allowance of claim against city. A contract by which a party agrees to use his influence to induce a municipality to allow a just and legal claim against it is valid, in the absenee of any showing that nonlegitimate means were contemplated.

Stoner v Stehm, 200-809; 202 NW 530

Money given to obstruct justice—recovery denied. The courts will not aid one to recover money that has been given to another to be used in obstructing or interfering with the orderly course of justice, nor will they protect one who obtains the money of another for a particular lawful purpose when he fails to so use it and refuses to return it.

Sarico v Romano, (NOR); 205 NW 862

Public policy—guaranty of solvency of bank. A contract between the state superintendent of banking and the officers and directors of a state bank, wherein the said officers and directors guarantee that the bank "is at this time solvent", and wherein they contract "to keep and maintain the bank in a solvent" condition, in consideration of an agreement that the superintendent will permit the bank to continue business, tho the superintendent questions its solvency, is a nullity, because gravely inconsistent with the statutory powers and duties of said superintendent, and therefore against public policy.

Andrew v Breon, 208-385; 226 NW 75

Trade unions—contracts—legality. A contract between a street railway company and a local labor union representing the employees will not be decreed illegal by a court of equity on the ground that the contract requires the company, against public policy, to maintain two employees on each car, (1) when the city has not exercised its undoubted power over such subject-matter, (2) when the city is not a party to the action, and (3) when

I REQUISITES AND VALIDITY IN GENERAL—concluded

(f) LEGALITY OF OBJECT—concluded

the object of the action seems to be to obtain a declaratory decree only.

Des Moines Ry. v Amalgamated Assn., 204-1195; 213 NW 264

Public improvements—patentee as bidder—legality of bid. When the city calls for competitive bids on four different kinds of paving mixtures, all of substantially the same utility, desirability, and cost of commercial materials, three of which mixtures are unpatented and one of which is patented, the bid of the patentee, tho the only bid on the patented article, to furnish and lay the patented mixture for one cent per square yard above the price (not shown to be exorbitant) at which he had agreed simply to furnish it to all other bidders, is not fraudulent and void as stifling competition, tho the cost of laying the mixture is some 28 cents per square yard.

Hoffman v Muscatine, 212-867; 232 NW 430; 77 ALR 680

Public policy—agreement to repurchase note and mortgage. A contract on the part of a trust company to repurchase a note and mortgage sold by it is not against public policy, it appearing that the company was organized to deal in commercial paper and, inter alia, to receive time deposits and issue drafts on its depositories.

Hawkeye Ins. v Central Trust, 210-284; 227 NW 637

Dragnet clause in mortgage. An oppressive and unconscionable dragnet clause in a mortgage is void as against public policy, even in the hands of a bona fide holder.

Sullivan v Murphy, 212-159; 232 NW 267

Legality of object—contract in re rule of evidence. It is not against public policy for parties to contract that, in an action on the contract, a specified nonstatutory rule of evidence shall not apply.

Lunt v Grand Lodge, 209-1138; 229 NW 323

Legality of object—reasonable restraint on trade. An agreement by the vendor of a furniture business and its good will that he will not sell or offer for sale furniture "so long as the vendee is in business" in a named town is reasonable as far as the time element is concerned, and is enforceable by injunction; and such agreement will not be held unlimited as to scope of territory (and therefore unreasonable) when the contract as a whole and the attending circumstances clearly show that the parties had in mind the town in question and the trade territory adjacent thereto.

Haggin v Derby, 209-939; 229 NW 257

Annuity contract as "wager". An annuity contract, entered into in good faith, under which the annuitant, for a lump sum payment determined by skilled actuaries, is promised a definite annual payment during the lifetime of the annuitant, does not offend against public policy—is not a "wager" contract.

Hult v Ins. Co., 213-890; 240 NW 218

Gambling contracts and transactions—property sold in furtherance of gambling. A vendor of property which is capable of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon Co. v Benakis, 213-136; 238 NW 611

Compounding offense—proof of agreement. The plea that an obligation is invalid because executed in consideration of the compounding of a crime necessitates proof of an agreement, express or implied, (1) to compound or conceal the offense, or (2) not to prosecute the same, or (3) not to give evidence thereof.

Cotten v Halverson, 201-636; 207 NW 795

Verdicts—directed on questions of law only. Directed verdicts have no place in jury trials unless the record clearly presents controlling questions of law. Record evidence held wholly insufficient to justify a directed verdict against plaintiff on the ground that as a matter of law the contract for damages for assault—on which plaintiff sued—was based in part (1) on an agreement by plaintiff to compound or conceal the commission of a public offense, or (2) on an agreement by plaintiff as an employee to refrain from circulating scandalous information concerning his employer.

In re Cuykendall, 223-526; 273 NW 117

Assessments—jurisdictional objections. The objection that an assessment for sewer is void because the work was let on a cost-plus contract when the specifications and notice to bidders were silent as to any such contract goes to the jurisdiction of the council to make the assessment, and may be raised for the first time on appeal.

Chi., RI Ry. v Dysart, 208-422; 223 NW 371

Entire or severable contract. A contract provision which is valid when standing alone is not necessarily rendered invalid by the fact that in the contract in question it is interwoven with other contract provisions which may be violative of a statute. So held where a lease sought to exempt the lessor, a railroad company, from liability to the lessee for negligence, but provided that, if such exemption legally failed, "the lessor shall have full benefit of any insurance effected by the lessee on structures erected on the premises".

Queen Ins. v Railway, 201-1072; 206 NW 804

II CONSTRUCTION AND OPERATION

(a) IN GENERAL

Discussion. See 5 ILB 65—Nonnegotiable bills and notes

Construction—intention of parties controls. In construing any instrument in writing, the primary object is to arrive at what the parties had in mind when it was drawn.

Osceola v Gjellefald Co., 225-215; 279 NW 590

When construed. Purpose of construction of a contract is to arrive at intent of parties, and, where intent is so plainly expressed that a mere reading of the contract leads the mind at once to a satisfactory conclusion as to what parties intended, there is no room for construction.

Beal v Milliron, (NOR); 267 NW 83

Different instruments treated as one. Two instruments executed at the same time and as part of the same transaction constitute, for purposes of construction, one instrument.

In re Barnett, 217-187; 251 NW 59

Policy of insurance and contract with mortgagee—construed together. A contract by which an insurance company agreed to insure all property on which a mortgagee held mortgages, and a certificate issued by the company when a policy was issued in compliance with the contract, when both referred to an open policy, must be construed together with the open policy so that a statutory provision of the open policy preventing the insured from obtaining additional insurance on his property becomes a part of his contract of insurance.

Calendro v Ins. Co., 227-829; 289 NW 485

Implied adoption of terms of related contract. A contract by a "subcontractor" to furnish the principal contractor certain artificial stone "according to the plans and specifications" of the architects of the building, together with samples and setting plans "approvable" by said architects, impliedly adopts and embraces within its terms the provisions of the plans and specifications of the general contract (between the principal contractor and the owner of the building) to the effect (1) that the architects may reject any and all materials, and their rejection shall be final; (2) that the subcontractor will, at his own expense, remove from the premises all rejected materials; and (3) that the subcontractor will replace rejected material with other proper material.

Granette Co. v Neumann & Co., 200-572; 203 NW 935; 205 NW 205

Long-continued mutual construction. Long-continued mutual construction of a contract by the parties thereto necessarily points strongly to the real intent of the parties.

Tucker v Leise, 201-48; 206 NW 258

Union Rep. Co. v Anderson, 211-1; 232 NW 492

Nelson v Hamilton, 213-1231; 240 NW 738

Melman Co. v Melman, 216-45; 245 NW 743

Mutual construction of parties. The maker of a promissory note who is unable to pay at maturity because of an unapprehended and long-continued change of condition for which the payee is not responsible, and who repeatedly and voluntarily renews his note by including in each renewal the amount of principal and legal interest then due, may not claim that he was improperly charged with interest upon interest, when such renewals appear to have been the mutual and practical construction by the parties of the contract out of which the original note arose.

Frank Cram v Trust Co., 205-408; 216 NW 71

Intention and practical construction of parties. A pledge of corporate shares of stock as collateral security will not be deemed novated into subsequently taken security and by an agreement in connection therewith, when such novation was never discussed between the parties, when the collateral holder never intended such novation, when pledgor's claim of novation was very belated, and when the parties had by their practical conduct negatived such novation.

Winfield Bk. v Snell, 208-1086; 226 NW 774

General words—scope. A written contract to act as agent "in the purchase, inspection, erection, and supervision of all labor employed and material purchased in the building of two additional stories upon" an existing building does not embrace mechanical equipment to be installed in the structure,—i. e., installation of elevators. Especially is this true when the parties never mutually treated the contract as embracing such equipment.

Parks & Co. v Howard Co., 200-479; 203 NW 247

Conflicting clauses—construction as an entirety. In an action upon written contract for real estate commission, in which there are conflicting clauses as to time of payment of commission, the rule is that a contract should be read and interpreted as an entirety rather than seriatim by clauses and that the position of clauses in such instrument is not material nor controlling.

Mealey v Kanealy, 226-1266; 286 NW 500

Intent derived from entire contract. Contract should be considered in its entirety in arriving at the intent of the parties.

State v Sprague, 225-766; 281 NW 349

II CONSTRUCTION AND OPERATION—continued

(a) IN GENERAL—continued

Selling price—standard price as basis. The selling price of goods was as definitely fixed in a contract as tho it were expressed in money or some other medium, when placed at a certain amount lower than the standard price on standard staple goods of the same kind.

Lee v Sundberg, 227-1375; 291 NW 146

Parol or extrinsic evidence affecting writings—right to enlarge writing. When the written evidence of a contract provides, in effect, that named subject matters shall be controlled thereby, oral evidence is admissible to enlarge said subject matters when the writing on its face reveals the contemplation of the parties to make such addition.

Smith & Co. v Hollingsworth, 218-920; 251 NW 749

Right to explain ambiguous clause. The rule that an ambiguous provision in a written contract may be explained by parol evidence, for the purpose of arriving at a basis on which to rest a legal conclusion as to the meaning of said provision, assuredly does not embrace the right of one party to the contract to show, (1) his understanding of said provision, and (2) the understanding of a former assignee of the contract (at a time when the question of the meaning of the provision had not arisen) as evidence of the understanding which a later assignee had or should have had of said provision.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Lease—oral explanation. The fact that both of two parties sign a lease and the accompanying rent notes does not necessarily establish, in a controversy strictly between said two parties, that each party should pay one-half the rent. The said fact is open to oral explanation.

Fisher v Nicola, 214-801; 241 NW 478

Mutual construction—effect. Conduct of a party in executing a contract as to matters over which there is no controversy may not be deemed a construction of the contract as to after-arising matters concerning which there is a controversy.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Joint and several (?) or several only (?). Whether a contract is joint and several must be determined by the terms thereof, viewed in the light of the attending circumstances, and especially in view of the practical mutual construction placed thereon by the parties.

Shively v Mfg. Co., 205-1233; 219 NW 266
Licht v Klipp, 213-1071; 240 NW 722

Practical construction by parties—partial performance—effect. Where parties to a contract have given the contract a practical construction,—as by acts of partial performance,—such construction is entitled to great, if not controlling, weight.

Dodds Co v Sch. Dist., 220-812; 263 NW 552

Conclusiveness of conditions. Distinct contract provisions to the effect that a highway between two named points shall be located on either of two clearly specified routes cannot be so construed as to justify a departure from both of said routes, nothing otherwise appearing in said contract which justifies such construction.

Clayton County v Thein, 204-911; 216 NW 276

Charities—devise—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good." Will construed, and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library, were conditions subsequent, and not conditions precedent, to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

Surrounding circumstances. A contract to the effect that certain orders for goods should be "uniformly distributed" over a named period of time does not imply that there shall be mathematical uniformity in the orders. Reasonableness in the matter must prevail.

Weitz' Sons v Fidelity Co., 206-1025; 219 NW 411

Written confirmation of oral sale—effect. Where, immediately following a telegraphic inquiry and answer as to the price of an article, and a telephone order by the buyer, the seller prepares and furnishes to the buyer a confirmatory writing, in the form of a contract reflecting his understanding, and the buyer makes no objection until after shipment is made, the contract will be deemed to consist solely of the confirmatory writing.

Lamis v Grain Co., 210-1069; 229 NW 756

Evidence attending interwoven transactions. Conversations had at the time of entering into a series of contracts at different times may be so closely related to, and so closely interwoven with, a subsequent contract as fully to justify their consideration on the issue whether the latter contract was entered into.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Forfeiture notwithstanding supplemental contracts. That part of a land-sale contract which provides for the forfeiture of the contract, in case of nonpayment of stipulated sums, applies to supplemental contracts, (1)

which simply extend the time of payments, or (2) which simply make a new division and new time of payment of former agreed payments, and in addition specifically provide that the provisions of the original contract shall not be deemed otherwise changed.

Schwab v Roberts, 220-958; 263 NW 19

Legality of object—entire or severable contract. A contract provision which is valid when standing alone is not necessarily rendered invalid by the fact that in the contract in question it is interwoven with other contract provisions which may be violative of a statute. So held where a lease sought to exempt the lessor, a railroad company, from liability to the lessee for negligence, but provided that, if such exemption legally failed, "the lessor shall have full benefit of any insurance effected by the lessee on structures erected on the premises".

Queen Ins. v Railway, 201-1072; 206 NW 804

Effect of separable invalid covenant. In an agreement to construct a grotto, an invalid provision as to restraint on alienation of property will not vitiate other valid covenants therein when separable therefrom.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Unilateral contract—voiding contract by one's own default. A provision in a deed of conveyance to the effect that if the grantee fails to make any of the payments which he has agreed to make, or fails to perform any of the obligations which he has agreed to perform the deed "shall be void and the title immediately revest" in grantor, simply means that the grantee has covenanted that if he defaults his default shall void the deed if the grantor so elects. Especially is this true when the acts of the parties indicate that they mutually so construe the contract.

Earle v Rehmann, 214-784; 243 NW 345

Equality in corporate control. Contracts relative to the purchase of corporate stock reviewed, and held to require plaintiff to pay therefor a sum equal to what defendant had paid therefor.

Holsinger v Herring, 207-1218; 224 NW 766

Avoidance of absurd, uncontemplated results. The court, in construing a contract, must necessarily view the contract as a whole, and not from the angle of one ambiguous provision, and must arrive at a conclusion, if possible, which will avoid results which, in the very reason of things, the parties manifestly never contemplated. So held as to contract provisions relative to the terms on which a party might purchase an interest in property.

Conn v Heaps, 205-248; 216 NW 73

Purchase of land. Evidence held to show that a contract for the purchase of land embraced all the land within the limits of an existing and visible inclosure.

Elliott v Horton, 205-156; 217 NW 829

Variation of terms. A written contract relative to the purchase, holding, management, and sale of land may not, in the absence of fraud or mistake, be contradicted as to that part thereof which clearly states the amount of money which one party had put into the land.

Conn v Heaps, 205-248; 216 NW 73

Assignment of rent construed. In construing the provisions of a settlement wherein a judgment debtor agreed to assign to his judgment creditor " * * * the amount due from the tenant * * * " of the debtor on certain real estate, the same " * * * being all rentals * * * " for a certain year, held, that federal agricultural conservation payments received by the debtor on the land in question were not in contemplation of the parties, hence creditor was not, on the basis of said assignment, entitled to these payments.

Cooke v Harrington, 227-145; 287 NW 837

Vendor and purchaser. Contract between the vendor and the purchaser of land in modification of the original contract of purchase reviewed, and held not to create the relation of landlord and tenant, notwithstanding the fact that the contract referred to the income from the land as "rent".

Thielen v Davenport Co., 203-100; 212 NW 352

Punctuation a fallible standard. Punctuation is ordinarily of little aid in the construction of a contract.

Seeger v Manifold, 210-683; 231 NW 479

Joint adventures—mutual liabilities of parties. A contract provision to the effect that if income fails to pay expenses of a joint adventure, "at the end of two years and thereafter", the deficiency shall be carried in named proportions by named parties, "after the two years have expired", means, that if, during the first two years, income fails to pay expenses, thereafter the named parties are liable therefor, in said proportions, whether said deficiency occurred during said two years or thereafter,—in view of other contract declarations that should any loss be incurred by reason of said adventure, such loss shall be borne by said parties in said proportions.

Fitzhugh v Thode, 221-533; 265 NW 893

Joint adventures — losses — joint liability. Two or more parties to a contract of joint adventure who agree to pay one-half of resulting losses, if any, are each individually liable for said one-half, tho no provision is made for any division among themselves.

Fitzhugh v Thode, 221-533; 265 NW 893

II CONSTRUCTION AND OPERATION—continued

(a) IN GENERAL—continued

Indemnity for operation of dam. A contract which provides that one joint owner of a dam to whom it is turned over for joint mutual use shall hold the other joint owner harmless from any damages arising from the "operation" thereof, imposes upon the operator of the dam, as between said joint owners, liability for damages to overflowed property owners, consequent on the general maintenance of the dam above the authorized level, even tho the other joint owner does reserve some control over the movable parts of said dam in order to avoid such damages.

Ellis Co. v Iowa Co., 204-1325; 217 NW 262

Contradictory provisions. A contract which provides (1) that, in consideration of a mortgagor's reconveying the property to the mortgagee (a former owner), the latter will pay the former a specified sum out of a contemplated future sale, and (2) that said sum "will not be paid under any circumstances until the farm shall have been sold", and (3) that "this contract is to continue for two years, and the sale provided for and full settlement hereunder shall be made in that time", obligates the promisor to pay the specified sum at the end of two years, even tho the land be not then sold.

Yerkes v Edmonds, 202-205; 208 NW 624

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe-line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received five dollars per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe-line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only fifty cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Undertaker's services—fee including casket. The fact that an undertaker makes a contract, wherein he furnishes a casket and a vault, tho called a contract for services, does not change the legal character of the transaction nor preclude it from being a sale of personal property nor prevent a transfer of title of said property to the purchaser.

Kistner v Board, 225-404; 280 NW 587

Indefinite duration—termination. A contract for the furnishing of a named commodity may be terminated on reasonable notice when the contract is silent as to its duration.

Hess v Iowa L. & P. Co., 207-820; 221 NW 194

Guarding against one's own fraud—effect. Contract provisions, designed to protect one from the effects of his own fraud, present no obstacles to the judicial uncovering of such fraud and the application of the proper principles thereto.

McTee & Co. v Ryder, 221-407; 265 NW 636

Construction against party using words. Principle reaffirmed that, speaking generally, a contract will be construed most strongly against the author of the words employed in the contract.

Buser v Land Co., 211-659; 234 NW 241

Ambiguity clarified by parol — doubts resolved against maker. In reviewing various canons of construction, principles reaffirmed that (1) if a contract is clear-cut and unambiguous the wording of the contract must control, but, if it is ambiguous, then parol evidence is admissible to ascertain intention of the parties, and (2) where there is ambiguity the doubt will be resolved against the party who prepared the instrument.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Strict construction against sole drafter. The rule that a written obligation will be construed most strongly against the sole drafter thereof manifestly has no application where the form and phraseology of the obligation are provided by statute.

Ballard-Hassett Co. v City, 207-1351; 224 NW 793

Perpetuities—not validated by estoppel or ratification. Since a restraint on alienation of title is in contravention of public policy, such a provision in a contract cannot be validated by ratification or estoppel.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Paving—suing city on express contract. Where a holder of invalid paving assessment certificates elects to base his recovery solely on an express written contract, no question of estoppel, waiver, ratification, or accord and satisfaction is involved.

Lytle v Ames, 225-199; 279 NW 453

Promissory note—severability of interest—when barred. Unless the maker and payee on a promissory note agree to sever the promise to pay interest installments from the promise to pay principal so as to make each promise separate and independent of the other, the interest is an incident to the principal debt and as such is barred when the statute of limitations has run against the principal debt.

Yeadon v Farmers Elevator Co., 224-829; 277 NW 709

Statutes and articles as part of contracts. The corporation charter and the statutes of the

state of domicile of the corporation become a part of any contract between the corporation and a purchaser of its stock.

Bishop v Middle States Co., 225-941; 282 NW 305

Municipal discharge of statutory liability. A contract between a county and a city wherein the city, in discharge of its statutory liability relative to one-half of the cost of paving a city boundary-line road, agrees to issue to the county road certificates in anticipation of the collection of special assessments on benefited property, cannot be construed as an unconditional promise on the part of the city to pay said statutory liability.

Polk County v Des Moines, 210-342; 226 NW 718

Unpermitted furnace installation — lawful and unlawful acts. A contract to install an oil burner, being a lawful act, is not rendered void on account of a failure to first secure an installation permit required by a city ordinance, inasmuch as this wrongful omission, not inhering in the contract, does not make an otherwise valid contract void. A distinction exists between doing a per se unlawful and prohibited thing, and doing a lawful thing in a prohibited manner.

Keith Co. v MacVicar, 225-246; 280 NW 496

Promise for benefit of third party is enforceable. The promise, made on adequate consideration, for the benefit of a third person, is enforceable by said third party.

Tracewell v Sanborn, 210-1324; 232 NW 724

Agreement for benefit of third party. Principle recognized that a third party, for whose benefit a contract is made, has a right to bring an action on the contract.

Venz v State Auto. Assn., 217-662; 251 NW 27

Transfer of property—assumption of mortgage debt—insufficiency. An agreement between partners in their contract of partnership to pay mortgages on land to which they have taken title "subject" to existing mortgages, will be deemed an agreement solely for their own mutual benefit, and not for the benefit of third parties, to wit, said mortgagees.

Bankers Tr. Co. v Knee, 222-988; 270 NW 438

"Bi-monthly payments." A contract for services providing for payments each two weeks is obligatory, even tho the party rendering the service has not worked two full weeks.

Goben v Paving Co., 218-829; 252 NW 262

Contract for haulage—unoccupied time. A contract for hauling material at a stated price per load, with right in the hirer to designate the number of hours each day and the number of days each week on which the work should be done, does not embrace a right of recovery for days on which there was no hauling to do. Especially is this true in view of repeated unexplained receipts "in full of account to date".

Peerboom v Minges, 201-706; 207 NW 753

Extraneous documents as part of contract. The words, "Regarding the sand and gravel to be used in the construction of the Spottsville Bridge, which contract you have, we agree to deliver" etc., contained in a letter of offer which was accepted, cannot be construed as making the "Spottsville" contract a part of the contract by letter, or as having any other force than to identify the subject-matter of the offer and the place of delivery.

Koch Co. v Koss Co., 221-685; 266 NW 507

Building contract—extra costs—written authorization required—effect. A written building contract which, in effect, excludes all claims for extra costs consequent on changes in the plans unless such claims are evidenced by written authorization signed by the owner or by the architect on behalf of the owner, must be given the legal effect of excluding all evidence of oral authorization, there being no plea or proof, on behalf of the contractor, of waiver or ratification.

Iowa Elec. Co. v Hopp, 221-680; 266 NW 512

Requirement of written order for extra work —effect. A building contractor may not recover for extra work performed under the oral advice of the architect when the contract specifically required a written order in such cases. Especially is this true when the owner lived in a distant part of the state and had no knowledge of the extra work until after it had been performed.

Des Moines Co. v Magarian, 201-647; 207 NW 750

Suggested change in contract—effect. A subcontractor who "suggests" to the contractor that the latter make certain modifications in the plans in the way of extras does not thereby obligate himself to pay to the contractor the cost entailed by such changes, even tho such changes were advantageous to the subcontractor.

Berger Co. v Salyers Co., 203-565; 213 NW 212

Public improvements—estimated quantities as basis for contract. In awarding a contract to build an electric plant, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

II CONSTRUCTION AND OPERATION—continued

(a) IN GENERAL—continued

Commission on "refund" of taxes—computation. Under a contract to pay an accountant a percentage of the amount "refunded" by the federal government as excess payment for certain years of income and war-profit taxes, the percentage must be computed on the actual amount returned by the government, even tho the government arrived at said amount by deducting from what would otherwise have been the refund the amount of tax inadequately paid in a certain year.

Gregerson Bros. v Cherry Co., 210-538; 231 NW 350

Homestead—debts enforceable against—contingent contract—noncertain debt. Under a written contract providing that first party will pay second party a named fee whenever second party secures the legal allowance of a certain claim in first party's favor, no debt is contracted which can be enforced against the subsequently acquired homestead of first party until said second party actually obtains the allowance of said claim, because until such allowance is obtained no debt accrues against first party which is certain and in all events payable.

Hunt v Moore, 219-451; 258 NW 114

Liability of principal and independent contractors. A contract granting the right of way over land for an underground pipe line, on payment of a certain sum per rod, and on payment of "damages to growing crops, fences, or improvements occasioned in laying, repairing, or removing lines", does not constitute an agreement by grantee that he will pay damages consequent on the negligent act—tort—of an independent contractor in injuring grantor's private bridge which was located wholly outside said right of way.

Asher v Continental Corp., 216-977; 250 NW 179

Contracts in name of association—personal liability. One who contracts for, or in the name or on behalf of, a legal nonentity, e. g., an unincorporated society or association, is personally liable on the contract unless he establishes the fact that at the time of so contracting his nonpersonal liability was agreed on.

Haldeman v Addison, 221-218; 265 NW 358

Prohibited changes—futility. A written contract, which in effect declares that no change in any portion of the contract shall be valid, cannot be construed to take away the right of the parties to subsequently orally modify the contract; nor does a provision for the termination of the contract in a certain manner preclude the parties from mutually terminating it in some other manner.

Webster County Co. v Nebraska Co., 216-485; 249 NW 203

Construction of undefined term. A stipulation that certain property was sold for the purpose of using the same as prizes in the operation of a punch board, is a concession that the term "punch board" has a general recognized meaning which must control the construction of the stipulation.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Statutes part of special assessment certificate holder's contract—no effect by amending tax sale statute. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

Right to lien—vendee's contract to keep in repair. An executory contract by a vendee of premises that he will keep the premises in reasonably good repair cannot be construed as authorizing the vendee to install an entirely new bathroom equipment, and to bind the vendor's interest therefor.

Darragh v Knolk, 218-686; 254 NW 22

Restraint of trade—scope of territory. An agreement not to engage in a named business in a named place presumptively embraces said named place and the trade territory adjacent thereto.

Haggin v Derby, 209-939; 229 NW 257

Contract pending appeal. Where, pending an appeal which involved the title to land, the rival claimants under a landlord's lien and under a chattel mortgage on the crop entered into an agreement for the harvesting and sale of the crop and the holding of the proceeds until the appeal was decided, held that the contract evidently contemplated that the final holding on appeal would settle the right of one or the other of the parties to the controversy without further litigation.

Farber v Andrew, 208-964; 225 NW 850

Varying contract by evidence of custom. Principle recognized that a clearly expressed and unambiguous contract cannot be varied by evidence of a custom.

Wall v Ins. Co., 217-1106; 253 NW 46

Evidence of custom and usage—contract prevails. Evidence of custom and usage cannot prevail against an express contract to the contrary.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Change in venue of action. A legislative change in the venue of an action may validly be applied to an existing contract.

Grain Belt Ins. v Gentry, 208-21; 222 NW 855

(b) GOOD WILL

Sale or transfer. Principle reaffirmed that the "good will" of a business may be sold or otherwise transferred.

Haggin v Derby, 209-939; 229 NW 257

Contract not to practice profession. Injunction will lie to restrain the violation of a contract wherein the defendant has agreed not to practice his profession in a named place for a stated period, the contract not being oppressive, unreasonable, or inequitable; and this is true even tho the plaintiff might have a remedy at law in the form of damages.

Proctor v Hansel, 205-542; 218 NW 255; 58 ALR 153

(c) TIME AS OF ESSENCE

Time of making payments as condition precedent. The making of payments under a contract at the exact time specified therein will not be deemed a condition precedent to the right to maintain an action for breach of the contract by the payee, when the contract does not, expressly or impliedly, make the time of payment the essence of the contract.

Armstrong Pav. v Nielsen, 215-238; 245 NW 278

Equitable relief—proof. Time will not, in equity, be deemed of the essence of a contract when the parties thereto have neither expressly so stipulated, nor, by their conduct, revealed that such was their understanding of the contract. So held as to the time of performance of a compromise settlement of mortgage indebtedness.

First Tr. JSL Bk. v Hanlon, 223-440; 273 NW 114

Services and compensation—ambiguous contract in re commissions. Contract construed, and held to provide no commission on sales until said sales exceeded a named amount.

Clinton v Music Co., 209-636; 228 NW 664

(d) WHAT LAW GOVERNS—LEX LOCI CONTRACTUS

Interstate carrier—lex loci contractus. A contract of employment for and on behalf of an interstate commerce carrier is consummated in this state when the conditional offer of employment is accepted in this state by a resident thereof, even tho the offer is made in a foreign state.

Chicago RI Ry. v Lundquist, 206-499; 221 NW 228

Mortgages—deficiency after foreclosure—action to recover—lex loci contractus. In an action in this state on promissory notes executed in Nebraska, and secured by mortgage on Nebraska land, to recover the balance due after foreclosure of said mortgage, the substantive rights of the parties must be determined by the lex loci contractus.

Federal Tr. Co. v Nelson, 221-759; 266 NW 509

What law governs. When the payee of a promissory note prepares it in blank in this state and sends it to the proposed maker in another state without any specific direction as to the method or manner in which it is to be returned to the payee after being signed, delivery takes place only when the note reaches the hands of the payee in this state. It follows that the statute of limitation of this state governs such note.

In re Young, 208-1261; 226 NW 137

Statutory bonds—law governing. A statutory bond executed in a foreign state and delivered in this state will be construed under the laws of this state.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Interest rate—when foreign law governs. In an action on a foreign contract to recover a money judgment, it is proper to allow interest at the rate authorized by the laws of such foreign state.

Benson v Sawyer, 216-841; 249 NW 424

Foreign law—comity. The law of a foreign state, which holds parties who are interested as shareholders in an unincorporated association, personally and individually liable as partners for the debts of such association even tho said parties, to the knowledge of the creditor, specifically contracted against such liability, will not be enforced by the courts of this state.

Farmers Bank v Anderson, 216-988; 250 NW 214

Place of contract—order in this state and acceptance in foreign state. The execution in this state by a proposed vendee of a naked order for goods, and the oral acceptance of such order by the vendor at his place of business in a foreign state, do not constitute the making of a contract in this state.

Anderson & Co. v Monument Co., 210-1226; 232 NW 689

Statute of limitation—what law governs. A note and mortgage representing a loan on land in a foreign state, duly signed in a foreign state by a resident thereof, and forwarded to the payee in this state, is an Iowa contract insofar as the statute of limitation is concerned, when such forwarding and receiving were with the understanding that the payee would apply the amount of the loan in discharging a prior matured mortgage on the land, if in so doing payee would be assured of a first lien.

Andrew v Ingvolstad, 218-8; 254 NW 334

II CONSTRUCTION AND OPERATION—concluded

(d) WHAT LAW GOVERNS—LEX LOCI CONTRACTUS—concluded

Iowa employment contract—action—place of business. Action for damages under oral contract of employment made in Iowa is not governed by the place where the contract was entered into, but may be maintained in state where employer's business was "localized".

Severson v Hanford Air Lines, 105 F 2d, 622

Foreign corporation without business permit—action on contract barred. A foreign stock corporation which, through its president while personally present in Iowa, sells on contract, accepts payment, part in cash and part in notes, and makes delivery of a machine, is doing business in the state, and not having first secured a permit to do business may not maintain an action on such contract.

Actino Lab v Lamb, 224-573; 278 NW 234

Common-law rule for recovery — modification. Principle reaffirmed that the common law rule that there can be no recovery on a written contract without a showing that it has been strictly performed has been modified in this state.

Gibson v Miller, 215-631; 246 NW 606

III ORAL CONTRACTS IN GENERAL

Parol evidence of execution of oral contract. Oral evidence of the execution of an oral contract, which has been performed or partially performed by one of parties, may be introduced in evidence, altho the witnesses who testified were not present when the contract was made.

Ford v Young, 225-956; 282 NW 324

Fully performed oral contract. A count which pleads a fully performed oral contract for an interest in real estate is not subject to a plea of the statute of frauds.

Halstead v Rohret, 212-837; 235 NW 293

Contemporaneous collateral contract. An oral contract contemporaneous with the execution of a written contract cannot be deemed collateral to said written contract unless said oral contract has a supporting consideration separate and distinct from the consideration which supports the written contract.

In re Simplot, 215-578; 246 NW 396

Specific performance—transfer to equity. In consolidated actions at law, involving a promissory note payable "to ourselves", the issue of specific performance of an oral contract by one of the makers to indorse the note, should be transferred to the equity calendar.

In re Divelbess, 216-1296; 249 NW 260

Statute of frauds—part performance. An oral agreement that a mortgagor of real estate will pay the mortgagee a stated sum, and, in addition, will convey to the mortgagee the mortgaged premises in full satisfaction of the mortgage debt, is not within the statute of frauds. (Contra, Fairall v Arnold, 226-977; 285 NW 664)

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

Promise to answer for debt of another—promise prior to any indebtedness. A defendant who is simply an old acquaintance of a deceased, and who, before any funeral expenses are contracted, orally promises to pay such expenses may not say that he contracted to pay the debt of "another". Evidence held to present jury question on the issue whether an oral promise was direct or collateral.

Samuels Bros. v Falwell, 215-650; 246 NW 657

Striking legally unprovable allegation. Legally unprovable allegations in pleadings are properly stricken on motion. So held where, in an action at law to recover the amount due on a written lease, defendant, while admitting the due execution by him of the written lease, pleaded a prior oral lease—contradictory of the written lease—as containing the correct terms of the leasing.

Jacobsen v Moss, 221-1342; 268 NW 162

Absence of agreement to pay entire price—effect. An allegation of oral sale of an article to a defendant is prima facie established, with consequent liability for the entire purchase price, by evidence that the price was fully understood and agreed upon, and that the defendant took and retained possession of the article, notwithstanding the fact that the defendant (1) promised to pay one-half only of the purchase price, and (2) promised, without warrant or authority, that a third party would pay the remaining one-half.

Finnerty v Shade, 210-1338; 228 NW 886

Assumption of mortgage—unallowable contradiction. A deed to land wherein the grantee assumes one-half of an existing mortgage on the land may not be modified by testimony to the effect that when the deed was executed it was orally agreed that the grantee should continue to be bound by the original written contract of sale wherein he agreed to assume the entire mortgage.

Reit v Driesen, 212-1011; 237 NW 325

Mortgages — priority — oral agreement of parties. The assignee of one of two simultaneously executed mortgages on the same property to different parties may show, in an action wherein the foreclosure of each mortgage is asked, that just prior to the execution of said mortgages it was orally agreed by all parties to both mortgages that a certain one

of said mortgages should be the first lien on the property.

Wuennecke v Hausman, 216-725; 247 NW 531

Oral wage agreement—erroneous writing—effect of employee's conduct. An oral wage scale agreement applicable to the first few weeks of employment, incorrectly reduced to writing by employer's agent, but correctly followed in paying wages which was not challenged by employee during the several years he continued in this employment, justifies a reformation of the writing to conform to the oral agreement.

Koch v Abramson, 223-1356; 275 NW 58

Oral employment agreement—no consideration for promissory note. Where one person agrees to make a loan of $3,500 to start a corporation and does loan $1,500 of this sum taking in exchange a promissory note, the borrower agreeing to employ the lender as a bookkeeper and salesman but for no definite period of time, such employment feature of the agreement is a separate contract and not the consideration for the loan.

Hillje v Tri-City Co., 224-43; 275 NW 880

Apparent scope of agent's authority—evidence. Evidence that an agent, for many years, had charge of a certain department of his principal's business and had, during said times, negotiated many written contracts relative to the subject-matter in his charge, may create a jury question on the issue whether the agent had authority, within the scope of his apparent powers, to enter into an oral contract covering the subject matter in his charge.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

Liability on note—discharge of maker—insufficient evidence. Evidence held insufficient to establish oral agreement discharging makers from liability on note and substituting purchaser of property for maker.

Citizens Bank v Probasco, (NOR); 233 NW 510

Custody and care of ward's estate—valid contract by ward. A mentally competent adult person who has, on her own voluntary application, been placed under guardianship solely because of her physical inability to freely move about and transact her business—tho no statute existed which authorized the appointment of a guardian under such application—is not deprived of power to enter into a valid oral contract for necessaries in the form of board and lodging and personal care for herself. And such contract, when executed, will be binding on her estate, even tho never approved by the probate court having jurisdiction over the guardianship.

Dean v Atwood, 221-1388; 221 NW 371

Enforceability—time limit. An oral agreement between a debtor and his creditors under which the creditors agree to accept a composition amounting to less than their demands is enforceable in equity; and if no time for performance be agreed on, the law will imply a reasonable time. Evidence reviewed and held to establish such agreement, and that the debtor's offer of performance was within a reasonable time.

Bailey v Ins. Co., 221-1195; 268 NW 173

Sale of goods—unenforceable contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency, or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease-Lied Motors v Sadler, 216-302; 249 NW 383

Oral testimony showing sale conditions—inadmissibility. In an action to recover on trade acceptances by indorsee thereof, where there is no provision in sales contract prohibiting either delivery, negotiation, or transfer of such acceptances which are regular on their face, held, proof of an alleged oral agreement that acceptances were subject to certain conditions in sale contract is inadmissible in evidence.

State Bank v Feed Co., 227-596; 288 NW 614

Lease—husband's oral termination invalid. An oral agreement between the landlord and the tenant-husband, to terminate a joint lease of the husband and wife, will not terminate their homestead rights in 40 acres of the land, so as to permit a forcible entry and detainer action, since a homestead can be terminated only in writing by both husband and wife signing the same joint instrument containing a legal description of the homestead.

Wright v Flatterich, 225-750; 281 NW 221

Insurance—assignment by deceased. An oral contract assigning insurance, made with a deceased, must be established by clear, satis-

III ORAL CONTRACTS IN GENERAL—continued

factory, and convincing evidence and leave no doubt as to the sufficiency of the consideration.

In re Hazeldine, 225-369; 280 NW 568

Implied authority of insurance agent. An insurance company which, in the issuance of policies against loss by hail, customarily dates said policies from the date of the insured's written application therefor, and not from the date of the acceptance by the company of such applications, must, notwithstanding provisions in said applications to the contrary, be deemed to have impliedly authorized its soliciting agents, on taking such applications, to validly enter into oral, preliminary contracts of insurance covering the period from the date of said applications to the date of their acceptance or rejection.

Boever v Ins. Co., 221-566; 266 NW 276

Contractor authorized by owner to hire architect. It is common knowledge that ordinarily the architect is employed by the owner and not by contractor, but evidence held to show that owner authorized contractor to employ an architect in owner's behalf.

Sugarman Co. v Phoenix System, (NOR); 243 NW 369

Well drilling—casing damage—discovery. In action on oral contract to recover for drilling well where, more than four months after judgment, defendant discovered damage to casing caused by plaintiff in digging the well, and thereupon moved for new trial, held that newly discovered evidence was not cumulative, and that under peculiar circumstances existing, the defendant was not guilty of lack of diligence in making such discovery.

Ross v Fahey, (NOR); 205 NW 855

Maintenance of fences. Principle reaffirmed that adjoining property owners may validly bind themselves by oral contract to maintain designated portions of partition fences.

Nichols v Fierce, 202-1358; 212 NW 151

Dead man statute—failure to prosecute claim or disclaimer of interest ineffective. A divorced wife of a deceased may not become a competent witness to an oral contract made jointly between herself, her mother, and the deceased, in order to subject his insurance to payment of her mother's valid probate claim, merely by failing to prosecute a similar claim of her own and disclaiming any interest in the claim in litigation, since she still has her claim and may enforce payment if the contract is established.

In re Hazeldine, 225-369; 280 NW 568

Life estate—proof of creation. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

Oral contract to devise—evidence to establish. Evidence to establish an alleged oral contract between a father and son, that the father would leave to the son a farm when he died, must be established by clear, satisfactory, and convincing evidence and it is the duty of the court to subject the evidence to every fair test which may tend to weaken its credibility.

Blezek v Blezek, 226-237; 284 NW 180

Love and affection — consideration — sufficiency. In an action to enforce grandfather's oral promise to will property to grandson in return for naming grandson after him, court held that love and affection, while being a "good" consideration, was not a sufficient consideration when unsupported by a pecuniary or material benefit, and created, at most, a bare moral obligation.

Lanfier v Lanfier, 227-258; 288 NW 104

Oral contract to convey land at death—absence of "strong equities". Absence of strong equities in favor of the plaintiff, a son trying to establish an oral contract with his father, since deceased, does not tend to weaken his corroborating testimony.

Blezek v Blezek, 226-237; 284 NW 180

Attachment when not waiver of unknown right to equitable lien. Where a father had orally contracted with a bank to pledge his son's share in his estate as security for a note executed by his son, later a bankrupt, on the understanding that payment from the father would not be sought while he lived, and where the father's copy of the contract contained an additional notation, made by a bank officer, that the bank would seek payment only from the son's share in the estate, which notation was unknown to the succeeding officers of the bank at the time of commencing an attachment action based on the father's attempted disposal of the pledged real estate, the bank's equitable lien on the real estate was not waived by the proceeding in attachment.

Emerson Bank v Cole, 225-281; 280 NW 515

Interest in real estate—part payment. Principle reaffirmed that part payment of the purchase price on an oral contract for an interest in land takes the contract out of the statute of frauds.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Contract of sale—statute of frauds. In buyer's action on an oral contract for sale of a business college where there was no competent

evidence taking case out of statute of frauds, a directed verdict for defendant was proper.

Patterson v Beard, 227-401; 288 NW 414

Change and correction—statute of frauds. An oral agreement to change a long established boundary fence is enforceable when taken out of the statute of frauds (1) by the mutual taking of a new survey, (2) by the building of a new fence in accordance with the said survey, and (3) by taking possession of the lands inclosed by such new fence.

Cheshire v McCoy, 205-474; 218 NW 329

Debt or default of another—original or collateral promise. The statute of frauds relative to answering for the debt of another does not enter into the proof of an oral contract to the effect that plaintiff should perform stated services and that the defendant would unconditionally pay therefor.

Richmann v Beach, 201-1167; 206 NW 806

IV MODIFICATION AND MERGER

General rule. Principle reaffirmed that there can be no modification of a contract unless there is a meeting of the minds of the parties on the modification.

Heggen v Coal Co., 217-820; 253 NW 140

Evidence to be clear and satisfactory. A court of equity will only reform a written instrument when it is moved to do so by clear and satisfactory evidence of a mutual mistake or other reason for reformation.

Knott v Ins. Co., 228- ; 290 NW 91

Oral contract merged in written. Principle reaffirmed that the terms of an oral contract are presumed to be merged into a subsequently executed written contract covering the same subject matter.

Jacobsen v Moss, 221-1342; 268 NW 162

Subsequent contract working merger. A contract is merged into a subsequent contract only in those cases where the subsequent contract completely covers the subject matter of the first contract, is inconsistent with the first contract, and is intended as a substitute for the first contract.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Nonmerger of oral in subsequent written contract. An oral contract on a distinct consideration, and in no manner varying or contradicting a later written contract between the same parties on another and different consideration, is not merged in said written contract, even tho said oral contract was the inducing cause for the execution of the written contract.

Stoner v Stehm, 200-809; 202 NW 530

Contemporaneous writing. An absolute promise in a promissory note to pay on or before a named time cannot be deemed qualified and limited by a contemporaneous written contract which reaches no further than a promise by the maker to exercise certain economies in his business and thereby possibly effect payment before the stipulated time.

Hughes v Campbell, 202-1352; 212 NW 115

Independent undertakings. An original written contract obligation is necessarily not abridged, enlarged, or modified by a subsequent undertaking which is independent of and separate from said original undertaking.

Schmoller Co. v Smith, 204-661; 215 NW 628

Evidence—sufficiency. Evidence reviewed and held wholly insufficient to establish a pleaded modification of a contract relative to the compensation of an agent for his services and for the use of his automobile in performing said services.

Hueston v Pointer Co., 222-630; 269 NW 754

Mutual partial modification—remainder in force. In a well drilling contract, a provision to use 4 inch casing all the way to the bottom of the well may be subsequently modified by an oral agreement to use 3 inch pipe, implied from the conduct of one party in accord with a change proposed by the other; but such a modification will not, necessarily, also modify the contract price per foot for the drilling.

Collins v Gard, 224-236; 275 NW 392

Right of action and defense—grounds—mistake. Equity will, on clear, satisfactory, and convincing evidence that such was the actual contract of the parties, insert in a contract for the exchange of lands a provision that one of the parties shall pay the interest on the mortgage on his land up to the time he delivers possession of the land; and this is true tho, at the time of executing the contract, the parties mistakenly believed that a particular clause of the contract covered said matter of interest.

Wormer v Gilchrist, 210-463; 230 NW 856

Fraud-induced contract. One who, after discovering that he had been fraudulently induced to enter into a contract of lease, secures a modification of the contract substantially beneficial and advantageous to himself, thereby waives the fraud and the original rights arising by reason thereof.

Timmerman v Gurnsey, 206-35; 217 NW 879

Prohibited changes—futility. A written contract, which in effect declares that no change in any portion of the contract shall be valid, cannot be construed to take away the right of the parties to subsequently orally modify the contract; nor does a provision for the termination of the contract in a certain manner preclude the parties from mutually terminating it in some other manner.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

IV MODIFICATION AND MERGER—concluded

Consummating contract in manner inconsistent therewith—effect. An original contract of sale of real estate is necessarily merged and discharged when the parties, on final settlement day, consummate the deal in a manner which is entirely inconsistent with the original contract as regards parties, price, terms, payments, conveyances, assumption of mortgage clause, and covenants generally.

Reit v Driesen, 212-1011; 237 NW 325

Contract to convey merged in resulting deed. A contract to convey land is presumed to be merged in the subsequent deed executed in performance thereof, except that the contract may be resorted to for explanation of an ambiguity or collateral agreement not incorporated in the deed, but, in instant case, deed held to be unambiguous when it warranted against all persons other than those asserting rights under existing tenancies and when the contract provided for possession upon delivery of the deed subject to all leases. Thereunder, the provisions of the contract merged in the deed so that grantee could not look to grantor for relief when the tenant in possession refused to vacate.

Swensen v Ins. Co., 225-428; 280 NW 600

Physician's certificate—conclusiveness—estoppel—absence of fraud. An Iowa statute providing that medical examiner's certificate of health issued to insured would estop insurer from setting up in defense of action on policy that insured was not in condition of health required by policy at time of issuance or delivery thereof, unless certificate was procured by fraud of insured, had the effect of changing contract through estoppel. A statute of this character does not limit the equitable jurisdiction of federal court and is enforceable therein, whether statute had been construed by Iowa supreme court as being rule of substantive law passing into contract, or as being merely a remedial right.

Mutual Ins. v Cunningham, 87 F 2d, 842

V NOVATION

Affirmative showing required. There is no such thing as an implied novation.

Blank v Michael, 208-402; 226 NW 12

Essential elements to establish. The necessary legal elements to establish a novation are (1) parties capable of contracting, (2) a valid prior obligation to be displaced, (3) consent of all parties to the substitution based on sufficient consideration, and (4) extinction of the old obligation and creation of a new one.

Wade v Central Co., 227-422; 288 NW 439

Pleading—sufficiency. A plea of novation must allege a mutual assent of all the parties affected by the transaction.

Benton v College, 202-15; 209 NW 516

Evidence—sufficiency. Evidence held ample to establish a novation under a contract for the purchase of real estate.

Montgomery v Beller, 207-278; 222 NW 846

Contract for sale of realty—consideration. A contract of novation under a contract for the sale of real estate is supported by ample consideration when the vendor agrees to divide the original contract and to have it executed by different parties and in a different manner than as provided in said original contract.

Montgomery v Beller, 207-278; 222 NW 846

New agreement supersedes old contract. When the parties to a contract mutually enter upon a new agreement abandoning the old contract, the old agreement is extinguished and any new rights accruing because of a default will not revive the old agreement, but will arise under the new and substituted contract.

Munn v Drakesville, 226-1040; 285 NW 644

New policy substituted for original contract—conclusiveness. Where a life policy is surrendered by insured to insurer, and a new policy issued therefor, the later executed policy is conclusive as to what the contract was, in the absence of mistake or fraud, and the probative force of the prior policy goes no further than the extent to which it may tend to prove there was a mistake.

Knott v Ins. Co., 228- ; 290 NW 91

Promissory note as accommodation. On the issue whether promissory notes were received by a bank in payment of commercial paper surrendered by the bank, it may be shown that the notes were intended by all the parties to be accommodations for the bank receiving the surrender and to enable the surrendering bank to account, as a matter of bookkeeping, for the paper in question, and that the said accommodation notes were not to be paid by the makers thereof, but by other means.

Flack v Bank, 211-6; 228 NW 667
Flack v Bank, 211-15; 228 NW 670

Mere extension of note at reduced interest. An agreement to extend the time of payment of a promissory note, and mortgage securing it, at a reduced rate of interest does not constitute a novation.

Des Moines JSL Bk. v Allen, 220-448; 261 NW 912

Consideration, failure of — nonestoppel to plead. The maker of a promissory note is not estopped to plead failure of consideration for the note as to him because of the fact that, subsequent to the signing, he was a party to a contract under which there was a novation of security.

Insell v McDaniels, 201-533; 207 NW 533

Insufficient showing. A purchaser of real estate who has assumed the payment of existing incumbrances may not base a novation

of his obligation on the simple expedient of causing the deed to be made to his wife as grantee.

Richardson v Short, 201-561; 207 NW 610

Consummating contract in manner inconsistent therewith. An original contract of sale of real estate is necessarily merged and discharged when the parties, on final settlement day, consummate the deal in a manner which is entirely inconsistent with the original contract as regards parties, price, terms, payments, conveyances, assumption of mortgage clause, and covenants generally.

Reit v Driesen, 212-1011; 237 NW 325

Pledge of stock—intention and practical construction of parties. A pledge of corporate shares of stock as collateral security will not be deemed novated into subsequently taken security by an agreement in connection therewith when such novation was never discussed between the parties, when the collateral holder never intended such novation, when the pledgor's claim of novation was very belated, and when the parties had by their practical conduct negatived such novation.

Winfield Bk. v Snell, 208-1086; 226 NW 774

Intent as controlling element. An agreement between a partnership and the individual members thereof, on one side, and a corporation, on the other side,—the corporation having succeeded to the business of the partnership,—to the effect that the corporation "hereby assumes and takes over as its own all the liabilities and obligations of said partnership", does not constitute a novation of an individual claim held by one of the partners against the partnership, unless the parties actually intended such novation.

In re Talbott, 209-1; 224 NW 550

Action for purchase price. A plaintiff-vendor who seeks to recover on a contract of sale of land, but pleads that, on performance day, he conveyed to a party other than the contract purchaser, but under an oral agreement that, by so doing, the contract purchaser would not be released, must stand or fall on his chosen theory. In other words, he must establish his own theory of non-novation.

Bobbitt v Van Eaton, 208-404; 226 NW 79

Contract for employment of acrobats—assignment to booking agency — non-novation. Where a broadcasting company assigned to a booking agency an oral contract for employment of an acrobatic team, and such agency subsequently became the booker of the acrobats under a written contract, the company was not relieved of liability under the employment contract on the ground of "novation", because there was no evidence that all parties consented to a substitution of the agency for the company.

Wade v Central Co., 227-422; 288 NW 439

Accord and satisfaction (?) or novation (?). An "accord" without "satisfaction" is a nullity; but nevertheless, the agreement of the parties, even tho the subject-matter be a tort, may rise to the dignity of a novation—the mutual substitution of a new obligation for an existing one which is thereby extinguished. Whether an obligation has been novated is necessarily a jury question, on conflicting testimony.

Wheeler v Woods, 205-1240; 219 NW 407

Novation as species of accord and satisfaction. Since the term "novation" is frequently applied when a substitution of obligation is effected as the result of an accord and satisfaction, it may be said that novation is a species of accord and satisfaction.

Munn v Drakesville, 226-1040; 285 NW 644

Substitution of new debtor. A debtor may validly contract with another that such other will wholly take over and assume the debtor's obligation, and such debtor is thereby fully released if the creditor acquiesces in the substitution of the new debtor and subsequently accepts acts of performance by the latter.

Reimers v Tonne, 207-1011; 221 NW 574

Substitution of new debtor—consent. A creditor may, by his actions and conduct, consent to the substitution of a new debtor.

Andrew v American Tr. Co., 219-1059; 258 NW 921

Nondischarge of existing obligations—extension of mortgage. An agreement between a mortgagee and an assumptor of the mortgage for an extension of time of payment does not constitute a novation, when the prior existing obligations for the same debt are not referred to, and when such extension agreement was entered into without the knowledge or consent of prior existing obligors.

Royal Ins. v Wagner, 209-94; 227 NW 599

Substitution and release—determination—new contract not creating presumption. The mere fact of the making of a new contract by which a third party becomes obligated to pay another person's previously existing indebtedness does not alone give rise to presumption that the creditor accepts the new debtor and releases the original debtor—question as to whether there is such a release is one of fact to be determined by all the evidence in the case.

Wade v Central Co., 227-422; 288 NW 439

VI ACCORD AND SATISFACTION

Discussion. See 3 ILB 240—Accord and satisfaction; 24 ILR 697—Outmoded terminology

Accord without satisfaction. An accord without a satisfaction is a nullity.

Hughes v National Corp., 216-1000; 250 NW 154

Officers—compensation—acceptance in part—effect. An officer who accepts part of a statutory compensation does not thereby es-

VI ACCORD AND SATISFACTION—cont.

top himself from enforcing payment of the balance.

Broyles v Mahaska County, 213-345; 239 NW 1

Action commenced—note to settle unlawful transaction—estoppel. Where, after an original notice of an action to recover commissions in purchase and sale of grain on Board of Trade had been served so that action was deemed commenced under the statute providing for service of original notice, a compromise was consummated whereby defendant executed a note extending payment for a period of 6 months, defendant is estopped in subsequent action on note to plead or prove that transactions were unlawful, since, regardless of validity of original transaction, the compromise, effected in good faith, estopped either party from any further litigation of matter in dispute.

Hoyt v Wickham, 25 F 2d, 777

Inadvertent cashing of check. When parties are in a bona fide dispute as to the amount due on account, the receipt by the creditor from the debtor of a check marked "In full of account," and accompanied by a letter to the same effect, and the cashing of said check in the ordinary course of business, constitute a complete accord and satisfaction, even tho the creditor, in cashing the check, overlooked the fact that both the check and the letter notified him that the remittance was in full settlement of the account.

Minnesota Co. v Register Co., 205-1228; 219 NW 321

Bona fide dispute. The settlement of a bona fide dispute as to the amount of an account is ample consideration for an accord and satisfaction.

Minnesota Co. v Register Co., 205-1228; 219 NW 321

Nature and requisites—execution. Principle recognized that an accord and satisfaction can exist only when there is a bona fide dispute, a compromise as to the amount to be paid, and an execution of the compromise agreement.

Olson v Shuler, 203-518; 210 NW 453

Debts included—plain and literal meaning controlling. In construing an "assumption-and-agreement-to-pay" clause in a deed of conveyance which, concededly, was executed and delivered in connection with a compromise and settlement agreement between a creditor and debtor, the court has no choice but to give effect to the plain and literal meaning of the words employed in said clause, there being no competent evidence dehors the written clause reflecting a different intention.

Monticello Bk. v Schatz, 222-335; 268 NW 602

Offer accepted or rejected as a whole. When a town warrant was issued in full payment of a disputed claim and was accepted with such knowledge, there was an accord and satisfaction of all claims, as such offer must be accepted or rejected as a whole.

Munn v Drakesville, 226-1040; 285 NW 644

Claims against county. The allowance by the board of supervisors of a lump sum on a claim consisting of several unliquidated items, and the taking and cashing by claimant of a warrant for said allowed amount, constitute a final accord and satisfaction.

Smith v Cherokee Co., 219-475; 257 NW 788

When plea unallowable. A plea of accord and satisfaction is properly stricken from a pleading when the pleading affirmatively shows that no basis existed or could exist for the plea—affirmatively shows that no bona fide dispute existed or could exist as to the amount due under the instrument on which suit was brought.

Jacobsen v Moss, 221-1342; 268 NW 162

Burden of proof. A debtor has the burden to establish his plea that the creditor accepted a check in full payment of the debt in question.

Kruidenier Co. v Manhardt, 220-787; 263 NW 282

Evidence—sufficiency. Evidence held insufficient to establish per se an accord and satisfaction.

Goben v Paving Co., 218-829; 252 NW 262
Koch Co. v Koss Co., 221-685; 266 NW 507

Evidence—sufficiency. Evidence exhaustively reviewed in an equitable action wherein was involved the issue of accord and satisfaction, and, inter alia, held that it is not in accord with reason that an aged and experienced, and financially involved business man would convey property of substantial value (and the last remnant of his once ample fortune) for no consideration whatever except that the grantee would pay to the public authorities the taxes thereon.

Stuart v Beans, 221-307; 263 NW 816

Payment—jury question. The issue of accord and satisfaction is for the jury when the evidence is not clear whether one party tendered the sum in full settlement, or, if he did so tender it, whether the other party so accepted the sum.

Zabawa v Osman, 202-561; 210 NW 602

Question of fact—conclusiveness of findings. Whether the facts and circumstances attending the receipt by a creditor from a debtor of a check for an amount less than claimed by the creditor, and the cashing of the check by the creditor, constituted an accord and satisfaction may be a question of fact; and the findings of the court thereon in a law action tried to

the court, on conflicting and supporting testimony, are necessarily conclusive on the appellate court.

Barth Co. v Kelly, 211-1154; 235 NW 471

New trial—grounds. New trial is necessarily proper when based on the established ground that the court failed to submit a defensive issue (e. g., accord and satisfaction) as to which the testimony makes a jury question.

Goben v Paving Co., 204-466; 215 NW 508

VII RESCISSION OR ABANDONMENT

(a) IN GENERAL

Technical breach. Principle reaffirmed that a purely technical and nonsubstantial breach of a contract affords no proper grounds for a rescission.

White v Massee, 202-1304; 211 NW 839; 66 ALR 1434

Executory contract—mutual disregard. Mutual disregard of an executory contract nullifies it.

Kortum v Kortum, 211-729; 234 NW 220

Cancellation by defaulting party. A contract may not be canceled by the arbitrary action of a party who is in default.

Atlas Co. v Huffman, 217-1217; 252 NW 133

Rescission as alternative remedy. Rescission will not be granted as a matter of course on denial of specific performance.

Davis v Eaton, 211-837; 234 NW 252

Burden of proof. To sustain a cause of action for rescission, proof of fraud must be clear, satisfactory, and convincing, and a mere preponderance is not sufficient.

Wiley v Bank, (NOR); 257 NW 214

Fraud—irrevocable waiver of action for damages. One who, with full knowledge that he has been fraudulently inveigled into signing an option contract for the sale of his property, elects not to rescind but to affirm and perform the contract, and does perform at a time when the contract is wholly executory and without consideration, thereby irrevocably waives, as a matter of law, any and all right to sue the wrongdoer for damages.

Ankeney v Brenton, 214-357; 238 NW 71

Loss of right by foreclosure. The purchaser of a mortgage-secured promissory note may not rescind on the ground of fraudulent representations as to the value of the security when, with full knowledge of the fraud, he forecloses the mortgage, bids in the property for the full amount of the judgment, and later takes a sheriff's deed to the premises.

Iowa Loan Co. v Bank, 200-952; 205 NW 744

Rescission for fraud—general denial—effect. Where plaintiff alleges rescission of a contract of sale because of defendant's fraud, and seeks to recover the money paid, a general denial does not raise the issue that plaintiff, after discovering the fraud, elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Mutuality of rescission—proof required. The vendee of goods who, in an action for the purchase price, defends on a plea of rescission must show that the rescission was mutual, expressly or impliedly.

Central Co. v Clancy, 206-1090; 221 NW 774

Rescission of sales contract — incurable breach. A dairyman who contracts to have his cows tested for tuberculosis, and to sell his milk to a retailer at a price substantially in excess of the market price for other milk of the same butterfat test, fatally breaches his contract by failing, for twelve months, (§3077, C., '27) to have his cows so tested, even tho a test, subsequent to the retailer's rescission, shows that the cows are free from tuberculosis.

Niederhauser v Jackson Co., 213-285; 237 NW 222

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Corporate contract—rescission by stockholder unallowable. A stockholder may not rescind a contract entered into by the corporation of which he is a stockholder and another corporation.

Andrew v Trust Co., 219-921; 258 NW 911

Termination without cause. A contract for the transportation of pupils for an entire school year, but containing a reservation by the board of right to terminate the contract at any time, enables the board to terminate the contract peremptorily at its pleasure, and without assigning any reason for such action.

Black v School Dist., 206-1386; 222 NW 350

School sites—contract—rescission and cancellation. The purchase by a school board of a schoolhouse site after bonds for such purchase had been duly voted, but prior to any bond levy, and the due issuance of a warrant in payment for such site, are not canceled or rescinded by the subsequent action of the

VII RESCISSION OR ABANDONMENT—continued

(a) IN GENERAL—continued

electors in voting to rescind their former action authorizing the bonds.

Looney v School Dist., 201-436; 205 NW 328

Contract employing physician—future practice restraint unaffected by indefinite employment extension. When a physician is employed by a medical clinic in a locality where he is not acquainted, his contract, agreeing that at its termination he will not practice his profession for ten years within a certain locality, is not invalidated by reason of an indefinite extension of the employment period mutually acted upon by all parties, and injunctive relief was properly granted to employer.

Larsen v Burroughs, 224-740; 277 NW 463

Contracts to devise. The abandonment of a contract which is, in effect, a contract to devise property, and which is highly advantageous to the party who is alleged to have done the abandonment, must be established by very clear and cogent testimony.

Kisor v Litzenberg, 203-1183; 212 NW 343

Alteration of plans — nonabandonment of contract. Where a city council hired an engineer to reconstruct a sewage disposal plant for a lump sum compensation, and thereafter adopted a motion to hire an engineer to investigate the adoption of a "trickling filter system" as a substitute for the original plan, to which the engineer who had been employed protested that the original contract was for the entire engineering work, and where a motion before the council to reject engineer's original plans was lost, but a motion was adopted to instruct the engineer to change the original plans, nevertheless the adoption of such motion to change original plans was not an abandonment of the original contract as respects the right of the engineer to compensation.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Banking corporations — merger contract — nonrescission. A contract for the merger of two banking corporations must be deemed final and irrevocable, even tho there has not been full compliance with every provision thereof, (1) when the corporation receiving the merger has passed into insolvency, (2) when, prior to such insolvency, substantial and good faith acts were performed by both parties in fulfillment of the contract, (3) when neither corporation ever attempted to rescind, and (4) when the restoration of the status quo would probably be impossible.

Andrew v Trust Co., 219-921; 258 NW 911

Instructions—nonrequest for elaboration. An instruction to the effect, in substance, that plaintiff must prove that he fully carried out the contract sued on necessarily embraces and covers defendant's contention that the plaintiff had abandoned the contract. If defendant desires elaboration of the idea of abandonment, he must request an additional instruction.

Hornish v Overton, 206-780; 221 NW 483

Forfeiture by delay. The right of rescission of a contract of purchase is per se forfeited by a delay of almost two years after the full execution of the contract, with knowledge, or with ample means of acquiring knowledge, of every fact relevant to the deal.

Edmunds v Ninemires, 200-805; 204 NW 219

Nonfatal delay. A delay of over a year in declaring a rescission because of a failure of title to the land contracted for is not shown to be unreasonable, on a record revealing a conflict as to negotiations for a settlement of the controversy.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Cancellation—proceedings and relief—laches —when no defense. Delay, on the part of the signer of an unmatured, negotiable promissory note, in bringing action to cancel the note for want of consideration, is quite immaterial when the delay has not been harmful to anyone.

Sterner v Bank, 221-1362; 268 NW 158

Sales—reasonable time for rescission—jury question. Whether the right to rescind a contract of sale for fraud was exercised within a reasonable time is ordinarily a jury question. Held that a rescission of a contract for the purchase of a store within five or six days after discovery of the fraud presented a jury question on the issue of reasonable time.

Blecher v Schmidt, 211-1063; 235 NW 34

Rescission within reasonable time — jury question—waiver. Where an Iowa seller's agent, by falsely representing that buyer would have exclusive territory, fraudulently induced a buyer in Texas to purchase vending machines and confections to be vended therein, the buyer, after discovering their falsity, waived such representations by accepting the machines and placing them in operation for about two months, but as to representations that the confections would withstand heat and humidity of Texas climate, and that a surety company bond would be filed with a certain bank, question as to whether rescission was made within reasonable time after discovery of falsity was for jury. It is buyer's duty to rescind contract within reasonable time after discovery that representations by seller are false, and what is a reasonable time must be determined with reference to all the circumstances, and ordinarily such question is for the jury.

Robinson v Main, 227-1195; 290 NW 539

Delay in rescinding induced by promises of other party. When the purchaser's delay in rescinding a contract to buy real estate was

induced by promises and representations of the vendor, there could be no complaint because rescission was not made within a reasonable time.

Trammel v Kemler, 226-918; 285 NW 196

Use and occupancy—measure. When the assignee of an option contract for the purchase of land rescinds after he has been put in possession, his liability for the use and occupancy of the land is measured by the reasonable value thereof, and not by the provisions of the rescinded contract.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Cancellation—right of action—nudum pactum. An unmatured, negotiable, promissory note, in the hands of the original payee, will be canceled, in equity, as to a party who signs it without consideration after the transaction giving rise to the note as to the other signer had been fully closed without obligation on the part of said other signer to obtain the additional signature in question.

Sterner v Bank, 221-1362; 268 NW 158

Defaulting plaintiff—equitable relief denied. Plaintiff vendee, after first defaulting under a contract for the sale of real estate, may not in equity, while still in default, rescind the contract because defendant vendor had later allowed a prior mortgage on the real estate to be foreclosed, and, therefore, had no title to deliver if plaintiff fully performed.

Fitchner v Walling, 225-8; 279 NW 417

Loss of right. A purchaser of land may not rescind the contract, prior to final performance, because the vendor did not have title and because the incumbrances on the land exceeded the amount the purchaser was to assume, when, with full knowledge of such facts, he takes possession of the land and makes payment on his contract; neither may the purchaser rescind at a time when the deed is due, under the contract, from the vendor, if he (the purchaser) is then in default.

Keifer v Dreier, 200-798; 205 NW 472

Subscription contract—when rescission unallowable. Principle reaffirmed that a contract of subscription for corporate shares of stock cannot be rescinded after the insolvency of the corporation, there being corporate creditors who became such after the subscription was executed.

Andrew v Bank, 219-921; 258 NW 911

Contract termination. A nondefaulting party to a contract who, because of a total breach of the contract by the other party thereto, proceeds to the formal termination of the contract in the manner required by the contract is standing upon and enforcing the contract, and not rescinding it.

Dunkelbarger v Ladd, 204-1208; 212 NW 726

Rescission by assignee—effect. The assignee of an option contract does not, by giving notice that he rescinds the contract between the original optionor and optionee, destroy the rights of the original optionee under the contract. Especially is such notice inconsequential when the record shows that the original option had no value.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Disaffirmance—sufficiency. Where a party has not received the property purchased and paid for, and the status quo has not been disturbed, a notice to the adverse party of disaffirmance and rescission is all-sufficient.

Ayres v Nopoulos, 204-881; 216 NW 258

Fraud—nonvariance. An allegation of fraudulent representations of title, as a basis in equity for rescission of a contract of purchase, is sufficiently met by proof of a mutual mistake by the parties as to the title.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Husband and wife—property-settlement contract—fraud—insufficient defense. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Finality of election—right to change remedy. A plaintiff who pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, may, upon discovering his inability to prove the rescission, amend his pleadings and pray for damages caused by the fraud. (Note that the reverse of this proposition presents a different rule.)

Reinertson v Struthers, 201-1186; 207 NW 247

Setting aside executed contract. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Innocent false representations. False representations, when material and justifiably relied on, furnish ample grounds for an equitable decree of rescission, even tho it be conceded that the representations were innocently made.

Lorenzen v Langman, 204-1096; 216 NW 768

Nature or subject of action—real property—action to establish and foreclose vendee's lien. An action by the vendee of land for rescission of the contract, for personal judgment against the defendant, and for the establishment and foreclosure of a lien on the land for the purchase money paid under mutual mistake, is properly brought in the county in which the

VII RESCISSION OR ABANDONMENT—continued

(a) IN GENERAL—concluded

land is located, irrespective of the residence of the defendant.

Lee v Bank, 209-609; 228 NW 570

Proper law action nontransferable in toto. An action brought on a contract (e. g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract.

Poole v Poole, 221-1073; 265 NW 653

Adjudication as to legal effect of contract. A final holding on appeal that a certain agreement between a corporation and a purchaser of its corporate shares constituted an absolute rescission of a contract of purchase of such shares becomes the law of the case, and precludes the after-presented contention that such agreement was a contract of indemnity only.

In re Selway Co., 211-89; 232 NW 831

(b) TENDER OR RETURN OF PROPERTY

Rescission—condition precedent. Rescission of a contract of sale imperatively requires a return of the status quo.

Rogers v Hale, 205-557; 218 NW 264

Rescission by buyer—restoration of goods—tender—placing goods within jurisdiction of court unnecessary. When a buyer rescinds contract for purchase of goods, his duty to restore the status quo only requires that he tender return of the goods at place of delivery, and the tender may be kept good by holding them in readiness for delivery to seller at such place on demand, it not being necessary that the goods be actually or constructively placed within the jurisdiction of the court.

Robinson v Main, 227-1195; 290 NW 539

Rescission by buyer—restoration of worthless goods unnecessary—buyer's duty to do substantial justice. On rescission of contract for purchase of vending machines and confections to be vended therein, the buyer was not obliged to return confections that had become worthless, and his failure to tender to seller a few coins found in the vending machines did not constitute such a failure to restore the status quo as would prevent him from recovering purchase price, the buyer being required only to do substantial justice to the seller.

Robinson v Main, 227-1195; 290 NW 539

Useless formal tenders unnecessary. A formal tender of property as a basis for the rescission of a contract is excusable when the one to whom the tender is to be made has given advance warning that the formal tender, if made, will not be accepted.

McTee & Co. v Ryder, 221-407; 265 NW 636

Indorsement of check. An agreement between the indorser of a check and the indorsee-bank, to the effect that the indorser would return to said indorsee that which he had received for the check, and that the indorsee-bank would return the check to the indorser, constitutes a full rescission of the contract of indorsement.

Runge v Benton, 205-845; 216 NW 737

Inability to return property. The purchaser of corporate bank stock cannot rescind when he has pledged the stock and is unable to tender it back to the seller.

Rogers v Jungkunz, 204-1119; 216 NW 705

Plea of return of consideration. The maker of a renewal note may not plead that said renewal note was executed to the indorsee of the original note because of the false and fraudulent representation of said indorsee that he was a holder without notice or knowledge of fraud in the original note, unless said maker also pleads and proves that he has returned or tendered everything of value received by him for the original note. So held where the original note was given for corporate shares of stock.

Continental Bank v Greene, 200-568; 203 NW 9

Judgment on note—relief—indivisible transaction. A party who is entitled to judgment for the return of a promissory note is necessarily entitled, on proper prayer, to a judgment for the return of another note which grew out of the same transaction and was attended by the same conditions.

Breza v Federal Society, 200-507; 205 NW 206

Status quo—nonapplication of principle. The rule of law that, when a party to a contract of sale rescinds the contract, he must restore the status quo has no application to a case where the vendor repossesses himself of the property after default of the vendee and, under and in accordance with the terms of the contract, retains the preceding payments and betterments made on the property as liquidated damages for nonperformance of the contract, depreciation, and rental; and in such case it is immaterial that the vendor, after so doing, surrendered the unpaid notes and released the contract of record.

Stauffer v Motor Co., 207-1038; 221 NW 918

Recovery for betterments. The assignee of an option contract for the purchase of land may, upon rescission, recover of his assignor the value of betterments which he—the assignee—has necessarily been compelled to place on the land.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Nonrecovery. The assignee of an option contract for the purchase of land may not, upon rescinding, recover of the original option-

or (with whom he has no contract) the amount paid for the option.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Unallowable rescission by purchaser. A vendor who is able to convey, who is not legally in default, and who has at all times insisted on performance by the purchaser, does not (1) by serving the 30-day notice of forfeiture, (2) by retaking possession, and (3) by instituting an action to quiet title, breach, abandon, or repudiate the contract in such sense that the purchaser may declare a rescission, and on the basis thereof recover the payments made by him.

Mintle v Sylvester, 202-1128; 211 NW 367

Recovery on sales in violation of securities law—tender of securities necessary. Purchaser suing to recover price paid for securities sold in violation of Iowa securities law must at least tender to seller securities equivalent in value to those purchased.

Huglin v Byllesby & Co., 72 F 2d, 341

Mental incompetency — realty exchange — voidable—duty to restore status quo. Where one of the parties to an exchange contract of realty is mentally incompetent, such contract is only voidable, not void, being valid until disaffirmed, and can only be disaffirmed as a whole, not in part, and when party seeks to avoid such contract it is necessary to restore, or offer to restore, status quo.

In re Gensicke, (NOR); 237 NW 333

Conditional sales—action for contract possession works no rescission. The vendor in a conditional sale contract by instituting replevin for the possession of the article, as provided by the contract in case of the vendee's default, manifests a clear intent to stand on the contract, and not to rescind it. It follows that the refusal of the court to submit to the jury the issue of rescission and return of the purchase price is proper. (Analogous holding, 202-1128.)

Schmoller Co. v Smith, 204-661; 215 NW 628

Liability—effect of rescission. A defendant who is tendered in court his promissory note, in rescission of the transaction out of which the note arose, and accepts said note may not defend against a claim based on the original transaction. In other words, defendant cannot, by accepting the offered rescission, defeat rescission and also escape all liability.

Miller v Nesbitt, 204-771; 212 NW 733

Contract price (?) or quantum meruit (?). A plaintiff who pleads that he partially performed an express contract for services and thereupon abandoned the work because of a breach of the contract by defendant must not be permitted to recover the contract price for the work actually performed unless he establishes his pleaded justifiable abandonment; and if he fails to establish justifiable abandonment, he may not recover on the basis of a quantum meruit which does not exceed the contract price when he neither pleads nor proves a quantum meruit.

Goben v Paving Co., 208-1113; 224 NW 785

Prohibited repudiation. A vendor who accepts and retains a partial payment for goods on the condition that the balance will be paid by the vendee when the goods are delivered may not, after a subsequent tender of the balance, repudiate the contract on the claim that the initial payment should have embraced the entire purchase price.

Daeges v Beh, 207-1063; 224 NW 80

Rescission and accounting — payments to third party by mistake. A purchaser of land who has been granted a rescission of the contract may compel an accounting by other executory vendors and vendees to whom part of the purchaser's payments has been made by mistake or inadvertence.

Winn v Williams, 200-905; 205 NW 541

Joint adventures—termination and accounting. A contract of joint adventure, which is wholly silent as to its duration, is terminable at will by a notice of any one of the parties to all other parties, especially when such other parties make no objection to such termination, and the right to an accounting necessarily follows.

Fitzhugh v Thode, 221-533; 265 NW 893

Guardianship—disaffirmance of contract—tender. The guardian of an incompetent may disaffirm the contract of his ward without going into equity and recover the amount paid by the ward on the contract.

Ayres v Nopoulos, 204-881; 216 NW 258

Unexecuted rescission of fraudulent contract. A subscriber for corporate shares of stock who, while the corporation is a going concern, enters into a bona fide agreement with the corporation for the complete rescission of the stock subscription contract, will be entitled to judgment against a subsequently appointed receiver for the amount of the stock subscription notes executed by him and transferred by the corporation and not returned to him as provided in the contract of rescission.

Lex v Selway Corp., 203-792; 206 NW 586

Breach of patent license contract. When a patent licensee ceased to pay royalties due the licensor, the licensor was not limited to an action against the licensee as a patent infringer, but could elect to treat the contract as still in force and bring an action to collect royalties.

Eulberg v Cooper, 226-776; 285 NW 131

Defaulting vendor may not recover payments. A vendor may not recover of his de-

faulting vendee payments advanced on incumbrances when the vendor is himself in default because of his inability to convey title.

Keifer v Dreier, 200-798; 205 NW 472

VIII PERFORMANCE OR BREACH

(a) PERFORMANCE GENERALLY

Justifiable abandonment—recovery. Principle reaffirmed that one who has contracted to render services, and justifiably abandons the work because of the breach of the contract by the other party, may recover at the contract price for the work already done.

Goben v Paving Co., 214-834; 239 NW 62
Goben v Paving Co., 218-829; 252 NW 262

Justifiable abandonment—instructions. Instructions held adequately to present the issue whether the performance of a contract was justifiably abandoned.

Goben v Paving Co., 218-829; 252 NW 262

Voluntary part performance—effect. Voluntary part performance of a contract by a legal stranger to the contract imposes no legal obligation to continue such performance.

Hess v Iowa L. & P. Co., 207-820; 221 NW 194

Impossible performance—when no excuse. A person is not legally excused from performing an act which he has unconditionally contracted to perform, but is prevented from performing because of the happening of a contingency of which he had knowledge when he contracted, and against which he might have protected himself. For instance, an insurer may not rely on a contract that he will, in full satisfaction of his liability, repossess a stolen automobile and properly repair it, and return it to the insured, when such return to the insured was prevented by the act of the seller of the car rightfully seizing the car, while it was in the possession of the insurance company, for nonpayment of installments due on the car, such possible seizure being well known to the insurance company when it so contracted.

Salinger v General Corp., 217-560; 250 NW 13

Failure to complete loan—no bar to recovery of part loaned. Where one person agrees to loan money to form a corporation, pursuant to which he loans a part and takes a note therefor, his failure to loan the balance will not prevent recovery of the part loaned, and a counterclaim so alleging states no cause of action and should be stricken.

Hillje v Tri-City Co., 224-43; 275 NW 880

Partnership changes after contract — performance. A physician as a party to a contract of employment with a medical clinic partnership is not in a position to question its validity on the ground that there had been a change in the members of the partnership and consequently no contract with the new entity, when his full performance of and under the contract had been with the new entity, including an extension of the contract.

Larsen v Burroughs, 224-740; 277 NW 463

Executory contract. Principle argumentatively recognized that a party to an executory agreement who is wholly in default may not maintain an action to enforce a part of the contract.

Crane v Leclere, 206-1270; 221 NW 925

Readiness and ability to perform. In an action by an architect on a contract of employment to draw plans and specifications, on the claim that the owner abandoned the contemplated construction, the all-important issue is the readiness, ability, and willingness of the architect to carry out his part of the contract.

Shockley v Davis Co., 200-1094; 205 NW 966

Exact (?) or substantial (?) performance. A building contractor, in order to recover the contract price, need not establish a technical, exact, and perfect performance of the contract. Substantial, good-faith performance is all-sufficient.

Miller v Gray, 205-1305; 217 NW 228

Breakage of tile—neglect of buyer. Burden of proof in action on contract providing for delivery of drain tile was upon seller to show that tile were "sound and true", and evidence held to show that breakage was due to neglect of buyer.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Public improvements — substantial compliance with contract. Evidence relative to the performance of a paving contract reviewed, and held to show substantial compliance in the matter of performance.

Central Co. v Des Moines, 204-678; 216 NW 41

Public improvements — acceptance — avoidance by proof of fraud. A nonfraudulently induced acceptance by a city council of a street pavement estops the city thereafter to plead nonperformance of the contract, but not so when the city pleads and proves that, at the time of said acceptance, the contractor, unbeknown to the council and in collusion with city employees, had constructed said pavement of a thickness substantially less than the thickness required by the contract.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Reasonable time to construct grotto. An individual constructing a grotto for a charitable organization under an agreement containing

no time for completion has a reasonable time for performance.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Contract restraining competition—liquidated damages. Injunction is a proper remedy to restrain one physician from practicing his profession contrary to the provisions of his contract not to engage in competitive practice in the same county for a specified period. A provision in the contract for "liquidated damages" will not bar injunctive relief.

McMurray v Faust, 224-50; 276 NW 95

Right to complete contract. Upon a substantial breach of a building contract and the refusal of the contractor to proceed with the work, the owner of the property may himself take over the completion of the contract according to its terms, and charge the cost thereof against the contractor.

Golwitzer v Hummel, 201-751; 206 NW 254

Nonrecoverable damages. In the construction of a building, defects and imperfections which do not establish a substantial failure to comply with the contract may not be compensated for by an allowance of damages when complainant plants his claim for damages solely on the difference between the value of the house as built and its value if built in compliance with the contract.

Hayes v Ramsey, 205-167; 217 NW 808

Action by subcontractor—principal contract admissible. A subcontractor under a building contract is impliedly bound by the standards of performance provided in the principal contract; therefore it is error to reject the principal contractor's offer of such contract as evidence.

Lantz v Goodwin, 210-605; 231 NW 331

(b) SUBSTANTIAL PERFORMANCE

Evidence. Plaintiff in an action to recover for materials furnished under a building contract may very properly be permitted to show that the quality of the materials furnished was as called for by the contract, even tho defendant was defending on the theory that, irrespective of such quality, the architect had a legal right, under the contract, arbitrarily to reject the materials, and that the architect had so done.

Granette Co. v Neumann & Co., 208-24; 221 NW 197

Statute of limitation—completion of work. Where a statutory provision declares that action may not be brought on the bond of a contractor "after six months of the completion" of a public improvement, the improvement will be deemed completed when the contractor has substantially performed on the improvement all that he contracted to perform, and has turned it over to the public authorities; and it is immaterial that controversy exists as to extras, or that trifling defects or shortcomings afterwards come to light, or that the formal certificate of acceptance was delayed.

Daniels Co. v Const. Co., 204-268; 214 NW 481

Contract to bring infringement suits. A contract between a patent owner as licensor and the manufacturer of the patented article as licensee, providing that the licensor receive royalties and should bring suits to prevent infringement upon the patent using royalties received, was fully performed on the part of the licensor when he spent, in bringing infringement suits, more than the amount of the royalties received.

Eulberg v Cooper, 226-776; 285 NW 131

(c) BREACH GENERALLY

Breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Nonwaiver. A party to a contract does not waive a breach of the contract by the other party thereto by failing to notify such other party that he has knowledge of such breach. Instructions held not to announce a contrary doctrine.

Cox v Fleisher Constr. Co., 208-458; 223 NW 521

Waiver by inconsistent conduct. When minority and majority stockholders agree that the former will withdraw their objections to the renewal of the corporation and the latter will vote for such directors as will employ the minority in certain corporate positions, the minority waives all rights under the contract by subsequently joining with all the other stockholders in the adoption of renewal articles which wholly ignores the said contract.

Clark v Bank, 219-637; 259 NW 211

Discharge of employee. The peremptory discharge without cause of an employee under a definite time contract is, of course, a breach of the contract.

Westerfield v Liberty Oil Co., 208-912; 223 NW 894

Failure to make repairs. The measure of damages for breach of a contract to make all necessary repairs to a pavement is the fair and reasonable cost of such repairs, and not the difference in value of the real estate with and without said repairs.

Armstrong, Inc. v Nielsen, 215-238; 245 NW 278

VIII PERFORMANCE OR BREACH—concluded

(c) BREACH GENERALLY—concluded

Refusal of employer to sell at price stated—not excused by resulting loss. One who contracted to pay a commission to a dealer for selling goods at a certain price could not excuse his breach of the contract by refusing to sell except at a higher price, at least as to orders for goods taken before the breach, on the ground that to fulfill the contract would cause him to operate his business at a loss.

Lee v Sundberg, 227-1375; 291 NW 146

Violation in re publication of newspaper. An agreement not to engage in the publication or circulation of a "newspaper" in a named locality is violated by the publication and circulation in said locality, without charge, of a so-called "Shopper's Guide" of eight pages arranged in the form of an ordinary newspaper, and containing much advertisement, some current news, serial stores, editorial comment, and newspaper clippings.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Discharging acrobatic team. In acrobatic team's action for breach of contract of employment for two bookings, evidence, that plaintiffs were ready to perform and that employer replaced them in one of the engagements and told them they would not be used in the other, justified finding that plaintiffs were discharged.

Wade v Central Co., 227-422; 288 NW 439

Building contracts—right to take over work. A building contractor who materially breaches his contract to erect a building at a certain minimum cost and refuses to proceed with the work opens the door to the other party to the contract to take over the work and complete it and recover of the contractor the resulting damages.

Johnson v Vogel, 208-44; 222 NW 864

Agreement to give, deed, or will property. One who orally contracts that, upon his death, he will pay for certain services "by giving, deeding, or willing" certain real property to the promisee, constructively breaches his contract by failing to either give, deed, or will the property as promised, and thereby opens the door to the promisee to maintain an action at law for damages; and especially is this true when the promisee establishes the contract by the same degree of proof as would be required in equity, and, moreover, offers to accept a deed to the property in lieu of damages allowed for the breach.

Ballard v Miller, 210-1144; 229 NW 159

Foreclosure—agreement to defer. An owner of mortgaged premises who has not assumed the mortgage, but who makes a payment thereon on the express or implied agreement that the mortgagee will defer foreclosure for a stated time, may recover back the payment from the mortgagee if the latter breaches the agreement.

First Tr. JSL Bk. v Cuthbert, 215-718; 246 NW 810

Approval by architect—conclusiveness. An architect who, in the absence of fraud or mistake, approves material may not, after the material is furnished, reverse his decision and reject the material.

Granette Co. v Neumann & Co., 208-24; 221 NW 197

Injunction—inducing breach of contract. Injunction will lie to prevent a third party from inducing parties to a contract to violate it.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Injunction—fatally indefinite decree. A decree which enjoins a party from doing any act which "would infringe upon the rights of the plaintiff" under a specified contract is fatally indefinite and therefore unallowable.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

IX RELEASES AND SETTLEMENTS AND WAIVER IN GENERAL

Discussion. See 20 ILR 106—"Mending hold doctrine"; 21 ILR 146—Rescission of release from liability

(a) IN GENERAL

Impeachment—burden of proof. He who seeks to avoid a duly proven compromise, settlement and release must establish:

1. That the release was procured by fraud, or
2. That the contention or claim on which the compromise and settlement was based was wholly unfounded, and, therefore, could not support a compromise and settlement.

Evidence reviewed and held wholly insufficient to impeach a compromise and settlement of liability under a policy of life insurance.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Compromise and settlement—impeachment—burden of proof. Fraud, in impeachment of a compromise and settlement, must be established by the pleader who alleges it.

Coffman v Brenton, 214-185; 239 NW 9

Personal injury release—mutual mistake. A contract for settlement of damages for personal injury in a motor vehicle accident, and for release of further liability, will be set aside when it is shown that both the injured party and the agent of the defendant relied on the physician's good-faith statement that the injury was healing and the patient would soon recover, tho it later developed that the doctor was mistaken—such mistake is a mutual mistake of fact by both parties to the contract.

Jordan v Brady Co., 226-137; 284 NW 73

Delivery date of policy—other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Release—fraud—jury question. A jury question as to the validity of a release of personal injury damages is made by proof that the release represented that the doctor's charges would be "about" $10, and that the representation was materially false, and was made to the releasor and acted on by him when he was alone and practically helpless from his injuries.

Robinson v Meek, 203-185; 210 NW 762; 5 NCCA(NS) 434

(b) RELEASES GENERALLY

Burden of proof. The burden of proof that a release was executed rests on the party alleging the release.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

General release of claim avoided by mutual mistake. A general release of a claim for personal injuries may, under proper circumstances, be avoided on the ground of mutual mistake as to the nature or seriousness of the injury.

Jordan v Brady Co., 226-137; 284 NW 73

Personal injury release—doctor's belief in recovery—mutual mistake. A contract for settlement of damages for personal injury in a motor vehicle accident, and for release of further liability will be set aside when it is shown that both the injured party and the agent of the defendant relied on the physician's good-faith statement that the injury was healing and the patient would soon recover, tho it later developed that the doctor was mistaken —such mistake is a mutual mistake of fact by both parties to the contract.

Jordan v Brady Co., 226-137; 284 NW 73

Joint wrongdoers. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525; 39 NCCA 574

Discharge of employer's liability—effect on third party wrongdoer. Where an injury, which is mandatorily compensable under the workmen's compensation act, is received by an employee in consequence of the actionable negligence of the operator of an automobile owned by, and operated with the consent of, the employer, the fact that the employer fully discharges his statutory liability to the employee does not ipso facto discharge the legal liability of the said negligent operator to said employee.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the injured party agreed not to sue such other party—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

Release of joint tort-feasor. An injured party, who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Notice of release after promising to pay for goods furnished to third person. A landlord who promised his tenant, in the presence of a gasoline dealer, to pay for tractor fuel furnished by the dealer to the tenant, and who later was released from his promise, was not obligated to pay the dealer for fuel sold to the tenant after the dealer received notice of the release.

Reichart v Downs, 226-870; 285 NW 256

Substitution and release—new contract not creating presumption. The mere fact of the making of a new contract by which a third party becomes obligated to pay another person's previously existing indebtedness does not alone give rise to presumption that the creditor accepts the new debtor and releases the original debtor—question as to whether there is such a release is one of fact to be determined by all the evidence in the case.

Wade v Central Co., 227-422; 288 NW 439

Fraudulent release. A written release of all damages suffered by an injured party is fraudulent and void when it was in fact mutually intended as a receipt for wages only, and was signed by the injured party without negligence on his part; and the failure of the injured person, who was himself unable to

IX RELEASES AND SETTLEMENTS AND WAIVER IN GENERAL—continued

(b) RELEASES GENERALLY—concluded

read, to have such instrument read to him does not necessarily constitute negligence per se.

Farwark v Railway, 202-1229; 211 NW 875; 26 NCCA 231; 4 NCCA(NS) 98

Fraud in securing release—consideration—burden of proof. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Fraudulent procurement—negligent execution—jury question. Evidence reviewed at length relative to a written release of damages consequent on shockingly severe injuries, and held to present a jury question on the issues (1) of defendant's fraudulent procurement of the release, and (2) of plaintiff's negligence in signing said release.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Bank promising father to carry son's debt until father's death. A father's contract with a bank, by which the bank agreed to carry a son's indebtedness to the bank until the death of the father, is personal and involves a trust and confidence, and such contract may not be assigned without the consent of the father, and when the bank's assignee started action for a money judgment, during the lifetime of the father, he was released from the obligation of his contract.

Evans v Cole, 225-756; 281 NW 230

Signing a release without reading. A signed release and settlement of a claim for damages is conclusive on the signer, even tho he signed it, because of a false statement of its contents, when he had ample time and ability to read, and was in no manner prevented from reading.

Crum v McCollum, 211-319; 233 NW 678; 4 NCCA(NS) 142

Implied fraud. Evidence reviewed and held to present a jury question on the issue whether a release of damages was binding on the plaintiff who signed the same without reading it.

Shadduck v Railway, 218-281; 252 NW 772

Consideration—presumption. Presumptively, a written release by a mortgagee of a mortgage is supported by a sufficient consideration.

Shaffer v Zubrod, 202-1062; 208 NW 294

(c) SETTLEMENTS GENERALLY

Construction — intent as polestar. Quite manifestly a written compromise and settlement may not be given an interpretation contrary to the actual intention of the parties.

Bates v Bank, 223-729; 273 NW 867

Construction—same as other contracts. An unjust compromise or private settlement will not be accorded by the court any different construction or treatment than any other unjust contract.

Jordan v Brady Co., 226-137; 284 NW 73

Agreement "to take care of claim". An agreement by one party to a compromise and settlement that he will "take care of" the claim of a named third party may not, in view of the circumstances attending the parties, be equivalent to an agreement to pay said claim.

Southern Surety v Railway, 215-525; 245 NW 864

Consideration. A written contract of compromise and settlement of a bona fide controversy between parties is supported by adequate consideration.

Kilts v Read, 216-356; 249 NW 157

Notes—compromise and settlement as consideration. A promissory note executed without fraud and in compromise and settlement of a disputed but honestly asserted claim—which may have been unfounded—must be deemed supported by an adequate consideration. Evidence held to support such a finding.

Booth v Johnston, 223-724; 273 NW 847

Promissory note—liability. A compromise and settlement which results from a bona fide controversy as to the liability of one of the parties on promissory notes is final. In other words, there need be no evidence that the party denying liability was not, in fact, legally liable on the notes.

Fairfax Bank v Coligan, 211-670; 234 NW 537

Compromising barred claim. If parties have actually compromised a bona fide controversy between themselves relative to the claim of one of the parties, it is immaterial whether, at the time of the compromise, the claim in controversy was barred by the statute of limitation.

Marron v Lynch, 215-341; 245 NW 346

Failure to plead and prove avoidance. A clearly established contract of settlement must prevail in the absence of plea and proof of matter in avoidance.

Bebensee v Blumer, 219-261; 257 NW 768

Absence of controversy—unsupported promise. An oral compromise and settlement of a bona fide controversy between parties relative to a claim of one of the parties is not established by evidence which affirmatively shows that no controversy existed between the parties, but that one of the parties made a promise to the other for which promise no consideration appears.

Marron v Lynch, 215-341; 245 NW 346

Mortgage indebtedness—time as essence of contract. Time will not, in equity, be deemed of the essence of a contract when the parties thereto have neither expressly so stipulated, nor, by their conduct, revealed that such was their understanding of the contract. So held as to the time of performance of a compromise settlement of mortgage indebtedness.

First Tr. JSL Bk. v Hanlon, 223-440; 273 NW 114

Offer of settlement—insufficient evidence. A statement by a creditor to his debtor that "You can do one of three things—pay the bill, return the merchandise, or beat the bill" held quite insufficient, in view of the record, to constitute an offer of settlement justifying the debtor in returning the goods in full settlement of the creditor's claim.

United Service v Heinen, 220-859; 263 NW 343

Performance—interest—when not allowable. Creditors who, in a composition agreement with their debtor, contract to accept specified sums in settlement of their respective demands are not entitled to interest on said sums during the time required to carry out the agreement.

Bailey v Ins. Co., 221-1195; 268 NW 173

Compromise by guardian — nonadversary proceedings. The good-faith compromise by a guardian, with the approval of the court, of pending litigation to which the minor is a party is not a proceeding adversary to the minor.

Kreamer v Wendel, 204-20; 214 NW 712

Corporation judgment compromised—former stockholder—no authority. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Apparent authority of agent—showing preliminary to receiving testimony. Testimony relative to a contract of compromise with a corporate agent on behalf of the corporation is admissible upon proof that the party offering the testimony, preliminary to entering into such contract, in good faith availed himself of the bureau of information maintained by the corporation, and by means thereof made contact with corporate agents who had physical possession of the papers and files relative to the subject-matter of said compromise, and who were, apparently and to all appearance, in authoritative charge of said matter for settlement. (Of course, the issue of apparent authority may be a jury question.)

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

Building contracts—final certificate by architect—what constitutes. A certificate by an architect that the contractor has been overpaid a stated amount, even tho it purports to be an "opinion" only, is a final certificate when the parties mutually expected that the certificate would be final, and mutually so treated it, and when the certificate contains an itemized computation showing how the overpayment was determined.

Van Dyck Co. v Central Co., 200-1003; 205 NW 650

Injury from motor vehicle—fraud in settlement. A plaintiff, injured when the automobile in which she is riding in a snowstorm is struck from the rear by another automobile, and who, in the presence of her husband and sister, makes a written settlement with the insurance company for such injuries, and who delays two years thereafter before attacking as fraudulent the validity of such settlement, does not meet her burden to overcome the written instruments by giving her own self-contradictory testimony with no proof of actual fraud or misrepresentations.

Mosher v Snyder, 224-896; 276 NW 582

Setting aside—insufficient grounds. A party who compromises and settles his claim for damages consequent on an alleged fraudulent sale, and voluntarily and under no additional fraud does so on the basis of his then knowledge of the claimed fraud, may not have the compromise set aside on the claim that he later discovered an additional element of fraud in the sale not known to him when he compromised.

Williams v Herman, 216-499; 249 NW 215

Validity—good faith—fraud—duress. Evidence held to generate a jury question on the issue whether a promissory note was signed as the result of a good-faith, nonfraudulent compromise and settlement.

Rounds v Butler, 207-735; 223 NW 487

Matters included—presumption. It being conceded, arguendo, that the execution and delivery of a promissory note generate a presumption that all prior mutual claims between the maker and payee were thereby settled, yet such presumption is necessarily rebuttable.

Fitzgerald v Miller, 200-718; 205 NW 324

IX RELEASES AND SETTLEMENTS AND WAIVER IN GENERAL—continued

(c) SETTLEMENTS GENERALLY—concluded

Posted signs—settlement offer. Denying a directed verdict based on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65

(d) COMPOSITION WITH CREDITORS

Oral agreement enforceable—time limit. An oral agreement between a debtor and his creditors under which the creditors agree to accept a composition amounting to less than their demands is enforceable in equity; and if no time for performance be agreed on, the law will imply a reasonable time. Evidence reviewed and held to establish such agreement, and that the debtor's offer of performance was within a reasonable time.

Bailey v Ins. Co., 221-1195; 268 NW 173

Fatally delayed execution. A written composition with creditors, silent as to the time of performance, must be executed within a reasonable time in view of all the attending circumstances.

Federal Corp. v Western Co., 219-271; 257 NW 785

Consideration—part payment of debt in discharge of whole. An executed agreement between a debtor and a creditor to the effect that the debtor will, before any part of the indebtedness is legally due, pay a part thereof in full satisfaction of the entire indebtedness, is supported by ample consideration, and is, therefore, enforceable.

Fisher Supply Co. v Northwestern Co., 216-909; 249 NW 664

Deception constituting fraud and liability therefor—right to rely on false statement. A debtor who falsely asserts his complete insolvency, and thereby induces his creditor, wholly ignorant of the true facts, to enter into a compromise settlement of indebtedness, will not, in an action to cancel the fraud-induced settlement, be heard to assert that the creditor had no right to rely on said false statement—that the creditor, before acting, should have made an independent investigation as to the truth of said statement.

Andrew v Baird, 221-83; 265 NW 170

(e) WAIVER GENERALLY

Waiver defined—burden of proof. A waiver is the voluntary and intentional relinquishment or abandonment of an existing legal right. He who relies thereon has the burden of establishing all elements thereof. Evidence involving the payment of renewal commissions on insurance policies reviewed and held insufficient to establish a waiver.

McPherrin v Assur. Co., 219-159; 257 NW 316

Jones v Des Moines, 225-1342; 283 NW 924

Mechanics' liens — waiver by conduct. A materialman who files his lien after inducing a mortgagee to take his mortgage on the express or implied promise that no lien will be filed, will not be decreed priority over the mortgage.

Fullerton Co. v Miller, 217-630; 252 NW 760

Matters specially pleadable. "Waiver" must be specially pleaded.

Cole v Ins. Co., 201-979; 205 NW 3

Schmid v Underwriters, 215-170; 244 NW 729

Fraud—irrevocable waiver of action for damages. One who, with full knowledge that he has been fraudulently inveigled into signing an option contract for the sale of his property, elects not to rescind but to affirm and perform the contract, and does perform at a time when the contract is wholly executory and without consideration, thereby irrevocably waives, as a matter of law, any and all right to sue the wrongdoer for damages.

Ankeney v Brenton, 214-357; 238 NW 71

"Estoppel" and "waiver" contrasted. Principle reaffirmed that, to constitute waiver, action to the prejudice of the party relying thereon is not essential; while such showing is essential to estoppel.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Renewal of note—waiver of defense. Principle reaffirmed that the maker of a promissory note waives his defense to the note when he renews the note with full knowledge of the defense; and especially is this true if the maker secures an extension of time.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Validity—renewal of forged note. The execution of a promissory note in renewal of a known forged note necessarily works a waiver of the fraud consequent on the forgery. Evidence held sufficient to establish the absence of such knowledge.

Bacon v Bank, 204-887; 216 NW 274

Incorporation denied by state—partnership formed. Promoters of a corporation are liable to an investor for money received as the agreed purchase price for stock in a corporation, even tho the failure to deliver stock occurred because the state denied the right to incorporate, and they are not relieved by a partnership agreement, signed by the investor, who nowhere waives nor abandons the agreement for delivery of the corporate stock.

Smith v Secor, 225-650; 281 NW 178

Merchandise return as condition for refund —waiver by correspondence manager. A requirement that buyer return warranted machines as a prerequisite to a refund of the purchase price may be waived by seller's agent in charge of correspondence when, in reply to buyer's offer to return, he instructs buyer not to return the machines.

Henriott v Main, 225-20; 279 NW 110

Right to discharge employee. Principle recognized that, tho an employer, by continuing the employment after knowledge of the breach of duty by the servant, is deemed thereby to waive his right to discharge, yet he is not thereby deemed to waive the breach of duty.

Durr v Park Co., 205-279; 218 NW 54

Insurance company's waiver of policy provision. When facts are disputed as to whether insurance company waived policy provisions as to unconditional ownership and as to location where property was to be kept which was later destroyed by fire, such dispute is for the jury.

Buettner v Ins. Assn., 225-847; 282 NW 733

Reply or amendment—waiver of objections. Altho a pleading, denominated as a reply, is really an amendment to the petition, but the question of proper pleading was not raised, and the defendants amended their answers as tho the reply had been an amendment to petition, and parties, without objection, offered evidence pertaining thereto, any objections possibly arising on account of the departure from the rules of pleading were waived.

Burns & McDonnell Co. v Iowa City, 225-1241; 282 NW 708

Error in pleadings by filing answer. To preserve an objection that an allegation of negligence was too general and indefinite to constitute basis of cause of action, a defendant should stand on its motion to strike and for more specific statement. Failing in this and filing its answer, it waived any error of court in overruling motion. A cause of action should be sufficiently precise to enable the defendant to prepare his defense.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

X ACTIONS

(a) IN GENERAL

Counts—express and implied contract. A plaintiff may, in different counts, plead an express and an implied contract as to the same subject matter.

Richmann v Beach, 201-1167; 206 NW 806

Reformation—implied contract. A court of equity cannot reform a written contract, let alone an implied contract.

Snell v Kresge Co., 220-837; 263 NW 493

Account—inconsequential plea. In an action on a contract to recover a money judgment for plaintiff's interest in certain property, the plea of an intervenor who claims an interest in the property that there must first be an accounting between plaintiff and defendant is of no consequence where there is no evidence that defendant has ever paid plaintiff anything on his claim.

Benson v Sawyer, 216-841; 249 NW 424

Action for breach—variance. Principle reaffirmed that a contract relied on must be established as pleaded.

Economy P. Co. v Honett, 222-894; 270 NW 842

Pleading—want of consideration. The all-essential element of a plea of failure of consideration is the facts. There need not necessarily be any formal statement "that there was a total failure of consideration".

Miller v Laing, 212-437; 236 NW 378

Lack of mutuality and consideration—agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

Proper law action nontransferable in toto. An action brought on a contract (e. g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract.

Poole v Poole, 221-1073; 265 NW 653

Contract for repayment—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

X ACTIONS—continued
(a) IN GENERAL—continued

Judgment—nonbar or estoppel. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in defense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Contract omitted from evidence. In a law action, where a written contract to furnish advertising material was not offered in evidence, a judgment for defendant was proper.

Clare v Pearson, 227-928; 289 NW 737

Plea of oral contract—failure of proof. There is a total failure of proof when plaintiff bases his action solely on a plea of oral contract and establishes a written contract.

Lamis v Des Moines Co., 210-1069; 229 NW 756

Coal mining—royalties—reduction by oral agreement—jury question. In an action to recover alleged balance due under coal mining contract for royalties, whether payments provided for in contract were reduced by subsequent oral agreement held to be a jury question.

Heggen v Mining Co., (NOR); 263 NW 268

Cashier of bank—nonimplied authority. A five-year contract involving an expenditure of $500 for advertising a small village bank in a bank directory is not an ordinary contract within the duties of the cashier, but an extraordinary one requiring the authority of the board of directors in order to bind the bank.

Ashland Towson Corp. v Bank, 216-780; 248 NW 336

Contract entered into by business department of real party. An action on a contract is properly brought by the real contracting party, even tho such contract was entered into by one of the business departments of said party.

Butler Co. v Elliott, 211-1068; 233 NW 669

Execution of promissory notes—subsequent ratification—effect. A plea that promissory notes were executed on Sunday is avoided by a plea, and proof thereof, that the maker of the notes subsequently ratified the execution of said notes.

Witmer v Fitzgerald, 209-997; 229 NW 239

Execution on Sunday—collateral agreement. The fact that a promissory note was signed on Sunday has no legal bearing on an agreement growing out of and relating to said note, but wholly collateral thereto.

Hirtz v Koppes, 212-536; 234 NW 854

Compensation—unallowable defense. In an action by a broker for a commission, it is no defense that the plaintiff had an arrangement with another broker for the sharing of the commission in return for services rendered in effecting a sale for defendant.

Lowery Co. v Lamp, 200-853; 205 NW 538

Illegal transaction. Principle reaffirmed that in an action on a fraudulent contract, as to which both parties are in pari delicto, the court will refuse relief to either party.

Schmidt v Twedt, 219-128; 257 NW 325

Teachers—issue as to terms of contract. Evidence held to present a jury question on the issue whether a contract had been entered into with a teacher.

Krutsinger v Township of Liberty, 219-291; 257 NW 797

Contract price (?) or quantum meruit (?). A plaintiff who pleads that he partially performed an express contract for services and thereupon abandoned the work because of a breach of the contract by defendant must not be permitted to recover the contract price for the work actually performed unless he establishes his pleaded justifiable abandonment; and if he fails to establish justifiable abandonment, he may not recover on the basis of a quantum meruit which does not exceed the contract price when he neither pleads nor proves a quantum meruit.

Goben v Paving Co., 208-1113; 224 NW 785

Form of remedy—quantum meruit for services covered by express contract. Plaintiff may not recover on quantum meruit for services which are inseparably connected with, and a part of, services which plaintiff has contracted to perform for an agreed compensation.

Gregerson Bros. v Cherry Co., 210-538; 231 NW 350

Oral express contract—compensation—evidence of reasonable value. On the issue whether parties to an express oral contract for services agreed on a certain stated compensation, evidence of the fair, reasonable, and usual compensation for such services is admissible.

Goben v Akin, 208-1354; 227 NW 400

Voluntary gratuitous services—recovery for. Services, tho valuable and continued for years, when voluntarily rendered as a gratuity, and accepted as such, furnish no basis for a later action in quantum meruit.

Equitable v Crosley, 221-1129; 265 NW 137

Validity of assent—confidential relations. No presumption of confidential relations arises

from the mere fact that the parties are closely related by blood.

Krcmar v Krcmar, 202-1166; 211 NW 699

Contract for equality in stock holdings—violation—injunction. Equity will, by injunction and other proper orders, protect a stockholder of a corporation from a violation of his contract with another stockholder under which equality of stockholdings of the two stockholders was clearly intended.

Holsinger v Herring, 207-1218; 224 NW 766

Transaction with deceased — coplaintiffs. When plaintiff and an intervening plaintiff are each claiming an undivided one-third interest in land, and one is incompetent to testify to a personal transaction with a deceased and thereby establish his contract, he is equally incompetent to testify to said personal transaction and thereby establish the contract for his coplaintiff.

Wagner v Wagner, 208-1004; 224 NW 583

Breach of patent license contract. When a patent licensee ceased to pay royalties due the licensor, the licensor was not limited to an action against the licensee as a patent infringer, but could elect to treat the contract as still in force and bring an action to collect royalties.

Eulberg v Cooper, 226-776; 285 NW 131

Violation in re publication of newspaper. An agreement not to engage in the publication or circulation of a "newspaper" in a named locality is violated by the publication and circulation in said locality, without charge, of a so-called "Shopper's Guide" of eight pages arranged in the form of an ordinary newspaper, and containing much advertisement, some current news, serial stories, editorial comment, and newspaper clippings.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Injunction—subjects of protection and relief—inducing breach of contract. Injunction will lie to prevent a third party from inducing parties to a contract to violate it.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Conditions precedent—inconsistent theories of recovery. When a plaintiff can, as a matter of law, avail himself of a contract provision only on the supported theory that defendant has performed the contract, it is baldly manifest that plaintiff cannot recover under said provision when his entire action rests on the asserted theory that defendant has not performed the contract.

Andrew v American Tr. Co., 219-921; 258 NW 911

Counterclaim — nullification. Proof that plaintiff substantially performed part of a contract for services and justifiably abandoned the performance of the remaining part necessarily precludes recovery by the defendant on his counterclaim for damages, (1) for negligent performance of the part performed, and (2) for failure to complete the work. Instructions held properly to present the issues.

Goben v Paving Co., 218-829; 252 NW 262

Redundant matter. In an action for breach of a written contract to sell all fine coal screenings "produced" during a stated time, a pleading that the parties mutually understood that the contract required the delivery of all fine screenings "produced * * * during the term of said contract" is redundant and properly stricken on motion.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Irrelevant and immaterial matter. In an action for breach of a written contract to sell all fine coal screenings "produced" during a stated time, a pleading that the parties mutually understood that the contract required the seller "to screen all the coal mined during the term" of the contract, is irrelevant and immaterial, and properly stricken on motion, (1) even tho the contract specifies what shall be deemed "screenings", and (2) even tho such pleading is sought to be aided by a plea of estoppel and custom.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Motion picture booking as severable contract. A motion picture exhibitor who books a series of films under contract, a part of which contract specified that he should have a certain film to exhibit on a certain date, is not entitled to breach the entire contract, when distributor fails to provide this certain film on the specified date, but exhibitor must recoup by way of damages, if any.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Foreign corporation's contract to install pipe organ—interstate commerce. In an action on contract by a Connecticut corporation doing business in New Jersey to build, deliver, and install a pipe organ in a theater in Iowa, held, the transaction was in "interstate commerce", and therefore local statutes governing foreign corporations doing business within this state were inapplicable.

Palmer v Aeolian Co., 46 F 2d, 746

(b) SPECIFIC PERFORMANCE GENERALLY

Discussion. See 1 ILB 53—Specific performance for the purchase price; 11 ILR 69—Contract terminable by plaintiff; 25 ILR 766—Extended supervision by the court

Contracts enforceable—conditions precedent. Principle reaffirmed that a contract may not be specifically enforced (1) unless the execution is established by very clear and definite proof, and (2) unless the terms of the contract as established are equally clear and definite.

Lockie v Baker, 206-21; 218 NW 483

X ACTIONS—continued

(b) SPECIFIC PERFORMANCE GENERALLY—cont.

Uncertainty in terms. Specific performance cannot be decreed of a contract which is uncertain in its terms.

Fenton v Clifton, 204-933; 216 NW 53

Rescission as alternative remedy. Rescission will not be granted as a matter of course on denial of specific performance.

Davis v Eaton, 211-837; 234 NW 252

Contracts performable—fraud. A fraudulently obtained contract will not be specifically enforced, but will, on proper plea and proof, be canceled.

Boyle v Geling, 206-1208; 218 NW 506

Nature and form—legal relief. Tho plaintiff in equity prays for a decree for the specific performance by defendant of the latter's written contract to repurchase corporate shares of stock sold to plaintiff, yet, if plaintiff's alternate prayer be sufficiently broad, the court may, on supporting evidence, enter such a judgment in favor of plaintiff as would be his legal due were his action strictly at law. And, in such case, it is manifestly wholly aside the mark for defendant to contend that specific performance was unallowable (1) because the life of the corporation in question had expired, (2) because of the nature of the property involved, and (3) because the contract in question was nonmutual.

Patterson v Bingham, 222-107; 268 NW 30

Contract of sale—right to conveyance. The purchaser of real estate who has fully complied with the contract is entitled to specific performance, in the absence of some fact or condition which renders such decree inequitable.

May v Haynie, 212-66; 236 NW 98

Probate claimant for services—incompetency as witness. In probate action to establish a claim against an estate based on an express contract for services rendered to decedent, claimant could not testify as to existence of contract.

In re McKeon, 227-1050; 289 NW 915

Action against estate—evidence—sufficiency. The rule of law, that he who asks the specific performance of a contract must establish said contract by clear, satisfactory, and convincing evidence, is pre-eminently and with added force applicable to prayers for the specific performance of oral contracts against the estates of deceased persons. Alleged contract to convey property, in return for privilege of naming a child, held unproven.

Baker v Fowler, 215-1157; 247 NW 676

Wills—contract to devise or bequeath—irrevocableness of will. A will is irrevocable when executed in compliance with a contract which is (1) in writing, and (2) contains mutual promises then and there executed by the parties; nor is such a will rendered revocable by the death of the beneficiary therein prior to the death of the testator.

Powell v McBlain, 222-799; 269 NW 883

Wills—contract to devise or bequeath—disposal during lifetime—validity. A contract that one will make a will and devise and bequeath to the promisee "all property which I may own at the time of my death" and the due execution of a will of the same scope, leaves the promisor (testator) free to use, control and dispose of his property in his lifetime, and nonfraudulent transfers and conveyances by him before his death are valid.

Powell v McBlain, 222-799; 269 NW 883

Contracts for estate in return for services. An oral executed contract to the effect that, in return for personal services, the party shall, on the death of the other party to the contract, have the entire personal and real estate of such other party, is specifically enforceable, provided that the evidence is clear and convincing. Evidence held insufficient.

Jordan v Doty, 200-1047; 205 NW 964

Contract to will—evidence—sufficiency. Evidence reviewed, and held wholly insufficient to establish the genuineness of an alleged written contract to will property.

Shisler v Catholic Cem. Impr. Assn., 207-306; 222 NW 838

Oral contract to devise. An alleged oral contract between a childless couple and a neighbor, that such couple would leave all their property to the neighbor's minor son when he became of age, if he would live with them until that time, must be established by clear, satisfactory and convincing evidence, and when so established, along with proof of compliance by the son, entitles the son to specific performance of the contract.

Ford v Young, 225-956; 282 NW 324

Oral contract to will property. Where the plaintiff had done work for a woman who was ill, and had been promised that she would give him certain property in her will in return for the services, and plaintiff seeks specific performance of the agreement, claiming as consideration his oral agreement not to file a claim against the estate for the services until after such claim had been barred by the statute of limitations, such oral agreement was only the manner adopted for extinguishing the claim for the past services and the consideration for the oral agreement was the cancellation of the claim for the services and the discharge and compromise of the obligation which had accrued.

Fairall v Arnold, 226-977; 285 NW 664

Contract not to change will—not guaranty of son's debt. A son being indebted to a bank in the sum of $10,000, the father entered into a contract with the bank, that he would not alter his will wherein said son was bequeathed that sum, in consideration of which the bank would not press payment while the father lived. Held that such contract was not an absolute guarantee that the son was to have $10,000 from his father's estate regardless of its condition at the father's death, nor an undertaking that would nullify other provisions of the will.

Evans v Cole, 225-756; 281 NW 230

Mutual wills enforced as contract. Clear and satisfactory evidence that husband and wife entered into a mutual contract, and in accordance therewith executed mutual and reciprocal wills providing for the disposition of all their property to each other and to certain named beneficiaries upon the death of survivor, entitles beneficiaries to specific performance thereof and to restrain probating of another will, executed by husband after the wife's death, making provision contrary thereto.

Child v Smith, 225-1205; 282 NW 316

Unconscionable fraud-induced contract. An inequitable and unconscionable contract, obtained by fraudulent representations, will not be specifically enforced.

Yarcho v Dawson, 211-248; 233 NW 21

Contract procured by misrepresentation. Where purchaser of grain elevator falsely represented to vendor that another person would furnish necessary financial assistance to perform the contract, and vendor relied thereon, held, purchaser was not entitled to specific performance of the contract.

Dunkelbarger v Brasted, (NOR); 212 NW 676

Writing repudiated before fully signed. Specific performance of a contract of purchase of real estate will not be decreed when the purchaser, prior to the actual signing of the contract by the actual title holder, rejected the title except on a condition which the said owner never complied with after he did sign the writing.

Jones v Anderson, 213-788; 239 NW 522

Waiver of time element—effect. When the vendee in a contract of sale of real estate waives the time element for the performance of the contract, he, in legal effect, arms the vendor with right to perform within a reasonable time, and to enforce specific performance if vendee then refuses to perform.

Andrew v Miller, 216-1378; 250 NW 711

Contract to repurchase note and mortgage. A written contract by the seller of a note and mortgage to repurchase the same in case the mortgage is foreclosed is specifically enforceable.

Hawkeye Ins. v Cent. Trust, 210-284; 227 NW 637

Reconveyance of property—estoppel. The fractional owner of property who quit-claims his interest to his co-owner in order to enable the co-owner to mortgage the entire property for his own purpose, and who receives from the co-owner an agreement to reconvey, free of incumbrance, within a named time or to pay a named sum, may not, after the mortgage is executed, and after the mortgagee has in good faith agreed to take over the property in satisfaction of the mortgage debt, obtain specific performance of the agreement to reconvey, even tho the mortgagee, before the deal was fully closed, had notice of the agreement to reconvey.

Clarkson v Bank, 218-326; 253 NW 25

Nondelivery of abstract company records—plaintiff's burden. Plaintiff had burden of proving defendant did not deliver all of property of abstract company as provided in contract whereby assets of abstract company were to be turned over to plaintiff, in that all "take-offs" were not delivered.

Mills Co. v Otis, (NOR); 228 NW 47

Trade unions—unilateral contract as to wage scale—enforcement. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral, —when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Coal Co., 215-855; 246 NW 753

Transfer of liability—receivership—effect. An action for specific performance is not abated by the subsequent appointment of a receiver for the defendant.

Hawkeye Ins. v Cent. Trust, 210-284; 227 NW 637

Sales contract—court approval as condition. A definite written offer by the superintendent of banking of this state to sell to a foreign administrator Iowa real estate, belonging to a bank receivership, and the written acceptance of the offer, by said foreign administrator, may constitute a valid and specifically enforceable contract tho the offer and the acceptance be both conditioned on the approval of the respective state courts.

Bates v Bank, 223-385; 272 NW 412

Composition—oral agreement enforceable—time limit. An oral agreement between a debtor and his creditors under which the creditors agree to accept a composition amounting to less than their demands, is enforceable in equity; and if no time for performance be agreed on, the law will imply a reasonable

X ACTIONS—continued
(b) SPECIFIC PERFORMANCE GENERALLY—cont.

time. Evidence reviewed and held to establish such agreement, and that the debtor's offer of performance was within a reasonable time.

Bailey v Life Co., 221-1195; 268 NW 173

Construction and operation—time as essence of contract. Time will not, in equity, be deemed of the essence of a contract when the parties thereto have neither expressly so stipulated, nor, by their conduct, revealed that such was their understanding of the contract. So held as to the time of performance of a compromise settlement of mortgage indebtedness.

First Tr. JSL Bk. v Hanlon, 223-440; 273 NW 114

Cashing conditional down payment check—claim of mistake. In an action for specific performance of a land purchase contract, the act of an agent having power to contract in allowing a down payment check to be cashed when it bears a notation, of which he is aware, that it is not to be cashed until and unless the contract is accepted, furnishes support for a finding in equity that the contract was accepted, even tho the agent later claims that the check was cashed by mistake.

Hotz v Assur. Soc., 224-552; 276 NW 413

Irretrievably abandoned contract. An irretrievably abandoned contract necessarily cannot be specifically enforced. So held where the heirs of an estate sought specific performance of an alleged contract by the donee of a deceased donor to reconvey the gift to the donor's estate and to take the share of a general heir, and where it developed that said heirs had, regardless of said alleged contract, fully settled the estate among themselves to the exclusion of the said donee.

McGaffin v Helmts, 210-108; 230 NW 532

Fatal indefiniteness. A written contract for the sale of real estate is not specifically enforceable when it is silent as to (1) the date of final settlement, (2) when possession is to be given, and (3) what kind of conveyance shall be executed.

Donovan v Murphy, 203-214; 212 NW 466

Divorce settlement stipulation—unenforceable if uncertain. Where a divorce stipulation of settlement leaves for future decision certain matters of education of the children, there is such uncertainty and ambiguity and lack of definiteness, that specific performance cannot be granted.

Johnstone v Johnstone, 226-503; 284 NW 379

Unconscionable contract. Equity will not decree the specific performance of a contract of exchange under which plaintiff would obtain defendant's property for nothing.

Pickett v Comstock, 209-968; 229 NW 249

Proceedings and relief—general inequitableness—nonmutuality—innocent third parties. A decree awarding specific performance cannot be justified (1) when the party awarded such performance has neither tendered performance nor specifically shown his ability to perform, (2) when the decree contains mandates on parties over whom the court has no jurisdiction, (3) when the decree awards such performance both in favor of and against parties who are not and never have been parties to the contract in question, and (4) when the decree compels parties who are strangers to the contract in question to change their position to their possible financial loss.

Anders v Crown, 210-469; 229 NW 744

Nature and grounds of remedy—enforcing partial performance. When a vendor has contracted to convey an entire property, but owns only a fractional part thereof, the purchaser who shows that he is entitled to specific performance may elect to take and may enforce specific performance as to the part which the vendor is able to convey; and in such case, the purchaser will be entitled to a pro tanto abatement of the purchase price.

Anderson v Weirsmith, 209-714; 229 NW 199

Discretion of court—trustee in bankruptcy. Principle reaffirmed that whether specific performance shall be granted rests largely in the discretion of the court. Record held to justify specific performance, on the prayer of a trustee in bankruptcy.

Wilson v Holub, 202-549; 210 NW 593; 58 ALR 646

Improvident contract. Equity cannot relieve a person of the duty to perform his contract simply because the contract turns out to be ill-advised, unprofitable, or disadvantageous.

Carson v Mikel, 205-657; 216 NW 60

Failure of proof—retention of suit to award damages. When plaintiff in an action for specific performance has quite successfully shown that he is not entitled to any equitable relief, equity will not retain the suit in order to award damages.

Fisher v Bank, 206-1105; 221 NW 816

Specific performance action — amendment asking damages. Where a plaintiff, after starting a specific performance action to require a federal land bank to complete a loan as agreed, loses the land by foreclosure because the money from the agreed loan is not available to pay off the outstanding mortgage —thereby damaging the plaintiff-landowner by the loss of his equity in the land—an amendment to the specific performance petition changing the relief sought and seeking dam-

ages ascertainable after institution of the original suit does not set up a new cause of action.

Johnston v Bank, 226-496; 284 NW 393

Repurchase of securities. Specific performance of a contract to repurchase securities or to exchange them for other securities will not be ordered on a showing which tacitly concedes that an action at law for damages would be full, complete, adequate, and speedy.

Fisher v Bank, 206-1105; 221 NW 816

Proceedings and relief—damages in lieu of specific performance. A party who has failed to establish his right to specific performance may not complain that the court of equity refused to allow damages in lieu of specific performance and relegated him to an action at law as to such damages.

Dunlop v Wever, 209-590; 228 NW 562

Moot case—dismissal. An appeal by plaintiff-appellant from an order dismissing his action for specific performance will be dismissed on motion when it is made to appear that since the ruling in the trial court the defendant-appellee has specifically performed, and that such performance has been accepted by appellant. The court will not retain the appeal for the purpose of determining costs.

Fish v Sioux City, 210-862; 232 NW 118

Defensive matter — evidence — sufficiency. Evidence reviewed, and held insufficient to show such fraud, inadequacy of consideration, or undue hardship as would justify a refusal of a prayer for specific performance.

Anderson v Weirsmith, 209-714; 229 NW 199

XI PARTICULAR CONTRACTS

(a) IN GENERAL

Breach of contract not to engage in business. In an action to recover damages consequent on the breach by defendant of a contract not to engage for a named time in a named business in a named place, a judgment is sustained by competent and adequate evidence as to the value of plaintiff's business immediately prior to the said breach by defendant and a like showing of the effect which said breach of contract had on such value.

Eyerly v Smith, 210-1056; 231 NW 383

Surface waters—natural flow—contract to change. Adjoining land owners, as between themselves, may validly contract for ditches and dikes which will free the servient estate from the burden of natural drainage, and the right, if not abandoned, to have such ditches and dikes maintained will pass to subsequent owners of the land. But he who alleges such contract must establish the same by clear and satisfactory evidence.

Young v Scott, 216-1253; 250 NW 484

Improvements — assessments. The assessment procedure to cover the cost of remodeling a public drainage improvement is controlled by the statute in effect when the contract is let.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe-line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received five dollars per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe-line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only fifty cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Bank night — consideration for unilateral contract. Where the promoter of a motion picture bank night drawing voluntarily makes certain requirements to qualify for the prize which is promised, he does not merely extend an offer to make a gift, but a unilateral contract is created in which the promoter determines the adequacy of the consideration for his promise, and when a person is induced to accept the promise and perform the specified act which was bargained for, it does not matter how insignificant the benefit of the performance may apparently be to the promoter, the promise can be enforced by the winner of the drawing.

St. Peter v Theatre, 227-1391; 291 NW 164

(b) ESCROWS

Discussion. See 14 ILR 461—Power of recall

Wrongful delivery of deed—effect. Principle recognized that no title passes where the escrow holder of a deed of conveyance delivers the deed to the grantee without performance of the conditions upon which it was to be delivered.

Lindberg v Younggren et al., 209-613; 228 NW 574

Delivery of deed as gift. The unconditional delivery, as a gift, of a duly executed and acknowledged deed of conveyance, by the compos mentis grantor therein, and without fraud, to a third party with explicit direction, both orally and in writing, to said party, to hold said deed for the grantee, and to record the same immediately upon the death of the grantor, constitutes an irrevocable delivery to said grantee; and a priori, when, in addition to the foregoing, it affirmatively appears from the circumstances of the transaction that the

XI PARTICULAR CONTRACTS—cont.
(b) ESCROWS—concluded

grantor was intending to pass title to the grantee.

Keating v Augustine, 213-1336; 241 NW 429

Stock—assignment without delivery of certificate. A written assignment by the owner of corporate shares of stock of all his right, title and interest therein conveys good title, (1) even tho the owner places the assignment in escrow and causes it, together with the stock certificate, to be delivered to the assignee after his death, and (2) even tho the assignor, prior to his death, pledges the said stock certificate as security for a personal loan, which his estate later paid.

Leedham v Leedham, 218-767; 254 NW 61

Liability of escrow holder. The holder of funds in escrow becomes personally liable for the fund when he makes application thereof contrary to or in violation of the escrow agreement.

Stevens v Eggerichs, 219-479; 257 NW 775

Delivery to trustee—no reservation of right to recall. Where deed is delivered by grantor to a third party with instructions to deliver it to the grantee or record the same upon the death of the grantor, with no reservations of a right to recall the same during the lifetime of the grantor, there is sufficient delivery.

Bohle v Brooks, 225-980; 282 NW 351

Authority of depository—assessment on corporate stock. The holder in escrow of corporate stock has no implied authority to pay an assessment on said stock.

Harris v Bills, 203-1034; 213 NW 929

Special deposit as part of real estate deal. A cash deposit in a bank, understood by all parties, including the bank, to be made for the purpose of paying a vendor for land sold, and which, with accompanying papers, was held in escrow pending completion of title, must be deemed a special deposit and entitled to preferential payment on the insolvency of the bank, even tho a certificate of deposit, payable to the vendor, was issued by the bank and retained among the papers evidencing the deal.

Gillett v Bank, 219-497; 258 NW 99

Contract pending appeal. Where, pending an appeal which involved the title to land, the rival claimants under a landlord's lien and under a chattel mortgage on the crop entered into an agreement for the harvesting and sale of the crop and the holding of the proceeds until the appeal was decided, held that the contract evidently contemplated that the final holding on appeal would settle the right of one or the other of the parties to the controversy without further litigation.

Farber v Andrew, 208-964; 225 NW 850

(c) OPTIONS

Discussion. See 3 ILB 173—Mutuality in option contracts

Option distinguished from executory contract. An obligation on the part of the owner of real estate to sell, and of another party to buy, are all-essential elements of an executory contract of purchase of said land. Writing reviewed and held to constitute a mere option to buy which became a nullity on failure of optionee to exercise the option.

Burmeister v Council Bluffs Co., 222-66; 268 NW 188

Sale (?) or option (?). A writing wherein the vendor agrees to sell and convey, and the vendee agrees to buy, on stated terms and conditions, and under which the vendee takes possession, is a contract of sale, and not an option to buy.

Wilson v Holub, 202-549; 210 NW 593; 58 ALR 646

Personal liability (?) or option (?). Contract construed, and in the light of the conduct of the parties, held to impose a personal obligation, and not to constitute a mere option.

Spencer v Likes, 214-1066; 241 NW 493

Option to buy in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession or (2) title or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Strip mining coal—back-filling required. A holder of a strip mine coal lease who enters upon and strips coal from land, upon which land a pipe line company holds an easement, knowing that by so mining violates his lease, must back-fill the land when the easement holder exercises his option to buy; and upon his failure to make the back-fill, a judgment against the coal lessee for the cost thereof is proper.

Penn v Pipe Line Co., 225-680; 281 NW 194

Rescission by optionee—nonrecovery. The assignee of an option contract for the purchase of land may not, upon rescinding, recover of the original optionor (with whom he has no contract) the amount paid for the option.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Rescission—recovery for betterments. The assignee of an option contract for the purchase of land may, upon rescission, recover of his

assignor the value of betterments which he—the assignee—has necessarily been compelled to place on the land.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Rescission — use and occupancy — measure. When the assignee of an option contract for the purchase of land rescinds after he has been put in possession, his liability for the use and occupancy of the land is measured by the reasonable value thereof, and not by the provisions of the rescinded contract.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Rescission by assignee—effect. The assignee of an option contract does not, by giving notice that he rescinds the contract between the original optionor and optionee, destroy the rights of the original optionee under the contract. Especially is such notice inconsequential when the record shows that the original option had no value.

Bredensteiner v Oviatt, 202-993; 210 NW 133

(d) EMPLOYMENT CONTRACTS

Discussion. See 17 ILR 388—Negative covenants enforced

Employer-employee relation—test. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

Master and servant — the relation — when question of law. When the relationship of parties is fixed by a written contract, the question whether they occupy the relation of master and servant (employer and employee) is one of law to be determined by the court and not one of fact to be determined by the jury.

Page v Constr. Co., 215-1388; 245 NW 208

Proposal or offer—implied acceptance. One who is, in writing, offered work at a specified price and proceeds to perform the work without further negotiation necessarily agrees to do the work for the offered compensation.

Commercial Bank v Broadhead, 212-688; 235 NW 299

Receiver — federal appointment — effect on state courts. The mere pendency of federal receivership proceedings over a party does not necessarily oust the jurisdiction of the state courts over the party and over his property, and such pendency may not be allowed as a defense to an employment contract.

Lippke v Milling Co., 215-134; 244 NW 845

Attorney and client—summary proceedings —findings conclusive. In a summary proceeding by a client against his attorney, the finding by the trial court on conflicting testimony is conclusive on the appellate court.

Norman v Bennett, 216-181; 246 NW 378

Employee earning bonus—effect. Evidence held to sustain a verdict that a bonus under an employment contract had been fully earned before the execution of a subsequent contract which supplanted the former contract.

Williams v Oil Corp., 216-821; 247 NW 817

Bonus at end of year—question of fraud. Oral contract of employment at fixed hourly rate and providing for bonus at end of year held not within statute of frauds.

Meredith v Youngstrom Co., (NOR); 205 NW 749

Partnership changes—performance with new entity—waiver. A physician as a party to a contract of employment with a medical clinic partnership is not in a position to question its validity on the ground that there had been a change in the members of the partnership and consequently no contract with the new entity, when his full performance of and under the contract had been with the new entity, including an extension of the contract.

Larsen v Burroughs, 224-740; 277 NW 463

Oral wage agreement—erroneous writing—effect of employee's conduct. An oral wage scale agreement applicable to the first few weeks of employment, incorrectly reduced to writing by employer's agent, but correctly followed in paying wages which was not challenged by employee during the several years he continued in this employment, justifies a reformation of the writing to conform to the oral agreement.

Koch v Abramson, 223-1356; 275 NW 58

Teachers—contract—oral extension—validity. An oral extension of time for teaching under a teacher's contract (under which no services were rendered) cannot be recognized.

Krutsinger v Township of Liberty, 219-291; 257 NW 797

Estates—payment for services. Where a deceased had taken his nephew, reared him, and promised to pay him for working on decedent's farm, testimony as to statements made by the deceased in conversations wherein deceased had said the boy was to be paid from his estate when he died, may be received from the wife of deceased, the wife of claimant, and the claimant himself, provided they took no part in the conversations.

Gardner v Marquis, 224-458; 275 NW 493

Evidence of express contract for services—jury question. In probate action to establish claim against estate based on express contract; where evidence that claimant acted as housekeeper, assisted with clerical work, and performed other duties about the farm for decedent, pursuant to his agreement to pay her a small amount sufficient to cover the cost of her clothing and other personal expenses, and in addition thereto to compensate her out of his estate at his decease in such amount as

XI PARTICULAR CONTRACTS—cont.
(d) EMPLOYMENT CONTRACTS—continued

would be in excess of any amount she could earn teaching school, a jury question was presented as to the existence of an enforceable contract and as to its nature.

In re McKeon, 227-1050; 289 NW 915

Services rendered to decedent—evidence of agreement admissible—jury question. In probate action where a claimant seeks to recover for services rendered to decedent under an express contract, the performance of such services must have been induced by a proposal and must have been in accordance therewith. Testimony by a witness to a conversation with decedent, who stated that he intended to see that claimant was properly cared for, that he would give her spending money (the little she would need), and at the end of his life he would leave her a home, was admissible and proper evidence for the jury to consider on question of whether or not there was any such arrangement or agreement. What the parties agreed to must be determined by the jury.

In re McKeon, 227-1050; 289 NW 915

Estates—partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the fourteen years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Services to be paid for "on or before" death. An oral contract to pay for services, payable "on or before" the death of the promisor, matures at his death and therefore is not barred by the statute of limitations, even tho the claim was running for over 20 years.

Gardner v Marquis, 224-458; 275 NW 493

Employment of acrobats—assignment to booking agency—nonnovation. Where a broadcasting company assigned to a booking agency an oral contract for employment of an acrobatic team, and such agency subsequently became the booker of the acrobats under a written contract, the company was not relieved of liability under the employment contract on the ground of "novation", because there was no evidence that all parties consented to a substitution of the agency for the company.

Wade v Central Broadcasting Co., 227-422; 288 NW 439

Discharging acrobatic team. In acrobatic team's action for breach of contract of employment for two bookings, evidence, that plaintiffs were ready to perform and that employer replaced them in one of the engagements and told them they would not be used in the other, justified finding that plaintiffs were discharged.

Wade v Central Broadcasting Co., 227-422; 288 NW 439

Discharge of employer's liability—effect on third party wrongdoer. Where an injury, which is mandatorily compensable under the workmen's compensation act, is received by an employee in consequence of the actionable negligence of the operator of an automobile owned by, and operated with the consent of, the employer, the fact that the employer fully discharges his statutory liability to the employee does not ipso facto discharge the legal liability of the said negligent operator to said employee.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Unilateral contract as to wage scale—enforcement. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral—when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Airline Co., 215-855; 246 NW 753

Contingent attorney fee—validity of contract. A contract between an attorney and a client fixing the contingent compensation of the attorney at one-third of the amount recovered, entered into at a time when the extent of the litigation was quite problematical, is not rendered unenforceable because ultimately the services necessary to effect a recovery were quite small. Nor is such a contract champertous.

State v Cas. Co., 212-1052; 237 NW 360

Compensation liability—contract in avoidance—effect. A contract must be wholly rejected insofar as it appears to be a mere device resorted to by the employer in order to relieve himself of liability under the workmen's compensation act.

Mallinger v Oil Co., 211-847; 234 NW 254

Compensation—use of auto. Evidence reviewed and held wholly insufficient to establish a pleaded modification of a contract relative to the compensation of an agent for his services and for the use of his automobile in performing said services.

Hueston v Pointer Co., 222-630; 269 NW 754

Devoting full time—question for jury. In action to recover for services in securing contract for construction of building, question of whether plaintiff breached his contract by failing to devote full time to developing and financing the project was for the jury.

Cox v Fleisher Const. Co., (NOR); 213 NW 442

Overdrawn moneys — counterclaim — pleadings. Where defendant employee's answer, in action by employer to recover overdrawn moneys sets up counterclaim for moneys due him under oral employment contract the lower court properly denied the counterclaim when the contract was not established as pleaded.

Economy Hog Co. v Honett, 222-894; 270 NW 842

Deducting employee's debt to employer. Where a defendant-employer in paying his employee deducted an amount which the employee was owing the employer, and, when sued, based his right so to do (1) on an oral contract that he might so deduct, and (2) on his right to so deduct irrespective of such oral contract, the court prejudicially errs, in its instructions, in making the right to deduct dependent on proof of the oral contract.

Jorgensen v Cocklin, 219-1103; 260 NW 6

Breach—acts constituting. An employee who is employed for a definite time to assist in or to supervise the sale of corporate securities may treat his contract of employment as breached when the master discontinues the sale of the securities and offers him employment in peddling merchandise from house to house.

Breen v Power Co., 207-1161; 224 NW 562

Contract employing physician—future practice restraint unaffected by indefinite employment extension. When being employed by a medical clinic in a locality where he is not acquainted, a contract by a physician agreeing that at the termination thereof he will not practice his profession for ten years within a certain locality is not invalidated by reason of an indefinite extension of the employment period mutually acted upon by all parties, and injunctive relief was properly granted to employer.

Larsen v Burroughs, 224-740; 277 NW 463

Contract restraining competition. An employment contract between two physicians, which after setting forth several requirements of the employee, further provides for "liquidated damages" in case the employee independently practices in the county within five years after termination of the employment, may be construed, not as a contract for liquidated damages, but as a penalty.

McMurray v Faust, 224-50; 276 NW 95

Contract restraining competition of profession—liquidated damages—nonbar. Injunction is a proper remedy to restrain one physician from practicing his profession contrary to the provisions of his contract not to engage in competitive practice in the same county for a specified period. A provision in the contract for "liquidated damages" will not bar injunctive relief.

McMurray v Faust, 224-50; 276 NW 95

Contract not to competitively engage in guarding property. Where a discharged employee of a company engaged in guarding business houses at night threatens to breach his contract prohibiting him from entering into competition therewith, a petition seeking injunctive relief against him and alleging these facts sets up a good cause of action for an injunction.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Infringement and unfair competition—employee entering employ of rival. An employee may lawfully terminate his employment with his employer, and enter into the employment of a rival of his former employer, and advertise and circularize such fact, and no legal right of the former employer is violated so long as it appears that the employee furnishes to his new employer no list of the former employer's customers and that no confidential information acquired in the former employment is used in the latter.

Universal Corp. v Jacobson, 212-1088; 237 NW 436

Unfair competition — evidence — sufficiency. Evidence reviewed and held insufficient to show that a party, in leaving an employment and entering into the same business in the same territory, took anything that could be deemed the property of his former employer.

Rosenstein v Smith, 218-1381; 257 NW 397

Performance or breach—waiver—evidence—sufficiency. A waiver is the voluntary and intentional relinquishment or abandonment of an existing legal right. He who relies thereon has the burden of establishing all elements thereof. Evidence involving the payment of renewal commissions on insurance policies reviewed and held insufficient to establish a waiver.

McPherrin v Assur. Co., 219-159; 257 NW 316

Breach—damages (?) or quantum meruit (?). An action for damages for breach of a contract of employment may be supported by evidence of the reasonable value of the services rendered, when the pleadings present such sum as the damages.

Westerfield v Oil Co., 208-912; 223 NW 894

Iowa employment contract—action—place of business. Action for damages under oral contract of employment made in Iowa is not governed by the place where the contract was entered into, but may be maintained in state where employer's business was "localized".

Severson v Hanford Air Lines, 105 F 2d, 622

Wage recovery dependent on reformation. In a law action for wages, allegedly due an employee under contract, where parties stipulate that the employee shall not recover such wages if the defendant prevails on his cross-

XI PARTICULAR CONTRACTS—continued
(d) EMPLOYMENT CONTRACTS—continued

petition for reformation, transferred to equity on motion, the employee may not thereafter deny the court's right to try the reformation issue and is bound by the decree if not contrary to the evidence.

Koch v Abramson, 223-1356; 275 NW 58

Duplicate counts pleading quantum meruit and express contract. In an action for services, duplicate counts are proper, one pleading quantum meruit, and the other an express contract for definite compensation, and a refusal to compel plaintiff to elect between the two counts is not erroneous.

Halstead v Rohret, 212-837; 235 NW 293

Value of services—issues control. Issues control the relevancy, materiality and competency of evidence. Principle applied where it is held that evidence of the value of services is not admissible on the narrow issue whether an oral contract for services for $500 had been entered into.

McManus v Kucharo, 219-865; 259 NW 926

Oral contract—bonus—submission of issues. In action on oral contract of employment submission to jury of controlling issue of whether plaintiff is entitled to $10 weekly bonus is sufficient even tho the court did not literally and technically follow the pleadings.

Yaus v Shawmutt Egg Co., 204-426; 213 NW 230

Employment contract—duration—jury question not within statute of frauds. Whether an employer agreed to pay bonus on wages earned by employee for each year of employment, or only for year in which agreement was made, held for jury on conflicting evidence and under the facts and circumstances such agreement was not within the statute of frauds.

Meredith v Youngstrom Co., (NOR); 205 NW 749

Duration — evidence — sufficiency. Evidence reviewed, and held to present a jury question on the issue whether a contract of employment had been entered into for a definite time.

Breen v Power Co., 207-1161; 224 NW 562

Employment of school janitor. When a school board each year considered hiring the janitor at a specified salary, the board proceedings invited a contract with the janitor, the acceptance being evidenced by performance on his part. The employment was for definite yearly periods, and the board proceedings being public records accessible to the janitor, he should have known that the employment was yearly, and he could not avoid the terms of the contract and claim an indefinite period of employment when by the exercise of reasonable diligence he could have known upon what he was agreeing.

Durst v Board, 228- ; 292 NW 73

Teachers—issue as to terms of contract. Evidence held to present a jury question on the issue whether a contract had been entered into with a teacher.

Krutsinger v Township of Liberty, 219-291; 257 NW 797

Injecting unpleaded issue into instructions. On the one duly joined issue whether plaintiff was orally employed to render services for defendant in a certain matter, the court commits reversible error by injecting into the instructions the unpleaded issue whether defendant knew that plaintiff was performing services for defendant and accepted the benefits of such services.

Graeser v Jones, 217-499; 251 NW 162

Similar but independent contracts. Parol evidence of a contract binding defendant to purchase and deliver to plaintiff a named number of corporate shares of stock in payment for services performed by plaintiff is independent of a subsequent written agreement binding plaintiff to buy of defendant the same number of shares of stock of the same company.

Cox v Constr. Co., 208-458; 223 NW 521

Value of services—harmless error—competent and incompetent evidence. It is not reversible error to permit to remain in the record on the issue of the quantum meruit of services testimony of what amount an expert witness would be willing to pay for such services, when the witness further testifies that said amount is the reasonable value of such services.

Olson v Shuler, 208-70; 221 NW 941

Services and compensation—evidence—sufficiency. Evidence held to support a finding that the salary received by plaintiff while she was in the employ of an individual was continued when she became an employee of a corporation of which her former individual employer was president.

Crawford v Finance Corp., 217-175; 251 NW 57

Unreasonable and unconscionable contract—evidence. On the issue whether a contract of employment was unreasonable and unconscionable, evidence of the salaries paid to former employees of the same corporation may be material.

Schulte v Ideal Co., 208-767; 226 NW 174

Breach—discharge of employee. The peremptory discharge without cause of an employee under a definite time contract is, of course, a breach of the contract.

Westerfield v Oil Co., 208-912; 223 NW 894

Teaching contract—modification by extrinsic matters. In an action at law by a teacher upon a written contract of employment, the rights of the parties are necessarily determinable by the actual terms of the contract,

unmodified by extraneous matters or circumstances.

Miner v Sch. Dist., 212-973; 234 NW 817

School contract — termination on notice — validity. A provision in a public school contract authorizing either party to the contract to terminate it by giving written notice of such termination for a named number of days is not violative of or inconsistent with either §4229 or §4237, C., '27.

Miner v Sch. Dist., 212-973; 234 NW 817

Teacher's contract—termination on notice. A provision, in a public school contract, which authorizes the school district to terminate the contract on stated notice at any time and for any reason, is valid, and, if a termination is effected under such contract authorization and not under statutory authorization (§4237, C., '35), no appeal will lie to the county superintendent or, in turn, to the state superintendent. In other words, neither superintendent has jurisdiction to review such a discharge.

School Dist. v Samuelson, 222-1063; 270 NW 434

Sales contract — indefinite term — termination. The oral granting, on adequate consideration, by a manufacturer to another party of the exclusive right to sell a legal article in prescribed territory so long as there is a demand for the article, and so long as such other party desires to continue such sale, is, on acceptance, a valid contract until terminated by reasonable notice.

Atlas Co. v Huffman, 217-1217; 252 NW 133

Employment of soldier for definite time—effect. An honorably discharged soldier who is employed by the board of supervisors, under a written contract, for a definite period of time as janitor of the courthouse, does not, by serving said contract period of time, acquire a legal right, even tho his competency and conduct are unquestioned, to continue in said position in preference to another honorably discharged soldier of equal qualifications.

Sorenson v Andrews, 221-44; 264 NW 562

Cancellation—instructions. In action by ballplayer to recover for services under written contract which could be terminated by defendant at any time, an instruction that oral notice of termination given by any of the members of the defendant baseball club would cancel the contract was not prejudicial when in fact all members of the club were present and in complete accord at the meeting at which the contract was canceled.

Jacobs v Vander Wicken, (NOR); 218 NW 147

Foreign employer — adjudication on registered mail service. The Workmen's Compensation Act, in the absence of a statutory rejection thereof, becomes a part of a contract of employment which is performable by the employee wholly within this state, and entered into between a resident employee of this state and a foreign nonresident employer doing business in this state without a state permit; but in case the employee dies from an injury compensable under said act, the industrial commissioner acquires no jurisdiction to determine and adjudicate the compensation due on account of said death by simply sending, by registered mail, notices of said proceedings to said employer in said foreign state, tho, concededly, the addressee received said notices. An adjudication on such service does not constitute due process.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

(e) BROKERS AND COMMISSION CONTRACTS GENERALLY

Petition—separate counts required. A plaintiff who pleads both quantum meruit and express contract in the same count should be compelled, on motion, to separate his cause of action into separate counts.

Donahoe v Gagen, 217-88; 250 NW 892

Compensation—insufficient proof. It is a far-fetched proposition that a broker employed to effect a sale of all the capital stock of a corporation has established his right to a commission by proof that he contacted a party in the effort to effect such sale but was unsuccessful, and that some two years later, without any further effort on his part, the party so contacted and said corporation effected a reorganization of the corporation on the basis of a stock issue entirely different than that formerly existing.

Jackley-Wiedman Co. v Washer Co., 220-486; 262 NW 97; 101 ALR 1216

Presence or absence of directions as to sale. Factors must comply with specific directions as to time of sale. In the absence of such directions, they must sell within a reasonable time.

Alley Co. v Cream. Co., 201-621; 207 NW 767

Contract to find purchaser—tentative offer —effect. The issue whether a broker found a purchaser ready, able, and willing to buy the property of his principal is not affirmatively established by proof that the broker found one who made a tentative proposition to purchase, which was specifically dependent on a further investigation as to the legality and probable security of the property—an issue of bonds—which investigation the person making the offer never made.

MacVicar v Paving Corp., 201-355; 207 NW 378

Action for compensation—status as licensee —failure to allege—effect. The failure of a broker in his petition for the recovery of commission to allege his status as a duly licensed broker is quite harmless (1) when the petition is not attacked because of such omission, and (2) when the evidence, received without objection, clearly establishes such status.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Action for compensation—quantum meruit —irrelevant testimony. In an action by a broker to recover commission on a basis of quantum meruit, evidence is properly rejected as to the compensation generally received by brokers when they work by the day, the actual evidence received fairly showing that the customary method of employment of brokers was on a commission basis.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Refusal of employer to sell at price stated —not excused by resulting loss. One who contracted to pay a commission to a dealer for selling goods at a certain price could not excuse his breach of the contract by refusing to sell except at a higher price, at least as to orders for goods taken before the breach, on the ground that to fulfill the contract would cause him to operate his business at a loss.

Lee v Sundberg, 227-1375; 291 NW 146

Loss of commissions on sales—price raised after orders taken. Where a manufacturer contracted with a dealer who was to take orders for twine at a certain price and the manufacturer later refused to fill the orders taken except at a higher price, in an action by the dealer for loss of commissions, damages were sufficiently proven by evidence that the dealer had incurred expenses in taking the orders, and that only about 25 percent of the orders were accepted by customers because of the increased price, while normally 95 percent of the orders would have been accepted.

Lee v Sundberg, 227-1375; 291 NW 146

Duties and liabilities to principal—acting for parties adversely interested. A broker may act for adversely interested parties provided that they consent to such dual agency.

Loots v Knoke, 209-447; 228 NW 45

CHAPTER 421

TENDER OF PAYMENT AND PERFORMANCE

9443 Demand required.

Refusal—effect. An agreement to receive corporate stock in payment of wages is converted into a money demand by a failure to deliver the stock.

Tracey v Judy, 202-646; 210 NW 793

Contracts — performance — reasonable time to construct grotto. An individual constructing a grotto for a charitable organization under an agreement containing no time for completion has a reasonable time for performance.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Cashing conditional down-payment check—claim of mistake. In an action for specific performance of a land purchase contract, the act of an agent having power to contract in allowing a down-payment check to be cashed when it bears a notation, of which he is aware, that it is not to be cashed until and unless the contract is accepted, furnishes support for a finding in equity that the contract was accepted, even tho the agent later claims that the check was cashed by mistake.

Hotz v Assur. Soc., 224-552; 276 NW 413

Nonpayment of royalties not repudiation of patent license. A contract to pay royalties under a patent license was not repudiated by the mere refusal to make the royalty payments which were legally due.

Eulberg v Cooper, 226-776; 285 NW 131

Proof—deferred salary—later payments nonwaiver. Waiver being an intentional relinquishment of a known right and provable only by clear, satisfactory, unambiguous evidence, where a corporation resolution deferring payment of certain delinquent salary accounts due corporate officers, did not of itself prevent payments thereon, fact of withdrawals thereafter from such salary accounts is not a waiver of such resolution.

Bankers Trust v Economy Coal, 224-36; 276 NW 16

Parol evidence to explain ambiguous contract. A written contract for storage of corn, which makes no provision as to when the seller is to exercise an option to sell nor as to when the storage is to be paid, does not contain the entire agreement entered into, and parol evidence is admissible on the question as to what was reasonable time to perform.

Andreas & Son v Hempy, 224-561; 276 NW 791

Waiver—definition—fact question. Waiver is the voluntary and intentional relinquishment of a known right and is a question of fact.

Jones v Des Moines, 225-1342; 283 NW 924

9444 Tender of labor or property.

Payment generally. See under §11209

Conditional tender. Principle reaffirmed that a tender is not good unless made unconditionally.

Schwab v Roberts, 220-958; 263 NW 19

Tender—sufficiency. On rescission of a contract of purchase of corporate shares of stock because of fraud which induced the purchase, an unconditional tender to the seller of the stock certificate is all-sufficient, even tho the certificate is being held as collateral security for the debt of the one who makes the rescission.

North Amer. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492

Tax titles—paying taxes before attacking tax deed—valid tender sufficient. Statute requiring payment of taxes as a prerequisite to attacking a tax deed, §7290, does not preclude questioning the title by a person who repeatedly offers to do equity by tendering the whole of the taxes legally and rightfully due together with interest and penalties thereon.

Jordan v Beeson, 225-460; 280 NW 625

Mode and sufficiency. Evidence held to show a good tender of corporate shares of stock.

Calvert v Mason City Co., 219-963; 259 NW 452

Right to increase tender. Tho a tender of the amount due under a contract is slightly inadequate, the court, in an equitable action involving the contract, may very properly permit the purchaser to increase his tender to the required amount.

May v Haynie, 212-66; 236 NW 98

Tender of deeds before suit—nonnecessity. In an equity action for specific performance of a land contract, a vendor need not formally tender the deeds before starting suit, and when vendee specifically contracts to first pay the purchase price before getting the deed, the vendor need only get himself in readiness to perform.

Utterback v Stewart, 224-1135; 277 NW 735

Justifiable refusal. A servant who agrees to accept corporate stock in a contemplated corporation in payment of his wages is justified in refusing the stock at a time when, without his consent, the corporation has become heavily incumbered by mortgage.

Tracey v Judy, 202-646; 210 NW 793

Sale for delinquent taxes not carried forward—setting aside—insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

9446 Effect of tender.

Payment generally. See under §11209

Sufficiency—effect—burden of proof. Tender will not discharge a debt, and is of no avail unless kept good, and the burden of proving affirmatively that it has been kept good is on the party relying thereon.

Hill v Rolfsema, 226-486; 284 NW 376

Specific performance of real estate sale contract—tender. In an action to recover rent a counterclaim for specific performance of a contract to sell the property was properly prepared when it contained allegations that the purchaser was at that time, and at all times had been, ready, willing, and able to perform, and had made a tender of performance which was refused, and a copy of the letter constituting such tender was attached to the counterclaim.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

9448 Offer in writing—effect.

Offer in pleadings. An offer by a litigant in an equitable pleading to pay whatever sums are legally necessary to effect a redemption constitutes a sufficient tender.

Fidelity Inv. v White, 208-519; 223 NW 884

Sufficiency in equity. In equity, it is sufficient to tender in the pleadings and at the trial, the restoration of the status quo.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

Nonproduction of money. A litigant who admits his indebtedness and is able and willing to pay it, and who, in order to protect himself, equitably interpleads warring claimants to the fund, and therein tenders the sum to whomsoever it is adjudged to belong, may not be held liable for interest because he does not actually bring the money into court until after the issues are determined.

Kelly etc. v Bank, 217-725; 248 NW 9; 250 NW 171

Tender of conveyance—sufficiency. Tender of a deed is not a condition precedent to the beginning of an equitable action by a vendor to enforce a contract for the sale of land. A tender in the petition is all-sufficient.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Specific performance. One who had agreed to obtain a loan to be used for the purchase of land did not make a sufficient showing that he was ready, willing, and able to perform the alleged contract to buy the land so as to entitle him to specific performance when it was never shown that he had the purchase money, when an attempted loan of the money was never completed, when there was no application on file for the loan at the time of trial, and when it was not shown that the loan would have been granted had the application been made.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

Tender—real estate contract. When the vendor had put it out of his power to perform a contract to sell realty by permitting a mortgage on the property to be foreclosed, it was not necessary for the purchaser to tender the unpaid part of the purchase price before commencing suit for the amounts paid.

Trammel v Kemler, 226-918; 285 NW 196

Check as good tender. The tender of a valid, collectible check in payment of a debt is good when not objected to because not lawful money, but objected to on an untenable ground.

Schmith v Cas. Co., 216-936; 247 NW 655

Time of performance—relative rights of parties. The vendor in a contract specifically requiring the vendee to first pay before getting the deed, need only get himself in readiness to perform, and need make no tender until payment is made or offered by vendee, and the vendor is not in default until this is done.

Foft v Page, 215-387; 245 NW 312

9449 Nonacceptance of tender.

ANALYSIS

I SUFFICIENCY AND NECESSITY OF TENDER
II MAINTENANCE OF TENDER
III EFFECT OF TENDER

Payment generally. See under §11209

I SUFFICIENCY AND NECESSITY OF TENDER

Conditional tender. Principle reaffirmed that a tender is not good unless made unconditionally.

Schwab v Roberts, 220-958; 263 NW 19

Rescission of promissory note—status quo. An offer by the maker of a promissory note, on rescission thereof, to return everything received by virtue of the note is a sufficient offer to put the holder in statu quo.

Larson v Bank, 202-333; 208 NW 726

Payment of dues and fines. When a lodge and the officers thereof are subject to contempt for failure to reinstate a member "upon the payment of all dues and fines", no basis for contempt proceedings is shown by testimony that a representative of the member attended a session of the lodge, made inquiry as to said member, discovered that the members present were hostile, and thereupon sat down without producing or offering to produce money for said dues and fines and without even giving notice that he was representing said member.

St. George's Soc. v Sawyer, 204-103; 214 NW 877

Contract for sale of land. A contract purchaser of land may rescind and recover the payment made by him when, at the contract time for performance, the vendor has no title, and in such case the purchaser need make no tender of performance by himself.

Dolliver v Elmer, 220-348; 260 NW 85

Real estate contract — vendor's inability to perform. When the vendor had put it out of his power to perform a contract to sell realty by permitting a mortgage on the property to be foreclosed, it was not necessary for the purchaser to tender the unpaid part of the purchase price before commencing suit for the amounts paid.

Trammel v Kemler, 226-918; 285 NW 196

Nontender of abstract and deed. In an action against a defaulting vendee, to foreclose a contract of sale of real estate for matured and unpaid installments, no tender of abstract and deed is necessary as a condition precedent to maintaining the action, when the right to said abstract and deed has not yet matured under the contract.

Dimon v Wright, 206-693; 214 NW 673

Replevin under conditional sale. In an action of replevin based on a conditional sale contract which provides for possession by the vendor in case of condition broken, tender of payments already made is not a condition precedent to the institution of the action.

Schmoller Co. v Smith, 204-661; 215 NW 628

Payment of disputed claim accepted. When a town had contracted to pay a certain rate for furnishing street lighting services, and later a reduced rate was adopted, and there was a disagreement as to the rate to be paid on certain months, there was accord and satisfaction when the plaintiff accepted and cashed a warrant knowing that it was tendered in full payment of all claims.

Munn v Drakesville, 226-1040; 285 NW 644

Offer accepted or rejected as a whole. When a town warrant was issued in full payment of a disputed claim, and was accepted with such knowledge, there was an accord and satisfaction of all claims, as such offer must be accepted or rejected as a whole.

Munn v Drakesville, 226-1040; 285 NW 644

Public utility—justifiable refusal to furnish product. A public utility company is within its rights in refusing to furnish its product—electric energy—to one who fails to pay his current bill for such product, and it is not sufficient that the customer tenders payment for future service.

Bailey v Power Co., 209-631; 228 NW 644

Recovery of purchase price—sales in violation of securities law — tender of securities necessary. Purchaser suing to recover price paid for securities sold in violation of Iowa securities law must at least tender to seller securities equivalent in value to those purchased.

Huglin v Byllesby & Co., 72 F 2d, 341

II MAINTENANCE OF TENDER

Rejection—effect. Even tho a tender has been refused, equity may require it to be kept good.

Thompson v Mott, 202-246; 210 NW 91

Temporary injunction — automatic dissolution. Under an order providing that defendant's motion to dissolve a temporary injunction "be sustained" if defendant, within a named time, paid plaintiff a named sum, and also certain costs, the injunction is automatically dissolved both (1) by the act of defendant in paying, within said time, the said costs and tendering to plaintiff the named sum (tho plaintiff refused the tender), and (2) by the affirmance of the order on appeal by plaintiff. It follows that a further unnecessary order, subsequent to the affirmance, finally dissolving the injunction, is not erroneous, even tho defendant had not kept good his tender.

Peoples Bk. v McCarthy, 210-952; 231 NW 487

III EFFECT OF TENDER

Workmen's compensation act. A tender by an employer of the proper amount of compensation payments, and for the proper compensation period, absolves the employer from all obligation to pay interest on such payments pending an unsuccessful attempt by the employee to secure an increase in the compensation period.

Pappas v Tile Co., 201-607; 206 NW 146

Workmen's compensation act. The acceptance by an employee of tendered compensation payments under the workmen's compensation act cannot prejudice him when the sole dispute between the employer and employee is as to the time the payments should continue.

Pappas v Tile Co., 201-607; 206 NW 146

Modification of contract — repudiation — effect. Where a vendor and purchaser of real estate mutually agree to an extension of time for the final performance of the contract, the purchaser may not put the vendor in default by a tender and demand during said extension of time. But, nevertheless, the vendor may acquiesce in the act of the purchaser in repudiating the extension agreement, and, within a reasonable time, put himself in a position to fulfill his contract to sell, and make tender and demand accordingly.

Foft v Page, 215-387; 245 NW 312

CHAPTER 422

ASSIGNMENT OF ACCOUNTS AND NONNEGOTIABLE INSTRUMENTS

9451 Assignment of nonnegotiable instruments.

ANALYSIS

I ASSIGNMENTS IN GENERAL
II ASSIGNABILITY OF INSTRUMENTS AND CLAIMS

Assignee as party to action. See under §10971
Assignment of leases. See under §10159 (III)
Assignment of leases in mortgage foreclosures. See under §§10107, 12372
Assignment of thing in action. See under §10971
Contracts prohibiting assignment. See under §9452

I ASSIGNMENTS IN GENERAL

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Note and mortgage — consideration — adequacy. Evidence reviewed relative to an assignment of a note and mortgage for $5,000, and held that a life annuity of $200 per year to the assignor was sufficiently adequate to prevent any imputation of fraud, actual or constructive.

Scott v Seabury, 220-655; 262 NW 804

Pre-existing debt as consideration. A pre-existing indebtedness furnishes ample consideration for a transfer by a mortgagor of rent notes.

First Tr. JSL Bank v Conway, 215-1031; 247 NW 253

Writing designated as "check". An instrument in the form of a combined voucher and receipt, and containing no words of negotiability, is not a negotiable instrument and does not become such when indorsed by the indicated payee, tho the instrument states that when so indorsed "it becomes a check".

Soldier V. S. Bank v Camanche Co., 219-614; 258 NW 879

Draft not ipso facto assignment. The oral statement by the president of a bank, made to the payee of a draft at the time of its issuance and delivery, that the draft "operated as an assignment" of an equal amount of money then in the hands of the drawee-bank and belonging to the issuing bank does not constitute an actual assignment.

Andrew v Bank, 215-290; 245 NW 329

Contract for sale of realty—liability of assignee. One who receives, from a purchaser, an assignment of a contract for a deed, which assignment binds the said assignee to fully perform the assigned contract, must be deemed to have ratified the terms of said assignment and be bound thereby when, henceforth, he treats said land as his land and said contract as his obligation, even tho the assignee did not sign said instrument of assignment.

Gables v Kleaveland, 220-1280; 263 NW 339

Statutory bonds—surety (?) or assignee (?). A surety who takes over the work of a defaulting public drainage contractor and proceeds to pay off claims which are statutorily lienable against the funds due under the con-

I ASSIGNMENTS IN GENERAL—continued

tract acquires a right of subrogation superior to that of a prior assignee of said funds.

Ottumwa Works v O'Meara, 206-577; 218 NW 920

Pledgee as purchaser—nonallowable lien on sale price. An assignee of a promissory note as collateral security who takes his assignment without delivery to him of the note may not have a lien for the amount of his claim established on the sum paid for the note by a subsequent pledgee of the note at a judicial foreclosure sale of said pledged note, it appearing that said pledgee acted in perfect good faith, and without notice of the assignee's equity in said note.

Reyelts v Feucht, 206-1326; 221 NW 937

Rights on indorsement—nonprotected party. A nonnegotiable instrument in the hands of a third party indorsee is subject to the equities existing between the original parties to the instrument.

Soldier V. S. Bank v Camanche Co., 219-614; 258 NW 879

Rents assigned—equities of parties. Principle recognized that an assignee of a landlord's right to demand an accounting for rents simply stands in the shoes of the assignor.

Quaintance v Bank, 201-457; 205 NW 739

Miller v Sievers, 213-45; 238 NW 469

Culavin v Telephone Co., 224-813; 276 NW 621

Attorney fees—persons liable—assignee of written lease. Attorney fees may be taxed as costs under a written lease so providing, when the action for rent is against the written assignee of the lease who orally accepted the assignment.

Central Bk. v Herrick, 214-379; 240 NW 242

Rents — assignee (?) or mortgagee (?). Rents accruing during the year in which a mortgage is foreclosed, and based on crops harvested or matured by the time the period starts to run, belong to the assignee of such rents who (1) became such assignee prior to the commencement of foreclosure, (2) was not made a party to the foreclosure, and (3) had no knowledge of the foreclosure.

Bain v Washburn, 214-609; 243 NW 286

Assignee of lease—rights limited to interest of mortgagor-landlord. The assignee of a lease from a landlord-mortgagor cannot take, as against mortgagee, any greater interest than held by the landlord-mortgagor.

Bankers Life v Garlock, 227-1335; 291 NW 536

Foreclosure—transfer of rents—consideration. Record reviewed and held that a written transfer of the right to the use and occupancy of mortgaged premises during the period of redemption was supported by adequate consideration and was free from fraud.

Andrew v Miller, 218-301; 255 NW 492

Forfeiture by assignee of contract. The assignee of a contract of sale of real estate has the same right to forfeit the contract as the assignor had.

Moore v Elliott, 213-374; 239 NW 32

Defense available against transferee. The maker of a nonnegotiable promissory note who, subsequent to the execution of the note, and before he had knowledge of the transfer of the note, has on deposit with the payee (a private banker), subject to check, an amount equal to the entire amount due on the note, may plead said claim against a transferee of the note when it is made to appear that the said maker, under an arrangement with the banker to apply the deposit on the note, never withdrew any part of said deposit.

Benton v College, 202-15; 209 NW 516

Nonnegotiable note—estoppel to plead defense. The maker of a nonnegotiable promissory note who signs it in blank for the accommodation of a bank, and delivers it to the cashier of the bank in such incomplete condition, is estopped to plead, against a good-faith and innocent indorsee, that, without his knowledge or consent, the cashier wrongfully inserted his own name in the note as the accommodation payee instead of the name of the bank. This is true because the maker must, under such circumstances, be held, impliedly at least, to have constituted the cashier his agent to fill out and complete the note, and must, as regards the perfectly innocent holder, bear the loss resulting from the wrongful act of his own agent.

First N. Bk. v McCartan, 206-1036; 220 NW 364

Interest—recovery dependent on pleading. In an action on a nonnegotiable promissory note, by a transferee thereof, defendant's plea that he be given a set-off in a stated sum because of an account held by defendant against the original payee, will not be construed as embracing a demand for interest on said "stated sum".

Lewis v Grain Co., 214-143; 241 NW 469

Counterclaim — unquestioned establishment — procedure. A duly pleaded counterclaim which is unquestionably established by the evidence should not be submitted to the jury, but should be summarily allowed by the court; and in a personal injury action the court should direct the jury how to proceed if plaintiff's recovery be more than the amount of the counterclaim; likewise how to proceed if plaintiff's recovery be less than the amount of the counterclaim.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Waiver of counterclaim. A party who is sued on a nonnegotiable claim by the assignee or quasi assignee thereof or by one who has been subrogated to the right to the claim, and fails to plead in defense a counterclaim which he then holds against the assignor, whether such counterclaim be liquidated or unliquidated, unconditionally waives the right to use such counterclaim as an offset against the judgment obtained by the assignee or subrogated party on the claim sued on.

Southern Sur. v Ins. Co., 210-359; 228 NW 56

Dual assignment of same chose—priority. As between two assignees of the same chose in action,—e. g., money due on contract,—the assignee who first obtains his assignment is prior in right, even tho he gives the debtor no notice of his assignment, while the subsequent assignee does give such notice.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Dual assignment of same chose—priority. An unconditional assignment of a chose in action—one effective instanter—takes priority over a prior conditional assignment of the same chose—one effective only on the happening of a future contingency. And this is true irrespective of the time notice of the assignments is given to the debtor.

Coon River Assn. v Constr. Co., 215-861; 244 NW 847

Conflicting assignments by partnership and partners. An unrecorded assignment by a partnership to a partnership creditor, of a lease of real estate and of the rents accruing thereunder, is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Delivery of assignment—sufficiency. Proof that a written assignment of a claim has been in the possession of the assignee since its execution constitutes prima facie proof of delivery by the assignor to the assignee, and especially when the delivery of such assignment is substantially admitted by the hostile pleadings.

Steenhoek v Trust Co., 205-1379; 219 NW 492

Admission by assignor of chose. In an action on a chose in action by the assignee thereof, suing on behalf of himself and said assignor (because the assignor had retained an interest in the claim), an affidavit by the assignor, containing a recital of facts materially discrediting the claimed chose in action, is admissible even tho made long after the assignment was executed.

Lake v Moots, 215-126; 244 NW 693

Apparent authority to transfer — estoppel. An owner who leaves in the hands of another, negotiable paper or nonnegotiable choses in action or security which can be transferred without the execution of further documents, thereby creates an appearance of ownership or control in the custodian, and is estopped as against an innocent party who has acted in reliance on the appearance thus created.

Matalone v Bank, 226-1031; 285 NW 648

II ASSIGNABILITY OF INSTRUMENTS AND CLAIMS

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Oral assignment of insurance policy. An oral assignment of a policy of fire insurance is valid (especially when the insurer consents thereto) and is prior in right to a subsequent assignment.

Boyce v Ins. Assn., 209-11; 227 NW 523

Interest in proceeds of life policy. A written assignment of a fractional interest in a life insurance policy to a trustee, made for the purpose of protecting the attorneys for the agreed value of their services in prosecuting an action on the policy, is supported by adequate consideration, especially when it appears that the trustee was to receive compensation for his services.

Welch v Taylor, 218-209; 254 NW 299

Assignment of life policy — estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness—it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Real estate contract—nonnegotiable instrument law inapplicable—assignor not liable to assignee. Under statute, assignor of nonnegotiable instruments guarantees payment thereof to assignee, but such statute is limited to commercial paper and does not embrace bilateral real estate purchase contract and does not create a right of action in vendor's assignee against such vendor as assignor under statute.

Nash v Rehmann Bros., 53 F 2d, 624

Lease and rent notes—priority. The simple delivery by a landlord to his creditor of his real estate lease and rent notes, with the intent thereby to effect an assignment to his

II ASSIGNABILITY OF INSTRUMENTS AND CLAIMS—continued

creditor as collateral security, is valid against a mortgagee who subsequently institutes foreclosure action on a mortgage pledging the rents.

First Tr. JSL Bank v Bank, 217-620; 252 NW 519

Nonexistent lease. A naked oral promise or understanding to assign a nonexistent but contemplated lease is not good against the subsequently accruing rights of a stranger to the understanding.

Kooistra v Gibford, 201-275; 207 NW 399

Lease — assignability — when lease survives death of lessee. A lease which requires the lessee to diligently farm a portion of the land and to "vigorously utilize" a portion of said land "by extraction of the available sand and gravel" thereon is assignable and survives the death of the lessee, it appearing that the lease was entered into without reliance on any particular personal fitness of the lessee.

In re Grooms, 204-746; 216 NW 78

Assignment of rent not recordable. A written assignment of a lease of real estate and of the rents accruing thereunder, (especially when the lease is at the time manually delivered to the assignee) is not an instrument which the law requires to be recorded, and if recorded the record imparts no notice.

Phelps v Kroll, 211-1097; 235 NW 67

Equitable assignment—sheriff's certificate—homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Stock — assignment without delivery of certificate. A written assignment by the owner of corporate shares of stock of all his right, title and interest therein conveys good title, (1) even tho the owner places the assignment in escrow and causes it, together with the stock certificate, to be delivered to the assignee after his death, and (2) even tho the assignor, prior to his death, pledges the said stock certificate as security for a personal loan, which his estate later paid.

Leedham v Leedham, 218-767; 254 NW 61

Equitable conversion — nonapplicability of doctrine. An assignment by an heir of all his interest in the "personal property" of an estate carries to the assignee the assignor's interest in funds derived from the sale of real estate for the purpose of paying debts and remaining in the hands of the administrator as an unused balance. The doctrine of equitable conversion has no application to such a state of facts.

In re Wilson, 218-368; 255 NW 489

Father's guaranty of son's debts — nonassignability. A father's contract with a bank, by which the bank agreed to carry a son's indebtedness to the bank until the death of the father, is personal and involves a trust and confidence, and such contract may not be assigned without the consent of the father, and when the bank's assignee started action for a money judgment, during the lifetime of the father, he was released from the obligation of his contract.

Evans v Cole, 225-756; 281 NW 230

Assignment of expectancy. An assignment by a debtor to his creditor of the debtor's expectancy in an estate as collateral security to the debt, with a proviso that, if the debtor does not pay within a stated time, the assignment shall operate as a "full receipt" against said expectancy, simply extends to the creditor an option to so treat the proviso. The creditor may ignore the proviso and maintain an action on his claim.

Smoley v Smoley, 203-685; 213 NW 229

Assignment of expectancy. Principle reaffirmed that while an assignment of an expectancy is not a favorite of the law, yet if, after careful scrutiny, it appears to have been made in good faith, for an adequate consideration, without fraud, and is not unconscionable or otherwise invalid, equity will sustain and enforce it.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Burk v Morain, 223-399; 272 NW 441

Assignment of expectancy. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues, and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

See Berg v Shade, 203-1352; 214 NW 513

Assignment of expectancy as security. An assignment of an expectancy in a contemplated estate as security for a debt is supported by adequate consideration.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Assignment of promissory notes carries pledged collateral securities. An assignment

by the receiver of an insolvent bank, duly ordered by the court, of bank assets in the form of promissory notes, automatically carries to the assignee the right to the possession of, and right to enforce, all collateral legally pledged to the bank for the payment of said notes.

Bates v Bank, 219-1358; 261 NW 797

Drainage warrants. Record reviewed and held that a written assignment of a drainage warrant must be deemed to have deprived the assignor of all interest therein.

Simmons v Tatham, 219-1407; 261 NW 434

Action based on forged indorsement of checks and drafts. Where an employee wrongfully possessed himself of checks and drafts belonging to his employer, and by forged indorsements caused a bank to pay them, the act of a surety company in paying the employer the amount of his loss does not discharge the bank from its liability to the employer for having paid the checks and drafts on forged indorsements. The employer, upon being so indemnified, may assign his cause of action against the bank to the surety, and the surety may maintain the action against the bank.

National Sur. v Trust Co., 210-323; 228 NW 635

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Surety—taking assignment of claim. Where, because of the peculations of a county auditor, a depository bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Set-offs against insolvent bank. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off not applicable.

Parker v Schultz, 219-100; 257 NW 570

Partial assignment of chose in action. The owner of a chose in action has a legal right to assign a part of his interest in such chose, and thereafter to join with the assignee in the prosecution of the entire cause of action.

Welch v Taylor, 218-209; 254 NW 299

9452 Assignment prohibited by instrument.

Scope of statute. This statute has no applicability to a personal executory contract, e. g., a lease of lands prohibiting an assignment by the tenant.

Snyder v Bernstein Bros., 201-931; 208 NW 503

Probate order for sale of lease which prohibits sale.

In re Owen, 219-750; 259 NW 474

Assignment working acceleration of maturity. A proviso in a contract for the purchase of real estate on installment payments, entered into without artifice or deception, to the effect that an assignment of the contract by the vendee without the written consent of the vendor will ipso facto mature the entire indebtedness, is valid, even tho our statute authorizes the assignment of such an instrument irrespective of the terms of any contract by the parties to the contrary.

Risser v Sec. Co., 200-987; 205 NW 648

Assignment in payment of pre-existing debt. The assignment of funds by the legal owner thereof in payment of a pre-existing debt is not effective against the equitable owner of said funds.

Stegemann v Bendixen, 219-1190; 260 NW 14

Stock assessments nonassignable. An assessment against a holder of corporate bank stock in an insolvent bank, ordered by the court under the so-called "double liability" statute (§9251, C., '31), even tho said assessment is in the form of a judgment, is nonassignable by the receiver, even under an authorizing order of court, and if formally assigned, is nonenforceable by the assignee, said attempted assignment being for a purpose other than the payment of creditors. (Double liability statute repealed.)

Roe v King, 217-213; 251 NW 81

Double liability of stockholders—nonassignability. The statutory "double liability" of a stockholder in an insolvent state bank to all the creditors of the bank is not of such nature that a sale or assignment thereof by the receiver, even under an order of court, will vest in the vendee or assignee the right to enforce such liability exclusively for his own use and benefit.

Andrew v Bank, 214-1339; 242 NW 62; 82 ALR 1280

9453 Assignment of open account.

Limitation of action on open account. See under §11011

Assignment for collection. Principle reaffirmed that the holder of a claim or account may validly assign it to another solely for collection.

Carson, et al. v Long, 219-444; 257 NW 815

Proceedings and relief—evidence. Evidence reviewed, in an action for an accounting, and

held that an assignment of a claim by plaintiff to defendant was absolute and not for collection for the benefit of plaintiff.

Moore v Bolton, 220-258; 260 NW 676

Causes assigned for collection—right of assignee to join. Plaintiff, in an action at law against a defendant, may join in separate counts:

1. Any number of causes of action against defendant of which plaintiff is the unqualified holder, and which are triable at law in said county of suit, and

2. Any number of causes of action against defendant of which plaintiff is holder as assignee for collection only, and which are triable at law in said county of suit.

Carson, et al. v Long, 222-506; 268 NW 518

Future accounts not founded on existing contract. An assignment of book accounts to accrue in the future is void when there is no obligation on the part of the assignor to sell, and no obligation on the part of customers to buy.

In re Nelson, 211-168; 233 NW 115; 72 ALR 850

Assignee of claim—priority. An assignment of a bank deposit in an insolvent bank, with notice thereof to the receiver, is prior in right to a subsequent garnishment of the receiver, if it be assumed that the receiver is subject to garnishment.

Newell v Edwards, 208-1214; 227 NW 151

9454 Assignment of wages.

Liability of assignee to assignor. Where an employee assigns his wages and said wages are paid by the employer to the assignee, the amount so paid may not be recovered by the employee-assignor of the assignee even tho it be conceded that the assignment was void because of defective acknowledgment.

Hutchins v Piano Co., 209-394; 228 NW 281

Procuring discharge. A person who voluntarily executes an assignment of his wages may not predicate damages against the assignee on the fact that when the assignee brought the assignment to the attention of the employer, the employer discharged the assignor.

Hutchins v Piano Co., 209-394; 228 NW 281

9456 Assignor liable.

Real estate contract—nonnegotiable instrument law inapplicable—assignor not liable to assignee. Under statute, assignor of nonnegotiable instruments guarantees payment thereof to assignee, but such statute is limited to commercial paper and does not embrace bilateral real estate purchase contract and does not create a right of action in vendor's assignee against such vendor as assignor under statute.

Nash v Rehmann Bros., 53 F 2d, 624.

Change in form of debt guaranteed—scope of guaranty. A vendor who, upon assigning his contract for the sale of land, guarantees the payment of the amount due on the contract, must be held to guarantee the payment of a mortgage for said amount subsequently accepted by the assignee, when the converting of the amount due on the contract into a mortgage was of the very essence of the contract of sale.

Buser v Land Co., 211-659; 234 NW 241

Discharge of guarantor—nonrelease by conduct of guarantee. The guarantor of the payment of the amount due on a contract of sale of land is not relieved of his contract of guaranty because the assignee-guarantee of the contract failed to control the action of the purchaser of the land in disbursing building funds, when the assignee-guarantee had no knowledge of the wrongful disbursement.

Buser v Land Co., 211-659; 234 NW 241

Rent—liability of assignee under his written acceptance. One who, in writing, accepts an assignment of a lease, with the consent of the lessor, thereby contracts to carry out the terms of the lease irrespective of any later assignment of the lease by the said assignee, and it is no defense that the lessor, the property being vacant, obtains the aid of a receiver.

Pickler v Mershon, 212-447; 236 NW 382

Rent—assignee—liability to discharge rent obligations. The written assignee of a lease of real estate who orally accepts the assignment, or effects such acceptance by his conduct, with the approval or acquiescence of the lessor, thereby binds himself to discharge the rent obligations; especially is this true when the express provisions of the lease impose such obligation.

Central Bank v Herrick, 214-379; 240 NW 242

Rent—obligation of assignee of lease to pay rent. The assignee of a lease (which simply binds the "lessee, his heirs, and assigns" to pay the rent) is obligated to pay rent because of privity of estate, and when said privity of estate is terminated by a valid reassignment of the lease the obligation of the assignee to pay rent necessarily terminates unless said assignee has, expressly or impliedly, otherwise obligated himself. And the fact that the lessor accepts the rent from the assignee during the assignee's occupancy is not sufficient to show that the assignee has assumed the obligation to pay rent after reassignment.

Seeburger v Cohen, 215-1088; 247 NW 292; 89 ALR 427

CHAPTER 423

SURETIES

9457 Requiring creditor to sue.

Scope of statute. This section applies even tho the principal on the obligation is not a resident of the state.

Cleophas v Walker, 211-122; 233 NW 257

Oral notice to sue—effect. Written notice by a surety to the holder of a promissory note to sue the principal is essential, in order to base thereon a plea of discharge because of failure to comply with the notice. Oral notice is ineffective.

Johnson v Hollis, 205-965, 218 NW 615

Unsigned notice to creditor. A written notice by a surety to a creditor requiring the creditor to sue on the obligation or to permit the surety so to do in the name of the creditor, is valid and effective tho wholly unsigned (1) when it is addressed to the creditor, (2) when the context thereof suggests that it is being given by the surety, and (3) when the surety personally delivers the notice to the creditor.

Cleophas v Walker, 211-122; 233 NW 257

Proof of lost notice and service thereof. The contents of a written notice by a surety to a creditor requiring the creditor to sue on the obligation or to permit the surety so to do in the name of the creditor, and the service of such notice, may be proven by oral evidence when neither the original notice nor a copy thereof can be produced, but such proof must be clear, positive, convincing, and satisfactory.

Cleophas v Walker, 211-122; 233 NW 257

9458 Refusal or neglect of creditor.

Discharge of surety. Principle reaffirmed that a contract of settlement which releases a principal ipso facto releases the surety.

Iowa Co. v Wagner Co., 203-179; 210 NW 775

See Warman v Ranch Co., 202-198; 207 NW 532

CHAPTER 424

NEGOTIABLE INSTRUMENTS LAW

Discussion. See 5 ILB 65—Nonnegotiable bills and notes

FORM AND INTERPRETATION

9461 [§1] Form of negotiable instrument.

Atty. Gen. Opinion. See '36 AG Op 287

Construction—modern tendency. Principle reaffirmed that, within the bounds of reason, liberality of construction will be exercised in favor of the negotiability of promissory notes.

Townsend v Adams, 207-326; 222 NW 878; 77 ALR 1079

Negotiability not terminated by maturity. The mere maturity of a negotiable promissory note does not destroy its negotiable character.

Federal Trust v Nelson, 221-759; 266 NW 509

Maturity on failure to give security. A promissory note, otherwise negotiable, is rendered nonnegotiable by a provision to the effect that the holder may at any time demand additional security, and if the demand is not complied with the note shall instantly mature.

First N. Bk. v McCartan, 206-1036; 220 NW 364

Extension of payment—effect. A promissory note which is payable on a specified day is not rendered nonnegotiable by the inclusion of a provision to the effect that, "after" the note falls due, the time of payment may be extended,—the term "after" being construed to refer to a time subsequent to the day of maturity.

Townsend v Adams, 207-326; 222 NW 878; 77 ALR 1079

"Myself" note. Principle reaffirmed that a promissory note payable to "myself" is a nullity until duly indorsed by the maker.

In re Richardson, 202-328; 208 NW 374

Writing designated as "check". An instrument in the form of a combined voucher and receipt, and containing no words of negotiability, is not a negotiable instrument and does not become such when indorsed by the indicated payee, tho the instrument states that when so indorsed "it becomes a check".

Soldier Valley Bank v Camanche Co., 219-614; 258 NW 879

Note on foreign letterhead—effect. The fact that a promissory note, made by a resident of this state and payable in this state to a resident of this state, was written in longhand on the letterhead of a foreign business concern does not establish, as a matter of law, that the note was executed and delivered in such foreign state and intended to be a foreign contract.

In re Thorne, 202-681; 210 NW 952

Contemporaneous writing as to time of payment. An absolute promise in a promissory

note to pay on or before a named time cannot be deemed qualified and limited by a contemporaneous written contract which reaches no further than a promise by the maker to exercise certain economies in his business and thereby possibly effect payment before the stipulated time.

Hughes v Campbell, 202-1352; 212 NW 115

Contemporaneous written contract. An ordinary promissory note must, between the original parties thereto, be construed in the light of a contemporaneous written agreement which makes reference to the note as a part thereof. So held where the two instruments were construed as an agency contract, with liability on the note limited to the amount of goods sold by the maker thereof.

Nolta v Lander, 200-608; 203 NW 710

No priority between equally dated and maturing notes. Neither of two promissory notes secured by the same mortgage have priority over the other when they carry the same date of execution and maturity.

Templeton v Stephens, 212-1064; 233 NW 704

Unallowable modification. Principle reaffirmed that oral evidence may not be introduced to nullify, modify, or change the character of a written obligation.

First N. Bk. v Mether, 217-695; 251 NW 505

Unallowable variation. Parol evidence is inadmissible to show that a note is not payable according to its terms.

Farmers Bk. v Fisher, 204-1049; 216 NW 709

Parol evidence as to fund. Proof of an oral agreement contemporaneous with the signing of a promissory note, to the effect that the note is to be paid out of a particular or specified fund only, is inadmissible.

Davenport v Mullins, 200-836; 205 NW 499

Promise to pay in application for insurance. An application for hail insurance containing a promise to pay insurer a certain amount upon designated dates is not a "negotiable instrument" within the meaning of statute concerning requirements of such instruments.

Inter-Ocean Co. v Gabrielson, 226-1242; 286 NW 514

Parol evidence to show maturity date. Parol evidence is admissible to show that a time certificate of deposit was accompanied by a collateral oral agreement between the depositor and the bank, to the effect that the bank would pay the certificate on demand.

In re Olson, 206-706; 219 NW 401

Parol in re accommodation note. Parol evidence to the effect that the payee of a note orally assured the maker, when the note was executed, and at later times, that the maker was not liable on the note and would never be called upon to pay it, is admissible on the issue whether the note was an accommodation note for the accommodation of the payee plaintiff.

Security Bk. v Carlson, 210-1117; 231 NW 643

Oral testimony as to liability. The accommodation maker of a promissory note may not, in the absence of evidence of fraud, testify that when he executed the note an oral agreement was entered into that he was not to assume any liability on the note.

Citizens Bk. v Rowe, 214-715; 243 NW 363

Parol—plea of fraud—effect. In an action on a promissory note, parol evidence to the effect that the maker was assured he would never be compelled to pay the note is admissible as bearing on the maker's plea of fraud in the procurement of the note.

Schipfer v Stone, 206-328; 218 NW 568

Bank officer—estoppel to deny liability. An officer of a national bank who, being unable to obtain a loan for his bank on the bank's own real estate, from a First Trust Joint Stock Land Bank—because such land banks are prohibited by federal statutes from making loans to a corporation such as a national bank—enters into a plan, without the knowledge of the land bank, to circumvent the federal statutes and obtain the loan for his bank by falsely representing to the land bank that he personally owns the land in question, and who successfully consummates said fraudulent scheme and obtains the loan on his personal note and mortgage, is estopped to deny his personal responsibility on said note and mortgage.

First Tr. JSL Bank v Diercks, 222-534; 267 NW 708

Genuineness of signature—jury question. Where in an action on a promissory note the defendant in his answer denies under oath the genuineness of the signature, a jury question is generated by positive testimony of the payee that the purported maker did sign the note, together with expert testimony on handwriting tending to prove that the signature was genuine, met by equally positive testimony by the purported maker that he did not sign the note.

Seibel v Fisher, 213-388; 239 NW 34

Unusual signature—allegation—sufficiency. An allegation, in an action on a promissory note, that both defendants executed and delivered the note, followed by a copy of the note bearing the signature "H. G. & L. T. Greenland", sufficiently alleges the signature of "H. G. Greenland".

Greenland v Carter, 219-369; 258 NW 678

Agent signing in representative capacity—nonliability. In an action to recover hail insurance premium under a policy to which was attached an application with a promise to pay and signed by defendant, alleged to be a member of a partnership, and who used the symbol

"%" in signing partnership name, such defendant is not liable individually where it is shown that defendant received commission for selling property and merely acted as agent for the partnership.

Inter-Ocean Co. v Gabrielson, 226-1242; 286 NW 514

Joint payees—rebuttable presumption of equal ownership. The presumption, that joint payees of a promissory note and of a mortgage securing the same are equal, must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Alleging note as receipt—sham defense—striking. Where a written instrument sued upon contains the legal elements of a negotiable promissory note, an allegation in an answer that such written instrument was a receipt shows on its face that such pleading is false and should be stricken on motion.

Hillje v Tri-City Co., 224-43; 275 NW 880

9462 [§2] Certainty as to sum—what constitutes.

Naked reference to mortgage. A promissory note, otherwise negotiable, is not rendered nonnegotiable by the insertion therein of a statement to the effect that it is "secured by mortgage".

Williamson v Craig, 204-555; 215 NW 664

Incorporating mortgage into note—effect. A promissory note, otherwise negotiable, is rendered nonnegotiable by incorporating into the note, by definite reference, the provisions of the mortgage security which give the mortgagee holder the option to secure insurance on the mortgaged property and to pay therefor, and also to discharge unpaid "taxes, charges, and assessments" on the property, and, if not repaid for such outlay, to declare the maturity of the note and of all of said outlay; and this is true even tho the purpose of making the terms of the mortgage a part of the note is to emphasize the fact that the note is secured by mortgage.

Hubbard v Wallace Co., 201-1143; 208 NW 730; 45 ALR 1065

Note incorporating mortgage providing payment of taxes. The federal court is bound only by superior federal court decisions in determining note's negotiability where state law merely declares principles of commercial law. Note incorporating mortgage authorizing holder to pay taxes in default, for which note was security, held nonnegotiable, as being uncertain in amount as contemplated by the law merchant and the negotiable instrument law of Iowa.

Peterson v Ins. Co., 19 F 2d, 74

Mortgage provisions not incorporated in note. The provisions of a mortgage will not be deemed incorporated into the mortgage-secured promissory note by a statement in such note to the effect that the note is secured by a first mortgage on real estate in a named county.

Des M. Bank v Stanley, 206-134; 220 NW 80

9463 [§3] When promise is unconditional.

Oral agreement as to fund. Proof of an oral agreement contemporaneous with the signing of a promissory note, to the effect that the note is to be paid out of a particular or specified fund only, is inadmissible.

Davenport v Mullins, 200-836; 205 NW 499

Recital of transaction. An instrument, otherwise negotiable, is not rendered nonnegotiable by the insertion therein of a statement of the transaction which gives rise to the instrument.

First N. Bk. v Power Equip. Co., 211-153; 233 NW 103

9464 [§4] Determinable future time—what constitutes.

Atty. Gen. Opinion. See '36 AG Op 287

Indefinite maturity. A promissory note which is payable "on settlement of William Dagel estate after date" is nonnegotiable.

Scott v Dagel, 200-1090; 205 NW 859

Agreement for extensions of time of payment. A promissory note, otherwise negotiable, is rendered nonnegotiable by the insertion therein of an agreement by the makers and indorsers "to extension of time from time to time by any one of the signers".

Second N. Bk. v Mielitz, 211-218; 233 NW 108

Reference in trade acceptance to maturity date. A trade acceptance, otherwise negotiable, is rendered nonnegotiable by the insertion therein of the clause "maturity being in conformity with the original terms of the purchase".

First N. Bk. v Power Equip. Co., 211-153; 233 NW 103

9465 [§5] Provisions not affecting negotiability.

Discussion. See 14 ILR 458—Extension provisions

9466 [§6] Omissions—seal—particular money.

Discussion. See 5 ILB 209—Payable in foreign money; 8 ILB 92—Unstamped paper; 9 ILB 128, 10 ILB 135—Instruments payable "in current funds"

Instrument payable in "current" funds. An instrument otherwise negotiable is not ren-

dered nonnegotiable by the fact that it provides for payment in "current funds".

Peoples Bk. v Smith, 210-136; 230 NW 565; 69 ALR 399

Note payable at particular office — effect. Principle recognized that the fact that a promissory note is payable at the office of a particular person does not, in and of itself, authorize or empower such particular person to receive payment on the note.

Whitney v Krasne, 209-236; 225 NW 245

9467 [§7] When payable on demand.

Signing after maturity—effect. A promissory note which is signed by a party after maturity is, as to such signer, payable on demand and parol evidence is inadmissible to contradict or vary such legal effect.

Fairley v Falcon, 204-290; 214 NW 538

Ambiguous provision as to interest. A certificate of deposit payable "on the return of this certificate properly indorsed, twelve months after date with interest at 5 percent or six months after date with interest at 5 percent per annum", is payable on demand, (1) with interest at 5 percent if presented in 12 months or later, (2) with interest at 5 percent if presented in six months or later, and (3) with no interest if presented within six months.

Partch v Krogman, 202-524; 210 NW 612

Statute of limitation. A promissory note due on demand is barred after ten years from the date thereof.

Citizens Bk. v Taylor, 201-499; 207 NW 570

Time of payment—marginal entry. A properly dated promissory note which fails to state, in the strict body thereof, any time for payment, is, nevertheless, for the purpose of a demurrer presenting the bar of the statute of limitation, payable at a fixed and definite date when, in the corner of the note and opposite the signature to the note, appear the words, "the term of five years".

Nylander v Nylander, 221-1358; 268 NW 7

Novation—mere extension of note at reduced interest. An agreement to extend the time of payment of a promissory note and mortgage securing it, at a reduced rate of interest does not constitute a novation.

Des M. Bank v Allen, 220-448; 261 NW 912

9469 [§9] When payable to bearer.

Fictitious payee. Evidence held to show knowledge of the fictitious character of a payee.

American Exp. Co. v Bank, 200-408; 205 NW 1

Fictitious payee. A check unwittingly made payable to a fictitious person is not payable to bearer.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Fictitious payee. The absolute duty of a bank, before it pays its depositor's check, to know that the payee's indorsement is genuine, and to pay only on such genuine indorsement, applies to a check which the depositor has unwittingly and without negligence made payable to a fictitious person.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Fictitious mortgagee. A mortgage which is executed to a fictitious mortgagee with the acquiescence of the mortgagor, but which is wholly free from fraud, is valid between the mortgagor and the actual mortgagee and likewise valid between the mortgagor and one who has acquired all the interest of the actual mortgagee. And this is true tho it be conceded, arguendo, that the note was nonnegotiable, and that the mortgage was not entitled to recordation.

Richardson v Stewart, 216-683; 247 NW 273

9471 [§11] Date—presumption as to.

Time of execution immaterial. When the one narrow issue is whether the defendant signed the note in question, the court may very properly instruct the jury that the time of signing is immaterial.

Conner v Henry, 205-95; 215 NW 506

9474 [§14] Blanks — when may be filled.

Discussion. See 4 ILB 195—Payee's name in blank

Unauthorized filling of blanks—ratification. Ratification by the signer of a promissory note of an unauthorized filling of blanks is simply dependent on the fact that the signer, when he acts, must have full knowledge of all the facts relative to such unauthorized filling.

Windahl v Vanderwilt, 200-816; 203 NW 252

Filling in place of payment. The holder of a negotiable promissory note has authority to fill in the place of payment in a blank provided for that purpose, there being no agreement between the parties relative to such completion of the note.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Place of payment—materiality. Testimony by the maker of a negotiable promissory note to the effect that he had never authorized any one to fill in the place of payment in a blank which had been inserted in the note for that purpose is material (1) on the question whether the note was incomplete when issued, and (2) on the issue whether there had been any agreement between the parties relative to such completion.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Place of payment — material alteration. Testimony that a negotiable promissory note had been delivered without any agreement relative to the filling of a blank therein for the place of payment, and that the holder had filled the blank without any authority from the maker, presents, on the issue of material alteration, a question of law for the court, and not a question of fact for the jury.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Accommodation payee—wrongful insertion. The maker of a nonnegotiable promissory note who signs it in blank for the accommodation of a bank, and delivers it to the cashier of the bank in such incomplete condition, is estopped to plead, against a good-faith and innocent indorsee, that, without his knowledge or consent, the cashier wrongfully inserted his own name in the note as the accommodation payee instead of the name of the bank. This is true because the maker must, under such circumstances, be held, impliedly at least, to have constituted the cashier his agent to fill out and complete the note, and must, as regards the perfectly innocent holder, bear the loss resulting from the wrongful act of his own agent.

First N. Bk. v McCartan, 206-1036; 220 NW 364

9476 [§16] Delivery—when effectual.

Discussion. See 5 ILB 257—Delivery

Delivery as essential element—restatement of common law. This section, providing that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto, is a restatement of the common-law rule.

In re Martens, 226-162; 283 NW 885

Right to show conditional delivery—limitation. The statutory right of the maker of a negotiable promissory note to show, against nonholders in due course, that the delivery of the note was on a condition, and not for the purpose of transferring the property in the instrument, does not embrace the right of the maker of an admittedly delivered note to show that the note was not to be paid according to its terms: e. g., that a director's note to a bank was to be paid by an assessment on the stockholders, or out of the future earnings of the bank, or was not to be paid at all, unless the bank was forced into liquidation.

Hills Bk. v Hirt, 204-940; 216 NW 281

Trade acceptance—authority conferred. In an action to recover on negotiable trade acceptances by indorsee bank, wherein drawee alleges nonliability on account of nonperformance by drawer of a condition in sales contract entered into between drawee and drawer providing for repurchasing of goods after certain date and furnishing salesman to assist drawee in selling goods, held, evidence established that delivery of acceptances was made, without condition, for the purpose of transferring all property rights therein to seller with full authority to negotiate acceptances or put them up as collateral security.

State Bank v Feed Co., 227-596; 288 NW 614

Lien of garnishment and liability of garnishee—ineffectual plea of payment by check. A garnishee should not be discharged on his plea that, prior to the garnishment, he issued his check to the judgment defendant in full payment of his indebtedness, when the facts and circumstances attending the issuance of such check show that the parties thereto never intended to treat the check as a negotiable instrument—never intended that it, in and of itself, should constitute payment of the indebtedness.

Lee v Lee, 210-618; 231 NW 426

Parol evidence affecting. Where the holder of a promissory note indorsed and surrendered it, and received in payment the duly indorsed note of a third party, parol evidence that, at the time the respective indorsements were made, there was talk to the effect that if such indorsements were made, one indorsement would cancel the other indorsement, has no probative force to show (1) inducement, or (2) conditional delivery, or (3) delivery for a specific purpose, of said indorsements, or (4) that the paid note was reissued and payment thereof guaranteed.

Versteeg v Hoeven, 214-92; 239 NW 709

Trade acceptances negotiated. In an action to recover on trade acceptances by indorsee thereof, where there is no provision in sales contract prohibiting either delivery, negotiation, or transfer of such acceptances which are regular on their face, held, proof of an alleged oral agreement that acceptances were subject to certain conditions in sale contract is inadmissible in evidence.

State Bank v Feed Co., 227-596; 288 NW 614

Execution of note—presumption. Principle recognized that the execution and delivery of a promissory note is prima facie evidence of the settlement of all existing demands between the parties up to the date of the note.

In re Kahl, 210-903; 232 NW 133

Place of delivery determines governing law. When the payee of a promissory note prepares it in blank in this state and sends it to the proposed maker in another state without any specific direction as to the method or manner in which it is to be returned to the payee after being signed, delivery takes place only when the note reaches the hands of the payee in this state. It follows that the statute of limitation of this state governs such note.

In re Young, 208-1261; 226 NW 137

See County Bk. v Jacobson, 202-1263; 211 NW 864

Directors' notes to bank. Bank directors who execute their promissory notes to the bank for the sole purpose of making good an impairment of the bank's capital and of preventing the immediate closing of the bank, and who know that said notes have been placed in the assets of the bank, may not say that a jury question exists as to the delivery of the notes to the bank.

Farmers Bk. v Bunge, 211-1357; 231 NW 651

Delivery by decedent—dead man statute. In the absence of contrary evidence, a valid delivery was proved by the statutory presumption of delivery arising from possession of a note, aided by evidence, secured without violating the dead man statute, to the effect that the note was in decedent maker's hands while visiting payee during an illness and after decedent left, the note was reposing on payee's bed.

In re Cheney, 223-1076; 274 NW 5

Notes of deceased—prima facie case. In an action in probate by payees of notes to establish notes as claims against maker's estate, the conceded signature of deceased and admission of the notes in evidence establish a prima facie case for claimants.

In re Humphrey, 226-1230; 286 NW 488

Note found in decedent's safe—no delivery. In spite of a mother's declarations as to the existence of a note and her instructions to her daughter to get it after the mother's death, a promissory note executed by a mother, with her daughter as payee, in repayment of money allegedly borrowed from the daughter, and found by said daughter in the mother's safe after her death, is not a valid claim against the estate of the mother—there having been no sufficient delivery thereof to payee. Quaere, as to validity of claim if based on the debt independent of the note.

In re Martens, 226-162; 283 NW 885

Death of payee—prima facie showing. Prima facie delivery of notes is shown by testimony that the notes were found, after the death of payee, among the private papers of the payee.

Lusby v Wing, 207-1287; 224 NW 554

Conditional delivery. Principle recognized that the delivery of a promissory note may be shown to have been conditional or for a particular purpose.

Kline v Reeder, 203-396; 212 NW 693

Conditional delivery—parol evidence. Parol evidence is admissible to prove that a surety signed a promissory note on the express condition that the note should not be deemed effective until another named party signed it.

Andrew v Hanson, 206-1258; 222 NW 10

Conditional delivery—parol evidence. While parol evidence is not admissible to vary the terms of a written instrument, yet it is competent as between the immediate parties to show that the delivery thereof may have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument.

Walker v Todd, 225-276; 280 NW 512

Conditional delivery—waiver. The plea that a promissory note was negotiated in violation of a conditional delivery must fail in the face of conclusive testimony that said note was surrendered by the indorsee to the maker, who thereupon executed and unconditionally delivered the note in suit.

Anderson, etc. v Reinking, 204-239; 213 NW 775

Conditional delivery—signatures of others. A written contract which provides that the failure of any party named therein to sign shall not affect the liability of those who do sign, may be shown to have been delivered on the condition that the writing was to be effective only after being signed by all of the parties.

Boyd v Miller, 210-829; 230 NW 851

Conditional delivery — sale of property. A surety on a promissory note may show, as against the payee, that he signed the note and permitted the delivery thereof on the express agreement with the principal and payee that the principal would sell certain property and deliver the proceeds to the payee, and that the payee would indorse such proceeds on the note.

Randolph Bk. v Osborn, 207-729; 223 NW 493

Conditional delivery — option to buy farm. With the evidence in conflict, a jury question is generated as to whether or not the delivery of a note was conditional, when it was given at the time of the execution of a farm lease which contained an option to purchase the farm on condition that the note should be paid.

Walker v Todd, 225-276; 280 NW 512

Conditionally delivered note—purchaser with knowledge not "holder in due course". Where insurance agent takes an application for life insurance, and as a part of the same transaction notes are executed and delivered conditionally, or for specific purpose of paying insurance premium, and a party takes the notes, as security for a loan to the agent, with knowledge that application has not been approved, such party is not a "holder in due course" and cannot enforce payment of the note after application has been rejected.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Right to show conditional delivery. Defendant in an action on a promissory note may show, against the plaintiff who is not a holder in due course, that the original delivery of the note was conditional, and for a special purpose only.

Hill v May, 205-948; 218 NW 946

Instructions in re delivery. Instruction to the effect that delivery of a promissory note is largely a matter of intention, and as to what acts will constitute delivery, reviewed and held unobjectionable.

Chariton Bank v Wright, 222-417; 269 NW 439

Evidence—jury question. Evidence held to present jury question on the issue of delivery.

Chariton Bank v Wright, 222-417; 269 NW 439

Proof of execution and delivery. In an action in probate to establish notes of deceased as claims, proof of the execution and delivery being established, it is presumed that notes were issued for a valuable consideration and the burden of showing lack of consideration is on the defense.

In re Humphrey, 226-1230; 286 NW 488

Consideration and delivery—proof by presumptions — instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Delivery as nonjury question. The plea of a surety (1) of want of consideration for, and (2) of improper delivery of, the notes sued on, is wholly ineffective:

1. When the surety signed and forwarded the notes for delivery on the prearranged and contracted condition that the payee would receive delivery only on condition that he—payee—would first cancel and surrender specified indebtedness held by him against the principal maker of the notes, and
2. When the surety knew that the payee had complied with said condition and had received delivery of the notes, and
3. When the surety thereafter, until sued, interposed no objection of illegality in the notes or improper delivery thereof, but on the contrary promised to pay them and negotiated for additional time in which to pay.

North Side Bank v Schreiber, 219-380; 258 NW 690

9477 [§17] Construction.

Conflict between note and mortgage. In case of a conflict between the note and the mortgage securing it, as to the conditions under which the mortgagee may treat the entire debt as due for the nonpayment of interest, the note will prevail.

Wilson v Tolles, 210-1218; 229 NW 724

Signature of spouse to mortgage only—effect. The defeasance clause in a real estate mortgage on the lands of a husband, to the effect that the mortgage shall be void if the signers shall "pay or cause to be paid" the secured notes, does not, in and of itself, impose personal liability on the wife who is one of the signers to the mortgage.

Fairfax Bk. v Coligan, 211-670; 234 NW 537

Waiver of homestead right—unauthorized decree. A waiver in a promissory note of the maker's homestead right does not constitute authority in the court in an action on the note to decree a lien on the maker's homestead for the amount due on the note.

First N. Bk. v Phillips, 203-372; 212 NW 678

Notes designed to resemble checks and so treated. Instruments for the payment of obligations, which papers resembled checks and were treated as such, but upon which the maker had cleverly executed certain qualifying words whereby he hoped that they could be treated as promissory notes, held to be in fact ordinary checks when it was noted that the payee was required to indorse them before payment.

State v Doudna, 226-351; 284 NW 113

9478 [§18] Liability of person signing in trade or assumed name.

Action in trade name. A person has the legal right to maintain an action in the duly registered trade name under which he transacts his business.

Keeling v Priebe, 219-155; 257 NW 199

Unusual signature—allegation—sufficiency. An allegation, in an action on a promissory note, that both defendants executed and delivered the note, followed by a copy of the note bearing the signature "H. G. & L. T. Greenland", sufficiently alleges the signature of "H. G. Greenland".

Greenland v Carter, 219-369; 258 NW 678

Discharge of surety—conditional signing—nonestoppel. A surety on a promissory note who signs and delivers the note on the condition that another named party also signs is not bound because he makes no response to a later notification from the payee that other parties have been substituted as signers in lieu of the one named and specified by the surety.

Andrew v Hanson, 206-1258; 222 NW 10

9479 [§19] Signature by agent—authority—how shown.

Agency of husband. Testimony tending to show a custom by a husband to sign the name of his wife to promissory notes, with her express or implied knowledge and approval, extending continuously through many years prior to the transaction in question, is admissible on the issue whether the husband had such authority from the wife.

State Bk. v Fairholm, 201-1094; 206 NW 143

"Apparent authority" defined. "Apparent authority" is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Pleading agent's apparent authority—sufficiency. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney, bank's answer alleging (1) payee's knowledge and acquiescence in the attorney's custom of indorsing payee's checks and remitting proceeds to it by his personal checks, (2) the bank's reliance thereon, and (3) that payee was estopped from asserting lack of authority held sufficient to raise question of attorney's implied, apparent, or ostensible authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Undisclosed limitation of agent's authority—effect. Altho a principal may by special limitations restrict the authority of his agent, and altho such restrictions are obligatory between the principal and his agent, such limitations are not binding upon third parties, and, in the absence of knowledge of such restrictions by them, the principal will be bound to the same extent as tho the restrictions were not made.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Agent's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant-bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Estoppel to deny agent's authority. In payee's action against bank which had cashed checks indorsed by payee's attorney without actual authority, where bank defended on ground that payee was estopped from asserting lack of authority, held, strict rules relating to equitable estoppel based upon false misrepresentation or concealment were not applicable in determining such defense.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Implied ratification of agent's acts. Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future, and an affirmance of an unauthorized transaction may be inferred from a failure to repudiate it.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Indorsement by payee's attorney—authority. In action to recover against bank which had cashed checks indorsed by payee's attorney, the authority to make such indorsements is, under this section, determinable from the rules applicable in cases of agency generally.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Liability to third persons. As between a principal and third parties, the principal is bound by the acts of his agent within the limits of the apparent scope of his authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

9480 [§20] Liability of person signing as agent.

Knowledge of agent—when not imputed to principal. The knowledge of an agent—especially an agent with limited authority—will not be imputed to his principal when such knowledge involves a breach of duty to the principal and is in regard to a transaction which is so unusual and exceptional—so out of the ordinary—as necessarily to put on guard the party dealing with the agent.

Clapp v Wallace, 221-672; 266 NW 493

First Tr. JSL Bank v Diercks, 222-534; 267 NW 708

Directors—personal liability. A director of a corporation who indorses the promissory obligations of the corporation for the purpose of guaranteeing payment cannot escape the obligation assumed because of the fact that he affixed to his signature the official designation of "director".

Northern Bk. v Ellwood, 200-1213; 206 NW 256

Signing in representative capacity—liability. No recovery can be had against one who, as treasurer of an unincorporated association, assumes to execute a promissory note in the name of the association, when he is allowed to plead and prove, without objection, that when the note was executed it was agreed with the

payee that no personal liability should attach to the said treasurer.

Andrew v Golf Club, 217-577; 250 NW 709

Execution of unauthorized contract—effect. An executor or administrator who signs a contract of subscription in the name of the estate and by himself as such officer, without authority so to do, thereby personally binds and obligates himself.

Y. M. C. A. v Caward, 213-408; 239 NW 41

9481 [§21] Signature by procuration —effect of.

Unusual signature—allegation—sufficiency. An allegation, in an action on a promissory note, that both defendants executed and delivered the note, followed by a copy of the note bearing the signature "H. G. & L. T. Greenland", sufficiently alleges the signature of "H. G. Greenland".

Greenland v Carter, 219-369; 258 NW 678

9483 [§23] Forged signature—effect of.

Discussion. See 15 ILR 357—Double forgery —bank liability

Agent's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant-bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

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Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

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Federal Land Bank v Trust Co., 228- ; 290 NW 512

Action based on forged indorsement of checks and drafts. Where an employee wrongfully possessed himself of checks and drafts belonging to his employer, and by forged indorsements caused a bank to pay them, the act of a surety company in paying the employer the amount of his loss does not discharge the bank from its liability to the employer for having paid the checks and drafts on forged indorsements. The employer, upon being so indemnified, may assign his cause of action against the bank to the surety, and the surety may maintain the action against the bank.

National Sur. v Tr. Co., 210-323; 228 NW 635
New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Renewal of forged note—effect. The execution of a promissory note in renewal of a known forged note necessarily works a waiver of the fraud consequent on the forgery. Evidence held sufficient to establish the absence of such knowledge.

Bacon v Bank, 204-887; 216 NW 274

Failure to examine monthly statement—effect. The failure of a depositor to examine

the monthly statement furnished to him by the bank and the paid checks accompanying the same, may have a material bearing on the issue whether the depositor's negligence has materially misled the bank, to its loss, into paying checks on forged indorsements.

Erickson Co. v Bank, 211-495; 230 NW 342

Forged indorsement—negligence of drawer—effect. Tho a drawee-bank is under an absolute duty to pay its depositor's check only to a holder thereof under a genuine indorsement, yet the depositor is estopped to question the payment of a check on a forged indorsement when he, by his own negligence or by the negligence of his authorized agents, materially misleads the drawee-bank into the justifiable belief that the indorsement on the check is genuine.

Erickson Co. v Bank, 211-495; 230 NW 342

Forged indorsement—evidence—sufficiency. An indorsement "Hazen Spears" on a check payable to "Hazen Spears" is not shown to be a forgery by evidence (1) that a person by the name of Hazen Speer lived in the county in which the check purported to be drawn and in which it was cashed, and (2) that said Hazen Speer did not make the said indorsement.

Bank of Pulaski v Bank, 210-817; 232 NW 124

Genuineness of signature—jury question. Where in an action on a promissory note the defendant in his answer denies under oath the genuineness of the signature, a jury question is generated by positive testimony of the payee that the purported maker did sign the note, together with expert testimony on handwriting tending to prove that the signature was genuine, met by equally positive testimony by the purported maker that he did not sign the note.

Seibel v Fisher, 213-388; 239 NW 34

Consideration and delivery—proof by presumptions—instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

CONSIDERATION

9484 [§24] Presumption of consideration.

Consideration implied in contracts generally. See under §9440

Pleading and proof of consideration generally. See under §9441 (I)

Actions—sufficiency of proof. The payee in possession of a promissory note the execution of which is not denied makes a prima facie case for recovery by the simple introduction of the note in evidence.

Henderson v Holt, 201-1017; 206 NW134

Consideration—when operative on all original makers. The consideration which supports a strictly original promissory note operates, in the absence of fraud or mistake, upon all the original and contemporaneous signers of said note; and especially must this be true when a maker who pleads want of consideration signs as a prospective participant in the enterprise.

Starry v Starry, 212-274; 234 NW 281

Executed consideration. The plea of fraud is unavailing in an action on promissory notes given for the purchase price of corporate stock when it appears (1) that the contract of purchase has been fully executed by the note maker, and (2) that there is no plea of rescission.

Conover v Hasselman, 206-100; 220 NW 42

Consideration and signature—resting on presumption. Plaintiff in an action on a promissory note which he has set forth by copy in his pleadings, may, on the trial, introduce the note in evidence and rest his case, it appearing that the purported maker of the note (defendant) has made no denial, under oath, of the genuineness of his signature; and this is true tho the defendant maker has pleaded want of consideration as a defense.

Booth v Johnston, 223-724; 273 NW 847

Failure to plead—effect. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Notes of deceased—prima facie case. In an action in probate by payees of notes to establish notes as claims against maker's estate, the conceded signature of deceased and admission of the notes in evidence establish a prima facie case for claimants.

In re Humphrey, 226-1230; 286 NW 488

Notes of deceased—lack of consideration. In probate action to establish as claims notes signed by deceased, evidence submitted by defense to show lack of consideration, was properly held to be insufficient to present a jury question.

In re Humphrey, 226-1230; 286 NW 488

Notes of deceased—consideration presumed. In an action in probate to establish notes of deceased as claims, proof of the execution and delivery being established, it is presumed that notes were issued for a valuable consideration and the burden of showing lack of consideration is on the defense.

In re Humphrey, 226-1230; 286 NW 488

Note given by decedent in settlement of claim. In an action in probate to establish a claim against the estate based upon a note which was the third renewal of a note originally given as the result of an accounting and settlement between deceased and claimants in 1913, such note is supported by consideration.

In re Humphrey, 226-1230; 286 NW 488

Gifts inter vivos — note as future gift. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

Consideration for wife's signature. The signature of a wife to her husband's note and mortgage is supported by ample consideration when her signature was a condition precedent to obtaining the loan represented by the note.

Andrew v Ingvoldstad, 218-8; 254 NW 334

Wife signing to release dower—inadequate evidence to show lack of consideration. The presumption of consideration for a promissory note and mortgage, signed jointly by a husband and wife but evidencing and securing an originally created debt of the husband only, is not overcome, as to the wife, by evidence that she was a stranger to the negotiations for the loan, received no part of the loan, had no interest in the mortgaged lands except a contingent dower interest, signed the instruments without reading them and solely at the request of the husband and solely to release said contingent interest. The fatal defect in such evidence is its failure to establish the fact that the loan would have been made without the wife's signature—that the payee-mortgagee did not part with the money in reliance on the wife's signature.

Northern Trust v Anderson, 222-590; 262 NW 529

Execution by agent. The beneficiaries of a trust, defendants in an action on a note and mortgage executed by their authorized agent, have the burden to show want of consideration.

Daries v Hart, 214-1312; 243 NW 527

Consideration and delivery—proof by presumptions — instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Consideration — accommodation — evidence. Evidence reviewed and held to show that a promissory note was executed without consideration and purely as an accommodation to the payee who was attempting to collect it.

Markworth v Bank, 217-341; 251 NW 857

Parol evidence to establish. Principle reaffirmed that parol evidence may be admissible to establish lack of consideration for a promissory note.

Northern Trust v Anderson, 222-590; 262 NW 529

Assumption of obligations of insolvent estate—consideration. Where heirs of a deceased take up the outstanding obligations of the latter and execute their personal note for the same, their plea of want of consideration, when sued on the note, imposes on them the burden to show that the estate of the said deceased was insolvent.

Alpha Bank v Ostrander, 214-563; 243 NW 198

Corporate note to director. Adequate consideration for a promissory note is revealed by proof that the note was executed by a corporation to one of its directors for the purpose of raising money for the corporation in an emergency, and by supporting proof that the director's check to the corporation for the amount of the note was paid.

Lewis v Grain Co., 214-143; 241 NW 469

Jury question. Evidence held to present a jury question on the issue whether a note was signed, without consideration, by defendant after the full execution and delivery of the note by other signers thereof.

Persia Bk. v Wilson, 214-993; 243 NW 581

Signing after execution and delivery by another. The signer of a promissory note may show that he signed it after its full execution and delivery by another signer and that there was no consideration for his belated signing.

Hiatt v Hamilton, 215-215; 243 NW 578

Employing third party note as payment. The payee of an unquestioned promissory note who surrenders the same to the maker, and in payment receives from said maker, under proper indorsement, a negotiable, unmatured promissory note which the maker holds against a third party, must be presumed, there being no evidence to the contrary, to pay value for the latter note to the full face value of the surrendered note.

Sword v Spry, 205-266; 215 NW 737

9485 [§25] Consideration—what constitutes.

Discussion. See 12 ILR 69—Debt as consideration for signature after delivery

Consideration generally. See under §§9440–9442

Face value presumed actual value. The face value of negotiable instruments and other like

or similar choses in action is presumptively the actual value.

Leonard v Sehman, 206-277; 220 NW 77

Pleading. The all-essential element of a plea of failure of consideration is the facts. There need not necessarily be any formal statement "that there was a total failure of consideration".

Miller v Laing, 212-437; 236 NW 378

Detriment—forbearance—benefit. The indorsement of a promissory note subsequent to its full execution is without a supporting consideration, and therefore nonenforceable by the payee, when the payee suffered no detriment and extended no forbearance by reason of such subsequent indorsement, and when no benefit passed to such indorsers by reason of their indorsement.

Northern Bk. v Ellwood, 200-1213; 206 NW 256

Agreement to pay another's debt. A promissory note which represents in part the separate debt of the maker and in part the separate debt of a nonparty to the note, is supported by sufficient consideration when the maker, by reason of the note, obtains a material extension of time in the payment of his debt.

Mohler v Andrew, 206-297; 218 NW 71

Promise to pay another's note. A promise by one party to pay the promissory note of another if such other will do certain things which he is under no legal obligation to do, is supported by adequate consideration.

Lange v Nissen, 208-211; 225 NW 266

Agreement relative to payment by indorser and surety. An agreement by the indorser and accommodation signer of a promissory note that each will pay one-half of the note to the indorsee, and that the accommodation signer will then sue the maker, and pay the indorser one-half of the amount collected, is supported by ample consideration and is enforceable.

Hirtz v Koppes, 212-536; 234 NW 854

Consideration to surety. It is quite immaterial that a surety, in signing a promissory note, received no actual consideration for such signing.

Castelline v Pray, 200-695; 205 NW 339
Windahl v Vanderwilt, 200-816; 203 NW 252
Granner v Byam, 218-535; 255 NW 653

Renewal notes signed by wife—burden of proof. The signing of a promissory note in renewal of the prior original note on which the signer was also a signer, ipso facto constitutes sufficient consideration for such renewal note, even tho no consideration for such renewal signing actually moved to the signer; and if there was no consideration for the original signing, the said signer must assume the burden of so showing.

Aetna Bank v Hawks, 213-340; 239 NW 91

Husband's renewal note signed by wife—contemporaneous signing. The signing of a promissory note by a wife with her husband in renewal of a note signed by the husband alone, is supported by sufficient consideration as to the wife if the wife signs contemporaneously with the husband; otherwise there must be a new consideration as to the wife. Evidence held to present a jury question on the issue.

Nolte v Nolte, 211-1289; 235 NW 483

Wife signing without reading. A wife who can read, but, voluntarily and without circumvention, signs, as surety, and without reading, the promissory note of her husband, in pursuance of a prior agreement to that effect between the husband and the payee, is bound thereby, both on the basis of assent and on the basis of consideration.

First N. Bk. v Phillips, 203-372; 212 NW 678

Signing husband's promissory note. Even tho a wife signed a promissory note solely because her husband asked her to do so, and even tho she received no benefit whatever for so signing, nevertheless she is personally liable on the note if it appears that the payee would not, without her signature, have advanced the money for the husband.

Hakes v Franke, 210-1169; 231 NW 1

Wife signing to secure extension on husband's debt. Principle reaffirmed that a wife who signs the promissory note of her husband, in order to enable him to secure an extension of time of his indebtedness, may not say there was no consideration for her signature.

American Bk. v Kramer, 204-49; 219 NW 931
Commercial Bk. v Carey, 207-1060; 224 NW 62
First N. Bank v Mether, 217-695; 251 NW 505
Bates v Green, 219-136; 257 NW 198

Wife signing mortgage and note to release dower. Evidence to the effect that a wife signed, not only the mortgage of her husband, but also the promissory note, and did so in order to enable the husband to obtain the loan and complete the deal, does not establish that the note was without consideration as to her, even tho she asserts that she signed solely to release her dower interest.

Des Moines JSL Bk. v Allen, 220-448; 261 NW 912
First Tr. JSL Bk. v Diercks, 222-534; 267 NW 708

Signing note to release dower—effect. A wife is not personally liable to the original payee of a promissory note which grew out of her husband's real estate transaction to which she was an entire stranger, except that she

signed said note (and mortgage) for the sole and only purpose of releasing her possible dower interest.

Gorman v Sampico, 202-802; 211 NW 429
Cooley v Will, 212-701; 237 NW 315
Bates v Green, 219-136; 257 NW 198
First B. & T. Co. v Welch, 219-318; 258 NW 96
Jones v Wilson, 219-324; 258 NW 82
See Bank v Mether, 217-695; 251 NW 505

Husband waiving dower interest. A husband who signs a note and mortgage along with his wife has the burden to show failure of consideration for his signature, and he does not meet such burden by proof that his wife received all of the money borrowed and that he signed the mortgage in order to waive his dower interest.

Penn Ins. v Orr, 217-1022; 252 NW 745

Corporate president's authority to write checks—burden of proof. In action by payee of check drawn by president of corporation for interest on officer's note it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

Extension of time of payment. Principle reaffirmed that an extension to a debtor of time for payment furnishes ample consideration for the signature to a new note by another for a debt owing by the principal debtor.

Frank Cram v Trust Co., 205-408; 216 NW 71
Scovel v Pierce, 208-776; 226 NW 133

Surrendering note and substituting new note. The act of the payee of a promissory note in surrendering it and thereby waiving his remedy against the signers, and accepting a new note signed in part by new parties, constitutes ample consideration for said substituted note.

Hirtz v Koppes, 212-536; 234 NW 854

Surrender of legal right. The execution of an obligation to make good the embezzlement of a relative is supported by adequate consideration when, in return for the obligation, the obligee waives or surrenders his right to proceed against the embezzler's surety bond.

Smith v Morgan, 214-555; 240 NW 257

Collateral signing. The collateral signing of a promissory note is supported by a consideration (1) when the collateral signer omits to inform himself of the agreement out of which the note arose, and (2) when part of such agreement was that he should sign the note.

Van Houten v Van Houten, 202-1085; 209 NW 293

Notes given in renewal of former notes. Promissory notes given in renewal of former notes of the same party are supported by a sufficient consideration.

Powers v Rogers, 212-1184; 234 NW 849

Surrender of old obligations. A showing that a mortgagee surrendered outstanding notes and mortgages of the mortgagor and took from the mortgagor a new note and mortgage, necessarily reveals full consideration for the latter obligations.

Winterset Bk. v Iiams, 211-1226; 233 NW 749

Mutual mistake as to maker's financial worth. The plea, in an action on a promissory note given by a husband to his wife as part of a separation agreement, to the effect that, when the note was executed, the husband and wife were mutually mistaken as to the husband's financial condition, is not established by evidence that a subsequent depreciation in the value of property left the husband insolvent. Whether such plea, if proved, is permissible, quaere.

Castelline v Pray, 200-695; 205 NW 339

Cancellation proceedings—laches—when no defense. Delay, on the part of the signer of an unmatured, negotiable promissory note, in bringing action to cancel the note for want of consideration, is quite immaterial when the delay has not been harmful to anyone.

Sterner v Bank, 221-1362; 268 NW 158

Right of action to cancel—nudum pactum. An unmatured, negotiable, promissory note, in the hands of the original payee, will be canceled, in equity, as to a party who signs it without consideration after the transaction giving rise to the note as to the other signer had been fully closed without obligation on the part of said other signer to obtain the additional signature in question.

Sterner v Bank, 221-1362; 268 NW 158

Employing third party note as payment. The payee of an unquestioned promissory note who surrenders the same to the maker, and in payment receives from said maker, under proper indorsement, a negotiable, unmatured promissory note which the maker holds against a third party, must be presumed, there being no evidence to the contrary, to pay value for the latter note to the full face value of the surrendered note.

Sword v Spry, 205-266; 215 NW 737

Pledge of collateral. The naming of a surety as beneficiary in a life insurance policy and the pledging of the policy in order to

indemnify the said surety on signing a renewal note constitute a sufficient consideration.

Beed v Beed, 207-954; 222 NW 442

Indemnity against impairment of bank capital. An agreement by the stockholders of a bank with the state superintendent of banking that the former will indemnify the bank (a third party) against loss on certain bills receivable, needs no consideration for its support; but if the rule were otherwise, such consideration is found in the interest of the stockholders in preserving the bank as a going concern and in preventing an impairment of the bank's capital.

In re Prunty, 201-670; 207 NW 785

Guaranty of payment of rediscounts. A written, individual guaranty by the officers of a bank of the payment of all promissory notes which the bank or its officers might take and rediscount with the guarantee is supported by ample consideration, it appearing that the taking and rediscounting of the notes were part of a plan under which the bank could continue to accommodate its customers with loans which it could not otherwise make because of statutory restrictions on loans.

Bankers Tr. Co. v Hill, 207-1375; 221 NW 916

Pre-existing debt. Principle reaffirmed that he who takes an unmatured negotiable promissory note as collateral security for a pre-existing indebtedness is a holder for value.

Des M. Bk. v Stanley, 206-134; 220 NW 80

First Tr. JSL Bk. v Conway, 215-1031; 247 NW 253

Subsequent signing—effect. A party who signs a note after its execution, delivery, and acceptance is not liable to the payee when there was no consideration for such signing, either in the form (1) of some advantage to some of the signers, or (2) of some disadvantage to the payee, or (3) of an agreement, at the time of the original execution and delivery, that the note would be so signed.

Merchants Bk. v Roline, 200-1059; 205 NW 863

Subsequent unauthorized signing — effect. One who signs a promissory note after its execution, delivery, and maturity, and without the consent of the original maker, thereby releases the original maker and makes the note his own: it follows that such belated signer may not successfully assert want of consideration for his signature.

Fairley v Falcon, 204-290; 214 NW 538

Release of existing maker as consideration for signature of new signer. The court will not, in order to supply a consideration for a third party's signing a pre-existing note, hold, as a matter of law, that the said signing, being without the knowledge or consent of the existing signers, (1) worked an absolute release of said existing signers, and (2) constituted the making of a new note by the new signer, when plaintiff was pressing his action on a theory flatly contradictory to such a holding.

Blain v Johnson, 201-961; 208 NW 273

Rent and advances—failure of consideration. The consideration for a lease of mortgaged premises (which mortgage pledges the rents) and for the promissory note given for the rent, wholly fails when the assignee in an unrecorded assignment of the lease and note stands by, during foreclosure, and, without asserting his claim by intervention or otherwise, knowingly permits the mortgagee to foreclose and oust the mortgagor and his tenant, and obtain a decree against the rents and a receiver therefor in order to discharge a deficiency judgment.

Miller v Sievers, 213-45; 238 NW 469

Compromise and settlement. A compromise and settlement which results from a bona fide controversy as to the liability of one of the parties on promissory notes, is final; in other words, there need be no evidence that the party denying liability was not, in fact, legally liable on the notes.

Fairfax Bk. v Coligan, 211-670; 234 NW 537

Compromise and settlement as consideration. A promissory note executed without fraud and in compromise and settlement of a disputed but honestly asserted claim—which may have been unfounded—must be deemed supported by an adequate consideration. Evidence held to support such a finding.

Booth v Johnston, 223-724; 273 NW 847

Accommodation party—consideration—jury question. Absence of consideration for the signing of a promissory note by an accommodation party is properly submitted to the jury when the record justifies a finding that the original delivery of the note was conditional, and for a specified purpose only, and that the accommodation signing was with the design of perpetuating said condition and special purpose, and that the indorsee-plaintiff had ample knowledge of all said facts when he assumed to purchase the note.

Hill v May, 205-948; 218 NW 946

Forbearance — evidence. Evidence held insufficient to establish an agreement to forbear suit on a pre-existing promissory note as a consideration for the signing of the note by a third party.

Blain v Johnson, 201-961; 208 NW 273

Forbearance of suit. An express or implied agreement by the payee and principal debtor in a promissory note to the effect that the time of paying the note shall be extended for one year is supported by ample

consideration in that the payee forbears suit for one year, and in that the maker secures the benefit of the forbearance.

Eilers v Frieling, 211-841; 234 NW 275

Directors' note to bank. The directors of a financially embarrassed bank who execute their individual promissory notes to the bank and receive in return certain assets of the bank to which the state banking department had objected, may not say that the notes were executed without consideration.

Andrew v Shimerda, 218-27; 253 NW 845

Directors' note to bank. Ample consideration for promissory notes executed to a bank by the directors and stockholders thereof conclusively appears when undisputed testimony shows that said notes were executed and delivered for the sole purpose of being substituted in lieu of certain questionable assets of the bank and thereby making good an impairment of the bank's capital and preventing the immediate closing of the bank.

In re Prunty, 201-670; 207 NW 785
Hills Bk. v Hirt, 204-940; 216 NW 281
Farmers Bk. v Fisher, 204-1049; 216 NW 709
Live S. Bk. v Irwin, 207-1083; 224 NW 76
Bankers Tr. Co. v Hill, 207-1375; 221 NW 916
Farmers Bk. v Bunge, 211-1357; 231 NW 651

Conveyance by parent to minor child. The fact that a parent has received the earnings of his unemancipated minor child will not support a conveyance to the minor when the conveyance leaves the parent without property sufficient to pay his debts.

Scovel v Pierce, 208-776; 226 NW 133

Disaffirmance by minor and acquiescence. A promissory note executed by a minor for undelivered property is deprived of all consideration by the disaffirmance of the note by the minor prior to any delivery of the property, and by the acquiescence of the payee in such disaffirmance.

Lagerquist v Guar. Co., 201-430; 205 NW 977; 43 ALR 585

Sale of note by agent. When a promissory note is executed and delivered by a principal to his agent, in furtherance of a plan for the agent to sell the note, and thereby secure money with which to pay certain debts of the principal, the consideration becomes complete when the note is sold and the money is received by the agent.

Old Line Ins. v Jones, 206-664; 221 NW 210

Indorsement in blank. An indorsement in blank of a promissory note is necessarily supported by ample consideration when the indorser has a personal interest in the transaction, and likewise when the indorsee parts with his money on the strength of the indorsement.

Kent Bk. v Campbell, 208-341; 223 NW 403

Indorsement without consideration—effect. The indorser of a promissory note may not be held on his indorsement by a holder who is not such in due course, even tho the indorser was the original payee of the note, when he never personally had any interest in the note, and indorsed it solely for the purpose of passing the legal title to the actual owner.

Spurway v Read, 210-710; 231 NW 306

Indorsement without consideration. The indorsement of a promissory note by a stranger thereto, and subsequent to the execution and delivery of the note, must be accompanied by some consideration in order to impose any legal obligation on the indorser.

Young v Jackson, 218-628; 255 NW 877

Conclusiveness of one's own plea. A plaintiff, who, in an action on a promissory note, specifically pleads a definite consideration, must stand or fall thereon. Having fallen, he will not be permitted to advantage himself of a consideration possibly reflected in the record, but not embraced within his own chosen plea.

Persia Bk. v Wilson, 214-993; 243 NW 581

Instructions in re failure of consideration. Instructions in re failure of consideration for a promissory note reviewed and, in view of the record, held quite unobjectionable.

Chariton Bank v Wright, 222-417; 269 NW 439

9486 [§26] What constitutes holder for value.

See under §9485

9488 [§28] Effect of want of consideration.

Failure of consideration—contracts generally. See under §9441

Stranger to contract—volunteer. The signer of a promissory note (no holdership in due course being involved) may plead want of consideration (1) when the note grew out of a transaction with which he was in no manner connected, (2) when he was under no possible obligation to sign the note, and (3) when he received nothing of value for so signing.

Insell v McDaniels, 201-533; 207 NW 533

Wife signing bank note at home. Evidence to the effect that defendant signed a promissory note to a bank at her home, at the request of her husband (an officer of the bank) and that she was paid nothing for so signing and never had had, up to that time, any business transaction with the bank, is quite insufficient to establish the broad plea of want of consideration.

Millard v Curtis, 208-682; 223 NW 489

Wife signing to release dower. Parol evidence is admissible between the original parties to a note and mortgage to show that the wife signed the obligations without any

consideration flowing to her, and solely for the purpose of releasing her possible dower interest, and without any knowledge that her signature was being required or demanded by the payee.

Cooley v Will, 212-701; 237 NW 315

Fraud—estoppel to plead no consideration. The maker of a promissory note may not plead failure of consideration when his own fraud brought about such failure.

Cloud v Burnett, 201-733; 206 NW 283

Novation—nonestoppel to plead. The maker of a promissory note is not estopped to plead failure of consideration for the note as to him because of the fact that, subsequent to the signing, he was a party to a contract under which there was a novation of security.

Insell v McDaniels, 201-533; 207 NW 533

Note for stock purchase—unavailable plea. The purchaser of corporate stock in praesenti by cash and by delivering his promissory note to the corporation for the balance, which note is sold by the corporation for cash, may not plead want of consideration when sued on the note, because by such transaction he has acquired the status of a stockholder, even tho no stock has been formally issued to him.

Conover v Hasselman, 206-100; 220 NW 42

Waiver by not pleading. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Note as gift—unallowable conclusion plea. An allegation that the transferee of a negotiable promissory note received it without consideration,—that said transferee was not a bona fide holder for value,—is a conclusion plea, and is not justified by the additional allegation of fact that said transferee took the note as a "donation or gift".

Benton v College, 202-15; 209 NW 516

Indorsement—absence of consideration. The indorser of a promissory note may not be held on his indorsement, even tho he was the original payee of the note, when he never owned any interest in the note, and when his indorsement was wholly without any consideration.

Pomeroy v Bank, 207-1310; 224 NW 512

Disaffirmance by minor—effect.

Lagerquist v Guar. Co., 201-430; 205 NW 977; 43 ALR 585

Corporate president's authority to write checks—burden of proof. In action by payee of check drawn by president of corporation for interest on officer's note it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

9489 [§29] Liability of accommodation party.

Discussion. See 23 ILR 335—Defenses

Party accommodated. Evidence reviewed and held to show that note was signed as an accommodation for the maker and not for the payee of the note in question.

Hirtz v Koppes, 212-536; 234 NW 854

Holder for value. The holder for value of accommodation paper may, of course, sue the accommodation maker.

Pennington v Nelson, 208-1310; 227 NW 163

When defense. The fact that a signer of a promissory note, negotiable or nonnegotiable, was an accommodation maker, is not, as against third persons, an infirmity or ground of defense.

Aetna Bank v Hawks, 213-340; 239 NW 91

Insufficient defense. It is no defense against the transferee of a promissory note that one of the signers was an accommodation maker, and that the transferee had knowledge of such fact at the time of acquiring the note; and it is immaterial whether the accommodation maker was loaning his name to the payee or to the principal maker.

Aetna Bank v Hawks, 213-340; 239 NW 91

Guaranty of payment. A general, unlimited guaranty of payment of an obligation is absolute. It follows that the neglect of the creditor to collect of the principal debtor becomes quite immaterial.

Schaffer v Acklin, 205-567; 218 NW 286

Varying indorsement of note. An unrestricted indorsement of a promissory note may not be modified by oral evidence to the effect that the indorser was not to be held personally liable on his indorsement.

Aetna Bank v Hawks, 213-340; 239 NW 91

Promises to answer for debt of another. Evidence that promissory notes were accommodation paper, and that the party accommodated was the real debtor, is not a violation of the statute of frauds.

Flack v Linden Bk., 211-15; 228 NW 670

Wife's separate estate—signing husband's promissory note—consideration. Even tho a

wife signed a promissory note solely because her husband asked her to do so, and even tho she received no benefit whatever for so signing, nevertheless she is personally liable on the note if it appears that the payee would not, without her signature, have advanced the money for the husband.

Hakes v Franke, 210-1169; 231 NW 1

Parol evidence. Parol evidence is admissible on the issue whether a promissory note is accommodation paper.

State Bk. v Markworth, 203-461; 212 NW 729

Parol on issue of "accommodation". Parol evidence to the effect that the payee of a note assured the maker, when the note was executed, that the maker would never be compelled to pay it is admissible on the issue whether the note was an accommodation note for the accommodation of plaintiff.

First N. Bank v Holley, 200-938; 205 NW 767

Oral testimony as to liability. The accommodating maker of a promissory note may not, in the absence of evidence of fraud, testify that when he executed the note an oral agreement was entered into that he was not to assume any liability on the note.

Citizens Bank v Rowe, 214-715; 243 NW 363

Who was accommodated party. Parol evidence to the effect that the payee of a note orally assured the maker, when the note was executed, and at later times, that the maker was not liable on the note and would never be called upon to pay it, is admissible on the issue whether the note was an accommodation note for the accommodation of the payee-plaintiff.

Security Bk. v Carlson, 210-1117; 231 NW 643

Burden of proof. On the issue whether a promissory note was an accommodation, it seems that the introduction of the note makes a prima facie case for the payee, and that thereupon the maker must establish the fact that the note was an accommodation.

Markworth v Bank, 217-341; 251 NW 857

Consideration — accommodation — evidence. Evidence reviewed and held to show that a promissory note was executed without consideration and purely as an accommodation to the payee who was attempting to collect it.

Markworth v Bank, 217-341; 251 NW 857

Accommodation note to bank. On the issue whether promissory notes were received by a bank in payment of commercial paper surrendered by the bank, it may be shown that the notes were intended by all the parties to be accommodations for the bank receiving the surrender, and to enable the surrendering bank to account as a matter of bookkeeping for the paper in question and that said accommodation notes were not to be paid by the makers thereof but by other means.

Flack v Linden Bank, 211-6; 228 NW 667
Flack v Linden Bank, 211-15; 228 NW 670

Liability—evidence. The maker of an accommodation note is not liable thereon to the party accommodated. Evidence held to show that the plaintiff was the accommodated party, and not the bank of which the makers were directors.

First N. Bk. v Holley, 200-938; 205 NW 767
State Bk. v Markworth, 203-461; 212 NW 729

Execution and delivery—evidence. One who executes and delivers a promissory note solely as an accommodation to another is not liable on the note to the person accommodated. Evidence reviewed and held that plaintiff was not the party accommodated in the execution of the note in question.

Citizens Bank v Rowe, 214-715; 243 NW 363

Ultra vires in re corporate accommodation note. A corporation is not estopped to plead ultra vires in becoming the maker of an accommodation promissory note, from the fact that its officers knew that the payee (who was not the accommodated party) was making advances to the party actually accommodated, when the payee knew (1) that the note was an accommodation solely to the party receiving the advances, and (2) that the note was not executed in conformity with the authority which the corporation had granted to its officers.

Black H. Bk. v Monarch Co., 201-240; 207 NW 121

Directors not to relieve excess bank loans. A director of a bank who executes a promissory note in order to raise the money which he, as a partner, had contracted to put into a partnership for the pecuniary profit of the partners, may not be said to be an accommodation party, even tho the object and purpose of forming the partnership was to relieve the bank of excess loans.

Pennington v Nelson, 208-1310; 227 NW 163

Plea of accommodation guarantor rejected. A nonstockholder of a corporation who, in order to enable the corporation to borrow money, signs a promissory note for the purpose of inducing certain stockholders of the corporation to sign it, may not, when sued on the note, proceed on the theory that he is simply an accommodation guarantor and that the stockholder signers are principals; it follows that the nonstockholder is not entitled to judgment against the other signers for what-

ever sum he may be compelled to pay on the note.

Bankers Tr. v Beinhauer, 211-112; 233 NW 34

Jury question. Evidence reviewed and held to present a jury question on the issue, who was the party accommodated, by the maker of an admittedly accommodation note.

Security Bk. v Carlson, 210-1117; 231 NW 643

Conditional delivery — jury question. Absence of consideration for the signing of a promissory note by an accommodation party is properly submitted to the jury when the record justifies a finding that the original delivery of the note was conditional, and for a specified purpose only, and that the accommodation signing was with the design of perpetuating said condition and special purpose, and that the indorsee-plaintiff had ample knowledge of all said facts when he assumed to purchase the note.

Hill v May, 205-948; 218 NW 946

Breach of agreement—waiver—jury question. Evidence held to present a jury question on the issue whether a surety signed a renewal note with knowledge that the payee had violated an agreement to apply certain moneys on the preceding note.

Randolph Bank v Osborn, 207-729; 223 NW 493

Signature in blank—estoppel. The maker of a nonnegotiable promissory note who signs it in blank for the accommodation of a bank and delivers it to the cashier of the bank in such incomplete condition, is estopped to plead, against a good-faith and innocent indorsee, that, without his knowledge or consent, the cashier wrongfully inserted his own name in the note as the accommodation payee instead of the name of the bank. This is true because the maker must, under such circumstances, be held, impliedly at least, to have constituted the cashier his agent to fill out and complete the note, and must, as regards the perfectly innocent holder, bear the loss resulting from the wrongful act of his own agent.

First N. Bk. v McCartan, 206-1036; 220 NW 364

Recitals not an adjudication. Recitals in the nondecretal portions of a foreclosure decree that the wife of the maker of the note in question was an accommodation maker are not evidence in a subsequent hearing in probate on the wife's claim against the estate that she was such accommodation maker, especially when the foreclosure order left such question open for future determination.

In re Cohen, 216-649; 246 NW 780

False return—unsustained verdict. Judgments of conviction in criminal cases will be set aside when they are clearly against the weight of the evidence and the instructions of the court. So held where, in a prosecution for making a false bank return, the issue turned on whether certain notes were accommodation paper.

State v Klein, 218-1060; 256 NW 741

NEGOTIATION

9490 [§30] What constitutes negotiation.

Lex loci contractus. A tentative understanding between an Iowa and a Minnesota bank to the effect that the foreign bank would negotiate commercial paper to the Iowa bank and guarantee the payment thereof, becomes a consummated Iowa contract upon the receipt and acceptance in this state of the paper aforesaid.

County Bk. v Jacobson, 202-1263; 211 NW 864

See In re Young, 208-1261; 226 NW 137

Authorized but bad-faith indorsement. The fact that the duly authorized officers of a corporation in indorsing in the name of the corporation a promissory note payable to it were not in good faith furthering the interest of the corporation, will not affect the rights of the good-faith indorsee who was not chargeable with knowledge of the bad faith actuating the said officers.

Lex v Selway Corp., 203-792; 206 NW 586

Indorsement by executor — effect. An executor may, for a proper consideration, and under a duly authorized permissive order by the court, indorse a promissory note belonging to the estate, and bind the estate to liability on the indorsement.

University Bk. v Johnson, 202-654; 210 NW 785

"Myself" note. Principle reaffirmed that a promissory note payable to "myself" is a nullity until duly indorsed by the maker.

In re Richardson, 202-328; 208 NW 374

Implied authority to negotiate note. The maker of a nonnegotiable promissory note will not be held to be estopped to deny liability on the theory that he impliedly clothed the payee with authority to negotiate the note, when the entire transaction contemplated such transfer.

Hubbard v Wallace Co., 201-1143; 208 NW 730; 45 ALR 1065

Rescission — authority — presumption. The cashier and general manager of a private bank will be presumed to have authority to enter into a contract of rescission relative to the indorsement of negotiable paper.

Runge v Benton, 205-845; 216 NW 737

Indorsement contract—rescission. An agreement between the indorser of a check and the indorsee-bank to the effect that the indorser would return to said indorsee that which he had received for the check, and that the indorsee-bank would return the check to the indorser, constitutes a full rescission of the contract of indorsement.

Runge v Benton, 205-845; 216 NW 737

"Indorsement" or "assignment" — instructions. Instructions relative to acquiring negotiable promissory notes by "assignment", instead of by "indorsement", are quite harmless, when complainant does not claim the rights of a holder in due course.

First Bk. v Tobin, 204-456; 215 NW 767

9491 [§31] Indorsement—how made.

Indorsement in blank—parol explanation. Parol evidence is admissible to show that an indorsement in blank of commercial paper was made solely to enable the holder to make collection, and not to transfer title. Especially is this true when the other writings accompanying the indorsement are ambiguous.

Leach v Bank, 201-349; 207 NW 332

Varying legal effect of blank indorsement. Oral evidence is inadmissible to vary the legal effect of a blank indorsement of a promissory note.

First N. Bk. v Raatz, 208-1189; 225 NW 856
Kent Bk. v Campbell, 208-341; 223 NW 403
See Aetna Bk. v Hawks, 213-340; 239 NW 91

Ratification of unauthorized indorsement. Evidence held to show the ratification of an unauthorized indorsement of a promissory note.

Lex v Steel Corp., 203-792; 206 NW 586

By corporate payee—prima facie sufficiency. An indorsement on a negotiable check payable to the "order of" a corporate payee, tho consisting simply of the name of said corporation, effects a prima facie transfer of absolute ownership of the check to a bank to which the check is delivered by the said corporation as a deposit; and especially so when it appears that said indorsement is in the handwriting of a general, managerial officer of the corporation.

Bureau Service v Lewis, 220-662; 263 NW 7

9493 [§33] Kinds of indorsement.

Blank indorsement. The indorsement "For value received, I guarantee payment and waive protest to F. A. Sword", duly signed by the payee, is, in effect, a blank indorsement.

Sword v Spry, 205-266; 215 NW 737

9494 [§34] Special indorsement—indorsement in blank.

Parol explanation. Parol evidence is admissible to show that an indorsement in blank of commercial paper was made solely to enable the holder to make collection, and not to transfer title. Especially is this true when the other writings accompanying the indorsement are ambiguous.

Leach v Bank, 201-349; 207 NW 332

9495 [§35] Blank indorsement—how changed to special indorsement.

Blank indorsement—material alteration. The act of converting a blank indorsement into a special indorsement is proper so long as the indorser's liability is not increased, but the unauthorized insertion in such special indorsement of a guaranty of payment of any renewal of the note (no such provision otherwise appearing in the note) constitutes a material alteration and releases the indorser.

First N. Bk. v Sweeney, 203-35; 212 NW 333

9496 [§36] When indorsement restrictive.

Deposit for collection—ill-advised indorsement. The payee of a negotiable check who, when depositing it with a nondrawee bank, intends to retain title to the proceeds of the check, should indorse "for collection only" or by words of similar import; should he indorse in blank he thereby presumptively vests said bank with unrestricted ownership of the check, and should said bank forward said check to its correspondent bank with direction to collect "and credit" the account of the forwarding bank, and should said correspondent enter said credit and, in reliance thereon, pay the drafts drawn on it by said forwarding bank to the full amount of said credit, and does so in good faith and without knowledge of any defect in the title of said forwarding bank or that said forwarding bank had ceased to be a going concern, then said correspondent bank will thereby acquire an unimpeachable title to said check, even tho the drawer thereof has assumed to stop payment thereon because of the insolvency of said forwarding bank.

Bureau Service v Lewis, 220-662; 263 NW 7

9498 [§38] Qualified indorsement.

Indorsement "without recourse". The indorsee of a mortgage-secured note is not entitled to a personal judgment against the indorser for the amount due on the note when such indorsee is holding the note (1) under an indorsement "without recourse", and (2) under an agreement by the indorser to repurchase the note in case of nonpayment by the maker at maturity, and when, after the indorser refuses to repurchase, the indorsee continues to

treat the note and mortgage as his own property, and sues in foreclosure as such owner.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Agreement to repurchase—effect. The payee of a promissory note does not convert his indorsement "without recourse" into a general and unqualified indorsement by separately executing an agreement to repurchase the note in case it was not paid by the maker at maturity.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Agreement to be bound contrary to indorsement. A contract is not binding on a corporation, tho entered into in its name by its president, to the effect that the corporation shall be and remain liable on promissory notes negotiated by it "without recourse" when authority to the president to enter into such contract cannot be found in the articles of incorporation, in the bylaws, in the proceedings of the directors in any act of corporate ratification, or in the customs and practices of the corporation.

First N. Bk. v Products Co., 209-358; 227 NW 908

Alteration of instruments — indorsement— jury question. Evidence held to present a jury question whether an alteration of an indorsement "without recourse" was made as part of the negotiations for the purchase of the note or after the transaction of purchase was fully consummated.

Falcon v Falcon, 214-490; 240 NW 735

9501 [§41] Indorsement where payable to two or more persons.

Essential indorsements. A promissory note payable "to ourselves" and signed by two makers and indorsed by only one of the makers, is obviously an incomplete instrument.

In re Divelbess, 216-1296; 249 NW 260

Indorsement without authority — effect. Where, at a sale of the joint property of a landlord and tenant, promissory notes were, without authority from the landlord or the tenant, taken in their names and later formally indorsed by the tenant in the name of both payees for the sole purpose of obtaining what was due to the landlord and tenant, held that neither of the so-called indorsers was liable as such, and especially the landlord, who did not even know that the notes had been so executed.

Johnson v Watland, 208-1370; 227 NW 410

9502 [§42] Effect of instrument drawn or indorsed to a person as cashier.

Deposit for collection—ill-advised indorsement. The payee of a negotiable check who, when depositing it with a nondrawee bank, intends to retain title to the proceeds of the check, should indorse "for collection only" or by words of similar import; should he indorse in blank he thereby presumptively vests said bank with unrestricted ownership of the check, and should said bank forward said check to its correspondent bank with direction to collect "and credit" the account of the forwarding bank, and should said correspondent enter said credit and, in reliance thereon, pay the drafts drawn on it by said forwarding bank to the full amount of said credit, and does so in good faith and without knowledge of any defect in the title of said forwarding bank or that said forwarding bank had ceased to be a going concern, then said correspondent bank will thereby acquire an unimpeachable title to said check, even tho the drawer thereof has assumed to stop payment thereon because of the insolvency of said forwarding bank.

Bureau Service v Lewis, 220-662; 263 NW 7

Election of remedies. Where a bank credits its correspondent bank with the amount of a check forwarded by the correspondent, and, in reliance on said credit, pays the drafts drawn on it by the correspondent, the act of said crediting bank in canceling the said credit on learning of the insolvency of said correspondent, and in returning said check to the receiver as a claim against the correspondent, is not such an election of remedies as will estop the crediting bank from later contending that it had, in due course of business, become the absolute owner of said check.

Bureau Service v Lewis, 220-662; 263 NW 7

9507 [§47] Continuation of negotiable character.

Negotiability not terminated by maturity. The mere maturity of a negotiable promissory note does not destroy its negotiable character.

Federal Trust v Nelson, 221-759; 266 NW 509

9509 [§49] Transfer without indorsement—effect of.

Applicability. This section has no application whatever to a promissory note payable "to ourselves" and not indorsed by the maker. (See §9501, C., '31.)

In re Divelbess, 216-1296; 249 NW 260

RIGHTS OF HOLDER

9511 [§51] Right of holder to sue—payment.

Real party in interest—disproving ownership of note. The plea that plaintiff in an action on a note as indorsee is not the real party in interest because the note carries a subsequent indorsement by plaintiff to another indorsee becomes of no consequence when said

subsequent indorsee is in court and personally causes proof to be made that plaintiff is the real owner of the note.

First Bank v Johnson, 202-799; 211 NW 373

Actions—nonadmissibility as evidence. Promissory notes, when offered in evidence, are properly excluded as to a party not shown to be liable thereon.

West Chester Bank v Dayton, 217-64; 250 NW 695

Transfer of title after action brought—effect. The fact that plaintiff, after commencing an action on promissory notes, transfers the title thereof does not prevent the prosecution of said action to judgment in the name of the original plaintiff.

Grimes Bank v McHarg, 213-969; 236 NW 418.

Right to transfer note. A bank which is a going concern, but insolvent, and known by all its officers to be insolvent, may, for full value, validly transfer a promissory note held by it, to a transferee who knows of such insolvency, even tho the incidental effect of such transfer may be to deprive the maker of said note of his right to offset against said note the amount of his deposit in said insolvent bank at the time of the transfer.

Ottumwa Bank v Crawford, 215-1386; 244 NW 674

Conflicting claims to proceeds. The holder of a check who, before payment thereof is stopped, indorses the same to a nondrawee private banker, and unwittingly receives in exchange therefor the worthless draft of said private banker, is entitled, in a subsequent action on the check, to the amount recovered thereon, in preference to the receiver for the private banker. Especially is this true when the banker was insolvent when he issued the draft.

Runge v Benton, 205-845; 216 NW 737

Title to deposited drafts. The act of a consignor in drawing against a consignee a draft (with bill of lading attached) in favor of a bank, and depositing the same in said bank and receiving credit on his checking account to the full amount thereof, constitutes the bank the unqualified owner of the draft and of the proceeds thereof, notwithstanding the fact that at a later time the consignor recognized the right of the consignee-drawee to a reduction on the draft, and requested the bank to make such reduction, and the bank voluntarily complied with the request.

Dubuque Fruit Co. v Emerson & Co., 201-129; 206 NW 672

Bearer or holder of negotiable paper. The trustee in a deed of trust which secures a series of bonds payable "to said trustee or to bearer", and which have been sold and delivered to numerous parties who continue to be the owners thereof, may maintain an action at law against the maker, on all the bonds, (1) when the trust deed empowers the trustee to declare the entire debt due in case of any default of the maker, and to proceed by means of any legal or equitable action to enforce collection, and imposes on the trustee the duty so to declare and proceed when the bondholders request him so to do, and (2) when all said bondholders, after default in payment of interest, individually redeliver to said trustee all of said bonds and specifically request the trustee in writing to declare the entire debt due and to proceed against the maker by legal action. Authority in plaintiff to maintain said action rests on a two-fold legal basis, viz:

1. Plaintiff is the legal bearer and holder of said bonds.
2. Plaintiff is the trustee of an express trust.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Lien on funds representing check. A drawee-bank which certifies a negotiable check at the request of a stranger to the check, and is informed that the stranger claims a lien on the proceeds, is nevertheless under no obligation to recognize such claim. The bank's sole duty is to pay the check on presentation with proper indorsement.

Parker v Walsh, 200-1086; 205 NW 853; 42 ALR 622

Prima facie showing for recovery. In an action on a promissory note, the introduction of the note with proof of the genuineness of the signature thereto makes a prima facie case for the plaintiff.

Pfeffer v Corey, 211-203; 233 NW 126

Matured principal and interest—permissible splitting of action. When a promissory note and the last interest coupon note both mature at the same time in the hands of the same holder, a judgment in an action solely on the interest coupon note (which contains no promise to pay the principal) is not an adjudication of the amount due on the principal note. In other words, the holder may first sue on the coupon note and later on the principal note.

Des Moines Bk. v Littell, 209-22; 227 NW 503

Accommodation note—burden of proof. On the issue whether a promissory note was an accommodation, it seems that the introduction of the note makes a prima facie case for the payee, and that thereupon the maker must establish the fact that the note was an accommodation.

Markworth v Bank, 217-341; 251 NW 857

Equitable estoppel—silence. The holder of a note and mortgage as collateral, who stands by, and even encourages and assists the maker and payee of the note to execute a rescission of the transaction out of which the note and mort-

gage arose, may not thereafter assert against the maker his right as a collateral holder, the said maker being ignorant that the said obligations were being so held as collateral.

Iowa Bank v Rons, 203-51; 212 NW 362

Ownership of note—adjudication. A judgment in an action between the payee of a promissory note and a former collateral holder, to the effect that the latter had become and was the unqualified owner of the note, precludes the maker of the note, when sued on the note by the adjudged owner, from readjudicating the ownership of the note on the basis of the same facts existing in the former action.

Commercial Bk. v Allaway, 207-419; 223 NW 167

9512 [§52] What constitutes a holder in due course.

Discussion. See 9 ILB 299—Payee as holder in due course

Payee as holder in due course. Conceding, arguendo, that the payee of a promissory note might, under some circumstances, be a holder in due course, yet he cannot have such standing when he knew, when he acquired the note, that it had not been executed by the proper officers of the corporation maker.

Black H. Bk. v Monarch Co., 201-240; 207 NW 121

Assignment of mortgage or debt. The rights acquired by a holder in due course of a negotiable promissory note attach to and accompany the mortgage securing said note, even tho the mortgage is simply "assigned" to said holder.

Fed. Bank v Sherburne, 213-612; 239 NW 778

Collateral — holder in due course — set-off against holder denied. Where commercial paper is rediscounted or put up as collateral, the holder is a bona fide holder in due course and the plea of set-off is not available against such holder.

Andrew v Union B. & T. Co., 225-929; 282 NW 299

Pre-existing debt as "value". Principle reaffirmed that he who takes a negotiable promissory note as collateral security for a preexisting debt takes the note "for value".

Miller v Miller, 211-901; 232 NW 498

Employing third party note as payment. The payee of an unquestioned promissory note who surrenders the same to the maker, and in payment receives from said maker, under proper indorsement, a negotiable, unmatured promissory note which the maker holds against a third party, must be presumed, there being no evidence to the contrary, to pay value for the latter note to the full face value of the surrendered note.

Sword v Spry, 205-266; 215 NW 737

Release of surety—nonapplicability of principle. The maker of a fraud-induced promissory note may not claim against a collateral holder in due course that he is released on the note because, without his consent, the collateral holder extended payment on the payee's note for which the fraud-induced note was collaterally pledged, on the theory that the act of collaterally pledging constituted the payee a principal and the maker a surety.

Mid-West Bk. v Struble, 203-82; 212 NW 377

Cashing fraud-induced check — nonliability to maker. The payee of a check, negotiable in form and regular on its face, and received in the ordinary course of business, and for value, and wholly without knowledge of a fraud which attended and induced the execution and delivery of the check, may not be held liable to the drawer of the check for damages consequent on said fraud.

Deater v City N. Bank, 223-86; 272 NW 423

Circumstances evincing bad faith. The indorsee of a negotiable promissory note must, upon proof that the note was fraud-induced, establish his bona fide holdership in due course. Evidence reviewed, and held to furnish substantial support for a finding by the trial court (which tried the case under waiver of jury) that the indorsee had acquired the note under circumstances evincing bad faith.

Windell v Steinhoff, 211-999; 234 NW 795

Burden of proof. The claim that, fraud being shown, the holder must establish his holdership in due course is manifestly answered by a record which, by findings of fact, judicially shows such holdership.

Sword v Spry, 205-266; 215 NW 737

Holder in due course—burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee-bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Conditionally delivered note—purchaser with knowledge not "holder in due course". Where insurance agent takes an application for life insurance, and as a part of the same transaction notes are executed and delivered conditionally or for specific purpose of paying insurance premium, and a party takes the notes, as security for a loan to the agent, with knowledge that application has not been approved, such party is not a "holder in due course" and can-

not enforce payment of the note after application has been rejected.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Value in form of "credits". Where the purchaser of a negotiable promissory note paid for the same by giving the payee a credit on others of payee's notes then held by the purchaser, the question of the value of said credit should not be submitted to the jury when the uncontradicted testimony shows that the payee was solvent; and this is true even tho the jury finds (contrary to the evidence) (1) that the credit had no value, and (2) that the purchaser was not a holder in due course.

State Bk. v Behm, 202-192; 209 NW 523

Issuance of certificate of deposit to pay note —validity. A certificate of deposit issued by a savings bank in payment of a negotiable promissory note constitutes a payment of value for the note, it appearing that the bank at the time had ample funds on hand for the purchase of said note; and this is true tho the directors had never authorized the purchase in such manner.

Andrew v Peterson, 214-582; 243 NW 340

9513 [§53] When person not deemed holder in due course.

Burden of proving bad faith. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

9514 [§54] Notice before full amount paid.

Negotiable certificate of deposit as payment. A bank which issues and delivers its negotiable certificate of deposit in exchange for an unmatured negotiable promissory note, then and thereby effects full payment for the note within the meaning of the negotiable instruments law.

People's Bk. v Smith, 210-136; 230 NW 565; 69 ALR 399

Amount recoverable by good-faith holder.

Sword v Spry, 205-266; 215 NW 737

9515 [§55] When title defective.

Fraud—nonavailability. Fraud, in order to be available as a defense to a promissory note in the hands of the original payee, must, of course, in some manner be brought home to the said payee.

Henderson v Holt, 201-1017; 206 NW 134

Incredible representations. The plea of fraud in the execution of a promissory note is not necessarily defeated by the fact that the fraud was such that only a gullible person would rely thereon.

McCorkle v Lessenger, 200-967; 205 NW 781

Parol as affecting writings—plea of fraud. In an action on a promissory note, parol evidence to the effect that the maker was assured that he would never be compelled to pay the note is admissible as bearing on the maker's plea of fraud in the procurement of the note.

Schipfer v Stone, 206-328; 218 NW 568; 219 NW 933

Renewal with knowledge of fraud. A fraud-induced note is validated by the act of the maker in renewing the note at a time when he knew of the fraud, or in reason ought to have had such knowledge.

Home Bk. v Heizer, 200-793; 205 NW 467
Walnut Bk. v Mueller, 202-961; 211 NW 215

Repeated renewals—fraud—effect. The maker of a negotiable promissory note who repeatedly renews the note in the hands of a transferee, with full knowledge of the fraud perpetrated upon him in the execution of the original note, and with like knowledge, necessarily, that an agreement that the original note should not be transferred, had been violated, thereby irrevocably waives his right to rescind the transaction out of which the original note grew.

First N. Bk. v Bensene, 200-1165; 206 NW 122

Renewal—waiver of defense. Principle reaffirmed that the maker of a promissory note waives his defense to the note when he renews the note with full knowledge of the defense; and especially is this true if the maker secures an extension of time.

Euclid Bk. v Nesbit, 201-506; 207 NW 761

Renewal with knowledge of fraud — jury question. Evidence reviewed, on the issue whether a maker of fraudulently procured promissory notes renewed them at a time when he had knowledge of the fraud, or in reason ought to have had such knowledge, and held to present a jury question.

Larson v Bank, 202-333; 208 NW 726

Renewal with partial knowledge — effect. The fact that a fraudulently induced maker

of a promissory note knew, when he renewed the note, that one of the very material inducing representations was false does not necessarily constitute a waiver of all other actionable fraud of which he was then ignorant; nor does such knowledge ipso facto charge him with knowledge of such other fraud.

Larson v Bank, 202-333; 208 NW 726

Fraud—similar facts and transactions. A party alleged to have been defrauded may show, on the issue of fraudulent representations inducing the execution of a promissory note, that the defendant made like representations to other parties at about the time in question.

Larson v Bank, 202-333; 208 NW 726

Holder in due course—burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee-bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Conditionally delivered note—purchaser with knowledge not "holder in due course". Where insurance agent takes an application for life insurance, and as a part of the same transaction notes are executed and delivered conditionally, or for specific purpose of paying insurance premium, and a party takes the notes, as security for a loan to the agent, with knowledge that application has not been approved, such party is not a "holder in due course" and cannot enforce payment of the note after application has been rejected.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Fictitious payee — indorsement as forgery. Principle recognized that the indorsement of a check payable to a fictitious payee, by one to whom the drawer did not intend payment to be made, is forgery.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Signing without reading. A wife who can read, but voluntarily and without circumvention signs as surety and without reading the promissory note of her husband, in pursuance of a prior agreement to that effect between the husband and the payee, is bound thereby, both on the basis of assent and on the basis of consideration.

First N. Bk. v Phillips, 203-372; 212 NW 678
Legler v Ins. Assn., 214-937; 243 NW 157
See Crum v McCollum, 211-319; 233 NW 678

Rescission—status quo. An offer by the maker of a promissory note, on rescission thereof, to return everything received by virtue of the note is a sufficient offer to put the holder in statu quo.

Larson v Bank, 202-333; 208 NW 726

9516 [§56] What constitutes notice of defect.

When notice imputed to corporate holder. A corporation may not be deemed to be a holder in due course of a negotiable promissory note when its holdership was acquired solely through the instrumentality of its own president, who owned substantially all the stock of the corporation, and who was an active participant in the fraud which permeated the note.

Kenwood Lbr. v Armstrong, 201-888; 208 NW 371

Holder in due course—burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee-bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Instructions in re holder in due course. Instructions in re holder in due course reviewed and, in view of other instructions, held quite unobjectionable.

Chariton Bank v Wright, 222-417; 269 NW 439

Knowledge of agent—when not imputed to principal. The knowledge acquired by the director of a corporation as to the proceedings of its directors will not be imputed to a bank of which the director is cashier, especially when the director-cashier is interested adversely to the bank.

Hancock Bk. v McMahon, 201-657; 208 NW 74

Nonevidence of bad faith. The fact that the transferee of a negotiable promissory note, when he acquired the note, required the transferor to guarantee its payment furnishes no evidence of a lack of good faith.

Williamson v Craig, 204-555; 215 NW 664

Rights on indorsement—holder in due course. One who executes a negotiable promissory note to his agent under an agreement that the agent will sell the note and with the proceeds discharge an existing mortgage on the principal's property, runs the risk that the agent

may, in discharge of his own debt, transfer the note, before due, to a bona fide holder.

Mynster v Baker, 215-456; 245 NW 722

Stolen bonds—when purchaser protected. The purchaser of stolen United States liberty bonds will be protected in his purchase when he purchases in good faith, for full value, in the ordinary course of business, and without actual notice or knowledge of any defect in the title of the seller, and without notice or knowledge of any fact which would put said purchaser on inquiry as to said seller's title.

State Bank v Iowa-Des Moines Bank, 223-596; 273 NW 160

9517 [§57] Rights of holder in due course.

Gambling obligations. See under §9442

Former statute—amount of recovery—implied repeal. The former statutory rule (§3070, C., '97) to the effect that when a note has its inception in fraud, a holder in due course could only recover the amount which he paid for the note was impliedly repealed by the enactment of the negotiable instruments law.

Sword v Spry, 205-266; 215 NW 737

Insanity as defense. Neither a negotiable promissory note nor a mortgage given by the makers to secure the same, even tho the mortgage is on a homestead, is subject, when in the hands of a holder in due course, to the plea that the maker was insane at the time of the execution of such note and mortgage.

Farmers Ins. v Ryg, 209-330; 228 NW 63

Liability of indorsee. One who has been induced to issue his check because of the criminal fraud of the payee may not recover the amount thereof from an indorsee on the naked showing that said indorsee received the said check from said payee in settlement of a like criminal fraud perpetrated by said payee on said indorsee.

Bogle v Goldsworthy, 202-764; 211 NW 257

Offsetting deposit against note—loss of right. The maker of a promissory note to a bank may not, after the insolvency of the bank, set off against the amount due on the note the amount of the maker's deposit in the bank, when, prior to insolvency, the note had been transferred by the bank to a holder in due course.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Prima facie case established without disproof—when credibility of witnesses not jury question. In an action on a note by alleged holder in due course, letters written by prior indorsee, after maturity, demanding payment from maker were properly excluded as hearsay, and in the absence of any disproof of prima facie case made under such circumstances it is not the duty of the court to submit case to jury solely on matter of credibility of witness.

Colthurst v Lake View Bank, 18 F 2d, 875

Second mortgage to secure items secured by first mortgage. Even tho a first mortgage on land is, by its terms, security for both accruing interest and taxes, nevertheless, where the owner of the land, after the first mortgage-secured notes had passed into the hands of holders in due course, executes to the mortgagee additional promissory notes in the amount of the then accrued interest and taxes, and secures such notes by an additional mortgage which is distinctly made subject to the first mortgage, the holders of such latter notes may not, as against said holders in due course, claim that such notes are secured by the first mortgage.

Des M. Bk. v Stanley, 206-134; 220 NW 80

Unallowable defense. A promissory note taken by a payee-bank without fraud and on a valuable consideration is not subject to an after-discovered fraud perpetrated on the same maker in the execution of another and different note to another and different party, in a transaction to which the payee-bank was in no manner a party; and this is true even tho the note in question worked a readjustment or rearrangement of the indebtedness represented by the said other note.

Hancock Bk. v McMahon, 201-657; 208 NW 74

Unallowable defense. In an action by the indorsee of a nonnegotiable promissory note for judgment thereon, and to foreclose the mortgage securing the same, it is no defense that the payee of the note did not use the proceeds derived from the negotiation of the note as he and his joint co-adventurers had agreed; and especially is this true where all of said proceeds were used for the benefit of the joint adventurers.

Co. Bluffs Bk. v Towl, 205-1185; 219 NW 315

9518 [§58] When subject to original defenses.

Certificates of deposit — illegal issuance. Certificates of deposit issued by a savings bank in payment or exchange for promissory notes when the bank has no funds with which to pay for the notes are absolutely void in the hands of any holder.

Sweet v Bank, 200-895; 205 NW 470

Defense available against transferee. The maker of a nonnegotiable promissory note who, subsequent to the execution of the note, and before he had knowledge of the transfer of the note, has on deposit with the payee (a private banker), subject to check, an amount equal to the entire amount due on the note, may plead

said claim against a transferee of the note when it is made to appear that the said maker, under an arrangement with the banker to apply the deposit on the note, never withdrew any part of said deposit.

Benton v College, 202-15; 209 NW 516

Duress—estoppel to assert. The plea that an obligation was signed under duress must fall when the signer, during a long time following the execution of said obligation, recognized it as legally binding, and caused others to act on such recognition to their detriment.

Smith v Morgan, 214-555; 240 NW 257

Failure to reply to letter as to ownership of instrument. The acceptor of a trade acceptance does not estop himself from pleading defensive matter by failing to reply to a letter from an indorsee to the effect that the indorsee has purchased the acceptance.

First N. Bk. v Power Equip. Co., 211-153; 233 NW 103

Ineffectual rescission—effect on nonholder in due course. The nonholder in due course of a promissory note is not exempt from a plea of fraud in the inception of the note because the maker of the note, after discovering the fraud, had demanded of the payee a rescission, and said payee had agreed to return the note, even tho he did not then own it.

Galloway v Hobson, 206-507; 220 NW 74

Fraud—estoppel. The maker of a negotiable promissory note may not be said to be estopped to plead fraud in the inception of the note, against a transferee, on a record which fails to show that the maker's conduct ever came to the knowledge of the transferee or in any manner controlled his conduct.

State Bk. v Behm, 202-192; 209 NW 523

Fraud—evidence. Evidence held to present a jury question on the issue of fraud in the inception of a negotiable certificate of deposit.

Sweet v Bank, 200-895; 205 NW 470

Fraud—evidence. Evidence reviewed, and held ample to show that the promissory note in question was fraud-induced.

Andrew v Hanson, 206-1258; 222 NW 10

North Amer. Ins. v Holstrum, 208-56; 221 NW 215

Fraud — evidence — insufficiency. Evidence held insufficient to present a jury question on the issue of fraud in the execution of notes to a bank by the directors thereof in order to prevent the closing of the bank.

Farmers Bank v Bunge, 211-1357; 231 NW 651

Fraud of payee—failure to establish. In action on promissory note, evidence failed to show payee fraudulently represented amount due upon various occasions when respective accounts were stated.

Conrad v Ashby, (NOR); 247 NW 218

Renewal of fraud-induced note. The renewal of a fraudulently induced note does not, of itself, alter the position of the victim of the fraud.

Hills Bk. v Cress, 205-306; 218 NW 74

Settlement for fraud. A mere promise by the payee of a fraud-induced note to return it to the maker cannot be deemed a settlement of the fraud.

Galloway v Hobson, 206-507; 220 NW 74

Holdership in due course—burden of proof —circumstances evincing bad faith. The indorsee of a negotiable promissory note must, upon proof that the note was fraud-induced, establish his bona fide holdership in due course. Evidence reviewed, and held to furnish substantial support for a finding by the trial court (which tried the case under waiver of jury) that the indorsee had acquired the note under circumstances evincing bad faith.

Windell v Steinhoff, 211-999; 234 NW 795

Holdership in due course—participation in fraudulent transaction — evidence. Evidence reviewed, and held to sustain a verdict to the effect that the acquisition of a negotiable promissory note by the holder thereof was part of a fraudulent transaction of which the holder had full knowledge and in which he actively participated.

Kenwood Co. v Armstrong, 201-888; 208 NW 371

Negativing fraud. The plea of fraudulent representation as to the value of property must necessarily fall in the face of testimony that the complainant was a person of unusual business ability and experience and had had long, personal and intimate knowledge of the property in question far superior to that of the alleged wrongdoer.

Tobin v Budd, 217-904; 251 NW 720

Ratification or waiver of fraud. A person who has been fraudulently induced to sign a promissory obligation may not be deemed to ratify or waive the fraud because he is not swift to notify the swindler that his fraud has been discovered.

Commercial Bank v Kietges, 206-90; 219 NW 44

Instructions as regards note not in issue. Instructions relative to the liability of the maker of an original note, are quite harmless when the action is on a renewal note and the instructions relative thereto are correct.

Farmers Bk. v DeWolf, 212-312; 233 NW 524

Nonprotected party. A nonnegotiable instrument in the hands of a third party indorsee is

subject to the equities existing between the original parties to the instrument.

Soldier Valley Bank v Camanche Co., 219-614; 258 NW 879

Note as receipt and not as loan. Evidence held to support a finding by the trial court that the nonnegotiable promissory note sued on was not intended to represent a loan by the payee to the maker, but was intended to evidence the fact that the payee had advanced to the maker the sum called for in the note as pro tanto payment of the payee's obligation to the maker.

Second N. Bk. v Mielitz, 211-218; 233 NW 108

Unallowable conclusion plea. An allegation that the transferee of a negotiable promissory note received it without consideration,—that said transferee was not a bona fide holder for value,—is a conclusion plea, and is not justified by the additional allegation of fact that said transferee took the note as a "donation or gift".

Benton v College, 202-15; 209 NW 516

Unpleaded defense—effect. The maker of a promissory note cannot be given the benefit of testimony tending to show that he signed the note under duress when he rests his defense on a distinctly different defense; and the court should so inform the jury.

Farmers Bk. v DeWolf, 212-312; 233 NW 524

9519 [§59] Who deemed holder in due course.

Holder in due course — presumption. The possessor of a negotiable promissory note, as owner, prior to its maturity, is presumptively a holder in due course.

Union Cent. Life v Mitchell, 206-45; 218 NW 40

Holder in due course — sufficiency of evidence. It is not necessarily true in all cases that a bank must prove its holdership in due course of a negotiable promissory note, by the testimony of all the officers of the bank.

Williamson v Craig, 204-555; 215 NW 664

Sufficiency of evidence. Testimony by a bank officer to the effect that he, on behalf of the bank, made the purchase of a promissory note, and that he had no notice of any defense to the note, may be sufficient to establish the bank's holdership in due course, even tho the other officers of the bank do not testify to their lack of knowledge of any defense.

Old Line Ins. v Jones, 206-664; 221 NW 210

Evidence—sufficiency. The corporate holder of a promissory note sufficiently establishes its holdership in good faith and for value by calling those of its officers only who participated in the purchase of said note.

Grimes Bk. v McHarg, 213-969; 236 NW 418

Sufficiency of evidence. Evidence fairly tending to negative holdership in due course of a negotiable promissory note presents a jury question, especially when not all of the officers of the plaintiff (a bank) testify, and negative knowledge of the pleaded fraud.

State Bk. v Behm, 202-192; 209 NW 523

Evidence. Evidence reviewed, and held to show that the holder of a promissory note was not a holder in due course.

McCorkle v Lessenger, 200-967; 205 NW 781

Evidence of ownership. The introduction in evidence by the payee-holder of a promissory note makes a prima facie showing of right of recovery.

Nolta v Lander, 200-608; 203 NW 710

Burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee-bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Burden of proof. The claim that, fraud being shown, the holder must establish his holdership in due course, is manifestly answered by a record which, by findings of fact, judicially shows such holdership.

Sword v Spry, 205-266; 215 NW 737

Burden of proving bad faith. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

Burden of proof — circumstances evincing bad faith. The indorsee of a negotiable promissory note must, upon proof that the note was fraud-induced, establish his bona fide holdership in due course. Evidence reviewed and held to furnish substantial support for a finding by the trial court (which tried the case under waiver of jury) that the indorsee had

acquired the note under circumstances evincing bad faith.

Windell v Steinhoff, 211-999; 234 NW 795

Evidence — decree of dissolution. A decree of dissolution of a corporation based on the fraud of the corporation is admissible, on the issue of fraud and want of consideration, against an alleged bona fide holder of a negotiable promissory note which was given to the corporation as the purchase price for its corporate stock, even tho neither of the parties to the action on the note were parties to the dissolution suit.

Andrew v Peterson, 214-582; 243 NW 340

Holder in due course — sufficiency of evidence. A jury question on the issue of holdership in due course of a negotiable promissory note is made by the explicit testimony of the trustee-plaintiff for the corporate indorsee that he had sole charge of the negotiations attending the purchase of the note, and that he had no notice whatever of any infirmity in the note; and this is true even tho he did not call all the other officers of the corporation to testify to their want of notice.

Brainerd v Koffmeal, 200-1281; 206 NW 606

Conflicting testimony. Holdership in due course of a negotiable promissory note as collateral security for a pre-existing debt is not shown as a matter of law by testimony which, besides being in part impeached, is uncertain as to how, when, and under what circumstances the note was acquired and when the indorsement was made; and especially is this true when the holdership in due course bears the appearance of being an afterthought, born subsequent to the filing of the petition.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Conflicting inference from testimony. The court has no right to say that the holder of a negotiable note is a holder in due course and to direct a verdict accordingly when conflicting inferences may be drawn from the facts whether viewed individually or collectively.

Grimes Bk. v McHarg, 204-322; 213 NW 798
Pierce v Lichtenstein, 214-315; 242 NW 59

Earmarks of knowledge of fraud. The extraordinary discount allowed in the negotiation of a promissory note, and the unusualness of the transaction in general, may very clearly create a jury question on the issue of holdership in due course.

Sweet v Bank, 200-895; 205 NW 470

Fraud—failure to establish per se. Evidence held insufficient to show as a matter of law that promissory notes were obtained by false representations.

Andrew v Peterson, 214-582; 243 NW 340

Estoppel to plead fraud.

Macedonia Bk. v Graham, 198-12; 199 NW 248

Estoppel to plead fraud. The maker of negotiable promissory notes is not estopped to plead fraud in the inception of the notes because he appeared in the insolvency proceedings against the payee, and obtained judgment for the amount of the notes (which had been negotiated), and in such proceedings took the position, in effect, that the indorsees were holders in due course, when the evidence fails to show that anyone had relied on such course of conduct to his injury.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Waiver of fraud. The holdership in due course of a negotiable promissory note is not put in issue by testimony that a former note of which the note sued on was a renewal was obtained by fraud.

Walnut Bk. v Mueller, 202-961; 211 NW 215

Waiver of fraud. It is quite immaterial whether the holder of a negotiable promissory note is or is not a holder in due course if the maker has waived the circumstances which originally invalidated the note.

Home Bk. v Heizer, 200-793; 205 NW 467

Waiver of fraud. The purchaser of a mortgage-secured promissory note may not rescind on the ground of fraudulent representations as to the value of the security when, with full knowledge of the fraud, he forecloses the mortgage, bids in the property for the full amount of the judgment, and later takes a sheriff's deed to the premises.

Iowa Co. v Bank, 200-952; 205 NW 744

Incompetent witness. In an action on a promissory note by the indorsee thereof, the maker is not a competent witness to testify to the fraud perpetrated on him by the payee in the execution of the note, when, at the time of the action, said payee is insane.

Cherokee Bk. v Lawrey, 203-20; 212 NW 359

Instructions re holder in due course. Instructions in re holder in due course reviewed and, in view of other instructions, held quite unobjectionable.

Chariton Bank v Wright, 222-417; 269 NW 439

Payee as holder in due course. Conceding, arguendo, that the payee of a promissory note might, under some circumstances, be a holder in due course, yet he cannot have such standing when he knew, when he acquired the note, that it had not been executed by the proper officers of the corporation maker.

Black Hawk Bk. v Monarch Co., 201-240; 207 NW 121

Undisclosed principal as indorsee. An indorsee of a negotiable promissory note has no basis for a claim of holdership in due course when he was the sole owner of the note from

its inception, and simply took under an indorsement by his own agent, to whom the note had been made payable.

Nolta v Lander, 200-608; 203 NW 710

LIABILITIES OF PARTIES

9520 [§60] Liability of maker.

When indorser primarily liable. A vendor of land who negotiates the purchase-price note received by him, and later either acquiesces in the abandonment of the contract by the purchaser or himself rescinds the contract and conveys the land to a new purchaser, thereby becomes primarily liable on the negotiated note, as between himself and a surety on said note.

First N. Bk. v LeBarron, 201-853; 208 NW 364

Agreement relative to payment by indorser and surety—enforceability. An agreement by the indorser and accommodation signer of a promissory note that each will pay one-half of the note to the indorsee, and that the accommodation signer will then sue the maker, and pay the indorser one-half of the amount collected, is supported by ample consideration and is enforceable.

Hirtz v Koppes, 212-536; 234 NW 854

Extension to principal available to surety — abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Liability of parties—beneficiary of loan. A promissory note executed by the maker in order to raise funds with which to take up his personal indebtedness to a bank is not in any sense the obligation of said bank (1) because the president of said bank personally indorsed the note, or (2) because the payee (who was correspondent for said bank), on accepting the note, credited said bank with the amount, or (3) because said bank applied the credit on the maker's indebtedness to said bank.

Andrew v Bank, 203-1; 212 NW 320

Payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee-bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amst. Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Release of surety—nonapplicability of principle. The maker of a fraud-induced promissory note may not claim, against a collateral holder in due course, that he is released on the note because, without his consent, the collateral holder extended payment on the payee's note for which the fraud-induced note was collaterally pledged, on the theory that the act of collaterally pledging constituted the payee a principal and the maker a surety.

Mid-West Bank v Struble, 203-82; 212 NW 377

Release of existing maker as consideration for signature of new signer. The court will not, in order to supply a consideration for a third party's signing a pre-existing note, hold, as a matter of law, that the said signing, being without the knowledge or consent of the existing signers, (1) worked an absolute release of said existing signers, and (2) constituted the making of a new note by the new signer, when plaintiff was pressing his action on a theory flatly contradictory of such a holding.

Blain v Johnson, 201-961; 208 NW 273

Statutory admission of existence and capacity to indorse. The maker of a promissory note who makes it payable "to the order of" a named payee thereby admits the existence of such payee and his then capacity to indorse the note, even tho the maker, when he executed the note, actually believed the named payee to be a corporation, when in fact the payee was only the trade name of an individual.

Schipfer v Stone, 206-328; 218 NW 568

Wife's separate estate—no joint adventure from husband's management. Where a wife inherits real property which is managed, as an incident to their marital relation, by her husband, his individual purchase of livestock in connection with such management and executing his individual promissory note therefor will not make the wife liable thereon as a joint adventure.

Valley Bank v Staves, 224-1197; 278 NW 346

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness that her signature would have no other effect than to release her dower interest in the husband's land

(which was embraced in the accompanying mortgage which she signed) constitutes no defense to personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

First N. Bank v Mether, 217-695; 251 NW 505

9521 [§61] Liability of drawer.

Drafts—demand necessary within limitation period. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee bank, but the demand cannot be postponed indefinitely and must be made within the 10-year limitation period.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Admitting existence of payee. The statutory provision that by drawing a check the drawer "admits the existence of the payee and his then capacity to indorse" is solely for the protection of the holders in case the drawee fails to pay. The statute does not, in case a check is unwittingly and without negligence made payable to a fictitious person, relieve the drawee of the duty to ascertain the identity of the indorser and the genuineness of the indorsement.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Deposits — cancellation of credit. A bank which, having issued foreign exchange, later receives it back (when its value is problematical), under an agreement to sell the same and collect the proceeds, does not thereby become the owner either of the returned exchange or of a check subsequently received as the result of the collection, and may cancel a credit which was entered on the mistaken assumption that the check was of face value.

Tropena v Bank, 203-701; 213 NW 398

Dishonor by drawee—drawer's recourse to drawee's funds in indorsee's hands. When a check is honored by the drawee's depository bank in satisfaction of payee's debt to said bank, and is properly charged to the drawee's deposit in said bank, and is later dishonored by the drawee because of insolvency, the cancellation of all of said entries, and the return of said check to the drawer who paid the amount thereof to the payee, leaves the drawer without any claim against the funds of the drawee in the said depository bank.

Davis Bros. v Bank, 216-277; 249 NW 170

Payment on forged indorsement — recovery —negligence. Evidence reviewed, in an action by a depositor against a bank to recover the amount paid by the bank on a forged indorsement, and charged to the depositor's account, and held ample to support a finding that the depositor was not guilty of any negligence which prejudiced the bank.

McCornack v Bank, 207-274; 222 NW 851

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

9525 [§65] Warranty where negotiation by delivery.

"Without recourse" — liability. The payee of a promissory note who, without fraud or deceit, indorses "without recourse" both the note and the mortgage securing it, cannot be deemed to warrant the solvency of the maker of the note.

Leekley v Short, 216-376; 249 NW 363; 91 ALR 394

9526 [§66] Liability of general indorser.

Absence of consideration. The indorser of a promissory note may not be held on his indorsement, even tho he was the original payee of the note, when he never owned any interest in the note, and when his indorsement was wholly without any consideration.

Pomeroy v Bank, 207-1310; 224 NW 512

Agreement relative to payment by indorser and surety—enforceability. An agreement by the indorser and accommodation signer of a promissory note that each will pay one-half of the note to the indorsee, and that the accommodation signer will then sue the maker, and pay the indorser one-half of the amount collected, is supported by ample consideration and is enforceable.

Hirtz v Koppes, 212-536; 234 NW 854

Agreement to repurchase as guaranty. An agreement by the seller of a promissory note to repurchase the note of the vendee, in the event of nonpayment at maturity, cannot be given the force and effect of a guaranty that the maker will pay at maturity.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Change of venue — indorser sued in wrong county. The indorser in blank of a promissory note, when sued alone on his indorsement in the county in which the note requires the maker to make payment, is entitled to a change of venue to the county of his residence when said first county is not the county of his residence in this state.

Dougherty v Shankland, 217-951; 251 NW 73
See Darling v Blazek, 142-355; 120 NW 961

Disaffirmance of promissory note — release of surety. The disaffirmance by a minor of his contract of purchase and of his negotiable promissory note given in connection therewith, before the property is delivered to him, releases the surety on the note of all liability to the payee, even tho the surety signed the note because of the known minority of the principal. In case the note has passed to a holder in due course by indorsement by the payee, the liability of the indorser becomes primary and the liability of the surety becomes secondary.

Lagerquist v Guar. Co., 201-430; 205 NW 977; 43 ALR 585

Delivery — parol evidence affecting. Where the holder of a promissory note indorsed and surrendered it, and received in payment the duly indorsed note of a third party, parol evidence that, at the time the respective indorsements were made, there was talk to the effect that if such indorsements were made, one indorsement would cancel the other indorsement, has no probative force to show (1) inducement, or (2) conditional delivery, or (3) delivery for a specific purpose, of said indorsements, or (4) that the paid note was reissued and payment thereof guaranteed.

Versteeg v Hoeven, 214-92; 239 NW 709

Forged indorsement — evidence—sufficiency. An indorsement "Hazen Spears" on a check payable to "Hazen Spears" is not shown to be a forgery by evidence (1) that a person by the name of Hazen Speer lived in the county in which the check purported to be drawn and in which it was cashed, and (2) that said Hazen Speer did not make the said indorsement.

Bank of Pulaski v Bank, 210-817; 232 NW 124

Indorsement without consideration — effect. The indorser of a promissory note may not be held on his indorsement by a holder who is not such in due course, even tho the indorser was the original payee of the note, when he never personally had any interest in the note, and indorsed it solely for the purpose of passing the legal title to the actual owner.

Spurway v Read, 210-710; 231 NW 306

Judgment against maker — effect. A judgment obtained by the indorsee of a promissory note solely against the maker thereof, does not adjudicate or affect any right or obligation of the indorser.

Callaway v Hauser Bros., 211-307; 233 NW 506

Liability of indorsee. One who has been induced to issue his check because of the criminal fraud of the payee may not recover the amount thereof from an indorsee on the naked showing that said indorsee received the said check from said payee in settlement of a like criminal fraud perpetrated by said payee on said indorsee.

Bogle v Goldsworthy, 202-764; 211 NW 257

Liability of parties—beneficiary of loan. A promissory note executed by the maker in order to raise funds with which to take up his personal indebtedness to a bank is not in any sense the obligation of said bank (1) because the president of said bank personally indorsed the note, or (2) because the payee (who was correspondent for said bank), on accepting the note, credited said bank with the amount, or (3) because said bank applied the credit on the maker's indebtedness to said bank.

Andrew v Bank, 203-1; 212 NW 320

Neglect to collect of maker. The plea of the indorser of a note that the indorsee negligently failed to file a claim against the estate of the maker for the amount of the note becomes of no consequence when it appears that the indorser himself had filed such claim.

First Bk. v Johnson, 202-799; 211 NW 373

Parol modification. Parol evidence is inadmissible to vary the legal effect of an indorsement in blank of a promissory note.

Union Mtg. v Evans, 200-1000; 205 NW 776
In re Newson, 206-514; 219 NW 305
Kent Bk. v Campbell, 208-341; 223 NW 403
First N. Bk. v Raatz, 208-1189; 225 NW 856
See Leach v Bank, 201-349; 207 NW 332

Payment by indorser revests original rights. The payee of a promissory note who indorses with recourse, necessarily continues to be a party to the note, and if he pays the note when due because of the default of the maker, he thereby re-acquires his original rights under the note. It follows that if the note was originally given for the purchase price of property, the indorser may enforce said note against such property, and it is quite immaterial that he does so under a duly assigned judgment obtained by the indorsee against the maker.

Callaway v Hauser Bros., 211-307; 233 NW 506

Unallowable counterclaim. A defendant sued on his indorsement of a promissory note manifestly may not avail himself, by way of counterclaim, of an indorsement by plaintiff to defendant of a promissory note which has been fully discharged. Somewhat unusual circumstances reviewed and held to show such discharge.

Versteeg v Hoeven, 214-92; 239 NW 709

PRESENTMENT FOR PAYMENT

9530 [§70] Effect of want of demand on principal debtor.

Deposit certificate—action accrues only after demand. Makers of notes, acceptors of bills

of exchange and issuers of certificates of deposit are charged on the instruments from their inception, and presentment to the maker or acceptor is unnecessary; but, as to the issuer of a certificate of deposit, there is an imputed agreement that before the depositor may sue the bank thereon, actual demand is necessary to mature the debt.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

"Reasonable time" for presentment—primary and secondary liability. The "reasonable time" clause of §9531, C., '35, negotiable instruments law, applies only to persons secondarily liable on the instrument. It has no application in determining what is a reasonable time for presentment where such step is only preliminary to the enforcement of a remedy against a party primarily liable.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Insufficient excuse for nonpresentment. Principle reaffirmed that presentment for payment of a negotiable promissory note is not excused because the bank which is named as the place of payment is insolvent, or because the indorser knew of such insolvency.

Wood v Roe, 205-399; 218 NW 51

Drafts—statute runs after reasonable time for presentment. Where no demand or presentment for payment of draft is made for over 19 years after its issuance, and where only person who could make due presentation was plaintiff-holder, the statute of limitations began to run after a reasonable time for presentment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Lapse of time with other circumstances—presumption. Mere lapse of time for less than 20 years may, with other circumstances, raise a presumption of payment, but it is not alone sufficient.

Citizens Bank v Probasco, (NOR); 233 NW 510

Nonpresentment of check. The plea that a loss resulting from the nonpayment of a check must be borne by the payee because of delay by the attorney who received it to present it for payment must fall when there is no showing that the attorney had authority to make the indorsement.

Prudential v Hart, 205-801; 218 NW 529

Pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

9531 [§71] Presentment—instrument payable and not payable on demand.

"Reasonable time" for presentment—primary and secondary liability. The "reasonable time" clause of this section applies only to persons secondarily liable on the instrument. It has no application in determining what is a reasonable time for presentment where such step is only preliminary to the enforcement of a remedy against a party primarily liable.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts—demand necessary within limitation period. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee bank, but the demand cannot be postponed indefinitely and must be made within the 10-year limitation period.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Notice—pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

9532 [§72] Sufficient presentment.

Demand and notice—pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

9533 [§73] Place of presentment.

Presentment, demand, and notice—failure to make. Principle reaffirmed that presentment for payment of a negotiable promissory note is not excused because the bank which is named as the place of payment is insolvent, or because the indorser knew of such insolvency.

Wood v Roe, 205-399; 218 NW 51

Note payable at particular place. Principle reaffirmed that the fact that a note is payable at a particular office does not authorize the persons in charge of said office to receive payment without the production and surrender of the note, nor warrant the belief on the part of the maker that said persons were so authorized.

Engelke v Drager, 213-598; 239 NW 569

9534 [§74] Instrument must be exhibited.

Agent's authority to receive payment. The maker of a promissory note who pays it to one who is not the payee or indorsee and does not receive a surrender of the note, must show that the recipient of the payment had actual or implied authority from the payee or holder to receive payment.

Engelke v Drager, 213-598; 239 NW 569

Note payable at particular place. Principle reaffirmed that the fact that a note is payable at a particular office does not authorize the persons in charge of said office to receive payment without the production and surrender of the note, nor warrant the belief on the part of the maker that said persons were so authorized.

Engelke v Drager, 213-598; 239 NW 569

9535 [§75] Presentment where instrument payable at bank.

Presentment, demand, and notice—failure to make. Principle reaffirmed that presentment for payment of a negotiable promissory note is not excused because the bank which is named as the place of payment is insolvent, or because the indorser knew of such insolvency.

Wood v Roe, 205-399; 218 NW 51

9542 [§82] Presentment dispensed with.

Guaranty with agreement for extension. A guarantor of payment of a promissory note who waives demand and consents to renewals and extensions must keep himself informed as to the nonpayment of the paper and protect himself if he can.

Granger v Graef, 203-382; 212 NW 730

9545 Holidays affecting presentation.

Atty. Gen. Opinions. See '38 AG Op 890, 896

Execution of promissory notes—subsequent ratification—effect. A plea that promissory notes were executed on Sunday is avoided by a plea, and proof thereof, that the maker of the notes subsequently ratified the execution of said notes.

Witmer v Fitzgerald, 209-997; 229 NW 239

9548 [§87] Rule where instrument payable at bank.

Construction—notes designed to resemble checks and so treated. Instruments for the payment of obligations, which papers resembled checks and were treated as such, but upon which the maker had cleverly executed certain qualifying words whereby he hoped that they could be treated as promissory notes, held to be in fact ordinary checks when it was noted that the payee was required to indorse them before payment.

State v Doudna, 226-351; 284 NW 113

Refusal of bank to pay. Making a promissory note payable at a named bank is equivalent to an order to the bank to pay the note, but such statutory rule has no application when the bank does not see fit to make such payment.

Iowa Co. v Seaman, 203-310; 210 NW 937

9549 [§88] What constitutes payment in due course.

Bills and notes—actions—prima facie proof of default in payment. The introduction in evidence of a promissory note which fails to carry any indorsement of the payment of an installment which, under the terms of the note, is past due, establishes, prima facie, a default in payment enabling the holder to avail himself of an accelerating payment clause in the note.

First Bank v Kruse, 219-1229; 260 NW 665

NOTICE OF DISHONOR

9550 [§89] Notice of dishonor.

Notice and protest—allowable and unallowable proof. Testimony tending to show the contents of a lost official notarial certificate of protest of a promissory note is inadmissible, but the facts constituting a legal protest of the note may, in such case, be established by any competent oral testimony.

Frank v Johnson, 212-807; 237 NW 488; 75 ALR 128

Pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

Waiver of notice. A surety may not complain that he was not notified of the nonpayment of the note by the principal when the surety has expressly waived notice of nonpayment.

Davenport v Mullins, 200-836; 205 NW 499

9564 [§103] Where parties reside in same place.

Presentment, demand, and notice—pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

9566 [§105] When sender deemed to have given due notice.

Delay. Mere delay in the delivery to an indorser of a notice of dishonor of a negotiable instrument is not sufficient to make a jury question on the issue whether such notice, properly addressed, was mailed within the statutory time, when the record reveals positive testimony of such mailing.

City Bk. v Edson, 202-671; 210 NW 898

9570 [§109] Waiver of notice.

Waiver by agreement. An indorser who has specifically agreed to carry out an extension agreement which provides for optional maturity if the interest be not paid, is not entitled to demand presentment and notice of dishonor when the option is exercised.

Hansen v Bowers, 208-545; 223 NW 891

Waiver by conduct. An indorser may, by his conduct, both before and after dishonor, clearly waive the failure to present the note to the maker and to accord him (the indorser) notice of such dishonor.

Hansen v Bowers, 208-545; 223 NW 891

Waiver by subsequent promise. Presentment to and demand on the maker and notice to the indorser of dishonor are waived by the subsequent unconditional promise of the indorser to pay the obligation.

County Bk. v Jacobson, 202-1263; 211 NW 864

9576 [§115] When notice need not be given to indorser.

Discussion. See 12 ILR 175—Joint accommodation indorsers—notice of dishonor

9579 [§118] When protest need not be made—when must be made.

Allowable and unallowable proof. Testimony tending to show the contents of a lost official notarial certificate of protest of a promissory note is inadmissible, but the facts constituting a legal protest of the note may, in such case, be established by any competent oral testimony.

Frank v Johnson, 212-807; 237 NW 488; 75 ALR 128

DISCHARGE OF NEGOTIABLE INSTRUMENTS

9580 [§119] How instrument discharged.

See also annotations under §9526
Conditional delivery of note. See under §9476

Payment—acts constituting. The act of a bank (1) in receiving, without authority, payment of its customer's notes at a time when said bank had either rediscounted or collaterally pledged and indorsed said notes to another bank, and (2) in forwarding to the then holder a draft and other remittances sufficient to cover the amount of the notes, and the act of the then holder (1) in accepting the remittances, (2) in marking the notes "paid", and (3) in returning them, work a complete payment of the notes, even tho the draft was not paid, owing to the failure of the drawer-bank, it appearing that, at the time of each transaction, both parties had entered the proper debits and credits on their mutual accounts in harmony with the theory of payment.

Leach v Bank, 204-493; 215 NW 617

Payment—acts constituting. Payment of a check which is amply protected by an available deposit is effected by the act of the payee in presenting it to the drawee-bank for payment, in having it honored, and in receiving, at his own request, in lieu of cash, a certificate of deposit on the bank on which the check was drawn, even tho the certificate of deposit is not paid, owing to the subsequent failure of the bank.

Cavanaugh v Praska, 205-660; 216 NW 15

Payment—acts constituting. Absolute payment of a promissory note is established by a showing that the payee received as payment from his collecting agent the full amount of the note, and thereafter retained said amount, and that his right so to do was not questioned by anyone; and this is true even tho it does appear that the check which was forwarded to the collecting agent in payment of the note went to protest.

Braun v Cox, 202-1244; 211 NW 891

Payment by check. A draft is paid (1) by the act of the drawee in delivering to the collecting bank his personal check for the amount of the draft on his ample checking account in said bank without knowledge that the bank was then insolvent, and (2) by the act of the bank in surrendering the draft to the drawee, and in marking the check "paid", and charging the amount thereof to the check drawer's account,—the bank then having on hand ample funds with which to pay said check.

Wells Oil v Supply Co., 206-1010; 221 NW 547; 65 ALR 1145

Check not necessarily payment. A check issued by an insurer for the amount of an adjusted loss and payable to a mortgagor and

mortgagee, jointly, and never cashed because the mortgagor refused to indorse it, cannot be deemed a payment of the loss when there was no express or implied agreement to that effect —when the insurer-drawer first asserted such claim after the bank on which the check was drawn failed.

Union Ins. v Ins. Co., 216-762; 249 NW 653

Payment by note. A mortgagee who accepts from the mortgagor the latter's promissory note for an item of interest, and in his then and subsequent conduct treats such note as payment of the said interest, will not be permitted to enforce payment of such interest against one who has assumed and agreed to pay said mortgage.

Gilmore v Geiger, 206-161; 220 NW 7

Payment — incompleted transactions. An agreement to the effect that the payee of a promissory note would accept as pro tanto payment an outstanding promissory note for a lesser amount in which he was maker, does not constitute payment of said smaller note when the agreement was never carried out, even to the extent of delivering said smaller note to the maker thereof, or to the extent of indorsing the amount thereof on the larger note.

Jasper Bk. v Saheroff, 205-774; 218 NW 486

Payment by guarantor—effect. Payment of a promissory note by the guarantor thereof will be deemed a purchase of the note as regards the maker, when such is the manifest intent of the guarantor.

Whitney v Eichner, 204-1178; 216 NW 625

Application of payments. A chattel mortgagee who consents to the shipment and sale of the mortgaged property in his name must obey the instructions of the mortgagor to apply the receipts on the mortgage-secured debt, irrespective of his right in the absence of such instructions.

Reichenbach v Bank, 205-1009; 218 NW 903

Application of payment prejudicial to surety. The fact that the common maker of two promissory notes signed by different sureties and payable to the same payee was aided by a loan by one of the sureties in order to enable the common maker to make up the amount of a payment to the payee, with the understanding that the total payment would be applied—indorsed—on the note on which said surety was obligated, does not estop or prevent the payee long afterwards (five years) from applying said payment (in accordance with the wishes of the common maker) on the note on which said surety was not obligated, the payee having no knowledge of said agreement. And this is true tho the common maker, and the surety on the note receiving the application, had, in the meantime, become insolvent.

Mitchell v Burgher, 216-869; 249 NW 357

Contradicting method of payment. A promissory note "payable in gold coin of the United States" may not be modified by a parol agreement, contemporaneous with the execution of the note, to the effect that the payee might pay the note by surrendering stock certificates which were pledged as collateral to the note.

Union Mtg. v Evans, 200-1000; 205 NW 776

Judgment—when not payment. The entry of judgment against the maker and assumptors of a note does not work a payment and discharge of the note as to an indorser, especially when the cause was continued to a future day for hearing on the liability of the indorser.

Hansen v Bowers, 208-545; 223 NW 891

Note payable at particular office. Principle recognized that the fact that a promissory note is payable at the office of a particular person does not, in and of itself, authorize or empower such particular person to receive payment on the note.

Whitney v Krasne, 209-236; 225 NW 245
Engelke v Drager, 213-598; 239 NW 569

Note payable at particular place. Principle reaffirmed that the fact that a note is payable at a particular office does not authorize the persons in charge of said office to receive payment without the production and surrender of the note, nor warrant the belief on the part of the maker that said persons were so authorized.

Engelke v Drager, 213-598; 239 NW 569

Payment to agent without production of note. Payment of a promissory note to one who is the actual or implied agent of the owner of the note, even tho the note is not produced and surrendered, effects a full discharge of the note, even tho the payer supposed he was making payment to the actual owner of the note.

Lusby v Bank, 207-147; 217 NW 459; 222 NW 450
Carr v Benjamin, 207-1139; 222 NW 373
Whitney v Krasne, 209-236; 225 NW 245
Northwest. Life v Blohm, 212-89; 234 NW 268

Payment without production of note. The maker of a promissory note who makes partial payment thereof to the original payee at the office at which the note is payable by its terms, and at a time when an assignment of the note (and mortgage securing it) is of record, without knowing that said original payee has possession of said note, and without demanding the production of said note, must, in order to receive credit on the note, prove that said original payee was then the agent of the then holder of said note to receive payment; and especially is this true when at the time of payment no part of the principal and no interest were due.

Holden v Batten, 215-448; 245 NW 750

Payment without production of note—effect. Principle reaffirmed that the payment of a negotiable promissory note without the production and surrender of the note is at the peril of the payer.

Commercial Bk. v Allaway, 207-419; 223 NW 167

Payment without production of note. The maker of a promissory note secured by mortgage who pays the same to the payee-mortgagee without requiring the production and surrender of the note does so at his peril, even tho the record reveals no assignment of the note and mortgage, such maker not being a subsequent purchaser, within the meaning of the recording acts.

Shoemaker v Nodland, 202-945; 211 NW 567
Shoemaker v Ragland, 202-947; 211 NW 564
Shoemaker v Minkler, 202-942; 211 NW 563
Wood v Swan, 206-1198; 221 NW 791

Right to possession of note. The court very properly refuses to instruct that a surety on a promissory note has a right to the possession of the note when it is paid by the principal maker.

Mitchell v Burgher, 216-869; 249 NW 357

Wrongful receipt of payment of note—ratification. The payee of a promissory note does not ratify and confirm the act of a third person in wrongfully receiving payment of the note by subsequently receiving and accepting partial payments from said wrongdoer.

Moron v Tuttle, 211-584; 233 NW 691

"Payment" is affirmative defense.

Columbia College v Hart, 204-265; 213 NW 761

Equitable estoppel — evidence — degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that the payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing, and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

Evidence of payment—burden of proof. A debtor has the burden to establish his plea that the creditor accepted a check in full payment of the debt in question.

Kruidenier Co. v Manhardt, 220-787; 263 NW 282

Payment—burden of proof. A plaintiff who alleges the nonpayment of the note and mortgage which he is seeking to foreclose must prove such nonpayment even tho defendant pleads payment.

Larson v Church, 213-930; 239 NW 921

Payment — burden of proof. Defendants, claiming payment on note which plaintiff denied, had burden to prove such payment by a preponderance of evidence, whether payment was made as partial payment on note or on property purchased, held for jury.

Sager v Skinner, (NOR); 229 NW 846

Burden of proof. The maker of a promissory note who claims prospective credits on the note, other than those shown by the record, must point out and establish such credits.

Aetna Bank v Hawks, 213-340; 239 NW 91

Unchangeable burden to show payment.

Riggs v Gish, 201-148; 205 NW 833

Circumstantial evidence showing payment. Payment of a promissory note may be established by circumstantial evidence, i. e., that the payee was a careful business man; that the maker and payee resided in the same place; that business transactions occurred between them which might have furnished opportunity for payment; that the note was always readily collectible; that no annual interest and no part of the principal were ever indorsed on the note; that 17 years elapsed from the maturity of the first annual interest, and 11 years after the maturity of the principal before any claim was made on the note and then only after the death of both maker and payee.

Finley v Thorne, 209-343; 226 NW 103

Deceased payee—proof of payment—when interested witness competent. In a proceeding between the maker of a promissory note and the administratrix of the estate of the deceased payee (involving the issue whether said note had been paid), the wife of said maker, tho herself a joint maker of said note, is a competent witness to testify to a conversation and transaction which occurred between her husband and said payee and which strongly tended to establish said payment—provided said witness took no part in said conversation and transaction.

In re Fish, 220-1247; 264 NW 123

Payment — insufficient evidence. Evidence held wholly insufficient to present a prima facie showing of payment.

McCornack v Bank, 207-274; 222 NW 851

Evidence—sufficiency. Evidence held quite insufficient to establish payment of a note.

Andrew v Ingvoldstad, 218-8; 254 NW 334

Payment—sufficient evidence. Testimony reviewed, and held that defendant had estab-

lished his plea of payment of interest by the equivocal and contradictory testimony of the plaintiff.

Pace v Mason, 206-794; 221 NW 455

Evidence — sufficiency. Evidence reviewed and held to show that a party who received money with which to pay a note and mortgage was the agent of the maker of the note and mortgage and not of the payee thereof.

Clayton Bk. v McMorrow, 209-165; 225 NW 859

Evidence—sufficiency. Evidence reviewed, and held wholly insufficient to show that a party who received the amount due on a note and mortgage was the agent of the holder to receive such payment.

Wood v Swan, 206-1198; 221 NW 791

Presumption of payment. The law will presume that a check was paid on proof that the check was, subsequent to its execution, (1) stamped "Paid", and (2) charged by the drawee to the account of the drawer.

Andrew v Bank, 207-407; 219 NW 929

Presumption from payment. Mere proof that a check payable to a bank was paid by the remotely located drawee will not warrant the presumption that the amount of such payment actually reached the payee bank and became a part of its cash assets.

Andrew v Bank, 207-407; 219 NW 929

Lapse of time with other circumstances—presumption. Mere lapse of time for less than 20 years may, with other circumstances, raise a presumption of payment, but it is not alone sufficient.

Citizens Bank v Probasco, (NOR); 233 NW 510

Presumption from possession. Possession of an unmatured negotiable promissory note by the maker thereof creates no presumption of payment and discharge, especially when such possession is open to the suspicion of being wrongful.

Haldeman v Martin, 205-302; 217 NW 851

Prima facie proof of default in payment. The introduction in evidence of a promissory note which fails to carry any indorsement of the payment of an installment which, under the terms of the note, is past due, establishes, prima facie, a default in payment enabling the holder to avail himself of an accelerating payment clause in the note.

First Bank v Kruse, 219-1229; 260 NW 665

Release—presumption. A marginal release of a mortgage, executed by the agent of the holder constitutes prima facie evidence of payment and discharge of both the note and the mortgage securing the note.

Larson v Church, 213-930; 239 NW 921

Receipts — parol showing purpose. Under plea of payment of a promissory note, parol evidence is admissible to show that nonexplanatory receipts represented money paid on the note and accepted as such by the payee.

Hallowell v Van Zetten, 213-748; 239 NW 593

Overcoming presumption of nonpayment. An instruction that the possession of an uncanceled promissory note creates a presumption of nonpayment is erroneous insofar as it further directs the jury, in effect, that it may find the presumption to be overcome by long delay in bringing action on the note and other circumstances, when the delay was some nine years, coupled with the circumstances that the defendant was at all times a nonresident of the state.

Mitchell v Burgher, 216-869; 249 NW 357

Agent's authority to receive payment. The maker of a promissory note who makes payment to some one other than the payee or holder must take on the burden of showing that the recipient of the payment had actual or apparent authority from the payee or holder to receive it. Evidence held to show that the party receiving payment on a note was the agent of the holder.

Whitney v Krasne, 209-236; 225 NW 245

Agent's authority to receive payment. The maker of a promissory note who pays it to one who is not the payee or indorsee, and does not receive a surrender of the note, must show that the recipient of the payment had actual or implied authority from the payee or holder to receive payment.

Engelke v Drager, 213-598; 239 NW 569

Agency to receive payment. Record reviewed and held to present a jury question on the issue whether the original payee of a promissory note was the agent of the indorsee to receive payment.

Andrew v Kolsrud, 218-15; 253 NW 913

Authority to receive payment. Authority or agency in a third party to receive payment of a promissory note is not shown by evidence:

1. That the note provided for payment at the office of said third party,
2. That the payee received payments of interest from said third party,
3. That the payee authorized said third party to grant an extension of the mortgage security,
4. That the payee wrote to said third party relative to the payment of the note, but long after said third party had collected the amount due thereon.

Moron v Tuttle, 211-584; 233 NW 691

Authority to collect interest not authority to collect principal. Principle reaffirmed that authority in an agent to receive interest on a

promissory note does not, in and of itself, carry authority to receive the amount of the principal.

Holden v Batten, 215-448; 245 NW 750

Payment and discharge—apparent agency. A payment made in a bank that is open and transacting business, to one behind the counter, with the permission of the managing officers of the bank, and with apparent authority to receive the money, constitutes a payment to the bank. It follows that the conversation at the time, relative to the subject matter of the payment, is competent.

First Bk. v Tobin, 204-456; 215 NW 767

Assumed agency—ratification. The holder of a note and mortgage was informed by one who had subsequently bought the mortgaged property that he had, without requiring the production of the note, paid the note to one of the original makers of the note. Thereupon, the holder admitted that he had received part payment from the said maker, and exhibited the mortgage papers to the informant. Held insufficient to show ratification of the payment to the said maker.

Ritter v Plumb, 203-1001; 213 NW 571

Implied agency to receive payment. The assignee of a promissory note who receives numerous payments of principal and interest from the original payee, with knowledge that such payments had been made to such payee by the makers of the note, thereby impliedly constitutes such payee his agent to receive such payments.

Shoemaker v Ragland, 202-947; 211 NW 564

Nonimplied agency to receive payment. Makers of promissory notes who make payment to the original payee without then demanding the surrender of the paid notes and without then knowing that the original payee had hypothecated said notes and others, as collateral security, may not assert apparent agency in said original payee to receive payment on behalf of the collateral holder, on the mere showing that the collateral holder, upon actual receipt from said original payee of the amount of a matured collateral note, credited said payee on his debt and returned the note to him.

Iowa Co. v Seaman, 203-310; 210 NW 937

Nonimplied agency to receive payment. The holder of notes and mortgage who accepts payment of one of the notes from a maker thereof, in form of part cash and part check payable to the holder, from one who had bought the property subject to the mortgage, cannot be held thereby to have held out the said maker as his agent to receive payment of the remaining note; nor will the added fact that on two occasions subsequent to the payment in question, and on one occasion prior thereto, the said holder had authorized the said maker to receive payments on wholly different transactions constitute such "holding out".

Ritter v Plumb, 203-1001; 213 NW 571
See Huismann v Althoff, 202-70; 209 NW 525

Receiving agent's authority to accept—maker's duty to know and prove. One who pays his promissory note has a duty to know and the burden to prove that (1) an agent to whom he makes payment has authority to receive on behalf of the holder, or that (2) the holder received the payment; and without proving one or the other the note is not discharged.

Fisher v Pride, 225-6; 280 NW 492

Payment to holder's agent. The holder of a promissory note who permits another person for a series of years to collect both interest and installments of principal on the note will not be permitted to deny the authority of such other person to make all collections on the note. And it is immaterial that the note was not surrendered to the maker when he made his final payment.

Ragatz v Diener, 218-703; 253 NW 824

Unauthorized agency — ratification by accepting benefit. The holder of a note is not estopped to challenge the unauthorized act of a party in receiving payment of the note, by accepting from such unauthorized agent part of the payment, (1) when he accepted such payment without knowledge that the party was assuming such agency, and (2) when such party was a maker of the note.

Ritter v Plumb, 203-1001; 213 NW 571

Assignment — payment to original payee — effect. The maker of a promissory note and mortgage who for four years before maturity of the principal and for eight years after maturity of the principal pays the accruing interest to an agent of the original payee without knowledge that the note and mortgage had been assigned, and finally pays the principal in the same manner without asking for or receiving the note in question, effects a complete discharge of the note and mortgage against an assignee thereof who had been such during all said times of payment but without recording his assignment, and in the meantime had permitted the original payee, a corporation, (1) to appear on the records as the owner of the paper, and (2) to collect the interest and pay it to him.

Kann v Fish, 209-184; 224 NW 531

Conditional sales — replevin of automobile conditionally sold under "trust receipt". Trust receipt for automobile delivered by a finance company was in effect conditional sale when accompanied by promissory note and agreement to return the automobile on demand. Held, in a replevin action the finance company

sustained its burden to prove its right to immediate possession by a showing of default in payment, which gave the right to possession.

General Motors v Koch, 225-897; 281 NW 728

Conditional sales — purchase without notice — effecting payment. Full payment for an article, bought in good faith, and for value and without notice of an existing conditional sales contract thereon, is effected by the act of the vendee in delivering to the vendor his negotiable check on actual funds in a foreign bank for the purchase price, and by the act of the vendor-payee in immediately negotiating the check to his bank as a general deposit, even tho the deposit slip in the latter transaction provided that the receiving bank took the check for collection only. It follows that the vendee is under no obligation to stop payment on the check issued by him because he learned of the conditional sale contract after said deposit and before his drawee-bank had paid the check.

General Motors v Whiteley, 217-998; 252 NW 779

Dishonor by drawee — drawer's recourse to drawee's funds in indorsee's hands. When a check is honored by the drawee's depository bank in satisfaction of payee's debt to said bank, and is properly charged to the drawee's deposit in said bank, and is later dishonored by the drawee because of insolvency, the cancellation of all of said entries, and the return of said check to the drawer who paid the amount thereof to the payee, leaves the drawer without any claim against the funds of the drawee in the said depository bank.

Davis Bros. v Bank, 216-277; 249 NW 170

Execution sale—purchase by maker—effect. The maker of a promissory note and mortgage may, by himself or through others, validly purchase said note and mortgage at execution sale against the payee or holder thereof, and thereby completely discharge the same.

Buter v Slattery, 212-677; 237 NW 232

Payee obtaining and negotiating check previously returned to maker. Where payee returned an executed check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff, evidence in action against maker warranted trial court's finding that check was never in hands of payee after indorsement and that it had never been canceled or paid.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

Principles — sleeping on rights. One who, without requiring the production of a note, innocently pays the note to one who is not the agent of the holder, may not insist that the said holder, and not himself, should suffer the loss, especially when the latter, upon discovering the truth, does nothing to protect himself against the solvent wrongdoer.

Ritter v Plumb, 203-1001; 213 NW 571

Promissory note as collateral—release and discharge per se. The payment of the promissory notes for which another promissory note is held solely as collateral, necessarily releases and discharges the collateral note, the maker of all of said notes being one and the same person; especially is this true when the collateral note was without original consideration other than as collateral, and when the record is void of any competent evidence that said collateral had taken on any new or different status.

Monticello Bank v Schatz, 222-335; 268 NW 602

Recorded assignment — constructive notice. A duly recorded assignment of a mortgage and of the promissory note secured, carries constructive notice to the world that the assignee is the owner of said note.

Holden v Batten, 215-448; 245 NW 750

9581 [§120] When persons secondarily liable discharged.

Extension of time of payment. The surety on a promissory note is released from all liability whenever the payee makes a binding agreement with the principal debtor, without the consent of the surety, to extend the time of payment to a certain definite time.

Eilers v Frieling, 211-841; 234 NW 275

Extension of time—prima facie presumption. The indorsement on an overdue promissory note of interest in advance of its maturity does not constitute conclusive evidence that the parties have entered into a binding agreement for the extension of the time of payment. The presumption is not more than a prima facie one.

Commer. Bk. v Dunning, 202-478; 210 NW 599; 59 ALR 983

Extension of time of payment. An extension of time of payment of a promissory note will not work a release of the surety when the note contains the consent of all parties to all such extensions.

Johnson v Hollis, 205-965; 218 NW 615

Extension of time to assuming vendee. The principle that the holder of an obligation releases the surety on the obligation by granting an extension of time of payment to the principal without the consent of the surety, has no application to a case where the maker of a mortgage-secured promissory note sells the mortgaged property to a vendee who assumes and agrees to pay the note, and where the holder of the note subsequently grants an extension of time of payment to the assuming

grantee without the consent of the original maker of the note.

Blank v Michael, 208-402; 226 NW 12
Iowa Co. v Clark, 209-169; 224 NW 774
Herbold v Sheley, 209-384; 224 NW 781

Consideration for extension of time of payment. An express or implied agreement by the payee and principal debtor in a promissory note to the effect that the time of paying the note shall be extended for one year is supported by ample consideration, in that the payee forbears suit for one year, and in that the maker secures the benefit of the forbearance.

Eilers v Frieling, 211-841; 234 NW 275

9585 [§124] Alteration of instrument —effect of.

Alteration by stranger—effect. A purported alteration of a promissory note by a stranger thereto does not invalidate the note.

Mandel v Siverly, 213-109; 238 NW 596

Stranger to instrument—defense of alteration not available. A third-party stranger to an instrument cannot avail himself of the alteration of such instrument by one of the parties thereto, as a defense against his own wrongful and fraudulent acts.

Winker v Tiefenthaler, 225-180; 279 NW 436

Attorney correcting instrument after employment terminates — invalidity. Attorneys hired to draft a mortgage, altho discovering that they have made a mistake in the description of the land, have no authority on their own initiative after termination of their employment and without consulting the mortgagee, to change the description and re-record the mortgage in the recorder's office.

Winker v Tiefenthaler, 225-180; 279 NW 436

Burden of proof. He who alleges a material alteration of an instrument has the burden to prove his allegation. No presumption exists that the alteration was made after the execution of the instrument.

Council Bluffs Bank v Wendt, 203-972; 213 NW 599

Pleading — burden of proof. A pleader who wishes to avoid the legal effect of an instrument, because of a material and unauthorized alteration therein, must plead that the alteration was made after delivery.

Hartwick v Hartwick, 217-758; 252 NW 502

Indorsement—jury question. Evidence held to present a jury question whether an alteration of an indorsement "without recourse" was made as part of the negotiations for the purchase of the note or after the transaction of purchase was fully consummated.

Falcon v Falcon, 214-490; 240 NW 735

Nonmaterial changes—effect on surety.

Throp v Chaloupka, 202-360; 208 NW 299

9586 [§125] What constitutes a material alteration.

Burden of proof. The maker of a promissory note must establish his plea of material alteration without his consent, but he may not be compelled to establish that the payee knew of the alteration and of the maker's nonconsent thereto.

Schram v Johnson, 208-222; 225 NW 369

Change of place of payment.
Johnson v Ballou, 201-202; 204 NW 427

Law (?) or jury (?) question. Testimony that a negotiable promissory note had been delivered without any agreement relative to the filling of a blank therein for the place of payment, and that the holder had filled the blank without any authority from the maker, presents, on the issue of material alteration, a question of law for the court, and not a question of fact for the jury.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Adding new signer to note. After a promissory note is fully executed and delivered, the signing of an additional name thereto as maker, without the consent of the first maker, constitutes a material alteration, and avoids the note in the hands of the original payee.

Schram v Johnson, 208-222; 225 NW 369

Blank indorsement — material alteration. The act of converting a blank indorsement into a special indorsement is proper so long as the indorser's liability is not increased, but the unauthorized insertion in such special indorsement of a guaranty of payment of any renewal of the note (no such provision otherwise appearing in the note) constitutes a material alteration and releases the indorser.

First N. Bk. v Sweeny, 203-35; 212 NW 333

Erasure and reinsertion — effect. The defense of material alteration in a promissory note after its delivery fails when the proof shows the erasure of a material provision and the subsequent exact reinsertion of that which had been erased.

Anderson v Foglesong, 201-481; 207 NW 562

Extension of time of payment. An agreement between a mortgagee and an assuming grantee for an extension of time of payment of the mortgage-secured note does not constitute a material alteration of the note.

Blank v Michael, 208-402; 226 NW 12
Royal Union v Wagner, 209-94; 227 NW 599

Extension agreement. The entering upon a promissory note of an agreement to extend the maturity date does not constitute an "alteration of the instrument".

Cresco Bk. v Terry & T., 202-778; 211 NW 228

Presumption as to time of alteration. A material alteration, manifest on the face of a promissory note, creates no presumption that the alteration was made after delivery.

In re Thorne, 202-681; 210 NW 952

Release of existing maker as consideration for signature of new signer. The court will not, in order to supply a consideration for a third party's signing a pre-existing note, hold, as a matter of law, that the said signing, being without the knowledge or consent of the existing signers, (1) worked an absolute release of said existing signers, and (2) constituted the making of a new note by the new signer, when plaintiff was pressing his action on a theory flatly contradictory of such a holding.

Blain v Johnson, 201-961; 208 NW 273

Subsequent unauthorized signing. One who signs a promissory note after its execution, delivery, and maturity, and without the consent of the original maker, thereby releases the original maker and makes the note his own. It follows that such belated signer may not successfully assert want of consideration for his signature.

Fairley v Falcon, 204-290; 214 NW 538

BILLS OF EXCHANGE—FORM AND INTERPRETATION

9587 [§126] "Bill of exchange" defined.

Drafts and checks—distinction. The distinguishing feature between a "check" and a "draft" is that in a draft the drawer is a bank, while in a check the drawer is an individual.

Leach v Bank, 202-899; 211 NW 506; 50 ALR 388

9588 [§127] Bill not an assignment of funds in hands of drawee.

See annotations on related matters under §9239

Operation and effect as to assignment. The issuance of a draft or check works no equitable assignment to the payee of the funds of the drawer in the hands of the drawee, and consequently, in case of the subsequent insolvency of the drawer, the payee is not a preferred creditor, (1) even tho the drawer at once charges himself and credits the drawee with the amount of the draft, (2) even tho the draft was issued by the drawer in payment of checks drawn upon himself by his depositors, whom he at once charges with the amounts of their checks, and (3) even tho the controversy over the funds is solely between the receiver of the insolvent drawer of the draft and the payee of the draft.

Leach v Bank, 202-894; 211 NW 517

Leach v Bank, 202-899; 211 NW 506; 50 ALR 388

Leach v Bank, 203-507; 211 NW 520; 212 NW 760

Leach v Bank, 203-782; 211 NW 522

Dishonor by drawee—drawer's recourse to drawee's funds in indorsee's hands. When a check is honored by the drawee's depository bank in satisfaction of payee's debt to said bank, and is properly charged to the drawee's deposit in said bank, and is later dishonored by the drawee because of insolvency, the cancellation of all of said entries, and the return of said check to the drawer who paid the amount thereof to the payee, leaves the drawer without any claim against the funds of the drawee in the said depository bank.

Davis Bros. v Bank, 216-277; 249 NW 170

Special deposits. Evidence held insufficient to show that a deposit was made for the special purpose of meeting payment on a particular draft, or was made under such circumstances that the issuance of the draft effected a pro tanto, equitable assignment of the deposit.

Heckman v Bank, 208-322; 223 NW 164

9590 [§129] Inland and foreign bills of exchange.

Deposits — cancellation of credit. A bank which, having issued foreign exchange, later receives it back (when its value is problematical), under an agreement to sell the same and collect the proceeds, does not thereby become the owner either of the returned exchange or of a check subsequently received as the result of the collection, and may cancel a credit which was entered on the mistaken assumption that the check was of face value.

Tropena v Bank, 203-701; 213 NW 398

9591 [§130] Bill treated as promissory note.

Cashier's check as bill of exchange—demand unnecessary — action accrues at making — barred after ten years. The holder of a cashier's check, certain in amount, containing no provision respecting demand and not in the nature of a certificate of deposit, has a right to sue thereon at any time from and after its issuance. Treated as a bill of exchange, presentment and demand for payment are not necessary to start running the statute of limitations. Therefore, after ten years from its issuance, a right of action thereon is barred.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

ACCEPTANCE

9593 [§132] Acceptance—how made.

Bank's obligation on depositor's check. A bank which agrees to pay checks issued from time to time by an insolvent livestock dealer for stock purchased, and to reimburse itself from the sight drafts drawn from time to time by the dealer when reselling the stock, and which, for a time, carries out the arrangement and encourages its continuance, and, in part,

applies the proceeds of such sight drafts to the discharge of other obligations of the dealer in which the bank is financially interested, may not, after taking over sight drafts covering certain resales with knowledge that unpaid checks for said stock were outstanding, apply the proceeds of said drafts to an overdraft against the dealer, and thereby shift the loss to the unpaid check holder. On the contrary, the bank must be held, impliedly, to have agreed to loan to the dealer money sufficient to pay said outstanding checks.

Pascoe v Bank, 217-205; 251 NW 63

PROMISSORY NOTES AND CHECKS

9645 [§184] "Promissory note" defined.

Promissory notes in general. See under §§9461–9477

Oral employment agreement—no consideration for promissory note. Where one person agrees to make a loan of $3,500 to start a corporation and does loan $1,500 of this sum taking in exchange a promissory note, the borrower agreeing to employ the lender as a bookkeeper and salesman but for no definite period of time, such employment feature of the agreement is a separate contract and not the consideration for the loan.

Hillje v Tri-City Co., 224-43; 275 NW 880

Severability of interest—when barred. Unless the maker and payee on a promissory note agree to sever the promise to pay interest installments from the promise to pay principal so as to make each promise separate and independent of the other, the interest is an incident to the principal debt and as such is barred when the statute of limitations has run against the principal debt.

Yeadon v Farmers Co., 224-829; 277 NW 709; 115 ALR 725

9646 [§185] "Check" defined.

Discussion. See 15 ILR 195—Checks sent to drawee bank for collection

Parol as affecting check as receipt. A check "in full", duly indorsed by the payee, is but a receipt, and subject to explanation and even contradiction.

In re Newson, 206-514; 219 NW 305

Bank's obligation on depositor's check. A bank which agrees to pay checks issued from time to time by an insolvent livestock dealer for stock purchased, and to reimburse itself from the sight drafts drawn from time to time by the dealer when reselling the stock, and which, for a time, carries out the arrangement and encourages its continuance, and, in part, applies the proceeds of such sight drafts to the discharge of other obligations of the dealer in which the bank is financially interested, may not, after taking over sight drafts covering certain resales with knowledge that unpaid checks for said stock were outstanding, apply the proceeds of said drafts to an overdraft against the dealer, and thereby shift the loss to the unpaid check holder. On the contrary, the bank must be held, impliedly, to have agreed to loan to the dealer money sufficient to pay said outstanding checks. In other words, the bank is obligated to pay said checks.

Pascoe v Bank, 217-205; 251 NW 63

Check not payment without agreement. The acceptance of a check by a creditor is not payment of a debt unless an understanding to that effect appears from the circumstances and conduct of the parties, as where a receipt stating "cash" was issued for an insurance premium check—such check later returned marked "insufficient funds".

Hockert v Ins. Co., 224-789; 276 NW 422

Payment by check. Principle reaffirmed that the delivery of a check to a creditor does not constitute payment unless, in due course of time, the check is actually paid.

Schwab v Roberts, 220-958; 263 NW 19

Conflicting claims to proceeds. The holder of a check who, before payment thereof is stopped, indorses the same to a nondrawee private banker, and unwittingly receives in exchange therefor the worthless draft of said private banker, is entitled, in a subsequent action on the check, to the amount recovered thereon, in preference to the receiver for the private banker. Especially is this true when the banker was insolvent when he issued the draft.

Runge v Benton, 205-845; 216 NW 737

Damages—check as measure of. Where in the sale of a business, the vendee gives a check for the full purchase price of a particularly designated part of said business, and later repudiates the entire contract except that part pertaining to said particularly designated part, the vendor may maintain an action to recover as damages the full amount of the check.

Courshon Co. v Brewer, 215-885; 245 NW 354

Deposits—cancellation of credit. A bank which, having issued foreign exchange, later receives it back (when its value is problematical), under an agreement to sell the same and collect the proceeds, does not thereby become the owner either of the returned exchange or of a check subsequently received as the result of the collection, and may cancel a credit which was entered on the mistaken assumption that the check was of face value.

Tropena v Bank, 203-701; 213 NW 398

Drafts and checks—distinction. The distinguishing feature between a "check" and a "draft" is that in a draft the drawer is a bank, while in a check the drawer is an individual.

Leach v Bank, 202-899; 211 NW 506; 50 ALR 388

Forged indorsement—burden of proof. A drawee bank, when sued for paying a check on a forged indorsement, must affirmatively establish prejudice as a result of the failure of the drawer to give notice of the forged indorsement upon the discovery thereof.

New Amst. Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Inadvertently paid check. A drawee of a check may recover of the payee the amount inadvertently paid on the check at a time when the payee knew that the drawer had no funds on deposit with the drawee—knew that the drawer had gone into the hands of a receiver and that his deposit had been transferred to the receiver.

Bank. Tr. Co. v Reg. Co., 200-1014; 205 NW 838

Payment of checks—fictitious payee. The absolute duty of a bank, before it pays its depositor's check, to know that the payee's indorsement is genuine, and to pay only on such genuine indorsement, applies to a check which the depositor has unwittingly and without negligence made payable to a fictitious person.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

McCornack v Bank, 207-274; 222 NW 851

9647 [§186] Within what time a check must be presented.

Drafts—demand necessary within limitation period. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee-bank, but the demand cannot be postponed indefinitely and must be made within the 10-year limitation period.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Presentation mandatory. A check must be presented for payment within a reasonable time, even tho the drawer's deposit in the drawee-bank is less than the amount of the check, it appearing that the drawer had arranged with the drawee-bank for payment in full.

Knauss v Aleck, 202-91; 209 NW 444

Check not necessarily payment. A check issued by an insurer for the amount of an adjusted loss and payable to a mortgagor and mortgagee, jointly, and never cashed because the mortgagor refused to indorse it, cannot be deemed a payment of the loss when there was no express or implied agreement to that effect—when the insurer-drawer first asserted such claim after the bank on which the check was drawn failed.

Union Ins. v Ins. Co., 216-762; 249 NW 653

Collections — negligence — measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks.

Schooler Motor v Bankers Tr. Co., 216-1147; 247 NW 628; 38 NCCA 361

Delayed presentation — effect. Where a check is drawn on a special deposit or trust fund, the act of the payee in withholding presentation for a few days, and until the bank had become insolvent and closed its doors, does not nullify the trust.

Rime v Andrew, 217-1030; 252 NW 542

Indorsement of check. The plea that a loss resulting from the nonpayment of a check must be borne by the payee because of delay by the attorney who received it to present it for payment must fall when there is no showing that the attorney had authority to make the indorsement.

Prudential v Hart, 205-801; 218 NW 529

Negligence of collecting bank. The indorsee for collection of a check who forwards it to the drawee-bank for payment is chargeable with the negligence of the drawee-bank in holding the check until such drawee-bank becomes insolvent and is unable to pay the check; and such negligence is attributable to the original payee.

Forgan v Allen Bros., 207-1198; 224 NW 500

Negligent delay — burden of proof. The payee of a check who is guilty of negligent delay in presenting the check for payment, has the burden to show that his negligence did not injure the drawer of the check.

Forgan v Allen Bros., 207-1198; 224 NW 500

Payment of taxes—uncashed check. The uncashed check of a taxpayer to the county treasurer in payment of taxes does not constitute such payment, even tho said check would have been paid, had it been properly presented, and even tho the treasurer, as a matter of bookkeeping, treated said check as cash, and prepared receipts accordingly.

Morgan v Gilbert, 207-725; 223 NW 483

Unreasonable delay. The holding of a check until after the drawee-bank became insolvent and closed its doors, 27 days after the check was received, ipso facto discharges the drawer to the extent of the loss suffered, when presentation for payment might have been made manually or by mail without undue effort on

the part of the payee. This is true even tho, when the check was given, the drawer's account was insufficient to meet the check, but was replenished and rendered ample within three days succeeding the date of the check.

Ostrander v Sauer, 208-77; 224 NW 581

Unreasonable delay. The presentation of a check for payment is not made within a reasonable time when the check is drawn on a bank located at the place of business of the payee, and there received by him, and forwarded by a circuitous route of 200 miles for collection, and presented some four days later, and after the bank had failed.

Northern Lbr. v Clausen, 201-701; 208 NW 72

Unreasonable delay. A check is not presented for payment within a reasonable time, as a matter of law, when it was received by the payee in the town in which the drawee bank was located and was taken by the payee "to his farm" and not presented until six days later.

Knauss v Aleck, 202-91; 209 NW 444

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

9648 [§187] Certification of check — effect of.

Certified check as certificate of deposit—action accrues only after demand. The act of a bank in certifying a check, at the request of the holder, creates a new obligation on the part of the bank to that holder, and the check then becomes in legal effect an ordinary certificate of deposit for the holder. Being such, an action thereon does not accrue until it is presented for payment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

9649 [§188] Effect where the holder of check procures it to be certified.

Certified check as certificate of deposit—action accrues only after demand. The act of a bank in certifying a check, at the request of the holder, creates a new obligation on the part of the bank to that holder, and the check then becomes in legal effect an ordinary certificate of deposit for the holder. Being such, an action thereon does not accrue until it is presented for payment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

9650 [§189] Check not an assignment —when bank liable.

Holdings under analogous statute relative to drafts. See under §§9239, 9588

Discussion. See 9 ILB 64, 210—Checks—as assignment of funds

Bank's obligation on depositor's check. A bank which agrees to pay checks issued from time to time by an insolvent livestock dealer, for stock purchased, and to reimburse itself from the sight drafts drawn from time to time by the dealer, when reselling the stock, and which, for a time, carries out the arrangement and encourages its continuance, and, in part, applies the proceeds of such sight drafts to the discharge of other obligations of the dealer, in which the bank is financially interested, may not, after taking over sight drafts covering certain resales with knowledge that unpaid checks for said stock were outstanding, apply the proceeds of said drafts to an overdraft against the dealer, and thereby shift the loss to the unpaid check holder. On the contrary, the bank must be held, impliedly, to have agreed to loan to the dealer money sufficient to pay said outstanding checks. In other words, the bank is obligated to pay said checks.

Pascoe v Bank, 217-205; 251 NW 63

Draft not ipso facto assignment. The oral statement by the president of a bank, made to the payee of a draft at the time of its issuance and delivery, that the draft "operated as an assignment" of an equal amount of money then in the hands of the drawee-bank and belonging to the issuing bank does not constitute an actual assignment.

Andrew v Bank, 215-290; 245 NW 329

Payment of taxes—uncashed check. The uncashed check of a taxpayer to the county treasurer in payment of taxes does not constitute such payment, even tho said check would have been paid, had it been properly presented, and even tho the treasurer, as a matter of bookkeeping, treated said check as cash, and prepared receipts accordingly.

Morgan v Gilbert, 207-725; 223 NW 483

Premium check received as "cash"—no lapse by nonpayment. Where an insurer notifies its insured that his premium lien note is due, but his new note and remittance mailed on or before a certain Saturday on which his policy lapses, will prevent any such lapse, the insurer knowing that thereby payment could not reach its office in another city before the policy lapse date, but, nevertheless, when the payment check arrives, receipts for it as cash, and when the insured shortly thereafter dies, and the check meanwhile being returned unpaid, and the insured altho then dead being notified that the policy had lapsed, is a situation justifying a finding that the check was received as payment and a repudiation of such

payment to escape liability on the policy will not be permitted.

Hockert v Ins. Co., 224-789; 276 NW 422

GENERAL PROVISIONS

9651 [§190] Short title.

Effect on prior rulings. The negotiable instrument law will not be construed as repealing former rulings unless there is such repugnancy between the two that they cannot be consistently reconciled.

Dougherty v Shankland, 217-951; 251 NW 73

9653 [§192] Person primarily liable on instrument.

When indorser primarily liable.

First N. Bk. v Le Barron, 201-853; 208 NW 364

Deposit certificate—action accrues only after demand. Makers of notes, acceptors of bills of exchange and issuers of certificates of deposit are charged on the instruments from their inception, and presentment to the maker or acceptor is unnecessary; but, as to the issuer of a certificate of deposit, there is an imputed agreement that before the depositor may sue the bank thereon, actual demand is necessary to mature the debt.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

9654 [§193] Reasonable time—what constitutes.

Collections — negligence — measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment,—not exceeding the amount of said checks.

Schooler Motor v Bankers Tr. Co., 216-1147; 247 NW 628; 38 NCCA 361

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts—statute runs after reasonable time for presentment. Where no demand or presentment for payment of draft is made for over 19 years after its issuance, and where only person who could make due presentation was plaintiff-holder, the statute of limitations began to run after a reasonable time for presentment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Reasonable time—undisputed facts. Whether a check is presented for payment within a reasonable time is a question of law for the court to decide, when the facts are undisputed.

Knauss v Aleck, 202-91; 209 NW 444

Unreasonable time. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

9657 [§196] Law merchant — when governs.

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness that her signature would have no other effect than to release her dower interest in the husband's land (which was embraced in the accompanying mortgage which she signed) constitutes no defense to personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

First N. Bank v Mether, 217-695; 251 NW 505

9658 Days of grace—demand made on.

See annotations under §9546, Vol I

9659 Indemnifying bond to protect payer.

Stolen bonds — when purchaser protected. The purchaser of stolen United States liberty bonds will be protected in his purchase when he purchases in good faith, for full value, in the ordinary course of business, and without actual notice or knowledge of any defect in the title of the seller, and without notice or knowledge of any fact which would put said purchaser on inquiry as to said seller's title.

State Bank v Bank, 223-596; 273 NW 160

CHAPTER 425

WAREHOUSE RECEIPTS LAW

PART I

THE ISSUE OF WAREHOUSE RECEIPTS

9662 [§2] Form of receipts—essential terms.

Atty. Gen. Opinion. See '25-26 AG Op 185

PART II

OBLIGATIONS AND RIGHTS OF WAREHOUSEMEN UPON THEIR RECEIPTS

9681 [§21] Liability for care of goods.

Negligence—degree. The failure of a warehouseman to exercise such care in regard to goods stored with him "as a reasonably careful owner of similar goods would exercise" renders him liable in damages, but any instruction which substantially embodies this rule is all-sufficient.

Kline v Transfer Co., 215-943; 247 NW 215

Presumption of negligence—required elaboration. An instruction, to the effect that on proof that goods were in good condition when stored with a warehouseman and in damaged condition when returned a presumption of negligence on the part of the warehouseman arises, is correct, but, on proper plea and proof, it may be necessary for the court to explain further the nonliability of the warehouseman for damages consequent on causes over which he has no control.

Kline v Transfer Co., 215-943; 247 NW 215

Fatally inconsistent instructions. A definite and unqualified instruction which, in effect, holds a warehouseman to liability as an insurer, and an additional instruction holding him to liability for negligence only, presents a fatal inconsistency.

Kline v Transfer Co., 215-943; 247 NW 215

Negligence—jury question. Evidence held to present a jury question on the issue whether a warehouseman was negligent in not properly guarding goods against damage from water.

Kline v Transfer Co., 215-943; 247 NW 215

CHAPTER 426

BONDED WAREHOUSES FOR AGRICULTURAL PRODUCTS

Atty. Gen. Opinions. See '28 AG Op 436; '36 AG Op 238

CHAPTER 427

UNBONDED AGRICULTURAL WAREHOUSES

Atty. Gen. Opinions. See '25-26 AG Op 306; '36 AG Op 238

9752 Definitions.

Atty. Gen. Opinions. See '25-26 AG Op 184; '36 AG Op 238

9752.25 Uniform warehouse receipts law.

Atty. Gen. Opinion. See '25-26 AG Op 130

CHAPTER 428

LIMITED PARTNERSHIP LAW

9806 [§1] "Limited partnership" defined.

Sharing of losses as essential element. Principle reaffirmed that an express or implied sharing of losses as well as profits is an essential element of an ordinary partnership.

Butz v Hahn Co., 220-995; 263 NW 257

9847 [§23] Distribution of assets.

Chattel mortgage to secure partner's debt. A chattel mortgage by a partner on his undivided chattel interest in the partnership, to secure his individual debt, becomes absolute when it is made to appear that the partnership is free of debt.

Schwanz v. Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Discovered assets. A partner may recover his proportionate share of partnership assets discovered subsequent to a dissolution and settlement, and collected by a copartner.

Power v Wood, 200-979; 205 NW 784; 41 ALR 1452

Father-son partnership—no claim in father's estate—no estoppel. Estoppel would not prevent a son from maintaining an action against his mother for an accounting and dissolution of a partnership which was established between son and father and mother and upon father's death was continued with mother; theory being that estoppel arose on account of son's acquiescence in mother's taking possession of and disposing of certain partnership assets as executrix and sole beneficiary of her husband's estate under his will. Son, having no claim against estate of his father, and not knowing of mother's claim that she was sole partner with her husband, could not be estopped thereby.

Eggleston v Eggleston, 225-920; 281 NW 844

Joint adventures—accounting. One of two joint adventurers may not wholly exclude his co-adventurer from all fruits of a successful consummation by claiming that the undertaking was accomplished solely through his efforts when he has never rescinded the contract with his co-adventurer, claims no damages because of a breach of contract by the co-adventurer, and when he has to some material extent profited from the funds and efforts of his co-adventurer.

O'Neil v Stoll, 218-908; 255 NW 692

Liability to third parties. Parties who enter into a joint adventure for the purchase of land for purpose of speculation are all liable for the purchase price thereof, even tho the note and mortgage for such price are executed by only one of the parties.

Bond v O'Donnell, 205-902; 218 NW 898; 63 ALR 901

CHAPTER 429.1

CONDUCTING BUSINESS UNDER TRADE NAME

9866.1 Use of trade name—verified statement required.

Action in trade name. A person has the legal right to maintain an action in the duly registered trade name under which he transacts his business.

Keeling v Priebe, 219-155; 257 NW 199

Bad check—issued in trade name with maker as agent. A livestock buyer who issues a bad check under a trade name, with himself as manager, cannot by this device escape criminal liability, since it is not essential in a prosecution that he obtained the property for himself; and there is no doctrine of agency in the criminal law which will permit an officer of a corporation to shield himself on the ground that his wrongful acts were for the corporation.

State v Doudna, 226-351; 284 NW 113

Husband and wife as partners—joint or separate liability—evidence. A transfer company operating under a trade name, headquartering at defendants' home, having trucks registered in wife's name, but with the state permit in the husband's name, and performing contracts in husband's name, are facts so indicating a partnership that court properly submitted automobile collision case as a joint liability of the husband and wife operating the transfer company.

Schalk v Smith, 224-904; 277 NW 303

Transacting business in assumed or trade name. Contracts which are otherwise valid are not rendered invalid because entered into by one of the parties in an assumed or trade name without having complied with the statutory command to file with the county recorder a statement of the names and addresses of the persons so carrying on the business; such statutes are regulatory only, even tho they declare it to be "unlawful" to carry on business in an assumed or trade name without the filing of said statement.

Ambro Adv. v Mfg. Co., 211-276; 233 NW 499

Unfair competition. Employing the business name of "Jasper Products Company" in the sale of jasper stone as "jasper silica" does not constitute unfair trade as regards an existing business carried on under the name of "Jasper Stone Company", and engaged in selling the same article as "adamant silica", complainant establishing neither fraud nor deception calculated to reasonably mislead.

Lytle v Smith, 204-619; 215 NW 668

CHAPTER 430

REGISTRATION OF TRADEMARKS, LABELS, AND ADVERTISEMENTS

9867 Registration.

Discussion. See 19 ILR 28—False advertising

Atty. Gen. Opinions. See '30 AG Op 100, 233; '38 AG Op 649

9872 Damages and general relief.

Unfair competition. Employing the business name of "Jasper Products Company" in the sale of jasper stone as "jasper silica" does not constitute unfair trade as regards an existing business carried on under the name of "Jasper Stone Company", and engaged in selling the same article as "adamant silica", complainant establishing neither fraud nor deception calculated to reasonably mislead.

Lytle v Smith, 204-619; 215 NW 668

Unfair competition — evidence — sufficiency. Evidence reviewed and held insufficient to show that a party, in leaving an employment and entering into the same business in the same territory, took anything that could be deemed the property of his former employer.

Rosenstein v Smith, 218-1381; 257 NW 397

"Wormix"—neither descriptive nor parts of two words. The word, "Wormix", an artificial word coined and used as the name of a hog remedy, is not descriptive in such sense that it may not be used as a valid trademark and registered, nor the fact that it is composed of parts of two words does not disqualify it for registration as a trademark. So the use by defendant of the word, "Worm-X", for a similar remedy was held a colorful imitation and an infringement, and where defendant has refused on notice to cease the use of an infringing device, and has continued to infringe, neither a fraudulent intent to injure complainant nor an actual misleading of the public need be proved, but will be presumed.

Feil v American S. Co., 16 F 2d, 88

CHAPTER 431

TRADEMARKS FOR ARTICLES MANUFACTURED IN IOWA

9876 "Manufacturer" defined.

Blaster and crusher of stone not manufacturer. One who blasts stone from a quarry and breaks it into merchantable size and sells such resulting product is not a manufacturer, within the taxation statute, §6975, C., '27.

Iowa Co. v Cook, 211-534; 233 NW 682

CHAPTER 431.1

DISTRIBUTION OF TRADEMARKED ARTICLES

9884.1 Contracts as to selling price.

Discussion. See 4 ILB 40—Price fixing by patentee; 13 ILR 324—Retail price fixing; 14 ILR 338—Price discrimination—Clayton Act; 19 ILR 577—Due process; 21 ILR 175, 486—Unfair competition—general survey

Price cutting—goods purchased before notice to desist. A wholesaler who had a contract to market a trademarked product at a certain price, after he gave a retailer notice to desist from selling the product at less than the established price and was refused, was entitled to an injunction to restrain the unfair trade practice, even tho he had refused to sell the product to the retailer who had made an attempt to buy, not in good faith, but as an attempt to establish a defense in the threatened injunction suit, and altho the retailer's stock was purchased before the notice to desist was received.

Barron Motor v May's Drug Stores, 227-1344; 291 NW 152

Refusal of wholesaler to sell to price-cutting retailer. A wholesaler was under no obligation to sell a trademarked product to a retailer who had refused to desist from selling the article at a price less than was specified by the manufacturer.

Barron Motor v May's Drug Stores, 227-1344; 291 NW 152

CHAPTER 432

UNFAIR DISCRIMINATION

Atty. Gen. Opinion. See '36 AG Op 565

9885 Unfair discrimination in sales.

Discussion. See 21 ILR 175, 486—Unfair competition—general survey; 22 ILR 736—Legislation favoring economic groups

Atty. Gen. Opinion. See '28 AG Op 63

Damages—failure to establish. Proof that defendants have conspired to injure plaintiff's business or to employ unfair competition against plaintiff becomes of no consequence in a law action when plaintiff fails to establish damages.

Roggensack v Winona Co., 211-1307; 233 NW 493

Essential elements—rejected opportunity. A claim of unfair competition because a particular bank was chosen as the depository of funds arising from a thrift system introduced into a public school falls when it is made to appear that the complainant was given full opportunity to be such depository.

Security N. Bank v Bagley, 202-701; 210 NW 947; 49 ALR 705

Infringement and unfair competition—employee entering employ of rival. An employee may lawfully terminate his employment with his employer, and enter into the employment of a rival of his former employer, and advertise and circularize such fact, and no legal right of the former employer is violated so long as it appears that the employee furnishes to his new employer no list of the former employer's customers and that no confidential information acquired in the former employment is used in the latter.

Universal Corp. v Jacobson, 212-1088; 237 NW 436

Literary property—trade secrets. Originator or proprietor may have property in idea, trade secret, or system, but, if it cannot be sold, negotiated or used without disclosure, contract should guard or regulate disclosure, or otherwise the idea becomes the acquisition of whoever receives it.

Young v Ralston-Purina Co., 88 F 2d, 97

Nonpayment of royalties not repudiation of patent license. A contract to pay royalties under a patent license was not repudiated by the mere refusal to make the royalty payments which were legally due.

Eulberg v Cooper, 226-776; 285 NW 131

Right to reject advertisement. The business of publishing a newspaper is a strictly private enterprise, and the owner thereof is free to accept or reject tendered advertisements as he sees fit.

Shuck v Daily Herald, 215-1276; 247 NW 813; 87 ALR 975

Unfair competition — evidence — sufficiency. Evidence reviewed and held insufficient to show that a party, in leaving an employment and entering into the same business in the same territory, took anything that could be deemed the property of his former employer.

Rosenstein v Smith, 218-1381; 257 NW 397

Royalties to pay costs of infringement suits —nonrepugnant provisions. A provision in a patent license contract which provided that the amount spent by the licensor in bringing suits to prevent patent infringements should not exceed the amount of royalties received by him, was not repugnant to other clauses providing that such suits should be brought by the licensor, or if not brought by him, the licensee could use the royalties to bring such suits.

Eulberg v Cooper, 226-776; 285 NW 131

Contract to bring infringement suits. A contract between a patent owner as licensor and the manufacturer of the patented article as licensee, providing that the licensor received royalties and should bring suits to prevent infringement upon the patent using royalties received, was fully performed on the part of the licensor when he spent, in bringing infringement suits, more than the amount of the royalties received.

Eulberg v Cooper, 226-776; 285 NW 131

Breach of patent license contract. When a patent licensee ceased to pay royalties due the licensor, the licensor was not limited to an action against the licensee as a patent infringer, but could elect to treat the contract as still in force and bring an action to collect royalties.

Eulberg v Cooper, 226-776; 285 NW 131

Evidence—sufficiency. In an action for injunction, where plaintiffs advanced capital to organize a corporation for the purpose of putting invention on market—the inventor in turn assigning to them an absolute interest in patent, and where plaintiffs thereafter organize a separate corporation to engage in marketing the patented device both directly and by license, the evidence held sufficient to entitle plaintiffs to injunction restraining inventor from circulating to plaintiffs' prospective customers material to effect plaintiffs had no interest in patent, and restraining the threatening of such prospective customers with litigation in event they should buy from plaintiffs.

Burlington Corp. v Debrey, 226-1190; 286 NW 473

9886 Unfair discrimination in purchases.

Atty. Gen. Opinion. See '34 AG Op 634

CHAPTER 433

OPTIONS AND BUCKET SHOPS

9895 Dealing in options—bucket shops.

ANALYSIS

I In General
II Evidence
III Instructions

I IN GENERAL

Implied or apparent authority of agent—unallowable plea. A commission firm was prohibited by the mandatory rules of the board of trade of which it was a member from dealing in so-called "futures" for and on behalf of a nonmember corporation unless the firm first obtained from said nonmember corporation a writing authorizing the latter's manager to contract for such "futures". The firm disregarded said rule and accepted orders for such "futures" from a manager who had been expressly forbidden to exercise such power. Held, that said firm, when sued by the injured corporation for the resulting loss, would not be permitted to defend on the ground that said manager had implied or apparent power to issue said orders.

Watkins Co. v Smith Co., 221-1164; 267 NW 115

Stock market profits—when not taxable—refunds—stipulated record. In an action to cancel and secure a refund of income taxes submitted on a stipulated record, stock market transactions involved therein would be illegal and void as based on a gaming transaction if the buyer neither intended nor contemplated taking actual delivery but intended that the profits or losses should be settled on the market quotations; however, illegality is not presumed, and without illegality appearing in the record, profits accruing from such transactions must be held to be profits from the sale of capital assets, and not taxable as income, hence taxes paid thereon must be refunded.

Martin v Board, 225-1319; 283 NW 418; 120 ALR 1273

II EVIDENCE

Money loaned—used for mutual benefit—jury question. Whether notes sued on represented money furnished by plaintiff to be used by defendants for benefit of both in illegal dealing in margins held for jury.

Hamilton v Wilson, (NOR); 240 NW 685

III INSTRUCTIONS

No annotations in this volume

9905 Prima facie evidence.

Presumption. The presumption, under the bucket shop act, that grain, the subject-matter of a purported contract of sale, was never intended to be delivered by the broker is not overcome by the simple expedient of having the broker testify that he intended to deliver the grain unless he had sooner sold it prior to the date of delivery.

Yoerg v Geneser, 219-132; 257 NW 541

CHAPTER 434

COMBINATIONS, POOLS, AND TRUSTS

Atty. Gen. Opinions. See '34 AG Op 538; '36 AG Op 591

9906 Pools and trusts.

Discussion. See 21 ILR 175, 486—Unfair competition—general survey

Allowable restraint of trade. An agreement, entered into on the sale of a newspaper, to the effect that the seller will not in any manner engage, either alone or with others, in the publication or circulation of a newspaper in the locality specified for a period of 15 years, is not invalid as being in restraint of trade.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

9915 Combinations, pools, and trusts—fixing prices.

Implied repeal because of repugnancy. It may not be successfully contended that a statute is invalid because repugnant to a prior and existing statute, since, as between repugnant statutes, the later in enactment must prevail. So held as to an alleged repugnancy between chapter 390 and this section.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

9916 Labor—unions.

Labor disputes. See under Ch 74, Note 1

9921 "Gift enterprise" defined.

Consideration for chance indispensable element. A scheme for the distribution, by lot or chance, of valuable prizes does not constitute a lottery when the recipient of the prize neither pays nor hazards anything of value for the chance to obtain said prize. And it is quite immaterial that the donor of such prizes expects

such distribution of prizes will work a financial betterment of his business.

State v Hundling, 220-1369; 264 NW 608; 103 ALR 861

Bank night — consideration for unilateral contract. Where the promoter of a motion picture bank night drawing voluntarily makes certain requirements to qualify for the prize which is promised, he does not merely extend an offer to make a gift, but a unilateral contract is created in which the promoter determines the adequacy of the consideration for his promise, and when a person is induced to accept the promise and perform the specified act which was bargained for, it does not matter how insignificant the benefit of the performance may apparently be to the promoter, the promise can be enforced by the winner of the drawing.

St. Peter v Theatre, 227-1391; 291 NW 164

Bank night—value of consideration in contract. A bank night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Theatre, 227-1391; 291 NW 164

Theatre employees—announcement of bank night winner. Testimony by the manager of a theatre that he had hired a lady to call out the name of the bank night drawing in front of the theatre, with evidence that she habitually announced the name drawn on former occasions, was sufficient to establish that she was employed to announce the winner and to establish her agency and make her announcement binding on the theatre owner.

St. Peter v Theatre, 227-1391; 291 NW 164

Winner's failure to act promptly caused by act of agent. Where the plaintiff's name was called outside a theatre as winner of a bank night drawing, and when she entered she was told that it was her husband's name that was called, and he was told he was one second too late when he followed her in, the theatre could not claim that neither she nor her husband had claimed the prize within the time set. If the husband was the one entitled to the prize, the theatre was estopped to claim the advantage of the one-second delay caused by the act of their agent in calling the wrong name outside the theatre.

St. Peter v Theatre, 227-1391; 291 NW 164

Bank night—evidence of drawing of winner —statements of agents. When one agent of a theatre announced the name of the plaintiff as winner of a bank night drawing and her husband's name was announced by another agent, both agents being in a position to bind the theatre, there was evidence that the name of one was drawn.

St. Peter v Theatre, 227-1391; 291 NW 164

9928 Provision part of every contract —forfeit.

Atty. Gen. Opinion. See '36 AG Op 591

Competitive bidding—patentee as bidder—legality of bid. When the city calls for competitive bids on four different kinds of paving mixtures, all of substantially the same utility, desirability, and cost of commercial materials, three of which mixtures are unpatented and one of which is patented, the bid of the patentee, tho the only bid on the patented article, to furnish and lay the patented mixture for one cent per square yard above the price (not shown to be exorbitant) at which he had agreed simply to furnish it to all other bidders, is not fraudulent and void as stifling competition, tho the cost of laying the mixture is some 28 cents per square yard.

Hoffman v Muscatine, 212-867; 232 NW 430; 77 ALR 680

TITLE XXIV

PERSONAL PROPERTY

CHAPTER 435

SALES LAW

Discussion. See 3 ILB 67—Uniform sales act—effect

PART I

FORMATION OF THE CONTRACT

9930 [§1] Contracts to sell and sales.

ANALYSIS

I CONTRACTS GENERALLY
II SALES
III CONTRACT TO SELL
IV OFFERS
V ACCEPTANCES
VI CANCELLATION OR WITHDRAWAL OF ORDERS
VII PAROL AS AFFECTING WRITING

I CONTRACTS GENERALLY

Formal bill of sale unnecessary. Execution of formal bill of sale is not essential to pass title to restaurant.

Bain v Thompson, (NOR); 239 NW 561

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency, or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease-Lied Motors v Sadler, 216-302; 249 NW 383

Severable (?) or indivisible (?) contract. A bill of sale which transfers different fractional parts of property to different parties for different prices is a severable contract.

Ayres v Nopoulos, 204-881; 216 NW 258

II SALES

Sale of article "produced". The operator of a coal mine who contracts to sell "all fine screenings produced by him" during a named period—the screenings being defined as the coal which will pass through described screens —may not absolve himself of his obligation by the simple expedient of failing to screen the coal.

Iowa Co. v Coal Co., 204-202; 210 NW 440; 215 NW 229

Liability for sales tax—undertaker as retailer. A funeral director becomes a retailer when he transfers title to personal property, the casket, vault, etc., to relatives of the deceased, by contract for his services in which such articles are used, and as such is liable for the retail sales tax on such articles.

Kistner v Board, 225-404; 280 NW 587

III CONTRACT TO SELL

Nonmeeting of minds. There can be no sale or contract of sale so long as the parties do not definitely agree upon the subject-matter nor upon the terms thereof.

Des M. Marble v Seevers, 201-642; 207 NW 743

Offer or order—insufficient acceptance by corporation. A contract for the purchase of an article from a corporation is not established by the simple, naked showing that the purported buyer signed an order addressed to the corporation for the article, and that said order carries an acceptance signed individually by a person who was, in fact, the vice president and general manager of the corporation.

Birum-Olson v Johnson, 213-439; 239 NW 123

Unaccepted order. Necessarily, no contract of sale results from a mere written order signed by the intended purchaser and delivered to an agent known to have no authority to accept it, and especially so when the order was conditioned on acceptance by the "general office", and was affirmatively rejected by the latter.

Am. Coal Co. v Hide Co., 201-306; 207 NW 347

IV OFFERS

Offers and acceptances. A contract for the sale of goods cannot result from an offer and acceptance unless (1) the offer is definite and certain in its terms, and (2) the acceptance is

an unqualified and unconditional acceptance of the identical terms set out in the offer.

Bradley Lbr. v Hunting Lbr., 218-739; 255 NW 711

Unilateral contract. A simple order for goods constitutes a unilateral contract—one in which the promisor receives no promise in return for his promise.

Port Huron Co. v Wohlers, 207-826; 221 NW 843

V ACCEPTANCES

Order—acceptance—sufficiency. A buyer's written order for goods "subject to the approval" of the seller does not necessarily require a written acceptance—in fact, requires nothing more in the way of an acceptance than proof of unequivocal acts done by the seller on the faith of the order and evincing an intent to accept.

Gibson v Miller, 215-631; 246 NW 606

Parol evidence to show acceptance. Parol evidence is admissible to show that a naked order for goods was accepted and, when material, that such acceptance was at a certain place.

Anderson Bros. v Monument Co., 210-1226; 232 NW 689

Unilateral contract—when promise binding. An order for the shipment of goods and a promise to pay therefor become a binding promise when the order is filled and shipped.

Port Huron Co. v Wohlers, 207-826; 221 NW 843

Unallowable assumption of fact. Assuming that a contract was fully executed as soon as it was signed by the plaintiff by his agent, and by the defendant, is erroneous when the contract on its face demonstrates that no contract resulted unless plaintiff accepted the order, and the fact of such acceptance was in issue.

Gibson v Miller, 215-631; 246 NW 606

VI CANCELLATION OR WITHDRAWAL OF ORDERS

Order—right to cancel. An order for goods may be canceled prior to acceptance of the order, and it is quite immaterial that the maker of the order referred in his cancellation to the "order" as a contract.

Doll & Smith v Dairy Co., 202-786; 211 NW 230

Prohibited repudiation. A vendor who accepts and retains a partial payment for goods on the condition that the balance will be paid by the vendee when the goods are delivered, may not, after a subsequent tender of the balance, repudiate the contract on the claim that the initial payment should have embraced the entire purchase price.

Daeges v Beh, 207-1063; 224 NW 80

VII PAROL AS AFFECTING WRITING

Delivery—intent—evidence. The intent of the parties necessarily controls the issues (1) whether, in a parol contract of purchase, title passed on delivery, with a right to rescind if a trial proved unsatisfactory, or (2) whether title passed only after a satisfactory trial. Necessarily, what the parties said to each other at the time the contract was entered into is admissible.

Bishop v Starrett, 201-493; 207 NW 561

9931 [§2] Capacity — liabilities for necessaries.

Minors generally. See under Ch 472

Invalid signature—nonratification. The invalid signature of a husband to a mortgage on the homestead—invalid because of his inebriate condition when he signed—is not ratified by a delay of some eight months in repudiating such signature (1) when the delay was caused in part by his continued inebriate condition and in part by a proper investigation by his attorney, and (2) when he did not actually intend to ratify.

State Bank v Nolan, 201-722; 207 NW 745

FORMALITIES OF THE CONTRACT

9932 [§3] Form of contract or sale.

Order—acceptance—sufficiency. A buyer's written order for goods "subject to the approval" of the seller does not necessarily require a written acceptance—in fact, requires nothing more in the way of an acceptance than proof of unequivocal acts done by the seller on the faith of the order and evincing an intent to accept.

Gibson v Miller, 215-631; 246 NW 606

Extraneous documents as part of contract. The words "Regarding the sand and gravel to be used in the construction of the Spottsville Bridge, which contract you have, we agree to deliver" etc., contained in a letter of offer which was accepted, cannot be construed as making the "Spottsville" contract a part of the contract by letter, or as having any other force than to identify the subject-matter of the offer and the place of delivery.

Koch Co. v Koss Co., 221-685; 266 NW 507

Telegrams and letters—intention of parties. Telegrams which are brief and incomplete and which reserve the right in each instance to clarify and amplify by letter point quite conclusively to the conclusion that the parties intended that the contract should be determined by a consideration of both the telegrams and letters.

Appel v Carr, 216-64; 246 NW 608

9933 [§4] Statute of frauds.

ANALYSIS

I CONTRACT IN GENERAL
II PROPERTY NOT OWNED BY VENDOR
III PART PAYMENT OR PERFORMANCE
IV DELIVERY

General statute of frauds. See under §§11285–11288

I CONTRACT IN GENERAL

Discussion. See 17 ILR 87—Construction of "void"

Memo sufficient to take contract out of statute. A written order for goods prepared by the seller but not signed by the buyer is taken out of the statute of frauds by a subsequent letter signed by the buyer and addressed to the seller, and requesting the seller to hold said order "until we give further notice".

Morris Co. v Braverman, 210-946; 230 NW 356

Memorandum of contract—essentials. In an action to recover damages for seller's refusal to perform an alleged oral contract for sale of a business college, a letter written to buyer merely indicating that seller would, in the near future, attend to the matter of writing the contract was not a "memorandum of contract" satisfying statute of frauds, it being essential that such a memorandum completely evidence the contract which the parties made, and not just merely indicate that a contract was made.

Patterson v Beard, 227-401; 288 NW 414

Merchandise sold—seller determining quantity—unenforceability. In an action for damages where an alleged contract was to sell surplus stock of merchandise, to be subsequently listed, a list previously sent merely as information in response to a request from buyer to the seller is inadmissible to complete a contract, under statute of frauds, §4625, C., '97 [§11285, C., '39]. Where such list could only be made a part of contract by proof of distinct oral contract, no connection appearing between the two papers by comparison or surrounding circumstances of parties, the contract leaving the quantity to be delivered to buyer to be determined by the will, want, or wish of the seller, makes the contract unenforceable because of lack of mutuality.

Midland Co. v Waterloo Co., 9 F 2d, 250

Oral contract of purchase. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

Oral contract for particular manufacture. An oral contract under which the seller agrees to manufacture for the buyer certain goods in particular styles, is not within the statute of frauds when such goods are not suitable for sale to others in the ordinary course of the seller's business.

Morris Co. v Braverman, 210-946; 230 NW 356

Oral contract to repurchase. An oral contract that the vendor of corporate shares of stock will repurchase the stock from the vendee, at the latter's option, is not within the statute of frauds when the vendor is selling as owner and not as agent of the owner.

Calvert v Mason City Co., 219-963; 259 NW 452

Oral contract to repurchase—when within statute. An oral contract by one who effects a sale of corporate shares of stock as agent of the owner thereof, that he will repurchase the shares on demand of the purchaser, is within the statute of frauds.

Thomas v Peoples Co., 220-850; 263 NW 499

Oral contract unenforceable. In buyer's action on an oral contract for sale of a business college where there was no competent evidence taking case out of statute of frauds, a directed verdict for defendant was proper.

Patterson v Beard, 227-401; 288 NW 414

Rule of evidence rather than invalidating statute. The Iowa statute of frauds relating to sales of goods is held to be a rule of evidence and not an invalidating statute, in view of subsequent provision of statute that regulations related merely to proof of contracts and should not prevent enforcement of those not denied in pleadings, and that oral evidence of maker against whom unwritten contract was sought to be enforced should be competent to establish contract. Under Iowa rule, both delivery and passing of title in sale of personal property are determined by intent of parties at time of transaction.

Tipton v Miller, 79 F 2d, 298

Telephone order. A telephone conversation wherein the buyer orders and the seller agrees to ship stated goods constitutes an oral contract, and is within the statute of frauds, notwithstanding the fact that the buyer had, im-

mediately preceding the telephone talk, telegraphed the seller as to the price of the goods and the seller had wired his reply.

Lamis v Grain Co., 210-1069; 229 NW 756

II PROPERTY NOT OWNED BY VENDOR

Frauds, statute of—sales of goods—oral contract to repurchase. An oral contract that the vendor of corporate shares of stock will repurchase the stock from the vendee, at the latter's option, is not within the statute of frauds when the vendor is selling as owner and not as agent of the owner. Evidence held to justify a finding that a vendor sold as owner.

Calvert v Loan Co., 219-963; 259 NW 452

III PART PAYMENT OR PERFORMANCE

Giving "something" to bind contract. Under exception in this section, authorizing enforcement of an oral contract when buyer gives to seller "something in earnest to bind the contract", the "something" given must be money or a thing that possesses value, tho the value may be of a small amount, and evidence that the buyer of a business college resigned from position of superintendent of a public school pursuant to alleged oral agreement of purchase did not satisfy such requirement. The determination of such a question is purely one of statutory construction and not a matter of equities between the parties.

Patterson v Beard, 227-401; 288 NW 414

Readiness to perform. Where there was no competent evidence to take case out of statute of frauds, it was not error to exclude oral testimony tending to show the making of an oral contract to sell a business college and the buyer's readiness and ability to perform the same.

Patterson v Beard, 227-401; 288 NW 414

IV DELIVERY

Nonphysical delivery of goods. An actual physical delivery of goods to a purchaser is not absolutely essential in order to take an oral contract out of the statute of frauds.

Madden v Eldridge, 210-938; 230 NW 371

THE PRICE

9938 [§9] Definition and ascertainment of price.

Selling price—standard price as basis. The selling price of goods was as definitely fixed in a contract as tho it were expressed in money or some other medium, when placed at a certain amount lower than the standard price on standard staple goods of the same kind.

Lee v Sundberg, 227-1375; 291 NW 146

Total failure of consideration. The sale of an automobile, the engine number of which has been defaced, altered, or tampered with, without an official certificate showing good and sufficient reasons for such change, presents a case of total failure of consideration, and no formal rescission of contract is necessary in order to recover back the price paid.

Espe v McClelland, 208-512; 226 NW 130

Nonpremature action. An action for the price of goods sold under a contract which provides that one-half of the purchase price is due on delivery, and the balance 6 months thereafter, is not premature when the goods were furnished, duly tendered to the defendant, and refused, and the action commenced some 4 years after said refusal.

Gibson v Miller, 215-631; 246 NW 606

CONDITIONS AND WARRANTIES

9940 [§11] Effect of conditions.

Failure to perform condition—effect. Failure of a vendor to furnish a pedigree, in accordance with his contract, after title to animals had passed to the purchaser and after they had died, does not render the sale without consideration.

Stanhope Bk. v Peterson, 205-578; 218 NW 262

Contract for warranty satisfactory to buyer. One who orders goods on the express condition that, before shipment, he be furnished a written guaranty which will be satisfactory to him, covering the effectiveness of the goods, is under no obligation to accept or pay for the goods until he receives such warranty, and when he acts honestly and in good faith his decision that he is not satisfied is final.

Mortemoth Co. v Furniture Co., 211-188; 233 NW 133

Motion picture booking as severable contract—damages as remedy. A motion picture exhibitor who books a series of films under contract, a part of which contract specified that he should have a certain film to exhibit on a certain date, is not entitled to breach the entire contract, when distributor fails to provide this certain film on the specified date, but exhibitor must recoup by way of damages, if any.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Warranty—merchandise return as condition for refund—waiver by correspondence manager. A requirement that buyer return warranted machines as a prerequisite to a refund of the purchase price may be waived by seller's agent in charge of correspondence when, in reply to buyer's offer to return, he instructs buyer not to return the machines.

Henriott v Main, 225-20; 279 NW 110

Warranty—waiver—jury question. Evidence held to present a jury question on the issue

whether the buyer of goods had waived the warranty for which he had contracted.

Mortemoth Co. v Home Co., 211-188; 233 NW 133

9941 [§12] Definition of "express warranty".

ANALYSIS

I WARRANTIES IN GENERAL
II RELIANCE ON WARRANTY
III WRITTEN AND PAROL WARRANTIES
IV PRINCIPAL AND AGENT
V CONSTRUCTION
VI PLEADINGS AND PROOF

Implied warranties. See under §9944
Discussion. See 22 ILR 118—Recoupment for breach of warranty

I WARRANTIES IN GENERAL

Warranty—what constitutes. The assertion by the vendor to the vendee of animals that they were "healthy and all right" will constitute a warranty if such was the mutual intention of the parties.

Cavanaugh v Farm Co., 206-893; 221 NW 512

Fact assertion (?) or opinion (?). A representation that water softeners "would produce sufficient water, properly softened, with which to conduct the business" of the prospective buyer, may constitute a warranty.

Brennan v Laundry Co., 209-922; 229 NW 321

Operation of tractor. In action by seller to foreclose a chattel mortgage on a tractor, the trial court's finding that the tractor would not operate properly as warranted was sustained by the evidence.

Cunningham v Drake, (NOR); 224 NW 48

Fraud by seller—promise of future resales. In an action for the purchase price of a trade-named beer dispenser bought for resale, purchaser, altho same may have been an inducement to buy, may neither predicate fraud on seller's promise to procure for purchaser future resales, unless the promise is made with a secret intent to disavow, nor upon statements amounting to an opinion as to superior design; however, the jury should determine whether a statement as to merchantableness is an opinion or representation of fact.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

Reports on vending machine earning power —noncompliance waived by acceptance. A seller of vending machines, who warrants their earning power and agrees to repurchase if they fail, may not in buyer's action on this warranty to recover the purchase price complain for the first time as to buyer's periodical reports not conforming to the contract, when, after being asked if they were satisfactory, he made no reply.

Henriott v Main, 225-20; 279 NW 110

II RELIANCE ON WARRANTY

Sales—reliance on warranty—unallowable defense. The vendor of animals who actually warrants them to be "healthy and all right" may not avail himself of the claim that he had only recently purchased them, and that the vendee had equal knowledge with him as to their state of health.

Cavanaugh v Farm Co., 206-893; 221 NW 512

III WRITTEN AND PAROL WARRANTIES

Seller escaping warranty — contract construed against him. A sale contract prepared by the seller limiting his liability under a warranty will be strictly construed against him.

Henriott v Main, 225-20; 279 NW 110

IV PRINCIPAL AND AGENT

Waiver of warranty by agent. A requirement that buyer return warranted machines as a prerequisite to a refund of the purchase price may be waived by seller's agent in charge of correspondence when, in reply to buyer's offer to return, he instructs buyer not to return the machines.

Henriott v Main, 225-20; 279 NW 110

V CONSTRUCTION

Construction against writer of contract. A sale contract prepared by the seller limiting his liability under a warranty will be strictly construed against him.

Henriott v Main, 225-20; 279 NW 110

Vending machine repurchase contingent on earning power failure. A seller of forty vending machines, who writes in the sale contract many avenues to escape liability on his warranty as to their earning power and his promise to repurchase if they fail in this respect, cannot, after notice of and acquiescence in the nonoperation of three of the machines, be relieved of his warranty on the claim that it only covered the full time operation of the entire forty machines sold.

Henriott v Main, 225-20; 279 NW 110

VI PLEADINGS AND PROOF

Breach of warranty—burden of proof. Burden of proof in action on contract providing for delivery of drain tile was upon seller to show that tile were "sound and true", and evidence held to show that breakage was due to neglect of buyer.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Negligence as defense. In an action for the breach of an express warranty as to the healthfulness of animals, it is incumbent on the defendant to allege contributory negligence on the part of the plaintiff, rather than for plaintiff to allege his freedom from negligence.

Cavanaugh v Farm Co., 206-893; 221 NW 512

Unallowable defense. The vendor of animals who actually warrants them to be "healthy and all right" may not avail himself of the claim that he had only recently purchased them, and that the vendee had equal knowledge with him as to their state of health.

Cavanaugh v Farm Co., 206-893; 221 NW 512

Warranty—failure of proof. An action for damages consequent on the breach of an express warranty as to the operation of automatic candy vending machines cannot, manifestly, be maintained unless there is evidence tending to establish said warranty, especially when the machines purchased were strictly in accordance with the sample furnished prior to the sale.

Dorman v Thorpe, 217-91; 250 NW 902

9942 [§13] Implied warranties of title.

Implied warranty of right to sell. The seller of an automobile impliedly warrants that he has a right to sell it.

Espe v McClelland, 208-512; 226 NW 130

Transfer of title—incumbrance—effect. The existence of an implied warranty that goods sold are free from incumbrance, and a breach of such warranty, do not prevent the title from passing to the purchaser.

Stanhope Bank v Peterson, 205-578; 218 NW 262

9943 [§14] Implied warranty in sale by description.

Implied warranty—reasonable fitness. Where a written contract to sell a specified trade-named beer dispenser contains no express warranties, but does contain a stipulation excluding all other agreements not mentioned therein, the purchaser, in seller's action for purchase price, may nevertheless go to the jury on defense of breach of implied warranty as to reasonable fitness for particular purpose, since this is not inconsistent with nor negatived by such express condition or stipulation.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

9944 [§15] Implied warranties of quality.

Discussion. See 22 ILR 118—Recoupment for breach of warranty

ANALYSIS

I Reasonable Fitness for Special Purpose
II Purchase by Description—Merchantableness
III Examination Prior to Purchase
IV Purchase of Specified Article
V Express Excluding Implied Warranty

I REASONABLE FITNESS FOR SPECIAL PURPOSE

Discussion. See 5 ILB 6, 86—Unwholesome food—liability; 5 ILB 259—Liability for unwholesome food

Animal for breeding purposes. There may be an implied warranty that an animal is suitable for breeding purposes. Evidence reviewed, and held to sustain such implied warranty.

Trousdale v Burkhardt, 207-1133; 224 NW 93

Buyer relying on seller—article for known purpose. Ordinarily no warranty of fitness will be implied where buyer orders specific article for specific purpose known to the seller, but where buyer relies on seller to furnish a suitable article for a known purpose warranty of fitness will be implied altho articles may have a well-known trade name. So whether seller impliedly warranted that certain lumber was fit for manufacture of tool chests, held, a jury question.

Davenport Co. v Edward Hines Co., 43 F 2d, 63

Contract exclusion. A written clause in a contract of sale of an article which declares that the contract contains the entire agreement does not exclude an implied warranty where one would otherwise be found.

Hughes v Equip. Corp., 216-1000; 250 NW 154

Fraud by seller—promise of future resales. In an action for the purchase price of a trade-named beer dispenser bought for resale, purchaser, altho same may have been an inducement to buy, may neither predicate fraud on seller's promise to procure for purchaser future resales, unless the promise is made with a secret intent to disavow, nor upon statements amounting to an opinion as to superior design; however, the jury should determine whether a statement as to merchantableness is an opinion or representation of fact.

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Implied warranty—reasonable fitness. Where a written contract to sell a specified trade-named beer dispenser contains no express warranties, but does contain a stipulation excluding all other agreements not mentioned therein, the purchaser, in seller's action for purchase price, may nevertheless go to the jury on defense of breach of implied warranty as to

I REASONABLE FITNESS FOR SPECIAL PURPOSE—concluded

reasonable fitness for particular purpose, since this is not inconsistent with nor negatived by such express condition or stipulation.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

Negativing implied warranty. An implied warranty that a rebuilt tractor is reasonably fit for the particular purpose for which it is purchased, which purpose is specifically stated to the seller at and before the sale is consummated, cannot exist when the written contract of sale contains the clause: "No warranty on second-hand or rebuilt tractors."

Dollen v Tractor Co., 214-774; 241 NW 307

Passenger elevator falling—nonliability elevator manufacturer. The builder of a passenger elevator is neither liable for a personal injury caused by the falling of the car where the safety device, designed to prevent such falling and to stop the car, was of an approved pattern in general use and was not shown to have ever before failed to work efficiently, nor where it is disclosed by the accident a device could have been made which would have obviated the particular defect which caused the particular accident, unless it is further shown that reasonable prudence would have discovered this defect and remedied it. Due care, in a legal sense, does not require an uncanny foresight.

Hoskins v Otis Elev. Co., 16 F 2d, 220

Parol warranty—when incompetent. Principle reaffirmed that when a written contract of sale contains no warranty, a parol one may not be engrafted thereon.

Blecher v Schmidt, 211-1063; 235 NW 34

Patented article — implied warranty. The fact that an article purchased is patented and is generally sold under a trade name does not exclude an implied warranty when, to the knowledge of the seller, it is purchased for a particular purpose.

Hughes v Equip. Corp., 216-1000; 250 NW 154

See Dorman v Thorpe, 217-91; 250 NW 902

Purchase for particular purpose. The knowledge of the authorized agent of the seller of an article that the article was being bought by the buyer for a particular purpose is imputed to the seller even tho the agent fails so to inform his principal.

Hughes v Equip. Corp., 216-1000; 250 NW 154

Waiver of breach by use or making payments. The buyer of an article by retaining it in his possession, and using it, and making payments thereon, after he knows it is not fulfilling the implied warranty, does not thereby estop himself from rescinding when said retention, use and payments were at the request of the seller and in consequence of the seller's promise to make the article work in a satisfactory manner.

Hughes v Equip. Corp., 216-1000; 250 NW 154

Warranty—necessity to plead. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

II PURCHASE BY DESCRIPTION—MERCHANTABLENESS

Documentary evidence — Coca-Cola advertisements—admissibility. In an action against a beverage bottler and wholesaler for damages caused by drinking unwholesome Coca-Cola, sold by the bottler to a retailer, the admission of Coca-Cola advertisements in evidence held nonprejudicial.

Anderson v Tyler, 223-1033; 274 NW 48

Implied warranty of merchantability. The assertion by a dealer in effecting a sale of a fur coat that "it is an A-No. 1 fur coat" and that the purchaser "would get a number of years' service out of the coat", may constitute the basis of an implied warrant of merchantability, when the buyer relies thereon.

Brandenberg v Stores, 211-1321; 235 NW 741; 77 ALR 1161

Remedies of buyer — breach of warranty, negligence, or both. A failure to use care in preparation and manufacture of a beverage constitutes negligence and anyone suing for injuries therefrom may rely on either this breach of duty or a breach of warranty, or both.

Anderson v Tyler, 223-1033; 274 NW 48

Sales on Sunday—unwholesome food—damages. Fact that beverage was sold on Sunday, in violation of §13227, C., '35, does not deprive plaintiff of right to recover proven damages.

Anderson v Tyler, 223-1033; 274 NW 48

III EXAMINATION PRIOR TO PURCHASE

Latent defects and equal opportunity to inspect. The rules of law pertaining to latent defects and equal opportunity to inspect do not apply to the sale of an article, the possession of which the law unconditionally prohibits.

Espe v McClelland, 208-512; 226 NW 130

Nonwaiver by inspection of goods. The inspection and acceptance of goods by the buyer thereof do not terminate an implied warranty

of quality when the buyer immediately notifies the seller of the breach of warranty.

Roland v Markman, 207-1322; 224 NW 826

IV PURCHASE OF SPECIFIED ARTICLE

Implied warranty—trade name as affecting reasonable fitness. Where a newly designed and marketed beer dispenser not generally known to the trade was purchased for a particular purpose on seller's recommendation therefor, fact that it was purchased under a trade name will not relieve seller of implied warranty as to fitness under this section.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

V EXPRESS EXCLUDING IMPLIED WARRANTY

Express and implied warranty. An express written warranty does not bar a noninconsistent implied warranty.

Wise v Motors Co., 207-939; 223 NW 862

SALE BY SAMPLE

9945 [§16] Implied warranties in sale by sample.

Unallowable directed verdict. The existence of conflicting evidence on the issue whether goods furnished were according to samples by which ordered, or whether a portion of the goods were ever ordered and were consequently properly returned, necessarily justifies the court in overruling a motion for a directed verdict for the entire sum sued for.

Central Shoe Co. v Kraft Co., 213-445; 239 NW 238

PART II

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

9946 [§17] When property passes.

Unascertained goods. The title to unascertained or unexamined goods contracted for does not pass to the vendee upon their delivery to the carrier.

Hostler Co. v Stuff, 205-1341; 219 NW 481

9947 [§18] Property in specific goods passes when parties so intend.

Motor vehicle act. The requirement of the motor vehicle act that delivery shall not be deemed made or title passed until a registration of transfer is consummated has no reference to a contract delivery and passing of title strictly between private parties.

Cerex Co. v Peterson, 203-355; 212 NW 890

Conditional seller not "owner". Statute making owner of automobile liable for damage caused by its operation when being driven with owner's consent, held not to extend to seller of automobile under conditional sales contract even when, under the contract of sale, seller retained title, for the buyer is the beneficial, equitable, and substantial owner, and the seller retains only naked title subject to complete divestation upon payment of the final installment of the purchase price.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Incumbrance—effect. The existence of an implied warranty that goods sold are free from incumbrance, and a breach of such warranty, does not prevent the title from passing to the purchaser.

Stanhope Bk. v Peterson, 205-578; 218 NW 262

Purchase with option to return unused portion. Where manufactured lumber is shipped freight prepaid under a contract that the buyer may return whatever portion he does not use, title to the entire shipment passes to the buyer, not as he uses the lumber, but when he receives and accepts the shipment.

Queal Lbr. v Anderson, 211-210; 229 NW 707

9948 [§19] Rules for ascertaining intention.

Title to unascertained goods. See under §9946

Atty. Gen. Opinion. See '34 AG Op 582

Delivery—intent—evidence. The intent of the parties necessarily controls the issues (1) whether, in a parol contract of purchase, title passed on delivery, with a right to rescind if a trial proved unsatisfactory, or (2) whether title passed only after a satisfactory trial. Necessarily, what the parties said to each other at the time the contract was entered into is admissible.

Bishop v Starrett, 201-493; 207 NW 561

Registration statutes. Purpose of §4964, C., '35, in the motor vehicle laws, providing that title does not pass until the registration provisions have been completed, is to enable officials to perform their duty, collect tax, and prevent fraud on state, and does not restrict the contract rights of parties as between themselves, which they would have had in the absence of such statute.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Unenforceable oral contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

9949 [§20] Reservation of right of possession or property when goods are shipped.

Defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

9950 [§21] Sale by auction.

When title passes. The act of a bidder at auction in settling with the clerk for his purchase by part payment in money and by the execution of a note conclusively establishes title in the purchaser.

Stanhope Bk. v Peterson, 205-578; 218 NW 262

9951 [§22] Risk of loss.

Retention of title as security—effect in case of loss. After full and proper delivery of an automobile has been made by the seller to the buyer, the risk of future loss of the car by fire or theft is on the buyer, even tho by contract the seller reserves title to the property merely as security for the performance of the contract of purchase.

Securities Inv. Corp. v Noltze, 222-678; 269 NW 866

PART III

PERFORMANCE OF THE CONTRACT

9970 [§41] Seller must deliver and buyer accept goods.

Contract for warranty satisfactory to buyer—effect. One who orders goods on the express condition that, before shipment, he be furnished a written guaranty which will be satisfactory to him, covering the effectiveness of the goods, is under no obligation to accept or pay for the goods until he receives such warranty, and when he acts honestly and in good faith his decision that he is not satisfied is final. Evidence held to present a jury question on the issue.

Mortemoth Co. v Furniture Co., 211-188; 233 NW 133

Delivery prevented by buyer—instructions. The court cannot properly instruct in an action to recover for goods sold that a verdict should be for defendant if no delivery was made when, under the record, the jury might find that the defendant prevented the plaintiff from making delivery.

Gibson v Miller, 215-631; 246 NW 606

Failure to perform contract—effect. Failure of a vendor to furnish a pedigree, in accordance with his contract, after title to animals had passed to the purchaser and after they had died, does not render the sale without consideration.

Stanhope Bank v Peterson, 205-578; 218 NW 262

Nondelivery of abstract company records—plaintiff's burden. Plaintiff had burden of proving defendant did not deliver all of property of abstract company as provided in contract whereby assets of abstract company were to be turned over to plaintiff, in that all "take-offs" were not delivered.

Mills Co. v Otis, (NOR); 228 NW 47

9971 [§42] Delivery and payment are concurrent conditions.

Acceptance of goods by paying draft—effect. The act of the vendee of goods in paying the draft attached to the bill of lading for the goods, cannot be deemed an acceptance of the goods as of the quality purchased.

Kelly Co. v Strand Co., 213-852; 239 NW 568

Prohibited repudiation. A vendor who accepts and retains a partial payment for goods on the condition that the balance will be paid by the vendee when the goods are delivered, may not, after a subsequent tender of the balance, repudiate the contract on the claim that the initial payment should have embraced the entire purchase price.

Daeges v Beh, 207-1063; 224 NW 80

9972 [§43] Place, time, and manner of delivery.

"About November first." A contract to deliver a commercial product "about November first" requires a delivery substantially on said date, or near approximation thereto. An offer to deliver six weeks after said date is not a compliance with the contract.

North Am. Co. v Gilbertson, 200-1349; 206 NW 610

Time of delivery—waiver. A waiver of the contract time for the delivery of goods is not established by testimony simply showing forbearance on the part of the buyer to specifically insist upon immediate delivery according to the contract.

North Am. Co. v Gilbertson, 200-1349; 206 NW 610

Varying contract as to delivery. A seller who has contracted to deliver "about" a named date a specified quantity of "dry ginseng" may not excuse his failure to deliver at approximately said time by the plea of a general custom to the effect "that delivery was not to be made until the roots had been thoroughly

dried according to a well established method of treatment".

North Am. Co. v Gilbertson, 200-1349; 206 NW 610

9976 [§47] Right to examine the goods.

Latent defects and equal opportunity to inspect. The rules of law pertaining to latent defects and equal opportunity to inspect do not apply to the sale of an article the possession of which the law unconditionally prohibits.

Espe v McClelland, 208-512; 226 NW 130

Unascertained goods. A vendee of unexamined goods has a right to examine them when delivery is tendered, and if he discovers that the goods are not what he ordered, and that a fraud has been perpetrated on him, his prompt refusal to receive the goods, and notification to the vendor accordingly, constitute a justifiable rescission.

Hostler Co. v Stuff, 205-1341; 219 NW 481

9977 [§48] What constitutes acceptance.

Acceptance of goods by paying draft—effect. The act of the vendee of goods in paying the draft attached to the bill of lading for the goods cannot be deemed an acceptance of the goods as of the quality purchased.

Kelly Mill. v Baking Co., 213-852; 239 NW 568

9978 [§49] Acceptance does not bar action for damages.

ANALYSIS

I ACCEPTANCE OF BELATED DELIVERIES
II ACCEPTANCE AFTER INSPECTION

I ACCEPTANCE OF BELATED DELIVERIES

No annotations in this volume

II ACCEPTANCE AFTER INSPECTION

Acceptance of goods—estoppel. A buyer who knows that the goods received are not the kind ordered, and is given by the seller the unrestricted option to return the goods, and who thereupon proceeds to use the goods, may not, when sued for the price, plead the defect as a defense.

McDonald Co. v Morrison, 211-882; 228 NW 878

Nonwaiver by inspection of goods. The inspection and acceptance of goods by the buyer thereof does not terminate an implied warranty of quality when the buyer immediately notifies the seller of the breach of warranty.

Roland v Markman, 207-1322; 224 NW 826

9980 [§51] Buyer's liability for failing to accept delivery.

Contracts—breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Incurable breach. A dairyman who contracts to have his cows tested for tuberculosis, and to sell his milk to a retailer at a price substantially in excess of the market price for other milk of the same butter-fat test, fatally breaches his contract by failing, for twelve months, (§3077, C., '27) to have his cows so tested, even tho a test, subsequent to the retailer's rescission, shows that the cows are free from tuberculosis.

Niederhauser v Dairy Co., 213-285; 237 NW 222

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

9982 [§53] Remedies of an unpaid seller.

Rescission—conflict of testimony. Evidence reviewed, and held to present a jury question on the issue whether parties to a contract had mutually rescinded the contract.

Percival v Sea, 207-245; 222 NW 886

RESALE BY THE SELLER

9989 [§60] When and how resale may be made.

Buyer's rescission—seller's duty to resell—measure of damages. Where a stock buyer after purchasing cattle under contract refuses to accept them and stops payment on the check given to seller, it becomes the seller's duty to exercise reasonable care within a reasonable time to dispose of the cattle at the best market price available, and an instruction measuring the damages as the difference between the sum obtained and the contract price is correct.

Bogren v Conn., 224-1031; 278 NW 289

Rent and advances—liability under assignment of lease. A vendee who in the purchase of a business takes an assignment of the lease and agrees to pay the future accruing rental, but later abandons the property, is liable for said rentals for the time consumed by the vendor in effecting a resale of the property for and on behalf of the defaulting vendee.

Courshon Co. v Brewer, 215-885; 245 NW 354

Right to resell—reasonable time. The right of a vendor to resell the property on vendee's

account and because of vendee's abandonment of the property and refusal to pay for the property, must be exercised within a reasonable time. Three months after the original sale held reasonable under the circumstances.

Courshon Co. v Brewer, 215-885; 245 NW 354

Vendor's right to resell for vendee. A vendee who, under a contract of purchase, takes title to and possession of personal property, and later abandons said property without paying the contract price, arms the vendor, by reason of said abandonment and refusal to pay, with legal right, on notice to the vendee, to retake possession of said property within a reasonable time, for and on behalf of said vendee, and to sell the property, credit the net proceeds on the contract price, and sue vendee for the balance.

Courshon Co. v Brewer, 215-885; 245 NW 354

Agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

RESCISSION BY THE SELLER

9990 [§61] When and how the seller may rescind the sale.

Rescission of contract—material evidence. The fact that a vendee at no time offered to place the vendor in statu quo—in fact had so handled the property that he was unable so to do,—tends quite forcibly to show that there had never been a mutual rescission of the contract of purchase.

Courshon Co. v Brewer, 215-885; 245 NW 354

Rescission of contract — evidence — sufficiency. Evidence held quite conclusively to show that a contract of sale had not been rescinded.

Marshall v Greenlease-Lied, 218-597; 255 NW 666

Useless formal tenders unnecessary. A formal tender of property as a basis for the rescission of a contract is excusable when the one to whom the tender is to be made has given advance warning that the formal tender, if made, will not be accepted.

McTee & Co. v Ryder, 221-407; 265 NW 636

PART V

ACTIONS FOR BREACH OF THE CONTRACT REMEDIES OF THE SELLER

9992 [§63] Actions for the price.

Action for damages—check as measure of. Where in the sale of a business, the vendee gives a check for the full purchase price of the good will of the business, and later repudiates the entire sale except that part pertaining to said good will, the vendor may maintain an action to recover as damages the amount of such check.

Courshon Co. v Brewer, 215-885; 245 NW 354

Conditional sales—breach—rescission. The seller of an automobile, under a conditional sales contract, who, when the buyer is not in default, peremptorily repossesses himself of the car, and applies unreasonable and exorbitant repairs on the car, and refuses to redeliver possession unless the buyer agrees to pay such charges, arms the buyer with right to rescind the contract, even tho the seller had reserved the right to make necessary repairs.

Manbeck Sales Co. v Davis, 217-1141; 251 NW 61

Agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

Conditional sales—seizure of property. A vendor of goods who retains title until the purchase price is paid, and who, on default in payment, repossesses himself of the goods and sells them, may not thereupon collect the balance of the purchase price from the vendee.

McNabb v Bunting, 207-1300; 224 NW 506

Defect as defense—waiver. The buyer of an article may not predicate objections to it on the ground of a defect which, at his request, was wholly corrected.

Gibson v Miller, 215-631; 246 NW 606

Delivery prevented by buyer—instructions. The court cannot properly instruct in an action to recover for goods sold that a verdict should be for defendant if no delivery was made when, under the record, the jury might find that the defendant prevented the plaintiff from making delivery.

Gibson v Miller, 215-631; 246 NW 606

Nonpremature action. An action for the price of goods sold under a contract which provides that one-half of the purchase price is due on delivery, and the balance six months thereafter, is not premature when the goods were furnished, duly tendered to the defendant, and refused, and the action commenced some four years after said refusal.

Gibson v Miller, 215-631; 246 NW 606

Payment on condition. A vendor who has contracted for payment of an article after he has delivered and erected it at a named place may not recover the purchase price, in the absence of proof that he has complied with said conditions.

Capitol Hill Co. v Chadwick, 200-916; 205 NW 766

Property sold in furtherance of gambling. A vendor of property which is capable of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Representation or warranty—necessity to plead. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

Total breach. Proof that an article was worthless for the purpose for which purchased precludes recovery therefor.

Crouch v Remedy Co., 205-51; 217 NW 557

Wrongful repudiation of contract—splitting action. A party to a continuing, executory contract may, notwithstanding the wrongful repudiation of the contract by the other party, insist on the contract and sue and recover the matured installments to date; and such action is no bar to a subsequent action to recover henceforth for the wrongful breach of the contract.

Collier v Rawson, 202-1159; 211 NW 704

9993 [§64] Action for damages for nonacceptance of the goods.

Refusal to receive—resumption by seller of dominion over goods—effect. The seller of goods, by resuming dominion over the shipment after the buyer had unqualifiedly refused to receive it on the ground that the goods were not in accordance with the contract, does not thereby waive his rights under the contract—does not thereby waive the breach of the contract by the buyer if there was such breach; and especially is this true when the goods are bulky, valuable, and at the time, subject to railroad demurrage and other expenses.

Appel v Carr, 216-64; 246 NW 608

Nonmarketable goods — refusal to accept. The measure of damages consequent on the refusal of the vendee to accept goods which have no market value because manufactured or remodeled for the vendee for a particular purpose is the difference between the nonmarket value, if any, and the contract price, and not the profit which the vendor would have made on the deal, had it been consummated.

Percival Co. v Sea, 207-245; 222 NW 886

Lack of mutuality and consideration—agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

Offer or order—insufficient acceptance by corporation. A contract for the purchase of an article from a corporation is not established by the simple, naked showing that the purported buyer signed an order addressed to the corporation for the article, and that said order carries an acceptance signed individually by a person who was, in fact, the vice president and general manager of the corporation.

Birum-Olson v Johnson, 213-439; 239 NW 123

Unallowable directed verdict. The existence of conflicting evidence on the issue whether goods furnished were according to samples by which ordered, or whether a portion of the goods were ever ordered and were consequently properly returned, necessarily justifies the court in overruling a motion for a directed verdict for the entire sum sued for.

Central Shoe Co. v Kraft Co., 213-445; 239 NW 238

9994 [§65] When seller may rescind contract or sale.

Status quo—nonapplication of principle. The rule of law that when a party to a contract of sale rescinds the contract he must restore the status quo has no application to a case where the vendor repossesses himself of the property after default of the vendee and, under and in accordance with the terms of the contract, retains the preceding payments and betterments made on the property as liquidated damages for nonperformance of the contract, depreciation, and rental; and in such case it is immaterial that the vendor after so doing surrendered the unpaid notes and released the contract of record.

Stauffer v Motor Co., 207-1038; 221 NW 918

Conflict of testimony. Evidence reviewed, and held to present a jury question on the issue whether parties to a contract had mutually rescinded the contract.

Percival Co. v Sea, 207-245; 222 NW 886

Prohibited repudiation. A vendor who accepts and retains a partial payment for goods on the condition that the balance will be paid by the vendee when the goods are delivered may not, after a subsequent tender of the balance, repudiate the contract on the claim that the initial payment should have embraced the entire purchase price.

Daeges v Beh, 207-1063; 224 NW 80

REMEDIES OF THE BUYER

9995 [§66] Action for converting or detaining goods.

Option to resell to vendor—reasonable time. The course of dealings between a vendor and vendee of personal property may have a very material bearing on the question whether the vendee exercised, within a reasonable time, his option to demand a repurchase of the property by the vendor.

Calvert v Mason City Co., 219-963; 259 NW 452

9996 [§67] Action for failing to deliver goods.

ANALYSIS

I ACTION IN GENERAL
II DAMAGES RECOVERABLE

I ACTION IN GENERAL

Refusal of employer to sell at price stated—not excused by resulting loss. One who contracted to pay a commission to a dealer for selling goods at a certain price could not excuse his breach of the contract by refusing to sell except at a higher price, at least as to orders for goods taken before the breach, on the ground that to fulfill the contract would cause him to operate his business at a loss.

Lee v Sundberg, 227-1375; 291 NW 146

Construction of contract—termination. The oral granting, on adequate consideration, by a manufacturer to another party of the exclusive right to sell a legal article in prescribed territory so long as there is a demand for the article, and so long as such other party desires to continue such sale, is, on acceptance, a valid contract until terminated by reasonable notice.

Atlas Co. v Huffman, 217-1217; 252 NW 133

Evidence—self-serving declarations. A contract of sale fully executed and no longer in controversy may be so related to and connected with a later contract between the same parties that the correspondence attending the former may be admissible as interpreting the latter, but the offerer must not be permitted to go to the extent of showing, by his own self-serving letters, his dissatisfaction with the goods furnished to him under said first contract, and the loss he suffered thereunder.

Appel v Carr, 216-64; 246 NW 608

Evidence—unallowable conclusion and assumption. A buyer of goods who is seeking to recover back from the seller the price paid because the goods were not in accordance with the contract and who has testified on cross-examination that he rejected the goods because his buyer refused to take the goods, may not show on re-direct that his buyer refused the goods because the goods "were not up to the grade purchased".

Appel v Carr, 216-64; 246 NW 608

II DAMAGES RECOVERABLE

Buyer's right to treat contract terminated. Seller's unjustified refusal to furnish materials under a continuing contract was ground for buyer (1) to treat contract as terminated and purchase elsewhere and (2) to make counterclaim for damages in seller's action against buyer on account.

Eastman Stores, Inc. v Eckert Studio, (NOR); 231 NW 434

Net profits as damages — evidence. The measure of damages suffered by one who has been wrongfully deprived of the exclusive right to sell a specified article in prescribed territory, is the net profits or commissions, provided for or contemplated by the contract, which he would have earned had the contract been carried out. And the evidentiary basis for computing such profits may be (1) proof of the number of such articles sold in the territory up to time of trial by plaintiff's successor, and (2) the profits and commissions he would have received on such sales, less the expenses and value of time necessarily entailed on him had he made such sales.

Atlas Co. v Huffman, 217-1217; 252 NW 133

9997 [§68] Specific performance.

Cancellation by defaulting party. A contract may not be canceled by the arbitrary action of a party who is in default.

Atlas Co. v Huffman, 217-1217; 252 NW 133

9998 [§69] Remedies for breach of warranty.

Discussion. See 22 ILR 118—Recoupment for breach of warranty

ANALYSIS

I REMEDIES IN GENERAL
II ACTION FOR BREACH OF WARRANTY
III RESCISSION
IV RETURN OF GOODS AND STATUS QUO
V PLEADINGS IN RE RESCISSION
VI DAMAGES

I REMEDIES IN GENERAL

As offer of settlement. A statement by a creditor to his debtor that "You can do one of three things—pay the bill, return the merchandise, or beat the bill" held quite insufficient, in view of the record, to constitute an offer of settlement justifying the debtor in returning the goods in full settlement of the creditor's claim.

United Service v Heinen, 220-859; 263 NW 343

Duty to pay notwithstanding breach. One who buys an article of substantial value, and is precluded by his own delay from rescinding because of a breach of warranty, must pay for the article, in the absence of evidence of the damage caused by the breach of warranty.

Chariton Co. v Lester, 202-475; 210 NW 584

II ACTION FOR BREACH OF WARRANTY

Evidence of breach—sufficiency. Evidence held to demonstrate a breach of warranty on a radio.

Des M. Music v Lindquist, 214-117; 241 NW 425

Evidence—sufficiency. Evidence held insufficient to show breach of warranty of a tractor and plow.

Wetmore v Wooster, 212-1365; 237 NW 430

Failure to prove. A buyer who relies on breach of warranty and fraud must fail if he fails to prove his allegations.

Oelwein Co. v Baker, 204-66; 214 NW 595

Nonwaiver of breach by renewing note. The fact that the buyer of various goods gives his promissory note for the entire amount and renews said note after he knew that an express warranty as to one class of the goods had been breached, does not constitute a waiver of his right, when sued on the note, to counterclaim for damages consequent on such breach.

Peet Co. v Bruene, 210-131; 230 NW 327

Nonwaiver by inspection of goods. The inspection and acceptance of goods by the buyer thereof does not terminate an implied warranty of quality when the buyer immediately notifies the seller of the breach of warranty.

Roland v Markman, 207-1322; 224 NW 826

Performance of contract — acceptance of goods—estoppel. A buyer who knows that the goods received are not the kind ordered, and is given by the seller the unrestricted option to return the goods, and who thereupon proceeds to use the goods, may not, when sued for the price, plead the defect as a defense.

McDonald Co. v Morrison, 211-882; 228 NW 878

Proof of both affirmative and negative. A vendee who, in defense to an action for the purchase price of hogs, alleges that he purchased under a representation that the stock had been doubly vaccinated, and that the representation was false, has the burden to establish not only (1) the representation, but (2) the falsity thereof.

Co-operative Sales Co. v Van Der Beek, 219-974; 259 NW 586

Representation or warranty—necessity to plead. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

Scienter. In an action on warranty, it is not necessary for plaintiff to prove that defendant knew that his warranty was false.

Passcuzzi v Pierce, 208-1389; 227 NW 409

Warranty—breach—evidence. Evidence held to present a jury question on the issue whether animals were, contrary to a warranty, infected with a disease at the time they were purchased.

Passcuzzi v Pierce, 208-1389; 227 NW 409

Warranty—total breach. Proof that an article was worthless for the purpose for which purchased precludes recovery therefor.

Crouch v Remedy Co., 205-51; 217 NW 557

Warranty—insufficient proof of breach. In an action for damages consequent on the alleged breach of a warranty that certain powders would prevent clover bloat in cattle, plaintiff must establish (1) that the powders were administered to the cattle in accordance with the instructions of the seller, and (2) that thereafter the cattle died of clover bloat.

Peet Co. v Bruene, 210-131; 230 NW 327

Warranty — reports on vending machine earning power—noncompliance waived by acceptance. A seller of vending machines, who warrants their earning power and agrees to repurchase if they fail, may not in buyer's action on this warranty to recover the purchase price complain for the first time as to buyer's periodical reports not conforming to the contract, when, after being asked if they were satisfactory, he made no reply.

Henriott v Main, 225-20; 279 NW 110

III RESCISSION

Rescission—belated assertion of right. The purchase and receipt of household furnishings and the use thereof for some three years constitute an irrevocable acceptance of the goods.

Braverman v Naso, 203-1297; 214 NW 574

Rescission—damages recoverable. A vendee of material for a particular purpose may rescind for failure of the material to meet the contract terms, and may recover his reasonable expense in attempting to use the material.

Granette Prod. v Neumann, 200-572; 203 NW 935; 205 NW 205

Rescission—fatal delay. A delay of more than a year to rescind the purchase of a freshwater-pumping apparatus, with full knowledge at all times of its defects, is unreasonable per se.

Chariton Co. v Lester, 202-475; 210 NW 584

Delay in rescission—excuse. The fact that the seller of an article induces the buyer to retain it, with the assurance that he—the seller—will make it comply with the warranty, is very material on the issue whether the buyer rescinded the contract within a reasonable time.

Brennan v Laundry Co., 209-922; 229 NW 321
Van Dyck v Abramsohn, 214-87; 241 NW 461

Rescission within reasonable time—jury question—waiver. Where an Iowa seller's agent, by falsely representing that buyer would have exclusive territory, fraudulently induced a buyer in Texas to purchase vending machines and confections to be vended therein, the buyer, after discovering their falsity, waived such representations by accepting the machines and placing them in operation for about two months, but as to representations that the confections would withstand heat and humidity of Texas climate, and that a surety company bond would be filed with a certain bank, question as to whether rescission was made within reasonable time after discovery of falsity was for jury. It is buyer's duty to rescind contract within reasonable time after discovery that representations by seller are false and what is a reasonable time must be determined with reference to all the circumstances and ordinarily such question is for the jury.

Robinson v Main, 227-1195; 290 NW 539

Rescission—inability to return property. The purchaser of corporate bank stock cannot rescind when he has pledged the stock and is unable to tender it back to the seller.

Rogers v Jungkunz, 204-1119; 216 NW 705

Rescission—total failure of consideration. The sale of an automobile, the engine number of which has been defaced, altered, or tampered with, without an official certificate showing good and sufficient reasons for such change, presents a case of total failure of consideration, and no formal rescission of contract is necessary in order to recover back the price paid.

Espe v McClelland, 208-512; 226 NW 130

Rescission—waiver by unauthorized use. The buyer of a machine who substantially operates it in his business and for his own profit after thoroughly testing it and tendering it back with notice of rescission, thereby irrevocably waives the rescission once made by him.

Advance Co. v Wharton, 211-264; 233 NW 673; 77 ALR 1153

Rescission—waiver by using article. The buyer of a fur coat will not be held to waive his right to rescind for breach of an implied warranty of merchantableness because of the fact that he temporarily wore the coat once or twice after asserting such rescission.

Brandenberg v Stores, 211-1321; 235 NW 741; 77 ALR 1161

Contract limitation on remedy. It seems that the seller and buyer of goods may validly contract to the effect that the sole remedy of the buyer for a breach of warranty shall be a rescission of the contract.

Advance Co. v Wharton, 211-264; 233 NW 673; 77 ALR 1153

Corporation stock—fraud. On rescission of a contract of purchase of corporate shares of stock because of fraud which induced the purchase, an unconditional tender to the seller of the stock certificate is all-sufficient, even tho the certificate is being held as collateral security for the debt of the one who makes the rescission.

North Amer. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492

Tender—sufficiency. The buyer of an installed refrigerator performs his full legal duty, as far as rescission is concerned, by tendering an installed refrigerator at the place where the buyer received it and by keeping the tender good.

Van Dyck v Abramsohn, 214-87; 241 NW 461

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Unascertained goods—right of examination. A vendee of unexamined goods has a right to examine them when delivery is tendered, and if he discovers that the goods are not what he ordered, and that a fraud has been perpetrated on him, his prompt refusal to receive the goods, and notification to the vendor accordingly, constitute a justifiable rescission.

Hostler Co. v Stuff, 205-1341; 219 NW 481

When tender excused. The buyer of an article is not required as a condition precedent to rescinding to tender the article to the seller at the railway depot where it was received when the seller has demonstrated by his conduct and declarations that he would not receive the article if so tendered.

Hughes v Equip. Corp., 216-1000; 250 NW 154

IV RETURN OF GOODS AND STATUS QUO

Rescission—condition precedent. Rescission of a contract of sale imperatively requires a return of the status quo.

Rogers v Hale, 205-557; 218 NW 264

Tender—placing goods within jurisdiction of court unnecessary. When a buyer rescinds contract for purchase of goods, his duty to restore the status quo only requires that he tender return of the goods at place of delivery and the tender may be kept good by holding them in readiness for delivery to seller at such place on demand, it not being necessary that the goods be actually or constructively placed within the jurisdiction of the court.

Robinson v Main, 227-1195; 290 NW 539

Restoration of worthless goods unnecessary—buyer's duty to do substantial justice. On rescission of contract for purchase of vending machines and confections to be vended therein, the buyer was not obliged to return confections that had become worthless, and his failure to tender to seller a few coins found in the vending machines did not constitute such a failure to restore the status quo as would prevent him from recovering purchase price, the buyer being required only to do substantial justice to the seller.

Robinson v Main, 227-1195; 290 NW 539

V PLEADINGS IN RE RESCISSION

Express and implied—pleading. An express written warranty does not bar a noninconsistent implied warranty. So held in the sale of an automobile for a particular purpose.

Wise v Central Co., 207-939; 223 NW 862

Estoppel to assert partial rescission. A buyer of goods who, in resisting payment, rests his defense solely on a total rescission of the contract of purchase, may not, after the close of the evidence, interpose a plea of partial rescission even tho the terms of the contract be severable.

Butler Co. v Elliott, 211-1068; 233 NW 669

Finality of election of remedy. A plaintiff who pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, may, upon discovering his inability to prove the rescission, amend his pleadings and pray for damages caused by the fraud. (Note that the reverse of this proposition presents a different rule.)

Reinertson v Struthers, 201-1186; 207 NW 247

Rescission — proof required. The vendee of goods who, in an action for the purchase price, defends on a plea of rescission must show that the rescission was mutual, expressly or impliedly.

Cent. Motors v Clancy, 206-1090; 221 NW 774

Rescission—jury question. In an action by the vendee of an article to recover payments made, a jury question on the issue of rescission of the contract is made by evidence tending to show that the vendor made repeated but unsuccessful efforts to repair and adjust the article so it would work to vendee's satisfaction, and that thereupon vendee (1) refused to accept it, (2) returned it to the vendor, (3) received from the vendor the note executed when the purchase was made, and (4) was told by the vendor that he would order a new article for vendee.

Trester v Swan, 216-465; 249 NW 168

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

VI DAMAGES

Failure to rescind — damages. The buyer of an article who fails to rescind within a

VI DAMAGES—concluded

reasonable time for breach of warranty will be deemed to have elected to retain the article and to rely on damages for relief.

Brennan v Laundry Co., 209-922; 229 NW 321

Giving note for goods—estoppel. A vendee who executes and delivers his promissory note for goods purchased does not thereby estop himself from the recovery of damages consequent on feeding the goods to his stock.

Crouch v Remedy Co., 205-51; 217 NW 557

PART VI

INTERPRETATION

10000 [§71] Variation of implied obligations.

Negativing implied warranty. An implied warranty that a rebuilt tractor is reasonably fit for the particular purpose for which it is purchased, which purpose is specifically stated to the seller at and before the sale is consummated, cannot exist when the written contract of sale contains the clause: "No warranty on second-hand or rebuilt tractors."

Dollen v Tractor Co., 214-774; 241 NW 307

Option to resell to vendor—reasonable time. The course of dealings between a vendor and vendee of personal property may have a very material bearing on the question whether the vendee exercised, within a reasonable time, his option to demand a repurchase of the property by the vendor.

Calvert v Inv. Co., 219-963; 259 NW 452

10002 [§73] Rule for cases not provided for herein.

ANALYSIS

I FRAUD IN GENERAL
II RESCISSION IN GENERAL
III GROUNDS FOR RESCISSION
IV NONGROUNDS FOR RESCISSION
V TIME OF RESCISSION
VI ELECTION OF REMEDIES
VII DAMAGES

I FRAUD IN GENERAL

Fraud pleas—status in court. In fraud actions, courts are reluctant to permit a cheater to profit by his own wrongdoing, tho at the same time courts are constrained by another consideration—that it is for the public welfare not to afford parties to written agreements such ready avenues of escape from their obligations that the purpose of lastingly recording such obligations in writing would be quite indifferently attained—the aim being to minimize both evils without accentuating either of them.

Griffiths v Brooks, 227-966; 289 NW 715

Fraud — cancellation and return of goods — burden of proof. A seller who seeks the cancellation and rescission of a contract of sale for fraud must prove that the buyer, when he bought the goods, did not intend to pay for them.

Vacuum Oil v Carstens, 211-1129; 231 NW 380

Deception constituting fraud—duty to investigate. Under clause in bonds entitling buyers to statement of securities, it is no excuse for failing to request the same, to say that statement from fraud perpetrators if furnished would not be true.

McGrath v Dougherty, 224-216; 275 NW 466

Transfer of note. Evidence held insufficient to show that transfer of a promissory note was fraudulent.

Hoyer v Jordan, 208-1256; 224 NW 574

Fraud—scienter as essential element. A demand for damages based on alleged fraud cannot be sustained without proof of scienter, or its equivalent, whether the action be at law or in equity.

Appleby v Kurtz, 212-657; 237 NW 312

Property sold in furtherance of gambling. A vendor of property which is capable of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Remedy of buyer. A buyer who relies on breach of warranty and fraud must fail if he fails to prove his allegations.

Oelwein Co. v Baker, 204-66; 214 NW 595

Sale by known nonowner. A vendee of property takes nothing by his conveyance when he knows who is the actual owner of the property, and that his vendor is simply in possession of the property as manager.

Kollmann v Kollmann, 204-950; 216 NW 77

II RESCISSION IN GENERAL

Rescission—useless formal tenders unnecessary. A formal tender of property as a basis for the rescission of a contract is excusable when the one to whom the tender is to be made has given advance warning that the formal tender, if made, will not be accepted.

McTee & Co. v Ryder, 221-407; 265 NW 636

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the

buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Tender—placing goods within jurisdiction of court unnecessary. When a buyer rescinds contract for purchase of goods, his duty to restore the status quo only requires that he tender return of the goods at place of delivery and the tender may be kept good by holding them in readiness for delivery to seller at such place on demand, it not being necessary that the goods be actually or constructively placed within the jurisdiction of the court.

Robinson v Main, 227-1195; 290 NW 539

Restoration of worthless goods unnecessary —buyer's duty to do substantial justice. On rescission of contract for purchase of vending machines and confections to be vended therein, the buyer was not obliged to return confections that had become worthless, and his failure to tender to seller a few coins found in the vending machines did not constitute such a failure to restore the status quo as would prevent him from recovering purchase price, the buyer being required only to do substantial justice to the seller.

Robinson v Main, 227-1195; 290 NW 539

III GROUNDS FOR RESCISSION

Fraud-induced sales. Principle reaffirmed that a fraud-induced sale of goods may be rescinded by the seller and the goods recovered.

Endicott Johnson v Shapiro, 200-843; 205 NW 511

Guardianship — disaffirmance of contract. The guardian of an incompetent may disaffirm the contract of his ward without going into equity, and recover the amount paid by the ward on the contract.

Ayres v Nopoulos, 204-881; 216 NW 258

Disaffirmance — sufficiency. Where a party has not received the property purchased and paid for, and the status quo has not been disturbed, a notice to the adverse party of disaffirmance and rescission is all-sufficient.

Ayres v Nopoulos, 204-881; 216 NW 258

IV NONGROUNDS FOR RESCISSION

Inability to restore status quo. The assignee or transferee of a mortgage-secured promissory note who forecloses the mortgage, buys in the property for the full amount of the judgment, and takes a deed, thereby necessarily releases the maker of the note from all personal liability. Manifestly, such assignee may not thereafter, in an action against his assignor, rescind the contract of purchase on the ground of fraud in the purchase, because he has disabled himself from putting the assignor in statu quo.

Iowa Co. v Bank, 200-952; 205 NW 744

Rescission—loss of right. The purchaser of a mortgage-secured promissory note may not rescind on the ground of fraudulent representations as to the value of the security when, with full knowledge of the fraud, he forecloses the mortgage, bids in the property for the full amount of the judgment, and later takes a sheriff's deed to the premises.

Iowa Co. v Bank, 200-952; 205 NW 744

V TIME OF RESCISSION

Reasonable time for rescission—jury question. Whether the right to rescind a contract of sale for fraud was exercised within a reasonable time is, ordinarily, a jury question.

Blecher v Schmidt, 211-1063; 235 NW 34

Reasonable time—jury question—waiver. Where an Iowa seller's agent, by falsely representing that buyer would have exclusive territory, fraudulently induced a buyer in Texas to purchase vending machines and confections to be vended therein, the buyer, after discovering their falsity, waived such representations by accepting the machines and placing them in operation for about two months, but as to representations that the confections would withstand heat and humidity of Texas climate, and that a surety company bond would be filed with a certain bank, question as to whether rescission was made within reasonable time after discovery of falsity was for jury. It is buyer's duty to rescind contract within reasonable time after discovery that representations by seller are false and what is a reasonable time must be determined with reference to all the circumstances and ordinarily such question is for the jury.

Robinson v Main, 227-1195; 290 NW 539

VI ELECTION OF REMEDIES

Bankruptcy—nondischargeable debt. A tenant who fraudulently causes the consumption and disposal of property belonging to his landlord as rent, thereby matures a cause of action against himself for the "malicious injury" to the said property—a claim not dischargeable in bankruptcy.

Russell v Peters, 219-708; 259 NW 197

Cases not covered by uniform act. The Uniform Sales Act is not a substitute for the entire law merchant existing before its adoption on the subject of sales.

Courshon Co. v Brewer, 215-885; 245 NW 354

Corn storage and sale—time indefinite—directing verdict. A contract for storage and sale of corn, "seller's option as to time", being indefinite as to what constitutes a reasonable time, the trial court's exclusion of defendants'

VI ELECTION OF REMEDIES—concluded

proffered evidence on this point and direction of a verdict for the plaintiff was error.

Andreas & Son v Hempy, 224-561; 276 NW 791

Defect as defense—waiver. The buyer of an article may not predicate objections to it on the ground of a defect which, at his request, was wholly corrected.

Gibson v Miller, 215-631; 246 NW 606

Irrevocable waiver of action for damages. One who, with full knowledge that he has been fraudulently inveigled into signing an option contract for the sale of his property, elects not to rescind but to affirm and perform the contract, and does perform at a time when the contract is wholly executory and without consideration, thereby irrevocably waives, as a matter of law, any and all right to sue the wrongdoer for damages.

Ankeney v Brenton, 214-357; 228 NW 71

Option to resell to vendor—reasonable time. The course of dealings between a vendor and vendee of personal property may have a very material bearing on the question whether the vendee exercised, within a reasonable time, his option to demand a repurchase of the property by the vendor.

Calvert v Mason City Co., 219-963; 259 NW 452

Rescission for fraud—general denial—effect. Where plaintiff alleges rescission of a contract of sale because of defendant's fraud and seeks to recover the money paid, a general denial does not raise the issue that plaintiff after discovering the fraud elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Right to change remedy. A plaintiff who pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, may, upon discovering his inability to prove the rescission, amend his pleadings and pray for damages caused by the fraud. (Note that the reverse of this proposition presents a different rule.)

Reinertson v Struthers, 201-1186; 207 NW 247

Specific performance — cashing conditional down-payment check—mistake. In an action for specific performance of a land-purchase contract, the act of an agent having power to contract in allowing a down-payment check to be cashed when it bears a notation, of which he is aware, that it is not to be cashed until and unless the contract is accepted, furnishes support for a finding in equity that the contract was accepted, even tho the agent later claims that the check was cashed by mistake.

Hotz v Equitable, 224-552; 276 NW 413

VII DAMAGES

Defendants not fraud perpetrators—directing verdict. In an action against the incorporators of an investment company for damages for fraud in the sale of bonds, a directed verdict in favor of the incorporators was proper when the evidence, other than the outlawed printed representations on the back of the bonds, showed the fraud, if any, was committed by a bank trustee of the securities.

McGrath v Dougherty, 224-216; 275 NW 466

Fraud and negligence—damages—recovery. Instructions reviewed, and held to correctly state the conditions under which recovery could be had for damages consequent on the feeding of a so-called hog remedy to hogs.

Crouch v Remedy Co., 205-51; 217 NW 557

10004 [§75] Provisions not applicable to mortgages.

Qualified indorsement — liability. The indorsee of a mortgage-secured note is not entitled to a personal judgment against the indorser for the amount due on the note when such indorsee is holding the note (1) under an indorsement "without recourse", and (2) under an agreement by the indorser to repurchase the note in case of nonpayment by the maker at maturity, and when, after the indorser refuses to repurchase, the indorsee continues to treat the note and mortgage as his own property, and sues in foreclosure as such owner.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Rescission—loss of right. The purchaser of a mortgage-secured promissory note may not rescind on the ground of fraudulent representations as to the value of the security when, with full knowledge of the fraud, he forecloses the mortgage, bids in the property for the full amount of the judgment, and later takes a sheriff's deed to the premises.

Iowa Tr. Co. v Bank, 200-952; 205 NW 744

10005 [§76] Definitions.

Pre-existing debt is not value. Where a car was sold on a conditional sales contract which was not recorded, and the purchaser later gave a chattel mortgage in payment of a pre-existing debt evidenced by a demand note, there being no extension of time or other new consideration for the mortgage, the pre-existing debt did not constitute value to entitle the mortgage to priority over the conditional sales contract.

Hughes v Wessell, 226-811; 285 NW 200

Consideration for chattel mortgage—credit on debt—extension of time. A vendor of a house whose vendee had not completed the payments on the contract of purchase gave valuable consideration for two mortgages on

an automobile owned by the vendee by taking the mortgages in return for payments advanced on the contract, by paying cash to the chattel mortgagee, and by extending the time on the payments for the house.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Value of realty bequest determined as of date of testator's death. Where, prior to his death, testator had given land of the value of $15,600 to four of his five children and directed his executors to purchase, for a daughter who had rejected partial distribution before his death, good Iowa land of the value of $15,600, the will, which was clear and definite as to the intention of testator, spoke as of date of testator's death, and the value of $15,600 fixed for land to be purchased for daughter was required to be determined as of the date of testator's death.

In re Holdorf, 227-977; 289 NW 756

Valuation of realty—evidence. In an equity action brought by trustee in bankruptcy to set aside an attachment lien on bankrupt's property, where judgment creditor complains of the evidence establishing the valuation in order to determine debtor's insolvency, and where creditor relies on a valuation of $4,500 offered for the property several years previous, but which offer had not been subsequently made by anyone, the reasonable finding, in view of all the evidence, is that the fair value of such property did not exceed $2,600.

Matthews v Engineering Co., 228- ; 292 NW 64

Valuation of accounts. The fair valuation of accounts is that amount which, with reasonable diligence, can be realized from their collection within a reasonable time, and the amount as shown on the face of ordinary retail business accounts is not usually their fair value, tho of course accounts may be such that their face value, as a matter of fact, is their fair value.

Matthews v Engineering Co., 228- ; 292 NW 64

Valuation of business assets—evidence. In an equity action by trustee in bankruptcy to set aside an attachment lien wherein the attaching creditor urges the insufficient showing of the debtor's insolvency, the evidence of the trustee as to fair valuation of the personal assets of a lumber company was sufficient to sustain the finding of the court as to valuation. Since the record stipulated the appraisal found by two competent lumbermen, acquainted with such values, substantiated the value placed thereon by the trustee, and, as the trustee was not bound by any one witness' testimony, it was the function of the court to consider all the admissible evidence.

Matthews v Engineering Co., 228- ; 292 NW 64

CHAPTER 436

SALES IN BULK

10008 Inventory—creditors—notice.

Discussion. See 20 ILR 815—Iowa Bulk Sales Act

Bulk sales act—scope. The bulk sales act is for the protection of all creditors of the seller, not of any particular class of creditors.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Nonapplicability of statute. This chapter has no application to a sale of a partnership interest to a copartner.

Peterson Co. v Freeburn, 204-644; 215 NW 746

Insufficient list of creditors. This chapter is not substantially complied with when the purported "list of creditors" simply states, under oath, (1) that the goods sold "have been paid for, and (2) that there are no creditors existing at the time of sale who could, by any process of law, obtain any interest in said goods"; and it is quite immaterial that the purchaser, in good faith, orally questioned the seller in regard to his creditors.

Hronik v Warty, 205-1111; 217 NW 449

Noncompliance with act—duty of creditor. A creditor who learns that neither his debtor nor his debtor's vendee has complied with this chapter must, within a reasonable time thereafter, determine his course of action, and by some appropriate legal procedure announce such determination; but he is not necessarily limited to seven days.

Andrew v Rivers, 207-343; 223 NW 102

Credit due purchaser. One, who purchases a stock of merchandise without compliance with the bulk sales act, will, when called upon to account for the property, be given full credit for the amount paid by him in discharging a prior and existing lien on the property, and a proportional credit for the amount paid by him in discharging unsecured claims of creditors of the seller.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Receiver — waiver of valuable rights. A chancery receiver may not waive a valuable right without the authority of the court, nor may an agent of a statutory receiver (e. g., the superintendent of banking) waive such val-

uable right without the authority of such statutory receiver. So held under this chapter.

Andrew v Rivers, 207-343; 223 NW 102

Waiver of illegality in sale. A creditor knowing that his debtor's stock of merchandise has been sold in bulk without notice to him, irrevocably waives all illegality in the sale by accepting, three months later, the debtor's note in full of his account—a note which enlarged the previous obligation of the debtor on the account.

Schramm & Co. v Shope, 200-760; 205 NW 350

See Andrew v Rivers, 207-343; 223 NW 102

10011 Purchaser deemed a receiver.

Second transferee as receiver. One, who receives title to a stock of merchandise, through the medium of a purported transfer from the former owner to a third party, with full knowledge that neither himself nor said other party had complied with the bulk sales act, will be held to hold said stock as receiver for the creditors of said former owner.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Violation—election by creditor. In case of a sale in disregard of this chapter a creditor waives his right to hold the bona fide vendee for value as a receiver by failing to assert such right with due diligence.

Lietchfield Co. v Heinicke, 200-958; 205 NW 774

CHAPTER 437

CHATTEL MORTGAGES AND CONDITIONAL SALES OF PERSONAL PROPERTY

Atty. Gen. Opinions. See '32 AG Op 204; '34 AG Op 588; '38 AG Op 45

GENERAL PROVISIONS

10013 Exempt property—mortgage by husband and wife—exception.

Belated waiver of exemptions. The invalidity of a lease (unsigned by the wife of the lessee), insofar as it attempts to grant a lien for rent on the exempt property of the lessee, is not cured by the act of the wife in waiving her exemptions after the commencement of an action to determine the rights of existing creditors.

Brownlee v Masterson, 215-993; 247 NW 481

Necessity for proof. A chattel mortgagee who pleads that the mortgage covers exempt property and that the mortgage is void because his wife did not join therein, can be given no relief in the absence of proof of the facts upon which exemption can be based.

Citizens Bank v Scott, 217-584; 250 NW 626

Right of spouse to sell. The statutory provision which, in effect, provides that if a debtor "absconds", the property exempt to him shall be exempt to his wife and children, does not deprive the debtor, who is about to be sentenced to the penitentiary, of his legal right validly to sell, in good faith, his exempt property without the consent of his wife.

Brayman v Brayman, 215-1183; 247 NW 621

Bankruptcy — effect on existing liens. The discharge in bankruptcy of the mortgagor of exempt chattels does not discharge the lien of such mortgage.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Enforcement after contest in bankruptcy. The holder of a chattel mortgage on exempt property who appears in bankruptcy proceedings against the mortgagor and unsuccessfully contests the asserted right of the mortgagor to have said property set off to him—the mortgagor—as exempt, is not thereby estopped to later and after the mortgagor has been discharged, enforce the lien of said mortgagor.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Federal jurisdiction. The jurisdiction of the federal bankruptcy court over the exempt property of the bankrupt extends no further than to enter an order setting off such property to the bankrupt. Irrespective of the proceedings in such court, the right to the exempt property, as between the owner and a mortgagee thereof, must be determined in the state court.

Eckhardt v Hess, 200-1308; 206 NW 291

Invalidity because of failure of consideration. A chattel mortgage on the exempt property of a husband and wife is void when the wife is in no manner indebted to the mortgagee, and concurs in and signs said mortgage with her husband solely because of the explicit promise of the mortgagee that he would advance certain funds to the mortgagors for use in their business, which promise the mortgagee subsequently wholly failed to perform.

Whittier Bank v Smith, 214-171; 241 NW 481

Nonexecution by wife — effect. A chattel mortgage on the exempt personal property of a husband and wife, not concurred in and signed by both of said parties, is absolutely void as to such exempt property.

Nat. Bank v Chapman, 212-561; 234 NW 198
Brownlee v Masterson, 215-993; 247 NW 481

Purchase of car—wife not joining—payment by employer—replevin. Where defendant was unable to meet payments on car, and employer, under an agreement with defendant, made delinquent and future payments to the finance company and took an assignment of the note and chattel mortgage, the employer was entitled to the possession of the car as against contentions that intervenor (defendant's wife) did not join in the execution of the chattel mortgage, that the assignment to employer did not create any right or lien sufficient to systain writ of replevin, and that the payments made by the employer constituted a satisfaction and payment and not a purchase of the chattel mortgage.

Simpson v McConnell, 228- ; 291 NW 862

Signing chattel mortgage—effect. The mere signing of a chattel mortgage in a partnership name does not, in and of itself, estop the signer from denying that the mortgaged property is partnership property.

Citizens Bank v Scott, 217-584; 250 NW 626

Unrecorded mortgage lease — priority. A lien on the exempt personal property of a tenant by virtue of the terms of an unrecorded lease, signed by both husband and wife, is subordinate in right to a subsequently executed and recorded chattel mortgage on the property, even tho the mortgagee takes his mortgage with knowledge that the mortgagor was a tenant, but without knowledge that the lease granted the landlord a lien on the tenant's exempt property.

Brenton v Bream, 202-575; 210 NW 756
Brownlee v Masterson, 215-993; 247 NW 481

10014 Right to possession—title.

Right to execution levy on mortgaged property. See under §11682, Vol I

Conversion by mortgagee. Where a chattel mortgage stipulates that the mortgagee may take possession of the mortgaged chattels "and sell the same", the mortgagee is guilty of conversion when he seizes the property and holds it in his possession for some four years without sale.

Wetmore v Wooster, 212-1365; 237 NW 430

Description omitting livestock increase or additions—effect. A chattel mortgage description not specifying future increase or additions to livestock will not be amplified by the court to include the same under a clause mortgaging "all personal property owned * * * and kept * * * in their possession", which clause speaks from the execution date of the mortgage.

Central B. & T. v Squires & Co., 225-416; 280 NW 594

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

Stipulation for possession. A stipulation in a chattel mortgage to the effect that the mortgagee, may, on default, take possession of the mortgaged chattels "and sell the same", excludes the mortgagee from seizing the property for any other purpose except to sell it.

Wetmore v Wooster, 212-1365; 237 NW 430

10015 Sales or mortgages—recording.

Discussion. See 20 ILR 616—Protection, purchasers and creditors; 20 ILR 800—Remedies

Atty. Gen. Opinions. See '25-26 AG Op 78, 188, 396; '30 AG Op 70; '32 AG Op 223; '34 AG Op 293; '38 AG Op 578

ANALYSIS

I NECESSITY OF RECORDING AND INSTRUMENTS TO BE RECORDED
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XI LOSS OF RIGHTS UNDER RECORDING LAW THROUGH FRAUD
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(d) DELAY IN RECORDING
(e) CIRCUMSTANCES TENDING TO SHOW FRAUD

Conditional sales generally. See under §10016
Real property—rights of purchasers and creditors. See under §§10105, 12389

I NECESSITY OF RECORDING AND INSTRUMENTS TO BE RECORDED

Discussion. See 14 ILR 329—Conditional sales distinguished

"Actual possession" defined. A mortgagor must be deemed in actual possession of the mortgaged chattels when he has them on his own farm and in the actual custody of his own servant, even tho he—the mortgagor—does not reside upon said premises.

Raybourn v Creger, 204-961; 216 NW 272

Belated delivery. One who buys personal property from a seller who is not then or afterwards in actual possession of the property cannot be affected by a chattel mortgage

I NECESSITY OF RECORDING AND INSTRUMENTS TO BE RECORDED—concl'd'd

subsequently acknowledged and subsequently delivered by the seller. The naked execution of a chattel mortgage confers no right on the one named therein as mortgagee.

Meredith v Beadle, 211-390; 233 NW 512

Chattel mortgage clause in real estate mortgage — when lien effective. The lien on the rents and profits created by a chattel mortgage clause in a real estate mortgage is effective from the date of the execution of the mortgage, and not from the date when petition for foreclosure and for the appointment of a receiver is filed.

Equitable v Brown, 220-585; 262 NW 124

Consideration for chattel mortgage—credit on debt—extension of time. A vendor of a house whose vendee had not completed the payments on the contract of purchase gave valuable consideration for two mortgages on an automobile owned by the vendee by taking the mortgages in return for payments advanced on the contract, by paying cash to the chattel mortgagee, and by extending the time on the payments for the house.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Chattel mortgage to secure partner's debt. A chattel mortgage by a partner on his undivided chattel interest in the partnership to secure his individual debt, becomes absolute when it is made to appear that the partnership is free of debt.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Mortgage on partner's interest. A recorded chattel mortgage executed by an incoming partner to an outgoing partner on the one-half interest in the partnership. property and on future additions thereto, and representing the purchase price of said interest (all with the consent of the old partner who remains in the business), is superior in right to the subsequently contracted debts of the new partnership.

In re Cutler & Horgen, 204-739; 212 NW 573; 54 ALR 527

Priority of creditor's claim over taxes. A chattel mortgagee may not have his claim reduced by taxes which have never been a lien on the mortgaged chattels superior to that of the mortgage.

In re Cutler, 213-983; 234 NW 238; 238 NW 80

See Linn County v Steele, 223-864; 273 NW 926

Lien on exempt property. A lease of land, unsigned by the lessee's wife, is a nullity insofar as it attempts to give the lessor a lien for rent on the exempt property of the lessee. Unnecessary to say that such a lease is of no validity against a subsequent valid chattel mortgage on the same property.

Brownlee v Masterson, 215-993; 247 NW 481

Delivery—intent of parties. An effective delivery of an instrument is made to the grantee by the naked execution of the instrument and by simply leaving said instrument at the place of execution, if such was the actual intent of the parties.

Beery v Glynn, 214-635; 243 NW 365

Limitation of actions—failure to index. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by §11007, C., '35.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

Unrecorded conditional sales contract. An automobile which the state seeks to forfeit because such vehicle had been employed in the unlawful transportation of intoxicating liquors may not be returned by the court to one who had sold the vehicle under a conditional sales contract which he had not recorded prior to the seizure, such contract having been taken, manifestly, as security only.

State v Automobile, 208-794; 226 NW 48

Pledge and mortgage distinguished. The deposit of collateral securities with a trustee, in order to secure the payment of bonds issued by the depositor, constitutes a pledge, and not a mortgage.

Central Bk. v Sec. Co., 206-75; 218 NW 622

Receiver's nonright to question mortgage. The receiver of an insolvent corporation has no such standing as will enable him to advantage himself of technical defects in a chattel mortgage executed by the corporation when solvent.

Silver v Farms, Inc., 209-856; 227 NW 97

Validity of unrecorded conditional sale. Altho a conditional sale contract on an automobile was not properly recorded, it was valid and enforceable between the parties and all others except purchasers for value and without notice.

Hughes v Wessell, 226-811; 285 NW 200

II CHANGE OF POSSESSION

Conditional sales contract — defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to

trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

Conditional sales—motor vehicles—ownership. An instruction was erroneous in stating that a conditional sales contract, containing a clause that title remained in seller, left the ownership of an automobile in the seller, because the buyer became the substantial and beneficial owner under the contract. Section 4964, C., '35, stating that title to motor vehicle shall not be deemed to pass until transferee has received and written his name on the registration certificate, is not construed to make seller liable as owner of the vehicle.

Craddock v Bickelhaupt, 227-202; 288 NW 109

III DESCRIPTION OF PROPERTY

Discussion. See 12 ILR 421—Description of goods

Description of property—rule of sufficiency. The description of property covered by a chattel mortgage is sufficient if the description is such as to enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property. Description considered and held sufficient for the purposes of the case at bar.

Producers Assn. v Morrell & Co., 220-948; 263 NW 242

Description of property—standard of sufficiency. Principle reaffirmed that to render a chattel mortgage valid as to third parties the description of the property embraced in the mortgage must be such as to direct the mind to evidence whereby the precise thing conveyed may be ascertained with absolute certainty.

Pierre v Pierre, 210-1304; 232 NW 633

Chattel mortgage clause in real estate mortgage—sufficiency. A complete chattel mortgage results from inserting, in a real estate mortgage following the description of the land conveyed, the words, "And, also, the rents, issues, use and profits of said land and the crops raised thereon, from now until the debt secured thereby shall be paid", coupled with a habendum clause to the effect that said property shall be held by the mortgagee forever.

Capital Bank v Riser, 215-680; 246 NW 763

Purchase of immature mortgaged animals. When pigs are covered by a chattel mortgage, and a nonfraudulent purchaser with knowledge of the mortgage matures said pigs into hogs, the holder of the mortgage may enforce against the proceeds of a sale of the hogs a trust for the full value of the hogs, not exceeding, of course, the amount of the mortgage debt.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Synonymous terms for "rent". A sale and conveyance in a real estate mortgage of "all the rents, issues, uses, profits and income therefrom and all crops raised thereon" as security additional to that afforded by the land, and in connection with a receivership clause, simply constitutes a chattel mortgage on "all the rents" (in whatever represented), said various terms in such case being deemed synonymous.

Equitable v Brown, 220-585; 262 NW 124

Unallowable blanket clause. The filing for record or recording of a chattel mortgage works no constructive notice to a third party of a mortgage on chattels which are sought to be embraced in the general, unlimited, blanket clause, "all other personal property which either of us own or may own so long as this mortgage may remain unpaid".

Reinig v Johnson, 202-1366; 212 NW 59

IV CONSTRUCTION OF DESCRIPTIONS

Description of property—fatal indefiniteness. A description in a chattel mortgage of "about 40 stock hogs" is insufficient to enable a searcher to identify the mortgaged property with absolute certainty, even tho the location of the hogs is shown, and consequently no constructive notice is imparted by the record of the mortgage.

Panama Bk. v De Cou, 209-450; 228 NW 35

Erroneous description—effect. An erroneous statement in a chattel mortgage as to the location of the property is not necessarily fatal. The description may be such, notwithstanding the erroneous statement, as to generate a jury question as to whether the property could have been identified from the entire description contained in the mortgage.

Wertheimer v Shultice, 202-1140; 211 NW 568

Description—fatal error in location. A chattel mortgage on property in this state, which gives the permanent location of the property at a point outside the state, imparts no constructive notice to a subsequent purchaser.

Slimmer v Lawler, 205-813; 218 NW 516

Description — jury question — instructions. When the sufficiency of a description of mortgaged chattels to impart constructive notice becomes a jury question, it is quite inaccurate for the court to instruct that "the recording gives notice of what its terms contained—but nothing more than its terms contained".

Wertheimer v Parsons, 209-1241; 229 NW 829

Description of property—nonjury question. A jury must not be permitted to pass on the sufficiency of a description of mortgaged chattels which is sufficient as a matter of law. So held where the description revealed the particular kind of cattle, their age, average

weight, the particular brand thereon, the particular farm where kept, and the particular possessor.

Wertheimer v Parsons, 209-1241; 229 NW 829

V PURCHASERS AND CREDITORS

(a) IN GENERAL

Discussion. See 17 ILR 223—Antecedent debt

Actual notice without actual knowledge. A mortgagee will be deemed to have had "actual notice" of a prior unrecorded mortgage (or of a prior mortgage so defectively acknowledged that the record thereof imparts no constructive notice) when the facts and circumstances attending and surrounding the taking of the second mortgage are such as to lead him as a reasonably prudent person to make inquiries, and when such inquiries if prosecuted with ordinary diligence would have revealed the former mortgage.

Mill Owners Ins. v Goff, 210-1188; 232 NW 504

Amount in controversy—chattel mortgage under $100, judgment for $330. Where in an action to foreclose a conditional sale contract on an automobile, the court granted priority of a lien of less than $100, and gave a judgment for $330 to the seller, an appeal therein involved more than $100 and was not subject to dismissal, altho no certificate had been filed by the trial court.

Hughes v Wessell, 226-811; 285 NW 200

Authorized sale waives lien. The purchaser of mortgaged chattels is not liable to the mortgagee, as for a conversion, when the mortgagee has waived his lien by expressly or impliedly consenting to a sale by the mortgagor.

Producers Assn. v Morrell & Co., 220-948; 263 NW 242

Conditional sale lien—superiority of tax lien. Taxes assessed (§§7205, 7206, C., '35) after execution of a conditional sale contract on a stock of goods and other personalty are superior to the lien of such contract inasmuch as (1) historically these sections were contained in a single section; (2) one section already carries a construction creating a lien paramount to all other liens; (3) necessarily security of the revenue is an incident of sovereignty; and (4) the above sections contain language which by necessarily implied legislative intent creates liens continuing and paramount to all other liens.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

See In re Cutler, 213-983; 234 NW 238; 238 NW 80

Conversion. A senior chattel mortgagee who, without foreclosure, takes possession of the mortgaged property and sells it at private sale must account to a junior mortgagee for such part of the proceeds as he applies to unsecured claims due him.

Money v Bank, 202-106; 209 NW 275

Trial—limiting damages—issue not raised in trial. Where an action in replevin by one claiming an automobile under a conditional sales contract was brought against a chattel mortgagee who had given some cash and extended credit in return for his mortgage, the plaintiff, having permitted the trial to be concluded on the issue of possession without raising any other issue or requesting instructions on any other issue, could not complain that the mortgagee's recovery should have been limited to the amount of actual cash given for the mortgage.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Forfeiture of real estate contract—rights of chattel mortgagee. An equitable owner of land who, while holding the land under a contract of purchase which, in case of forfeiture, unconditionally forfeits all improvements thereon to the legal title holder, erects a dwelling house on the land with materials sold for such purpose, and on individual credit, may not, after he has forfeited or surrendered his contract of purchase, and while he is in possession of the land solely as a tenant, execute a chattel mortgage on the house to the seller of the materials, as security for the past-due purchase price of the materials, and thereby invest the mortgagee with any right against the owner of the realty.

O'Bryon v Weatherly, 201-190; 206 NW 828

Impounding proceeds. While a chattel mortgagee may not follow the proceeds of wrongfully sold mortgaged property and enforce a lien thereon, yet the court will recognize an arrangement under which such proceeds are impounded in the hands of a third party and the right thereto litigated.

Slimmer v Lawler, 205-813; 218 NW 516

Mortgage on rents — exclusive power of mortgagee to collect. A chattel mortgage on the rents and income of real estate, tho combined in a real estate mortgage as dual security for the same debt, vests the mortgagee with full and exclusive power to collect said rents and income.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Sub-purchaser as subsequent purchaser. The third purchaser of mortgaged chattels does not establish the status of "subsequent purchaser", within the meaning of the recording statute, unless he shows that his immediate vendor purchased of the mortgagor.

Wertheimer v Shultice, 202-1140; 211 NW 568

Subsequent purchaser — assignee of mortgage. The good-faith assignee for value of a chattel mortgage and of the promissory note secured thereby, without actual or constructive notice of a prior existing mortgage, is a "subsequent purchaser", within the meaning of the recordation statutes, and therefore protected against such prior mortgage.

Slimmer v Lawler, 205-813; 218 NW 516

Wrongful application of trust funds. The principle that the lien of a chattel mortgage does not follow the proceeds of a sale of the mortgaged property has no application to an action to recover wrongfully dissipated or applied trust funds.

In re Aasheim, 212-1300; 236 NW 49

Impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds. So held as to rent due a landlord.

Stegemann v Bendixen, 219-1190; 260 NW 14

Wrongful release of conditionally canceled mortgage—effect. Where, in rescission proceedings, a decree in effect provided that a promissory note and recorded real estate mortgage given for the purchase price of goods should be null and void from and after the return of the goods by the mortgagor to the mortgagee, and where the goods were never so returned, and where the mortgage was wrongfully released of record by a court-appointed commissioner, the mortgage may be foreclosed against a purchaser of the land who innocently bought in reliance on the wrongful release. This is true because, while both the mortgagee and the subsequent purchaser were innocent, yet the purchaser had the means of knowing whether the goods had been returned to the mortgagee,—the very act which, under the decree, would work a nullification of the mortgage and note and justify a release.

Moore v Crawford, 210-632; 231 NW 363

(b) WITHOUT NOTICE—PRIORITY

Agreed public sale—lien on proceeds. An agreement between chattel mortgagees and the chattel mortgagor that the mortgaged property shall be sold at public sale and the proceeds turned over to the mortgagees in the order of their liens, is valid and enforceable in equity. In other words equity, in order to enforce the agreement, will impress a trust on said proceeds in favor of said mortgagees, even tho the occasion so to do arises in a proceeding at law, to wit, a garnishment.

Jasper Co. Bank v Klauenberg, 218-578; 255 NW 884

Antenuptial contract — preference — "existing creditors". On the issue whether a widow has the right in the settlement of her husband's estate to be paid, prior to all third and fourth class claimants, a sum provided for her in an unrecorded, antenuptial contract, said third and fourth class claimants will be deemed "existing creditors" within the meaning of this section, there being no evidence that said third and fourth class claimants had any knowledge of said antenuptial contract until after the death of the husband.

In re Shepherd, 220-12; 261 NW 35

Assigned rent note—priority over chattel mortgage. A mortgagor may, in the absence of fraud, deed his land to another who, as owner, may lease for an ensuing term within the period of redemption and assign to a bank his lease and rent note, which assignment made prior to any foreclosure action will be superior to the lien of the chattel mortgage clause and entitle the bank to the rent as against the receiver in the foreclosure action claiming under such chattel mortgage clause.

Equitable v Hastings, 223-808; 273 NW 908

Assignments for benefit of creditors—recording not necessary. Where the interest of a beneficiary of a testamentary trust is assigned for the benefit of creditors, such assignment need not be recorded to be valid against existing creditors without notice.

Friedmeyer v Lynch, 226-251; 284 NW 160

Date of recording immaterial. A chattel mortgage which is taken without actual knowledge of an existing unrecorded chattel mortgage is prior in right to said first mortgage, even tho said first mortgage is first recorded.

Iowa Bk. v Bradfield, 204-488; 215 NW 602

Equitable estoppel. A chattel mortgage on property which the mortgagor does not own cannot prevail against the claim of the actual owner, even tho the latter has permitted the mortgagor to treat the property as his own, when the mortgagee takes such mortgage as additional security to a pre-existing debt, and without parting with anything of value, and without in any manner changing his position to his detriment.

Peoples Bk. v McCarthy, 206-28; 217 NW 453

Mortgage given for pre-existing debt—no priority over unrecorded conditional sale. Where a car was sold on a conditional sales contract which was not recorded, and the purchaser later gave a chattel mortgage in pay-

V PURCHASERS AND CREDITORS—continued

(b) WITHOUT NOTICE—PRIORITY—continued

ment of a pre-existing debt evidenced by a demand note, there being no extension of time or other new consideration for the mortgage, the pre-existing debt did not constitute value to entitle the mortgage to priority over the conditional sales contract.

Hughes v Wessell, 226-811; 285 NW 200

Priority — pledge for pre-existing debt. A pledge of rents contained in a real estate mortgage and taken as security for a pre-existing indebtedness is not entitled to priority over chattel mortgage clauses in prior real estate mortgages for value on the same land, even tho said prior mortgages are not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Priority of unrecorded mortgage. An unrecorded chattel mortgage has priority over a subsequent bill of sale based on a pre-existing consideration.

National Bk. v Chapman, 212-561; 234 NW 198

Notice only issue—unnecessary instructions. Where the plaintiff claimed the right to possession of an automobile under a conditional sales contract and the defendant claimed under two chattel mortgages acquired subsequent to the conditional sale but recorded first, instructions which submitted only the issue of whether the chattel mortgagee had notice of the prior conditional sale were not erroneous in failing to define "subsequent purchaser" as used in recording statutes and in failing to require the jury to determine whether the defendant gave value so as to constitute himself a "subsequent purchaser".

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Remedies of creditors — evidence — sufficiency. Proof, (1) that the vendee of personal property did not record or file his bill of sale as required by law, (2) that there was no change of possession following the bill of sale, and (3) that the vendee actively aided the vendor in disposing of the property as the property of the vendor, furnishes ample justification for the holding that the rights of a good-faith and innocent attaching creditor of the vendor were superior to the asserted rights of the vendee.

Beno Co. v Perrin, 221-716; 266 NW 539

Sale—right to proceeds. A chattel mortgagee who consents to a sale of the mortgaged property on condition that the proceeds be paid to him acquires a right to such proceeds superior to the rights of the garnishing creditor of the mortgagor.

Scurry v Quaker Co., 201-1171; 208 NW 860

Sale—right to proceeds. While the lien of a chattel mortgage does not follow the proceeds of a sale of the mortgaged property, yet the mortgagee may in equity impress a trust on such proceeds when in the hands of one who had full knowledge of the mortgage and of the source of said proceeds.

Jones v Bank, 200-1186; 206 NW 107

Sale—right to proceeds. The sale and converting into money of incumbered chattels under agreement between the lienholder, the debtor, and a third party, under which the third party agrees to collect the proceeds and apply the same on the existing lien, create in the lienholder a right to said proceeds which is superior to garnishments of said third party by the creditors of the debtor.

Korner v McKirgan, 202-515; 210 NW 562

Subsequent purchaser — burden of proof. A mortgagee in an action for the conversion of the mortgaged chattels need only allege the existence of his unsatisfied mortgage. The defendant must allege and prove not only (1) that he is a subsequent purchaser, but (2) that he became such purchaser without notice of the plaintiff's mortgage.

Loranz & Co. v Smith, 204-35; 214 NW 525; 53 ALR 662

Manbeck Motor v Garside, 208-656; 226 NW9

Subsequent mortgages securing pre-existing indebtedness. An unrecorded chattel mortgage (or one improperly recorded because fatally defective in its acknowledgment) is nevertheless prior in right to a subsequent chattel mortgage given in satisfaction of or as security for a pre-existing indebtedness.

Chariton Bk. v Taylor, 210-1153; 232 NW 487

Unacknowledged subsequent mortgage—priority. A chattel mortgage, even tho the acknowledgment thereto is wholly void—in legal effect, no acknowledgment at all—is superior to a prior chattel mortgage of which the subsequent mortgagee had no actual or constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

Unrecorded mortgage—lease. A provision in a valid lease of land that the lessor shall have a lien for rent on the exempt property of the lessee constitutes a chattel mortgage, and must be recorded or filed in order to have priority over a subsequent good-faith mortgagee of said exempt property, without notice.

Brownlee v Masterson, 215-993; 247 NW 481

Chattel mortgage on rents—priority. The right to the appointment of a receiver under a receivership clause in a real estate mortgage, and the right to have the rents accruing during the redemption year applied to discharge a foreclosure deficiency, are superior to a chattel mortgage executed subsequent to the real estate mortgage on crop to be grown by the mortgagor on said land during said

year, said crop not being yet in existence when the real estate foreclosure was commenced.

Louis v Hansen, 205-1216; 219 NW 523
Phelps v Taggart, 207-164; 219 NW 528
Virtue v Teget, 209-157; 227 NW 635

Chattel mortgage as part of real estate mortgage—lien and priority. A clause (inserted in a mortgage of real estate) which sells and conveys to the mortgagee "all the rents" of the mortgaged land as security for the payment of the debt in question, constitutes a legal chattel mortgage which, inter alia, (1) gives to the mortgagee, as against the mortgagor and others having actual knowledge thereof, a first lien on all subsequently executed leases of said land and on the promissory notes which represent the rental under said leases, and (2) gives to the mortgagee a first lien on such leases and notes against all assignees thereof provided that when the assignees became such the real estate mortgage had been duly recorded as such, and the record thereof had been duly indexed in the chattel-mortgage index book. (No plea in this case of holdership in due course.)

Equitable v Brown, 220-585; 262 NW 124

Rent—unrecorded contract lien. An unrecorded lease giving the landlord a lien on exempt property kept on the premises is not effective against a purchaser of the exempt property without notice of the written lease.

Sparks v Flesher, 217-1086; 252 NW 529

Chattel mortgage clause—failure to index—effect. A recorded real estate mortgage containing a mortgage on the rents of the mortgaged real estate, but not indexed in the chattel mortgage index, is, as regards the rents, subject to a subsequent like mortgage taken by one for value and without notice of the former chattel mortgage clause, even tho the latter mortgage is not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Chattel mortgage clause—lien—when acquired. Under a combined real estate and chattel mortgage of the rents, the mortgagee, as against parties not subsequent purchasers for value and without notice, acquires a lien from the date of the execution of the mortgage.

Soehren v Hein, 214-1060; 243 NW 330

Lien on crops pending foreclosure. The remedial provisions of a mortgage, including a pledge of the rents and profits, are such a part of the subject-matter of a foreclosure action that indexing in lis pendens imparts to a purchaser of the mortgagor-landlord's share of the corn constructive notice of the mortgagee's lien on the corn.

Sutton v Schnack, 224-251; 275 NW 870

Mortgage on crop-share rent superior to garnishment of tenant. The lien of a chattel mortgage on a landlord's share of crops reserved as rent, but in the possession of the tenant, is, as to matured crops actually set aside to the landlord or otherwise actually determined as belonging to the landlord, superior to a subsequent garnishment of the tenant by a judgment creditor of the landlord.

Pierre v Pierre, 210-1304; 232 NW 633

Chattel mortgage on rents—priority. A chattel mortgage on a landlord's crop-rental share of growing crops is prior in right to the claim of a receiver appointed in real estate mortgage foreclosure proceedings instituted subsequent to the execution of the chattel mortgage, even tho the real estate mortgage was executed prior to the chattel mortgage, and pledged the rents to the payment of the real estate mortgage debt.

Hansen v Sheffer, 205-1191; 219 NW 529

Pledge of rents and subsequent chattel mortgage on crops—priority. A pledge, in a duly recorded real estate mortgage, of the rents of the mortgaged premises is superior to a subsequently executed and duly recorded chattel mortgage on crops which the chattel mortgagee was obligated to grow on said premises, but which crops were not in existence when the real estate mortgagee instituted his foreclosure proceedings.

Bunting v Berns, 212-1127; 237 NW 220

Priority over rent accruing under tenancy at will. A recorded chattel mortgage on the property of a tenant used on the demised premises under a lease for years, attains priority, immediately upon the termination of the lease, over the landlord's claim for future rent accruing under a succeeding tenancy at will of the same premises; likewise a recorded chattel mortgage executed by a tenant at will, on property used on the leased premises, attains priority immediately upon the expiration of 30 days after the execution and recording of the mortgage, over the landlord's claim for future accruing rent.

Nickle v Mann et al., 211-906; 232 NW 722

Rent notes subject to prior chattel mortgage. The receiver of an insolvent takes the land of said insolvent subject to the lien of a prior unsatisfied, combined real estate and chattel mortgage covering both the said real estate and the "rents, issues, use and profits" thereof. It necessarily follows that notes taken by the receiver for the rent of said mortgaged premises for the year embracing foreclosure proceedings and the redemption period are subject to said chattel mortgage lien.

Capital Bank v Riser, 215-680; 246 NW 763

Rents—adjudication against chattel mortgage. On the issue, in real estate mortgage foreclosure, whether an outstanding lease be-

V PURCHASERS AND CREDITORS—concluded

(b) WITHOUT NOTICE—PRIORITY—concluded

tween the owner and his tenant (parties to the action) was superior to the mortgagee's right to a receiver for said premises and for the rents thereof, an unappealed decree which orders the appointment of such receiver works an eviction of said tenant and the consequent nullification of a chattel mortgage by the landlord on his share of the crop rent under said lease, it appearing that the real estate mortgagee had no notice or knowledge of such chattel mortgage until after the entry of his decree of foreclosure.

Keenan v Jordan, 204-1338; 217 NW 248

Rents—conflicting claims. The lien on matured crops, acquired by virtue of the commencement of foreclosure proceedings on a second mortgage carrying simply a pledge of the rents, is inferior to the lien acquired under the first mortgage, which is a duly recorded, combined real estate and chattel mortgage on the land and on the rents and crops thereof. This is true because the lien under the first mortgage necessarily attaches ahead of the lien of the second mortgage. Likewise the lien acquired by such second mortgage on unmatured rents is inferior to the lien of the first mortgage because, while both liens attach at the same instant of time, the first mortgage lien is first in time of origin.

Equitable v Read, 215-700; 246 NW 779

(c) UNLAWFUL PREFERENCES

"Rent"—taxes included—notice to creditors—recording. The term "rent", within statutes giving a landlord a lien for rent, cannot be construed to include taxes in absence of a clear intention of parties to that effect expressed in lease, and so a lessor was held not entitled to preferential lien against assets of bankrupt assignee of lease for unpaid taxes, interest, and penalties, on ground that chattel mortgage clause of lease, which was recorded in deed and chattel mortgage records, was sufficient to protect lessor's lien, the assignment of lease being recorded only in deed record and not in chattel mortgage records. Such filing did not give notice to creditors, as required by recording statutes.

Lamoine Mott Estate v Neiman, 77 F 2d, 744

Bankruptcy—limitation on evidence. Where a chattel mortgage was executed within four months preceding the filing of bankruptcy proceedings against the mortgagor, and where, later, the mortgaged property was sold by the mortgagor and a new mortgage was executed by the purchaser on the same property to the former mortgagee, and where the original mortgage was thereupon released, and where the two transactions were attacked by the trustee in bankruptcy as an unlawful preference, the evidence must be confined to the conditions existing on the date of the first transaction.

Stark v White, 215-899; 245 NW 337

VI AFTER-ACQUIRED PROPERTY AND PROPERTY NOT IN BEING

Discussion. See 10 ILB 224—Mortgages on "potential property"

After-acquired stock. Even tho a chattel mortgage on a stock of goods does not provide that it shall cover after-acquired stock, it must be deemed to cover the existing stock, in the absence of some definite evidence as to what part of the original stock had been sold.

Smith Bros. v Goldberg, 204-816; 215 NW 956

Chattel clause in real estate mortgage. A real estate mortgage which, in addition to the land, conveys the crops raised on the land "from now until the debt secured is paid" is also a chattel mortgage to the extent of the crops.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Future grown crops—death of mortgagor—effect. A chattel mortgage on crops to be grown in the future (combined in a real estate mortgage as additional security) does not become a lien on crops grown subsequent to the death of the mortgagor.

Fawcett Co. v Rullestad, 218-654; 253 NW 131; 94 ALR 800

Landlord's share of crops to be grown. A chattel mortgage executed by a landlord on all grain, feed, and hay "to be grown" on definitely and accurately described lands which were then under lease for the ensuing year, is a valid incumbrance on the landlord's share of the crops reserved as rent under said lease.

Pierre v Pierre, 210-1304; 232 NW 633

Lien—increase of animals. The lien of a chattel mortgage (prior in time to a lease) on animals and on the increase thereof is superior to the landlord's lien as to all increase born prior to the actual execution of the lease, and inferior to the landlord's lien on all increase born subsequent to the actual execution of the lease and prior to its termination. An agreement between the landlord and tenant that the lease shall be effective from a date prior to its actual execution is not binding on the mortgagee.

Wunder v Schram, 217-920; 251 NW 762

Lien—priority on increase of mortgaged stock. A landlord's lien on the increase of stock after the stock is taken upon the leased premises is superior to the lien of a chattel mortgage executed on the stock and on its prospective increase, and prior to the commencement of the rent term.

Corydon Bank v Scott, 217-1227; 252 NW 536

"Increase of livestock"—subsequent exception—effect. A chattel mortgage which, in the granting clause, enumerates certain livestock "together with all increase of livestock of every description now on said farm" must be held to cover such increase even tho it is exempt from execution, notwithstanding the fact that, after enumerating yet other classes of property as covered by the mortgage, the said granting clause terminates with the subclause "Also all personal property of every description, except that covered by legal exemptions".

Chambers v Bank & Trust, 218-63; 254 NW 309

Mortgaged and unmortgaged goods. When a chattel mortgage covered the crops grown on a designated part of a farm only, the unmortgaged crops are properly segregated by placing them in a separate crib.

Peoples Bk. v McCarthy, 206-28; 217 NW 453

VII FIXTURES

Movable farm structures. Movable hog houses and feed bunks on a farm will not constitute fixtures when to so declare would be contrary to the actual expressed intent of the person—a tenant—who placed them on the farm, and contrary to the intent as reflected in the nature of the articles, their use, and the mode of attachment to the realty.

Speer v Donald, 201-569; 207 NW 581

VIII WAIVER OF MORTGAGE LIEN

Mortgagee authorizing sale of property by mortgagor—waives lien. The purchaser of mortgaged chattels is not liable to the mortgagee, as for a conversion, when the mortgagee has waived his lien by expressly or impliedly consenting to a sale by the mortgagor.

Producers Livestock Assn. v Morrell & Co., 220-948; 263 NW 242

IX ACKNOWLEDGMENT AND RECORDING

Acknowledgment—disqualification of officer. A chattel mortgage which is acknowledged before a notary public who is the mortgagee is not recordable, and if recorded, the record imparts no constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

Recording—law governing. A chattel mortgage executed and delivered in a foreign state on property there situated will be governed by the recording laws of this state when the parties mutually contemplate the immediate transfer of the property to this state to the domicile of the mortgagor, under a lien good under the laws of this state.

Wertheimer v Shultice, 202-1140; 211 NW 568

Recording after death of mortgagor—effect. The recording of a chattel mortgage after the death of an insolvent mortgagor does not, as between the mortgagee and other creditors of the estate, give the mortgage any preferential standing over what it had prior to the recording.

Raybourn v Creger, 204-961; 216 NW 272

Recording after death of mortgagor. The rule of law that a valid chattel mortgage recorded after the death of the insolvent mortgagor is void as to the creditors of the deceased can have no application where the mortgaged chattels are delivered to the mortgagee prior to the death of the mortgagor, or where the mortgagor is solvent. Evidence held to present jury question on both insolvency and change of possession.

Beery v Glynn, 214-635; 243 NW 365

Real estate mortgage pledging rents. A real estate mortgage which pledges the rents and profits of the land need not be recorded as a chattel mortgage.

Union Ins. v Eggers, 212-1355; 237 NW 240

Limitation of actions—failure to index. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by §11007, C., '35.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

Chattel mortgage not properly acknowledged or recorded—secured claim denied. Where a chattel mortgage on restaurant fixtures, given to secure purchase price, was never properly acknowledged, and hence not properly recorded as required by statute, mortgagee was not entitled to secured claim against trustee in bankruptcy of purchaser.

Albert Pick v Wilson, 19 F 2d, 18

Conditional sales contract — defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

Inference of execution. The fact that a mortgage carries a notarial certificate of acknowledgment by the parties purporting to execute it is persuasive evidence that said

IX ACKNOWLEDGMENT AND RECORDING—concluded

parties did, in fact, execute it—that their signatures are genuine.

Greenland v Abben, 218-255; 254 NW 830

Mandamus to compel recording.
Weyrauch v Johnson, 201-1197; 208 NW 706

"Rent"—taxes included—notice to creditors—recording. The term "rent", within statutes giving a landlord a lien for rent, cannot be construed to include taxes in absence of a clear intention of parties to that effect expressed in lease, and so a lessor was held not entitled to preferential lien against assets of bankrupt assignee of lease for unpaid taxes, interest, and penalties, on ground that chattel mortgage clause of lease, which was recorded in deed and chattel mortgage records, was sufficient to protect lessor's lien, the assignment of lease being recorded only in deed record and not in chattel mortgage records. Such filing did not give notice to creditors, as required by recording statutes.

Lamoine Mott Estate v Neiman, 77 F 2d, 744

Unacknowledged subsequent mortgage—priority. A chattel mortgage, even tho the acknowledgment thereto is wholly void—in legal effect, no acknowledgment at all—is superior to a prior chattel mortgage of which the subsequent mortgagee had no actual or constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

X FOREIGN MORTGAGES

Foreign mortgage—priority. A chattel mortgage validly executed and recorded in and according to the laws of a foreign state where the mortgagor then resides, and where the property is then situated, retains its priority over a subsequent mortgage executed and recorded in this state after the mortgagor has removed to this state with said property; and this is true even tho the foreign mortgagee knew that the property had been removed to this state.

First N. Bk. v Ripley, 204-590; 215 NW 647
See Wertheimer v Shultice, 202-1140; 211 NW 568

Forfeiture—conveyance—unrecorded claim—effect. In proceedings for the forfeiture of a conveyance which has been employed in the unlawful transportation of intoxicating liquors, a claimant of the conveyance under an unrecorded sales contract may not have the conveyance returned to him, and it is quite immaterial that such contract was executed in a foreign state in which claimant's lien would be valid against subsequent purchasers without recording.

State v Kelsey, 206-356; 220 NW 324
State v Jennings, 206-361; 220 NW 327

XI LOSS OF RIGHTS UNDER RECORDING LAW THROUGH FRAUD

(a) FRAUD IN FACT

Foreclosure—transfer to court. The right of a mortgagee to foreclose a chattel mortgage by notice and sale (1) under the statute (Ch 523, C., '31), or (2) under the terms of the mortgage itself, may not be transferred to the district court on the application of the mortgagor on the ground of fraud and want of consideration in obtaining the mortgage, when an action of replevin involving the mortgaged chattels, and pending against the mortgagor furnishes him ample opportunity to test the mortgagee's right to foreclose by interposing said plea of fraud and want of consideration.

McDonald v Johnston, 218-1352; 256 NW 676

Remedies of creditors and purchasers—evidence—sufficiency. Evidence reviewed, and held to show that a chattel mortgage was fraudulent.

Northwestern Bk. v Muilenburg, 209-1223; 229 NW 813

(b) RETENTION OF POSSESSION BY MORTGAGOR

Actual possession defined. A mortgagor must be deemed in actual possession of the mortgaged chattels when he has them on his own farm and in the actual custody of his own servant, even tho he (the mortgagor) does not reside upon said premises.

Raybourn v Creger, 204-961; 216 NW 272

(c) RIGHT TO SELL IN ORDINARY COURSE OF TRADE

Sale of property—right to proceeds. A chattel mortgagee who consents to a sale of the mortgaged property on condition that the proceeds be paid to him acquires a right to such proceeds superior to the rights of the garnishing creditor of the mortgagor.

Scurry v Quaker Oats Co., 201-1171; 208 NW 860

Impounding proceeds of wrongful sale. While a chattel mortgagee may not follow the proceeds of wrongfully sold mortgaged property and enforce a lien thereon, yet the court will recognize an arrangement under which such proceeds are impounded in the hands of a third party and the right thereto litigated.

Slimmer v Lawler, 205-813; 218 NW 516

(d) DELAY IN RECORDING

Withholding from record—effect. Creditors who seek to avoid a chattel mortgage because it has been withheld from record must show that such withholding was for the purpose of enabling the debtor to obtain credit.

Baxter v Baxter, 204-1321; 217 NW 231

(e) CIRCUMSTANCES TENDING TO SHOW FRAUD

Corporate officer's lien denied. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Exline Fuel Co., 224-466; 276 NW 41

Evidence — fraudulent transfer. Evidence held to establish a fraudulent transfer by a bankrupt.

Schnurr v Miller, 211-439; 233 NW 699

10016 Conditional sales.

Discussion. See 20 ILR 616—Protection—purchasers and creditors; 20 ILR 800—Remedies

Atty. Gen. Opinions. See '25-26 AG Op 341, 397; '30 AG Op 70; '32 AG Op 183; '34 AG Op 293; '38 AG Op 578

ANALYSIS

I THE COMMON LAW AND THE STATUTE
II WHAT CONSTITUTES A CONDITIONAL SALE
III CREDITORS AND PURCHASERS WITHOUT NOTICE
IV VALIDITY OF SALES NOT IN COMPLIANCE WITH STATUTE
V EXECUTION OF CONTRACT, RECORDING, AND REMEDIES

Chattel mortgages generally. See under §10015

I THE COMMON LAW AND THE STATUTE

Discussion. See 5 ILB 129—Uniform conditional sales act; 12 ILR 235—Insurance of interests

Conditional sale vendor not liable for negligence of vendee. The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

II WHAT CONSTITUTES A CONDITIONAL SALE

Discussion. See 14 ILR 329—Chattel mortgages distinguished

Definition. A contract of sale of personal property in which the seller reserves and retains title until the purchase price is fully paid constitutes a conditional sales contract and not a chattel mortgage.

Northern Fin. v Meinhardt, 209-895; 226 NW 168

Stull v Davidson, 211-239; 233 NW 114

Ownership depending on condition—statute applicable. Under a contract for sale of automatic sprinkler system where the title or ownership is made to depend on a condition, it comes within this section, making such contracts invalid against creditors, and where seller by way of counterclaim to buyer's action to avoid a mechanic's lien for the same property, elected to recover the purchase price, such seller made an irrevocable exercise of his option and neither the fact of filing such action nor filing the notice of lis pendens was a notice of lien as against the trustee for bondholders whose bonds were secured by a mortgage on all equipment of the corporation filed subsequent to such action. However, the action was a notice of an election to recover purchase price which waived any right to title, but was not such notice as was required by this section.

Fire Protection Co. v Hawkeye Co., 8 F 2d, 810

Bailment (?) or conditional sale (?). A so-called "trust receipt" for goods delivered constitutes a conditional sale contract when accompanied, as a part of the same transaction, by an unconditional promise to pay for the goods.

General Motors v Whiteley, 217-998; 252 NW 779

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency, or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease-Lied Motors v Sadler, 216-302; 249 NW 383

Conditional sales—elements. When a truck was sold under a written agreement reserving title in the seller for the purpose of security to be divested on the payment of the final installment on a note given for the purchase price, the vendee was clearly obligated by a promise to pay for the truck, so it was a conditional sale contract rather than a bailment or lease.

Hansen v Kuhn, 226-794; 285 NW 249

II WHAT CONSTITUTES A CONDITIONAL SALE—concluded

Contract covering future sales. A conditional sale contract covering specific goods may legally provide that all future purchases of goods by vendee shall be controlled by said contract.

Davidson Co. v Francis, 214-1317; 243 NW 333

Right to sell in ordinary course of business—effect. A conditional sale contract with proviso that the vendee may sell in the ordinary course of business, remains and continues as a conditional sale contract as to all unsold goods; especially is this true when the contract provides that the vendee shall hold the proceeds of goods sold for the benefit of the vendor.

Internat. Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Ownership in vendee. When a motor vehicle is sold under a conditional sales contract, altho the seller retains legal title for the purpose of security, the ownership of the car passes to the buyer.

Hansen v Kuhn, 226-794; 285 NW 249

Replevin of automobile conditionally sold under "trust receipt". Trust receipt for automobile delivered by a finance company was in effect conditional sale when accompanied by promissory note and agreement to return the automobile on demand. Held, in a replevin action the finance company sustained its burden to prove its right to immediate possession by a showing of default in payment, which gave the right to possession.

General Motors v Koch, 225-897; 281 NW 728

III CREDITORS AND PURCHASERS WITHOUT NOTICE

Innocent subsequent purchaser. Principle reaffirmed that the right of a vendor under a sale on condition that the vendee pay the purchase price is subordinate to the rights of a subsequent purchaser without notice in good faith from the vendee.

Hart v Wood, 202-58; 209 NW 430

Purchase without notice—effecting payment. Full payment for an article, bought in good faith, and for value and without notice of an existing conditional sales contract thereon, is effected by the act of the vendee in delivering to the vendor his negotiable check on actual funds in a foreign bank for the purchase price, and by the act of the vendor-payee in immediately negotiating the check to his bank as a general deposit, even tho the deposit slip in the latter transaction provided that the receiving bank took the check for collection only. It follows that the vendee is under no obligation to stop payment on the check issued by him because he learned of the conditional sale contract after said deposit and before his drawee-bank had paid the check.

General Motors v Whiteley, 217-998; 252 NW 779

Mortgage given for pre-existing debt—no priority over unrecorded conditional sale. Where a car was sold on a conditional sales contract which was not recorded, and the purchaser later gave a chattel mortgage in payment of a pre-existing debt evidenced by a demand note, there being no extension of time or other new consideration for the mortgage, the pre-existing debt did not constitute value to entitle the mortgage to priority over the conditional sales contract.

Hughes v Wessell, 226-811; 285 NW 200

Acknowledgment—form and contents—failure of statutory requirements—not constructive notice. Under statute requiring that, in order to give constructive notice, conditional sales contracts be acknowledged in the same manner as chattel mortgages, a certificate of acknowledgment on a conditional sales contract, stating merely that person making acknowledgment was personally known to notary and that person making acknowledgment said he signed it voluntarily, held defective, because notary did not therein identify the person making the acknowledgment as signer of contract acknowledged. Hence contract was invalid as against creditors of bankrupt conditional buyer.

In re Elliott, 72 F 2d, 300

Notice and means of knowledge — instructions—adequacy. Instructions defining "notice" and "means of knowledge" and concretely applying such definitions to the evidence, reviewed, and held adequate without further elaboration.

General Motors v Whiteley, 217-998; 252 NW 779

Notice only issue—unnecessary instructions. Where the plaintiff claimed the right to possession of an automobile under a conditional sales contract and the defendant claimed under two chattel mortgages acquired subsequent to the conditional sale but recorded first, instructions which submitted only the issue of whether the chattel mortgagee had notice of the prior conditional sale were not erroneous in failing to define "subsequent purchaser" as used in recording statutes and in failing to require the jury to determine whether the defendant gave value so as to constitute himself a "subsequent purchaser".

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Failure to index. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority

through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by §11007 (4), C., '35.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

False representation—law of foreign state. A representation to the effect that, when a good-faith purchaser of property acquired it, a conditional sale contract was already of record in a foreign state in conformity with the laws thereof, is a representation of fact, and, if false, will sustain a plea of fraud in the execution of notes by said purchaser in the good-faith reliance on such representation, even tho such purchaser makes no examination of the laws of the foreign state.

Baker v Bockelman, 208-254; 225 NW 411

Nonwaiver of rights. A vendor who sells an article under the conditions (1) that the title shall not pass to vendee until the purchase-money note is paid in full, and (2) that the vendor may at any time repossess himself of the article and sell the same and hold the vendee for a deficiency, does not, as to a purchaser with notice of said conditional sale, waive or relinquish any right possessed by him under such conditional sale by simply taking judgment on the purchase-money note.

Murray v McDonald, 203-418; 212 NW 711; 56 ALR 233

Public service vehicles—tax—nonliability of vehicle. An automobile truck purchased under an ordinary conditional sale contract, and operated by a motor vehicle carrier as such under a certificate of authority issued by the board of railroad commissioners, is not subject to levy for the payment of the statutory motor vehicle carrier tax under a tax warrant issued by the commissioners after the vendor had repossessed himself of said truck for default in payment of the purchase price.

Universal Co. v Mamminga, 214-1135; 243 NW 513

Wrongful conveyance by agent. An agent in possession of chattels, with power "to sell" and to account immediately to the principal, may not, in payment of his pre-existing personal debt, transfer the property to a third party, even tho such possession is under a contract which is in the nature of a conditional sale, said third party making no claim that he did not have notice of the contract.

Ohio Co. v Schneider, 202-938; 211 NW 248

IV VALIDITY OF SALES NOT IN COMPLIANCE WITH STATUTE

Conditional sale contract valid against bankruptcy trustee tho not acknowledged as per statute. Where conditional sale contract provided that machinery and equipment should remain the property of the seller until contract was completely performed by buyer, title remained in seller, so that, on buyer's filing of petition for reorganization under the Bankruptcy Act, the property did not, under Iowa law, pass to trustee in bankruptcy, notwithstanding that contract was not acknowledged in accordance with Iowa laws.

In re Pointer Brewing Co., 105 F 2d, 478

V EXECUTION OF CONTRACT, RECORDING, AND REMEDIES

Acknowledgment — dual purpose. The sole purpose of a certificate of acknowledgment of a conditional sale contract is (1) to prove the execution of the instrument, and (2) to render the instrument legally recordable.

Atlas Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Surplus acknowledgment. When a conditional sale contract is validly acknowledged by the vendor, an acknowledgment by the vendee may be deemed surplusage.

Atlas Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

False certificate—proximate cause. A willfully false certificate by a notary public as to the acknowledgment by the vendee of the execution of a forged conditional sale contract, is not the proximate cause of the damage suffered by one who purchases the forged contract and the forged promissory note accompanying it.

Atlas Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Conditional sales contract in foreign state —priority. The lien of a garage keeper on an automobile for storage in this state is subject to the superior right of the vendor of said vehicle, or his assignee, under a conditional sales contract executed, delivered and recorded solely in a foreign state at the place of sale, said vehicle having been removed to this state without the knowledge or consent of the vendor.

Northern Fin. v Meinhardt, 209-895; 226 NW 168

Validity against trustee in bankruptcy. An ordinary conditional sale contract, covering present and future purchases, is enforceable against the vendee's assignee for the benefit

V EXECUTION OF CONTRACT, RECORDING, AND REMEDIES—continued

of creditors, and against the vendee's trustee in bankruptcy who has never had possession of the property; and this is true irrespective (1) of the recording or filing of the contract, and (2) of the fact that the contract imperfectly describes the goods.

Internat. Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Remedy of trustee in bankruptcy. Where property sold under a conditional sale contract is replevined by the vendor and thereafter bankruptcy proceedings are instituted against the vendee, the trustee in bankruptcy necessarily has notice of the rights and claims of the vendor, and occupies, as to such property, the legal position of a judgment creditor holding an execution duly returned unsatisfied.

Internat. Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Validity of unrecorded conditional sale. Altho a conditional sale contract on an automobile was not properly recorded, it was valid and enforceable between the parties and all others except purchasers for value and without notice.

Hughes v Wessell, 226-811; 285 NW 200

Unrecorded contract—election of remedy by seller—third party's rights. Under a contract for sale of automatic sprinkler system where the title or ownership is made to depend on a condition, it comes within this section making such contracts invalid against creditors, and where seller by way of counterclaim to buyer's action to avoid a mechanic's lien for the same property, elected to recover the purchase price, such seller made an irrevocable exercise of his option and neither the fact of filing such action nor filing the notice of lis pendens was a notice of lien as against the trustee for bondholders whose bonds were secured by a mortgage on all equipment of the corporation filed subsequent to such action. However, the action was a notice of an election to recover purchase price which waived any right to title, but was not such notice as was required by this section.

Fire Protection Co. v Hawkeye, 8 F 2d, 810

Foreclosure. A conditional sales contract which provides that, on default, the vendor may seize the property and sell at public or private sale and credit the vendee with the net proceeds may be foreclosed by judicial proceedings.

Cent. Motors v Clancy, 206-1090; 221 NW 774

Right to foreclose. A conditional sale contract which retains title in the vendor, but which binds the vendee to pay the entire price, and provides for foreclosure in case of default of payment, arms the vendor in case of such default to proceed in equity for the foreclosure of his lien.

Jensen v Kissick, 204-756; 215 NW 962

Foreclosure—required credit on judgment. Where a vendor under a conditional sale contract elects to declare the entire debt due and to foreclose, and to hold the vendee for the deficiency judgment, the vendor must (under the contract in question) credit on the judgment the net amount received on the foreclosure sale, notwithstanding he was compelled to expend a substantial sum in buying in the property at tax sale in order to protect his lien.

Wis. Chair v Bluechel, 216-717; 246 NW 817

Unallowable foreclosure. In an action to foreclose a conditional sales contract on a specifically described article, foreclosure may not be decreed on another and different article, but of the same general nature, in the absence of allegation and proof that the latter article had been mutually substituted for the former.

Des M. Music v Lindquist, 214-117; 241 NW 425

Action for contract possession works no rescission. The vendor in a conditional sale contract by instituting replevin for the possession of the article, as provided by the contract in case of the vendee's default, manifests a clear intent to stand on the contract, and not to rescind it. It follows that the refusal of the court to submit to the jury the issue of rescission, and return of purchase price, is proper. (Analogous holding, 202-1128.)

Schmoller Piano v Smith, 204-661; 215 NW 628

Rescission. The seller of an automobile, under a conditional sales contract, who, when the buyer is not in default, peremptorily repossesses himself of the car, and applies unreasonable and exorbitant repairs on the car, and refuses to redeliver possession unless the buyer agrees to pay such charges, arms the buyer with right to rescind the contract, even tho the seller had reserved the right to make necessary repairs.

Manbeck Sales Co. v Davis, 217-1141; 251 NW 61

Right of forfeiture—effect. Tho the vendor in a conditional contract of sale has retained the right to forfeit the contract for nonpayment and to resume absolute ownership, yet, so long as he has not done so, his assignment of the contract invests the transferee with no greater right than the vendor had under the contract.

Soodhalter v Coal Co., 203-688; 213 NW 213

Right to remove fixture. A dealer who, under an unrecorded conditional sale contract, permanently installs for the vendee of real estate a furnace in the house situated thereon,

may not legally remove said furnace, as against the vendor of the real estate who did not authorize or know of the installation, and who has sold under a contract which he has caused to be forfeited in accordance with the terms thereof.

Holland Co. v Pope, 204-737; 215 NW 943

Removal against mortgagee. A steam boiler and a bake oven so erected on mortgaged real estate that they become fixtures, in lieu of former articles of the same kind, cannot be legally removed, even tho sold under a contract providing for retention of title in the vendor until paid for, when such removal would materially diminish the security of the said mortgagee.

Comly v Lehmann, 218-644; 253 NW 501

Concealment by vendee under conditional sale—demand necessary. The state, in a prosecution for larceny based solely on the charge that the vendee in a conditional bill of sale "willfully and with intent to defraud concealed the property", must, in order to create, under §13037-c1, C., '31 [§13037.1, C., '39], prima facie evidence of such concealment, establish the making of a demand by the vendor on the vendee that the latter pay for the property or produce and return it, and that the latter failed to comply with said demand.

State v Delevie, 219-1317; 260 NW 737

Forcible repossession of property. That part of a conditional sale contract which provides that the vendor, in case of default under the contract, may repossess himself of the property "forcibly and without process of law" is void because violative of public policy.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA(NS) 203

Seizure of property—collection of purchase price. A vendor of goods who retains title until the purchase price is paid, and who, on default in payment, repossesses himself of the goods and sells them, may not thereupon collect the balance of the purchase price of the vendee.

McNabb v Bunting, 207-1300; 224 NW 506

Absence of annexation or connection of fixtures—effect. An oil tank buried entirely in the parking of a public street and covered with cement, and a pump connected with said tank and bolted into said cement, tho wholly used in connection with the operation of an automobile service garage on a lot abutting said street and adjacent to said tank and pump, do not become fixtures to said lot, (1) when said tank and pump are in no manner in contact with said lot or with any building thereon or fixture thereof, and (2) when the parties to the original installation distinctly intended that the title to said tank and pump should remain in the party installing them, the latter not being the owner of said lot.

McCoun v Drews, 221-227; 265 NW 160

Tender—when unnecessary. In an action of replevin based on a conditional sale contract, which provides for possession by the vendor in case of condition broken, tender of payments already made is not a condition precedent to the institution of the action.

Schmoller Piano v Smith, 204-661; 215 NW 628

Default on payments—nonright to redeem. The buyer, under a conditional sale contract, of an article of personal property, who has long been in default on payments, and who has lost possession to the seller, has no right to redeem by tendering the amount then due, the contract providing (1) that title to the property shall remain in the conditional seller until all payments have been made, and (2) that in case of default on payments, the seller may repossess the property and treat all payments made as rent for use of the property.

Smith v Russell, 223-123; 272 NW 121

Unallowable lien. A provision in a conditional sale contract reserving a lien on the goods and providing that said contract shall control future purchases, does not, manifestly, authorize the vendor to charge into the future account charges for goods purchased prior to the date of the said sale contract, and claim a lien for said prior purchases.

Davidson Co. v Francis, 214-1317; 243 NW 333

10017 Filing equivalent of recording.

Atty. Gen. Opinions. See '25-26 AG Op 78; '30 AG Op 70; '34 AG Op 293; '38 AG Op 578

10018 Receipt.

Atty. Gen. Opinions. See '30 AG Op 70; '38 AG Op 578

10020 Time of filing noted—effect.

Real property conveyances—filing and indexing. See under §10115

10021 Index book.

Atty. Gen. Opinions. See '34 AG Op 449; AG Op June 30, '39

10023 Mortgage void after five years—extension.

Atty. Gen. Opinion. See '30 AG Op 343

10024 Assignments—how made.

Atty. Gen. Opinion. See AG Op Oct. 18, '39

10025 Copy furnished and certified—additional filings.

Atty. Gen. Opinions. See '32 AG Op 204; '34 AG Op 124

10026 Certified copies.

Certificate of county recorder. The certificate of the county recorder showing the recordation or filing of a chattel mortgage is competent and admissible evidence.

Wertheimer v Parsons, 209-1241; 229 NW 829

10028 Release of mortgage.

Atty. Gen. Opinions. See '25-26 AG Op 396; 32 AG Op 139

10030 Originals destroyed.

Atty. Gen. Opinions. See '28 AG Op 325; '30 AG Op 343; AG Op April 26, '39

10031 Fees.

Atty. Gen. Opinions. See '25-26 AG Op 96, 98; '30 AG Op 70; '32 AG Op 176, 204; '34 AG Op 56, 588; '38 AG Op 45; AG Op May 24, '39; June 26, '39; Aug. 25, '39

10032 Real estate mortgage with chattel mortgage clause.

Atty. Gen. Opinions. See '25-26 AG Op 96, 164; '28 AG Op 213, 218; '32 AG Op 101, 145; '34 AG Op 449

Application of rents—foreclosure. See under §12372 (III)

Appointment of receiver on foreclosure. See under §12372 (VII)

Chattel mortgages. See under §10015

Chattel clause in real estate mortgage. A real estate mortgage which, in addition to the land, conveys the crops raised on the land "from now until the debt secured is paid" is also a chattel mortgage to the extent of the crops.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Sufficiency. A complete chattel mortgage results from inserting, in a real estate mortgage following the description of the land conveyed, the words, "And, also, the rents, issues, use and profits of said land and the crops raised thereon, from now until the debt secured thereby shall be paid", coupled with a habendum clause to the effect that said property shall be held by the mortgagee forever.

Capital Bank v Riser, 215-680; 246 NW 763

Reference to realty mortgage provisions for interpretation. In a realty mortgage, a chattel mortgage clause conveying all the rents, issues, uses, profits and income therefrom and crops raised thereon "from date of this agreement until the terms of this instrument are complied with and fulfilled" was not invalid on ground that such provision required reference to realty mortgage provisions for interpretation or effect.

Bankers Life v Garlock, 227-1335; 291 NW 536

Chattel mortgage as part of real estate mortgage—lien and priority. A clause (inserted in a mortgage of real estate) which sells and conveys to the mortgagee "all the rents" of the mortgaged land as security for the payment of the debt in question, constitutes a legal chattel mortgage which, inter alia, (1) gives to the mortgagee, as against the mortgagor and others having actual knowledge thereof, a first lien on all subsequently executed leases of said land and on the promissory notes which represent the rental under said leases, and (2) gives to the mortgagee a first lien on such leases and notes against all assignees thereof provided that when the assignees became such the real estate mortgage had been duly recorded as such, and the record thereof had been duly indexed in the chattel-mortgage index book. (No plea in this case of holdership in due course.)

Equitable v Brown, 220-585; 262 NW 124

When lien effective. The lien on the rents and profits created by a chattel mortgage clause in a real estate mortgage is effective from the date of the execution of the mortgage, and not from the date when petition for foreclosure and for the appointment of a receiver is filed.

Equitable v Brown, 220-585; 262 NW 124

Effective date—priority over subsequent assignee of rents and profits. A clause in realty mortgage, duly recorded and indexed, providing that mortgagor conveyed in addition to realty "also all the rents, issues, uses, profits and income therefrom, and all the crops raised thereon from the date of this agreement until the terms of this instrument are complied with and fulfilled", created a valid chattel mortgage, effective from date of execution of the mortgage and not from date of filing the foreclosure petition in which appointment of receiver is asked, and subsequent assignee of property, described in instrument, took subject to lien provided in such chattel mortgage clause.

Bankers Life v Garlock, 227-1335; 291 NW 536

Lien on rents—priority. The commencement of foreclosure proceedings on a real estate mortgage which pledges the rents as security gives the mortgagee a lien on the crop rent of the legal title holder superior to a prior attempted levy on the immature crops; and this is true even tho the mortgage is not indexed in the chattel mortgage record.

Rodgers v Oliver, 200-869; 205 NW 513

Priority of creditor's claim over rents. A chattel mortgagee may not have his claim reduced by a claim for unpaid rent accruing subsequent to the mortgage and on the premises whereon the mortgaged chattels were kept.

In re Cutler, 213-983; 234 NW 238; 238 NW 80

Pledge of rents—what constitutes. A provision in a mortgage to the effect that, in case of foreclosure, a receiver may be appointed to collect the rents and to apply the same to the payment of taxes and principal and interest constitutes a pledge of the rents.

Wilson v Tolles, 210-1218; 229 NW 724

Construing decree—pledge of rents not a chattel mortgage. A decree, which recites that a real estate mortgage is also foreclosed as a chattel mortgage and that the receiver shall

collect the rents "during the period of redemption", will, when construed as a whole —resort being taken to the pleadings—be taken to mean that the receiver collect the rents "pending foreclosure sale, and redemption"—the petition neither alleging nor asking for such foreclosure but instead praying for a receiver from the date of the petition.

Sutton v Schnack, 224-251; 275 NW 870

Pledge of rents not chattel mortgage. Clause in real estate mortgage not conveying but merely pledging rents and profits is not chattel mortgage.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Synonymous terms for "rent". A sale and conveyance in a real estate mortgage of "all the rents, issues, uses, profits and income therefrom and all crops raised thereon" as security additional to that afforded by the land, and in connection with a receivership clause, simply constitutes a chattel mortgage on "all the rents" (in whatever represented), said various terms in such case being deemed synonymous.

Equitable v Brown, 220-585; 262 NW 124

Real estate mortgage pledging rents. A real estate mortgage which pledges the rents and profits of the land need not be recorded as a chattel mortgage.

Union Ins. v Eggers, 212-1355; 237 NW 240

Rents—transfer—effect on pledge. Under a mortgage which carries a simple pledge of the rents, an unconditional transfer, by the mortgagor prior to foreclosure proceedings, of rent notes for the redemption period passes the rents beyond the reach of the mortgagee, the transferee being a good faith holder for consideration.

First Tr. JSL Bk. v Conway, 215-1031; 247 NW 253

Landlord mortgagor's assignment of lease—no effect on chattel clause of realty mortgage. A lien on rents and profits created by chattel mortgage clause in realty mortgage, duly recorded and indexed, was not invalid as to mortgagor's share of crops produced under two-year lease, because such crops did not belong to mortgagor at time they came into existence, and, the landlord having assigned the lease, the subsequent assignee of property described in mortgage would take subject to the lien provided therein.

Bankers Life v Garlock, 227-1335; 291 NW 536

Chattel mortgage clause—effect on landlord's agreement to rent to third party. Where a valid chattel mortgage clause is contained in a realty mortgage, duly recorded and indexed, providing that mortgagor conveyed, in addition to realty, all the rents, issues, uses, profits and income therefrom and all crops raised thereon from date of instrument until payment of debt, an agreement by mortgagor to rent land to a third party was subject to such chattel mortgage clause, as against contention that agreement to rent was not the same as rents, issues, income, profit, or crops.

Bankers Life v Garlock, 227-1335; 291 NW 536

When lien under pledge of rent attaches. Principle reaffirmed that a mortgagee has no lien on rents pledged under the mortgage until foreclosure action is commenced with prayer for a receiver.

First Tr. JSL Bk. v Conway, 215-1031; 247 NW 253

Pledge of rents—when lien perfected. A mortgagee's lien on the rents of the mortgaged premises under a pledge of the rents, accrues only when the mortgagee makes proper prayer or request, in his duly commenced foreclosure suit, for the appointment of a receiver. It follows that, if prior to such prayer or request said rents have been unconditionally transferred, the good faith transferee thereof has an unassailable title thereto.

First Tr. JSL Bk. v Stevenson, 215-1114; 245 NW 434

Lien—when acquired. Under a combined real estate and chattel mortgage of the rents, the mortgagee, as against parties not subsequent purchasers for value and without notice, acquires a lien from the date of the execution of the mortgage.

Soehren v Hein, 214-1060; 243 NW 330

Pledge of rents and subsequent chattel mortgage on crops—priority. A pledge, in a duly recorded real estate mortgage, of the rents of the mortgaged premises is superior to a subsequently executed and duly recorded chattel mortgage on crops which the chattel mortgagee was obligated to grow on said premises, but which crops were not in existence when the real estate mortgagee instituted his foreclosure proceedings.

Bunting v Berns, 212-1127; 237 NW 220

Rent notes subject to prior chattel mortgage. The receiver of an insolvent takes the land of said insolvent subject to the lien of a prior unsatisfied, combined real estate and chattel mortgage covering both the said real estate and the "rents, issues, use and profits" thereof. It necessarily follows that notes taken by the receiver for the rent of said mortgaged premises for the year embracing foreclosure proceedings and the redemption period are subject to said chattel mortgage lien.

Capital Bank v Riser, 215-680; 246 NW 763

Receiver to collect unpaid rents. A pledge of rents in a real estate mortgage entitles the mortgagee, even tho the redemption period has expired (a deficiency judgment existing), to the appointment of a receiver to collect unpaid

rents which had accrued when the lien on the rents attached, and rents which accrued thereafter prior to the expiration of the redemption period. And this is true tho the rent be in the form of an agreement by lessee to support and maintain the mortgagor-lessors during their lifetime, and to pay said lessors such sums as they might request.

Metropolitan v Andrews, 215-1049; 247 NW 551

"Pledge" and "chattel mortgage" contrasted —priority. A mere pledge of rents written into a real estate mortgage remote from the granting clause of the mortgage cannot be deemed a chattel mortgage. It follows that such pledge is inferior to the rights of the good-faith assignee of a lease and rent notes executed subsequent to the real estate mortgage and prior to an action to foreclose such mortgage, and accompanying pledge.

Owen v Fink, 218-412; 255 NW 459

Foreclosure—rents—conflicting claims. The lien on matured crops, acquired by virtue of the commencement of foreclosure proceedings on a second mortgage carrying simply a pledge of the rents, is inferior to the lien acquired under the first mortgage, which is a duly recorded, combined real estate and chattel mortgage on the land and on the rents and crops thereof. This is true because the lien under the first mortgage necessarily attaches ahead of the lien of the second mortgage. Likewise the lien acquired by such second mortgage on unmatured rents is inferior to the lien of the first mortgage because, while both liens attach at the same instant of time, the first mortgage lien is first in time of origin.

Equitable v Read, 215-700; 246 NW 779

Rents and profits—secondary security after exhausting land—showing for immediate receiver. A pledge of rents and profits in a real estate mortgage, being secondary and unavailable until the land as primary security is exhausted, the filing of a petition in foreclosure does not immediately entitle mortgagee to a receiver prior to the sale without a showing both of mortgagor's insolvency and the insufficiency of the land alone to pay the mortgage indebtedness.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Harmless error. In the foreclosure of a real estate mortgage and of a chattel mortgage clause embraced therein, the fact that the lower court failed to enter an order for the formal foreclosure of the chattel mortgage is quite inconsequential when the court did appoint a receiver of said mortgaged chattels and properly ruled that plaintiff's lien was superior to that of appellant's.

Equitable v Brown, 220-585; 262 NW 124

Priority—pledge for pre-existing debt. A pledge of rents contained in a real estate mortgage and taken as security for a pre-existing indebtedness is not entitled to priority over chattel mortgage clauses in prior real estate mortgages for value on the same land, even tho said prior mortgages are not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Pledge of possession—effect. A pledge in a real estate mortgage of the right of possession of the premises is in substance a pledge of the rents and profits of the premises.

Mickelson v Rehnstrom, 215-1056; 247 NW 275

Real estate mortgage with chattel provision —failure to index. Failure to index the record of a real estate mortgage in the chattel mortgage index in order to give notice of chattel provisions in the real estate mortgage becomes quite immaterial when the complainant, a subsequent chattel mortgagee, simply held a chattel mortgage on crops which had not yet come into existence.

Louis v Hansen, 205-1216; 219 NW 523

Failure to index—effect. A recorded real estate mortgage containing a mortgage on the rents of the mortgaged real estate, but not indexed in the chattel mortgage index, is, as regards the rents, subject to a subsequent like mortgage taken by one for value and without notice of the former chattel mortgage clause, even tho the latter mortgage is not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Recording "instrument relating to real estate". A mortgage (1) on chattels on certain described real estate and (2) on all crops "sown, planted, raised, growing or grown" on said real estate for two specified years following the execution of said instrument, being an instrument which "relates to real estate", is recordable as a real estate mortgage, and such recording may be enforced by mandamus.

Weyrauch v Johnson, 201-1197; 208 NW 706

TITLE XXV

REAL PROPERTY

CHAPTER 438

REAL PROPERTY IN GENERAL

GENERAL PRINCIPLES

10040 Who deemed seized.

Discussion. See 4 ILB 48—Landowner's rights in underground waters; 16 ILR 169—Ownership of air above land; 18 ILR 67—Subjacent land

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

10041 Estate in fee simple.

Estate by entirety not recognized.

Fay v Smiley, 201-1290; 207 NW 369

Nature of estate devised—fee (?) or life (?). A testamentary devise, to testator's wife of specified real estate "to be and become the absolute property" of said wife, must be deemed to convey a fee simple estate unless accompanied by some other valid and enforceable provision manifesting a contrary intent. So held where the contrary intent was sought to be drawn from other provisions of the will which were either (1) precatory, or (2) repugnant to the granted fee.

Baker v Elder, 223-395; 272 NW 153

Deed—life estate (?) or fee (?). A deed which is in consideration of love and affection, which contains no words of inheritance, nor the word "heirs", which reserves to the grantor the right to control the premises during his life, which provides that, when the grantor dies, the grantee shall take absolute control of the premises, and which provides that, when the grantee dies, the absolute title shall vest in the grantee's children, (1) reserves a life estate in grantor, (2) conveys a life estate to grantee, and (3) conveys the fee to grantee's children.

Farmers Mtg. v Walker, 207-696; 223 NW 497

Conveyance to "heirs and assigns"—effect. A grant of land to a named person "and to his heirs and assigns" conveys a fee simple title, irrespective of a habendum clause which provides that, upon the death of the grantee, the property shall revert to the grantor or to his heirs.

Dolan v Newberry, 204-443; 215 NW 599

Will—words "to own" conveying absolute title. A devise of "one-half of all property I may own at the time of my death" to testator's wife "to own, hold and enjoy as her own", conveys an absolute title to one half of testator's estate.

In re Bigham, 227-1023; 290 NW 11

Will—property devised in fee—subsequent limitation void. Principle reaffirmed that a testator cannot make an absolute devise of his property in fee and in a subsequent clause destroy or place a limitation on such title. The subsequent limitation is void for repugnancy.

In re Bigham, 227-1023; 290 NW 11

Rule in Shelley's case—when inapplicable. The rule in Shelley's case has no application when the conveyance, deed, or will is to one for life with remainder over to the children of the life tenant, unless it is manifest that the grantor used the word "children" as the equivalent of the word "heirs".

Blair v Kenaston, 223-620; 273 NW 184

10042 Conveyance passes grantor's interest.

Discussion. See 22 ILR 696—Alienability—contingent remainders—defeasible fees.

ANALYSIS

I IN GENERAL
II ESTATES CONVEYED—LIFE ESTATES, ETC.
III FIXTURES INVOLVED

Deeds as mortgages. See under §12372
Easements granted by conveyance. See under §10175 (II)
Fee simple. See under §10041
Fixtures involved in leases. See under §10159 (III)
Fixtures involved in real estate contracts. See under §12389 (II)
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Life estates, enlargement into fee. See under §10060
Life estates in partition. See under §12350
Merger of contract of sale and deed. See under §12389 (II)
Mortgages generally. See under §12372
Reformation of instruments generally. See under §10941 (XI)
Tenants in common. See under §10054
Vendor and purchaser generally. See under §12389 (II)

I IN GENERAL

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Elements of conveyance—delivery. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

Transfer of present interest necessary—intent of grantor. Any instrument to be effective as conveyance of real estate must operate to convey a present interest in the real estate, and the intent of the grantor is the controlling factor in determining whether or not such present interest is conveyed.

Bohle v Brooks, 225-980; 282 NW 351

Accretion passes by ordinary deed. Accretion to land passes by a deed of the upland owner unless expressly excepted.

Haynie v May, 217-1233; 252 NW 749

Excessive conveyance—reversion—effect. A deed in which two cotenant-grantors purport to convey the whole of premises, tho they owned but a two-thirds interest therein, to a cotenant who already owned the other one-third interest, with proviso that, in case a named condition fails, "the aforesaid premises shall revert back" to the grantors and their heirs, works the effect, in case the said condition does fail, of reinvesting the grantors and their heirs with precisely the interest which the grantors parted with by said deed: to-wit, a two-thirds interest, and no more.

Boley v Boley, 206-1394; 220 NW 121

Invalid reservation in land grant. Principle reaffirmed that the insertion in a patent issued by the federal government, under a public improvement grant, of a clause "excepting and reserving all mineral lands" is, in the absence of fraud, a nullity, even tho the grant itself did except mineral lands.

Herman v Engstrom, 204-341; 214 NW 588

Boundary line between farm buildings—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential, to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Part of single ownership conveyed—implied easement or reservation—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

Fee devised but alienation restricted—coexistence impossible. The fee simple title to real property cannot be devised coupled with a restriction on alienation of said property.

Hudnutt v Ins. Co., 224-430; 275 NW 581

"Church purposes". A broad and comprehensive meaning must be accorded to the term "church purposes" in a conveyance of land to trustees "so long as used for church purposes".

Presbyterian Church v Johnson, 213-49; 238 NW 456

Right of way deed—abandonment—effect. A deed to a strip of land for highway purposes is ipso facto annulled and rendered ineffective by the definite abandonment of the proposal to establish the highway. In other words, the municipality may not, years after definitely abandoning the project, establish the highway and claim anything under the deed.

Beim v Carlson, 209-1001; 227 NW 421

Express trusts—unconditional conveyance—parol evidence. A parol, unexecuted, and unadmitted trust cannot be ingrafted on an unconditional conveyance in fee of real estate.

Hospers v Watts, 209-1193; 229 NW 844

Termination—merger—acquisition of title by stockholder of corporate lessee. A lease in which a corporation with many stockholders is lessee may not be said to be merged, and thereby terminated, simply because some of the stockholders acquire the equitable title to the real estate.

Fleming v Casady, 202-1094; 211 NW 488

Mortgages — priority — right of parties in possession. Assuming, arguendo, that a person who is negotiating with the record grantee of land for an interest in the land (e. g., as mortgagee), is under duty to make inquiry as to the rights of the former warranty deed grantor who has remained in actual possession, yet said duty is fully performed when the negotiator is assured by said former grantor that said grantee is the absolute owner of the land. It follows that said grantor will not thereafter be permitted to assert that when he conveyed the land by warranty deed he orally reserved an equitable interest in the land.

Clark v Chapman, 213-737; 239 NW 797

Loan to discharge mortgage — subsequent mortgagee subrogated to former's rights. A governmental loaning agency, set up to meet an emergency, by making loans to save homes from foreclosure, is entitled to be subrogated to the rights of the original mortgagee, when it discovers that there is an heir of one of the original mortgagors who has an interest in the title and who did not join in the mortgage it holds, and when through no fault or negligence on its part, said heir's interest was not discovered and he was not prejudiced by this latter mortgage, but was given the right to redeem in the event of foreclosure.

Home Owners Corp. v Rupe, 225-1044; 283 NW 108

Strip mining—when back-filling required. A holder of a strip mine coal lease who enters upon and strips coal from land, upon which land a pipe line company holds an easement, knowing that by so mining violates his lease, must back-fill the land when the easement holder exercises his option to buy; and upon his failure to make the back-fill, a judgment against the coal lessee for the cost thereof is proper.

Penn v Pipe Line Co., 225-680; 281 NW 194

Strip mining—pipe line easement. Where a pipe line company has an easement across land and an option to buy a designated strip of land along the pipe line if a strip coal mine should be opened on the land, a subsequent strip mine coal lease, subject to the pipe line easement and option, gives the coal lessee no rights to strip mine coal on the land covered by the purchase option and thus destroy the lateral support of the pipe line, nor is such lessee entitled to any part of the purchase price for such strip of land.

Penn v Pipe Line Co., 225-680; 281 NW 194

II ESTATES CONVEYED—LIFE ESTATES, ETC.

Discussion. See 22 ILR 543—Renunciation of life estate

Future-acquired interest. A conveyance which purports to convey the grantor's present interest in land cannot be held to convey an interest subsequently acquired in the land by the grantor.

Lee v Lee, 207-882; 223 NW 888

Assignment by heir—construction. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor.

Berg v Shade, 203-1352; 214 NW 513
See Funk v Grulke, 204-314; 213 NW 608

Expectancies — ineffectual conveyance. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues, and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

Conditions—unallowable disregard of. A conveyance "of the fee title" of land may make the vesting, in the grantee, of said fee conditional on the happening of any named, legal condition; and, in such case, it is idle to contend that this section furnishes authority to disregard the conditions and to hold the conveyance absolute.

So held where the vesting was, inter alia, dependent on the conditions:

1. That grantees should survive their mother, the holder of a preceding life estate.
2. That in case grantees did not survive their mother, only direct heirs of the body of grantees should take said title.

Schultz v Peters, 223-626; 273 NW 134

Repugnancy between clauses—modern rule. The technical rules of the common law as to the division of deeds of conveyances into formal parts, i. e., premises or granting clause, and habendum clause, will not prevail as against the manifest intention of the parties as shown by the deed as a whole. Applied (1) where the granting clause clearly granted a life estate, while (2) the habendum clause defined the estate received by the grantee as the fee.

Blair v Kenaston, 223-620; 273 NW 184

Life estate (?) or fee (?). A deed which is in consideration of love and affection, which contains no words of inheritance, nor the word "heirs" which reserves to the grantor the

II ESTATES CONVEYED—LIFE ESTATES, ETC.—continued

right to control the premises during his life, which provides that, when the grantor dies, the grantee shall take absolute control of the premises, and which provides that, when the grantee dies, the absolute title shall vest in the grantee's children, (1) reserves a life estate in grantor, (2) conveys a life estate to grantee, and (3) conveys the fee to grantee's children.

Farmers Co. v Walker, 207-696; 223 NW 497

Will—property devised in fee—subsequent limitation void. Principle reaffirmed that a testator cannot make an absolute devise of his property in fee and in a subsequent clause destroy or place a limitation on such title. The subsequent limitation is void for repugnancy.

In re Bigham, 227-1023; 290 NW 11

Devisees and heirs joining in deed. A conveyance of land carries the entire fee when properly joined in (1) by all those who could take under the probated will of the fee owner, and (2) by all those who would take the property under the laws of inheritance in case said property proved to be intestate property.

Bahls v Dean, 222-1291; 270 NW 861

Construction—life estate—title vests on termination. Will bequeathing income of property to widow for life with remainder equally to his then living brothers and sisters, a woman not related to testator, and a business associate also not related, construed to vest title at widow's death rather than at death of testator so as to entitle unrelated legatees to take entire remainder as against heirs of brothers and sisters who predeceased widow.

Rice v Yockey-Klein, 227-175; 288 NW 63

Remainder—vested (?) or contingent (?). A provision in a deed of conveyance that the remainder—after the termination of a life estate—shall pass to the named remaindermen "on the death of" or "at the death of" the life tenant, has reference solely to the time of enjoyment by the remaindermen of their estate in remainder—not to the time of the vesting of said remainder.

Blair v Kenaston, 223-620; 273 NW 184

Conveyance to deceased junior mortgagee. In an equity action for foreclosure against mortgagor and administrators of deceased junior mortgagee to whom mortgagor had allegedly executed the land, evidence held to establish that a deed had been executed by mortgagor in favor of deceased junior mortgagee.

Federal Bank v Ditto, 227-475; 288 NW 618

Conveyance to junior mortgagee. In an equity action for foreclosure of realty mortgage, where it is shown mortgagor made a conveyance of land to junior mortgagee who surrendered note and mortgage and accepted land in payment, and who, at the same time assumed payment of first mortgage and thereafter took possession and rented the land, held, sufficient consideration to bind junior mortgagee on his assumption agreement as to first mortgage.

Federal Bank v Ditto, 227-475; 288 NW 618

Valuable improvements—nonliability of remainderman. Principle recognized that a life tenant of realty may not, on his own initiative, place valuable improvements on the property, and legally hold the remainderman liable for the value of such improvements.

Kinnett v Ritchie, 223-543; 273 NW 175

Life estate — proof — mortgage recitals. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

Lands subject to mortgage—contingent interest. Lands devised by will are mortgageable by the devisee tho the devise be subject (1) to a preceding life estate in another, and (2) to the payment, after the death of the life tenant, of a named legacy; being thus legally mortgageable, the mortgage is legally foreclosable during the life of the life tenant, but subject, of course, to all outstanding superior equities.

State Bank v Bolton, 223-685; 273 NW 121

Mortgage of life estate and remainder. A court of equity, in an emergency, has inherent power, on the application of life tenants and remaindermen—tho some of the latter be minors—to authorize the execution of a mortgage on the entire fee title in the property in question regardless of the respective interest of the parties among themselves, when such order or authorization is necessary to preserve the property for all said parties and prevent loss to any of them. And this is true tho the creator of the two estates did not contemplate such emergency.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Delivery to trustee—no reservation of right to recall. Where deed is delivered by grantor to a third party with instructions to deliver it to the grantee or record the same upon the death of the grantor, with no reservations of a right to recall the same during the lifetime of the grantor, there is sufficient delivery.

Bohle v Brooks, 225-980; 282 NW 351

Deeds to children delivered to trustee—wife acquiescing in husband's instructions. An agreement reached by a husband and wife, that he should deed his property to her and she would deed it to the children, the deeds to be placed with a trustee, who was to record the first deed on the death of the husband and then record the second deeds on the death of the wife, is binding on the wife, when she is present at the execution of the deeds and, by her silence, acquiesces in the instructions given by the husband to the trustee.

Bohle v Brooks, 225-980; 282 NW 351

Escrow delivery—life estate reserved. Delivery of a deed to a trustee for redelivery to grantee after grantor's death reserves a life estate in the grantor, with title immediately passing to grantee, but with his right to possession and enjoyment of land therein conveyed postponed until grantor's death.

Bohle v Brooks, 225-980; 282 NW 351

Admission by nominal defendant not binding on principal defendant—guardianship. A wife seeking to quiet title in herself by virtue of a deed from her deceased husband, recorded by a trustee after the husband's death, must prevail on the strength of her own title as opposed by her insane son's title, obtained through a deed from her, also in the hands of the trustee, the two deeds being executed at the same time; but she gains nothing because the trustee concedes her title, when the real party in interest, the son, through his guardian, made no such admission in his separate answer.

Bohle v Brooks, 225-980; 282 NW 351

Resulting trust denied—deed from father to son—conduct of parties. In a partition action involving a decedent's property, tried on issues raised by defendant's cross-petition, alleging that another property of decedent, which had been deeded by decedent to one of his sons, should be included in the partition action—in the absence of fraud—such deed therefor will not be set aside on the theory of a resulting trust in favor of the decedent's estate, when there is no evidence that either the grantor or grantee so considered it altho they both lived several years after the deed was made.

Gilligan v Jones, 226-86; 283 NW 434

When life estate not subject to sale. A trust agreement and a deed of conveyance accompanying it, executed as security for a named debt, and granting the trustee immediate possession with right and duty to apply the rents to the secured debt, may not be foreclosed and the grantor's life estate sold, when the trust agreement and conveyance (1) recite the grantor's interest as a life estate only, but (2) contain no agreement or inference that the trustee may alienate said life estate.

In re Barnett, 217-187; 251 NW 59

Execution sale purchaser—buying tax certificates — remainderman unaffected. Where a judgment creditor purchases a life estate at execution sale and then purchases tax certificates outstanding against such life estate he is merely redeeming the taxes and cannot acquire any interest adverse to the remainderman.

Rich v Allen, 226-1304; 286 NW 434

Life tenant—duty to pay taxes. It is the duty of a life tenant to pay taxes.

Kinnett v Ritchie, 223-543; 273 NW 175
Rich v Allen, 226-1304; 286 NW 434

Taxes paid by life tenant—heirs cannot recover from remainderman. Heirs of a life tenant, who acquired life estate at execution sale, cannot recover from the remainderman, contribution for delinquent taxes paid on life estate which accrued prior to execution sale, since it is the duty of life tenant to pay taxes.

Rich v Allen, 226-1304; 286 NW 434

Transfers taxable—life reservation, by grantor, of income. Section 7307, C., '24, declaring that property passing by a "transfer made or intended to take effect in possession or enjoyment after the death of the grantor or donor" is subject to an inheritance or transfer tax, embraces property which passes by a conveyance in trust in which the grantor or donor reserves unto himself, during his lifetime, the net annual income of the conveyed property; and this is true even tho said section is later so amended as to specifically declare the above to be the effect of such a reservation.

In re Toy, 220-825; 263 NW 501

Administrator liable only for funds in hands of life tenant. Administrator who was garnished by judgment creditor of decedent's widow, who was life tenant, held liable only for property constituting income of life estate which was in his hands at time of service of notice of garnishment, and not for such income that might come into his hands thereafter.

Yoss v Sampson, (NOR); 269 NW 22

III FIXTURES INVOLVED

Essential elements—intent controlling. The essential elements in determining whether a chattel is a fixture are (1) actual annexation to the realty, (2) the use or purpose to which that part of the realty is appropriated, and (3) the intent of the party making the annexation to make a permanent accession to the freehold. The latter, being the most controlling factor, is determined from the expressed inten-

III FIXTURES INVOLVED—concluded

tion or by the facts and circumstances surrounding the annexation.

Equitable v Chapman, 225-988; 282 NW 355

Intent in making annexation. The particular method of attaching a thing to the realty becomes quite inconsequential when the parties admit that it was bought, sold, and erected with the mutual intent of having it become a fixture.

O'Bryon v Weatherly, 201-190; 206 NW 828

Intent and purpose in making annexation. Buildings resting solely on beveled skids, to which they are securely attached in the process of construction, and therefore capable of being moved from place to place, are fixtures, when they are appropriate and essential to the successful use of the land upon which they rest and to which they relate, and when they were placed upon said land with intent to make them permanent structures on the land.

College v Crain, 211-1343; 235 NW 731

Steam boiler and bake oven. A steam boiler weighing a ton and a half becomes a fixture—a part of the realty—(1) when set on a cement foundation, (2) when it is so large that when installed it cannot be removed from the building without removing a portion of the wall of the building, and (3) when it is connected with a bake oven and with various radiators throughout the building; likewise a bake oven weighing eleven tons (1) when set upon a cement foundation without fastenings other than its own weight, and (2) when so built into the building as seemingly to be a part thereof.

Comly v Lehmann, 218-644; 253 NW 501

Removal against mortgagee. A steam boiler and a bake oven so erected on mortgaged real estate that they become fixtures, in lieu of former articles of the same kind, cannot be legally removed, even tho sold under a contract providing for retention of title in the vendor until paid for, when such removal would materially diminish the security of the said mortgagee.

Comly v Lehmann, 218-644; 253 NW 501

Right to remove fixture as against vendor. A dealer who permanently installs a furnace in a house for a subvendee, under a contract that he (the dealer) shall retain title to the furnace and the right to remove it in case of nonpayment, may not lawfully remove the furnace for nonpayment, as against the vendor, who did not expressly or impliedly consent to such installation, and who sold under a written forfeitable contract, which was, subsequent to the installation of the furnace, forfeited and abandoned by both the original vendee and the subvendee.

Des Moines Co. v Holland Co., 204-274; 212 NW 551

Movable farm structures. Movable hog houses and feed bunks on a farm will not constitute fixtures, when to so declare would be contrary to the actual expressed intent of the person who placed them on the farm—a tenant—and contrary to the intent as reflected in the nature of the articles, their use, and the mode of attachment to the realty.

Speer v Donald, 201-569; 207 NW 581

Mortgage foreclosure—effect of decree on pipe line fixtures — damages. A mortgagee, having foreclosed and taken a sheriff's deed, may not require a gas pipe line company to pay for its pipe and fixtures previously installed across the mortgaged premises in addition to the damages for right of way on the theory that the foreclosure decree vested in mortgagee the title to such pipe and fixtures.

Titus Co. v Natural Gas Co., 223-944; 274 NW 68

Eminent domain—compensation—fixtures on mortgaged premises—res judicata. In a proceeding to condemn right of way for a gas pipe line, the fact that the pipe was already installed under an easement which was held in a foreclosure action to be inferior to a prior mortgage, did not thereby give the mortgagee through his foreclosure decree title and ownership of the pipe and fixtures installed on the mortgaged premises, nor is such foreclosure decree res judicata as to title to such pipe and fixtures without in the foreclosure action trying the issue thereon.

Titus Co. v Natural Gas Co., 223-944; 274 NW 68

10043 After-acquired interest—exception.

Future-acquired interest. A conveyance which purports to convey the grantor's "present" interest in land cannot be held to convey an interest subsequently acquired in the land by the grantor.

Lee v Lee, 207-882; 223 NW 888

After-acquired interest in buildings. A grantee of land under a full warranty deed may hold the buildings on the land even tho, unbeknown to him when he contracted for the land, the grantor did not own said buildings, it appearing that, since the execution of the deed, the grantor did become the owner of said buildings.

Schiltz v Ferguson, 210-677; 231 NW 358

Remedies of purchaser—right to lien. The contracting purchaser of land who rescinds, because the contracting vendor has no title whatever, is nevertheless entitled to a lien on the land for payments advanced in case the vendor, subsequent to the rescission, acquires such title.

Dolliver v Elmer, 220-348; 260 NW 85

10045 Future estates.

Estates created by will. See under §11846 (V)

Discussion. See 3 ILB 133—Possibilities of reverter after determinable fees; 3 ILB 170—Conveyances to take effect on death of grantor; 6 ILB 198—Freeholds in future; 8 ILB 104—Future interests in personalty; 18 ILR 289—Modern classification; 21 ILR 1—Conversion of use into a legal interest; 22 ILR 437; 23 ILR 1; 24 ILR 1, 635; 25 ILR 1, 707—Alienability and perpetuities; 22 ILR 696—Alienability—contingent remainders—defeasible fees

Educational and religious purposes—not a conditional limitation. A conditional limitation in a deed is self-operative and determines the period of the existing estate without any act on the part of the person entitled to the next expectant estate, and therefore a deed containing merely a provision for educational and religious purposes is not restricted by a conditional limitation.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Educational and religious purposes—not condition subsequent. A deed, conveying the title and the fee and containing the single statement "said land to be used for educational purposes and religious purposes only" followed by a warranty but by no words of condition, and no conditions appearing in the circumstances surrounding its execution, does not signify an intention by the grantor to create a condition subsequent which, in case the land is not used as designated or is conveyed by grantee, will upon re-entry by an heir, invest him with title.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Delivery to trustee—no reservation of right to recall. Where deed is delivered by grantor to a third party with instructions to deliver it to the grantee or record the same upon the death of the grantor, with no reservations of a right to recall the same during the lifetime of the grantor, there is sufficient delivery.

Bohle v Brooks, 225-980; 282 NW 351

Escrow delivery—life estate reserved. Delivery of a deed to a trustee for redelivery to grantee after grantor's death reserves a life estate in the grantor, with title immediately passing to grantee, but with his right to possession and enjoyment of land therein conveyed postponed until grantor's death.

Bohle v Brooks, 225-980; 282 NW 351

Admission by nominal defendant not binding on principal defendant—guardianship. A wife seeking to quiet title in herself by virtue of a deed from her deceased husband, recorded by a trustee after the husband's death, must prevail on the strength of her own title as opposed by her insane son's title, obtained through a deed from her, also in the hands of the trustee, the two deeds being executed at the same time; but she gains nothing because the trustee concedes her title, when the real party in interest, the son, through his guardian, made no such admission in his separate answer.

Bohle v Brooks, 225-980; 282 NW 351

Particular estate. A "particular estate" is an estate for life or for years for the reason that it is only a small part or portion of the inheritance.

Anderson v Anderson, 227-25; 286 NW 446

Death of joint life tenant without issue—remainder over in fee. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one-third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Remainder over—absence of issue. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

Remainder over—in fee per stirpes to lawful issue. When a will provides for a devise of realty to wife for life, then to three named children for life as tenants in common and remainder over in fee per stirpes to their lawful issue, held, life estate vested in children after wife's death with contingent remainder over in fee, as provided by statute—the life estates being the particular estate supporting the contingent estate which would vest, upon death of each of testator's named children, in that child's lawful issue, if any.

Anderson v Anderson, 227-25; 286 NW 446

Vested (?) or contingent (?) estate. A will giving a life estate to a sister and the remainder to a nephew receivable immediately upon

sister's death if nephew had reached majority, or if he had not attained majority, providing for a guardianship during minority, creates not a contingent but a vested remainder with only the enjoyment postponed, and as such, on the death of the nephew after reaching majority by marriage, goes to his widow rather than as residuary property in the estate.

Boehm v Rohlfs, 224-226; 276 NW 105

Debt-encumbered remainder—equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some 30 years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Special assessments—duty to discharge. As between life tenants and remaindermen, the former, during their tenancy, should pay the interest on special assessments, and the latter should pay the principal; and refunds on such assessments should be distributed in the same proportions.

Cooper v Barton, 208-447; 226 NW 70

10046 Contingent remainders.

Discussion. See 8 ILB 49—Restraints on the alienation of fee; 8 ILB 109—Invalidity of new estates of inheritance; 8 ILB 247—Alienation of contingent interests; 10 ILB 89, 275—Contingent remainder act; 10 ILB 317—Restraints on the alienation of equitable fee; 14 ILR 80—Vested and contingent remainders—executions; 18 ILR 425—Common law estates; 22 ILR 543—Renunciation of life estate; 22 ILR 696—Alienability—contingent remainders—defeasible fees; 22 ILR 437; 23 ILR 1; 24 ILR 1, 635; 25 ILR 1, 707—Alienability and perpetuities; 24 ILR 268—Seizin and possession—title

Vested (?) or contingent (?)—definition. A vested remainder is an estate which passes by will or other conveyance with possession and enjoyment postponed until a particular preceding estate terminates—an estate which is invariably fixed by the will or other conveyance "to remain to certain determinate persons". A remainder is not vested when it is dependent on the grantee being alive when the preceding life tenant dies or re-marries.

Fulton v Fulton, 179-948; 162 NW 253; LRA 1918E, 1080

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

In re Est. Phearman, 211-1137; 232 NW 826; 82 ALR 674

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

See Callison v Morris, 123-297; 98 NW 780
Archer v Jacobs, 125-467; 101 NW 195
Shafer v Tereso, 133-342; 110 NW 846
Lingo v Smith, 174-461; 156 NW 402
Atchison v Francis, 182-37; 165 NW 587
Hiller v Herrick, 189-668; 179 NW 113
Moore v Dick, 208-693; 225 NW 845
In re Est. Gordon, 213-6; 236 NW 37
Diagonal Bank v Nichols, 219-342; 258 NW 700

Distinction between a vested and a contingent interest. In an action to partition land, it is not uncertainty of time of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks difference between a vested and a contingent interest.

Flanagan v Spalti, 225-1231; 282 NW 347

Remainder—contingent (?) or vested (?). The remainder is contingent, in a devise of a life estate to a daughter, with remainder to the "surviving children", if any, of the life tenant at the time of her death; otherwise to certain designated devisees.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Vested (?) or contingent (?)—general rule. A remainder must be deemed vested, generally speaking, when a designated taker is living and ready to go into possession instantly upon the termination of the preceding estate, even tho such person may, in the course of time, die prior to the preceding life tenant.

Bogenrief v Law, 222-1303; 271 NW 229

Vested or contingent remainder—transfer and alienation. Remainders, whether vested or contingent, may be transferred, alienated or incumbered.

Bogenrief v Law, 222-1303; 271 NW 229

Vested estates. The estate of a remainderman must be deemed vested upon the probate of a will devising a life estate to testator's wife with remainder to testator's children.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Remainder to class—rule as to vesting. When there is an immediate gift to a class of persons, the gift vests in the members of that class who are existent at the time testator dies, unless a different intention appears from the context of the will. So held where the gift was "to the children living of my brothers and sisters living or dead".

In re Gordon, 213-6; 236 NW 37

Contingency—person not in esse. A remainder, so limited as to take effect in persons not in esse, is a contingent remainder.

Bankers Trust v Garver, 222-196; 268 NW 568

Estate "to heirs of father at death of husband"—vested interest. A will devising a portion of an estate "to the legal heirs of my father to be distributed * * * at the death of my husband" vests this portion in such heirs of the father as were living at the time of testatrix' death—the father being dead at that time.

Flanagan v Spalti, 225-1231; 282 NW 347

Right to possession on expiration of life estate—vested remainder. A person in being who, under a will, would have an immediate right to possession of the lands devised upon the termination of a life tenancy therein provided, has a vested remainder.

Flanagan v Spalti, 225-1231; 282 NW 347

Perpetuities — limitations void ab initio. Testamentary attempts by means of limitations to create in property contingent interests or estates, which will not necessarily become vested within the period of time prescribed by the statute prohibiting perpetuities, are futile, all such limitations being void ab initio. (§10127, C., '35.)

Bankers Tr. Co. v Garver, 222-196; 268 NW 568

Unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant arising out of the terms of a testamentary devise is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189

Merger of life estate and contingent remainder into fee. The grantee of a life estate, on condition, however, that if grantee violates any one of named prohibited acts the said estate shall ipso facto instantly terminate, and the fee pass to grantee's issue, or to named remaindermen if grantee then has no issue, may, if without issue, take a conveyance by warranty deed from said contingent remaindermen of all their present and possible future interest in the land, and thereby merge the life estate and contingent remainders into a fee in himself.

Thorsen v Long, 212-1073; 237 NW 515

Interest of remainderman passes to trustee. The interest of a bankrupt as a real estate remainderman, whether the interest be vested or contingent, passes to the trustee in bankruptcy.

Noonan v Bank, 211-401; 233 NW 487

Attachment or execution levy. A contingent remainder—contingent because of the uncertainty of the person who will take the property —is not subject to attachment or execution levy and sale.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Sale under execution. A contingent remainder, being legally mortgageable, is necessarily subject to sale on mortgage foreclosure execution.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Protection from execution sale. Principle reaffirmed that a contingent remainderman may maintain an action to protect his contingent interest from execution sale.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

10048 Defeating expectant estate.

Discussion. See 10 ILB 314—Destruction of contingent remainders by merger; 22 ILR 268—Tax on trust income; 22 ILR 696—Alienability — contingent remainders — defeasible fees; 22 ILR 437; 23 ILR 1; 24 ILR 1, 635; 25 ILR 1, 707—Alienability and perpetuities

Merger of life estate and contingent remainder into fee. The grantee of a life estate, on condition, however, that if grantee violates any one of named prohibited acts the said estate shall ipso facto instantly terminate, and the fee pass to grantee's issue, or to named remaindermen if grantee then has no issue, may, if without issue, take a conveyance by warranty deed from said contingent remaindermen of all their present and possible future interest in the land, and thereby merge the life estate and contingent remainders into a fee in himself.

Thorsen v Long, 212-1073; 237 NW 515

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

10049 Declarations of trust.

ANALYSIS

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I IN GENERAL

Discussion. See 18 ILR 43—Continuation of business; 19 ILR 574—Charitable bequest—construction; 25 ILR 836—Action against trustee—attorney paid from trust funds

Cy pres doctrine invoked by state in equity court. A public charity, created by trust, about to fail, is properly represented in court of equity to invoke jurisdiction to apply cy pres doctrine by the state or some authorized agency thereof.

Schell v Leander Clark College, 10 F 2d, 542

Trust property for educational purposes. Property transferred to a county in trust for the establishment of a prescribed seminary of learning, and duly accepted by the board of supervisors on behalf of the county, becomes a special part of the school fund of the county, and remains such, tho the legal title be transferred to court-appointed trustees for managerial purposes. It follows that, being county property and devoted to public use and not held for pecuniary profit, said property is exempt from taxation (§6944, subsec. 2, C., '35), even tho no action has been taken to actually execute the trust.

McColl v Dallas County, 220-434; 262 NW 824

Charitable trust to county for paving roads. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Trust fund doctrine—unpaid stock subscription. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced, unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "equitable trust fund doctrine" does not apply to such a condition.

Fundamental reason. Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Augmentation theory. The assets of an insolvent may be said to have been augmented by a trust fund whenever the trust owner is able to point out the trust property, either by actual proof or by legal presumption of fact.

Andrew v Bank, 204-565; 215 NW 742

Equitable preference—pro rata distribution. A trust fund must be prorated among the established claims when the fund is insufficient to pay all in full.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Following trust funds into property. A cestui que trust owns the property into which he can trace dissipated trust funds.

Mandel v Siverly, 213-109; 238 NW 596

Impressing trust on proceeds of lienable property—limitation. An action to impress a trust on the proceeds of property on which a landlord had a lien, against a depository who had full knowledge that the sale had been had for the benefit of the landlord, is not barred immediately after the lapse of six months from the termination of the lease.

Andrew v Bank, 208-1184; 225 NW 957

Lien—sale of property—impressing trust on proceeds. Where property subject in part to a lien for rent was sold by the tenant-owner for the benefit of the landlord, and at public sale, in order to save court costs, a depository of the proceeds who was also a creditor of the tenant's, and who had full knowledge of the purpose of the sale, may not complain that the court impressed a trust on such proceeds to the amount of the lien which the landlord had on the property.

Andrew v Bank, 208-1184; 225 NW 957

Assessment certificates create no trust relationship. A city or town in issuing valid special assessment certificates for street improvements and in levying valid assessments for the payment of the certificates, does not constitute itself a trustee for said certificate holders.

Stockholders Inv. Co. v Brooklyn, 216-693; 246 NW 826

Deed and agreement creating trust. Where a husband conveyed his separate property to wife pursuant to an agreement providing that upon her death property was to go to a granddaughter either by will or deed, and where, after consummation of this transaction, the husband tore up the original copy of the agreement and executed an absolute conveyance of the same property to his wife, held, that the original deed and agreement, which were simultaneously executed, must be construed as one instrument, and that an irrevocable trust was created in favor of the granddaughter since no power of revocation was expressly reserved.

Young v Young-Wishard, 227-431; 288 NW 420

Prohibitory statute—excludes trust conveyance. Where a husband conveyed his separate property to wife pursuant to agreement providing that, upon her death, property was to go to granddaughter either by will or proper deed of conveyance, such an agreement was not a contract dealing primarily with the inchoate right of dower of the wife and therefore was not void under statute providing that a husband or wife has no interest in the property owned by the other which can be the subject of contract between them, since that statute prohibits only such transactions when they relate directly to dower rights.

Young v Young-Wishard, 227-431; 288 NW 420

Partnership and trust—construed separately. A trust deed and a partnership agreement, altho executed at the same time, cannot be construed together, when the parties thereto and the purposes thereof are not the same.

Lunt v Van Gorden, 224-1323; 278 NW 631

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Validity—nonright to question. A creditor may not have his claim decreed a lien on the property of a nonfraudulent trust which the debtor has created for the specific purpose of discharging an obligation as to which the said creditor is a stranger; and especially is this true when the said creditor fails to show that he was injured by the creation of said trust.

Clark v Langerak, 205-748; 218 NW 280

Enforcement—loss of right against innocent grantee. The owner of an equitable interest in land loses all right (1) to establish his interest as a trust in the land, and (2) to personal judgment against the grantees of the land, when, after refusing a proffered deed to the land, he knowingly permits the legal title holder to convey the land by quitclaim deed and for a valuable consideration to another equitably interested party who had no notice or knowledge of said first party's claim; and especially is this true when the consideration for the quitclaim deed was at all times a senior claim.

Brenton Bros. v Bissell, 214-175; 239 NW 14

Estoppel—knowledge and acceptance of benefits. Beneficiaries of a trust will not be heard in equity to assert the invalidity of a lease entered into by their trustee, when they (1) had full general knowledge thereof, (2) long acquiesced therein, (3) accepted and retained the rentals arising from the lease, and (4) knew at all times that the lessee was relying thereon at great expense.

Bowman v Swanwood Co., 201-1236; 207 NW 591

Transaction with deceased—intervenor—competency. In equity action to quiet title and to declare a trust in realty, an intervenor who claims same relief as plaintiff may not testify to alleged oral agreement between parties, some of whom are deceased.

Wagner v Wagner, (NOR); 224 NW 583

Rights of legatees—election—notice—right of wife as cestui to ignore. A wife who ignores a notice requiring her to elect whether she would take under her husband's will does not estop herself from alleging and proving that the property which the husband assumed to devise was held by him in trust for her.

Spring v Spring, 210-1124; 229 NW 147

Computation of period of limitation—repudiation necessary to start statute. The statute of limitation does not commence to run against the beneficiary of an express and continuing trust until the trustee directly repudiates the trust. Evidence held insufficient to show repudiation at such remote date as to bar an action for accounting. So held where the grantee of land—the trustee—took title under written agreement to account to grantor for one-half of the profits which might be realized on a sale.

Howes v Sutton, 221-1326; 268 NW 164

I IN GENERAL—concluded

Shelley's case inapplicable. The so-called "rule in Shelley's case" has no application to a deed of conveyance which creates a trust in the grantee for the benefit of his heirs.

Hibler v Hibler, 208-586; 226 NW 8

Transfers taxable—life reservation, by grantor, of income. The statutory declaration of §7307, C., '24, that property passing by a "transfer made or intended to take effect in possession or enjoyment after the death of the grantor or donor" is subject to an inheritance or transfer tax, embraces property which passes by a conveyance in trust in which the grantor or donor reserves unto himself, during his lifetime, the net annual income of the conveyed property; and this is true even tho said section is later so amended as to specifically declare the above to be the effect of such a reservation.

In re Toy, 220-825; 263 NW 501

Note—consideration—absence of—burden of proof. The beneficiaries of a trust, defendants in an action on a note and mortgage executed by their authorized agent, have the burden to show want of consideration.

Daries v Hart, 214-1312; 243 NW 527

Creation—evidence—sufficiency. Evidence held quite insufficient to create a trust in funds passing through the hands of the defendant.

Federal Sur. v Morris Plan, 213-464; 239 NW 99

Oral evidence—when competent. Parol evidence is admissible to establish and show the nature of an admitted, or partially or wholly executed trust.

Andrew v Bank, 209-1149; 229 NW 819

Presumption from possession. A mere preponderance of the evidence is not sufficient to overcome the presumption arising from the possession of the legal title to real property.

Wagner v Wagner, 208-1004; 224 NW 583

II EXPRESS TRUSTS

Discussion. See 12 ILR 66—Beneficiaries in charitable trusts

Equality of benefits—ambiguous provision. The fact that various provisions of a conveyance in trust clearly require, under named conditions, equality of benefits between beneficiaries, may very materially influence the construction of other provisions which are ambiguous as to equality of benefits under other and different conditions.

Dunn v Dunn, 219-349; 258 NW 695

Designation of devisee. The fact that the name of the beneficiary of a religious or charitable trust as specified in a will is different than the name of the claimant of the devise becomes unimportant, in the face of ample testimony that the designated beneficiary and the claimant are one and the same institution.

Ross v Seminary, 204-648; 215 NW 710

Establishing trust by oral agreement—prohibitory statute. Under the Iowa statute an express trust cannot be established by a parol agreement, but such statute is inapplicable to constructive trusts.

D. M. Terminal v D. M. Union, 52 F 2d, 616

When parol evidence competent. Principle reaffirmed that parol evidence is competent to impress an express trust upon an absolute deed, provided the trust has been partially executed.

Hardy v Daum, 219-982; 259 NW 561

Conveyance by grantor to himself as trustee—effect. A conveyance in which the grantor as an individual divests himself, by comprehensive and unequivocal language, of all interest in the conveyed property and casts said property upon himself (and successors) as trustee for a specified purpose, and containing no clause authorizing a revocation, must be deemed to create an absolute and irrevocable trust.

Dunn v Dunn, 219-349; 258 NW 695

Trustee and beneficiary as same person—conveyance to self-quieting title. A sister, as the only heir in her brother's estate, who conveys by a trust instrument to a nonrelated person her entire interest in such estate, in exchange for the trustee providing her life support, and upon fulfillment of which the trustee became the beneficiary and was directed to convey the balance of the property from himself, as a trustee, to himself, individually, evidence, in trustee-beneficiary's quieting title action against settlor's heirs, held to establish soundness of mind and freedom of action by settlor in executing the trust instrument.

Goodman v Bauer, 225-1086; 281 NW 448

Testamentary trusts. A devise for charitable purposes tho apparently uncertain will be enforced if the court can from extrinsic evidence discover the testator's meaning.

In re Durham, 203-497; 211 NW 358

Testamentary trust. A testamentary devise of a charitable trust the object and beneficiaries of which are designated with any reasonable certainty will be sustained.

Martinson v Jacobson, 200-1054; 205 NW 849

Testamentary trust — validity. A testamentary trust will be sustained when the intent of testator is evident, even tho the bequest runs to an unincorporated entity.

Meeker v Lawrence, 203-409; 212 NW 688

Powers—execution of notes. Power in a testamentary trustee to invest and reinvest

the subject-matter of the trust and generally to do substantially whatever the testator might do, were he alive, necessarily embraces the power to purchase lands and to execute promissory notes therefor.

Arnette v Watson, 203-552; 213 NW 270

Nontermination by beneficiaries. The beneficiaries of a testamentary trust may not, by mutual agreement, even tho approved and confirmed by the court, terminate the trust and accelerate the final vesting of the corpus of the trust, when the testator has clearly demonstrated a contrary intent.

Windsor v Barnett, 201-1226; 207 NW 362

Renunciation of trust by wife—effect. A testamentary trust embracing all of testator's property, and for the benefit of the testator's wife and other named beneficiaries in named proportions, is not terminated by the renunciation of the will by the wife. The trust will proceed as to two-thirds of the property, for the benefit of the remaining beneficiaries.

Windsor v Barnett, 201-1226; 207 NW 362

Nontestamentary instrument. A declaration of trust in and over real estate for the benefit of the trustor and named beneficiaries, and a contemporaneously executed and delivered warranty deed to the same property to the trustee, cannot be deemed a will, even tho the trustor-grantor reserves in the declaration of trust complete control, management, and dominion over the property during his lifetime, even to the power to revoke the trust and to demand a reconveyance, or to dispose of the property by testament.

Keck v McKinstry, 206-1121; 221 NW 851

Nonalienable interest. No present alienable interest which can be made subject to a lien by the creditor of a cestui que trust son passes to the son under a testamentary trust which is created for the express purpose of maintaining, supporting, and educating testator's son, wife, and family, with proviso (1) that the income of the trust fund shall be paid periodically to the wife of said son, and (2) that the corpus of the trust shall be paid, at a named future date, to both the son and wife, with direction, in substance, for the son and wife thereafter to continue the trust for the benefit of any of their then surviving children.

Damhoff v Shambaugh, 200-1155; 206 NW 248

Charities—devise—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good". Will construed, and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library, were conditions subsequent, and not conditions precedent, to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

Voluntary association — personal liability. Individuals who voluntarily associate themselves in a business venture in the form of a trust are each personally liable for the authorized acts of their agent.

Daries v Hart, 214-1312; 243 NW 527

Educational and religious purposes—declaration of purpose or trust. A covenant in a deed specifying use for educational and religious purposes is only a "declaration of purpose" or a trust.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Indefinitely named charitable beneficiary. A testamentary devise in trust to "some old ladies' home" in a named locality necessarily implies a substantial institution devoted to said purposes, and manifestly, the court will not be compelled to bestow such bounty only on one of those who apply for such bounty.

In re Clifton, 207-71; 218 NW 926

Joint purchase of property. When the beneficiaries of a trust in real property and in the long-time lease thereon are given the right either to continue to receive the rent under the lease or to terminate the lease by jointly purchasing of the lessee the building which the lessee has erected on the land, under the lease, then the assignees of the beneficiaries must likewise act jointly in the purchase of the building.

Fleming v Casady, 202-1094; 211 NW 488

Alimony—property settlement under trust agreement. A property settlement under an irrevocable trust agreement made by husband and wife previous to and confirmed in divorce decree discharged husband's obligation for further support and precluded right to further alimony.

Fitch v Com. of Internal Rev., 103 F 2d, 702

Trustor's life support—gift "when funds are available". Where a will and trust instrument, designed to support two trustors as long as either one of them lived, contains also a $5,000 gift for each of two named beneficiaries, payable as soon as funds are available, such gifts may not be paid until after the death of last trustor, when it appears uncertain from the encumbered status of the trusteed property whether or not the property is adequate to provide the required support for last surviving trustor, and even then the gifts or legacies with interest thereon are not due until one year after death of the last trustor.

In re Jeffrey, 225-316; 280 NW 536

II EXPRESS TRUSTS—concluded

Trust agreement—evidence insufficient to set aside. Evidence held insufficient to entitle trustor to set aside trust agreement and conveyances of property to trustees pursuant thereto on ground of mismanagement of trust property by trustees in failing to pay trustor full amount of monthly payments provided under trust agreement.

Hatt v Hatt, (NOR); 265 NW 640

Foreclosure—when life estate not subject to sale. A trust agreement and a deed of conveyance accompanying it, executed as security for a named debt, and granting the trustee immediate possession with right and duty to apply the rents to the secured debt, may not be foreclosed and the grantor's life estate sold, when the trust agreement and conveyance recite, (1) the grantor's interest as a life estate only, but (2) contain no agreement or inference that the trustee may alienate said life estate.

In re Barnett, 217-187; 251 NW 59

Relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple"; the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

III RESULTING TRUSTS

Discussion. See 6 ILB 177—Cy pres doctrine

Resulting trust—insufficient basis. A resulting trust cannot be based on facts showing the purchase of land and the taking of title in the name of the purchaser, and the long subsequent borrowing of money with which to pay the purchase price.

Andrew v Martin, 218-19; 254 NW 67

Devise and bequest—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

Payment by one and title in another. Principle reaffirmed that a husband who takes title to real estate which has been wholly paid for by the wife will be deemed to hold the title in resulting trust for the wife.

State Bk. v Nolan, 201-722; 207 NW 745

Consideration paid by one and deed taken in name of another. Where, upon the purchase of property, the consideration is paid by one, and the legal title is conveyed to another, a resulting trust is thereby raised in favor of the one paying the consideration.

Spring v Spring, 210-1124; 229 NW 147

Warranty deed and contemporaneous trust. A warranty deed which absolutely and unconditionally conveys real estate to the grantee and to "his heirs and assigns forever" will, in equity, be restricted, in its apparently limitless legal effect and operation, to such extent as will bring it into harmony with the terms of a contemporaneously executed instrument of trust covering the same property, which trust the grantee has acquiesced in and agreed to carry out as trustee.

Keck v McKinstry, 206-1121; 221 NW 851

Resulting trust denied—deed from father to son—conduct of parties. In a partition action involving a decedent's property, tried on issues raised by defendant's cross-petition, alleging that another property of decedent, which had been deeded by decedent to one of his sons, should be included in the partition action—in the absence of fraud—such deed therefor will not be set aside on the theory of a resulting trust in favor of the decedent's estate, when there is no evidence that either the grantor or grantee so considered it altho they both lived several years after the deed was made.

Gilligan v Jones, 226-86; 283 NW 434

Wife's funds in husband's realty. A deceased wife's administrator, seeking to impress a resulting trust on her surviving second husband's realty, held by him for more than 30 years, has the burden to prove the trust, not by a mere preponderance, but by clear, satisfactory evidence. Evidence held insufficient where alleged funds of wife came from wife's land, whose value arose largely from husband's improvements thereon, and which funds were turned over by wife to husband, commingled with his money and used to purchase realty, later exchanged for the property upon which a trust impressment is sought.

Keshlear v Banner, 225-471; 280 NW 631

Deed and agreement creating trust. Where a husband conveyed his separate property to wife pursuant to an agreement providing that upon her death property was to go to a granddaughter either by will or deed, and where, after consummation of this transaction, the husband tore up the original copy of the agreement and executed an absolute conveyance of the same property to his wife, held, that the original deed and agreement, which were simultaneously executed, must be construed as one instrument, and that an irrevocable trust was created in favor of the granddaughter

since no power of revocation was expressly reserved.

Young v Young-Wishard, 227-431; 288 NW 420

Resulting trust—fraud—elements. The plea that a trust resulted against one who fraudulently obtained the property necessitates proof of representation, reliance thereon, falsity thereof, scienter, deception and injury.

Andrew v Bank, 205-244; 216 NW 551

Resulting trust—surety as cestui que. Where a party, by his promissory note and by the aid of a surety thereon, (1) effects a loan and with the proceeds thereof buys land of an equitable owner who, himself, had not yet paid for the land, and (2) where said borrower and purchaser later loses all interest in said land, the dual facts (1) that the surety was compelled to pay said note, and (2) that said equitable owner employed the money—the proceeds of said loan—in carrying out his contract of purchase, will not enable said surety to establish a resulting trust in said land against said former equitable owner.

Harnagel v Fett, 215-868; 244 NW 704

Banking corporations — making collections. A bank upon making a collection for its implied principal, under authority to "collect and remit", takes no title to the collected funds, but immediately becomes a trustee thereof and remains such trustee until said funds are paid over to the principal. It follows that such relationship is not affected in the least by the unauthorized act of the bank in issuing and mailing to the principal a certificate of deposit for the amount of the collection.

Andrew v Bank, 217-232; 251 NW 860

Fraudulent conveyance—dower nonexistent. Where a debtor, as grantor, made a conveyance to sister-in-law without consideration in order to escape payment of judgment which he feared would be rendered against him, and where 25 days after settlement of claim for which grantor was being sued she reconveyed without consideration, sister-in-law obtained no beneficial interest in the property. Hence, her husband could not claim a one-third interest in property upon her death, altho he signed deed of reconveyance only as a witness.

Renne v Tumbleson, 227-159; 287 NW 839

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Voluntary deed to persons entitled to property. When land, which was part of an estate, was purchased by decedent's two sons who paid no cash consideration, but occupied, paying rent to the other heirs, and who later, in order to protect the land from creditors, deeded it to two sisters who did not know of the indebtedness of the brothers, and when the sons made a contract with the sisters at the time of the deed protecting the other heirs in case the land were sold, a creditor of one of the brothers who knew of the rent payments and knew of the deed, but made no objection, could neither have it set aside as a fraudulent conveyance nor have the real estate subjected to a judgment against the debtor-brother, as the deed and contract conveyed the mere legal title to the sisters in trust for the heirs who were the persons entitled to the property.

Lakin v Eittreim, 227-882; 289 NW 433

Evidence—sufficiency. A resulting trust will be established only on testimony which is clear and certain.

Irving v Grimes, 208-298; 225 NW 453
See Kortum v Kortum, 211-729; 234 NW 220

Evidence to establish in order to justify compulsory deed. The court will order an executor to execute a deed to real property, and to the proper person, on proof that the deceased personally owned no interest in the property and was holding the legal title in consequence of a resulting trust; but the evidence must be so explicit and decisive as to leave the existence of no essential fact to conjecture, or to remote and uncertain inference.

In re Moore, 211-804; 232 NW 729

Avoidance of statute of frauds. Parol evidence is competent to show that the titleholder to land has admitted he was to hold such title only until such time as he was reimbursed for money expended on the property, and that such arrangement has been in part carried out.

Neilly v Hennessey, 208-1338; 220 NW 47

Unconditional conveyance—parol evidence. A parol, unexecuted, and nonadmitted trust cannot be ingrafted on an unconditional conveyance in fee of real estate.

Hospers v Watts, 209-1193; 229 NW 844

Parol to prove execution of unenforceable trust. It is true that one claiming to be the absolute owner of land may not, as against the

III RESULTING TRUSTS—concluded

grantee in a conveyance, prove, by parol evidence, that when the conveyance was executed grantee's name was inserted in the conveyance as grantee under an oral agreement that said substituted grantee would hold said land solely and exclusively for said secret grantee, but said parties may show by parol evidence, as against a stranger, that said oral agreement was actually carried out and executed by said parties.

Bates v Zehnpfennig, 220-164; 262 NW 141

Estoppel. A party estops himself from ingrafting a trust on an absolute conveyance of real estate after he has stood by and allowed the grantee to treat the property as his own and to pledge it to grantee's innocent creditors.

Hospers v Watts, 209-1193; 229 NW 844

Waiver of trust relation. Any possible presumption of a resulting trust in a husband who pays for realty conveyed to the wife cannot prevail against the act of the husband, after the death of the wife, in founding an action in behalf of himself and his children on the solemn declaration that he and the children inherited the property from the wife and mother.

Campbell v Humphreys, 202-472; 210 NW 558

IV CONSTRUCTIVE TRUSTS

Discussion. See 2 ILB 78—Following trust money

Applicability of statute. This statute has no application to constructive or resulting trusts.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Constructive trusts solely cognizable in equity. An action to establish and enforce a constructive trust, e.g., an action to recover funds to which plaintiff has equitable title against a defendant who holds the legal title, must, on timely motion by the defendant, be tried as an equitable action, (1) even tho plaintiff disclaims all equitable relief, and prays for a money judgment only, and (2) even tho, under plaintiff's allegation defendant obtained possession of the funds by fraud practiced on a third party, but under circumstances excluding any inference or presumption that he received the funds for the use and benefit of plaintiff.

Markworth v Bank, 212-954; 237 NW 471

Fraud between banks—constructive trust not established. The plaintiff bank, in failing to establish that the defendant bank was guilty of fraudulent conduct in aiding the plaintiff's cashier to conceal a shortage in his accounts, thereby failed to establish any basis for a constructive trust against the assets of the defendant bank for the amount of the shortage, or a basis for requiring the defendant bank to be held to account for the loss.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Constructive trusts—when existent. A constructive trust arises where a conveyance of real estate is without consideration and:

1. It appears that the grantee was not intended to take beneficially, or as a gift; or
2. Where the conveyance is fraud-induced.

This is true irrespective of the statute which renders parol evidence incompetent to establish an unexecuted express trust in real property.

Wellman v Wellman, 206-445; 220 NW 82

Constructive trust—secret intent not to perform condition. A grantee of land who receives the conveyance on the oral condition that the land will be reconveyed to grantor on the happening of a named event, e. g., on return from a trip abroad, and who secretly intends not to comply with said condition, will be deemed in equity a trustee ex maleficio.

Carlson v Smith, 213-231; 236 NW 387; 80 ALR 186

Constructive trust—fraud by grantee. Where grantee obtained title by false assurance that he would hold title as trustee to protect grantor's ownership, and immediately placed a mortgage on the property for his own benefit after obtaining title, a constructive trust was created and grantee became a trustee ex maleficio for benefit of grantor.

Rance v Gaddis, 226-531; 284 NW 468

Fraud in procuring deed. Where deed containing recital of consideration was obtained by fraud, the grantor is not precluded as a matter of law from showing a constructive trust arising from the fraud, and equity will allow such showing to be made by parol evidence, but such evidence must be clear and satisfactory.

Rance v Gaddis, 226-531; 284 NW 468

Constructive trusts—fiduciary relation—burden of proof. One who exercises exclusive management of the funds of an aged, sick, infirm, illiterate, inexperienced, unadvised, and mentally dependent person (especially a relative) and assumes a position of trust and confidence toward such person, and thereby acquires from such person, either for himself or for members of his family, a profit and benefit, will be presumed to do so fraudulently and must establish that such profit and benefit was acquired with the full, free, and intelligent consent of such dependent person, and if he fails in such proof he will be held to account for all such benefits.

Burger v Krall, 211-1160; 235 NW 318

Fraudulent purchase of property. An owner of real estate who has been fraudulently induced to convey the same because of the

secret intent of the supposedly solvent purchaser not to pay the promissory note given therefor may enforce a trust therein against one who holds the property as security for the pre-existing debt of the fraudulent purchaser. Especially is this true when the security holder had, in legal effect, made himself a party to the fraudulent transaction of the purchaser.

Bogle v Goldsworthy, 202-764; 211 NW 257

Evidence—sufficiency. Evidence reviewed, and held insufficient to show that a deed was other than what it purported to be, to wit: a voluntary, good-faith gift to grantor's sister, of the land in question, and insufficient to establish any constructive trust therein in favor of other relatives of the grantor.

Redden v Murray, 213-519; 239 NW 129

Cancellation of fraudulently acquired deed. A person who secretly buys up a certificate of execution sale and takes a sheriff's deed in his own name, in violation of his agreement with the judgment defendant to pay off the judgment in question and thereby satisfy his own debt to the judgment defendant, has no standing to contest an action by the latter for the cancellation of said deed.

Swearingen v Neff, 204-1167; 216 NW 621

Constructive trust — evidence — sufficiency. An express trust in real property cannot be legally established by parol, nor may an implied or constructive trust in such property be established except by evidence which is clear, convincing, and satisfactory.

McMains v Tullis, 213-1360; 241 NW 472

Establishing trust by oral agreement—prohibitory statute—inapplicable to constructive trusts. Under the Iowa statute an express trust cannot be established by a parol agreement, but such statute is inapplicable to constructive trusts.

D. M. Terminal v D. M. Union, 52 F 2d, 616

Gifts inter vivos—fiduciaries—donee's burden. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Property held by administrator. Where trust property in the possession of an administrator is identifiable and not affected by rights of innocent third parties, equity may impress a trust thereon.

Carpenter v Lothringer, 224-439; 275 NW 98

Loss of improperly created trust fund—reimbursement. Where an executor is devised a named sum of money in trust for a named person, and where the executor assumes to set aside or hold certain bank stock as said trust fund, which stock becomes worthless, by the failure of the bank, the estate must make good the resulting loss (or pro rata if the estate is insufficient to pay all legacies) less any payments made to the cestui que trust.

Mills v Manchester, 213-95; 237 NW 228; 238 NW 718

Insolvent estates—unallowable payment in full. The act of the administratrix of an insolvent estate in applying estate funds to the full payment of a debt, which is the personal obligation of both the deceased and the administratrix, is fundamentally unallowable. It follows that the creditor, by receiving such payment, becomes a trustee of the fund for the use and benefit of the estate, especially when he knew that the estate was insolvent.

Reason: The administratrix could not legally make such payment, even on an authorizing order of the court.

Andrew v Bank, 217-69; 251 NW 23

Recovery of funds expended without order of court. Guardianship funds expended by a guardian in the purchase of property without an authorizing order of court may be recovered from the seller who had knowledge of the trust nature of the funds when he received them.

Kowalke v Evernham, 210-1270; 232 NW 670

Collections by agent. An agent necessarily holds collections in trust for his principal, and an assignee of the agent for the benefit of creditors has no title or interest thereto.

Second N. Bank v Millbrandt, 211-1299; 235 NW 577

V SPENDTHRIFT TRUSTS

Discussion. See 4 ILB 139—Spendthrift trusts; 9 ILB 305—Spendthrift trusts; 11 ILR 386—Words necessary to create

Spendthrift trusts — general requirements. If the terms of a trust provide that the income be applied to the cestui at the discretion of the trustee, or the income is payable to the cestui at his demand, or the trust is for a special purpose, or in general where no debt is owed the cestui by the trustee, the creditors of the cestui cannot appropriate the benefaction.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trust—intent to create must be in instrument. The intention to create a spendthrift trust must be found on the face of the instrument creating the trust and cannot be found from the circumstance that the

V SPENDTHRIFT TRUSTS—concluded

cestui was a spendthrift and insolvent when a will creating such trust was executed.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trust — beneficiary's quitclaim. A trust in a deed vesting in grantees as trustees the absolute control of the property from which two beneficiaries receive the income until termination of the trust at a future time, if said beneficiaries are free from debt, is a spendthrift trust and a quitclaim grantee from one beneficiary secures thereby no present interest in the property.

Beemer v Challas, 224-411; 276 NW 60

Trusts which vest no inheritable interest in beneficiary. A testator who bequeaths directly to his wife a specific fund in trust, with directions to the wife to pay to their daughter for the latter's "care and support" such part of the accruing interest on said fund as the wife "shall deem advisable", and such part of the principal of said fund as the wife "shall deem advisable", will not be deemed to have intended to vest in the daughter any interest in said fund which would survive her death, it appearing as side lights that the daughter was debt-ridden, was possessed of an impecunious, inefficient, and likewise debt-ridden husband, and that the testator, prior to his death, had supported said daughter.

In re Bunting, 220-186; 261 NW 922

No spendthrift trust created — creditor's rights in. When the testator's will created a trust for his son, providing that the proceeds of the trust be paid to the son "yearly or oftener if collected for shorter periods," and contained no words showing an intent to place the trust income beyond the reach of the son's creditors, a debt due the son from the trustee was created, which was a vested right which could be assigned and was subject to claims of creditors.

Standard Chemical v Weed, 226-882; 285 NW 175

Judgment creditor of devisee-heir. When a father's will left property to a son and heir in trust so that it could not be subjected to the son's debts, a judgment creditor of the son was an interested person who had a beneficial and pecuniary interest in the estate of the deceased and in the son's share therein, of which he would be deprived to his prejudice if the will were probated.

In re Duffy, 228- ; 292 NW 165

Termination or removal of trustee by court —evidence insufficient. Evidence sustained trial court's refusal to terminate a spendthrift trust, or discharge trustees, upon application of beneficiary who alleged mismanagement and lack of cooperation on part of trustees, and also that beneficiary was not a spendthrift and that trust was not accomplishing purpose intended.

In re Sexauer's Trust, (NOR); 287 NW 247

VI TRUSTS ON PERSONALTY GENERALLY

Trust funds—nonpreference. The title to a testamentary fund perpetually bequeathed as a saving deposit to a bank as trustee with direction to pay the interest thereon to a church organization, for the sole purpose of repairing the church, necessarily passes to the trustee, and becomes a general deposit, with result that the fund is not entitled to an equitable preference in payment when the bank becomes insolvent.

Andrew v Presbyterian Church, 216-1134; 249 NW 274

Wrongful payment of dividends. Stockholders who, while their corporation is solvent and so remains, in good faith receive dividends which, unbeknown to them, are paid from corporate capital and not from corporate profits or surplus, are not, in case the corporation subsequently becomes insolvent, liable, in an action at law, to corporate creditors for the amount of such dividends. And it is quite immaterial whether the claimed liability is predicated on the statutes (§§8377, 8378, C., '35) or on and under the so-called corporate "trust fund" doctrine of the common law.

Bates v Brooks, 222-1128; 270 NW 867; 109 ALR 1371

Bank deposit—evidence to establish. In action to establish trust in funds in bank, represented by certificate of deposit which defendants claimed as a gift, evidence held to warrant decree for plaintiff.

Wier v Davidson, (NOR); 242 NW 37

Fatal delay in enforcing unknown trust. A trust fund, created without the knowledge of the cestui que trust, in the form of a bank deposit in a national bank and carried on the books of the bank for many years and then dropped, may not, after the bank has become insolvent, a receiver appointed, its affairs liquidated, and its charter surrendered and canceled, be enforced against a bank which took over certain assets of the old insolvent bank, and assumed certain of its obligations, not including, however, the trust fund in question.

Short v Bank, 210-1202; 232 NW 507

Rent—lien—impression of trust. A landlord may, against one who has no lien thereon, impress a trust upon the proceeds of property on which he—the landlord—had a lien for rent.

Federal Bank v Wylie, 207-816; 221 NW 831

Wrongful sale of mortgaged property—dissipation of proceeds. It being conceded, arguendo, that, when mortgaged personal property is sold without the consent of the mortgagee,

and the proceeds are deposited in a bank to the mortgagor's credit, said proceeds constitute a trust fund, of which the mortgagee is the beneficiary, yet such trust is dissolved if such proceeds are wholly dissipated in the payment of the debts of the bank.

Andrew v Bank, 209-273; 228 NW 12

Stock held in trust—double assessment liability—form of action to enforce. Under decree of an Iowa equity court assessing statutory liability on stock in a closed Iowa bank against a national bank as trustee under an identified trust, the bank does not become personally liable, under laws of Iowa, for such assessment. Neither could the receiver of the Iowa closed bank, in a common-law action, charge the trust property with such statutory liability.

Bates v Bank, 101 F 2d, 278

Trusteed special assessment certificates—pro rata distribution. Where a corporation, dealing in securities, owns a group of special assessment certificates for public improvements, and places them in a trust, against which trust are sold certain "ownership certificates" issued in numerical order as representing an interest therein and redeemable in their numerical order, and when, subsequently, it becomes apparent that the trust is insolvent, an application by the trustee to the court for instructions as to whether payment was to be made in numerical order or pro rata was properly decided for the pro rata method on the equity rule of equality and proportionate distribution of the remaining assets.

Iowa-Des Moines Bank v Dietz, 225-566; 281 NW 134

Improper allowance of attorney fees. A trust created by a legislative appropriation act solely for the "education, care, and keep" of a designated person may not be depleted by the allowance by the court of attorney fees for services rendered not in the administration of the trust, but in inducing the legislature to make the appropriation.

In re Gage, 208-603; 226 NW 64

VII TRUSTEES GENERALLY

Powers of trustee. Principle reaffirmed that the power of a trustee to dispose of trust property is limited to the powers granted in the trust agreement.

In re Barnett, 217-187; 251 NW 59

Dry trust—duty of trustee. A trustee who holds the naked legal title to property under a trust which has become legally dry should convey to the beneficial owners.

Fleming v Casady, 202-1094; 211 NW 488

Trust rendered dry by conveyance. A testamentary, nonspendthrift trust in real estate and in the income thereof, which imposes no limitation or prohibition on the right of the beneficiaries to convey, is rendered passive by the conveyance by all the beneficiaries of their respective interests; and this is true where the beneficiaries have the right, under the will, to compel the trustee, on petition to him, to sell the subject-matter of the trust and to divide the proceeds among themselves.

Fleming v Casady, 202-1094; 211 NW 488

Defending dry trust. A trustee may not employ attorneys at the expense of the estate to defend a trust which has become legally dry.

Fleming v Casady, 202-1094; 211 NW 488

Death of trustee—title of new appointee. A declaration of trust which makes a conveyance of the real estate to the trustee, and which reserved the right in the trustor to appoint a new trustee on the death of the original trustee, necessarily has the effect of casting upon such new trustee the identical title formerly held by the said original trustee.

Keck v McKinstry, 206-1121; 221 NW 851

Consent to change in trustee. An owner of land under trust deed to secure a bond issue, who unqualifiedly consents to a change of trustee may not thereafter claim that the new trustee is not the proper party to foreclose the trust deed, and especially when the bondholders unanimously approve of such change.

Central Bk. v Benson, 209-1176; 229 NW 691

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not

VII TRUSTEES GENERALLY—continued

an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Right to collect collateral. Trust deed held unequivocally to authorize the pledgor of collateral as security for a bond issue, to collect the principal and interest maturing on the collateral so long as the pledgor was not sixty days in default in himself paying the maturing principal and interest of the bonds, in which latter case the right and duty to collect devolved on the trustee.

Walker v Howell, 209-823; 226 NW 85

Trustee by contract—jurisdiction of court. A trustee who is such by contract between himself and the beneficiaries, but who applies to the district court for formal appointment, who is so appointed, who qualifies as such trustee under order of court, and who, in compliance with a prayer therefor, is authorized to take possession of, and manage the property in question under "orders of court", is subject to the jurisdiction of the court in the matter of reports, the rejection thereof, and final accounting.

In re Skinner, 215-1021; 247 NW 484

Trustees — control and removal by court. Trustees are subject to control or removal by the court.

In re Sexauer's Trust, (NOR); 287 NW 247

Execution of trust—trustees (?) or receiver (?). A court of equity may not terminate or violate a trust agreement between the issuer of bonds and trustees to the effect that the former will transfer to the latter securities for the benefit of bondholders, and that if the issuer defaults in the payment of interest on, or principal of, the bonds, the trustees, on notice from the unpaid bondholders, shall liquidate said securities and apply the proceeds to the payment of the bonds. It follows that, if the issuer of the bonds becomes insolvent, the trustees, in the absence of any counterwish of the bondholders, have a right, superior to that of the receiver, to liquidate the securities, the securities being less than the outstanding bonds; and this is true even tho the securities in question are not actually transferred to the trustees but only delivered to them.

In re Trusteeship, 214-884; 241 NW 308

Trustee for beneficiaries. The administrator is a trustee for the benefit of persons interested in the estate.

Goodman v Bauer, 225-1086; 281 NW 448

Right of trustee-plaintiff. When a plaintiff is a trustee with power simply to receive the amount of the recovery and deliver the same to the real party in interest, the action will be determined solely on the basis of the rights of such real party.

Ronna v Bank, 213-855; 236 NW 68

No failure for want of trustee. A trust estate will not fail for want of a trustee. So held where the bank, named as trustee in a will, failed.

First Methodist Church v Hull, 225-306; 280 NW 531

Trustee—disqualification—effect. Equity will not permit a trust to fail simply because a particular trustee is disqualified from acting.

State v Cas. Co., 206-988; 221 NW 585

Management of trust property—compensation and attorney fees. The compensation of a trustee and of his attorney necessarily rests quite largely in the discretion of the trial court.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Rights and liabilities as to third persons—imputation of notice or knowledge. A party who, as managing officer of a company, transfers the company's mortgage-secured promissory notes, and orally agrees that the indorsee shall have priority over other prior maturing notes secured by the same mortgage, must be held to have knowledge of said agreement when said prior maturing notes are subsequently transferred by the company to him as trustee of an estate.

White v Gutshall, 213-401; 238 NW 909

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Intermingled trust and private funds—presumption. Upon the insolvency of a trustee, it cannot be presumed that trust funds were preserved in the cash and loan notes taken over by the receiver when the proof shows (1) that the trustee received trust funds in the form of checks and, instead of cashing the checks and holding the cash for application on certain bonds as was his sole duty, he converted said checks by indorsing and depositing them in a bank in his personally owned deposit account, and thereby promiscuously intermingled both classes of funds, (2) that, from time to time, he drew checks against said intermingled funds for the purpose of carrying on his own private loan business, or so drew checks and placed the proceeds in his cash drawer for the same purpose, (3) that during all said time said private business was carried on at a heavy loss, and (4) that at one time after the trust

funds were received the trustee's deposit account was materially overdrawn.

Andrew v Trust Co., 217-464; 250 NW 177

Unauthorized and unallowable investments. The court may charge a court-appointed trustee with the amount of an investment purchased by the trustee from himself at a profit and without an authorizing order of court.

In re Siberts, 216-336; 249 NW 196

Wrongful purchase of securities by trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated, and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

Wrongful retention of securities by trustee. An objection to the final report of a trust company acting as trustee and executor of an estate is sufficient in alleging generally that the trust company wrongfully retained securities which it should have disposed of altho it does not state on what dates the securities should have been sold and what their values were on those dates.

In re Carson, 227-941; 289 NW 30

Mortgages — authority of trustee. Trust agreement construed and held to authorize the trustee to execute mortgages and to bind the beneficiaries of the trust for the payment thereof.

Daries v Hart, 214-1312; 243 NW 527

Consideration—assignment to trustee. A written assignment of a fractional interest in a life insurance policy to a trustee, made for the purpose of protecting the attorneys for the agreed value of their services in prosecuting an action on the policy, is supported by adequate consideration, especially when it appears that the trustee was to receive compensation for his services.

Welch v Taylor, 218-209; 254 NW 299

Escrow delivery—life estate reserved. Delivery of a deed to a trustee for redelivery to grantee after grantor's death reserves a life estate in the grantor, with title immediately passing to grantee, but with his right to possession and enjoyment of land therein conveyed postponed until grantor's death.

Bohle v Brooks, 225-980; 282 NW 351

Fiduciary relationship. A person is said to receive money in a fiduciary capacity when it does not belong to him or for his benefit, but is received for the benefit of another person to whom the receiver stands in a relation implying great confidence and trust on the one part and a high degree of good faith on the other.

Vertman v Drayton, 223-380; 272 NW 438

Fiduciary relationship—when not presumed. Principle reaffirmed that no presumption of fiduciary relationship arises from the fact of kinship. Evidence held quite insufficient to invalidate a deed on the ground of undue influence.

Craig v Craig, 222-783; 269 NW 743

Purchase of corporate stock by officers—fiduciary relation. Principle recognized that an officer or director of a corporation occupies a fiduciary relation towards a fellow stockholder in the purchase of the latter's corporate stock and is under duty to disclose to the selling stockholder evidence which has bearing on the value of the stock and which has come to him as such officer or director. Held, principle not applicable under certain facts.

Humphrey v Baron, 223-735; 273 NW 856

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Order fixing fiduciary's liability. An unappealed order of court, entered on the objections of a beneficiary to the report of a fiduciary, fixing the amount of liability of the fiduciary, is conclusive (in the absence of fraud) on the surety and those claiming under said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Nonpermissible purchase by trustee. A trustee of property may not sell trust property to himself, nor to a co-trustee, nor to his or her spouse, without the consent of all beneficiaries of the trust, nor may the court authorize or approve such a sale without the consent of said beneficiaries.

In re Holley, 211-77; 232 NW 807

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

Conflict of duty with personal interest—fiduciary's burden. A fiduciary may not appropriate funds to himself without consent of the beneficiary having full knowledge of the facts and any act by the fiduciary wherein personal interest and duty conflict is voidable at the mere option of the beneficiary. Fiduciary has

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the burden of showing his utmost good faith and fairness.

State v Exline Fuel Co., 224-466; 276 NW 41

Presumption of nondissipation. Principle reaffirmed that there is no presumption that a trust fund has been invested by the trustee in property other than cash.

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Preservation—presumption. Trust funds in the form of cash are presumptively preserved in the cash balance which passed into the hands of the receiver for the insolvent trustee.

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Trust fund—presumption. The presumption that a trustee has preserved a cash trust fund in his cash balance applies solely to the lowest cash balance subsequent to the creation of the trust and prior to insolvency.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Augmentation of assets—nonpresumption. An equitable preference in the payment of trust funds may not be decreed against the receiver of the insolvent trustee when there is no evidence whatever as to the property taken over by the receiver except the concession by the receiver that he had "assets sufficient to pay" the claim if the court decreed an equitable preference in payment.

Andrew v Bank, 205-237; 216 NW 12

Trust to secure bond issue—withdrawal of securities. Trust agreement under which mortgage securities were deposited with a trustee as security for the payment of a bond issue construed, and held not to authorize, expressly or impliedly, the withdrawal of securities from the trustee and the substitution of other securities in lieu of the ones withdrawn.

Richardson v Union Co., 210-346; 228 NW 103

Impressing unpaid warrant on excess assessment—necessary parties. Where two counties, by contract between both boards of supervisors and the contractors, issued warrants for construction of an intercounty drain and one county had a balance remaining from its assessments after paying all its drainage warrants but the other county after exhausting all funds from its assessments still owed outstanding unpaid warrants, an action in equity by an assignee of one of the unpaid warrants of the latter county to impress a trust for the amount of his warrant on the excess balance of the assessment in the former county, cannot be maintained against the former county alone because the other unpaid warrant holders and the landowners who paid the excess assessment are necessary parties.

Straub v Board, 223-1099; 274 NW 84

Substitution of securities. A trustee who, in violation of a trust agreement, permits valuable securities (pledged with him as security for payment of bonds issued by the trustor) to be withdrawn by the trustor and other securities to be substituted for the ones withdrawn has the burden of proof to show that the substituted securities were of the actual value of the securities withdrawn.

Richardson v Union Co., 210-346; 228 NW 103

Withdrawal and substitution of securities—liability of trustee. A trustee who, in violation of the trust agreement, permits valuable securities to be withdrawn from him by the trustor, and worthless securities to be substituted by the trustor, in lieu of the securities withdrawn, thereby fraudulently breaches his trust, and renders himself personally liable for the damages resulting to bondholders for whose benefit and security the trustee was holding said securities.

Richardson v Union Co., 210-346; 228 NW 103

Objections to trustee's final report—failure to dispose of securities. Objections to the final report of a trust company are not subject to a motion for more specific statement when officers of the trust company have equal or better knowledge of the facts called for by the motion, especially where the motion calls for evidentiary facts. Held, also, that trustee was charged with maladministration and not fraud.

In re Carson, 227-941; 289 NW 30

Testamentary trustee's conduct. The intentions of a testator must be ascertained from the terms of the will and such intentions must prevail. In a matter of doubtful construction, circumstances surrounding the execution of the will may be shown to aid in determining what the testator meant by the language used. The conduct of a testamentary trustee is not such a circumstance and is therefore not a material, evidential matter in determining testator's intention.

Freier v Longnecker, 227-366; 288 NW 444

Reinstating trust after wrongful dissipation. A trust which has been inadvertently or wrongfully converted and dissipated by the trustee to his own use is effectually reinstated by the subsequent act of the trustee, while solvent, in repurchasing with his own funds the subject-matter of said trust, with the specific intent to effect such reinstatement.

Leach v Bank, 202-887; 211 NW 529

Accounting by trustee—bank inducing lien release. Where a bank holds a chattel mortgage on horses, executed as part of an arrangement with the mechanic lienholder for payment of his lien, the release of which was induced by the execution of the chattel mortgage, a sale of the horses by the bank, under a subsequent chattel mortgage, would constitute the bank a trustee required to account to the mechanic lienholder, but, without proof that the horses sold were the same ones in both mortgages, no showing is made of trust funds to be accounted for.

Shimp Bros. v Place, 225-1098; 281 NW 471

Reports—justification—burden of proof. A trustee has the burden to justify his own reports.

In re Bartholomew, 207-109; 222 NW 356

Reports — disapproval — jurisdiction. A trustee who, in his acceptance of a nontestamentary trust, agrees to report annually to the district court, and does so report, and who invokes the jurisdiction of the probate court to pass upon his reports, may not thereafter question the power and right of such court to act upon such reports.

In re Bartholomew, 207-109; 222 NW 356

Right to impeach action of trustee. The act of a trustee in individually buying in property at tax sale and receiving a tax sale certificate when a mortgage on the property constituted part of the trust fund is unimpeachable except by the cestui que trust. In other words, the subsequent purchaser of said property at foreclosure sale may not impeach such act, especially when such purchaser had both actual and constructive knowledge when he purchased that the taxes had not been paid.

Eyres v Koehler, 212-1290; 237 NW 351

Fraud of trustee—affirmance or disaffirmance. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

Fraudulent substitution of pledged securities—effect on purchaser. The plea that the holder of bonds bought with full knowledge of the nature of the securities held by a trustee for the payment of the bonds can avail nothing when the holder, in purchasing, had no knowledge that said securities were inadequate because the trustee fraudulently permitted the trustor fraudulently to withdraw valuable securities and to substitute worthless securities with the trustee.

Richardson v Union Co., 210-346; 228 NW 103

Misconduct—attempted exemption — effect. A trustee may not, by any provision in a trust agreement, exempt himself from the consequences of his own fraudulent conduct, nor escape responsibility for an act done by an employee when the act was the trustee's own act, nor escape like responsibility for the doing of a prohibited act on the plea that he simply exercised a mistaken judgment.

Richardson v Union Co., 210-346; 228 NW 103

Maladministration by trustee—definiteness of allegation. When the final report of an executor and trustee of an estate was objected to on the ground of maladministration, the objection was sufficient tho it did not state whether the alleged wrongful acts were performed while the trustee was acting in its official capacity as executor or trustee.

In re Carson, 227-941; 289 NW 30

Self-enrichment of trustee—insufficient evidence of misconduct. A testamentary trustee of a coal mining company who, personally or in connection with employees of the company, with his own funds, buys up lands or mining rights in lands and leases to the company the right to mine coal from said lands under a royalty, will not be compelled, long afterward, to account to the legatees and devisees for the royalties so received and for salary drawn during said time (1) when the trustee had been vested, under the will, with substantially the same power over the business as the deceased possessed when living, (2) when the policy of operating on leases was but a continuance of the life-long policy of the deceased, (3) when the royalties paid were the royalties ordinarily and customarily paid in said locality, and (4) when the existence and history of said transactions were carried openly on the books of the company, and were either personally known or capable of being easily known by all the legatees and devisees.

Evans v Hynes, 212-1; 232 NW 72

Transfer of trust funds—recovery. Funds transferred from one trust fund by the trustee thereof to another trust fund of which he is also the trustee, in order to make good a wrongful shortage in the latter fund, may be recovered by the beneficiary of the wrongfully depleted fund.

In re Aasheim, 212-1300; 236 NW 49

Action against joint parties. Two or more persons acting jointly in a fiduciary capacity in relation to the same property for the same beneficiary, are properly made joint defendants in an action to enforce the trust.

Burger v Krall, 211-1160; 235 NW 318

Debt due—prerequisite proof. In actions in which an accounting is sought to determine the balance due from one party to another, it must be alleged and established that something is due before an accounting will be undertaken. This rule does not apply, however, in cases

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where an accounting is asked of a trustee who is under duty to account.

Burkey v Bank, (NOR); 256 NW 300

Credit for overpayment of income. On final accounting, a trustee will be credited with an overpayment to the beneficiary of income even tho such payment was made in advance of the actual receipt of the income.

In re Siberts, 216-336; 249 NW 196

Garnishment of trustee and trust funds. A trustee cannot be made a garnishee by a creditor of the cestui que trust when, at the time of garnishment, the net income only of the trust is (under the terms of the trust) payable to the cestui, and then only on his optional demand, and when such net income was not only then undeterminable, but the cestui had not exercised his option to demand it.

Darling v Dodge, 200-1303; 206 NW 266
See Ober v Dodge, 210-643; 231 NW 444

Discretion of trustee—review by court. The discretion of a trustee in carrying out the purposes of the trust is always subject to review by the court.

In re Cool, 210-30; 230 NW 353

Findings of fact in probate. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams, 219-374; 258 NW 682

Adjudication of liability — conclusiveness. An order of court unappealed from, adjudicating the amount of the liability of a trustee to the beneficiary, is conclusive on the trustee, and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Subrogation—conditional order. An order subrogating a surety to all the rights of his principal—a trustee—in unauthorized investments of trust funds is properly conditioned on payment being first made of all sums due the trust.

In re Riordan, 216-1138; 248 NW 21

10050 Conveyances by married women.

See annotations under §§10051, 10052, 10446, 10447, 10449
After-acquired title of wife. See §10043

10051 Conveyances by husband and wife.

Vendor and purchaser generally. See under §12389 (II)

Warranty deed—effect. A warranty deed duly signed by both husband and wife necessarily constitutes a complete subordination and waiver of all the rights of both husband and wife, including homestead and dower.

Clark v Chapman, 213-737; 239 NW 797

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Reservation of homestead right—evidence. Where a form book used for the recordation of warranty deeds in the office of the recorder of deeds contained a printed relinquishment by a spouse of "dower and homestead", the fact that in a certain instance the word "homestead" has been erased furnishes no evidence that the grantors had orally reserved a homestead right in the conveyed property.

Clark v Chapman, 213-737; 239 NW 797

Elements of conveyance—delivery. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

Forfeiture of insurance policy for breach of condition subsequent—change of title. A conveyance, without consideration, by a husband to his wife of a stock of insured goods with the intent to place the goods beyond the reach of his apprehended creditors, without any actual change of possession or use taking place, followed later by a reconveyance, without consideration, by the wife to the husband, constitutes no such change in the interest or title of the insured as will void the policy, the wife never having had any financial interest in the property.

McVay v Ins. Co., 218-402; 252 NW 548

"One dollar and other valuable consideration"—sufficiency. A deed from husband to wife, executed two years prior to the rendition of a judgment against the husband and which deed recites a consideration of "one dollar and other valuable consideration", is not fraudulent as against such judgment creditor of the grantor-husband, when it is shown

that the "other consideration" consisted of $3,000 actually paid by the wife.

Donovan v White, 224-138; 275 NW 889

10052 Covenants—spouse not bound.

Legal cancellation of covenant of seizin. A grantee of land, in legal effect, cancels the covenant of seizin contained in his deed, and likewise cancels an indemnity bond which is tantamount to a covenant of seizin, by reconveying the land to the grantor with covenant of seizin.

Duke v Tyler, 209-1345; 230 NW 319

Restrictions as to use—omission from deed —effect. The grantee of a lot who takes by quitclaim deed which contains no restrictions as to the use of the property is, nevertheless, bound by restrictions as to the use of the property contained in the deed to his grantor and in substantially all other deeds to lots in the addition, it appearing that the addition in question was publicly and notoriously platted as a restricted residence area.

Shuler v Gravel Co., 203-134; 209 NW 731

Signature of spouse to mortgage only—effect. The defeasance clause in a real estate mortgage on the lands of a husband, to the effect that the mortgage shall be void if the signers shall "pay or cause to be paid" the secured notes, does not, in and of itself, impose personal liability on the wife who is one of the signers to the mortgage.

Fairfax Bank v Coligan, 211-670; 234 NW 537

"Mortgagor" defined. A "mortgagor" is he who holds title to the premises mortgaged. A wife who joins in a mortgage of the husband's land for the purpose of releasing her distributive share is not a mortgagor.

Wood v Schwartz, 212-462; 236 NW 491

Covenant to pay taxes—nonduty of wife to pay. A wife who, for the purpose of releasing her distributive share, joins with her husband in a mortgage of the husband's lands is not bound by the husband's covenants or legal obligation to pay future accruing taxes on the land.

Wood v Schwartz, 212-462; 236 NW 491

Covenant for insurance does not run with land. A covenant by a mortgagor to keep the buildings on the mortgaged premises insured for the benefit of the mortgagee is entirely personal in character, and does not run with the land. Where a mortgagor obtained a policy payable to himself, and later sold the premises to one who did not assume the mortgage, and assigned the policy, held that the grantee, upon discovering that the policy had lapsed because of nonpayment of premiums, might reinstate the policy by paying the premiums, and henceforth carry the policy solely for his own benefit, and free from any equitable claim of the mortgagee.

First Tr. JSL Bk. v Duroe, 212-795; 237 NW 319

10053 Title and possession of mortgagor.

Rights to possession and rents. A grantee of land who takes possession under his deed at a time when the purchaser under an outstanding, unforfeited bond-for-a-deed contract of sale of the land is entitled to possession, cannot be deemed a "mortgagee in possession", and must account to said purchaser or to his grantees for rents.

Harrington v Feddersen, 208-564; 226 NW 110; 66 ALR 59

Mortgagee in possession. A mortgagee who, under an agreement with the mortgagor, takes possession of the mortgaged premises, and rents the land and applies the rents in accordance with the agreement, must be deemed a mortgagee in possession.

Richardson v Rusk, 215-470; 245 NW 770

Right of mortgagee to possession. A general provision in a real estate mortgage that the mortgagee may, for any default of the mortgagor, declare the entire debt due, and thereupon "shall be entitled to the immediate possession of said premises and to the appointment of a receiver", does not contemplate or authorize any possession of the premises by the mortgagee except a possession obtained by a foreclosure and by the appointment of a receiver thereunder.

First Tr. JSL Bk. v Stevenson, 215-1114; 245 NW 434

Andrew v Haag, 215-282; 245 NW 436

Transfer to mortgagee — nonmerger of lien. A mortgagee who, subsequent to the execution of his mortgage, acquires the fee title to the mortgaged land does not thereby merge the lien of the mortgage into the fee when such was not his intention and when such merger would be detrimental to his interest.

Andrew v Woods, 217-453; 252 NW 112

Quitclaim to avoid foreclosure—effect of existing junior liens—insurance unaffected. A mortgagee's status as such, as affecting his rights under a fire insurance policy, is not lost by merger when he takes a quitclaim deed from mortgagor agreeing not to foreclose if no junior liens exist against the property, when thereafter it is found that such liens do exist whose presence would cause a merger to be against the interest and inconsistent with the intention of the mortgagee.

Guaranty Ins. v Farmers Assn., 224-1207; 278 NW 913

10054 Tenancy in common.

Discussion. See 12 ILR 415—Estates by entireties

Estate by entirety. The common-law estate by entirety has not been recognized in this state.

Fay v Smiley, 201-1290; 207 NW 369

Conveyance by husband to wife and himself. A conveyance of land by a husband to his wife and to himself creates a tenancy in common.

Fay v Smiley, 201-1290; 207 NW 369

Conveyances — statutory presumption. Conveyances of land to two grantees in their own right create a tenancy in common (no contrary intent appearing in the conveyance) irrespective of the legal terms privately employed by the grantees in describing their relation to the property.

Conlee v Conlee, 222-561; 269 NW 259

Partners as tenants in common. Principle reaffirmed that the legal title to partnership realty is held by the partners as tenants in common.

Bankers Trust v Knee, 222-988; 270 NW 438

Surviving spouse and children. Upon the death of the owner of land, the surviving spouse and children become tenants in common of said land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Prichard v Anderson, 224-1152; 278 NW 348

Joint tenancy—validity. Two or more persons may validly orally agree that their accumulations of real and personal property shall be held and owned jointly, and that, upon the death of one of the parties, the property shall pass to the survivors, and that the final survivor shall take the property absolutely.

Stonewall v Danielson, 204-1367; 217 NW 456

Possession of tenant possession of landlord. The possession of a tenant is the possession of the landlord, and is notice of the rights of the landlord.

Phelps v Kroll, 211-1097; 235 NW 67

Mutual liabilities—contribution for necessary expenditures. A tenant in common is entitled to contribution from his co-tenant for expenditures absolutely necessary for the benefit and preservation of the common property. So held where one tenant paid off a mortgage.

Yagge v Tyler, 225-352; 280 NW 559

Action for partition—allowance to co-tenant for improvements. A co-tenant who, in good faith, makes valuable and beneficial improvements upon the common property, even without the knowledge or consent of the other co-tenant, will, on final decree in partition, be protected to the extent which the improvements have enhanced the sale value of the land.

Nelson v Pratt, 212-441; 230 NW 324; 236 NW 386

Paying mortgage to protect undivided interest—not gift to co-tenant. Payment, by a mother, of a mortgage on property she holds as a tenant in common with her adopted son, held to be for the preservation and protection of her share in the property, when otherwise unexplained.

Yagge v Tyler, 225-352; 280 NW 559

Widow preserving unadministered estate—contribution from co-tenant — nonestoppel. Where an adopted son and the widow are tenants in common in a deceased husband's estate, the fact that the widow did not open administration, no showing being made that she administered de son tort, does not estop her executor from claiming contribution from the adopted son for payments made by the widow to preserve the common property.

Yagge v Tyler, 225-352; 280 NW 559

Joint tenancy not favored—words creating strictly construed. The rule of joint tenancy with right of survivorship is not favored in public policy, and the mere inclusion of the words in a deed "Said real estate being taken jointly" will not be sufficient to establish a joint tenancy, especially when followed by words tending to negative such assumption, such as, "to the grantees, their assigns, heirs, and devisees forever".

Albright v Winey, 226-222; 284 NW 86

Ouster of all tenants by superior title—effect. Principle reaffirmed that after tenants in common are all ousted by a superior title, e. g., a tax deed, one who was such former tenant in common may buy in the superior title exclusively for his own benefit.

Wood v Schwartz, 212-462; 236 NW 491

Accounting—division of receipts. When it happens that only one of two joint, equal, equitable owners of real estate is personally obligated on the contract for a deed under which the land is held, it is quite manifest that the law cannot presume, without supporting evidence, that forfeited payments received by said parties as the result of a futile attempt at sale of said premises, belong wholly to said non-obligated party; and equally manifest that the law cannot, on such circumstances, rear a so-called quasi contract to the same effect, in the absence of like evidence.

In re Kelly, 221-1067; 267 NW 667

Highway assessment — tenants in common. Jurisdiction to establish an assessment district as to only one of two tenants in common does

not embrace jurisdiction to levy an assessment against the farm as a whole.

In re Road Dist., 213-988; 238 NW 66

Sale—redemption by co-tenant. One who, during the period for redemption from mortgage foreclosure and sale en masse, purchases by quitclaim the undivided interests in the land of a part of the personal judgment defendants, can redeem only by paying the full amount of the sheriff's certificate of purchase, plus interest and costs, the remedy of such redemptioner being to enforce contribution from his co-tenants.

Kupper v Schlegel, 207-1248; 224 NW 813

Contribution for taxes, interest, repairs, and tiling. A surviving mother, in partition of lands left by the deceased husband, is entitled to proper contribution from the children for money paid by her for taxes, interest on mortgages, and necessary repairs, but not (under certain facts) for tiling of the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Accrual of right of action—contribution by co-tenant. The cause of action in favor of one tenant in common against his co-tenant for contribution for the outlay in discharging an incumbrance on the common property accrues instantly upon payment of the incumbrance and is barred in five years.

Lawrence v Melvin, 202-866; 211 NW 440

Accounting—limitation of action. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common property, until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

10055 Co-tenant liable for rent.

Purchase of outstanding lease, etc. One of several tenants in common of the fee to land who, on his own behalf, purchases of a lessee both an outstanding long-time lease on the said land and the building thereon, erected and owned by the lessee under said lease, may not enforce contribution from his co-tenants for his outlay; nor may said co-tenants legally demand the right to make contribution to the purchasing tenant and become tenants in common of the building.

Fleming v Casady, 202-1094; 211 NW 488

Purchase by tenant of undivided interest. A lessee who exercises his option under the lease to buy an undivided half of the leased premises does not cease to be the tenant of the lessor as to the undivided interest retained by the lessor, and after the purchase, such tenant remains liable under the lease to the lessor for one half of the originally reserved rent.

Schick v Realty Co., 200-997; 205 NW 782

Nonduty to account for rents. A surviving wife is under no legal obligation, in partition proceedings, to account to her children for the rent of their shares of the land left by the deceased husband and father, when, upon the death of the latter, the wife and children continued to jointly occupy and farm the land in the usual way, and to apply the resulting profits and products to their joint maintenance and education.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

10057 Vendor's lien.

ANALYSIS

I NATURE OF LIEN
II PRIORITY
III LOSS OR WAIVER OF LIEN

Foreclosure of vendee's rights. See under §§12382, 12383
Vendor and purchaser generally. See under §12389 (II)

I NATURE OF LIEN

Vendor's and equitable lien contrasted. The power of a court of equity to establish an equitable lien is quite independent of the law applicable to a vendor's lien.

Bogle v Goldsworthy, 202-764; 211 NW 257

Vendee as owner under executory contract. The vendee of land under a contract calling for installment payments is the equitable titleholder, and therefore, the "owner" of the land within the mechanic lien statutes, and may contract for improvements on the land and subject his interest to the resulting mechanic liens.

Knapp v Baldwin, 213-24; 238 NW 542

Specific performance—allowable relief under general prayer. In bank receiver's specific performance action to compel heirs to perform contract to purchase receiver's interest in estate property, a prayer for general equitable relief warrants a decree establishing vendor's lien, ordering a special execution sale of the receiver's interest, and a general execution for any deficiency.

Utterback v Stewart, 224-1135; 277 NW 735

Waiver of time element. When the vendee in a contract of sale of real estate waives the time element for the performance of the contract, he, in legal effect, arms the vendor with right to perform within a reasonable time, and to enforce specific performance if vendee then refuses to perform.

Andrew v Miller, 216-1378; 250 NW 711

I NATURE OF LIEN—concluded

Enforcement of vendee's lien — burden of proof. A vendee who rescinds, and seeks to establish a lien on the land for his proper advancements, need not show that a subsequent titleholder had knowledge of his (vendee's) rights. The subsequent titleholder must show his want of knowledge.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Rescission by vendee—lien. A vendee of land is entitled in equity, on proper rescission by him of the contract of purchase, to a lien on the land (1) for the amount of the purchase price advanced by him, (2) for the reasonable value of all proper improvements made on the land by him, and (3) for any other proper expenditure suffered by him and growing out of the contract,—a right enforceable against all parties who take rights in the land with knowledge, actual or constructive, of vendee's rights.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

II PRIORITY

Purchase-money mortgage. A real estate mortgage may not be deemed a purchase-money mortgage and have extended to it the pre-eminent right of priority over all other liens and claims arising through the mortgagor, unless the holder distinctly establishes the fact that the money secured by the mortgage was advanced for the express purpose of paying the purchase price of the land.

Ely Bk. v Graham, 201-840; 208 NW 312

Purchase-money mortgage. A mortgage on land given to secure a balance due the mortgagee from the mortgagor on a transaction disconnected with the land, is not a purchase-money mortgage in such sense as to give the mortgagee priority over pre-existing liens.

Miller v Miller, 211-901; 232 NW 498

When superior to mechanic's lien. A vendor's lien for the purchase price of land sold on installments without obligating or requiring the vendee to make any improvement on the property is superior to mechanics' liens growing out of the repair and improvement of a building existing on the land when it was sold; and this is true even tho the vendor may have expected that the vendee would or might make such repairs or improvements, or may have actually known that the vendee was making them.

Knapp v Baldwin, 213-24; 238 NW 542

Unremovable repairs and improvements. Where the vendee of land, exclusively on his own authority, places repairs and improvements upon an existing building on the land of such a nature that they cannot be removed without material damage to the building, the vendor's lien for the purchase price of the land is superior to the lien of the mechanic lien claimants both as to the real estate, and as to repairs and improvements.

Knapp v Baldwin, 213-24; 238 NW 542

III LOSS OR WAIVER OF LIEN

Absence of necessary parties. A vendor's lien may not be established against land after it has been transferred by the purchaser and the new owners are not made party defendants.

In re Thomas, 203-174; 210 NW 747

Deed—new grantee. The grantor in a deed of conveyance in escrow who consents to the substitution in the deed of the name of a new grantee, and to the delivery of the deed to such new grantee, and who permits such new grantee to pay taxes and interest on incumbrances and ultimately to sell and convey the land to a good-faith purchaser for value, necessarily loses the right to establish a vendor's lien on the land.

Lindberg v Younggren, 209-613; 228 NW 574

Election of remedies. A purchaser of land who rescinds, and obtains against the vendor judgment at law for the amount advanced as purchase price and for other proper expenditures, does not thereby waive his right to bring an action in equity to have the judgment declared a lien on the land.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

10058 Fraudulent conveyances.

Actual or constructive fraud required. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Evidence insufficient to show fraud. Evidence held sufficient to sustain a judgment refusing to set aside a conveyance of realty by devisee thereof to claimant against estate on ground of lack of consideration or fraud in making conveyance.

First N. Bank v Adams, (NOR); 266 NW 484

Fraud in procuring deed. Where deed containing recital of consideration was obtained by fraud, the grantor is not precluded as a matter of law from showing a constructive trust arising from the fraud, and equity will allow such showing to be made by parol evidence, but such evidence must be clear and satisfactory.

Rance v Gaddis, 226-531; 284 NW 468

Constructive trust—fraud by grantee. Where grantee obtained title by false assurance that he would hold title as trustee to protect grantor's ownership, and immediately placed a

mortgage on the property for his own benefit after obtaining title, a constructive trust was created and grantee became a trustee ex maleficio for benefit of grantor.

Rance v Gaddis, 226-531; 284 NW 468

Trustee in bankruptcy—remedy. A trustee in bankruptcy cannot maintain an action at law against a grantee of the bankrupt to recover the "value" of property collusively and fraudulently transferred to said grantee in fraud of creditors. This is not saying that the trustee may not treat the property in the hands of the grantee as belonging to the bankrupt, or impress a trust on the proceeds of the property if grantee has disposed of it.

Lambert v Reisman Co., 207-711; 223 NW 541

Unallowable action for damages. A judgment plaintiff may not maintain an action at law for damages against the fraudulent grantee of land transferred by the judgment defendant, even tho the action is aided by an allegation of conspiracy to defraud plaintiff.

McKay v Barrick, 207-1091; 224 NW 84

Proof required. Principle reaffirmed that a deed of conveyance will not be set aside on an allegation of fraudulent representation which is sustained by a mere preponderance of the evidence.

Clark v Beck, 208-156; 225 NW 353

Burden of proof. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Conveyance and assignment to stepson. Where an elderly but unusually self-willed woman executed a deed to her stepson during time in which she managed her own affairs, and relationship with grantee was only that which ordinarily exists between a mother and son, evidence in action to set aside the deed did not warrant finding that confidential relationship existed so as to raise presumption of fraud, but as to the assignment of a mortgage procured by this stepson after he came to live with her and had taken over management of her affairs, evidence justified finding that such relationship did exist.

O'Brien v Stoneman, 227-389; 288 NW 447

Fraud and undue influence not proved. In an action in equity by a 73-year-old grantor, who had no children of his own, to set aside deed to adult children of second wife, subject to a life estate in grantor, where associations of the grantor and grantees, over a long period of years, were not unlike that ordinarily observed between natural parents and children, evidence did not sustain charge that deed was procured by fraud and undue influence.

Lawson v Boo, 227-100; 287 NW 282

Undue influence as phase. Undue influence, a phase of actual fraud, will invalidate a transaction between persons in a confidential relationship.

Merritt v Easterly, 226-514; 284 NW 397

Monomania and undue influence unproved. Where a daughter, among other things, testified against her father in a divorce action and left him to live with her mother, she furnished the evidence for his belief of her lack of filial affection, and conveyances of his property executed pursuant to his intention to disinherit her upheld over her contentions that he was a monomaniac and that the conveyances resulted from the use of undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Undue influence—destroying free will. Undue influence necessary to set aside a conveyance must be enough to destroy the free agency of the grantor. Evidence reviewed and found insufficient to establish undue influence.

Mastain v Butschy, 224-68; 276 NW 79.

Evidence necessary to invalidate deed. A deed is presumed to express the intention of the grantor and one who attempts to set it aside on the ground of undue influence or insanity has the burden of proof to present evidence that is clear, satisfactory, and convincing.

Mastain v Butschy, 224-68; 276 NW 79

Mental incompetency — undue influence — burden of proof. The mental incompetency of a grantor to execute a deed of conveyance, or the obtaining of said conveyance by the grantee by undue influence, when assigned as ground for setting aside said conveyance, must be established by plaintiff and by clear, satisfactory and convincing evidence—there being no proof that a confidential relationship existed. Evidence reviewed and held insufficient to meet said burden of proof.

Foster v Foster, 223-455; 273 NW 165

10059 Rule in Shelley's case.

Application. A conveyance to grantee "during his natural lifetime with remainder to his legal heirs" carries the fee to grantee under the rule in Shelley's case. (Deed executed prior to July 4, 1907.)

Biddle v Worthington, 216-102; 248 NW 301

When inapplicable. The rule in Shelley's case has no application when the conveyance, deed, or will is to one for life with remainder over to the children of the life tenant, unless it is manifest that the grantor used the word

"children" as the equivalent of the word "heirs".

Blair v Kenaston, 223-620; 273 NW 184

Shelley's case inapplicable. The so-called "rule in Shelley's case" has no application to a deed of conveyance which creates a trust in the grantee for the benefit of his heirs.

Hibler v Hibler, 208-586; 226 NW 8

Inapplicability of rule. The so-called "rule in Shelley's case" has no application to a deed of conveyance which creates a trust in the grantee for the benefit of his heirs.

Hibler v Hibler, 208-586; 226 NW 8

Construction of wills—intent of testator to nullify rule. While the rule in Shelley's case applied to wills as well as deeds, yet, wills being construed more liberally than deeds, if the intent of the testator appears to create a life estate, the rule did not apply.

Friedmeyer v Lynch, 226-251; 284 NW 160

Abrogative statute not retroactive. The legislature by abrogating the rule in Shelley's case did not give the statute any retroactive effect; therefore, the rule applies to wills made before the enactment of the statute.

Friedmeyer v Lynch, 226-251; 284 NW 160

Testator's intention—rules of construction—when used. Intention of testator will be determined from the actual language of the entire will, but if this is not possible, then rules of construction will be employed, not including rule in Shelley's case abrogated by statute.

Hudnutt v John Hancock Ins., 224-430; 275 NW 581

10060 Devise, bequest, or conveyance not enlarged.

Discussion. See 22 ILR 543—Renunciation of life estate

Sale of life estate—interest acquired. Judgment creditor of a life tenant in purchasing a life estate at execution sale cannot acquire any greater interest than that held by the life tenant.

Rich v Allen, 226-1304; 286 NW 434

Life estate (?) or fee (?)—intestacy. An unambiguous will of property for the devisee's "perfectly free use during his lifetime", without any gift over, conveys a life estate only. It is not permissible to construe such a will as conveying the fee simply to avoid intestacy.

Horak v Stanley, 216-318; 249 NW 166

"Particular estate". A "particular estate" is an estate for life or for years for the reason that it is only a small part or portion of the inheritance.

Anderson v Anderson, 227-25; 286 NW 446

Testator's intention. In construing a will the principal concern will be to ascertain and determine the intention of the testator, and it is the duty of the court, if it be reasonably possible, to give effect to all of the will's provisions.

Anderson v Anderson, 227-25; 286 NW 446

Life estates—remainder over. When a will provides for a devise of realty to wife for life, then to three named children for life as tenants in common and remainder over in fee per stirpes to their lawful issue, held, life estate vested in children after wife's death with contingent remainder over in fee, as provided by statute—the life estates being the particular estate supporting the contingent estate which would vest, upon death of each of testator's named children, in that child's lawful issue, if any.

Anderson v Anderson, 227-25; 286 NW 446

Remainder over—absence of issue—no lapse of remainder. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

Deeds—creation of vested interest—inviolability. A deed, (1) which is conditioned on grantee paying, after the death of grantor, named sums to each of grantee's two sisters, and (2) which is executed and delivered by grantor and accepted by grantee in accordance with a plan entered into by all of said parties for the settlement of their inherited interests in said land, creates, instanter, in said sisters a vested landed interest which is immune from change without their consent. So held where the grantor, later, erroneously assumed the right to treat the deed as testamentary and, by a new deed, to reduce the payments to the sisters.

Carlson v Hamilton, 221-529; 265 NW 906

Death of joint life tenant without issue—remainder over in fee. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one-third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts

against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Devise—life estate (?) or fee (?)—mortgage validity. Where a will devised land to a son to use until son's youngest child became twenty years old, or if such child died before such age, then until January 1, 1940, when the land became the property of the "son and his heirs", a mortgage placed on the land by the son, altho before 1940, is a valid lien, not merely on a life estate, but on the fee, and an equitable action by son's children against the mortgagee and others to establish title in the land was properly dismissed.

Hudnutt v John Hancock Ins., 224-430; 275 NW 581

CHAPTER 439

CONVEYANCES

10066 "Instruments affecting real estate" defined—revocation.

Atty. Gen. Opinion. See '30 AG Op 277

Recording "instrument relating to real estate". A mortgage (1) on chattels on certain described real estate and (2) on all crops "sown, planted, raised, growing or grown" on said real estate for two specified years following the execution of said instrument, being an instrument which "relates to real estate", is recordable as a real estate mortgage, and such recording may be enforced by mandamus.

Weyrauch v Johnson, 201-1197; 208 NW 706

Lease—assignment—recordation. A lease of real estate and the assignment thereof are recordable for the purpose of conveying constructive notice to a mortgagee and his subsequently appointed receiver under a mortgage which contains a pledge of the rents, even tho said parties are not entitled, as a matter of right, to such notice.

King v Good, 205-1203; 219 NW 517

Assignment of rent not recordable. A written assignment of a lease of real estate and of the rents accruing thereunder, (especially when the lease is at the time manually delivered to the assignee) is not an instrument which the law requires to be recorded, and if recorded the record imparts no notice.

Phelps v Kroll, 211-1097; 235 NW 67

10067 Corporation having seal.

Release or subordination of mortgage—authority of president. A corporation is bound by the act of its president in subordinating its mortgage to another mortgage (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Duty to affix — scope of requirement. A writing granting to a party a mere option to repurchase land from a corporation within a named time and at a named price, is not an instrument such as is contemplated by the statute which requires the corporate seal to be affixed to instruments "conveying, incumbering or affecting real estate", nor as is contemplated by substantially similar requirements in articles of incorporation.

Shanda v Bank, 220-290; 260 NW 841

10069 Release of corporate lien—omission of seal.

Change in name of mortgagee—presumption. A recital in a formal release of a mortgage, to the effect that the mortgagee has, by proper amendment to its articles of incorporation, changed its name to the name indicated by the one executing the release, will be deemed presumptively true.

Vanderwilt v Broerman, 201-1107; 206 NW 959

10070 Contract for deed — presumption of abandonment.

Lost instrument—real property title affected. Where a lost instrument relied upon affects the record title to real estate, public policy demands that the proof of its former existence, its loss and its contents, should be strong and conclusive—rule applied to real estate contract.

Forrest v Otis, 224-63; 276 NW 102

10071 Christian names — variation — effect.

Variation in names—notice to purchasers. See under §10105 (V), Vol I

"Idem sonans" doctrine—applicability. The doctrine of idem sonans is recognized by Iowa courts and, while each case must be determined according to its own facts, the mere fact that names spelled differently from true name could be pronounced like the true name by a strained pronunciation would not make the doctrine applicable, but where the names, when general and ordinary rules of pronunciation are applied, are so identical in pronunciation and so alike that there is no possibility of mis-

take, the doctrine should be applied; or where two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even slight difference in their pronunciation is unimportant, if the attentive ear finds difficulty in distinguishing the two names when pronounced. Such names are "idem sonans" and, altho spelled differently, are to be regarded as the same.

Webb v Ferkins, 227-1157; 290 NW 112

Discrepancy in names—effect. The fact that in the body of a mortgage, and in the certificate of acknowledgment of said mortgage, the name of the wife of the mortgagor-owner appears as "Mary F. McNeff" instead of "Mary T. McNeff" (her correct name) is not of controlling importance on the issue as to the validity of the mortgage as to the wife, it appearing that she was correctly identified in said certificate of acknowledgment "as the wife" of said mortgagor-owner.

First Tr. JSL Bank v McNeff, 220-1225; 264 NW 105

10072 Assignment of certificate of entry deemed deed.

Patents—collateral attack. The issuance by the state of a patent to lands is an assertion of the existence of the property conveyed; and such patent is immune from attack in a collateral proceeding.

Meeker v Kautz, 213-370; 239 NW 27

10074 Railroad land grants—duty to record.

Invalid reservation in land grant. Principle reaffirmed that the insertion in a patent issued by the federal government under a public improvement grant of a clause "excepting and reserving all mineral lands", is, in the absence of fraud, a nullity even tho the grant itself did except mineral lands.

Herman v Engstrom, 204-341; 214 NW 588

10075 Patents covering land in different counties.

Patents—presumption. A government patent is not conclusive that the government owned the land at the date of the patent.

Bigelow v Herrink, 200-830; 205 NW 531

User—estoppel. In an action to enjoin the repair of a dike originally constructed in connection with drainage system created jointly by adjoining landowners, including plaintiff's predecessor in title, and used with knowledge of plaintiff for over 20 years without objection, principles reaffirmed (1) that where there is proof of more than mere user, the statute providing that an easement cannot be established by proof of mere user alone does not apply, and (2) that the owner of a dominant estate may by consent, express or implied, estop himself from insisting upon adherence to the principle that the owner of a servient estate has no right to interfere with the natural flow of water in a well-defined course so as to cast it back upon the dominant estate.

Dodd v Aitken, 227-679; 288 NW 898

10083 Certification—effect.

Certified copies of records. See §11296

10084 Forms of conveyance.

Atty. Gen. Opinion. See '38 AG Op 546

ANALYSIS

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I DEEDS IN GENERAL

(a) IN GENERAL

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Estate by entirety. The common-law estate by entirety has not been recognized in this state.

Fay v Smiley, 201-1290; 207 NW 369

Instrument not passing present title.

Tilton v Klingaman, 214-67; 239 NW 83

Repugnancy between clauses—modern rule. The technical rules of the common law as to the division of deeds of conveyances into formal

parts, i. e., premises or granting clause, and habendum clause, will not prevail as against the manifest intention of the parties as shown by the deed as a whole. Applied (1) where the granting clause clearly granted a life estate, while (2) the habendum clause defined the estate received by the grantee as the fee.

Blair v Kenaston, 223-620; 273 NW 184

Repugnancy—modern rule. The technical rules of the common law as to the division of deeds of conveyances into formal parts, i. e., premises or granting clause and habendum clause, will not prevail as against the manifest intention of the parties as shown by the deed as a whole. Applied (1) where the granting clause granted a fee and, apparently, vested it at once, while (2) the habendum clause clearly revealed a purpose to render the vesting conditional.

Shultz v Peters, 223-626; 273 NW 134

"Subject to liens of record." The expression "subject to liens of record", when embraced in the habendum clause of a deed of conveyance, does not have the effect of continuing the lien of a judgment after the holder thereof has failed to exercise his right to redeem.

Paulsen v Jensen, 209-453; 228 NW 357

Substitution of grantee. Principle recognized that substitution of grantees in a deed of conveyance may be made, with the consent of the parties concerned.

Lindberg v Younggren, 209-613; 228 NW 574

Transfer of present interest necessary—intent of grantor. Any instrument to be effective as conveyance of real estate must operate to convey a present interest in the real estate, and the intent of the grantor is the controlling factor in determining whether or not such present interest is conveyed.

Bohle v Brooks, 225-980; 282 NW 351

Unreasonable deed—validity. If a grantor is of sound mind, and acts of his own free will and accord, he has a legal right to make an unjust and unreasonable conveyance.

O'Neil v Morrison, 211-416; 233 NW 708

Absolute deed as mortgage—evidence—sufficiency. Evidence reviewed at length and held, that a deed of conveyance, absolute in form, was intended to be such, and not a mortgage.

Shanda v Bank, 220-290; 260 NW 841

Accretion passes by ordinary deed. Accretion to land passes by a deed of the upland owner unless expressly excepted.

Haynie v May, 217-1233; 252 NW 749

Acknowledgment before disqualified notary. The validity of a deed of conveyance is, as between the grantor and grantee, in no manner affected by the fact that the deed was acknowledged before a disqualified notary public.

Shanda v Bank, 220-290; 260 NW 841

Acquiescence in title by grantor—deed not set aside. When the grantor of a warranty deed had acquiesced for five years in the title of the grantee, he could not set aside the deed and quiet title in himself without establishing a plain, clear, and decisive case.

Huxley v Liess, 226-819; 285 NW 216

Assignment of share—construction. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor.

Berg v Shade, 203-1352; 214 NW 513
See Funk v Grulke, 204-314; 213 NW 608

Bona fide purchaser—recital in deed—effect. A grantee of real estate is bound by a recital in his deed that the land is taken subject to all recorded mortgages.

Citizens Bank v Hamilton, 209-626; 227 NW 112

Cancellation. Want of consideration in itself will not warrant the setting aside of a deed, it being competent for a grantor to make a gift of his property and, altho want of consideration is a good defense to an executory contract, a deed is not such a contract, but instead represents a contract executed and a conveyance fully accomplished.

Lawson v Boo, 227-100; 287 NW 282

Cancellation of deed—statements to attorney subsequent to execution—incompetency. In an action by a grantor to set aside deed, testimony as to the contents of statements made by grantor to his attorneys eight days after execution of deed, was incompetent and inadmissible.

Lawson v Boo, 227-100; 287 NW 282

Confidential relations—independent advice. In connection with a gift from a person occupying a confidential relation with another, "independent advice" means the donor's opportunity of conferring fully and privately with a person competent to advise as to the legal effect of the transaction and who will advise in a manner disassociated from the interests of the donee.

Merritt v Easterly, 226-514; 284 NW 397

Consideration—adequacy. A deed of conveyance which recites (1) that it is in payment for services performed by grantee in caring for her mother in her lifetime and (2) that grantee will support and care for grantor during his lifetime, is supported by an adequate consideration.

Ellis v Allman, 217-483; 250 NW 172

I DEEDS IN GENERAL—continued
(a) IN GENERAL—continued

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Consideration—nonconclusiveness. The consideration named in a deed of conveyance is only prima facie evidence of the amount, and as to the fact of payment.

Gilbert v Plowman, 218-1345; 256 NW 746

Levy and assessment — equalization — evidence—recitals of consideration. The recitals of consideration in deeds of conveyances are not admissible to prove the value of real estate for the purpose of taxation.

Iowa Corp. v Board, 209-687; 228 NW 623

Deed consideration—no negative fact from affirmative testimony. Positive, uncontradicted testimony of husband and wife, defendants, called to testify by plaintiff, affirming, in their own behalf, fact of consideration for a deed to wife, cannot be held to have proven a negative fact of lack of consideration.

Donovan v White, 224-138; 275 NW 889

Construction — meaning of "children". At common law, the word "children", when used in wills, deeds, or other conveyances, means legitimate children unless will reveals a clear intention to use the generic term "children" so as to include an illegitimate child, or it is impossible under the circumstances that legitimate children could take.

In re Estate of Ellis, 225-1279; 282 NW 758

Conveyance to "heirs and assigns"—effect. A grant of land to a named person "and to his heirs and assigns" conveys a fee simple title, irrespective of a habendum clause which provides that, upon the death of the grantee, the property shall revert to the grantor or to his heirs.

Dolan v Newberry, 204-443; 215 NW 599

Conveyance—insufficiency. A stipulation between plaintiff and defendant in a divorce proceeding to the effect that the defendant, for the good of the children of the parties, shall not "convey, incumber, or mortgage in any manner" certain named lands does not constitute a conveyance to the children, even tho the stipulation is fully embraced in the subsequently entered decree.

Putensen v Dreeszen, 206-1242; 219 NW 490

Conveyance and devise of same property. A deed of conveyance in the ordinary form and placed in proper escrow for delivery immediately after the death of grantor conveys full title, even tho the grantor, a few days after the execution of the deed, devises the same property to the same grantee.

In re Champion, 206-6; 218 NW 37

Conveyance by husband to wife and himself. A conveyance of land by a husband to his wife and to himself creates a tenancy in common.

Fay v Smiley, 201-1290; 207 NW 369

Corporate seal—duty to affix. A writing, granting to a party a mere option to repurchase land from a corporation within a named time and at a named price, is not an instrument such as is contemplated by the statute which requires the corporate seal to be affixed to instruments "conveying, incumbering or affecting real estate", nor as is contemplated by substantially similar requirements in articles of incorporation.

Shanda v Bank, 220-290; 260 NW 841

Deed as mortgage—consideration. A warranty deed may not be decreed to be a mortgage when the daughter-grantee pays a good-faith and complete consideration to her father, the grantor.

Witousek & Co. v Holt, (NOR); 224 NW 530

Deed to trustees—grantor's subsequent land contract invalid. An absolute warranty deed subject only to a trust created therein precludes the grantor from later contracting to sell the property to another and will support an action to quiet title in the trustees.

Beemer v Challas, 224-411; 276 NW 60

Descriptions — acreage — representations in deed—effect. Principle reaffirmed that a deed covenant which specifies the acreage, "be it more or less", constitutes a representation that the specified acreage is approximately correct.

Mahrt v Mann, 203-880; 210 NW 566

Fatally indefinite description. A deed which is so indefinite that the land intended to be conveyed cannot be determined, is a nullity.

Beim v Carlson, 209-1001; 227 NW 421

Particular description followed by recital of acreage—effect. A deed to a governmental described 20-acre division of land, but containing the recital "containing 18½ acres, more or less", does not convey a tract of 1½ acres contained in said division and already conveyed by the grantor to another grantee.

Montgomery Co. v Case, 212-73; 232 NW 150

Educational and religious purposes — not condition subsequent. A deed, conveying the title and the fee and containing the single statement "said land to be used for educational purposes and religious purposes only" followed by a warranty but by no words of condition,

and no conditions appearing in the circumstances surrounding its execution, does not signify an intention by the grantor to create a condition subsequent which, in case the land is not used as designated or is conveyed by grantee, will upon re-entry by an heir, invest him with title.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Educational and religious purposes—not a conditional limitation. A conditional limitation in a deed is self-operative and determines the period of the existing estate without any act on the part of the person entitled to the next expectant estate, and therefore a deed containing merely a provision for educational and religious purposes is not restricted by a conditional limitation.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Escrow agent's memorandum made in absence of parties — inadmissible. An escrow agent's understanding of the arrangement by which he was to record deeds after the death of the grantor, noted on the envelope in the absence of the parties, is not admissible in evidence as to the substance of the arrangement and would be of doubtful evidentiary value even if admitted.

Bohle v Brooks, 225-980; 282 NW 351

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

Foreclosure—agreement to pay. The recital in a deed to real estate that the grantee assumed and agreed to pay an existing mortgage is conclusive unless the grantee overcomes the presumption that the deed correctly expresses the final contract of the parties, even tho the original contract of sale is silent as to such agreement to pay.

Royal Ins. v Hughes, 205-563; 218 NW 251

Foreclosure against vendor — purchaser's payments recoverable. An action to recover payments made on the purchase of a lot was not barred by a quitclaim deed given by the purchaser to one who had bought the land at a foreclosure sale, when it was given for the purpose of transferring possession during the period of redemption and in order to reduce the loss to the purchaser, after the vendor had failed to obtain a release of the lot from a mortgage and had no intention of redeeming after the mortgage was foreclosed.

Trammel v Kemler, 226-918; 285 NW 196

Fraud — cancellation — grounds. When a grantee in securing a deed to land acquires an unconscionable and inequitable advantage over the grantor, equity will infer fraud; likewise when the grantee obtains the deed through a promise which he intends to breach in the future.

Bruner v Myers, 212-308; 233 NW 505; 235 NW 726

Part performance—fraud. An oral contract for the sale of land is not within the statute of frauds when the owner of the land executes and delivers to the buyer a deed of conveyance even tho said deed is blank as to grantee.

Gilbert v Plowman, 218-1345; 256 NW 746

Gifts—inter vivos—fiduciary relation—evidence. A fiduciary relationship is not established or even presumed from the naked fact that the parties are closely related by blood, or live and reside in the same house.

Humphrey v Norwood, 213-912; 240 NW 232

Granting and habendum clauses. The habendum clause of a deed of conveyance which clearly indicates the quality of the estate conveyed will be given full force and effect when the granting clause does not clearly indicate such quality.

Central Life v Spangler, 204-995; 216 NW 116

Impeachment of title. Principle recognized that the grantor in a deed of conveyance may not by subsequent declarations impeach the title conveyed by him.

Jones v Betz, 203-767; 210 NW 609; 213 NW 282

Unallowable impeachment. The ex parte recitals in a will by a grantor of real estate are insufficient to impeach the title conveyed by the deed.

Bibler v Bibler, 205-639; 216 NW 99

Mortgage embraces conveyance. A valid prohibition against the "conveyance" of real property embraces a mortgage.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Nature and effect—controlling elements. The nature and effect of a deed of conveyance must be determined from the words therein contained which are descriptive of the estate conveyed, and not from the mere legal name employed. So held where the deed named the estate conveyed as one "by entirety", while the covenants of the deed demonstrated that it was a warranty in fee.

Fay v Smiley, 201-1290; 207 NW 369

I DEEDS IN GENERAL—continued
(a) IN GENERAL—continued

Oral contract contemporaneous with deed. When a duly recorded deed contains a prohibition against a sale or conveyance of any part of the land during the lifetime of the grantor, parol evidence is admissible against a subsequent mortgagee to show that the purpose of said prohibition was to protect the grantor during his lifetime in a contract reservation of rent in the land.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Parol testimony—deed as mortgage. Parol testimony is admissible to show that deed was in fact a mortgage and was so intended.

Rance v Gaddis, 226-531; 284 NW 468

Proceedings and relief — negligence — mistake—evidence—sufficiency. A deed of conveyance will not, on the plea of the grantor, be reformed by inserting therein an assumption by the grantee of an existing mortgage, when the grantor executed the deed without reading it, tho he was able to read, and was not prevented from reading, when his testimony in support of a mutual mistake is neither satisfactory nor convincing; and especially when the grantee has, in the meantime, justifiably changed his position in reliance on the omission of the assumption clause.

Scover v Gauley, 209-1100; 229 NW 684

Prohibition against conveyance—validity—record. A provision in an ordinary warranty deed absolutely prohibiting a sale or conveyance of any part of the land during the lifetime of the grantor without the consent of the grantor, is not repugnant to the deed if the unrevealed purpose of said prohibition is legal, and a part of the consideration for the deed, and is expressed in a contract which accompanies the execution of the deed, even tho the contract be oral. It follows that the record of such deed charges third parties with notice of said contract if reasonable inquiry would reveal it.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Quiet title—issues under general denial. In an action to quiet title where plaintiff's claim of ownership arose out of a deed deposited with a bank for delivery, and delivered to plaintiff after grantor's death, a general denial puts in issue both the execution and the delivery of the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Defaulted real estate vendee's deed after decree—invalidity. In a quieting title action against a real estate contract vendee, the decree ends all rights of the vendee under a defaulted contract, and if he deeds to another before the decree, the grantee takes nothing.

Forrest v Otis, 224-63; 276 NW 102

Previous and subsequent chain of title lacking—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant's received and recorded a deed to the land from another is insufficient to overthrow plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple"; the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Quitclaim grantees — knowledge of prior equities. The grantee of land under a quitclaim deed is conclusively presumed to have known of all prior equities in and to the land, and will be held to have taken and to hold said land subject to said equities.

Junkin v McClain, 221-1084; 265 NW 362

Quitclaim deed from spendthrift trust beneficiary. The rights of a grantee under a quitclaim deed from a spendthrift trust beneficiary cannot be determined until the trust is terminated, and cannot be litigated in an action between the trustees and grantee where the rights between the grantee and beneficiary are not issues.

Beemer v Challas, 224-411; 276 NW 60

Quitclaim — prior claims — nonapplicability of rule. The principle that one who acquires title by quitclaim takes with notice of prior bona fide claims has no application to a case where a mortgagee receives his mortgage for a valuable consideration and without notice of any infirmity, and later, in order to avoid the expense of a foreclosure, receives a quitclaim deed to the land in satisfaction of the mortgage.

Brenton Bros. v Bissell, 214-175; 239 NW 14

Reservation of right to repurchase. A recital in a conveyance that the grantor "reserves the right to repurchase said premises under his contract with said grantee" does not, in and of itself, show that said deed was intended as a mortgage.

Sheley v Engle, 204-1283; 213 NW 617

Riparian rights—accretion—apportionment—estoppel. Riparian land owners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop

themselves, in an action to quiet title, from asserting that land did not pass under their deed because is was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Riparian rights—when not withheld by deed. A conveyance of lands by a riparian owner, especially when the lands are largely accretions, will not be deemed to withhold conveyance of riparian rights simply because the land is described by metes and bounds.

Harrington v Foster, 220-1066; 264 NW 51

Sale by known nonowner. A vendee of property takes nothing by his conveyance when he knows who is the actual owner of the property and that his vendor is simply in possession of the property as manager.

Kollman v Kollman, 204-950; 216 NW 77

Signing and executing without reading—effect. One who signs and delivers a deed of conveyance without either reading it or asking to have it read to him is bound thereby, when he can read it and is given free and unlimited opportunity to read it.

Raible v Bernstein, 209-1083; 229 NW 753

Spendthrift trust—beneficiary's quitclaim—interest conveyed. A trust in a deed vesting in grantees as trustees the absolute control of the property from which two beneficiaries receive the income until termination of the trust at a future time, if said beneficiaries are free from debt, is a spendthrift trust and a quitclaim grantee from one beneficiary secures thereby no present interest in the property.

Beemer v Challas, 224-411; 276 NW 60

Validity—evidence. Evidence reviewed, and held insufficient to establish the invalidity of a deed.

Bibler v Bibler, 205-639; 216 NW 99

Banking corporations—director—violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

Consideration — overthrowing presumption. The statutory presumption that a deed of conveyance was supported by a consideration is not overcome by the naked testimony of the grantor that he was never paid anything for the conveyance.

Carr v McCauley, 215-298; 245 NW 290

(b) WANT OF ASSENT (Undue Influence, Mistake, Insanity, etc.)

Evidence—sufficiency. Principle reaffirmed that, in an action to set aside a conveyance because of fraud, undue influence, or mistake, the proof must be clear, satisfactory, and convincing.

Stonewall v Danielson, 204-1367; 217 NW 456

Evidence—insufficiency. In action to set aside deed, evidence held insufficient to support contention that deed was executed through fraud, duress, undue influence, or lack of mental capacity.

Ryan v Church, (NOR); 216 NW 713

Freedom of disposal. Courts must be zealous to guard the right of every man to dispose of his own property as he sees fit, so long as he has the mental capacity (1) to know what property he possesses, (2) to know what he desires to do with it, and (3) to exercise his free and voluntary will in such disposition.

Coughlin v Church, 201-1268; 203 NW 812

Invalidity—burden of proof. Principle reaffirmed that (barring fiduciary relationships) the burden of proof rests on the party who alleges fraud, undue influence, or mental incompetency as the basis for invalidating a deed of conveyance.

Kramer v Leinbaugh, 219-604; 259 NW 20

Undue influence. "Influence" exercised over the grantor by the grantee in a deed of conveyance in obtaining the deed is not "undue" in a legal sense unless it submerges the free agency of the grantor.

Osborn v Fry, 202-129; 209 NW 303

Validity—substitution of will. Principle reaffirmed that a deed of conveyance will not be set aside on the ground of undue influence unless it is made to appear that the will of the wrongdoer was substituted for the will of the grantor.

Utterback v Hollingsworth, 208-300; 225 NW 419

Age of grantor—undue influence. In an action contesting deeds on the ground of undue influence, the age of the grantor is an important consideration, but it is not conclusive.

Tedemandson v Morris, 227-774; 289 NW 1

Mental incapacity—proof required. Clear, satisfactory, and convincing proof of mental incapacity must be produced in order to invalidate a deed of conveyance on that ground.

Bardsley v Spencer, 215-616; 244 NW 275

Burden of proof. The burden to establish undue influence in the execution of a deed rests on the one who so alleges.

Bardsley v Spencer, 215-616; 244 NW 275

I DEEDS IN GENERAL—continued
(b) WANT OF ASSENT (Undue Influence, Mistake, Insanity, etc.)—continued

Undue influence—evidence. Influence, to be undue, within the meaning of the law, must be such as to substitute the will of the person exercising the influence for the will of the party upon whom the influence is brought to bear. Evidence held insufficient to meet the rule.

Arndt v Lapel, 214-594; 243 NW 605

Undue influence—claim not supported by evidence. When two daughters had cared for their aged mother for about twenty years while the mother was in good health, neat in appearance, mentally alert, and did much reading in a foreign language, altho she could not read English, and the daughters went with the mother to a lawyer's office, but remained outside while deeds were drawn up by which the mother granted property to them to be effective after her death, there was no showing of mental weakness, fraud, or undue influence upon which to base a decree setting aside the deeds.

Tedemandson v Morris, 227-774; 289 NW 1

Undue influence—parent and child. There was sufficient evidence to warrant setting aside a deed on the ground of undue influence when it was made by an aged, eccentric father who was not in the best of health and had a limited business experience and had a kindly feeling toward all his children, the deed to the farm, which consisted of almost all his property, being made to a son, without the father having an independent adviser, seven days after the father had gone to live with the son who handled his business affairs and to whom he had at one time sold the farm, receiving a reconveyance when the payments were not kept up.

Stout v Vesely, 228- ; 290 NW 116

Confidential relationship established—grantee's failure to sustain burden. In an action to set aside a deed from a deceased mother, 83 years of age and ill at the time of execution of the deed, to her daughter, who had handled her mother's business for a number of years, who had the deed prepared by an attorney, and who was the only person present when mother signed the deed, evidence held to establish that there was a confidential relationship between mother and daughter, thus placing burden of proof on daughter to show that deed was not procured by fraud, and, such burden not having been met, the deed could not be sustained.

Tiernan v Brulport, 227-1152; 290 NW 53

Undue influence—evidence to negative. On the issue of undue influence in the execution of a deed to land, it seems that the grantee may show that the grantor, subsequent to the execution of the deed, repeatedly expressed his full satisfaction with, and approval of, said deed.

Hess v Pittman, 214-269; 242 NW 113

Deed from parent to child—constructive fraud—presumption. The doctrine of constructive fraud arises from the existence of a fiduciary relationship, and equity raises a presumption against the validity of a transaction where the superior party obtains a possible benefit, as in a case where a parent has become the dependent person in his relationship with a child, trusting his interests to the advice and guidance of the child, and has deeded his land to the child.

Stout v Vesely, 228- ; 290 NW 116

Fiduciary relation between husband and wife. Whether in an action by an heir to set aside a conveyance by a wife to her husband on the ground of undue influence the burden of disproof of said ground shifts to the defendant-husband, quaere.

Browne v Johnson, 218-498; 255 NW 862

Gifts—inter vivos. Undue influence necessary to set aside a conveyance must be enough to destroy the free agency of the grantor. Evidence reviewed and found insufficient to establish undue influence.

Coughlin v Church, 201-1268; 203 NW 812
Mastain v Butschy, 224-68; 276 NW 79

Undue influence—degree of proof. A deed to land must not be disturbed on the ground of undue influence unless the proof clearly and convincingly establishes that the said instrument is not the free and voluntary act of the grantor, but is the will and purpose of the grantee. Evidence reviewed and, conceding, arguendo, that a confidential relation existed between the grantor and grantee, held that the grantee had met the burden of proof to sustain the deed.

Hess v Pittman, 214-269; 242 NW 113

Relationship—effect. Blood relationship between a grantor and a grantee furnishes, in and of itself, no basis for a presumption of undue influence.

O'Neil v Morrison, 211-416; 233 NW 708

Mistake—evidence. Evidence held quite insufficient to show any mistake in the reservation in a conveyance of an easement.

Spalding v McCartney, 207-1025; 221 NW 665

Performance of contract—implied reformation. A decree which correctly, by metes and bounds, describes the land which was mutually sold and purchased, impliedly reforms the grantor's deed, which inadvertently described slightly less acreage than as correctly described by the decree.

Elliott v Horton, 205-156; 217 NW 829

Reformation of deed. The statute of limitation does not commence to run against an action to reform a deed on the ground of mutual mistake until the mistake has been discovered.

American Bank v Borcherding, 205-633; 216 NW 719

Reformation—proceedings and relief. Evidence reviewed, and held to establish clearly, satisfactorily, and convincingly plaintiff's right, on the ground of mutual mistake, to the reformation of a deed by striking therefrom an agreement by the grantee to pay an existing mortgage.

Eglin v Miller, 209-326; 228 NW 305

Insanity—effect. Principle reaffirmed that a deed of conveyance by an insane person is not necessarily void.

Montagne v Cherokee County, 200-534; 205 NW 228

Mental incompetency affecting validity. Principle reaffirmed that old age and physical impairment do not, in and of themselves, invalidate deeds of conveyance.

Utterback v Hollingsworth, 208-300; 225 NW 419

Burden of proof—failure to meet. In an action to set aside the probate of a will, and to cancel a deed (1) on the ground of the mental incapacity of the testator-grantor, and (2) on the ground of the undue influence of the devisee-grantee, the burden rests on plaintiff to establish at least one of said grounds. Evidence quite elaborately reviewed and held, plaintiff had failed to meet the burden of proof resting upon him.

Walters v Heaton, 223-405; 271 NW 310

Canceling deed—nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor—both instruments having been executed by the same party and at the same time —it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Grantor 90 years old—evidence insufficient. Evidence reviewed, as to the mental capacity of a 90-year-old mother who, to the exclusion of one son, willed and assigned her property to another son, in exchange for life support and care; and held that she still was sane and that the charge of undue influence was not substantiated.

Reed v Reed, 225-773; 281 NW 444

Mental incapacity — evidence — sufficiency. Principle reaffirmed that the courts will zealously guard the right of every person to make such legal disposition of his property as he sees fit, and to that end will demand the production of very convincing evidence in support of the plea of mental incapacity interposed by strangers to the deed.

Keating v Augustine, 213-1336; 241 NW 429

Mental incapacity—proof required to set aside. In order to set aside conveyances on the grounds of mental incapacity and undue influence, the burden is on the plaintiff to establish same by evidence which is clear, satisfactory, and convincing.

Merritt v Easterly, 226-514; 284 NW 397

Mental incompetency — realty exchange — voidable—duty to restore status quo. Where one of the parties to an exchange contract of realty is mentally incompetent, such contract is only voidable, not void, being valid until disaffirmed, and it can only be disaffirmed as a whole, not in part, and when party seeks to avoid such contract it is necessary to restore, or offer to restore, status quo.

In re Gensicke, (NOR); 237 NW 333

Mental incompetency—undue influence—burden of proof. The mental incompetency of a grantor to execute a deed of conveyance, or the obtaining of said conveyance by the grantee by undue influence, when assigned as ground for setting aside said conveyance, must be established by plaintiff and by clear, satisfactory and convincing evidence—there being no proof that a confidential relationship existed. Evidence reviewed and held insufficient to meet said burden of proof.

Foster v Foster, 223-455; 273 NW 165

Mental unsoundness — fraud — degree of proof. A deed of conveyance will be set aside on the ground of fraud or grantor's mental unsoundness, only on clear and convincing evidence in support of the charge. Evidence held insufficient.

Ellis v Allman, 217-483; 250 NW 172

Rescission of contract of sale — evidence sufficiency. Evidence reviewed and held insufficient to justify the rescission and cancellation of a contract of purchase of real estate on the ground of the mental incompetency of the purchaser.

Ridenour v Jamison, 218-277; 254 NW 802

Setting aside deed—burden of proof. A delivered deed carries a presumption in favor of its validity, so one suing to set aside a deed has the burden of proving that at the time of execution of deed, grantor was incapable of understanding her property and her relations thereto, or understanding natural objects of her bounty or nature and effect of instrument.

Bishop v Leighty, (NOR); 237 NW 251

I DEEDS IN GENERAL—continued

(b) WANT OF ASSENT (Undue Influence, Mistake, Insanity, etc.)—continued

Validity. Evidence relative to the validity of deeds reviewed, and held insufficient to show that the grantor was mentally incompetent to execute them, or that they were the result of undue influence.

Thompson v Mott, 202-246; 210 NW 91

Validity of deed. Record reviewed, and held insufficient to establish such mental incapacity in a grantor as to invalidate a deed executed by him.

Goodman v Andrews, 203-979; 213 NW 605

Fraud—evidence—sufficiency. Principle reaffirmed that testimony sufficient to overthrow a duly acknowledged deed of conveyance must amount to more than a preponderance—must be clear, satisfactory, and convincing. Record held insufficient to meet said rule of law.

Richardson v Richardson, 216-1205; 250 NW 481

Fiduciary relationship — nonpresumption. Principle reaffirmed (1) that no presumption of fiduciary relationship arises from the fact of kinship, and (2) that in the absence of proof of such relationship, plaintiff in an action to set aside a conveyance because of undue influence, has the burden to establish such fraud by convincing evidence. Evidence held quite insufficient.

Craig v Craig, 222-783; 269 NW 743

Fraud—evidence—sufficiency. Evidence held sufficient to set aside deed for fraud in its procurement.

Marsh v Hanna, 219-682; 259 NW 225

Assumption of mortgage debt—reformation of instruments—generally. Where an instrument is executed without consideration on the part of a grantee, to assume and pay the mortgage debt, the contract is not binding upon him, or if the deed is delivered in blank, or the conveyance made as security only, or if a clause if inserted by fraud, inadvertence, or mistake, without the knowledge or acquiescence of the grantee, he may have the instrument reformed in equity so as to make it express the true intent and understanding of the parties.

Guarantee Co. v Cox, 201-598; 206 NW 278

Age of grantor—insufficient to invalidate deed. Before the supreme court will set aside a deed executed by a person advanced in years, there must be evidence that such individual was not capable of carrying on his business transactions, and that he did not understand the nature of the transaction into which he was entering.

Gilligan v Jones, 226-86; 283 NW 434

Cancellation of fraudulently acquired deed. A person who secretly buys up a certificate of execution sale and takes a sheriff's deed in his own name in violation of his agreement with the judgment-defendant to pay off the judgment in question and thereby satisfy his own debt to the judgment-defendant has no standing to contest an action by the latter for the cancellation of said deed.

Swearingen v Neff, 204-1167; 216 NW 621

Confidential relation. Where an elderly but unusually self-willed woman executed a deed to her stepson during time in which she managed her own affairs, and relationship with grantee was only that which ordinarily exists between a mother and son, evidence in action to set aside the deed did not warrant finding that confidential relationship existed so as to raise presumption of fraud, but as to the assignment of a mortgage procured by this stepson after he came to live with her and had taken over management of her affairs, evidence justified finding that such relationship did exist.

O'Brien v Stoneman, 227-389; 288 NW 447

Confidential relationship—showing grantor's freedom of action. One who stands in a confidential relationship to another may not retain advantages of a transaction with the cestui when they may reasonably be the result of the confidence reposed, unless he shows that the cestui acted with freedom, intelligence, and with full knowledge of the facts.

Merritt v Easterly, 226-514; 284 NW 397

Transactions scrutinized with vigilance. Courts of equity must scrutinize, with jealous vigilance, transactions between persons sustaining relations of trust and confidence, to the end that the dominating member shall conduct himself with the utmost good faith.

Merritt v Easterly, 226-514; 284 NW 397

Confidential relations — presumption — burden of proof. The law presumes that a deed of conveyance is fraudulent and void whenever it is made to appear that, when the deed was executed, the grantee occupied a position of trust and confidence as regards the grantor, or held a dominating and controlling influence over the grantor. It follows that the grantee must overthrow the presumption by a showing of the eminent fairness and legality of the transaction. Evidence held insufficient to overthrow the presumption.

McNeer v Beck, 205-196; 217 NW 825

Burden of proof. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Actual or constructive fraud. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Constructive fraud. Evidence held to show affirmatively that the execution of a deed was not brought about by any constructive fraud arising out of the intimate relations of the parties.

Utterback v Hollingsworth, 208-300; 225 NW 419

Constructive fraud not inevitable from blood relationship. As to constructive fraud arising from the gift of real property to one standing in a confidential or fiduciary relationship to the grantor, the rule placing the burden of proof on the grantee, to show the bona fides of the transaction, is of necessity applied according to the peculiar circumstances of each particular case, and not necessarily applied because mere blood relationship exists.

Jensen v Phippen, 225-302; 280 NW 528

Duty to set aside fraud-induced deed. When a deed has been manifestly obtained by the fraud of the grantee, and without consideration, a court of equity must set it aside, on a distinct prayer for such relief, and not assume to reform it, without any prayer therefor, and decree a life interest in the defrauded grantor.

Guenther v Kurtz, 204-732; 216 NW 39

Fiduciary relation—burden of proof. Plaintiff, in an action to avoid a deed of conveyance, makes a prima facie case of constructive fraud by proof that, when the deed was executed, the grantor, tho mentally competent, was, in the transaction of his business and in his conduct generally, under the absolute domination of the grantee. After such proof, the grantee must take on the burden of affirmatively showing the complete bona fides of the transaction. Proof that the deed left grantor practically penniless, that grantee paid no consideration and was aggressively active in obtaining the deed, accentuates the presumption of fraud instead of overcoming it.

Ennor v Hinsch, 219-1076; 260 NW 26

Fiduciary relation between husband and wife. A fiduciary relation within the meaning of the law is not established by a showing that the parties were husband and wife and that the wife frequently aided her husband in the transaction of his business, it appearing that the husband was physically infirm.

Arndt v Lapel, 214-594; 243 NW 605

Fiduciary relation—proof. The fact that a grantor and grantee in a deed (being father and son) frequently talk over business matters is, in and of itself, quite insufficient to establish a fiduciary relation.

Bardsley v Spencer, 215-616; 244 NW 275

Fiduciary relationship—intestate and heir—receiving property—failure of proof. In an action by heirs of intestate to set aside a conveyance of realty made by intestate to son, on the ground of an alleged fiduciary relationship existing between aged intestate and son, held, that evidence was insufficient to establish such relationship, and even tho such relationship existed, whatever property the son received from his mother was by her voluntary and intelligent act, and without duress, dominance or overreaching on his part.

Robbins v Daniel, 226-678; 284 NW 793

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Fraudulent conveyance—sufficient showing. A deed from a mother to her son will be set aside as fraudulent, in a proper action by the administrator of the mother, on a showing that the mother, when the deed was executed, was in serious financial embarrassment, of which the son had full knowledge, and that the son, who then occupied a close fiduciary relation to his mother, presented no competent evidence of any consideration for the deed, or evidence overcoming the presumption of fraud and bad faith.

Howell v Howell, 211-70; 232 NW 816

Gift to daughter—no fiduciary relation—no fraud. Where a daughter, receiving a real estate gift from her parents, did not transact, nor advise concerning, her parents' business, nor dominate nor support them but, on the contrary, was more or less dependent upon them, such gift does not present a case of fiduciary or confidential relationship sufficient to nullify the deed on the ground of constructive fraud.

Jensen v Phippen, 225-302; 280 NW 528

Mere inference of invalidity. A mere alleged inference of fraud or illegality cannot overthrow a deed of conveyance.

Carr v McCauley, 215-298; 245 NW 290

Nullifying fraud—degree of proof required. A deed of conveyance will not be set aside for fraud practiced on the grantor unless proof of the fraud is clear, satisfactory, and convincing. Evidence held insufficient.

Valentine v Read, 217-57; 250 NW 634

Resulting trust denied—deed from father to son—conduct of parties. In a partition action involving a decedent's property, tried on issues

I DEEDS IN GENERAL—continued
(b) WANT OF ASSENT (Undue Influence, Mistake, Insanity, etc.)—continued
raised by defendant's cross-petition, alleging that another property of decedent, which had been deeded by decedent to one of his sons, should be included in the partition action—in the absence of fraud—such deed therefor will not be set aside on the theory of a resulting trust in favor of the decedent's estate, when there is no evidence that either the grantor or grantee so considered it altho they both lived several years after the deed was made.

Gilligan v Jones, 226-86; 283 NW 434

Secret deeds — 87-year-old grantor. A nephew, who was a sort of de facto guardian for his 87-year-old aunt, who procured from her certain deeds with utmost secrecy a short time before her death, and who did not record one of them until the day of her death, has the burden to prove his aunt acted of her own free will or from independent advice, when there is evidence bearing on her mental incapacity.

Merritt v Easterly, 226-514; 284 NW 397

Transfer of land. A vendee of land who has never agreed to assume and pay a mortgage on the land cannot be made so liable by the act of the vendor in executing and recording, without the knowledge or consent of the vendee, a deed containing such assumption and agreement to pay, it appearing that the vendee promptly repudiated and rejected said deed.

Steffes v Hale, 204-226; 215 NW 248

Validity of assent—signing without reading. A party will not be permitted to say that he was defrauded into signing an instrument without knowing its contents when he could read, did not read, and was in no manner prevented from reading.

Legler v Ins. Assn., 214-937; 243 NW 157

(c) DELIVERY

Discussion. See 8 ILB 254—Conditional delivery

Delivery—acts constituting. Delivery of a deed is necessarily established by uncontradicted, competent testimony that the grantor personally handed the deed to the grantee, with the intent to make the delivery.

Buckley v Ebendorf, 204-896; 216 NW 20

Delivery — indispensable elements. The physical delivery by a grantor to a grantee of a warranty deed passes no title unless such was the intent of the parties.

Kiser v Ins. Assn., 213-18; 237 NW 328

Intent of grantor as element of delivery. The intent of the grantor is the controlling element in the delivery of a deed.

Huxley v Liess, 226-819; 285 NW 216

Acceptance of deed—no waiver of easement rights under contract. When a contract of sale of land provided that the deed would grant an easement for the right of ingress and egress to the property, but the deed drawn on the same day failed to make such provision, the acceptance of the deed by the grantee did not waive the provision of the collateral contract, altho ordinarily the acceptance of a deed would complete the execution of the contract and would be conclusive evidence of its complete fulfilment.

Dawson v McKinnon, 226-756; 285 NW 258

Delivery—burden of proof. A judgment creditor who claims that his transcript of judgment was filed prior to the delivery of a deed of conveyance by the judgment debtor has the burden of so showing.

Richardson v Estle, 214-1007; 243 NW 611

Burden on plaintiff to show delivery of deed. In a replevin action against an administrator for possession of a deed found in the safety deposit box of the deceased, the burden is on the plaintiffs to show a valid delivery of the deed effective to pass title.

Orris v Whipple, 224-1157; 280 NW 617

Delivery of deed as gift. The unconditional delivery, as a gift, of a duly executed and acknowledged deed of conveyance, by the compos mentis grantor therein, and without fraud, to a third party with explicit direction, both orally and in writing, to said party, to hold said deed for the grantee, and to record the same immediately upon the death of the grantor, constitutes an irrevocable delivery to said grantee; and a priori, when, in addition to the foregoing, it affirmatively appears from the circumstances of the transaction that the grantor was intending to pass title to the grantee.

Keating v Augustine, 213-1336; 241 NW 429

Deeds to children delivered to trustee—wife acquiescing in husband's instructions. An agreement reached by a husband and wife, that he should deed his property to her and she would deed it to the children, the deeds to be placed with a trustee, who was to record the first deed on the death of the husband and then record the second deeds on the death of the wife, is binding on the wife, when she is present at the execution of the deeds and, by her silence, acquiesces in the instructions given by the husband to the trustee.

Bohle v Brooks, 225-980; 282 NW 351

Delivery — evidence — sufficiency. Evidence reviewed and held to establish the delivery of a deed.

McCloud v Bates, 220-252; 261 NW 766

Delivery—evidence—sufficiency. On the issue of delivery of a deed, the recitals in the will of the grantor that he was then deeding the property to said grantee, and other oral

statements of the purported grantor to the same effect, may have material and influential bearing.

Arndt v Lapel, 214-594; 243 NW 605

Insufficient delivery. No delivery of a deed of conveyance is shown by the act of the grantor (without the knowledge of the grantee) in executing and acknowledging the deed, with the continuing purpose in mind to change the grantee if the grantee predeceased the grantor, and thereafter retaining the deed among his (grantor's) private papers, with a memorandum attached to the deed, directing the grantor's executor to make delivery.

Lathrop v Knoop, 202-621; 210 NW 764

Deposit by grantor in safety deposit box. Legal delivery of deeds of conveyance is established, (1) by proof that the grantor executed them, placed them in her safety deposit box in a bank, and apparently never thereafter disturbed them during her lifetime, and (2) by proof, aliunde the deeds, that, in doing that which she did do, she intended to pass title to the grantees; and this is true even tho grantor after executing said deeds continued, until her death, to manage said lands as she had managed them prior to the execution of said deeds. (Overruled, see Orris v Whipple, 224-1157; 280 NW 617.)

Robertson v Renshaw, 220-572; 261 NW 645

Depositing with third party. The depositing of a duly executed deed with a third party with direction without reservation to record the same in case of the death of the grantor constitutes a delivery to the grantee.

Goodman v Andrews, 203-979; 213 NW 605

Escrow delivery—effect on title—life estate reserved. Delivery of a deed to a trustee for redelivery to grantee after grantor's death reserves a life estate in the grantor, with title immediately passing to grantee, but with his right to possession and enjoyment of land therein conveyed postponed until grantor's death.

Bohle v Brooks, 225-980; 282 NW 351

Escrow—safety deposit box—recall power nullifies delivery. No valid delivery of a deed is made by depositing it in a safety deposit box over which grantor thereafter maintains full dominion, with power to recall the deed. (Davis v College, 208 Iowa 480; Robertson v Renshaw, 220 Iowa 572; and Boone College v Forrest, 223 Iowa 1260, overruled.)

Orris v Whipple, 224-1157; 280 NW 617

Delivery—intent of parties. An effective delivery of an instrument is made to the grantee by the naked execution of the instrument and by simply leaving said instrument at the place of execution, if such was the actual intent of the parties.

Beery v Glynn, 214-635; 243 NW 365

Delivery by mail. Where it was definitely agreed between a debtor and creditor that the debtor would execute a deed of specified land to the creditor in partial satisfaction of the debt, and that the debtor upon the execution of the deed would forward it to the county recorder with direction to record and forward to the grantee, delivery will be deemed complete at the point of time when the deed is duly mailed by the debtor to the recorder.

Richardson v Estle, 214-1007; 243 NW 611

Delivery to notary—acceptance by grantee without obtaining possession of deed. Acceptance is a necessary element of the delivery of a deed and may be presumed where the conveyance is beneficial to the grantee and carries no onerous obligations. Where the grantee agreed to accept a deed, and it was executed and, in her presence, delivered for her to a notary to be recorded, there was acceptance and title vested in her at the time of delivery to the notary, altho the notary kept the deed and she never had possession of it.

Huxley v Liess, 226-819; 285 NW 216

Delivery to trustee with power to recall. A grantor, in depositing a deed with a trustee for delivery to the grantee upon grantor's death, may reserve the right to recall the deed; but if he does not exercise such right, the final passing of the deed by the trustee to the grantee, after the death of the grantor, consummates a valid delivery. (Overruled, see Orris v Whipple, 224-1157; 280 NW 617.)

Davis v College, 208-480; 222 NW 858

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Delivery—presumption. A deed in the possession of the grantee, tho the estate created is to take effect in the future, carries a presumption of delivery.

Browne v Johnson, 218-498; 255 NW 862

Delivery—presumption attending possession by grantee. A deed of conveyance when produced by the grantee therein, need not be accompanied by any evidence of the execution or of the delivery of the deed, because due execution and delivery will be presumed until he who attacks it shows to the contrary. And this is true even tho the deed did not reach the hands of the grantee, or was not recorded, until after the death of the grantor.

Heavner v Kading, 209-1275; 228 NW 313

Delivery — overthrowing presumption. The presumption of delivery of a deed which arises from possession and recording of the deed by the grantee cannot be overthrown by equivocal testimony.

Jones v Betz, 203-767; 210 NW 609

Delivery — presumption from record. The fact that a deed of conveyance has been duly recorded generates a presumption of delivery

I DEEDS IN GENERAL—continued
(c) DELIVERY—continued

so strong and persuasive that only clear and satisfactory evidence will overthrow such presumption. Evidence held insufficient.

Gibson v Gibson, 205-1285; 217 NW 852

Delivery presumed from recording. Recording of a deed does not constitute delivery, but it is evidence which creates a presumption of delivery rebuttable only by clear and satisfactory evidence.

Huxley v Liess, 226-819; 285 NW 216

Delivery—rebutting presumption by possession—forgery. Transfers and assignments of property of a deceased, in the hands of certain heirs, raise a presumption that they were delivered. However, facts and circumstances may overcome this presumption, especially when it is shown that the signatures of the deceased to the instruments are forgeries.

Brien v Davidson, 225-595; 281 NW 150

Elements of conveyance—delivery. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

Equitable estoppel—fraud as essential element. If there be no fraud, actual or constructive, in the execution and delivery of a deed of conveyance, there can be no estoppel against the grantee.

McCloud v Bates, 220-252; 261 NW 766

Management of estate—unlawful delivery of deed. An administrator who has in his possession a deed of conveyance purporting to have been executed by the deceased has no authority to deliver said deed to the grantee in said deed without an authorizing order of court.

Blain v Blain, 215-69; 244 NW 827

Mortgage assumed by grantee—accrual of action. When grantees of property accepted a deed by which they assumed a mortgage debt on the property, the statute of limitations began to run from the time of the acceptance of the deed, but the grantees were still liable after the 10 years when they had extended the time of maturity.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Nondelivery of pledge—effect. An agreement that a deed of conveyance may be held by a creditor as collateral security to an indebtedness of the debtor is ineffective when unaccompanied by an express or implied delivery of the deed to the creditor.

Andrew v Hanchett, 208-1179; 226 NW 3

Non-presumption of delivery. Assuming that, at the trial of an action to quiet title, the production of a deed of conveyance by the grantee named therein creates a presumption that the deed was duly delivered to the grantee, yet such presumption does not prevail when the deed was in the possession of the grantor's administrator at the commencement of said action, and when the grantee is enabled to produce the deed at the trial because the administrator, before the trial, unlawfully delivered said deed to the grantee.

Blain v Blain, 215-69; 244 NW 827

Passing with intent to transfer title. An intent on the part of a grantor to make the passing of the instrument a present transfer of title is an element of an effective delivery.

Lawson v Boo, 227-100; 287 NW 282

Proof of delivery. In an action for partition, wherein defendant claimed absolute title under a deed which she first physically obtained, after the grantor's death, by going to the bank where it was on deposit, the defendant is a competent witness to testify, (1) that she knew where the deed was kept, but (2) not that grantor told her where it was kept.

Robertson v Renshaw, 220-572; 261 NW 645

Recording long after grantor's death—no delivery—nonvalidity. A deed, found among the personal effects of a deceased grantor and recorded seven or eight years after the estate was closed, not having been delivered by grantor nor ordered delivered by the court, has no validity.

Forrest v Otis, 224-63; 276 NW 102

Delivery intended by recording. If a deed, after being signed and acknowledged by grantor, is placed of record by him with the intention of making the recording stand for delivery, the title will pass to the grantees, assuming there was acceptance by them of the title.

Lawson v Boo, 227-100; 287 NW 282

Rebuttable presumption from recording. In an action by a 73-year-old grantor to set aside deed to stepchildren, wherein grantor reserved a life estate to himself, the grantor failed to overcome by clear and satisfactory evidence the presumption arising from the recording of the deed that there was a delivery that transferred the title.

Lawson v Boo, 227-100; 287 NW 282

Sale or transfer—nonintent to pass title—effect. Proof that an insured, after the issuance of a policy, and without notice to the insurer, executed, physically delivered, and

permitted to be recorded an unqualified warranty deed to the insured property, establishes, prima facie, an automatic forfeiture of the policy when the policy provides that such forfeiture shall follow any "sale or transfer" of the property without notice; but evidence is admissible, under proper plea, in avoidance of the apparent forfeiture, to show that there was no completed sale or transfer in fact—that the insured-grantor and grantee mutually understood and agreed that such execution, delivery, and recording should not have the effect to pass title until a future date; but ordinarily such evidence can only generate a jury question on the issue of intent to pass title.

Kiser v Ins. Assn., 213-18; 237 NW 328

Symbolical delivery. Evidence relative to an alleged symbolical delivery of a deed of conveyance reviewed, and held insufficient to establish delivery.

Blain v Blain, 215-69; 244 NW 827

Symbolical or constructive delivery. An effective symbolical or constructive delivery of a deed of conveyance is established by proof (1) that the grantor showed the deed to a party (not the grantee) and, in effect, said: "I am going to keep this deed in my safety deposit box in the bank. After my death you get the deed from the box and record it"; (2) that later when the grantor was stricken with a fatal illness he handed a key to said party and in effect said it was the key to his said box, and told said party to look after the recording of the deed, and (3) that after the death of the grantor, the safety deposit box was unlocked by said party with said key, the deed was found therein, and thereupon recorded.

Heavner v Kading, 209-1271; 228 NW 311
Heavner v Kading, 209-1275; 228 NW 313

Surrender—effect. The voluntary surrender of an unrecorded deed by the grantee therein, with the intent thereby to relinquish the title conveyed by such deed, and the acceptance of such surrender by the grantor, in consideration of other agreements entered into by the grantor and grantee, estop the grantee from asserting any further rights under the deed.

Bibler v Bibler, 205-639; 216 NW 99

Wrongful delivery—effect. Principle recognized that no title passes where the escrow holder of a deed of conveyance delivers the deed to the grantee without performance of the conditions upon which it was to be delivered.

Lindberg v Younggren, 209-613; 228 NW 574

(d) COVENANTS

Discussion. See 3 ILB 40—Equitable restrictions on land; 8 ILB 259—Liability of grantor to remote grantee on covenants

Attorney fees. Attorney fees may be a proper element of recovery in an action for breach of a covenant of warranty.

Kellar v Lindley, 203-57; 212 NW 360

Breach of warranty—evidence available against vouchee. In an action for breach of warranty because of an existing mortgage on the property, the foreclosure proceedings and judgment entry therein are admissible against the covenantor-defendant to prove the plaintiff's measure of damages, it appearing that the covenantor had been duly vouched into said foreclosure proceedings.

Kellar v Lindley, 203-57; 212 NW 360

Breach—evidence—sufficiency. A covenant against incumbrance, or to defend the title against the lawful claims of all persons whomsoever cannot be deemed broken on a naked showing that the covenantee remained out of possession because some one else was in possession. The nature of that possession is, manifestly, all-important; e.g., whether it is lawful and paramount and hostile to the rights of the covenantee.

Pope v Coe, 208-759; 225 NW 939

Breach—insufficient record. A mortgagee may not maintain an action for damages for breach of the covenant of warranty of title in the mortgage, on a record which fails to show that the mortgage is invalid in any particular.

Churchman v Wilson, 204-1017; 216 NW 726

"Buildings"—intent of parties. The word "building" as used in restrictive covenants in deeds of conveyance will be so construed as to give effect to the manifest intention and purposes of the parties. Held, inter alia, that structures for screening sand, and a derrick with hoisting machinery were "buildings" within the meaning of restrictive covenants against the erection of buildings which would cut off a view.

Curtis v Schmidt, 212-1279; 237 NW 463

Building restrictions—knowledge of. A grantee of land who at the time of purchasing knows, generally, that there are building restrictions running with the land, is bound by such restrictions even tho they are omitted from the deed taken by him.

Burgess v Magarian, 214-694; 243 NW 356

Contract—presumption as to waiver. A provision for the forfeiture of a life estate reserved in a contract for the sale of land will be presumed waived, prima facie, when not inserted in the subsequently executed deed.

Toedt v Bollhoefer, 206-39; 218 NW 56

Damages—improper measure. In an action for damages consequent on a breach of the covenant of warranty of title contained in a mortgage, the amount of the mortgage is not the proper measure of damages, when the mortgagor received no consideration for executing the mortgage, and when the mortgagee parted with no consideration, except to

I DEEDS IN GENERAL—concluded
(d) COVENANTS—concluded

forbear the enforcement of his judgment against a third party.

Churchman v Wilson, 204-1017; 216 NW 726

Educational and religious purposes—declaration of purpose or trust. A covenant in a deed specifying use for educational and religious purposes is only a "declaration of purpose" or a trust.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Indemnity bond as covenant of seizin. An indemnity bond conditioned to hold the obligee harmless from any loss which he may sustain by reason of a defect of title to certain real estate, is equivalent to a covenant of seizin and governed by the same rule, to-wit: no action for substantial damages is maintainable on the bond until a hostile, paramount title is asserted.

Duke v Tyler, 209-1345; 230 NW 319

Legal cancellation of covenant of seizin. A grantee of land in legal effect cancels the covenant of seizin contained in his deed, and likewise cancels an indemnity bond which is tantamount to a covenant of seizin, by reconveying the land to the grantor with covenant of seizin.

Duke v Tyler, 209-1345; 230 NW 319

Restrictions as to use of property—estoppel. Record reviewed, and held insufficient to show that property owners were estopped to insist on compliance with certain restrictions as to the use of platted lots.

Shuler v Sand Co., 203-134; 209 NW 731

Restrictions as to use of property—omission from deed. The grantee of a lot who takes by quitclaim deed which contains no restrictions as to the use of the property is, nevertheless, bound by restrictions as to the use of the property contained in the deed to his grantor and in substantially all other deeds to lots in the addition, it appearing that the addition in question was publicly and notoriously platted as a restricted residence area.

Shuler v Sand Co., 203-134; 209 NW 731

Unilateral contract—voiding contract by one's own default. A provision in a deed of conveyance to the effect that if the grantee fails to make any of the payments which he has agreed to make, or fails to perform any of the obligations which he has agreed to perform, the deed "shall be void and the title immediately revest" in grantor, simply means that the grantee has covenanted that if he defaults, his default shall void the deed if the grantor so elects. Especially is this true when the acts of the parties indicate that they mutually so construe the contract.

Earle v Rehmann, 214-784; 243 NW 345

Warranty and incumbrance—drainage improvement. A covenant against incumbrance is not broken by the existence of a public drainage improvement on the land, nor is a general covenant of warranty breached by the fact that, subsequent to the deed, an additional assessment is levied on the land for such improvement.

Kleinmeyer v Willenbrock, 202-1049; 210 NW 447

II MERGER OF REALTY INTERESTS GENERALLY

Merger and cancellation. The fact that the holder of trust or mortgage-secured bonds later acquires an incomplete title to the mortgaged premises, and later conveys both the premises and bonds in trust, as security to a creditor, and yet later has his title to the premises fully completed, does not work a merger and cancellation of the bonds, it appearing that such merger and cancellation would have been to the disadvantage of said titleholder and his transferee in trust.

Sunset Park Co. v Eddy, 205-432; 216 NW 93

Merger of life estate and contingent remainder into fee. The grantee of a life estate, on condition, however, that if grantee violates any one of named prohibited acts the said estate shall ipso facto instantly terminate, and the fee pass to grantee's issue, or to named remaindermen if grantee then has no issue, may, if without issue, take a conveyance by warranty deed from said contingent remaindermen of all their present and possible future interest in the land, and thereby merge the life estate and contingent remainders into a fee in himself.

Thorsen v Long, 212-1073; 237 NW 515

Contract to convey merged in resulting deed. A contract to convey land is presumed to be merged in the subsequent deed executed in performance thereof, except that the contract may be resorted to for explanation of an ambiguity or collateral agreement not incorporated in the deed, but, in instant case, deed held to be unambiguous when it warranted against all persons other than those asserting rights under existing tenancies and when the contract provided for possession upon delivery of the deed subject to all leases. Thereunder, the provisions of the contract merged in the deed so that grantee could not look to grantor for relief when the tenant in possession refused to vacate.

Swensen v Ins. Co., 225-428; 280 NW 600

Merger of easement in title and fee. A recorded conveyance of land which, in addition to conveying the land, also grants a private roadway over other lands of the grantor, creates an easement which runs with the land, even tho the grantor subsequently reacquires title to the lands first conveyed and again becomes the owner of both tracts and subse-

quently conveys both tracts by separate conveyances to different grantees.

Feilhaber v Swiler, 203-1133; 212 NW 417

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Quitclaim to avoid foreclosure — effect of existing junior liens—insurance unaffected. A mortgagee's status as such, as affecting his rights under a fire insurance policy, is not lost by merger when he takes a quitclaim deed from mortgagor agreeing not to foreclose if no junior liens exist against the property, when thereafter it is found that such liens do exist whose presence would cause a merger to be against the interest and inconsistent with the intention of the mortgagee.

Guaranty Ins. v Ins. Assn., 224-1207; 278 NW 913

Termination—acquisition of title by stockholder of corporate lessee. A lease in which a corporation with many stockholders is lessee may not be said to be merged, and thereby terminated, simply because some of the stockholders acquire the equitable title to the real estate.

Fleming v Casady, 202-1094; 211 NW 488

Transfer of property mortgaged—merger—general rule. Where a titleholder of real estate pays off a prior existing mortgage thereon, the mortgage lien merges in the fee, but where a mortgagee acquires the fee to the mortgaged premises his mortgage lien does not thereby merge therewith if this would be detrimental to his interest unless he intends such merger.

Bankers Trust v Stallcop, 223-1344; 275 NW 120

10085 Acknowledgments within state.

Atty. Gen. Opinion. See '34 AG Op 672

ANALYSIS

I PARTIES AUTHORIZED TO TAKE
II LEGALIZING ACKNOWLEDGMENTS

I PARTIES AUTHORIZED TO TAKE

Disqualification of officer. A chattel mortgage which is acknowledged before a notary public who is the mortgagee, is not recordable, and if recorded, the record imparts no constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

Elements of conveyance—delivery. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

II LEGALIZING ACKNOWLEDGMENTS

Discussion. See 16 ILR 541—Acknowledgment statute

10094 Certificate of acknowledgment.

Atty. Gen. Opinion. See '28 AG Op 135

ANALYSIS

I FORM OF CERTIFICATE
II CERTIFICATE AS EVIDENCE
III OFFICIAL TITLE OF OFFICER

I FORM OF CERTIFICATE

Note: A legal form of a certificate of acknowledgment is set out in §10103

Statutory form. In absence of express requirements to that effect, exact language of statute need not be used, it being sufficient if necessary facts required to be contained in acknowledgment be expressed in words of substantially equivalent import.

Hauser v Callaway, 36 F 2d, 667

Statutory forms—recital as to authority of officer—sufficiency. It is the general rule that forms of acknowledgment as prescribed in statutes are permissive, and not mandatory, and it is therefore sufficient if substantial compliance as to essentials is present. So where title of acknowledging officer did not appear in body of certificate as suggested by statute, but appeared in subscription of certificate, the acknowledgment was held valid.

Advance-Rumely Co. v Wagner, 29 F 2d, 984

Insufficient form. Notary's certificate of acknowledgment to conditional sale contract, not mentioning in body name, title, or county of subscribing notary, held insufficient as basis for record.

In re Holley, 25 F 2d, 979

Sufficient acknowledgment. Under statute, requiring notary in acknowledgment of mort-

I FORM OF CERTIFICATE—concluded

gage to show that mortgagor acknowledged execution of instrument to be his voluntary act and deed, acknowledgment, reciting that mortgagor named who executed said instrument "acknowledged said instrument to be his voluntary act and deed," held sufficient to make filing and recording of such mortgage constructive notice; the objection that the acknowledgment stated that the instrument, and not the execution of the instrument, was the mortgagor's free act and deed, being hypercritical.

Hauser v Callaway, 36 F 2d, 667

Form and contents—failure of statutory requirements—not constructive notice. Under statute requiring that, in order to give constructive notice, conditional sales contracts be acknowledged in the same manner as chattel mortgages, a certificate of acknowledgment on a conditional sales contract, stating merely that person making acknowledgment was personally known to notary and that person making acknowledgment said he signed it voluntarily, held defective, because notary did not therein identify the person making the acknowledgment as signer of contract acknowledged. Hence contract was invalid as against creditors of bankrupt conditional buyer.

In re Elliott, 72 F 2d, 300

Name variation of mortgagor—when noneffective. A mortgage executed by "Chester C. Callaway", which was acknowledged, filed, and recorded, was constructive notice to trustee in bankruptcy of the estate of Charles Chester Callaway, bankrupt, the bankrupt being best known in the community in which he lived by the name which he signed to the mortgage, and the fact that the acknowledgment stated that he "acknowledged said instrument", instead of statutory requirement of "acknowledged execution of instrument", was held sufficient to make the filing and recording of such mortgage constructive notice.

Hauser v Callaway, 36 F 2d, 667

II CERTIFICATE AS EVIDENCE

Impeachment by notary of his own certificate. Very little weight will be given to the testimony of a notary public that the recitals of his certificate are false.

McDaniel v Bank, 210-1287; 232 NW 653

Denial of signature overcome by certificate of acknowledgment. Tho a proper denial of the genuineness of the signature to an instrument casts the burden on the opposing litigant to prove the genuineness of such signature, yet, if the instrument is one which is legally acknowledgeable and is duly acknowledged and properly introduced in evidence with the acknowledgment, the burden of proof henceforth is on the party causing the signature to be denied to overcome, by clear, satisfactory, and convincing evidence, the very strong presumption, generated by the certificate of acknowledgment, that the instrument was actually executed by the acknowledging party. Held, presumption not overcome.

Northwestern Ins. Co. v Blohm, 212-89; 234 NW 268

Presumption. Principle reaffirmed that great weight is accorded to a certificate of acknowledgment.

Hutchins v Jones Piano Co., 209-394; 228 NW 281

III OFFICIAL TITLE OF OFFICER

Certificate sufficient. Certificate of acknowledgment held valid, tho title of acknowledging officer did not appear in body of certificate.

Advance-Rumely Co. v Wagner, 29 F 2d, 984

10098 Use of seal.

Atty. Gen. Opinion. See '38 AG Op 650

10101 Certificate of acknowledgment.

Curing defects. A notary public may not, after his term of appointment has expired, voluntarily or under order of court validly attach a new certificate of acknowledgment to a statutory agreement for arbitration executed during his expired term, even tho, at the time of attaching such new certificate, he was a notary public under a new appointment.

Koht v Towne, 201-538; 207 NW 596

Disqualified notary — when inconsequential. The validity of a deed of conveyance is, as between the grantor and grantee, in no manner affected by the fact that the deed was acknowledged before a disqualified notary public.

Shanda v Bank, 220-290; 260 NW 841

Impeachment—evidence—sufficiency. Principle recognized that testimony sufficient to overthrow the probative force of a certificate of acknowledgment must amount to more than a preponderance in the balancing of probabilities.

Parry v Reinertson, 208-739; 224 NW 489; 63 ALR 1051

Presumption. Principle reaffirmed that great weight is accorded to a certificate of acknowledgment.

Hutchins v Piano Co., 209-394; 228 NW 281

10103 Forms of acknowledgment.

Atty. Gen. Opinions. See '28 AG Op 135; '30 AG Op 144

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Northwestern Ins. v Blohm, 212-89; 234 NW 268

Discrepancy in names—effect. The fact that in the body of a mortgage, and in the certificate of acknowledgment of said mortgage, the name of the wife of the mortgagor-owner appears as "Mary F. McNeff" instead of "Mary T. McNeff" (her correct name) is not of controlling importance on the issue as to the validity of the mortgage as to the wife, it appearing that she was correctly identified in said certificate of acknowledgment "as the wife" of said mortgagor-owner.

First Tr. JSL Bk. v McNeff, 220-1225; 264 NW 105

Evidence — inference of execution. The fact that a mortgage carries a notarial certificate of acknowledgment by the parties purporting to execute it is persuasive evidence that said parties did, in fact, execute it—that their signatures are genuine.

Greenland v Abben, 218-255; 254 NW 830

Fraudulent assignment—evidence. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Impeaching signature but not acknowledgment — effect. Even tho it appears that the purported signature of a wife to a promissory note and mortgage (admittedly executed by the husband on his own land) was affixed by someone other than the wife, yet if the mortgage carries a certificate of acknowledgment in due and proper form as required by law reciting an acknowledgment by said wife of said mortgage as her voluntary act and deed, the wife must, in order to avoid the mortgage as to herself, overcome by clear, satisfactory and convincing evidence the facts affirmed in said certificate.

First Tr. JSL Bk. v McNeff, 220-1225; 264 NW 105

Official title—sufficiency. A certificate of acknowledgment which in the body thereof describes the acknowledging officer as a "notary public in and for said county" is all-sufficient, when the heading to the acknowledgment specifically names the county.

Dunham v Grant, 207-602; 223 NW 385

See Citizens Bk. v Hamilton, 209-626; 227 NW 112

Omission of name of officer—effect. A certificate of acknowledgment may be sufficient without any recital therein of the name of the officer before whom the acknowledgment was taken.

Manbeck Motor v Garside, 208-656; 226 NW 9

Statutory forms—recital as to authority of officer—sufficiency. It is the general rule that forms of acknowledgment as prescribed in statutes are permissive, and not mandatory, and it is therefore sufficient if substantial compliance as to essentials is present. So where title of acknowledging officer did not appear in body of certificate as suggested by statute, but appeared in subscription of certificate, the acknowledgment was held valid.

Advance-Rumely v Wagner, 29F 2d, 984

10105 Recording.

Discussion. See 2 ILB 52—Recording of instruments affecting land; 2 ILB 109—Effect of recording; 2 ILB 169—Record as notice; 3 ILB 25—Void and defective deeds

ANALYSIS

I NECESSITY AND EFFECT OF RECORDING
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I NECESSITY AND EFFECT OF RECORDING

Discussion. See 4 ILB 266—Torrens land title system

Certificates—nonnecessity to record. Conceding arguendo, that municipal improvement certificates and assignments thereof are in-

I NECESSITY AND EFFECT OF RECORDING—concluded

struments which require filing and recordation under this section, yet the failure to so file and record is quite inconsequential as to parties who had full knowledge that the certificates were outstanding.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Delivery of deed—presumption from record. The fact that a deed of conveyance has been duly recorded generates a presumption of delivery so strong and persuasive that only clear and satisfactory evidence will overthrow such presumption. Evidence held insufficient.

Gibson v Gibson, 205-1285; 217 NW 852

Delivery of deed presumed from recording. Recording of a deed does not constitute delivery, but it is evidence which creates a presumption of delivery rebuttable only by clear and satisfactory evidence.

Huxley v Liess, 226-819; 285 NW 216

Fraudulent conveyances—transfers invalid—withholding from record. The withholding of a mortgage from record until after the mortgagor became involved in litigation is not, in and of itself, sufficient to justify an inference of fraud, in the face of unquestioned evidence that the debt secured was genuine.

Citizens Bank v Hamilton, 209-626; 227 NW 112

Husband and wife—secret, unrecorded deed—estoppel. A wife who, even without fraudulent intent, receives from her husband a secret, voluntary conveyance of land, and withholds the deed from record for many years, and allows her husband publicly to treat, manage, and control the land as his own and to obtain credit on the strength of such apparent ownership, thereby estops herself from asserting her ownership against said creditors.

Meltzer v Shafer, 215-785; 244 NW 851

Delivery intended by recording. If a deed, after being signed and acknowledged by grantor, is placed of record by him with the intention of making the recording stand for delivery, the title will pass to the grantees, assuming there was acceptance by them of the title.

Lawson v Boo, 227-100; 287 NW 282

Delivery—rebuttable presumption from recording. In an action by a 73-year-old grantor to set aside deed to stepchildren, wherein grantor reserved a life estate to himself, the grantor failed to overcome by clear and satisfactory evidence the presumption arising from the recording of the deed that there was a delivery that transferred the title.

Lawson v Boo, 227-100; 287 NW 282

Disqualification of officer. A chattel mortgage which is acknowledged before a notary public who is the mortgagee is not recordable, and, if recorded, the record imparts no constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

Elements of conveyance. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

Failure to record deed—effect. In a controversy between a landlord and a chattel mortgagee over the priority of their liens, it is quite immaterial that the landlord's title deed is not of record.

Corydon Bank v Scott, 217-1227; 252 NW 536

Mortgages executed on same day on same property. As between mortgages executed and delivered on the same day on the same property, it will be presumed, nothing appearing to the contrary, that the mortgage first recorded was first executed and delivered, and consequently entitled to priority.

Miller v Miller, 211-901; 232 NW 498

Nonconstructive knowledge. One who takes a mortgage from a mortgagor who, under the recording acts, appears to be the sole owner of the fee is not charged with constructive knowledge of matter which appears in the "probate record" (§11842, C., '31) and which suggests or implies that some person other than the apparent fee owner has an interest in the property.

Booth v Cady, 219-439; 257 NW 802

Recording long after grantor's death—no delivery—nonvalidity. A deed, found among the personal effects of a deceased grantor and recorded seven or eight years after the estate was closed, not having been delivered by grantor nor ordered delivered by the court, has no validity.

Forrest v Otis, 224-63; 276 NW 102

II INSTRUMENTS AFFECTING REAL ESTATE

Discharge in bankruptcy—effect. The discharge in bankruptcy of a mortgagor does not affect the lien of the mortgage.

Webber v King, 205-612; 218 NW 282

Attorney and client—correcting instrument after employment terminates. Attorneys hired

to draft a mortgage, altho discovering that they have made a mistake in the description of the land, have no authority on their own initiative after termination of their employment and without consulting the mortgagee, to change the description and re-record the mortgage in the recorder's office.

Winker v Tiefenthaler, 225-180; 279 NW 436

Deeds to children delivered to trustee—wife acquiescing in husband's instructions. An agreement reached by a husband and wife, that he should deed his property to her and she would deed it to the children, the deeds to be placed with a trustee, who was to record the first deed on the death of the husband and then record the second deeds on the death of the wife, is binding on the wife, when she is present at the execution of the deeds and, by her silence, acquiesces in the instructions given by the husband to the trustee.

Bohle v Brooks, 225-980; 282 NW 351

III SUBSEQUENT PURCHASERS

Failure to record—who may complain.

Johnson v Railway, 202-1282; 211 NW 842

Inadvertent antedating and recording of intended second mortgage—priority. Altho all parties to two mortgages, growing out of the same transaction and executed at substantially the same time, intended that one of them should be a first lien, yet if the intended second mortgage and note are inadvertently antedated and recorded, a subsequent purchaser of said antedated and recorded mortgage acquires a first lien when he purchased in good faith, for value, before maturity, without notice of the intention of said original parties, and in the honest and justifiable belief that he was acquiring a first mortgage lien; and it is quite immaterial that said purchaser long delayed the recording of his formal assignment of the mortgage.

Fed. Bank v Sherburne, 213-612; 239 NW 778

Mortgage on interest of joint adventurer. Land belonging to a joint adventure becomes individually owned land when the joint adventurers execute and place of record an instrument which specifically states the fractional individual ownership of each in the land. It follows that as subsequent mortgagee who in good faith relies on such record cannot be detrimentally affected by equities arising out of the joint adventure and existing between the joint adventurers.

State Bank v Calvert, 219-539; 258 NW 713

Oral contract contemporaneous with deed. When a duly recorded deed contains a prohibition against a sale or conveyance of any part of the land during the lifetime of the grantor, parol evidence is admissible against a subsequent mortgagee to show that the purpose of said prohibition was to protect the grantor during his lifetime in a contract reservation of rent in the land.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Mortgages—recitals—effect. One who in good faith and for value purchases a note and a mortgage which from its face and recording date is a first lien, is not charged with notice that another mortgage of later date and record is in fact the first lien on the same land because the later mortgage runs to a federal land bank (which is prohibited from taking second mortgages) and recites that the land is free from incumbrance.

Fed. Bk. v Sherburne, 213-612; 239 NW 778

Unrecorded conveyance of interest of co-tenant. A tenant in common who, while in possession under a deed granting such tenancy, orally purchases his co-tenant's interest may not thereafter claim that his continued possession is notice to the world of his newly acquired right to his co-tenant's share. It follows that if the co-tenant, who has sold his interest, subsequently mortgages his apparent record interest to a good-faith mortgagee without notice of the oral purchase, the mortgage will take priority over the said purchase.

Oxford Jct. Bk. v Hall, 203-320; 211 NW 389

IV VALUABLE CONSIDERATION

Exchange of property. Instruments duly executed in exchange of property cannot be impeached without convincing proof of fraud, and values of exchanged properties are liberally regarded in determining adequacy of consideration.

Ragan v Lehman, (NOR); 216 NW 717

Purchaser—nonpayment—effect. The purchaser of land from a fraudulent grantee will not be protected as a purchaser in good faith and for a valuable consideration when, at the time notice of the fraud is brought home to him, the purchase-price note was in the hands of the grantor, and unpaid.

Reining v Nevison, 203-995; 213 NW 609

Transfers and transactions invalid—good-faith grantee. Principle reaffirmed that a conveyance will be sustained in favor of a grantee who in good faith paid an adequate consideration, without participating in the fraudulent purpose, if any, of the grantor.

First N. Bk. v Currier, 218-1041; 256 NW 734

V NOTICE

(a) RECORD NOTICE

Prohibition against conveyance—validity—record. A provision in an ordinary warranty deed absolutely prohibiting a sale or conveyance of any part of the land during the lifetime of the grantor without the consent of the grantor, is not repugnant to the deed if the unrevealed purpose of said prohibition is legal, and a part of the consideration for the deed,

V NOTICE—continued

(a) RECORD NOTICE—concluded

and is expressed in a contract which accompanies the execution of the deed, even tho the contract be oral. It follows that the record of such deed charges third parties with notice of said contract if reasonable inquiry would reveal it.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Landlord's contractual lien—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

(b) ACTUAL AND IMPLIED NOTICE

Actual notice without actual knowledge. A mortgagee will be deemed to have had "actual notice" of a prior unrecorded mortgage (or of a prior mortgage so defectively acknowledged that the record thereof imparts no constructive notice) when the facts and circumstances attending and surrounding the taking of the second mortgage are such as to lead him as a reasonably prudent person to make inquiries, and when such inquiries if prosecuted with ordinary diligence would have revealed the former mortgage.

Mill Owners Ins. v Goff, 210-1188; 232 NW 504

Codicil as deed. A duly signed, acknowledged, and recorded contract to the effect that a specified devise in the will of one of the parties to the contract should act as a deed to the other party to the contract will prevail over a subsequent conveyance of the property by the testator, especially when the grantee had actual notice of the contents of the will and of the contract in reference thereto.

Kremar v Kremar, 202-1166; 211 NW 699

Constructive notice imposes duty to make inquiry. A mortgagee who is constructively charged with notice of another mortgage executed on the same day is actually charged with notice that said other mortgage was first executed if appropriate inquiry would have revealed such fact.

Miller v Miller, 211-901; 232 NW 498

Inquiry and constructive notice. A purchaser of real estate must be charged with actual notice of such facts as he would have ascertained had he made such inquiries as ordinary prudence reasonably suggested.

Young v Hamilton, 213-1163; 240 NW 705

Maintenance of railroad bridge—notice implied. The existence, on a minor fractional part of a government 40-acre tract, of permanent improvements in the form of a railway bridge spanning a public drainage ditch constitutes implied notice to the purchaser of the remaining part of the said 40-acre tract of the unrecorded written contract right of the railway company to maintain said bridge in its then length and elevation without liability in damages to the owner of the abutting land.

Johnson v Railway, 202-1282; 211 NW 842

Mortgage on partner's undivided interest. The mortgagee of an undivided interest in land, taken on the supposition or assumption that the mortgagor's interest was absolute, is subject to a showing that the owners of the land were partners and that the land was the property of the partnership, and needed for the payment of partnership obligations, when the fact of such partnership and its ownership of the property in question could readily have been discovered by the mortgagee by the exercise of reasonable diligence before he accepted the mortgage.

Norwood v Parker, 208-62; 224 NW 831

Mortgages—unknown lessee—estoppel. A lessee of mortgaged land whose rights are such that the mortgagee is not chargeable with notice thereof, will not be permitted to assert his rights when he deliberately withholds such assertion until after the court enters a decree making permanent the receivership over the rents.

Ferguson v White, 213-1053; 240 NW 700

Wrongful release of conditionally canceled mortgage. Where, in rescission proceedings, a decree in effect provided that a promissory note and recorded real estate mortgage given for the purchase price of goods should be null and void from and after the mortgagor returned the goods to the mortgagee, and where the goods were never so returned, and where the mortgage was wrongfully released of record by a court-appointed commissioner, the mortgage may be foreclosed against a purchaser of the land who innocently bought in reliance on the wrongful release. This is true because, while both the mortgagee and subsequent purchaser were innocent, yet the purchaser had the means of knowing whether the goods had been returned to the mortgagee—the very act which, under the decree, would work a nullification of the mortgage and note and justify a release.

Moore v Crawford, 210-632; 231 NW 363

(c) NOTICE IMPARTED BY POSSESSION

1 Nature of Notice

Buildings as personalty—rights of one in possession. A mortgagee of real estate, tho his mortgage contains no reservation or exception of the buildings situated on the land, is charged with notice of the possible fact

that said buildings are personal property, and belong exclusively, not to the mortgagor, but to the person who, when the mortgage is executed, is in the open, visible and unequivocal possession and use of said buildings.

Lutton v Steng, 208-1379; 227 NW 414

Notice of rights of party in possession. A party who in good faith takes a mortgage of land from the record owner thereof, who was then and had been for years in the unrestricted possession, control, and management of the land, is not chargeable with notice of the rights of a nonrecord owner from the simple fact that said nonrecord owner had moved some household goods into a small building on the land and had lived there "part of the time".

Burmeister v Walz, 216-265; 249 NW 197

Overcoming presumption from possession—amount of proof. A mere preponderance of the evidence is not sufficient to overcome the presumption arising from the possession of the legal title to real property. The evidence for that purpose must be clear, convincing, and satisfactory.

Wagner v Wagner, (NOR); 224 NW 583

Possession insufficient to impart notice. One who acquires an interest in real estate is charged with knowledge of the rights of the person in possession, provided the possession is of such a character as to indicate that the party is claiming ownership, partial or otherwise.

Booth v Cady, 219-439; 257 NW 802

Rights of grantor in possession. One who acquires a mortgage from the record warranty-deed grantee is not chargeable with notice of the rights of the warranty-deed grantor who continues in possession of the property, when said grantor wholly fails to overthrow the legal presumption that his possession is in subordination to the said deed—that his possession is without claim of right, and by sufferance of his grantee.

Clark v Chapman, 213-737; 239 NW 797

Rights of one in possession. A contract purchaser of real estate becomes the equitable owner, and his actual possession is notice to the world of his rights, even tho he purchases from a person who has no title whatever, but who assumed equitable ownership, and who later had such assumption ratified and confirmed in himself by a contract of purchase and by a deed of conveyance from the legal titleholder.

Ely Bank v Graham, 201-840; 208 NW 312

Rights of person in possession. A mortgagee is not chargeable with notice that one of the members of the mortgagor's family residing upon the mortgaged property, is a lessee of the land when to all appearances, the possession of said person is the possession of the mortgagor.

Ferguson v White, 213-1053; 240 NW 700

2 What Constitutes Possession

Possession of tenant—landlord's right. The possession of a tenant is the possession of the landlord and is notice of the rights of the landlord.

Phelps v Kroll, 211-1097; 235 NW 67

Possession insufficient to impart notice. One who acquires an interest in real estate is charged with knowledge of the rights of the person in possession, provided the possession is of such a character as to indicate that the party is claiming ownership, partial or otherwise.

Booth v Cady, 219-439; 257 NW 802

When possession not notice of adverse claim. The actual possession of real estate by the grantor in a duly recorded conveyance in fee during a reasonable time following the execution of such conveyance does not charge a good-faith subsequent purchaser for value of the land with notice that the one in possession continues to claim ownership notwithstanding said conveyance.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Vendor and purchaser—purchase from nontitleholder—equitable ownership. A contract purchaser of real estate becomes the equitable owner, and his actual possession is notice to the world of his rights, even tho he purchases from a person who has no title whatever, but who assumed equitable ownership, and who later had such assumption ratified and confirmed in himself by a contract of purchase and by a deed of conveyance from the legal titleholder.

Ely Bank v Graham, 201-840; 208 NW 312

VI NOTICE OF EXISTING EQUITIES AND LIENS

Advancements after judgment. A mortgage on realty actually given to secure future advances of money to the mortgagor is prior in right to subsequently rendered judgments against the mortgagor as to advances made after the rendition of the judgments, it not appearing that the mortgagee had actual knowledge of said judgments.

Everist v Carter, 202-498; 210 NW 559

Devise and bequest—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

VI NOTICE OF EXISTING EQUITIES AND LIENS—concluded

Mortgage on devise—prior rights of estate.

Bell v Bell, 216-837; 249 NW 137

Subsequent easement in land. A permanent easement in land, granted subsequent to the recording of a mortgage on the land, is subsequent in right to said mortgage.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

VII NOTICE UNDER PARTICULAR CONVEYANCES

Assignment of rent not recordable. A written assignment of a lease of real estate and of the rents accruing thereunder, (especially when the lease is at the time manually delivered to the assignee) is not an instrument which the law requires to be recorded, and if recorded the record imparts no notice.

Phelps v Kroll, 211-1097; 235 NW 67
See King v Good, 205-1203; 219 NW 517

Bona fide purchaser — quitclaim claimant. Principle reaffirmed that a quitclaim deed holder is not entitled to be considered a bona fide purchaser, and does not acquire priority over equities which are valid against the grantor.

Howell v Howell, 211-70; 232 NW 816

Conflicting assignments by partnership and partners—priority. An unrecorded assignment by a partnership to a partnership creditor, of a lease of real estate and of the rents accruing thereunder, is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Foreclosure—rents—grantee not entitled to retain. The grantee under quitclaim deed of premises which are subject to a duly recorded mortgage pledging the rents and profits, even tho he does not assume the payment of said mortgage, is not entitled to collect and retain the rents accruing during the redemption period following foreclosure of the mortgage with a deficiency judgment. This is true because the grantee takes the premises subject to the same burdens under which the mortgagor held them.

Equitable v Jeffers, 215-696; 246 NW 784

Fraudulent release of prior mortgage by agent. A mortgagee who takes his mortgage as a first mortgage, in good-faith reliance on the release by his agent of a prior mortgage, does not lose his priority because of the fact that the release was fraudulent in that, prior to the release, the prior mortgage had been assigned, without a recording of the assignment, the knowledge of the agent of his own dishonesty not being imputable to his principal, the first mortgagee.

Leach v Bank, 202-265; 209 NW 422

Quitclaim — prior claims — non-applicability of rule. The principle that one who acquires title by quitclaim takes with notice of prior bona fide claims has no application to a case where a mortgagee receives his mortgage for a valuable consideration and without notice of any infirmity, and later, in order to avoid the expense of a foreclosure, receives a quitclaim deed to the land in satisfaction of the mortgage.

Brenton Bros. v Bissell, 214-175; 239 NW 14

Quitclaim security. A mortgagee of an "undivided interest" in certain land is not protected against unrecorded instruments which affect the land and which are valid against the mortgagor.

Young v Hamilton, 213-1163; 240 NW 705

VIII BURDEN OF PROOF

Equitable estoppel—unrecorded conveyance —pleader's burden. One alleging an equitable estoppel must prove it by clear, satisfactory, and convincing evidence, hence in asserting in a fraudulent conveyance action, an equitable estoppel against the wife of a bank stockholder, because she withheld from record, for many years, a deed to herself from her husband, the creditors of the bank have not sustained the burden of proving estoppel when they admit that they did not deposit their money on the wife's representation, nor upon their belief in the husband's ownership of the land.

Bates v Kleve, 225-255; 280 NW 501

Escrow agent's memorandum made in absence of parties—inadmissible. An escrow agent's understanding of the arrangement by which he was to record deeds after the death of the grantor, noted on the envelope in the absence of the parties, is not admissible in evidence as to the substance of the arrangement and would be of doubtful evidentiary value even if admitted.

Bohle v Brooks, 225-980; 282 NW 351

Unrecorded conveyance—burden of proof. Where children, holding undivided interests in lands as heirs, vest their mother, by an unrecorded instrument, with actual possession of the lands during her widowhood, a subsequent deed holder of the interest of one of the children may not have partition of the land unless he pleads and proves (1) his subsequent purchase, (2) that he paid value therefor, and (3) that he had no notice of said unrecorded instrument.

Young v Hamilton, 213-1163; 240 NW 705

Unrecorded mortgage—estoppel to assert lien. Naked proof that, during the time the

mortgagee of land neglected to record his mortgage, the mortgagor obtained credit from another, who placed his claim in judgment, is wholly insufficient to estop the mortgagee from insisting on the priority of his mortgage lien. Additional proof of fraud or deception in some form is indispensable.

Brauch v Freking, 219-556; 258 NW 892

IX COUNTY OF RECORDING

No annotations in this volume

10106 Acknowledgment as condition precedent.

Atty. Gen. Opinion. See '28 AG Op 317

Acknowledgment of chattel mortgages. See under §10015 (IX)

Disqualified notary—when inconsequential. The validity of a deed of conveyance is, as between the grantor and grantee, in no manner affected by the fact that the deed was acknowledged before a disqualified notary public.

Shanda v Bank, 220-290; 260 NW 841

Name variation of mortgagor—when noneffective. A mortgage executed by "Chester C. Callaway", which was acknowledged, filed, and recorded, was constructive notice to trustee in bankruptcy of the estate of Charles Chester Callaway, bankrupt, the bankrupt being best known in the community in which he lived by the name which he signed to the mortgage, and the fact that the acknowledgment stated that he "acknowledged said instrument", instead of statutory requirement of "acknowledged execution of instrument", was held sufficient to make the filing and recording of such mortgage constructive notice.

Hauser v Callaway, 36 F 2d, 667

10107 Assignment by separate instrument.

Mortgage foreclosure provisions. See under §12372 (III)

Assignment—failure to record—effect. The failure of the assignee of a duly recorded first mortgage on real estate to record his assignment does not deprive him of his position of priority over the assignee of subsequently executed mortgages on the same property who records his assignment.

Wood v Swan, 206-1198; 221 NW 791
Kuhn v Larson, 220-365; 259 NW 765

Assignment of note—payment to original payee—effect. The maker of a promissory note and mortgage who, for four years before maturity of the principal, and for eight years after maturity of the principal, pays the accruing interest to the agent of the original payee, without knowledge that the note and mortgage had been assigned, and finally pays the principal in the same manner, without asking for or receiving the note in question, effects a complete discharge of the note and mortgage against an assignee thereof who had been such during all said times of payment, but without recording his assignment, and in the meantime had permitted the original payee, a corporation, (1) to appear on the records as the owner of the paper and (2) to collect the interest and pay it to him.

Kann v Fish, 209-184; 224 NW 531

Assignment—recordation—scope of notice. The recording of an assignment of a promissory note and of a real estate mortgage securing the note charges the world with no constructive notice except of the assignee's interest in the land. Such record does not charge a subsequent pledgee of the note and mortgage with constructive notice of the assignee's equity in the note as personal property.

Reyelts v Feucht, 206-1326; 221 NW 937

Recorded assignment—constructive notice. A duly recorded assignment of a mortgage and of the promissory note secured, carries constructive notice to the world that the assignee is the owner of said note.

Holden v Batten, 215-448; 245 NW 750

Assignment reserving interest—construction. A broker who, in negotiating a loan, takes the note and mortgage in his own name and, pursuant to an agreement, adds to the rate of interest due the actual mortgagee a fractional percent to cover his commission, and who, in assigning the note and mortgage to said actual mortgagee, reserves to himself said fractional percent of the interest "when and as the interest matures and is paid, without right of priority or interest in the mortgage", thereby deprives himself of all interest in the mortgage in case the mortgagor voluntarily, or involuntarily because of foreclosure, ceases to pay interest.

Metropolitan v Sutton, 219-879; 259 NW 788

Failure to record assignment. The assignee of a real estate mortgage and the note secured thereby is under no legal obligation to record his assignment as to a person who buys the property with particular reference to said note and mortgage.

Shoemaker v Minkler, 202-942; 211 NW 563

Failure to record assignment. A transferee of one of several notes secured by a recorded junior real estate mortgage who fails to take and record any assignment to himself of said mortgage is bound by the subsequent wrongful agreement of the record mortgagee that a prior mortgagee (who had no notice of the transfer of the note) might take a new mort-

gage in lieu of his old mortgage, and for an increased amount, and retain priority over the junior mortgage; and it is immaterial that said agreement is evidenced by an unacknowledged entry on the margin of the recorded mortgage.

Squire Co. v Hedges, 200-877; 205 NW 525

Fraudulent assignment. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Lease—assignment—recordation—effect. A lease of real estate and the assignment thereof are recordable for the purpose of conveying constructive notice to a mortgagee and his subsequently appointed receiver under a mortgage which contains a pledge of the rents, even tho said parties are not entitled, as a matter of right, to such notice.

King v Good, 205-1203; 219 NW 517

Payment without production of note. The maker of a promissory note secured by mortgage who pays the same to the payee-mortgagee without requiring the production and surrender of the note does so at his peril, even tho the record reveals no assignment of the note and mortgage, such maker not being a subsequent purchaser, within the meaning of the recording acts.

Shoemaker v Nodland, 202-945; 211 NW 567
Shoemaker v Ragland, 202-947; 211 NW 564

Transfer of part of mortgage-secured debt —effect. Principle reaffirmed that a transfer of part of a mortgage-secured debt operates ipso facto as a pro tanto assignment of the mortgage security.

Miller & C. Bk. v Collis, 211-859; 234 NW 550

10109 Index books.

Recording "Instrument relating to real estate". A mortgage (1) on chattels on certain described real estate and (2) on all crops "sown, planted, raised, growing or grown" on said real estate for two specified years following the execution of said instrument, being an instrument which "relates to real estate", is recordable as a real estate mortgage, and such recording may be enforced by mandamus.

Weyrauch v Johnson, 201-1197; 208 NW 706

10115 Filing and indexing—constructive notice.

Atty. Gen. Opinions. See '34 AG Op 57, 588

ANALYSIS

I Necessity and Effect of Indexing
II Sufficiency of Indexing
III Priority

Sufficiency of recording. See under §10118, Vol. I

I NECESSITY AND EFFECT OF INDEXING

Assignment of mortgage or debt—recorded —constructive notice. A duly recorded assignment of a mortgage and of the promissory note secured carries constructive notice to the world that the assignee is the owner of said note.

Holden v Batten, 215-448; 245 NW 750

II SUFFICIENCY OF INDEXING

Fatally defective index. An index of the recording of a written instrument constituting an equitable mortgage is fatally defective when it designates the actual grantor as grantee and the actual grantee as grantor.

Parry v Reinertson, 208-739; 224 NW 489; 63 ALR 1051

III PRIORITY

Failure to index. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by §11007 (4), C., '35.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

10115.1 Marginal entries indexed.

Atty. Gen. Opinion. See AG Op Aug. 25, '39

10116 Entry on auditor's transfer books.

Atty. Gen. Opinions. See '25-26 AG Op 136; '28 AG Op 115

10118 Final record.

Effect of record notice. See under §10105

Property conveyed — ownership not paramount—title at issue. In an action between a creditor and a grantee to set aside a deed, ownership by the grantor being the question in issue rather than recovery by virtue of a superior title, an uncontradicted public record showing ownership in grantor at time the deeds were made is conclusive on that issue.

Bagley v Bates, 224-637; 276 NW 797

10122 Book of plats—how kept.

Atty. Gen. Opinion. See '38 AG Op 177

10123 Entries of transfers.

Atty. Gen. Opinion. See '38 AG Op 177

10126 Correction of books and instruments.

Atty. Gen. Opinion. See '32 AG Op 181

10127 Perpetuities prohibited.

Discussion. See 22 ILR 437; 23 ILR 1; 24 ILR 1; 24 ILR 635; 25 ILR 1—Perpetuities

Clause repugnant to fee. A stipulation in divorce proceedings, even tho carried into the

decree, is a nullity insofar as it seeks to render land exempt from the claims of creditors of the fee-title owner.

Putensen v Dreeszen, 206-1242; 219 NW 490

Limitations void ab initio. Testamentary attempts by means of limitations to create in property contingent interests or estates, which will not necessarily become vested within the period of time prescribed by the statute prohibiting perpetuities, are futile, all such limitations being void ab initio.

Bankers Trust v Garver, 222-196; 268 NW 568

Partial invalidity of will—effect on valid part. The invalidity of a testamentary limitation—invalid because prohibited by the statute against perpetuities—will not affect the validity of preceding limitations which are otherwise valid, when it is manifest from the will that testator had no intent to make said preceding limitations dependent on said subsequent limitations—ultimately rejected as void.

Bankers Trust v Garver, 222-196; 268 NW 568

Perpetual care of burial lot. A bequest for the perpetual maintenance of testator's cemetery lot is not violative of this statute.

Hipp v Hibbs, 215-253; 245 NW 247

Prohibition against conveyance—validity. A provision in an ordinary warranty deed absolutely prohibiting a sale or conveyance of any part of the land during the lifetime of the grantor, without the consent of the grantor, is not repugnant to the deed if the unrevealed purpose of said prohibition is legal, and a part of the consideration for the deed, and is expressed in a contract which accompanies the execution of the deed, even tho the contract be oral. It follows that the record of such deed charges third parties with notice of said contract if reasonable inquiry would reveal it.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Restraint on alienation—as affecting charitable organization—validity. Where an individual agrees to construct a grotto on land then belonging to a charitable organization which in return agrees among other things not to alienate the land, such a covenant, not being created in a gift for charitable purposes and as such an exception to the rule against perpetuities or against restraint on alienation, but instead, an attempt by the fee titleholder to retain his land while separating from the fee the unlimited power of alienation, is violative of public policy, void and unenforceable in equity.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Restraint on alienation—definitions. Rule against perpetuities concerns vesting of estates and rule against restraint on alienation concerns limitations on enjoyment of property, both of which are founded on the public policy preventing property being taken out of commerce.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Restraint on alienation—not validated by estoppel or ratification. Since a restraint on alienation of title is in contravention of public policy, such a provision in a contract cannot be validated by ratification or estoppel.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Void remainders as intestate property. Property embraced in a void, testamentary limitation—void because prohibited by the statute relating to perpetuities—passes to those persons who would have been entitled thereto under the laws of intestacy had the limitation been omitted from the will, and a judgment creditor may, by proper procedure, have a lien established thereon.

Bankers Trust v Garver, 222-196; 268 NW 568

Will suspending property control—terminable at death of heirs—no perpetuity. A will which suspends the power of controlling the property during the life of persons now in being only until the time it passes to the heirs does not create a perpetuity.

Friedmeyer v Lynch, 226-251; 284 NW 160

CHAPTER 440
OCCUPYING CLAIMANTS

10128 Right to improvements.

Improvements. In an action to quiet title the court may, on proper pleading and proof, decree a lien on the land in defendant's favor for improvements made in good faith on the property.

Rainsbarger v same, 208-764; 224 NW 45

Loss of remedy. An unsuccessful defendant in an action for the recovery of real property who is afforded no opportunity therein to interpose a claim for permanent improvements (§§12235, 12249, C., '27), must necessarily resort to the occupying claimant's act for relief, and when he fails to resort to such remaining and exclusive remedy, and quits and surrenders the premises, he will not be permitted, when subsequently sued on a supersedeas bond growing out of the litigation, to interpose a claim for such improvements as a set-off.

Bigelow v Ins. Co., 206-884; 221 NW 661

10129 "Color of title" defined.

Discussion. See 20 ILR 551—"Color of title"—adverse possession; 22 ILR 437; 23 ILR 1; 24 ILR 1, 635; 25 ILR 1—Alienability and perpetuities

See additional annotations under §11007 (XXVIII)

CHAPTER 441
HOMESTEAD

10135 "Homestead" defined.

Atty. Gen. Opinion. See '38 AG Op 531

ANALYSIS

I ACQUISITION AND ESTABLISHMENT
(a) NECESSITY AND SUFFICIENCY OF OCCUPANCY
(b) OCCUPANCY OF PORTION OF PREMISES
II PROPERTY CONSTITUTING HOMESTEAD
(a) OWNERSHIP, ESTATE, OR INTEREST IN PROPERTY
(b) RENTS, PROFITS, PRODUCTS, AND PROCEEDS OF HOMESTEAD
III ABANDONMENT AND WAIVER OF RIGHT
(a) ABANDONMENT IN GENERAL
(b) TEMPORARY ABSENCE WITH INTENT TO RETURN
(c) ACTS RELEVANT TO ABANDONMENT
(d) WAIVER OF RIGHT

I ACQUISITION AND ESTABLISHMENT

(a) NECESSITY AND SUFFICIENCY OF OCCUPANCY

Acquisition—evidence—sufficiency. Evidence reviewed and held ample to show the homestead character of property.

Hagge v Gonder, 222-954; 270 NW 371

Acquisition—necessity of occupancy. Principle reaffirmed that mere intention to occupy property as a home, howsoever definite the intention may be, is insufficient to give said property a homestead character.

In re McClain, 220-638; 262 NW 666

Adjudication of homestead status. An unquestioned order in bankruptcy setting off to a bankrupt certain land as a homestead is, as to all parties to the proceedings, a final adjudication that said land was then a homestead.

Bracewell v Hughes, 214-241; 242 NW 66

Homestead exemption—waiver of residence relates to year of homestead acquisition. The provision in the homestead tax exemption statute waiving the six months requirement for residence, for the first year of a newly acquired homestead, is not sufficient to extend the exemption back to taxes levied a year previous to the year in which it was acquired.

Ahrweiler v Board, 226-229; 283 NW 889

Infirmity in title—effect. A homestead in land exists from the time of actual, good-faith occupancy by claimant and his family under a parol gift, and if the occupancy is continuous it matters not that said occupant does not acquire the legal title until many years later.

Lennert v Cross, 215-551; 241 NW 787; 244 NW 693

Nonoccupancy. The naked act of a husband and wife in moving certain of their belongings to a farm and leaving them there does not constitute the farm the homestead of the husband and wife.

Harris v Carlson, 201-169; 205 NW 202

Presumption of continuance. Upon proof that a homestead in property was acquired by a mother because of the occupancy of the property by herself and minor daughter as a home, and that such occupancy continued until the mother died, it will be rebuttably presumed that the property was the homestead of the mother at the time of her death, even tho, in the meantime, the daughter marries and, with her husband, continues joint occupancy of the property with the mother.

In re McClain, 220-638; 262 NW 666

Subordinate to contract under which acquired. Homestead rights which are acquired under a contract of sale are necessarily subordinate to the contract under which they are acquired.

Westerman v Raid, 203-1270; 212 NW 134

(b) OCCUPANCY OF PORTION OF PREMISES

Extent—noncontiguous tracts. One-half of a double garage, situated on property used by the owner solely for rental purposes, may not be deemed an appurtenance of the said owner's homestead, composed of a nearby, separate, independent and wholly different tract, noncontiguous to the rental property. So held in an action involving the validity of a sheriff's deed based on a sale en masse—a sale without platting.

Van Law v Waud, 223-208; 272 NW 523

II PROPERTY CONSTITUTING HOMESTEAD

(a) OWNERSHIP, ESTATE, OR INTEREST IN PROPERTY

Debts enforceable against. One of several remaindermen may not acquire, in a portion of the common property, a homestead based on his occupancy of the property as a tenant of the life tenant. If, after the death of the life tenant, he acquires a homestead by virtue of his new occupancy, such homestead is necessarily subject to a judgment based on claims long antedating the death of the life tenant.

Kramer v Hofmann, 218-1269; 257 NW 361

Homestead character of property—evidence. Evidence held to show that the property in question was, at the time of a conveyance by a husband to his wife, the homestead of the grantor and grantee, and therefore not fraudulent as to creditors.

Hansen v Richter, 208-179; 225 NW 361

Setting off homestead — effect. An unappealed order in bankruptcy proceedings setting off a homestead to the bankrupt does not constitute an adjudication of the bankrupt's rights in the homestead, e. g., the existence of liens and the order and priority thereof.

Kramer v Hofmann, 218-1269; 257 NW 361

(b) RENTS, PROFITS, PRODUCTS, AND PROCEEDS OF HOMESTEAD

Abandonment—subsequent sale and investment in homestead—effect. When the owner of a homestead in lands moves therefrom with the intent never to return thereto,—in other words, when the owner of a homestead abandons it,—no part of the proceeds of a subsequent sale by the owner of the lands can be said to represent a homestead; and the investing of any part of such proceeds in lands then used as a homestead simply constitutes the acquisition of an original homestead, just as tho he had never theretofore had a homestead.

Crail v Jones, 206-761; 221 NW 467

Temporary business structures on homestead land — no effect on homestead exemptions. Temporary structures, built on land otherwise exempt to bankrupt as part of homestead, removable without injury to themselves or the land, tho not themselves exempt, having been used in business of the bankrupt, held, not to render the land nonexempt under state statutes.

Duffy v Tegeler, 19 F 2d, 305

III ABANDONMENT AND WAIVER OF RIGHT

(a) ABANDONMENT IN GENERAL

Abandonment—evidence. Evidence reviewed, and held insufficient to show an abandonment of a homestead.

Phoenix Tr. v Vaught, 201-450; 205 NW 792

Abandonment — evidence — sufficiency. Evidence held to establish the abandonment of a homestead.

Des M. Marble v McConn, 210-266; 227 NW 521

Abandonment — evidence. Record reviewed and held to establish the existence of a homestead and the nonabandonment thereof.

Mill Owners Ins. v Petley, 210-1085; 229 NW 736

Abandonment — evidence. The homestead character of rural property is seriously questioned by testimony that, upon the destruction of the residence, the husband and wife did not rebuild, but moved to town, purchased a new residence, and thereafter continued to live and vote in said town. Especially is this true when the record is silent as to the intentions of the husband.

Evans v Evans, 202-493; 210 NW 564

Abandonment — nonvoluntary removal. An abandonment of the homestead by a wife may not be predicated on her involuntary absence from the property: i. e., her removal from the property in compliance with a court order which practically evicted her, pending divorce proceedings.

Novotny v Horecka, 200-1217; 206 NW 110; 42 ALR 1158

Presumption of abandonment. A presumption of abandonment of a homestead arises when the owners thereof actually cease to occupy it as a homestead. Evidence held insufficient to overcome the presumption.

Citizens Bk. v Frank, 212-707; 235 NW 30

Antenuptial contract specifying manner of property descent—dower lost. An antenuptial contract, preserving the property of each party for the benefit of their respective heirs, operates to extinguish the homestead right, and, in the absence of children to the union, the property of each descends to his heirs as tho no marriage existed.

Finn v Grant, 224-527; 278 NW 225

(b) TEMPORARY ABSENCE WITH INTENT TO RETURN

Abandonment—burden of proof. Ceasing to occupy a homestead creates a presumption of

III ABANDONMENT AND WAIVER OF RIGHT—concluded

(b) TEMPORARY ABSENCE WITH INTENT TO RETURN—concluded

abandonment, and the burden of proof is on the claimant to overcome the presumption by showing a fixed and definite purpose to return to the homestead.

Fardal v Satre, 200-1109; 206 NW 22

Abandonment — temporary leasing. The temporary leasing of a homestead does not affect its homestead character.

Hatter v Icenbice, 207-702; 223 NW 527

Intent to return necessary—burden of proof. In order to preserve the homestead character of property when the owner goes to live elsewhere, it is necessary that said owner have a fixed, specific, and abiding intent to return and burden of proving same is on the owner.

Grimes Bank v McHarg, 224-644; 276 NW 781

Temporary removal—effect. The homestead character of property is not lost by a removal therefrom by the owner in order to be more conveniently located for medical treatment, with the continuing intent to return to the homestead as soon as the treatment ceases.

Southwick v Strong, 218-435; 255 NW 523

(c) ACTS RELEVANT TO ABANDONMENT

Removal from old, and acquiring new—effect. A homestead must be deemed abandoned on naked testimony that the owner thereof removed therefrom, and immediately acquired a new homestead which he continuously maintained until his death many years later.

In re McClain, 220-638; 262 NW 666

Voting as evidence of change of residence. Voting at a place other than where a homestead is located is a very strong circumstance tending to show a permanent change of residence.

Citizens Bk. v Frank, 212-707; 235 NW 30

(d) WAIVER OF RIGHT

Abandonment—burden of proof on claimant—sufficiency. Ceasing to occupy a homestead creates a presumption of abandonment, and the burden of proof is on the claimant to overcome the presumption by showing a fixed and definite purpose to return to the homestead. Burden held amply sustained.

Fardal v Satre, 200-1109; 206 NW 22

Abandonment — evidence. The homestead character of rural property is seriously questioned by testimony that, upon the destruction of the residence, the husband and wife did not rebuild, but moved to town, purchased a new residence, and thereafter continued to live and vote in said town. Especially is this true when the record is silent as to the intentions of the husband.

Evans v Evans, 202-493; 210 NW 564

10136 Extent and value.

Discussion. See 16 ILR 96—Determining value

Temporary business structures on homestead land—no effect on homestead exemptions. Temporary structures, built on land otherwise exempt to bankrupt as part of homestead, removable without injury to themselves or the land, tho not themselves exempt, having been used in business of the bankrupt, held, not to render the land nonexempt under state statutes.

Duffy v Tegeler, 19 F 2d, 305

Town property exceeding half acre. A homestead within the corporate limits of a town may consist of contiguous subdivisions of a government forty, habitually and in good faith used as a part of the homestead, even tho such subdivisions aggregate more than half an acre. To reduce such a homestead to a half acre, the creditor must show that the property has taken on an exclusively municipal aspect, nature, or use.

Hatter v Icenbice, 207-702; 223 NW 527

10137 Dwelling and appurtenances.

Temporary business structures on homestead land — no effect on homestead exemptions. Temporary structures, built on land otherwise exempt to bankrupt as part of homestead, removable without injury to themselves or the land, though not themselves exempt, having been used in business of the bankrupt, held, not to render the land nonexempt under state statutes.

Duffy v Tegeler, 19 F 2d, 305

10139 Platted by officer having execution.

Notice to plat before execution sale—nonprejudicial failure. A sheriff's failure to notify a mortgagor to plat his homestead before selling under mortgage foreclosure execution is immaterial under a showing that the sheriff himself platted the homestead, offered separately the nonexempt property and then the homestead, but, receiving no bids, he then sold the property as a whole.

Travelers Ins. v Brooks, 224-170; 276 NW 617

10141 Changes—nonconsenting spouse.

Change of homestead—evidence. Evidence reviewed, and held wholly insufficient to sustain a claim to homestead exemption of the proceeds of an execution sale on the ground of intended use in acquiring another homestead.

Phoenix Tr. v Vaught, 201-450; 205 NW 792

Nonmutual abandonment. The abandonment of a homestead by a husband without the consent of the wife in possession is ineffective as to the wife.

Novotny v Horecka, 200-1217; 206 NW 110; 42 ALR 1158

Change to a different portion of the same tract. An owner of land who, while possessing an unplatted homestead right in one portion of the land, erects new residence buildings on another unplatted portion of the land, and removes thereto, simply continues in the new homestead his former homestead right. In other words, if, after so doing, he sells the entire tract of land except that embraced in the new homestead, such new homestead will not be liable for a debt for which the original homestead was not liable.

Berner v Dellinger, 206-1382; 222 NW 370

10145 Occupancy by surviving spouse.

Antenuptial contract—effect on homestead occupancy. An antenuptial contract under which the wife agrees to accept a named fractional part of the husband's property in case she survives, does not have the legal effect of depriving her of her statutory right to occupy the homestead, free of all rent, until her share is actually set off to her or otherwise actually disposed of.

Fraizer v Fraizer, 201-1311; 207 NW 772

Antenuptial contract—forfeiture of homestead and life estate. When by an antenuptial contract a spouse has relinquished all right to homestead or distributive share, the rights ordinarily accorded under this section and section 10146, C., '35, do not apply.

Finn v Grant, 224-527; 278 NW 225

No presumption of election from mere occupancy by spouse. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

Exemption from debt. Principle reaffirmed that a homestead, set aside to the widow as her dower or distributive share, passes to her free from the debts of the husband-owner.

Southwick v Strong, 218-435; 255 NW 523

Occupancy not newly created right. The right of a surviving spouse to freely occupy the homestead until it is otherwise disposed of according to law, is but a continuation of the right possessed by him or her prior to the death of the homestead owner.

Crouse v Crouse, 219-736; 259 NW 443

Right to free occupancy. In case rents accumulate in an estate prior to the setting off of the wife's distributive share, the wife, in the division of said rents with the other tenants in common, cannot be charged with the rental value of the homestead occupied by her. Moreover if the other tenants have wrongfully ousted the wife for a time of her said occupancy, they must account to her for the rentals received.

Crouse v Crouse, 219-736; 259 NW 443

Surviving spouse's occupancy not conclusive on taking homestead. Inasmuch as the surviving spouse's occupancy of the homestead may be as a tenant in common, as a life tenant, or under the statute pending administration, such occupancy, altho being evidence, is not conclusive of her election to take the homestead right, but the true character of the occupancy is determinable from all the surrounding facts and circumstances.

Jackson v Grant, 224-579; 278 NW 190
Prichard v Anderson, 224-1152; 278 NW 348

Failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

Undue length of occupation. The heirs of an intestate will not be heard to complain of the extreme length of time the surviving spouse has maintained the free occupancy of the homestead when they were the direct cause of delaying the admeasurement of the spouse's distributive share.

Crouse v Crouse, 219-736; 259 NW 443

Warranty deed—effect. A warranty deed duly signed by both husband and wife necessarily constitutes a complete subordination and waiver of all the rights of both husband and wife, including homestead and dower.

Clark v Chapman, 213-737; 239 NW 797

Wrongful ouster—effect. Manifestly a surviving spouse who has been wrongfully ousted from her occupancy of the homestead following the death of her husband-owner cannot be held thereby to have lost said right.

Crouse v Crouse, 219-736; 259 NW 443

10146 Life possession in lieu of dower.

ANALYSIS

I ESTATE AND RIGHTS OF SURVIVOR
II ELECTION BETWEEN HOMESTEAD AND DISTRIBUTIVE SHARE

Making election of record. See under §12012, Vol I

I ESTATE AND RIGHTS OF SURVIVOR

Discussion. See 22 ILR 543—Renunciation of life estate

Antenuptial contract—forfeiture of homestead and life estate. When by an antenuptial contract a spouse has relinquished all right to homestead or distributive share, the rights ordinarily accorded under this section and section 10145, C., '35, do not apply.

Finn v Grant, 224-527; 278 NW 225

II ELECTION BETWEEN HOMESTEAD AND DISTRIBUTIVE SHARE

Dower—when vested—divesting by choosing homestead. Instantly on the death of a married intestate, an undivided one-third interest and estate in his real estate vests in the surviving spouse as tenant in common, which vested estate is subject to being divested by a later election to take the homestead for life in lieu of such distributive share.

Jackson v Grant, 224-579; 278 NW 190

Homestead or distributive share—election—evidence necessary. The distributive share being the primary and more worthy right of the surviving spouse, evidence that the survivor elected to take the homestead right in lieu thereof should be clear and satisfactory.

Prichard v Anderson, 224-1152; 278 NW 348

Life occupancy—unprayed-for relief. A surviving spouse who, in a contest with an heir of the intestate's, claims absolute ownership of the entire homestead, and who is decreed to own only an undivided fractional part thereof, may be decreed the right to elect to occupy the homestead for life, even tho there is no prayer for such relief.

Myrick v Bloomfield, 202-401; 210 NW 428

Nonforfeiture by taking foreign homestead. A wife who is legally disinherited by her husband's will executed in a foreign state, where the parties had their domicile, is not deprived of her dower or distributive share in the husband's Iowa real estate because of the fact that in said foreign state the homestead there situated was set off to her by the probate court on her application. In other words, the Iowa statute according to a wife the right to take the homestead in lieu of dower applies solely to an Iowa homestead.

Ehler v Ehler, 214-789; 243 NW 591

No presumption of election from mere occupancy by spouse. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

Selling homestead for debts—necessity of election between will and dower. An order of court to an executrix to sell real estate, to pay claims, is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one-third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

Surviving spouse's occupancy not conclusive on taking homestead. Inasmuch as the surviving spouse's occupancy of the homestead may be as a tenant in common, as a life tenant, or under the statute pending administration, such occupancy, altho being evidence, is not conclusive of her election to take the homestead right, but the true character of the occupancy is determinable from all the surrounding facts and circumstances.

Jackson v Grant, 224-579; 278 NW 190
Prichard v Anderson, 224-1152; 278 NW 348

Vesting and divesting. The unadmeasured distributive share (dower) of a surviving spouse vests immediately upon the death of the other spouse, subject to being divested by the subsequent election of the surviving spouse to take under the will, if there be one, or to take homestead rights in lieu of distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718
Prichard v Anderson, 224-1152; 278 NW 348

10147 Conveyance or incumbrance.

Atty. Gen. Opinion. See '38 AG Op 325

ANALYSIS

I NATURE OF HOMESTEAD RIGHT OF SPOUSE
II CONSENT AND JOINDER OF HUSBAND AND WIFE
(a) CONVEYANCES
(b) CONTRACTS TO CONVEY
(c) MORTGAGES AND OTHER INCUMBRANCES
(d) ASSIGNMENTS AND LEASES
(e) EASEMENTS
III NATURE AND SUFFICIENCY OF CONSENT
(a) CONSENT BY JOINDER IN EXECUTION OF INSTRUMENT
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(c) RATIFICATION
(d) CONSENT BY CONDUCT
(e) MENTAL INCAPACITY OF SPOUSE
(f) FRAUD AND DURESS
IV FORM AND EXECUTION OF INSTRUMENT
V EFFECT OF DEFECTIVE INSTRUMENT

VI RIGHTS AND LIABILITIES OF PURCHASERS
VII FORECLOSURE OF INCUMBRANCES AGAINST HOMESTEAD
VIII EFFECT OF FAILURE TO CLAIM HOMESTEAD EXEMPTION

I NATURE OF HOMESTEAD RIGHT OF SPOUSE

Purpose of statute. The purpose of the statute was to prevent the destruction of the homestead rights of married persons except in the manner prescribed by the statute.

Wright v Flatterich, 225-750; 281 NW 221

II CONSENT AND JOINDER OF HUSBAND AND WIFE

(a) CONVEYANCES

Ineffectual partial conveyance to wife. A conveyance by a husband to his wife of a life estate in their homestead and of the fee to another, when the wife does not join therein, is a nullity.

Thayer v Sherman, 218-451; 255 NW 506

(b) CONTRACTS TO CONVEY

Insane persons' contracts—general rule of liability. Persons of unsound mind will be held liable as to executed contracts when the transaction is in the ordinary course of business, when it is reasonable, when the mental condition was not known to the other party, and when the parties cannot be put in statu quo.

Farmers Ins. Co. v Ryg, 209-330; 228 NW 63

(c) MORTGAGES AND OTHER INCUMBRANCES

Joint execution—sufficiency. An incumbrance upon a homestead must be jointly executed by the husband and wife, but not necessarily at the same point of time.

Harlow v Larson, 204-328; 213 NW 417

Instrument reformable. A mortgage which is duly and jointly executed by a husband and wife on part of their homestead when they unquestionably intended to embrace in the mortgage the entire homestead, is so reformable, on proper showing of the mistake, as to make the instrument in form exactly what it always has been in law; and such reformation is not violative of this statute.

Rankin v Taylor, 204-384; 214 NW 725

Mortgage—invalidity—estoppel. A husband, by accepting from his wife a conveyance of homestead property subject to a named existing mortgage thereon, thereby estops himself from questioning the validity of said mortgage on the ground that he never joined in the execution thereof.

Truro Bk. v Foster, 206-432; 220 NW 20

(d) ASSIGNMENTS AND LEASES

Extent—tenant's right to homestead before termination of lease. A tenant may have a homestead right under a leasehold interest which is available to him as against all persons, including the holder of the superior title, the lessor-owner, during the term of the tenancy and before the lease has expired.

Wright v Flatterich, 225-750; 281 NW 221

Lease—husband's oral termination invalid—statutory requisites. An oral agreement between the landlord and the tenant-husband, to terminate a joint lease of the husband and wife, will not terminate their homestead rights in 40 acres of the land, so as to permit a forcible entry and detainer action, since a homestead can be terminated only in writing by both husband and wife signing the same joint instrument containing a legal description of the homestead.

Wright v Flatterich, 225-750; 281 NW 221

Unexpired lease—tenant's oral agreement to vacate as "conveyance" of homestead. This section will not be construed narrowly as referring only to a conveyance or incumbrance of a homestead. Oral termination of a lease during the term and the homestead thereunder held invalid.

Wright v Flatterich, 225-750; 281 NW 221

(e) EASEMENTS

No annotations in this volume

III NATURE AND SUFFICIENCY OF CONSENT

(a) CONSENT BY JOINDER IN EXECUTION OF INSTRUMENT

Partial conveyance—nonjoinder by wife. A conveyance by a husband to his wife of a life estate in their homestead and of the fee to another, when the wife does not join therein, is a nullity.

Thayer v Sherman, 218-451; 255 NW 506

Unexpired lease—tenant's oral agreement to vacate as "conveyance" of homestead. Statute requiring written joint instrument by husband and wife to terminate a homestead will not be construed narrowly as referring only to a conveyance or incumbrance of a homestead. Oral termination of a lease during the term and the homestead thereunder held invalid.

Wright v Flatterich, 225-750; 281 NW 221

(b) VERBAL ASSENT

Lease—husband's oral termination invalid—statutory requisites. An oral agreement between the landlord and the tenant-husband, to terminate a joint lease of the husband and wife, will not terminate their homestead rights in 40 acres of the land, so as to permit a forcible entry and detainer action, since a homestead can be terminated only in writing by both husband and wife signing the same joint instrument containing a legal description of the homestead.

Wright v Flatterich, 225-750; 281 NW 221

III NATURE AND SUFFICIENCY OF CONSENT—concluded

(c) RATIFICATION

Invalid signature—nonratification. The invalid signature of a husband to a mortgage on the homestead—invalid because of his inebriate condition when he signed—is not ratified by a delay of some eight months in repudiating such signature (1) when the delay was caused in part by his continued inebriate condition and in part by a proper investigation by his attorney, and (2) when he did not actually intend to ratify.

State Bank v Nolan, 201-722; 207 NW 745

(d) CONSENT BY CONDUCT

Conveyance to husband subject to mortgage —estoppel. A husband, by accepting from his wife a conveyance of homestead property subject to a named existing mortgage thereon, thereby estops himself from questioning the validity of said mortgage on the ground that he never joined in the execution thereof.

Truro Bank v Foster, 206-432; 220 NW 20

(e) MENTAL INCAPACITY OF SPOUSE

Note and mortgage in hands of holder in due course. Neither a negotiable promissory note nor a mortgage given by the makers to secure the same, even tho the mortgage is on a homestead, is subject, when in the hands of a holder in due course, to the plea that the maker was insane at the time of the execution of such note and mortgage.

Farmers Ins. v Ryg, 209-330; 228 NW 63

(f) FRAUD AND DURESS

Nonhomestead character of land. A creditor who is seeking to set aside the deed of his debtor as fraudulent need not prove the nonhomestead character of the land even tho he alleges such fact, because the homestead character of the land is an affirmative defense, pleadable and provable by the grantee.

Malcolm Bk. v Mehlin, 200-970; 205 NW 788

IV FORM AND EXECUTION OF INSTRUMENT

Life estate to wife—fee simple title to another by husband only—ineffectual. A conveyance by a husband to his wife of a life estate in their homestead and of the fee to another, when the wife does not join therein, is a nullity.

Thayer v Sherman, 218-451; 255 NW 506

V EFFECT OF DEFECTIVE INSTRUMENT

Reformation of mortgage embracing homestead. A mortgage which is duly and jointly executed by a husband and wife on part of their homestead, when they unquestionably intended to embrace in the mortgage the entire homestead, is so reformable, on proper showing of the mistake, as to make the instrument in form exactly what it always has been in law; and such reformation is not violative of this section, which declares conveyances of the homestead invalid when the husband and wife do not join in the execution of the same joint instrument.

Rankin v Taylor, 204-384; 214 NW 725

VI RIGHTS AND LIABILITIES OF PURCHASERS

Insane persons — validity and liability of contract. Persons of unsound mind will be held liable as to executed contracts when the transaction is in the ordinary course of business, when it is reasonable, when the mental condition was not known to the other party, and when the parties cannot be put in statu quo.

Farmers Ins. Co. v Ryg, 209-330; 228 NW 63

VII FORECLOSURE OF INCUMBRANCES AGAINST HOMESTEAD

Mortgage foreclosures generally. See under §12372 (VII)

Nonloss of lien in bankruptcy proceedings.

First Bk. v Kleih, 201-1298; 205 NW 843

Eviction of husband — effect. The eviction of a husband, by foreclosure decree, of lands of which he and his wife are both tenants is, to all practical purposes, an eviction of the wife.

Miller v Laing, 212-437; 236 NW 378

Equitable assignment—sheriff's certificate —redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Redemption of homestead by judgment creditor. A judgment creditor who was made a defendant in a foreclosure action against appellant's 120-acre farm is a junior lienholder under the statute, not a stranger nor interloper, and is entitled to redeem from sheriff's sale, even tho the judgment was not a lien on the 40 acres constituting appellant's homestead.

Ackerman v Bank, 228- ; 291 NW 150

VIII EFFECT OF FAILURE TO CLAIM HOMESTEAD EXEMPTION

Reservation of homestead right — evidence. Where a form book used for the recordation of

warranty deeds in the office of the recorder of deeds contained a printed relinquishment by a spouse of "dower and homestead", the fact that in a certain instance the word "homestead" has been erased furnishes no evidence that the grantors had orally reserved a homestead right in the conveyed property.

Clark v Chapman, 213-737; 239 NW 797

10148 Devise.

Intention to render homestead subject to debts. A testator in devising a homestead will not be deemed to have intended to render it subject to his debts—even to his funeral expenses—unless such intention is clearly and unequivocally expressed in the will.

Buck v MacEachron, 209-1168; 229 NW 693

10149 Removal of spouse or children.

Atty. Gen. Opinion. See '38 AG Op 325

Unexpired lease—tenant's oral agreement to vacate as "conveyance" of homestead. Section 10147, C., '35, requiring written joint instrument by husband and wife to terminate a homestead, will not be construed narrowly as referring only to a conveyance or incumbrance of a homestead. Oral termination of a lease during the term and the homestead thereunder held invalid.

Wright v Flatterich, 225-750; 281 NW 221

10150 Exemption—divorced spouse.

Application of payments—preservation of homestead. In the absence of any direction by a debtor as to how his payment shall be applied, as between a homestead-secured obligation and a non-secured obligation, the equities of the law may require an application which will preserve the homestead of the debtor and family.

Pospishil v Jensen, 205-1360; 219 NW 507

Consideration—value of homestead. On the issue whether a creditor took a conveyance of real property at a fair valuation, the value of that part of the land which represented the debtor's homestead must be excluded from the computation.

Commercial Bk. v McLaughlin, 203-1368; 214 NW 542

Findings in re homestead—conclusiveness. On an application by an executor for an order to sell real estate to pay debts, a finding by the court that certain land was not the homestead of the deceased is conclusive on appeal (1) unless such finding is without substantial support in the evidence, or (2) unless the court erroneously applied the law to conceded facts.

In re McClain, 220-638; 262 NW 666

Homestead exemption—waiver. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff and that plaintiff's judgment was a lien on the land is immune from subsequent attack on the ground that the land was, at the time of the conveyance, the homestead of the grantor and grantee, such fact not being pleaded in the action.

Reining v Nevison, 203-995; 213 NW 609

Liabilities—family expenses. A homestead is exempt from execution on a judgment for a family expense contracted after the acquisition of the homestead. In other words, the statutory declaration that a homestead is exempt from judicial sale "when there is no special declaration of statute to the contrary" has no reference whatever to the statutory declaration that a family expense is "chargeable upon the property of both husband and wife". (§10459, C., '27.)

Dorsey v Bentzinger, 209-883; 226 NW 52

Unenforceable agreement. An oral agreement by one of several heirs of homestead property that the funeral expenses of the deceased should stand against the property is of no validity.

Warner v Tullis, 206-680; 218 NW 575

Notice of homestead right. The holder of a sheriff's deed under execution sale necessarily takes the deed subject to the homestead rights of the execution defendant of which he had actual or constructive notice.

Frum v Kueny, 201-327; 207 NW 372

Subrogation. If a second mortgagee uses his own funds in discharging a first mortgage in order to save the property he will be subrogated to the rights of said first mortgagee; on the other hand, if funds are obtained through a new mortgage, and used in the discharge of said first mortgage, then the new mortgagee will acquire said right of subrogation, and in either case, the homestead character of part of the mortgaged property is quite immaterial.

Clark v Chapman, 213-737; 239 NW 797

Waiver in promissory note—effect. A waiver in a promissory note of the maker's homestead right does not constitute authority in the court in an action on the note to decree a lien on the maker's homestead for the amount due on the note.

First N. Bk. v Phillips, 203-372; 212 NW 678

Waiver through antenuptial contract. An antenuptial contract will not be construed to embrace a waiver of homestead rights in the absence of plain and unmistakable language to that effect. Such waiver must have a more secure basis than a mere inference from broad and sweeping language referable to waiver of right to dower or distributive share.

Mill Owners Ins. v Petley, 210-1085; 229 NW 736

10151 "Family" defined.

ANALYSIS

I PERSONS ENTITLED TO EXEMPTION
II DISPOSAL OF HOMESTEAD IN DIVORCE ACTIONS

I PERSONS ENTITLED TO EXEMPTION

"Family" defined. Principle reaffirmed that, within the meaning of the homestead exemption statute, a family is a collective body of persons who live in one house, under one head or manager.

Solnar v Solnar, 205-701; 216 NW 288

Father and crippled son. A father who substantially supports his adult, motherless, crippled son in his home is the head of a family, and consequently capable of acquiring and holding a homestead.

Poffinbarger v Admr., 206-961; 221 NW 550

Acquisition — presumption of continuance. Upon proof that a homestead in property was acquired by a mother because of the occupancy of the property by herself and minor daughter as a home, and that such occupancy continued until the mother died, it will be rebuttably presumed that the property was the homestead of the mother at the time of her death, even tho, in the meantime, the daughter marries and, with her husband, continues joint occupancy of the property with the mother.

In re McClain, 220-638; 262 NW 666

Childless widow—right to sell and acquire new homestead. A childless widow to whom the family homestead has been devised by her husband may sell said homestead and invest the proceeds thereof in a new homestead and hold the latter, to the extent in value of the old homestead, exempt from execution in all cases where the old homestead would have been exempt had she retained it.

Magel v Hunt, 221-199; 265 NW 119

Noninterest of absent spouse. The fact that a homestead was both acquired and lost by the wife, during a time when the whereabouts of the husband was unknown, renders quite immaterial the question whether the husband is yet alive.

Solnar v Solnar, 205-701; 216 NW 288

Termination of family relation. Land which acquires the status of a homestead because of its occupancy by the owner and by her minor children as a family (the mother being, long prior thereto, permanently deserted by her husband) loses such status when the family relation is destroyed by the death of some of the minors and by the attaining of maturity by the others and the removal to homes of their own, thereby leaving the owner-mother in sole occupancy of the property.

Solnar v Solnar, 205-701; 216 NW 288

II DISPOSAL OF HOMESTEAD IN DIVORCE ACTIONS

Divorce—sale of homestead. The court may properly decree in divorce proceedings that a monthly allowance solely for the support and education of a child shall be a lien on the defendant-parent's homestead—all the property the parent possesses—but may not properly decree that in case of a failure to pay the allowance the homestead shall be sold and the proceeds impounded solely for the support and education of the child. On the contrary, a sale of the parent's homestead should be permitted only on proof of the parent's willful refusal or neglect to pay as far as he can reasonably pay.

Paul v Paul, 217-977; 252 NW 114

10152 Descent.

Devise subject to unenforceable debts — requirements. The will of a spouseless testator will not be held to devise testator's homestead to his children subject to debts which could not be otherwise enforced against said homestead, unless the intent so to do is evidenced by testamentary language which is unequivocal and imperative. The usual and formal paragraph in the preliminary part of a will directing the payment of "all my just debts" is quite insufficient to evince such intent.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Homestead possession—effect. An heir cannot successfully claim that he is the owner of premises because his father continuously occupied said premises for some thirty-five years and until his death, as a homestead, when it appears that during said time the premises went to tax deed, and that thereupon the mother re-acquired title from the tax deed holder and thereunder adversely occupied said premises under said newly acquired deed for more than ten years.

Mann v Nies, 213-121; 238 NW 601

Foreclosure — unallowable collateral attack. In the foreclosure of a mortgage, executed by an administrator on lands of the deceased and on due order and authorization of the court, the defending heirs, who were parties to the order and authorization for the mortgage, will not be permitted to collaterally attack the validity of the mortgage on the ground that part of the land was the homestead of the deceased and therefore descended to the heirs exempt from the debts of the deceased.

Reinsurance Life v Houser, 208-1226; 227 NW 116

10153 Exemption in hands of issue.

Right of heirs. A homestead devised by the owner thereof to his wife, who accepts the same in lieu of her distributive share, de-

scends, upon the death of the wife intestate, to her heirs at law, free from the debts of the original owner contracted subsequent to his acquisition of the said homestead.

Wheeler v Meyer, 201-59; 206 NW 301

Devisee takes exempt from testator's debts. Homestead may be devised exempt from the debts of the testator contracted subsequent to its acquisition.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

See In re Schultz, 192-436; 185 NW 24

Purchase (?) or descent (?). A homestead cannot be deemed to descend under the laws of descent to the children of a spouseless parent when the parent leaves a will which provides that no child contesting the will shall take anything under the will, altho the will otherwise gives to the children the identical shares which the laws of descent would give.

Luglan v Lenning, 214-439; 239 NW 692

Title under will (?) or law of descent (?)—attending rights. Devisees whose shares under a will are, both in quantity and quality, exactly the shares which they, in the absence of a will, would take under the statute law of descent, are deemed to take title, not under the will, but under the said statutes of descent—the worthier title—and so taking they necessarily take the statutory exemptions, if any, attending the property.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Exemption from debt. When an intestate homestead owner is survived by a spouse, or by issue, or by both spouse and issue, the homestead property cannot be subject to the debts of the deceased owner except as provided in §10155, C., '31.

Southwick v Strong, 218-435; 255 NW 523

Immateriality as to source of title. On the question of the descent to heirs of the homestead of an intestate, the source of title of the intestate is quite immaterial.

Oskaloosa Bk. v Jamison, 205-349; 218 NW 29

Involuntary sale—effect. When, in probate proceedings, the sale of the homestead of an intestate is involuntary as to an heir, then the proceeds of such sale, insofar as the interest of such heir is concerned, are exempt from execution levy.

Oskaloosa Bk. v Jamison, 205-349; 218 NW 29

Rights of children. Homestead property which descends to children of an intestate and spouseless owner is exempt from all antecedent debts of such children.

Dever v Turner, 200-926; 205 NW 755

Arispe Bk. v Werner, 201-484; 207 NW 578

Rights of children. Homestead property passing by will to testator's children by way of remainder after the termination of a life estate in the surviving spouse is not exempt from the antecedent debts of such children.

Arispe Bk. v Werner, 201-484; 207 NW 578

See Bracewell v Hughes, 214-241; 242 NW 66

Liability for debts of children. Children who take a homestead under the will of their spouseless parent, take it subject to their own debts created subsequent to the acquisition of the homestead by their parent.

Luglan v Lenning, 214-439; 239 NW 692

10154 New homestead exempt.

Acquisition of new homestead. A present homestead is shown to be a continuation of a prior homestead by evidence that, immediately after the sale of the prior homestead, the ground for the present homestead was acquired, and that thereon a residence was erected with all due diligence, and occupied as a home by the owner and his family, all at an expense which did not exceed the value of the prior homestead; and it is immaterial that part of the said expense was not shown to be the identical money which was received from the prior sale.

Harm v Hale, 206-920; 221 NW 582

Burden of proof. One who claims that his present homestead was purchased with funds received from the sale of a prior homestead has the burden so to show.

Harm v Hale, 206-920; 221 NW 582

Childless widow—right to sell and acquire new homestead. A childless widow to whom the family homestead has been devised by her husband may sell said homestead and invest the proceeds thereof in a new homestead and hold the latter, to the extent in value of the old homestead, exempt from execution in all cases where the old homestead would have been exempt had she retained it.

Magel v Hunt, 221-199; 265 NW 119

Destruction by fire—proceeds of insurance—exemption. The act of the owners of a homestead destroyed by fire in immediately using a portion of the proceeds of the insurance on the destroyed homestead in the purchase of a new homestead does not deprive them of the right to hold, for a reasonable time, the balance of said proceeds as exempt, when they have the bona fide intention of applying said balance in the repair and improvement of the new homestead, said entire proceeds being less than the value of the old homestead.

Blakeslee v Paul, 212-1385; 238 NW 447

Exemption of proceeds. A homesteader who exchanges his homestead for other property—even for property other than money—may, for a reasonable time, hold exempt the property

so received, when he made the exchange in the then bona fide intent to acquire a new homestead with the proceeds.

Fardal v Satre, 200-1109; 206 NW 22

Trading old for new — rule for valuation. When the owner of a mortgage-incumbered homestead trades it for a new homestead, and the issue arises, under this section, whether the value of the new homestead exceeds the value of the old homestead, the old homestead must be valued as wholly unincumbered.

[The fundamental reason for such holding is that the owner of such incumbered homestead would have the right, of course, to pay off or discharge the incumbrances, and, after so doing, would have the legal right to hold the entire unincumbered homestead, exempt from any debt contracted after it became his homestead.]

American Bank v Willenbrock, 209-250; 228 NW 295

Selling, investing and buying new homestead. A person who temporarily moves away from his homestead, but later sells it on credit, may invest the proceeds, as collected, in loans, with the bona fide purpose at all times of using said proceeds and the accumulations therefrom in the purchase of a new homestead, and if said purpose is executed within a reasonable time, the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old one would have been exempt.

Elliott v Till, 219-649; 259 NW 460

When unimproved lot exempt. An unimproved city lot purchased with the proceeds of the purchaser's former homestead, and within a reasonable time after the sale of said homestead, and with the bona fide purpose of at once improving said lot as a new homestead —said proceeds never having lost their homestead character,—is, to the extent in value of the old homestead, exempt from execution where the old would have been exempt.

Elliott v Till, 219-649; 259 NW 460

10155 Debts for which homestead liable.

Atty. Gen. Opinion. See '25-26 AG Op 315

ANALYSIS

I DEBTS CONTRACTED PRIOR TO ACQUISITION OF THE HOMESTEAD
(a) NATURE AND KIND OF DEBTS
(b) METHOD OF ACQUIRING AND HOLDING HOMESTEAD IN RE LIABILITY FOR DEBTS
(c) ACCRUAL AND ENFORCEMENT OF CLAIM AGAINST THE HOMESTEAD
(d) LIEN OF JUDGMENTS
(e) PURCHASE MONEY
II DEBTS CREATED BY WRITTEN CONTRACT
III EXHAUSTION OF OTHER PROPERTY BEFORE RESORTING TO HOMESTEAD
(a) ASSERTING RIGHT TO HAVE OTHER PROPERTY EXHAUSTED
(b) INCUMBRANCES ON BOTH HOMESTEAD AND OTHER PROPERTY
(c) PROCEDURE IN EXHAUSTING OTHER PROPERTY
IV DISPOSAL OF HOMESTEAD AS AFFECTING RIGHTS OF CREDITORS
V MECHANICS' LIENS
VI ABSENCE OF SPOUSE OR ISSUE

Mechanics' liens in general. See under Ch 451

I DEBTS CONTRACTED PRIOR TO ACQUISITION OF THE HOMESTEAD

(a) NATURE AND KIND OF DEBTS

Descent of homestead free from prior debts of devisor.

Wheeler v Meyer, 201-59; 206 NW 301

Devise subject to unenforceable debts. The will of a spouseless testator will not be held to devise testator's homestead to his children subject to debts which could not be otherwise enforced against said homestead, unless the intent so to do is evidenced by testamentary language which is unequivocal and imperative. The usual and formal paragraph in the preliminary part of a will directing the payment of "all my just debts" is quite insufficient to evince such intent.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Rights of children or heirs. When an intestate homestead owner is survived by a spouse, or by issue, or by both spouse and issue, the homestead property cannot be subject to the debts of the deceased owner except as provided in this section.

Southwick v Strong, 218-435; 255 NW 523

(b) METHOD OF ACQUIRING AND HOLDING HOMESTEAD IN RE LIABILITY FOR DEBTS

Devisee takes exempt from testator's debts. Homestead may be devised exempt from the debts of the testator contracted subsequent to its acquisition.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

See In re Schultz, 192-436; 185 NW 24

Presumption from continued occupancy. Upon proof that a homestead in property was acquired by a mother because of the occupancy of the property by herself and minor daughter as a home, and that such occupancy continued until the mother died, it will be rebuttably presumed that the property was the homestead of the mother at the time of her death, even tho, in the meantime, the daughter marries and, with her husband, continues joint occupancy of the property with the mother.

In re McClain, 220-638; 262 NW 666

Will subjecting homestead to debts of life tenant. A provision in a will, setting up a life estate with remainder over to certain devisees, after all indebtedness and funeral expenses of the life tenant are paid, subjects the estate to a claim for funeral expenses of the life tenant, even if it was his homestead, such provision being a condition upon the devise to the remaindermen.

De Cook v Johnson, 226-246; 284 NW 118

(c) ACCRUAL AND ENFORCEMENT OF CLAIM AGAINST THE HOMESTEAD

Jurisdiction of bankruptcy court. The jurisdiction of the federal bankruptcy court over the exempt property of the bankrupt extends no further than to enter an order setting off such property to the bankrupt. Irrespective of the proceedings in such court, the right to the exempt property, as between the owner and a mortgagee thereof, must be determined in the state court.

Eckhardt v Hess, 200-1308; 206 NW 291

Debts enforceable against—unallowable procedure. After a court of bankruptcy had adjudged a debtor to be a bankrupt and after the court has set off a homestead to said debtor, a creditor holding a duly scheduled, unliquidated, and unsecured debt has no right to proceed in equity in the state court, and have his debt adjudicated and enforced as a lien on the said homestead because said debt antedates the acquisition of said homestead. And it is immaterial that the creditor, preceding his action in the state court, obtained an order staying the final discharge of the bankrupt.

Bracewell v Hughes, 214-241; 242 NW 66

Failure of junior mortgagee to redeem—effect. The holder of a junior mortgage on both homestead and nonhomestead property of a bankrupt, who is not satisfied out of the proceeds of a "free-from-lien" sale of the nonhomestead property by the trustee in bankruptcy, does not lose his lien on the homestead property by failing to redeem from the foreclosure of senior mortgages which are satisfied out of said proceeds, because the satisfaction of said senior mortgages left nothing from which redemption could be made.

First Bk. v Kleih, 201-1298; 205 NW 843

Homestead and nonhomestead property—sale en masse—appropriation of surplus. A junior execution creditor who, at a senior mortgage foreclosure sale, buys in property which, in accordance with the mortgagor's agreement to that effect, is sold en masse, and regardless of the homestead character of part of the property, and who, in so buying, bids an amount in excess of the senior mortgage debt, on the express condition that said excess be indorsed on his junior execution (which is done), and who, with the full knowledge of the mortgagor, and without objection by him, complies with his bid, and after a year for redemption takes a deed, is not thereafter liable to the mortgagor for the amount of said excess on the theory that such excess represents the mortgagor's homestead, on which the junior execution creditor admittedly had no lien.

Phoenix Tr. v Vaught, 201-450; 205 NW 792

Receiver under mortgage foreclosure. The right of a homestead to be protected from receivership in mortgage foreclosure is fully protected by delaying the appointment of a receiver until after the sale of all the mortgaged lands under foreclosure has revealed a deficiency judgment.

Finken v Schram, 212-406; 236 NW 408

Incumbrance—right to receiver. In the foreclosure of a mortgage solely on a homestead and for the purchase price thereof, the mortgagee is entitled (except under exceptional circumstances) to the appointment of a receiver without proof of the insolvency of the debtor, (1) when the mortgage pledges a lien on the rents in case of default in payment, and provides for a receiver in case of foreclosure, and (2) when the inadequacy of the security is clearly made to appear.

Iowa-D. M. Bank v Crawford, 217-609; 252 NW 97

Receiver—inequitable circumstances. On the issue whether a receiver for pledged rents should be appointed in the foreclosure of a mortgage solely on a homestead, the court cannot give consideration to the plea that extensive improvements have been made on the property since the mortgage was given when there is no proof that the mortgagee is the grantor of the defendant homestead owner.

Iowa-D. M. Bank v Crawford, 217-609; 252 NW 97

(d) LIEN OF JUDGMENTS

Administrator's settlement of unenforceable lien—homestead's nonliability. Altho a settlement agreement was made between a claimant and an administrator, a decedent's homestead may not be subjected to a mortgage or judgment which has never become a lien thereon, which was not filed nor allowed against the estate, which was not enforced within two years after judgment entry, and when such settlement was never approved by the probate court.

Finn v Grant, 224-527; 278 NW 225

Antecedent debts—double liability on bank stock. The very act of acquiring the ownership of corporate bank stock ipso facto creates a contract "debt" for the statutory double liability on the stock. It follows that a judgment against the stockholder on such double liability may (the debtor having no other leviable property) be enforced against the stockholder's subsequently acquired homestead, even tho the judgment was rendered subsequent to the acquisition of the homestead.

Smith v Andrew, 209-99; 227 NW 587

I DEBTS CONTRACTED PRIOR TO ACQUISITION OF HOMESTEAD—concluded

(d) LIEN OF JUDGMENTS—concluded

Family expenses. A homestead is exempt from execution on a judgment for a family expense contracted after the acquisition of the homestead. In other words, the statutory declaration that a homestead is exempt from judicial sale "where there is no special declaration of statute to the contrary" (§10150, C., '27) has no reference whatever to the statutory declaration that a family expense is "chargeable upon the property of both husband and wife". (§10459, C., '27.)

Dorsey v Bentzinger, 209-883; 226 NW 52

Judgment on loans to pay alimony. Judgments against a husband on obligations contracted since the acquisition of a homestead are not liens on the homestead which is awarded to the wife in divorce proceedings as alimony, even tho the judgment be for money borrowed by the husband to pay temporary alimony and attorney fees for the wife in said proceedings.

Novotny v Horecka, 200-1217; 206 NW 110; 42 ALR 1158

Subsequent loan to pay prior debt. A judgment on a loan made to the owners of a homestead long after the acquisition of the homestead is not a lien on the homestead, because of the fact that said loan was made and used for the specific purpose of paying off a debt antedating the acquisition of said homestead.

Brauch v Freking, 219-556; 258 NW 892

Unallowable acquisition—debts enforceable against. One of several remaindermen may not acquire, in a portion of the common property, a homestead based on his occupancy of the property as a tenant of the life tenant. If, after the death of the life tenant, he acquires a homestead by virtue of his new occupancy, such homestead is necessarily subject to a judgment based on claims long antedating the death of the life tenant.

Kramer v Hofmann, 218-1269; 257 NW 361

Valueless and oppressive lien. A court of equity will not decree a lien on the nonexempt portion of the judgment defendant's homestead and award a special execution for the enforcement of such lien, tho plaintiff is technically entitled thereto, when on the record such procedure would be valueless, and possibly oppressive on the defendant.

American Bk. v Willenbrock, 209-250; 228 NW 295

Wife's homestead not liable for husband's debt. A judgment against a husband is not enforceable against a homestead acquired by his wife in her own name,—even tho so acquired long after the inception of the debt on which said judgment was rendered,—on proof that the husband, while perfectly solvent, and with no fraudulent intent, and without expressly or impliedly acquiring any interest in the land, voluntarily permitted a portion of his own assets to be applied on the debt of the wife for her said homestead.

Price v Scharpff, 220-125; 261 NW 511

Admissions of husband—when inadmissible against wife. In an action against a wife to subject her homestead to a judgment which had been rendered against her husband on his debt antedating the acquisition by the wife of her said homestead, admissions of the husband tending to show that he furnished the money to pay for the said homestead are not binding on, or admissible against, the wife.

Price v Scharpff, 220-125; 261 NW 511

(e) PURCHASE MONEY

Incumbrance—pledge of rents—effect. The purchaser of property who, simultaneously with the purchase, mortgages the property for the purchase price, and therein pledges the rents in case of default, and agrees to a receivership in case of foreclosure, does not, by subsequently occupying the property as a homestead, acquire a homestead right which will be superior to the right of the mortgagee to enforce, by receivership, the pledge of rents in order to pay a deficiency judgment.

Iowa-D. M. Bank v Crawford, 217-609; 252 NW 97

II DEBTS CREATED BY WRITTEN CONTRACT

Contingent contract—noncertain debt. Under a written contract providing that first party will pay second party a named fee whenever second party secures the legal allowance of a certain claim in first party's favor, no debt is contracted which can be enforced against the subsequently acquired homestead of first party until said second party actually obtains the allowance of said claim, because until such allowance is obtained no debt accrues against first party which is certain and in all events payable.

Hunt, etc. v Moore, 219-451; 258 NW 114

Mortgage without consideration as to wife. A mortgage on homestead property duly signed by both husband and wife cannot be enforced against the wife when it appears that there was no consideration for the wife's signature.

Greenland v Abben, 218-255; 254 NW 830

III EXHAUSTION OF OTHER PROPERTY BEFORE RESORTING TO HOMESTEAD

(a) ASSERTING RIGHT TO HAVE OTHER PROPERTY EXHAUSTED

Homestead and nonhomestead property—sale en masse—apportionment of surplus. Tho it be conceded, arguendo, that, where mortgaged property is sold on foreclosure en masse, and regardless of the homestead character of part of the property, to a junior execution creditor on an indivisible bid in excess of the mortgage debt, the mortgagor would have a

recoverable interest in the excess on the theory that it represented his homestead, on which the junior creditor had no lien, nevertheless the mortgagor would not be entitled to recover the entire excess, because equity would require the bid to be apportioned between the homestead and the nonhomestead property, in order that the homestead should bear its just proportion of the mortgage debt.

Phoenix Co. v Vaught, 201-450; 205 NW 792

(b) INCUMBRANCES ON BOTH HOMESTEAD AND OTHER PROPERTY

Exhausting nonhomestead property. The right, under this section, of a mortgagor of both homestead and nonhomestead property to insist that the nonhomestead property be first exhausted before resorting to the homestead property, is a right which a subsequent mortgagee of the same property may insist on against a prior mortgagee of the nonhomestead property only.

Moody v Century Sav. Bank, 239 US 374

Exhausting other property. A sheriff in selling a homestead forty, and a nonhomestead forty (under special mortgage-foreclosure execution) may very properly call for and receive, in turn, separate, substantial, and good-faith bids, (1) on the nonhomestead forty, (2) on the homestead forty, and (3) on the two forties en masse, and, over the objections of the debtor, may accept the bid en masse and sell thereunder when said bid en masse is substantially in excess of the aggregate of the other two bids, tho insufficient to completely satisfy the execution.

Prudential v Westfall, 219-1119; 260 NW 344
American Bk. v Davis, 221-1183; 268 NW 9

(c) PROCEDURE IN EXHAUSTING OTHER PROPERTY

Failure of junior mortgagee to redeem. The holder of a junior mortgage on both homestead and nonhomestead property of a bankrupt, who is not satisfied out of the proceeds of a "free-from-lien" sale of the nonhomestead property by the trustee in bankruptcy, does not lose his lien on the homestead property by failing to redeem from the foreclosure of senior mortgages which are satisfied out of said proceeds, because the satisfaction of said senior mortgages left nothing from which redemption could be made.

First Tr. & Sav. Bk. v Kleih, 201-1298; 205 NW 843

Liabilities enforceable against—exhausting other property. A sheriff in selling a homestead forty, and a nonhomestead forty (under special mortgage-foreclosure execution) may very properly call for and receive, in turn, separate, substantial, and good-faith bids, (1) on the nonhomestead forty, (2) on the homestead forty, and (3) on the two forties en masse, and, over the objections of the debtor, may accept the bid en masse and sell thereunder when said bid en masse is substantially in excess of the aggregate of the other two bids, tho insufficient to completely satisfy the execution.

Prudential Ins. v Westfall, 219-1119; 260 NW 344
American Bk. v Davis, 221-1183; 268 NW 9

Liabilities enforceable against—prayer for valueless and oppressive lien. A court of equity will not decree a lien on the nonexempt portion of the judgment defendant's homestead and award a special execution for the enforcement of such lien, tho plaintiff is technically entitled thereto, when, on the record, such procedure would be valueless, and possibly oppressive on the defendant.

American Savings Bk. v Willenbrock, 209-250; 228 NW 295

IV DISPOSAL OF HOMESTEAD AS AFFECTING RIGHTS OF CREDITORS

Voluntary conveyance—burden of proof. The principle that the grantee in a voluntary conveyance of a homestead may sustain the conveyance against the claims of the creditors of the grantor necessarily imposes on the grantee the burden of showing the homestead character of the property.

Dolan v Newberry, 200-511; 202 NW 545; 205 NW 205

V MECHANICS' LIENS

No annotations in this volume

VI ABSENCE OF SPOUSE OR ISSUE

Acquisition and loss—noninterest of absent spouse. The fact that a homestead was both acquired and lost by the wife during a time when the whereabouts of the husband was unknown renders quite immaterial the question whether the husband is yet alive.

Solnar v Solnar, 205-701; 216 NW 288

Loss of homestead status—termination of family relation—effect. Land which acquires the status of a homestead because of its occupancy by the owner and by her minor children as a family (the mother being, long prior thereto, permanently deserted by her husband) loses such status when the family relation is destroyed by the death of some of the minors and by the attainment of maturity by the others and the removal to homes of their own, thereby leaving the owner-mother in sole occupancy of the property.

Solnar v Solnar, 205-701; 216 NW 288

CHAPTER 442

LANDLORD AND TENANT

10156 Apportionment of rent.

Rentals for successive seasons. In an action to recover the rental of lands for successive seasons, interest is properly computed from the end of each annual period on each item of annual rent.

Bigelow v Ins. Co., 206-884; 221 NW 661

10157 Double rental value—liability.

Constructive eviction—effect. The constructive eviction of a tenant does not absolve him from the payment of the agreed rent unless he surrenders the premises.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

10158 Attornment to stranger.

Attornment—acts not constituting. No attornment takes place by the mere act of a tenant in assigning his interest in the lease and placing the assignee in possession of the leased premises.

Snyder v Bernstein, 201-931; 208 NW 503

Disputing title. Proof that an apparently valid lease is in reality a fraud and a sham is not violative of the rule that a tenant will not be permitted to deny the title of his landlord.

Schmidt v Twedt, 219-128; 257 NW 325

Estoppel to dispute landlord's title. One who mistakenly supposes that he has lost his property by the issuance of a tax deed (which in fact is void) and, under the influence of legal duress, becomes the tenant of the deed holder, is not estopped to dispute the latter's title.

Galleger v Duhigg, 218-521; 255 NW 867

Estoppel of tenant. A lessee in possession will not be heard to assert against his lessor that he never intended to carry out his agreement to surrender the premises and every part thereof, on the termination of his lease.

Taylor v Olmstead, 201-760; 206 NW 88

Landlord's title—estoppel to dispute. A tenant who remains in undisturbed possession of realty under a lease with an executor, and refuses to quit and surrender said premises at the termination of said lease, may not defend his wrongful possession by or under the plea that the executor had no legal right to lease the land.

Wright v Zachgo, 222-1368; 271 NW 512

Nonpermissible plea by tenant. In an action to quiet title to lands, a defendant who is in peaceable possession of the premises under a lease from plaintiff will not be permitted to assert that plaintiff had no title when the lease was executed.

McKenney & Seabury v Nelson, 220-504; 262 NW 101

Rents — adjudication against chattel mortgage. On the issue, in real estate mortgage foreclosure, whether an outstanding lease between the owner and his tenant (parties to the action) was superior to the mortgagee's right to a receiver for said premises and for the rents thereof, an unappealed decree which orders the appointment of such receiver works an eviction of said tenant and the consequent nullification of a chattel mortgage by the landlord on his share of the crop rent under said lease, it appearing that the real estate mortgagee had no notice or knowledge of such chattel mortgage until after the entry of his decree of foreclosure.

Keenan v Jordan, 204-1338; 217 NW 248

Rent — incident to land — passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Title of landlord. In an action by a landlord to recover damages consequent on the conversion by defendant of property on which the landlord had a lien for rent, the question of the ownership of the land by the landlord is wholly irrelevant and immaterial.

Mau v Rice Bros., 216-864; 249 NW 206

10159 Tenant at will—notice to quit.

ANALYSIS

I NATURE AND CREATION OF TENANCY AT WILL
II TERMINATION OF TENANCY
III LEASES
(a) IN GENERAL
(b) ASSIGNMENT GENERALLY
(c) FIXTURES INVOLVED
(d) REPAIRS GENERALLY

Adverse possession by tenant. See under §11007 (XXVIII)
Estoppel to deny landlord's title. See under §10158
Landlord's lien. See under §10261
Leased premises, negligence. See under §6392
Leases and assignments involved in mortgage foreclosures. See under §§10107, 12372
Negligence liability generally. See Ch 484, Note 1
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Rents and profits under mortgages. See under §12372 (III)
Repairs, housing law. See under §6392
Tenants in common and joint tenancy. See under §10054

I NATURE AND CREATION OF TENANCY AT WILL

Lease (?), joint adventure (?), or partnership (?). Instrument reviewed and held to create the relation of landlord and tenant, and not that of a joint adventure or partnership.

Johnson v Watland, 208-1370; 227 NW 410

Apparent authority of manager sufficient to bind corporation to tenancy. Corporation held liable for rent as tenant at will, based on correspondence and telephone conversations with corporation's manager, as against contention that manager was not authorized to enter into arrangement made—principal being bound by apparent authority of its agent.

Daly Co. v Brunswick Co., (NOR); 263 NW 234

Implied obligation. Proof that the holder of a first mortgage on real estate was himself in occupancy of the premises, and continued such occupancy after the issuance of a sheriff's deed under a junior lien, generates the presumption that such occupancy was with the assent of the said occupant and the said deed holder, with consequent obligation of the occupant to pay reasonable rental to said deed holder until such time as a deed might be executed under foreclosure of the first mortgage.

Norman v Dougan, 201-923; 208 NW 366

Payment of rent not essential. Payment of rent is not an essential element to the creation of the relation of landlord and tenant.

Reynolds v Oil Co., 227-163; 287 NW 823

Possession of tenant possession of landlord. The possession of a tenant is the possession of the landlord, and is notice of the rights of the landlord.

Phelps v Kroll, 211-1097; 235 NW 67

II TERMINATION OF TENANCY

Constructive eviction. The constructive eviction of a tenant does not absolve him from the payment of the agreed rent unless he surrenders the premises.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Injunction not available in lieu of possessory action. One, who claims the possession of realty against another who is in actual possession as a tenant at will, may not resort to injunction proceedings to adjudicate his claimed right of possession.

Austin v Perry, 219-1344; 261 NW 615

Oral sale with part payment. An oral agreement to sell land, accompanied at the time by part payment, constitutes a "sale", within the terms of a lease which provides that, in case of a sale of the premises, the tenancy may be terminated.

Luse v Elliott, 204-378; 213 NW 410

Termination—30 days notice—insufficiency appearing in petition. In a forcible entry and detainer action where the petition alleged a notice dated January 12th terminating a tenancy at will "within 30 days from the date of this notice", such notice being served on January 13th, a demurrer should have been sustained, as only 29 and not the statutory 30 days written notice was given.

Murphy v Hilton, 224-199; 275 NW 497

Unavailable defense. A tenant who has agreed that his tenancy may be terminated in case the landlord sells the property may not predicate a defense to such termination on the fact that the landlord (concededly in good faith) actually conveyed a part of the land to his wife, solely in consideration of the wife's agreement to sign a conveyance of the remaining part of the land.

Luse v Elliott, 204-378; 213 NW 410

III LEASES

Discussion. See 6 ILB 173—Occupation of premises by employee

(a) IN GENERAL

Discussion. See 9 ILB 119—Duty of landlord to relet premises

Change of relation—effect. Manifestly a landlord and his tenant may, at the close of the tenancy, take on and assume the relationship of vendor and purchaser, and thereby enable the former tenant to hold the premises in question adversely to the former landlord.

Burch v Wickliff, 209-582; 227 NW 133

Commencement of term. A lease which definitely provides that the term of the lease shall begin with the execution of the lease, but which, with equal definiteness, provides that the landlord shall not give possession until a named date after the execution of the lease, gives the landlord no lien for rent on property which the tenant takes and keeps upon the property after the execution of the lease, but which he removes before the day for possession under the lease arrives, it appearing that such short-time possession by the tenant was for a purpose foreign to the lease.

Federal Bank v Wylie, 207-816; 221 NW 831

Conditional delivery. No contract relation is created by the execution of a lease and the delivery thereof on a condition which later fails.

Standard v Kinseth, 204-974; 215 NW 972

Collateral evidence—interference by lessor—evidence. Evidence reviewed and held insufficient to show that the parties to a lease had entered into an alleged collateral agreement, or that the lessor had so interfered

III LEASES—continued
(a) IN GENERAL—continued

with the lessee and his possession as to render impossible the carrying on of lessee's business.

Woodhull v Trainor, 215-1330; 247 NW 808

Conflicting evidence. Conflicting testimony on the issue whether a tenant had waived his right to certain refrigerating room, as called for by the lease, necessarily generates a jury question; and the verdict thereon is a finality.

Rocho Bros. v Dairy, 204-391; 214 NW 685

Oral explanation. The fact that both of two parties sign a lease and the accompanying rent notes does not necessarily establish, in a controversy strictly between said two parties, that each party should pay one half the rent. The said fact is open to oral explanation.

Fisher v Nicola, 214-801; 241 NW 478

Nonabuse of discretion. In action for forcible entry and detainer, where there was evidence of error in instructions in that court assumed that an alleged lease was made with agent of plaintiff with authority to make an oral lease, and that court did not specifically define to jury necessary elements of an oral lease, and there was also question that verdict was not supported by evidence, granting new trial held not an abuse of discretion.

Holman v Rook, (NOR); 271 NW 612

Precautionary instructions. A jury may very properly be told not to allow a recovery of rents prior to a specified time, even tho no claim is made in the pleadings for such prior rents, when it is manifest that the court was simply guarding against possible confusion because of the state of the record.

Bigelow v Ins. Co., 206-884; 221 NW 661

Contract lien—enforcement. An action to establish and enforce a contract lien for rent is properly brought in equity, and is not transferable to law, because the answer presents law issues. Held that a contract lien for rent is validly created by a lease provision that the landlord should have, not only the statutory lien for rent, but also a lien upon all property of the tenant used or situated on the leased premises whether exempt from execution or not.

Beh v Tilk, 222-729; 269 NW 751

Contract against lien—validity. An owner of land in leasing his property has a right to contract that improvements made by the lessee on the land shall not be made on credit, and that said property shall not be liable therefor.

Thompson Yards v Haakinson Co., 209-985; 229 NW 266

Contract of sale in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession or (2) title or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Construction—joint purchase of property. When the beneficiaries of a trust in real property and in the long-time lease thereon are given the right either to continue to receive the rent under the lease, or to terminate the lease by jointly purchasing of the lessee the building which the lessee has erected on the land, under the lease, then the assignees of the beneficiaries must likewise act jointly in the purchase of the building.

Fleming v Casady, 202-1094; 211 NW 488

Lease—readjustment of rent—construction. A long-time lease which provides (1) that the rental shall be computed at a named percentage on the value of the land (subject to a minimum rental); (2) that, for the first five-year period, a specified rental shall be paid (which was said percentage on the agreed and estimated value); (3) that the rental for the balance of the term shall, at the close of each five-year period, be subject to revision, "based upon any increase in the estimated value of the land"; and (4) that such valuation shall be made by certain valuers or appraisers, requires the valuers, in making such valuation, to treat the last preceding value as a verity. In other words, the valuers may not adjudge that the preceding valuers were mistaken in their judgment. Phrased otherwise, the valuers must confine themselves to a determination of the simple question whether the value has increased or decreased since the last preceding valuation, and add such increase to, or subtract such decrease from, the last preceding valuation.

Minot v Pelletier Co., 207-505; 223 NW 182

Disputing landlord's title—fraud. Proof that an apparently valid lease is in reality a fraud and a sham is not violative of the rule that a tenant will not be permitted to deny the title of his landlord.

Schmidt v Twedt, 219-128; 257 NW 325

Execution by husband only—liability of wife. A wife is not liable on a written lease signed by the husband alone as lessee, tho the leased premises be occupied by the husband and wife as a family residence.

Whether the wife be liable for the rent as a family expense under §10459, C., '35, is a quite different question—a question which cannot be deemed before the court in landlord's attachment proceedings manifestly based solely on the lease signed by the husband alone.

Rogers v Davis, 223-373; 272 NW 539

Foreclosure—sale—deed—right to unaccrued rents. The principle that one who receives a sheriff's deed is entitled to unaccrued rents under an outstanding lease can have no application when the lease had terminated immediately prior to the issuance of said sheriff's deed.

Kerr v Horn, 211-1093; 232 NW 494

Forfeiture—noncontract grounds. A lease may not be forfeited on a noncontract ground.

In re Grooms, 204-746; 216 NW 78

Landlord's contractual lien—recording articles and assignments—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

Measure of damages—wrongful act without profit to wrongdoer — essential proof. The lessee of coal lands who seeks to recover damages consequent on the wrongful act of the owner of the land in taking coal from the land, need not show that the defendant-owner made any profit from his wrongful operations. Plaintiff need only show wherein and to what extent he was damaged.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Merger—acquisition of title by stockholder of corporate lessee. A lease in which a corporation with many stockholders is lessee may not be said to be merged, and thereby terminated, simply because some of the stockholders acquire the equitable title to the real estate.

Fleming v Casady, 202-1094; 211 NW 488

Mutual rights—compensation—nondual employment. The fact that different property owners employ the same rental agent to obtain the same tenant does not constitute such a dual employment as to deprive the agent of his compensation from the owner for whom a lease is obtained.

Foley v Mathias, 211-160; 233 NW 106; 71 ALR 696

Mutual termination—jury question. Whether a lease has been mutually terminated is necessarily a jury question on conflicting testimony.

Benson v Iowa Co., 207-410; 221 NW 464

Negligence of tenant — liability of landlord. Principle recognized that a property owner who has parted with full possession and control of his premises by lease is not liable to third persons for injuries caused by the negligence of the tenant.

Updegraff v City, 210-382; 226 NW 928

Nonpermissible power of partner—burden of proof. A partnership is not bound by the act of one partner in consenting to, and acquiescing in, an act which is subversive of the very purpose of the partnership, unless he who seeks so to bind the partnership establishes the fact that all the partners consented to, and acquiesced in, said act.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Option conditioned on payment of note—conditional delivery—jury question. With the evidence in conflict, a jury question is generated as to whether or not the delivery of a note was conditional when it was given at the time of the execution of a farm lease which contained an option to purchase the farm on condition that the note should be paid.

Walker v Todd, 225-276; 280 NW 512

Pledge of rents and profits—tenant's right of offset. The right which a mortgagee has, as pledgee of the rents and as assignee of a lease executed by the mortgagor-owner, is subordinate to the right of the tenant under said lease to offset against the rents owed by him to the insolvent landlord-mortgagor an unpaid indebtedness which was due to the tenant from said landlord-mortgagor prior to the time when the mortgage and lease were executed.

Loots v Clancey, 209-442; 228 NW 77

Priority over rent accruing under tenancy at will. A recorded chattel mortgage on the property of a tenant used on the demised premises under a lease for years, attains priority, immediately upon the termination of the lease, over the landlord's claim for future rent accruing under a succeeding tenancy at will of the same premises; likewise a recorded chattel mortgage executed by a tenant at will, on property used on the leased premises, attains priority immediately upon the expiration of 30 days after the execution and recording of the mortgage, over the landlord's claim for future accruing rent.

Nickle v Mann, 211-906; 232 NW 722

Reformation of lease—right of action—negligence barring relief. A party who has no excuse whatever for signing a writing without reading it, or without requesting a reading of it, will not be granted reformation. And the rights of the wife of the signer insofar as she is interested in the writing, tho not a signer thereof, will be foreclosed by her like inexcusable neglect to read or request the reading of the instrument.

Stillman v Bank, 216-957; 249 NW 230

Reformation of lease—mandatory degree of proof. Plaintiff seeking the reformation of a written instrument must fail unless he estab-

III LEASES—continued
(a) IN GENERAL—concluded

lishes by clear, satisfactory, and convincing evidence—by evidence exceeding a mere preponderance—by evidence approximating proof beyond a reasonable doubt—the definite contract which the executed writing does not embrace. Evidence reviewed in detail under a prayer for the reformation of a lease, and held insufficient to comply with the rule.

Stillman v Bank, 216-957; 249 NW 230

Rents—payment in advance—ouster—right to recover. A tenant who pays the rent in advance to the landlord and is legally evicted by foreclosure proceedings before the commencement of the term may recover of the landlord the sum so paid as for a total failure of consideration.

Ransier v Worrell, 211-606; 229 NW 663

Right to terminate. Lease reviewed and held that the lessor in terminating the lease was acting strictly within his contract right.

Liberty Oil v Green, 208-1136; 225 NW 858

Securing modification of fraud-induced contract—effect. One who, after discovering that he had been fraudulently induced to enter into a contract of lease, secures a modification of the contract substantially beneficial and advantageous to himself, thereby waives the fraud, and the original rights arising by reason thereof.

Timmerman v Gurnsey, 206-35; 217 NW 879

Strip mining coal—pipe-line right-of-way easement—back-filling required. A holder of a strip mine coal lease who enters upon and strips coal from land, upon which land a pipe-line company holds an easement, knowing that by so mining violates his lease, must back-fill the land when the easement holder exercises his option to buy; and upon his failure to make the back-fill, a judgment against the coal lessee for the cost thereof is proper.

Penn v Pipe Line Co., 225-680; 281 NW 194

Lease of minable coal—breach—burden of proof. In an action to recover minimum royalties under a lease of coal lands because of defendant's breach of contract to mine all minable, workable and merchantable coal underlying said lands, plaintiff has the burden to establish the existence of such coal, especially when plaintiff assumed such burden by his pleadings. Evidence exhaustively reviewed and held insufficient to generate a question for the jury.

Scovel v Coal Co., 222-354; 269 NW 9

Tenant's right to homestead before termination of lease. A tenant may have a homestead right under a leasehold interest which is available to him as against all persons, including the holder of the superior title, the lessor-owner, during the term of the tenancy and before the lease has expired.

Wright v Flatterich, 225-750; 281 NW 221

Unilateral right to terminate. The fact that a lease accords to the lessee the right to terminate the lease on a given notice, without a corresponding right in the lessor, does not render the lease unenforceable when the consideration for the lease does not lie in mutual promises.

Standard v Veland, 207-1340; 224 NW 467

(b) ASSIGNMENT GENERALLY

Assignees—original relationship continues. Lessor's assignee of a lease, and a telephone corporation succeeding to the ownership of the original lessee corporation, stand in the same position as the original parties to the lease.

Culavin v Tel. Co., 224-813; 276 NW 621

Assignee of lease—rights limited to interest of mortgagor-landlord. The assignee of a lease from a landlord-mortgagor cannot take, as against mortgagee, any greater interest than held by the landlord-mortgagor.

Bankers Life v Garlock, 227-1335; 291 NW 536

Assignment prohibited. A lease of lands may validly prohibit the tenant from assigning the lease and validly provide for an optional termination by the landlord of the lease in case the prohibition is violated.

Snyder v Bernstein, 201-931; 208 NW 503

Acceptance of assignment of lease—effect. One who, in writing, accepts an assignment of a lease, with the consent of the lessor, thereby contracts to carry out the terms of the lease irrespective of any later assignment of the lease by the said assignee, and it is no defense that the lessor, the property being vacant, obtains the aid of a receiver.

Pickler v Mershon, 212-447; 236 NW 382

Assignee—liability to discharge rent obligations. The written assignee of a lease of real estate who orally accepts the assignment, or effects such acceptance by his conduct, with the approval or acquiescence of the lessor, thereby binds himself to discharge the rent obligations; especially is this true when the express provisions of the lease impose such obligation.

Central Bk. v Herrick, 214-379; 240 NW 242

Assignment of rent construed—federal soil conservation payments not included. In construing the provisions of a settlement wherein a judgment debtor agreed to assign to his judgment creditor "* * * the amount due from the tenant * * *" of the debtor on certain real estate, the same "* * * being all rentals * * *" for a certain year, held, that federal agricultural conservation payments received by the debtor on the land in question were not in

contemplation of the parties, hence creditor was not, on the basis of said assignment, entitled to these payments.

Cooke v Harrington, 227-145; 287 NW 837

Conflicting assignments by partnership and partners—priority. An unrecorded assignment by a partnership to a partnership creditor of a lease of real estate and of the rents accruing thereunder is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Liability under assignment of lease. A vendee who in the purchase of a business takes an assignment of the lease and agrees to pay the future accruing rentals, but later abandons the property, is liable for said rentals for the time consumed by the vendor in effecting a resale of the property for and on behalf of the defaulting vendee.

Courshon Co. v Brewer, 215-885; 245 NW 354

Liabilities—equities between original parties. Principle recognized that an assignee of a landlord's right to demand an accounting for rents simply stands in the shoes of the assignor.

Quaintance v Bank, 201-457; 205 NW 739

Estate—sale of lease which prohibits sale. The probate court may validly order the administrator of an insolvent estate to sell and assign a lease of realty of which the deceased was lessee, notwithstanding the fact that the lease prohibits the lessee from assigning the lease without the lessor's consent, and provides that the terms of the lease are binding on the heirs, executors, and administrators of the parties, but contains no provision specifically applicable to a sale or assignment by operation of law.

In re Owen, 219-750; 259 NW 474

When lease survives death of lessee. A lease which requires the lessee to diligently farm a portion of the land and to "vigorously utilize" a portion of said land "by extraction of the available sand and gravel" thereon is assignable, and survives the death of the lessee, it appearing that the lease was entered into without reliance on any particular personal fitness of the lessee.

In re Grooms, 204-746; 216 NW 78

Obligation of assignee of lease to pay rent. The assignee of a lease (which simply binds the "lessee, his heirs, and assigns" to pay the rent) is obligated to pay rent because of privity of estate, and when said privity of estate is terminated by a valid re-assignment of the lease the obligation of the assignee to pay rent necessarily terminates unless said assignee has, expressly or impliedly, otherwise obligated himself. And the fact that the lessor accepts the rent from the assignee during the assignee's occupancy is not sufficient to show that the assignee has assumed the obligation to pay rent after re-assignment.

Seeburger v Cohen, 215-1088; 247 NW 292; 89 ALR 427

Recording of assignment of rent not authorized. A written assignment of a lease of real estate and of the rents accruing thereunder (especially when the lease is, at the time, manually delivered to the assignee) is not an instrument which the law requires to be recorded; and if it is recorded, the record imparts no notice.

Phelps v Kroll, 211-1097; 235 NW 67

Recording—effect. A lease of real estate and the assignment thereof are recordable for the purpose of conveying constructive notice to a mortgagee and his subsequently appointed receiver under a mortgage which contains a pledge of the rents, even tho said parties are not entitled, as a matter of right, to such notice.

King v Good, 205-1203; 219 NW 517

Rents—release of tenant—insufficient evidence. Knowledge on the part of a landlord that his tenant has assigned his lease, and the subsequent receipt by the landlord of rent payments from the assignee, are not sufficient, in and of themselves, to show that the landlord has released the original tenant.

Lazerus v Shapiro, 211-376; 233 NW 723

Sale, assignment or sub-letting—principles governing. Principles recognized that provisions in a lease of realty prohibiting the sale or assignment of the lease:

1. Are not favorites of the law and are construed most strongly against the lessor.
2. Will, when unambiguous, be enforced between the original parties.
3. Are not deemed broken when the assignment is by operation of law, unless such an assignment is specifically and by apt words prohibited.

In re Owen, 219-750; 259 NW 474

Sale by known nonowner. A vendee of property takes nothing by his conveyance when he knows who is the actual owner of the property and that his vendor is simply in possession of the property as manager.

Kollman v Kollman, 204-950; 216 NW 77

Stock—restraint on transfer—strictly construed. Restraints on powers to transfer corporate stock, or to assign leases, must be strictly construed.

McDonald v Manufacturing Co., 226-53; 283 NW 261

III LEASES—continued

(b) ASSIGNMENT GENERALLY—concluded

Sufficiency — nonexistent lease. A naked oral promise or understanding to assign a nonexistent but contemplated lease is not good against the subsequently accruing rights of a stranger to the understanding.

Kooistra v Gibford, 201-275; 207 NW 399

Validity—scope of statute. Section 9452, C., '24, which, in effect, provides that an instrument is assignable even tho such assignment is prohibited by the instrument, has no applicability to a personal executory contract, e. g., a lease of lands prohibiting an assignment by the tenant.

Snyder v Bernstein Bros., 201-931; 208 NW 503

(c) FIXTURES INVOLVED

Discussion. See 3 ILB 243—Removing trade fixtures; 18 ILR 527—Renewal—right of removal

Fixtures—absence of annexation or connection. An oil tank buried entirely in the parking of a public street and covered with cement, and a pump connected with said tank and bolted into said cement, tho wholly used in connection with the operation of an automobile service garage on a lot abutting said street and adjacent to said tank and pump, do not become fixtures to said lot, (1) when said tank and pump are in no manner in contact with said lot or with any building thereon or fixture thereof, and (2) when the parties to the original installation distinctly intended that the title to said tank and pump should remain in the party installing them, the latter not being the owner of said lot.

McCoun v Drews, 221-227; 265 NW 160

Constructive severance doctrine inapplicable to movable chattel. When a tenant purchases an electric lighting plant on agreement with the landlord that he may take it with him upon termination of the tenancy, and when, at the termination of such tenancy, the tenant purchases the reversion, there is no occasion to apply the doctrine of constructive severance, because the plant maintained at all times its character as a movable chattel.

Equitable v Chapman, 225-988; 282 NW 355

Farm light plant—not part of realty. In a replevin action for a Delco lighting plant placed on a concrete block in the basement of a farmhouse, such electric plant is not essential to the main business of operating the farm, but is a mere convenience, and is not a part of the realty when it is easily removable, along with the batteries resting on a shelf, and without damage to the house, the wiring being capable of use with any other electrical installation, and when there is no evidence of an intent that it be permanently fixed.

Equitable v Chapman, 225-988; 282 NW 355

Improvement by tenant with right to remove. A mechanic's lien may not be established for a building erected on land by a tenant under an agreement with the landlord-owner that the tenant may, and if required by the landlord will, remove it when the lease terminates.

Southern Sur. v Tire Serv., 209-104; 227 NW 606

Movable farm structures. Movable hog houses and feed bunks on a farm will not constitute fixtures, when to so declare would be contrary to the actual expressed intent of the person, a tenant, who placed them on the farm, and contrary to the intent as reflected in the nature of the articles, their use, and the mode of attachment to the realty.

Speer v Donald, 201-569; 207 NW 581

Removal of building. A mechanic's lien is properly decreed against an improvement erected by a tenant on leased ground when the tenant and his lessor have mutually contracted that the tenant might, at the end of the term, remove all improvements placed on the property by the tenant; and this is true even tho the removal cannot be made without damage to the premises.

Lane-Moore Co. v Kloppenburg, 204-613; 215 NW 637

(d) REPAIRS GENERALLY

Discussion. See 9 ILB 250—Rights of tenant—repairs

Injury to tenant—common-law rules. The housing law (Ch 323, C., '31) providing that "Every dwelling and all the parts thereof shall be kept in good repair by the owner", (§6392, C., '31) does not change the common-law rule of tort liability of the lessor to the lessee.

Johnson v Carter, 218-587; 255 NW 864; 93 ALR 774

Nonduty to repair. Principle reaffirmed that a landlord is under no duty to repair or maintain the leased premises in a safe and suitable condition in the absence of a covenant to that effect.

Chicago JSL Bank v Eggers, 214-710; 243 NW 193

Premises and enjoyment and use thereof—abandonment—recovery for work done. A tenant who, at his own instance, and to advance his own interest under his lease, performs fall plowing on the leased premises, and later, over the landlord's protest, voluntarily surrenders and abandons the premises, may not recover of the landlord the reasonable value of said plowing, even tho the landlord has advantaged himself on account thereof.

Hill v Groves, 209-45; 227 NW 582

Tenantable premises—jury question. In an action on a lease which provided for the payment of rent except when the premises are

"untenantable by reason of fire", the issue whether certain painting, papering, and decorating were necessary to render the premises tenantable after a fire, is a jury question, under conflicting testimony.

Benson v Iowa Co., 207-410; 221 NW 464

10160 Termination of farm tenancies.

Abandonment—recovery for work done. A tenant who at his own instance and to advance his own interest under his lease performs fall plowing on the leased premises, and later, over the landlord's protest, voluntarily surrenders and abandons the premises, may not recover of the landlord the reasonable value of said plowing even tho the landlord has advantaged himself on account thereof.

Hill v Groves, 209-45; 227 NW 582

Assignability of lease which survives death of lessee. A lease which requires the lessee to diligently farm a portion of the land and to "vigorously utilize" a portion of said land "by extraction of the available sand and gravel" thereon, is assignable and survives the death of the lessee, it appearing that the lease was entered into without reliance on any particular personal fitness of the lessee.

In re Grooms, 204-746; 216 NW 78

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a sharecropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

Nonduty to repair. Principle reaffirmed that a landlord is under no duty to repair or maintain the leased premises in a safe and suitable condition in the absence of a covenant to that effect.

Chicago JSL Bank v Eggers, 214-710; 243 NW 193

Right to remove tenant if landlord dissatisfied. A landlord, under a lease authorizing either party thereto to cancel the same "in case the farming conditions are not satisfactory", need not, in a petition to remove the tenant, allege or set forth the reasons for his alleged dissatisfaction.

Jepson v Conner, 210-1267; 232 NW 693

10161 Agreement for termination.

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a sharecropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

Eviction by foreclosure decree—plea of want of consideration. Even tho a wife who had joined with her husband in the execution of rent obligations was not made a party to subsequent mortgage foreclosure wherein her husband and the landlord were evicted by the appointment of a receiver, yet she may, when sued on the rent obligations by the landlord or by his assignee, plead the foreclosure decree as establishing a total failure of consideration.

Miller v Laing, 212-437; 236 NW 378

Lease—assignees—original relationship continues. Lessor's assignee of a lease, and a telephone corporation succeeding to the ownership of the original lessee corporation, stand in the same position as the original parties to the lease.

Culavin v Telephone Co., 224-813; 276 NW 621

Lease construed — automatic renewal. A lease providing for a written notice of discontinuance, and in the absence of which a "renewal shall be assumed and in force" for an additional term, is automatically renewed unless the notice provided for is given by lessee.

Culavin v Telephone Co., 224-813; 276 NW 621

Noncontract grounds. A lease may not be forfeited on a noncontract ground.

In re Grooms, 204-746; 216 NW 78

Tenant's right to homestead before termination of lease. A tenant may have a homestead right under a leasehold interest which is available to him as against all persons, including the holder of the superior title, the lessor-owner, during the term of the tenancy and before the lease has expired.

Wright v Flatterich, 225-750; 281 NW 221

CHAPTER 443

WALLS IN COMMON

10163 Resting wall on neighbor's land.

Discussion. See 8 ILB 249—Lateral support

Creek channel excavation destroying lateral support—rules for liability. A city excavating a new creek channel near the boundary of its land must use reasonable care that it does not destroy the natural lateral support for the adjoining land. Nevertheless, (1) if despite using reasonable precautions the adjoining land falls under its own weight, a liability arises for damage to the land but not to the superstructure; but (2) if a fall is occasioned solely by the weight of a superstructure, no liability arises for damage to either land or superstructure; however (3) if negligent excavation causes the fall, liability arises for damage to both soil and superstructure.

Covell v Sioux City, 224-1060; 277 NW 447

Strip mining—coal lease subject to pipe line easement. Where a pipe line company has an easement across land and an option to buy a designated strip of land along the pipe line if a strip coal mine should be opened on the land, a subsequent strip mine coal lease, subject to the pipe line easement and option, gives the coal lessee no rights to strip mine coal on the land covered by the purchase option and thus destroy the lateral support of the pipe line, nor is such lessee entitled to any part of the purchase price for such strip of land.

Penn v Pipe Line Co., 225-680; 281 NW 194

10174 Special agreements—evidence.

Damages. The fact that a party, who legally attaches his building to a wall, does not actually own the wall does not prevent him from recovering damages to his goods consequent on the wrongful act of the actual owner in causing surface waters to seep through the wall.

Dravis v Sawyer, 218-742; 254 NW 920

CHAPTER 444

EASEMENTS

Discussion. See 10 ILB 72—Rights and remedies of burial lot holder

10175 Adverse possession — "use" as evidence.

Discussion. See 20 ILR 551; 738—Adverse possession

Atty. Gen. Opinion. See '38 AG Op 239

ANALYSIS

I EASEMENTS BY PRESCRIPTION
(a) IN GENERAL
(b) HIGHWAYS
(c) RAILWAY RIGHT OF WAY
II EASEMENTS CREATED BY CONVEYANCES

Adverse possession generally. See under §11007
Dedication of highways. See under §6277
Merger of realty interests generally. See under §10084 (II)

I EASEMENTS BY PRESCRIPTION

(a) IN GENERAL

Discussion. See 17 ILR 235—Assignability in gross

Prescription—essential elements. An easement by prescription demands a showing (1) of some claim of right which is independent of use, and (2) of knowledge of such claim on the part of the person against whom the easement is sought to be enforced.

Black v Whitacre, 206-1084; 221 NW 825

Easements and tenements — relation. An easement is a privilege or right without profit which the owner of one piece of realty may have in another, or conversely, it is a service which one tract of land owes to another. The land entitled to the easement is the dominant tenement, and the land burdened with the servitude is the servient tenement, neither the easement nor servitude being personal, but accessory, running with the land.

Dawson v McKinnon, 226-756; 285 NW 258

Claim broad as possession — unaccepted street. Where their claim extending to a certain fence was as broad as their possession, persons, who for more than ten years had continuous and exclusive possession of a dedicated but unaccepted street secured title thereto by adverse possession.

Brewer v Claypool, 223-1235; 275 NW 34

Creation by ancient grantors—effect. An owner of land may not, except with the consent of all interested parties, question a visible and permanent drainage easement imposed upon the land by his ancient grantors.

Ehler v Stier, 205-678; 216 NW 637

Easement—loss of right. One who bases his attempt to enjoin interference with a public or private easement in a strip of land solely on the ground of his ownership of the abutting land loses such right by an unconditional conveyance of the abutting land.

Rider v Narigon, 204-530; 215 NW 497

Easement—scope and extent. Where a right of way is jointly used by the fee owner, and by the owner of a duly granted easement

therein, (1) the width of said easement, (2) the duty of the owner of the easement to close the gates leading thereto, (3) the duty of each party to refrain from interfering with the use by the other, (4) the mutual right to repair the way, and (5) the proper division of the expense of such repairs, should, under proper evidence, be specifically decreed, and all violations thereof enjoined.

Bina v Bina, 213-432; 239 NW 68; 78 ALR 1216

Element of "right" and "notice"—evidence. The fact that a property owner claimed an easement in the land of another "as his right", and "that the party against whom the claim is made had express notice thereof", may manifestly be conclusively deduced from evidence of the negotiations, conduct, and acts which led to and culminated in the creation and establishment of the easement by the parties.

Ehler v Stier, 205-678; 216 NW 637

Establishment—evidence—sufficiency. Record reviewed in detail, and held insufficient to establish an easement in the form of a driveway by oral agreement, by prescription, by estoppel, or by or from necessity.

Black v Whitacre, 206-1084; 221 NW 825

Equitable estoppel—nonestoppel to deny existence of street. Where a dedicated but unaccepted street is partly enclosed within defendants' land and partly used by both plaintiffs and defendants for mutual access to their properties, defendants are not thereby estopped from denying the legal existence of the street and claiming title thereto by adverse possession.

Brewer v Claypool, 223-1235; 275 NW 34

Estoppel—evidence—sufficiency. An easement by estoppel may not, of course, be established on the basis of a fact or transaction which is as consistent with mere permissive use as the contrary.

Black v Whitacre, 206-1084; 221 NW 825

Hostile possession—notice. An easement in the form of a driveway on the land of another can be established only by evidence distinct from and independent of its use, to the effect that, for ten years, the user has claimed such use as a right, and that for all of said time the owner of the land has had notice of such asserted right.

Manning v George, 205-994; 219 NW 135

Long and unquestioned use—effect. Thirty years of continuous and unquestioned use of an easement across land is persuasive that the owners of the dominant and servient estates were interpreting the easement as a permanent one and not a mere temporary and personal one.

Thul v Weiland, 213-713; 239 NW 515

Mutual agreement and acquiescence. A driveway equally upon the dividing line between two adjoining owners may be used by them under such condition of mutual acquiescence and agreement as to ripen in each an irrevocable easement.

Molene v Tansey, 203-992; 213 NW 759
Ellsworth v Martin, 208-169; 225 NW 417

Natural watercourses—duty to maintain. It is the duty of the owner of a servient estate to maintain free from obstruction the natural watercourses, even tho they have no well-defined banks.

Heinse v Thorborg, 210-435; 230 NW 881

Necessity—scope. Easements in the form of a roadway by or from necessity arise, generally speaking, only in favor of a grantee as against his grantor.

Black v Whitacre, 206-1084; 221 NW 825

Permissive use. Mere use of a way over the land of another by permission of the latter furnishes no basis for a title by prescription.

Feilhaber v Swiler, 203-1133; 212 NW 417

Permissive use—revocation. A naked permissive use of land as a driveway may be revoked at the pleasure of the person granting the permission.

Black v Whitacre, 206-1084; 221 NW 825

Permissive use of passageway. Mere permissive use of an opening under a railroad track, howsoever long continued, will not ripen into an irrevocable easement.

Chicago, Mil. Ry. v Cross, 212-218; 234 NW 569

Termination—violating conditions. The owner of a duly established right of way easement in the land of another does not forfeit the right to said easement by inadvertently or carelessly leaving open the gates leading to said easement even tho the duty to close said gates is made mandatory by the conveyance granting said easement; but the easement owner will be enjoined from violating said mandatory duty.

Bina v Bina, 213-432; 239 NW 68; 78 ALR 1216

Unaccepted platted street—applicability. Where parties claim land, dedicated in plat as a street but, not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

Unallowable obstruction. Principle recognized that an easement which is appurtenant to specific land only may not be used in connection with other land to which the easement is not appurtenant, but that a violation of such rule by the owner of the dominant estate does not justify the owner of the servient es-

I EASEMENTS BY PRESCRIPTION—concluded

tate in excluding the dominant owner from all use of the easement.

Thul v Weiland, 213-713; 239 NW 515

(b) HIGHWAYS

Essential elements. Principle reaffirmed that to establish a public highway by prescription there must be satisfactory evidence of a general, uninterrupted public use, under a claim of right, continued for the statutory period.

Shuler v Gravel Co., 203-134; 209 NW 731

Easement—fundamental requirements. The mere use of a roadway, howsoever long continued, will not ripen into an irrevocable private easement in favor of the private user nor into a dedicated public highway in favor of the public generally, unless, in the case of a claim of private easement, the fact is established, independent of the evidence of use, that the private user has, for at least ten years, and to the knowledge of the landowner, asserted or claimed a hostile right to use such way, and unless, in the case of a claimed public dedication, the fact is established that the landowner has, by deliberate, unequivocal, and decisive acts and declarations, manifested a positive intention permanently to abandon the land in question to the public for highway purposes.

Culver v Converse, 207-1173; 224 NW 834

Adjoining landowner—no title accrues from encroachment on highway. Encroachment by an adjoining landowner on an established public highway will not ripen into a title through any statute of limitations, doctrine of acquiescence, adverse possession, or estoppel—the establishment and maintenance of public highways being a governmental function.

Richardson v Derry, 226-178; 284 NW 82

Evidence—old road records—different location in use—use alone insufficient. In an action to establish a road by prescription, evidence in the form of a page from an old road record made in 1850, which was a copy of the surveyor's notes, and introduced as evidence of an adverse claim, is not sufficient, when it does not show that such road as shown on the old record was the same as the road now in use. Without this, the road could not be established on the sole evidence of long continued use.

Slack v Herrick, 226-336; 283 NW 904

(c) RAILWAY RIGHT OF WAY

No annotations in this volume

II EASEMENTS CREATED BY CONVEYANCES

Discussion. See 9 ILB 309—Easements—implied grant and reservation; 13 ILR 74—Easements by implication.

Part of single ownership conveyed—implied easement or reservation—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

License — definition — revocability — constructing a grotto for charitable organization. Since a license is a permission to do particular acts on another's land without possessing an interest therein, revocable at licensor's pleasure except where coupled with an expenditure of money or labor, an individual constructing a grotto on the land of a charitable organization under an agreement containing a provision for entry on the land for purposes of the agreement, has a personal privilege of going on the land to complete the undertaking.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Abandonment of easement—affirmative defense. Abandonment is an affirmative defense, and clear, unequivocal evidence is required to establish that an easement was abandoned.

Dawson v McKinnon, 226-756; 285 NW 258

Acceptance of deed—no waiver of easement rights under contract. When a contract of sale of land provided that the deed would grant an easement for the right of ingress and egress to the property, but the deed drawn on the same day failed to make such provision, the acceptance of the deed by the grantee did not waive the provision of the collateral contract, altho ordinarily the acceptance of a deed would complete the execution of the contract and would be conclusive evidence of its complete fulfilment.

Dawson v McKinnon, 226-756; 285 NW 258

Contract for definite easement—substitute. A contract under which land was purchased, which provided that the purchaser would receive a definitely established easement for the right of ingress and egress to the land, entitled the purchaser to all the contract gave her, and not merely to another easement as a substitute for what was granted.

Dawson v McKinnon, 226-756; 285 NW 258

Easement rights omitted from deed—extrinsic evidence. When land was purchased under a contract providing that the deed would grant an easement of the right of ingress and egress to the property, and that the exact description of the easement would be made a part of the deed, but such description having been omitted, it was proper, in purchaser's action to assert such easement rights, to ad-

mit extrinsic evidence to show the exact location of the easement.

Dawson v McKinnon, 226-756; 285 NW 258

Easement running with land. A recorded conveyance of land which, in addition to conveying the land, also grants a private roadway over other lands of the grantor, creates an easement which runs with the land, even tho the grantor subsequently re-acquires title to the lands first conveyed (and again becomes the owner of both tracts) and subsequently conveys both tracts by separate conveyances to different grantees.

Feilhaber v Swiler, 203-1133; 212 NW 417

Grant—construction. An instrument which grants to a railway company a release of all present and future damages resulting from the overflow of land consequent on the maintenance of tracks and bridges, but also grants, as running with the land, the right to maintain the railway as then or thereafter existing, together with the right to overflow the land, creates not only (1) a settlement of damages, present and prospective, but (2) a permanent easement in the land.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

Boundary line between farm buildings—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential, to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Release of part of easement—no waiver of remainder. One who had an easement for the right of ingress and egress to her land over a curved driveway with two exits, and who consented to the closing of one exit, did not thereby waive or abandon her easement rights to the other exit.

Dawson v McKinnon, 226-756; 285 NW 258

Reservation—construction. Reservation of an easement construed, and held to demonstrate that the right to beautify the land in question rested in the defendant, and not in the plaintiff and defendant jointly.

Spaulding v McCartney, 207-1025; 221 NW 665

Right of way—deed—effect as to subsequently laid out streets. An ordinary railroad right-of-way deed simply grants to the railroad an easement, and works no impediment to the vesting in a municipality, subject to such easement, of streets subsequently laid out across such right of way; and especially so when the railroad company acquiesces in and recognizes the statutory dedication to the public.

Ackley v Elec. Co., 206-533; 220 NW 315

Stipulation in sidewalk dispute. A stipulation disposing of litigation over use of sidewalk, and providing for joint use, creates an easement for said purpose, and injunction would lie for interference with such right.

McEachron v Schick, (NOR); 218 NW 955

Water easement—protection by injunction. Where a contract easement exists to pipe water from the premises of the owner of land to the premises of the easement owner, it necessarily follows that the latter's right to go upon said premises of the former to make reasonable repairs to the pipes and related equipment will be protected from interference by injunction.

Hawkeye Cement v Williams, 213-482; 239 NW 120

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe-line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received $5 per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe-line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only 50 cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

10176 Light and air.

Overhanging windows and box screens. A property owner who builds upon a boundary line has no right to operate and maintain

windows and box screens that overhang adjoining property.

Minear v Furnace Co., 213-663; 239 NW 584

10177 Footway.

License—evidence. A contract easement in a footway over land is not established by evidence which is perfectly consistent with a mere naked license only.

Hawkeye Cement v Williams, 213-482; 239 NW 120

Mutual agreement and acquiescence. A driveway upon and along the dividing line between two adjoining owners may be used by them under such conditions of mutual acquiescence and agreement as to ripen in each an irrevocable easement.

Ellsworth v Martin, 208-169; 225 NW 417

CHAPTER 445

GIFTS

Gifts generally. See Note 1 at end of chapter

10185 Gifts to state.

Atty. Gen. Opinions. See '34 AG Op 285, 357; '36 AG Op 224

Codicil with invalid provision giving executor highway construction powers. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

Lapsing of legacy. A condition in a charitable bequest, that if the legatee takes no steps within a named time to augment said bequest the same shall revert to testator's estate, must be deemed a condition precedent and not a condition subsequent. It follows that said bequest lapses upon the expiration of said time if the legatee, with actual knowledge of the bequest, fails to signify any acceptance of the bequest, and fails to take any steps to augment said bequest.

In re Hillis, 215-1015; 247 NW 499

10186 Management of property.

Atty. Gen. Opinions. See '34 AG Op 285, 357; '36 AG Op 224

10187 Gifts to state institutions.

Atty. Gen. Opinions. See '34 AG Op 357; '36 AG Op 224, 293, 416, 429

Cy pres doctrine invoked by state in equity court. A public charity, created by trust, about to fail, is properly represented in court of equity to invoke jurisdiction to apply cy pres doctrine by the state or some authorized agency thereof.

Schell v Leander Clark College, 10 F 2d, 542

10188 Gifts to municipal corporations.

Atty. Gen. Opinion. See '34 AG Op 357

Devise for charity—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good". Will construed, and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library, were conditions subsequent and not conditions precedent, to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

Waterworks—Simmer law unaffected by federal money grants. The words "maximum amount to be expended" in the so-called "Simmer law" refer not to the size of the plant but to the amount to be paid from the earnings. It follows that the construction fund may be enlarged by other funds that do not have to be repaid from taxes or from earnings.

Keokuk W. Co. v Keokuk, 224-718; 277 NW 291

Abbott v Iowa City, 224-698; 277 NW 437

Bequest for paving roads — acceptance by county not enjoined. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Absolute bequest—later repugnant provision disregarded. Where a codicil made an absolute bequest of a residuary estate to a county to be used in paving a highway, and a later provision in the codicil gave certain directions to the executor and imposed conditions for acceptance of the bequest by the county, such later conditions were repugnant and would defeat the purpose of the testator and must be disregarded when void in delegating power to the executor in violation of statute, and the intention of the testator as expressed in the first provision must be given effect to prevent intestacy.

Blackford v Anderson, 226-1138; 286 NW 735

Codicil creating charitable trust to county for paving roads. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Federal grant for constructing municipal plant. Under this section, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

Note 1 Gifts.

ANALYSIS

I GIFTS GENERALLY
(a) IN GENERAL
(b) GRATUITOUS SERVICES GENERALLY
II GIFTS INTER VIVOS
III GIFTS CAUSA MORTIS

Advancements. See under §12029
Conveyances in fraud of creditors. See under §11815
Deeds given by parents for support—consideration. See under §9440 (II)
Gratuitous services to decedent. See under §11957 (II)

I GIFTS GENERALLY

(a) IN GENERAL

Cancellation—fraud and undue influence not proved. In an action in equity by a 73-year-old grantor, who had no children of his own, to set aside deed to adult children of second wife, subject to a life estate in grantor, where associations of the grantor and grantees, over a long period of years, were not unlike that ordinarily observed between natural parents and children, evidence did not sustain charge that deed was procured by fraud and undue influence.

Lawson v Boo, 227-100; 287 NW 282

Confidential relations—independent advice—sufficiency. In connection with a gift from a person occupying a confidential relation with another, "independent advice" means the donor's opportunity of conferring fully and privately with a person competent to advise as to the legal effect of the transaction and who will advise in a manner disassociated from the interests of the donee.

Merritt v Easterly, 226-514; 284 NW 397

Confidential relations — presumption of fraud. The act of a mother, in causing a certificate of deposit to be changed from her own name to that of a son who, it is made to appear, occupied a very close and confidential relation with his mother, is presumptively fraudulent, and will be sustained only on proof by the son that the transfer was free from all undue influence and fraud.

Roller v Roller, 201-1077; 203 NW 41

Construction of writing. Language which clearly indicates a completed gift may be so controlled by other parts of the same writing and by attending circumstances as to show that no such gift was intended.

Rodgers v Reinking, 205-1311; 217 NW 441

Conveyances as gifts. A surviving wife has no interest in lands which the husband bought and paid for, and which he, without working any fraud upon the wife and without intending such fraud, caused to be conveyed directly by his vendor to grantees other than himself, as a gift.

Grout v Fairbairn, 204-727; 215 NW 963

Deposits—alternate payees—effect. A certificate of deposit taken out by a mother, and "payable to the order of self or Hazel Pent, daughter," may be treated as a gift to the daughter when the mother dies without change in the certificate, and when there is no evidence to the contrary as to the intent of the mother.

Andrew v Bank, 205-237; 216 NW 12

Evidence—weight and sufficiency. Proof of an oral gift of real estate must be clear, substantial and convincing. Evidence reviewed and held quite insufficient to comply with the rule.

Long v Kline, 222-81; 268 NW 150

Advancements—burden of proof. An irrevocable gift by a parent to a child is pre-

I GIFTS GENERALLY—continued
(a) IN GENERAL—continued

sumptively an advancement, but the child may show, by any competent evidence, that the parent did not intend the gift to be an advancement. Evidence held to overthrow the presumption.

Fell v Bradshaw, 205-100; 215 NW 595

Bank deposit—evidence to establish as gift. In action to establish trust in funds in bank, represented by certificate of deposit which defendants claimed as a gift, evidence held to warrant decree for plaintiff.

Wier v Davidson, (NOR); 242 NW 37

Deeds—evidence necessary to invalidate. A deed is presumed to express the intention of the grantor and one who attempts to set it aside on the ground of undue influence or insanity has the burden of proof to present evidence that is clear, satisfactory, and convincing.

Mastain v Butschy, 224-68; 276 NW 79

Delivery—evidence—sufficiency. The act of a donor in inclosing his gifts to different persons in an envelope, with an indorsement on each gift of the name of the donee, and forwarding the envelope by mail to one of the donees, constitutes a delivery of the gifts to each donee, such being the manifest intent of the donor.

In re Higgins, 207-95; 222 NW 401

Evidence—insufficiency. Evidence held insufficient to show that the transfer of a certificate of deposit by a mother to her son was intended as a gift.

Roller v Roller, 201-1077; 203 NW 41

Fiduciary relationship—intestate and heir receiving property—failure of proof. In an action by heirs of intestate to set aside a conveyance of realty made by intestate to son, on ground of an alleged fiduciary relationship existing between aged intestate and son, held, that evidence was insufficient to establish such relationship, and even tho such relationship existed, whatever property the son received from his mother was by her voluntary and intelligent act, and without duress, dominance or overreaching on his part.

Robbins v Daniel, 226-678; 284 NW 793

Incompetency of donor—evidence. Evidence held insufficient to establish the mental incompetency of a donor.

Humphrey v Norwood, 213-912; 240 NW 232

Oral contract—evidentiary demands. Principle reaffirmed that oral evidence of the gift of real estate must be clear, cogent, and convincing.

Black v Nichols, 213-976; 240 NW 261

Transfer for support—insufficiency to show mental incapacity. In an action by heirs to set aside an assignment of note and mortgage and transfer of realty by an intestate to a son, who had lived with and cared for her a number of years, on ground of mother's mental incapacity, evidence which tended to show preference to son is insufficient to support claim of mental incapacity.

Robbins v Daniel, 226-678; 284 NW 793

Electric plant—Simmer law unaffected by federal money grant. The words "maximum amount to be expended" in the Simmer law refer not to the entire cost of the plant but to the amount to be paid from the earnings, therefore the amount expended for construction may be enlarged by gifts or other funds not repayable from taxes nor from earnings.

Abbott v Iowa City, 224-698; 277 NW 437

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Intent to make—effect. An expressed intention to make a gift is, of course, quite insufficient to constitute a gift in praesenti.

Nugent v Dittel, 213-671; 239 NW 559

Inconsistent conduct. Grossly inconsistent conduct may outweigh direct testimony to the contrary. So held as to the making of a gift.

Cherniss v Thompson, 209-309; 228 NW 66

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Monomania and undue influence unproved. Where a daughter, among other things, testified against her father in a divorce action and left him to live with her mother, she furnished the evidence for his belief of her lack of filial affection, and conveyances of his property executed pursuant to his intention to disinherit her upheld over her contentions that he was a monomaniac and that the conveyances resulted from the use of undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Mutual expectations—presumption. The rendition on one hand and the acceptance on the other of valuable services (board and lodging) for a series of years generates a presumption that the one rendering was to receive pay and that the one receiving was to pay; and this is true tho the receiver and the giver were life-

long associates, and related, but were not members of the same family.

Peterson v Johnson, 205-16; 212 NW 138

Renunciation—no control by creditors—not a conveyance. A creditor has no control over a beneficiary's right to refuse or accept a gift, as a renunciation is not equivalent to a conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Right of debtor to renounce gift after suit brought. The act of the life beneficiary of an annual interest charge imposed as a gift in her favor in a deed (which the grantee duly accepted), in formally and unconditionally renouncing and rejecting all benefits "which do, may, or might accrue" to her under the deed, legally places such interest charge beyond the reach of a judgment creditor who duly institutes an equitable action to subject such interest charge to the satisfaction of his judgment, even tho the said renunciation was not made until long after the said action was duly instituted.

Gottstein v Hedges, 210-272; 228 NW 93; 67 ALR 1218

Rights of legatees—advancement (?) or gift (?). The cancellation by a testator, after making his will, of notes held by him against a legatee, and the surrender of said notes to the legatee (after carefully computing the amount due thereon) are not sufficient to overcome the presumption of an advancement, in view of the declaration in the will (1) that testator intended an equal division between his legatees, and (2) that all loans to legatees, as shown by testator's account book (made part of the will) should be deemed part of his estate, and in view of the fact that said account book listed the notes in question as loans, and not as gifts.

In re Francis, 204-1237; 212 NW 306

Secret deeds — 87-year-old grantor — confidential relation—grantee's burden of proof. A nephew, who was a sort of de facto guardian for his 87-year-old aunt, who procured from her certain deeds with utmost secrecy a short time before her death, and who did not record one of them until the day of her death, has the burden to prove his aunt acted of her own free will or from independent advice, when there is evidence bearing on her mental incapacity.

Merritt v Easterly, 226-514; 284 NW 397

Verdict sustaining part of gift as establishing mental competency. In a replevin action by executor to recover property held under claim of gift inter vivos from decedent, a jury verdict validating part of the gift made on a later date, from which part of the verdict no appeal is taken, also establishes the donor's mental competency to consummate that part of the gift made on an earlier date.

Wilson v Findley, 223-1281; 275 NW 47

(b) GRATUITOUS SERVICES GENERALLY

Cosmetology schools—charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

Family relation—presumption. Services rendered in a family by one member thereof to another member are presumptively gratuitous, but claimant may overthrow the presumption by proof of an express contract to pay for such services, or by proof of such circumstances as will justify a finding that the member rendering the services expected to be paid therefor and that the member receiving the services expected to pay therefor. Instructions reviewed in detail, and held to adequately present the law.

Wilson v Else, 204-857; 216 NW 33

Living with and caring for parents at their request — nongratuitous services — allowable probate claim upheld on appeal. Reciprocal services rendered by and between members of a family are presumed to be gratuitous, yet, the court, a jury being waived, may find that a married daughter, who with her family, returns to the home of her aged parents at their request to care for them, for which she expected to receive and the parents expected to pay remuneration, did not re-establish a family relationship with her parents so as to raise the presumption of gratuitous services. Such finding will be binding on the appellate court.

Clark v Krogh, 225-479; 280 NW 635

Services by child—presumption. Principle reaffirmed that services rendered by a member of a family are presumptively gratuitous.

Howell v Howell, 211-70; 232 NW 816

Services in family—presumption. There can be no presumption that services performed for a deceased were gratuitous when claimant and deceased were not related and not members of the same family.

In re Walton, 213-104; 238 NW 577

II GIFTS INTER VIVOS

Bank deposit with symbolical delivery. A bank deposit made with the intent to make a gift, and followed by a symbolical delivery to the donee, constitutes a consummated gift.

In re Belgard, 202-1356; 212 NW 116

Consideration and revocability. An executed, delivered, and accepted gift needs no consideration for its support, and is irrevocable.

Stonewall v Danielson, 204-1367; 217 NW 456

Oral gift of real property. An oral, executed gift of real estate, established to a reasonable certainty, is valid.

Mann v Nies, 213-121; 238 NW 601

Mere "expectancy" as subject-matter. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject-matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Gift inter vivos—notes assigned direct to donee on purchase by donor—donor retaining interest and notes deposited at bank. To constitute a gift inter vivos there must be a clear intention to make a present gift fully executed by actual, constructive, or symbolic delivery, so where donor purchased notes and mortgages from a trust company, and had assignments thereof made to her sister, established a gift inter vivos and neither the fact that the donor reserved the right to collect interest thereon nor that trust company retained possession of the notes and mortgage invalidate the gift.

Ratterman v Lodge, 13 F 2d, 805

Perpetuities—charitable organization—validity. Where an individual agrees to construct a grotto on land then belonging to a charitable organization which in return agrees among other things not to alienate the land, such a covenant, not being created in a gift of land for charitable purposes and as such an exception to the rule against perpetuities or against restraint on alienation, but instead, an attempt by the fee titleholder to retain his land while separating from the fee the unlimited power of alienation, is violative of public policy, void and unenforceable in equity.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Retention of authority and interest—effect. It is not essential to the validity of a gift that the donor relinquish all authority or even all interest in the subject of it. So held as to a banking account, consisting of money and securities.

Eaton v Blood, 201-834; 208 NW 508; 44 ALR 1516

Right of revocation. A writing which on its face carries a presumption of a consummated gift of the property which accompanies the writing does not foreclose the apparent donor from establishing in his lifetime that such was not his intention; that, in the execution of the writing, he did not intend to surrender either his dominion over the property or his right to revoke the writing.

Needles v Bank, 202-927; 211 NW 392

Evidence. Proof of an oral gift of real estate must be clear, substantial and convincing. Evidence reviewed and held quite insufficient to comply with the rule.

Long v Kline, 222-81; 268 NW 150

Evidence—failure to list for taxation—effect. The naked fact that a donee fails to list the gift (a substantial sum in cash) for taxation cannot have such evidentiary force as to overthrow other evidence which persuasively shows that the gift was actually made and executed.

Humphrey v Norwood, 213-912; 240 NW 232

Evidence—sufficiency. Evidence that bonds had donee's name added, were turned over to her, and she kept them in a safety deposit box registered in her name but rented by donor, that donee had the key, coupled with other testimony of disinterested persons, shows a conclusive intention of a completed gift inter vivos.

Reeves v Lyon, 224-659; 277 NW 749

Confidential or fiduciary relationship—presumption of fraud. A gift of a deed to one who stands in a confidential or fiduciary relationship to the donor raises a presumption of constructive fraud, and the burden is on the donee to make such showing of fact as to overcome the presumption.

Jensen v Phippen, 225-302; 280 NW 528

Deed—confidential relationship established—grantee's failure to sustain burden. In an action to set aside a deed from a deceased mother, 83 years of age and ill at the time of execution of the deed, to her daughter, who had handled her mother's business for a number of years, who had the deed prepared by an attorney, and who was the only person present when mother signed the deed, evidence held to establish that there was a confidential relationship between mother and daughter, thus placing burden of proof on daughter to show that deed was not procured by fraud, and, such burden not having been met, the deed could not be sustained.

Tiernan v Brulport, 227-1152; 290 NW 53

Delivery — evidence — sufficiency. Evidence that a father and mother mutually intended at one time to make a gift of land to their daughter; that a deed conveying the land to the daughter, subject to a life estate in grantors, was actually executed by the father and mother but was never manually delivered; that the daughter paid rent to the parents during their lifetime; that the father who held the legal title often declared that the land belonged to the daughter; and that the daughter made substantial and permanent improvements on the land at her own expense, may be ample to establish an actual delivery of the subject matter of the gift—the land.

Rapp v Losee, 215-356; 245 NW 317

Essential elements—evidence. The subject of a gift inter vivos must be certain; and there must be the mutual consent and concurrent will of both parties followed by delivery of the specific subject-matter. Evidence held insufficient to establish these essential requirements.

Woodward v Woodward, 222-145; 268 NW 540

Fiduciary relation—evidence. A fiduciary relationship is not established or even presumed from the naked fact that the parties are closely related by blood, or live and reside in the same house.

Humphrey v Norwood, 213-912; 240 NW 232

General denial—evidence of gift admitted. Evidence to establish a gift is admissible under a general denial.

Wilson v Findley, 223-1281; 275 NW 47

Gifts inter vivos—joint (?) bank account—evidence. Where during her lifetime decedent permitted defendant, for years her confidential advisor, to sign with her the bank's signature card applying to decedent's personal bank account, whereupon the bank added defendant's name thereto as a joint bank account, but decedent kept her passbook and an interest in and control over the account, then under these circumstances, defendant, whose custody of the account during decedent's lifetime was never inconsistent with decedent's sole ownership, cannot after her death claim a gift of the deposit on the sole basis of the signature card.

Taylor v Grimes, 223-821; 273 NW 898

Inter vivos—evidence—ownership and presumption. The fact that an alleged donee was, for a time prior to the death of the alleged donor, in possession of bonds (the subject of the alleged gift) does not in and of itself, establish ownership in the alleged donee, or raise a presumption of gift to said alleged donee, the record unquestionably showing that the alleged donor died in the full ownership of said bonds unless he had made a gift thereof.

Malcor v Johnson, 223-644; 273 NW 145

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Mother to son gift for mother's life support. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Note as future gift—presumption—burden. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney's Estate, 223-1076; 274 NW 5

Oral gift—possession followed by improvements. Evidence that the donee in an alleged oral gift of land took possession of the land, but that said possession was not necessarily referable solely to said alleged gift, together with evidence of the making of temporary and inconsequential improvements on the land, is wholly insufficient to take the transaction out of the statute of frauds.

Nugent v Dittel, 213-671; 239 NW 559

Setting aside deed—lack of assent. In action to set aside deed, evidence held insufficient to support contention that deed was executed through fraud, duress, undue influence, or lack of mental capacity.

Ryan v Church, (NOR); 216 NW 713

Trusts — creation — evidence — sufficiency. Evidence reviewed, and held insufficient to show that a deed was other than what it purported to be, to wit, a voluntary, good-faith gift to grantor's sister, of the land in question, and insufficient to establish any constructive trust therein in favor of other relatives of the grantor.

Redden v Murray, 213-519; 239 NW 129

Undue influence—rule—destroying free will. Undue influence necessary to set aside a conveyance must be enough to destroy the free

II GIFTS INTER VIVOS—concluded

agency of the grantor. Evidence reviewed and found insufficient to establish undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Verdict sustaining part of gift as establishing mental competency. In a replevin action by executor to recover property held under claim of gift inter vivos from decedent, a jury verdict validating part of the gift made on a later date, from which part of the verdict no appeal is taken, also establishes the donor's mental competency to consummate that part of the gift made on an earlier date.

Wilson v Findley, 223-1281; 275 NW 47

Bonds—nonexclusive possession — unallowable directed verdict. An alleged donee of bonds may not, as defendant in replevin proceedings, have a verdict directed in her favor, (1) on the strength of her claimed exclusive possession, or (2) on the strength of lack of evidence of ownership in the alleged donor, when the jury might properly find that the possession of the alleged donee was not exclusive, and when the alleged donor was manifestly the owner of the bonds if the jury found there had been no gift.

Malcor v Johnson, 223-644; 273 NW 145

III GIFTS CAUSA MORTIS

Essential elements. A gift causa mortis is a gift of personal property, intentionally made, even orally, by the mentally competent owner of said property, in expectation of his or her imminent death from an impending disorder or peril (tho not necessarily so imminent as to exclude the opportunity to execute a will), and made and delivered by the donor to the donee on the essential condition that, if the gift be not in the meantime revoked, the property shall belong to the donee in case the donor dies, as anticipated, of the disorder or peril, leaving said donee surviving.

Flint v Varney, 220-1241; 264 NW 277

Bank deposit—delivery. The act of a donor in making a bank deposit in the joint name of himself and a donee, and in retaining no authority to withdraw the deposit except on the signature of himself and the donee, with unqualified directions to the bank to pay the deposit to the donee on the death of the donor, constitutes full delivery.

In re Hanson, 205-766; 218 NW 308

Burden of proof. The burden to establish a gift causa mortis rests on the donee claiming thereunder. Evidence reviewed, and held that said burden had been successfully met.

Flint v Varney, 220-1241; 264 NW 277

Evidence—competency. Delivery of a gift causa mortis may be established by circumstantial evidence; likewise the gift itself may be established by the declarations of the donor tho they be not res gestae.

Flint v Varney, 220-1241; 264 NW 277

Delivery of deed as gift. The unconditional delivery, as a gift, of a duly executed and acknowledged deed of conveyance, by the compos mentis grantor therein, and without fraud, to a third party with explicit direction, both orally and in writing, to said party, to hold said deed for the grantee, and to record the same immediately upon the death of the grantor, constitutes an irrevocable delivery to said grantee; and a priori, when, in addition to the foregoing, it affirmatively appears from the circumstances of the transaction that the grantor was intending to pass title to the grantee.

Keating v Augustine, 213-1336; 241 NW 429

Delivery to third person. The act of a donor in placing the subject-matter of a gift in the unqualified possession of a third party for the benefit of the donee constitutes a complete delivery.

In re Hanson, 205-766; 218 NW 308

CHAPTER 446

CEMETERIES AND MANAGEMENT THEREOF

10198 Trustee appointed—trust funds.

"Donations" defined. Funds received by a court-appointed trustee "for the perpetual care" of a named cemetery are "donations" within the meaning of the statute requiring a bond securing such funds.

Belmond Assn. v Luick, 217-805; 253 NW 521

Testamentary trust. A testamentary trust will be sustained when the intent of testator is evident, even tho the bequest runs to an unincorporated entity.

Meeker v Lawrence, 203-409; 212 NW 688

10202 Loans—security.

Directors of bank—trust funds—personal liability. The directors of a bank who personally know of, and connive at, the investment of the funds of a cemetery association (in the hands of the president of said bank as trustee) in the time certificates of deposit of the bank —in violation of this section—are personally liable, ex maleficio, for the loss of said funds consequent on the insolvency of said bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

10204 Bond—approval—oath.

Construction and operation—intent of parties controls. A bond given to secure cemetery funds in the hands of a trustee will be construed in accordance with the undoubted intentions of the parties thereto. Held, bond not given to secure funds received during the one year term of the bond only, but to secure the entire fund as it might exist at any time during said term.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Equitable estoppel — pleading one's own wrong. In an action on a bond given by a bank as principal and by its directors as sureties to secure a trust fund which was in the possession of the bank, the defensive plea that plaintiff was estopped from prosecuting the action by his laches in so doing, is not available to the sureties when they at all times, before the bank became insolvent, had unhampered opportunity to compel compliance with the bond, and thus protect themselves, but, on the contrary, manifestly connived at a continuous breach of the bond in order to conserve the interest of the bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Evidence required to reform bond. To justify the reformation of a written instrument, the evidence must be clear, satisfactory and convincing and free from reasonable doubt. So held in an action to reform the term of a bond, the evidence being held insufficient.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Unauthorized deposit of trust funds. A court-appointed trustee of cemetery funds and the sureties on his bond are liable for said funds deposited, without authority of court, in a bank of which both the trustees and the sureties were officers, and lost because of the insolvency of said bank.

Belmond Assn. v Luick, 217-805; 253 NW 521

10213.1 Settlement of estates—maintenance fund.

Perpetual care of burial lot. A bequest for the perpetual maintenance of testator's cemetery lot is not violative of the statute relating to perpetuities.

Hipp v Hibbs, 215-253; 245 NW 247

CHAPTER 448

ISLANDS AND ABANDONED RIVER CHANNELS

Atty. Gen. Opinion. See '38 AG Op 352

10221 Sale authorized.

Atty. Gen. Opinion. See '38 AG Op 352

Islands—accretion. An island in a navigable stream cannot be deemed an accretion to another island when the surface of said islands at the point where they connect is not visible even at ordinary stage of the water, let alone being visible when the water is at its high watermark.

Meeker v Kautz, 213-370; 239 NW 27

Sudden shifting of boundary river—effect. Principle applied that the sudden shiftings of boundary rivers do not change state boundary lines.

Dermit v School Dist., 220-344; 261 NW 636

10227 Appraisement.

Atty. Gen. Opinion. See '30 AG Op 364

10230 Sale—how effected—rights of occupants.

Atty. Gen. Opinions. See '30 AG Op 364; '38 AG Op 352

10231 Lease authorized—lands re-advertised—sale.

Atty. Gen. Opinion. See '30 AG Op 364

10238 Good-faith possession—preference.

Discussion. See 8 ILB 100—Accretion as affected by surveyed and determinable boundaries

Atty. Gen. Opinion. See '38 AG Op 352

Accretions — construction of decree quieting title. A decree quieting title to accretions, and based on adverse possession, will be deemed to quiet title up to the high watermark of the river in question, even tho when literally and hypercritically construed it seemingly quiets title only to the high watermark as it existed when the action to quiet title was commenced. So held where, pending the action, trial and entry of decree, the river continued to recede.

Harrington v Foster, 220-1066; 264 NW 51

Accretion—apportionment—estoppel. Riparian landowners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop themselves, in an action to quiet title, from asserting that land did not pass under their deed because it was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Accretion passes by ordinary deed. Accretion to land passes by a deed of the upland owner unless expressly excepted.

Haynie v May, 217-1233; 252 NW 749

Accretion—original land washed away—new land in same place. Where original lands in place are washed away by river erosion and at a later time redeposited, then such deposits are accretions becoming a part of the land to which at such later time they accrete.

Sheldon v Chambers, 225-716; 281 NW 438

Lands under water—continuing ownership of land in place. The mere fact that land may disappear for a time, because river water enters a slough and spreads over it, will not destroy the ownership thereto as lands in place after the water recedes.

Sheldon v Chambers, 225-716; 281 NW 438

Estoppel—disclaimer filed — foreclosure of adjoining property in prior action. In an action foreclosing a mortgage and also asking for the reformation of the description of land in said mortgage in which one of the defendants by way of answer denies that plaintiff is entitled to reformation of description because of confusion as to the property covered by said mortgage as a result of a shifting river channel between the mortgaged land and the defendant's adjoining land, and alleging the plaintiff is estopped from asserting any interest in such adjoining land on account of a disclaimer filed by plaintiff's predecessor in a prior foreclosure action involving said adjoining land, held that such estoppel and disclaimer in the present action is ineffective in the absence of any evidence of any confusion or encroachment upon the adjoining land.

State Central Bank v Mapel, 226-1328; 286 NW 517

Ownership of lands—accretions. The owner of land along the bank of a navigable stream is entitled to accretions to the land even tho such accretions extend over the exact spot where another person formerly owned land eroded by the river, because the complete erosion of land works a complete destruction of the title and of all governmental descriptions pertaining thereto.

Bone v May, 208-1094; 225 NW 367

Riparian rights—accretions—formation of sand bars. Land by accretions is not established by showing that sand bars formed in the bed of the stream beyond high watermark and became visible as the waters of the river receded.

McFerrin v Wiltse, 210-627; 231 NW 438

Riparian rights—islands—accretion. An island in a navigable stream cannot be deemed an accretion to another island when the surface of said islands at the point where they connect is not visible even at ordinary stage of the water, let alone being visible when the water is at its high watermark.

Meeker v Kautz, 213-370; 239 NW 27

Riparian rights—when not withheld by deed. A conveyance of lands by a riparian owner, especially when the lands are largely accretions, will not be deemed to withhold conveyance of riparian rights simply because the land is described by metes and bounds.

Harrington v Foster, 220-1066; 264 NW 51

10241 Sale or lease authorized.

Atty. Gen. Opinion. See '38 AG Op 352

10242 Survey—appraisement—sale.

Atty. Gen. Opinion. See '38 AG Op 352

10245 Patent or lease.

Atty. Gen. Opinion. See '38 AG Op 352

CHAPTER 449

ACQUISITION OF TITLE BY STATE OR MUNICIPAL CORPORATION

Atty. Gen. Opinions. See '38 AG Op 111, 149, 314

10246 Right to receive conveyance.

Atty. Gen. Opinions. See '28 AG Op 348; '30 AG Op 224; '38 AG Op 149

10247 Bidding in at execution sale.

Atty. Gen. Opinion. See '38 AG Op 111

10249 Costs and expenses.

Atty. Gen. Opinion. See '28 AG Op 348

10260.1 Management.

Atty. Gen. Opinions. See '36 AG Op 399; '38 AG Op 149, 314, 328, 354; AG Op Nov. 8, '39

10260.3 Execution of deeds and leases.

Sale—contract without official action. Proof that a writing purporting to be a contract for the sale by the board of supervisors of county-owned land, signed by the purported purchaser and by one member of the board as "acting chairman", together with proof that the board never took any official action in regard to the said matter, is quite insufficient to show a valid and enforceable contract.

Smith v Standard Oil, 218-709; 255 NW 674

10260.4 Title under tax deed—sale—apportionment of proceeds.

Atty. Gen. Opinions. See '38 AG Op 2, 36, 153, 213, 328, 354, 396, 542, 622, 658, 733; AG Op May 3, '39, Nov. 8, '39

TITLE XXVI

CERTAIN SPECIAL LIENS

CHAPTER 450

LANDLORD'S LIEN

10261 Lien created — property subjected.

Atty. Gen. Opinions. See '38 AG Op 76; AG Op Aug. 23, '39

ANALYSIS

I CREATION AND EXISTENCE OF LIEN
II RENT AND OTHER INDEBTEDNESS FOR WHICH LIEN MAY BE CLAIMED
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Leases in general. See under §10159 (III)
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I CREATION AND EXISTENCE OF LIEN

"Lien" defined. A "lien" is a right of property, and not mere matter of procedure.

Britton v Western Iowa Co., 9 F 2d, 488

Landlord's lien—vested right prior to Chandler Act. Under Iowa statutes and the bankruptcy act of 1898, rent accruing within year preceding lessee's bankruptcy was secured by a valid statutory lien and was entitled to priority in bankruptcy proceeding, such a lien being a vested property right. So the provision of Chandler Act which became effective two months before filing of petition in bankruptcy, restricting priority for rent to the rent accruing within three months before bankruptcy, would not be allowed to destroy priority of rent claim for preceding 12 months under the Iowa statute.

Ginsberg v Lindel, 107 F 2d, 721
Miles Corp. v Lindel, 107 F 2d, 729

The relation—insufficient showing. Contract between the vendor and the purchaser of land in modification of the original contract of purchase reviewed, and held not to create the relation of landlord and tenant, notwithstanding the fact that the contract referred to the income from the land as "rent".

Thielen v Elev. Co., 203-100; 212 NW 352

Leases—execution by husband only—liability of wife. A wife is not liable on a written lease signed by the husband alone as lessee, tho the leased premises be occupied by the husband and wife as a family residence.

Whether the wife be liable for the rent as a family expense under §10459, Code, '35, is a quite different question—a question which cannot be deemed before the court in landlord's attachment proceedings manifestly based solely on the lease signed by the husband alone.

Rogers v Davis, 223-373; 272 NW 539

No lien prior to possession given. A lease which definitely provides that the term of the lease shall begin with the execution of the lease, but which provides that the landlord shall not give possession until a named date after the execution of the lease, gives the landlord no lien for rent on property which the tenant takes and keeps upon the property after the execution of the lease, but which he removes before the day for possession under the lease arrives, it appearing that such short-time possession by the tenant was for a purpose foreign to the lease.

Federal Bk. v Wylie, 207-816; 221 NW 831

Rent and advances—liability of assignee under his written acceptance. One who, in writing, accepts an assignment of a lease, with the consent of the lessor, thereby contracts to carry out the terms of the lease irrespective of any later assignment of the lease by the said assignee, and it is no defense that the lessor, the property being vacant, obtains the aid of a receiver.

Pickler v Mershon, 212-447; 236 NW 382

II RENT AND OTHER INDEBTEDNESS FOR WHICH LIEN MAY BE CLAIMED

General equitable relief prayed. In equity action seeking the appointment of a receiver, defendant's contention, that a receiver could not be appointed because no main cause of action was stated, was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal in technicalities, but rather it seeks to ascertain the true intent of the pleading filed."

Wagner v Securities Co., 226-568; 284 NW 461.

Tenantable premises. In an action on a lease which provided for the payment of rent

except when the premises are "untenantable by reason of fire", the issue whether certain painting, papering, and decorating were necessary, to render the premises tenantable after a fire, is a jury question, under conflicting testimony.

Benson v Bake-Rite Co., 207-410; 221 NW 464

III PROPERTY SUBJECT TO LIEN

Burden of proof to show lien. A landlord seeking to enforce a landlord's lien on pigs must show that they were kept on the leased premises after they became six months old.

Sparks v Flesher, 217-1086; 252 NW 529

Crops grown by subtenant. A landlord has a lien for his rent on crops which have been grown upon the leased premises by a subtenant between whom and the landlord no privity of contract exists; and a sale of such crops by the subtenant will not defeat the lien.

Hanson v Carl, 201-521; 207 NW 579

Purchaser of nonexempt property. Pigs farrowed on leased premises but removed from said premises before they were six months old, and not thereafter returned to said premises, are not subject to the landlord's lien for rent.

Sparks v Flesher, 217-1086; 252 NW 529

Unincorporated association—property liable for rent. Where a provision of a lease executed by members of a voluntary unincorporated association mortgaged the property of the society as security for the rent, a further provision exempting the individual members from liability did not exempt the assets of the association, as the individual members had only a severable interest in the association's property which terminated with the membership.

Lamm v Stoen, 226-622; 284 NW 465

IV PRIORITIES

(a) PRIORITY BETWEEN LANDLORD'S LIEN AND LIEN OF MORTGAGE

Discussion. See 21 ILR 109—Relative priority

Lien—failure to record deed. In a controversy between a landlord and a chattel mortgagee over the priority of their liens, it is quite immaterial that the landlord's title deed is not of record.

Corydon Bank v Scott, 217-1227; 252 NW 536

Lien — increase of animals — priority over mortgagee. The lien of a chattel mortgage (prior in time to a lease) on animals and on the increase thereof is superior to the landlord's lien as to all increase born prior to the actual execution of the lease, and inferior to the landlord's lien on all increase born subsequent to the actual execution of the lease and prior to its termination. An agreement between the landlord and tenant that the lease shall be effective from a date prior to its actual execution is not binding on the mortgagee.

Wunder v Schram, 217-920; 251 NW 762

Lien—priority on increase of mortgaged stock. A landlord's lien on the increase of stock after the stock is taken upon the leased premises is superior to the lien of a chattel mortgage executed on the stock and on its prospective increase, and prior to the commencement of the rent term.

Corydon Bank v Scott, 217-1227; 252 NW 536

Priority of mortgage over rent. A recorded chattel mortgage on the property of a tenant used on the demised premises under a lease for years, attains priority, immediately upon the termination of the lease, over the landlord's claim for future rent accruing under a succeeding tenancy at will of the same premises; likewise a recorded chattel mortgage executed by a tenant at will, on property used on the leased premises, attains priority immediately upon the expiration of 30 days after the execution and recording of the mortgage, over the landlord's claim for future accruing rent.

Nickle v Mann, 211-906; 232 NW 722

Mortgage on crop-share rent superior to garnishment of tenant. The lien of a chattel mortgage on a landlord's share of crops reserved as rent, but in the possession of the tenant, is, as to matured crops actually set aside to the landlord or otherwise actually determined as belonging to the landlord, superior to a subsequent garnishment of the tenant by a judgment creditor of the landlord.

Pierre v Pierre, 210-1304; 232 NW 633

Sale of crops—landlord's and purchaser's rights. A tenant's sale of crops will not divest a landlord of his statutory lien, and the landlord may maintain a conversion action against the purchaser who, if he has disposed of grain, is liable for damages unless he shows a waiver or estoppel of such lien which he must prove as an affirmative defense. So, in an equity action to enforce landlord's lien on grain sold to elevator by tenant, wherein evidence shows the manager of the elevator informed landlord's agent by telephone that tenant was selling grain, and landlord's agent replied that they had a man in the field looking after corn, the trial court was justified, under such circumstances, in holding that landlord rather than elevator company rendered the wrongful act of tenant possible, and therefore was the one to suffer from such wrongful act.

Sensibar v Hughett, 227-591; 288 NW 674

(b) PRIORITY BETWEEN LANDLORD'S LIEN AND OTHER CLAIMS

Enlargement against third party. A tenant may not, against a third party, enlarge the landlord's lien provided by statute.

O'Donell v Davis, 201-214; 205 NW 347

Impressing trust for rent on proceeds of property sold. Where property subject in part to a lien for rent was sold by the tenant-owner for the benefit of the landlord, and at public sale, in order to save court costs, a depository of the proceeds who was also a creditor of the tenant's, and who had full knowledge of the purpose of the sale, may not complain that the court impressed a trust on such proceeds to the amount of the lien which the landlord had on the property.

Federal Bk. v Wylie, 207-816; 221 NW 831
Andrew v Bank, 208-1184; 225 NW 957

Mortgage on crop-share rent superior to garnishment of tenant. The lien of a chattel mortgage on a landlord's share of crops reserved as rent, but in the possession of the tenant, is, as to matured crops actually set aside to the landlord, or otherwise actually determined as belonging to the landlord, superior to a subsequent garnishment of the tenant by the landlord's judgment creditor.

Pierre v Pierre, 210-1304; 232 NW 633

"Rent"—taxes included—notice to creditors—recording. The term "rent", within statutes giving a landlord a lien for rent, cannot be construed to include taxes in absence of a clear intention of parties to that effect expressed in lease, and so a lessor was held not entitled to preferential lien against assets of bankrupt assignee of lease for unpaid taxes, interest and penalties, on ground that chattel mortgage clause of lease, which was recorded in deed and chattel mortgage records, was sufficient to protect lessor's lien, the assignment of lease being recorded only in deed record and not in chattel mortgage records. Such filing did not give notice to creditors, as required by recording statutes.

Lamoine Mott Estate v Neiman, 77 F 2d, 744

Right to rents after sheriff's deed. Upon the execution and delivery of a deed by the sheriff in real estate mortgage foreclosure, the grantee becomes vested eo instanti with the right to future-maturing rents—no contract or stipulation to the contrary appearing—even tho such rents accrued in part during the period of redemption and in part afterward. In other words, the right of the grantee to such rents may be superior to that of the assignee of the lease and of the rent notes executed thereunder.

First JSL Bank v Ingels, 217-705; 251 NW 630

Unrecorded contract lien. An unrecorded lease giving the landlord a lien on exempt property kept on the premises is not effective against a purchaser of the exempt property without notice of the written lease.

Sparks v Flesher, 217-1086; 252 NW 529

Landlord's lien—vested right prior to Chandler Act. Under Iowa statutes and the bankruptcy act of 1898, rent accruing within year preceding lessee's bankruptcy was secured by a valid statutory lien and was entitled to priority in bankruptcy proceeding, such a lien being a vested property right. So the provision of Chandler Act which became effective two months before filing of petition in bankruptcy, restricting priority for rent to the rent accruing within three months before bankruptcy, would not be allowed to destroy priority of rent claim for preceding 12 months under the Iowa statute.

Ginsberg v Lindel, 107 F 2d, 721
Miles Corp. v Lindel, 107 F 2d, 729

V REMOVAL OR TRANSFER OF PROPERTY SUBJECT TO LIEN

(a) LIABILITIES OF PURCHASERS

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a sharecropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

(b) ACTIONS

Contract lien—enforcement. An action to establish and enforce a contract lien for rent is properly brought in equity, and is not transferable to law, because the answer presents law issues. Held that a contract lien for rent is validly created by a lease provision that the landlord should have, not only the statutory lien for rent, but also a lien upon all property of the tenant used or situated on the leased premises whether exempt from execution or not.

Beh v Tilk, 222-729; 269 NW 751

"Destruction" of building. In an action on a lease which provided that it should be void in case the building was "destroyed" by fire, evidence reviewed, and held not to show a destruction of the building within the meaning of the lease.

Benson v Bake-Rite Co., 207-410; 221 NW 464

Title of landlord. In an action by a landlord to recover damages consequent on the conversion by defendant of property on which the landlord had a lien for rent, the question of the ownership of the land by the landlord is wholly irrelevant and immaterial.

Mau v Rice Bros., 216-864; 249 NW 206

VI ESTOPPEL AND WAIVER OF LIEN

Liability of purchaser. A landlord may successfully maintain an action for conversion against the purchaser of property on which he has a lien for rent unless such purchaser avoids the action by a plea of waiver or estoppel. Especially is it erroneous to instruct the jury that the landlord must prove that he had no "knowledge" of the sale.

Wilson v Fortune, 209-810; 229 NW 190

Sale of crops—landlord's and purchaser's rights. A tenant's sale of crops will not divest a landlord of his statutory lien, and the landlord may maintain a conversion action against the purchaser who, if he has disposed of grain, is liable for damages unless he shows a waiver or estoppel of such lien which he must prove as an affirmative defense. So, in an equity action to enforce landlord's lien on grain sold to elevator by tenant, wherein evidence shows the manager of the elevator informed landlord's agent by telephone that tenant was selling grain, and landlord's agent replied that they had a man in the field looking after corn, the trial court was justified, under such circumstances, in holding that landlord rather than elevator company rendered the wrongful act of tenant possible, and therefore was the one to suffer from such wrongful act.

Sensibar v Hughett, 227-591; 288 NW 674

Statute of limitation—estoppel to plead—delay induced by debtor. The fact that a debtor repeatedly requests time in order to investigate the claim made against him before paying it, and the fact that the creditor repeatedly acquiesces in such delay tho under no obligation so to do, will not estop the debtor, when sued, from pleading the statute of limitation which in the meantime has fully run because of said delays.

Bundy v Grinnell Co., 215-674; 244 NW 841

VII RENT IN GENERAL

Discussion. See 13 ILR 328—Liability when premises untenantable; 18 ILR 251—Mortgagee's right during redemption

Payment of rent not essential element. Payment of rent is not an essential element to the creation of the relation of landlord and tenant.

Reynolds v Oil Co., 227-163; 287 NW 823

Abandonment—duty of landlord. A landlord is under duty, in case the tenant abandons the premises, to use reasonable diligence to re-lease the premises, in order to avoid unnecessary damages.

Benson v Bake-Rite Co., 207-410; 221 NW 464

Acceleration of maturity of rent — construction. Under a farm lease for a stated number of years at a stated yearly rental payable semiannually, a provision that "a failure to pay any portion of the rent as the same becomes due shall mature the whole amount of rent", must, in case of default, be construed as having reference solely to the rent of each rental year as it falls due. In other words a default during the first rental year does not mature the rent for all the remaining years of the lease.

Hoefer v Fortmann, 219-746; 259 NW 494

Action on separate installments. The bringing of separate actions on separate installments of rent as they fall due under a lease does not constitute a splitting of a single cause of action, because the maturing of each installment matures a new cause of action.

Hoefer v Fortmann, 219-746; 259 NW 494

Allowable failure to collect rents. A widow who is entitled to receive during life from the executor the annual rents accruing on lands belonging to residuary devisees may allow such devisee to occupy the land free of rent, and objections to the executor's final report will not lie because of such action.

In re Murphy, 209-679; 228 NW 658

Assignee—liability to discharge rent obligations. The written assignee of a lease of real estate who orally accepts the assignment, or effects such acceptance by his conduct, with the approval or acquiescence of the lessor, thereby binds himself to discharge the rent obligations; especially is this true when the express provisions of the lease impose such obligation.

Central Bank v Herrick, 214-379; 240 NW 242

Directed verdict—payment of rent — sufficiency of evidence. Direction of verdict in action to recover on rent note from tenant was erroneous when there was sufficient evidence of payment by tenant in turning over proceeds of crop to warrant submission of the case to jury.

McCann v McCann, (NOR); 226 NW 922

Implied obligation. Proof that the holder of a first mortgage on real estate was himself in occupancy of the premises, and continued such occupancy after the issuance of a sheriff's deed under a junior lien, generates the presumption that such occupancy was with the assent of the said occupant and the said deed holder, with the consequent obligation of the occupant to pay reasonable rental to said deed holder until such time as a deed might be executed under foreclosure of the first mortgage.

Norman v Dougan, 201-923; 208 NW 366

Leases—readjustment of rent—construction. A long-time lease which provides (1) that the rental shall be computed at a named percentage on the value of the land (subject to a minimum rental); (2) that, for the first five-year period, a specified rental shall be

paid (which was said percentage on the agreed and estimated value); (3) that the rental for the balance of the term shall, at the close of each five-year period, be subject to revision, "based upon any increase in the estimated value of the land"; and (4) that such valuation shall be made by certain valuers or appraisers, requires the valuers, in making such valuation, to treat the last preceding value as a verity. In other words, the valuers may not adjudge that the preceding valuers were mistaken in their judgment. Phrased otherwise, the valuers must confine themselves to a determination of the simple question whether the value has increased or decreased since the last preceding valuation, and add such increase to, or subtract such decrease from, the last preceding valuation.

Minot v Pelletier Co., 207-505; 223 NW 182

Mortgage of landlord's share of crops to be grown. A chattel mortgage executed by a landlord on all grain, feed, and hay "to be grown" on definitely and accurately described lands which were then under lease for the ensuing year, is a valid incumbrance on the landlord's share of the crops reserved as rent under said lease.

Pierre v Pierre, 210-1304; 232 NW 633

Nonimplied promise to pay rent. No implied promise by a parent to pay rent is shown by proof that the parent bought the property, and caused it to be conveyed to his minor child, and immediately erected substantial improvements on the property and continued to occupy the property as a homestead, together with the grantee, for a great number of years, without any claim for rent being made during the lifetime of the parties.

Hodgson v Keppel, 214-408; 238 NW 439

Obligation of assignee of lease to pay rent. The assignee of a lease (which simply binds the "lessee, his heirs, and assigns" to pay the rent) is obligated to pay rent because of privity of estate, and when said privity of estate is terminated by a valid reassignment of the lease the obligation of the assignee to pay rent necessarily terminates unless said assignee has, expressly or impliedly, otherwise obligated himself. And the fact that the lessor accepts the rent from the assignee during the assignee's occupancy is not sufficient to show that the assignee has assumed the obligation to pay rent after reassignment.

Seeburger v Cohen, 215-1088; 247 NW 292; 89 ALR 427

Purchase by tenant of undivided interest—effect. A lessee who exercises his option under the lease to buy an undivided half of the leased premises does not cease to be the tenant of the lessor as to the undivided interest retained by the lessor, and after the purchase, such tenant remains liable under the lease to the lessor for one-half of the originally reserved rent.

Schick v Realty Co., 200-997; 205 NW 782

Release of tenant. Knowledge on the part of a landlord that his tenant has assigned his lease, and the subsequent receipt by the landlord of rent payments from the assignee, is not sufficient, in and of itself, to show that the landlord has released the original tenant.

Lazerus v Shapiro, 211-376; 233 NW 723

Rent—constructive eviction. The constructive eviction of a tenant does not absolve him from the payment of the agreed rent unless he surrenders the premises.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Rent incident to land—passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Rent—when due in absence of agreement. In the absence of a contrary agreement, rentals of realty are not due prior to the customary time of payment.

Wilson v Wilson, 220-878; 263 NW 830

"Rent"—taxes included—notice to creditors—recording. The term "rent", within statutes giving a landlord a lien for rent, cannot be construed to include taxes in absence of a clear intention of parties to that effect expressed in lease, and so a lessor was held not entitled to preferential lien against assets of bankrupt assignee of lease for unpaid taxes, interest, and penalties, on ground that chattel mortgage clause of lease, which was recorded in deed and chattel mortgage records, was sufficient to protect lessor's lien, the assignment of lease being recorded only in deed record and not in chattel mortgage records. Such filing did not give notice to creditors, as required by recording statutes.

Lamoine Mott Estate v Neiman, 77 F 2d, 744

Rescission of contract—status quo—rents—permanent improvements. A decree confirmatory of a rescission of a real estate contract of purchase should, inter alia, charge the rescinding purchaser with the fair and reasonable rental of the property during the time he was in possession, and credit said purchaser with the reasonable value of permanent improvements placed on the property.

Kunde v O'Brian, 214-921; 243 NW 594

Right to rents prior to sheriff's deed—exception to general rule. Ordinarily, the owner of mortgaged real estate is entitled to the rents until the issuance of the sheriff's deed on foreclosure sale; but where, substantially at the close of the redemption period, litigation arose over the right to redeem, and where it

was agreed that the rights of the parties should remain in statu quo without the issuance of a deed until the litigation was determined, and where the court later decreed the ownership of the property as of the date when redemption expired, held that the rents accruing subsequent to the expiration of the period of redemption belonged to the parties so decreed to be the owners, even tho the sheriff's deed was executed long subsequent to said expiration.

Peoples Bank v McCarthy, 209-1283; 228 NW 7

10262 Duration of lien.

Lien—automatic termination. A landlord's lien automatically expires six months after the lease terminates.

Kerr v Horn, 211-1093; 232 NW 494

Computation of six months period. In computing the six months during which a landlord's lien survives the expiration of the lease, the count must commence with the first day following the said expiration. The statutory rule to exclude the first day and to include the last day has no application.

Welch v Welch, 212-1245; 238 NW 81

Barred claim as counterclaim. The statutory right under the general statute of limitations to plead as a counterclaim a barred claim, does not extend to a claim barred under a limitation contained in this chapter.

Miller Bk. v Collis, 211-859; 234 NW 550

Delay induced by debtor. The fact that a debtor repeatedly requests time in order to investigate the claim made against him before paying it, and the fact that the creditor repeatedly acquiesces in such delay tho under no obligation so to do, will not estop the debtor, when sued, from pleading the statute of limitation which in the meantime has fully run because of said delays.

Bundy v Canning Co., 215-674; 244 NW 841

Impressing trust on proceeds of lienable property. An action to impress a trust on the proceeds of property on which a landlord had a lien, against a depository who had full knowledge that the sale had been had for the benefit of the landlord, is not barred immediately after the lapse of six months from the termination of the lease.

Andrew v Bank, 208-1184; 225 NW 957

Insufficient "commencement" of action. In landlord attachment, the filing of a petition only, and the issuance of the writ prior to the expiration of six months after the termination of the lease, and the levying of the writ after the expiration of said six months, do not constitute the "commencement" of an action in such sense as will preserve the lien against a general creditor who levies after the expiration of said six months.

O'Donell v Davis, 201-214; 205 NW 347

Landlord's lien—vested right prior to Chandler Act. Under Iowa statutes and the bankruptcy act of 1898, rent accruing within year preceding lessee's bankruptcy was secured by a valid statutory lien and was entitled to priority in bankruptcy proceeding, such a lien being a vested property right. So the provision of Chandler Act which became effective two months before filing of petition in bankruptcy, restricting priority for rent to the rent accruing within three months before bankruptcy, would not be allowed to destroy priority of rent claim for preceding 12 months under the Iowa statute.

Ginsberg v Lindel, 107 F 2d, 721
Miles Corp. v Lindel, 107 F 2d, 729

Limitation on landlord's lien—nonapplicability to rents and profits pledge. This section does not apply to a contract lien against a mortgagor-landlord and in favor of a mortgagee under a "rents and profits" pledge in a real estate mortgage.

Sutton v Schnack, 224-251; 275 NW 870

Loss of lien as to one who has converted crops. A landlord's lien automatically terminates six months after the termination of the lease; likewise, the right of the landlord to proceed after said six months in any form against a third party who has converted to his own use the crops grown on the leased premises.

Miller Bk. v Collis, 211-859; 234 NW 550

Three-year lease—period of lien. The term of a 3-year lease (March 1, 1934, to March 1, 1937) cannot, as to the 1935 crops, be said to expire on March 1, 1936, under the provisions of this section, giving the landlord a lien on the crops for six months after "the expiration of the term".

Sutton v Schnack, 224-251; 275 NW 870

10263 Limitation on lien in case of sale under judicial process.

Refusal of future rent. A landlord who buys the property of the tenant under a sale by an assignee for the benefit of creditors and immediately resumes possession of said property on his own premises and continues the business formerly carried on by the tenant is properly refused any allowance of future rent under the interrupted lease.

In re Cutler & Horgen, 204-739; 212 NW 573; 54 ALR 527

"Lien" defined. A "lien" is a right of property, and not mere matter of procedure.

Britton v Western Iowa Co., 9 F 2d, 488

Landlord's lien—vested right prior to Chandler Act. Under Iowa statutes and the bankruptcy act of 1898, rent accruing within year preceding lessee's bankruptcy was secured by a valid statutory lien and was entitled to priority in bankruptcy proceeding, such a lien being a vested property right. So the provision of Chandler Act which became effective two months before filing of petition in bankruptcy, restricting priority for rent to the rent accruing within three months before bankruptcy, would not be allowed to destroy priority of rent claim for preceding 12 months under the Iowa statute.

Ginsberg v Lindel, 107 F 2d, 721
Miles Corp. v Lindel, 107 F 2d, 729

10264 Enforcement — proceeding by attachment.

Atty. Gen. Opinion. See '32 AG Op 270

Contract for lien — enforcement — proper forum. An action to establish and enforce a contract lien for rent is properly brought in equity, and is not transferable to law, because the answer presents law issues. Held that a contract lien for rent is validly created by a lease provision that the landlord should have, not only the statutory lien for rent, but also a lien upon all property of the tenant used or situated on the leased premises whether exempt from execution or not.

Beh v Tilk, 222-729; 269 NW 751

Conversion by commission merchant. A defendant may not defend his conversion of property on which a plaintiff-landlord had a lien for rent on the plea that he received the property as agent for the tenant and sold the property on commission.

Mau v Rice Bros., 216-864; 249 NW 206

Conversion—chattel mortgage—materiality. In an action by a landlord to recover damages consequent on the conversion by defendant of property on which the landlord had a lien for rent, the rejection of defendant's offer in evidence of a chattel mortgage on the property is proper (1) when the record demonstrated that the landlord's lien was prior to the lien of the said mortgage, and (2) when it appeared that the mortgage had been satisfied.

Mau v Rice Bros., 216-864; 249 NW 206

Lien—nonwaiver by taking general judgment. The plaintiff in landlord's attachment by failing to ask for a special execution for the sale of the attached property, and by taking a general judgment against the lessee, does not thereby waive his landlord's lien. On the contrary, the lien follows the general judgment upon which a special execution may issue notwithstanding the failure to pray therefor, and notwithstanding the failure of the judgment to provide therefor.

Wunder v Schram, 217-920; 251 NW 762

Loss of lien. The levy of a landlord's writ of attachment after the lien has expired effects nothing.

O'Donell v Davis, 201-214; 205 NW 347

Right to docket action. A judgment creditor, after perfecting a garnishment of the tenant of the judgment debtor, has a right to have an action docketed, without fee, for the purpose of enforcing the landlord's lien theretofore held by said judgment debtor, and such action may not be deemed a "creditor's bill," in the ordinary sense.

Kinart v Churchill, 210-72; 230 NW 349

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds. So held as to rent due a landlord.

Stegemann v Bendixen, 219-1190; 260 NW 14

See Jasper County Bank v Klauenberg, 218-578; 255 NW 884

Statutory and contract lien for rent. A landlord who seeks to enforce his statutory lien for rent through an ordinary landlord's attachment makes no election of remedies such as will prevent him from amending his pleading and asking the foreclosure of a contractual lien embraced in the lease. Both remedies are coexistent and consistent.

Pickler v Lanphere, 209-910; 227 NW 526
Mau v Rice Bros., 216-864; 249 NW 206

Subsequent writs authorized. When a landlord's attachment is timely in that it was commenced within 6 months after the expiration of the lease, and the writ is improperly levied on property in a foreign county, a new writ may issue, even after the 6 months has expired, and a valid levy made thereunder on the same property if it has, in the meantime, been brought into the county of suit.

Welch v Welch, 212-1245; 238 NW 81

Subtenant as party. A landlord need not, in an action to enforce his lien, make a subtenant a party defendant, even tho a lien is claimed on crops grown by the subtenant.

Hanson v Carl, 201-521; 207 NW 579

Landlord's statutory lien—taxes as part of rent—interest—lien on proceeds of sale. Where bankrupt's stock of merchandise was sold by receiver and proceeds turned over to trustee, bankruptcy court had jurisdiction to enforce against the proceeds a landlord's lien as provided by §6502, C.C., '19 (§§10261-10263, C., '24-'39), regardless of whether debt was provable under §63 of the bankruptcy act (Comp. St. §9647; 11 USC 103). Taxes are part of rent protected by landlord's lien under a lease requiring tenant to pay taxes, and landlord is

entitled to legal interest from the dates rental payments and taxes became due, but not from date of filing bankruptcy petition.

Britton v Western Iowa Co., 9 F 2d, 488

Want of probable cause—improper submission. In an action for malicious prosecution in suing out a writ of landlord's attachment for rent admittedly due (but which was canceled by a pleaded and established counterclaim), manifest error results from submitting to the jury the question whether the landlord had probable grounds to believe the truth of the ground alleged as a basis for the writ.

Kelp v McManus, 218-226; 253 NW 813

Writ of attachment—legality. The issuance of a landlord's writ of attachment for rent admittedly due is not rendered unlawful because the tenant subsequently pleads and establishes a counterclaim which cancels the landlord's admitted claim for rent.

Kelp v McManus, 218-226; 253 NW 813

10265 Lien upon additional property.

Belated waiver of exemptions. The invalidity of a lease (unsigned by the wife of the lessee), insofar as it attempts to grant a lien for rent on the exempt property of the lessee, is not cured by the act of the wife in waiving her exemptions after the commencement of an action to determine the rights of existing creditors.

Brownlee v Masterson, 215-993; 247 NW 481

Lien on exempt property. A lease of land, unsigned by the lessee's wife, is a nullity insofar as it attempts to give the lessor a lien for rent on the exempt property of the lessee. Unnecessary to say that such a lease is of no validity against a subsequent valid chattel mortgage on the same property.

Brownlee v Masterson, 215-993; 247 NW 481

Nonpriority over mortgage. A lien on the exempt personal property of a tenant by virtue of the terms of an unrecorded lease, signed by both husband and wife, is subordinate in right to a subsequently executed and recorded chattel mortgage on the property, even tho the mortgagee takes his mortgage with knowledge that the mortgagor was a tenant, but without knowledge that the lease granted the landlord a lien on the tenant's exempt property.

Brenton v Bream, 202-575; 210 NW 756
Brownlee v Masterson, 215-993; 247 NW 481

10267 Acts sufficient to constitute taking of property.

Return—permissible amendment. The return of the levy of an attachment may be so amended as (1) to definitely locate the property levied on and (2) to specifically describe the kind of property levied on.

Salinger v Elev. Co., 210-668; 231 NW 366

CHAPTER 451

MECHANIC'S LIEN

10270 Definitions and rules of construction.

ANALYSIS

I Ownership or Possession of Land
II Estates or Interests Subject to Lien

I OWNERSHIP OR POSSESSION OF LAND

"Owner" defined. The legal titleholder of real estate and a prospective purchaser, for whose benefit and use an improvement is erected upon the real estate, may both be considered "owners" of the property within the meaning of the mechanic's lien law.

American Bk. v West, 214-568; 243 NW 297

Scope of term "owner". The term "owner" embraces not only an "owner" in the ordinary acceptance of such term, but "every person for whose use or benefit" an improvement is made.

Schoeneman Lbr. v Davis, 200-873; 205 NW 502

Owner requiring improvements by vendee. An owner of land, who, in a contract of sale,

binds the purchaser to make specified improvements on the existing buildings, will be deemed the owner of the property in proceedings for the enforcement of the mechanics' liens resulting from such improvements. It follows that the statutes (§§10287, 10290, C., '27) which adjust the equities between rival lienholders have no application to the case of said owner.

Consumers v Rozema, 212-696; 237 NW 433

Vendee as owner under executory contract. The vendee of land under a contract calling for installment payments is the equitable titleholder, and, therefore, the "owner" of the land within the mechanic's lien statutes, and may contract for improvements on the land and subject his interest to the resulting mechanics' liens.

Knapp v Baldwin, 213-24; 238 NW 542

II ESTATES OR INTERESTS SUBJECT TO LIEN

Right to lien—vendor's interest bound—consent to improvement. The term "owner" in the mechanic's lien statutes includes a vendor who expressly or impliedly consents to improvements on the real estate and the interest of said vendor is subject to mechanics' liens for labor and materials furnished for such improvements.

Murray v Kelroy, 223-1331; 275 NW 21

10271 Persons entitled to lien.

ANALYSIS

I MECHANIC'S LIEN IN GENERAL
II PERSONS ENTITLED TO LIEN
III SERVICES AND MATERIALS SECURED BY LIEN
IV REQUIREMENT OF CONTRACT WITH OWNER
V CONTRACT WITH HUSBAND FOR IMPROVEMENT ON WIFE'S LAND
VI SUFFICIENCY OF CONTRACT

Labor and material on public improvements. See Ch 452

I MECHANIC'S LIEN IN GENERAL

Contract waiver. A principal contractor may, by explicit contract with the owner of the premises, validly waive his statutory right to a mechanic's lien as against the owner.

Van Dyck Co. v Bldg. Co., 200-1003; 205 NW 650

Contractor of vendee. A mechanic's lien may not be established against the land of a vendor or against a building thereon of which the improvement became an integral part, when the vendor is not directly or indirectly a party to such improvement. Especially is this true when the vendee is not a party to the action to foreclose such claimed lien.

Joyce Lbr. Co. v Wick, 200-796; 205 NW 476

Improper interest and attorney fees. Tho the lien of a materialman may, in a certain case, be superior to the lien of a prior mortgage on the land, yet the court is in error in computing interest at a rate in excess of 6 percent and in allowing an attorney's fee and taxing it as costs and decree a lien for such excess interest and costs, even tho the claim of the materialman is evidenced by a promissory note calling for such excess interest and attorney fees.

Spieker v Fair Assn., 216-424; 249 NW 415

Model house constructed by lienholders' joint enterprise—priority of vendor's lien. Where materialmen and laborers who enter into an enterprise, whereby all agree to furnish labor and materials to construct a model home to be given away by a chance drawing and agree that they will receive their reimbursement from the sale of tickets to an entertainment at which said drawing will be held, and when the returns from the ticket sale are insufficient to pay all claims, the mechanics' liens are not superior to a vendor's lien held by the vendor of the land on which the house was built, when such vendor did not enter the joint enterprise; such cooperating mechanics' lienholders share pro rata.

Joyce Co. v Marshalltown League, 226-274; 283 NW 912

House constructed by lienholders' joint enterprise—vendor's lien inferior to noncooperating worker's mechanic's lien. Where an owner sells land knowing that certain materialmen and laborers are promoting a joint enterprise to build a model home thereon and dispose of the property at an advertising chance drawing scheme, such owner's vendor's lien is inferior to a mechanic's lien acquired by a laborer whose work was not performed as a part of, nor in cooperation with, the joint enterprise.

Joyce Co. v Marshalltown League, 226-274; 283 NW 912

Nature of lien—waiver or estoppel by conduct. A mechanic's lien is a statutory right given to contractor furnishing labor or material to protect himself from loss. He may, by contract or by his actions, expressly or impliedly waive that right or be estopped from asserting it.

Joyce Co. v Marshalltown League, 226-274; 283 NW 912

Parties to appeal—fatal defect in parties. In an action by the purchaser of land to quiet title against certain claims for mechanics' liens, the decree confirmed the claims as liens on the land, and ordered said land sold for the payment—at least pro tanto—of said liens, and, in addition, entered personal judgments against a former owner of the land for the amount of each of said claims. Plaintiff appealed from the decree insofar as it established said claims as liens.

I MECHANIC'S LIEN IN GENERAL—concluded

Held, the appeal could not be maintained without service of notice of appeal on said former owner.

Gordon-Van Tine Co. v Ideal Co., 223-313; 271 NW 523

Property subject—mechanic's lien debtor's right of redemption. A mechanic's lien debtor's right of redemption and right of possession are not subject to levy nor to junior mechanic's lien judgments obtained more than nine months after the sale, but within the year for redemption.

Murray v Kelroy, 223-1331; 275 NW 21

Property subject to lien—furnace. The refusal to establish a mechanic's lien against a duly installed furnace is proper when the removal of the furnace would leave the building in a dilapidated condition.

Ilten & Taege v Pfister, 202-833; 211 NW 407

Quasi-mechanics' liens—materialman not subcontractor. A party who contracts to furnish and deliver gravel to a contractor on a public improvement, at the contractor's place of work, and at a stated price per ton, is not a subcontractor but is a materialman. It follows that demands for labor, gasoline, and oil furnished to various parties, in the execution of a part of the gravel contract which the materialman sublets, cannot be enforced against the retained percentage of the contract price in the hands of the public authorities.

Forsberg v Const. Co., 218-818; 252 NW 258

Right to lien—agency—facts not constituting. The vendor of land sold on installments does not constitute the vendee his agent to make improvements and repairs on the property by requiring the vendee to obligate himself to the effect that all improvements placed upon the property shall remain thereon and not be destroyed until final payment is made.

Knapp v Baldwin, 213-24; 238 NW 542

Unauthorized sale by co-tenant. One tenant in common may not, without authority from his co-tenants, so sell the property as to render it liable to a mechanic's lien for material contracted for by the purchaser.

Ilten & Taege v Pfister, 202-833; 211 NW 407

Waiver—obligation of mortgagee. A mortgagee who consents that insurance money collected by him on a destroyed building on the mortgaged premises may be used by the mortgagor in the construction of a new building on the premises, tho said consent is communicated to a materialman, does not thereby obligate himself to pay the deficiency in the cost of said new building after applying the insurance money, nor does the mortgagee thereby waive the priority of his mortgage in favor of the materialman; and this is true tho the mortgagee knew that the insurance money would not be sufficient to pay the cost of the new building.

First Bank v Westendorf, 213-475; 239 NW 73

II PERSONS ENTITLED TO LIEN

Quasi-mechanics' liens—employee of materialman. One who assists a materialman in producing the material which the materialman has contracted to furnish to a county for highway purposes has no quasi lien on, or claim to, the fund due the materialman from the county.

Nolan v Larimer, Inc., 218-599; 254 NW 45

Performance—well drilling—faulty pump. A well driller's guarantee to secure an ample supply of water has been fulfilled when the evidence in a mechanic's lien foreclosure fairly establishes that there is a constant head of 180 feet of water in the well, and the lack of ample water was due entirely to the improper pump line furnished by the owner.

Collins v Gard, 224-236; 275 NW 392

III SERVICES AND MATERIALS SECURED BY LIEN

Proof of claim—evidence. A claim for extra work is not proved by the production of the contractor's books of account, showing items of time employed, and made up from oral statements by workmen who were not called as witnesses, neither the contractor nor the bookkeeper having any personal knowledge of the correctness of the items.

Van Dyck Co. v Bldg. Co., 200-1003; 205 NW 650

Quasi-mechanics' liens—nonlienable claims. Claims for meals furnished employees of a contractor on a public improvement are not lienable; likewise claims for groceries bought by an employee for his personal use.

Coon River Co-op. v McDougall Co., 215-861; 244 NW 847

Lumber for cement forms nonlienable. Lumber furnished to a contractor on a public improvement, solely for the purpose of building forms to hold cement or concrete while it is solidifying, is not lienable under the statute providing for quasi mechanics' liens growing out of public improvements.

Melcher Co. v Robertson Co., 217-31; 250 NW 594

Right to complete contract. Upon a substantial breach of a building contract and the refusal of the contractor to proceed with the work, the owner of the property may himself take over the completion of the contract ac-

cording to its terms, and charge the cost thereof against the contractor.

Golwitzer v Hummel, 201-751; 206 NW 254

Right to take over work. A building contractor who materially breaches his contract to erect a building at a certain minimum cost, and refuses to proceed with the work, opens the door to the other party to the contract to take over the work and complete it, and recover of the contractor the resulting damages.

Johnson v Vogel, 208-44; 222 NW 864

Well drilling—compensation per foot to ample water, as a basis for a mechanic's lien. A contract to drill a well at an agreed price per foot for each foot drilled, coupled with a guarantee by the driller to secure an ample supply of water with no limitation on the depth of the well, means that the driller is to be paid at the contract price for every foot drilled to whatever depth it is necessary to go to fulfill the guarantee.

Collins v Gard, 224-236; 275 NW 392

IV REQUIREMENT OF CONTRACT WITH OWNER

Contract against lien—validity. An owner of land in leasing his property has a right to contract that improvements made by the lessee on the land shall not be made on credit, and that said property shall not be liable therefor.

Thompson Yards, Inc. v Haakinson & Beaty Co., 209-985; 229 NW 266

Contract forfeiture of improvements. One who purchases property under a contract which provides that, in case of forfeiture, all improvements placed thereon by the purchaser shall belong to the vendor, and who voluntarily surrenders and abandons the property, has no such interest in the property as may be made subject to a mechanic's lien.

Ilten & Taege v Pfister, 202-833; 211 NW 407

Contract with purchaser—forfeiture—effect. One who erects an improvement on land solely under a contract with the purchaser of the land is not entitled to a mechanic's lien on the land when the purchaser has lost all interest in the land because of the legal forfeiture of his contract of purchase; and this is true, even tho the legal owner had knowledge that the improvement was being erected.

Nolan v Wick, 218-660; 254 NW 80

Contract with owners of land in severalty. Fundamentally, there must be a contract with the owner of land as a basis for a mechanic's lien thereon. Evidence reviewed relative to the remodeling by a tenant of a building situated on three separate, contiguous tracts of land owned in severalty by three different owners, and held, insufficient to show the existence of any contract, express or implied, with either of the landowners, even tho said owners did know that the work was being carried on.

Thompson Yards, Inc. v Haakinson & Beaty Co., 209-985; 229 NW 266

Contract with landowner—evidence—sufficiency. Evidence reviewed, and held to justify the finding of the trial court that the owner of realty had authorized his tenant as his agent to contract for material for making repairs to improvements on the farm and that a mechanic's lien was properly foreclosed against said owner and his subsequent grantee.

Iowa Supply v Petersen, 221-978; 267 NW 716

Contract with nonowner of premises. Failure of a mechanic's lien claimant to prove that he furnished the materials in question, under and by virtue of a contract with the owner of the premises or with some one legally representing the said owner, is fatal to his claim to a lien.

Eclipse Lbr. v Murphy Co., 206-1280; 221 NW 930

Improvements by tenant. A mechanic's lien may not be decreed on the land of a landlord, for improvements erected on the land by the tenant with the knowledge of the landlord, the tenant having reserved in the lease the right to remove, at the end of the term, all improvements erected by him.

Lane-Moore Lbr. Co. v Kloppenburg, 204-613; 215 NW 637

Enforcement — contract not foreclosed or made with owner. A mechanic's lien claimant has no lien against intestate property when (1) his claim was not foreclosed within the time allowed by statute, and (2) his contract for furnishing the labor and material was not made with decedent's heirs as owners of the property.

Finn v Grant, 224-527; 278 NW 225

Impossible ratification. A vendor of land who, upon discovering that his vendee has placed repairs and improvements upon the property, does nothing in the way of repudiating the actions of the vendee, cannot be held thereby to have ratified the actions of the vendee and constituted the vendee his agent to make the improvements, when the vendee in making said repairs and improvements never assumed to act for the vendor.

Knapp v Baldwin, 213-24; 238 NW 542

Improvement by tenant with right to remove. A mechanic's lien may not be established for a building erected on land by a tenant under an agreement with the landlord-owner that the tenant may, and if required by the landlord will, remove it when the lease terminates.

Southern Sur. v Serv. Co., 209-104; 227 NW 606

IV REQUIREMENT OF CONTRACT WITH OWNER—concluded

Tenant's agency for landlord—burden of proof on mechanic's lien claimant. Burden of proving agency is upon the one who seeks to impress a mechanic's lien on a landlord's real estate for material furnished at the instance of the tenant, and such agency is not found in a lease which consents to the building of a room on the premises, but specifically provides that no obligation shall be imposed on the landlord therefor, such a contract being one which he had a right to make when no fraud is involved.

Perkins Service v Rosenberg, 226-27; 282 NW 371

Grounds — contract as necessary element. Before one can successfully maintain a mechanic's lien, he must have a contract with the owner, his agent, trustee, contractor, or subcontractor.

Perkins Service v Rosenberg, 226-27; 282 NW 371

Priority—avoidance of prior mortgage. A mechanic's lien claimant may not complain of the act of the legal titleholder in taking a mortgage on a part only of a number of lots, instead of asserting his prior right to a mortgage on all the lots, when the mechanic's lien claimant has made no attempt to perfect his lien on any of the lots omitted from the mortgage.

Marker v Davis, 200-446; 204 NW 287

Priority—rights of titleholder under contract of sale. A mechanics' lienholder takes subject to the rights of the legal, recorded titleholder, including the rights of such holder under a contract of sale of the land: e. g., the right of the said holder ultimately to receive a mortgage on every part and parcel of the land as security for the entire unpaid purchase price.

Marker v Davis, 200-446; 204 NW 287

Right to lien—vendor's interest bound—consent to improvement. The term "owner" in the mechanic's lien statutes includes a vendor who expressly or impliedly consents to improvements on the real estate and the interest of said vendor is subject to mechanics' liens for labor and materials furnished for such improvements.

Murray v Kelroy, 223-1331; 275 NW 21

Right to remove fixture as against vendor. A dealer who permanently installs a furnace in a house for a subvendee, under a contract that he (the dealer) shall retain title to the furnace and the right to remove it in case of nonpayment, may not lawfully remove the furnace for nonpayment, as against the vendor, who did not expressly or impliedly consent to such installation, and who sold under a written forfeitable contract, which was, subsequent to the installation of the furnace, forfeited and abandoned by both the original vendee and the subvendee.

Des M. Impr. v Furnace Co., 204-274; 212 NW 551

Vendee's contract to keep in repair — construction. An executory contract by a vendee of premises that he will keep the premises in reasonably good repair cannot be construed as authorizing the vendee to install an entirely new bathroom equipment, and to bind the vendor's interest therefor.

Darragh v Knolk, 218-686; 254 NW 22

Vendee under contract for deed—forfeiture of contract—effect. One who erects or installs an improvement on premises under a contract with a bond-for-deed vendee may establish a mechanic's lien against the vendee's interest, but if said vendee's contract for a deed be legally forfeited and he be left without interest, said lien cannot be established against the vendor's interest unless said vendor required or authorized said improvement.

Darragh v Knolk, 218-686; 254 NW 22

V CONTRACT WITH HUSBAND FOR IMPROVEMENT ON WIFE'S LAND

No annotations in this volume

VI SUFFICIENCY OF CONTRACT

Well drilling—compensation per foot to ample water, as a basis for a mechanic's lien. A contract to drill a well at an agreed price per foot for each foot drilled, coupled with a guarantee by the driller to secure an ample supply of water with no limitation on the depth of the well, means that the driller is to be paid at the contract price for every foot drilled to whatever depth it is necessary to go to fulfill the guarantee.

Collins v Gard, 224-236; 275 NW 392

10273 Security after completion of work.

Action at law aided by attachment. The obtaining of a judgment at law on an account and the sale of property seized on an attachment, do not constitute a waiver of a mechanic's lien for the same account to the extent that the judgment remains unpaid.

Southern Sur. v Serv. Co., 209-104; 227 NW 606

Accounting by trustee—bank inducing lien release by mortgage on horses. Where a bank holds a chattel mortgage on horses, executed as part of an arrangement with the mechanic's lienholder for payment of his lien, the release of which was induced by the execution of the chattel mortgage, a sale of the horses by the bank, under a subsequent chattel mortgage, would constitute the bank a trustee required to account to the mechanic's lienholder, but, without proof that the horses sold were the same

ones in both mortgages, no showing is made of trust funds to be accounted for.

Shimp Bros. v Place, 225-1098; 281 NW 471

10274 Extent of lien.

Dower—not subject to mechanic's lien. A mechanic's lien filed after the death of the titleholder is not a lien on the unassigned dower, of the surviving spouse, in the property in question.

Fullerton Lbr. Co. v Miller, 217-630; 252 NW 760

10275 In case of leasehold interest.

Improvement by tenant—sale and removal. A mechanic's lien may not be enforced against a tenant's leasehold interest and against the improvement erected by him, other than by a sale of the leasehold interest and the improvement as a whole,—as a unit,—when the improvement was erected by the tenant under a specific agreement that the improvement should, upon the termination of the lease, become the property of the lessor. In other words, the improvement may not be separately sold and removed.

Queal Lbr. v Lipman, 200-1376; 206 NW 627

Removal of building. A mechanic's lien is properly decreed against an improvement erected by a tenant on leased ground when the tenant and his lessor have mutually contracted that the tenant might, at the end of the term, remove all improvements placed on the property by the tenant; and this is true, even tho the removal cannot be made without damage to the premises.

Lane-Moore Lbr. Co. v Kloppenburg, 204-613; 215 NW 637

10277 Perfection of lien.

Nonfraudulent claim for nonlienable articles. Principle reaffirmed that the nonfraudulent inclusion in an account of nonlienable items will not nullify the lien to which the materialman is entitled.

Consumers Lbr. v Rozema, 212-696; 237 NW 433

Public improvements—"verified" statement as condition precedent. Failure to file a verified statement of materials or labor employed on a public improvement, as the basis of an action under §3102, C., '97, and Ch 347, 38 GA, is fatal to the validity of the claim; and a mere "certification" is not a "verification".

Francesconi v School Dist., 204-307; 214 NW 882

10278 Time of filing.

Computation of time. The 60-day period within which a subcontractor is permitted to file a statement for a mechanic's lien commences to run when all interested parties regard the subcontractor's contract as completed, and not from a subsequent time when some trifling work is done, for the purpose (1) of correcting defective work, or (2) of furnishing an excuse for further time in which to file the statement.

Nielson v Buser, 207-288; 222 NW 856

Fatal delay in perfecting. A mechanic's lien claimant acquires no lien when he delays the perfecting of his claimed lien by proper filing until long after the expiration of the 90 days given by statute, and until, in the meantime, a mortgage has been taken and foreclosed on the land by parties who had no knowledge of any claim for such nonperfected lien.

Cochran v Ory, 222-772; 269 NW 764

10282 Liability of owner to original contractor.

Payment of subcontractors—receipts and waivers. In action for foreclosure of a mechanic's lien, the amount due to subcontractors must be determined when the contractor fails to furnish receipts and waivers of claims for liens as required by statute.

Newell Co. v Fyler, (NOR); 230 NW 322

10283 Liability to subcontractor after payment of original contractor.

Right to lien—misapplication of payments. A subcontractor who receives money from the contractor with knowledge that the money had been paid to the contractor by the owner of the improvement may not apply said funds on other claims which he holds against the contractor.

McDonald Mfg. Co. v Leverett, 203-1215; 211 NW 849

Establishment — misapplied payments. A subcontractor who attempts to establish his lien against the premises is very properly charged with the amount of payments received by him from the contractor with knowledge that they came from the owner and wrongfully applied by crediting them on an antecedent debt of the contractor.

Hawkeye Lbr. v Day, 203-172; 210 NW 430

Payment of subcontractors—receipts and waivers. In action for foreclosure of a mechanic's lien, the amount due to subcontractors must be determined when the contractor fails to furnish receipts and waivers of claims for liens as required by statute.

Newell Co. v Fyler, (NOR); 230 NW 322

10287 Priority over other liens.

Discussion. See 17 ILR 516—Mortgages and mechanics' liens

ANALYSIS

I PRIORITY OVER CONVEYANCES, LIENS, AND INCUMBRANCES
(a) PRIORITY IN GENERAL
(b) CONVEYANCES
(c) MORTGAGES
(d) VENDOR'S LIEN

I PRIORITY OVER CONVEYANCES, LIENS, AND INCUMBRANCES

(a) PRIORITY IN GENERAL

Decree does not inure to nonappellant. Where an equitable decree adjudged (1) that one of two assignees of the same fund took priority over the other assignee, but (2) that certain mechanics and dealers had lienable claims on said fund prior to both of said assignees, and where, on appeal solely by the defeated assignee, it was adjudged not only (1) that the appellant-assignee took priority over the appellee-assignee, but (2) that said mechanics and dealers had no lienable claims on said fund, held that the judgment on appeal that the mechanics and dealers had no lienable claims on said fund did not inure to the benefit of the appellee-assignee. In other words, the appellee-assignee was still bound by the decree of the trial court because he did not appeal therefrom.

Ottumwa Works v O'Meara, 208-80; 224 NW 803

(b) CONVEYANCES

Sale on foreclosure. A purchaser of land at mechanic's lien foreclosure sale (there being no redemption) acquires the entire title of the then owner of the property, and such right is necessarily transmitted to the purchaser's grantee and to all others claiming title from such source. It follows that a mechanic's lien claimant has no standing who delays the filing of his lien against the same owner until after said sale, even tho he files it before the issuance of the sheriff's deed.

Soltow v Roth, 204-665; 215 NW 705

(c) MORTGAGES

Improvements contemplated—effect on priority of purchase money mortgage. Contract of sale held not to contemplate improvements to the purchased premises so that mechanic's lien has priority over seller's purchase money mortgage.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Intent to give—constructive notice. When the mortgagor has told materialman that mortgagor intended to give a mortgage for the purchase price, materialman, claiming mechanic's lien, has constructive notice of such prior mortgage of record, even tho the acknowledgment thereof is defective.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Mortgage to finance improvement. A mortgage on unimproved land in an amount much in excess of the value of the land, made for the specific purpose of enabling the owner to obtain funds with which to erect, and with which he does erect, an improvement on the land, (1) carries in equity a lien on the entire property as improved, superior to the mechanic's lien of a claimant who at all times had full knowledge of the purpose of the mortgage, and (2) carries, under the statute (§3095, C., '97), a superior right to the entire proceeds of a sale of the improved property.

Crawford-Fayram Lbr. Co., v Mann, 203-748; 211 NW 225

Priority—actual notice of mortgage not required. Statute making mechanic's lien inferior to mortgage, where materialman has notice of the mortgage, construed not to require actual notice.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Priority—belated filing of lien. A mechanic's lien, tho not filed within the statutory limit of time, is prior in right to a mortgage on the premises executed during the construction of the improvement in question.

American Bk. v West, 214-568; 243 NW 297

Priority—mechanic's lien. Materialman is not entitled to priority of his mechanic's lien over previously recorded mortgage to the extent of balance of mortgage funds not paid to borrower who built the house, when such amount was past due to mortgagee and was applied on the mortgage debt.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Priority — mortgage less than permitted amount. Materialman, claiming mechanic's lien, has no priority to extent of $300 over prior recorded mortgage, where a contract for the sale of land upon which the building was constructed permitted a $3200 mortgage, but contract vendee mortgaged it for only $2900.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Priority over mortgage—time of furnishing material. Where material is furnished to a building for one property, and part of the material is left over and taken to another property for which the materialman also furnishes material and upon which a mechanic's lien is being asserted, the materialman may not incorporate into his claim against the second property the cost of such remaining material and thus carry back the first item of his claim for a mechanic's lien to defeat an intervening mortgage.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Priority on building over prior mortgage on land. A mechanic's lien on a new and independent building on mortgaged land for material furnished in the construction of such building may be decreed priority on the build-

ing, with right to remove it in case such removal can be effected without substantial injury to either the land or the building.

Lincoln Ins. v McSpadden, 211-97; 232 NW 824

Priority—title to realty not in purchaser of materials. In determining priority of mechanic's lien for materials furnished prior to time mortgage was recorded, the court properly denied priority to mechanic's lien when record title to the property was not in the purchaser of the materials, and materialman was charged with notice of an unrecorded contract which provided that the mortgage was to be executed.

Queal Lbr. v McNeal, 226-631; 284 NW 482

Priority over equitable mortgage. The making and acceptance of a written application for a loan, together with a written agreement to secure the loan on land in which the proposed borrower then had no interest whatever (tho he later acquired the title), no money being then advanced on the strength of the acceptance, create no equitable mortgage which will be superior to mechanics' liens accruing prior to the actual execution and recording of the contemplated mortgage.

Iowa Co. v Plewe, 202-79; 209 NW 399

Waiver by conduct. A materialman who files his lien after inducing a mortgagee to take his mortgage on the express or implied promise that no lien will be filed, will not be decreed priority over the mortgage.

Fullerton Lbr. Co. v Miller, 217-630; 252 NW 760

Waiver—mortgage to secure funds. Proof, provided it is clear, satisfactory, and convincing, that a materialman agreed that the owner of land should, by a mortgage on the land, raise the funds with which to pay for the materials going into an improvement, and that such mortgage was so executed during the period of construction, subordinates the lien of said materialman to the lien of the mortgage.

Eclipse Lbr. v Bitler, 213-1313; 241 NW 696

(d) VENDOR'S LIEN

Improvement by vendee. A mechanic's lien for an improvement erected by a vendee cannot have precedence over the vendor's lien and claim for the unpaid purchase price when the improvement was not for the vendor's "use or benefit", and when, in its last analysis, the vendor simply knew that the vendee was making the improvement.

Schoeneman Lbr. v Davis, 200-873; 205 NW 502

Rights of titleholder under contract of sale. A mechanic's lien claimant who commences to furnish material to a vendee of land while the recorded title is in the vendor, is chargeable with notice of the contract rights of the vendor.

Magnesite Products Co. v Bensmiller, 207-1303; 224 NW 514

Unremovable repairs and improvements. Where the vendee of land, exclusively on his own authority, places repairs and improvements upon an existing building on the land of such a nature that they cannot be removed without material damage to the building, the vendor's lien for the purchase price of the land is superior to the lien of the mechanic's lien claimants both as to the real estate, and as to repairs and improvements.

Knapp v Baldwin, 213-24; 238 NW 542

Vendor's lien—when superior to mechanic's lien. A vendor's lien for the purchase price of land sold on installments without obligating or requiring the vendee to make any improvement on the property is superior to mechanics' liens growing out of the repair and improvement of a building existing on the land when it was sold; and this is true even tho the vendor may have expected that the vendee would or might make such repairs or improvements, or may have actually known that the vendee was making them.

Knapp v Baldwin, 213-24; 238 NW 542

10289 Priority as to buildings over prior liens upon land.

Priority over prior mortgage. A mechanic's lien for materials furnished for a grandstand, on lands belonging to a fair association, to replace one burned, may, in a proper case, have priority over a prior mortgage on the land when the structure can be removed without damage to the realty; and this is true tho the insurance on the burned structure was applied in payment of the material going into the new structure, a fact which the materialman did not know until long after the building had been completed.

Spieker v Fair Assn., 216-424; 249 NW 415

10290 Foreclosure of mechanic's lien when lien on land.

Appeal—triable de novo. An appeal from judgment of dismissal in action to foreclose mechanic's lien is triable de novo in supreme court.

Sloan Co. v Hall, (NOR); 206 NW 573

Curtailing right of mortgagee. Whether a mortgagee of unimproved land may constitutionally be deprived of a lien on future-erected and permanent improvements on the land, quaere.

Crawford-Fayram Lbr. Co. v Mann, 203-748; 211 NW 225

Enforcement—modern house—removal without undue loss. The trial court's finding in a

mechanic's lien foreclosure that a house built on a concrete foundation, having a sewer and other improvements, could be removed from the soil without undue loss or damage, held justified from the evidence; especially when the house was on a farm possessing in addition a full complement of farm buildings, including another house.

Anfinson v Cook, 224-833; 276 NW 762

Enforcement—modern house—court discretion in removal. The fact that a building is modern, with gas, sewer, and water connections to the soil, does not necessarily, in a mechanic's lien foreclosure, take it from the realm of discretion of the trial court to order it removed under proper evidence.

Anfinson v Cook, 224-833; 276 NW 762

Priority—estoppel. A mortgagee cannot be held estopped to insist on the priority of his mortgage over the mechanic's lien of a materialman on an indefinite showing of the conduct of the mortgagee on which the materialman never relied.

First Bank v Westendorf, 213-475; 239 NW 73

Priority on building over prior mortgage on land. A mechanic's lien on a new and independent building on mortgaged land for material furnished in the construction of such building, may be decreed priority on the building, with right to remove it in case such removal can be effected without substantial injury to either the land or the building.

Lincoln Ins. v McSpadden, 211-97; 232 NW 824

Spieker v Fair Assn., 216-424; 249 NW 415

Refusal of proportional distribution on sale. Failure of the court to decree a proportional part of the proceeds of a mortgage foreclosure sale to the prior mortgagee and a proportional part to the subsequent mechanic's lien holder for additions, repairs, and betterments is harmless error when the property sold simply for the amount of the mortgage and the mechanic's lien holder did not redeem.

Hedges Co. v Holland, 203-1149; 212 NW 480

Right to remove improvement. Principle recognized that the removal from land of a modern residence, as ordinarily constructed, entails unjustifiable waste.

Crawford-Fayram Lbr. Co. v Mann, 203-748; 211 NW 225

First Bank v Westendorf, 213-475; 239 NW 73

Sale en masse and division of proceeds. Where land with a residence thereon was mortgaged and the residence burned and was replaced by a new one, the court cannot order a sale of the land and so divide the proceeds as to give the mortgagee priority on the land, and the mechanic's lien claimant priority on the new residence, when there is no evidence demonstrating how the division should be made; and especially when the mortgagee has surrendered the insurance on the old residence and allowed it to be expended on the new residence.

First Bank v Westendorf, 213-475; 239 NW 73

Unremovable repairs and improvements. Where the vendee of land, exclusively on his own authority, places repairs and improvements upon an existing building on the land of such a nature that they cannot be removed without material damage to the building, the vendor's lien for the purchase price of the land is superior to the lien of the mechanic's lien claimants both as to the real estate, and as to repairs and improvements.

Knapp v Baldwin, 213-24; 238 NW 542

10293 Time of bringing action—court.

Adjudication and loss of right. The right to foreclose a mechanic's lien is wholly lost by the act of the claimant, when made a party to mortgage foreclosure, (1) in filing a cross-petition for foreclosure of his lien without service of notice of such filing and of hearing thereon; (2) in filing an answer which, in effect, repeats all the allegations of the cross-petition; (3) in allowing the proceedings to go to decree, which omitted any foreclosure of the mechanic's lien, but determined the status and priority of all parties, and which ordered a sale of the premises and foreclosed all subordinate parties of all rights after sale, except the right of redemption; and (4) in failing to appeal from said decree.

Matthews v Quaintance, 200-736; 205 NW 361

Contract limitation — unreasonableness. A contract provision in an indemnity bond which requires the obligee to begin suit thereon before the amount of his recovery on the bond is determinable, is unreasonable, and therefore unenforceable. In such case, the general statute which limits actions applies. So held as to a building performance bond which involved mechanics' liens.

Cook v Heinbaugh, 202-1002; 210 NW 129

Sale on foreclosure—effect. A purchaser of land at mechanic's lien foreclosure sale (there being no redemption) acquires the entire title of the then owner of the property; and such right is necessarily transmitted to the purchaser's grantee and to all others claiming title from such source. It follows that a mechanic's lien claimant has no standing who delays the filing of his lien against the same owner until after said sale, even tho he files it before the issuance of the foreclosure deed.

Soltow v Roth, 204-665; 215 NW 705

10295 Kinds of action.

Receiver—appointment. The appointment in mechanic's lien foreclosure proceedings of a receiver of the rents, at the instance of a vendor and lien claimants, may be proper when the equitable owner of the property in question is insolvent, and when the property itself is inadequate security for the established claims.

Des M. Marble v McConn, 210-266; 227 NW 521

Foreclosure—amount due. Plaintiff's failure to prove that some amount is due him necessarily precludes a foreclosure.

Hagen v Reid, 207-39; 222 NW 377

Performance—well drilling—faulty pump. A well driller's guarantee to secure an ample supply of water has been fulfilled when the evidence in a mechanic's lien foreclosure fairly establishes that there is a constant head of 180 feet of water in the well, and the lack of ample water was due entirely to the improper pump line furnished by the owner.

Collins v Gard, 224-236; 275 NW 392

10296 Limitation on action.

Contract not foreclosed or made with owner. A mechanic's lien claimant has no lien against intestate property when (1) his claim was not foreclosed within the time allowed by statute, and (2) his contract for furnishing the labor and material was not made with decedent's heirs as owners of the property.

Finn v Grant, 224-527; 278 NW 225

Principal contractor. An action to enforce the mechanic's lien of a principal contractor is not barred until the lapse of two years from the expiration of 90 days for filing the claim.

Fryman v McCaffrey, 208-531; 222 NW 19; 224 NW 95

Statute, not contract, governs. Where an owner of land in a contract of sale requires the vendee to make certain improvements on the property within a certain time, it cannot be held that the time for the enforcement of the mechanic's lien commences to run from the time the vendee contracts to have the improvements finished.

Consumers Lbr. v Rozema, 212-696; 237 NW 433

When action deemed commenced. An action to enforce a mechanic's lien is deemed commenced at the time the original notice of the action is delivered to the sheriff for immediate service.

Consumers Lbr. v Rozema, 212-696; 237 NW 433

CHAPTER 452

LABOR AND MATERIAL ON PUBLIC IMPROVEMENTS

10299 Terms defined.

Atty. Gen. Opinions. See '28 AG Op 46; '32 AG Op 166

Statute not retroactive.

Francesconi v School Dist., 204-307; 214 NW 882

Bonds—scope. A bond conditioned to pay all subcontractors for "materials" furnished embraces "fuel", when the statute under which the bond is given defines "materials" as including "fuel".

Standard v Marvill, 201-614; 206 NW 37

Right to lien — groceries, meats, oil, and money loaned.

Teget v Drain. Ditch, 202-747; 210 NW 954
See Monona County v O'Connor, 205-1119; 215 NW 803

Right to lien—"materials, feed, provisions, and fuel".

Aetna Cas. v Kimball, 206-1251; 222 NW 31

Nonlienable claims. Claims for labor and materials furnished to a contractor on a public drainage improvement in repairing the machinery which the contractor employed on the work are not lienable on the drainage funds.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Nonlienable claims. Claims for meals furnished employees of a contractor on a public improvement are not lienable; likewise claims for groceries bought by an employee for his personal use.

Coon River Assn. v Constr. Co., 215-861; 244 NW 847

Lumber for cement forms. Lumber furnished to a contractor on a public improvement, solely for the purpose of building forms to hold cement or concrete while it is solidifying, is not lienable under the statute providing for quasi mechanics' liens growing out of public improvements.

Melcher Lbr. Co. v Robertson Co., 217-31; 250 NW 594

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract to build an electric plant, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement

of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

10300 Public improvements—bond and conditions.

Atty. Gen. Opinions. See '25-26 AG Op 26; '36 AG Op 527

Assignments of contracts—priorities.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Coon River Assn. v McDougall, 215-861; 244 NW 847

Statutory bond not deemed common-law bond. A statutory bond may not be treated as a common-law bond.

Zeidler Co. v Ryan & Fuller, 205-37; 215 NW 801

Execution and delivery in foreign state. A statutory bond which is executed and delivered in a foreign state for the performance of a contract in this state will be construed in accordance with the laws of this state when such was the intention of the parties, as shown (1) by the nature of the transaction, (2) by the subject matter, and (3) by the attending circumstances.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Statutory bonds — sufficiency. A statutory bond conditioned to pay a subcontractor on a public improvement the amount owed him by the principal contractor need not be signed by the latter.

Ft. Dodge Co. v Miller, 200-1169; 206 NW 141

Statutory bonds—estoppel. A surety on a bond given for the performance of a public building contract, and containing some of the conditions which the statute mandatorily prescribes for such bond,—anything in any contract to the contrary notwithstanding,—will be deemed a statutory bond, with all the statutory conditions impliedly inserted therein.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

See Francesconi v School Dist., 204-307; 214 NW 882

Action on bond—accrual. The right of a public corporation to bring an action on a public contractor's bond conditioned to hold the municipality harmless from all loss which it may suffer in consequence of the contractor's default does not accrue until after judgment is rendered against the city and the same is paid by the city.

Waukon v Surety Co., 214-522; 242 NW 632

Construction against party using words—premium on contractor's bond. On the question whether, under a written application for a contractor's bond on a grading contract, the contractor had agreed to pay, when the contract was fully executed, an additional percentage premium on the amount received by him on "overhaul", doubts and uncertainties arising from the noncomprehensiveness of the language used will be construed most strongly against the insurer who solely drafted the application on information solely obtained by himself, without fraud on the part of the contractor.

Iowa Co. v Cram, 209-424; 228 NW 24

Bond of contractor—breach—no piecemeal recovery. Recovery on a contractor's bond may not be piecemeal, consequently that part of trial court's decree, holding its judgment is not a bar nor an adjudication of any future claim against the bond, will be stricken on appeal.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Contractor's bond — implied condition — no acceptance of hidden defects. A bond filed by a contractor, assuming the sole responsibility of constructing a water-tight dam for a city reservoir, contains the implied condition that acceptance by the city of the work will not bar recovery by the city on account of defects unknown and undiscovered at the time of acceptance.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Nonpermissible assumption of liability. A statutory bond for the performance of a public improvement contract is void insofar as it attempts to assume liability for the nonperformance of independent obligations which the statute does not contemplate, but which are voluntarily inserted into the contract; and this is true as to the surety, even tho the public authorities have on hand and undistributed, a fund arising under the contract and sufficient to discharge such nonstatutory obligations.

Monona County v O'Connor, 205-1119; 215 NW 803

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Breach of contract to build. In an action for damages based on alleged breach of a written contract for the erection, under written specifications, of a structure (especially when it is of magnitude and complexity), general conclusion allegations by plaintiff of the use by defendant of defective materials and workmanship must, on proper motion, be accompanied and supported by fact allegations showing, with reasonable certainty, (1) wherein said material and workmanship were defective, (2) the location of the several alleged defects, and (under some circumstances) when

each of said defects became manifest, and (3) the particular specification which was violated by using such material and workmanship.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Leakage through dam—causal connection with contract violation. In an action on a contractor's bond because of leakage through a dam, a defense that no causal connection existed between the violation of the specifications and the damage, inasmuch as extreme heat and freezing as natural causes could also produce the leakage between the cement slabs, raises a fact question for the court, in the absence of a jury, to determine along with other circumstances as to whether this explanation sufficiently justifies a 12- to 18-inch separation of the concrete slabs.

Osceola v Gjellefald Co., 225-215; 279 NW 590

City engineer supervising construction—no abrogation of contract duty. The fact that a city had an engineer directing the construction of a dam does not relieve the contractor of his specified duty to make a water-tight dam when contractor practically concedes that, had he followed the specifications, the dam would hold water.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Damages—superior replacement construction—contractor nonliable. A contractor should not be required to pay in damages for a quality and quantity of replacement construction superior to what he originally contracted to do.

Osceola v Gjellefald Co., 225-215; 279 NW 590

10302 Deposit in lieu of bond.

Atty. Gen. Opinion. See '36 AG Op 527

10303 Amount of bond.

Contractor's bond—implied condition—no acceptance of hidden defects. A bond filed by a contractor, assuming the sole responsibility of constructing a water-tight dam for a city reservoir, contains the implied condition that acceptance by the city of the work will not bar recovery by the city on account of defects unknown and undiscovered at the time of acceptance.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Successive actions by several beneficiaries. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

10304 Subcontractors on public improvements.

Settlement between contractor and subcontractor—effect. In an action by a second subcontractor on a bond for the performance of a contract for a public improvement, it is no defense, as to claims properly filed and established, that the principal contractor has fully settled with the first subcontractor, especially when the principal contractor knew that plaintiff was a subcontractor.

Ryerson v Schraag, 211-558; 229 NW 733

10305 Claims for material or labor.

Atty. Gen. Opinions. See '28 AG Op 64; '30 AG Op 142; '32 AG Op 167

Failure to file with proper officer—effect. The failure of a laborer or materialman on a public improvement to make a timely and proper filing of his claim with the officer designated by statute, even tho after action is brought he files his claim with the court, deprives him of all right to a judgment against the surety on the contractor's bond in case the retained percentage of the contract price is insufficient to pay his claim.

Southern Sur. v Jenner, 212-1027; 237 NW 500

Lumber for cement forms nonlienable. Lumber furnished to a contractor on a public improvement, solely for the purpose of building forms to hold cement or concrete while it is solidifying, is not lienable under the statute providing for quasi-mechanics' liens growing out of public improvements.

Melcher Co. v Robertson Co., 217-31; 250 NW 594

Quasi-mechanics' liens—nonlienable claims. Claims for meals furnished employees of a contractor on a public improvement are not lienable; likewise claims for groceries bought by an employee for his personal use.

Coon River Co-op. v McDougall Co., 215-861; 244 NW 847

Employee of materialman. One who assists a materialman in producing the material which the materialman has contracted to furnish to a county for highway purposes has no quasi-lien on, or claim to, the fund due the materialman from the county.

Nolan v Larimer, 218-599; 254 NW 45

Fatally defective petition. A petition by a subcontractor on a public improvement to establish, on public funds due his contractor, his claim for rentals of machinery leased to said contractor and used "in the construction" of said improvement, is fatally defective when it fails to allege how long or to what definite extent said machinery was used "in" said construction. Whether the leasing of machinery

and the use thereof constitutes the furnishing of "services" within the meaning of the statute, quaere.

Byers Mach. v Highway Com., 214-1347; 242 NW 22

Itemized statement—sufficiency. A statement for labor employed by the week upon a public improvement is sufficiently itemized when it shows the dates between which the labor was performed; likewise a statement for labor which consists of duly indorsed weekly time checks which show the date and number of hours worked during each day, even tho the statement fails specifically to identify the building on which the work was performed.

Francesconi v Sch. Dist., 204-307; 214 NW 882

Materialman not subcontractor. A party who contracts to furnish and deliver gravel to a contractor on a public improvement, at the contractor's place of work, and at a stated price per ton, is not a subcontractor but is a materialman. It follows that demands for labor, gasoline, and oil furnished to various parties, in the execution of a part of the gravel contract which the materialman sublets, cannot be enforced against the retained percentage of the contract price in the hands of the public authorities.

Forsberg v Const. Co., 218-818; 252 NW 258

"Verified" statement as condition precedent. Failure to file a verified statement of materials or labor employed on a public improvement, as the basis of an action under §3102, C., '97 and Ch 347, 38 GA, is fatal to the validity of the claim and a mere "certification" is not a "verification".

Francesconi v School Dist., 204-307; 214 NW 882

Use of materials—burden of proof. A subcontractor on a public improvement is not entitled to have his claim established against the retained portion of the contract price due the contractor unless he establishes the fact that the materials furnished by him were actually used "in the construction" of the improvement, that is, were used in some proper way in connection with said construction work.

Rainbo Oil v McCarthy Co., 212-1186; 236 NW 46

Place of filing claims. Claims for labor or materials employed on a public improvement were properly filed with the warrant-issuing officer, as provided by Ch 347, 38 GA, even tho a prior enacted and existing statute (§3102, C., '97) provided for filing with the warrant-paying officer.

Francesconi v School Dist., 204-307; 214 NW 882

"Warrant-issuing officer" determined. (Statute now changed.)

Missouri Gravel v Surety Co., 212-1322; 237 NW 635

10306 Highway improvements.

Atty. Gen. Opinions. See '30 AG Op 142; '32 AG Op 166

Primary road improvements. Under prior statutes (§3102, C., '97, and Chs. 237 and 380, 38 GA) now repealed, claims for labor or material furnished by subcontractors on primary road improvements were fileable with the county auditor.

Fuller & Hiller v Shannon, 205-104; 215 NW 611

10308 Time of filing claims.

Belated filing of claim and bringing of action. Failure of a subcontractor on a municipal improvement to file his claim and to bring his action on the bond of the principal contractor within a stated statutory time is fatal to the right to maintain such action when such timely filing and bringing of action is made a statutory condition precedent to the right to bring the action.

Zeidler Co. v Ryan & Fuller, 205-37; 215 NW 801

Belated filing of claim—belated suit—effect. A materialman who furnishes material to a contractor who is constructing a public improvement is twice barred of any right to enforce his claim against the municipality or against the surety on the contractor's bond, (1) when he files his claim after the expiration of the 30 days given him by statute, and after the municipality has fully settled with the contractor (except for a merely nominal sum), and (2) when he fails to commence action to enforce his claim until after the expiration of the six months given him by statute in which to commence such action.

Perkins Co. v School Dist., 206-1144; 221 NW 793

"Completion and final acceptance." "The completion and final acceptance" of a public improvement, within the meaning of this section, may be made by the municipality by acts other than a formal resolution.

Perkins Co. v School Dist., 206-1144; 221 NW 793

Failure to make timely filing of claim. Under a statute making the liability of a surety on a statutory bond for the performance of a public contract dependent on the filing by the claimant of a verified statement of the goods sold, within a specified time after the goods are "furnished", it is not necessarily sufficient to file such statement within the time specified by the statute, after the goods are

"used" by the buyer, even tho the goods were bought under a contract providing that the buyer might return such portion as he did not use.

Queal Lbr. v Anderson, 211-210; 229 NW 707

10309 Claims filed after action brought.

Quasi-mechanics' liens—failure to file with proper officer—effect. The failure of a laborer or materialman on a public improvement to make a timely and proper filing of his claim with the officer designated by statute, even tho after action is brought he files his claim with the court, deprives him of all right to a judgment against the surety on the contractor's bond in case the retained percentage of the contract price is insufficient to pay his claim.

So. Sur. Co. v Jenner, 212-1027; 237 NW 500

10310 Payments under public contracts.

Atty. Gen. Opinions. See '25-26 AG Op 73, 85, 86, 102, 338; '28 AG Op 312

Construction aside contract. A public drainage contractor may not recover for construction work which is neither provided for in his contract nor ordered nor approved by the board of supervisors, even tho it was ordered by the engineer in charge.

Gjellefald v Drainage Dist., 203-1144; 212 NW 691

Interest on deferred payment. Interest on long deferred payments due to a contractor may properly be ordered.

Gjellefald v Drainage Dist., 203-1144; 212 NW 691

Ten percent retention fund—loss of status. The "ten percent retention fund", which a public corporation is required to hold for at least 30 days following the completion and acceptance of a public improvement under contract, loses its statutory status immediately after the expiration of said 30 days when no claims for labor or materials have been filed.

Southern Sur. v Jenner, 212-1027; 237 NW 500

Failure to include statutory provisions. A contract let by a town for the erection of a municipal light and power plant was not void for failure to require that 10 percent of the contract price be retained to cover possible claims for labor and materials as required by statute, when the statute protects the persons furnishing labor and materials on public contracts without regard for the express provisions of the contract.

Weiss v Woodbine, 228- ; 289 NW 469

10311 Inviolability and disposition of fund.

Atty. Gen. Opinions. See '25-26 AG Op 86, 102; '28 AG Op 312

Lien on retained percentage only. Claimants for material, labor, or services furnished in the execution of a public improvement contract can assert no claim to or lien on any part of the monthly estimates except to or on that part of the estimates which the municipality holds back as a retained percentage.

Federal Sur. v Morris Plan, 213-464; 239 NW 99

10312 Retention of unpaid funds.

Atty. Gen. Opinions. See '25-26 AG Op 73, 85, 86, 102; '28 AG Op 312; '30 AG Op 148; '32 AG Op 166

Premature payment to contractor—effect. The fact that a municipality pays its contractor immediately after the completion and final acceptance of a public improvement becomes quite immaterial when the materialman fails to file his claim or to commence action to enforce his claim until after the time provided by statute.

Perkins Co. v School Dist., 206-1144; 221 NW 793

Failure to file claim—right of public corporation. The public corporation is under no legal obligation to retain any percentage of the contract price beyond 30 days after the completion and acceptance of the work if no claims have been filed by laborers or materialmen.

Southern Sur. v Jenner, 212-1027; 237 NW 500

10313 Optional and mandatory actions —bond to release.

Atty. Gen. Opinions. See '25-26 AG Op 102; '28 AG Op 312; '30 AG Op 148; '32 AG Op 166

Accrual of action—contractor's bond. The right of a public corporation to bring an action on a public contractor's bond conditioned to hold the municipality harmless from all loss which it may suffer in consequence of the contractor's default does not accrue until after judgment is rendered against the city and the same is paid by the city.

Waukon v Sur. Co., 214-522; 242 NW 632

Assignment as security—effect. The second subcontractor on a public improvement may recover on the bond given by the principal contractor for the full amount of his properly filed and established claim notwithstanding the fact that he has received from the first subcontractor an assignment of the amount due the latter from the principal contractor (1) when, at the time of the assignment, the principal contractor had already honored a trade acceptance for the entire amount due to the first subcontractor, and (2) when the second subcontractor had, consequently, never received anything on his assignment.

Ryerson v Schraag, 211-558; 229 NW 733

Bond as written contract. The statute of limitation relative to unwritten contracts manifestly has no relevancy to an action for damages consequent on the breach of the statutory bond of a public contractor.

Waukon v Sur. Co., 214-522; 242 NW 632

"Completion of work". Where a statutory provision declares that action may not be brought on the bond of a contractor "after six months of the completion" of a public improvement, the improvement will be deemed completed when the contractor has substantially performed on the improvement all that he contracted to perform, has turned it over to the public authorities, and it is immaterial that controversy exists as to extras, or that trifling defects or shortcomings afterwards come to light or that the formal certificate of acceptance was delayed.

Daniels Lbr. v Ottumwa Co., 204-268; 214 NW 481

Dismissal before trial—effect. The dismissal of an action by plaintiff before trial, even tho it is an equitable action which involves the liability of a defendant city relative to various claimants for work and materials on a public improvement, deprives the court of all jurisdiction thereafter to proceed with the trial and adjudicate any right of the dismissing plaintiff, when the pleadings of the defendant are solely defensive.

Eclipse Lbr. v City, 204-278; 213 NW 804
Eclipse Lbr. v Kepler, 204-286; 213 NW 809

Belated filing of claim and bringing of action —effect. Failure of a subcontractor on a municipal improvement to file his claim and to bring his action on the bond of the principal contractor within a stated statutory time is fatal to the right to maintain such action when such timely filing and bringing of action is made a statutory condition precedent to the right to bring the action.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Belated filing of claim—belated suit—effect. A materialman who furnishes material to a contractor who is constructing a public improvement is twice barred of any right to enforce his claim against the municipality or against the surety on the contractor's bond (1) when he files his claim after the expiration of the 30 days given him by statute, and after the municipality has fully settled with the contractor (except for a merely nominal sum), and (2) when he fails to commence action to enforce his claim until after the expiration of the six months given him by statute in which to commence such action.

Perkins Co. v School Dist., 206-1144; 221 NW 793

Equitable action—adjudication. The general equitable action, authorized by this section, in favor of any party interested under a public improvement contract, may be utilized for two purposes, to wit: (1) to adjudicate the rights of the various parties to the contract funds retained by the public corporation, and (2) to adjudicate the liability, to said parties, of the surety on the contractor's bond to the municipality; but a decree in such action is not an adjudication of the right of the municipality to recover on the said bond when such issue was in no manner presented in such action.

Waukon v Surety Co., 214-522; 242 NW 632

Limitation of actions. The statutory provision authorizing a public corporation to bring an action within a specified time to adjudicate the rights of claimants to the funds retained by the municipality imposes no limitation of time on the right of the municipality to proceed against the surety on the bond held by it.

Waukon v Surety Co., 214-522; 242 NW 632

Provisional and conditional order of condemnation. When the court on appeal in an action to adjudicate rights to a fund growing out of a public improvement, is in a quandary as to how far an admitted claim can be enforced against a fund belonging to a nonparty to the action, it may enter a provisional and conditional order of condemnation.

Commercial Bank v Broadhead, 212-688; 235 NW 299

Relief notwithstanding partial failure of recovery. A subcontractor on a public improvement who, in an equitable action, establishes a contract right of recovery against the principal contractor, is entitled to judgment accordingly, notwithstanding the fact that, because of his noncompliance with the statute, he is denied recovery either against the surety for the principal contractor, or against the municipality, or against the undistributed funds in the hands of the municipality.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Statutory bond—subrogation of surety. A surety on a statutory bond for the performance of a public improvement contract who has performed his statutory contract at an expense which exceeds the balance on hand and due under the contract is ipso facto subrogated to the right of the principal contractor to such balance, in preference to subcontractors who hold claims which arise out of contract obligations which are not contemplated by the statute, but which were, nevertheless, inserted into the contract.

Monona County v O'Connor, 205-1119; 215 NW 803

10315 Adjudication—payment of claims.

Right to personal judgment. One who sues on and establishes his claim against a materialman for a county is entitled to a personal judgment against the materialman, even tho his prayer for a lien on the amount due the materialman from the county is denied.

Nolan v Larimer, 218-599; 254 NW 45

When interest unallowable. Interest on claims of laborers and materialmen on public improvements will not be allowed when the

fund from which payment must be made is insufficient to pay the principal of all allowed claims.

Southern Sur. v Jenner, 212-1027; 237 NW 500

10318 Attorney fees.

Nonpermissible allowance by court. The allowance by the court of attorney fees to a party not contemplated by the statute is manifestly erroneous.

Teget v Drain. Ditch, 202-747; 210 NW 954

10319 Unpaid claimants—judgment on bond.

Issue of liability. In an action on a bond running to a subcontractor on a public improvement and conditioned to pay whatever amount may be found due him from the principal contractor, a stipulation for judgment signed by the said contractor and subcontractor is material and competent on the issue of the proper amount due the subcontractor.

Ft. Dodge Co. v Miller, 200-1169; 206 NW 141

10323 Public corporation—action on bond.

Acceptance of completed construction work—undiscoverable defects—recovery. In the absence of fraud or mistake, the acceptance of construction work by a city bars recovery on the contractor's bond, except as to defects undiscoverable or unknown at the time of acceptance; however, the fraud or mistake necessary to overcome the acceptance must be alleged and proven.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Bond of contractor—breach—no piecemeal recovery. Recovery on a contractor's bond may not be piecemeal, consequently that part of trial court's decree, holding its judgment is not a bar nor an adjudication of any future claim against the bond, will be stricken on appeal.

Osceola v Gjellefald Co., 225-215; 279 NW 590

CHAPTER 453

MINER'S LIEN

10324 Nature of miner's lien.

Agreement for payment in stock—effect. A miner who, under a contract with a lessee, opens a mine, is entitled to a lien on the land of the lessor to the extent that his work has enhanced the value of the land, notwithstanding the fact that the work was done under an agreement to receive part payment in corporate stock, which was never delivered.

Tracey v Judy, 202-646; 210 NW 793

Priority. A miner who opens and works a coal mine for a lessee has a lien on the leasehold prior to a mortgage on the entire tract of land, the mortgage not assuming to cover such leasehold.

Ford v Dayton, 201-513; 207 NW 565

Priority. The lien of a miner on land for work in opening a mine thereon is superior to a mortgage given within the lienable period on the leasehold interest to one who had full knowledge of the work already performed.

Tracey v Judy, 202-646; 210 NW 793

Extent. A miner's lien for opening and working a coal mine for a lessee whose lease covers only the coal and a necessary part of the surface, does not extend to the entire tract of land covering the mine and owned by the lessor.

Ford v Dayton, 201-513; 207 NW 565

Lien for improvements—limit. A person contracting to open a slope coal mine is entitled to a lien for the work done, not to exceed the increase in the value of the property because of the improvement, when the tipple is built, the track laid, and the coal is reached.

Hazen v Penn, 226-263; 284 NW 139

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

CHAPTER 454

COMMON CARRIER'S LIEN

10326 Lien of common carrier.

Interstate shipment—building contractor not consignee—nonliability. A common carrier's petition against a building contractor alleging transportation as a benefit received, alleging unjust enrichment and nonpayment, and seeking to collect transportation charges on an interstate shipment of building material is demurrable and fails to state a cause of action in omitting an allegation showing a contractual liability on the defendant contractor as a party to the shipping contract.

Des Moines & C. I. Ry. v Ins. Co., 224-15; 276 NW 56

CHAPTER 455

FORWARDING AND COMMISSION MERCHANT'S LIEN

10341 Nature of lien.

Belated and unexplained sale at low price—effect. A sale by a commission merchant at an extremely low price, and on a steadily falling market, and after a long and unexplained delay, may be sufficient to present a jury question on the issue of negligence.

Blanchard v Wood Co., 204-255; 214 NW 583

Failure to obey instructions. A commission merchant is excused from all liability for failure to sell goods on the terms prescribed by the principal when such failure was because of conditions over which he had no control.

Blanchard v Wood Co., 204-255; 214 NW 583

Presence or absence of directions as to sale. Factors must comply with specific directions as to time of sale. In the absence of such directions, they must sell within a reasonable time.

Alley Co. v Cream Co., 201-621; 207 NW 767

CHAPTER 456

ARTISAN'S LIEN

10344 Enforcement of lien.

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

CHAPTER 457

LIEN FOR CARE OF STOCK AND STORAGE OF MOTOR VEHICLES

10345 Nature of lien.

Bailment from unauthorized person. A garage keeper has no lien on an automobile for the storage thereof when received from one who has the wrongful possession thereof.

Lewis v Garage, 200-1051; 205 NW 983

Conditional sales contract in foreign state—priority. The lien of a garage keeper on an automobile for storage in this state is subject to the superior right of the vendor of said vehicle, or his assignee, under a conditional sales contract executed, delivered, and recorded solely in a foreign state at the place of sale, said vehicle having been removed to this state without the knowledge or consent of the vendor.

Northern Fin. v Meinhardt, 209-895; 226 NW 168

10346 Satisfaction of lien by sale.

Atty. Gen. Opinion. See AG Op June 12, '39

10347 Disposal of proceeds.

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

CHAPTER 457.1

LIEN FOR SERVICES OF ANIMALS

10347.08 Sale—application of proceeds.

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

See Jasper County Bk. v Klauenberg, 218-578; 255 NW 884

CHAPTER 458

HOTELKEEPER'S LIEN

10348 Definitions.

Automobile not "baggage". An automobile kept by the occupant of an apartment house in a garage adjacent to the apartment is not "baggage", within the meaning of this chapter.

Cedar R. Inv. v Hotel Co., 205-736; 218 NW 510; 56 ALR 1098

"Rooming" house defined. An apartment house is not a "rooming" house, within the meaning of this chapter.

Cedar R. Inv. v Hotel Co., 205-736; 218 NW 510; 56 ALR 1098

Lien on personal effects. An incorporated hospital in which a patient is furnished board and room, in addition to care, medicine, hospital supplies, treatment and nursing, is not entitled to a lien on personal effects left by the patient in the hospital.

Reason: A "hospital" is not a "hotel" within the meaning of the hotel lien act. [§§10347.14-10347.17, C., '39.]

Hull Hospital v Wheeler, 216-1394; 250 NW 637

10352 Disposal of proceeds—statement.

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

CHAPTER 459

RELEASE OF LIENS BY BOND

10354 Liens subject to release.

Procedure optional. The statutory right of an owner of personal property who disputes the existence of a lien thereon, to give a bond conditioned to pay the amount of any lien which may be established, and thereby secure right to possession of the property, is a procedure entirely optional with the owner.

Lewis v Garage, 200-1051; 205 NW 983

Statutory bond to discharge receiver and pay claims—effect. Where, in order to secure an order for the discharge of a receiver, the defendant in the receivership proceedings executes and delivers to a claimant in said proceedings a bond conditioned to pay said claimant whatever judgment he may obtain on his claim, it follows that the claimant's lien on the assets in the hands of the receiver is thereby transferred to the bond, and recovery may be had on said bond, for whatever judgment the claimant secures on his claim.

Shanahan v Truck Co., 209-1231; 229 NW 748

TITLE XXVII

LEGALIZING ACTS

CHAPTER 460

PUBLICATION OF PROPOSED LEGALIZING ACTS

10358 Publication prior to passage.

Discussion. See 11 ILR 390—Validity of curative legislation on judgments

Legalizing acts—self-nullification. A legislative act which purports to legalize specified municipal warrants, the legality of which is then being litigated, is completely nullified, so far as said question of legality is concerned, by the insertion in the act of a proviso that "nothing in this act shall affect any pending litigation".

Mote v Town, 211-392; 233 NW 695

CHAPTER 461

NOTARIES PUBLIC AND ACKNOWLEDGMENTS

10367 Mayors and notaries.

Atty. Gen. Opinion. See '38 AG Op 798

CHAPTER 462

JUDGMENTS AND DECREES

10378 Judgments or decrees respecting wills.

Creditor's suit. Record involving an equitable proceeding to discover property belonging to a judgment defendant, and to subject said discovered property to the satisfaction of said judgment, reviewed and held not barred by this section or §§11007 and 11882, C., '35.

Bankers Tr. v Garver, 222-196; 268 NW 568

CHAPTER 462.1

EXECUTION SALES

10383.1 Failure to make proper entries.

Curative acts—omission of levying officer. The failure of an officer to indorse on an execution the procedural matter required by statute may be legalized by an act of the legislature.

Francis v Todd & Co., 219-672; 259 NW 249
Nelson v Hayes, 222-701; 269 NW 861

TITLE XXVIII

DOMESTIC RELATIONS

CHAPTER 469

MARRIAGE

10427 Contract.

Antenuptial agreements. See under §11990(IV)
Postnuptial agreements. See under §10447

Discussion. See 8 ILB 245—Mohammedan marriage; 13 ILR 210—State's interest in marital relation; 14 ILR 215—Presumptions in common law marriage; 16 ILR 534—Marriage by proxy; 23 ILR 75—Cohabitation necessary—common law marriage

Antenuptial agreement—sufficiency of evidence. Evidence held sufficient to show execution of antenuptial agreement precluding widow from dower share.

In re Dunn, (NOR); 224 NW 38

Evidence of marriage—heirs claiming estate. In probate proceedings by heirs claiming under the deceased spouse of intestate, the evidence was sufficient to establish the marriage between the intestate and deceased spouse, tho the trial court found that there was insufficient evidence to establish heirship and rendered judgment that the property escheat to the state as uninherited property.

In re Clark, 228- ; 290 NW 13

Common-law requisites—known inability to contract. A common-law marriage may not exist between parties who mutually know that one of them has a legal spouse, living and undivorced.

Baldwin v Sullivan, 201-955; 204 NW 420; 208 NW 218

Common-law marriage—evidence. Evidence held insufficient to establish a common-law marriage.

Hoese v Hoese, 205-313; 217 NW 860
Reppert v Reppert, 214-17; 241 NW 487

Common-law marriage—written contract—sufficiency. A written agreement between a man and a woman "to live as husband and wife until such time that we are lawfully married" is insufficient to constitute a common-law marriage, because the writing not only furnishes a cover for illicit relation but fails to carry on its face the required element of a present intention to assume the legal relation.

State v Grimes, 215-1287; 247 NW 664

Marriage settlements—validity. A marriage settlement, duly and in good faith executed, and confirmed by the subsequent marriage of the parties, is valid against the creditors of the husband when not grossly out of proportion to the husband's station and circumstances.

Benson v Burgess, 214-1220; 243 NW 188

Marriage as consideration. Marriage is a good consideration for a contract,—one of the highest known to the law.

In re Shepherd, 220-12; 261 NW 35

Interest on antenuptial-contract allowance. A provision in an antenuptial contract that the wife shall be paid a named sum within a named time after the death of the husband contemplates interest on said sum from the maturity date, even tho said contract also provides that the widow shall be paid a monthly sum until the former main sum is paid.

In re Shepherd, 220-12; 261 NW 35

Claim under antenuptial contract—nontransferability to equity. A simple, unsecured claim for money, filed against an estate by the surviving widow, is not, against the objections of the administrator, transferable to equity for trial. So held as to a claim due the widow under an alleged antenuptial contract.

In re Mason, 223-179; 272 NW 88

Manslaughter—marriage as inference of suppressing testimony. It is reversible error in a manslaughter case for the state to call accused's wife as a witness and, in the presence of the jury after discovering her relationship, to elicit testimony over accused's objection thereby creating the prejudicial inference that accused's marriage was purposefully to suppress testimony.

State v Chismore, 223-957; 274 NW 3

Support and maintenance—stepchildren. The legal obligation of a father to support his minor children extends to stepchildren.

Rule v Rule, 204-1122; 216 NW 629

Construction of will—conditions and restrictions—restraint of marriage. That part of a devise to testator's widowed daughter-in-law which provides that the property shall pass to her children upon her remarriage is not void because in undue restraint of marriage.

Anderson v Crawford, 202-207; 207 NW 571; 45 ALR 1216

10428 Age.

Valid where made, valid everywhere. Generally speaking, a marriage valid where made is valid everywhere.

Boehm v Rohlfs, 224-226; 276 NW 105

Foreign state—parties below age requirement. A marriage, the parents consenting thereto, in a foreign state, between two persons, one of whom has not reached the age at and above which parents may give their consent for marriage, is not void but merely voidable, and as affecting rights in Iowa such parties thereby legally reach majority.

Boehm v Rohlfs, 224-226; 276 NW 105

10429 License.

Atty. Gen. Opinions. See '32 AG Op 90; AG Op June 20, '39

10430 Age and qualification—affidavit.

Atty. Gen. Opinions. See '32 AG Op 84, 90

10437 Nonstatutory solemnization—forfeiture.

Common-law requisites—known inability to contract. A common-law marriage may not exist between parties who mutually know that one of them has a legal spouse, living and undivorced.

Baldwin v Sullivan, 201-955; 204 NW 420; 208 NW 218

10445 Void marriages.

Discussion. See 17 ILR 254—"Void" and "voidable"

"Sister" contemplates "half-sister". The statute which declares void a marriage between a man and his sister's daughter, embraces a marriage between a man and his half-sister's daughter. As a consequence carnal knowledge between a man and the daughter of his half-sister constitutes incest. (§12978, C., '27.)

State v Lamb, 209-132; 227 NW 830

Temporary alimony—showing. Ample showing of marriage justifying an order for temporary alimony, suit money, and attorney fees in an action for separate maintenance, is made by proof that even tho plaintiff and defendant were married at a time when plaintiff's decree of divorce from a former husband had not been entered of record, yet plaintiff and defendant for several years lived together as husband and wife after said decree had been so entered.

Hanford v Hanford, 214-839; 240 NW 732

CHAPTER 470

HUSBAND AND WIFE

10446 Property rights of married women.

Conveyances by wife. See under §10050, Vol. I

Discussion. See 25 ILR 351—Larceny of spouse's property

Admissions of husband—when inadmissible against wife. In an action against a wife to subject her homestead to a judgment which had been rendered against her husband on his debt antedating the acquisition by the wife of her said homestead, admissions of the husband tending to show that he furnished the money to pay for the said homestead are not binding on, or admissible against, the wife.

Price v Scharpff, 220-125; 261 NW 511

Antenuptial contract—validity. Antenuptial contract reviewed, and held not invalid on the grounds of unfairness, unconscionableness, and non-mutuality, or because it contained an invalid provision in relation to property interest and the right to children, which in no manner affected the consideration actually received by the wife.

Kalsem v Froland, 207-994; 222 NW 3

Equitable conversion—right to reconvert—consent of spouse. The right of a legatee to make and enforce an election to take real estate in lieu of a devise of the proceeds thereof, does not depend in any degree on the consent of the spouse of such legatee.

In re Warner, 209-948; 229 NW 241

Mutual wills—husband and wife. Where wills were drawn by the same scrivener, executed by the husband and wife, at the same time and place, before the same witnesses, and each will containing reciprocal provisions, such wills, in and of themselves, establish prior agreement to execute mutual wills and no other evidence is necessary, even when wills contain no memorandum of the agreement.

Maurer v Johansson, 223-1102; 274 NW 99
Child v Smith, 225-1205; 282 NW 316

Purchase by wife who joined in mortgage—effect. A wife who joins with her husband in a mortgage on the husband's land, but who assumes no obligation, contractual or otherwise, to pay subsequently accruing taxes on the land, may, after the land has gone to tax deed to a stranger without collusion with her and while she was not in possession, purchase the land of the tax deed holder and acquire his title, viz, a fee simple indefeasible title—a title free from the lien of said mortgage.

Wood v Schwartz, 212-462; 236 NW 491

Property rights determinable after death. Principle reaffirmed that the mutual property rights of a husband and wife may be determined after the death of one of the parties.

Melvin v Lawrence, 203-619; 213 NW 420

Torts during coverture. A wife may not maintain an action against her husband for

damages consequent upon willful injuries inflicted upon her by her husband.

In re Dolmage, 203-231; 212 NW 553

Wife's separate estate—no joint adventure from husband's management. Where a wife inherits real property which is managed, as an incident to their marital relation, by her husband, his individual purchase of livestock in connection with such management and executing his individual promissory note therefor will not make the wife liable thereon as a joint adventure.

Valley Bank v Staves, 224-1197; 278 NW 346

Wife's homestead not liable for husband's debt. A judgment against a husband is not enforceable against a homestead acquired by his wife in her own name—even tho so acquired long after the inception of the debt on which said judgment was rendered—on proof that the husband, while perfectly solvent, and with no fraudulent intent, and without expressly or impliedly acquiring any interest in the land, voluntarily permitted a portion of his own assets to be applied on the debt of the wife for her said homestead.

Price v Scharpff, 220-125; 261 NW 511

Written contract not signed by wife. Where a husband and wife had an oral agreement for the sale of farm personalty in which they had a joint interest, and a written contract, specifying manner of disposition of proceeds of sale, which was signed by the husband but not by wife, she was not bound by written contract.

Russell v Moeller, (NOR); 268 NW 60

10447 Interest of spouse in other's property.

ANALYSIS

I TRANSACTIONS BETWEEN HUSBAND AND WIFE IN GENERAL
II SEPARATION AGREEMENTS
III OWNER'S LIABILITY FOR SPOUSE'S DEBTS

Antenuptial agreements. See under §§10427, 11285(III), 11990(IV)

I TRANSACTIONS BETWEEN HUSBAND AND WIFE IN GENERAL

Discussion. See 15 ILR 481—Insurable interest

Accounting against bank—husband as wife's agent. In an action by a wife against a bank challenging her husband's speculations and transactions in her behalf and for an accounting as to funds and securities where the wife having (1) permitted, acquiesced in, and cooperated with her husband in managing her business with the bank for a period of years, (2) kept a personal record showing she had knowledge of many challenged transactions (proved through ultra violet ray photography of obliterated items), (3) reported income tax on other challenged transactions, (4) a bank account in her own name showing profits from other challenged transactions, (5) been a woman personally familiar with business and speculative dealings, and (6) made a settlement with the bank after ample consideration and acting upon the advice of friends skilled in the business of securities, cannot thereafter claim that the bank could not rely upon her husband's apparent general agency, nor that his dealings with the bank involving her securities and obligations arising therefrom were not the joint operations of herself and husband, nor that a settlement thereof she thereafter made with the bank resulted from the bank's concealment and duress.

Clark v Iowa-D. M. Bank, 223-1176; 274 NW 919

Action for partition. A husband may not maintain an action to partition lands of which his wife holds the legal title, and in which he has no interest except the contingent interest of a husband.

Jones v Park, 220-903; 262 NW 801

Antenuptial contract—insufficiency. A written instrument purporting to be an antenuptial contract waiving all interest which each of the contracting parties would have after marriage in the property of the other, but shown to have been actually signed after marriage, will not bar such property interest when the instrument neither recites (1) that it was executed for the purpose of furnishing evidence of a previous antenuptial oral contract nor (2) that it was executed in consideration of a previous oral antenuptial contract.

Battin v Bank, 202-976; 208 NW 343

Claims — peculiar circumstances excusing service of notice of hearing. Altho claimant is executor's wife, peculiar circumstances excusing a claimant's failure to serve notice of hearing may be found in evidence showing that the claim was filed within six months from executor's appointment, that executor told claimant he had knowledge of the matters upon which the claim was based, and that it would be unnecessary to serve notice. Suspicious circumstances surrounding the claim are to be considered in the trial of the claim on its merits.

In re Hill, 225-527; 281 NW 500

Marriage settlements. The parties to an antenuptial contract which simply and generally provides that the wife shall, on the death of the husband, "be paid" a named sum by the latter's personal representative, will not be deemed to have intended that in the settlement of the estate of the husband, the said sum to be paid the wife should have priority over third and fourth class claims. (Holding based on the intent of the parties as reflected in the contract and surrounding circumstances.)

In re Shepherd, 220-12; 261 NW 35

I TRANSACTIONS BETWEEN HUSBAND AND WIFE IN GENERAL—concluded

Deed and agreement creating trust. Where a husband conveyed his separate property to wife pursuant to an agreement providing that upon her death property was to go to a granddaughter either by will or deed, and where, after consummation of this transaction, the husband tore up the original copy of the agreement and executed an absolute conveyance of the same property to his wife, held, that the original deed and agreement, which were simultaneously executed, must be construed as one instrument, and that an irrevocable trust was created in favor of the granddaughter since no power of revocation was expressly reserved.

Young v Young-Wishard, 227-431; 288 NW 420

Mutual wills not prohibited contract. Mutual reciprocal wills, drawn pursuant to a compact between husband and wife, do not violate the statute prohibiting agreements affecting the right which, by reason of the marriage relation, one party has in the property of the other.

Maloney v Rose, 224-1071; 277 NW 572

Wife's claim for services—public policy. When necessarily including compensation for purely domestic duties, a wife's claim against the estate of her deceased, divorced husband, furnishes in itself sufficient ground for denying it, under the rule that agreements that a wife be compensated for the performance of obligations incident to the marital relation violate public policy and are void.

In re Straka, 224-109; 275 NW 490

Mutual wills enforced as contract. Clear and satisfactory evidence that husband and wife entered into a mutual contract, and in accordance therewith executed mutual and reciprocal wills providing for the disposition of all their property to each other and to certain named beneficiaries upon the death of survivor, entitles beneficiaries to specific performance thereof and to restrain probating of another will, executed by husband after the wife's death, making provision contrary thereto.

Child v Smith, 225-1205; 282 NW 316

Taxes—nonduty of wife to pay. A wife who, for the purpose of releasing her distributive share, joins with her husband in a mortgage of the husband's lands is not bound by the husband's covenants or legal obligation to pay future accruing taxes on the land.

Wood v Schwartz, 212-462; 236 NW 491

Transactions concerning separate property. Where a husband conveyed his separate property to wife pursuant to agreement providing that, upon her death, property was to go to granddaughter either by will or proper deed of conveyance, such an agreement was not a contract dealing primarily with the inchoate right of dower of the wife and therefore was not void under statute providing that a husband or wife has no interest in the property owned by the other which can be the subject of contract between them, since that statute prohibits only such transactions when they relate directly to dower rights.

Young v Young-Wishard, 227-431; 288 NW 420

II SEPARATION AGREEMENTS

Division of property pending divorce. An agreement for a division of property between husband and wife pending contemplated divorce proceedings is enforceable.

Castelline v Pray, 200-695; 205 NW 339

Property-settlement contract. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Property settlement action nontransferable in toto. An action brought on a contract (e.g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract. Said alleged fraud, if established in the law action, constitutes a complete defense, and remaining equitable issues are properly transferred to and disposed of in equity. Failure, in the law action, to establish said alleged fraud, necessarily removes from the case said equitable issue of rescission.

Poole v Poole, 221-1073; 265 NW 653

III OWNER'S LIABILITY FOR SPOUSE'S DEBTS

Discussion. See 18 ILR 30—Torts of wife

Estoppel in favor of creditors or trustee in bankruptcy. A husband who, in the sale of his land, permits a note and mortgage to be given on the land to his wife for one-third of the deferred payments, and later mutually rescinds the sale with the vendee, and causes the mortgage to be released and accepts a reconveyance of the land, is estopped, as against the wife's creditors or trustee in bankruptcy, to dispute the lien and full validity of said note and mortgage, when, with the knowledge of the husband, and without objection by him, the creditors extended credit to the wife in reliance on her supposed ownership of the note and mortgage.

Browning v Kannow, 202-465; 210 NW 596

Signature of spouse to mortgage only—effect. The defeasance clause in a real estate

mortgage on the lands of a husband, to the effect that the mortgage shall be void if the signers shall "pay or cause to be paid" the secured notes, does not, in and of itself, impose personal liability on the wife who is one of the signers to the mortgage.

Fairfax Bank v Coligan, 211-670; 234 NW 537

Wife's separate estate—surety on mortgage. Where a married woman without any consideration therefor mortgages her separate property to secure the separate debt of the husband, he is the principal and she is a surety as to such indebtedness.

Clindinin v Graham, 224-142; 275 NW 475

10448 Remedy by one against the other.

Action by wife against the husband. See under §10461(II)

Atty. Gen. Opinion. See AG Op Jan. 24, '39

Accounting—evidence—insufficiency. A husband will not be compelled to account to his wife for the amount of certificates of deposit discovered by the wife in the common safety-deposit box of the husband and wife and payable to the wife, when there is no evidence of the source of the money represented by the certificates and no evidence of what became of the certificates.

Junger v Bank, 208-336; 223 NW 381

Converted bank account. A husband must account to his wife for the proceeds of a bank deposit personally made by her in her own name, and of her own funds, but credited on the books of the bank to the husband and converted by him to his own use without the consent of the wife.

Junger v Bank, 208-336; 223 NW 381

Joint securities deposit—settlement. Where securities are deposited with a bank by husband and wife as joint principals, a settlement thereon can be made by the joint cooperation of the principals or by one as authorized legal representative of both.

Clark v Bank, 223-1176; 274 NW 919

Tort action by one against other. The rule of the common law that neither the husband nor wife may maintain an action against the other for damages consequent on the negligent or willful injuring of one by the other, is the law of this state,—not having been abrogated by anything contained in §10991-d1, C., '35. [§10991.1, C., '39].

Aldrich v Tracy, 222-84; 269 NW 30

When wife not creditor. A wife does not, against her husband's creditors, become the creditor of her husband by turning over to him her money for indiscriminate use in the family, and without any agreement for or expectation of repayment.

Harris v Carlson, 201-169; 205 NW 202

10449 Conveyances to each other.

ANALYSIS

I CONTRACTS BETWEEN HUSBAND AND WIFE
II TRANSFERS OF PROPERTY BETWEEN HUSBAND AND WIFE

Antenuptial agreements. See under §§10427, 11285(III), 11990(IV)
Fiduciary relations, fraudulent transactions. See under §11315

I CONTRACTS BETWEEN HUSBAND AND WIFE

Deeds to children delivered to trustee—wife acquiescing. An agreement reached by a husband and wife, that he should deed his property to her and she would deed it to the children, the deeds to be placed with a trustee, who was to record the first deed on the death of the husband and then record the second deeds on the death of the wife, is binding on the wife, when she is present at the execution of the deeds and, by her silence, acquiesces in the instructions given by the husband to the trustee.

Bohle v Brooks, 225-980; 282 NW 351

Resulting trust—payment by wife and title in husband.

State Bank v Nolan, 201-722; 207 NW 745

Fraud—remedies of creditors—burden of proof. A creditor, seeking to set aside an alleged fraudulent conveyance which recites a consideration which is apparently valid and substantial tho indefinite in amount, must carry his proof beyond showing that the grantor and grantee were husband and wife and that the grantor was insolvent when he delivered the conveyance. In other words, such proof does not cast upon grantee the burden, (1) to sustain the adequacy of the consideration, and (2) to negative bad faith in the transaction, or (3) to show that the grantor at the time retained sufficient other property to pay his creditors.

First N. Bank v Currier, 218-1041; 256 NW 734

Transfers and transactions invalid—bona fide conveyance to wife. A conveyance by a husband to his wife, for the sole purpose of paying a bona fide indebtedness long owing by the husband to the wife, is unimpeachable, even tho the creditors of the husband are thereby hindered or perhaps wholly prevented from collecting their claims, it appearing that the value of the land was less than the debt due the wife.

Andrew v Martin, 218-19; 254 NW 67

Transfers and transactions invalid—right of wife—burden of proof. A wife as a bona fide creditor of her husband has the legal right to take from her husband a conveyance of all his real and personal property provided she is actuated by the sole purpose of obtaining pay-

ment of her claim. And if the property received is out of proportion to the debt, the party questioning the conveyance has the burden so to show.

Farmers Bank v Ringgenberg, 218-86; 253 NW 826

II TRANSFERS OF PROPERTY BETWEEN HUSBAND AND WIFE

Alimony—property settlement under trust agreement. A property settlement under an irrevocable trust agreement made by husband and wife previous to and confirmed in divorce decree discharged husband's obligation for further support and precluded right to further alimony.

Fitch v Com. of Internal Rev., 103 F 2d, 702

Equitable estoppel—unrecorded conveyance —pleader's burden. One alleging an equitable estoppel must prove it by clear, satisfactory, and convincing evidence, hence in asserting in a fraudulent conveyance action, an equitable estoppel against the wife of a bank stockholder, because she withheld from record, for many years, a deed to herself from her husband, the creditors of the bank have not sustained the burden of proving estoppel when they admit that they did not deposit their money on the wife's representation, nor upon their belief, in the husband's ownership of the land.

Bates v Kleve, 225-255; 280 NW 501

Estoppel to dispute husband's title. A wife who permits her husband to take and record title to her lands, and for a long series of years, to exercise the usual and customary indicia of ownership, is estopped to assert her title against the claims of the husband's creditors who have extended credit to him in reliance on his apparent title.

Farmers Bank v Pugh, 204-580; 215 NW 652

Fiduciary relation between husband and wife. Whether in an action by an heir to set aside a conveyance by a wife to her husband on the ground of undue influence the burden of disproof of said ground shifts to the defendant-husband, quaere.

Browne v Johnson, 218-498; 255 NW 862

Fiduciary relation between husband and wife. A fiduciary relation within the meaning of the law is not established by a showing that the parties were husband and wife and that the wife frequently aided her husband in the transaction of his business, it appearing that the husband was physically infirm.

Arndt v Lapel, 214-594; 243 NW 605

Fraud—validity of transfer. A wife who has a bona fide claim against her husband may, when actuated by the sole and good-faith purpose of obtaining payment, take a nonexcessive conveyance of property from her husband, even tho she knows at the time that the husband is financially embarrassed and that he intends by the conveyance to circumvent another of his creditors.

Clark v Clark, 209-1179; 229 NW 816

Sustaining constructively fraudulent deed. A deed from a husband to his wife, constructively fraudulent as to an existing creditor because it left the husband insolvent, will, nevertheless, be sustained as superior in right to that of the creditor, to the extent of the valuable consideration admittedly paid by the wife for the land, when the creditor fails to establish some active fraud on the part of the wife.

Malcolm Bank v Mehlin, 200-970; 205 NW 788

Homestead character of property—evidence. Evidence held to show that the property in question was, at the time of a conveyance by a husband to his wife, the homestead of the grantor and grantee, and therefore not fraudulent as to creditors.

Hansen v Richter, 208-179; 225 NW 361

Nonestoppel against wife. One who purchases a promissory note without any consultation whatever with the maker or the maker's wife, may not successfully assert that the wife is estopped to lay claim to lands which stood in the name of the husband-maker at the time of said purchase.

Jordan v Sharp, 204-11; 214 NW 572

"One dollar and other valuable consideration"—sufficiency. A deed from husband to wife, executed two years prior to the rendition of a judgment against the husband and which deed recites a consideration of "one dollar and other valuable consideration", is not fraudulent as against such judgment creditor of the grantor-husband, when it is shown that the "other consideration" consisted of $3,000 actually paid by the wife.

Donovan v White, 224-138; 275 NW 889

Personal liability of grantee. A wife who, knowing that her husband intended to hinder and delay his creditors, accepts a voluntary transfer of his bank deposit is, nevertheless, not personally liable to the husband's subsequently appointed trustee in bankruptcy for that part of the deposit which is expended prior to the bankruptcy proceedings in carrying on in good faith the ordinary business of the husband.

Barks v Kleyne, 201-308; 207 NW 329

Preference to wife—insolvency of husband. A conveyance of land by a husband to his wife for the sole purpose on his part of repaying, and for the sole purpose on her part of receiving, that which he is actually owing to her, (no question of adequacy of consideration being raised) is unassailable, even tho such conveyance works a direct preference in favor of

the wife over other creditors of the husband; and especially is this true when the party attacking the conveyance fails to plead and prove that the conveyance left the husband insolvent.

Bartlett v Webber, 218-632; 252 NW 892

Allowable preference to wife. A wife who permits her husband to use her personal funds in payment for land purchased by him in his own name, and so permits under circumstances fairly justifying the inference that said use was as a loan and not as a gift, may thereafter (some 20 years in present case), validly take from the husband a conveyance of said land at a fair valuation and for the sole and only purpose of satisfying said loan; and this is true tho such conveyance works a preference in her favor over other creditors of the husband. (No issue of estoppel in the case.)

Bates v Maiers, 223-183; 272 NW 444

Voluntary, nonfraudulent conveyance. Altho wholly voluntary, a conveyance executed when the grantor has no fraudulent intent cannot be impeached by a subsequent creditor, so a real estate conveyance by a husband to his wife many years before he becomes a bank stockholder cannot be invalidated by the creditors of the bank, seeking to collect a judgment on stock liability assessment.

Bates v Kleve, 225-255; 280 NW 501

Wife as noncreditor. A husband who takes title to land paid for by the wife without any agreement to repay the wife, may not later by a conveyance to the wife validly prefer the wife over his creditors on the theory that the wife was a creditor.

Farmers Bank v Pugh, 204-580; 215 NW 652
See Harris v Carlson, 201-169; 205 NW 202

Right of wife—burden of proof. A wife as a bona fide creditor of her husband has the legal right to take from her husband a conveyance of all his real and personal property provided she is actuated by the sole purpose of obtaining payment of her claim. And if the property received is out of proportion to the debt, the party questioning the conveyance has the burden to so show.

Farmers Bank v Ringgenberg, 218-86; 253 NW 826

Right of wife to take conveyance solely to protect herself.

Harris v Carlson, 201-169; 205 NW 202
Johnson v Warrington, 213-1216; 240 NW 668

Right to prefer. A conveyance by a husband to his wife, executed and received for the sole purpose of paying an actual bona fide debt of the husband to the wife, is beyond the reach of other creditors provided the property conveyed is not substantially in excess of the debt.

Johnson v Warrington, 213-1216; 240 NW 668

Securing wife against loss on homestead mortgage. A bona fide conveyance of personal property by a husband to his wife, to secure her from liability on a mortgage on her homestead, executed for the purpose of raising money to discharge a debt of the husband's, is prior in right to subsequently rendered judgments against the husband and levies thereunder on the said conveyed property; but the security will be sustained only insofar as will make the wife whole.

Sherman v Linderson, 204-532; 215 NW 501

Secret, unrecorded deed—estoppel. A wife who, even without fraudulent intent, receives from her husband a secret, voluntary conveyance of land, and withholds the deed from record for many years, and allows her husband publicly to treat, manage, and control the land as his own and to obtain credit on the strength of such apparent ownership, thereby estops herself from asserting her ownership against said creditors.

Meltzer v Shafer, 215-785; 244 NW 851

Setting aside—limitation of actions—laches. A suit in equity by trustee in bankruptcy to set aside deed by bankrupt to husband on grounds of want of consideration, fraud, and failure to take possession of land, brought more than 6 years after recording of deed, is barred by laches under statute of limitations where only one creditor secured allowance of claim, which claim was based on note past due when deed was recorded.

Monroe v Ordway, 103 F 2d, 813

Tenancy—termination—unavailable defense. A tenant who has agreed that his tenancy may be terminated in case the landlord sells the property may not predicate a defense to such termination on the fact that the landlord (concededly in good faith) actually conveyed a part of the land to his wife, solely in consideration of the wife's agreement to sign a conveyance of the remaining part of the land.

Luse v Elliott, 204-378; 213 NW 410

Transfers and transactions invalid. Record reviewed and held that a deed from a husband to his wife was executed for the sole purpose of repaying the wife a bona fide indebtedness, and was without any intent to defraud the husband's creditors.

Farmers Bk. v Skiles, 220-462; 261 NW 643

Nonimpeachable transfer to wife. A nonexcessive conveyance by a husband to his wife in satisfaction of an actual and good faith indebtedness owing by him to her is unimpeachable when in taking the conveyance the

II TRANSFERS OF PROPERTY BETWEEN HUSBAND AND WIFE—concluded

wife is motivated by the sole purpose of obtaining payment of her claim; and this is true irrespective of her knowledge of the financial condition of her husband.

Steffy v Schultz, 215-837; 246 NW 910

Wife's separate estate—surety on mortgage. Where a married woman without any consideration therefor mortgages her separate property to secure the separate debt of the husband, he is the principal and she is a surety as to such indebtedness.

Clindinin v Graham, 224-142; 275 NW 475

Withholding from record—effect. The nonfraudulent act of a wife in withholding from record a deed of land from the husband will not estop her from disputing the title of the husband, when she did not know or have reason to know that anyone would be extending credit to the husband in reliance on his supposed title.

Farmers Bk. v Schleisman, 203-585; 213 NW 211; 52 ALR 182

See Crowley v Brower, 201-257; 207 NW 230

10450 Attorney in fact.

Accounting against bank—husband as wife's agent—evidence. In an action by a wife against a bank challenging her husband's speculations and transactions in her behalf and for an accounting as to funds and securities where the wife having (1) permitted, acquiesced in, and cooperated with her husband in managing her business with the bank for a period of years, (2) kept a personal record showing she had knowledge of many challenged transactions (proved through ultra violet ray photography of obliterated items), (3) reported income tax on other challenged transactions, (4) a bank account in her own name showing profits from other challenged transactions, (5) been a woman personally familiar with business and speculative dealings, and (6) made a settlement with the bank after ample consideration and acting upon the advice of friends skilled in the business of securities, cannot thereafter claim that the bank could not rely upon her husband's apparent general agency, nor that his dealings with the bank involving her securities and obligations arising therefrom were not the joint operations of herself and husband, nor that a settlement thereof she thereafter made with the bank resulted from the bank's concealment and duress.

Clark v Bank, 223-1176; 274 NW 919

Custom as evidence. Testimony tending to show a custom by a husband to sign the name of his wife to promissory notes, with her express or implied knowledge and approval, extending continuously through many years prior to the transaction in question, is admissible on the issue whether the husband had such authority from his wife.

State Bk. v Fairholm, 201-1094; 206 NW 143

Evidence of agency. Prima facie proof of agency of a husband for his wife is shown by evidence that the husband had, in a transaction in question, always acted for his wife, both in her presence and in her absence, and that the wife had never denied or repudiated the right of the husband so to act.

Herron v Temple, 198-1259; 200 NW 917

Dealings—trust officer's brokerage account—husband pledging wife's securities. Where a husband having a general agency, acquiesced in and ratified by the wife, to transact the wife's business, has a key to her bank deposit box, and personally removes certain securities therefrom which he pledges as collateral for a brokerage account in the name of the bank's assistant trust officer, of which transaction the wife receives knowledge, the fact that the brokerage account is in the name of such trust officer will not impose liability on the bank for a breach of a fiduciary relation, because, the husband having authority to pledge the stock, the account for which he pledged it would not matter.

Clark v Bank, 223-1176; 274 NW 919

Joint securities deposit—settlement—manner. Where securities are deposited with a bank by husband and wife as joint principals, a settlement thereon can be made by the joint cooperation of the principals or by one as authorized legal representative of both.

Clark v Bank, 223-1176; 274 NW 919

10459 Family expenses.

ANALYSIS

I NATURE OF THE OBLIGATION FOR FAMILY EXPENSES
II WHAT CONSTITUTES FAMILY EXPENSES
III DUTY TO SUPPORT MINOR CHILDREN

Action by one parent against the other for contribution. See under §10448, Vol I
Minors' contracts. See under §10493

I NATURE OF THE OBLIGATION FOR FAMILY EXPENSES

Liabilities enforceable against. A homestead is exempt from execution on a judgment for a family expense contracted after the acquisition of the homestead. In other words, the statutory declaration that a homestead is exempt from judicial sale "where there is no special declaration of statute to the contrary" (§10150, C., '27) has no reference whatever to the statutory declaration that a family expense is "chargeable upon the property of both husband and wife".

Dorsey v Bentzinger, 209-883; 226 NW 52

Living with and caring for parents at their request — nongratuitous services — allowable probate claim upheld on appeal. Reciprocal services rendered by and between members of a family are presumed to be gratuitous, yet, the court, a jury being waived, may find that a married daughter, who with her family, returns to the home of her aged parents at their request to care for them, for which she expected to receive and the parents expected to pay remuneration, did not re-establish a family relationship with her parents so as to raise the presumption of gratuitous services. Such finding will be binding on the appellate court.

Clark v Krogh, 225-479; 280 NW 635

Services by child—presumption. Principle reaffirmed that services rendered by a member of a family are presumptively gratuitous.

Howell v Howell, 211-70; 232 NW 816

II WHAT CONSTITUTES FAMILY EXPENSES

Evidence—sufficiency. Evidence held to present jury questions on the issues of the delivery of certain articles of family expense and the liability of the husband therefor.

Younker Bros. v Meredith, 217-1130; 253 NW 58

Leases—execution by husband only—liability of wife. A wife is not liable on a written lease signed by the husband alone as lessee, tho the leased premises be occupied by the husband and wife as a family residence.

Whether the wife be liable for the rent as a family expense under this section is a quite different question—a question which cannot be deemed before the court in landlord's attachment proceedings manifestly based solely on the lease signed by the husband alone.

Rogers v Davis, 223-373; 272 NW 539

III DUTY TO SUPPORT MINOR CHILDREN

Divorce—liability of parent. The father of a minor child is liable for necessary medical and hospital services rendered without his knowledge to the child in an emergency even tho the mother has obtained a divorce and the custody of said child, and has been paid the decreed alimony.

Stech v Holmes, 210-1136; 230 NW 326
Hensen v Hensen, 212-1226; 238 NW 83

Stepchildren. The legal obligation of a stepfather to support his minor children extends to stepchildren.

Rule v Rule, 204-1122; 216 NW 629

Support and education of child. Principle recognized that, ordinarily, a parent is not entitled to compensation for the support of his child when the parent has sufficient means of his own.

In re Nolan, 216-903; 249 NW 648

10460 Custody of children.

Alienation of affections. A mother may not maintain an action for damages for the alienation of the affection for her of her minor son, in the absence of an allegation that she has thereby been deprived of the custody and services of said minor.

Pyle v Waechter, 202-695; 210 NW 926; 49 ALR 557

Award of custody of child ordinarily not disturbed. In deciding the custody of child so much depends on appearance and demeanor of the parties, witnesses, trial court's discretion, and child's welfare as disclosed by his appearance and affections, that supreme court is not ordinarily justified in disturbing trial court's finding.

Ellison v Platts, 226-1211; 286 NW 413

Best interest of child. The paramount consideration in determining the custody of a child is the best interest of the child.

Ellison v Platts, 226-1211; 286 NW 413

Modification of order of custody—considerations. In an action for the modification of an order for the custody of a 10-year-old child, where the affection and care received in the homes of each of the divorced parents was satisfactory, the wishes of the child cannot have great weight, the controlling consideration being the welfare of the child, and, when there was no change in circumstances to require the action of the court, a previous adjudication that the child remain with his mother should not be modified.

Vierck v Everson, 228- ; 291 NW 865

Custody of child. Evidence held not to warrant disturbing trial court's decree in habeas corpus denying mother custody of her 20-months-old child when child had been in custody of mother's aunt and uncle with whom child had resided and been cared for since her birth out of wedlock.

Ellison v Platts, 226-1211; 286 NW 413

Proceeding for child custody treated as equitable action. Habeas corpus actions involving the custody of minor children treated as equitable proceeding.

Ellison v Platts, 226-1211; 286 NW 413

Controlling considerations. The fact that one custody of a child may offer larger financial and educational advantages than another custody, is not necessarily a controlling consideration on the issue of the child's best welfare.

Jensen v Sorenson, 211-354; 233 NW 717

Death of custodial mother—revival of paternal rights—conditions. Assuming that the death of a mother (to whom the custody of

her infant child had been judicially awarded) revives the custodial rights of the father, yet he must assert such rights with a promptness commensurate with the helplessness of the child, or he will be deemed to have forfeited and waived them, and will not, thereafter, be permitted to challenge the rights of another custodian except on the grounds of unfitness.

Jensen v Sorenson, 211-354; 233 NW 717

Dying request—materiality. Evidence of the dying request of a mother as to the future custody of her infant child is highly material on the issue of such custody.

Jensen v Sorenson, 211-354; 233 NW 717

Guardian—invalid appointment as to parent. The right of a fit and proper father to the custody of his minor child whom he has never abandoned, and whose custody he has neither forfeited nor waived, is in no manner affected by orders of court (1) appointing, without notice to said parent, the maternal grandfather as guardian of said child, and (2) authorizing said guardian to proceed and adopt said child; especially is this true when the petition by the mother for the appointment of the grandfather was not filed until after the appointment was made.

In re McFarland, 214-417; 239 NW 702

Illegitimate child. The mother of an illegitimate child is entitled to its custody, service, and earnings.

Pitzenberger v Schnack, 215-466; 245 NW 713

Loss of right. The mother of an illegitimate child, who has for a long series of years evinced but a very casual interest in the child, may not successfully urge her right to the custody of the child, against fit and proper parties who have nurtured, cared for, and educated the child, from birth, even tho they have been paid compensation by parties other than the mother, it appearing that it would not be to the best interest of the child to decree custody to the mother.

Barry v Reeves, 203-1345; 214 NW 519

Pre-eminent right of child. The moral and legal right of a father to the custody of his motherless child must yield to a custodial order which is best for the child.

Werling v Heggen, 208-908; 225 NW 952

Presumptive right. A father is necessarily given the custody of his motherless child when he has neither abandoned the child, nor surrendered his right to the custody of the child, and when there is no showing that the welfare of the child requires its custody to be awarded to another.

Bonnarens v Klett, 213-1286; 241 NW 483

10461 Wages of wife—actions by.

Atty. Gen. Opinion. See '25-26 AG Op 146

ANALYSIS

I Right to Personal Earnings of Wife
II Actions by Wife Against Husband

I RIGHT TO PERSONAL EARNINGS OF WIFE

Wife as employee of husband. A husband who is the sole owner of a printing plant may validly employ his wife as a linotype and press operator in said plant and the wife may legally accept such employment and collect therefor, because such services are wholly outside of, and foreign to, the usual and ordinary marital duties of a wife. It follows that the wife is entitled to compensation under the workmen's compensation act for injuries arising out of and in the course of said employment.

Reid v Reid, 216-882; 249 NW 387

II ACTIONS BY WIFE AGAINST HUSBAND

Action by one spouse against the other. See under §10448

Contribution between husband and wife. Husband cannot secure contribution from divorced wife for payment of notes signed by both and paid by husband when wife signed as surety only.

Hall v Brownlee, (NOR); 216 NW 953

10462 Action for personal injuries—elements of recovery. (Repealed.)

Separate occupations — decreased earning capacity—damages.

Rulison v X-ray Corp., 207-895; 223 NW 745

Torts during coverture. A wife may not maintain an action against her husband for damages consequent upon willful injuries inflicted upon her by her husband.

In re Dolmage, 203-231; 212 NW 553

10463 Action by administrator—elements of recovery. (Repealed.)

Excessive verdict—wrongful death of wife. In an action for the wrongfully caused death of a wife, the statutory power to allow "such sum as the jury may deem proportionate to the injury" is not an unbridled discretion. Evidence reviewed and held that a verdict of $10,000 was excessive to the extent of $4,000. The deceased was childless and illiterate, had accumulated no property, was a beet weeder for a small part of the year at small wages, and also operated a boarding house, but whether at a profit did not appear.

Hanna v Electric Co., 210-864; 232 NW 421

Judgment of jurors. Jurors must necessarily rely on their own fair and unbiased judg-

ment as to the amount of damages recoverable for pain and suffering and for disability as a wife and homekeeper.

Rulison v X-ray Corp., 207-895; 223 NW 745

Separate occupations—double recovery (?). Whether a married woman and a mother who has an independent occupation and who also occupies a home with her family may recover in both capacities for loss of the same time and for services at the same time, quaere. Record held to show no double recovery in instant case.

Rulison v X-ray Corp., 207-895; 223 NW 745

10464 Exemplary damages—maximum recovery. (Repealed.)

Instructions inviting excess recovery. Instructions allowing the jury to return damages in excess of statutory limitation are harmless when the jury returns a verdict for less than the statutory limit.

Siesseger v Puth, 211-775; 234 NW 540

10465 Liability for separate debts.

Court findings—when conclusive. A finding by the trial court on supporting testimony that a wife signed both the note and mortgage of her husband solely for the purpose of waiving her dower interest, and received no actual consideration herself, is conclusive on the appellate court.

Bates v Green, 219-136; 257 NW 198

Liability of wife on husband's note. A wife, after signing promissory notes which represent the husband's indebtedness only, may not avoid personal liability on the ground of absence of consideration flowing to her when it appears that the notes were so signed on demand of the payee and as a condition precedent to the granting by payee of an extension of time of payment.

First N. Bank v Mether, 217-695; 251 NW 505

Liability—wife signing husband's note. A wife who signs the note and mortgage of her husband cannot escape personal liability thereon on the ground of want of consideration as to her—because she signed simply to release her dower interest—when, without her signature, the husband would be unable to obtain the loan.

First Tr. JSL Bank v Diercks, 222-534; 267 NW 708

Signing husband's promissory note—consideration. Even tho a wife signed a promissory note solely because her husband asked her to do so, and even tho she received no benefit whatever for so signing, nevertheless she is personally liable on the note if it appears that the payee would not, without her signature, have advanced the money for the husband.

Hakes v Franke, 210-1169; 231 NW 1

Signing mortgage to release dower—effect. Principle recognized that a wife who is an entire stranger to her husband's note and mortgage, except to sign the same solely for the purpose of releasing her possible dower interest, is not personally liable thereon.

First B. & T. Co. v Welch, 219-318; 258 NW 96

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness that her signature would have no other effect than to release her dower interest in the husband's land (which was embraced in the accompanying mortgage which she signed) constitutes no defense to personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

First N. Bank v Mether, 217-695; 251 NW 505

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Signing to release dower. A promissory note and mortgage for the pre-existing debt of a husband are without consideration as to the wife who signs the same for the sole purpose of releasing her dower interest.

Gorman v Sampica, 202-802; 211 NW 429

Signing note to release dower. A wife is not personally liable to the original payee of a promissory note which grew out of her husband's real estate transaction to which she was an entire stranger, except that she signed said note (and mortgage) for the sole and only purpose of releasing her possible dower interest.

Jones v Wilson, 219-324; 258 NW 82

Transfers and transactions invalid—wife's suretyship for husband—effect in husband's bankruptcy. Where land owned jointly by husband and wife is mortgaged and the wife signs the note and mortgage on her separate interest to secure the loan to the husband who received and used the loan for his own personal debts and later conveyed his one-half interest in the land to his wife, then, in an action by the husband's trustee in bankruptcy to set aside the conveyance as in fraud of creditors, the wife, as surety, is entitled to have the husband's interest in the land applied first to

the satisfaction of the mortgage debt in preference to the claims of the trustee in bankruptcy, and the conveyance accomplishing her subrogation thereto was valid.

Clindinin v Graham, 224-142; 275 NW 475

Wife's separate estate—no joint adventure from husband's management. Where a wife inherits real property which is managed, as an incident to their marital relation, by her husband, his individual purchase of livestock in connection with such management and executing his individual promissory note therefor will not make the wife liable thereon as a joint adventure.

Valley Bank v Staves, 224-1197; 278 NW 346

Wife's separate estate—surety on mortgage. Where a married woman without any consideration therefor mortgages her separate property to secure the separate debt of the husband, he is the principal and she is a surety as to such indebtedness.

Clindinin v Graham, 224-142; 275 NW 475

10466 Contracts of wife.

See under §10465

10467 Husband not liable for wife's torts.

Coercion of wife in crime. See under §12895

Coercion of wife by husband. No presumption exists that a wife who commits a crime in the presence of her husband does so under the coercion of the husband.

State v Renslow, 211-642; 230 NW 316; 71 ALR 1111

Crimes—presumption of coercion. The presumption that the participation of a wife, in the presence of her husband, in the commission of a crime is the result of the coercion of the husband applies only when the wife is in the near presence of her husband.

State v Kuhlman, 206-622; 220 NW 118

Tort action by one against other. The rule of the common law that neither the husband nor wife may maintain an action against the other for damages, consequent on the negligent or willful injuring of one by the other, is the law of this state,—not having been abrogated by anything contained in §10991-d1, C., '35 [§10991.1, C., '39].

Aldrich v Tracy, 222-84; 269 NW 30

Note 1. Husband and wife generally.

ANALYSIS

I IN GENERAL
II ALIENATION OF AFFECTIONS
III CRIMINAL CONVERSATION

Husband or wife as witness against the other. See under §11260

I IN GENERAL

Discussion. See 2 ILB 137—Loss of citizenship by marriage; 4 ILB 166—Breach of marriage; 10 ILB 68—Physical condition as excuse for breach of marriage

Coercion—no presumption. In arson prosecution against husband and wife, it is no longer presumed that a wife, committing a crime in the presence of her husband, did so under his coercion.

State v Bazoukas, 226-1385; 286 NW 458

II ALIENATION OF AFFECTIONS

Son from mother. A mother may not maintain an action for damages for the alienation of the affection for her of her minor son, in the absence of an allegation that she has thereby been deprived of the custody and services of said minor.

Pyle v Waechter, 202-695; 210 NW 926

Evidence—declarations of wife—hearsay. In an action by a husband for damages for alienation of affection, declarations of the wife made long after she had separated from her husband, and explanatory of such separation, are manifestly hearsay.

McGlothlen v Mills, 221-204; 265 NW 117

Evidence—sufficiency. Evidence held to present a jury question on the issue whether the affections of the wife had been alienated.

Weyer v Vollbrecht; 208-914; 224 NW 568

Hearsay. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

Judgment for temporary alimony. In an action for damages consequent on defendants' acts in alienating the affections of plaintiff's husband, evidence that plaintiff obtained a judgment for temporary alimony and for attorney fees in an action by her husband for divorce and that the judgment was never paid is wholly irrelevant to the issue of relationship existing between plaintiff and defendant.

Case v Case, 212-1213; 238 NW 85

Measure of damages—inadequate instructions. A husband's right of action for the wrongful alienation and enticing of his wife is based on the loss of her consortium, not alone on the loss of her love. Instructions held inadequate.

McGlothlen v Mills, 221-204; 265 NW 117

Pleadings—sufficiency. An allegation that the affections of a wife were alienated by slandering the plaintiff-husband and by cultivating in the wife a dislike for plaintiff is

sufficient without setting out the words uttered and the persons in whose presence they were spoken; likewise an allegation that defendants "jointly and severally" conspired to alienate the affections of the wife from the husband.

Depping v Hansmeier, 202-314; 208 NW 288

Presumption. Presumptively a wife has affection for her husband, and a defendant has the burden to overcome such presumption.

Weyer v Vollbrecht, 208-914; 224 NW 568

Prosecution of plaintiff by husband. In an action for damages consequent on the acts of defendants in alienating the affections of plaintiff's husband, the fact that plaintiff was criminally prosecuted by her husband is admissible provided it is shown that defendants participated in or instigated such prosecution. But neither the docket entries of the justice of the peace nor the verdict of the jury is competent to show such participation or instigation.

Case v Case, 212-1213; 238 NW 85

Relevancy and competency. In an action by a wife for damages for the alienation of the affections of her husband, an information filed by the plaintiff, charging the defendants with having threatened to injure her, is wholly irrelevant and incompetent.

Paup v Paup, 208-215; 225 NW 251

Unallowable conclusions. The mere conclusions of a plaintiff in an action for damages for alienating the affections of her husband as to what the defendants had done in procuring the enlistment of the husband in the army and thereby effecting a separation of plaintiff and her husband, are wholly unallowable.

Paup v Paup, 208-215; 225 NW 251

III CRIMINAL CONVERSATION

Cross-examination. A plaintiff who, in an action for damages for criminal conversation, testifies, in effect, on direct examination, that the defendant's criminal relation with plaintiff's husband was the sole cause of disrupting plaintiff's home, thereby opens the door to cross-examination of the husband's criminal relations with other women and plaintiff's knowledge thereof, even though defendant has not pleaded such matter in mitigation of damages.

Morrow v Scoville, 206-1134; 221 NW 802

Criminal conversation — instructions. Instructions in action for damages for criminal conversation which allegedly occurred "on or about" a certain date "or at any time thereafter" are prejudicially erroneous when the record reveals the fact that the jury might have found the existence of said wrongful act from transactions occurring some four months prior to the limiting date specified by the instructions.

Newcomer v Ament, 214-307; 242 NW 82

CHAPTER 471

DIVORCE AND ANNULMENT OF MARRIAGES

10468 Jurisdiction.

ANALYSIS

I JURISDICTION IN GENERAL
II RESIDENCE
III SETTING ASIDE DIVORCE DECREES
IV PRESUMPTION OF DIVORCE

Validity of foreign decrees. See under §11567 (XII)

I JURISDICTION IN GENERAL

Discussion. See 13 ILR 820—Recognition of foreign decrees; 18 ILR 492—Divorce by judicial process

Absence of recital of facts found. A decree of divorce is not void because it contains no recitals of facts as found by the court.

Oliver v Oliver, 216-57; 248 NW 233

Consent decree. The mere fact that a defendant in divorce proceedings makes, during the trial, certain concessions of fact does not render the decree a consent decree.

Radle v Radle, 204-82; 214 NW 602

Jurisdiction—estoppel to question. A party, who instigates and successfully promotes a fraudulent proceeding on the part of his wife under which she is granted a decree of divorce, who pays the alimony decreed, and who promptly remarries, will not be permitted, after the death of his former wife, to maintain an action to annual said decree (and thereby restore his property rights) on the ground that the court had no jurisdiction to enter said decree.

Robson v Kramer, 215-973; 245 NW 341

Notice by publication — plaintiff assailing own decree not permitted. A wife who obtains a divorce by publication may not in a subsequent action between the same parties for divorce, aided by attachment, complain that her previous divorce decree is void for defective publication on the ground that the record fails to show selection of the newspaper by "plaintiff or his attorney", when she relied on the publication and induced the court to grant a decree thereon.

Hanson v Hanson, 226-423; 284 NW 141

I JURISDICTION IN GENERAL — concluded

Previous divorce by publication — defense. Decree of divorce denied on the ground that the parties were already divorced in a previous proceeding in which the court had full and complete jurisdiction upon service of notice by publication.

Hanson v Hanson, 226-423; 284 NW 141

Separate maintenance. Principle reaffirmed that an action by a wife against the husband for separate maintenance is a creature of equity only, not of statute.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

State party by implication. The state is impliedly a party to every divorce action.

Walker v Walker, 205-395; 217 NW 883

Unallowable new trial. The statutory provision for a new trial for a defaulting defendant served by publication only does not apply to divorce proceedings.

Girdey v Girdey, 213-1; 238 NW 432

II RESIDENCE

Change of venue mistaken remedy. Motion for change of venue in an action for divorce is not the proper remedy to present the claim that plaintiff is not a resident of the county in which the action is instituted.

Garside v Garside, 208-534; 224 NW 586

Effect of military service. A person who has once acquired a legal residence in this state does not lose it by entering the military service of the federal government, and by being stationed, in accordance with superior military order, for a series of years at various military posts, his intentions being at all times ultimately to return to his formerly acquired residence, and his conduct being in harmony with such expressed intention.

Harris v Harris, 205-108; 215 NW 661

Foreign divorce—when not recognized. A foreign decree of divorce will not be recognized in this state when it is made to appear that the defendant (1) was at all times domiciled in this state, the matrimonial domicile, (2) was never subject to the jurisdiction of such foreign court, and (3) had never consented to, or justified by misconduct, the acquisition by plaintiff of a domicile in such foreign country. Especially is this true when there is no showing that the plaintiff ever acquired a domicile in such foreign country.

Bonner v Reandrew, 203-1355; 214 NW 536

Foreign decree—"full faith and credit"—comity. The "full faith and credit" clause of the federal constitution does not compel the courts of this state to recognize as valid a default decree of divorce against a defendant domiciled in this state, rendered in a foreign state in appropriate proceedings in rem; but such a decree, when valid on its face, will, as a matter of reciprocal comity between the states, be recognized as valid in this state, in the absence of allegation and proof of fraud in obtaining it.

Miller v Miller, 200-1193; 206 NW 262

Fraud—motion to set aside decree. A motion to set aside a decree of divorce for fraud, in that plaintiff had not acquired a bona fide residence required by statute, is a proper procedure, but the burden of proof necessarily rests on the maker of the motion.

Girdey v Girdey, 213-1; 238 NW 432

Vacation for nonresidence. Record reviewed, in an action to vacate a decree of divorce on the ground of nonresidence of both of the parties, and held to show that the husband at least was, at the time of the divorce action, a resident of the county in which the decree was rendered.

Melvin v Lawrence, 203-619; 213 NW 420

III SETTING ASIDE DIVORCE DECREES

Vacation of illegal order. A motion to set aside and vacate an order which is in excess of the jurisdiction of the court is proper.

Guisinger v Guisinger, 201-409; 205 NW 752

Evidence—sufficiency. Evidence held insufficient to set aside a decree of divorce and to grant a new trial on the grounds of fraud and unavoidable casualty and misfortune.

McAtlin v McAtlin, 205-339; 217 NW 864

Fraudulently obtained decree—swift annulment. In view of the confidential relationship existing between a husband and wife, a court of equity should be swift to set aside a decree of divorce obtained by the husband by fraudulent means, the application by the innocent party for such annulment being made promptly after learning of the deception.

Petersen v Petersen, 221-897; 267 NW 719

Incompetent testimony in disregard of statute. A final decree of divorce, rendered by a court which has jurisdiction of the subject matter and of the parties, is not void because no witness was sworn or testified in the cause and no corroborating testimony was offered.

Radle v Radle, 204-82; 214 NW 602

Nonextrinsic fraud. Principle reaffirmed that the fraud which will justify the setting aside of a decree must be extrinsic and collateral to the matter determined by the decree—something other than false swearing in procuring the decree.

Girdey v Girdey, 213-1; 238 NW 432

Void decree—collateral attack. A decree of divorce, wheresoever rendered, is always open

to collateral attack by proof that the court was without jurisdiction to render it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Vacation—unallowable grounds. A decree of divorce, rendered on full jurisdiction, will not be set aside and cancelled on the ground that the applicant for the cancellation fraudulently colluded with the other party to the action to obtain the decree.

Reppert v Reppert, 214-17; 241 NW 487

IV PRESUMPTION OF DIVORCE

Foreign decree—duty of court. The "full faith and credit" clause of the federal constitution does not compel the courts of this state to recognize as valid a default decree of divorce against a defendant domiciled in this state, rendered in a foreign state in appropriate proceedings in rem; but such a decree, when valid on its face, will, as a matter of reciprocal comity between the states, be recognized as valid in this state, in the absence of allegation and proof of fraud in obtaining it.

Miller v Miller, 200-1193; 206 NW 262

Presumption of sameness of foreign laws. It is presumed that the laws of every other state are the same as those of this state, in the absence of any showing to the contrary.

Harris v Harris, 205-108; 215 NW 661

Jurisdiction—unappealed decree of separate maintenance in foreign state—final adjudication. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state, and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

10469 Kind of action—joinder.

Adjudication of bastardy—effect on child. That part of a decree of divorce which adjudges that a child of the wife is not the child of the husband is a nullity as far as the child is concerned.

Ryke v Ream, 212-126; 234 NW 196

Decree — refusal—nonallowable accounting. The court, after refusing a decree of divorce, may not enter into an accounting and make a division of property between the parties.

Henriksen v Henriksen, 205-684; 216 NW 636

Separate maintenance. Record held to justify the entry of a decree and for the allowance of $40 per month for the separate maintenance of the wife, on her counter plea in divorce action.

Crees v Crees, 218-338; 255 NW 515

10470 Petition.

Condonation—pleading. Principle recognized that condonation must be specifically pleaded.

Nelson v Nelson, 208-713; 225 NW 843

Pleadings—objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

10471 Verification—evidence.

Evidence—sufficiency. Evidence held to sustain a decree of divorce.

Garside v Garside, 208-534; 224 NW 586

Former decree — effect. In a second action for divorce, evidence of events antedating the first decree and including the history of the parties, and their relations, is not objectionable insofar as such evidence throws light upon the conduct of the parties subsequent to the former decree.

Garside v Garside, 208-534; 224 NW 586

Objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

10473 Residence—failure of proof.

Residence—absence on visit—effect. A bona fide residence in this state, once acquired, is not lost by a temporary visit of some considerable length in a foreign state.

Coulter v Coulter, 204-575; 215 NW 619

Void decree—collateral attack. A decree of divorce, wheresoever rendered, is always open

to collateral attack by proof that the court was without jurisdiction to render it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

10474 Corroboration of plaintiff.

Corroborative evidence. It is unnecessary that every fact and circumstance detailed by complaining party to divorce action be corroborated. Evidence held corroborated sufficiently to entitle wife to divorce on ground of cruel and inhuman treatment.

Bohlmann v Bohlmann, (NOR); 240 NW 693

Disregard of statute. A final decree of divorce, rendered by a court which has jurisdiction of the subject matter and of the parties, is not void because no witness was sworn or testified in the cause and no corroborating testimony was offered.

Radle v Radle, 204-82; 214 NW 602

Difficulty attending proof. Corroboration of testimony tending to establish grounds for divorce is indispensable, irrespective of the difficulty of obtaining such corroboration.

Hummel v Hummel, 200-1176; 206 NW 115

Evidence sufficient. In an action for divorce resulting in decree for plaintiff on a general finding, where defendant assigns error based on a failure of proof of cruelty, and where, during the same term and before the same judge hearing the divorce proceedings, the defendant pleaded guilty to a grand jury indictment charging him with the crime of assault with intent to inflict great bodily injury upon plaintiff, and where on the following day plaintiff amended her petition for divorce by alleging defendant had been convicted of felony, and, while plaintiff did not personally testify to cruel and inhuman treatment, the record of conviction was offered and introduced in evidence without objection, the trial court did not err in granting a divorce as both parties apparently assumed the court was fully advised of the cruelty. Moreover, since defendant made no objection in court below, the question cannot be considered on appeal.

Ayers v Ayers, 227-646; 288 NW 679

Sufficiency. Corroboration sufficient to sustain a divorce is found in evidence, other than that of complainant, either direct or circumstantial, tending to establish the grounds charged, even tho such corroborative testimony does not extend to every part of complainant's testimony.

Courtney v Courtney, 214-721; 243 NW 510
Blazek v Blazek, 216-775; 249 NW 199

Vacation of decree. A final decree of divorce may not be vacated, even during the term at which entered, on a motion by defendant which alleges that no witness was sworn or testified in the cause and no corroborating testimony was offered, but which is silent as to any showing that plaintiff had no cause of action, or that defendant had a defense to plaintiff's action, or that there was fraud in obtaining the decree.

Radle v Radle, 204-82; 214 NW 602

10475 Causes.

ANALYSIS

I In General
II Adultery
III Desertion
IV Conviction of Felony
V Habitual Drunkenness
VI Inhuman Treatment
VII Condonation

Separate maintenance actions. See under §10481 (V)

I IN GENERAL

Attorney fees — when nontaxable. Tho a husband's action against his wife for the annulment of the marriage is legally nonmaintainable, and is therefore dismissed, attorney fees for the wife for defending the action may not be taxed against him.

Clark v Clark, 219-338; 258 NW 719

Connivance at wrongdoing. A husband who connives at the wrongdoing of his wife may not avail himself of such wrongdoing as a ground for divorce.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Hopeless conflict of testimony. No divorce will be granted on a petition and cross-petition therefor when the testimony and the weight thereof are in hopeless and irreconcilable conflict.

Ross v Ross, 205-424; 216 NW 22

Imputation of unchastity. The act of a husband, for a long series of years, in accusing his wife, without foundation, of unchastity, may furnish ample grounds for divorce.

Miller v Miller, 203-1218; 211 NW 705; 214 NW 613
Blazek v Blazek, 216-775; 249 NW 199

Two-fold insufficiency. Evidence reviewed and held wholly insufficient to justify the granting of a divorce because (1) of lack of evidence of cruel and inhuman treatment and (2) of lack of evidence that the treatment accorded plaintiff endangered her life.

Siverson v Siverson, 217-1167; 251 NW 653

II ADULTERY

Adultery — insufficient evidence. Circumstantial evidence on the issue of adultery reviewed and held, in view of its improbability in part, and in view of its manifest fabrica-

tion in part, to be quite insufficient on which to base a decree of divorce.

Goodrich v Goodrich, 205-1096; 216 NW 609

Adultery — evidence. The court will not be swift to impose the stigma of adultery upon a party even tho the party has been very indiscreet and has seriously violated the laws of propriety.

Turner v Turner, 219-334; 257 NW 819

Separate maintenance — evidence — insufficiency. Evidence held insufficient to justify a decree of separate maintenance either on the ground of cruel and inhuman treatment or on the ground of adultery.

Agnew v Agnew, 216-1; 248 NW 241

III DESERTION

Discussion. See 15 ILR 477—Denial of intercourse

Desertion. The act of a wife in leaving her husband without legal cause necessarily constitutes desertion.

Depping v Depping, 206-1203; 219 NW 416

Desertion—insanity—burden of proof. When it appears that the defendant in an action for divorce based on desertion has been judicially declared insane, plaintiff must overcome the presumption that such insanity continued. In other words, plaintiff must establish a return to sanity on the part of defendant—must establish a mental condition such as would enable defendant to form an intent to desert.

Carr v Carr, 209-160; 225 NW 948

Desertion—computation of period. In order to establish willful desertion for two years, plaintiff will not be permitted to include the time intervening between the date of a former decree of divorce for desertion and the date when said decree was wholly reversed on appeal, because during said time the defendant was excusably absent from the home of the plaintiff.

Carr v Carr, 212-1130; 237 NW 492

IV CONVICTION OF FELONY

Evidence sufficient. In an action for divorce resulting in decree for plaintiff on a general finding, where defendant assigns error based on a failure of proof of cruelty, and where, during the same term and before the same judge hearing the divorce proceedings, the defendant pleaded guilty to a grand jury indictment charging him with the crime of assault with intent to inflict great bodily injury upon plaintiff, and where on the following day plaintiff amended her petition for divorce by alleging defendant had been convicted of felony, and, while plaintiff did not personally testify to cruel and inhuman treatment, the record of conviction was offered and introduced in evidence without objection, the trial court did not err in granting a divorce as both parties apparently assumed the court was fully advised of the cruelty. Moreover, since defendant made no objection in court below, the question cannot be considered on appeal.

Ayers v Ayers, 227-646; 288 NW 679

V HABITUAL DRUNKENNESS

Inebriacy defined. Inebriacy is the state of drunkenness or habitual intoxication.

Maher v Brown, 225-341; 280 NW 553

Drunkenness—cruelty. Evidence as to habitual drunkenness and cruel and inhuman treatment reviewed and held to justify decree.

Converse v Converse, 225-1359; 282 NW 368

VI INHUMAN TREATMENT

Discussion. See 14 ILR 266—Cruelty as ground

Corroborative evidence. It is unnecessary that every fact and circumstance detailed by complaining party to divorce action be corroborated. Evidence held corroborated sufficiently to entitle wife to divorce on ground of cruel and inhuman treatment.

Bohlmann v Bohlmann, (NOR); 240 NW 693

Inhuman treatment—proof required. Proof of inhuman treatment sufficient to endanger life, and thereby justify the granting of a decree of divorce, must be clear, definite and satisfactory.

Wallace v Wallace, 212-190; 235 NW 728

Imperative requirements. Proof that alleged inhuman treatment endangered the life of the victim thereof, and the required statutory corroboration, are essential conditions to the right to a divorce.

Bartlett v Bartlett, 214-616; 243 NW 588

Cruelty — evidence — sufficiency. Evidence held sufficient to require a decree of divorce on the grounds of cruel and inhuman treatment.

Coulter v Coulter, 204-575; 215 NW 619
McGrath v McGrath, 205-192; 217 NW 821
O'Brien v O'Brien, 205-212; 217 NW 629
McCulla v McCulla, 213-1348; 241 NW 453
Courtney v Courtney, 214-721; 243 NW 510
Strickler v Strickler, (NOR); 255 NW 528

Drunkenness—cruelty. Evidence as to habitual drunkenness and cruel and inhuman treatment reviewed and held to justify decree.

Converse v Converse, 225-1359; 282 NW 368

Evidence sufficient. In an action for divorce resulting in decree for plaintiff on a general finding, where defendant assigns error based on a failure of proof of cruelty, and where, during the same term and before the same judge hearing the divorce proceedings, the defendant pleaded guilty to a grand jury in-

VI INHUMAN TREATMENT—continued

dictment charging him with the crime of assault with intent to inflict great bodily injury upon plaintiff, and where on the following day plaintiff amended her petition for divorce by alleging defendant had been convicted of felony, and, while plaintiff did not personally testify to cruel and inhuman treatment, the record of conviction was offered and introduced in evidence without objection, the trial court did not err in granting a divorce as both parties apparently assumed the court was fully advised of the cruelty. Moreover, since defendant made no objection in court below, the question cannot be considered on appeal.

Ayers v Ayers, 227-646; 288 NW 679

Evidence—sufficiency. Evidence held insufficient to justify a decree of divorce on the ground of cruel and inhuman treatment.

Walker v Walker, 205-395; 217 NW 883
Nelson v Nelson, 208-713; 225 NW 843
Vogt v Vogt, 208-1329; 227 NW 107
Krotz v Krotz, 209-433; 228 NW 30
Wallace v Wallace, 212-190; 235 NW 728

Evidence — sufficiency. Evidence reviewed, and held that certain treatment of a refined and cultured woman was "inhuman" within the meaning of the statute, and amply justified a decree of divorce.

Roach v Roach, 213-314; 237 NW 439

Evidence—sufficiency. Evidence of mistreatment of feeble old man in failing health and at times dangerously ill held sufficient to justify decree of divorce.

Graham v Graham, 227-223; 288 NW 78

Endangering health and life. On husband's cross-petition, trial court properly denied divorce where there was no evidence to show that wife's refusal to share the burdens naturally incident to the relationship of marriage so affected him as to injure his health and ultimately endanger his life. In the absence of physical violence, cruel and inhuman treatment to justify a divorce must not only endanger health, but must also be such as to ultimately endanger life.

Goecker v Goecker, 227-697; 288 NW 884

Mere filing of petition. The mere filing of a petition for divorce in which no actual moral delinquency is charged against the defendant does not establish cruel and inhuman treatment.

Biebesheimer v Biebesheimer, 202-668; 210 NW 896

Nonphysical violence. Life may be endangered by treatment tho it involves no physical violence.

Coulter v Coulter, 204-575; 215 NW 619

Insufficiency of evidence. Evidence reviewed and held insufficient to warrant divorce for cruel and inhuman treatment.

West v West, (NOR); 218 NW 292

Indirect charges of infidelity. Indirect charges of infidelity may constitute cruel and inhuman treatment.

McClurg v McClurg, 207-271; 222 NW 862
Williges v Williges, 215-960; 247 NW 222

Mental cruelty — evidence — sufficiency. Record reviewed and held to reveal such cruel and inhuman treatment of a wife by her husband as amply to support a decree of divorce to the wife, said cruelty being in the form of a systematic course of conduct, by the husband, deliberately designed to mentally harass the wife.

Hemmen v Hemmen, 221-894; 267 NW 687

Showing of indiscretion. The act of a husband in obtaining an affidavit which tends to show indiscretions on the part of the wife with other male persons does not establish cruel and inhuman treatment, it appearing that the existence of the affidavit was not revealed until the trial.

Biebesheimer v Biebesheimer, 202-668; 210 NW 896

Separate maintenance — evidence — insufficiency. Evidence held insufficient to justify a decree of separate maintenance either on the ground of cruel and inhuman treatment or on the ground of adultery.

Agnew v Agnew, 216-1; 248 NW 241

Unsustained charge of infidelity. Unsustained charges by a husband that his wife, at the time of their marriage, was, unbeknown to him, pregnant with child by another than the husband, may constitute cruel and inhuman treatment.

Heath v Heath, 222-660; 269 NW 761

Unwarranted charges and threats. Unwarranted charges of unchastity and violent threats may constitute such cruel and inhuman treatment as to justify a decree of divorce provided they endanger the life of complainant.

Massie v Massie, 202-1311; 210 NW 431

Inhuman treatment — sufficiency. Evidence that a husband treated his wife as a mere servant and mistress, constantly swore at and reviled her, struck her on occasions, drew a gun on her, threatened her life, begrudgingly furnished her medical services, and falsely accused her of infidelity, and that such treatment seriously undermined her health, held ample to support a decree of divorce.

Schneckloth v Schneckloth, 209-496; 228 NW 290

Impairment of health. (1) Impairment of health and (2) endangering the life of complainant are indispensable elements of "inhuman treatment," within the meaning of the divorce statutes.

White v White, 200-779; 205 NW 305
Hill v Hill, 201-864; 208 NW 377
Henriksen v Henriksen, 205-684; 216 NW 636

VII CONDONATION

Condonation. Condonation is always conditional upon the fact that the party forgiven will thereafter abstain from the commission of offenses similar to those forgiven.

Massie v Massie, 202-1311; 210 NW 431

Condonation. A formal agreement to withhold divorce proceedings pending the good conduct of the other party to the marriage relation, followed by no resumption of the marriage relation, does not constitute condonation of existing grounds for divorce.

Vincent v Vincent, 201-299; 207 NW 114

Condonation—insufficient basis. The plea of condonation is not established by evidence that, on one occasion, and for a considerable period of time, the wife visited the husband in order that he might visit with the children, the husband and wife not cohabitating as husband and wife; and especially is this true when, throughout said visit, there was no reformation in the husband's conduct.

Coulter v Coulter, 204-575; 215 NW 619

Condonation — cohabitation — husband and wife during continued cruelty. The fact that a wife during long and continued cruelty on the part of the husband, lived and cohabited with him as his wife, does not constitute condonation of such cruelty, especially when she was justifiably in fear of him.

Schneckloth v Schneckloth, 209-496; 228 NW 290

Unpleaded condonation. After adultery has been unquestionably established, the court, in the absence of plea and proof of condonation, may not legally refuse a decree of divorce to the innocent party on the theory that said party has condoned the adultery by apparently living with the guilty party after the adultery but before learning thereof.

Stambaugh v Stambaugh, 214-327; 242 NW 46

Condonation. A husband who, with full knowledge of the misconduct of his wife, resumes the marital relation thereby condones the wrong.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

10476 Husband from wife — other causes.

Pregnancy at time of marriage. A husband who marries his wife in the belief that he was the father of her unborn child is entitled to a divorce upon discovery of his mistake, he having no illegitimate children living at the time of said marriage.

Wiley v Wiley, 204-553; 215 NW 705

"Annulment" and "divorce" distinguished. A husband may not maintain an independent action in equity to nullify a marriage on the ground that the wife, at the time of marriage, was, unbeknown to him, pregnant by another than himself. His action should be one for divorce on said ground.

Clark v Clark, 219-338; 258 NW 719

Unknown pregnancy — evidence — insufficiency. Evidence reviewed and held insufficient to rebut the presumption of legitimacy which attends a child born in lawful wedlock.

Heath v Heath, 222-660; 269 NW 761

10477 Cross petition.

Separate maintenance. Principle recognized that in an action by a husband for divorce the wife may, on proper pleading and supporting evidence, be granted a decree for separate maintenance.

Waddington v Waddington, 218-460; 255 NW 462

10478 Maintenance during litigation.

Absence of marriage relation — effect. A prayer, in a divorce action, for alimony, attorney fees, and costs becomes a nullity when it is found that the plaintiff and defendant are not husband and wife.

Reppert v Reppert, 214-17; 241 NW 487

Attorney fees — inadequacy. An inadequate allowance to the wife for attorney fees will be corrected on appeal.

Tennigkeit v Tennigkeit, 222-657; 269 NW 877

Decree for attorney fees — nonadjudication as to attorney. A decree in divorce proceedings awarding plaintiff (in addition to a divorce) a specified sum as attorney fees is not an adjudication as to the amount owing by plaintiff to her attorney for services rendered in the action,—the attorney, of course, not being a party to the action.

Duke v Park, 220-889; 262 NW 799
Maddy v Park, 220-899; 262 NW 796
Jones v Park, 220-894; 262 NW 797; 264 NW 700

Attorney fees — ordering clerk to satisfy. When at the time of agreeing to a property

settlement, plaintiff in divorce proceeding also orally agreed to pay her attorney a fee of $250 for his services, the court should order the clerk to satisfy said fee from the money paid into his hands in satisfaction of said property settlement and on which money the attorney had perfected a lien,—it appearing that said fee was reasonable in amount and the agreement therefor untainted with any illegality.

Mickelson v Mickelson, 222-942; 270 NW 365

Nonallowable attorney fees. Attorney fees may not be allowed in a proceeding to modify a decree of divorce as to alimony.

Handsaker v Handsaker, 223-462; 272 NW 609

Action on divorce settlement stipulation—unallowable attorney fees. A stipulation or contract of settlement in a divorce action as a basis for a money recovery is in no different category from any other contract, and, unless provided for therein, attorney fees are not taxable in an action based thereon.

Johnstone v Johnstone, 226-503; 284 NW 379

Dismissal — effect on taxation of attorney fees. The action of plaintiff in divorce proceedings in dismissing his action pending defendant's application for suit money, deprives the court of jurisdiction thereafter to tax to plaintiff, as costs, any allowance to compensate defendant for attorney fees for services performed prior to said dismissal.

Dallas v Dallas, 222-42; 268 NW 516

Modification — attorney fees unallowable. The statutory authority to allow attorney fees in an original divorce proceeding, does not apply to proceedings for the modification of a decree of alimony.

Nicolls v Nicolls, 211-1193; 235 NW 288

Rule for allowance. Temporary alimony and suit money will be gauged in harmony with the station in life of the parties and the financial ability of the husband to pay. An allowance of $500 per month as temporary alimony, $1,000 as suit money, and $1,000 as attorney fees held not excessive.

Hanford v Hanford, 214-839; 240 NW 732

Suit money and attorney fees not allowable. Suit money and attorney fees are not allowable to the defendant in an action or application for the modification of a decree of divorce as to the custody of a child of the parties.

Hensen v Hensen, 212-1226; 238 NW 83

Temporary alimony, etc. — showing. Ample showing of marriage justifying an order for temporary alimony, suit money, and attorney fees in an action for separate maintenance, is made by proof that even tho plaintiff and defendant were married at a time when plaintiff's decree of divorce from a former husband had not been entered of record, yet plaintiff and defendant for several years lived together as husband and wife after said decree had been so entered.

Hanford v Hanford, 214-839; 240 NW 732

10479 Attachment.

Statutory origin. Principle reaffirmed that proceedings in attachment are of statutory origin only, and in derogation of the common law.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Fatally delayed presentation. The objection that a motion to discharge an attachment was not timely may not be raised for the first time on appeal.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Separate maintenance. The statutory power of a judge of the district court in action for divorce to order an attachment, with or without bond, does not authorize him to enter such order in an action for separate maintenance.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

10481 Alimony—custody of children —changes.

ANALYSIS

I CUSTODY AND SUPPORT OF CHILDREN
II PERMANENT ALIMONY
(a) IN GENERAL
(b) NATURE OF ALIMONY
(c) JURISDICTION
(d) CONDITIONS UNDER WHICH ALIMONY ALLOWED
(e) AMOUNT OF ALIMONY
(f) PROPERTY SUBJECT TO ALIMONY—ENFORCEMENT OF DECREE
III SUBSEQUENT CHANGES IN ALIMONY AND CUSTODY OF CHILDREN
IV COSTS AND ATTORNEY FEES
V SEPARATE MAINTENANCE
VI DISPOSITION OF PROPERTY

Custody of illegitimate children. See under §10460
Separation agreements. See under §10447 (II)

I CUSTODY AND SUPPORT OF CHILDREN

Discussion. See 11 ILR 365—Jurisdiction of status created by award of custody

Affirmance of order—effect. The affirmance, on appeal, of an order relative to the custody of children will not prevent a future modification by the trial court of such order.

Oliver v Oliver, 216-57; 248 NW 233

Alimony—support when husband able. A decree of divorce should not make the divorced husband and father destitute for purpose of permitting the wife and children to live in idleness and luxury, but, on other hand, so long as the divorced husband and father has property or income, the divorced wife and

children of tender age should not be deprived of a decent home and decent support.

Converse v Converse, 225-1359; 282 NW 368

Appeal — deference to trial court. Tho divorce proceedings are triable de novo on appeal, yet the wide discretion vested in the trial court in determining the custody of children will be respected and confirmed in all cases except where the discretion has been abused.

Wood v Wood, 220-441; 262 NW 773

Allowance for child—sale of homestead. The court may properly decree in divorce proceedings that a monthly allowance solely for the support and education of a child shall be a lien on the defendant-parent's homestead—all the property the parent possesses—but may not properly decree that in case of a failure to pay the allowance the homestead shall be sold and the proceeds impounded solely for the support and education of the child. On the contrary, a sale of the parent's homestead should be permitted only on proof of the parent's willful refusal or neglect to pay as far as he can reasonably pay.

Paul v Paul, 217-977; 252 NW 114

Change in condition—burden of proof—supplemental decree—effect. When plaintiff in divorce proceedings is unconditionally awarded the custody of children, a supplemental decree which is plainly temporary in its provisions in that it clearly awards custody to defendant only during plaintiff's then sickness, necessarily loses all force and effect when plaintiff is admittedly restored to good health. Defendant, to justify his refusal to surrender custody, has the burden to establish a material change in conditions since the original decree, by proof other than by proof of the facts on which the supplemental decree rests.

Wood v Wood, 220-441; 262 NW 773

Conditional custody. The court in a decree of divorce has power to award to one of the parties the custody of the children so long as such party maintains his or her residence in this state.

Goodrich v Goodrich, 209-666; 228 NW 652

Controlling considerations. The fact that one custody of a child may offer larger financial and educational advantages than another custody, is not necessarily a controlling consideration on the issue of the child's best welfare.

Jensen v Sorenson, 211-354; 233 NW 717

Custody of child—best interest of child. The paramount consideration in determining the custody of a child is the best interest of the child.

Ellison v Platts, 226-1211; 286 NW 413

Selecting parent—custody—when not disturbed. Where children are old enough to elect with which parent they will live, the refusal of the lower court to disturb their custody sustained on appeal.

Johnstone v Johnstone, 226-503; 284 NW 379

Custodial order as adjudication. An order in divorce proceedings awarding to the mother, without fraud on her part, the unconditional custody of her children, constitutes a final adjudication in her favor of each and every fact then bearing on her fitness for such custody.

Wood v Wood, 220-441; 262 NW 773

Custodial order improper. In wife's action for divorce wherein husband also sought divorce by way of cross-petition and trial court found neither party guilty of grounds for divorce, it was improper and inequitable to grant wife custody of child and support money, because under such circumstances husband was under no duty to support wife and child away from home, and because such order would merely serve to continue the estrangement and create a situation naturally productive of evil results and inimical to the best interests of society.

Goecker v Goecker, 227-697; 288 NW 884

Divorce—effect as to children. Principle reaffirmed that the duties and liabilities of the parents to a minor child do not terminate by a decree of divorce.

Hensen v Hensen, 212-1226; 238 NW 83

Divorce settlement stipulation—unenforceable if uncertain. Where a divorce stipulation of settlement leaves for future decision certain matters of education of the children, there is such uncertainty and ambiguity and lack of definiteness, that specific performance cannot be granted.

Johnstone v Johnstone, 226-503; 284 NW 379

Dying request—materiality. Evidence of the dying request of a mother as to the future custody of her infant child is highly material on the issue of such custody.

Jensen v Sorenson, 211-354; 233 NW 717

Foreign decree. A foreign decree of divorce fixing the custody of a child is not res judicata of the rights of a third party in this state to such custody. In any event, such third party may show that, by statute in such foreign state, the custodial decree is not conclusive and unalterable; or he may rest on the presumption that the foreign statute is the same as in this state, relative to such decree's being non res judicata as to subsequent changed conditions.

Barnett v Blakley, 202-1; 209 NW 412

Garnishment — divorce proceedings — allowance for children. Money awarded to a mother in a decree of divorce "for the support and maintenance" of her minor children is not sub-

I CUSTODY AND SUPPORT OF CHILDREN—continued

ject to process of garnishment under a personal judgment against the mother.

Peck v Peck, 207-1008; 222 NW 534

Health of mother as element—discretion of court. The action of the trial court in reaffirming, or refusing to modify, an original decree which unconditionally awarded to a mother the custody of her immature, minor children, will not be disturbed when the mother is admittedly in good mental and physical health, and when the sole support for cancellation of the decree is limited to nonpersuasive, opinion evidence relative to the mother being afflicted with epileptic insanity, and whether, if so afflicted, the disease may or probably will light up at some future time.

Wood v Wood, 220-441; 262 NW 773

Improper allowance for support. The fact that a wife, successful plaintiff in divorce proceedings, (1) has title to or possession of the life-accumulations of the parties, (2) has but recently personally inherited, in her own right, substantial amounts of property, and (3) that the health of the defendant has failed with consequent lessened earning power, may render improper any monthly financial allowance to the plaintiff for the support of the minor children.

Tennigkeit v Tennigkeit, 222-657; 269 NW 877

Irrevocable decree prohibited. The court cannot, in divorce proceedings, make an irrevocable order relative to the custody of children.

Goodrich v Goodrich, 209-666; 228 NW 652

Justifiable order. In an action for divorce, the property rights of the parties and the custody of the children cannot be adjudicated unless a case is made warranting a decree of divorce.

Oliver v Oliver, 216-57; 248 NW 233

Maternal preference. All other matters being equal, the court will be strongly inclined to favor the mother as the proper custodian of immature children.

Werner v Werner, 204-550; 212 NW 569

Modification of decree—conditions. A decree of divorce will not be modified as to the custody of children except on a clear showing by the applicant of such facts and circumstances occurring subsequent to the date of the decree, as affect the well-being of the children, and demand a change in their custody.

Neve v Neve, 210-120; 230 NW 339

Modification — insufficient showing. That part of a decree of divorce which conditionally awards the successful party the custody of children cannot be so modified as to avoid the conditions except on allegation and proof of a substantial change in the conditions or circumstances of the parties. So held where a mother was decreed the custody of children while she remained a resident of the state, with right of visitation in the father. Held, the investment of her assets in property outside the state was insufficient as such change of circumstances.

Goodrich v Goodrich, 209-666; 228 NW 652

Private modification—confirmation by court. When parties to a divorce voluntarily modify the decree relative to the custody of the children, the court may, by a subsequent order, very properly confirm the said modification when it is conducive to the welfare of the children.

Wheeler v Wheeler, 217-422; 251 NW 693

Refusal to modify. Evidence in proceedings supplemental to divorce reviewed, and held to sustain the refusal of the trial court to order a change in the custody of a minor child in favor of a parent who had never contributed to the support of the child, and had not even seen it until it was some eighteen months old.

Reeves v Reeves, 205-215; 217 NW 823

Review — divorce modification. Where a woman seeks, by virtue of a divorce settlement stipulation, to collect, from her ex-husband, the expenses of a son while at college, and the trial court, after hearing the evidence, reduced the amount she was seeking, held no error.

Johnstone v Johnstone, 226-503; 284 NW 379

Moot questions. An order of the supreme court on appeal that the trial court enter a decree of divorce in favor of plaintiff, and all proper orders relative to the custody of the children, renders moot the legality of all prior orders of the trial court in injunctional proceedings relative to the custody of such children.

McGrath v Dist. Court, 205-191; 217 NW 823

Preference to mother. To separate immature, minor children from a mother possessing a normal outlook on life, and normal motherly instincts, is a tragedy which should be avoided wherever reasonably possible.

Wood v Wood, 220-441; 262 NW 773

Paternal preference. Circumstances may be such as to justify the trial court in divorce proceedings in giving the custody of an immature infant to the father, even tho he is the party in the wrong.

Watland v Watland, 206-1191; 221 NW 819

Presumptive right of parent. A father is necessarily given the custody of his motherless child when he has neither abandoned the child, nor surrendered his right to the custody of the child, and when there is no showing that

the welfare of the child requires its custody to be awarded to another.

Bonnarens v Klett, 213-1286; 241 NW 483

Revival of paternal rights—conditions. Assuming that the death of a mother (to whom the custody of her infant child had been judicially awarded) revives the custodial rights of the father, yet he must assert such rights with a promptness commensurate with the helplessness of the child, or he will be deemed to have forfeited and waived them, and will not, thereafter, be permitted to challenge the rights of another custodian except on the grounds of unfitness.

Jensen v Sorenson, 211-354; 233 NW 717

Unallowable condition. The right of a father and child to visit each other should not be conditioned on the father's paying the alimony decreed to the mother.

Fitch v Fitch, 207-1193; 224 NW 503

Welfare of child sole question. Orders in divorce proceedings as to the custody of minor children of the parties will, irrespective of the wishes of the parents, be made on the basis of what the equity court deems to be for the best interest of the child.

Horn v Horn, 221-190; 265 NW 148

II PERMANENT ALIMONY

(a) IN GENERAL

Discussion. See 13 ILR 164—Garnishment of alimony; 18 ILR 64—Enforcement by contempt; 24 ILR 735—Separate action after divorce

Alimony—nonabatement by death. A decree for alimony does not abate on the subsequent death of the party to whom the alimony was awarded.

Higgins v Higgins, 204-1312; 216 NW 693

Alimony—property settlement under trust agreement. A property settlement under an irrevocable trust agreement made by husband and wife previous to and confirmed in divorce decree discharged husband's obligation for further support and precluded right to further alimony.

Fitch v Com. of Internal Rev., 103 F 2d, 702

Lien against homestead. In a divorce action granting wife a decree of divorce and alimony, decree could make provision for the disposition of the homestead or make charges against it in favor of one of the parties as against the other.

Ayers v Ayers, 227-646; 288 NW 679

Right to alimony—how determined. In action for divorce the right to alimony must be determined in light of all facts and circumstances, and is not mandatory, but depends somewhat on parties' ages, sex, health, abilities to earn, properties, resources, etc.

Retman v Retman, (NOR); 254 NW 804

(b) NATURE OF ALIMONY

Alimony—nonlienable decree for money. A decree (in divorce proceedings) which, inter alia, simply "orders" defendant to pay to the clerk for the use of plaintiff a stated sum each month, but renders against defendant no present judgment for money but authorizes the clerk to enter such judgment for payments in default, neither becomes a lien on defendant's lands, nor authorizes the issuance of an execution.

Millisack v O'Brien, 223-752; 273 NW 875

Temporary appointment of guardian—validity. The appointment of a temporary guardian on proper and sufficient notice to the person sought to be placed under guardianship is valid, even tho the statute authorizing such appointment is silent as to notice.

In re Barner, 201-525; 207 NW 613

(c) JURISDICTION

Alimony to guilty party. The allowance of alimony to a guilty party is within the legal discretion of the court.

Mitchell v Mitchell, 193-153; 185 NW 62
Blain v Blain, 200-910; 205 NW 785

Allowance on prior divorce. The court may be justified in wholly denying to a successful party in divorce proceedings any alimony, in view of the amount allowed to said party on a former decree of divorce between the same parties.

Black v Black, 200-1016; 205 NW 970

Decree—refusal—nonallowable accounting. The court, after refusing a decree of divorce, may not enter into an accounting and make a division of property between the parties.

Henriksen v Henriksen, 205-684; 216 NW 636

(d) CONDITIONS UNDER WHICH ALIMONY ALLOWED

Unallowable allowance to guilty party. Alimony should not be allowed to a defendant against whom a decree of divorce is entered, when he has never made any contribution to plaintiff's property.

Rule v Rule, 204-1122; 216 NW 629

(e) AMOUNT OF ALIMONY

Alimony—refusal of—construction of decree. A decree of divorce will not be held to deny all alimony if it makes some provision for the maintenance of plaintiff. So held on an application to modify alimony.

Handsaker v Handsaker, 223-462; 272 NW 609

Allowance for children. Allowance to a successful party in divorce proceedings for the support of children reviewed, and order increased by 100 percent.

Black v Black, 200-1016; 205 NW 970

II PERMANENT ALIMONY—concluded

(e) AMOUNT OF ALIMONY—concluded

Excessive alimony.

Blain v Blain, 200-910; 205 NW 785

Nonexcessive alimony.

Schneckloth v Schneckloth, 209-496; 228 NW 290

Williges v Williges, 215-960; 247 NW 222

Nonexcessive allowance. An award of $22,000 as alimony, and of $100 per month for the support and education for a named time of minor children, is not excessive as regards a defendant who is worth at least $75,000.

Goodrich v Goodrich, 205-1096; 216 NW 609

Nonexcessive allowance. Decree for alimony reviewed, and held that an allowance of $75 per month out of the husband's income of $125 per month was proper.

Roach v Roach, 213-314; 237 NW 439

Nonexcessive allowance. Record reviewed, and held that an allowance to the wife of $40 per month for five years was not excessive in view of the financial condition, earning power, and health of the parties.

Ellsworth v Ellsworth, 218-957; 256 NW 690

Equitable allowance. Evidence reviewed and held that alimony of $30 per month to a wife to whom was decreed the custody of three minor children was not inequitable in view of the wife's contribution to the tangible property and the division of such property.

Crouch v Crouch, 213-460; 239 NW 106

Equitable apportionment. An order for alimony in divorce proceedings should be based on a reasonable and equitable apportionment of the income of the defendant, and not solely on the basis of the amount of money necessary to support the wife and children.

Schorr v Schorr, 206-334; 220 NW 31

Reasonableness. Award of $7,000 for the first year, of $6,000 for each ensuing year, and $4,000 for attorney fees, reviewed and held reasonable in view of the circumstances of the parties.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Fundamental considerations. A decree for alimony and support must fundamentally rest on the necessities and financial condition of both the husband and wife and children, yet the court will not be blind to the relative deserts of the principal parties as reflected in their conduct and in the aggravations and palliations thereof. Decree reviewed, and held unreasonably burdensome.

Saunders v Saunders, 211-976; 234 NW 830

Manifest inability to pay. Alimony which is so large in amount as manifestly to be wholly beyond the ability of the husband to pay is legally excessive, irrespective of the needs of the wife.

Fitch v Fitch, 207-1193; 224 NW 503

One-half of property to wife. Record reviewed and held to demand a modification to the extent of awarding one-half of the property to the injured wife, and an increase in the amount of a monthly award in money.

Parizek v Parizek, 210-1099; 229 NW 689

(f) PROPERTY SUBJECT TO ALIMONY—ENFORCEMENT OF DECREE

Contingent liability not debt "to become due". The defendant in a decree for alimony (assuming such decree to create a "debt") is not garnishable on an installment which is unmatured on the date of the garnishment, and the maturity of which will be wholly defeated by the death of the plaintiff in alimony before the maturity date as provided by the decree.

Malone v Moore, 204-625; 215 NW 625; 55 ALR 356

Property subject to garnishment—decree for alimony. A decree for alimony in fixed monthly payments does not create a "debt". It follows that the defendant in alimony cannot be legally garnished for unpaid installments as a debtor of the plaintiff in alimony, even tho the claim on which the garnishment is based is for necessaries sold to the plaintiff in alimony since the entry of the decree and in reliance on said decree.

Malone v Moore, 212-58; 236 NW 100

III SUBSEQUENT CHANGES IN ALIMONY AND CUSTODY OF CHILDREN

Discussion. See 2 ILB 204—Alimony—modification; 6 ILB 233—Modification of alimony decree

Custody of children—subsequent modification of orders. The fact that a parent who was given the right to visit her child at stated times has, since the entry of the order, become better circumstanced financially to provide for the child will not necessarily constitute such "change of condition" as to justify a change in the court order; and whether the court order should be changed may be materially controlled by a consideration of the difficulties which the parties have experienced since the entry of the order and which relate to the welfare of the child.

Bennett v Bennett, 200-415; 203 NW 26

Modification in re children. A decree of divorce which specifically denies all allowance of alimony may be subsequently so modified as to require the defendant to pay a stated sum for the care and support of his children.

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

Insufficient grounds. A decree for alimony with right in defendant to visit his children

will not necessarily be suspended because the wife, immediately upon the rendition of the decree, took the children beyond the jurisdiction of the court.

Schneider v Schneider, 207-189; 222 NW 400

Loss of right. The mother of an illegitimate child, who has for a long series of years evinced but a very casual interest in the child, may not successfully urge her right to the custody of the child against fit and proper parties who have nurtured, cared for, and educated the child from birth, even tho they have been paid compensation by parties other than the mother, it appearing that it would not be to the best interest of the child to decree custody to the mother.

Barry v Reeves, 203-1345; 214 NW 519

Modification of order of custody—considerations. In an action for the modification of an order for the custody of a 10-year-old child, where the affection and care received in the homes of each of the divorced parents was satisfactory, the wishes of the child cannot have great weight, the controlling consideration being the welfare of the child, and, when there was no change in circumstances to require the action of the court, a previous adjudication that the child remain with his mother should not be modified.

Vierck v Everson, 228- ; 291 NW 865

Modification refused—evidence. Evidence justified trial court's refusal to modify divorce decree giving custody of children to be reared in home of wife's parents. Lower court's discretion and responsibility in such cases discussed.

Townsend v Townsend, (NOR); 213 NW 273

Support of children—stipulated settlement. Altho a divorced father's financial condition has changed but he is still able to carry out a settlement stipulation merged in a divorce decree, and altho his ex-wife has property and an income of her own, a review of the evidence on appeal held to justify the refusal of the lower court to modify the support provisions of the divorce decree.

Johnstone v Johnstone, 226-503; 284 NW 379

Alimony—modification. Order for alimony reviewed, and an equitable modification ordered.

McClurg v McClurg, 207-271; 222 NW 862

Accounting between parties. Where in an application to modify a decree in alimony it is made to appear that the defendant is in arrears on payments, but it also appears that plaintiff has seized and converted certain property of the defendant, the court may work out an accounting by plaintiff for the property seized, and may, on supporting testimony, decree that the property seized equals the payments which are in arrears, it appearing that the parties had, without objection, litigated such issue.

Woodall v Woodall, 204-423; 214 NW 483

Accrued and unpaid installments unchangeable. While the court, in divorce proceedings, has ample power, on a showing of change of conditions of the parties, to modify a former order or judgment for alimony or support money, yet the court is wholly without jurisdiction to cancel installments which have accrued and which remain unpaid under said former order or judgment.

Horn v Horn, 221-190; 265 NW 148

Unpaid accrued installments—status. Accrued and unpaid installments of alimony cannot be modified by the court.

Roach v Oliver, 215-800; 244 NW 899

Adjudicated grounds. A modification of a decree of divorce as to the property rights of the parties may not be had on grounds known to exist at the time the decree was entered.

Guisinger v Guisinger, 201-409; 205 NW 752

Appeal—nonabatement by death. The death of a party to whom a decree of divorce has been awarded does not abate an appeal insofar as property rights and the custody of children are affected by the decree.

Oliver v Oliver, 216-57; 248 NW 233

Fatally belated objection. The objection that a party to a divorce decree filed no pleadings in resistance to an application for a modification of the decree may not be raised for the first time on appeal.

McNary v McNary, 206-942; 221 NW 580

Findings in alimony modifications—weight on appeal. In equity cases triable de novo, much weight should be given to findings of the trial court because of the better opportunities of that court to weigh the testimony, and in matters like modification of alimony decrees the court exercises a large discretion which, unless abused, will not be interfered with on appeal.

Siders v Siders, 227-764; 288 NW 909

Jurisdiction. The statutory provision that the court in divorce proceedings may make changes in prior orders ipso facto works a retention in the court of jurisdiction of both (1) the subject-matter of the orders and (2) the parties, even tho the decree is silent as to such retention of jurisdiction.

Franklin v Bonner, 201-516; 207 NW 778

Notice. The retained jurisdiction of the court may be reasserted by the court at any time on such reasonable notice as the court may order.

Franklin v Bonner, 201-516; 207 NW 778

Presentation and reservation of grounds of review. On application to modify an award of

III SUBSEQUENT CHANGES IN ALIMONY AND CUSTODY OF CHILDREN—continued

alimony and support money, a plea of adjudication must be presented to the trial court, or it will not be considered on appeal.

Kruckman v Kruckman, 209-1218; 229 NW 700

Decree on publication service—effect on alimony. A plaintiff who takes a decree of divorce on service by publication may not thereafter resurrect the proceeding for the purpose of an allowance of alimony. This is true even tho plaintiff prayed for alimony, and even tho the court assumed to continue the proceeding on the question of alimony.

Doeksen v Doeksen, 202-488; 210 NW 545

Decree providing alimony until child attains majority—not subject to change thereafter. Decree of divorce providing that husband's monthly payments of alimony for child should continue "until said minor child has attained his 21st birthday, unless this decree should be modified or changed by said court", held not to authorize change in decree after child attained majority.

Hartwick v Hartwick, (NOR); 227 NW 341

Default — effect. The alimony provisions of a decree of divorce will not be modified as a matter of course simply because the other party to the decree defaults when the application for modification comes on for hearing.

McNary v McNary, 206-942; 221 NW 580

General equitable relief. In an application for the modification of a decree of alimony, a prayer for general equitable relief justifies, under proper showing, a modification of that part of the alimony decree pertaining to the maintenance of insurance.

Nicolls v Nicolls, 211-1193; 235 NW 288

Interest. Circumstances may be such as to justify an award of interest on an agreed settlement of alimony long delayed by the wrong of the defendant.

Miller v Miller, 203-1218; 211 NW 705; 214 NW 613

Legally unmodifiable decree. A final, legal decree of divorce, which denies alimony, may not be modified by the court as to alimony, even under a showing of materially changed circumstances.

Handsaker v Handsaker, 223-462; 272 NW 609

Lessened earning power. A material decrease in the earning power of a person subsequent to the time when he was decreed to pay monthly alimony, is such change of circumstances as will justify a modification of the decree.

Nicolls v Nicolls, 211-1193; 235 NW 288
Keller v Keller, 214-909; 243 NW 182
Junger v Junger, 215-636; 246 NW 659

Lessened earning power — willful neglect. The plea of lessened earning power of one who has been decreed to pay alimony will not be deemed such "change in circumstances" as to justify a modification of the decree of alimony when such lessened earning power is the result of his own willful neglect.

Stone v Stone, 212-1344; 235 NW 492

Lessened earning power. Basis for a modification of a decree for monthly alimony may be found in the unavoidable lessened earning power of the defendant.

Corl v Corl, 217-812; 253 NW 125

Lien on homestead. Defendant, in an application for modification of an alimony allowance, by praying for general equitable relief thereby offers to do equity, and arms the court with power to make the reduced allowance a lien on defendant's homestead, even tho former allowances had not thus been made a lien on said homestead.

Paul v Paul, 217-977; 252 NW 114

Life estate to wife, remainder to children—modified on appeal. A decree of divorce awarding to the wife a life estate in real property, with remainder to the children, modified on appeal to give the remainder to the husband subject to the wife's life estate.

Converse v Converse, 225-1359; 282 NW 368

Modification—changed financial condition. A change for the better in the financial condition of a party to divorce proceedings may furnish basis for an application for modification of the decree. Decrees in re alimony will be subsequently modified only under unusual circumstances.

Handsaker v Handsaker, 223-462; 272 NW 609

Contemplated change of circumstances. A plea for modification of a decree of alimony must be based on some condition or state of circumstances not known to or reasonably contemplated by the parties when the decree was originally entered.

Handsaker v Handsaker, 223-462; 272 NW 609

Modification by action by executor. Whether an action or proceeding to modify an alimony allowance survives the death of the obligated party, and passes to the latter's executor, quaere, but, conceding such survival, there must be proof that the right to such modification existed in the obligated party during his lifetime.

Goldsberry v Goldsberry, 217-750; 252 NW 531

No modification without substantially changed condition. Trial court may not modify an original divorce decree without a substantial change in the condition of the parties, which must be more than small income employment for the wife and remarriage of the husband.

Metzger v Metzger, 224-546; 278 NW 187

Facts warranting modification. Divorce decree providing for $75 monthly payments for alimony and child support modified on showing of defendant's ownership of 120-acre farm and $1,500 unsecured debt as only assets.

Jones-Holmes v Jones, (NOR); 216 NW 688

Justifiable modification. A modification of a decree for monthly payments of alimony is justified by a showing that, since the entry of the decree, the defendant has, by reason of age, been retired by his employer on a pension which is defendant's sole means of support, and which is a very material reduction of his former income.

Toney v Toney, 213-398; 239 NW 21

Justifiable modification. A decree for alimony may be subsequently modified by reducing the amount on a showing of loss of health and lessened earning ability, even tho the allowance is solely for the benefit of a child.

Paul v Paul, 217-977; 252 NW 114

Factors justifying reduction. On application for modification of alimony decree, evidence relating to both parties' ages, health, wages, earning capacities, expenses and indebtedness justified trial court's reduction of alimony from $50 to $30.

Siders v Siders, 227-764; 288 NW 909

Insufficient change in condition. Evidence held insufficient to show such change in the condition of the parties to a divorce decree as to justify a modification of the provisions relative to alimony by returning to the applicant a part of a specific property once awarded to plaintiff.

McNary v McNary, 206-942; 221 NW 580

Justifiable refusal to increase. The refusal of the court to increase a former award of alimony finds full justification in the fact that, at the time of the application for the increase, the applicant was in affluent circumstances.

Miller v Miller, 200-1193; 206 NW 262

Unallowable modification. Where parties to a divorce proceeding formally stipulated that they owned all the capital stock of a corporation, and that said stock should be equally divided between them, and said stipulation was carried into, and confirmed by, the decree, the defendant will not later be granted a modification assigning to plaintiff a minority of the stock on the ground that defendant was mistaken, when the decree was entered, in the ownership of one share, when at said time he had knowledge of every fact bearing on the ownership of said share.

Parker v Parker, 214-1327; 241 NW 497

Unallowable modification. An unappealed decree of divorce, which specifically denies all allowance of alimony because the parties had theretofore entered into a property settlement, is a finality on the subject matter of alimony, and may not, long after the court term has expired, be modified by inserting said settlement therein as alimony, because (1) said modification would contradict said final decree, and (2) any prior contract between the parties relative to alimony necessarily merges into the final decree.

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

Nonallowable modification. Where parties to a divorce proceeding owned the entire capital stock of a corporation, and said stock was decreed to the parties in equal shares, a subsequent modification of the decree will not be entered because of the doing of acts in the course of the corporate management in which each acquiesced, nor because one of the parties now apprehends that said equal division of stock will ultimately result in a deadlock in corporate management.

Parker v Parker, 214-1327; 241 NW 497

Unauthorized modification. A decree in divorce proceedings to the effect that the wife should, until a named date, have the possession of certain property belonging to the husband, and that the husband, in the meantime, should pay off an existing mortgage and accruing taxes on the property, works a vested interest in the husband when he complies with the decree—an interest which the court has no jurisdiction to disturb by a subsequent order conferring the property absolutely on the wife.

Guisinger v Guisinger, 201-409; 205 NW 752

Modification refused—noninterference on appeal. The refusal of the trial court to modify its previous order relative to monthly payments will not be interfered with in the absence of a showing of abuse. Evidence held insufficient to reveal such abuse.

Kirk v Kirk, 222-945; 270 NW 432

Unsupported modification. A decree in divorce action may not be subsequently modified on hearsay evidence of misconduct on the part of one of the parties.

McDaniel v McDaniel, 218-772; 253 NW 803

Unallowable grounds. An unappealed decree in divorce proceedings as to the property rights of the parties may not be modified on the grounds that the applicant did not "understand" the decree.

Guisinger v Guisinger, 201-409; 205 NW 752

III SUBSEQUENT CHANGES IN ALIMONY AND CUSTODY OF CHILDREN—concluded

Overestimated values. A decree for alimony will not be modified on the ground (1) that the stipulation for alimony and the decree confirming it overestimated the value of the husband's property, or (2) that the defendant has unexpectedly been called upon to discharge an obligation of suretyship of which he had knowledge when the decree was entered.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Remarriage. One who asks for a modification of a decree for alimony has the burden to plead and prove the change of circumstances which will justify such modification. Where the only proven change in circumstances was that the defendant had remarried and had a dependent family, held that the modification granted was ample and would not be increased.

Morrison v Morrison, 208-1384; 227 NW 330

Remarriage—lessened earning power, etc. The remarriage of a person at a time when an unsatisfied decree for alimony in monthly installments exists against him does not constitute grounds for an order reducing said alimony, but an unavoidable reduction in earning power of the defendant, and the fact that the family of the plaintiff in alimony has decreased in size may furnish such grounds.

Boquette v Boquette, 215-990; 247 NW 255

Remarriage—effect. While remarriage is not, in and of itself, such change of circumstances as will justify a modification of a decree of alimony, yet the remarried person may secure a modification if his evidence, other than the mere showing of remarriage, meets the requirements of the statute.

Nicolls v Nicolls, 211-1193; 235 NW 288

Remarriage—effect. Remarriage of divorced husband does not alone present such change in the circumstances as to justify a modification of alimony requirements.

Siders v Siders, 227-764; 288 NW 909

Remarriage as "change of circumstances". The continuing expense consequent on the remarriage of a person decreed to pay alimony is not, in and of itself, such "change in circumstances" as to authorize a modification of that part of the decree pertaining to alimony, especially when such remarriage is in violation of the statute.

Stone v Stone, 212-1344; 235 NW 492

Impaired health and remarriage. The fact (1) that the health, but not the income, of a defendant has become impaired since the entry of a decree for alimony, (2) that the defendant has remarried since the divorce, and that a child will soon be born to him, and (3) that the plaintiff has since the decree become more able to support herself and child (such being contemplated by the decree) are not such "change in circumstances" as will authorize a modification of the decree for alimony.

Newburn v Newburn, 210-639; 231 NW 389

Remarriage justifying modification. Monthly payments decreed to a wife "for the support" of her minor child, will be canceled when it is made to appear (1) that the wife was also decreed substantial alimony "for the support of herself and minor child"; (2) that she has since remarried and is being amply supported by her present husband, (3) that she has adequate means from the alimony awarded to her to support the child, and (4) that the financial condition of the father has changed to his detriment.

Kruckman v Kruckman, 209-1218; 229 NW 700

Subsequent birth of child. A decree of divorce will not be modified by increasing the alimony because of the subsequent birth of a child when consideration was given to such possible birth in fixing the original amount of alimony.

Kiger v Kiger, 205-1200; 219 NW 314

Subsequent entry of omitted provision. An agreement as to alimony inadvertently omitted from the decree may be subsequently entered on proper application.

Bennett v Bennett, 200-415; 203 NW 26

Stipulated decree—effect. The fact that the alimony part of a decree was based upon an agreed stipulation of the parties, does not place it in the category of an enforceable contract and therefore beyond the power of the court to modify.

Nicolls v Nicolls, 211-1193; 235 NW 288

Waiver of notice. Failure to serve an adverse party in divorce proceedings with notice of a hearing to modify the decree becomes quite immaterial when such adverse party appears at said hearing in person and by attorney.

Guisinger v Guisinger, 201-409; 205 NW 752

IV COSTS AND ATTORNEY FEES

Attorney fees. A successful party in divorce proceedings is entitled to an allowance for attorney fees.

Black v Black, 200-1016; 205 NW 970

Attorney fees. Equity will not set aside a consent judgment for attorney fees for both parties in divorce proceedings, against the defeated party and his land, when no fraud is shown, and when the court had personal jurisdiction over both parties to the proceeding.

Coulter v Smith, 201-984; 206 NW 827

Decree for attorney fees—nonadjudication as to attorney. A decree in divorce proceed-

ings awarding plaintiff (in addition to a divorce) a specified sum as attorney fees is not an adjudication as to the amount owing by plaintiff to her attorney for services rendered in the action,—the attorney, of course, not being a party to the action.

Jones v Park, 220-894; 262 NW 797; 264 NW 700
Duke v Park, 220-889; 262 NW 799
Maddy v Park, 220-899; 262 NW 796

Former dismissed actions. The court may refuse to a successful party in divorce proceedings any allowance by way of costs and attorney fees contracted in prior and voluntarily dismissed actions for divorce between the same parties.

Black v Black, 200-1016; 205 NW 970

Nonallowable attorney fees. Attorney fees are not allowable on an application to modify alimony allowance.

Barish v Barish, 190-493; 180 NW 724
Nicolls v Nicolls, 211-1193; 235 NW 288
Stone v Stone, 212-1344; 235 NW 492
Hensen v Hensen, 212-1226; 238 NW 83
Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

V SEPARATE MAINTENANCE

Discussion. See 24 ILR 137—Separate maintenance

Creature of equity only. Principle reaffirmed that an action by a wife against the husband for separate maintenance is a creature of equity only, not of statute.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Separate decree to wife. Principle recognized that in an action by a husband for divorce the wife may, on proper pleading and supporting evidence, be granted a decree for separate maintenance.

Waddington v Waddington, 218-460; 255 NW 462

Separate maintenance. Separate maintenance may not be decreed on evidence which would be insufficient to justify a decree of divorce.

Depping v Depping, 206-1203; 219 NW 416
Krotz v Krotz, 209-433; 228 NW 30
Bartlett v Bartlett, 214-616; 243 NW 588
Agnew v Agnew, 216-1; 248 NW 241

Separate maintenance. Tho a husband is guilty of no personal violence toward his wife, yet she may be entitled to separate maintenance on a showing that his conduct toward her has been domineering, arbitrary, unsympathetic, unkind, stubborn, uncommunicative, and parsimonious, and that such treatment has endangered her life.

Cruse v Cruse, 201-810; 208 NW 324

Divorce in lieu of separate maintenance. The court has no right to decree a divorce on a cross-petition which alleges cruel and inhuman treatment but specifically prays for separate maintenance only; and this is true tho there is also a prayer for general equitable relief, it appearing that cross-petitioner's attitude on the trial was in strict accord with said prayer.

Davis v Davis, 209-1186; 229 NW 855
DeReus v DeReus, 212-762; 237 NW 323

Essential conditions. A wife in an action against her husband for separate maintenance, on the ground of inhuman treatment, is entitled to a decree only in case her supporting evidence is such as would entitle her to a divorce if she asked such relief. Evidence held amply to meet said requirement.

Bartlett v Bartlett, 214-616; 243 NW 588

Approved allowance. An allowance of $60 per month for separate maintenance reviewed, and held proper.

Bartlett v Bartlett, 214-616; 243 NW 588

Attachment not authorized. The statutory power of a judge of the district court in action for divorce to order an attachment, with or without bond, does not authorize him to enter such order in an action for separate maintenance.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Counter plea—allowance. Record held to justify the entry of a decree and for the allowance of $40 per month for the separate maintenance of the wife, on her counter plea in divorce action.

Crees v Crees, 218-338; 255 NW 515

Divorce and remarriage as bar. An action for separate maintenance presupposes the existence of the marriage relation, and a wife who institutes such action while the marriage relation exists may not, after the entry of a valid decree of divorce, and after the remarriage of both parties, maintain the action, even to the extent of recovering (1) for her own past support up to the time of her remarriage, or (2) for the past and future support of her minor child.

Freet v Holdorf, 205-1081; 216 NW 619

Foreign decree. The recognition of the validity in this state of a foreign divorce decree in rem does not preclude the courts of this state from adjusting the property rights of one of the parties, under a decree in this state for separate maintenance.

Miller v Miller, 200-1193; 206 NW 262

Foreign judgment — full-faith-and-credit clause. An unmodified judgment in personam in a court of competent jurisdiction of a foreign state which is then the matrimonial domicile of both husband and wife, for the

V SEPARATE MAINTENANCE—concluded

maintenance of the wife, payable in monthly installments, is entitled to the full-faith-and-credit clause of the federal constitution as to all matured installments, even tho, subsequent to the entry of such judgment, the judgment defendant departs from the matrimonial domicile and obtains in this state a naked degree of divorce on service by publication.

Bennett v Tomlinson, 206-1075; 221 NW 837

Fraudulent decree — new trial. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state, and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

Habitual drunkenness — fixed habit as essential element. In determining whether a husband or wife, after marriage, has become an habitual drunkard, the element of "fixed habit" in the excessive use of intoxicants is an all-essential element.

Leonard v Leonard, 221-722; 266 NW 537

Statute of limitation. In case of a judgment for the separate maintenance of a wife through monthly installments, the statute of limitation does not commence to run from the date of the judgment, but on each separate installment from the maturity thereof.

Bennett v Tomlinson, 206-1075; 221 NW 837

Weight given decision of lower court. Altho a divorce action, being in equity, is triable de novo on appeal, yet the supreme court will give serious consideration to the decision of the lower court when there is a conflict in the testimony. Evidence reviewed and held to justify award of separate maintenance to the wife and to deny divorce to the husband.

Blew v Blew, 225-832; 282 NW 361

Written stipulation for decree—effect. The signing by a plaintiff and a defendant in an action for separate maintenance of an agreement which specifies the amount and terms of such maintenance and provides for the entry of decree in accordance therewith, and the filing of such stipulation in the action, constitute an appearance by the defendant to said action.

Kalde v Kalde, 207-121; 222 NW 351

VI DISPOSITION OF PROPERTY

Disposition of property. An adjudication of property interests and a disposition of the household goods in a divorce action, is proper, there being a prayer by both parties for general equitable relief, and the issue, moreover, being voluntarily litigated.

Garside v Garside, 208-534; 224 NW 586

Cancellation of instruments. In divorce action, trial court was justified in cancelling notes and deeds from husband to wife for lack of consideration, under statute empowering court to make proper disposition of the property of the parties.

Graham v Graham, 227-223; 288 NW 78

Death of party—appeal not abated. Death of appellee during pendency of divorce appeal to the supreme court does not abate the action when property rights are involved.

Graham v Graham, 227-223; 288 NW 78

Division in kind not desirable. In divorce action, where trial court awarded the wife unincumbered land, a dwelling house, household goods, a money judgment, and various sums of money for child support, payment of a debt, costs, attorney fees, and temporary alimony, all of which, at court's valuation, amounted to approximately one-third of husband's property, held, the decree was as nearly equitable as was possible, especially in view of fact that his nonliquid assets consisted of various interests in real estate and were of such nature that even an equal division in kind would have put the wife in a worse position.

Twombley v Twombley, 227-177; 287 NW 841

Factors considered in dividing property. In divorce action, general principle recognized that in division of property court should take into consideration the sex, age, health, future prospects of the parties, the private estate of each, the contributions of each to the joint or accumulated property, the earning capacity of each, their respective incomes and their respective indebtedness, and so of necessity each case involving disposition of property must stand on its own facts.

Twombley v Twombley, 227-177; 287 NW 841

Factors in disposition of property. Where wife is offending party and contributed nothing to property of husband, the court, taking into consideration the age, health, and future prospects of the parties was justified in granting property to the husband.

Graham v Graham, 227-223; 288 NW 78

Noninvalidating provision. That part of a decree in divorce proceedings which, in disposing of the property of the parties, purports to impose an obligation on a corporation, the entire capital stock of which is owned by the

parties and decreed to them in equal shares, is not void as between the parties to the action, or as to the property decreed to each of the parties.

Parker v Parker, 214-1327; 241 NW 497

Lien against homestead. In a divorce action granting wife a decree of divorce and alimony, decree could make provision for the disposition of the homestead or make charges against it in favor of one of the parties as against the other.

Ayers v Ayers, 227-646; 288 NW 679

Property-settlement contract — fraud — insufficient defense. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Stipulation in re property—effect. A stipulation between plaintiff and defendant in a divorce proceeding to the effect that the defendant, for the good of the children of the parties, shall not "convey, incumber, or mortgage in any manner" certain named lands does not constitute a conveyance to the children, even tho the stipulation is fully embraced in the subsequently entered decree.

Putensen v Dreeszen, 206-1242; 219 NW 490

Unconscionable stipulation. A stipulation relative to the property and personal rights of a wife, tho signed by her, may be so unconscionable that a court of equity will refuse to enforce it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Validity of deeds—clause repugnant to fee. A stipulation in divorce proceedings, even tho carried into the decree, is a nullity insofar as it seeks to render land exempt from the claims of creditors of the fee-title owner.

Putensen v Dreeszen, 206-1242; 219 NW 490

10482 Contempt.

Burden to purge. In proceedings for contempt in failing to pay alimony, defendant must purge himself.

Roach v Oliver, 215-800; 244 NW 899

Contempt proceedings—constitutionality. A defendant who is decreed to pay alimony and who willfully secretes his property for the purpose of avoiding compliance with said order, may be imprisoned as for a contempt of court, an award of alimony not being a "debt" in the sense of the constitutional prohibition against imprisonment for "debt".

Mason v Dist. Court, 209-774; 229 NW 168
Roberts v Fuller, 210-956; 229 NW 163
Roach v Oliver, 215-800; 244 NW 899

Disobedience of divorce decree. In an equity action involving alleged nonpayment of support under a divorce decree and seeking punishment for alleged disobedience of the decree, a contempt order will not issue unless the disobedience was willful and the proof thereof clear and satisfactory, and where a father is willing to pay a reasonable sum for his son's expenses at college, a refusal to cite for contempt is proper.

Johnstone v Johnstone, 226-503; 284 NW 379

Inability to pay. Actual inability to pay alimony is a complete defense to a charge of contempt of court.

Pewick v Meyer, 202-134; 209 NW 396
Porter v Maxwell, 208-1224; 226 NW 917
Mason v Dist. Court, 209-774; 229 NW 168

Orders—violation. The violation of an order to the defendant in pending divorce proceedings not to interfere with the person of the plaintiff or with plaintiff's peaceable possession of her home is properly punished as a contempt.

Blunk v Walker, 206-1389; 222 NW 358

Willful avoidance of decree. A willful refusal to pay an award of alimony may be punished as a contempt of court by imprisonment until the award is paid.

Roberts v Fuller, 210-956; 229 NW 163

Unallowable avoidance. Under a decree awarding a wife and mother the custody of minor children, and directly awarding her alimony for herself and children, the defendant may not excuse his default in making payment by showing that he has expended a named amount for the support of one of the said children and obligated himself for other sums for the same purpose, there being no proof that the wife consented to such method of payment.

Roach v Oliver, 215-800; 244 NW 899

10484 Remarriage.

Atty. Gen. Opinion. See AG Op June 20, '39

10486 Annulling illegal marriage—causes.

"Annulment" and "divorce" distinguished. A husband may not maintain an independent action in equity to nullify a marriage on the ground that the wife, at the time of marriage, was, unbeknown to him, pregnant by another than himself. His action should be one for divorce on said ground.

Clark v Clark, 219-338; 258 NW 719

Insanity—sufficiency of evidence. Evidence reviewed and held sufficient to authorize default decree annulling marriage on ground of insanity at time of marriage.

Kurtz v Kurtz, 228- ; 290 NW 686

Foreign judicial records—improper certification first raised on appeal. Admission of

improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Attorney fees — when nontaxable. Tho a husband's action against his wife for the annulment of the marriage is legally nonmaintainable, and is therefore dismissed, attorney fees for the wife for defending the action may not be taxed against him.

Clark v Clark, 219-338; 258 NW 719

Temporary alimony and suit money. In an action by a wife for separate maintenance, a prayer by the husband for an annulment of the marriage because of the alleged invalidity of said marriage, furnishes sufficient showing of a marriage to justify an allowance of temporary alimony and suit money.

Hanford v Hanford, 214-839; 240 NW 732

10489 Children—legitimacy.

Adjudication of bastardy — effect on child. That part of a decree of divorce which adjudges that a child of the wife is not the child of the husband is a nullity as far as the child is concerned.

Ryke v Ream, 212-126; 234 NW 196

Child begotten out of, but born in, wedlock —presumption. A child manifestly begotten out of wedlock but born during wedlock is presumed to be the child of such intermarried persons.

Ryke v Ream, 212-126; 234 NW 196

CHAPTER 472

MINORS

10492 Period of minority.

Atty. Gen. Opinions. See '30 AG Op 173; '38 AG Op 899

Contributory negligence — duty to negative —sufficient proof by infant. Plaintiff, in an action for damages for negligently inflicted injuries, establishes prima facie freedom from contributory negligence by proof that when he suffered the injuries in question he was only ten years of age, thereby advantaging himself of the common-law presumption arising from such proof. And the case would be quite rare where defendant's rebutting testimony would be so convincing and overwhelming as per se to overthrow said prima facie showing.

Flickinger v Phillips, 221-837; 267 NW 101

Contributory negligence. Where a minor bicyclist collided with a car unlawfully parked on left side of city street without tail light, when he pulled over to his right to avoid an approaching car the question of his contributory negligence, which depended on whether or not he should have observed the parked car in time to avoid the collision, was for the jury.

Trailer v Schelm, 227-780; 288 NW 865

Marriage in foreign state—parties below age requirement—voidable only. A marriage, the parents consenting thereto, in a foreign state, between two persons, one of whom has not reached the age at and above which parents may give their consent for marriage, is not void but merely voidable, and as affecting rights in Iowa such parties thereby legally reach majority.

Boehm v Rohlfs, 224-226; 276 NW 105

Support and maintenance—stepchildren. The legal obligation of a father to support his minor children extends to stepchildren.

Rule v Rule, 204-1122; 216 NW 629

Will construction—reaching majority—law of testator's domicile controls. When the property is situated and the testator was domiciled in Iowa, provisions of the will as to real and personal property and question as to named devisee attaining majority are to be determined according to the law of testator's domicile.

Boehm v Rohlfs, 224-226; 276 NW 105

10493 Contracts—disaffirmance.

Family expenses. See under §10459

Discussion. See 11 ILR 394—Liability of surety when infant disaffirms; 20 ILR 785—Infant's liability on contract

Disaffirmance of joint contract. A party who jointly contracts with an adult and a minor must take notice of the amount which the minor contributed to the deal.

Roeper v Danese, 206-964; 221 NW 506

Disaffirmance—release of surety. The disaffirmance by a minor of his contract of purchase and of his negotiable promissory note given in connection therewith, before the property is delivered to him, releases the surety on the note of all liability to the payee, even tho the surety signed the note because of the known minority of the principal. In case the note has passed to a holder in due course by indorsement by the payee, the liability of the indorser becomes primary and the liability of the surety becomes secondary.

Lagerquist v Guar. Co., 201-430; 205 NW 977; 43 ALR 585

Ineffectual affirmance. A minor, being under a disability to enter into a contract during his minority, is likewise under a disability to affirm the contract during his minority. Held, that the bringing of an action by the minor during minority for damages consequent on the contract did not prevent him, after withdrawing from the action during minority, and before trial, from bringing an action to disaffirm the contract.

Roeper v Danese, 206-964; 221 NW 506

Disaffirmance by minor. A void order of the probate court authorizing the executor to satisfy a cash bequest to a minor by transferring a note and mortgage to the father of the minor as the latter's natural guardian, may be disaffirmed and repudiated by the minor on reaching his majority.

Irwin v Bank & Trust, 218-477; 255 NW 671

Timely disaffirmance. A delay of some fifty days after a person attains his majority before disaffirming a contract of exchange of automobiles is not necessarily untimely.

Eckrich v Hogan Bros., 220-755; 263 NW 308

Disaffirmance—reasonable time. A minor, upon becoming of age, is required to disaffirm contracts made during minority within a reasonable time after attaining majority or within a reasonable time after discovery of the fraud.

In re Fisher, 226-596; 284 NW 821

Limitation on right. A minor may not disaffirm a contract which has been entered into by a partnership of which he is a member, and recover of the other party to the contract on the theory that the money of the minor was paid out under such contract, when such other party in good faith entered into the contract, without knowledge that the minor was a member of the partnership.

Kuehl v Means, 206-539; 218 NW 907; 58 ALR 1359

Nonliability of agent. A minor upon disaffirmance of his contract may not recover of an agent who disclosed his principal and acted strictly within his authority.

Hubler v Gates, 209-1198; 229 NW 767

Ratification of settlement—failure to disaffirm. In guardianship proceeding, wherein father acting as guardian made a settlement with his children after son had reached his majority, but daughter lacked three months of being 21 years of age, and suit against the father for an accounting was not brought until two and one-half years after the settlement, held, evidence sufficient to support finding of trial court in approving the guardian's report which, in effect, approved the settlement, the same having been ratified by failure to disaffirm within a reasonable period of time.

In re Fisher, 226-596; 284 NW 821

Guardian—unauthorized investments—rejection by ward. A ward, on the hearing on the final report of the guardian, may reject any or all loans or investments made by the guardian without the authority or approval of the court.

In re Jefferson, 219-429; 257 NW 783

Guardian—unauthorized and imprudent investments. A guardian who, without authorization from the court, invests his ward's funds in real estate does so at his peril and irrespective of his good faith; nor may he compel the ward to accept such property even tho the ward did not promptly disavow the investment on attaining his majority.

In re Pharmer, 211-1285; 235 NW 478

Unauthorized and invalid investments—who may question. The invalidity which attends the act of a guardian in loaning guardianship funds to himself, individually, and in securing such loan by a first mortgage on real estate, —all without any preauthorizing order of court,—may not be pleaded by a second mortgagee of the land on the theory that such invalidity absolutely voided the said note and mortgage to the guardian, and thereby left the purported second mortgage as the first lien on the land. The sole right to question the legality of said acts of the guardian rests in the ward, or in his heirs, or in those properly representing said ward or heirs.

Richardson v Lampe, 221-410; 265 NW 629

10494 Misrepresentations—engaging in business.

Disaffirmance barred by misrepresentation. A person may not disaffirm his contract on the ground that he was a minor when the contract

was entered into, when, at said time, he falsely represented that he was an adult, and, to all appearance, was such.

Eckrich v Hogan Bros., 220-755; 263 NW 308

Failure to restore property—effect. A minor may not disaffirm his contract when he has entered into it as an apparent adult, and when the party contracted with had good reason to believe, and did believe, that he was contracting with an adult. Especially is this true when the minor fails to make any restoration of the property received by him under the contract.

Kuehl v Means, 206-539; 218 NW 907; 58 ALR 1359

CHAPTER 473

ADOPTION

Atty. Gen. Opinions. See '38 AG Op 421, 464, 559

10501.1 Who may adopt—petition.

Contracts to devise and bequeath. See under §11846 (II)

Invalid articles of adoption as enforceable contract. See under §11846 (II), Vol. I

Right of foster parents to inherit from adopted child. See under §12017

Discussion. See 3 ILB 48—Specific performance in adoption contracts; 13 ILR 84—Specific performance of contracts to adopt

Atty. Gen. Opinion. See '38 AG Op 421

Articles—liberal construction. In determining the validity of articles of adoption, the court will note, if such is the fact, that the attack is being made by collateral heirs.

In re Wadst, 209-1200; 229 NW 835

Articles—noninvalidating defects. Articles of adoption otherwise valid, are not, under Ch. 7, Title 15, C., '73, rendered invalid:

1. When they are signed and consented to by only one of the natural parents, the other being insane, and confined in a state hospital, or
2. Because they do not literally contain the statutory provision that the consenting parent "gives the child to the adopter for the purpose of adoption as his own child", or
3. Because, while they state the residence of the consenting parent, they fail to state the residence of the child or insane parent, or
4. Because, while they state the present name of the child, they fail to state the future name of such child.

In re Wadst, 209-1200; 229 NW 835

Creature of statute. Adoption of children is a procedure unknown to the common law.

In re Fitzgerald, 223-141; 272 NW 117

Adoption by estoppel. The execution, by the actual and the foster parents of a child, of articles of adoption of the child, with implicit reliance thereon by said parties that said articles were legally complete, followed during the ensuing years by full performance by the child of all duties legally incident to a complete adoption (even tho said articles were never entered of record as required by statute, and even tho the contents of said articles cannot be determined because they have been lost) creates an adoption by estoppel absolutely binding on the foster parents and necessarily on their heirs.

Shaw v Scott, 217-1259; 252 NW 237

Adoption by estoppel. Evidence that deceased recognized plaintiff as his own son and so referred to him, that plaintiff gave deceased the obedience, loyalty, and affection of a natural son, and that deceased reciprocated in kind and gave plaintiff his name and took him into his home, created an adoption by estoppel, so that heirs of deceased were estopped from denying the adoption, and plaintiff held entitled to inherit as adopted son.

Bergman v Carson, 226-449; 284 NW 442

Adoption by estoppel. Evidence that at the age of thirteen months the plaintiff was taken by foster parents from her natural parents under an agreement to adopt her, and that she was reared by the foster parents, the foster mother referring to her as a daughter in conversation and in a will, established an adoption by estoppel, estopping other heirs of the foster mother from denying the adoption.

Vermillion v Sikora, 227-786; 289 NW 27

Charitable institution. A charitable institution, concededly a home-finding agency, under statutory authorization which, however, did not engage in finding homes and did not comply with the law in accepting children and did not comply with adoption law, was nevertheless properly held to be entitled to benefits of school law for the reason that violations of other statutes were immaterial issues.

School Twp. v Nicholson, 227-290; 288 NW 123

Domicile of abandoned child. Upon the death of a parent of a child and the abandonment of the child by the other parent, the next of kin may, if acting in good faith, legally determine the domicile of said child for the purpose of adoption.

Jensen v Sorenson, 211-354; 233 NW 717

Parol agreement to adopt. A parol agreement to adopt a child is unenforceable.

Morris v Trotter, 202-232; 210 NW 131

Material departure from statute. A material departure from the statutory requirements for the adoption of a child nullifies the articles of adoption.

In re Williamson, 205-772; 218 NW 469

Support and maintenance—stepchildren. The legal obligation of a father to support his minor children extends to stepchildren.

Rule v Rule, 204-1122; 216 NW 629

10501.3 Consent, when necessary.

Atty. Gen. Opinions. See '38 AG Op 421, 559

Consent by guardian ad litem. A guardian ad litem in adoption proceedings need not consent to such adoption.

In re Burkholder, 211-1222; 233 NW 702

Consent by guardian. The statutory requirement that a guardian consent to the adoption of his ward is complied with when the guardian consents that he adopt the child himself.

In re Burkholder, 211-1222; 233 NW 702

Consent of both divorced parents—father contributing to support. Under adoption statute providing that, where the parents are not married to each other, the "parent having the care and providing for the wants of the child" may give consent to adoption, where mother and father, who were divorced, had stipulated that in case of divorce the father would contribute to the support of child and have the right of visitation and thereafter divorce decree gave effect to the stipulation, the mother was not "parent having the care and providing for the wants of child" to the exclusion of father so as to authorize child's adoption with mother's consent without consent of natural father.

Rubendall v Bisterfelt, 227-1388; 291 NW 401

Divorced father contributing child support not notified—adoption invalid. Where a father and mother stipulated that father would contribute to support of child and have the right to visit the child, and divorce decree gave effect to the provisions, and thereafter the mother gave consent to adoption in an adoption proceeding without notice to the father, he not having consented, abandoned, waived, or forfeited his paternal right, the mother's consent to the adoption was not sufficient and the decree of adoption was void.

Rubendall v Bisterfelt, 227-1388; 291 NW 401

Controlling considerations. The fact that one custody of a child may offer larger financial and educational advantages than another custody, is not necessarily a controlling consideration on the issue of the child's best welfare.

Jensen v Sorenson, 211-354; 233 NW 717

Custody of child—loss of right. The mother of an illegitimate child, who has for a long series of years evinced but a very casual interest in the child, may not successfully urge her right to the custody of the child, against fit and proper parties who have nurtured, cared for, and educated the child from birth, even tho they have been paid compensation by parties other than the mother, it appearing that it would not be to the best interest of the child to decree custody to the mother.

Barry v Reeves, 203-1345; 214 NW 519

Death of mother—revival of paternal rights—conditions. Assuming that the death of a mother (to whom the custody of her infant child has been judicially awarded) revives the custodial rights of the father, yet he must assert such rights with a promptness commensurate with the helplessness of the child, or he will be deemed to have forfeited and waived them, and will not, thereafter, be permitted to challenge the rights of another custodian except on the grounds of unfitness.

Jensen v Sorenson, 211-354; 233 NW 717

Dying request — materiality. Evidence of the dying request of a mother as to the future custody of her infant child is highly material on the issue of such custody.

Jensen v Sorenson, 211-354; 233 NW 717

Invalid appointment of guardian. The right of a fit and proper father to the custody of his minor child whom he has never abandoned, and whose custody he has neither forfeited nor waived, is in no manner affected by orders of court (1) appointing, without notice to said parent, the maternal grandfather as guardian of said child, and (2) authorizing said guardian to proceed and adopt said child; especially is this true when the petition by the mother for the appointment of the grandfather was not filed until after the appointment was made.

In re McFarland, 214-417; 239 NW 702

10501.4 Notice of hearing.

Fabricated ground of abandonment. A decree of adoption of a child, based solely on a finding that the child had been abandoned by its parent, and entered without notice to the parent of the hearing, tho her residence was known, will be set aside on a direct attack supported by affirmative and conclusive evidence that the child had never been so abandoned.

Pitzenberger v Schnack, 215-466; 245 NW 713

10501.5 Decree—change of name.

Atty. Gen. Opinion. See '28 AG Op 360

10501.6 Status of the adopted child.

Discussion. See 16 ILR 538—Visits by natural parents; 22 ILR 145—Inheritance by adopted children

Atty. Gen. Opinion. See '36 AG Op 191

Scope of section. This section "does not determine the status of the adopted child as to the ancestor or other relative of the adopting parent".

Cook v Underwood, 209-641; 228 NW 629

Right of inheritance.

McCune v Oldham, 213-1221; 240 NW 678

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

Liberal construction against collateral heirs. Articles of adoption, executed under §3251, C., '97, will not, in an action involving the right of the alleged adopted child to inherit from the alleged foster parents in preference to collateral heirs, be held invalid simply because the name of the father of said child is not stated in said articles, tho said section literally requires such statement.

Eggimann-Eckard v Evans, 220-762; 263 NW 328

Collateral heirs over natural parents. The estate of a legally adopted, intestate, spouseless and issueless person whose adopting parents are both dead leaving surviving collateral heirs only, descends to said collateral heirs and not to the surviving natural parents or parent of said adopted person.

In re Fitzgerald, 223-141; 272 NW 117

Descent and distribution—persons entitled. The heirs as a class of each adopting parent, each class receiving one half, rather than the natural parents or their heirs, inherit the estate of an adopted child dying intestate to the exclusion of adopting father's surviving second wife who was decreed no part of the estate and did not appeal—but, quaere, if surviving second wife had claimed a dower interest.

In re Smith, 223-817; 273 NW 891

Adoption by estoppel. Evidence that deceased recognized plaintiff as his own son and so referred to him, that plaintiff gave deceased the obedience, loyalty, and affection of a natural son, and that deceased reciprocated in kind and gave plaintiff his name and took him into his home, created an adoption by estoppel, so that heirs of deceased were estopped from denying the adoption, and plaintiff held entitled to inherit as adopted son.

Bergman v Carson, 226-449; 284 NW 442

Adoption by estoppel. Evidence that at the age of thirteen months the plaintiff was taken by foster parents from her natural parents under an agreement to adopt her, and that she was reared by the foster parents, the foster mother referring to her as a daughter in conversation and in a will, established an adoption by estoppel, estopping other heirs of the foster mother from denying the adoption.

Vermillion v Sikora, 227-786; 289 NW 27

Adoption by estoppel—surrender of child as consideration. An oral contract to adopt a child, not followed by legal adoption, was not within the statute of frauds when part of the consideration, the surrender of the child, was given at the time the agreement was made. So the child was entitled to specific performance of the contract even tho it was contended that the contract was void under the statute of frauds of a foreign state.

Vermillion v Sikora, 227-786; 289 NW 27

10501.7 Annulment.

Atty. Gen. Opinion. See AG Op March 27, '40

TITLE XXIX

JUSTICES OF THE PEACE

CHAPTER 474

JUSTICE OF THE PEACE COURT

10502 Jurisdiction.

Criminal jurisdiction. See under §13557
Atty. Gen. Opinion. See '25-26 AG Op 205

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of coordinate authority.

First Methodist Church v Hull, 225-306; 280 NW 531

Requirements for valid decree. To be valid and binding, the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

Failure to notify party of trial day. The failure of a justice of the peace to notify defendant of the time to which a cause had been continued at defendant's request does not deprive the justice of jurisdiction to render judgment against the defendant.

Hensch v Meyers, 200-850; 205 NW 510

10503 Amount in controversy.

Exceeding amount—replevin a nullity. Under the statute allowing an enlarged jurisdiction for a justice of the peace up to $300 by written agreement, he is without authority to issue a writ of replevin for automobiles whose value exceeds such amount limiting his jurisdiction.

In re Sweet, 224-589; 277 NW 712

10505 Where defendant served.

Resident of adjoining township. A resident of a township in which there is no justice of the peace is suable in justice court in an adjoining township on personal service in the township of his residence.

Coulter Bros. v Riegel, 204-1032; 216 NW 715

10506 Replevin.

Constructive severance doctrine inapplicable to movable chattel. When a tenant purchases an electric lighting plant on agreement with the landlord that he may take it with him upon termination of the tenancy, and when, at the termination of such tenancy, the tenant purchases the reversion, there is no occasion to apply the doctrine of constructive severance, because the plant maintained at all times its character as a movable chattel.

Equitable Life v Chapman, 225-988; 282 NW 355

Farm light plant—not part of realty. In a replevin action for a Delco lighting plant placed on a concrete block in the basement of a farm house, such electric plant is not essential to the main business of operating the farm, but is a mere convenience, and is not a part of the realty when it is easily removable, along with the batteries resting on a shelf, and without damage to the house, the wiring being capable of use with any other electrical installation, and when there is no evidence of an intent that it be permanently fixed.

Equitable Life v Chapman, 225-988; 282 NW 355

Jurisdiction—exceeding amount—replevin a nullity. Under the statute allowing an enlarged jurisdiction for a justice of the peace up to $300 by written agreement, he is without authority to issue a writ of replevin for automobiles whose value exceeds such amount limiting his jurisdiction.

In re Sweet, 224-589; 277 NW 712

10515 In adjoining township.

Resident of adjoining township. A resident of a township in which there is no justice of the peace is suable in justice court in an adjoining township on personal service in the township of his residence.

Coulter Bros. v Riegel, 204-1032; 216 NW 715

10516 Docket furnished.

Atty. Gen. Opinion. See '28 AG Op 96

10517 Entries on docket.

Confession of judgment—mandatory duties. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the

peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

10524 Service and return.

Atty. Gen. Opinion. See '34 AG Op 396

10529 Time for appearance.

Municipal courts. This section is not applicable to municipal courts.

Boody v Sawyer, 201-496; 207 NW 589

10531 Adjournment.

Jurisdiction. The failure of a justice of the peace to notify defendant of the time to which a cause had been continued at defendant's request does not deprive the justice of jurisdiction to render judgment against the defendant.

Hensch v Myers, 200-850; 205 NW 510

10536 Written instruments filed.

Atty. Gen. Opinion. See AG Op July 17, '39

10548 Judgment set aside.

Forcible entry and detainer — dismissal — effect. A justice of the peace who, after an action of forcible entry and detainer has been returned to him on a writ of error, enters an authorized order of dismissal, has no jurisdiction, so long as said order of dismissal remains on the docket, to enter in said assumed proceedings "The decision of Justice Jones reversed. Order of removal cancelled."; moreover, assuming jurisdiction, the form of such entry is quite nugatory.

Rasmussen v Alberts, 215-644; 246 NW 620

10560 Mutual judgments set off.

Effect on lien of attorney. The offsetting of the larger against the smaller of two mutual judgments wholly terminates an unadjudicated attorney's lien duly noticed in the judgment docket of the smaller judgment, when the indebtedness represented by the larger judgment antedates the indebtedness represented by the smaller judgment.

McIntosh v McIntosh, 211-750; 234 NW 234

10568 Costs in case of set-off.

See §11740

10574 Effect.

Atty. Gen. Opinions. See '38 AG Op 272; AG Op July 17, '39

10576 Form.

Form of execution. See §11659

10577 Return.

Sale—right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he was bidding on two separate tracts of land, when only one tract was being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

10582 Appeal.

De novo status. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10583 Amount in controversy.

Amount in controversy as bearing on appeals generally. See under §12833

Claim for attorney fee. In computing the amount involved in an appeal from a court of a justice of the peace, costs cannot be considered whether they be ordinary costs or costs claimed as attorney fees.

Johnson v Boren, 215-453; 245 NW 711

10589 Proceedings suspended.

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff

to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10595 Affirmance—trial.

Docketing appeals. See under §11440

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10597 How served.

Appeal—notice of—proper service. A statute which distinctly provides that a notice, e. g., a notice of appeal, shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over 14 years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under §7133, C., '35.

In re Sioux City Yards, 222-323; 268 NW 18

10598 Trial of appeal.

Allowable amendment. On appeal from the judgment of a justice of the peace, an unassailed amendment by defendant, setting up a counterclaim which was stricken in the justice court, is good.

Davis v Robinson, 200-840; 205 NW 520

De novo status. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10602 Judgment on appeal bond.

Suretyship generally. See under §11577

10605 Writs of error—when allowed.

Futile writ. It is futile for defendant in an action of forcible entry and detainer to sue out a writ of error after he has been found guilty, and after he has surrendered possession of the premises in controversy.

Rasmussen v Alberts, 215-644; 246 NW 620

Writ coram nobis. Holding reaffirmed that the common law writ of error coram nobis is not available in this state.

State v Harper, 220-515; 258 NW 886

10613 Restitution.

Writ of error (?) or appeal (?)—order of restitution. The district court has no jurisdiction, on writ of error, in an action of forcible entry and detainer, to enter an order restoring the defendant to the possession of the premises in question.

Rasmussen v Alberts, 215-644; 246 NW 620

10627 Special constables.

Atty. Gen. Opinion. See '32 AG Op 133

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

10629 Constables—duties.

Atty. Gen. Opinions. See AG Op Jan. 16, '39, March 22, '40

10630 Sheriff and constable.

Atty. Gen. Opinion. See AG Op March 22, '40

10634 Report of unclaimed witness fees.

Atty. Gen. Opinion. See '32 AG Op 11

10636 Fees of justice.

Atty. Gen. Opinions. See '25-26 AG Op 204; '28 AG Op 445; AG Op March 30, '39

10637 Fees of constable.

Atty. Gen. Opinions. See '25-26 AG Op 179; '32 AG Op 149, 247; '38 AG Op 164, 326, 558, 798; AG Op Oct. 12, '39

10638 In criminal cases.

Atty. Gen. Opinions. See '25-26 AG Op 179; '28 AG Op 445; '32 AG Op 149; '38 AG Op 798

Criminal process in state cases. A county is liable to the bailiff of a municipal court for mileage and expenses incurred in the service of warrants and subpoenas in state cases pending in said court.

Brookins v Polk Co., 203-567; 213 NW 258

10639 Accounting for fees—compensation.

Atty. Gen. Opinions. See '28 AG Op 445; '32 AG Op 27; '38 AG Op 171, 798

Compensation—acceptance in part—effect. An officer who accepts part of a statutory compensation does not thereby estop himself from enforcing payment of the balance.

Broyles v County, 213-345; 239 NW 1

Compensation—contradictory provisions. A constable in a township having a population of ten thousand and under twenty thousand is entitled to $800 per annum and no more, all fees belonging to the county, except such as may be legally allowed for office expenses.

Broyles v County, 213-345; 239 NW 1

Non-estoppel to claim compensation. A constable is not estopped to claim a specific compensation as distinguished from fees (the former being due him because of a change in population) because of the fact that during a time when the population was not officially known he continued to act on a fee basis.

Broyles v County, 213-345; 239 NW 1

TITLE XXX

COURTS OF RECORD OF ORIGINAL JURISDICTION

CHAPTER 475

MUNICIPAL COURT

10643 Election.

Percentage of voters required. The phrase "fifteen per cent of the qualified electors as shown by the poll list" as employed in this section, must be deemed to refer to the "poll books" in cities having no statutory system of permanent registration of voters, while in cities having such system of registration (where poll books are not employed) the phrase must be deemed to refer to the "certificates of registration" duly signed by voters just preceding their actual voting.

Gilman v Sioux City, 215-442; 245 NW 868

10648 Qualification and duties of officers.

Atty. Gen. Opinion. See '38 AG Op 789

10655 Jurisdiction—civil matters.

Territorial limitations—effect. The municipal court has concurrent jurisdiction with the district court in the territory within the municipal court district, and not otherwise. (§§694-c1, 694-c18, 694-c23, SS., '15.)

Gumbert v Sheehan, 200-1310; 206 NW 604

Enjoining proceedings—proper court. An action to enjoin proceedings on a judgment rendered in a municipal court cannot be maintained in the district court, even tho both courts are located in the same county.

Keeling v Priebe, 219-155; 257 NW 199

Enjoining proceedings to enforce judgment in another county. A municipal court of one county has no jurisdiction to enjoin proceedings to enforce a judgment entered by a municipal court of another county.

Educational Film v Hansen, 221-1153; 266 NW 487

Establishing and foreclosing lien. An action in equity in municipal court on an account with prayer for the establishment and foreclosure of a lien on certain real estate should be dismissed for want of jurisdiction as far as equitable relief is concerned. The court may, on application of plaintiff, proceed at law on the account.

Avon Lakes v Deaton, 218-303; 255 NW 531

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of co-ordinate authority.

First Methodist Church v Hull, 225-306; 280 NW 531

Jurisdiction defined. Jurisdiction means the power of a court to take cognizance of and to decide a case and carry its judgment and decree into execution.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Dropping action from calendar—reinstatement. The district court has jurisdiction to

reinstate a cause which, under order of court, has been "dropped from the calendar," if such dropping from the calendar was not with the intent to dismiss.

Bankers Trust v Dist. Court, 209-879; 227 NW 536

Lack of jurisdiction—raised at any time. Objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and, when the law withholds from a court, authority to determine a case, jurisdiction cannot be conferred, even by consent of parties.

Johnson v Purcell, 225-1265; 282 NW 741

Special appearance and motion to dismiss. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

10657 Territorial jurisdiction and powers.

Resident of county but not city. Municipal courts have jurisdiction, on proper service, of a resident of the county in which the court exists tho not a resident of the city in which the court is established.

Kinsey v Clark, 215-765; 246 NW 840

Contracts performable in county. A municipal court has jurisdiction on personal service on the defendant within this state, but outside the county of the court's organization, to render judgment for not exceeding $1,000 on a promissory note signed by the defendant and payable within the said county, even tho the defendant is a nonresident of said county.

West v Heyman, 214-1173; 241 NW 451

Procedure in general—correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

10658 Inferior courts abolished.

Atty. Gen. Opinion. See '32 AG Op 30

10664 Laws applicable—rules.

Atty. Gen. Opinions. See '34 AG Op 616; '38 AG Op 739

Change of venue. An action instituted in the municipal court at Council Bluffs must be transferred, on proper motion, to the Avoca district court, on a showing that the plaintiff and defendant are both residents of the latter district. (§§694-c1, 694-c18, 694-c23, SS., '15.)

Gumbert v Sheehan, 200-1310; 206 NW 604

Contracts performable in county. A municipal court has jurisdiction on personal service on the defendant within this state, but outside the county of the court's organization, to render judgment for not exceeding $1,000 on a promissory note signed by the defendant and payable within the said county, even tho the defendant is a nonresident of said county.

West v Heyman, 214-1173; 241 NW 451

Default—affidavit of merit. Defaults in municipal courts may not be set aside in the absence of an affidavit which specifically sets forth the facts relied on as a defense to the action sued on.

Boody v Sawyer, 201-496; 207 NW 589

Defaults—nonapplicable statutes. The statute (§11589, C., '35) requiring applications to set aside defaults in the district court, to be made "at the term" in which default is entered, is not applicable to defaults in municipal courts because said latter courts have no terms.

La Forge v Cooter, 220-1258; 264 NW 268

Judgment by default—setting aside—"practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Mun. Court, 225-501; 281 NW 441

Jurisdiction to dismiss pending an appeal. An appeal from the municipal court to the supreme court from an interlocutory order involving part of an answer (order striking pleaded set-offs from part of the divisions of the answer), without supersedeas bond in, or stay order by, the appellate court, does not deprive the municipal court of jurisdiction to dismiss the action, in accordance with its rules, for want of attention.

Des M. & CI Ry. v Powers, 215-567; 246 NW 274

No right to set aside orders on own motion. A judge of the municipal court has no jurisdiction to set aside, on his own motion, a duly rendered and journalized order of another judge of the same court sustaining a motion to set aside a default; and equally without

jurisdiction, thereupon, to overrule said motion.

Denman v Sawyer, 211-56; 232 NW 819

10665 Change of venue.

Discussion. See 11 ILR 336—Code revision—change of venue in municipal courts

10667 Filing petition—pleadings.

Time for appearance. Parties do not have one hour in which to appear as provided in justice courts.

Boody v Sawyer, 201-496; 207 NW 589

10668 Return day.

Appearance. Party litigants in class B actions do not have one hour in which to appear after the time fixed in the original notice.

Boody v Sawyer, 201-496; 207 NW 589

10669.1 Information by county attorney.

Atty. Gen. Opinion. See AG Op June 9, '39

10670.1 Payment of witness fees.

Atty. Gen. Opinion. See '30 AG Op 235

10671 Fees, costs, and expenses.

Atty. Gen. Opinions. See '30 AG Op 73, 196, 235, 252, '34 AG Op 133; AG Op Oct. 12, '39

Criminal process in state cases. A county is liable to the bailiff of a municipal court for mileage and expenses incurred in the service of warrants and subpoenas in state cases pending in said court.

Brookins v Polk Co., 203-567; 213 NW 258

10678 Jurors—number—demand for jury.

Municipal court jury trial. Where plaintiff requested jury trial and later withdrew such request, municipal court's refusal to allow defendant trial by jury was error.

Metier v Brewer, (NOR); 205 NW 734

Number of jurors. The trial of a nonindictable misdemeanor may legally be had in municipal court before a jury of six persons.

State v Porter, 206-1247; 220 NW 100

Jury of six—constitutionality. The municipal court act is not unconstitutional because, in the absence of a demand for a jury of twelve, it compels a defendant residing outside the city in which the court is established to submit to a trial by a jury of six which are drawn from the city and not from the county at large.

Kinsey v Clark, 215-765; 246 NW 840

Presumption of regularity. In municipal courts, judgments rendered by the court without a jury must, on appeal, be deemed regular in the absence of any showing as to the rules of the court governing demand for a jury.

La Forge v Cooter, 220-1258; 264 NW 268

10681 Entry judgment—jurisdiction—setting aside default.

Atty. Gen. Opinion. See '38 AG Op 739

Absence of affidavit of merit. Judgments by default in municipal courts, after proper service, may not be set aside in the absence of an affidavit of merit, nor may such judgments be set aside on a motion filed more than ten days after the default is entered, nor are such defects remedied by renewing the motion, after the ruling of the court, with an affidavit of merit.

Borden v Voegtlin, 215-882; 245 NW 331

Affidavit of merit. Defaults in municipal courts may not be set aside in the absence of an affidavit which specifically sets forth the facts relied on as a defense to the action sued on.

Boody v Sawyer, 201-496; 207 NW 589

Defaults—nonapplicable statutes. Section 11589, C., '35, requiring applications to set aside defaults in the district court to be made "at the term" in which default is entered, is not applicable to defaults in municipal courts because said latter courts have no terms.

La Forge v Cooter, 220-1258; 264 NW 268

Notice of taking default—attorneys' custom. Defendants may have a default judgment set aside, where two reputable attorneys, one of which resided in the county where the action was brought, were employed, and where such attorneys rely on a practice among the attorneys in that county to inform opposing counsel of intention to take default, and where a default without notice pending appeal would not have been anticipated.

Lunt v Van Gorden, 225-1120; 281 NW 743

"Practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Case reinstated after dismissal. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erron-

eously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

Court acting on own motion contrary to agreement of counsel. Consolidated actions, dismissed by the court on its own motion in the absence of counsel, for want of prosecution, are properly reinstated on a showing of "unavoidable casualty and misfortune" in that there was no negligence on the part of plaintiffs or their counsel and that they were relying on an agreement between counsel that certain motions would not be made nor issues made up until convenient to all counsel.

Thoreson v Central States Co., 225-1406; 283 NW 253

Filing motions after verdict—extending time—jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Munic. Court, 225-501; 281 NW 441

Improper to review setting aside of default—appeal proper. Appeal, not certiorari, is the proper method to proceed to attack an alleged erroneous order of the municipal court in sustaining a motion to set aside a default judgment, where the court had jurisdiction to enter the order.

Weston v Allen, 225-835; 282 NW 278

Judgment by default—timely motion to reconsider. In municipal court a motion to reconsider the overruling of a motion to set aside a default judgment, tho filed more than 10 days but within 90 days after entry of the order refusing to set aside the default, when such motion to reconsider was based on irregularity in obtaining the judgment, was a timely motion and the court had jurisdiction to sustain it.

Weston v Allen, 225-835; 282 NW 278

Non-jurisdiction to set aside dismissal. A municipal court having entered a valid order of dismissal of an action has no jurisdiction, seven months later, to set aside said order and reinstate said action without notice to the defendant.

Des M. & CI Ry. v Powers, 215-567; 246 NW 274

No right to set aside orders on judge's own motion. A judge of the municipal court has no jurisdiction to set aside, on his own motion, a duly rendered and journalized order of another judge of the same court sustaining a motion to set aside a default; and equally without jurisdiction, thereupon, to overrule said motion.

Denman v Sawyer, 211-56; 232 NW 819

Opening or vacating—discretion of court. The action of the municipal court, on timely motion, in vacating a judgment for irregularity in obtaining the judgment will not be disturbed on appeal in the absence of a clear showing of abuse on the part of the court.

Mitchell v Brennan, 213-1375; 241 NW 408

Revoking order for costs. An order relative to the costs of a continuance may be set aside by the municipal court when motion for new trial is heard.

Main v Brown, 202-924; 211 NW 232

Setting aside — different allowable procedures. When final judgment is erroneously rendered in municipal court against a defendant (1) because of the mistaken assumption by the court that defendant was in default for want of an answer, and (2) because of the fraud of plaintiff, said defendant may (at least when he acts diligently under the circumstances) proceed by petition under §12787 et seq., C., '35, for the setting aside of said judgment, instead of proceeding by motion under this section for the same relief. It necessarily follows that if defendant so proceeds, he is not bound by the 90-day limitation imposed by said last named section.

La Forge v Cooter, 220-1258; 264 NW 268

Setting aside—fatal delay. A delay of over five months in instituting proceedings to set aside a default judgment in municipal court, bars relief.

Harding v Quinlan, 209-1190; 229 NW 672

Setting aside judgment. Judgments in municipal courts may not be set aside after the lapse of ten days from the entry simply on the ground that the petition shows on its face that the claim sued on was barred by the statute of limitation.

Merkel v Hallagan, 207-153; 222 NW 393

Timely motion to set aside default. Where judgment is entered in a municipal court on April 9th, a motion filed on April 19th following, to set aside the default, is timely.

Service System v Johns, 206-1164; 221 NW 777

Vacating—nonpermissible issue. In an action to cancel a judgment by default on a promissory note, the defendant will not be permitted to present the issue that he was not personally liable on said note.

West v Heyman, 214-1173; 241 NW 451

Void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

10682 Judgment liens.

Establishing and foreclosing lien. An action in equity in municipal court on an account with prayer for the establishment and foreclosure of a lien on certain real estate should be dismissed for want of jurisdiction as far as equitable relief is concerned. The court may, on application of plaintiff, proceed at law on the account.

Avon Lakes v Deaton, 218-303; 255 NW 531

10685 Shorthand reporter.

Atty. Gen. Opinion. See '30 AG Op 235

10688 Salary.

Atty. Gen. Opinion. See AG Op Oct. 12, '39

CHAPTER 476

SUPERIOR COURT

10697 Establishment and effect of.

Discussion. See 12 ILR 138—Classification of cities

10702 Vacancy.

Atty. Gen. Opinion. See AG Op July 26, '39

10704 Concurrent jurisdiction.

Atty. Gen. Opinion. See '38 AG Op 464

Dropping action from calendar—reinstatement. The district court has jurisdiction to reinstate a cause which, under order of court, has been "dropped from the calendar," if such dropping from the calendar was not with the intent to dismiss.

Bankers Trust v Dist. Court, 209-879; 227 NW 536

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of coordinate authority.

First Methodist Church v Hull, 225-306; 280 NW 531

Procedure in general—correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Special appearance and motion to dismiss—attacking only part of jurisdiction improper. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Lack of jurisdiction—not conferred by consent. Objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and, when the law withholds from a court, authority to determine a case, jurisdiction cannot be conferred, even by consent of parties.

Johnson v Purcell, 225-1265; 282 NW 741

10716 Court of record—laws applicable.

Atty. Gen. Opinion. See '38 AG Op 739

Default—setting aside. The superior court has ample jurisdiction, during a term at which a motion to set aside a default is overruled, to reconsider its judgment and to enter an order sustaining said motion.

Braverman v Burns, 207-1382; 224 NW 596

Requirements for valid decree. To be valid and binding, the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

10719 Marshal as sheriff.

Atty. Gen. Opinions. See '28 AG Op 287; '32 AG Op 131

10721 Accounting by clerk.

Atty. Gen. Opinion. See '32 AG Op 149

10722 Violations of ordinances.

Atty. Gen. Opinion. See AG Op Feb. 21, '39

10723 Criminal actions.

Atty. Gen. Opinion. See '32 AG Op 149

10745 Judgments made liens.

Enforcement—void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

10748 Salary of judge.

Atty. Gen. Opinion. See AG Op Feb. 21, '39

10750 Compensation of marshal.

Atty. Gen. Opinions. See '28 AG Op 287; '32 AG Op 131, 149

CHAPTER 477

DISTRICT COURT

10761 General jurisdiction.

Discussion. See 20 ILR 83—Jurisdiction—federal receiverships

Atty. Gen. Opinion. See '38 AG Op 464

ANALYSIS

I NATURE AND EXTENT OF JURISDICTION IN GENERAL
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Certiorari to test jurisdiction. See under §12456 (III)
Constitutional provision. See also under Art V, §§1, 6
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I NATURE AND EXTENT OF JURISDICTION IN GENERAL

Discussion. See 15 ILR 309, 434—Restatement of conflicts; 19 ILR 385—Nonjudicial functions; 19 ILR 406, 540—U. S. Courts—consent receiverships

Jurisdiction defined. Jurisdiction means the power of a court to take cognizance of and to decide a case and carry its judgment and decree into execution.

Western Grocer v Glenn, 226-1374; 286 NW 441

Jurisdictional questions always presentable.

Latta v Utterback, 202-1116; 211 NW 503

Requirements for valid decree. To be valid and binding, the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

Rules—general order—dismissal for want of prosecution. Under the recognized rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings in order to expedite the trial of cases, to keep their dockets clear, and to facilitate the administration of justice, the judges of a judicial district could adopt and enforce a general order requiring parties to cause each case to be finally determined within two years from date of filing petition and providing upon failure to comply with such order the clerk should enter upon the record, "Dismissed without prejudice for want of prosecution".

Hammon v Gilson, 227-1366; 291 NW 448

Dropping action from calendar—reinstatement. The district court has jurisdiction to reinstate a cause which, under order of court, has been "dropped from the calendar", if such dropping from the calendar was not with the intent to dismiss.

Bankers Trust v Dist. Court, 209-879; 227 NW 536

Procedure in general—correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Concurrent jurisdiction—possession of res. The court appointing a receiver and having possession of the res has exclusive jurisdiction to hear and determine all controversies affecting title, possession and control of the property, which jurisdiction must be respected by all other courts, except that another court may entertain another cause concerning the same subject matter if it does not oust the appointing court from possession of the res, or appropriate disposal of the cause there entertained.

Bates v Evans, 226-438; 284 NW 385

Unauthorized release of bond. The liability of a surety on an appeal (supersedeas) bond, attaches the moment when the bond is accepted. It follows that an order of court assuming to set aside and to cancel the bond and to authorize the filing of a new and different bond, without notice to the appellee-obligee, is a nullity as to the first filed bond.

State v Packing Co., 219-419; 258 NW 456

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Deposition of adversary. The court has no legal right, even in an equitable action, to enter an order authorizing plaintiff to take, on his own behalf and by deposition, the testimony of the defendants bearing on the issues joined between plaintiff and all of said defendants.

Bagley v Dist. Court, 218-34; 254 NW 26

I NATURE AND EXTENT OF JURISDICTION IN GENERAL—continued

Disbarment—jurisdictional order. The order of court, finding that formal charges against an attorney are sufficient to justify disbarment proceedings, and ordering copy thereof served on him and for his appearance is jurisdictional, but not the preliminary order for the investigation into the conduct of the attorney.

In re Cloud, 217-3; 250 NW 160

District court—enjoining unlicensed person practicing law. In an equity suit brought by members of bar for injunction to restrain an unlicensed person from professing to be an attorney and from practicing law, where irreparable damage was the gist of the action, this subject matter was within the jurisdiction of the district court.

Johnson v Purcell, 225-1265; 282 NW 741

Enjoining proceedings—proper court. An action to enjoin proceedings on a judgment rendered in a municipal court cannot be maintained in the district court, even tho both courts are located in the same county.

Keeling v Priebe, 219-155; 257 NW 199

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of coordinate authority.

First M. E. Church v Hull, 225-306; 280 NW 531

Personal jurisdiction assumed when unchallenged. Where the jurisdiction of the person is not challenged in an action to set aside a default judgment, it must be assumed that the court had such jurisdiction, and, if it also had jurisdiction of the subject matter, it was warranted in entering judgment.

Jensen v Martinsen, 228- ; 291 NW 422

Foreign corporation — interference with internal affairs. Where a foreign corporation receives, as a consideration for the legal sale of its entire assets, a certain amount in money and the balance in the bonds, and in the preferred and participating stock of the purchaser, the courts of this state will not, in an action against the corporation, adjudicate the question whether a dissenting stockholder should be paid in cash the value of his stock, as such adjudication would be an unallowable interference with the internal affairs of said foreign corporation.

Graeser v Finance Co., 218-1112; 254 NW 859

Foreign law—refusal to enforce. The law of a foreign state, which holds parties who are interested as shareholders in an unincorporated association, personally and individually liable as partners for the debts of such association even tho said parties, to the knowledge of the creditor, specifically contracted against such liability, will not be enforced by the courts of this state.

Reason: Said foreign law is directly contrary to the law of this state.

Farmers & M. Bk. v Anderson, 216-988; 250 NW 214

Action involving land along Missouri river. In an action to enjoin trespass and recover damages, wherein cross-action to quiet title was brought, and where all parties appeared, and where at the time of the action and for many years prior thereto, the land in controversy was situated on the Iowa side of the Missouri river and within Pottawattamie county, altho formerly as result of changes in course of river, such land lay, for a certain period of time, on the Nebraska side, the district court for said county had jurisdiction.

Arnd v Harrington, 227-43; 287 NW 292

Federal appointment of receiver—effect on state courts. The mere pendency of federal receivership proceedings over a party does not necessarily oust the jurisdiction of the state courts over the party and over his property.

Lippke v Milling Co., 215-134; 244 NW 845

Lands in foreign state. The district court, when it has jurisdiction of all parties to a controversy, has jurisdiction to determine their contract relations to lands situated in a foreign state: e. g., whether an absolute deed to such lands was an absolute conveyance or a mortgage.

Tansil v McCumber, 201-20; 206 NW 680

Lex rei sitae. The title to real estate in this state under a will must be determined by the courts of this state, and under the law of this state.

Scofield v Hadden, 206-598; 220 NW 1

Life policy payable in Iowa pledged in another state—Iowa jurisdiction. Tho a life policy payable to the estate of a deceased Iowa resident is deposited in a foreign state, as security for a debt, the proceeds are not beyond the jurisdiction of the Iowa probate court, inasmuch as the right to such proceeds depends, not upon their location, but upon the terms of the policy, supplemented by any contract relating thereto.

In re Hazeldine, 225-369; 280 NW 568

Probate—nonwaiver of federal jurisdiction. Agreed postponements of a probate hearing in the state court will not prevent the Reconstruction Finance Corporation, a party authorized by act of congress to sue in the federal courts, from thereafter commencing action thereon in the federal courts.

RFC v Dingwell, 224-1172; 278 NW 281

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

Indictments—district court (?) or juvenile court (?). The juvenile court act has not deprived the district court of jurisdiction over indictments against persons under eighteen years of age. (Ch 179, C., '27.)

State v Reed, 207-557; 218 NW 609

Judgment of dismissal—nonjurisdiction to set aside. The district court, having at one term entered a judgment of dismissal of an action for want of prosecution of the action as required by the rules of the court, has no jurisdiction at a subsequent term, tho the judgment entry remains unsigned, to set aside said judgment under §10801, C., '35, and reinstate the action. The governing procedure, under such circumstances, is provided by §12787 et seq., C., '35.

Workman v Dist. Court, 222-364; 269 NW 27

Rules in re failure to prosecute action. Rules of the district court for the dismissal of actions for want of reasonable prosecution thereof are proper.

Workman v Dist. Court, 222-364; 269 NW 27

Dismissal of cases for want of prosecution —validity of general order. The fact that an order of the judges of a judicial district, requiring the parties to cause each case to be finally determined within two years from date of filing petition, was a general order applicable to all cases or proceedings pending or to come before the courts of the district did not invalidate such order.

Hammon v Gilson, 227-1366; 291 NW 448

Clerk's entry of dismissal under general order—nonreviewable when court approves entry. Where a general order of the judges of a judicial district provided for the dismissal of all actions and proceedings undetermined after a period of two years, and directed the clerk of court to enter the dismissal without prejudice, and where such order was so entered in the district court record by the clerk, the supreme court is not required to pass upon the question of whether such entry by the clerk would be an effective dismissal, when at the same term of court the presiding judge made an entry in the same record "approving, affirming and ratifying" this and all other orders of dismissal under the general order.

Hammon v Gilson, 227-1366; 291 NW 448

Clerk's dismissal for want of prosecution—reinstatement—statutory proceedings necessary. The power of the court to modify or set aside a judgment, when once entered, is purely statutory, and where clerk of court, under a general order of judges of judicial district, on April 20, 1935, entered an order dismissing action without prejudice for want of prosecution, and trial court's order of approval was entered on August 28, 1935, the trial court could set aside judgment of dismissal by statutory proceedings only, and by bringing defendants into court by same proceedings, respecting notice and service, as an ordinary action, hence, an order of reinstatement made September 8, 1938, was unauthorized where application for reinstatement was made on November 27, 1936, and a five-day notice of hearing on application was given defendants by mail and defendants appeared specially in response to notice.

Hammon v Gilson, 227-1366; 291 NW 448

Master and servant — original action for damages—jurisdiction. The district court has no jurisdiction to try and determine an original action against an employer for damages consequent upon the alleged negligence of the employer, resulting in the death of an employee, when both the employer and the employee are under the terms and conditions of the workmen's compensation act.

Hlas v Oats Co., 211-348; 233 NW 514

Social welfare board—administrative duties —nonjudicial review. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

I NATURE AND EXTENT OF JURISDICTION IN GENERAL—concluded

Money given to obstruct justice—recovery denied. The courts will not aid one to recover money that has been given to another to be used in obstructing or interfering with the orderly course of justice, nor will they protect one who obtains the money of another for a particular lawful purpose when he fails to so use it and refuses to return it.

Sarico v Romano, (NOR); 205 NW 862

Motions—sua sponte simplification by court. The district court has inherent power, sua sponte, to simplify pleadings.

Collins v Cooper, 215-99; 244 NW 858

Retention of jurisdiction—effect. In judicial proceedings to accomplish a certain purpose, e. g., the proper and legal protection of both life tenants and remaindermen in the matter of preserving the estate for all the parties, the record retention by the court of jurisdiction over the proceedings and parties thereto, will enable the court subsequently to make valid and supplementary orders in furtherance of the said purpose.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Removal of administrator. Jurisdiction to remove an administrator is furnished by an application by the surety on the bond wherein he prays for an order (1) removing the administrator or (2) requiring the filing of a report and the making of distribution, when notice of the application is duly served on all interested parties and when no part of the prayer has been withdrawn of record. The filing of a report under a mutual arrangement between the parties does not exhaust the jurisdiction of the court.

In re Donlon, 201-1021; 206 NW 674

Stipulation—effect. A stipulation in an equity cause that testimony may be taken before any judge of the district does not deprive the court of the county wherein the action is brought of jurisdiction.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Vacating final report of receiver of closed bank—jurisdiction of court. After the approval of the final report of the receiver of a closed bank which discharged both the receiver and the examiner in charge, an application by the receiver for vacation of the order consented to the jurisdiction of the court only as to the receiver, but the court had jurisdiction to deal summarily with the examiner by prescribing the form of notice to be served on him and to set the time for his appearance so long as the statutory provisions for vacating and modifying judgments were complied with and the application filed within one year from the date of rendition of the order attacked.

Bates v Loan & Tr., 227-1347; 291 NW 184

Refunding erroneous tax — administrative remedies must be exhausted before resorting to court. Under the statute providing for refunding erroneous tax, stockholders of a national bank are not entitled to money judgment in alternative of statute. All adequate administrative remedies must be exhausted to recover tax illegally collected before resorting to the courts.

First Nat. Bk. v Harrison County, 57 F 2d, 56

Hammerstrom v Toy Nat. Bk., 81 F 2d, 628

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v First Nat. Bk., 42 F 2d, 30

Crawford Co. Bk. v Crawford Co., 66 F 2d, 971

II LAW AND EQUITY

Avoidance of multiplicity of law actions. A strict action at law may not be brought and maintained in equity on the mere allegation that thereby a multiplicity of actions will be avoided. So held where plaintiff sought, in equity, to recover not only presently accrued but future possibly accruing weekly total disability benefits under a policy of accident insurance.

Gephardt v Ins. Co., 213-354; 239 NW 235

Fraud as defense in law action—nonright to transfer. A defendant in an action at law on a policy of insurance is not entitled to a transfer of the action to the equity calendar simply because he pleads fraudulent representation as a defense and prays a cancellation of the policy.

Beeman v Life Co., 215-1163; 247 NW 673

Proper law action nontransferable in toto. An action brought on a contract (e. g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract. Said alleged fraud, if established in the law action, constitutes a complete defense, and remaining equitable issues are properly transferred to and disposed of in equity. Failure, in the law action, to establish said alleged fraud, necessarily removes from the case said equitable issue of rescission.

Poole v Poole, 221-1073; 265 NW 653

Sales—remedies of purchaser—optional remedies. A vendee who has been fraudulently induced to purchase property may exercise one of three remedies, to wit:

1. He may, within a reasonable time, offer to place the vendor in statu quo, and, when the vendor refuses, keep his tender good, and ask a court of equity to cancel and rescind the contract and give him a judgment for the price paid.
2. He may himself, within a reasonable time, do the canceling and rescinding of the contract, by offering to place the vendor in statu quo; and, when the vendor refuses, keep his tender good, and sue at law for the purchase price.
3. He may affirm the contract and sue at law for the damages suffered by him.

Lambertson v Natl. Inv. & Fin., 200-527; 202 NW 119

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Transfer as sole remedy. A court which has jurisdiction of an action when brought in the right forum has jurisdiction when brought in the wrong forum. The remedy for an incorrect forum is to transfer to the correct docket.

In re Nish, 220-45; 261 NW 521; 100 ALR 1516

III COURT AND JUDGE

Discussion. See 13 ILR 456—Control of master's fees; 15 ILR 141—Powers of court and judge

Distinction between "court" and "judge". Statutes, providing for the prosecution of injunction violators, which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v District Court, 226-717; 285 NW 236

Procedure in general—correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Nonjurisdiction to dismiss action. When a cause is assigned to, and tried by, a judge of the district court, all other judges of the same court are thereby deprived of jurisdiction to dismiss the cause while it is pending before said trial judge.

Dunkelbarger v Myers, 211-512; 233 NW 744

Rules in re failure to prosecute action. Rules of the district court for the dismissal of actions, for want of reasonable prosecution thereof, are proper.

Workman v Dist. Court, 222-364; 269 NW 27

Ruling on motion as adjudication—unallowable review. An order overruling plaintiff's motion (1) to strike an answer, and (2) for judgment nil dicit (assuming the propriety of such procedure) constitutes an adjudication that plaintiff has no legal right to a judgment on the pleadings as they then stand; and plaintiff has no right later to present, to another judge of the same court, a motion for judgment on the same pleadings, and said latter judge has no right to review the rulings of the former judge by sustaining said latter motion.

Taylor v Canning Corp., 218-1281; 257 NW 353

IV ATTACKING JURISDICTION—COLLATERAL AND DIRECT

Reports — disapproval — jurisdiction. A trustee who, in his acceptance of a nontestamentary trust, agrees to report annually to the district court and does so report, and who invokes the jurisdiction of the probate court to pass upon his reports, may not thereafter question the power and right of such court to act upon such reports.

In re Bartholomew, 207-109; 222 NW 356

IV ATTACKING JURISDICTION—COLLATERAL AND DIRECT—concluded

Special appearance and motion to dismiss. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Western Ins., 225-1018; 282 NW 771

Irregular petition for appointment of guardian—collateral attack. Irregularities in the form of a petition for the appointment of a guardian, while perhaps subject to direct attack, were not sufficient to justify a collateral attack in an action to set aside a default judgment obtained by the guardian.

Jensen v Martinsen, 228- ; 291 NW 422

V CONFERRING JURISDICTION

Lack of jurisdiction not conferred by consent. Objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and, when the law withholds from a court authority to determine a case, jurisdiction cannot be conferred, even by consent of parties.

Johnson v Purcell, 225-1265; 282 NW 741
Eby v Phipps, 225-1328; 283 NW 423

VI EXCEEDING JURISDICTION

Judicial legislation. A court enters the wholly unallowable field of judicial legislation when it assumes to enter ex parte orders directing the payment of mileage to grand jurors in an amount different than the amount provided by statute.

Park v Polk County, 220-120; 261 NW 508

Retaining jurisdiction. In action on life insurance policy for payment of annual total disability benefits, where court ordered payment up to time of trial, court's action in retaining jurisdiction for adjudication of rights and liabilities of parties accruing in the future held erroneous.

Kurth v Ins. Co., 227-242; 288 NW 90

Mandatory procedendo for dismissal. On the reversal and remand in toto, on the merits, of a judgment for plaintiff in an equitable action, a procedendo directing the trial court, generally, to take "further proceedings not inconsistent with the opinion of the supreme court," must be deemed, in the absence of additional pleadings or evidence in the trial court, a mandatory direction to the trial court to dismiss the action. In the absence of such pleadings or evidence, the trial court has no jurisdiction to enter a judgment on a basis not presented by the pleadings or authorized by the opinion.

Ronna v Bank, 215-806; 246 NW 798

VII REMOVAL OF CAUSES

State and federal courts—comity. The necessity for comity between state and federal courts demands that controversies shall not arise concerning their respective jurisdictional powers on account of unsubstantial considerations, and certiorari from the supreme court of Iowa will lie to require a district court of the state to relinquish jurisdiction over a probate matter after the federal court, through diversity of citizenship, has assumed jurisdiction.

RFC v Dingwell, 224-1172; 278 NW 281

Removal of causes by nonresident. When a petition for removal to the federal court was filed, the state court did not lose jurisdiction of the action when both the trial court and federal court decided that the petition was insufficient to confer jurisdiction on the federal court, and all the petitioners but one were residents of the state with no right to removal, and the one nonresident failed to make a claim of a separable controversy.

Carey v Dist. Court, 226-717; 285 NW 236

Joinder of "separable controversy"—removal to federal court by nonresident. The liability of several insurance companies which were members of an association which insured plaintiff's property against loss by fire presented a "separable controversy", and when plaintiff under the statute joined the several defendants in a single action, it did not create a joint liability so as to preclude a nonresident defendant from removing cause from state to federal court.

D. M. Elev. Co., v Underwriters' Gr. Assn., 63 F 2d, 103

United States courts—transfer of jurisdiction. A petition for removal to federal court must be filed before noon of second day of term for which the action is brought, and if good and sufficient, and so filed with proper notice and bond, the state court loses jurisdiction to the federal court.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

Filing of petition—general (?) or special (?) appearance. Rule of federal courts recognized that filing of petition for removal of cause to federal court constitutes special and not general appearance. Under Iowa statute,

the filing of such petition with notation thereof on record would constitute a special appearance even tho not expressly announced as such, since court will look to substance rather than form in determining whether an appearance is general or special.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

10762 Appeals and writs of error.

Stay under inherent power of court.

Francis v Todd, 219-672; 259 NW 249

Writ of error (?) or appeal (?)—order of restitution. The district court has no jurisdiction, on writ of error, in an action of forcible entry and detainer to enter an order restoring the defendant to the possession of the premises in question.

Rasmussen v Alberts, 215-644; 246 NW 620

De novo status. An appeal from justice court, perfected and docketed, is in the district court as though it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10763 Wills—administration—guardianship.

ANALYSIS

I ESTATES OF DECEASED PERSONS
II GUARDIANSHIP

I ESTATES OF DECEASED PERSONS

Nature of probate proceedings. Probate proceedings by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same, is in the nature of a proceeding in rem, and is one as to which all the world is charged with notice.

In re Harsh, 207-84; 218 NW 537

Jurisdiction—domicile of deceased — evidence. Evidence reviewed and held to warrant finding that deceased was resident of Boone county at time of death, giving the district court of that county exclusive jurisdiction to appoint an administrator for his estate.

Crawford County v Kock, 227-1235; 290 NW 682

Jurisdiction—appointment of administrator —recital of residence in petition. The district court of the county in which deceased resided at time of his death has exclusive jurisdiction to appoint an administrator and petition for appointment need not recite the place of residence of the deceased.

Crawford County v Kock, 227-1235; 290 NW 682

Approval of unauthorized act. The contention that the court by approving a report of an administrator thereby approved a former unauthorized act of the administrator, cannot be sustained when the alleged approval was subsequent to the joinder of issues in the action in question, when such approval was in no manner pleaded, and when there was no showing that the court had jurisdiction to enter the approval.

Blain v Blain, 215-69; 244 NW 827

Jurisdiction—exclusiveness. Where a clear and unambiguous will is admitted to probate and administration is being had thereon in probate court, the jurisdiction of such court to determine any rights thereunder, and to administer and direct the disposition of the property involved, cannot be interfered with by a court of equity.

Anderson v Meier, 227-38; 287 NW 250

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Jurisdiction. The district court of the county in which an unsatisfied judgment was rendered has jurisdiction to appoint administration upon the estate of the nonresident judgment plaintiff.

Edwards v Popham, 206-149; 220 NW 16

Jurisdiction when will exists. The appointment of an administrator cannot be said to be without jurisdiction even tho a will existed.

Murphy v Hahn, 208-698; 223 NW 756

I ESTATES OF DECEASED PERSONS—concluded

Lost will — probate jurisdiction exclusive. An action to establish a lost will must be brought in the probate court.

Coulter v Petersen, 218-512; 255 NW 684

II GUARDIANSHIP

Presumption. Orders in probate appointing guardians are presumptively regular.

Marsh v Hanna, 219-682; 259 NW 225

Testamentary guardian of person. Principle recognized that a testamentary guardianship of the person is unknown to our law.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Appointment—foreign courts—jurisdiction. Record reviewed, and held to show jurisdiction in the courts of a foreign state validly to appoint a guardian of the property and person of an adult former resident of this state who has had a mental defect (tho not an imbecile or idiot) from birth, and who has lived in said foreign state continuously for some 25 years with a protecting chaperon.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Approval of unauthorized act. A court order which impliedly approves a former unauthorized hypothecation by a guardian of the ward's property as security for a loan does not deprive the probate court of jurisdiction over the hypothecated property.

Fansher v Bank, 204-449; 215 NW 498

Compromise settlement—approval — conclusiveness. An order in guardianship proceedings approving a settlement of a claim on behalf of the ward is conclusive until set aside by some direct and appropriate proceedings in the probate court.

Bennett v Ryan, 206-1263; 222 NW 16

Settlement of claim—irregularities — effect. The validity of a settlement of a claim on behalf of a ward is not affected by the fact that the settlement was signed shortly before the guardian was actually appointed, or that there was some delay in filing the order of court approving the settlement.

Bennett v Ryan, 206-1263; 222 NW 16

Testamentary provision in re guardianship. A testamentary request that "the court" appoint a guardian of the property devised to minors does not give the presiding judge a personal power to appoint, but contemplates an appointment by the court acting as a judicial tribunal.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Ward's control over appointment. In proceedings for the appointment of a guardian or trustee of the property of a minor who is over 14 years of age and under no legal disability, the court abuses its discretion when it refuses to appoint the concededly competent and qualified person formally requested by the ward for such appointment. So held where the court ignored the request solely because the person whose appointment was requested resided just outside the judge's judicial district and some short distance from the location of the trust property.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

10764 Executors and trustees.

Testamentary trusts. See under §11876

Findings of fact in probate. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams' Est., 219-374; 258 NW 682

Nonpower to approve termination of testamentary trust.

Windsor v Barnett, 201-1226; 207 NW 362

Creation of trust—mistaken view of law. Securities deposited by an insurance company with the commissioner of insurance for the specific purpose of protecting the policyholders constitute a trust fund for said specified purpose, both in the hands of the commissioner and, in case of insolvency, in the hands of the receiver of the company, even tho said deposit was made on demand of the commissioner, acquiesced in by the company, in the mutually mistaken, but good-faith, belief that the statute required such deposit before a license to transact business could legally issue to the company.

State v Cas. Co., 206-988; 221 NW 585

Escrow delivery—recall power nullifies delivery. No valid delivery of a deed is made by depositing it in a safety deposit box over which grantor thereafter maintains full dominion, with power to recall the deed. (Davis v College, 208-480; Robertson v Renshaw, 220-572; and Boone College v Forrest, 223-1260, overruled.)

Orris v Whipple, 224-1157; 280 NW 617

Unlawful delivery of deed. An administrator who has in his possession a deed of conveyance purporting to have been executed by the deceased has no authority to deliver said deed to the grantee in said deed without an authorizing order of court.

Blain v Blain, 215-69; 244 NW 827

Improper allowance of attorney fees. A trust created by a legislative appropriation act, solely for the "education, care, and keep" of a designated person, may not be depleted

by the allowance by the court of attorney fees for services rendered, not in the administration of the trust, but in inducing the legislature to make the appropriation.

In re Gage, 208-603; 226 NW 64

"Net income"—what constitutes. "Net income" does not mean the general income of the estate without provision for the payment of just charges, taxes, and reasonable repair and upkeep. On the contrary, it means the income remaining, if any, after such charges and expenses are taken care of. (So held as to a testamentary trust which provided for the keeping of the trust estate intact and for the annual distribution of the net income.)

In re Whitman, 221-1114; 266 NW 28

Distribution of trust income — when conclusive. When the sole beneficiaries of the annual net income of a trust estate have been and are, themselves, trustees of the trust estate, the court will not disturb the annual distributions which the trustee-beneficiaries, on an erroneous but good-faith interpretation of the trust instrument, have made among themselves during a long series of years. But the court will give proper directions as to future distributions.

In re Whitman, 221-1114; 266 NW 28

Note found in decedent's safe—no delivery. In spite of a mother's declarations as to the existence of a note and her instructions to her daughter to get it after the mother's death, a promissory note executed by a mother, with her daughter as payee, in repayment of money allegedly borrowed from the daughter, and found by said daughter in the mother's safe after her death, is not a valid claim against the estate of the mother—there having been no sufficient delivery thereof to payee. Quaere, as to validity of claim if based on the debt independent of the note.

In re Martens, 226-162; 283 NW 885

Property held by administrator. Where trust property in the possession of an administrator is identifiable and not affected by rights of innocent third parties, equity may impress a trust therein.

Carpenter v Lothringer, 224-439; 275 NW 98

Receiver of insolvent executor bank—duty. Where the Scott county district court appoints a receiver to take charge of an insolvent trust company, which company had been previously appointed by the Johnson county district court as co-executor in an estate pending in the Johnson county district court, such receiver did not become an officer accountable to the Johnson county district court but was an officer of the Scott county district court having possession of the property and his duty was only to deliver such property under direction of the Scott county district court to the person entitled thereto.

Bates v Evans, 226-438; 284 NW 385

Rent-free occupancy by beneficiary. A testamentary trust manifestly cannot be construed to authorize one of the beneficiaries to occupy a portion of the trust estate free of rent when the trust instrument contains no such authorization, but clearly provides that the net income of the entire trust estate shall be divided in a stated manner among named beneficiaries.

In re Whitman, 221-1114; 266 NW 28

Rescission of contract—tender of performance to trustee. The guardian of an incompetent has no authority, even with the approval of the court, to contract for the sale of lands held by the ward as trustee only, yet the purchaser under such a contract may not base a rescission of the contract on such a lack of authority only, and recover payments already made, if, on the death of the trustee-ward, and before full performance of the contract is due, the guardian is also appointed successor trustee, thereby enabling said purchaser to tender performance to the trustee.

Copple v Morrison, 221-183; 264 NW 113

Trustee — disqualification — effect. Equity will not permit a trust to fail simply because a particular trustee is disqualified from acting.

State v Cas. Co., 206-988; 221 NW 585

Trustee for beneficiaries. The administrator is a trustee for the benefit of persons interested in the estate.

Goodman v Bauer, 225-1086; 281 NW 448

Compensation and attorney fees. The compensation of a trustee and of his attorney necessarily rests quite largely in the discretion of the trial court.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Trustee by contract. A trustee who is such by contract between himself and the beneficiaries but who applies to the district court for formal appointment, who is so appointed, who qualifies as such trustee under order of court, and who, in compliance with a prayer therefor, is authorized to take possession of, and manage the property in question under "orders of court", is subject to the jurisdiction of the court in the matter of reports, the rejection thereof, and final accounting.

In re Skinner, 215-1021; 247 NW 484

Credit for overpayment of income. On final accounting, a trustee will be credited with an overpayment to the beneficiary of income even tho such payment was made in advance of the actual receipt of the income.

In re Siberts, 216-336; 249 NW 196

Liability on trustee's bonds — receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Powers of trustee. Principle reaffirmed that the power of a trustee to dispose of trust property is limited to the powers granted in the trust agreement.

In re Barnett, 217-187; 251 NW 59

Trustee borrowing from himself. A trustee, duly appointed by the court to execute a contract trusteeship, who loans the trust funds to himself, and uses the same in the purchase and improvement of various properties, without any authorizing order of court and without the knowledge or consent of the beneficiaries of the trust, will, on final report, be ordered to account in cash for said funds, and not in the physical properties bought by him, especially when said properties are inferior to the standard of investments required by said contract.

In re Skinner, 215-1021; 247 NW 484

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

Death of trustee—revesting of title. Upon the death of a trustee, the title to the trust property vests in the beneficiary of the trust.

Copple v Morrison, 221-183; 264 NW 113

Investments — negligence — evidence. Evidence held to support a finding that a trustee had failed to exercise a fair and sound discretion in investing trust funds.

In re Bartholomew, 207-109; 222 NW 356

Investments without authorizing order — subsequent confirmation. Assuming, arguendo, that an authorizing order of court is absolutely necessary in order to render legal an investment of trust funds, yet a trustee, who, without such order, has made an investment in good faith, and without loss to the estate, may, subsequently, on a full showing of the controlling facts, and at a time when the estate has suffered no loss, be granted a valid order confirming said investment. (See §12772, C., '31.)

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Unauthorized and unallowable investments. The court may charge a court-appointed trustee with the amount of an investment purchased by the trustee from himself at a profit and without an authorizing order of court.

In re Siberts, 216-336; 249 NW 196

Unauthorized investment—advice of counsel —effect. An illegal and unauthorized investment by a trustee will not, on an accounting, be treated as legal and authorized on a showing that the investment was made on the advice of an attorney.

In re Skinner, 215-1021; 247 NW 484

Wrongful purchase of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated, and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

Probate application by trustee—transfer to equity. Where an application in probate brought by a trustee under a will asking for directions of the court was transferred to equity on a motion by intervenors after a hearing at which all parties appeared and submitted arguments but did not except to the transfer, it was proper for the court to refuse a motion made eight months later asking that the transfer be canceled, when it was not shown that the rights of the parties could be better determined in probate than in equity, the question being a matter of forum rather than of jurisdiction.

In re Proestler, 227-895; 289 NW 436

Trust—precatory words as basis. Expression in a will, following an absolute devise of property, of an apparent wish that said devisee will, on his death, distribute said property among named persons, cannot be deemed to create a trust on behalf of said persons unless it is clear from the will as a whole that said so-called wish was not, in fact, a wish, but a mandatory direction.

In re Hellman, 221-552; 266 NW 36

Trusts — precatory statements — legal effect. The construction of a testamentary trust cannot be controlled by a written, precatory statement made by the testatrix subsequent to the execution of the will and not even made a part thereof.

In re Whitman, 221-1114; 266 NW 28

Trust property held by ward. A contract by the guardian of an incompetent, for the sale of land owned by the ward solely as trustee, tho approved by the court, cannot, in any sense, be deemed the contract of the ward; therefore, such contract cannot, in the event of the death of the ward, be deemed to create any indebtedness against the estate of the ward.

Copple v Morrison, 221-183; 264 NW 113

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648 .

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

10767 Counties bordering on Missouri river.

Mississippi and Missouri rivers, concurrent jurisdiction. See under §13449 (III)

Accretion and avulsion—presumptions. In an action involving title to land affected by changes in course of Missouri river, court recognized principles that boundaries established in the middle of the main channels vary as channels change by accretion, but that boundaries are unaffected where change takes place suddenly by avulsion; that land on Iowa side of Missouri river is presumed to be in Iowa, and that land, left by recession of the river, is presumed to be the result of accretion rather than avulsion.

Arnd v Harrington, 227-43; 287 NW 292

Jurisdiction. In an action to enjoin trespass and recover damages, wherein cross-action to quiet title was brought, and where all parties appeared, and where at the time of the action and for many years prior thereto, the land in controversy was situated on the Iowa side of the Missouri river and within Pottawattamie county, altho formerly as result of changes in course of river, such land lay, for a certain period of time, on the Nebraska side, the district court for said county had jurisdiction.

Arnd v Harrington, 227-43; 287 NW 292

10794 Decisions and entries in vacation.

Judgment in vacation—when a lien. Where a cause is tried, submitted, and taken under advisement under a stipulation that judgment may be entered "during term time or vacation", a subsequently rendered judgment becomes a lien on the defendant's land from the date of its actual entry, and not from the date of actual trial and submission under said stipulation, even tho the judgment entry recites such day of trial and submission.

Andrew v Winegarden, 205-1180; 219 NW 326

Entry two terms after submission. In an action between co-sureties on probate bond, the fact that two terms intervene between date cause was submitted to trial court and date of trial court's judgment does not divest trial court of jurisdiction of parties or subject matter of litigation such as to invalidate judgment and decree notwithstanding statute concerning decisions and entries in vacation.

Bookhart v Cas. Co., 226-1186; 286 NW 417

10795 Expiration of term—pending trials.

Adjournment sine die—sufficient entry. The entry by the clerk of the court in the permanent records of the court, of the usual entry of adjournment sine die, all in compliance with the oral direction of the court, effectually terminates the term of court, tho said entry is not signed by the court or by any judge thereof.

State v Harper, 220-515; 258 NW 886

10797 Judges not to sit together.

Dismissal—nonjurisdiction of court. When a cause is assigned to and tried by a judge of the district court, all other judges of the same court are thereby deprived of jurisdiction to dismiss the cause while it is pending before said trial judge.

Dunkelbarger v Myers, 211-512; 233 NW 744

10798 Preparation and signing of record.

ANALYSIS

I MEMORANDA OF DECREE
II RECORDING, APPROVING, AND SIGNING
III JUDICIAL NOTICE OF RECORDS

I MEMORANDA OF DECREE

Unallowable amendment. A record cannot be amended by affidavits of counsel.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Calendar memorandum—approval by judge. A calendar memorandum of findings of fact may be sufficient basis for a judgment entry by the clerk in the proper record, when approved by the judge.

Rance v Gaddis, 226-531; 284 NW 468

Order noted on calendar. A party may not appeal from an order in the form of a mere notation on the judge's calendar, which order is later incorporated into the final decree.

Yeomen v Ressler, 216-983; 250 NW 169

II RECORDING, APPROVING, AND SIGNING

Adjournment sine die—sufficient entry. The entry by the clerk of the court in the permanent records of the court, of the usual entry of adjournment sine die, all in compliance with the oral direction of the court, effectually terminates the term of court, tho said entry is not signed by the court or by any judge thereof.

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III JUDICIAL NOTICE OF RECORDS

Another case in same county—same parties. The supreme court cannot take judicial notice of the record of another case involving the same parties and tried in the same county, when the record of such prior case is not before it.

Lawrence v Melvin, 202-866; 211 NW 410

Notice of information and warrant—condemnation of gambling devices. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant, and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

Bankruptcy proceedings in another court. Court cannot take judicial notice of bankruptcy proceedings in another court however seriously they affect the rights of parties to the suit already pending. Defense of discharge in bankruptcy should have been pleaded.

Reining v Nevison, 203-995; 213 NW 609

Dismissal for lack of prosecution—another action pending. In denying motion for reinstatement of case which had lain dormant for 25 years, it was not error for the court to take notice that such cause was eliminated from the calendar for want of prosecution under circumstances inherent in the record; and it was also proper to take notice of another pending action even tho the record was silent in regard to it.

Benjamin v Jackson, 207-581; 223 NW 383

History of state — statutes — decisions of court. Court may take judicial notice of history of events in the state, and especially of the statutes of the state and the decisions of this court.

Mathews v Turner, 212-424; 236 NW 412

Probate and equity jurisdiction exercised by same judge. The court will judicially notice the fact that the same judge was exercising both probate jurisdiction, and equity jurisdiction in an action for appointment of a receiver for the estate property—the extent that an appellate tribunal may divide the equity and probate functions of the same judge, so that the equity judge may know nothing of the probate proceedings, and the probate judge know nothing of the equity proceedings, being a puzzle sui generis.

Frazier v Wood, 214-237; 242 NW 78

Supreme court's own records. Principle reaffirmed that the supreme court will take judicial notice of its own records.

Dayton v Ins. Co., 202-753; 210 NW 945
Farmers Bk. v Miles, 206-766; 221 NW 449

10799 Signing after term—effect.

Filing for record after term time—effect. A judgment is not rendered erroneous because signed, filed and entered of record after the adjournment of the trial term, when the decision was rendered in term time, and then noted on the court calendar and on the appearance docket, with directions to the attorneys to prepare a decree in accordance with the decision.

Andrew v Bank, 209-1149; 229 NW 819

Costs—motion to retax—limited applicability. A motion to retax costs can reach only errors of the clerk and not errors inhering in a judgment.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

10801 Amending or expunging entry.

ANALYSIS

I CORRECTIONS DURING TERM
II CORRECTIONS AFTER TERM
III NOTICE OF CHANGE

I CORRECTIONS DURING TERM

Application to vacate. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Calendar memorandum—superseded by subsequent decree. Where trial judge made calendar memorandum of findings of fact which he did not sign, and the clerk's record thereof was not signed, the signing of the recorded entry of a subsequent decree was convincing proof that the subsequent decree and not the memorandum was the final decree.

Rance v Gaddis, 226-531; 284 NW 468

Entry of judgment—record clarified by later entry. When the court stated in its entry of judgment: "The defendant excepts to said judgment. Exceptions allowed and granted.", and in ruling on a motion for a new trial, made an entry that the above-quoted was intended to save an exception for the defendant, the court was correct in its action to clarify the record, and on appeal the defendant could not contend that the entry could only be interpreted to mean that the exception to the judgment was sustained.

Wessman v Sundholm, 228- ; 291 NW 137

Default—setting aside. The superior court has ample jurisdiction, during a term at which a motion to set aside a default is overruled, to reconsider its judgment and to enter an order sustaining said motion.

Braverman v Burns, 207-1382; 224 NW 596

Default—setting aside—when affidavit of merit unnecessary. A default may be legally set aside, tho the mover therefor files no affidavit of merit, when the court, in entering the default, stated that he would set aside the default if a motion so asking be filed, and when the applicant for the default then affirmatively acquiesced in such purpose of the court.

Wagoner v Ring, 213-1123; 240 NW 634

Dismissal—jurisdiction to set aside. The voluntary dismissal of an action may not, even during the same term, be set aside and the action reinstated when such dismissal was brought about by the negligence of the dismissing party and such negligence is wholly unexplained or unexcused. Whether the court has jurisdiction in any case to set aside a voluntary dismissal, quaere.

Ryan v Ins. Co., 204-655; 215 NW 749

Inaccurate judgment — correction without new trial. When parties to an action voluntarily (tho irregularly) submit to a referee certain counts only of the petition, and later judgment is entered on the report of the referee in such form as to indicate that all counts of the petition had been so submitted, the court, on proper proof, is under mandatory duty, during the term at which the judgment was entered, to exercise its statutory and inherent power and, itself, correct said inaccuracy.

Watters v Knutsen, 223-225; 272 NW 420

Inherent power of court. The district court has inherent power to set aside a judgment during the term at which it was rendered on proof that the judgment was obtained by fraud, extrinsic and collateral to the judgment, even tho there was no default.

Cedar R. Co. v Bowen, 211-1207; 233 NW 495

Misunderstanding as to decree. A pardonable misunderstanding between parties and their attorneys which results in a consenting by one of the parties to an unintended decree, affords ample grounds for vacating the decree during the term at which it is entered.

Dimick v Munsinger, 202-784; 211 NW 404

Municipal court—filing motions after verdict. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Munic. Court, 225-501; 281 NW 441

Non-jurisdiction to set aside dismissal. A municipal court having entered a valid order of dismissal of an action has no jurisdiction, seven months later, to set aside said order and reinstate said action without notice to the defendant.

Des M. & CI Ry. v Powers, 215-567; 246 NW 274

No right to set aside orders on judge's motion. A judge of the municipal court has no jurisdiction to set aside, on his own motion, a duly rendered and journalized order of another judge of the same court sustaining a motion to set aside a default; and equally without jurisdiction, thereupon, to overrule said motion.

Denman v Sawyer, 211-56; 232 NW 819

Recitals—presumption—insufficient showing to overcome. A judgment recital that a plain-

I CORRECTIONS DURING TERM — concluded

tiff appeared and requested the dismissal of the action will not be expunged on motion on testimony which is in equipoise on the issue whether such recital is correct.

Sullivan v Coakley, 205-225; 217 NW 820

Trial record—not corrected in appellate court. Any correction of the trial court record should be made by a motion to correct or expunge in the lower court as provided by statute, and not in the appellate court.

Rance v Gaddis, 226-531; 284 NW 468

Unauthorized entry. A provision in a judgment sentence to the county jail to the effect that the sentence shall be served in the penitentiary is a nullity, even tho the defendant consents thereto; and the court may at the same term, and in the absence of the defendant, strike said provision from the judgment entry and change the commitment to a county other than the county of trial.

State v Herzoff, 200-889; 205 NW 500

Vacation of divorce decree. A final decree of divorce may not be vacated, even during the term at which entered, on a motion by defendant which alleges that no witness was sworn or testified in the cause and no corroborating testimony was offered, but which is silent as to any showing that plaintiff had no cause of action, or that defendant had a defense to plaintiff's action, or that there was fraud in obtaining the decree.

Radle v Radle, 204-82; 214 NW 602

II CORRECTIONS AFTER TERM

Attorney's lien—belated cost modification. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

Case reinstated after dismissal—court rules not in evidence. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erroneously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

Foreclosure — decree — nonjurisdiction to amend. The district court has no jurisdiction, long after a duly rendered decree in mortgage foreclosure has become final, to amend said decree by striking therefrom a provision for redemption from execution sale, and by substituting therefor a provision directing the sheriff to issue deed forthwith upon making such sale. So held where the judgment plaintiff sought such amendment on the theory that the judgment defendant had lost his right to redeem because of a stay of execution obtained by him pending ineffectual bankruptcy proceedings.

Nibbelink v De Vries, 221-581; 265 NW 913

Judgment of dismissal — nonjurisdiction to set aside. The district court, having at one term entered a judgment of dismissal of an action for want of prosecution of the action as required by the rules of the court, has no jurisdiction at a subsequent term, tho the judgment entry remains unsigned, to set aside said judgment under this section, C., '35, and reinstate the action. The governing procedure, under such circumstances, is provided by §12787 et seq., C., '35.

Workman v Dist. Court, 222-364; 269 NW 27

Modification under curative and legalizing act. A decree which adjudges the rights of the public under a statute as it exists at the date of the decree may, after the term and after the enactment of a curative and legalizing act, be so modified as to express the public rights under the statute as it exists under the curative act.

Wilcox v Miner, 201-476; 205 NW 847

Unallowable modification. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Canning Corp., 218-1281; 257 NW 353

Motion to retax costs—limited applicability. A motion to retax costs can reach only errors of the clerk and not errors inhering in a judgment.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

Nunc pro tunc—inherent power. It is fundamental law that courts possess the inherent power to correct their records so as to make them speak the truth and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power. So where a district court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of the district court, aggrieved party's right to have judgment set aside was neither waived by delay and negligence, nor by failure to show fraud, unavoidable casualty, or misfortune preventing defendant from filing his motion promptly.

Yost v Gadd, 227-621; 288 NW 667

III NOTICE OF CHANGE

Absence of notice. A material amendment to a judgment of conviction of contempt, without notice to the defendant, is a nullity.

Ciccio v Utterback, 205-482; 218 NW 253

Notice as condition precedent. A decree may not be materially corrected or amended, even during the term at which the decree was entered, without notice to the adverse party.

Chariton Bk. v Taylor, 210-1153; 232 NW 487

10802 Unauthorized alteration.

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

Nunc pro tunc—inherent power. It is fundamental law that courts possess the inherent power to correct their records so as to make them speak the truth and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power. So where a district court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of the district court, aggrieved party's right to have judgment set aside was neither waived by delay and negligence, nor by failure to show fraud, unavoidable casualty, or misfortune preventing defendant from filing his motion promptly.

Yost v Gadd, 227-621; 288 NW 667

10803 Corrections because of mistakes.

ANALYSIS

I General Power to Make Corrections
II Nature of Mistake
III Allowable Corrections
IV Notice of Change
V Nunc Pro Tunc Orders in General
VI Matters Correctable by Nunc Pro Tunc Orders
VII Procedure

I GENERAL POWER TO MAKE CORRECTIONS

Judgment — amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Correction of record. Corrections of the trial court record must be made in the trial court, not in the appellate court.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Default—right to set aside after term. An order declaring that defendant is in default for want of appearance—in other words, a "simple" or "naked" default unaccompanied by any judgment on the claim sued on—may be validly set aside at a subsequent term on proper showing.

Weinhart v Meyer, 215-1317; 247 NW 811

Effect on decree and mistaken stipulation. An order, on appeal, for a new trial on the ground of a conceded mutual mistake in entering into a written stipulation for judgment

I GENERAL POWER TO MAKE CORRECTIONS—concluded

necessarily works a setting aside, not only of the judgment, but of the stipulation; and, after procedendo, the trial court does not exceed its jurisdiction in entering a formal order to said effect.

Hall v Dist. Court, 206-179; 215 NW 606

Evident mistake. The evident mistake of the court in entering upon its calendar that a motion was sustained, when in fact the motion had been overruled, may, on notice, etc., be corrected at a subsequent term.

State v Frey, 206-981; 221 NW 445

Rulings in re change of records. A ruling of the trial court relative to changing its records will not be interfered with by the appellate court in the absence of a clear and satisfactory showing that the trial court was in error.

Gow v County, 213-92; 238 NW 578

Unallowable modification. An unappealed decree of divorce, which specifically denies all allowance of alimony because the parties had theretofore entered into a property settlement, is a finality on the subject matter of alimony, and may not, long after the court term has expired, be modified by inserting said settlement therein as alimony, because (1) said modification would contradict said final decree, and (2) any prior contract between the parties relative to alimony necessarily merges into the final decree.

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

Unallowable modification. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Canning Corp., 218-1281; 257 NW 353

II NATURE OF MISTAKE

Attorney's lien—belated cost modification—review. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

Mistake of clerk—unpardonable delay. A judgment may not be corrected for error of the clerk in computing the amount thereof, when the defendant, before the expiration of the year following the entry felt in his own mind that such error had been made, but, without explanation, delayed the filing of his application for correction until after the expiration of said year, and until after land had been sold under the judgment; and especially when his application is accompanied by an inequitable demand.

Floyd County v Ramsey, 213-556; 239 NW 237

III ALLOWABLE CORRECTIONS

Correction of order for new trial. The trial court has power to so correct an order for a new trial as to show the grounds upon which the order was made.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Costs—motion to retax—limited applicability. A motion to retax costs can reach only errors of the clerk and not errors inhering in a judgment.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

Erroneous entry of amount. The inadvertent entry on the appearance docket of the amount of a judgment, followed by the issuance of an execution in the erroneous amount, sale thereunder, and issuance of sale certificate, must, on proper motion, be corrected by expunging the erroneous entry, recalling the execution, setting aside the sale, and canceling the certificate, no rights of third parties having intervened.

Equitable v Carpenter, 202-1334; 212 NW 145

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

Modification under curative and legalizing act. A decree which adjudges the rights of the public under a statute as it exists at the date of the decree may, after the term and after the enactment of a curative and legalizing act, be so modified as to express the public rights under the statute as it exists under the curative act.

Wilcox v Miner, 201-476; 205 NW 847

IV NOTICE OF CHANGE

Absence of notice. A material amendment to a judgment of conviction of contempt, without notice to the defendant, is a nullity.

Ciccio v Utterback, 205-482; 218 NW 253

V NUNC PRO TUNC ORDERS IN GENERAL

Discussion. See 13 ILR 241, 426—Corrective entries

Nunc pro tunc generally. The power is inherent in the court to make nunc pro tunc entries.

State v Frey, 206-981; 221 NW 445

Nunc pro tunc entry—effect. The recital in a judgment entry of the date on which a cause came on for trial does not, in and of itself, constitute a nunc pro tunc order that a subsequently entered judgment shall be a lien from said recited date of trial.

Andrew v Winegarden, 205-1180; 219 NW 326

Nunc pro tunc—inherent power. It is fundamental law that courts possess the inherent power to correct their records so as to make them speak the truth and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power. So where a district court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of the district court, aggrieved party's right to have judgment set aside was neither waived by delay and negligence, nor by failure to show fraud, unavoidable casualty, or misfortune preventing defendant from filing his motion promptly.

Yost v Gadd, 227-621; 288 NW 667

Nunc pro tunc order for more time—ineffective after five days from verdict. An application for a nunc pro tunc order for an extension of time to file motion for new trial is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

Amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Denying moratorium cancels restraining order on sheriff. An order restraining the sheriff from issuing a deed, pending a hearing on a moratorium application for extension of period for redemption, is automatically dissolved when the application is denied, and a deed issued is valid when a nunc pro tunc order places the moratorium denial order on record as of a date prior to the issuance of deed.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as though it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

Harmless error—nunc pro tunc correction—waiver. Overruling a special appearance to plaintiff's application for a nunc pro tunc order and then correcting the trial record thereunder by substituting "plaintiff" for "defendant" in an order extending time to file exceptions to instructions and motion for new trial is harmless error where defendant appeared and without objections thereto permitted and participated in hearing on the merits of such exceptions and motion for new trial.

Thompson v Butler, 223-1085; 274 NW 110

Inherent power of court. The district court is but exercising its inherent power when, on motion, it corrects by nunc pro tunc order, and regardless of the one-year limitation imposed by §12791, C., '35, the unquestionably established error of its own clerk in entering a judgment against a judgment defendant for a less amount than theretofore ordered by the court,—it appearing that the judgment plaintiff had not, by laches, forfeited the right to demand such correction against the judgment defendant.

Murnan v Schuldt, 221-242; 265 NW 369

Unallowable nunc pro tunc entry. The supreme court may not enter a nunc pro tunc order to the effect that an abstract was filed within the time provided by statute when, in truth and in fact, it was not so filed.

Farmers Bank v Miles, 206-766; 221 NW 449

VI MATTERS CORRECTABLE BY NUNC PRO TUNC ORDERS

Nunc pro tunc correction—appeal as sole remedy. The nunc pro tunc correction of an unsigned decree in order to make it conform to the original order of the court, such correction being made on motion, service, and ap-

VI MATTERS CORRECTABLE BY NUNC PRO TUNC ORDERS—concluded

pearance of all parties, is a finality in the absence of an appeal therefrom.

Samek v Taylor, 203-1064; 213 NW 801

Nunc pro tunc correction of manifest error. A decree in chattel mortgage foreclosure may be so corrected by nunc pro tunc entry that the detailed enumeration of the mortgaged property will appear in the corrected decree exactly as the court unquestionably intended such enumeration to appear in the original judgment entry.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

VII PROCEDURE

Rules long established—disturbing not favored. Rules of practice and procedure which have been long established by decisions of the court should not be lightly disturbed.

McKee v National Assn., 225-1200; 282 NW 291

CHAPTER 478

GENERAL PROVISIONS RELATING TO JUDGES AND COURTS

10805 Expenses.

Atty. Gen. Opinion. See '34 AG Op 53

10809 Compensation.

Atty. Gen. Opinion. See '38 AG Op 577

10811 Expenses.

Atty. Gen. Opinion. See AG Op June 14, '39

10818 When judge disqualified.

Direct pecuniary interest. The interest which disqualifies a trial judge, means some direct pecuniary gain or property interest, and has no reference to the remote interest which he, along with every other citizen and taxpayer of a city, might have in the result of a judgment against a city.

Sioux City v Western Corp., 223-279; 271 NW 624

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

10820 Rules for conciliation.

Discussion. See 5 ILB 200—Conciliation law

CHAPTER 479

CLERK OF THE DISTRICT COURT

10825 General duties.

Payment to clerk—effect. Payment by an administrator to the clerk of the district court of the amount of an allowed claim is an authorized and legal payment and discharges the estate from further liability.

In re Nairn, 209-52; 227 NW 585

Affidavit lacking seal of court clerk. Affidavit of publication of notice of hearing on drainage assessment was sufficient altho court seal was not attached by court clerk before whom the affidavit was made. Moreover, statute did not require that proof of service be by affidavit.

Whisenand v Van Clark, 227-800; 288 NW 915

Confession of judgment—mandatory duties. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

10826 Payment of money—notice.

Not insurer of official funds. The clerk of the district court is not liable for loss of official funds coming into his hands and lost because of the failure of the bank in which they were deposited, when, at the time of deposit, he in good faith justifiably believed the bank to be solvent.

Prudential v Hart, 205-801; 218 NW 529

10830 Records and books.

ANALYSIS

I Records Generally
II Record Book (Par. 1)
III Judgment Docket (Par. 2)
IV Incumbrance Book (Par. 5)
V Appearance or Combination Docket (Par. 6)
VI Lien Index (Par. 7)

I RECORDS GENERALLY

Rules—general order—dismissal for want of prosecution. Under the recognized rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings in order to expedite the trial of cases, to keep their dockets clear, and to facilitate the administration of justice, the judges of a judicial district could adopt and enforce a general order requiring parties to cause each case to be finally determined within two years from date of filing petition and providing upon failure to comply with such order the clerk should enter upon the record, "Dismissed without prejudice for want of prosecution".

Hammon v Gilson, 227-1366; 291 NW 448

Entry—necessity. Principle reaffirmed that the oral rendition by the court of his decision, the entry of such decision on the court calendar, and the transcribing of such entry into the appearance docket and fee book, do not constitute a judgment.

State v Wieland, 217-887; 251 NW 757

Clerk's entry of dismissal under general order—nonreviewable when court approves entry. Where a general order of the judges of a judicial district provided for the dismissal of all actions and proceedings undetermined after a period of two years, and directed the clerk of court to enter the dismissal without prejudice, and where such order was so entered in the district court record by the clerk, the supreme court is not required to pass upon the question of whether such entry by the clerk would be an effective dismissal, when at the same term of court the presiding judge made an entry in the same record "approving, affirming and ratifying" this and all other orders of dismissal under the general order.

Hammon v Gilson, 227-1366; 291 NW 448

II RECORD BOOK (PAR. 1)

Belated entry in clerk's record—showing by later order. Where a proceeding was shown on the judge's calendar as held on November 15, and, although given that date in the district court record book, was not entered therein before December 12, plaintiff was entitled to an entry on the record book showing that the proceedings were not therein entered before the latter date.

Buser v Kriechbaum, 224-1147; 278 NW 330

III JUDGMENT DOCKET (PAR. 2)

Calendar memorandum as basis for judgment. A calendar memorandum of findings of fact may be sufficient basis for a judgment entry by the clerk in the proper record, when approved by the judge.

Rance v Gaddis, 226-531; 284 NW 468

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as though it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

Journal entry as evidence. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record, and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Nunc pro tunc—courts' inherent power. It is fundamental law that courts possess the inherent power to correct their records so as to make them speak the truth and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power. So where a district court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of the district court, aggrieved party's right to have judgment set aside was neither waived by delay and negligence, nor by failure to show fraud, unavoidable casualty, or misfortune preventing defendant from filing his motion promptly.

Yost v Gadd, 227-621; 288 NW 667

Transcript of evidence filed prior to judgment. When the reporter's notes and a transcript thereof were made a part of the record before final judgment was signed, filed, or entered, there was no merit in a contention that the court had no jurisdiction because the evi-

dence was not properly made of record before entering judgment.

Carey v Dist. Court, 226-717; 285 NW 236

IV INCUMBRANCE BOOK (PAR. 5)

No annotations in this volume

V APPEARANCE OR COMBINATION DOCKET (PAR. 6)

"Filing"—acts constituting. The indorsement and signing on the combination docket of the court of a remittitur constitutes a "filing" of a remittitur within the meaning of a court order to the effect that a new trial would automatically follow the failure "to file" such remittitur.

Fox v McCurnin, 210-429; 228 NW 582

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

VI LIEN INDEX (PAR. 7)

No annotations in this volume

10833 Pleadings—when deemed filed—removal of papers.

Drainage appeal notice—proper filing notwithstanding auditor's failure to mark "filed". A paper is said to be "filed" when it is delivered to the proper officer and by him received to be kept on file.

Mills v Board, 227-1141; 290 NW 50

Court rule contravening statute. A court-established rule, as to when a motion shall be deemed filed, is a nullity when the rule is in contravention of the statute.

Tate v Delli, 222-635; 269 NW 871

Appeal—filing of notice. The filing of a duly served notice of appeal with the clerk of the trial court is an essential step in perfecting an appeal.

Educational Exch. v Thornburg, 217-178; 251 NW 66

Notice of amendment unnecessary. A plaintiff who at one stage of the pleadings wholly withdraws his claim for personal judgment against the defendant may later, by proper amendment, reassert such claim without notice to the defendant who has appeared, personally and by counsel, and is actively contesting the relief sought by plaintiff.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Notice of appeal—fatally deficient record. An appeal cannot be entertained when the record affirmatively shows (1) that the appearance docket of the trial court carries no notation of the filing of a notice of appeal, and (2) that no notice of appeal can be found in the office of the clerk of said court.

Educational Exch. v Thornburg, 217-178; 251 NW 66

10836 Change in title—certification.

Atty. Gen. Opinions. See '25-26 AG Op 153; '28 AG Op 322

10837 Fees.

Atty. Gen. Opinions. See '28 AG Op 292, 372; '32 AG Op 54, 260; '34 AG Op 283; AG Op Jan. 24, '39; May 22, '39; June 20, '39

Statute of limitation—clerk's costs barred after five years. Clerk's costs inuring to the general fund when collected are no part of the judgment to which they are incident, but are only a debt, not necessarily arising out of a governmental function, which costs are such debts as become outlawed at the expiration of five years and may not then be retaxed and collected.

Great Western Ins. v Saunders, 223-926; 274 NW 28

10838 Accounting for fees.

Not insurer of official funds. The clerk of the district court is not liable for loss of official funds coming into his hands and lost because of the failure of the bank in which they were deposited, when, at the time of deposit, he in good faith justifiably believed the bank to be solvent.

Prudential v Hart, 205-801; 218 NW 529

10840 Allowed claims—payment.

Atty. Gen. Opinion. See '32 AG Op 11

10841 Salary exclusive.

Clerk as commissioner of insanity. The clerk of the district court may not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity.

Baldwin v Stewart, 207-1135; 222 NW 348

CHAPTER 480

JURORS IN GENERAL

10842 Competency.

Competency of jurors. See under §§11472, 13830

10843 Exemption.

Atty. Gen. Opinions. See '32 AG Op 13; '34 AG Op 58

10846 Fees of jurors.

Atty. Gen. Opinions. See '25-26 AG Op 441; '32 AG Op 13; AG Op Feb. 27, '40

Equitable estoppel — when inapplicable to public. A county is not estopped to recover back unlawful excess mileage paid a grand juror, even tho the payment was made under an ex parte order of court.

Park v Polk County, 220-120; 261 NW 508

Judicial legislation. A court enters the wholly unallowable field of judicial legislation when it assumes to enter ex parte orders directing the payment of mileage to grand jurors in an amount different than the amount provided by statute.

Park v Polk County, 220-120; 261 NW 508

Mileage—limitation on. A grand juror is entitled, for each term of court, to only one mileage of ten cents for each mile traveled from his residence to the county seat. If more be paid the county may recover back the illegal excess.

Park v Polk County, 220-120; 261 NW 508

CHAPTER 482

SELECTION OF JURORS

10868 Lists by board of supervisors.

Atty. Gen. Opinion. See '34 AG Op 463

Correction. A jury list which contains the names of the judges of election of the precinct from which the list is sent, is not a list, as provided by statute, and is properly corrected by the board of supervisors by striking the names of said judges and by inserting the names of qualified persons in lieu thereof.

State v Pierson, 204-837; 216 NW 43

Correction without formal record. The act of the board of supervisors in correcting a jury list by substituting the names of competent jurors in lieu of those who are incompetent, is not rendered illegal because the substituted names were all suggested by one member of the board, nor because no record of the correction was preserved in the minutes of the proceedings, it appearing that the final correction was approved by the board.

State v Pierson, 204-837; 216 NW 43

10869 Certification.

Competency—waiver. The fact that a juror was an election judge at the election at which the jury list was selected and certified is not a ground for challenge for cause under §13830, C., '24, even tho his name is certified as a juror in violation of this statute. In any event, any tenable objection to the juror is waived by not discovering the incompetency until after the verdict.

State v Burch, 202-348; 209 NW 474

10873 Preparation of ballots.

Drawn on precept. If a grand jury be once regularly drawn, and for any cause fails to appear at a subsequent term, a precept for a jury should, at that term, issue to the body of the county, and §240, C., '73 [§§10873, 10874, C., '39] providing that the jurors shall be drawn 20 days before the term, does not apply.

State v Beste, 91-565; 60 NW 112

10879 Notice of drawing.

Ignoring statutory time-notice. The fact that the ex officio jury commission under order of court drew a petit jury panel to take the place of discharged jurors on the regular panel, and did so without the five-day notice provided by the statute, will not be deemed prejudicial in the absence of an affirmative showing by complainant that he was prejudiced.

State v Archibald, 208-1139; 226 NW 186

10885 Number from township limited.

Setting aside indictment. An indictment must be set aside when returned by a grand jury two members of which were from the same township. (But now see §13781.1)

State v Judkins, 200-1234; 206 NW 119

CHAPTER 483

ATTORNEYS AND COUNSELORS

10907 Admission to practice.

Discussion. See 17 ILR 50—Integration of the bar; 17 ILR 83—Practice by corporations

Supreme court — no power to enjoin unlicensed person practicing law. Supreme court has no implied power, by virtue of its exclusive statutory power to admit persons to practice as attorneys, to enjoin unlicensed law practice, for it has no original jurisdiction to grant injunctive relief, and an equity action therefor by members of bar is in no way related to the matter of admission to bar or disbarment.

Johnson v Purcell, 225-1265; 282 NW 741

District court's power to enjoin unlicensed person practicing law—certiorari thereon annulled. Whether attorneys admitted to practice law are possessed of valuable right, privilege, or franchise which may be unlawfully encroached upon by an unlicensed person, thereby causing irreparable damage and injury to such attorneys and others similarly situated, and whether they are entitled to injunctive relief in equity, were all questions determinable by the district court after hearing of evidence, so a writ of certiorari, issued by the supreme court to the district court, for want of jurisdiction of subject matter, must be quashed and annulled.

Johnson v Purcell, 225-1265; 282 NW 741

10919 Nonresident attorney—appointment of local attorney.

Appointment of resident attorney. This section does not apply to an action (1) in which the foreign attorney is a plaintiff, or (2) in which a resident attorney appears of record with the foreign attorney.

Arthaud v Griffin, 202-462; 210 NW 540

10920 Duties of attorneys and counselors.

ANALYSIS

I Officer of Court
II Fiduciary Relation
III Disabilities
IV Liability to Client
V Acquiring Client's Property
VI Compensation
VII Contingent Fee—Champerty

Judgment against attorneys on motion. See under §11608

I OFFICER OF COURT

Discussion. See 11 ILR 224—Duty of lawyer to the court

Attorney as witness. An attorney in a cause is not per se incompetent to testify in his client's behalf.

Kellar v Lindley, 203-57; 212 NW 360

Attorney as witness. It still seems necessary for the courts to express their strong disapproval of the conduct of an attorney in voluntarily maintaining the dual attitude of counsel and vital witness in his own case.

Bibler v Bibler, 205-639; 216 NW 99

Attorney as counsel and witness in same case. While the court views with emphatic disfavor the act of an attorney in assuming the dual attitude of both counsel and witness in the same case, yet such conduct does not go to the competency of the attorney as a witness, but to the weight and credibility of his testimony, which latter fact may be very properly presented to the jury by appropriate instruction.

Cuvelier v Dumont, 221-1016; 266 NW 517

Attorney fees—material evidence withheld from court. An executor being an officer of the court, the matter of his expenses is at all times subject to revision, so an order fixing his attorney's fees should be set aside when it appears that material matters were not before the court at the hearing.

In re Schropfer, 225-576; 281 NW 139

Affidavit for cost bond—valid execution by attorney for corporation. The statutory affidavit supporting a motion for cost bond may be made and filed by a defendant corporation's attorney, and a corporation need not personally make and file such affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

II FIDUCIARY RELATION

When fiduciary relationship exists. No fiduciary relation exists between an attorney and another relative to the contract which creates the relation of attorney and client.

State v Cas. Co., 212-1052; 237 NW 360

Presumption of fraud. Transactions between an attorney and his aged and mentally infirm client which are apparently advantageous to the attorney and disadvantageous to the client, and which are not merely incidental to the relationship of attorney and client, are pre-

sumptively fraudulent. Evidence held insufficient to overcome said presumption.

Reeder v Lund, 213-300; 236 NW 40

Parent and child—required proof. In an action to set aside a trust agreement executed to a son and an attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Negativing fraud. The plea of fraudulent representation as to the value of property must necessarily fall in the face of testimony that the complainant was a person of unusual business ability and experience and had had long, personal and intimate knowledge of the property in question far superior to that of the alleged wrongdoer.

Tobin v Budd, 217-904; 251 NW 720

Insufficient showing. The relation of attorney and client is not established by the simple showing that the attorney in question had, at one time in the past, examined an abstract of title for the juror.

Tobin v Budd, 217-904; 251 NW 720

Payment of claims—death of claimant's attorney — peculiar circumstances relieving barred claim. Where an attorney files a probate claim for a nonresident claimant, but dies one day before the expiration of the year and without serving a notice of hearing on such claim—claimant, not learning of his attorney's death until later, and tho then delaying several months while his new attorney negotiated with the estate, held to have shown peculiar circumstances entitling him to equitable relief considering the estate was still unsettled and solvent.

Hagen v Nielsen, 225-127; 279 NW 94; 281 NW 356

Note—evidence. Record reviewed and held wholly insufficient to establish any fiduciary relation as attorney and client between the payee and the maker of a promissory note at the time the note was executed.

Tobin v Budd, 217-904; 251 NW 720

III DISABILITIES

Communications between attorney and client —when not privileged. A client who consults his attorney for the simple purpose of having the attorney put him in touch with a broker, with whom the client could arrange for the sale of property, may not claim that the resulting conversation is privileged or confidential; likewise, if the client's purpose is to obtain such assistance as will enable him to consummate a crime.

State v Kirkpatrick, 220-974; 263 NW 52

Improper appearance—who may object. An objection that an attorney was appearing both for and against a party litigant cannot be made by a litigant other than the one affected.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

IV LIABILITY TO CLIENT

Fraud — illegal interest charge. Evidence held insufficient to show fraud on the part of an attorney in charging interest in excess of the legal rate on certain obligations.

Tobin v Budd, 217-904; 251 NW 720

Fraud in foreclosure. Evidence held insufficient to show fraud in the receipt by an attorney of a portion of an attorney fee taxed in a foreign foreclosure.

Tobin v Budd, 217-904; 251 NW 720

Fraud—sufficiency. Evidence held insufficient to show fraud on the part of an attorney in withholding facts which were of no concern to the complainant.

Tobin v Budd, 217-904; 251 NW 720

Inadvertent misrepresentation. Evidence held insufficient to show fraud by an attorney in the making of an inadvertent false representation.

Tobin v Budd, 217-904; 251 NW 720

Summary proceedings—appeal—no hearing de novo. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Attorney omitting defense—belated attack ineffectual. A regularly entered decree against a person represented by reputable counsel will not seven years thereafter be set aside for alleged fraud of an attorney in failing to plead a bankruptcy discharge as a defense.

Ware v Eckman, 224-783; 277 NW 725

V ACQUIRING CLIENT'S PROPERTY

Presumption of fraud. Transactions between an attorney and his aged and mentally infirm client which are apparently advantageous to the attorney and disadvantageous to the client, and which are not merely incidental to the relationship of attorney and client, are presumptively fraudulent. Evidence held insufficient to overcome said presumption.

Reeder v Lund, 213-300; 236 NW 40

VI COMPENSATION

Discussion. See 3 ILB 43—Attorney's services —void or champertous contract

Action for services in effecting settlement—evidence. An attorney in an action against a client on a contract of employment may testify to the acts and things done by him in effecting an agreement of settlement of the claim in question.

Coughlon v Pedelty, 211-138; 233 NW 63

VI COMPENSATION—continued

Attorney's fee fixed by agreement of heirs. The fee of an administrator's attorney may be fixed by agreement of the heirs and the amount is of no concern to anyone else, where no rights of creditors are involved.

In re Schropfer, 225-576; 281 NW 139

Attorney fees as matter of right. A defendant in attachment who counterclaims on the bond and recovers both actual and exemplary damages is entitled to a taxation of reasonable attorney fees as a matter of right, even tho the sureties on the bond are not made parties to the counterclaim.

Mogler v Nelson, 211-1288; 234 NW 480

Fees for services to estate. The burden of proof is on attorney claiming fees for services, whether ordinary or extraordinary, and, while court may to a certain extent use its own judgment, claim should be based on evidence.

Glynn v Bank, 227-932; 289 NW 722

Fees for extraordinary services. An executor has the burden to prove the extraordinary services and the reasonableness of additional compensation.

In re Metcalf, 227-985; 289 NW 739

Fees for extraordinary services. Without evidence as to extent and value of extraordinary services, an allowance therefor to executor and his attorney is not res judicata as to factual matters, and the attorney's statement which fails to separate time spent in courtroom from time spent in briefing and consultation will not furnish proper legal basis for any final adjudication.

In re Metcalf, 227-985; 289 NW 739

Counterclaim—justifiable dismissal. An unsupported counterclaim for damages consequent on the negligent handling of a claim by an attorney who sued for fees due him, is, of course, properly dismissed by the court.

Hunt v Moore, 213-1323; 239 NW 112

Contract of employment not presumptively fraudulent. The rule that contracts entered into between attorney and client subsequent to the creation of such relation are presumptively fraudulent, has no application to the contract by which the relation of attorney and client is created.

Coughlon v Pedelty, 211-138; 233 NW 63

Contracts—offers—when implied acceptance not recognized. Proof that a party made an offer to pay a stated sum for services to be performed and that the offeree thereafter proceeded to perform the services, creates a presumption that the offeree accepted all the terms of the offer; not so, however, when such offer is made after a large part of the services has been rendered on the basis of a quantum meruit, and the offeree continues to perform the remaining services. In the latter instance, the quantum meruit contract will be deemed to continue unless an acceptance of the offer is actually proven.

Kelly, etc. v Trust Co., 217-725; 248 NW 9; 250 NW 171

Directed verdict—when required. Plaintiff in an action to recover, e. g., attorney fees, is necessarily entitled to a directed verdict when the evidence on all the controverted issues is uncontradicted, sufficient, and conclusive in plaintiff's favor.

Hunt v Moore, 213-1323; 239 NW 112

Elements to be considered. In fixing the compensation for attorneys on a quantum meruit basis, due consideration must be given (1) to the amount involved, (2) to the nature of the litigation in question, (3) to the time occupied, (4) to the results accomplished, and (5) to the standing of the attorney.

Kelly, etc. v Trust Co., 217-725; 248 NW 9; 250 NW 171

Employment by apparent agent. An attorney who claims to have been employed, by an alleged apparent agent, to defend an action, may not, after the action is dismissed and immediately recommenced, continue to rely on the alleged contract with the apparent agent when he then knows that said agent never had any authority to employ.

Orwig v Railway, 217-521; 250 NW 148; 90 ALR 258

Essentials of employment. A contract of employment of an attorney is established on a showing that the advice and assistance of the attorney in a matter pertinent to his profession were solicited and received.

Anderson v Lundt, 200-1265; 206 NW 657

Harmless error—taxation of attorney fees. Error in taxing attorney fees when the instrument sued on does not provide therefor is fully cured by a statement in the written argument on appeal by the attorney in whose favor the taxation was had, to the effect that he had fully released and satisfied the judgment for such fees, such statement, though irregularly presented, being irrevocably binding on the attorney.

Koontz v Clark Bros., 209-62; 227 NW 584

Injecting unpleaded issue into instructions. On the one duly joined issue whether plaintiff was orally employed to render services for defendant in a certain matter, the court commits reversible error by injecting into the instructions the unpleaded issue whether defendant knew that plaintiff was performing services for defendant and accepted the benefits of such services.

Graeser v Jones, 217-499; 251 NW 162

Instructions. In an action by an attorney for services based on an express contract to assist in the settlement of an appeal, the court, in its instructions, should not make plaintiff's recovery dependent on proof that defendant was apprised of just what efforts plaintiff was making to effect a settlement.

Graeser v Jones, 220-354; 261 NW 439

Record—materiality. In an action by an attorney for services in obtaining a decree for the defendant, the record of the decree is receivable in evidence, as bearing on the issue of the performance of the contract.

Hornish v Overton, 206-780; 221 NW 483

Trusts—compensation and attorney fees. The compensation of a trustee and of his attorney necessarily rests quite largely in the discretion of the trial court.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

VII CONTINGENT FEE—CHAMPERTY

Belated presentation of defense. In summary proceedings between an attorney and a client, the defense that a contract between the parties was champertous, or against public policy, must be presented in some manner in the trial court, even tho such summary proceedings are heard by the trial court without written pleadings.

Norman v Bennett, 216-181; 246 NW 378

Contingent fee—validity of contract. A contract between an attorney and a client fixing the contingent compensation of the attorney at one-third of the amount recovered, entered into at a time when the extent of the litigation was quite problematical, is not rendered unenforceable because ultimately the services necessary to effect a recovery were quite small. Nor is such a contract champertous.

State v Cas. Co., 212-1052; 237 NW 360

10921 Deceit or collusion.

Recovery of fraudulently induced fee. Ordinarily, one who has paid an attorney for services and seeks to recover the entire fee on the ground that payment was fraudulently induced, must show that the services were of no value, and the evidence is fatally deficient if services are performed, but their value is not shown, as the plaintiff thereby fails to establish the amount of his damage.

Gipp v Lynch, 226-1020; 285 NW 659

10922 Authority.

ANALYSIS

I General Authority
II Execution of Bonds and Other Papers
III Agreements Generally
IV Authorized Agreements
V Unauthorized Agreements
VI Evidence of Agreement
VII Right to Receive Money

I GENERAL AUTHORITY

Liability to third persons. As between a principal and third parties, the principal is bound by the acts of his agent within the limits of the apparent scope of his authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

"Apparent authority" defined. "Apparent authority" is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Undisclosed limitation of agent's authority—effect. Altho a principal may by special limitations restrict the authority of his agent, and altho such restrictions are obligatory between the principal and his agent, such limitations are not binding upon third parties and, in the absence of knowledge of such restrictions by them, the principal will be bound to the same extent as tho the restrictions were not made.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Admissions—when receivable. Admissions or statements by an attorney during the course of, and pertaining to, his client's litigation are not admissible against, nor binding on, his client unless made for the express purpose of dispensing with formal proof of a fact at the trial. A priori, admissions or statements made after the litigation has terminated and relating to a distinctly different subject matter are in no manner chargeable to said former client.

Dugan v Midwest Co., 213-751; 239 NW 697

Admissions by attorney—conditions. Admissions of fact by an attorney are admissible against his client when said admissions are relevant and material and within the actual or ostensible scope of the attorney's employment, and are not in effect an offer of compromise.

Suntken v Suntken, 223-347; 272 NW 132

Admission binding on client. A party is bound by the admission of his attorneys, made in a counterclaim to another action.

Mitchell v Automobile Underwriters, 225-906; 281 NW 832

Admissions of attorney—effect. The admission of an attorney, made during a trial, as to the agency of a party for his client, is not necessarily binding on the client in other and subsequent litigation of a similar nature.

Iowa Co. v Seaman, 203-310; 210 NW 937

Implied ratification of agent's acts. Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future, and an affirm-

I GENERAL AUTHORITY—continued

ance of an unauthorized transaction may be inferred from a failure to repudiate it.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney signing notice and accepting service thereof. An attorney who signs a notice of appeal on behalf of an appealing defendant, for whom he appeared in the trial court, may validly accept service of said notice on behalf of a nonappealing co-defendant for whom said attorney also appeared in the trial court.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Authority of attorney to employ attorney. Record held to be wholly insufficient to present a jury question on the issue whether an attorney for defendant had apparent authority to employ another attorney on behalf of defendant; also whether an alleged employment was ratified.

Orwig v Ry. Co., 217-521; 250 NW 148; 90 ALR 258

Correcting instrument after employment terminates—invalidity. Attorneys hired to draft a mortgage, altho discovering that they have made a mistake in the description of the land, have no authority on their own initiative after termination of their employment and without consulting the mortgagee, to change the description and re-record the mortgage in the recorder's office.

Winker v Tiefenthaler, 225-180; 279 NW 436

Costs — persons acting officially. Costs should not be taxed against a county auditor in a matter in which he acts officially, in good faith, and on the advice of counsel.

Northwestern Bank v Van Roekel, 202-237; 207 NW 345

Death of party. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Forfeiture—notice—sufficient signing. Notices of forfeiture of a real estate contract are all-sufficient when signed in the name of the vendor by his duly authorized attorney.

Cassady v Mott, 203-17; 212 NW 332

Indorsement of check. The plea that a loss resulting from the nonpayment of a check must be borne by the payee because of delay by the attorney who received it to present it for payment must fail when there is no showing that the attorney had authority to make the indorsement.

Prudential v Hart, 205-801; 218 NW 529

Indorsement by payee's attorney—authority. In action to recover against bank which had cashed checks indorsed by payee's attorney, the authority to make such indorsements is, under §9479, C., '39, determinable from the rules applicable in cases of agency generally.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant-bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Instructing on basis of counsel's admissions. The court is not in error in peremptorily instructing in an action of replevin that plaintiff is entitled to the immediate possession of all property claimed by him (except specifically enumerated articles) when said instruction is in strict accord with the explicit admission in court of defendant's counsel, tho no such admission appears in defendant's answer.

Luther v Investment Co., 222-305; 268 NW 589

Mandatory duty of court to vacate judgment. A judgment must be set aside on proper and timely application when an agreement or understanding existed between the respective counsel such that one of the counsel was justified in assuming, and in good faith did assume, that the cause would not be assigned for trial without notice to him, and when the judgment was the result of a violation of said agreement or understanding.

First N. Bk. v Bank, 210-521; 231 NW 453; 69 ALR 1329

Nonright of attorney to bind estate. An executor is not estopped to enforce a liability against a surety on the bond of a former ex-

ecutor by reason of the fact that his attorney has represented to such surety that the estate intends to enforce said liability solely against the estate of another surety, even tho said surety acted on such representation and did not file any contingent claim against the estate of the other surety.

In re Carpenter, 210-553; 231 NW 376

Estoppel to deny agent's authority. In payee's action against bank which had cashed checks indorsed by payee's attorney without actual authority, where bank defended on ground that payee was estopped from asserting lack of authority, held, strict rules relating to equitable estoppel based upon false misrepresentation or concealment were not applicable in determining such defense.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Notice of additional testimony — acceptance of service by attorney valid. Service of notice, and copy thereof, of the intention of the state, on the trial of an indictment, to offer stated testimony additional to that receivable under the indictment as returned, may be validly accepted in writing for and on behalf of the defendant, by the defendant's acting attorney of record.

State v Froah, 220-840; 263 NW 525

Opinion by attorney—effect. The written opinion of an attorney as to the law governing a certain matter is not admissible against the client to whom the opinion is addressed.

In re Dodge, 207-374; 223 NW 106

Oral stipulations — conflicting affidavits — effect. A war of conflicting affidavits between counsel as to what oral understanding was had relative to the filing of abstracts will not necessarily be determined by the supreme court. Moral: Oral stipulations and agreements should be reduced to writing and duly signed.

Reppert v Reppert, 214-17; 241 NW 487

Payment of claims — death of claimant's attorney — peculiar circumstances relieving barred claim. Where an attorney files a probate claim for a nonresident claimant, but dies one day before the expiration of the year and without serving a notice of hearing on such claim—claimant, not learning of his attorney's death until later, and tho then delaying several months while his new attorney negotiated with the estate, held to have shown peculiar circumstances entitling him to equitable relief considering the estate was still unsettled and solvent.

Hagen v Nielsen, 225-127; 279 NW 94; 281 NW 356

"Practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Proof of authority — necessity in general. Aside from the statutory powers and authority of an attorney, a client is not bound by the contract of his attorney in his behalf unless the authority of the attorney so to bind the client is made to appear.

Albright v Albright, 209-409; 227 NW 913

Pleading agent's apparent authority—sufficiency. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney, bank's answer alleging (1) payee's knowledge and acquiescence in the attorney's custom of indorsing payee's checks and remitting proceeds to it by his personal checks, (2) the bank's reliance thereon, and (3) that payee was estopped from asserting lack of authority held sufficient to raise question of attorney's implied, apparent, or ostensible authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Reservation of grounds—belated attack on stipulation. The contention that a stipulation in the trial court as to the testimony of a party was collusive and fraudulent may not be presented for the first time on appeal.

Bolte v Schenk, 205-834; 210 NW 797

Redemption — 90-day notice — defective return of service. An affidavit of service of the 90-day notice to redeem from tax sale is insufficient when served by a sheriff at the instance of the certificate holder's attorney, thereby failing to show that the person who made the service was the certificate holder's agent or attorney and, consequently, the period of redemption was not terminated.

Weidman v Pocahontas, 225-141; 279 NW 146

II EXECUTION OF BONDS AND OTHER PAPERS

Affidavit for cost bond—valid execution by attorney for corporation. The statutory affidavit supporting a motion for cost bond may be made and filed by a defendant corporation's attorney, and a corporation need not personally make and file such affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

Bonds — presumption of validity. A bond executed in the name of a plaintiff in attachment, by the attorney appearing for such plaintiff, is presumptively valid.

Carson, etc., v Long, 219-444; 257 NW 815

II EXECUTION OF BONDS AND OTHER PAPERS—concluded

Cost bond affidavit by attorney. A corporation defendant's attorney making statutory affidavit in support of a motion for cost bond will be presumed to have had sufficient knowledge of facts to enable him to make such affidavit and such knowledge need not be alleged.

Schultz v Ins. Co., 225-1024; 282 NW 776

III AGREEMENTS GENERALLY

Cost bond application before answer is timely. Court erred in overruling a motion for cost bond and holding that defendant's application therefor was not filed in time, because filed after time for defendant's appearance when evidence showed that the plaintiff's attorney, through correspondence, gave defendant's attorney more time, and where it was filed long prior to filing of any answer in cause, there being no order of court therein requiring such motion for cost bond to be filed within certain time.

Schultz v Ins. Co., 225-1024; 282 NW 776

Corporation judgment compromised—former stockholder—no authority. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Court acting on own motion contrary to agreement of counsel. Consolidated actions, dismissed by the court on its own motion in the absence of counsel, for want of prosecution, are properly reinstated on a showing of "unavoidable casualty and misfortune" in that there was no negligence on the part of plaintiffs or their counsel and that they were relying on an agreement between counsel that certain motions would not be made nor issues made up until convenient to all counsel.

Thoreson v Central States Elec. Co., 225-1406; 283 NW 253

In re evidence and objections thereto. Litigants may validly agree of record (at least with the consent of the court) that, in the taking of testimony, objections thereto need not be made at the time of offer, but that such testimony shall be deemed objected to on "all grounds known to the law".

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Oral nonrecord agreements. Oral agreements between litigants or their attorneys when not brought to the attention of the court are entitled to little favor on hearings to set aside default judgments.

Standard v Marvill, 201-614; 206 NW 37

Stipulations—appearance date agreed on—waiver of notice. Where the parties in a proceeding to vacate an order of court approving the final report of a bank receiver stipulate that the court may set a date for appearance later than the second day of the term, and that the bank examiner will file an appearance or pleading on or before that date, and that no other or further notice to him shall be necessary, the examiner may not assert the departure from the statutory requirements as to the appearance date as a ground for challenging the jurisdiction of the court by a special appearance.

Bates v Loan & Trust Co., 227-1347; 291 NW 184

Stipulations — indefiniteness as to time — effect accorded. An oral agreement or understanding between opposing counsel that one of them should have time, additional to that specified by statute, in which to file exceptions to the report of a referee, tho the extent of such additional time is quite indefinite, will be construed and recognized by the court in the spirit and to the extent reasonably contemplated by the parties.

Holdorf v Miller, 220-1380; 264 NW 602

Waiver of jury by agreement of attorneys—validity. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Chemical Co., 222-347; 268 NW 581; 106 ALR 198

IV AUTHORIZED AGREEMENTS

Consent decree. While counsel cannot exceed their authority in making contract or settlement affecting their clients' rights, an attorney having full charge of client's action for mandatory injunction is authorized to consent to decree substantially complying with supreme court order.

Vaughan v Dist. Court, (NOR); 226 NW 49

V UNAUTHORIZED AGREEMENTS

Corporation judgment compromised. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise

settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Employment by apparent agent. An attorney who claims to have been employed, by an alleged apparent agent, to defend an action, may not, after the action is dismissed and immediately recommenced, continue to rely on the alleged contract with the apparent agent when he then knows that said agent never had any authority to employ.

Orwig v Ry. Co., 217-521; 250 NW 148; 90 ALR 258

Involuntary dismissal — justifiable setting aside. The court is, manifestly, within its discretion in setting aside the dismissal of an action when the dismissal was entered by the plaintiff's counsel at a time when he had been discharged.

Pilcher Co. v Clark, 218-150; 253 NW 907

Unauthorized investment—advice of counsel —effect. An illegal and unauthorized investment by a trustee will not, on an accounting, be treated as legal and authorized on a showing that the investment was made on the advice of an attorney.

In re Skinner, 215-1021; 247 NW 484

VI EVIDENCE OF AGREEMENT

Offer to pay attorney fees not accepted. When an attorney, who had received a retainer fee of $100 to represent the insured in a criminal case arising from an automobile accident, received a letter from the attorney for the insurer requesting him to tell the insured that the insurer was willing to take care of attorney fees, such letter was admissible to show an offer to pay such fees, but was insufficient to show that such offer was authorized by the insurer, and his reply that he would look to the company for payment of only those fees exceeding $100, did not amount to an acceptance of the offer.

Gipp v Lynch, 226-1020; 285 NW 659

VII RIGHT TO RECEIVE MONEY

Compromise of judgment by attorney. A statute authorizing an attorney to receive money claimed by his client in an action, and upon payment thereof, to acknowledge satisfaction of the judgment, means not payment in part, but payment in full, as the general rule is that an attorney who has recovered a judgment for his client has authority to receive payment, but cannot accept in satisfaction of the claim a sum less than is actually due.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Nonpresumption as to authority. It will not be presumed that an attorney for a plaintiff in partition has authority, after the death of said plaintiff, to receive on behalf of the resulting estate the share which said plaintiff would have received had he lived, it appearing that said plaintiff's administrator was not substituted in the partition action.

Albright v Moeckley, 209-1304; 230 NW 351

10923 Proof of authority.

ANALYSIS

I In General
II Employment of Attorney
III Proof of Authority

I IN GENERAL

Agency not asserted—no estoppel to deny. In an action to recover a retainer fee given an attorney for defending a criminal case, the attorney was not estopped from denying that he was the agent for an insurance company, when he had made no claim of being such agent and had told the client that the company was not interested in the case and would not pay the attorney fee.

Gipp v Lynch, 226-1020; 285 NW 659

Presumption. An attorney who appears for a party to an action will be presumed to have been authorized so to appear—until the opposing party shows the want of such authority.

Carson, etc. v Long, 219-444; 257 NW 815
Bleakley v Long, 222-76; 268 NW 152

Retainer and authority. Aside from the statutory powers and authority of an attorney, a client is not bound by the contract of his attorney in his behalf unless the authority of the attorney so to bind the client is made to appear.

In re Lipp, 209-409; 227 NW 913

II EMPLOYMENT OF ATTORNEY

Compensation—contract of employment not presumptively fraudulent. The rule that contracts entered into between attorney and client subsequent to the creation of such relation are presumptively fraudulent has no application to

II EMPLOYMENT OF ATTORNEY—concluded

the contract by which the relation of attorney and client is created.

Coughlon v Pedelty, 211-138; 233 NW 63

Defending dry trust. A trustee may not employ attorneys at the expense of the estate to defend a trust which has become legally dry.

Fleming v Casady, 202-1094; 211 NW 488

Employment by apparent agent. An attorney who claims to have been employed, by an alleged apparent agent, to defend an action, may not, after the action is dismissed and immediately recommenced, continue to rely on the alleged contract with the apparent agent when he then knows that said agent never had any authority to employ.

Orwig v Railway, 217-521; 250 NW 148; 90 ALR 258

Ratification. Record held to be wholly insufficient to present a jury question on the issue whether an attorney for defendant had apparent authority to employ another attorney on behalf of defendant; also whether an alleged employment was ratified.

Orwig v Railway, 217-521; 250 NW 148; 90 ALR 258

Refusal to establish drains—appeal. The board of supervisors, after refusing to establish a proposed drainage improvement because such establishment would not be conducive to public benefit, utility, health, convenience, and welfare, has no power to employ attorneys and an engineer to defend, on appeal, the action of the board. Such employment being a nullity, the resulting expense may not be taxed to the petitioners.

Christensen v Agan, 209-1315; 230 NW 800

School district property, contracts, and liabilities. An informal employment of attorneys by the directors of a school district in a matter as to which the district had a right to employ attorneys is fully ratified by the good-faith formal action of the board, with full knowledge of the facts, in allowing the claim of the attorneys.

Beers v Lasher, 209-1158; 229 NW 821

III PROOF OF AUTHORITY

Presumption attending appearance. The law presumes that an attorney who appears for a party to an action had authority from the party so to do. Evidence held insufficient to overcome the presumption.

Sloan v Jepson, 217-1082; 252 NW 535

10924 Attorney's lien—notice.

ANALYSIS

I NATURE, EXTENT, AND SUBJECT MATTER
II NOTICE OF LIEN
III PRIORITY OF LIEN
IV DEFEATING LIEN
V ENFORCEMENT OF LIEN

I NATURE, EXTENT, AND SUBJECT MATTER

Attorney fees — ordering clerk to satisfy. When at the time of agreeing to a property settlement, plaintiff in divorce proceeding also orally agreed to pay her attorney a fee of $250 for his services, the court should order the clerk to satisfy said fee from the money paid into his hands in satisfaction of said property settlement and on which money the attorney had perfected a lien,—it appearing that said fee was reasonable in amount and the agreement therefor untainted with any illegality.

Mickelson v Mickelson, 222-942; 270 NW 365

Attorney's lien as assignment—effect. The duly perfected lien of an attorney with reference to the judgment obtained by him for his client, is tantamount to an assignment of an interest in the judgment. It follows that the attorney has such interest in the judgment as to support an intervention by him in an action by the judgment plaintiff to set aside certain conveyances as fraudulent.

Grimes Bank v McHarg, 217-636; 251 NW 51

Burden of proof. An attorney who seeks to establish a lien for his fees on money in the hands of the adverse party has the burden to show that the adverse party, after the service of notice of such lien, had money in his possession belonging to the attorney's client.

Hemingway v Bank, 206-1308; 221 NW 920

Decree in divorce for attorney fees—nonadjudication as to attorney. A decree in divorce proceedings awarding plaintiff (in addition to a divorce) a specified sum as attorney fees is not an adjudication as to the amount owing by plaintiff to her attorney for services rendered in the action,—the attorney, of course, not being a party to the action.

Duke v Park, 220-889; 262 NW 799
Maddy v Park, 220-899; 262 NW 796
Jones v Park, 220-894; 262 NW 797; 264 NW 700

Compensation—elements to be considered. In fixing the compensation for attorneys on a quantum meruit basis, due consideration must be given (1) to the amount involved, (2) to the nature of the litigation in question, (3) to the time occupied, (4) to the results accomplished, and (5) to the standing of the attorney.

Kelley v Bank, 217-725; 248 NW 9; 250 NW 171

Error against noncomplainant. A defendant in an action by an attorney for professional services may not complain that the jury was instructed that no consideration should be given to the fact, if it was a fact, that the

plaintiff possessed extraordinary skill and experience as a lawyer.

Klass v Ins. Co., 210-78; 230 NW 314

Nonallowable attorney fees. An attorney who, under employment by a debtor whose property is under receivership, successfully defends an attempt to throw the debtor into bankruptcy, may not have his attorney fees paid from the receivership funds, when the receiver and his attorney, under order of court, also appeared and successfully contested said bankruptcy proceeding.

Cook v McHenry, 208-442; 223 NW 377

Offers—when implied acceptance not recognized. Proof that a party made an offer to pay a stated sum for services to be performed and that the offeree thereafter proceeded to perform the services, creates a presumption that the offeree accepted all the terms of the offer; not so, however, when such offer is made after a large part of the services has been rendered on the basis of a quantum meruit, and the offeree continues to perform the remaining services. In the latter instance, the quantum meruit contract will be deemed to continue unless an acceptance of the offer is actually proven.

Kelley v Bank, 217-725; 248 NW 9; 250 NW 171

Statutory liens—discharge. An attorney's lien which is adjudicated by a foreclosure decree unappealed from, to have become a lien on defendant's land as of a date several years prior to the filing by defendant of a petition in bankruptcy (to which the attorney was not a party) is not discharged by §67f of the bankruptcy act [11 USC, §107f], even tho the foreclosure decree was entered within the four-months period immediately preceding the filing of said petition in bankruptcy.

Sweatt v Acres, 209-1288; 228 NW 74

Unauthorized order for lien. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Witness—inexperience of attorney. The fact that a lawyer never drew a particular legal instrument does not disqualify him from testifying as to the reasonable value of the services of an attorney in drawing such instrument.

Klass v Ins. Co., 210-78; 230 NW 314

II NOTICE OF LIEN

Fatally delayed notice. An attorney loses his lien for attorney fees when he delays serving an adverse party with notice of his lien until after the adverse party has in good faith settled and discharged in full his indebtedness to the attorney's client.

Hemingway v Bank, 206-1308; 221 NW 920

III PRIORITY OF LIEN

Set-off of judgments—effect on lien. The offsetting of the larger against the smaller of two mutual judgments wholly terminates an unadjudicated attorney's lien duly noticed in the judgment docket of the smaller judgment, when the indebtedness represented by the larger judgment antedates the indebtedness represented by the smaller judgment.

McIntosh v McIntosh, 211-750; 234 NW 234

Belated cost modification—review by certiorari. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Sav. Bank v Jordan, 224-28; 276 NW 71

IV DEFEATING LIEN

Lien—burden of proof. An attorney who seeks to establish a lien for his fees on money in the hands of the adverse party has the burden to show that the adverse party, after the service of notice of such lien, had money in his possession belonging to the attorney's client.

Hemingway v Bank, 206-1308; 221 NW 920

Lien—fatally delayed notice. An attorney loses his lien for attorney fees when he delays serving an adverse party with notice of his lien until after the adverse party has in good faith settled and discharged in full his indebtedness to the attorney's client.

Hemingway v Bank, 206-1308; 221 NW 920

Lien—unauthorized order. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re estate of Lear, 204-346; 213 NW 240

Bankruptcy — distribution of estate — discharge of lien. A statutory attorney's lien which is adjudicated by a foreclosure decree unappealed from, to have become a lien on de-

IV DEFEATING LIEN—concluded

fendant's land as of a date several years prior to the filing by defendant of a petition in bankruptcy (to which the attorney was not a party) is not discharged by §67f of the bankruptcy act [11 USC, §107f], even tho the foreclosure decree was entered within the four-months period immediately preceding the filing of said petition in bankruptcy.

Sweatt v Acres, 209-1288; 228 NW 74

Receivers — claims — unallowable attorney fees. An attorney who, under employment by a debtor whose property is under receivership, successfully defends an attempt to throw the debtor into bankruptcy, may not have his attorney fees paid from the receivership funds when the receiver and his attorney, under order of court, also appeared and successfully contested said bankruptcy proceeding.

Cook v McHenry, 208-442; 223 NW 377

V ENFORCEMENT OF LIEN

Lien as interest in judgment—basis for intervention. An attorney's lien, when perfected, creates an interest in a judgment and is a sustaining basis for an intervention by the attorney in a separate equity action to subject land to the payment of the judgment.

Grimes Sav. Bank v Jordan, 224-28; 276 NW 71

10925 Release of lien by bond.

Transaction with deceased partner. In an action by the surviving members of a firm of attorneys to recover attorney fees on the basis of a quantum meruit, the surety on the bond to release the lien for said fees is incompetent to testify that; after a large part of the services had been rendered, he had an oral agreement with the deceased partner to the effect that the firm would accept a certain definite sum for all services performed and to be performed.

Kelley v Bank, 217-725; 248 NW 9; 250 NW 171

10929 Revocation of license.

Discussion. See 8 ILB 65—Character qualifications—disbarment

Right to practice mere privilege. The right to practice law is not a constitutional right—not a vested right—but a mere privilege.

In re Cloud, 217-3; 250 NW 160

10930 Grounds of revocation.

Conviction of felony—judicial notice of reversal. On an appeal from an order disbarring an attorney on the ground that he has been convicted of a felony, the appellate court will take judicial notice that said conviction has been reversed by said court subsequent to the entry of the order of disbarment.

State v Metcalfe, 204-123; 214 NW 874

Abandoned conviction. A conviction of an attorney in police court for keeping a disorderly house followed by an appeal which has remained dormant for six years must be deemed abandoned as a ground for disbarment of the attorney.

State v Metcalfe, 204-123; 214 NW 874

Disbarment—evidence—sufficiency. Record reviewed and held ample to justify a judgment of disbarment of an attorney.

In re Cloud, 217-3; 250 NW 160

Disbarment—modification of judgment on appeal. A judgment of disbarment of an attorney may, in view of the immature age and inexperience of the accused, and the unappealing nature of the charges preferred and established against him, be modified on appeal by providing that the accused may, after a stated time, apply for reinstatement.

In re DeCaro, 220-176; 262 NW 132

Disbarment—settlement with client—effect. The fact that an attorney has settled with his client and fully accounted for all funds of the client does not preclude an examination of his conduct and his disbarment on proper proof of misconduct.

In re Cloud, 217-3; 250 NW 160

Grounds—false certificate as to bond.

In re Hunt, 201-181; 205 NW 321

Intoxicating liquor nuisance. Proof that an attorney has been enjoined from trafficking in intoxicating liquors, but that his participation in such trafficking was purely passive, does not furnish grounds for disbarment.

State v Metcalfe, 204-123; 214 NW 874

Quarreling, fighting and breaches of the peace. The fact that an attorney has been personally embroiled in quarrels with others and has inflicted grievous wounds upon them, does not furnish grounds for disbarment unless such transactions establish a lack of that professional integrity, honesty, and fidelity which are required in an attorney.

State v Metcalfe, 204-123; 214 NW 874

Solicitation of business. The solicitation of business by attorneys and the working up of legal controversies are unprofessional, and violate all the ethics of the profession.

State v Kaufmann, 202-157; 209 NW 417

10931 Proceedings.

Discussion. See 23 ILR 83—Liability of bar association—libel

Jurisdiction—how acquired.

In re Hunt, 201-181; 205 NW 321

Disbarment—jurisdictional order. The order of court, finding that formal charges against an attorney are sufficient to justify disbarment proceedings, and ordering copy thereof served on him and for his appearance, is juris-

dictional, but not the preliminary order for the investigation into the conduct of the attorney.

In re Cloud, 217-3; 250 NW 160

Disbarment—preliminary order. An order signed by all the judges of a district court directing the making of an investigation of the conduct of an attorney, and directing the conditional filing of disbarment proceedings, becomes an order of the district court when filed by the presiding judge in the proper county with the clerk of said court. And this is true tho said order was prepared and signed outside said county.

In re Cloud, 217-3; 250 NW 160

10934.4 Trial court.

Special court—constitutionality. The act of the supreme court in appointing three district court judges as a special court to hear and determine disbarment proceedings against an attorney is necessarily a holding that the statute providing for such appointment is constitutional.

In re Cloud, 217-3; 250 NW 160

Special court. The legislature has ample constitutional power to create a special court to hear and determine disbarment proceedings against an attorney and the fact that said special court is composed of three district court judges appointed by the supreme court does not constitute an attempt by the legislature to create a district court of three judges in violation of Art. V, §5, of the constitution.

In re Cloud, 217-3; 250 NW 160

10934.7 Record and judgment.

Majority decree. The findings and judgment of the special court for the trial and determination of disbarment proceedings, concurred in by a majority of the members of said court, are the findings and judgment of a court of record, because the requirement that such findings and judgment of said court shall constitute a part of the records of the district court ipso facto constitutes said special court a court of record.

In re Cloud, 217-3; 250 NW 160

10934.8 Pleadings—evidence— preservation.

Disbarment — evidence required. Evidence sufficient to disbar an attorney must clearly, satisfactorily and convincingly establish the wrongdoing charged.

In re DeCaro, 220-176; 262 NW 132

10936 Appeal.

Appeal heard de novo. An appeal by the accused in disbarment proceedings is triable de novo.

In re DeCaro, 220-176; 262 NW 132

De novo procedure. An appeal in disbarment proceedings against an attorney is, on a proper record, triable de novo, even tho tried by the special court as an action at law.

In re Cloud, 217-3; 250 NW 160

Modification of judgment on appeal. A judgment of disbarment of an attorney may, in view of the immature age and inexperience of the accused, and the unappealing nature of the charges preferred and established against him, be modified on appeal by providing that the accused may, after a stated time, apply for reinstatement.

In re DeCaro, 220-176; 262 NW 132

Permissible record. On appeal from an order of disbarment, the state has the right to present the entire record, even tho it embraces testimony relative to charges on which the accused was acquitted.

State v Kaufmann, 202-157; 209 NW 417

TITLE XXXI

GENERAL PROVISIONS RELATING TO CIVIL PRACTICE AND PROCEDURE

CHAPTER 484

FORMS OF ACTIONS

Malicious prosecution. See under §13728. **Negligence liability generally.** See Note 1 at end of chapter. **Torts generally.** See Note 2 at end of chapter

10938 "Proceedings" classified.

Atty. Gen. Opinion. See '36 AG Op 395

Election between securities. The holder of both a chattel and a real estate mortgage securing the same debt has the right to elect to proceed to the foreclosure of his mortgages and to abandon all interest in a block of trust bonds secured by trust deed on other real estate and held by him as collateral security for said debt, and in such case the foreclosure by the trustee of the trust deed and the buying in of the trust property by the trustee in the interest of the bondholders will not be deemed a payment to any extent of the chattel and real estate mortgage-secured debt.

Silver v Wickfield Farms, 209-856; 227 NW 97

Allowable legal and equitable actions at same time. Where each of a series of matured, mortgage-secured, promissory notes of the same maker possesses the same grade of lien, and is, by a trust agreement executed by the various noteholders, placed in the hands of a trustee with power to institute such actions as he may deem fit in order to effect collection, the trustee may maintain and carry on at the same time an action at law on a portion of said notes, and an action in equity to foreclose the mortgage for the remainder of the notes.

Iowa T & L Co. v Clark, 215-929; 247 NW 211

Presumptions—parties and actions. Presumptively, parties to an action in this state are residents of this state, and presumptively, the cause of action sued on arose in this state.

Farmers & M. Bk. v Anderson, 216-988; 250 NW 214

Duplicate actions on same subject matter—priority. When two actions involving the same subject matter are commenced by different parties (e.g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones et al. v Park, 220-903; 262 NW 801

Objections to executrix's report—real estate title issue not misjoinder—statewide jurisdiction. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

10939 Civil and special actions.

Discussion. See 20 ILR 106—"Mending hold doctrine"; 22 ILR 128—Cause of action defined

Atty. Gen. Opinion. See '36 AG Op 395

ANALYSIS

I ACTIONS IN GENERAL
II ELECTION OF REMEDIES
III IN REM GENERALLY

I ACTIONS IN GENERAL

Splitting causes—pleading. See under §11111 (II)

Special action defined. A proceeding for the forfeiture of a conveyance because of its use in the unlawful transportation of liquors is a special action, and not triable de novo on appeal.

State v Coupe, 205-597; 218 NW 346

Action at law as nonwaiver of lien. The obtaining of a judgment at law on an account and the sale of property seized on an attachment, do not constitute a waiver of a mechanic's lien for the same account to the extent that the judgment remains unpaid.

Southern Sur. v Serv. Co., 209-104; 227 NW 606

Condemnation of automobile—non de novo hearing. A proceeding for the condemnation of an automobile because employed in the unlawful transportation of intoxicating liquors will not be tried de novo on appeal. Whether the statutory presumption of knowledge of such use, by the claimant, has been negatived rests with the trial court.

State v Chrysler Coupe, 215-1308; 245 NW 243; 247 NW 639

Cumulative and exclusive remedy. A contract provision to the effect that, if damages accrue to one party, he may apply to the payment thereof any money in his hands belonging to the other party, is permissive only, and additional to the usual remedy by action in court.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Enjoining action in foreign state. A defendant who is a resident of this state may, even after he has filed formal answer, enjoin a plaintiff who is a resident of this state from maintaining in a foreign state an action on a contract arising in this state, when said action is sought to be maintained for the purpose of vexatiously harassing the defendant and subjecting him to unnecessary costs, part of which are untaxable as costs.

Bankers Life v Loring, 217-534; 250 NW 8

Illegal transaction. Principle reaffirmed that in an action on a fraudulent contract, as to which both parties are in pari delicto, the court will refuse relief to either party.

Schmidt v Twedt, 219-128; 257 NW 325

Lex fori procedure—exclusiveness. While, as a matter of comity, the courts of this state will, under proper pleading, recognize and enforce the civil rights and liabilities of parties to a tort committed in a foreign state—if not contrary to the public policy of this state—yet in determining all issues of fact on which such rights and liabilities depend, the judicial procedure of the courts of this state must be followed.

Kingery v Donnell, 222-241; 268 NW 617

Nature and form—submission with and without action. The filing of a petition and answer, without service of an original notice, and the submission of the matter to the court on an agreed statement of facts which stipulated for judgment for plaintiff in case the court found that a recovery should be allowed, followed by a motion by defendant for a verdict in his favor, show the institution and prosecution of an ordinary action, and not the submission of a controversy to the court without action, as provided by Ch 547, C., '24.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851

Splitting—insufficient showing. A mortgagee who, in foreclosure, continues until after decree and sale his application for the appointment of a receiver for the pledged rents does not thereby "split" his cause of action.

Equitable v Rood, 205-1273; 218 NW 42

Treating sight draft as paid and later denying payment. The drawer of a sight draft who sends it to a bank for collection, and knows that said bank has assumed to collect it, and has forwarded its own bank draft in payment of the collection, and who, after payment of the bank draft is refused because of the insolvency of the collecting bank, lays claim to said bank draft and establishes his claim thereon against the receiver, may not thereafter proceed against the receiver and the original drawee in the sight draft and obtain judgment against them on the pleaded theory that said drawee in the sight draft never in fact paid it—paid it by an overdraft on the collecting bank, and that the defendants must account to plaintiff for said overdraft.

Enterline v Andrew, 211-176; 231 NW 416

Writs of prohibition. The supreme court has original jurisdiction, under the constitution, to issue common-law writs of prohibition; but, when the application is for a writ directed to a district court and commanding it to discontinue further jurisdiction over named actions pending in said lower court, the supreme court must act solely on the established facts as revealed in the proceedings in said district court, and, if material disputed issues of fact arise, the writ will be refused, as the supreme court has no power to take testimony on disputed questions of fact dehors said district court records.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Inquisitions—appeal—special proceeding. An appeal to the district court from the finding of the county insanity commission is a special proceeding, and, since the legislature did not provide for a jury trial, the issue is triable to the court.

In re Brewer, 224-773; 276 NW 766

II ELECTION OF REMEDIES

Splitting causes. See under §§11111 (II), 11567 (VII)

Election of remedy. It cannot be said that a party conclusively elected his remedy by proceeding under a statute under which he was adjudged to have no right.

Hansen v Bank, 209-1352; 230 NW 415

Election of remedy. A mortgagor who, in foreclosure, pleads for judgment against his subsequent purchaser on the original contract of purchase, makes no such election of remedies as will prevent him from subsequently praying for such reformation of the deed to such purchaser as to show that the purchaser had assumed the mortgage debt.

American Bk. v Borcherding, 205-633; 216 NW 719

Election of remedies. A purchaser of land who rescinds, and obtains against the vendor judgment at law for the amount advanced as purchase price and for other proper expenditures, does not thereby waive his right to bring an action in equity to have the judgment declared a lien on the land.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

II ELECTION OF REMEDIES—continued

Election of remedies. The fact that a city institutes an action against its treasurer to recover its public funds is not an election of remedies such as will preclude the city from maintaining an action against a county treasurer to recover its funds illegally paid to the city treasurer.

State v Hanson, 210-773; 231 NW 428

Election of remedies—when doctrine applicable. The doctrine of election of remedies applies only when a party is attempting to pursue inconsistent remedies.

Andrew v Bank, 218-1313; 256 NW 292

When doctrine not applicable. The doctrine of election of remedies is applicable only to inconsistent remedies, but in a probate proceeding, the filing of a claim against estate of husband for the support of widow to whom husband bequeathed realty for life, with right of disposal of realty for her necessary support, held, not such an election of remedy as to bar proceeding in equity to establish the claim for support as a lien on realty.

Hoskin v West, 226-612; 284 NW 809

Inconsistent remedies. An administrator who has credible information for the belief and does believe that a wrongdoer has caused bank certificates of deposit belonging to the deceased to be paid by the bank on forged indorsements, and who, in an action between said wrongdoer and himself involving the estate, cross-petitions for judgment for the amount of the proceeds of said certificates, and who successfully prosecutes said cross-petition to judgment against the wrongdoer, thereby makes an election of remedies which precludes said administrator from subsequently maintaining an action against the bank on said certificates.

Sackett v Bank, 209-487; 228 NW 51

Inconsistent remedies — creditor bound by election. A creditor who is faced by the dilemma (1) of foreclosing his mortgage and treating the mortgagor as the sole debtor, or (2) of proceeding against a third party on the theory that said third party actually received the money in question under circumstances giving rise to an implied promise to return said money, and who chooses the former procedure, is irrevocably bound by his election. In other words, after taking personal judgment against the mortgagor and foreclosing against and selling the land with unfavorable results, he will not be permitted to proceed against said third party on the remaining, inconsistent theory.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Inconsistent remedies—holder of draft. One who receives a check from his debtor and, on presenting it, receives in payment from the drawee bank a draft which is dishonored because of the insolvency of the bank, and who thereupon seeks to be decreed the status of a preferential trust holder to the amount of the draft, but is decreed the status of a general creditor only, may not later reshape and refile his claim and be decreed subrogated to the rights of the depositor who originally drew the check; and especially is this true when the latter remedy was alternatively sought in the prior litigation.

Becker v Leach, 208-1347; 227 NW 344

Inconsistent remedies—irrevocable election—effect. A judgment creditor who, instead of satisfying his judgment (1) by enforcing his lien on personal property which his judgment debtor had assigned to him as security, satisfies said judgment, (2) by buying in the same property under a general execution levy and sale under his said judgment, must be deemed to have irrevocably waived all right under his said assignment as security, it appearing that after said levy but before the sale thereunder, the said judgment creditor learned that the judgment defendant had also assigned said property to another party.

Zimmerman v Horner, 223-149; 272 NW 148

Noninconsistent remedies. The commencement of an action of replevin to recover the possession of promissory notes does not constitute the election of a remedy which will preclude the subsequent filing of a substituted petition presenting the controversy in the form of an action in equity.

Pickford v Smith, 215-1080; 247 NW 256

Noninconsistent action. Where a bank credits its correspondent bank with the amount of a check forwarded by the correspondent, and, in reliance on said credit, pays the drafts drawn on it by the correspondent, the act of said crediting bank in cancelling the said credit on learning of the insolvency of said correspondent, and in returning said check to the receiver as a claim against the correspondent, is not such an election of remedies as will estop the crediting bank from later contending that it had, in due course of business, become the absolute owner of said check.

Bureau Service v Lewis, 220-662; 263 NW 7

Pursuing noninconsistent remedies. A policy holder who, in an action at law, pleads that the insurer has waived that provision of the policy which invalidates the insurance in case of a change in the title to the insured property, and is unsuccessful on appeal in sustaining said plea, does not thereby make such an election of remedies as will prevent him, after remand, from amending and praying in equity that the policy be so reformed as to eliminate the invalidating provision.

Green v Ins. Co., 218-1131; 253 NW 36

Action for contract possession works no rescission. The vendor in a conditional sale con-

tract by instituting replevin for the possession of the article, as provided by the contract in case of the vendee's default, manifests a clear intent to stand on the contract, and not to rescind it. It follows that the refusal of the court to submit to the jury the issue of rescission and return of the purchase price is proper.

Mintle v Sylvester, 202-1128; 211 NW 367
Schmoller Co. v Smith, 204-661; 215 NW 628

Action to enforce partner's liability — waiver. The liquidating receiver of a private bank, when appointed with power to bring action against the partners on their individual liability, may, with the approval of the court, and notwithstanding the objections of a creditor, settle and compromise the liability of a partner when the creditor has appeared in the receivership proceedings and secured the allowance of his claim.

Reason: The creditor, by submitting himself to the jurisdiction of the receivership court, irrevocably elects his remedy.

Ellis v Bank, 218-750; 251 NW 744

Amendment—no election of remedies. In an action to compel certain heirs to contribute a share of a judgment arising out of a decedent's ownership of bank stock, a petition that alleges defendants' liability as individuals is not an election of remedies so as to prevent an amendment thereto setting up liability against an estate as an additional party, since there was no change in the nature of relief asked and no choice was made between inconsistent remedies at the time of the election.

Daniel v Best, 224-1348; 279 NW 374

Changing amendment. A plaintiff who, in a timely brought action, pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, and who, after discovering his inability to prove the pleaded rescission, and after the statute of limitation has fully run against his cause of action, amends his pleadings by praying for damages consequent upon the fraud, does not thereby plead a new cause of action. He simply exercises his permissible right to change the remedy.

Reinertson v Struthers, 201-1186; 207 NW 247

Breach of patent license contract. When a patent licensee ceased to pay royalties due the licensor, the licensor was not limited to an action against the licensee as a patent infringer, but could elect to treat the contract as still in force and bring an action to collect royalties.

Eulberg v Cooper, 226-776; 285 NW 131

Conclusive election of remedy—nonapplicability of doctrine. A party who elects to pursue one of two or more concurrent, inconsistent remedies is absolutely bound thereby, but the purchaser of land who, subsequent to the purchase, pays the contract price by reconveying to the vendor is not thereby necessarily estopped to sue for false representation in the original sale.

Boysen v Petersen, 203-1073; 211 NW 894

Irrevocable abandonment of action. An intervenor who pleads a personal claim to specific attached property, but later joins with other intervenors in a joint demand for judgment for all the property seized on the attachment belonging to all the intervenors, and receives a part of the resulting judgment when it is paid, must be held to have irrevocably abandoned her formerly pleaded personal claim.

Peoples Bank v McCarthy, 211-40; 231 NW 482

Mistake in remedy. The filing of a claim against an estate will not estop the party from abandoning such claim and instituting an action for a partnership accounting with deceased when such latter proceeding was his sole allowable remedy.

Hull v Padgett, 207-430; 223 NW 154

Noninconsistent action. The bringing of an action against a party on his obligation is not such election of remedies as will bar an action on the same obligation, but against a third party who has agreed to pay it.

Mohler v Andrew, 206-297; 218 NW 71

Paving — suing city on express contract. Where a holder of invalid paving assessment certificates elects to base his recovery solely on an express written contract, no question of estoppel, waiver, ratification, or accord and satisfaction is involved.

Lytle v Ames, 225-199; 279 NW 453

Rent—dual lien—election. A landlord seeking to enforce a dual lien for the rent, viz: a contract lien by virtue of the lease, and the statutory lien by virtue of the statute, need not elect on which lien he will proceed.

Mau v Rice Bros., 216-864; 249 NW 206

Statutory and contract lien for rent. A landlord who seeks to enforce his statutory lien for rent through an ordinary landlord's attachment makes no election of remedies such as will prevent him from amending his pleading and asking the foreclosure of a contractual lien embraced in the lease. Both remedies are coexistent and consistent.

Pickler v Lanphere, 209-910; 227 NW 526

III IN REM GENERALLY

Discussion. See 7 ILB 138—Actions in personam and actions in rem in Iowa; 25 ILR 329—General appearance—quasi in rem

Cancellation of mortgage as real action—venue change to land situs. Ultimate test of applicability of §11034, C., '35, is not whether

III IN REM GENERALLY—concluded

proceeding is in personam or in rem but whether determination of a right in real estate is involved, and therefore an action for cancellation of mortgages involving a determination of a right in real estate, which is the subject of the action, must be brought in the county where the land is located, and granting change of venue thereto will be upheld on certiorari.

Whalen v Ring, 224-267; 276 NW 409

Primary jurisdiction in personam—decree affecting status of bank deposit. Primarily and fundamentally, courts of equity act only in personam, and it is only by statute that they have acquired jurisdiction to act directly in rem. The fact that a decree determines the rights of parties to a bank deposit from insurance proceeds, and indirectly affects the status thereof, does not make the proceeding one in rem.

In re Hazeldine, 225-369; 280 NW 568

10940 Forms of action.

Abolition of forms. See under §11108

Foreclosure—agreed public sale. An agreement between chattel mortgagees and the chattel mortgagor that the mortgaged property shall be sold at public sale and the proceeds turned over to the mortgagees in the order of their liens, is valid and enforceable in equity. In other words equity, in order to enforce the agreement, will impress a trust on said proceeds in favor of said mortgagees, even tho the occasion so to do arises in a proceeding at law, to wit, a garnishment.

Jasper Co. Bank v Klauenberg, 218-578; 255 NW 884

Foreign remedial statute—nonapplicability. The remedial statutes of a foreign state, authorizing an action in said state against a corporation which has been dissolved at the instance of said state, do not and cannot control the procedure when the action is sought to be maintained in this state; and especially is this true when said authorized foreign procedure is contrary to the procedural law of this state.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Insured's remedy—law (?) or equity (?)—law action on contract proper. An insured under an accident policy has a plain, speedy, and adequate remedy at law, to wit: action on the contract; and, unless the insurer makes unreasonable and bad-faith demands on insured, he is not entitled to relief in equity.

Eller v Guthrie, 226-467; 284 NW 412

Nature and form—statutory remedies not necessarily exclusive. A statutory remedy will not be construed as abrogating an existing common-law remedy unless the statute affirmatively indicates an intention to make the statutory remedy exclusive.

Jones v Knutson, 212-268; 234 NW 548

Nontransfer to equity on cross-petition merely re-stating answer. An action at law to recover bank deposits does not become a suit in equity because of defendant's cross-petition which only served to amplify and repeat the defense pleaded in the answer.

Younkin v Bank, 226-343; 284 NW 151

Paternity statutes—proceedings civil. The statutory proceeding to determine paternity and for support money is not a criminal proceeding but is tried as an ordinary action.

State v Devore, 225-815; 281 NW 740

Prayer not necessarily controlling. The prayer to a petition is not necessarily controlling on the question whether the action is at law or in equity.

Markworth v Bank, 212-954; 237 NW 471

Submission with and without action. The filing of a petition and answer, without service of an original notice, and the submission of the matter to the court on an agreed statement of facts which stipulated for judgment for plaintiff in case the court found that a recovery should be allowed, and followed by a motion by defendant for a verdict in his favor, show the institution and prosecution of an ordinary action, and not the submission of a controversy to the court without action, as provided by Ch 547, C., '24.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851

Taking gravel—injury to mortgage security—measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt County, 224-841; 277 NW 715

Wrong form of action. Supreme court cannot assume jurisdiction on appeal where the matter in issue is not such as was triable in the form of action brought in the trial court below.

Anderson v Meier, 227-38; 287 NW 250

10941 Equitable proceedings.

Discussion. See 20 ILR 1—Equity and property law; 20 ILR 106—"Mending hold doctrine"

ANALYSIS

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I EQUITABLE ACTIONS—JURISDICTION

Discussion. See 19 ILR 406, 540—U.S. courts—consent receiverships

Exclusive equitable action. Equity has exclusive jurisdiction of a petition which, in effect, alleges that a husband and wife mutually pooled their efforts and respective personal properties in a joint undertaking under their joint management, and with title in the husband to the properties and to their future accumulations; that it was agreed that the properties should be so employed by the survivor of the two, and on the death of the latter, should be divided equally among the heirs of each; that both parties are now dead; that plaintiffs are the heirs of the wife,—with prayer for a money judgment and general relief, together with other allegations of an equitable nature.

McAnulty v Peisen, 208-625; 226 NW 144

Primary jurisdiction in personam. Primarily and fundamentally, courts of equity act only in personam, and it is only by statute that they have acquired jurisdiction to act directly in rem. The fact that a decree determines the rights of parties to a bank deposit from insurance proceeds, and indirectly affects the status thereof, does not make the proceeding one in rem.

In re Hazeldine, 225-369; 280 NW 568

Accounting—opening de novo—exceptions. In some cases of gross fraud, mistake or disadvantage, equity will open the whole accounting de novo, but if all items are not so affected, equity may (1) allow the account to stand except to the extent invalidated by the opposing party, who has the burden to prove errors, or (2) open the account to contest as to such items as are specified to be erroneous, otherwise conclusive.

Clark v Bank, 223-1176; 274 NW 919

Contract to purchase estate property—equity action. Bank receiver's specific performance action to require heirs to perform contract to purchase receiver's interest in estate property is not lacking in mutuality and is not transferable to law because involving both personal and real property, since equity once acquiring jurisdiction retains it for all purposes, and since cross-petition filed by heirs also asking specific performance, is sufficient reason to deny transfer to law.

Utterback v Stewart, 224-1135; 277 NW 735

Court's jurisdiction—legal issues. In action for a money judgment, foreclosure of a mortgage and appointment of a receiver, the equity court had jurisdiction of the controversy and parties. The action having been properly brought in equity, all issues, legal and equitable, are triable therein.

Deaton v Hollingshead, 225-967; 282 NW 329

Claims—lapsed time for hearing—reopening discretionary. Trial court administering receiverships has a discretion dependent upon equitable circumstances and not a mandatory duty to permit a claim to be presented and heard after the time fixed therefor.

Headford et al. Co. v Associated Co., 224-1364; 278 NW 624

Election of remedies. The doctrine of election of remedies is applicable only to inconsistent remedies, but in a probate proceeding, the filing of a claim against estate of husband for the support of widow to whom husband bequeathed realty for life, with right of disposal of realty for her necessary support, held, not such an election of remedy as to bar proceeding in equity to establish the claim for support as a lien on realty.

Hoskin v West, 226-612; 284 NW 809

I EQUITABLE ACTIONS — JURISDICTION—continued

Enjoining unlicensed person practicing law. In an equity suit brought by members of bar for injunction to restrain an unlicensed person from professing to be an attorney and from practicing law, where irreparable damage was the gist of the action, this subject matter was within the jurisdiction of the district court.

Johnson v Purcell, 225-1265; 282 NW 741

Mandamus. A mandamus proceeding, altho originally an action at law under Iowa practice, is now triable in equity and, in the determination of such action, the court must necessarily apply equitable principles.

Briley v Board, 227-55; 287 NW 242

Selection of official county newspapers — speedy and adequate remedy — jurisdiction. Mandamus to compel county supervisors to select petitioner's newspaper as one of three official newspapers was a proper procedure where petitioner was one of three applicants and had no plain, speedy, and adequate remedy at law, since there was no contest in the selection from which an appeal would lie under §5406, C., '39.

Bredt v Franklin County, 227-1230; 290 NW 669

Probate court. Where a clear and unambiguous will is admitted to probate and administration is being had thereon in probate court, the jurisdiction of such court to determine any rights thereunder, and to administer and direct the disposition of the property involved, cannot be interfered with by a court of equity.

Anderson v Meier, 227-38; 287 NW 250

Merger of estates—nonapplicability of doctrine. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Mutual wills—enforcement in equity. Mutual wills are those made as separate wills of two people which are reciprocal in provision. Such wills may be enforced in equity.

Child v Smith, 225-1205; 282 NW 316

Objections to executrix's report—real estate title issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

Ordinary probate proceedings—noninterference by equity court. An equity court may not interfere with the ordinary proceedings of the probate court in exercising its exclusive jurisdiction in the administration of estates. Rule applies when probate court is following the manner and the method provided by the testator in the will.

First Methodist Church v Hull, 225-306; 280 NW 531

Widow's support—probate claim denied—no bar in subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Pupils' residence determined by school district. When school district had exclusive jurisdiction to determine residence of pupils, it waived such exclusive jurisdiction by bringing equitable action in district court, as all material matters necessary to determine the issues, including the determination of residence, were before the court and within its jurisdiction.

School Twp. v Nicholson, 227-290; 288 NW 123

Practicing medicine without license—injunction — constitutionality. The statute which authorizes injunction to restrain the practice of medicine and surgery without a license is

constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances; and this is true irrespective of the question whether the district court may be constitutionally vested with an equitable jurisdiction not possessed by chancery courts when the state constitution was adopted.

State v Howard, 214-60; 241 NW 682

Remedy at law. Equity will not assume jurisdiction to declare illegal and to enjoin the enforcement of a contract between an employer and a local labor union on behalf of the employees when the controversy may readily be presented in a law action. So held where the contract required the employer to retain certain sums from the pay of each employee and to pay the same to the local union as members' dues, it appearing that some of the employees had objected to the retention of said sums.

Des Moines Railway v Amalgamated Assn.. 204-1195; 213 NW 264

Setting aside executed contract or deed. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v D. M. Nat. Bank, 18 F 2d, 269

Unallowable cancellation in equity of insurance policy. Equity will not, after the death of the insured, entertain jurisdiction to cancel the life insurance policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

Vacation of plat. A county auditor's plat may be vacated by a court of equity at the instance of a plaintiff who, since the plat was duly executed, has become the owner of all the various tracts embraced in said plat.

Schemmel v Town, 214-321; 242 NW 89

II LAW AND EQUITY CONCURRENT

Law action tried by equity procedure—errors must be assigned. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v Ins. Co., 225-293; 280 NW 521

III LAW OR EQUITY DEPENDING ON ALLEGATIONS AND RELIEF

Calendars—right to trial at law. A plaintiff who, in an ordinary action on a promissory note, alleges a fraudulent transfer by defendant of his property and prays for an attachment and a decree subjecting the property to his judgment, does not, by docketing said action in equity, deprive defendant of the right to a transfer to the law calendar of that part of the action which involves his liability on the note.

Fed. Bk. v Geannoulis, 203-1385; 214 NW 576

Claims against estate—belated filing—equitable circumstances. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband, who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Damages in lieu of specific performance. A party who has failed to establish his right to specific performance, may not complain that the court of equity refused to allow damages in lieu of specific performance, and relegated him to an action at law as to such damages.

Dunlop v Wever, 209-590; 228 NW 562

Redemption—law remedy to remove tax sale cloud. A property owner, presumed to have been informed of his tax assessments, know-

III LAW OR EQUITY DEPENDING ON ALLEGATIONS AND RELIEF—concluded

ing that they will become due and payable without demand, yet allowing the taxes to become delinquent and the property to go to tax sale, may not resort to equity to remove the cloud on his title when he has by redemption a plain, speedy, and adequate remedy at law.

Jones v Mills County, 224-1375; 279 NW 96

Trial de novo. An action which plaintiff denominates when commenced as "in equity", and which is fully tried "in equity" without objection or effort to transfer to law, will, on appeal by defendant, be treated as "in equity" and tried de novo, without assignment of error.

Bates v Seeds, 223-70; 272 NW 515

IV GRANTING OF RELIEF IN GENERAL

(a) IN GENERAL

Discussion. See 18 ILR 266—Champerty with third party; 24 ILR 337—Mistake of law

Common fund doctrine.

In re Lear, 204-346; 213 NW 240

Accounting — setting aside final report. Principle reaffirmed that the final report of an executor or administrator, after due approval and discharge, will be set aside only on a clear and satisfactory showing of fraud, mistake, or other equitable grounds. Evidence held to justify such order.

Becker v Becker Bros., 202-7; 209 NW 447

Defense arising or discovered since judgment entered. The fact that a claim, when judgment was entered thereon, had been discharged in bankruptcy is not a "defense which has arisen or been discovered since the judgment was rendered," and therefore within the power of a court of equity to annul or modify.

Harding v Quilan, 209-1190; 229 NW 672

Duty to set aside fraud-induced deed. When a deed has been manifestly obtained by the fraud of the grantee, and without consideration, a court of equity must set it aside, on a distinct prayer for such relief, and not assume to reform it, without any prayer therefor, and decree a life interest in the defrauded grantor.

Guenther v Kurtz, 204-732; 216 NW 39

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Equitable relief for fraud. In action for equitable relief and damages, where proof justified the purely equitable relief of quieting title and cancellation of mortgage because of fraud, entry of personal judgment for damages against grantee was proper.

Rance v Gaddis, 226-531; 284 NW 468

Equitable assignment. The oral statement by the president of a bank, made to the payee of a draft at the time of its issuance and delivery, that the draft "operated as an assignment" of an equal amount of money then in the hands of the drawee-bank and belonging to the issuing bank does not constitute an actual assignment.

Andrew v Bank, 215-290; 245 NW 329

Promise to apply proceeds—equitable assignment. Promise not to sell or mortgage any real estate (which was not described) and that proceeds of any sale or mortgage should be applied on payment of debt, held not to create an equitable assignment of proceeds of sale or mortgage.

Kuppenheimer v Mornin, 78 F 2d, 261

Father promising son's creditor not to change son's legacy. Simply because a testator contracts with a bank not to change his will bequeathing $10,000 to a son who was indebted to the bank, and when the father did not contract to pay the son's debt, there is no "unjust enrichment" of devisees and legatees who accept property willed to them, although father during his lifetime had depleted his estate by property transfers and conveyances to his other children.

Evans v Cole, 225-756; 281 NW 230

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband, who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the

children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Improvements—special assessment—appeal as sole remedy. The objection that the board of supervisors levied an assessment for a highway improvement against an entire 40-acre tract, instead of that part only which was at right angles to the improvement, must be presented on appeal from the assessment, and not by an independent action in equity.

Paul v Marshall County, 204-1114; 216 NW 736

Legal and conventional subrogation distinguished. Legal subrogation exists only in favor of one who, to protect his own rights, pays the debt of another. Conventional subrogation arises only upon agreement, between the lender and the debtor or old creditor, that the lender shall be subrogated to the old lien.

HOLC v Rupe, 225-1044; 483 NW 108

Liens—impressment of trust on proceeds of sale. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee, and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds. So held as to rent due a landlord.

Stegemann v Bendixen, 219-1190; 260 NW 14

Origin and theory of subrogation. The doctrine of subrogation is purely of equitable origin and grew out of the need, in aid of natural justice, in placing a burden where it of right ought to rest.

HOLC v Rupe, 225-1044; 483 NW 108

Relief notwithstanding partial failure of recovery. A subcontractor on a public improvement who, in an equitable action, establishes a contract right of recovery against the principal contractor is entitled to judgment accordingly, notwithstanding the fact that, because of his noncompliance with the statute, he is denied recovery, either against the surety for the principal contractor, or against the municipality, or against the undistributed funds in the hands of the municipality.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Restoration of status quo. An incompetent, through his guardian, may, on proper grounds, maintain an action to set aside and annul a judgment in foreclosure without offering to restore the status quo, when the incompetent received no part of the money secured by the mortgage.

Engelbercht v Davison, 204-1394; 213 NW 225

Equitable assignment—sheriff's certificate—homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Town, 215-82; 244 NW 707

Interstate shipment—building contractor not consignee—nonliability. A common carrier's petition against a building contractor alleging transportation as a benefit received, alleging unjust enrichment and nonpayment, and seeking to collect transportation charges on an interstate shipment of building material is demurrable and fails to state a cause of action in omitting an allegation showing a contractual liability on the defendant contractor as a party to the shipping contract.

Des Moines & C. I. Ry. v Ins. Co., 224-15; 276 NW 56

Right to reconvert—consent of spouse. The right of a legatee to make and enforce an election to take real estate in lieu of a devise of the proceeds thereof does not depend in any degree on the consent of the spouse of such legatee.

In re Warner, 209-948; 229 NW 241

Scope of relief. In equitable action where pleading "was not as clear as it might have been", yet prayed for general equitable relief, court enforced express provisions of legal contract to preserve rents and profits under the rule that where general equitable relief is prayed, any relief may be granted consistent with the pleadings and the evidence.

Wagner v Securities Co., 226-568; 284 NW 461

Supreme court—no power to enjoin unlicensed person practicing law. Supreme court has no implied power, by virtue of its exclusive statutory power to admit persons to prac-

IV GRANTING OF RELIEF IN GENERAL—continued

(a) IN GENERAL—concluded

tice as attorneys, .to enjoin unlicensed law practice, for it has no original jurisdiction to grant injunctive relief, and an equity action therefor by members of bar is in no way related to the matter of admission to bar or disbarment.

Johnson v Purcell, 225-1265; 282 NW 741

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced, unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "equitable trust fund doctrine" does not apply to such a condition.

Fundamental reason. Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Accounting—trial de novo—record. Tho defendant, in an equitable action for an accounting, unsuccessfully moves at the close of plaintiff's testimony for a dismissal of the action, yet the final determination of the action must be determined, in the trial court and on appeal, on the entire record testimony including that introduced by said unsuccessful movant.

Economy Co. v Honett, 222-894; 270 NW 842

(b) EQUITABLE LIENS GENERALLY

Claimant planting crops subsequent to receiver's appointment—value of labor and material allowed. Claimant who, before institution of foreclosure suit in which receiver for mortgagor was appointed, had furnished and planted seed under oral agreement with mortgagor's heirs held entitled to reasonable value of labor and material from receivership fund.

Chicago JSL Bank v Hargrove, (NOR); 234 NW 801

Wife's deed to husband's creditors as mortgage. Wife's deed to creditors in payment of husband's notes, under circumstances, construed as mortgage with right to creditors to foreclose.

Allen v Hume, 227-1224; 290 NW 687

Franchise renewal—no corporate obligation nor lien. Statute requiring majority stockholders, voting for renewal of corporate franchise, to purchase objecting stockholders' stock creates no liability against the corporation nor lien on its assets.

Terrell v Tel. Co., 225-994; 282 NW 702

Attachment liens set aside—insolvency. In an equity action brought by trustee in bankruptcy to set aside and annul an attachment lien upon the bankrupt's property, the provisions of the Bankruptcy Act are such that it is essential that the person attacking a lien must show that debtor was insolvent when the lien was obtained.

Matthews v Engineering Co., 228- ; 292 NW 64

Impressment of lien—special execution. A court of equity upon impressing a lien on property should order the issuance of a special execution for the sale of the property and the satisfaction of the lien.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

No lien. Where no real estate was described, promise not to convey or mortgage any real estate then owned until payment of debt guaranteed by promisor, and that proceeds of any sale or mortgage should be applied on such debt, held not to have created equitable lien on promisor's real estate.

Kuppenheimer & Co. v Mornin, 78 F 2d, 261

Partners—agreement for lien—construction. A partnership agreement which provides that it shall stand as security for all money "advanced to said business" by the second party, and all indebtedness of the first party to the second party, does not embrace the right to a lien for money not shown to have been "advanced to said business", nor for money advanced subsequent to the said agreement.

Reilly v Woods, 216-419; 249 NW 381

Testator's contract to devise to son—will changed after loan relying thereon. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor son.

Emerson Bank v Cole, 225-281; 280 NW 515

Vendor's and equitable lien contrasted. The power of a court of equity to establish an equitable lien is quite independent of the law applicable to a vendor's lien.

Bogle v Goldsworthy, 202-764; 211 NW 257

(c) MARSHALING ASSETS

Discussion. See 24 ILR 328—Marshaling assets

Marshaling assets—inadequate showing in order to apply doctrine. An assignee of property subject to a prior judgment is not entitled to the benefit of the doctrine of marshaling of assets by simply alleging and proving the naked fact that the judgment holder has mort-

gage security on other property for his judgment debt.

Iowa Co. v Clark, 213-875; 237 NW 336

Marshaling of assets. In the foreclosure of a valid and good-faith real estate mortgage by a mortgagee who also holds chattel security for the same debt, a judgment creditor and a junior lienholder may not have a marshaling of assets in the absence of any duly joined issue relating thereto, and when the real estate is of a value sufficient to satisfy all liens against it; neither may the court arbitrarily decree that the plaintiff's mortgage shall have priority over the junior lien to an amount less than the full amount due on the mortgage.

White v Smith, 210-787; 231 NW 309

Partnership assets marshaled. Where partnership property and the individual property of all the partners are in the hands of the partnership receiver, a creditor whose claim is against the partnership because of a partnership transaction, and also against an individual partner because the partner has individually guaranteed the claim, may have the assets so marshaled that he will share in the partnership property along with the other partnership creditors, and then resort to the individual property of the guaranteeing partner to the exclusion of partnership creditors.

Simmons v Simmons, 215-654; 245 NW 597

Valuation of accounts. The fair valuation of accounts is that amount which, with reasonable diligence, can be realized from their collection within a reasonable time, and the amount as shown on the face of ordinary retail business accounts is not usually their fair value, tho of course accounts may be such that their face value, as a matter of fact, is their fair value.

Matthews v Engineering Co., 228- ; 292 NW 64

Valuation of business assets—evidence. In an equity action by trustee in bankruptcy to set aside an attachment lien wherein the attaching creditor urges the insufficient showing of the debtor's insolvency, the evidence of the trustee as to fair valuation of the personal assets of a lumber company was sufficient to sustain the finding of the court as to valuation. Since the record stipulated the appraisal found by two competent lumbermen, acquainted with such values, substantiated the value placed thereon by the trustee, and, as the trustee was not bound by any one witness' testimony, it was the function of the court to consider all the admissible evidence.

Matthews v Engineering Co., 228- ; 292 NW 64

Valuation of realty—evidence. In an equity action brought by trustee in bankruptcy to set aside an attachment lien on bankrupt's property, where judgment creditor complains of the evidence establishing the valuation in order to determine debtor's insolvency, and where creditor relies on a valuation of $4500 offered for the property several years previous, but which offer had not been subsequently made by anyone, the reasonable finding, in view of all the evidence, is that the fair value of such property did not exceed $2600.

Matthews v Engineering Co., 228- ; 292 NW 64

V PRINCIPLES AND MAXIMS

Preservation of property by administrator. In proceeding to recover from surety on administrator's bond, principle held applicable that a trustee is presumed to have preserved the property and that such presumption stands until overcome by evidence. Fact that such proceeding is at law does not preclude application of equitable principles.

In re Willenbrock, 228- ; 290 NW 503

Clean hands—collateral transaction. Principle recognized that a plaintiff is not deprived of his right to equitable relief in a given transaction simply because his hands were somewhat soiled by fraud in another subsequent transaction which is only incidentally or collaterally connected with said prior transaction.

Benson v Sawyer, 216-841; 249 NW 424

Construction—clear and unambiguous wills. In equitable action for construction of wills of deceased husband and wife, where husband's will provided for payment of debts and funeral expenses and devised to his wife all his estate; and where wife's will contained certain specific bequests and directed that remainder and after-acquired property be divided into equal shares for distribution, held, both wills to be clear and unambiguous and therefore not open to construction. Actions for that purpose are entertained by a court of equity or probate only when there is uncertainty or ambiguity.

Anderson v Meier, 227-38; 287 NW 250

Equal equities—which shall prevail. Principle reaffirmed that as between equal equities, the first in time shall prevail—that the first in time shall be first in right. Applied as between special assessment certificates issued at different times against the same lots or land for different improvements.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Two innocent parties—one liable who made wrongful act possible. Where one of two innocent parties must suffer from the wrongs of a third person, he who placed the wrongdoer in a position to do the wrong must suffer the consequences of his act.

Allen v Hume, 227-1224; 290 NW 687

Equitable representation—limit to doctrine. The rule that in some instances a person may,

V PRINCIPLES AND MAXIMS—concluded

on the principle of "equitable representation", be bound by an adjudication bearing on the title to realty, tho said person is not a party to the action in which the adjudication is had, cannot be extended to include persons who are in being and subject to being brought under the jurisdiction of the court, and who are entitled to notice and hearing as to the matter in question.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

Reformation of deed—refusal to surrender advantage. The grantee in a deed of conveyance who has obtained a decree quieting his title on the plea that the deed was in satisfaction of the grantor's prior mortgage on the land may not, while insisting on all the advantages accruing to him under the decree, have the deed so reformed as to include the grantor's homestead, on the claim that the homestead was mistakenly or fraudulently omitted from the deed.

Galvin v Taylor, 203-1139; 212 NW 709

Sale—tax tender as doing equity before enjoining deed issuance. One who allows his property to go to tax sale and later seeks to enjoin the county from issuing a tax deed claiming a void sale must, if seeking equity, do equity by tendering the amount of the taxes due and attempt to make redemption as by statute provided.

Jones v Mills County, 224-1375; 279 NW 96

VI LACHES AND STALE DEMANDS

Action in 1923 to enjoin excessive assessment of 1919—no laches. Banks suing in 1923 to enjoin excessive levy in years 1919 to 1922, inclusive, held, not estopped by laches.

Munn v D. M. Nat. Bank, 18 F 2d, 269

Federal court rule as applied to state statute. The rule in federal courts in equitable actions is that state statutes of limitations are not controlling but will be followed in application of the doctrine of laches unless the circumstances of the particular case are convincing that a shorter or longer period would be just.

Crawford Bank v Crawford County, 66 F 2d, 971

Limitation of action—failure to plead—no question of laches presented. In action to quiet title by owner of land against a tax deed which had been issued on an insufficient affidavit of service of notice of expiration of redemption from tax sale, where the right to redeem had not expired, and no claim of statute of limitations was made, no question of laches was presented.

Weideman v Pocahontas, 225-141; 279 NW 146

Banking corporations—stockholders—double liability—laches as bar. Record reviewed and held insufficient to show such laches as would bar an action to enforce, against the estate of a stockholder, the latter's statutory, superadded liability on capital stock.

Bates v McGill, 223-62; 272 NW 535

Bridge abandoned—sleeping on one's rights. A property owner who, with his grantor, has acquiesced for over a half century in the action of public authorities in substituting a solid earth embankment for a bridge spanning a natural drain across a public highway, need not expect a court of equity to listen to his belated demand for a reinstatement of the bridge.

Thomas v Cedar Falls, 223-229; 272 NW 79

County paying support of insane person—*laches of officials imputed to county.* When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Detachment of territory—unallowable defense. The fact that territory has remained within a municipality for some half century without the institution of proceedings to have it detached, furnishes no basis, when such proceedings are instituted, for the defensive plea of laches, equitable estoppel, or acquiescence.

McKeon v Council Bluffs, 206-556; 221 NW 351; 62 ALR 1006

Estoppel to rely on limitation—essential evidence. The maker of a promissory note cannot be held estopped to plead the statute of limitation in the absence of evidence of some act of omission or commission upon which the holder relied to his detriment.

King v Knudson, 209-1214; 229 NW 839

Laches—nonoperative as to unknown issue. Where an equitable issue involving an oral contract is unknown to plaintiff until pleaded by defendant, plaintiff is neither guilty of laches in withholding the issue nor thereby deprived of its benefits, when, because of death, the defendants have in the meantime lost the benefit of the testimony of one of the parties to the oral contract and equitable issue.

Emerson Bank v Cole, 225-281; 280 NW 515

Unavailable plea. Laches will not be imputed to a person in possession of property to the advantage of one who has contracted in relation thereto without inquiry or investigation as to the rights of such possessor.

Lutton v Steng, 208-1379; 227 NW 414

Licenses—for occupations—estoppel—evidence—sufficiency. It is futile for the defendant, in an action by the state to enjoin the defendant from practicing medicine without a license, to plead that the state and its officers are estopped to question his right to so practice, and assume to support such plea by the fact that the state had not, for twenty years, questioned his right so to practice tho he had never offered to take the statutory examination for any recognized system of practice.

State v Howard, 216-545; 245 NW 871

Partnership—accounting. An action to establish a partnership of some 35 years standing and for an accounting thereunder is not barred by laches when the plaintiff moved with reasonable promptness after his interest was questioned.

Hull v Padgett, 207-430; 223 NW 154

Principles—sleeping on rights. One who, without requiring the production of a note, innocently pays the note to one who is not the agent of the holder may not insist that the said holder, and not himself, should suffer the loss, especially when the latter, upon discovering the truth, does nothing to protect himself against the solvent wrongdoer.

Ritter v Plumb, 203-1001; 213 NW 571

Right to corporate transfer of stock. Delay of some seven years by a pledgee of corporate shares of stock, to enforce his right to have the stock transferred on the corporate stock records, will not bar the enforcement of said right when there are no unprotected rights of third parties intervening and when the corporation has not been harmed by the delay.

Bankers Tr. v Rood, 211-289; 233 NW 794; 73 ALR 1421

VII ESTOPPEL GENERALLY

Discussion. See 1 ILB 142—Estoppel by silence; 17 ILR 472—By record and in pais

"Estoppel" and "waiver" contrasted. Principle reaffirmed that, to constitute waiver, action to the prejudice of the party relying thereon is not essential, while such showing is essential to estoppel.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Acting to one's detriment. An estoppel necessitates proof that a party has acted to his detriment because of something done by the other party.

In re Sarvey, 206-527; 219 NW 318

Innocent parties—most blameworthy to suffer. Where one of two innocent people must suffer because of the wrongful act of a third person, that one must suffer who has placed the third person in a position to do the wrong.

Deater v Bank, 223-86; 272 NW 423

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Absence of fraudulent intent. Principle reaffirmed that a fraudulent intent is not a necessary element of an equitable estoppel.

Browning v Kannow, 202-465; 210 NW 596

Fundamental element. Fundamentally a plea of estoppel demands proof that the person alleged to be estopped has done something, or omitted to do something which he ought to have done, which has justifiably caused the pleader to change his position to his detriment.

Macheak v Adamsen, 214-446; 239 NW 574

Inconsistent conduct not relied on. An estoppel may not be rested on alleged inconsistent conduct on which the pleader never relied.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Streets and alleys—estoppel to open. A city estops itself from asserting any right in and to a public alley when, knowing that a person has taken possession of such alley under a claim of right, it permits such person to remain in undisturbed possession under such claim for ten years and to erect valuable improvements on such alley.

Page Co. v Clear Lake, 208-735; 225 NW 841

Fraud as essential element. If there be no fraud, actual or constructive, in the execution and delivery of a deed of conveyance, there can be no estoppel against the grantee.

McCloud v Bates, 220-252; 261 NW 766

Appeal—failure to file brief and argument—estoppel to assert claim. In action by subcontractor against principal and drainage district jointly to establish claim as a lien on the district's fund, where drainage district filed no brief or argument, court need give no attention to its plea that subcontractor was estopped from asserting claim by his action in accepting auditor's warrant for a lesser amount than that to which he was entitled.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Adoption by estoppel. Evidence that at the age of 13 months the plaintiff was taken by foster parents from her natural parents under an agreement to adopt her, and that she was

VII ESTOPPEL GENERALLY—continued

reared by the foster parents, the foster mother referring to her as a daughter in conversation and in a will, established an adoption by estoppel, estopping other heirs of the foster mother from denying the adoption.

Vermillion v Sikora, 227-786; 289 NW 27

Adjudication—inconsistent attitude of party. A plaintiff who successfully prevents an attempted intervention on the grounds that the intervener's claim would not be prejudiced by the adjudication of the issues between the plaintiff and the defendant, may not thereafter claim that the adjudication so had did adjudicate the claim of the party attempting to intervene.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Establishment by consent—user—estoppel. In an action to enjoin the repair of a dike originally constructed in connection with drainage system created jointly by adjoining landowners, including plaintiff's predecessor in title, and used with knowledge of plaintiff for over 20 years without objection, principles reaffirmed (1) that where there is proof of more than mere user, the statute providing that an easement cannot be established by proof of mere user alone does not apply, and (2) that the owner of a dominant estate may by consent, express or implied, estop himself from insisting upon adherence to the principle that the owner of a servient estate has no right to interfere with the natural flow of water in a well-defined course so as to cast it back upon the dominant estate.

Dodd v Aitken, 227-679; 288 NW 898

Establishment—estoppel to question validity. One who redeemed land from tax sale for nonpayment of drainage assessment installments and who acquiesced in drainage proceedings during years in which her land received benefits of the improvement is estopped from questioning establishment of the drainage district.

Whisenand v Van Clark, 227-800; 288 NW 915

Contested election — appeal from consent judgment. An election contestant may not appeal from the judgment of the contest board holding the election in question illegal and providing for the calling of a new election by said board, when he consented to the entry of such judgment; nor may an estoppel to question such appeal be based upon the fact that the official board of which appellees were members refused to recognize the validity of the new election called by the contest board.

Leslie v Barnes, 201-1159; 208 NW 725

Erroneous but nonreversible error. Where an indorser of a promissory note pleaded an estoppel as consisting (1) of a mere promise by the payee to collect the note from the maker and a prior indorser, and (2) of a later statement by the payee that the note had been paid, the submission of said pleaded promise in one instruction, and of said statement as to payment in another instruction, thereby inferentially indicating that there were two estoppels, will not be deemed reversible error when the record reveals the fact that the maker and prior indorser both remained solvent up to the time and after the statement as to payment was made.

Birmingham Bank v Keller, 205-271; 215 NW 649

Estoppel to deny agent's authority. In payee's action against bank which had cashed checks indorsed by payee's attorney without actual authority, where bank defended on ground that payee was estopped from asserting lack of authority, held, strict rules relating to equitable estoppel based upon false misrepresentation or concealment were not applicable in determining such defense.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Banking corporations—insolvency—estoppel to present claim. Plea of estoppel to present a claim in bank receivership reviewed and held not sustained.

Andrew v Bank, 218-1313; 256 NW 292

Equitable estoppel—unrecorded conveyance —pleader's burden. One alleging an equitable estoppel must prove it by clear, satisfactory, and convincing evidence, hence in asserting in a fraudulent conveyance action, an equitable estoppel against the wife of a bank stockholder, because she withheld from record, for many years, a deed to herself from her husband, the creditors of the bank have not sustained the burden of proving estoppel when they admit that they did not deposit their money on the wife's representation, nor upon their belief in, the husband's ownership of the land.

Bates v Kleve, 225-255; 280 NW 501

Wrongful issuance of certificate of deposit —timely repudiation. A party to whom a bank, without authority, has issued a certificate of deposit in payment of a claim due from the bank, may not be deemed estopped to repudiate such certificate, or be deemed to have ratified the issuance of such certificate, when his repudiation was reasonably prompt, and when no injury resulted to the bank or to its receiver from any delay in repudiating.

Andrew v Bank, 217-232; 251 NW 860

Bills and notes—estoppel when negotiable paper transferred by apparent owner. An owner who leaves in the hands of another, negotiable paper or nonnegotiable choses in action or security which can be transferred without the execution of further documents

thereby creates an appearance of ownership or control in the custodian, and is estopped as against an innocent party who has acted in reliance on the appearance thus created.

Matalone v Bank, 226-1031; 285 NW 648

Consideration, failure of — nonestoppel to plead. The maker of a promissory note is not estopped to plead failure of consideration for the note as to him because of the fact that, subsequent to the signing, he was a party to a contract under which there was a novation of security.

Insell v McDaniels, 201-533; 207 NW 533

Failure of consideration—when plea unallowable. The maker of a promissory note may not plead failure of consideration when his own fraud brought about such failure.

Cloud v Burnett, 201-733; 206 NW 283

Failure to reply to letter as to ownership of instrument. The acceptor of a trade acceptance does not estop himself from pleading defensive matter by failing to reply to a letter from an indorsee to the effect that the indorsee has purchased the acceptance.

First N. Bank v Power Co., 211-153; 233 NW 103

Grounds—giving note for goods. A vendee who executes and delivers his promissory note for goods purchased does not thereby estop himself from the recovery of damages consequent on feeding the goods to his stock.

Crouch v Remedy Co., 205-51; 217 NW 557

Holdership in due course—fraud. The maker of a negotiable promissory note may not be said to be estopped to plead fraud in the inception of the note, against a transferee, on a record which fails to show that the maker's conduct ever came to the knowledge of the transferee or in any manner controlled his conduct.

State Bank v Behm, 202-192; 209 NW 523

Holdership in due course—inconsistent attitude. The maker of negotiable promissory notes is not estopped to plead fraud in the inception of the notes because he appeared in the insolvency proceedings against the payee and obtained judgment for the amount of the notes (which had been negotiated), and in such proceedings took the position, in effect, that the indorsees were holders in due course, when the evidence fails to show that anyone had relied on such course of conduct to his injury.

Citizens Bank v Martens, 204-1378; 215 NW 754

Implied authority to negotiate note. The maker of a nonnegotiable promissory note will not be held to be estopped to deny liability on the theory that he impliedly clothed the payee with authority to negotiate the note, when the entire transaction contemplated such transfer.

Hubbard v Wallace, 201-1143; 208 NW 730; 45 ALR 1065

Party entitled to allege error. A plaintiff who prays for and is given judgment on a promissory note may not insist, on appeal by the defendant, that a particular and material provision of the note was not embraced in the note when it was executed and delivered.

Anderson v Foglesong, 201-481; 207 NW 562

Failure to act promptly caused by act of agent. Where the plaintiff's name was called outside a theatre as winner of a bank night drawing, and when she entered she was told that it was her husband's name that was called, and he was told he was one second too late when he followed her in, the theatre could not claim that neither she nor her husband had claimed the prize within the time set. If the husband was the one entitled to the prize, the theatre was estopped to claim the advantage of the one-second delay caused by the act of their agent in calling the wrong name outside the theatre.

St. Peter v Theatre, 227-1391; 291 NW 164

Payment to holder's agent. The holder of a promissory note who permits another person for a series of years to collect both interest and installments of principal on the note will not be permitted to deny the authority of such other person to make all collections on the note. And it is immaterial that the note was not surrendered to the maker when he made his final payment.

Ragatz v Diener, 218-703; 253 NW 824

Silence. The holder of a note and mortgage as collateral, who stands by, and even encourages and assists the maker and payee of the note to execute a rescission of the transaction out of which the note and mortgage arose, may not thereafter assert against the maker his right as a collateral holder, the said maker being ignorant that the said obligations were being so held as collateral.

Iowa Bank v Rons, 203-51; 212 NW 362

Bonds — validity — estoppel to question. A duly appointed referee in partition will not be permitted to question the authorized execution in his name of a bond as such referee, when, subsequent to the said execution and filing of said bond, he reports to the court and under oath, that he had given said bond and had effected a sale of said property.

Indemnity Ins. v Opdycke, 223-502; 273 NW 373

Liability of surety—authority of agent. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court

VII ESTOPPEL GENERALLY—continued

and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

Permitting reliance on unauthorized bond. The surety on an appeal (supersedeas) bond is estopped to question its liability on the bond when, knowing of the execution of the bond by its agent and the filing and acceptance thereof, it permits the appellee-obligee and the clerk accepting the bond, innocently to act and rely on said bond until the full purpose of the bond had been accomplished.

State v Packing Co., 219-419; 258 NW 456

Pleading one's own wrong. In an action on a bond given by a bank as principal and by its directors as sureties to secure a trust fund which was in the possession of the bank, the defensive plea that plaintiff was estopped from prosecuting the action by his laches in so doing, is not available to the sureties when they at all times, before the bank became insolvent, had unhampered opportunity to compel compliance with the bond, and thus protect themselves, but, on the contrary, manifestly connived at a continuous breach of the bond in order to conserve the interest of their bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Statutory bond — validity questioned. The sureties on a bond to secure deposits of county funds in a bank who, upon the failure of the bank, induce the county, because of their suretyship, to institute an action against the receiver for an order of preference in the payment of said deposits, and who intervene in such action because and on the basis of their confessed suretyship, and who later, after preference is denied, induce the county to delay action on the bond under a promise that, as soon as all dividends have been paid on the deposit account, they will, without further question, pay the balance due under the bond, will not be permitted, when sued on the bond, to question either the validity of the bond or the validity of the deposits made thereunder.

Plymouth County v Schulz, 209-81; 227 NW 622

Statutory bonds—estoppel to deny. A bond given for the performance of a public building contract, and containing some of the conditions which the statute mandatorily prescribes for such a bond, anything in any contract to the contrary notwithstanding, will be deemed a statutory bond, with all the statutory conditions impliedly inserted therein.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Corporations—issuance of stock. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank & Trust, 219-939; 258 NW 925

Necessity to plead. Under an allegation that plaintiff was the owner of corporate stock when it was sold, no defense is presented by a general denial. If defendant claims that plaintiff is estopped to assert such ownership, then defendant must specially so plead.

Wilson v Lindhart, 216-825; 249 NW 218

Stock subscriber — nonbar or estoppel. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in defense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Issuance of unpaid stock—pledge to innocent party. A corporation which issues and delivers its corporate shares of stock without receiving payment therefor estops itself to question such issuance and delivery after the stock has been pledged by the holder thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Repurchase of stock—equitable issues not raised by demurrer. The facts, set up in answer by a Delaware corporation, that (1) it had no surplus, and (2) the laws of the state of its domicile prohibited a repurchase of its stock from capital, present a defense to an action for recovery on an alleged breach of contract to repurchase stock when such answer is attacked simply by demurrer rather than by an appropriate remedy based on equitable rights. Demurrer does not raise estoppel, ratification, implied contract nor any other equitable theory.

Bishop v Middle States Co., 225-941; 282 NW 305

Ultra vires in re corporate accommodation note. A corporation is not estopped to plead ultra vires in becoming the maker of an accommodation promissory note, from the fact that its officers knew that the payee (who was not the accommodated party) was making advances to the party actually accommodated, when the payee knew (1) that the note was an accommodation solely to the party receiving the advances, and (2) that the note was not

executed in conformity with the authority which the corporation had granted to its officers.

Black Hawk Bk. v Monarch Co., 201-240; 207 NW 121

Contracts—duress—estoppel to assert. The plea that an obligation was signed under duress must fall when the signer, during a long time following the execution of said obligation, recognized it as legally binding, and caused others to act on such recognition to their detriment.

Smith v Morgan, 214-555; 240 NW 257

Contracts—disaffirmance. A minor may estop himself by his conduct from disaffirming or questioning the legality of his contract.

First Bank v Torkelson, 209-659; 228 NW 655

Devisees' rights—election by spouse. The heirs of a surviving wife are not estopped to insist that the wife took her dower interest, and did not take under the will, by the fact that, separately and apart from the will and prior to its execution, the husband had turned over certain funds to a society under an agreement that the society should pay interest on the funds to him and to the wife during their lifetime, and that the wife received such interest after the death of the husband.

In re Culbertson, 204-473; 215 NW 761

Estoppel by deed. Mortgagors will not be permitted to deny that they own the quality of title which they have assumed to mortgage.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

By deed—signing chattel mortgage—effect. The mere signing of a chattel mortgage in a partnership name does not, in and of itself, estop the signer from denying that the mortgaged property is partnership property.

Citizens Bank v Scott & Son, 217-584; 250 NW 626

Father-son partnership—no estoppel. Estoppel would not prevent a son from maintaining an action against his mother for an accounting and dissolution of a partnership which was established between son and father and mother and upon father's death was continued with mother; theory being that estoppel arose on account of son's acquiescence in mother's taking possession of and disposing of certain partnership assets as executrix and sole beneficiary of her husband's estate under his will. Son, having no claim against estate of his father, and not knowing of mother's claim that she was sole partner with her husband, could not be estopped thereby.

Eggleston v Eggleston, 225-920; 281 NW 844

Guardian's delayed report—failure to rely. A party will not be permitted to say that he relied, to his financial disadvantage, on the long delay of a guardian to file his final report, when it appears that he did not change his position because of said delay—did not, because of his own lack of due diligence, have knowledge of said delay until long after he had acted to his disadvantage.

Bates v Remley, 223-654; 273 NW 180

Care of ward's estate—when ward estopped to object. A mentally competent adult person, who, on his own application, causes a guardian of his property to be appointed (§12617, C., '35), will be estopped to object to fair and honest investment of guardianship funds in real estate, when said investment, tho made without first securing the approval of the court, was made with the knowledge, consent, and approval of the ward, and when the ward at once entered into possession of the property and thereon resided for some seven years without payment of rent of any kind.

In re Meinders, 222-236; 268 NW 537

Evidence—degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing, and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

Parol or extrinsic evidence affecting writings. A party may not object to oral evidence which shows that an apparently absolute note and mortgage were given as collateral security for other debts when the absence of such evidence would leave the objector without any defense whatever.

Bilharz v Martinsen, 209-296; 228 NW 268

Governmental agency—estoppel against. A county which accepts, and for some thirty years retains, the financial benefits arising from a particular action of its governing body will not be permitted, as to said transaction, to question the legal authority of its governing body to act as it did act.

Plymouth County v Koehler, 221-1022; 267 NW 106

Public funds — misappropriation—recovery. Where, during a series of years, public funds have been appropriated by a county to a farm bureau organization under the good-faith but mistaken belief that a statute authorized such appropriations, and where said funds have been expended in furtherance of the agricultural

VII ESTOPPEL GENERALLY—continued

activities of said bureau, an action to recover such funds on behalf of the county will not lie by a taxpayer who has at all time had actual knowledge of the making of such appropriations and of the use to which they were being put, and took no action to question them.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

Public improvements — hidden fraud—nonestoppel by use. A city, by using a pavement for some three and a half years, does not estop itself from legally moving against the contractor because of a hidden-from-view, fraudulent defect in the work for which the contractor was responsible.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Simmer law—no estoppel to deny general liability for engineering services. Where a city contracts for engineering services necessary to construct a municipal electric light and power plant to be paid for under the Simmer law, out of plant's future earnings, and then later repeals the ordinance authorizing its construction and adopts a resolution withdrawing the application for the federal loan therefor, yet the city was not estopped to deny a general liability for the engineering services performed, when it was known to the engineering company, when the services were commenced, that no money derived from taxation was payable for any services it might render, and there was no showing of reliance by the plaintiff company on alleged implied obligation to erect the plant.

Burns & McDonnell Co. v Iowa City, 225-1241; 282 NW 708

Estoppel to dispute power of insurance agent. An insurance company estops itself from asserting that its agent is other than a recording or policy-issuing agent when it furnishes the agent with all blanks and supplies necessary for the actual execution and issuance by him of policies and otherwise recognizes his broad powers, and when a policyholder has relied on the agreement and representation of said agent.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Physician's certificate—conclusiveness. An Iowa statute providing that medical examiner's certificate of health issued to insured would estop insurer from setting up in defense of action on policy that insured was not in condition of health required by policy at time of issuance or delivery thereof, unless certificate was procured by fraud of insured, had the effect of changing contract through estoppel. A statute of this character does not limit the equitable jurisdiction of federal court and is enforceable therein, whether statute had been construed by Iowa supreme court as being rule of substantive law passing into contract, or as being merely a remedial right.

Mutual Ins. v Cunningham, 87 F 2d, 842

Jurisdiction—estoppel to question. A party who instigates and successfully promotes a fraudulent proceeding on the part of his wife under which she is granted a decree of divorce, who pays the alimony decreed, and who promptly remarries, will not be permitted, after the death of his former wife, to maintain an action to annul said decree (and thereby restore his property rights) on the ground that the court had no jurisdiction to enter said decree.

Robson v Kramer, 215-973; 245 NW 341

Mortgages—equitable estoppel—nonchange of position. Estoppel to declare a mortgage-secured debt due for nonpayment of interest, as provided in an accelerating clause, may not be based on transactions and conversations between the parties which in no manner caused the mortgagor to change his position.

Collins v Nagel, 200-562; 203 NW 702

Non-change in position. The plea of a mortgagee that a mortgagor was estopped to deny the validity of his signature to the mortgage because, when the mortgagor was thrown into bankruptcy, the mortgage prevented the mortgagee from participating in dividends to unsecured creditors, must fall when there is no showing that there were any such dividends.

State Bank v Nolan, 201-722; 207 NW 745

Allegation of mortgageable interest. A mortgagor is presumed to have a mortgageable interest in the property mortgaged, and is estopped to assert the contrary.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Allegation of ownership or mortgageable interest. A petition in mortgage foreclosure need not allege that the mortgagor owned the land or had a mortgageable interest therein; neither need it allege that the mortgagor is estopped to deny such ownership or interest because the execution of such mortgage worked such estoppel in and of itself.

Watts v Wright, 201-1118; 206 NW 668

Equitable relief for fraud. In action for equitable relief and damages, where proof justified the purely equitable relief of quieting title and cancellation of mortgage because of fraud, entry of personal judgment for damages against grantee was proper.

Rance v Gaddis, 226-531; 284 NW 468

Receiver for rents—estoppel to question. A mortgagor is estopped, in foreclosure proceedings, to question the appointment of a receiver for the rents of the mortgaged premises when it was made with his consent, and for his benefit, and recognized by him without objec-

tion throughout some three years of protracted proceedings.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Appointment of receiver. A mortgagee who consents to the appointment of a receiver in foreclosure proceedings in which the court would not otherwise have made the appointment may not, on change of mind, recover of the receiver funds properly applied by him.

Malvern Bank v Swain, 203-616; 213 NW 216

Unrecorded mortgage — estoppel to assert lien. Naked proof that, during the time the mortgagee of land neglected to record his mortgage, the mortgagor obtained credit from another, who placed his claim in judgment, is wholly insufficient to estop the mortgagee from insisting on the priority of his mortgage lien. Additional proof of fraud or deception in some form is indispensable.

Brauch v Freking, 219-556; 258 NW 892

Partnerships—personal property of other partner—liability. In equity action to subject junior partner's personal property to payment of judgment against senior partner, evidence held insufficient to show that former acted fraudulently or that he was estopped as against senior partner's judgment creditors to claim such personal property.

Creston Bank v Wessels, (NOR); 232 NW 496

Money advanced on joint representations—suing jointly. Where money is invested with several persons representing themselves to be jointly interested in a hemp production scheme, such joint promoters may be sued jointly notwithstanding one of them asserts that he was not in fact so interested,—he is estopped from denying his interest.

Smith v Secor, 225-650; 281 NW 178

Equitable estoppel—pleading. An estoppel and the facts supporting it must be pleaded.

Securities Corp. v Noltze, 222-678; 269 NW 866

Pleading—sufficiency. An estoppel is properly pleaded by setting forth the facts upon which the estoppel is based, even tho the term "estoppel" is not used.

Bibler v Bibler, 205-639; 216 NW 99

Essential requirements. A good plea of estoppel requires a succinct fact basis and an allegation that because of said facts the pleader has been misled or has detrimentally changed his position.

Federal Land Bk. v Sherburne, 213-612; 239 NW 778

Failure to submit plea—effect. Failure to submit a plea of estoppel to rely on an alleged agreement may be quite harmless in view of the full and explicit instructions on the subject of waiver of the right to rely on the said alleged agreement.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikeable on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc., 222-1269; 271 NW 220

Nonnecessity to plead. A mortgagee who seeks to enforce the agreement of a grantee of the land to pay the mortgage debt need not plead that the grantee, by taking and retaining possession of the land, has waived, or is estopped to assert, any defect in the title to the land.

Richardson v Short, 201-561; 207 NW 610

Special plea required. He who relies on a prior adjudication must plead it.

Andrew v Bank, 205-237; 216 NW 12

Probate—belated claimant not entitled to hotchpot. A claimant against an estate who, by grace of the statute and by grace of the court, is permitted, because of "peculiar circumstances", to file and prove his claim after the expiration of the 12 months given for the filing of claims (§11972, C., '27), has no right, when the estate is found to be insolvent, to pursue other fourth class claimants who have filed and had their claims allowed within said 12 months and to recapture and put in hotchpot the payments legally made to them, in order that a new distribution may be made.

Elliott v Bank, 209-1258; 228 NW 274

Inconsistent conduct — contesting will and claiming property as gift. The fact that a daughter contests the probate of her father's will does not estop her from later claiming as a gift a portion of the devised property; nor does the judgment admitting the will to probate constitute an adjudication against her of her claim of gift.

Rapp v Losee, 215-356; 245 NW 317

Real property—assessments. Principle reaffirmed that when property owners stand by and see a drainage improvement made, and take no steps of legal interference, they are estopped to raise the question of validity when called upon to pay their assessments.

Dashner v Woods Co., 205-64; 217 NW 464

Drains—assessments—validity—estoppel. A property owner cannot be deemed estopped to question the illegality of a drainage improvement because of the action of a former owner of the land on which no one relied; nor because the property owner, after he discovered that the work has been substantially completed, entered a formal complaint as to certain defects in the work.

Kelleher v Drain. Dist., 216-348; 249 NW 401

VII ESTOPPEL GENERALLY—continued

Change of position. A landowner is estopped to deny the effectiveness of his consent to the relocation of an established boundary line after the adjoining landowner has acted on such consent and rebuilt the fence in accordance with the relocation agreement.

Cheshire v McCoy, 205-474; 218 NW 329

Clothing one with apparent title. A creditor who claims that the actual owner of property is estopped to assert his title because such actual owner has so dealt with the property as to apparently clothe another person with the title, and has thereby misled the creditor into extending credit to such other person, must show some actual or implied knowledge on the part of the actual owner that such credit was being extended.

Bihlmeier v Budzine, 201-398; 205 NW 763

Ejectment. A recorded titleholder who learns that his grantor, without authority, has contracted to sell the property, and thereupon consents that the contract may be consummated provided he—the titleholder—receives the purchase price, is not estopped to insist on his title and right to possession thereunder, by receiving part of said sale price, it appearing that the contracting purchaser had no knowledge of such consent and made no payment in reliance on such consent.

Fitch v Stephenson, 217-458; 252 NW 130

Estoppel to dispute husband's title. A wife who permits her husband to take and record title to her lands, and for a long series of years to exercise the usual and customary indicia of ownership, is estopped to assert her title against the claims of the husband's creditors who have extended credit to him in reliance on his apparent title. So held where the husband, a farmer, became a debtor by reason of having signed notes as a surety.

Farmers Bank v Pugh, 204-580; 215 NW 652

Homestead and nonhomestead property—sale en masse—appropriation of surplus. A junior execution creditor who, at a senior mortgage foreclosure sale, buys in property which, in accordance with the mortgagor's agreement to that effect, is sold en masse, and regardless of the homestead character of part of the property, and who, in so buying, bids an amount in excess of the senior mortgage debt, on the express condition that said excess be indorsed on his junior execution (which is done), and who, with the full knowledge of the mortgagor, and without objection by him, complies with his bid, and after a year for redemption takes a deed, is not thereafter liable to the mortgagor for the amount of said excess on the theory that such excess represents the mortgagor's homestead, on which the junior execution creditor admittedly had no lien. This is true (1) because the mortgagor by his silence has permitted the junior execution creditor to change his position to his detriment, and is estopped to question the appropriation of said excess, and (2) because the mortgagor, by failing to attack said sale, and by demanding said excess under and by virtue of the sale, has confirmed the bid and all matters inhering therein,—i. e., the condition attending said bid.

Phoenix Co. v Vaught, 201-450; 205 NW 792

Knowledge of grantee—nonparticipation in fraud. A creditor will be protected in taking a conveyance from his debtor when the creditor acts solely for his own protection, and not to aid the debtor in defrauding other creditors.

Jordan v Sharp, 204-11; 214 NW 572

Landlord's title—estoppel to dispute. A tenant who remains in undisturbed possession of realty under a lease with an executor, and refuses to quit and surrender said premises at the termination of said lease, may not defend his wrongful possession by or under the plea that the executor had no legal right to lease the land.

Wright v Zachgo, 222-1368; 271 NW 512

Recognizing invalid tax deed—effect. An owner of land who, for his own advantage, recognizes the validity of a tax deed to his land, and thereby causes another to change his position, may not thereafter plead invalidating irregularities in the deed.

First N. Bank v Barthell, 201-857; 208 NW 286

Reconveyance of property. The fractional owner of property who quitclaims his interest to his co-owner in order to enable the co-owner to mortgage the entire property for his own purpose, and who receives from the co-owner an agreement to reconvey, free of incumbrance, within a named time or to pay a named sum, may not, after the mortgage is executed, and after the mortgagee has in good faith agreed to take over the property in satisfaction of the mortgage debt, obtain specific performance of the agreement to reconvey, even tho the mortgagee, before the deal was fully closed, had notice of the agreement to reconvey.

Clarkson v Bank, 218-326; 253 NW 25

Remainderman's offer to pay taxes adjudged by court. Where remainderman offers to reimburse the heirs of a life tenant for delinquent taxes paid by life tenant in such amount as the court may find to be due, it cannot be held that the remainderman recognized or acquiesced in the claim for reimbursement, and is not thereby estopped from refusing to pay.

Rich v Allen, 226-1304; 286 NW 434

Repudiating one's own chain of title. A titleholder who, by contract, repudiates the deeds under which he claims title and agrees that they shall be deemed null and void, thereby estops himself from asserting said deeds

against parties who subsequently acquire title in reliance on said repudiation.

Carr v McCauley, 215-298; 245 NW 290

Riparian rights—accretion—apportionment. Riparian landowners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop themselves, in an action to quiet title, from asserting that land did not pass under their deed because it was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Self-imposed knowledge of vendor. A vendor of land will not be heard to claim that he did not know that his purchaser was holding adversely to him.

Burch v Wickliff, 209-582; 227 NW 133

Surviving spouse—failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

Special interrogatories. One who causes a special interrogatory to be submitted to the jury is estopped thereafter to claim that the record contains no sufficient evidence to support the answer.

Tigue Co. v Motor Co., 207-567; 221 NW 514

Trademark signs. In an action for injuries caused by alleged negligence of filling station operator, the fact that trademark signs of defendant oil company were displayed did not estop it from claiming that it was not the owner of filling station business and that operator was not employee of company, it being a matter of common knowledge that such signs are displayed throughout country by independent dealers.

Reynolds v Oil Co., 227-163; 287 NW 823

Trust—establishment and enforcement. A party estops himself from ingrafting a trust on an absolute conveyance of real estate after he has stood by and allowed the grantee to treat the property as his own and to pledge it to grantee's innocent creditors.

Hospers v Watts, 209-1193; 229 NW 844

Consent to change in trustee. An owner of land under trust deed to secure a bond issue, who unqualifiedly consents to a change of trustee, may not thereafter claim that the new trustee is not the proper party to foreclose the trust deed, especially when the bondholders unanimously approve of such change.

Central Bank v Benson, 209-1176; 229 NW 691

Establishment and enforcement of trust. A chattel mortgagee who, knowing that the mortgaged property has been sold without his consent and that the proceeds of the sale have been deposited in a bank to the mortgagor's credit, accepts the mortgagor's check on said deposited proceeds for the amount due under the mortgage, together with security for the payment of said check in the form of an assignment by the mortgagor of the balance of said deposit in the bank (which had failed), thereby estops himself from asserting that said deposited proceeds have always belonged to him and therefore constitute a trust fund in his favor.

Andrew v Bank, 209-273; 228 NW 12

Knowledge and acceptance of benefits. Beneficiaries of a trust will not be heard in equity to assert the invalidity of a lease entered into by their trustee, when they (1) had full general knowledge thereof, (2) long acquiesced therein, (3) accepted and retained the rentals arising from the lease, and (4) knew at all times that the lessee was relying thereon at great expense.

Bowman v Coal Co., 201-1236; 207 NW 591

Trusts—loss of right against innocent grantee. The owner of an equitable interest in land loses all right (1) to establish his interest as a trust in the land, and (2) to personal judgment against the grantees of the land, when, after refusing a proffered deed to the land, he knowingly permits the legal titleholder to convey the land by quitclaim deed and for a valuable consideration to another equitably interested party who had no notice or knowledge of said first party's claim; and especially is this true when the consideration for the quitclaim deed was at all times a senior claim.

Brenton Bros. v Bissell, 214-175; 239 NW 14

Witness—estoppel to change testimony. A clerk of the district court who testifies, in an action to which he is not a party, that he has "in his hands" the amount of a tender deposited with him, will not, in a later action against him by one of said litigants who relied on said testimony and thereby materially altered his position, be permitted to show that at the time of so testifying he did not have said money "in his hands" because he had already lost it by failure of the bank in which it was deposited.

Andresen v Andresen, 219-434; 258 NW 107

Truthful answer to inquiry. The holder of a mortgage on the individual share of an heir does not estop himself from insisting on his mortgage because, upon receiving a subsequent inquiry whether there was any incumbrance on

the estate, he truthfully answered in the negative.

Halbert v Halbert, 204-1227; 214 NW 535

VIII PLEADING

Motion to dismiss—optional rights. When a motion to dismiss an equitable action is sustained, the plaintiff may (1) stand on his pleadings and appeal, or (2) amend.

Schwartzendruber v Polke, 205-382; 218 NW 62

Mandamus—petition—motion to dismiss as proper attack. Attack on mandamus petition should have been made by a motion to dismiss rather than by a demurrer, since statutes provide that mandamus shall be tried as an equitable action, and that a petition in equity may be attacked by motion to dismiss.

Bredt v Franklin County, 227-1230; 290 NW 669

Motion to consolidate actions by plaintiffs. Two personal injury actions arising out of the same accident and brought against the same defendant cannot be consolidated on motion by the plaintiffs for altho equity has the power to consolidate causes of action to avoid multiplicity of suits, the right to move for a consolidation of causes of action in law is by statute granted only to the defendant, and a plaintiff has no such right.

Brooks v Paulson, 227-1359; 291 NW 144

Technicalities ignored. In equity action seeking the appointment of a receiver, defendant's contention, that a receiver could not be appointed because no main cause of action was stated, was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal in technicalities, but rather it seeks to ascertain the true intent of the pleading filed".

Wagner v Securities Co., 226-568; 284 NW 461

Trust—essential allegation. In an action to establish a bank deposit as a trust fund, an allegation as to the trust character of the deposit is all-essential.

Peterson v Bank & Trust, 219-699; 259 NW 199

Unallowable repetition—procedure. The filing of a petition once held insufficient is properly reached by a plea to the jurisdiction, or by a motion to strike, treated as such plea.

Schwartzendruber v Polke, 205-382; 218 NW 62

IX EVIDENCE GENERALLY

Appeals—weight of court's findings. In the trial of an equity case where the credibility of the witnesses is in issue, great weight will be given to the findings of the trial court.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Estoppel—nonchange of position. Estoppel may not be predicated on conversations and negotiations which induced no change in the position of a party.

School District v Morris, 208-588; 226 NW 66

Accord and satisfaction. Evidence exhaustively reviewed in an equitable action wherein was involved the issue of accord and satisfaction, and, inter alia, held that it is not in accord with reason that an aged and experienced, and financially involved, business man would convey property of substantial value (and the last remnant of his once ample fortune) for no consideration whatever except that the grantee would pay to the public authorities the taxes thereon.

Stuart v Beans, 221-307; 263 NW 816

Sale for delinquent taxes not carried forward—insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

X DISMISSAL

Motion to dismiss equitable action—authority. There is no statutory authority for a motion to dismiss an equitable action at the close of plaintiff's testimony.

Appanoose Bureau v Board, 218-945; 256 NW 687

Motion to dismiss. If any of the grounds of a motion to dismiss petition for construction of a will are well-taken, it is not error to sustain such motion.

Anderson v Meier, 227-38; 287 NW 250

Motion to dismiss in equity—operation and effect. A defendant who, at the close of plaintiff's testimony in an equitable action, makes and stands on a motion for judgment in his own favor and for dismissal of plaintiff's pe-

tition, in effect, announces that he rests his case.

Haggin v Derby, 209-939; 229 NW 257

Trial after dismissal. A judgment entered as the result of an attempted trial after plaintiff had dismissed his action is a nullity as to the dismissing plaintiff when the defendant's pleadings were purely defensive.

Eclipse Co. v Kepler, 204-286; 213 NW 809

Unallowable equitable action. An order of court which, in bank receivership proceedings, mistakenly grants, under a misapprehension of the law, an absolute preference in payment of the deposit of a municipality may not, on the ground of such mistake, be set aside by an independent action in equity by other depositors and creditors of the insolvent bank, when such depositors and creditors neither (1) appealed from said order nor (2) entered, in the receivership proceedings, any objection to such order.

Schubert v Andrew, 205-353; 218 NW 78

When trial precluded. The dismissal of an action by plaintiff before trial, even tho it is an equitable action which involves the liability of a defendant-city relative to various claimants for work and materials on a public improvement, deprives the court of all jurisdiction thereafter to proceed with the trial and adjudicate any right of the dismissing plaintiff's when the pleadings of the defendant are solely defensive.

Eclipse Co. v Waukon, 204-278; 213 NW 804

XI PARTICULAR ACTIONS

(a) IN GENERAL

Appeals triable de novo. Equity appeals are triable de novo both as to the facts and the law.

Kurth v Ins. Co., 227-242; 288 NW 90

Avoidance of multiplicity of law actions. A strict action at law may not be brought and maintained in equity on the mere allegation that thereby a multiplicity of actions will be avoided. So held where plaintiff sought, in equity, to recover not only presently accrued, but future possibly accruing weekly total disability benefits under a policy of accident insurance.

Gephardt v Ins. Co., 213-354; 239 NW 235

Constructive trusts solely cognizable in equity. An action to establish and enforce a constructive trust, e. g., an action to recover funds to which plaintiff has equitable title against a defendant who holds the legal title, must, on timely motion by the defendant, be tried as an equitable action, (a) even tho plaintiff disclaims all equitable relief, and prays for a money judgment only, and (b) even tho, under plaintiff's allegation defendant obtained possession of the funds by fraud practiced on a third party, but under circumstances excluding any inference or presumption that he received the funds for the use and benefit of plaintiff.

Markworth v Bank, 212-954; 237 NW 471

Fraud between banks—constructive trust not established. The plaintiff bank, in failing to establish that the defendant bank was guilty of fraudulent conduct in aiding the plaintiff's cashier to conceal a shortage in his accounts, thereby failed to establish any basis for a constructive trust against the assets of the defendant bank for the amount of the shortage, or a basis for requiring the defendant bank to be held to account for the loss.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Decree—broad power under general prayer for relief. A court of equity, in dealing with and adjusting involved and complicated matters of fact, has exceptionally broad power to effect equity and justice when both parties pray for general equitable relief. Illustrated where defendant, who was the owner of coal lands, and those working in conjunction with him, had wrongfully interfered with the rights of lessees, and were held liable in a reasonable amount for permanent improvements placed in the mine by lessees, even tho said improvements became worthless, it appearing that defendant's misconduct had materially contributed to said latter condition.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Interpleader—availability of remedy. The pre-code equitable action of "interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution against him of separate actions on the policy by said warring parties.

Equitable Life v Johnston, 222-687; 269 NW 767; 108 ALR 257

Accounting—burden of proof. In action for accounting plaintiff has burden to prove account and show balance and amount due.

Palmer v Manville, (NOR); 228 NW 20

Accounting—evidence. Evidence reviewed, in an action for an accounting, and held that an assignment of a claim by plaintiff to defendant was absolute and not for collection for the benefit of plaintiff.

Moore v Bolton, 220-258; 260 NW 676

Accounting—inconsequential plea. In an action on a contract to recover a money judgment for plaintiff's interest in certain property, the plea of an intervenor who claims an

XI PARTICULAR ACTIONS—continued
(a) IN GENERAL—continued

interest in the property that there must first be an accounting between plaintiff and defendant is of no consequence where there is no evidence that defendant has ever paid plaintiff anything on his claim.

Benson v Sawyer, 216-841; 249 NW 424

Debt due—prerequisite proof. In actions in which an accounting is sought to determine the balance due from one party to another, it must be alleged and established that something is due before an accounting will be undertaken. This rule does not apply, however, in cases where an accounting is asked of a trustee who is under duty to account.

Burkey v Bank, (NOR); 256 NW 300

Duty to account as unavoidable preliminary issue. The court has no authority, in an action for an accounting, to appoint, without the consent of the defendant, a referee to take the accounting, until defendant's plea that he is under no legal duty to account is first determined adversely to the defendant.

Benson v Weitz' Sons, 211-489; 231 NW 431

Agreement excluding increase in livestock—accounting denied. Where defendants, in consideration of cancellation of debts, deeded farm to plaintiffs and gave bill of sale for farm personalty under agreement that defendants would operate farm, and as payment therefor take increase from livestock and surplus crops not needed for feeding livestock, plaintiffs were not entitled to accounting for produce or increase of livestock, but only for property turned over by plaintiffs under the contract.

Russell v Moeller, (NOR); 268 NW 60

Contract not to change son's legacy—creditor bank estopped as to other legacies. Where a son is indebted to a bank, and his father contracts with the bank to make no change in his will respecting a $10,000 bequest to the son, and bank seeks liability against all of father's property, there is no estoppel against the other heirs claiming the son's indebtedness be deducted from any bequest payable to him.

Evans v Cole, 225-756; 281 NW 230

Affirmation (?) or rescission (?) of contract. A purchaser of land, after he has given notice of rescission and moved off the land, will not be held to have elected to affirm the contract and to recover damages at law by bringing an action which is entitled neither at law nor in equity, and which prays for the same money relief to which he would be entitled on a rescission, even tho the petition as it stands would be triable at law.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Boundary line between farm buildings—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Easements—part of single ownership conveyed—implied easement or reservation—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

Rescission of contract—wife denying husband's agency. A wife, owning a rooming house, sold on the fraudulent representation of her husband, made in response to purchaser's direct question, that the furnace heated the upstairs rooms, will not, in purchaser's action to rescind and recover the down payment, be permitted to deny her husband's authority to represent her and at the same time retain the down payment as fruits of the deceit.

Smith v Miller, 225-241; 280 NW 493

Rescission of contract—defaulting plaintiff. Plaintiff vendee, after first defaulting under a contract for the sale of real estate, may not in equity, while still in default, rescind the contract because defendant vendor had later allowed a prior mortgage on the real estate to be foreclosed, and, therefore, had no title to deliver if plaintiff fully performed.

Fitchner v Walling, 225-8; 279 NW 417

Liability for corporate debts. The personal and individual liability imposed by statute (§8380, C., '24) on the corporate directors and officers for corporate debts to which they have knowingly consented, and which are in excess of the indebtedness permitted by law, is a liability which is enforceable, not by action at law by each creditor in piecemeal, and against one or more or all offending officers and directors, but by an action in equity for and on behalf of all creditors, wherein may be ad-

judicated, once for all, the extent of liability of each defendant and the extent of right of each creditor.

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Unpaid stock subscriptions. An action by a receiver of a dissolved corporation to collect on the unpaid stock subscriptions of various parties must be by separate, ordinary proceedings at law, and not jointly in equity when the demand is solely for a money judgment; and this is true even tho in equity a multiplicity of suits would be avoided.

Kosman v Thompson, 204-1254; 215 NW 261

Damages by surface waters. Surface water collected by one landowner and drained by tile to the land of another's servient estate, where it is there conveyed by the latter's tile to the lands of a second servient estate, all through the natural course of drainage, is not such subject of damages as to entitle the third estate owner to equitable relief; especially when it is not shown that he was substantially damaged thereby.

Johannsen v Otto, 225-976; 282 NW 334

Fraud—presumption and burden of proof. Fraud is never presumed. He who alleges its existence must establish it by clear, convincing and satisfactory evidence. Principle applied in an equitable action to set aside and cancel certain financial obligations allegedly obtained by fraud.

Eckhardt v Trust Co., 223-471; 273 NW 347

Judgment creditors and mortgage holders—proper intervenors. In an action between copartners for receivership and accounting, holders of mortgages and deficiency judgments against land purchased in name of some partners for partnership purposes held proper intervenors.

Heger v Bussanmas, (NOR); 232 NW 663

Moratorium act — unallowable independent action. An independent action in equity to secure, under the moratorium act, an extension of time in which to redeem from mortgage foreclosure sale, and to enjoin the plaintiff in foreclosure from procuring a writ of possession, is not maintainable, all such matters of relief being determinable in said foreclosure proceedings.

Brown v Lincoln JSL Bank, 221-42; 265 NW 115

Municipal corporations—demand for legal salary. A city officer, who has not, for a series of months, received his full salary as legally fixed by ordinance, may not, in an equitable action, compel the city to pay him the deficiency when, during said time, he has properly received an unknown amount of fees belonging to the city (or county) but has illegally retained them as salary and makes no offer to return said fees.

King v Eldora, 220-568; 261 NW 602

Excessive assessment—nonestoppel. A property owner is not estopped to assert that his property has been assessed in excess of 25 percent of its value because he (along with a majority of the property owners) had petitioned for the improvement, and in the petition had waived the 25 percent limitation, when the record made by the city council shows that the petition was ignored, and that the improvement was ordered solely on the motion of the council.

Nelson v Sioux City, 208-709; 226 NW 41

Probate—claim against deceased's realty. In an equity action to establish a claim against deceased's real estate for services rendered deceased's widow to whom deceased devised such realty for life, with right to dispose of real estate for her necessary support, held, such action was not a "suit for construction" of will, merely because trial court's opinion mentioned word "construction", but not in such manner as to indicate that trial court held action to be for that purpose. A will which in plain and uncertain terms makes disposition of property is one which needs no construction.

Hoskin v West, 226-612; 284 NW 809

Debt-encumbered remainder—equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some thirty years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bk. v Nichols, 219-342; 258 NW 700

Devise—life estate (?) or fee (?)—mortgage validity. Where a will devised land to a son to use until son's youngest child became 20 years old, or if such child died before such age, then until January 1, 1940, when the land became the property of the "son and his heirs", a mortgage placed on the land by the son, although before 1940, is a valid lien, not merely on a life estate, but on the fee, and an equitable action by son's children against the mortgagee and others to establish title in the land was properly dismissed.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Dower—assignment or setting off—recognized methods. The statutory provisions for admeasurement of dower do not exclude the

XI PARTICULAR ACTIONS—continued
(a) IN GENERAL—concluded

setting off of dower by an action in equity, by partition, or by any other appropriate action.

Ehler v Ehler, 214-789; 243 NW 591

Independent action reopening estate—judgment appealable. A judgment for plaintiff in a separate independent action in equity brought, not against an administrator but against the surviving spouse and heir, seeking to set aside the order in probate approving the final report and closing the estate, is a final judgment such as will entitle the defendant to appeal.

Federal Bank v Bonnett, 226-112; 284 NW 97

Equitable liens—improvements on land of another. One who places improvements on land solely because of his confident belief that his wife will ultimately become a devisee of the land will not, in case the land is otherwise willed, be accorded an equitable lien on the land for the value of said improvements.

Grecian v Steele, 208-1359; 227 NW 341

Release on basis of mistaken diagnosis. Where a settlement and release of a personal injury claim involved a mistaken diagnosis by the injured person's doctor, his statements are binding on the defendant, although he was not connected with the defendant or its liability insurance carrier, since the inquiry, not involving fraud, centers on the existence of and good-faith reliance on the mistaken diagnosis.

Jordan v Brady Co., 226-137; 284 NW 73

Representations as to priority of mortgages—owner's liability. Where owner of property represented to bank from which he was borrowing money that only specified mortgages were superior to those offered to bank as security for loans, and bank relied thereon, law of estoppel will not permit owner to acquire mortgage and assert its priority contrary to representation and agreement, since to allow such mortgage priority would constitute fraud, and equity requires owner to make his promises and representations good.

Stoner v Cook, (NOR); 229 NW 696

Specific performance—discretionary matter. Specific performance is largely a matter of discretion with the trial court and not a matter of absolute right.

Hotz v Equitable, 224-552; 276 NW 413

Cashing conditional down-payment check—claim of mistake. In an action for specific performance of a land purchase contract, the act of an agent having power to contract in allowing a down-payment check to be cashed when it bears a notation, of which he is aware, that it is not to be cashed until and unless the contract is accepted, furnishes support for a finding in equity that the contract was accepted, even tho the agent later claims that the check was cashed by mistake.

Hotz v Equitable, 224-552; 276 NW 413

Mutual wills enforced as contract. Clear and satisfactory evidence that husband and wife entered into a mutual contract, and in accordance therewith executed mutual and reciprocal wills providing for the disposition of all their property to each other and to certain named beneficiaries upon the death of survivor, entitles beneficiaries to specific performance thereof and to restrain probating of another will, executed by husband after the wife's death, making provision contrary thereto.

Child v Smith, 225-1205; 282 NW 316

Trusteed special assessment certificates. Where a corporation, dealing in securities, owns a group of special assessment certificates for public improvements, and places them in a trust, against which trust are sold certain "ownership certificates" issued in numerical order as representing an interest therein and redeemable in their numerical order, and when, subsequently, it becomes apparent that the trust is insolvent, an application by the trustee to the court for instructions as to whether payment was to be made in numerical order or pro rata was properly decided for the pro rata method on the equity rule of equality and proportionate distribution of the remaining assets.

Iowa-Des M. Bank v Dietz, 225-566; 281 NW 134

(b) REFORMATION AND CANCELLATION GENERALLY

Reformation—implied contract. A court of equity cannot reform a written contract, let alone an implied contract.

Snell v Kresge Co., 220-837; 263 NW 493

Evidence mandatorily required. A written instrument will not be reformed because of a mutual mistake unless said mistake is established substantially beyond a reasonable doubt. Evidence held insufficient.

Fischer v Bockenstedt, 215-319; 245 NW 352

Mutual mistake or fraud—proof necessary. To entitle a person to reformation of a contract, there must be some showing of fraud, ambiguity, or mutual mistake, and the general rule is that proof must be clear, satisfactory, and convincing. A contract cannot be reformed on grounds of both mutual mistake and fraud, as such claims would be mutually destructive. Evidence insufficient to warrant finding of fraud or mutual mistake.

Wall v Ins. Co., 228- ; 289 NW 901

Futile reformation. An instrument will not be reformed when the reformation asked would be entirely futile.

State v Kronstadt, 204-1151; 216 NW 707

Nonnecessity to reform. No necessity exists for reforming a written instrument when the

party thereto has a legal right to orally contradict it because his controversy is with a stranger to the instrument.

Nissen v Sabin, 202-1362; 212 NW 125; 50 ALR 1216

Proceedings and relief—absence of required plea. A plea of fraud, accident, or mistake, is a condition precedent to the right to reform any written instrument.

Sargent v Ins. Co., 217-225; 251 NW 71

Deed without contract assumption of mortgage. The holder of a mortgage on land may not have a deed to a subsequent purchaser so reformed as to embrace an assumption by the purchaser of the payment of the mortgage, on the naked plea that the purchaser, in buying the land, contracted to pay such mortgage. This is true because such contract assumption was subject to cancellation by the vendor and purchaser at any time before the mortgagee had assented to the assumption, and the passing of a deed without the incorporation therein of such assumption generates a presumption that the contract assumption had been abrogated or in some manner canceled.

American Bk. v Borcherding, 201-765; 208 NW 518

Action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho plaintiff also prays for the cancellation of the promissory notes, a proceeding which would be transitory if separately brought.

Eckhardt v Trust Co., 218-983; 249 NW 244; 252 NW 373

Deed as mortgage—consideration. A warranty deed may not be decreed to be a mortgage when the daughter-grantee pays a good-faith and complete consideration to her father, the grantor.

Witousek & Co. v Holt, (NOR); 224 NW 530

Cancellation of sheriff's certificate—issuance of deed restrained. An action to enjoin issuance of sheriff's deed and to cancel certificate held properly brought in equity as against contention that §11792, C., '24, furnished exclusive remedy.

Paulsen v Hansen, (NOR); 216 NW 762

Defense—negligent acceptance of deed. Reformation of a deed which wrongfully obligated the grantee to pay an existing mortgage on the land will not be denied because the grantee was guilty of a measure of negligence in accepting the deed, it appearing that the objectionable clause was quite successfully camouflaged by other language of the deed.

Betz v Swanson, 200-824; 205 NW 507

Cancellation—want of consideration. Want of consideration in itself will not warrant the setting aside of a deed, it being competent for a grantor to make a gift of his property and, although want of consideration is a good defense to an executory contract, a deed is not such a contract, but instead represents a contract executed and a conveyance fully accomplished.

Lawson v Boo, 227-100; 287 NW 282

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Insurance premium notes—evidence establishing cancellation. In action to cancel insurance premium notes where evidence, clearly admissible against administrator of deceased insurance agent, established that check and two notes were delivered to agent for payment of premium and that insurer rejected application for insurance, such evidence warranted cancellation of the notes and established agent's liability for the unaccounted part of the check as against administrator of the agent's estate.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Excessive deed. A deed which is shown by clear, satisfactory, and convincing evidence to embrace a larger portion of an originally integral tract of land than the grantor and the grantee mutually intended, will be so reformed in favor of a nonnegligent grantor as to meet the mutual intent of said parties.

Taylor v Lindenmann, 211-1122; 235 NW 310

Making contract for parties. Reformation of the description of land sought to be conveyed is unthinkable when the vendee would be compelled to take, under such proposed reformation, land which he in part clearly did not intend to buy, and would lose land which he unquestionably intended to buy.

Cahail v Langman, 204-1011; 216 NW 765

Motion to separate actions—nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor — both instruments having been executed by the same party and at the same time—it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separ-

XI PARTICULAR ACTIONS—continued
(b) REFORMATION AND CANCELLATION GENERALLY—continued

ate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Particular description followed by recital of acreage—effect. In a reformation action a deed to a governmental described 20-acre division of land, but containing the recital "containing 18½ acres, more or less", does not convey a tract of 1½ acres contained in said division and already conveyed by the grantor to another grantee.

Montgomery Co. v Case, 212-73; 232 NW 150

Performance of contract—deed. A decree which correctly, by metes and bounds, describes the land which was mutually sold and purchased, impliedly reforms the grantor's deed, which inadvertently described slightly less acreage than as correctly described by the decree.

Elliott v Horton, 205-156; 217 NW 829

Refusal to surrender advantage. The grantee in a deed of conveyance who has obtained a decree quieting his title on the plea that the deed was in satisfaction of the grantor's prior mortgage on the land may not, while insisting on all the advantages accruing to him under the decree, have the deed so reformed as to include the grantor's homestead, on the claim that the homestead was mistakenly or fraudulently omitted from the deed.

Galvin v Taylor, 203-1139; 212 NW 709

Tax deed—evidence. Evidence held insufficient to show that a mortgagee had, in taking his mortgage, agreed, inter alia, to pay a tax sale certificate under which he subsequently took a tax deed.

Proctor v Williamson, 205-127; 215 NW 593

Evidence required. To justify the reformation of a written instrument, the evidence must be clear, satisfactory and convincing and free from reasonable doubt. So held in an action to reform the term of a bond, the evidence being held insufficient.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Reformation of instruments—evidence required. Principle reaffirmed that a contract will not be reformed except on clear, satisfactory, and convincing evidence establishing the grounds alleged. Evidence held insufficient to meet the rule.

Runciman v Bailey, 217-1034; 250 NW 630

Burden of proof. The plea of alteration of an instrument will be disregarded in the absence of evidence by the pleader not only that the alteration was material, but that it was made after delivery.

Monona County v Gray, 200-1133; 206 NW 26

Evidence—burden which complainant must carry. An instrument will not be reformed on the ground of mutual mistake unless the supporting testimony is clear, satisfactory, and convincing beyond a mere preponderance of the evidence, nor will such reformation be granted if the complainant has been guilty of inexcusable neglect in not having the instrument read; and especially is this true when a reformation will detrimentally affect the intervening rights of innocent third parties.

Galva Bank v Reed, 205-7; 215 NW 732

Evidence—sufficiency. Reformation of an instrument can only be decreed on testimony which is clear, satisfactory, and convincing.

King v Good, 205-1203; 219 NW 517

Evidence must be clear and satisfactory. A court of equity will only reform a written instrument when it is moved to do so by clear and satisfactory evidence of a mutual mistake or other reason for reformation.

Knott v Ins. Co., 228- ; 290 NW 91

Evidence—sufficiency. Evidence held sufficient to justify such reformation of a deed as to show that the grantee had assumed and agreed to pay a mortgage on the property.

American Bank v Borcherding, 205-633; 216 NW 719

Reformation of deed—evidence—sufficiency. A deed will not be reformed by striking therefrom a clause wherein grantee assumes an existing mortgage when the testimony of mutual mistake consists wholly of the conclusions of the witness and is otherwise uncertain.

Peilecke v Cartwright, 213-144; 238 NW 621

Evidence—insufficiency. A contract for the sale and purchase of real estate will necessarily not be so reformed as to render it a contract for sale at a stated sum per acre, when the testimony preponderates in favor of a contract for a lump-sum price.

Davis v Norton, 202-374; 210 NW 438

Documentary evidence—judgment—admissibility against stranger. A final decree and the pleadings relating thereto may, in some cases, be admissible in a subsequent action to prove an ultimate fact even tho the party against whom the decree is offered was not a party to the decree. So held where the decree was received to prove the judicial cancellation of a contract of sale upon which cancellation depended the validity of a promissory note sued on.

Pigree v Lichtenstein, 214-315; 242 NW 59

Mandatory degree of proof. Plaintiff seeking the reformation of a written instrument

must fail unless he establishes by clear, satisfactory, and convincing evidence—by evidence exceeding a mere preponderance—by evidence approximating proof beyond a reasonable doubt—the definite contract which the executed writing does not embrace. Evidence reviewed in detail under a prayer for the reformation of a lease, and held insufficient to comply with the rule.

Stillman v Bank, 216-957; 249 NW 230

Official survey on court order—evidence sufficient to support confirming report. In an action for reformation of description by metes and bounds in realty mortgages and for their foreclosure, evidence held sufficient to support judgment confirming surveyor's report, where surveyor is permitted to testify, without objection, that he was qualified to make the survey and that the plat of survey prepared by him is a true and correct survey showing the property in question and made in accordance with a previous order of court and such plat, after identification, was introduced in evidence without objection.

State Bank v Mapel, 226-1328; 286 NW 517

Parol or extrinsic evidence affecting writings —"exceptions" catalogued. The so-called "exceptions" to the parol evidence rule may be stated thus: Parol evidence is admissible,

1. To establish grounds for the reformation of a written contract.
2. To establish the unnamed consideration for a unilateral written contract.
3. To establish a distinctly separate and complete contract contemporaneous with, and noncontradictory of, a written contract.
4. To establish the conditional delivery of a written contract, and the failure of said condition.
5. To complete a written contract which shows on its face that it is fragmentary and incomplete.

In re Simplot, 215-578; 246 NW 396

Parol evidence rule. The rule of evidence which forbids oral testimony to contradict or vary the terms of a written contract has no application to proceedings in equity where a mistake in the contract is alleged, and its reformation demanded.

Floberg v Peterson, 214-1364; 242 NW 13

Parol evidence rule—nonapplicability. The parol evidence rule is not applicable to a proceeding to reform an instrument.

In re Jenkins, 201-423; 205 NW 772

Proceedings and relief — evidence — sufficiency. To justify the reformation of an instrument in the language of a bill of sale so it will stand as a chattel mortgage, the supporting evidence must be more than a preponderance. It must be clear, satisfactory, and convincing.

Scott v Menin, 216-1211; 250 NW 457

Grounds—mistake and fraud. A written release and quitclaim of all the interest of an heir in an estate will be reformed on a showing that one party thereto was mistaken in its scope and that the fraud of the other party was responsible for the mistake.

In re Jenkins, 201-423; 205 NW 772

Grounds—fraud plus unilateral mistake. A showing (1) that a grantor either mistakenly or fraudulently inserted in his deed a clause binding the grantee to pay an existing mortgage on the land, contrary to the prior contract of the parties, and (2) that the grantee without undue negligence accepted said deed without knowledge of said clause affords ample ground for the reformation of said deed.

Betz v Swanson, 200-824; 205 NW 507

Grounds—degree of proof. Reformation of an instrument on the ground of mutual mistake cannot be granted except on very clear, satisfactory, and convincing proof of the mistake, because otherwise the court might unwittingly make a contract for the parties.

Phillips v McIlrath, 205-1126; 217 NW 429

Negligence—effect. Negligence in signing an instrument is not necessarily fatal to a plea for reformation, especially when the equities are strongly in favor of the pleader.

Steele v Kluter, 204-153; 214 NW 522

Negligence in signing. The maker of an instrument may not have it reformed by striking material matters therefrom, when he had unlimited and unimpeded opportunity before signing to learn just what was in the instrument, but negligently failed to inform himself.

Turnis v Ballou, 201-468; 205 NW 746

Negligence—mutual mistake. Reformation will be denied in a proper case for negligence in failing to read a written instrument but will be granted for a mutual mistake arising from the negligence of both parties.

Conrad v Ins. Assn., 223-828; 273 NW 918

Mutual mistake—description in deed—evidence—sufficiency. Where the grantor of land executed to grantee a quitclaim deed to a strip of land 10 feet wide to provide grantee a wider, better way over grantor's land to the highway, and the evidence of grantor's attorney, who prepared quitclaim deed, shows there was no consideration for the deed and no other land was mentioned except the 10-foot roadway, this testimony being uncontradicted by defendant, the trial court's findings and decree reforming the deed, so as to except any accretions to the 10-foot strip described, was justified on the ground of mutual mistake of all the parties in not expressly excepting the accretions from the deed.

Haynie v May, 228- ; 291 NW 404

XI PARTICULAR ACTIONS—continued
(b) REFORMATION AND CANCELLATION GENERALLY—continued

Right of action—negligence barring relief. A party who has no excuse whatever for signing a writing without reading it, or without requesting a reading of it, will not be granted reformation. And the rights of the wife of the signer insofar as she is interested in the writing, tho not a signer thereof, will be foreclosed by her like inexcusable neglect to read or request the reading of the instrument.

Stillman v Bank, 216-957; 249 NW 230

Negligence—mistake—evidence—sufficiency. A deed of conveyance will not, on the plea of the grantor, be reformed by inserting therein an assumption by the grantee of an existing mortgage, when the grantor executed the deed without reading it, though he was able to read, and was not prevented from reading, when his testimony in support of a mutual mistake is neither satisfactory nor convincing; and especially when the grantee has, in the meantime, justifiably changed his position in reliance on the omission of the assumption clause.

Scover v Gauley, 209-1100; 229 NW 684

Mistake—evidence. Evidence held quite insufficient to show any mistake in the reservation in a conveyance of an easement.

Spalding v McCartney, 207-1025; 221 NW 665

Mistake. The statute of limitation does not commence to run against an action to reform a deed on the ground of mutual mistake until the mistake has been discovered.

American Bank v Borcherding, 205-633; 216 NW 719

Adopting wrong instrument to accomplish purpose—effect. The execution of an ordinary, unconditional promissory note and mortgage on the mutual supposition of the parties thereto that said instruments would exactly carry out their agreement that one of them would pay the other a life annuity only, is not such mistake of law as will prevent reformation of the note and mortgage to meet the mutual purpose of the parties; but, of course, the proof of mutual mistake must be clear, satisfactory, and convincing.

Floberg v Peterson, 214-1364; 242 NW 13

Mistake affecting interest. A deed cannot be reformed by one who is not a party thereto unless the mistake claimed therein affects his interest.

American Bk. v Borcherding, 201-765; 208 NW 518

Contracts—revocation for mistake. Mistake as a basis to set aside a settlement, release, accord and satisfaction or covenant not to sue, must be a mutual mistake of an essential fact, inducing the execution of the instrument.

Jordan v Brady Co., 226-137; 284 NW 73

Mistake—dragnet clause in mortgage. A dragnet clause in a mortgage, to the effect that the mortgage shall stand as security for any other debt which the mortgagee may hold or acquire against the mortgagor, will be stricken from the mortgage on proper plea for reformation, and on proof that, by the use of a printed form, the said clause was inadvertently embraced in the mortgage by both parties.

Pospishil v Jensen, 205-1360; 219 NW 507

Mistake—fraud—evidence—sufficiency. Reformation of an instrument because of the mistake of plaintiff and fraud on the part of defendant will not be decreed except on clear, satisfactory, and convincing proof of the existence of said grounds. Evidence held insufficient.

West v Hysham, 214-349; 242 NW 19

Mistake and fraud—evidence. Evidence reviewed, and held ample to justify the reformation of a deed because of the mistaken, and fraudulently induced, omission therefrom of a clause reserving to grantors a life estate in the land in question.

Foote v Soukup, 221-1218; 266 NW 904

Mistake—gross negligence in failure to read. The maker of an instrument may not avoid it because he did not have knowledge of its contents, when he failed to avail himself of admitted ability to read and of unrestricted and uncircumvented opportunity to read.

Charlson v Bank, 201-120; 206 NW 812

Instruments reformable—mistake. A written contract between a drainage contractor and the board of supervisors which inadvertently departs from the terms of the bid and the acceptance by the board will be reformed on an application in equity.

Gjellefald v Drainage Dist., 203-1144; 212 NW 691

Mistake—omission of lands from mortgage-judgment creditors. A mortgage may be so reformed as to correct the mutual mistake of mortgagor and mortgagee in omitting certain lands from the mortgage, even against a judgment creditor of the mortgagor's, who became such after the mortgage was executed.

Davis v Bunnell, 207-1181; 225 NW 6

Mistake tolling statute. A mortgagee, seeking to reform his mortgage to correct an error in the real estate description and escape the statute of limitations on the ground of mutual mistake which tolled the statute until discovered, has the burden of showing he did not discover the error until a time within 5 years

before bringing action, and without which proof the statute operates as a bar.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Mutual mistake—conflicting testimony. Circumstances and attending facts bearing on the issue of reformation because of mutual mistake may be ample to establish such mistake even tho the parties are hopelessly at war in their personal testimony relative to such issue.

Steele v Kluter, 204-153; 214 NW 522

Recovery of payments—mutual mistake—evidence—sufficiency. Evidence reviewed in an action to recover back money alleged to have been paid under a mutual mistake for heat furnished, and held insufficient to establish such mistake.

Thomas v Central Co., 217-899; 251 NW 616

Mortgages — omitted tract — reformation against non-innocent incumbrancers. A plaintiff-mortgagee, after having foreclosed his purchase money mortgage and purchased the land at execution sale, discovering that one 80-acre tract was erroneously omitted from the mortgage and sale, and that mortgagor, having discovered the error, had executed another mortgage thereon as security for an old loan to parties with notice and knowledge of plaintiff's equitable right in the land, is entitled to a reformation of his mortgage, since later mortgagees were not innocent incumbrancers.

Winker v Tiefenthaler, 225-180; 279 NW 426

Mortgages—assumption of mortgage debt—no consideration. Where an instrument is executed without consideration on the part of a grantee, to assume and pay the mortgage debt, the contract is not binding upon him, or if the deed is delivered in blank, or the conveyance made as security only, or if a clause is inserted by fraud, inadvertence, or mistake, without the knowledge or acquiescence of the grantee, he may have the instrument reformed in equity so as to make it express the true intent and understanding of the parties.

Guarantee Co. v Cox, 201-598; 206 NW 278

Conclusiveness of judgment. A decree in mortgage foreclosure that the mortgagee is not entitled to the reformation of a deed from the mortgagor to a subsequent purchaser so as to show an assumption by such purchaser of the mortgage debt is not an adjudication that the mortgagor is not entitled to such reformation, even tho the mortgagor was a party to the foreclosure, but not a party to the mortgagee's petition for reformation.

American Bank v Borcherding, 205-633; 216 NW 719

Dragnet clause securing multiple debts. A general clause in a mortgage to the effect that the mortgage shall stand as security for any debt in addition to the debt specifically secured which the mortgagee may hold or acquire against the mortgagors or either of them will be wholly eliminated on a prayer for reformation on proof that said clause was contrary to the mutual intent of the mortgagors and mortgagee when the mortgage was executed, because to hold that said clause was enforceable under such circumstances would be to countenance a legal fraud. And all this is true tho the mortgagors did not read and were not prevented from reading the mortgage when it was executed.

Commercial Bank v Ireland, 215-241; 245 NW 224

Estoppel—insufficiency. A mortgagee cannot be estopped to insist on a reformation of his mortgage so as to include mistakenly omitted land simply because a subsequent judgment creditor had omitted to levy on the unincumbered land and collect his judgment.

Davis v Bunnell, 207-1181; 225 NW 6

Discrepancy between mortgage and application for loan. A mortgage to secure a loan will not be reformed by striking therefrom a material clause on the ground that such clause was not embraced in the application for the loan, when the application was a naked proposal for the loan, did not assume to be a contract in itself, and did not provide for the various terms and conditions of the mortgage in case the application was accepted.

Turnis v Ballou, 201-468; 205 NW 746

Nonestoppel. A mortgagor who, in foreclosure proceedings, withholds his plea for a reformation of his deed to a subsequent purchaser in order to show an assumption of the debt until the mortgagee has unsuccessfully attempted to secure such reformation, and who actively seeks to aid the mortgagee in such attempt, does not thereby estop himself from interposing such plea after the mortgagee's attempt has proven a failure.

American Bank v Borcherding, 205-633; 216 NW 719

Mortgage on homestead. A mortgage which is duly and jointly executed by a husband and wife on part of their homestead, when they unquestionably intended to embrace in the mortgage the entire homestead, is so reformable, on proper showing of the mistake, as to make the instrument in form exactly what it always has been in law; and such reformation is not violative of the statute (§10147, C., '24) which declares conveyances of the homestead invalid when the husband and wife do not join in the execution of the same joint instrument.

Rankin v Taylor, 204-384; 214 NW 725

Relief barred by fraud. A mortgagor's prayer for cancellation of a mortgage on the plea of payment will be denied when, in connection with the transaction on which the claim of payment is based, he dishonestly ob-

XI PARTICULAR ACTIONS—continued
(b) REFORMATION AND CANCELLATION GENERALLY—continued

tained from the mortgagee, and without the knowledge of the latter, a sum exactly equal to the claimed payment.

Strahan v Strahan, 205-92; 217 NW 436

Right in general—ineffectual reformation. A contract between a mortgagor of real estate and a purchaser of the land, wherein the purchaser assumes the payment of the mortgage, will not be reformed in proceedings to foreclose the mortgage, by inserting in the contract a maturity date which is different from the admittedly true maturity date as specified in the mortgage, because such reformation could not possibly affect the mortgagee.

Richardson v Short, 201-561; 207 NW 610

Tract omitted from mortgage. Equity will not only reform a mortgage between the parties by including an omitted tract so as to carry out their intentions but also against subsequent purchasers with notice.

Winker v Tiefenthaler, 225-180; 279 NW 436

Reformation—abuse of discretion in refusing. A court of equity abuses its discretion when it refuses to reform a written contract wherein the owner of property lists it with a broker for sale and binds himself to pay a commission in case a sale is made, even by himself, when it is shown, by clear, satisfactory, and convincing testimony, that the oral preliminary contract which the parties attempted to reduce to writing embraced the definite, mutual understanding that no commission would be payable if the owner made a sale to his then tenant, and that said understanding was inadvertently omitted from said writing. (In this case the owner made a sale to his tenant and was later sued by the broker for a commission.)

Milligan Co. v Lott, 220-1043; 263 NW 262

Bail bond—necessary parties. A bail bond will not be reformed when the defendant on whose behalf the bond was given, and who signed it, is not before the court.

State v Kronstadt, 204-1151; 216 NW 707

Statutory bonds. A statutory bond may not be so reformed as to defeat its purpose.

Leach v Bank, 205-975; 213 NW 612

Reformation of promissory note—change of venue. An equitable action for the reformation of a promissory note, by changing the name of the payee, and for judgment on the note as reformed, cannot be maintained in the county wherein the note by its terms is payable, when the defendant's residence is elsewhere in this state, and he properly moves for a change of venue.

Palmas v Tankersley, 218-416; 255 NW 514

Defenses—merger of prior contract. The principle that a contract for the sale of real estate is, as a general rule, merged in the subsequently executed deed has no application to an action wherein reformation of the deed is asked in order to make it harmonize with the prior contract.

Betz v Swanson, 200-824; 205 NW 507

Dissolution of partnership. A partnership settlement on dissolution may be so reformed that it will show that it does not embrace partnership assets discovered subsequent to the dissolution and then unknown to the partners.

Power v Wood, 200-979; 205 NW 784; 41 ALR 1452

Dissolution of partnership — by order in equity—insufficient ground. A partnership or joint adventure for a definite contract term will not be cancelled and terminated by a court of equity before the time fixed by the contract, on the ground that such quarreling and bickering between the parties have resulted as to render inadvisable the further continuance of the undertaking, when the applicant for the cancellation and termination of the contract is the only one of the parties who has done any quarreling or been guilty of any bickering.

Green v Kubik, 213-763; 239 NW 589

Joint adventures—dissolution in equity. Assuming, arguendo, that proof that a joint undertaking had proven to be a losing venture is sufficient to justify an order of dissolution, by a court of equity, of a joint undertaking, yet evidence reviewed, and held insufficient to so show such fact.

Green v Kubik, 213-763; 239 NW 589

Cancellation of instruments—divorce. In divorce action, trial court was justified in cancelling notes and deeds from husband to wife for lack of consideration, under statute empowering court to make proper disposition of the property of the parties.

Graham v Graham, 227-223; 288 NW 78

Duress—required showing. A contract obtained by so oppressing a person, by threats regarding his personal safety or liberty as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress. So held in case of mortgages and notes.

Guttenfelder v Iebsen, 222-1116; 270 NW 900

Erroneous finding against garnishee. Concede that a finding by the court that the garnishee was indebted to the defendant in attachment was erroneous, nevertheless such fact furnishes no basis for enjoining the enforcement of the judgment entered on such

finding, when the court was proceeding under fully acquired jurisdiction.

Farmers Exchange v Iowa Co., 201-78; 203 NW 283

Forgery — insufficient evidence. Evidence held insufficient to show forgery of a mortgage.

McDaniel v Life Co., 210-1279; 232 NW 649
McDaniel v Bank, 210-1287; 232 NW 653

Incomplete contract. A court of equity may not reform a written instrument by supplying any element necessary to give it validity, or by compelling the party in default to supply the omitted element. So held where the court was asked to compel or order one of the makers of a note payable "to ourselves" to indorse the note.

In re Divelbess, 216-1296; 249 NW 260

Laches—when no defense. Delay, on the part of the signer of an unmatured, negotiable promissory note, in bringing action to cancel the note for want of consideration, is quite immaterial when the delay has not been harmful to anyone.

Sterner v Bank, 221-1362; 268 NW 158

Excessive lease. A written lease which is shown by clear, satisfactory, and convincing evidence to embrace a larger portion of integral premises than the lessor and lessee mutually intended, will be so reformed as to meet the mutual intent of said parties.

Kanofsky v Woerderhoff, 211-1175; 235 NW 305

Oral wage agreement. An oral wage scale agreement applicable to the first few weeks of employment, incorrectly reduced to writing by employer's agent, but correctly followed in paying wages which was not challenged by employee during the several years he continued in this employment, justifies a reformation of the writing to conform to the oral agreement.

Koch v Abramson, 223-1356; 275 NW 58

Personal contract reformed to show contract as representative of another. A written contract of sale of property purporting to obligate the purchaser personally will, on clear, satisfactory, and convincing evidence that the purchaser was acting as guardian only, be so reformed as to avoid the mutual mistake or oversight.

Kowalke v Evernham, 210-1270; 232 NW 670

Policy of insurance. A mutual mistake as to the location of insured buildings is reformable.

Jack v Farm Ins., 205-1294; 217 NW 816

Wrong motor numbers not invalidating liability policy. Motor numbers in an automobile insurance policy are only for the purpose of aiding in identifying the car, and, tho the numbers be wrong, a liability policy will not be invalidated if the car is otherwise properly identified, for which purpose other evidence may be resorted to, and, if sufficient, will cure the error without resort to a proceeding in equity to reform the policy.

Fucaloro v Standard Co., 225-437; 280 NW 605

Public improvements—void contract—unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Carlisle (Town), 215-82; 244 NW 707

Remedies of buyer. The purchaser of goods manifestly may not have his note and mortgage canceled on the claim of payment unless he establishes such payment.

Rogers v Hale, 205-557; 218 NW 264

Right of action—nudum pactum. An unmatured negotiable promissory note, in the hands of the original payee, will be canceled, in equity, as to a party who signs it without consideration after the transaction giving rise to the note as to the other signer had been fully closed without obligation on the part of said other signer to obtain the additional signature in question.

Sterner v Bank, 221-1362; 268 NW 158

Transfer of funds by check—reformation. Where, "for the bona fide transfer of funds" a cashier's check is purchased by one who supposed he was receiving a draft (and the bank official so knew), the court may treat the check as a draft in order to afford the check holder a preference in case the bank becomes insolvent before the check is paid.

Reason: So treating the check constitutes, in effect, a proper reformation of the check to comply with the mutual understanding of the parties.

Andrew v Bank, 216-1165; 250 NW 487

Vendor and purchaser both defaulting—equity directing performance, rescission and redemption. In a vendee's action to rescind a real estate contract and promissory note, supreme court may invoke broad equitable power to protect both vendor and vendee by allowing vendor, after his mortgage on the real estate had been foreclosed, to negotiate vendee's note to provide funds with which to redeem, on the condition that he apply the proceeds to the mortgage indebtedness and then pay the remaining mortgage indebtedness so as to deliver a clear title to vendees at the time fixed in the contract, or suffer a cancellation of the real estate contract and note.

Fitchner v Walling, 225-8; 279 NW 417

10942 Action on note and mortgage.

Action at law—pendency of foreclosure in foreign state—effect. The right of a party to maintain in this state an action at law to recover of the maker of bonds the balance due after foreclosure, in a foreign state, of the securing mortgage, will not be denied on the plea that the foreclosed property is yet in the hands of the foreclosing receiver and that the amount of rents which will be derived thereunder is not made to appear, when the evidence demonstrates that the utmost that can be realized will not pay taxes and other expenses.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Action on note—prima facie showing. In an action on a promissory note, the introduction of the note with proof of the genuineness of the signature thereto makes a prima facie case for the plaintiff.

Pfeffer v Corey, 211-203; 233 NW 126

Allowable legal and equitable actions at same time. Where each of a series of matured, mortgage-secured, promissory notes of the same maker possesses the same grade of lien, and is, by a trust agreement executed by the various noteholders, placed in the hands of a trustee with power to institute such actions as he may deem fit in order to effect collection, the trustee may maintain and carry on at the same time an action at law on a portion of said notes, and an action in equity to foreclose the mortgage for the remainder of the notes.

Iowa T. & L. Co. v Clark, 215-929; 247 NW 211

Claims acquired during foreclosure—independent action to enforce. Where, pending foreclosure action, plaintiff acquires an additional claim against the defendant, he is not bound to amend and assert said claim in the foreclosure proceedings, but may maintain a subsequent and independent action on the newly acquired claim even tho it pertains to the subject-matter of the foreclosure.

Central Bk. v Herrick, 214-379; 240 NW 242

Court's jurisdiction—legal issues. In action for a money judgment, foreclosure of a mortgage and appointment of a receiver, the equity court had jurisdiction of the controversy and parties. The action having been properly brought in equity, all issues, legal and equitable, are triable therein.

Deaton v Hollingshead, 225-967; 282 NW 329

Judgment for installment as adjudication. A judgment for the amount of one installment and interest on a promissory note, being all that was then due on the note, is not an adjudication of an action to recover a future maturing installment and interest, the note not containing an accelerating clause maturing the entire indebtedness in case of a default.

Andrew v Stearns, 215-5; 244 NW 670

Judgment in equitable action. The holder of unquestioned, matured promissory notes, secured by a real estate mortgage, is entitled to judgment on the notes, on a proper prayer in an equitable proceeding, even tho the proceeding is not for the foreclosure of the mortgage.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Judgment on note alone. A separate judgment on a note does not discharge the mortgage securing it.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

Land situated wholly in foreign state. A mortgage on land situated wholly within a foreign state may not be foreclosed in this state, tho the mortgagee may maintain, in this state, an action at law on the note so secured.

Beach v Youngblood, 215-979; 247 NW 545

Mortgage foreclosure after judgment on note. A mortgage foreclosure action is maintainable after securing judgment on the note secured thereby.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

Nonsplitting of action. A mortgagee is not guilty of splitting his cause of action (1) by suing at law on his secured note and proceeding against property of the mortgagor other than the mortgaged property, and (2) by instituting foreclosure proceeding as trustee for other secured noteholders without making any claim therein on his own note.

Iowa T. & L. Co. v Clark, 213-875; 237 NW 336

No presumption foreign foreclosure was in personam. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court, on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

Omnibus assignment of error. In an appeal in a law action on a promissory note, tried to the court, where all assigned errors violate supreme court rule 30 as being omnibus in form and supreme court, on its own initiative, could discover no errors, an affirmance and dismissal of the appeal on motion will result.

Pickett v Wray, 225-288; 280 NW 519

Optional remedies to enforce payment. The trustee in a deed of trust securing bonds can-

not be deemed to be limited simply to a foreclosure of the deed—cannot be deemed to be excluded from maintaining an action at law against the maker—when the deed confers upon the trustee the widest discretion as to the remedy which he may choose to enforce collection.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Party defendants in foreclosure. In an action to foreclose a mortgage, it is allowable to join as defendants (1) the maker of the promissory note, (2) the payee-indorser in blank, and (3) all assumptors of the mortgage.

Hansen v Bowers, 208-545; 223 NW 891

Right of mortgagee to sue at law. A mortgagee has a legal right to sue at law on his mortgage-secured note, and to enforce the resulting judgment against leviable property of the mortgagor other than the mortgaged property.

Iowa T. & L. Co. v Clark, 213-875; 237 NW 336

10943 Ordinary proceedings.

Law (?) or equity (?)—mutual treatment of action. An action mutually treated as a law action, from its inception in the trial court to and including its presentation on appeal, must be treated on appeal as a law action.

Garden v Ins. Co., 218-1094; 254 NW 287

Appeal from fence viewers. Since an appeal to district court from decision of fence viewers is triable as a law action to a jury, if demanded, the supreme court will not interfere with verdict if there is substantial evidence to sustain it. Hence, where parties waived jury on trial of such appeal, the trial court's decision, supported by sufficient evidence, was necessarily affirmed.

Moore v Short, 227-380; 288 NW 407

Application for order in probate. Application for orders in probate which necessitate a construction of a will have no place on the jury calendar, and reversible error results from a refusal to exclude them from such calendar on application of an interested litigant.

In re Watters, 201-884; 208 NW 281

Assignment for benefit of creditors—equity (?) or law(?). The court is inclined to treat an assignment for the benefit of creditors as a proceeding in equity; but howsoever this may be, a proceeding which involves the final report of the assignee and the accounting therein made, and which embraces equitable issues, will be heard on appeal as in equity when so treated by the litigants and trial court.

In re Stone, 220-1341; 264 NW 604

Claims against estate—belated filing—equitable circumstances. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Deception constituting fraud—nonright to rely. A plaintiff may not maintain an action at law for damages consequent on fraudulent representations not made to him or his agent.

Markworth v Bank, 212-954; 237 NW 471

Findings in re homestead — conclusiveness. On an application by an executor for an order to sell real estate to pay debts, a finding by the court that certain land was not the homestead of the deceased is conclusive on appeal (1) unless such finding is without substantial support in the evidence, or (2) unless the court erroneously applied the law to conceded facts.

In re McClain, 220-638; 262 NW 666

Law issues in equity—no transfer. Law issues in a suit properly brought in equity are not transferable to the law calendar.

Deaton v Hollingshead, 225-967; 282 NW 329

Taking gravel—injury to mortgage security —measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt Co., 224-841; 277 NW 715

Unallowable action at law. An action for money had and received cannot be maintained at law under circumstances excluding any inference or presumption that defendant received the money for the use and benefit of plaintiff.

Markworth v Bank, 212-954; 237 NW 471

Unallowable equitable remedy. Equity will not assume jurisdiction to declare illegal and to enjoin the enforcement of a contract between an employer and a local labor union on behalf of the employees when the controversy may readily be presented in a law action.

Des M. Ry. v Assn., 204-1195; 213 NW 264

Unpaid stock subscriptions. An action by a receiver of a dissolved corporation to collect on the unpaid stock subscriptions of various parties must be by separate, ordinary proceedings at law, and not jointly in equity, when the demand is solely for a money judgment; and this is true even tho in equity a multiplicity of suits would be avoided.

Kosman v Thompson, 204-1254; 215 NW 261

10944 Error—effect of.

Discussion. See 20 ILR 106—"Mending hold doctrine"

ANALYSIS

I IN GENERAL
II TRANSFER OF CAUSES
III ELECTION OF REMEDIES GENERALLY

I IN GENERAL

Equitable action—legal relief. Tho plaintiff in equity prays for a decree for the specific performance by defendant of the latter's written contract to repurchase corporate shares of stock sold to plaintiff, yet, if plaintiff's alternate prayer be sufficiently broad, the court may, on supporting evidence, enter such a judgment in favor of plaintiff as would be his legal due were his action strictly at law. And, in such case, it is manifestly wholly aside the mark for defendant to contend that specific performance was unallowable (1) because the life of the corporation in question had expired, (2) because of the nature of the property involved, and (3) because the contract in question was nonmutual.

Patterson v Bingham, 222-107; 268 NW 30

Ademption of bequest. A bequest is specific in a will where a note and real estate mortgage securing it were bequeathed to a son of testatrix, and the residuary estate was bequeathed to such son and her grandson; and cancellation by testatrix of the note and mortgage and the taking of title to such real estate in lieu thereof adeems the bequest as respects son's claim that subject matter of bequest still existed but was only changed in form.

In re Keeler, 225-1349; 282 NW 362

Wrong form of action. Supreme court cannot assume jurisdiction on appeal where the matter in issue is not such as was triable in the form of action brought in the trial court below.

Anderson v Meier, 227-38; 287 NW 250

II TRANSFER OF CAUSES

Nonapplicability of statute. The statutory provision for a transfer of a cause from law to equity is not applicable to a cause distinctly brought and tried at law,—a cause wherein plaintiff neither pleads nor proves an equitable cause of action.

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Transfer from law to equity sole remedy. Defendant's plea to the jurisdiction of the court because the action is at law, when it ought to be in equity, is unknown to our practice. A transfer on motion to equity is the sole remedy.

Ayres v Nopoulos, 204-881; 216 NW 258
Heileman v Dakan, 211-344; 233 NW 542

Error as to form—exclusive procedure. Mistakenly instituting an action in equity when it ought to be at law must be met by a motion, not to dismiss, but to transfer to the law calendar.

Solberg v Davenport, 211-612; 232 NW 477

Estoppel to allege error. A defendant who, in the trial court, in an action on an unliquidated claim, remains on the equity side of the calendar, without request for transfer to the law calendar, estops himself from complaining on appeal that he was denied a jury trial.

Ober v Dodge, 210-643; 231 NW 444

Contract to purchase estate property—specific performance—equity action. Bank receiver's specific performance action to require heirs to perform contract to purchase receiver's interest in estate property is not lacking in mutuality and is not transferable to law because involving both personal and real property, since equity once acquiring jurisdiction retains it for all purposes, and since cross-petition filed by heirs also asking specific performance, is sufficient reason to deny transfer to law.

Utterback v Stewart, 224-1135; 277 NW 735

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

Injunction in lieu of certiorari—procedure. It seems that when a plaintiff brings an action in equity for injunction when certiorari is the proper action, the defendant's sole remedy is to move for a transfer of the injunction proceedings into certiorari proceedings.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Law issues in proper equity action nontransferable. Principle recognized that law issues, defensively injected into an action properly commenced in equity, are not transferable to the law calendar.

Bankers Life v Bennett, 220-922; 263 NW 44

Remand in equity—untried law issue. Tho an equitable action is tried de novo on appeal, and modified as to the amount due, yet the entire judgment will be set aside and remanded for trial by the lower court of an issue improperly transferred to the law calendar, and for the final entry of such judgment by the lower court as may be fit and proper.

Pace v Mason, 206-794; 221 NW 455

Transfer from equity to law—undetermined motion—procedure. An undetermined motion by defendant to dismiss an action erroneously pending in equity immediately becomes a

demurrer when the action is properly transferred to the law calendar, and must be disposed of as any other demurrer, and with the same consequences.

State v Murray, 219-108; 257 NW 553

Wrong calendar—transfer as sole remedy. A court which has jurisdiction of an action when brought in the right forum has jurisdiction when brought in the wrong forum. The remedy for an incorrect forum is to transfer to the correct docket.

In re Nish, 220-45; 261 NW 521; 100 ALR 1516

III ELECTION OF REMEDIES GENERALLY

Petition to board of review on excessive tax assessment—not exclusion of federal court. Bank's petition to board of review, held, not to constitute a selection of statutory remedy for adjudication of alleged excessive assessment to exclusion of remedy in federal court of equity.

Munn v D. M. Nat. Bank, 18 F 2d, 269

10945 Correction by plaintiff.

Noninconsistent remedies. The commencement of an action of replevin to recover the possession of promissory notes does not constitute the election of a remedy which will preclude the subsequent filing of a substituted petition presenting the controversy in the form of an action in equity.

Pickford v Smith, 215-1080; 247 NW 256

10946 Correction on motion.

Cross-petition—provisional remedies. The right of a litigant to move to transfer an issue from the equity calendar to the law calendar is not a provisional remedy, within the meaning of §11155, C., '27.

Pace v Mason, 206-794; 221 NW 455

Dockets—transfer—exclusive remedy. Motion to transfer is the exclusive remedy when an action has been commenced at law instead of in equity.

Heileman v Dakan, 211-344; 233 NW 542

Error as to forum—failure to file motion—effect. Where an action is commenced in equity and defendants make no motion to change action to law, tho action was commenced in the wrong forum, it could remain and be concluded in equity.

Russell v Moeller, (NOR); 268 NW 60

Misjoinder — wrong calendar — waiver. A defendant in equity who files answer after the overruling of his motion (1) to strike alleged misjoined causes of action, and (2) to transfer from equity to law, may not maintain an appeal from the ruling on his said motion.

Thompson v Erbes, 221-1347; 268 NW 47

Motions—nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor—both instruments having been executed by the same party and at the same time—it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Right to transfer action waived by answer. Defendant in an equitable action, when confronted by an amendment to the petition pleading an action at law in addition to the equitable matters, waives his right to have the law action transferred to the law docket by first filing an answer to said amendment; and this is true tho the equitable issues are later entirely disposed of by decree leaving nothing for determination but the issues raised by said amendment and answer.

Kimmel Inv. Co. v Renwick, 220-362; 261 NW 775

Transfer to equity—return to probate refused. Where an application in probate brought by a trustee under a will asking for directions of the court was transferred to equity on a motion by intervenors after a hearing at which all parties appeared and submitted arguments but did not except to the transfer, it was proper for the court to refuse a motion made eight months later asking that the transfer be canceled, when it was not shown that the rights of the parties could be better determined in probate than in equity, the question being a matter of forum rather than of jurisdiction.

In re Proestler, 227-895; 289 NW 436

Trespass on real estate. Allegations to the effect that defendants on a certain occasion tore down plaintiff's fence, trespassed upon plaintiff's land, and wrongfully removed a building belonging to plaintiff disclose no equitable jurisdiction for the issuance of a mandatory injunction for the restoration of the fence and building; and such action is properly transferred to the law calendar.

Griffiths v Allen, 212-831; 237 NW 219

Unallowable transfer from equity to law. Law issues which are injected by cross-petition into an action properly commenced in equity are not transferable to the law calendar on motion of either party.

Pace v Mason, 206-794; 221 NW 455

10947 Equitable issues.

ANALYSIS

I ISSUES AND TRIALS GENERALLY
II WHEN EQUITABLE ISSUES ARISE
III EQUITABLE ISSUES IN LAW ACTION—EFFECT
IV LAW ISSUES IN EQUITABLE ACTION—EFFECT
V PRIORITY IN TRIAL OF LEGAL AND EQUITABLE ISSUES
VI ERRONEOUS TRANSFER OR REFUSAL TO TRANSFER—EFFECT

I ISSUES AND TRIALS GENERALLY

Equitable action not transferable to law. A motion will not lie to transfer an equitable action to the law calendar.

Federal Sur. v Morris Plan, 209-339; 228 NW 293

Nontransfer to equity on cross-petition merely re-stating answer. An action at law to recover bank deposits does not become a suit in equity because of defendant's cross-petition which only served to amplify and repeat the defense pleaded in the answer.

Younkin v Bank, 226-343; 284 NW 151

Equitable and law issues in probate. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Restraint on alienation—no reformation to limited time. Where an individual agrees to construct a grotto on land of a charitable organization, such agreement will not be reformed to restrict alienation for period of individual's lifetime since restraints against alienation are void even for limited times.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Objections to executrix's report—real estate title issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

Loss of right to equitable relief. A duly entered judgment against plaintiff on the merits in a law action, and affirmed on appeal, constitutes a final judgment, and §11017, C., '31, furnishes no authority to plaintiff thereafter to file in the adjudicated law action a "substituted petition in equity" (and motion to transfer to equity) involving the same subject matter, and no authority or jurisdiction to the court to entertain such attempted action.

Phoenix Ins. v Fuller, 216-1201; 250 NW 499

Fraud as defense in law action—nonright to transfer. A defendant in an action at law on a policy of insurance is not entitled to a transfer of the action to the equity calendar simply because he pleads fraudulent representation as a defense and prays a cancellation of the policy.

Beeman v Life Co., 215-1163; 247 NW 673

Fraud as defense to law action—nonright to transfer. A defendant who is sued at law for damages for breach of contract, and who defensively pleads that he was fraudulently induced to enter into the contract, and prays for the cancellation of the contract, is not entitled to an order transferring the action to the equity calendar.

Randolph v Ins. Co., 216-1414; 250 NW 639

Inaccurate stipulation for trial in equity—effect. The trial to the court of a strictly law action on the law calendar under a stipulation that the trial shall be "in the same manner as an equity cause" gives appellant no right to a trial de novo on appeal, it appearing that the cause was treated throughout as a law action.

Hostler Lbr. v Stuff, 205-1341; 219 NW 481

Assignment of part of expected judgment—effect. A transfer of a strictly law action to equity is not required simply because an intervenor, on the motion of the defendant, appears and sets up an assignment of part of the expected judgment as security for a claim held by intervenor against plaintiff, intervenor distinctly disclaiming any interest whatever in plaintiff's cause of action.

Wilkinson v Lbr. Co., 208-933; 226 NW 43

Involved account. An action commenced at law on an account may be very properly ordered transferred to the equity calendar when the account runs through a series of years, is extremely involved and complicated, and necessitates innumerable computations beyond the comprehension of the average juror.

Mann v Wilson & Co., 218-395; 253 NW 506

Law action with prayer for injunction. In an action at law for damages, with auxiliary prayer for injunction to prevent a repetition of the injury, the injunction feature of the action is not transferable to the equity calendar for trial.

Pisny v Railway, 207-515; 221 NW 205; 222 NW 609

Nontransferable to equity. A demand for an accounting is not necessarily transferable to equity. For instance, an action by a surety

(who has paid the debt) against a co-surety for proportional reimbursement is not so transferable simply because of the defensive plea that plaintiff had failed to apply to the debt funds in his hands belonging to the principal, and that defendant was, therefore, entitled to an "accounting".

Brown v Conway, 201-117; 206 NW 665

Replevin nontransferable. An action in replevin, insofar as plaintiff claims a lien on the property replevined, may not be transferred to equity.

Commer. Credit v Hazel, 214-213; 242 NW 47

Replevin—substituted petition in equity—mandatory transfer. A plaintiff who, as the maker of promissory notes, brings an action of replevin against the holder, and obtains possession of the notes on the ground of fraudulent representations and want and failure of consideration in the inception of the notes, and who, without his legal right so to do being questioned, thereupon files an amended and substituted petition in equity praying the cancellation of the notes on the grounds pleaded in the replevin action, is entitled to a transfer to the equity docket and to a trial in equity. This is true because of the favorable rule in equity that fraudulent representations may be established without proof of scienter.

Pickford v Smith, 215-1080; 247 NW 256

Transfer from equity to law—effect. A law action, e. g., quo warranto, commenced as an equitable action and properly transferred by the court to law, will, on appeal, be disposed of as a law action.

State v Murray, 219-108; 257 NW 553

Unallowable transfer to equity. An action of replevin involving mortgaged chattels, and wherein the only issue joined is that of fraud and want of consideration in the execution of the mortgage, cannot be legally transferred to equity for the equitable foreclosure of the mortgage.

McDonald v Johnston, 218-1352; 256 NW 676

Implied contract. A court of equity cannot reform a written contract, let alone an implied contract.

Snell v Kresge Co., 220-837; 263 NW 493

II WHEN EQUITABLE ISSUES ARISE

Proper calendar—equity issues. A foreclosure proceeding wherein an intervener is asking for an accounting by a receiver, and wherein an adverse party is praying for the reformation of an instrument, is manifestly properly kept on the equity side of the calendar.

King v Good, 205-1203; 219 NW 517

Retention of suit to award damages. When plaintiff in an action for specific performance has quite successfully shown that he is not entitled to any equitable relief, equity will not retain the suit in order to award damages.

Fisher v Bank, 206-1105; 221 NW 816

III EQUITABLE ISSUES IN LAW ACTION —EFFECT

Action properly at law—limitation on transfer. In an action properly commenced at law on a policy of insurance, defendant may not complain that his plea of arbitration only was transferred to equity.

Koopman v Ins. Assn., 209-958; 229 NW 221

Implied consolidation. A stipulation by parties that a jury be waived in a law action, and that said action together with an equitable action involving the same general subject matter be tried by the court as an equitable matter, constitutes a consolidation of the actions tho no actual order of consolidation is entered.

Holman v Wahner, 221-1318; 268 NW 168

Belated transfer from law to equity. After a jury has been impaneled, evidence taken, and an amendment raising an equitable issue filed, the court may enter an order transferring the cause to equity.

Benson v Weitz, 208-397; 224 NW 592

Appeal from condemnation award—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v Des Moines, 227-382; 288 NW 399

Claims against estate—belated filing—equitable circumstances. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Eminent domain proceeding. An alleged owner of land who appeals to the district court from an award of damages in eminent domain proceedings may not complain of an order which transfers to the equity side of the calendar so much of said appeal as involves the issue whether the condemnor or the appellant owns part of the land sought to be condemned.

Montgomery County v Case, 204-1104; 216 NW 633

III EQUITABLE ISSUES IN LAW ACTION—EFFECT—concluded

Fiduciary relation — proper transfer to equity. A claim in probate is properly transferred to the equity docket for trial on a showing that a confidential relation existed between claimant and the deceased, and that deceased had fraudulently concealed from claimant the existence of certain trust funds belonging to claimant, and had failed to account therefor.

In re Sibert, 220-971; 263 NW 5

Formal transfer excused. Failure to formally transfer an equitable issue of reformation of an instrument in a law action—i. e., a probate proceeding—to equity, will be disregarded on appeal when the issue was determinative of the litigation and was tried to the court without objection.

In re Jenkins, 201-423; 205 NW 772

Preliminary proceedings—motion to transfer to equity—law question. On a motion to transfer to equity an issue as to reformation of contract, the question of transfer is one of law, determinable from the pleadings.

Koch v Abramson, 223-1356; 275 NW 58

Proper law action nontransferable in toto. An action brought on a contract (e. g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract. Said alleged fraud, if established in the law action, constitutes a complete defense, and remaining equitable issues are properly transferred to and disposed of in equity. Failure, in the law action, to establish said alleged fraud, necessarily removes from the case said equitable issue of rescission.

Poole v Poole, 221-1073; 265 NW 653

Specific performance. In consolidated actions at law, involving a promissory note payable "to ourselves", the issue of specific performance of an oral contract by one of the makers to indorse the note, should be transferred to the equity calendar.

In re Divelbess, 216-1296; 249 NW 260

Wage recovery dependent on reformation. In a law action for wages, allegedly due an employee under contract, where parties stipulate that the employee shall not recover such wages if the defendant prevails on his cross-petition for reformation, transferred to equity on motion, the employee may not thereafter deny the court's right to try the reformation issue and is bound by the decree if not contrary to the evidence.

Koch v Abramson, 223-1356; 275 NW 58

IV LAW ISSUES IN EQUITABLE ACTION —EFFECT

Law issues in proper equity action nontransferable. Principle recognized that law issues, defensively injected into an action properly commenced in equity, are not transferable to the law calendar.

Bankers Life v Bennett, 220-922; 263 NW 44

Law issues in equity—no transfer. Law issues in a suit properly brought in equity are not transferable to the law calendar.

Deaton v Hollingshead, 225-967; 282 NW 329

Unallowable transfer from equity to law. Law issues which are injected by cross-petition into an action properly commenced in equity are not transferable to the law calendar on motion of either party.

Pace v Mason, 206-794; 221 NW 455

Non-right to transfer. The guarantor of a promissory note who is properly joined with the makers in equitable proceedings to foreclose the mortgage given to secure the note is not entitled to a transfer to the law calendar even tho the makers, by defaulting and suffering judgment, leave no issue for trial in the equitable proceedings except the guarantor's liability at law on his guaranty.

Williamsburg Bank v Donohoe, 203-257; 212 NW 555

Right to trial at law. A plaintiff who, in an ordinary action on a promissory note, alleges a fraudulent transfer by defendant of his property, and prays for an attachment and a decree subjecting the property to his judgment, does not by docketing said action in equity, deprive defendant of the right to a transfer to the law calendar of that part of the action which involves his liability on the note.

Federal Res. Bank v Geannoulis, 203-1385; 214 NW 576

Cross-petition at law in equitable action—nontransferability. A defendant in an equitable action who answers therein, and files therein a cross-petition at law, without questioning either the legal sufficiency of the petition or the jurisdiction of the court over such equitable action, thereby waives all right, if any, to have plaintiff's action transferred to the law calendar. Neither has defendant a right to have his cross-petition at law transferred to said law calendar.

Penn Ins. v Doyen, 211-426; 233 NW 790

Complete relief granted tho subject matter partly legal. Principle reaffirmed that equity having once obtained jurisdiction will determine all necessary matters even tho some of them are ordinarily cognizable only at law.

Penn Ins. v Doyen, 211-426; 233 NW 790

Rent and advances — contract for lien — enforcement — proper forum. An action to establish and enforce a contract lien for rent is properly brought in equity, and is not transferable to law, because the answer presents law issues. Held that a contract lien for rent is

validly created by a lease provision that the landlord should have, not only the statutory lien for rent, but also a lien upon all property of the tenant used or situated on the leased premises whether exempt from execution or not.

Beh v Tilk, 222-729; 269 NW 751

V PRIORITY IN TRIAL OF LEGAL AND EQUITABLE ISSUES

Equitable and law issues—order of trial—estoppel. The fact that the court first tries the pending equitable issues rather than the pending law issues furnishes no basis for complaint by a party who at the time neither requested a different order of trial nor objected to the order pursued by the court.

Pickler v Lanphere, 209-910; 227 NW 526

Allowance and payment of claims—nontransferability to equity. A simple, unsecured claim for money, filed against an estate by the surviving widow, is not, against the objections of the administrator, transferable to equity for trial. So held as to a claim due the widow under an alleged antenuptial contract.

In re Mason, 223-179; 272 NW 88

Law and equity—consolidation—mandatory order of trial. When litigants submit to the court, for trial by the court, both a law action and an equitable action, the court is under duty to first try the equitable issues if they be such as to dispose of both cases.

Holman v Wahner, 221-1318; 268 NW 168

Appeal from condemnation award—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v Des Moines, 227-382; 288 NW 399

VI ERRONEOUS TRANSFER OR REFUSAL TO TRANSFER—EFFECT

Refusal to transfer. The refusal to transfer from equity to law is quite harmless when the record reveals the fact that movant has no defense in law or in equity.

Westerman v Raid, 203-1270; 212 NW 134

Refusal to transfer. It is error to refuse a transfer to equity of an issue of reformation arising in a law action.

Power v Wood, 200-979; 205 NW 784; 41 ALR 1452

10948 Court may order change.

Eminent domain — bringing in necessary parties. In eminent domain proceedings on appeal from the award of the sheriff's jury, the court may permit the appellant land owner to amend, and bring in, and join equitable issue of ownership as to a portion of the property involved, with a stranger to the proceedings, and to try out such issue prior to trying out the issue of damages.

McCall v Highway Com., 217-1054; 252 NW 546

10949 Errors waived.

Waiver. A defendant who, in an equitable action for injunction, prays for equitable relief may not, after trial, question the jurisdiction of the court on the ground that plaintiff's action ought to have been at law,—to wit, replevin.

Baxter v Baxter, 204-1321; 217 NW 231

Equity instead of law—estoppel. A litigant may not allow an action in the trial court to remain on the equity side of the calendar without objection, and on appeal, for the first time, claim that the action should have been at law.

Burmeister v Hamann, 208-412; 226 NW 10

Des M. Music Co. v Lindquist, 214-117; 241 NW 425

Petition at law in equitable action—nontransferability. A defendant in an equitable action who answers therein and files therein a cross-petition at law, without questioning either the legal sufficiency of the petition or the jurisdiction of the court over such equitable action, thereby waives all right, if any, to have plaintiff's action transferred to the law calendar. Neither has defendant a right to have his cross-petition at law transferred to said law calendar.

Penn Ins. v Doyen, 211-426; 233 NW 790

Waiver by answer. Defendant in an equitable action, when confronted by an amendment to the petition pleading an action at law in addition to the equitable matters, waives his right to have the law action transferred to the law docket by first filing an answer to said amendment; and this is true tho the equitable issues are later entirely disposed of by decree leaving nothing for determination but the issues raised by said amendment and answer.

Kimmel Corp. v Renwick, 220-362; 261 NW 775

Law (?) or equity (?) — presentation of question. Whether an action brought in equity should have been brought at law can only be

raised by a motion to transfer to the law side of the calendar.

Des M. Music v Lindquist, 214-117; 241 NW 425

Beach v Youngblood, 215-979; 247 NW 545

Wrong docket—waiver. When in an action brought against two defendants in equity one defendant is sought to be charged at law and the other in equity and the equity feature of the action is wholly dismissed, the remaining party waives any right to a transfer to the law docket by failing to move for such transfer.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Failure to except. Rulings relative to the transfer of a cause from law to equity or vice versa will not be reviewed in the absence of exceptions to the rulings.

Hogan v Perkins, 213-1175; 238 NW 608

Van Dyck v Abramsohn, 214-87; 241 NW 461

Following trial court method of trial. An appeal will be heard de novo when the parties mutually and without controversy tried the cause in equity in the trial court.

State v Automobile, 214-1088; 243 NW 303

Separating issues—required procedure. A party who wishes to separate the equitable issues already joined from a law action, pleaded by the adversary as an amendment, must move to separate before he answers.

Kimmel Corp. v Renwick, 220-362; 261 NW 775

Transfer to equity—return to probate refused. Where an application in probate brought by a trustee under a will asking for directions of the court was transferred to equity on a motion by intervenors after a hearing at which all parties appeared and submitted arguments but did not except to the transfer, it was proper for the court to refuse a motion made eight months later asking that the transfer be canceled, when it was not shown that the rights of the parties could be better determined in probate than in equity, the question being a matter of forum rather than of jurisdiction.

In re Proestler, 227-895; 289 NW 436

10950 Uniformity of procedure.

Comity between states. A cause of action which is predicated on the statutes of a foreign state will, as a matter of comity, be enforced in the courts of this state, but only under and in accordance with the recognized and prescribed court procedure of this state.

Rastede v Railway, 203-430; 212 NW 751

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

10951 Title of cause.

Immaterial deviation. The fact that a guardian brings an action in behalf of the ward as "next friend" does not necessarily affect the validity of the proceedings.

Bennett v Ryan, 206-1263; 222 NW 16

10952 Judgments annulled in equity.

Enforcement of judgments restrained. See under §12527

Consent decree. Equity will not set aside a consent judgment for attorney fees for both parties in divorce proceedings, against the defeated party and his land, when no fraud is shown, and when the court had personal jurisdiction over both parties to the proceeding.

Coulter v Smith, 201-984; 206 NW 827

Counterclaim—waiver by failure to plead. A party who is sued on a nonnegotiable claim by the assignee or quasi assignee thereof or by one who has been subrogated to the right to the claim, and fails to plead in defense a counterclaim which he then holds against the assignor, whether such counterclaim be liquidated or unliquidated, unconditionally waives the right to use such counterclaim as an offset against the judgment obtained by the assignee or subrogated party on the claim sued on.

Southern Sur. v Ins. Co., 210-359; 228 NW 56

Defense arising or discovered since judgment entered. The fact that a claim, when judgment was entered thereon, had been discharged in bankruptcy, is not a "defense which has arisen or been discovered since the judgment was rendered", and therefore within the power of a court of equity to annul or modify.

Harding v Quinlan, 209-1190; 229 NW 672

Equitable action after one year. What exact limitations a court of equity will impose on

itself in exercising its power to vacate a judgment or decree and to grant a new trial because of evidence discovered after the expiration of the statutory one year for vacation and new trial, quaere (§12787 et seq.); but such power will not be exercised either (1) when the new evidence was or ought to have been discovered during said statutory period, or (2) when such evidence falls far short of presenting strong equitable considerations, is largely incompetent, and, within the range of competency, is a double-edged sword which militates strongly against the equities of the applicant.

Abell v Partello, 202-1236; 211 NW 868

Failure to do equity. Equity will not set aside a judgment for a debt which complainant admits he owes, and which he in no manner offers to discharge.

Coulter v Smith, 201-984; 206 NW 827

Fraud of judgment plaintiff. A judgment entered against a defendant after plaintiff, for a sinister purpose, had assured defendant that he would not be held on his indorsement of the note in question, and after plaintiff had induced defendant to forego reimbursing himself by a settlement with the maker of the note, will be deemed fraudulent and set aside accordingly.

Foote v Bank, 201-174; 206 NW 819

Void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

10953 Action to obtain discovery.

Discussion. See 19 ILR 589—Illinois-Iowa procedure; 20 ILR 68—Discovery before trial

Improper use of statute. Principle reaffirmed that the court will not extend its aid to a litigant in his effort to enter upon a roving, gambling expedition for the purpose of discovering his antagonist's evidence.

Scott v Seabury, 216-1214; 250 NW 468

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

Motions — more specific statement — unreasonable requirement. In an action in the nature of a discovery and for an accounting, plaintiff ought not, under a motion for a more specific statement, to be required to set forth the very facts which he is seeking to discover.

Garretson v Harlan, 218-1049; 256 NW 749

10956 Successive actions.

Statute of limitations on successive actions. See under §11007, Vol I

Successive actions on statutory bond.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Splitting action. A party to a continuing, executory contract may, notwithstanding the wrongful repudiation of the contract by the other party, insist on the contract and sue and recover the matured installments to date; and such action is no bar to a subsequent action to recover henceforth for the wrongful breach of the contract.

Collier v Rawson, 202-1159; 211 NW 704

Permissible splitting of action. When a promissory note, and the last interest coupon note, both mature at the same time in the hands of the same holder, a judgment in an action solely on the interest coupon note (which contains no promise to pay the principal) is not an adjudication of the amount due on the principal note. In other words, the holder may first sue on the coupon note and later on the principal note.

Des M. Trust Co. v Littell, 209-22; 227 NW 503

Failure to enforce all security in mortgage foreclosure.

Schnuettgen v Mathewson, 207-294; 222 NW 893

Failure to plead available claim in foreclosure.

Miller Bk. v Collis, 211-859; 234 NW 550
Jones v Knutson, 212-268; 234 NW 548

Allowable partial assignment. The owner of a chose in action has a legal right to assign a part of his interest in such chose, and thereafter to join with the assignee in the prosecution of the entire cause of action.

Welch v Taylor, 218-209; 254 NW 299

Future payments—total disability. In action on life insurance policy for total disability payments, where supreme court ordered insurance company in prior case, decided in 1931, to pay annual benefits up to that time, the decision of the trial court in a subsequent action on the same policy ordering payments up to 1937 and thereafter, was erroneous as to that part requiring future payments, particularly since opinion in first appeal is binding not only under the doctrine of stare decisis, but also under the rule of res adjudicata, when the first opinion held that "continuance of such disability must be established by later proofs".

Kurth v Ins. Co., 227-242; 288 NW 90

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting action. A mortgagee who had paid delinquent

taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch. 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

10957 Actions survive.

Discussion. See 3 ILB 196—Instantaneous death; 10 ILB 169—Liability for wrongful death; 11 ILR 28—Liability for wrongful death

ANALYSIS

I SURVIVAL OF ACTIONS AND RESULTING RIGHTS

II ASSIGNABILITY OF ACTIONS

Assignment of chose in action. See under §10971
Assignment of nonnegotiable instruments and accounts. See under §9451

I SURVIVAL OF ACTIONS AND RESULTING RIGHTS

What causes of action survive. While the right of an injured employee to compensation under the workmen's compensation act is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Coal Co., 217-827; 250 NW 607

Death of spouse—effect. Principle reaffirmed that the mutual property rights of a husband and wife may be determined after the death of one of the parties.

Melvin v Lawrence, 203-619; 213 NW 420

Damages for death—evidence. In an action for damages for wrongful death, evidence is admissible of the recent purchase, solely on credit, by decedent, of a business, and of the marked reduction by decedent of his indebtedness subsequent to such purchase, together with evidence of his ability, health, and other kindred matters.

Scott v Hinman, 216-1126; 249 NW 249

Assessment on bank stock—liability survives. The cause of action for the enforcement of an assessment on corporate bank stock survives the death of the stockholder, the stock continuing to stand in his name on the books of the bank until the necessity for, and right to, the assessment arose.

Andrew v Bank, 219-1244; 260 NW 849

Alimony—modification by action by executor. Whether an action or proceeding to modify an alimony allowance survives the death of the obligated party, and passes to the latter's executor, quaere, but, conceding such survival, there must be proof that the right to such modification existed in the obligated party during his lifetime.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Bonds—enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Common law abrogated. The original cause of action that accrued to an injured party survives his death in favor of his legal representatives, the common-law rule to the contrary being abrogated by statute.

Boyle v Bernholtz, 224-90; 275 NW 479

Death of party—appeal not abated. Death of appellee during pendency of divorce appeal to the supreme court does not abate the action when property rights are involved.

Graham v Graham, 227-223; 288 NW 78

II ASSIGNABILITY OF ACTIONS

Joinder—causes assigned for collection—right of assignee. Plaintiff, in an action at law against a defendant, may join in separate counts:

1. Any number of causes of action against defendant of which plaintiff is the unqualified holder, and which are triable at law in said county of suit, and
2. Any number of causes of action against defendant of which plaintiff is holder as assignee for collection only, and which are triable at law in said county of suit.

Carson etc. v Long, 222-506; 268 NW 518

10958 Civil remedy not merged in crime.

Bar of action—acquittal as bar to civil action—penalties—forfeitures. The general rule is that a defendant's acquittal in a criminal prosecution is neither a bar to a civil action

against him nor evidence in such action of his innocence; but, when the subsequent action, altho civil in form, is quasi-criminal in nature, as to recovering penalties or declaring forfeitures, the second action may be barred by the former.

Bates v Carter, 225-893; 281 NW 727

10959 Actions by or against legal representatives—substitution.

ANALYSIS

I IN GENERAL
II SUBSTITUTION
III ACCRUAL OF ACTION
IV RECOVERY AND DISTRIBUTION

Disposition of recovered proceeds. See under §11920

I IN GENERAL

Action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

Collection of estate—breach of contract. An executor may maintain an action for the breach of a contract between the deceased and an heir of deceased by which the latter agreed to pay, as part of the estate, a named sum to another heir.

Rodgers v Reinking, 205-1311; 217 NW 441

Death of partner—action by surviving partner. A surviving partner cannot maintain an action at law against the representative of a deceased copartner to recover plaintiff's share of specific partnership property appropriated by the deceased partner, in the absence of proof that the partnership affairs have been settled and all partnership debts paid.

Dolan v McManus, 209-1037; 229 NW 687

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bank v Taylor, 213-1206; 240 NW 740

Statutory double liability repealed—limitation of action. After the effective date of Ch 219 of the 47th G.A., the act repealing the statutory double assessment liability on bank stock, a closed bank's receiver may not maintain against the executor and beneficiaries under the will an action to enforce the double liability as to stock issued prior to December 1, 1933, and formerly owned by decedent.

Bates v Bank, 227-925; 289 NW 735

Surety bond—when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

II SUBSTITUTION

Appeal in name of deceased party. Altho plaintiff died during pendency of action below, supreme court took jurisdiction of appeal taken in name of such decedent, because parties treated cause as one properly before the court and because it was a case where court's constitutional authority could be invoked.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Death of applicant for compensation—proper substitution. Where an injured employee files with the industrial commissioner, under the workmen's compensation act, his application for compensation, and dies before compensation has been adjudicated, the surviving wife, who is the sole surviving dependent, may be substituted as claimant.

Dille v Coal Co., 217-827; 250 NW 607

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Substitution—irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased

II SUBSTITUTION—concluded

defendants are for the first time enumerated and named as the defendants, and, under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

Substitution of administrator. Upon the death of a party plaintiff, his administrator is properly substituted as plaintiff.

Dimon v Wright, 206-693; 214 NW 673

Substitution of county treasurer as defendant without notice. A default judgment entered against a county treasurer who had been substituted as defendant in lieu of a former treasurer, in an action to enjoin the sale of land for taxes, must be set aside when the substitution is made without the service of original notice upon him, and without knowledge on his part, even tho the former treasurer had been negligent in not entering an appearance; and especially is this true when the application to set aside is timely, and accompanied by an affidavit of merit and an apparently good answer.

Dewell v Suddick, 211-1352; 232 NW 118

Belated substitution—discretion. In an action at law by a corporation to recover on a contract, the court has discretionary power during the actual trial and after the jury has been obtained and after some testimony has been introduced, to order plaintiff's assignee for the benefit of creditors to be substituted as plaintiff,—no actual prejudice to defendant being made to appear; and this is true even tho defendant was, of course, deprived of the privilege of examining the jurors relative to their relations to the said assignee.

Webster County Buick Co. v Auto Co., 216-485; 249 NW 203

III ACCRUAL OF ACTION

Common law abrogated. The original cause of action that accrued to an injured party survives his death in favor of his legal representatives, the common-law rule to the contrary being abrogated by statute.

Boyle v Bornholtz, 224-90; 275 NW 479

IV RECOVERY AND DISTRIBUTION

Dormant action until death of defendants—substitution of heirs—irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased defendants are for the first time enumerated and named as the defendants, and, under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

Workmen's compensation—death of party claiming disability—substitution of dependents for loss of support. While the right of an injured employee to compensation under the workmen's compensation act is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Plainview Coal, 217-827; 250 NW 607

Note 1 Negligence liability generally.

Discussion. See 21 ILR 650—Assumption of risk

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I NEGLIGENCE

(a) IN GENERAL

Discussion. See 2 ILB 122; 5 ILB 36—Last clear chance

Interpretation of uncertain and indefinite plea. An indefinite and uncertain plea of negligence may very properly be given an interpretation by the court that is not inconsistent with the plea and which is consistent with the way or manner in which both parties have treated it.

Dean v Koolish, 212-238; 234 NW 179

No warning signal at railroad crossing—statute violations—negligence. The failure of compliance with a statutory standard of care is negligence. In an action for personal injuries sustained by an automobile passenger in collision in Illinois between an automobile and railway motorcar, where petition alleged that railway employees failed to ring bell or sound whistle of motorcar while approaching a crossing, as required by Illinois statute, such allegations were sufficient to state a cause of action based on negligence of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

Due care—measure affected by conditions. Care commensurate with the dangers inherent in the surroundings is required for the exercise of due care.

Denny v Augustine, 223-1202; 275 NW 117

Ordinary care—definition reaffirmed—first complaint on appeal. The standard definition of ordinary care need not be augmented by adding an extra word "ordinarily" to the phrases "would do" or "would not do under the circumstances", and, without a proper request in the trial court, complaint cannot be made on appeal.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Ordinary care—unallowable standard. Error results from instructing that a party would not be guilty of negligence if he moved machinery across a railroad track in the manner in which he usually so moved it, unless he knew such manner to be dangerous.

Graves v Railway, 207-30; 222 NW 344

Physical defect. The doctrine that a traveler upon the public highway must exercise a degree of ordinary care commensurate with a known physical defect necessarily can have no application when he did not know that he had the physical defect in question.

Greenlee v Belle Plaine, 204-1055; 216 NW 774

Intervention of second force—determining liability. Where an injury results through the operation of a second force, ordinarily liability depends upon whether or not that second force may be anticipated to be the natural and probable consequence of the negligent act of the first party.

Blessing v Welding, 226-1178; 286 NW 436

"Volenti non fit injuria" defined. The maxim "Volenti non fit injuria" means: "That to which a person assents is not esteemed in law an injury" or "He who consents cannot receive an injury."

Edwards v Kirk, 227-684; 288 NW 875

Evidence—jury question. The court cannot, ordinarily, say that conflicting testimony tending to establish a charge of negligence is per se so absurd and improbable as to be insufficient to generate a jury question.

Elmore v Railway, 207-862; 224 NW 28; 32 NCCA 185; 35 NCCA 421

Contributory negligence — jury question. Principle reaffirmed that a jury question exists on the issue of negligence whenever on the record reasonable minds might reasonably differ as to the effect of what was done or not done under the circumstances.

Rosenberg v Railway, 213-152; 238 NW 703

Submitting both negligence and recklessness. Both questions of negligence and of recklessness may in a proper case be submitted together to the jury.

Wells v Wildin, 224-913; 277 NW 308

"Last clear chance" doctrine—applicability. The "last clear chance" doctrine has no application except in those cases only where defendant actually discovers plaintiff's position of peril in time to prevent injury by the exercise of ordinary care, and fails to exercise such care.

Graves v Railway, 207-30; 222 NW 344

Assumption of risk—lack of knowledge. An injured party may not be held to assume the risk of a defect of which he had no knowledge.

Dahna v Fun House Co., 204-922; 216 NW 262

Contributory negligence per se—hotel laundry truck—failure to see. Evidence reviewed and held to establish negligence per se on the part of plaintiff in not seeing and avoiding a truck which was standing in the hallway of a hotel.

Walker v Hotel Co., 214-1150; 241 NW 484

Hotels—negligence liability.

Van Heukelom v Hotels Corp., 222-1033; 270 NW 16

Inadvertent self-inflicted injury. One may not recover damages for an injury arising out of his own act, and under circumstances under his exclusive control. So held where the party in removing a prop under a loading

I NEGLIGENCE—continued
(a) IN GENERAL—continued

chute was injured by the prop falling against his face.

Rodgers v Railway, 214-1018; 243 NW 351

Tripping over mop handle. A naked showing that a pedestrian, while walking along a public street, was tripped and caused to fall by a mop handle in the hands of a window cleaner does not present a jury question on the issue of negligence.

Aita v Beno Co., 206-1361; 222 NW 386; 61 ALR 351

Unsupported issue. An unsupported issue of negligence must not be submitted to the jury. So held on the issue whether a city had negligently maintained its dump grounds.

Nichols Co. v Des Moines, 215-894; 245 NW 358

Depositing refuse on city dump. A person who deposits, on dump grounds provided by a city, discarded materials containing acid or capable of generating acid by a process of decomposition, becomes, henceforth, a stranger to such materials. In other words, he cannot be deemed negligent, toward persons frequenting said grounds, either in making the original deposit or in leaving it unguarded on the grounds. But evidence reviewed and held insufficient to sustain plaintiff's action even on a contrary theory.

Cabrnosh v Penick & Ford, 218-972; 252 NW 88

Negligence of contractor — unanticipated event. A contractor who, while constructing a sewer under the direction of and in accordance with the plans prescribed by the city, is unexpectedly interrupted in his work by the failure of the city to acquire a continuous right of way for the sewer, is under no legal obligation to a property owner to leave his uncompleted work in such condition as will avoid damages which no reasonable foresight would anticipate.

Newton Co. v Herrick, 203-424; 212 NW 680

Governmental function—nonliability. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk Co., 224-1159; 276 NW 706; 281 NW 837

Drowning in swimming pool. Negligence of a corporation operating a swimming pool in which an 11-year-old boy drowned, could not be grounded upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v Playground Assn., 227-81; 287 NW 259

Charitable institutions—nonliability to beneficiaries for employees' negligence. Tho as between benefactor and beneficiary, an institution conducted solely for doing charity may not be liable for the negligence of its employees to a person receiving the benefits of that charity; however, a WPA worker doing work on the premises of a Y. M. C. A. was not a beneficiary of the charitable work of the institution, so as to be within this rule.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Vicious and runaway team. Evidence held insufficient to establish that a team of horses in question were vicious and addicted to running away.

Hansen v Jensen, 204-1063; 216 NW 677

Failure to warn employee. An employer is not negligent in failing to warn an experienced farm hand of the danger of going in front of a team of horses when the employee had full knowledge of the temperamental condition of the team.

Hansen v Jensen, 204-1063; 216 NW 677; 39 NCCA 431

Master and servant—injuries to servant—place for work—loose rug on polished floor. The maintenance in the doorway between the dining room and hallway of an ordinary home, and on the polished hardwood floor thereof, of a 3-ft. x 6-ft. Persian rug with ribbed undersurface but without floor fastenings of any kind, cannot, as a matter of law, be deemed negligence.

Nelson v Smeltzer, 221-972; 265 NW 924

Unguarded opening in wall—nonattractive nuisance. It is not negligent for a factory owner to maintain on his premises an unguarded opening in a wall under a building adjoining a driveway, when the opening is of a size sufficient to enable a small child to crawl through and under the building and come in contact with hidden machinery.

Nelson v Canning Co., 193-1346; 188 NW 990

Wrecking building—duty in re adjoining tenants. A party rightfully engaged in tearing down a building is under legal obligation to exercise reasonable care for the safety of

other persons who are rightfully in buildings adjoining the one which is being torn down.

Crawford v Emerson Co., 222-378; 269 NW 334

Nonpresented theory. Correct instructions relative to the duty of the defendant to guard an excavation made by him are all-sufficient, in the absence of a request by defendant that there be presented to the jury his claim that he had properly covered the excavation and that someone had, without his knowledge, wrongfully removed such covering.

McKee v Iowa Co., 204-44; 214 NW 564

Willful or wanton act—evidence. Evidence, relative to the circumstances under which a visitor in a manufacturing plant was injured by her clothing catching on a revolving shaft, reviewed, and held quite insufficient to reveal any element of willfulness or wantonness in the conduct of an employee of the plant.

Sanburn v Rollins Mills, 217-218; 251 NW 144

Boy drowning in swimming pool at boys' camp—owners of pool—liability. In an action to recover damages for the drowning of an 11-year-old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about one hundred boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

Hecht v Playground Assn., 227-81; 287 NW 259

Agent's duty to care for principal's property. An agent has the duty to exercise reasonable care in safeguarding the property of his principal, and ordinarily he is not liable for loss of such property resulting from causes other than his own negligence.

Crouse v Cadwell, 226-1083; 285 NW 623

Negligence of tenant—liability of landlord. Principle recognized that a property owner who has parted with full possession and control of his premises by lease is not liable to third persons for injuries caused by the negligence of the tenant.

Updegraff v Ottumwa, 210-382; 226 NW 928

Bailments—gratuitous lender—no affirmative duty to user—injury from borrowed corn shredder. A gratuitous bailor or lendor of a chattel, deriving no advantage from the relationship, owes no affirmative duty to his donee to see that the chattel is free from danger, except to inform the donee of known dangerous conditions. Rule applied to loaned corn shredder in which a person injured his hand.

Davis v Sanderman, 225-1001; 282 NW 717

Borrowing automobile to deliver telegraph message. A telegraph company is not responsible for the act of its messenger in borrowing an automobile with which to make a delivery of a message when the usual and ordinary way of making delivery was by means of a bicycle, and when the borrowing aforesaid was wholly unauthorized by and unknown to the company.

Hughes v Western Union, 211-1391; 236 NW 8; 31 NCCA 423

Bailments—duty to user—injury from borrowed corn shredder. A person supplying a chattel for another's use, and who derives some beneficial interest therefrom, must use reasonable care to discover, and is liable for, unreasonable risks due to the condition or disrepair of the chattel or its unfitness or inadequacy for the purpose for which supplied. The user assumes only such risks as are not known and not discoverable by the supplier using ordinary care. Rule applied to corn shredder loaned to neighbor and in which shredder a person injured his hand.

Davis v Sanderman, 225-1001; 282 NW 717

Corn shredder gratuitously loaned—farm machinery mechanic injuring hand in knives—directing verdict. Directing a verdict is proper against a plaintiff, a farm machinery mechanic and salesman, seeking recovery for an injury sustained when his hand was caught in a corn shredder, which had been gratuitously loaned by defendant to a neighbor on whose farm plaintiff was operating the machine, the evidence showing plaintiff was an adult familiar with such machinery and in full possession of his faculties, and that there was no negligence attributable to defendant.

Davis v Sanderman, 225-1001; 282 NW 717

Trespassing boy—jumping from freight car to building. There are cases where the owner of premises will be held liable for injury to a child too young to understand the fact or meaning of trespass, or to care for his own safety when attracted to the premises by some act or omission of the owner which he knows, or as a reasonably prudent person ought to apprehend, would render the premises dangerous. But where, as in this case, a boy 13 years of age climbed upon a freight car standing at defendant's railway station and from there jumped to the roof of a storage building for electric cars, and when about to jump back to the car was injured by contact with an uninsulated power wire passing above the roof of the building, and it appeared that plaintiff knew he was a trespasser, that the railway was operated by electricity and that electric wires were dangerous; that the roof could only be reached by climbing the cars; that this was

I NEGLIGENCE—continued
(a) IN GENERAL—continued

the first incident of the kind and no necessity for guards or signs had been indicated to the owner, the plaintiff was guilty of such negligence as to preclude recovery for the injury.

Anderson v Railway, 150-465; 130 NW 391

Alighting from moving train. Negligence may be found in the act of a brakeman of a train in advising a passenger to alight from a moving train, and it is not necessarily negligence for the passenger to follow the advice.

Bersie v Railway, 202-1090; 211 NW 250

Nonapprehended danger. Negligence may not be predicated on the failure of the operatives of a train to stop and remove a 7-year-old child from a pile of cinders near the track when there is no occasion to apprehend danger to the child.

Radenhausen v Railway, 205-547; 218 NW 316

Sudden stopping of streetcar. Evidence that a street railway car was put in motion in order to carry it around a corner at two intersecting streets, and was momentarily thereafter brought to a sudden stop because of the unexpected act of an automobile driver in attempting to pass the streetcar and in being caught by the overswing of the rear end of the streetcar, presents no jury question on the issue of negligence in operating the streetcar.

Wheeler v Railway, 205-439; 215 NW 950; 55 ALR 473

Instructions—undue burden. No undue burden is imposed on a defending street railway company by requiring it to keep its car "under proper control and to use ordinary care," to operate its car "in a careful manner and not at a dangerous rate of speed," and to give notice of its approach "by ringing the gong or bell or otherwise," when the pleaded assignment of negligence embraces (1) excessive speed, (2) want of proper control of the car, and (3) failure to give warning of the approach of the car.

Johnson v Railway, 201-1044; 207 NW 984

Failure to instruct on general negligence. There was no prejudicial error in failing to instruct that an action was based on general negligence when, in assigning this alleged error, the defendant stated that the court set out the substance of the petition in stating the issues, but did not show in what manner the jury would have better understood the issues had the court instructed as to general negligence.

Porter v Elec. Co., 228- ; 292 NW 231

Specific negligence—res ipsa loquitur—separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used, the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65

Adverse result of X-ray treatment — jury question. While the adverse result attending X-ray treatment, e. g., a burn, is not in and of itself evidence of negligence, yet evidence that such result does not ordinarily follow reasonably skillful treatment, plus evidence that such result may result from too frequent treatment, or from treatment prolonged during a long period of time, and that plaintiff was so treated, may generate a jury question on the issue of negligence.

Berg v Willett, 212-1109; 232 NW 821; 38 NCCA 383

Joint action—evidence. In a joint action against two physicians for malpractice, evidence of negligence on the part of one of the defendants prior to the other defendant's connection with the case is inadmissible.

Lemon v Kessel, 202-273; 209 NW 393

Necessity for amputation—jury question. The issue whether a necessity existed for the amputation of an arm does not become a jury question on general descriptive testimony of laymen, bearing on the appearance of the arm, and tending to show no necessity for amputation, and unanimous expert testimony to the effect that amputation was necessary in order to save the life of the patient.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Amputation without X-ray picture. The issue whether a surgeon was negligent in failing to have an X-ray picture taken of a broken arm before amputating it does not become a jury question on general testimony by laymen descriptive of the arm opposed by unanimous expert testimony that the extent of the broken, crushed, and mangled arm was plainly apparent without an X-ray picture, the issue being whether amputation was necessary.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Malpractice—other possible causes of injury. In a malpractice action against dentist for injuries caused by lodging of root of tooth in plaintiff's lung, other possible and reasonable causes of the injury were eliminated on the contentions that the object causing injury was not the root of a human tooth, when six laymen testified that it was, even tho there was no expert testimony to this effect; that the object was a calcareous deposit when the

defendant, after viewing the object, failed to suggest that it was a calcareous deposit and stated, "We will see you through all this", that no one saw the root at the time it was expectorated when it would have been impossible to see it in the bloody mass of sputum; and that plaintiff could have unknowingly sucked the root into his lung when such objects do not unknowingly pass into the windpipe.

Whetstine v Moravec, 228- ; 291 NW 425

Collections—relying on telephone message. A bank which receives from a livestock commission company a check on a local bank, payable to a nonresident shipper (for whom the receiving bank was acting as general collector), is not, as a matter of law, negligent if, in attempting to collect the check, it relies on the telephoned statement of the drawee-bank that the drawer has no funds on deposit with which to pay the check, even tho it is made to appear that the check would have been paid if it had been personally presented at later, but unidentified, times during the same or the following day.

Steadman v Bank, 200-347; 202 NW 523

Insurance companies—negligence in issuing policy—liability. An insurance company, even tho it be but a mutual association which resorts to assessments on its members for funds with which to pay losses "and necessary expenses", must respond in damages for its tort in negligently failing to issue a policy which had been duly contracted for.

Mortimer v Ins. Assn., 217-1246; 249 NW 405; 35 NCCA 134

Sales—belated and unexplained sale at low price. A sale by a commission merchant at an extremely low price, and on a steadily falling market, and after a long and unexplained delay, may be sufficient to present a jury question on the issue of negligence.

Blanchard v Wood Co., 204-255; 214 NW 583

Truck tire—placing on rim. Where recovery is sought because a minute particle of metal, apparently chipped off of operator's hammer, flew into plaintiff's eye while his truck tire was being repaired by filling station operator, and where there was no showing that tools and methods used by the operator were not those ordinarily used, motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

(b) ATTRACTIVE NUISANCE IN GENERAL

Attractive nuisance—basis of theory. In this state, the doctrine of attractive nuisance has its foundation in an implied invitation of the landlord on the theory that the temptation of an attractive plaything to a child of tender years is equivalent to an express invitation to an adult.

Harriman v Afton, 225-659; 281 NW 183

Building reconstruction—attractive nuisance. In an action for damages consequent on a child falling into an opening in the floor of a building which was undergoing reconstruction after a fire, an amendment to the petition, alleging that the building was an attractive nuisance, and offered on the theory of conforming the pleadings to the proof, is properly rejected when the record is bare of any evidence that the said place was attractive to children.

Battin v Cornwall, 218-42; 253 NW 842

City reservoir and raft thereon—attractive nuisance doctrine not applicable. Neither a reservoir maintained by a city on private ground isolated from any public place or playground nor a raft thereon, capable of supporting a man, used to measure the water depth, being inherently an attractive nuisance, a combination of the two will not invoke a different rule.

Harriman v Afton, 225-659; 281 NW 183

Swimming pool not an "attractive nuisance". A swimming pool, either natural or artificial, is not an attractive nuisance.

Hecht v Playground Assn., 227-81; 287 NW 259

Concealed amusement device. The maintenance and operation of an amusement device may constitute actionable negligence as to one from whom the maintenance and operation were concealed, even tho it might be otherwise as to one who had full knowledge.

Dahna v Fun House Co., 204-922; 216 NW 262

Dangerous machinery—attractive nuisance doctrine inapplicable. The owners and proprietors of shops and factories may be liable for negligence by exposing and leaving in an unguarded condition in an open or public place dangerous machinery likely to attract children, where their presence may be known or reasonably apprehended; but such owners or proprietors are not precluded from the right to use their appliances and machinery in their own buildings and upon their own premises as may best serve their advantage, and when neither expressly inviting children to enter there or to put themselves in a place of danger they will not be liable for an injury not wantonly inflicted.

Hart v Brick & Tile Co., 154-741;135 NW 423

Park instrumentality as nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA (NS) 432

I NEGLIGENCE—continued

(b) ATTRACTIVE NUISANCE IN GENERAL—concluded

Pool of water not "attractive nuisance". A small, but deep and unguarded, pond or pool of water, permitted to form at the outlet of a municipal stormwater sewer, will not be deemed an "attractive nuisance" within the law of negligence.

Raeside v Sioux City, 209-975; 229 NW 216; 30 NCCA 299; 2 NCCA(NS) 734

Water tank and electric transformer not attractive nuisance. The maintenance in a brickyard where children sometimes play of a circular water tank about 11 feet in height, with no inviting or ready means of going up and down the side thereof except a perpendicular, smooth overflow pipe 1¼ inch in diameter extending from the top to the bottom of the tank and at a distance of 8 inches from the outside wall, and the maintenance on the top of the tank of heavily charged electric transformers 4 feet high, without any warning signs of danger, will not be deemed an "attractive nuisance", within the law of negligence.

Cox v Des Moines L. Co., 209-931; 229 NW 244; 36 NCCA 160

(c) RES IPSA LOQUITUR IN GENERAL

Res ipsa loquitur—nonapplicability. Record reviewed relative to the fatal injuries received by a party on, in, or about, a freight elevator, and relative to the defendant's control of the operation of said elevator at the time said injuries were received, and held to show the inapplicability of the doctrine of res ipsa loquitur.

Boles v Hotel Maytag, 221-211; 265 NW 183

Malpractice — doctrine generally inapplicable. As a general rule, the doctrine of res ipsa loquitur does not apply in malpractice cases for the reason that the professional man is required to exercise only that degree of care and skill ordinarily exercised by other members of the same profession, in like communities, under similar circumstances; also, the doctor does not have complete and exclusive control over the instrumentality with which he is working.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—root of tooth in lung. While the doctrine of res ipsa loquitur does not ordinarily apply in malpractice cases, the doctrine was held applicable under the pleadings and proof that plaintiff was given a general anesthetic, was completely unconscious and under the exclusive control of the defendant-dentist at the time his teeth were extracted, and that nine months later he expectorated from his lungs, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Carriers—applicability. Principle recognized that the doctrine of res ipsa loquitur is, under appropriate facts, applicable to common carriers.

Preston v Railway, 214-156; 241 NW 648

Carriage of passengers—res ipsa loquitur applicable tho negligence pleaded specifically. The doctrine of res ipsa loquitur may be applicable under one unquestioned count of a petition which alleges negligence generally, notwithstanding the fact that the same cause of action is pleaded in another count under specific allegations of negligence.

Crozier v Hawkeye, Inc., 209-313; 228 NW 320

Limitation of actions — amendment after period has run. The identity of a cause of action is not changed by an amendment (made at a time when the action would otherwise be barred) which strikes from a petition a specific allegation of negligence in furnishing electricity for lighting purposes, and substituting therefor a general allegation of negligence in order to rely on the doctrine of res ipsa loquitur.

Orr v D. M. Elec., 213-127; 238 NW 604

Inflammable gas—explosion. Basis for the application of the doctrine of res ipsa loquitur is established by proof that pipes and appliances for conducting inflammable gas into a place of business were under the full control of the party furnishing the gas, that gas leaked from said pipes and appliances before it entered the meter, and that a violent explosion resulted from such leakage.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Negligence—applicability. The rule of res ipsa loquitur applies where the circumstances attending the injury are of such character that the accident could not well have happened in the ordinary course of events without negligence on defendants' part, and the instrumentalities causing the injury were within exclusive control of defendants.

Peterson v De Luxe Co., 225-809; 281 NW 737

Malpractice—physicians and surgeons. It has seldom been questioned that where the act of omission or commission upon the part of a surgeon has been plainly negligent, as where a sponge, gauze, instrument, or needle has been left in the body, the rule of res ipsa loquitur applies, and that it is also unnecessary to show by expert testimony that such an act does not comport with the required standards.

Whetstine v Moravec, 228- ; 291 NW 425

Inapplicability. The doctrine of res ipsa loquitur has no place in a cause wherein plaintiff rests his action on specific allegations of negligence.

Rauch v D. M. Elec., 206-309; 218 NW 340; 34 NCCA 668

Evidence. Doctrine of res ipsa loquitur held applicable to an accident of which noninsulated electric wires were the proximate cause.

Beman v Iowa Co., 205-730; 218 NW 343; 30 NCCA 635

Pleading. A general allegation of negligence, or a pleading of facts which is equivalent to such allegation, is an essential prerequisite to the application of the doctrine of res ipsa loquitur.

Whitmore v Herrick, 205-621; 218 NW 334; 34 NCCA 670

Dangerous instrumentalities. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence, not that such facts compel the jury to draw such inference. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Scope. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence, not that such facts compel the jury to draw such inference in the absence of explanatory evidence. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Preston v Railway, 214-156; 241 NW 648; 33 NCCA 782

Pleading. Plaintiff who relies on the doctrine of res ipsa loquitur and pleads facts showing the applicability of such doctrine, may (and should) plead negligence generally —need not (and should not) plead specific acts of negligence on the part of defendant and his employees.

Van Heukelom v Hotels Corp., 222-1033; 270 NW 16

Pleading—waiver. A general allegation of negligence, supportable by the doctrine of res ipsa loquitur, is waived by inserting in the same count a specific allegation of negligence; but the rule is otherwise when the different allegations are in different counts and when the issue arising on the general allegation is alone submitted because of the dismissal by plaintiff of the count containing the specific allegation.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Motions—more specific statement—avoidance under res ipsa loquitur. A general allegation of negligence is subject to a motion for a more specific statement unless the pleader clearly indicates in his pleading his purpose to sustain said general allegation under the doctrine of res ipsa loquitur.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Specific allegations—effect. Proof that an agency or thing caused an injury under circumstances strongly suggestive of negligence on the part of the defendant having control of such agency or thing, but under circumstances such that direct evidence of the specific negligence is not readily available, opens the door to the injured party to rely on the doctrine of res ipsa loquitur, unless the injured party sees fit to allege and rely on specific allegations of negligence.

Orr v Des Moines L. Co., 207-1149; 222 NW 560; 30 NCCA 622; 3 NCCA (NS) 540

Trap door in leased coliseum not a nuisance. Trap door in leased coliseum opened only to dispose of refuse held not a nuisance. Doctrine of res ipsa loquitur held inapplicable where person fell into opening, especially in view of fact that trap door was not wholly under control of defendant-lessees.

Work v Coliseum Co., (NOR); 207 NW 679

Drowning—res ipsa loquitur nonapplicable. The mere fact that a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v Playground Assn., 227-81; 287 NW 259

(d) NO-EYEWITNESS RULE IN GENERAL

Accidents at crossings. The presumption of care which may be indulged in case of an accident of which there is no eyewitness has no application when the record affirmatively shows that the accident would not have happened had the injured party exercised reasonable care.

Tegtmeyer v Byram, 204-1169; 216 NW 613

Improper submission of issue. When the record affirmatively shows the absence of all eyewitnesses to a fatal accident because the sole survivor was not observing the deceased persons immediately preceding the accident, the court should peremptorily instruct that there were no such witnesses; but the defendant is not, in such case, prejudiced if the existence of such witnesses is submitted to the jury.

Rastede v Railway, 203-430; 212 NW 751

Indispensable showing—nonpresumption. In an action against a railway company for damages for negligently running over and killing, during the nighttime, and within its switching yard, a pedestrian, the all-important and indispensable fact that said pedestrian was, when hit, on a near-by public sidewalk—where he had a right to be—will not be presumed from the fact that there was no eyewitness to the fatal accident, the "no-eyewitness rule" having no such function.

Young v Railway, 223-773; 273 NW 885

I NEGLIGENCE—continued

(d) NO-EYEWITNESS RULE IN GENERAL—concluded

No-eyewitness rule — instructions. Instructions relative to the permissible inference of care which the law authorizes when there are no eyewitnesses to an accident reviewed and held correct.

Azeltine v Lutterman, 218-675; 254 NW 854

Omission to state "no-eyewitness" rule — effect. Failure to instruct as to the presumption of care which the law indulges when there is no eyewitness to a fatal accident does not constitute reversible error when no such instruction was requested, and when it is somewhat questionable whether plaintiff was entitled to such instruction, and the ordinary instruction as to freedom from contributory negligence was given.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA (NS) 547

Presumption arising from human instinct. The presumption that the instinct of self preservation caused a traveler who was killed by a train at a crossing to look for a train before he went upon the crossing has no application when it affirmatively appears that, had he looked at any time while he was in the zone of danger, he must have seen the train.

Wasson v Railway, 203-705; 213 NW 388

Eyewitness requirement. Proof by an insurer that the insured was murdered by being shot by some unknown person does not establish the defense that a limited liability is provided by the policy if the insured is killed by the discharge of firearms and there is no actual witness to the transaction "except the insured himself," because such proof establishes that there was an eyewitness other than the insured, to wit, the assailant.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

(e) NEGLIGENCE PER SE IN GENERAL

Discussion. See 11 ILR 78—Violation of statutes and ordinances

Electricity — charged wire. A person is guilty of contributory negligence per se when, knowing that a wire at the top of a pole carries a very dangerous voltage of electricity, and faced by no emergency requiring or excusing a relaxation of due care, he attempts to get another wire out of his way by swinging it upward in the form of a rainbow, in order to hook it over a spike which has been driven into the pole some two feet below the dangerously charged wire.

Murphy v Iowa Co., 206-567; 220 NW 360

Known obstruction on sidewalk. A pedestrian who discovers in his pathway on a public sidewalk a substantial obstruction of frozen straw and other refuse and unnecessarily attempts to walk over the same is guilty of negligence per se.

Wells v Oskaloosa, 212-1095; 235 NW 322

Machinery in enclosed building. The maintenance and operation of machinery, for a legitimate purpose, in an enclosed building and with ordinary and suitable protection is not negligence, altho attractive to children and no special guard is employed to look after their safety.

Brown v Canning Co., 132-631; 110 NW 12

Negligence of pedestrian. A pedestrian must be deemed guilty of negligence per se when, on a dark and cloudy morning, in full possession of the senses of seeing and hearing, he looks for an approaching streetcar while at the street curb line, and claims he saw none (tho a car would be visible at a distance of 100 feet), and when he thereupon quickly passes into the street for a distance of 18 feet and is hit by the car which he says he did not see.

Barboe v Service Co., 205-1074; 215 NW 740

Streets—obstructions. A pedestrian who, on a dark and rainy night, passes over a parking in a public street in close proximity to a pile of broken cement, with full knowledge of the presence of such obstruction and of its dangerous character, and is injured by stumbling over a detached piece of the cement, is guilty of contributory negligence per se when it appears that a very slight deviation in his course would have placed him in a zone of perfect safety.

Roppel v Mount Pleasant, 208-117; 224 NW 579

Stopping on streetcar track. A vehicle driver who passes a streetcar going in the same direction, and later drives upon the streetcar tracks and stops at a point 100 feet ahead of the car, is not guilty of negligence per se.

Towberman v Railway, 202-1299; 211 NW 854

Torts—defects or obstructions in streets. A pedestrian who attempts to pass over an abrupt decline, known to be dangerous, in a public street, in the belief that he can do so in safety, will be deemed guilty of negligence per se, in the absence of any showing of acts of care on his part.

Lundy v Ames, 202-100; 209 NW 427

Injury near track. Negligence per se is established by evidence which conclusively forces the mind to the conclusion that a deceased who was hit by a passing train either did not look or listen for the train, which was in plain sight, or attempted to cross the track in front of the train, which he knew to be coming.

Pieczynski v Railway, 202-625; 210 NW 758

(f) IMPUTED NEGLIGENCE IN GENERAL

Passenger elevator falling—nonliability—elevator manufacturer. The builder of a passenger elevator is neither liable for a personal injury caused by the falling of the car where the safety device, designed to prevent such falling and stop the car, was of an approved pattern in general use and was not shown to have ever before failed to work efficiently, nor where it is disclosed by the accident a device could have been made which would have obviated the particular defect which caused the particular accident, unless it is further shown that reasonable prudence would have discovered this defect and remedied it. Due care, in a legal sense, does not require an uncanny foresight.

Hoskins v Otis Elev. Co., 16 F 2d, 220

(g) RECKLESSNESS IN GENERAL

Submitting both negligence and recklessness. Both questions of negligence and of recklessness may in a proper case be submitted together to the jury.

Wells v Wildin, 224-913; 277 NW 308

Recklessness of railway employees—insufficient pleading to establish. In action for personal injuries sustained by automobile passenger in collision between automobile and railway motorcar, where petition alleged that railway motorcar had been standing a short distance from crossing, obscured from view of motorist by shrubbery along railway right of way, and was driven onto crossing and into the course of oncoming automobile without warning, and that railway motorcar could have been stopped by applying brakes, such allegations were insufficient to state a cause of action based upon recklessness of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

Wantonness or recklessness. Wantonness is something more than recklessness and recklessness is something more than negligence.

Sanburn v Hosiery Mills, 217-218; 251 NW 144

II PROXIMATE, REMOTE, AND CONCURRING CAUSE IN GENERAL

Aggravation of disease—liability in general. One who is predisposed to disease which is aggravated or accelerated by negligence is entitled to recover damages necessarily and proximately resulting from such aggravation or acceleration.

Hackley v Robinson, (NOR); 219 NW 398

Proximate cause—fatal uncertainty. The theory that animals died from the effects of a so-called stock remedy administered to them cannot be said to be established when the cause of the deaths is essentially and necessarily within the domain of expert testimony, and when the experts are unable to determine with reasonable certainty whether said remedy caused or contributed to said deaths.

Tracy v Oil Co., 208-882; 226 NW 178

Burden of proof. Causal connection between the negligence proven and the injury complained of must be established by plaintiff. Evidence held insufficient.

Rauch v Elec. Co., 206-309; 218 NW 340

Causal relation. Evidence held to show causal relation between the taking of a radiograph of plaintiff's head and certain subsequent injuries.

Rulison v X-ray Corp., 207-895; 223 NW 745

Evidence. Evidence held insufficient to show that defendant's negligence was the proximate cause of an injury.

Schmidt v Hayden, 205-1369; 219 NW 399

Failure to maintain lookout. Failure of the operatives of a train to keep a lookout for pedestrians near the tracks does not constitute negligence when such failure had nothing whatever to do with the resulting accident.

Radenhausen v Railway, 205-547; 218 NW 316

Illegal payment of funds to city. The act of a county treasurer in illegally paying collected municipal taxes to the city treasurer is the proximate cause of the loss of said funds consequent on the deposit of said funds in an insolvent bank by the city treasurer,—it being assumed that the question of negligence and proximate cause is a material inquiry in such a case.

State v Hanson, 210-773; 231 NW 428

Intervening cause. The principle that a defendant is not relieved of the consequences of his negligence because some other cause operates therewith manifestly has no application to a case wherein it is not shown that defendant was negligent.

Rauch v Elec. Co., 206-309; 218 NW 340

Malpractice. In an action for malpractice, plaintiff does not make a jury question by proof that the defendant was negligent in the treatment or in the lack of treatment of the patient, but must go forward with his proof and establish by a preponderance of the testimony that such negligence, and not the original injury, was the proximate cause of death.

Ramberg v Morgan, 209-474; 218 NW 492

Malpractice—root of tooth in lung. In a malpractice action against dentist, the court erroneously directed a verdict for defendant on the ground that there was no showing that the presence of the root of a tooth in plaintiff's right lung was the proximate cause of the injury to plaintiff, under evidence that plaintiff was given a general anesthetic, was com-

II PROXIMATE, REMOTE, AND CONCURRING CAUSE IN GENERAL—concluded

pletely unconscious at time six teeth were extracted, and that plaintiff lost 60 pounds between the day of the extractions and the day he expectorated, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Noncausal relation. Principle reaffirmed that negligence becomes quite inconsequential when it has no causal relation to the accident in question.

Simmons v Railway, 217-1277; 252 NW 516

Proximate cause of injury—when jury question. Whether certain negligence was the proximate cause of a certain injury is always a jury question when different minds might reasonably reach different conclusions.

Bell v Brown, 214-370; 239 NW 785

One conclusion by all reasonable men—court question. Ordinarily the questions of proximate cause and contributory negligence are matters for the jury, and it is only where the facts are such, that all reasonable men must draw the same conclusion, that these questions become of law for the court.

Gowing v Field, 225-729; 281 NW 281

Accident causing injury—death following—jury question. Where a healthy normal boy of 17 dies from an ear infection and mastoid involvement, the symptoms of which began shortly after the upsetting of a school bus in which he was riding, a jury question is created as to whether such accident was the moving or producing—the proximate—cause of the injury and death.

Olson v Cushman, 224-974; 276 NW 777

Repetition of instruction. A definite and correct instruction as to proximate cause of an injury need not be repeated in other instructions.

Oestereich v Leslie, 212-105; 234 NW 229

Specific grounds alleged—proximate cause. In damage action based on drowning in a swimming pool wherein several grounds of negligence were specified, it was necessary to establish one of the grounds and prove that it was the proximate cause of the drowning—actionable negligence being negligence that is fastened to the injury.

Hecht v Playground Assn., 227-81; 287 NW 259

Storm waters into sanitary sewer. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

Excess voltage—evidence—sufficiency. Evidence held insufficient to show that certain acts of omission and commission were the proximate cause of the reaching and entrance to a building of an excess voltage of electricity.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Contributory negligence and proximate cause. Actionable negligence must be proximate cause whereas contributory negligence need only contribute to the injury.

Aller v Iowa Co., 227-185; 288 NW 66

III CONTRIBUTORY NEGLIGENCE IN GENERAL

Discussion. See 6 ILB 55—Self-preservation instinct—due care

Avoidance by last clear chance. Principle reaffirmed that the doctrine of the "last clear chance" has no application except where it affirmatively appears that the one charged with negligence actually knew of the position of peril of the injured person in time to prevent the injury by the exercise of reasonable care.

Hamilton v Railway, 211-924; 234 NW 810; 31 NCCA 762

"Last clear chance"—inapplicability of doctrine. The doctrine of "the last clear chance" has no application to a record which shows (1) that the plaintiff was confessedly negligent, and (2) that the accident of which plaintiff complains occurred instantly and inevitably after plaintiff's negligence was discovered.

Albrecht v Berry, 202-250; 208 NW 205; 32 NCCA 108

Injury avoidable notwithstanding contributory negligence—"last clear chance"—inapplicability. The doctrine of the "last clear chance" can have no application when the nonnegligent driver of a conveyance, after he discovers the danger, does everything in his power to prevent an accident.

Middleton v Railway, 209-1278; 227 NW 915

Degree barring recovery—model instruction. Principle reasserted that negligence is not contributory unless it contributes directly to plaintiff's injury.

Engle v Ungles, 223-780; 273 NW 879

Adequate definition. Instructions defining contributory negligence as negligence which contributes to cause the injury and stating that before plaintiff could recover he must establish by a preponderance of the evidence that he was not guilty of any negligence that in any degree contributed to cause of collision were not erroneous and did not tell jury such

negligence must be a proximate cause before it would prevent recovery.

Jakeway v Allen, 227-1182; 290 NW 507

Contributory negligence—degree. Contributory negligence sufficient to bar recovery need go no further than to contribute to the causing of plaintiff's injuries, but it is not error against plaintiff to define such negligence as that negligence without which the injury would not have been sustained.

Hellberg v Lund, 217-1; 250 NW 192

Erroneous definition—effect. Defining contributory negligence as including only acts of omission does not necessarily constitute reversible error, especially when such definition is in harmony with the trial theory.

Williams v Railway, 205-446; 214 NW 692

Contributory negligence — freedom from. Freedom from contributory negligence is proven if, under all the facts and circumstances, a jury can reasonably find a plaintiff was exercising ordinary care.

Denny v Augustine, 223-1202; 275 NW 117

Contributory negligence—jury or law question. Contributory negligence is ordinarily for the jury, but it becomes a question of law only when reasonable minds can come to but one conclusion from facts and circumstances.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Jury question unless all minds concur. Contributory negligence is for the jury, and a directed verdict should be denied except in cases where the facts are clear and undisputed and the cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn.

In re Green, 224-1268; 278 NW 285

Law question. Principle reaffirmed that a very clear and unequivocal showing of negligence is required to make the issue of contributory negligence a question of law.

Beman v Iowa Co., 205-730; 218 NW 343

Law of case—implied avoidance. The law of a case on the subject of contributory negligence as declared on appeal cannot be avoided on a retrial by simply adding to the testimony of a witness, by implication, something that the witness did not say.

Russell v Elec. Co., 218-427; 255 NW 504

Nonproximate cause. Contributory negligence may bar recovery even tho it is not the proximate cause of the injury.

Towberman v Railway, 202-1299; 211 NW 854

Plaintiff's conduct—conflict in evidence. The presence or absence of contributory negligence is generally a jury question, and two elements are involved: (1) what plaintiff did, and (2) the effect of his action; if either or both of said propositions present uncertainty, there is a jury question.

Riggs v Pan-Amer., 225-1051; 283 NW 250

Assumption of risk—walking down fire escape carrying tools. A plumber, an independent contractor, who attempts the acrobatic feat of walking down a steep, but ordinarily safe, fire escape as if it were a stairway, with his hands full of wrenches and a length of pipe, or, while balancing on one heel, attempts to swing his body around while his hands were so employed, has assumed the risk arising from such conduct and must be held, as a matter of law, to have contributed to his injuries, if he falls.

Gowing v Field, 225-729; 281 NW 281

Defendant's belief as to plaintiff's safety. In an action for damages consequent on the alleged negligence of defendant in tearing down the walls of a building adjoining the building in which plaintiff, at the time, was rightfully present, the court cannot properly say that plaintiff was guilty of contributory negligence per se in being present in his said building when the evidence shows that defendant, at the time, believed plaintiff was in a safe place while in his said building.

Crawford v Emerson Co., 222-378; 269 NW 334

Burden of proof. A definite instruction that plaintiff has the burden of proof to show that he was not guilty of any negligence contributing to his injury is in no degree overcome by later instructions wherein the court, with reference to contributory-fact issues, uses the expression "if you find." In other words, such expression does not have the effect of impliedly placing the burden of proof as to contributory negligence upon the defendant.

Dean v Koolish, 212-238; 234 NW 179

Evidence—sufficiency. Evidence held insufficient to show contributory negligence per se in an accident on a sidewalk.

Sloan v Des Moines, 205-823; 218 NW 301

Contributory negligence — entering pitch-dark room. An invitee who enters a bakery in the nighttime, at a place other than a perfectly safe place where he had entered on a former occasion, and is unable to see anything owing to the darkness, and finds his progress blocked by an obstruction which, by sense of feeling, proves to be a movable, lattice gateway and who deliberately removes said gateway and, on advancing, falls into an elevator shaft, is, per se, guilty of negligence contributing to his resulting injury.

Hammer v Liberty Bak. Co., 220-229; 260 NW 720

Contributory negligence. Evidence reviewed and held to establish negligence per se on the

III CONTRIBUTORY NEGLIGENCE IN GENERAL—continued

part of plaintiff in not seeing and avoiding a laundry truck which was standing in the hallway of a hotel.

Walker v Hotel Co., 214-1150; 241 NW 484

Contracts—signing without reading. A party will not be permitted to say that he was defrauded into signing an instrument without knowing its contents when he could read, did not read, and was in no manner prevented from reading.

Legler v Ins. Assn., 214-937; 243 NW 157

Derrick—improper erection and use. Record reviewed and held that a deceased foreman of a construction company was guilty of negligence contributing to his own death, by the manner in which he erected and attempted to operate a derrick for the handling of stone.

Hatfield v Freight Co., 223-7; 272 NW 99

Electric elevator—place of danger. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y. M. C. A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Operation of electric elevator—no eyewitnesses. An expert and experienced electrician who enters an electrically operated freight elevator which he had often operated,—the mechanism and condition of which were fully known to him, and especially the fact that the elevator could be moved at any time by manipulation by other parties on other floors of the building unless the electric circuit was broken,—is guilty of negligence per se in taking the risk of the elevator moving while he was attempting, without breaking the circuit, to close a door with known defective appliances,—the circuit breaker being in his immediate presence and easily accessible; and this is true tho there were no eyewitnesses to the occurrence.

Boles v Hotel Maytag, 218-306; 253 NW 515

Inadvertent self-inflicted injury. One may not recover damages for an injury arising out of his own act, and under circumstances under his exclusive control. So held where the party in removing a prop under a loading chute was injured by the prop falling against his face.

Rodgers v Railway, 214-1018; 243 NW 351

Injuries to servant—instruction. The court may very properly instruct the jury that a master must establish his plea of contributory negligence on the part of his servant by a preponderance of the evidence, and that such plea, if so established, is available to the master only in mitigation of damages.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67

Minors — contributory negligence—12-year-old child—presumption. A child between the ages of seven and 14 is presumed to be free from contributory negligence, and where a plaintiff is between those ages a prima facie case of nonnegligence on his part is established.

Samuelson v Sherrill, 225-421; 280 NW 596

Imputed negligence—guest. The negligence of the driver of a conveyance in which a child is riding is, in an action by the child against a third party for damages, wholly immaterial as far as said child is concerned unless said negligence is the sole cause of the damages. (See also under §5028.)

Armstrong v Waffle, 212-335; 236 NW 507; 5 NCCA(NS) 763

Contributory negligence of 11-year-old boy. In an action for personal injuries sustained by an 11-year-old boy who, while playing in a tree in a public street fell into wires of public utility company, sustaining severe burns, the question of contributory negligence of the boy together with question of whether defendant company had knowledge of the use of the tree by the boys in the neighborhood in playing, and the question of proximate cause of the injury should have been submitted to the jury.

Reynolds v Utilities Co., 21 F 2d, 958

Minors—presumption and burden of proof. An instruction, in a personal injury action, that the burden of proof is on plaintiff to establish his freedom from contributory negligence is not nullified by an instruction that the plaintiff, if of the age of eight years only, is presumed to be incapable of such negligence, and that, to find to the contrary, defendant must so show.

Stutzman v Younkerman, 204-1162; 216 NW 627

Unnecessarily placing one's self in danger. A person 18 years of age and of ordinary intelligence (not an employee of the defendant) who, in attempting to drive a wagon over a manifestly heavy six-inch steel pipe, deliberately places his foot in front of and against said pipe, knowing and expecting that when the team was started the wheels of the wagon would probably roll the pipe toward him, is guilty of negligence as a matter of law.

Perkins v Schmit Co., 215-350; 245 NW 343; 37 NCCA 301

Negligence as defense. In an action for the breach of an express warranty as to the healthfulness of animals, it is incumbent on the defendant to allege contributory negligence on the part of the plaintiff, rather than for plaintiff to allege his freedom from negligence.

Cavanaugh v Stock Co., 206-893; 221 NW 512

Ordinary and extraordinary dangers contrasted. A nontrespassing party who voluntarily exposes himself to the dangers attending the ordinary and customary manner of wrecking or tearing down the walls of a building, and is injured, may be guilty of contributory negligence per se, but not necessarily so when, without his knowledge, the manner of doing the work was unusually and extraordinarily dangerous and hazardous, and by reason thereof the party was injured.

Crawford v Emerson Co., 222-378; 269 NW 334

Overdose of poison. In an action for damages consequent on the death of animals caused by an overdose of copper sulphate, in part contained in a stock food, it is manifest that plaintiff cannot recover if, by his own conduct, he has contributed to his said injury.

Jensen v Moorman Mfg. Co., 213-922; 239 NW 917

Pedestrians—defective sidewalk—duty to see defect. A person is not exercising reasonable care, as a matter of law, when, immediately after emerging from a store, she walks directly across an eight-foot cement sidewalk, of which she had a general knowledge, and fails to see that the extreme inner edge of the walk, elevated some eight inches above the vehicular part of the street, has been broken away for a distance of some 30 inches, and to an irregular depth not exceeding eight inches, when the unobscured opening is directly in front of her, and when she is walking under perfect conditions of weather, light, and sight, and attended by no mental abstraction except a voluntary conversation with her companion.

Seiser v Redfield (Town), 211-1035; 232 NW 129

Negligence of pedestrian. A pedestrian must be deemed guilty of negligence per se when, on a dark and cloudy morning, in full possession of the senses of seeing and hearing, he looks for an approaching streetcar while at the street curb line, and claims he saw none (tho a car would be visible at a distance of 100 feet), and when he thereupon quickly passes into the street for a distance of 18 feet and is hit by the car which he says he did not see.

Barboe v Service Co., 205-1074; 215 NW 740

Obstructions in street—jury question. Evidence reviewed relative to the act of plaintiff (injured by coming in contact with a wire stretched across a public street) in running, in semidarkness along the street and outside a crowded sidewalk, in order to reach shelter from a sudden and rapidly gathering thunderstorm, and held to present a jury question on the issue of contributory negligence on the part of plaintiff.

Cuvelier v Dumont (Town), 221-1016; 266 NW 517

Passing along known slippery sidewalk. A pedestrian is not guilty of negligence per se in attempting to walk along a freshly snow-covered sidewalk bounded by a foot or two of snow, even tho he knows that the walk is rough, uneven, and slippery from an accumulation of ice, when he had prepared his feet with rubbers in order to avoid slipping and, upon reaching the walk, thoughtfully slackened his speed, and was proceeding cautiously in order to avoid a fall.

Smith v Hamburg, 212-1022; 237 NW 330

Tree over transmission line—failure to remove. Where a tree limb on plaintiffs' land had broken and lodged in the fork of a dead tree and hung two or three feet over defendant's transmission line, and later electricity from the line set the tree on fire and it spread to the plaintiffs' house, in an action to recover for the fire loss it could not be said as a matter of law that the plaintiffs were contributorily negligent in not removing the limb when they had acted as reasonable and prudent persons in twice requesting the defendant to take the line down or shut off the current so the tree could be cut down and the overhanging limb removed.

Porter v Elec. Co., 228- ; 292 NW 231

Municipal corporation—construction of approach to sidewalk. A municipality is not bound to construct an approach from street to sidewalk differently because some engineer other than its own thought some other method would be better, so where a pedestrian, who was familiar with such approach, who admitted that there was plenty of room for a pedestrian to pass on meeting two other pedestrians in broad daylight, and who without thought or attention stepped off approach and fell, such pedestrian was guilty of contributory negligence precluding recovery for personal injuries.

Hoffman v Sioux City, 227-1131; 290 NW 62

Subsequent negligence aggravating injury—amount of recovery. After receiving burns in a beauty parlor treatment, a person's subsequent neglect of proper medical treatment, not contributing to the original injuries, is not contributory negligence and does not defeat but affects only the amount of recovery.

Pearson v Butts, 224-376; 276 NW 65

Contributory negligence and proximate cause. Actionable negligence must be proxi-

III CONTRIBUTORY NEGLIGENCE IN GENERAL—concluded

mate cause whereas contributory negligence need only contribute to the injury.

Aller v Iowa Co., 227-185; 288 NW 66

Drawing wire cable against power line. Farmer attempting to connect wire cable from hay carrier on barn to pole 50 or 55 feet distant is contributorily negligent in drawing cable against power line when he saw or should have seen the power line and knew that it was not insulated.

Aller v Iowa Co., 227-185; 288 NW 66

IV INVITEES, LICENSEES, AND TRESPASSERS

Discussion. See 7 ILB 65—Duty to strangers on land

(a) INVITEES

"Invitee"—"licensee." An invitee to a place of business is one who goes there, either at the express or implied invitation of the owner or occupant, on business of mutual interest to both, or in connection with the business of the owner or occupant. A licensee is one who goes upon the property of another, either at the invitation, or with the implied acquiescence, of the owner or occupant, for a purpose purely personal to himself.

Wilson v Goodrich, 218-462; 252 NW 142

Acts or omissions constituting negligence. One who enters the office of a private business as an invitee may, upon leaving the office, immediately become, by his conduct, a mere licensee.

Wilson v Goodrich, 218-462; 252 NW 142

Charitable institutions liable to strangers, invitees, or employees. Public policy has never demanded nor has the legislature adopted any immunity to charitable institutions from liability to strangers, invitees, or employees arising because of negligence of the servants of such institutions, and the court will not grant such immunity.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Condition of store building—invitee (?) or licensee (?). An invitee in a public store continues as an invitee after he passes from in front of a counter and around the end thereof into a narrow space having no connection with the space back of the counter, and with no intent to pass back of the counter, but for the purpose of inspecting and possibly buying goods on a shelf directly in front of him; and when the appearance of the space in which he is then walking reasonably justifies his belief that said space is a place to which customers are impliedly admitted for the purpose of inspecting goods which they wish to purchase, and when the facts are in fair dispute, a jury question is generated.

Nelson v Woolworth Co., 211-592; 231 NW 665; 30 NCCA 542

Trap door in drug store prescription room—telephone user as invitee (?) or licensee (?). Hotel guest given permission to use telephone just inside entrance to prescription room in hotel drug store was a mere licensee and not an invitee, and could not recover damages sustained by falling through open trap door when partially entering the prescription room to reach the telephone, unless showing was made that injury was result of willful or wanton misconduct on part of hotel company, and evidence that manager of store directed plaintiff to telephone did not establish such conduct in absence of showing that he knew trap door was open.

McMullen v Hotel Co., 227-1061; 290 NW 3

Contributory negligence. A physician who enters a food-processing plant and in an effort to reach a rear room for a purpose purely personal to himself, ignores a wide, well-lighted passageway provided for and ordinarily used for reaching said rear room, and pursues a narrow, out-of-the-way course where neither licensees nor invitees were expected to be, and falls into an elevator shaft in front of which an electric light, suspended from the ceiling, was burning and immediately adjacent to which was an open, five-foot door opening into said rear room in which some thirty electric lights were burning, is guilty of negligence per se even tho he be deemed an invitee.

Wilson v Goodrich, 218-462; 252 NW 142

Damages—aged man with small earning capacity. In a personal injury action, evidence reviewed relative to past and future pain, loss of time, and decreased earning capacity, of a 67-year-old plaintiff, and held, a verdict of $5,000 was excessive and should be reduced to $4,000.

Johnson v Sioux City, 220-66; 261 NW 536

Elevator accident—liability of subtenant. Subtenants occupying only a portion of a building are not liable to the customers or employees of the tenants who enter the premises without their invitation, for injuries resulting from the negligent failure to properly guard an elevator shaft, where such subtenants had no leasehold right to use the elevator, or, having the right to use it in common, were under no obligation to repair or maintain the same.

Burner v Higman & Skinner, 127-580; 103 NW 802

Elevator accident—liability of tenants. A tenant who sublets a portion of the premises to another for the purpose of storing goods, impliedly invites his subtenant or his employees to enter upon the premises, and is liable for an injury caused by a negligent failure to properly guard an elevator shaft used in storing and removing such goods. Evidence held sufficient to take the case to the jury on the question of the tenant's negligence.

Burner v Higman & Skinner, 127-580; 103 NW 802

Independent contractor as invitee—known danger revealed. Person employing an independent contractor to put steam pipes in downspouting owes only the duty to such invitee to use reasonable care for his safety, and to warn the contractor as to defects or dangers known to the employer and not apparent to the contractor. The employer is not responsible to the contractor for injuries from defects that the contractor knew of or, in the exercise of ordinary care, ought to have known of.

Gowing v Field, 225-729; 281 NW 281

Injury to invitee. Evidence reviewed and held to sustain a verdict for damages consequent on an invitee's stepping into hot ashes piled upon the premises of the defendant.

Pomerantz v Penn. Corp., 214-1002; 243 NW 283

Invitee—deliveryman under direction of consignee. A deliveryman placing goods on consignee's premises, under direction of said consignee, is an invitee, and it is consignee's duty to furnish the deliveryman a safe place in which to discharge his duties.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Invitee's duty—"reasonably safe place" defined. The operator of a filling station was under a legal obligation to exercise reasonable and ordinary care to see that his place of business was reasonably safe for an invitee who was having truck tire repaired—the phrase "reasonably safe" meaning safe according to the usage, habits, and ordinary risks of the business.

Reynolds v Oil Co., 227-163; 287 NW 823

Invitee in public store—jury question. An invitee in a public store has a right to assume that the operator of the store will not be negligent in furnishing a safe place for customers, and a jury question on the issue of the invitee's contributory negligence is presented by such assumption in connection with testimony tending to show that the invitee, in walking along a passageway, looked, but could not see the floor or an adjacent open stairway, and thereupon continued to move forward, with his eyes on some goods on a shelf slightly above the level of his eyes.

Nelson v Woolworth Co., 211-592; 231 NW 665; 30 NCCA 542

Invitees—reasonably safe premises must be provided. Customer was store owners' invitee to premises of store and it was therefore owners' duty to be reasonably sure that they were not inviting customer into a place of danger, and to that end they were required to exercise ordinary care and prudence to make the premises reasonably safe for customer's visit.

Osborn v Klaber Bros., 227-105; 287 NW 252

Inviters—waxed floor with polished surface not inherent hazard to invitees. A waxed floor resulting in a polished surface is not an inherent hazard to the safety of invitees within the standard of care required of inviters.

Osborn v Klaber Bros., 227-105; 287 NW 252

Inviters—common carriers' high liability not applicable. An inviter is not held to that high liability that attaches to common carriers of passengers for hire.

Osborn v Klaber Bros., 227-105; 287 NW 252

Lost person as invitee. A traveler who loses his way and drives upon premises on the supposition that he is on a public highway, and consequently not for a purpose which has in view the mutual benefit of the traveler and the owner of the premises, may not be deemed an invitee, it appearing that the way over which the traveler passed never had been used and could not be used for general unrestricted travel by the public.

Printy v Reimbold, 200-541; 202 NW 122; 205 NW 211

Unguarded premises—duty of inviter. Principle recognized that he who invites people to come upon his premises must exercise reasonable care to keep them free from danger. So held as to an unguarded elevator shaft.

Noyes v Des Moines Club, 178-815; 160 NW 215

(b) LICENSEES

"Invitee"—"licensee". An invitee to a place of business is one who goes there, either at the express or implied invitation of the owner or occupant, on business of mutual interest to both, or in connection with the business of the owner or occupant. A licensee is one who goes upon the property of another, either at the invitation, or with the implied acquiescence, of the owner or occupant, for a purpose purely personal to himself.

Wilson v Goodrich, 218-462; 252 NW 142

Acts or omissions constituting negligence. A licensee on the premises of a manufacturing plant is bound to accept the premises as he finds them.

Sanburn v Hosiery Mills, 217-218; 251 NW 144

Bare licensee—nonliability for injury. One upon premises by the sufferance or acquiescence of the owner is a bare licensee, and there is no liability on the owner's part to keep the premises in safe condition for the licensee's use.

Davis v Malvern Co., 186-884; 173 NW 262

Condition of store building—open stairway. The operator of a public store is not necessarily negligent toward an invitee in maintaining an open stairway in that part of the store to which customers are impliedly invited; but a jury question may arise, if an invitee falls down the stairway, whether the operator was

IV INVITEES, LICENSEES, AND TRESPASSERS—continued

(b) LICENSEES—concluded

negligent in maintaining an open, unlighted, and narrow stairway with the first step thereof immediately adjacent to the space set aside to invitees for passage.

Nelson v Woolworth Co., 211-592; 231 NW 665; 30 NCCA 542

Duty owed to licensee. When a material issue is whether a person injured in a public store because of a defect in the maintenance of the store was, at the time of the injury, an invitee or a mere licensee, the court must plainly tell the jury that, if the injured party was a mere licensee when injured, he cannot recover, even tho the operator of the store was negligent in maintaining the store, unless the injured party shows that he was injured by some willful or affirmative action of the said operator.

Nelson v Woolworth Co., 211-592; 231 NW 665

Elevator accident — liability of owner of premises. Where the owner of a building containing a freight elevator for the common use of the tenants does not by the terms of the lease part with his control of the elevator except the right to use the same, he may be liable with a tenant for injuries to a licensee of the tenant resulting from negligent construction and maintenance of the elevator, without proper gates or guards, in such a place that it could not be readily seen, and knowing that persons must frequent the place and use the elevator to make the premises available to the tenant. Evidence held sufficient to take the case to the jury on the question of the owner's liability.

Burner v Higman & Skinner, 127-580; 103 NW 802

Failure to signal approach of train. Train operatives may not be said to be negligent in failing to signal the approach of a train for the benefit of a pedestrian who had full and timely knowledge of such approach.

Radenhausen v Railway, 205-547; 218 NW 316

Nonduty to guard visible obstruction. Where pedestrians had habitually used a path on a railway right of way and near the track, the act of the company in dumping a ridge of cinders upon the path and in failing to guard or so obstruct the way as to prevent walking upon the cinders does not constitute actionable negligence.

Radenhausen v Railway, 205-547; 218 NW 316

Permitting relation of licensor and licensee. A railway company may not be said to be guilty of actionable negligence because it habitually permits or suffers pedestrians on its right of way to use a path alongside, but well removed from, the rails of its track.

Radenhausen v Railway, 205-547; 218 NW 316; 39 NCCA 36

Person not customer in store. A person who enters an ordinary retail store and discloses no purpose other than to obtain an accommodation strictly personal to himself, and is granted such accommodation by those in charge of the store, is a mere licensee, and not an invitee, and the owner of the store is not liable for an injury received by said licensee while availing himself of said accommodation, and while at a place in the store not provided for customers.

Keeran v Spurgeon Co., 194-1240; 191 NW 99

Trap door in drug store prescription room—telephone user as invitee (?) or licensee (?). Hotel guest given permission to use telephone just inside entrance to prescription room in hotel drug store was a mere licensee and not an invitee, and could not recover damages sustained by falling through open trap door when partially entering the prescription room to reach the telephone, unless showing was made that injury was result of willful or wanton misconduct on part of hotel company, and evidence that manager of store directed plaintiff to telephone did not establish such conduct in absence of showing that he knew trap door was open.

McMullen v Hotel Co., 227-1061; 290 NW 3

Private premises—owner's duty. The owner of private premises over which others are not accustomed to pass is not required to keep them in a safe condition for the benefit of a bare licensee.

Connell v Electric Ry., 131-622; 109 NW 177

Willful or wanton act—evidence. Evidence, relative to the circumstances under which a visitor in a manufacturing plant was injured by her clothing catching on a revolving shaft, reviewed, and held quite insufficient to reveal any element of willfulness or wantonness in the conduct of an employee of the plant.

Sanburn v Hosiery Mills, 217-218; 251 NW 144

(c) TRESPASSERS

Building reconstruction — trespassing children. The owner or occupier of real property is under no legal obligation to make or keep the premises safe for trespassers or bare licensees. So held where a child fell through an opening in the floor of a building which was undergoing reconstruction after a fire.

Battin v Cornwall, 218-42; 253 NW 842

Electrical structure—trespassing as defense. The fact that a person injured by coming in contact with a high-voltage wire was a trespasser on the land of a third party upon whose

land the wire was erected is no defense to an action for damages for said injury.

Lipovac v Iowa Co., 202-517; 210 NW 573
Cox v Des Moines Co., 209-931; 229 NW 244

Electric wires — owner of premises — duty. The owner of premises negligently maintaining electric wires over the same is liable for the death of a bare licensee or trespasser coming in contact therewith, where it appears that the public was accustomed to cross the premises and the owner can be reasonably charged with knowledge of that fact.

Connell v Electric Ry., 131-622; 109 NW 177

Electric pole—spikes driven in as ladder—trespassers. An owner of property may so negligently use it as to become liable in damages for a resulting injury to a trespasser. A jury question, both as to negligence and contributory negligence, is presented by testimony tending to show that an owner, without full compliance with city ordinance requirements, erected and maintained, on his own uninclosed, populously surrounded, and promiscuously frequented premises, which abutted upon an uninclosed and much frequented public park and fishing resort, a pole with a ladder thereon in the form of spikes driven therein, and with a cross arm on the pole, some 25 feet from the ground, carrying wires heavily charged with electricity, and that a trespassing boy 14 years of age, and of ordinary intelligence, climbed the pole and, upon reaching the cross arm, was killed by an electric shock.

McKiddy v Des Moines Co., 202-225; 206 NW 815

Landowner's duty to trespasser. The owner of property owes to a trespasser no duty other than not to injure him willfully or wantonly and to use reasonable care, after his presence becomes known, to avoid injuring him.

Harriman v Afton (Town), 225-659; 281 NW 183

Liability of owner or operator of machinery. In determining the liability of the owner or operator of machinery for injury to a trespasser upon the premises the mental capacity of the injured party is immaterial.

Brown v Canning Co., 132-631; 110 NW 12

Municipal market place—open manhole. A municipality is not liable in damages to a person who is injured in a municipal market place by falling through an open manhole while he is on an errand distinctly personal to himself, and not as a customer of the market, and when the manhole is located at a place where he is neither expected nor invited to be.

Knote v Des Moines, 204-948; 216 NW 52

Trespassers—duty of owner of premises. The only duty an owner of premises owes to a trespasser thereon is not to injure him willfully or wantonly, and to use reasonable care, after his presence on the premises becomes known, to avoid injuring him.

Davis v Malvern L. & P. Co., 186-884; 173 NW 262

Trespassing boy—jumping from freight car to building. There are cases where the owner of premises will be held liable for injury to a child too young to understand the fact or meaning of trespass, or to care for his own safety when attracted to the premises by some act or omission of the owner which he knows, or as a reasonably prudent person ought to apprehend, would render the premises dangerous. But where, as in this case, a boy 13 years of age climbed upon a freight car standing at defendant's railway station and from there jumped to the roof of a storage building for electric cars, and when about to jump back to the car was injured by contact with an uninsulated power wire passing above the roof of the building, and it appeared that plaintiff knew he was a trespasser, that the railway was operated by electricity and that electric wires were dangerous; that the roof could only be reached by climbing the cars; that this was the first incident of the kind and no necessity for guards or signs had been indicated to the owner, the plaintiff was guilty of such negligence as to preclude recovery for the injury.

Anderson v Railway, 150-465; 130 NW 391

Use of highway. A pedestrian is not a trespasser while walking along that part of a public highway which is not and could not be used for ordinary travel.

Eves v Const. Co., 202-1338; 212 NW 154

V ACTIONS GENERALLY

Accident — evidence — jury question. Evidence, tho somewhat inconsistent, held to present a jury question on the issue as to the manner in which an injury occurred.

Elmore v Surety Co., 207-872; 224 NW 32

Bad-faith defense by vouchee. One who is vouched by a defendant into an action, and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a co-defendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee, knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Carriage of passengers—hand baggage—condition to liability. A carrier of passengers is not liable, as an insurer, for the loss of the hand baggage of the passenger unless said

V ACTIONS GENERALLY—continued

baggage is definitely surrendered into the exclusive possession and control of the carrier. If liability is predicated on negligence, such ground must be pleaded and, of course, proven. Evidence held to show no such surrender of custody.

Jensen v Interstate Corp., 221-513; 266 NW 9

No warning signal at railroad crossing—statute violations—negligence. The failure of compliance with a statutory standard of care is negligence. In an action for personal injuries sustained by an automobile passenger in collision in Illinois between an automobile and railway motorcar, where petition alleged that railway employees failed to ring bell or sound whistle of motorcar while approaching a crossing, as required by Illinois statute, such allegations were sufficient to state a cause of action based on negligence of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

Pleading negligence of employees operating railway motorcar—sufficiency. In action for personal injuries sustained by an automobile passenger in collision between automobile and railroad motorcar, where petition alleged that motorcar standing at crossing, obscured from view of motorist by shrubbery along railroad right of way, and was driven into course of the oncoming automobile without any warning and that it could have been stopped by applying the brakes, such allegations were sufficient to state a cause of action based upon negligence of railroad employees.

Smith v Railway, 227-1404; 291 NW 417

Circumstantial evidence. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrell v Oil Co., 222-1257; 270 NW 857

Conclusions controlled by specific allegations. An allegation that an act was done "carelessly, negligently, and fraudulently" must be construed as predicating the action solely on negligence, when such is the effect of the pleader's subsequent and particularized allegations.

Pease v Bank, 210-331; 228 NW 83

Fatally belated contention. A litigant who, in the trial court, relies solely on specific acts of negligence as a basis for his cause of action may not be heard, on appeal, to assert that he has a right to rely on a statutory presumption of negligence.

Dilley v Iowa Co., 210-1332; 227 NW 173

Insurance—negligence in passing on application—damages. In an action for damages consequent on the alleged negligence of an insurer in passing on an application for insurance, the plaintiff must fail, irrespective of his evidence of negligence, unless he establishes, to the extent of furnishing a measure for his damages, the substance of the contract which he was prevented from entering into.

Winn v Ins. Co., 216-1249; 250 NW 459

Insurance—negligence—passing on application. Evidence reviewed in an action for damages consequent on the alleged negligence of an insurer in passing on, prior to the death of the applicant, an application for industrial insurance, and held quite insufficient to establish such negligence.

Winn v Ins. Co., 216-1249; 250 NW 459

Justifiable submission. The submission to the jury, in an action for personal injury, of the question of "internal injury" is proper under evidence that the plaintiff, after receiving a grave physical injury, suffered from internal hemorrhages.

Ashcraft v Kriv, 207-574; 223 NW 365

Negligence in making bank deposits. Evidence held insufficient to show negligence on the part of a public officer in making deposit of public funds in a bank which ultimately failed.

Danbury v Riedmiller, 208-879; 226 NW 159

Contracts — signing. Principle reaffirmed that it is incumbent upon a person who executes an instrument to exercise reasonable care to ascertain its contents.

Farwark v Railway, 202-1229; 211 NW 875; 26 NCCA 231; 4 NCCA(NS) 197

Reformation of instruments — negligence barring relief. A party who has no excuse whatever for signing a writing without reading it, or without requesting a reading of it, will not be granted reformation. And the rights of the wife of the signer insofar as she is interested in the writing, tho not a signer thereof, will be foreclosed by her like inexcusable neglect to read or request the reading of the instrument.

Stillman v Bank, 216-957; 249 NW 230

Specific allegations conclusive. Principle recognized that, when negligence is the foundation of an action, specific allegations control, and plaintiff may not rely on general allegations of negligence.

McCoy v Railway, 210-1075; 231 NW 353

Res ipsa loquitur—nonapplicability. Record reviewed relative to the fatal injuries received by a party on, in, or about a freight elevator, and relative to the defendant's control of the operation of said elevator at the time said injuries were received, and held to show the

inapplicability of the doctrine of res ipsa loquitur.

Boles v Hotel, 221-211; 265 NW 183

Substituting specific negligence for general negligence. A plaintiff who, on one trial, rests on a general allegation of negligence, does not plead a new cause of action within the meaning of the statute of limitation, when on retrial he, by amendment, withdraws his general allegation and substitutes a specific allegation of negligence which, if proven, will furnish basis for the doctrine of the "last clear chance".

Reason: The latter allegation was always embraced within the former general allegation.

Pettijohn v Weede, 219-465; 258 NW 72

Use of mongrel "and/or". The use of the mongrel term "and/or" in pleading specifications of negligence or recklessness, is sharply disapproved of.

Popham v Case, 223-52; 271 NW 226

Note 2 Torts generally.

Discussion. See 21 ILR 146—Rescission of release from liability; 22 ILR 60—Tort claims in receiverships

ANALYSIS

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IX EXPLOSIONS, LIABILITY (Page 1383)

City's tort liability generally. See under §5738 (III)
Fraud, bills and notes. See under §§9518, 9519
Governmental nonliability. See under §§2, 4123, 5128, 5527, 5738, 5903.11
Libel and slander. See under §§12412, 13256
Malpractice suits. See under §2538
Motor vehicles, liability. See under §5037.09 and cross-references thereunder
Negligence. See under Note 1 above
Sale or mortgage of personal property, fraud. See under §§10002 (I), 10015 (XI)
Transmission lines, torts involving. See under §8323

I IN GENERAL

Discussion. See 2 ILB 1—Foreign wrong; 4 ILB 67—*Permanent structures—continuing injuries;* 6 ILB 111—Damages for loss of a chance; 12 ILR 291—Confusion of goods; 15 ILR 83—Torts of corporation subsidiaries; 16 ILR 89—Malicious prosecution; 18 ILR 30—Torts of spouse

Fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

Lex fori procedure. While, as a matter of comity, the courts of this state will, under proper pleading, recognize and enforce the civil rights and liabilities of parties to a tort committed in a foreign state—if not contrary to the public policy of this state—yet in determining all issues of fact on which such rights and liabilities depend, the judicial procedure of the courts of this state must be followed.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Committee of unincorporated association—suability. A committee of an unincorporated organization is not a legal entity and is not suable in tort.

Work v Coliseum Co., (NOR); 207 NW 679

"Alibi" in civil cause — burden of proof. Where a defendant in a civil case enters a general denial to a charge of having committed a tort, and in support thereof testifies that, at the time in question, he was at his home, not far from the scene of the alleged tort, the court has no right to instruct (1) that defendant's defense is that of an "alibi," and (2) that defendant has the burden to establish such alibi by evidence which will outweigh the evidence tending to show that defendant did commit the tort.

Gregory v Sorensen, 208-174; 225 NW 342

Bond of notary—action. An action against a notary public and his sureties for damages consequent on a willfully false certificate of acknowledgment does not sound in tort.

Atlas Security v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Cause of loss of rentals—construction work (?) or business depression (?). Question as to whether rentals from property are lost because of construction of a bridge and new creek channel by a city, which construction occasioned some inconvenience to tenants in egress or ingress to the property, or because of depression in business conditions, is a question for the jury.

Edmond v Sioux City, 225-1058; 283 NW 260

Civil liability—damages—failure to establish. Proof that defendants have conspired to injure plaintiff's business or to employ unfair competition against plaintiff becomes of no consequence in a law action when plaintiff fails to establish damages.

Roggensack v Winona Co., 211-1307; 233 NW 493

Municipal corporations—liability to pedestrians. Principle reaffirmed that in determining municipality's liability for injuries to pedestrian, precedents are of little value. Each case must be determined upon its own peculiar facts.

Hoffman v Sioux City, 227-1131; 290 NW 62

Cornice on building as nuisance. Evidence that a building built flush with the street line

I IN GENERAL—concluded

was surmounted by a cornice which overhung the street for a material distance and which for several years, through some defect, cast water upon the sidewalk, and at times caused a dangerous accumulation of ice on the sidewalk, furnishes ample basis for a jury finding that the city had not and was not keeping its street free from nuisance.

Wright v A. & P. Co., 216-565; 246 NW 846; 32 NCCA 509

Defects or obstructions in streets—liability of property owner. Principle recognized that a property owner may be liable in damages for creating or permitting to exist a nuisance upon a public sidewalk, even tho the municipality rests by statute under substantially the same liability.

Updegraff v Ottumwa, 210-382; 226 NW 928

Evidence — footprints. Evidence of footprints at or near the scene of the commission of a wrongful act is admissible in an action against the defendant for the resulting damages, provided the defendant is properly connected with said footprints.

Gregory v Sorenson, 214-1374; 242 NW 91

Evidence—newspaper advertisement. In an action for damages consequent on an alleged wrongful act by defendant, a competitor of plaintiff, an advertisement inserted by defendant in a local newspaper and tending to show hostility against plaintiff, may be relevant and material in view of other evidence in the case.

Gregory v Sorenson, 214-1374; 242 NW 91

Felling tree into street. A city is not liable in damages consequent on the act of a property owner or his contractor in felling into a street a tree standing in the parking. In other words, the city is not liable because of its failure to exercise its governmental power to police the street at the place and time when the tree was felled, it knowing that the property owner intended to cut and fell said tree.

Armstrong v Waffle, 212-335; 236 NW 507

Joinder—contract and tort. A plaintiff may not base an action to recover damages for a personal injury on both (1) the commission of a tort by the defendant and (2) the breach of a contract by the defendant; and reversible error necessarily results from submitting both issues when they are not identical.

Randall v Moen Co., 206-1319; 221 NW 944

Liability of mere employee. The mere employee of a tort-feasor is not necessarily liable for the damage resulting from the tort. So held in an action by the lessee of coal lands for damages consequent on the wrongful removal of coal by the owner of the leased land.

Hartford Co. v Helsing, 220-1010; 268 NW 269

Money given to obstruct justice—recovery denied. The courts will not aid one to recover money that has been given to another to be used in obstructing or interfering with the orderly course of justice, nor will they protect one who obtains the money of another for a particular lawful purpose when he fails to so use it and refuses to return it.

Sarico v Romano, (NOR); 205 NW 862

Dunning letters—threats. Willful threats made to a debtor for the purpose of producing in the mind of the debtor such mental pain, anguish, and harassment as will induce him to pay the debt, render the offender liable in damages for the resulting pain and anguish, even tho there be no actual or threatened physical injury, provided the threats are not mere threats to resort to legal procedure.

Barnett v Collection Co., 214-1303; 242 NW 25; 4 NCCA(NS) 223

Motions—more specific pleading—erroneous denial. In an action for general and special damages, under general and somewhat meager pleading, based on an alleged libelous publication resulting (1) in loss of customers, (2) in being refused credit, and (3) in loss of earnings in business, plaintiff should, on motion for more specific statement of the action, be compelled to set forth the names of customers lost, the names of those who refused him credit, and the ultimate facts upon which he bases his demand for judgment on account of injury to his earnings.

Dorman v Credit Co., 213-1016; 241 NW 436

Surface waters—increased flowage consequent on nonnegligent execution of expert plans. Damage to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria, especially when the damage occurs at the converging point of natural watercourses.

Cole v Des Moines, 212-1270; 232 NW 800

Trespass. The mere opening of an unlocked door and entering premises, without right or authority, constitutes a breaking and entering within the law of trespass.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA(NS) 203

II JOINT TORT-FEASORS

Discussion. See 8 ILB 115—Judgments against joint tort-feasors; 16 ILR 361—Vicarious liability

Proximate cause—concurrent causes—liability. Principle reaffirmed that when two parties by their concurrent negligence injure a nonnegligent third party, both of said two parties are liable for the resulting damages suffered by said third party.

Andersen v Christensen, 222-177; 268 NW 527

Unintentional injury. Two or more tort-feasors are suable jointly as for a joint tort when their concurring negligence is the proximate cause of a wholly unintentional injury which is indivisible in its nature.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419; 34 NCCA 306

Objections—unallowable motion to strike. In an action against several defendants for damages consequent on a negligent act, that defendant who is, in effect, alleged to have occupied the position of respondeat superior cannot have his name stricken from the petition.

Elder v Maudlin, 213-758; 239 NW 577

Release of joint tort-feasor. An injured party who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Action based on fraud—conspiracy. In an action based on a conspiracy to defraud, the issue of conspiracy is not determinative, the important factor being that in order to be granted relief, it is necessary that the plaintiff establish the necessary elements of actionable fraud, the amount of recovery being dependent upon the extent of damage resulting from the fraudulent conduct.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Admissibility of contract in action sounding in tort. In an action sounding in tort only, against alleged joint tort-feasors, a contract entered into by one of the defendants with a third party, and conversations between said parties relative to matters arising under said contract, may be material, not for the purpose of permitting plaintiff to recover on the contract, but for the purpose of showing the defendant's relation to a certain subject matter, and thereby establishing a basis for the applicable law of tort.

Hanna v Central Co., 210-864; 232 NW 421

Joining contract and tort actions. A joint action cannot be maintained (1) against a contractor on his contract liability to answer for possible torts committed during the progress of work, and (2) against those who are alleged to have subsequently committed a tort during the progress of said work, when the contractor and the alleged tort-feasors are residents of different counties.

Elder v Maudlin, 213-758; 239 NW 577

Partnership — husband and wife — joint or separate liability. A transfer company operating under a trade name, headquartering at defendants' home, having trucks registered in wife's name, but with the state permit in the husband's name, and performing contracts in husband's name, are facts so indicating a partnership that court properly submitted automobile collision case as a joint liability of the husband and wife operating the transfer company.

Schalk v Smith, 224-904; 277 NW 303

Liability of principal and independent contractors. A contract granting the right of way over land for an underground pipe line, on payment of a certain sum per rod, and on payment of "damages to growing crops, fences, or improvements occasioned in laying, repairing, or removing lines", does not constitute an agreement by grantee that he will pay damages consequent on the negligent act (tort) of an independent contractor in injuring grantor's private bridge which was located wholly outside said right of way.

Asher v Continental Corp., 216-977; 250 NW 179

Malpractice—nonjoint liability. The mere fact that a physician directs his patient to go to a named dentist for the extraction of a tooth, and agrees to and does administer the anaesthetic, does not create such relation as will render the physician liable for the negligence of the dentist.

Nelson v Sandell, 202-109; 209 NW 440; 46 ALR 1447

Malpractice—negligence—evidence. In a joint action against two physicians for malpractice, evidence of negligence on the part of one of the defendants prior to the other defendant's connection with the case is inadmissible.

Lemon v Kessel, 202-273; 209 NW 393

Settlement and release—conclusiveness. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525; 39 NCCA 574

Attorney fees for defending. When joint wrongdoers jointly and severally employ attorneys to defend themselves in an action for damages consequent on the joint tort, the one who pays the attorney fees may enforce contribution from all the other co-defendants.

Licht v Klipp, 213-1071; 240 NW 722; 1 NCCA(NS) 419

III FRAUD GENERALLY

Discussion. See 4 ILB 46—Elements of deceit; 14 ILR 453—Misrepresentation of law; 21 ILR 158—Caveat emptor—misrepresentation

Essential elements. The elements necessary to constitute actionable fraud are representation, falsity, materiality, scienter, intent to

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deceive, reliance, and resulting injury and damage.

Gipp v Lynch, 226-1020; 285 NW 659

Damage or prejudice must be shown. There can be no actionable fraud in the absence of damage or prejudice, as without these elements there is no fraud, even tho there is an intent to defraud.

Gipp v Lynch, 226-1020; 285 NW 659

Actual intent to defraud. An actual intent to defraud may be found from false and material representations made by a party as of his own knowledge.

Hills Bank v Cress, 205-306; 218 NW 74

Representations must be made to plaintiff. A plaintiff may not maintain an action at law for damages consequent on fraudulent representations not made to him or his agent.

Markworth v Bank, 212-954; 237 NW 471

Evidence of intent—other transactions. On an issue of specific fraud, other related and nonremote transactions of a fraudulent character are admissible on the question of motive and intent.

Lambertson v Finance Co., 200-527; 202 NW 119

Clean hands—collateral transaction. Principle recognized that a plaintiff is not deprived of his right to equitable relief in a given transaction simply because his hands were somewhat soiled by fraud in another subsequent transaction which is only incidentally or collaterally connected with said prior transaction.

Benson v Sawyer, 216-841; 249 NW 424

Fraud pleas—status in court. In fraud actions, courts are reluctant to permit a cheater to profit by his own wrongdoing, tho at the same time courts are constrained by another consideration—that it is for the public welfare not to afford parties to written agreements such ready avenues of escape from their obligations that the purpose of lastingly recording such obligations in writing would be quite indifferently attained—the aim being to minimize both evils without accentuating either of them.

Griffiths v Brooks, 227-966; 289 NW 715

Pleading conclusions insufficient. Pleading general charge of fraud merely by way of conclusions is insufficient to raise issue of fraud.

Nash v Rehmann Bros., 53 F 2d, 624

Burden of proof. Fraud, in the absence of any showing of fiduciary relationship between the parties, cannot be presumed, but must be established by the party alleging it.

Plymouth County v Koehler, 221-1022; 267 NW 106

Evidence—sufficiency. Fraud must be affirmatively established.

King v Good, 205-1203; 219 NW 517

Evidence—weight and sufficiency. Principle reaffirmed that proof of fraud must be clear, satisfactory, and convincing.

Goff v Milliron, 221-998; 266 NW 526

Evidence — insufficiency — directed verdict warranted. In a damage action arising out of fraudulent procurement of plaintiff's signature to note and conditional sale contract, where plaintiff predicates error on granting defendant a directed verdict on the ground that defendant's fraud was not proved—the evidence showing that plaintiff could read and write English language but failed to read instruments while having an opportunity to do so —and where plaintiff's reasons for not reading instruments were (1) he did not have his glasses, and (2) he thought he was signing an ordinary order for automobile, held, plaintiff's conduct precludes him from asserting fraud, and the ruling on the motion was warranted.

Griffiths v Brooks, 227-966; 289 NW 715

Presumption and burden of proof. Fraud is never presumed. He who alleges its existence must establish it by clear, convincing and satisfactory evidence. Principle applied in an equitable action to set aside and cancel certain financial obligations allegedly obtained by fraud.

Eckhardt v Trust Co., 223-471; 273 NW 347

Scienter as essential element. A demand for damages based on alleged fraud cannot be sustained without proof of scienter or its equivalent, whether the action be at law or in equity.

Appleby v Kurtz, 212-657; 237 NW 312

Damages—scienter. Scienter—knowledge of the falsity—is an indispensable element of an action for damages for fraudulent representation. Evidence held insufficient to show knowledge of the falsity of representation relative to the extent to which a farm was tiled.

Kleinmeyer v Willenbrock, 202-1049; 210 NW 447

False representations—reliance. The right to rely on representations in one transaction may have a very material bearing on the right to rely on the same representations in a former transaction between the same parties.

Breza v Federal Soc., 200-507; 205 NW 206

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and

even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Opinions—effect. Expressions of opinions may, under some circumstances, amount to representations of fact.

Baumchen v Donahoe, 215-512; 242 NW 533

Opinion (?) or fact (?). A representation may be one of fact per se, or it may be one of opinion per se, or it may be neither per se. In the latter case, whether the representation or statement be of fact or of opinion depends essentially on the subject matter of the transaction and on all the material attending facts and circumstances thereof; and the court must, in its instructions, clearly differentiate between the two questions. So held where the representation was as to presence of rock on the premises.

Boysen v Petersen, 203-1073; 211 NW 894

Representations referring to existing facts. The rule that fraud cannot be predicated upon the failure to perform a promise or stated intention to do something in the future unless the statement is made with an existing real intention not to perform does not apply when the representations relied on refer to existing facts. The representation by a corporation that it has adopted a particular sales program was such reference to existing facts.

Lee v Sundberg, 227-1375; 291 NW 146

Interwoven statements of fact and opinion. A fraud-doer may not complain of the submission to the jury of matters of opinion, as distinguished from representations of fact, when his statements of opinion are so interwoven with his statements of fact that to separate them is practically impossible.

Pullan v Struthers, 201-1179; 207 NW 235

Damages—pleading and proof. Allegation and proof of fraud without any allegation and proof of damages leave plaintiff without a cause of action.

Vorpahl v Surety Co., 208-348; 223 NW 366

Elements—damage—failure of proof. Fraud, howsoever clearly established, becomes inconsequential in a law action when it appears that the victim of the fraud was in no manner damaged.

Rawleigh v Cook, 200-412; 205 NW 57

Federal court jurisdiction—exemplary damages. Exemplary damages may be added to actual damages to make up federal jurisdictional amount where exemplary damages are recoverable, and exemplary damages may be allowed in actions on case of conspiracy or deceit.

Young v Main, 72 F 2d, 640

Knowledge of fraud. One who knows that he is being defrauded and voluntarily submits thereto and consummates the transaction waives the fraud.

Loots v Knoke, 209-447; 228 NW 45

Specific elements — instructions. An abstract instruction defining fraudulent representations is not adequate when there is a request for a specific instruction covering the elements of falsity, scienter, deception, and injury.

Gray v Shell Corp., 212-825; 237 NW 460

Discovery — petition — sufficiency. Petition for the production of papers and correspondence, in an action for damages for deceit, reviewed, and held to comply with the governing statute.

Main v Ring, 219-1270; 260 NW 859

Discovery — correspondence with defendant and his trade-name affiliates. The court, in an action against an individual for deceit, is not necessarily acting beyond its jurisdiction in ordering the production of correspondence not only with the defendant personally, but with various trade-name concerns under which the defendant is alleged to be doing business.

Main v Ring, 219-1270; 260 NW 859

Advice — when fraudulent. One who is sought out as an adviser in a contemplated purchase, and gives such advice fraudulently, and with the intent to defraud and to promote his own secret, but concealed, interest in the transaction, must respond in damages to the one who justifiably relies thereon.

Faust v Parker, 204-297; 213 NW 794

Commercial college representations. Record reviewed, and held insufficient to support a finding either (1) that an instructor in a commercial college was not an "expert," as represented, or (2) that the student in such college did not receive "individual instruction," as represented.

Mitchell v College, 200-1202; 206 NW 81

Measure of damages. The measure of damages for fraudulently representing the nature of instruction given to students in a commercial college is the difference between the value of the represented instruction and the value of the instruction actually received.

Mitchell v College, 200-1202; 206 NW 81

Ratification of part ratifies all. Partial ratification of an agency adopts it as a whole, including detriments.

Smith v Miller, 225-241; 280 NW 493

Fraud on agent, fraud on principal. Fraud on an agent, in a matter in which the agent is acting in his representative capacity, is a fraud on the principal. It follows that the principal may seek redress to the same extent

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as tho the fraud was perpetrated directly and personally upon him.

Andrew v Baird, 221-83; 265 NW 170

Wife denying husband's agency but accepting benefits not permitted. A wife, owning a rooming house, sold on the fraudulent representation of her husband, made in response to purchaser's direct question, that the furnace heated the upstairs rooms, will not, in purchaser's action to rescind and recover the down payment, be permitted to deny her husband's authority to represent her and at the same time retain the down payment as fruits of the deceit.

Smith v Miller, 225-241; 280 NW 493

Attorney and client—inadvertent misrepresentation. Evidence held insufficient to show fraud by an attorney in the making of an inadvertent false representation.

Tobin v Budd, 217-904; 251 NW 720

Financial statement—future reliance. The plea that a financial statement as a basis for credit was given so long prior to the actual granting of credit that the plaintiff granting the credit had, as a matter of law, no right to rely thereon is futile when said statement distinctly recognizes that it is a continuing one, and for the purpose of future reliance.

Hills Bank v Cress, 205-306; 218 NW 74

Delay — misrepresentation by carrier. A charge of misrepresentation may not be successfully based on the good-faith statement by the agent of the carrier as to his understanding as to where a shipment was and when it would arrive.

Percy v Railway, 207-889; 223 NW 879

False promise. A statement to the effect that if a party will sign an obligation "he will never be sued thereon," is fraudulent when made for the purpose of deceiving the party to whom made, and when the latter justifiably relies thereon.

Commercial Bank v Kietges, 206-90; 219 NW 44

Waiver by action for breach of contract. He who bases his action on the breach of a contract thereby affirms the contract, and may not recover damages for fraud in the inception of the contract.

Bergman v Coal Co., 200-419; 203 NW 697

Fraud—irrevocable waiver of action for damages. One who, with full knowledge that he has been fraudulently inveigled into signing an option contract for the sale of his property, elects not to rescind but to affirm and perform the contract, and does perform at a time when the contract is wholly executory and without consideration, thereby irrevocably waives, as a matter of law, any and all right to sue the wrongdoer for damages.

Ankeney v Brenton, 214-357; 238 NW 71

Payment with knowledge of facts. Principle reaffirmed that one who voluntarily pays a disputed claim with full knowledge of the facts may not recover the sum so paid.

Meyer v Gotsdiner, 208-677; 226 NW 38

Federal jurisdiction. Where petition alleged rescission of contract obtained by fraud, and prayed for purchase price and for damages for conspiracy or deceit, federal court did not acquire jurisdiction on ground that total amount sought exceeded $3,000, where action in effect was one in assumpsit for recovery of purchase price which was less than $3,000.

Young v Main, 72 F 2d, 640

Cause of action not tort. Petition alleging that defendants by fraudulent statements induced plaintiff to buy machines, and that promptly thereafter plaintiff rescinded contract of purchase and demanded return of purchase price, and that fraudulent statements were made willfully and maliciously, and that plaintiff was entitled to recover amount of purchase price and exemplary damages held to set out cause for recovery of purchase price and not in tort.

Young v Main, 72 F 2d, 640

Damages—recovery. Instructions reviewed and held to correctly state the conditions under which recovery could be had for damages consequent on the feeding of a so-called hog remedy to hogs.

Crouch v Remedy Co., 205-51; 217 NW 557

Measure of recovery. Measure of recovery for plaintiff who has rescinded his contract on ground that contract was obtained by fraud is return of money paid or recovery of property with which he parted, and by rescinding contract plaintiff demands that parties be placed in statu quo, and plaintiff has right to have money or property with which he parted restored to him.

Young v Main, 72 F 2d, 640

Permissible relief. Where contract is obtained by fraud, person defrauded may affirm contract and sue party who defrauded him for his damages, or he may repudiate contract and recover purchase price paid, but he must elect one remedy and, if injured person pleads rescission, he cannot then say that his action is in tort.

Young v Main, 72 F 2d, 640

Husband and wife—action on property-settlement contract. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither

as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Compromise and settlement — impeachment —burden of proof. Fraud, in impeachment of a compromise and settlement, must be established by the pleader who alleges it.

Coffman v Brenton, 214-185; 239 NW 9

Evidence of intent to defraud—sufficiency. In an action to cancel an alleged fraud-induced compromise settlement of indebtedness, proof that in the negotiations leading up to said settlement defendant made to plaintiff inducing and material statements as of fact but which defendant, at the time, knew to be false, justifies the finding, without further proof, that defendant made said statements with intent to defraud and deceive the plaintiff.

Andrew v Baird, 221-83; 265 NW 170

Compromise settlement—impeachment—burden of proof. A plaintiff who attacks a compromise settlement of the amount due under a policy of insurance on the ground that it was fraud-induced has the burden to show that the representations inducing the settlement were knowingly false and that he innocently relied thereon; and plaintiff must, of course, fail on a record showing that the representations were true, and that he knew they were true.

Bockes v Cas. Co., 212-499; 232 NW 156

Insurance—fraud-induced settlement. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156

Insurance—compromise settlement — justifiable representation of defense. An officer of an insurance company is amply justified in believing that his company has a good defense to an action on a policy and in so stating to the insured in negotiations for a compromise settlement when the application for the insurance contained false representations of a material nature and an agreement that "the right to recover * * * should be barred" if any of the statements in the application "material either to the acceptance of the risk or the hazard assumed by the company is false and made with the intent to deceive."

Bockes v Cas. Co., 212-499; 232 NW 156

Deception constituting fraud and liability therefor—right to rely on false statement. A debtor who falsely asserts his complete insolvency, and thereby induces his creditor, wholly ignorant of the true facts, to enter into a compromise settlement of indebtedness, will not, in an action to cancel the fraud-induced settlement, be heard to assert that the creditor had no right to rely on said false statement—that the creditor, before acting, should have made an independent investigation as to the truth of said statement.

Andrew v Baird, 221-83; 265 NW 170

Reinsurance—disclosure of material facts. In an action on a reinsurance contract against reinsurer, held, not breached on account of original insurer's failure to retain full amount of liability agreed upon where original insurer was liable on another contract with the same principal and the evidence was insufficient to show any wrongful or fraudulent concealment of material facts, since the same principles of law as to false representations and concealments govern in reinsurance as in original insurance. Altho insured and reinsured have duty to exercise good faith and disclose all material facts, a presumption must be based on facts, not upon other presumptions. The mere nondisclosure of facts possibly known is not fraudulent concealment of facts, so reinsurer, to establish concealment of facts, must show intentional concealment or bad faith in ascertaining facts.

General Reins. v Surety Co., 27 F 2d, 265

Delay—effect. Long delay (short of the running of the statute of limitation) does not bar an action for damages for deceit in the sale of land.

Boysen v Petersen, 203-1073; 211 NW 894

False representations—measure of damages. The measure of damages for false representations inducing the purchase of real estate is the difference between the value of the land as received and the value as it would have been, had the land been as represented.

Aldrich v Worley, 200-1009; 205 NW 851

Sale of land—fraudulent representations. Evidence held to present a jury question on the issue of fraud in the sale of land.

Williams v Burnside, 207-239; 222 NW 413

Measure of damages—instruction following rescission theory—error without prejudice under evidence. In vendee's action for damages for fraudulent representations of value in the sale of real estate, no rescission being asked, it is error to instruct that the measure of damages is the amount paid less the reasonable rental value for the time occupied, which error, however, is without reversible prejudice to the vendor, when the amount of recovery is so small that the hope for a more favorable verdict on a retrial is, under the evidence, too remote.

Neal v Miller, 225-252; 280 NW 499

Measure of damages. Principle reaffirmed that the measure of damages for fraudulent representations as to the condition of land sold is the difference between the reasonable value

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of the land at the time in question and what would have been said value had the land been as represented.

Fry Co. v Gould, 214-983; 241 NW 666

Wholly unallowable counterclaim. The amount which a vendee of land claims to have expended on land foisted upon him because of fraudulent representations by the vendor, in order to render the land "suitable, productive, and usable," is wholly unallowable as a counterclaim because said amount as a measure of damages for the wrong suffered is unknown to the law.

Fry Co. v Gould, 214-983; 241 NW 666

Evidence—sufficiency. A showing that a conveyance by a debtor is attended by a mere suspicion of fraud is not sufficient foundation for decreeing its invalidity. Fraud must be clearly and satisfactorily established.

First N. Bank v Lynch, 202-795; 211 NW 381

Remedy—unallowable action for damages. A judgment plaintiff may not maintain an action at law for damages against the fraudulent grantee of land transferred by the judgment defendant, even tho the action is aided by an allegation of conspiracy to defraud plaintiff.

McKay v Barrick, 207-1091; 224 NW 84

False representations—actionable matters of fact and opinion. Representations (1) that land was a choice tract, (2) that it was adapted to rice culture at small expense, (3) that it was well improved, (4) that it had improvements in good repair and of ample capacity and of a named value, and (5) that the cost of operating certain machinery would not exceed a named sum are statements of present fact and actionable, if false. If treated as matters of opinion, they are likewise actionable if false, when made by a party as of his own personal knowledge.

Aldrich v Worley, 200-1009; 205 NW 851

Negativing fraud. The plea of fraudulent representation as to the value of property must necessarily fall in the face of testimony that the complainant was a person of unusual business ability and experience and had had long, personal and intimate knowledge of the property in question far superior to that of the alleged wrongdoer.

Tobin v Budd, 217-904; 251 NW 720

Nonreliance on representations. Fraud may not be based on alleged false representations as to the value and condition of property when it appears that complainant had unrestricted opportunity to investigate said representations and availed himself to the fullest extent of said opportunity.

Hall v Swanson, 201-134; 206 NW 671

Right to rely on representation. A purchaser of real estate who makes an unhampered examination of the premises prior to purchase may not rely on representations of any fact as to the truth of which he can reasonably assure himself.

Boysen v Petersen, 203-1073; 211 NW 894

Unavailing inspection—effect. The plea that the party complaining of false and fraudulent representations in an exchange of land had inspected the land prior to accepting it, and had full opportunity to learn all relevant facts, must necessarily fall when it is shown that an inspection at said time would not reveal the falsity of the particular representations relied on.

Baumhover v Gerken, 200-551; 203 NW 15

Reformation of deed—omission. Evidence reviewed, and held ample to justify the reformation of a deed because of the mistaken, and fraudulently induced, omission therefrom of a clause reserving to grantors a life estate in the land in question.

Foote v Soukup, 221-1218; 266 NW 904

Silence—effect. A vendor who, in answer to an inquiry by a proposed purchaser concerning a fact having material relation to the property, speaks half the truth and remains silent as to the other half, may be guilty of actionable false representation. Evidence held insufficient to apply the principle.

Foreman v Dugan, 205-929; 218 NW 912

Mechanic's lien release through fraud. Where a landowner desiring to refinance a mortgage on his land is unable to do so, unless he also satisfies a mechanic's lien thereon, and when the landowner's son, seeking to aid his father by securing a release of the mechanic's lien, executes to a bank a chattel mortgage, after which the mechanic's lien is released because of a special account set up by the bank for the mechanic's lien holder, but which account is available, however, only in such amounts and at such times as the son paid off the chattel mortgage to the bank, and when the same bank later took another chattel mortgage from both the landowner and son, which it later foreclosed, and in the sale disposed of the property, previously mortgaged for the benefit of the mechanic's lien holder, without crediting to the mechanic's lien holder's benefit the proceeds therefrom, a fraud action by the mechanic's lien holder against the bank held not to have been proven.

Shimp v Place, 225-1098; 281 NW 471

Nonwaiver by exercising acts of ownership. Fraud in an exchange of properties is not waived by the victim of the fraud by exercising acts of ownership over the land received, at a time when he had not fully discovered the fraud practiced on him, and at a time when the other party was asserting that the contract was not fraudulent, and that the deal,

if not satisfactory, would be mutually rescinded.

Baumhover v Gerken, 200-551; 203 NW 15

False statement as to incumbrancer. Fraud may consist of a statement that a named banking institution was the holder of an incumbrance upon land when in fact the incumbrance holder was an estate, the victim of the fraud knowing nothing of the value of the land.

Hills Bank v Cress, 205-306; 218 NW 74

Mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

Concealment. An heir may not predicate fraud in the sale of his share in an estate on the claim that his stepmother, the purchaser, concealed from him the amount of the estate, when the inventory was on file, when the uncertainty attending the existence of debts and a possible will was equally known to all parties, and when the heir possessed the same opportunity to learn the full amount of the estate as was possessed by the stepmother.

Ward v Ward, 207-647; 223 NW 369

Confidential relations—parent and child. A conveyance between parent and child generates no presumption of fraud, but necessarily invites critical examination of the attending circumstances. Circumstances indicative of fraud reviewed, and held to outweigh positive testimony tending to show good faith.

First N. Bank v Hartsock, 202-603; 210 NW 919

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and an attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Resulting trusts. The plea that a trust resulted against one who fraudulently obtained the property necessitates proof of representation, reliance thereon, falsity thereof, scienter, deception, and injury. Evidence held affirmatively to show the contrary.

Andrew v Bank, 205-244; 216 NW 551

Recovery of money against innocent third party. One who is defrauded of his money may not recover the same of an innocent third party to whom the wrongdoer paid it in discharge of the bona fide debt of the wrongdoer to the innocent third party.

Bogle v Bank, 203-203; 212 NW 547

Law of foreign state. A representation to the effect that, when a good-faith purchaser of property acquired it, a conditional sale contract was already of record in a foreign state in conformity with the laws thereof, is a representation of fact, and, if false, will sustain a plea of fraud in the execution of notes by said purchaser in the good-faith reliance on such representation, even tho such purchaser makes no examination of the laws of the foreign state.

Baker v Bockelman, 208-254; 225 NW 411

Validity of note. Evidence reviewed and held ample to show that the promissory note in question was fraud-induced.

North Amer. Ins. v Holstrum, 208-56; 221 NW 214

Cashing fraud-induced check—nonliability to maker. The payee of a check, negotiable in form and regular on its face, and received in the ordinary course of business, and for value, and wholly without knowledge of a fraud which attended and induced the execution and delivery of the check, may not be held liable to the drawer of the check for damages consequent on said fraud.

Deater v Bank, 223-86; 272 NW 423

Holdership in due course—estoppel. The maker of a negotiable promissory note may not be said to be estopped to plead fraud in the inception of the note, against a transferee, on a record which fails to show that the maker's conduct ever came to the knowledge of the transferee or in any manner controlled his conduct.

State Bank v Behm, 202-192; 209 NW 523

Banks—objectionable assets. False representations by the managing officers of a reorganized bank to the effect that all objectionable assets of the old bank had been eliminated from the new bank are actionable if relied on to one's damage.

Baumchen v Donahoe, 215-512; 242 NW 533

Payment of funds to one with apparent authority to collect. When the plaintiff gave a third party his passbook to be used to withdraw an account from an Italian bank, and the third party used the passbook to secure a personal note given to the defendant bank through which the exchange transaction was

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made, the bank was not liable for using the funds received from the Italian bank as payment of the note, when it might have thought that the note was given to obtain an advance for the plaintiff and had no knowledge of wrongdoing, and previous transactions indicated an apparent authority to transact the business in such manner.

Matalone v Bank, 226-1031; 285 NW 648

Purchase of stock—damages. The measure of damages for false representations inducing the purchase of corporate bank stock is the price paid for the stock; also, in addition, the amount of assessments subsequently paid on the stock if said assessments are the proximate results of the cause which brought about the original loss.

Baumchen v Donahoe, 215-512; 242 NW 533

Iowa securities act—false representations. A corporation's false representations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid with attorney's fees for violation of such act.

Associated Mfr. Corp. v De Jong, 64 F 2d, 64

Sale of bonds—fraud—discovery—limitation of action. Under the rule that the statute of limitations begins to run on a law action for fraud when the fraud is consummated unless tolled by an intentional fraudulent concealment, and since §11010 does not apply to law actions, in a case where bonds were sold in 1922 and buyers could have secured at any time a detailed statement of the securities held for payment of the bonds, the buyers cannot claim they did not discover, until 1933, fraud in the sale of the bonds.

McGrath v Dougherty, 224-216; 275 NW 466

Essential elements. A jury question is presented by testimony which tends to show that defendants, with the intent to defraud, falsely represented the value and ownership of corporate stock and its great desirability as an investment, and that the victim thereof justifiably relied thereon to his damage.

Faust v Parker, 204-297; 213 NW 794

Knowledge of falsity—opportunity to learn truth. The purchaser of corporate shares of stock will not be permitted to say that he relied to his damage on false representations as to the assets of the corporation and the value thereof, and as to amount originally paid in on the stock and the dividends declared, when, at the time the representations were made, he personally knew that some of the representations were false, and when, at said time, he had equal opportunity with the seller to know and learn the actual truth of the remaining representations but did not avail himself of said opportunity.

Wead v Ganzhorn, 216-478; 249 NW 271

False promise—when actionable. The deliberate making of a promise to resell corporate stock which was being offered for sale, with the intent to defraud, and with no intention of performing such promise, matures a cause of action in one who justifiably relies thereon to his damage.

Faust v Parker, 204-297; 213 NW 794

Interwoven statements as to future possibilities. On the issue whether the purchase of corporate shares of stock was induced by fraudulent representations, the entire series of interwoven representations which were made to induce such purchase must be considered, even tho some of them relate to the future possibilities of the corporation and of its stock.

North Amer. Ins. v. Holstrum, 208-722; 217 NW 239; 224 NW 492

Fraud pleadable against corporate creditors. One who is fraudulently induced to subscribe for corporate stock and to execute his negotiable promissory note in payment therefor may plead said fraud against a creditor of the corporation who, by indorsement, became a collateral security holder of the note, with full knowledge that it was given in payment for stock, (1) whether the creditor sues on the note or (2) whether the creditor sues on the theory (conceding, arguendo, its legal permissibility) that the indorsement of the note worked an assignment to him of the corporation's right of action against the subscriber for unpaid installments of stock.

Arnd v Grell, 200-1272; 206 NW 613

Corporate stock—no market value—net value of assets. If there is no evidence of the market value of corporate stock—in an action for damages consequent on a fraudulently induced sale—said value must be determined by ascertaining the net value of the assets of the corporation.

Humphrey v Baron, 223-735; 273 NW 856

Action based on fraud—conspiracy. In an action based on a conspiracy to defraud, the issue of conspiracy is not determinative, the important factor being that in order to be granted relief, it is necessary that the plaintiff establish the necessary elements of actionable fraud, the amount of recovery being dependent upon the extent of damage resulting from the fraudulent conduct.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Fraud on bank by officer—conspiracy. Where the cashier of the plaintiff bank concealed a shortage with the bank by making fraudulent entries in its bond account and, to further conceal the shortage, obtained credit with the defendant bank by using drafts on the

plaintiff bank as security, and concealed the monthly statements of the defendant in order to continue to conceal the shortage, the defendant having nothing to gain by aiding him in his fraud, there was neither direct nor circumstantial evidence of any arrangement between the cashier and the defendant to support a claim that there was conspiracy between them.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Conspiracy—concert of action—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue of concert of action between the officers and directors of a corporation for the purpose of defrauding plaintiff in the purchase of stock, except as to two defendants.

Stambaugh v Haffa, 217-1161; 253 NW 137; 38 NCCA 114.

Evidence—sufficiency. Evidence reviewed, and held to present a jury question on the issue of fraud in the sale of corporate stock.

Reinertson v Products Co., 205-417; 216 NW 68

Different fraud in same transaction. A decree in an action for fraudulent representations in the sale of the corporate stock of one corporation is not an adjudication of an action for materially different fraudulent representations in the sale of the corporate stock of another and different corporation; and this is true tho said actions grew out of the same written contract of purchase.

Reinertson v Products Co., 205-417; 216 NW 68

Defendants not fraud perpetrators—directing verdict. In an action against the incorporators of an investment company for damages for fraud in the sale of bonds, a directed verdict in favor of the incorporators was proper when the evidence, other than the outlawed printed representations on the back of the bonds, showed the fraud, if any, was committed by a bank trustee of the securities.

McGrath v Dougherty, 224-216; 275 NW 466

Sale of bonds—damage accrual—later exchange no concealment of fraud. Where bonds purchased in 1922 were exchanged in 1927 and 1932 for new bonds, the damage from fraud in their sale, if any, occurred when they were first purchased, and when neither the actual fraud itself nor due diligence to discover the same are proven, the subsequent exchange transactions will not toll the statute as a concealment of the original fraud, especially if none existed.

McGrath v Dougherty, 224-216; 275 NW 466

Deception constituting fraud—sale of bonds—duty to investigate. Under clause in bonds entitling buyers to statement of securities, it is no excuse for failing to request the same, to say that statement from fraud perpetrators if furnished would not be true.

McGrath v Dougherty, 224-216; 275 NW 466

Joinder of corporations and officers. Two corporations, each organized by the same promoters, for identically the same purpose, and officered by the same officers, may be joined with the common president, in an action based upon a single joint transaction wherein the said president in the sale of corporate stock of both corporations made false representations in the interest of and for the benefit of both corporations.

McCarthy v Dixon, 219-15; 257 NW 327

Municipal officers—pensions — findings and orders—effect. The official decision of the board of trustees of the firemen's pension fund that an applicant was not entitled to a pension on account of an alleged injury, is final and conclusive in the absence of fraud, and fraud will not be presumed in the absence of proof thereof. So held as to a claimed injury which had, apparently, been concealed for some nine years before being presented as a ground for pension.

Fehrman v Sioux City, 223-308; 271 NW 500

IV CONVERSION, CIVIL LIABILITY GENERALLY

Joint liability. If two parties be liable for a conversion, plaintiff may sue either or both.

School District v Sass, 220-1; 261 NW 30

Pleading—trespass and conversion. A party may plead trespass and conversion in the same action.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA (NS) 203

Admissions showing weakness of contentions. Where the cashier of the plaintiff bank had entered into two similar credit transactions with the defendant bank in order to cover a shortage in accounts, in an action to recover the amount of the shortage, the plaintiff's brief stating that there had been a full accounting between the two banks except as to one of the two transactions, such statement recognized a weakness in the plaintiff's contentions, as the amount claimed was equal to the amount involved in only one of the transactions and, when both had been accounted for in the same manner, the accounting for both had to be either proper or improper.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Jury question. Direct evidence is not essential in order to generate a jury question on the issue of conversion.

Mulenix v Bank, 203-897; 209 NW 432

Separate and distinct conversions. A misjoinder of causes of action and of parties occurs

IV CONVERSION, CIVIL LIABILITY GENERALLY—continued

when a petition for damages, consequent on successive sales of mortgaged chattels, reveals that two separate and distinct sales were made with actual or constructive notice of the recorded mortgage,—one by part of the defendants, and one by the remaining defendants,—without any allegation of conspiracy, unity of design, or concert of action on the part of all of said defendants, and without any allegation that the concurrent acts of all the defendants proximately contributed to the conversion.

Producers Assn. v Livingston, 216-1257; 250 NW 602

Title—evidence. On the issue of ownership of personal property, plaintiff may introduce (for what it is worth) a policy of insurance carried by him on the property, especially when defendant is insisting that plaintiff's claim of ownership is a belated afterthought.

Antes v Coal Co., 203-485; 210 NW 767

Transfer of property by mortgagor. The purchaser of mortgaged chattels is not liable to the mortgagee, as for a conversion, when the mortgagee has waived his lien by expressly or impliedly consenting to a sale by the mortgagor.

Producers Assn. v Morrell & Co., 220-948; 263 NW 242

Right to dictate application. A chattel mortgagee who consents to the shipment and sale of the mortgaged property in his name must obey the instructions of the mortgagor to apply the receipts on the mortgage-secured debt, irrespective of his right in the absence of such instructions.

Reichenbach v Bank, 205-1009; 218 NW 903

Liabilities of parties. A senior chattel mortgagee who, without foreclosure, takes possession of the mortgaged property and sells it at private sale must account to a junior mortgagee for such part of the proceeds as he applies to unsecured claims due him.

Money v Bank, 202-106; 209 NW 275

Liability of bailee. The bailee of an article is liable to the bailor for the reasonable value of the article when the bailee sells it after receiving it under an agreement to credit the bailor with a certain amount on a contemplated purchase of a new article of the same kind, it appearing that the bailor had abandoned his former contemplated new purchase.

Kinsey v Massey, 204-758; 216 NW 54

Unidentified bailments—ratable distribution. When the subject matter of various bailments with the same bailee is identical in kind,—e. g., government bonds,—and becomes so intermingled that the owners are unable to identify their separate property, the entire series of bailments must, in case of the insolvency of the bailee, be ratably distributed among the bailors.

In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910

Insurance premium—conversion by agent—liability of insurer. Where insurance agent taking an application for life insurance had authority to collect premiums on behalf of the insurer and where proceeds of check given with application for payment of premium were partly converted while in authorized possession of insurer's agent, and the application was thereafter rejected by insurer, the conversion was an act for which the insurer was liable.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Treating collateral security as one's own. The collateral holder of mortgage-secured bonds is guilty of conversion if, when the mortgage is foreclosed, he so treats said bonds as his individual property that they pass beyond the control of himself and of the real owner, without the knowledge or consent of said real owner.

Leonard v Sehman, 206-277; 220 NW 77

Fraud on bank by officer. Where the cashier of the plaintiff bank concealed a shortage with the bank by making fraudulent entries in its bond account and, to further conceal the shortage, obtained credit with the defendant bank by using drafts on the plaintiff bank as security, and concealed the monthly statements of the defendant in order to continue to conceal the shortage, the defendant having nothing to gain by aiding him in his fraud, there was neither direct nor circumstantial evidence of any arrangement between the cashier and the defendant to support a claim that there was conspiracy between them.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Bonds — evidence — sufficiency. Plaintiff in an action for the conversion of bonds may recover on proof of the conversion and of the value of the bonds. Proof that bonds found in the possession of the conversioner or of his executor are the identical bonds converted is material only in case plaintiff elects to recover the bonds in kind.

Annis v Morgan, 210-478; 231 NW 457

Corporate stock — evidence — jury question. Evidence held to present jury question on the issue whether corporate stock alleged to have been converted was worthless, whether a bank cashier acted individually or on behalf of the bank, and whether the bank received any funds in the transaction in question.

Butterworth v Bank, 211-1327; 236 NW 83

Official bonds—time deposit works conversion. A sheriff is guilty of instant conversion and a breach of his bond when he deposits in a bank funds properly coming into his hands in unadjudicated condemnation proceedings and takes from the bank a certificate of deposit which is payable at a definite time in the future, because he thereby fails so to "hold" said funds as commanded by statute as to enable him to account for such funds whenever the proceedings are finally determined; and in such case the question of due care or negligence in making the deposit is quite immaterial.

Northwestern Co. v Bassett, 205-999; 218 NW 932

Identification of goods—evidence. In an action against an execution plaintiff for conversion of goods stored in certain "boxes, barrels, and trunks," and sold in bulk, without inventory of the contents, plaintiff may introduce duly identified and detailed inventories of the contents, on a showing that such inventories represent the contents of said "boxes, barrels, and trunks."

Antes v Coal Co., 203-485; 210 NW 767

Chattel mortgage foreclosure — misdescription of horses. In an action against a bank for conversion of horses sold in a chattel mortgage foreclosure and allegedly being the same horses mortgaged previously to induce the release of a mechanic's lien, held, evidence failed to establish that the horses sold were the same ones described in the prior chattel mortgage.

Shimp Bros. v Place, 225-1098; 281 NW 471

Property under receivership. One who is in possession of property as agent of a duly appointed receiver is not guilty of a conversion of the property by refusing to give it up without the consent of the receiver, even tho such agent is plaintiff in the action in which the receiver was appointed, and even tho a full settlement of the action has been consummated, but not yet called to the attention of the court.

McCarthy v Cutchall, 209-193; 225 NW 865

Trusts — management—unauthorized transfer of collateral. The act of a trustee holding collateral as security for a particular bond issue in transferring, without authority, the collateral so held to another and different series of bonds, in order that the said latter bonds may be better secured, or the transfer of such collateral to any other foreign purpose, constitutes a conversion and renders the trustee and the corporate officers who connive thereat personally responsible to the bondholders for the loss suffered by them.

Walker v Howell, 209-823; 226 NW 85

Matured crops. Principle reaffirmed that matured corn, standing in the field, is personal property and therefore subject to conversion.

Durflinger v Heaton, 219-528; 258 NW 543

Rent—conversion—jury question. Record held to present jury question on issue whether property on which a landlord had a lien for rent had been sold by the tenant with or without the consent of the landlord.

Mau v Rice Bros., 216-864; 249 NW 206

Rent—lien—liability of purchaser—burden of proof. A landlord may successfully maintain an action for conversion against the purchaser of property on which he has a lien for rent, unless such purchaser avoids the action by a plea of waiver or estoppel. Especially is it erroneous to instruct the jury that the landlord must prove that he had no "knowledge" of the sale.

Wilson v Fortune, 209-810; 229 NW 190

V ASSAULTS

Disabilities—torts during coverture. A wife may not maintain an action against her husband for damages consequent upon willful injuries inflicted upon her by her husband.

In re Dolmage, 203-231; 212 NW 553

Civil liability—jury question. Evidence held to present jury question in an action for damages for assault and battery.

Fox v McCurnin, 205-752; 218 NW 499

Evidence — competency — non-res-gestae statements. In an action for damages consequent on an assault, a witness will not be permitted, over proper objection, to testify as to what plaintiff, some two hours after the occurrence, said relative to the cause of her agitation.

McQueen v Stores, 214-1300; 244 NW 278

Evidence—hearsay—incompetency. Plaintiff in an action for damages consequent on an assault, may not testify as to the "remarks" that her friends and neighbors made to her relative to the assault, such "remarks" being hearsay.

McQueen v Stores, 214-1300; 244 NW 278

V ASSAULTS—continued

Pleading—confession and avoidance. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v Sundholm, 228- ; 291 NW 137

Civil liability—trespassers—abortive issue. The plea in an action for personal injury that plaintiff was a trespasser on defendant's property presents no jury question when defendant neither pleads nor proves (1) that he had requested plaintiff to depart and that plaintiff had refused to do so, or (2) that any force was necessary to remove plaintiff—in short, when defendant does not plead or show that he was ejecting plaintiff as a trespasser.

Pettijohn v Halloran, 200-1355; 206 NW 631

Civil liability—self-defense. The aggressor in a physical encounter who is met by allowable self-defense necessarily has no cause of action against the party he assaults.

Lake v Moots, 215-126; 244 NW 693

Arrest without warrant—reasonable ground—excessive force. Testimony reviewed and held to present a jury question on the issues (1) whether a defendant-sheriff in an action for damages had reasonable cause to believe that plaintiff's automobile contained the persons who had just prior thereto committed a robbery, (2) whether the sheriff acted as a prudent and reasonable officer would act under similar circumstances, and (3) whether the sheriff employed more force than was apparently necessary to stop the car.

Lawyer v Stansell, 217-111; 250 NW 887

Combatants' consent to fight—no defense. In a case of mutual combat consent is no defense in an action by either combatant to recover damages for injuries inflicted by the other. Such fighting being unlawful, and the combat involving a breach of the peace, the mutual consent is to be regarded as unlawful and as not depriving the injured party, or, for that matter, either party, from recovering damages.

Schwaller v McFarland, 228- ; 291 NW 852

Self-defense — admitted aggression — effect. Whether defendant employed excessive force in repelling an assault upon him is the sole question at issue in a civil action for damages when plaintiff admits that he was the aggressor in the affray with defendant. In other words, in such a case neither the issue (1) whether the plaintiff was the aggressor, or (2) whether the defendant had the right of self-defense, should be submitted to the jury.

Booton v Metcalfe, 201-311; 207 NW 386

Self-defense—permissible degree of force. The degree of force which a defendant may employ in order to prevent injury to himself from an assault by one person is not necessarily the measure of defendant's permissible resistance when, at the same instant of time, he is menacingly threatened by several other persons in his immediate presence. This important fact must not be overlooked by the instructions.

Booton v Metcalfe, 201-311; 207 NW 386

Excessive force used to eject—instructions limiting recovery. When the jury was told that if it found that the defendant used more force than was reasonably necessary to eject the plaintiff from his home, they must find the defendant liable for the injuries caused by the excessive force, the instructions, when considered as a whole, were not subject to the objection that the right of recovery was not limited in the event that the injuries were due to the excessive force.

Wessman v Sundholm, 228- ; 291 NW 137

Error in favor of complainant. An instruction relative to the right of the jury to determine the extent and severity of injuries suffered by plaintiff in a personal encounter with defendant by considering, inter alia, the relative size, health, and physical conditions of the parties is harmless (conceding it to be erroneous) when apparently, on the face of the record, such instruction was to the material advantage of the complainant.

Morrow v Scoville, 206-1134; 221 NW 802

Instructions concerning assault—balancing illustration. The court, after instructing that the taking of indecent liberties with the person of a woman may constitute an assault, and after employing an illustration descriptive of indecent liberty, need not balance the illustration by giving the converse thereof.

Ransom v McDermott, 215-594; 246 NW 266

"Assault" admitted in pleadings — use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

Instructions as whole—self-defense properly submitted. In an assault and battery case an instruction setting out elements of plaintiff's proof without referring to "self-defense" is not erroneous when "self-defense" is suffi-

ciently explained to the jury in other instructions.

Hauser v Boever, 225-1; 279 NW 137

Self-defense—instructions. Where defendant voluntarily participated in a fight, not in his own defense, the court did not err in failing to instruct the jury on self-defense as, under such circumstances, self-defense was not available as a defense.

Schwaller v McFarland, 228- ; 291 NW 852

Damages—loss of earnings. In an action for injuries received in an assault and battery, evidence that the plaintiff had been incapacitated for 41 days and that his earnings prior to the injury were about $10 per day, was sufficient to submit to the jury an issue of loss of earnings.

Wessman v Sundholm, 228- ; 291 NW 137

Instructions—directing jury to award damages to plaintiff. Undisputed evidence held to establish that plaintiff and defendant mutually consented to engage in a fight, and that defendant unlawfully committed an assault and battery on plaintiff, warranting an instruction to the jury to return a verdict for plaintiff in some amount.

Schwaller v McFarland, 228- ; 291 NW 852

Civil liability — damages — physical pain. Damages may be awarded for physical pain and suffering consequent on an assault and battery even tho no very appreciable physical injury is made to appear.

Ransom v McDermott, 215-594; 246 NW 266

Excessive verdict—$3,500 for indecent assault. Verdict of $1,500 actual and $2,000 punitive damages held excessive as to the actual damages.

Ransom v McDermott, 215-594; 246 NW 266

Nominal damages—right to recover more. The court is not in error in instructing that a plaintiff is entitled to more than nominal damages ("such as one dollar or less") consequent on a wholly unjustified assault and battery resulting in admittedly substantial physical injury to plaintiff.

Ashby v Nine, 218-953; 256 NW 679

Exemplary damages—malice as basis. Exemplary damages are allowable for malicious assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

Elements in mental anguish—separate recoveries as double damages—curing by remittitur. Humiliation and mortification being included in mental anguish, an instruction in an assault and battery case allowing one recovery for mental anguish and another recovery for humiliation and mortification is erroneous as allowing for double damages for the element of mental anguish; however, the defect is cured by requiring the plaintiff to remit the entire amount allowed for humiliation and mortification.

Hauser v Boever, 225-1; 279 NW 137

Verdict—directed on questions of law only. Directed verdicts have no place in jury trials unless the record clearly presents controlling questions of law. Record evidence held wholly insufficient to justify a directed verdict against plaintiff on the ground that as a matter of law the contract for damages for assault—on which plaintiff sued—was based in part (1) on an agreement by plaintiff to compound or conceal the commission of a public offense, or (2) on an agreement by plaintiff as an employee to refrain from circulating scandalous information concerning his employer.

In re Cuykendall, 223-526; 273 NW 117

VI THREATS

Boycott — essential elements — intimidation and coercion. Intimidation and coercion are essential elements of boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done.

Smythe Co. v Local Union, 226-191; 284 NW 126

Secondary boycott—essential elements. A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw from their beneficial business intercourse, by threats that, unless they do so, the combination will cause similar loss to them; or by the use of such means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm.

Smythe Co. v Local Union, 226-191; 284 NW 126

Peacefully picketing not secondary boycott —no injunction. A threat to do something that a person has a right to do is not a threat in a legal sense. Held that union officials, by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott, and an injunction will not lie.

Smythe Co. v Local Union, 226-191; 284 NW 126

Duress—pleading—conclusiveness. A party must stand or fall on the particular threat alleged by him as constituting duress. Reversible error results from permitting the jury to base its finding of duress on unpleaded matters.

Gray v Shell Corp., 212-825; 237 NW 460

Liability for mental pain. Willful threats made to a debtor for the purpose of producing

in the mind of the debtor such mental pain, anguish, and harassment as will induce him to pay the debt, render the offender liable in damages for the resulting pain and anguish, even tho there be no actual or threatened physical injury, provided the threats are not mere threats to resort to legal procedure.

Barnett v Collection Co., 214-1303; 242 NW 25; 4 NCCA(NS) 223

VII ABUSE OF PROCESS

Writs of prohibition — power of supreme court to issue. The supreme court has original jurisdiction, under the constitution, to issue common-law writs of prohibition; but, when the application is for a writ directed to a district court and commanding it to discontinue further jurisdiction over named actions pending in said lower court, the supreme court must act solely on the established facts as revealed in the proceedings in said district court, and, if material disputed issues of fact arise, the writ will be refused, as the supreme court has no power to take testimony on disputed questions of fact dehors said district court records.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Evidence—sufficiency. Evidence held to present jury question on the issue of abuse of process.

Sokolowske v Wilson, 211-1112; 235 NW 80

Execution sale—presumption of ownership. In an action against a sheriff for the wrongful sale of plaintiff's machinery as the property of an execution defendant, no error results from the failure to instruct that the finding of the property on the premises of the execution defendant raised a presumption of ownership in the latter when the court specifically placed the burden on plaintiff to prove his ownership of said property. (No request for the instruction was made.)

Rosander v Knee, 222-1164; 271 NW 292

Rent—writ of attachment—legality. The issuance of a landlord's writ of attachment for rent admittedly due is not rendered unlawful because the tenant subsequently pleads and establishes a counterclaim which cancels the landlord's admitted claim for rent.

Kelp v McManus, 218-226; 253 NW 813

Threatened attachment levy. The fact that a tenant's creditor is present at a public sale of the tenant's property and threatens to levy an attachment on said property does not constitute such abuse of process as will invalidate a check given by the landlord to the creditor in payment of his claim and to prevent such levy.

Myers v Watson, 204-635; 215 NW 634

VIII ELECTRICITY GENERALLY

Danger signs—posting—sufficient evidence. Evidence sufficient to justify finding that electric company had complied with statute requiring danger signs to be posted on poles or towers along highway.

Aller v Elec. Co., 227-185; 288 NW 66

Common knowledge that metal wire will conduct electricity. Farmer 36 years of age familiar with high lines and use of electricity is presumed to have the common knowledge of all intelligent persons that a metal wire will conduct electric current.

Aller v Elec. Co., 227-185; 288 NW 66

Contributory negligence nullifies statutory presumption. When a person is injured by transmission line, the statutory presumption of defendant's negligence need not be rebutted when plaintiff fails to establish freedom from contributory negligence.

Aller v Elec. Co., 227-185; 288 NW 66

Contributory negligence—operation of electric elevator—no eyewitnesses. An expert and experienced electrician who enters an electrically operated freight elevator which he had often operated,—the mechanism and condition of which were fully known to him, and especially the fact that the elevator could be moved at any time by manipulation by other parties on other floors of the building unless the electric circuit was broken,—is guilty of negligence per se in taking the risk of the elevator moving while he was attempting, without breaking the circuit, to close a door with known defective appliances,—the circuit breaker being in his immediate presence and easily accessible; and this is true tho there were no eyewitnesses to the occurrence.

Boles v Hotel Co., 218-306; 253 NW 515

Manner of construction of lines. In an action against an electric company whose transmission line was so close to plaintiff's building that firemen could not throw water on a fire until current was turned off, which delay caused destruction of building and contents, a complaint alleging violation of town ordinance and a state statute respecting construction of transmission line held insufficient to state a cause of action.

Bowen v Ia. Public Service, 35 F 2d, 616

Tree over transmission line—failure to remove. Where a tree limb on plaintiffs' land had broken and lodged in the fork of a dead tree and hung two or three feet over defendant's transmission line, and later electricity from the line set the tree on fire and it spread to the plaintiffs' house, in an action to recover for the fire loss it could not be said as a matter of law that the plaintiffs were contributorily negligent in not removing the limb when they had acted as reasonable and prudent persons in twice requesting the defendant to take the

line down or shut off the current so the tree could be cut down and the overhanging limb removed.

Porter v Elec. Co., 228- ; 292 NW 231

Negligence—presumption. An allegation of negligent construction or maintenance of an electrical transmission line is unnecessary and, if made, need not be proved, in an action for damages caused by fire set out by such line. Proof that fire was communicated to property by said line, and proof of the amount of damages resulting, plus the statutory presumption of negligence on the part of the operator of the line, make a prima facie case for recovery.

Walters v Iowa Co., 203-471; 212 NW 884; 38 NCCA 551

Res ipsa loquitur. Evidence tending to show that decedent came to his death from an electric shock consequent on handling an ordinary electric lighting fixture, charged with electricity by the defendant, and that the ordinary lighting voltage was harmless, even tho there is evidence to the contrary as to the last proposition, furnishes basis for the application of the doctrine of res ipsa loquitur, and creates a jury question on the issue of the defendant's negligence.

Orr v Elec. L. Co., 213-127; 238 NW 604

Water tank and electric transformer not attractive nuisance. The maintenance in a brick yard, where children sometimes play, of a circular water tank about eleven feet in height with no inviting or ready means of going up and down the side thereof except a perpendicular, smooth, overflow pipe one and one-fourth inches in diameter extending from the top to the bottom of the tank and at a distance of eight inches from the outside wall, and the maintenance on the top of the tank of heavily charged electric transformers, four feet high, without any warning signs of danger, will not be deemed an "attractive nuisance" within the law of negligence.

Cox v Elec. Co., 209-931; 229 NW 244

IX EXPLOSIONS, LIABILITY

Actions — pleading — res ipsa loquitur — waiver. A general allegation of negligence, supportable by the doctrine of res ipsa loquitur, is waived by inserting in the same count a specific allegation of negligence; but the rule is otherwise when the different allegations are in different counts and when the issue arising on the general allegation is alone submitted because of the dismissal by plaintiff of the count containing the specific allegation.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Actions — res ipsa loquitur — applicability. Basis for the application of the doctrine of res ipsa loquitur is established by proof that pipes and appliances for conducting inflammable gas into a place of business were under the full control of the party furnishing the gas, that gas leaked from said pipes and appliances before it entered the meter, and that a violent explosion resulted from such leakage.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Negligence—proximate cause. The act of a contractor in abandoning dynamite caps in a public highway is the proximate cause of an injury to an immature boy who found the caps and was injured thereby, rather than the act of the boy in attempting to remove the explosive from the container.

Eves v Const. Co., 202-1338; 212 NW 154; 28 NCCA 155

Gas—duty as to unowned pipes and fixtures. A gas company engaged in furnishing inflammable gas for domestic or for other like or similar purposes is under legal obligation to exercise a degree of care, commensurate with the danger, to maintain in a safe condition the pipes and fixtures over which it has full control, and through which its gas passes into the meter, even tho the company does not own said pipes or fixtures and did not originally install them.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

CHAPTER 485

JOINDER OF ACTIONS

10960 When permitted.

ANALYSIS

I PROPER JOINDER OF ACTIONS
II · IMPROPER JOINDER OF ACTIONS
III PROCEDURE ON IMPROPER JOINDER

I PROPER JOINDER OF ACTIONS

Action on bond. An action on a bond, brought against both the principal and surety, presents no question of misjoinder of causes of action. So held as to a bond given under the Iowa securities act.

Kellogg v Bell, 222-510; 268 NW 534

Causes assigned for collection—right of assignee. Plaintiff, in an action at law against a defendant, may join in separate counts:

1. Any number of causes of action against defendant of which plaintiff is the unqualified holder, and which are triable at law in said county of suit, and

2. Any number of causes of action against defendant of which plaintiff is holder as assignee for collection only, and which are triable at law in said county of suit.

Carson v Long, 222-506; 268 NW 518

Independent causes of action—appeal. When plaintiff sues on two independent causes of

I PROPER JOINDER OF ACTIONS—concluded

action, the appellate court may, on appeal, reverse as to one cause of action and affirm as to the other.

Keller v Gartin, 220-78; 261 NW 776

Concerted action without conspiracy. Joint liability may exist without allegation or proof of conspiracy. So held where there was allegation and proof of concerted action by several persons with common intent and purpose.

Baumchen v Donahoe, 215-512; 242 NW 533

Joinder—city and benefited property owners. There is no misjoinder of parties or causes of action where a city in its own behalf and in behalf of the parties beneficially interested brings an action against a contractor, combining therein both a claim for damages for defective pavement and a claim for the cost of "coring" to determine the thickness, since the basis for the latter claim was found in the contract. A motion to strike is properly overruled.

Sioux City v Krage, 225-1154; 281 NW 828

Petition in two counts—(1) guest and (2) not a guest. An automobile passenger receiving injuries in a collision may not be required to elect between counts when his petition contains (1) a count alleging recklessness based on theory he was a guest, and (2) a count alleging negligence based on theory he was not a guest—where plaintiff's cause of action is for a single wrong and he seeks in each count damages for the same injuries arising out of the same act of decedent.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Quieting title—prayer for writ of possession. An equitable action (1) to quiet title, and (2) in addition, to obtain a writ ousting defendant from the premises, is proper.

McKenney v Nelson, 220-504; 262 NW 101

Objections to executrix's report—real estate title issue not misjoinder—jurisdiction. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

Objections to executrix's report—conversion issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

Trust — action against joint trustees. Two or more persons acting jointly in a fiduciary capacity in relation to the same property for the same beneficiary are properly made joint defendants in an action to enforce the trust.

Burger v Krall, 211-1160; 235 NW 318

Trustee to collect — allowable joinder. A trustee who has been authorized by the joint instrument of several individual owners of separate promissory notes, signed by the same maker, to bring such actions as he may deem fit to enforce collection of said notes, may maintain solely in his own name as such trustee an action at law on all or on any number of said notes. It follows that a motion to require the plaintiff to elect as to the particular count on which he will proceed will not lie.

Iowa Co. v Clark, 215-929; 247 NW 211

Parties acting jointly and in cooperation. Several persons engaged jointly and in cooperation in the unlawful furnishing, prescribing and administering of medicine without a license may be properly joined in one action for injunction.

State v Baker, 212-571; 235 NW 313

Claims acquired during foreclosure—independent action to enforce. Where, pending foreclosure action, plaintiff acquires an additional claim against the defendant, he is not bound to amend and assert said claim in the foreclosure proceedings, but may maintain a subsequent and independent action on the newly acquired claim even tho it pertains to the subject matter of the foreclosure.

Central Bank v Herrick, 214-379; 240 NW 242

II IMPROPER JOINDER OF ACTIONS

Decisions reviewable—orders to strike and dismiss. An order overruling a motion to strike a pleading and to dismiss parties because of the improper joinder of actions and of party defendants is appealable.

Ontjes v McNider, 218-1356; 256 NW 277

Ruling on motion as adjudication. Whether a ruling sustaining a motion to strike a pleading on the ground that it improperly joins causes of action and party defendants constitutes (in the absence of an appeal) a final adjudication in the further progress of the cause, quaere.

Ontjes v McNider, 218-1356; 256 NW 277

Mandamus and damages. An action of mandamus to compel the board of supervisors to proceed to the assessment of damages consequent on the taking of land in order to effect a change in a highway is properly stricken on

motion when joined with an action against the county for damages for the taking of said land.

Valentine v Board, 206-841; 221 NW 517

Unallowable joinder of law and mandamus. An action at law against a county for judgment for taxes illegally exacted may not be joined with an equitable action of mandamus for an order on the board of supervisors directing the county treasurer to refund such taxes.

First N. Bank v Board, 217-702; 247 NW 617; 250 NW 887

Joining law and equity. It is not permissible for the receiver of an insolvent private bank to join (1) a law action to obtain a judgment against an alleged partner in the bank, and (2) an equitable action against the partner and his grantee to set aside a conveyance alleged to be fraudulent.

Cooper v Erickson, 213-448; 239 NW 87

Law and equity. An equitable action to foreclose a mortgage, and a law action to enforce the liability of an indorser who indorsed "without recourse", may not be joined.

Leekley v Short, 216-376; 249 NW 363; 91 ALR 394

See Murphy v Board, 205-256; 215 NW 744

Joinder—tort of one and contract of another. A joint action (1) against a wrongdoer upon his tort consequent on the negligent operation of a motor vehicle, and (2) against a surety company upon its policy to indemnify the wrongdoer from loss because of said tort, even tho but one recovery is sought, presents two different causes of action, and the joinder thereof is wholly unallowable. And this is true whether the policy is simply a private, optional contract between the insured and insurer, or a policy mandatorily required by statute to be filed with and approved by the railroad commission as a condition precedent to the obtaining of a permit to operate said vehicle.

Ellis v Bruce, 215-308; 245 NW 320

Contract and tort. A plaintiff may not base an action to recover damages for a personal injury on both (1) the commission of a tort by the defendant and (2) the breach of a contract by the defendant, and reversible error necessarily results from submitting both issues, when they are not identical.

Randall v Moen Co., 206-1319; 221 NW 944

Joining contract and tort actions. A joint action cannot be maintained (1) against a contractor on his contract liability to answer for possible torts committed during the progress of work, and (2) against those who are alleged to have subsequently committed a tort during the progress of said work, when the contractor and the alleged tort-feasors are residents of different counties.

Elder v Maudlin, 213-758; 239 NW 577

Nonpermissible joinder. An action against a corporation on its obligation and an action against the directors to enforce a statutory liability relative to such obligation may not be joined.

McPherson v Sec. Co., 206-562; 218 NW 306

Motion to consolidate actions by plaintiffs. Two personal injury actions arising out of the same accident and brought against the same defendant cannot be consolidated on motion by the plaintiffs for although equity has the power to consolidate causes of action to avoid multiplicity of suits, the right to move for a consolidation of causes of action in law is by statute granted only to the defendant, and a plaintiff has no such right.

Brooks v Paulson, 227-1359; 291 NW 144

Separate and distinct conversions. A misjoinder of causes of action and of parties occurs when a petition for damages, consequent on successive sales of mortgaged chattels, reveals that two separate and distinct sales were made with actual or constructive notice of the recorded mortgage,—one by part of the defendants, and one by the remaining defendants,—without any allegation of conspiracy, unity of design, or concert of action on the part of all of said defendants, and without any allegation that the concurrent acts of all the defendants proximately contributed to the conversion.

Producers Assn. v Livingston, 216-1257; 250 NW 602

III PROCEDURE ON IMPROPER JOINDER

Misjoinder. In an action by plaintiff to recover for money paid for the use and benefit of defendant, an allegation of money paid by a third party for the use and benefit of defendant is properly stricken on motion.

Wragg v Wragg, 208-939; 226 NW 99; 64 ALR 1292

Improper joinder in wrong county—procedure. Where a receiver joins in one proceeding (1) an equitable action asking the court to declare an assessment on unpaid stock subscriptions, and (2) a law action praying judgment on the assessment against stock subscribers who were nonresidents of the county of such proceedings, the stock subscribers need not move to strike the latter cause of action, but may very properly move (1) to separate the latter cause of action from the former, (2) to transfer the said latter cause of action to the law calendar, and (3) to transfer said latter cause of action to the various counties of the subscribers' residences.

State v Packing Co., 217-1172; 250 NW 876

Objections to executrix's report—conversion issue not misjoinder—motion to strike. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets

III PROCEDURE ON IMPROPER JOINDER—concluded

claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

Motion to strike as demurrer. A motion in a law action to strike an alleged misjoined action will be treated by the appellate court as a demurrer when so treated by the trial court and by the parties to the action.

Kellogg v Bell, 222-510; 268 NW 534

Demurrer. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

Pleadings unamendable after dismissal. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties-plaintiffs and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 106 ALR 566

Curing misjoinder. Any claim of misjoinder of causes of action as to defendants and of misjoinder of parties defendant because plaintiff joined an action at law on bonds against one defendant with an action in equity to set aside an alleged fraudulent conveyance against the other defendant, is effectually effaced by an order of court dismissing the action as to the equitably charged defendant.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

10962 Plaintiff may strike out.

Unamendable pleadings after dismissal. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties plaintiffs and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 106 ALR 566

10963 Motion to strike out.

Discussion. See 20 ILR 49—Defective pleading

Order refusing separation of misjoined causes of action. The court, on proper motion, must correct an unallowable joinder of causes of action and an order refusing so to do is appealable.

Ellis v Bruce, 215-308; 245 NW 320

Unallowable motion. A motion to dismiss an action because of a misjoinder of causes of action will not lie.

Federal Sur. v Morris Plan, 209-339; 228 NW 293

Improper joinder—sole remedy. A motion by defendant to require plaintiff to elect on which of two improperly joined causes of action he will proceed to trial is unallowable. Motion to strike is the sole remedy.

Neidigh v Finance System, 219-225; 257 NW 563

Motion to correct improper joinder—form. Where causes of action against different defendants are unallowably joined in the same action, a defendant wishing to correct the error should move to strike from the petition the cause of action not affecting himself.

Ellis v Bruce, 215-308; 245 NW 320

Misjoinder both of parties and of causes. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

Intermingled law and equity. A petition, tho divided into "divisions" and to some extent separately embracing legal and equitable matters, is not subject to a motion to strike because of misjoinder, when the petition as a whole manifestly pleads but one cause of action, viz: an action for discovery and for an accounting.

Garretson v Harlan, 218-1049; 256 NW 749

Separating issues—required procedure. A party who wishes to separate the equitable issues already joined from a law action pleaded by the adversary as an amendment must move to separate before he answers.

Kimmel Inv. Co. v Renwick, 220-362; 261 NW 775

Striking objections in probate—affidavits improper. A motion to strike objections to probate accounts on the grounds of misjoinder of actions is determinable only on the contents of the pleading attacked without aid of affidavits.

In re Rinard, 224-100; 275 NW 485

Misjoinder—motion to strike. When a defendant is sued in a county other than the county of his residence, and is not suable in

said county of suit because of misjoinder of causes of action and of parties, he may, by motion to strike, trim the petition of every defendant except himself and of every cause of action except the one pleaded against himself.

Producers Assn. v Livingston, 216-1257; 250 NW 602

Improper joinder in wrong county. Where a receiver joins in one proceeding (1) an equitable action asking the court to declare an assessment on unpaid stock subscriptions, and (2) a law action praying judgment on the assessment against stock subscribers who were nonresidents of the county of such proceedings, the stock subscribers need not move to strike the latter cause of action, but may very properly move (1) to separate the latter cause of action from the former, (2) to transfer the said latter cause of action to the law calendar, and (3) to transfer said latter cause of action to the various counties of the subscribers' residences.

State v Packing Co., 217-1172; 250 NW 876

Single or dual cause of action—test. The obligee of a bond, who pleads solely for the recovery of the amount due him under the bond, pleads but a single cause of action, tho he prays for different remedies against different parties, or in part pleads for unallowable relief.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor—both instruments having been executed by the same party and at the same time—it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Refusal to strike — answer waives error. Where plaintiff filed law action to establish right to inherit as illegitimate son, then, by way of amendment, filed an equitable petition asking that he be adjudged an adopted son of deceased, and that adoption by estoppel be recognized as against grandchildren of the deceased, and later made application to transfer the cause to the equity docket, the court did not err in overruling defendant's resistance to the transfer and motion to strike the petition in equity, the same result being reached as if the court had sustained the motion to strike and plaintiff had filed his amendment as a separate petition in equity as provided by statute. Moreover, error, if any, in refusal to strike the misjoined causes of action was waived by defendant's act in filing answer.

Bergman v Carson, 226-449; 284 NW 442

Matter incidental to ruling on motion not res judicata. In a libel action brought against a newspaper and others as joint tort-feasors, when affiants testified as to the matter of agency at a hearing on a motion to strike part of the petition, a ruling by the court denying the motion was not res judicata on the question of agency, as agency question was only incidental to the question of misjoinder raised by the motion to strike and could be raised in a subsequent trial on the merits of the case.

Cooper v Gazette Co., 226-737; 285 NW 147

Unallowable motion to strike. In an action against several defendants for damages consequent on a negligent act, that defendant who is, in effect, alleged to have occupied the position of respondeat superior cannot have his name stricken from the petition.

Elder v Maudlin, 213-758; 239 NW 577

10964 Misjoinder waived.

Wrong calendar—waiver by answering. A defendant in equity who files answer after the overruling of his motion (1) to strike alleged misjoined causes of action, and (2) to transfer from equity to law, may not maintain an appeal from the ruling on his said motion.

Thompson v Erbes, 221-1347; 268 NW 47

Waiver by answer. Where plaintiff filed law action to establish right to inherit as illegitimate son, then, by way of amendment, filed an equitable petition asking that he be adjudged an adopted son of deceased, and that adoption by estoppel be recognized as against grandchildren of the deceased, and later made application to transfer the cause to the equity docket, the court did not err in overruling defendant's resistance to the transfer and motion to strike the petition in equity, the same result being reached as if the court had sustained the motion to strike and plaintiff had filed his amendment as a separate petition in equity as provided by statute. Moreover, error, if any, in refusal to strike the misjoined causes of action was waived by defendant's act in filing answer.

Bergman v Carson, 226-449; 284 NW 442

Waiver by filing answer. In action on note, filing of answer waived right to proceed under statute by motion to strike cause of action improperly joined.

Brown v Correll, 227-659; 288 NW 907

Withdrawal of pleading to file demurrer. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

10965 Separate petitions.

Transfer of cause. Where plaintiff filed law action to establish right to inherit as illegiti-

mate son, then, by way of amendment, filed an equitable petition asking that he be adjudged an adopted son of deceased, and that adoption by estoppel be recognized as against grandchildren of the deceased, and later made application to transfer the cause to the equity docket, the court did not err in overruling defendant's resistance to the transfer and motion to strike the petition in equity, the same result being reached as if the court had sustained the motion to strike and plaintiff had filed his amendment as a separate petition in equity as provided by statute. Moreover, error, if any, in refusal to strike the misjoined causes of action was waived by defendant's act in filing answer.

Bergman v Carson, 226-449; 284 NW 442

10966 Principal and agent.

Discussion. See 1 ILB 83—Vice-principal rule; 8 ILB 95—Share tenancies and partnerships; 10 ILB 144—Liability of principal for acts of agent; 10 ILB 147, 228—Liability of master and servant; 19 ILR 606—Admissions of agent

ANALYSIS

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Master and servant. See under §1495
Motor vehicles—liability of owner. See under §5037.09

I IN GENERAL

Parties—objections—unallowable motion to strike. In an action against several defendants for damages consequent on a negligent act, that defendant who is, in effect, alleged to have occupied the position of respondeat superior cannot have his name stricken from the petition.

Elder v Maudlin, 213-758; 239 NW 577

Government nonliability for employee's tort. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior, and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608

Negligence — immunity rule — basis. Such immunity as is granted a public charity institution for its negligence has been sustained by the courts on (1) the trust fund theory, or (2) the nonapplicability of the rule of respondeat superior, or (3) the waiver theory, or (4) the public policy theory.

Andrews v Y. M. C. A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Agency and joint adventure distinguished. A contract which provides that one party shall, for a limited time and at his own expense, have the exclusive right to sell the property of another and account for sales in a named manner creates a contract of agency only, and not a joint adventure.

Coburn v Davis, 201-1253; 207 NW 586

Agency in county in which action brought. Action on a contract of agency wherein plaintiff is given the exclusive right to make sales on commission in a named county is properly brought in said county, even tho the contract was elsewhere executed, and even tho defendant does not reside in said county.

Hawbaker v Laco Co., 210-544; 231 NW 347

Buyer and seller of note and mortgage. The act of the owner of a note and mortgage in selling them and the act of the purchaser in purchasing said note and mortgage do not, in and of themselves, create the relation of principal and agent.

Federal Land Bk. v Sherburne, 213-612; 239 NW 778

Authority of agent—declarations of agent. Agency may not be established by the declarations of the alleged agent.

Huismann v Althoff, 202-70; 209 NW 525

Authority of agent—ipso facto notice of limitation. A party signing a writing which provides that it shall not constitute a contract until it is signed and expressly approved by the other party thereto is given palpable warning that the agent of such other party has no authority to bind his principal by any final agreement.

Adams v Iowa Co., 200-782; 203 NW 229

Theatre employees—announcement of bank night winner. Testimony by the manager of a theatre that he had hired a lady to call out the name of the bank night drawing in front of the theatre, with evidence that she habitually announced the name drawn on former occasions, was sufficient to establish that she was employed to announce the winner and to establish her agency and make her announcement binding on the theatre owner.

St. Peter v Theatre, 227-1391; 291 NW 164

Evidence — sufficiency. Evidence reviewed, and held to show that a party who received money with which to pay a note and mortgage was the agent of the maker of the note and mortgage, and not of the payee thereof.

Clayton Bank v McMorrow, 209-165; 225 NW 859

Vendor and vendee—agency—facts not constituting. The vendor of land sold on installments does not constitute the vendee his agent to make improvements and repairs on the property by requiring the vendee to obli-

gate himself to the effect that all improvements placed upon the property shall remain thereon and not be destroyed until final payment is made.

Knapp v Baldwin, 213-24; 238 NW 542

Service of original notice. Evidence relative to the service of an original notice on a corporation by service on an agent reviewed, and held insufficient to establish the alleged agency.

Bennett v Lumber Co., 201-770; 208 NW 519

Authority—insufficient plea. An allegation that a named party was an officer and was charged with the financial management of a college, "and, because of being such officer and financial agent, was authorized to enter into, on behalf of the college," a specified contract, is not such clear, direct, and definite allegation of authority as is required by the law.

Benton v Morningside, 202-15; 209 NW 516

Assignment of note—payment to original payee—effect. The maker of a promissory note and mortgage who, for four years before maturity of the principal, and for eight years after maturity of the principal, pays the accruing interest to the agent of the original payee, without knowledge that the note and mortgage had been assigned, and finally pays the principal in the same manner, without asking for or receiving the note in question, effects a complete discharge of the note and mortgage against an assignee thereof who had been such during all said times of payment, but without recording his assignment, and in the meantime had permitted the original payee, a corporation, (1) to appear on the records as the owner of the paper and (2) to collect the interest and pay it to him.

Kann v Fish, 209-184; 224 NW 531

Powers of agent—declarations. The declarations of an agent as to his authority may be competent and material, not to show his authority, but to show the capacity in which he acted in the transactions in question and the good faith of the party with whom the agent acted.

State Bank v Fairholm, 201-1094; 206 NW 143

Equitable estoppel—implied authority to negotiate note. The maker of a nonnegotiable promissory note will not be held to be estopped to deny liability on the theory that he impliedly clothed the payee with authority to negotiate the note, when the entire transaction contemplated such transfer.

Hubbard v Wallace, 201-1143; 208 NW 730; 45 ALR 1065

Powers of agent—apparent authority. An owner of land who authorizes his agent (1) to contract with a broker for sale of the land and (2) to pay the broker a specified and limited compensation is bound by the agreement of his agent to pay the broker a greater commission, when the broker had no knowledge of such limited authority.

Boylan v Workman, 206-469; 220 NW 49

Negligence of borrower imputable to lender—effect. One who borrows an automobile becomes, by force of our statute (§5026, C., '24 [§5037.09, C., '39]), the agent of the lender, in the operation of the car. It necessarily follows that the negligence of the borrower is imputable to the lender and is a bar to the recovery of damages by the lender in an action against a third party if such negligence contributed to the injury and resulting damages.

Secured Fin. Co. v Railway, 207-1105; 224 NW 88; 61 ALR 855; 30 NCCA 90

Authority—waiver. A principal who directs his agent to accept cash only, on making sales, waives any violation of his instructions by accepting notes of various purchasers, with full knowledge of the facts.

Donnelly v Walch, 203-32; 212 NW 310

The relation — evidence — sufficiency. Evidence relative to a contract for the exchange of lands reviewed, and held insufficient to show that a party thereto who signed the same individually was acting solely as the agent of his wife.

Richardson v Short, 201-561; 207 NW 610

Agency of husband—custom as evidence. Testimony tending to show a custom by a husband to sign the name of his wife to promissory notes, with her express or implied knowledge and approval, extending continuously through many years prior to the transaction in question, is admissible on the issue whether the husband had such authority from the wife.

State Bank v Fairholm, 201-1094; 206 NW 143

Acts constituting conversion — property under receivership. One who is in possession of property as agent of a duly appointed receiver is not guilty of a conversion of the property by refusing to give it up without the consent of the receiver, even tho such agent is plaintiff in the action in which the receiver was appointed, and even tho a full settlement of the action has been consummated, but not yet called to the attention of the court.

McCarthy v Cutchall, 209-193; 225 NW 865

Authority of agent—collection of interest. Authority in an agent to receive interest accruing on a promissory note does not embrace authority to receive the principal.

Huismann v Althoff, 202-70; 209 NW 525

Authority of agent — implied authority. Principle reaffirmed that a bank has no authority to receive payment of a note from the naked fact that the note is payable at said bank,

I IN GENERAL—continued

especially in the absence of the note, and before maturity.

Huismann v Althoff, 202-70; 209 NW 525

Agency to receive payment. Record reviewed and held to present a jury question on the issue whether the original payee of a promissory note was the agent of the indorsee to receive payment.

Andrew v Kolsrud, 218-15; 253 NW 913

Authority—note payable at particular office—effect. Principle recognized that the fact that a promissory note is payable at the office of a particular person does not, in and of itself, authorize or empower such particular person to receive payment on the note.

Whitney v Krasne, 209-236; 225 NW 245

Authority of agent—disbursement of borrowed money. The fact that a loaner of money who was the agent of the borrower to negotiate a loan and receive the money thereon retained the money and paid it to the borrower in installments, in order to protect himself (the loaner), is very persuasive that the said loaner was not also the agent of the borrower to disburse said money.

Hubbard v Wallace, 201-1143; 208 NW 730; 45 ALR 1065

Agent's authority to receive payment on note. The maker of a promissory note who makes payment to someone other than the payee or holder must take on the burden of showing that the recipient of the payment had actual or apparent authority from the payee or holder to receive it. Evidence reviewed in detail, and held to show that the party receiving payment on a note was the agent of the holder to receive any indebtedness due such holder at the place of payment.

Whitney v Krasne, 209-236; 225 NW 245

Agent of interested party. In an action by the beneficiary in a life insurance policy to recover thereon, an agent of the insurer who negotiated the policy is a competent witness to testify that the insured did not make payment to him of the premiums due on the policy.

Range v Ins. Co., 216-410; 249 NW 268

Receipt of proceeds by mutual agent—effect. Where the mortgagor of an unmatured mortgage authorizes his agent to negotiate a new mortgage and with the proceeds pay off the unmatured mortgage, and where the holder of the unmatured mortgage authorizes the same agent to collect and release his unmatured mortgage, the mere receipt by the mutual agent of the proceeds of the new mortgage in the form of checks, etc., does not ipso facto constitute a payment of the unmatured mortgage; and especially so when the mutual agent, on receipt of said proceeds, and pending the final approval of the new mortgage, deposits the said proceeds in his overdrawn general bank account and credits the mortgagor of the unmatured mortgage with the amount thereof. Payment of the unmatured mortgage can only result when the agent has, expressly or impliedly, appropriated the proceeds to said unmatured mortgage.

In re Schanke & Co., 201-678; 207 NW 756

Spurious mortgage—insufficient ratification. Evidence held quite insufficient to show that a purported mortgagor had ratified a spurious mortgage on his property.

Hagensick v Koch, 220-1055; 264 NW 13

Authority—when principal not bound. A principal is not, in the absence of assent or ratification, bound by the acts of his agent which are against the interests of the principal.

Benton v College, 202-15; 209 NW 516

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Liability of agent—nonapplicability of rule. The rule that an agent binds himself by acting in his own name for an undisclosed principal may not be invoked by one who is an entire stranger to the contract.

Nissen v Sabin, 202-1362; 212 NW 125; 50 ALR 1216

Signing in representative capacity—effect. The principle that an agent is not personally liable on a contract when the writing shows that another person is the principal is necessarily not applicable when the signer intended to make the contract his own.

Vance v Sowden, 205-389; 217 NW 874

Liability as to third persons—declarations of agent. Principle recognized that a principal is not bound by the independent admissions of an agent after the event.

State Bank v Cooper, 201-225; 205 NW 333

Bank night—evidence of drawing of winner—statements of agents. When one agent of a theatre announced the name of the plaintiff as

winner of a bank night drawing and her husband's name was announced by another agent, both agents being in a position to bind the theatre, there was evidence that the name of one was drawn.

St. Peter v Theatre, 227-1391; 291 NW 164

Mistaken delivery absolves carrier. A carrier is not responsible for a loss which results from delivering a shipment to a person who is not the agent of the consignee for the purpose of such shipment, when the carrier justifiably believed such person to be such agent, and when such person was the very person to whom the consignor intended delivery to be made, because of a like belief on his part as to such agency.

Malvern Co. v Express Co., 206-292; 220 NW 322

Fraudulent release of prior mortgage by agent. A mortgagee who takes his mortgage as a first mortgage in good-faith reliance on the release by his agent of a prior mortgage does not lose his priority because of the fact that the release was fraudulent in that, prior to the release, the prior mortgage had been assigned without a recording of the assignment, the knowledge of the agent of his own dishonesty not being imputable to his principal, the first mortgagee.

Leach v Bank, 202-265; 209 NW 422

Bank deposits—fraudulent dissipation—nonliability of bank. A bank is not responsible to its depositor for the fraudulent conduct of the depositor's employee, aided by an employee of the bank, in fraudulently withdrawing from the bank the funds of the depositor, on checks which the depositor's employee had specific written authority to draw to himself personally, when the bank had no knowledge or reason to know of any of said wrongdoings.

Pierce v Bank, 213-1388; 239 NW 580

Exoneration of agent exonerates principal. If the master is responsible for an act solely under the doctrine of respondeat superior, then an exoneration of the agent or servant who actually did the act ipso facto exonerates the master.

Hobbs v Railway, 171-624; 152 NW 40
Maine v Maine, 198-1278; 201 NW 20
Lahr v Railway, 212-544; 234 NW 223
Hall v Miller, 212-835; 235 NW 298

Authority of agent—termination by death. Principle reaffirmed that the authority of an agent terminates with the death of the principal.

Huismann v Althoff, 202-70; 209 NW 525

Subagency—essentials. A subagency cannot arise without the knowledge or consent of either the principal or his agent. So held in an action involving the operation of an automobile by a mere volunteer.

McLain v Armour, 205-343; 218 NW 69

Right of action against subagent. Principle reaffirmed that a principal who has expressly or impliedly authorized his agent to employ a subagent may and should bring his action directly against the subagent for the latter's negligence.

Thompson v Bank, 207-786; 223 NW 517

II THE RELATION

Evidence insufficient to establish relation. Agency arises out of contract, express or implied. Stockholder of bank held not bound by purchase of stock for him by cashier, and charging his account therefor, in view of showing as to cashier's authority.

Andrew v Bank, (NOR); 239 NW 551

Creation of relation—effect. The implied promise of a principal to reimburse his surety if the surety is compelled to pay the debt brings into existence the relation of debtor and creditor between the principal and surety immediately upon the execution of the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Admissions of attorney—effect. The admission of an attorney, made during a trial, as to the agency of a party for his client, is not necessarily binding on the client in other and subsequent litigation of a similar nature.

Iowa Co. v Seaman, 203-310; 210 NW 937

Creation and existence—circumstantial evidence. Agency may be established by circumstantial evidence, as well as by the most affirmative testimony.

Flack v Linden Bk., 211-6; 228 NW 667
Flack v Linden Bk., 211-15; 228 NW 670

Proof under general allegation. A general allegation of agency may be supported by evidence of either an express or implied agency.

Andrew v Kolsrud, 218-15; 253 NW 913

Voluntary nonpaper issues—sufficiency. In an action to recover quantum meruit for the use of machinery, the court, in submitting defendant's nonpaper issue (acquiesced in by plaintiff) whether the use was under a contract for an agreed rental entered into with plaintiff's employee, must submit the question of the authority of the employee to enter into such a contract, there being evidence of the lack of such authority.

Des Moines Co. v Lincoln Co., 201-502; 207 NW 563

Authority of agent—evidence—jury question. The jury has the right, on the issue whether an agent had authority to enter into a contract on behalf of his principal, to pass on whatever competent evidence has a tendency to prove such authority even tho such evidence is not fully and wholly satisfactory. So held as to the correspondence passing be-

II THE RELATION—continued

tween the principal and the agent as to the leasing of the land of the principal.

First JSL Bk. v Noland, 221-1305; 268 NW 69

Proof of agency. It is quite commonplace to say that, under a plea of false representation by an agent, the agency must be proven.

Ettinger v Malcolm, 208-311; 223 NW 247

Evidence—sufficiency. Evidence held insufficient to establish agency.

Teget v Polk County, 202-747; 210 NW 954

Actions—pleading and evidence—admission of agency. Record held to show no admission of a subagencyship.

Thompson v Bank, 207-786; 223 NW 517

Substituted service on agent of nonresident. Whether a nonresident may be legally sued in this state by service in this state on an alleged, resident agent (on a cause of action growing out of such alleged agency) must necessarily be determined by resorting (1) to the express contract, if any, between the resident and nonresident parties, and (2) to the course of dealings existing between the said parties. Held, agency not shown, even tho an officer of the alleged resident agent was a director of the nonresident defendant, and even tho the nonresident defendant paid commission on sales to the alleged resident agent.

Toole Co. v Dist. Group, 217-414; 251 NW 689

Rights and liabilities as to third persons—ratification of assumption of agency. Tho there is no agency, in fact, yet if there is an assumption of agency the assumed principal may ratify the unauthorized assumption.

Linn v Kendall, 213-33; 238 NW 547

Rights and liabilities as to third persons—impossible ratification. A vendor of land who, upon discovering that his vendee has placed repairs and improvements upon the property, does nothing in the way of repudiating the actions of the vendee, cannot be held thereby to have ratified the actions of the vendee and constituted the vendee his agent to make the improvements, when the vendee in making said repairs and improvements never assumed to act for the vendor.

Knapp v Baldwin, 213-24; 238 NW 542

Unauthorized acts—ratification—knowledge. The knowledge of a fiscal agent of a corporation in charge of sales of corporate stock of his corporation that an authorized subagent had received payment for stock sold is presumptively the knowledge of the corporation.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

Authority of agent—receipt of money. Principle reaffirmed that the receipt by a duly authorized agent of money belonging to the principal is, of necessity, a receipt by the principal.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

Remedies of purchaser—delay—unallowable rescission. A purchaser may not rescind his contract of purchase because of a delay which was occasioned by his own agent.

Gutz v Holahan, 209-839; 227 NW 504

Knowledge of agent—when not imputed to principal. The knowledge acquired by the director of a corporation as to the proceedings of its directors will not be imputed to a bank of which the director is cashier, especially when the director-cashier is interested adversely to the bank.

Hancock Bk. v McMahon, 201-657; 208 NW 74

Apparent authority to execute mortgage. Evidence reviewed and held quite insufficient to support the contention that an agent, in executing a mortgage in the name of his principal, was acting within the scope of his apparent authority.

Hagensick v Koch, 220-1055; 264 NW 13

Implied agency—insufficient "holding out." The holder of notes and mortgage who accepts payment of one of the notes from a maker thereof, in form of part cash and part check payable to the holder, from one who had bought the property subject to the mortgage, cannot be held thereby to have held out the said maker as his agent to receive payment of the remaining note; nor will the added fact that, on two occasions subsequent to the payment in question and on one occasion prior thereto, the said holder had authorized the said maker to receive payments on wholly different transactions, constitute such "holding out".

Ritter v Plumb, 203-1001; 213 NW 571

Insufficient showing—imputation of knowledge. The fact that the payee of two promissory notes signed by the same maker but by different sureties caused the maker to be consulted relative to which of the notes should be indorsed with a certain payment, and then made the indorsement in accordance with the maker's wishes, cannot have the effect of creating any agency and thereby charging said payee with knowledge of an agreement between the maker and one of the sureties for a different application of the payment.

Mitchell v Burgher, 216-869; 249 NW 357

Insolvency — preference — drawee-bank as agent to collect from self. The holder of a bank check in sending it to the drawee-bank for "collection and remittance" does not create the relation of principal and agent or any trust relation sufficient to support a claim of preference in case the draft of the said drawee-bank in payment of the check is not paid because of the insolvency of the bank.

Leach v Bank, 205-973; 219 NW 43

Bank collections. Principle reaffirmed that the act of the owner of a draft in forwarding the same to a bank for collection, and the act of the bank in making the collection, create the relation of principal and agent, and not that of debtor and creditor.

Andrew v Bank, 207-403; 223 NW 176

Insolvency — preference — drawee-bank as agent to collect from self. The act of the indorsee of a check in sending it to the drawee-bank for collection and remittance, and the act of the drawee-bank in charging the account of the drawer of the check with the amount thereof, create no relation of principal and agent, and consequently no trust relationship.

Leach v Bank, 207-471; 220 NW 10

Dual agency for borrower and loaner. A loaner of money, in closing a loan, may extend to the borrower the option (1) to sign a written direction to the loaner to pay the proceeds of the loan to a named third party as the borrower's agent, or (2) to refuse to sign such direction, and permit the loaner himself to pay out of the loan all prior incumbrances and remit to the borrower the balance, if any, of the loan; and, in the absence of fraud, if the borrower signs such direction, he will be bound by the resulting consequences, even tho said third party, in all the prior loan negotiations, had acted as the agent of the loaner, and while so acting, had furnished the loaner with a forged abstract of title, and had thereby initiated the fraud from which the borrower ultimately suffered.

Burlington Bk. v Ins. Co., 207-808; 221 NW 796; 223 NW 520

Lender and borrower. Principle reaffirmed that the issue whether a third party was the agent of the borrower or of the lender will not be determined solely from the terms of the contract between the lender and the said third party, but that the court will look to the resulting course of dealing between said contracting parties, in order to determine the very truth of the matter of agency.

Burlington Bk. v Ins. Co., 207-808; 221 NW 796; 223 NW 520

Agent as witness—individual (?) or agency (?) transaction. The president of a bank may testify that in a certain transaction he was not acting for or on behalf of the bank of which he was president, but was acting in and with reference to an individual transaction of his own.

Security Bk. v Bigelow, 205-695; 216 NW 96

Disclaiming agency—effect. If a loan company and a party through whom loans are made occupy, in truth and fact, the relation of principal and agent, it matters not that, in their contract, they positively disclaim such relation, or provide that the party through whom loans are made shall be deemed the agent of the borrower, or otherwise studiously seek to disguise such relation.

Burlington Bk. v Ins. Co., 206-475; 218 NW 949

Liability of agent—negligence in preparing estimates for contract. An agent is negligent when, in preparing estimates as a basis for bids by his contractor-principal, he fails to indicate correctly the sum total of his detailed estimates; but before the principal (who obtains the contract) may recover of the agent the amount of the error as a profit lost, he (the principal) must show that he would have secured the contract had no such error been made.

Mayberry v Newell, 200-458; 204 NW 413

Avoidance of policy—false statement as to responsibility. An insured may not recover on an indemnity bond which is given for the performance of a building contract when, in or in connection with the application for the bond, he willfully gives the insurer a false statement relative to the contractor's financial responsibility, and the insurer innocently relies thereon. This is especially true when the insured is, at the time, acting as the agent of the insurer.

Cook v Heinbaugh, 202-1002; 210 NW 129

Contractor authorized by owner to hire architect. It is common knowledge that ordinarily the architect is employed by the owner and not by contractor, but evidence held to show that owner authorized contractor to employ an architect in owner's behalf.

Sugarman Co. v Phoenix System, (NOR); 243 NW 369

Independent contractor—test. If, as to the result, and in the employment of the means, one acts entirely independent of the master, he must be regarded as an independent contractor, and not an employee.

Reynolds v Oil Co., 227-163; 287 NW 823

Liability—parties not in privity. An agent who procures contracts for his principal may not hold a subsequently formed corporation liable for his commission, even tho the agent's contract was with a person who subsequently became an officer of the corporation, and even tho the subsequently formed corporation carried out the contracts so obtained.

Heinen v Waterloo Co., 206-198; 220 NW 62

Compensation—lien of agent—proceeds of unindorsed check. A broker who, in effecting a sale for his principal, secures possession of a certified but unindorsed check, payable to the order of his principal, as part of the purchase price, has no lien for his commission on the funds on deposit representing said check, even tho the broker himself procured the certification of the check and notified the drawee-bank of his claim to a lien on the funds.

Parker v Walsh, 200-1086; 205 NW 853; 42 ALR 622

II THE RELATION—concluded

Termination of relation — agency coupled with interest. To constitute an agency coupled with an interest, the agent must have some other interest than merely to accomplish the purpose of his principal and to earn his commission.

Coburn v Davis, 201-1253; 207 NW 586

Termination when not coupled with an interest. Contract of agency reviewed in detail, and held not coupled with an interest in favor of the agent, and therefore terminable at will.

Andrew v Ins. Co., 211-282; 233 NW 473

Termination by operation of law. A contract of agency is terminated by the insolvency of the agent and the placing of his business affairs in the hands of a receiver.

Andrew v Ins. Co., 211-282; 233 NW 473

III MUTUAL RIGHTS, LIABILITIES, AND DUTIES

Banking corporations — insolvency — trust funds—facts showing. A bank which, through its officers, manages a public sale as agent for a party, and holds the cash proceeds thereof in the bank without settlement with the said party, will be deemed to hold the money as trustee, and in case of insolvency, the trust funds will be presumed to be embraced in a final cash balance which is in excess of the trust; and it is immaterial how or in what manner the bank, on its own motion, treated said cash on its books.

Andrew v Bank, 209-1147; 229 NW 907

Nonliability of bank for personal deal of officers. A bank is not responsible for the acts of an officer of the bank in misappropriating the proceeds of a draft when said draft, tho payable to the officer in his official capacity, was received by him, not as an officer of the bank, but in his individual capacity, and in the furtherance of a private transaction between himself and others with whom he was associated.

Security Bk. v Bigelow, 205-695; 216 NW 96

Liability on official bonds—unnecessary demand. In an action on the bond of a public officer to recover funds unaccounted for, no demand on the surety is necessary before commencing the action when proper demand has been made on the principal.

State v Carney, 208-133; 217 NW 472

Presence or absence of directions as to sale. Factors must comply with specific directions as to time of sale. In the absence of such directions, they must sell within a reasonable time.

Alley Co. v Cream Co., 201-621; 207 NW 767

Execution of agency—fraud of agent. In an action for an accounting in the sale of real estate lots, record reviewed, and held to establish fraud on the part of the agent.

Coburn v Davis, 201-1253; 207 NW 586

Worthless investment—ratification. The act of an agent in making for his principal a loan in the form of a mortgage of questionable value must be deemed ratified when the principal received the mortgage, retained it in his possession, and thereafter collected two annual payments of interest thereon.

Van Every v Crawford, 207-1049; 221 NW 914

Failure to obey instructions. A commission merchant is excused from all liability for failure to sell goods on the terms prescribed by the principal when such failure was because of conditions over which he had no control.

Blanchard v Wood Co., 204-255; 214 NW 583

Shortage in shipment. A commission merchant, in an action against his principal for a balance due for advances, must adequately account for all goods consigned to him.

Blanchard v Wood Co., 204-255; 214 NW 583

Assumed authority—no ratification. The act of the payee of a promissory note in receiving and accepting a payment on a note, from one who had no authority to collect it on payee's behalf, does not constitute a ratification of the act of such assumed agent in receiving an additional payment, when payee had no knowledge of such additional payment and no knowledge of such assumed agency.

Huismann v Althoff, 202-70; 209 NW 525

Apparent authority of manager sufficient to bind corporation to tenancy. Corporation held liable for rent as tenant at will, based on correspondence and telephone conversations with corporation's manager, as against contention that manager was not authorized to enter into arrangement made—principal being bound by apparent authority of its agent.

Daly Co. v Brunswick Co., (NOR); 263 NW 234

Authority to collect interest not authority to collect principal. Principle reaffirmed that authority in an agent to receive interest on a promissory note does not, in and of itself, carry authority to receive the amount of the principal.

Holden v Batten, 215-448; 245 NW 750

Broker—acting for parties adversely interested. A broker may act for adversely interested parties provided that they consent to such dual agency.

Loots v Knoke, 209-447; 228 NW 45

Compensation — nondual employment. The fact that different property owners employ the same rental agent to obtain the same tenant does not constitute such a dual employment

as to deprive the agent of his compensation from the owner for whom a lease is obtained.

Foley v Mathias, 211-160; 233 NW 106; 71 ALR 696

Assumed purchase of note and mortgage by agent—effect. Where a note and mortgage on land were executed by a principal to his agent and sold by the agent in order to acquire funds with which to discharge a pre-existing note and mortgage on the same land, and where the agent embezzled the funds so acquired, the subsequent act of the agent in assuming to purchase said pre-existing note and mortgage by taking from the holder (who acted in good faith) both an assignment in blank and also a satisfaction piece, cannot be deemed a satisfaction and discharge of said pre-existing note and mortgage (1) when no satisfaction was, in fact, intended, (2) when the agent wholly discarded the satisfaction piece, and consummated the assumed purchase by means of funds belonging solely to an innocent and good-faith re-transferee, and by forthwith delivering said pre-existing note and mortgage to said re-transferee together with said blank assignment properly made out in the latter's favor; and it is immaterial that the re-transferee took said note and mortgage when they were overdue.

Mandel v Siverly, 213-109; 238 NW 596

Mutual liabilities—incorrect expenditures by agent. An agent who disburses the money of his principal without verifying the correctness of the basis on which payment is made, e. g., the weight of stock purchased, becomes liable to the principal for the resulting damage.

McNeil v Farmers Co., 219-1010; 259 NW 594

Knowledge of agent—when not imputed to principal. The knowledge of an agent will not be imputed to his principal when such knowledge involves a breach of duty on the part of the agent to his principal, and is of such nature as to justify the presumption that the offending agent will not convey it to his principal.

Clapp v Wallace, 221-672; 266 NW 493

County board of supervisors—limited power of individual member. A single member of a board of supervisors has no power to bind the board, or to bind the county, unless specifically authorized by the board to act for the whole board, or unless an agreement made by him for the county is approved or ratified by the board.

Greusel v O'Brien County, 223-747; 273 NW 853

Itinerant vendors—agents and employees. The statute which defines an itinerant vendor of drugs as "any person who, by himself, agent or employee goes from place to place or from house to house, and sells, offers or exposes for sale any drug" etc. (§3148, C., '31) renders a person an "itinerant vendor" who goes from place to place or from house to house and does the specified acts, even tho he does such acts solely as the employee of an employer who is concededly an itinerant vendor.

State v Logsdon, 215-1297; 248 NW 4

Treating sight draft as paid and later denying payment. The drawer of a sight draft who sends it to a bank for collection, and knows that said bank has assumed to collect it, and has forwarded its own bank draft in payment of the collection, and who, after payment of the bank draft is refused because of the insolvency of the collecting bank, lays claim to said bank draft and establishes his claim thereon against the receiver, may not thereafter proceed against the receiver and the original drawee in the sight draft and obtain judgment against them on the pleaded theory that said drawee in the sight draft never in fact paid it,—paid it by an overdraft on the collecting bank,—and that the defendants must account to plaintiff for said overdraft.

Enterline v Andrew, 211-176; 231 NW 416

Insurance agents—imputable and nonimputable knowledge. Knowledge on the part of a mere soliciting agent of an insurance company is imputable to his principal when such knowledge is acquired in connection with an application for insurance. Knowledge acquired by such agent subsequent to the issuance of the policy, and relative to an act which invalidates the policy, is not so imputable.

Green v Ins. Co., 215-1220; 247 NW 660

Property damaged while in storage—liability. When motor vehicle carriers utilized the terminal facilities of a third party, who provided pickup and delivery service from the terminal, and had individual spaces rented to each trucker for the storage of that trucker's shipments, it was held that control and possession of the shipments of goods was in the truck carriers during the storage period, and when a fire destroyed the terminal, the terminal-owner was acting as agent for the truckers, who were liable to the owners of the property in transit for the losses occasioned by the fire.

Crouse v Cadwell, 226-1083; 285 NW 623.

Misappropriation by agent. A bank is not charged with notice of, nor liability for, a misappropriation of an agent from the mere fact that the agent deposits funds to his own or his principal's account and thereafter misappropriates the funds by checks drawn upon the account. The mere fact that a bank has notice that the funds deposited belong to a principal imposes no duty upon the bank to inquire as to the agent's authority to make the deposit or withdraw the funds.

Fidelity Co. v Bank, 223-446; 273 NW 141

III MUTUAL RIGHTS, LIABILITIES, AND DUTIES—concluded

New trial—nonabuse of discretion. In action for forcible entry and detainer, where there was evidence of error in instructions in that court assumed that an alleged lease was made with agent of plaintiff with authority to make an oral lease, and that court did not specifically define to jury necessary elements of an oral lease, and there was also question that verdict was not supported by evidence, granting new trial held not an abuse of discretion.

Holman v Rook, (NOR); 271 NW 612

IV RIGHTS OF THIRD PARTIES

Liability to third persons. As between a principal and third parties, the principal is bound by the acts of his agent within the limits of the apparent scope of his authority.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Undisclosed limitation of agent's authority—effect. Altho a principal may by special limitations restrict the authority of his agent, and altho such restrictions are obligatory between the principal and his agent, such limitations are not binding upon third parties, and, in the absence of knowledge of such restrictions by them, the principal will be bound to the same extent as tho the restrictions were not made.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Insurance agent—authority. Evidence held to show that the authority of an agent ceased upon the delivery of a policy, and that his subsequent knowledge of the execution of a mortgage on the insured premises would not be imputed to the insurer.

Hart v Ins. Assn., 208-1030; 226 NW 781

Unlicensed insurance agent—noneffect on insurer. Where an accident policy is to become effective at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured, while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22, while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statement to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Knowledge of agent. Testimony as to what a party knew that an agent knew is not competent.

Hart v Ins. Assn., 208-1030; 226 NW 781

Authority of agent—variation from direction—effect. A principal who employs an agent to perform a certain act may be responsible for the doing of the act by the agent in a manner different than the principal had directed.

Herring Co. v Myerly, 207-990; 222 NW 1

Estoppel to deny agent's authority. In payee's action against bank which had cashed checks indorsed by payee's attorney without actual authority, where bank defended on ground that payee was estopped from asserting lack of authority, held, strict rules relating to equitable estoppel based upon false misrepresentation or concealment were not applicable in determining such defense.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Distribution of award. The individual members of a committee appointed by an unincorporated association of banks for the purpose of making distribution of a reward offered by the association for the apprehension of criminals are not responsible to third parties for an erroneous decision as to the manner in which such reward should be distributed.

Bird v Barrett, 207-1158; 224 NW 556

Payment of note—agency—effect. Payment of a promissory note to one who is the actual agent of the owner of the note, even tho the note is not produced and surrendered, effects a full discharge of the note, even tho the payer supposed he was making payment to the actual owner of the note.

Carr v Benjamin, 207-1139; 222 NW 373

Payment of note to holder's agent. The holder of a promissory note who permits another person for a series of years to collect both interest and installments of principal on the note will not be permitted to deny the authority of such other person to make all collections on the note. And it is immaterial that the note was not surrendered to the maker when he made his final payment.

Ragatz v Diener, 218-703; 253 NW 824

Sleeping on rights. One who, without requiring the production of a note, innocently pays the note to one who is not the agent of the holder, may not insist that the said holder, and not himself, should suffer the loss, especially when the latter, upon discovering the truth, does nothing to protect himself against the solvent wrongdoer.

Ritter v Plumb, 203-1001; 213 NW 571

Payment and discharge—apparent agency. A payment made in a bank that is open and transacting business; to one behind the counter, with the permission of the managing officers of the bank, and with apparent authority to receive the money, constitutes a payment to the bank. It follows that the conversation at

the time, relative to the subject matter of the payment, is competent.

First St. Bank v Tobin, 204-456; 215 NW 767

Officers and agents—liability for corporate tort. The managing officer of a corporation who causes the corporation of which he is such officer wrongfully to withhold personal property from a person who is entitled to the immediate possession of said property, is guilty of a tort, and is personally liable for said tort along with his said corporation.

Luther v National Co., 222-305; 268 NW 589

Knowledge of agent—when not imputed to principal. The knowledge of an agent—especially an agent with limited authority—will not be imputed to his principal when such knowledge involves a breach of duty to the principal and is in regard to a transaction which is so unusual and exceptional—so out of the ordinary—as necessarily to put on guard the party dealing with the agent.

First JSL Bank v Diercks, 222-534; 267 NW 708

Undisclosed principal liable. An undisclosed principal is liable on a contract which he has permitted to be entered into in his behalf and under which he has received resulting benefits.

Util. Corp. v Chapman, 210-994; 232 NW 116

Undisclosed agency—right of principal to maintain action. An undisclosed principal has a right to maintain an action on a contract signed by the agent in his individual name.

Util. Corp. v Chapman, 210-994; 232 NW 116

Wrongful receipt of payment of note—ratification. The payee of a promissory note does not ratify and confirm the act of a third person in wrongfully receiving payment of the note by subsequently receiving and accepting partial payments from said wrongdoer.

Moron v Tuttle, 211-584; 233 NW 691

Apparent authority of agent to collect collateral. Makers of promissory notes who make payment to the original payee without then demanding the surrender of the paid notes and without then knowing that the original payee had hypothecated said notes and others as collateral security, may not assert apparent agency in said original payee to receive payment on behalf of the collateral holder, on the mere showing that the collateral holder, upon actual receipt from said original payee of the amount of a matured collateral note, credited said payee on his debt and returned the note to him.

Iowa Co. v Seaman, 203-310; 210 NW 937

Unauthorized agency—ratification by accepting benefit. The holder of a note is not estopped to challenge the unauthorized act of a party in receiving payment of the note, by accepting from such unauthorized agent part of the payment, (1) when he accepted such payment without knowledge that the party was assuming such agency, and (2) when such party was a maker of the note.

Ritter v Plumb, 203-1001; 213 NW 571

Undisclosed principal—liability. One who, through a broker with whom land is listed for sale, and without the knowledge of the owner of the land, secretly arranges to buy the land, and obligates himself to pay the purchase price thereof, and who, through said broker, causes an impecunious and fictitious buyer to enter into the contract of purchase and to execute the notes and mortgage and to become the grantee in the deed of conveyance, and who receives from the said fictitious buyer an assignment of the said contract and a deed under which he assumes no personal liability on the mortgage debt, will, nevertheless, be held personally liable to the actual vendor for the full purchase price as an undisclosed principal; and if the agent goes beyond the scope of his authority in negotiating the said contract, the undisclosed principal may not complain, if, with full knowledge of the terms of said contract, and before parting with anything of value, he appropriates to himself the full benefits of the contract.

Collentine v Johnson, 203-109; 202 NW 535; 208 NW 318

"Apparent authority" defined. "Apparent authority" is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Pleading agent's apparent authority—sufficiency. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney, bank's answer alleging (1) payee's knowledge and acquiescence in the attorney's custom of indorsing payee's checks and remitting proceeds to it by his personal checks, (2) the bank's reliance thereon, and (3) that payee was estopped from asserting lack of authority, held sufficient to raise question of attorney's implied, apparent, or ostensible authority.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Liabilities as to third persons — apparent scope of authority—evidence. Evidence that an agent, for many years, had charge of a certain department of his principal's business and had, during said times, negotiated many written contracts relative to the subject matter in his charge, may create a jury question on the issue whether the agent had authority, within the scope of his apparent powers, to enter into an oral contract covering the subject matter in his charge.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

IV RIGHTS OF THIRD PARTIES—cont.

Unauthorized acts — ratification — essential elements. To constitute a ratification by a bank of the unauthorized contract of its cashier, the bank must have had full knowledge of the facts and what had been done in its name and on its behalf by said cashier. Record reviewed and held affirmatively to show no ratification.

Chismore v Bank, 221-1256; 268 NW 137

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Authority of agent—evidence—jury question. The jury has the right, on the issue whether an agent had authority to enter into a contract on behalf of his principal, to pass on whatever competent evidence has a tendency to prove such authority even tho such evidence is not fully and wholly satisfactory. So held as to the correspondence passing between the principal and the agent as to the leasing of the land of the principal.

First JSL Bank v Noland, 221-1305; 268 NW 69

Implied or apparent authority of agent—unallowable plea. A commission firm was prohibited by the mandatory rules of the board of trade of which it was a member from dealing in so-called "futures" for and on behalf of a nonmember corporation unless the firm first obtained from said nonnmember corporation a writing authorizing the latter's manager to contract for such "futures". The firm disregarded said rule and accepted orders for such "futures" from a manager who had been expressly forbidden to exercise such power. Held, that said firm, when sued by the injured corporation for the resulting loss, would not be permitted to defend on the ground that said manager had implied or apparent power to issue said orders.

Watkins Co. v Smith Co., 221-1164; 267 NW 115

Fraud on agent, fraud on principal. Fraud on an agent, in a matter in which the agent is acting in his representative capacity, is a fraud on the principal. It follows that the principal may seek redress to the same extent as tho the fraud was perpetrated directly and personally upon him.

Andrew v Baird, 221-83; 265 NW 170

Nonimputation of hostile knowledge—exception. While a principal is not chargeable with the guilty knowledge which his agent acquires in the agent's own interest and in hostility to the interest of his principal, yet a principal is chargeable with knowledge of facts which his dishonest agent would necessarily have acquired in performing the duties of his employment if he had been honest.

Erickson Co. v Bank, 211-495; 230 NW 342

Authority to receive payment on promissory note. Authority or agency in a third party to receive payment of a promissory note is not shown by evidence:

1. That the note provided for payment at the office of said third party;
2. That the payee received payments of interest from said third party;
3. That the payee authorized said third party to grant an extension of the mortgage security;
4. That the payee wrote to said third party relative to the payment of the note, but long after said third party had collected the amount due thereon.

Moron v Tuttle, 211-584; 233 NW 691

Knowledge of agent—when not imputed to principal. Principle reaffirmed that a principal is not charged with the knowledge of his agent when the agent is interested adversely to the principal.

Templeton v Stephens, 212-1064; 233 NW 704

Trusts—management and disposal of trust property. Individuals who voluntarily associate themselves in a business venture in the form of a trust are each personally liable for the authorized acts of their agent.

Daries v Hart, 214-1312; 243 NW 527

Assumed agency—ratification. The holder of a note and mortgage was informed by one who had subsequently bought the mortgaged property that he had, without requiring the production of the note, paid the note to one of the original makers of the note. Thereupon, the holder admitted that he had received part payment from the said maker, and exhibited the mortgage papers to the informant. Held insufficient to show ratification of the payment to the said maker.

Ritter v Plumb, 203-1001; 213 NW 571

Insurance premium—conversion by agent—liability of insurer. Where insurance agent taking an application for life insurance had authority to collect premiums on behalf of the insurer and where proceeds of check given with application for payment of premium were partly converted while in authorized possession of insurer's agent, and the application was thereafter rejected by insurer, the conversion was an act for which the insurer was liable.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Embezzlement—agency. In a prosecution for embezzlement by an agent, an allegation of the defendant's agency may be supported by proof that the money in question was delivered by the owner thereof to the defendant for the special purpose of delivering it to the borrower, notwithstanding the fact that the defendant was the agent of the borrower to procure the loan.

State v Reynolds, 209-543; 228 NW 283

Payment of note to payee's agent without surrender of note. Payment of a promissory note, by the maker thereof, to the noteholder's authorized agent to receive payment, works a complete discharge of the note, even tho the maker did not receive a surrender of the note.

Northwestern Ins. v Blohm, 212-89; 234 NW 268

Agent's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant-bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Indorsement by payee's attorney—authority. In action to recover against bank which had cashed checks indorsed by payee's attorney, the authority to make such indorsements is, under §9479, C., '39, determinable from the rules applicable in cases of agency generally.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Implied ratification of agent's acts. Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future, and an affirmance of an unauthorized transaction may be inferred from a failure to repudiate it.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Authority of agent—violation—ratification. A principal must be deemed to ratify irrevocably the act of his agent in making an investment contrary to instructions when, with full knowledge of the said violation, the principal for some three years accepts and retains all benefits resulting from such investment, and otherwise manifests his acquiescence.

Miller v Bank, 203-411; 212 NW 722

Disclosed principal—nonliability of agent. A minor, upon disaffirmance of his contract, may not recover of an agent who disclosed his principal and acted strictly within his authority.

Hubler v Gates, 209-1198; 229 NW 767

True implied agency—knowledge of principal's acts. He who seeks to prove an implied agency (as distinguished from an agency by estoppel) need not show that he had knowledge of, and relied on, the acts of the claimed principal.

Andrew v Kolsrud, 218-15; 253 NW 913

Powers of agent—burden of proof. A defendant who meets an action of quantum meruit for the use of machinery with the defense that he used the machinery under a contract for an agreed rental, entered into with one of the employees of plaintiff, must establish the authority of the employee to enter into such contract.

Des Moines Co. v Lincoln Co., 201-502; 207 NW 563

Constructive trusts—collections by agent. An agent necessarily holds collections in trust for his principal, and an assignee of the agent for the benefit of creditors has no title or interest thereto.

Second N. Bank v Millbrandt, 211-1299; 235 NW 577

Apparent authority—showing preliminary to receiving testimony. Testimony relative to a contract of compromise with a corporate agent on behalf of the corporation is admissible upon proof that the party offering the testimony, preliminary to entering into such contract, in good faith availed himself of the bureau of information maintained by the corporation, and by means thereof made contact with corporate agents who had physical possession of the papers and files relative to the subject matter of said compromise, and who were, apparently and to all appearance, in authoritative charge of said matter for settlement. (Of course, the issue of apparent authority may be a jury question.)

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

Failure to act promptly caused by act of agent. Where the plaintiff's name was called outside a theatre as winner of a bank night drawing, and when she entered she was told that it was her husband's name that was called, and he was told he was one second too late when he followed her in, the theatre could not claim that neither she nor her husband had claimed the prize within the time set. If the

IV RIGHTS OF THIRD PARTIES—cont.

husband was the one entitled to the prize, the theatre was estopped to claim the advantage of the one-second delay caused by the act of their agent in calling the wrong name outside the theatre.

St. Peter v Theatre, 227-1391; 291 NW 164

Liability of surety—authority of agent—estoppel. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

Liability of principal and independent contractors. A contract granting the right of way over land for an underground pipe line, on payment of a certain sum per rod, and on payment of "damages to growing crops, fences, or improvements occasioned in laying, repairing, or removing lines", does not constitute an agreement by grantee that he will pay damages consequent on the negligent act (tort) of an independent contractor in injuring grantor's private bridge which was located wholly outside said right of way.

Asher v Cont. Corp., 216-977; 250 NW 179

Payment to agent without production of note. Payment of a promissory note to one who is in fact the agent of the holder to receive such payment discharges the note, even tho the note is not in the possession of the agent at the time of payment.

Whitney v Krasne, 209-236; 225 NW 245

Unauthorized assignment of mortgage—ratification. An unauthorized assignment by bank officials of a note and mortgage belonging to the bank is ratified and confirmed by the act of the bank in receiving and retaining the consideration paid by the purchaser for said note and mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

Reformation of policy—knowledge of agent. The knowledge of a soliciting agent that the insured understood that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Contracts in name of unincorporated association—personal liability. One who contracts for, or in the name or on behalf of, a legal nonentity, e. g., an unincorporated society or association, is personally liable on the contract unless he establishes the fact that at the time of so contracting his nonpersonal liability was agreed on.

Haldeman v Addison, 221-218; 265 NW 358

Unincorporated association — liability of members. An individual who contracts in the name of a voluntary unincorporated association is personally liable thereon in the absence of an agreement with the other party releasing him from personal liability, and such other members of said association who authorize, consent to, or ratify such undertaking are also personally liable in the absence of an agreement exempting them, the personal liability being based upon principles of agency.

Lamm v Stoen, 226-622; 284 NW 465

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease v Sadler, 216-302; 249 NW 383

Right to lien—contract with landowner—evidence—sufficiency. Evidence reviewed, and held to justify the finding of the trial court that the owner of realty had authorized his tenant as his agent to contract for material for making repairs to improvements on the farm and that a mechanic's lien was properly foreclosed against said owner and his subsequent grantee.

Iowa Supply Co. v Petersen, 221-978; 267 NW 716

Automobile—operation by garageman without knowledge of owner—nonowner—liability. The owner of an automobile is not liable for damages done by his car consequent on the negligent operation of the car by the proprietor of a garage who, without the knowledge of said owner, and as an independent contractor, was towing said car to his place of business in order to repair it; nor is a nonowner of the car, who directed the garageman to take the car and repair it, liable for said damages.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Release—covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the

injured party agreed not to sue such other party,—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

Wife denying husband's agency but accepting benefits not permitted. A wife, owning a rooming house, sold on the fraudulent representation of her husband, made in response to purchaser's direct question, that the furnace heated the upstairs rooms, will not, in purchaser's action to rescind and recover the down payment, be permitted to deny her husband's authority to represent her and at the same time retain the down payment as fruits of the deceit.

Smith v Miller, 225-241; 280 NW 493

Freight elevator—res ipsa loquitur—nonapplicability. Record reviewed relative to the fatal injuries received by a party on, in, or about, a freight elevator, and relative to the defendant's control of the operation of said elevator at the time said injuries were received, and held to show the inapplicability of the doctrine of res ipsa loquitur.

Boles v Hotel Co., 221-211; 265 NW 183

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Proof of relation—declarations of agent—incompetency. The fact of agency may not be established by the mere declarations of the agent.

Humphrey v Baron, 223-735; 273 NW 856

Negligence — personal injury — evidence insufficient for jury. Where recovery is sought because a minute particle of metal, apparently chipped off of operator's hammer, flew into plaintiff's eye while his truck tire was being repaired by filling station operator, and where there was no showing that tools and methods used by the operator were not those ordinarily used, motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Master and servant—oil company and filling station operator. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence that operator conducted the station before approval of lease just as if it had been accepted, that he bought merchandise for cash from this company and others and kept the profits, that he received no remuneration from company, that altho company suggested things to help him, it exercised no supervision, that he took out state permits in his own name, and personally arranged for utility service, failed to establish relation of employer and employee. Hence, company's motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

CHAPTER 486

PARTIES TO ACTIONS

10967 Real party in interest.

ANALYSIS

I REAL PARTY IN INTEREST
II ASSIGNEES
III PARTNERSHIP
IV PRINCIPAL AND AGENT
V UNINCORPORATED ASSOCIATIONS
VI ADMINISTRATORS AND HEIRS
VII SUBSTITUTION OF PROPER PARTY

Taxpayer's remedy by injunction. See under §§12512, 12513

I REAL PARTY IN INTEREST

"Idem sonans" doctrine—applicability. The doctrine of idem sonans is recognized by Iowa courts and, while each case must be determined according to its own facts, the mere fact that names spelled differently from true name could be pronounced like the true name by a strained pronunciation would not make the doctrine applicable, but where the names, when general and ordinary rules of pronunciation are applied, are so identical in pronunciation and so alike that there is no possibility of mistake, the doctrine should be applied; or where two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even slight difference in their pronunciation is unimportant, if the attentive ear finds difficulty in distinguishing the two names when pronounced. Such names are "idem sonans" and, altho spelled differently, are to be regarded as the same.

Webb v Ferkins, 227-1157; 290 NW 112

Presumption of jurisdiction. Presumptively, parties to an action in this state are residents of this state, and presumptively, the cause of action sued on arose in this state.

Farmers Bk. v Anderson, 216-988; 250 NW 214

Foreign corporation—right to maintain action. A foreign corporation which has not been authorized to do business in this state may, nevertheless, maintain an action in this state on a contract entered into in a foreign state.

Standard Co. v Sur. Co., 207-619; 223 NW 365

Foreign receivers. A foreign state officer as a foreign receiver of an insolvent foreign corporation, charged by the laws of his state with the mandatory duty of enforcing a "double" liability on the corporate stock of such corporation and of distributing the pro-

I REAL PARTY IN INTEREST—continued

ceeds among the creditors, is vested with such title to the fund accruing under said liability as will enable him to maintain an action in this state against a resident holder of stock in such corporation.

Hirning v Hamlin, 200-1322; 206 NW 617

Federal conservator—authority. The federal statute that the conservator of a national bank shall act "under the direction" of the comptroller of the currency does not require the conservator to secure specific authority from the comptroller for the bringing of an attachment and the execution of a bond on behalf of the bank.

Ross v Long, 219-471; 258 NW 94

Public officers. The proper officer charged with the enforcement of the "housing law" may maintain an action to enjoin the storage of gasoline on residence property without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

Taxpayer on behalf of state. A taxpayer may, when the proper state official refuses to act, maintain, on behalf of the state, an action to recover state funds received by the defendant in violation of the constitution of the state.

Wertz v Shane, 216-768; 249 NW 661

Taxpayers. The fact that a party plaintiff is a taxpayer does not, in and of itself, give him any standing to question the action of public authorities when such action does not work any expenditure of public funds.

Sec. N. Bank v Bagley, 202-701; 210 NW 947; 49 ALR 705

Taxpayers. A taxpayer may maintain an action to enjoin the board of supervisors from issuing county bonds for a purpose not authorized by law.

Harding v Board, 213-560; 237 NW 625

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract, e. g., (1) that he owns property which will be specially assessed, or (2) that he is a taxpayer and must contribute to the improvement fund from which payment of a deficit must be made.

Donovan Co. v City, 211-506; 231 NW 499

Municipal property owner. A property owner who owns property adjacent to a building being erected in violation of a town ordinance, relating to constructions within the fire limits of the town, has such interest as will entitle him to an injunction against the erection and maintenance of such building.

Boehner v Williams, 213-578; 239 NW 545

Uninjured taxpayer. A public utility corporation, operating in a city under a duly granted franchise, may not, solely as a taxpayer, maintain injunction to test the legality of an ordinance granting a franchise to a competitor, on the grounds (1) that the ordinance rates for private consumers are unreasonable and (2) that the city has an option under the ordinance to take over the ownership of the plant after it has paid for itself out of its own earnings, when it appears that such possible "taking over" will be without the creation of any debt on the part of the city, and without resort to any taxation—in other words, when it appears that there is no present or threatened danger to the plaintiff, except the danger of competition.

Iowa Co. v City, 210-300; 227 NW 514

Assessed lands — correction of description. An owner of land which is assessed for the construction of a drainage improvement may maintain an action of mandamus against the board of supervisors for the correction of the insufficient description of other assessed lands within the district in such manner that such other lands can be sold under the assessment against them.

Plumer v Board, 203-643; 213 NW 257

Right to withdraw. Parties who, through a misunderstanding, have been joined as plaintiffs, necessarily have the right to withdraw from the action.

Schaal v Schaal, 203-667; 213 NW 207

Presumption. On appeal in an action involving the title to real estate, it will be assumed, in support of the judgment, that the plaintiffs were the proper parties in interest, tho the record is indefinite, when they were so treated without objection in the trial below.

Bullock v Smith, 201-247; 207 NW 241

When issue inconsequential. The plea that plaintiff in an action on a note as indorsee is not the real party in interest because the note carries a subsequent indorsement by plaintiff to another indorsee becomes of no consequence when said subsequent indorsee is in court and personally causes proof to be made that plaintiff is the real owner of the note.

First Bk. v Johnson, 202-799; 211 NW 373

Mandamus. One who, as an attorney in fact (tho not an attorney at law), is in good faith interested on behalf of his principal in a transfer of corporate stock, and who will become entitled to a compensation if he succeeds in collecting his client's claim, has such interest as will enable him to maintain mandamus to compel the corporation to permit an examination of the stock books and transfer records of the corporation.

Drennan v Ins. Co., 200-931; 205 NW 735

Mandamus—official newspapers—proprietor as proper party to compel selection. The rule

is now well established that the proprietor of a newspaper has such interest in the selection of official newspapers that he can maintain an action of mandamus in his own name to compel the selection by the county supervisors.

Bredt v Franklin County, 227-1230; 290 NW 669

Landlord and tenant. A lessor is the real party in interest to recover one-half of the rent due him because of a purchase by the tenant of an undivided half interest in the premises.

Schick v Realty Co., 200-997; 205 NW 782

Reformation of instrument. A deed cannot be reformed by one who is not a party thereto unless the mistake claimed therein affects his interest.

American Bank v Borcherding, 201-765; 208 NW 518

Bondholders (?) or trustees (?). When trustees for a bondholder have, under the terms of the bonds, the exclusive right to maintain an action for the protection of the bondholder, the latter may not maintain such action, and thereby convert himself into a trustee, on the naked allegation, in substance, that the trustees will, because of partiality, be less aggressive in prosecuting such action than the bondholder.

McPherson v Sec. Co., 206-562; 218 NW 306

Equitable owner. An equitable owner of land who effects a sale of the land through an agent, but permits the contract of sale to be made between the purchaser and the legal titleholder, in order to secure to the latter the amount due him, remains the real party in interest in an action against the agent, to compel him to account for a consideration received by him in the sale of the land, and concealed from the said equitable owner.

Hiller v Betts, 204-197; 215 NW 233

Promise for benefit of third party. A promise, made on adequate consideration, for the benefit of a third person, is enforceable by said third party.

Tracewell v Sanborn, 210-1324; 232 NW 724

Agreement for benefit of third party. Principle recognized that a third party, for whose benefit a contract is made, has a right to bring an action on the contract.

Venz v Ins. Assn., 217-662; 251 NW 27

Contest of will by judgment creditor. The creditor of an heir who holds a judgment against him which would be a lien upon any real estate which he would inherit from an ancestor has an interest which entitles him to contest the ancestor's will.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of heir. Judgments held against a son and heir of the decedent and recorded where real estate owned by the decedent was located became liens upon the real estate at the time the title thereto vested in the son, and were a beneficial interest entitling the creditor to contest the probate of a will which would deprive him of that interest.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of devisee-heir. When a father's will left property to a son and heir in trust so that it could not be subjected to the son's debts, a judgment creditor of the son was an interested person who had a beneficial and pecuniary interest in the estate of the deceased and in the son's share therein, of which he would be deprived to his prejudice if the will were probated.

In re Duffy, 228- ; 292 NW 165

Contract by business department of real party. An action on a contract is properly brought by the real contracting party even tho such contract was entered into by one of the business departments of said party.

Butler Co. v Elliott, 211-1068; 233 NW 669

Protection of easement—loss of right. One who bases his attempt to enjoin interference with a public or private easement in a strip of land solely on the ground of his ownership of the abutting land loses such right by an unconditional conveyance of the abutting land.

Rider v Narigon, 204-530; 215 NW 497

Right of trustee-plaintiff. When a plaintiff is a trustee with power simply to receive the amount of the recovery and deliver the same to the real party in interest, the action will be determined solely on the basis of the rights of such real party.

Ronna v Bank, 213-855; 236 NW 68

Action against third party wrongdoer—foreign statute—effect. Under the workmen's compensation act of Illinois, when an employer pays his employee compensation for an injury, said employer is thereby subrogated to the employee's right to maintain an action against a third party wrongdoer who caused the injury, provided all three said parties are operating under said act. Said Illinois act will not be given, in this state, the effect of depriving an employee who renders services in Illinois for his Iowa employer, but who was injured in this state by a wrongdoer resident of this state, of the right to maintain in his own name in this state an action for damages against said wrongdoer, even tho said employer has paid, in Illinois, said employee the compensation called for by the Illinois act, and even tho wrongdoer's general business extended into the state of Illinois.

Henriksen v Stages, Inc., 216-643; 246 NW 913; 32 NCCA 602

Execution of trust—trustees (?) or receiver (?). A court of equity may not terminate or violate a trust agreement between the issuer

I REAL PARTY IN INTEREST—continued

of bonds and trustees to the effect that the former will transfer to the latter securities for the benefit of bondholders, and that if the issuer defaults in the payment of interest on, or principal of, the bonds, the trustees, on notice from the unpaid bondholders, shall liquidate said securities and apply the proceeds to the payment of the bonds. It follows that, if the issuer of the bonds becomes insolvent, the trustees, in the absence of any counter-wish of the bondholders, have a right, superior to that of the receiver, to liquidate the securities, the securities being less than the outstanding bonds; and this is true even tho the securities in question are not actually transferred to the trustees but only delivered to them.

In re Trusteeship, 214-884; 241 NW 308

Corporate entity—unallowable disregard of. Where collaterally secured bonds, owned by a corporation, were depreciated in value by the wrongful act of the collateral-holding trustee in permitting worthless collaterals to be substituted for valuable collaterals, the resulting damages belong solely to the corporation. In other words, a stockholder may not maintain an action against the trustee for alleged special damages suffered by said stockholder consequent on the fact that said depreciation so impaired the capital of the corporation that an assessment on the corporate shares became necessary, and that the stockholder was unable to pay said assessment and thereby lost his said stock.

Grimes v Brammer, 214-405; 239 NW 550

Stock—rights of equitable owner. The legal rights of an equitable owner of corporate shares of stock (stock not duly transferred to him on the books of the corporation) are, in many respects, very limited, but, among such rights, is the right to maintain an action against the corporation to establish and protect the interest of such equitable owner in the corporate property.

Graeser v Finance Co., 218-1112; 254 NW 859

Fraudulent conveyance—action by trustee to set aside. A trustee in bankruptcy may not maintain an action to set aside a fraudulent conveyance by the bankrupt unless he pleads and proves that such setting aside is necessary in order to pay claims allowed in the bankruptcy proceedings.

Newman v Callahan, 212-1003; 237 NW 514

Duplicate actions on same subject matter—priority. When two actions involving the same subject matter are commenced by different parties (e. g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones et al. v Park, 220-903; 262 NW 801

Causes assigned for collection—right of assignee. Plaintiff, in an action at law against a defendant, may join in separate counts:

1. Any number of causes of action against defendant of which plaintiff is the unqualified holder, and which are triable at law in said county of suit, and

2. Any number of causes of action against defendant of which plaintiff is holder as assignee for collection only, and which are triable at law in said county of suit.

Carson et al. v Long, 222-506; 268 NW 518

Writ of prohibition—state as plaintiff. An original action in the supreme court, for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; especially is this true when said private actions arose out of proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Joinder of corporations and officers. Two corporations, each organized by the same promoters, for identically the same purpose, and officered by the same officers, may be joined with the common president, in an action based upon a single joint transaction wherein the said president in the sale of corporate stock of both corporations made false representations in the interest of and for the benefit of both corporations.

McCarthy v Dixon, 219-15; 257 NW 327

Incapacity to sue—waiver. An objection to the capacity in which plaintiff sues must be interposed by defendant before he pleads to the merits.

Keeling v Priebe, 219-155; 257 NW 199

Statutory bond. An action on a statutory bond is properly brought by the entity to which the bond runs.

Belmond Assn. v Luick, 217-805; 253 NW 521

Action in trade name. A person has the legal right to maintain an action in the duly registered trade name under which he transacts his business.

Keeling v Priebe, 219-155; 257 NW 199

Naked legal titleholder. A judgment plaintiff may maintain an action to set aside conveyances as fraudulent even tho he has transferred the equitable title to the judgment and holds only the legal title.

Grimes Bank v McHarg, 217-636; 251 NW 51

Husband of titleholder as improper plaintiff. A husband may not maintain an action to partition lands of which his wife holds the legal

title, and in which he has no interest except the contingent interest of a husband.

Jones et al. v Park, 220-903; 262 NW 801

Real estate contract foreclosed against bankrupt. A real estate contract may be foreclosed in the state court and vendor is real party in interest regardless of the buyer's discharge in bankruptcy when the bankruptcy court entirely ignored this property as an asset of the bankrupt, upon which land the vendor had a valid pre-existing lien.

Blotcky v Silberman, 225-519; 281 NW 496

Stockholders—superadded double liability—improper plaintiff. An insolvent bank may not maintain an action against its stockholders to enforce and collect the superadded double liability imposed by §9251, C., '27.

Home Bk. v Berggren, 211-697; 234 NW 573

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Bank, 221-1270; 268 NW 56

Promissory notes charged off assets. Fact that an agreement with a third person permits the charging off from bank assets of certain promissory notes objected to by the banking department will not divest the bank of title thereto nor render fraudulent a judgment obtained by the bank thereon.

Grimes Bank v McHarg, 224-644; 276 NW 781

School districts—tuition transfer. In an equitable action between school districts to prevent a statutory transfer by a county treasurer of funds in payment of tuition, a cross-petition of the defendant school district, not joined in by the county treasurer, may not be stricken therefrom, inasmuch as the county treasurer has no investment therein and is not a necessary party thereto.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Action on insurance policy. Defendant corporation, Automobile Underwriters, formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers, called the State Automobile Insurance Association, is the real party in interest in an action to enforce a judgment against the insurance carrier. The association is not a legal entity and, when the Automobile Underwriters is the only legal entity of the two, an admission of an important fact by the underwriters made in a counterclaim in the action in which judgment was obtained is binding on them in the later action.

Mitchell v Automobile Underwriters, 225-906; 281 NW 832

Presumptions—ownership of claim. One need not affirmatively prove that he is the owner of a cause of action which arose in his favor out of the very transaction on which he is sued.

Williams v Burnside, 207-239; 222 NW 413

"Real party in interest"—partial loss paid. The circuit court of appeals is bound by decisions of federal court in construing a state statute, in the absence of state court's construction on similar facts, so on question of construction of statute providing for the prosecution of an action in the name of the "real party in interest" held, an insurer cannot maintain an action against a defendant causing loss for amount paid insured, after a judgment has been rendered against defendant and in favor of insured for total amount of loss less insurance received, since the right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss.

Fireman's Ins. Co. v Bremner, 25 F 2d, 75

Action by automobile owner—insurer and mortgagee not necessary parties. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

II ASSIGNEES

Unallowable will contestant—assignee of expectancy. An assignee—even for value—of the interest which an heir expects to inherit in the property of his parent, may not contest the will of the parent in case the assignor-heir be disinherited by the last will and testament of the parent.

Burk v Morain, 223-399; 272 NW 441; 112 ALR 79

Assignment of claim of guest—effect. The driver of an automobile involved in an acci-

dent may take from his guest an assignment of the guest's cause of action and recover thereon even tho he—the driver—was guilty of contributory negligence, provided the guest was not guilty of such negligence. The driver's contributory negligence simply defeats his own individual claim for damages.

Albert v Trans. Co., 215-197; 243 NW 561

III PARTNERSHIP

Contract for benefit of third party. An oral contract between the joint purchasers of land that they would surrender their rights under the contract of purchase and reconvey to their vendor, upon certain terms, to be performed by the vendor, said contract being partially performed, is enforceable by the vendor, even tho he had no knowledge of such contract at the time it was entered into in his behalf.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

IV PRINCIPAL AND AGENT

Agent for undisclosed principal or beneficiary. Principle reaffirmed that a mortgagee may enforce the mortgage in his own name, even tho the mortgage is for the benefit of a third party.

Turnis v Ballou, 201-468; 205 NW 746

Right of action against subagent. Principle reaffirmed that a principal who has expressly or impliedly authorized his agent to employ a subagent may and should bring his action directly against the subagent for the latter's negligence.

Thompson v Bank, 207-786; 223 NW 517

Undisclosed principal. An undisclosed principal has a right to maintain an action on a contract signed by the agent in his individual name.

Utilities Corp. v Chapman, 210-994; 232 NW 116

V UNINCORPORATED ASSOCIATIONS

Discussion. See 11 ILR 193—Jurisdiction over partnerships, associations, and joint debtors

Note—signing in representative capacity—liability. No recovery can be had against one who, as treasurer of an unincorporated association, assumes to execute a promissory note in the name of the association, when he is allowed to plead and prove, without objection, that when the note was executed it was agreed with the payee that no personal liability should attach to the said treasurer.

Andrew v Golf Club, 217-577; 250 NW 709

Contracts in name of association—personal liability. One who contracts for, or in the name or on behalf of, a legal nonentity, e. g., an unincorporated society or association, is personally liable on the contract unless he establishes the fact that at the time of so contracting his nonpersonal liability was agreed on.

Haldeman v Addison, 221-218; 265 NW 358

Unincorporated associations. Voluntary unincorporated associations may neither sue nor be sued.

Wilson v Coal Co., 215-855; 246 NW 753

Noncapacity to contract or sue. Strictly speaking, a voluntary unincorporated association organized for literary and social purposes has no right to contract and cannot maintain a suit in the name of such voluntary unincorporated association alone.

Lamm v Stoen, 226-622; 284 NW 465

Committee of unincorporated association. A committee of an unincorporated organization is not a legal entity and is not suable in tort.

Work v Coliseum Co., (NOR); 207 NW 679

VI ADMINISTRATORS AND HEIRS

Collection of estate—breach of contract. An executor may maintain an action for the breach of a contract between the deceased and an heir of deceased by which the latter agreed to pay, as part of the estate, a named sum to another heir.

Rodgers v Reinking, 205-1311; 217 NW 441

Personal property—right of heirs to protect. Tho the title to the personal property of a deceased does not pass directly to his heirs, they may, in the absence of any administration, maintain an action to protect or recover such property.

Powell v McBlain, 222-799; 269 NW 883

Removal of administrator—surety as applicant. A surety on the bond of an administrator has such "interest in the estate" as empowers him to make application for the removal of the administrator, even tho such surety has taken steps to terminate his future suretyship.

In re Donlon, 201-1021; 206 NW 674

Administrator. In an action by an administrator for damages consequent on the wrongful death of the deceased, the defendant may not raise the issue whether the plaintiff is the real party in interest.

Reidy v Railway, 216-415; 249 NW 347

Objections to executrix's report—real estate title issue not misjoinder—jurisdiction. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to

compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

Replevin—testator's gift inter vivos to sister. In a case where decedent, an unmarried man 60 years of age, a physician and capable business man, high in public affairs, is starting on a vacation trip, his gift of all his property to his mother and sister, they being the natural objects of his bounty, cannot be said to be unreasonable or contrary to public policy when in a replevin action the validity of the gift is challenged by decedent's executor at the instance of decedent's second wife whom he married during the vacation trip and just 10 days before his death.

Wilson v Findley, 223-1281; 275 NW 47

VII SUBSTITUTION OF PROPER PARTY

Amendment. Amendments are allowable which substitute the real party in interest, even tho such amendment is filed during the actual trial.

Norton v Ferguson, 203-317; 211 NW 417

Substitution of administrator. Upon the death of a party plaintiff, his administrator is properly substituted as plaintiff.

Dimon v Wright, 206-693; 214 NW 673

Right to show ownership of claim. Upon the substitution of the actual owner of a promissory note sued on as plaintiff, in lieu of a plaintiff who has sued as indorsee for collection only, the substituted plaintiff should be permitted to show by written assignment, and irrespective of any consideration, that the note had been fully and formally retransferred to him.

Richardson v Clark, 202-1371; 212 NW 133

Belated substitution—discretion. In an action at law by a corporation to recover on a contract, the court has discretionary power during the actual trial and after the jury has been obtained and after some testimony has been introduced, to order plaintiff's assignee for the benefit of creditors to be substituted as plaintiff,—no actual prejudice to defendant being made to appear; and this is true even tho defendant was, of course, deprived of the privilege of examining the jurors relative to their relations to the said assignee.

Webster County Buick Co. v Auto. Co., 216-485; 249 NW 203

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

10968 Plaintiff as legal representative.

ANALYSIS

I TRUSTEE OF EXPRESS TRUST
II CONTRACTS FOR BENEFIT OF THIRD PARTY
III PLAINTIFF BY STATUTE

Additional annotations. See under §10967

I TRUSTEE OF EXPRESS TRUST

Derogation of common law. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statute law of this state.

In re Van Vechten, 218-229; 251 NW 729

Jurisdiction on diverse citizenship. The jurisdiction of the federal court cannot be defeated by joinder of an unnecessary party, nor will the bringing in of an unnecessary party after commencement of suit oust its jurisdiction.

First Tr. & Sav. Bk. v Iowa-Wis. Bridge Co., 98 F 2d, 416

Estate funds—action to recover. An executor is the proper party to maintain an action against his predecessor and his bondsmen to recover the funds of the estate, even tho such funds ultimately belong to testamentary devisees.

Bookhart v Younglove, 207-800; 218 NW 533

Opinion—parties concluded. One on whose behalf an administrator seeks to maintain an action is necessarily bound by the opinion of the appellate court on appeal, and, on reversal and remand, he acquires no additional standing by simply joining with the administrator in a motion for judgment, without being substituted as plaintiff or in any manner making himself a party to the action by intervention or otherwise, and without in any manner changing the record.

Ronna v Bank, 215-806; 246 NW 798

Trustee to collect—allowable joinder. A trustee who has been authorized by the joint instrument of several individual owners of separate promissory notes, signed by the same maker, to bring such actions as he may deem fit to enforce collection of said notes, may maintain solely in his own name as such trustee an action at law on all or on any number of said notes. It follows that a motion to require the plaintiff to elect as to the particular count on which he will proceed will not lie.

Iowa Co. v Clark, 215-929; 247 NW 211

I TRUSTEE OF EXPRESS TRUST—concluded

Trustee of express trust. The trustee in a deed of trust which secures a series of bonds payable "to said trustee or to bearer", and which have been sold and delivered to numerous parties who continue to be the owners thereof, may maintain an action at law against the maker, on all the bonds, (1) when the trust deed empowers the trustee to declare the entire debt due in case of any default of the maker, and to proceed by means of any legal or equitable action to enforce collection, and imposes on the trustee the duty so to declare and proceed when the bondholders request him so to do, and (2) when all said bondholders, after default in payment of interest, individually redeliver to said trustee all of said bonds and specifically request the trustee in writing to declare the entire debt due and to proceed against the maker by legal action. Authority in plaintiff to maintain said action rests on a two-fold legal basis, viz:

1. Plaintiff is the legal bearer and holder of said bonds.
2. Plaintiff is the trustee of an express trust.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Continuance and dismissal by guardian. An order in partition proceedings brought by the guardian of an incompetent to the effect that the cause "be continued until certain conditions are complied with, which being fulfilled the cause should be dismissed", and a later order dismissing said cause on a recital that said "conditions" had been fulfilled, cannot be said to be illegal and beyond the jurisdiction of the court, even tho such "conditions" were not recited in the record, it appearing that the court had personal knowledge of them.

Salomon v Newby, 210-1023; 228 NW 661

Estoppel to question proceedings. An executor who institutes an authorized action against a corporate receiver in the county of the receiver's appointment, for relief against an alleged fraud-induced contract by the deceased, and (1) is met by a cross-petition for judgment on the said contract, and (2) has his action properly consolidated with divers other actions under duly joined issues which might have been the basis of an original action against the executor in said county of suit, may not thereupon, after dismissing his action, have all proceedings against himself and the estate dismissed on the claim that the probate court which appointed him had sole jurisdiction to render a judgment against him or against the estate.

Lex v Steel Corp., 203-792; 206 NW 586

Unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Defect not cured by appearance. Lack of capacity to act as party plaintiff cannot be remedied by the appearance of the defendant in the action.

Pearson v Anthony, 218-697; 254 NW 10

II CONTRACTS FOR BENEFIT OF THIRD PARTY

Discussion. See 1 ILB 187—Suit by third party

Promise for benefit of third party enforceable. The promise, made on adequate consideration, for the benefit of a third person is enforceable by said third party.

Tracewell v Sanborn, 210-1324; 232 NW 724

Third-party action. Principle recognized that a third party, for whose benefit a contract is made, has a right to bring an action on the contract.

Venz v Ins. Assn., 217-662; 251 NW 27

Agent for undisclosed principal or beneficiary. Principle reaffirmed that a mortgagee may enforce the mortgage in his own name, even tho the mortgage is for the benefit of a third party.

Turnis v Ballou, 201-468; 205 NW 746

Party to contract but without interest. A party may maintain foreclosure proceedings on a mortgage in which he is named as mortgagee, tho he has no beneficial interest in the mortgage.

Brauch v Freking, 219-556; 258 NW 892

Bond—breach—allowable and unallowable action by city. A city, tho named as obligee in a bond for the construction of a street pavement, may not—assuming fraud-induced acceptance by the city of the work—maintain in its own right and for its sole benefit an action at law on the bond for damages consequent on the failure of the contractor to construct the pavement of the thickness required by contract. But the city may maintain such action in its own name as representative of the assessed property owners, and to recover for itself its own proper outlay.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Workmen's compensation—paying medical expense—no third-party contract for physician. In a workmen's compensation case a stipulation of settlement including "all medical expense incurred" does not make a contract for the benefit of third persons so as to permit an action to be maintained by the physician

who rendered medical services to the injured employee.

Casey v Creamery Co., 224-1094; 278 NW 214

Debt of another—original promise. An agreement by a vendor of real property with his purchaser to pay for the making of certain improvements on the property is an original promise, and not within the statute of frauds.

Madden Co. v Becker Co., 205-783; 218 NW 466

Agreement for benefit of third party. Principle recognized that the rights of a third party for whose benefit a promise is made are subject to the rights of the original parties and to any modifications which such parties may make before knowledge of the covenant is imparted to the third party.

Coen v Bank, 205-483; 218 NW 325

Enforceable by vendor. An oral contract between the joint purchasers of land that they would surrender their rights under the contract of purchase and reconvey to their vendor, upon certain terms to be performed by the vendor, said contract being partially performed, is enforceable by the vendor, even tho he had no knowledge of such contract at the time it was entered into in his behalf.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

III PLAINTIFF BY STATUTE

Foreign receivership—right to maintain action in this state. A foreign receiver of a foreign insolvent banking corporation may maintain an action in this state to collect a "double" liability assessment on the stock of a stockholder who is a resident of this state when the receiver is charged by statute with the duty to make such collection and to distribute the proceeds among creditors.

Baird v Cole, 207-664; 223 NW 514

Recovery on excess corporate indebtedness—proper party plaintiff. A trustee in bankruptcy of a corporate bankrupt cannot maintain an action against the directors and officers of the corporation to enforce the statutory individual liability attaching to such directors and officers consequent on their act in knowingly consenting to a corporate indebtedness in excess of that permitted by law. Such right of action never, in any sense, belongs to the corporation, but on the contrary is a right extended to the corporate creditors, and is enforceable solely by such creditors, if necessary, irrespective of the bankruptcy proceedings.

Hicklin v Cummings, 211-687; 234 NW 530; 72 ALR 822

Trustees of unincorporated association. The trustees of a voluntary unincorporated association, and not the association itself, are proper plaintiffs in an action to quiet title to real estate of which the association is the beneficial owner.

Presbyterian Church v Johnson, 213-49; 238 NW 456

10969 Plaintiffs joined.

ANALYSIS

I PROPER JOINDER
II IMPROPER JOINDER
III PROCEDURE ON MISJOINDER

I PROPER JOINDER

State as party. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

City and benefited property owners. There is no misjoinder of parties or causes of action where a city in its own behalf and in behalf of the parties beneficially interested brings an action against a contractor, combining therein both a claim for damages for defective pavement and a claim for the cost of "coring" to determine the thickness, since the basis for the latter claim was found in the contract. A motion to strike is properly overruled.

Sioux City v Krage, 225-1154; 281 NW 828

Action on supersedeas bond. The various obligees in a supersedeas bond given on appeal from a decree quieting title to different tracts of land in different parties are all proper and necessary parties in an action on the bond to recover rents during the period covered by the bond.

Bigelow v Ins. Co., 206-884; 221 NW 661

Inconsequential joinder. It is quite inconsequential in an action by a trustee to recover funds belonging to him as trustee, that the heirs, who are beneficiaries of the trust, are named in the caption of the petition as plaintiffs, said heirs making no claim in the body of the petition adverse to the trustee.

In re Van Vechten, 218-229; 251 NW 729

II IMPROPER JOINDER

Improper parties. A county and its treasurer are not proper parties to an action by the treasurer of state to recover on a depositary bond in which the county and its treasurer no longer have any interest.

State v Bartlett, 207-208; 222 NW 529

Party defendants—appraisers under lease. In an action to have the court appoint a third

II IMPROPER JOINDER—concluded

appraiser in accordance with the terms of a lease, the two already appointed appraisers are not proper parties to a cross-petition asking the court to construe the rental provisions of the lease concerning which the appraisers were to act.

Minot v Pelletier Co., 207-505; 223 NW 182

Motion to consolidate actions by plaintiffs. Two personal injury actions arising out of the same accident and brought against the same defendant cannot be consolidated on motion by the plaintiffs for altho equity has the power to consolidate causes of action to avoid multiplicity of suits, the right to move for a consolidation of causes of action in law is by statute granted only to the defendant, and a plaintiff has no such right.

Brooks v Paulson, 227-1359; 291 NW 144

Title—nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

III PROCEDURE ON MISJOINDER

Misjoinder in equity of parties and causes—remedy. A misjoinder, in an equitable action, of parties and causes of action is properly met by motion to dismiss.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Unassailable by demurrer. Misjoinder of parties plaintiff is not a ground of demurrer.

Gibson v Union Co., 208-314; 223 NW 111
Brown v Correll, 227-659; 288 NW 907

Demurrer. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

10970 United interests in equity.

Quieting title—separate owners of separate tracts. Various parties, each of whom claims exclusive ownership in separate and different tracts of land formerly held by a railway company as right of way, may join as plaintiffs in an equitable action against said railway company to quiet title in each separate party to the particular tract owned by him.

Duggleby v Railway, 214-776; 243 NW 372

Authorized joinder in equity. Several heirs of an intestate having been adjudged the owners of the undivided lands of an intestate, and having later, by an exchange of deeds, effected particular distribution among themselves, may, in an action to quiet title to their respective tracts, join as plaintiffs against an heir who had been adjudged to have no interest in the said lands because of his insolvency and failure to pay his debt to the estate.

Bauer v Bauer, 221-782; 266 NW 531

10971 Assignments—exception.

Assignment of actions generally. See under §10957 (II)
Similar provisions. See under §§9451-9456

Foreign assignee of note—assignor and makers residents of state. In an action on a note by an assignee, resident of a different state than makers, held, improperly brought in federal court where assignee derived title through indorsers residing in same state as makers.

Sargent v Trust Co., 12 F 2d, 758

Sufficiency of pleading.

Benton v College, 202-15; 209 NW 516

Plaintiffs—transfer of title after action brought—effect. The fact that plaintiff, after commencing an action on promissory notes, transfers the title thereof does not prevent the prosecution of said action to judgment in the name of the original plaintiff.

Grimes Bank v McHarg, 213-969; 236 NW 418

Recovery dependent on pleading. In an action on a nonnegotiable promissory note, by a transferee thereof, defendant's plea that he be given a set-off in a stated sum because of an account held by defendant against the original payee, will not be construed as embracing a demand for interest on said "stated sum".

Lewis v Grain Co., 214-143; 241 NW 469

Assignment for collection. Principle reaffirmed that the holder of a claim or account may validly assign it to another solely for collection.

Carson, etc. v Long, 219-444; 257 NW 815

Allowable partial assignment. The owner of a chose in action has a legal right to assign a part of his interest in such chose, and thereafter to join with the assignee in the prosecution of the entire cause of action.

Welch v Taylor, 218-209; 254 NW 299

Unquestioned establishment — proper procedure. A duly pleaded counterclaim which is unquestionably established by the evidence should not be submitted to the jury, but should be summarily allowed by the court; and in a

personal injury action the court should direct the jury how to proceed if plaintiff's recovery be more than the amount of the counterclaim; likewise how to proceed if plaintiff's recovery be less than the amount of the counterclaim.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Set-off or retainer against beneficiary — power of probate court. In probate proceedings wherein a beneficiary is indebted to the estate, the right of set-off or retainer is not restricted to a court of equity, but rests upon wholesome principles of right and justice which can be administered in probate courts without the aid of a court of conscience.

In re Sheeler, 226-650; 284 NW 799

Heir's assignment of interest subject to estate claims—rights of assignee. In a probate proceeding where one of the heirs, who is indebted to the estate, purchases a farm from the executor and assigns her one-tenth interest in the estate as security for a purchase note to the executor, who in turn assigns the note to a third party, held that such assignment of interest is taken subject to the estate claims, and whatever interest remains should be paid to the holder of the note irrespective of the fact the executor is also indebted to the estate on his final account.

In re Sheeler, 226-650; 284 NW 799

Insolvent bank—set-offs unallowable. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off is not applicable.

Parker v Schultz, 219-100; 257 NW 570

Defense available against transferee. The maker of a nonnegotiable promissory note who, subsequent to the execution of the note, and before he had knowledge of the transfer of the note, has on deposit with the payee (a private banker), subject to check, an amount equal to the entire amount due on the note, may plead said claim against a transferee of the note when it is made to appear that the said maker, under an arrangement with the banker to apply the deposit on the note, never withdrew any part of said deposit.

Benton v College, 202-15; 209 NW 516

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Heir's interest assigned to executor—chargeable to executor when reassigned. In a probate proceeding where a beneficiary assigns her interest in estate to executor to the extent necessary to satisfy beneficiary's note held by the executor, and the executor reassigns said interest to a third party, the executor is chargeable with value of such interest after deducting beneficiary's indebtedness to the estate.

In re Sheeler, 226-650; 284 NW 799

10972 Defendants.

ANALYSIS

I PERMISSIBLE DEFENDANTS
II PROPER OR NECESSARY DEFENDANTS
III UNNECESSARY DEFENDANTS
IV IMPROPER DEFENDANTS
V EFFECT OF DEFECT IN PARTIES
VI MISJOINDER—PROCEDURE
VII NONJOINDER—PROCEDURE

I PERMISSIBLE DEFENDANTS

Receiver of national bank—liability in state court. The receiver of an insolvent national bank is not immune from suit in the state court to recover property to which neither the bank nor the receiver ever acquired any title.

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Venue in quo warranto. The district court of one county of a judicial district, in duly authorized quo warranto proceedings in said county involving the rival claims of two parties to the office of district judge, may acquire jurisdiction of both parties even tho one of them is a nonresident of the county of suit and is sole defendant in the county of his residence in a proceeding in quo warranto involving the same office.

State v Murray, 219-108; 257 NW 553

Drainage district not legal entity. Principle reaffirmed that a drainage district is not a legal entity, and, consequently, cannot be sued.

Houghton v Bonnicksen, 212-902; 237 NW 313

Refusal of change of venue. Error in refusing to transfer an action to the county of defendant's residence becomes inconsequential when, in the further making up of the issues, either by additional pleadings in the case itself or by intervention therein or by proper consolidation of the action with other actions, the nature of the final action as tried becomes such that it might have been brought originally against all the defendants in the county in which the original action or actions were brought.

Lex v Selway Corp., 203-792; 206 NW 586

I PERMISSIBLE DEFENDANTS—concluded

Foreclosure of mortgages. In an action to foreclose a mortgage, it is allowable to join as defendants (1) the maker of the promissory note, (2) the payee-indorser in blank, and (3) all assumptors of the mortgage.

Hansen v Bowers, 208-545; 223 NW 891

Joinder of corporations and officers. Two corporations, each organized by the same promoters, for identically the same purpose, and officered by the same officers, may be joined with the common president, in an action based upon a single joint transaction wherein the said president in the sale of corporate stock of both corporations made false representations in the interest of and for the benefit of both corporations.

McCarthy v Dixon, 219-15; 257 NW 327

Bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank & Trust, 218-961; 256 NW 681

Defendant by implication. A third party who is not a party defendant in an action legally submits himself to the jurisdiction of the court by directing the actual defendant to appear for and on behalf of said third party and to protect his interest.

Davis v Agr. Soc., 208-957; 226 NW 90

Bad-faith defense by vouchee. One who is vouched by a defendant into an action and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a co-defendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee, knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Evidence available against vouchee. In an action for breach of warranty because of an existing mortgage on the property, the foreclosure proceedings and judgment entry therein are admissible against the covenantor-defendant to prove the plaintiff's measure of damages, it appearing that the covenantor had been duly vouched into said foreclosure proceedings.

Kellar v Lindley, 203-57; 212 NW 360

Tort-feasors committing unintentional injury. Two or more tort-feasors are suable jointly as for a joint tort when their concurring negligence is the proximate cause of a wholly unintentional injury which is indivisible in its nature.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419; 34 NCCA 306

Party defendant—witness fee. A party defendant is not entitled to witness fees tho he has entered no appearance in the action, but has been subpoenaed.

Vacuum Oil Co. v Carstens, 211-1129; 231 NW 380

II PROPER OR NECESSARY DEFENDANTS

Expiration of official term. An appeal in an action in which the county is the real party in interest will not be dismissed because the terms of office of the official party defendants have expired.

First N. Bank v Burke, 201-994; 196 NW 287

Contending school districts. In an action to determine which of two school districts embraces certain land, both districts are absolutely necessary parties.

Whitmer v Board, 210-239; 230 NW 413

Unallowable motion to strike. In an action against several defendants for damages consequent on a negligent act, that defendant who is, in effect, alleged to have occupied the position of respondeat superior cannot have his name stricken from the petition.

Elder v Maudlin, 213-758; 239 NW 577

Cross-petition defense — state as proper party—belated objections. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross-petition, such question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Fuel Co., 224-466; 276 NW 41

Certiorari to review discharge of state employee. The custodian of public buildings and grounds (at Des Moines) is the sole, proper defendant in an action of certiorari to review the legality, under the soldiers preference law, of the discharge of an employee of said department.

Pittington v Herring, 220-1375; 264 NW 712

Parties acting jointly and in cooperation. Several persons engaged jointly and in cooperation in the unlawful furnishing, prescribing and administering of medicine without a license may be properly joined in one action for injunction.

State v Baker, 212-571; 235 NW 313

Fence viewing proceedings. On certiorari to review the action of fence viewers, the

party who initiated the proceedings is not a necessary party.

Sinnott v Dist. Court, 201-292; 207 NW 129

Bail bond—necessary parties. A bail bond will not be reformed when the defendant on whose behalf the bond was given, and who signed it, is not before the court.

State v Kronstadt, 204-1151; 216 NW 707

Vendor's lien—absence of necessary parties. A vendor's lien may not be established against land after it has been transferred by the purchaser and the new owners are not made party defendants.

In re Thomas, 203-174; 210 NW 747

Undisclosed principal liable. An undisclosed principal is liable on a contract which he has permitted to be entered into in his behalf and under which he has received resulting benefits.

Utilities Corp. v Chapman, 210-994; 232 NW 116

Replevin. A party from whom both plaintiff and defendant in replevin trace their title is a proper party defendant.

Hart v Wood, 202-58; 209 NW 430

Dissolution of corporation. All stockholders of a corporation are proper parties to an action by the state to dissolve the corporation.

Lex v Selway Corp., 203-792; 206 NW 586

Action by stockholder for contribution. All stockholders of a corporation are proper parties to an action by one stockholder who has fully paid for his stock, for contribution from the other stockholders who have not fully paid for their stock, in order to equalize the losses between stockholders.

Lex v Selway Corp., 203-792; 206 NW 586

Nominal parties—who are not. Pleadings reviewed in an action against a corporation and its officers for an accounting, and held, the corporation could not, under an application for an order for the production of papers and documents, be deemed a merely nominal defendant.

Independent Order v Scott, 223-105; 272 NW 68

Action against joint trustees. Two or more persons acting jointly in a fiduciary capacity in relation to the same property for the same beneficiary are properly made joint defendants in an action to enforce the trust.

Burger v Krall, 211-1160; 235 NW 318

Tort-feasors committing unintentional injury. Two or more tort-feasors are suable jointly as for a joint tort when their concurring negligence is the proximate cause of a wholly unintentional injury which is indivisible in its nature.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Action on note—failure to join surety. In an action on a promissory note, the surety is a proper, but not necessary, party defendant.

Clapp v Wallace, 221-672; 266 NW 493

Unincorporated association—individual liability of members—agency. An individual who contracts in the name of a voluntary unincorporated association is personally liable thereon in the absence of an agreement with the other party releasing him from personal liability, and such other members of said association who authorize, consent to, or ratify such undertaking are also personally liable in the absence of an agreement exempting them, the personal liability being based upon principles of agency.

Lamm v Stoen, 226-622; 284 NW 465

Inheritance taker as "representative" of contingent remainderman. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; and especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51
See Mennig v Graves, 211-758; 234 NW 189

III UNNECESSARY DEFENDANTS

Action to vacate municipal plat. In an action for the vacation of a county auditor's plat of land within a city or town, the county auditor is not a necessary party.

Schemmel v Town, 214-321; 242 NW 89

Denial of right to implead. In an action on the bond of an administrator, the surety should be granted the right to implead the surety on another bond given by the administrator; but a refusal is nonprejudicial when the rights of the respective sureties, as between themselves, are in no manner adjudicated.

Bookhart v Younglove, 207-800; 218 NW 533

Rent—subtenant as party. A landlord need not, in an action to enforce his lien, make a subtenant a party defendant, even tho a lien is claimed on crops grown by the subtenant.

Hanson v Carl, 201-521; 207 NW 579

Dismissal as to one of defendants when other defendants not affected. In an action for injuries sustained in an automobile accident, a dismissal as to one of the defendants could not be complained of by other defendants who were not prejudicially affected by the dismissal.

Womochil v Peters, 226-924; 285 NW 151

IV IMPROPER DEFENDANTS

Unallowable cross-petition. In an action of quo warranto against a particular claimant to the office, brought, under authorization of the court, in the name of the state on the relation of a private party, the defendant will not be permitted to cross-petition against a third party claimant to the same office, and thereunder bring said third party into the proceeding for an adjudication of his right to the office.

State v Murray, 217-1091; 252 NW 556

Action on bond—prior sureties. Defendant in an action on a guardian's bond has no right to demand that a surety on a prior bond of the guardian be made a party defendant on the theory that the defendant has a right to demand contribution from such prior surety.

Brooke v Bank, 207-668; 223 NW 500

Joining contract and tort actions. A joint action cannot be maintained (1) against a contractor on his contract liability to answer for possible torts committed during the progress of work, and (2) against those who are alleged to have subsequently committed a tort during the progress of said work, when the contractor and the alleged tort-feasors are residents of different counties.

Elder v Maudlin, 213-758; 239 NW 577

Party defendants—appraisers under lease. In an action to have the court appoint a third appraiser in accordance with the terms of a lease, the two already appointed appraisers are not proper parties to a cross-petition asking the court to construe the rental provisions of the lease concerning which the appraisers were to act.

Minot v Pelletier Co., 207-505; 223 NW 182

Substitution—irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased defendants are for the first time enumerated and named as the defendants, and, under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

V EFFECT OF DEFECT IN PARTIES

Belated objection. A claim of defect of party defendants cannot be presented for the first time on appeal.

Page & Crane v City, 208-735; 225 NW 841

Title — nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary, or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

VI MISJOINDER—PROCEDURE

Motion to strike. When a defendant is sued in a county other than the county of his residence, and is not suable in said county of suit because of misjoinder of causes of action and of parties, he may, by motion to strike, trim the petition of every defendant except himself and of every cause of action except the one pleaded against himself.

Producers Assn. v Livingston, 216-1257; 250 NW 602

Separate and distinct conversions. A misjoinder of causes of action and of parties occurs when a petition for damages, consequent on successive sales of mortgaged chattels, reveals that two separate and distinct sales were made with actual or constructive notice of the recorded mortgage—one by part of the defendants, and one by the remaining defendants—without any allegation of conspiracy, unity of design, or concert of action on the part of all of said defendants, and without any allegation that the concurrent acts of all the defendants proximately contributed to the conversion.

Producers Assn. v Livingston, 216-1257; 250 NW 602

Curing misjoinder. Any claim of misjoinder of causes of action as to defendants and of misjoinder of parties defendant because plaintiff joined an action at law on bonds against one defendant with an action in equity to set aside an alleged fraudulent conveyance against the other defendant, is effectually effaced by an order of court dismissing the action as to the equitably charged defendant.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Improper joinder in probate. One who files a claim for a simple money demand against the estate of a deceased may not join in the probate proceedings actions against other parties for the same claim for which the estate is alleged to be liable.

Ontjes v McNider, 218-1356; 256 NW 277

Misjoinder of parties — appealable order. The action of the court in overruling a motion to set aside an ex parte order making movant a party to a pending action is appealable, the motion being based on the ground of misjoinder of parties.

Irwin v Bank & Trust, 218-961; 256 NW 681

Decisions reviewable—orders to strike and dismiss. An order overruling a motion to strike a pleading and to dismiss parties because of the improper joinder of actions and of party defendants is appealable.

Ontjes v McNider, 218-1356; 256 NW 277

Ruling on motion as adjudication. Whether a ruling sustaining a motion to strike a pleading on the ground that it improperly joins causes of action and party defendants constitutes (in the absence of an appeal) a final adjudication in the further progress of the cause, quaere.

Ontjes v McNider, 218-1356; 256 NW 277

Misjoinder of corporate parties. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, such question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

VII NONJOINDER—PROCEDURE

Venue—domicile and residence of parties—venue in quo warranto. The district court of one county of a judicial district, in duly authorized quo warranto proceedings in said county involving the rival claims of two parties to the office of district judge, may acquire jurisdiction of both parties even tho one of them is a nonresident of the county of suit and is sole defendant in the county of his residence in a proceeding in quo warranto involving the same office.

State v Murray, 219-108; 257 NW 553

Appeal and error—harmless error—denial of right to implead. In an action on the bond of an administrator, the surety should be granted the right to implead the surety on another bond given by the administrator; but a refusal is nonprejudicial when the rights of the respective sureties as between themselves are in no manner adjudicated.

Bookhart v Younglove, 207-800; 218 NW 533

Defendant by implication. A third party who is not a party defendant in an action legally submits himself to the jurisdiction of the court by directing the actual defendant to appear for and on behalf of said third party and to protect his interest.

Davis v Agri. Soc., 208-957; 226 NW 90

10973 United interest.

Joint payees. The presumption that joint payees of a promissory note, and of a mortgage securing the same, are equal, must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Money advanced on joint representations—suing jointly. Where money is invested with several persons representing themselves to be jointly interested in a hemp-production scheme, such joint promoters may be sued jointly, notwithstanding one of them asserts that he was not in fact so interested, because he is estopped from denying his interest.

Smith v Secor, 225-650; 281 NW 178

Action by owner—insurer and mortgagee not necessary parties. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

10974 One suing for all.

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system, to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract: e. g. (1) that he owns property which will be specially assessed; or (2) that he is a taxpayer, and must contribute to the im-

provement fund from which payment of a deficit must be made.

Donovan Co. v Waterloo, 211-506; 231 NW 499

Right of taxpayer. The statutory discretion of the board of supervisors to enter into an agreement with legally reorganized and approved banks, with reference to the county's deposits in said banks, cannot be questioned by a taxpayer except on proof of fraud or arbitrary abuse of said discretion.

Pugh v Polk County, 220-794; 263 NW 315

Bondholders (?) or trustees (?). When trustees for a bondholder have, under the terms of the bonds, the exclusive right to maintain an action for the protection of the bondholder, the latter may not maintain such action, and thereby convert himself into a trustee, on the naked allegation, in substance, that the trustees will, because of partiality, be less aggressive in prosecuting such action than the bondholder.

McPherson v Sec. Co., 206-562; 218 NW 306

One suing for all — ratification — effect. A member of a fraternal order may not maintain an action against a former officer of the order to recover, on behalf of the order, money belonging to the order and expended by said officer for unauthorized purposes, when the governing body of the order has formally and explicitly ratified such expenditures.

Outing v Plum, 212-1169; 235 NW 559

When demand on corporation unnecessary. Demand on an incorporated fraternal order to institute an action against a former officer of the order to recover money belonging to the order and unlawfully expended by such officer, is not a condition precedent to the commencement of such action by a member of the order, when the record reveals the fact that such demand if made would have been met by a peremptory refusal.

Outing v Plum, 212-1169; 235 NW 559

10975 Joint and several obligations.

Suretyship generally. See under §11577

Joint liability—right to sue either or both. If two parties be liable for a conversion, plaintiff may sue either or both.

School District v Sass, 220-1; 261 NW 30

Joint wrongdoers—attorney fees for defending. When joint wrongdoers jointly and severally employ attorneys to defend themselves, in an action for damages consequent on the joint tort, the one who pays the attorney fees may enforce contribution from all the other co-defendants.

Licht v Klipp, 213-1071; 240 NW 722; 1 NCCA(NS) 419

Concerted action without conspiracy. Joint liability may exist without allegation or proof of conspiracy. So held where there was allegation and proof of concerted action by several persons with common intent and purpose.

Baumchen v Donahoe, 215-512; 242 NW 533

Parties not in privity. An agent who procures contracts for his principal may not hold a subsequently formed corporation liable for his commission, even tho the agent's contract was with a person who subsequently became an officer of the corporation, and even tho the subsequently formed corporation carried out the contracts so obtained.

Heinen v Monument Co., 206-198; 220 NW 62

Notice—coparties. In an action by a municipality against the receiver of an insolvent bank and its surety to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Independent Dist. v Bank, 204-1; 213 NW 397

Joint contract. A contract wherein two parties, for one and the same consideration, agree to pay to another party a named sum in stated proportions, is a joint contract.

Lockie v Baker, 206-21; 218 NW 483

Joint and several (?) or several only (?). Whether a contract is joint or several must be determined by the terms thereof viewed in the light of the attending circumstances, and the practical, mutual construction, if any, placed thereon by the parties.

Shively v Mfg. Co., 205-1233; 219 NW 266
Licht v Klipp, 213-1071; 240 NW 722

Joint note-makers. A joint action against two alleged joint signers of a promissory note presents no suggestion of a misjoinder of parties.

Greenland v Carter, 219-369; 258 NW 678

Joint purchase—liability. Parties who enter into a joint mutual agreement to purchase land, and induce the vendor to accept the note and mortgage of one of them, with the assurance that the financial responsibility of all is behind the deal, all become personally liable for the indebtedness, and especially so when such has been the interpretation of the transaction by all the parties.

Bond v O'Donnell, 205-902; 218 NW 898; 63 ALR 901

Party defendants — foreclosure of mortgages. In an action to foreclose a mortgage, it is allowable to join as defendants (1) the maker of the promissory note, (2) the payee-indorser in blank, and (3) all assumptors of the mortgage.

Hansen v Bowers, 208-545; 223 NW 891

Action on note — failure to join surety — effect. In an action on a promissory note, the surety is a proper, but not necessary, party defendant.

Clapp v Wallace, 221-672; 266 NW 493

Liability of surety—joint benefit obligation —proportionate liabilities. As between themselves on a joint obligation, each person is a principal as to his own share of the debt or acts and a surety as to the shares or acts of the others.

Clindinin v Graham, 224-142; 275 NW 475

Money advanced on joint representations—suing jointly. Where money is invested with several persons representing themselves to be jointly interested in a hemp-production scheme, such joint promoters may be sued jointly, notwithstanding one of them asserts that he was not in fact so interested, because he is estopped from denying his interest.

Smith v Secor, 225-650; 281 NW 178

Action on bond—prior sureties. Defendant in an action on a guardian's bond has no right to demand that a surety on a prior bond given by the guardian be made a party defendant on the theory that the defendant has a right to demand contribution from such prior surety.

Brooke v Bank, 207-668; 223 NW 500

Motor carriers — action on bond. A party injured in person and property by the operation of a motor vehicle carrier may bring his action directly against the carrier and the statutory surety on the bond filed with the board of railroad commissioners, even tho no service is had on the carrier, and even tho the bond provides, in effect, for an action against the surety in event the injured party first obtains a judgment against the carrier and fails to collect thereon.

Curtis v Michaelson, 206-111; 219 NW 49; 1 NCCA(NS) 336

Loss on fidelity bond—recovery by surety. In action against a person covered by a fidelity bond, to indemnify plaintiff, as surety, for a loss sustained because it executed the bond, a direct evidentiary conflict precludes a directed verdict for plaintiff.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

Automobile indemnity policy — right of injured party. When the owner or operator of a motor vehicle has insured his liability for damages consequent on the operation of his vehicle, an injured party may not sue directly on the policy which indemnifies the wrongdoer —the insured—until he has obtained a judgment against the wrongdoer—the insured—and until an execution on the judgment has been returned unsatisfied (§8940, C., '31). There is one exception to this statutory rule, to wit: When the policy is one obtained by a motor vehicle carrier as a mandatory statutory condition precedent to obtaining a certificate to operate as such carrier, an injured party may maintain an action on the policy when service of notice of suit cannot be had on the carrier within this state (§5105-a26, C., '31 [§5100.26, C., '39]).

Ellis v Bruce, 215-308; 245 NW 320

Rights and remedies of surety—agreement to indemnify. A written agreement in an application for a surety bond by two duly appointed referees in partition to the effect and in the language of "we hereby agree" to indemnify said surety for any damage suffered by him because of said bond, is jointly and severally binding on both principals even tho one of them received no part of the funds covered by the bond and was guilty of no personal failure to account.

Indemnity Ins. v Opdycke, 223-502; 273 NW 373

Conformity to process and pleading—absence of any issue. The court may not decree who is principal in a transaction and who is surety, and render a personal judgment in favor of the surety and against the principal for sums paid by the surety, when the original notice and petition are silent as to such matters, and when there is no other pleading which prays such relief.

Sutton v Rhodes, 205-227; 217 NW 626

Contractual prerequisites—burden of proof. In an action against a husband and wife on a promissory note signed only by the husband, and involving the wife on a theory that both were engaged in a joint adventure for which the money was used, liability of the wife may be predicated only upon a joint adventure contract, either express or implied, and plaintiff has the burden to prove the existence of such contract.

Valley Bank v Staves, 224-1197; 278 NW 346

Joinder of "separable controversy". The liability of several insurance companies which were members of an association which insured plaintiff's property against loss by fire presented a "separable controversy", and when plaintiff under the statute joined the several defendants in a single action, it did not create a joint liability so as to preclude a nonresident defendant from removing cause from state to federal court.

D. M. Elev. Co. v Grain Assn., 63 F 2d, 103

Relief notwithstanding partial failure of recovery. A subcontractor on a public improvement who, in an equitable action, establishes a contract right of recovery against the principal contractor is entitled to judgment accordingly, notwithstanding the fact that, because of his noncompliance with the statute, he is denied recovery, either against the surety for the principal contractor, or against the

municipality, or against the undistributed funds in the hands of the municipality.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Cross-examination — whole of writing — admissibility. A surety who denies in toto the execution, delivery, and consideration of the promissory note in question, but sees fit to cross-examine his co-defendant principal with reference to a letter written by the principal to the payee with reference to said denied matter, may not complain of the reception in evidence of said letter as a part of his own cross-examination.

Granner v Byam, 218-535; 255 NW 653

Remedies of creditors — pleading — prima facie sufficiency. A prima facie cause of action against guarantors is presented by a pleading based on an instrument which purports to reveal a principal debtor and a guaranty of the promise of such debtor and an allegation that the debtor has defaulted.

Foundation Press v Bechler, 211-1217; 233 NW 666

10976 Adjudication.

See under §11567

10979 Service.

Director general of railroads. Service of an original notice on a delivering carrier did not, under the war emergency act, bring the director general of railroads into court as a representative of the initial carrier.

Dye Co. v Davis, 202-1008; 209 NW 744

10980 Liability of joint carriers.

Damage to privately owned car—liability. An action by a shipper to recover of an initial carrier damages to the shipper's own car which had been delivered to the said carrier, fully loaded, for transportation to a connecting carrier, and injured by the connecting carrier while returning the car to the initial carrier, cannot be maintained in the absence of some showing as to the contract or arrangement governing the return of the car.

Bott Bros. Co. v Railway, 215-16; 244 NW 679

10981 Necessary parties.

Discussion. See 21 ILR 644—Interpleader—scope of relief

Unallowable cross-petition. In an action of quo warranto against a particular claimant to the office, brought, under authorization of the court, in the name of the state on the relation of a private party, the defendant will not be permitted to cross-petition against a third party claimant to the same office, and thereunder bring said third party into the proceeding for an adjudication of his right to the office.

State v Murray, 217-1091; 252 NW 556

Necessary parties — school district. In an action to determine which of two school districts embraces certain land, both districts are absolutely necessary parties.

Whitmer v Board, 210-239; 230 NW 413

Foreign guardianship — personal judgment unallowable. A nonresident minor may, in a proper case, be made a party to litigation in this state, by service in this state on the foreign guardian, but such service will not confer jurisdiction on the court to enter a personal judgment against the minor.

Irwin v Bank & Trust, 218-474; 255 NW 670

Absence of necessary parties. The court will not construe a testamentary trust or a deed in the absence of necessary parties.

Windsor v Barnett, 201-1226; 207 NW 362
Fay v Smiley, 201-1290; 207 NW 369

Certiorari. On certiorari to review the action of fence viewers, the party who initiated the proceedings is not a necessary party.

Sinnott v Dist. Court, 201-292; 207 NW 129

Bail bond—necessary parties. A bail bond will not be reformed when the defendant on whose behalf the bond was given, and who signed it, is not before the court.

State v Kronstadt, 204-1151; 216 NW 707

Harmless error—denial of right to implead. In an action on the bond of an administrator, the surety should be granted the right to implead the surety on another bond given by the administrator; but a refusal is nonprejudicial when the rights of the respective sureties as between themselves are in no manner adjudicated.

Bookhart v Younglove, 207-800; 218 NW 533

Supersedeas bond—action—parties plaintiff. The various obligees in a supersedeas bond given on appeal from a decree quieting title to different tracts of land in different parties are all proper and necessary parties in an action on the bond to recover rents during the period covered by the bond.

Bigelow v Ins. Co., 206-884; 221 NW 661

Order of court — noncompliance — effect. The fact that an order of court that certain parties be made parties to an action was not fully complied with is of no consequence when it appears that said order was superfluous.

Harris v Randolph, 213-772; 236 NW 51

Interpleader as remedy. The pre-code equitable action of "interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution

against him of separate actions on the policy by said warring parties.

Equitable v Johnston, 222-687; 269 NW 767; 108 ALR 257

Recovery of unpaid legacy—bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank & Trust, 218-961; 256 NW 681

Title — nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

Eminent domain—bringing in necessary parties. In eminent domain proceedings on appeal from the award of the sheriff's jury, the court may permit the appellant landowner to amend, and bring in, and join equitable issue of ownership as to a portion of the property involved, with a stranger to the proceedings, and to try out such issue prior to trying out the issue of damages.

McCall v Hy. Com., 217-1054; 252 NW 546

Defect of parties in re objections to guardian's report. A guardian, after purchasing a residence property for his ward at a price authorized by the court, paid the vendor a trifling part of the contract price and obtained a deed from the vendor to the ward who thereafter for years remained in undisturbed possession of the property. The guardian in a later report credited himself with the full amount of the contract price. Later, the deception being discovered, the ward filed objections to the report. The guardian dying, his administrator appeared in re said objections.

Held, the court was in error in establishing a claim in favor of the ward and against the guardian's estate in the amount of the credit improperly taken by the guardian, on condition that the ward reconvey the property to the unpaid vendor,—that the court was per se without jurisdiction to adjudicate said controversy in the absence of said unpaid vendor as a party to said proceedings.

In re Bennett, 221-518; 266 NW 6

Notice of appeal—mortgagor as adverse and necessary party. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor, as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Notice of appeal—administrator failing to serve all objectors—dismissal. Notice of appeal from a judgment sustaining objections to an administrator's final report must be served on all heirs objecting to the report, and a failure will result in a dismissal of the appeal.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Necessary parties—tax sales injunction. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

Impressing unpaid warrant on excess assessment—necessary parties. Where two counties, by contract between both boards of supervisors and the contractors, issued warrants for construction of an intercounty drain and one county had a balance remaining from its assessments after paying all its drainage warrants but the other county after exhausting all funds from its assessments still owed outstanding unpaid warrants, an action in equity by an assignee of one of the unpaid warrants of the latter county to impress a trust for the amount of his warrant on the excess balance of the assessment in the former county, cannot be maintained against the former county alone because the other unpaid warrant holders and the landowners who paid the excess assessment are necessary parties.

Straub v Board, 223-1099; 274 NW 84

Insurer and mortgagee not necessary parties. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

Death of party without substitution. Where no personal representative was substituted for

plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

10982 Public bond.

Execution and delivery in foreign state. A statutory bond which is executed and delivered in a foreign state for the performance of a contract in this state will be construed in accordance with the laws of this state when such was the intention of the parties, as shown (1) by the nature of the transaction, (2) by the subject matter, and (3) by the attending circumstances.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Construction—law governing. A statutory bond executed in a foreign state and delivered in this state will be construed under the laws of this state.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Unallowable limitation on liability. A statutory bond which is given for the express purpose of securing public deposits in a bank may not be limited in liability to less than the liability called for by the statute; and any such attempt will be deemed nugatory, even tho such bond is approved by the public governing board.

Leach v Bank, 205-1154; 213 NW 517

Bank as beneficiary. An instrument in writing, tho addressed to the superintendent of banking, entered into by the stockholders of a bank in order to avoid an impairment of the capital stock of the bank, wherein the stockholders "guarantee the said bank against loss" in a named amount on certain bills receivable, is a contract of indemnity to the bank; and the bank may maintain an action thereon, its acceptance of the instrument being presumed.

In re Prunty, 201-670; 207 NW 785

Successive actions. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Motor carriers—action on bond. A party injured in person and property by the operation of a motor vehicle carrier may bring his action directly against the carrier and the statutory surety on the bond filed with the board of railroad commissioners, even tho no service is had on the carrier, and even tho the bond provides, in effect, for an action against the surety in event the injured party first obtains a judgment against the carrier and fails to collect thereon.

Curtis v Michaelson, 206-111; 219 NW 49; 1 NCCA(NS) 336

Indemnity against loss—"charging off" item of loss—effect. The act of a bank in "charging off" on its books an item of loss in no manner affects the right of the bank to proceed against a party who has legally agreed to indemnify the bank against such loss.

In re Prunty, 201-670; 207 NW 785

Indemnity against impairment of bank capital — consideration. An agreement by the stockholders of a bank with the state superintendent of banking that the former will indemnify the bank (a third party) against loss on certain bills receivable, needs for its support no consideration moving from the bank to the indemnitors. Sufficient consideration is found in the interest of the stockholders in preserving the bank as a going concern and in preventing an impairment of the bank's capital.

In re Prunty, 201-670; 207 NW 785

Surety's answer—effect. In mandamus action by county treasurer to obtain salary warrant where county board of supervisors answered, alleging indebtedness on part of treasurer to county for which set-off was claimed, and where county board brought treasurer's surety into the action as a cross-defendant, held, allegation in surety's answer, indicating that shortage in treasurer's office was due to the embezzlement by a third party, was not binding on board in view of its affirmative allegation that treasurer was indebted to the county.

Briley v Board, 227-55; 287 NW 242

10983 Partnership.

ANALYSIS

I THE RELATION GENERALLY
II FIRM NAME, CAPITAL, AND PROPERTY
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VI DISSOLUTION, SETTLEMENT, AND ACCOUNTING
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Limited partnership. See under Ch 428
Parties to actions. See under §10967

I THE RELATION GENERALLY

Discussion. See 13 ILR 463—Nature of partnership; 15 ILR 186—Partnership as entity

Evidence — sufficiency. Evidence reviewed, and held to establish a partnership in the buying and farming of land.

Hull v Padgett, 207-430; 223 NW 154

Pleading — general allegation and general denial—effect. A general allegation of partnership capacity met by a general denial justifies the court in treating the partnership as existing, especially when there is evidence of the existence of such partnership.

Jordison v Jordison Bros., 215-938; 247 NW 491

Unsupported issue of partnership. In an action of replevin for two articles, of which plaintiff was the absolute owner of one and the holder of a chattel mortgage on the other, defendant's issue of partnership is properly rejected when supported only by a showing that the parties had temporarily shared equally in the net earnings of the two articles.

Dieter v Coyne, 201-823; 208 NW 359

The relation—agreement—evidence. An actual or real partnership cannot exist except through an express or implied agreement containing all the elements of a partnership. Evidence held quite insufficient.

Citizens Bank v Scott, 217-584; 250 NW 626

The relation—profit and loss. Principle reaffirmed that an agreement to share in profits and losses is of the essence of a partnership.

Tracey v Judy, 202-646; 210 NW 793

The relation—fundamental essentials. Principle reaffirmed that, aside from ostensible partnerships, there can be no partnership except by agreement of the parties, and unless there exists, expressly or impliedly, an agreement for the sharing of losses as well as profits.

Farmers & M. Bank v Anderson, 216-988; 250 NW 214

The relation — evidence — sufficiency. Evidence reviewed and held wholly insufficient to establish a partnership relation.

DeLong v Whitlock, 204-701; 215 NW 954

Relation nonexistent — operation of bank. Where probate court set aside to decedent's widow a private bank which was thereafter operated for many years by her son, who received none of the profits thereof, held, evidence did not establish partnership as between the son and his mother. Hence, son's trustee in bankruptcy could claim no interest in said bank.

Duckworth v Manning's Estate, (NOR); 252 NW 559

Partnership—the relation. The fact that a party furnished much of the capital with which a partnership did business, took an active part in the business of the partnership, shared in the profits thereof, and when the partnership was merged into a corporation received a substantial block of the corporate stock, does not necessarily show that he was a partner in the partnership.

Smith, etc. v Hollingsworth, 218-920; 251 NW 749

Nonpartnership tho sharing profits. Where it is contemplated that a private unincorporated bank will be reorganized by incorporating the business (apparently in the same name as the private bank) and where stock in the contemplated incorporation is subscribed for, paid, and issued in a name identical with that of the private bank, and where the plans for incorporation are later wholly abandoned, the subscribers do not become partners in the private business when they never intended such relation, or held themselves out as such partners, or as having any interest in said bank; and this is true even tho said private bank continues for several years to pay said subscribers annual dividends out of its earnings.

Kinney v Bank, 213-267; 236 NW 31

Employee (?) or partner (?). One who has no control over the management of a business, and makes no contribution thereto except his personal services, and has no interest therein except to receive a portion of the profits thereof as compensation for his services, is an employee and not a partner.

Butz v Hahn Co., 220-995; 263 NW 257

Opinion evidence — conclusion in re partnership. The question whether an association of individuals constitutes a partnership calls for a legal conclusion.

DeLong v Whitlock, 204-701; 215 NW 954

Substituting or joining partners. Whether individual members of a partnership should be joined as defendants, or substituted for the partnership, in a suit brought against the partnership, under this section, is a question for the state court to decide and is cognizable in the federal courts only so far as it may affect the right to remove the suit from the state court.

McLaughlin v Hallowell, 228 US 278

Joint adventure. The requisites of an ordinary contract, and of a contract of joint adventure, as to form and validity, are substantially the same.

Smith, etc. v Hollingsworth, 218-920; 251 NW 749

Fundamental essentials of relationship. The partnership relation is predicated on mutual consent and is evidenced by the terms of the contract, the conduct of the parties, and the

I THE RELATION GENERALLY—concluded

circumstances surrounding the transaction. In action to dissolve partnership involving joint farming operations, evidence held insufficient to show that a partnership existed.

Criswell v Criswell, 225-1219; 282 NW 337

Partnership and trust—same property but different parties. A trust deed and a partnership agreement, altho executed at the same time, cannot be construed together, when the parties thereto and the purposes thereof are not the same.

Lunt v Van Gorden, 224-1323; 278 NW 631

Unsustained verdict — evidence. Evidence reviewed and held insufficient to sustain a jury finding that defendant was a partner, and, as a consequence, that the trial court properly set aside the verdict and ordered a new trial.

Spurway v Milling Co., 207-1332; 224 NW 564

Contract — construction. A contract which simply provides that, on the happening of certain conditions, the parties will enter into a partnership agreement cannot be deemed, in and of itself, to constitute such agreement.

Ayres v Nopoulos, 204-881; 216 NW 258

Release of surety—identity of partnership and corporation. A bona fide corporation which is engaged in one business and a bona fide partnership which is engaged in a different business may not, even in equity, be deemed identical—one and the same entity—even tho the corporate stock of the corporation is owned entirely by the partnership entity and by the individual partners, and even tho the individual partners of the partnership constitute the board of directors of the corporation. So held on the plea that a contract of the corporation worked a change in a former contract of the partnership, and thereby released the surety.

Weitz v Fidelity Co., 206-1025; 219 NW 411

Family partnership—sufficiency of evidence. Evidence reviewed in an action to dissolve a partnership, and held that the attempts of both a mother and son to exclude the other from a claimed partnership with the husband and father were not sustained by the evidence, and that each had a third interest in said partnership.

Eggleston v Eggleston, 225-920; 281 NW 844

Incorporation denied by state—partnership formed. Promoters of a corporation are liable to an investor for money received as the agreed purchase price for stock in a corporation, even tho the failure to deliver stock occurred because the state denied the right to incorporate, and they are not relieved by a partnership agreement, signed by the investor, who nowhere waives nor abandons the agreement for delivery of the corporate stock.

Smith v Secor, 225-650; 281 NW 178

Not a joint enterprise between driver and passenger. A joint enterprise is not shown between a driver of an automobile and his passenger when the passenger neither drove the car at any time nor exercised any control over its operation, but merely directed the driver which way to go so that the driver might view a team of mules which he was interested in buying.

Churchill v Briggs, 225-1187; 282 NW 280

II FIRM NAME, CAPITAL, AND PROPERTY

Identity of partnership and corporation. A bona fide corporation which is engaged in one business, and a bona fide partnership which is engaged in a different business may not, even in equity, be deemed identical—one and the same entity—even tho the corporate stock of the corporation is owned entirely by the partnership entity and by the individual partners, and even tho the individual partners of the partnership constitute the board of directors of the corporation. So held on the plea that a contract of the corporation worked a change in a former contract of the partnership, and thereby released the surety.

Weitz v Fidelity Co., 206-1025; 219 NW 411

Signing chattel mortgage—effect. The mere signing of a chattel mortgage in a partnership name does not, in and of itself, estop the signer from denying that the mortgaged property is partnership property.

Citizens Bank v Scott, 217-584; 250 NW 626

III MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS

Assumption of mortgage debt. An agreement between partners in their contract of partnership to pay mortgages on land to which they have taken title "subject" to existing mortgages, will be deemed an agreement solely for their own mutual benefit, and not for the benefit of third parties, to wit, said mortgagees.

Bankers Trust v Knee, 222-988; 270 NW 438

Sharing of losses. Principle reaffirmed that an express or implied sharing of losses as well as profits is an essential element of an ordinary partnership.

Butz v Hahn Co., 220-995; 263 NW 257

Extent of interest—presumption. The presumption, in the absence of a contrary showing, that partners hold equal interests in the partnership is, of course, rebuttable.

In re Talbott, 204-363; 213 NW 779

Trading partnership. A trading partnership and the individual members thereof are liable on a promissory note and on extensions thereof executed in the partnership name for borrowed money which, without the knowledge of the lender, was obtained by one partner

for the purpose of discharging his individual obligation to another partner.

Cresco Bank v Terry, 202-778; 211 NW 228

Action by partner on segregated matter. While a partner may maintain an action on a segregated partnership matter which has been put in the form of a promissory note in which the partner is both payee and one of several partner-makers, nevertheless, as contribution must be finally worked out when the partnership matters are finally settled, the amount of recovery by the partner-payee may, by agreement, be limited to such proportion of the amount found due on the note as the defending partner has interest in the partnership.

In re Talbott, 200-585; 203 NW 303

Dismissal of partnership suit. A partnership action cannot be legally dismissed by one half of the partners against the wishes of the remaining half of the partners when such dismissal would be materially injurious to the partnership.

Reason: Partners cannot legally dismiss such an action unless they have authority so to do.

Lunt Co. v Hamilton, 217-22; 250 NW 698

Primary liability of partner. A partnership debt is the individual, primary debt of each of the individual members of the partnership.

Boeger v Hagen, 204-435; 215 NW 597; 55 ALR 562

Williams v Schee, 214-1181; 243 NW 529

Members as tenants in common. Principle reaffirmed that the legal title to partnership realty is held by the partners as tenants in common.

Bankers Trust v Knee, 222-988; 270 NW 438

Partner's right to compete with partnership. The members of a partnership may validly authorize a partner to privately engage in the same business for the transaction of which the partnership was formed, and in such cases no partner will be permitted to lay claim, on behalf of the partnership, to any profits accruing under such private contracts,—no rights of third parties being involved.

Anderson v Dunnegan, 217-672; 250 NW 115

Mortgage on interest of joint adventurer. Lands belonging to a joint adventure become individually owned land when the joint adventurers execute and place of record an instrument which specifically states the fractional individual ownership of each in the land. It follows that a subsequent mortgagee who in good faith relies on such record cannot be detrimentally affected by equities arising out of the joint adventure and existing between the joint adventurers.

State Bank v Calvert, 219-539; 258 NW 713

Losses—joint liability. Two or more parties to a contract of joint adventure who agree to pay one half of resulting losses, if any, are each individually liable for said one half, tho no provision is made for any division among themselves.

Fitzhugh v Thode, 221-533; 265 NW 893

Property rights of joint adventurers. Property and profits of joint adventure after division between participants therein become separate and distinct property of joint adventurers. However, joint adventurer sustaining loss through transactions involving mortgage received in settlement and division of property and profits held not entitled to contribution.

Scott v McEvoy, (NOR); 228 NW 16

Agreement for lien—construction. A partnership agreement which provides that it shall stand as security for all money "advanced to said business" by the second party, and all indebtedness of the first party to the second party, does not embrace the right to a lien for money not shown to have been "advanced to said business", nor for money advanced subsequent to the said agreement.

Reilly v Woods, 216-419; 249 NW 381

Personal property of other partner—liability. In equity action to subject junior partner's personal property to payment of judgment against senior partner, evidence held insufficient to show that former acted fraudulently or that he was estopped as against senior partner's judgment creditors to claim such personal property.

Creston Bk. v Wessels, (NOR); 232 NW 496

Rights and liabilities as to third persons—burden of proof. A partnership is not bound by the act of one partner in consenting to, and acquiescing in, an act which is subversive of the very purpose of the partnership, unless he who seeks so to bind the partnership establishes the fact that all the partners consented to, and acquiesced in, said act.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Foreign law—comity. The law of a foreign state, which holds parties who are interested as shareholders in an unincorporated association, personally and individually liable as partners for the debts of such association even tho said parties, to the knowledge of the creditor, specifically contracted against such liability, will not be enforced by the courts of this state.

Reason: Said foreign law is directly contrary to the law of this state.

Farmers & M. Bank v Anderson, 216-988; 250 NW 214

Contract—construction. A contract provision to the effect that if income fails to pay expenses of a joint adventure, "at the end of two years and thereafter", the deficiency shall

III MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS—concluded

be carried in named proportions by named parties, "after the two years have expired", means, that if, during the first two years, income fails to pay expenses, thereafter the named parties are liable therefor, in said proportions, whether said deficiency occurred during said two years or thereafter, in view of other contract declarations that should any loss be incurred by reason of said adventure, such loss shall be borne by said parties in said proportions.

Fitzhugh v Thode, 221-533; 265 NW 893

Disputed question of partnership business. In equity action to recover judgment against members of alleged partnership and to impress trust on certain funds in satisfaction of such judgment, where existence of partnership is shown, judgment against the members is proper, irrespective of disputed fact question as to whether parties were engaged in partnership business.

Maybaum v Bank, (NOR); 282 NW 370

IV RIGHTS AND LIABILITIES AS TO THIRD PERSONS

Application of assets to liabilities. The assets of a partnership must be applied to partnership obligations before any part thereof can be legally applied to the obligations of the individual partners.

Phelps v Kroll, 211-1097; 235 NW 67

Negotiable notes taken in name of individual partner. Partners may, in good faith, validly agree between themselves that promissory notes belonging to the partnership shall be taken in the individual name of the partner who is in active charge of the business, and that the individual indorsement of the notes when rediscounted shall bind the partnership.

Second N. Bank v Millbrandt, 211-1299; 235 NW 577

Action for goods sold—dissolution at time—jury question. Whether plaintiff suing partner for goods sold had knowledge that partnership was dissolved at time of sale held question of fact for jury.

Harlan Co. v Saylor, (NOR); 228 NW 6

Conflicting assignments by partnership and partners — priority. An unrecorded assignment by a partnership to a partnership creditor of a lease of real estate and of the rents accruing thereunder is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Ratification of nonpartnership obligation—unsupported instruction. Instruction authorizing a finding of ratification by partners of a nonpartnership obligation is fundamentally erroneous when there is insufficient evidence to support a finding of ratification.

Maxfield v Heishman, 209-1061; 229 NW 681

Judgment lien on partner's interest—limitation. A judgment decreeing to a judgment-creditor a lien on the uncertain interest of the judgment-debtor in a private banking partnership in process of voluntary liquidation must not exceed the interest which the said partner would be entitled to after final partnership accounting.

Anthony v Heiny, 215-1347; 244 NW 902

Presumption—note executed by partnership—erroneous instruction. An instruction to the effect that one receiving the promissory note of a partnership may presume that it was executed in the course of the partnership business, without any statement of the legal effect of the payee's knowledge that the note represented the individual debt of one of the partners (as shown by the record), is fundamentally erroneous.

Maxfield v Heishman, 209-1061; 229 NW 681

Application of partnership assets and assets of partners. Where partnership property and the individual property of all the partners are in the hands of the partnership receiver, a creditor whose claim is against the partnership because of a partnership transaction, and also against an individual partner because the partner has individually guaranteed the claim, may have the assets so marshaled that he will share in the partnership property along with the other partnership creditors, and then resort to the individual property of the guaranteeing partner to the exclusion of partnership creditors.

Iowa-D.M. Bk. v Lewis, 215-654; 246 NW 597

Levies on realty. Holding reaffirmed that §11680, C., '35, applies solely to levies on personal property.

Bankers Trust v Knee, 222-988; 270 NW 438

Judgment against partners only — effect. A joint, personal judgment solely against the members of a partnership, on a partnership transaction, does not constitute a judgment against the partnership itself.

Bankers Trust v Knee, 222-988; 270 NW 438

Transfers and transactions invalid—right of insolvent partnership to prefer creditor. A partnership engaged in the operation of a private bank may, in good faith, validly pledge promissory notes belonging to it as collateral security for its outstanding obligations, even tho the partnership is insolvent.

Second N. Bank v Millbrandt, 211-1299; 235 NW 577

V RETIREMENT AND ADMISSION OF PARTNERS

Retirement of partners — notice. A partner in a private bank, on a sale of his interest in the bank, need not give notice of such sale to one who already has full knowledge thereof.

Fidelity Co. v Bank, 218-1083; 255 NW 713

Unincorporated association—members. An association name may be regarded as designating the individuals which it represents, altho the members own no proportionate share of its property. Such members have joint use and enjoyment of the property, which right ceases upon termination of membership.

Lamm v Stoen, 226-622; 284 NW 465

Bulk sales—nonapplicability of statute. The bulk sales act has no application to a sale of a partnership interest to a copartner.

Peterson Co. v Freeburn, 204-644; 215 NW 746

Mortgage on partner's interest—priority. A recorded chattel mortgage executed by an incoming partner to an outgoing partner on the one-half interest in the partnership property and on future additions thereto, and representing the purchase price of said interest (all with the consent of the old partner who remains in the business), is superior in right to the subsequently contracted debts of the new partnership.

In re Cutler & Horgen, 204-739; 212 NW 573; 217 NW 448; 54 ALR 527

Remedies of creditors—attacking conveyance —conditions precedent. The surety on an administrator's bond who has paid the shortage of the administrator consequent on the failure of the private bank in which the estate funds were deposited, may not, in an action to recoup his loss, question a conveyance by a former partner in the bank when, prior to the giving of the bond, the said partner had, in good faith and to the full knowledge of the administrator, sold his interest in the bank at a time when the bank had ample funds with which to pay the administrator's deposit.

Fidelity Co. v Bank, 218-1083; 255 NW 713

VI DISSOLUTION, SETTLEMENT, AND ACCOUNTING

Services of partner—value. In action for accounting and dissolution of partnership, reasonable value of services of partner managing garage held properly fixed at $30 per week.

Boldrini v Beneventi, (NOR); 240 NW 680

Right of retiring partner. Articles of partnership which provide (1) for "an undistributed profit" account, as working capital and to pay off loans, (2) for the retirement of partners at their option, and (3) for payment to a retiring partner, in addition to his investment, of profits "accrued to date of effective withdrawal, figured on basis of going concern," entitle a retiring partner to his pro rata share of the undistributed profit account when there are no outstanding loans.

Slaughter v Burgeson, 203-913; 210 NW 553

Allowance of interest to partner. It is not necessarily a badge of fraud that partners, in settling their affairs, allowed one partner interest on funds advanced individually by said partner for the benefit of the firm.

Cass v Ney, 209-17; 227 NW 512

Accounting—laches. An action to establish a partnership of some 35 years standing and for an accounting thereunder is not barred by laches when the plaintiff moved with reasonable promptness after his interest was questioned.

Hull v Padgett, 207-430; 223 NW 154

Joint adventures—dissolution in equity. Assuming, arguendo, that proof that a joint undertaking had proven to be a losing venture is sufficient to justify an order of dissolution, by a court of equity, of a joint undertaking, yet evidence reviewed and held insufficient to so show such fact.

Green v Kubik, 213-763; 239 NW 589

Joint adventure. A contract of joint adventure, which is wholly silent as to its duration, is terminable at will by a notice of any one of the parties to all other parties, especially when such other parties make no objection to such termination, and the right to an accounting necessarily follows.

Fitzhugh v Thode, 221-533; 265 NW 893

Excess advancement by partner—priority of claim. The excess capital advanced to the partnership assets by one of two partners will, when such was the original intention of the partners, be treated as the debt of the partnership, and, on dissolution, will be ordered paid out of the partnership assets after the payment of other firm debts, even tho the partner making the advancement holds, for the excess, the promissory note of the partner not making the advancement. It follows that such right belonging to the partner making the advancement will be deemed superior to a mortgage of the other partner's partnership interest.

Hart v Smiley, 210-1004; 229 NW 139

Appointment of receiver—who may not object. Alleged partners in an alleged private banking business may not object to the appointment of a permanent receiver for the business on the prayer of those who are admittedly partners when the order of appointment in no manner disturbs complainants in their property and specifically withholds adjudication of the issues whether complainants are partners.

Tillinghast v Courson, 215-957; 247 NW 252

VI DISSOLUTION, SETTLEMENT, AND ACCOUNTING—concluded

Undiscovered assets. A partner may recover his proportionate share of partnership assets discovered subsequent to a dissolution and settlement, and collected by a copartner.

Power v Wood, 200-979; 205 NW 784; 41 ALR 1452

Dissolution—by order in equity. A partnership or joint adventure for a definite contract term will not be cancelled and terminated by a court of equity before the time fixed by the contract on the ground that such quarreling and bickering between the parties have resulted as to render inadvisable the further continuance of the undertaking, when the applicant for the cancellation and termination of the contract is the only one of the parties who has done any quarreling or been guilty of any bickering.

Green v Kubik, 213-763; 239 NW 589

Partners' incompatibility — dissolution for best interests. A partnership dissolution is proper on application of one of the partners, when the record is replete with disputes, bickerings, and litigation between partners and it is obvious that they can no longer work in harmony.

Lunt v Van Gorden, 224-1323; 278 NW 631

Estoppel of joint adventurer. One of two joint adventurers may not wholly exclude his co-adventurer from all fruits of a successful consummation by claiming that the undertaking was accomplished solely through his efforts when he has never rescinded the contract with his co-adventurer, claims no damages because of a breach of contract by the co-adventurer, and when he has to some material extent profited from the funds and efforts of his co-adventurer.

O'Neil v Stoll, 218-908; 255 NW 692

Death of partner—effect. Principle reaffirmed that the death of a partner, generally speaking, works a dissolution of the partnership.

Williams v Schee, 214-1181; 243 NW 529

Surviving partners—burden of proof. In an accounting between the representative of a deceased partner and the surviving partners, the burden of the accounting is upon the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Evidence — insufficiency. Record reviewed, and held quite insufficient to support the theory that the defendant estate was liable for the claim sued on because contracted in the liquidation of a partnership of which the deceased was a member.

Williams v Schee, 214-1181; 243 NW 529

Corporate stock — book value. In an accounting between surviving partners and the representative of a deceased partner, the surviving partners will not be heard to say, on appeal, that there is no evidence of the actual value of the stock of a corporation owned wholly by the partnership, when said partners did not, in the trial court, question the "book" value of said stock.

Fleming v Fleming, 211-1251; 230 NW 359

Liquidation—corporation as part of assets. Where a corporation is the exclusive property of a partnership, its affairs are subject, in an accounting between the surviving partners and the representatives of a deceased partner, to investigation, correction, and review.

Fleming v Fleming, 211-1251; 230 NW 359

Unallowable credits. In an accounting between the representative of a deceased partner and the surviving partners, who continued the partnership business as tho no dissolution had occurred, attorney fees in the accounting proceedings, and personal, family, and household expenses of the surviving partners are properly rejected by the referee as a credit.

Fleming v Fleming, 211-1251; 230 NW 359

Salary of surviving partners. In an accounting between the representative of a deceased partner and the surviving partners, who continued the partnership business as tho there had been no dissolution, an allowance of a credit by the referee for salaries of the surviving partners in a sum less than actually drawn by them will not be disturbed, in the absence of any evidence of the value of said services.

Fleming v Fleming, 211-1251; 230 NW 359

Rejecting salary of superintendent. In an accounting between the representative of a deceased partner and the surviving partners, who continued the partnership business as tho there had been no dissolution, the refusal of the referee to allow as a credit the salary of a superintendent (the surviving partners devoting their entire time to the business) will not be disturbed when there is no evidence of the value or necessity of such services.

Fleming v Fleming, 211-1251; 230 NW 359

Disallowance of unsupported depreciation in assets. In an accounting between the representative of a deceased partner and the surviving partners, who continued the business as tho no dissolution had occurred, the rejection by the referee of a claimed depreciation in the assets of the partnership is proper when there is no evidence to support such depreciation.

Fleming v Fleming, 211-1251; 230 NW 359

VII SURVIVING AND DECEASED PARTNERS

Mistake — effect. The filing of a claim against an estate will not estop the party from abandoning such claim and instituting an action for a partnership accounting with deceased

when such latter proceeding was his sole allowable remedy.

Hull v Padgett, 207-430; 223 NW 154

Action to recover specific property—conditions precedent. A surviving partner cannot maintain an action at law against the representative of a deceased copartner to recover plaintiff's share of specific partnership property appropriated by the deceased partner, in the absence of proof that the partnership affairs have been settled and all partnership debts paid.

Dolan v McManus, 209-1037; 229 NW 687

Accounting — proper form of judgment. Where an accounting proceeding instituted by the widow of a deceased partner, in order to determine her dower interest in the partnership property, is tried on the mutual theory that her interest, when determined, should be impressed as a trust on the entire partnership property, a judgment in rem against the partnership property should be entered, and not a personal judgment against the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Death of partner—liability of estate. Where a deceased was a member of a banking partnership, a plaintiff seeking to hold the estate liable for financial transactions with the bank must definitely establish that the obligation sued on was created before the death of the deceased.

Williams v Schee, 214-1181; 243 NW 529

Implied authority to continue partnership. Where a deceased had been a member of a banking partnership, an order in probate allowing a claim against the estate consequent on a defalcation of a former employee of the bank, cannot be deemed an implied authorization to the administrator to continue the partnership after the death of the deceased.

Williams v Schee, 214-1181; 243 NW 529

Property passing to survivor — contract. Tenants in common of real estate who embark their holdings, and the personal property used in connection therewith, in a partnership, violate no rights of heirship or testamentary rights of their brothers and sisters by including in their partnership contract an agreement that upon the death of one of the partners the survivor shall become the absolute owner of all the partnership property.

Conlee v Conlee, 222-561; 269 NW 259

Continuing partnership—conditions. An administrator, without an authorizing order of court, has no power to bind the estate by continuing a partnership of which the deceased was a member or by creating a new partnership. And under such circumstances the ex parte statements or pretenses of the surviving partners are quite inconsequential.

Williams v Schee, 214-1181; 243 NW 529

Right to close up business — compensation. Surviving partners have a right to continue the partnership business for the purpose of winding up its affairs, but in so doing they become trustees for the heirs of the deceased and must exercise the utmost good faith. Failure to exercise such good faith deprives them of all right to compensation for time and labor expended in closing up the business.

Anderson v Droge, 216-159; 248 NW 344

Allowance and payment of claims—belated filing—insufficient showing of delay. A depositor in a private bank will not be permitted to file and prosecute his claim against the estate of a deceased partner, after the lapse of four years after notice of administration was given, on a showing that the executor soon after his appointment believed the bank as continued by the surviving partners was insolvent, and stipulated for the possible filing, at a later period, by the surviving partners, of a contingent claim against the estate, said stipulation not being shown to be fraudulent and not deceiving said depositor; and especially is this true when the attempt of the depositor to file his claim was evidently an afterthought.

Anthony v Wagner, 216-571; 246 NW 748

Accounting and settlement—right to disregard administration. Notwithstanding the fact that in the administration of an estate the tangible interest of the deceased in a partnership has been sold to the surviving partners under order of court, and the proceeds accounted for, and the administrator discharged, the heirs may maintain, against the surviving partners, an action for an accounting as to the share of said deceased in elements of partnership property other than the tangible property, such, for instance, as profits, and going concern and good-will values. And especially is this true when the surviving partners fraudulently concealed said latter elements of value at the time of the administration aforesaid.

Anderson v Droge, 216-159; 248 NW 344

Continuance of business—effect. Where surviving partners, upon the death of a partner, continue to carry on the partnership business as tho there had been no dissolution, those interested in the share of the deceased partner have the right, on an accounting, to elect to take the profits realized from the continued use of their property.

Fleming v Fleming, 211-1251; 230 NW 359

Accounting for good will. When, on accounting, the heir of a deceased partner is given the benefits of the profits derived from the utilization of the good will of the business,

no further charge should be made against the surviving partners for such good will.

Anderson v Droge, 216-159; 248 NW 344

VIII ACTIONS

Discussion. See 11 ILR 193—Jurisdiction over partnerships, nonpartnership associations, and joint debtors

Action to enforce partner's liability—waiver. The liquidating receiver of a private bank, when appointed with power to bring action against the partners on their individual liability, may, with the approval of the court, and notwithstanding the objections of a creditor, settle and compromise the liability of a partner when the creditor has appeared in the receivership proceedings and secured the allowance of his claim.

Reason: The creditor, by submitting himself to the jurisdiction of the receivership court, irrevocably elects his remedy.

Ellis v Bank, 218-750; 251 NW 744

Creditor—right of action. A creditor of a private banking partnership may maintain an action against one of the partners only, to set aside, as fraudulent, a conveyance by said partner, and to subject said property to the satisfaction of his claim.

Biddle v Worthington, 216-102; 248 NW 301

Authority to authorize suit against partners. In an action for the dissolution of an insolvent partnership, a court of equity has power to authorize its receiver to bring suit against the partners to collect the funds necessary to pay the debts of the partnership in full.

Bierma v Ellis, 212-366; 236 NW 402

Election of remedies. A creditor of an insolvent banking partnership who, under an authorizing order of court, files proof of his claim with a duly appointed and unquestioned receiver of the partnership will not be permitted thereafter to maintain an independent action against the partners until after the receivership has been closed, when the receiver, under an order of court, has already instituted an action against all the partners to collect the amount necessary to settle the indebtedness of said bank; and especially is this true when a multiplicity of suits is avoided.

Bierma v Ellis, 212-366; 236 NW 402

Accounting—right of action. The principle that a partnership cannot sue a partner until there has been an accounting has no application to an action by a partnership against parties who have an interest in partnership assets but are not partners, which action, by amendment, is converted into an action for accounting and transferred to the equity calendar.

Lunt Co. v Hamilton, 217-22; 250 NW 698

Judgment creditors and mortgage holders—proper intervenors. In an action between copartners for receivership and accounting, holders of mortgages and deficiency judgments against land purchased in name of some partners for partnership purposes held proper intervenors.

Heger v Bussanmas, (NOR); 232 NW 663

Abatement of authorized action. A court having ordered its receiver in partnership to begin action against the partners, in order to collect funds with which to pay creditors, has discretionary power, after such action has been commenced, and on a showing that the receiver has in his possession a very large amount of unliquidated partnership assets, to abate the action until such assets are liquidated.

Day v Power, 219-138; 257 NW 187

Chattel mortgage to secure partner's debt. A chattel mortgage by a partner on his undivided chattel interest in the partnership to secure his individual debt becomes absolute when it is made to appear that the partnership is free of debt.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Dismissal of partnership suit. A partnership action cannot be legally dismissed by one half of the partners against the wishes of the remaining half of the partners when such dismissal would be materially injurious to the partnership.

Reason: Partners cannot legally dismiss such an action unless they have authority so to do.

Lunt Co. v Hamilton, 217-22; 250 NW 698

Claim belonging to some of the defendants. In an action against a partnership and against the individual partners thereof, a claim for necessaries furnished by the partnership to plaintiff and her husband (who was a party defendant) is not pleadable as a counterclaim, because said claim does not belong to all the defendants.

Jordison v Jordison Bros., 215-938; 247 NW 491

Review de novo—irrespective of failure to file brief. An action in equity to recover a judgment against the members of an alleged partnership and to impress a trust on certain funds is triable de novo on appeal and the supreme court will examine the record despite parties' failure to furnish brief and argument.

Maybaum v Bank, (NOR); 282 NW 370

10985 Seduction.

Promise of marriage by married man. A promise of marriage will not support a charge of seduction when the promisee knows that the promisor is a married man.

Gardner v Boland, 209-362; 227 NW 902

Minor's loss of time—medical expenses. A minor, in an action for damages for her se-

duction, may not recover for loss of time, nor for the expense of medical service.

Gardner v Boland, 209-362; 227 NW 902

Illicit sexual relations with persons other than defendant. Testimony tending to show that plaintiff in an action for damages for seduction was, shortly after her claimed seduction, guilty of illicit sexual intercourse with men other than the defendant, is admissible on the issues (1) whether plaintiff was truthful in her testimony that she had never had such intercourse except with defendant, (2) whether she was under promise to marry the defendant, and (3) whether defendant was the father of plaintiff's child.

Gardner v Boland, 209-362; 227 NW 902

Instructions — misleading terms. The expression "yielding to the embraces" is not synonymous with "sexual intercourse"; likewise, the expression "wrongful acts" is not synonymous with the term "seduction".

Gardner v Boland, 209-362; 227 NW 902

Unchastity per se. Lewd and lascivious conduct on the part of a female at the very time of her alleged seduction may per se establish her unchastity.

Schultz v Schultz, 203-910; 210 NW 94

10986 Injury or death of minor child.

Emancipation by desertion. A parent who deserts and abandons his minor child thereby emancipates him, and may not maintain an action based on a plea of loss of services consequent upon the wrongful killing of the child.

Lipovac v Iowa Co., 202-517; 210 NW 573

Alienation of affections. A mother may not maintain an action for damages for the alienation of the affection for her of her minor son, in the absence of an allegation that she has thereby been deprived of the custody and services of said minor.

Pyle v Waechter, 202-695; 210 NW 926; 49 ALR 557

Measure of damages—interest on funeral expenses. The measure of damages for wrongful death, while not including reasonable funeral expenses, does include simple interest at a legal rate on such expenses for the time intervening between the premature death and the time when, in the ordinary course of events, the deceased would have died.

Lukin v Marvel, 219-773; 259 NW 782

10989 Prisoner in penitentiary.

Appeal bond—late appearance. When a criminal defendant who had posted an appeal bond did not appear after affirmance of the conviction, because he was incarcerated in a federal penitentiary, but was shortly thereafter brought to the court through the efforts of the surety on his bond, and was then taken to the state reformatory, all at the cost of the surety, there was delivery of the defendant into court so that the state could not recover on the bond.

State v Thomason, 226-1057; 285 NW 636

Convict as defendant in civil action—non-right to attendance in court. In death action against imprisoned convict, motion for production of defendant in court held properly overruled.

Collings v Gibson, (NOR); 220 NW 338

10990 Actions by state.

Discussion. See 9 ILB 225—Recovery of moneys paid out by government officials

Rights and remedies of taxpayer. A taxpayer may, when the proper state official refuses to act, maintain, on behalf of the state, an action to recover state funds received by the defendant in violation of the constitution of the state.

Wertz v Shane, 216-768; 249 NW 661

Estoppel against state. When the state allows an estate to be fully settled, and the executor to be duly and finally discharged without the payment of an inheritance tax, and makes no application to open up the accounts of the executor, it may not thereafter enforce the statutory personal liability of the executor to pay said tax. This is true on two fundamental propositions, to wit: (1) That the court, being prohibited by statute from discharging the executor until the tax is paid, must be presumed, in entering such discharge, to have found that no tax was due, and (2) that the state, by designating the court as its special statutory representative, will not be permitted to deny such presumption.

In re Meinert, 204-355; 213 NW 938

Actions—waiver. The state, after reimbursing a county for the loss of county deposits in an insolvent bank, may validly prohibit an action in its own favor on the depository bond to which it was legally subrogated by the process of reimbursing the county.

State v Bartlett, 207-208; 222 NW 529

Negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee-bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amst. Cas. Co. v Bank, 214-541; 239 NW 4; 242 NW 538

Writ of prohibition—state as plaintiff. An original action in the supreme court, for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; and especially is this true when said private actions arose out of the proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

County attorney's powers—reinstatement of action. A county attorney who, in his official capacity, brings an action in behalf of the state, and later, by amendment, changes said action to a personal action by himself and others, may not, after he ceases to be such officer, reinstate said action as one on behalf of the state. Nor may the court reinstate said action as an official action in the name of said ex-county attorney. Especially is this true when the official county attorney objects to such procedure.

State v Power Co., 214-1109; 243 NW 149

Labor union injunction. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Continuance. A continuance requested on the ground that the state had been made a party to proceedings involving the violation of an injunction by labor union officers was properly refused when the petition of the state alleged the same matter and sought the same relief as the petition of the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

10990.1 Actions against state.

Action against state. Allegations in a petition to quiet title to land and to obtain a writ of possession for said land, (1) that defendants constitute the entire membership of the state board of control,—an agency of the state,—and (2) that said defendants are wrongfully withholding said possession from plaintiff, furnish no sufficient basis for the holding that said action, in truth and fact, is against the state in its sovereign capacity.

Iowa Co. v Board, 221-1050; 266 NW 543

Special appearance—nondeterminable matters. Whether an action is, in truth and fact, an action against the state in its sovereign capacity, is a question which cannot be tried out on a special appearance—the petition not showing on its face that the action is such.

Iowa Co. v Board, 221-1050; 266 NW 543

Aerial navigation statutes—governmental functions—nonliability in performance. The statutory-prescribed rules of the state governing aerial navigation (§8338-c7, C., '35 [§8338.20, C., '39]) have no application to the state in its sovereign capacity, nor to its governmental agencies, nor to the officials of said agencies when exclusively engaged in performing the duties of said agencies.

De Votie v Cameron, 221-354; 265 NW 637

Cross-petition defense—state as proper party—belated objections. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross-petition, such question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Fuel Co., 224-466; 276 NW 41

Action against agent of state. An employee of a state hospital for the insane may not maintain an action for salary against the executive officer thereof, as such action is, in effect, an action against the state.

Cross v Donohoe, 202-484; 210 NW 532

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

State fair board. The Iowa state fair board is an arm or agency of the state and, therefore, not suable.

De Votie v Fair Board, 216-281; 249 NW 429

Prohibited condemnation. Injunction will lie against the members of the state highway commission to enjoin a prohibited condemnation of private property for highway purposes, even tho such commission is an arm of the state.

Hoover v Hy. Com., 207-56; 222 NW 438

10991 Nonabatement by transfer of interest.

Right to show ownership of claim. Upon the substitution of the actual owner of a promissory note sued on, in lieu of a plaintiff who had sued as indorsee for collection only, the substituted plaintiff should be permitted to show by written assignment, and irrespective of any consideration, that the note had been fully and formally retransferred to him.

Richardson v Clark, 202-1371; 212 NW 133

Transfer of title after action brought—effect. The fact that plaintiff after commencing an action on promissory notes transfers the title thereof does not prevent the prosecution of said action to judgment in the name of the original plaintiff.

Grimes Bk. v McHarg, 213-969; 236 NW 418

Belated substitution—discretion. In an action at law by a corporation to recover on a contract, the court has discretionary power during the actual trial and after the jury has been obtained and after some testimony has been introduced, to order plaintiff's assignee for the benefit of creditors to be substituted as plaintiff,—no actual prejudice to defendant being made to appear; and this is true even tho defendant was, of course, deprived of the privilege of examining the jurors relative to their relations to the said assignee.

Webster County Buick Co. v Auto Co., 216-485; 249 NW 203

Double liability of stockholders—nonassignability. The statutory "double liability" of a stockholder in an insolvent state bank to all the creditors of the bank is not of such nature that a sale or assignment thereof by the receiver, even under an order of court, will vest in the vendee or assignee the right to enforce such liability exclusively for his own use and benefit.

Andrew v Bank, 214-1339; 242 NW 62; 82 ALR 1280

Appeal—transfer of interest—effect. An appeal may not be dismissed on the ground that the appellant has transferred to another the subject matter involved in the appeal.

Union Ins. v Eggers, 212-1355; 237 NW 240

10991.1 Women—injury or death.

Preservation of accrued right. An action to recover damages for negligently causing the death of a married woman survives the repeal of the statute authorizing such action, and the measure of recovery in such cases is governed by the repealed statute, not by the measure of recovery provided in a later and substituted statute on the same subject.

Azeltine v Lutterman, 218-675; 254 NW 854

Husband's negligence not imputed to passenger-wife. The negligence of a husband in the operation of an automobile is not imputable to his wife who is riding with him as a passenger.

Hough v Freight Service, 222-548; 269 NW 1

Disabilities of coverture—tort action by husband or wife against other. The rule of the common law that neither the husband nor the wife may maintain an action against the other for damages consequent on the negligent or willful injuring of one by the other, is the law of this state,—not having been abrogated by anything contained in this section.

Aldrich v Tracy, 222-84; 269 NW 30

Wrongfully caused death of wife. In an action for the wrongfully caused death of a wife, the statutory power to allow "such sum as the jury may deem proportionate to the injury" is not an unbridled discretion. Evidence reviewed and held that a verdict of $10,000 was excessive to the extent of $4,000. The deceased was childless and illiterate, had accumulated no property, was a beet weeder for a small part of the year, at small wages, and also operated a boarding house, but whether at a profit did not appear.

Hanna v Central Co., 210-864; 232 NW 421

Disabilities—torts during coverture. A wife may not maintain an action against her husband for damages consequent upon willful injuries inflicted upon her by her husband.

In re Dolmage, 203-231; 212 NW 553

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

10996 Insane person.

Appointment of guardian—irregularities in petition—right to bring action. A petition by the wife of an inmate of a state hospital for the insane, asserting that she was the wife of the inmate who had property, and asking that she be appointed guardian, altho insufficient to meet the statutory requirements for a petition for the appointment of a guardian, was sufficient for the appointment of a temporary guardian, and when notice was accepted by the superintendent of the institution and the wife was appointed, she was at least a temporary guardian and, as such, could maintain an action in behalf of the incompetent.

Jensen v Martinsen, 228- ; 291 NW 422

10997 Defense by minor.

Unauthorized satisfaction of bequest. An order of the probate court authorizing an executor to discharge a cash bequest to a minor by transferring to the father of the minor as natural guardian a note and mortgage belonging to the estate, is wholly void when said order is entered without the appearance of any guardian, regular or ad litem, for the minor.

Irwin v Bank, 218-477; 255 NW 671

Guardian and ward—actions—prompt appointment during trial. No prejudicial error is committed when, after a trial has proceeded for some time, it develops that one of the defendants is a minor, a fact previously unknown to the court, whereupon the court promptly appoints the minor's attorney as his guardian ad litem, inasmuch as the minor's

rights had been fully protected, since said attorney, being present all the time, was fully cognizant of the proceedings up to that point.

Brien v Davidson, 225-595; 281 NW 150

11000 Defense of insane person.

When judgment voidable only. A default judgment, even tho procured by fraud not going to the jurisdiction of the court, against an insane person on personal service, and without the appointment of a guardian ad litem, is not void, but voidable only.

Montagne v County, 200-534; 205 NW 228

Unknown insanity—effect. A judgment in foreclosure which was obtained by the holder in due course of the notes secured, and which has passed to foreclosure deed, will not be set aside on the ground that the defendant was at all times mentally incompetent and that the notes and mortgage were forgeries, (1) when neither the plaintiff nor the court had knowledge of such grounds, (2) when the defendant was personally served in the foreclosure and appeared by counsel and filed answer, and (3) when the defendant had never been adjudged to be insane, nor was he an inmate of a state hospital for the insane.

Engelbercht v Davison, 204-1394; 213 NW 225

Note and mortgage in hands of holder in due course. Neither a negotiable promissory note nor a mortgage given by the makers to secure the same, even tho the mortgage is on a homestead, is subject, when in the hands of a holder in due course, to the plea that the maker was insane at the time of the execution of such note and mortgage.

Farmers Ins. v Ryg, 209-330; 228 NW 63

General rule of liability. Persons of unsound mind will be held liable as to executed contracts when the transaction is in the ordinary course of business, when it is reasonable, when the mental condition was not known to the other party, and when the parties cannot be put in status quo.

Farmers Ins. v Ryg, 209-330; 228 NW 63

Guardian ad litem—when necessary—judgment—when valid. Every person is presumed sane until the contrary appears and unless an adult person appearing in court has been judicially declared insane, there is no requirement that a guardian ad litem be appointed to represent him, this being especially true where, not being confined, he appears by counsel and presents a defense, and a judgment against him will not be set aside.

Ware v Eckman, 224-783; 277 NW 725

Judgment against insane person—validity. The validity of a judgment obtained in a law action against an insane defendant is not affected by such insanity, or by fact that a guardian had been appointed for his property.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

11002 Interpleader.

Availability of remedy. The pre-code equitable action of "interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution against him of separate actions on the policy by said warring parties.

Equitable Life v Johnston, 222-687; 269 NW 767; 108 ALR 257

Prior adjudication—pleading prerequisite to proof. A prior adjudication must be pleaded before evidence thereof is admissible. Rule applicable to interpleaders.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Right to proceeds—change of beneficiary. The original beneficiary, interpleaded in an action on a fraternal insurance policy, acquires no vested interest in benefit as against the subsequent beneficiary designated as such in accordance with bylaws of insurer and statute of this state, notwithstanding insured member's agreement with such original beneficiary that she should remain beneficiary.

Kohler v Kohler, 104 F 2d, 38

CHAPTER 487

LIMITATIONS OF ACTIONS

GENERAL PROVISIONS

11007 Period of.

Discussion. See 22 ILR 128—Amendments after limitation has run

Atty. Gen. Opinions. See '25-26 AG Op 171; '28 AG Op 325; '30 AG Op 174, 355; '32 AG Op 232; '36 AG Op 395; AG Op Aug. 12, '39

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Adverse possession and acquiescence in boundary disputes. See under §12306

Limitation of action on fire insurance policy. See under §9018

I NATURE OF STATUTORY LIMITATION

Construction—retroactive effect. A statute of limitation will be given retroactive effect only when it appears by express provision or necessary implication that such was the legislative intent.

Hinrichs v Locomotive Wks., 203-1395; 214 NW 585

Obligation of contracts—shortening limitation on action—constitutional condition. Principle reaffirmed that the legislature may constitutionally shorten the time within which an existing cause of action may be barred if a reasonable time is given for the commencement of an action before the bar takes effect.

Johnson v Leese, 223-480; 273 NW 111

Action against tax deed holder. When the owner of the fee title continued in possession with rights subservient to the rights of the tax title owner after land was sold for nonpayment of taxes, and the owner's right to bring an action for recovery of the real estate was barred by a statute of limitations, one who claimed title under the owner was not entitled to succeed in an action to quiet title against the tax title owner.

McCormick v Anderson, 227-888; 289 NW 440

II WHAT LAW GOVERNS

Bar in foreign state—effect. Action on a promissory note executed in a foreign state is barred in this state when action is barred in said foreign state, even tho such promissory note was given in renewal and in lieu of a note executed in this state.

Martin v Martin, 205-209; 217 NW 818

Bar under foreign jurisdiction. Principle reaffirmed that the statute of limitation of the forum ordinarily governs, except where a foreign-accruing claim is fully barred by the law of the foreign country.

Williams v Burnside, 207-239; 222 NW 413

Federal court rule as applied to state statute. The rule in federal courts in equitable actions is that state statutes of limitations are not controlling but will be followed in application of the doctrine of laches unless the circumstances of the particular case are convincing that a shorter or longer period would be just.

Crawford Bank v Crawford County, 66 F 2d, 971

Mortgage on foreign land. A note and mortgage representing a loan on land in a foreign state, duly signed in a foreign state by a resident thereof, and forwarded to the payee in this state, is an Iowa contract insofar as the statute of limitation is concerned, when such forwarding and receiving were with the understanding that the payee would apply the amount of the loan in discharging a prior matured mortgage on the land, if in so doing payee would be assured of a first lien.

Andrew v Ingvoldstad, 218-8; 254 NW 334

National bank directors—violation of duty—state statute invoked—construction. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

Note delivered in this state. When the payee of a promissory note prepares it in blank in this state and sends it to the proposed maker in another state without any specific direction as to the method or manner in which it is to be returned to the payee after being signed, delivery takes place only when the note reaches the hands of the payee in this state. It follows that the statute of limitation of this state governs such note.

In re Young, 208-1261; 226 NW 137

III CONSTRUCTION OF LIMITATION LAWS IN GENERAL

Doing equity notwithstanding statute. The full equitable titleholder of land held under a dry trust who asks equity to invest him with the full legal title must do equity to the extent of reimbursing the trustee for good-faith expenditures made by him at the request, or with the consent and acquiescence of the equitable titleholder in improving or preserving the property, even tho the trustee's claims for such expenditures are barred at law by the statute of limitations.

Warner v Tullis, 206-680; 218 NW 575

Accrual of action—plaintiff perfecting cause of action—exception to rule. While a cause of action does not accrue so as to start the statute of limitations running unless all the facts exist so that plaintiff can allege a complete cause of action, an exception occurs where the only act necessary to perfect the plaintiff's cause of action is one to be performed by the plaintiff and he is under no restraint or disability in the performance of such act.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts—statute runs after reasonable time for presentment. Where no demand or presentment for payment of draft is made for over 19 years after its issuance, and where only person who could make due presentation was plaintiff-holder, the statute of limitations began to run after a reasonable time for presentment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Laches—effect on law action. The doctrine of laches, in the absence of elements of estoppel, finds no application to an action at law.

Reinertson v Struthers, 201-1186; 207 NW 247

Accounts—interest items. In an action by a widow to establish a claim against the estate of her deceased husband based on an alleged oral contract of decedent to repay a loan of money made by appellant widow to decedent, prior to November 1, 1912, to which the statute of limitations was pleaded, held, mere posting of items of interest applicable to one individual transaction is insufficient to show a "connected series of transactions" so as to convert the matter into a "continuous, open, current account" under statute providing cause of action accrues on date of last item, as this means a connected series of transactions.

Leland v Johnson, 227-520; 288 NW 595

Action in 1923 to enjoin excessive assessment of 1919—no laches. Banks suing in 1923 to enjoin excessive levy in years 1919 to 1922 inclusive, held, not estopped by laches.

Munn v D. M. Nat. Bank, 18 F 2d, 269

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Banking superintendent. The superintendent of banking in his acts as bank receiver is not a public officer within the meaning of a statute providing for a limitation on the time for bringing an action against a sheriff or other public officer.

Bates v Niles, 226-1077; 285 NW 626

Barred claims—when pleadable. Statutory principle reaffirmed that a debtor, when sued, may employ, as a set-off against plaintiff's demand, any claim which is barred by the statute of limitation, (1) provided that the debtor owned the claim when it became barred, and (2) provided that the claim was not barred when the demand sued on accrued.

Riggs v Gish, 201-148; 205 NW 833

Right to offset barred claim. A bank may apply the deposit of a deceased depositor on the promissory note of the depositor to the bank, even tho such note is barred by the statute of limitation.

Merritt v Peterson, 208-672; 222 NW 853

Federal court rule as applied to state statute. The rule in federal courts in equitable actions is that state statutes of limitations are not controlling but will be followed in application of the doctrine of laches unless the circumstances of the particular case are convincing that a shorter or longer period would be just.

Crawford Bank v Crawford County, 66 F 2d, 971

National bank directors—violation of duty —state statute invoked. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

Motion to re-tax costs—laches as bar. A delay of some six years on the part of a defendant in moving for a re-taxation of costs, held not such laches as to bar the motion, defendant having moved as soon as assured of the illegality in the taxation, and no one being materially prejudiced by the delay.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Lost admission in writing reviving debt. An admittedly executed but lost written instrument providing for a payment on a real estate mortgage was an admission of indebtedness sufficient to revive the debt barred by the statute of limitations, since neither the amount nor the indebtedness need be specifically referred to, for if the natural and necessary inference from the writing is an admission of an unpaid indebtedness, it is sufficient.

Barton v Boland, 224-1215; 279 NW 87

Revival of contract—admission in writing. In an action by a widow to establish a claim against her deceased husband's estate based on an oral contract to repay to appellant widow a sum of money loaned to decedent prior to November 1, 1912, wherein it is shown by the record of entries in decedent's ledger and by checks signed and deposited by the decedent to joint savings account with the widow, that interest was computed on what purported to be a loan of $4,000, and even tho the statute of limitations had run, the conduct, circumstantial evidence, and admissions of the party to be charged sufficiently showed the existence of a contract so as to make applicable the statute providing for revival of contract by admission in writing.

Leland v Johnson, 227-520; 288 NW 595

Setting aside—limitation of actions—laches. A suit in equity by trustee in bankruptcy to set aside deed by bankrupt to husband on grounds of want of consideration, fraud, and failure to take possession of land, brought more than six years after recording of deed, is barred by laches under statute of limitations where only one creditor secured allowance of claim, which claim was based on note past due when deed was recorded.

Monroe v Ordway, 103 F 2d, 813

Statutory double liability repealed—limitation of action. After the effective date of Ch 219 of the 47th G. A., the act repealing the statutory double assessment liability on bank stock, a closed bank's receiver may not maintain against the executor and beneficiaries under the will an action to enforce the double liability as to stock issued prior to December 1, 1933, and formerly owned by decedent.

Bates v Bank, 227-925; 289 NW 735

Time of payment — marginal entry. A properly dated promissory note which fails to state, in the strict body thereof, any time for payment, is, nevertheless, for the purpose of a demurrer presenting the bar of the statute of limitation, payable at a fixed and definite date when, in the corner of the note and opposite the signature to the note, appear the words, "the term of five years".

Nylander v Nylander, 221-1358; 268 NW 7

IV RETROACTIVE OPERATION

Legislative intent. A statute of limitation will be given retroactive effect only when it appears by express provision, or necessary implication, that such was the legislative intent.

Hinrichs v Locomotive Wks., 203-1395; 214 NW 585

V CHANGE OR REPEAL OF LIMITATION

Shortening limitation on action — constitutional condition. Principle reaffirmed that the legislature may constitutionally shorten the time within which an existing cause of action may be barred if a reasonable time is given for the commencement of an action before the bar takes effect.

Johnson v Leese, 223-480; 273 NW 111

VI LIMITATION AS AGAINST GOVERNMENT, STATE, MUNICIPALITY, PUBLIC CORPORATION, OR OFFICERS

(a) IN GENERAL

Computation of period—accrual of right—official nonfeasance. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred, by this section, after three years.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

County claim for care of insane. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Inapplicability—duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

Mandamus—when statute runs. The statute of limitation commences to run against an action of mandamus to compel the board of supervisors to levy an additional assessment to pay drainage warrants even tho the board had not levied or otherwise provided for the additional assessment to complete the fund from which the warrants are to be paid.

Lenehan v Drain. Dist., 219-294; 258 NW 91

Nonperformance of public duties. Mandamus to compel a public officer to perform a mandatory public duty is not barred by the lapse of any time.

Perley v Heath, 201-1163; 208 NW 721

(b) IN RE HIGHWAYS, STREETS, ALLEYS, AND PUBLIC GROUNDS

Public not barred. An action to oust an alleged franchise holder from public streets because of the invalidity of the alleged franchise, tho brought by the county attorney in quo warranto, cannot be barred by the lapse of time.

State v Munn, 216-1232; 250 NW 471

"Adverse possession" of highway. The term "adverse possession" is not employed in decisions relative to the abandonment of public highways in the technical sense which such term has acquired as a part of the statute of limitation, but rather in the sense of recognizing those antagonistic acts on the part of a landowner which, if unheeded by the public, will have evidentiary bearing on the issue of abandonment.

Clare v Wogan, 204-1021; 216 NW 739

Inadequate showing of abandonment. A duly established highway which constituted a link between other existing highways is not shown to have been abandoned by evidence that, about a year after the establishment, the landowner (who had petitioned for the highway) fenced in the part carved from his other lands, and held possession for some 15 years, and that the road had never been used, because the public officers had failed to bridge and grade impassable places thereon.

Clare v Wogan, 204-1021; 216 NW 739

Nonapplicability to nonaccepted street. In a quiet title action where land was dedicated but never accepted as street in unincorporated village, the rule that statute of limitations will not run against a municipality exercising a governmental function, does not apply.

Brewer v Claypool, 223-1235; 275 NW 34

No title accrues from encroachment on highway. Encroachment by an adjoining landowner on an established public highway will not ripen into a title through any statute of limitations, doctrine of acquiescence, adverse possession, or estoppel—the establishment and maintenance of public highways being a governmental function.

Richardson v Derry, 226-178; 284 NW 82

"Nonuser" of highway. Nonuser of an established public highway is not, in and of itself, sufficient to establish a claimed abandonment of the highway, especially when the nonuser is caused by the failure of the public officers to promptly bridge or grade places otherwise impassable.

Clare v Wogan, 204-1021; 216 NW 739

Obstructions and encroachments on highway. Encroachments on a public highway in the form of fences or like obstructions furnish no basis for a legal right, howsoever long continued.

Dickson v Davis County, 201-741; 205 NW 456

Streets and alleys—estoppel to open. A city estops itself from asserting any right in and to a public alley when, knowing that a person has taken possession of such alley under a claim of right, it permits such person to remain in undisturbed possession under such claim for ten years, and to erect valuable improvements on such alley.

Page & Crane v City, 208-735; 225 NW 841

Torts—notice to municipality of injury—proof of service. Evidence of service of notice of injury in consequence of defective street, in order to prevent the attaching of the "three month" statute of limitation, held sufficient to justify submission to jury of the issue of such service.

Cuvelier v Dumont, 221-1016; 266 NW 517

Trees in highway not property of adjoining owner. A property owner abutting and occupying a part of a highway has no rights in trees growing on such part of the highway, no matter how long his occupancy of the highway continued before public convenience and necessity required appropriation of the full highway width.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Unallowable alteration in highway. A highway which was established substantially on a designated line, but which was actually opened and maintained by the public authorities and fenced by the various abutting property owners for more than a half century on a line variant from the established line, may not be summarily changed back to the established line and thereby made to embrace lands which were theretofore undisturbed.

Clarken v Lennon, 203-359; 212 NW 686

VII LIMITATIONS AS AGAINST QUASI-PUBLIC CORPORATIONS

Waterworks sold to city—stockholder's action to establish interest barred. Where a waterworks was sold to a city, and a stockholder seeks to establish an interest in the waterworks property on the ground that the city took the property burdened with a trust for his benefit, the action was barred by statute of limitations where no effort to enforce claim against city was made during a period of more than 10 years after the sale.

Shaver v Des Moines, 227-411; 288 NW 412

VIII LIMITATION RUNS IN FAVOR OF PUBLIC

Public not barred by statute. An action to oust an alleged franchise holder from public streets because of the invalidity of the alleged franchise, tho brought by the county attorney in quo warranto, cannot be barred by the lapse of time.

State v Munn, 216-1232; 250 NW 471

Unaccepted platted street—applicability. Where parties claim land, dedicated in plat as a street but, not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

Streets—nonuser—adverse possession—estoppel. Tho a street be legally established, yet where (1) the municipality does not open up the street, or there is nonuser for the statutory period, and (2) private rights have been acquired by adverse possession, then abandonment may be presumed, the public estopped from asserting any rights therein, and public rights in street extinguished.

Brewer v Claypool, 223-1235; 275 NW 34

IX PERSONS WHO MAY RELY ON LIMITATION

National bank directors—state statute invoked. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

Inapplicable to tax sale for unpaid drainage assessments—duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

X ESTOPPEL TO RELY ON LIMITATION

Estoppel to plead limitation.

Dist. Twp. v French, 40-601
Findley v Stewart, 46-655
Bradford v McCormick, 71-129; 32 NW 93
Wilder v Secor, 72-161; 33 NW 448
Carrier v Railway, 79-80; 44 NW 203
McBride v Railway, 97-91; 66 NW 73
Mereness v Bank, 112-11; 83 NW 711
Daugherty v Daugherty, 116-245; 90 NW 65
Faust v Hosford, 119-97; 93 NW 58
Simmons v Western Co., 171-429; 154 NW 166
Van Wechel v Van Wechel, 178-491; 159 NW 1039
Ogg v Robb, 181-145; 162 NW 217
Conklin v Towne, 204-916; 216 NW 264
Murphy v Hahn, 208-698; 223 NW 756

X ESTOPPEL TO RELY ON LIMITATION —concluded

Estoppel. A party may not enter into an understanding with another to the effect that a claim shall remain in status quo, and abide the outcome of pending litigation in another action, and then plead the statute of limitation because of such waiting period.

Weitz v Guar. Co., 206-1025; 219 NW 411

Elements of estoppel. The maker of a promissory note cannot be held estopped to plead the statute of limitation in the absence of evidence of some act of omission or commission upon which the holder relied to his detriment.

King v Knudson, 209-1214; 229 NW 839

Nonestoppel by municipal corporations. The act of a city attorney in stating that he would not plead the statute of limitation against a proposed action against the city for an injury claimed to have been suffered because of a defective street will not estop the city from interposing said plea when the action is actually instituted. Whether the municipality could, under any circumstances, estop itself, quaere.

Welu v Dubuque, 202-201; 209 NW 439

Compromising barred claim. If parties have actually compromised a bona fide controversy between themselves relative to the claim of one of the parties, it is immaterial whether, at the time of the compromise, the claim in controversy was barred by the statute of limitation.

Marron v Lynch, 215-341; 245 NW 346

Delay induced by debtor. The fact that a debtor repeatedly requests time in order to investigate the claim made against him before paying it, and the fact that the creditor repeatedly acquiesces in such delay tho under no obligation so to do, will not estop the debtor, when sued, from pleading the statute of limitation which in the meantime has fully run because of said delays.

Bundy v Canning Co., 215-674; 244 NW 841

Enforcing unknown trust. A trust fund, created without the knowledge of the cestui que trust, in the form of a bank deposit in a national bank and carried on the books of the bank for many years and then dropped, may not, after the bank has become insolvent, a receiver appointed, its affairs liquidated, and its charter surrendered and cancelled, be enforced against a bank which took over certain assets of the old insolvent bank, and assumed certain of its obligations, not including, however, the trust fund in question.

Short v Bank, 210-1202; 232 NW 507

Laches and stale demands. Principle recognized that delay, without any showing of prejudice, in the prosecution of a claim in equity, for a period of time less than the statute of limitation, does not constitute laches.

Lutton v Steng, 208-1379; 227 NW 414

Pleading—sufficiency. A plea, in avoidance of the statute of limitation, to the effect that, while plaintiff city had full knowledge of its cause of action against defendant under an ordinance in the form of a contract, it relied, until the statute had run, on defendant's deliberately false representation that he had never accepted or agreed to said ordinance, is demurrable because presenting no legal basis for tolling said statute, there being no allegation as to diligence to discover the falsity of said representation.

Pella v Fowler, 215-90; 244 NW 734

Right to corporate transfer of stock—laches —effect. Delay of some seven years, by a pledgee of corporate shares of stock, to enforce his right to have the stock transferred on the corporate stock records, will not bar the enforcement of said right when there are no unprotected rights of third parties intervening, and when the corporation has not been harmed by the delay.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

XI AGREEMENTS AS TO PERIOD OF LIMITATION

Statutory bonds. Whether parties to a statutory bond will be permitted by contract to specify the time before which, or after which, an action can be maintained, quaere.

Page County v Deposit Co., 205-798; 216 NW 957

Unreasonableness. A contract provision in an indemnity bond which requires the obligee to begin suit thereon before the amount of his recovery on the bond is determinable, is unreasonable, and therefore unenforceable. In such case, the general statute which limits actions applies.

Cook v Heinbaugh, 202-1002; 210 NW 129

Unreasonableness. A provision in a contract of insurance which prohibits the bringing of an action earlier than 60 days or later than 90 days after loss is unreasonable per se and void.

Page Co. v Deposit Co., 205-798; 216 NW 957

XII ACCRUAL OF RIGHT OF ACTION OR DEFENSE

Discussion. See 4 ILB 118—Accrual of cause of action

(a) ACCRUAL IN GENERAL

Amendment to petition—statute of limitations. An amendment to petition, setting up a new cause of action barred by the statute of limitations, may be stricken, but when both the original petition and the amendment plead the same cause of action in general allegations

of negligence, such amendment may not be stricken.

Olson v Cushman, 224-974; 276 NW 777

Claims—statute of limitations—continuing liability accruing after death—peculiar circumstances. For the liability of a decedent accruing against his estate on account of ownership of a bank, an action thereon, commenced within five years after the closing of the bank and appointment of a receiver, is neither barred by the general statute of limitation nor by the one-year limitation on filing claims against an estate, when peculiar circumstances concealed the estate's liability thereon.

Daniel v Best, 224-1348; 279 NW 374

Computation of period—claim payable "on or before" death. An oral contract to pay for services, payable "on or before" the death of the promisor, matures at his death and therefore is not barred by the statute of limitations, even tho the claim was running for over 20 years.

Gardner v Marquis, 224-458; 275 NW 493

Defect of notice of commencement of action —noninterruption of running of limitations. In action to recover erroneous refund of income tax, summons addressed to marshal only and commanding him to summon named defendants to appear on specific date "to answer to a complaint filed by the United States of America" was defective as not addressed to defendants, not stating cause of action, and not describing consequences of failure to defend, and hence did not interrupt running of limitations as of date of service.

U. S. v French, 95 F 2d, 922

Premature commencement — instructions. Record reviewed, and held to properly present defendant's plea of premature commencement of the action.

Zabawa v Osman, 202-561; 210 NW 602

School tuition deemed open account. In an action to recover tuition accumulating yearly during the period from 1930 to 1937, the court properly held that the portion of the claim accruing in the period from 1930 to 1932 was not barred by a five-year statute of limitations, since a further statute made a cause of action on a continuous, open, and current account accrue on the date of the last item therein.

School Twp. v Nicholson, 227-290; 288 NW 123

Statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American B. & C. Co., 225-638; 281 NW 172

Plaintiff perfecting cause of action—exception to rule. While a cause of action does not accrue so as to start the statute of limitations running unless all the facts exist so that plaintiff can allege a complete cause of action, an exception occurs where the only act necessary to perfect the plaintiff's cause of action is one to be performed by the plaintiff and he is under no restraint or disability in the performance of such act.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts—demand necessary within limitation period. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee bank, but the demand cannot be postponed indefinitely and must be made within the 10-year limitation period.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Cashier's check as bill of exchange—demand unnecessary — action accrues at making — barred after 10 years. The holder of a cashier's check, certain in amount, containing no provision respecting demand and not in the nature of a certificate of deposit, has a right to sue thereon at any time from and after its issuance. Treated as a bill of exchange, presentment and demand for payment are not necessary to start running the statute of limitations. Therefore, after 10 years from its issuance, a right of action thereon is barred.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Deposit certificate—action accrues only after demand. Makers of notes, acceptors of bills of exchange and issuers of certificates of deposit are charged on the instruments from their inception, and presentment to the maker, or acceptor is unnecessary; but, as to the issuer of a certificate of deposit, there is an imputed agreement that before the depositor may sue the bank thereon, actual demand is necessary to mature the debt.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Certified check as certificate of deposit—action accrues only after demand. The act of a

XII ACCRUAL OF RIGHT OF ACTION OR DEFENSE—continued

(a) ACCRUAL IN GENERAL—concluded

bank in certifying a check, at the request of the holder, creates a new obligation on the part of the bank to that holder, and the check then becomes in legal effect an ordinary certificate of deposit for the holder. Being such, an action thereon does not accrue until it is presented for payment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Negotiable instrument—"reasonable time" for presentment—primary and secondary liability. The "reasonable time" clause of §9531, C., '35, negotiable instruments law, applies only to persons secondarily liable on the instrument. It has no application in determining what is a reasonable time for presentment, where such step is only preliminary to the enforcement of a remedy against a party primarily liable.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Agreement to pay debt out of insolvent estate. A contract to pay a debt out of dividends on a claim against an insolvent may not be said to be barred when the dividends declared have been so applied and when the estate of the insolvent is still pending.

Flack v Linden Bank, 211-6; 228 NW 667
Flack v Linden Bank, 211-15; 228 NW 670

(b) ACCRUAL IN RE REAL PROPERTY

Contribution by co-tenant. The cause of action in favor of one tenant in common against his co-tenant for contribution for the outlay in discharging an incumbrance on the common property accrues instantly upon payment of the incumbrance and is barred in five years.

Lawrence v Melvin, 202-866; 211 NW 410

Damages—original or continuing. Where a bridge which spanned a natural watercourse or drain across a public highway was removed and replaced by the public authorities with a solid and permanent earth embankment, the injury or hurt to nearby lands, from flood water consequent on said change in the highway, must be deemed original damages which mature upon completion of the embankment—or at least on the occurrence of substantial damages consequent on the change. It follows that the maintenance of said embankment may not be legally questioned by action commenced after the lapse of five years from the maturity of said damages.

Thomas v Cedar Falls, 223-229; 272 NW 79

Injury to property—trespass. The cause of action in favor of a mortgagee and against a third party for wrongfully entering upon the mortgaged premises and removing gravel therefrom, and thereby impairing the mortgage security, accrues when the gravel is removed—when the actual injury is inflicted—not when the mortgagee discovers said injury.

New York Ins. v Clay County, 221-966; 267 NW 79

Mistake tolling statute—burden of proving nondiscovery on pleader. A mortgagee, seeking to reform his mortgage to correct an error in the real estate description and escape the statute of limitations on the ground of mutual mistake which tolled the statute until discovered, has the burden of showing he did not discover the error until a time within five years before bringing action, and without which proof the statute operates as a bar.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Mortgage assumed by grantee—effect of extension. When grantees of property accepted a deed by which they assumed a mortgage debt on the property, the statute of limitations began to run from the time of the acceptance of the deed, but the grantees were still liable after the 10 years when they had extended the time of maturity.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Municipal interference with ingress and egress. An action by a property owner against a city for damages consequent on a long-delayed but finally completed street improvement which, while somewhat various in its operations, is one project, and which substantially destroys the owner's means of passing to and from his property, does not accrue until the improvement is completed.

Ashman v Des Moines, 209-1247; 228 NW 316; 229 NW 907

Railway right of way. The period of adverse possession of a railway right of way begins to run when the claimant takes possession under a color of title or claim of right, and not at a later date when the court ordered the railway sold.

Montgomery County v Case, 212-73; 232 NW 150

Special limitations unaffected by general. The limitation contained in §11028, C., '35, requiring mortgage foreclosure within 20 years, is subject only to the exceptions contained in that section, and not to the exceptions appearing in §11018, C., '35, dealing with revival of action by admission of the indebtedness. This latter section applies only to the general statutes of limitations.

Lackey v Melcher, 225-698; 281 NW 225

Tenancy in common—accounting. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common prop-

erty, until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

Wrongful flooding of land—when action accrues. Where a city, by the erection of a dam on its own land, wrongfully flooded adjacent private land, and some years later instituted proceedings to condemn said overflowed land for a public purpose but later wholly abandoned said proceedings, the injured property owner may not say that his cause of action for damages did not accrue until the city abandoned its condemnation proceedings.

Wheatley v Fairfield, 221-66; 264 NW 906

(c) ACCRUAL IN RE IMPLIED CONTRACTS

No annotations in this volume

(d) ACCRUAL IN RE EXPRESS CONTRACTS

Agreement extending time. The extension of the time for the payment of the debt was sufficient consideration for an agreement extending a mortgage, even tho the holder reserved the right to sue at any time any person who did not consent in writing to the extension.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Marriage contracts. An action for damages for breach of promise of marriage accrues on the breach, and is barred upon the expiration of two years therefrom.

Wilson v Stever, 202-1396; 212 NW 142

Guardianship—action on bond—accrual. Action on the bond of a guardian is barred in ten years (1) from the death of the guardian, or (2) from the death of the ward, or (3) from the attainment by the ward of his majority.

Armon v Craig, 203-1338; 214 NW 556

Guardianship — conversion — effect. Conversion by a guardian of the guardianship funds does not start the running of the statute of limitation on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Guardianship — failure to account — effect. The statute of limitation is not held in abeyance on the bond of a guardian by the fact that the guardian makes no accounting or settlement.

Armon v Craig, 203-1338; 214 NW 556

Unpaid subscriptions for stock — order for assessment. The power of the court to enter an order of assessment on unpaid written contracts of subscription for corporate stock in a corporation which has become insolvent and is under receivership, is not barred from and after the lapse of five years from the time the attorney general brought the action for dissolution and alleged the insolvency of the corporation, nor from and after the lapse of five years from the time when the insolvency of the corporation was definitely determined.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

(e) ACCRUAL IN RE TRUSTS AND BAILMENTS

Impressing trust on proceeds of lienable property. An action to impress a trust on the proceeds of property on which a landlord had a lien, against a depository who had full knowledge that the sale had been had for the benefit of the landlord, is not barred immediately after the lapse of six months from the termination of the lease.

Andrew v Bank, 208-1184; 225 NW 957

Recovery of erroneous payment. An action to recover estate funds paid out by an executor under an interlocutory but erroneous order for distribution accrues when the erroneous order is set aside and the executor is ordered to proceed to recover the erroneous payments.

Dillinger v Steele, 207-20; 222 NW 564

Statute of limitation—clerk's costs barred after five years. Clerk's costs inuring to the general fund when collected are no part of the judgment to which they are incident, but are only a debt, not necessarily arising out of a governmental function, which costs are such debts as become outlawed at the expiration of five years and may not then be retaxed and collected.

Great Western Ins. v Saunders, 223-926; 274 NW 28

Trust estate. The statute of limitation does not commence to run against an action for the recovery of trust funds until the trustee, on due notice, repudiates the trust.

Hoffman v Hoffman, 205-1194; 219 NW 311

Trust relation — repudiation. Principle reaffirmed that the statute of limitation commences to run against an action to enforce a trust, from the time the trustee openly repudiates the trust relationship.

In re Hellman, 221-552; 266 NW 36
Howes v Sutton, 221-1326; 268 NW 164

Trust — repudiation necessary to start statute. The statute of limitation does not commence to run against the beneficiary of an express and continuing trust until the trustee directly repudiates the trust. Evidence held insufficient to show repudiation at such remote date as to bar an action for accounting. So held where the grantee of land—the trustee—

XII ACCRUAL OF RIGHT OF ACTION OR DEFENSE—continued

(e) ACCRUAL IN RE TRUSTS AND BAILMENTS—concluded

took title under written agreement to account to grantor for one-half of the profits which might be realized on a sale.

Howes v Sutton, 221-1326; 268 NW 164

Trusts — mere lapse of time. A plea that an action to enforce a trust is barred by the statute of limitation must allege facts other than the mere lapse of time.

Spring v Spring, 210-1124; 229 NW 147

(f) ACCRUAL IN RE NUISANCES

Injury to relative rights—nuisance. An action for damages consequent on a nuisance is not an action for injury to "relative rights" and is not, therefore, barred in two years.

Chase v Winterset, 203-1361; 214 NW 591
Hill v Winterset, 203-1392; 214 NW 592

(g) ACCRUAL IN RE TORT

Actions—accrual—sale of stock. A cause of action for damages arising out of the fraudulent sale of stock accrues when the contract induced by fraud is executed or the stock is bought and paid for.

Smith v Utilities Co., 224-151; 275 NW 158

(h) ACCRUAL IN RE OFFICIAL TRANSACTIONS

Mistake of law—statute not tolled—mistake defined. Where a sheriff collects fees under a mistake of law, the failure to discover a mistake of law will not toll the running of the statute of limitations. The word "mistake" in §11010, C., '35, means mistake of fact.

George v Webster County, 211-164; 233 NW 49

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

Contractor's bond. The right of a public corporation to bring an action on a public contractor's bond conditioned to hold the municipality harmless from all loss which it may suffer in consequence of the contractor's default does not accrue until after judgment is rendered against the city and the same is paid by the city.

Waukon v Surety Co., 214-522; 242 NW 632

Drainage outlet repair—contribution—statute of limitation. The legal right of the governing body of a drainage district located in one county to compel a drainage district located in another county, through its governing body, to contribute to the cost of cleaning out, deepening, enlarging, extending or straightening of the outlet which is common to both of said districts, accrues when the actual cost of said work is legally apportionable to the different districts; and action to enforce said right, unless instituted within five years after said accrual, is barred by the statute of limitation. And the making of an erroneous apportionment will not toll said statute.

Board v Board, 221-337; 264 NW 702

Special assessment certificates. A cause of action accrues against a city or town on special assessment certificates, issued and delivered by it for street improvements, at the point of time when it fails to levy valid assessments for the payment of said certificates, and such cause of action is barred in 10 years after said accrual.

Stockholders Inv. v Town, 216-693; 246 NW 826

Statutory liability. An action to enforce the statutory liability of a county to return mortgage foreclosure execution fees to the certificate holder (when the debtor does not redeem) is barred from and after the expiration of five years from the enactment of the statute giving the right to such return. (40 GA., Ch 102.)

Liljedahl v Montgomery County, 212-951; 237 NW 523

See George v Webster County, 211-164; 233 NW 49

(i) ACCRUAL IN RE STATUTORY ACTIONS AND LIABILITY

Mandamus against county supervisors to erect bridge—nonlapse of time. Mandamus to compel the board of supervisors to erect a bridge on an established and existing highway at the point where the highway is crossed by a public drainage improvement is not barred by the lapse of time.

Perley v Heath, 201-1163; 208 NW 721

Corporate officers' personal statutory liability. A cause of action to enforce the statutory-declared personal liability of corporate officers and directors for prohibited, excess corporate indebtedness (now repealed) is barred after the lapse of five years from the creation of the indebtedness.

Preston v Howell, 219-231; 257 NW 415; 97 ALR 1140

Transfer of corporate stock—when barred. The right of the pledgee of corporate shares of stock to have said stock transferred on the corporate stock records is based on a written contract arising out of the articles of incorporation, bylaws, certificate of stock, and statutes (§§8386, 8387, C., '27), and consequently such right may be enforced at any time within the

10-year period following a written demand for such transfer, unless the enforcement of such right is barred by laches.

Bankers Trust v Rood, 211-289; 233 NW 794; 73 ALR 1421

XIII DEATH AND ADMINISTRATION

Discussion. See 22 ILR 557—Limitations and claims against estate

Computation of period—claim payable "on or before" death. An oral contract to pay for services, payable "on or before" the death of the promisor, matures at his death and therefore is not barred by the statute of limitations, even tho the claim was running for over 20 years.

Gardner v Marquis, 224-458; 275 NW 493

Decedent's bank stock. After the effective date of Ch 219 of the 47th GA., the act repealing the statutory double assessment liability on bank stock, a closed bank's receiver may not maintain against the executor and beneficiaries under the will an action to enforce the double liability as to stock issued prior to December 1, 1933, and formerly owned by decedent.

Bates v Bank, 227-925; 289 NW 735

Statute not suspended by death of claim holder. The statute of limitation having commenced to run on a cause of action, during the lifetime of the person in whose favor the cause of action accrued (he being under no disability) is not suspended by the death of such person, even tho the claim descends to minor heirs.

Hodgson v Keppel, 211-795; 232 NW 725

Unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Valid probate claim—no duty to interpose statute. An administrator is not required to resist a valid existing claim nor interpose the statute of limitations against a claim he believes is just.

In re Sterner, 224-605; 277 NW 366

XIV PERSONAL DISABILITIES AND PRIVILEGES

Guardianship—action on bond—accrual. Action on the bond of a guardian is barred in ten years (1) from the death of the guardian, or (2) from the death of the ward, or (3) from the attainment by the ward of his majority.

Armon v Craig, 203-1338; 214 NW 556

Infants—disaffirmance. A minor, upon becoming of age, is required to disaffirm contracts made during minority within a reasonable time after attaining majority or within a reasonable time after discovery of the fraud.

In re Fisher, 226-596; 284 NW 821

Guardian and ward—failure to disaffirm. In guardianship proceeding, wherein father acting as guardian made a settlement with his children after son had reached his majority, but daughter lacked three months of being 21 years of age, and suit against the father for an accounting was not brought until 2½ years after the settlement, held, evidence sufficient to support finding of trial court in approving the guardian's report which, in effect, approved the settlement, the same having been ratified by failure to disaffirm within a reasonable period of time.

In re Fisher, 226-596; 284 NW 821

XV PENDENCY OF LEGAL PROCEEDINGS

Amendments containing "thread" of original claim not barred. In an action for compensation for professional engineering services involved in construction of a sewage disposal plant, profuse substitutions and amendments to a petition which keep a thread of thought identifying them with the claim in the original notice, which amendments and substitutions tho not filed within the allowable period of the statute of limitations, come within the rule that commencement of the action tolls the statute.

Slippy Corp. v Grinnell, 224-212; 276 NW 58

Filing probate application not commencement of action. When heirs filed an application in probate, more than ten years after the clerk had approved certain claims, asking that the claims be disallowed and expunged from the record, the right to object to such claims was not barred by the statute of limitations, as the filing of the application was an appearance prior to any final adjudication in the still pending proceedings to collect such claims, rather than the commencement of an action.

In re Baker, 226-1071; 285 NW 641

XVI INJURIES FROM DEFECTS IN HIGHWAYS

Notice—fatal inaccuracy. A statutory notice designed to avoid the three months statute of limitation on an action against a city for

XVI INJURIES FROM DEFECTS IN HIGHWAYS—concluded

damages consequent on a defective street is fatally defective when it designates the place of injury at a point on a street some 3,000 feet distant from the place or point on said street where the injury was actually received.

Tredwell v Waterloo, 218-243; 251 NW 37

Statute governing action for damages. In a city which has abandoned its special charter and become organized under the commission form of municipal government, actions for damages consequent on defective streets are governed by §11007, subsec. 1, C., '27, and not by §6734, C., '27, such reorganized city having no "vested right" in said latter section within the meaning of §6569, C., '27.

Wilson v Cedar Rapids, 210-790; 231 NW 495

XVII INJURIES TO PERSON OR REPUTATION—RELATIVE RIGHTS

National bank directors—state statute invoked. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

XVIII STATUTE PENALTY

State bank liquidating national bank. In an action by state bank, liquidating a national bank, to recover excess of liabilities over assets, held, not a suit for "statute penalty" within the statute of limitations.

Derscheid v Andrew, 34 F 2d, 884

Statutory liability. A cause of action to enforce the statutory-declared personal liability of corporate officers and directors for prohibited, excess corporate indebtedness (now repealed) is barred after the lapse of five years from the creation of the indebtedness.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

XIX PROBATE OF WILL

Filing probate application not commencement of action. When heirs filed an application in probate, more than 10 years after the clerk had approved certain claims, asking that the claims be disallowed and expunged from the record, the right to object to such claims was not barred by the statute of limitations, as the filing of the application was an appearance prior to any final adjudication in the still pending proceedings to collect such claims, rather than the commencement of an action.

In re Baker, 226-1071; 285 NW 641

XX ACTION AGAINST SHERIFF OR OTHER PUBLIC OFFICER

Computation of period—accrual of right—official nonfeasance. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by this section.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

Public rights—nonperformance. Mandamus to compel the board of supervisors to erect a bridge on an established and existing highway at the point where the highway is crossed by a public drainage improvement is not barred by the lapse of time.

Perley v Heath, 201-1163; 208 NW 721

XXI UNWRITTEN CONTRACTS

Accounts—interest items. In an action by a widow to establish a claim against the estate of her deceased husband based on an alleged oral contract of decedent to repay a loan of money made by appellant widow to decedent, prior to November 1, 1912, to which the statute of limitations was pleaded, held, mere posting of items of interest applicable to one individual transaction is insufficient to show a "connected series of transactions" so as to convert the matter into a "continuous, open, current account" under statute providing cause of action accrues on date of last item, as this means a connected series of transactions.

Leland v Johnson, 227-520; 288 NW 595

Continuous salary account. Statute of limitations will not commence to run against a continuous running salary account until the status of such account is changed.

Bankers Trust Co. v Economy Coal Co., 224-36; 276 NW 16

Revival of contract—admission in writing. In an action by a widow to establish a claim against her deceased husband's estate based on an oral contract to repay to appellant widow a sum of money loaned to decedent prior to November 1, 1912, wherein it is shown by the record of entries in decedent's ledger and by checks signed and deposited by the decedent to joint savings account with the widow, that interest was computed on what purported to be a loan of $4,000, and even tho the statute of limitations had run, the conduct, circumstantial evidence, and admissions of the party to be charged sufficiently showed the existence of a contract so as to make applicable the statute providing for revival of contract by admission in writing.

Leland v Johnson, 227-520; 288 NW 595

Revival of contract by undelivered check. In an action by a widow to establish a claim against deceased husband's estate based on an oral contract to repay a loan made by appellant widow to decedent prior to November 1, 1912, wherein the widow offers evidence of a check purported to have been issued to widow by husband for "interest 1935, 6 months" and deposited by him in joint account with his wife, and it is claimed by appellee that since check was not delivered to appellant widow nor to anyone acting for her, the writing is insufficient, held, such memorandum need not be delivered to opposite party nor his agent nor a person in privity with him, but is sufficient if it is signed and in any way promulgated so as to become an instrument of evidence.

Leland v Johnson, 227-520; 288 NW 595

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband, who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

XXII INJURY TO PROPERTY

Computation of period—accrual of action—municipal interference with ingress and egress. An action by a property owner against a city for damages consequent on a long delayed but finally completed street improvement which, while somewhat various in its operations, is one project, and which substantially destroys the owner's means of passing to and from his property, does not accrue until the improvement is completed.

Ashman v Des Moines, 209-1247; 228 NW 316; 229 NW 907

Wrongful flooding of land. Where a city, by the erection of a dam on its own land, wrongfully flooded adjacent private land, and some years later instituted proceedings to condemn said overflowed land for a public purpose but later wholly abandoned said proceedings, the injured property owner may not say that his cause of action for damages did not accrue until the city abandoned its condemnation proceedings.

Wheatley v City, 221-66; 264 NW 906

Computation of period—damages—original or continuing. Where a bridge which spanned a natural watercourse or drain across a public highway was removed and replaced by the public authorities with a solid and permanent earth embankment, the injury or hurt to nearby lands, from flood water consequent on said change in the highway, must be deemed original damages which mature upon completion of the embankment—or at least on the occurrence of substantial damages consequent on the change. It follows that the maintenance of said embankment may not be legally questioned by action commenced after the lapse of five years from the maturity of said damages.

Thomas v Cedar Falls, 223-229; 272 NW 79

Computation of period—wrongful flooding of land—when action accrues. Where a city, by the erection of a dam on its own land, wrongfully flooded adjacent private land, and some years later instituted proceedings to condemn said overflowed land for a public purpose but later wholly abandoned said proceedings, the injured property owner may not say that his cause of action for damages did not accrue

until the city abandoned its condemnation proceedings.

Wheatley v City, 221-66; 264 NW 906

XXIII FRAUD

Discussion. See 22 ILR 704—Fraud tolling statute of limitations

Concealment—effect. Whether an action for damages for fraudulent representations is barred by the statute of limitations is properly presented to the jury, on evidence that the defendants had for several years concealed the fraudulent acts and conduct which they had perpetrated on the plaintiff.

Reinertson v Chem. Co., 205-417; 216 NW 68

Disaffirmance. A minor, upon becoming of age, is required to disaffirm contracts made during minority within a reasonable time after attaining majority or within a reasonable time after discovery of the fraud.

In re Fisher, 226-596; 284 NW 821

Guardian and ward—failure to disaffirm. In guardianship proceeding, wherein father acting as guardian made a settlement with his children after son had reached his majority, but daughter lacked three months of being 21 years of age, and suit against the father for an accounting was not brought until two and one-half years after the settlement, held, evidence sufficient to support finding of trial court in approving the guardian's report which, in effect, approved the settlement, the same having been ratified by failure to disaffirm within a reasonable period of time.

In re Fisher, 226-596; 284 NW 821

Fraud and mistake distinguished—mistake not involving equity conscience. Relief from the statute of limitations on account of fraud is in equity based on good conscience; whereas when pure mistake is the ground for relief, there is no occasion for weighing matters of conscience against either party.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Fraud—discovery—when statute tolled. Unless the fraud be fraudulently concealed by some affirmative act of the fraud perpetrator, a law action for damages on account of such fraud, not being an action solely cognizable in equity prior to the adoption of the statute, the five-year statute of limitations is not tolled by nondiscovery of the fraud.

Smith v Utilities Co., 224-151; 275 NW 158

Fraudulent concealment of fraud—burden of proof. To overcome the defense of statute of limitations on the ground of fraudulent concealment, the burden to both plead and prove such fraudulent concealment is on the party relying thereon.

Smith v Utilities Co., 224-151; 275 NW 158

Fraud — instructions — prejudice not presumed. Prejudice will not be presumed from instructions readily reconciled and understood by the jury as not conflicting, but in an action for damages on account of fraud where the defense was the statute of limitations it is prejudicial error to instruct on the elements of fraud as a basis for recovery without requiring consideration of the defense of the statute of limitations.

Smith v Utilities Co., 224-151; 275 NW 158

Sale of bonds—damage accrual—later exchange no concealment of fraud. Where bonds purchased in 1922 were exchanged in 1927 and 1932 for new bonds, the damage from fraud in their sale, if any, occurred when they were first purchased, and when neither the actual fraud itself nor due diligence to discover the same are proven, the subsequent exchange transactions will not toll the statute as a concealment of the original fraud, especially if none existed.

McGrath v Dougherty, 224-216; 275 NW 466

Sale of bonds—fraud—discovery. Under the rule that the statute of limitations begins to run on a law action for fraud when the fraud is consummated unless tolled by an intentional fraudulent concealment, and since §11010 does not apply to law actions, in a case where bonds were sold in 1922 and buyers could have secured at any time a detailed statement of the securities held for payment of the bonds, the buyers cannot claim they did not discover, until 1933, fraud in the sale of the bonds.

McGrath v Dougherty, 224-216; 275 NW 466

Statute tolled by fraudulent concealment. In an action for damages for fraud in the sale of stock where the defense was the statute of limitations, an instruction that fails to tell the jury that the statute of limitations would run unless tolled by some affirmative act of fraudulent concealment on the part of the fraud perpetrator is prejudicially erroneous.

Smith v Utilities Co., 224-151; 275 NW 158

Subsequent demand for accounting—bar. An administrator may not, after the lapse of more than five years from his final discharge, be compelled to account for funds claimed to have been fraudulently withheld by him, when the evidence of such withholding was accessible to the complainant at and prior to the time the order of discharge was entered.

Murphy v Hahn, 208-698; 223 NW 756

XXIV WRITTEN CONTRACTS

Action to redeem from mortgage. When the right of a mortgagee to foreclose a mortgage is barred by the statute of limitation, then the right of the mortgagor to redeem is foreclosed, and vice versa.

Volding v Goepel, 203-540; 211 NW 482

Agreement extending time. The extension of the time for the payment of the debt was sufficient consideration for an agreement extending a mortgage, even tho the holder reserved the right to sue at any time any person who did not consent in writing to the extension.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Arbitration and award—subsequent written compromise. A definite written agreement in which one party agrees to pay the other a named sum in settlement of their actual differences furnishes ample basis for a future action within 10 years after default, even tho, when it was entered into, the said differences had been submitted to statutory arbitrators, and even tho the agreement contemplated that the arbitrators would report to the court, in accordance with the agreement, which was done, but without filing in court.

In re Powers, 205-956; 218 NW 941

Bond as written contract. The statute of limitation relative to unwritten contracts manifestly has no relevancy to an action for damages consequent on the breach of the statutory bond of a public contractor.

Waukon v Surety Co., 214-522; 242 NW 632

Computation of period—promissory note—severability of interest. Unless the maker and payee on a promissory note agree to sever the promise to pay interest installments from the promise to pay principal so as to make each promise separate and independent of the other, the interest is an incident to the principal debt and as such is barred when the statute of limitations has run against the principal debt.

Yeadon v Farmers Co., 224-829; 277 NW 709; 115 ALR 725

Demand note. A promissory note due on demand is barred after 10 years from the date thereof.

Citizens Bank v Taylor, 201-499; 207 NW 570

Demand notes. A promissory note due 30 days after demand is barred after 10 years and 30 days from the date thereof, no legal justification appearing for delay in making demand.

Lovrien v Oestrich, 214-298; 242 NW 57

Foreclosure of mortgage. The right to foreclose a mortgage is not barred so long as the secured debt is not barred.

Randell v Fellers, 218-1005; 252 NW 787

Lien—mortgage recitation of previous mortgage as extension—priority. A property owner gave a note and mortgage in 1915, due in 1920, but which was not paid and in 1930, before it was barred by the statute of limitations, he gave a second mortgage reciting therein the existence of the prior mortgage, after which in 1931 he gave another note and mortgage to the heirs of the first mortgagee as a renewal of the 1915 mortgage, held that the recitation as to the first mortgage in the second mortgage extended the indebtedness of the first mortgage, so that by renewal of the first mortgage, even after 10 years, it retained priority over the second mortgage.

Lackey v Melcher, 225-698; 281 NW 225

Right to corporate transfer of stock. The right of the pledgee of corporate shares of stock to have said stock transferred on the corporate stock records is based on a written contract arising out of the articles of incorporation, bylaws, certificate of stock and statute (§§8386, 8387, C., '27) and consequently such right may be enforced at any time within the 10-year period following a written demand for such transfer, unless the enforcement of such right is barred by laches.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

XXV RECOVERY OF REAL PROPERTY

Recovery of real property (?) or partition (?). An action for the partition of real property by parties who are in possession of the property, and who claim to be co-owners thereof, may not be deemed an action for the recovery of real property, within the meaning of the statute of limitation, because an intervenor pleads a recorded deed which would deprive plaintiffs of all title, but which deed plaintiffs by reply claim was never delivered.

Gibson v Gibson, 205-1285; 217 NW 852

Duration of mortgage lien. Principle reaffirmed that the lien of a mortgage continues until the debt is paid, irrespective of the form in which the debt is evidenced.

Equitable v Rood, 205-1273; 218 NW 42

Waterworks sold to city—stockholder's action. Where a waterworks was sold to a city, and a stockholder seeks to establish an interest in the waterworks property on the ground that the city took the property burdened with a trust for his benefit, the action was barred by statute of limitations where no effort to enforce claim against city was made during a period of more than 10 years after the sale.

Shaver v Des Moines, 227-411; 288 NW 412

XXVI JUDGMENTS OF COURTS OF RECORD

Judgment due in installments. In case of a judgment for the separate maintenance of a wife through monthly installments, the statute of limitation does not commence to run from the date of the judgment, but on each separate installment from the maturity thereof.

Bennett v Tomlinson, 206-1075; 221 NW 837

Creditor's suit. Record involving an equitable proceeding to discover property belonging to a judgment defendant, and to subject said discovered property to the satisfaction of

XXVI JUDGMENTS OF COURTS OF RECORD—concluded

said judgment, reviewed, and held not barred by §10378 and §11882, C., '35, nor by this section.

Bankers Tr. v Garver, 222-196; 268 NW 568

Default—setting aside—when fraud no defense. When fraud in obtaining a judgment is not available to have the judgment set aside (because of the lapse of time), such fraud necessarily ceases to be a defense to an auxiliary proceeding to enforce the judgment.

Wade v Swartzendruber, 206-637; 220 NW 37

Lien—judgment is debt—action thereon is ex contractu. A judgment procured upon a judgment creates a lien of the same force and effect upon the real estate of the judgment debtor as does any other judgment of the district court.

Chader v Wilkins, 226-417; 284 NW 183

Lien on real property—attaches by operation of law. A judgment on a judgment is a lien on the real property of the debtor for 10 years and where debtor's father died, leaving real estate to the debtor-son's wife, who then in turn died intestate, the lien attaches to the debtor's one-third interest therein, even tho he quitclaimed his interest to his daughter within 10 days after his wife's death and before execution on the judgment issued.

Chader v Wilkins, 226-417; 284 NW 183

XXVII PLEADINGS

Amendment notwithstanding statute. A plaintiff who, in a timely brought action, pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, and who, after discovering his inability to prove the pleaded rescission, and after the statute of limitation has fully run against his cause of action, amends his pleadings by praying for damages consequent upon the fraud, does not thereby plead a new cause of action. He simply exercises his permissible right to change the remedy.

Reinertson v Struthers, 201-1186; 207 NW 247

Amendment to petition—when strikeable. An amendment to petition, setting up a new cause of action barred by the statute of limitations, may be stricken, but when both the original petition and the amendment plead the same cause of action in general allegations of negligence, such amendment may not be stricken.

Olson v Cushman, 224-974; 276 NW 777

Amendment in re conspiracy. A pleader does not, in legal effect, change the nature of his cause of action by striking from his petition the allegation that the defendants "conspired, colluded, and confederated together", and by substituting therefor the allegation that the defendants "acted together jointly and aided and abetted each other".

Dickson v Young, 202-378; 210 NW 452

Amendment setting up new cause of action. A claim in probate bottomed on a judgment on a bond, and a so-called amendment thereto bottomed on the bond itself, present different causes of action, and if the amended claim is filed after the statute of limitation has run it is barred notwithstanding the original filing.

In re Skiles, 210-935; 229 NW 235

Amendment for new relief after action barred. A timely action to set aside the cancellation of a policy of insurance may be amended by asking for a reformation of the policy even tho the amendment is filed at a time which would have barred the original action.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Amplifying facts. Plaintiff in an action for damages consequent on the dangerous condition of a sidewalk pleads no new cause of action by so amending his petition as to amplify the facts which brought about said dangerous condition.

Casper v Sioux City, 213-69; 238 NW 591

Burden to overcome bar. Proof that a claim is barred by the statute of limitation imposes on claimant the burden of showing the facts which neutralize the bar.

Lawrence v Melvin, 202-866; 211 NW 410

New cause of action under guise of amendment. A cause of action predicated on the plea that a bank wrongfully hypothecated a bailment as security for a loan to the bank, and that the directors were personally liable for the resulting loss because of their neglect to learn of said wrongful act and to prevent or correct it, is wholly separate and distinct from a cause of action predicated on a plea that the directors personally made the loan and hypothecation. It follows that said latter plea is subject to demurrer when made as an amendment to the former action, and after such latter plea is barred by the statute of limitation.

Cornick v Weir, 212-715; 237 NW 245; 32 NCCA 616

New cause of action under guise of amendment. A cause of action for damages predicated on the alleged negligence of plaintiff's agent in making improvident loans of plaintiff's funds, and a cause of action for damages predicated on the alleged fraudulent misapplication and appropriation by plaintiff's agent of plaintiff's funds, are separate and distinct causes of action. It follows that the pleading of the latter as an amendment to the former

is unallowable when the latter cause of action is barred by the statute of limitation.

Pease v Bank, 210-331; 228 NW 83

Non-issue-changing amendment. Where a petition alleges that it was negligent for the driver of a conveyance to use a street owing to its extreme slipperiness, an amendment to the effect that other safe and convenient streets existed which might have been used presents no new issue.

McDowell v Oil Co., 212-1314; 237 NW 456; 31 NCCA 305

Non-issue-changing amendment. The identity of a cause of action is not changed by an amendment (made at a time when the action would otherwise be barred) which strikes from a petition a specific allegation of negligence in furnishing electricity for lighting purposes, and substituting therefor a general allegation of negligence in order to rely on the doctrine of res ipsa loquitur.

Orr v Light Co., 213-127; 238 NW 604

Substituting specific negligence for general negligence. A plaintiff who, on one trial, rests on a general allegation of negligence, does not plead a new cause of action within the meaning of the statute of limitation, when on retrial he, by amendment, withdraws his general allegation and substitutes a specific allegation of negligence which, if proven, will furnish basis for the doctrine of the "last clear chance".

Reason: The latter allegation was always embraced within the former general allegation.

Pettijohn v Weede, 219-465; 258 NW 72

Nonallowable amendment. A timely brought action based solely on the common-law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee, in due course of employment, may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Constr. Co., 219-1017; 257 NW 426

Amendments after expiration of period. The right to reform a policy of insurance (if such right exists) and to recover on it as reformed, is incident to the right to recover on the instrument in its original form. It follows that where plaintiff is unsuccessful on appeal in his effort to recover on the instrument in its original form, he may, after remand, amend and tender the issue of reformation, even tho when the amendment is filed an original action would have been barred by the statute of limitation.

Green v Ins. Co., 218-1131; 253 NW 36

Sufficiency. An informal and defective plea of the statute of limitation, and of a former adjudication, may be sufficient in the absence of a proper attack thereon.

Murphy v Hahn, 208-698; 223 NW 756

Sufficiency. In pleading the bar of the statute of limitation, the facts must be alleged.

Conklin v Towne, 204-916; 216 NW 264

Timely plea. A plea of the statute of limitation is timely when interposed as soon as its availability becomes known, e. g., during the taking of the testimony.

Lawrence v Melvin, 202-866; 211 NW 410
Conklin v Towne, 204-916; 216 NW 264

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

Unallowable motion to strike plea. A motion to strike an answering amendment which interposes the bar of the statute of limitation is not the proper procedure under which to plead facts which avoid the bar. Reply is necessary.

Lawrence v Melvin, 202-866; 211 NW 410

Unavailable plea. A plea of title to real estate by adverse possession is not available against one whose rights were acquired before the lapse of the 10 years sufficient to ripen such title, even tho said title had ripened as to the same property as against another party to the litigation.

Oxford Bk. v Hall, 203-320; 211 NW 389

Unnecessary instructions. There is no occasion to instruct relative to the statute of limitation when the parties join no issue thereon.

Dravis v Sawyer, 218-742; 254 NW 920

Waiver. The statute of limitation must be pleaded or the bar will be deemed waived.

North Am. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492

When not demurrable. A petition which alleges that defendant, on a date more than five years prior to the commencement of the action, fraudulently converted to his own use property owned by plaintiff subject to a life estate in another, is not demurrable when the petition otherwise shows that plaintiff was entitled to the property only upon the death of the life tenant and that such death occurred less than five years before the commencement of the action.

Mastbergen v Bank, 216-1408; 250 NW 641

XXVIII ADVERSE POSSESSION

Discussion. See 2 ILB 144—Adverse possession

(a) RIGHTS BY PRESCRIPTION IN GENERAL

Discussion. See 24 ILR 268—Seizin and possession—title

Prescription — insufficient evidence. A public way by prescription will not be decreed on evidence which is just as consistent with the theory of the owner that whatever use was made of the land as a road was purely permissive as with the theory that the use was hostile, adverse, and under a claim of right.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Permissive use. Mere use of a way over the land of another by permission of the latter furnishes no basis for a title by prescription.

Feilhaber v Swiler, 203-1133; 212 NW 417

Self-imposed knowledge of vendor. A vendor of land will not be heard to claim that he did not know that his purchaser was holding adversely to him.

Burch v Wickliff, 209-582; 227 NW 133

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

Streets — nonuser—adverse possession—estoppel. Tho a street be legally established, yet where (1) the municipality does not open up the street, or there is nonuser for the statutory period, and (2) private rights have been acquired by adverse possession, then abandonment may be presumed, the public estopped from asserting any rights therein, and public rights in street extinguished.

Brewer v Claypool, 223-1235; 275 NW 34

Unaccepted platted street — applicability. Where parties claim land, dedicated in plat as a street but, not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

Repair of dike—user—estoppel. In an action to enjoin the repair of a dike originally constructed in connection with drainage system created jointly by adjoining landowners, including plaintiff's predecessor in title, and used with knowledge of plaintiff for over 20 years without objection, principles reaffirmed (1) that where there is proof of more than mere user, the statute providing that an easement cannot be established by proof of mere user alone does not apply, and (2) that the owner of a dominant estate may by consent, express or implied, estop himself from insisting upon adherence to the principle that the owner of a servient estate has no right to interfere with the natural flow of water in a well-defined course so as to cast it back upon the dominant estate.

Dodd v Aitken, 227-679; 288 NW 898

(b) PROPERTY SUBJECT TO PRESCRIPTION

Highways—abandonment—"nonuser" as element. Nonuser of an established public highway is not in and of itself, sufficient to establish a claimed abandonment of the highway, especially when the nonuser is caused by the failure of the public officers to promptly bridge or grade places otherwise impassable.

Clare v Wogan, 204-1021; 216 NW 739

Unaccepted platted street — applicability. Where parties claim land, dedicated in plat as a street but, not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

(c) CLAIM OF RIGHT OR COLOR OF TITLE

"Claim of right". "Claim of right" as an element of adverse possession of land is furnished by an oral agreement between claimant and parties to a federal action to determine title, to the effect that if said parties were successful in their action claimant should have the land of which he was then in possession.

Wallis v Clinkenbeard, 214-343; 242 NW 86

Claim of right. A claim of right is an essential element of adverse possession.

Stone v Richardson, 206-419; 218 NW 332

Claim of right—facts militating against. Evidence tending to show that one, while in possession of an abandoned railway right of way to which he claimed title by adverse possession, (1) offered to buy the right of way from the railway company, (2) claimed to the railway company that he would ultimately get title through a reversion, (3) failed to list the right of way for taxation, (4) excluded the right of way from mortgages executed by him, and (5) farmed the right of way under permission from the railway company, is material as militating against the claimant's claim of right.

Montgomery County v Case, 212-73; 232 NW 150

Color of title—deed from tax deedholder. One who is in possession of real property under deed from a tax deedholder has color of title.

Mann v Nies, 213-121; 238 NW 601

Claim of right or title. To constitute claim of right or title something more than the mere assertion of ownership coupled with actual occupancy, must be shown.

McFerrin v Wiltse, 210-627; 231 NW 438

Accretions claimed. In an action to enjoin trespass and recover damages, where defendants filed a cross-petition to quiet title, claiming right to alleged accretions formed by recession of Missouri river, evidence, that for more than 15 years plaintiffs had been in possession of the land under color of title and claim of right, open, notorious, hostile, and adverse as against all others, established title in plaintiffs.

Arnd v Harrington, 227-43; 287 NW 292

Elements—mutually agreed possession. Possession of land under an amicable arrangement cannot ripen into title by adverse possession.

Warner v Tullis, 206-680; 218 NW 575

Knowledge of hostile claims—effect. The running of the statute of limitation in favor of one who is in good faith in the open and adverse possession of real estate under color of title is manifestly not interrupted by the fact that the possessor knows that other parties are asserting an interest in the property, or that other parties actually had an interest which they might successfully assert, but did not.

Lemker v Claimants, 201-902; 208 NW 290

Homestead possession — effect. An heir cannot successfully claim that he is the owner of premises because his father continuously occupied such premises for some 35 years and until his death, as a homestead, when it appears that during said time the premises went to tax deed, and that thereupon the mother re-acquired title from the tax deed holder and thereunder adversely occupied said premises under said newly acquired deed for more than 10 years.

Mann v Nies, 213-121; 238 NW 601

(d) ACTUAL, VISIBLE, NOTORIOUS, DISTINCT AND EXCLUSIVE POSSESSION

Discussion. See 25 ILR 78—Actual possession

Accretions claimed. In an action to enjoin trespass and recover damages, where defendants filed a cross-petition to quiet title, claiming right to alleged accretions formed by recession of Missouri river, evidence, that for more than 15 years plaintiffs had been in possession of the land under color of title and claim of right, open, notorious, hostile, and adverse as against all others, established title in plaintiffs.

Arnd v Harrington, 227-43; 287 NW 292

Acquiescence in title. Exclusive possession, control, and use for 18 years of lands by a child after the death of his parents, the owners, under a claim of absolute ownership in which all the other children of the parents acquiesced, ripen into a full title by adverse possession.

Hancock v Frok, 203-491; 211 NW 237

Claim broad as possession — unaccepted street. Where their claim to a certain fence was as broad as their possession, persons, who for more than 10 years had continuous and exclusive possession of a dedicated but unaccepted street secured title thereto by adverse possession.

Brewer v Claypool, 223-1235; 275 NW 34

Essential elements. Open, continuous, and good-faith possession of land, under claim of right, and with the knowledge of the record titleholder, by virtue of an oral contract of purchase, matures in the possessor an absolute title by adverse possession, even tho the contract price has never been paid.

Burch v Wickliff, 209-582; 227 NW 133

Adverse possession — elements — mutually agreed possession. Possession of land under an amicable arrangement cannot ripen into title by adverse possession.

Warner v Tullis, 206-680; 218 NW 575

(e) DURATION AND CONTINUITY OF POSSESSION

Acquiesced-in line—buildings. A line between adjoining tracts of land, definitely marked by a fence which, for 10 years, has been acquiesced in and recognized by the owners of the tracts as the division line, becomes, as between the parties, the conclusive line, irrespective of the true line in fact; and this is true altho neither party intended to claim more than his deed calls for. It follows that either party has a legal right to build in reliance on said acquiesced-in line.

Minear v Keith Co., 213-663; 239 NW 584

Acquiescence in boundary line—effect. Where plaintiffs for over 10 years and plaintiffs and their grantors for over 20 years acquiesced in a certain fence as the boundary of defendants' property and acquiesced in the use of the land south of the fence as a traveled highway, the fence becomes the boundary altho it may not be the true line.

Brewer v Claypool, 223-1235; 275 NW 34

Hostile character of possession. A possession that has been open, continuous, and adverse for the statutory time is a fundamental element of title by adverse possession. Evidence held insufficient.

McFerrin v Wiltse, 210-627; 231 NW 438

Hostile possession—tax deed does not interrupt. The continuity of possession by one claiming title to real estate by adverse possession is not broken by the execution and recording of a tax deed under which no right was asserted against claimant for some 16 years.

Wallis v Clinkenbeard, 214-343; 242 NW 86

XXVIII ADVERSE POSSESSION—cont.

(f) HOSTILE POSSESSION

1. Mistake and Effect Thereof

Additional notes. See under §12306
Discussion. See 7 ILB 129—Mistake and adverse possession

Mistake—effect. One may not be said to be in the adverse possession of land beyond the governmental line when, during his entire possession, he never intended to claim beyond the true line.

Kotze v Sullivan, 210-600; 231 NW 339

Boundary dispute on fenced land. In a dispute involving title to a strip of land between two town lots which were separated by a fence, where there was no acquiescence in the fence as the true boundary line, and one party had no intent to claim beyond the true boundary line, held that title was acquired by the other party by adverse possession when he claimed both title and possession to the strip irrespective of the location of the fence.

Patrick v Cheney, 226-853; 285 NW 184

Occupancy—intention. For adverse possession there must be occupancy taken with the intention to assert title beyond the true boundary line under a claim of right which must be as broad as the possession, whereas, occupancy taken by mistake beyond the true line with claim of right only up to the true line will not acquire title.

Patrick v Cheney, 226-853; 285 NW 184

2. Grantor and Grantee

Adverse possession — title — essential elements. Open, continuous, and good-faith possession of land under claim of right and with the knowledge of the record titleholder, by virtue of an oral contract of purchase, matures in the possessor an absolute title by adverse possession, even tho the contract price has never been paid.

Burch v Wickliff, 209-582; 227 NW 133

3. Mortgagor and Mortgagee

Limitation of actions—written contracts—action to redeem from mortgage. When the right of a mortgagee to foreclose a mortgage is barred by the statute of limitation, then the right of the mortgagor to redeem is foreclosed, and vice versa.

Volding v Goepel, 203-540; 211 NW 482

Adverse possession—nature and requisites—unavailable plea. A plea of title to real estate by adverse possession is not available against one whose rights were acquired before the lapse of the 10 years sufficient to ripen such title, even tho said title had ripened as to the same property as against another party to the litigation.

Oxford Junction Savings Bank v Hall, 203-320; 211 NW 389

4. Trustee and Cestui

No annotations in this volume

5. Landlord and Tenant

Landlord and tenant — change of relation. Manifestly a landlord and his tenant may, at the close of the tenancy, take on and assume the relationship of vendor and purchaser, and thereby enable the former tenant to hold the premises in question adversely to the former landlord.

Burch v Wickliff, 209-582; 227 NW 133

6. Husband and Wife

No annotations in this volume

7. Tenants in Common

Ouster—acts necessary. An ouster may not be predicated on the mere fact that one of several tenants in common, a father, farmed the premises, to the knowledge of the other tenants, his children.

Campbell v Humphreys, 202-472; 210 NW 558

Ouster of all tenants by superior title — effect. Principle reaffirmed that after tenants in common are all ousted by a superior title, e. g., a tax deed, one who was such former tenant in common may buy in the superior title exclusively for his own benefit.

Wood v Schwartz, 212-462; 236 NW 491

(g) PAYMENT OF TAXES

Nonpayment of taxes. A title by adverse possession may be acquired even tho such claimant does not pay the taxes on the land.

Wallis v Clinkenbeard, 214-343; 242 NW 86

Presumption in favor of tax deed holder. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

(h) BURDEN OF PROOF AND EVIDENCE

Failure to prove title—effect. A plaintiff in an action to quiet title must necessarily fail when he bases his title both on (1) accretion and (2) adverse possession, and establishes

neither; and this, too, irrespective of the weakness of defendant's title.

McFerrin v Wiltse, 210-627; 231 NW 438

Fraudulent concealment as tolling statute—burden of proof on pleader. After a defendant raises the defense of statute of limitations, plaintiff, alleging that because of defendant's fraud or fraudulent concealment the cause of action was not barred, has the burden of establishing such facts which he claims avoid the statute of limitations.

Carroll v Arts, 225-487; 280 NW 869

Presumption in favor of tax deed holder. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Recovery of land after tax sale. Under a statute limiting the time in which an action may be brought for the recovery of real estate sold for taxes, the possession by the owner necessary to bar an action by the tax titleholder is ordinarily not the possession required under the general statute of limitations and need not be adverse, but need be only such possession as would entitle the tax titleholder to maintain an action against the owner.

McCormick v Anderson, 227-888; 289 NW 440

11009 Judgments.

Reducing statute of limitation on judgments. A legislative act which reduces the existing statutory period of time in which existing judgments may be enforced, yet accords to the holders of such judgments a reasonable time in which to enforce said judgments before the reduced time becomes an absolute bar, is not violative of the "due process" or "impairment of contract" clauses of the federal constitution.

Berg v Berg, 221-326; 264 NW 821

11010 Fraud—mistake—trespass.

Discussion. See 22 ILR 704—Fraud tolling statute of limitations

ANALYSIS

I FRAUDS WITHIN STATUTE
II FRAUDS NOT WITHIN STATUTE
III MISTAKE
IV KNOWLEDGE OF FRAUD OR MISTAKE

I FRAUDS WITHIN STATUTE

Concealment. Whether an action for damages for fraudulent representations is barred by the statute of limitation is properly presented to the jury, on evidence that the defendants had for several years concealed the fraudulent acts and conduct which they had perpetrated on the plaintiff.

Reinertson v Prod. Co., 205-417; 216 NW 68

Fraud — concealment — effect. A fraud-doer who by a subsequent fraud conceals the original fraud from his victim thereby tolls the statute of limitation on the original fraud until such time as the original fraud is discovered, or in reason ought to have been discovered. This is true irrespective of this section.

Pullan v Struthers, 201-1179; 207 NW 235

Foreclosure proceeding withheld — insufficient evidence. Evidence held quite insufficient to establish a charge to the effect that a plaintiff was fraudulently induced to withhold mortgage foreclosure proceeding.

Andrew v Bank, 215-401; 246 NW 48

Fraud — jury questions. Whether an action at law for damages consequent on fraud is barred by the statute of limitation, may depend, inter alia, on a finding of fact by the jury as to the time when plaintiff discovered the fraud, or should have discovered it by the exercise of due diligence; also whether defendant concealed his liability from plaintiff.

Vertman v Drayton, 223-380; 272 NW 438

Injury to property — trespass. The cause of action in favor of a mortgagee and against a third party for wrongfully entering upon the mortgaged premises and removing gravel therefrom, and thereby impairing the mortgage security, accrues when the gravel is removed—when the actual injury is inflicted—not when the mortgagee discovers said injury.

New York Ins. v Clay Co., 221-966; 267 NW 79

II FRAUDS NOT WITHIN STATUTE

Accessible fraud. An administrator may not, after the lapse of more than five years from his final discharge, be compelled to account for funds claimed to have been fraudulently withheld by him, when the evidence of such withholding was accessible to the complainant at and prior to the time the order of discharge was entered.

Murphy v Hahn, 208-698; 223 NW 756

Concealment. A plaintiff who, after the lapse of five years, brings his action for damages consequent on the fraudulent sale of corporate stock, must meet the plea of the statute of limitation by proof that, notwithstanding due diligence on his part, knowledge of the

II FRAUDS NOT WITHIN STATUTE—concluded

fraud perpetrated upon him has been fraudulently concealed from him by the defendant.

Conklin v Towne, 204-916; 216 NW 264

Fraud. An action for damages consequent on a fraud which was discovered seven years prior to commencement of the action is necessarily barred by the statute of limitations.

Van Every v Crawford, 207-1049; 221 NW 914

Fraud—concurrent remedies. An equitable action for an accounting for royalties on a patent sounding in damages and based on the fraud of the defendant is barred in five years after the fraud is perpetrated, nothing being pleaded to toll the statute.

Benedict v Hall, 201-488; 207 NW 606

Fraud—discovery—when statute tolled. Unless the fraud be fraudulently concealed by some affirmative act of the fraud perpetrator, a law action for damages on account of such fraud, not being an action solely cognizable in equity prior to the adoption of the statute, the five-year statute of limitations is not tolled by nondiscovery of the fraud.

Smith v Utilities Co., 224-151; 275 NW 158

Father and son partnership—mother as partner after father's death—dissolution. Where father and son were partners, and the partnership after father's death was continued with the mother, and tho she refused the son funds but did not, until 10 years after father died, specifically inform the son that she denied his status as a partner, the son's cause of action against his mother for an accounting and dissolution was neither barred by limitation nor laches.

Eggleston v Eggleston, 225-920; 281 NW 844

Sale of bonds—fraud—discovery. Under the rule that the statute of limitations begins to run on a law action for fraud when the fraud is consummated unless tolled by an intentional fraudulent concealment, and since this section does not apply to law actions, in a case where bonds were sold in 1922 and buyers could have secured at any time a detailed statement of the securities held for payment of the bonds, the buyers cannot claim they did not discover, until 1933, fraud in the sale of the bonds.

McGrath v Dougherty, 224-216; 275 NW 466

III MISTAKE

Mistake—reformation of deed. The statute of limitation does not commence to run against an action to reform a deed on the ground of mutual mistake until the mistake has been discovered.

American Bk. v Borcherding, 205-633; 216 NW 719

Mistake—statute operative from time of discovery. A cause of action for relief on the ground of mistake is not barred until five years after the mistake was discovered.

Winker v Tiefenthaler, 225-180; 279 NW 436

Mistake tolling statute—burden of proving nondiscovery on pleader. A mortgagee, seeking to reform his mortgage to correct an error in the real estate description and escape the statute of limitations on the ground of mutual mistake which tolled the statute until discovered, has the burden of showing he did not discover the error until a time within five years before bringing action, and without which proof the statute operates as a bar.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Computation of period under mistake of law. Where a sheriff collects fees under a mistake of law, the failure to discover a mistake of law will not toll the running of the statute of limitations. The word "mistake" in this section means mistake of fact.

George v Webster County, 211-164; 233 NW 49

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

Fraud and mistake distinguished. Relief from the statute of limitations on account of fraud is in equity based on good conscience; whereas, when pure mistake is the ground for relief, there is no occasion for weighing matters of conscience against either party.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

IV KNOWLEDGE OF FRAUD OR MISTAKE

Fraud — discovery — record of deed — effect. A creditor will be deemed to have notice of the fraudulent character of duly recorded conveyances by his debtor.

Bristow v Lange, 221-904; 266 NW 808

Sale of bonds—damage accrual—later exchange no concealment of fraud. Where bonds purchased in 1922 were exchanged in 1927 and 1932 for new bonds, the damage from fraud in their sale, if any, occurred when they were first purchased, and when neither the actual fraud itself nor due diligence to discover the same are proven, the subsequent exchange transactions will not toll the statute as a concealment of the original fraud, especially if none existed.

McGrath v Dougherty, 224-216; 275 NW 466

11011 Open account.

Atty. Gen. Opinion. See '25-26 AG Op 150

Open accounts. Tho a continuous, open account runs for many years, the statute of limitation commences to run from the date of the last item.

In re Ransom, 219-284; 258 NW 78

Account—long lapse of time between items. A lapse of three years, and a lapse of 15 months, between credit items of an account, they being the last items in the account, do not constitute such breaks in the account as to start the running of the statute of limitation before the date of the last payment.

Ritter v Schultz, 211-106; 232 NW 830

Construction of pleading. Petition reviewed and held, on its face, to reveal an action on a continuous, open, current account and not an action on a single contract or order for a stipulated amount.

Miller v Boyce, 219-534; 258 NW 764

Continuous salary account. Statute of limitations will not commence to run against a continuous running salary account until the status of such account is changed.

Bankers Trust Co. v Economy Coal Co., 224-36; 276 NW 16

County claims for care of insane. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Current account (?) or separate accounts (?). On the issue whether a claim against an estate was based on one continuous, open, current account, or on separate and distinct accounts, to some of which the statute of limitation would apply, evidence held to support the rulings of the court on the introduction of evidence, and the findings of the jury.

In re Davis, 217-509; 248 NW 497

"Continuous, open, current account" defined. A series of independent express contracts for services to be performed for an agreed compensation does not constitute a "continuous, open, current account".

Sammon v Roach, 211-1104; 235 NW 78

Fraud or mistake. An account stated may always be opened for fraud or mistake.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Improper assumption of fact. Prejudicial error results from directing the jury, on conflicting evidence, that a claim sued on was an "open, current, and running" account.

Seddon v Richardson, 200-763; 205 NW 307

Interest items—not series of transactions to toll statute. In an action by a widow to establish a claim against the estate of her deceased husband based on an alleged oral contract of decedent to repay a loan of money made by appellant widow to decedent, prior to November 1, 1912, to which the statute of limitations was pleaded, held, mere posting of items of interest applicable to one individual transaction is insufficient to show a "connected series of transactions" so as to convert the matter into a "continuous, open, current account" under statute providing cause of action accrues on date of last item, as this means a connected series of transactions.

Leland v Johnson, 227-520; 288 NW 595

Interruption — instructions. The fragmentary nature of the evidence in proof of the rendition of alleged services may justify the court in instructing as to the effect of any interruptions in the running of the account, even tho there be no direct evidence of such interruptions.

Peterson v Johnson, 205-16; 212 NW 138

School tuition deemed open account. In an action to recover tuition accumulating yearly during the period from 1930 to 1937, the court properly held that the portion of the claim accruing in the period from 1930 to 1932 was not barred by a five-year statute of limitations, since a further statute made a cause of action on a continuous, open, and current account accrue on the date of the last item therein.

School Twp. v Nicholson, 227-290; 288 NW 123

Time lapse starting statute. A lapse of a year and seven months between the first two credit items on a continuous, open, current account is not sufficient to start the running of the statute of limitation prior to the date of the last item.

Miller v Boyce, 219-534; 258 NW 764

11012 Commencement of action.

Insufficient "commencement". In landlord attachment, the filing of a petition only, and the issuance of the writ prior to the expiration of six months after the termination of the lease, and the levying of the writ after the expiration of said six months, do not constitute the "commencement" of an action in such sense as will preserve the lien against a general creditor who levies after the expiration of said six months.

O'Donnell v Davis, 201-214; 205 NW 347

Defect of notice of commencement of action —noninterruption of running of limitations. In action to recover erroneous refund of income tax, summons addressed to marshal only and commanding him to summon named defendants to appear on specific date "to answer to a complaint filed by the United States of America" was defective as not addressed to defendants, not stating cause of action, and not describing consequences of failure to defend,

and hence did not interrupt running of limitations as of date of service.

U. S. v French, 95 F 2d, 922

Filing probate application not commencement of action. When heirs filed an application in probate, more than 10 years after the clerk had approved certain claims, asking that the claims be disallowed and expunged from the record, the right to object to such claims was not barred by the statute of limitations, as the filing of the application was an appearance prior to any final adjudication in the still pending proceedings to collect such claims, rather than the commencement of an action.

In re Baker, 226-1071; 285 NW 641

Service of notice. An action to modify a judgment for mistake therein is "commenced", under §12793, C., '24, by the service of the notice of such action.

Reno v Avery, 203-645; 212 NW 564

Unsigned notice. An unsigned original notice is a nullity.

Citizens Bank v Taylor, 201-499; 207 NW 570

When action deemed commenced. An action to enforce a mechanic's lien is deemed commenced at the time the original notice of the action is delivered to the sheriff for immediate service.

Consumers Lbr. v Rozema, 212-696; 237 NW 433

11013 Nonresidence.

Nonresidence. Intermittent absences from the state by a debtor in looking after his business affairs do not toll the statute.

Freet v Holdorf, 201-748; 206 NW 609

11014 Bar in foreign jurisdiction.

Nonresidence. Action on a promissory note apparently executed and delivered in this state and not shown to have been elsewhere executed and delivered, is not barred simply because an action on the note could not be maintained in another state to which the maker had removed.

In re Thorne, 202-681; 210 NW 952

Bar in foreign state — effect. Action on a promissory note executed in a foreign state is barred in this state when action is barred in said foreign state, even tho such promissory note was given in renewal and in lieu of a note executed in this state.

Martin v Martin, 205-209; 217 NW 818

11016 Exception in case of death.

See under §11007 (XIII)

Statute not suspended by death of claim holder.

Hodgson v Keppel, 211-795; 232 NW 725

11017 Failure of action.

Applicability of statute. This section is not available to a plaintiff who has validly contracted for the period within which to begin his action and who begins his second action after expiration of the contract period.

Taylor v Railway, 208-1396; 227 NW 407

Dismissal — right to recommence action. A plaintiff who voluntarily dismisses his action without prejudice because, without negligence on his part, he is unable to proceed with the trial when the cause is reached on the assignment, has the right to recommence said action at any time within six months following said dismissal and to have said latter action treated as a continuation of said dismissed action, even tho the statutory period for bringing said action would, otherwise, have expired subsequent to said dismissal and prior to reinstituting the action.

Weisz v Moore, 222-492; 265 NW 606; 269 NW 443

Improper procedure. After judgment of dismissal of an action has been entered, plaintiff's right to bring a new action within six months and have it deemed a continuance of the first action (for the purpose of the statute of limitation) can only be exercised by the institution of a new action precisely as tho no prior action had been brought by him. Simply filing a new petition in the defunct prior proceeding is quite futile.

Bird v Nelson, 216-262; 249 NW 393

Loss of right to equitable relief. A duly entered judgment against plaintiff on the merits in a law action, and affirmed on appeal, constitutes a final judgment, and this section furnishes no authority to plaintiff thereafter to file in the adjudicated law action a "substituted petition in equity" (and motion to transfer to equity) involving the same subject matter, and no authority or jurisdiction to the court to entertain such attempted action.

Phoenix Ins. v Fuller, 216-1201; 250 NW 499

New action after failure of former action. An action in equity to mandamus the board of supervisors to order the refund of a tax which has been illegally exacted from plaintiff, may not be deemed a continuation of a former action at law by the same plaintiff against the county and its treasurer for a personal judgment for the amount of said illegally exacted tax.

Murphy v Board, 205-256; 215 NW 744

11018 Admission in writing—new promise.

Admission by attorney — competency. Whether a letter, signed only by the attorney for a debtor and containing an admission of the unpaidness of a debt which is barred by

the statute of limitation, is admissible to show a revival of the debt, quaere.

Koht v Dean, 220-86; 261 NW 491

Admission in writing. In an action by a widow to establish a claim against her deceased husband's estate based on an oral contract to repay to appellant widow a sum of money loaned to decedent prior to November 1, 1912, wherein it is shown by the record of entries in decedent's ledger and by checks signed and deposited by the decedent to joint savings account with the widow, that interest was computed on what purported to be a loan of $4,000, and even tho the statute of limitations had run, the conduct, circumstantial evidence, and admissions of the party to be charged sufficiently showed the existence of a contract so as to make applicable the statute providing for revival of contract by admission in writing.

Leland v Johnson, 227-520; 288 NW 595

Admission to attorney. A communication made by a client to his attorney, relative to the unpaidness of a debt then barred by the statute of limitation, cannot be deemed a confidential communication when made for the very purpose of being communicated to the holder of the barred debt, or to the latter's attorney.

Koht v Dean, 220-86; 261 NW 491

Agreement to pay loan in accordance with terms of note—evidence. Evidence held insufficient to show that an oral promise was made to pay a loan in accordance with the terms of a contemporaneously executed note, and that consequently the claim sued on was barred by the statute of limitations.

Hodgson v Keppel, 211-795; 232 NW 725

Ancient mortgage—debt extended—effect on lien. An admission of an old indebtedness, extending the debt another 10 years, starts the running of the statute of limitations anew, and the lien of a mortgage securing the debt is thereby extended for 20 years from its execution date, but as to whether the lien continues thereafter until the indebtedness secured by it would be barred, quaere.

Lackey v Melcher, 225-698; 281 NW 225

Lien—mortgage recitation of previous mortgage as extension—priority. A property owner gave a note and mortgage in 1915, due in 1920, but which was not paid; and in 1930, before it was barred by the statute of limitations, he gave a second mortgage reciting therein the existence of the prior mortgage, after which in 1931 he gave another note and mortgage to the heirs of the first mortgagee as a renewal of the 1915 mortgage, held that the recitation as to the first mortgage in the second mortgage extended the indebtedness of the first mortgage, so that by renewal of the first mortgage, even after 10 years, it retained priority over the second mortgage.

Lackey v Melcher, 225-698; 281 NW 225

Lost admission in writing reviving debt. An admittedly executed but lost written instrument providing for a payment on a real estate mortgage was an admission of indebtedness sufficient to revive the debt barred by the statute of limitations, since neither the amount nor the indebtedness need be specifically referred to, for if the natural and necessary inference from the writing is an admission of an unpaid indebtedness, it is sufficient.

Barton v Boland, 224-1215; 279 NW 87

Oral promise to pay. Whether an oral promise to pay a debt tolls the statute of limitation, quaere.

Bundy v Canning Co., 215-674; 244 NW 841

Oral promise prior to bar. The statute of limitation may be tolled by an admission that the debt is unpaid, or by a promise to pay the debt, made either before or after the statute has run, but such admission or promise must be in writing and signed by the party to be charged.

In re Sleezer, 209-56; 227 NW 644

Reference to prior mortgage in later admission of debt—revival of action. A statement in a second mortgage, that the premises are encumbered by another prior mortgage as of a certain date, constitutes an admission of that indebtedness such as to start the statute of limitations running anew, and the particular mortgage referred to may be established by extrinsic evidence.

Lackey v Melcher, 225-698; 281 NW 225

Revival of contract by undelivered check. In an action by a widow to establish a claim against deceased husband's estate based on an oral contract to repay a loan made by appellant widow to decedent prior to November 1, 1912, wherein the widow offers evidence of a check purported to have been issued to widow by husband for "interest 1935, 6 months" and deposited by him in joint account with his wife, and it is claimed by appellee that since check was not delivered to appellant widow nor to anyone acting for her, the writing is insufficient, held, such memorandum need not be delivered to opposite party nor his agent nor a person in privity with him, but is sufficient if it is signed and in any way promulgated so as to become an instrument of evidence.

Leland v Johnson, 227-520; 288 NW 595

Special limitations unaffected by general. The limitation contained in §11028, C., '35, requiring mortgage foreclosure within 20 years, is subject only to the exceptions contained in that section, and not to the exceptions appearing in this section, dealing with revival of

action by admission of the indebtedness. This section applies only to the general statute of limitations.

Lackey v Melcher, 225-698; 281 NW 225

Sufficiency of admission of unpaidness. A promissory note, action on which is barred by the statute of limitation, is revived by a duly signed letter of the maker which, while not directly and specifically stating in the language of the statute "that the note is unpaid", naturally and necessarily does so assert from the language used; and this is true even tho the letter contains a plea to the generosity of the creditor to compromise on the basis of a lesser amount.

Koht v Dean, 220-86; 261 NW 491
McClure v Smeltzer, 222-732; 269 NW 888

Supplementing admission by extrinsic evidence. A written acknowledgment by a debtor that a debt, action on which is barred by the statute of limitation, is unpaid, may, for the purpose of showing a revival of the debt, be supplemented by extrinsic evidence which clearly identifies the unpaid debt and the amount thereof.

Koht v Dean, 220-86; 261 NW 491

Unsigned extension. An unsigned indorsement in the handwriting of the maker of a promissory note, and appearing on the back thereof, and made with the knowledge of the payee, and purporting to extend the note to a named future date does not toll the statute of limitation.

King v Knudson, 209-1214; 229 NW 839

11019 Counterclaim.

Section applied.

Riggs v Gish, 201-148; 205 NW 833

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl. Bk. v Malone, 76 F 2d, 251

Barred claim as counterclaim. A defendant, sued on his promissory note to plaintiff, may counterclaim by pleading an admittedly barred claim in defendant's favor and against plaintiff, and arising out of a former partnership between said parties, provided said barred claim was not barred when said note was executed.

Stuff v Stuff, 219-869; 259 NW 924

Judgment assigned by bank receiver. A judgment rendered on May 28, 1926, in favor of a state bank, and later assigned by the receiver of said bank, absolutely ceases to exist on January 1, 1934, for any purpose whatsoever, except as a counterclaim, unless, prior to said latter date, the holder of said judgment and the judgment debtor file in said cause a written stipulation continuing the life of said judgment. (§11033-e1, C., '35 [§11033.1, C., '39]).

Johnson v Keir, 220-69; 261 NW 792

Right to offset on debt to bank. A bank may apply the deposit of a deceased depositor on the promissory note of the depositor to the bank, even tho such note is barred by the statute of limitation.

Merritt v Peterson, 208-672; 222 NW 853

Scope of statute. The statutory right under the general statute of limitations to plead as a counterclaim a barred claim does not extend to a claim barred under a limitation contained in a distinctly different chapter of the code, e. g., a claim for a landlord's lien.

Miller & Chaney Bk. v Collis, 211-859; 234 NW 550

11020 Injunction.

See annotations under §11007

SPECIAL LIMITATIONS

11021 Recovery by cestui que trust.

From time of repudiation. Principle reaffirmed that the statute of limitation commences to run against an action to enforce a trust from the time the trustee openly repudiates the trust relationship.

In re Hellman, 221-552; 266 NW 36

11024 Claims to real estate antedating 1920.

Discussion. See 6 ILB 77—Limitation of real actions; 17 ILR 520—Adverse possession claims

11028 Foreclosure of ancient mortgages.

Lien—mortgage recitation of previous mortgage as extension—priority. A property owner gave a note and mortgage in 1915, due in 1920, but which was not paid and in 1930, before it was barred by the statute of limitations, he gave a second mortgage reciting therein the existence of the prior mortgage, after which in 1931 he gave another note and mortgage to the heirs of the first mortgagee as a renewal of the 1915 mortgage, held that the recitation as to the first mortgage in the second mortgage extended the indebtedness of the first mortgage, so that by renewal of the first mortgage, even after 10 years, it retained priority over the second mortgage.

Lackey v Melcher, 225-698; 281 NW 225

Ancient mortgage—debt extended—effect on lien. An admission of an old indebtedness, extending the debt another 10 years, starts the running of the statute of limitations anew, and the lien of a mortgage securing the debt

is thereby extended for 20 years from its execution date, but as to whether the lien continues thereafter until the indebtedness secured by it would be barred, quaere.

Lackey v Melcher, 225-698; 281 NW 225

Special limitations unaffected by general. The limitation contained in this section, requiring mortgage foreclosure within 20 years, is subject only to the exceptions contained in this section, and not to the exceptions appearing in §11018, C., '35, dealing with revival of action by admission of the indebtedness. This latter section applies only to the general statute of limitations.

Lackey v Melcher, 225-698; 281 NW 225

CHAPTER 487.1

SPECIAL LIMITATIONS ON JUDGMENTS

11033.1 Execution on certain judgments prohibited.

Deficiency judgment as basis for receivership. See under §12372 (VII)

Deficiency judgments generally. See under §12377

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

Reducing statute of limitation on judgments. A legislative act which reduces the existing statutory period of time in which existing judgments may be enforced, yet accords to the holders of such judgments a reasonable time in which to enforce said judgments before the reduced time becomes an absolute bar, is not violative of the "due process" or "impairment of contract" clauses of the federal constitution.

Berg v Berg, 221-326; 264 NW 821

Permissible classification for purpose of legislation. The legislative act which singles out four classes of judgments only, and markedly reduces the period of time theretofore granted by statute for their enforcement, does not constitute prohibited class legislation because the court will judicially take notice of the fact that the enumerated judgments and the claims out of which they arise are generally, if not uniformly, attended by such superior facilities and opportunities for collection as to justify a statute of limitation applicable to them alone.

Berg v Berg, 221-326; 264 NW 821

Statute construed—two-year limitation on foreclosure judgments. Statutory provision that no judgment rendered in foreclosure proceedings "shall be enforced and * * * no force or vitality given thereto for any purpose" after two years from entry thereof, means that after two years, no action could be brought on judgment, no execution could issue thereon, the judgment would not be a lien, no proceedings to enforce the judgment could be commenced by issuance of an execution, and, generally, the judgment would be without force or effect.

Deaton v Hollingshead, 225-967; 282 NW 329

Administrator's settlement of unenforceable lien. Altho a settlement agreement was made between a claimant and an administrator, a decedent's homestead may not be subjected to a mortgage or judgment which has never become a lien thereon, which was not filed or allowed against the estate, which was not enforced within two years after judgment entry, and when such settlement was never approved by the probate court.

Finn v Grant, 224-527; 278 NW 225

Equitable action—waiver of foreclosure decree—nontransfer to law. In a suit brought for money judgment, foreclosure of mortgage, and appointment of a receiver, the plaintiff does not transform the equity action to a suit at law by waiving the foreclosure decree, and therefore the judgment therein is governed by the special limitation provided for judgments obtained in actions for foreclosure of real estate mortgages.

Deaton v Hollingshead, 225-967; 282 NW 329

Execution levy before judgment barred—validity of sale thereafter. If execution proceedings are instituted and levy made during the lifetime of the judgment, a sale thereunder is valid, tho held after the judgment is barred by the statute of limitations.

Deaton v Hollingshead, 225-967; 282 NW 329

11033.2 Revival of certain judgments prohibited.

Judgment assigned by bank receiver — irrevocable termination. A judgment rendered on May 28, 1926, in favor of a state bank, and later assigned by the receiver of said bank, absolutely ceases to exist on January 1, 1934, for any purpose whatsoever, except as a counterclaim, unless, prior to said latter date, the holder of said judgment and the judgment debtor file in said cause a written stipulation continuing the life of said judgment.

Johnson v Keir, 220-69; 261 NW 792

11033.3 Future judgments without foreclosure.

Discussion. See 25 ILR 146—Mortgages—debt barred

11033.4 Former judgments without foreclosure.

Equitable action—waiver of foreclosure decree—nontransfer to law. In a suit brought

for money judgment, foreclosure of mortgage, and appointment of a receiver, the plaintiff does not transform the equity action to a suit at law by waiving the foreclosure decree, and therefore the judgment therein is governed by the special limitation provided for judgments obtained in actions for foreclosure of real estate mortgages.

Deaton v Hollingshead, 225-967; 282 NW 329

Judgment on note — two-year limitation — effect on mortgage foreclosure. Statute outlawing, after two years, a judgment on a promissory note secured by a mortgage did not bar a subsequent foreclosure of the mortgage, commenced before the judgment was barred but while the debt was unpaid, altho the foreclosure decree was not entered until after the judgment on the note was outlawed by the statute.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

CHAPTER 488

PLACE OF BRINGING ACTIONS

11034 Real property.

Action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho plaintiff also prays for the cancellation of the promissory notes—a proceeding which would be transitory if separately brought.

Eckhardt v Trust Co., 218-983; 252 NW 373

Action to establish and foreclose vendee's lien. An action by the vendee of land for rescission of the contract, for personal judgment against the defendant, and for the establishment and foreclosure of a lien on the land for the purchase money paid under mutual mistake, is properly brought in the county in which the land is located, irrespective of the residence of the defendant.

Lee v Bank, 209-609; 228 NW 570

Cancellation of mortgage as real action—venue change to land situs. Ultimate test of applicability of this section is not whether proceeding is in personam or in rem but whether determination of a right in real estate is involved, and therefore an action for cancellation of mortgages involving a determination of a right in real estate, which is the subject of the action, must be brought in the county where the land is located, and granting change of venue thereto will be upheld on certiorari.

Whalen v Ring, 224-267; 276 NW 409

Foreclosure — lands in different counties — sale—validity. Under an ordinary mortgage foreclosure decree, covering land both in the county in which the decree is rendered and in an adjoining county, the clerk has authority to issue a special execution embracing the lands in both counties, and the sheriff of the county in which the execution is issued has authority to make a valid sale in his county of all said lands.

Tice v Tice, 208-145; 224 NW 571

Recovery of realty — jurisdictional venue. An action by the beneficiaries of a trust in real estate (located in this state) to compel the trustee holding title to convey the land, in accordance with the terms of the trust agreement, to a newly designated trustee, must be brought and litigated in the county in which the land, or some part thereof, is located. If not so brought, the court is under mandatory duty, on motion for change of venue, to transfer the action to a proper county.

Titus Co. v Kelsey, 221-1368; 268 NW 23

11035 Injuries to real property.

Questions undeterminable on certiorari. On certiorari to test the legality of an order denying petitioner a change of venue to the county of his residence, the supreme court cannot determine whether the respondent judge correctly determined (1) that a cause of action was pleaded against petitioner's co-defendant, or (2) that said co-defendant was, in fact, a resident of the county of suit, or (3) that the cause of action pleaded in the original suit was for injury to real estate.

Reason: The lower court had jurisdiction to rule on all said matters, and said rulings, tho erroneous, are not illegal acts within the law of certiorari.

Adams v Smith, 216-1365; 250 NW 466

11036 Local actions.

Official action. An action against a sheriff to set aside an execution sale by him must be brought in the county in which the sheriff made the sale, irrespective of the residence of other party defendants.

Brownell v Bank, 201-781; 208 NW 210

Certiorari—when writ lies—ruling on venue. Certiorari will not lie to review the action of the trial court in overruling a motion by the state appeal board for a change of venue of a trial questioning a decision of such board.

State Board v Dist. Court, 225-296; 280 NW 525

Action where school district located—propriety. An action against the state appeal board to review its rulings affecting a school district under the local budget law is properly brought in the county where the school district was located and where proceedings on the levy involved were held from which resulted the board's ruling.

State Board v Dist. Court, 225-296; 280 NW 525

11038 Resident—attachment.

Unallowable place of suit. All of three separately joined causes of action are brought in the wrong county (1) when brought in a county which is not the residence of the defendant; (2) when one cause of action authorizes suit in the said county, but on its face reveals a presumption of full payment; and (3) when the other two causes of action are admittedly not suable in said county.

Smith v Morrison, 203-245; 212 NW 567

Action on stock subscription. A stockholder of a dissolved corporation is entitled to a change of venue to the county of his residence when sued on a stock subscription in a county where he does not reside.

Kosman v Thompson, 204-1254; 215 NW 261

Enjoining action in foreign state. A defendant who is a resident of this state may, even after he has filed formal answer, enjoin a plaintiff who is a resident of this state from maintaining in a foreign state an action on a contract arising in this state, when said action is sought to be maintained for the purpose of vexatiously harassing the defendant and subjecting him to unnecessary costs, part of which are untaxable as costs.

Bankers Life v Loring, 217-534; 250 NW 8

Foreign assignee of note — assignor and makers residents of state—no jurisdiction. In an action on a note by an assignee, resident of a different state than makers, held, improperly brought in federal court where assignee derived title through indorsers residing in same state as makers.

Sargent v State Bk. & Tr. Co., 12 F 2d, 758

11039 Transfer—attached property held.

Harmless refusal to transfer action. Error in refusing to transfer an action to the county of defendant's residence becomes inconsequential when, in the further making up of the issues, either by additional pleadings in the case itself or by intervention therein or by proper consolidation of the action with other actions, the nature of the final action as tried becomes such that it might have been brought originally against all the defendants in the county in which the original action or actions were brought.

Lex v Selway Corp., 203-792; 206 NW 586

Action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

11040 Place of contract.

Unallowable place of suit. All of three separately joined causes of action are brought in the wrong county (1) when brought in a county which is not the residence of the defendant; (2) when one cause of action authorizes suit in the said county, but on its face reveals a presumption of full payment; and (3) when the other two causes of action are admittedly not suable in said county.

Smith v Morrison, 203-245; 212 NW 567

Action against supervisors in re drainage bonds. An action against the board of supervisors relative to public drainage bonds must be brought in the county of which such supervisors are officials, even tho such bonds provide for payment in some other county. It follows that when not so brought a motion for change of venue to the proper county must be sustained. So held where the action sought not only a judgment at law against the supervisors for the amount due on the bonds, but sought mandamus to compel the levy of assessments.

Board v Dist. Court, 209-1030; 229 NW 711

Change of venue — indorser and maker in different counties. In action against maker and indorser of promissory note brought in county of maker's residence where note was payable, the indorser's motion for change of venue to county of its residence was properly overruled.

Lockie v McCauley, (NOR); 213 NW 768

Contracts performable in county. A municipal court has jurisdiction on personal service on the defendant within this state, but outside the county of the court's organization, to render judgment for not exceeding $1,000 on a promissory note signed by the defendant and payable within the said county, even tho the defendant is a nonresident of said county.

West v Heyman, 214-1173; 241 NW 451

Implication to pay in certain county. A mere implication arising from a writing that payments maturing under the writing will be made at a certain place in a certain county, furnishes no legal basis for bringing action in said county when defendant is an actual resident of some other county. Basis for such action in a county other than that of defendant's residence must be found in the express terms of the writing. So held in an action by

a holder of drainage bonds to recover assessments on land to pay the bonds.

Bechtel v Dist. Court, 215-295; 245 NW 299

Implied place of performance. The fact that a writing is, by implication only, performable in a certain county, does not justify the bringing of an action thereon in said county when the defendant is a resident of the state but a nonresident of said county.

Adams v Smith, 216-1365; 250 NW 466

Indorser sued in wrong county. The indorser in blank of a promissory note, when sued alone on his indorsement in the county in which the note requires the maker to make payment, is entitled to a change of venue to the county of his residence when said first county is not the county of his residence in this state.

Dougherty v Shankland, 217-951; 251 NW 73
See Darling v Blazek, 142-355; 120 NW 961

Reformation of promissory note. An equitable action for the reformation of a promissory note, by changing the name of the payee, and for judgment on the note as reformed, cannot be maintained in the county wherein the note by its terms is payable, when the defendant's residence is elsewhere in this state, and he properly moves for a change of venue.

Palmas v Tankersley, 218-416; 255 NW 514

Iowa employment contract—action—place of business. Action for damages under oral contract of employment made in Iowa is not governed by the place where the contract was entered into, but may be maintained in state where employer's business was "localized."

Severson v Hanford Air Lines, 105 F 2d, 622

Nonpermissible motion. In an action in the county in which a promissory note is specifically made payable, and against the apparent signers of the note, it is not permissible for a defendant to file a motion to transfer the action to the county of his residence on the ex parte showing that he never signed said note, or authorized or ratified, or confirmed any signing of said note in his name.

Greenland v Carter, 219-369; 258 NW 678

11041 Certain carriers and transmission companies—actions against.

Resident and nonresident defendants. A resident of this state who is sued in a county of which he is not a resident, as a joint defendant with a nonresident railway corporation, may have the entire cause transferred for trial to the county of his residence, even tho the railway corporation is operating its line in the county in which the suit is brought, it appearing that the nonresident defendant would not be materially inconvenienced by said transfer.

Nickell v Dist. Court, 202-408; 210 NW 563

Actions against common carriers. Statute providing that "an action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars * * * in any county through which such road or line passes or is operated" was apparently based upon the thought that the public interest and convenience would be promoted by permitting suits against common carriers in any counties on their lines.

Bruce Transfer v Johnston, 227-50; 287 NW 278

Venue change denied. The terms "line", "stage", "car" and "other line of coaches and cars" as defined at the time of the enactment of the statute specifying venue of actions against carriers are comprehensive enough to include the operations of a transfer company as a common carrier using motor vehicles, and a damage action against such motor vehicle carrier is properly brought in a county where an automobile collided with one of the carrier's trucks while traveling over its regular route, altho company had no office in such county.

Bruce Transfer v Johnston, 227-50; 287 NW 278

Construction—interpretation as of time of enactment. Whether or not the intendment of the legislature as expressed in a statute providing that "an action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars * * * in any county through which such road or line passes or is operated" included a transfer company using motor vehicle freight trucks operating over a regular route must be determined through interpretation of the words of the statute as of the time adopted.

Bruce Transfer v Johnston, 227-50; 287 NW 278

11042 Construction companies.

Construction of highway. Subgrading a street preparatory to putting down curbing and guttering constitutes "construction of a highway improvement" within the meaning of this section and the contractor is suable by the subcontractor in any county where the contract is made or performed, irrespective of the residence of the defendant.

Goben v Akin, 208-1354; 227 NW 400

Retroactive operation — venue. A plaintiff may avail himself of a statute which regulates the venue of the action, and which is in force when the action is brought, irrespective of the fact that the statute was not in force when the cause of action accrued.

Goben v Akin, 208-1354; 227 NW 400

11043 Insurance companies.

Assignee of policy—venue. The assignee of a fractional interest in a life insurance policy

may, in conjunction with the original beneficiary (who retains the remaining fractional interest), maintain an action on the policy in the county of which the assignee is a resident, even tho said county is not the county of which the original beneficiary is a resident.

Welch v Taylor, 218-209; 254 NW 299

11044 Nonlife insurance assessments.

Class legislation — venue. The legislature may validly classify the subject of insurance into (1) life insurance and (2) nonlife insurance and validly enact that actions to recover assessments under nonlife insurance contracts shall be brought in the county of the defendant's residence without applying the same statutory rule to life insurance companies.

Midwest Ins. v DeHoet, 208-49; 222 NW 548

Impairment of contract—existing statutes. An insurance company may not complain that its contracts are impaired by an unrepealed statute which was enacted prior to its incorporation and which provides that actions on assessments shall be brought in the county in which the defendant resides.

Midwest Ins. v DeHoet, 208-49; 222 NW 548

11044.1 Nonlife insurance premiums or notes.

Statutory change in venue of action. A legislative change in the venue of an action may be validly applied to an existing contract.

Grain Belt Ins. v Gentry, 208-21; 222 NW 855

11046 Office or agency.

Acts not constituting. The act of a corporation whose business was that of a retail clothier in contracting to pay an individual a commission for finding a purchaser for the corporation's real estate in a foreign county (which was the residence of said individual, and which real estate was being used as a branch store), does not constitute the establishment by the corporation of an "office or agency" in such foreign county for the sale of such real estate, no control over the actions of such individual being retained by the corporation.

Syndicate Co. v Garfield, 204-159; 214 NW 598

Change of place of trial—insufficient showing. A defendant who is sued in a county on the theory that the action grew out of an agency maintained by him in said county, is not entitled to have the action transferred to the county of his residence on the simple showing that the particular agent who was in charge when the transaction took place was not such agent when the action was commenced.

Tracy v Oil Co., 208-882; 226 NW 178

Nature or subject of action — agency in county in which action brought. Action on a contract of agency wherein plaintiff is given the exclusive right to make sales on commission in a named county, is properly brought in said county even tho the contract was elsewhere executed, and even tho defendant does not reside in said county.

Hawbaker v Laco Co., 210-544; 231 NW 347

Service on agent at maintained agency. A foreign joint stock land bank must be held to maintain an "office or agency" within the meaning of this section and §11079, C., '35, when, in a county of this state, it maintains a so-called "fieldman" charged with the duty of generally caring for and leasing (under limited authority) the lands belonging to the bank in some 14 counties of this state; and this is true tho said "fieldman" is not designated by the bank as having any office other than his residence in a designated county.

Higdon v Lincoln JSL Bank, 223-57; 272 NW 93

Substituted service on agent of nonresident. Whether a nonresident may be legally sued in this state by service in this state on an alleged, resident agent (on a cause of action growing out of such alleged agency) must necessarily be determined by resorting (1) to the express contract, if any, between the resident and nonresident parties, and (2) to the course of dealings existing between the said parties. Held, agency not shown, even tho an officer of the alleged resident agent was a director of the nonresident defendant, and even tho the nonresident defendant paid commission on sales to the alleged resident agent.

Toole Co. v Group, 217-414; 251 NW 689

Suit in foreign county. A corporation which causes its agent to go into a foreign county and to establish himself at a hotel therein, with authority to take and negotiate promissory notes in effecting sales of corporate stock of the corporation, thereby creates an "office or agency" in said county "for the transaction of business", and may be sued in said county for the return of the consideration paid for a worthless note negotiated in said county by the agent.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

11049 Personal actions.

Discussion. See 13 ILR 212—Distinction between suability and residence

Change of venue—indorser and maker in different counties. In action against maker and indorser of promissory note brought in county of maker's residence where note was payable, the indorser's motion for change of venue to county of its residence was properly overruled.

Lockie v McCauley, (NOR); 213 NW 768

Dismissal—effect on cross-petition. An executor who institutes an authorized action against a corporate receiver in the county of the receiver's appointment, for relief against an alleged fraud-induced contract by the deceased, and (1) is met by a cross-petition for judgment on the said contract, and (2) has his action properly consolidated with divers other actions under duly joined issues which might have been the basis of an original action against the executor in said county of suit, may not thereupon, after dismissing his action, have all proceedings against himself and the estate dismissed on the claim that the probate court which appointed him had sole jurisdiction to render a judgment against him or against the estate.

Lex v Selway Corp., 203-792; 206 NW 586

Dismissal in lieu of change of venue. An action brought against a defendant in a county other than that of his residence, on service on a person who is not the defendant's agent, is properly dismissed, on special appearance by the defendant. Plaintiff has no right to demand that such attempted action be transferred to the county of defendant's residence.

North English Bank v Webber, 204-958; 216 NW 10

Foreign assignee of note — assignor and makers residents of state—no jurisdiction. In an action on a note by an assignee, resident of a different state than makers, held, improperly brought in federal court where assignee derived title through indorsers residing in same state as makers.

Sargent v State Bk. & Tr. Co., 12 F 2d, 758

Official action—action to annul. An action against a sheriff to set aside an execution sale by him must be brought in the county in which the sheriff made the sale, irrespective of the residence of other party defendants.

Brownell v Bank, 201-781; 208 NW 210

Questions undeterminable on certiorari. On certiorari to test the legality of an order denying a petitioner a change of venue to the county of his residence, the supreme court cannot determine whether the respondent judge correctly determined (1) that a cause of action was pleaded against petitioner's co-defendant, or (2) that said co-defendant was, in fact, a resident of the county of suit, or (3) that the cause of action pleaded in the original suit was for injury to real estate.

Reason: The lower court had jurisdiction to rule on all said matters, and said rulings, tho erroneous, are not illegal acts within the law of certiorari.

Adams v Smith, 216-1365; 250 NW 466

Reformation of promissory note. An equitable action for the reformation of a promissory note, by changing the name of the payee, and for judgment on the note as reformed, cannot be maintained in the county wherein the note by its terms is payable, when the defendant's residence is elsewhere in this state, and he properly moves for a change of venue.

Palmas v Tankersley, 218-416; 255 NW 514

Resident and nonresident defendants. A resident of this state who is sued in a county of which he is not a resident, as a joint defendant with a nonresident railway corporation, may have the entire cause transferred for trial to the county of his residence, even tho the railway corporation is operating its line in the county in which suit is brought, it appearing that the nonresident defendant would not be materially inconvenienced by said transfer.

Nickell v Dist. Court, 202-408; 210 NW 563

Stockholders — double liability — procedure. The question whether an assessment on the stockholders of an insolvent banking institution is necessary and, if necessary, the legal amount of such assessment on each stockholder, must be determined in one equitable action instituted by the receiver in the forum of the receivership against all the stockholders. No change of venue is allowable to a defendant who is not a resident of the county where suit is properly brought.

Williams v McCord, 204-851; 214 NW 702
Kosman v Thompson, 204-1254; 215 NW 261

Venue in quo warranto. The district court of one county of a judicial district, in duly authorized quo warranto proceedings in said county involving the rival claims of two parties to the office of district judge, may acquire jurisdiction of both parties even tho one of them is a nonresident of the county of suit and is sole defendant in the county of his residence in a proceeding in quo warranto involving the same office.

State v Murray, 219-108; 257 NW 553

Void sale — relief — venue. A proceeding wherein relief is sought on the theory that the petitioner bought property at a void judicial sale and received nothing for his purchase price must be brought in the court and in the proceedings out of which the execution arose.

State v Beaton, 205-1139; 217 NW 255

11050 Negotiable paper.

Change of venue—indorser and maker in different counties. In action against maker and indorser of promissory note brought in county of maker's residence where note was payable, the indorser's motion for change of venue to county of its residence was properly overruled.

Lockie v McCauley, (NOR); 213 NW 768

Contracts performable in county. A municipal court has jurisdiction on personal service on the defendant within this state but outside the county of the court's organization, to ren-

der judgment for not exceeding $1,000 on a promissory note signed by the defendant and payable within the said county, even tho the defendant is a nonresident of said county.

West v Heyman, 214-1173; 241 NW 451

Foreign assignee of note — assignor and makers residents of state—no jurisdiction. In an action on a note by an assignee, resident of a different state than makers, held, improperly brought in federal court where assignee derived title through indorsers residing in same state as makers.

Sargent v State Bk. & Tr. Co., 12 F 2d, 758

Indorser sued in wrong county. The indorser in blank of a promissory note, when sued alone on his indorsement in the county in which the note requires the maker to make payment, is entitled to a change of venue to the county of his residence when said first county is not the county of his residence in this state.

Dougherty v Shankland, 217-951; 251 NW 73
See Darling v Blazek, 142-355; 120 NW 961

11051 Right of nonresident defendant.

Change of venue—dismissal of resident defendant—effect. In an action against two defendants, one of whom only is a resident of the county of suit, the dismissal of the action as to said resident does not give the remaining defendant a right to have the action transferred to the county of his residence when the entire transaction on which the action was based occurred in the county of suit and at a time when both defendants were residents of said county.

Wilson v Lindhart, 216-825; 249 NW 218

11053 Change when brought in wrong county.

ANALYSIS

I REMEDY FOR WRONG VENUE
II RIGHT TO CHANGE
III QUESTIONS OF FACT
IV COSTS AND EXPENSES
V WAIVERS
VI NONAPPLICABILITY OF STATUTE

I REMEDY FOR WRONG VENUE

Motion to transfer as sole remedy. An action commenced on due and proper service, and concerning a subject matter of which the court has jurisdiction, should not be dismissed because commenced in the wrong county. Motion to transfer to the proper county is the sole remedy.

Baker v Bank, 205-1259; 217 NW 621

II RIGHT TO CHANGE

Action against common carrier — venue change denied. The terms "line", "stage", "car" and "other line of coaches and cars" as defined at the time of the enactment of the statute specifying venue of actions against carriers are comprehensive enough to include the operations of a transfer company as a common carrier, using motor vehicles, and a damage action against such motor vehicle carrier is properly brought in a county where an automobile collided with one of the carrier's trucks while traveling over its regular route, altho company had no office in such county.

Bruce Transfer v Johnston, 227-50; 287 NW 278

Action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

Action in county of receivership forum. A resident national bank as a stockholder in an insolvent state bank of this state is subject to suit in equity by the receiver in the county of the receivership forum, along with all other stockholders, to enforce the statutory double liability of stockholders, even tho the county of said forum is not the county of which the national bank is a resident.

Merchants Bank v Henderson, 218-657; 254 NW 65

Action on stock subscriptions. Parties sued jointly as in equity, for a personal judgment on their separate stock subscriptions, by the receiver of an insolvent corporation, are entitled to a change of place of trial to the county of their respective residences, and to a trial at law in their respective counties; and this is true irrespective of any doctrine (1) of multiplicity of suits, (2) of retention of an action by equity, or (3) of the so-called trust fund doctrine.

Kosman v Thompson, 204-1254; 215 NW 261

Answering defendant — unallowable change. Tho, in an action of tort, the husband and wife are sued jointly in a county other than the county of their common residence, the action of the wife in entering a general appearance and filing answer precludes the court thereafter from granting her a change of place of trial to the county of her residence. So held where the court, on the application of the husband, properly granted him a change of place of trial, and later dismissed the entire action because the plaintiff failed to pay, as ordered, the costs consequent on bringing the action in the wrong county.

Mansfield v Municipal Court, 222-61; 268 NW 908

Assessment on stockholders. Stockholders in an insolvent corporation which is in process

II RIGHT TO CHANGE—continued

of liquidation, are not entitled to a change of place of trial to the county of their residence, on the narrow issue whether an assessment on unpaid stock subscriptions is necessary.

Kosman v Thompson, 204-1254; 215 NW 261
Williams v McCord, 204-851; 214 NW 702

Change of venue granted—order not appealable. Appeal does not lie from an order sustaining a motion for change of place of trial from one county to another and, under the statute, ordering the cause transferred.

Gervich v Cedar Rapids Co., 226-1223; 286 NW 411

Dismissal in lieu of change of venue. An action brought against a defendant in a county other than that of his residence, on service on a person who is not the defendant's agent, is properly dismissed, on special appearance by the defendant. Plaintiff has no right to demand that such attempted action be transferred to the county of defendant's residence.

North English Bk. v Webber, 204-958; 216 NW 10

Effect on nonresident of state. An order for a change of venue to the county of a defendant's residence in this state ipso facto effects a transfer of that part of the action which is against a nonresident of this state, the latter not objecting to such transfer.

Hinchcliff v Dist. Court, 204-470; 215 NW 605

Fatally delayed motion. It is mandatory that a motion for a change of venue from the county of suit to the county of defendant's residence be filed before answer. Manifestly, certiorari will not lie to question the overruling of such belated motion.

Thornburg v Mershon, 216-455; 249 NW 202

Harmless refusal to transfer action. Error in refusing to transfer an action to the county of defendant's residence becomes inconsequential when, in the further making up of the issues, either by additional pleadings in the case itself or by intervention therein or by proper consolidation of the action with other actions, the nature of the final action as tried becomes such that it might have been brought originally against all the defendants in the county in which the original action or actions were brought.

Lex v Selway Corp., 203-792; 206 NW 586

Improper joinder in foreign county. A party who is sued in a county which is not the county of his residence on two causes of action, one of which is not properly suable in such foreign county, may have the place of trial of the latter action changed to the county of his residence.

Lex v Selway Corp., 203-792; 206 NW 586

Improper joinder in wrong county — procedure. Where a receiver joins in one proceeding (1) an equitable action asking the court to declare an assessment on unpaid stock subscriptions, and (2) a law action praying judgment on the assessment against stock subscribers who were nonresidents of the county of such proceedings, the stock subscribers need not move to strike the latter cause of action, but may very properly move (1) to separate the latter cause of action from the former, (2) to transfer the said latter cause of action to the law calendar, and (3) to transfer said latter cause of action to the various counties of the subscribers' residences.

State v Packing Co., 217-1172; 250 NW 876

Insufficient showing. A defendant who is sued in a county on the theory that the action grew out of an agency maintained by him in said county, is not entitled to have the action transferred to the county of his residence on the simple showing that the particular agent who was in charge when the transaction took place was not such agent when the action was commenced.

Tracy v Oil Co., 208-882; 226 NW 178

Judgment in wrong county — collateral attack — immunity from. Conceding, arguendo, that the municipal court was in error in overruling defendant's motion for change of venue to the county of his conceded residence, yet the court manifestly had jurisdiction to rule on the motion, and defendant having failed to seek correction of the error by appeal or other appropriate direct proceedings, the ruling becomes a finality, and the subject matter thereof cannot properly be injected into subsequent collateral proceedings wherein the judgment entered on the merits is sought to be enforced. So held where the collateral proceeding was an action to recover on a stay bond.

Educational Film v Hansen, 221-1153; 266 NW 487

Nonwaiver. Appearing generally, and filing motions to set aside orders, does not work a waiver of the right to a change of place of trial when the application for such change is made before answer.

Kosman v Thompson, 204-1254; 215 NW 261

Nonwaiver of right to be heard on motion. The right to be heard on a motion for change of venue is not waived because movant simultaneously with the filing of the motion files a demurrer to the petition.

Board v Dist. Court, 209-1030; 229 NW 711

Public officer entitled to change. A sheriff who is defendant in an action to set aside an execution sale is entitled to a transfer to the county in which the sale occurred.

Brownell v Bank, 201-781; 208 NW 210

Resident and nonresident defendants. A resident of this state who is sued in a county of which he is not a resident, as a joint defendant with a nonresident railway corporation, may have the entire cause transferred for trial to the county of his residence, even though the railway corporation is operating its line in the county in which suit is brought, it appearing that the nonresident defendant would not be materially inconvenienced by said transfer.

Nickell v Dist. Court, 202-408; 210 NW 563

Stockholders—"double" liability. A stockholder in an insolvent bank who is sued by the receiver, on his "double liability", in the forum of the receivership, in one equitable action, along with all other stockholders, is not entitled to a change of venue in case the county of suit is not the county of his residence in this state.

Broulik v Henderson, 218-640; 254 NW 63

III QUESTIONS OF FACT

Cancellation of mortgage as real action—venue change to land situs. Ultimate test of applicability of §11034, C., '35, is not whether proceeding is in personam or in rem but whether determination of a right in real estate is involved, and therefore an action for cancellation of mortgages involving a determination of a right in real estate, which is the subject of the action, must be brought in the county where the land is located, and granting change of venue thereto will be upheld on certiorari.

Whalen v Ring, 224-267; 276 NW 409

Denial of signature—effect. The statutory denial under oath of one's apparent signature to a promissory note, on which suit is commenced in the county in which the note is payable, furnishes no basis for a motion to transfer the action to the county of the residence of the mover.

Greenland v Carter, 219-369; 258 NW 678

Nonpermissible motion. In an action in the county in which a promissory note is specifically made payable, and against the apparent signers of the note, it is not permissible for a defendant to file a motion to transfer the action to the county of his residence on the ex parte showing that he never signed said note, or authorized or ratified, or confirmed any signing of said note in his name.

Greenland v Carter, 219-369; 258 NW 678

IV COSTS AND EXPENSES

Items recoverable. A defendant who is sued in the wrong county, and appears in such county solely by his attorney in order to obtain a transfer to the proper county, is entitled to be reimbursed for his reasonable outlay consequent on the employment of his attorney, even tho the attorney fee is the only item of expense which he has suffered.

State v Packing Co., 215-1172; 250 NW 876

When amount discretionary. The amount which a defendant, who is sued in the wrong county, is entitled to for expenses in attending in such county lies in the sound discretion of the court.

State v Packing Co., 217-1172; 250 NW 876

When entitled to reimbursement. A defendant who is ruled to be entitled to the transfer of an action to the county of his residence on the happening of a named condition, and said condition happens, is entitled to be reimbursed for his expenses in attending in the wrong county.

State v Packing Co., 217-1172; 250 NW 876

V WAIVERS

Nature or subject of action—nonwaiver of right to be heard on motion. The right to be heard on a motion for change of venue is not waived because movant, simultaneously with the filing of the motion, files a demurrer to the petition.

Board of Supervisors v Dist. Court, 209-1030; 229 NW 711

Nonresident—nonwaiver of right. The act of a defendant who is sued in a county other than that of his residence in appearing generally, filing motions, and proceeding to trial on preliminary matters, does not work a waiver of his right to a change of place of trial to the county of his residence when the application for such change is made before answer.

Kosman v Thompson, 204-1254; 215 NW 261

VI NONAPPLICABILITY OF STATUTE

Nature and subject of action—action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho the plaintiff also prays for the cancellation of the promissory notes—a proceeding which would be transitory if separately brought.

Eckhardt v Bankers Trust, 218-983; 249 NW 244; 252 NW 373

Change of venue—action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

11054 Dismissal.

Change of venue — failure to file papers. When a motion for change of venue is sus-

tained, the papers in the case must be filed in the district court to which the change is granted 10 days before the next term, upon penalty of dismissal of the action by operation of law.

Chariton Finance Co. v Wennerstrum, 226-464; 284 NW 375

Failure to file papers—effect. When defendant has been granted a change of venue to the county of his residence (because he has been sued in the wrong county), the failure of the plaintiff to file "the papers" in the court to which the change is ordered ten days before the first day of the next term of said court, works an automatic dismissal of the action. Whether the filing of certified copies complies with the statute, quaere.

State v Packing Co., 216-1053; 250 NW 130

CHAPTER 489

MANNER OF COMMENCING ACTIONS

11055 Original notice.

Discussion. See 23 ILR 246—Requisites of original notice

ANALYSIS

I COMMENCEMENT OF ACTION
II ORIGINAL NOTICES IN GENERAL
III NAMES OF PARTIES
IV CAUSE OF ACTION AND RELIEF
V COURT, TERM, AND APPEARANCE
VI SIGNATURE TO NOTICE
VII FRAUDULENT SERVICE

Immunity from service generally. See under §11061 (III)
Sovereignty and immunity, state and federal. See under §2

I COMMENCEMENT OF ACTION

Action commenced—note to settle unlawful transaction—estoppel. Where, after an original notice of an action to recover commissions in purchase and sale of grain on board of trade had been served so that action was deemed commenced under the statute providing for service of original notice, a compromise was consummated whereby defendant executed a note extending payment for a period of six months, defendant is estopped in subsequent action on note to plead or prove that transactions were unlawful, since, regardless of validity of original transaction, the compromise, effected in good faith, estopped either party from any further litigation of matter in dispute.

Hoyt v Wickham, 25 F 2d, 777

Defect of notice of commencement of action — noninterruption of running of limitations. In action to recover erroneous refund of income tax, summons addressed to marshal only and commanding him to summon named defendants to appear on specific date "to answer to a complaint filed by the United States of America" was defective as not addressed to defendants, not stating cause of action, and not describing consequences of failure to defend, and hence did not interrupt running of limitations as of date of service.

U. S. v French, 95 F 2d, 922

II ORIGINAL NOTICES IN GENERAL

Cross-petition—notice of—sufficiency. In an action for the partition of lands, a notice by one co-defendant to another co-defendant of the filing by the former of a cross-petition, denying all interest of the latter in the lands in question, is not a nullity because said notice fails to specifically describe or identify said lands, when said notice makes proper reference to the original petition in the action for a correct description of said lands.

Bauer v Bauer, 221-782; 266 NW 531

Default—setting aside—no service of notice. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick-Balke Co. v Dillon, 226-244; 283 NW 872

Employee performing governmental function —jurisdiction through original notice. A liquor commission enforcement officer as a state employee performing a governmental function is, nevertheless, subject to the jurisdiction of the courts by proper service of an original notice.

Anderson v Moon, 225-70; 279 NW 396

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Foreign corporations — burden to sustain original notice. In an action against a foreign corporation commenced by service of original notice on the secretary of state, the plaintiff has the burden to sustain its service and fail-

ing therein may not question the sufficiency of a motion to quash the service.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

When jurisdiction acquired. A court acquires no jurisdiction over the person of a defendant by the due service of an original notice of suit, and consequently no jurisdiction to enter judgment against the defendant, until the arrival of the time for entering default against the defendant as specified in said notice; and this is true tho the notice is served by taking defendant's signed acknowledgment of service wherein defendant "waives time" and "consents to the taking of the judgment".

Dayton v Patterson, 216-1382; 250 NW 595

Service — nonresident attending court — immunity. Nonresident witnesses and suitors attending a court outside of the territorial jurisdiction of their residence are immune from service of civil process while attending court, and for a reasonable time before and after.

Lingo v Reichenbach Co., 225-112; 279 NW 121

Service—nonresident entering state to compromise litigation. Where no fraud or bad faith of an adversary is practiced on a nonresident to induce him to enter this state but he enters solely on the instance of his own attorney in order to attempt a compromise settlement of a pending proceeding, he is not entitled to immunity from service of a civil process and a special appearance therefor will be denied.

Lingo v Reichenbach Co., 225-112; 279 NW 121

Service on nonresident — nonwaiver of immunity. Resisting in a foreign state an action involving the same money sought in an Iowa probate proceeding is not a waiver of the immunity from process permitted a party or witness while attending such probate proceeding.

Moseley v Ricks, 223-1038; 274 NW 23

Service—nonresident—when exempt. A nonresident coming into the state as a party or witness and who is sued while attending the contest of her brother's will may appear specially to secure her common-law immunity from civil process of local courts, which immunity exists and continues not only while in attendance but for a reasonable time thereafter.

Moseley v Ricks, 223-1038; 274 NW 23

Nonresident with securities office in state—statute authorizing service on agent—constitutional. A state statute permitting the service of process on any agent or clerk employed in an office or agency maintained in the state by a nonresident in all actions growing out of, or connected with, the business of such office or agency does not abridge the privileges and immunities to which he is entitled by Art. IV, §2, of the federal constitution, or deprive him of the equal protection of the laws.

Doherty & Co. v Goodman, 294 US 623

Substituted service on nonresidents—automobile cases—contents of notice. Provision in motor vehicle law invoking special method of service on nonresidents does not require that the original notice set out facts which warrant use of such method and which might be necessary to sustain jurisdiction. Notice which complies with §§5038.03 and 11055, C., '39, is sufficient.

Welsh v Ruopp, 228- ; 289 NW 760

Service of notice — presumption attending sheriff's return. A very strong presumption obtains in favor of the return of service of original notice made by an officer, and it cannot be impeached except by very clear and satisfactory proof.

Chader v Wilkins, 226-417; 284 NW 183

III NAMES OF PARTIES

Discussion. See 19 ILR 362—Effect of misnomer

"Idem sonans"—name "Ferkins" instead of "Firkins" within rule. In an action against "Dean Firkins" an original notice addressed and naming "Dean Ferkins" as defendant and which was personally served upon "Dean Firkins" was held sufficient to confer jurisdiction over "Dean Firkins" since the names were within the rule of idem sonans.

Webb v Ferkins, 227-1157; 290 NW 112

"Idem sonans"—greater applicability to constructive service. The application of the doctrine of idem sonans, by the courts, is more strict in regard to constructive service of notice than where the service is personal.

Webb v Ferkins, 227-1157; 290 NW 112

"Idem sonans" doctrine—applicability. The doctrine of idem sonans is recognized by Iowa courts and, while each case must be determined according to its own facts, the mere fact that names spelled differently from true name could be pronounced like the true name by a strained pronunciation would not make the doctrine applicable, but where the names, when general and ordinary rules of pronunciation are applied, are so identical in pronunciation and so alike that there is no possibility of mistake, the doctrine should be applied; or where two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even slight difference in their pronunciation is unimportant, if the attentive ear finds difficulty in distinguishing the two names when pronounced. Such names are "idem sonans" and, altho spelled differently, are to be regarded as the same.

Webb v Ferkins, 227-1157; 290 NW 112

III NAMES OF PARTIES—concluded

Failure to address to defendant. In an attempted action against a city, an original notice which is not addressed to the city, but to a named person with added words "city clerk", is a nullity.

Barton v Waterloo, 218-495; 255 NW 700

Fatal defect in name. An original notice directed to and duly served on "Frank Genero" confers no jurisdiction to enter a judgment by default against "Frank Geneva".

Geneva v Thompson, 200-1173; 206 NW 132

Name of plaintiff—variations. When, in a duly served original notice of suit, and in the petition filed, plaintiff's name appears as "Joseph Gulberg", the statement in the body of the petition that the plaintiff is also known as "Joseph Eulberg" and "that Joseph Gulberg and Joseph Eulberg are one and the same person" furnishes no ground for quashing the notice and dismissing the action.

Gulberg v Cooper, 219-858; 259 NW 925

IV CAUSE OF ACTION AND RELIEF

Duplicate actions — which abatable. While an action in partition, in which service of the original notice is incomplete in whole or in part, is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Duplicate actions on same subject matter—priority. When two actions involving the same subject matter are commenced by different parties (e. g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones et al. v Park, 220-903; 262 NW 801

Injunction—multifarious, vexatious and bad faith litigation. Injunction will lie to restrain the bringing of an action, which has been adjudicated, on a clear showing (1) that the defendant intends in bad faith to institute other and repeated actions on said adjudicated cause of action, (2) that plaintiff has and will continue to suffer irreparable damage and injury in loss of credit and business, and (3) that plaintiff has no remedy for such harassment except to interpose the wholly inadequate plea of adjudication.

Benedict v Mfg. Co., 211-1312; 236 NW 92

Judgment to conform to process and pleading. The court may not decree who is principal in a transaction and who is surety, and render a personal judgment in favor of the surety and against the principal for sums paid by the surety, when the original notice and petition are silent as to such matters, and when there is no other pleading which prays such relief.

Sutton v Rhodes, 205-227; 217 NW 626

Nature of cause of action—failure to state. Jurisdiction is not conferred on the court by an original notice of suit which simply notifies defendant that plaintiff claims a stated sum of money—which contains no statement whatever as to the nature of the cause of action—and said notice is not aided by an inserted statement directing defendant to examine the petition, when filed, for further particulars.

Farley v Carter, 222-92; 269 NW 34

V COURT, TERM, AND APPEARANCE

Incorrect date of appearance term. An original notice of suit in which the date of the beginning of the appearance term is incorrectly stated is fatally insufficient to confer jurisdiction on the court.

Pendy v Cole, 211-199; 233 NW 47

Omission of date of commencement of term. An original notice need not state the date on which the appearance term commences. (Note statute as amended.)

Swan v McGowan, 212-631; 231 NW 440

"Place where" court convenes. The statutory requirement that an original notice state the "place where" said court will convene is complied with by a recital that the court will be held "in the courthouse" at a named place.

Ransom v Mellor, 216-197; 248 NW 361

Void when essentials determinable by inference only. An original notice is wholly void when only by inference can it be determined (1) the time of filing the petition, (2) the court in which the petition is or will be filed, and (3) the term at which defendant is required to appear.

Rhodes v Oxley, 212-1018; 235 NW 919

VI SIGNATURE TO NOTICE

Unsigned notice. An unsigned original notice is a nullity.

Citizens Bank v Taylor, 201-499; 207 NW 570

VII FRAUDULENT SERVICE

Nonresident entering state to compromise litigation—no immunity from process. Where

no fraud or bad faith of an adversary is practiced on a nonresident to induce him to enter this state but he enters solely on the instance of his own attorney in order to attempt to compromise settlement of a pending proceeding, he is not entitled to immunity from service of a civil process and a special appearance therefor will be denied.

Lingo v Reichenbach Land Co., 225-112; 279 NW 121

11056.1 Process—criminal defendant.

Discussion. See 23 ILR 253—Process—criminal defendant

Constitutionality. A statute which provided that service in any action could be made on a nonresident criminal defendant while he was within the state, was unconstitutional in providing that the statute legalized such service where it had been made in cases pending, as after the commencement of an action the question of determining jurisdiction is a judicial function which the legislature is without power to control.

Frink v Clark, 226-1012; 285 NW 681

Nonresident served while in state as criminal defendant. When nonresident defendants in a criminal case were in attendance within the state, they were privileged from the service of civil process in another action, and a special appearance filed by them should have been sustained, notwithstanding a statute passed later legalizing such notice served on criminal defendants in pending actions.

Frink v Clark, 226-1012; 285 NW 681

Service—nonresident—when exempt. A resident of a foreign state who comes into this state at the request of the sheriff of a county in which an official inquest is being held by the coroner, and for the good-faith and sole purpose of giving his testimony at said inquest, is immune from civil process until the lapse of a reasonable time after he has accomplished said purpose.

Kelly v Shafer, 213-792; 239 NW 547

11057 Dismissal.

Attempt to utilize petition in dismissed action. A plaintiff who dismisses his action without prejudice and thereupon institutes a new action may not treat the petition in the dismissed action as surviving and performing the functions of a petition in his newly brought action, even tho he causes the clerk to mark said old petition "Refiled".

Brown v Dickey, 208-410; 226 NW 65

Duplicate actions on same subject matter—priority. When two actions involving the same subject matter are commenced by different parties (e. g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones v Park, 220-903; 262 NW 801

Unallowable reopening of terminated cause. After a cause has gone to judgment as to the only party defendant, no procedure exists which will permit the reopening of the case by service of an original notice on a new party and trying a new case on the old pleadings.

Dye Co. v Davis, 202-1008; 209 NW 744

11058 Who may serve notice.

Service by attorney. Notice of hearing of claims against an estate may be served by the attorney for claimants.

Schroeder v Dist. Court, 213-814; 239 NW 806

11059 How long before term.

Atty. Gen. Opinion. See '38 AG Op 273

11060 Method of service.

Atty. Gen. Opinions. See '34 AG Op 396; '38 AG Op 273

ANALYSIS

I PERSONAL SERVICE
II SERVICE BY LEAVING COPY
III ACKNOWLEDGMENT OF SERVICE

I PERSONAL SERVICE

Discussion. See 11 ILR 131—Acceptance of service outside state

Default—setting aside—no service of notice. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick-Balke Co. v Dillon, 226-244; 283 NW 872

Foreign judgments—immunity from process. A defendant, who, when sued in a foreign state, litigates the issue that he was immune from the service of process in said state because he was then temporarily and involuntarily therein as a military officer of the federal government, and on land owned and used exclusively by said government for military purposes, and who fails to appeal from a ruling denying his claimed immunity may not relitigate said issue when sued in this state on the foreign judgment.

N. W. Cas. Co. v Conaway, 210-126; 230 NW 548; 68 ALR 1465

Mandatory statutory service—strict compliance required. Where jurisdiction of the person depends upon service of either notice or process, the mandatory provision of statutes in regard to such service must be strictly complied with.

Collins v Powell, 224-1015; 277 NW 477

Method of service. As to the proper method of service when statute simply requires the

I PERSONAL SERVICE—concluded

notice to be "served", and specifies no method of service, see

Casey (Town) v Hogue, 204-3; 214 NW 729

"Idem sonans"—name "Ferkins" instead of "Firkins" within rule. In an action against "Dean Firkins" an original notice addressed and naming "Dean Ferkins" as defendant and which was personally served upon "Dean Firkins" was held sufficient to confer jurisdiction over "Dean Firkins" since the names were within the rule of idem sonans.

Webb v Ferkins, 227-1157; 290 NW 112

No presumption foreign foreclosure was in personam. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court, on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

Substituted service statute—strict adherence. Statutes providing for substituted service of original notice present a method of procedure that is extraordinary in character and allowed only because specially authorized. Because such statutes are the only authority for the procedure, the facts required in the statute must appear.

Jermaine v Graf, 225-1063; 283 NW 428

Unallowable substituted service. Service of an original notice on a member of defendant's family as a substitute for actual personal service on the defendant (he being neither sick nor under disability) is a nullity when the person making the service knows that the defendant is then within the county of his residence and where he may be readily found.

Coster v Jensen, 218-1215; 257 NW 303

II SERVICE BY LEAVING COPY

Appeal—notice of—proper service. A statute which distinctly provides that a notice, e. g., a notice of appeal, shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over 14 years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under §7133.

In re Sioux City Yards, 222-323; 268 NW 18

Public officers — survival of service. Service on the superintendent of banking, as such, of an original notice of mortgage foreclosure, survives the retirement of said official from office — is valid and binding on his duly appointed successor.

Greenleaf v Bates, 223-274; 271 NW 614

Substituted service. The district court acquires full jurisdiction over a defendant not found within the county of his residence by leaving a copy of the original notice with defendant's daughter with whom defendant lived, except during temporary absences, said daughter being over 14 years of age.

Moughan v Moughan, 218-1162; 254 NW 828

Substituted service authorized. The requirement that, in proceedings to revoke the license of a physician, the notice of the filing of the charges shall be served "in the manner provided for the service of an original notice in a civil action", authorizes substituted service on a proper member of the defendant's family, in case he cannot be found in the county.

State v Hanson, 201-579; 207 NW 769

Substituted service — presumption. A return of service of an original notice which reveals service on defendant by service on a proper member of his family is presumed correct, and judgment rendered thereon is valid tho defendant never learned of the notice.

Dickerson v Utterback, 202-255; 207 NW 752

Unallowable substituted service. Statutory authority to serve an original notice in certain exceptional instances on the defendant by leaving a copy "at his usual place of residence with some member of his family over 14 years of age" does not permit such substituted service to be made by leaving the copy with a person whose sole contact with the defendant's family is that of an employee in the family of the defendant.

Thompson v Butler, 214-1123; 243 NW 164

"Idem sonans"—greater applicability to constructive service. The application of the doctrine of idem sonans, by the courts, is more strict in regard to constructive service of notice than where the service is personal.

Webb v Ferkins, 227-1157; 290 NW 112

III ACKNOWLEDGMENT OF SERVICE

Acceptance by college graduate—knowledge of act. Court properly refused to set aside divorce decree on grounds that defendant did not know the full import of her act in accepting service of the original notice when the record disclosed that she was college-trained and majored in English.

Reppert v Reppert, 214-17; 241 NW 487

11061 Return of personal service.

ANALYSIS

I PERSONAL SERVICE IN GENERAL
II SUBSTITUTED SERVICE
III PRIVILEGES AND EXEMPTIONS
IV RETURN AND PROOF OF SERVICE
V NO NOTICE AND DEFECTIVE NOTICE CONTRASTED
VI COURT FINDINGS AND JUDGMENT RECITALS

I PERSONAL SERVICE IN GENERAL

General appearance—effect. No service of an original notice of suit need be made if the defendant enters a general appearance.

Scott v Price Bros. Co., 207-191; 217 NW 75
Tracy v Oil Co., 208-882; 226 NW 178

II SUBSTITUTED SERVICE

Substituted service statute — strict adherence. Statutes providing for substituted service of original notice present a method of procedure that is extraordinary in character and allowed only because specially authorized. Because such statutes are the only authority for the procedure, the facts required in the statute must appear.

Jermaine v Graf, 225-1063; 283 NW 428

Jurisdiction of court. The district court acquires full jurisdiction over a defendant not found within the county of his residence by leaving a copy of the original notice with defendant's daughter with whom defendant lived, except during temporary absences, — said daughter being over 14 years of age.

Moughan v Moughan, 218-1162; 254 NW 828

Nonresident corporation — substituted service—special appearance—plaintiff's burden. In a motor vehicle accident action wherein plaintiff obtained service of notice upon a nonresident corporation by serving the commissioner of motor vehicles, and wherein the defendant attacked such service by special appearance on the ground that it was not a person within the purview of the statute, the burden was on the plaintiff to make such showing that defendant was a person under the statute. Held burden not met.

Jermaine v Graf, 225-1063; 283 NW 428

Substituted service on nonresident individual. The statute (§11079, C., '31) which provides, in effect, that when a corporation, company, or individual maintains in this state an agency "in any county" other than that in which said principal resides, service of original notice of any action growing out of or connected with said agency may be personally had on the principal in this state by serving in this state an agent employed in said agency, applies to a nonresident individual maintaining an agency in this state, and when so applied does not deny to said defendant (1) due process of law, (2) the equal protection of the law, (3) any privilege or immunity granted to citizens of this state, or (4) any privilege or immunity possessed by said defendant as a citizen of the United States.

Davidson v Doherty, 214-739; 241 NW 700; 91 ALR 1308

Unallowable substituted service. Statutory authority to serve an original notice in certain exceptional instances on the defendant by leaving a copy "at his usual place of residence with some member of his family over 14 years of age" does not permit such substituted service to be made by leaving the copy with a person whose sole contact with the defendant's family is that of an employee in the family of the defendant.

Thompson v Butler, 214-1123; 243 NW 164

Unallowable substituted service. Service of an original notice on a member of defendant's family as a substitute for actual personal service on the defendant (he being neither sick nor under disability) is a nullity when the person making the service knows that the defendant is then within the county of his residence and where he may be readily found.

Coster v Jensen, 218-1215; 257 NW 303

Venue—residence of defendant—dismissal in lieu of change of venue. An action brought against a defendant in a county other than that of his residence, on service on a person who is not the defendant's agent, is properly dismissed, on special appearance by the defendant. Plaintiff has no right to demand that such attempted action be transferred to the county of defendant's residence.

North English Bank v Webber, 204-958; 216 NW 10

III PRIVILEGES AND EXEMPTIONS

Immunity of state and federal government. See under §2

Service — nonresident attending court — immunity. Nonresident witnesses and suitors attending a court outside of the territorial jurisdiction of their residence are immune from service of civil process while attending court, and for a reasonable time before and after.

Lingo v Reichenbach Co., 225-112; 279 NW 121

Service—nonresident—when exempt. A resident of a foreign state who comes into this state at the request of the sheriff of a county in which an official inquest is being held by the coroner, and for the good-faith and sole purpose of giving his testimony at said inquest, is immune from civil process until the lapse of a reasonable time after he has accomplished said purpose.

Kelly v Shafer, 213-792; 239 NW 547

Service—nonresident—when exempt. A nonresident coming into the state as a party or witness and who is sued while attending the contest of her brother's will may appear specially to secure her common-law immunity from civil process of local courts, which immunity exists and continues not only while in attendance but for a reasonable time thereafter.

Moseley v Ricks, 223-1038; 247 NW 23

Service — nonresident — when not exempt. Where no fraud or bad faith of an adversary is practiced on a nonresident to induce him to enter this state but he enters solely on the in-

stance of his own attorney in order to attempt a compromise settlement of a pending proceeding, he is not entitled to immunity from service of a civil process and a special appearance therefor will be denied.

Lingo v Reichenbach Co., 225-112; 279 NW 121

IV RETURN AND PROOF OF SERVICE

Impeachment of return. The return of a notice is impeachable on a direct attack on its validity.

Casey (Town) v Hogue, 204-3; 214 NW 729

Insufficient impeachment. Evidence held insufficient to impeach the sheriff's return of service of an original notice.

Heater v Bagan, 206-1301; 221 NW 932

V NO NOTICE AND DEFECTIVE NOTICE CONTRASTED

No annotations in this volume

VI COURT FINDINGS AND JUDGMENT RECITALS

Default—setting aside—no service of notice. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick-Balke Co. v Dillon, 226-244; 283 NW 872

11062 Indorsement and return by sheriff.

Atty. Gen. Opinion. See '30 AG Op 59

Garnishment judgment—quashing of return. Upon the quashing of an execution and return, a garnishment judgment has nothing to sustain it.

Gohring v Koonce, 224-1186; 278 NW 283

Service—presumption attending sheriff's return. A very strong presumption obtains in favor of the return of service of original notice made by an officer, and it cannot be impeached except by very clear and satisfactory proof.

Chader v Wilkins, 226-417; 284 NW 183

11063 Penalty—amendment.

Mortgage foreclosure—sale — return — correcting inadvertent error. An inadvertent error in the return of a mortgage foreclosure sale may be corrected by an amendment by the sheriff after the land has gone to sheriff's deed, provided the judgment plaintiff and defendant are the only persons affected. In such case oral testimony showing the error is quite unnecessary. Especially is this true when complainant shows no injury consequent on such correcting amendment.

Equitable v Ryan, 213-603; 239 NW 695

11068 Acknowledgment of service.

Atty. Gen. Opinion. See '38 AG Op 273

Irregularities in petition for appointment of guardian—right to bring action. A petition by the wife of an inmate of a state hospital for the insane, asserting that she was the wife of the inmate who had property, and asking that she be appointed guardian, altho insufficient to meet the statutory requirements for a petition for the appointment of a guardian, was sufficient for the appointment of a temporary guardian, and when notice was accepted by the superintendent of the institution and wife was appointed, she was at least a temporary guardian, and, as such, could maintain an action in behalf of the incompetent.

Jensen v Martinsen, 228- ; 291 NW 422

11069 Insane person out of hospital.

Unknown insanity of defendant.

Engelbercht v Davison, 204-1394; 213 NW 225

11071 County.

Atty. Gen. Opinion. See '36 AG Op 670

11072 Public utility and foreign corporations.

"Doing business in this state." A foreign corporation is "doing business in this state" and is subject to the jurisdiction of the courts of this state when it permanently maintains in this state a sample room of its goods, solicits orders, through its agents, for stocks of goods, assists its purchasers in an advisory way in carrying on their business, and receives, from customers, through said agents, checks for the purpose of the same being forwarded to the main house in the foreign state.

International Co. v Lovejoy, 219-204; 257 NW 576; 101 ALR 122

"Doing business in this state"—what constitutes. Proof that a local resident occasionally solicited and obtained orders for grave memorials to be manufactured by and shipped to this state by a foreign corporation is wholly insufficient, in and of itself, to show that such corporation was doing business in this state in such sense as to evince an intention to submit itself to the jurisdiction of the courts of this state. It follows that valid service of an original notice of suit may not be made on such corporation by serving said local resident.

Dorsey v Anderson, 222-917; 270 NW 463

Director general of railroads. Service of an original notice on a delivering carrier did not, under the war emergency act, bring the director general of railroads into court as a representative of the initial carrier.

Dye Co. v Davis, 202-1008; 209 NW 744

Service on agent. The fact that a delivering carrier is, in point of law, the agent of the

initial carrier in completing a shipment does not authorize service of an original notice on the initial carrier by service on the delivering carrier.

Dye Co. v Davis, 202-1008; 209 NW 744

Service—foreign corporation. A foreign corporation which maintains no office or agency within this state may be validly served with notice of suit by serving said notice on any general agent of the corporation at any point within this state where such agent may be found transacting the business of the corporation.

Kalbach v Equip. Co., 207-1077; 224 NW 73

Foreign corporation without permit—"transacting business" defined. A foreign corporation, even tho it has no permit to do business in this state, and even tho neither it nor its agents maintain an office in this state is, nevertheless, "transacting business" within this state, and subject to service of notice of suit on its resident agent, when, as a continuous and systematic course of business it, in part at its own expense, maintains in this state an agent with powers limited strictly to the solicitation of orders which the corporation approves or disapproves, and on which, in case of approval, it makes its own collections.

American Corp. v Shankland, 205-862; 219 NW 28; 60 ALR 986

Service on soliciting agent. A foreign corporation which has no permit from this state to transact business in this state, and which maintains no office in this state, is not subjected to the jurisdiction of the courts of this state by service in this state of process on the corporation's traveling agent whose authority begins and ends in soliciting and receiving at his own expense in this state orders for goods, and in forwarding said orders to the corporation in the foreign state for approval or disapproval.

Burnham Mfg. v Stove Works, 214-112; 241 NW 405

11073 Consolidated railways.

Atty. Gen. Opinion. See '36 AG Op 670

11074 Insurance company.

Atty. Gen. Opinion. See '36 AG Op 670

Contract remedies for collection—failure to comply with — fatal effect. The beneficiary (and his assignor), in a certificate of insurance of a mutual benefit association, is bound by the bylaws which provide that no resort shall be had to the courts to enforce payment of said certificate until said beneficiary has first exhausted the contract remedies provided by the bylaws for the allowance and payment of said claim.

Ater v Ben. Dept., 222-1390; 271 NW 517

Original notice—service—deputy commissioner may accept. Valid service of an original notice of suit against a foreign insurance company doing business in this state, is made by the act of the deputy commissioner of insurance in accepting, in writing and in the name of said commissioner, service of said notice for and on behalf of said company, tho the authority filed by the company only authorized the commissioner to accept such service.

Woodmen v Dist. Court, 219-1326; 260 NW 713; 98 ALR 1431

Submission to foreign courts — insufficient showing. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Iowa Assn., 222-969; 270 NW 407

11075 Municipal corporation.

Atty. Gen. Opinion. See '36 AG Op 670

11076 School township or district.

Atty. Gen. Opinion. See '36 AG Op 670

11077 Other corporations.

Atty. Gen. Opinion. See '36 AG Op 670

Change of place of trial. A defendant who is sued in a county on the theory that the action grew out of an agency maintained by him in said county, is not entitled to have the action transferred to the county of his residence on the simple showing that the particular agent who was in charge when the transaction took place was not such agent when the action was commenced.

Tracy v Oil Co., 208-882; 226 NW 178

Foreign corporation—discharged employee. Service of an original notice on a foreign corporation which has wholly withdrawn from the state may not legally be made on one who was never an officer or acting officer of the corporation, and who, at the time of service, was simply a discharged former employee.

Reliance Co. v Craig, 206-804; 221 NW 499

Garnishment — notice, service, and return. A corporation may be validly garnished by serving the notice of garnishment on an agent

employed in the office of the corporation in the general management of the corporation's business, e. g., on one employed as a bookkeeper and for general office work, and who looks after the office when the manager is absent, who signs as "cashier" checks issued by the corporation, and who has on occasions, to the knowledge of, and without objection by, the corporation accepted notice of garnishment on the corporation.

Waterloo Canning Co. v Municipal Court, 214-1169; 243 NW 287

Service on corporate director. Statutory authorization of service of an original notice on a corporation by serving a trustee, officer, or general managing agent of the corporation does not authorize such service on a mere director of the corporation.

Bennett v Coal Co., 201-770; 208 NW 519

Service of notice—agent—insufficient proof. Evidence relative to the service of an original notice on a corporation by service on an agent reviewed, and held insufficient to establish the alleged agency.

Bennett v Coal Co., 201-770; 208 NW 519

Service outside state — effect. Jurisdiction in personam of an Iowa corporation is constitutionally obtained by proper service of a proper original notice in a foreign state on one of the last known or acting officers of the corporation, as shown by the last statutory annual report of the corporation on file with the secretary of state of this state.

Bennett v Coal Co., 201-770; 208 NW 519

11079 Actions arising out of agency.

Discussion. See 18 ILR 257—Jurisdiction over nonresidents; 19 ILR 421—Jurisdiction of nonresident

Foreign corporations — burden to sustain original notice. In an action against a foreign corporation commenced by service of original notice on the secretary of state, the plaintiff has the burden to sustain its service and failing therein may not question the sufficiency of a motion to quash the service.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

Foreign corporations — original notice — quashing service. A foreign corporation that has no office, no representative, and at most only one transaction in Iowa is not "doing business" in the state so as to give Iowa courts jurisdiction thereof by service of original notice on the secretary of state and a motion to quash the service was properly sustained.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

Foreign corporation without permit—"transacting business" defined. A foreign corporation, even tho it has no permit to do business in this state, and even tho neither it nor its agents maintain an office in this state, is, nevertheless, "transacting business" within this state, and subject to service of notice of suit on its resident agent, when, as a continuous and systematic course of business, it, in part at its own expense, maintains in this state an agent with powers limited strictly to the solicitation of orders which the corporation approves or disapproves, and on which, in case of approval, it makes its own collections.

American Corp. v Shankland, 205-862; 219 NW 28; 60 ALR 986

General appearance—effect. It is of no consequence how or where the defendant was served when he enters a general appearance to the action.

Tracy v Oil Co., 208-882; 226 NW 178

Nonresident with securities office in state—statute authorizing service on agent. A state statute permitting the service of process on any agent or clerk employed in an office or agency maintained in the state by a nonresident in all actions growing out of, or connected with, the business of such office or agency does not abridge the privileges and immunities to which he is entitled by Art. IV, §2, of the federal constitution, or deprive him of the equal protection of the laws.

Henry L. Doherty & Co. v Goodman, 294 US 623

Service on agent—due process. In an action against a partnership as the sole defendant (all the partners being nonresidents of the state, and unserved), a return simply to the effect that the original notice was served on a named person as agent of defendant is fatally wanting in due process unless plaintiff, by some appropriate and adequate showing, establishes the existence of every fact which justifies such substituted service under this statute.

Thornburg v Bennett, 206-1187; 221 NW 840

Service on agent at maintained agency. A foreign joint stock land bank must be held to maintain an "office or agency" within the meaning of §11046 and this section, C., '35, when, in a county of this state, it maintains a so-called "fieldman" charged with the duty of generally caring for and leasing (under limited authority) the lands belonging to the bank in some 14 counties of this state; and this is true tho said "fieldman" is not designated by the bank as having any office other than his residence in a designated county.

Higdon v Lincoln JSL Bank, 223-57; 272 NW 93

Substituted service on nonresident individual. This section applies to a nonresident individual maintaining an agency in this state, and when so applied does not deny to said defendant (1) due process of law, (2) the equal pro-

tection of the law, (3) any privilege or immunity granted to citizens of this state, or (4) any privilege or immunity possessed by said defendant as a citizen of the United States.

Davidson v Doherty & Co., 214-739; 241 NW 700; 91 ALR 1308

Substituted service on nonresident individual. Principle reaffirmed that an individual nonresident who maintains in this state an office or agency, even tho he has never personally been within this state, may be legally personally served in this state with original notice of suit as to matters growing out of such office or agency by service directed to him and made on his agent employed in said office or agency.

Goodman v Doherty, 218-529; 255 NW 667

Substituted service on agent of nonresident. Whether a nonresident may be legally sued in this state by service in this state on an alleged, resident agent (on a cause of action growing out of such alleged agency) must necessarily be determined by resorting (1) to the express contract, if any, between the resident and nonresident parties, and (2) to the course of dealings existing between the said parties. Held, agency not shown, even tho an officer of the alleged resident agent was a director of the nonresident defendant, and even tho the nonresident defendant paid commission on sales to the alleged resident agent.

Toole Co. v Group, 217-414; 251 NW 689

11080 Minor.

Service on minor when parent is plaintiff. In an action to quiet title, statutory acceptance by a parent, of service of the original notice for his minor child under 14 years of age, is adequate, even tho the parent is plaintiff in the action, it affirmatively appearing that the action was not adverse to said minor.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

11081 Service by publication.

ANALYSIS

I PUBLICATION SERVICE IN GENERAL
II ACTIONS IN WHICH PUBLICATION AUTHORIZED
III THE AFFIDAVIT
IV THE JUDGMENT

I PUBLICATION SERVICE IN GENERAL

Alimony — decree on publication service — effect. A plaintiff who takes a decree of divorce on service by publication may not thereafter resurrect the proceeding for the purpose of an allowance of alimony. This is true even tho plaintiff prayed for alimony, and even tho the court assumed to continue the proceeding on the question of alimony.

Doeksen v Doeksen, 202-489; 210 NW 545

Jurisdiction under publication service. A decree, rendered on service by publication in the foreclosure of a second mortgage, adjudging that said second mortgage is senior and superior to a first mortgage, in accordance with a definite pleading and prayer to said effect based on a good-faith but mistaken belief that said first mortgage had been paid, is binding and conclusive on the holder of said first mortgage, and may not be collaterally assailed by said first mortgagee in an action to foreclose his mortgage. (It appears that said first mortgagee had allowed the time to elapse in which to attack said decree under §11595.)

Lyster v Brown, 210-317; 228 NW 3

Jurisdiction under publication service. In partition proceedings, service by publication only on a nonresident nonappearing defendant arms the court with jurisdiction to adjudicate the title to the property.

Clark v Robinson, 206-712; 221 NW 217

No presumption foreign foreclosure was in personam. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court, on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

II ACTIONS IN WHICH PUBLICATION AUTHORIZED

Publication as to concealed debtor. A judgment in rem on publication service on an actual resident of the county of suit is proper when it is made to appear that the defendant locked herself in her own house and concealed herself in order to avoid personal service of the notice of suit.

Reinecke v Hinman, 202-419; 215 NW 442

III THE AFFIDAVIT

No annotations in this volume

IV THE JUDGMENT

Garnishment—judgment in rem—nonmerger of debt sued on. In an action aided by attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation,—if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

11082 Unknown defendants.

Inheritance taker as "representative" of contingent remainderman. A decree setting

aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

Unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant, arising out of the terms of a testamentary devise, is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189

11084 Method of publication.

Atty. Gen. Opinion. See '36 AG Op 128

"General circulation" — general test. A "newspaper of general circulation" is determined not by the number of its subscribers but by the diversity of its subscribers, and is such newspaper if it contains news, tho of limited amount, of a general nature, even tho it makes a specialty of news of a particular kind.

Burak v Ditson, 209-926; 229 NW 227; 68 ALR 538

Divorce—notice by publication—plaintiff assailing own decree. A wife who obtains a divorce by publication may not in a subsequent action between the same parties for divorce, aided by attachment, complain that her previous divorce decree is void for defective publication on the ground that the record fails to show selection of the newspaper by "plaintiff or his attorney", when she relied on the publication and induced the court to grant a decree thereon.

Hanson v Hanson, 226-423; 284 NW 141

Previous divorce by publication — defense. Decree of divorce denied on the ground that the parties were already divorced in a previous proceeding in which the court had full and complete jurisdiction upon service of notice by publication.

Hanson v Hanson, 226-423; 284 NW 141

Requisites—selection of newspaper. Statute providing method of publishing original notice does not require a record showing who selected the newspaper.

Hanson v Hanson, 226-423; 284 NW 141

11085 Service complete—proof.

Service by publication—frivolous objection to affidavit. Argument that an affidavit of publication of original notice having been signed by the "foreman" of the newspaper did not constitute an affidavit by "the publisher or his foreman" in compliance with the statute is too hypercritical and frivolous to be noticed on appeal.

Hanson v Hanson, 226-423; 284 NW 141

11086 Actual service.

Indexing petition—lis pendens. The filing and due indexing of a petition to subject real estate to the lien of a personal judgment creates a lis pendens, and personal service of the action on the defendants outside the state establishes jurisdiction in rem, even tho the petition may be subject to a corrective motion or to a demurrer.

Lawrence v Stanton, 212-949; 237 NW 512

Special appearance after general appearance. A nonresident defendant who, after a service in a foreign state, enters a general appearance in an action in rem, is not thereby precluded from later entering a special appearance attacking the jurisdiction of the court because of the filing by plaintiff of an amended and substituted petition which converts his former action in rem into an action for an accounting and for personal judgment against said nonresident.

Fidelity Co. v Bank, 213-1058; 237 NW 234

11087 Mode of appearance.

ANALYSIS

I WHAT CONSTITUTES GENERAL APPEARANCE
II WHAT DOES NOT CONSTITUTE GENERAL APPEARANCE
III AUTHORITY TO APPEAR
IV EFFECT OF APPEARANCE

I WHAT CONSTITUTES GENERAL APPEARANCE

Filing of motion—effect. A defendant who appears generally and files successive motions is necessarily in court for all purposes tho he suffers judgment by default for want of an answer.

Andrew v Bank, 206-1070; 221 NW 809

Pleading to merits. A plea to the merits of a case is necessarily a general appearance.

Scott v Price Bros. Co., 207-191; 217 NW 75

Pro se appearance—new trial—grounds—insufficient record. Record reviewed in an action wherein plaintiff appeared pro se in the trial court, and held insufficient to authorize the court (1) to set aside a former order denying a new trial, and (2) thereupon—11 months

after the entry of judgment on a directed verdict—to grant a new trial.

Spoor v Price, 223-362; 272 NW 305

Stipulation for decree constitutes appearance. The signing by a plaintiff and defendant in an action for separate maintenance of an agreement which specifies the amount and terms of such maintenance and provides for the entry of decree in accordance therewith, and the filing of such stipulation in the action, constitute an appearance by the defendant to said action.

Kalde v Kalde, 207-121; 222 NW 351

What constitutes appearance. Whether a duly signed acceptance of service wherein defendant "waive time, and receipt for copy, and consent to the filing of the petition, and the taking of judgment", constitutes an appearance by the defendant, quaere, but it cannot be deemed to constitute an acceptance when the court at the time of assuming to enter judgment did not so construe it, but specifically found that defendant had made no appearance.

Dayton v Patterson, 216-1382; 250 NW 595

II WHAT DOES NOT CONSTITUTE GENERAL APPEARANCE

Consent by adversely interested party. One of two adversely interested defendants may not, as a matter of law, appear in court on behalf of such other defendant. It follows that a consent decree entered on such appearance may be set aside.

Graettinger Tile v Paine, 202-804; 211 NW 366

Filing of petition for removal—general (?) or special (?) appearance. Rule of federal courts recognized that filing of petition for removal of cause to federal court constitutes special and not general appearance. Under Iowa statute, the filing of such petition with notation thereof on record would constitute a special appearance even tho not expressly announced as such, since court will look to substance rather than form in determining whether an appearance is general or special.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

Improper appearance—who may object. An objection that an attorney was appearing both for and against a party litigant cannot be made by a litigant other than the one affected.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Appearance of receiver of insolvent co-executor trust company. Where the district court of Scott county appoints a receiver to take charge of an insolvent trust company which was also a co-executor and co-trustee in an estate pending in the district court of Johnson county, and when such receiver is ordered by the Johnson district court to report and account, such receiver does not, by filing a pleading and supporting it by evidence denying the jurisdiction of the Johnson district court, thereby make a "general appearance" in the Johnson district court.

Bates v Evans, 226-438; 284 NW 385

III AUTHORITY TO APPEAR

Attorney—presumption. An attorney who appears for a party to an action will be presumed to have been authorized so to appear—until the opposing party shows the want of such authority.

Sloan v Jepson, 217-1082; 252 NW 535
Carson & Co. v Long, 219-444; 257 NW 815

IV EFFECT OF APPEARANCE

Discussion. See 25 ILR 329—Quasi in rem action

Appeal—fatally defective notice—appearance—effect. A fatal defect in a notice of appeal to the district court from the action of the board of review in a city is not cured by the entry in the district court of a general appearance by the city through its attorneys.

Midwestern Co. v Des Moines, 210-942; 231 NW 459

Defective service cured by appearance. Any defect in the service of the notice of the filing of charges in proceedings to revoke the license of a physician is cured by the appearance of the accused.

State v Hanson, 201-579; 207 NW 769

General appearance—effect. It is of no consequence how or where the defendant was served when he enters a general appearance to the action.

Scott v Price Bros. Co., 207-191; 217 NW 75
Tracy v Oil Co., 208-882; 226 NW 178

Defective notice—appearance—effect. A notice of appeal from a refusal of the board of review to lower an assessment and the form, contents, and service of such notice become quite immaterial when the board enters a general appearance and contests the appeal.

Chapman Bros. v Board, 209-304; 228 NW 28

Nonservice cured by appearance. Failure to serve an adverse party in divorce proceedings with notice of a hearing to modify the decree becomes quite immaterial when such adverse party appears at said hearing in person and by attorney.

Guisinger v Guisinger, 201-409; 205 NW 752

Notice—jurisdictional—nonwaiver of defects by appearance. A voluntary appearance by attorneys for appellee and the filing of a motion to dissolve a restraining order do not waive defective notice. Notice of appeal is jurisdic-

IV EFFECT OF APPEARANCE — concluded

tional and want of notice cannot be supplied by voluntary appearance.

Cheney v Board, (NOR); 222 NW 899

Operation and effect. Lack of capacity to act as party plaintiff cannot be remedied by the appearance of the defendant in the action.

Pearson v Anthony, 218-697; 254 NW 10

Vendor's attorneys at vendee's bankruptcy. Fact that attorneys for a real estate contract vendor appeared in vendee's bankruptcy is not a submission to nor adjudication by the bankruptcy court of vendor's rights under the real estate contract, when no claim was filed thereon and purpose of appearance was to protect a different and unsecured indebtedness of the vendee to the vendor.

Blotcky v Silberman, 225-519; 281 NW 496

11088 Special appearance.

Discussion. See 10 ILB 121—Special appearance in Iowa; 13 ILR 468, 17 ILR 81—Pleading to the merits

Special appearance—purpose. Purpose of special appearance is to protect defendant from being required to defend action in which court has no jurisdiction.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Filing of petition for removal—general (?) or special (?) appearance. Rule of federal courts recognized that filing of petition for removal of cause to federal court constitutes special and not general appearance. Under Iowa statute, the filing of such petition with notation thereof on record would constitute a special appearance even tho not expressly announced as such, since court will look to substance rather than form in determining whether an appearance is general or special.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

Appearance by vouchee. A vouchee who has voluntarily taken over the defense of an action may not file a special appearance to a motion for judgment against him on the judgment rendered against the principal defendant.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Appearance to fatally defective service — effect. Appearance in an appellate tribunal for the purpose of objecting because the notice of appeal was not served as required by law does not confer jurisdiction on the tribunal to hear the appeal.

Casey (Town) v Hogue, 204-3; 214 NW 729

Certiorari — defective service — no jurisdiction through special appearance nor return to writ. Where mandatory statute requiring service of writ of certiorari had neither been complied with nor service accepted, the supreme court acquires no jurisdiction of the inferior tribunal and a proper special appearance will not waive defective service nor does the return to the writ constitute a pleading to the merits.

Collins v Powell, 224-1015; 277 NW 477

Employee performing governmental function —jurisdiction through original notice. A liquor commission enforcement officer as a state employee performing a governmental function is, nevertheless, subject to the jurisdiction of the courts by proper service of an original notice.

Anderson v Moon, 225-70; 279 NW 396

Failure of service—dismissal. The dismissal of an action is proper when it appears that no defendant has been legally served with the original notice.

Thompson v Butler, 214-1123; 243 NW 164

Certiorari—respondent's right to appear specially. A respondent in certiorari has a right to appear specially to question jurisdiction, in the absence of a statute to the contrary, regardless of whether or not this right is conferred by this section.

Collins v Powell, 224-1014; 277 NW 477

Service — nonresident — when not exempt. Where no fraud or bad faith of an adversary is practiced on a nonresident to induce him to enter this state but he enters solely on the instance of his own attorney in order to attempt a compromise settlement of a pending proceeding, he is not entitled to immunity from service of a civil process and a special appearance therefor will be denied.

Lingo v Reichenbach Co., 225-112; 279 NW 121

Service—nonresident—when exempt. A nonresident coming into the state as a party or witness and who is sued while attending the contest of her brother's will may appear specially to secure her common law immunity from civil process of local courts, which immunity exists and continues not only while in attendance but for a reasonable time thereafter.

Moseley v Ricks, 223-1038; 274 NW 23

Special appearance after general appearance. A nonresident defendant who, after service in a foreign state, enters a general appearance in an action in rem, is not thereby precluded from later entering a special appearance attacking the jurisdiction of the court because of the filing by plaintiff of an amended and substituted petition which converts his former action in rem into an action for an accounting and for personal judgment against said nonresident.

Fidelity & Cas. v Bank, 213-1058; 237 NW 234

See Dunlop v Land Bank, 222-887; 270 NW 362

Special appearance after judgment. Where a salesman obtained an Iowa judgment against an Indiana company and after judgment the company filed a combination pleading consisting of a special appearance (the propriety of which is doubtful) and a petition to vacate the judgment for lack of jurisdiction, and a decision is rendered thereon adversely to the company, from which no appeal was taken, such judgment becomes a final judgment, and where company subsequently brings a separate action in equity to vacate such judgment for lack of jurisdiction, the trial court properly dismissed the equity petition and refused to enjoin its enforcement, since the former decision on the jurisdiction question was res adjudicata. The company cannot relitigate the same questions that were, or might have been, determined upon its former petition to vacate the judgment.

Martin Bros. v Fritz, 228- ; 292 NW 143

Special appearance—burden to sustain jurisdiction. On special appearance directly attacking the jurisdiction of the court because of a defect in the original notice or in the service thereof, the burden of proof rests upon the plaintiff to sustain the jurisdiction by proof of an adequate notice and the service thereof; and such burden is not met by the production of a captionless, unaddressed, and unsigned notice.

Pendy v Cole, 211-199; 233 NW 47

Special appearance — standing on. In appealing from an adverse ruling on the issues raised by a special appearance, it is not necessary for appellant especially to elect to stand upon his special appearance, or to suffer judgment to be entered against him.

Irwin v Bank & Trust, 218-470; 254 NW 806

Special appearance — sufficiency. A special appearance for the sole purpose of attacking the jurisdiction of the court, may be made in the form of a motion to dismiss wherein the movant recites that he appears "specially to the jurisdiction".

Hlas v Quaker Co., 211-348; 233 NW 514

Subsequent plea to merits—effect. One who, on special appearance, challenges the jurisdiction of the court on the ground of defective service of the notice of suit, and who, after his challenge is overruled, pleads to the merits and participates in the trial, thereby submits himself to the jurisdiction of the court, and is in no position to ask, on appeal, for a review of the ruling on his special appearance; especially is this true as to suits in equity.

Crouch v Remedy Co., 205-51; 217 NW 557
Scott v Price Bros. Co., 207-191; 217 NW 75
Webster County Buick Co. v Auto Co., 216-485; 249 NW 203

Substituted service on nonresident corporation—special appearance. In a motor vehicle accident action, wherein plaintiff obtained service of notice upon a nonresident corporation by serving the commissioner of motor vehicles, and wherein the defendant attacked such service by special appearance on the ground that it was not a person within the purview of the statute, the burden was on the plaintiff to make such showing that defendant was a person under the statute. Held burden not met.

Jermaine v Graf, 225-1063; 283 NW 428

Original notice—service on nonresidents under motor vehicle law—showing required. Where an attack by special appearance and motion to quash is made upon use of special method of securing service on nonresidents provided for in motor vehicle law, a showing is required of facts essential to jurisdiction, and one of such basic facts is nonresidence of defendant at the time the use and operation of the vehicle allegedly causing the damage upon which suit is brought. Accordingly, proof of nonresidence at time suit is started would not be sufficient where accident in question occurred one and one-half years earlier.

Welsh v Ruopp, 228- ; 289 NW 760

Writ of prohibition — right to issue. The jurisdiction of the supreme court to issue a writ of prohibition commanding a district court to discontinue all assumption of jurisdiction over named actions pending in said latter court does not depend on whether the district court has made rulings as to special appearances entered in said actions.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

General appearance after special appearance. General appearance subsequent to a special appearance works a waiver of the special appearance.

Music v De Long, 209-1068; 229 NW 673

Scope—applicable to entire action. Statute authorizing a special appearance contemplates such an appearance to the entire action and not to a part of it only.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Government employee's automobile collision —immunity as a defense. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Groves v Webster City, 222-849; 270 NW 329
Anderson v Moon, 225-70; 279 NW 396

Harmless error—nunc pro tunc correction. Overruling a special appearance to plaintiff's application for a nunc pro tunc order and then correcting the trial record thereunder by substituting "plaintiff" for "defendant" in an order extending time to file exceptions to instructions and motion for new trial is harmless error where defendant appeared and

without objections thereto permitted and participated in hearing on the merits of such exceptions and motion for new trial.

Thompson v Butler, 223-1085; 274 NW 110

Jurisdiction as sole question. Jurisdiction of the court is the only question which can be tried out on special appearance. So held where attempt was made, on such appearance, to try out the question whether attached property was exempt from attachment or execution levy.

Scott v Wamsley, 215-1409; 245 NW 214

Jurisdictional only—no pleading to merits. A special appearance goes only to jurisdictional matters and does not permit any pleading relative to the merits of the case.

Anderson v Moon, 225-70; 279 NW 396

Jurisdiction of officers. It seems that a special appearance before an administrative officer, e.g., the industrial commissioner, for the sole purpose of questioning the jurisdiction of the officer to act in a certain proceeding, is proper, and will not be deemed an appearance to the merits.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

Moot case—unnecessary review. An appeal from an order sustaining a special appearance will be dismissed when it appears that since the entry of the order plaintiff has instituted a new action on the same subject matter and that defendant has entered a general appearanee thereto.

Schnurr v Brazelton, 217-1125; 253 NW 152

Motion to dismiss—special appearance. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Nondeterminable matters. Whether an action is, in truth and fact, an action against the state in its sovereign capacity, is a question which cannot be tried out on a special appearance—the petition not showing on its face that the action is such.

Iowa Elec. Co. v Board, 221-1050; 266 NW 543

Nongeneral appearance. A special appearance to question the jurisdiction of the court on the ground that the defendant had been sued in a county other than that of his residence, and on service on a nonagent of the defendant's, is not rendered a general appearance (1) by a motion to quash the return of service of the notice and to dismiss the action, or (2) by the introduction of relevant testimony at the hearing on said motion.

North English Bk. v Webber, 204-958; 216 NW 10

Nonresident served while in state as criminal defendant. When nonresident defendants in a criminal case were in attendance within the state, they were privileged from the service of civil process in another action, and a special appearance filed by them should have been sustained, notwithstanding a statute passed later legalizing such notice served on criminal defendants in pending actions.

Frink v Clark, 226-1012; 285 NW 681

Order overruling special appearance. An order of the district court overruling a special appearance, and thereby sustaining the jurisdiction of the court, is appealable.

In re Sioux City Yards, 222-323; 268 NW 18

Appearance of receiver of insolvent company. Where the district court of Scott county appoints a receiver to take charge of an insolvent trust company which was also a co-executor and co-trustee in an estate pending in the district court of Johnson county, and when such receiver is ordered by the Johnson district court to report and account, such receiver does not, by filing a pleading and supporting it by evidence denying the jurisdiction of the Johnson district court, thereby make a "general appearance" in the Johnson district court.

Bates v Evans, 226-438; 284 NW 385

Appearance date agreed on—waiver of notice. Where the parties in a proceeding to vacate an order of court approving the final report of a bank receiver stipulate that the court may set a date for appearance later than the second day of the term, and that the bank examiner will file an appearance or pleading on or before that date, and that no other or further notice to him shall be necessary, the examiner may not assert the departure from the statutory requirements as to the appearance date as a ground for challenging the jurisdiction of the court by a special appearance.

Bates v Loan & Trust Co., 227-1347; 291 NW 184

11091 Unserved parties—optional procedure.

Form. In rendering a decree, the court may very properly insert a precautionary clause to the effect that the decree is not binding on unserved and nonappearing parties.

Gunn v Gould Co., 206-172; 218 NW 895; 220 NW 127

11092 Real estate—action indexed.

Discussion. See 20 ILR 476—Lis pendens

Duplicate actions—which abatable. While an action in partition, in which service of the original notice is incomplete in whole or in part, is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Lien on crops pending foreclosure—lis pendens. The remedial provisions of a mortgage, including a pledge of the rents and profits, are such a part of the subject matter of a foreclosure action that indexing in lis pendens imparts to a purchaser of the mortgagor-landlord's share of the corn constructive notice of the mortgagee's lien on the corn.

Sutton v Schnack, 224-251; 275 NW 870

Petition—index—service—effect. The filing and due indexing of a petition to subject real estate to the lien of a personal judgment creates a lis pendens, and personal service of the action on the defendants outside the state establishes jurisdiction in rem, even tho the petition may be subject to a corrective motion or to demurrer.

Lawrence v Stanton, 212-949; 237 NW 512

Rents—lis pendens—effect. The filing of a petition for the foreclosure of a real estate mortgage, with prayer for the appointment of a receiver of the rents pledged by said mortgage, and the due indexing of said petition as a lis pendens, matures the mortgagee's lien on the pledged rents, even tho at said time the original notice of the action has not been served on the mortgagor. It necessarily follows that said matured lien has priority over a subsequent assignment of the said rents.

First Tr. JSL Bk. v Jansen, 217-439; 251 NW 711

11093 Lis pendens.

Discussion. See 20 ILR 476—Lis pendens

Assignment pending action—right of grantee. One who becomes an assignee of a real estate mortgage after the commencement of a successful action to set aside the mortgage as fraudulent (the action being legally lis pendens by proper index) and who, during the trial of said action, to which he had been made a party, redeems the land from tax sale, must be deemed a mere volunteer payer of taxes with no right to have the amount paid by him made a lien on the land.

Clarkson v McCoy, 215-1008; 247 NW 270

Foreclosure — perfecting right to receivership. A mortgagee, whose mortgage contains a receivership clause covering the rents during the redemption period, perfects his right to such remedy (1) by duly filing his petition for foreclosure, (2) by praying for the appointment of such receiver, and (3) by causing his action to be indexed as a lis pendens. And this is true even tho the original notice filed with the petition is a nullity. It follows that his right to such remedy is prior to all other mortgagees subsequently foreclosing mortgages which embrace like clauses.

Union Tr. Co. v Carter, 214-1131; 243 NW 523

Indexing lis pendens—overcoming presumption. The presumption that the clerk of the district court duly indexed, as a lis pendens, a petition for the foreclosure of a real estate mortgage is so strong that convincing proof to the contrary is required to overcome it.

First Tr. JSL Bank v Jansen, 217-439; 251 NW 711

Lien on crops pending foreclosure. The remedial provisions of a mortgage, including a pledge of the rents and profits, are such a part of the subject matter of a foreclosure action that indexing in lis pendens imparts to a purchaser of the mortgagor-landlord's share of the corn constructive notice of the mortgagee's lien on the corn.

Sutton v Schnack, 224-251; 275 NW 870

Petition—index—service—effect. The filing and due indexing of a petition to subject real estate to the lien of a personal judgment creates a lis pendens, and personal service of the action on the defendants outside the state establishes jurisdiction in rem, even tho the petition may be subject to a corrective motion or to a demurrer.

Lawrence v Stanton, 212-949; 237 NW 512

Purchase during litigation—effect. Principle reaffirmed that one who acquires an interest in land pendente lite is bound by the resulting judgment, even tho he was not made a party to the pending litigation.

Stiles v Bailey, 205-1385; 219 NW 537

Purchase pending foreclosure. One who purchases real estate pending a properly indexed foreclosure proceeding on the property, purchases at his peril.

Eckert v Sloan, 209-1040; 229 NW 714

Purchase pending foreclosure. The purchaser of real estate pending foreclosure of a mortgage may not avoid the effect of the constructive notice imparted by such proceeding by

the claim that he purchased in reliance on a release of the mortgage by the mortgagee, (1) when he knew that the consideration for the release had wholly failed, and (2) when neither he nor the mortgagor acted in good faith in the transaction.

Eckert v Sloan, 209-1040; 229 NW 714

Mortgages—rents—lis pendens—effect. The filing of a petition for the foreclosure of a real estate mortgage, with prayer for the appointment of a receiver of the rents pledged by said mortgage, and the due indexing of said petition as a lis pendens, matures the mortgagee's lien on the pledged rents, even tho at said time the original notice of the action has not been served on the mortgagor. It necessarily follows that said matured lien has priority over a subsequent assignment of the said rents.

First Tr. JSL Bank v Jansen, 217-439; 251 NW 711

Unrecorded contract—election of remedy by seller—third party's rights. Under a contract for sale of automatic sprinkler system where the title or ownership is made to depend on a condition, it comes within §2905, C., '97 [§10016, C., '39] making such contracts invalid against creditors; and where seller by way of counterclaim to buyer's action, to avoid a mechanic's lien for the same property, elected to recover the purchase price, such seller made an irrevocable exercise of his option and neither the fact of filing such action nor filing the notice of lis pendens was a notice of lien as against the trustee for bondholders whose bonds were secured by a mortgage on all equipment of the corporation filed subsequent to such action. However, the action was a notice of an election to recover purchase price which waived any right to title, but was not such notice as was required by §2905, C., '97 [§10016, C., '39].

Fire Protection Co. v Hawkeye Co., 8 F 2d, 810

CHAPTER 490

PUBLICATION AND POSTING OF NOTICES

11098 Publications in English.

Atty. Gen. Opinion. See '25-26 AG Op 427

11099.1 "Newspaper" defined.

Atty. Gen. Opinions. See '38 AG Op 448; AG Op June 29, '39

Official newspapers—form and sufficiency of application for appointment. Under statute requiring that application shall be made to county supervisors for appointment as an official newspaper, an application which avers the qualifications of the newspaper in the words of the statute is sufficient. The application need not be in any particular form, and any written application by the publisher which apprises the board of the desire of the newspaper to be selected is sufficient to require the board to take cognizance of it.

Bredt v Franklin County, 227-1230; 290 NW 669

"General circulation" — general test. A "newspaper of general circulation" is determined not by the number of its subscribers, but by the diversity of its subscribers, and is such newspaper if it contains news, tho of limited amount, of a general nature, even tho it makes a specialty of news of a particular kind.

Burak v Ditson, 209-926; 229 NW 227; 68 ALR 538

Official newspapers—"bona fide yearly subscribers" defined. On the question whether a newspaper is entitled to be selected as an "official newspaper" of the county for a certain year, the following persons cannot be deemed "bona fide yearly subscribers," tho the newspaper is being sent to and received by them in the county, viz.:

1. Those whose subscriptions have expired prior to the year in question.
2. Those who have not subscribed for the newspaper for several years prior to the year in question.
3. Those who have never subscribed for the newspaper.

Van der Burg v Bailey, 209-991; 229 NW 253

Official newspapers—division of compensation. A newspaper which is entitled to be selected as an official newspaper for a county may agree with a newspaper which is not entitled to be so selected for a division of the compensation for official publications, and in such case both newspapers will be designated as official publications, but for one compensation only.

Van der Burg v Bailey, 209-991; 229 NW 253

11102 Selection by county officers.

Atty. Gen. Opinion. See '38 AG Op 448

11103 Refusal to publish.

Right to reject advertisement. The business of publishing a newspaper is a strictly private enterprise, and the owner thereof is free to accept or reject tendered advertisements as he sees fit.

Shuck v Herald, 215-1276; 247 NW 813; 87 ALR 975

11104 Days of publication.

Atty. Gen. Opinion. See '36 AG Op 128

11106 Fees for publication.

Atty. Gen. Opinions. See '25-26 AG Op 427; '28 AG Op 262; AG Op Jan. 25, '39; Jan. 26, '39

CHAPTER 491

PLEADINGS

11108 Technical forms.

Removal of causes—filing of petition. Rule of federal courts recognized that filing of petition for removal of cause to federal court constitutes special and not general appearance. Under Iowa statute, the filing of such petition with notation thereof on record would constitute a special appearance even tho not expressly announced as such, since court will look to substance rather than form in determining whether an appearance is general or special.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

Allegations—conclusiveness on party pleading. An allegation binds the one who makes it, and when its truth militates against the pleader, it must be taken as true as against him.

Reynolds v Aller, 226-642; 284 NW 825

Immaterial deviation. The fact that a guardian brings an action in behalf of the ward as "next friend" does not necessarily affect the validity of the proceedings.

Bennett v Ryan, 206-1263; 222 NW 16

Liberality in pleadings. In the adjudication of claims pending in receivership proceedings, compliance with the strict rules of pleadings will not ordinarily be demanded.

Andrew v Bank, 207-948; 222 NW 8

Mongrel "and/or". The use of the mongrel term "and/or", in pleading specifications of negligence or recklessness, is sharply disapproved.

Popham v Case, 223-52; 271 NW 226

Technical inaccuracy. The pleading of an adjudication in a reply, instead of in the petition, does not necessarily constitute an error of consequence, even tho it be conceded that the technical rules of pleading are violated.

Cochran v Sch. Dist., 207-1385; 224 NW 809

11109 "Pleadings" defined.

Treating legally insufficient pleading as sufficient. See under §12827
Voluntary issues. See under §11426
Discussion. See 20 ILR 49—Defective pleading

Allegations in one count not admissions as to another count. Different theories of recovery contained in separate counts of a petition are not admissions by which the plaintiff is bound under the rule that he may not controvert his own pleading.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Answer and motion at same time. The filing of an answer to a petition as amended, and, at the same time, a motion attacking the amendment, is unallowable. In such case the answer will stand and the motion will be deemed waived.

Bliss v Watson, 208-1199; 227 NW 108

Belated filing of motion first raised on appeal—ignored. Question, that a motion attacking an answer was not timely, raised for the first time on appeal, will not be considered by the appellate court.

Hillje v Tri-City Co., 224-43; 275 NW 880

Conclusiveness on pleader. A litigant who both concedes and alleges in his pleadings that the adverse party is in possession of premises under a lease is necessarily bound thereby.

Metropolitan v Andrews, 215-1049; 247 NW 551

Conclusiveness on party. The recitals of fact in the verified pleadings of a party may be conclusive on the same party in subsequent litigation.

Plymouth Co. v Schulz, 209-81; 227 NW 622

Contract to repurchase stock—equitable issues not presented. On appeal from a ruling sustaining plaintiff's demurrer to answer of a foreign corporation, in suit for breach of contract to repurchase from plaintiff its own stock, setting up defense that such purchase would impair its capital, which was prohibited under the statute of the state of its domicile, the supreme court could not exercise its inherent equitable power or give consideration to estoppel, ratification, implied contract, or theory that contract was loan, when proper pleading or proof relating thereto was lacking.

Bishop v Middle States Co., 225-941; 282 NW 305

Cost bond affidavit not a pleading. The statutory affidavit in support of a motion for cost bond is not a pleading.

Schultz v Ins. Co., 225-1024; 282 NW 776

Equitable estoppel—pleading—necessity. An estoppel and the facts supporting it must be pleaded.

Securities Inv. Corp. v Noltze, 222-678; 269 NW 866

Misnomer—effect. The misnomer of a pleading is of little consequence.

Wilson v Tolles, 210-1218; 229 NW 724

Motion to strike conclusions—overruling not ground for reversal. Supreme court will not assume original jurisdiction to determine a motion to strike not ruled on in the lower court; but, even tho it were overruled, a motion to strike allegations on the ground that they were

in the nature of conclusions and not statements of fact would not warrant a reversal in the supreme court.

Albright v Winey, 226-222; 284 NW 86

Receivers—nonnecessity for formal objections. The receiver of an insolvent bank is under no legal obligation to file formal objections to a claim which asserts a right to an equitable preference in payment of a deposit. In other words, he may contest the claim without formal pleadings.

Andrew v Church, 216-1134; 249 NW 274

Rejoinder. A "rejoinder" to a reply is unknown to our practice.

Cochran v Sch. Dist., 207-1385; 224 NW 809
Hiller v Felton, 208-291; 225 NW 452

Reply or amendment—waiver of objections. Altho a pleading, denominated as a reply, is really an amendment to the petition, but the question of proper pleading was not raised, and the defendants amended their answers as tho the reply had been an amendment to petition, and parties, without objection, offered evidence pertaining thereto, any objections possibly arising on account of the departure from the rules of pleading were waived.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Reply to reply—no legal standing. A reply to a reply brief and argument has no standing and will be stricken on motion.

In re Rinard, 224-100; 275 NW 485
See Cochran v School Dist., 207-1385; 224 NW 809

Waiver of error—answer after overruling motions to dismiss. An error in overruling a demurrer or motion to dismiss is waived by answering to merits.

Johnson v Purcell, 225-1265; 282 NW 741

Withdrawal of admission—effect. An admission by a party in his pleading is admissible against him even tho by an amended pleading he has withdrawn his admission.

Beery v Glynn, 214-635; 243 NW 365

11111 Petition.

Discussion. See 20 ILR 106—"Mending hold doctrine"

ANALYSIS

I FORM OF PETITION
II SPLITTING CAUSE OF ACTION
III CONSTRUCTION OF PLEADINGS
IV GENERAL TEST OF SUFFICIENCY
V ULTIMATE FACTS
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IX NEGLIGENCE
X FRAUD
XI ALLEGATION OF DAMAGES
XII PRAYER FOR RELIEF

Judgments, actions split, res judicata. See under §11567 (VII)

I FORM OF PETITION

Pleadings in probate—informality. Pleadings in probate do not require the particularity and formality of pleadings in actions generally.

In re Willenbrock, 228- ; 290 NW 503

Name of plaintiff—variations. When, in a duly served original notice of suit, and in the petition filed, plaintiff's name appears as "Joseph Gulberg", the statement in the body of the petition that the plaintiff is also known as "Joseph Eulberg" and "that Joseph Gulberg and Joseph Eulberg are one and the same person" furnishes no ground for quashing the notice and dismissing the action.

Gulberg v Cooper, 219-858; 259 NW 925

Novation. A plea of novation must allege a mutual assent of all the parties affected by the transaction.

Benton v College, 202-15; 209 NW 516

II SPLITTING CAUSE OF ACTION

See also §11567 (VII)
Discussion. See 14 ILR 311—Splitting cause of action

Executory contract. A party to a continuing, executory contract may, notwithstanding the wrongful repudiation of the contract by the other party, insist on the contract and sue and recover the matured installments to date; and such action is no bar to a subsequent action to recover henceforth for the wrongful breach of the contract.

Collier v Rawson, 202-1159; 211 NW 704

Subjecting insurance to probate claim—dismissal as to policy in foreign court unallowable. A claimant in probate, alleging an oral contract assigning all decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

Res judicata — persons and matters concluded. Under the doctrine of res judicata a party must try his entire cause without splitting the issues or defenses, and so a former judgment of a court of competent jurisdiction rendered on the merits between the same parties or privies and on the same cause of action estops and bars relitigation of, not only matters raised, but also matters which might properly have been raised.

Bagley v Bates, 223-836; 273 NW 924

Claims acquired during foreclosure—independent action to enforce. Where, pending foreclosure action, plaintiff acquires an additional claim against the defendant, he is not bound to amend and assert said claim in the foreclosure proceedings, but may maintain a subsequent and independent action on the newly acquired claim, even tho it pertains to the subject matter of the foreclosure.

Central Bank v Herrick, 214-379; 240 NW 242

Claim acquired during foreclosure. A junior mortgagee who, pending the foreclosure of his mortgage, pays the interest on a senior mortgage, is under no legal duty to include said payment in his foreclosure proceedings. He may subsequently assert such claim in an independent proceeding.

Jones v Knutson, 212-268; 234 NW 548

Mortgagee suing for delinquent taxes omitted from foreclosure judgment. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Note and mortgage—nonsplitting of action. A mortgagee is not guilty of splitting his cause of action (1) by suing at law on his secured note and proceeding against property of the mortgagor other than the mortgaged property, and (2) by instituting foreclosure proceeding as trustee for other secured note holders without making any claim therein on his own note.

Iowa Co. v Clark, 213-875; 237 NW 336

Open account for material and labor—separate counts not required. In action on open account embracing material and labor, court's refusal to require plaintiff to divide cause of action into two counts, alleging items of material in one count and items of labor in the other, held not erroneous.

Edwards v Cooper, (NOR); 222 NW 376

Permissible splitting of action. When a promissory note, and the last interest coupon note, both mature at the same time in the hands of the same holder, a judgment in an action solely on the interest coupon note (which contains no promise to pay the principal) is not an adjudication of the amount due on the principal note. In other words, the holder may first sue on the coupon note and later on the principal note.

Des M. Trust Co. v Littell, 209-22; 227 NW 503

Rent—action on separate installments. The bringing of separate actions on separate installments of rent as they fall due under a lease does not constitute a splitting of a single cause of action, because the maturing of each installment matures a new cause of action.

Hoefer v Fortmann, 219-746; 259 NW 494

III CONSTRUCTION OF PLEADINGS

Construction supporting judgment. The court will, if fairly possible, so construe a pleading as to support the judgment of the trial court.

Schramm & S. Co. v Shope, 200-760; 205 NW 350

Constitutionality of statute. A pleading assailing the constitutionality of a statute must (1) point out specifically the clause or section of the constitution which it is claimed is violated, and (2) designate the specific grounds upon which the asserted violation is based.

Peverill v Board, 201-1050; 205 NW 543

Acquiescence in construction. A pleader who acquiesces in the interpretation of the trial court of an ambiguous pleading may not, on appeal, deny the effect of his acquiescence, especially when by a simple amendment he might easily have removed all uncertainty.

Wilson v Stever, 202-1396; 212 NW 142

Alternative allegation—construction. An allegation that a party "knew, or by the exercise of reasonable diligence should have known" of a certain act, will be construed, when attacked by motion or demurrer, as simply alleging the weaker of the two alternatives, to wit: that the party "by the exercise of reasonable diligence should have known" of said act.

Cornick v Weir, 212-715; 237 NW 245

Action for discovery and accounting—intermingled law and equity. A petition, tho divided into "divisions" and to some extent separately embracing legal and equitable matters, is not subject to a motion to strike because of misjoinder, when the petition as a whole manifestly pleads but one cause of action, viz: an action for discovery and for an accounting.

Garretson v Harlan, 218-1049; 256 NW 749

Mutual construction of indefinite pleadings. Indefinite pleadings will be treated on appeal as sufficient to properly raise the issue when

III CONSTRUCTION OF PLEADINGS—concluded

the parties have so treated them in the trial court.

O'Bryon v Weatherly, 201-190; 206 NW 828

Building contracts—approval of materials—noncontradictory custom. Under a contract providing for the approval of materials to be furnished by a subcontractor to a principal contractor in part execution of a building contract, a known custom may be pleaded, to the effect that such approval was to be determined according to the plans and specifications of the general contract between the principal contractor and the owner of the building, provided that such custom is not contradictory to the subcontractor's contract.

Granette Co. v Neumann & Co., 200-572; 203 NW 935; 205 NW 205

Actions for damages—evidence. Evidence that a nuisance was a "health hazard" is fairly justified by a pleading that plaintiff and his family were, by reason of the nuisance, subject to "offensive, obnoxious, and poisonous odors * * * and detrimental to the comfort, use, and enjoyment of their property."

Hill v Winterset, 203-1392; 214 NW 592; 37 NCCA 232

Authority—insufficient plea. An allegation that a named party was an officer, and was charged with the financial management, of a college, "and, because of being such officer and financial agent, was authorized to enter into, on behalf of the college", a specified contract, is not such clear, direct, and definite allegation of authority as is required by the law.

Benton v College, 202-15; 209 NW 516

Contradicting one's own pleading. A pleader is not estopped from pleading a state of facts which is absolutely contrary to his pleaded state of facts in a former pleading in the same court and in the same trial.

First N. Bk. v Frank, 203-364; 212 NW 705

Indefinite treated as sufficient. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (i. e., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

Pleadings as evidence—counterclaim as admission. Where corporation, within its agency for an insurance association, insured its own automobile, and when sued along with the driver thereof on account of a collision involving the automobile, and when the corporation counterclaims therein, alleging that it and driver were free from negligence, which counterclaim was subsequently dismissed, then in a later action against corporation to recover on the policy, the corporation was bound by such allegation as an admission of its consent to use the vehicle, and the pleading was admissible in evidence therefor.

Mitchell v Underwriters, 225-906; 281 NW 832

Action on insurance policy—real party in interest—authority to make admission in pleading. A defendant, Automobile Underwriters, a corporation, formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers, called the State Automobile Insurance Association, is the real party in interest in an action to enforce a judgment against the insurance carrier. The association is not a legal entity and, when the Automobile Underwriters is the only legal entity of the two, an admission of an important fact by the underwriters made in a counterclaim in the action in which judgment was obtained is binding on them in the later action.

Mitchell v Underwriters, 225-906; 281 NW 832

Scope of employment—admission. A counterclaim to the effect that defendant's employee was, at a named time and place, operating defendant's automobile in a careful manner and without negligence, with prayer for damages against plaintiff for injuring the machine, will be construed as an admission that the employee was, at the time and place, acting within the scope of his employment.

Hamilton v Sprague, 202-47; 209 NW 446

Supplemental petition after answer—pleading valid second tax deed. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without reserving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Trespass and conversion. A party may plead trespass and conversion in the same action.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA(NS) 203

Unpleaded issues—instruction. Instruction reviewed and held not open to the vice of injecting an issue not in the pleadings, to wit: that plaintiff was an unwilling guest in defendant's automobile.

Reed v Pape, 226-170; 284 NW 106

IV GENERAL TEST OF SUFFICIENCY

Allegations—res ipsa loquitur—applicability determined from pleadings. When a dispute

arose as to whether or not plaintiff was relying on res ipsa loquitur, trial court should interpret pleading, and determine therefrom—rather than from statements of counsel—whether res ipsa loquitur was applicable.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Arrest of judgment—motion goes to sufficiency of petition. A motion in arrest of judgment raises only the question of whether the petition wholly fails to state a cause of action, not whether the petition should have been more specific.

Kirchner v Dorsey, 226-283; 284 NW 171

Authority of agent. An allegation that money was paid under a mistake, in that the payer (1) did not know that the payee was not a bona fide holder for value of the nonnegotiable note in question, and (2) did not know the authority of the agent of the payee, is wholly insufficient, no attempt being made to show what authority the agent had.

Benton v College, 202-15; 209 NW 516

Belated objections. The objection that a petition does not state a cause of action may be deemed waived when made for the first time in a motion for a new trial.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Beneficiary's right to insurance. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Establishing claim against proceeds of realty. An equity petition which alleged that widow elected to take under will devising to her a life estate, with the right to dispose of realty for her necessary support, and which prayed that a claim for support of widow, pursuant to a contract with her, be established and declared a lien against the realty, was held to plead sufficient facts, and, together with the evidence in the case, was sufficient to warrant its submission.

Hoskin v West, 226-612; 284 NW 809

Foreign corporation's permit to do business—burden of proof. A foreign corporation for pecuniary profit, suing on an Iowa contract, has the burden to plead and prove its compliance with the statutes requiring permit to do business herein, without which a directed verdict in its favor is error.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Judgment by default—no admission of cause of action. Principle reaffirmed that a default is not an admission of a valid cause of action where none is pleaded.

Neilan v Lytle Co., 223-987; 274 NW 103

Judgment notwithstanding the verdict—pleadings complete. Where the pleadings of the successful party averred all material facts necessary to a complete cause of action or defense, a motion for judgment notwithstanding the verdict was properly overruled.

Lee v Sundberg, 227-1375; 291 NW 146

Nonspecific allegations. Even tho a pleading is not as specific and detailed in its allegations as it ought to be, yet if it alleges the ultimate fact governing plaintiff's action, the submission of such ultimate fact will not necessarily constitute error, especially when there is no motion for a more specific statement.

Kenwood Lbr. v Armstrong, 201-888; 208 NW 371

Petition—competent allegations—striking in toto improper. A motion to strike an entire amended and substituted petition, being too broad, is properly overruled when such pleading, altho replete with objectionable matters, nevertheless contains competent allegations necessary to afford the relief prayed for.

Skaien v Witmer Co., 224-391; 276 NW 623

Public aid—mandamus—sufficiency of petition. In mandamus to compel an appropriation by a board of supervisors to a farm bureau association, the failure of the petition to state the amount of aid furnished the bureau by the federal government is not fatal when the petition was not attacked in the trial court.

Appanoose Bureau v Board, 218-945; 256 NW 687

Removal—petition failing to state grounds. A petition, challenging the appointment of an administrator with will annexed and the correctness of the report filed on behalf of the deceased executrix, concluding with a prayer that the letters of administration be set aside, is insufficient inasmuch as it fails to state any ground for such removal as contemplated by §12066, C., '35.

In re Collicott, 226-106; 283 NW 869

Slander of property or title—essential elements—when petition demurrable. A petition in an action for damages for slander of title is

IV GENERAL TEST OF SUFFICIENCY —concluded

demurrable unless, inter alia, it alleges, in some proper form, (1) the utterance and publication of the alleged slanderous words, and (2) the special legal damages suffered by plaintiff. Pleading reviewed and held fatally deficient in both particulars.

Witmer v Bank, 223-671; 273 NW 370

Subsequent purchaser—burden of proof. A mortgagee in an action for the conversion of the mortgaged chattels need only allege the existence of his unsatisfied mortgage. The defendant must allege and prove, not only (1) that he is a subsequent purchaser, but (2) that he became such purchaser without notice of the plaintiff's mortgage.

Loranz & Co. v Smith, 204-35; 214 NW 525; 53 ALR 662

V ULTIMATE FACTS

Admissions of fact—conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Enticing and alienating. An allegation that the affections of a wife were alienated by slandering the plaintiff husband and by cultivating in the wife a dislike for plaintiff is sufficient without setting out the words uttered and the persons in whose presence they were spoken; likewise, an allegation that defendants "jointly and severally" conspired to alienate the affections of the wife from the husband.

Depping v Hansmeier, 202-314; 208 NW 288

Want of consideration. The all-essential element of a plea of failure of consideration is the facts. There need not necessarily be any formal statement "that there was a total failure of consideration."

Miller v Laing, 212-437; 236 NW 378

VI CONCLUSIONS

Conclusion plea. Alleging a legal conclusion without alleging the supporting facts is a bad plea.

Taylor County Bureau v Board, 218-937; 252 NW 498

Conclusions controlled by specific allegations. An allegation that an act was done "carelessly, negligently and fraudulently" must be construed as predicating the action solely on negligence when such is the effect of the pleader's subsequent and particularized allegations.

Pease v Bank, 210-331; 228 NW 83

Fact-supported conclusions permissible. A pleader has the right to plead conclusions provided the ultimate facts alleged support the conclusions.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Harmless conclusion. An allegation of fact which is sufficient, if proven, to constitute negligence, is none the less sufficient because the pleader adds thereto his conclusion of negligence.

Townsend v Armstrong, 220-396; 260 NW 17

Unallowable conclusion plea. An allegation that a person was a financial officer of a college, and because of such fact was authorized to enter into a specified contract on behalf of the college, is an unallowable conclusion plea.

Benton v College, 202-15; 209 NW 516

Unallowable conclusion plea. An allegation that the transferee of a negotiable promissory note received it without consideration,—that said transferee was not a bona fide holder for value,—is a conclusion plea, and is not justified by the additional allegation of fact that said transferee took the note as a "donation or gift".

Benton v College, 202-15; 209 NW 516

Damages—wrongful possession of trust deed and note. In action to recover damages because defendant wrongfully procured and retained possession of trust deed and note, plaintiff's allegation that, "by reason of the alleged wrongful conduct of the defendant, plaintiff was rendered helpless and unable to comply with his contract of sale of said land and to secure an extension of the time of payment" of an incumbrance, was a mere conclusion and insufficient to show that defendant's wrongful appropriation of note and trust deed was proximate cause of plaintiff's damages.

Arthaud v Griffin, (NOR); 205 NW 528

Fraud—conclusion. A general allegation that a defendant practiced fraud and deceit on the plaintiff in procuring the latter's signature to an instrument is a pure conclusion.

Legler v Ins. Assn., 214-937; 243 NW 157

Naked conclusion. An allegation that a fund "belongs to plaintiff" is, in and of itself, a mere conclusion.

Markworth v Bank, 212-954; 237 NW 471

Proof—legal conclusion of fraud—no defense. In an action on an administrator's bond, the surety's pleading of a legal conclusion of fraud between administrator and a claimant will not constitute a defense.

In re Davie, 224-1177; 278 NW 616

Striking of conclusions. Conclusions and immaterial matter have no proper place in a pleading, and should be stricken on motion.

Andrew v Ind. Co., 207-652; 223 NW 529

VII PRESUMPTIONS

Presumption. Principle reaffirmed that it will be presumed that a pleader states a case as strongly as the facts will justify, and that nothing will be assumed in his favor except that which, upon a fair and liberal interpretation, is implied from his averments.

Pettijohn v Halloran, 200-1355; 206 NW 631

Presumption as to sustaining facts. On appeal in an action involving the title to real estate, it will be assumed, in support of the judgment, that the plaintiffs were the proper parties in interest, tho the record is indefinite, when they were so treated without objection in the trial below.

Bullock v Smith, 201-247; 207 NW 241

Probate claim—payments applied on debts due—presumption. In a probate action to establish claim for housekeeping services rendered to decedent, where decedent promised to pay claimant small amounts from time to time to cover cost of her clothing and personal expenses, with an additional amount upon his death out of his estate, it would be presumed that small payments made by decedent in his lifetime were to be applied on debts which were due for such expenses, no showing having been made to the contrary.

In re McKeon, 227-1050; 289 NW 915

Allegation of ownership or mortgageable interest. A petition in mortgage foreclosure need not allege that the mortgagor owned the land or had a mortgageable interest therein; neither need it allege that the mortgagor is estopped to deny such ownership or interest because the execution of such mortgage worked such estoppel in and of itself.

Watts v Wright, 201-1118; 206 NW 668

VIII CONDITIONS MATURING OR DEFEATING ACTION

Demurrer—self-negativing petition. A petition which alleges the personal liability of defendants as partners or members of a joint adventure predicated on a writing which on its face reveals the fact that said defendants specifically contracted against such liability—no question of ostensible partnership being raised—is demurrable as not stating a cause of action.

Bank v Anderson, 216-988; 250 NW 214

Unpleaded theory. Appellant's demand, on appeal, for judgment on an unpleaded theory will be ignored.

Forsberg v Const. Co., 218-818; 252 NW 258

IX NEGLIGENCE

Discussion. See 16 ILR 480—Pleading negligence

Action—res ipsa loquitur applicability. The rule of res ipsa loquitur applies where the circumstances attending the injury are of such character that the accident could not well have happened in the ordinary course of events without negligence on defendants' part, and the instrumentalities causing the injury were within exclusive control of defendants.

Peterson v De Luxe Co., 225-809; 281 NW 737

Res ipsa loquitur—malpractice by dentist. While the doctrine of res ipsa loquitur does not ordinarily apply in malpractice cases, the doctrine was held applicable under the pleadings and proof that plaintiff was given a general anesthetic, was completely unconscious and under the exclusive control of the defendant-dentist at the time his teeth were extracted, and that nine months later he expectorated from his lungs, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Res ipsa loquitur. A general allegation of negligence or pleading of facts which is equivalent to such allegation, is an essential prerequisite to the application of the doctrine of res ipsa loquitur.

Whitmore v Herrick, 205-621; 218 NW 334; 34 NCCA 670

Res ipsa loquitur—specific allegations—effect. Proof that an agency or thing caused an injury under circumstances strongly suggestive of negligence on the part of the defendant having control of such agency or thing, but under circumstances such that direct evidence of the specific negligence is not readily available, opens the door to the injured party to rely on the doctrine of res ipsa loquitur, unless the injured party sees fit to allege and rely on specific allegations of negligence.

Orr v Elec. Light Co., 207-1149; 222 NW 560; 30 NCCA 622; 3 NCCA(NS) 540

Pleading—res ipsa loquitur. Plaintiff who relies on the doctrine of res ipsa loquitur and pleads facts showing the applicability of such doctrine, may (and should) plead negligence generally—need not (and should not) plead specific acts of negligence on the part of defendant and his employees.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Specific negligence—res ipsa loquitur—separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used,

IX NEGLIGENCE—concluded

the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Res ipsa loquitur in amendment—nonconformity to evidence. Where a prospective purchaser driving a used automobile belonging to an automobile dealer takes as a passenger a person familiar with automobiles to advise as to its value, and while so driving has an accident wherein the passenger is injured, an amended petition relying on the doctrine of res ipsa loquitur does not conform to the proof where the evidence excludes the likelihood of any automobile defect and indicates the accident was caused by driver trying to close automobile door against wind.

Sproll v Burkett Co., 223-902; 274 NW 63; 2 NCCA(NS) 424

Res ipsa loquitur—waiver. A general allegation of negligence, supportable by the doctrine of res ipsa loquitur, is waived by inserting in the same count a specific allegation of negligence; but the rule is otherwise when the different allegations are in different counts and when the issue arising on the general allegation is alone submitted because of the dismissal by plaintiff of the count containing the specific allegation.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Taxicab door striking eye—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab, and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendants' motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Amendment to petition—statute of limitations. An amendment to petition, setting up a new cause of action barred by the statute of limitations, may be stricken, but when both the original petition and the amendment plead the same cause of action in general allegations of negligence, such amendment may not be stricken.

Olson v Cushman, 224-974; 276 NW 777

Facts alleged generally—arrest of judgment not tenable. A motion in arrest of judgment will not lie to a petition which recites the facts out of which plaintiff's injury arose, and which contains a general allegation of negligence on the part of the defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

Allegation of negligence—definiteness determined in each case. Whether a negligence allegation is too general and indefinite to sustain a verdict, must, in every case, be determined in the light of the peculiar facts and circumstances out of which the cause of action arose.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Negligence—pleading—sufficiency. A pleader is entitled to claim as many grounds of actionable negligence as flow from his pleaded statements of fact.

Sutton v Moreland, 214-337; 242 NW 75

Pleading carrier's degree of care and res ipsa loquitur. A general allegation of negligence in a petition followed by a further allegation of negligence, dealing with the degree of care required of carriers, did not prevent application of the doctrine of res ipsa loquitur.

Peterson v De Luxe Co., 225-809; 281 NW 737

Rules and customs. Evidence of unpleaded rules and customs as a basis on which to predicate negligence is inadmissible.

Chilcote v Railway, 206-1093; 221 NW 771

Substituting last clear chance — not permitted. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout, and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine, on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825

Ultimate facts. Assignments of negligence reviewed and held to constitute sufficient statements of ultimate facts pertaining to a collision between vehicles.

Ege v Born, 212-1138; 236 NW 75

Unnecessary particularity—name of negligent employee. Plaintiff, in an action based on negligence need not allege the names of defendant's servants and employees whom he claims were negligent.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

X FRAUD

Fraud pleas—status in court. In fraud actions, courts are reluctant to permit a cheater to profit by his own wrongdoing, tho at the same time courts are constrained by another consideration—that it is for the public welfare

not to afford parties to written agreements such ready avenues of escape from their obligations that the purpose of lastingly recording such obligations in writing would be quite indifferently attained—the aim being to minimize both evils without accentuating either of them.

Griffiths v Brooks, 227-966; 289 NW 715

Fraud—conclusion. An allegation that an administrator "fraudulently and collusively" caused the allowance of a claim against the estate is wholly insufficient to constitute a good plea of fraud.

In re Kessler, 213-633; 239 NW 555

Damages—pleading and proof. Allegation and proof of fraud without any allegation and proof of damages leave plaintiff without a cause of action.

Vorpahl v Surety Co., 208-348; 223 NW 366

Acceptance of completed construction work. In the absence of fraud or mistake, the acceptance of construction work by a city bars recovery on the contractor's bond, except as to defects undiscoverable or unknown at the time of acceptance; however, the fraud or mistake necessary to overcome the acceptance must be alleged and proven.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Fraud in securing release. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Evidence—sufficiency. Principle reaffirmed that fraud cannot be assumed, and must be established by clear and convincing proof.

Edmunds v Ninemires, 200-805; 204 NW 219

Evidence — insufficiency — directed verdict warranted. In a damage action arising out of fraudulent procurement of plaintiff's signature to note and conditional sale contract, where plaintiff predicates error on granting defendant a directed verdict on the ground that defendant's fraud was not proved—the evidence showing that plaintiff could read and write English language but failed to read instruments while having an opportunity to do so—and where plaintiff's reasons for not reading instruments were (1) he did not have his glasses, and (2) he thought he was signing an ordinary order for automobile, held, plaintiff's conduct precludes him from asserting fraud, and the ruling on the motion was warranted.

Griffiths v Brooks, 227-966; 289 NW 715

Particular threat—reversible error. A party must stand or fall on the particular threat alleged by him as constituting duress. Reversible error results from permitting the jury to base its finding of duress on unpleaded matters.

Gray v Shell Corp., 212-825; 237 NW 460

XI ALLEGATION OF DAMAGES

Damages (?) or quantum meruit (?). An action for damages for breach of a contract of employment may be supported by evidence of the reasonable value of the services rendered, when the pleadings present such sum as the damages.

Westerfield v Oil Co., 208-912; 223 NW 894

Future pain. Damages for "future" physical and mental pain may not be submitted to the jury under a pleading (1) which makes no specific reference to such damages, and (2) which expressly pleads that such pain continued for a stated period, to wit, three weeks. This is true even though the pleading alleges that the injury alleged resulted in permanent, visible scars upon the "arm and wrist."

Pettijohn v Halloran, 200-1355; 206 NW 631

Future disability—submission not erroneous when permanent injury alleged. When petition, alleging that plaintiff was permanently injured, contained a general allegation for damages, an instruction on damages for future disability was not objectionable on the ground that the petition did not ask for such damages, and it was not necessary for plaintiff to specifically plead such elements of damage.

Schwaller v McFarland, 228- ; 291 NW 852

Malpractice action — measure of damages. Damages for personal injury by malpractice held not limited to the time plaintiff was in the hospital, but included defendants' treatment during the subsequent period while the wound was healing.

Kirchner v Dorsey, 226-283; 284 NW 171

Manner of construction of lines—pleading violation of statute or ordinance—insufficiency. In an action against an electric company whose transmission line was so close to plaintiff's building that firemen could not throw water on a fire until current was turned off, which delay caused destruction of building and contents, a complaint alleging violation of town ordinance and a state statute respecting construction of transmission line held insufficient to state a cause of action. .

Bowen v Iowa Public Service, 35 F 2d, 616

XI ALLEGATION OF DAMAGES — concluded

Substituting last clear chance—not permitted. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout, and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine, on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825

XII PRAYER FOR RELIEF

Prayer not necessarily controlling. The prayer to a petition is not necessarily controlling on the question whether the action is at law or in equity.

Markworth v Bank, 212-954; 237 NW 471

General prayer—scope of relief. In equitable action where pleading "was not as clear as it might have been", yet prayed for general equitable relief, court enforced express provisions of legal contract to preserve rents and profits under the rule that where general equitable relief is prayed, any relief may be granted consistent with the pleadings and the evidence.

Wagner v Securities Co., 226-568; 284 NW 461

General equitable relief. In equity action seeking the appointment of a receiver, defendant's contention, that a receiver could not be appointed because no main cause of action was stated, was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal in technicalities, but rather it seeks to ascertain the true intent of the pleading filed".

Wagner v Securities Co., 226-568; 284 NW 461

Ignoring defective pleading. A defendant may not ignore a suit against him and allow judgment to be entered and then have the judgment set aside for want of jurisdiction because of merely defective pleading, as distinguished from absence of pleading and prayer.

Nelson v Higgins, 206-672; 218 NW 509

Insufficient prayer. A personal judgment without a specific prayer therefor is erroneous, and a prayer for "other and further relief" is not such prayer.

Richardson v Short, 201-561; 207 NW 610

Labor union injunction. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Petition — statutory requirements — prayer limits relief. Statute specifies the component parts of a petition, and the relief permitted thereunder is limited by the prayer therein.

In re Collicott, 226-106; 283 NW 869

Plea for additional relief—effect. The fact that a substituted petition asks for the same relief asked in the original petition, and for additional relief, does not change the cause of action.

Dunlop v First Tr. JSL Bank, 222-887; 270 NW 362

Teacher's pension—employment prerequisite. A public school teacher, after 30 years' service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment, and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

11112 Counts or divisions—prayer.

Express contract and quantum meruit. A broker may plead in different counts (1) an express contract to pay a specified commission, and (2) an implied contract to pay a reasonable commission, and may insist on the submission of both issues to the jury if the evidence will support either finding. It follows that evidence may be admissible on the issue of quantum meruit, even tho plaintiff produces evidence of an agreement to pay the specifically named commission.

Ransom-Ellis Co. v Eppelsheimer, 205-809; 218 NW 566

Quantum meruit and express contract. In an action for services, duplicate counts are proper, one pleading quantum meruit and the other an express contract for definite compensation, and a refusal to compel plaintiff to elect between the two counts is not erroneous.

Halstead v Rohret, 212-837; 235 NW 293

Express and implied contract. A plaintiff may, in different counts, plead an express and an implied contract as to the same subject-matter.

Richmann v Beach, 201-1167; 206 NW 806

Double recovery. The submission to the jury of duplicate counts—counts praying recovery on the same elements of damages—and

permitting recovery on both such counts is clearly erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Form of judgment. Where a trustee under a trust agreement sues the maker of promissory notes on a series of notes the beneficial interest of which is in different parties, the defendant may not complain that a separate judgment is rendered on each count, and an aggregate judgment for the sum of all the separate judgments, the defendant being amply protected, by the terms of the judgments, from a double liability.

Iowa Co. v Clark, 215-929; 247 NW 211

Harmless striking of count. The striking by the court of one of several counts of a petition must be deemed quite harmless when the matter stricken is substantially repeated in an unstricken count.

McGlothlen v Mills, 221-204; 265 NW 117

Multifarious theories in one count. A cause of action which is not barred until ten years after the execution and delivery of a deed is shown by a pleading which (1) pleads a contract of purchase of land by the acre, and the deed in fulfillment thereof, (2) shows payment for the acreage represented in the deed, and (3) alleges actual material shortage in the said acreage; and this is true even tho the pleading does allege "mutual mistake" of the parties as to the acreage, and asks for the reformation of a mortgage for the purchase price.

Mahrt v Mann, 203-880; 210 NW 566

Open account for material and labor—separate counts not required. In action on open account embracing material and labor, court's refusal to require plaintiff to divide cause of action into two counts, alleging items of material in one count and items of labor in the other, held not erroneous.

Edwards v Cooper, (NOR); 222 NW 376

Pleadings—objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

Single count—not construed as two causes unless purpose of pleader clearly appears. While a defendant may waive the requirement that each cause of action must be set out separately, parties are presumed to follow the requirements of the statute in preparing their pleadings, and a single count or division of a petition will not be construed to state two causes of action unless the purpose of the pleader to do so clearly appears.

Young v Main, 72 F 2d, 640

Specific negligence—res ipsa loquitur—separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used, the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Striking matter judicially held insufficient. A plaintiff has no right to re-plead a count which had been judicially and finally held to present no cause of action even tho he combines said condemned count with another count.

Arthaud v Griffin, 212-646; 235 NW 66

Submission — nonspecific withdrawal of counts. The submission of one count of a petition may, in effect, work a withdrawal of all other counts.

Hill v Winterset, 203-1392; 214 NW 592

When separate counts required. A plaintiff who pleads both quantum meruit and express contract in the same count should be compelled, on motion, to separate his cause of action into separate counts.

Donahoe v Gagen, 217-88; 250 NW 892

Withdrawal of count by failure to instruct. Failure of the court to instruct on a pleaded count constitutes an effectual withdrawal of the count from the jury.

Cox v Fleisher Co., 208-458; 223 NW 521

11114 Answer.

Discussion. See 20 ILR 106—"Mending hold doctrine"

ANALYSIS

I ANSWERS IN GENERAL
II GENERAL DENIAL
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V CONFESSION AND AVOIDANCE
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VII EQUITABLE DEFENSE
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Counterclaims generally. See under §11151

I ANSWERS IN GENERAL

Admissions, general denial, and special defense—effect. An answer which consists (1)

I ANSWERS IN GENERAL—continued

of certain admissions, (2) of a general denial of all other allegations, and (3) of a special defense which is in harmony with the denial, has the effect of requiring the plaintiff to establish all his allegations not admitted.

Walters v Acc. Assn., 208-894; 224 NW 494

Admissions of fact — conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Adopting pleading stating valid defense—default against aged defendant set aside. A default order unaccompanied by any judgment may be validly set aside at a subsequent term. So held in a partition suit where defendant, an 84-year-old mother holding a life estate, after defaulting, adopted the answer and cross-petition of the defendant children, which pleadings, if true, would effectually prevent partition—a sound reason for setting aside the default.

Redding v Redding, 226-327; 284 NW 167

Avoidance of matter first appearing in reply. An answer to a reply seems to be unknown to our practice. But when the defendant in an action to quiet title answers that he is the owner of the property, and is met by a reply that defendant is estopped by his own contract from claiming title, and defendant wishes to plead that said contract was obtained from him by fraud and without consideration, quaere: must defendant plead his said defense (a) by way of amendment to his answer, or (b) does the law impliedly supply such plea?

Carr v McCauley, 215-298; 245 NW 290

Bankruptcy—failure to plead discharge—effect. A discharge in bankruptcy of a claim subsequently sued on avails nothing unless the discharge is pleaded as a defense; and this is true tho the plaintiff has knowledge of the discharge.

Harding v Quinlan, 209-1190; 229 NW 672

Bank's mortgage on life estate changed to cover "undivided one-third" interest—effect. Where a bank has knowledge of an arrangement whereby a mother had a life estate in the entire property and made a mortgage accordingly, but in a later mortgage attempts to change its position by a mortgage on her interest as an "undivided one-third", its answer, admitting this allegation in the petition, estops the bank from claiming the mother had a greater interest and, when her interest develops to be a life estate, the bank's mortgage attaches only to an undivided one-third of this life estate.

Redding v Redding, 226-327; 284 NW 167

Cross-complaint — construction in view of stricken references. While the striking of portions of the first division of an answer may be proper as far as plaintiff's action is concerned, yet the court must treat said stricken portions as unstricken in construing defendant's cross-petition contained in a subsequent division of his answer when said stricken portions are essentially material to the cross-petition and are incorporated therein by distinct reference.

Andrew v Boyd, 213-1277; 241 NW 423

Cross-defendant's answer—effect on cross-petitioner. In mandamus action by county treasurer to obtain salary warrant where county board of supervisors answered, alleging indebtedness on part of treasurer to county for which set-off was claimed, and where county board brought treasurer's surety into the action as a cross-defendant, held, allegation in surety's answer, indicating that shortage in treasurer's office was due to the embezzlement by a third party, was not binding on board in view of its affirmative allegation that treasurer was indebted to the county.

Briley v Board, 227-55; 287 NW 242

Delayed defense — effect. Long delay in pleading defensive matter is not, in and of itself, sufficient to fatally discredit such defense.

Bibler v Bibler, 205-639; 216 NW 99

Demurrer—improper use in denying truth of pleadings. A so-called demurrer, to a defendant-lessee's answer of lack of consideration for an oral agreement to surrender the premises, which does not admit the truth of the answer, but in effect denies it, is properly overruled. Such application is not the function of demurrer.

Wright v Flatterich, 225-750; 281 NW 221

Equitable estoppel—failure to reply to letter as to ownership of instrument. The acceptor of a trade acceptance does not estop himself from pleading defensive matter by failing to reply to a letter from an indorsee to the effect that the indorsee has purchased the acceptance.

First N. Bank v Power Co., 211-153; 233 NW 103

Estoppel to refuse payment. Where remainderman offers to reimburse the heirs of a life tenant, for delinquent taxes paid by life tenant, in such amount as the court may find to be due, it cannot be held that the remainderman recognized or acquiesced in the claim for reimbursement, and is not thereby estopped from refusing to pay.

Rich v Allen, 226-1304; 286 NW 434

Governmental immunity — law question raised in reply. The defense of "governmental

immunity" of an employee, in a personal injury action, should properly be assailed by motion or demurrer. However, if the law question of sufficiency of this defense is raised in the reply and not challenged by the defendant, and the case tried on that theory, then the court is correct in recognizing the issue and instructing on the inadequacy of that defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Frauds, statute of—pleading. A defendant, who has duly denied the alleged making of a contract to answer for the debt of another, needs no further pleading on which to base, during the trial, an objection that oral testimony is incompetent to establish such contract.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Fraud — insufficient defense. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Indirect admission. An answer may, by indirection, clearly admit the truth of an allegation contained in the petition.

Arends v DeBruyn, 217-529; 252 NW 249

Invalid defense not attacked by motion—defeating recovery. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Motion to separate actions — nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor — both instruments having been executed by the same party and at the same time—it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Pleading — conclusiveness. A party must stand or fall on the particular threat alleged by him as constituting duress. Reversible error results from permitting the jury to base its finding of duress on unpleaded matters.

Gray v Shell Corp., 212-825; 237 NW 460

Plea without proof. A defensive plea without proof availeth nothing.

Hawkeye Clay v Ins. Co., 202-1270; 211 NW 860

Recklessness particulars unchallenged before answer—submitting as alleged. Error may not be predicated on the submission of certain particulars alleging recklessness when their sufficiency is not raised before answer filed and when evidence exists to sustain them.

Claussen v Johnson's Est., 224-990; 278 NW 297

Stranger to instrument—defense of alteration not available. A third-party stranger to an instrument cannot avail himself of the alteration of such instrument by one of the parties thereto, as a defense against his own wrongful and fraudulent acts.

Winker v Tiefenthaler, 225-180; 279 NW 436

Unallowable pleadings—answer and motion at same time. The filing of an answer to a petition as amended and, at the same time, a motion attacking the amendment are unallowable. In such case, the answer will stand, and the motion will be deemed waived.

Bliss v Watson, 208-1199; 227 NW 108

Unassailed answer or cross-petition. Matter pleaded by defendant in an answer or cross-petition, if not assailed by motion or demurrer, will, if proven, defeat plaintiff's action, altho, had the question been raised, the answer would have been held to present no defense. Held, defendant had failed to prove his allegations.

Maloney v Rose, 224-1071; 277 NW 572

Withdrawing answer—substituting demurrer or motion. It is within the trial court's discretion to permit a litigant to withdraw his answer and substitute therefor a motion or demurrer.

In re Arduser, 226-103; 283 NW 879

Withdrawal to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

II GENERAL DENIAL

Discussion. See 6 ILB 96—Scope of the denial in Iowa

General denial. A denial of knowledge or information sufficient to form a belief constitutes a general denial of the allegation referred to.

Dean v Atkinson, 201-818; 208 NW 301

General denial—evidence of gift admitted. Evidence to establish a gift is admissible under a general denial.

Wilson v Findley, 223-1281; 275 NW 47

II GENERAL DENIAL—continued

General denial—chattel mortgage not admissible thereunder in replevin action. General denial puts in issue only facts pleaded in the petition. So, under a general denial to a replevin action for an automobile, evidence of a prior mortgage is properly excluded, when not pleaded, inasmuch as, under a general denial, the court is not called upon to decide which lien is first but only the question of whether plaintiff is entitled to possession.

General Motors v Koch, 225-897; 281 NW 728

General denial coupled with inferential admission. In an action on a promissory note, an answer which contains a general denial is not rendered demurrable by an answering statement that "defendant admits he signed a note which he assumes is the one in controversy, but he demands its production and proof at the trial herein".

Home Bank v Kelley, 205-514; 218 NW 288

General denial supported by "alibi". Where a defendant in a civil case enters a general denial to a charge of having committed a tort, and in support thereof testifies that at the time in question he was at his home not far from the scene of the alleged tort, the court has no right to instruct (1) that defendant's defense is that of an "alibi", and (2) that defendant has the burden to establish such alibi by evidence which will outweigh the evidence tending to show that defendant did commit the tort.

Gregory v Sorensen, 208-174; 225 NW 342

General denial — unavailable matters in avoidance. Under a general denial of a contract of employment, defendant may not show that the contract was terminated by the discharge of the plaintiff.

Hornish v Overton, 206-780; 221 NW 483

Answer—foreign corporation—right to sue raised by general denial. A general denial will put in issue a foreign corporation's right to sue in Iowa when so alleged, dependent upon securing the statutory permit therefor.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Answer negativing petition. An answer which, in effect, is a negation of the allegations of the petition, proof of which plaintiff must make in order to recover, is not subject to a motion to dismiss.

Clark Bros. v Anderson, 211-920; 234 NW 844

Denial that plaintiff is real party in interest. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

Denial precludes demurrer. An answer which pleads a denial of the execution of the note sued on is not demurrable, even tho, in an evident attempt to plead inconsistent defenses, the answer contains a colorable confession of such execution.

Seibel v Olson Bros., 202-711; 210 NW 925
Empire Trust v Dye, 205-1271; 215 NW 636

Denial with defendant's version. A defendant is under no obligation to prove his version of what a contract really was, even tho he pleads such version, when the plaintiff's plea of the contract has been met by a general denial.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Inoperative denials. A denial of any knowledge or information sufficient to form a belief is inoperative when the admissions made remove all matters upon which issue could be joined.

Kaeser v Manderschied, 203-773; 211 NW 379

New matter and general denial in single division—new matter admissions controlling. Where new defensive matter and a general denial are pleaded in a single division answer, the admission implied of the cause of action must control; however, an answer in fact separating its general denial and other matters into numbered parts, altho lacking the word "division" before each numeral, is sufficiently divided to avoid the effect of the foregoing rule.

Keshlear v Banner, 225-471; 280 NW 631

Quiet title—issues under general denial. In an action to quiet title where plaintiff's claim of ownership arose out of a deed deposited with a bank for delivery, and delivered to plaintiff after grantor's death, a general denial puts in issue both the execution and the delivery of the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Rescission for fraud—general denial—effect. Where the plaintiff alleges rescission of a contract of sale because of defendant's fraud, and seeks to recover the money paid, a general denial does not raise the issue that plaintiff, after discovering the fraud, elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Unnecessary plea — burden of proof. A defendant who specifically pleads certain matter as a defense in addition to his defense of gen-

eral denial, thereby invites the court so to instruct as to impose on defendant the burden to prove said specially pleaded defense, even tho said defendant might have rested on his general denial.

Jordison v Jordison Bros., 215-938; 247 NW 491

Johnson v McVicker, 216-654; 247 NW 488

III CONCLUSION DENIALS

Proof — legal conclusion of fraud — no defense. In an action on an administrator's bond, the surety's pleading of a legal conclusion of fraud between administrator and a claimant will not constitute a defense.

In re Davie, 224-1177; 278 NW 616

IV INFORMATION OR BELIEF

Answer—inoperative denials. A denial of any knowledge or information sufficient to form a belief is inoperative when the admissions made remove all matters upon which issue could be joined.

Kaeser v Manderschied, 203-773; 211 NW 379

General denial—what constitutes. A denial of knowledge or information sufficient to form a belief as to a signature constitutes a general denial of the genuineness of such signature.

Dean v Atkinson, 201-818; 208 NW 301

V CONFESSION AND AVOIDANCE

Assault and battery. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v.Sundholm, 228- ; 291 NW 137

"Assault" admitted in pleadings—use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

VI SPECIAL AND AFFIRMATIVE DEFENSE AND NEW MATTER

Affirmative defense—burden of pleader. The jury, in a personal injury or death claim action where the defendant pleads "assumption of risk," should be plainly instructed that one pleading an affirmative defense must assume the burden of proving it.

White v Zell, 224-359; 276 NW 76

Instructions—reasonable value—admissions from pleadings. In action to recover price of corn sold to elevator, an instruction injecting element of reasonable value was erroneous where the pleading alleged express agreement on price, and a further erroneous instruction stating what defendant's answer admitted, but omitting qualification in defendant's pleadings, was not cured by instruction referring to a substituted oral agreement.

Hartwig v Elevator Co., (NOR); 226 NW 116

Directing verdict—stricken pleading of settlement—nonreview. Since a settlement must be pleaded, the overruling of a motion for directed verdict alleging a settlement of the action is not reviewable when the pleading setting forth the settlement has been ordered stricken and such order stands unchallenged.

Pearson v Butts, 224-376; 276 NW 65

Government employee's automobile collision. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Anderson v Moon, 225-70; 279 NW 396

Matters which may have been litigated in prior action—res judicata. In an action by heirs of intestate against a son of intestate to have property received by such son decreed to be an advancement and be deducted from the son's interest in the estate, wherein it is shown that such son had instituted a prior action in partition to have his interest in realty determined, held that such issue of advancement should have been raised as an affirmative defense and litigated in the prior partition action, and therefore is now res judicata.

Robbins v Daniel, 226-678; 284 NW 793

Mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikeable on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc., 222-1269; 271 NW 220

Merger and bar of defenses — nonbar or estoppel. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in

VI SPECIAL AND AFFIRMATIVE DEFENSE AND NEW MATTER—concluded

defense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Posted signs — damage — settlement offer—denying directed verdict based on stricken pleadings. Denying a directed verdict based on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Public official's receipt of money as issue—plea of full accounting—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk,—the clerk's answer denying receipt of such funds and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll v Arts, 225-487; 280 NW 869

Res judicata plea—inapplicability—stricken on motion. In an action by citizens against the town council to enjoin the operation of a municipal electric plant, the trial court is correct in striking, on motion, that portion of defendant's answer which pleads res judicata. when it appears that a former action in the United States district court for the same purpose was by a private electric company in its individual capacity to enjoin the construction of the plant and that no judgment on the merits was rendered.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

VII EQUITABLE DEFENSE

Defense against transferee. The maker of a nonnegotiable promissory note who, in defense to an action thereon by a transferee, pleads that, before he learned of the transfer, he had on deposit with the payee (a private banker) a sum sufficient to discharge the note, sufficiently alleges his continued ownership of the deposit by alleging that he never withdrew any part thereof from the bank.

Benton v College, 202-15; 209 NW 516

VIII COUNTERCLAIM

Agreement to release judgment—attorney fee and costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Amended answer omitting objectionable parts. In an action on a promissory note where the defendant asked for a set-off of the amount of the note and counterclaimed for an additional amount, and the counterclaim was stricken on motion, a substituted answer by the defendant which omitted the counterclaim was not subject to being stricken because of being identical with the original answer.

Lowry v White, (NOR); 285 NW 687

IX WAIVER BY ANSWER

More specific statement—error waived. Error in overruling a motion for more specific statement is waived by movant filing an answer.

Kirchner v Dorsey, 226-283; 284 NW 171

Subsequent plea to the merits—effect. One who, on special appearance, challenges the jurisdiction of the court on the ground of defective service of the notice of suit, and who, after his challenge is overruled, pleads to the merits, and participates in the trial, thereby submits himself to the jurisdiction of the court, and is in no position to ask, on appeal, for a review of the ruling on his special appearance.

Crouch v Remedy Co., 205-51; 217 NW 557

Waiver by filing answer. In action on note, filing of answer waived right to proceed under statute by motion to strike cause of action improperly joined.

Brown v Correll, 227-659; 288 NW 907

Withdrawal of pleading to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

11115 Multiple defenses and counterclaims.

Agreement to release judgment—attorney fee and costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Repurchase of stock — answer — validity against demurrer—equitable issues not raised by demurrer. The facts, set up in answer by a Delaware corporation, that (1) it had no surplus, and (2) the laws of the state of its domicile prohibited a repurchase of its stock from capital, present a defense to an action for recovery on an alleged breach of contract to repurchase stock when such answer is attacked simply by demurrer rather than by an appropriate remedy based on equitable rights. Demurrer does not raise estoppel, ratification, implied contract nor any other equitable theory.

Bishop v Middle States Co., 225-941; 282 NW 305

11117 Divisions of answer.

Answer—new matter and general denial in single division—new matter admissions controlling. Where new defensive matter and a general denial are pleaded in a single division answer, the admission implied of the cause of action must control; however, an answer in fact separating its general denial and other matters into numbered parts, altho lacking the word "division" before each numeral, is sufficiently divided to avoid the effect of the foregoing rule.

Keshlear v Banner, 225-471; 280 NW 631

Burden of proof—public official's receipt of money as issue—plea of full accounting—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk, —the clerk's answer, denying receipt of such funds, and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll v Arts, 225-487; 280 NW 869

Demurrer to several defenses—motion to divide—prerequisite. A demurrer to a part only of several defenses not separated into divisions as contemplated by statute, is not the proper method of attack; the proper procedure would have been to require defendant to separate and divide before demurring.

Bishop v Middle States Co., 225-941; 282 NW 305

Inconsistent defenses — necessity for separate counts. A general denial and a plea of settlement of plaintiff's cause of action embraced in one count or division of an answer render inadmissible evidence in support of the general denial, because, when both defenses are pleaded in the same count or division, the general denial is nullified by the plea of settlement.

Miller v Johnson, 205-786; 218 NW 472

11120 Correction of defect.

Discussion. See 20 ILR 49—Defective pleading

Demurrer to several defenses. A demurrer to a part only of several defenses not separated into divisions as contemplated by statute, is not the proper method of attack; the proper procedure would have been to require defendant to separate and divide before demurring.

Bishop v Middle States Co., 225-941; 282 NW 305

Sua sponte simplification by court. The district court has inherent power, sua sponte, to simplify pleadings.

Collins v Cooper, 215-99; 244 NW 858

11121 Time to plead.

Answer after appeal on ruling on demurrer. A defendant who assumes to appeal from an adverse ruling on his demurrer without standing on his demurrer, and without suffering a judgment to be entered against himself, has a right to file an answer after his appeal has been dismissed and before default is entered.

Gow v Dubuque County, 213-92; 238 NW 578

Answer—stricken when belated—court's discretion. When no excuse for delay is shown, striking a belated answer is within the discretion of the trial court.

In re Cheney, 223-1076; 274 NW 5

Special appearance and motion to dismiss. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

11124 Copy of pleading—fee.

Failure to file — effect. Whether a motion should be sustained to strike a petition on the ground that no copy of the petition was also filed rests in the sound discretion of the court.

Andrew v Bank, 216-60; 245 NW 241

11127 Motion for more specific statement.

ANALYSIS

I In General
II When Motion Will Lie
III When Motion Will Not Lie
IV Waiver
V Appellate Review

I IN GENERAL

Amendment — insufficiency. Amendment, in action for damages consequent on alleged breach of building contract, reviewed and held wholly insufficient to comply with a motion for a more specific pleading.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Exception to order. A plaintiff may except to an order sustaining a motion for a more specific statement and obtain a review of such ruling by refusing to plead over and appealing from the final judgment dismissing his action.

Depping v Hansmeier, 202-314; 208 NW 288

Nonpermissible objects. Motion seeking names and addresses of persons to whom alleged slanderous statements were made held properly overruled.

Johns v Cooper, (NOR); 205 NW 791

Order — attempted compliance — effect. Principle reaffirmed that a plaintiff who attempts to comply with an order of court, that he make his petition more specific, may not, when threatened with discipline for noncompliance, justify himself by the plea that the order for more specific statement ought not to have been entered.

Lamp v Williams, 222-298; 268 NW 543

Order — impossible compliance. A plaintiff who is ordered to make his petition more specific in certain particulars which he is actually or reasonably unable to state, and so demonstrates in a good faith effort to comply with the order, must be deemed to have complied with the order, and must not be disciplined by a dismissal of his action.

Lamp v Williams, 222-298; 268 NW 543

Objections to executor's final report—failure to dispose of securities. Objections to the final report of a trust company are not subject to a motion for more specific statement when officers of the trust company have equal or better knowledge of the facts called for by the motion, especially where the motion calls for evidentiary facts. Held, also, that trustee was charged with maladministration and not fraud.

In re Carson, 227-941; 289 NW 30

Maladministration by executor or trustee—definiteness of allegation. When the final report of an executor and trustee of an estate was objected to on the ground of maladministration, the objection was sufficient tho it did not state whether the alleged wrongful acts were performed while the trustee was acting in its official capacity as executor or trustee.

In re Carson, 227-941; 289 NW 30

Wrongful retention of securities by trustee or executor. An objection to the final report of a trust company acting as trustee and executor of an estate is sufficient in alleging generally that the trust company wrongfully retained securities which it should have disposed of altho it does not state on what dates the securities should have been sold and what their values were on those dates.

In re Carson, 227-941; 289 NW 30

Wrongful purchase of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated, and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

Res ipsa loquitur — specific allegations — effect. Proof that an agency or thing caused an injury under circumstances strongly suggestive of negligence on the part of the defendant having control of such agency or thing, but under circumstances such that direct evidence of the specific negligence is not readily available, opens the door to the injured party to rely on the doctrine of res ipsa loquitur, unless the injured party sees fit to allege and rely on specific allegations of negligence.

Orr v Elec. Light Co., 207-1149; 222 NW 560; 30 NCCA 622; 3 NCCA(NS) 540

Torts—defect in street—notice—pleading. In an action in tort against a municipality, a plea that the city had notice of the defect in the street may be adequate tho such plea be subject to a motion for more specific statement.

Jensen v Magnolia, 219-209; 257 NW 584

Withdrawal of pleading to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

II WHEN MOTION WILL LIE

Arrest of judgment—motion goes to sufficiency of petition. A motion in arrest of judgment raises only the question of whether the petition wholly fails to state a cause of action, not whether the petition should have been more specific.

Kirchner v Dorsey, 226-283; 284 NW 171

Avoidance under res ipsa loquitur. A general allegation of negligence is subject to a motion for a more specific statement unless the pleader clearly indicates in his pleading his purpose to sustain said general allegation under the doctrine of res ipsa loquitur.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Breach of contract to build — particularity required. In an action for damages based on alleged breach of a written contract for the erection, under written specifications, of a structure (especially when it is of magnitude and complexity), general conclusion allegations by plaintiff of the use by defendant of defective materials and workmanship must, on proper motion, be accompanied and supported by fact allegations showing, with reasonable certainty, (1) wherein said material and workmanship were defective, (2) the location of the several alleged defects, and (under some circumstances) when each of said defects became manifest, and (3) the particular specification which was violated by using such material and workmanship.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Erroneous denial. In an action for general and special damages, under general and somewhat meager pleading, based on an alleged libelous publication resulting (1) in loss of customers, (2) in being refused credit, and (3) in loss of earnings in business, plaintiff should, on motion for more specific statement of the action, be compelled to set forth the names of customers lost, the names of those who refused him credit, and the ultimate facts upon which he bases his demand for judgment on account of injury to his earnings.

Dorman v Credit Co., 213-1016; 241 NW 436

Overruling motion — movant at loss. An order overruling a motion for a more specific statement is appealable when the ruling deprives the movant of a right which cannot be protected by appeal from the final judgment.

Fay v Dorow, 224-275; 276 NW 31

"Reckless and negligent"—single allegation —more specific statement required. Where two motor vehicles collide and plaintiff riding in the back seat of one of the vehicles sues both drivers alleging "concurrent, reckless, and negligent conduct", the petition is subject to motion for more specific statement as to whether or not plaintiff was a guest and whether defendants were both charged with both reckless and negligent acts.

Fay v Dorow, 224-275; 276 NW 31

Reservation of ground of review—general allegation of negligence—standing on motion to strike or make specific. To preserve an objection that an allegation of negligence was too general and indefinite to constitute basis of cause of action, a defendant should stand on its motion to strike and for more specific statement. Failing in this and filing its answer, it waived any error of court in overruling motion. A cause of action should be sufficiently precise to enable the defendant to prepare his defense.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

When required — avoidance of contract. A general allegation by an answering defendant of the commission, by plaintiff, of acts of "unfaithfulness and adultery", pleaded by defendant in avoidance of the contract sued on, must be amplified, on proper motion, by alleging more specifically said alleged acts and the time when, place where, and person with whom, committed.

Poole v Poole, 221-1073; 265 NW 653

III WHEN MOTION WILL NOT LIE

Calling for evidentiary matter. A motion for more specific statement wherein evidentiary matters are largely called for is properly overruled.

Halstead v Rohret, 212-837; 235 NW 293

Excessive order. Motion for more specific statement of cause of action—sustained generally—reviewed, and held to burden plaintiff with unwarranted and unnecessary exactions, compliance with which were either most difficult or impossible.

Lamp v Williams, 222-298; 268 NW 543

Explaining common terms. Plaintiff who alleges that he furnished defendant the article or thing contracted to be furnished and that defendant accepted said article or thing, cannot be required to set forth in his pleadings how or in what manner plaintiff furnished said article or thing and how or in what manner defendant accepted it.

Hoxsey v Baker, 216-85; 246 NW 653

Nonpermissible objects. A motion for more specific statement of a petition should not call for (1) matter evidentiary in character, (2) matter essential for plaintiff's recovery, or (3) matter purely defensive to the action.

Day v Power, 219-138; 257 NW 187

Pleading carrier's degree of care and res ipsa loquitur. A general allegation of negligence in a petition followed by a further allegation of negligence, dealing with the degree of care required of carriers, did not prevent

III WHEN MOTION WILL NOT LIE—concluded

application of the doctrine of res ipsa loquitur.

Peterson v De Luxe Co., 225-809; 281 NW 737

Reasons for dissatisfaction. A landlord, under a lease authorizing either party thereto to cancel the same "in case the farming conditions are not satisfactory", need not, in a petition to remove the tenant, allege or set forth the reasons for his alleged dissatisfaction.

Jepson v Conner, 210-1267; 232 NW 693

Res ipsa loquitur—unnecessary particularity. Plaintiff who relies on the doctrine of res ipsa loquitur and pleads facts showing the applicability of such doctrine, may (and should) plead negligence generally—need not (and should not) plead specific acts of negligence on the part of defendant and his employees.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Specific reliance on res ipsa loquitur. A plaintiff who sues in tort and alleges generally (1) that defendant was guilty of negligence which was the proximate cause of her injuries, and (2) that she relies on the doctrine of res ipsa loquitur, cannot be compelled, by motion for more specific statement, to state the particular acts of negligence of which she complains.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Taxicab door striking eye—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab, and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendants' motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Unallowable use of motion. A motion for more specific statement must not be made a vehicle with which to obtain from a plaintiff evidence upon which defendant may frame a defense. So held where the motion largely sought the production by plaintiff of matters extraneous to that sued on.

Southern Sur. v Salinger, 213-188; 238 NW 715

Unnecessary particularity—name of negligent employee. Plaintiff, in an action based on negligence need not allege the names of defendant's servants and employees whom he claims were negligent.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Unreasonable requirement. In an action in the nature of a discovery and for an accounting, plaintiff ought not, under a motion for a more specific statement, to be required to set forth the very facts which he is seeking to discover.

Garretson v Harlan, 218-1049; 256 NW 749

IV WAIVER

General and indefinite pleadings—waiver. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (e. g., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

General or dragnet assignment. A general or dragnet allegation of negligence is properly submitted to the jury in accordance with the supporting evidence when such allegation is neither attacked (1) by motion for more specific allegation, nor (2) by motion to strike or withdraw.

Watson v Railway, 217-1194; 251 NW 31

Failure to attack general pleading. A pleading, unquestioned in the trial court, which alleges that goods were purchased and delivered under an "oral agreement", without specification of any agreed terms as to price or quantity, will support a judgment for the unquestioned reasonable value of the goods.

Chandler Co. v Groc. Co., 200-919; 205 NW 787

Future pain. A supported allegation that certain injuries were "permanent" is sufficient basis for the recovery of damages for future pain, in the absence of a motion for a more specific statement, or of instructions bearing thereon.

Cuthbertson v Hoffa, 205-666; 216 NW 733

More specific statement—error waived by filing answer. Error in overruling a motion for more specific statement is waived by movant filing an answer.

Kirchner v Dorsey, 226-283; 284 NW 171

Nonspecific allegations. Even tho a pleading is not as specific and detailed in its allegations as it ought to be, yet if it alleges the ultimate fact governing plaintiff's action, the submission of such ultimate fact will not necessarily constitute error, especially when there is no motion for a more specific statement.

Kenwood Lbr. v Armstrong, 201-888; 208 NW 371

Waiver. Error in overruling a motion for a more specific statement as to alleged negligence is waived by the filing of an answer.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

McKeehan v City, 213-1351; 242 NW 42

Y. M. C. A. v Caward, 213-408; 239 NW 41

Waiver of error by pleading over. Plaintiff may not predicate error on orders for more specific statement with which orders he has complied by pleading over.

Pride v Kittrell, 218-1247; 257 NW 204

V APPELLATE REVIEW

Appeal. An appeal will lie directly from an order overruling a motion to require plaintiff, in an action to recover the contract price for medical services rendered by him, to state whether at the time of rendering the services he was duly licensed to practice medicine; otherwise as to requiring plaintiff to set forth the contents of the formula used by plaintiff tho said formula was a subject matter of the contract.

Hoxsey v Baker, 216-85; 246 NW 653

Appeal. Orders which simply settle the issues in a case (e. g., an order overruling a motion for a more specific statement) are not ordinarily appealable.

Southern Sur. v Salinger, 213-188; 238 NW 715

Certiorari to review ruling. A litigant who moves to strike a pleading or to require it to be made more specific, may not have the rulings on his motion reviewed on certiorari; and this is necessarily true even tho it be conceded, arguendo, that the pleading in question was not legally on the calendar.

Holcomb v Franklin, 212-1159; 235 NW 474

Order overruling motion for more specific statement. An appeal will lie directly from an order overruling a motion for a more specific statement of a cause of action, when the ruling deprives the movant of a right which cannot be protected by an appeal from the final judgment.

Dorman v Credit Co., 213-1016; 241 NW 436

Motion for more specific statement—denial. An order overruling a motion for a more specific statement of allegations of negligence is not appealable when the allegations so attacked are virtually nugatory—of such nature that evidence in purported support thereof will not be admissible on the trial.

Ferguson v Cannon, 214-798; 243 NW 175

11129 Pleading contract.

Breach of contract to build — particularity required. In an action for damages based on alleged breach of a written contract for the erection, under written specifications, of a structure (especially when it is of magnitude and complexity), general conclusion allegations by plaintiff of the use by defendant of defective materials and workmanship must, on proper motion, be accompanied and supported by fact allegations showing, with reasonable certainty, (1) wherein said material and workmanship were defective, (2) the location of the several alleged defects, and (under some circumstances) when each of said defects became manifest, and (3) the particular specification which was violated by using such material and workmanship.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Profert, oyer, and exhibits. The common law procedure of "oyer and profert", by which a party obtained the inspection of documents, is unknown to our code procedure.

Dunlop v Dist. Court, 214-389; 239 NW 541

Well drilling — compensation per foot to ample water, as a basis for a mechanic's lien. A contract to drill a well at an agreed price per foot for each foot drilled, coupled with a guarantee by the driller to secure an ample supply of water with no limitation on the depth of the well, means that the driller is to be paid at the contract price for every foot drilled to whatever depth it is necessary to go to fulfill the guarantee.

Collins v Gard, 224-236; 275 NW 392

11130 Equitable actions—motion to dismiss.

Discussion. See 10 ILB 193—Abolition of the equitable demurrer; 20 ILR 49—Defective pleading

Motion to dismiss — definition. A motion to dismiss an equitable action is, in legal effect, an equitable demurrer.

Swartzendruber v Polke, 205-382; 218 NW 62

Motion for dismissal—allowability and effect. A motion to dismiss an action in equity, made at the close of plaintiff's testimony, being without statutory recognition, simply constitutes an announcement by defendant that he rests his case without further testimony.

Vogt v Vogt, 208-1329; 227 NW 107

Motion as demurrer — effect. A motion to dismiss in an equitable action serves the same purpose as a demurrer in a law action, and admits as true only such facts as are well pleaded. Necessarily, then, the motion does not admit the legal conclusions of the pleader.

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

Motion to dismiss. If any of the grounds of a motion to dismiss petition for construction of a will are well taken, it is not error to sustain such motion.

Anderson v Meier, 227-38; 287 NW 250

Motion to dismiss in lieu of demurrer. A motion to dismiss a petition for a writ of certiorari will be treated as a demurrer when based on statutory grounds for demurrer.

Fehrman v Sioux City, 216-286; 249 NW 200

Mandamus—petition—motion to dismiss as proper attack. Attack on mandamus petition should have been made by a motion to dismiss rather than by a demurrer, since statutes provide that mandamus shall be tried as an equitable action, and that a petition in equity may be attacked by motion to dismiss.

Bredt v Franklin County, 227-1230; 290 NW 669

Motion to dismiss—scope of confession. A motion to dismiss, under our new equity practice, confesses all facts which are properly and sufficiently pleaded in the pleading assailed, but not conclusions of law nor conclusions of fact, unless the facts from which the conclusions of fact logically follow are set out.

Benton v College, 202-15; 209 NW 516

Motion to dismiss—speaking demurrer. A motion to dismiss in equity, being in effect a demurrer, is a speaking demurrer if it refers to matters not appearing on the face of the petition: e. g., a transcript of the board of review proceedings.

Board v Sioux City Yards, 223-1066; 274 NW 17

Amended pleading—repeating bad pleading —improper striking in toto. Error results from striking in toto an amended and substituted petition in equity on the sole ground that said pleading is but a repetition of a former petition which had been held bad on equitable demurrer (motion to dismiss), when said amended and substituted petition, while in part a repetition of said former bad pleading, alleges an entirely new fact basis for recovery and a prayer in harmony therewith.

Birk v Jones County, 221-794; 266 NW 553

Demurrer in lieu of motion. The attempt to employ a demurrer in an equity cause, in lieu of a motion to dismiss, presents no question to the court, and especially so when the so-called demurrer is inherently faulty.

American Sur. v Leach, 206-1355; 220 NW 34

Demurrer in lieu of motion. A demurrer to a petition in equity will, under some circumstances, be treated by the appellate court as a motion to dismiss.

Heitzman v Hannah, 206-775; 221 NW 470

Mandamus—demurrer treated as motion to dismiss. In mandamus action, where parties treat a demurrer as a motion to dismiss, it will be so viewed on appeal.

Bredt v Franklin County, 227-1230; 290 NW 669

Demurrer or motion to dismiss—pleading over in equity. Plaintiff, in an action triable in equity, who has his action dismissed on motion because of defenses in point of law appearing on the face of the petition, must be accorded the right (1) to plead over, or (2) to elect to stand upon the ruling of the court.

Marcovis et al. v Commonwealth Inv. Co., 223-801; 273 NW 888

Equitable demurrer — effect. All material, well-pleaded fact allegations of a petition in equity are, for the purpose of a motion to dismiss (equitable demurrer), admitted to be true.

State v Des Moines, 221-642; 266 NW 41

Equitable demurrer — appeal — condition precedent. A party may not appeal from an order sustaining an equitable demurrer (motion to dismiss) unless he elects in some sufficient manner in the trial court to stand on the ruling of the court.

Benjamin v Jackson, 207-581; 223 NW 383

Sustaining equitable demurrer — failure to stand on pleading or suffer judgment — effect. An order sustaining defendant's motion to dismiss plaintiff's action on the ground that the petition fails to state a cause of action, will not be reviewed on appeal when the record fails to show that plaintiff either, (1) elected to stand on his pleadings, or (2) permitted final judgment to be entered against him. The ruling not being reviewable, the appeal will be dismissed.

Grimm v First N. Bank, 221-667; 266 NW 517

Demurrer in lieu of motion to dismiss. The action of the court in treating a demurrer in an equitable action as a motion to dismiss cannot be questioned by a party who invited such action and acquiesced therein until he suffered an adverse ruling.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Change in beneficiary of insurance—justifiable and unjustifiable payment. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Conditions attending appeal. An appeal will not lie from an order overruling a motion to dismiss an equitable action on the ground of misjoinder of parties, unless the record shows (1) an election to stand on the pleading, or (2) that judgment was entered against the movant.

Fed. Sur. v Morris Plan, 209-339; 228 NW 293

Conditions precedent to appeal. An appeal from a ruling sustaining a motion to strike a plea of the statute of limitation in probate proceedings will not lie when the complainant fails to stand on the plea and fails to permit judgment to go against him.

In re Delaney, 207-451; 223 NW 486
Hawthorne v Andrew, 208-1364; 227 NW 402

Dismissal on plaintiff's testimony—effect. A defendant in an equitable action who, at the close of plaintiff's evidence, moves for and obtains a dismissal of plaintiff's action places himself in the position where, on appeal, the final determination of plaintiff's action must be determined on plaintiff's evidence.

Hirtz v Koppes, 212-536; 234 NW 854

Dissolving temporary injunction not operative as demurrer. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Franchise renewal statute—objecting stockholders selling to majority. At the termination of a mutual telephone company franchise, stockholders voting against renewal of franchise may not maintain an action against the majority stockholders to require purchase of their stock by such stockholders voting in favor thereof, until after three years from date of voting, under §8365, C., '35, permitting such franchise renewal, if the majority stockholders voting renewal purchase the stock of those voting against renewal within three years from date of voting, and an action commenced within such three-year period, being premature, will be dismissed on motion.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Effect of stipulated evidence. The principle that a motion to dismiss the petition in an equitable action (formerly denominated a demurrer) necessarily admits the truth of the well-pleaded allegation of the petition, may be materially modified or obviated by evidence which the parties stipulate into the record for the purpose of said motion.

Pierre v Pierre, 210-1304; 232 NW 633
Panther v Agri. Dept., 211-868; 234 NW 560

Effect of ruling. An order sustaining a motion to dismiss an equitable action and adjudging costs against plaintiff constitutes a final adjudication on the pleaded facts.

Swartzendruber v Polke, 205-382; 218 NW 62

Escheat proceeding. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Governmental immunity — law question raised in reply. The defense of "governmental immunity" of an employee, in a personal injury action, should properly be assailed by motion or demurrer. However, if the law question of sufficiency of this defense is raised in the reply and not challenged by the defendant, and the case tried on that theory, then the court is correct in recognizing the issue and instructing on the inadequacy of that defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Improper joinder. A misjoinder both of causes of action and of parties is ground for demurrer or for motion to dismiss in equitable proceedings.

McPherson v Sec. Co., 206-562; 218 NW 306
Baker v Baker, 220-1216; 264 NW 116

Improper use of motion. An issue of fact in an equity case cannot be determined on a motion to dismiss.

Lenehan v Drain. Dist., 219-294; 258 NW 91

Invalid defense not attacked by motion. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Legal effect. Plaintiff who, in an equitable action, moves to dismiss defendant's answer may not avail himself of the allegations of the petition when the allegations of the answer are diametrically the opposite to those of the petition.

Lenehan v Drain. Dist., 219-294; 258 NW 91

Misjoinder both of parties and of causes. In action on promissory notes, defendant's demurrer, filed after answer, on ground of mis-

joinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

Misjoinder of parties. A mere misjoinder of parties cannot be reached by demurrer.

Brown v Correll, 227-659; 288 NW 907

Misjoinder in equity of parties and causes—remedy. A misjoinder, in an equitable action, of parties and causes of action, is properly met by motion to dismiss.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Nonappealable orders—motion in equity to dismiss. An appeal will not lie from an order in an equity cause sustaining a motion to dismiss made at the close of plaintiff's testimony.

Bridges v Sams, 202-310; 202 NW 558

Optional rights. When a motion to dismiss an equitable action is sustained, the plaintiff may (1) stand on his pleadings and appeal, or (2) amend.

Swartzendruber v Polke, 205-382; 218 NW 62

Order overruling motion to strike. An order overruling a motion to strike a pleading is appealable when the ruling goes to the very merits of the controversy.

State v Murray, 217-1091; 252 NW 556

Repeating bad pleading — improper striking in toto. Error results from striking in toto an amended and substituted petition in equity on the sole ground that said pleading is but a repetition of a former petition which had been held bad on equitable demurrer (motion to dismiss), when said amended and substituted petition,—while in part a repetition of said former bad pleading,—alleges an entirely new fact basis for recovery and a prayer in harmony therewith.

Birk v Jones County, 221-794; 266 NW 553

Ruling as adjudication. The overruling of a motion to dismiss a petition in an equitable action does not amount to an adjudication unless the defendant stands on his motion and allows judgment to be entered against him.

Frazier v Wood, 219-36; 255 NW 647; 257 NW 768

Single or dual cause of action — test. The obligee of a bond, who pleads solely for the recovery of the amount due him under the bond, pleads but a single cause of action, tho he prays for different remedies against different parties, or in part pleads for unallowable relief.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Standing on motion. An order overruling a motion to strike which is not the equivalent of a demurrer imposes no necessity on the appealing party to affirmatively stand on his motion and allow judgment to be entered against him on the merits.

Ontjes v McNider, 218-1356; 256 NW 277

Standing on motion to dismiss. A ruling which denies a motion to dismiss (in lieu of the former equitable demurrer) is not appealable unless the movant unequivocally elects to stand upon his motion, and submits to a final adverse judgment; and this is true tho appellant asserts on his attempted appeal that he has nothing further to plead.

Morrison v Clinic, 204-54; 214 NW 705
Frazier v Wood, 215-1202; 247 NW 618

When appeal lies — overruled demurrer to answer. Where plaintiff after answer moved for judgment of dismissal and also for judgment on the pleadings, held that if it be permissible to treat the latter motion as a demurrer to the answer, yet an adverse ruling thereon was not appealable unless plaintiff elected to stand thereon.

Morrison v Clinic, 204-54; 214 NW 705

Waiver of error—answer after overruling motions to dismiss. An error in overruling a demurrer or motion to dismiss is waived by answering to merits.

Johnson v Purcell, 225-1265; 282 NW 741

Withdrawal of pleading to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

11131 Disposal of points of law.

Disposing of law points—premature questions. In determining the effect of a ruling on a motion to dispose of points of law, it is proper to read the whole pertinent record to ascertain what the court decided, and where a court overruled such a motion which urged that a certain letter was not a sufficient memorandum to take the case out of the statute of frauds, and record revealed that ruling was made because the question could not be determined before submission of evidence, such ruling was not an adjudication which became the "law of the case" so as to prevent subsequent exclusion of the letter upon objection made during trial.

Patterson v Beard, 227-401; 288 NW 414

Law issues determined—premature motion. Where trial court made a finding in decree on final determination of the case that a finding and determination of law issues, filed three years previously on plaintiff's motion for "Disposal of points of law" under statute, was final as to the rights of litigants, it not having been

appealed from, and on appeal from decree on final determination, where plaintiff alleges supreme court is without jurisdiction to hear or determine the appeal for the reason that order determining issues is res adjudicata and notice of appeal not having been filed until after three years, held, since such order on motion to determine law issues was entered not only before any testimony was taken, but before issues were made up, no answer being filed, the motion was premature. The statute is not to be used to test the court on assumed facts which might or might not appear from evidence.

Wall v Ins. Co., 228- ; 289 NW 901

Striking cross-petition. An order in foreclosure proceedings striking a defendant's cross-petition from the files is not appealable when defendant's answer, which remained on file, properly pleaded and prayed for the sole and identical relief pleaded and prayed for in said cross-petition.

Yeomen v Ressler, 216-983; 250 NW 169

Striking objections in probate — affidavits improper. A motion to strike objections to probate accounts on the grounds of misjoinder of actions is determinable only on the contents of the pleading attacked without aid of affidavits.

In re Rinard, 224-100; 275 NW 485

11132 Plea in bar or abatement.

Duplicate actions — which abatable. While an action in partition, in which service of the original notice is incomplete in whole or in part, is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Prior adjudication—pleading prerequisite to proof. A prior adjudication must be pleaded before evidence thereof is admissible. Rule applicable to interpleaders.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Unamendable pleadings. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties plaintiffs and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 106 ALR 566

11133 Notice for hearing.

Undetermined motion—procedure. An undetermined motion by defendant to dismiss an action erroneously pending in equity immediately becomes a demurrer when the action is properly transferred to the law calendar, and must be disposed of as any other demurrer, and with the same consequences.

State v Murray, 219-108; 257 NW 553

11134 Time of answer or reply.

Belated reply. A reply filed without leave of court and after the trial is concluded, and purporting to conform the pleadings to the evidence, may be considered, notwithstanding its untimeliness, when neither party is deprived thereby of any testimony.

Miller v Surety Co., 209-1221; 229 NW 909

McDonald Co. v Morrison, 211-882; 228 NW 878

11135 Motions and demurrers.

Motions generally. See under §11229
Discussion. See 20 ILR 49—Defective pleading

Brief of authorities—motion to strike. An elaborate brief of authorities, inserted in a pleading following the pleading of foreign statutes, is properly stricken on motion.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Decisions reviewable—orders to strike and dismiss. An order overruling a motion to strike a pleading and to dismiss parties because of the improper joinder of actions and of party defendants is appealable.

Ontjes v McNider, 218-1356; 256 NW 277

Misjoinder of parties. A mere misjoinder of parties cannot be reached by demurrer.

Brown v Correll, 227-659; 288 NW 907

Motion to dismiss. If any of the grounds of a motion to dismiss petition for construction of a will are well taken, it is not error to sustain such motion.

Anderson v Meier, 227-38; 287 NW 250

Overruled motion to strike—standing on motion. An order overruling a motion to strike which is not the equivalent of a demurrer imposes no necessity on the appealing party to affirmatively stand on his motion and allow

judgment to be entered against him on the merits.

Ontjes v McNider, 218-1356; 256 NW 277

Pleadings—objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

Striking legally unprovable allegation. Legally unprovable allegations in pleadings are properly stricken on motion. So held where, in an action at law to recover the amount due on a written lease, defendant, while admitting the due execution by him of the written lease, pleaded a prior oral lease—contradictory of the written lease—as containing the correct terms of the leasing.

Jacobsen v Moss, 221-1342; 268 NW 162

Unallowable modification of ruling. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Grimes Corp., 218-1281; 257 NW 353

Waiver by filing answer. In action on note, filing of answer waived right to proceed under statute by motion to strike cause of action improperly joined.

Brown v Correll, 227-659; 288 NW 907

Withdrawal of pleading to file motion or demurrer. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

11135.1 One motion and demurrer only.

Motion to strike as demurrer. A motion in a law action to strike an alleged misjoined action will be treated by the appellate court as a demurrer when so treated by the trial court and by the parties to the action.

Kellogg v Bell, 222-510; 268 NW 534

Unallowable motion to strike. A second motion to strike matter from the same unamended petition is unallowable.

Conner v Henry, 205-95; 215 NW 506

Unallowable successive motions. It is not permissible for defendant to file separate, successive motions "of the same kind" to the same unamended petition. So held where defendant first filed a motion to strike portions of a petition, and, being overruled, filed a motion for a more specific statement of said petition, it being held that said motions were "of the same kind" in that each motion had the same objective, to wit, the proper settling of the pleading for trial.

The proper and necessary procedure is to combine the subject matters of both motions into one motion.

Bookin v Utilities Co., 221-1336; 268 NW 50

11136 Subsequent pleadings.

Amendments. See under §§11182, 11184

Belated filing—effect. A reply may be permitted, within the discretion of the court, after the close of plaintiff's evidence and after the court has overruled a motion for a directed verdict.

Miller v Surety Co., 209-1221; 229 NW 909

McDonald Co. v Morrison, 211-882; 228 NW 878

Belated filing of motion first raised on appeal—ignored. Question, that a motion attacking an answer was not timely, raised for the first time on appeal, will not be considered by the appellate court.

Hillje v Tri-City Co., 224-43; 275 NW 880

Supplemental petition after answer—pleading valid second tax deed. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without re-serving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

11137 Pleadings suspended.

Undetermined motion—procedure. An undetermined motion by defendant to dismiss an action erroneously pending in equity immediately becomes a demurrer when the action is properly transferred to the law calendar, and must be disposed of as any other demurrer, and with the same consequences.

State v Murray, 219-108; 257 NW 553

11140 Amendment before answer.

Amendment before answer—notice—sufficiency. A notice of the filing of an amendment before answer need not comply with all the requirements of an original notice, either as to form or service.

Swan v McGowan, 212-631; 231 NW 440

Amendment after demurrer—when timely. Timely filing of an amendment to an answer by party entitled so to amend, after a demurrer to the answer was sustained, deprived the ruling on the demurrer of all effect as a final adjudication. Such ruling on demurrer in and of itself settles nothing and it becomes an adjudication only if defeated party chooses to make it such.

Schwartz v School Dist., 225-1272; 282 NW 754

Amendment to petition when ready for trial. In a contract action, when the petition had been on file for almost three years, the pleadings made up, the jury impanelled, and witnesses in attendance when their attendance at another time might have been difficult to obtain, the court acted within sound judicial discretion in striking an amendment which the plaintiff had filed without leave of the court, by which the plaintiff attempted to increase the amount of recovery sought, basing the amendment on quantum meruit rather than on the contract, as in the original petition.

Munn v Drakesville, 226-1040; 285 NW 644

Reply or amendment—waiver of objections. Altho a pleading, denominated as a reply, is really an amendment to the petition, but the question of proper pleading was not raised, and the defendants amended their answers as though the reply had been an amendment to petition, and parties, without objection, offered evidence pertaining thereto, any objections possibly arising on account of the departure from the rules of pleading were waived.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Failure to give notice. A plaintiff may not, after the entry of default, amend his pleadings by increasing the amount of the claim, without notice to the defendant, and take judgment on the amended pleadings.

Chandler Co. v Sinaiko, 201-791; 208 NW 323
Sutton v Rhodes, 205-227; 217 NW 626

Invalidating amendment. A petition to enjoin a defendant from maintaining a nuisance (§2017), may not be so amended, before appearance and before answer, as to convert the petition into one to enjoin the defendant from operating as a bootlegger (§1927), unless the defendant is given due notice of such amendment.

De Witt v Dist. Court, 206-139; 220 NW 70

Matters concluded—issue raised by rejected amendment. An application to amend the petition offered after submission of the case, tho overruled by the court, makes the issue raised by the amendment res judicata when the identical issue is raised in a subsequent action, especially when no appeal is taken from the ruling on such application.

Bagley v Bates, 223-836; 273 NW 924

New cause of action under guise of amendment. A cause of action for damages predicated on the alleged negligence of plaintiff's agent in making improvident loans of plaintiff's funds, and a cause of action for damages predicated on the alleged fraudulent misapplication and appropriation by plaintiff's agent of plaintiff's funds, are separate and distinct causes of action. It follows that the pleading of the latter as an amendment to the former is unallowable when the latter cause of action is barred by the statute of limitation.

Pease v Bank, 210-331; 228 NW 83

Special appearance after general appearance. A nonresident defendant who, after a service in a foreign state, enters a general appearance in an action in rem, is not thereby precluded from later entering a special appearance attacking the jurisdiction of the court because of the filing by plaintiff of an amended and substituted petition which converts his former action in rem into an action for an accounting and for personal judgment against said nonresident.

Fidelity Co. v Bank, 213-1058; 237 NW 234

11141 Demurrer—causes of—actions at law.

Discussion. See 20 ILR 49—Defective pleading

ANALYSIS

I Applicability and Inapplicability in General
II Form and Requisites
III Speaking Demurrer
IV Demurrer to Part of Pleading
V Demurrer to Pleading Good in Part
VI Operation and Effect of Demurrer
VII Jurisdiction of Person or Subject Matter
VIII Legal Capacity to Sue
IX Another Action Pending
X Defect of Parties
XI Insufficient Statement of Facts to Justify Relief Prayed
XII Statute of Limitations
XIII Statute of Frauds
XIV Attaching Written Instrument or Account or Copy Thereof

Evidence admissible under general denial. See under §11196
Pleading in abatement. See under §11222

I APPLICABILITY AND INAPPLICABILITY IN GENERAL

General denial. A general denial is not demurrable.

Dean v Atkinson, 201-818; 208 NW 301

Denial precludes demurrer. An answer which pleads a denial of the execution of the note sued on is not demurrable, even tho, in an evident attempt to plead inconsistent defenses, the answer contains a colorable confession of such execution.

Seibel v Olson Bros., 202-711; 210 NW 925

I APPLICABILITY AND INAPPLICABILITY IN GENERAL—continued

General denial precludes demurrer. A general denial precludes demurrer.

Empire Co. v Dye, 205-1271; 215 NW 636

General denial coupled with inferential admission. In an action on a promissory note, an answer which contains a general denial is not rendered demurrable by an answering statement that "defendant admits he signed a note which he assumes is the one in controversy, but he demands its production and proof at the trial herein."

Home Bank v Kelley, 205-514; 218 NW 288

Conclusions of law or fact. Conclusions of law or fact are not demurrable.

Dean v Atkinson, 201-818; 208 NW 301

Administrator—petition for removal—when not demurrable. When the allegations of a petition for removal of an administrator are sufficient to warrant a hearing on the application because of a showing of a tangible and substantial reason to believe that damage will accrue to the estate, the petition is not vulnerable to a demurrer.

In re Arduser, 226-103; 283 NW 879

Attorneys for juveniles — compensation — jury question. An action by an attorney against a county for compensation for defending a juvenile delinquent is not demurrable but presents a jury question.

Ferguson v Pottawattamie County, 224-516; 278 NW 223

Bondholders (?) or trustees (?). When trustees for a bondholder have, under the terms of the bonds, the exclusive right to maintain an action for the protection of the bondholder, the latter may not maintain such action, and thereby convert himself into a trustee, on the naked allegation, in substance, that the trustees will, because of partiality, be less aggressive in prosecuting such action than the bondholder.

McPherson v Sec. Co., 206-562; 218 NW 306

Carriage of goods — interstate shipment — building contractor not consignee. A common carrier's petition against a building contractor alleging transportation as a benefit received, alleging unjust enrichment and nonpayment, and seeking to collect transportation charges on an interstate shipment of building material is demurrable and fails to state a cause of action in omitting an allegation showing a contractual liability on the defendant contractor as a party to the shipping contract.

Des Moines & C. I. Ry. v Ins. Co., 224-15; 276 NW 56

Conclusion allegation. A petition in habeas corpus does not show on its face that the petitioner is entitled to a discharge when it simply alleges the naked conclusion that he has served the full statutory time prescribed as a penalty for "arson", the crime of arson being covered by various and different statutes and being attended by various and different terms of imprisonment.

Bailey v Hollowell, 209-729; 229 NW 189

Dissolving temporary injunction not operative as demurrer—nonadjudication. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Effect of stipulated evidence. The principle that a motion to dismiss the petition in an equitable action (formally denominated a demurrer) necessarily admits the truth of the well-pleaded allegation of the petition, may be materially modified or obviated by evidence which the parties stipulate into the record for the purpose of said motion.

Pierre v Pierre, 210-1304; 232 NW 633
Panther v Agri. Dept., 211-868; 234 NW 560

Governmental employees—personal liability for torts—demurrer inapplicability. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4
Futter v Hout, 225-723; 281 NW 286
Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4
Lenth v Schug, 226-1; 281 NW 510; 287 NW 596
Doherty v Edwards, 226-249; 284 NW 159

Improper motion to strike and judgment on pleadings. A motion to strike an answer and for judgment on the pleadings manifestly cannot be properly sustained when the answer, both by general and specific denials, puts in issue the very gist of plaintiff's cause of action.

Ind. Sch. Dist. v Sch. Dist., 216-1013; 250 NW 192

Invalid defense not attacked by motion—defeating recovery. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Misjoinder both of parties and of causes. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or ministerial (the only acts for which the municipality would be liable), and not governmental.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Pleading—prima facie sufficiency. A prima facie cause of action against guarantors is presented by a pleading based on an instrument which purports to reveal a principal debtor, and a guaranty of the promise of such debtor, and an allegation that the debtor has defaulted.

Foundation Press v Bechler, 211-1217; 233 NW 666

Repurchase of stock — answer — validity against demurrer—equitable issues not raised by demurrer. The facts, set up in answer by a Delaware corporation, that (1) it had no surplus, and (2) the laws of the state of its domicile prohibited a repurchase of its stock from capital, present a defense to an action for recovery on an alleged breach of contract to repurchase stock when such answer is attacked simply by demurrer rather than by an appropriate remedy based on equitable rights. Demurrer does not raise estoppel, ratification, implied contract nor any other equitable theory.

Bishop v Middle States Co., 225-941; 282 NW 305

Right of review—error against appellee—when considered. An answer, in an action to recover personal judgment on a promissory note, to the effect that plaintiff had theretofore foreclosed a mortgage securing the note and had thereby elected his remedy and abandoned all claim to a personal judgment against defendant and was estopped to assert the contrary, is demurrable when there is no allegation, (1) that personal judgment had been, or might have been, rendered in said foreclosure against defendant, or (2) that inconsistent remedies existed and that plaintiff had chosen one of them, or (3) that defendant had altered his position because of said foreclosure; but if error in sustaining the demurrer be conceded, yet the error is not such as an appellee may avail himself of, without appeal, in order to neutralize an error against appellant.

Northern Trust v Anderson, 222-590; 262 NW 529

Ruling on demurrer after answer. The court may, with the acquiescence of all parties, rule on a demurrer after the demurrant has answered. Such action is equivalent to permitting the demurrant to withdraw his answer.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Self-negativing petition. A petition which alleges the personal liability of defendants as partners or members of a joint adventure predicated on a writing which on its face reveals the fact that said defendants specifically contracted against such liability—no question of ostensible partnership being raised—is demurrable as not stating a cause of action.

Reason: The petition on its face negatives liability.

Farmers & M. Bk. v Anderson, 216-988; 250 NW 214

Slander of property or title—when petition demurrable. A petition in an action for damages for slander of title is demurrable unless, inter alia, it alleges, in some proper form, (1) the utterance and publication of the alleged slanderous words, and (2) the special legal damages suffered by plaintiff. Pleading reviewed and held fatally deficient in both particulars.

Witmer v Bank, 223-671; 273 NW 370

Teachers—action on contract. A petition which seeks recovery of the compensation arising under a contract for teaching, but which pleads a statutory discharge of plaintiff by the board of directors, is demurrable, even tho plaintiff also pleads that his appeal from the discharge to the superintendent of public instruction was dismissed for want of jurisdiction.

Streyfeller v School Dist., 210-780; 231 NW 325

Waiver of error. An error in overruling a demurrer or motion to dismiss is waived by answering to merits.

Johnson v Purcell, 225-1265; 282 NW 741

Withdrawal of pleading to file demurrer. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

II FORM AND REQUISITES

Defective form. A demurrer to a petition in quo warranto—a law action—on the ground that "the facts stated do not entitle plaintiff to the relief demanded" presents no question for the court beyond those wherein the demurrant specifically points out wherein said facts are insufficient.

State v Munn, 216-1232; 250 NW 471

Motion to dismiss as demurrer. A motion to dismiss a petition for a writ of certiorari will be treated as a demurrer when based on statutory grounds for demurrer.

Fehrman v Sioux City, 216-286; 249 NW 200

Motion to strike as demurrer. A motion in probate to strike a plea in defense to a claim sought to be enforced by the executor, admits the truth of all matters properly pleaded in the plea.

In re Carpenter, 210-553; 231 NW 376

Motion to strike as demurrer. A motion in a law action to strike an alleged misjoined action will be treated by the appellate court as a demurrer when so treated by the trial court and by the parties to the action.

Kellogg v Bell, 222-510; 268 NW 534

Conclusions of law not admitted by demurrer. In an action against a school district for the reasonable value of transportation furnished to a pupil, a demurrer by the school district did not admit that the transportation was furnished under an implied contract, as a demurrer does not admit the truth of a conclusion of law.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Nature or subject of action—nonwaiver of right to be heard on motion. The right to be heard on a motion for change of venue is not waived because movant, simultaneously with the filing of the motion, files a demurrer to the petition.

Board v Dist. Court, 209-1030; 229 NW 711

III SPEAKING DEMURRER

Power of court. The supreme court can take no notice of the allegations of a speaking demurrer.

Grimes v Taylor, (NOR); 282 NW 346

Speaking demurrer. Judicial proceedings, which are extraneous to a pleading which is demurred to, may not be considered in ruling on the demurrer, either in the trial or the appellate court.

McPherson v Sec. Co., 206-562; 218 NW 306

Speaking demurrer. A demurrer presents no questions unless the basic facts giving rise to such questions appear on the face of the pleading demurred to.

Ritter v Schultz, 211-106; 232 NW 830

Motion to dismiss — speaking demurrer — transcript from board of review. A motion to dismiss in equity, being in effect a demurrer, is a speaking demurrer if it refers to matters not appearing on the face of the petition: e. g., a transcript of the board of review proceedings.

Board v Sioux City Yards, 223-1066; 274 NW 17

IV DEMURRER TO PART OF PLEADING

Demurrer—improper use in denying truth of pleadings. A so-called demurrer, to a defendant-lessee's answer of lack of consideration for an oral agreement to surrender the premises, which does not admit the truth of the answer, but in effect denies it, is properly overruled. Such application is not the function of demurrer.

Wright v Flatterich, 225-750; 281 NW 221

Demurrer to several defenses — motion to divide—prerequisite. A demurrer to a part only of several defenses not separated into divisions as contemplated by statute, is not the proper method of attack; the proper procedure would have been to require defendant to separate and divide before demurring.

Bishop v Middle States Co., 225-941; 282 NW 305

V DEMURRER TO PLEADING GOOD IN PART

Invalid resolution of necessity—procedural requisites to paving contract—demurrer. After the supreme court has adjudged certain paving assessments and the procedural requisites to a paving contract invalid because the resolution of necessity lacked the necessary three-fourths vote of the city council, an assignee of the paving assessment certificates may not rely on said contract as an express written agreement to pay for the paving from the general fund on account of a clause in the contract requiring deficiencies to be so paid, hence a cause of action thereon is subject to demurrer.

Lytle v Ames, 225-199; 279 NW 453

VI OPERATION AND EFFECT OF DEMURRER

Answer after appeal on ruling on demurrer. A defendant who assumes to appeal from an adverse ruling on his demurrer without standing on his demurrer, and without suffering a judgment to be entered against himself, has a right to file an answer after his appeal has been dismissed and before default is entered.

Gow v County, 213-92; 238 NW 578

Appeal from ruling on demurrer. In an action to recover against the estate of a deceased executor for losses caused by improper handling of an estate, the plaintiffs had no right to appeal from a ruling sustaining a demurrer filed by the defendants when the plaintiffs did

not elect to stand on the pleadings nor suffer final judgment to be entered against them.

Hayes v Selzer, 227-693; 289 NW 25

Demurrer admitting paternity of illegitimate child. In an application in probate to construe the word "grandchild" in a will which left the residuary estate to children and grandchildren of testatrix's deceased brother-in-law, and a contention that an illegitimate child of brother-in-law's son was included in such word "grandchild", a demurrer to the petition admitted allegations that brother-in-law's son was father of such illegitimate, and that testatrix knew of such relationship at time will was executed.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Motions—striking revamped pleading. Striking a pleading which is simply a repleading of a formerly stricken matter is proper, but not so when the repleading is so coupled with new matter as to render the whole pleading proper.

Granette Co. v Neumann & Co., 200-572; 203 NW 935; 205 NW 205

Nonwaiver—right of appeal. If it affirmatively appears that the unsuccessful party does not waive the error in ruling on demurrer, he may properly urge, on appeal, objection to such order.

Blessing v Welding, 226-1178; 286 NW 436

Pleading over—issue abandoned. When district court determines, on demurrer, that restrictions on alienation in a will to avoid debts are invalid, and parties plead over and do not appeal from said ruling, the issue is abandoned and cannot be made the subject of an appeal.

Rich v Allen, 226-1304; 286 NW 434

Questions of fact ignored. Paragraphs of a demurrer which averred defensive matters involving controversial questions of fact, such as ratification, waiver, laches, former adjudication, and estoppel, were not entitled to recognition as grounds of demurrer and were properly ignored by the trial court.

In re Baker, 226-1071; 285 NW 641

Repleading—not waiver of exception. Pleading a restatement of original allegations of petition does not constitute a waiver of exception to ruling on demurrer, and objection may be urged upon such ruling when the party duly excepts and allows judgment to be entered.

Blessing v Welding, 226-1178; 286 NW 436

Statute violation—assumed for purpose of demurrer. In an action for injuries resulting from a motor vehicle collision at an intersection, where defendant's truck is alleged to have been parked so as to obscure the view of a stop sign, and where the violations of both city ordinance and state law are pleaded, the supreme court will assume, for the purpose of demurrer, that truck was parked within prohibited distance and did obscure the sign.

Blessing v Welding, 226-1178; 286 NW 436

Striking matter judicially held insufficient. A plaintiff has no right to replead a count which has been judicially and finally held to present no cause of action even tho he combines said condemned count with another count. It follows that said last count is properly stricken insofar as it embraces said formerly adjudicated count.

Arthaud v Griffin, 212-646; 235 NW 66

Tenancies at will—termination. In a forcible entry and detainer action where the petition alleged a notice dated January 12th terminating a tenancy at will "within 30 days from the date of this notice", such notice being served on January 13th, a demurrer should have been sustained, as only 29 and not the statutory 30 days' written notice was given.

Murphy v Hilton, 224-199; 275 NW 497

VII JURISDICTION OF PERSON OR SUBJECT MATTER

Negligent operation of road maintainer—nonliability—demurrer. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

VIII LEGAL CAPACITY TO SUE

Incapacity to sue—waiver. An objection to the capacity in which plaintiff sues must be interposed by defendant before he pleads to the merits.

Keeling v Priebe, 219-155; 257 NW 199

IX ANOTHER ACTION PENDING

No annotations in this volume

X DEFECT OF PARTIES

Improper joinder. A misjoinder both of causes of action and of parties is ground for demurrer or for motion to dismiss in equitable proceedings.

McPherson v Sec. Co., 206-562; 218 NW 306

Misjoinder both of parties and of causes. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

X DEFECT OF PARTIES—concluded

Misjoinder of corporate parties. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Unassailable by demurrer. A mere misjoinder of parties cannot be reached by demurrer.

Gibson v Union Co., 208-314; 223 NW 111
Brown v Correll, 227-659; 288 NW 907

XI INSUFFICIENT STATEMENT OF FACTS TO JUSTIFY RELIEF PRAYED

Counterclaim—failure to complete loan—no bar to recovery of part loaned. Where one person agrees to loan money to form a corporation, pursuant to which he loans a part and takes a note therefor, his failure to loan the balance will not prevent recovery of the part loaned, and a counterclaim so alleging states no cause of action and should be stricken.

Hillje v Tri-City Co., 224-43; 275 NW 880

Franchise renewal statute—objecting stockholders selling to majority—action within three years premature—dismissal. At the termination of a mutual telephone company franchise, stockholders voting against renewal of franchise may not maintain an action against the majority stockholders to require purchase of their stock by such stockholders voting in favor thereof, until after three years from date of voting, under §8365, C., '35, permitting such franchise renewal, if the majority stockholders voting renewal purchase the stock of those voting against renewal within three years from date of voting, and an action commenced within such three-year period, being premature, will be dismissed on motion.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

XII STATUTE OF LIMITATIONS

Bills and notes—construction and operation—time of payment—marginal entry. A properly dated promissory note which fails to state, in the strict body thereof, any time for payment, is, nevertheless for the purpose of a demurrer presenting the bar of the statute of limitation, payable at a fixed and definite date when, in the corner of the note and opposite the signature to the note, appear the words, "the term of five years".

Nylander v Nylander, 221-1358: 267 NW 7

Cashier's check as bill of exchange—demand unnecessary—accrual of action—barred after 10 years. The holder of a cashier's check, certain in amount, containing no provisions respecting demand and not in the nature of a certificate of deposit, has a right to sue thereon at any time from and after its issuance. Treated as a bill of exchange, presentment and demand for payment are not necessary to start running the statute of limitations. Therefore, after 10 years from its issuance, a right of action thereon is barred.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

XIII STATUTE OF FRAUDS

Sale of goods — unenforceable contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

XIV ATTACHING WRITTEN INSTRUMENT OR ACCOUNT OR COPY THEREOF

Credit transactions with bank. Where the cashier of the plaintiff bank had entered into two similar credit transactions with the defendant bank in order to cover a shortage in accounts, in an action to recover the amount of the shortage, the plaintiff's brief stating that there had been a full accounting between the two banks except as to one of the two transactions, such statement recognized a weakness in the plaintiff's contentions, as the amount claimed was equal to the amount involved in only one of the transactions, and, when both had been accounted for in the same manner, the accounting for both had to be either proper or improper.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

11142 Insufficient statement.

ANALYSIS

I SPECIFICATION AT LAW
II SPECIFICATION IN EQUITY

I SPECIFICATION AT LAW

Demurrer—when bad. A demurrer to a petition in an action for slander will not lie solely on the ground that the petition shows on its face that defendant, at the time of speaking the words in question, was acting in a governmental capacity, because defendant's right to assert the privileged character of the spoken words is not an absolute right but a qualified right only. The demurrer—if employed under such circumstances—must point out wherein said petition fails to state a cause of action against defendant.

Brown v Cochran, 222-34; 268 NW 585

General and nonspecific demurrer. A demurrer to an answer in a law action on the ground that the facts pleaded "do not entitle the defendant to the relief demanded" is fatally defective in definiteness, and should be overruled.

Dean v Atkinson, 201-818; 208 NW 301

II SPECIFICATION IN EQUITY

Pleading—motions—for more specific pleading—when required. A general allegation by an answering defendant of the commission, by plaintiff, of acts of "unfaithfulness and adultery", pleaded by defendant in avoidance of the contract sued on, must be amplified, on proper motion, by alleging more specifically said alleged acts and the time when, place where, and person with whom, committed.

Poole v Poole, 221-1073; 265 NW 653

11144 Effect of demurrer.

ANALYSIS

I ADMISSION BY DEMURRER
II WAIVER IN GENERAL
III ANSWERING OVER AND ADJUDICATION

I ADMISSION BY DEMURRER

Allegation of fact—effect. A well pleaded allegation of ultimate fact must, for the purpose of a demurrer, be taken as true, unless other well pleaded allegation of fact affirmatively shows that the first allegation is erroneous. So held as to an allegation of the book value of corporate stock.

In re Richter, 212-38; 234 NW 285

Facts well pleaded in petition—assumed to be true. For the purpose of demurrer, any fact well pleaded in the petition is assumed to be true.

Smith v Railway, 227-1404; 291 NW 417

Allegations taken as true. The allegations of defendant's answer must be taken as true for the purpose of considering a demurrer thereto.

Sorensen v Ins. Ass'n, 226-1316; 286 NW 494

Will contest—fatal admission. A demurrer to objections to the probate of a will should have been overruled when it admitted as facts that the contestant held judgments against the devisee who was a son and heir of the decedent who died seized of real estate, that the judgments were liens against any real estate the son would inherit as heir, and that the decedent was of unsound mind when the will was made, as, if the decedent were incompetent, the will was void and he died intestate. So the title to the son's share in the real estate vested at the father's death, and, at the same instant, the judgments became liens on his share of the real estate.

In re Duffy, 228- ; 292 NW 165

Demurrer admitting paternity of illegitimate child. In an application in probate to construe the word "grandchild" in a will which left the residuary estate to children and grandchildren of testatrix's deceased brother-in-law, and a contention that an illegitimate child of brother-in-law's son was included in such word "grandchild", a demurrer to the petition admitted allegations that brother-in-law's son was father of such illegitimate, and that testatrix knew of such relationship at time will was executed.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Defendant admitting negligence. Negligence of defendants alleged in petition is admitted by demurrer.

Blessing v Welding, 226-1178; 286 NW 436

Sole basis for determining. The court, in passing on a demurrer, may not go outside the allegations of fact contained in the pleading demurred to, and indulge in speculation or conjecture in aid of the demurrer.

Hoefer v Fortmann, 219-746; 259 NW 494

II WAIVER IN GENERAL

Answer after demurrer—waiver waived by consent to withdrawal of answer. While ordinarily the filing of an answer after filing a demurrer waives consideration of the demurrer, the court may properly allow the withdrawal of the answer, the adverse party not objecting, and rule on the demurrer.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Appeal and error—demurrer—nonwaiver—right of appeal. If it affirmatively appears that the unsuccessful party does not waive the error in ruling on demurrer, he may properly urge, on appeal, objection to such order.

Blessing v Welding, 226-1178; 286 NW 436

Demurrer in equity—waiver by treating as motion to dismiss. In equity proceeding for modification of alimony decree, appellant waived her right to insist that a demurrer could not be filed in lieu of a motion to dismiss, by electing to stand upon the ruling on the demurrer.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Pleading—demurrer—repleading—when not waiver of exception. Pleading a restatement of original allegations of petition does not constitute a waiver of exception to ruling on demurrer, and objection may be urged upon such ruling when the party duly excepts and allows judgment to be entered.

Blessing v Welding, 226-1178; 286 NW 436

Pleadings—demurrer or exception—motion to dismiss—ruling as adjudication. The overruling of a motion to dismiss a petition in an equitable action does not amount to an adjudi-

cation unless the defendant stands on his motion and allows judgment to be entered against him.

Frazier v Wood, 219-36; 255 NW 647

III ANSWERING OVER AND ADJUDICATION

Amendment after demurrer—when timely. Timely filing of an amendment to an answer by party entitled so to amend, after a demurrer to the answer was sustained, deprived the ruling on the demurrer of all effect as a final adjudication. Such ruling on demurrer in and of itself settles nothing and it becomes an adjudication only if defeated party chooses to make it such.

Schwartz v School Dist., 225-1272; 282 NW 754

Ruling as adjudication. In an action at law on a money demand, aided by attachment on the ground that defendant had fraudulently conveyed his land, the overruling of defendant's demurrer based on the ground that the action was barred because not brought within five years after the recording of said deed, cannot be deemed an adjudication of the ground of said demurrer so as to prevent defendant from asserting the same ground against a later-brought action in equity to set aside said alleged fraudulent deed.

Bristow v Lange, 221-904; 266 NW 808

11145 Failure to demur.

Judgment notwithstanding verdict—waiver. The right of plaintiff to file a motion for judgment notwithstanding a verdict in favor of defendant on the ground that defendant's answer fails to plead a defense, is not waived by plaintiff because of his failure to demur to said answer.

Persia Bk. v Wilson, 214-993; 243 NW 581

11147 Pleading over.

ANALYSIS

I PLEADING OVER
II WAIVER BY PLEADING OVER

I PLEADING OVER

Motion to dismiss—pleading over in equity. Plaintiff, in an action triable in equity, who has his action dismissed on motion because of defenses in point of law appearing on the face of the petition, must be accorded the right (1) to plead over, or (2) to elect to stand upon the ruling of the court.

Marcovis v Inv. Co., 223-801; 273 NW 888

Repleading—when not waiver of exception. Pleading a restatement of original allegations of petition does not constitute a waiver of exception to ruling on demurrer, and objection may be urged upon such ruling when the party duly excepts and allows judgment to be entered.

Blessing v Welding, 226-1178; 286 NW 436

Nonwaiver—right of appeal. If it affirmatively appears that the unsuccessful party does not waive the error in ruling on demurrer, he may properly urge, on appeal, objection to such order.

Blessing v Welding, 226-1178; 286 NW 436

II WAIVER BY PLEADING OVER

Issue abandoned — not reviewable. When district court determines, on demurrer, that restrictions on alienation in a will to avoid debts are invalid, and parties plead over and do not appeal from said ruling, the issue is abandoned and cannot be made the subject of an appeal.

Rich v Allen, 226-1304; 286 NW 434

11148 Failure to plead over—effect.

Standing on demurrer. A pleader who (1) excepts to a ruling on demurrer, (2) does not plead over, and (3) suffers a final adverse judgment to be rendered, thereby affirmatively shows that he stands on his demurrer, with consequent right to appeal.

Hanson v Carl, 201-521; 207 NW 579

Standing on demurrer. Where plaintiff after answer moved for judgment of dismissal and also for judgment on the pleadings, held that if it be permissible to treat the latter motion as a demurrer to the answer, yet an adverse ruling thereon was not appealable unless plaintiff elected to stand thereon.

Morrison v Clinic, 204-54; 214 NW 705

Failure to stand on pleading. An appeal from an order sustaining a demurrer to a petition for certiorari (or sustaining a motion to dismiss when it is the equivalent of a demurrer) will not lie when plaintiff did not in the trial court stand on his pleading or suffer judgment to go against him.

Fehrman v City, 216-286; 249 NW 200

Standing on overruled motion to dismiss. A ruling which denies a motion to dismiss (in lieu of the former equitable demurrer) is not appealable unless the movant unequivocally elects to stand upon his motion, and submits to a final adverse judgment; and this is true though appellant asserts on his attempted appeal that he has nothing further to plead.

Morrison v Clinic, 204-54; 214 NW 705

Appeal — when allowable. An appeal will not lie from a ruling which sustains a demurrer unless the defeated party does one of two things, to wit: (1) elects to stand on his pleadings, or (2) suffers final judgment to be entered against himself.

Devoe v Dusey, 205-1262; 217 NW 625

Habeas corpus—adverse ruling on demurrer. Where a defendant was sentenced and imprisoned upon failing to plead after his demurrer to the indictment was overruled, an appeal will be dismissed from an adverse ruling on demurrer in a habeas corpus action to test the validity of such imprisonment, when the defendant does not (1) elect to stand upon his pleadings, or (2) suffer judgment to be entered against him in the lower court.

Besch v Haynes, 224-166; 276 NW 13

Refusal to replead—election—effect. After the sustaining of a demurrer, the adverse party may very properly refuse to plead within the time specified by the court and elect to appeal from the ruling on the demurrer.

Home Bank v Kelley, 205-514; 218 NW 288

Refusal to plead over—effect. A defendant who refuses to plead over after an adverse ruling on his demurrer may not complain of the judgment entered on the merits, insofar as it is sustained by the petition.

Shaffer v Marshall, 206-336; 218 NW 292

Answer after appeal on ruling on demurrer. A defendant who assumes to appeal from an adverse ruling on his demurrer without standing on his demurrer, and without suffering a judgment to be entered against himself, has a right to file an answer after his appeal has been dismissed and before default is entered.

Gow v Dubuque County, 213-92; 238 NW 578

Undetermined motion—procedure. An undetermined motion by defendant to dismiss an action erroneously pending in equity immediately becomes a demurrer when the action is properly transferred to the law calendar, and must be disposed of as any other demurrer, and with the same consequences.

State v Murray, 219-108; 257 NW 553

Ruling on demurrer conclusive. A ruling sustaining a demurrer in mortgage foreclosure proceeding on the ground that the estate of the mortgagor is not personally liable on the mortgage because of the failure of the mortgagee to file said claim against the estate within the time provided by statute, constitutes a final adjudication of such nonliability when plaintiff neither pleads over nor appeals from the ruling.

Oates v College, 217-1059; 252 NW 783; 91 ALR 563

Standing on motion. An order overruling a motion to strike which is not the equivalent of a demurrer imposes no necessity on the appealing party to affirmatively stand on his motion and allow judgment to be entered against him on the merits.

Ontjes v McNider, 218-1356; 256 NW 277

Action by teacher for compensation. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v School Dist., 225-1272; 282 NW 754

11151 Counterclaim—how stated.

ANALYSIS

I COUNTERCLAIM, SET-OFF, RECOUPMENT, DEFENSE, AND CROSS-DEMAND
II ALLOWABLE COUNTERCLAIMS
III NONALLOWABLE COUNTERCLAIMS
IV TIME OF ACQUISITION OF COUNTERCLAIM

I COUNTERCLAIM, SET-OFF, RECOUPMENT, DEFENSE, AND CROSS-DEMAND

Discussion. See 22 ILR 118—Recoupment for breach of warranty; 24 ILR 310—Counterclaims

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl Bk. v Malone, 76 F 2d, 251

Attorney's admission binding on client. A party is bound by the admission of his attorneys, made in a counterclaim to another action.

Mitchell v Underwriters, 225-906; 281 NW 832

Claims arising out of extrinsic transactions. A defendant sued by the receiver of an insolvent bank on indebtedness due the bank may not, in order to establish a set-off, plead an interest in certain deposits in the bank, and interest in extraneous transactions when such interests can only be determined by bringing in total strangers to the transactions sued on, and adjudicating their interests.

Foster v Read, 212-803; 237 NW 634

Conversion of collaterals. A debtor when sued may, without first paying the debt, plead a counterclaim to the effect that he deposited collateral securities with the creditor who converted the same to his individual use without the consent of the debtor.

Leonard v Sehman, 206-277; 220 NW 77

Deducting employee's debt to employer. Where a defendant-employer in paying his employee deducted an amount which the employee was owing the employer, and, when

I COUNTERCLAIM, SET-OFF, RECOUPMENT, DEFENSE, AND CROSS-DEMAND —continued

sued, based his right so to do (1) on an oral contract that he might so deduct, and (2) on his right to so deduct irrespective of such oral contract, the court prejudicially errs, in its instructions, in making the right to deduct dependent on proof of the oral contract.

Jorgensen v Cocklin, 219-1103; 260 NW 6

Equity retaining jurisdiction—law issues. An action in equity by one school district to enjoin another school district and the county treasurer from transferring, to the defendant school, certain funds claimed to be due from the plaintiff school as tuition, remains in equity although the defendant school files a cross-petition raising issues at law as to determination of the amount due, if any, and for judgment accordingly, since equity, acquiring jurisdiction, may determine all issues.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Equitable set-off—nature and scope. The doctrine of equitable set-off is a rule of equity, and is applied quite independently of the limitations which attach to a so-called legal or statutory offset.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Equitable set-off—surety of insolvent. In an action by the receiver of an insolvent, the defendant may set off, against the obligation sued on, the amount which the defendant as surety for the insolvent has been compelled to pay on the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Equitable set-off. Where an insolvent bank in the hands of a receiver owes an estate on a deposit, an heir who owes the bank, tho he is the executor of the estate, may have his interest in the deposit set off against his indebtedness to the bank, subject, of course, to claims which may be filed against the estate.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Equitable set-off against insolvent county treasurer. Where an insolvent county treasurer brought mandamus action to secure salary warrant, and another suit was pending against the treasurer and his surety wherein county sought to recover for shortage in treasurer's office, the fact that county's claim was unliquidated would not prevent pleading the same as an equitable set-off, in view of the fact that the treasurer was insolvent.

Briley v Board, 227-55; 287 NW 242

Erroneous but harmless striking of counterclaim. In an action for damages consequent on the collision of automobiles, the erroneous striking of defendant's counterclaim for damages growing out of the collision is harmless when the jury finds that defendant was proximately negligent and that plaintiff was not guilty of contributory negligence.

Harriman v Roberts, 211-1372; 235 NW 751

Failure to complete loan—no bar to recovery of part loaned. Where one person agrees to loan money to form a corporation, pursuant to which he loans a part and takes a note therefor, his failure to loan the balance will not prevent recovery of the part loaned, and a counterclaim so alleging states no cause of action and should be stricken.

Hillje v Tri-City Co., 224-43; 275 NW 880

Inducing third party to perform covenants. An owner of mortgaged premises who leases the same and agrees with the lessee to erect certain improvements on the land, and who pledges the lease with the mortgagee as additional collateral security for the mortgage debt, and who, in the foreclosure of the mortgage, fully acquiesces in and approves and ratifies an application by the receiver for authority to borrow money and therewith to make the improvements which the lessor had obligated himself to make, thereby impliedly empowers the mortgagee, who advanced the funds with which to make the improvements, to reimburse himself out of the rentals accruing under the lease and collected prior to the expiration of the period for redemption from the mortgage sale.

Quaintance v Bank, 201-457; 205 NW 739

Procedendo—retrial (?) or peremptory judgment (?). When an action at law is reversed because defendant had not sufficiently or properly proven his counterclaim, the cause, after procedendo, stands for retrial on said counterclaim, and the peremptory rendition of judgment by the trial court against defendant on said counterclaim is error.

Perry-Fry Co. v Gould, 217-958; 251 NW 142

Recovery of unpaid legacy—bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank, 218-961; 256 NW 681

Seller's refusal to deliver — buyer's right. Seller's unjustified refusal to furnish materials under a continuing contract was ground for buyer (1) to treat contract as terminated and purchase elsewhere, and (2) to make counterclaim for damages in seller's action against buyer on account.

Eastman Stores, Inc. v Eckert Studio, (NOR); 231 NW 434

Striking counterclaim. An order striking a counterclaim in toto necessarily strikes the prayer for recovery on the counterclaim.

Davis v Robinson, 200-840; 205 NW 520

Subject matter—counterclaim in general. It is not necessary that a counterclaim arise out of the transactions set forth in the petition or be connected with the subject of the action.

Imes v Hamilton, 222-777; 269 NW 757

Tuition transfer—county treasurer—joinder. In an equitable action between school districts to prevent a statutory transfer by a county treasurer of funds in payment of tuition, a cross-petition of the defendant school district, not joined in by the county treasurer, may not be stricken therefrom, inasmuch as the county treasurer has no investment therein and is not a necessary party thereto.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Unliquidated demand set off against court costs. On a motion by an administrator to tax court costs against a defeated claimant in probate, the latter may not have a duly filed but unliquidated claim in his favor and against the estate adjudicated and set off against said costs and a judgment rendered against the estate for the excess.

In re Nairn, 215-920; 247 NW 220

Unquestioned establishment—proper procedure. A duly pleaded counterclaim which is unquestionably established by the evidence should not be submitted to the jury, but should be summarily allowed by the court; and in a personal injury action the court should direct the jury how to proceed if plaintiff's recovery be more than the amount of the counterclaim; likewise how to proceed if plaintiff's recovery be less than the amount of the counterclaim.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

II ALLOWABLE COUNTERCLAIMS

Agreement to release judgment—attorney fee and costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Attachment bond—counterclaim on deficiency judgment. In suit on attachment bond for damages, principal on bond could file counterclaim based on deficiency judgment obtained in foreclosure action altho counterclaim was not in favor of surety on bond, since principal was primarily liable.

Imes v Hamilton, 222-777; 269 NW 757

Right to plead barred counterclaim.

Riggs v Gish, 201-148; 205 NW 833

Damages growing out of same transaction. Joint defendants in an action for damages consequent on a collision of two automobiles, may each separately plead as a counterclaim any damages suffered by him in the collision in question.

Harriman v Roberts, 211-1372; 235 NW 751

Principal and surety — permissible plea. In an action against the principal and surety on an attachment bond for damages consequent on the alleged wrongful issuance of the writ, the principal in said bond may plead a counterclaim which neither arises out of or is connected with the transaction on which plaintiff sues, nor in which the surety has any personal ownership. A surety is not primarily liable on the bond and the principal who is primarily liable should be permitted to defeat recovery on the bond if he can so do.

Imes v Hamilton, 222-777; 269 NW 757

Deposit as set-off. Where, prior to the insolvency of a bank, said bank and a depositor became irrevocably obligated under a letter of credit issued to said depositor to enable him to make a purchase of goods in a foreign country, and where the drafts drawn in the foreign country under said letter of credit did not mature until after the insolvency of said bank, and where the receiver of said bank paid said drafts in full on their maturity, the claim of said receiver against said depositor for reimbursement is subject to an offset to the extent of the depositor's deposit in said insolvent bank.

Andrew v Trust Co., 217-657; 251 NW 48

Specific performance of real estate contract. In an action to recover rent a counterclaim for specific performance of a contract to sell the property was properly prepared when it contained allegations that the purchaser was at that time, and at all times had been, ready, willing, and able to perform, and had made a tender of performance which was refused, and a copy of the letter constituting such tender was attached to the counterclaim.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

III NONALLOWABLE COUNTERCLAIMS

Unallowable counterclaim. A fraudulent grantee of land may not, in an action by the judgment creditor of the grantor to set aside the conveyance, set up a counterclaim for money due to said grantee from said judgment creditor.

Evans v Evans, 202-493; 210 NW 564

III NONALLOWABLE COUNTERCLAIMS —continued

Unallowable counterclaim. A counterclaim has no place in an action of forcible entry and detainer.

Votruba v Hanke, 202-658; 210 NW 753

Unallowable counterclaim. The amount which a vendee of land claims to have expended on land foisted upon him because of fraudulent representations by the vendor, in order to render the land "suitable, productive, and usable", is wholly unallowable as a counterclaim because said amount as a measure of damages for the wrong suffered is unknown to the law.

Perry Fry Co. v Gould, 214-983; 241 NW 666

Unallowable counterclaim. A defendant sued on his indorsement of a promissory note manifestly may not avail himself, by way of counterclaim, of an indorsement by plaintiff to defendant of a promissory note which has been fully discharged. Somewhat unusual circumstances reviewed and held to show such discharge.

Versteeg v Hoeven, 214-92; 239 NW 709

Counterclaim — nullification. Proof that plaintiff substantially performed part of a contract for services and justifiably abandoned the performance of the remaining part necessarily precludes recovery by the defendant on his counterclaim for damages (1) for negligent performance of the part performed, and (2) for failure to complete the work.

Goben v Paving Co., 218-829; 252 NW 262

Counterclaim by one joint defendant. New matter which constitutes a cause of action in favor of one of several defendants is not pleadable as a counterclaim; and if an assignment of such cause of action to all the defendants is relied on, it must appear that the assignment was made prior to the commencement of the action.

Shaw v Ioerger, 203-1256; 212 NW 719

Claim belonging to some of the defendants. In an action against a partnership and against the individual partners thereof, a claim for necessaries furnished by the partnership to plaintiff and her husband (who was a party defendant) is not pleadable as a counterclaim, because said claim does not belong to all the defendants.

Jordison v Jordison Bros., 215-938; 247 NW 491

Nonright to set-off. The officers of a bank who, to further the interest of their bank, enter into an individual guaranty of the payment of all promissory notes which their bank or its officers may rediscount with the guarantee, are not entitled, when sued on the guaranty, to off-set against their liability the amount of a deposit which their bank had with the guarantee at the time it became insolvent and passed into the hands of a receiver, and which deposit the guarantee surrendered to the receiver on his demand.

Bankers Tr. Co. v Hill, 207-1375; 221 NW 916

Double liability not subject to offset. Funds voluntarily paid into a bank by a stockholder thereof, in order to repair or make good the impaired capital of the bank while it is a going concern, may not later, after the bank has gone into the hands of a receiver for liquidation because of insolvency, be set off by the stockholder against the demand of the receiver for a 100 percent statutory assessment on the stock for the benefit of creditors.

Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Justifiable dismissal. An unsupported counterclaim for damages consequent on the negligent handling of a claim by an attorney who sued for fees due him, is, of course, properly dismissed by the court.

Hunt v Moore, 213-1323; 239 NW 112

Loss of remedy. An unsuccessful defendant in an action for the recovery of real property who is afforded no opportunity therein to interpose a claim for permanent improvements (§§12235, 12249) must necessarily resort to the occupying claimants act (§10128 et seq.) for relief, and when he fails to resort to such remaining and exclusive remedy, and quits and surrenders the premises, he will not be permitted, when subsequently sued on a supersedeas bond growing out of the litigation, to interpose a claim for such improvements as a set-off.

Bigelow v Ins. Co., 206-884; 221 NW 661

Malicious prosecution growing out of auto collision. Defendant in an action for damages consequent on a collision between automobiles, may not plead as a counterclaim damages consequent on a malicious prosecution instituted by the plaintiff against defendant for reckless driving at the time of the collision.

Harriman v Roberts, 211-1372; 235 NW 751

Recovery of property. A defendant in an action for the recovery of real property whose possession originated in a contract of purchase which has been formally and legally forfeited may not counterclaim for rescission of the contract, and for judgment against plaintiff for the amount paid on the contract, and for the value of improvements placed on the property, especially when plaintiff was never a party to said contract.

Detmers v Russell, 212-767; 237 NW 494

Representation or warranty—necessity to plead. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed

when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

Review—fatally delayed objection. The point that a party may not plead a counterclaim which is based on the assignment of part of a claim unless he brings into the case other interested parties may not be first raised on appeal.

Weitz' Sons v Fidelity Co., 206-1025; 219 NW 411

Waiver by failure to plead. A party who is sued on a nonnegotiable claim by the assignee or quasi-assignee thereof or by one who has been subrogated to the right to the claim, and fails to plead in defense a counterclaim which he then holds against the assignor, whether such counterclaim be liquidated or unliquidated, unconditionally waives the right to use such counterclaim as an off-set against the judgment obtained by the assignee or subrogated party on the claim sued on.

Southern Sur. v Ins. Co., 210-359; 228 NW 56

IV TIME OF ACQUISITION OF COUNTERCLAIM

Set-offs unallowable. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off not applicable.

Parker v Schultz, 219-100; 257 NW 570

11153 Counterclaim by co-maker or surety.

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl Bk. v Malone, 76 F 2d, 251

11155 Cross-petition—third parties.

Rejection of issue which breeds confusion.

Cotten v Halverson, 201-636; 207 NW 795

Certiorari. Certiorari will not lie to review an order of court, entered on its own motion, striking from the files defendant's cross-petition against a co-defendant.

Collins v Cooper, 215-99; 244 NW 858

Construction in view of stricken references. While the striking of portions of the first division of an answer may be proper as far as plaintiff's action is concerned, yet the court must treat said stricken portions as unstricken in construing defendant's cross-petition contained in a subsequent division of his answer when said stricken portions are essentially material to the cross-petition and are incorporated therein by distinct reference.

Andrew v Boyd, 213-1277; 241 NW 423

Cross-complaint—when allowable. In an action by an administrator for damages consequent on the alleged negligent killing by defendant of the intestate in a collision between automobiles, the defendant may cross-petition for damages against the administrator personally under the allegation that the deceased at the time of said collision was negligently operating an automobile which was personally owned by said administrator and was so doing with the consent of said owner. And this is true irrespective of the personal residence of the administrator.

Ryan v Amodeo, 216-752; 249 NW 656

Cross-petition against plaintiff—notice not required. A pleading designated as a cross-petition asking for enforcement of a painting clause in a lease and filed at the close of the evidence was not filed in violation of statute requiring notice of a cross-petition against a co-defendant or third party, since the pleading prayed for affirmative relief against the plaintiff, who was neither a co-defendant nor third party.

Lamm v Stoen, 226-622; 284 NW 465

Cross-petition defense—state as proper party—belated objections. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross-petition, which question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Exline Fuel Co., 224-466; 276 NW 41

Cross-petition not affecting subject matter of main action. In an action on the bonds of a public officer and his bondsmen to recover a shortage, one surety may not cross-petition against a party who he alleges wrongfully received the funds resulting in the shortage, said latter party not being a party to the bond sued on.

School District v Sass, 220-1; 261 NW 30

Partition—cross-petition—notice of—sufficiency. In an action for the partition of lands, a notice by one co-defendant to another co-defendant of the filing by the former of a cross-petition, denying all interest of the latter in the lands in question, is not a nullity because said notice fails to specifically describe or identify said lands, when said notice makes proper reference to the original petition in the action for a correct description of said lands.

Bauer v Bauer, 221-782; 266 NW 531

Partition—insolvent heir's unpaid debt to estate—jurisdiction of court to offset. The court has jurisdiction, in an equitable action to

partition the lands of an intestate (to which action all heirs are parties), to entertain a cross-petition by one of the heirs as administrator of said estate, and, under proper pleading and proof:

1. To decree that a certain insolvent heir has no interest in said land because his unpaid indebtedness to said estate equals or exceeds the value of the share in said lands which he would take were he not so indebted, and

2. To decree that said lands belong solely to the other heirs who are not so indebted, and to the surviving widow, if any.

Bauer v Bauer, 221-782; 266 NW 531

Propriety—waiver. The court has authority to consider and pass upon a cross-petition which asks the court to construe the rental provisions of a lease, when issue is duly joined thereon and tried out without motion to strike or dismiss such petition; and especially is this true when the cross-petitioner alleges the existence of an unadjusted difference between the parties relative to such construction.

Minot v Pelletier Co., 207-505; 223 NW 182

Provisional remedies. The right of a litigant to move to transfer an issue from the equity calendar to the law calendar is not a provisional remedy within the meaning of this section.

Pace v Mason, 206-794; 221 NW 455

Review—scope—nonappeal from inferential rulings. When the court finds in favor of the defendant on a specifically named defense, the inference will be indulged that the court found against him on his cross-petition for relief which is affirmative, and in the nature of an independent cause of action. It follows that defendant is not entitled, on an appeal by plaintiff, to a review of the inferential rulings on said affirmative and independent matters.

Toedt v Bollhoefer, 206-39; 218 NW 56

Reviving dismissed cross-petition. A party who dismisses his cross-petition may not subsequently revive the same by giving adverse parties notice of the filing of said petition and the hearing thereon.

Matthews v Quaintance, 200-736; 205 NW 361

Tuition transfer—county treasurer—joinder. In an equitable action between school districts to prevent a statutory transfer by a county treasurer of funds in payment of tuition, a cross-petition of the defendant school district, not joined in by the county treasurer, may not be stricken therefrom, inasmuch as the county treasurer has no investment therein and is not a necessary party thereto.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Wage recovery dependent on reformation. In a law action for wages, allegedly due an employee under contract, where parties stipulate that the employee shall not recover such wages if the defendant prevails on his cross-petition for reformation, transferred to equity on motion, the employee may not thereafter deny the court's right to try the reformation issue and is bound by the decree if not contrary to the evidence.

Koch v Abramson, 223-1356; 275 NW 58

11156 Reply—when necessary.

Denial by operation of law. See under §11201

When reply necessary. A motion to strike an answering amendment which interposes the bar of the statute of limitation is not the proper procedure under which to plead facts which avoid the bar. Reply is necessary.

Lawrence v Melvin, 202-866; 211 NW 410

When reply not necessary. In an action by a guardian of a minor on a certificate of deposit issued to the minor by the defendant bank, an answer alleging that the minor, in the re-organization of the bank, waived a named portion of the deposit is denied by operation of law.

McFerren v Bank, 214-198; 238 NW 914

When reply unnecessary. In an action wherein plaintiff alleges that defendant is owing him a stated sum, and wherein defendant answers that he has not received proper credit for payments made by him, no reply is necessary in order to enable plaintiff to prove an agreement that certain payments were not to be applied on the account sued on.

Northern Lbr. Co. v Clausen, 201-701; 208 NW 72

Allowable reply. An answer which alleges a failure on the part of an insured to furnish the proofs of loss required by statute is properly met by a reply which alleges that the policy itself waives such proofs.

Glandon v Ins. Assn., 207-1068; 224 NW 65

Avoidance of matter first appearing in reply. An answer to a reply seems to be unknown to our practice. But when the defendant in an action to quiet title answers that he is the owner of the property, and is met by a reply that defendant is estopped by his own contract from claiming title, and defendant wishes to plead that said contract was obtained from him by fraud and without consideration, quaere: must defendant plead his said defense (a) by way of amendment to his answer, or (b) does the law impliedly supply such plea?

Carr v McCauley, 215-298; 245 NW 290

Belated reply. A reply filed without leave of court and after the trial is concluded, and purporting to conform the pleadings to the evidence, may be considered, notwithstanding its untimeliness, when neither party is deprived thereby of any testimony.

McDonald Co. v Morrison, 211-882; 228 NW 878

Plea and answer—reply inconsistent with petition—election. Plaintiff's petition alleged a cause of action against defendant as a peace officer. Plaintiff filed a reply in which he denied that the defendant was acting as a peace officer. Such departure did not change, add to, or enlarge the cause of action alleged in the petition. The function of a reply is to avoid matters alleged in the answer or make an issue when a counterclaim is alleged. Plaintiff having alleged but one cause of action, the trial court did not err in refusing to require plaintiff to elect between causes of action.

Boyle v Bornholtz, 224-90; 275 NW 479

Reply tho no counterclaim pleaded. Even tho an answer pleads no counterclaim yet if it prays for affirmative relief, a reply may be proper.

Carr v McCauley, 215-298; 245 NW 290

Reply to reply—no legal standing. A reply to a reply brief and argument has no standing and will be stricken on motion.

In re Rinard, 224-100; 275 NW 485

See Cochran v School Dist., 207-1385; 224 NW 809

Technical inaccuracy. The pleading of an adjudication in a reply instead of in the petition, does not necessarily constitute an error of consequence, even tho it be conceded that the technical rules of pleading are violated.

Cochran v Sch. Dist., 207-1385; 224 NW 809

11157 Statements of.

Reply—improper use. Principle recognized that a plaintiff may not utilize a reply for the purpose of radically departing from the cause of action made by him in his petition. So held where plaintiff pleaded in his petition as an assignee, and in his reply as a holder in due course.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Failure to plead and prove avoidance. A clearly established contract of settlement must prevail in the absence of plea and proof of matter in avoidance.

Bebensee v Blumer, 219-261; 257 NW 768

Plea and answer—reply inconsistent with petition. Plaintiff's petition alleged a cause of action against defendant as a peace officer. Plaintiff filed a reply in which he denied that the defendant was acting as a peace officer. Such departure did not change, add to, or enlarge the cause of action alleged in the petition. The function of a reply is to avoid matters alleged in the answer or make an issue when a counterclaim is alleged. Plaintiff having alleged but one cause of action, the trial court did not err in refusing to require plaintiff to elect between causes of action.

Boyle v Bornholtz, 224-90; 275 NW 479

Confession and avoidance. Under a claim for workmen's compensation, a defense alleging that the injuries sustained by the claimant were caused by the willful act of a third person is in the nature of a confession and avoidance and places the burden of proving it to be true upon the defendant.

Everts v Jorgensen, 227-818; 289 NW 11

11158 Allegation of new matter—effect.

Inconsistent defenses. See under §11199

Establishing immaterial reply. An answer which pleads affirmative defenses and a reply which pleads adjudication of such alleged affirmative defenses both become quite immaterial when defendant offers no evidence in support of his answer, but defendant has no basis for complaint if the court finds that the allegations of the reply have been established, and renders judgment for plaintiff "under the whole record".

Hiller v Felton, 208-291; 225 NW 452

Stock—subscriptions—burden of proof. In an action by a corporation on a stock subscription contract for stock in an unorganized but contemplated corporation, plaintiff has the burden to establish every nonadmitted fact entitling it to recover, even tho defendant, in addition to a limited general denial, pleads in great detail that plaintiff's corporate organization was wholly beyond the contemplation of his subscription contract.

Cedar Rapids Amu. Assn. v Wymer, 213-1012; 240 NW 644

11159 Defenses to counterclaim—paragraphs.

Set-offs unallowable. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off not applicable.

Parker v Schultz, 219-100; 257 NW 570

11160 Signing and verification.

Pleading verification requirements — nonapplicability to cost bond affidavit. Statutes requiring verification of pleadings, to be made by persons knowing facts, require the affidavit to state that affiant believed statements therein contained to be true, but such statutes relate to verification of pleadings, and not to affidavits generally in support of motions for special remedies, nor to cost bond affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

Nonstatutory verification fatal. In an action upon a promissory note, where defendant's answer contained two inconsistent defenses in separate counts, the answer, being verified on defendant's "knowledge, information and be-

lief", was properly stricken on motion, where the statute, in such cases, provided the verification must allege that "the party believes one or the other to be true but cannot determine which".

Stern Finance Co. v Bleifuss, 226-665; 284 NW 460

Objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

11164 Verification by person knowing facts.

Pleading verification requirements—nonapplicability to cost bond affidavit. Statutes requiring verification of pleadings, to be made by persons knowing facts, require the affidavit to state that affiant believed statements therein contained to be true, but such statutes relate to verification of pleadings, and not to affidavits generally in support of motions for special remedies, nor to cost bond affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

11166 Verification not required.

Action by administrator. Plaintiff suing as an administrator need not verify his pleadings.

Markworth v Bank, 217-341; 251 NW 857

11168 Failure to verify.

Nonstatutory verification fatal. In an action upon a promissory note, where defendant's answer contained two inconsistent defenses in separate counts, the answer, being verified on defendant's "knowledge, information and belief", was properly stricken on motion, where the statute, in such cases, provided the verification must allege that "the party believes one or the other to be true but cannot determine which".

Stern Finance Co., v Bleifuss, 226-665; 284 NW 460

Waiver of defective verification. Defects in the verification of a pleading are waived by failure to move to strike the defectively verified pleading.

Cutino Co. v Weeks, 203-581; 213 NW 413

11172 Mitigating facts.

Aggravation of injury by unskillful treatment—liability of original wrongdoer. It is a principle of law that one who negligently inflicts a personal injury on another is liable in damages for the aggravation of said injury resulting from the unskillful treatment of said injury by his physicians and surgeons, provided the injured party exercised reasonable care in selecting said physicians and surgeons, but to permit the application of said principle there must be a proper showing of causal connection between said wrongfully inflicted injury and the said unskillful treatment.

Johnson v Selindh, 221-378; 265 NW 622

Confession and avoidance—assault and battery. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v Sundholm, 228- ; 291 NW 137

Bad reputation of plaintiff. Under proper plea and proof, evidence of the general bad professional reputation of the plaintiff in the place where he is practicing his profession is admissible in mitigation of damages, even tho the slander was spoken at a nearby place.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Immaterial evidence. In an action for assault and false imprisonment committed by a mayor and a city marshal, evidence of violations by plaintiff of an ordinance is inadmissible when it appears that, on the occasion in question, no attempt was made to arrest plaintiff for such violations, and when the pleadings are silent as to justification and mitigation.

Schultz v Enlow, 201-1083; 205 NW 972

Joint wrongdoers release. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525

More specific pleading—erroneous denial. In an action for general and special damages, under general and somewhat meager pleading, based on an alleged libelous publication resulting (1) in loss of customers, (2) in being refused credit, and (3) in loss of earnings in business, plaintiff should, on motion for more specific statement of the action, be compelled to set forth the names of customers lost, the names of those who refused him credit, and the ultimate facts upon which he bases his demand for judgment on account of injury to his earnings.

Dorman v Credit Co., 213-1016; 241 NW 436

Motion picture booking as severable contract—damages as remedy. A motion picture exhibitor who books a series of films under contract, a part of which contract specified that he should have a certain film to exhibit on a certain date, is not entitled to breach the entire contract, when distributor fails to provide this certain film on the specified date, but exhibitor must recoup by way of damages, if any.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Teachers—wrongful discharge—duty to seek employment. A teacher wrongfully discharged is under obligation to exercise reasonable diligence to secure like employment in the same locality—not like employment at distant places or similar employment of a lower or different grade.

Shill v School Township, 209-1020; 227 NW 412

11173 Necessity to plead.

Cross-examination. The plaintiff who, in an action for damages for criminal conversation, testifies, in effect, on direct examination, that the defendant's criminal relation with plaintiff's husband was the sole cause of disrupting plaintiff's home, thereby opens the door to cross-examination of the husband's criminal relations with other women and plaintiff's knowledge thereof, even tho defendant has not pleaded such matter in mitigation of damages.

Morrow v Scoville, 206-1134; 221 NW 802

"Assault" admitted in pleadings—use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

Submission without plea. The unpleaded mitigating fact that a plaintiff knew of a fire at the time it was wrongfully set out upon his premises, and made no effort to put out the fire or to lessen his damages, is properly presented to the jury when plaintiff's own testimony tended to prove such fact.

Ferber v Railway, 205-291; 217 NW 880

11174 Intervention.

ANALYSIS

I INTERVENTION IN GENERAL
II ALLOWABLE INTERVENTION
III NONALLOWABLE INTERVENTION

I INTERVENTION IN GENERAL

Preventing intervention—subsequent estoppel.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Account—inconsequential plea. In an action on a contract to recover a money judgment for plaintiff's interest in certain property, the plea of an intervenor who claims an interest in the property that there must first be an accounting between plaintiff and defendant is of no consequence where there is no evidence that defendant has ever paid plaintiff anything on his claim.

Benson v Sawyer, 216-841; 249 NW 424

Action by teacher for compensation. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v School Dist., 225-1272; 282 NW 754

Attorney's lien as assignment—effect. The duly perfected lien of an attorney with reference to the judgment obtained by him for his client, is tantamount to an assignment of an interest in the judgment. It follows that the attorney has such interest in the judgment as to support an intervention by him in an action by the judgment plaintiff to set aside certain conveyances as fraudulent.

Grimes Bank v McHarg, 217-636; 251 NW 51

Failure to intervene. The consideration for a lease of mortgaged premises (which mortgage pledges the rents) and for the promissory note given for the rent, wholly fails when the assignee in an unrecorded assignment of the lease and note stands by, during foreclosure, and, without asserting his claim by intervention or otherwise, knowingly permits the mortgagee to foreclose and oust the mortgagor and his tenant, and obtain a decree against the

rents and a receiver therefor in order to discharge a deficiency judgment.

Miller v Sievers, 213-45; 238 NW 469

Intervenor as interloper. An intervenor becomes an interloper and consequently is without standing when it appears that he is attempting to institute an independent action under the guise of a petition of intervention.

Cooper v Erickson, 213-448; 239 NW 87

Intervenor—failure to appeal—notice. Where the petition, and a petition of intervention, both asking the same relief, were dismissed on their merits, the fact that intervenor fails to appeal, or was not served with notice of appeal by plaintiff, is quite inconsequential as far as plaintiff's appeal is concerned.

Anderson v Dunnegan, 217-1210; 245 NW 326

Judgment—attempt by party to intervene—effect. A judgment quieting title in plaintiff on the ground that the defendant had fraudulently obtained the possession of a deed by plaintiff to defendant and had recorded the same is not an adjudication of the right of a subsequent purchaser from said defendant because said purchaser attempted to intervene in said action, the record revealing the fact that the intervention was denied on grounds not going to the merits of said purchaser's rights.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Opinion on appeal—parties concluded. One on whose behalf an administrator seeks to maintain an action is necessarily bound by the opinion of the appellate court on appeal, and, on reversal and remand, he acquires no additional standing by simply joining with the administrator in a motion for judgment, without being substituted as plaintiff or in any manner making himself a party to the action by intervention or otherwise, and without in any manner changing the record.

Ronna v Bank, 215-806; 246 NW 798

Transaction with deceased — intervenor — competency. In equity action to quiet title and to declare a trust in realty, an intervenor who claims same relief as plaintiff may not testify to alleged oral agreement between parties, some of whom are deceased.

Wagner v Wagner, (NOR); 224 NW 583

Unilateral wage agreement—effect of intervention. A wage agreement which is void as to plaintiff who seeks to enforce it (because wholly lacking in mutuality of obligation and remedy) is necessarily void as to intervenors who join in the prayer of plaintiff.

Wilson v Coal Co., 215-855; 246 NW 753

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

II ALLOWABLE INTERVENTION

Attorney's lien as interest in judgment—basis for intervention. An attorney's lien, when perfected, creates an interest in a judgment and is a sustaining basis for an intervention by the attorney in a separate equity action to subject land to the payment of the judgment.

Grimes Sav. Bank v Jordan, 224-28; 276 NW 71

Garnishment—attorney's lien against estate funds. Where a casualty company secured a judgment against beneficiaries under a will and issued an execution under which the administrator with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

Judgment creditors and mortgage holders—proper intervenors. In an action between copartners for receivership and accounting, holders of mortgages and deficiency judgments against land purchased in name of some partners for partnership purposes held proper intervenors.

Heger v Bussanmas, (NOR); 232 NW 663

Right of creditors to contest claims. Creditors whose claims have been allowed have a statutory right to appear and formally contest the allowance of a claim.

In re Lounsberry, 208-596; 226 NW 140

III NONALLOWABLE INTERVENTION

Unallowable intervention. A taxpayer who is given the right to intervene in an action by joining (1) with the plaintiff, or (2) with the defendant, and in an attempted intervention does neither, has no standing in the action.

Mathews v Turner, 212-424; 236 NW 412

Unallowable intervention. In an action by an heir against an executor to quiet title in himself to land which the testator purported to devise, a general creditor of the estate has no standing as an intervenor.

Rapp v Losee, 215-356; 245 NW 317

Unallowable intervention. An intervention involving the right to rents in foreclosure proceedings is unallowable, after decree has been entered, as to all issues pending at the time of such decree.

First Tr. JSL Bk. v Cuthbert, 215-718; 246 NW 810

11175 Decision—delay—costs.

Action by teacher for compensation. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v School Dist., 225-1272; 282 NW 754

Avoidance of continuance by admission. An intervenor is properly denied a continuance because of his own sickness and consequent inability to be present and testify at the trial, (1) when his intervention was delayed until after the action in question had been reversed and remanded on appeal and until the very eve of the retrial, and (2) when it is admitted that intervenor, if present, would testify to the alleged facts set forth in his application.

Flood v Bank, 220-935; 263 NW 321

Intervenor as applicant for continuance—rule for determination. Whether an intervenor has a right to a continuance, even on account of his own sickness and consequent inability to be present at the trial and testify, must be determined by giving due consideration to the fact that, by this statute he "has no right to delay".

Flood v Bank, 220-935; 263 NW 321

11177 Variance.

ANALYSIS

I VARIANCE IN GENERAL
II NONFATAL VARIANCE
III FATAL VARIANCE

Unquestioned pleadings. See under §12827
Variance as to "place". See under §11195, Vol I
Variance between "time" alleged and proven. See under §11194, Vol I

I VARIANCE IN GENERAL

Alleging quantum meruit and proving express contract. An allegation of quantum meruit cannot be supported by proof of an express contract.

Wayman v Cherokee, 208-905; 225 NW 950

Express and implied contract. There is no variance between an allegation of an express contract of sale of property, and proof that the vendee accepted the offer of the vendor by acts and conduct.

Blakesburg Bk. v Blake, 207-843; 223 NW 895

Rules and customs. Evidence of unpleaded rules and customs as a basis on which to predicate negligence is inadmissible.

Chilcote v Railway, 206-1093; 221 NW 771

Implied contract to pay—absence of agreement to pay entire price—effect. An allegation of oral sale of an article to a defendant is prima facie established, with consequent liability for the entire purchase price, by evidence that the price was fully understood and agreed on, and that the defendant took and retained possession of the article, notwithstanding the fact that the defendant (1) promised to pay one-half only of the purchase price, and (2) promised, without warrant or authority, that a third party would pay the remaining one-half.

Finnerty v Shade, 210-1338; 228 NW 886

Proof under general allegation. A general allegation of agency may be supported by evidence of either an express or implied agency.

Andrew v Kolsrud, 218-15; 253 NW 913

Action for breach of contract. Principle reaffirmed that a contract relied on must be established as pleaded.

Economy Co. v Honett, 222-894; 270 NW 842

Submission of nonpleaded issues. The submission of a nonpleaded issue of negligence constitutes reversible error.

Morse v Castana (town), 213-1225; 241 NW 304

II NONFATAL VARIANCE

Absence of pleading—waiver. A litigant who, without objection, permits a material fact to be established will not be heard thereafter to assert that no appropriate pleading existed as a basis for such testimony.

Harrington v Surety Co., 206-925; 221 NW 577

Express and implied contract. A plaintiff may, in different counts, plead an express and an implied contract as to the same subject matter.

Richmann v Beach, 201-1167; 206 NW 806

Failure to attack general pleading. A pleading, unquestioned in the trial court, which alleges that goods were purchased and delivered under an "oral agreement", without specification of any agreed terms as to price or quantity, will support a judgment for the unquestioned reasonable value of the goods.

Chandler Co. v Groc. Co., 200-919; 205 NW 787

II NONFATAL VARIANCE—concluded

Fraud—nonvariance. An allegation of fraudulent representations of title, as a basis in equity for rescission of a contract of purchase, is sufficiently met by proof of the mutual mistake of the parties as to the title.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Land description. In an action involving title to real estate, the decree of the court below was not objectionable on the ground that it was not in conformity with pleadings on account of the manner in which the land was described in such pleadings, where throughout the litigation, in the evidence and many of the exhibits the land was fully described, and there was no question as to just what land was in dispute, and where the decree covered the land in controversy.

Arnd v Harrington, 227-43; 287 NW 292

Similar representation. An allegation that a representation was that a doctor's charge "would not exceed $10" is properly met by proof that the representation was that the said charge "would be about $10".

Robinson v Meek, 203-185; 210 NW 762

III FATAL VARIANCE

Pleading quantum meruit and proving express contract. A fatal variance between allegation and proof results from pleading quantum meruit and proving an express contract for compensation.

Sammon v Roach, 211-1104; 235 NW 78

Specific allegations control general allegations. When negligence is the foundation of an action, specific allegations control, and plaintiff may not rely on general allegations of negligence.

McCoy v Railway, 210-1075; 231 NW 353

11179 Immaterial variance.

Pleading and proof as to entering into contract. No material variance is presented by an allegation "that plaintiff entered into a contract with defendant whereby plaintiff and another (naming him) sold to the defendant", etc., and proof that the contract was entered into by plaintiff and the named other party on the one hand, and by the defendant on the other hand.

Weinhart v Smith, 211-242; 233 NW 26

11180 Failure of proof.

Variance between pleading and proof. See under §11177

Common law rule for recovery—modification. Principle reaffirmed that the common law rule that there can be no recovery on a written contract without a showing that it has been strictly performed has been modified in this state.

Gibson v Miller, 215-631; 246 NW 606

Failure of proof. Evidence of the rental value of lands in a certain neighborhood is no evidence of the rental value of other lands in the same neighborhood, when such other lands are not shown to be similar to the land as to which there is evidence; and a judgment based thereon is improper.

Harris v Carlson, 201-169; 205 NW 202

Failure of proof of material allegation. A fatal failure of proof results from a failure to prove an allegation to the effect that services were to be paid for at the time of the death of the promisor, and where the court instructs to such effect.

Ballard v Miller, 210-1144; 229 NW 159

Failure to meet contract basis for recovery. In an action by an insurer to recover of the insured premiums under a policy indemnifying the insured against injury to his workmen, there is a total failure of proof when the premium is, by contract, computable at a certain rate on the amount paid by the insured to his workmen in a limited and specified class of work, and the insurer wholly fails to present any evidence as to the amount so paid.

Globe Ind. Co. v Anderson-Deering Co., 200-1035; 205 NW 845

Failure to prove condition precedent. In an action by an insurer to recover premiums due on an insurance rider which by its terms is valid only "when signed by an authorized representative", a failure of proof results from the failure of the insurer to prove that the rider was signed as required.

Globe Ind. Co. v Anderson-Deering Co., 200-1035; 205 NW 845

Total failure of proof. Failure of proof results from pleading a claim for money and proving a claim payable in part in money and in part in other personal property.

Hughes v Bridge Co., 204-1229; 210 NW 451

Plea of oral contract. There is a total failure of proof when plaintiff bases his action solely on a plea of oral contract and establishes a written contract.

Lamis v Grain Co., 210-1069; 229 NW 756

Pleading fraud and proving mistake. A plaintiff who pleads that he was induced to make certain payments because of fraudulent representations may not recover on proof that he made the payments because of a unilateral mistake on his own part.

Morrow v Downing, 210-1195; 232 NW 483

Pleading quantum meruit and proving express contract. A fatal variance between allegation and proof results from pleading quantum meruit, and proving an express contract for compensation.

Sammon v Roach, 211-1104; 235 NW 78

Alleging quantum meruit and proving express contract. An allegation of quantum meruit cannot be supported by proof of an express contract.

Wayman v City, 208-905; 225 NW 950

Express contract and quantum meruit. A broker may plead in different counts (1) an express contract to pay a specified commission and (2) an implied contract to pay a reasonable commission, and may insist on the submission of both issues to the jury if the evidence supports both. It follows that evidence may be admissible on the issue of quantum meruit, even though plaintiff produces evidence of an agreement to pay the specifically named commission.

Ransom-Ellis Co. v Eppelsheimer, 205-809; 218 NW 566

Contract and quantum meruit value. Evidence of both the reasonable and contract value of services is admissible when so pleaded, even tho the pleading is embraced in one slovenly drawn but unquestioned count.

Pressly v Stone, 214-449; 239 NW 567

Quantum meruit. A denied plea of quantum meruit for services rendered must be established, or plaintiff must fail, irrespective of whether the defendant does or does not establish his defensive plea that the contract of employment was different, and that thereunder the plaintiff had been paid. Instructions are necessarily erroneous when to the effect that defendant is entitled to the verdict only in case he establishes his claim as to the contract.

Olson v Shuler, 203-518; 210 NW 453

Quantum meruit for services covered by express contract. Plaintiff may not recover on quantum meruit for services which are inseparably connected with, and a part of, services which plaintiff has contracted to perform for an agreed compensation.

Gregerson v Cherry Co., 210-538; 231 NW 350

See Goben v Des M. Co., 214-834; 239 NW 62

Commission—finding sustained by evidence. In a law action by real estate agent to recover commissions for negotiating sale of realty, which had been listed with several brokers, where another agent intervenes claiming such commission, and evidence shows both agents were empowered to dispose of land at reduced price, held, evidence sustained finding of trial court that intervening agent was entitled to commission where he had conducted the preliminary negotiations and also consummated the sale. Broker claiming commission must show he was the efficient and procuring cause of the sale.

Armstrong v Smith, 227-450; 288 NW 621

Contract to find purchaser—tentative offer —effect.

MacVicar v Pav. Corp., 201-355; 207 NW 378

Failure to show agreement. In an action to recover real estate commission, the dismissal of one real estate broker's claim against an intervening real estate broker was proper under the evidence where no showing was made of any agreement for the payment of a definite amount.

Armstrong v Smith, 227-450; 288 NW 621

Granting unallowable relief. The court may not decree the cancellation of an unquestioned judgment, or decree a re-conveyance of land when the validity of the original conveyance was not properly in issue.

Benson v Sawyer, 216-841; 249 NW 424

Novation—pleadings. A plaintiff-vendor who seeks to recover on a contract of sale of land, but pleads that on performance day he conveyed to a party other than the contract purchaser, but under an oral agreement that by so doing the contract purchaser would not be released, must stand or fall on his chosen theory. In other words, he must establish his own theory of nonnovation.

Bobbitt v Van Eaton, 208-404; 226 NW 79

Partly void warrants. There can be no recovery on municipal warrants given in payment of part of a total purported indebtedness, part of which is void because in excess of constitutional debt limitation. In other words, recovery, insofar as permissible, must be had in some proceedings other than on said warrants.

Trepp v Sch. Dist., 213-944; 240 NW 247

11181 Amount of proof.

Burden of proof. See under §11487
Motor vehicle cases. See under Ch 251.1, §§5037.09, 5037.10
Probate claims—burden. See under §11972
Will contests—burden. See under §11846
Workmen's compensation cases. See under §1441

Action on note—sufficiency of proof. The payee in possession of a promissory note the execution of which is not denied makes a prima facie case for recovery by the simple introduction of the note in evidence.

Henderson v Holt, 201-1017; 206 NW 134

Cruel and inhuman treatment — separate maintenance. Principles reaffirmed that a divorce will not be granted on the ground of cruel and inhuman treatment unless such treatment endangers the life of the applicant for divorce, nor will separate maintenance be awarded on said ground unless the evidence is such as to justify a divorce if it were asked. Evidence held insufficient to justify either divorce or separate maintenance.

Krotz v Krotz, 209-433; 228 NW 30

Deed to ancestor—proof—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant received and recorded a deed to the land from another is insufficient to overthrow

plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Directing verdict — amount of evidence. Court in directing a verdict is guided by not whether there is literally no evidence, but whether there is any evidence which ought reasonably to satisfy the jury that the fact is established.

Wilson v Findley, 223-1281; 275 NW 47

Equitable estoppel — evidence — degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that the payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing, and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

No decree on unsworn evidence. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments the nonconformity of plat to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and, the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Inv. Co., 223-987; 274 NW 103

Foreign corporations — burden to sustain original notice. In an action against a foreign corporation commenced by service of original notice on the secretary of state, the plaintiff has the burden to sustain its service and failing therein may not question the sufficiency of a motion to quash the service.

Keokuk v Curtin-Howe Corp., 223-915; 274 NW 78

Gifts—inter vivos—evidence—sufficiency to establish. Evidence to establish a parol gift of personal property must be clear, unequivocal, and convincing.

Malcor v Johnson, 223-644; 273 NW 145

Grantor's action to set aside deed. When the grantor of a warranty deed had acquiesced for five years in the title of the grantee, he could not set aside the deed and quiet title in himself without establishing a plain, clear, and decisive case.

Huxley v Liess, 226-819; 285 NW 216

Instructions—evidence defined. Instruction that "evidence is whatever is admitted in the trial of a case as part of the record, whether it be an article or document marked as exhibit, other matter formally introduced and received, stipulation, or testimony of witnesses, in order to enable jury to pronounce with certainty, concerning the truth of any matter in dispute", considered with other instructions, and while not approved, could not have prejudicially misled the jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Instructions — negligence—requiring excessive proof. An instruction is erroneous when it requires negligence to be established "in the respects charged in the petition," and the negligence so charged is (1) excessive speed, (2) excessive speed after warning, and (3) excessive speed while traveling on loose gravel.

Codner v Stowe, 201-800; 208 NW 330

Negligence—general and specific allegations. Except in res ipsa loquitur cases a specific allegation will not waive a general allegation of negligence, which general allegation must be assailed by motion, if timely, before answer and without such motion is properly submitted to the jury if sustained by the evidence.

Gookin v Baker & Son, 224-967; 276 NW 418

Note as future gift—presumption. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney's Estate, 223-1076; 274 NW 5

Oral agreement between an attorney and a promoter. An attorney who, in an action against a promoter for an accounting, alleges that he acted with the promoter to establish a corporation for conducting "sales contests", which corporation was later dissolved, and that the promoter alone then formed a similar second corporation from which by oral agreement the attorney was to share in the profits, properly has his petition for accounting dismissed, when he fails to establish the alleged oral agreement upon which his action was based.

Davies v Stayton, 226-79; 283 NW 436

Malpractice—proximate cause of damage. In an operation for conization of the cervix, evidence held to clearly place the negligence of the defendants, if any, in failing to keep the canal open while healing, as the proximate cause of plaintiff's injury.

Kirchner v Dorsey, 226-283; 284 NW 171

Materiality — adding suspicions. Rejecting evidence which simply adds suspicions held not prejudicial.

McGrath v Dougherty, 224-216; 275 NW 466

Objections in probate—securities ownership issue—no jury. The probate court having jurisdiction to compel executrix to account for all assets, and the burden to sustain her accounts being on executrix, objections to her accounts raising the issue of ownership of certain securities are triable in probate without a jury.

In re Rinard, 224-100; 275 NW 485

Oral contract to convey land at death. Absence of strong equities in favor of the plaintiff, a son trying to establish an oral contract with his father, since deceased, does not tend to weaken his corroborating testimony.

Blezek v Blezek, 226-237; 284 NW 180

Physician—revocation of license. In proceedings to revoke the license of a physician, ample proof of some of the grounds for revocation renders quite immaterial the fact that other grounds were not proved.

State v Hanson, 201-579; 207 NW 769

Pleading conspiracy and proving joint wrong. Damages for a joint wrong are recoverable even tho an allegation of conspiracy be not proven.

Andrew v Ind. Co., 207-652; 223 NW 529

Pleading carrier's degree of care and res ipsa loquitur. A general allegation of negligence in a petition followed by a further allegation of negligence, dealing with the degree of care required of carriers, did not prevent application of the doctrine of res ipsa loquitur.

Peterson v De Luxe Co., 225-809; 281 NW 737

Possession of liquor—third conviction. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pleaded guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

Proof under "guest" statute. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "consent", even tho the allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

Res ipsa loquitur applicability. The rule of res ipsa loquitur applies where the circumstances attending the injury are of such character that the accident could not well have happened in the ordinary course of events without negligence on defendants' part, and the instrumentalities causing the injury were within exclusive control of defendants.

Peterson v De Luxe Co., 225-809; 281 NW 737

Res ipsa loquitur as rule of evidence. The doctrine of res ipsa loquitur is a rule of evidence not applicable where specific allegations of negligence are pleaded but only where general allegations of negligence are wholly relied upon.

Olson v Cushman, 224-974; 276 NW 777

Specific negligence—res ipsa loquitur—separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used, the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Scintilla evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 154

Surplus allegation. Plaintiff in an action to recover the balance due on a mortgage-secured promissory note need not allege, and if he does allege, need not prove that the credit on the note arose through a mortgage foreclosure and sale.

Williams v Guy, 209-711; 228 NW 646

Undue burden. No undue burden is imposed on a defending street railway company by requiring it to keep its car "under proper control and to use ordinary care", to operate its car "in a careful manner and not at a dangerous rate of speed", and to give notice of its approach "by ringing the gong or bell or otherwise", when the pleaded assignment of negligence embraces (1) excessive speed, (2) want of proper control of the car, and (3) failure to give warning of the approach of the car.

Johnson v Railway, 201-1044; 207 NW 984

Unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and

must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Town, 215-82; 244 NW 707

Unpleaded defense—effect. The maker of a promissory note cannot be given the benefit of testimony tending to show that he signed the note under duress when he rests his defense on a distinctly different defense; and the court should so inform the jury.

Farmers Bank v DeWolf, 212-312; 233 NW 524

11182 Amendments allowed.

Discussion. See 22 ILR 128—Amendments after limitation has run

ANALYSIS

I PLEADINGS AMENDABLE
II AMENDMENTS IN GENERAL
III LEAVE OF COURT AND TERMS
IV SUBSTANTIAL NATURE OF AMENDMENT
V ALLOWABLE AMENDMENTS
VI TIMELY AND UNTIMELY AMENDMENTS
VII CONFORMING PLEADINGS TO PROOF
VIII AMENDMENTS IN RE JUSTICE OF THE PEACE APPEALS

Amendments after statute of limitation has run. See under §11007 (XXVII)
Curative amendments. See under §11557

I PLEADINGS AMENDABLE

Right to change remedy. A plaintiff who pleads a rescission of a fraud-induced contract and prays for judgment for the consideration paid, may, upon discovering his inability to prove the rescission, amend his pleadings and pray for damages caused by the fraud. (Note that the reverse of this proposition presents a different rule.)

Reinertson v Struthers, 201-1186; 207 NW 247

II AMENDMENTS IN GENERAL

Error as to abandoned pleading. Errors in ruling on motions aimed at a reply to an amended and substituted answer are harmless when defendant later files a new amended and substituted answer.

Butler Co. v Elliott, 211-1068; 233 NW 669

Plea for additional relief—effect. The fact that a substituted petition asks for the same relief asked in the original petition, and for additional relief, does not change the cause of action.

Dunlop v First Tr. JSL Bank, 222-887; 270 NW 362

Repeating bad pleading—improper striking in toto. Error results from striking in toto an amended and substituted petition in equity on the sole ground that said pleading is but a repetition of a former petition which had been held bad on equitable demurrer (motion to dismiss), when said amended and substituted petition—while in part a repetition of said former bad pleading—alleges an entirely new fact basis for recovery and a prayer in harmony therewith.

Birk v Jones County, 221-794; 266 NW 553

Seeming illegality—explanatory amendment. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Stipulation of fact as amendment. A duly signed stipulation as to the ultimate facts in a case may become, in legal effect, an amendment to the petition in the case, for the purpose of a subsequently interposed motion to dismiss the petition.

Pierre v Pierre, 210-1304; 232 NW 633

Reply—avoidance of matter first appearing in reply. An answer to a reply seems to be unknown to our practice. But when the defendant in an action to quiet title answers that he is the owner of the property, and is met by a reply that defendant is estopped by his own contract from claiming title, and defendant wishes to plead that said contract was obtained from him by fraud and without consideration, quaere: must defendant plead his said defense (a) by way of amendment to his answer, or (b) does the law impliedly supply such plea?

Carr v McCauley, 215-298; 245 NW 290

Substituted petition constituting new action. The filing, by plaintiff in partition, of an amended and substituted petition, in which the name of his wife is omitted as a defendant and appears as a joint plaintiff, must be deemed the commencement of an entirely new action.

Jones et al. v Park, 220-903; 262 NW 801

III LEAVE OF COURT AND TERMS

Amendment after submission. After the trial and submission of an equitable cause, the court may, without notice to the defendant, permit the filing of an amendment which amplifies a defectively pleaded statutory warranty, it appearing that the defendant ap-

peared and unsuccessfully moved to strike said belated amendment, but proffered no pleading in answer thereto.

Wise v Motors Co., 207-939; 223 NW 862
Kimmel v Mitchell, 216-366; 249 NW 151

Discretion of court. Principle reaffirmed that the granting of amendments, and the refusal to grant a continuance on account thereof, rest largely in the discretion of the court.

Wolfe v Decker, 221-600; 266 NW 4

Permitting belated amendment and receiving testimony. After the evidence in an action at law is closed the court may, in its discretion, permit the filing of an amendment presenting equitable issues, and may receive testimony thereon.

Carlson v City, 212-373; 236 NW 421

Striking amendment to petition when case ready for trial. In a contract action, when the petition had been on file for almost three years, the pleadings made up, the jury impanelled, and witnesses in attendance when their attendance at another time might have been difficult to obtain, the court acted within sound judicial discretion in striking an amendment which the plaintiff had filed without leave of the court, by which the plaintiff attempted to increase the amount of recovery sought, basing the amendment on quantum meruit rather than on the contract, as in the original petition.

Munn v Drakesville, 226-1040; 285 NW 644

IV SUBSTANTIAL NATURE OF AMENDMENT

Conformity to pleading—amendment after default. A personal judgment may not validly be entered on an amendment filed after default, of which amendment the defendant has no notice.

Sutton v Rhodes, 205-227; 217 NW 626

V ALLOWABLE AMENDMENTS

Corporate or partnership capacity. An amendment during the trial, alleging partnership capacity of the defendant in lieu of a former allegation of corporate capacity, is proper.

Mau v Rice Bros., 216-864; 249 NW 206

Substitution of real party in interest. Amendments are allowable which substitute the real party in interest, even though such amendment is filed during the actual trial.

Norton v Ferguson, 203-317; 211 NW 417

Substituting quantum meruit plea. A broker may very properly be permitted, at the close of the testimony, to withdraw his plea of express contract as to a commission, and amend by a plea of quantum meruit.

Lowery Co. v Lamp, 200-853; 205 NW 538

Allowable amendment after reversal. The elements of the doctrine of "last clear chance" may be deemed as inherently attending an allegation which, in effect, charges defendant with proximate negligence up to the very time of the infliction of the injury, even tho said allegation carries no reference to the "last clear chance" or to the doctrine thereof. It follows that after trial and reversal thereof, such allegation may be amended and amplified by alleging facts which, if proven, will specifically present the issue of the "last clear chance".

Spaulding v Miller, 220-1107; 264 NW 8

Amendments allowable after reversal and remand. Defendant, in an action at law, may, after reversal and remand on plaintiff's appeal, amend his answer by pleading new and additional grounds of defense.

Flood v Bank, 220-935; 263 NW 321

Amended answer omitting objectionable parts. In an action on a promissory note where the defendant asked for a set-off of the amount of the note and counterclaimed for an additional amount, and the counterclaim was stricken on motion, a substituted answer by the defendant which omitted the counterclaim was not subject to being stricken because of being identical with the original answer.

Lowry v White, (NOR); 285 NW 687

Amendment to cure error in computation. Amendments filed during the trial of an action to cure an error in the computation of the amount of a party's claim are presumptively proper.

Barth Prod. v Kelly, 211-1154; 235 NW 471

Change of venue—fraud in inception of contract—right to amend answer. A defendant who bases a motion for change of venue to the county of his residence on an answer alleging fraud in the inception of the contract sued on may amend such answer, if he deems it defective, and thereafter stand on the amended answer as a basis for the change of venue.

Wright v Thompson, 209-1133; 229 NW 765

Computation of period—amendment in re conspiracy. A pleader does not, in legal effect, change the nature of his cause of action by striking from his petition the allegation that the defendants "conspired, colluded, and confederated together", and by substituting therefor the allegation that the defendants "acted together jointly and aided and abetted each other".

Dickson v Young, 202-378; 210 NW 452

Issue-changing amendment — allowability. Permitting an issue-changing amendment during the course of a trial in equity is not erroneous when the opposite party is given ample time to meet the new issue.

Markworth v Sav. Bk., 217-341; 251 NW 857

V ALLOWABLE AMENDMENTS—continued

Notice of amendment. A plaintiff who at one stage of the pleadings wholly withdraws his claim for personal judgment against the defendant may later, by proper amendment, reassert such claim without notice to the defendant who has appeared, personally and by counsel, and is actively contesting the relief sought by plaintiff.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Ownership of property—inadvertent plea—effect. An inadvertent pleading to the effect that a person other than plaintiff had an interest in the insured property becomes of no consequence when the pleading was duly corrected, and when the proofs conclusively established sole ownership in plaintiff.

Havirland v Ins. Co., 204-335; 213 NW 762

Rejecting unsupported amendment. In an action for damages consequent on a child falling into an opening in the floor of a building which was undergoing reconstruction after a fire, an amendment to the petition, alleging that the building was an attractive nuisance, and offered on the theory of conforming the pleadings to the proof, is properly rejected when the record is bare of any evidence that the said place was attractive to children.

Battin v Cornwall, 218-42; 253 NW 842

Remand—right to amend. A plaintiff manifestly does not set up a new and different cause of action when, after remand on appeal in a law action based on negligence, he, by allowable pleadings, rephrases and elaborates an unadjudicated ground of negligence which was embraced in his pleadings at the time of the original trial.

Lahr v Railway, 218-1155; 252 NW 525

Admitting evidence on promise to amend. In a law case, especially, it is poor practice to permit evidence, objected to as incompetent, to be admitted on the promise that amendments would later be filed to meet the proof. Such objections coming after the witness has answered should be followed by motions to strike.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Amendments containing "thread" of original claim not barred. In an action for compensation for professional engineering services involved in construction of a sewage disposal plant, where profuse substitutions and amendments to a petition which keep a thread of thought identifying them with the claim in the original notice are filed, such amendments and substitutions, tho not filed within the allowable period of the statute of limitations, come within the rule that commencement of the action tolls the statute.

Slippy Co. v Grinnell, 224-212; 276 NW 58

Continuance—justifiable refusal. Reversible error does not result from the action of the court in permitting a belated nonissue-changing amendment to the petition to stand, and in refusing defendant a continuance until all his attorneys can be present at the opening of the trial.

Newland v McClelland & Son, 217-568; 250 NW 229

Failure to give notice. A plaintiff may not, after the entry of default, amend his pleadings by increasing the amount of the claim, without notice to the defendant, and take judgment on the amended pleadings.

Chandler Co. v Sinaiko, 201-791; 208 NW 323

Inadvertently omitted party—opening proceeding to supply. A court of equity, in the exercise of a sound discretion, may reopen a foreclosure proceeding on application of the purchaser at, and deed holder under, execution sale, in order to bring in a party who was inadvertently omitted as a party defendant in the original institution of the action, and whose claim is manifestly barred by the statute of limitation.

Johnson v Leese, 223-480; 273 NW 111

Issue-changing. The court does not abuse its discretion in refusing a belated amendment which would convert an action for damages for a permanent nuisance into an action to enjoin a nonpermanent nuisance and for damages.

Cary-Platt v Elec. Co., 207-1052; 224 NW 89

Nonissue-changing amendment—no special appearance after general appearance. If a defendant, by proper appearance to an action and pleading thereto, is in court when an amendment is filed to the petition, which amendment does not create a new cause of action, he is precluded from appearing specially to the petition as amended.

Johnston v Federal Land Bank, 226-496; 284 NW 393

Justifiable rejection. The rejection of an amendment may be justified when filed after the cause is fully submitted to the court and without explanation for the delay.

Thul v Weiland, 213-713; 239 NW 515

New party but same relief—no election of remedies. In an action to compel certain heirs to contribute a share of a judgment arising out of a decedent's ownership of bank stock, a petition that alleges defendants' liability as individuals is not an election of remedies so as to prevent an amendment thereto setting up liability against an estate as an additional party, since there was no change in the nature of relief asked and no choice was made between inconsistent remedies at the time of the election.

Daniel v Best, 224-1348; 279 NW 374

Objectionable form. The practice of amending a pleading by dictating the same into the record during the progress of the trial without any record clearly showing what was done, to the knowledge of all the litigants, is condemned.

Mitchell v College, 200-1202; 206 NW 81

Pursuing noninconsistent remedies. A policyholder who, in an action at law, pleads that the insurer has waived that provision of the policy which invalidates the insurance in case of a change in the title to the insured property, and is unsuccessful on appeal in sustaining said plea, does not thereby make such an election of remedies as will prevent him, after remand, from amending and praying in equity that the policy be so reformed as to eliminate the invalidating provision.

Green v Ins. Co., 218-1131; 253 NW 36

Specific performance action. Where a plaintiff, after starting a specific performance action to require a federal land bank to complete a loan as agreed, loses the land by foreclosure because the money from the agreed loan is not available to pay off the outstanding mortgage —thereby damaging the plaintiff-landowner by the loss of his equity in the land—an amendment to the specific performance petition changing the relief sought and seeking damages ascertainable after institution of the original suit does not set up a new cause of action.

Johnston v Federal Land Bank, 226-496; 284 NW 393

Unallowable amendment after remand. A party who attacks the constitutionality of a statute on specified grounds, and, on appeal is defeated in his contentions, will not, after remand to the trial court, be permitted to file an amendment to his pleading attacking the constitutionality of the law on new and additional grounds.

Rural Dist. v McCracken, 215-55; 244 NW 711

Unamendable pleadings. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties plaintiff and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 106 ALR 566

Nonallowable amendment. A timely brought action based solely on the common law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee, in due course of employment, may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Constr. Co., 219-1017; 257 NW 426

Unnecessary amendment. In proceedings for the appointment of a guardian, the allegation of unsoundness of mind made when the petition is filed may be supported by testimony of unsoundness at the time of the trial, tho the proceedings be long protracted. It follows that the unnecessary allowance of an amendment alleging such subsequent unsoundness is quite harmless.

Anspach v Littler, 217-787; 253 NW 120

Workmen's compensation act — lost memorandum of agreement—procedure. In a proceeding to obtain judgment on a lost memorandum of agreement relative to compensation under the workmen's compensation act, the said memorandum, if found after the record is closed, may yet be made a part of the record, with the consent of the court, by proper amendment to the pleadings.

Biggs v Bank, 218-48; 254 NW 331

VI TIMELY AND UNTIMELY AMENDMENTS

Timely amendment. An amendment to an answer setting up a new defense, filed on the opening day of trial, and as soon as defendant learned of the defense, is timely.

Finch v Gates, 210-859; 229 NW 832

Changing issue after trial. Issue-changing amendments are properly rejected when made after trial.

Fairley v Falcon, 204-290; 214 NW 538
Benson v Sawyer, 216-841; 249 NW 424

Dual amendments on same subject matter—timeliness. Permitting several amendments as to the same subject matter, some being filed after the commencement of the trial, may be proper, especially when complainant has been in no manner surprised.

Dougherty v McFee, 221-391; 265 NW 176

Belated amendment. Striking an amendment filed after the opening statements at the second trial of the cause, is within the discretion of the court, especially when the same amendment had been stricken at the first trial.

Lockie v Baker Est., 208-1293; 227 NW 160

Belated issue-changing amendment. The refusal to allow an issue-changing amendment after the close of the testimony, and after a

VI TIMELY AND UNTIMELY AMENDMENTS—concluded

motion had been made to direct a verdict, will not be disturbed in the absence of a showing of prejudice, and especially when an element of negligence exists in not filing the amendment at an earlier date.

Lawyer v Stansell, 217-111; 250 NW 887

Belated new issue. Plaintiff may not amend after verdict and inject into his petition for the first time a plea for "future mental and physical pain".

Pettijohn v Halloran, 200-1355; 206 NW 631

Belated, issue-changing and prejudicial amendment properly stricken. An amendment to an answer is properly stricken on motion when said amendment, if allowed, would materially change the issues to the prejudice of plaintiff, would delay the trial, and was filed after the trial had proceeded some eight days, and after plaintiff had closed his evidence, and when the cause was substantially ready for submission to the jury.

McKeown v McKeown, 220-791; 263 NW 266

Amended and supplemental pleadings—issue-changing amendment. Principle reaffirmed that issue-changing amendments are unallowed after the close of the testimony.

Andrew v Golf Club, 217-577; 250 NW 709

Belated pleading — discretion to strike. Striking an amended and substituted answer and counterclaim which is filed over 18 months after the overruling of defendant's motion to strike and demurrer to petition, instead of being filed within 10 days after said ruling as provided by the court, evinces no abuse of the discretion lodged in the trial court.

Andreas & Son v Hempy, 221-1184; 268 NW 13

Belated plea of fraud. A timely petition for the vacation of a judgment on the ground that the stipulation on which the judgment was rendered was wholly unauthorized, may not, after the lapse of one year after the rendition of the judgment, be so amended as to inject the issue of fraud as a basis for such vacation. (§12790, C., '24.)

Haas v Nielsen, 200-1314; 206 NW 253

Belated and unsupported amendment. It is doubly erroneous for the court, after argument has closed, (1) to permit an amendment assigning a new ground of negligence which is without support in the evidence, and (2) to submit such alleged negligence to the jury.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Fatally belated amendment. An issue-changing amendment offered by defendant after he had repeatedly amended his pleadings and delayed the cause, and after testimony had been taken by deposition in a distant state, and after the trial had reached its closing stage, is properly rejected.

Hunt, etc. v Moore, 213-1323; 239 NW 112

Fatally belated and unallowable amendment. After an action has been twice tried in the trial court, and once heard on appeal in the supreme court on the same issues, it is not permissible to so change the issues as to present a distinctively different cause of action.

State v Cordaro, 214-1070; 241 NW 448

Fatally delayed amendment. The court may be quite justified, in the midst of a trial, in refusing an amendment which will entirely change the issues, even tho the other party to the action is willing to meet the proposed change in the issues.

Dolan v McManus, 209-1037; 229 NW 687

Pleadings amended after submission—refusal. It is not error to refuse permission to file an issue-changing amendment after submission of the cause.

Carpenter v Lothringer, 224-439; 275 NW 98

Unallowable amendment. An amendment to a petition, filed after the cause has been fully tried and submitted to the court, and without leave of the court, and brought to the appellate court as an amendment to the abstract, will be stricken on motion.

Fleming v Fleming, 211-1251; 230 NW 359

Belated presentation of proposition—nonreviewable. Where there is a failure to make a timely submission of a proposition in the court below, it will not be considered on appeal.

Whisenand v Van Clark, 227-800; 288 NW 915 .

VII CONFORMING PLEADINGS TO PROOF

Liberality of rule. Quite large discretion is lodged in the trial court in allowing amendments to pleadings in order to conform pleadings to proof.

Eilers v Frieling, 211-841; 234 NW 275

Conforming pleading to proof. One who pleads fraud in the inception of a contract and prays for rescission on that ground may, at any proper time, and in order to conform the pleadings to the proof, amend by pleading that no contract ever existed, because of the failure of the minds of the parties to meet on the terms of the contract.

Cloud v Burnett, 201-733; 206 NW 283

Conforming pleadings to proof—absence of prejudice. An amendment to a petition, which simply conforms the pleadings to the proofs already taken, cannot be deemed prejudicial.

Hardin v Ins. Co., 222-1283; 271 NW 176

Conforming pleadings to proof. Amendments after verdict are proper when they present no new issue and take no one by surprise, but simply conform the pleadings to the proofs.

Yaus v Egg Co., 204-426; 213 NW 230
State v Carney, 208-133; 217 NW 472

Pleading conforming to proof. A pleading may be amended to conform to the proof.

Henriott v Main, 225-20; 279 NW 110

Amendment after appeal. An amendment which is filed after reversal on appeal, and filed in order to conform the pleadings to the real issue as determined on the appeal, should not be stricken, especially when the same issue appears to have been voluntarily litigated in the original trial.

In re Talbott, 204-363; 213 NW 779

Amendment not permitted. An assignment of error which stated that "the court abused its discretion when it refused to permit plaintiff to amend its amended and substituted petition to conform to the proof" is insufficient when the written contract sought to be enforced was not established by the proof; and the court's refusal to permit amendment to pleadings was not an abuse of discretion.

Clare v Pearson, 227-928; 289 NW 737

Belated reply. A reply filed without leave of court and after the trial is concluded, and purporting to conform the pleadings to the evidence, may be considered, notwithstanding its untimeliness, when neither party is deprived thereby of any testimony.

McDonald v Morrison, 211-882; 228 NW 878

Correcting error in copy. An error in a copy of an instrument attached to a pleading may be corrected during the trial, especially when the error had no bearing on any issue in the case.

Mau v Rice Bros., 216-864; 249 NW 206

Nonissue changing. Plaintiff may not successfully complain of an amendment, filed at the close of all the testimony, which conforms the pleadings to the proofs and in no manner changes the defendant's position.

Andrew v Martin, 218-19; 254 NW 67

Res ipsa loquitur in amendment—nonconformity to evidence. Where a prospective purchaser driving a used automobile belonging to an automobile dealer takes as a passenger a person familiar with automobiles to advise as to its value, and while so driving has an accident wherein the passenger is injured, an amended petition relying on the doctrine of res ipsa loquitur does not conform to the proof where the evidence excludes the likelihood of any automobile defect and indicates the accident was caused by driver trying to close automobile door against wind.

Sproll v Burkett Co., 223-902; 274 NW 63; 2 NCCA (NS) 424

Unallowable amendment. An amendment filed after decree, on the theory of conforming the pleading to the facts proven, is necessarily unallowable when the record contains no evidence supporting the amendment.

Des M. Music v Lindquist, 214-117; 241 NW 425

VIII AMENDMENTS IN RE JUSTICE OF THE PEACE APPEALS

Allowable amendment. On appeal from the judgment of a justice of the peace, an unassailed amendment by defendant, setting up a counterclaim which was stricken in the justice court, is good.

Davis v Robinson, 200-840; 205 NW 520

11183 Continuance on account of amendment.

Estoppel. An order which permits the filing of an issue-changing amendment will not be reviewed on appeal when it appears that appellant rejected an offered continuance.

Kellar v Lindley, 203-57; 212 NW 360

11184 How amendment made—substitute pleading.

Discussion. See 22 ILR 128—Amendments after limitation has run

11185 Interrogatories annexed to pleading.

Interrogatories to jury. See under §§11513, 13916

Answers to interrogatories. Answers to interrogatories which are offered in evidence for a particular purpose by the party requiring them, are in evidence for other purposes.

Hart v Ins. Assn., 208-1020; 226 NW 777

Disclosure of insurance settlement. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to

bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

Order overruling objections to interrogatories—not appealable. An order overruling objections and exceptions to interrogatories attached to a plaintiff's petition in an action for accounting is not an order from which an appeal will lie.

Eby v Phipps, 225-1328; 283 NW 423

Review of order overruling objections. This statute simply creates a rule of evidence; and an order which overrules objections to such interrogatories on the naked ground of irrelevancy, incompetency, and immateriality, and which requires the adversary to answer such interrogatories, is not reviewable by certiorari.

Winneshiek Bank v Dist. Court, 203-1277; 212 NW 391

11191 Effect of failure to answer.

Failure to answer—effect. Defendant's failure to answer interrogatories attached to the petition will not entitle plaintiff to judgment on his affidavit and claim when the court has not fixed the time within which the interrogatories must be answered.

Union Rep. Co. v Anderson, 211-1; 232 NW 492

11196 Evidence under denial.

Issues under general denial. See under §11114
Matters specially pleadable. See under §11209

Affirmative elaboration of general denial. The beneficiary in an accident insurance policy has the burden of proof to establish that the insured was killed under the particular condition covered by the policy and alleged in the petition, notwithstanding elaborate affirmative assertions by the defendant in addition to a general denial.

Nelson v Acc. Soc., 212-989; 237 NW 341

Burden of proof. A bank which furnishes its customer periodical statements of the condition of his debits and credits which are acquiesced in by the long silence of the customer, is under no burden of proof to disprove the subsequent claim of the customer that certain specified items of the account were incorrect. The burden rests on the customer to establish his allegation of incorrectness.

State Bank v Cooper, 201-225; 205 NW 333

Collateral issue. The right to pursue a collateral issue developed on cross-examination is in distinct disfavor in our law, especially when the evidence in support thereof is ambiguous, remote from all proper issues, and otherwise incompetent.

Moen v Fry, 215-344; 245 NW 297

Exercise of option—reasonable time—jury question. In an action to recover part of an advance paid for corn stored in an elevator under a written contract to sell at seller's option, the filing of a general denial raises the issue of defendant's performance; and question as to whether defendant exercised his seller's option within a reasonable time is for the jury.

Andreas & Son v Hempy, 224-561; 276 NW 791

General denial—evidence of gift admitted. Evidence to establish a gift is admissible under a general denial.

Wilson v Findley, 223-1281; 275 NW 47

Permissible evidence. Under a general denial of an allegation of a loan, defendant may show that the money received by him was his own money.

Southhall v Berry, 207-605; 223 NW 480

Poor practice—admitting evidence on promise to amend—motion to strike. In a law case, especially, it is poor practice to permit evidence, objected to as incompetent, to be admitted on the promise that amendments would later be filed to meet the proof. Such objections coming after the witness has answered should be followed by motions to strike.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Quantum meruit. A denied plea of quantum meruit for services rendered must be established, or plaintiff must fail, irrespective of whether the defendant does or does not establish his defensive plea that the contract of employment was different, and that thereunder the plaintiff had been paid. Instructions are necessarily erroneous when to the effect that defendant is entitled to the verdict only in case he establishes his claim as to the contract.

Olson v Shuler, 203-518; 210 NW 453

Rescission for fraud—general denial—effect. Where plaintiff alleges rescission of a contract of sale because of defendant's fraud and seeks to recover the money paid, a general denial does not raise the issue that plaintiff after discovering the fraud elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Stock—subscriptions—burden of proof. In an action by a corporation on a stock subscription contract for stock in an unorganized but contemplated corporation, plaintiff has the burden to establish every nonadmitted fact entitling it to recover, even tho defendant, in addition to a limited general denial, pleads in great detail that plaintiff's corporate organization was wholly beyond the contemplation of his subscription contract.

Cedar Rapids Amus. Assn. v Wymer, 213-1012; 240 NW 644

Unavailable matters in avoidance. Under a general denial of a contract of employment,

defendant may not show that the contract was terminated by the discharge of the plaintiff.

Hornish v Overton, 206-780; 221 NW 483

11197 Sham defenses—redundant matter.

Discussion. See 17 ILR 508—Sham and frivolous pleading; 20 ILR 49—Defective pleading

Abstracts of record—motion to strike. The court will be slow to strike amendments to an abstract when the filing appears to be actuated by a good-faith desire to present with great thoroughness matters of unusual importance.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

Accord and satisfaction—when plea unallowable. A plea of accord and satisfaction is properly stricken from a pleading when the pleading affirmatively shows that no basis existed or could exist for the plea—affirmatively shows that no bona fide dispute existed or could exist as to the amount due under the instrument on which suit was brought.

Jacobsen v Moss, 221-1342; 268 NW 162

Alleging note as receipt—sham defense—striking. Where a written instrument sued upon contains the legal elements of a negotiable promissory note, an allegation in an answer that such written instrument was a receipt shows on its face that such pleading is false and should be stricken on motion.

Hillje v Tri-City Co., 224-43; 275 NW 880

Answer negativing petition. An answer which, in effect, is a negation of the allegations of the petition, proof of which plaintiff must make in order to recover, is not subject to a motion to dismiss.

Clark Bros. v Anderson, 211-920; 234 NW 844

Appeal—abandonment. An appeal from the refusal of the court to strike a petition must be deemed abandoned when it is made to appear that subsequent to the perfecting of the appeal, the appellant answered the petition and went to trial on the merits.

Iowa Bk. v Raffensperger, 208-1133; 224 NW 505

Assignment of error. Error, if any, of the court, during the trial, in striking evidence or tendered issues cannot be reached by an assignment of error to the effect that the court erred in failing to instruct on said stricken matters. The assignment must be on the original alleged erroneous striking of said matters.

Reidy v Railway, 220-1386; 258 NW 675

Attorney and guardian fees—immateriality. Allegation, in petition to terminate guardianship, that 37 percent of the receipts of the guardianship had been paid to guardian and his attorney for fees and expenses, was properly stricken out on motion as not being material to the issue before the court.

In re Hawk, 227-232; 288 NW 114

Brief of authorities—motion to strike. An elaborate brief of authorities, inserted in a pleading following the pleading of foreign statutes, is properly stricken on motion.

Kingery v Donnell, 222-241; 268 NW 617

Certiorari to review ruling. A litigant who moves to strike a pleading or to require it to be made more specific, may not have the rulings on his motion reviewed on certiorari; and this is necessarily true even tho it be conceded, arguendo, that the pleading in question was not legally on the calendar.

Holcomb v Franklin, 212-1159; 235 NW 474

Conclusions. Conclusions and immaterial matter have no proper place in a pleading and should be stricken on motion.

Andrew v Indem. Co., 207-652; 223 NW 529

Construction in view of stricken references. While the striking of portions of the first division of an answer may be proper as far as plaintiff's action is concerned, yet the court must treat said stricken portions as unstricken in construing defendant's cross-petition contained in a subsequent division of his answer when said stricken portions are essentially material to the cross-petition and are incorporated therein by distinct reference.

Andrew v Boyd, 213-1277; 241 NW 423

Escheat proceeding — striking allegations asking for new administrator—no appeal—dismissal. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Evidence on stricken plea. After striking from a pleading a claim for damages, error necessarily results from receiving evidence as to the claim and leaving the instructions in such form that the jury may give consideration to such evidence in arriving at their verdict.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Foreign procedural statutes—nonright to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of the defendant in operating an automobile in said foreign state, plaintiff has no right to

plead the procedural statutes and rules of law of said foreign state. For example, those pertaining:

1. To what matters would be presumptive evidence of negligence.

2. To the burden of proof in the trial of the action.

3. To the right of plaintiff to submit his action on different theories of the evidence.

Reason: All said matters are purely procedural.

Kingery v Donnell, 222-241; 268 NW 617

Harmless striking of duplicate count. The striking by the court of one of several counts of a petition must be deemed quite harmless when the matter stricken is substantially repeated in an unstricken count.

McGlothlen v Mills, 221-204; 265 NW 117

Harmless striking of material allegation. No injury results from striking a material allegation from a pleading when the record shows that in the trial the matter stricken was treated as at issue, was duly tried out, and was properly submitted to the jury.

Rudd v Jackson, 203-661; 213 NW 428

Immaterial allegations. On the issue whether plaintiff is entitled to recover damages for a personal injury because of an alleged negligent act, allegations (1) that parties other than plaintiff were injured, and (2) that defendant carried indemnity insurance, are wholly immaterial, and subject to a motion to strike.

Seleine v Wisner, 200-1389; 206 NW 130

Immaterial matter. Immaterial matters are properly stricken from a pleading.

Thomas v Disbrow, 208-873; 224 NW 36; 30 NCCA 672

Improper motion to strike and judgment on pleadings. A motion to strike an answer and for judgment on the pleadings manifestly cannot be properly sustained when the answer, both by general and specific denials, puts in issue the very gist of plaintiff's cause of action.

Ind. Sch. Dist. v Sch. Dist., 216-1013; 250 NW 192

Improper rebuttal evidence—motion to strike necessary for review. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

Irrelevant matter. In an action to set aside decrees canceling certain assessments for paving, because of failure to substantially perform the contract, a cross-petition repleading the formerly sustained plea of "failure substantially to perform the contract" should be stricken, on motion; because, if the decrees were valid, such repleaded matter effected nothing, and if the decrees were invalid, the court had no jurisdiction to entertain the plea, as the time within which to present such a plea had expired.

Western Corp. v City, 203-1324; 214 NW 687

Irrelevant and immaterial matter. In an action for breach of a written contract to sell all fine coal screenings "produced" during a stated time, a pleading that the parties mutually understood that the contract required the seller "to screen all the coal mined during the term" of the contract is irrelevant and immaterial, and properly stricken on motion (1) even tho the contract specifies what shall be deemed "screenings", and (2) even tho such pleading is sought to be aided by a plea of estoppel and custom.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Irrelevant matter on foreclosure. An allegation by a mortgagor in mortgage foreclosure that he had sold the property to one who had not been brought into the foreclosure, and was holding the property as the tenant of said grantee, is irrelevant to any issue in the foreclosure, and is properly stricken on motion.

Kaeser v Manderschied, 203-773; 211 NW 379

Irrelevant and redundant matter.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Joinder—city and benefited property owners. There is no misjoinder of parties or causes of action, where a city in its own behalf and in behalf of the parties beneficially interested brings an action against a contractor, combining therein both a claim for damages for defective pavement and a claim for the cost of "coring" to determine the thickness, since the basis for the latter claim was found in the contract. A motion to strike is properly overruled.

Sioux City v Krage, 225-1154; 281 NW 828

Matter judicially held insufficient. A plaintiff has no right to re-plead a count which has been judicially and finally held to present no cause of action even tho he combines said condemned count with another count. It follows that said last count is properly stricken insofar as it embraces said formerly adjudicated count.

Arthaud v Griffin, 212-646; 235 NW 66

Motions—as pruner for nondefensive matter. Nondefensive allegations in answers are properly stricken on motion.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Motions—mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikeable

on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc., 222-1269; 271 NW 220

Motions — striking immaterial allegations. When neither material nor asserted as the truth, allegations in a pleading may be stricken on motion.

Johnstone v Johnstone, 226-503; 284 NW 379

Overruled motion to strike—suffering final judgment. Where a motion to strike which is not the equivalent of a demurrer is overruled, the defeated party is under no duty to suffer final judgment as a condition precedent to an appeal—assuming a right of appeal exists.

Dorman v Credit Co., 213-1016; 241 NW 436

Scope of motion. A motion to strike a pleaded cause of action from two of three existing, specified, and separate pleadings by the same party does not embrace the striking of the cause of action from the third pleading.

Matthews v Quaintance, 200-736; 205 NW 361

Unallowable motion to strike. A second motion to strike matter from the same unamended petition is unallowable.

Conner v Henry, 205-95; 215 NW 506

Nonappealable order—dismissal sua sponte. On an attempted appeal from an order which the appellate court has no jurisdiction to review (e. g., an order striking portions of an answer) the court will dismiss sua sponte, even tho the opposing party does not move to dismiss.

Joslin v Bank, 213-107; 238 NW 715

Nonappealable ruling. An order overruling a motion to strike alleged immaterial or redundant allegations, or to strike matters which do not involve the merits of the case, is not appealable.

Morrison v Clinic, 204-54; 214 NW 705

Nonstrikeable matter. An allegation to cancel the obligations on notes joined with an allegation to cancel the mortgage securing the notes, and to quiet plaintiff's title to the land, is not strikeable. (So held where the controversy was as to the proper venue.)

Eckhardt v Bankers Trust Co., 218-983; 252 NW 373

Order striking portion of answer. An order striking part of an answer is not appealable when defendant fails to stand upon his pleading or to allow final judgment to be entered against him. In other words, he may not maintain an appeal and at the same time maintain his right in the trial court to amend.

Joslin v Bank, 213-107; 238 NW 715

Private drainage—construction under contract. On the issue whether a dominant estate holder may maintain a tile drainage system on his land, and by means thereof discharge waters on the land of a servient estate holder, a plea should not be stricken which asserts, in substance, that the tile system in question was constructed at large cost under an agreement with the former owner of the servient estate, and was open, visible, and notorious to all subsequent purchasers of the latter estate.

Salinger v Winthouser, 200-755; 205 NW 309

Redundant matter. In an action for breach of a written contract to sell all fine coal screenings "produced" during a stated time, a pleading that the parties mutually understood that the contract required the delivery of all fine screenings "produced * * * during the term of said contract" is redundant and properly stricken on motion.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Redundant matter strikeable on motion. Repetitious pleadings are properly stricken on motion.

Flood v Bank, 220-935; 263 NW 321

Redundant pleadings. In an action on a written contract, that part of the pleadings which alleges the mutual understanding of the parties as to the requirements of the contract is properly stricken when such requirements appear on the face of the contract.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Refusal to strike. The refusal to strike a count confined to general allegations of negligence is of no consequence when the specific allegations of the remaining count simply elaborated the general allegations.

Tissue v Durin, 216-709; 246 NW 806

Repeating bad pleading — improper striking in toto. Error results from striking in toto an amended and substituted petition in equity on the sole ground that said pleading is but a repetition of a former petition which had been held bad on equitable demurrer (motion to dismiss), when said amended and substituted petition,—while in part a repetition of said former bad pleading,—alleges an entirely new fact basis for recovery and a prayer in harmony therewith.

Birk v Jones County, 221-794; 266 NW 553

Service by publication—frivolous objection to affidavit. Argument that an affidavit of publication of original notice having been signed by the "foreman" of the newspaper did not constitute an affidavit by "the publisher or his foreman" in compliance with the statute is too hypercritical and frivolous to be noticed on appeal.

Hanson v Hanson, 226-423; 284 NW 141

Stay of proceedings — discretion of court. The matter of granting a stay pending appeal from an order overruling a motion to strike

is one resting largely in the sound discretion of the trial court.

State v Murray, 219-108; 257 NW 553

Striking allegation (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Striking counterclaim — effect. An order striking a counterclaim in toto necessarily strikes the prayer for recovery on the counterclaim.

Davis v Robinson, 200-840; 205 NW 520

Striking cross-petition. An order in foreclosure proceedings striking a defendant's cross-petition from the files is not appealable when defendant's answer, which remained on file, properly pleaded and prayed for the sole and identical relief pleaded and prayed for in said cross-petition.

Yeomen v Ressler, 216-983; 250 NW 169

Striking definitely pleaded defense. Definitely pleaded defensive matter should not, manifestly, be stricken from an answer.

Meredith v Miller, 209-849; 228 NW 14

Striking duplicate matter. Striking one count of a petition, on the mistaken assumption that it is but a repetition of a remaining count, is necessarily erroneous.

Lamp v Williams, 222-298; 268 NW 543

Striking irrelevant and redundant matter. Where plaintiff involves in one action (1) demands, as a taxpayer, against a county, and (2) demands against reorganized banks as a depositor thereof, the court commits no error in striking, after the county has been dismissed as a party, all plaintiff's allegation relative to his status as a taxpayer.

Pugh v Polk Co., 220-794; 263 NW 315

Striking legally unprovable allegation. Legally unprovable allegations in pleadings are properly stricken on motion. So held where, in an action at law to recover the amount due on a written lease, defendant, while admitting the due execution by him of the written lease, pleaded a prior oral lease—contradictory of the written lease—as containing the correct terms of the leasing.

Jacobsen v Moss, 221-1342; 268 NW 162

Superfluous denials. A defendant who has denied generally and specifically may not complain that additional affirmative allegations of fact and of argument in emphasis of his denials are stricken from his answer.

Rudd v Jackson, 203-661; 213 NW 428

Unallowable repetition. The filing of a petition once held insufficient is properly reached by a plea to the jurisdiction, or by a motion to strike, treated as such plea.

Swartzendruber v Polke, 205-382; 218 NW 62

Using wrong side of road. An allegation that defendant's car at the time of a collision was "over the center of the pavement, and over on plaintiff's side of the pavement" may be very material and not subject to a motion to strike.

Harriman v Roberts, 211-1372; 235 NW 751

Waiver of right to ruling. Plaintiff waives his right to a ruling on his motion to strike portions of the answer before ruling is made on defendant's motion for a directed verdict, when plaintiff at the close of the trial acquiesces in the action of the court in considering both motions at the same time.

Ankeney v Brenton, 214-357; 238 NW 71

11198 Statute—how pleaded.

Foreign procedural statutes—nonright to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of the defendant in operating an automobile in said foreign state, plaintiff has no right to plead the procedural statutes and rules of law of said foreign state. For example, those pertaining:

1. To what matters would be presumptive evidence of negligence.
2. To the burden of proof in the trial of the action.
3. To the right of plaintiff to submit his action on different theories of the evidence.

Reason: All said matters are purely procedural.

Kingery v Donnell, 222-241; 268 NW 617

Foreign remedial statutes—right to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of defendant in operating an automobile in said foreign state, plaintiff may plead those statutes and rules of law of said foreign state from which actionable negligence, under the facts of the case, are deducible, e. g., those (1) which declare the degree of care required of defendant in such operation in said foreign state, and (2) the nature and degree of plaintiff's contributory negligence which will bar his action, said pleaded statutes and laws being of the very essence of plaintiff's cause of action, and not contrary to the public policy of this state, even tho they exact a greater degree of care than would be exacted by the law of this state had the injury occurred in this state.

Kingery v Donnell, 222-241; 268 NW 617

11199 Inconsistent defenses—verification.

ANALYSIS

I INCONSISTENT DEFENSES IN GENERAL
II "DENIAL" AND "CONFESSION AND AVOIDANCE" AS INCONSISTENT DEFENSES
III INCONSISTENT ATTITUDE

I INCONSISTENT DEFENSES IN GENERAL

Contradicting one's own pleading. A pleader is not estopped from pleading a state of facts which is absolutely contrary to his pleaded state of facts in a former pleading in the same court and in the same trial.

First N. Bk. v Frank, 203-364; 212 NW 705

Inconsistent defenses—abandonment—effect. The abandonment of certain defensive issues and the substitution of another issue in lieu thereof may not be deemed the pleading of inconsistent defenses.

Schaffer v Acklin, 205-567; 218 NW 286

Inconsistent theories of recovery. When a plaintiff can, as a matter of law, avail himself of a contract provision only on the supported theory that defendant has performed the contract, it is baldly manifest that plaintiff cannot recover under said provision when his entire action rests on the asserted theory that defendant has not performed the contract.

Andrew v Bank & Trust Co., 219-921; 258 NW 911

Nonstatutory verification fatal. In an action upon a promissory note, where defendant's answer contained two inconsistent defenses in separate counts, the answer, being verified on defendant's "knowledge, information and belief", was properly stricken on motion, where the statute, in such cases, provided the verification must allege that "the party believes one or the other to be true but cannot determine which".

Stern Finance Co. v Bleifuss, 226-665; 284 NW 460

Use of pleadings for impeaching purposes. Pleadings and amendments thereto which reveal changes and enlargements of the amount sued for may be used for impeaching purposes, and the court may so instruct.

Wilson v Else, 204-857; 216 NW 33

II "DENIAL" AND "CONFESSION AND AVOIDANCE" AS INCONSISTENT DEFENSES

Denial of contract, and payment. A defendant may very properly plead in denial of the contract of employment alleged by plaintiff, and payment of the obligation created by such alleged contract.

Baker v Davis, 212-1249; 235 NW 749

Denial precludes demurrer. An answer which pleads a denial of the execution of the note sued on is not demurrable, even though, in an evident attempt to plead inconsistent defenses, the answer contains a colorable confession of such execution.

Seibel v Olson Bros., 202-711; 210 NW 925

Necessity for separate counts. A general denial and a plea of settlement of plaintiff's cause of action embraced in one count or division of an answer render inadmissible evidence in support of the general denial, because, when both defenses are pleaded in the same count or division, the general denial is nullified by the plea of settlement.

Miller v Johnson, 205-786; 218 NW 472

New matter and general denial in single division. Where new defensive matter and a general denial are pleaded in a single division answer, the admission implied of the cause of action must control; however, an answer in fact separating its general denial and other matters into numbered parts, altho lacking the word "division" before each numeral, is sufficiently divided to avoid the effect of the foregoing rule.

Keshlear v Banner, 225-471; 280 NW 631

III INCONSISTENT ATTITUDE

Estoppel. Pleadings reviewed, and held to evince no inconsistent attitude.

Webber v King, 205-612; 218 NW 282

11201 What deemed admitted.

ANALYSIS

I IN GENERAL
II DENIAL OF FACT ALLEGATIONS
III DENIALS IN LAW
IV ESTOPPEL TO DENY ISSUE
V ADMISSIONS

Waiver of law denial. See under §11158, Vol I
When reply necessary. See under §11156

I IN GENERAL

Establishing immaterial reply. An answer which pleads affirmative defenses and a reply which pleads adjudication of such alleged affirmative defenses both become quite immaterial when defendant offers no evidence in support of his answer, but defendant has no basis for complaint if the court finds that the allegations of the reply have been established, and renders judgment for plaintiff "under the whole record".

Hiller v Felton, 208-291; 225 NW 452

II DENIAL OF FACT ALLEGATIONS

Unnecessary assumption of burden. A plaintiff may assume the burden of showing that the signature to an instrument, defensively pleaded against him by the defendant, is not genuine, even tho he might have availed him-

self of a statutorily implied denial of the answer, or might have definitely cast the burden as to genuineness upon the defendant by a denial under oath. And, if he successfully establishes the aforesaid negative, he will be accorded the same protection as tho the defendant had failed to establish the affirmative.

McFerren v Bank, 214-198; 238 NW 914

III DENIALS IN LAW

Existence of lease—conclusiveness on pleader. A litigant who both concedes and alleges in his pleadings that the adverse party is in possession of premises under a lease is necessarily bound thereby.

Metropolitan v Andrews, 215-1049; 247 NW 551

When reply not necessary. In an action by a guardian of a minor on a certificate of deposit issued to the minor by the defendant bank, an answer alleging that the minor, in the re-organization of the bank, waived a named portion of the deposit is denied by operation of law.

McFerren v Bank, 214-198; 238 NW 914

IV ESTOPPEL TO DENY ISSUE

Ex parte allowance of fees. Tho unsupported by affidavits, every material allegation in a verified motion attacking an ex parte order allowing executor's and attorney's fees for extraordinary services will, in the absence of attack thereon or resistance thereto, be taken as true.

In re Metcalf, 227-985; 289 NW 739

V ADMISSIONS

General denial coupled with inferential admission. In an action on a promissory note, an answer which contains a general denial is not rendered demurrable by an answering statement that "defendant admits he signed a note which he assumes is the one in controversy, but he demands its production and proof at the trial herein".

Home Bank v Kelley, 205-514; 218 NW 288

Admissions showing weakness of contentions. Where the cashier of the plaintiff bank had entered into two similar credit transactions with the defendant bank in order to cover a shortage in accounts, in an action to recover the amount of the shortage, the plaintiff's brief stating that there had been a full accounting between the two banks except as to one of the two transactions, such statement recognized a weakness in the plaintiff's contentions, as the amount claimed was equal to the amount involved in only one of the transactions, and, when both had been accounted for in the same manner, the accounting for both had to be either proper or improper.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Admission of counsel in lieu of testimony. The admission of a material fact by counsel in the course of a trial and for the purpose thereof becomes a part of the record just as tho said fact had been established by testimony in the ordinary manner.

Azeltine v Lutterman, 218-675; 254 NW 854

Admissions of fact—conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Inadvertent admission. An admission will be disregarded when, from the entire record, it clearly appears to have been inadvertent.

Campbell v Humphreys, 202-472; 210 NW 558

11202 Allegations as to value or damage.

Discussion. See 2 ILB 38—Liquidated damages —public contract

Alienation of affections—hearsay. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

Ambiguous contract—mutual interpretation. A co-operative marketing association, which, by written contract separately binds each member of the association to sell and deliver exclusively to the association the milk produced by the member—impliedly from day to day—or "pay as liquidated damages $25 for each and every such failure and breach of contract", will not be permitted to recover from a member said amount for each and every day there is a failure so to deliver, when such interpretation is absolutely contrary to the uniform, mutual interpretation theretofore placed on the contract during a long series of years. Especially is this true because otherwise the

court would be compelled to construe the said damage clause as a penalty.

Fort Dodge Assn. v Ainsworth, 217-712; 251 NW 85

Breach of contract not to engage in business. In an action to recover damages consequent on the breach by defendant of a contract not to engage for a named time in a named business in a named place, a judgment is sustained by competent and adequate evidence as to the value of plaintiff's business immediately prior to the said breach by defendant, and a like showing of the effect which said breach of contract had on such value.

Eyerly v Smith, 210-1056; 231 NW 383

Credibility of expert witnesses. Instructions are proper which, in substance, direct the jury that they are to use their own judgment in considering evidence relative to values, and that such judgment need not be surrendered for that of the expert witnesses.

State v Bevins, 210-1031; 230 NW 865

Fully reparable injury. If the injury to an article is fully reparable, then the measure of damages is the reasonable cost of the repairs —not the difference between the reasonable value of the article before and after the injury.

Looney v Parker, 210-85; 230 NW 570

Fraud—pleading and proof. Allegation and proof of fraud without any allegation and proof of damages leave plaintiff without a cause of action.

Vorpahl v Surety Co., 208-348; 223 NW 366

Future pain as incident to permanent injury. Even without a claim for damages for future pain and suffering, allegations and proof of permanent injuries from which future pain and suffering are reasonably certain to follow warrant the submission to the jury of this question.

Keller v Dodds, 224-935; 277 NW 467

Future pain and suffering—$4,000 not excessive. Record reviewed showing shrinkage of fractured vertebrae, and expectancy of continued pain, held, claim for future pain and suffering properly submitted and $4,000 verdict not excessive.

Smithson v Mommsen, 224-307; 276 NW 47

Hospital expenses—evidence—absence of—effect. In an action for personal injury, no recovery can be had for hospital expenses when there is no evidence of any kind bearing on the reasonableness of the charge—not even in the form of an itemized bill or that the bill had been paid.

Ege v Born, 212-1138; 236 NW 75

Instructions—measure of damages—unsupported element. Instructions to the effect that a measure of damages would be the difference between the value of property as it actually was when a party received it, and its value had it been as represented, are manifestly erroneous when the record contains no testimony of the latter value.

Vanarsdol v Farlow, 200-495; 203 NW 794

Instructions—reasonable value — admissions from pleadings. In action to recover price of corn sold to elevator, an instruction injecting element of reasonable value was erroneous where the pleading alleged express agreement on price, and a further erroneous instruction stating what defendant's answer admitted, but omitting qualification in defendant's pleadings, was not cured by instruction referring to a substituted oral agreement.

Hartwig v Elev. Co., (NOR); 226 NW 116

Intemperate habits bearing on damages. In an action for damages consequent on wrongful death, evidence is admissible tending to show the intemperate habits of the deceased.

Townsend v Armstrong, 220-396; 260 NW 17

Judgment of jurors. It is proper for the court, irrespective of §11471-d1, C., '31 [§11471.1, C., '39], to instruct the jurors that they are not compelled to rely wholly on the opinions of witnesses as to the value of services, but that in connection with such opinions they may use and be guided by their own judgment in such matters.

In re Stencil, 215-1195; 248 NW 18

Landowner—independent action. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union County, 208-314; 223 NW 111

Liability insurance—destruction of property —evidence of value—pleading. In motor carrier's action on liability insurance policy for loss of property destroyed by fire in freight terminal, plaintiff has burden of proof as to its "custody and control" of goods within policy provisions, also as to value thereof, and stipulation as to value of certain goods on which claims had been paid by insured does not admit value of other goods in absence of competent proof thereof.

American Ins. v Brady Co., 101 F 2d, 144

Liquidated damages (?) or penalty (?). An agreed sum as damages will be treated as "liquidated", even if not so labeled, when from

all the attending facts and circumstances it is evident that the parties must have so intended.

Shockley v Davis Co., 200-1094; 205 NW 966

Liquidated damages and penalties—contract restraining competition. An employment contract between two physicians, which after setting forth several requirements of the employee, further provides for "liquidated damages" in case the employee independently practices in the county within 5 years after termination of the employment, may be construed, not as a contract for liquidated damages, but as a penalty.

McMurray v Faust, 224-50; 276 NW 95

Acceleration clause as imposing penalty. A mortgage provision empowering the mortgagee to declare the entire debt due and payable in case of nonpayment of an installment of principal, or of interest, taxes, etc., imposes no penalty on the mortgagor; likewise a provision fixing one rate of interest on unmatured sums, and a different and higher rate on matured and unpaid sums, provided the legal rate is not exceeded.

Federal Land Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Measure of damages—instructions—assumption of fact. An instruction which is a technically incorrect statement of the measure of damages is harmless when, if a correct instruction had been given, the verdict of the jury must have been the same as found by the jury under the incorrect instruction.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

Medical services. It is error to permit the recovery of expense for medical services necessitated by a personal injury when there is no evidence of the reasonable value of such services and no showing that the amount in question has been paid.

Melsha v Dillon, 214-1324; 243 NW 295

Noncontemplated damages. The purchaser of land may not recover damages because a belated delivery of the land to him prevented him from wrecking the building and using the salvage in other building operations, when the vendor was not apprised of such purpose of the purchaser when the sale was made.

In re Hager, 212-851; 235 NW 563

Nonright of jurors to substitute their own knowledge. Jurors may use and employ their own knowledge as to values in determining the weight and effect of expert testimony as to such values, but they must not be instructed, in effect, that they may disregard such expert testimony and substitute their own knowledge as evidence.

State v Brown, 215-600; 246 NW 258

Opinion evidence. If a witness shows "some qualifications" to testify as to value, the court has a discretion to admit his testimony as to value.

In re Manning, 215-746; 244 NW 860

Personalty — reparable and nonreparable injury. The measure of damages for injury to an article is:

1. For total destruction, the reasonable value at the time of destruction.
2. For a fully reparable injury, the reasonable cost of the repairs, plus the reasonable value of the use of the article during a reasonable time for repair.
3. For a partially reparable injury, the difference in the reasonable value of the article before and after the injury.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Laizure v Railway, 214-918; 241 NW 480
Bush v Railway, 216-788; 247 NW 645

Remittitur to cure error. The fact that plaintiff, a layman, in a personal injury action, is permitted to testify as to the reasonable value of the medical services rendered him by a physician may not be sufficient to justify a reversal; yet such fact may demand a remittitur as a condition to affirming the case.

Wood v Branning, 215-59; 244 NW 658

Sick and unhealthy animals. Evidence of the fair, reasonable value of sound, healthy, marketable hogs is not admissible to prove the value of admittedly unhealthy and sick hogs.

Tracy v Oil Co., 208-882; 226 NW 178

Speculative damages—unsupported opinions. Damages in the purchase of corporate stock under alleged false representations as to its earning power may not be predicated on the unsupported-by-fact opinion of a witness that, had the stock had the earning power represented, it would have been worth double its par value.

Otte v James, 200-1353; 206 NW 613

Threat of injury. In an action by a wife for damages for the alienation of the affections of her husband, an information filed by the plaintiff, charging the defendants with having threatened to injure her, is wholly irrelevant and incompetent.

Paup v Paup, 208-215; 225 NW 251

Unallowable conclusions. The mere conclusions of a plaintiff in an action for damages for alienating the affections of her husband as to what the defendants had done in procuring the enlistment of the husband in the army and thereby effecting a separation of plaintiff and her husband are wholly unallowable.

Paup v Paup, 208-215; 225 NW 251

Value—competency of experts. On the issue of the solvency of a bank, expert witnesses

may be permitted to testify to the value of the bank's assets, even tho they do not possess, as to all items, the most comprehensive qualifications.

State v Bevins, 210-1031; 230 NW 865

Value—presumption. The face value of negotiable instruments and other like or similar choses in action is presumptively the actual value.

Leonard v Sehman, 206-277; 220 NW 77

Value—violation of constitutional right. The constitutional right of an accused in a criminal case to be confronted by the witnesses against him is violated, in a criminal case wherein the value of various items of property is material, by an instruction to the effect that the jurors "have the right to use their own knowledge of values * * * in connection with the testimony as to values which have been given by the different witnesses".

State v Henderson, 217-402; 251 NW 640

11203 Account—bill of particulars.

Matter specially pleadable — "account stated". An "account stated" must be specially pleaded.

Schooler Motor Co. v Trust Co., 216-1147; 247 NW 628

11204 Account deemed true.

Accounts—admission in evidence. See under §11281

Burden of proof. In an action on an account, the plaintiff must necessarily fail when he wholly fails to establish either the reasonable value of the goods or the agreed price therefor, such being the issues in the case.

Cutino Co. v Weeks, 203-581; 213 NW 413

Conclusiveness. A bank depositor may not question the correctness of the periodical balancing and statement of his account by the bank when, for years, he has uniformly acquiesced in such accounting with full knowledge of an alleged error in favor of the bank.

First N. Bk. v Williamson, 205-925; 219 NW 32

11206 Conditions precedent.

Common law rule for recovery — modification. Principle reaffirmed that the common law rule that there can be no recovery on a written contract without a showing that it has been strictly performed has been modified in this state.

Gibson v Miller, 215-631; 246 NW 606

When allegation and proof unnecessary. There need be no allegation or proof of the furnishing of proofs of loss under a policy which by its terms waives such proofs.

Glandon v Ins. Assn., 211-60; 232 NW 804

Impossible performance — when no excuse. A person is not legally excused from performing an act which he has unconditionally contracted to perform, but is prevented from performing because of the happening of a contingency of which he had knowledge when he contracted, and against which he might have protected himself.

Salinger v Ins. Corp., 217-560; 250 NW 13

Reasonable time. Principle reaffirmed that a clause in a contract of sale of real estate giving the vendor "whatever time he finds necessary" to perfect his title, must be construed as giving to the vendor a reasonable time only, in view of the circumstances.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Time of making payments as condition precedent. The making of payments under a contract at the exact time specified therein will not be deemed a condition precedent to the right to maintain an action for breach of the contract by the payee, when the contract does not, expressly or impliedly, make the time of payment the essence of the contract.

Armstrong Pav. v Nielsen, 215-238; 245 NW 278

Well drilling contract performed — faulty pump. A well driller's guarantee to secure an ample supply of water has been fulfilled when the evidence in a mechanic's lien foreclosure fairly establishes that there is a constant head of 180 feet of water in the well, and the lack of ample water was due entirely to the improper pump line furnished by the owner.

Collins v Gard, 224-236; 275 NW 392

11207 Allegation of representative capacity.

Corporate or partnership capacity. An amendment during the trial, alleging partnership capacity of the defendant in lieu of a former allegation of corporate capacity, is proper.

Mau v Rice Bros., 216-864; 249 NW 206

General allegation and general denial. A general allegation of partnership capacity met by a general denial, justifies the court in treating the partnership as existing, especially when there is evidence of the existence of such partnership.

Jordison v Jordison, 215-938; 247 NW 491

Nonconclusion allegation. An allegation that plaintiffs are the duly and legally appointed and qualified trustees of a named trust estate is an all-sufficient allegation of representative capacity.

Windsor v Barnett, 201-1226; 207 NW 362

Partnership—husband and wife — liability. A transfer company operating under a trade name, headquartering at defendants' home, having trucks registered in wife's name, but with the state permit in the husband's name, and performing contracts in husband's name, are facts so indicating a partnership that court properly submitted automobile collision case as a joint liability of the husband and wife operating the transfer company.

Schalk v Smith, 224-904; 277 NW 303

Representative capacity. The conservator of a national bank may, in an action instituted by him, allege generally his official capacity and authority.

Ross v Long, 219-471; 258 NW 94

11208 Fact denial required.

"Condition precedent"—denial—effect. The statutory rule that a general allegation of performance of a "condition precedent" is not put in issue by a general denial, has no application to a general allegation of performance of a promise or agreement which was the consideration for the promise or agreement sued on. So held when plaintiff's promise was to discharge a certain promissory note, and in return the promisee agreed to make a will in favor of plaintiff.

In re Fetterman, 207-252; 222 NW 872

Denial of incorporation — insufficiency. A simple denial by a defendant that he has knowledge or information sufficient to form a belief whether plaintiff is a corporation presents no issue as to the incorporation of plaintiff.

Winterset Bk. v Iiams, 211-1226; 233 NW 749

11209 Matters specially pleaded.

ANALYSIS

I MATTERS SPECIALLY PLEADABLE, AND EXCEPTIONS

II MATTERS NOT SPECIALLY PLEADABLE

Matters provable under general denial. See under §11196
Statute of limitations. See under §11007
Waiver in life insurance cases. See under Ch 401, Note 1 (IX)

I MATTERS SPECIALLY PLEADABLE, AND EXCEPTIONS

Absence of required plea. A plea of fraud, accident or mistake is a condition precedent to the right to reform any written instrument.

Sargent v Ins. Co., 217-225; 251 NW 71

"Account stated". An "account stated" must be specially pleaded.

Schooler Motor v Trust Co., 216-1147; 247 NW 628

Adjudication. He who relies on a prior adjudication must plead it.

Andrew v Bank, 205-237; 216 NW 12

Admissions, general denial, and special defense—effect. An answer which consists (1) of certain admissions, (2) of a general denial of all other allegations, and (3) of a special defense which is in harmony with the denial, has the effect of requiring plaintiff to establish all his allegations not admitted.

Walters v Mutual Assn., 208-894; 224 NW 494

Alteration. A pleader who wishes to avoid the legal effect of an instrument, because of a material and unauthorized alteration therein, must plead that the alteration was made after delivery.

Hartwick v Hartwick, 217-758; 252 NW 502

Assumption of risk. The defense of "assumption of risk" must be specially pleaded in order to justify the submission of the issue to the jury.

Johnson v McVicker, 216-654; 247 NW 488

Authority—waiver. A principal who directs his agent to accept cash only, on making sales, waives any violation of his instructions by accepting notes of various purchasers, with full knowledge of the facts.

Donnelly v Walch, 203-32; 212 NW 310

Carriage of passengers—hand baggage—condition to liability. A carrier of passengers is not liable, as an insurer, for the loss of the hand baggage of the passenger unless said baggage is definitely surrendered into the exclusive possession and control of the carrier. If liability is predicated on negligence, such ground must be pleaded and, of course, proven. Evidence held to show no such surrender of custody.

Jensen v Inter. Corp., 221-513; 266 NW 9

Conditional sales—purchase without notice—effecting payment. Full payment for an article, bought in good faith, and for value and without notice of an existing conditional sales contract thereon, is effected by the act of the vendee in delivering to the vendor his negotiable check on actual funds in a foreign bank

for the purchase price, and by the act of the vendor-payee in immediately negotiating the check to his bank as a general deposit, even tho the deposit slip in the latter transaction provided that the receiving bank took the check for collection only. It follows that the vendee is under no obligation to stop payment on the check issued by him because he learned of the conditional sale contract after said deposit and before his drawee-bank had paid the check.

General Motors v Whiteley, 217-998; 252 NW 779

Condonation. Condonation must be specifically pleaded.

Nelson v Nelson, 208-713; 225 NW 843

Assault and battery—self-defense—instructions. Where defendant voluntarily participated in a fight, not in his own defense, the court did not err in failing to instruct the jury on self-defense as, under such circumstances, self-defense was not available as a defense.

Schwaller v McFarland, 228- ; 291 NW 852

Consideration—absence of. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Want of consideration. Want of consideration for a pledge of collateral securities must be alleged and proven by the pledgor.

Hiatt v Hamilton, 215-215; 243 NW 578

Discharge in bankruptcy. The discharge of a debt through bankruptcy proceedings must be specially pleaded.

Fierce v Fleming, 205-1281; 217 NW 806

Discharge in bankruptcy. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff is immune from subsequent attack on the ground that, when the decree was rendered, the judgment in question had been discharged in bankruptcy, such fact not having been pleaded in said action.

Reining v Nevison, 203-995; 213 NW 609

Rights, remedies, and discharge of bankrupt—failure to plead discharge—effect. A discharge in bankruptcy of a claim subsequently sued on avails nothing unless the discharge is pleaded as a defense; and this is true tho the plaintiff has knowledge of the discharge.

Harding v Quilan, 209-1190; 229 NW 672

Equitable estoppel. A good plea of estoppel requires a succinct fact basis, and an allegation that because of said facts the pleader has been misled or has detrimentally changed his position.

Fed. Bank v Sherburne, 213-612; 239 NW 778

Equitable estoppel—degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that the payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing, and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

Equitable estoppel. Under an allegation that plaintiff was the owner of corporate stock when it was sold, no defense is presented by a general denial. If defendant claims that plaintiff is estopped to assert such ownership, then defendant must specially so plead.

Wilson v Lindhart, 216-825; 249 NW 218

Equitable relief—defense arising or discovered since judgment entered. The fact that a claim, when judgment was entered thereon, had been discharged in bankruptcy is not a "defense which has arisen or been discovered since the judgment was rendered," and therefore within the power of a court of equity to annul or modify.

Harding v Quilan, 209-1190; 229 NW 672

Estoppel. An estoppel is properly pleaded by setting forth the facts upon which the estoppel is based, even tho the term "estoppel" is not used.

Bibler v Bibler, 205-639; 216 NW 99

Fiduciary relation. The rule that a party who claims under an instrument executed by one to whom he occupies a fiduciary relation must establish the absolute good faith of the transaction has no application in the absence of plea and proof of such relation.

Steenhoek v Trust Co., 205-1379; 219 NW 492

General denial—chattel mortgage not admissible in replevin action. General denial puts in issue only facts pleaded in the petition. So, under a general denial to a replevin action for an automobile, evidence of a prior mortgage is properly excluded, when not pleaded, inasmuch as, under a general denial, the court is not called upon to decide which lien is first but only the question of whether plaintiff is entitled to possession.

General Motors v Koch, 225-897; 281 NW 728

Governmental employee—immunity—pleading.

Anderson v Moon, 225-70; 279 NW 396

I MATTERS SPECIALLY PLEADABLE, AND EXCEPTIONS—continued

Homestead exemption. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff and that plaintiff's judgment was a lien on the land is immune from subsequent attack on the ground that the land was, at the time of the conveyance, the homestead of the grantor and grantee, such fact not being pleaded in the action.

Reining v Nevison, 203-995; 213 NW 609

Nonhomestead character of land. A creditor who is seeking to set aside the deed of his debtor as fraudulent need not prove the nonhomestead character of the land even tho he alleges such fact, because the homestead character of the land is an affirmative defense, pleadable and provable by the grantee.

Malcolm Bk. v Mehlin, 200-970; 205 NW 788

"Last clear chance" doctrine. The "last clear chance" doctrine cannot be presented to the jury in the absence of a plea of the ultimate facts which furnish a basis for such doctrine.

Steele v Brada, 213-708; 239 NW 538

See also Crowley v Railway, 65-658; 20 NW 67

"Last clear chance". The doctrine of the "last clear chance" is not available unless distinctly pleaded.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Merger of note in foreclosure decree. The fact that a promissory note sued on has been merged in a foreclosure decree in a foreign state on good personal service must be specifically pleaded.

Pfeffer v Corey, 211-203; 233 NW 126

Mistake in partnership settlement.

Tabler v Evans, 202-1386; 212 NW 161

Mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikeable on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc. 222-1269; 271 NW 220

Negative condition. A plaintiff who seeks to enjoin the appropriation of county funds in aid of a farm bureau organization on the ground that the bureau was not organized to cooperate with stated governmental agencies, must specially plead and prove said fact.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Payment. Principle reaffirmed that payment as a defense to a claim must be specially pleaded.

Olson v Roberts, 218-410; 255 NW 461

Payment. A plea of payment of a promissory note is an affirmative defense.

Columbia Coll. v Hart, 204-265; 213 NW 761

Payment—burden of proof. A plaintiff who alleges the nonpayment of the note and mortgage, which he is seeking to foreclose, must prove such nonpayment even tho defendant pleads payment.

Larson v Church, 213-930; 239 NW 921

Probate claim—payment specially pleaded—burden of proof—jury question. In probate action to establish claim for services rendered to decedent under an express agreement, where defendant specially pleaded a defense of payment as a part of a different contract of employment, the burden rested upon defendant to establish such different contract, including payment, and, if evidence justified, it was the duty of the court to submit the issue to the jury, but, where defendant's evidence is also consistent with and does not negative plaintiff's claim as to her express contract, it is admissible and proper to be considered by the jury as tending to show that the present claim was an afterthought, or that claimant had failed under suitable circumstances to advance the demand now relied upon, and as tending to support defendant's theory of the nature of her employment. However, such evidence failed to establish the specially pleaded defense of payment, and the court's failure to submit the question of payment to the jury was not erroneous.

In re McKeon, 227-1050; 289 NW 915

Payment. A plaintiff suing for damages consequent on the feeding of a so-called hog remedy to hogs need not allege that the damages have not been paid.

Crouch v Remedy Co., 205-51; 217 NW 557; 38 NCCA 80

Payment—application—right of debtor. A creditor who has come into the possession of funds belonging to his debtor, but originally without the consent of the debtor, express or implied, must, at the least, obey the direction of the debtor as to the particular debt upon which the said funds shall be applied.

First B. & T. Co. v Welch, 219-318; 258 NW 96

Application of payment—right of debtor to control. An insured in paying his premium dues to an officer authorized to receive them may direct that the money be applied on said dues, and arbitrarily enforce such direction.

Forrest v Camp, 220-478; 261 NW 802

Creditor's right to apply payment. Creditor holding more than one matured obligation against his debtor has the right to apply payments received as he sees fit, where the debtor gives no directions as to application.

Baker v Bank, (NOR); 219 NW 511

Authority to receive payment on promissory note. Authority or agency in a third party to receive payment of a promissory note is not shown by evidence:

1. That the note provided for payment at the office of said third party;
2. That the payee received payments of interest from said third party;
3. That the payee authorized said third party to grant an extension of the mortgage security;
4. That the payee wrote to said third party relative to the payment of the note, but long after said third party had collected the amount due thereon.

Moron v Tuttle, 211-584; 233 NW 691

Payment of note—burden of proof. Defendants, claiming payment on note which plaintiff denied, had burden to prove such payment by a preponderance of evidence, whether payment was made as partial payment on note or on property purchased, and question was for jury.

Sager v Skinner, (NOR); 229 NW 846

Payments and credits—burden of proof. The maker of a promissory note who claims prospective credits on the note, other than those shown by the record, must point out and establish such credits.

Aetna Bank v Hawks, 213-340; 239 NW 91

Evidence—burden of proof. A debtor has the burden to establish his plea that the creditor accepted a check in full payment of the debt in question.

Kruidenier Co. v Manhardt, 220-787; 263 NW 282

Check not necessarily payment. A check issued by an insurer for the amount of an adjusted loss and payable to a mortgagor and mortgagee, jointly, and never cashed because the mortgagor refused to indorse it, cannot be deemed a payment of the loss when there was no express or implied agreement to that effect—when the insurer-drawer first asserted such claim after the bank on which the check was drawn failed.

Union Ins. v Ins. Co., 216-762; 249 NW 653

Payment by check. Principle reaffirmed that the delivery of a check to a creditor does not constitute payment unless, in due course of time, the check is actually paid.

Schwab v Roberts, 220-958; 263 NW 19

Check not payment without agreement. The acceptance of a check by a creditor is not payment of a debt unless an understanding to that effect appears from the circumstances and conduct of the parties, as where a receipt stating "cash" was issued for an insurance premium check—such check later returned marked "insufficient funds".

Hockert v Ins. Co., 224-789; 276 NW 422

Contract for haulage—payment. A contract for hauling material at a stated price per load, with right in the hirer to designate the number of hours each day and the number of days each week on which the work should be done, does not embrace a right of recovery for days on which there was no hauling to do. Especially is this true in view of repeated unexplained receipts "in full of account to date".

Peerboom v Minges, 201-706; 207 NW 753

Directed verdict—payment of rent—sufficiency of evidence. Direction of verdict in action to recover on rent note from tenant was erroneous when there was sufficient evidence of payment by tenant in turning over proceeds of crop to warrant submission of the case to jury.

McCann v McCann, (NOR); 226 NW 922

Employer paying doctor bills — negligent person still liable. Payment of an injured truck driver's doctor bills, by his employer, whether the motive be philanthropy or contract, constitutes a bounty from which a negligent defendant motorist can derive no benefit in reduction of his liability, inasmuch as he owes compensation for all damages as to which his negligence was the proximate cause.

Clark v Berry Co., 225-262; 280 NW 505

Long and unexplained delay in demanding payment. Substantive evidence of the payment of a claim may be found in the conduct of a plaintiff in failing for several years, and during the lifetime of the party obligated, to assert his claim, when the party obligated was financially able to pay, and when the circumstances were such as to fairly cause plaintiff to assert his claim if he had not been paid.

Baker v Davis, 212-1249; 235 NW 749

Nonpayment. Plaintiff must plead nonpayment in an action on contract when the gist of the action is a failure to pay according to the contract. Whether, in an action on contract, an unquestioned allegation that a specified sum is due from defendant is a sufficient plea of nonpayment, quaere.

Andrew v Boyd, 213-1277; 241 NW 423

Payment to authorized agent. The requirement of a certificate of insurance, that premium dues shall be paid to a named officer of the local camp, is not a limitation on the insured's right to pay to some other officer who has been authorized by the association to receive such dues.

Forrest v Camp, 220-478; 261 NW 802

Payment of wages not release of damages. A written release of all damages suffered by an injured party is fraudulent and void when it was in fact mutually intended as a receipt for wages only, and was signed by the injured party without negligence on his part; and the failure of the injured person, who was

I MATTERS SPECIALLY PLEADABLE, AND EXCEPTIONS—continued

himself unable to read, to have such instrument read to him does not necessarily constitute negligence per se.

Farwark v Railway, 202-1229; 211 NW 875; 26 NCCA 231, 31 NCCA 759, 4 NCCA(NS) 98, 197

Payment with knowledge of facts. Principle reaffirmed that one who voluntarily pays a disputed claim with full knowledge of the facts may not recover the sum so paid.

Meyer v Gotsdiner, 208-677; 226 NW 38

Presumption of payment. In an action on a claim which calls for payments in a particular manner, a presumption of payment in full will be indulged when the credits set up in the pleadings equal the full amount of said claim, even tho other separate causes of action are joined with the first claim.

Smith v Morrison, 203-245; 212 NW 567

Partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the fourteen years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Public official's receipt of money as issue—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk,—the clerk's answer, denying receipt of such funds, and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll, City of, v Arts, 225-487; 280 NW 869

Public utility—justifiable refusal to furnish product. A public utility company is within its rights in refusing to furnish its product—electric energy—to one who fails to pay his current bill for such product, and it is not sufficient that the customer tenders payment for future service.

Bailey v Power Co., 209-631; 228 NW 644

Recovery of payments—rule—exception as to officer. Where a sheriff not knowing that a statute has been repealed collects fees thereunder, he acts not under a mistake of fact but under a mistake of law, and such fees when paid to an officer of court, even though voluntarily, are recoverable, this being an exception to the general rule that voluntary payments under a mistake of law are not recoverable.

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

Recovery of payments—in general. Principle reaffirmed that a voluntary payment is not recoverable by the party making it.

Browning v Kannow, 202-465; 210 NW 596

Reply—necessity—plea of payment. In an action wherein plaintiff alleges that defendant is owing him a stated sum, and wherein defendant answers that he has not received proper credit for payments made by him, no reply is necessary in order to enable plaintiff to prove an agreement that certain payments were not to be applied on the account sued on.

Northern Lbr. Co. v Clausen, 201-701; 208 NW 72

Treating sight draft as paid and later denying payment. The drawer of a sight draft who sends it to a bank for collection, and knows that said bank has assumed to collect it, and has forwarded its own bank draft in payment of the collection, and who, after payment of the bank draft is refused because of the insolvency of the collecting bank, lays claim to said bank draft and establishes his claim thereon against the receiver, may not thereafter proceed against the receiver and the original drawee in the sight draft and obtain judgment against them on the pleaded theory that said drawee in the sight draft never in fact paid it,—paid it by an overdraft on the collecting bank,—and that the defendants must account to plaintiff for said overdraft.

Enterline v Andrew, 211-176; 231 NW 416

Wrongful receipt of payment of note—ratification. The payee of a promissory note does not ratify and confirm the act of a third person in wrongfully receiving payment of the note by subsequently receiving and accepting partial payments from said wrongdoer.

Moron v Tuttle, 211-584; 233 NW 691

Pleading fraud and recovering on proof of mistake. A plaintiff who pleads that he was induced to make certain payments because of fraudulent representations may not recover on proof that he made the payments because of a unilateral mistake on his own part.

Morrow v Downing, 210-1195; 232 NW 483

Pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or minis-

terial (the only acts for which the municipality would be liable), and not governmental.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Unpleaded defense—effect. The maker of a promissory note cannot be given the benefit of testimony tending to show that he signed the note under duress when he rests his defense on a distinctly different defense; and the court should so inform the jury.

Farmers Bank v DeWolf, 212-312; 233 NW 524

Unpleaded issue. An unpleaded claim that an oral contract existed for the transfer of a policy of insurance on one automobile to a subsequently acquired automobile amounts to nothing.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Torts—special plea in re governmental function. The nonliability of a municipality, for the negligence of an employee in the performance of a governmental function, is a special defense and must be pleaded as such.

Groves v Webster City, 222-849; 270 NW 329

Transfer of property—invalidation of policy. In equitable action against mutual insurance association where defendant admitted that property in question was insured under a fire policy, defendant's contention that a certain transfer of the property had invalidated the policy, having not been pleaded as a special defense, was not in issue under the pleadings.

Webber v Ins. Assn., 227-793; 288 NW 868

Trust relationship—pleading. The claim that the purchase price of a bank draft which was not paid constitutes a trust fund because the bank was insolvent at the time of the receipt of the money and the issuance of the draft, must, manifestly, be presented by definite plea and supported by sufficient proof.

Shifflett v Bank, 215-823; 246 NW 757

Waiver. "Waiver" must be specially pleaded.

Breza v Loan Soc., 200-507; 205 NW 206

Cole v Ins. Co., 201-979; 205 NW 3

Harrington v Feddersen, 208-564; 226 NW 110; 66 ALR 59

Schmid v Underwriters, 215-170; 244 NW 729

"Waiver" or "acquiescence". "Waiver" or "acquiescence" is properly pleaded by setting forth the facts showing such waiver or acquiescence, even tho the pleader inaccurately designates his plea as an "estoppel".

Schramm & S. v Shope, 200-760; 205 NW 350

Waiver and estoppel. A mortgagee who seeks to enforce the agreement of a grantee of the land to pay the mortgage debt need not plead that the grantee, by taking and retaining possession of the land, has waived, or is estopped to assert, any defect in the title to the land.

Richardson v Short, 201-561; 207 NW 610

Waiver of right to divorce as consideration. The defense that a waiver by a wife of her asserted right to a divorce constitutes a valid consideration for a conveyance by the husband to the wife must be specifically pleaded.

Burgess v Stinson, 207-1; 222 NW 362

Waiver — voluntary litigated issue. Parties who voluntarily litigate the issue of waiver of the time element in a contract of sale are bound thereby even tho the written pleadings are silent as to waiver.

Andrew v Miller, 216-1378; 250 NW 711

II MATTERS NOT SPECIALLY PLEADABLE

Absence of full knowledge of facts, voluntary payment rule inapplicable. The rule that money voluntarily paid cannot be recovered does not apply where payor did not have full knowledge of all the facts, or where payment was compulsory, or was made under mistake of fact by payor under no legal obligation to make it, and especially where the mistake of fact was mutual.

New York Ins. v Talley, 72 F 2d, 715

Administratrix — voluntary payment for services to one not an attorney. Where defendant rendered services to administratrix, who was also an heir, as an intermediary between her and her attorney in administering the estate, held that she could not recover payment to defendant, made voluntarily and with full knowledge of the facts.

Hartnett v Van Alstine, (NOR); 213 NW 595

Benefits accepted under unconstitutional statute. No objection could be made to the constitutionality of a law extending the period of redemption after mortgage foreclosures by parties who accepted benefits under a court order extending the period and appointing a receiver whose acts benefited both parties.

New York Ins. v Breen, 227-738; 289 NW 16

Ex-judge's affidavit—no part of record. A judge's affidavit made after termination of his office, and three months after perfection of the appeal, is no part of the record and cannot be considered against the appellant as a basis for an alleged waiver.

In re Metcalf, 227-985; 289 NW 739

Government employee's automobile collision —immunity as a defense. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function

II MATTERS NOT SPECIALLY PLEADABLE—concluded

is a matter of defense not properly raised by special appearance.

Anderson v Moon, 225-70; 279 NW 396

See also:

Montanick v McMillin, 225-442; 280 NW 608

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Last clear chance — amendment after reversal. The elements of the doctrine of "last clear chance" may be deemed as inherently attending an allegation which, in effect, charges defendant with proximate negligence up to the very time of the infliction of the injury, even tho said allegation carries no reference to the "last clear chance" or to the doctrine thereof. It follows that after trial and reversal thereof, such allegation may be amended and amplified by alleging facts which, if proven, will specifically present the issue of the "last clear chance".

Spaulding v Miller, 220-1107; 264 NW 8

Payment. Evidence of payment of an account is not admissible under a general denial.

Siegel Mar. v Billings, 203-190; 210 NW 749

Representation or warranty. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

Unpleaded defense — evidence. In an action on policy of fire insurance, evidence that the fire was of incendiary origin and that the property was, at the time of the fire, being used for an unlawful purpose, is inadmissible in the absence of a defensive plea to that effect.

Basta v Ins. Assn., 217-240; 252 NW 125

11210 Contributory negligence—burden—special exception—mitigation.

Contributory negligence generally. See under Ch 484, Note 1 (III)

Burden of proof. A definite instruction that plaintiff has the burden of proof to show that he was not guilty of any negligence contributing to his injury is in no degree overcome by later instructions wherein the court, with reference to contributory-fact issues, uses the expression "if you find"; in other words, such expression does not have the effect of impliedly placing the burden of proof as to contributory negligence on the defendant.

Dean v Koolish, 212-238; 234 NW 179

Contributory negligence — burden. An employee who voluntarily steps outside the zone of his specific employment and voluntarily engages in a work in which the employer is engaged, and is injured, must, in an action for damages, prove his own freedom from contributory negligence.

Tellier v Davenport, 203-1012; 213 NW 565

Contributory negligence plea. An instruction relative to a master's plea of assumption of risk by his servant will not be deemed to deprive the master of his plea of contributory negligence on the part of the servant when the latter element is correctly covered by a separate instruction.

Oestereich v Leslie, 212-105; 234 NW 229

Contributory negligence of servant—effect. In an action by an employee against his employer for damages consequent on the negligence of the employer, the contributory negligence of the employee may be pleaded by the employer in mitigation, only, of damages.

Bell v Brown, 214-370; 239 NW 785

Drowning—res ipsa loquitur nonapplicable. The mere fact a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v Playground Assn., 227-81; 287 NW 259

Exoneration of servant exonerates master. A master cannot be held liable for an injury solely on the ground of the negligence of his servant when the jury wholly exonerates the servant from any negligence.

Hall v Miller, 212-835; 235 NW 298

Jury question — rule. Generally, contributory negligence is peculiarly for the jury, the rule being that where the conduct of the plaintiff is such that fair-minded and reasonable men might honestly and sincerely arrive at a different conclusion, then the court should submit the question to the jury.

Rogers v Jefferson, 224-324; 275 NW 874

Looking left at intersection. Principle reaffirmed that vehicle driver's failure to look to the left when entering highway intersection does not constitute contributory negligence as a matter of law.

Rogers v Jefferson, 226-1047; 285 NW 701

Minor walking on wrong side of highway. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about four or five feet from west side of highway, and failing to make observations as to oncoming traffic from the rear, while walking after dark on a street traversed

by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Passengers — termination of relation. A passenger on a streetcar ceases to be such the moment he completes his step from the car into the street.

MacLearn v Utilities Co., 212-555; 234 NW 851

Specific reliance on res ipsa loquitur. A plaintiff who sues in tort and alleges generally (1) that defendant was guilty of negligence which was the proximate cause of her injuries, and (2) that she relies on the doctrine of res ipsa loquitur, cannot be compelled, by motion for more specific statement, to state the particular acts of negligence of which she complains.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Statutory effect. The court may very properly instruct the jury that a master must establish his plea of contributory negligence on the part of his servant by a preponderance of the evidence, and that such plea if so established is available to the master only in mitigation of damages.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67

Bell v Brown, 214-370; 239 NW 785; 34 NCCA 68

11211 Judicial notice.

Foreign statutes. See under §11312
Judicial notice of ordinances. See under §5735, Vol I

Ability to stop car. The court will take judicial notice of the fact that an automobile in good mechanical condition, with good brakes, and traveling at a speed not greater than 25 miles per hour on a highway which is in good condition, can be stopped in a less distance than 100 feet.

Wright v Railway, 222-583; 268 NW 915

Attaching bills of lading to draft. Judicial notice will be taken of the custom of attaching bills of lading to drafts.

Dubuque Fruit Co. v Emerson & Co., 201-129; 206 NW 672

Case reinstated after dismissal. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erroneously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

Change in mode of transportation. Court will take judicial notice of the changes in the mode of transportation occurring during the last preceding twenty-five years.

Harris v Railway, 224-1319; 278 NW 338

Judicial notice of conditions—effect. While the court should, in a proper case, in construing a statute, take judicial notice of the statewide condition surrounding the subject matter covered by the statute, yet such condition will not warrant the court in overthrowing the clear and concise language of the statute.

Andrew v Bank, 214-204; 242 NW 80

Courts own records. The supreme court takes judicial notice of its own records in a particular case.

Farmers Bank v Miles, 206-766; 221 NW 449

Information and warrant—condemnation of gambling devices. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

Depression—real estate values. Court will take judicial notice of the nation-wide depression and shrinkage in real estate values.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Shrinkage of land values. The court will take judicial notice of the shrinkage of land values in this state following the year 1920.

In re Jeffrey, 225-316; 280 NW 536

Distance between cities, etc. The courts of this state may and do take judicial notice of the distance between cities in this state, and the direction of one from the other; also of the states which abut this state.

State v Johnson, 221-8; 264 NW 596; 267 NW 91

Foreign judicial proceedings. The judicial proceedings of the courts of a foreign state may not, of course, be given any effect except on due proof thereof.

Chi. RI Ry. v Lundquist, 206-499; 221 NW 228

Geographical locations. Courts will take judicial notice of the location of cities and towns.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Harmless error. Error of the court in improperly taking judicial notice of the pendency of another action becomes quite harmless when the appellant demonstrates by his abstract of

the record that said other action was actually pending.

Benjamin v Jackson, 207-581; 223 NW 383

Habits and instincts of chickens. Courts will take judicial notice of the habits and instincts of chickens under different surroundings, and under familiar or unfamiliar methods of care.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Location of farms and highways. Supreme court does not take judicial notice of the location of highways or farms.

State v Archibald, (NOR); 221 NW 814

Matters judicially noticed by supreme court. The supreme court takes judicial notice of matters of common knowledge.

Edwards v Kirk, 227-684; 288 NW 875

Water between plastered and outer walls—deterioration of wood. It is a matter of common knowledge and one of which the court has a right to take judicial notice, that, when water is confined in a space as between the plastered and outer walls of a building where the air cannot circulate, many times the water will cause a deterioration of the lumber and sometimes cause rotting of the wood.

Horn v Ins. Co., 227-1045; 290 NW 8

Moratorium act—emergency must be temporary. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441

Moratorium act—purpose. Tho moratorium act makes no distinction between individual and corporate debtors, supreme court may take judicial notice of fact that, Iowa being an agricultural state, moratorium acts were passed primarily for purpose of preserving farm and other homes of distressed debtors.

Massachusetts Ins. v Schenkberg et al. Co., 225-1148; 281 NW 825

Nondischargeable debts. State courts will take judicial notice that, under the federal bankruptcy statutes, a debt arising from the fraud of the debtor is not dischargeable in bankruptcy.

Hills Bank v Cress, 205-306; 218 NW 74

Registration plate on automobile—county of issuance. The court cannot, from the figures alone, take judicial notice that a registration number plate on an automobile was issued by the county treasurer of a certain county.

Putnam v Bussing, 221-871; 266 NW 559

Reversal of conviction. On an appeal from an order disbarring an attorney on the ground that he has been convicted of a felony, the appellate court will take judicial notice that said conviction has been reversed by said court subsequent to the entry of the order of disbarment.

State v Metcalfe, 204-123; 214 NW 874

Sale—deed—ownership of existing crop. On the issue whether the holder of a sheriff's deed was the owner of a crop of corn grown on the land, or whether the crop had matured, and therefore belonged to the tenant, the court will not take judicial notice that corn will mature on any particular date. The holding of the trial court on clearly competent and conflicting testimony is final.

Frum v Kueny, 201-327; 207 NW 372

Sale—good cause for continuing—economic emergency—governor's proclamation. Good cause for continuing a tax sale is shown by the governor's proclamation of the existence of a great economic emergency also recognized by the legislative and judicial branches of the government.

Freemyer v Taylor Co., 224-401; 275 NW 718

Starting vehicle in reverse gear. The court will take judicial notice of the fact that if the engine of a motor vehicle is started while the vehicle is in reverse gear, said vehicle will move backward. And no evidence is necessary to establish a fact of which the court takes judicial notice.

Laudner v James, 221-863; 266 NW 15

Statutory law. The courts of a state will take judicial notice of its statutory law.

Andrew v Indem. Co., 207-652; 223 NW 529

Tender of fare—judicial notice. A passenger failing to leave the train at his destination does not render himself subject to immediate ejection from the train because he fails to tender the fare to another destination. Judicial notice is taken of the fact that it is the duty of the conductor to demand the fare.

Vanderbeck v Railway, 210-230; 230 NW 390

Trademark signs displayed—common knowledge. In an action for injuries caused by alleged negligence of filling station operator, the fact that trademark signs of defendant oil company were displayed did not estop it from claiming that it was not the owner of filling station business and that operator was not employee of company, it being a matter of common knowledge that such signs are displayed throughout country by independent dealers.

Reynolds v Oil Co., 227-163; 287 NW 823

Evidence of value. While court may take judicial notice of its own records in same case, this does not obviate necessity for proof of services and the reasonable value as to an attorney fee claim for extraordinary services to estate.

Glynn v Bank, 227-932; 289 NW 722

11216 Malice.

Exemplary damages. Exemplary damages are allowable for malicious assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

Exemplary damages—failure to submit—effect. Failure of the court to submit to the jury the question of exemplary damages is not error, even tho plaintiff's pleading was broad enough to embrace such damages, when the plaintiff neither claimed such damages in the pleading, nor requested the court to submit such issue.

Morrow v Scoville, 206-1134; 221 NW 802

Exemplary damages—purpose. Punishment of the defendant is one of the purposes in permitting an allowance of exemplary damages in a proper case; and it is proper for the court so to instruct the jury.

Gregory v Sorenson, 214-1374; 242 NW 91

Hearsay evidence. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

Insufficient basis. Exemplary damages may not be allowed solely on the basis of the implication of malice which the law attaches to a libel per se.

Ballinger v Demo. Co., 207-576; 223 NW 375

Malice as essential basis. The submission of the question of exemplary damages without supporting evidence of malice is prejudicially erroneous.

Sokolowske v Wilson, 211-1112; 235 NW 80

Measure of damages. The measure of damages in an action commenced during the lifetime of an injured person is what will right the wrong done, including exemplary damages, which are still recoverable if he dies during the pendency of the action; but if commenced by the administrator after death, the measure is the reasonable present value of his life without recovery for pain and suffering or exemplary damages.

Boyle v Bornholtz, 224-90; 275 NW 479

Nonexcessive verdict. A verdict for exemplary damages which is fairly in proportion to the actual damages will not be disturbed by the court.

Gregory v Sorenson, 214-1374; 242 NW 91

Recovery permissive only. Reversible error results from instructing in substance and in effect that the jury is under obligation to return a verdict for exemplary damages in case it finds that plaintiff has suffered actual damages.

Boom v Boom, 206-70; 220 NW 17

11217 Bond—breaches of.

Allowance and payment of claims against estate—failure to file—when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Cross-complaint. In an action on the bonds of a public officer and his bondsmen to recover a shortage, one surety may not cross-petition against a party who he alleges wrongfully received the funds resulting in the shortage, said latter party not being a party to the bond sued on.

School District v Sass, 220-1; 261 NW 30

Liabilities on bonds — existing judgment. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Right to maintain immediate action. An action on a contractor's bond to repair a street may be maintained without allegation and proof that the city has made the repairs.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

Single or dual cause of action. The obligee of a bond, who pleads solely for the recovery of the amount due him under the bond, pleads but a single cause of action, tho he prays for

different remedies against different parties, or in part pleads for unallowable relief.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

11218 Denial of genuineness of signature.

Change of venue—nonpermissible motion. In an action in the county in which a promissory note is specifically made payable, and against the apparent signers of the note, it is not permissible for a defendant to file a motion to transfer the action to the county of his residence on the ex parte showing that he never signed said note, or authorized or ratified, or confirmed any signing of said note in his name.

Greenland v Carter, 219-369; 258 NW 678

Conclusiveness of proof. The court may not say that the genuineness of a signature, duly put in issue, is conclusively established solely by expert opinion evidence of its genuineness, and thereby rightfully exclude the jury from passing upon the issue.

In re Richardson, 202-328; 208 NW 374

Consideration and signature. Plaintiff in an action on a promissory note which he has set forth by copy in his pleadings, may, on the trial, introduce the note in evidence and rest his case, it appearing that the purported maker of the note (defendant) has made no denial, under oath, of the genuineness of his signature; and this is true tho the defendant maker has pleaded want of consideration as a defense.

Booth v Johnston, 223-724; 273 NW 847

Denial by guardian.

Farmers Bank v Bank, 201-73; 204 NW 404

Denial of signature—avoidance. The denial under oath of the signature to a promissory note may be met by the plaintiff by proof (1) that the signature is genuine, or (2) that the defendant has ratified and adopted the signature as his own.

Old Line Ins. v Jones, 206-664; 221 NW 210

Denial of signature—effect. The statutory denial under oath of one's apparent signature to a promissory note, on which suit is commenced in the county in which the note is payable, furnishes no basis for a motion to transfer the action to the county of the residence of the mover.

Greenland v Carter, 219-369; 258 NW 678

Denial of signature overcome by certificate of acknowledgment. Tho a proper denial of the genuineness of the signature to an instrument casts the burden on the opposing litigant to prove the genuineness of such signature, yet, if the instrument is one which is legally acknowledgeable, and is duly acknowledged and properly introduced in evidence with the acknowledgment, the burden of proof henceforth is on the party causing the signature to be denied to overcome, by clear, satisfactory and convincing evidence, the very strong presumption generated by the certificate of acknowledgment, that the instrument was actually executed by the acknowledging party.

Northwestern Ins. v Blohm, 212-89; 234 NW 268

Evidence—sufficiency. Evidence held to support finding that signatures to note and mortgage were genuine.

Rieper v Berner, 222-1399; 271 NW 519

Evidence—sufficiency. Evidence that the signature to a mortgage is the genuine signature of the mortgagor, and that the mortgage is in the possession of the mortgagee is prima facie evidence of the due execution of the mortgage.

Citizens Bk. v Hamilton, 209-626; 227 NW 112

Admissions—evidence—sufficiency. The mere act of a wife in joining with her husband in the execution of a deed of the husband's property in payment of certain notes executed by the husband, cannot be deemed a recognition or admission by her of personal liability on the notes when she did not know that her name had been signed to the notes.

West Chester Bank v Dayton, 217-64; 250 NW 695

Admissibility when signature not denied. A promissory note, duly pleaded and incorporated in the pleading, by original or copy, is receivable in evidence without further proof,—unless the purported maker of the signature, under oath, properly denies said signature.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Burden to establish genuineness. Principle reaffirmed that plaintiff in foreclosure has the burden to establish the genuineness of the signatures to the mortgage and accompanying promissory notes when the genuineness of said signatures is specifically denied under oath by the purported maker. Evidence reviewed in detail and held that plaintiff had not successfully carried said burden.

Hagensick v Koch, 220-1055; 264 NW 13

Signing—evidence. In an action on a written guaranty which plaintiff introduces in evidence, the fact that plaintiff dismisses his action, without prejudice, as to one alleged signer, does not render said dismissed defendant incompetent to testify that he never signed said guaranty.

Rawleigh Co. v Moel, 215-843; 246 NW 782

Unnecessary assumption of burden—effect. A plaintiff may assume the burden of showing that the signature to an instrument, defensively pleaded against him by the defendant, is

not genuine, even tho he might have availed himself of a statutorily implied denial of the answer, or might have definitely cast the burden as to genuineness upon the defendant by a denial under oath. And, if he successfully establishes the aforesaid negative, he will be accorded the same protection as tho the defendant had failed to establish the affirmative.

McFerren v Bank, 214-198; 238 NW 914

Forged signatures — expert testimony to overcome. While an acknowledgment by a notary is presumptively true and requires clear and convincing evidence to overcome it, yet by statute it is not conclusive, and the court acting as a jury may find, after reviewing the conflicting testimony of handwriting experts, properly received, that signatures to transfers and assignments of assets of an estate, attacked by an administrator de bonis non, were forgeries.

Brien v Davidson, 225-595; 281 NW 150

General denial. A denial of knowledge or information sufficient to form a belief as to a signature constitutes a general denial of the genuineness of such signature.

Dean v Atkinson, 201-818; 208 NW 301

Impeaching signature but not acknowledgment. Even tho it appears that the purported signature of a wife to a promissory note and mortgage (admittedly executed by the husband on his own land) was affixed by someone other than the wife, yet if the mortgage carries a certificate of acknowledgment in due and proper form as required by law and reciting an acknowledgment by said wife of said mortgage as her voluntary act and deed, the wife must, in order to avoid the mortgage as to herself, overcome, by clear, satisfactory and convincing evidence, the facts affirmed in said certificate.

First Tr. JSL Bank v McNeff, 220-1225; 264 NW 105

Jury question. Where in an action on a promissory note the defendant in his answer denies under oath the genuineness of the signature, a jury question is generated by positive testimony of the payee that the purported maker did sign the note, together with expert testimony on handwriting tending to prove that the signature was genuine, met by equally positive testimony by the purported maker that he did not sign the note.

Seibel v Fisher, 213-388; 239 NW 34

Jury question. A jury question is presented on the issue of the genuineness of a signature denied under oath, (1) by admitted signatures as to the genuineness of which reasonable minds might differ, after comparison with the original; (2) by expert testimony of a not very persuasive nature that the signature was genuine; (3) by testimony tending to show that the party had recognized the indebtedness as her own, and had (impliedly at least) recognized the genuineness of her signature, but had belatedly denied it; and (4) by testimony tending to show that she had adopted the signature as hers, even tho she had not physically affixed it to the instrument.

McColl v Jordan, 200-961; 205 NW 838

Ratification and adoption of signature. Principle reaffirmed that a party may be bound by a signature which he has confirmed and adopted as his own, even tho he has not physically affixed it to the instrument.

McColl v Jordan, 200-961; 205 NW 838

Undenied signature — effect. The mere introduction in evidence of promissory notes sued on makes a prima facie right of recovery when the signatures to said notes are not denied under oath.

Grimes Bank v McHarg, 204-322; 213 NW 798

Unimpeached and uncontradicted testimony. The positive and wholly uncontradicted testimony of an unimpeached and disinterested witness that he saw the purported maker of a promissory note sign it, plus the unqualified opinion of a competent and unimpeached witness to the effect that the signature to the note was genuine, justifies a directed verdict when the genuineness of the signature is the sole issue.

In re Work, 212-31; 233 NW 28

Unusual signature — allegation—sufficiency. An allegation, in an action on a promissory note that both defendants executed and delivered the note, followed by a copy of the note bearing the signature "H. G. & L. T. Greenland", sufficiently alleges the signature of "H. G. Greenland."

Greenland v Carter, 219-369; 258 NW 678

Unverified petition — written agreement. Where an unverified petition is filed in an action on a written agreement, the contents of which are challenged by general and specific denials under oath, plaintiff is not entitled to judgment on pleadings, even tho genuineness of signature is not properly challenged.

Clare v Pearson, 227-928; 289 NW 737

11221 Supplemental pleading.

Deportation grounds — reviewed in habeas corpus. On an appeal from a denial of a writ of habeas corpus under deportation order, the question of sufficiency of evidence to support the order may be properly reviewed in a habeas corpus action, and where ground of deportation is fraud committed in Canada with no showing that crimes charged were criminal under the law of Canada, the order denying the writ was reversed with instructions to grant the writ, as neither a court nor an administrative body can take judicial notice of

the laws of a foreign country. In an administrative proceeding there must be such procedure as to accord substantial justice and afford the parties a fair trial.

Smith v Hays, 10 F 2d, 145

Nonissue-changing amendment. If a defendant, by proper appearance to an action and pleading thereto, is in court when an amendment is filed to the petition, which amendment does not create a new cause of action, he is precluded from appearing specially to the petition as amended.

Johnston v Federal Land Bank, 226-496; 284 NW 393

Seeming illegality — explanatory amendment. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Specific performance action. Where a plaintiff, after starting a specific performance action to require a federal land bank to complete a loan as agreed, loses the land by foreclosure because the money from the agreed loan is not available to pay off the outstanding mortgage —thereby damaging the plaintiff-landowner by the loss of his equity in the land—an amendment to the specific performance petition changing the relief sought and seeking damages ascertainable after institution of the original suit does not set up a new cause of action.

Johnston v Federal Land Bank, 226-496; 284 NW 393

Unnecessary amendment. In proceedings for the appointment of a guardian, the allegation of unsoundness of mind made when the petition is filed may be supported by testimony of unsoundness at the time of the trial, tho the proceedings be long protracted. It follows that the unnecessary allowance of an amendment alleging such subsequent unsoundness is quite harmless.

Anspach v Littler, 217-787; 253 NW 120

11222 Matter in abatement.

ANALYSIS

I In General
II Pleading
III Allowable Pleas in Abatement
IV Nonallowable Pleas in Abatement
V Judgment on Plea

I IN GENERAL

Abatement of authorized action. A court having ordered its receiver in partnership to begin action against the partners, in order to collect funds with which to pay creditors, has discretionary power, after such action has been commenced, and on a showing that the receiver has in his possession a very large amount of unliquidated partnership assets, to abate the action until such assets are liquidated.

Day v Power, 219-138; 257 NW 187

Nonabatement of action by receivership. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bank v McHarg, 217-636; 251 NW 51

Duplicate actions—which abatable. While an action in partition, in which service of the original notice is incomplete in whole or in part, is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Foreign corporations—dissolution—effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement, (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such cir-

cumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Jury question—conflict of evidence. On a plea in abatement in an action on a note which matures when a certain farm is sold, as "per contract" (which was oral), a fair conflict of testimony as to the terms of such contract and when such provision was inserted in the note necessarily presents a jury question.

Anderson v Foglesong, 201-481; 207 NW 562

Receivership—effect. An action for specific performance is not abated by the subsequent appointment of a receiver for the defendant.

Hawkeye Ins. v Trust Co., 210-284; 227 NW 637

II PLEADING

Delay in pleading. Defendant's right to plead in abatement is wholly lost when delayed until the plaintiff might legally have brought his action.

Larsen & Son v Ins. Co., 212-943; 237 NW 468

Necessity for plea. There can be no abatement or stay of an action until another action has been determined when there is no pleading requesting such abatement or stay.

Music v De Long, 209-1068; 229 NW 673

III ALLOWABLE PLEAS IN ABATEMENT

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Pendency of another action—evidence. Indefinite evidence of the pendency of an action by the defendant as an occupying claimant presents no obstacle to the entry of a decree quieting title in the plaintiff.

Korf v Howerton, 205-534; 218 NW 274

IV NONALLOWABLE PLEAS IN ABATEMENT

Abatement—other action pending. A motion or proceeding for the abatement of an action of forcible entry and detainer because an equitable action by movant is pending in the district court for relief consequent on the alleged fraud of plaintiff in the forcible detention action, is properly overruled.

Music v De Long, 209-1068; 229 NW 673

Dissolution and receivership. A foreign decree of dissolution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Want of demand. Replevin will not be abated for want of demand on defendants for possession prior to the institution of the action (1) when one defendant had incapacitated himself from complying with a demand, and (2) when the other defendant asserted unqualified title against the plaintiff.

Hart v Wood, 202-58; 209 NW 430

V JUDGMENT ON PLEA

Modification of judgment to show abatement only. A judgment presumptively in bar will be modified on appeal to show that it is in abatement only, when such is in fact the effect of the judgment.

Murphy v Berry, 200-974; 205 NW 777

11223 Waiver of matter in bar.

Pleadings in abatement—effect. Principle recognized that a party may not, after trial on matter of abatement, be permitted, in the same action, to answer or reply matter in bar.

Foster & Son v Bellows, 204-1052; 216 NW 956

11224 Subsequent defenses.

Seeming illegality—explanatory amendment. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

11226 Consolidation of actions.

Law and equitable actions. Actions which seek one or more of the following purposes are properly consolidated:

1. Equitable actions for the appointment of a receiver for a corporation and for the closing up of its affairs.
2. Equitable actions by the state for the dissolution of the said corporation.
3. Equitable actions by a stockholder of the said corporation who has fully paid for his stock, for contribution from the other stockholders who have not fully paid for their stock, in order that losses may be equalized on the stockholders.
4. Equitable actions by the executor of a deceased stockholder against the receiver of the corporation for the cancellation of an alleged fraudulently induced stock subscription contract, and for the return of the money paid thereon, met by the receiver with a prayer for judgment for the amount due under the contract.
5. Law actions by the receiver of the said corporation or by the judgment creditors thereof, to recover of the stockholders the amount unpaid on their stock subscriptions.

Lex v Selway Corp., 203-792; 206 NW 586

Discretion of court. The court may be amply justified in refusing to incumber and confuse the trial of a distinct issue in mortgage foreclosure with the trial of a cross-petition by one defendant against a co-defendant.

Cotten v Halverson, 201-636; 207 NW 795

Consolidation—pending actions only. A motion by plaintiff, whereby his independent separate action to set aside a dismissal and to reinstate the cause would be consolidated with the original action to recover accident insurance dismissed by such order, is properly overruled upon defendant's resistance thereto, since, under the statute, such motion can only be made at instance of defendant and then only as to pending actions.

McKee v National Assn., 225-1200; 282 NW 291

Motion to consolidate actions by plaintiffs. Two personal injury actions arising out of the same accident and brought against the same defendant cannot be consolidated on motion by the plaintiffs, for altho equity has the power to consolidate causes of action to avoid multiplicity of suits, the right to move for a consolidation of causes of action in law is by statute granted only to the defendant, and a plaintiff has no such right.

Brooks v Paulson, 227-1359; 291 NW 144

Implied consolidation. A stipulation by parties that a jury be waived in a law action, and that said action together with an equitable action involving the same general subject matter be tried by the court as an equitable matter, constitutes a consolidation of the actions tho no actual order of consolidation is entered.

Holman v Wahner, 221-1318; 268 NW 168

Probate—hostile petitions—refusal to consolidate. Possibly the hearing on different petitions for the probate of hostile wills might be consolidated and the validity of said wills tried out in one action, yet an order which refuses such consolidation is not erroneous when the rights of all parties are fully protected by the order.

In re Fitzgerald, 219-988; 259 NW 455

Premature consolidation of actions. The fact that an order for the consolidation of actions was entered prior to the time when the issues were fully made up, and without notice to some of the parties, will not affect the judgment subsequently entered, when the results obtained were the same as would have been obtained, had the order been made on notice and after the issues were fully made up.

Lex v Selway Corp., 203-792; 206 NW 586

Proper consolidation. Separate appeals to the district court in eminent domain proceedings relative to the same award are properly consolidated.

Genco v Mfg. Co., 203-1390; 214 NW 545

11228 Immaterial errors disregarded.

Harmless error. See under §11548

Erroneous but harmless evidence. Tho the cause of death of a deceased was a question for the jury to decide, yet permitting a physician to testify that death resulted from certain injuries must be deemed harmless when the cause of death never was in issue,—when the jury would necessarily have found in accordance with said testimony had it not been received.

Lukin v Marvel, 219-773; 259 NW 782

Nonprejudicial instructions. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Refusing cumulative evidence. Refusal to admit testimony, which at the best is merely cumulative, is not prejudicially erroneous.

Hawkins v Burton, 225-707; 281 NW 342

CHAPTER 492

MOTIONS AND ORDERS

11229 "Motion" defined.

ANALYSIS

I IN GENERAL
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III PARTICULAR MOTIONS
IV PARTIES
V NOTICE
VI FILING AND ENTRY
VII RESISTANCE
VIII HEARING AND DETERMINATION
IX WITHDRAWAL, ABANDONMENT, OR WAIVER

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(d) Dismissal of actions. See under §14027
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Striking irrelevant matter. See under §11197
Striking misjoined causes. See under §§10963–10965
Striking unverified pleadings. See under §11168
Summary judgment. See under §§11567 (III), 11608
Time of making motion. See under §§11121, 11136

I IN GENERAL

Motion to strike motion. A motion to strike a motion is not proper practice.

Markworth v Bank, 212-954; 237 NW 471

Motion to strike motion not recognized. A motion to strike another motion is a procedure not recognized by our practice, but an order sustaining a motion to strike a pleading consisting of objections to a receiver's report and an application for a hearing on a claim was nothing more than an order overruling the objections and denying the application.

Headford et al. Co. v Associated Co., 224-1364; 278 NW 624

Motions—unallowable successive motions. It is not permissible for defendant to file separate, successive motions "of the same kind" to the same unamended petition. So held where defendant first filed a motion to strike portions of a petition and, being overruled, filed a motion for a more specific statement of said petition, it being held that said motions were "of the same kind" in that each motion had the same objective, to wit, the proper settling of the pleading for trial.

The proper and necessary procedure is to combine the subject matters of both motions into one motion.

Bookin v Utilities Co., 221-1336; 268 NW 50

Alleging note as receipt—sham defense—striking. Where a written instrument sued upon contains the legal elements of a negotiable promissory note, an allegation in an answer that such written instrument was a receipt shows on its face that such pleading is false and should be stricken on motion.

Hillje v Tri-City Co., 224-43; 275 NW 880

Cost bond affidavit not a pleading. The statutory affidavit in support of a motion for cost bond is not a pleading.

Schultz v Ins. Co., 225-1024; 282 NW 776

Franchise renewal statute. At the termination of a mutual telephone company franchise, stockholders voting against renewal of franchise may not maintain an action against the majority stockholders to require purchase of their stock by such stockholders voting in favor thereof, until after three years from date of voting, under §8365, C., '35, permitting such franchise renewal, if the majority stockholders voting renewal purchase the stock of those voting against renewal within three years from date of voting, and an action commenced within such three-year period, being premature, will be dismissed on motion.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Invalid defense not attacked by motion—defeating recovery. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been

I IN GENERAL—concluded

properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased defendants are for the first time enumerated and named as the defendants, and under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

Motion to dismiss equitable action. There is no statutory authority for a motion to dismiss an equitable action at the close of plaintiff's testimony.

Appanoose Bureau v Board, 218-945; 256 NW 687

Nongermane matters. Motions must be dealt with as presented and not utilized for nongermane purposes.

In re Nairn, 215-920; 247 NW 220

Objections to executrix's report—conversion issue not misjoinder—motion to strike. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

Pleading verification requirements. Statutes requiring verification of pleadings, to be made by persons knowing facts, require the affidavit to state that affiant believed statements therein contained to be true, but such statutes relate to verification of pleadings, and not to affidavits generally in support of motions for special remedies, nor to cost bond affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

Poor practice—admitting evidence on promise to amend. In a law case, especially, it is poor practice to permit evidence, objected to as incompetent, to be admitted on the promise that amendments would later be filed to meet the proof. Such objections coming after the witness has answered should be followed by motions to strike.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Rulings on motions — correction—certiorari (?) or appeal (?). Certiorari will not lie to review rulings of the court on motions submitted to the court by the hostile litigants, the sole function of the writ being to annul illegal action and not to review mere errors. Appeal is the sole remedy for the correction of the latter.

Morrison v Patterson, 221-883; 267 NW 704

Unassailed answer or cross-petition, if proven, defeats plaintiff. Matter pleaded by defendant in an answer or cross-petition, if not assailed by motion or demurrer, will, if proven, defeat plaintiff's action, altho, had the question been raised, the answer would have been held to present no defense. Held, defendant had failed to prove his allegation.

Maloney v Rose, 224-1071; 277 NW 572

II FORM AND REQUISITES

Unallowable motion to strike. A second motion to strike matter from the same unamended petition is unallowable.

Conner v Henry, 205-95; 215 NW 506

Answer negativing petition not subject to motion to strike. An answer which, in effect, is a negation of the allegations of the petition proof of which plaintiff must make in order to recover, is not subject to a motion to dismiss.

Clark Bros. v Anderson & Perry, 211-920; 234 NW 844

When appeal lies—overruled demurrer to answer. Where plaintiff, after answer, moved for judgment of dismissal, and also for judgment on the pleadings, held that, if it be permissible to treat the latter motion as a demurrer to the answer, yet an adverse ruling thereon was not appealable unless plaintiff elected to stand thereon.

Morrison v Clinic, 204-54; 214 NW 705

Elimination of irrelevant and redundant matter. Principle reaffirmed that irrelevant and redundant matter in a pleading must be eliminated by a motion to strike.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Equitable action—motion to dismiss—scope of confession. A motion to dismiss, under our new equity practice (§11130, C., '24), confesses all facts which are properly and sufficiently pleaded in the pleading assailed, but not conclusions of law or conclusions of fact, unless the facts from which the conclusions of fact logically follow are set out.

Benton v College, 202-15; 209 NW 516

Improper striking in toto. A count which contains both defensive and nondefensive matter must not be stricken in toto.

Cedar Rapids Co. v Sec. Co., 208-150; 225 NW 339

Judgment notwithstanding verdict. A motion for judgment non obstante veredicto is based wholly on a defective pleading, in that it omits to aver some material fact necessary

to complete a cause of action or defense and the motion must clearly point out the omission.

In re Larimer, 225-1067; 283 NW 430

Presentation and reservation of grounds of review—motion to strike—omnibus motion. A blanket motion to strike intermingled competent and incompetent testimony is improper, and will not be reviewed on appeal.

Koopman v Ins. Assn., 209-958; 229 NW 221

III PARTICULAR MOTIONS

Motion as proper remedy. A motion to set aside and vacate an order which is in excess of the jurisdiction of the court is proper.

Guisinger v Guisinger, 201-409; 205 NW 752

Motion to dismiss—definition. A motion to dismiss an equitable action is, in legal effect, an equitable demurrer.

Schwartzendruber v Polke, 205-382; 218 NW 62

Another action pending—necessity for plea. There can be no abatement or stay of an action until another action has been determined, when there is no pleading requesting such abatement or stay.

Music v DeLong, 209-1068; 229 NW 673

Application to vacate. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Competent allegations—striking in toto improper. A motion to strike an entire amended and substituted petition, being too broad, is properly overruled when such pleading, although replete with objectionable matters, nevertheless contains competent allegations necessary to afford the relief prayed for.

Skaien v Witwer Co., 224-391; 276 NW 623

New trial—discretion of court. A large discretion is lodged in the trial court in determining whether a new trial should be granted on the ground of newly discovered evidence, since the trial court has a much better opportunity for seeing and judging how the testimony given, and that afterward discovered, bears upon the issues, and for determining whether the facts offered are similar or dissimilar.

Larson v Meyer, 227-512; 288 NW 663

New trial—amendment after extended time for filing motion—when permitted. An amendment to a motion for a new trial may be filed after the statutory or extended time for filing the motion if it is germane to the original motion.

Mitchell v Heaton, 227-1071; 290 NW 39

Escheat proceeding—no appeal—dismissal. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Executor's and attorney's fees—proper attack by motion. While an estate is being administered, an ex parte order allowing executor's and attorney's fees for ordinary and extraordinary services is properly attacked by motion.

In re Metcalf, 227-985; 289 NW 739

General allegation of negligence—standing on motion. To preserve an objection that an allegation of negligence was too general and indefinite to constitute basis of cause of action, a defendant should stand on its motion to strike and for more specific statement. Failing in this and filing its answer, it waived any error of court in overruling motion. A cause of action should be sufficiently precise to enable the defendant to prepare his defense.

O'Meara v Green Const. Co., 225-1365; 282 NW 785

Improper rebuttal evidence. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

Improper striking in toto. A count which contains both defensive and nondefensive matter must not be stricken in toto.

Cedar Rapids Co. v Sec. Co., 208-150; 225 NW 339

Incapacity to sue—waiver. An objection to the capacity in which plaintiff sues must be interposed by defendant before he pleads to the merits.

Keeling v Priebe, 219-155; 257 NW 199

New trial — insufficient ground. Where a jury returned a verdict in favor of payee in an action on a note executed by a partnership wherein the defense of payment was pleaded and evidence was introduced to show a tender of payment by the partnership to payee, but with payee's consent the money was retained by one partner as a personal loan from payee to such partner, defendants' motion for new

III PARTICULAR MOTIONS—concluded

trial based on newly discovered evidence consisting of other admissions at different times of the same facts presented at the trial was properly overruled, as such evidence of the same kind and to the same point was merely cumulative.

Larson v Meyer, 227-512; 288 NW 663

Judgment on pleadings — motion for — permissibility. The practice of entertaining motions for judgment on the pleadings will be recognized, on appeal, not as a matter of right in movant, but as a matter of mutual agreement between litigants.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Judgment on pleadings denied. Where an unverified petition is filed in action on a written agreement, the contents of which are challenged by general and specific denials under oath, plaintiff is not entitled to judgment on pleadings, even tho genuineness of signature is not properly challenged.

Clare v Pearson, 227-928; 289 NW 737

Motion in lieu of reply. A motion to strike an answering amendment which interposes the bar of the statute of limitation is not the proper procedure under which to plead facts which avoid the bar. Reply is necessary.

Lawrence v Melvin, 202-866; 211 NW 410

Motion to correct trial record. Any correction of the trial court record should be made by a motion to correct or expunge in the lower court as provided by statute, and not in the appellate court.

Rance v Gaddis, 226-531; 284 NW 468

Motion to set aside by stranger to proceeding. The owner of land which has been levied upon and sold under execution as the property of the judgment defendant on the theory that the judgment became a lien on the land before said owner acquired the land may maintain a motion to set aside the sale on the ground that said judgment was not, and never had been, a lien on the land.

Dorsey v Bentzinger, 209-883; 226 NW 52

Motion to set aside decree. A motion to set aside a decree of divorce for fraud, in that plaintiff had not acquired a bona fide residence required by statute, is a proper procedure, but the burden of proof necessarily rests on the maker of the motion.

Girdey v Girdey, 213-1; 238 NW 432

Motion to strike defensive matter in probate —effect. A motion in probate to strike a plea in defense to a claim sought to be enforced by the executor admits the truth of all matters properly pleaded in the plea.

In re Carpenter, 210-553; 231 NW 376

Negligence—conclusion assignment—proper submission. Supported assignments of negligence are properly submitted to the jury, even tho as pleaded by plaintiff they are "the mere opinions and conclusions of plaintiff and not statements of fact," it appearing that defendant wholly failed to question the legal sufficiency of said assignments prior to filing answer—in fact so delayed until after the close of all the testimony in the case.

Engle v Ungles, 223-780; 273 NW 879

New trial. If a different result is not reasonably probable on account of newly discovered evidence, a new trial ought not be granted.

Larson v Meyer, 227-512; 288 NW 663

New trial not germane to non obstante veredicto. A motion for new trial is not germane to a motion for judgment notwithstanding the verdict and cannot be considered if made after a lapse of five days from the verdict.

In re Larimer, 225-1067; 283 NW 430

Overruling motion to strike after curative amendment. A motion to strike a pleading for a defect therein is properly overruled when the defect is cured by proper amendment before the motion is ruled on.

Cleophas v Walker, 211-122; 233 NW 257

Scope of motion. A motion to strike a pleaded cause of action from two of three existing, specified, and separate pleadings by the same party does not embrace the striking of the cause of action from the third pleading.

Matthews v Quaintance, 200-736; 205 NW 361

Striking objections in probate. A motion to strike objections to probate accounts on the grounds of misjoinder of actions is determinable only on the contents of the pleading attacked without aid of affidavits.

In re Rinard, 224-100; 275 NW 485

Subsequent errors harmless after refusal to direct verdict. Where the court should have directed a verdict for the defendant at the completion of testimony, subsequent errors on rulings or orders were not prejudicial and could not be relied on by the plaintiff as grounds for a new trial, after a verdict was rendered for the defendant.

Paulson v Hanson, 226-858; 285 NW 189

IV PARTIES

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the

dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Insurer and mortgagee not necessary parties. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

V NOTICE

Judgment—entry—unallowable modification. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Grimes Canning Corp., 218-1281; 257 NW 353

VI FILING AND ENTRY

Neglect to file bond within time ordered—effect. The nonwillful neglect to file a cost bond by the time ordered by the court will not justify a dismissal of the action when the bond is filed prior to the ruling on the motion to dismiss.

Arthaud v Griffin, 205-141; 217 NW 809

Motions — negligence — general and specific allegations—belated attack. Except in res ipsa loquitur cases a specific allegation will not waive a general allegation of negligence, which general allegation must be assailed by motion, if timely, before answer and without such motion is properly submitted to the jury if sustained by the evidence.

Gookin v Baker & Son, 224-967; 276 NW 418

Municipal court—extending time. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Municipal Ct., 225-501; 281 NW 441

Withdrawal of pleading to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

VII RESISTANCE

Motion to strike motion improper. Principle recognized that a motion to strike a motion is not proper practice.

Markworth v Bank, 212-954; 237 NW 471

VIII HEARING AND DETERMINATION

Action by teacher for compensation. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v Con. Sch. Dist., 225-1272; 282 NW 754

Answer—res judicata plea — inapplicability —stricken on motion. In an action by citizens against the town council to enjoin the operation of a municipal electric plant, the trial court is correct in striking, on motion, that portion of defendant's answer which pleads res judicata, when it appears that a former action in the United States district court for the same purpose was by a private electric company in its individual capacity to enjoin the construction of the plant and that no judgment on the merits was rendered.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Ex parte allowance of fees—attack by motion. Tho unsupported by affidavits, every material allegation in a verified motion attacking an ex parte order allowing executor's and attorney's fees for extraordinary services will, in the absence of attack thereon or resistance thereto, be taken as true.

In re Metcalf, 227-985; 289 NW 739

Joinder—city and benefited property owners. There is no misjoinder of parties or causes of action, where a city in its own behalf and in behalf of the parties beneficially interested brings an action against a contractor, combining therein both a claim for damages for defective pavement and a claim for the cost of "coring" to determine the thickness, since the basis for the latter claim was found in the contract. A motion to strike is properly overruled.

Sioux City v Krage, 225-1154; 281 NW 828

Motion to dismiss—grounds. If any of the grounds of a motion to dismiss petition for construction of a will are well-taken, it is not error to sustain such motion.

Anderson v Meier, 227-38; 287 NW 250

VIII HEARING AND DETERMINATION—concluded

Motion to strike conclusions—overruling not ground for reversal. Supreme court will not assume original jurisdiction to determine a motion to strike not ruled on in the lower court; but, even tho it were overruled, a motion to strike allegations on the ground that they were in the nature of conclusions and not statements of fact would not warrant a reversal in the supreme court.

Albright v Winey, 226-222; 284 NW 86

Ruling on motion to strike—nonreviewable fact question. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Motion sustained if any ground is good. When a motion to strike an application by an executor to have a clerk's approval of claims against an estate set aside was based on several grounds and when the granting of the motion was assailed as to only one ground, on an appeal, the supreme court was precluded from reversing the case since, if the motion was good on any of its grounds, the ruling below was correct.

In re Baker, 226-1071; 285 NW 143

Order—vacation—sanity of applicant. In an application to set aside an ex parte order in probate wherein the defendant, inter alia, pleads mental incompetency of the plaintiff, a motion by defendant to set the matter for hearing solely on the issue of plaintiff's sanity is properly overruled.

In re Brockmann, 207-707; 223 NW 473

Order overruling motion to strike. An order overruling a motion to strike a pleading is appealable when the ruling goes to the very merits of the controversy.

State v Murray, 217-1091; 252 NW 556

Reception of evidence—discretion in reopening—new trial for abuse. Granting or refusing a motion to reopen a case to admit further evidence is within the sound discretion of the court, but if a refusal to reopen is an abuse of discretion, a new trial should be granted on appeal.

In re Canterbury, 224-1080; 278 NW 210

Ruling on motion as adjudication. An order overruling plaintiff's motion (1) to strike an answer, and (2) for judgment nil dicit (assuming the propriety of such procedure) constitutes an adjudication that plaintiff has no legal right to a judgment on the pleadings as they then stand; and plaintiff has no right later to present, to another judge of the same court, a motion for judgment on the same pleadings, and said latter judge has no right to review the rulings of the former judge by sustaining said latter motion.

Taylor v Canning Corp., 218-1281; 257 NW 353

Ruling on motion as adjudication. Whether a ruling sustaining a motion to strike a pleading on the ground that it improperly joins causes of action and party defendants constitutes (in the absence of an appeal) a final adjudication in the further progress of the cause, quaere.

Ontjes v McNider, 218-1356; 256 NW 277

IX WITHDRAWAL, ABANDONMENT, OR WAIVER

Answer and motion at same time. The filing of an answer to a petition as amended, and, at the same time, a motion attacking the amendment, is unallowable. In such case the answer will stand and the motion will be deemed waived.

Bliss v Watson, 208-1199; 227 NW 108

More specific statement — error waived. Error in overruling a motion for more specific statement is waived by movant filing an answer.

Kirchner v Dorsey, 226-283; 284 NW 171

Motions—waiver by filing subsequent pleading. A motion by defendant to dismiss an application for the appointment of a receiver, and not ruled on, is waived by the subsequent filing by defendant of an answer and resistance to said application.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Motions—waiver of right to ruling. Plaintiff waives his right to a ruling on his motion to strike portions of the answer before ruling is made on defendant's motion for a directed verdict, when plaintiff at the close of the trial acquiesces in the action of the court in considering both motions at the same time.

Ankeney v Brenton, 214-357; 238 NW 71

Scope of remedy—striking allegation (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Treating unallowable motion as allowable. A litigant, by allowing a motion to be argued

and submitted to the court for determination without effort to exclude such motion from the record, waives the objection that the movant had no legal right to file said motion.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Trial—effect on unruled motion. Defendant in a criminal proceeding waives a motion filed by him by going to trial without demanding a ruling on said motion.

State v Wilson, 222-572; 269 NW 205

Waiver by filing answer. In action on note, filing of answer waived right to proceed under statute by motion to strike cause of action improperly joined.

Brown v Correll, 227-659; 288 NW 907

Withdrawing answer—substituting demurrer or motion—court's discretion. It is within the trial court's discretion to permit a litigant to withdraw his answer and substitute therefor a motion or demurrer.

In re Arduser, 226-103; 283 NW 879

11230 Several objects.

Unallowable successive motions. It is not permissible for defendant to file separate, successive motions "of the same kind" to the same unamended petition. So held where defendant first filed a motion to strike portions of a petition, and, being overruled, filed a motion for a more specific statement of said petition, it being held that said motions were "of the same kind" in that each motion had the same objective, to wit, the proper settling of the pleading for trial.

The proper and necessary procedure is to combine the subject matters of both motions into one motion.

Bookin v Utilities Co., 221-1336; 268 NW 50

11231 Proof by affidavit—cross-examination.

Affidavits. See under §11342 et seq.
Oral examination of affiants. See under §11347, Vol I

Affidavit (?) or bill of exceptions (?). Misconduct of an attorney in argument (not taken down and made of record) must be presented by bill of exceptions and not by affidavit attached to the motion for new trial.

Hornish v Overton, 206-780; 221 NW 483

Conflicting affidavits—effect. A war of conflicting affidavits between counsel as to what oral understanding was had relative to the time of filing an abstract on appeal will not necessarily be determined by the supreme court.

Farmers Bank v Miles, 206-766; 221 NW 449
Reppert v Reppert, 214-17; 241 NW 487

Matter incidental to ruling on motion not res judicata. In a libel action brought against a newspaper and others as joint tort-feasors, when affiants testified as to the matter of agency at a hearing on a motion to strike part of the petition, a ruling by the court denying the motion was not res judicata on the question of agency, as agency question was only incidental to the question of misjoinder raised by the motion to strike and could be raised in a subsequent trial on the merits of the case.

Cooper v Gazette Co., 226-737; 285 NW 147

Nonpermissible affidavits. Affidavits to the effect that a juror changed his vote from "not guilty" to "guilty" because of certain misconduct occurring during the deliberation of the jury will be given no consideration whatever.

State v Clark, 210-724; 231 NW 450

Nonpermissible affidavits. Improper argument by the county attorney cannot be shown by affidavits attached to motion for new trial.

State v Hixson, 208-1233; 227 NW 166

Optional methods of proof. The grounds for a new trial need not necessarily be established by affidavits. In proper cases such grounds may be established by the testimony of witnesses.

Skinner v Cron, 206-338; 220 NW 341

Refusal to call jurors. When jurors are present in court when a motion for a new trial comes on for hearing, it is reversible error for the court to refuse to order their personal examination as to specified misconduct which, if established, would reveal grounds for a new trial; and especially so when it appears that the jurors had refused to make their personal affidavits as to the facts.

Skinner v Cron, 206-338; 220 NW 341

Refusal to call jurors. An unsupported request by an accused in a motion for a new trial that certain trial jurors be called for examination as to alleged misconduct on the part of the jury is properly overruled, especially when no affidavit of any juror had been filed.

State v Friend, 206-615; 220 NW 59

Unallowable impeachment. In a personal injury action, a verdict may not be impeached by the affidavits of jurors to the effect that a certain allowance was made for an element of damages as to which there was no evidence.

McQuillen v Meyers, 213-1366; 241 NW 442

11232 Notice of motion.

Case reinstated after dismissal. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erroneously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

11240 "Order" defined.

ANALYSIS

I IN GENERAL
II EX PARTE ORDERS

I IN GENERAL

"Order" defined. An "order" of court, speaking broadly, is any direction of the court in a proceeding, not including the judgment or decree.

Blunk v Walker, 206-1389; 222 NW 358

Alimony—nonlienable decree for money. A decree (in divorce proceedings) which, inter alia, simply "orders" defendant to pay to the clerk for the use of plaintiff a stated sum each month, but renders against defendant no present judgment for money, but authorizes the clerk to enter such judgment for payments in default, neither becomes a lien on defendant's lands, nor authorizes the issuance of an execution.

Millisack v O'Brien, 223-752; 273 NW 875

Compromise settlement — approval — effect. An order in guardianship proceedings approving a settlement of a claim on behalf of the ward is conclusive until set aside by some direct and appropriate proceedings in the probate court.

Bennett v Ryan, 206-1263; 222 NW 16

Fraudulently obtained order. A fraudulently obtained order of court may, of course, be set aside on proper application.

In re Riordan, 216-1138; 248 NW 21

Judicial legislation. A court enters the wholly unallowable field of judicial legislation when it assumes to enter ex parte orders directing the payment of mileage to grand jurors in an amount different than the amount provided by statute.

Park v Polk County, 220-120; 261 NW 508

Municipal court—filing motions after verdict —extending time—jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Municipal Court, 225-501; 281 NW 441

Sales and conveyances—approval as interlocutory order. The approval by the probate court of a sale and conveyance of land belonging to an estate, must be deemed an interlocutory order.

In re Doherty, 222-1352; 271 NW 609

Extension of testator's limitation in reacceptance of bequest—effect of unappealed order. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

Unappealed but erroneous order dismissing party defendant. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

II EX PARTE ORDERS

Attorney fee for extraordinary services—review. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Computation of period—tolling statute of limitation—unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and

adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Decisions reviewable—misjoinder of parties. The action of the court in overruling a motion to set aside an ex parte order making movant a party to a pending action is appealable, the motion being based on the ground of misjoinder of parties.

Irwin v Bank, 218-961; 256 NW 681

Executor's and attorney's fees — ex parte allowance. While an estate is being administered, an ex parte order allowing executor's and attorney's fees for ordinary and extraordinary services is properly attacked by motion.

In re Metcalf, 227-985; 289 NW 739

Improper vacation of order. An order approving the final report of an executor and discharging him, on due notice to all parties interested, cannot be later set aside on the ex parte application of the former executor.

In re Brockmann, 207-707; 223 NW 473

Intermediate accounts. Mistakes in ex parte orders, made during settlement of an estate, are subject to correction at any time before final settlement of the estate.

In re Metcalf, 227-985; 289 NW 739

Misjoinder of parties. The action of the court in overruling a motion to set aside an ex parte order making movant a party to a pending action is appealable, the motion being based on the ground of misjoinder of parties.

Irwin v Bank & Trust, 218-961; 256 NW 681

Power of judge at chambers. An ex parte order of a judge at chambers to the effect that a party to an action may, on the trial, use a transcript of the testimony taken in another and former action is a nullity.

Kostlan v Mowery, 208-623; 226 NW 32

11244 Filed and entered.

Irregularities — effect. The validity of a settlement of a claim on behalf of a ward is not affected by the fact that the settlement was signed shortly before the guardian was actually appointed, or that there was some delay in filing the order of court approving the settlement.

Bennett v Ryan, 206-1263; 222 NW 16

CHAPTER 493

SECURITY FOR COSTS

11245 Bond for costs.

Affidavit for cost bond. The statutory affidavit supporting a motion for cost bond may be made and filed by a defendant corporation's attorney, and a corporation need not personally make and file such affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

Cost bond affidavit by attorney—presumption of knowledge. A corporation defendant's attorney making statutory affidavit in support of motion for cost bond will be presumed to have had sufficient knowledge of facts to enable him to make such affidavit and such knowledge need not be alleged.

Schultz v Ins. Co., 225-1024; 282 NW 776

Cost bond affidavit not a pleading. The statutory affidavit in support of a motion for cost bond is not a pleading.

Schultz v Ins. Co., 225-1024; 282 NW 776

Security for payment—cost bond application before answer. Court erred in overruling a motion for cost bond and holding that defendant's application therefor was not filed in time, because filed after time for defendant's appearance when evidence showed that plaintiff's attorney, through correspondence, gave defendant's attorney more time, and where it was filed long prior to filing of any answer in cause, there being no order of court therein requiring such motion for cost bond to be filed within certain time.

Schultz v Ins. Co., 225-1024; 282 NW 776

11248 Dismissal for failure to furnish.

Neglect to file within time ordered—effect. The nonwilful neglect to file a cost bond by the time ordered by the court will not justify a dismissal of the action when the bond is filed prior to the ruling on the motion to dismiss.

Arthaud v Griffin, 205-141; 217 NW 809

CHAPTER 494

EVIDENCE

GENERAL PRINCIPLES

11254 Witnesses—who competent.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

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I WITNESSES

(a) IN GENERAL

Examination by court. An impartial examination of a witness by the court is proper.

State v Weber, 204-137; 214 NW 531

Examination—leading questions condemned. Record reviewed, and held that, in the examination of certain witnesses, leading questions were not permissible.

Wildeboer v Peterson, 201-1202; 203 NW 284

Definition of "hearing". A "hearing" is the trial of an issue, including the introduction of evidence, the arguments, the consideration by the court, and the final decree and order.

Equitable v McNamara, 224-859; 278 NW 910

Unallowable self-corroboration. A party may not corroborate the testimony of his own witness by having the witness testify that he has told the same story on other occasions.

Wertz v Hale, 206-1018; 221 NW 504

Identity of voice in telephone conversation. Identity of one speaking through a telephone may be by sound of voice or by sound of voice aided by a showing of fact that the speaker in

question was perfectly familiar with the particular subject matter of the conversation.

Hanna v Central Co., 210-864; 232 NW 421

Conclusiveness on party introducing. Plaintiff who, in his own behalf, calls the defendant as a witness, is bound by the latter's apparently frank, unequivocal and undisputed testimony.

May v Hall, 221-609; 266 NW 297

Malpractice—expert and nonexpert testimony—competency. Ordinarily the question of whether a doctor or dentist exercised the requisite care or skill in any case cannot be determined by the testimony of laymen or nonexperts, nor be left to the judgment of a jury or court, unaided by expert testimony, and only those learned or experienced in the profession may testify as to what should or should not have been done. But there are exceptions to this rule depending wholly on the fact situation, and no ironclad rule can be laid down as to when the doctrine shall be applied.

Whetstine v Moravec, 228- ; 291 NW 425

Credibility—adverse interest and impeaching circumstances. Self-evident principle applied that the most positive assertion of fact by a witness may be wholly overcome by the adverse interest of the witness, and by impeaching circumstances and sidelights. So held as to testimony relative to the signing and acknowledgment of a mortgage.

Hagensick v Koch, 220-1055; 264 NW 13

Estoppel of witness to change testimony. A clerk of the district court who testifies, in an action to which he is not a party, that he has "in his hands" the amount of a tender deposited with him, will not, in a later action against him by one of said litigants who relied on said testimony and thereby materially altered his position, be permitted to show that at the time of so testifying he did not have said money "in his hands" because he had already lost it by failure of the bank in which it was deposited.

Andresen v Andresen, 219-434; 258 NW 107

Evidence—voluntary inculpatory statements. Police officer need not warn a person in custody that incriminating statements may be used against him, for, if voluntarily made, they are admissible in evidence without warning.

State v Beltz, 225-155; 279 NW 386

Proof of felony conviction not an impeachment. Proof that witness has been convicted of felony does not of itself impeach him, discredit his testimony, nor make him wholly unworthy of belief. Such proof goes only to the weight to be given his testimony by the jury.

State v Wehde, 226-47; 283 NW 104

Conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony and since the weight to be given such testimony is for the jury, when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

Impeachment—effect—duty of jury. A witness at the outset is presumed to be telling the truth and it does not follow that, because there is evidence tending to impeach him, that he has thereby been successfully impeached, or that he has been successfully impeached because he has been attacked. If the jury is of the opinion that he has been successfully impeached, it should disregard his testimony unless some material part of it has been corroborated.

State v Wehde, 226-47; 283 NW 104

Stolen bonds—good-faith purchase—seller's bad character — materiality. On the issue whether stolen United States liberty bonds had been purchased by a bank in good faith, evidence that the person from whom the bank bought the bonds was a notorious underworld character is inadmissible, it appearing that he was a regular depositor of the bank, and had had prior bond deals with the purchasing bank.

State Bank v Bank, 223-596; 273 NW 160

(b) CHILDREN

Child a proper corroborating witness. Age alone of a ten-year-old corroborating witness will not vitiate her testimony, since credibility and weight are matters for the jury.

State v Beltz, 225-155; 279 NW 386

Seven-year-old boy—competency established. A seven-year-old boy is a competent witness in a criminal trial when it is shown that the court examined him and was satisfied that he knew what an oath was, and understood that he was to tell the truth.

State v Hall, 225-1316; 283 NW 414

Leading questions—discretion of court. The propriety of leading questions to immature witnesses must be left, in a large degree, to the discretion of the trial court.

State v Wheelock, 218-178; 254 NW 313

Failure to object to eight-year-old witness. In prosecution for statutory rape where it is shown on preliminary examination of eight-year-old witness that she knew what "telling the truth" meant and knew what a lie was, that it was wrong to tell a lie, and that punishment was the penalty for not telling the truth, it was not error to permit such witness to testify, especially where no objection was made to witness' competency until the conclusion of her testimony, altho she did not understand the meaning of the word "oath", nor definition of word "witness".

State v Diggins, 227-632; 288 NW 640

I WITNESSES—continued
(b) CHILDREN—concluded

Eight-year-old witness—credibility of testimony. In a prosecution for statutory rape where an eight-year-old witness testified on direct examination in a clear, frank, direct, and intelligent manner as to what she had seen or heard on the occasion in controversy, a motion to strike such testimony was properly overruled, as the question of the credit and weight to be given her testimony was clearly for the jury. The testimony of a witness must be construed in its entirety.

State v Diggins, 227-632; 288 NW 640

Statutory corroboration—trial court to determine. In a prosecution for statutory rape it is essential that the testimony of a prosecuting witness be corroborated by other testimony tending to connect the defendant with the commission of the crime, but it is not necessary that all of the material evidence of the prosecuting witness be corroborated. The question of whether there was statutory corroboration is a question for the trial court, and there was sufficient evidence of corroboration by an eight-year-old witness as to what she saw and heard to warrant the submission of the question of corroboration to the jury.

State v Diggins, 227-632; 288 NW 640

(c) COMPETENCY OR INCOMPETENCY IN GENERAL

Discussion. See 24 ILR 482—Competency

Opinion evidence—allowable conclusion. A nonexpert witness may, on proper foundation, be permitted to testify that an injured person was unable to perform labor for a named time after he was injured.

Looney v Parker, 210-85; 230 NW 570

Insanity—nonexpert witness. A nonexpert witness who has never seen an accused in a homicide case prior to the transaction which resulted in the homicide may not express an opinion as to the then insanity of the accused.

State v Maharras, 208-127; 224 NW 537

Distance in which train could be stopped—opinion. A witness, tho a farmer at the time of trial, is competent to testify concerning the distance in which a certain train could be stopped, when it appears that the witness had formerly been engaged for many years in railroad work on freight and passenger trains as brakeman and conductor; that he was acquainted with the ordinary train-control equipment of such trains; and that long observation had enabled him to know the time required for stopping trains under varying conditions.

Williams v Ry. Co., 205-446; 214 NW 692

Value in condemnation proceedings. A landowner who knows the value of land sought to be condemned for an electric power line is competent to testify to the amount of damages caused to the tract by such condemnation even tho he does not qualify as an electrical expert.

Evans v Utilities Co., 205-283; 218 NW 66

Opinion evidence—value of land. A witness is not competent to testify to the value of land when he has never been on the land and lives a material distance therefrom; neither is a witness competent who has never been on the land but once, lives at a great distance, and has manifestly superficial knowledge of the land.

Vanarsdol v Farlow, 200-495; 203 NW 794

Nonmarital communications. A divorced wife is a competent witness to testify to a communication between her former husband and a third person, prior to the divorce.

Stutzman v Bank, 205-379; 218 NW 39

Report of motor vehicle accident—remarks overheard—privileged communication. Evidence of witness who overheard statement of defendant in reporting accident, the witness being neither a peace officer nor an official, was properly excluded under statute requiring such report to be made and further providing that the report shall be confidential and not used as evidence in any trial, civil or criminal, arising out of the accident.

McBride v Stewart, 227-1273; 290 NW 700

Agent of interested party. In an action by the beneficiary in a life insurance policy to recover thereon, an agent of the insurer who negotiated the policy is a competent witness to testify that the insured did not make payment to him of the premiums due on the policy.

Range v Ins. Co., 216-410; 249 NW 268

Spouse as witness against self. In an action against a husband and wife for the reformation of a mortgage so as to include therein the entire homestead of the parties, the wife is a competent witness to testify against herself and her estate, as distinguished from that of the husband; and the same rule necessarily applies to the husband.

Rankin v Taylor, 204-384; 214 NW 725

Market value. A witness who is familiar with the market reports of an article is prima facie competent to testify to the value of such article.

State v Gill, 202-242; 210 NW 120

Customer injured in store — evidence of store's custom. Where damages are sought for injuries alleged to have been sustained when plaintiff fell down a stairway in defendant's store, and when plaintiff offered a witness to show defendant's custom of giving away boxes and that the removal of boxes by plaintiff was a benefit to defendant, the trial court did not err in excluding this evidence for that purpose when it appears that plaintiff's witness was not employed at defendant's store at

the time of the accident, and there is no showing of his competency to testify to the existence of any custom at or before the time of the accident, as no foundation was laid for the purpose of said evidence.

Lotz v United Food Markets, 225-1397; 283 NW 99

Incompetency of witness—excessive motion to strike. A motion to strike the entire testimony of a bank examiner as to the value of the assets of a bank alleged to be insolvent should not be sustained simply because it appears that, as to some of many particular assets, he was not competent to express an opinion.

State v Niehaus, 209-533; 228 NW 308

(d) PHYSICAL OR MENTAL DEFECTS

Mental competency determined by court. It is the duty of the court, on proper hearing, to determine whether a proffered witness is mentally competent to testify as such.

State v Patrick, 201-368; 207 NW 393

Evidence of subnormal mentality. The court is not in error in refusing to receive specific evidence of facts tending to show that a witness of the age of 12 years is of subnormal mentality—as bearing on the credibility of the witness—when such testimony is offered after said witness had been sworn and had testified without question having been raised as to the capacity of the witness to understand the obligation of an oath.

State v Teager, 222-392; 269 NW 348

(e) ATTORNEY AS WITNESS

Attorney as counsel and witness in same case. While the court views with emphatic disfavor the act of an attorney in assuming the dual attitude of both counsel and witness in the same case, yet such conduct does not go to the competency of the attorney as a witness, but to the weight and credibility of his testimony, which latter fact may be very properly presented to the jury by appropriate instruction.

Cuvelier v Dumont, 221-1016; 266 NW 517

Competency of attorney to testify. An attorney in a cause is not per se incompetent to testify in his client's behalf.

Kellar v Lindley, 203-57; 212 NW 360

Action for services of attorney in effecting settlement. An attorney in an action against a client on a contract of employment may testify to the acts and things done by him in effecting an agreement of settlement of the claim in question.

Coughlon v Pedelty, 211-138; 233 NW 63

Examination by court—error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

(f) CROSS-EXAMINATION

Discussion. See 24 ILR 564—Cross-examination —scope

Permissible scope — court discretion. The permissible range of cross-examination of witnesses in general rests in the sound discretion of the trial court.

State v Kendall, 200-483; 203 NW 806

Court's discretion. In cross-examination for the purpose of showing partiality and interest of witness, a large discretion rests with trial court.

Higgins v Haagensen, (NOR); 220 NW 38

Discretion of court. Principle reaffirmed that the court has wide discretion as to the scope of a cross-examination.

Olson v Shuler, 208-70; 221 NW 941
Laudner v James, 221-863; 266 NW 15

Abuse—discretion of court. The discretionary power of the trial court over cross-examinations will not be interfered with by the appellate court except in cases of clear abuse.

Rawleigh Co. v Bane, 218-154; 254 NW 18

Cross-examination—unallowable scope. Reversible error results in permitting a cross-examination to develop testimony which is highly prejudicial to the party calling the witness, and which has no relation to the testimony developed on the direct examination. So held where a direct examination was strictly confined to that which the witness observed at the time and place of an accident, while the cross-examination developed the fact that the witness declared at the time of the accident that the defendant was not to blame for the accident.

McNeely v Conlon, 216-796; 248 NW 17

Improper question—effect. The mere asking, on cross-examination of a defendant, of a wholly improper question does not necessarily result in reversible error.

State v Umphalbaugh, 209-561; 228 NW 266

Unallowable cross-examination. Cross-examination on matters which are not germane to anything testified to on direct and not bearing on any contested issue, is properly refused.

Cory v State, 214-222; 242 NW 100

I WITNESSES—continued
(f) CROSS-EXAMINATION—continued

Fatal undue limitation. Undue limitation on the cross-examination of a witness may constitute reversible error. So held where the examining party offered to prove, on cross-examination, material matter which went to the heart of the controversy.

West Branch Bank v Farmers Exc., 221-1382; 268 NW 155

Right to full cross-examination as to inconsistent statements. A witness may always be fully cross-examined as to signed statements of fact made outside the court which are inconsistent with his statements in court.

Stickling v Railway, 212-149; 232 NW 677

Nonresponsive answers — motion to strike. Error results in overruling a motion to strike, on cross-examination, an answer insofar as it constituted an opinion, conclusion, and voluntary statement, of the witness.

Miller v Fire Assn., 219-689; 259 NW 572

Expert—opinion evidence. An expert witness who, on a hypothetical question, states that in his opinion a defendant is of unsound mind, and is suffering from a form of senile dementia, may, on cross-examination, be asked, in effect, whether he would be of the same opinion if the defendant was able to accurately explain involved financial transactions—reflected in the testimony and detailed to the expert.

Richardson v Richardson, 217-127; 250 NW 897

Whole of writing—admissibility. A surety who denies in toto the execution, delivery, and consideration of the promissory note in question, but sees fit to cross-examine his co-defendant-principal with reference to a letter written by the principal to the payee with reference to said denied matter, may not complain of the reception in evidence of said letter as a part of his own cross-examination.

Granner v Byam, 218-535; 255 NW 653

Cross-examination as to writing may necessitate reception of writing itself. When a cross-examination is designed to show that a witness had asked plaintiff to sign an untruthful statement of fact, the party calling the witness must be permitted to show by a duplicate original, tho unsigned, just what plaintiff was asked to sign.

Stickling v Railway, 212-149; 232 NW 677

Credibility and impeachment—bias of witness. A witness on his cross-examination may be interrogated as to his state of mind or bias against the party against whom he testifies, for instance, that the witness and said other party are involved in hostile litigation.

Bond v Lotz, 214-683; 243 NW 586

Examination by several counsel. The act of the court in permitting more than one counsel to cross-examine witnesses does not necessarily constitute error, especially when there are several defendants in the case.

Williamson v Craig, 204-555; 215 NW 664

Ignoring statute. The concededly wide discretion of the court in controlling cross-examination does not embrace the right to ignore a statute governing such examination. So held where the court allowed the reception of only part of a conversation.

Bond v Lotz, 214-683; 243 NW 586

Eminent domain—need for fence—issue already settled. In a condemnation action, denial of cross-examination of landowner by condemnor as to necessity of fencing held not reversible error when plat of property already in evidence settled question.

Moran v Highway Com., 223-937; 274 NW 59

Arbitrary right to shape form of question. An examiner in the cross-examination of an expert has the right, as a general rule, to shape his question as he pleases. So held where the witness had testified as to the value of a farm before and after condemnation, and where the examiner chose to ask the witness as to the value of separate tracts without directing the witness, in effect, to exclude all benefits consequent on the condemnation.

Dean v State, 211-143; 233 NW 36

Sworn assessment roll competent for impeaching purposes. The defendant in eminent domain proceedings has the right, on the cross-examination of the plaintiff, and for the purpose of contradicting and impeaching him, to show the sworn statement made by the plaintiff to the assessor as to the value of the farm in question and as to the number and value of the livestock kept on said farm.

Welton v Highway Com., 211-625; 233 NW 876

Eminent domain — assessment as commissioner's personal judgment. In a condemnation action, permitting landowner to cross-examine a condemnation commissioner regarding the sworn assessment of damages as expressing his personal judgment held not error. (Distinguishing Winkelmans v Des Moines N. W. Ry. Co., 62 Iowa 11.)

Moran v Highway Com., 223-937; 274 NW 59

Accessibility of farm to market. The defendant in eminent domain proceedings has the legal right, on the cross-examination of plaintiff's witnesses as to value, to show the distance of plaintiff's farm from the market and the kind of roads leading to such market.

Welton v Highway Com., 211-625; 233 NW 876

Medical works — examination concerning. Prejudicial error results from permitting a physician, defendant in an action for malpractice, to be cross-examined as to the contents and teaching of scientific works on medicine, when the witness has not testified, directly or indirectly, as to such works.

Wilcox v Crumpton, 219-389; 258 NW 704

Harmless error—striking testimony. A party who seeks on cross-examination to secure from the witness an admission of facts derogatory to the credibility of the witness, and is met by a positive denial, may not be deemed prejudiced by the striking out of such denials, tho the cross-examination was proper.

Glass v Ice Cream Co., 214-825; 243 NW 352

Harmless error — curtailed cross-examination. Conceding that a cross-examination was unduly curtailed, yet no error results when the complaining party offered the witness as his own witness, and brought out the testimony excluded on cross-examination.

Goben v Des Moines Co., 218-829; 252 NW 262

Character and conduct of witness—particular acts or facts. Offer on cross-examination to prove certain reprehensible acts and conduct on the part of the witness reviewed, and held properly rejected.

Wilson v Fortune, 209-810; 229 NW 190

Permissible redirect. When counsel on cross-examination enters an experimental field of inquiry foreign to the essential issues of the case, he may not complain if opposing counsel exercises his right on redirect to make an exploration into the same field of inquiry with disastrous results to the first offender.

Azeltine v Lutterman, 218-675; 254 NW 854

Credibility and impeachment — conclusiveness. A party who, on cross-examination, seeks to secure from the witness an admission that he was not sober at the time of an occurrence and that he had been drinking shortly prior thereto, and is met by a positive denial, is absolutely bound by such testimony, it appearing that the pleadings presented no issue as to whether the witness was sober.

Glass v Ice Cream Co., 214-825; 243 NW 352

Paternity — incompetent evidence. On an issue as to the paternity of a child, testimony by the family pastor that at the time the child was baptized prosecutrix charged another person with the paternity of said child does not justify, on cross-examination, testimony as to what said accused party said and did, and what talk the pastor had with members of the family, relative to said charge.

Moen v Fry, 215-344; 245 NW 297

Evidence—collateral issue. The right to pursue a collateral issue developed on cross-examination is in distinct disfavor in our law, especially when the evidence in support thereof is ambiguous, remote from all proper issues, and otherwise incompetent.

Moen v Fry, 215-344; 245 NW 297

Nonexplanatory questions — nonapplicability of rule. The rule that the exclusion of questions which in no manner indicate the prospective answer is presumptively without prejudice has little, if any, application to the cross-examination of a witness.

Schulte v Ideal Co., 203-676; 213 NW 431

Admission of entire conversation as evidence. When part of a conversation relative to the execution of a guaranty is drawn from a witness, the entire conversation may be brought out on cross-examination.

Boyd v Miller, 210-829; 230 NW 851

Evidence offered covered by other testimony. Where an offer of evidence was made during cross-examination, and was covered by other testimony, there was no prejudice in sustaining an objection to the offer.

Maddy v City Council, 226-941; 285 NW 208

Limiting to matter covered in direct examination. Cross-examination was properly limited to matters brought out on direct examination in an automobile accident case in which the witness was a defendant taxicab driver with whom the plaintiff was riding, when such witness might be regarded as hostile to the plaintiff's cause.

Womochil v Peters, 226-924; 285 NW 151

No opportunity to cross-examine. When a recess was taken after the cross-examination of a witness for the defendants had begun, and through no fault of the defendants the witness did not re-appear for further cross-examination, his testimony was properly stricken on the ground that the plaintiff had been denied the right of full cross-examination.

Womochil v Peters, 226-924; 285 NW 151

Permissible cross-examination. In quiet title action brought by the husband of the former owner of land who had continued in possession after her mother had obtained the tax deed under an agreement with the daughter, it was proper to cross-examine the plaintiff as to whether he recalled the time the mother-in-law gave him certain bonds, because of the inference which might be drawn from such testimony as to the purpose for which the mother-in-law acquired the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

(g) DIRECT EXAMINATION

Children—leading questions. The propriety of leading questions to immature witnesses

I WITNESSES—concluded

(g) DIRECT EXAMINATION—concluded

must be left, in a large degree, to the discretion of the trial court.

State v Wheelock, 218-178; 254 NW 313

Leading questions—when permissible. Leading questions on direct examination are permissible, within the range of fair discretion.

State v Costello, 200-313; 202 NW 212

Leading questions condemned. Record reviewed and held that, in the examination of certain witnesses, leading questions were not permissible.

Wildeboer v Peterson, 201-1202; 203 NW 284

Nonleading question—calling attention to topic. Where a question is framed so as only to call the witness' attention to the topic, it is not leading.

State v Hartwick, 228- ; 290 NW 523

Nonresponsiveness of answer—right to object. The party examining a witness has, ordinarily, the sole right to object to answers on the ground that they are not responsive to the question asked.

State v Murray, 222-925; 270 NW 355

Examination by court—error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Admission in chief of evidence excluded on cross-examination. In prosecution for bootlegging, the fact that evidence as to officers' search of defendant's car for liquor was excluded on defendant's cross-examination did not require its exclusion when offered in chief by state's witness.

State v Chase, (NOR); 221 NW 796

Expert—medical works—unallowable reception. Error results from permitting a party on the direct examination of his own expert witness to read extracts from a medical work, and then to ask the witness if he agrees with the statement so read.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Redirect examination—corroboration by testimony at former trial. After a party to an action has been cross-examined with regard to his testimony on a former trial for the purpose of laying the foundation for proving contradictory statements, it is wholly unallowable for counsel on redirect examination to read copious excerpts from the transcript of the witness' former testimony and have the witness say that he did so testify.

State v Cordaro, 214-1070; 241 NW 448

Sales—action to recover price paid—evidence—unallowable conclusion and assumption. A buyer of goods who is seeking to recover back from the seller the price paid because the goods were not in accordance with the contract and who has testified on cross-examination that he rejected the goods because his buyer refused to take the goods, may not show on redirect that his buyer refused the goods because the goods "were not up to the grade purchased".

Appel v Carr, 216-64; 246 NW 608

Extension of time for new trial motion—canvass of jury as to misconduct of court. An extension of time for filing a motion for new trial to enable counsel to canvass the jury and learn the prejudicial effect of remarks made by the court during the trial was properly refused when there was attached to the motion an affidavit by a juror that the remarks of the court had led the jury to disbelieve a witness, the affidavit not supporting its conclusion, and when no exceptions were taken to the remarks by the court.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

II EVIDENCE GENERALLY

(a) ADMISSIBILITY GENERALLY

Discussion. See 13 ILR 458—Rules—administrative tribunals

1 In General

Discussion. See 24 ILR 411—Introduction of evidence—symposium; 24 ILR 464—Before administrative bodies

Immaterial and irrelevant matters properly excluded. Immaterial and irrelevant matters are properly excluded in the trial of a cause.

Weinhart v Smith, 211-242; 233 NW 26

Intent—materiality. A person may testify to his intent when such intent is material to the issues involved.

In re Talbott, 209-1; 224 NW 550

Evidence similar to that of adverse party. The court having permitted one party to an action to support his case by a particular line of testimony, must, manifestly, permit the other party to introduce opposing testimony along the same line. So held as to testimony as to the market value of second-hand goods destroyed by fire.

Maasdam v Ins. Assn., 222-162; 268 NW 491

Quantum meruit—former contract. On the issue of the quantum meruit of services, a

former similar written contract may be relevant, material, and competent.

Olson v Shuler, 208-70; 221 NW 941

Relevancy, materiality, and competency—similar facts and transactions. On the issue whether the proximate cause of the death of hogs was a so-called hog remedy fed to them, evidence is inadmissible that other hog raisers fed the remedy to hogs which in part died, unless there is proof of substantial similarity of all the conditions that might enter into or affect the result.

Crouch v Remedy Co., 205-51; 217 NW 557

Reason for not looking for danger. The reason why a pedestrian while crossing a street did not look in the direction of an oncoming vehicle which injured him is relevant and material, and the injured party may testify as to such reason.

Orr v Hart, 219-408; 258 NW 84

Letter—admissible tho of slight materiality. Letter reviewed, and held admissible as furnishing a possible basis for impeaching party's testimony.

Redfern v Redfern, 212-454; 236 NW 399

Wholesomeness of product. On plaintiff's trial theory that a product purchased of defendant was unwholesome and injurious, defendant may, of course, counter with evidence tending to show the wholesomeness and non-injurious character of the said product.

Tracy v Oil Co., 208-882; 226 NW 178

Answers to interrogatories — use for other purposes. Answers to interrogatories which are offered in evidence for a particular purpose by the party requiring them are in evidence for other purposes.

Hart v Ins. Assn., 208-1020; 226 NW 777

Part of telephone message. A witness, in corroboration of testimony as to a conversation over the telephone, may be permitted to detail that part of the talk heard by him, even though he did not know the identity of the other party to the conversation.

Kruidenier Estate v Trust Co., 203-776; 209 NW 452

Matters of speculation. Transactions which account for a fact by a process of so-called reasoning which is purely speculative are wholly inadmissible.

Wildeboer v Peterson, 201-1202; 203 NW 284

Conversations in the presence of prosecutrix. In a civil prosecution for forcible defilement, statements may become material when made in the presence of the injured female, and long after the commission of the alleged offense, and by a member of her family who was instrumental in later initiating the prosecution, to the effect that the accused was a good man, and that a person other than the accused was responsible for the woman's condition.

Wildeboer v Peterson, 201-1202; 203 NW 284

Conduct of third party as bearing on motive. The long delayed institution of a prosecution for forcible defilement, and then its institution by a member of the family of the alleged injured female, coupled with the very serious discrediting of the testimony of the latter, may render the animus and state of mind of such member of the family justifiably material, and require the reception in evidence of threats, in the presence of the alleged injured woman, by said member "to get even" with the accused for other claimed wrongs.

Wildeboer v Peterson, 201-1202; 203 NW 284

Corroborative testimony. On the issue whether a bank in renewing a promissory note demanded additional security, evidence that the value of the security then held by the bank was ample security for the note is competently corroborative of evidence that no additional security was demanded.

Persia Bank v Wilson, 214-993; 243 NW 581

Value—market price of property. The price paid for property is not conclusive as to its value, but is admissible as evidence thereof.

State v Beaton, 209-1291; 228 NW 111

Whereabouts of insured—result of inquiries. On the issue whether due and proper inquiries as to the whereabouts of an insured person had been made, a person may testify as to the inquiries made by him and as to the results of such inquiries.

Rodskier v Ins. Co., 216-121; 248 NW 295

Relevancy and materiality—implied contract. Evidence relevant and material to the issue of an implied contract is necessarily admissible.

Valentine v Morgan, 207-232; 222 NW 412

Fictitious person—hiring post office box. On the issue whether different names on notes, mortgages, deposit accounts, and checks were fictitious, evidence of the hiring of a post office box under such alleged name, and of the manner in which mail coming thereto was handled, is admissible, in connection with other evidence connected therewith and tending to show the fictitious character of said alleged parties and who the real actor was.

Kruidenier Estate v Trust Co., 203-776; 209 NW 452

Admissibility controlled by issues. Issues control the relevancy, materiality and competency of evidence. Principle applied where it is held that evidence of the value of services is not admissible on the narrow issue whether an oral contract for services for $500 had been entered into.

McManus v Kucharo, 219-865; 259 NW 926

II EVIDENCE GENERALLY—continued
(a) ADMISSIBILITY GENERALLY—continued
1. In General—continued

Residence and occupation—harmless error in admitting. Evidence as to the residence and occupation of a defendant may be quite immaterial, yet quiet nonprejudicial.

State v Salisbury, 209-139; 227 NW 589

Admissibility of deposition—action between different parties. In an equitable action by an administrator to enforce the dower rights of the deceased, the deposition of the deceased taken in another action between other and different parties is entitled to no consideration on an issue on which the administrator has the burden of proof.

In re Mann, 201-878; 208 NW 310

Conflicting and unfair rulings. Reversible error results from (1) receiving incompetent testimony over plaintiff's objection, (2) striking such testimony at the close of defendant's testimony, and (3) reinstating such testimony, without warning to the plaintiff, after plaintiff had dismissed his witnesses and made his opening argument.

Braverman v Naso, 203-1297; 214 NW 574

Inadmissible experiments. Evidence as to experiments is inadmissible when performed under unstated conditions, or under conditions materially different from those attending the particular fact in issue.

State v Kneeskern, 203-929; 210 NW 465

Similar facts and transactions—fraud. A party alleged to have been defrauded may show, on the issue of fraudulent representations inducing the execution of a promissory note, that the defendant made like representations to other parties at about the time in question.

Larson v Bank, 202-333; 208 NW 726

Forgery of note. On the issue of forgery of a promissory note, evidence that other people dealing with the bank through which the note was issued had made no claim of forgeries is manifestly irrelevant.

Schram v Johnson, 208-222; 225 NW 369

Fictitious person—postmaster's and county auditor's testimony. On the issue whether the drawee of a check and the maker of a note and mortgage on real estate was a fictitious and nonexistent person, evidence of the postmaster at the place in question that he knew of no such person is admissible; also, that of the county auditor and of the treasurer that no such person was a taxpayer in their county; and that of the county recorder that the records of his office showed that the land in question belonged to parties other than such alleged person.

Kruidenier Estate v Trust Co., 203-776; 209 NW 452

Contract in re rule of evidence. It is not against public policy for parties to contract that in an action on the contract a specified nonstatutory rule of evidence shall not apply.

Lunt v Grand Lodge, 209-1138; 229 NW 323

Negligence and proximate cause—burden of proof. Both negligence and proximate cause are questions of fact for the jury if the evidence is of sufficient weight and character to warrant their submission, and plaintiff has burden to establish them by a preponderance of the evidence, whether the evidence be direct or circumstantial.

Whetstine v Moravec, 228- ; 291 NW 425

Gift—burden of proof. The burden to establish a gift causa mortis rests on the donee claiming thereunder. Evidence reviewed, and held that said burden had been successfully met.

Flint v Varney, 220-1241; 264 NW 277

General denial—evidence of gift admitted. Evidence to establish a gift is admissible under a general denial.

Wilson v Findley, 223-1281; 275 NW 47

Indemnity contract—immateriality of other transaction. On the issue whether defendant had contracted to indemnify plaintiff against liability as surety on an appeal bond in a criminal case, and whether defendant had received funds from the accused with which to perform such indemnity contract, evidence is wholly inadmissible that defendant had received funds from the father or brother of the accused for a purpose wholly foreign to said indemnity contract.

State v Cordaro, 211-224; 233 NW 51

Evidence beyond issues. Evidence beyond the issues in a case is properly excluded.

West Chester Bank v Dayton, 217-64; 250 NW 695

Unpleaded defense—nonadmissibility. Evidence is inadmissible on an unpleaded defense.

Federal Corp. v Western Co., 219-271; 257 NW 785

Relevancy between evidence and issue. There must be some logical relationship between a fact offered in evidence and the fact sought to be proved, before the offered evidence can be deemed relevant.

West Chester Bank v Dayton, 217-64; 250 NW 695

Sagging wires on highway after storm—knowledge. In a case where a woman is burned by contacting a high tension electric line, sagging over a highway after a storm, and who testifies she had no knowledge it was there, newly discovered evidence to show that she was seen stepping over the broken poles prior to the accident, is not cumulative but

tends directly to establish a material fact affecting the result of the case on retrial.

Wilbur v Iowa P. & L. Co., 223-1349; 275 NW 43

Customer injured in store — evidence of store's custom. Where damages are sought for injuries alleged to have been sustained when plaintiff fell down a stairway in defendant's store, and when plaintiff offered a witness to show defendant's custom of giving away boxes and that the removal of boxes by plaintiff was a benefit to defendant, the trial court did not err in excluding this evidence for that purpose when it appears that plaintiff's witness was not employed at defendant's store at the time of the accident, and there is no showing of his competency to testify to the existence of any custom at or before the time of the accident, as no foundation was laid for the purpose of said evidence.

Lotz v United Food Markets, 225-1397; 283 NW 99

Res ipsa loquitur as rule of evidence. The doctrine of res ipsa loquitur is a rule of evidence not applicable where specific allegations of negligence are pleaded but only where general allegations of negligence are wholly relied upon.

Olson v Cushman, 224-974; 276 NW 777

Leading questions—court's own objection. Perhaps trial court should refrain from objecting on his own motion to leading questions, but no prejudice resulted where court's views as to weight of evidence were not disclosed and trial court must be allowed some latitude in supervising trials.

State v Carlson, 224-1262; 276 NW 770

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

Accidents at crossings—obstructions. On the issue whether the view of a railway track was so obstructed at the time of an accident that an approaching train could not be seen, testimony by an eyewitness is manifestly admissible to the effect that he immediately stationed himself at the point of accident and could plainly see the entire track over which a train would approach.

Langham v Railway, 201-897; 208 NW 356

Materiality — adding suspicions. Rejecting evidence which simply adds suspicions held not prejudicial.

McGrath v Dougherty, 224-216; 275 NW 466

Administrator supporting sister's claim — not fraud. Testimony by an administrator in support of a sister's claim against estate does not amount to fraud.

In re Sterner's Estate, 224-605; 277 NW 366

Threat of injury. In an action by a wife for damages for the alienation of the affections of her husband, an information filed by the plaintiff, charging the defendants with having threatened to injure her, is wholly irrelevant and incompetent.

Paup v Paup, 208-215; 225 NW 251

Unallowable conclusions. The mere conclusions of a plaintiff in an action for damages for alienating the affections of her husband as to what the defendants had done in procuring the enlistment of the husband in the army and thereby effecting a separation of plaintiff and her husband, are wholly unallowable.

Paup v Paup, 208-215; 225 NW 251

Alienation — judgment for temporary alimony. In an action for damages consequent on defendant's acts in alienating the affections of plaintiff's husband, evidence that plaintiff obtained a judgment for temporary alimony and for attorney fees in an action by her husband for divorce and that the judgment was never paid is wholly irrelevant to the issue of relationship existing between plaintiff and defendant.

Case v Case, 212-1213; 238 NW 85

Agency of husband — custom as evidence. Testimony tending to show a custom by a husband to sign the name of his wife to promissory notes, with her express or implied knowledge and approval, extending continuously through many years prior to the transaction in question, is admissible on the issue whether the husband had such authority from the wife.

State Bk. v Fairholm, 201-1094; 206 NW 143

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Federal Bank v Trust Co., 228- ; 290 NW 512

Evidence determining section line—first challenged on appeal. Evidence in the record without objection by which a fence on the section line is definitely determined as the boundary of a highway cannot be objected to for the first time on appeal.

Davelaar v Marion Co., 224-669; 277 NW 744

II EVIDENCE GENERALLY—continued
(a) ADMISSIBILITY GENERALLY—continued
1. In General—continued

Abandonment of easement. Abandonment is an affirmative defense, and clear, unequivocal evidence is required to establish that an easement was abandoned.

Dawson v McKinnon, 226-756; 285 NW 258

Eminent domain—distance to markets. In a condemnation action, evidence as to distance from market centers and condition of old roads not admissible in determining damages.

Moran v Highway Com., 223-937; 274 NW 59

Value of property—trade values. Evidence of the amount which parties place upon property for the sole purpose of effecting a mere trade is not competent to show the reasonable value of such property.

Hiller v Betts, 204-197; 215 NW 533

Value of land — selling price as evidence. The value of farm land, through which a highway right of way is sought to be condemned, cannot be competently shown by evidence of the recent sale price of similar land in a nearby community.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Rental value of nearby lands. Evidence of the rental value of lands in a certain neighborhood is no evidence of the rental value of other lands in the same neighborhood when such other lands are not shown to be similar to the land as to which there is evidence; and a judgment based thereon is improper.

Harris v Carlson, 201-169; 205 NW 202

Crops on land in neighborhood—competency. A witness should not be permitted to testify to the crop yield of his land as bearing on the probable yield of another farm in the same vicinity unless it appears that the two farms possess similar soil conditions.

Slinger v Ins. Assn., 219-329; 258 NW 101

Eminent domain—value of land—amount of insurance. The amount of insurance carried on farm improvements, situated on a farm through which a highway right of way is sought to be condemned, does not constitute substantive evidence of the value of said farm, and is quite inadmissible for such purpose.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Discovery—production of noncompetent evidence. The court is not necessarily acting outside its jurisdiction in ordering the production of papers, and copies which would not or might not be admissible as competent evidence on the trial of the pending action.

Main v Ring, 219-1270; 260 NW 859

Malpractice—evidence—usual and ordinary practice. The defendant, in an action for damages for malpractice, may always establish, even by his own testimony, the usual and ordinary practice of physicians and surgeons in treating, in the locality in question, the injury which is the subject matter of the action.

Wilcox v Crumpton, 219-389; 258 NW 704

Negligence—usual and ordinary treatment—competency of witness. A witness, his competency to testify being established, may testify as to what was the usual and ordinary practice at a named time and place among physicians and surgeons in the treatment of a specified injury.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Evidence — undue limitation on reception. The action of the trial court in unduly limiting litigants in the introduction of testimony having direct bearing on a vital and material issue constitutes reversible error. So held as to evidence relative to the tracks of colliding automobiles.

Harness v Tehel, 221-403; 263 NW 843

Dismissal of issue—striking evidence. The court should not permit testimony bearing on a dismissed issue to remain in the record when it has no material bearing on any remaining issue.

In re Muhr, 218-867; 256 NW 305

Evidence improperly admitted—dismissal—nonreview. In appeal from court's refusal to set aside default decree annulling marriage, alleged errors in admitting evidence are not reviewable, even tho raised on motion to set aside the decree, when the appeal from the order denying the motion is dismissed.

Kurtz v Kurtz, 228- ; 290 NW 686

Torts — newspaper advertisement. In an action for damages consequent on an alleged wrongful act by defendant, a competitor of plaintiff, an advertisement inserted by defendant in a local newspaper and tending to show hostility against plaintiff, may be relevant and material in view of other evidence in the case.

Gregory v Sorenson, 214-1374; 242 NW 91

Insolvency of corporation—inapplicable testimony. Testimony that a corporation was insolvent when it was placed under receivership is not, in and of itself, competent to establish insolvency of the corporation a year previous to the receivership.

Ryan v Cooper, 201-220; 205 NW 302

Bills and notes—fraud by dissolved corporation. Decree of dissolution of a corporation based on the fraud of the corporation is admissible, on the issue of fraud and want of consideration, against an alleged bona fide holder of a negotiable promissory note which was given to the corporation as the purchase price for its corporate stock, even tho neither of

the parties to the action on the note were parties to the dissolution suit.

Andrew v Peterson, 214-582; 243 NW 340

Contract and quantum meruit value. Evidence of both the reasonable and contract value of services is admissible when so pleaded, even tho the pleading is embraced in one slovenly drawn but unquestioned count.

Pressley v Stone, 214-449; 239 NW 567

Action for assault—immaterial evidence. In an action for assault and false imprisonment committed by a mayor and a city marshal, evidence of violations by plaintiff of an ordinance is inadmissible when it appears that, on the occasion in question, no attempt was made to arrest plaintiff for such violations, and when the pleadings are silent as to justification and mitigation.

Schultz v Enlow, 201-1083; 205 NW 972

Accident insurance—pregnancy of injured person. In an action on a policy of accident insurance, evidence that the insured was pregnant and prematurely gave birth to a child which died shortly after birth is admissible on the issue of the extent of the injuries.

Elmore v Surety Co., 207-872; 224 NW 32

Verdict of coroner's jury. The verdict of a coroner's jury is not, in an action on a policy of insurance, admissible on the issue as to the cause of death.

Wilkinson v Life Assn., 203-960; 211 NW 238

Instructions—evidence defined. Instruction that "evidence is whatever is admitted in the trial of a case as part of the record, whether it be an article or document marked as exhibit, other matter formally introduced and received, stipulation, or testimony of witnesses, in order to enable jury to pronounce with certainty, concerning the truth of any matter in dispute", considered with other instructions, and while not approved, could not have prejudicially misled the jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Intoxication subsequent to automobile theft. Exclusion of evidence offered by an insurance company, in an effort to escape liability on a theft policy, as to a thief's intoxicated condition an hour after the alleged theft of motor vehicles, as bearing on his condition at the time of the taking, held not prejudicial.

Whisler v Home Ins., 224-201; 276 NW 606

Examination — retention of nonresponsive answer. The court does not necessarily have to strike the nonresponsive answer of a witness when the answer reveals competent testimony. So held relative to the issue whether a party was intoxicated.

State v Fahey, 201-575; 207 NW 608

Situation—subsequent to injury. Testimony as to the condition of a rain spout on a building some days after an accident is competent when it appears that no change of condition has taken place since the accident.

Updegraff v Ottumwa, 210-382; 226 NW 928

Fraud—family relationship—effect. Principle reaffirmed that, on the issue whether a conveyance is fraudulent, the family relationship of the parties is a circumstance to be considered.

Schulein Co. v Lipschutz, 208-1315; 227 NW 141

Nuisance — admissibility under pleadings. Evidence that a nuisance was a "health hazard" is fairly justified by a pleading that plaintiff and his family were, by reason of the nuisance, subject to "offensive, obnoxious, and poisonous odors * * * and detrimental to the comfort, use, and enjoyment of their property."

Hill v Winterset, 203-1392; 214 NW 592; 37 NCCA 232

Waiver of incompetency. Error may not be predicated on the reception of irrelevant and incompetent testimony relative to the condition of a nuisance at a place remote from the place in controversy when the complainant fails to avail himself of a later indicated willingness on the part of the court to strike such testimony.

Chase v Winterset, 203-1361; 214 NW 591

Harmless error. Wholly irrelevant testimony may be harmless in view of other relevant testimony in the record.

Looney v Parker, 210-85; 230 NW 570

Harmless error—receiving pleadings in evidence. The reception in evidence of a petition already before the court may be quite inconsequential.

Kemmerer v Highway Com., 214-136; 241 NW 693

Reversal on appeal—inconsequential testimony. The reception of immaterial and inconsequential testimony is not ground for reversal.

Graeser v Jones, 217-499; 251 NW 162

Excluding evidence on conceded fact. Error may not be predicated on the exclusion of evidence when the existence of the ultimate fact which said evidence would establish is conceded.

Ankeney v Brenton, 214-357; 238 NW 71

Exclusion of evidence — other competent proof. The supreme court was not required to pass on the soundness of sustained objections to evidence that a certain road was a county trunk highway when there was other competent proof of the point and no offer of controverting testimony was made.

Davis v Hoskinson, 228- ; 290 NW 497

Review—refusing cumulative evidence. Refusal to admit testimony, which at the best is merely cumulative, is not prejudicially erroneous.

Hawkins v Burton, 225-707; 281 NW 342

II EVIDENCE GENERALLY—continued
(a) ADMISSIBILITY GENERALLY—continued
1 In General—concluded

Motion to strike — evidence admissible in part. Evidence which is clearly admissible in part will not be stricken in toto on indefinite testimony as to the inadmissible part.

Jones v Sur. Co., 210-61; 230 NW 381.

Parol contract—time of passing title. The intent of the parties necessarily controls the issues (1) whether, in a parol contract of purchase, title passed on delivery, with a right to rescind if a trial proved unsatisfactory, or (2) whether title passed only after a satisfactory trial. Necessarily, what the parties said to each other at the time the contract was entered into is admissible.

Bishop v Starrett, 201-493; 207 NW 561

Enforceability of contract not shown. Where there was no competent evidence to take case out of statute of frauds, it was not error to exclude oral testimony tending to show the making of an oral contract to sell a business college and the buyer's readiness and ability to perform the same.

Patterson v Beard, 227-401; 288 NW 414

Conclusions—nonfatal admission. Admission of conclusions of witnesses that they sawed lumber according to instructions, that the logs of appellee were better than others, and other similar conclusions held not prejudicial when the same testimony was elicited by proper questions and answers.

Waterman v Gaynor Co., (NOR); 215 NW 641

Paternity — incompetent evidence. On an issue as to the paternity of a child, the material fact that prosecutrix had at a former time charged another party with said paternity presents no justification for the reception in evidence of substantially the entire judicial proceeding growing out of said former accusation.

Moen v Fry, 215-344; 245 NW 297

Will contest — immaterial and prejudicial matter. In a will contest, evidence that the wife of a witness gave birth to a child materially earlier than the ordinary period of gestation is quite improper and immaterial.

In re Thompson, 211-935; 234 NW 841

Lost will — unsuccessful search. In proceedings to establish a lost will, the loss of the will and the search for it were proved by evidence that the will could not be found altho the home of the deceased and other places where the will might have been kept were thoroughly searched. The conclusion of the trial judge on the sufficiency of such evidence will not be disturbed unless discretion is abused.

Goodale v Murray, 227-843; 289 NW 450

Effect of "no recollection" by witness. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing, but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot as a matter of law establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

Competency—source of evidence—improperly obtained. Testimony is not objectionable simply because it has been obtained by the improper issuance of a search warrant.

Hammer v Utterback, 202-50; 209 NW 552

Words actionable—evidence admissible as alleged. In a slander action it is not error to admit in evidence the very statements that plaintiff alleged in his petition were spoken.

Shultz v Shultz, 224-205; 275 NW 562

Words actionable. Woman's statement that son's wife was "dirty trash" admissible as proof of slander per se when understood by hearer to mean a prostitute.

Shultz v Shultz, 224-205; 275 NW 562

2 Circumstantial Evidence

Force and effect—instruction. A jury may be told that, if they find circumstantial evidence to be strong and satisfactory, they should so treat it.

Ferber v Railway, 205-291; 217 NW 880

Weight and sufficiency. Principle reaffirmed that a theory cannot be said to be established by circumstantial evidence unless such evidence is not only consistent with said theory, but inconsistent with any other theory.

Field v Surety Co., 211-1239; 235 NW 571
Stickling v Railway, 212-149; 232 NW 677
Comparet v Metz, 222-1328; 271 NW 847

Sufficiency to establish theory. A theory cannot be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them, and it is not sufficient that they be consistent merely with that theory.

Ferber v Railway, 205-291; 217 NW 880
Gregory v Sorenson, 214-1374; 242 NW 91
Jakeway v Allen, 227-1182; 290 NW 507

Voting as evidence of domicile. In determining domicile, fact that person voted in school election in Crawford county is not conclusive evidence that Crawford county was his residence.

Crawford County v Kock, 227-1235; 290 NW 682

Gift—evidence—competency. Delivery of a gift causa mortis may be established by circumstantial evidence; likewise the gift itself may be established by the declarations of the donor tho they be not res gestae.

Flint v Varney, 220-1241; 264 NW 277

Payment of note. Payment of a promissory note may be established by circumstantial evi-

dence: i. e., that the payee was a careful business man; that the maker and the payee resided in the same place; that business transactions occurred between them which might have furnished opportunity for payment; that the note was always readily collectible; that no annual interest and no part of the principal were ever indorsed on the note; that 17 years elapsed from the maturity of the first annual interest and 11 years after the maturity of the principal before any claim was made on the note, and then only after the death of both maker and payee.

Finley v Thorne, 209-343; 226 NW 103

Stock — agreement to repurchase — agency. The existence of authority, actual or apparent, for an agreement made by an agent on behalf of a corporation to repurchase its own stock sold by the agent to a third person, being within his apparent authority, being neither denied nor repudiated by the corporation, and although being based on circumstantial evidence, is not a question of law but a question for the jury.

Wright v Iowa L. & P. Co., 223-1192; 274 NW 892

Place of accident—nonapplicability of circumstantial evidence instruction. In a death claim action for negligence arising from an automobile collision occurring in a suburban district of a city where the negligence alleged was in failing to travel on the right-hand side of the street and where along with the physical facts there was direct evidence by the driver of the car wherein decedent was riding, as to decedent's travel on the right-hand side of the street, it was error to give an instruction, applicable only to cases based entirely on circumstantial evidence, when such instruction prevented the jury from properly considering the direct evidence as to where the accident occurred.

Rusch v Hoffman, 223-895; 274 NW 96

Fraud on bank by officer. Where the cashier of the plaintiff bank concealed a shortage with the bank by making fraudulent entries in its bond account and, to further conceal the shortage, obtained credit with the defendant bank by using drafts on the plaintiff bank as security, and concealed the monthly statements of the defendant in order to continue to conceal the shortage, the defendant having nothing to gain by aiding him in his fraud, there was neither direct nor circumstantial evidence of any arrangement between the cashier and the defendant to support a claim that there was conspiracy between them.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Insufficiency to make jury question. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrell v Oil Co., 222-1257; 270 NW 857

Torts—footprints. Evidence of footprints at or near the scene of the commission of a wrongful act is admissible in an action against the defendant for the resulting damages, provided the defendant is properly connected with said footprints.

Gregory v Sorenson, 214-1374; 242 NW 91

Theories of equal probability. Circumstantial evidence relative to the loss of a diamond reviewed, and held that the court could not say as a matter of law that the theories of loss by theft or by fire were of equal probability.

Hall v Ins. Co., 217-1005; 252 NW 763

Positive testimony vs inherent improbability. The positive testimony of witnesses affirming the existence of an alleged fact, e. g., the entering into a contract, may be wholly overcome by the facts and circumstances attending the alleged fact and by the inherent improbability thereof.

Garretson v Harlan, 218-1049; 256 NW 749

Cause of fire—jury question. Circumstantial evidence reviewed, and held to present a jury question on the issue whether a fire was set by a passing engine.

Stickling v Railway, 212-149; 232 NW 677

Other fires set by other engines. In an action to recover damages consequent on a fire alleged to have been set by a certain passing engine, evidence of other fires set by other engines on other occasions near the place in question may be admissible, not on the issue of negligence, but on the issue as to how far an engine would throw burning embers.

Stickling v Railway, 212-149; 232 NW 677

3 Conduct of Parties

Tampering with witness. Evidence is admissible, in an equitable action for the revocation of the license of a physician, which tends to show that the defendant had tampered with a witness, in an effort to induce her to change her testimony.

State v Knight, 204-819; 216 NW 104

Easements—elements deduced from acts of parties. The fact that a property owner claimed an easement in the land of another "as his right," and "that the party against whom the claim is made had express notice thereof," may manifestly be conclusively deduced from evidence of the negotiations, conduct, and acts which led to and culminated in

II EVIDENCE GENERALLY—continued
(a) ADMISSIBILITY GENERALLY—continued
3 Conduct of Parties—concluded

the creation and establishment of the easement by the parties.

Ehler v Stier, 205-678; 216 NW 637

Habits of insured. In an action on a policy of insurance, evidence as to the habits and industry of the insured is wholly immaterial, there being no issue in the case on such matters.

Murray v Ins. Co., 204-1108; 216 NW 702

Contract—acceptance of offer—implication. Principle recognized that the conduct of parties to an alleged contract may furnish ample evidence that an offer by one party of certain terms was accepted by the other party.

Breen v Power Co., 207-1161; 224 NW 562

Direct testimony outweighed by inconsistent conduct. Grossly inconsistent conduct may outweigh direct testimony to the contrary. So held as to the making of a gift.

Cherniss v Thompson, 209-309; 228 NW 66

Malicious prosecution—ill feeling. Plaintiff in a prosecution for malicious prosecution may show that, many years prior to the prosecution in question, he had arrested the defendant, and that such arrest resulted in ill feeling on the part of defendant against plaintiff. But plaintiff should not make prominent the reason for such arrest.

Fisher v Tullar, 209-35; 227 NW 580

Renewal of written contract by conduct. Where a heating plant owner contracted to furnish to a storekeeper heat for a period of one year at the termination of which no new written nor verbal contract was made, but for seven years more the heat was furnished and accepted at the same price as in the original agreement, until discontinued at nearly the end of the 1933-34 season, in an action to recover the contract price for the 1933-34 year's heat, a contract would be implied from the storekeeper's conduct, to pay the contract price regardless of the fact that storekeeper shut off some of the radiators.

Snell v Kresge, 223-911; 274 NW 35

Fidelity bond—fraud in extension of credit by overdrafts. In action on fidelity bond of bank cashier the exclusion of evidence of bank's custom of deferring posting of checks creating an overdraft was not erroneous where the dishonest acts complained of were the extension of credit by means of overdrafts in violation of statute.

Fidelity Co. v Bates, 76 F 2d, 160

Guaranty—ambiguity—intent. In searching for the actual intention of both parties to an ambiguous written guaranty—in other words, in searching for the proper construction to place on such contract—the court may receive evidence of the conduct of the party to whom the guaranty was given tending to show that said party, shortly after the time the guaranty was executed, and contrary to his present attitude, was placing the same construction thereon as contended for by the guarantor.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Subscribing witness—proof of testamentary intentions. Testimony by a witness to a will that the will was read aloud in the presence of himself and the testator, and that the testator signed it and did not object to the contents, was proper to show that the instrument was executed with the belief that it disposed of the testator's property in accordance with his intentions.

Goodale v Murray, 227-843; 289 NW 450

4 Res Gestae

Discussion. See 1 ILB 36—Res gestae—exception; 14 ILR 87—Res gestae; 24 ILR 558—Unidentified persons

Hearsay — res gestae exception. Hearsay which is no part of the res gestae is inadmissible.

State v Kneeskern, 203-929; 210 NW 465

Res gestae—real test to determine. The real test whether declarations of an injured party as to how he received his injury are part of the res gestae and admissible as such, is not whether the declarations were contemporaneous with the receiving of the injury, but whether the circumstances attending the making of the declarations exclude premeditation and design.

Miser v Iowa Assn., 223-662; 273 NW 155

All-essential test. On the question whether declarations of an injured party are competent as a part of the res gestae, the length of time elapsing between the receiving of the injury and the making of said declarations is, while important, not necessarily controlling. The all-essential test is whether they (1) relate to, and are explanatory of, the principal transaction, and (2) are made under such circumstances as to reasonably show that they are spontaneous and not the result of deliberation or design. Held, court abused its discretion by excluding declarations made some two hours after the occurrence of a transaction.

Aldine Trust v Accident Assn., 222-20; 268 NW 507

Discretion of court. The ruling of the trial court that certain declarations were not part of the res gestae will not ordinarily be overruled.

Pride v Accident Assn., 207-167; 216 NW 62; 62 ALR 31

Discretion of court. Principle reaffirmed that the court has a wide discretion in ruling

on the admissibility of matters claimed to be part of the res gestae.

Case v Case, 212-1213; 238 NW 85

Reception discretionary with court. The admissibility of res gestae statements rests in the sound discretion of the trial court. So held as to nonconsequential statements attending an accident.

Fortman v McBride, 220-1003; 263 NW 345

Declarations made 15 minutes after accident. Declarations of an injured ballplayer made some 15 minutes after he had made a slide to a base, and after he had collapsed, and was apparently in great pain, to the effect that he was so sick he thought he was going to die and that when he made the slide he felt a tear in his abdomen—repeated to the physician to whom he was at once taken—are admissible as a part of the res gestae; nor are such declarations subject to the objection that they are the unallowable opinions of a lay witness.

Dawson v Life Co., 216-586; 247 NW 279

Admission by one of defendants. The declaration of the driver of an automobile almost immediately after a collision had occurred, and before or while an injured person was being removed from one of the cars, to the effect that "I know I was driving fast," is part of the res gestae, and admissible against both defendants, to wit, the driver of the car and the owner thereof.

Duncan v Rhomberg, 212-389; 236 NW 638

Execution of notes—statement by bank examiner. In an action on promissory notes executed to a bank by its directors and stockholders in order to prevent an impairment of the bank's capital, testimony is admissible as to what the state bank examiner said, at the time the notes were executed, relative to including the notes in the assets of the bank.

Farmers Bk. v Bunge, 211-1357; 231 NW 651

Declaration made two hours after assault. In an action for damages consequent on an assault, a witness will not be permitted, over proper objection, to testify as to what plaintiff, some two hours after the occurrence, said relative to the cause of her agitation.

McQueen v Stores, 214-1300; 244 NW 278

(b) PRESUMPTIONS IN GENERAL

Discussion. See 20 ILR 147; 20 ILR 516; 24 ILR 413—Presumptions

Presumptions act prospectively only. Principle recognized that presumptions do not travel backward. They look forward only.

State v Liechti, 209-1119; 229 NW 743

Laws of other states. Presumptively the law of Minnesota is the same as the law of this state.

Northern Finance v Meinhardt, 209-895; 226 NW 168

"Inference upon inference." It is not true that an inference cannot be based on an inference.

Martin v Life Co., 216-1022; 250 NW 220

Pyramiding of presumptions. Presumptions must rest on proven facts. The pyramiding of presumptions is not recognized in law.

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Presumptions ousted by evidence. Presumptions disappear when evidence of the actual facts is introduced.

Wilson v Findley, 223-1281; 275 NW 47

Parties presumed residents—cause of action presumed local. Presumptively, parties to an action in this state are residents of this state, and presumptively, the cause of action sued on arose in this state.

Farmers Bk. v Anderson, 216-988; 250 NW 214

Injunction—presumption of continuance of condition. Proof that enjoinable acts were being committed at the time of the commencement of an action carries the presumption that the condition complained of existed at the time of the trial.

State v Kindy Co., 216-1157; 248 NW 332

Fraud not presumed. Fraud, in the absence of any showing of fiduciary relationship between the parties, cannot be presumed, but must be established by the party alleging it.

Plymouth County v Koehler, 221-1022; 267 NW 106

Incorrect instruction presumably followed. It will be conclusively presumed that the jury followed an incorrect rule of law as stated to it by the court in its instructions.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Regularity of officials' actions. The actions of public officials are presumed to be regular unless there be clear evidence to the contrary.

Priest v Whitney Co., 219-1281; 261 NW 374

Banta v Clarke County, 219-1195; 260 NW 329

Thrasher v Haynes, 221-1137; 264 NW 915

Krueger v Mun. Court, 223-1363; 275 NW 122

Execution — levy — return — presumption—burden to overcome. A party who claims that the various entries of the acts done under an execution and constituting the officer's "return" were not entered at the time the various acts were done, has the burden to so show. In the absence of such showing, it must be presumed that the officer did his duty and made the entries at the time required by statute. (§11664, C., '31.)

Northwestern Ins. v Block, 216-401; 249 NW 395

II EVIDENCE GENERALLY—continued
(b) PRESUMPTIONS IN GENERAL—continued

Proper index of lis pendens. The presumption that the clerk of the district court duly indexed, as a lis pendens, a petition for the foreclosure of a real estate mortgage is so strong that convincing proof to the contrary is required to overcome it.

First Tr. JSL Bank v Jansen, 217-439; 251 NW 711

Jurisdictional recital as prima facie showing. A recital made in 1868 by a board of supervisors, when ordering the establishment of a highway, to the effect, "The board being fully advised in the premises", states a prima facie presumption that they had jurisdiction and had complied with all statutory requirements.

Davelaar v Marion County, 224-669; 277 NW 744

Presumption as to width of old road duly established. When the records of the establishment of a highway, made many years ago, are silent as to the width thereof, it must be presumed to be the statutory width, to wit, 66 feet.

Richardson v Derry, 226-178; 284 NW 82

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "Stop" and "Slow" signs, as they are found upon the public highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 277 NW 570; 4 NCCA (NS) 318

Supervisors representing drainage district—good faith. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

Lawfulness of action. In the absence of any evidence or showing to the contrary, it will not be presumed that a public service corporation is seeking the location of its lines along a highway without having procured a franchise, or that the highway engineer is proceeding to mark such location without a written application therefor. (§4838, C., '31)

Swartzwelter v Util. Corp., 216-1060; 250 NW 121

Possession of property. Proof that stock was on the premises of a defendant and under his control, both before and after it was at large in the public highway (where it was alleged to have caused a damage), and that the defendant had inferentially admitted that the stock was his, creates a jury question on the issue of the defendant's ownership.

Stewart v Wild, 202-357; 208 NW 303

Quitclaim grantees. The grantee of land under a quitclaim deed is conclusively presumed to have known of all prior equities in and to the land, and will be held to have taken and to hold said land subject to said equities.

Junkin v McClain, 221-1084; 265 NW 362

Delivery of deed—presumption attending acceptance. Principle reaffirmed that the acceptance of a deed of conveyance implies an agreement by the grantee to perform legal conditions imposed on him by the deed, e. g., the payment of stated sums to named persons.

Carlson v Hamilton, 221-529; 265 NW 906

Execution and delivery of deed—presumption attending possession by grantee. A deed of conveyance, when produced by the grantee therein, need not be accompanied by any evidence of the execution or of the delivery of the deed, because due execution and delivery will be presumed until he who attacks it shows to the contrary. And this is true even tho the deed did not reach the hands of the grantee, or was not recorded, until after the death of the grantor.

Heavner v Kading, 209-1275; 228 NW 313

Rebutting presumption by possession. Transfers and assignments of property of a deceased, in the hands of certain heirs, raise a presumption that they were delivered. However, facts and circumstances may overcome this presumption, especially when it is shown that the signatures of the deceased to the instruments are forgeries.

Brien v Davidson, 225-595; 281 NW 150

Deed from parent to child — constructive fraud. The doctrine of constructive fraud arises from the existence of a fiduciary relationship, and equity raises a presumption against the validity of a transaction where the superior party obtains a possible benefit, as in a case where a parent has become the dependent person in his relationship with a child, trusting his interests to the advice and guidance of the child, and has deeded his land to the child.

Stout v Vesely, 228- ; 290 NW 116

Delivery of deed presumed from recording. Recording of a deed does not constitute delivery, but it is evidence which creates a presumption of delivery rebuttable only by clear and satisfactory evidence.

Huxley v Liess, 226-819; 285 NW 216

Effect of acknowledgment. Principle reaffirmed that great weight is accorded to a certificate of acknowledgment.

Hutchins v Piano Co., 209-394; 228 NW 281

Forged signatures—expert testimony to overcome. While an acknowledgment by a notary is presumptively true and requires clear and convincing evidence to overcome it, yet by statute it is not conclusive, and the court acting as a jury may find, after reviewing the conflicting testimony of handwriting experts, properly received, that signatures to transfers and assignments of assets of an estate, attacked by an administrator de bonis non, were forgeries.

Brien v Davidson, 225-595; 281 NW 150

Possession of legal title—rebutting presumption. A mere preponderance of the evidence is not sufficient to overcome the presumption arising from the possession of the legal title to real property.

Wagner v Wagner, 208-1004; 224 NW 583

Setting aside deed—burden of proof. A delivered deed carries a presumption in favor of its validity, so one suing to set aside a deed has the burden of proving that at the time of execution of deed, grantor was incapable of understanding her property and her relations thereto, or understanding natural objects of her bounty or nature and effect of instrument.

Bishop v Leighty, (NOR); 237 NW 251

Alteration of instruments after delivery. Alteration apparent on face of instrument does not raise presumption alteration was made after delivery. Evidence held insufficient to carry burden of showing mortgage was altered after delivery.

Durr v Pratt, (NOR); 240 NW 681

Setting aside conveyance—confidential relation. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Knowledge by mortgagee of adverse claim. Where mortgagee pays money to mortgagor after being notified by third parties that mortgagor's title is defective and that third parties have an adverse interest, the mortgagee is presumed to have a knowledge of all facts of the superior right or title which a reasonable and diligent search would have revealed.

Rance v Gaddis, 226-531; 284 NW 468

Tax deed. A tax deed is presumptively unassailable.

Fidelity Co. v White, 208-519; 223 NW 884; 225 NW 868

Injunction against tax sales. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax deed as evidence under statute. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Statutory presumption of validity of tax deeds. A defendant in a quiet title action may not claim that the plaintiff by first pleading title by invalid tax deeds, and then amending by pleading second corrective tax deeds, had abandoned the statutory presumption of their validity, nor must he, therefore, resort to the common law to prove his title.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Issuance of deeds prima facie evidence of regularity. The issuance by the county treasurer of tax deeds is prima facie evidence that proper notice of tax sale had been given.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Consideration—written contract. Presumptively a written contract is supported by a sufficient consideration, and the burden of proof rests on him who asserts to the contrary.

Krcmar v Krcmar, 202-1166; 211 NW 699

Burden of proof—fraud—extending time on mortgage as consideration. In an action by a bank to foreclose a mortgage on land, the defendants had the burden of proving their defenses of fraud and want of consideration, and, altho there was testimony that the mortgage was given to enable the bank to make a good showing to bank examiners and that there had been a promise that it would never be foreclosed, the court was justified in finding from other evidence that there was no fraud and that the consideration was the granting of an extension of time on a past due mortgage on other land.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Insolvency of bank—knowledge of officers presumed. Principle reaffirmed that for many purposes the managing officers of a bank will be conclusively presumed to have knowledge of the insolvent condition of their bank.

Leach v Beazley, 201-337; 207 NW 374

II EVIDENCE GENERALLY—continued
(b) PRESUMPTIONS IN GENERAL—continued

Banks and banking—collections—negligence—measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks. Substantial but conflicting testimony reviewed and held to present a jury question.

Schooler Motor Co. v Trust Co., 216-1147; 247 NW 628; 38 NCCA 361

Authority of agent to collect note. The naked showing that the payee of a promissory note received from a bank or from an officer thereof a payment on the note of a third party creates no presumption that the payee had expressly or impliedly authorized the bank or its official to receive said payment on said payee's behalf.

Huismann v Althoff, 202-70; 209 NW 525

Alteration of instruments—burden of proof. He who alleges a material alteration of an instrument has the burden to prove his allegation. No presumption exists that the alteration was made after the execution of the instrument.

Council Bluffs Bank v Wendt, 203-972; 213 NW 599

Title to certificate of deposit. The mere offer in court of an unquestioned nonnegotiable certificate of deposit by the indorsee-possessor thereof constitutes prima facie evidence of title in and to the instrument.

Farmers Bank v Bank, 201-73; 204 NW 404

Holder in due course. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

Consideration and delivery of note—proof by presumptions—instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Proof of execution and delivery. In an action in probate to establish notes of deceased as claims, proof of the execution and delivery being established, it is presumed that notes were issued for a valuable consideration and the burden of showing lack of consideration is on the defense.

In re Humphrey, 226-1230; 286 NW 488

Notes—overcoming presumption of nonpayment. An instruction that the possession of an uncancelled promissory note creates a presumption of nonpayment is erroneous insofar as it further directs the jury, in effect, that it may find the presumption to be overcome by long delay in bringing action on the note and other circumstances, when the delay was some nine years, coupled with the circumstances that the defendant was at all times a nonresident of the state.

Mitchell v Burgher, 216-869; 249 NW 357

Discharge—extension of time. The indorsement on an overdue promissory note of interest in advance of its maturity does not constitute conclusive evidence that the parties have entered into a binding agreement for the extension of the time of payment. The presumption is not more than a prima facie one.

Commercial Bank v Dunning, 202-478; 210 NW 599; 59 ALR 983

Payment—lapse of time with other circumstances. Mere lapse of time for less than 20 years may, with other circumstances, raise a presumption of payment, but it is not alone sufficient.

Citizens Bk. v Probasco, (NOR); 233 NW 510

Mutual expectations—board and lodging. The rendition on one hand and the acceptance on the other of valuable services (board and lodging) for a series of years generates a presumption that the one rendering was to receive pay and that the one receiving was to pay; and this is true tho the receiver and the giver were lifelong associates, and related, but were not members of the same family.

Peterson v Johnson, 205-16; 212 NW 138

Living with and caring for parents at their request. Reciprocal services rendered by and between members of a family are presumed to be gratuitous, yet, the court, a jury being waived, may find that a married daughter, who with her family, returns to the home of her aged parents at their request to care for them, for which she expected to receive and the parents expected to pay remuneration, did not reestablish a family relationship with her parents so as to raise the presumption of gratui-

tous services. Such finding will be binding on the appellate court.

Clark v Krogh, 225-479; 280 NW 635

Probate claim—payments applied on debts due—presumption. In a probate action to establish claim for housekeeping services rendered to decedent, where decedent promised to pay claimant small amounts from time to time to cover cost of her clothing and personal expenses, with an additional amount upon his death out of his estate, it would be presumed that small payments made by decedent in his lifetime were to be applied on debts which were due for such expenses, no showing having been made to the contrary.

In re McKeon, 227-1050; 289 NW 915

Substitution and release—new contract not creating presumption. The mere fact of the making of a new contract by which a third party becomes obligated to pay another person's previously existing indebtedness does not alone give rise to presumption that the creditor accepts the new debtor and releases the original debtor—question as to whether there is such a release is one of fact to be determined by all the evidence in the case.

Wade v Central Broadcasting Co., 227-422; 288 NW 439

Consideration—note as future gift. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney's Estate, 223-1076; 274 NW 5

Construction of will—death—presumption as to time. A provision in a will as to how property shall pass in case of the death of a devisee or legatee presumptively refers to a death which occurs prior to the death of the testator.

Moore v Dick, 208-693; 225 NW 845

Lost will—presumption of revocation. In the establishment of a lost will, there is a presumption that a will which was in the custody of the testator at his death, and which cannot be found, was destroyed by him with the intention of revoking it. The presumption may be rebutted or strengthened by proof of declarations of the testator, his circumstances, or his relations to the persons involved.

Goodale v Murray, 227-843; 289 NW 450

Destruction of evidence by claimant. Principle reaffirmed that a presumption is created against one who voluntarily destroys evidence of a claim asserted by him.

Meyer v Gotsdiner, 208-677; 226 NW 38

Liquidation—trust relation — presumption. The presumption that a trustee has preserved the subject matter of the trust cannot exist, in the absence of an allegation that said subject matter came into the hands of the representative of the trustee, and some proof to sustain the allegation.

Andrew v Bank, 204-431; 215 NW 623

Value of government bonds. The face value of government bonds is prima facie evidence of their actual value.

Mulenix v Bank, 203-897; 209 NW 432

Public improvements — assessments. Presumptively a special assessment for a municipal improvement is equitable. The burden of proof is on him who disputes the presumption.

In re Hume, 202-969; 208 NW 285

Assessor's valuation—burden of proof. The presumption is that the valuation placed by the assessor upon any particular property is correct, and the burden of proof is upon the person challenging that estimate to prove otherwise, as provided by statute, yet the opinion of the assessor is not conclusive, but when properly based and apparently not erroneous, excessive, or out of proportion, it is to be held as the true value of the property.

Trustees of Flynn's Estate v Board, 226-1353; 286 NW 483

Assessor's valuation—inequitable assessment even tho below value—failure of proof. There is a strong presumption in favor of the valuation fixed by the assessor which will not be disturbed on appeal, unless the presumption is overcome by proof, and altho the assessment is less than the value of the property, if it is inequitable when compared with assessments on similar property, it will be reduced to an equitable basis; so, where petition for reduction of city tax assessment on petitioner's lots did not allege that it was inequitable, where evidence showed lots were assessed pursuant to uniform system and reason for petitioner's witnesses' disagreement with assessor as to value did not appear, and, where assessments on similar lots in same amount were not challenged, the presumption in favor of assessment was not overcome and petitioner failed to sustain statutory burden of proving that assessor's valuation was inequitable.

Call v Board, 227-1116; 290 NW 109

Assessments—presumption of correctness—failure to overcome. An assessment for sewer must stand when appellant fails to establish his objections: to wit, that the assessment exceeds benefits and exceeds 25 percent of the value of the property.

Chicago, R. I. Ry. v Dysart, 208-422; 223 NW 371

Assessments—presumption of correctness. Evidence held insufficient to overcome presumption of correctness of tax assessments, where two properties, similar in construction and pro-

II EVIDENCE GENERALLY—continued
(b) PRESUMPTIONS IN GENERAL—continued

ducing about the same income, are claimed to be disproportionate to respective values.

Crary v Board of Review, 226-1197; 286 NW 428

Stock market profits—when not taxable. In an action to cancel and secure a refund of income taxes submitted on a stipulated record, stock market transactions involved therein would be illegal and void as based on a gaming transaction if the buyer neither intended nor contemplated taking actual delivery but intended that the profits or losses should be settled on the market quotations; however, illegality is not presumed, and without illegality appearing in the record, profits accruing from such transactions must be held to be profits from the sale of capital assets, and not taxable as income, hence taxes paid thereon must be refunded.

Martin v Board, 225-1319; 283 NW 418

Foreign corporation doing business without permit. A necessary statutory prerequisite, to the right of a foreign corporation for pecuniary profit to sue on an Iowa contract, is that it first have a permit to transact business in Iowa, and the very nature of its business may raise the presumption that such corporation is one for pecuniary profit.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Liability of capital stock not considered. Under the statute providing for the remedy of a creditor who is damaged by the wrongful diversion of funds of a corporation, it is held, the word "liability", as used in the statute, of a corporation on its capital stock is not an indebtedness to be considered in determining whether or not a corporation may lawfully pay dividends. In the absence of a showing to the contrary the presumption is that the payment of dividends is lawful.

Majestic Co. v Orpheum Circuit, 21 F 2d, 720

Fire damage by railroad—evidence sufficiency. In an action against a railroad for loss of property by fire, the state court's construction of statute, respecting presumption against railroad causing fire damage, is binding on federal courts. So where a prima facie case is established by plaintiff and no rebuttal thereto is offered, evidence held sufficient to make case for jury.

Turner Mfg. Co. v Bremner, 40 F 2d, 368

Presumption of constitutionality of statutes. Principle recognized that a legislative act will be declared constitutional unless its unconstitutionality is clear, palpable and practically free from doubt.

State v Darling, 216-553; 246 NW 390; 88 ALR 218
Berg v Berg, 221-326; 264 NW 821
Miller v Schuster, 227-1005; 289 NW 702

Presumption of constitutionality—strong case to invalidate. In passing upon constitutionality of acts of the legislature a presumption exists in favor of constitutionality, and an act will be invalidated only when it is clearly, plainly, and palpably unconstitutional, and it is the duty of the courts to give such a construction to an act that, if possible, this necessity is avoided and the act upheld.

State v Talerico, 227-1315; 290 NW 660

Construction by executive departments—legislative intent. The legislature is presumed to know the construction of its statutes by the executive departments, and when legislature indicates no dissatisfaction with such construction, the court may conclude such construction followed legislative intent.

State v Ind. Foresters, 226-1339; 286 NW 425

Former statute revised — legislative construction. When the motor vehicle statutes were completely revised, and exempted the vendor of a motor vehicle, under a conditional sales contract, from liability for negligent operation of the vehicle, such revision did not create a legislative construction that a former statute defining "owner" as the person with the use or control of a vehicle included such vendor within its definition, as a general revision of the laws creates no presumption of an intent to change the law, as is created when a particular section or a limited part of an act is re-enacted.

Hansen v Kuhn, 226-794; 285 NW 249

Unauthorized taking of motor vehicle. When an owner of a motor vehicle establishes that his car was taken without his knowledge or consent from the place he left it, he has made a prima facie case of theft. The law raises a rebuttable presumption that the taking was with intent to steal the same.

Whisler v Home Ins., 224-201; 276 NW 606

Consent of automobile owner—inference—burden of proof. An inference arises from the ownership of an automobile that it was operated with the owner's consent, or under his direction, and the owner has the burden of establishing that such was not the case.

McCann v Downey, 227-1277; 290 NW 690

Retainer and authority of attorney. The presumption that an attorney has authority to appear for a party for whom he does appear, must prevail until the adverse party who demands proof of authority overcomes the presumption by allegation and proof of reasonable grounds tending to disprove such authority.

Bleakley v Long, 222-76; 268 NW 152

Tenants in common—accounting—division of receipts. When it happens that only one of two joint, equal, equitable owners of real estate is personally obligated on the contract for

a deed under which the land is held, it is quite manifest that the law cannot presume, without supporting evidence, that forfeited payments received by said parties as the result of a futile attempt at sale of said premises, belong wholly to said nonobligated party; and equally manifest that the law cannot, on such circumstances, rear a so-called quasi contract to the same effect, in the absence of like evidence.

In re Kelly, 221-1067; 267 NW 667

Right of parent to custody of child. Presumptively, the welfare of a child will be best served in the care and control of its parents, and a showing of such relationship makes a strong prima facie case for parents claiming the care of their children. The presumption is rebuttable in cases of extreme neglect of natural and legal duty by the parents, the controlling consideration being the present and best future interests of the children, with due regard to the natural rights of the parents.

Allender v Selders, 227-1324; 291 NW 176

Alienation of affections. Presumptively a wife has affection for her husband, and a defendant has the burden to overcome such presumption.

Weyer v Vollbrecht, 208-914; 224 NW 568

Adjudication of insanity — nonretroactive presumption. An adjudication of insanity creates no presumption that the person in question was insane at any particular period of time prior to said adjudication.

Davidson v Piper, 221-171; 265 NW 107

Denial of insanity after adjudication. One judicially held to be insane has the burden to overthrow the presumption that such insane condition continues.

Hazen v Donahoe, 208-582; 226 NW 33

Incorrectly addressed letter. There is no presumption that mail matter addressed to a person at a town which is not his post office address will be delivered to the addressee at another town which is his post office address, tho the two towns are in the same county and in the same vicinity.

Lundy v Skinner, 220-831; 263 NW 520

Mailing and delivery of mail matter. In order to raise a presumption of delivery of a paper through the mail, the essential elementary facts giving rise to the presumption may be shown by course of business properly proved; but such proof must be directed to facts, and not conclusions, and the facts proven must be legally sufficient to create the presumption. Proofs held insufficient.

Central Co. v Des Moines, 205-742; 218 NW 580

Mailing notice of cancellation—presumption of receipt. In an action on an insurance policy to recover damages for loss by hail, where the answer alleges cancellation of policy by mailing five days written notice to insured, receipt of which notice plaintiff denies, it may be presumed or inferred by the supreme court in reviewing a decision on demurrer, that the letter properly addressed and mailed reached the plaintiff in due time.

Sorensen v Ins. Assn. 226-1316; 286 NW 494

Insurance—attempted cancellation contrary to bylaws—effect. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter," and which, in its attempt to cancel a policy, ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insuree; and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insuree are of equal probative force. Therefore, the insurer has not established the receipt of said notice by the insuree.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Reinsurance—disclosure of material facts. In an action on a reinsurance contract against reinsurer, held, not breached on account of original insurer's failure to retain full amount of liability agreed upon where original insurer was liable on another contract with the same principal and the evidence was insufficient to show any wrongful or fraudulent concealment of material facts, since the same principles of law as to false representations and concealments governs in reinsurance as in original insurance. Although insured and reinsured have duty to exercise good faith and disclose all material facts, a presumption must be based on facts, not upon other presumptions. The mere nondisclosure of facts possibly known is not fraudulent concealment of facts, so reinsurer, to establish concealment of facts, must show intentional concealment or bad faith in ascertaining facts.

General Reins. v So. Surety Co., 27 F 2d, 265

Accidental death—burden of proof. Under a policy providing for additional payment in case of death from accidental means, the beneficiary has burden of showing that insured shot himself accidentally, which need not be proved by direct evidence, but may be proved by proper inferences and presumptions from facts, and the beneficiary is aided in carrying this burden of proof by the presumption that death was not the result of suicide. Such presumption, however, is a rebuttable one and ordinarily a question of fact to be determined by the jury. So where evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question was properly held for the jury.

Mutual Ins. v Hatten, 17 F 2d, 889

II EVIDENCE GENERALLY—continued
(b) PRESUMPTIONS IN GENERAL—continued

Accident insurance—intentional acts resulting in injury. Under a policy of accident insurance which exempts the insurer from liability for injuries sustained by the insured by reason of "intentional" acts, the presumption will be indulged that injuries inflicted upon the insured by another person were not intentional.

Olson v Surety Co., 201-1334; 208 NW 213

Suicide—burden of proof. An insurer is not entitled to a directed verdict on its defensive plea of suicide unless the facts and circumstances preclude every reasonable hypothesis except that of suicide. Evidence held insufficient to overcome presumption of nonsuicide.

Wilkinson v Life Assn., 203-960; 211 NW 238

Death by accidental means. In a law action by beneficiary to recover for death of insured on a policy containing additional benefits for death resulting from accidental means, the defendant insurer complaining that the court erred in submitting to the jury the question of whether or not plaintiff had successfully carried her burden of proof that death resulted from accidental means, held, there being circumstantial evidence tending to establish that the discharge of a gun was accidental, creating a presumption having probative value in favor of the theory of accident, the question was properly submitted to the jury.

Waddell v Ins. Co., 227-604; 288 NW 643

Unexplained absence. A rebuttable presumption of death arises from the unexplained disappearance of a person for seven years from his usual place of living.

McCoid v Norton, 207-1145; 222 NW 390

Evidence of death—presumption—fugitive from justice. Continued and unexplained absence of an insured from his home or usual place of abode for seven years, notwithstanding diligent efforts of relatives and friends to locate him, creates a jury question on the issue of death, even tho the original disappearance was caused by the fact that he was a defaulter in a large amount.

Rodskier v Ins. Co., 216-121; 248 NW 295

Original notice—substituted service. A return of service of an original notice which reveals service on defendant by service on a proper member of his family is presumed correct, and judgment rendered thereon is valid tho defendant never learned of the notice. Evidence held insufficient to overcome said presumption.

Dickerson v Utterback, 202-255; 207 NW 752

Incapacity to make will not presumed—fact question. One under guardianship is not necessarily incompetent to make a will, for instance, as to a drunkard under guardianship incapacity is not presumed. Evidence failed to establish that testator was intoxicated when he made his will, and his competency, being a fact question when decided in his favor by the court after waiver of a jury, will not be disturbed on appeal.

In re Willer, 225-606; 281 NW 155

Certificate of birth—evidentiary effect. That part of an official certificate of birth which states that the name of the father is unknown is not presumptive evidence of that fact in an action for damages for seduction, and does not contradict direct testimony as to the paternity of the child.

Gardner v Boland, 209-362; 227 NW 902

Birth during lawful wedlock—presumption—proof to overthrow. The presumption of legitimacy of a child born in lawful wedlock is so strong that it will yield only to clear, satisfactory and practically conclusive proof that the husband was:

1. Impotent, or
2. Entirely absent so as to have no access to the mother, or
3. Entirely absent from the mother at the period during which the child must have been begotten, or
4. Present with the mother under circumstances negativing sexual intercourse with her.

Craven v Selway, 216-505; 246 NW 821

Attorney fee allowance. Tho a presumption of correctness exists in favor of trial court's decision fixing compensation for administrator's attorney, yet, where objection is made to application for allowance, and no evidence is introduced as to the services other than a bare statement in the applicant's affidavit, the trial court is not warranted in making a finding involving both nature and value of services.

Glynn v Bank, 227-932; 289 NW 722

Attempted destruction of intoxicating liquors. The attempt on the part of a person to destroy a liquid while the officers are searching his premises under a warrant constitutes prima-facie proof that the liquid was intoxicating, and intended for unlawful purposes.

State v Barton, 202-530; 210 NW 551

No presumption of election from mere occupancy by spouse. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

"Wormix"—neither descriptive nor parts of two words. The word, "Wormix", an artificial word coined and used as the name of a hog remedy, is not descriptive in such sense that it may not be used as a valid trade-mark and registered, nor the fact that it is composed of parts of two words does not disqualify it for registration as a trade-mark. So the use by

defendant of the word, "Worm-X", for a similar remedy was held a colorful imitation and an infringement, and where defendant has refused on notice to cease the use of an infringing device, and has continued to infringe, neither a fraudulent intent to injure complainant nor an actual misleading of the public need be proved, but will be presumed.

Feil v American S. Co., 16 F 2d, 88

Credibility of witness. In prosecution for subornation of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not tell the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions)—it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Withholding evidence. Record reviewed and held to afford no basis for an instruction to the effect that a failure of a party to testify to facts that are wholly within his knowledge raises an inference that if he did testify the testimony would be to his disadvantage.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Common knowledge that metal wire will conduct electricity. Farmer 36 years of age familiar with high lines and use of electricity is presumed to have the common knowledge of all intelligent persons that a metal wire will conduct electric current.

Aller v Iowa Electric Co., 227-185; 288 NW 66

(c) BEST AND SECONDARY EVIDENCE

Antenuptial contract—proof. Record held to establish, by copy, an antenuptial contract, the original being lost.

Fraizer v Fraizer, 201-1311; 207 NW 772

Secondary evidence—admissibility as affecting title to real estate. Where title to real estate is not in issue, secondary evidence of title is admissible, when proper foundation for its introduction has been laid, otherwise, if title is in issue.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Copies in lieu of originals—conditions. Carbon copies of letters, the originals of which are in the possession of the adverse party, are not admissible until the originals are properly called for and not produced.

Miller v Fire Assn., 219-689; 259 NW 572

Loss of writing as foundation for secondary. Proof of the loss of the written authority of an agent justifies the reception in evidence of a printed form with proof that such form substantially embodies the words of the lost writing.

Stoner v Ins. Co., 215-665; 246 NW 615

Deposit in banks. The books of a bank constitute the best evidence of the deposits of estate funds by the administrator—not what appears to be deposit slips and letters of the bank relative thereto.

Varga v Guaranty Co., 215-499; 245 NW 765

Requiring creditor to sue—proof of lost notice and service thereof. The contents of a written notice by a surety to a creditor requiring the creditor to sue on the obligation or to permit the surety so to do in the name of the creditor, and the service of such notice, may be proven by oral evidence when neither the original notice nor a copy thereof can be produced; but such proof must be clear, positive, convincing, and satisfactory. Evidence held to meet the rule.

Cleophas v Walker, 211-122; 233 NW 257

Value of livestock. Competent oral testimony of the value of livestock is admissible even tho a recognized market journal is in evidence showing such values.

Riddle v Railway, 203-1232; 210 NW 770

Authority of corporate officer. It is not erroneous to permit a corporate officer to testify to his authority to sign an instrument on behalf of the corporation, a copy of the authorizing resolution of the corporate directors being before the trial court.

Main v Brown, 202-924; 211 NW 232

Profits made in similar business. On the issue, in an action for an accounting, as to the amount of profits made by defendant in the operation of a gasoline and oil service station during a given time at a given place, plaintiff, in the absence of legally better evidence, may show, as bearing on the probable amount of gasoline and oil sold by defendant, the amount of gasoline and oil sold during said time in question and in said locality by other substantially similar stations, similarly situated, even tho the kind or grade of gasoline and oil sold at said latter stations is different than the gasoline and oil sold by defendant. But said evidence furnishes no basis whatever on which to compute the amount of profits made by defendant unless plaintiff supplements said evidence with proof of the wholesale price paid, and the retail price received,

II EVIDENCE GENERALLY—continued
(c) BEST AND SECONDARY EVIDENCE—concluded

by defendant for the kind or grade of gasoline and oil handled by him.

Standard Oil v Stubbs Co., 221-489; 265 NW 121

Lost will—required proof. In proceedings to establish a lost will, the proponent must prove (1) the due execution and existence of the instrument; (2) that it has been lost and could not be found through diligent search; (3) that the presumption of its destruction by the testator with intention to revoke it, arising from its absence on his death, has been rebutted, and (4) the contents or provisions of the will.

Goodale v Murray, 227-843; 289 NW 450

Cause of death—testimony of attending physician nonconclusive. The testimony of a physician as to the cause of death of a person whom the physician personally attended shortly prior to said death is not conclusive, especially when the physician was, at the time of the examination, uncertain as to the cause of death. In other words, expert testimony, on proper hypothetical facts, is admissible to show a cause of death other than that testified to by the attending physician.

Dawson v Life Co., 216-586; 247 NW 279

(d) DEMONSTRATIVE EVIDENCE

1 In General

Demonstrative evidence—order for production. It is discretionary with the court whether a witness shall or shall not produce demonstrative evidence.

State v Graham, 203-532; 211 NW 244

Identification and materiality. Duly identified demonstrative evidence is admissible when shown to be material.

State v Umphalbaugh, 209-561; 228 NW 266

Demonstrative evidence—identification. Exhibit held sufficiently identified, material and relevant, and properly received in evidence.

State v Brown, 216-538; 245 NW 306

Erroneous instruction on fact not existing—failure of circumstantial evidence to overcome error. It is error to assume or state in an instruction that certain facts exist which do not exist, and a presumption of prejudicial error arises therefrom. Therefore, in arson trial, circumstantial evidence was held insufficient to establish defendant's guilt so conclusively as to require a conviction notwithstanding an erroneous instruction on state's evidence of footprints "pointing toward and away from" burned store building when there was no evidence of footprints "pointing toward" such building.

State v Neff, 228- ; 291 NW 415

Instructions not substantiated by evidence—error. In arson trial, an instruction on the state's evidence that footprints "pointing toward and away from" burned store building was held erroneous, in absence of any evidence of footprints pointing toward building.

State v Neff, 228- ; 291 NW 415

2 Blood Tests, Urinalysis, and Other Examinations

Discussion. See 23 ILR 57—Scientific tests for intoxication; 24 ILR 191—Blood test—medico-legal aspects

Compulsory examination of defendant's person. An examination of the defendant's person, while in jail, by a physician, cannot be said to have been compulsory, where the only evidence of compulsion was that the sheriff accompanied the physician, but it was not shown that he did or said anything in respect to the examination.

State v Struble, 71-11; 32 NW 1

Blood tests. In the absence of a clear and definite statute so authorizing, state and local boards of health may not, on mere suspicion that a person is afflicted with, or has been exposed to, a venereal disease, cause such person to be compulsorily detained and physically examined by withdrawing blood from the veins and pus smear from the urethra, for the purpose of determining the existence of such disease in such person, even tho such examination, while painful, is not dangerous to life. (See 24 Iowa Law Review 191).

Wragg v Griffin, 185-243; 170 NW 400

Blood test—authority to take. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence, over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

Blood tests—expert testimony. Greater care could have been taken in tracing a blood sample from an operating room to a trial seven months later than evidence which showed that it had passed through the hands of several persons, not all of them being identified, and had been kept for a time in some sort of mailboxes in a doctor's office in another city. Without more foundation, a statement by the doctor at the trial that the blood sample was then in the same condition as it was in the beginning was a mere conclusion.

State v Weltha, 228- ; 292 NW 148

Blood test and urinalysis—testimony as hearsay. In prosecution for driving while intoxicated, physician's testimony concerning analysis of blood and urine of defendant was not objectionable as hearsay on the ground that

an assistant made the analysis when the doctor testified that "together we analyzed it."

State v Morkrid, (NOR); 286 NW 412

Blood tests and urinalysis — voluntaryism. Admission of evidence of blood test and urinalysis in prosecution for drunken driving is not objectionable as compelling defendant to be a witness against himself when the evidence disclosed that the analyzed substances were given up voluntarily and without compulsion or entrapment.

State v Morkrid, (NOR); 286 NW 412

3 Physical Injuries

Exhibiting wounds to jury. During the final arguments in a personal injury case, the court may permit the plaintiff to seat himself alongside the jury in order that the jury may have a close-up view of wounds which, during the taking of testimony, have been fully described and exhibited to the jurors while some of them were twenty feet from the witnesses.

Mizner v Lohr, 213-1182; 238 NW 584

Exhibition of injured body. An injured party, in an action for damages, has a right to disrobe and exhibit to the jury his actual injury and the result thereof tho they present a most pitiable sight.

Olson v Tyner, 219-251; 257 NW 538

Presumption attending injuries. In the absence of direct or circumstantial evidence to the contrary, physical injuries to a person are presumed accidental.

Dewey v Ins. Co., 218-1220; 257 NW 308

4 Articles and Objects

Identity of object. The identity of an object may be established (1) by proof of facts and circumstances and (2) by positive identification by a witness who has first revealed his positive knowledge on the subject.

State v Umphalbaugh, 209-561; 228 NW 266

Nonpresented issue. Household furnishings, especially when they have been in use for some three years, are inadmissible to show their condition, when the sole issue before the jury is as to the contract price.

Braverman v Naso, 203-1297; 214 NW 574

Illegal possession of liquors—articles seized on search. In a prosecution for willful and unlawful possession of intoxicating liquors, a still seized, together with liquors, during a search of defendant's premises is admissible over the general objections of incompetency, immateriality, and irrelevancy.

State v Matthes, 210-178; 230 NW 522

Identification of subject matter. It is proper to ask a witness whether certain liquors purporting to come from a named place had been delivered to him for analysis, such liquors being otherwise properly identified.

State v Olson, 200-660; 204 NW 278

(e) ADMISSIONS IN GENERAL

Cautious consideration of. Principle reaffirmed that admissions, as a rule, are to be considered with caution and scrutinized with care.

Kuhn v Kjose, 216-36; 248 NW 230

Plea of guilty in criminal prosecution. A plea of guilty in a criminal prosecution may be admissible as an admission when the judgment entered thereon would not be admissible.

In re Johnston, 220-328; 261 NW 908; 262 NW 488

Admissions—plea of guilty. In a civil action, the plea of guilty to a criminal prosecution involving the same transaction is admissible as an admission but is not conclusive when the criminal defendant, as a witness in the civil action, gives testimony tending to contradict his plea of guilty.

Boyle v Bornholtz, 224-90; 275 NW 479

Offers of compromise—nonviolation of general rule. The reception in evidence of a written "agreement for arbitration" of a loss is not violative of the rule that "offers of compromise" are inadmissible.

Hansell v Ins. Co., 209-378; 228 NW 88

Admissions against interest—admissibility. Testimony by a party against his own interest is admissible in a subsequent proceeding against him wherein said testimony is material.

Stark v White, 215-899; 245 NW 337

Admissions of counsel in lieu of testimony. The admission of a material fact by counsel in the course of a trial and for the purpose thereof becomes a part of the record just as tho said fact had been established by testimony in the ordinary manner.

Azeltine v Lutterman, 218-675; 254 NW 854

Opinion by attorney—effect. The written opinion of an attorney as to the law governing a certain matter is not admissible against the client to whom the opinion is addressed.

In re Dodge, 207-374; 223 NW 106

Insured's settlement offer — inadmissibility. A letter written by plaintiff's attorney before trial offering settlement without expense of litigation is inadmissible in a trial on the merits seeking recovery on an automobile theft insurance policy.

Whisler v Ins. Co., 224-201; 276 NW 606

Counsel revealing offer of compromise. Statements by plaintiff's counsel in his opening statement to the jury to the effect that defendant had offered to compromise the claim sued

II EVIDENCE GENERALLY—continued
(e) ADMISSIONS IN GENERAL—continued

on, together with testimony by plaintiff to the same effect, constitutes reversible error, even tho said testimony is stricken from the record and the jury is admonished not to consider it.

Hoover v Ins. Co., 218-559; 255 NW 705

Admissions of attorney—effect. The admission of an attorney, made during a trial, as to the agency of a party for his client, is not necessarily binding on the client in other and subsequent litigation of a similar nature.

Iowa Co. v Seaman, 203-310; 210 NW 937

Admissions by attorney—conditions. Admissions of fact by an attorney are admissible against his client when said admissions are relevant and material and within the actual or ostensible scope of the attorney's employment, and are not in effect an offer of compromise.

Suntken v Suntken, 223-347; 272 NW 132

Signature on notes not admitted by spouse. The mere act of a wife in joining with her husband in the execution of a deed of the husband's property, in payment of certain notes executed by the husband, cannot be deemed a recognition or admission by her of personal liability on the notes when she did not know that her name had been signed to the notes.

West Chester Bank v Dayton, 217-64; 250 NW 695

Admissions of husband—when inadmissible against wife. In an action against a wife to subject her homestead to a judgment which had been rendered against her husband on his debt antedating the acquisition by the wife of her said homestead, admissions of the husband tending to show that he furnished the money to pay for the said homestead are not binding on, or admissible against, the wife.

Price v Scharpff, 220-125; 261 NW 511

Admissions of wife against husband. Admissions by a wife in the absence of the husband, tending to show that a claimant in probate had been employed in the business and had not been paid, are admissible against the estate of the husband when it appears that the wife was both the general manager of the business in question and a partner therein with her husband.

Nortman v Lally, 204-638; 215 NW 713

Pleading as evidence — withdrawal of admission—effect. An admission by a party in his pleading is admissible against him even tho by an amended pleading he has withdrawn his admission.

Beery v Glynn, 214-635; 243 NW 365

Allegations in one count not admissions as to another count. Different theories of recovery contained in separate counts of a petition are not admissions by which the plaintiff is bound under the rule that he may not controvert his own pleading.

Wells v Wildin, 224-913; 277 NW 308

Judgment by default—no admission of cause of action. Principle reaffirmed that a default is not an admission of a valid cause of action where none is pleaded.

Neilan v Lytle Inv. Co., 223-987; 274 NW 103

Rejection and reception of same evidence. Undue strictness in rejecting admissions by plaintiff tending to show that he was to blame for an accident is harmless when the record reveals the fact that such admissions ultimately found their way into the record.

Handlon v Henshaw, 206-771; 221 NW 489

By employee—competency. Admissions by an employee may be competent evidence against such employee while wholly incompetent against the employer.

Glass v Ice Cream Co., 214-825; 243 NW 352

By employee—competency. Statements by an employee of an electric light company made about an hour after a fatal accident to the effect that "there was a liability to the case" are inherently incompetent, especially when authority to make such statement is not shown.

Cox v Light Co., 209-931; 229 NW 244

Nonconcerted action of tort-feasors. In a joint action against two or more tort-feasors for damages consequent on their concurring negligence, plaintiff has the right to prove what each did or said, as affecting joint liability. So held where the court properly received the culpable admission of one of the tort-feasors, made after the happening of the accident.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419; 34 NCCA 306

Admissions of heirs and devisees. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Declarations in disparagement of title — admissibility. On the issue whether defendant was a donee of certain bonds and had been such prior to the death of the alleged donor, a writing executed by the alleged donee subsequent to the making of the alleged gift, and tending to show ownership at said time in the alleged donor, is admissible against the alleged donee as in the nature of an admission in disparagement of donee's alleged claim.

Malcor v Johnson, 223-644; 273 NW 145

Damaging statements—failure to deny as admission. Evidence of the failure of a person to reply to material statements made in his presence and hearing, concerning facts affecting his rights, is competent if the statements are of such character and are made under such conditions that a denial would have been natural had the statements been untrue and incorrect.

Doherty v Edwards, 227-1264; 290 NW 672

Attempt to suppress testimony. While an attempt by the defendant to keep an adverse witness from testifying is not necessarily an admission by him that his claim or defense is false, yet such attempt is in effect an admission by the defendant that the testimony sought to be suppressed is unfavorable to his cause; and instructions to this effect, on supporting evidence, are proper.

Gregory v Sorenson, 214-1374; 242 NW 91

Bribery as indicating unfavorable admission. Attempt by a defendant to bribe a witness is indicative of an admission on his part that his cause or claim is unjust, dishonest, and unrighteous; and the court may so instruct the jury on supporting testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

Agent—corruption of witness. An interwoven transaction tending to show that a defendant and a third party were working in conjunction to corrupt a witness, and consisting of conversations in part between said witness and said third person, and in part between all three said parties, is admissible—the court carefully limiting the jury in the consideration of said testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

Destruction of property—evidence of value. In motor carrier's action on liability insurance policy for loss of property destroyed by fire in freight terminal, plaintiff has burden of proof as to its "custody and control" of goods within policy provisions, also as to value thereof, and stipulation as to value of certain goods on which claims had been paid by insured does not admit value of other goods in absence of competent proof thereof.

Amer. Alliance Ins. v Brady Co., 101 F 2d, 144

Civil service—taking examination not admission of necessity. A Sioux City policeman who served as a patrolman for about 14 years and was then promoted to rank of detective, in which capacity he served for about 4 years until demoted to former position of patrolman, came within purview of statute enacted during his service as a detective providing that any person having "* * * 5 years of service in a position or positions, shall retain his position and have full civil service rights * * *" without examination. Hence his demotion without cause was improper, and the fact that he had taken examinations for position of detective did not amount to an admission that an examination was necessary in his case.

Brown v Sturgeon, 227-136; 287 NW 834

Precautionary unbalanced instructions—correction by court. The court may very properly correct a requested precautionary instruction relative to the consideration by the jury of admissions by a deceased, by balancing the instruction, and making it applicable to the admissions of all parties to the action, including the deceased.

Halstead v Rohret, 212-837; 235 NW 293

(f) DECLARATIONS

1 In General

Impeachment—interest in outcome of litigation. An impeaching witness may not testify to declarations of another witness tending to show that such other witness had an interest in the pending litigation, no proper foundation for such declarations appearing.

Cleophas v Walker, 211-122; 233 NW 257

Alienation of affection—declarations of wife. In an action by a husband for damages for alienation of affection, declarations of the wife made long after she had separated from her husband, and explanatory of such separation, are manifestly hearsay.

McGlothlen v Mills, 221-204; 265 NW 117

Declarations of insured. Declarations, not part of the res gestae, of an insured under an accident policy of insurance, tending to prove that an injury to the insured was self-inflicted, are not admissible against the beneficiary of the policy.

Pride v Assn., 207-167; 216 NW 62; 62 ALR 31

Agent as witness—individual (?) or agency (?) transaction. The president of a bank may testify that in a certain transaction he was not acting for or on behalf of the bank of which he was president, but was acting in and with reference to an individual transaction of his own.

Security Bank v Bigelow, 205-695, 216 NW 96

Knowledge of insolvency of bank—declarations subsequent to receipt of deposit. On the issue whether a bank deposit was received by the accused with knowledge of the bank's insolvency, declarations by the accused subsequent to the receipt of the deposit, tending to show that he then, and at the time of the deposit, knew that the bank was insolvent, are admissible.

State v Bevins, 210-1031; 230 NW 865

Impeachment of title by grantor. Principle recognized that the grantor in a deed of con-

II EVIDENCE GENERALLY—continued
(f) DECLARATIONS—concluded
1. In General—concluded

veyance may not by subsequent declarations impeach the title conveyed by him.

Jones v Betz, 203-767; 210 NW 609; 213 NW 282

Damaging statements—failure to deny as admission. Evidence of the failure of a person to reply to material statements made in his presence and hearing, concerning facts affecting his rights, is competent if the statements are of such character and are made under such conditions that a denial would have been natural had the statements been untrue and incorrect.

Doherty v Edwards, 227-1264; 290 NW 672

Declarations of injured party. The declarations of an injured party, made shortly after receiving the injury, as to the manner in which the injury was received, may be admissible as substantive evidence.

Califore v Railway, 220-676; 263 NW 29

Undue influence—declarations of testator. Declarations of a testator that he intended to make disposition of his property in a manner different than that provided in the subsequently executed will is inadmissible on the issue of undue influence.

In re Diver, 214-497; 240 NW 622

Declaration by one of several heirs or devisees. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Illegitimacy in general—declarations admissible. Declarations of the deceased mother of a child born out of lawful wedlock, as to who was the father of said child, are admissible on the issue of paternity; also like declarations of other members of the family as a matter of family history. Evidence reviewed and held insufficient to establish plaintiff's paternity.

Hopp v Petkin, 222-609; 269 NW 758

Bastards—nonallowable evidence. The illegitimacy of a child born in lawful wedlock, without proof that the husband was impotent or had no sexual access to the mother, cannot be established by the declarations of the mother, or of the putative father, or of said child, nor by proof of the mother's adultery.

This does not imply that after illegitimacy has been made to appear, by competent proof, the declarations of the putative father and of the mother are not admissible to identify the actual father.

Craven v Selway, 216-505; 246 NW 821

2 Self-serving Declarations

Inadmissibility. Self-serving declarations of a party are inadmissible.

Ankeney v Brenton, 214-357; 238 NW 71

Claim against estate not negatived by statements of spouse. Self-serving declarations of a husband or wife during their lifetime are inadmissible to negative a claim in probate against the estate of the husband.

Nortman v Lally, 204-638; 215 NW 713

Gifts inter vivos—self-serving acts—incompetency. An alleged donee may not affirmatively establish the gift by testifying to his own prior self-serving acts and declarations.

Malcor v Johnson, 223-644; 273 NW 145

Self-serving declarations made to physician. In an action for damages for injuries received by plaintiff almost a year previously when a rug fell on her in defendant's store, it was prejudicial error to allow a physician, who had never attended her but had examined her shortly before the trial in order to enable him to give evidence at the trial, to testify over objections as to self-serving declarations concerning her health made at that time by plaintiff, and to allow him to answer hypothetical questions based partly upon the incompetent testimony.

Mitchell v Ward & Co., 226-956; 285 NW 187

Sales—action to recover price paid—letters inadmissible. A contract of sale fully executed and no longer in controversy may be so related to and connected with a later contract between the same parties that the correspondence attending the former may be admissible as interpreting the latter, but the offerer must not be permitted to go to the extent of showing, by his own self-serving letters, his dissatisfaction with the goods furnished to him under said first contract, and the loss he suffered thereunder.

Appel v Carr, 216-64; 246 NW 608

3 Dying Declarations

Discussion. See 16 ILR 530—Dying declarations

Decedent's statements concerning will. Decedent's statements, made to the person who drew a will for him, that he wished to make a will and that he wished a certain person to have all his property, were admissible after his death as an exception to the hearsay rule to prove his existing state of mind at the time and to show that his plan was put into effect by making such a will.

Goodale v Murray, 227-843; 289 NW 450

(g) HEARSAY

Discussion. See 16 ILR 92—Pedigree declarations

Res gestae. Hearsay which is no part of the res gestae is inadmissible.

State v Kneeskern, 203-929; 210 NW 465

Expert—answers to be based on experience. An expert may not testify to matters of fact or opinion which are not based on his own knowledge or experience, but on what he has read.

Evans v Utilities Co., 205-283; 218 NW 66

Physician's observation concerning X-ray. The statement of a physician, not a party to an action, relative to an X-ray picture exhibited to him is hearsay and, therefore, incompetent.

Wilcox v Crumpton, 219-389; 258 NW 704

Workmen's compensation. Hearsay evidence is not admissible nor competent to prove any of the basic facts in a compensation case. So held, as to statements made by deceased employee to doctor that injury was received in course of employment.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Physician's opinion—hearsay. The inclusion in a physician's report to an insurance company, of his opinion, that an employee sustaining an eye injury had no vision in that eye previous to the accident, is hearsay evidence.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Competent sustaining evidence necessary—hearing before commission. Where, in a proceeding before the civil service commission, incompetent hearsay evidence, in the form of minutes of testimony before a grand jury, is considered on the question of whether suspended police officers should be reinstated, the supreme court on review in certiorari must examine the record to ascertain if there is other competent evidence to support the commission's ruling.

Luke v Civil Service, 225-189; 279 NW 443

Information of accused concerning crime charged. What an accused has been told about an offense for which he is on trial is immaterial and hearsay.

State v Papst, 221-770; 266 NW 498

Hearsay brought out in cross-examination. Defendant who, on cross-examination of the state's witness, first enters the forbidden field of hearsay testimony on a certain point, is not in an advantageous position to object when the state, on redirect, follows into the same field of inquiry, especially when the testimony erroneously received is not inherently prejudicial and is practically that which was brought out by defendant on cross-examination.

State v Philpott, 222-1334; 271 NW 617

Libel evidence excluded. Evidence as to criminal libel reviewed, and held to be in the nature of hearsay, and properly excluded.

State v Heptonstall, 209-123; 227 NW 616

Slander of title — evidence — competency. Plaintiff in an action for damages consequent on the loss of a sale of his property because of a slander of his title by defendant manifestly will not be permitted to establish by hearsay evidence that the prospective purchaser would have been able to procure a first mortgage loan in a certain amount,—such being a condition of the contemplated sale,—let alone by evidence of a less satisfactory nature.

Farmers Bank v Hintz, 206-911; 221 NW 540

Assault—remarks—incompetency. Plaintiff, in an action for damages consequent on an assault, may not testify as to the "remarks" that her friends and neighbors made to her relative to the assault, such "remarks" being hearsay.

McQueen v Safeway Stores, 214-1300; 244 NW 278

Statement concerning absent person. Evidence of what a school treasurer said to the school board on a matter material to an absent party is in the nature of hearsay, and properly excluded.

School District v Morris, 208-588; 226 NW 66

Deposition based on unidentified records. A deposition is properly excluded for incompetency (and hearsay) when offered in evidence on the trial, when it appears from the deposition itself that the testimony of the witness is based wholly on unidentified hospital records, the correctness and verity of which the witness has no personal knowledge.

Foy v Ins. Co., 220-628; 263 NW 14

Date of letter. Testimony reviewed, contradictory of the testimony of another witness as to the time a letter was written, and held not to constitute a conclusion nor hearsay.

Cleophas v Walker, 211-122; 233 NW 257

Letters demanding payment excluded. In an action on a note by alleged holder in due course, letters written by prior indorsee, after maturity, demanding payment from maker were properly excluded as hearsay, and in the absence of any disproof of prima facie case made under such circumstances it is not the duty of the court to submit case to jury solely on matter of credibility of witness.

Colthurst v Lake View Bank, 18 F 2d, 875

Admission by assignor of chose. In an action on a chose in action by the assignee thereof, suing on behalf of himself and said assignor (because the assignor had retained an interest in the claim), an affidavit by the assignor, containing a recital of facts materially discrediting the claimed chose in action, is admissible even tho made long after the assignment was executed.

Lake v Moots, 215-126; 244 NW 693

Fraud—connected transactions. Fraudulent transactions may be so related, connected, and interwoven that evidence thereof may be ad-

II EVIDENCE GENERALLY—continued
(g) HEARSAY—concluded

missible against a party who was not present at the transaction.

Leach v Edgerton, 203-512; 211 NW 538

Cancellation of deed—incompetent testimony. In an action by a grantor to set aside deed, testimony as to the contents of statements made by grantor to his attorneys eight days after execution of deed, was incompetent and inadmissible.

Lawson v Boo, 227-100; 287 NW 282

Decedent's statements concerning will. Decedent's statements, made to the person who drew a will for him, that he wished to make a will and that he wished a certain person to have all his property, were admissible after his death as an exception to the hearsay rule to prove his existing state of mind at the time and to show that his plan was put into effect by making such a will.

Goodale v Murray, 227-843; 289 NW 450

Conversation with deceased. When a person who had talked with the decedent shortly before decedent's death testified that the decedent told him that he had made a will, where it was made, and who were witnesses to the will, the testimony, when not objected to, could be given its full probative effect, and came under an exception to the hearsay rule to show the then state of mind of the decedent, tending to prove the prior execution of the will.

Goodale v Murray, 227-843; 289 NW 450

Lost will—contents shown by subscribing witness. The contents of a lost will were sufficiently established by testimony of a subscribing witness who heard the testator tell the scrivener how he wanted to dispose of his property, and heard the will read aloud to the testator who signed it without suggesting any change in the contents, when the testimony met all the requirements justifying an exception to the hearsay rule.

Goodale v Murray, 227-843; 289 NW 450

Statements of third party—competency. Principle recognized that a witness may testify to a statement of a third party for the purpose of showing a motive for his actions, but the evidence thus introduced goes only to the question whether such statement was made, not to the truth of such statement.

State v Brown, 218-166; 253 NW 836

Conversation proved by hearsay. Evidence of a conversation which otherwise would be hearsay and inadmissible is admissible when the issue is whether the conversation was actually had.

Graeser v Jones, 217-499; 251 NW 162

Persons who made statement identified. A witness who states that, on a named occasion, a party litigant asked him to name the persons who had asserted the existence of a certain fact does not testify to hearsay evidence by detailing his responsive answer.

McColl v Jordan, 200-961; 205 NW 838

Unobjected to, relevant hearsay evidence considered. In the absence of objection, relevant hearsay evidence may be given consideration.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Alimony—unsupported modification. A decree in divorce action may not be subsequently modified on hearsay evidence of misconduct on the part of one of the parties.

McDaniel v McDaniel, 218-772; 253 NW 803

Corporate stockholder—statement by spouse. On the issue whether defendant was a corporate stockholder, declarations of her husband made out of her presence and hearing and apparently without any authority from her are hearsay and inadmissible.

Gruetzmacher v Quevli, 208-537; 226 NW 5

Alienation of affections. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

Bastardy—incompetent declarations by prosecutrix. On the issue as to the paternity of a child, statements by the prosecutrix, not in the presence of the defendant, to the effect that defendant was the father of her child, are wholly incompetent.

Moen v Fry, 215-344; 245 NW 297

Declarations and letters as to paternity. Ante litem motam declarations and letters of deceased parties relating to the parentage of a certain person, even tho they are not related to such person by blood or marriage, are admissible on the issue of parentage when such declarants and writers stood in such relation to the person in question as to give assurance that they would know the real truth as to such parentage, and could not be mistaken. For a stronger reason, similar declarations and letters of those related by blood or marriage to the person in question are admissible.

In re Frey, 207-1229; 224 NW 597

(h) DOCUMENTARY EVIDENCE IN GENERAL

1 In General

Discussion. See 14 ILR 326—Hospital records; 24 ILR 436—Introduction of documents; 24 ILR 751—Business entries—proposed uniform act

Identification of exhibits. Exhibits are receivable in evidence only when properly identified.

State v Halley, 203-192; 210 NW 749

Excluded evidence otherwise received. Excluding exhibits when the contents thereof so far as material are otherwise admitted presents no error.

Ankeney v Brenton, 214-357; 238 NW 71

Failure to mark exhibit—correction. Failure during trial to identify by proper exhibit mark a volume, portions of which were offered in evidence, may, pending appeal, be corrected on motion before the trial court.

Orr v Hart, 219-408; 258 NW 84

Exhibit treated by parties as being before the court. The court is not in error in treating an exhibit as in evidence when the party litigants have treated and regarded it as in evidence.

Boyd v Miller, 210-829; 230 NW 851

Improper reception of evidence cured by withdrawal and instructions. The improper reception of noninflammatory evidence is cured by the subsequent withdrawal of the evidence and by pointed instructions to the jury not to consider said evidence.

State v Slycord, 210-1209; 232 NW 636

Dragnet objections—exhibit partly admissible. A dragnet objection to an exhibit is properly overruled when the exhibit is clearly admissible in part and when the objector makes no effort to separate the admissible from the inadmissible or to expunge from the record the inadmissible part.

State v Bevins, 210-1031; 230 NW 865

Books of accounts made from sales slips. A book of accounts showing the date of purchase, nature of article sold, and amount, made up from sales slips, constitutes a book of original entries, all other statutory elements of such books being made to appear.

Younker Bros. v Meredith, 217-1130; 253 NW 58

Summary of books and records. Principle reaffirmed that a duly identified and verified summary of voluminous books and records may be admissible in connection with said books and records.

State v Dobry, 217-858; 250 NW 702

Identification of goods by inventories. In an action against an execution plaintiff for conversion of goods stored in certain "boxes, barrels, and trunks," and sold in bulk, without inventory of the contents, plaintiff may introduce duly identified and detailed inventories of the contents, on a showing that such inventories represent the contents of said "boxes, barrels, and trunks."

Antes v Coal Co., 203-485; 210 NW 767

Examination of witness—memory-refreshing memoranda. An inventory of goods which a witness shows was correct when made may be used by the witness to refresh his memory, and is admissible for that purpose.

Antes v Coal Co., 203-485; 210 NW 767

Discovery—order to produce — effect. An order to produce books and papers is not a ruling that, when produced, the books and papers will be admissible as legal evidence.

Main v Ring, 219-1270; 260 NW 859

Ownership of property—insurance policy. On the issue of ownership of personal property, plaintiff may introduce (for what it is worth) a policy of insurance carried by him on the property, especially when defendant is insisting that plaintiff's claim of ownership is a belated afterthought.

Antes v Coal Co., 203-485; 210 NW 767

Fire insurance—proof of loss. Exhibit held inadmissible to establish the giving of statutory proofs of loss.

Havirland v Ins. Co., 204-335; 213 NW 762

Excessive offer — justifiable rejection. A party may not complain of the rejection of his offer in evidence of a pleading when he makes no effort to separate the relevant from the irrelevant matter and to confine his offer to the relevant matter only.

People's Bk. v Smith, 210-136; 230 NW 565; 69 ALR 399

Tables of life expectancy. The introduction of tables of life expectancy is not a condition precedent to the recovery of damages for future pain.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Life tables—effect. Life tables are not conclusive on the subject of life expectancy, and instructions should carefully elucidate such fact.

Droullard v Rudolph, 207-367; 223 NW 100

Improper disregard. The court, in its quest for a fact, may not, by assumption based on speculation or inference, refuse to accord force and effect to undisputed, unimpeached, and nondiscredited documentary evidence which unequivocally establishes said fact, especially when the fact arises out of a somewhat remote transaction, and when the party carrying the burden of proving said fact is hampered in his proof by reason of the death of parties who

II EVIDENCE GENERALLY—continued
(h) DOCUMENTARY EVIDENCE IN GENERAL—continued
1. In General—continued

had knowledge of said transaction and by his own incompetency resulting from said deaths.

In re Allis, 221-918; 267 NW 683

Ledgers—correctness—who may testify. Testimony of vice-president of bank as to correctness of ledger held inadmissible where it appeared that ledger was posted by assistant cashier and bookkeeper.

Andrew v Bank, (NOR); 213 NW 271

Evidence in other proceeding—inadmissible against nonparty. A transcript of the original, official shorthand notes of a witness in proceedings auxiliary to execution, to which proceedings the witness was not a party, is inadmissible as substantive evidence in a subsequent proceeding against the witness wherein a conveyance is sought to be set aside as fraudulent; neither is such transcript admissible, in the absence of proper foundation, to show the admissions of, or to impeach, the witness.

Hawkins v VerMeulen, 211-1279; 231 NW 361

Action by subcontractor—principal contract admissible. A subcontractor under a building contract is impliedly bound by the standards of performance provided in the principal contract; therefore it is error to reject the principal contractor's offer of such contract as evidence.

Lantz v Goodwin, 210-605; 231 NW 331

Bylaws—insufficient proof. A bylaw may not be deemed established by the mere introduction in evidence of the minute book of the corporation which reveals the presence of the alleged bylaw on pages of the book prior to the commencement of the official minutes of the corporation, which minutes contain no reference to bylaws.

Home Bank v Ratcliffe, 206-201; 220 NW 36

Exhibits bearing on nonissuable matter. In an action for damages consequent on the making of improper loans, exhibits bearing on loans should be confined in their admissibility to the loans to which they have application.

Pease v Bank, 204-70; 214 NW 486

Tax receipts. On the trial of a petition for a new trial because of the discovery of an old and forgotten deed, tax receipts which show who paid the taxes before, and who paid the taxes after, the execution of such deed may be admissible.

Mills v Hall, 202-340; 209 NW 291

General denial—chattel mortgage not admissible thereunder in replevin action. General denial puts in issue only facts pleaded in the petition. So, under a general denial to a replevin action for an automobile, evidence of a prior mortgage is properly excluded, when not pleaded, inasmuch as, under a general denial, the court is not called upon to decide which lien is first but only the question of whether plaintiff is entitled to possession.

General Motors v Koch, 225-897; 281 NW 728

Unsigned copy of fidelity bond—inadmissible. In action by a surety company against defendant, who was covered by a fidelity bond and who agreed to indemnify plaintiff against loss sustained by reason of its executing fidelity bond in his behalf, it was error to admit in evidence instrument purporting to be a certified copy of the bond, but containing no signatures and which was admittedly no true and genuine copy of original bond.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

Notes—nonadmissibility as evidence. Promissory notes, when offered in evidence, are properly excluded as to a party not shown to be liable thereon.

West Chester Bank v Dayton, 217-64; 250 NW 695

Heirs' rights—evidence of shares. Where a farm, comprising a part of an estate which is settled without administration by vesting control in one of the heirs under a trust agreement, is sold, and several first and second mortgages are taken in part payment and divided among the heirs, and title subsequently reverts to trustee without foreclosure, the mortgages, altho losing their effect as liens, serve as evidencing respective share of each heir.

Meeker v Meeker, (NOR); 283 NW 873

Preferred stockholders' rights—proof by articles of incorporation. Rights of preferred stockholders in a bankrupt corporation's assets are subject to all debts of the corporation, including general creditors, and instruments having attributes commonly attached to preferred stock are construed as stock unless contrary intention clearly appears, in which respect the articles of incorporation are held competent to prove meaning and legal effect of certificates purporting to be issued under such articles.

In re Hicks-Fuller Co., 9 F 2d, 492

Objections—waiver by introducing exhibit. Objections made by the defendant to testimony given by the plaintiff's witness on direct examination were not waived when the defendant introduced an exhibit containing written statements made by the witness which tended to weaken his oral testimony. But objections

by the defendant to other testimony in the direct examination were waived by statements in the exhibit supporting the testimony to which objections had been made.

Goodale v Murray, 227-843; 289 NW 450

Ancient documents—conditions of admission. Church records of parish church in Sweden, signed by the rector and church custodian, were admissible as ancient documents when they were over 30 years old, when they were obtained from the proper custody, when they were certified as true exhibits from the consulate of Sweden, and where there were no suspicious appearances.

Bergman v Carson, 226-449; 284 NW 442

Tax deed as evidence under statute. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

2 Public Records and Documents (See also §11296, et seq.)

Ballots—prima facie showing. Principle reaffirmed that ballots are prima facie admissible in evidence when it is shown that they have come through the channels and from the custodian provided by law, and have been so guarded and preserved by the legal custodian thereof as to exclude all reasonable possibility of tampering.

Tyler v Klaver, 220-1124; 264 NW 37

City ordinance in re flagman—lack of relevancy. A city ordinance which requires a railway company, during certain hours, to maintain a flagman at one of its street crossings, is neither relevant nor material when the accident did not occur during said hours, but at a time substantially thereafter.

Miller v Railway, 223-316; 272 NW 96

Census enumerator's report. In probate proceedings to establish heirship of certain claimants through the deceased spouse of an intestate (who died without issue), the trial court erroneously disregarded a census enumerator's report which showed that intestate was married and that she had no children. While such record was a hearsay statement, yet because of circumstances under which it was made, and because it is a part of a public record, it would have been admissible as an exception to the hearsay rule.

In re Clark, 228- ; 290 NW 13

Official certificates of death—admissibility. A certificate of death not signed, executed, and certified in accordance with the laws governing the disposal of dead bodies is inadmissible as evidence in an action between private parties.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Certificate as to stillborn infant. A certified copy of a return by a physician showing the delivery, by a Caesarean operation, of a stillborn infant, while proper evidence, may have but little bearing on the issue whether said stillborn possessed an independent circulation after being fully separated from the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Records of former compensation claim inadmissible. Records in the industrial commissioner's office as to a former compensation claim are inadmissible when they have no bearing on the merits of the claim at bar.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Bankruptcy proceeding—certified records admissible. Records certified to by the clerk of the United States District Court as to the existence of a bankruptcy proceeding are competent evidence of said bankruptcy admissible in the state courts.

Bagley v Bates, 224-637; 276 NW 797

Federal income tax from receiver. In an action involving a claim for federal income tax from an insolvent corporation, the assessment by the internal revenue collector must be treated as prima facie evidence of the amount due, and the state statutes do not control the matter of deduction for attorney fees, referee fees, court costs, and other expenses, but the burden is on the receiver to establish these deductions.

State v American B. & C. Co., 225-638; 281 NW 172

Certified copies—federal statute—effect. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record.

Bristow v Lange, 221-904; 266 NW 808

Photostatic copies—government documents duly authenticated. Photostatic copies of government documents, duly authenticated, are accepted instrumentalities of introducing official records. Tax returns are public records, the filing and preserving of which are official acts.

Cooper v United States, 9 F 2d, 216

II EVIDENCE GENERALLY—continued
(h) DOCUMENTARY EVIDENCE IN GENERAL—continued
2. Public Records and Documents—concluded

Inadmissible assessment rolls showing nonexistence of note. Since a party assessed need not list all liabilities, assessment rolls, which fail to show a liability promissory note of decedent, are not thereby admissible as evidence to prove the note never existed nor constituted a real indebtedness.

In re Cheney's Estate, 223-1076; 274 NW 5

Assessment rolls—contradictory statements—unallowable purpose. Assessment rolls covering personal property of the taxpayer and the total value thereof, and introduced for purpose of impeachment, are not also receivable for the purpose of showing the value placed on a particular article when the owner demonstrates that the article was not given in for taxation.

Hall v Ins. Co., 217-1005; 252 NW 763

Eminent domain—assessment rolls as evidence. In eminent domain proceedings, the duly signed assessment roll of the property in question is admissible for the purpose of showing the assessed value.

Duggan v State, 214-230; 242 NW 98

Tax deed as evidence under statute. Statutes providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax deed extinguishing special assessment lien. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the speccial assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax sale register as evidence of tax certificates. In an action to enjoin a county treasurer from selling at tax sale land on which the county held either certificates of tax sale or tax deeds, books designated as "tax sale registers" containing the county record of tax sales were competent evidence of the issuance of tax certificates to the county, although not evidence of the county's alleged tax deeds.

Bennett v Greenwalt, 226-1113; 286 NW 722

Certificate of county recorder. The certificate of the county recorder showing the recording or filing of a chattel mortgage is competent and admissible evidence.

Wertheimer v Parsons, 209-1241; 229 NW 829

Notice and proof of service—drainage record book admissible. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor, and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend through or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

3 Private Memoranda and Statements in General (See also §§11272, 11279, et seq.)

Offers en masse. An offer in evidence, en masse, of voluminous record filings, consisting of both material and immaterial matter, is very properly rejected.

Bates v Brooks, 222-1128; 270 NW 867; 109 ALR 1371

Hotel register—dual purpose. A hotel register may become material and therefore admissible in evidence, not only for the purpose of impeaching a witness who asserted he had registered at the hotel, but as tending to show the presence of the witness at the time in question at the scene of an accident.

Ritter v Fort Madison, 212-564; 234 NW 814

Bills and notes—admissibility when signature not denied. A promissory note, duly pleaded and incorporated in the pleading, by original or copy, is receivable in evidence without further proof,—unless the purported maker of the signature, under oath, properly denies said signature.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Taxation—deed not admissible to show value. The recitals of consideration in deeds of conveyances are not admissible to prove the value of real estate for the purpose of taxation.

Iowa Corp. v Board, 209-687; 228 NW 623

Deed—not impeached by will. The ex parte recitals in a will by a grantor of real estate are insufficient to impeach the title conveyed by the deed.

Bibler v Bibler, 205-639; 216 NW 99

Escrow agent's memorandum made in absence of parties. An escrow agent's under-

standing of the arrangement by which he was to record deeds after the death of the grantor, noted on the envelope in the absence of the parties, is not admissible in evidence as to the substance of the arrangement and would be of doubtful evidentiary value even if admitted.

Bohle v Brooks, 225-980; 282 NW 351

Memoranda — admissibility. Mere memoranda book entries, when material, are admissible on proper foundation. So held as to entries tending to show when a note was received by a bank.

Farmers Bk. v DeWolf, 212-312; 233 NW 524

Bank ledger. It is not erroneous to receive in evidence the ledger of a bank for the purpose of showing the credits of a depositor, the correctness of such book being first established; and it is immaterial that the account reveals credit items not in controversy.

Ryan v Cooper, 201-220; 205 NW 302

Corporation statement—insufficient authentication. A purported financial statement of a corporation is manifestly inadmissible, in the absence of testimony as to its authenticity or as to the author thereof and the circumstances of its preparation.

Helberg v Zuck, 201-860; 208 NW 209

Genuineness of corporate records. In an action against the secretary of a corporation individually, the record proceedings of the corporation are admissible against him, when material, upon an admission by such secretary that he believed them to be such records, even tho he states such belief as a conclusion, or bases his belief on hearsay, and even tho he states that he does not know that they were correctly kept.

Helberg v Zuck, 201-860; 208 NW 209

Criminal prosecution—corporate books and records. In a prosecution, under the securities law, of an officer of a corporation for having made, before the secretary of state, a false statement relative to the financial condition of the corporation, the corporate books and a tabulated statement and summary thereof, properly identified, are admissible, even tho there is no showing (1) that said books were made in the ordinary course of business, or (2) that they were true or correct, or (3) that they were books of original entry, or (4) that the accused made or directed their making,—it appearing that the examination of the books was made in the office of the corporation and largely in the immediate presence of the accused.

State v Dobry, 217-858; 250 NW 702

Account book—necessity to identify. Pages of a book containing various notations, memoranda, and accounts in the handwriting of a deceased administrator are not admissible in an action to establish a shortage on the part of said administrator without some proper proof identifying said book as the book in which the administrator kept his accounts relative to the estate in question.

Varga v Guaranty Co., 215-499; 245 NW 765

Professional memorandum by deceased. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

Carriers—rule requiring written orders for cars. The rule of a carrier requiring orders by a shipper for cars to be in writing, and being a part of its freight-rate schedules on file with the board of railroad commissioners, is mandatory, and compliance therewith is not shown by evidence that the station agent upon receiving an oral order made a written memorandum thereof for his own convenience. Such rule is manifestly admissible as evidence in a proper case.

Jackson v Railway, 213-365; 238 NW 912

Delivery date of insurance policy. In an action to recover on a life policy of a daughter, an exhibit showing that a son's policy was delivered on September 14 was admissible to contradict testimony of father and mother that the daughter's policy was delivered August 23 and that son's policy was delivered previously.

Luce v Ins. Co., 227-532; 288 NW 681

4 Charts and Maps Generally (See also §11300)

Plat explained by parol. A town plat which is ambiguous in its descriptions and recitals is subject to parol explanation.

Schuler v Sand Co., 203-134; 209 NW 731

5 Writings and Telegrams

Letters by persons not parties to action. Letters which pass between parties who are not parties to an action are manifestly incompetent as substantive evidence for or against the parties to the action.

Kollmann v Kollmann, 204-950; 216 NW 77

Construction of contract—telegrams and letters—intention of parties. Telegrams which are brief and incomplete and which reserve the right in each instance to clarify and amplify by letter point quite conclusively to the conclusion that the parties intended that the contract should be determined by a consideration of both the telegrams and letters.

Appel v Carr, 216-64; 246 NW 608

Telegram received—use as evidence. The telegram which a party receives will be deemed the original when there is no showing that a

II EVIDENCE GENERALLY—continued
(h) DOCUMENTARY EVIDENCE IN GENERAL—continued
5. Writings and Telegrams—concluded

written message was delivered to the company at the point of sending; and in case of the loss of such delivered telegram, a copy thereof is receivable in evidence when material.

State v Lozier, 200-652; 204 NW 256

Relevancy — insured's settlement offer. A letter written by plaintiff's attorney before trial offering settlement without expense of litigation is inadmissible in a trial on the merits seeking recovery on an automobile theft insurance policy.

Whisler v Home Ins., 224-201; 276 NW 606

Handwriting—proper standard for comparison. Proof that a party whose handwriting is in question admitted writing a certain exhibit renders the exhibit admissible as a proper standard for comparison.

State v Debner, 205-25; 215 NW 721

Will as entirety when only signature offered. Without an objection thereto or a showing of prejudice, it is not error to admit and send with the jury the entire will of decedent, even tho only the signature was offered in evidence.

In re Cheney's Estate, 223-1076; 274 NW 5

Insurance agents—license application. The written request of an insurance company to the commissioner of insurance for a license for a named agent "to transact its authorized business" is admissible for the purpose of showing that said person was the company's agent, but not for the purpose of showing the scope of the powers of such agent.

Stoner v Ins. Co., 218-720; 253 NW 821

Location of insured—letters tending to prove inquiry. On the issue whether due and proper inquiries as to the whereabouts of an insured person had been made, evidence in the form of identified letters replying to such inquiries are admissible.

Rodskier v Ins. Co., 216-121; 248 NW 295

Offer to pay attorney fees not accepted. When an attorney, who had received a retainer fee of $100 to represent the insured in a criminal case arising from an automobile accident, received a letter from the attorney for the insurer requesting him to tell the insured that the insurer was willing to take care of attorney fees, such letter was admissible to show an offer to pay such fees, but was insufficient to show that such offer was authorized by the insurer, and his reply that he would look to the company for payment of only those fees exceeding $100, did not amount to an acceptance of the offer.

Gipp v Lynch, 226-1020; 285 NW 659

Delivery date of policy—other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Sales—action to recover price paid—evidence—self-serving declarations. A contract of sale fully executed and no longer in controversy may be so related to and connected with a later contract between the same parties that the correspondence attending the former may be admissible as interpreting the latter, but the offerer must not be permitted to go to the extent of showing, by his own self-serving letters, his dissatisfaction with the goods furnished to him under said first contract, and the loss he suffered thereunder.

Appel v Carr, 216-64; 246 NW 608

Mailing and delivery of letter. For the purpose of proving that an original letter was presumptively received by the addressee through the mail, a proven copy of said letter is inadmissible simply on the showing that the writer of the letter personally signed it, and relied on the accuracy of his secretary to make a proper mailing of the letter in accordance with the routine of the office, there being no evidence as to such routine.

Forrest v Woodmen, 220-478; 261 NW 802

Preliminary proceedings—disposing of law points. In determining the effect of a ruling on a motion to dispose of points of law, it is proper to read the whole pertinent record to ascertain what the court decided, and where a court overruled such a motion which urged that a certain letter was not a sufficient memorandum to take the case out of the statute of frauds, and record revealed that ruling was made because the question could not be determined before submission of evidence, such ruling was not an adjudication which became the "law of the case" so as to prevent subsequent exclusion of the letter upon objection made during trial.

Patterson v Beard, 227-401; 288 NW 414

6 Publications (See also §§11276, 11349)

Coca-cola advertisements—admissibility. In an action against a beverage bottler and wholesaler for damages caused by drinking unwholesome coca-cola, sold by the bottler to a retailer, the admission of coca-cola advertisements in evidence held nonprejudicial.

Anderson v Tyler, 223-1033; 274 NW 48

7 Pictures, Photographs, X-rays (See also §11283)

Photographs inadmissible unless relevant. Photographs of a stranger to the prosecution are, manifestly, inadmissible in the absence of evidence showing relevancy.

State v Papst, 221-770; 266 NW 498

Photographs — essentials for admission. Within the sound discretion of the court, a photograph is admissible in evidence when taken under conditions similar to those material to the inquiry to which it relates, and an instruction may call the jury's attention to the difference in lighting conditions at time an injury occurred, and at the time the picture was taken.

Riggs v Pan-Amer., 225-1051; 283 NW 250

Criminal record on reverse side of photograph. The fact that the state, in identifying an accused, employs a photograph on the reverse side of which is printed the criminal record of the accused, furnishes no basis for an assignment of error when the photograph was never in the hands of any juror, and was not received in evidence, and when the criminal record was not referred to in the presence of the jurors.

State v Kelly, 202-729; 210 NW 903

Handwriting photographs — explanatory marks—court's discretion. Photographs of handwriting, although bearing explanatory markings made by the expert witness, are proper evidence to aid the jury's comparison of the disputed signature on a will, as well as to explain expert testimony and their admissibility is largely within the trial court's discretion.

In re Cheney's Estate, 223-1076; 274 NW 5

Photostatic copies—government documents duly authenticated. Photostatic copies of government documents, duly authenticated, are accepted instrumentalities of introducing official records. Tax returns are public records, the filing and preserving of which are official acts.

Cooper v United States, 9 F 2d, 216

Identification of ballistic photographs. Evidence held ample to identify certain ballistic photographs.

State v Campbell, 213-677; 239 NW 715

Accounting—obliterated items proved by photograph. In an action by a wife against a bank challenging her husband's speculations and transactions in her behalf and for an accounting as to funds and securities where the wife having (1) permitted, acquiesced in, and cooperated with her husband in managing her business with the bank for a period of years, (2) kept a personal record showing she had knowledge of many challenged transactions (proved through ultra violet ray photography of obliterated items), (3) reported income tax on other challenged transactions, (4) a bank account in her own name showing profits from other challenged transactions, (5) been a woman personally familiar with business and speculative dealings, and (6) made a settlement with the bank after ample consideration and acting upon the advice of friends skilled in the business of securities, cannot thereafter claim that the bank could not rely upon her husband's apparent general agency, nor that his dealings with the bank involving her securities and obligations arising therefrom were not the joint operations of herself and husband, nor that a settlement thereof she thereafter made with the bank resulted from the bank's concealment and duress.

Clark v Iowa-D. M. Bank, 223-1176; 274 NW 919

Radiograph—oral explanation. A radiograph may be explained or interpreted to a jury by an expert insofar as the radiograph does not interpret itself to the mere observation of a nonexpert.

Appleby v Cass, 211-1145; 234 NW 477

Amputation without X-ray picture. The issue whether a surgeon was negligent in failing to have an X-ray picture taken of a broken arm before amputating it, does not become a jury question on general descriptive testimony of the arm by laymen opposed by unanimous expert testimony that the extent of the broken, crushed, and mangled arm was plainly apparent without an X-ray picture, the issue being whether amputation was necessary.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

X-ray observations by stranger-physician. The statement of a physician, not a party to an action, relative to an X-ray picture exhibited to him is hearsay and, therefore, incompetent.

Wilcox v Crumpton, 219-389; 258 NW 704

X-ray pictures—sufficient foundation. Principle reaffirmed that foundation for the admissibility of X-ray pictures may be established by the testimony of the technicians who took or interpreted the pictures.

Bauer v Reavell, 219-1212; 260 NW 39; 1 NCCA(NS) 761

X-ray picture taken after amputation. An X-ray picture of an arm of the human body taken several days after amputation and when the arm is admittedly in a materially different condition than it was in when amputated, cannot be received for any other purpose than to show the condition of the arm when the picture was taken, the very material issue being as to the condition of the arm at the time of amputation.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

II EVIDENCE GENERALLY—continued
(h) DOCUMENTARY EVIDENCE IN GENERAL—concluded
7. Pictures, Photographs, X-rays—concluded

X-ray sciagraphs — sufficient foundation. Proof that certain X-ray sciagraphs were taken, for the use of the attending physician, by an expert in that science, and other circumstantial evidence tending to show the correctness of such sciagraphs, furnish sufficient basis for their introduction as evidence, even tho no witness specifically asserts that they "correctly portray the condition of the body affected."

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

X-ray pictures admitted. In a law action for damages for personal injuries resulting from an automobile accident, question of proper foundation being laid for introduction of X-ray pictures is largely in trial court's discretion, and where it is shown that an osteopathic physician and surgeon in charge of surgery and X-ray department in hospital had made a physical examination of injured party and testified in detail to condition of spine, back, and abdomen, the admission of X-ray pictures to illustrate the surgeon's oral testimony was not an abuse of discretion.

Kramer v Henely, 227-504; 288 NW 610

(I) PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS

Understanding of parties to agreement. See §11275

Discussion. See 7 ILB 173; 20 ILR 713—Parol evidence rule

Rule not available to stranger. The parol evidence rule is not available to a stranger to the writing in question.

Kiser v Ins. Assn., 213-18; 237 NW 328

Third parties. Principle reaffirmed that, as between persons who are not parties to a written contract, parol evidence is admissible to prove what in fact was the actual contract.

Holst v School Dist., 203-288; 211 NW 398

Stranger to transaction. The objection that a transaction is within the statute of frauds or that testimony is violative of the parol evidence rule is not available to a party who is a total stranger to the transaction, and to the title involved therein.

Lennert v Cross, 215-551; 241 NW 787; 244 NW 693

Applicability to third parties. Parol evidence rule excluding oral evidence varying terms of written agreement is applicable in case where one claims rights under such instrument even tho he is not a party thereto.

Willard Co. v Palmer, (NOR); 205 NW 976

Unambiguous contract. An unambiguous contract, being the final agreement of the parties, reduced to writing at the conclusion of the negotiations, cannot be varied by parol evidence.

Hillje v Tri-City Co., 224-43; 275 NW 880

Unallowable modification. Principle reaffirmed that oral evidence may not be introduced to nullify, modify, or change the character of a written obligation.

First N. Bank v Mether, 217-695; 251 NW 505

Ambiguity clarified by parol — doubts resolved against maker. In reviewing various canons of construction, principles reaffirmed that (1) if a contract is clear cut and unambiguous, the wording of the contract must control, but, if it is ambiguous, then parol evidence is admissible to ascertain intention of the parties, and (2) where there is ambiguity the doubt will be resolved against the party who prepared the instrument.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Adding additional agreement. Parol evidence is inadmissible in an action at law to add to a written instrument which clearly reflects its intent and purpose, an additional agreement which the parties failed to insert therein.

Dolan v Bank, 207-597; 223 NW 400

Parol to explain judgment. The use of ambiguous words in a judgment or decree of court may open the door to parol evidence to establish what the court actually decided.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Admission of debt supplemented by parol. A written acknowledgment by a debtor that a debt, action on which is barred by the statute of limitations, is unpaid may, for the purpose of showing a revival of the debt, be supplemented by extrinsic evidence which clearly identifies the unpaid debt and the amount thereof.

Koht v Dean, 220-86; 261 NW 491

Proof of novation. Evidence tending to show that a contract was novated is not violative of the parol evidence rule.

Montgomery v Beller, 207-278; 222 NW 846

Exception—proof of fraud. The parol evidence rule is not an obstacle to the proof of fraud in obtaining a contract.

Schmidt v Twedt, 219-128; 257 NW 325

Fraudulent conveyance — indebtedness of grantor. Evidence held to show that the grantor in an alleged fraudulent conveyance was indebted at the time of the execution of the conveyance.

Scovel v Pierce, 208-776; 226 NW 133

Instrument in part in form of receipt. An instrument which is in the dual form of part receipt and part agreement is not subject to

parol explanation insofar as it evidences an agreement.

Mechanics Bk. v Gish, 200-463; 203 NW 687

Ambiguous recital of settlement. An ambiguous written recital of the settlement of differences between parties may be aided by parol testimony in order to identify the differences actually settled.

Stoner v Stehm, 200-809; 202 NW 530

Registration of private vehicles—transfer—right to contradict. On the issue whether plaintiff, in an action on a policy of insurance covering the theft of an automobile, was the "unconditional and sole" owner of the vehicle, plaintiff may testify to facts attending a written transfer of the certificate of registration tending to show that he, in fact, remained the owner of the vehicle notwithstanding said transfer.

Abraham v Ins. Co., 215-1; 244 NW 675

Mutual insurance associations—validity of assessments. Oral testimony may be admissible as to the manner in which an assessment was made when such testimony bears on matters not revealed by the minutes of the board of directors or is explanatory of such minutes.

Hauge v Ins. Assn., 205-1099; 212 NW 473

Partnership interest. Parol evidence is admissible to show that, at a time subsequent to written articles of partnership which fixed the interest of each partner, the interests of the various partners were, by reason of oral agreement, different from those recited in the former writings.

In re Talbott, 204-363; 213 NW 779

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe-line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received $5 per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only 50 cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Royalties — reduction by oral agreement — jury question. In an action to recover alleged balance due under coal mining contract for royalties, whether payments provided for in contract were reduced by subsequent oral agreement held to be a jury question.

Heggen v Mining Co., (NOR); 263 NW 268

Right to enlarge writing. When the written evidence of a contract provides, in effect, that named subject matters shall be controlled thereby, oral evidence is admissible to enlarge said subject matters when the writing on its face reveals the contemplation of the parties to make such addition.

Smith & Co. v Hollingsworth, 218-920; 251 NW 749

Composition with creditors — unambiguous. A plain and unambiguous written composition with creditors may not be modified by parol evidence tending to show that the indebtedness referred to was other than that specified in the writing.

Federal Corp. v Western Co., 219-271; 257 NW 785

Cross-examination as to writing may necessitate reception of writing itself. When a cross-examination is designed to show that a witness had asked plaintiff to sign an untruthful statement of fact, the party calling the witness must be permitted to show by a duplicate original, tho unsigned, just what plaintiff was asked to sign.

Stickling v Railway, 212-149; 232 NW 677

Contracts—prohibited changes—futility. A written contract, which in effect declares that no change in any portion of the contract shall be valid, cannot be construed to take away the right of the parties to subsequently orally modify the contract; nor does a provision for the termination of the contract in a certain manner preclude the parties from mutually terminating it in some other manner.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

Execution of contract proved—witness not present when contract made. Evidence of the execution of an oral contract, which has been performed or partially performed by one of parties, may be introduced in evidence, although the witnesses who testified were not present when the contract was made.

Ford v Young, 225-956; 282 NW 324

"Exceptions" catalogued. The so-called "exceptions" to the parol evidence rule may be stated thus: Parol evidence is admissible,

1. To establish grounds for the reformation of a written contract.
2. To establish the unnamed consideration for a unilateral written contract.
3. To establish a distinctly separate and complete contract contemporaneous with, and noncontradictory of, a written contract.
4. To establish the conditional delivery of a written contract, and the failure of said condition.
5. To complete a written contract which shows on its face that it is fragmentary and incomplete.

In re Simplot, 215-578; 246 NW 396

II EVIDENCE GENERALLY—continued
(i) PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—continued

Reformation of instruments—rule inapplicable. The parol evidence rule is not applicable to a proceeding to reform an instrument.

In re Jenkins, 201-423; 205 NW 772

Reformation of instrument—mistake. The rule that parol evidence cannot be invoked to vary the terms of a written contract has no application to prevent parol proof of a mistake or the reforming of an instrument to correct a mistake.

Wormer v Gilchrist, 210-463; 230 NW 856

Reformation of deed—mistake and fraud. Evidence reviewed, and held ample to justify the reformation of a deed because of the mistaken, and fraudulently induced, omission therefrom of a clause reserving to grantors a life estate in the land in question.

Foote v Soukup, 221-1218; 266 NW 904

Reformation of instruments — proceedings and relief—mandatory degree of proof. Plaintiff seeking the reformation of a written instrument must fail unless he establishes by clear, satisfactory, and convincing evidence—by evidence exceeding a mere preponderance—by evidence approximating proof beyond a reasonable doubt—the definite contract which the executed writing does not embrace. Evidence reviewed in detail under a prayer for the reformation of a lease, and held insufficient to comply with the rule.

Stillman v Bank, 216-957; 249 NW 230

Reformation of instruments—mistake. The rule of evidence which forbids oral testimony to contradict or vary the terms of a written contract has no application to proceedings in equity where a mistake in the contract is alleged, and its reformation demanded.

Floberg v Peterson, 214-1364; 242 NW 13

Passbook—contract partly written, partly oral. Where a passbook issued by a savings bank to a depositor contained certain printed provisions governing the deposit, but contained no provision as to the date when the deposit was payable, parol evidence is admissible to show the agreement between the bank and the depositor as to the said date of payment.

Popofsky Co. v Wearmouth, 216-114; 248 NW 358

Parol variation of check. Parol evidence that a bank agreed with its depositor not to charge a special trust deposit with the amount of a certain check which the depositor had given to the bank to correct a mistake in the depositor's account is not inadmissible as varying the terms of the check.

Townsend v Bank, 212-1078; 237 NW 356

Certificate of deposit. Parol evidence is admissible to show that a time certificate of deposit was accompanied by a collateral oral agreement between the depositor and the bank to the effect that the bank would pay the certificate on demand.

In re Olson, 206-706; 219 NW 401

Passbook—ambiguity—parol to explain. A passbook issued by a savings bank to a depositor and containing certain printed provisions governing deposits, but silent as to the date when the deposit was payable, and carrying the indorsement "Maytag Employee's Special Savings Account", creates such ambiguity (assuming that the printed provisions embraced the full agreement) as to justify the reception of parol evidence to explain the ambiguity.

Popofsky Co. v Wearmouth, 216-114; 248 NW 358

Parol to contradict cash payment. A written contract binding plaintiff to buy of defendant a certain number of shares of corporate stock "and pay for the same" cannot be so modified by parol as to show that payment by plaintiff was to be in the form of services to be performed by plaintiff for defendant.

Cox v Fleisher Co., 208-458; 223 NW 521

Similar but independent contracts. Parol evidence of a contract binding defendant to purchase and deliver to plaintiff a named number of corporate shares of stock in payment for services performed by plaintiff is independent of a subsequent written agreement binding plaintiff to buy of defendant the same number of shares of stock of the same company.

Cox v Fleisher Co., 208-458; 223 NW 521

Admissibility to show conditional delivery. While parol evidence is not admissible to vary the terms of a written instrument, yet it is competent as between the immediate parties to show that the delivery thereof may have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument.

Walker v Todd, 225-276; 280 NW 512

Conditional delivery. A written contract, which provides that the failure of any party named therein to sign shall not affect the liability of those who do sign, may be shown to have been delivered on the condition that the writing was to be effective only after being signed by all of the parties.

Boyd v Miller, 210-829; 230 NW 851

Right to explain ambiguous clause. The rule that an ambiguous provision in a written contract may be explained by parol evidence, for the purpose of arriving at a basis on which to rest a legal conclusion as to the meaning of said provision, assuredly does not embrace the right of one party to the contract to show, (1) his understanding of said provision, and (2) the understanding of a former assignee of the contract (at a time when the question of the

meaning of the provision had not arisen) as evidence of the understanding which a later assignee had or should have had of said provision.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Parol to explain the ambiguous. It is always competent in construing inconsistent and ambiguous language in a written contract to receive parol evidence bearing on the situation of the parties, the subject matter of the writing, and the acts of the parties thereunder.

Dunn v Dunn Trust, 219-349; 258 NW 695

Clearly expressed consideration. The clearly expressed consideration recited in an unambiguous written instrument cannot be contradicted by parol evidence.

Burrier v Sheriff, 207-692; 223 NW 395

Consideration—absence of. Principle reaffirmed that parol evidence may be admissible to establish lack of consideration for a promissory note.

Northern Tr. Co. v Anderson, 222-590; 262 NW 529; 271 NW 192

Parol as affecting writings—manner of paying promissory note. Parol evidence is inadmissible to show that an ordinary promissory note to a corporation was to be paid from the earnings of the corporation.

Mechanics Bk. v Gish, 200-463; 203 NW 687

Form of note—unallowable variation. Parol evidence is inadmissible to show that a note is not payable according to its terms.

Farmers Bk. v Fisher, 204-1049; 216 NW 709

Varying legal effect of blank indorsement. Oral evidence is inadmissible to vary the legal effect of a blank indorsement of a promissory note.

First N. Bk. v Raatz, 208-1189; 225 NW 856

Independent contemporaneous oral agreement. In an action on a promissory note, parol evidence is admissible to show that at the time the note was executed an independent agreement, consistent with the note, was entered into under which certain credits under named contingencies were to be made upon the note.

Andrew v Brooks, 219-134; 257 NW 315

Evidence of assumption—discharge of maker—insufficient. Evidence held insufficient to establish oral agreement discharging makers from liability on note and substituting purchaser of property for maker.

Citizens Bk. v Probasco, (NOR); 233 NW 510

Accommodation maker. Parol evidence is admissible on the issue whether a promissory note is accommodation paper.

State Bk. v Markworth, 208-461; 212 NW 729

Transfer of note — indorsement in blank. Parol evidence is admissible to show that an indorsement in blank of commercial paper was made solely to enable the holder to make collection, and not to transfer title. Especially is this true when the other writings accompanying the indorsement are ambiguous.

Leach v Bank, 201-349; 207 NW 332

Trade acceptances negotiated. In an action to recover on trade acceptances by indorsee thereof, where there is no provision in sales contract prohibiting either delivery, negotiation, or transfer of such acceptances which are regular on their face, held, proof of an alleged oral agreement that acceptances were subject to certain conditions in sale contract is inadmissible in evidence.

State Bk. v Feed Co., 227-596; 288 NW 614

Collateral agreement—payment of note by sureties. Parol evidence is admissible to prove that, when a promissory note was signed by the sureties, it was agreed between all parties thereto that the principal would sell certain property and deliver the proceeds to the payee, and that the payee would apply the proceeds on the note.

Randolph Bk. v Osborn, 207-729; 223 NW 493

Conditional delivery. Parol evidence is admissible to prove that a surety signed a promissory note on the express condition that the note should not be deemed effective until another named party signed it.

Andrew v Hanson, 206-1258; 222 NW 10

Bills and notes—issue, who was accommodated party. Parol evidence to the effect that the payee of a note orally assured the maker, when the note was executed and at later times, that the maker was not liable on the note, and would never be called upon to pay it, is admissible on the issue whether the note was an accommodation note for the accommodation of the payee-plaintiff.

Security Bk. v Carlson, 210-1117; 231 NW 643

Note—oral testimony as to liability. The accommodating maker of a promissory note may not, in the absence of evidence of fraud, testify that when he executed the note an oral agreement was entered into that he was not to assume any liability on the note.

Citizens Bank v Rowe, 214-715; 243 NW 363

Varying written description of notes guaranteed. In an action on a written guaranty of payment of separately and unambiguously described notes, parol evidence is inadmissible to show what notes were intended, and that they are different from those described in the guaranty.

Andrew v Austin, 213-963; 232 NW 79

Varying indorsement of note. An unrestricted indorsement of a promissory note may not be modified by oral evidence to the effect

II EVIDENCE GENERALLY—continued
(i) PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—continued

that the indorser was not to be held personally liable on his indorsement.

Aetna Bank v Hawks, 213-340; 239 NW 91

Oral agreement for mortgage priority. Oral evidence that when a promissory note and the mortgage securing it were assigned, it was agreed that the indorsee should have priority over other prior maturing notes secured by the same mortgage and then held by the assignor, is not violative of the "parol-evidence rule."

White v Gutshall, 213-401; 238 NW 909

Signing note after maturity—oral modification. A promissory note which is signed by a party after maturity is, as to such signer, payable on demand; and parol evidence is inadmissible to contradict or vary such legal effect.

Fairley v Falcon, 204-290; 214 NW 538

Receipts—parol showing of purpose. Under plea of payment of a promissory note, parol evidence is admissible to show that nonexplanatory receipts represented money paid on the note and accepted as such by the payee.

Hallowell v Van Zetten, 213-748; 239 NW 593

Direct contradiction—commission stated in contract. A written contract which provides for a commission of 10 percent on a specified expenditure may not be contradicted by parol evidence to the effect that the parties orally agreed that the commission should be 8 percent.

Parks & Co. v Howard Co., 200-479; 203 NW 247

Parol warranty—when incompetent. Principle reaffirmed that, when a written contract of sale contains no warranty, a parol one may not be engrafted thereon.

Blecher v Schmidt, 211-1063; 235 NW 34

Naked order for goods—parol evidence to show acceptance. Parol evidence is admissible to show that a naked order for goods was accepted, and, when material, that such acceptance was at a certain place.

Anderson Co. v Monument Co., 210-1226; 232 NW 689

Trade acceptances negotiated. In an action to recover on trade acceptances by indorsee thereof, where there is no provision in sales contract prohibiting either delivery, negotiation, or transfer of such acceptances which are regular on their face, held, proof of an alleged oral agreement that acceptances were subject to certain conditions in sale contract is inadmissible in evidence.

State Bk. v Feed Co., 227-596; 288 NW 614

Parol consent to sale of mortgaged chattels. Evidence is admissible that a chattel mortgagee orally consented to the sale of the chattels by the mortgagor, notwithstanding the fact that the criminal statute denominates such sales criminal unless the consent is in writing.

Hepker v Schmickle, 209-744; 229 NW 177

Deed as mortgage. Parol testimony is admissible to show that deed was in fact a mortgage and was so intended.

Rance v Gaddis, 226-531; 284 NW 468

Oral contradiction of mortgage-assumption clause. One who contracts for and receives a deed to land, and in both instances assumes payment of an existing mortgage on the land, may wholly avoid such apparent obligation, as regards the mortgagee, by oral testimony—the rule against contradicting written instruments by parol evidence to the contrary notwithstanding—to the effect that he never had any interest in the land, and without consideration therefor contracted for and received a deed, and conveyed the land simply as a matter of convenience for the real owner.

Nissen v Sabin, 202-1362; 212 NW 125; 50 ALR 1216

Oral addition to mortgage. Evidence is inadmissible that, at the time of the execution of a purchase-money mortgage, an oral contemporaneous agreement was entered into, to the effect that, if the mortgagor was unable to finance (pay) the mortgage, the mortgagee would pay to the mortgagor the value of any improvements placed on the land by the mortgagor.

Felton v Thompson, 209-29; 227 NW 529

Consideration—failure of, as to wife. Parol evidence is admissible between the original parties to a note and mortgage to show that the wife signed the obligations without any consideration flowing to her, and solely for the purpose of releasing her possible dower interest, and without any knowledge that her signature was being required or demanded by the payee.

Cooley v Will, 212-701; 237 NW 315

Reference to prior mortgage in later admission of debt—revival of action. A statement in a second mortgage, that the premises are encumbered by another prior mortgage as of a certain date, constitutes an admission of that indebtedness such as to start the statute of limitations running anew, and the particular mortgage referred to may be established by extrinsic evidence.

Lackey v Melcher, 225-698; 281 NW 225

Mortgages — priority — oral agreement of parties. The assignee of one of two simultaneously executed mortgages on the same property to different parties may show, in an action wherein the foreclosure of each mortgage is asked, that just prior to the execution of said mortgages it was orally agreed by all

parties to both mortgages that a certain one of said mortgages should be the first lien on the property.

Wuennecke v Hausman, 216-725; 247 NW 531

Contradicting mortgage. Parol evidence to the effect that, at the time of the delivery of a mortgage, the mortgagee agreed that he would extend the mortgage indefinitely, and that in no event would a certain portion of the mortgaged property be taken under the mortgage, is wholly inadmissible.

Farmers Bank v Weeks, 209-26; 227 NW 508

Parol nullification of mortgage assumption clause. A written clause in a deed to mortgaged premises purporting to bind the grantee to pay the mortgage debt may be nullified by parol evidence,—the mortgagee not being a party to the deed or to the contract of sale preceding the deed.

Andrew v Naglestad, 216-248; 249 NW 131

Partition plaintiff as purchaser assuming mortgage. A plaintiff in a partition action, becoming the purchaser, who accepts, from the referee with knowledge of its contents, a deed reciting an assumption of a mortgage together with a reference to the referee's report of sale, and who also retains an amount equal to the mortgage, does thereby assume and agree to pay such mortgage. Such a reference incorporates the report into the deed and the actual consideration may be shown by parol evidence.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Parol to explain ambiguous storage contract. A written contract for storage of corn, which makes no provision as to when the seller is to exercise an option to sell nor as to when the storage is to be paid, does not contain the entire agreement entered into, and parol evidence is admissible on the question as to what was reasonable time to perform.

Andreas & Son v Hempy, 224-561; 276 NW 791

Lease—oral explanation. The fact that both of two parties sign a lease and the accompanying rent notes does not necessarily establish, in a controversy strictly between said two parties, that each party should pay one-half the rent. The said fact is open to oral explanation.

Fisher v Nicola, 214-801; 241 NW 478

Oral contract contemporaneous with deed. When a duly recorded deed contains a prohibition against a sale or conveyance of any part of the land during the lifetime of the grantor, parol evidence is admissible against a subsequent mortgagee to show that the purpose of said prohibition was to protect the grantor during his lifetime in a contract reservation of rent in the land.

Iowa F. C. Corp. v Halligan, 214-903; 241 NW 475

Assumption of mortgage—unallowable contradiction. A deed to land wherein the grantee assumes one-half of an existing mortgage on the land may not be modified by testimony to the effect that when the deed was executed it was orally agreed that the grantee should continue to be bound by the original written contract of sale wherein he agreed to assume the entire mortgage.

Reit v Driesen, 212-1011; 237 NW 325

Estoppel to object. A party may not object to oral evidence which shows that an apparently absolute note and mortgage were given as collateral security for other debts when the absence of such evidence would leave the objector without any defense whatever.

Bilharz v Martinsen, 209-296; 228 NW 268

Acceptance of deed—no waiver of easement rights under contract. When a contract of sale of land provided that the deed would grant an easement for the right of ingress and egress to the property, but the deed drawn on the same day failed to make such provision, the acceptance of the deed by the grantee did not waive the provision of the collateral contract, altho ordinarily the acceptance of a deed would complete the execution of the contract and would be conclusive evidence of its complete fulfillment.

Dawson v McKinnon, 226-756; 285 NW 258

Easement rights omitted from deed. When land was purchased under a contract providing that the deed would grant an easement of the right of ingress and egress to the property, and that the exact description of the easement would be made a part of the deed, but such description having been omitted, it was proper, in purchaser's action to assert such easement rights, to admit extrinsic evidence to show the exact location of the easement.

Dawson v McKinnon, 226-756; 285 NW 258

Avoidance of statute of frauds. Parol evidence is competent to show that the titleholder to land has admitted that he was to hold such title only until such time as he was reimbursed for money expended on the property and that such arrangement has been in part carried out.

Neilly v Hennessey, 208-1338; 220 NW 47

Shortage in acreage—evidence. Where lands of an estate are ordered sold for a lump sum, parol evidence is admissible to show that the land was, in reality, sold at a certain price per acre and that the acreage fell short of what was supposed to be the acreage, and that

II EVIDENCE GENERALLY—continued
(i) PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—continued

the administrator properly made a deduction for said shortage.

In re Oelwein, 217-1137; 251 NW 694

Ambiguous plat. A town plat which is ambiguous in its descriptions and recitals is subject to parol explanation.

Shuler v Sand Co., 203-134; 209 NW 731

Ambiguous clause in broker's contract—limitation. In an action to recover commission under real estate broker's contract in which the clause providing for time when commission is due and payable is ambiguous, proof of the circumstances accompanying the execution of the ambiguous instrument is admissible to assist in the interpretation, but not to vary the terms of the instrument.

Mealey v Kanealy, 226-1266; 286 NW 500

Contracts partly written, partly oral. Parol evidence is admissible to show that a building contract was partly in writing and partly oral.

Golwitzer v Hummel, 201-751; 206 NW 254

Building contract—extra costs—written authorization required—effect. A written building contract which, in effect, excludes all claims for extra costs consequent on changes in the plans unless such claims are evidenced by written authorization signed by the owner or by the architect on behalf of the owner must be given the legal effect of excluding all evidence of oral authorization, there being no plea or proof, on behalf of the contractor, of waiver or ratification.

Iowa Elec. Co. v Hopp, 221-680; 266 NW 512

Express trusts — unconditional conveyance. A parol, unexecuted, and unadmitted trust cannot be engrafted on an unconditional conveyance in fee of real estate.

Hospers v Watts, 209-1193; 229 NW 844

Trusts—oral evidence — when competent. Parol evidence is admissible to establish and show the nature of an admitted or partially or wholly executed trust.

Andrew v Bank, 209-1149; 229 NW 819

Parol to prove execution of unenforceable trust. It is true that one claiming to be the absolute owner of land may not, as against the grantee in a conveyance, prove, by parol evidence, that when the conveyance was executed grantee's name was inserted in the conveyance as grantee under an oral agreement that said substituted grantee would hold said land solely and exclusively for said secret grantee, but said parties may show by parol evidence, as against a stranger, that said oral agreement was actually carried out and executed by said parties.

Bates v Zehnpfennig, 220-164; 262 NW 141

Constructive trust — evidence — sufficiency. An express trust in real property cannot be legally established by parol, nor may an implied or constructive trust in such property be established except by evidence which is clear, convincing, and satisfactory.

McMains v Tullis, 213-1360; 241 NW 472

Establishing trust by oral agreement—prohibitory statute. Under the Iowa statute an express trust cannot be established by a parol agreement, but such statute is inapplicable to constructive trusts.

D. M. Terminal v D. M. Union, 52 F 2d, 616

Testator's or grantor's meaning admissible. Where such terms as children, grandchildren, or nephews are used in a will or a deed, and there are both legitimates and illegitimates and the testator has full knowledge of such fact, and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption, but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of will, but also in the light of the circumstances surrounding the execution of the will, and parol evidence is admissible to prove the intent of the testator or grantor.

In re Estate of Ellis, 225-1279; 282 NW 758

Parol to show circumstances attending making of mutual wills. Even though extrinsic evidence is inadmissible to vary or change the terms of a will, yet evidence may be admitted to show circumstances which accompanied or attended making of the instrument, or to identify papers or writings which in fact constitute the will, especially where it is claimed that two or more writings made at or about the same time are part of a single transaction and together constitute in law a single will.

Child v Smith, 225-1205; 282 NW 316

Adding additional burden. An unambiguous written stipulation and agreement, duly filed in a will contest, providing in effect that defendant will pay, and plaintiff will accept, a named sum of money in full settlement of any and all claim which plaintiff may have against the estate cannot be added to by proof of an oral contemporaneous agreement to the effect that defendant would also execute a will devising and bequeathing all his property to plaintiff.

In re Simplot, 215-578; 246 NW 396

Appointment of executor—notice—proof of service. Parol evidence of the posting, as officially directed, of a notice of the appointment of an executor is admissible, and positive evidence to such effect will not be overcome by evidence of witnesses to the effect that they had not "observed" such posted notice.

Peterson v Johnson, 205-16; 212 NW 138

Court order ratifying oral contemporaneous contract—effect. In an action by a receiver to

recover mining royalties accruing under a written contract, the defendant may show that the court has, on due notice and hearing, approved, confirmed, and ratified an oral contract which was contemporaneous with the written contract and which varied and altered the terms of said written contract.

Dinning v Krapfel, 211-888; 232 NW 490

(j) OPINION EVIDENCE

Discussion. See 6 ILB 168—Opinion rule; 24 ILR 498—Character testimony

Nonconclusiveness on trier of fact question. Opinion evidence is not, ordinarily, conclusive on the trier of a question of fact, especially when such evidence happens to be only one of several elements which the trier must weigh in determining the fact.

Wood v Wood, 220-441; 262 NW 773

Discrimination between parties. Permitting one party to introduce opinion evidence on a certain point and denying to the opposing party the right to counter with like evidence does not necessarily constitute reversible error.

Slinger v Ins. Assn., 219-329; 258 NW 101

Conclusions invading province of jury. Questions are unallowable which call for the very conclusions which the jury must ultimately draw.

State v Johnson, 211-874; 234 NW 263

Concealed basis of opinion. An opinion resting on a basis withheld from the jury would be wholly incompetent.

Spicer v Administrator, 201-99; 202 NW 604

Subject of expert testimony—improper hypothetical question. It is not permissible for a party to gather together in the form of a hypothetical question the various circumstances established by him as bearing on a fact issue and present them to a so-called expert for his opinion, when the circumstances are such that the opinion of a lay witness would carry equal evidentiary value.

McClary v Railway, 209-67; 227 NW 646

"Safe condition"—jury question. A witness should not be permitted to testify that a walk was "ordinarily clean" when such condition is the crux of the issue before the jury.

Smith v Sioux City, 200-1100; 205 NW 956

Death of animals—invading province of the jury. The opinion of a witness as to what caused the death of certain animals is wholly incompetent when such cause was the very question submitted to the jury.

Crouch v Remedy Co., 205-51; 217 NW 557

Cause of death as question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

Radiograph—oral explanation. A radiograph may be explained or interpreted to a jury by an expert, insofar as the radiograph does not interpret itself to the mere observation of a nonexpert.

Appleby v Cass, 211-1145; 234 NW 477

Nonright of jurors to substitute their own knowledge. Jurors may use and employ their own knowledge as to values in determining the weight and effect of expert testimony as to such values, but they must not be instructed, in effect, that they may disregard such expert testimony and substitute their own knowledge as evidence.

State v Brown, 215-600; 246 NW 258

Explanation of architectural drawings. The meaning of marks and characters unintelligible to the layman, appearing on an architectural drawing, may be shown by a witness familiar with such matters. So held as to characters which indicated the presence of a sewer.

Des Moines Co. v Magarian, 201-647; 207 NW 750

Fingerprints—expert testimony as to ultimate fact. A witness who is expert in the science of dactylography may testify that, in his opinion, judgment, or belief, different fingerprints were made by one and the same finger, but he may not testify that they were made by one and the same finger.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

Homicide — robbery. Whether a homicide was committed by one who was at the time robbing the deceased is quite beyond the proper scope of expert testimony.

Nelson v Acc. Soc., 212-989; 237 NW 341

Proof of agency by agent. Testimony by a witness that he acted as agent for the defendant was admissible evidence.

Ballard v Ballard, 226-699; 285 NW 165

Agent's opinion—cause of fire. The expression of an opinion by a party as to the "cause of a fire" is not admissible on such issue, whether viewed as the opinion of an individual or as that of the agent of the party sought to be held liable.

Walters v Elec. Co., 203-467; 212 NW 886

Knowledge of agent. Testimony as to what a party knew that an agent knew is not competent.

Hart v Ins. Assn., 208-1030; 226 NW 781

Question not to ask for opinion. It is not allowable to ask a witness whether a named

II EVIDENCE GENERALLY—continued
(j) OPINION EVIDENCE—continued

person "admitted" writing a named instrument. The question should call for what was said.

State v Debner, 202-150; 209 NW 404

Unallowable opinion on otherwise established fact. The reception of opinion evidence to the effect that a fire was caused in a certain manner is harmless when the record otherwise conclusively demonstrates that the fire was caused in said manner.

Walters v Elec. Co., 203-467; 212 NW 886

Wrongful attachment — incompetent testimony as to damage. In an action on an attachment bond, plaintiff will not be permitted to testify to his opinion as to the effect which the attachment had on a possible sale of the land upon which levy was made, there having been theretofore no negotiations whatever for such sale.

Thielen v Schechinger, 211-470; 233 NW 750

Satisfaction of claim—conclusion usurping jury function. Prejudicial error results from permitting the question whether a party to an action had ever "agreed" to accept a named sum in satisfaction of his claim, and permitting a negative answer, when the existence of such agreement is the sole question before the jury.

Strand v Bleakley, 214-1116; 243 NW 306

Custom of factors—competency. The general custom of factors in handling goods is provable by any witness familiar therewith.

Alley Co. v Cream. Co., 201-621; 207 NW 767

Mathematical computation by witness. A witness may be permitted to make a mathematical computation or summary of detail record evidence.

Johnson Corp. v Shapiro, 200-843; 205 NW 511

Conclusion—material covered in other testimony. In a quiet title action it was not prejudicial to sustain an objection to a question asking the plaintiff if the defendant had made any claim to land at, or prior to, a certain time, when the question asked for a conclusion of the witness, and the witness had answered the question in other testimony.

McCormick v Anderson, 227-888; 289 NW 440

Interwoven statements of fact and opinion. A fraud-doer may not complain of the submission to the jury of matters of opinion, as distinguished from representations of fact, when his statements of opinion are so interwoven with his statements of fact that to separate them is practically impossible.

Pullan v Struthers, 201-1179; 207 NW 235

State of mind admissible. If question calls for state of mind, answer is admissible altho in the nature of a conclusion.

Rogers v Jefferson, 224-324; 275 NW 874

Harmless error—conclusion answers. Error may not be predicated on the fact that a witness was permitted to give a conclusion answer when the witness had, prior thereto, without objection, stated the facts relative to said matter.

First St. Bank v Tobin, 204-456; 215 NW 767

Allowable conclusion. The statement that a party "was trying to get away" from another party is an allowable conclusion.

State v Graham, 203-532; 211 NW 244

Beneficiary's complaints — conclusion. The testimony of a witness that she had never heard the beneficiary of a will talk to the testator in any way "other than in a complaining way of his treatment of her" is a conclusion and properly excluded.

McCollister v Showers, 216-108; 248 NW 363

Allowable conclusion. When the actions and conduct of a witness at a certain time are material and there is no other adequate way of placing the matter before the jury, then the witness should be permitted to describe what he saw, even though his description consists of a mixed statement of fact and conclusion. So held as to the statement "It seemed as though the man jumped right in front of the car, and we hit him."

Wieneke v Steinke, 211-477; 233 NW 535

Position of vehicle—allowable conclusion of witness. Statements of a witness to the effect that a vehicle seemed to be on the wrong side of a black line drawn along the center of a paved highway, may be an allowable conclusion.

Henriksen v Crandic Stages, 216-643; 246 NW 913

Unallowable questions. Whether a motorman could have done anything which would have stopped his streetcar sooner than it was stopped is properly excluded because the question calls for an unallowable conclusion, and also invades the province of the jury.

Allen v Railway, 218-286; 253 NW 143

Speed of automobile. A witness who has operated an automobile for several years, and whose business necessitates extensive travel by him over the country, mostly by automobile, is competent to give an opinion as to the speed at which an automobile was being operated on a certain occasion.

State v Thomlinson, 209-555; 228 NW 80

Competency of testimony—brakes on train. The opinion of a witness, on proper foundation, as to the distance in which a certain train could be stopped is not rendered incompetent because the witness did not know the particular make of air brake on the train in question or the air pressure carried, he having testified that the ordinary train was so equipped and

operated that the effect of manipulating the air valve would be the same, regardless of the kind and make of brakes.

Williams v Railway, 205-446; 214 NW 692

Ability of driver—conclusion. An opinion as to "what kind of a driver" the operator of an automobile was is an unallowable conclusion.

In re Hill, 202-1038; 208 NW 334; 210 NW 241; 26 NCCA 193

Conclusion in re partnership. The question whether an association of individuals constitutes a partnership calls for a legal conclusion.

DeLong v Whitlock, 204-701; 215 NW 954

Contract—conclusions. The question whether a witness had a contract with another which would permit the witness to do thus or so calls for an unallowable conclusion.

Baitinger v Elmore, 208-1342; 227 NW 344

Questions improper—conclusions called for. Questions asking whether defendant's movements caused globe to fall from electrolier, and whether plaintiff exercised more than ordinary care for himself after injury, and whether he suffered a direct money loss in his business as a result of his absence from the store were properly excluded as calling for conclusions.

Rauch v Dengle, (NOR); 218 NW 470

Conclusions—nonfatal admission. Admission of conclusions of witnesses that they sawed lumber according to instructions, that the logs of appellee were better than others, and other similar conclusions held not prejudicial when the same testimony was elicited by proper questions and answers.

Waterman v Gaynor Co., (NOR); 215 NW 641

Cause of injury—invading province of jury. It is improper (1) to call upon an expert witness for his conclusion as to the cause of an injury, or (2) to ask such witness for his opinion as to the "sole cause" or "direct and exclusive cause" or "sole primary cause" of such injury, and reversible error results from permitting the witness to affirmatively state such conclusion or opinion.

Justis v Cas. Co., 215-109; 244 NW 696

Identification of alcohol. The opinion of a properly qualified witness is admissible on the issue whether a certain liquid is alcohol.

State v Healy, 217-1155; 251 NW 649

Taste and smell of liquor. Principle reaffirmed that witnesses may testify that certain liquors smelled or tasted like alcohol.

State v Ferro, 211-910; 232 NW 127

Homicide—character of accused. Not even a defendant in a charge of homicide is a competent witness to testify to the reputation of the deceased as to peaceableness or quarrelsomeness when he—the defendant—fails to show his qualification to so testify.

State v Reynolds, 201-10; 206 NW 635

Intoxication. The fact of intoxication may be shown by one who has observed the conduct and appearance of the person in question and describes the same.

State v Kendall, 200-483; 203 NW 806

Intoxication—basis of opinion. A witness may testify whether a person was sober or intoxicated without first stating the facts on which the opinion is based.

State v Wheelock, 218-178; 254 NW 313

Insanity—absence of fact basis. Nonexpert testimony by an accused who pleads insanity as a defense to a charge of murder, to the effect that his father was "out of his mind" for some time prior to his death, without any fact basis for such testimony, constitutes an unallowable conclusion.

State v Buck, 205-1028; 219 NW 17

Hypothetical questions to expert. It is not erroneous to permit an attending physician who has detailed the injuries of his patient to answer hypothetical questions.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Malpractice—evidence — usual and ordinary practice. The defendant, in an action for damages for malpractice, may always establish, even by his own testimony, the usual and ordinary practice of physicians and surgeons in treating, in the locality in question, the injury which is the subject matter of the action.

Wilcox v Crumpton, 219-389; 258 NW 704

Usual course of recovery. Evidence of an expert witness relative to the recovery usually made in average cases of certain injuries is wholly irrelevant and immaterial when there is no evidence that the injuries in question constituted an "average case."

DeMoss v Cab Co., 218-77; 254 NW 17

Nonexpert opinion of sanity. A nonexpert witness may base an opinion as to the sanity or insanity of a person on a proper detail of facts.

State v Murphy, 205-1130; 217 NW 225

Mental unsoundness—cross-examination. A witness who testifies to the mental unsoundness of a party may, on cross-examination, be questioned as to his knowledge of rumors in the neighborhood as to the party's mental condition.

Ayres v Nopoulos, 204-881; 216 NW 258

Sanity—permissible hypothetical question. A hypothetical question may embody any material and supported fact. So held as to what

II EVIDENCE GENERALLY—continued
(j) OPINION EVIDENCE—continued

witnesses had "observed" as to the actions of an alleged insane person.

State v Murphy, 205-1130; 217 NW 225

Testamentary capacity. A nonexpert witness may not express an opinion that a testator was of unsound mind on a recital of facts which pertain solely to his physical condition.

In re Paczoch, 202-849; 211 NW 500

Expert and lay opinions—which must yield. An expert opinion that a person was insane at a named time prior to the time when said person was judicially declared insane will not be permitted to outweigh overwhelming lay testimony which strongly tends to establish the contrary, when said expert opinion is based almost wholly on information obtained from said person after she was adjudged insane, and on information obtained from the relatives of said person.

Davidson v Piper, 221-171; 265 NW 107

Value of lands—familiarity. A witness who is shown to be familiar with the value of lands in the vicinity of the land in question is competent to testify as to the value of the latter.

Millard v Mfg. Co., 200-1063; 205 NW 979

Value of land—selling price as evidence. The value of farm land, thru which a highway right of way is sought to be condemned, cannot be competently shown by evidence of the recent sale price of similar land in a nearby community.

Maxwell v Highway Commission, 223-159; 271 NW 883; 118 ALR 862

Land values—familiarity with land. A witness is not competent to testify to the value of land when he has never been on the land and lives a material distance therefrom; neither is a witness competent who has never been on the land but once, lives at a great distance, and has manifestly superficial knowledge of the land.

Vanarsdol v Farlow, 200-495; 203 NW 794

Taxation—farm land within city—evidence warranting reduction in actual value. Where a 371.51-acre farm within the corporate limits of a city was very rough, the top soil washed off, the fertility gone, a third of the land infested with weeds rendering it impossible to raise even grass crops, and where the taxes exceeded the income, and qualified witnesses fixed its value at between $10 and $15 per acre, as against the tax assessor's value fixed at $65.58 per acre, on same basis as adjoining lands, tho there was no other similar land in the district, the supreme court fixed the actual value thereof for taxation at $30 per acre.

Lincoln Bank v Board, 227-1136; 290 NW 94

Abuse of discretion in curtailing cross-examination. Where an expert witness has testified, on direct, to the value of a farm as a whole before and after a condemnation for a highway right of way, it is an abuse of discretion to refuse a cross-examination as to the value of separate tracts of the farm before and after the condemnation.

Dean v State, 211-143; 233 NW 36

Accessibility of farm to market. The defendant in eminent domain proceedings has the legal right, on the cross-examination of plaintiff's witnesses as to value, to show the distance of plaintiff's farm from the market and the kind of roads leading to such market.

Welton v Hy. Comm., 211-625; 233 NW 876

Driving stock across highway. In condemnation proceeding to acquire ground to widen highway which divided plaintiff's farm, a hypothetical question asked of one witness as to whether the additional trouble experienced by plaintiff in driving his stock across highway, since it had been widened, would affect the values of the farm—altho being a question of doubtful propriety, was related to a matter so simple and self-evident that the opinion of the witness could add no force or prejudicial effect thereto.

Stoner v Hy. Comm., 227-115; 287 NW 269

Value—owner of property. An owner of personal property is a competent witness to give his opinion as to the value of the property.

Walters v Elec. Co., 203-467; 212 NW 886

Incompetency of owner of property. Proof of ownership is ordinarily prima facie proof of qualification on the part of the owner of property to testify to the value thereof, but not so when the record negatives such qualification. So held as to the value of corporate stock.

Ryan v Cooper, 201-220; 205 NW 302

Value of automobile—competency of witness. A witness is competent to testify to the value of an automobile before and after an accident when it appears that he has seen cars of that make sold, and also second-hand cars bought and sold.

Anderson v U. S. Ry. Adm., 203-715; 211 NW 872

Value—discretion of court. If a witness shows "some qualifications" to testify as to value, the court has a discretion to admit his testimony as to value.

In re Manning, 215-746; 244 NW 860

Corporate stock—no market value—net value of assets. If there is no evidence of the market value of corporate stock—in an action for damages consequent on a fraudulently induced sale—said value must be determined by ascertaining the net value of the assets of the corporation.

Humphrey v Baron, 223-735; 273 NW 856

Value for services for engineering—contract—inadmissible. In an action against a city for engineering services, consisting of inspection and reconstruction of sewage disposal plant, refusal to admit evidence of value of services rendered within contemplation of contract for lump sum compensation is not error.

Slippy Engineering Corp. v Grinnell, 226-1293; 286 NW 508

Competency of witness—value of services. Allowing a witness to testify to the value of services without a showing of competency, or after an admission of a total lack of knowledge as to such value, is manifestly erroneous.

Seddon v Richardson, 200-763; 205 NW 307

Competency of expert — value at distant market. A coal dealer who has for a long time purchased coal at points in a foreign state is competent to testify to the value of such commodity at said foreign points.

Smith v Railway, 202-292; 209 NW 465

Value—selling price. The issue of the value of an article is quite conclusively settled by evidence that the defendant had sold the article for the very sum which plaintiff contended was its value.

Kinsey v Massey, 204-758; 216 NW 54

Value—competency of testimony. Competency to testify to the value of an apparatus may not be predicated solely on the fact that the apparatus does not work efficiently.

Chariton Co. v Lester, 202-475; 210 NW 584

(k) WEIGHT AND SUFFICIENCY IN GENERAL

Taking case from jury—scintilla evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 155

Evidence incapable of direct contradiction—effect. Evidence which is of such nature that it is incapable of direct contradiction must be closely scrutinized.

Heavner v Kading, 209-1271; 228 NW 311

Testimony incapable of direct contradiction—credibility tested. Where the only person who can deny the testimony of a witness is dead, it is incumbent on the court to look upon such testimony with great jealousy and to weigh it in the most scrupulous manner to see what is the character and position of the witness generally, and whether he is corroborated to such an extent as to secure confidence that he is telling the truth.

Peterson v Bank, 228- ; 290 NW 546

Circumstantial evidence—sufficiency to establish theory. A theory cannot be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them, and it is not sufficient that they be consistent merely with that theory.

Jakeway v Allen, 227-1182; 290 NW 507

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Acknowledgment — preponderance of testimony. Principle recognized that testimony sufficient to overthrow the probative force of a certificate of acknowledgment must amount to more than a preponderance in the balancing of probabilities.

Parry v Reinertson, 208-739; 224 NW 489; 63 ALR 1051

"Don't remember" testimony. Witness' testimony that he does not remember a conversation is of no probative value and is not sufficient to raise a conflict in the evidence.

Rance v Gaddis, 226-531; 284 NW 468

Testimony—effect of "improbabilities." "Improbabilities" in certain features of the testimony relative to a party's claim do not constitute a defense, and the court must not so instruct.

In re Dolmage, 204-231; 213 NW 380

Positive, affirmative and uncontradicted—effect. Positive testimony which affirms a fact cannot, when uncontradicted, be held to prove the negative.

Williams Bank v Murphy, 219-839; 259 NW 467

Burden of proof—negligence and proximate cause. Both negligence and proximate cause are questions of fact for the jury if the evidence is of sufficient weight and character to warrant their submission, and plaintiff has burden to establish them by a preponderance of the evidence, whether the evidence be direct or circumstantial.

Whetstine v Moravec, 228- ; 291 NW 425

Reformation of instruments — proceedings and relief. Reformation of an instrument because of the mistake of plaintiff and fraud on the part of defendant will not be decreed except on clear, satisfactory, and convincing proof of the existence of said grounds. Evidence held insufficient.

West v Hysham, 214-349; 242 NW 19

Reformation of instruments — mandatory degree of proof. Plaintiff seeking the reformation of a written instrument, must fail unless he establishes by clear, satisfactory, and convincing evidence—by evidence exceeding a

II EVIDENCE GENERALLY—continued
(k) WEIGHT AND SUFFICIENCY IN GENERAL—continued

mere preponderance—by evidence approximating proof beyond a reasonable doubt—the definite contract which the executed writing does not embrace. Evidence reviewed in detail under a prayer for the reformation of a lease, and held insufficient to comply with the rule.

Stillman v Bank, 216-957; 249 NW 230

Statutory bond—forgery. Evidence reviewed and held that the signature to a depositary bond was genuine.

School District v Bank, 218-91; 253 NW 920

Payment and discharge of note. Evidence held quite insufficient to establish payment of a note.

Andrew v Ingvoldstad, 218-8; 254 NW 334

Accommodation paper. Evidence held to show affirmatively that the maker of a promissory note was not an accommodation party.

Pennington v Nelson, 208-1310; 227 NW 163

Ratification of unauthorized indorsement. Evidence held to show the ratification of an unauthorized indorsement of a promissory note.

Lex v Steel Corp., 203-792; 206 NW 586

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Consideration and delivery—proof by presumptions. The questions of want of consideration and nondelivery of a note, though supported in proof by presumptions, need not be submitted under instructions to the jury when such presumptions are not overcome by evidence and the only conflict arises over the genuineness of the signature.

In re Cheney's Estate, 223-1076; 274 NW 5

Holdership in due course—participation in fraudulent transaction. Evidence reviewed, and held to sustain a verdict to the effect that the acquisition of a negotiable promissory note by the holder thereof was part of a fraudulent transaction of which the holder had full knowledge and in which he actively participated.

Kenwood Co. v Armstrong, 201-888; 208 NW 371

Execution of contract. Evidence held sufficient to present a jury question on the issue whether bank directors had entered into an agreement as to what each, as between themselves, should pay on a promissory note given for the benefit of the bank.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Special deposits. Evidence held insufficient to show that a deposit was made for the special purpose of meeting payment on a particular draft, or was made under such circumstances that the issuance of the draft effected a pro tanto equitable assignment of the deposit.

Heckman v Bank, 208-322; 223 NW 164

Testamentary trustee of business nonchargeable with interest. Evidence reviewed, and held that a testamentary trustee, vested with unusually broad managerial powers, was not chargeable with interest on bank deposits, even though he was a stockholder in the bank.

Evans v Hynes, 212-1; 232 NW 72

Directed verdict—payment of rent. Direction of verdict in action to recover on rent note from tenant was erroneous when there was sufficient evidence of payment by tenant in turning over proceeds of crop to warrant submission of the case to jury.

McCann v McCann, (NOR); 226 NW 922

Evidence insufficient to warrant cancellation of note. Evidence held insufficient to warrant cancellation of note given to bank for loan used to purchase its stock when it did not sustain the plaintiff's charges of fraud, misrepresentation of the value of the stock, or that he received stock other than that which he intended to buy.

Bowne v Bonnifield, 226-712; 285 NW 144

Harmless error. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Action on bond. Evidence reviewed, in action on a fidelity surety bond, and held to show abstraction of the employer's funds by the employee and consequent loss by the employer, within the terms of the bond.

Webster Bank v Ins. Co., 203-1264; 212 NW 545

Fraud—remedies of creditors. Proof (1) that the vendee of personal property did not record or file his bill of sale as required by law, (2) that there was no change of possession following the bill of sale, and (3) that the vendee actively aided the vendor in disposing of the property as the property of the vendor,

furnishes ample justification for the holding that the rights of a good faith and innocent attaching creditor of the vendor were superior to the asserted rights of the vendee.

Beno Co. v Perrin, 221-716; 266 NW 539

Fraud—evidence sufficient to sustain. Evidence held to show that conveyance by judgment-debtor was with intent to hinder, delay, and defraud creditor in collection of judgment.

Phillips v McIlrath, (NOR); 237 NW 212

Action by trustee in bankruptcy—fraudulent conveyance. Trustee in bankruptcy who introduces testimony given on examination in bankruptcy court is bound thereby, and evidence is insufficient to sustain trustee's claim that transfer of note by bankrupt to sister was in fraud of creditors.

Cooney v Graves, (NOR); 230 NW 407

Fraudulent conveyances — self-impeaching evidence. The court cannot say, at least ordinarily, that wholly undisputed testimony tending to show that a conveyance was bona fide and for value is so self-impeaching as to establish the very contrary.

Hawkins v VerMeulen, 211-1279; 231 NW 361

Conveyance and assignment to stepson — evidence to set aside. Where an elderly but unusually self-willed woman executed a deed to her stepson during time in which she managed her own affairs, and relationship with grantee was only that which ordinarily exists between a mother and son, evidence in action to set aside the deed did not warrant finding that confidential relationship existed so as to raise presumption of fraud, but as to the assignment of a mortgage procured by this stepson after he came to live with her and had taken over management of her affairs, evidence justified finding that such relationship did exist.

O'Brien v Stoneman, 227-389; 288 NW 447

Fraudulent conveyance. Evidence held to establish the fraudulent nature of a conveyance.

Hansen v Richter, 208-179; 225 NW 361

Self-enrichment of trustee—insufficient evidence of misconduct. A testamentary trustee of a coal mining company who, personally or in connection with employees of the company, with his own funds buys up lands or mining rights in lands and leases to the company the right to mine coal from said lands under a royalty, will not be compelled, long afterward, to account to the legatees and devisees for the royalties so received and for salary drawn during said time (1) when the trustee had been vested, under the will, with substantially the same power over the business as the deceased possessed when living, (2) when the policy of operating on leases was but a continuance of the lifelong policy of the deceased, (3) when the royalties paid were the royalties ordinarily and customarily paid in said locality, and (4) when the existence and history of said transactions were carried openly on the books of the company, and were either personally known or capable of being easily known by all the legatees and devisees.

Evans v Hynes, 212-1; 232 NW 72

Resulting trusts. A resulting trust will be established only on testimony which is clear and certain.

Irving v Grimes, 208-298; 225 NW 453

Validity of deed—constructive fraud. Evidence held to show affirmatively that the execution of a deed was not brought about by any constructive fraud arising out of the intimate relations of the parties.

Utterback v Hollingsworth, 208-300; 225 NW 419

Validity of deed — false representation — proof required. Principle reaffirmed that a deed of conveyance will not be set aside on an allegation of fraudulent representation which is sustained by a mere preponderance of the evidence.

Clark v Beck, 208-156; 225 NW 353

Covenants—action for breach. A covenant against incumbrance or to defend the title against the lawful claims of all persons whomsoever cannot be deemed broken on a naked showing that the covenantee remained out of possession because someone else was in possession. The nature of that possession is manifestly all-important: e. g., whether it is lawful and paramount and hostile to the rights of the covenantee.

Pope v Coe, 208-759; 225 NW 939

Standing truck—negligence per se. Evidence reviewed and held to establish negligence per se on the part of plaintiff in not seeing and avoiding a truck which was standing in the hallway of a hotel.

Walker v Hotel Co., 214-1150; 241 NW 484

Actions—evidence insufficient. In an action by a store customer to recover damages suffered when customer slipped and fell on waxed floor, evidence held insufficient to warrant instruction on question as to whether floor was excessively waxed at place where customer fell and that under the evidence such question was so conjectural as to be outside the jury's proper functioning.

Osborn v Klaber Bros., 227-105; 287 NW 252

Electricity — negligence — proximate cause. Evidence held insufficient to show that certain acts of omission and commission were the proximate cause of the reaching and entrance to a building of an excess voltage of electricity.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

II EVIDENCE GENERALLY—continued
(k) WEIGHT AND SUFFICIENCY IN GENERAL—continued

Remote examination. Evidence of the existence of marks upon a public street and on the curb bordering thereon, several hours after an accident in question, is admissible over the objection that the evidence is too remote.

Stutzman v Younkerman, 204-1162; 216 NW 627

Cornice on building as nuisance. Evidence that a building built flush with the street line was surmounted by a cornice which overhung the street for a material distance and which for several years, through some defect, cast water upon the sidewalk, and at times caused a dangerous accumulation of ice on the sidewalk, furnishes ample basis for a jury finding that the city had not and was not keeping its street free from nuisance.

Wright v A. & P. Co., 216-565; 246 NW 846; 32 NCCA 509

Alienation of affections. Evidence held to present a jury question on the issue whether the affections of the wife had been alienated.

Weyer v Vollbrecht, 208-914; 224 NW 568

Annulment of marriage—insanity. Evidence reviewed and held sufficient to authorize default decree annulling marriage on ground of insanity at time of marriage.

Kurtz v Kurtz, 228- ; 290 NW 686

Health insurance—partial disability. Evidence held to justify the submission to the jury of the issue of partial disability.

Vorpahl v Surety Co., 208-348; 223 NW 366

Broker — action for compensation — presumption not jury question. In an action by a real estate broker for commission, on the theory that he was the efficient and procuring cause for a sale, his showing that he was authorized to sell and had contacted a buyer who afterward purchased directly from the owner, raises no jury question but only a rebuttable presumption which defendant successfully rebuts by direct evidence to the contrary.

Donahoe v Denman, 223-1273; 275 NW 155

Council's judgment—filling station permit. The wisdom, judgment, or lack thereof, on the part of a city council in issuing a permit to erect a "filling station" is not reviewable by the courts unless the action taken was arbitrary, oppressive, or capricious. Evidence reviewed and permit held valid.

Scott v Waterloo, 223-1169; 274 NW 897

Waiver—definition—proof—deferred salary. Waiver being an intentional relinquishment of a known right and provable only by clear, satisfactory, unambiguous evidence, where a corporation resolution deferring payment of certain delinquent salary accounts due corporate officers, did not of itself prevent payments thereon, fact of withdrawals thereafter from such salary accounts is not a waiver of such resolution.

Bankers Trust Co. v Economy Coal Co., 224-36; 276 NW 16

Deportation grounds — reviewed in habeas corpus. On an appeal from a denial of a writ of habeas corpus under deportation order, the question of sufficiency of evidence to support the order may be properly reviewed in a habeas corpus action, and where ground of deportation is fraud committed in Canada with no showing that crimes charged were criminal under the law of Canada, the order denying the writ was reversed with instructions to grant the writ, as neither a court nor an administrative body can take judicial notice of the laws of a foreign country. In an administrative proceeding there must be such procedure as to accord substantial justice and afford the parties a fair trial.

Smith v Hays, 10 F 2d, 145

Verdict set aside — criminal more readily than civil. Where the verdict is clearly against the weight of evidence, a new trial should be granted, and the appellate court will interfere more readily in a criminal case than in a civil one.

State v Carlson, 224-1262; 276 NW 770

No negative fact from affirmative testimony. Positive, uncontradicted testimony of husband and wife, defendants, called to testify by plaintiff, affirming in their own behalf fact of consideration for a deed to wife, cannot be held to have proven a negative fact of lack of consideration.

Donovan v White, 224-138; 275 NW 889

"Last clear chance"—evidence—insufficiency. The doctrine of "last clear chance" is not applicable unless peril of injured party is actually discovered and appreciated in time to prevent his injury by the exercise of ordinary care. So where plaintiff drives his truck at a speed of four or five miles per hour onto a railroad track, and is struck by a train going four or five miles per hour, and it is shown engineer of train felt a jar and, looking out of cab, saw some object in front of locomotive and immediately applied brakes and placed locomotive in reverse, held, evidence insufficient to submit to jury, and a motion for directed verdict was rightfully sustained.

Kinney v C. G. W. Ry. Co., 17 F 2d, 708

Mouse in Coca-Cola—jury question. Evidence establishing (1) purchase of a bottle of Coca-Cola from stand at country club, (2) immediate drinking of part of contents in presence of those in charge of stand, and (3) discovery of a dead mouse in bottle, and becoming ill as

consequence, presents question for the jury as to whether the mouse was in the bottle when purchased by the country club.

Anderson v Tyler, 223-1033; 274 NW 48

Special assessments — excessiveness. Evidence held to justify a materially higher assessment for paving than the assessment fixed by the trial court.

Nelson v Sioux City, 208-709; 226 NW 41

Uncontroverted evidence may be insufficient unless corroborated. Positive evidence of the truth of an all-controlling fact may be insufficient to establish such fact when such evidence is, from its very nature, incapable of contradiction by any other witness, and when, if the evidence be true, corroborative facts necessarily exist, and are not shown. So held where it was sought to trace title through a secret trust.

Nehring v Hamilton, 210-1292; 232 NW 655

Unlawful transportation of liquor—evidence —sufficiency. A jury is amply justified in finding that an accused was engaged in the unlawful transportation of intoxicating liquors when the evidence shows that he was found seated in the driver's seat of an automobile standing on a country road, with a loaded revolver by his side, and with fifty-five gallons of alcohol stored in the car.

State v Anderson, 216-887; 247 NW 306

Intoxicating liquors—illegal transportation. A charge of illegal transportation of intoxicating liquors is not sustained by unquestioned testimony that the defendant was overtaken by the operator of an automobile and was invited to ride, accepted the invitation, and entered the car (in which he had no interest), where he later found a jug of whisky, in which he likewise had no interest, but which he threw out of the car when pursued by peace officers.

State v Duskin, 202-425; 210 NW 421

Prosecution—probable cause—jury question. "Probable cause" for prosecution is defined as "the knowledge by the prosecuting witness of such a state of facts as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe the person accused is guilty", and except where the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion, the question of probable cause is for the jury.

Bair v Schultz, 227-193; 288 NW 119

Total disability — de novo determination. Where evidence given by licensed chiropractors testifying for plaintiff, and physicians and surgeons testifying for defendant in regard to plaintiff's total disability is widely divergent and where there is ample evidence to support a finding either way, the supreme court, in a de novo trial, will not disturb the trial court's findings, the trial court being in a far more favorable position to determine whether claim of total disability is made in good faith.

Kurth v Ins. Co., 227-242; 288 NW 90

Absence of showing of cause and effect. Evidence in an action for forcible defilement, to the effect that the injured female suffered a case of nervous prostration over two years after the alleged assault, is wholly inadmissible, in the absence of any testimony tending to show that such condition was attributable to the alleged assault.

Wildeboer v Peterson, 201-1202; 203 NW 284

11255 Credibility.

ANALYSIS

I CREDIBILITY IN GENERAL
II IMPEACHMENT UNDER STATUTE
III IMPEACHMENT IN GENERAL
IV IMPEACHMENT BY CROSS-EXAMINATION

Confidential communications. See under §11263

I CREDIBILITY IN GENERAL

Testimony incapable of direct contradiction —credibility tested. Where the only person who can deny the testimony of a witness is dead, it is incumbent on the court to look upon such testimony with great jealousy and to weigh it in the most scrupulous manner to see what is the character and position of the witness generally, and whether he is corroborated to such an extent as to secure confidence that he is telling the truth.

Peterson v Bank, 228- ; 290 NW 546

Withdrawal of issue—effect on testimony introduced. Upon the withdrawal by the court of an issue, testimony which was primarily introduced on such issue is properly left in the record when it bears on the weight and credibility of the testimony of witnesses.

Birmingham Bank v Keller, 205-271; 215 NW 649

Incompetent testimony. Testimony that a witness was "arraigned" on a charge of intoxication is wholly incompetent on the issue of the credibility of the witness.

State v Voelpel, 213-702; 239 NW 677

Contradictory statements. It may always be shown that a witness has made material statements out of court contradictory of his material statements in court if proper foundation has been laid in the cross-examination.

State v Patrick, 201-368; 207 NW 393

Jury question on discredited testimony. The testimony of a prosecuting witness (forcible defilement in instant case) may be very seriously discredited, yet present a jury question as to its credibility.

Wildeboer v Peterson, 201-1202; 203 NW 284

I CREDIBILITY IN GENERAL—continued

Cross-examination affecting credibility—conclusiveness. A party who, on cross-examination, seeks to secure from the witness an admission that he was not sober at the time of an occurrence and that he had been drinking shortly prior thereto, and is met by a positive denial, is absolutely bound by such testimony, it appearing that the pleadings presented no issue as to whether the witness was sober.

Glass v Hutchinson Co., 214-825; 243 NW 352

Discretionary limit to cross-examination. After a witness, on cross-examination, has testified (1) that he is a laborer, (2) that he has been convicted of a felony, and (3) that he is now residing in the county jail, the court may very properly curtail further cross-examination by excluding questions designed to show that the witness, instead of being a laborer, has been engaged, generally, in bootlegging and in the commission of larcenies and burglaries.

State v Johnson, 215-483; 245 NW 728

Evidence of subnormal mentality. The court is not in error in refusing to receive specific evidence of facts tending to show that a witness of the age of 12 years is of subnormal mentality—as bearing on the credibility of the witness—when such testimony is offered after said witness had been sworn and had testified without question having been raised as to the capacity of the witness to understand the obligation of an oath.

State v Teager, 222-391; 269 NW 348

Rape—motive of prosecutrix. Principle recognized that the motive of a witness may be shown as bearing on the question of credibility.

State v Ingram, 219-501; 258 NW 186

Evidence revealing no inconsistency. Evidence offered for the purpose of impeaching a witness is, of course, properly rejected when such evidence reveals no inconsistency whatever with the testimony of the witness.

In re Work, 212-31; 233 NW 28

Contradictions—duty of jury. The mere fact that the testimony of a witness reveals material contradictions does not necessarily deprive it of all probative force, and deprive the jury of the right and duty to reconcile the contradictions. The fact that the witness is a foreigner and untutored in the English language may be quite material under such circumstances.

State v Andrioli, 216-451; 249 NW 379

Positive testimony vs inherent improbability. The positive testimony of witnesses affirming the existence of an alleged fact, e. g., the entering into a contract, may be wholly overcome by the facts and circumstances attending the alleged fact and by the inherent improbability thereof.

Garretson v Harlan, 218-1049; 256 NW 749

Good character as defense. Defendant in a criminal prosecution may place in issue that trait of his character which is questioned by the charge made against him, and may sustain his good character as to said trait (1) by evidence of his good reputation as to said trait, or (2) by the direct testimony of witnesses who, by knowledge, qualify to speak as to such good character.

State v Ferguson, 222-1148; 270 NW 874

Good character generating reasonable doubt. The previous good character of an accused (as to the trait involved) shown either (1) by the general reputation of the accused, or (2) by actual personal experience of witnesses with the accused, may, in connection with all the evidence in the case, generate a reasonable doubt of the guilt of the accused, and entitle him to an acquittal. And the jury must, on request, be so instructed.

State v Ferguson, 222-1148; 270 NW 874

Good character witness—cross-examination. A good character witness, who testifies that the general reputation of an accused (charged with operating an automobile while intoxicated) for moral character is good, may, on cross-examination, be asked whether he has heard within a stated recent time that the defendant, while operating a motor vehicle and while in an intoxicated condition, had been involved in certain specified accidents.

State v Wheelock, 218-178; 254 NW 313

Bribery as indicating unfavorable admission. Attempt by a defendant to bribe a witness is indicative of an admission on his part that his cause or claim is unjust, dishonest, and unrighteous; and the court may so instruct the jury on supporting testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

Attempt to suppress testimony. While an attempt by the defendant to keep an adverse witness from testifying is not necessarily an admission by him that his claim or defense is false, yet such attempt is in effect an admission by the defendant that the testimony sought to be suppressed is unfavorable to his cause; and instructions to this effect, on supporting evidence, are proper.

Gregory v Sorenson, 214-1374; 242 NW 91

Instructions as to credibility. The ordinary instructions as to the credibility of witnesses are all-sufficient in the absence of a request for a specific instruction as to the effect of impeaching testimony.

Altfilisch v Wessel, 208-361; 225 NW 862

Instruction—rule as to presumption on credibility of witness. In prosecution for suborna-

tion of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not tell the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions)—it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Interest of accused as witness. Principle reaffirmed that an accused as a witness in his own behalf is an interested witness, and that the court may so instruct.

State v Bird, 207-212; 220 NW 110
State v Healy, 217-1155; 251 NW 649

Instructions—refusal. Reversal of a cause will not be ordered because the court refused to instruct as to the conditions under which the jury might entirely reject the testimony of a witness for falsely testifying, when the court otherwise sufficiently guides the jury as to the credibility of witnesses.

Burke v Lawton (Town), 207-585; 223 NW 397

Former plea of guilty—not conclusive in a civil action. In a civil action the plea of guilty to a criminal prosecution involving the same transaction is admissible as an admission but is not conclusive when the criminal defendant, as a witness in the civil action, gives testimony tending to contradict his plea of guilty.

Boyle v Bornholtz, 224-90; 275 NW 479

Intoxication of motorist—evidentiary conflict. A sharp conflict in the testimony, as to whether a motor vehicle driver was intoxicated, generates a question of the credibility of the witnesses, which is a matter peculiarly for the jury.

State v Carlson, 224-1262; 276 NW 770

Prima facie case established without disproof. In an action on a note by alleged holder in due course, letters written by prior indorsee, after maturity, demanding payment from maker were properly excluded as hearsay, and in the absence of any disproof of prima facie case made under such circumstances it is not the duty of the court to submit case to jury solely on matter of credibility of witness.

Colthurst v Lake View Bank, 18 F 2d, 875

"Don't remember" testimony—no probative value. Witness' testimony that he does not remember a conversation is of no probative value and is not sufficient to raise a conflict in the evidence.

Rance v Gaddis, 226-531; 284 NW 468

Credibility — contradictory previous testimony. Inconsistent testimony by a witness at one trial as to certain facts in an automobile accident cannot as a matter of law negative his testimony in a later trial, inasmuch as the jury is the sole judge of the credibility of a witness and the weight of his testimony.

Echternacht v Herny, 224-317; 275 NW 576

Credibility—bias of witness. Fact that a doctor, the real instigator of the prosecution, as a witness in a criminal case, showed considerable feeling and interest was a matter for the jury—not for the court.

State v Carlson, 224-1262; 276 NW 770

Attorney as counsel and witness in same case. While the court views with emphatic disfavor the act of an attorney in assuming the dual attitude of both counsel and witness in the same case, yet such conduct does not go to the competency of the attorney as a witness, but to the weight and credibility of his testimony, which latter fact may be very properly presented to the jury by appropriate instruction.

Cuvelier v Dumont (Town), 221-1016; 266 NW 517

Contradictory statements—unallowable purpose. Assessment rolls covering personal property of the taxpayer and the total value thereof, and introduced for purpose of impeachment, are not also receivable for the purpose of showing the value placed on a particular article when the owner demonstrates that the article was not given in for taxation.

Hall v Ins. Co., 217-1005; 252 NW 763

Court's discretion as to cross-examination. In cross-examination for the purpose of showing partiality and interest of witness a large discretion rests with trial court.

Higgins v Haagensen, (NOR); 220 NW 38

Conflicting evidence. On conflicting testimony, the jury is to determine the credibility of the witnesses and to ascertain the facts, and on appeal the supreme court is to determine not what the facts were, but solely what the jury was warranted in finding them to be, reviewing the evidence in the light most favorable to the party in whose favor the verdict was returned.

Remer v Takin Bros., 227-903; 289 NW 477

II IMPEACHMENT UNDER STATUTE

Impeached but corroborated—effect. Rule restated for weighing the testimony of an impeached but corroborated witness.

State v Philpott, 222-1334; 271 NW 617

III IMPEACHMENT IN GENERAL

Pleadings as evidence. Pleadings containing inconsistent or contradictory statements of relevant facts are available for impeaching purposes.

Larson v Bank, 202-333; 208 NW 726

Pleadings as evidence. Pleadings and amendments thereto which reveal changes and enlargements of the amount sued for may be used for impeaching purposes, and the court may so instruct.

Wilson v Else, 204-857; 216 NW 33

Inconsistent conduct. A party who, by his pleading and testimony, denies all liability may be impeached by a showing that he made no denial of liability on a former occasion when a denial would have been natural; likewise by a showing that he has made statements out of court wholly inconsistent with his statements in court.

Starry v Starry, 208-228; 225 NW 268

Shorthand notes. The shorthand notes taken upon the trial of an action may be used for impeaching purposes.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Evidence in other proceeding—inadmissible against nonparty. A transcript of the original, official shorthand notes of a witness in proceedings auxiliary to execution, to which proceedings the witness was not a party, is inadmissible as substantive evidence in a subsequent proceeding against the witness wherein a conveyance is sought to be set aside as fraudulent; neither is such transcript admissible, in the absence of proper foundation, to show the admissions of, or to impeach, the witness.

Hawkins v VerMeulen, 211-1279; 231 NW 361

Right to full cross-examination as to inconsistent statements. A witness may always be fully cross-examined as to signed statements of fact made outside the court which are inconsistent with his statements in court.

Stickling v Railway, 212-149; 232 NW 677

Form of question. The question used as the foundation for the impeachment of a witness by showing that the witness has made statements out of court contradictory of his statements in court, and the question asked the impeaching witness, do not necessarily have to be in the same words.

State v Patrick, 201-368; 207 NW 393

Immaterial contradictory statements. Impeachment may not be based on immaterial contradictory statements of a witness.

State v Halley, 203-192; 210 NW 749

Disregarding testimony — instructions. The court should instruct, on request, that if the jury believes a witness has been successfully impeached by the making of contradictory statements, his testimony may be disregarded unless it has been corroborated by other credible evidence.

Welton v Hy. Com., 211-625; 233 NW 876

Disregarding testimony — instructions. Instructions to the effect that the jury may peremptorily reject in toto the testimony of a witness who has testified falsely to any material fact, or who has been impeached, are prejudicially erroneous unless accompanied (1) by qualifying instructions that the false swearing must be wilful, and (2) by instructions guiding the jury in case they find for any reason that the testimony in question is reasonable and credible.

State v McCook, 206-629; 221 NW 59

Unallowable self-corroboration. A witness may not corroborate himself by testifying that on other occasions out of court he has told the same story which he has told in court. Neither may a party prove such extra recitals by other witnesses.

State v Bell, 206-816; 221 NW 521

Unallowable self-corroboration. After a party to an action has been cross-examined with regard to his testimony on a former trial for the purpose of laying the foundation for proving contradictory statements, it is wholly unallowable for counsel on redirect examination to read copious excerpts from the transcript of the witness' former testimony and have the witness say that he did so testify.

State v Cordaro, 214-1070; 241 NW 448

Effect of impeachment. A jury should not be told to reject the testimony of an impeached witness unless it has been corroborated.

State v Ellington, 200-636; 204 NW 307

Contradictory statements. A witness who has testified that, at the time of the search of an establishment for intoxicating liquors, he was the owner thereof by purchase from the accused on trial, may be impeached by testimony that, at the time of the search, he had said that he was working for the accused on trial; and it is immaterial (except as to the application of such testimony) whether the accused on trial was or was not present at the time of said search.

State v Olson, 200-660; 204 NW 278

Striking collateral and immaterial matter. Collateral and immaterial matters which are brought out on the redirect examination of a good-character witness are properly stricken from the record.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Association with accomplice. An accused who becomes a witness in his own behalf may

be impeached by testimony tending to establish his personal association with an accomplice, the existence of such association being material, and having been denied by the accused.

State v Hart, 205-1374; 219 NW 405

Nonresponsive matters. An accused may not impeach a witness for the state by testifying to matters which are quite unresponsive to anything to which the witness has testified.

State v McCook, 206-629; 221 NW 59

Reputation at present time—relevancy. A question calling for the reputation of a witness is properly limited to the present time—the time when he testifies—not to the time of the occurrence concerning which he testifies.

State v Teager, 222-391; 269 NW 348

Bad moral character—scope of cross-examination. A person testifying to the general bad moral character of a witness may be cross-examined as to the reputation of the witness as to truth and veracity.

State v Smalley, 211-109; 233 NW 55

Impeachment by reputation—dual methods. The common-law rule that a witness may be impeached by showing his bad reputation for truth and veracity in the community where he resides or in which he has recently resided, has not been abrogated or in any manner changed by the statutory provision that the general moral character of a witness may be proved for the purpose of testing his credibility.

State v Teager, 222-391; 269 NW 348

Unallowable impeachment—reputation. Mere witnesses in a criminal prosecution are not impeachable by testimony that their general reputation in the community where they reside is bad as to some particular trait of character.

State v Ferguson, 222-1148; 270 NW 874

Exclusion of nonexplanatory question. The erroneous refusal of the court, in a prosecution for assault to rape, to permit a witness, proffered by the defendant, to answer a question whether the witness knew the general reputation of the prosecutrix as to truth and veracity in the community where she lived, cannot be deemed harmless error on the ground that the question did not reveal whether the witness would answer "yes" or "no", when, in connection with the proffer of the witness, defendant offered to show that said prosecutrix was "wholly unreliable in her word and statements".

State v Teager, 222-391; 269 NW 348

Adverse party as witness — contradictory testimony. Where plaintiff calls adverse party as witness he vouches for his competency, credibility, and truthfulness; however, he is entitled to the benefit of any conflict, inconsistency, or incongruity, which might be found in his testimony and is not precluded from calling other witnesses to contradict testimony or if the testimony of the adverse party appears to be inherently improbable or lacking in credit or made to appear so by the testimony of other witnesses, the court is not bound by the language in which the witnesses frame their answers, and may enter a decree setting aside a conveyance as fraudulent, notwithstanding that husband and wife, as adverse witnesses called by creditor, testified to sustain conveyances.

Goeb v Bush, 226-1224; 286 NW 492

Impeachment of one's own witness. A party may not impeach his own witness.

Endicott v Shapiro, 200-843; 205 NW 511
Bihlmeier v Budzine, 201-398; 205 NW 763
Lawton Bk. v Bremer, 205-334; 218 NW 49

Impeachment — allowable contradiction. A party may not impeach his own witness but he may offer testimony of other witnesses in contradiction thereof.

White v Zell, 224-359; 276 NW 76

Right to contradict one's own witness. While a litigant may not impeach his own witness, he may show that his witness is mistaken.

North Amer. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492
Homestead. Life v Salinger, 212-251; 235 NW 485
Larson v Church, 213-930; 239 NW 921
Johnson v Warrington, 213-1216; 240 NW 668
In re Skinner, 215-1021; 247 NW 484

Conclusiveness on party calling witness. A party who calls a witness is not necessarily bound by the testimony of the witness, yet, when a party calls a witness on the issue of fraud and want of consideration in a conveyance, he will not be permitted to say that affirmative, uncontradicted, and positive testimony of the witness that there was no fraud and that there was a consideration establishes the direct contrary.

Pike v Coon, 217-1068; 252 NW 888

Discrediting own witness—claimant against estate. A claimant against an estate who puts the administratrix on the stand as his witness may not discredit her by attempting to show that she tried to deceive him as to the fact of decedent's death so that his claim against the estate would be barred.

Federal Bank v Bonnett, 226-112; 284 NW 97

Impeachment of one's own witness. A party may not show that his own witness has a bad reputation for truth and veracity, or for moral character, or that said witness has made prior contradictory statements relative to the subject-matter in question, but a party may always show the facts attending a transaction tho he

III IMPEACHMENT IN GENERAL—concluded

thereby contradicts one or more of his own witnesses.

Johnson v Warrington, 213-1216; 240 NW 668

Right to rebut impeaching testimony. Testimony by grand jurors which tends to show, by way of impeachment, that a witness for an accused made statements before the grand jury inconsistent with the statements of the witness at the trial arms the accused with right to show by the clerk of the grand jury that the grand jurors were mistaken,—that the testimony of the witness in question was the same on both occasions.

State v Archibald, 204-406; 215 NW 258

Limiting impeaching evidence. The failure of the court on its own motion in its instructions to specifically limit impeaching testimony to that particular purpose is not erroneous when the testimony in question is of such a nature that it could not be considered for any other purpose.

State v Brewer, 218-1287; 254 NW 834

Impeachment — inconsistent statements—insufficient foundation. Testimony by a witness that he has no remembrance of having used a certain expression in testifying before a coroner's jury, but that he would not say that he did not use the expression, furnishes no foundation for impeaching the witness by proof that he actually did use said expression.

State v Johnston, 221-933; 267 NW 698

Impeachment — permissible cross-examination. A witness who has testified to the reputed good character of a party may, within the limits of good faith on the part of the cross-examiner, be examined along the line whether said good character witness had "heard of" certain nefarious transactions in which the said party had been engaged.

State v Carter, 222-474; 269 NW 445

Witness—contradicting self and impeachment. The fact that a witness was impeached or, being mentally slow and confused, makes statements on cross-examination which might be construed as contradictory, instead of being sufficient to take the case from the jury, on the contrary presents a jury question.

Russell v Leschensky, 224-334; 276 NW 608

Impeachment—instructions by court. While in criminal cases the court must fairly present the issues to the jury, yet, after this is done, a defendant should ask for further instructions, if desired, or not be heard to complain; so where the jury would have understood from the instructions given, the purpose of introducing a written instrument for impeachment only and the meaning of the word "impeachment", it was not reversible error to fail to give a separate instruction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Error which becomes inconsequential. Error in overruling a motion for a directed verdict at the close of plaintiff's evidence when certain all-essential testimony was not then in the record, becomes inconsequential when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record.

Newland v McClelland & Son, 217-568; 250 NW 229

Going under assumed name. It is proper, on cross-examination of an accused in a criminal cause, to ask him if he has not gone under an assumed name since the commission of the offense in question, and, if denial be made, to introduce evidence tending to prove such fact.

State v Ivey, 200-649; 203 NW 38

Corruption of witness. An interwoven transaction tending to show that a defendant and a third party were working in conjunction to corrupt a witness, and consisting of conversations in part between said witness and said third person, and in part between all three said parties, is admissible—the court carefully limiting the jury in the consideration of said testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

Documentary contradiction. Testimony that an insurance company would not have issued a policy to an insured had it known his true occupation may be met by the introduction of policies which negatived such testimony.

Murray v Ins. Co., 204-1108; 216 NW 702

Impeachment on unallowable point. A witness who makes no denial of his liability on the claim sued on, but by his testimony denies, in effect, the liability of his co-defendant on said claim, may not be impeached by a showing that on former occasions he made no denial of the liability of his co-defendant, it appearing that such former occasions were such as not to call for any denial by him of the liability of his co-defendant.

Starry v Starry, 208-228; 225 NW 268

IV—IMPEACHMENT BY CROSS-EXAMINATION

Sworn assessment roll competent. The defendant in eminent domain proceedings has the right, on the cross-examination of the plaintiff and for the purpose of contradicting and impeaching him, to show the sworn statement made by the plaintiff to the assessor as to the value of the farm in question and as to the number and value of the livestock kept on said farm.

Welton v Hy. Com., 211-625; 233 NW 876

Bias of witness. A witness on his cross-examination may be interrogated as to his

state of mind or bias against the party against whom he testifies, for instance, that the witness and said other party are involved in hostile litigation.

Bond v Lotz, 214-683; 243 NW 586

Improper cross-examination. Reversible error results from repeatedly and insistently injecting into the cross-examination of a defendant on trial for crime, and into the cross-examination of his character witnesses, insinuations and innuendoes to the effect that the accused had been guilty of other crimes prior to the time in question.

State v Rounds, 216-131; 248 NW 500

Remote collateral matters. The state may not, on cross-examination of an accused, delve into remote collateral matters.

State v McCumber, 202-1382; 212 NW 137

Character and conduct — particular acts or facts. Offer on cross-examination to prove certain reprehensible acts and conduct on the part of the witness reviewed, and held properly rejected.

Wilson v Fortune, 209-810; 229 NW 190

Impeachment—improper but harmless cross-examination. The cross-examination of a good character witness for a defendant in a criminal case should be limited to reports and rumors in the community to negative good reputation. But ordinarily prejudicial and reversible error will not be deemed to result from an improper cross-examination when it is not extreme, when the answers are favorable to defendant, and when the court promptly admonishes the jury to wholly disregard such examination.

State v Clay, 222-1142; 271 NW 212

Bias—indictment for same offense. A witness for parties jointly indicted for conspiracy may be cross-examined along the line of showing that he, himself, stands indicted for conspiracy of the identical nature as that for which defendants stand indicted,—such testimony being strictly confined to its bearing on the bias of the witness.

State v Moore, 217-872; 251 NW 737

11256 Interest.

Hearsay evidence. An impeaching witness may not testify to declarations of another witness tending to show that such other witness had an interest in the pending litigation, no proper foundation for such declarations appearing.

Cleophas v Walker, 211-122; 233 NW 257

Interest of accused as witness. An accused as a witness in his own behalf is an interested witness, and the court may so instruct.

State v Bird, 207-212; 220 NW 110
State v Healy, 217-1155; 251 NW 649

11257 Transaction with person since deceased.

ANALYSIS

I APPLICABILITY OF STATUTE IN GENERAL
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V ASSIGNEES, LEGATEES, NEXT OF KIN, EXECUTORS, ETC.
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X NONPERSONAL TRANSACTIONS AND COMMUNICATIONS, AND EXCEPTIONS
XI OBJECTIONS AND EXCEPTIONS.

I APPLICABILITY OF STATUTE IN GENERAL

Discussion. See 19 ILR 521—Admission of evidence

Dead man statute — difficulty in applying. Difficulty or undesirability of applying the so-called dead man statute is no justification for the courts to disregard it, so long as it remains as an act of the legislature.

Brien v Davidson, 225-595; 281 NW 150

Testimony incapable of direct contradiction —credibility tested. Where the only person who can deny the testimony of a witness is dead, it is incumbent on the court to look upon such testimony with great jealousy and to weigh it in the most scrupulous manner to see what is the character and position of the witness generally, and whether he is corroborated to such an extent as to secure confidence that he is telling the truth.

Peterson v Bank, 228- ; 290 NW 546

Contract with deceased. A claimant against an estate who is sui juris does not competently establish a mutually binding contract between claimant and the deceased for the conveyance of land by deceased to claimant by proving a conversation (1) which took place in the presence of claimant, but solely between the mother of claimant and the deceased, (2) which was in no manner addressed to claimant, and (3) in which claimant took no part.

In re Runnells, 203-144; 212 NW 327

Action against guardian—testimony by wife of indorsee. The wife of the indorsee of a certificate of deposit is incompetent to testify against the guardian of the original payee as to the genuineness of the signature of the latter as indorsee.

Farmers Bank v Bank, 201-73; 204 NW 404

Reliance on statements to third party. A claimant in probate must not be permitted to

I APPLICABILITY OF STATUTE IN GENERAL—continued

testify that he relied and acted on statements made by the deceased to a third party in a conversation in which claimant took part; otherwise as to statements made by deceased in conversation in which claimant did not take part.

In re Newson, 206-514; 219 NW 305

Nonprejudicial exclusion of question. A witness, who is incompetent to testify to material conversations with a deceased person, may be asked and permitted to answer the general question whether he had a conversation with the deceased, on a certain occasion, on the subject matter in issue, but the exclusion of such question is nonprejudicial.

Southhall v Berry, 207-605; 223 NW 480

Cashier-stockholder — incompetency of. In an action by a bank to recover on the promissory notes of a deceased maker, in which action the defendant executor pleads a settlement in full between said bank and said maker, a witness who is both cashier of, and a stockholder in, said bank, is incompetent to testify that at the time of the settlement in question it was "understood" that the notes sued on were not to be included in said settlement; likewise that one of the notes sued on (admittedly without original consideration) was to be substituted for other notes charged off as paid.

Monticello Bk. v Schatz, 222-335; 268 NW 602

Bank receiver not protected. In an action by the receiver of an insolvent bank to recover on promissory notes allegedly due the bank, wherein defendant pleaded payment, held that the receiver was not within the class protected by the dead man statute.

Bates v Zehnpfennig, 220-164; 262 NW 141

Deceased's insurance as security—original holder incompetent witness. Altho having assigned his claim and altho the claim is duly allowed in probate, the original party to an oral contract with a deceased is incompetent as a witness, when the assignee of such contract seeks to subject the proceeds of the deceased's life insurance to payment thereof by reason of an oral contract claimed to have been entered into with the deceased.

In re Hazeldine, 225-369; 280 NW 568

Testimony by one who takes no part in conversation. Where a deceased had taken his nephew, raised him, and promised to pay him for working on decedent's farm, testimony as to statements made by the deceased in conversations wherein deceased had said the boy was to be paid from his estate when he died, may be received from the wife of deceased, the wife of claimant, and the claimant himself, provided they took no part in the conversations.

Gardner v Marquis, 224-458; 275 NW 493

Decedent's admissions against interest — scrutiny. In support of a claim against an estate, testimony of decedent's alleged admissions against interest, not being susceptible of denial or explanation by decedent and its worth being measured by the veracity of the witness, should be closely scrutinized and cautiously received.

In re Straka, 224-109; 275 NW 490

Witnesses qualifying books of account — statute not applicable. Statute prohibiting testimony concerning transactions or communications with a person now deceased does not render a claimant against the estate incompetent as witness to testify to preliminary facts required for authentication of books of account, admissibility of which is permitted by statute.

In re Cummins, 226-1207; 286 NW 409

Bills and notes—requisites and validity—delivery of note. In the absence of contrary evidence, a valid delivery was proved by the statutory presumption of delivery arising from possession of a note, aided by evidence, secured without violating the dead man statute, to the effect that the note was in decedent maker's hands while visiting payee during an illness and after decedent left, the note was reposing on payee's bed.

In re Cheney, 223-1076; 274 NW 5

Offering direct examination makes cross-examination admissible. In an action for conversion of an intestate's property, testimony of a witness on direct examination, given in a prior probate discovery proceeding offered and introduced from the transcript of the discovery proceeding, renders also admissible from such transcript the cross-examination of such witness, as being the whole of the conversation, altho under the dead man statute the witness may have been incompetent.

Reeves v Lyon, 224-659; 277 NW 749

Dead man statute—circumventing by indirection. A witness is not permitted to do by indirection that which the law forbids. So held where a passenger in a motor vehicle attempted to circumvent the dead man statute by testifying that he was hired by someone to make the trip, who was no other person than the deceased driver.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Probate claimant's wife. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However since court also found in effect that such evidence would not have been sufficiently definite

to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Conversation with deceased—state of mind—lost will. When a person who had talked with the decedent shortly before decedent's death testified that the decedent told him that he had made a will, where it was made, and who were witnesses to the will, the testimony, when not objected to, could be given its full probative effect, and came under an exception to the hearsay rule to show the then state of mind of the decedent, tending to prove the prior execution of the will.

Goodale v Murray, 227-843; 289 NW 450

Fiduciary relationship—intestate and heir. In an action by heirs of intestate to set aside a conveyance of realty made by intestate to son, on the ground of an alleged fiduciary relationship existing between aged intestate and son, held, that evidence was insufficient to establish such relationship, and even tho such relationship existed, whatever property the son received from his mother was by her voluntary and intelligent act, and without duress, dominance or overreaching on his part.

Robbins v Daniel, 226-678; 284 NW 793

Widow's support—subjecting proceeds from land sale. Where real estate devised to widow for life with right to dispose of such realty for her necessary support, when an equity action was brought to establish a claim for the support of widow as a lien against this realty on the ground that widow contracted for support and intended, prior to her death, to sell such realty, in accordance with the terms of the will to provide money with which to pay such claim, held, evidence sufficient to establish claim and subject the proceeds from the sale of such realty to payment of said claim.

Hoskin v West, 226-612; 284 NW 809

II PARTIES TO ACTION

Communications between deceased and party to action. A proper party to an action is incompetent to testify, against an administrator, as to a material personal transaction with the deceased, represented by said administrator, even tho said party is only indirectly interested in the issue on trial.

Nugent v Dittel, 213-671; 239 NW 559

Resignation of administrator. An administrator who has been substituted as plaintiff in lieu of the deceased plaintiff, but who has later resigned, and been succeeded by another appointee, may not be deemed a party to the action, and therefore incompetent to testify to personal transactions with the deceased.

Buckley v Ebendorf, 204-896; 216 NW 20

Probate claimant for services—incompetency as witness. In probate action to establish a claim against an estate based on an express contract for services rendered to decedent, claimant could not testify as to existence of contract.

In re McKeon, 227-1050; 289 NW 915

Instruction — agreement with decedent — claimant incompetent to testify. In probate action to establish a claim based upon an express agreement of decedent that claimant's services should be paid for from decedent's estate, an instruction that claimant was not permitted to testify as to agreement between her and decedent, and that if any agreement was in fact made between the parties, it must be proved by testimony other than that of claimant, was not prejudicial to defendant in that jury would believe that it applied to the communication of the contract to claimant through her father, who had been informed by decedent as to the nature of the agreement—there being other testimony of the communication, and the trial court having excluded the testimony of the father after objection of defendant.

In re McKeon, 227-1050; 289 NW 915

Contract with deceased. In an action against an administrator and against a devisee, to quiet title to real estate, plaintiff is wholly incompetent to testify with respect to a contract between the plaintiff and the deceased.

Black v Nichols, 213-976; 240 NW 261

Interest of party. A party to an action against an estate is competent to testify to the material intent which actuated him or which he had in a transaction with the deceased.

In re Talbott, 209-1; 224 NW 550

Intervenor—competency. In equity action to quiet title and to declare a trust in realty, an intervenor who claims same relief as plaintiff may not testify to alleged oral agreement between parties, some of whom are deceased.

Wagner v Wagner, (NOR); 224 NW 583

Co-plaintiffs. When plaintiff and an intervening plaintiff are each claiming an undivided one-third interest in land, and one is incompetent to testify to a personal transaction with a deceased and thereby establish his contract, he is equally incompetent to testify to said personal transaction and thereby establish the contract for his co-plaintiff.

Wagner v Wagner, 208-1004; 224 NW 583

III INTERESTED PARTIES

Will contestant. A will contestant is incompetent to testify to a conversation between herself and the deceased relative to the will.

Worth v Pierson, 208-353; 223 NW 752

Husband of claimant—participation in conversation. In an action against an estate for services rendered the deceased, the husband of claimant is incompetent to testify to conversa-

III INTERESTED PARTIES—concluded

tions between his wife and the deceased, relative to said services, when the husband takes part to any extent in the subject matter of said conversations.

In re Stencil, 215-1195; 248 NW 18

Nonpayment of insurance premiums. In an action by the beneficiary in a life insurance policy to recover thereon, an agent of the insurer who negotiated the policy is a competent witness to testify that the insured did not make payment to him of the premiums due on the policy.

Range v Ins. Co., 216-410; 249 NW 268

Witness' knowledge of fact but not who told him. In an action for partition, wherein defendant claimed absolute title under a deed which she first physically obtained, after the grantor's death, by going to the bank where it was on deposit, the defendant is a competent witness to testify, (1) that she knew where the deed was kept, but (2) not that grantor told her where it was kept.

Robertson v Renshaw, 220-572; 261 NW 645

Witness — cross-examination establishing competency to testify on redirect. Altho being an incompetent witness as to conversations with the deceased, a daughter, objecting to an executor's report because against her share is offset a promissory note which she claims was canceled by the testator, may be rendered competent to testify on redirect examination when conversations with testator were partially inquired into on cross-examination.

In re Morgan, 225-746; 281 NW 346

Defendant with nominal interest only. A bank cashier, who is made a party defendant in a quiet title action, involving deeds he holds in escrow with instructions to record upon the death of the grantor, is incompetent to testify regarding a conversation had with the deceased husband of the grantor about said deeds, although his interest in the action is purely nominal.

Bohle v Brooks, 225-980; 282 NW 351

Fraud perpetrated by insane payee of note. In an action on a promissory note by the indorsee thereof, the maker is not a competent witness to testify to the fraud perpetrated on him by the payee in the execution of the note, when, at the time of the action, said payee is insane.

Cherokee Bk. v Lawrey, 203-20; 212 NW 359

IV NONINTERESTED PARTIES

Nondisqualifying interest. A person may not be deemed "interested" in the outcome of an action by an administrator, and therefore disqualified from testifying to personal communications with the deceased, from the fact that the will of the deceased directs that he be paid whatever testatrix may be owing him at the time of her death.

Buckley v Ebendorf, 204-896; 216 NW 20

Disqualifying "interest" defined—testimony as to deposit made by decedent. In action against bank to secure an accounting for funds given to cashier by decedent, where cashier, who was not associated with bank at time of trial, testified that the funds were received by him in connection with a personal transaction had with the decedent, held, that he was not an incompetent witness under dead man statute. To render a witness incompetent under that statute he must be interested in the sense that he will either gain or lose by direct legal operation of the judgment or in the sense that the record will be legal evidence for or against him in some other action.

Peterson v Citizens Bank, 228- ; 290 NW 546

Attesting witness to will—"or otherwise"—construction. An attesting witness to a will is not a person from, through, or under whom the proponents, as legatees, derive any interest or title by assignment "or otherwise" and, therefore, is not incompetent to testify under the dead man statute. Whatever interest proponents have they derive from the will.

In re Iwers, 225-389; 280 NW 579

Indirect and uncertain interest of attorney. The fact that a will directs the executor and trustee to procure the services of a named attorney (who drew the will) in carrying out the provisions of the will, does not render the said attorney incompetent to testify to personal transactions and communications with the deceased.

In re Kenney, 213-360; 239 NW 44; 78 ALR 1189

Probate claimant's wife. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

V ASSIGNEES, LEGATEES, NEXT OF KIN, EXECUTORS, ETC.

Satisfaction of legacy. On the issue whether a testator had, prior to his death, satisfied a legacy, the legatee is not a competent witness as to a personal conversation between him and the testator relative to said matter.

Heileman v Dakan, 211-344; 233 NW 542

Execution of instrument. The wife of the assignee of a claim is competent to testify that, in a transaction between her husband and

the assignor (since deceased), in which transaction she took no part, she saw the assignor affix her signature to the written assignment.

Steenhoek v Tr. Co., 205-1379; 219 NW 492

VI SURVIVORS

Transaction with deceased partner. In an action by the surviving members of a firm of attorneys to recover attorney fees on the basis of a quantum meruit, the surety on the bond to release the lien for said fees is incompetent to testify that, after a large part of the services had been rendered, he had an oral agreement with the deceased partner to the effect that the firm would accept a certain definite sum for all services performed and to be performed.

Kelly v Bk. 217-725; 248 NW 9; 250 NW 171

VII HUSBAND OR WIFE

Admissions of wife against husband. Admissions by a wife in the absence of the husband, tending to show that a claimant in probate had been employed in the business and had not been paid, are admissible against the estate of the husband when it appears that the wife was both the general manager of the business in question and a partner therein with her husband.

Nortman v Lally, 204-638; 215 NW 713

Failure to prosecute claim or disclaimer of interest ineffective. A divorced wife of a deceased may not become a competent witness to an oral contract made jointly between herself, her mother, and the deceased, in order to subject his insurance to payment of her mother's valid probate claim, merely by failing to prosecute a similar claim of her own and disclaiming any interest in the claim in litigation, since she still has her claim and may enforce payment if the contract is established.

In re Hazeldine, 225-369; 280 NW 568

Fraudulent conveyance. In action by creditor to set aside a fraudulent conveyance by decedent to claimant against estate, claimant and her husband held not incompetent to testify by reason of dead man statute.

First N. Bank v Adams, (NOR); 266 NW 484

VIII PRINCIPAL AND AGENT

Employee of plaintiff as witness. In proceedings in probate to establish a claim against an estate where the plaintiff, a gasoline dealer, sought to prove that the deceased had promised to pay a gasoline bill for his tenant, it was not error to permit the plaintiff's tank wagon driver to testify as to a conversation between the deceased and the tenant concerning the payment of the bill, when the driver took no part in the conversation, had already received his commission on the sale, and had no present, certain, and vested interest in the litigation.

Reichart v Downs, 226-870; 285 NW 256

Ratification of unauthorized act. The agent of a deceased who executes a promissory note in the name of the deceased but without authority so to do, and the person who received the consideration for said note, are incompetent in an action against the administrator on the note, to testify to personal communications with the deceased tending to show that the deceased ratified the unauthorized act of the agent.

Lyon Bank v Winter, 214-533; 242 NW 600

Agent of party litigant. An interested party litigant is a competent witness to testify to personal transactions and communications had by him with the deceased alleged agent of another party litigant who is "next of kin" to such alleged agent, but who is making no claim of right under such kinship.

State Bk. v Fairholm, 201-1094; 206 NW 143

Insurance premium—deceased agent's liability. In action to cancel insurance premium notes where evidence, clearly admissible against administrator of deceased insurance agent, established that check and two notes were delivered to agent for payment of premium and that insurer rejected application for insurance, such evidence warranted cancellation of the notes and established agent's liability for the unaccounted part of the check as against administrator of the agent's estate.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

IX PERSONAL TRANSACTIONS AND COMMUNICATIONS

Delivery of notes. The maker of a promissory note is incompetent to testify against an administrator that he did not deliver promissory notes to the deceased.

Lusby v Wing, 207-1287; 224 NW 554

Creditor of heir. An heir of a deceased is a competent witness to testify against his creditor as to a personal transaction between said heir and his deceased parent.

Lennert v Cross, 215-551; 241 NW 787; 244 NW 693

Incompetency of minor claimant. A claimant against an estate for services rendered to the deceased is not a competent witness to testify to a conversation between her father and the deceased in which the deceased agreed to pay claimant, a minor, for past and future services, even tho claimant took no part in said conversation.

In re Willmott, 211-34; 230 NW 330; 71 ALR 1018

Rendition of services. Plaintiff in an action against an estate for services rendered to the deceased during his lifetime is incompetent to testify to the rendition of the services.

In re Kahl, 210-903; 232 NW 133

IX PERSONAL TRANSACTIONS AND COMMUNICATIONS—concluded

Expectation of payment. A claimant for services rendered as a member of the family of a decedent is incompetent to testify against the executor that she expected to receive compensation for the services performed.

In re Docius, 215-1193; 247 NW 796

Taking part in conversation. Testimony of a claimant in probate as to a conversation between the deceased and a third party, in which claimant took no part, should be stricken from the record, when it is later shown that claimant was present during a material part of the conversation and took part therein.

In re Newson, 206-514; 219 NW 305

Rendition of judgment against party—effect. The fact that judgment has been rendered against one of several defendants on the pleaded cause of action, does not render said judgment defendant a competent witness to testify against an administrator, who is a defendant, as to a personal transaction with the deceased intestate, said transaction being vital to plaintiff's right to recover.

Rawleigh Co. v Moel, 215-843; 246 NW 782

Stookesberry v Burgher, 220-916; 262 NW 820

Proper objector in will contest. All heirs of a testator and all beneficiaries under testator's will are affected by the ordinary probate proceedings for the proof of the will, provided they have had due service by publication of the notice promulgated by the clerk for the hearing of such proof; and when a contest of the will is injected into such proceedings, the recognized proponent of the will, even tho he is not a testamentary beneficiary, and even tho he is holding no official probate position, may, on behalf of such heirs and beneficiaries, validly interpose the objection that contestant is incompetent to testify to personal transactions and communications with the deceased testator.

Blakely v Cabelka, 207-959; 221 NW 451

Intervenor in garnishment proceedings. In garnishment proceedings involving a controversy between a judgment plaintiff and an intervenor claiming the garnished funds under an assignment, the fact that the judgment defendant is an executor of the alleged assignor does not render the intervenor-assignee incompetent to testify to personal transactions and communications with the deceased assignor, it appearing that the executor was disclaiming any interest in said funds.

Shierry v Randall, 214-1053; 243 NW 350

When incompetent testimony harmless. The reception of incompetent testimony in the form of personal transactions with a deceased becomes inconsequential when the issue on which the testimony has bearing is established beyond question by other competent testimony.

Nortman v Lally, 204-638; 215 NW 713

Evidence disregarded. Prohibited evidence, in an equitable action, of a personal transaction between a grantee in a conveyance and the deceased grantor will be disregarded on appeal.

O'Neil v Morrison, 211-416; 233 NW 708

De novo trial in equity—disregarding improper testimony. On trial de novo on appeal in equity cases, testimony given by incompetent witnesses, as to transactions and communications with a deceased person, will be disregarded.

Flint v Varney, 220-1241; 264 NW 277

X NONPERSONAL TRANSACTIONS AND COMMUNICATIONS, AND EXCEPTIONS

Nonpersonal transactions. A party to an action is competent to testify against an executor as to the receipt of letters through the mail, and as to whose signature is attached to the letter; also, as to the physical condition of an instrument when he signed it.

Riggs v Gish, 201-148; 205 NW 833

Authentication of books of account. The claimant against an estate for services rendered to the deceased is a competent witness to testify to the preliminary facts required by the statute (§11281, C., '31) for the authentication of his books of account against the deceased.

In re Davis, 217-509; 248 NW 497

Reading will which decedent held. Testimony of a claimant in probate that she read a certain provision of a will, while the will was being held in the hands of the testator (since deceased), is not testimony relating to a personal communication or personal transaction with the deceased.

In re Newson, 206-514; 219 NW 305

State of mind of donor—parents. A daughter claiming under a gift of land from her deceased parents may testify to a conversation, in which she took no part, between her said parents relative to said gift, not for the purpose of establishing a contract between herself and parents, but for the sole purpose of establishing the state of mind of said parents relative to said gift.

Rapp v Losee, 215-356; 245 NW 317

Nonapplicability of statute. Plaintiff, in an action to set aside the probate of a will on the ground that the deceased was mentally incompetent to execute a valid will, and the wife of said plaintiff, are not incompetent:

1. To testify to the personal appearance and actions of said deceased at a time material to the inquiry, or

2. To testify to statements made in their presence by said deceased in conversation with

other persons, in which conversation said witnesses took no part.

Diesing v Spencer, 221-1143; 266 NW 567

Nonparticipation in transaction. Principle reaffirmed that, under the dead man statute, a witness, otherwise incompetent, may testify to a transaction or conversation in which said witness took no part.

In re Allis, 221-918; 267 NW 683

When interested witness competent. In a proceeding between the maker of a promissory note and the administratrix of the estate of the deceased payee (involving the issue whether said note had been paid), the wife of said maker, tho herself a joint maker of said note, is a competent witness to testify to a conversation and transaction which occurred between her husband and said payee and which strongly tended to establish said payment—provided said witness took no part in said conversation and transaction.

In re Fish, 220-1247; 264 NW 123

Probate claimant's wife. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Decedent's statements concerning will. Decedent's statements, made to the person who drew a will for him, that he wished to make a will and that he wished a certain person to have all his property, were admissible after his death as an exception to the hearsay rule to prove his existing state of mind at the time and to show that his plan was put into effect by making such a will.

Goodale v Murray, 227-843; 289 NW 450

XI OBJECTIONS AND EXCEPTIONS

Failure to object. Failure to object to testimony as to a personal transaction between an interested party and a deceased precludes assignment of error, on appeal, in receiving such testimony.

In re Willmott, 215-546; 243 NW 634

Dead man statute — operation — trial procedure. The dead man statute is placed in operation by objecting to the competency, not of the testimony, but of the witness.

In re Scholbrock, 224-593; 277 NW 5

11258 Exceptions.

Permissible testimony by executor. An executor may, in his own behalf, testify to personal communications had by him with his deceased co-executor.

In re Culbertson, 204-473; 215 NW 761

Administrator — excluding reports as evidence. Reports of an administrator are properly excluded in toto as evidence in his behalf when they contain self-serving declarations and recitals of personal transactions with the deceased as to which the administrator would be incompetent to testify, and when there is no offer to separate the competent matter from the incompetent matter.

In re Manning, 215-746; 244 NW 860

Indirect and uncertain interest of attorney who drew will. The fact that a will directs the executor and trustee to procure the services of a named attorney (who drew the will) in carrying out the provisions of the will, does not render the said attorney incompetent to testify to personal transactions and communications with the deceased.

In re Kenney, 213-360; 239 NW 44; 78 ALR 1189

Cross-examination establishing competency to testify on redirect. Altho being an incompetent witness as to conversations with the deceased, a daughter, objecting to an executor's report because against her share is offset a promissory note which she claims was canceled by the testator, may be rendered competent to testify on redirect examination when conversations with testator were partially inquired into on cross-examination.

In re Morgan, 225-746; 281 NW 346

11260 Husband or wife as witness.

ANALYSIS

I Civil Actions
II Criminal Actions

I CIVIL ACTIONS

Reformation of mortgage. In an action against a husband and wife for the reformation of a mortgage so as to include therein the entire homestead of the parties, the wife is a competent witness to testify against herself and her estate as distinguished from that of the husband; and the same rule necessarily applies to the husband.

Rankin v Taylor, 204-384; 214 NW 725

Deed consideration—no negative fact from affirmative testimony. Positive, uncontradicted testimony of husband and wife, defendants, called to testify by plaintiff, affirming, in their own behalf, fact of consideration for a deed to wife, cannot be held to have proven a negative fact of lack of consideration.

Donovan v White, 224-138; 275 NW 889

Alienation of affections. In an action by a wife for damages for the alienation of the

I CIVIL ACTIONS—concluded

affections of her husband, an information filed by the plaintiff, charging the defendants with having threatened to injure her, is wholly irrelevant and incompetent.

Paup v Paup, 208-215; 225 NW 251

Alienation — unallowable conclusions. The mere conclusions of a plaintiff in an action for damages for alienating the affections of her husband as to what the defendants had done in procuring the enlistment of the husband in the army and thereby effecting a separation of plaintiff and her husband, are wholly unallowable.

Paup v Paup, 208-215; 225 NW 251

Hearsay—improper testimony. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

II CRIMINAL ACTIONS

Declarations of wife in presence of husband. Declarations of a wife in the presence and hearing of her husband, and undenied by the husband at the time, as to what the husband had done on a certain occasion, are admissible against the husband in a subsequent criminal proceeding against him, wherein the truth of said declarations is material, even tho the wife, if called as a witness against her husband would not be competent to testify to the statements embodied in the declarations.

State v Sharpshair, 215-399; 245 NW 350

Motion to dismiss—improper testimony by wife. A defendant in a criminal case who knows, before the commencement of the trial, that his wife has, before the grand jury, improperly given material testimony against him, must, if he wishes to attack the indictment on such ground, move to quash the indictment. He may not utilize such objection as the basis of a motion for a directed verdict.

State v Smith, 215-374; 245 NW 309

Wife as a witness against husband. The act of the state in calling a woman as a witness against the defendant (who was accused of a felonious assault on a third party) does not constitute reversible error when a preliminary examination, on prompt objection, reveals the fact that the witness is the common law wife of the defendant, and when the witness was thereupon promptly excluded.

State v Smith, 215-374; 245 NW 309

Marriage after return of indictment. A wife, although married to accused after return of the indictment, is nevertheless incompetent as a witness to testify against him.

State v Chrismore, 223-957; 274 NW 3

Marriage as inference of suppressing testimony. It is reversible error in a manslaughter case for the state to call accused's wife as a witness and in the presence of the jury after discovering her relationship, to elicit testimony over accused's objection thereby creating the prejudicial inference that accused's marriage was purposefully to suppress testimony.

State v Chrismore, 223-957; 274 NW 3

11262 Communications between husband and wife.

Communication with third person. A divorced wife is a competent witness to testify to a communication between her former husband and a third person, prior to the divorce.

Stutzman v Bank, 205-379; 218 NW 39

Husband and wife — communications. All communications between a husband and wife during their married life are privileged.

Rodskier v Ins. Co., 216-121; 248 NW 295

Divorced wife's testimony as to venereal disease—nonprejudicial. In a rape prosecution, an unsuccessful attempt to introduce objectionable testimony relative to defendant's affliction with venereal disease, during marriage, by asking divorced wife if she had observed his condition relative to venereal disease, and if she had testified in her divorce action that she had received venereal disease from him, held nonprejudicial error.

State v Donovan, (NOR); 263 NW 516

Dead man statute—payment for services. Where a deceased had taken his nephew, raised him, and promised to pay him for working on decedent's farm, testimony as to statements made by the deceased in conversations wherein deceased had said the boy was to be paid from his estate when he died, may be received from the wife of deceased, the wife of claimant, and the claimant himself, provided they took no part in the conversations.

Gardner v Marquis, 224-458; 275 NW 493

11263 Communications in professional confidence.

ANALYSIS

I PROFESSIONAL COMMUNICATIONS IN GENERAL
II ATTORNEY AND CLIENT
III PHYSICIAN AND PATIENT
IV MINISTERS
V STENOGRAPHER OR CONFIDENTIAL CLERK
VI WAIVER OF PRIVILEGE
VII OTHER PRIVILEGED COMMUNICATIONS

Witness' competency generally. See under §11255

I PROFESSIONAL COMMUNICATIONS IN GENERAL

Discussion. See 19 ILR 104—Nurses; 24 ILR 538—Professional communications

Physician — confidential communications — admissibility in workmen's compensation case. The statutory rule of evidence that information obtained by a physician from his patient is inadmissible does not apply to workmen's compensation cases.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Privileged communication—waived in proof of loss for insurance. In an action on a life policy where the beneficiary signed a proof of loss which contained an express waiver of the statute protecting communications in professional confidence, the testimony of a nurse who attended deceased-insured should not have been excluded, as such testimony was within the scope of the waiver.

Luce v Ins. Co., 227-532; 288 NW 681

II ATTORNEY AND CLIENT

Failure to object. One who, without objection, allows an attorney to testify to confidential communications, may not thereafter base error on the reception of such testimony.

Hepker v Schmickle, 209-744; 229 NW 177

Examination by court—error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Attorney and client — when not privileged. A client who consults his attorney for the simple purpose of having the attorney put him in touch with a broker, with whom the client could arrange for the sale of property, may not claim that the resulting conversation is privileged or confidential; likewise, if the client's purpose is to obtain such assistance as will enable him to consummate a crime.

State v Kirkpatrick, 220-974; 263 NW 52

Attorney — confidential communications — what is not. A communication made by a client to his attorney relative to the unpaidness of a debt then barred by the statute of limitation, cannot be deemed a confidential communication when made for the very purpose of being communicated to the holder of the barred debt, or to the latter's attorney.

Koht v Dean, 220-86; 261 NW 491

Nonconfidential communications. An attorney for two parties having adverse interests is not disqualified from testifying to communications made to him by one client in the presence of the other client, nor to communications made to him by one client with the intent that they be communicated to the other client.

Lewis v Beh, 206-281; 218 NW 944; 220 NW 126

See Ayres v Nopoulos, 204-881; 216 NW 258

Nonconfidential communications. An attorney is not prohibited from testifying to communications arising out of a transaction between himself and parties who mutually consulted him in regard to contemplated conveyances by one to the other and the rights and duties of each thereunder, no suggestion appearing that any of the parties treated the transaction as confidential.

Crawford v Raible, 206-732; 221 NW 474

Overheard talk between accused and attorney. A witness is competent to testify to a conversation which he overheard between the accused and an attorney relative to the offense charged when the attorney was not an attorney for the accused.

State v Bittner, 209-109; 227 NW 601

Attorney—workmen's compensation settlement confidential. With respect to a workmen's compensation settlement, testimony of an attorney for the deceased workman is a confidential communication not admissible in a hearing to determine the liability of such compensation for deceased's debts, even tho such attorney had also been consulted by the claimant as to the legality of the claim against the compensation money.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

III PHYSICIAN AND PATIENT

"Observations" of witness. Testimony by a physician and his attendants, as to their "observations" of a person confined in a state hospital for the insane, is not violative of the statute which prohibits the divulging of confidential communications.

State v Murphy, 205-1130; 217 NW 225

Nonrelation of physician and patient. The relation of physician and patient does not exist between a physician and a person who is examined by such physician, under appointment from the United States government, and for the sole purpose of determining whether said person is entitled to a pension, the said physician neither medically treating nor prescribing for said person.

Cherokee v Ins. Co., 215-1000; 247 NW 495

III PHYSICIAN AND PATIENT—concluded

Expert opinions. The expert opinion of a physician as to the possible cause of an injury, based on no fact obtained from the injured party, does not constitute the disclosing of a confidential communication.

Whitmore v Herrick, 205-621; 218 NW 334

Waiver by act of patient. A physician may testify to facts learned by him in the treatment of a patient when the patient has already detailed said facts to the grand jury or to other persons with whom the patient had no confidential or professional relation.

State v Knight, 204-819; 216 NW 104

Waiver by act of patient. An injured party who describes his injury and exhibits it to the jury thereby waives his right to object to testimony by his physician descriptive of such injury.

Whitmore v Herrick, 205-621; 218 NW 334

Contract waiver. A contract by an applicant for insurance to the effect that any physician who "has been consulted" by him may be examined as a witness as to any matter which the physician has learned from such consultation does not embrace physicians subsequently consulted by the insured.

Pride v Acc. Assn., 207-167; 216 NW 62; 62 ALR 31

Physicians testifying—nonwaiver if one testifies. An injured person who on different occasions is professionally examined and treated by different physicians may call and use as a witness one of the physicians and not thereby waive his privilege as to confidential communications with the other physician.

Pearson v Butts, 224-376; 276 NW 65

Privileged communications—waiver of statute. A waiver, in a policy of accident insurance, of the statute which forbids a physician when testifying to reveal a professional or privileged communication, is operative whether the particular communication be favorable or unfavorable to the insurer.

Miser v Iowa Assn., 223-662; 273 NW 155

Privileged communication—nonapplicable to physician performing autopsy. In an action to recover on an accident policy for the death of insured, where the court excluded testimony of a physician, who performed a post mortem examination but did not treat the patient before death, on the ground of privileged communication between patient and physician, held, court improperly excluded such testimony, since the privilege is purely statutory and for the purpose of encouraging patients to make full disclosure to the physician of all facts to enable him to prescribe and administer the proper treatment. A deceased body is not a patient and the relation of physician and patient ends when the death of the patient ensues.

Travelers Ins. Co. v Bergeron, 25 F 2d, 680

Physician—nonconfidential communications. Questions asked by a physician and answers thereto, which have no relation whatever to anything which may enable the physician medicinally to treat the persons giving the answers, are not confidential communications.

State v Johnston, 221-933; 267 NW 698

Physician — confidential communications — admissibility in workmen's compensation case. The statutory rule of evidence that information obtained by a physician from his patient is inadmissible does not apply to workmen's compensation cases.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

IV MINISTERS

No annotations in this volume

V STENOGRAPHER OR CONFIDENTIAL CLERK

Professional memorandum by deceased—incompetent when stating no fact. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

VI WAIVER OF PRIVILEGE

Waived in proof of loss for insurance. In an action on a life policy where the beneficiary signed a proof of loss which contained an express waiver of the statute protecting communications in professional confidence, the testimony of a nurse who attended deceased-insured should not have been excluded, as such testimony was within the scope of the waiver.

Luce v Ins. Co., 227-532; 288 NW 681

VII OTHER PRIVILEGED COMMUNICATIONS

Competency—husband and wife—communications. All communications between a husband and wife during their married life are privileged.

Rodskier v Ins. Co., 216-121; 248 NW 295

Waived in proof of loss for insurance. In an action on a life policy where the beneficiary signed a proof of loss which contained an express waiver of the statute protecting communications in professional confidence, the testimony of a nurse who attended deceased-insured should not have been excluded, as such testimony was within the scope of the waiver.

Luce v Ins. Co., 227-532; 288 NW 681

Witnesses — competency — nonmarital communications. A divorced wife is a competent

witness to testify to a communication between her former husband and a third person, prior to the divorce.

Stutzman v Bank, 205-379; 218 NW 39

11267 Criminating questions.

Discussion. See 5 ILB 174—Self-criminating testimony

Rule of evidence does not compel self-incrimination. The statutory declaration (§1966.1) that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Testimony of patrolman. In a prosecution arising from an automobile accident, testimony by a patrolman as to statements made by himself is admissible and not within the purview of statutes pertaining to accident reports and incriminating questions.

State v Weltha, 228- ; 292 NW 148

Blood tests and urinalysis—voluntary submission to tests. Admission of evidence of blood test and urinalysis in prosecution for drunken driving is not objectionable as compelling defendant to be a witness against himself when the evidence disclosed that the analyzed substances were given up voluntarily and without compulsion or entrapment.

State v Morkrid, (NOR); 286 NW 412

Self-debasement. In an equitable action by the state to revoke the license of a physician, the defendant may not base a claim of error in the fact that, over his objections, the court permitted witnesses for the state to expose themselves to public disgrace and ignominy by their testimony.

State v Knight, 204-819; 216 NW 104

Exemption from self-incrimination — nonwaiver. A witness who voluntarily appears before a grand jury, and, without duress or compulsion, testifies to matters which tend to render himself criminally liable for an offense as to which he is not given absolute immunity from prosecution (§11269, C., '35), does not thereby waive his natural, common-law, statutory, and constitutional right to refuse to testify to said matters on the subsequent trial of another party under an indictment returned in whole or in part on the original testimony of said witness.

Duckworth v District Court, 220-1350; 264 NW 715

Statutory privilege. A female upon whom it is alleged a criminal abortion has been committed by a physician may, when called to testify as to what transpired between her and the physician, legally refuse, not on the ground that her answer might render her criminally liable, but on the ground that her answer would expose her to public ignominy.

State v Brown, 218-166; 253 NW 836

11268 Exceptions.

Atty. Gen. Opinion. See '36 AG Op 591

Evidence at preliminary examination. Defendant, on cross-examination, may be examined as to his apparently voluntary testimony given on a preliminary examination in which another was accused of the crime, and not defendant.

State v Kneeskern, 203-929; 210 NW 465

11269 Immunity from prosecution.

Exemption from self-incrimination — nonwaiver. A witness who voluntarily appears before a grand jury, and, without duress or compulsion, testifies to matters which tend to render himself criminally liable for an offense as to which he is not given absolute immunity from prosecution, does not thereby waive his natural, common-law, statutory, and constitutional right to refuse to testify to said matters on the subsequent trial of another party under an indictment returned in whole or in part on the original testimony of said witness.

Duckworth v District Court, 220-1350; 264 NW 715

Nonincriminating grand jury testimony—no resulting immunity. A person involuntarily appearing before the grand jury, tho not asked self-incriminating questions, who later is charged by county attorney's information with falsification of records, a subject connected with the grand jury investigation, may not, by certiorari, review the overruling of a motion to dismiss the information on the ground of immunity because of such grand jury appearance, when a remedy by appeal existed.

Kommelter v Dist. Court, 225-273; 280 NW 511

11270 Previous conviction.

Permissible cross-examination. An accused in a criminal prosecution who, for the manifest purpose of placing himself in the light of an honorable and trusted character, testifies to his former membership on the police force may, on cross-examination, be shown to have secured his said position by falsely representing that he had never been convicted of a felony.

State v Shaw, 202-632; 210 NW 901

Former conviction of different felony. It is not erroneous to ask an accused, on cross-examination, whether he has been convicted of a specific felony, the offense on trial and the one inquired about not being the same.

State v Friend, 210-980; 230 NW 425

Conviction of felony—effect on credibility. The law does not presume that a person who has been convicted of a felony is less worthy of belief than a person who has not been so convicted, and error results from so instructing.

State v Voelpel, 208-1049; 226 NW 770

Discretionary limit to cross-examination. After a witness, on cross-examination, has testified (1) that he is a laborer, (2) that he has been convicted of a felony, and (3) that he is now residing in the county jail, the court may very properly curtail further cross-examination, by excluding questions designed to show that the witness, instead of being a laborer, has been engaged, generally, in bootlegging, and in the commission of larcenies and burglaries.

State v Johnson, 215-483; 245 NW 728

Conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony and since the weight to be given such testimony is for the jury, when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

Impeachment—effect—duty of jury. A witness at the outset is presumed to be telling the truth and it does not follow that, because there is evidence tending to impeach him, that he has thereby been successfully impeached, or that he has been successfully impeached because he has been attacked. If the jury is of the opinion that he has been successfully impeached, it should disregard his testimony unless some material part of it has been corroborated.

State v Wehde, 226-47; 283 NW 104

Proof of felony conviction not an impeachment. Proof that witness has been convicted of felony does not of itself impeach him, discredit his testimony, nor make him wholly unworthy of belief. Such proof goes only to the weight to be given his testimony by the jury.

State v Wehde, 226-47; 283 NW 104

Former plea of guilty—not conclusive in a civil action. In a civil action the plea of guilty to a criminal prosecution involving the same transaction is admissible as an admission but is not conclusive when the criminal defendant, as a witness in the civil action, gives testimony tending to contradict his plea of guilty.

Boyle v Bornholtz, 224-90; 275 NW 479

11271 Moral character.

ANALYSIS

I GENERAL MORAL CHARACTER
II SUSTAINING WITNESS

Good character of defendant. See under §13397 (XIX)

I GENERAL MORAL CHARACTER

General moral character. The general reputation of a witness for good moral character may be shown in rebuttal for impeaching purposes without limiting the reputation to the time in controversy.

State v Reynolds, 201-10; 206 NW 635

Cross-examination as to remote matters. The cross-examination of a good character witness may not be carried into matters which are from eight to twelve years remote from the time of trial.

State v Bell, 206-816; 221 NW 521

Impeachment of witness—proper time limitation. A question calling for the reputation of a witness is properly limited to the present time—the time when he testifies—not to the time of the occurrence concerning which he testifies.

State v Teager, 222-391; 269 NW 348

Unnecessary limitation. Testimony of general bad moral character of an accused and of his bad reputation for truth and veracity need not be limited to the very time of the commission of the offense on trial.

State v Parsons, 206-390; 220 NW 328

Bad moral character—scope of cross-examination. A person testifying to the general bad moral character of a witness may be cross-examined as to the reputation of the witness as to truth and veracity.

State v Smalley, 211-109; 233 NW 55

Limit on cross-examination. A witness who has testified to the good reputation for honesty of an accused in the community where the accused lives can be cross-examined solely and alone as to what the witness has heard in the community in the way of rumors or reports derogatory to the honesty of the accused. In other words, the state may not, on such examination, ask the witness if he does not know that the accused has been charged with or convicted of this or that offense.

State v Bell, 206-816; 221 NW 521

General reputation—sufficiency. The point that a question calls for testimony of the "reputation" of a witness instead of testimony of the general reputation is not raised by the objection of incompetency and immateriality.

State v Dillard, 205-430; 216 NW 610

Qualification of witness. A witness who testifies that he knows the general moral character of a party, may testify thereto, even tho the witness does not reside in the locality in which the impeached party resides.

State v Weber, 204-137; 214 NW 531

Disregarding testimony of witness. The jury must not be instructed that it may disregard the testimony of a witness if it finds

that the general reputation of the witness for truth and veracity is bad.

Jorgensen v Cocklin, 219-1103; 260 NW 6

Unallowable impeachment. Mere witnesses in a criminal prosecution are not impeachable by testimony that their general reputation in the community where they reside is bad as to some particular trait of character.

State v Ferguson, 222-1148; 270 NW 874

Impeachment — dual methods. The common-law rule that a witness may be impeached by showing his bad reputation for truth and veracity in the community where he resides or in which he has recently resided, has not been abrogated or in any manner changed by the statutory provision that the general moral character of a witness may be proved for the purpose of testing his credibility.

State v Teager, 222-392; 269 NW 348

Proof of good character or reputation. Conceding, arguendo, that one accused of being the father of a child may sustain his denial by proof of good character or reputation, yet such evidence must be confined to the traits involved in the charge.

Moen v Fry, 215-344; 245 NW 297

Stolen bonds—good faith purchase. On the issue whether stolen United States liberty bonds had been purchased by a bank in good faith, evidence that the person from whom the bank bought the bonds was a notorious underworld character is inadmissible, it appearing that he was a regular depositor of the bank, and had had prior bond deals with the purchasing bank.

State Bank v Iowa-Des Moines Bank, 223-596; 273 NW 160

II SUSTAINING WITNESS

See annotations under §13897 (XIX)

11272 Whole of a writing or conversation.

Cross-examination—ignoring statute. The concededly wide discretion of the court in controlling cross-examination does not embrace the right to ignore a statute governing such examination. So held where the court allowed the reception of only part of a conversation.

Bond v Lotz, 214-683; 243 NW 586

Cross-examination as to balance of conversation. When part of a conversation relative to the execution of a guaranty is drawn from a witness, the entire conversation may be brought out on cross-examination.

Boyd v Miller, 210-829; 230 NW 851

Cross-examination — permissible redirect. When counsel on cross-examination enters an experimental field of inquiry foreign to the essential issues of the case, he may not complain if opposing counsel exercises his right on redirect to make an exploration into the same field of inquiry with disastrous results to the first offender.

Azeltine v Lutterman, 218-675; 254 NW 854

Details of conversation — legal limits. Details of a conversation between the soliciting agent of an insurance company and the insured, after the issuance of the policy, with reference to a letter to be written by the agent to the company concerning a loss, are not competent when they extend beyond reference to the subject-matter of the letter.

Miller v Mutual Assn., 219-689; 259 NW 572

Harmless error — refusal to admit all of conversation. Error in refusing to permit a witness to fully detail a conversation with another party is harmless when the excluded part is otherwise brought out by other witnesses.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Examination—part of conversation—rebuttal. A defendant, who places in evidence a conversation between his witness and the plaintiff, may not complain if on rebuttal the plaintiff inquires of the witness as to the whole conversation.

Churchill v Briggs, 225-1187; 282 NW 280

Cross-examination establishing competency to testify on redirect. Altho being an incompetent witness as to conversations with the deceased, a daughter, objecting to an executor's report because against her share is offset a promissory note which she claims was canceled by the testator, may be rendered competent to testify on redirect examination when conversations with testator were partially inquired into on cross-examination.

In re Morgan, 225-746; 281 NW 346

Offering direct examination makes cross-examination admissible. In an action for conversion of an intestate's property, testimony of a witness on direct examination, given in a prior probate discovery proceeding offered and introduced from the transcript of the discovery proceeding, renders also admissible from such transcript the cross-examination of such witness, as being the whole of the conversation, although under the dead man statute the witness may have been incompetent.

Reeves v Lyon, 224-659; 277 NW 749

Improper rebuttal evidence—motion to strike necessary for review. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

Objections—waiver by introducing exhibit. Objections made by the defendant to testimony

given by the plaintiff's witness on direct examination were not waived when the defendant introduced an exhibit containing written statements made by the witness which tended to weaken his oral testimony. But objections by the defendant to other testimony in the direct examination were waived by statements in the exhibit supporting the testimony to which objections had been made.

Goodale v Murray, 227-843; 289 NW 450

Whole of writing. When a cross-examination is designed to show that a witness had asked plaintiff to sign an untruthful statement of fact, the party calling the witness must be permitted to show by a duplicate original, tho unsigned, just what plaintiff was asked to sign.

Stickling v Railway, 212-149; 232 NW 677

Whole of writing offered—must be on same subject as part offered. In automobile damage action for injuries sustained by plaintiff while riding as a guest of defendant's deceased husband, where, on cross-examination of plaintiff, he was interrogated for impeachment purposes concerning statements made by him as witness in coroner's investigation, and admitted making certain statements, but claimed he was mistaken as to facts, and defendant offered such statements found in coroner's transcript as admission against interest, whereupon plaintiff offered the transcript in its entirety under statute providing the whole of a writing on the same subject may be inquired into, exclusion of transcript by the court was rightful since transcript contained statements made by plaintiff that were not on the same subject as were the answers offered by defendant, as well as being self-serving in character.

Jones v Krambeck, 228- ; 290 NW 56

Documentary evidence — will as entirety when only signature offered. Without an objection thereto or a showing of prejudice, it is not error to admit and send with the jury the entire will of decedent, even tho only the signature was offered in evidence.

In re Cheney, 223-1076; 274 NW 5

Res gestae—execution of notes. In an action on promissory notes executed to a bank by its directors and stockholders in order to prevent an impairment of the bank's capital, testimony is admissible as to what the state bank examiner said, at the time the notes were executed, relative to including the notes in the assets of the bank.

Farmers Bk. v Bunge, 211-1357; 231 NW 651

Indictment as evidence. An indictment is wholly inadmissible to show the guilt of the defendant even tho offered, on cross-examination, in connection with an offer, by the accused, of the minutes of testimony returned with the indictment.

State v Huckins, 212-283; 234 NW 554

11273 Detached acts, declarations, or conversations.

Evidence attending interwoven transactions. Conversations had at the time of entering into a series of contracts at different times may be so closely related to, and so closely interwoven with, a subsequent contract as fully to justify their consideration on the issue whether the latter contract was entered into.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Separation of relevant and irrelevant matter. When a conversation relates to two distinct and easily separated subject matters, one relevant and one irrelevant, the latter cannot be deemed admissible simply because it is a part of the conversation as a whole. So held where the conversation related (1) to the manner in which an accident happened and (2) to the insurance carried by the defendant.

Kuhn v Kjose, 216-36; 248 NW 230

Different instruments treated as one. Two instruments executed at the same time and as part of the same transaction constitute, for purposes of construction, one instrument.

In re Barnett, 217-187; 251 NW 59

Declarations in disparagement of title—admissibility. On the issue whether defendant was a donee of certain bonds and had been such prior to the death of the alleged donor, a writing executed by the alleged donee subsequent to the making of the alleged gift, and tending to show ownership at said time in the alleged donor, is admissible against the alleged donee as in the nature of an admission in disparagement of donee's alleged claim.

Malcor v Johnson, 223-644; 273 NW 145

Gifts—self-serving acts. An alleged donee may not affirmatively establish the gift by testifying to his own prior self-serving acts and declarations.

Malcor v Johnson, 223-644; 273 NW 145

Admissibility of letter in action on note. A surety who denies in toto the execution, delivery, and consideration of the promissory note in question, but sees fit to cross-examine his co-defendant principal with reference to a letter written by the principal to the payee with reference to said denied matter, may not complain of the reception in evidence of said letter as a part of his own cross-examination.

Granner v Byam, 218-535; 255 NW 653

Delivery date of policy—other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting

practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to reply upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Improper rebuttal evidence — motion to strike necessary for review. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

11274 Writing and printing.

Inconsistent provisions as to title. A purchaser may not insist on a "marketable" title in accordance with the printed provisions of a blank form of contract when the typewritten provisions very clearly provide for a title of lesser quality.

Herman v Engstrom, 204-341; 214 NW 588

11275 Understanding of parties to agreement.

Contracts in general. See under Ch 420

Nonapplicability — unambiguous contract. This section has no application to an unambiguous legal written contract.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Nonapplicability—two contracts in question. An instruction to the effect that, if parties had different understandings as to the terms of a contract, that understanding should prevail against a party in which he had reason to suppose that the other understood it, is wholly inapplicable when the issue is whether one or the other of two different contracts was entered into.

Olson v Shuler, 203-518; 210 NW 453

Construction — intent derived from entire contract. Contract should be considered in its entirety in arriving at the intent of the parties.

State v Sprague, 225-766; 281 NW 349

Intention of parties controls. In construing any instrument in writing, the primary object is to arrive at what the parties had in mind when it was drawn.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Parol evidence of execution of oral contract. Oral evidence of the execution of an oral contract, which has been performed or partially performed by one of parties, may be introduced in evidence, altho the witnesses who testified were not present when the contract was made.

Ford v Young, 225-956; 282 NW 324

Contemporaneous facts as aids. Principle reaffirmed that, when a contract is susceptible of different constructions, it is ambiguous, and the conversations, circumstances, negotiations, and conduct of the parties may be looked to as an aid in determining the true construction.

Cedar Rapids Co. v Sec. Co., 208-150; 225 NW 339

Unambiguous contract—parol inadmissible. An unambiguous written contract may not be aided by parol testimony tending to show the sense in which one party had reason to know the other party understood the contract.

Commercial Bank v Crissman, 214-217; 242 NW 355

Ambiguous contract. When a written contract is susceptible of two or more conflicting constructions, the court, in the quest for the proper construction, will give due consideration to (1) the situation of the parties, (2) the circumstances attending the transaction, and (3) the conduct of the parties.

Tucker v Leise, 201-48; 206 NW 258

Right to explain ambiguous clause—limitation on rule. The rule that an ambiguous provision in a written contract may be explained by parol evidence, for the purpose of arriving at a basis on which to rest a legal conclusion as to the meaning of said provision, assuredly does not embrace the right of one party to the contract to show, (1) his understanding of said provision, and (2) the understanding of a former assignee of the contract (at a time when the question of the meaning of the provision had not arisen) as evidence of the understanding which a later assignee had or should have had of said provision.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Contemporaneous agreements — circumstances attending execution. Principle reaffirmed that contemporaneous agreements as to the same subject-matter will be construed together, and if ambiguity appears, the facts and circumstances attending the execution of the instruments may be received as an aid to construction.

Seeger v Manifold, 210-683; 231 NW 479

Ambiguity—intent—conduct of parties as evidence. In searching for the actual intention of both parties to an ambiguous written guaranty,—in other words, in searching for the proper construction to place on such contract —the court may receive evidence of the conduct of the party to whom the guaranty was given, tending to show that said party, short-

ly after the time the guaranty was executed, and contrary to his present attitude, was placing the same construction thereon as contended for by the guarantor.

West Branch Bank v Farmers Exchange, 221-1382; 268 NW 155

Mutual understanding. When the parties mutually treat a written compromise and settlement as ambiguous, the court will construe it in the light of their testimony as to the circumstances attending the transaction, and if the question be close, some consideration will be given to the fact that one of the parties was the sole author of the disputed language.

Goode v Ry. Exp. 205-297; 215 NW 621; 217 NW 876

Ambiguous contract—mutual interpretation. A cooperative marketing association, which, by written contract separately binds each member of the association to sell and deliver exclusively to the association the milk produced by the member—impliedly from day to day—or "pay as liquidated damages $25 for each and every such failure and breach of contract", will not be permitted to recover from a member said amount for each and every day there is a failure so to deliver, when such interpretation is absolutely contrary to the uniform, mutual interpretation theretofore placed on the contract during a long series of years. Especially is this true because otherwise the court would be compelled to construe the said damage clause as a penalty.

Fort Dodge Assn. v Ainsworth, 217-712; 251 NW 85

Construction against party using words. On the question whether, under a written application for a contractor's bond on a grading contract, the contractor had agreed to pay, when the contract was fully executed, an additional percentage premium on the amount received by him on "overhaul", doubts and uncertainties arising from the noncomprehensiveness of the language used will be construed most strongly against the insurer who solely drafted the application on information solely obtained by himself without fraud on the part of the contractor.

Iowa Cas. v Cram, 209-424; 228 NW 24
See Buser v Land Co., 211-659; 234 NW 241

Construction against party using words. When the construction of a writing which precedes a compromise and settlement is doubtful, the doubt will be resolved against the party who deliberately employed the words in question.

Fairfax Bk. v Coligan, 211-670; 234 NW 537

Spur track to state institution—maintenance cost. After a contract places the burden on the state to pay the cost of construction, maintenance, and operation of a spur track to the industrial school for boys at Eldora, a state institution, and in a later clause requires the railway company to maintain the spur track, the contract as a whole was construed and the apparent ambiguity resolved in a finding that the railroad should do the maintenance work, but that the state should pay the cost.

State v Sprague, 225-766; 281 NW 349

Parol to explain ambiguous contract. A written contract for storage of corn, which makes no provision as to when the seller is to exercise an option to sell nor as to when the storage is to be paid, does not contain the entire agreement entered into, and parol evidence is admissible on the question as to what was reasonable time to perform.

Andreas & Son v Hempy, 224-561; 276 NW 791

Unambiguous contract to sell. An agreement by one party to sell and by another to buy "all gasoline * * * used, kept, or sold" on described premises is quite unambiguous.

Hladik v Noe, 214-854; 243 NW 180

Parol or extrinsic evidence affecting writings —right to enlarge writing. When the written evidence of a contract provides, in effect, that named subject matters shall be controlled thereby, oral evidence is admissible to enlarge said subject matters when the writing on its face reveals the contemplation of the parties to make such addition.

Smith & Co. v Hollingsworth, 218-920; 251 NW 749

Unambiguous contract. An unambiguous contract is self-interpreting. In other words, there is no occasion and no possibility of applying "rules of construction" to such a contract.

Chambers v Bank & Trust, 218-63; 254 NW 309

Rejection of hopelessly indefinite clause. In the construction of a contract, the court may be compelled to wholly reject a hopelessly indefinite clause. So held where a written contract granted to a sales agent the exclusive right to sell on a stated commission in named territory, "except in special cases".

Hawbaker v Laco Co., 210-544; 231 NW 347

Permissible proof of oral contract. Evidence which will be admissible to prove an oral contract to transfer real property must be either in writing or by tangible acts or circumstances definitely referable to the oral agreement, but when such tangible acts are shown, then parol evidence becomes competent to show the specific terms of the contract.

Fairall v Arnold, 226-977; 285 NW 664

Services and compensation—ambiguous contract in re commissions. Contract construed, and held to provide no commission on sales until said sales exceeded a named amount.

Clinton v Music Co., 209-636; 228 NW 664

Ambiguous clause in contract—limitation. In an action to recover commission under real estate broker's contract in which the clause providing for time when commission is due and payable is ambiguous, proof of the circumstances accompanying the execution of the ambiguous instrument is admissible to assist in the interpretation, but not to vary the terms of the instrument.

Mealey v Kanealy, 226-1266; 286 NW 500

Ambiguous clause—effect. In an action to recover commission under real estate broker's contract, which provides for payment of commission upon execution of the contract to which is added the phrase "The commission being due and payable upon the transfer of properties," held, that the last clause is not repugnant to the general purpose and intent of the instrument, its effect being only to modify and not to destroy an element thereof, such limitation cannot be nullified under the guise of interpretation.

Mealey v Kanealy, 226-1266; 286 NW 500

Conflicting clauses—construction as entirety. In an action upon written contract for real estate commission, in which there are conflicting clauses as to time of payment of commission, the rule is that a contract should be read and interpreted as an entirety rather than by seriatim by clauses and that the position of clauses in such instrument is not material nor controlling.

Mealey v Kanealy, 226-1266; 286 NW 500

Contract to bring infringement suits. A contract between a patent owner as licensor and the manufacturer of the patented article as licensee, providing that the licensor receive royalties and should bring suits to prevent infringement upon the patent using royalties received, was fully performed on the part of the licensor when he spent, in bringing infringement suits, more than the amount of the royalties received.

Eulberg v Cooper, 226-776; 285 NW 131

Utility plant—contract and specifications variation first alleged on appeal. A contended variation between the contract for a municipal public utility plant and the specifications, in that the contract omitted the right to call bonds at a certain time, will not be considered on appeal, when such variation, if any, was not an issue in the lower court.

Lahn v Primghar, 225-686; 281 NW 214

Contract for services—question of quantum meruit. In an action against city for engineering services rendered in reconstruction of sewage disposal plant wherein plaintiff bases his claim on quantum meruit, and city contends services were contemplated by contract providing for lump sum compensation, question of liability of city for services on quantum meruit basis held insufficient for jury.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Value of services for engineering—inadmissible. In an action against a city for engineering services, consisting of inspection and reconstruction of sewage disposal plant, refusal to admit evidence of value of services rendered within contemplation of contract for lump sum compensation is not error.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Alteration of plans — nonabandonment of contract. Where a city council hired an engineer to reconstruct a sewage disposal plant for a lump sum compensation, and thereafter adopted a motion to hire an engineer to investigate the adoption of a "trickling filter system" as a substitute for the original plan, to which the engineer who had been employed protested that the original contract was for the entire engineering work, and where a motion before the council to reject engineer's original plans was lost, but a motion was adopted to instruct the engineer to change the original plans, nevertheless the adoption of such motion to change original plans was not an abandonment of the original contract as respects the right of the engineer to compensation.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Mutual partial modification—remainder in force. In a well drilling contract, a provision to use 4-inch casing all the way to the bottom of the well may be subsequently modified by an oral agreement to use 3-inch pipe, implied from the conduct of one party in accord with a change proposed by the other; but such a modification will not, necessarily, also modify the contract price per foot for the drilling.

Collins v Gard, 224-236; 275 NW 392

Requisites—implied from conduct. A contract implied in fact, differing from an express contract only in the method of proof, may be inferred under certain circumstances from acts and conduct justifying a promisee in understanding a promisor intended to contract.

Snell v Kresge Co., 223-911; 274 NW 35

Renewal of written contract by conduct. Where a heating plant owner contracted to furnish to a storekeeper heat for a period of one year at the termination of which no new written nor verbal contract was made, but for seven years more the heat was furnished and accepted at the same price as in the original agreement, until discontinued at nearly the end of the 1933-34 season, in an action to recover the contract price for the 1933-34 year's heat, a contract would be implied from the

storekeeper's conduct, to pay the contract price regardless of fact that storekeeper shut off some of the radiators.

Snell v Kresge Co., 223-911; 274 NW 35

Parol testimony—deed as mortgage. Parol testimony is admissible to show that deed was in fact a mortgage and was so intended.

Rance v Gaddis, 226-531; 284 NW 468

Easement rights omitted from deed—evidence. When land was purchased under a contract providing that the deed would grant an easement of the right of ingress and egress to the property, and that the exact description of the easement would be made a part of the deed, but such description having been omitted, it was proper, in purchaser's action to assert such easement rights, to admit extrinsic evidence to show the exact location of the easement.

Dawson v McKinnon, 226-756; 285 NW 258

Royalties to pay costs of infringement suits—nonrepugnant provisions. A provision in a patent license contract which provided that the amount spent by the licensor in bringing suits to prevent patent infringements should not exceed the amount of royalties received by him, was not repugnant to other clauses providing that such suits should be brought by the licensor, or if not brought by him, the licensee could use the royalties to bring such suits.

Eulberg v Cooper, 226-776; 285 NW 131

Escrow agent's memorandum made in absence of parties. An escrow agent's understanding of the arrangement by which he was to record deeds after the death of the grantor, noted on the envelope in the absence of the parties, is not admissible in evidence as to the substance of the arrangement and would be of doubtful evidentiary value even if admitted.

Bohle v Brooks, 225-980; 282 NW 351

Parol or extrinsic evidence—testator's or grantor's meaning admissible. Where such terms as children, grandchildren, or nephews are used in a will or a deed, and there are both legitimates and illegitimates and the testator has full knowledge of such fact, and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption, but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of the will, but also in the light of the circumstances surrounding the execution of the will, and parol evidence is admissible to prove the intent of the testator or grantor.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Individual liability of corporate stockholders. When two individuals who owned practically all of the stock in a corporation executed as individuals a contract in the name of the corporation, without advising the other party to the contract of the corporate character, they could not later deny individual liability, although the performance was by the corporation which in effect acted as their agent in executing the contract.

Eulberg v Cooper, 226-776; 285 NW 131

Allowable conclusion—ownership of note. It was not error for the court to permit the plaintiff, in an action on a note, to testify that he was the owner of the note over an objection that such testimony was the conclusion of the witness.

Ballard v Ballard, 226-699; 285 NW 165

Absence of ambiguity. When the terms employed in a policy of insurance are plain and unambiguous there is no room for the application of the oft-quoted rule that the policy must be construed most strongly against the insurer.

Field v Southern Sur., 211-1239; 235 NW 571

Release on basis of mistaken diagnosis. Where a settlement and release of a personal injury claim involved a mistaken diagnosis by the injured person's doctor, his statements are binding on the defendant, altho he was not connected with the defendant or its liability insurance carrier, since the inquiry, not involving fraud, centers on the existence of and good-faith reliance on the mistaken diagnosis.

Jordan v Brady Co., 226-137; 284 NW 73

Delivery date of policy. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Assignment of rent construed. In construing the provisions of a settlement wherein a judgment debtor agreed to assign to his judgment creditor "* * * the amount due from the tenant * * *" of the debtor on certain real estate, the same "* * * being all rentals * * *" for a certain year, held, that federal agricultural conservation payments received by the debtor on the land in question were not in contemplation of the parties. Hence creditor was not, on the basis of said assignment, entitled to these payments.

Cooke v Harrington, 227-145; 287 NW 837

Consideration and acceptance. Where a note was sent for the purchase price of land in partition, and though objections were made to it because the signature was not in ink, a judgment for the plaintiff on the note was warranted when there was evidence on which the jury could have found consideration for the note and that it was later accepted by the plaintiff after learning that the penciled signature was valid.

Ballard v Ballard, 226-699; 285 NW 165

Parol to show circumstances attending making of mutual wills. Even tho extrinsic evidence is inadmissible to vary or change the terms of a will, yet evidence may be admitted to show circumstances which accompanied or attended making of the instrument, or to identify papers or writings which in fact constitute the will, especially where it is claimed that two or more writings made at or about the same time are part of a single transaction and together constitute in law a single will.

Child v Smith, 225-1206; 282 NW 316

Contract to will property—past consideration. Altho past services or past indebtedness may be a lawful consideration for an agreement, the parol evidence of such past services or indebtedness will not establish a contract by which the debtor agrees to sell or transfer his property by will in satisfaction of such services or debt.

Fairall v Arnold, 226-977; 285 NW 664

Long continued mutual construction—effect. A written guaranty by the seller of the assets of a bank "of all outstanding paper to the extent of 93 percent owing said bank at this time" will be construed as guaranteeing 93 percent of each individual piece of commercial paper, when such construction was the construction placed upon the contract by both parties thereto on numerous occasions subsequent to the execution of the contract.

Tucker v Leise, 201-48; 206 NW 258

11276 Historical and scientific works.

Medical works — examination concerning. Prejudicial error results from permitting a physician, defendant in an action for malpractice, to be cross-examined as to the contents and teaching of scientific works on medicine, when the witness has not testified, directly or indirectly, as to such works.

Wilcox v Crumpton, 219-389; 258 NW 704

Medical works — unallowable reception. Error results from permitting a party on the direct examination of his own expert witness to read extracts from a medical work, and then to ask the witness if he agrees with the statement so read.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

11278 Handwriting.

Expert witnesses generally. See under §11329

Discussion. See 7 ILB 55—Handwriting—instructions

Effect of expert testimony. Competent expert testimony as to the genuineness of a signature is admissible notwithstanding an element of weakness therein.

McColl v Jordan, 200-961; 205 NW 838

Handwriting experts—probative value. Conceding, arguendo, that the testimony of experts on handwriting is not of the highest order, nevertheless, under proper circumstances, such testimony has probative value.

State v Manly, 211-1043; 233 NW 110

Examination of expert. An expert witness may testify that a signature "looks like" the signature of the party in question; likewise that a given signature is "in his judgment" genuine.

McColl v Jordan, 200-961; 205 NW 838

Limitation on nonexpert. A nonexpert witness may not testify that the signature to an instrument "looks like" or "resembles" the genuine signature of a named person. Such a witness is competent to testify only to his belief or opinion.

Schram v Johnson, 208-222; 225 NW 369

Unallowable standard. Manifest error results, in the trial of the issue of handwriting, from admitting in evidence writings as standards for comparison without proof that the person in question wrote the standards.

State v Debner, 202-150; 209 NW 404

Proper standard for comparison. Proof that a party whose handwriting is in question admitted writing a certain exhibit renders the exhibit admissible as a proper standard for comparison.

State v Debner, 205-25; 215 NW 721

Examination—unallowable conclusion. It is not allowable to ask a witness whether a named person "admitted" writing a named instrument. The question should call for what was said.

State v Debner, 202-150; 209 NW 404

Disparaging expert testimony—instructions. A party who requests an instruction which emphasizes the superiority of positive over expert testimony as to the genuineness of handwriting may not complain that the court gave an instruction which fully embodied the idea of the requested instruction, but which more sharply, but correctly, emphasized the inferiority of expert testimony generally.

Keeney v Arp, 212-45; 235 NW 745

Non-issue as to signature. When it is practically conceded, under the evidence, that a party did not himself sign a promissory note

(tho his name is signed thereto), the fact that the record contains an admitted signature of the party imposes no obligation on the court to permit the jury, by a comparison of signatures, to find that the party did, himself, sign the note.

West Chester Bank v Dayton, 217-64; 250 NW 695

Cross-examination. The cross-examination of an expert witness, a banker, who has testified to the genuineness of a signature to a promissory note in suit, may not be carried to the extent of questioning the witness as to his course of action in case supposed checks were presented to his bank for payment, when the answers, whatever they might be, can have no legitimate bearing on the credibility, qualification, competency, accuracy, or mental attitude or bias of the witness.

Keeney v Arp, 212-45; 235 NW 745

Signatures — jury question. The mere introduction in evidence of genuine signatures of a party in order to establish the plea that the purported signature of the party to a written release is a forgery does not generate a jury question on the issue of forgery, irrespective of other ample evidence persuasively showing that the signature to the release is genuine.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Expert and jury comparison. On the issue whether certain signatures on checks are purely fictitious and were in reality written by a named existing party, experts in handwriting and the jury may compare said signatures with the admitted or proven handwriting of said named party.

Kruidenier Est. v Trust Co., 203-776; 209 NW 452

Denial of signature—jury question. A jury question is presented on the issue of the genuineness of a signature denied under oath, (1) by admitted signatures as to the genuineness of which reasonable minds might differ, after comparison with the original; (2) by expert testimony of a not very persuasive nature that the signature was genuine; (3) by testimony tending to show that the party had recognized the indebtedness as her own, and had (impliedly at least) recognized the genuineness of her signature, but had belatedly denied it; and (4) by testimony tending to show that she had adopted the signature as hers, even tho she had not physically affixed it to the instrument.

McColl v Jordan, 200-961; 205 NW 838

Conclusiveness of proof. The court may not say that the genuineness of a signature, duly put in issue, is conclusively established solely by expert opinion evidence of its genuineness, and thereby rightfully exclude the jury from passing upon the issue.

In re Richardson, 202-328; 208 NW 374

Comparison by jury. If complainant concedes that an instruction is correct insofar as it characterizes, as of a low order, expert testimony concerning the genuineness or nongenuineness of signatures, then complainant may not complain that comparisons of handwriting by jurors are characterized in the said instruction as of an equally low order.

In re Wood, 213-254; 237 NW 237

Genuineness of signature on note—jury question. Where in an action on a promissory note the defendant in his answer denies under oath the genuineness of the signature, a jury question is generated by positive testimony of the payee that the purported maker did sign the note, together with expert testimony on handwriting tending to prove that the signature was genuine, met by equally positive testimony by the purported maker that he did not sign the note.

Seibel v Fisher, 213-388; 239 NW 34

Will as entirety when only signature offered. Without an objection thereto or a showing of prejudice, it is not error to admit and send with the jury the entire will of decedent, even tho only the signature was offered in evidence.

In re Cheney, 223-1076; 274 NW 5

Handwriting expert — striking evidence — curing error. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

Forged signatures—expert testimony to overcome. While an acknowledgment by a notary is presumptively true and requires clear and convincing evidence to overcome it, yet by statute it is not conclusive, and the court acting as a jury may find, after reviewing the conflicting testimony of handwriting experts, properly received, that signatures to transfers and assignments of assets of an estate, attacked by an administrator de bonis non, were forgeries.

Brien v Davidson, 225-595; 281 NW 150

Scientifically demonstrated fact. Evidence consisting of microscopic inspection, magnified photographs, or chemical tests, may so demonstrate the nongenuineness of a writing as to become substantive evidence. It follows that such evidence not being mere expert testimony is not subject to the disparagement usually and ordinarily applied to expert testimony.

Keeney v Arp, 212-45; 235 NW 745

Handwriting photographs — court's discretion. Photographs of handwriting, altho bearing explanatory markings made by the expert witness, are proper evidence to aid the jury's comparison of the disputed signature on a will, as well as to explain expert testimony and their admissibility is largely within the trial court's discretion.

In re Cheney, 223-1076; 274 NW 5

11279 Private writing—acknowledgment.

Documentary evidence generally. See under §11254 (II)
Instruments affecting realty or adoption of minors as evidence. See under §11289, Vol I

Hotel register—dual purpose. A hotel register may become material and therefore admissible in evidence, not only for the purpose of impeaching a witness who asserted he had registered at the hotel, but as tending to show the presence of the witness at the time in question at the scene of an accident.

Ritter v City, 212-564; 234 NW 814

Documentary evidence—improper disregard of. The court, in its quest for a fact, may not, by assumption based on speculation or inference, refuse to accord force and effect to undisputed, unimpeached, and nondiscredited documentary evidence which unequivocally establishes said fact, especially when the fact arises out of a somewhat remote transaction, and when the party carrying the burden of proving said fact is hampered in his proof by reason of the death of parties who had knowledge of said transaction and by his own incompetency resulting from said deaths.

In re Allis, 221-918; 267 NW 683

11280 Entries and writings of deceased person.

Documentary evidence—necessity to identify. Pages of a book containing various notations, memoranda, and accounts in the handwriting of a deceased administrator are not admissible in an action to establish a shortage on the part of said administrator without some proper proof identifying said book as the book in which the administrator kept his accounts relative to the estate in question.

Varga v Guar. Co., 215-499; 245 NW 765

Professional memorandum by deceased. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

Revival of contract by undelivered check. In an action by a widow to establish a claim against deceased husband's estate based on an oral contract to repay a loan made by appellant widow to decedent prior to November 1, 1912, wherein the widow offers evidence of a check purported to have been issued to widow by husband for "interest 1935, 6 months" and deposited by him in joint account with his wife, and it is claimed by appellee that since check was not delivered to appellant widow nor to anyone acting for her, the writing is insufficient, held, such memorandum need not be delivered to opposite party nor his agent nor a person in privity with him, but is sufficient if it is signed and in any way promulgated so as to become an instrument of evidence.

Leland v Johnson, 227-520; 288 NW 595

Accounts—interest items posted. In an action by a widow to establish a claim against the estate of her deceased husband based on an alleged oral contract of decedent to repay a loan of money made by appellant widow to decedent, prior to November 1, 1912, to which the statute of limitations was pleaded, held, mere posting of items of interest applicable to one individual transaction is insufficient to show a "connected series of transactions" so as to convert the matter into a "continuous, open, current account" under statute providing cause of action accrues on date of last item, as this means a connected series of transactions.

Leland v Johnson, 227-520; 288 NW 595

11281 Books of account—when admissible.

Discussion. See 7 ILB 88—Regular entries, books of account

ANALYSIS

I BOOKS OF ORIGINAL ENTRY
II PRELIMINARY PROOF
III ADMISSIBILITY

Accounts deemed true. See under §11204

I BOOKS OF ORIGINAL ENTRY

Insufficient proof of claim. A claim for extra work is not proved by the production of the contractor's books of account showing items of time employed, and made up from oral statements by workmen who were not called as witnesses, neither the contractor nor the bookkeeper having any personal knowledge of the correctness of the items.

Van Dyck Co. v Bldg. Co., 200-1003; 205 NW 650

Books of accounts made from sales slips. A book of accounts showing the date of purchase, nature of article sold, and amount, made up from sales slips, constitutes a book of original

I BOOKS OF ORIGINAL ENTRY—concluded

entries, all other statutory elements of such books being made to appear.

Younker Bros. v Meredith, 217-1130; 253 NW 58

Counter slips and sales tickets. In seller's action for lumber sold, counter slips and sales tickets held inadmissible as "books or records of original entries" where slips were offered in whole, covered many transactions not involved in action, were not consecutively dated, and showed changes.

Alquist v Thompson, (NOR); 251 NW 509

II PRELIMINARY PROOF

Documentary evidence—insufficient authentication. A purported financial statement of a corporation is manifestly inadmissible, in the absence of testimony as to its authenticity or as to the author thereof and the circumstances of its preparation.

Helberg v Zuck, 201-860; 208 NW 209

Transaction with deceased — authentication of books of account. The claimant against an estate for services rendered to the deceased is a competent witness to testify to the preliminary facts required by the statute for the authentication of his books of account against the deceased.

In re Davis, 217-509; 248 NW 497

Witnesses qualifying books of account. Statute prohibiting testimony concerning transactions or communications with a person now deceased does not render a claimant against the estate incompetent as witness to testify to preliminary facts required for authentication of books of account, admissibility of which is permitted by statute.

In re Cummins, 226-1207; 286 NW 409

Ledgers — correctness — who may testify. Testimony of vice-president of bank as to correctness of ledger held inadmissible where it appeared that ledger was posted by assistant cashier and bookkeeper.

Andrew v Bank, (NOR); 213 NW 271

Claim for loan based on alleged book of accounts. Where claimant's evidence of loan of $1,000 based on book of accounts is held inadmissible, testimony of payment of interest and admission of existence of loan by decedent standing alone, held insufficient to prove all facts necessary to establish claim against estate of decedent, as required by statute.

In re Cummins, 226-1207; 286 NW 409

III ADMISSIBILITY

Genuineness of corporate records. In an action against the secretary of a corporation individually, the record proceedings of the corporation are admissible against him, when material, upon an admission by such secretary that he believed them to be such records, even tho he states such belief as a conclusion, or bases his belief on hearsay, and even tho he states that he does not know that they were correctly kept.

Helberg v Zuck, 201-860; 208 NW 209

Deposits—stated account. Principle reaffirmed that the monthly and customary statement of a bank to its customer of the condition of the customer's account becomes an account stated after the lapse of a reasonable time without objection by the customer.

Pierce v Bank, 213-1388; 239 NW 580

Slips containing account—admissibility as original entries. Where account books were not kept, slips containing original entries of the account were admissible.

Edwards v Cooper, (NOR); 222 NW 376

Corporate books and records. In a prosecution, under the securities act, of an officer of a corporation for having made, before the secretary of state, a false statement relative to the financial condition of the corporation, the corporate books and a tabulated statement and summary thereof, properly identified, are admissible.

State v Dobry, 217-858; 250 NW 702

Bank ledger. It is not erroneous to receive in evidence the ledger of a bank for the purpose of showing the credits of a depositor, the correctness of such book being first established; and it is immaterial that the account reveals credit items not in controversy.

Ryan v Cooper, 201-220; 205 NW 302

Summary of books and records. Principle reaffirmed that a duly identified and verified summary of voluminous books and records may be admissible in connection with said books and records.

State v Dobry, 217-858; 250 NW 702

Books of account to prove loan of money. In an action to establish a probate claim based on alleged loan to decedent, alleged to be shown in his "book of accounts", which consisted merely of vest-pocket size memorandum book in which appeared an entry indicating a loan to decedent with interest payments, such "book of accounts" is not admissible where evidence was wholly insufficient to establish the claimant as engaged in general banking business or paying out or loaning money to others.

In re Cummins, 226-1207; 286 NW 409

Fair valuation of accounts. The fair valuation of accounts is that amount which, with reasonable diligence, can be realized from their collection within a reasonable time, and the amount as shown on the face of ordinary retail business accounts is not usually their fair

value, tho of course accounts may be such that their face value, as a matter of fact, is their fair value.

Matthews v Engineering Co., 228- ; 292 NW 64

Mere memoranda. Mere memoranda book entries, when material, are admissible on proper foundation. So held as to entries tending to show when a note was received by a bank.

Farmers Bk. v De Wolf, 212-312; 233 NW 524

Admissibility in aid of memory. Memoranda of account, the correctness of which is verified by the oath of the witness, may be admissible, in connection with his testimony, as an aid to him in remembering the transactions noted therein.

Madison Bank v Phillips, 216-1399; 250 NW 598

False tax returns—corporation books admissible evidence. In a prosecution of corporate officers for conspiracy to defraud government by filing false income tax return of corporation, the books of the corporation, together with summaries obtained by expert accountants, are admissible as tending to show what the taxable income of the corporation was represented to be, where such books were present and available for cross-examination.

Cooper v United States, 9 F 2d, 216

Meeting statutory proof requirements. Before proper books of account may be received in evidence, the party offering the same must introduce proof to meet all requirements of statute.

In re Cummins, 226-1207; 286 NW 409

11283 Photographic copies.

Photographs and X-rays generally. See under §11254 (II)

X-ray sciagraphs — sufficient foundation. Proof that certain X-ray sciagraphs were taken, for the use of the attending physician, by an expert in that science, and other circumstantial evidence tending to show the correctness of such sciagraphs, furnish sufficient bases for their introduction as evidence, even tho no witness specifically asserts that they "correctly portray the condition of the body affected".

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 747

X-ray pictures. Foundation for the admissibility of X-ray pictures may be established by the testimony of the technicians who took or interpreted the pictures.

Bauer v Reavell, 219-1212; 260 NW 39; 1 NCCA(NS) 761

Photographs — essentials for admission. Within the sound discretion of the court, a photograph is admissible in evidence when taken under conditions similar to those material to the inquiry to which it relates, and an instruction may call the jury's attention to the difference in lighting conditions at time an injury occurred, and at the time the picture was taken.

Riggs v Pan-American Co., 225-1051; 283 NW 250

11284 Notarial certificate of protest.

Allowable and unallowable proof. Testimony tending to show the contents of a lost official notarial certificate of protest of a promissory note is inadmissible, but the facts constituting a legal protest of the note may, in such case, be established by any competent oral testimony.

Frank v Johnson, 212-807; 237 NW 488; 75 ALR 128

11285 Statute of frauds.

Discussion. See 21 ILR 653—Oral contract to make will

ANALYSIS

I STATUTE IN GENERAL
II CONTRACT IN GENERAL AND SUFFICIENCY THEREOF
III CONTRACTS IN CONSIDERATION OF MARRIAGE
IV DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER
(a) CONTRACTS WITHIN STATUTE
(b) CONTRACTS NOT WITHIN STATUTE
V CREATION OR TRANSFER OF INTEREST IN LAND
VI CONTRACTS NOT PERFORMABLE WITHIN YEAR

Antenuptial contracts generally. See under §11990 (IV)
Express, resulting, and constructive trusts. See under §10049
Sales of personal property. See under §9933

I STATUTE IN GENERAL

Discussion. See 4 ILB 185—Foreign contracts; 21 ILR 630—Applicability to foreign contract

Scope of statute. The statute of frauds is applicable to cases in which a contractual obligation is the basis of recovery; not to cases wherein the basis of recovery is a breach of duty in a fiduciary relationship.

Farmers Bk. v Kaufmann, 201-651; 207 NW 764

Separate writings. A contract is taken out of the statute of frauds by two separate writings each containing internal reference to the other, and together constituting a complete contract.

Boyd v Miller, 210-829; 230 NW 851

Oral contract to will property. Where the plaintiff had done work for a woman who was ill, and had been promised that she would give him certain property in her will in return for the services, and plaintiff seeks specific performance of the agreement, claiming as consideration his oral agreement not to file a claim

I STATUTE IN GENERAL—concluded

against the estate for the services until after such claim had been barred by the statute of limitations, such oral agreement was only the manner adopted for extinguishing the claim for the past services and the consideration for the oral agreement was the cancellation of the claim for the services and the discharge and compromise of the obligation which had accrued.

Fairall v Arnold, 226-977; 285 NW 664

Accommodation paper. Evidence that promissory notes were accommodation paper and that the party accommodated was the real debtor, is not a violation of the statute of frauds.

Flack v Bank, 211-15; 228 NW 670

Fatally belated objection. The objection that evidence was inadmissible under the statute of frauds may not be presented for the first time on appeal.

Heflen v Brown, 208-325; 223 NW 763

Parol evidence—fraud in procuring deed. Where deed containing recital of consideration was obtained by fraud, the grantor is not precluded as a matter of law from showing a constructive trust arising from the fraud, and equity will allow such showing to be made by parol evidence, but such evidence must be clear and satisfactory.

Rance v Gaddis, 226-531; 284 NW 468

II CONTRACT IN GENERAL AND SUFFICIENCY THEREOF

Discussion. See 1 ILB 185—Mutuality—statute of frauds.

Express contract. To constitute an "express contract" there must have been an offer and acceptance as to the same thing. Usually an agreement is arrived at by means of an expressed or implied proposal or offer from one side, expressly or impliedly accepted on the other, but formality in proposing and accepting is not required, providing there is an intention to assume legal liability as distinguished from a mere ebullition of emotion or expression of intention to do an act of generosity. A promissory expression without intention to contract is not sufficient.

In re McKeon, 227-1050; 289 NW 915

Sale of goods—unenforceable contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

Contract to devise. Principle reaffirmed that a parol contract on due consideration to devise or leave property to another, is shown by clear and convincing testimony, is enforceable, especially when the contract is corroborated by declarations of the alleged grantor against his own interest, and when the equities are strongly in favor of the alleged grantee.

Kisor v Litzenberg, 203-1183; 212 NW 343

Adoption by estoppel—surrender of child as consideration. An oral contract to adopt a child, not followed by legal adoption, was not within the statute of frauds when part of the consideration, the surrender of the child, was given at the time the agreement was made. So the child was entitled to specific performance of the contract even tho it was contended that the contract was void under the statute of frauds of a foreign state.

Vermillion v Sikora, 227-786; 289 NW 27

III CONTRACTS IN CONSIDERATION OF MARRIAGE

Discussion. See 12 ILR 164—Evidence of oral antenuptial contract

Marriage settlements. A written instrument purporting to be an antenuptial contract waiving all interest which each of the contracting parties would have after marriage in the property of the other, but shown to have been actually signed after marriage, will not bar such property interest when the instrument neither recites (1) that it was executed for the purpose of furnishing evidence of a previous antenuptial oral contract nor (2) that it was executed in consideration of a previous oral antenuptial contract.

Battin v Bank, 202-976; 208 NW 343

Marriage settlements—antenuptial contract—proof. Record held to establish, by copy, an antenuptial contract, the original being lost.

Fraizer v Fraizer, 201-1311; 207 NW 772

Antenuptial agreement—sufficiency of evidence. Evidence held sufficient to show execution of antenuptial agreement precluding widow from dower share.

In re Dunn, (NOR); 224 NW 38

Agreements in consideration of marriage—strangers to contract. A contract made in consideration of marriage is provable against parties who are strangers to such contract.

Benson v Burgess, 214-1220; 243 NW 188

IV DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER

(a) CONTRACTS WITHIN STATUTE

Oral promise to pay orally compromised debt. An oral agreement to pay the debt of another is not taken out of the statute of frauds because the debt arose out of an oral agreement of compromise.

Leytham v McHenry, 209-692; 228 NW 639

Extension of time—insufficient consideration. An oral promise to pay the debt of another person if the creditor will give such other person—the original debtor—an extension of time in which to pay, is within the statute of frauds.

Leytham v McHenry, 209-692; 228 NW 639

Widow's groceries—nonliability of administrator. Administrator who has paid testator's widow more than amount to which she was entitled prior to alleged promise to pay for groceries furnished to widow held not authorized to make payment out of estate for such groceries.

Yoss v Sampson, (NOR); 269 NW 22

(b) CONTRACTS NOT WITHIN STATUTE

Oral contract of indemnity. An oral contract to indemnify and hold harmless a party if he would sign as surety a promissory note of the promisor's son, is an original undertaking and consequently not within the statute of frauds.

Kladivo v Melberg, 210-306; 227 NW 833.

Promise arising out of new consideration or benefit. The oral promise of a bank, upon receipt from a tenant of checks for grain sold, to pay the amount then due the landlord as rent is not within the statute of frauds as a promise to pay the debt of another.

Tracewell v Sanborn, 210-1324; 232 NW 724

Promise to pay debt of another—consideration. Tho the vendee of a stock of goods did not, in making the purchase, assume the payment of an outstanding account for goods, yet his later written promise to pay said bill if the creditor would extend the time of payment and furnish additional stock for the store —which was done—is supported by ample consideration.

Smith Co. v Carmichael, 221-301; 264 NW 65

Promise to answer for debt of another—promise prior to any indebtedness. A defendant who is simply an old acquaintance of a deceased, and who, before any funeral expenses are contracted, orally promises to pay such expenses may not say that he contracted to pay the debt of "another".

Samuels Bros. v Falwell, 215-650; 246 NW 657

Promise to answer for debt of another—direct and original agreement. An oral contract for services to be performed on the lands of third parties, and an oral and unconditional promise to pay for said services, are not within the statute of frauds as a promise to pay the debt of said third parties.

In re Davis, 217-509; 248 NW 497

Original promise. An agreement by a vendor of real property with his purchaser to pay for the making of certain improvements on the property is an original promise, and not within the statute of frauds.

Madden v Roofing Co., 205-783; 218 NW 466

Promise to reimburse party. The promise of the accommodation maker of a promissory note to reimburse the indorser, for assisting in paying the note, out of the amount collected from the principal maker, bears no semblance to a promise to pay the debt of another.

Hirtz v Koppes, 212-536; 234 NW 854

Agreement for contribution. An oral agreement between the directors of a bank to the effect that, as between themselves, each would be liable on a promissory note (given for the benefit of the bank) in proportion to the stock holdings of each, is not within the statute of frauds as an oral promise to pay the debt of another.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Promise to answer for debt of another—oral guaranty by bank of payment of director's mortgage. Testimony that a bank, acting through its board of directors, orally guaranteed the payment of the personal mortgage of one of said directors, is incompetent under the statute of frauds.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Debt of another—basis for objection—unnecessary pleading. A defendant, who has duly denied the alleged making of a contract to answer for the debt of another, needs no further pleading on which to base, during the trial, an objection that oral testimony is incompetent to establish such contract.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Debt of another—unallowable implied contract. The law, after refusing, under the statute of frauds, to permit a contract to answer for the debt of another to be established by incompetent parol testimony, will not imply a contract on the part of the alleged obligor to answer for the debt of said other person, or hold said obligor estopped to deny such obligation.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Original or collateral promise. The statute of frauds relative to answering for the debt of another does not enter into the proof of an oral contract to the effect that plaintiff should perform stated services and that the defendant would unconditionally pay therefor.

Richmann v Beach, 201-1167; 206 NW 806

Notice of release after promising to pay for goods furnished to third person. A landlord who promised his tenant, in the presence of a

IV DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER—concluded
(b) CONTRACTS NOT WITHIN STATUTE—concluded

gasoline dealer, to pay for tractor fuel furnished by the dealer to the tenant, and who later was released from his promise, was not obligated to pay the dealer for fuel sold to the tenant after the dealer received notice of the release.

Reichart v Downs, 226-870; 285 NW 256

Promise to pay for goods furnished—promisor's own debt. When a landlord orally agreed to pay for tractor fuel furnished to his tenant, the agreement was not within the statute of frauds, as the landlord made the payment his own obligation rather than promising to answer for the debt of the tenant.

Reichart v Downs, 226-870; 285 NW 256

Sale of book account—payment orally guaranteed. Where the holder of a book account sold it for a consideration along with an oil station, and orally guaranteed payment, such undertaking was primarily for the benefit of the seller, and was not within the statute of frauds as an oral promise to answer for the debt of another.

Miller v Pound, 226-628; 284 NW 449

V CREATION OR TRANSFER OF INTEREST IN LAND

Permissible proof of the contract. Evidence which will be admissible to prove an oral contract to transfer real property must be either in writing or by tangible acts or circumstances definitely referable to the oral agreement, but when such tangible acts are shown, then parol evidence becomes competent to show the specific terms of the contract.

Fairall v Arnold, 226-977; 285 NW 664

Oral agreement to change boundary. A naked oral agreement to change an established boundary line is nonenforceable.

Stone v Richardson, 206-419; 218 NW 332

Oral agreement as to security. An oral agreement by one of several heirs of homestead property that the funeral expenses of the deceased should stand against the property is of no validity.

Warner v Tullis, 206-680; 218 NW 575

Evidence—insufficiency. A contract for the sale and purchase of real estate will necessarily not be so reformed as to render it a contract for sale at a stated sum per acre, when the testimony preponderates in favor of a contract for a lump-sum price.

Davis v Norton, 202-374; 210 NW 438

Parol to prove execution of unenforceable trust. It is true that one claiming to be the absolute owner of land may not, as against the grantee in a conveyance, prove, by parol evidence, that when the conveyance was executed grantee's name was inserted in the conveyance as grantee under an oral agreement that said substituted grantee would hold said land solely and exclusively for said secret grantee, but said parties may show by parol evidence, as against a stranger, that said oral agreement was actually carried out and executed by said parties.

Bates v Zehnpfennig, 220-164; 262 NW 141

Validity of contract—court approval as condition. A definite written offer by the superintendent of banking of this state to sell, to a foreign administrator, Iowa real estate belonging to a bank receivership, and the written acceptance of the offer by said foreign administrator, may constitute a valid and specifically enforceable contract tho the offer and the acceptance be both conditioned on the approval of the respective state courts.

Bates v Citizens Bank, 223-385; 272 NW 412

Land—oral agreement to surrender. An oral agreement by a mortgagor of real estate to surrender and abandon the land to the mortgagee is within the statute of frauds.

Parker v Coe, 200-862; 205 NW 505

Fully performed oral contract. A count which pleads a fully performed oral contract for an interest in real estate is not subject to a plea of the statute of frauds.

Halstead v Rohret, 212-837; 235 NW 293

Secondary evidence—admissibility. Where title to real estate is not in issue, secondary evidence of title is admissible when proper foundation for its introduction has been laid; otherwise if title is in issue.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Stranger to transaction. The objection that a transaction is within the statute of frauds or that testimony is violative of the parol evidence rule is not available to a party who is a total stranger to the transaction, and to the title involved therein.

Lennert v Cross, 215-551; 241 NW 787; 244 NW 693

Parol evidence—fraud in procuring deed. Where deed containing recital of consideration was obtained by fraud, the grantor is not precluded as a matter of law from showing a constructive trust arising from the fraud, and equity will allow such showing to be made by parol evidence, but such evidence must be clear and satisfactory.

Rance v Gaddis, 226-531; 284 NW 468

When parol evidence competent. Principle reaffirmed that parol evidence is competent to impress an express trust upon an absolute

deed, provided the trust has been partially executed.

Hardy v Daum, 219-982; 259 NW 561

Constructive trust—evidence—sufficiency. An express trust in real property cannot be legally established by parol, nor may an implied or constructive trust in such property be established except by evidence which is clear, convincing, and satisfactory.

McMains v Tullis, 213-1360; 241 NW 472

Parol testimony—deed as mortgage. Parol testimony is admissible to show that deed was in fact a mortgage and was so intended.

Rance v Gaddis, 226-531; 284 NW 468

Naming child as consideration. A promise by grandfather to will property to grandson, if the parents name the grandson after the grandfather, is void for lack of legal consideration when such promise was made over three months after grandson had already been named after the grandfather.

Lanfier v Lanfier, 227-258; 288 NW 104

VI CONTRACTS NOT PERFORMABLE WITHIN YEAR

Employment contract—bonus at end of year. Oral contract of employment at fixed hourly rate and providing for bonus at end of year held not within statute of frauds.

Meredith v Youngstrom Co., (NOR); 205 NW 749

11286 Exception.

ANALYSIS

I EXCEPTIONS IN GENERAL
II POSSESSION, PART PERFORMANCE, AND PAYMENT

I EXCEPTIONS IN GENERAL

Oral gift of real property. An oral executed gift of real estate, established to a reasonable certainty, is valid.

Mann v Nies, 213-121; 238 NW 601

Oral contract—evidentiary demands. Principle reaffirmed that oral evidence of the gift of real estate must be clear, cogent, and convincing.

Black v Nichols, 213-976; 240 NW 261
Long v Kline, 222-81; 268 NW 150

Oral contract to devise. Evidence to establish an alleged oral contract between a father and son, that the father would leave to the son a farm when he died, must be established by clear, satisfactory, and convincing evidence and it is the duty of the court to subject the evidence to every fair test which may tend to weaken its credibility.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract to will property. Where the plaintiff had done work for a woman who was ill, and had been promised that she would give him certain property in her will in return for the services, and plaintiff seeks specific performance of the agreement, claiming as consideration his oral agreement not to file a claim against the estate for the services until after such claim had been barred by the statute of limitations, such oral agreement was only the manner adopted for extinguishing the claim for the past services and the consideration for the oral agreement was the cancellation of the claim for the services and the discharge and compromise of the obligation which had accrued.

Fairall v Arnold, 226-977; 285 NW 664

Oral contract to convey land at death. Absence of strong equities in favor of the plaintiff, a son trying to establish an oral contract with his father, since deceased, does not tend to weaken his corroborating testimony.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract. Evidence sufficient to establish an oral contract for the conveyance of real estate may be found in the unequivocal and definite testimony of the claimed grantee, which testimony was uncontradicted, though the opportunity to contradict was present and immediately available, plus the strong corroboration afforded by the actual execution by the grantor of a deed which was not effectually delivered.

Kissling v Bank, 203-62; 212 NW 314
See Hagerty v Hagerty, 186-1329; 172 NW 259

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

II POSSESSION, PART PERFORMANCE, AND PAYMENT

Discussion. See 15 ILR 351—Part performance; 19 ILR 54—"Purchase money" doctrine

Interest in realty—dual way to orally establish. An interest in real estate may be established:

1. By parol evidence of claimant and others when the purchase price or a part thereof has been paid, and
2. By parol evidence of the adverse parties. Decree held supported by both classes of evidence.

Hardy v Daum, 219-982; 259 NW 561

II POSSESSION, PART PERFORMANCE, AND PAYMENT—continued

Trusts—when parol evidence competent. Principle reaffirmed that parol evidence is competent to impress an express trust upon an absolute deed, provided the trust has been partially executed.

Hardy v Daum, 219-982; 259 NW 561

Oral contract—part payment. Principle reaffirmed that part payment of the purchase price on an oral contract for an interest in land takes the contract out of the statute of frauds.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Oral sale with part payment. An oral agreement to sell land, accompanied at the time by part payment, constitutes a "sale", within the terms of a lease which provides that, in case of a sale of the premises, the tenancy may be terminated.

Luse v Elliott, 204-378; 213 NW 410

Essentials of consideration. An oral contract for the conveyance of land is not taken out of the statute of frauds (1) by establishing a past and executed consideration for the contract, or (2) by establishing the subsequent performance of an essentially nominal consideration.

In re Runnells, 203-144; 212 NW 327

Agreement by purchasers to reconvey. An oral contract between the joint purchasers of land that they would surrender their rights under the contract of purchase and reconvey to the vendor upon the repayment by the vendor of the earnest money plus a certain bonus, which oral contract was fulfilled by some of said joint purchasers, is not within the statute of frauds.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Mortgage contract. An oral agreement that a mortgagor of real estate will pay the mortgagee a stated sum, and, in addition, will convey to the mortgagee the mortgaged premises in full satisfaction of the mortgage debt, is not within the statute of frauds.

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

See Fairall v Arnold, 226-977; 285 NW 664

Contract for estate in return for services. An oral executed contract to the effect that, in return for personal services, the party shall, on the death of the other party to the contract, have the entire personal and real estate of such other party, is specifically enforceable, provided that the evidence is clear and convincing.

Jordan v Doty, 200-1047; 205 NW 964

Oral contract to devise—convincing evidence necessary. An alleged oral contract between a childless couple and a neighbor, that such couple would leave all their property to the neighbor's minor son when he became of age, if he would live with them until that time, must be established by clear, satisfactory, and convincing evidence, and when so established, along with proof of compliance by the son, entitles the son to specific performance of the contract.

Ford v Young, 225-956; 282 NW 324

Oral contract to devise or convey lands. An oral offer to convey or devise land in consideration of services to be performed for the offerer, and an oral acceptance thereof by the offeree, is specifically enforceable when both the execution of the contract and the performance thereof are established by clear, convincing, and satisfactory evidence, and when the acts of performance are referable exclusively to such contract.

Houlette v Johnson, 205-687; 216 NW 679

Parol transfer of land. Clear and unequivocal testimony is an indispensable requisite, not only to the establishment, but to the performance of an oral contract between a party deceased and another for the transfer of land in return for services.

Helmers v Brand, 203-587; 213 NW 384
Elder v Brown, 203-1124; 212 NW 147
Black v Nichols, 213-976; 240 NW 261

Oral gift—possession followed by improvements. Evidence that the donee in an alleged oral gift of land took possession of the land, but that said possession was not necessarily referable solely to said alleged gift, together with evidence of the making of temporary and inconsequential improvements on the land, is wholly insufficient to take the transaction out of the statute of frauds.

Nugent v Dittel, 213-671; 239 NW 559

Parol contract—nature of proof. A parol contract for the purchase of real estate may not be deemed established unless the sustaining testimony is clear, definite, unequivocal, satisfactory, and convincing, nor unless the acts which are claimed to have been done under such contract are clearly referable to such contract.

Lane v Bank, 209-437; 227 NW 911

Permissible proof of the contract. Evidence which will be admissible to prove an oral contract to transfer real property must be either in writing or by tangible acts or circumstances definitely referable to the oral agreement, but when such tangible acts are shown, then parol evidence becomes competent to show the specific terms of the contract.

Fairall v Arnold, 226-977; 285 NW 664

Easement contracts fully performed. A right of way easement in real estate is as effectually acquired by the vendee taking possession

under an oral contract as tho a formal written deed to the easement has been delivered to the vendee.

Furgason v County, 212-814; 237 NW 214

Oral agreement—boundary change. An oral agreement to change a long established boundary fence is enforceable when taken out of the statute of frauds (1) by the mutual taking of a new survey, (2) by the building of a new fence in accordance with the said survey, and (3) by taking possession of the lands inclosed by such new fence.

Cheshire v McCoy, 205-474; 218 NW 329

Part performance—delivery of deed. An oral contract for the sale of land is not within the statute of frauds when the owner of the land executes and delivers to the buyer a deed of conveyance even tho said deed is blank as to grantee.

Gilbert v Plowman, 218-1345; 256 NW 746

Delivery of deed as part performance. An oral contract between the owner of land and all the heirs, from whom he had obtained it by different deeds, to reconvey the land and thereby cancel the purchase-money mortgage, is taken out of the statute of frauds by the act of the owner in executing and delivering to the attorney for the heirs the deeds agreed on, and the acceptance by one of the heirs of the deed to him.

Anderson v Lundt, 200-1265; 206 NW 657

Avoidance of statute. Parol evidence is competent to show that the titleholder to land has admitted he was to hold such title only until such time as he was reimbursed for money expended on the property, and that such arrangement has been in part carried out.

Neilly v Hennessey, 208-1338; 220 NW 47

Negative act as part performance. To make an oral contract to convey lands enforceable by part performance to take it out of the statute of frauds, where the performance consists of a negative act such as not filing a claim against an estate, there must be written evidence of the agreement or proof of some tangible act or circumstance other than the absence of such claim from the probate record, which will definitely tend to establish that the absence of such claim was because of the oral agreement.

Fairall v Arnold, 226-977; 285 NW 664

Part performance must be referable to oral contract and subsequent to it. In order for part performance of a contract to convey lands to take a case out of the statute of frauds, such performance must be subsequent to the alleged agreement, and when services were rendered prior to the agreement, they could not be referable to it, not having been done in the performance of, pursuant to, on the faith of, nor in reliance upon, such agreement.

Fairall v Arnold, 226-977; 285 NW 664

Part performance must refer exclusively to the contract. For part performance to take a case out of the statute of frauds, the oral contract to convey lands must be established by clear, unequivocal, and definite proof, and the acts constituting performance must be equally clear and definite, and referable exclusively to the contract.

Fairall v Arnold, 226-977; 285 NW 664

Part performance—basis of doctrine. The doctrine of part performance as an exception to the provision of the statute of frauds requiring written evidence of contracts involving the creation or transfer of an interest in lands, is based on equitable estoppel and fraud, to prevent the defendant from escaping performance of his part of an oral agreement after permitting the plaintiff to perform in reliance upon the contract.

Fairall v Arnold, 226-977; 285 NW 664

Adoption by estoppel—surrender of child as consideration. An oral contract to adopt a child, not followed by legal adoption, was not within the statute of frauds when part of the consideration, the surrender of the child, was given at the time the agreement was made. So the child was entitled to specific performance of the contract even tho it was contended that the contract was void under the statute of frauds of a foreign state.

Vermillion v Sikora, 227-786; 289 NW 27

11287 Contract not denied in the pleadings.

Rule of evidence rather than invalidating statute. The Iowa statute of frauds relating to sales of goods is held to be a rule of evidence and not an invalidating statute, in view of subsequent provision of statute that regulations related merely to proof of contracts and should not prevent enforcement of those not denied in pleadings, and that oral evidence of maker against whom unwritten contract was sought to be enforced should be competent to establish contract. Under Iowa rule, both delivery and passing of title in sale of personal property are determined by intent of parties at time of transaction.

Tipton v Miller, 79 F 2d, 298

11288 Party made witness.

Oral evidence of party. In an action against bank officers and directors on their written guaranty of payment of notes of doubtful value belonging to the bank, wherein the defendants contended that the guaranty did not identify the notes guaranteed, the testimony of a guarantor called by the plaintiff as to

what notes were intended to be guaranteed is not violative of the statute of frauds.

Boyd v Miller, 210-829; 230 NW 851

Interest in realty—dual way to orally establish. An interest in real estate may be established:

1. By parol evidence of claimant and others when the purchase price or a part thereof has been paid, and

2. By parol evidence of the adverse parties. Decree held supported by both classes of evidence.

Hardy v Daum, 219-982; 259 NW 561

11289 Instruments affecting real estate —adoption of minors.

Private writings as evidence. See under §11279

Lost real estate contract—degree of proof. Where a lost instrument relied upon affects the record title to real estate, public policy demands that the proof of its former existence, its loss and its contents, should be strong and conclusive—rule applied to real estate contract.

Forrest v Otis, 224-63; 276 NW 102

Fraudulent assignment—failure of proof. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Conveyance to deceased junior mortgagee. In an equity action for foreclosure against mortgagor and administrators of deceased junior mortgagee to whom mortgagor had allegedly executed the land, evidence held to establish that a deed had been executed by mortgagor in favor of deceased junior mortgagee.

Federal Bank v Ditto, 227-475; 288 NW 618

11290 Record or certified copy.

Necessary preliminary proof. The record of a duly recorded deed is not admissible as proof of title until preliminary proof is offered that the original deed (1) has been lost, or (2) does not belong to the party wishing to use the same, and is not within his control.

Buckley v Ebendorf, 204-896; 216 NW 20

Unsigned copy of fidelity bond. In action by a surety company against defendant, who was covered by a fidelity bond and who agreed to indemnify plaintiff against loss sustained by reason of its executing fidelity bond in his behalf, it was error to admit in evidence instrument purporting to be a certified copy of the bond, but containing no signatures and which was admittedly no true and genuine copy of original bond.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

Nonjudicial public record—certified copies—federal statute—effect. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record. (See page 37, C., '35 [page 39, C., '39]; also §11296.)

Bristow v Lange, 221-904; 266 NW 808

Ancient documents—conditions of admission. Church records of parish church in Sweden, signed by the rector and church custodian, were admissible as ancient documents when they were over 30 years old, when they were obtained from the proper custody, when they were certified as true exhibits from the consulate of Sweden, and where there were no suspicious appearances.

Bergman v Carson, 226-449; 284 NW 442

Admitting record of deed. In an equity action for foreclosure of realty mortgage against mortgagor and administrators of deceased junior mortgagee, to whom mortgagor had conveyed the land, where it is shown that deed to junior mortgagee was not within the control of senior mortgagee, and where attorneys for defendants stated that they would "admit what the records show", the admission in evidence of the record of such deed was not error.

Federal Bank v Ditto, 227-475; 288 NW 618

Conveyance to deceased junior mortgagee established. In an equity action for foreclosure against mortgagor and administrators of deceased junior mortgagee to whom mortgagor had allegedly executed the land, evidence held to establish that a deed had been executed by mortgagor in favor of deceased junior mortgagee.

Federal Bank v Ditto, 227-475; 288 NW 618

11293 Presumption rebuttable.

Forged signatures — expert testimony to overcome. While an acknowledgment by a notary is presumptively true and requires clear and convincing evidence to overcome it, yet by statute it is not conclusive, and the court acting as a jury may find, after reviewing the conflicting testimony of handwriting experts, properly received, that signatures to transfers and assignments of assets of an estate, attacked by an administrator de bonis non, were forgeries.

Brien v Davidson, 225-595; 281 NW 150

Secondary evidence—admissibility as affecting title to real estate. Where title to real estate is not in issue, secondary evidence of title is admissible when proper foundation for its introduction has been laid; otherwise, if title is in issue.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

11294 United States and state patents.

Presumption. A government patent is not conclusive that the government owned the land at the date of the patent.

Bigelow v Herrink, 200-830; 205 NW 531

Collateral attack. The issuance by the state of a patent to lands is an assertion of the existence of the property conveyed; and such patent is immune from attack in a collateral proceeding.

Meeker v Kautz, 213-370; 239 NW 27

11295 Field notes and plats.

Plat of premises. A privately made plat of premises may be admissible even tho it contains objectionable matter, the jury being orally directed to disregard the latter.

Lee v Ins. Assn., 214-932; 241 NW 403

Official survey on court order. In an action for reformation of description by metes and bounds in realty mortgages and for their foreclosure, evidence held sufficient to support judgment confirming surveyor's report, where surveyor is permitted to testify, without objection, that he was qualified to make the survey and that the plat of survey prepared by him is a true and correct survey showing the property in question and made in accordance with a previous order of court and such plat, after identification, was introduced in evidence without objection.

State Bank v Mapel, 226-1328; 286 NW 517

Official surveys—objections. In an action for reformation of description in realty mortgage and for foreclosure, wherein a surveyor or civil engineer is appointed by the court to make a survey of property covered by mortgages, and no objections are made to his appointment nor exceptions taken thereto, objection to the surveyor's report on appeal cannot be predicated on alleged failure to strictly follow the statutory provisions applicable to the reference of an equity case to a referee when the parties have agreed to procedure.

State Bank v Mapel, 226-1328; 286 NW 517

11296 Records and entries in public offices.

Incorporation—certified copy of articles. A copy of the articles of incorporation of a banking corporation, duly certified by the secretary of state, is sufficient proof of such incorporation.

State v Niehaus, 209-533; 228 NW 308

Certificate of county recorder. The certificate of the county recorder showing the recordation or filing of a chattel mortgage is competent and admissible evidence.

Wertheimer v Parsons, 209-1241; 229 NW 829

Ownership not paramount title at issue. In an action between a creditor and a grantee to set aside a deed, ownership by the grantor being the question in issue rather than recovery by virtue of a superior title, an uncontradicted public record showing ownership in grantor at time the deeds were made is conclusive on that issue.

Bagley v Bates, 224-637; 276 NW 797

Assessment rolls as showing nonexistence of note. Since a party assessed need not list all liabilities, assessment rolls, which fail to show a liability promissory note of decedent, are not thereby admissible as evidence to prove the note never existed nor constituted a real indebtedness.

In re Cheney, 223-1076; 274 NW 5

Nonjudicial public record—certified copies—federal statute—effect. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record. (See page 37, C., '35 [page 39, C., '39]; also §11290.)

Bristow v Lange, 221-904; 266 NW 808

Certificate of death—admissibility. In an action to recover on a policy of insurance, a certificate of death of the insured, tho duly and legally executed by a coroner, is inadmissible as evidence insofar as said certificate assumes to state the cause of death as "suicide by hanging", said stated cause of death being simply the opinion or conclusion of the coroner and not a statement of fact.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

See Wilkinson v Assn., 203-960; 211 NW 238

Ballots—preservation. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

11302 Duplicate receipt of receiver of land office.

Collateral attack. The issuance by the state of a patent to lands is an assertion of the existence of the property conveyed; and such patent is immune from attack in a collateral proceeding.

Meeker v Kautz, 213-370; 239 NW 27

11305 Judicial record—state or federal courts.

Judgment of former conviction. The record of a former conviction of an accused is admissible under an indictment which properly charges such conviction.

State v Lambertti, 204-670; 215 NW 752

Evidence available against vouchee. In an action for breach of warranty because of an existing mortgage on the property, the foreclosure proceedings and judgment entry therein are admissible against the covenantor-defendant to prove the plaintiff's measure of damages, it appearing that the covenantor had been duly vouched into said foreclosure proceedings.

Kellar v Lindley, 203-57; 212 NW 360

Admissibility against stranger. A final decree and the pleadings relating thereto may, in some cases, be admissible in a subsequent action to prove an ultimate fact even tho the party against whom the decree is offered was not a party to the decree. So held where the decree was received to prove the judicial cancellation of a contract of sale upon which cancellation depended the validity of a promissory note sued on.

Pierce v Lichtenstein, 214-315; 242 NW 59

Bankruptcy proceeding — certified records admissible. Records certified to by the clerk of the United States district court as to the existence of a bankruptcy proceeding are competent evidence of said bankruptcy admissible in the state courts.

Bagley v Bates, 224-637; 276 NW 797

Former plea of guilty—not conclusive in a civil action. In a civil action, the plea of guilty to a criminal prosecution involving the same transaction is admissible as an admission but is not conclusive when the criminal defendant, as a witness in the civil action, gives testimony tending to contradict his plea of guilty.

Boyle v Bornholtz, 224-90; 275 NW 479

Pleadings as evidence—counterclaim as admission. Where corporation, within its agency for an insurance association, insured its own automobile, and when sued along with the driver thereof on account of a collision involving the automobile, and when the corporation counterclaims therein, alleging that it and driver were free from negligence, which counterclaim was subsequently dismissed, then in a later action against corporation to recover on the policy, the corporation was bound by such allegation as an admission of its consent to use the vehicle, and the pleading was admissible in evidence therefor.

Mitchell v Underwriters, 225-906; 281 NW 832

11306 Of another state.

Foreign judicial proceedings. The judicial proceedings of the courts of a foreign state may not, of course, be given any effect except on due proof thereof.

Railway v Lundquist, 206-499; 221 NW 228

Improper certification first raised on appeal. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Documentary evidence — certified copies — federal statute. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record.

Bristow v Lange, 221-904; 266 NW 808

11309 Presumption of regularity.

Similar annotations. See under §§10502, 11548, 14010

Official action. The actions of public officials are presumed to be regular unless there be clear evidence to the contrary.

Priest v Whitney Co., 219-1281; 261 NW 374
Krueger v Mun. Court, 223-1363; 275 NW 122

Presumptions ousted by evidence. Presumptions disappear when evidence of the actual facts is introduced.

Wilson v Findley, 223-1281; 275 NW 47

Change of place of commitment. It will be presumed, in the absence of any counter showing, that the court had a legal reason for changing the place of commitment from the county jail of the county of trial to the jail of a foreign county.

State v Herzoff, 200-889; 205 NW 500

Result of election verified by canvassers. It will be presumed, in the absence of a showing to the contrary, that the state board of canvassers has duly performed its duty to certify the result of a primary election to the various chairmen of political parties.

Zellmer v Smith; 206-725; 221 NW 220

Location of public utility lines. In the absence of any evidence or showing to the contrary, it will not be presumed that a public service corporation is seeking the location of its lines along a highway without having procured a franchise, or that the highway engineer is proceeding to mark such location without a written application therefor. (§4838, C., '31.)

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121

Appointment of administrator — collateral attack. The record of the appointment in a county of an administrator and his due quali-

fication is a finality and beyond collateral attack, even tho the record fails affirmatively to show the existence of the facts upon which the jurisdiction of the court depends; otherwise if the record affirmatively reveals want of jurisdiction.

Ferguson v Connell, 210-419; 230 NW 859

Regularity of inferior bodies. Jurisdiction, in an inferior governmental body over a subject matter, lies at the very threshold of a proceeding, and no presumption of regularity in such proceeding can be indulged until the fact of jurisdiction is first made to appear from a record finding of jurisdiction by the body in question, or by other equivalent showing.

McKinley v Lucas County, 215-46; 244 NW 663

Tax sale—scavenger sale. When a county treasurer sells lands to the highest bidder at "scavenger" tax sale it will be presumed, in the absence of any showing to the contrary, that said lands were duly and unsuccessfully offered for sale at prior tax sales as required by statute.

Board v Stone, 212-660; 237 NW 478

Sale under execution. A sheriff in making a sale under execution will be presumed, nothing appearing to the contrary, to have complied with the statutes governing such sales.

Ebinger v Wahrer, 213-84; 238 NW 587

Improvement of county road within town. When a board of supervisors proceeds to improve a town street which is a continuation of a county road, it will be presumed, nothing being shown to the contrary, that the board and the town council first entered into a written agreement covering the work as provided by statute.

Norwalk v County, 210-1262; 232 NW 682

Officers — when jurisdiction must appear. The statutory presumption that the proceedings of inferior tribunals, e. g., the county board of supervisors, are presumed to be regular, does not extend to the acquisition of jurisdiction of the board—this must be shown.

Davelaar v Marion Co., 224-669; 277 NW 744

Erection of proper signs along road. On appeal, the appellate court will, in the absence of proof to the contrary, assume that the board of supervisors has performed its mandatory duty to erect and maintain proper signs on local county roads where they intersect with county trunk roads.

Arends v DeBruyn, 217-529; 252 NW 249

Indexing lis pendens. The presumption that the clerk of the district court duly indexed, as a lis pendens, a petition for the foreclosure of a real estate mortgage is so strong that convincing proof to the contrary is required to overcome it.

First Tr. JSL Bk. v Jansen, 217-439; 251 NW 711

Deficient record—presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

Attorney fee for extraordinary probate services. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Mailing and delivery of letter. For the purpose of proving that an original letter was presumptively received by the addressee through the mail, a proven copy of said letter is inadmissible simply on the showing that the writer of the letter personally signed it, and relied on the accuracy of his secretary to make a proper mailing of the letter in accordance with the routine of the office, there being no evidence as to such routine.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Incorrectly addressed letter. There is no presumption that mail matter addressed to a person at a town which is not his post-office address will be delivered to the addressee at another town which is his post-office address, tho the two towns are in the same county and in the same vicinity.

Lundy v Skinner, 220-831; 263 NW 520

11311 Proceedings of legislature.

Enrollment — when conclusive — when not conclusive. The text of the official enrollment of a legislative act will be treated by the courts as an absolute verity, but the courts will go behind such enrollment on the question whether the house or senate complied with the mandatory constitutional requirement that the bill be put on passage by a yea and nay vote and such vote be entered on the legislative journal.

Smith v Thompson, 219-888; 258 NW 190

11312 Printed copies of statutes.

Presumption—law of sister state. Presumptively the laws of a sister state relative to a named subject-matter are the same as those of this state.

Tansil v McCumber, 201-20; 206 NW 680

Exception to presumption. No presumption will be indulged that the statutory law of another state is the same as the statutory law of this state when the pleadings of the parties are inconsistent with such presumption.

Woodard v Ins. Co., 201-378; 207 NW 351

Presumption—laws of other states. Presumptively the law of Minnesota is the same as the law of this state.

Northern Finance v Meinhardt, 209-895; 226 NW 168

Foreign law governing foreclosure. Presumptively, the laws of a foreign state governing mortgage foreclosures are the same as the laws of this state.

Pfeffer v Corey, 211-203; 233 NW 126

Comity between states—procedure governing. A cause of action which is predicated on the statutes of a foreign state will, as a matter of comity, be enforced in the courts of this state, but only under and in accordance with the recognized and prescribed court procedure of this state.

Rastede v Railway, 203-430; 212 NW 751

Foreign corporations—dissolution—effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Foreign procedural statutes — nonright to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of the defendant in operating an automobile in said foreign state, plaintiff has no right to plead the procedural statutes and rules of law of said foreign state. For example, those pertaining:

1. To what matters would be presumptive evidence of negligence.
2. To the burden of proof in the trial of the action.
3. To the right of plaintiff to submit his action on different theories of the evidence.

Reason: All said matters are purely procedural.

Kingery v Donnell, 222-241; 268 NW 617

Foreign remedial statute—nonapplicability. The remedial statutes of a foreign state, authorizing an action in said state against a corporation which has been dissolved at the instance of said state, do not and cannot control the procedure when the action is sought to be maintained in this state; and especially is this true when said authorized foreign procedure is contrary to the procedural law of this state.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Foreign remedial statutes — right to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of defendant in operating an automobile in said foreign state, plaintiff may plead those statutes and rules of law of said foreign state from which actionable negligence, under the facts of the case, are deducible, e. g., those (1) which declare the degree of care required of defendant in such operation in said foreign state, and (2) the nature and degree of plaintiff's contributory negligence which will bar his action, said pleaded statutes and laws being of the very essence of plaintiff's cause of action, and not contrary to the public policy of this state, even tho they exact a greater degree of care than would be exacted by the law of this state had the injury occurred in this state.

Kingery v Donnell, 222-241; 268 NW 617

11315 Ordinances of city or town.

Ordinance book as evidence. A book purporting to be the ordinances of a municipality and duly certified as such by the city clerk is admissible, so far as material, without further showing.

Hollingsworth v Hall, 214-285; 242 NW 39

Sufficient "offer". A book purporting to have been issued by a city or town and to contain the ordinances thereof, as of a certain date, need not be formally offered as such. Counsel need only produce or bring the volume into court for the inspection of the court and thereupon formally offer such portions thereof as he may see fit.

Orr v Hart, 219-408; 258 NW 84

Burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

11316 Production of books and papers.

Profert, oyer, and exhibits. The common law procedure of "oyer and profert", by which a party obtained the inspection of documents, is unknown to our code procedure.

Dunlop v Dist. Court, 214-389; 239 NW 541

"Paper" defined. A laboratory analysis, duly reduced to writing, of an organ of the human body and of the contents thereof is a "paper", within the meaning of the statute

relative to the compulsory production of "papers or books", and the party to an action who has the exclusive possession thereof may be compelled to produce it for the inspection of the other party when such inspection is material to the issue whether the deceased died by accident or by suicide by means of poison; but the production of private correspondence or memoranda relative to the analysis may not be coerced.

Travelers Ins. v Jackson, 201-43; 206 NW 98

Resulting inconvenience—effect. It is inconsequential that a valid and reasonable order for the production of books and papers will inconvenience and interrupt the business of the party ordered to produce them.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Surrender of possession—legality. An order of court directing a party litigant to produce and deposit in the custody of a court officer certain documents and papers is not void because the effect of the order is temporarily to dispossess said litigant of his own property.

Foresters v Scott, 223-105; 272 NW 68

Production of noncompetent evidence. The court is not necessarily acting outside its jurisdiction in ordering the production of papers, and copies which would not or might not be admissible as competent evidence on the trial of the pending action.

Main v Ring, 219-1270; 260 NW 859

Materiality. The materiality of books and papers in view of the issues is the test by which to determine the correctness of an order of court for their production.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Dual materiality—effect. An order for the production of books and papers which are material under the pleadings of the applicant for the order is not illegal because such books and papers tend to prove the case of the party ordered to produce such books and papers.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Materiality generally—presumption. Whether an order should be entered for the production, by one of the parties, of books or papers, manifestly depends on the nature of the action and on a liberal construction of the issues joined. No nice discrimination on the question of materiality should be attempted. Presumptively the order for production is within the jurisdiction of the court.

Main v Ring, 219-1270; 260 NW 859

Sealing portions of books. A rule for the production of books should provide for the sealing up of such parts thereof as are not legally subject to the inspection of the applicant for the rule.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Unallowable scope of order. The court, in order to keep within its jurisdiction, must, irrespective of the scope of objections pressed upon its attention, so frame its order for the production of correspondence as will not enable the applicant for the order to go on a fishing expedition, and ransack and rifle the files of his adversary for matters irrespective of their materiality.

Main v Ring, 219-1270; 260 NW 859

Illegal rule. When an action is predicated by plaintiff on the plea that a corporation in entering into a contract with plaintiff was acting as the agent of one or both of two other corporations, and also on the plea that said contract was in furtherance of a joint adventure of said three parties, the court in granting plaintiff a rule for the production of books and papers acts illegally insofar as it fails to confine said rule to books and papers which tend to support the affirmative of either or both of said issues.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Minority stockholders — right to inspect books. The minority stockholders of a dissolved corporation have the right (in an action for an accounting against another corporation which has succeeded to the business, assets, books, and papers of the dissolved corporation), on a proper petition therefor, to an order for the production and inspection of the material books, records, and papers of the dissolved corporation and of the succeeding corporation.

National Prod. Co., v Dist. Court, 214-960; 243 NW 727

Right to examine books and records. An administrator and the heirs at law of a deceased stockholder in a corporation, when refused an examination by the corporation, have the right, without any plea of good faith, to an order of court, in an appropriate proceeding, permitting them and their necessary assistants to examine the books and records of the corporation in order to determine the financial condition of the corporation and the value of its stock.

Becker v Trust Co., 217-17; 250 NW 644

Certiorari—essential purpose of writ. On certiorari to review an order of the district court relative to the production of books and papers, the sole inquiry is whether the lower court had jurisdiction to enter the order in question, not whether the lower court made errors in exercising its jurisdiction.

Main v Ring, 219-1270; 260 NW 859
Foresters v Scott, 223-105; 272 NW 68

Order to produce—admissibility. An order to produce books and papers is not a ruling that, when produced, the books and papers will be admissible as legal evidence.

Main v Ring, 219-1270; 260 NW 859

Order for production — subpoena duces tecum. The power of the court to order a litigant to produce documents and papers is not dependent in any degree on any analogy to the rules of law governing subpoenas duces tecum.

Foresters v Scott, 223-105; 272 NW 68

Optional procedure—depositions. The court is not without jurisdiction to order the production of the original of documents and papers because the applicant for the order might avail himself of depositions.

Foresters v Scott, 223-105; 272 NW 68

Facts otherwise available. The court is not without jurisdiction to order the production of the originals of documents and papers because litigants, hostile to the applicant for the order, have taken depositions which reveal purported copies of said documents and papers. And especially when such depositions were not of record when the order to produce was entered.

Foresters v Scott, 223-105; 272 NW 68

Place of inspection of books. One ordered to produce books for inspection may have the right to insist that said inspection be made at his principal place of business, and not at a place where said books will pass, temporarily, entirely out of his possession.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Place of production of books, etc. A rule for the production by defendant of books or papers kept by him at his place of business remote from the place of trial should require the production to be made at said place of business when production at the place of trial would impose on defendant undue burden and expense, and interruption of business.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Foreign corporations—visitatorial power of state. A foreign corporation transacting business within this state is subject to all the remedies available against a domestic corporation. So held under an application for an order for the production of papers and documents.

Foresters v Scott, 223-105; 272 NW 68

Foreign corporation — nonjurisdiction of officer—effect. An order of court directing a foreign corporation, as a litigant doing business in this state, to produce certain documents and papers, is not invalid because jurisdiction, while complete as to the corporation, has not been obtained over any corporate officer.

Foresters v Scott, 223-105; 272 NW 68

Inability to enforce order — effect. That a foreign corporation doing business in this state may not comply with an order for the production of documents and papers and that the court may be unable to enforce its order, is no adequate reason for refusing the order or for annulling such order when made.

Foresters v Scott, 223-105; 272 NW 68

Balance of convenience — order. Record evidence reviewed and held, under "balance of convenience" rule, to justify the court in ordering a defending insurance company located at Toronto, Canada, to produce in this state, and at its own expense certain documents and papers.

Foresters v Scott, 223-105; 272 NW 68

Place of inspection—balance of convenience. A foreign corporation, doing business in this state, has no absolute right to demand that its documents and papers be inspected at its home office in the foreign state. So held as to documents and papers which did not pertain to the daily operations of a foreign insurance company.

Foresters v Scott, 223-105; 272 NW 68

Harmless comprehensive order. The objection that an order for the production of correspondence is so comprehensive as to require the production of mere private letters between the parties, having nothing whatever to do with the suit in question, is neutralized by a record fairly showing that the parties are strangers, residents of distant states, and have never had any transaction except the subject matter of the suit.

Main v Ring, 219-1270; 260 NW 859

Nonexcessive order. Order for the production of the originals of certain documents and papers, and the facts attending such order, reviewed, and held such order could not be deemed a roving commission.

Foresters v Scott, 223-105; 272 NW 68

Refusal to compel production. The refusal of the court to compel the county attorney to produce the confession of a co-accused will not be deemed reversible error when the accused makes no effort to secure such confession except to unsuccessfully request the county attorney to produce it.

State v Bittner, 209-109; 227 NW 601

Correspondence between defendant and third parties. An order, in an action for damages for deceit, for the production by defendant of correspondence between himself and a third party, is within the jurisdiction of the court when the materiality of such correspondence is alleged, and appears tho in not a very definite manner.

Main v Ring, 219-1270; 260 NW 859

Correspondence with defendant and his tradename affiliates. The court, in an action against

an individual for deceit, is not necessarily acting beyond its jurisdiction in ordering the production of correspondence not only with the defendant personally, but with various tradename concerns under which the defendant is alleged to be doing business.

Main v Ring, 219-1270; 260 NW 859

Admitting record of deed not error. In an equity action for foreclosure of realty mortgage against mortgagor and administrators of deceased junior mortgagee, to whom mortgagor had conveyed the land, where it is shown that deed to junior mortgagee was not within the control of senior mortgagee, and where attorneys for defendants stated that they would "admit what the records show", the admission in evidence of the record of such deed was not error.

Federal Bank v Ditto, 227-475; 288 NW 618

11317 Petition—granting or refusing.

Sufficiency in general. The petition for a rule for the production of books or papers may be sufficient even tho it does not state in detail what particular facts will be proved by certain specified books or papers.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Order for production — sufficiency. Books and papers should, in an order for their production, be identified and pointed out with reasonable certainty, but absolute precision is not required.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Petition—sufficiency—deceit action. Petition for the production of papers and correspondence, in an action for damages for deceit, reviewed, and held to comply with the governing statute.

Main v Ring, 219-1270; 260 NW 859

Appeal from order not permitted. An order for the production of books is not appealable.

Stagg v Bank, 203-84; 212 NW 342

Certiorari to review. The legal discretion of the court to enter an order for the production of books and papers cannot be controlled by certiorari.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

(Contra) Stagg v Bank, 203-84; 212 NW 342

Non-jurisdictional showing. The district court has no jurisdiction to enter an order requiring plaintiff in mortgage foreclosure action to deposit with the clerk the original note and mortgage sought to be foreclosed, for the inspection of a non-answering defendant, when the application upon which the order is entered is unverified, and contains no allegation concerning the materiality of said inspection. It follows said order is subject to review on certiorari.

Dunlop v Dist. Court, 214-389; 239 NW 541

Relevancy — determination of issue. The affidavit of one, against whom an order for the production of books is sought, to the effect that said books are wholly irrelevant to the matter in litigation, will be deemed presumptively true.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Protection of private papers. A party defendant may not be required to expose to his adversary, or the public, his private business affairs which have no relation to the matters in litigation. If his books contain matters relevant to the litigation, and also purely nonrelevant personal matters, the order for the production and inspection of the books must, by some proper provision, protect the latter.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Order on strangers to action. The jurisdiction of the court, on a proper petition, to order a party to an action to produce books, papers, etc., does not embrace the jurisdiction to enter such order against one who is not a party to the litigation. And an amendment to the petition for such order which does no more than to insert in the caption the names of various parties as defendants does not make such parties defendants in the statutory sense.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Order for correspondence unlimited as to time. An order for the production of correspondence between a party and his agent may be so unlimited as to time of correspondence as to call for manifestly immaterial testimony.

Main v Ring, 219-1270; 260 NW 859

11322 To whom directed—duces tecum.

Subpoena duces tecum—office. The remedy of a party to an action who desires the production of books, papers, etc., in the possession of a stranger to the action is to cause to be issued and served a subpoena duces tecum.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Order for production distinguished. The power of the court to order a litigant to produce documents and papers is not dependent in any degree on any analogy to the rules of law governing subpoenas duces tecum.

Foresters v Scott, 223-105; 272 NW 68

Copies in lieu of originals. Carbon copies of letters, the originals of which are in the possession of the adverse party, are not ad-

missible until the originals are properly called for and not produced.

Miller v Fire Assn., 219-689; 259 NW 572

11326 Witness fees.

Atty. Gen. Opinion. See '30 AG Op 177

Party defendant. A party defendant is not entitled to witness fees tho he has entered no appearance in the action, but has been subpoenaed.

Vacuum Oil v Carstens, 211-1129; 231 NW 380

11328 Peace officer.

Atty. Gen. Opinions. See '25-26 AG Op 431; '36 AG Op 419

11329 Expert witnesses—fee.

Opinion testimony. See under §11254 (II)
Atty. Gen. Opinion. See AG Op Feb. 27, '40

Answers based on hearsay. An expert may not testify to matters of fact or opinion which are not based on his own knowledge or experience, but on what he has read.

Evans v Iowa Co., 205-283; 218 NW 66

Subsequent appeal — law of case—inability to meet. On the retrial of a reversed and remanded cause, additional testimony in the form of expert opinion which is the merest conjecture—opinion which is not predicated upon any basis (1) of scientific knowledge, or (2) of general experience—is entirely too weak to lift the cause out of the evidential law of the case as first declared on appeal.

Hartford Ins. v Mellon, 206-182; 220 NW 331

Subject of expert testimony. It is not permissible for a party to gather together in the form of a hypothetical question the various circumstances established by him as bearing on a fact issue and present them to a so-called expert for his opinion, when the circumstances are such that the opinion of a lay witness would carry equal evidentiary value.

McClary v Railway, 209-67; 227 NW 646

Cause of injury—invading province of jury. It is improper (1) to call upon an expert witness for his conclusion as to the cause of an injury, or (2) to ask such witness for his opinion as to the "sole cause" or "direct and exclusive cause" or "sole primary cause", of such injury, and reversible error results from permitting the witness to affirmatively state such conclusion or opinion.

Justis v Cas. Co., 215-109; 244 NW 696

Hypothetical question based on testimony of one witness. The inclusion in a hypothetical question of a certain fact is proper tho only one witness has testified to such fact.

Boston v Keokuk Co., 206-753; 221 NW 508

Hypothetical question based on untrue statement. The jury should be plainly instructed, at least on request, that it must give no weight or consideration to an answer to a hypothetical question if it finds that any assumed fact embodied in the question is not, in fact, true.

Wilcox v Crumpton, 219-389; 258 NW 704

Instructions—noncontrolling effect of expert testimony. Instructions to the effect that a jury is not necessarily compelled to give controlling effect to expert testimony reviewed, and held correct.

Crouch v Remedy Co., 210-849; 231 NW 323; 38 NCCA 81

Instructions—credibility of expert witnesses. Instructions are proper which, in substance, direct the jury that they are to use their own judgment in considering evidence relative to values and that such judgment need not be surrendered for that of the expert witnesses.

State v Bevins, 210-1031; 230 NW 865

Nonright of jurors to substitute their own knowledge. Jurors may use and employ their own knowledge as to values in determining the weight and effect of expert testimony as to such values, but they must not be instructed, in effect, that they may disregard such expert testimony and substitute their own knowledge as evidence.

State v Brown, 215-600; 246 NW 258

Hypothetical questions on unproven facts. The court may permit hypothetical questions to be asked and answered before all the assumed facts have been established, the jury being cautioned to disregard such testimony in case the assumed facts have not been established at any stage of the trial.

Crouch v Remedy Co., 205-51; 217 NW 557

Opinion evidence—nonconclusiveness. Opinion evidence is not, ordinarily, conclusive on the trier of a question of fact, especially when such evidence happens to be only one of several elements which the trier must weigh in determining the fact.

Wood v Wood, 220-441; 262 NW 773

Explanation of architectural drawings. The meaning of marks and characters unintelligible to the layman, appearing on an architectural drawing, may be shown by a witness familiar with such matters. So held as to characters which indicated the presence of a sewer.

Des Moines Co. v Magarian, 201-647; 207 NW 750

Arbitrary right to shape form of question. An examiner in the cross-examination of an expert has the right, as a general rule, to shape his question as he pleases. So held where the witness had testified as to the value of a farm before and after condemnation, and where the examiner chose to ask the witness as to the value of separate tracts without directing the

witness, in effect, to exclude all benefits consequent on the condemnation.

Dean v State, 211-143; 233 NW 36

Subject of expert testimony—radiograph. A radiograph may be explained or interpreted to a jury by an expert, insofar as the radiograph does not interpret itself to the mere observation of a nonexpert.

Appleby v Cass, 211-1145; 234 NW 477

Harmless error—oral testimony as to foreign statutes. No reversible error occurs in permitting a layman (without objection to his competency) to testify relative to the statute laws of a foreign state when such statutes, relative to the subject matter in question, were ultimately introduced in evidence.

Richmond v Whitaker, 218-606; 255 NW 681

Opinion evidence—qualified mechanic. It is not error to permit testimony of expert witnesses when there is a sufficient showing of their qualifications to give such testimony. So held as to a mechanic's testimony regarding brakes and lights.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Possible cause of death—artificial heat. In workmen's compensation action in which objection is raised to the admission of expert testimony to show the heat situation in a bakeshop, where the death of a workman is allegedly caused by intensified or artificial heat, held, that insofar as the conditions, causes, and effects to which the experts testified required special study and experience to understand and explain, the admission of such expert testimony was proper.

West v Phillips, 227-612; 288 NW 625

Evidentiary (?) or ultimate (?) facts. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein defendant asserts that expert witnesses testified to the ultimate fact that there was excessive heat, which fact was for the determination of the commissioner, held, the evidence given by the experts consisted of material, evidentiary facts, constituting a basis for one of the ultimate facts in the case, which was that decedent received an injury arising out of and in the course of his employment, and therefore was admissible, particularly so where defendant did not object to the testimony on the ground that it stated an ultimate fact.

West v Phillips, 227-612; 288 NW 625

Cause of death of hogs—question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

Thickness of pavement. Whether a pavement constructed four and a half inches in thickness only is in substantial compliance with a contract requiring a thickness of six inches, is not a subject of expert testimony.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Hypothetical questions—wholly insufficient basis. Evidence of the naked fact that a railway locomotive was "coaled twice" within a few miles furnishes no foundation for the expert conclusion "that the front end of the engine was burned out, that the screens were in bad condition, or that the flues were dirty."

Stickling v Railway, 212-149; 232 NW 677

Fingerprints—expert testimony as to ultimate fact. A witness who is expert in the science of dactylography may testify that, in his opinion, judgment, or belief, different fingerprints were made by one and the same finger, but he may not testify that they were made by one and the same finger.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

Homicide—robbery. Whether a homicide was committed by one who was at the time robbing the deceased is quite beyond the proper scope of expert testimony.

Nelson v Acc. Soc., 212-989; 237 NW 341

Burglars' tools—expert testimony. Expert testimony is admissible as to the burglarious nature of certain tools.

State v McHenry, 207-760; 223 NW 535

Burglar's tools. In a prosecution for possessing burglar's tools, with felonious intent, the state may show by expert testimony that certain instruments could be used in the commission of a burglary, but erroneously asking the witness whether such instruments would be so used is not necessarily prejudicial.

State v Furlong, 216-428; 249 NW 132

"Conclusion" of ballistic expert. The province of a jury is not invaded by permitting a ballistic expert to testify that as a result of his detailed investigation he had "reached the conclusion" that a certain bullet had been fired through the barrel of a certain gun.

State v Campbell, 213-677; 239 NW 715

Identification of ballistic photographs. Evidence held ample to identify certain ballistic photographs.

State v Campbell, 213-677; 239 NW 715

Handwriting—unallowable standard. Manifest error results, in the trial of the issue of handwriting, from admitting in evidence writ-

ings as standards for comparison without proof that the person in question wrote the standards.

State v Debner, 202-150; 209 NW 404

Handwriting—proper standard for comparison. Proof that a party whose handwriting is in question admitted writing a certain exhibit renders the exhibit admissible as a proper standard for comparison.

State v Debner, 205-25; 215 NW 721

Signatures—jury question. The mere introduction in evidence of genuine signatures of a party in order to establish the plea that the purported signature of the party to a written release is a forgery does not generate a jury question on the issue of forgery, when other ample evidence persuasively shows that the signature to the release is genuine.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Fictitious signature—expert and jury comparison. On the issue whether certain signatures on checks are purely fictitious and represent no existing person, and were in reality written by a named existing party, experts in handwriting and the jury may compare said signatures with the admitted or proven handwriting of said named party.

Kruidenier Estate v Trust Co., 203-776; 209 NW 452

Handwriting expert—striking evidence. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

Genuineness of signature. Competent expert testimony as to the genuineness of a signature is admissible notwithstanding an element of weakness therein.

McColl v Jordan, 200-961; 205 NW 838

Disparaging expert testimony—instructions. A party who requests an instruction which emphasizes the superiority of positive over expert testimony as to the genuineness of handwriting may not complain that the court gave an instruction which fully embodied the idea of the requested instruction, but which more sharply, but correctly, emphasized the inferiority of expert testimony generally.

Keeney v Arp, 212-45; 235 NW 745

Limitation on nonexpert. A nonexpert witness may not testify that the signature to an instrument "looks like" or "resembles" the genuine signature of a named person. Such a witness is competent to testify only to his belief or opinion.

Schram v Johnson, 208-222; 225 NW 369

Examination of expert. An expert witness may testify that a signature "looks like" the signature of the party in question; likewise that a given signature is "in his judgment" genuine.

McColl v Jordan, 200-961; 205 NW 838

Handwriting experts—probative value. It being conceded, arguendo, that the testimony of experts on handwriting is not of the highest order, nevertheless, under proper circumstances, such testimony has probative value.

State v Manly, 211-1043; 233 NW 110

Comparison of handwriting—cross-examination. The cross-examination of an expert witness, a banker, who has testified to the genuineness of a signature to a promissory note in suit, may not be carried to the extent of questioning the witness as to his course of action in case supposed checks were presented to his bank for payment, when the answers, whatever they might be, can have no legitimate bearing on the credibility, qualification, competency, accuracy, or mental attitude or bias of the witness.

Keeney v Arp, 212-45; 235 NW 745

Enlarged photographs of handwriting. Evidence consisting of microscopic inspection, magnified photographs, or chemical tests may so demonstrate the nongenuineness of a writing as to become substantive evidence. It follows that such evidence, not being mere expert testimony, is not subject to the disparagement usually and ordinarily applied to expert testimony.

Keeney v Arp, 212-45; 235 NW 745

Handwriting photographs. Photographs of handwriting, altho bearing explanatory markings made by the expert witness, are proper evidence to aid the jury's comparison of the disputed signature on a will, as well as to explain expert testimony and their admissibility is largely within the trial court's discretion.

In re Cheney, 223-1076; 274 NW 5

Taxation—farm land within city—evidence warranting reduction in actual value. Where a 371.51-acre farm within the corporate limits of a city was very rough, the top soil washed off, the fertility gone, a third of the land infested with weeds rendering it impossible to raise even grass crops, and where the taxes exceeded the income, and qualified witnesses fixed its value at between $10 and $15 per acre, as against the tax assessor's value fixed at $65.58 per acre, on same basis as adjoining lands, tho there was no other similar land in

the district, the supreme court fixed the actual value thereof for taxation at $30 per acre.

Lincoln Bank v Board, 227-1136; 290 NW 94

Competency of experts—value. On the issue of the solvency of a bank, expert witnesses may be permitted to testify to the value of the bank's assets even tho they do not possess, as to all items, the most comprehensive qualification.

State v Bevins, 210-1031; 230 NW 865

Assets of bank. A qualified expert accountant is competent to testify that certain proven payments of money to a bank "did not come into the assets of the bank as shown by the books and records of the bank."

Andrew v Ind. Co., 207-652; 223 NW 529

Fraudulent banking—insolvency. In a prosecution for receiving deposits with knowledge that the bank was insolvent, the value of the assets of the bank may be proven by any witness who is familiar with such assets and knows the value thereof.

State v Childers, 202-1377; 212 NW 63

Blood test—authority to take. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

Blood test—expert testimony. Greater care could have been taken in tracing a blood sample from an operating room to a trial 7 months later than evidence which showed that it had passed through the hands of several persons, not all of them being identified, and had been kept for a time in some sort of mailboxes in a doctor's office in another city. Without more foundation, a statement by the doctor at the trial that the blood sample was then in the same condition as it was in the beginning was a mere conclusion.

State v Weltha, 228- ; 292 NW 148

Attending physician. It is not erroneous to permit an attending physician who has detailed the injuries of his patient to answer hypothetical questions.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Privileged communications. The expert opinion of a physician as to the possible cause of an injury, based on no fact obtained from the injured party, does not constitute the disclosing of a confidential communication.

Whitmore v Herrick, 205-621; 218 NW 334

Cause of death. A physician may, on a hypothetical question based on the testimony of other witnesses and on his own examination of the body of the deceased, give his opinion as to the cause of death.

State v Korth, 204-1360; 217 NW 236

Documentary evidence—medical works—unallowable reception. Error results from permitting a party on the direct examination of his own expert witness to read extracts from a medical work, and then to ask the witness if he agrees with the statement so read.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Physicians—success of treatment. An expert medical witness may not testify as to the success he has had in treating a specified injury in a specified manner.

Wilcox v Crumpton, 219-389; 258 NW 704

Opinion evidence—usual course of recovery. Evidence of an expert witness relative to the recovery usually made in average cases of certain injuries is wholly irrelevant and immaterial when there is no evidence that the injuries in question constituted an "average case."

DeMoss v Cab Co., 218-77; 254 NW 17

Hypothetical questions — inadmissible when not based on evidence. In a prosecution for homicide where it was shown that the deceased was found with a fractured neck, with no marks on his neck or body nor any evidence of a quarrel or struggle, after he had been left alone for only about a minute and a half with the defendant who was a friend of about the same size and weight, it was reversible error to allow a physician to demonstrate a strangle hold, and to answer a hypothetical question, not based on evidence, that force could be applied from the rear so as to break a man's neck.

State v Hillman, 226-932; 285 NW 176

Physician's cross-examination. In a murder prosecution, when a doctor on direct examination testified only as to what he found when he made physical examinations of the deceased, it was not error to deny cross-examination on the history of the patient.

State v Coleman, 226-968; 285 NW 269

Malpractice—testimony of laymen considered. The necessity or nonnecessity for removal of an organ from the body is not exclusively a subject of expert testimony.

Kirchner v Dorsey, 226-283; 284 NW 171

Self-serving declarations made to physician. In an action for damages for injuries received by plaintiff almost a year previously when a rug fell on her in defendant's store, it was prejudicial error to allow a physician, who had never attended her but had examined her

shortly before the trial in order to enable him to give evidence at the trial, to testify over objections as to self-serving declarations concerning her health made at that time by plaintiff, and to allow him to answer hypothetical questions based partly upon the incompetent testimony.

Mitchell v Ward & Co., 226-956; 285 NW 187

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Cause of death—testimony of attending physician nonconclusive. The testimony of a physician as to the cause of death of a person whom the physician personally attended shortly prior to said death is not conclusive, especially when the physician was, at the time of the examination, uncertain as to the cause of death. In other words, expert testimony, on proper hypothetical facts, is admissible to show a cause of death other than that testified to by the attending physician.

Dawson v Life Co., 216-586; 247 NW 279

Unallowable conclusion—method of treatment. Whether the results of a line of medical treatment which was employed on a named occasion were satisfactory is, at the best, an unallowable conclusion.

Lemon v Kessel, 202-273; 209 NW 393

Necessity for abortion. A physician who has professionally attended a woman upon whom an abortion has been attempted, and who later performed an autopsy upon her body, may state whether, in his opinion, the abortion was necessary to save the life of the woman. Otherwise as to a physician who bases his opinion on matters not appearing in the record.

State v Sweeney, 203-1305; 214 NW 735

Necessity to guard against infection. A physician may not testify to his conclusion that, in all cases of miscarriage, it is necessary to take precautions to prevent infection.

State v Candler, 204-1355; 217 NW 233

Customary medical practice. A witness, after properly testifying to the line of medical treatment employed on a certain occasion, may not testify that such treatment was the usual and ordinary practice of the profession at the time and place in question.

Lemon v Kessel, 202-273; 209 NW 393

Physicians — usual and ordinary practice. The defendant, in an action for damages for malpractice, may always establish, even by his own testimony, the usual and ordinary practice of physicians and surgeons in treating, in the locality in question, the injury which is the subject matter of the action.

Wilcox v Crumpton, 219-389; 258 NW 704

Malpractice — expert and nonexpert testimony—competency. Ordinarily the question of whether a doctor or dentist exercised the requisite care or skill in any case cannot be determined by the testimony of laymen or nonexperts, nor be left to the judgment of a jury or court, unaided by expert testimony, and only those learned or experienced in the profession may testify as to what should or should not have been done. But there are exceptions to this rule depending wholly on the fact situation, and no ironclad rule can be laid down as to when the doctrine shall be applied.

Whitestine v Moravec, 228- ; 291 NW 425

Malpractice—testimony of physician. In a malpractice action, testimony of a physician, who lived 70 miles away from the town where defendants lived, is admissible on the subject of the usual and accepted procedure in like operations in like localities, when it is shown that he had knowledge of the degree of skill, care, and attention necessary to successfully perform the operation.

Kirchner v Dorsey, 226-283; 284 NW 171

Malpractice—unsuccessful operation. Altho, in malpractice actions, an unsuccessful operation does not always indicate negligence, yet it is admissible, coupled with other evidence, in determining negligence or want of skill.

Kirchner v Dorsey, 226-283; 284 NW 171

Rape—possibility of intercourse. Expert testimony tending to show the possibility of sexual intercourse with a nine-year-old child may be proper.

State v Ingram, 219-501; 258 NW 186

Testamentary capacity — unsoundness of mind—unallowable opinion. Nonexpert witnesses must not be permitted to express their opinions that a testator was of unsound mind except on a recital of facts which fairly indicate mental unsoundness.

In re Diver, 214-497; 240 NW 622

Examination of expert — questions — form and sufficiency. On the trial of the issue whether a deceased was mentally competent to

execute a will, counsel has the right to shape his hypothetical questions to his expert witnesses in accordance with his (counsel's) theory of the case—the right to embrace in said questions such proven facts as he deems relevant and material to said theory and the right to omit all other facts, provided his questions as finally framed furnish adequate basis for an expert opinion as to mental soundness.

Diesing v Spencer, 221-1143; 266 NW 567

Nonexpert opinion as to insanity—necessary foundation—discretion of court. Nonexpert opinion as to unsoundness of mind is inadmissible unless the nonexpert witness first details such facts as tend, in the judgment of the court, to show an abnormal state of mind of the person whose mentality is under investigation; and the discretion of the court will not be interfered with unless there is a clear showing of abuse of such discretion.

Campfield v Rutt, 211-1077; 235 NW 59

Opinion as to sanity — cross-examination. An expert witness who, on a hypothetical question, states that in his opinion a defendant is of unsound mind, and is suffering from a form of senile dementia, may, on cross-examination, be asked, in effect, whether he would be of the same opinion if the defendant was able to accurately explain involved financial transactions—reflected in the testimony and detailed to the expert.

Richardson v Richardson, 217-127; 250 NW 897

Hypothetical question — fundamentally required instructions. Expert testimony tending to show that a party is of unsound mind, based solely on a hypothetical state of fact, is wholly without value unless the jury finds that the assumed state of fact is true, and fundamental error results in failure so to instruct.

Anspach v Littler, 215-873; 245 NW 304

Insanity—inadequate form of question. The opinion of an expert witness to the effect that a person was insane carries but slight probative value when the opinion is based on a hypothetical question which omits therefrom material and influential facts clearly established.

Crawford v Raible, 206-732; 221 NW 474

Expert and lay opinions—which must yield. An expert opinion that a person was insane at a named time prior to the time when said person was judicially declared insane will not be permitted to outweigh overwhelming lay testimony which strongly tends to establish the contrary, when said expert opinion is based almost wholly on information obtained from said person after she was adjudged insane, and on information obtained from the relatives of said person.

Davidson v Piper, 221-171; 265 NW 107

11330 Fees payable by county.

Fees in criminal causes. See under §13880, Vol I

11331 Fees in advance.

Party defendant. A party defendant is not entitled to witness fees tho he has entered no appearance in the action, but has been subpoenaed.

Vacuum Oil v Carstens, 211-1129; 231 NW 380

11336 When party fails to obey subpoena.

Deposition of adversary. The court has no legal right, even in an equitable action, to enter an order authorizing plaintiff to take, on his own behalf and by deposition, the testimony of the defendants bearing on the issues joined between plaintiff and all of said defendants.

Bagley v Dist. Court, 218-34; 254 NW 26

11342 Affidavits—before whom made.

Administration of oaths. See under §1215, Vol I
Proof by affidavit. See under §11231

Unallowable affidavits.

Radle v Radle, 204-82; 214 NW 602

Changing record. A record cannot be amended by affidavits of counsel.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Unallowable affidavit. Improper argument by the county attorney cannot be shown by affidavits attached to motion for new trial.

State v Hixson, 208-1233; 227 NW 166

Grounds for new trial—optional proof. The grounds for a new trial need not necessarily be established by affidavits. In proper cases, such grounds may be established by the testimony of witnesses.

Skinner v Cron, 206-338; 220 NW 341

Affidavit (?) or bill of exceptions (?). Misconduct of an attorney in argument (not taken down and made of record) must be presented by bill of exceptions and not by affidavit attached to the motion for new trial.

Hornish v Overton, 206-780; 221 NW 483

Conflicting affidavits—effect. A war of conflicting affidavits between counsel as to what oral understanding was had relative to the time of filing an abstract on appeal will not necessarily be determined by the supreme court.

Farmers Bank v Miles, 206-766; 221 NW 449

Misconduct of jurors—nonpermissible affidavits. The affidavits of jurors that their verdict was or was not affected by certain verdict-inhering matters are not permissible. The

effect of such matters must be determined by the court.

State v Siegel, 221-429; 264 NW 613

Ex-judge's affidavit—no part of record. A judge's affidavit made after termination of his office, and three months after perfection of the appeal, is no part of the record and cannot be considered against the appellant as a basis for an alleged waiver.

In re Metcalf, 227-985; 289 NW 739

11349 Newspaper publications—how proved.

Proof of publication of original notices. See under §11085

11350 Proof of serving or posting notices.

Impeachment of return. The return of a notice is impeachable on a direct attack on its validity.

Casey (Town) v Hogue, 204-3; 214 NW 729

Parol proof of service. Parol evidence of the posting, as officially directed, of a notice of the appointment of an executor is admissible, and positive evidence to such effect will not be overcome by evidence of witnesses to the effect that they had not "observed" such posted notice.

Peterson v Johnson, 205-16; 212 NW 138

Proof of lost notice and service thereof. The contents of a written notice by a surety to a creditor requiring the creditor to sue on the obligation or to permit the surety so to do in the name of the creditor, and the service of such notice, may be proven by oral evidence when neither the original notice nor a copy thereof can be produced, but such proof must be clear, positive, convincing, and satisfactory.

Cleophas v Walker, 211-122; 233 NW 257

REPORTER'S NOTES AS EVIDENCE

11353 Authorized use.

Impeachment purposes. The shorthand notes taken upon the trial of an action may be used for impeaching purposes.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Death or absence of witness—use of transcript. On the retrial of an action a duly certified transcript of the entire testimony at the former trial of a dead or absent witness is admissible.

Grimes Bk. v McHarg, 213-969; 236 NW 418

Testimony of party in former and different action. The transcript of the testimony of a party to an action is admissible against him in a subsequent and different action to which he is also a party, when such testimony is material as an admission of such party.

Duncan v Rhomberg, 212-389; 236 NW 638

Offering direct examination makes cross-examination admissible. In an action for conversion of an intestate's property, testimony of a witness on direct examination, given in a prior probate discovery proceeding offered and introduced from the transcript of the discovery proceeding, renders also admissible from such transcript the cross-examination of such witness, as being the whole of the conversation, altho under the dead man statute the witness may have been incompetent.

Reeves v Lyon, 224-659; 277 NW 749

Ex parte orders. An ex parte order of a judge at chambers to the effect that a party to an action may, on the trial, use a transcript of the testimony taken in another and former action, is a nullity.

Kostlan v Mowery, 208-623; 226 NW 32

Separate actions. The reporter's transcript of the testimony of a witness in bankruptcy proceedings before the commissioner in bankruptcy is not admissible as a deposition in a subsequent replevin action against the witness by one of his creditors.

Endicott Johnson Corp. v Shapiro, 200-843; 205 NW 511

Action between different parties. The reception in evidence (under proper objection), in an equitable action by an administrator, of the deposition of the deceased taken in another action between other and different parties is entitled to no consideration on an issue on which the administrator has the burden of proof.

In re Mann, 201-878; 208 NW 310

Nonadmissible against nonparty. A transcript of the original, official shorthand notes of a witness in proceedings auxiliary to execution, to which proceedings the witness was not a party, is inadmissible as substantive evidence in a subsequent proceeding against the witness wherein a conveyance is sought to be set aside as fraudulent; neither is such transcript admissible in the absence of proper foundation, to show the admissions of, or to impeach, the witness.

Hawkins v Vermeulen, 211-1279; 231 NW 361

DEPOSITIONS

11358 When and before whom taken.

Discussion. See 23 ILR 93—Letters rogatory

Deposition—when admissible. The deposition of an injured employee in support of his application for compensation under the workmen's compensation act, is admissible, after his death, on behalf of a dependent spouse who has been substituted as plaintiff, the proceeding by the employee during his lifetime and the proceeding by the dependent spouse as substituted plaintiff being in law one and the same cause of action.

Dille v Coal Co., 217-827; 250 NW 607

"Party" and "witness" not synonymous. The terms "party" to an action and "witness" are not synonymous within the meaning of this section.

Bagley v Dist. Court, 218-34; 254 NW 26

Right to take depositions—remedy by certiorari. Certiorari is the proper remedy to test the legal right of the district court to order defendants in an action to submit to the taking of their depositions by plaintiff.

Bagley v Dist. Court, 218-34; 254 NW 26

Deposition of adversary. The court has no legal right, even in an equitable action, to enter an order authorizing plaintiff to take, on his own behalf and by deposition, the testimony of the defendants bearing on the issues joined between plaintiff and all of said defendants.

Bagley v Dist. Court, 218-34; 254 NW 26

Who may offer. Depositions taken by one party may be offered in evidence by either party.

Justis v Cas. Co., 219-213; 257 NW 581

Order—form. An order of court authorizing the taking of depositions "during a term of court" need not necessarily recite that such order is "in furtherance of justice".

Bagley v Dist. Court, 218-34; 254 NW 26

11364 On commission—notice—interrogatories.

"Letters rogatory" as unallowable substitute. The courts of a foreign state have no jurisdiction to issue, and the district courts of this state have no jurisdiction to honor, so-called "letters rogatory" which are such in name only and not in substance, and which are clearly in evasion of the statutes of the state from which issued, which statutes prescribe the procedure to be followed by the courts of said state and by litigants therein desiring the testimony of witnesses residing in a foreign state.

Magdanz v Dist. Court, 222-456; 269 NW 498; 108 ALR 377

11391 Reasons for taking—presence of witness.

Independent testimony to justify. Upon the offer in evidence of a deposition and upon objection to leading questions therein, the court has a discretion to permit the introduction of testimony, independent of the deposition, explanatory of the circumstances under which the deposition was taken, to wit, that the witness was mentally alert but very weak physically and gave his testimony with difficulty.

Finnerty v Shade, 210-1338; 228 NW 886

11394 Exceptions.

ANALYSIS

I Objections in General
II Objections Limited in Time
III Incompetency, Irrelevancy, or Immateriality
IV Admissibility

I OBJECTIONS IN GENERAL

Leading questions—independent testimony to justify. Upon the offer in evidence of a deposition, and upon objection to leading questions therein, the court has a discretion to permit the introduction of testimony, independent of the deposition, explanatory of the circumstances under which the deposition was taken: to wit, that the witness was mentally alert, but very weak physically, and gave his testimony with difficulty.

Finnerty v Shade, 210-1338; 228 NW 886

Questions not revealing purpose—exclusion—effect. The rule that the appellate court will not review the exclusion of questions which do not reveal what is proposed to be proven has no application to a question and answer appearing in a deposition.

Jensen v Sorenson, 211-354; 233 NW 717

Re-taking—motion to strike. A second deposition of a witness is, of course, not necessarily subject to a motion to strike.

Justis v Cas. Co., 215-109; 244 NW 696

II OBJECTIONS LIMITED IN TIME

No annotations in this volume

III INCOMPETENCY, IRRELEVANCY, OR IMMATERIALITY

Exclusion on trial for incompetency. A deposition is properly excluded for incompetency (and hearsay) when offered in evidence on the trial, when it appears from the deposition itself that the testimony of the witness is based wholly on unidentified hospital records, the correctness and verity of which the witness has no personal knowledge.

Foy v Ins. Co., 220-628; 263 NW 14

IV ADMISSIBILITY

"Letters rogatory" as unallowable substitute. The courts of a foreign state have no jurisdiction to issue, and the district courts of this state have no jurisdiction to honor, so-called "letters rogatory" which are such in name only and not in substance, and which are clearly in evasion of the statutes of the state from which issued, which statutes prescribe the procedure to be followed by the courts of said state and by litigants therein desiring the testimony of witnesses residing in a foreign state.

Magdanz v Dist. Court, 222-456; 269 NW 498; 108 ALR 377

CHAPTER 495

CHANGE OF VENUE

11408 Grounds for.

ANALYSIS

I CHANGE OF VENUE IN GENERAL
II STIPULATIONS FOR CHANGE
III COUNTY AS PARTY
IV JUDGE AS PARTY OR INTERESTED
V PREJUDICE OF INHABITANTS
VI UNDUE INFLUENCE OF PARTY OR ATTORNEY
VII DISCRETION TO GRANT OR REFUSE

I CHANGE OF VENUE IN GENERAL

Fraud in inception of contract—right to amend answer. A defendant who bases a motion for change of venue to the county of his residence on an answer alleging fraud in the inception of the contract sued on may amend such answer, if he deems it defective, and thereafter stand on the amended answer as a basis for the change of venue.

Wright v Thompson, 209-1133; 229 NW 765

Impairment of contract. A legislative change in the venue of an action may validly be applied to an existing contract.

Grain Belt Ins. v Gentry, 208-21; 222 NW 855

Certiorari—when writ lies—suing state appeal board. Certiorari will not lie to review the action of the trial court in overruling a motion by the state appeal board for a change of venue of a trial questioning a decision of such board.

State Board v Dist. Court, 225-296; 280 NW 525

Time of trial—delay by criminal defendant. One convicted of larceny, who, on appeal is granted a reversal, and who, then, each time thereafter as his case is assigned for retrial, delays trial on the merits by dilatory moves such as request for rehearing and change of venue, may not complain that he has been denied a speedy trial as provided by law, and certiorari will not lie to require dismissal of the indictment.

Ferguson v Bechly, 224-1049; 277 NW 755

II STIPULATIONS FOR CHANGE

No annotations in this volume

III COUNTY AS PARTY

No annotations in this volume

IV JUDGE AS PARTY OR INTERESTED

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

V PREJUDICE OF INHABITANTS

No annotations in this volume

VI UNDUE INFLUENCE OF PARTY OR ATTORNEY

Influence of defendant — continuance. An application by plaintiff for a change of venue made after a continuance of the action over a term, on the ground of the undue influence of the defendant, is properly overruled when plaintiff makes no showing that said ground was unknown to him prior to the continuance.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551

VII DISCRETION TO GRANT OR REFUSE

Appealable orders. While direct and immediate appeal will not lie from an order denying a change of venue, yet such order is reviewable on appeal from a subsequent order refusing to strike an improperly joined cause of action.

Smith v Morrison, 203-245; 212 NW 567

11411 Fraud in written contract.

Nonapplicability of statute. This section has no application to an action brought against a stockholder of a corporation on his stock subscription which contains no agreement as to the place of payment.

Lex v Selway Corp., 203-792; 206 NW 586

Sole basis for change. The sworn answer is the sole basis for a change of venue in an action on a contract in the county of performance, but not the county of defendant's residence.

Sell v Mershon, 202-627; 210 NW 758

Nondiscretion of court. In an action on a contract in the county of performance, but not of the defendant's residence, the filing of a sworn answer which pleads fraud in the inception of the contract, with prayer for change of venue, leaves the court no discretion to refuse the change.

Sell v Mershon, 202-627; 210 NW 758

Arbitrary right. A defendant sued on a written contract in a county which is the county of performance, but which is not the county of defendant's residence, is arbitrarily entitled to a change of venue when he files, (1) a sworn answer properly alleging fraud in the inception of the contract as a complete

defense, and (2) the bond required by statute.

Eulberg v Cooper, 218-82; 254 NW 48

Sufficiency of pleading. The technical sufficiency of a sworn answer as a pleading of fraud as a basis for a change of venue will not be passed upon on certiorari, in the absence of any attack thereon in the district court.

Sell v Mershon, 202-627; 210 NW 758

Fraud — sufficiency of allegation. A sworn answer, containing substantially all the fact allegations necessary to constitute fraud in the inception of a contract, furnishes adequate basis for an order for change of venue to the county of defendant's residence, unless the absence of the omitted allegations is specifically called to the attention of the trial court by appropriate pleading.

Iowa Corp. v Allen, 217-1112; 253 NW 43

Right to amend answer. A defendant who bases a motion for change of venue to the county of his residence on an answer alleging fraud in the inception of the contract sued on, may amend such answer, if he deems it defective, and thereafter stand on the amended answer as a basis for the change of venue.

Wright v Thompson, 209-1133; 229 NW 765

Allowable amendment. An answer showing fraud in the inception of a contract constituting a complete defense to the contract, filed as a basis for a motion for a change of venue, does not necessarily have to be complete in itself, but may be amended and the motion renewed on the basis of the answer and amendment thereto.

Iowa Corp. v Sawyer, 210-43; 230 NW 409

Allegation of damages. An answer showing fraud in the inception of a contract, filed as a basis for a motion for a change of venue, sufficiently shows the damages resulting from the fraud when it alleges that said fraud deprived defendant of the only consideration which induced him to execute the obligation sued on.

Iowa Corp. v Sawyer, 210-43; 230 NW 409

Fraud in contract. An action to quiet title under a trust deed, brought in a county in which part of the land is situated, is not transferable to the county of defendant's residence on the plea of fraud in the execution of the deed, when the deed is silent as to the county in which the trustee-grantee shall perform the trust agreements.

McEvoy v Cooper, 208-649; 226 NW 13

11412 Expense and attorney fees.

Amount in controversy—unallowable computation. Where the court, on separate applications in the same case, orders separate changes of venue, and separately adjudges in favor of each party an allowance for expense and attorney fees for attending in the wrong county, the orders are not appealable simply because the sum total of the separate allowances is over $100.

In re Mann, 211-85; 232 NW 839

11413 Bond.

Bond essential. The right to a change of venue on the plea of fraud in the contract sued on is conditioned on the filing of a cost bond by the movant.

McEvoy v Cooper, 208-649; 226 NW 13

Time of filing not jurisdictional. Where a change of venue is sought by a nonresident because of fraud in the inception of the contract sued on, the time of filing the bond required by this section is not jurisdictional. Bond filed before any ruling on motion to dismiss the application is timely in the absence of prejudice.

Iowa Corp. v Sawyer, 210-43; 230 NW 409

11414 Application for change.

Continuance — effect. An application by plaintiff for a change of venue made after a continuance of the action over a term, on the ground of the undue influence of the defendant, is properly overruled when plaintiff makes no showing that said ground was unknown to him prior to the continuance.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551

CHAPTER 496

TRIAL AND JUDGMENT

11426 Issues.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I ISSUES IN GENERAL
II VOLUNTARY ISSUES
III STIPULATIONS

Equitable issues. See under §10947
Estoppel to deny issue. See under §11201 (III)
Instructions on voluntary issues. See under §11493 (II)
Legally insufficient pleading treated as sufficient. See under §12827
Voluntary or nonpaper issues—instructions. See under §11493

I ISSUES IN GENERAL

Dismissal of issue—striking evidence. The court should not permit testimony bearing on a dismissed issue to remain in the record when it has no material bearing on any remaining issue.

In re Muhr, 218-867; 256 NW 305

Claim of undue submission of issues. A preliminary recital in the language of an unquestioned pleading of an issue of negligence in maintaining a sidewalk, which embraces statements of the method by which and the source from which the alleged nuisance was created on the walk, reveals no error when the definite legal issue was alone actually submitted to the jury.

Fosselman v Dubuque, 211-1213; 233 NW 491

Alleging quantum meruit and proving express contract. An allegation of quantum meruit cannot be supported by proof of an express contract.

Wayman v Cherokee, 208-905; 225 NW 950

Undue influence—submission of dual issues. Testimony which supports the issue of undue influence necessarily has material bearing on the supported issue of the testamentary capacity of an aged and infirm person, but both issues are properly submitted, on supporting testimony.

Brogan v Lynch, 204-260; 214 NW 514

Will contests—contract of settlement—fraud and undue influence. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

Unconscionable action with indefinite pleading. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (i. e., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

Submitting doubtful issue to jury. In a damage action for fraud, the submission to the jury of an issue as to a repurchase contract held not error under the pleadings and tactics of the parties.

Smith v Utilities Co., 224-151; 275 NW 158

Matters concluded—issue raised by rejected amendment. An application to amend the petition offered after submission of the case, tho overruled by the court, makes the issue raised by the amendment res judicata when the identical issue is raised in a subsequent action, especially when no appeal is taken from the ruling on such application.

Bagley v Bates, 223-836; 273 NW 924

Mutual construction in re issues. It is quite conclusive that an issue was raised by the pleadings when the parties and the court proceed on that theory in the trial court.

Ia.-D. M. Bk. v Lewis, 215-654; 246 NW 597

Contradicting trial theory. After an action by a widow of a deceased partner to determine her dower interest in her husband's partnership interest is fully tried on the mutual theory of determining the amount and adjudging such amount as a trust against the entire property of the partnership, it is too late for the surviving partners to insist that the widow should take her interest in kind.

Fleming v Fleming, 211-1251; 230 NW 359

Appeal theory not presented to lower court. A contention, on appeal, that a plaintiff son seeking to establish his title in his father's property by reason of an oral contract with the father, inferentially admitted his father's title in his pleadings and is bound thereby, will not be considered on appeal when such was not the theory upon which the case was tried in the lower court.

Blezek v Blezek, 226-237; 284 NW 180

Agency revocation — nonpleaded issues. In an action for real estate commission, contentions as to revocation of the agency arising from disposal of the subject matter of the agency and mental incapacity and death of one of the joint principals before the sale by the agent, will not be considered on appeal when the pleadings show no issue thereon but

the action is on a contract allegedly personally made with the defendant.

Maher v Breen, 224-8; 276 NW 52

Writing and publication—when an issue. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing, but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot as a matter of law establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

Quitclaim from spendthrift trust beneficiary. The rights of a grantee under a quitclaim deed from a spendthrift trust beneficiary cannot be determined until the trust is terminated, and cannot be litigated in an action between the trustees and grantee where the rights between the grantee and beneficiary are not issues.

Beemer v Challas, 224-411; 276 NW 60

Teachers — pension—employment prerequisite. A public school teacher, after 30 years service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment, and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

Nonreviewable fact question. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Denial of incorporation — insufficiency. A simple denial by a defendant that he has knowledge or information sufficient to form a belief whether plaintiff is a corporation presents no issue as to the incorporation of plaintiff.

Winterset Bank v Iiams, 211-1226; 233 NW 749

II VOLUNTARY ISSUES

Voluntary nonpaper issues. In an action to recover quantum meruit for the use of machinery, the court, in submitting defendant's nonpaper issue (acquiesced in by plaintiff) whether the use was under a contract for an agreed rental entered into with plaintiff's employee, must submit the question of the authority of the employee to enter into such a contract, there being evidence of the lack of such authority.

Des M. Pav. v Lincoln Co., 201-502; 207 NW 563

Voluntary issues—trial—effect. Principle reaffirmed that parties who voluntarily litigate issues which are not within the pleadings, are bound thereby.

Woodall v Woodall, 204-423; 214 NW 483
Andrew v Miller, 216-1378; 250 NW 711
Peterson v Bank, 219-699; 259 NW 199

Insufficient basis. Parties may not be held to have voluntarily litigated a nonpleaded issue—e. g., waiver—because of testimony which was admissible on the written issues.

Durr v Park Co., 205-279; 218 NW 54

Litigation of issue without plea. A party who, without objection, permits to be litigated and submitted to the jury the issue whether the adverse party relied on a pleaded estoppel may not thereafter predicate error on the absence of any formal plea of reliance.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

Disposition of property. An adjudication of property interests and a disposition of the household goods in a divorce action, is proper, there being a prayer by both parties for general equitable relief, and the issue, moreover, being voluntarily litigated.

Garside v Garside, 208-534; 224 NW 586

III STIPULATIONS

Written stipulation for decree—effect. The signing by a plaintiff and a defendant in an action for separate maintenance of an agreement which specifies the amount and terms of such maintenance and provides for the entry of decree in accordance therewith, and the filing of such stipulation in the action, constitute an appearance by the defendant to said action.

Kalde v Kalde, 207-121; 222 NW 351

Stipulation of fact may act as amendment. A duly signed stipulation as to the ultimate facts in a case may become, in legal effect, an amendment to the petition in the case for the purpose of a subsequently interposed motion to dismiss the petition.

Pierre v Pierre, 210-1304; 232 NW 633

Submission without action — taxation of costs. When the issues in a controversy are made up by pleadings and the pleadings then abandoned and the matter submitted to the court on a stipulation of fact, the costs are properly taxed against the wholly unsuccessful party.

Chambers v Bank, 218-63; 254 NW 309

III STIPULATIONS—concluded

Motion to dismiss equitable action—effect of stipulated evidence. The principle that a motion to dismiss the petition in an equitable action (formerly denominated a demurrer) necessarily admits the truth of the well-pleaded allegations of the petition, may be materially modified or obviated by evidence which the parties stipulate into the record for the purpose of said motion.

Panther v Department, 211-868; 234 NW 560

Stipulation of fact—conclusiveness. A stipulation of facts upon which a cause is submitted is conclusive on both parties. In other words, no fact not embraced in the stipulation can be considered on appeal.

Andrew v Bank, 209-277; 227 NW 899

Wage recovery dependent on reformation. In a law action for wages, allegedly due an employee under contract, where parties stipulate that the employee shall not recover such wages if the defendant prevails on his cross petition for reformation, transferred to equity on motion, the employee may not thereafter deny the court's right to try the reformation issue and is bound by the decree if not contrary to the evidence.

Koch v Abramson, 223-1356; 275 NW 58

Withdrawing after submission of cause. Parties entering into a stipulation before trial, having knowledge or means of knowledge of its contents, may not withdraw part of the stipulated facts long after submission of the cause.

Carpenter v Lothringer, 224-429; 275 NW 98

Enforceability. The court will enforce a duly filed stipulation by the parties to an action of forcible entry and detainer to the effect that if defendant fails to comply with specified conditions judgment shall be entered against defendant for the possession of said premises.

Peak v Mulvaney, 215-1400; 245 NW 748

Maintenance of status quo—effect. A stipulation entered into by an insured and insurer relative to the employment of attorneys by the insurer to defend an action brought against the insured by a third party, and designed to maintain the status quo of the stipulating parties, cannot be deemed to have any bearing on a waiver of a policy provision already effected by the insurer.

Venz v Ins. Assn., 217-662; 251 NW 27

Settlement of claim—adding additional burden. An unambiguous written stipulation and agreement, duly filed in a will contest, providing in effect that defendant will pay, and plaintiff will accept, a named sum of money in full settlement of any and all claim which plaintiff may have against the estate cannot be added to by proof of an oral contemporaneous agreement to the effect that defendant would also execute a will devising and bequeathing all his property to plaintiff.

In re Simplot, 215-578; 246 NW 396

Trial by jury—waiver by stipulation. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Iowa Co., 222-347; 268 NW 581; 106 ALR 198

11427 Of fact and of law.

Answer. See under §11114
Demurrer. See under §11141
Petition. See under §11111
Reply. See under §11156

Withdrawal—effect on testimony introduced. Upon the withdrawal by the court of an issue, testimony which was primarily introduced on such issue is properly left in the record when it bears on the weight and credibility of the testimony of witnesses.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

11428 "Trial" defined.

Law and equity—consolidation—mandatory order of trial. When litigants submit to the court, for trial by the court, both a law action and an equitable action, the court is under duty to first try the equitable issues if they be such as to dispose of both cases.

Holman v Wahner, 221-1318; 268 NW 168

Definition of "hearing". A "hearing" is the trial of an issue, including the introduction of evidence, the arguments, the consideration by the court, and the final decree and order.

Equitable v McNamara, 224-859; 278 NW 910

11429 How issues tried.

Discussion. See 1 ILB 144—Trial without jury—evidence

ANALYSIS

I RIGHT TO JURY
II NONRIGHT TO JURY
III REVIEW ON APPEAL
IV PARTICULAR JURY QUESTIONS

Automobile cases. See under §5037.09 (VIII)
Court findings as jury verdict, reviewability, conclusiveness. See under §§11435, 11581
Directing verdicts. See under §11508 (VI)
Findings inconsistent with verdict. See under §11514, Vol I
Findings of jury generally. See under §11513
Jury questions, probate of wills. See under §11863 (III)
Law issues. See under §11426
Right of trial by jury. See also under Const Art I, §§9, 10; §13571
Special interrogatories. See under §11513
Trial of issues. See under §§10947, 11519
Trial to court. See under §§11435, 11581
Waiver of jury. See under §§11519, 11581

I RIGHT TO JURY

Trial by court—submissions contrasted. The submission of a pending law action and of the pleadings and stipulations of fact filed therein, for trial by the court without a jury, cannot be deemed a submission under and subject to the provisions of Ch 547, C., '35, relating to the submission of controversies without action.

Rogers v Davis, 223-373; 272 NW 539

Right to trial by jury — default as jury waiver. Failure to appear for trial is a waiver of the right to trial by jury and a consent to trial by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Jury to try fact issues. Issues of fact in a law action are for the determination of the jury unless the jury be waived.

Cooper v Gazette Co., 226-737; 285 NW 147

Reasonable minds differing as to conclusions. If reasonable men may differ as to conclusions drawn from the evidence, the question is one for the jury.

Yale v Hanson, 227-813; 288 NW 905

Taking case from jury—conflicting evidence. The court manifestly has no right to direct a verdict on an issue which is, under the evidence, a question for the jury.

Oestereich v Leslie, 212-105; 234 NW 229

Municipal court jury trial. Where plaintiff requested jury trial and later withdrew such request, municipal court's refusal to allow defendant trial by jury was error.

Metier v Brewer, (NOR); 205 NW 734

Conflict of evidence. On a plea in abatement in an action on a note which matures when a certain farm is sold, as "per contract" (which was oral), a fair conflict of testimony as to the terms of such contract and when such provision was inserted in the note necessarily presents a jury question.

Anderson v Foglesong, 201-481; 207 NW 562

Warranty of stock remedy—proximate cause of death. Evidence held to present a jury question on the issue whether the feeding of a so-called hog remedy to hogs was the proximate cause of their death.

Crouch v Remedy Co., 205-51; 217 NW 557

Waiver of jury by agreement of attorneys—validity. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Chemical Co., 222-347; 268 NW 581; 106 ALR 198

Evidence sufficiency for jury question. Where evidence was sufficient to take a case to the jury on the question of whether the injury of the insured came within the terms of his policy, and it was submitted under proper instructions, there was no error in overruling a motion for new trial made on the ground that the verdict was contrary to the evidence.

Dykes v Washington Co., 226-771; 285 NW 201

Riding or driving motor vehicle. In an action on an insurance policy, there was sufficient evidence for a jury question on whether an accident came within terms of the policy insuring against injuries received in an accident of a vehicle in which the insured was riding or driving, when it was shown that the car started moving down a grade, and the insured was thrown to the ground from a position partly in the car and partly on the running board while attempting to stop the car.

Dykes v Washington Co., 226-771; 285 NW 201

II NONRIGHT TO JURY

Instructions—unsupported issue. Nonsupported issues must not be submitted to the jury.

Veith v Cassidy, 201-376; 207 NW 328

Description of property. A jury must not be permitted to pass upon the sufficiency of a description of mortgaged chattels which is sufficient as a matter of law. So held where the description revealed the particular kind of cattle, their age, average weight, the particular brand thereon, the particular farm where kept, and the particular possessor.

Wertheimer v Parsons, 209-1241; 229 NW 829

Insane persons—inquisitions—special proceeding—no jury. An appeal to the district court from the finding of the county insanity commission is a special proceeding, and, since the legislature did not provide for a jury trial, the issue is triable to the court.

In re Brewer, 224-773; 276 NW 766

Application for order in probate. Applications for orders in probate which necessitate a construction of a will have no place on the jury calendar, and reversible error results from a refusal to exclude them from such calendar on application of an interested litigant.

In re Watters, 201-884; 208 NW 281

Objections in probate—no jury. The probate court having jurisdiction to compel executrix to account for all assets, and the burden

to sustain her accounts being on executrix, objections to her accounts raising the issue of ownership of certain securities are triable in probate without a jury.

In re Rinard, 224-100; 275 NW 485

III REVIEW ON APPEAL

Verdicts—conclusiveness. Where question of fact as to negligence was properly submitted to jury, the supreme court cannot interfere with findings, no matter what its views might be if it were a trier of facts.

Usher v Stafford, 227-443; 288 NW 432

Conflicting evidence—conclusive on appeal. Where there is a conflict in evidence, the question is for jury, and supreme court will not disturb case.

Union Co. v Boyce, (NOR); 238 NW 471

Questions of fact—jury's verdict final. When instructions are proper and the question is one of fact for the jury, its verdict is final and the judgment of the supreme court cannot be substituted for that of the jury.

Ballard v Ballard, 226-699; 285 NW 165

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Verdicts — conflicting evidence—conclusiveness. Where there is conflicting evidence, verdict and judgment thereon constitute a finality in absence of any error of the trial court in rulings on the evidence.

Higgins v Haagensen, (NOR); 220 NW 38

Fact findings of trial court—conclusiveness. The findings of the trial court, on supporting testimony, as to the fact bearing on a question of exemptions are conclusive on the appellate court.

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200

Direction of verdict—most favorable view. In reviewing the action of the trial court in overruling the defendant's motion for a directed verdict, the supreme court must consider the evidence, determining, not what the facts were, but what the jury was warranted in finding them to be, viewing the record in the light most favorable to the plaintiff.

Wessman v Sundholm, 228- ; 291 NW 137

Supreme court not trier of facts. The supreme court may not sit as a trier of fact and substitute its judgment as to the amount of damages to be awarded, for the judgment of the jury.

Stoner v Hy. Comm., 227-115; 287 NW 269

Excessiveness indicating passion and prejudice. Unless a verdict is so excessive as to indicate clearly passion and prejudice on the part of the jury, it should not be disturbed.

Stoner v Hy. Comm., 227-115; 287 NW 269

Lump sum verdict on several counts—waiver. The defendant may not predicate error on the fact that the jury returned a lump sum as the amount allowed on different counts, when he failed to avail himself of special interrogatories to the jury, and sought to accomplish the same object by requested instructions which embodied certain findings, but failed to submit his substitute for interrogatories to the opposing attorneys before argument.

Ransom v McDermott, 215-594; 246 NW 266

Undetermined issue in equity. In appeals in equity, the appellate court aims to pass upon the issues insofar only as will be necessary to a final determination, and will, especially on appropriate application, formally withdraw from adjudication any undetermined issue.

Goode v Express Co., 205-297; 215 NW 621

Argument ignoring adjudication. A cause will be summarily affirmed on appeal when the record prima facie shows a conclusively established plea of former adjudication, and appellant sees fit in his argument to ignore such condition of the record.

Franquemont v Munn, 208-528; 224 NW 39

Verdicts on conflicting evidence—conclusive. A jury verdict on competent, but conflicting testimony, relative to the consideration—if any—for a chattel mortgage, is conclusive on the appellate court.

McDonald v Webb, 222-1402; 271 NW 521

Speeding in residence district—sufficiency of evidence—jury question. Evidence that accident occurred on main street of town about four or five blocks from the business district, that defendant was driving 50 miles per hour, that there were a number of dwellings on both sides of the street, and that defendant had passed a sign which read, "Slow down, speed limit 25 miles per hour", was sufficient to raise jury question on issue of whether car was being driven in a residence dictrict in excess of 25 miles per hour.

Doherty v Edwards, 227-1264; 290 NW 672

Finding as to proximate cause conclusive on court. A finding by the jury, on supporting testimony, that the negligence of one of two alleged joint tort-feasors was the sole proximate cause of the injury in question is necessarily conclusive on the court.

Hanna v Central Co., 210-864; 232 NW 421

Female jurors—no presumption of prejudice. Contention that a fair trial was not obtained on account of female jurors, a majority of which were on the jury, having an inborn prejudice against a woman accused of keeping a house of ill fame, denied because, in absence of a contrary showing, jurors regardless of sex

are presumed to follow instructions and determine guilt upon the evidence.

State v Hathaway, 224-478; 276 NW 207

Equitable and law issues in probate—appellate practice. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Testamentary capacity—incapacity not presumed. One under guardianship is not necessarily incompetent to make a will, for instance, as to a drunkard under guardianship, incapacity is not presumed. Evidence failed to establish that testator was intoxicated when he made his will, and his competency, being a fact question when decided in his favor by the court after waiver of a jury, will not be disturbed on appeal.

In re Willer, 225-606; 281 NW 155

Findings on conflicting evidence. Where different inferences reasonably may be drawn from undisputed facts and circumstances, the drawing of any one of such inferences by the court in a trial without a jury is a final finding which will not be disturbed on appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Conflicting evidence. In an action against street railway for injury to passenger in being thrown to the floor of car, the supreme court is not concerned with the question whether plaintiff got up from seat before car started, where there is a dispute in the testimony on that point, since such question is for the jury.

Havens v Railway, (NOR); 207 NW 677; 32 NCCA 680

Conflicting evidence. Conflicting testimony on the issue whether a tenant had waived his right to certain refrigerating room, as called for by the lease, necessarily generates a jury question, and the verdict thereon is a finality.

Rocho Bros. v Dairy, 204-391; 214 NW 685

Injunction violated—reopening case. After the court had announced its opinion and permitted cross-examination of the defendants as a preliminary step to the final determination of the punishment to be imposed upon them, it had the discretion, in view of the circumstances, to reopen the case.

Carey v Dist. Court, 226-717; 285 NW 236

Disputed fact questions as to value. In a condemnation proceeding to acquire ground for highway purposes, the right of the jury to decide disputed fact questions as to value will not be interfered with by the supreme court, if there is evidence upon which the jury could reach the verdict it did reach.

Stoner v Hy. Comm., 227-115; 287 NW 269

Verdict not excessive for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80 acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Hy. Comm., 227-115; 287 NW 269

Finding of duplication in claims. Since appellant-claimant failed to challenge finding of trial court that two claims against a decedent's estate based on a note and a loan were a duplication, the sufficiency of other grounds of judgment disallowing claim for the loan was immaterial.

In re Green, 227-702; 288 NW 881

Objections to administrator's final report. Trial court's ruling on objection to administrator's final report will not be disturbed on appeal where fact question was involved, as supreme court would not substitute its judgment for that of court below.

In re Windhorst, 227-808; 288 NW 892

IV PARTICULAR JURY QUESTIONS

Reasonable minds reaching different conclusions. Where reasonable minds may reach different conclusions from the facts presented, the case is one for the jury.

Short v Powell, 228- ; 291 NW 406

Jury's judgment controls on disputed facts. The court cannot substitute its judgment for that of the jury when disputed facts are involved.

Glover v Vernon, 226-1089; 285 NW 652

Weight of evidence for jury—duty of court. The weight of the evidence is for jury, and the duty of court is to carefully instruct jury so as to furnish them a guide insofar as possible in attempting to arrive at truth.

Jakeway v Allen, 226-13; 282 NW 374

Law question submitted to jury. No prejudice can result when court submits to the jury a law question upon which the court could well have ruled adversely to complainant as a matter of law.

Central B. & T. Co. v Squires & Co., 225-416; 280 NW 594

Taking case from jury—scintilla evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 155

IV PARTICULAR JURY QUESTIONS—continued

Conflict of testimony. A conflict of testimony in a law action on a material issue necessarily generates a jury question.

Percival Co. v Sea, 207-245; 222 NW 886

Harmless error—erroneous submission of unsupported issue. The submission to the jury, in an action for damages, of an unsupported measure of damages constitutes error, but record reviewed and held harmless to the complaining defendant.

Carpenter v Wolfe, 223-417; 273 NW 169

Improbability of testimony. A jury question may exist even tho material portions of plaintiff's testimony strongly suggest improbability.

Ransom v McDermott, 215-594; 246 NW 266

Agreed issue conclusive. A plaintiff is bound by his concession, in open court and at the close of his evidence, that of several pleaded grounds of negligence a certain one only should be submitted to the jury.

Gorham v Richard, 223-364; 272 NW 512

Acts not constituting submission of issue. It may not be said that an unsustained or unsustainable allegation of negligence is submitted to the jury because the court briefly, though unfortunately, mentioned such allegation in a preliminary recital of plaintiff's allegations, it appearing that such objectionable ground of recovery was thereafter studiously ignored in the instructions.

Williams v Railway, 205-446; 214 NW 692

Striking allegations (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Taking case from jury—motion for directed verdict. The court, in passing upon a motion to direct a verdict against plaintiff, must assume that plaintiff has already established every material fact which his evidence fairly tends to prove.

Blecher v Schmidt, 211-1063; 235 NW 34

Directed verdict—absence of jurors—effect. When the court sustains a motion for a directed verdict, it is quite immaterial that all the jurors were not present.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Court's duty in construing evidence. In passing on a defendant's motion for a directed verdict, the court must construe the evidence in the light most favorable to plaintiff.

Mueller v State Assn., 223-888; 274 NW 106; 113 ALR 1256

Willers v Flanley Co., 224-409; 275 NW 474

Plaintiff's conduct. The presence or absence of contributory negligence is generally a jury question, and two elements are involved, (1) what plaintiff did, and (2) the effect of his action; if either or both of said propositions present uncertainty, there is a jury question.

Riggs v Pan-American Co., 225-1051; 283 NW 250

One conclusion by all reasonable men. Ordinarily the questions of proximate cause and contributory negligence are matters for the jury, and it is only where the facts are such, that all reasonable men must draw the same conclusion, that these questions become of law for the court.

Gowing v Field Co., 225-729; 281 NW 281

Contributory negligence—jury or law question. Contributory negligence is ordinarily for the jury, but it becomes a question of law only when reasonable minds can come to but one conclusion from facts and circumstances.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Veracity of witnesses. In reviewing on appeal an action involving an alleged fraudulent transaction, the appellate court must of necessity rely quite largely on the judgment of the trial court as to the veracity of witnesses, especially as to the values of real estate.

Bates v Zehnpfennig, 220-164; 262 NW 141

Contradicting self and impeachment. The fact that a witness was impeached or, being mentally slow and confused, makes statements on cross-examination which might be construed as contradictory, instead of being sufficient to take the case from the jury, on the contrary, presents a jury question.

Russell v Leschensky, 224-334; 276 NW 608

Testamentary capacity. Record reviewed and held to present a jury question on the issue of mental competency to execute a will.

Diesing v Spencer, 221-1143; 266 NW 567

Testamentary capacity — evidence — sufficiency. Evidence reviewed and held insufficient to make a jury question on the issue of testamentary capacity.

Green v Ellsworth, 221-1098; 267 NW 714

Testamentary capacity. A showing of old age, deafness, forgetfulness, inability to understand, moroseness, shyness, exclusiveness, lessened ability to transact business, and a general slowing down of the mental processes to a degree common with the aged does not

necessarily present a jury question on the issue of testamentary capacity.

In re Paczoch, 202-849; 211 NW 500

Testator's physical disabilities—lack of education. In an action to contest a will under which a son receives eight times as much property as the children of a deceased son and the evidence is disputed as to whether testator had sufficient understanding of English that when will was read over to her in English, unexplained, she fully understood its contents, a jury question is presented.

In re Younggren's Estate, 226-1377; 286 NW 467

Will contests—contract of settlement—fraud and undue influence. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

Subscribing witnesses—sufficiency of request to sign. A will, to be valid, must be witnessed at the request of testator; however, the request need not be spoken but may be by acquiescence, by act or motion, or even by his silence when he knows that the witnesses are signing, though at the request of another, and he makes no objections, but the question of due execution should be left to the jury when it develops from testimony that one witness signed at the request of a beneficiary and that testator may not have, in any manner, requested the witnesses to sign.

Burgan v Kinnick, 225-804; 281 NW 734

Claims against estate—belated filing. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Probate claim for services—express contract. In probate action to establish claim against estate based on express contract, where evidence that claimant acted as housekeeper, assisted with clerical work, and performed other duties about the farm for decedent, pursuant to his agreement to pay her a small amount sufficient to cover cost of her clothing and other personal expenses, and in addition thereto to compensate her out of his estate at his decease in such amount as would be in excess of any amount she could earn teaching school, a jury question was presented as to the existence of an enforceable contract and as to its nature.

In re McKeon, 227-1050; 289 NW 915

Services rendered to decedent—evidence of agreement admissible—jury question. In probate action where a claimant seeks to recover for services rendered to decedent under an express contract, the performance of such services must have been induced by a proposal and must have been in accordance therewith. Testimony by a witness to a conversation with decedent, who stated that he intended to see that claimant was properly cared for, that he would give her spending money (the little she would need), and at the end of his life he would leave her a home, was admissible and proper evidence for the jury to consider on question of whether or not there was any such arrangement or agreement. What the parties agreed to must be determined by the jury.

In re McKeon, 227-1050; 289 NW 915

Probate claim—payment specially pleaded—burden of proof—jury question. In probate action to establish claim for services rendered to decedent under an express agreement, where defendant specially pleaded a defense of payment as a part of a different contract of employment, the burden rested upon defendant to establish such different contract, including payment, and, if evidence justified, it was the duty of the court to submit the issue to the jury, but, where the defendant's evidence is also consistent with and does not negative plaintiff's claim as to her express contract, it is admissible and proper to be considered by the jury as tending to show that the present claim was an afterthought, or that claimant had failed under suitable circumstances to advance the demand now relied upon, and as tending to support defendant's theory of the nature of her employment. However, such evidence failed to establish the specially pleaded defense of payment, and the court's failure to submit the question of payment to the jury was not erroneous.

In re McKeon, 227-1050; 289 NW 915

Mental competency and elements of gift. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Bank cashier—authority to sell realty. Evidence reviewed and held to present a jury question on the issue whether the cashier of a savings bank had been given actual authority by the board of directors to sell certain real estate belonging to the bank.

Chismore v Bank, 221-1256; 268 NW 137

Reliance on notes by bank. Evidence held to show conclusively that a bank relied on

IV PARTICULAR JURY QUESTIONS—continued

promissory notes given to it in order to prevent an impairment of capital.

Farmers Bank v Bunge, 211-1357; 231 NW 651

Execution of contract—evidence—sufficiency. Evidence held sufficient to present a jury question on the issue whether bank directors had entered into an agreement as to what each, as between themselves, should pay on a promissory note given for the benefit of the bank.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Bank collections—negligence — measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks. Substantial but conflicting testimony reviewed and held to present a jury question.

Schooler Motor Co. v Trust Co., 216-1147; 247 NW 628; 38 NCCA 361

Conversion of stock. Evidence held to present jury question on the issue whether corporate stock alleged to have been converted was worthless, whether a bank cashier acted individually or on behalf of the bank, and whether the bank received any funds in the transaction in question.

Butterworth v Bank, 211-1327; 236 NW 83

Holdership in due course. Evidence fairly tending to negative holdership in due course of a negotiable promissory note presents a jury question, especially when not all of the officers of the plaintiff (a bank) testify, and negative knowledge of the pleaded fraud.

State Bank v Behm, 202-192; 209 NW 523

Holdership in due course. Holdership in due course of a negotiable promissory note as collateral security for a pre-existing debt is not shown as a matter of law by testimony which, besides being in part impeached, is uncertain as to how, when, and under what circumstances the note was acquired and when the indorsement was made; and especially is this true when the holdership in due course bears the appearance of being an afterthought, born subsequent to the filing of the petition.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Rights on indorsement—holdership in due course. The court has no right to say that the holder of a negotiable note is a holder in due course and to direct a verdict accordingly when conflicting inferences may be drawn from the facts bearing on such holdership.

Pierce v Lichtenstein, 214-315; 242 NW 59

Renewal of note—breach of agreement—waiver. Evidence held to present a jury question on the issue whether a surety signed a renewal note with knowledge that the payee had violated an agreement to apply certain moneys on the preceding note.

Randolph Bk. v Osborn, 207-729; 223 NW 493

Fraud—renewal with knowledge. Evidence reviewed, on the issue whether a maker of fraudulently procured promissory notes renewed them at a time when he had knowledge of the fraud, or in reason ought to have had such knowledge, and held to present a jury question.

Larson v Bank, 202-333; 208 NW 726

Option conditioned on payment of note—conditional delivery—jury question. With the evidence in conflict, a jury question is generated as to whether or not the delivery of a note was conditional when it was given at the time of the execution of a farm lease which contained an option to purchase the farm on condition that the note should be paid.

Walker v Todd, 225-276; 280 NW 512

Action on note. A jury question is necessarily generated when the testimony is such as to justify the jury in finding in favor of a party on his plea of want of consideration for, and conditional delivery of, a promissory note, and against the opposite party on his plea of waiver.

Hill v May, 205-948; 218 NW 946

Fraudulent representations. Competent evidence of fraud in the execution of a lease and promissory notes, tho not free from inconsistencies, and contradicted in part, generates a jury question.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Blank spaces on note filled in. Testimony that a negotiable promissory note had been delivered without any agreement relative to the filling of a blank therein for the place of payment, and that the holder had filled the blank without any authority from the maker, presents, on the issue of material alteration, a question of law for the court, and not a question of fact for the jury.

Citizens Bank v Martens, 204-1378; 215 NW 754

Agency to receive payment. Record reviewed and held to present a jury question on the issue whether the original payee of a promissory note was the agent of the indorsee to receive payment.

Andrew v Kolsrud, 218-15; 253 NW 913

Nonissue as to signature. When it is practically conceded, under the evidence, that a party did not, himself, sign a promissory note (tho his name is signed thereto), the fact that the record contains an admitted signature of the party imposes no obligation on the court to permit the jury, by a comparison of signatures, to find that the party did, himself, sign the note.

West Chester Bank v Dayton, 217-64; 250 NW 695

Payment of note—burden of proof. Defendants, claiming payment on note which plaintiff denied, had burden to prove such payment by a preponderance of evidence, whether payment was made as partial payment on note or on property purchased, and question was for jury.

Sager v Skinner, (NOR); 229 NW 846

Money loaned—used for mutual benefit—dealing in options. Whether notes sued on represented money furnished by plaintiff to be used by defendants for benefit of both in illegal dealing in margins held for jury.

Hamilton v Wilson, (NOR); 240 NW 685

Actions on policies—accident as jury question. Evidence reviewed and held properly to present a jury question on the issue whether an injury was caused by accidental means.

Miser v Trav. Assn., 223-662; 273 NW 155

Death—"immediate" notice. Record reviewed and held to present a jury question on the issue whether a preliminary notice of death, to an insurer, was "immediate," within the meaning of the policy.

Nelson v Acc. Soc., 212-989; 237 NW 341

Injuries resulting from accident complained of. Record held replete with evidence that an insured's injuries and loss of time were caused directly and exclusively by the accident in issue and held to justify a refusal to direct a verdict for insurer on the ground that there was no competent evidence that the injuries were caused by the accident.

Eller v Ins. Co., 226-474; 284 NW 406

Insurance policy—willful deception as to health. Record reviewed on the issue whether an insured had knowingly deceived the insurer in stating his condition of health during the preceding five years, and held to present a jury question.

Parker v Ins. Co., 218-145; 254 NW 31

Avoidance of policy for misrepresentation. On the issue whether a policy of life insurance had been obtained by the insured by means of false and fraudulent representations relative to the prior and present state of health of the insured, record reviewed in detail and held to present a jury question.

Getsinger v Ins. Co., 216-610; 247 NW 260

Insurance—farmer afflicted with arthritis—total disability. Where the insured, a farmer afflicted with arthritis, brings an action on a life insurance policy providing monthly payments for total disability, which was defined as disability preventing insured "from engaging in any occupation or performing any work for compensation of financial value", and where the insured farmer was unable to perform the labor on his farm, but still was able to direct the farming operations of his hired men, it was a jury question whether or not insured was totally and permanently disabled under terms of policy.

Hoover v Ins. Co., 225-1034; 282 NW 781

Osteomyelitis of spine—permanent disability. In an action on a life insurance policy providing against "total and permanent disability", evidence that insured, afflicted with an incurable condition of osteomyelitis of the vertebrae, was able to do a few hours bookkeeping, drive an automobile occasionally, and enrolled in the State University for a short time, will not necessarily negative permanent disability but presents a question properly submitted to the jury.

Wood v Ins. Co., 224-179; 277 NW 241

Accidental death—burden of proof. Under a policy providing for additional payment in case of death from accidental means, the beneficiary has burden of showing that insured shot himself accidentally, which need not be proved by direct evidence, but may be proved by proper inferences and presumptions from facts, and the beneficiary is aided in carrying this burden of proof by the presumption that death was not the result of suicide. Such presumption, however, is a rebuttable one and ordinarily a question of fact to be determined by the jury. So where evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question was properly held for the jury.

Mutual Ins. v Hatten, 17 F 2d, 889

Death by accidental means. In a law action by beneficiary to recover for death of insured on a policy containing additional benefits for death resulting from accidental means, the defendant insurer complaining that the court erred in submitting to the jury the question of whether or not plaintiff had successfully carried her burden of proof that death resulted from accidental means, held, there being circumstantial evidence tending to establish that the discharge of a gun was accidental, creating a presumption having probative value in favor of the theory of accident, the question was properly submitted to the jury.

Waddell v Ins. Co., 227-604; 288 NW 643

Presumption against suicidal death. The common law presumption that a death was not a suicide does not necessarily create a jury

IV PARTICULAR JURY QUESTIONS—continued

question, because the presumption may be wholly negatived by the attending facts and circumstances.

Warner v Ins. Co., 219-916; 258 NW 75

Application attached to policy—illegibly reduced photo copy. In action on life policies, where defense was based on false representations in application for policy, and it is shown original application is plainly printed in legible letters of fair size, while copy furnished and attached to policy is so reduced in size and so dim or blurred that it can only be read by persons with normal vision by use of a strong magnifying glass, the statute requiring "true copy" of application to be attached to policy is not complied with, and the submission of question to the jury as to legibility under an instruction that a true copy must be readable was not erroneous.

New York Ins. v Miller, 73 F 2d, 350

Evidence of death—presumption — fugitive from justice. Continued and unexplained absence of an insured from his home or usual place of abode for seven years, notwithstanding diligent efforts of relatives and friends to locate him, creates a jury question on the issue of death, even tho the original disappearance was caused by the fact that he was a defaulter in a large amount.

Rodskier v Ins. Co., 216-121; 248 NW 295

Actions on insurance policies — delivery of mortgages. Record held to present a jury question whether mortgages, alleged to have voided a policy of insurance, had been delivered.

Hoover v Ins. Co., 218-559; 255 NW 705

Insurance—soliciting agents—enlarged power. Record reviewed and held to present a jury question whether an insurance company had held out its purported soliciting agent as really having the powers of a recording agent.

Stoner v Ins. Co., 218-720; 253 NW 821

Insurance company's waiver of policy provision. When facts are disputed as to whether insurance company waived policy provisions as to unconditional ownership and as to location where property was to be kept which was later destroyed by fire, such dispute is for the jury.

Buettner v Le Mars Assn., 225-847; 282 NW 733

Taking case from jury—insurance transfer—company knowledge. In an action against an automobile insurance company to collect under the collision clause of a policy after transferring the original policy to another automobile on which a conditional sale was outstanding, a directed verdict is properly refused when fact questions exist as to the company's knowledge of the outstanding conditional sale at time of transfer.

Mougin v Central Assn., 224-1202; 278 NW 336

Circumstantial evidence—theories of equal probability. Circumstantial evidence relative to the loss of a diamond reviewed, and held that the court could not say as a matter of law that the theories of loss by theft or by fire were of equal probability.

Hall v Ins. Co., 217-1005; 252 NW 763

Negligence—mouse in Coca-Cola—jury question. Evidence establishing (1) purchase of a bottle of Coca-Cola from stand at country club, (2) immediate drinking of part of contents in presence of those in charge of stand, and (3) discovery of a dead mouse in bottle, and becoming ill as consequence, presents question for the jury as to whether the mouse was in the bottle when purchased by the country club.

Anderson v Tyler, 223-1033; 274 NW 48

Accident—evidence. Evidence, tho somewhat inconsistent, held to present a jury question on the issue as to the manner in which an injury occurred.

Elmore v Surety Co., 207-872; 224 NW 32

Contributory negligence of 11-year-old boy. In an action for personal injuries sustained by an 11-year-old boy, who, while playing in a tree in a public street fell into wires of public utility company, sustaining severe burns, the question of contributory negligence of the boy together with question of whether defendant company had knowledge of the use of the tree by the boys in the neighborhood in playing, and the question of proximate cause of the injury should have been submitted to the jury.

Reynolds v Iowa Southern Utilities Co., 21 F 2d, 958

Negligence—adverse result of X-ray treatment. While the adverse result attending X-ray treatment, e.g., a burn, is not in and of itself evidence of negligence, yet evidence that such result does not ordinarily follow reasonably skillful treatment, plus evidence that such result may result from too frequent treatment, or from treatment prolonged during a long period of time, and that plaintiff was so treated, may generate a jury question on the issue of negligence.

Berg v Willett, 212-1109; 232 NW 821; 38 NCCA 383

Necessity for amputation. The issue whether a necessity existed for the amputation of an arm does not become a jury question on general descriptive testimony of laymen, bearing on the appearance of the arm, and tending to show no necessity for amputation, and unanimous expert testimony to the effect that am-

putation was necessary in order to save the life of the patient.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Negligence—amputation without X-ray picture. The issue whether a surgeon was negligent in failing to have an X-ray picture taken of a broken arm before amputating it, does not become a jury question on general descriptive testimony of the arm by laymen opposed by unanimous expert testimony that the extent of the broken, crushed, and mangled arm was plainly apparent without an X-ray picture, the issue being whether amputation was necessary.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Malpractice action—evidence of medical men—jury question. In a malpractice action, testimony of medical men located in the vicinity of the defendant surgeons, that in cervical operations it is essential that the canal be kept open while healing, makes a jury question when there is testimony that defendants failed to do this.

Kirchner v Dorsey, 226-283; 284 NW 171

Internal injury—justifiable submission. The submission to the jury, in an action for personal injury, of the question of "internal injury" is proper, under evidence that the plaintiff, after receiving a grave physical injury, suffered from internal hemorrhages.

Ashcraft v Kriv, 207-574; 223 NW 365

Future pain as incident to permanent injury. Even without a claim for damages for future pain and suffering, allegations and proof of permanent injuries from which future pain and suffering are reasonably certain to follow warrant the submission to the jury of this question.

Keller v Dodds, 224-935; 277 NW 467

Worker crushed in elevator shaft. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y. M. C. A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Deliveryman falling in elevator shaft. Where a deliveryman fell down an elevator shaft in consignee's building, a sharp conflict in the evidence as to whether the deliveryman, an invitee, had been on the premises before, whether the guard rail to an elevator shaft was in place, and whether the lights were burning at the time, generates a jury question on the issue of negligence and contributory negligence.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Excessively waxed floor—jury question conjectural. In an action by a store customer to recover damages suffered when customer slipped and fell on waxed floor, evidence held insufficient to warrant instruction on question as to whether floor was excessively waxed at place where customer fell and that under the evidence such question was so conjectural as to be outside the jury's proper functioning.

Osborn v Klaber Bros., 227-105; 287 NW 252

Contributory negligence—invitee in public store. An invitee in a public store has a right to assume that the operator of the store will not be negligent in furnishing a safe place for customers, and a jury question on the issue of the invitee's contributory negligence is presented by such assumption in connection with testimony tending to show that the invitee, in walking along a passageway, looked, but could not see the floor or an adjacent open stairway, and thereupon continued to move forward, with his eyes on some goods on a shelf slightly above the level of his eyes.

Nelson v Woolworth, 211-592; 231 NW 665; 30 NCCA 542

When reasonable men differ—injury from street defect. When a street defect is of such character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, the question of city's liability for injuries caused thereby is generally one for jury.

Thomas v Fort Madison, 225-822; 281 NW 748

Defects in streets or highway—liability. In determining municipality's liability for injuries from defective streets or highways, if reasonable or prudent men could reasonably differ as to whether accident could and should have been reasonably anticipated from the existence of the defect, then the case is generally one for the jury, but if careful or prudent men would not reasonably anticipate any danger from the existence of the defect, but still an accident happens which could have been guarded against, the question of liability is one of law.

Bird v Keokuk, 226-456; 284 NW 438

Torts—cause of loss of rentals. Question as to whether rentals from property are lost because of construction of a bridge and new creek channel by a city, which construction occasioned some inconvenience to tenants in egress or ingress to the property, or because of

IV PARTICULAR JURY QUESTIONS—continued

depression in business conditions, is a question for the jury.

Edmond v Sioux City, 225-1058; 283 NW 260

Public water supply — water-tightness of dam. Tho no one testifies that a dam for a city reservoir was not water-tight when finished, there is sufficient evidence for the court, trying the case without a jury, to make the determination as to water-tightness on a record showing that when the water, a year after completion of the dam, reached for the first time the desired level, repairs were needed to prevent loss of water.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Leakage through dam — causal connection with contract violation. In an action on a contractor's bond because of leakage through a dam, a defense that no causal connection existed between the violation of the specifications and the damage, inasmuch as extreme heat and freezing as natural causes could also produce the leakage between the cement slabs, raises a fact question for the court, in the absence of a jury, to determine along with other circumstances as to whether this explanation sufficiently justifies a 12- to 18-inch separation of the concrete slabs.

Osceola v Gjellefald Co., 225-216; 279 NW 590

Obstructions in street—contributory negligence. Evidence reviewed relative to the act of plaintiff (injured by coming in contact with a wire stretched across a public street) in running, in semidarkness along the street and outside a crowded sidewalk, in order to reach shelter from a sudden and rapidly gathering thunderstorm, and held to present a jury question on the issue of contributory negligence on the part of plaintiff.

Cuvelier v Dumont (Town), 221-1016; 266 NW 517

"Last clear chance" doctrine—inapplicability. The "last clear chance" doctrine cannot operate against one who has no reason to suspect that a pedestrian is in any danger.

Radenhausen v Ry., 205-547; 218 NW 316

"Last clear chance"—justifiable submission. The mere fact that a train operator on the rear of a backing train saw a party approaching a public crossing, at a time when the party was 100 or more feet distant, affords no basis for submitting to the jury the issue of the "last clear chance," but such basis is furnished by testimony tending to show (1) that, to the knowledge of the operator, the party continued to approach said crossing, and was in a position of peril when 30 feet therefrom, and (2) that the train could have been stopped within 20 feet.

Williams v Railway, 205-446; 214 NW 692

Contributory negligence—"last clear chance" doctrine—applicability. The "last clear chance" doctrine can have no application unless it be found that defendant discovered the negligence of the plaintiff at a time such that, by the exercise of reasonable care, defendant might have avoided injuring plaintiff.

Steele v Brada, 213-708; 239 NW 538

"Last clear chance" doctrine—applicability. The "last clear chance" doctrine has no application except in those cases only where defendant actually discovers plaintiff's position of peril in time to prevent injury by the exercise of ordinary care, and fails to exercise such care.

Graves v Railway, 207-30; 222 NW 344

Positive and negative evidence—signals at railway crossings. Testimony of witnesses to the effect that they did not hear or notice any signals, when the witnesses were in no mental attitude to hear or notice such signals, creates no conflict with positive testimony that such signals were given.

Lenning v Railway, 209-890; 227 NW 828

Starting streetcar. Question whether conductor started streetcar, when passenger who was injured by being thrown to the floor of car was in position of peril and such fact was apparent to him, held for jury determination.

Havens v Railway, (NOR); 207 NW 677; 32 NCCA 680

Opening streetcar door as invitation to alight. Evidence that the conductor of a streetcar called the street, and, at a point very close to the customary place for discharging passengers, opened the exit door, after a stop signal had been given, and after he saw the passenger standing in front of the closed door, presents a jury question on the issue whether the opening of the door was an invitation to the passenger forthwith to alight, even tho unknown to the passenger, the car had not fully stopped.

Fitzgerald v Railway, 201-1302; 207 NW 602; 2 NCCA(NS) 540

Streetcar motorman—failure to maintain lookout. Evidence held to present a jury question on the issue whether a motorman in the operation of a streetcar maintained a proper lookout for pedestrians.

Allen v Railway, 218-286; 253 NW 143

Approach of streetcar—failure to give warning. Evidence held to present a jury question on the issue whether a motorman in the operation of a streetcar failed to give warning of the approach of the car.

Allen v Railway, 218-286; 253 NW 143

Streetcar—excessive speed—lack of control. Evidence held to present jury questions on the issues whether a motorman was, in view of the

presence of children in the street, operating his streetcar at an excessive rate of speed, also whether he had his car under proper control.

Allen v Railway, 218-286; 253 NW 143

Fires—circumstantial evidence. Circumstantial evidence reviewed, and held to present a jury question on the issue whether a fire was set by a passing engine.

Stickling v Railway, 212-149; 232 NW 677

Consent to operate vehicle—admission in pleading. In an action against an insurance carrier to collect an unsatisfied judgment arising out of an automobile collision, and where the insurance carrier raises the question of consent to operate the vehicle, its admission of this fact in a pleading in a previous action is sufficient to carry to the jury such question of consent to operation.

Mitchell v Underwriters, 225-906; 281 NW 832

Intoxication—physical facts considered by jury. Physical facts that a motorist drove over a sidewalk, into the front yard of a house, striking a child, together with certain remarks he made immediately after the accident which were inconsistent with sobriety, warrants the jury, trying to reconcile conflicting testimony, in finding the driver was intoxicated.

State v Carlson, 224-1262; 276 NW 770

Recklessness—jury question. Evidence that the driver of an automobile on a straight, smooth, graveled road was traveling 45 miles per hour in an attempt to pass other automobiles does not, in and of itself, furnish a jury question on the issue of reckless operation; otherwise as to evidence that after the car slipped and entered a ditch along the roadside the speed materially increased for a distance of 160 feet at which latter point the car collided with an intersecting grade, turned over twice, and came to a stop some 105 feet farther on.

White v McVicker, 216-90; 246 NW 385; 34 NCCA 371; 37 NCCA 126

Intoxication—defense to automobile theft insurance. Conflicting evidence as to whether one who took motor vehicle, without owner's consent, was intoxicated, presents a jury question.

Whisler v Ins. Co., 224-201; 276 NW 606

Absence of tail lights and reflectors. Testimony reviewed and held that the court could not say, as a matter of law, that the truck in question was not, at the time of a collision, equipped with tail lights and reflectors.

Isaacs v Bruce, 218-759; 254 NW 57; 36 NCCA 93

Agent's authority. Questions as to the nature or extent of an agent's authority, determinable or implied from the facts, are for the jury.

Wright v Iowa P. & L. Co., 223-1192; 274 NW 892

Employment—evidence—sufficiency. Evidence reviewed, and held to present a jury question on the issue whether a contract of employment had been entered into for a definite time.

Breen v Power Co., 207-1161; 224 NW 562

Apparent scope of agent's authority—evidence. Evidence that an agent, for many years, had charge of a certain department of his principal's business and had, during said times, negotiated many written contracts relative to the subject matter in his charge, may create a jury question on the issue whether the agent had authority, within the scope of his apparent powers, to enter into an oral contract covering the subject matter in his charge.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

Rights and liabilities as to third persons—authority of agent—evidence. The jury has the right, on the issue whether an agent had authority to enter into a contract on behalf of his principal, to pass on whatever competent evidence has a tendency to prove such authority even tho such evidence is not fully and wholly satisfactory. So held as to the correspondence passing between the principal and the agent as to the leasing of the land of the principal.

First Tr. JSL Bk. v Noland, 221-1305; 268 NW 69

Abandonment of employment — jury question. Conflicting evidence reviewed, and held to present a jury question on the issue whether an agent at the time of committing an alleged negligent act was in the course of his employment.

Heintz v Packing Co., 222-517; 268 NW 607

Apparent authority of agent—showing preliminary to receiving testimony. Testimony relative to a contract of compromise with a corporate agent on behalf of the corporation is admissible upon proof that the party offering the testimony, preliminary to entering into such contract, in good faith availed himself of the bureau of information maintained by the corporation, and by means thereof made contact with corporate agents who had physical possession of the papers and files relative to the subject matter of said compromise, and who were, apparently and to all appearance, in authoritative charge of said matter for settlement. (Of course, the issue of apparent authority may be a jury question.)

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

IV PARTICULAR JURY QUESTIONS—continued

Actions for compensation—dispute in evidence. Evidence, that defendant orally agreed to pay plaintiff a commission to assist in the sale of gypsum lands upon which plaintiff held drill plats, that agents of purchaser conferred with plaintiff and examined the plats, coupled with a denial by defendant that plaintiff accepted the offer or assisted in consummating the sale, presents a question precisely determinable by the jury.

Maher v Breen, 224-8; 276 NW 52

Broker—action for compensation—procuring cause. Evidence held to present a jury question on the issue whether a plaintiff-broker was the procuring cause of the leasing of premises when the lease was made, not to the individual produced by the broker, but to an unincorporated entity.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Royalties—reduction by oral agreement. In an action to recover alleged balance due under coal mining contract for royalties, whether payments provided for in contract were reduced by subsequent oral agreement held to be a jury question.

Heggen v Mining Co., (NOR); 263 NW 268

Warranty—waiver. Evidence held to present a jury question on the issue whether the buyer of goods had waived the warranty for which he had contracted.

Mortemoth Co. v Home Co., 211-188; 233 NW 133

Sales—rescission of contract—jury question. In an action by the vendee of an article to recover payments made, a jury question on the issue of rescission of the contract of purchase is made by evidence tending to show that the vendor made repeated but unsuccessful efforts to repair and adjust the article so it would work to vendee's satisfaction, and that thereupon vendee (1) refused to accept it, (2) returned it to the vendor, (3) received from the vendor the note executed when the purchase was made, and (4) was told by the vendor that he would order a new article for vendee.

Trester v Swan, 216-465; 249 NW 168

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency, or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease-Lied Motors v Sadler, 216-302; 249 NW 383

Fraud by seller—future promises—opinions. In an action for the purchase price of a trade-named beer dispenser bought for resale, purchaser, although same may have been an inducement to buy, may neither predicate fraud on seller's promise to procure for purchaser future resales, unless the promise is made with a secret intent to disavow, nor upon statements amounting to an opinion as to superior design; however, the jury should determine whether a statement as to merchantableness is an opinion or representation of fact.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

Implied warranty—buyer relying on seller. Ordinarily no warranty of fitness will be implied where buyer orders specific article for specific purpose known to the seller, but where buyer relies on seller to furnish a suitable article for a known purpose warranty of fitness will be implied although article may have a well-known trade name. So whether seller impliedly warranted that certain lumber was fit for manufacture of tool chests, held, a jury question.

Davenport Co. v Edward Hines Co., 43 F 2d, 63

Sale—disputed facts. Disputed evidence in buyer's action against seller over oral contract to deliver corn makes a jury question requiring a motion for directed verdict to be overruled.

Willers v Flanley Co., 224-409; 275 NW 474

Exercise of option—reasonable time. In an action to recover part of an advance paid for corn stored in an elevator under a written contract to sell at seller's option, the filing of a general denial raises the issue of defendant's performance; and question as to whether defendant exercised his seller's option within a reasonable time is for the jury.

Andreas & Son v Hempy, 224-561; 276 NW 791

Action for goods sold—dissolution of partnership at time. Whether plaintiff suing partner for goods sold had knowledge that partnership was dissolved at time of sale held question of fact for jury.

Harlan Co. v Saylor, (NOR); 228 NW 6

Substitution and release. The mere fact of the making of a new contract by which a third party becomes obligated to pay another person's previously existing indebtedness does not alone give rise to presumption that the creditor accepts the new debtor and releases the original debtor—question as to whether there

is such a release is one of fact to be determined by all the evidence in the case.

Wade v Broadcasting Co., 227-422; 288 NW 439

Release of damages—implied fraud. Evidence reviewed and held to present a jury question on the issue whether a release of damages was binding on the plaintiff who signed the same without reading it.

Shadduck v Railway, 218-281; 252 NW 772

Release—fraudulent procurement—negligent execution—jury question. Evidence reviewed at length relative to a written release of damages consequent on shockingly severe injuries, and held to present a jury question on the issues (1) of defendant's fraudulent procurement of the release, and (2) of plaintiff's negligence in signing said release.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Release—damages—fraud. A jury question as to the validity of a release of personal injury damages is made by proof that the releasee represented that the doctor's charges would be "about" $10, and that the representation was materially false, and was made to the releasor and acted on by him when he was alone and practically helpless from his injuries.

Robinson v Meek, 203-185; 210 NW 762; 5 NCCA(NS) 434

Opinion evidence—signatures. The mere introduction in evidence of genuine signatures of a party in order to establish the plea that the purported signature of the party to a written release is a forgery does not generate a jury question on the issue of forgery when other ample evidence persuasively shows that the signature to the release is genuine.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Conspiracy—concert of action—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue of concert of action between the officers and directors of a corporation for the purpose of defrauding plaintiff in the purchase of stock, except as to two defendants.

Stambaugh v Haffa, 217-1161; 253 NW 137; 38 NCCA 114

Nonconflicting evidence—only law questions presented. Where the only witnesses to testify at a trial were the plaintiff and her husband and their testimony did not conflict, no disputed question of fact was presented, but only questions of law.

St. Peter v Theatre, 227-1391; 291 NW 164

Arrest without warrant—reasonable ground—excessive force. Testimony reviewed and held to present a jury question on the issues (1) whether a defendant-sheriff in an action for damages had reasonable cause to believe that plaintiff's automobile contained the persons who had just prior thereto committed a robbery, (2) whether the sheriff acted as a prudent and reasonable officer would act under similar circumstances, and (3) whether the sheriff employed more force than was apparently necessary to stop the car.

Lawyer v Stansell, 217-111; 250 NW 887

"Unlawful dispensing" of liquor. Evidence that an accused made known to others the location of a cache of intoxicating liquors, assisted in actually locating it, and thereupon, jointly with the other parties, consumed the liquors, presents a jury question on the issue of "unlawful dispensing" of such liquors.

State v Meyer, 203-694; 213 NW 220

Confession of crime—claim of intoxication. A purported confession as to lascivious acts with a child, the admissibility of which confession is objected to because of a claim of intoxication at the time the confession was made, raises a question properly submitted to the jury when it appears the defendant had not taken any liquor for 15 to 18 hours before the confession was made.

State v Hall, 225-1316; 283 NW 414

Bias of witness—driving while intoxicated. Fact that a doctor, the real instigator of the prosecution, as a witness in a criminal case, showed considerable feeling and interest was a matter for the jury—not for the court.

State v Carlson, 224-1262; 276 NW 770

Homicide—deliberation and premeditation. Deliberation and premeditation as an element of murder in the second degree are necessarily provable by the facts and circumstances attending homicide. Evidence held such as to justify the jury in finding affirmatively on such evidence.

State v Woodmansee, 212-596; 233 NW 725

Conflicting testimony of ownership. In prosecution for receiving and concealing a stolen cow, cause was properly submitted to jury when testimony of ownership was conflicting.

State v McAteer, 227-320; 288 NW 72

Discredited testimony. The testimony of a prosecuting witness (forcible defilement in instant case) may be very seriously discredited, yet present a jury question as to its credibility.

Wildeboer v Peterson, 201-1202; 203 NW 284

Attorneys for juveniles—compensation. An action by an attorney against a county for compensation for defending a juvenile delinquent is not demurrable but presents a jury question.

Ferguson v Pottawattamie Co., 224-516; 278 NW 223

IV PARTICULAR JURY QUESTIONS—continued

Action for malicious prosecution. In an action for malicious prosecution, record reviewed and held to present jury questions on both the issues of (1) want of probable cause, and (2) malice.

Richmond v Whitaker, 218-606; 255 NW 681

Usurping province of jury. A question for the jury, and not for the court, is generated when the defendant in an action for damages for malicious prosecution makes substantial proof that, prior to commencing the prosecution, he made a full, fair, and good-faith recital of the facts to his attorney, and was advised to commence the prosecution.

Beard v Wilson, 211-914; 234 NW 802

Malicious prosecution—want of probable cause—landlord's writ—improper submission. In an action for malicious prosecution in suing out a writ of landlord's attachment for rent admittedly due (but which was canceled by a pleaded and established counterclaim), manifest error results from submitting to the jury the question whether the landlord had probable grounds to believe the truth of the ground alleged as a basis for the writ.

Kelp v McManus, 218-226; 253 NW 813

Arrest with warrant—issue as to person intended. In action for false arrest and imprisonment of plaintiff under an indictment and warrant for commission of an offense committed by another who falsely represented himself to be the plaintiff, issue as to what person was intended by the name used in the warrant could be shown by all the competent facts and circumstances surrounding the transaction out of which the indictment arose and warrant issued, and determination of such question was for jury.

O'Neill v Keeling, 227-754; 288 NW 887

Malicious prosecution — probable cause. "Probable cause" for prosecution is defined as "the knowledge by the prosecuting witness of such a state of facts as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe the person accused is guilty", and except where the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion, the question of probable cause is for the jury.

Bair v Schultz, 227-193; 288 NW 119

False imprisonment—justification. In an action for wrongful arrest and false imprisonment, where defendants, Polk county sheriff and deputies, acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury, hence court erred in sustaining motion for directed verdict.

Drake v Keeling, (NOR); 287 NW 596

Writing and publication—when an issue. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing, but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot as a matter of law establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

Defense—evidence of crime withdrawn from jury. In an action for libel, based on a defamatory publication, that the plaintiff could not tell the truth when on the witness stand, in which action defendant offered to show that plaintiff perjured himself in a previous foreclosure hearing, as to the existence of a certain fence, the court errs in withdrawing this evidence from the jury on the ground of indefiniteness, since in this civil action the defendant was not required to prove perjury beyond a reasonable doubt.

McCuddin v Dickinson, 226-304; 283 NW 886

Transcript of evidence filed prior to judgment. When the reporter's notes and a transcript thereof were made a part of the record before final judgment was signed, filed, or entered, there was no merit in a contention that the court had no jurisdiction because the evidence was not properly made of record before entering judgment.

Carey v Dist. Court, 226-717; 285 NW 236

Assessment of damage. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed for the land appropriated is peculiarly one for the jury.

Stoner v Hy. Comm., 227-115; 287 NW 269

Credibility—contradictions—duty of jury. The mere fact that the testimony of a witness reveals material contradictions does not necessarily deprive it of all probative force, and deprive the jury of the right and duty to reconcile the contradictions. The fact that the witness is a foreigner and untutored in the English language may be quite material under such circumstances.

State v Andrioli, 216-451; 249 NW 379

Chattel mortgage—replevin action. In replevin action by assignee of alleged chattel mortgage to recover possession of mortgaged property, whether mortgage had ever been executed or whether property was exempt to alleged mortgagor, who claimed he was a mar-

ried man, the head of a family, and that he made his living with such property, held to be jury question.

Brown v Heising, (NOR); 282 NW 345

Rent—conversion—jury question. Record held to present jury question on issue whether property on which a landlord had a lien for rent had been sold by the tenant with or without the consent of the landlord.

Mau v Rice Bros., 216-864; 249 NW 206

Liability of garnishee—willful destruction of property. Evidence tending to show that a garnishee had, subsequent to garnishment, willfully destroyed the property in his possession belonging to the defendant in garnishment, generates a jury question as to the liability of the garnishee.

Schooley v Efnor, 202-141; 209 NW 408

Family expenses — evidence — sufficiency. Evidence held to present jury questions on the issues of the delivery of certain articles of family expense and the liability of the husband therefor.

Younker Bros. v Meredith, 217-1130; 253 NW 58

Consideration. Evidence held to present a jury question on the issue of consideration.

Whitlock v Norris, 218-1066; 256 NW 734

Possession—presumption as to ownership. Proof that stock was on the premises of a defendant and under his control, both before and after it was at large in the public highway (where it was alleged to have caused a damage), and that the defendant had inferentially admitted that the stock was his, creates a jury question on the issue of the defendant's ownership.

Stewart v Wild, 202-357; 208 NW 303

Cause of death as question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

11430 Evidence in ordinary actions.

Evidence generally. See under §11254

11431 Ordinary actions—evidence on appeal.

Equitable appeals triable de novo. See under §11433

Law (?) or equity (?). An action which is treated in the trial court as at law will be so treated on appeal, even tho the pleadings and filings therein are indorsed as in equity.

Kline v Reeder, 203-396; 212 NW 693

Action essentially at law. An action which is essentially at law, and so tried to the court under a specific waiver of a jury, is not triable de novo on appeal.

Bremer County v Schroeder, 200-1285; 206 NW 303

Fact questions—absence of evidence. Manifestly the appellate court cannot pass on fact questions unless the evidence is before the court.

Chicago JSL Bank v Eggers, 214-710; 243 NW 193

Inaccurate stipulation—effect. The trial to the court of a strictly law action on the law calendar under a stipulation that the trial shall be "in the same manner as an equity cause" gives appellant no right to a trial de novo on appeal, it appearing that the cause was treated throughout as a law action.

Hostler Co. v Stuff, 205-1341; 219 NW 481

Mutual treatment of action. An action mutually treated as a law action, from its inception in the trial court to and including its presentation on appeal, must be treated on appeal as a law action.

Garden v Ins. Co., 218-1094; 254 NW 287

Correct ruling on erroneous grounds—valid grounds existing. An error in sustaining a motion for new trial on two particular grounds cannot be prejudicial if other grounds exist on which it should be sustained, all of which will be considered on appeal.

Thompson v Butler, 223-1085; 274 NW 110

Review, scope of—parties entitled. A successful party as appellee may without assigning errors show, if he can, that he was so erred against as to entirely neutralize any errors against appellant.

Thompson v Butler, 223-1085; 274 NW 110

Final report of administrator — hearing. Hearings on final reports of administrators are not reviewed de novo in the appellate court.

In re Manning, 215-746; 244 NW 860

Appeals in probate. Appeals from orders in probate on the final reports of executors are not reviewed de novo.

In re Bourne, 210-883; 232 NW 169
In re Mowrey, 210-923; 232 NW 82
In re Oelwein, 217-1137; 251 NW 694

Accounting and settlement. An order of the probate court granting an executor credit on his final report for the amount paid by him on his own motion, on a claim against the estate, is conclusive on the appellate court if the record reveals supporting testimony as to the genuineness of the claim.

In re Plendl, 218-103; 253 NW 819

Hearings in probate. Hearings on the final reports of executors are at law and on appeal are reviewed as at law.

In re Mann, 217-1134; 251 NW 83

Reports reviewed on appeal—not de novo. The trial court's findings in probate proceedings relating to executor's reports are not triable or reviewable de novo on appeal to the supreme court. If the findings have support in the record, they cannot be disturbed.

In re Sheeler, 226-650; 284 NW 799

Probate—allowance of claim—review only by appeal. Errors in a probate proceeding for allowance of a claim as in law actions should be corrected by appeal, and no exceptions nor appeal therefrom being taken, a finding in such probate proceeding is a final adjudication.

In re Davie, 224-1177; 278 NW 616

Equitable and law issues in probate—appellate practice. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Hearings in probate. Where the issue whether a trustee should be credited with a loss of trust funds was heard by the probate court without a jury (as a continuation of the probate proceedings out of which the trust arose) the holding of the court, granting such credit, will be sustained if the evidence pro and con would have presented a jury question had the hearing been before a jury.

In re Moylan, 219-624; 258 NW 766

Guardianship. A finding of fact by the court in guardianship proceedings, on supporting testimony, is conclusive on appeal, such proceedings not being reviewable de novo.

In re Roland, 212-907; 237 NW 349

Fence viewers—appeal from. Only questions of law will be considered on appeal from an order of the trial court which confirms the decision of fence viewers.

In re Swisher, 204-1072; 216 NW 673

Forfeiture of conveyance. A proceeding for the condemnation of a conveyance unlawfully used in the transportation of intoxicating liquors is not reviewable de novo on appeal. For instance, the appellate court will not review the credibility of competent and supporting testimony.

State v Ford Coupe, 205-597; 218 NW 346
State v Wilson, 212-1341; 237 NW 511
State v Coupe, 215-1308; 245 NW 243; 247 NW 639

Summary proceedings. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Contempt—extent of proof. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

Contempt — review—extent. On certiorari to review a judgment holding a party guilty of contempt, the findings by the respondent court are not conclusive on the reviewing court, tho due regard will be accorded such findings.

Roach v Oliver, 215-800; 244 NW 899

Instructions—absence of applicable evidence precludes review. The appellate court cannot review an instruction to the jury when the correctness of such instrument depends on the contents of exhibits not embraced in the abstract.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Law action tried by equity procedure. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v Ins. Co., 225-293; 280 NW 521

Matter of discretion—matter of law—when reviewable. An order phrased in general terms granting a new trial will be deemed discretionary and not reviewable except for an abuse of discretion, but where granted on specific legal grounds it is reviewable like any other error of law.

Thompson v Butler, 223-1085; 274 NW 110

Objection to instruction—first raised on appeal. An instruction placing on a defendant-owner of an automobile the burden to prove its operation was without owner's consent, when first objected to on appeal, will not be considered.

Mitchell v Underwriters, 225-906; 281 NW 832

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

Verdict contrary to evidence—preserving question in lower court. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent

over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence, and should be set aside, cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

11432 Evidence in equitable actions.

Motion to dismiss equitable action. There is no statutory authority for a motion to dismiss an equitable action at the close of plaintiff's testimony.

Appanoose County Bureau v Board, 218-945; 256 NW 687

Stipulation. A stipulation in an equity cause that testimony may be taken before any judge of the district, does not deprive the court, of the county wherein the action is brought, of jurisdiction.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

11433 Equitable actions—evidence on appeal.

ANALYSIS

I TRIAL DE NOVO
II EQUITABLE PROCEEDINGS TRIABLE ON ERRORS
III PRACTICE IN TRIALS DE NOVO

Abstracts on appeal. See under §12845
Constitutional provisions. See Const, Art V, §4
Evidence required for trial de novo. See under §12845
Law appeals not triable de novo. See under §11431
Remand of equitable cause on appeal. See §12871
Report of trial and certification thereof. See under §§11456, 11457

I TRIAL DE NOVO

Review—trial de novo in equity. Appeals in equity are triable de novo both as to the facts and the law.

Federal Bank v Bonnett, 226-112; 284 NW 97; 226-126; 284 NW 105
Kurth v Ins. Co., 227-242; 288 NW 90

Appeal in equity—method of trial. All appeals in equity are triable anew substantially as tho the appellate court had original jurisdiction.

Manning v Auto Co., 210-1182; 232 NW 501
Baker v Ward, 217-581; 250 NW 109

Record for trial de novo. In order for an appellant to have a trial de novo on appeal, it is incumbent on him to present a complete record of all the evidence heard, and certified, by the court.

In re Schlicht, 218-114; 253 nw 847
Northrup v Mikkleson, 222-1046; 270 NW 401

Absence of evidence. Trial de novo in the supreme court is impossible in the absence of the evidence.

Gotsch v Schoenjahn, 201-1317; 207 NW 567
Merritt v Ludwig-Wiese, 212-71; 235 NW 292

Consideration given lower court ruling. Altho a case is triable de novo in the supreme court, consideration will be given to the ruling of the lower court.

Donovan v White, 224-138; 275 NW 889
Chader v Wilkins, 226-417; 284 NW 183

Findings in equity cases—weight on appeal. In equity cases triable de novo, much weight should be given to findings of the trial court because of the better opportunities of that court to weigh the testimony, and in matters like modification of alimony decrees the court exercises a large discretion which, unless abused, will not be interfered with on appeal.

Siders v Siders, 227-764; 288 NW 909

Equity proceeding to establish heirs. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

On errors (?) or de novo (?). When it cannot be determined whether an action, tried to the court, was brought at law or in equity, it will, on appeal, be tried de novo in compliance with the apparent desire of the parties —the record containing all matters necessary for such review.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Law (?) or equity (?). An action which is treated in the trial court as at law will be so treated on appeal, even tho the pleadings and filings therein are indorsed as in equity.

Kline v Reeder, 203-396; 212 NW 613

Inaccurate stipulation—effect. The trial to the court of a strictly law action on the law calendar under a stipulation that the trial shall be "in the same manner as an equity cause" gives appellant no right to a trial de novo on appeal, it appearing that the cause was treated throughout as a law action.

Hostler Co. v Stuff, 205-1341; 219 NW 481

Following trial court method of trial. An appeal will be heard de novo when the parties mutually and without controversy tried the cause in equity in the trial court.

State v Automobile, 214-1088; 243 NW 303

I TRIAL DE NOVO—continued

Method of trial controls appeal. An action tried in the lower court as equitable will be so treated on appeal.

Murphy v Hahn, 208-698; 223 NW 756
In re Moore, 211-804; 232 NW 729

Commenced and tried in equity—appeal in equity. An action which plaintiff denominates when commenced as "in equity", and which is fully tried "in equity" without objection or effort to transfer to law, will, on appeal by defendant, be treated as "in equity" and tried de novo, without assignment of error.

Bates v Seeds, 223-70; 272 NW 515

Vacation of judgment. A proceeding to vacate a default judgment and for new trial is not triable de novo on appeal.

Rock Island Plow Co. v Brunkan, 215-1264; 248 NW 32

Injunction violation by labor union—no trial de novo. In certiorari to review a judgment finding the defendants guilty of violating an injunction, the case was not triable de novo in the supreme court.

Carey v Dist. Court, 226-717; 285 NW 236

Fact findings in probate not triable de novo on appeal. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Probate claims—no trial de novo. Probate claims are not triable de novo in the supreme court, as credibility of witnesses and weight of testimony are involved.

In re Martens, 226-162; 283 NW 885

Allowance of probate claim—no appeal de novo. An appeal from probate proceedings, in which a claim was established against an estate of a deceased person, was not triable de novo, but could be reversed when the judgment of the trial court was not supported by the record.

Reichart v Downs, 226-870; 285 NW 256

Workmen's compensation case. Principle reaffirmed that appeals under the workmen's compensation law are not tried de novo.

Arne v Silo Co., 214-511; 242 NW 539

Mechanic's lien foreclosure. An appeal from judgment of dismissal in action to foreclose mechanic's lien is triable de novo in supreme court.

Sloan Co. v Hall, (NOR); 206 NW 573

Record examined irrespective of failure to file brief. An action in equity to recover a judgment against the members of an alleged partnership and to impress a trust on certain funds is triable de novo on appeal, and the supreme court will examine the record despite parties' failure to furnish brief and argument.

Maybaum v Bank, (NOR); 282 NW 370

Assignment for benefit of creditors—equity (?) or law (?). The court is inclined to treat an assignment for the benefit of creditors as a proceeding in equity; but howsoever this may be, a proceeding which involves the final report of the assignee and the accounting therein made, and which embraces equitable issues, will be heard on appeal as in equity when so treated by the litigants and trial court.

In re Stone, 220-1341; 264 NW 604

Decision in general—avoidance of technical remand. The claim on appeal that an equitable action for the foreclosure of a contract for the sale of real estate is premature, and that judgment was rendered for the entire amount prior to its full maturity, will be disregarded on the de novo review on appeal, when it then appears that the entire amount is due and unpaid, and that no plea in abatement of the action, or other objection because of prematurity, was made in the trial court.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Accounting—trial de novo—limitation. An appeal from a ruling on objections to a referee's report must be tried de novo on the objections specified to such report.

Fleming v Fleming, 211-1251; 230 NW 359

Disbarment—appeal heard de novo. An appeal by the accused in disbarment proceedings is triable de novo.

In re DeCaro, 220-176; 262 NW 132

Disbarment—procedure. An appeal in disbarment proceedings against an attorney is, on a proper record, triable de novo, even tho tried by the special court as an action at law.

In re Cloud, 217-3; 250 NW 160

Detaching municipal territory. Proceedings for the severance and detaching of territory from a municipality, being now purely equitable, are triable de novo on appeal.

McKeon v City, 206-556; 221 NW 351; 62 ALR 1006

Levy and assessment—board of supervisors as objectors. The board of supervisors as objectors to the assessment of a stockyards company may properly appeal to the supreme court from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

Custody of child—appeal—trial de novo. An appeal in habeas corpus proceedings involving the custody and best welfare of a child, nec-

essarily and unavoidably gravitates to a review de novo; obviously such review is proper when distinctly equitable issues are involved.

Jensen v Sorenson, 211-354; 233 NW 717

Habeas corpus proceedings—custody of child. An appeal in habeas corpus proceedings—a law action—involving the custody and best welfare of a child necessarily and unavoidably gravitates to a review de novo.

Adair v Clure, 218-482; 255 NW 658

Custody of children—appeal—deference to trial court. Tho divorce proceedings are triable de novo on appeal, yet the wide discretion vested in the trial court in determining the custody of children will be respected and confirmed in all cases except where the discretion has been abused.

Wood v Wood, 220-441; 262 NW 773

Total disability—de novo determination. Where evidence given by licensed chiropractors testifying for plaintiff, and physicians and surgeons testifying for defendant in regard to plaintiff's total disability is widely divergent and where there is ample evidence to support a finding either way, the supreme court, in a de novo trial, will not disturb the trial court's findings, the trial court being in a far more favorable position to determine whether claim of total disability is made in good faith.

Kurth v Ins. Co., 227-242; 288 NW 90

Guardianship proceedings—findings by court—conclusiveness. A finding of fact by the court in guardianship proceedings on supporting testimony is conclusive on appeal, such proceedings not being reviewable de novo. So held on the issue whether a guardian had, in effect, paid an allowed claim.

In re Roland, 212-907; 237 NW 349

Reports of executors—appeals—review not de novo. Appeals from orders in probate on the final reports of executors are not reviewed de novo.

Bourne v Bourne, 210-883; 232 NW 169
In re Mowrey, 210-923; 232 NW 82
In re Oelwein, 217-1137; 251 NW 694

Condemnation of conveyance. A proceeding for the forfeiture of a conveyance because of its use in the unlawful transportation of liquors is a special action, and not triable de novo on appeal.

State v Ford Coupe, 205-597; 218 NW 346

Duties and liabilities to client—summary proceedings—appeal—no hearing de novo. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Proceedings and determination—method of trial—extent of proof. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

II EQUITABLE PROCEEDINGS TRIABLE ON ERRORS

Irregularities in trial of equity cause. An appeal in equity, tried solely on plaintiff's testimony, will not be reversed because the proper order for the introduction of testimony was not observed, or because defendant improperly brought out material testimony on cross-examination.

Coen & Conway v Bank, 205-483; 218 NW 325

Treating improperly stricken plea as in record. Upon appeal in an equity cause, the court, upon discovering from the record that the cause of action is barred by the statute of limitation, will treat an improperly stricken plea of such statute as still in the record, and enter judgment accordingly.

Lawrence v Melvin, 202-866; 211 NW 410

Absence of witnesses. The refusal of the court to continue a cause in order to enable counsel to obtain a witness will not be deemed error when there is no showing as to diligence or as to the time in which the witness might have been produced.

Miller v Hurburgh, 212-970; 235 NW 282
Barth Prod. v Kelly, 211-1154; 235 NW 471

Stockholder — who is — wholly inadequate evidence. In an equitable action to enforce, against an estate, "double" liability on bank stock, a finding and decree (based almost exclusively on the testimony of the record owner of said stock), that the deceased had actually owned said stock for some thirty years and was such owner at the time of his death, will (notwithstanding the deference accorded to the trial court in judging of the credibility of witnesses) be annulled on appeal as without adequate support in the evidence when the actions and conduct of said record owner during substantially all of said time in asserting exclusive ownership in himself, even after the death of the deceased, is wholly at war with his present testimony that he had never owned said stock and that the deceased had always owned it.

Andrew v Bank, 220-219; 261 NW 810

III PRACTICE IN TRIALS DE NOVO

Review de novo. The appellate court may review all legal propositions presented by the record in an equitable action even tho the trial court considered only one proposition which it deemed controlling.

Geil v Babb, 214-263; 242 NW 34

Dismissal—total absence of evidence. An appeal in an equitable action must be dismissed

III PRACTICE IN TRIALS DE NOVO—continued

when the only questions raised depend on the facts, and such facts are not presented.

Union County v Bank, 202-652; 210 NW 769

Abstract—incompleteness—effect. An appeal in an equitable action will not necessarily be dismissed nor a de novo hearing be refused, because all the evidence is not embraced in the abstract. So held where only one of several defendants was affected by the appeal.

State v Baker, 212-571; 235 NW 313

Equity cause tried on exceptions. When a cause in equity is tried on exceptions to the report of a referee, and the appeal is from the judgment rendered on said exceptions, the review on appeal is limited to the exceptions presented to the trial court and to the record there made.

Hogan v Perkins, 213-1175; 238 NW 608

Unallowable addition to record. On appeal, even in an equity case, the record as made in the trial court cannot be added to by the filing of affidavits bearing on the fact situation.

McDaniel v McDaniel, 218-772; 253 NW 803

Limited appeal in equity limits de novo hearing. The de novo hearing on appeal in an equitable action is necessarily limited to the particular part of the decree from which the appeal is taken; and, under such an appeal, appellee cannot have a de novo hearing on some other part of the decree unless he perfects a cross-appeal.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

Review, scope of—ruling adverse to appellee. A part of a decree on which no appeal is taken by the party adversely affected is not before the supreme court for review.

Scott v Waterloo, 223-1169; 274 NW 897

Judgment solely on plaintiff's testimony. It is not true, in an equity case submitted solely on plaintiff's testimony, that the testimony must, on appeal, be accepted in the most favorable light which can be given to it. On the other hand, such an appeal must be heard de novo and on its merits.

Coen & Conway v Bank, 205-483; 218 NW 325

Judgment solely on plaintiff's evidence. A defendant in an equitable action who, at the close of plaintiff's evidence, successfully moves for a directed verdict against plaintiff, must, on appeal, submit to a final trial de novo solely on plaintiff's evidence.

Pickler v Lanphere, 209-910; 227 NW 526
Hirtz v Koppes, 212-536; 234 NW 854

Accounting — trial de novo — record. Tho defendant, in an equitable action for an accounting, unsuccessfully moves at the close of plaintiff's testimony for a dismissal of the action, yet the final determination of the action must be determined, in the trial court and on appeal, on the entire record testimony including that introduced by said unsuccessful movant.

Economy Co. v Honett, 222-894; 270 NW 842

Judgment solely on plaintiff's testimony—effect. A defendant in an equitable action who, at the close of plaintiff's testimony, successfully moves for a dismissal, and who suffers a reversal, on trial de novo on appeal, may not, after general remand, resume the trial in the lower court and attempt to establish his defenses, on the sole claim that when he made the motion to dismiss, he had not rested his case.

Matthews v Quaintance, 204-520; 215 NW 707
Haggin v Derby, 209-939; 229 NW 257

Motion to dismiss on plaintiff's evidence. A motion to dismiss an action in equity, made at the close of plaintiff's testimony, being without statutory recognition, simply constitutes an announcement by defendant that he rests his case without further testimony.

Vogt v Vogt, 208-1329; 227 NW 107

Absence of evidence in equity. An appeal in an action brought and tried in equity will not be dismissed because the appellant fails to include the evidence in his abstract when the record reveals everything necessary for the court to decide the narrow question of law presented by appellant.

Carlson v Layman, 214-114; 241 NW 457

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Presumption as to evidence legally inadmissible. In a trial to the court, it will be presumed that testimony which is inadmissible as a matter of law was not considered by the court tho actually admitted in evidence.

James v Sch. Twp., 210-1059; 229 NW 750

Postponed rulings—presumption. The judgment of the trial court will be presumed to have been based solely on competent testimony when the court so certifies at the time of passing on postponed rulings and excluding certain testimony thereunder.

In re O'Hara, 204-1331; 217 NW 245

Incompetent evidence in equity. It must be presumed on appeal in an equity proceeding that the court disregarded incompetent testimony which was received under proper objection.

State v Dietz, 202-1202; 211 NW 727

Disregarding improper testimony. On trial de novo on appeal in equity cases, testimony given by incompetent witnesses, as to transactions and communications with a deceased person, will be disregarded.

Flint v Varney, 220-1241; 264 NW 277

De novo hearing regardless of decretal recitals. A recital in a mortgage foreclosure decree that of two defensive pleas one had been established, and one had not been established, does not prevent the appellate court on review de novo from adjudging that both said defensive pleas have been established, even tho the prevailing party—the appellee—does not assume to appeal from the one adverse court finding of fact against him.

Northwest. Ins. v Blohm, 212-89; 234 NW 268

Presumption attending unduly abbreviated abstract. When the complete record on which the trial court reached its conclusion on a fact proposition is not before the court on a de novo trial, and where the contrary does not appear, the presumption must be indulged that the trial court properly performed its duty and reached a proper conclusion.

Harrington v Foster, 220-1066; 264 NW 51

Certification of evidence. Evidence taken in an equitable action need not be certified by the trial judge and reporter until there exists a necessity for such certification. Conceding, arguendo, that the certification should be made within a reasonable time after such necessity arises, then the presence or absence of prejudice will materially control the question as to what is such reasonable time.

Andrew v Bank, 206-1368; 222 NW 553

Rent advanced as cost of administration. A stockholder of a clay products company in receivership, having advanced the rent due from the company on its clay pit lease, may not recover this rent as a cost of administration, especially when he advances this theory for the first time on appeal.

Parks v Carlisle Co., 224-1024; 277 NW 731

Family transaction—careful scrutiny for fraud. A transaction wherein an insolvent mortgagor, also in arrears on interest and taxes, makes an assignment to his father-in-law of a lease on his mortgaged premises, being a family transaction, will be carefully scrutinized for fraud; but without specific evidence indicating an incorrect conclusion by the lower court, its decision validating such transaction will not be disturbed on appeal.

First Tr. JSL Bank v Ver Steeg, 223-1165; 274 NW 883

Equitable and law issues in probate—appellate practice. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Appeal de novo—weight given decision of lower court. Altho a divorce action, being in equity, is triable de novo on appeal, yet the supreme court will give serious consideration to the decision of the lower court when there is a conflict in the testimony. Evidence reviewed and held to justify award of separate maintenance to the wife and to deny divorce to the husband.

Blew v Blew, 225-832; 282 NW 361

Determining preponderance. Where one witness' word was against that of another, the supreme court, on appeal in an equity action, looked to the conduct of the parties and surrounding circumstances to determine the preponderance of the evidence.

Webber v Ins. Assn., 227-793; 288 NW 868

11434 Abstracts in equity causes.

Dismissal—total absence of evidence. An appeal in an equitable action must be dismissed when the only questions raised depend on the facts, and such facts are not presented.

Union County v Bank, 202-652; 210 NW 769

11435 Finding of facts by court.

Court findings reviewed, conclusiveness. See also under §11581
Jury findings, reviewability. See under §11429 (III)
Most favorable evidence rule. See under §11508 (VI)
Special interrogatories. See under §11513
Trial to court. See also under §11581
Discussion. See 22 ILR 609—Trial technique

Conflicting evidence — findings conclusive. Findings of the court in a law action on conflicting evidence, like a jury verdict, are conclusive upon appeal. In such cases the supreme court may not determine facts but merely decide what the court was warranted in finding them to be.

Barth Co. v Kelly, 211-1154; 235 NW 471
Jefferies v Prall, 215-763; 246 NW 816
In re Canterbury, 226-586; 284 NW 807
In re Fisher, 226-596; 284 NW 821
School District v Ida County, 226-1237; 286 NW 407
Armstrong v Smith, 227-450; 288 NW 621
Fed. Bank v Trust Co., 228- ; 290 NW 512

Supported findings of court in law actions inviolable. It is beyond the power of the appellate court in a law action tried solely to the court to disturb the findings of the court on conflicting but supporting evidence, or to disturb the judgment based on such findings.

Eilers v Frieling, 211-841; 234 NW 275

Presumption attending general findings. A defendant-appellee may not have an affirmance on appeal on the theory that the general findings of the trial court in his favor imply a finding in his favor on every material and defensive issue, when the record shows that the issues in question were abandoned by defendant in the trial court.

Schaffer v Acklin, 205-567; 218 NW 286

Grounds presentable by appellee. When the lower court in an equity cause sustains plaintiff's action on one presented ground, but overrules all other presented grounds, the appellee on appeal may very properly argue the correctness of the overruled grounds.

Reason: The appellate court must affirm the decree of the lower court if it is sustainable on any ground properly presented in the lower court, irrespective of the findings of the lower court.

Wyatt v Manning, 217-929; 250 NW 141

Findings on conflicting evidence—conclusiveness. Where different inferences reasonably may be drawn from undisputed facts and circumstances, the drawing of any one of such inferences by the court in a trial without a jury is a final finding which will not be disturbed on appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Supported findings in probate. Supported findings of fact by the probate court have the force and effect of a verdict of a jury and will not be reviewed on appeal.

In re Fish, 220-1328; 264 NW 542

Preservation of estate funds—findings in probate. A supported finding by the probate court that an administrator had failed to exercise ordinary care to preserve the funds of the estate is conclusive on the appellate court.

In re Foster, 218-1202; 256 NW 744

Loss to estate—certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

Removal of administrator—failure to hear evidence. An order by the court removing an administrator will not necessarily be deemed invalid because the court did not formally receive any testimony.

In re Donlon, 201-1021; 206 NW 674

Court findings—effect on trial de novo. In an equitable proceeding where there is conflict in evidence, the supreme court must give weight to findings of trial court altho case is tried de novo.

Horn v Ins. Co., 227-1045; 290 NW 8

Probate orders—non de novo hearing. An appeal from an order adjudging the final liability of an administrator is not heard de novo. In other words, the supported findings of the trial court are conclusive on the appellate court.

In re Enfield, 217-273; 251 NW 637

Findings on objections to administrator's final report. Trial court's ruling on objection to administrator's final report will not be disturbed on appeal where fact question was involved, as supreme court would not substitute its judgment for that of court below.

In re Windhorst, 227-808; 288 NW 892

Probate proceedings not triable de novo. A ruling by the lower court approving the final report of an executor and overruling objections thereto is not triable de novo on appeal and will be affirmed if substantial support is found in the record.

In re Smith, 228- ; 289 NW 694

Probate findings. The supported finding of the court in probate on the issue whether funds received by a person were received by him as guardian or as trustee (bond in each case having been given) is conclusive on the appellate court.

In re Baldwin, 217-279; 251 NW 696

Allowance of claims — conclusiveness. The allowance of a claim by the probate court on supporting testimony is conclusive on the appellate court, even tho the supporting testimony is not wholly satisfactory to the judicial mind.

Olson v Roberts, 218-410; 255 NW 461

Disallowance of claims. A supported finding in probate that a claim should be disallowed is conclusive on appeal.

Chamberlain v Fay, 205-662; 216 NW 700
In re Anderson, 216-1017; 250 NW 183

Advancements—how issue tried. A proceeding in probate on the issue whether a conveyance by a father to his son constituted an advancement is triable, both in the trial and appellate court, as an action at law. It follows that a supported finding by the trial court is conclusive on the appellate court.

In re O'Hara, 204-1331; 217 NW 245

Court findings upheld. In proceedings to establish a lost will, the loss of the will and the search for it were proved by evidence that the will could not be found altho the home of the deceased and other places where the

will might have been kept were thoroughly searched. The conclusion of the trial judge on the sufficiency of such evidence will not be disturbed unless discretion is abused.

Goodale v Murray, 227-843; 289 NW 450

Supported findings in law action—conclusiveness. The finding and judgment of trial court on claim against decedent's estate has the effect of a jury verdict and may not be set aside if it finds any substantial support in the record.

In re Green, 227-702; 288 NW 881

When reviewable. Findings of the trial court in a law action (under §11972, C., '35) that plaintiff was not entitled, on the facts, to be relieved from his failure to make timely filing of a claim against an estate, will not be disturbed on appeal when substantially supported by the record.

Bates v Remley, 223-654; 273 NW 180

Assignment of errors — fatal insufficiency. Assignments of error which make no reference to any part of the record other than to the exceptions to the rulings of the court, with no specific complaint or reason assigned why the court was in error, must be deemed omnibus in form and fatally insufficient.

Rogers v Davis, 223-373; 272 NW 539

Malicious prosecution — questions for jury. Evidence reviewed in action for damages for false arrest and malicious prosecution (padlocked schoolhouse case), and held such as to preclude the court from determining the question of want of probable cause, malice, and good-faith reliance on the advice of counsel.

Gripp v Crittenden, 223-240; 271 NW 599

Cashing of check—conclusiveness of findings. Whether the facts and circumstances attending the receipt by a creditor from a debtor of a check for an amount less than claimed by the creditor, and the cashing of the check by the creditor, constituted an accord and satisfaction may be a question of fact; and the findings of the court thereon in a law action tried to the court, on conflicting and supporting testimony, are necessarily conclusive on the appellate court.

Barth Co. v Kelly, 211-1154; 235 NW 471

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts, with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a share cropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

Redemption of mortgage—extension of time —rent—reasonableness. An order fixing the rent to be paid by the mortgagor to the mortgagee, during a granted extension of time in which to redeem, may be conclusive on the appellate court, in view of the nature of the very meager testimony presented.

Union Ins. v Waddell, 218-1367; 257 NW 319

Homestead abandonment. A finding by the trial court, in a law action, on conflicting but supporting testimony that a homestead had been abandoned, is conclusive on the appellate court.

Crail v Jones, 206-761; 221 NW 467

When conclusive. A finding by the trial court on supporting testimony that a wife signed both the note and mortgage of her husband solely for the purpose of waiving her dower interest, and received no actual consideration herself, is conclusive on the appellate court.

Bates v Green, 219-136; 257 NW 198

Directed verdict—failure to rule on motion. Error, if any, in trial court's failure in replevin action to rule on defendant's motion to direct verdict at close of plaintiff's evidence is not prejudicial where case is tried to court.

Prehn v Kindig, (NOR); 232 NW 812

Conclusiveness of court's finding. The finding of the court in a trial to the court on supporting evidence on the issue whether an insured died "solely through external, violent, and accidental means" or from disease is conclusive on the appellate court; and it is immaterial that the court determines its findings by sustaining a motion to dismiss at the close of all the evidence, or by overruling such motion and later dismissing the action on its own motion.

Cherokee v Ins. Co., 215-1000; 247 NW 495

Judgment on bail bond—conclusiveness. A finding by the court, on conflicting and supporting testimony, in a proceeding to set aside a judgment on a bail bond, that the surety had,

at his own expense, caused the principal in the bond to be delivered to the sheriff, is not reviewable on appeal.

State v Robinson, 205-1055; 218 NW 918

Electric plant earnings — fact findings in trial to court. Where an injunction wrongfully restrained and delayed, for 11 months, construction of a municipal light plant and in an action on the injunction bonds, tried without a jury, where the trial court had evidence to determine the plant's net earnings for first year of operation and there was sufficient evidence to support his findings that earnings during 11 months lost by delay would have been substantially same, damages in that amount for such period are not too speculative, remote, and uncertain, and such findings are conclusive on appeal.

Corning v Iowa-Nebr. L. & P. Co., 225-1380; 282 NW 791

Social welfare board—findings of fact—noninterference by court. The provisions as to powers and authority of the court on appeal, under the provisions of the social welfare law as to old-age assistance, are somewhat analogous to those of the workmen's compensation law, under which the holdings of our court have always been that, when supported by competent evidence, the findings of fact by the commission will not be interfered with by the court.

Schneberger v Board, 228- ; 291 NW 859

Probate claim denied—no bar in subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Attorney fee allowance. Tho a presumption of correctness exists in favor of trial court's decision fixing compensation for administrator's attorney, yet, where objection is made to application for allowance, and no evidence is introduced as to the services other than a bare statement in the applicant's affidavit, the trial court is not warranted in making a finding involving both nature and value of services.

Glynn v Bank, 227-932; 289 NW 722

Findings of fact in probate. The appellate court will review an attorney's allowance for ordinary or extraordinary services to an estate where it appears from the record that the allowance is excessive or the claim therefor is not supported by sufficient evidence.

Glynn v Bank, 227-932; 289 NW 722

11437 Separate trials.

Joint tort-feasors.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419; 34 NCCA 306

Denial of separate trial. An order refusing a separate trial to one of two joint defendants is appealable when it materially affects the "final decision".

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Separate trial—right to. Reversible error results from refusing a separate trial to a defendant who is sued jointly with another for damages consequent on his alleged negligence, and on the alleged recklessness of his codefendant, the defensive issues of the two defendants being wholly hostile to each other, and the opportunity existing for collusion between the plaintiff and such other defendant.

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Joint tort-feasors with different defenses. Altho joint tort-feasors may be joined in one action, a petition charging two colliding motorists generally with negligence and recklessness and only alleging that plaintiff was riding in one of the vehicles with no averment as to his status as a guest or otherwise, presents to the jury such complex and confusing issues as to entitle defendants to separate trials.

Fay v Dorow, 224-275; 276 NW 31

11438 Trial notice.

Order of court in lieu of notice. No necessity exists for the filing of a trial notice in a cause when the court enters an order placing the cause on the trial calendar under conditions which operated exactly as a trial notice would have operated.

Fidelity Inv. v White, 212-782; 237 NW 518

Default for nonappearance—trial to court. Where an action on a promissory note had been assigned for trial, continued to the next day because of defendant's nonappearance for trial, and at such time called for trial a second time with defendant still not appearing until after the jury panel had been dismissed, a default having been entered, and plaintiff being allowed to prove up his case to the court, held on defendant's belated appearance and demand for jury trial, an offer by the court to require plaintiff to reintroduce his evidence but requiring a trial to the court without a jury, otherwise, permitting default and judgment thereon to stand, was not error.

Vaux v Hensal, 224-1055; 277 NW 718

Want of prosecution—court rules construed with statute. A district court rule, providing for dismissal of actions for want of prosecution if not noticed for trial within one year,

must be construed in conjunction with statute requiring trial notices to be filed.

Thoreson v Central States Co., 225-1406; 283 NW 253

Reinstating dismissed action. One seeking to reinstate an action which has been dismissed must do more than establish his ground for vacating the judgment; he must show that he has a valid cause of action or defense to the action in which the judgment was rendered. Held that the failure of plaintiffs to make a prima facie showing of a valid cause of action was fatal to their proceedings.

Thoreson v Central States Co., 225-1406; 283 NW 253

11439 Assignments—hearing of motions, etc.

Court's discretion. Assignment of causes rests largely within discretion of trial court.

Collings v Gibson, (NOR); 220 NW 338

Assignment before issues joined. The assignment of a case for trial before the issues are fully made up does not constitute error.

Bliss v Watson, 208-1199; 227 NW 108

Effect of assignment to certain judge. When a cause is assigned to, and tried by, a judge of the district court, all other judges of the same court are thereby deprived of jurisdiction to dismiss the cause while it is pending before said trial judge.

Dunkelbarger v Myers, 211-512; 233 NW 744

11440 Docketing appeals.

Bond not required. No appeal bond is required in an appeal to the district court from the judgment of an election contest court by a party who is not an incumbent of the office in question, this section having no application to such a case.

Donlan v Cooke, 212-771; 237 NW 496

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

11441 Calendar.

Atty. Gen. Opinion. See '34 AG Op 93

Dropping action from calendar — reinstatement. The district court has jurisdiction to reinstate a cause which, under order of court, has been "dropped from the calendar" if such dropping was not with the intent to dismiss.

Bankers Tr. v Dist. Court, 209-879; 227 NW 536

See Dunkelbarger v Myers, 211-512; 233 NW 744

Appeal from order noted on calendar. A party may not appeal from an order in the form of a mere notation on the judge's calendar, which order is later incorporated into the final decree.

Brotherhood v Ressler, 216-983; 250 NW 169

Entry—necessity. Principle reaffirmed that the oral rendition by the court of his decision, the entry of such decision on the court calendar, and the transcribing of such entry into the appearance docket and fee book do not constitute a judgment.

State v Wieland, 217-887; 251 NW 757

Extending time to file motion—journal entry valid. A statute requiring that an application for a new trial must be made within five days after the verdict is rendered unless the court grants an extension of time, contemplates orders which are only temporary and incidental to the case, and an order extending the time for such application was effective to extend the time beyond the five-day limit, when it was entered on the judge's calendar before the five days were up, even tho not entered on the record book until seven days after judgment was rendered.

Street v Stewart, 226-960; 285 NW 204

Calendar entry as judgment. From a statute requiring that all judgments and orders must be entered in the record book, it may be inferred that the judge's calendar is in the nature of a memorandum book ordinarily used by the judge to guide the clerk in entering judgments and orders in the record book which is their final place of repose, and that the clerk's entry in the record book is the legal evidence of a judgment or order.

Street v Stewart, 226-960; 285 NW 204

Competent evidence of judgment — journal entry. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record, and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

11442 Continuances—application for.

Discretion of court. When no continuance was asked, trial court held not to have abused discretion in refusing new trial on ground that defendant was not present at trial.

Bergen v Baker, (NOR); 205 NW 327

Death of absent witness. An order refusing a continuance which was asked for because of the absence of a witness will be sustained when it appears that the absent witness has died since the trial.

Suiter v Wehde, 218-200; 254 NW 33

Continuance under financial emergency. The legislative power of the state may, for the purpose of ameliorating an existing, public, financial emergency, constitutionally grant to a mortgagor, on equitable conditions, the right, in an action to foreclose the mortgage, to a continuance which is very materially in excess of that ordinarily permitted or sanctioned by law. (For fundamental reason see Des Moines Bank v Nordholm, 217 Iowa 1319.)

Craig v Waggoner, 218-876; 256 NW 285
Tusha v Eberhart, 218-1065; 256 NW 740

Dismissal for want of prosecution. The dismissal of an action for want of prosecution is eminently proper (1) when plaintiff knew that defendant was insisting on immediate trial, (2) when the cause was twice assigned for trial at the same term, and (3) when defendant failed to appear at the time finally set for trial and filed no motion for continuance.

Pride v Kittrell, 218-1247; 257 NW 204

Foreclosure—continuance under emergency act. The emergency act for the continuance of mortgage foreclosure proceedings (Ch 182, 45th GA) was not designed to grant a continuance to a mortgagor of nonhomestead property who is so hopelessly insolvent that a continuance would, manifestly, work no benefit to him but would work material harm to the mortgagee.

Reed v Snow, 218-1165; 254 NW 800

11443 Causes for.

Continuances in criminal cases. See under §13843
Mortgage moratorium continuances. See under §12372 (VII)
Discussion. See 12 ILR 182—Continuance—constitutional right

Arbitrary refusal. The refusal of the board of medical examiners (§2578-a, S., '13), in proceedings for the revocation of the license of a physician, to grant a continuance until the accused had finished serving a sentence in the penitentiary is not necessarily arbitrary.

State v Hanson, 201-579; 207 NW 769

Justifiable refusal. Reversible error does not result from the action of the court in permitting a belated nonissue-changing amendment to the petition to stand, and in refusing defendant a continuance until all his attorneys can be present at the opening of the trial.

Newland v McClelland, 217-568; 250 NW 229

Unsustained grounds. Refusal of a continuance will not be deemed error when movant's ground of surprise is wholly unfounded.

Cochran v Sch. Dist., 207-1385; 224 NW 809

Wide discretion of court. An order overruling a motion for a continuance will not be interfered with on appeal in the absence of a showing that the order has resulted in grave injustice.

Twaites v Bailly, 210-783; 231 NW 332

Useless amendment. An amendment to a petition in a real estate mortgage foreclosure to the effect "that the mortgagor was the owner of the land when the mortgage was executed" is unnecessary and, if made, furnishes no basis for a continuance on the ground of surprise.

Fitz v Forbes, 208-970; 226 NW 117

Intervenor as applicant—rule for determination. Whether an intervenor has a right to a continuance, even on account of his own sickness and consequent inability to be present at the trial and testify, must be determined by giving due consideration to the fact that, by statute (§11175, C., '35) he "has no right to delay".

Flood v City N. Bank, 220-935; 263 NW 321

Labor union injunction—state as party. A continuance requested on the ground that the state had been made a party to proceedings involving the violation of an injunction by labor union officers was properly refused when the petition of the state alleged the same matter and sought the same relief as the petition of the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Continuance—refusal to sick litigant—denial of day in court—discretion reviewed. A motion for a continuance in a will contest, addressed to the sound discretion of the court, should have been sustained when it is properly shown that one of the proponents was seriously ill, and through no fault or negligence on her part, would be unable to attend the trial. Depriving a party in this manner of his day in court is abuse of discretion.

In re Rogers, 226-183; 283 NW 906

Receiver — application — continuance. A plaintiff in a mortgage foreclosure, who enters

upon the hearing of his application for the appointment of a receiver, may very properly be denied (1) a continuance in order to enable him to secure the note and mortgage as evidence, (2) the right to dismiss his application with the option to refile the same after execution sale, and (3) the right so to withdraw the application that the court would retain jurisdiction thereover, and act thereon after the result of the execution sale became known.

Des Moines JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Curing erroneous denial. If it be error for the trial court in the midst of a jury trial to refuse a 24-hour continuance to enable plaintiff to produce absent testimony rendered necessary by a sudden and unexpected ruling of the court, said error is cured or avoided by the action of the court in offering to permit plaintiff to dismiss his action without prejudice, and by the plaintiff's rejection of said offer, there being no showing that plaintiff would suffer loss on account of a dismissal.

Putnam v Bussing, 221-871; 266 NW 559

Guardianship proceedings. A motion for a continuance, even in proceedings for the appointment of a guardian, is addressed, peculiarly, to the sound legal discretion of the court, and the order overruling such motion is conclusive on the appellate court unless it clearly appears that the trial court has abused its discretion and thereby perpetrated an injustice.

Anspach v Littler, 217-787; 253 NW 120

11444 Absence of evidence.

ANALYSIS

I THE AFFIDAVIT
II NAME, RESIDENCE, AND ATTENDANCE OF WITNESS
III DILIGENCE
IV FACTS SOUGHT TO BE PROVED

Continuances in criminal cases. See under §13843

I THE AFFIDAVIT

Insufficient showing. A motion for a continuance because of the absence of witnesses, with an affidavit in support thereof, is properly overruled when they fail to set forth the facts to which such witnesses will testify.

State v Candler, 204-1355; 217 NW 233

II NAME, RESIDENCE, AND ATTENDANCE OF WITNESS

Negligence. The trial court manifestly does not abuse its discretion in overruling a motion for a continuance because of the absence of a witness when movant's predicament is directly traceable to his own fault and negligence.

Temple Lbr. v Lattner, 211-465; 233 NW 522

Death of absent witness. An order refusing a continuance which was asked for because of the absence of a witness will be sustained when it appears that the absent witness has died since the trial.

Suiter v Wehde, 218-200; 254 NW 33

III DILIGENCE

Continuance—absence of witnesses. The refusal of the court to continue a cause in order to enable counsel to obtain a witness will not be deemed error when there is no showing as to diligence or as to the time in which the witness might have been produced.

Miller v Hurburgh, 212-970; 235 NW 282

IV FACTS SOUGHT TO BE PROVED

Insufficient showing — failure to set forth facts. A motion for a continuance because of the absence of witnesses, with an affidavit in support thereof, is properly overruled when they fail to set forth the facts to which such witnesses will testify.

State v Candler, 204-1355; 217 NW 233

11445 Admission by opposite party.

Continuances in criminal cases. See under §13843

Avoidance by admission. An intervenor is properly denied a continuance because of his own sickness and consequent inability to be present and testify at the trial, (1) when his intervention was delayed until after the action in question had been reversed and remanded on appeal and until the very eve of the retrial, and (2) when it is admitted that intervenor, if present, would testify to the alleged facts set forth in his application.

Flood v Bank, 220-935; 263 NW 321

11450 Appeal.

Election of remedies generally. See under §10939 (II)

Prosecution — several offenses — election at close of direct evidence. In a statutory rape prosecution, where several acts of intercourse are shown, the state need not, before the close of the direct evidence, elect on which act it relies.

State v Beltz, 225-155; 279 NW 386

Petition in two counts—(1) guest and (2) not a guest. A passenger in an automobile receiving injuries in a collision may not be required to elect between counts when his petition contains (1) a count alleging recklessness based on theory he was a guest, and (2) a count alleging negligence based on theory he was not a guest.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

New party but same relief—no election of remedies. In an action to compel certain heirs to contribute a share of a judgment arising

out of a decedent's ownership of bank stock, a petition that alleges defendants' liability as individuals is not an election of remedies so as to prevent an amendment thereto setting up liability against an estate as an additional party, since there was no change in the nature of relief asked and no choice was made between inconsistent remedies at the time of the election.

Daniel v Best, 224-1348; 279 NW 374

Action by teacher for compensation—pleading—intervention by taxpayer. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v School Dist., 225-1272; 282 NW 754

Plea and answer—reply inconsistent with petition—election. Plaintiff's petition alleged a cause of action against defendant as a peace officer. Plaintiff filed a reply in which he denied that the defendant was acting as a peace officer. Such departure did not change, add to, or enlarge the cause of action alleged in the petition. The function of a reply is to avoid matters alleged in the answer or make an issue when a counterclaim is alleged. Plaintiff having alleged but one cause of action, the trial court did not err in refusing to require plaintiff to elect between causes of action.

Boyle v Bornholtz, 224-90; 275 NW 479

Erroneous docketing—effect. An applicant for condemnation of realty who erroneously causes its appeal from the award of the sheriff's jury to be docketed in the name of itself as plaintiff, and in the name of the landowner as defendant, and files petition, and thereby induces the landowner to file answer thereto, is in no position, after causing its own error to be corrected by a proper redocketing, either to demand the entry of judgment in accordance with its own offer to confess judgment, or to object to the action of the court in granting to the landowner (the proper plaintiff) a continuance over the term in which to file a proper petition.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

11456 Detailed report of trial.

Correction of reporter's notes. See under §10803 (III)
Reporter's notes as evidence. See under §§11353, 11354

Record—nonnecessity for demand. A litigant need not formally demand that the "whole proceedings" be reported in the form of a complete record, when such record is being made in the presence of all the parties in pursuance of a general custom of the court and reporter.

Andrew v Bank, 206-1368; 222 NW 553

Failure to preserve record. Tho a motion to vacate a final decree for erroneous proceedings which preceded the decree, be treated in the appellate court as a motion for a new trial, yet movant cannot prevail when he deliberately permitted such proceedings to take place in the trial court without any record preservation, and seeks in his motion proceedings to establish them by mere affidavit and extraneous testimony.

Radle v Radle, 204-82; 214 NW 602

Record—proceedings after judgment. On an appeal from a judgment in mortgage foreclosure, the fact that execution has been issued and the property so sold as to leave a deficiency judgment is not properly made a part of the appellate record by including the same in an amendment to the abstract, and such amendment will be stricken on motion.

John Hancock Ins. v Linnan, 205-176; 218 NW 46

11457 Certification—ipso facto bill.

ANALYSIS

I CERTIFICATION AND FILING
II DOCUMENTARY EVIDENCE

I CERTIFICATION AND FILING

Certification of evidence—absence of time limit—effect. Evidence taken in an equitable action need not be certified by the trial judge and reporter until there exists a necessity for such certification. Conceding, arguendo, that the certification should be made within a reasonable time after such necessity arises, then the presence or absence of prejudice will materially control the question as to what is such reasonable time.

Andrew v Bank, 206-1368; 222 NW 553

Correction of certificate to shorthand notes. A purported certificate of the trial reporter to the correctness of the shorthand notes, which certificate is fatally defective because not signed by the reporter, may be corrected by said reporter by the subsequent execution of a new and duly signed certificate.

Melman Co. v Melman, 216-45; 245 NW 743

Filing abstract when notes and transcript not with clerk. An abstract filed with the clerk of the supreme court within the time provided by statute (§12847, C., '31) is a proper and valid abstract notwithstanding the fact that, at the time of said filing, the shorthand notes had not been returned to, nor had

the transcript been filed with, the clerk of the trial court.

Melman Co. v Melman, 216-45; 245 NW 743

Necessary corrections in trial court. An attack on the record as duly certified to the supreme court on appeal cannot be originated in the supreme court. If the record in the trial court is incorrect it must be there corrected by amendment on proper application.

Melman Co. v Melman, 216-45; 245 NW 743

II DOCUMENTARY EVIDENCE

Documentary evidence in general. See under §11254 (II)

Nonjudicial record of foreign state—effect of federal statute. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record.

Bristow v Lange, 221-904; 266 NW 808

11468 Peremptory.

Interest in insurance companies. The wide discretion of the trial court to permit counsel to ask jurors on their voir dire whether they are stockholders, officers, or directors in any insurance company writing automobile liability insurance will not be interfered with in the absence of an abuse of such discretion. But the purpose of such questions must be solely to guide counsel in exercising his peremptory challenges.

Raines v Wilson, 213-1251; 239 NW 36
Kaufman v Borg, 214-293; 242 NW 104
Holub v Fitzgerald, 214-857; 243 NW 575

Questioning jurors as insurance stockholders—when proper. Counsel, when actuated by good faith and the sole purpose of acquiring information which will control the exercise of his peremptory challenges, may very properly be permitted, in a personal injury action, to ask a juror on his voir dire whether he or any member of his family is a stockholder in any insurance company.

Montanick v McMillin, 225-442; 280 NW 608

Improper reference to insured liability. The rule of law, in actions for personal injuries, that reversible error results from the willful injection, by plaintiff, into the record and before the jury, of the fact that defendant is carrying insurance against the liability sued on, is not violated:

1. By asking, in good faith, a juror on voir dire whether he is interested in any such insurance company, or
2. By asking a witness, in good faith, for legitimate testimony, and receiving an answer which, inter alia, reveals the fact of such insurance. (And especially when defendant's cross-examination accentuates the objectionable answer.)

Bauer v Reavell, 219-1212; 260 NW 39

11469 Challenges—number—striking.

Overruled challenge—waiver. A party may not predicate error on the overruling of his challenge for cause to a juror when he fails to utilize his unused peremptory challenges.

Tobin, etc. v Budd, 217-904; 251 NW 720

11472 Challenges for cause.

Discussion. See 2 ILB 127—Unknown disqualification of juror

ANALYSIS

I CHALLENGE FOR CAUSE GENERALLY
II QUALIFICATIONS
III FIDUCIARY, CONFIDENTIAL AND OTHER SPECIAL RELATIONS
IV JUROR IN FORMER TRIAL OF SAME ISSUES
V OPINION OR BIAS
VI INTEREST IN LIKE ISSUES

General provisions in re jurors. See under §§10842–10847, Vol I

I CHALLENGE FOR CAUSE GENERALLY

Rejection of competent juror. The rejection by the court of a qualified juror does not constitute reversible error in the absence of a showing that, because of such rejection, the complainant did not have a fair trial.

Boston v Elec. Co., 206-753; 221 NW 508

Competency—excusing for insufficient cause—effect. It is suggested that it is not reversible error to exclude a juror for an insufficient cause if an impartial jury is afterwards obtained.

State v Kendall, 200-483; 203 NW 806

Competency—discretion of court. Whether a juror shall be excused on an issue as to his competency rests in the sound legal discretion of the court.

State v Kendall, 200-483; 203 NW 806

Competency—friendliness with defendant—no cause for challenge. Friendliness of a prospective juror with the defendant is not a cause for challenging his competency, when he states on examination that he would try the case on the evidence, the court's instructions, and render a fair and impartial verdict.

Tharp v Rees, 224-962; 277 NW 758

II QUALIFICATIONS

Competency—waiver. The fact that a juror was an election judge at the election at which the jury list was selected and certified, is not a ground for challenge for cause even tho his name is certified as a juror in violation of the statute. In any event, any tenable objec-

II QUALIFICATIONS—concluded

tion to the juror is waived by not discovering the incompetency until after the verdict.

State v Burch, 202-348; 209 NW 474

Competency — waiver. Incompetency of a juror because of deafness is waived (1) by failing to examine the juror as to such condition, or (2) by so examining him and accepting him without objection.

Tollackson v City, 203-696; 213 NW 222

III FIDUCIARY, CONFIDENTIAL AND OTHER SPECIAL RELATIONS

Acquaintance and relationship between jurors and witnesses. It is quite proper for counsel upon the voir dire to ascertain by proper questions the acquaintance and relationship existing between prospective jurors and prospective witnesses.

Duncan v Rhomberg, 212-389; 236 NW 638

Attorney and client. The relation of attorney and client is not established by the simple showing that the attorney in question had, at one time in the past, examined an abstract of title for the juror.

Tobin, etc. v Budd, 217-904; 251 NW 720

IV JUROR IN FORMER TRIAL OF SAME ISSUES

No annotations in this volume

V OPINION OR BIAS

Jury—competency—friendliness with defendant—no cause for challenge. Friendliness of a prospective juror with the defendant is not a cause for challenging his competency, when he states on examination that he would try the case on the evidence, the court's instructions, and render a fair and impartial verdict.

Tharp v Rees, 224-962; 277 NW 758

VI INTEREST IN LIKE ISSUES

No annotations in this volume

11473 How tried.

Injecting insurance in motor vehicle accident cases. See under §5037.09 (VII)

Discussion. See 12 ILR 433—Judicial examination of jurors; 17 ILR 501—Informing of defendant's insurance

Conduct of jurors—false answers on voir dire. False answers by a juror on his voir dire do not constitute grounds for new trial unless shown to be prejudicial.

Elmore v Railway, 207-862; 224 NW 28

Voir dire examination—permissible range. The act of the county attorney, in a prosecution for maintaining a liquor nuisance, in asking a proposed juror (whose business was transporting beer) whether he would vote to convict the accused if the accused was proven guilty beyond all reasonable doubt, will not, in and of itself, be deemed prejudicial error.

State v Harrington, 220-1116; 264 NW 24

Interest of juror in insurance company. The good faith asking on voir dire whether a prospective juror is a policyholder or in any way interested in a certain insurance association, is not reversible error.

Kaufman v Borg, 214-293; 242 NW 104

Motor vehicle collision—injecting insurance on voir dire—discretion of court. Control of voir dire examination on the subject of liability insurance is largely within the discretion of the trial court, and will not be interfered with without a showing of prejudicial abuse.

Hawkins v Burton, 225-707; 281 NW 342

Voir dire examination. In an action for damages arising out of a collision between automobiles, plaintiff, in the selection of the jury, has the right, in a proper manner, to ask each prospective juror whether he is in any manner interested in any liability insurance company.

Olson v Tyner, 219-251; 257 NW 538

Voir dire examination as to insurance — motor vehicle case. In examining jurors for an automobile accident case, where counsel asked two or three jurors if they had insurance in a certain company, and the court then learned that the plaintiff was not insured in a mutual company and so informed the counsel, such allowance of questions was not an abuse of discretion of the trial court, when no improper motive or bad faith was shown, and no other mention of insurance was made.

Kiesau v Vangen, 226-824; 285 NW 181

11479 Drawing.

Jury drawn from part of panel. An accused in a criminal cause who fails to show that he exercised any or all of his peremptory challenges, or that he did not obtain a fair and impartial jury, may not complain that he was denied the right to have the jury drawn from the entire jury panel.

State v McHenry, 207-760; 223 NW 535

11485 Procedure after jury is sworn—order of evidence.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I TRIAL GENERALLY
II ORDER OF EVIDENCE
III NUMBER OF WITNESSES

"Burden of proof" or "burden of issue". See under §11487
Cross-examination of witnesses. See under §11254
Reopening case—oversight or mistake corrected. See under §11505

I TRIAL GENERALLY

Examination by several counsel. The act of the court in permitting more than one counsel to cross-examine witnesses does not necessa-

rily constitute error, especially when there are several defendants in the case.

Williamson v Craig, 204-555; 215 NW 664

Discretion as to nonrelevant matter. The court, having exercised its discretion to permit a litigant to introduce testimony of a somewhat nonrelevant nature, may very well permit the opposite party to counter with opposing testimony on the same point.

Nigut v Hill, 200-748; 205 NW 312

Conduct of trial—leading questions. Perhaps trial court should refrain from objecting on his own motion to leading questions, but no prejudice resulted where court's views as to weight of evidence were not disclosed and trial court must be allowed some latitude in supervising trials.

State v Carlson, 224-1262; 276 NW 770

Unnecessary assumption of burden. A plaintiff may assume the burden of showing that the signature to an instrument, defensively pleaded against him by the defendant, is not genuine, even tho he might have availed himself of a statutorily implied denial of the answer, or might have definitely cast the burden as to genuineness upon the defendant by a denial under oath. And if he successfully establishes the aforesaid negative he will be accorded the same protection as tho the defendant had failed to establish the affirmative.

McFerren v Bank, 214-198; 238 NW 914

Fraud—burden of proof. Principle reaffirmed that (barring fiduciary relationships) the burden of proof rests on the party who alleges fraud, undue influence, or mental incompetency as the basis for invalidating a deed of conveyance.

Kramer v Leinbaugh, 219-604; 259 NW 20

Striking allegation (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Collateral issue. The right to pursue a collateral issue developed on cross-examination is in distinct disfavor in our law, especially when the evidence in support thereof is ambiguous, remote from all proper issues, and otherwise incompetent.

Moen v Fry, 215-344; 245 NW 297

Unallowable scope. Reversible error results in permitting a cross-examination to develop testimony which is highly prejudicial to the party calling the witness, and which has no relation to the testimony developed on the direct examination.

McNeely v Conlon, 216-796; 248 NW 17

Cross-examination—broad discretion of court—abuse. Principle reaffirmed that the court has broad discretion in determining the proper limits of a cross-examination,—a discretion which will not be interfered with except in case of clear abuse.

Laudner v James, 221-863; 266 NW 15

Cross-examination—fatal undue limitation. Undue limitation on the cross-examination of a witness may constitute reversible error. So held where the examining party offered to prove, on cross-examination, material matter which went to the heart of the controversy.

West Branch Bank v Farmers Exchange, 221-1382; 268 NW 155

Evidence offered covered by other testimony. Where an offer of evidence was made during cross-examination, and was covered by other testimony, there was no prejudice in sustaining an objection to the offer.

Maddy v City Council, 226-941; 285 NW 208

Opportunity to cross-examine — necessity. When a recess was taken after the cross-examination of a witness for the defendants had begun, and through no fault of the defendants the witness did not re-appear for further cross-examination, his testimony was properly stricken on the ground that the plaintiff had been denied the right of full cross-examination.

Womochil v Peters, 226-924; 285 NW 151

Question read by reporter—repeating objection unnecessary — answer stricken. An answer to a question should not be permitted to stand, even without objection, when it came as the result of the reporter reading the question previously given and objected to, which objection was sustained.

Jakeway v Allen, 226-13; 282 NW 374

Belated nonrebuttal testimony. The reception of nonrebuttal testimony after parties have rested will not be deemed reversible error unless it affirmatively appears that the court abused its discretion.

Hoegh v See, 215-733; 246 NW 787

II ORDER OF EVIDENCE

Reception of evidence — proffer in presence of jury — discretion of court. The court has discretionary power to refuse to permit counsel to state, in the presence of the jury, the controversial facts which he expects to prove by a proffered witness.

State v Teager, 222-392; 269 NW 348

Consideration and delivery—proof by presumptions — instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuine-

II ORDER OF EVIDENCE—concluded

ness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Improper rebuttal evidence—motion to strike necessary for review. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

Gifts—inter vivos—consideration. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

Malicious prosecution—evidence. In action for damages for malicious prosecution, plaintiff has burden to show (1) the prosecution; (2) instigation or procurement by defendant; (3) acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice.

Bair v Schultz, 227-193; 288 NW 119

III NUMBER OF WITNESSES

Cross-examination—limiting to matter covered in direct examination. Cross-examination was properly limited to matters brought out on direct examination in an automobile accident case in which the witness was a defendant taxicab driver with whom the plaintiff was riding, when such witness might be regarded as hostile to the plaintiff's cause.

Womochil v Peters, 226-924; 285 NW 151

11487 Argument—opening and closing.

ANALYSIS

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Amount of proof. See under §11181
Checks, burden to prove presentment. See under §9647
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Motor vehicle cases. See under Ch 251.1, §§5037.09, 5037.10
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I ARGUMENT IN GENERAL

Discussion. See 6 ILB 193—Oral argument

Right to open and close. It is erroneous to refuse to a party, who has the burden of the issue, the right to open and close the argument, but not necessarily reversible error.

Schipfer v Stone, 206-328; 218 NW 568

Right to open and close. The right to open and close argument is properly given to the defendant when the issues are such that plaintiff must recover unless defendant establishes his affirmative defenses.

First Bk. v Tobin, 204-456; 215 NW 767

Burden of issues. The opening and closing argument is properly accorded to a defendant who admits the allegations of the petition but avoids them by an affirmative defense.

Early v Ins. Assn., 201-263; 207 NW 117

Party having full burden of issues. A defendant is properly accorded the right to open and close the argument when he pleads that, when he executed a renewal note to an indorsee, he had knowledge of the fraud in the original note, but that he executed the renewal note because of the false and fraudulent representation of the indorsee that he was a holder of the note in due course.

Continental Bank v Greene, 200-568; 203 NW 9

Latitude allowed. Counsel has the right to draw his own conclusions from the testimony even tho his logic may be faulty, or the opinions expressed or conclusions drawn may be unjust, so long as he keeps within the record and does not appeal to passion and prejudice rather than to reason.

Lawyer v Stansell, 217-111; 250 NW 887

Curing error in argument. An oral admonition by the court to the jury, during argument not to consider a certain statement by counsel, ordinarily cures any error resulting from the making of the statement.

Stingley v Crawford, 219-509; 258 NW 316

Improper argument. An argument to the effect that plaintiff could not have known at the time of an accident of the existence of an ordinance relative to rear signal lights on vehicles, because defendant's counsel did not know such fact until long after the accident, is improper.

DeMoss v Cab Co., 218-77; 254 NW 17

Trial—prosecutor's misconduct—admonition. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were

not true, defendant's counsel would not jump up and squeal like a pig under a gate, and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

Arguments and conduct of counsel. An opening statement in the presence of and not objectionable to the court cannot be an erroneous violation of attorney's privilege of argument since the control thereof rests largely with the trial court.

Thompson v Butler, 223-1085; 274 NW 110

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"

Plaintiff's burden—proving negligence allegations. A plaintiff's failure to carry the burden of proving at least some of his allegations of negligence properly results in a directed verdict against him.

King v Gold, 224-890; 276 NW 774

Dual meaning term "burden of proof". Burden of proof has two meanings: (1) a named litigant must establish a given proposition to succeed and (2) at a given stage in the trial it becomes the duty of one of the parties to go forward with the evidence.

Wilson v Findley, 223-1281; 275 NW 47

Admissions require no proof—binding effect. An admission in a pleading raises no issue, requires no proof, and the pleader is bound thereby.

Blezek v Blezek, 226-237; 284 NW 180

Confession and avoidance—assault and battery. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v Sundholm, 228- ; 291 NW 137

Unnecessary allegation. A pleader need not prove an unnecessary allegation.

Malcolm Bank v Mehlin, 200-970; 205 NW 788

Superfluous allegation. An allegation in mortgage foreclosure that the mortgagor was, when the mortgage was executed, a fee simple owner of the property need not be proven.

Colby v Forbes, 207-9; 216 NW 722

Right to ignore one's own allegation. A plaintiff in making his proof may ignore a negative allegation which he need not have made, when defendant pleads, as was his legal duty, an affirmative allegation as to the same subject matter.

Wilson v Fortune, 209-810; 229 NW 190

Undue influence—burden of proof. Burden of proving undue influence, and its invalidating effect on a transaction, rests on him who makes the allegation.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Answer — unnecessary plea. A defendant who specifically pleads certain matter as a defense in addition to his defense of general denial thereby invites the court so to instruct as to impose on defendant the burden to prove said specially pleaded defense, even tho said defendant might have rested on his general denial.

Jordison v Jordison Bros., 215-938; 247 NW 491

Burden to sustain jurisdiction. On special appearance directly attacking the jurisdiction of the court because of a defect in the original notice or in the service thereof, the burden of proof rests upon the plaintiff to sustain the jurisdiction by proof of an adequate notice and the service thereof; and such burden is not met by the production of a captionless, unaddressed, and unsigned notice.

Pendy v Cole, 211-199; 233 NW 47

Proving material fact—inference from isolated fact insufficient. Proof of a material fact is not accomplished by inference from one isolated incident or circumstance, but from the aggregation of all related circumstances that appear.

McGarry v Mathis, 226-37; 282 NW 786

Ownership of claim. One need not affirmatively prove that he is the owner of a cause of action which arose in his favor out of the very transaction on which he is sued.

Williams v Burnside, 207-239; 222 NW 413

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

Burden to prove invalidity of statutes. One who attacks the constitutionality of a statute must show its invalidity beyond a reasonable doubt.

Miller v Schuster, 227-1005; 289 NW 702

Husband—nonsupport. In a prosecution for failure of a husband to support his wife and child, it is not incumbent on the accused to

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

show that he was "without fault", and reversible error results from so instructing.

State v Gude, 201-4; 206 NW 584

Divorce—desertion—insanity. When it appears that the defendant in an action for divorce based on desertion has been judicially declared insane, plaintiff must overcome the presumption that such insanity continued. In other words, plaintiff must establish a return to sanity on the part of defendant—must establish a mental condition such as would enable defendant to form an intent to desert.

Carr v Carr, 209-160; 225 NW 948

Antenuptial conveyance — fraud. A wife who pleads that her deceased husband fraudulently disposed of his property prior to marriage, in order to deprive her of the interest which she would take as a wife, must establish (1) an existing contract of marriage between herself and the deceased at the time of the conveyance by the deceased, and (2) that she had no knowledge of such conveyance prior to her marriage.

In re Mann, 201-878; 208 NW 310

Elections—contests—preserving and guarding ballots. Ballots cast at an election are not admissible as evidence in a subsequent contest unless the contestant first establishes the fact that the officer legally charged with the custody of said ballots has preserved, guarded, and protected them in such manner as to reasonably preclude the opportunity of unauthorized persons to tamper with them.

Matzdorff v Thompson, 217-961; 251 NW 867
Traeger v Meskel, 217-970; 252 NW 108

Execution — levy — return — presumption —burden to overcome. A party who claims that the various entries of the acts done under an execution and constituting the officers "return" were not entered at the time the various acts were done, has the burden to so show. In the absence of such showing, it must be presumed that the officer did his duty and made the entries at the time required by statute. (§11664, C., '31.)

Northwestern Ins. v Block, 216-401; 249 NW 395

Replevin—strength of title. Plaintiff in replevin, in order to recover, must show, by the strength of his own title, that, when the writ was issued, he was entitled to the possession of the property in question. Evidence held quite insufficient so to show.

Chorpening v Nickerson, 223-791; 273 NW 843

Requiring defendant to prove allegations of co-defendant. In damage action by one riding in an automobile against a truck driver and his employer where defense was conducted jointly and where, in respect to negligence, the question was whether negligence of the automobile driver or the negligence of the truck driver was the sole proximate cause of the accident, it was not prejudicial error to instruct jury that burden was upon both defendants to prove negligence of automobile driver, affirmatively alleged by the employer alone.

Usher v Stafford, 227-443; 288 NW 432

Injury from motor vehicle—fraud in settlement—burden. A plaintiff, injured when the automobile in which she is riding in a snowstorm is struck from the rear by another automobile, and who, in the presence of her husband and sister, makes a written settlement with the insurance company for such injuries, and who delays two years thereafter before attacking as fraudulent the validity of such settlement, does not meet her burden to overcome the written instruments by giving her own self-contradictory testimony with no proof of actual fraud or misrepresentations.

Mosher v Snyder, 224-896; 276 NW 582; 4 NCCA(NS) 132

Requiring excessive proof. An instruction is erroneous when it requires negligence to be established "in the respects charged in the petition", and the negligence so charged is (1) excessive speed, (2) excessive speed after warning, and (3) excessive speed while traveling on loose gravel.

Codner v Stowe, 201-800; 208 NW 330

Substituted service on nonresident corporation—plaintiff's burden. In a motor vehicle accident action, wherein plaintiff obtained service of notice upon a nonresident corporation by serving the commissioner of motor vehicles, and wherein the defendant attacked such service by special appearance on the ground that it was not a person within the purview of the statute, the burden was on the plaintiff to make such showing that defendant was a person under the statute. Held burden not met.

Jermaine v Graf, 225-1063; 283 NW 428

Burden — railway crossing — injuries from jolting—causal negligence necessary. Plaintiff has the burden to show wherein a railway was negligent in maintaining a viaduct crossing, since jury's verdict may not rest upon surmise, speculation, or guess, and this burden is not met when plaintiff fails to show that injuries received from being thrown against top of car while going over viaduct were caused by a condition of the viaduct resulting from negligence.

Harris v Milwaukee Ry., 224-1319; 278 NW 338

Contributory negligence — minors. An instruction, in a personal injury action, that the burden of proof is on plaintiff to establish his

freedom from contributory negligence is not nullified by an instruction that the plaintiff, if of the age of eight years only, is presumed to be incapable of such negligence, and that, to find to the contrary, defendant must so show.

Stutzman v Younkerman, 204-1162; 216 NW 627

Personal injury—contributory negligence. A definite instruction that plaintiff has the burden of proof to show that he was not guilty of any negligence contributing to his injury is in no degree overcome by later instructions wherein the court, with reference to contributory-fact issues, uses the expression "if you find." In other words, such expression does not have the effect of impliedly placing the burden of proof as to contributory negligence upon the defendant.

Dean v Koolish, 212-238; 234 NW 179

Res ipsa loquitur—scope. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence, not that such facts compel the jury to draw such inference in the absence of explanatory evidence. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Preston v D. M. Ry. Co., 214-156; 241 NW 648

Assumption of risk—burden on pleader. The jury, in a personal injury or death claim action where the defendant pleads "assumption of risk," should be plainly instructed that one pleading an affirmative defense must assume the burden of proving it.

White v Zell, 224-359; 276 NW 76

Death of animals—proof of cause. Proof that a preparation was fed to animals and that immediately, or shortly thereafter, some of them died, and the others became permanently stunted in growth, does not justify a presumption that the said preparation caused the deaths or stunting.

Hildebrand v Oil Co., 205-946; 219 NW 40

Falsity of statement by seller. A vendee who, in defense to an action for the purchase price of hogs, alleges that he purchased under a representation that the stock had been doubly vaccinated, and that the representation was false, has the burden to establish not only (1) the representation, but (2) the falsity thereof.

Co-operative Sales Co. v Van der Beek, 219-974; 259 NW 586

Affirmative defense—instruction on preponderance of evidence. In an action to recover damages from railroad for value of stallion which died during transportation, wherein an excepted cause of death is pleaded and relied on as an affirmative defense, railroad will be entitled only to instruction that verdict must be for railroad if such cause should appear from a preponderance of the evidence.

Vander Beek v Railway, 226-1363; 286 NW 452

Carrier's "burden of proof". In an action for damages against a railroad for the value of a stallion which died in transit, where the court clearly defined those matters and facts as to which the burden of proof was on plaintiff, and in substance charged the jury that, upon plaintiff having successfully carried this burden, the "burden of proof" would be on defendant to show, by a preponderance of the evidence, the excepted cause, held, the use of the phrase "burden of proof" as quoted in second instruction was not error.

Vander Beek v Railway, 226-1363; 286 NW 452

Contributory negligence nullifies statutory presumption. When a person is injured by transmission line, the statutory presumption of defendant's negligence need not be rebutted when plaintiff fails to establish freedom from contributory negligence.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

Reasonably safe street. An injured person suing for damages consequent upon the dangerous condition of ice and snow on a public street between the curb lines has the burden of proof to show what reasonable action the city might have taken to avoid the said dangerous condition.

Ritchie v Des Moines, 211-1026; 233 NW 43

Proof justifying recovery—conspiracy. Under a plea of (1) conspiracy to commit a wrongful act, and (2) joint participation in the wrongful act, recovery may be had on proof of the latter allegation only.

De Bruin v Studer, 206-129; 220 NW 116

Malicious prosecution — elements of proof. In action for damages for malicious prosecution, plaintiff has burden to show (1) the prosecution; (2) instigation or procurement by defendant; (3) acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice.

Bair v Schultz, 227-193; 288 NW 119

Death of partner, and surviving partners—accounting. In an accounting between the representative of a deceased partner and the surviving partners, the burden of the accounting is upon the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Corporate president's authority to write checks. In action by payee of check drawn by president of corporation for interest on officer's note it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

Agent's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Federal Bank v Trust Co., 228- ; 290 NW 512

Debts—liability of stockholders. Persons who are in good faith contracted with and extended credit as partners are personally liable for the resulting debt, in the absence of evidence by them that they are stockholders in a corporation which is at least a de facto corporation.

Wilkin Co. v Assn., 208-921; 223 NW 899

Equitable estoppel—unrecorded conveyance—pleader's burden. One alleging an equitable estoppel must prove it by clear, satisfactory, and convincing evidence, hence in asserting in a fraudulent conveyance action, an equitable estoppel against the wife of a bank stockholder, because she withheld from record, for many years, a deed to herself from her husband, the creditors of the bank have not sustained the burden of proving estoppel when they admit that they did not deposit their money on the wife's representation, nor upon their belief in, the husband's ownership of the land.

Bates v Kleve, 225-255; 280 NW 501

Foreign corporation's permit to do business—burden of proof. A foreign corporation for pecuniary profit, suing on an Iowa contract, has the burden to plead and prove its compliance with the statutes requiring permit to do business herein, without which a directed verdict in its favor is error.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Accounting—burden on plaintiff. In action for accounting plaintiff has burden to prove account and show balance and amount due.

Palmer v Manville, (NOR); 228 NW 20

Account stated. A bank which furnishes its customer periodical statements of the condition of his debits and credits which are acquiesced in by the long silence of the customer is under no burden of proof to disprove the subsequent claim of the customer that certain specified items of the account were incorrect. The burden rests on the customer to establish his allegation of incorrectness.

State Bank v Cooper, 201-225; 205 NW 333

Value of goods. In an action on an account, the plaintiff must necessarily fail when he wholly fails to establish either the reasonable value of the goods or the agreed price therefor, such being the issues in the case.

Cutino Co. v Weeks, 203-581; 213 NW 413

Tender—must be kept good. Tender will not discharge a debt, and is of no avail unless kept good, and the burden of proving affirmatively that it has been kept good is on the party relying thereon.

Hill v Rolfsema, 226-486; 284 NW 376

Contract for repayment of money. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

Breach of warranty. Burden of proof in action on contract providing for delivery of drain tile was upon seller to show that tile were "sound and true", and evidence held to show that breakage was due to neglect of buyer.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Nondelivery of abstract company records—plaintiff's burden. Plaintiff had burden of proving defendant did not deliver all of property of abstract company as provided in contract whereby assets of abstract company were to be turned over to plaintiff, in that all "take-offs" were not delivered.

Mills Co. v Otis, (NOR); 228 NW 47

Consideration—implied in written contracts. The presumption created by statute providing that all contracts in writing, signed by the party to be bound, should import consideration is sufficient to cast burden upon defendant asserting lack of consideration to overcome such presumption.

Beal v Milliron, (NOR); 267 NW 83

Rescission of contract. To sustain a cause of action for rescission proof of fraud must be clear, satisfactory, and convincing, and a mere preponderance is not sufficient.

Wiley v Bank, (NOR); 257 NW 214

Chattel mortgage—subsequent purchaser. In replevin by a chattel mortgagee, if the defendant is (1) a subsequent purchaser for value, and (2) without notice, he must so allege and prove.

Manbeck Co. v Garside, 208-656; 226 NW 9

Subsequent purchaser—mortgaged chattels. A mortgagee in an action for the conversion of the mortgaged chattels need only allege the existence of his unsatisfied mortgage. The

defendant must allege and prove, not only (1) that he is a subsequent purchaser, but (2) that he became such purchaser without notice of the plaintiff's mortgage.

Loranz & Co. v Smith, 204-35; 214 NW 525; 53 ALR 662

Conditional sales—replevin of automobile conditionally sold under "trust receipt". Trust receipt for automobile delivered by a finance company was in effect conditional sale when accompanied by promissory note and agreement to return the automobile on demand. Held, in a replevin action the finance company sustained its burden to prove its right to immediate possession by a showing of default in payment, which gave the right to possession.

General Motors v Koch, 225-897; 281 NW 728

Pledges — sale. Merely showing that the relation of pledgor and pledgee existed does not cast on the pledgee the burden of proving that his sale of the pledge was bona fide.

Williams v Herman, 216-499; 249 NW 215

Alteration of instrument. He who alleges a material alteration of an instrument has the burden to prove his allegation. No presumption exists that the alteration was made after the execution of the instrument.

Council Bluffs Bank v Wendt, 203-972; 213 NW 599

Payment of note—burden on defendant. In an action in probate to establish claim based on promissory note, the burden of proving payment is upon defense.

In re Humphrey, 226-1230; 286 NW 488

Payment of note—burden of proof. Defendants, claiming payment on note which plaintiff denied, had burden to prove such payment by a preponderance of evidence, whether payment was made as partial payment on note or on property purchased, and question was for jury.

Sager v Skinner, (NOR); 229 NW 846

Execution of promissory notes. The burden to prove payment never shifts from the litigant who pleads it—not even when he creates by his evidence a presumption of payment on which he may safely rely, in the absence of counter evidence. So held where the pleader established the execution of promissory notes by his debtor, and thereby generated the rebuttable presumption that all prior claims between the parties had been settled and paid.

Riggs v Gish, 201-148; 205 NW 833

Husband's management of wife's property. In an action against a husband and wife on a promissory note signed only by the husband, and involving the wife on a theory that both were engaged in a joint adventure for which the money was used, liability of the wife may be predicated only upon a joint adventure contract, either express or implied, and plaintiff has the burden to prove the existence of such contract.

Valley Bank v Staves, 224-1197; 278 NW 346

Shifting defense after denial of directed verdict. In an action on a note, when the defendant asked for a directed verdict on the grounds of lack of consideration, he was not in a position to complain of the refusal to direct the verdict when he later shifted his defense admitting the signature on the note and setting up affirmative defenses, thereby placing the burden of proof on himself.

Ballard v Ballard, 226-699; 285 NW 165

Consideration and delivery of note—proof by presumptions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Bills and notes—payment. One who pays his promissory note has a duty to know and the burden to prove that (1) an agent to whom he makes payment has authority to receive on behalf of the holder, or that (2) the holder received the payment; and without proving one or the other the note is not discharged.

Fisher v Pride, 225-6; 280 NW 492

Holder in due course — burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Unreasonable time. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within the statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

Genuineness of signature—unnecessary assumption of burden—effect. A plaintiff may assume the burden of showing that the signature to an instrument, defensively pleaded against him by the defendant, is not genuine, even tho he might have availed himself of a statutorily implied denial of the answer, or might have definitely cast the burden as to genuineness upon the defendant by a denial under oath. And if he successfully establishes the aforesaid negative he will be accorded the same protection as tho the defendant had failed to establish the affirmative.

McFerren v Bank, 214-198; 238 NW 914

Alteration of bond. The burden of proof to establish a material alteration of a depositary bond is on the sureties who allege such alteration. Evidence held insufficient to show such alteration, notwithstanding its numerical strength.

Plymouth County v Schulz, 209-81; 227 NW 622

Public funds — payment by depositaries. Proof that a municipality had deposited public funds to a named amount in an authorized public depositary casts the burden on the depositary, or on the receiver therefor, to show what payments were made from such deposits and the legality of such payments. And such burden is not met by the introduction of unexplained ledger entries.

Winnebago County v Horton, 204-1186; 216 NW 769

Bonds—possession and ownership—evidence—insufficiency. Evidence reviewed and held insufficient to establish, prima facie, (1) that certain government bonds were in a certain bank of deposit when said bank was robbed, or (2) that said bonds belonged to an alleged owner.

State Bank v Bank, 223-596; 273 NW 160

Real estate commission. In an action by a real estate broker for commission he has burden to prove that he was the efficient and procuring cause of the sale.

Donahoe v Denman, 223-1273; 275 NW 154

Liability—shortage in shipment. A commission merchant, in an action against his principal for a balance due for advances, must adequately account for all goods consigned to him.

Blanchard v Wood Co., 204-255; 214 NW 583

Independent contractor. One who claims that labor and services accepted by him were performed by an independent contractor has the burden to prove such claim.

Buescher v Schmidt, 209-300; 228 NW 26

Employment—wrongful discharge—prima facie measure of damages. The prima facie measure of damages for the wrongful discharge of a servant is the contract wage. The master has the burden to show the extent to which this prima facie measure should be reduced.

Breen v Power Co., 207-1161; 224 NW 562

Consent of automobile owner—inference. An inference arises from the ownership of an automobile that it was operated with the owner's consent, or under his direction, and the owner has the burden of establishing that such was not the case.

McCann v Downey, 227-1277; 290 NW 690

Powers of agent. A defendant who meets an action of quantum meruit for the use of machinery with the defense that he used the machinery under a contract for an agreed rental, entered into with one of the employees of plaintiff, must establish the authority of the employee to enter into such contract.

Des Moines Paving Co. v Lincoln Co., 201-502; 207 NW 563

Workmen's compensation act—review for additional compensation. An employee under the workmen's compensation act, allowed and paid compensation for an injury, has the burden of proof, on his application for review and compensation for additional consequences of said injury, to establish by a preponderance of evidence that said additional consequences are such as would naturally and proximately follow said original injury,—were not the result of intervening accidents or other causes.

Oldham v Scofield, 222-764; 266 NW 480; 269 NW 925

Exception to workmen's compensation. One relying on an exception to the workmen's compensation act, providing that no compensation shall be allowed for an injury caused by the employee's willful intent to injure himself or to willfully injure another, has the burden of establishing the facts which bring the matter within the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Exception to workmen's compensation—burden of proof not sustained. The defendant in an action for workmen's compensation who relied on an exception to the law failed to sustain the burden of proving the exception when there was an entire lack of evidence tending to prove or disprove the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Workmen's compensation exception—confession and avoidance. Under a claim for workmen's compensation, a defense alleging that the injuries sustained by the claimant were caused by the willful act of a third person is in the nature of a confession and avoidance and places the burden of proving it to be true upon the defendant.

Everts v Jorgensen, 227-818; 289 NW 11

Fact of employment—claimant's burden of proof. The general rule that an employee is entitled to compensation for injuries arising in the course of his employment places upon him the burden of proving himself to be an employee within the meaning of the statute and proving that he received an injury which arose in the course of his employment.

Everts v Jorgensen, 227-818; 289 NW 11

Compromise and settlement—impeachment. Fraud, in impeachment of a compromise and settlement, must be established by the pleader who alleges it.

Coffman v Brenton, 214-185; 239 NW 9

Fraud—elements and degree of proof. An action to set aside a contract of compromise and settlement because of alleged fraudulent representations must be supported by proof which clearly, satisfactorily and convincingly establishes (1) the actual making of the material representations, (2) the falsity thereof, (3) the defendant's knowledge of the falsity, (4) the plaintiff's ignorance of the falsity, and (5) plaintiff's reliance thereon. If plaintiff fails to show by the required amount of proof the actual making of the representations, the court, of course, need proceed no further, except to enter a dismissal.

Kilts v Read, 216-356; 249 NW 157

Compromise and settlement—impeachment. He who seeks to avoid a duly proven compromise, settlement and release must establish:

1. That the release was procured by fraud, or
2. That the contention or claim on which the compromise and settlement was based was wholly unfounded, and, therefore, could not support a compromise and settlement.

Evidence reviewed and held wholly insufficient to impeach a compromise and settlement of liability under a policy of life insurance.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Compromise settlement—fraud. A plaintiff who attacks a compromise settlement of the amount due under a policy of insurance on the ground that it was fraud-induced has the burden to show that the representations inducing the settlement were knowingly false and that he innocently relied thereon; and plaintiff must, of course, fail on a record showing that the representations were true, and that he knew they were true.

Bockes v Cas. Co., 212-499; 232 NW 156

Release — avoidance for fraud — indirectly imposing. The burden of proof to avoid a written release of damages, on the ground that said release was obtained by fraud, rests on the party who alleges the fraud. Instructions reviewed and held adequately to impose such burden in substance tho not in words, assuming ordinary intelligence on the part of the jury.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Note as future gift—presumption—burden. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

Gifts inter vivos—mother to son gift for mother's life support — fiduciaries — donee's burden. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Gift causa mortis—burden of proof. The burden to establish a gift causa mortis rests on the donee claiming thereunder. Evidence reviewed, and held that said burden had been successfully met.

Flint v Varney, 220-1241; 264 NW 277

Gifts inter vivos—presumption of fraud. A gift of a deed to one who stands in a confidential or fiduciary relationship to the donor raises a presumption of constructive fraud, and the burden is on the donee to make such showing of fact as to overcome the presumption.

Jensen v Phippen, 225-302; 280 NW 528

Replevin to recover property held as gift. In a replevin action for property held under claim of gift, plaintiff has the burden throughout the trial to establish right to immediate possession.

Wilson v Findley, 223-1281; 275 NW 47

Execution of release. The burden of proof that a release was executed rests on the party alleging the release.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Fraud—presumption and burden of proof. Fraud is never presumed. He who alleges its existence must establish it by clear, convincing and satisfactory evidence. Principle applied in an equitable action to set aside and cancel certain financial obligations allegedly obtained by fraud.

Eckhardt v Trust Co., 223-471; 273 NW 347

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

Fraud—remedies of creditors. A creditor, seeking to set aside an alleged fraudulent conveyance which recites a consideration which is apparently valid and substantial tho indefinite in amount, must carry his proof beyond showing that the grantor and grantee were husband and wife and that the grantor was insolvent when he delivered the conveyance. In other words, such proof does not cast upon grantee the burden (1) to sustain the adequacy of the consideration, and (2) to negative bad faith in the transaction, or (3) to show that the grantor at the time retained sufficient other property to pay his creditors.

First N. Bank v Currier, 218-1041; 256 NW 734

Transfers and transactions invalid—voluntary conveyance — proof showing validity. Principle reaffirmed that a voluntary conveyance is constructively fraudulent as to existing creditors of the grantor unless the grantee establishes the fact that the grantor at the time of the conveyance retained sufficient property to pay his creditors.

First N. Bank v Currier, 218-1041; 256 NW 734

Fraudulent conveyance—debtor's burden. A debtor who voluntarily conveys his property to others has the burden to prove that he retained sufficient other property to pay his debts and failing this, it follows that the conveyance was fraudulent as to existing creditors.

Grimes Bank v McHarg, 224-644; 276 NW 781

Setting aside conveyance. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Transfers and transactions invalid—right of wife. A wife as a bona fide creditor of her husband has the legal right to take from her husband a conveyance of all his real and personal property provided she is actuated by the sole purpose of obtaining payment of her claim. And if the property received is out of proportion to the debt, the party questioning the conveyance has the burden to so show.

Farmers Bank v Ringgenberg, 218-86; 253 NW 826

Fraudulent conveyances—wages of minor as consideration. A deed from a father to a son, of a $2,500 town property for admittedly no consideration, and a deed of a $12,000, partly encumbered farm, in fulfillment of an alleged contract that the son (at the time of contract an unemancipated, unmarried, nineteen-year-old minor) should, when married, be given said farm if he remained on, and helped in the management of said farm, are, irrespective of any actual fraud, constructively fraudulent as to a prior existing creditor of the grantor, because of want of or grossly inadequate consideration,—it appearing that the son married within a month after attaining majority; and grantee must, in order to sustain said deeds, prove that grantor still continued to retain sufficient property to pay his said creditor.

Commercial Bank v Balderston, 219-1250; 260 NW 728

Fraudulent conveyance—family relationship. A creditor, seeking to set aside as fraudulent a conveyance from a father to son, is not aided, from the family relationship alone, by any presumption of fraud, but, on the contrary, must clearly, satisfactorily, and convincingly establish the fraudulent character of the conveyance by proof that more than preponderates over counterproof. Evidence held insufficient to show fraud.

Royer v Erb, 219-705; 259 NW 584

Fiduciary relationship — burden of proof. Principle reaffirmed (1) that no presumption of fiduciary relationship arises from the fact of kinship, and (2) that in the absence of proof of such relationship, plaintiff in an action to set aside a conveyance because of undue influence, has the burden to establish such fraud by convincing evidence. Evidence held quite insufficient.

Craig v Craig, 222-783; 269 NW 743

Setting aside deed. A delivered deed carries a presumption in favor of its validity, so one suing to set aside a deed has the burden of proving that at the time of execution of deed, grantor was incapable of understanding her property and her relations thereto, or understanding natural objects of her bounty or nature and effect of instrument.

Bishop v Leighty, (NOR); 237 NW 251

Confidential relationship—showing grantor's freedom of action—grantee's burden. One who stands in a confidential relationship to another may not retain advantages of a transaction with the cestui when they may reasonably be the result of the confidence reposed, unless he shows that the cestui acted with freedom, intelligence, and with full knowledge of the facts.

Merritt v Easterly, 226-514; 284 NW 397

Gift—confidential relations—presumption of fraud. The act of a mother, in causing a certificate of deposit to be changed from her own name to that of a son who, it is made to appear, occupied a very close and confidential relation with his mother, is presumptively fraudulent, and will be sustained only on proof by the son that the transfer was free from all undue influence and fraud.

Roller v Roller, 201-1077; 203 NW 41

Fiduciary relation between husband and wife. Whether in an action by an heir to set aside a conveyance by a wife to her husband on the ground of undue influence the burden of disproof of said ground shifts to the defendant-husband, quaere.

Browne v Johnson, 218-498; 255 NW 862

Conflict of duty with personal interest — fiduciary's burden. A fiduciary may not appropriate funds to himself without consent of the beneficiary having full knowledge of the facts and any act by the fiduciary wherein personal interest and duty conflict is voidable at the mere option of the beneficiary. Fiduciary has the burden of showing his utmost good faith and fairness.

State v Exline Fuel Co., 224-466; 276 NW 41

Fiduciary relation. No confidential relation may be said to exist between the officers of a mortgagee and the mortgagor because of the fact that on a few occasions the officers had aided the mortgagor in closing ordinary business transactions.

Charlson v Bank, 201-120; 206 NW 812

Fiduciary relations—elements—bona fides of transaction—shifting burden. One asserting the existence of a fiduciary relationship must prove it by (1) a reposal of confidence, and (2) positions of dominance and subservience, respectively, occupied by the repository and cestui, before he can shift the burden of proving the bona fides of the transaction to the other party.

Mastain v Butschy, 224-68; 276 NW 79

Surviving spouse—failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

Homestead — voluntary conveyance. The principle that the grantee in a voluntary conveyance of a homestead may sustain the conveyance against the claims of the creditors of the grantor necessarily imposes on the grantee the burden of showing the homestead character of the property.

Dolan v Newberry, 200-511; 202 NW 545; 205 NW 205

Abandonment of homestead—intent to return. In order to preserve the homestead character of property when the owner goes to live elsewhere, it is necessary that said owner have a fixed, specific, and abiding intent to return and burden of proving same is on the owner.

Grimes Bank v McHarg, 224-644; 276 NW 781

Nonhomestead character of land. A creditor who is seeking to set aside the deed of his debtor as fraudulent need not prove the nonhomestead character of the land even tho he alleges such fact, because the homestead character of the land is an affirmative defense, pleadable and provable by the grantee.

Malcolm Bk. v Mehlin, 200-970; 205 NW 788

Purchase-money mortgage—burden to establish. A real estate mortgage may not be deemed a purchase-money mortgage and have extended to it the pre-eminent right of priority over all other liens and claims arising through the mortgagor unless the holder distinctly establishes the fact that the money secured by the mortgage was advanced for the express purpose of paying the purchase price of the land. Evidence held insufficient to show such fact.

Ely Bank v Graham, 201-840; 208 NW 312

Instructions—improper shifting of burden of proof. Plaintiff who bases his claim for damages on the alleged execution and breach by defendant of a specified contract to convey various tracts of land is not relieved of the burden of establishing said alleged contract by the fact that defendant, after pleading a general denial, sees fit, unnecessarily, to plead, in defense, the contract as he claims it to be. Instruction held erroneous as violative of this principle.

Chismore v Bank, 221-1256; 268 NW 137

Delivery of deed—presumption from recording—evidence to overcome. The recording of a real estate deed constitutes prima facie proof that the grantor has made full delivery of the deed to grantee; but, on the issue that the grantee fraudulently obtained possession of the deed and recorded it, the grantor must, against a subsequent good-faith purchaser for value from the grantee, show (on the facts of the instant case) (1) that the deed was actually put in escrow by agreement of the parties, and later wrongfully delivered to the grantee without the direct or indirect fault of the grantor, and (2) that the wrongful delivery to the grantee was not the result of any act on the part of the grantor's own agents.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Confidential relation—grantor and grantee. The mere showing that the grantor and grantee in a deed of conveyance are related by blood creates no presumption of confidential relationship such as to cast upon the grantee the burden to establish the bona fides of the transaction.

Osborn v Fry, 202-129; 209 NW 303

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

Deeds—confidential relations—presumption. The law presumes that a deed of conveyance is fraudulent and void whenever it is made to appear that, when the deed was executed, the grantee occupied a position of trust and confidence as regards the grantor, or held a dominating and controlling influence over the grantor. It follows that the grantee must overthrow the presumption by a showing of the eminent fairness and legality of the transaction. Evidence held insufficient to overthrow the presumption.

McNeer v Beck, 205-196; 217 NW 825

Deeds—validity—fraud—evidence—sufficiency. Principle reaffirmed that testimony sufficient to overthrow a duly acknowledged deed of conveyance must amount to more than a preponderance—must be clear, satisfactory and convincing. Record held insufficient to meet said rule of law.

Richardson v Richardson, 216-1205; 250 NW 481

Deeds—validity—evidence necessary to invalidate. A deed is presumed to express the intention of the grantor and one who attempts to set it aside on the ground of undue influence or insanity has the burden of proof to present evidence that is clear, satisfactory and convincing.

Mastain v Butschy, 224-68; 276 NW 79

Burden on plaintiff to show delivery of deed. In a replevin action against an administrator for possession of a deed found in the safety deposit box of the deceased, the burden is on the plaintiffs to show a valid delivery of the deed effective to pass title.

Orris v Whipple, 224-1157; 280 NW 617

Deeds—invalidity. Principle reaffirmed that (barring fiduciary relationships) the burden of proof rests on the party who alleges fraud, undue influence, or mental incompetency as the basis for invalidating a deed of conveyance.

Kramer v Leinbaugh, 219-604; 259 NW 20

Deeds — mental incompetency — undue influence. The mental incompetency of a grantor to execute a deed of conveyance, or the obtaining of said conveyance by the grantee by undue influence, when assigned as ground for setting aside said conveyance, must be established by plaintiff and by clear, satisfactory and convincing evidence—there being no proof that a confidential relationship existed. Evidence reviewed and held insufficient to meet said burden of proof.

Foster v Foster, 223-455; 273 NW 165

Remedies of purchaser—enforcement of vendee's lien. A vendee who rescinds, and seeks to establish a lien on the land for his proper advancements, need not show that a subsequent titleholder had knowledge of his (vendee's) rights. The subsequent titleholder must show his want of knowledge.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Resulting trust—convincing proof by administrator necessary. A deceased wife's administrator seeking to impress a resulting trust on her surviving second husband's realty, held by him for more than 30 years, has the burden to prove the trust, not by a mere preponderance, but by clear, satisfactory evidence. Evidence held insufficient where alleged funds of wife came from wife's land, whose value arose largely from husband's improvements thereon, and which funds were turned over by wife to husband, commingled with his money and used to purchase realty, later exchanged for the property upon which a trust impressment is sought.

Keshlear v Banner, 225-471; 280 NW 631

Interest in real estate. A defendant in an action to recover real estate who claims an interest in the land derived from a source other than the plaintiff must plead and prove such interest.

O'Connor v Hassett, 207-155; 222 NW 530

Quieting title — rule governing recovery. Principle reaffirmed that plaintiff in an action to quiet title to realty must assume the burden of proof and must recover on the strength of his own title and not on the weakness of that of the defendant.

Lockie v White, 221-1044; 267 NW 671

Surface waters—natural flow—contract to change. Adjoining land owners, as between themselves, may validly contract for ditches and dikes which will free the servient estate from the burden of natural drainage, and the right, if not abandoned, to have such ditches and dikes maintained will pass to subsequent owners of the land. But he who alleges such contract must establish the same by clear and satisfactory evidence.

Young v Scott, 216-1253; 250 NW 484

Surface waters—interference by dikes. The maintenance of a dike along lands for the purpose of warding off backwater from a river may not be enjoined by an adjoining landowner unless he shows (1) that his lands constitute the dominant estate and the diked lands the servient estate, and (2) that the dike materially and substantially interferes with surface drainage. High lands which are last covered by backwater from a river are not servient to adjoining low lands which are first covered by such backwater.

Downey v Phelps, 201-826; 208 NW 499

Lease of minable coal—breach. In an action to recover minimum royalties under a lease of coal lands because of defendant's breach of

contract to mine all minable, workable and merchantable coal underlying said lands, plaintiff has the burden to establish the existence of such coal, especially when plaintiff assumed such burden by his pleadings. Evidence exhaustively reviewed and held insufficient to generate a question for the jury.

Scovel v Coal Co., 222-354; 269 NW 9

Quasi-mechanics' liens—public improvement—use of materials. A subcontractor on a public improvement is not entitled to have his claim established against the retained portion of the contract price due the contractor unless he establishes the fact that the materials furnished by him were actually used "in the construction" of the improvement, that is, were used in some proper way in connection with said construction work.

Rainbo Oil Co. v McCarthy Co., 212-1186; 236 NW 46

Moratorium—mortgagee's burden—cause for refusing—failure of proof. Trial court did not abuse its discretion in granting an extension of redemption, under the moratorium of the 47th General Assembly, where the mortgagee did not prove mortgagor's lack of possibility and good faith efforts to refinance, nor insolvency, nor inadequacy of the security, thereby failing to maintain his burden of showing good cause for denying the extension.

Larson v Ronan, 224-1248; 278 NW 641

Moratorium continuance—burden to prevent. Mortgagors, as a matter of law and equity, are entitled to moratorium continuances unless good cause is shown to the contrary, the burden of which showing is upon the mortgagee.

Prudential Ins. v Schaefer, 224-1243; 278 NW 602

Power of city to acquire property—defense. A municipality as defendant in an action for specific performance of its alleged contract for the purchase of land, has the burden to establish its plea that its attempted purchase of said land was for a purpose not authorized by law. Record reviewed and held said burden had not been met.

Golf View Co. v Sioux City, 222-433; 269 NW 451

Adjudication of insanity—presumption. One judicially held to be insane has the burden to overthrow the presumption that such insane condition continues.

Hazen v Donahoe, 208-582; 226 NW 33

Validity of contract—demand by guardian of insane person for accounting. In an action by the guardian of an insane ward to compel defendant to account for property paid or delivered by the ward to defendant, without consideration, and at various periods of time prior to the time the ward was adjudged insane, the guardian must establish the insanity of the ward at each particular transaction, or must establish such fact condition as compels an accounting. Evidence held insufficient to meet the burden of proof as to one transaction.

Davidson v Piper, 221-171; 265 NW 107

Signature and verification—denial by guardian—effect. The guardian of an insane person may, by sworn answer, put in issue the genuineness of the purported signature of his ward as indorser of a nonnegotiable certificate of deposit, and thereby throw upon the holder-plaintiff the burden of proving the genuineness of such signature.

Farmers Bank v Bank, 201-73; 204 NW 404

Mental capacity to contract—existence—burden to disprove. Mental weakness from disease does not deprive a person of capacity to dispose of property until the power of intelligent action is destroyed, and executor relying thereon to recover gift made by decedent to sister has burden of proof.

Wilson v Findley, 223-1281; 275 NW 47

Testamentary capacity—proponents' burden. In an action to contest a will under which one son receives over eight times as much property as the children of his deceased brother and evidence discloses dispute as to testator's understanding of English language in which the will is written and such circumstances lead the court to suspect testator may have been imposed upon, an additional burden is imposed upon proponents of will to show testator was acquainted with the provisions of the will.

In re Younggren, 226-1377; 286 NW 467

Will contest—testamentary capacity—how determined. In a will contest, after proponent's formal proofs, the burden of showing lack of mental capacity of testatrix is on contestant. Mere deterioration in physical or mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable to intelligently comprehend the estate of which he is possessed and the natural objects of his bounty and to intelligently exercise judgment and discretion in the disposition of his property.

In re Behrend, 227-1099; 290 NW 78

Actions on policies—exemption from liability. The insurer has the burden to establish a contract exception which exempts him from liability.

Lamar v Trav. Assn., 216-371; 249 NW 149; 92 ALR 159

Insurance—prorating loss. An insurer who pleads that the loss should be prorated with another policy must assume the burden to show indubitably that such other policy was "valid and collectible".

Cole v Ins. Co., 201-979; 205 NW 3

Accident insurance — avoidance of policy. The insurer in an accident insurance policy has the burden of proof to establish the de-

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

fense that the policy is wholly avoided because the insured, in obtaining the policy, had falsely represented that his habits of life were "correct and temperate", and had thereby intentionally deceived the insurer. Evidence held insufficient to establish such defense, as a matter of law.

Olson v Surety Co., 201-1334; 208 NW 213

Accident insurance—avoidance of policy. An accident insurance policy (against injury sustained solely through external, violent, and accidental means) which provides, in effect, that it does not cover injuries sustained by reason of the intentional act of any person except assaults upon the insured by a person committing or attempting to commit robbery, casts upon the insurer the burden to establish (1) that the insured was injured by the intentional acts of another person, (2) that the injury was intentional, and (3) that such other person was not committing or attempting to commit robbery. Evidence held insufficient to sustain such defense, as a matter of law.

Olson v Surety Co., 201-1334; 208 NW 213

Actions on policies—accidental death—burden of proof. In order to recover on the ordinary accident insurance policy, claimant must show by a preponderance of the evidence that the injury or death resulted solely from bodily injury received through accidental means. Evidence held to present a jury question.

Dawson v Life Co., 216-586; 247 NW 279

Accident insurance—burden of proof. Under an accident policy against bodily injury through accidental means, resulting directly, independently, and exclusively of all other causes, the insured must necessarily meet the burden of showing that the injuries received resulted solely from accidental means. Evidence held insufficient.

Michener v Cas. Co., 200-476; 203 NW 14

Fraud in securing release—burden of proof. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Accidental death—burden of proof—presumption against suicide—jury question. Under a policy providing for additional payment in case of death from accidental means, the beneficiary has burden of showing that insured shot himself accidentally, which need not be proved by direct evidence, but may be proved by proper inferences and presumptions from facts, and the beneficiary is aided in carrying this burden of proof by the presumption that death was not the result of suicide. Such presumption, however, is a rebuttable one and ordinarily a question of fact to be determined by the jury. So where evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question was properly held for the jury.

Mutual Life Ins. v Hatten, 17 F 2d, 889

Actions on policies—condition subsequent. In an action on a policy of fire insurance which excepts loss "by theft or neglect", the burden to establish the theft or neglect is on the insurer.

Hall v Ins. Co., 217-1005; 252 NW 763

Liability insurance—destruction of property—evidence of value. In motor carrier's action on liability insurance policy for loss of property destroyed by fire in freight terminal, plaintiff has burden of proof as to its "custody and control" of goods within policy provisions, also as to value thereof, and stipulation as to value of certain goods on which claims had been paid by insured does not admit value of other goods in absence of competent proof thereof.

American Ins. v Brady Co., 101 F 2d, 144

Insurance—cancellation of fire policy—burden of proof on insurer. The burden of proving cancellation of a fire insurance policy is on the insurer who denies liability thereunder.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Action on policy—insured's burden of proof. In action against an insurance company to recover on a policy covering tractors destroyed by fire, where defense was that plaintiff's ownership was not unconditional and that the property was not kept on the described location as the policy required, plaintiff was required to prove that, with full knowledge of facts disclosed to its agent by plaintiff, the defendant admitted its liability and waived those provisions of policy.

Buettner v Le Mars Assn., 225-847; 282 NW 733

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not

fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

Mailing notice of cancellation—presumption. In an action on an insurance policy to recover damages for loss by hail and where the answer alleges cancellation of policy by mailing five days written notice to insured, receipt of which notice plaintiff denies, it may be presumed or inferred by the supreme court in reviewing a decision on demurrer, that the letter properly addressed and mailed reached the plaintiff in due time.

Sorensen v Ins. Ass'n., 226-1316; 286 NW 494

Insurance policy—invalidating mortgage—burden of proof and shifting thereof. Proof by an insurer that a mortgage on the insured property was, without his consent, signed and recorded subsequent to the issuance of the policy presumptively establishes the execution and delivery of said mortgage, yet, the insurer is not entitled to an instruction that the burden of proof is, by such proof, shifted to the insured; but the insurer would, on request, be entitled to an instruction that, in view of such proof, the insured would not be entitled to recover unless he proceeds to negative the presumption aforesaid.

Hoover v Ins. Co., 218-559; 255 NW 705

Limitation of actions—mistake tolling statute. A mortgagee, seeking to reform his mortgage to correct an error in the real estate description and escape the statute of limitations on the ground of mutual mistake which tolled the statute until discovered, has the burden of showing he did not discover the error until a time within five years before bringing action, and without which proof the statute operates as a bar.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Fraudulent concealment—statute of limitations. To overcome the defense of statute of limitations on the ground of fraudulent concealment, the burden to both plead and prove such fraudulent concealment is on the party relying thereon.

Smith v Middle States Utilities Co., 224-151; 275 NW 158

Fraudulent concealment as tolling statute—burden of proof on pleader. After a defendant raises the defense of statute of limitations, plaintiff, alleging that because of defendant's fraud or fraudulent concealment the cause of action was not barred, has the burden of establishing such facts which he claims avoid the statute of limitations.

Carroll v Arts, 225-487; 280 NW 869

Injunction against tax sales—tax deed as evidence. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

Correctness of assessment—burden of proof. One who complains of a tax assessment has burden of proof of overcoming the presumption of correctness of assessments.

Crary v Board, 226-1197; 286 NW 428

Assessor's valuation—burden of proof. The presumption is that the valuation placed by the assessor upon any particular property is correct, and the burden of proof is upon the person challenging that estimate to prove otherwise, as provided by statute, yet the opinion of the assessor is not conclusive, but when properly based and apparently not erroneous, excessive, or out of proportion, it is to be held as the true value of the property.

Trustees of Flynn's Estate v Board, 226-1353; 286 NW 483

Federal income tax from receiver—burden of sustaining deductions. In an action involving a claim for federal income tax from an insolvent corporation, the assessment by the internal revenue collector must be treated as prima facie evidence of the amount due, and the state statutes do not control the matter of deduction for attorney fees, referee fees, court costs, and other expenses, but the burden is on the receiver to establish these deductions.

State v American B. & C. Co., 225-638; 281 NW 172

Rights of heirs—collateral heirs—burden of proof. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had been taken, by a Caesarian operation, from the womb of a dead mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Administrator's report—nonprejudicial nature. An administrator has the burden of proof to establish the nonprejudicial nature of his irregular report.

In re Eschweiler, 202-259; 209 NW 273

Attorney fees for services to estate. The burden of proof is on attorney claiming fees for services, whether ordinary or extraordinary, and, while court may to a certain extent

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—concluded

use its own judgment, claim should be based on evidence.

Glynn v Bank, 227-932; 289 NW 722

Probate claim—payment specially pleaded—burden of proof—jury question. In probate action to establish claim for services rendered to decedent under an express agreement, where defendant specially pleaded a defense of payment as a part of a different contract of employment, the burden rested upon defendant to establish such different contract, including payment, and, if evidence justified, it was the duty of the court to submit the issue to the jury, but, where defendant's evidence is also consistent with and does not negative plaintiff's claim as to her express contract, it is admissible and proper to be considered by the jury as tending to show that the present claim was an afterthought, or that claimant had failed under suitable circumstances to advance the demand now relied upon, and as tending to support defendant's theory of the nature of her employment. However, such evidence failed to establish the specially pleaded defense of payment, and the court's failure to submit the question of payment to the jury was not erroneous.

In re McKeon, 227-1050; 289 NW 915

Administrator's debt to decedent—burden of proof. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

Lost will—proof necessary to establish. To establish a lost will, the evidence must be clear, satisfactory and convincing, but need not be free from doubt.

Goodale v Murray, 227-843; 289 NW 450

Lost will — presumption of revocation rebutted. In the establishment of a lost will, there is a presumption that a will which was in the custody of the testator at his death, and which cannot be found, was destroyed by him with the intention of revoking it. The presumption may be rebutted or strengthened by proof of declarations of the testator, his circumstances, or his relations to the persons involved.

Goodale v Murray, 227-843; 289 NW 450

Directing verdict generally on several grounds—appellant's burden to reverse. Before the supreme court can reverse the trial court's ruling in sustaining generally a motion for directed verdict, which contained several grounds, appellant must show that no one of such grounds was sufficient to support such ruling.

Lotz v United Food Markets, 225-1397; 283 NW 99

Notice of appeal—nonserved parties. The burden is on an appellant to show—should the question arise—that parties not served with notice of appeal are not necessary parties to the appeal—that they will not be prejudiced or adversely affected in any manner by any order or decree of the appellate court.

State v Sur. Co., 223-558; 273 NW 129

Death—burden of proof to show self-defense. A peace officer, in attempting an arrest for a misdemeanor, has no legal right, unless he acts in legal self-defense, to kill the offender. It follows that, if he does kill, and is sued for damages consequent on the death, he has the burden to prove self-defense, especially so (1) when death was effected by a deadly weapon used in a deadly manner, (2) when the defendant distinctly pleaded self-defense as a defense, and (3) when plaintiff neither by plea nor proof presented the question of self-defense.

Klinkel v Saddler, 211-368; 233 NW 538

Rape—mental condition. In a prosecution for unlawfully having carnal knowledge of an imbecile, the state must establish the imbecility of the prosecutrix beyond all reasonable doubt. Testimony held to present a jury question.

State v Patrick, 201-368; 207 NW 393

Arrest without warrant — justification. A party who instigates an arrest without warrant and without later filing an information against the accused must, in an action for false imprisonment, assume the burden to legally justify his action.

Fox v McCurnin, 205-752; 218 NW 499

III PREPONDERANCE OF EVIDENCE

Alibi as defense. See under §13897 (XVI)
Bastardy proceedings. See under §12663 (II)
Insanity as defense. See under §13897 (XV)

Taking case from jury. The fact that the testimony of a plaintiff in support of his cause of action is met by positive testimony to the contrary by the defendant, both witnesses being of equal credibility, does not, of itself, show that plaintiff has failed to establish his case by a preponderance of the evidence.

Reichenbach v Bank, 205-1009; 218 NW 903

Negligence and proximate cause. Both negligence and proximate cause are questions of fact for the jury if the evidence is of sufficient weight and character to warrant their submis-

sion, and plaintiff has burden to establish them by a preponderance of the evidence, whether the evidence be direct or circumstantial.

Whetstine v Moravec, 228- ; 291 NW 425

Absence of preponderance of evidence. A party who has the burden of proof must fail when the record per se reveals no preponderance of evidence in his favor.

Waxmonsky v Hoskins, 216-476; 249 NW 195

Preponderance of evidence definition held nonprejudicial. Instruction when construed in its entirety defining preponderance of evidence as that evidence which "appeals most forcibly to your judgment and is most satisfactory to your minds in determining upon which side of the issues is the truth and the right", held nonprejudicial.

Moran v Kean, 225-329; 280 NW 543

Instructions — defining "preponderance of evidence". In defining "preponderance of evidence" as evidence which is "more convincing as to its truth", the court does not, in effect, say that evidence cannot constitute a preponderance unless the jury is satisfied that it is true.

Priest v Hogan, 218-1371; 257 NW 403

Instructions — interchange of synonymous terms. In instructing on the subject of "preponderance of the evidence", it is not erroneous to interchange the terms "evidence" and "testimony".

In re Burcham, 211-1395; 235 NW 764

Acknowledgment—impeachment—sufficiency. Principle recognized that testimony sufficient to overthrow the probative force of a certificate of acknowledgment must amount to more than a preponderance in the balancing of probabilities.

Perry v Reinertson, 208-739; 224 NW 489

Overcoming presumption from possession. A mere preponderance of the evidence is not sufficient to overcome the presumption arising from the possession of the legal title to real property. The evidence for that purpose must be clear, convincing, and satisfactory.

Wagner v Wagner, (NOR); 224 NW 583

Prima facie proof of title to note. The payee in possession of a promissory note the execution of which is not denied makes a prima facie case for recovery by the simple introduction of the note in evidence.

Farmers Bank v Bank, 201-73; 204 NW 404
Henderson v Holt, 201-1017; 206 NW 134

Mortgages—payment. A plaintiff who alleges the nonpayment of the note and mortgage which he is seeking to foreclose, must prove such nonpayment even tho defendant pleads payment. Evidence held insufficient to show nonpayment.

Larson v Ames Church, 213-930; 239 NW 921

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, although plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Burden of proof—public official's receipt of money as issue—plea of full accounting—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk, the clerk's answer denying receipt of such funds, and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll v Arts, 225-487; 280 NW 869

Real estate commission—issues correctly submitted. In a suit for breach of oral commission contract, instructions plainly stating that burden was on plaintiff to establish by a preponderance of evidence, (1) the terms of his contract, and (2) that through his efforts a sale was "effected, obtained, and procured", reviewed and held to correctly submit the issues under the pleadings.

Maher v Breen, 224-8; 276 NW 52

Oral contract to devise—evidence to establish—duty of court. Evidence to establish an alleged oral contract between a father and son, that the father would leave to the son a farm

III PREPONDERANCE OF EVIDENCE—concluded

when he died, must be established by clear, satisfactory, and convincing evidence and it is the duty of the court to subject the evidence to every fair test which may tend to weaken its credibility.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract to devise—convincing evidence necessary. An alleged oral contract between a childless couple and a neighbor, that such couple would leave all their property to the neighbor's minor son when he became of age, if he would live with them until that time, must be established by clear, satisfactory, and convincing evidence, and when so established, along with proof of compliance by the son, entitled the son to specific performance of the contract.

Ford v Young, 225-956; 282 NW 324

Unnecessary allegation of negligence. An allegation of negligent construction or maintenance of an electrical transmission line is unnecessary, and if made, need not be proved, in an action for damages caused by fire set out by such line. Proof that fire was communicated to property by said line, and proof of the amount of damages resulting, plus the statutory presumption of negligence on the part of the operator of the line, make a prima facie case for recovery.

Walters v Elec. Co., 203-471; 212 NW 884; 38 NCCA 551

Instructions—law of case. An instruction to the effect that no damage for the flooding of land could be recovered if such damages resulted partly from the wrongful act of the defendant in erecting an embankment and partly from the natural overflow of a natural stream constitutes the law of the case, and a verdict for the plaintiff must be set aside if the evidence conclusively shows that the damages were caused in part by the natural overflow of the stream.

Pfannebecker v Railway, 208-752; 226 NW 161

Burden which complainant must carry. An instrument will not be reformed on the ground of mutual mistake unless the supporting testimony is clear, satisfactory, and convincing beyond a mere preponderance of the evidence, nor will such reformation be granted if the complainant has been guilty of inexcusable neglect in not having the instrument read; and especially is this true when a reformation will detrimentally affect the intervening rights of innocent third parties.

Galva Bank v Reed, 205-7; 215 NW 732

Reformation of instruments—evidence—sufficiency. To justify the reformation of an instrument in the language of a bill of sale so it will stand as a chattel mortgage, the supporting evidence must be more than a preponderance. It must be clear, satisfactory, and convincing.

Scott v Menin, 216-1211; 250 NW 457

Defense. In an action for libel, based on a defamatory publication, that the plaintiff could not tell the truth when on the witness stand, in which action defendant offered to show that plaintiff perjured himself in a previous foreclosure hearing, as to the existence of a certain fence, the court errs in withdrawing this evidence from the jury on the ground of indefiniteness, since in this civil action the defendant was not required to prove perjury beyond a reasonable doubt.

McCuddin v Dickinson, 226-304; 283 NW 886

Determining preponderance. Where one witness' word was against that of another, the supreme court, on appeal in an equity action, looked to the conduct of the parties and surrounding circumstances to determine the preponderance of the evidence.

Webber v Ins. Assn., 227-793; 288 NW 868

11491 Instructions requested.

ANALYSIS

I REQUESTED INSTRUCTIONS
(a) NECESSITY FOR REQUEST IN GENERAL
(b) FURTHER AND MORE SPECIFIC INSTRUCTIONS
(c) REQUESTS OTHERWISE COVERED
(d) JUSTIFIABLE REFUSALS IN GENERAL
(e) UNJUSTIFIABLE REFUSALS IN GENERAL
(f) INCORRECT REQUEST SUGGESTING CORRECT PRINCIPLE
(g) ESTOPPEL BY REQUESTING INSTRUCTIONS
(h) APPELLATE REVIEW OF REFUSAL

Motor vehicle cases. See under §5037.09

I REQUESTED INSTRUCTIONS

(a) NECESSITY FOR REQUEST IN GENERAL

Stating who asked instructions. Stating in instructions that certain instructions were given at the request of a named party does not constitute reversible error, but such practice should be avoided.

Johnson v McVicker, 216-654; 247 NW 488

Nominal damages. Instructions as to nominal damages need not be given, in the absence of a request.

Schultz v Enlow, 201-1083; 205 NW 972

Exemplary damages. Failure of the court to submit to the jury the question of exemplary damages is not error, even tho plaintiff's pleading was broad enough to embrace such damages, when the plaintiff neither claimed such damages in the pleading nor requested the court to submit such issue.

Morrow v Scoville, 206-1134; 221 NW 802

Future pain. An instruction to the effect that a recovery would be limited to "the fair

and reasonable compensation for personal injury, pain and suffering, past and future * * * as shown by the evidence", is all-sufficient on the subject of future pain and suffering in the absence of a request for elaboration.

Duncan v Rhomberg, 212-389; 236 NW 638

Limiting damages—issue not raised in trial. Where an action in replevin by one claiming an automobile under a conditional sales contract was brought against a chattel mortgagee who had given some cash and extended credit in return for his mortgage, the plaintiff, having permitted the trial to be concluded on the issue of possession without raising any other issue or requesting instructions on any other issue, could not complain that the mortgagee's recovery should have been limited to the amount of actual cash given for the mortgage.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Impeaching testimony. The ordinary instructions as to the credibility of witnesses is all-sufficient in the absence of a request for a specific instruction as to the effect of impeaching testimony.

Altfilisch v Wessel, 208-361; 225 NW 862

Presentation of particular theory. Comprehensive and correct instructions by the court render unnecessary, in the absence of a request, the submission of defendant's particular theory of the case.

State v Dillard, 205-430; 216 NW 610

Duty to request amplification. Instruction as to the effect of knowledge, on the part of an insurance agent, of an existing mortgage on the insured property, held correct as far as it went, and to impose on defendant the obligation to request amplification relative to the effect of knowledge acquired by the agent when he was not transacting the business of defendant.

Hoover v Ins. Co., 218-559; 255 NW 705

Third party nondefendant — instructions. Where, under the pleadings and evidence, the jury might find that plaintiff's injuries were caused (1) by defendant's negligence, or (2) solely by the negligence of a third party nondefendant, the court must, on proper request, fully instruct as to the negligence of said third party.

Dennis v Merrill, 218-1259; 257 NW 322

Striking testimony in absence of jury. Failure of the court to inform the jury that certain testimony had, in the absence of the jury, been stricken from the record does not necessarily constitute reversible error. So held where complainant neither orally nor by requested instruction asked that the jury be so informed.

Justis v Cas. Co., 219-213; 257 NW 581

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

Undenied statement as admission—cautionary instruction—failure to request. Court did not err in failing to give a cautionary instruction concerning evidence of damaging statements against defendant, made in his presence, to which he failed to reply or deny, when no such instruction was requested, nor when such claimed error was not raised in the trial court.

Doherty v Edwards, 227-1264; 290 NW 672

Failure to testify. Defendant's failure to be a witness in his own behalf need not be covered by an instruction, in the absence of a request.

State v Reid, 200-892; 205 NW 517

Failure to define offense—effect. The failure specifically to define an offense, in the absence of a request, does not constitute error when the elements of the offense are accurately set forth in the instructions.

State v Grimm, 212-1193; 237 NW 451

Issues in criminal cases. An accused waives nothing by failing to request the court adequately to cover all the material allegations in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Inviting court to err—not permitted. A litigant will not be permitted to entrap the court by an invitation to commit error.

In re Iwers, 225-389; 280 NW 579

(b) FURTHER AND MORE SPECIFIC INSTRUCTIONS

Amplification—failure to request. A party cannot successfully assert that a correct instruction lacks amplification when he failed in the trial court to request such amplification.

Siesseger v Puth, 216-916; 248 NW 352

When all-sufficient. Instructions which fairly present the issues to the jury are all-sufficient, and, if defendant wishes some particular theory presented, he must make request therefor.

State v Harrington, 220-1116; 264 NW 24

Correct but inexplicit—responsibility of carrier. A correct instruction as to the responsibility of a carrier for the acts of its different agencies employed in transporting and delivering a shipment is sufficient, in the absence of a request for particular limitations thereon.

Riddle v Railway, 203-1232; 210 NW 770

Correct but not elaborate. Instructions which are correct as far as they go are sufficient,

I REQUESTED INSTRUCTIONS—continued
(b) FURTHER AND MORE SPECIFIC INSTRUCTIONS —concluded

in the absence of a request for further elaboration.

State v Peacock, 201-462; 205 NW 738
Clarkson v Cas. Co., 201-1249; 207 NW 132
State v Speck, 202-732; 210 NW 913
In re Newson, 206-514; 219 NW 305
Granette v Neumann, 208-24; 221 NW 197
Brennan v Laundry Co., 209-922; 229 NW 321
Updegraff v City, 210-382; 226 NW 928
State v Bourgeoise, 210-1129; 229 NW 231
Sergeant v Challis, 213-57; 238 NW 442
McQuillen v Meyers, 213-1366; 241 NW 442
State v Griffin, 218-1301; 254 NW 841

Care in handling electricity. In an action for damages for wrongful death from electricity, the usual correct instructions given in negligence cases relative to "ordinary care" are all-sufficient. If plaintiff desires to have the attention of the jury called to the exceptional danger attending the handling of electricity and to the fact that "ordinary care" must be in keeping with such danger, he must request such additional instruction.

Hanna v Electric Co., 210-864; 232 NW 421

Correct but not detailed—damages. An instruction relative to the measure of damages which is correct as far as it goes will be deemed all-sufficient, in the absence of a request for elaboration as to the detailed method to be followed in determining the present worth of the damages.

Rastede v Railway, 203-430; 212 NW 751

Correct but not elaborate—damages. Correct instructions relative to the allowance of damages generally, rather than on the basis of present worth, are all-sufficient, in the absence of a request for elaboration as to such present worth.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Non-presented theory—guarding excavation. Correct instructions relative to the duty of the defendant to guard an excavation made by him are all-sufficient in the absence of a request by defendant that there be presented to the jury his claim that he had properly covered the excavation and that some one had, unbeknown to him, wrongfully removed such covering.

McKee v Iowa Co., 204-44; 214 NW 564

Failure to request simplification. An instruction which embraces complainant's theory of the case may be all-sufficient, in the absence of a request for a simplification of the language therein employed.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Failure to elaborate defendant's theory. When instructions as given are fair and correct, defendant may not, in the absence of a request, complain that his particular theory was not elaborated and specifically stated to the jury.

State v Christensen, 205-849; 216 NW 710

Waiver of elaboration—mental anguish. An instruction which directs the jury to allow a party damages for the "mental anguish she has suffered as a direct result of such injuries" is all-sufficient, in the absence of any request for a more specific statement of the elements which may in the particular case constitute mental anguish.

Strayer v O'Keefe, 202-643; 210 NW 761

Nonrequest for elaboration. An instruction to the effect, in substance, that plaintiff must prove he fully carried out the contract sued on, necessarily embraces and covers defendant's contention that the plaintiff had abandoned the contract. If the defendant desires elaboration of the idea of abandonment, he must request an additional instruction.

Hornish v Overton, 206-780; 221 NW 483

Amount deceased would have spent—reducing verdict. An instruction in a personal injury action held not prejudicially objectionable on the ground that it did not specifically tell the jury that the amount the deceased plaintiff would have spent should be considered only for the purpose of reducing the amount to be recovered.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Will contestants bound by own theory. Contestants alleging that a will was not duly and legally executed may not amplify their claim thereunder after requesting instructions proceeding solely on the theory that their construction of their claim was that the signatures of the testator and one witness, now deceased, were not genuine. In such case it is not error, when otherwise unobjected to, for the court on its own motion to add an instruction which in effect limits the case to the theory propounded in contestants' requested instructions.

In re Iwers. 225-389: 280 NW 579

(c) REQUESTS OTHERWISE COVERED

Covering requested instructions. A requested instruction need not be given when the requested material is covered by another instruction.

State v McDowell, 228- ; 290 NW 65

Covering requested instructions. Instructions given in lieu of requested instructions and on the same subject-matter are all-sufficient when they fairly embody the law appli-

cable to the case, even tho such given instructions might very properly have been amplified.

In re Anderson, 203-985; 213 NW 567
Appleby v Cass, 211-1145; 234 NW 477
Duncan v Rhomberg, 212-389; 236 NW 638
Union Co. v Boyce, (NQR); 238 NW 471
Kemmerer v Highway Com., 214-136; 241 NW 693
Cory v State, 214-222; 242 NW 100
State v Moore, 217-872; 251 NW 737
Laudner v James, 221-863; 266 NW 15
Smithson v Mommson, 224-307; 276 NW 47
Buettner v LeMars Assn., 225-847; 282 NW 733
Kirchner v Dorsey, 226-283; 284 NW 171
State v Ferguson, 226-361; 283 NW 917
Womochil v Peters, 226-924; 285 NW 151

Covering requested instructions. When three similar instructions were requested, it was not error to refuse to give two of them, and give but one embodying the propositions of the other two.

Remer v Takin Bros., 227-903; 289 NW 477

Balancing request—handwriting testimony. A party who requests an instruction which emphasizes the superiority of positive over expert testimony as to the genuineness of handwriting, may not complain that the court gave an instruction which fully embodied the idea of the requested instruction, but which more sharply but correctly emphasized the inferiority of expert testimony generally.

Keeney v Arp, 212-45; 235 NW 745

Disregard of testimony. Reversal of a cause will not be ordered because the court refused to instruct as to the conditions under which the jury might entirely reject the testimony of a witness for falsely testifying, when the court otherwise sufficiently guides the jury as to the credibility of witnesses.

Burke v Town, 207-585; 223 NW 397

Requests otherwise covered. In condemnation proceeding for highway purposes, refusal to give all of defendant's requested instructions was proper, where on the whole, instructions given were more favorable to defendant than it was by right entitled and most of the matters contained in the requested instructions that could be properly included were covered by the instructions given.

Stoner v Hy. Comm., 227-115; 287 NW 269

(d) JUSTIFIABLE REFUSALS IN GENERAL

Failure to give promised instruction. Failure of the court to instruct as promised during the course of the trial will not be reviewed in the absence of an exception to such failure.

Lee v Ins. Assn., 214-932; 241 NW 403

Refusal of incorrect instruction. Instructions which assert a person's right to use, manage, and dispose of his property as he sees fit, without the qualifying clause "if of sound mind", are properly refused, when the instructions given embrace the instructions asked, insofar as they are correct.

Zander v Cahow, 200-1258; 206 NW 90

Absence of evidence. Instructions which are without support in the evidence are properly refused.

Kimmel v Mitchell, 216-366; 249 NW 151
Minks v Stenberg, 217-119; 250 NW 883

Undue emphasis on one theory of case. Requested instructions which place special emphasis on a party's theory of the case are properly refused.

Beardmore v New Albin, 203-721; 211 NW 430

Request which ignores defense. An instruction is properly refused when it ignores a pleaded and supported defense.

Merchants Bk. v Roline, 200-1059; 205 NW 863

Requiring disregard of evidence. Instructions are properly refused when, if given, the jury would be compelled to render a verdict in disregard of relevant and supporting testimony on a material issue.

Kiser v Ins. Assn., 216-928; 249 NW 753

Failure to plead want of consideration. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Undue emphasis. An instruction which places undue emphasis on some particular fact or feature of a case is properly refused.

Farwark v Railway, 202-1229; 211 NW 875

Unduly comprehensive request. Instructions which are so comprehensive as to authorize and direct a verdict in favor of all defendants are properly rejected when one of the defendants would be liable in any event.

Waldman v Motor Co., 214-1139; 243 NW 555

Nonapplicability to pleadings. Requested instructions are properly rejected when they go beyond any tendered issue.

Bilharz v Martinsen, 209-296; 228 NW 268

Confusing instruction refused. The prolixity of a technically correct, requested instruction and the fact that the instruction is so grammatically framed as to require a parsing of it by the jury, in order to understand it, furnish reasons for its refusal in addition to the fact that the court's instruction adequately covers the same subject matter.

Orr v Hart, 219-408; 258 NW 84

I REQUESTED INSTRUCTIONS—continued
(d) JUSTIFIABLE REFUSALS IN GENERAL—concluded

Instructions carrying improper inference. An instruction carrying the possible inference that the court did not believe that plaintiff was entitled to recover damages is properly refused by the court.

Orr v Hart, 219-408; 258 NW 84

Invading province of jury. An instruction which deprives the jury of the right to pass on a jury question is, of course, unthinkable.

Stingley v Crawford, 219-509; 258 NW 316

Refusal of inapplicable instruction not error. It is not error to refuse a requested instruction that has no applicability to the facts of the case.

Young v Hendricks, 226-211; 282 NW 895

Condemnation — highway used for lawful purpose—unsupported issue. A requested instruction to the effect that in arriving at compensation the law presumes that the highway to be built would be used for a lawful purpose is properly refused when there is no claim that the highway would be unlawfully used.

Cutler v State, 224-686; 278 NW 327

Relative to nonpleaded negligence. Instructions that the jury should not consider the failure to ring a bell on a street car as a ground of negligence, are properly refused (1) when plaintiff pleads no such ground of negligence, (2) when no such ground was submitted to the jury, and (3) when the testimony relative to such failure was received without objection.

Watson v Railway, 217-1194; 251 NW 31

Instruction requested—loan to be approved by loan committee—properly refused. In action on fidelity bond of a bank cashier, a request that the court inform jury that statute required that loans be made by executive officer and not by a loan committee was properly refused, since requirement that loan be approved by loan committee was lawful.

Fidelity Co. v Bates, 76 F 2d, 160

Assuming issuable facts. When it assumes disputed questions of fact as established, a requested instruction may be properly refused, even tho the request embodies a correct statement of the law.

Usher v Stafford, 227-443; 288 NW 432

Right to possession of note. The court very properly refuses to instruct that a surety on a promissory note has a right to the possession of the note when it is paid by the principal maker.

Mitchell v Burgher, 216-869; 249 NW 357

(e) UNJUSTIFIABLE REFUSALS IN GENERAL

Speculative damages — condemnation proceedings. Instructions cautioning the jury in condemnation proceedings against allowing damages based on speculative matters should, on request, be given.

Dugan v State, 214-230; 242 NW 98

Eminent domain — inconvenience resulting from taking. The jury must be instructed, on request, in eminent domain proceedings for highway purposes, that damages must not be allowed on the theory that the highway through the landowner's farm will be used illegally, with resulting inconvenience to the landowner; likewise an instruction to the effect that the jury must assess the damages on the presumption that the use would be lawful.

Welton v Hy. Comm., 211-625; 233 NW 876

Right of governmental agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency was an individual.

Welton v Hy. Comm., 211-625; 233 NW 876

Malpractice—new condition subsequent to discharge. If, after the discharge of a patient, new conditions arise which are not the natural result of the previously existing condition of the patient, the physician must have due notification of such condition and an opportunity to treat it, and the jury must be so instructed, if an instruction is requested.

Lemon v Kessel, 202-273; 209 NW 393

Neutralizing effect of immaterial testimony. Letters written by the son of a testator twenty years prior to a will contest, and requesting financial help from the parent, (while admissible as bearing on the issue of unequal distribution of the estate) are wholly immaterial to the issue of want of testamentary capacity and undue influence, and a refusal to so instruct constitutes error.

In re Thompson, 211-935; 234 NW 841

Specific elements of fraud. An abstract instruction defining fraudulent representations is not adequate when there is a request for a specific instruction covering the elements of falsity, scienter, deception, and injury.

Gray v Shell Corp., 212-825; 237 NW 460

Hypothetical question based on untrue statement. The jury should be plainly instructed, at least on request, that it must give no weight or consideration to an answer to a hypothetical question if it finds that any assumed fact embodied in the question is not, in fact, true.

Wilcox v Crumpton, 219-389; 258 NW 704

"Physical fact" rule — diverting circumstance. A requested instruction should be given, when the testimony is supporting, to the effect that, if the view of a railway track is unobstructed for a long distance while a traveler is knowingly approaching it, he will

be held to have seen the train approaching thereon, there being no diverting circumstance.

Langham v Ry. Co., 201-897; 208 NW 356

(f) INCORRECT REQUEST SUGGESTING CORRECT PRINCIPLE

Trial—instructions—refusal of incorrect instruction. Instructions which assert a person's right to use, manage, and dispose of his property as he sees fit, without the qualifying clause "if of sound mind", are properly refused, when the instructions given embrace the instructions asked, insofar as they are correct.

Zander v Cahow, 200-1258; 206 NW 90

(g) ESTOPPEL BY REQUESTING INSTRUCTIONS

Requesting instructions — waiver. A litigant who has suffered prejudicial error and is unable to get it out of the record, may adjust himself to the condition thus brought about, and seek to neutralize the error by requested instructions, and in so doing he does not estop himself to insist on the error.

Miller v Kooker, 208-687; 224 NW 46

Requested instruction as waiver of objections. A party whose objections to the submission of a subject matter to the jury have been erroneously overruled by the court does not waive his objections by asking an instruction which is in harmony with his objections as to said subject matter.

Ballinger v Demo. Co., 207-576; 223 NW 375

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Estoppel to allege error. A party may not predicate error on the giving of an instruction which he has requested.

Keeney v Arp, 212-45; 235 NW 745

Estoppel to object. A party is not estopped to object to the giving of an erroneous instruction because he requested it in part, when his request was for the purpose of presenting to the jury an entirely different conclusion than the one actually presented to the jury.

Cooley v Killingsworth, 209-646; 228 NW 880

Error not waived by requesting instruction. Where motion for a directed verdict is erroneously overruled, the defeated party does not waive said error by asking instructions which correctly state the law of the case as fixed by the ruling of the court on the motion. (Overruling Martens v Martens, 181 Iowa 350, and McDermott v Ida County, 186 Iowa 736)

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

(h) APPELLATE REVIEW OF REFUSAL

Witnesses — credibility — instructions — refusal. Reversal of a cause will not be ordered because the court refused to instruct as to the conditions under which the jury might entirely reject the testimony of a witness for falsely testifying, when the court otherwise sufficiently guides the jury as to the credibility of witnesses.

Burke v Town of Lawton, 207-585; 223 NW 397

11492 Duty as to instructions asked.

Precautionary unbalanced instructions. The court may very properly correct a requested precautionary instruction relative to the consideration by the jury of admissions by a deceased, by balancing the instruction, and making it applicable to the admissions of all parties to the action, including the deceased.

Halstead v Rohret, 212-837; 235 NW 293

Different phraseology but same meaning. A requested instruction, tho couched in proper and accurate language, need not necessarily be given in the exact language requested.

Malcor v Johnson, 223-644; 273 NW 145

Interrogatory seeking more than statutory requirements—proper refusal. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "consent", even tho allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

11493 Instructions by the court.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

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I PROVINCE OF COURT AND JURY

(a) ASSUMPTION IN RE ISSUABLE FACTS IN CIVIL CASES

Measure of damages. An instruction which is a technically incorrect statement of the measure of damages is harmless when, if a correct instruction had been given, the verdict of the jury must have been the same as found by the jury under the incorrect instruction.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

"Alibi" in civil cause—burden of proof. Where a defendant in a civil case enters a general denial to a charge of having committed a tort, and in support thereof testifies that, at the time in question, he was at his home, not far from the scene of the alleged tort, the court has no right to instruct (1) that defendant's defense is that of an "alibi," and (2) that defendant has the burden to establish such alibi by evidence which will outweigh the evidence tending to show that defendant did commit the tort.

Gregory v Sorensen, 208-174; 225 NW 342

Assumption that note was partnership business.

Maxfield v Heishman, 209-1061; 229 NW 681

Avoiding assumption of fact—use of "if any". The submission of a nonpleaded element of damages, or the submission of a nonproven element of damages, will be deemed harmless when the instruction carries the limitation "if any".

Hepker v Schmickle, 209-744; 229 NW 177
Kisling v Thierman, 214-911; 243 NW 552

Inferential assumption of fact negatived. An inferential assumption of fact in instructions may manifestly be wholly negatived by other instructions.

State v Harding, 204-1135; 216 NW 642

Unallowable assumption of fact. The court may not assume as a fact that a bill of sale was intended to convey title and not to act as a mortgage, such matter being in issue.

First N. Bk. v Schram, 202-791; 211 NW 406

Treating receipt as contract. A court must carefully refrain from stating or even inferring that a naked receipt for money constitutes a contract, the issue of contract being sharply in dispute.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Wills—undue influence—presumption of testamentary capacity. When the sole issue in a will contest is that of undue influence, the court is not in error in instructing that the jury should consider as an established fact that the testator was possessed of testamentary capacity at the time of the execution of the will.

In re Muhr, 218-867; 256 NW 305

Malpractice—nonassumption of fact—improper definition. In an action based on malpractice in sewing up in a wound a piece of gauze, instruction reviewed and held not subject to the objections, (1) that it assumed the existence of an issuable fact, and that such fact constituted negligence per se, and (2) that ordinary care was improperly defined.

Forrest v Abbott, 219-664; 259 NW 238

Unwarranted assumption of fact. Assumption of the truth of an issue, as to which the testimony is in conflict, constitutes reversible error.

Millard v Mfg. Co., 200-1063; 205 NW 979
Boston v Elec. Co., 206-753; 221 NW 508
Passcuzzi v Pierce, 208-1389; 227 NW 409
Tullar v Ins. Co., 214-166; 239 NW 534

Existence of contract. Instructions must not assume the existence of a contract the existence of which is distinctly in issue.

Bremhorst v Coal Co., 202-1251; 211 NW 898
Gibson v Miller, 215-631; 246 NW 606

Improper assumption of fact. Prejudicial error results from directing the jury, on con-

flicting evidence, that a claim sued on was an "open, current, and running" account.

Seddon v Richardson, 200-763; 205 NW 307

Unallowable assumption. Instructions must not assume that a resolution of a board of directors of a corporation was adopted in good faith when the good-faith adoption was distinctly in issue.

Schulte v Ideal Co., 208-767; 226 NW 174

Family relations — compensation. On the issue whether services were rendered as a member of the family, and with the mutual expectation of paying and receiving compensation therefor, the court must not assume, in his instructions, that a statement by the recipient that he would pay for the services would necessarily establish the expectation of the party rendering the services to receive compensation.

Seddon v Richardson, 200-763; 205 NW 307

Assuming truth of fact. It is inaccurate (but not necessarily reversible error) for instructions to refer to "admitted" signatures when the testimony only tended to show that the accused had, prior to the trial, admitted their genuineness.

State v Debner, 202-150; 209 NW 404

Emergency — jury question. Instructions reviewed and held not to be subject to the vice of foreclosing the jury from passing upon the issue whether an injured party was guilty of negligence in what she did under an emergency.

Elmore v Railway, 207-862; 224 NW 28

Cooley v Killingsworth, 209-646; 228 NW 880

See In re Davis, 217-509; 248 NW 497

Assuming issuable facts—refusal. When it assumes disputed questions of fact as established, a requested instruction may be properly refused, even tho the request embodies a correct statement of the law.

Usher v Stafford, 227-443; 288 NW 432

Nonassumption of fact. Instructions reviewed as a whole and held not to assume the existence of a fact contrary to defendant's contention.

Baker v Davis, 217-509; 248 NW 497

(b) ASSUMPTION IN RE UNCONTROVERTED FACTS IN CIVIL CASES

Assumption of truth of conceded fact. Instructions may very properly assume the truth of conceded or unquestionably established facts.

Eves v Littig Co., 202-1338; 212 NW 154

Assumption of truth. The court may, in its instructions, very properly assume the truth of an admitted or unquestionably proven fact.

Rosander v Knee, 222-1164; 271 NW 292

Proper assumption of fact. An instruction may properly assume as true a fact which the record unquestionably reveals.

Engle v Nelson, 220-771; 263 NW 505

Omission of conclusively established fact. The erroneous omission from an instruction of a fact element which stands conclusively established in the testimony, is harmless.

Schipfer v Stone, 206-328; 218 NW 568; 219 NW 933

McClary v Ry. Co., 209-67; 227 NW 646

Error to submit admitted fact. Error results from submitting to the jury the question of the existence of a fact unquestionably admitted by both parties.

Jordan v Schantz, 220-1251; 264 NW 259

Failure to submit uncontroverted fact. An issue of fact is properly withheld from the jury when the record presents no controversy as to said fact.

Morris Co. v Braverman, 210-946; 230 NW 356

Submitting established fact. Instructions may not properly require a defendant to prove the truth of that which plaintiff solemnly admits to be true. Juries must not be permitted to find a material fact contrary to the clear admission of a party.

Booton v Metcalfe, 201-311; 207 NW 386

Inferential submission of uncontroverted fact—avoidance. The definite and proper assumption, by the court in its instructions, of the truth of an unquestioned fact, renders quite harmless any mere inference, in other parts of the instructions, that the truth of such fact was submitted to the jury.

In re Willmott, 215-546; 243 NW 634

Allowable assumption of fact. It is not of material consequence that instructions to a jury refer to the conceded president of a corporation as "a duly authorized agent" of the corporation.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Assumption of abandonment of project. Instructions may assume that a building project was admittedly abandoned when both parties concede throughout the trial that such was the fact.

Shockley v Davis Co., 200-1094; 205 NW 966

Real party at interest—noncontested question. The question whether plaintiff was the real party in interest need not be submitted as a jury question when such question is not raised in the trial court.

Weinhart v Smith, 211-242; 233 NW 26

Instructing on basis of counsel's admissions. The court is not in error in peremptorily instructing in an action of replevin that plaintiff

I PROVINCE OF COURT AND JURY—continued

(b) ASSUMPTION IN RE UNCONTROVERTED FACTS IN CIVIL CASES—concluded

is entitled to the immediate possession of all property claimed by him (except specifically enumerated articles) when said instruction is in strict accord with the explicit admission in court of defendant's counsel, tho no such admission appears in defendant's answer.

Luther v Investment Co., 222-305; 268 NW 589

Eyewitnesses—improper submission of issue. When the record affirmatively shows the absence of all eyewitnesses to a fatal accident because the sole survivor was not observing the deceased persons immediately preceding the accident, the court should peremptorily instruct that there were no such witnesses; but the defendant may not, in such case, be prejudiced if the existence of such witnesses is submitted to the jury.

Rastede v Railway Co., 203-430; 212 NW 751

(c) ASSUMPTION IN RE ISSUABLE FACTS IN CRIMINAL CASES

See annotations under §13876

(d) WEIGHT AND SUFFICIENCY OF EVIDENCE AND CREDIBILITY OF WITNESSES

Fallibility of testimony. A jury need not be told that testimony as to the identity of a party who did a named thing is "exceedingly fallible".

State v Flory, 203-918; 210 NW 961

Preponderance of evidence definition held nonprejudicial. Instruction when construed in its entirety defining preponderance of evidence as that evidence which "appeals most forcibly to your judgment and is most satisfactory to your minds in determining upon which side of the issues is the truth and the right", held nonprejudicial.

Moran v Kean, 225-329; 280 NW 543

Weight of evidence for jury—duty of court. The weight of the evidence is for jury, and the duty of court is to carefully instruct jury so as to furnish them a guide insofar as possible in attempting to arrive at truth.

Jakeway v Allen, 226-13; 282 NW 374

Circumstantial evidence—force and effect. A jury may be told that, if they find circumstantial evidence to be strong and satisfactory, they should so treat it.

Ferber v Railway, 205-291; 217 NW 880

Absence of applicable evidence precludes review. The appellate court cannot review an instruction to the jury when the correctness of such instrument depends on the contents of exhibits not embraced in the abstract.

Forrest v Woodmen, 220-478; 261 NW 802

Employment contract—oral cancellation. In action by ballplayer to recover for services under written contract which could be terminated by defendant at any time, an instruction that oral notice of termination given by any of the members of the defendant baseball club would cancel the contract was not prejudicial when in fact all members of the club were present and in complete accord at the meeting at which the contract was cancelled.

Jacobs v Vander Wicken, (NOR); 218 NW 147

Fraudulent representations—notes and lease. Competent evidence of fraud in the execution of a lease and promissory notes, tho not free from inconsistencies, and contradicted in part, generates a jury question.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Malicious prosecution—jury question. A question for the jury and not for the court is generated when the defendant in an action for damages for malicious prosecution makes substantial proof that, prior to commencing the prosecution, he made a full, fair, and good-faith recital of the facts to his attorney and was advised to commence the prosecution.

Beard v Wilson, 211-914; 234 NW 802

Credibility of witness—rule as to presumption. In prosecution for subornation of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not tell the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions)—it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Expert testimony — nonright of jurors to substitute their own knowledge. Jurors may use and employ their own knowledge as to values in determining the weight and effect of expert testimony as to such values, but they must not be instructed in effect, that they may disregard such expert testimony and substitute their own knowledge as evidence.

State v Brown, 215-600; 246 NW 258

Expert testimony as to insanity. Instructions to the effect that certain expert testimony might be found quite reliable and satisfactory, or the reverse, and entitled to little, if any, consideration, reviewed and held quite nonprejudicial.

State v Mullenix, 212-1043; 237 NW 483

Unallowable contrasting of testimony of physicians. The court may not say to a jury, as a matter of law, that the testimony of regular attending physicians of a deceased has greater weight than the testimony of experts based solely on hypothetical questions.

Blakely v Cabelka, 203-5; 212 NW 348

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Trust v Accident Assn., 222-20; 268 NW 507

Life tables—effect. Life tables are not conclusive on the subject of life expectancy, and instructions should carefully elucidate such fact.

Droullard v Rudolph, 207-367; 223 NW 100
Bauer v Reavell, 219-1212; 260 NW 39

Mortality tables. Instructions held not subject to the vice of treating mortality tables as conclusive on the jury.

Rulison v X-ray Corp., 207-895; 223 NW 745

Value of services—judgment of jurors. It is proper for the court, irrespective of §11471-d1, C., '31 [§11471.1, C., '39], to instruct the jurors that they are not compelled to rely wholly on the opinions of witnesses as to the value of services, but that in connection with such opinions they may use and be guided by their own judgment in such matters.

In re Stencil, 215-1195; 248 NW 18

Unallowable assumption — nonsupport of wife. Record reviewed, and held reversible error for the court to instruct that, as a matter of law, an accused had failed to show any conduct on the part of his wife which would justify him in refusing to support her.

State v Gude, 201-4; 206 NW 584

Preponderance of evidence erroneously defined. It is error to define "preponderance of the credible evidence" as the testimony which best satisfies the juror's mind "that it is true", because it implies that the jury must be fully convinced of the truth of the testimony which controls the decisions on an issue.

Heacock v Baule, 216-311; 245 NW 753; 249 NW 437; 93 ALR 151; 36 NCCA 25

"Net value". The issue of the "net value" of an estate is properly submitted on evidence showing the gross value, all contested and pending claims and the facts attending the same, and the amount of the debts.

In re Anderson, 203-985; 213 NW 567

Effect of "improbabilities". "Improbabilities" in certain features of the testimony relative to a party's claim do not constitute a defense, and the court must not so instruct.

In re Dolmage, 204-231; 213 NW 380

Verbal admissions — balanced instruction. The ordinary practice in balancing an instruction relative to the weight to be given to verbal admissions is to say to the jury, in substance, that when such admissions are voluntarily, freely, and understandingly made and clearly and correctly remembered and stated they are often most satisfactory evidence. But the omission of the qualifying word "most" is not necessarily erroneous.

Abraham v Ins. Co., 215-1; 244 NW 675

Admissions—attempt to suppress testimony. While an attempt by the defendant to keep an adverse witness from testifying is not necessarily an admission by him that his claim or defense is false, yet such attempt is in effect an admission by the defendant that the testimony sought to be suppressed is unfavorable to his cause; and instructions to this effect, on supporting evidence, are proper.

Gregory v Sorenson, 214-1374; 242 NW 91

Circumstantial evidence. Principle reaffirmed that a theory may not be said to be established by circumstantial evidence unless the facts upon which the theory is predicated are of such a nature and so related to each other that the conclusion sought to be drawn therefrom is the only conclusion that fairly and reasonably arises.

Hogan v Nesbit, 216-75; 246 NW 270

Limiting jury to testimony. An instruction which limits the jury to the testimony produced and submitted does not necessarily constitute reversible error.

Dahna v Fun House Co., 204-922; 216 NW 262

Time of execution of note immaterial. When the one narrow issue is whether the defendant signed the note in question, the court may very properly instruct the jury that the time of signing is immaterial.

Conner v Henry, 205-95; 215 NW 506

Interlocutory reference. It is not error for the court to refer to the testimony of a witness as a "fact" when such reference is man-

I PROVINCE OF COURT AND JURY—continued

(d) WEIGHT AND SUFFICIENCY OF EVIDENCE AND CREDIBILITY OF WITNESSES—concluded

ifestly for the purpose of correcting counsel in the assertion that the testimony was an "opinion" or "conclusion".

State v Bourgeoise, 210-1129; 229 NW 231

Fatal assumption of fact. Prejudicial error results (1) from the mistaken assumption by the court that a named witness had remained in the court room during the taking of testimony, in violation of the orders of the court to the contrary, and (2) from instructing that the jury might consider such conduct in determining the weight to be given to the testimony of said named witness.

State v McCook, 206-629; 221 NW 59

Opinion evidence—harmless exclusion. Error in striking testimony is harmless when the facts sought are otherwise in the record, and when if admitted the record would still present a jury question.

In re Willer, 225-606; 281 NW 155

(e) DETERMINATION OF QUESTIONS OF LAW

Incorrect statement of law—conclusive presumption. It will be conclusively presumed that the jury followed an incorrect rule of law as stated to it by the court in its instructions.

Aldine Trust v Accident Assn., 222-20; 268 NW 507

Theories of equal probability. Circumstantial evidence relative to the loss of a diamond reviewed, and held that the court could not say as a matter of law that the theories of loss by theft or by fire were of equal probability.

Hall v Ins. Co., 217-1005; 252 NW 763
See Brower v Ry. Co., 218-317; 252 NW 755

Public improvements — acceptance — fraud — instructions required. In an action by a city as representative of the assessed property owners for damages consequent on the failure of the contractor to construct a pavement of the thickness required by the contract, the court must instruct on the issues as to the effect of an acceptance by the city council of the work, and as to the fraud which would overcome the estoppel because of said acceptance.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to recover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit, (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff, consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

When question of law. When the relationship of parties is fixed by a written contract, the question whether they occupy the relation of master and servant (employer and employee) is one of law to be determined by the court and not one of fact to be determined by the jury.

Page v Const. Co., 215-1388; 245 NW 208

Materiality of testimony. An instruction is prejudicially erroneous which directs the jury to disregard expert opinion testimony elicited through hypothetical questions which contain material statements which are not proved or which fail to contain material facts which are proved.

Blakely v Cabelka, 203-5; 212 NW 348

Materiality of facts. An instruction which permits a jury to determine the materiality of the facts assumed in a hypothetical question, preliminary to determining the value of the opinion expressed in the answer to the question, is prejudicially erroneous.

Lemon v Kessel, 202-273; 209 NW 393

Limiting one's legal right. Where a defendant-employer in paying his employee deducted an amount which the employee was owing the employer, and, when sued, based his right so to do (1) on an oral contract that he might so deduct, and (2) on his right to so deduct irrespective of such oral contract, the court prejudicially errs, in its instructions, in making the right to deduct dependent on proof of the oral contract.

Jorgensen v Cocklin, 219-1103; 260 NW 6

Submitting issue notwithstanding negligence per se. It is not necessarily reversible error for the court to fail to instruct the jury that the defendant was negligent as a matter of law, even tho had the court so instructed, the appellate court would not reverse because of such instruction.

Townsend v Armstrong, 220-396; 260 NW 17

Law question submitted to jury—when nonprejudicial. No prejudice can result when court submits to the jury a law question upon which the court could well have ruled adversely to complainant as a matter of law.

Central B. & T. Co. v Squires & Co., 225-416; 280 NW 594

Assault and battery—directing jury to award damages to plaintiff. Undisputed evidence held to establish that plaintiff and de-

fendant mutually consented to engage in a fight, and that defendant unlawfully committed an assault and battery on plaintiff, warranting an instruction to the jury to return a verdict for plaintiff in some amount.

Schwaller v McFarland, 228- ; 291 NW 852

(f) VERDICT-URGING OR COERCIVE INSTRUCTIONS

Invading province of jury. Instruction held not to direct a verdict of guilt of one or the other of two offenses.

State v Shannon, 214-1093; 243 NW 507

When prejudicial. A so-called verdict-urging instruction must be deemed prejudicial when it appears from the entire record that it did have a coercive effect on some of the jurors. (It is quite pointedly suggested that, irrespective of the foregoing, reversible error will be deemed to follow the further insertion in instructions by trial courts of the idea that "If any of the jurors differ in their view of the evidence from a larger number of their fellow jurors, such difference of opinion should induce the minority to doubt the correctness of their own judgment and cause them to scrutinize the evidence more closely and re-examine the grounds of their opinions.")

Middle States Co. v Telephone Co., 222-1275; 271 NW 180; 109 ALR 66

Ignoring defense. An instruction which mandatorily requires a verdict for plaintiff upon proof of the allegations as to which he has the burden of proof, without reference to a pleaded and supported defense, is manifestly erroneous.

Schulte v Ideal Co., 208-767; 226 NW 174

II FORM, REQUISITES, AND SUFFICIENCY

(a) WRITTEN INSTRUCTIONS

Oral statements to jury. Material statements of fact must not be orally given to the jury.

Alley Co. v Creamery Co., 201-621; 207 NW 767

Colloquy with jury. A colloquy between the court and the foreman of the jury, in the presence of the jury, relative to the instructions already given, reviewed and held not to constitute oral instructions and, therefore, not improper.

State v Mullenix, 212-1043; 237 NW 483

(b) FORM AND LANGUAGE IN GENERAL

Discussion. See 19 ILR 603—Statement by court

Inadvertent use of words. The inadvertent use in instructions of a word which could not have misled the jury, will be treated as harmless.

State v Hughey, 208-842; 226 NW 371

Harmless misdescription of land. Inadvertently omitting from instructions, in eminent domain proceedings, a minor portion of the land involved, does not constitute reversible error when otherwise the entire integral tract was consistently and persistently treated throughout the trial as the land in controversy, and when it is obvious that the jury never discovered the inadvertent error of the court.

Sherwood v Reynolds, 213-539; 239 NW 137

Ill-advised but harmless use of term. Error may not be predicated on the ill-advised use of the word "rapid" as applied to the descent of an elevator when the evidence conclusively shows that the elevator had, mechanically, but one speed and that such speed never varied.

Dean v Koolish, 212-238; 234 NW 179

Harmless inaccuracy. A reference in instructions to the amount to be allowed plaintiff on his claim as "made in the petition" instead of as "shown by the evidence" is harmless when, from the instructions as a whole, the latter was manifestly intended.

Ashby v Nine, 218-953; 256 NW 679

Harmless inaccuracy in use of terms. Instruction relative to acquiring negotiable promissory notes by "assignment", instead of by "indorsement", is quite harmless when complainant does not claim the rights of a holder in due course.

First Bk. v Tobin, 204-456; 215 NW 767

Nonmisleading terms. A grantee of land who, in buying the land, does not agree or intend to agree to assume an existing mortgage on the land, yet accepts a deed which provides for such assumption, and subsequently discovers such fact, and thereupon recognizes and accepts such obligation as binding upon him, is bound thereby; and it is not prejudicially erroneous for the court in instructions to refer to such "recognition and acceptance" as a ratification.

Carney v Jacobson, 210-485; 231 NW 436

Interrogatories—stated or agreed amount—services rendered to decedent. In probate action to establish a claim for services rendered to decedent, wherein the court submitted two interrogatories to the jury to determine (1) amount per month, if any, decedent agreed to pay claimant out of his estate at his decease, and (2) whether amount per month was to be paid for 9 or 12 months of each year, the interrogatories being submitted under an instruction to be answered in event jury found for claimant and not to be answered if verdict was for defendant, such instruction was not erroneous since, before interrogatories could be answered, the jury must have found under the evidence that there was a stated or agreed amount, and the findings therein conformed to the verdict.

In re McKeon, 227-1050; 289 NW 915

II FORM, REQUISITES, AND SUFFICIENCY—continued

(b) FORM AND LANGUAGE IN GENERAL—concluded

Inconsequential error. The erroneous designation of a count by giving the wrong number thereof becomes inconsequential when the subject-matter is such that the jury could not have been misled.

Cox v Const. Co., 208-458; 223 NW 521

Interchange of synonymous terms. In instructing on the subject of "preponderance of the evidence" it is not erroneous to interchange the terms "evidence" and "testimony".

In re Burcham, 211-1395; 235 NW 764

Interchange of conjunctions. An objection to the use, in instructions, of the conjunction "but" instead of "and" is quite hypercritical when the same objection could, with equal plausibility, be lodged against the instruction had the term "and" been used.

State v Davis, 212-131; 235 NW 759

Use of "and" and "or". An instruction to the effect that a litigant must establish the contract in question "substantially as alleged and testified to by him" cannot be deemed to mean that the contract must be established "substantially as alleged or testified to by him".

Blakesburg Bank v Blake, 207-843; 223 NW 895

Indiscriminative use of "may". An instruction to the effect that ordinary care may be in proportion to the danger that is reasonably to be feared or anticipated is not necessarily erroneous when the instructions as a whole employ the word "must" in reference to the same principle.

Thompson v City, 212-1348; 237 NW 366

Instructions—paraphrasing "legal excuse". The phrase "explained or justified by the evidence" used as a substitute in instructions for the term "legal excuse" should be avoided as possibly permitting the jury to consider evidence which would not constitute a legal excuse as defined in another instruction, but under the evidence and considered with other instructions held not reversible error.

Edwards v Perley, 223-1119; 274 NW 910

Popular designation of offense. Designating an offense in instructions by its popular name is quite unobjectionable when the specific elements of the offense are correctly set forth.

State v Bevins, 210-1031; 230 NW 865

Evidence "produced and submitted". It is not reversible error to limit a jury in the consideration of the case to the evidence "produced and submitted".

State v Speck, 202-732; 210 NW 913
State v Halley, 203-192; 210 NW 749

"Lack of evidence." It is not improper to instruct the jury in a civil case that in arriving at a verdict it should consider the "lack of evidence", if any.

Ege v Born, 212-1138; 236 NW 75

Mortgaged chattels—description—jury question. When the sufficiency of a description of mortgaged chattels to impart constructive notice becomes a jury question, it is quite inaccurate for the court to instruct that "the recording gave notice of what its terms contained, but nothing more than its terms contained."

Wertheimer v Parsons, 209-1241; 229 NW 829

(c) REPETITIONS

Repetitions unnecessary—proximate cause. A definite and correct instruction as to proximate cause of an injury need not be repeated in other instructions.

Oestereich v Leslie, 212-105; 234 NW 229
Albert v Maher Bros., 215-197; 243 NW 561

Reasonable doubt — repetition unnecessary. An instruction which clearly instructs the jury of its right to find a reasonable doubt, because of the lack or want of evidence, need not be repeated.

State v Harrington, 220-1116; 264 NW 24

Instructions—embodying substance of request. Where the trial court gives an instruction which is similar to or embodies all the principles of a requested instruction, it is not error to refuse the requested instruction.

Kirchner v Dorsey, 226-283; 284 NW 171

(d) STATEMENT OF ISSUES IN GENERAL

Omitting issue. The omission from instructions of a material issue necessarily constitutes reversible error.

Whyte v Cas. Co., 209-917; 227 NW 518

Correct but not amplified. Concise instructions which are correct and which fairly present the issues, are all-sufficient in the absence of a request for amplification.

State v Miller, 217-1283; 252 NW 121
State v Sampson, 220-142; 261 NW 769

Abstract statements of law. The inclusion in instructions of abstract statements of the law does not necessarily constitute material error.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

Statement of issues. It is fundamental that instructions must clearly place before the jury the conflicting contentions of the party litigants.

Bremhorst v Coal Co., 202-1251; 211 NW 898
State v Hixson, 205-1321; 217 NW 814

Unnecessary issue. The submission of an unnecessary issue will not constitute error

when it is one closely interwoven with the all-controlling issue, and when the instructions as a whole fairly place the controlling issues before the jury.

Conway v Alexander, 200-705; 205 NW 351

Stating withdrawn issue. It is not necessarily prejudicial error for the court, in outlining the issues, to refer to withdrawn issues, when the jury is specifically directed to disregard them.

Reinertson v Struthers, 201-1186; 207 NW 247

General statement of issue. The submission by the court to the jury of the controlling issue in the case is all-sufficient, even though the court did not literally and technically follow the pleadings.

Yaus v Egg Co., 204-426; 213 NW 230

Recital of issuable facts. The court may very properly recite in its instructions the material and record facts which they may consider in arriving at the reasonable value of services.

Olson v Shuler, 208-70; 221 NW 941

Inferential departure from issues. Reversible error does not result from so instructing in one paragraph as to seemingly depart from the particular act of negligence alleged as a basis for recovery, when the instructions as a whole clearly remove any possible confusion or misunderstanding on the part of the jury.

Azeltine v Lutterman, 218-675; 254 NW 854

Mutually agreed theory. A trial and submission of a cause on a theory mutually agreed on by both parties, precludes a change of theory on appeal.

Rocho v Dairy, 204-391; 214 NW 685

Trial theory. The submission of a cause on the theory of common-law negligence will not be disturbed on appeal when such submission appears to have been acquiesced in in the trial court, even though the petition would justify the submission of the cause on the theory of the "attractive nuisance" doctrine.

Eves v Littig Co., 202-1338; 212 NW 154

Trial theory. One of two defendants may not complain that the court, in the submission of various forms of verdicts, adopted his trial theory of nonjoint liability.

Zieman v Amusement Assn., 209-1298; 228 NW 48

Limiting jury to evidence and instructions. An instruction that the jury should not consider anything except the evidence and the instructions, and that all statements and suggestions from any other source should be discarded, cannot (under the present record) be deemed a direction to disregard the arguments and reasoning of the attorneys.

Albert v Maher Bros., 215-197; 243 NW 561

Erroneous limitation of jury on consideration of evidence. Instructions which limit the jury on the issue of the existence of a wrongful act (which is the very gist of the action) to a consideration of transactions occurring "on or about" a certain date "or at any time thereafter" is prejudicially erroneous when the record reveals the fact that the jury might have found the existence of said wrongful act from transactions occurring some four months prior to the limiting date set by the court.

Newcomer v Ament, 214-307; 242 NW 82

Implied withdrawal of unsupported count. No affirmative withdrawal of an unsupported count is necessary in instructing the jury when the court in the instructions wholly ignored said count.

Spicer v Administrator, 201-99; 202 NW 604

Performance or breach—justifiable abandonment. Instructions held adequately to present the issue whether the performance of a contract was justifiably abandoned.

Goben v Paving Co., 218-829; 252 NW 262

Eminent domain—compensation. It is erroneous for the court to instruct that a condemnation is for the purpose of appropriating the land, when the real purpose is to determine compensation for an incidental injury.

Millard v Mfg. Co., 200-1063; 205 NW 979

Inadvisable but harmless. An instruction in eminent domain proceedings that the real right of which the property owner is deprived, and for which he is entitled to compensation, is the right to remain in undisturbed possession of his property, while ill-advised, may be quite harmless.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Suretyship—want of consideration. A plea of want of consideration, interposed by a gratuitous surety on a promissory note may be very properly ignored in the instructions of the court when the record shows (1) that the surety signed the note without fraud imposed upon him, and (2) that there was a consideration between the principal and the payee.

Granner v Byam, 218-535; 255 NW 653

Inadequate enumerations of elements. Instructions which direct the jury to convict on proof of named elements of an offense are prejudicially erroneous when not all the elements of such offense are enumerated.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Undue burden—claim against estate. A claim against an estate triable at law is established by a fair preponderance of the testimony, and reversible error results from in-

II FORM, REQUISITES, AND SUFFICIENCY—continued

(d) STATEMENT OF ISSUES IN GENERAL—continued

structing that such claim must be established only by "strict and satisfactory" proof.

In re Dolmage, 204-231; 213 NW 380

Inadequate presentation of issues. When issue is joined both (1) on the terms of the contract alleged by plaintiff and (2) on the defendant's plea of fraud, error necessarily results from instructing that the verdict must be for plaintiff if defendant fails to establish his plea of fraud.

Augustine-Stalker v Bracha, 204-253; 212 NW 936

Failure to instruct on material issue. Failure to instruct on the pleaded and supported material issue of fraud in the adoption of a resolution by the board of directors of a corporation necessarily constitutes reversible error.

Schulte v Ideal Co., 208-767; 226 NW 174

Failure to submit issue—payment. Failure to submit a pleaded and supported plea of payment is necessarily prejudicial, even tho defendant makes no request for such submission.

Baker v Davis, 212-1249; 235 NW 749

Failure to submit issue—partnership. Failure to submit an issue of partnership is harmless when such failure does not change the result, especially when the evidence supporting the issue is indefinite.

First N. Bank v Schram, 202-791; 211 NW 406

Justifiable omission to instruct. The action of the court in omitting a certain subject matter from the instructions must be deemed justifiable when, after a consultation with the litigants, the court understood that such omission was requested, and when complainant entered no exception when the instructions were given, and made no objections to such omission.

McLain v Risser, 207-490; 223 NW 162

Assault and battery—self-defense. Where defendant voluntarily participated in a fight, not in his own defense, the court did not err in failing to instruct the jury on self-defense as, under such circumstances, self-defense was not available as a defense.

Schwaller v McFarland, 228- ; 291 NW 852

Waiver—apparent authority. Instructions relative to the duty of an insured to furnish proofs of loss, and to the burden resting on him in case he relied on a waiver of such proofs; also relative to the actual or apparent authority of the insurer's agent to bind the company by a waiver, reviewed and held correct.

Basta v Ins. Assn., 217-240; 252 NW 125

Harmless failure to submit. Failure to submit a plea of estoppel to rely on an alleged agreement may be quite harmless in view of the full and explicit instructions on the subject of waiver of the right to rely on the said alleged agreement.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Nonspecific withdrawal of counts. The submission of one count of a petition may in effect work a withdrawal of all other counts.

Hill v City, 203-1392; 214 NW 592

Instruction favorable to complainant. An instruction that certain testimony is not "necessarily" conclusive on a named issue cannot constitute error when the use of the term was intended to be and was favorable to complainant.

Carney v Jacobson, 210-485; 231 NW 436

Inaccurate limitation on recovery. Where a plaintiff itemized his general and particular damages in a personal injury action, the failure of the court to specifically say to the jury that it must not allow more on any item than the amount as stated in the petition, nor more than the aggregate of said items, is nonprejudicial when the evidence would not support a greater verdict on any particular item than as itemized, and when the verdict was materially less than the claim for general damages, and when the court specifically instructed the jury that it could not allow any item of damages in a greater sum than "established by the evidence".

Wosoba v Kenyon, 215-226; 243 NW 569

Failure to limit findings. An instruction which directs the jury, in determining the damages to an article, "to consider" its value before the injury and its value after injury is erroneous, because it fails to confine the jury in its findings of damages.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Stating amount of plaintiff's claim. Instructions in actions for unliquidated damages are not erroneous because they state to the jury the amount of plaintiff's claim, yet preferably such statement ought not to be made.

Cory v State, 214-222; 242 NW 100

Damages—failure to limit. Reversible error results from the failure of the court in its instructions to limit the jury in its return of damages, on various items of claimed damages, to the amount claimed in the pleadings; and limiting damages "as shown by the evidence" does not necessarily cure the error.

Desmond v Smith, 219-83; 257 NW 543

Limiting recovery to sum of separate claims. Limiting a recovery of damages to the sum of one amount claimed for present and future physical pain, and one amount claimed for mental pain will not be deemed erroneous when the verdict demonstrates that less was allowed than claimed.

Danner v Cooper, 215-1354; 246 NW 223

Submission of excess recovery. The submission to the jury of a possible amount of recovery slightly in excess of what is legally recoverable does not constitute error when the final result is not affected thereby.

McQuillen v Meyers, 213-1366; 241 NW 442

Erroneous limitation on verdict. A general instruction, in a personal injury case, to the effect that the jury must not return a verdict in excess of the sum total of all the damages claimed by plaintiff is prejudicially erroneous when the plaintiff has alleged a particular amount of damages for each element of damages.

Sergeant v Challis, 213-57; 238 NW 442
See Albert v Maher Bros., 215-197; 243 NW 561

Supported assignments of negligence. Pleaded and supported assignments of negligence, which the jury might find was the proximate cause of the accident and resulting injury, must necessarily be submitted to the jury.

Muirhead v Challis, 213-1108; 240 NW 912

Grouping distinct grounds of negligence. Reversible error results from grouping separate and distinct grounds of negligence, and so instructing as to lead the jury to understand that plaintiff, before he can recover, must establish the truth of an entire group.

Leete v Hays, 211-379; 233 NW 481

Proximate cause. The court must submit to the jury, without request, the respective claims of each party as to the proximate cause of an accident.

Towberman v Ry. Co., 202-1299; 211 NW 854
Clark v Fair Assn., 203-1107; 212 NW 163

Insufficient presentation—negligence of outsider. The court must submit to the jury the supported plea that the proximate cause of an accident was the negligence of an outsider—a person not a party to the action.

Hoover v Haggard, 219-1232; 260 NW 540

Unnecessary amplification. Instructions which fully and correctly instruct the jury as to negligence and proximate cause need not (especially in the absence of a request) be amplified by the specific submission of defendant's plea that some certain act or failure to act on the part of plaintiff was the proximate cause of the injury—said latter matters having been otherwise adequately presented to the jury.

Lang v Siddall, 218-263; 254 NW 783

(e) VOLUNTARY OR NONPAPER ISSUES

Applicability to pleading—voluntary issues. The court may very properly instruct on nonpaper issues voluntarily and mutually litigated by the parties.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

Sufficiency. In an action to recover quantum meruit for the use of machinery, the court, in submitting defendant's nonpaper issue (acquiesced in by plaintiff) whether the use was under a contract for an agreed rental entered into with plaintiff's employee, must submit the question of the authority of the employee to enter into such a contract, there being evidence of the lack of such authority.

Des M. Pav. Co. v Lincoln Co., 201-502; 207 NW 563

Unnecessary plea — burden of proof. A defendant who specifically pleads certain matter as a defense in addition to his defense of general denial, thereby invites the court so to instruct as to impose on defendant the burden to prove said specially pleaded defense, even tho said defendant might have rested on his general denial.

Jordison v Jordison Bros., 215-938; 247 NW 491
Johnson v McVicker, 216-654; 247 NW 488

Agreed issue conclusive. A plaintiff is bound by his concession, in open court and at the close of his evidence, that of several pleaded grounds of negligence a certain one only should be submitted to the jury.

Gorham v Richard, 223-364; 272 NW 512

Instruction foreign to record. Instruction reviewed in an action involving the issue as to the making of a gift, and held not subject to the vice of submitting to the jury a matter wholly foreign to the record.

Malcor v Johnson, 223-644; 273 NW 145

Fraud—prejudice not presumed. Prejudice will not be presumed from instructions readily reconciled and understood by the jury as not conflicting, but in an action for damages on account of fraud where the defense was the statute of limitations it is prejudicial error to instruct on the elements of fraud as a basis for recovery without requiring consideration of the defense of the statute of limitations.

Smith v Utilities Co., 224-151; 275 NW 158

Submitting doubtful issue to jury. In a damage action for fraud, the submission to the jury of an issue as to a repurchase contract held not error under the pleadings and tactics of the parties.

Smith v Utilities Co., 224-151; 275 NW 158

II FORM, REQUISITES, AND SUFFICIENCY—continued

(f) READING, USING, OR REFERRING TO PLEADINGS

Copying pleadings. The practice of stating the issues by copying the pleadings is condemned.

Dunnegan & Briggs v Ry. Co., 202-787; 211 NW 364

Copying brief and concise pleadings. No error results from copying into the instructions portions of the pleadings which are relevant to the issues, and which are concise, brief, and noninflammatory.

Wilson v Else, 204-857; 216 NW 33
McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419
Stilson v Ellis, 208-1157; 225 NW 346
Hoegh v See, 215-733; 246 NW 787
Forrest v Sovereign Camp, 220-478; 261 NW 802

Copying involved pleadings. Issues susceptible of brief condensation should not be presented to the jury through the easy expedient of copying long, involved, and complicated pleadings.

Mowry v Reinking, 203-628; 213 NW 274
Peet Stock Co. v Bruene, 210-131; 230 NW 327

Copying verbose pleadings. The presentation of issues to the jury by copying verbose pleadings may constitute reversible error.

Veith v Cassidy, 201-376; 207 NW 328
Granette v Neumann, 208-24; 221 NW 197
Balik v Flacker, 212-1381; 238 NW 467
Mitchell v Burgher, 216-869; 249 NW 357

Copying pleadings containing questions of law. Copying the pleadings into the instructions and instructing that such were the issues constitutes error when pure questions of law are intermingled in such pleadings.

In re Dolmage, 204-231; 213 NW 380

Copying pleadings—curing error. The appellate court again, quite pointedly, expresses its surprise that occasionally some trial courts, in attempting to state the issues to the jury, do not recognize the impropriety of copying verbose pleadings into the instructions.

But error and the resulting confusion in copying pleadings will be deemed cured by the later action of the court in the instructions, in clearly and definitely confining the jury to the proper issues.

Young v Jacobsen Bros., 219-483; 258 NW 104
Hammer v Liberty Baking Co., 220-229; 260 NW 720

Copying pleadings not always erroneous. Copying pleadings in instructions is generally bad practice; however, where the pleadings concisely and clearly state the issues, the court may adopt them and use them.

Reed v Pape, 226-170; 284 NW 106

Copying pleadings—when nonprejudicial. Practice of stating case in language of pleadings, except where pleadings concisely and clearly state the substance of the controversy, condemned by court.

Jakeway v Allen, 227-1182; 290 NW 507

Copying defendant's answer improper. Instructions should not substantially copy defendant's answer as jury may easily be confused and misled thereby.

White v Zell, 224-359; 276 NW 76

Copying pleadings and stating issues. Instructions which set forth plaintiff's claim in accordance with the petition which is somewhat at variance with the evidence are not erroneous when in later paragraphs the issues are distinctly stated.

Goben v Paving Co., 218-829; 252 NW 262

Use of synonymous terms. The fact that the court in its instructions employs not only the terms employed in the petition but additional synonymous terms is quite inconsequential.

Klass v Ins. Co., 210-78; 230 NW 314

Interpretation of uncertain and indefinite plea. An indefinite and uncertain plea of negligence may very properly be given an interpretation by the court that is not inconsistent with the plea and which is consistent with the way or manner in which both parties have treated it.

Dean v Koolish, 212-238; 234 NW 179

Paraphrasing grounds of negligence. An accurate paraphrase of various grounds of recovery is all-sufficient for submission to the jury.

Fleming v Thornton, 217-183; 251 NW 158

Copying pleadings and paraphrasing them. The fact that pleadings are copied at length into the instructions does not constitute error when such pleadings are later so paraphrased by the court as to definitely submit the controlling issues.

Elmore v Ry. Co., 207-862; 224 NW 28

Justifiable paraphrase of grounds. Both of two grounds of negligence are properly submitted to the jury (1) when the pleadings fairly justify such action, (2) when the court so paraphrased the pleadings, and (3) when the cause was tried on the theory that both grounds were involved.

Buchanan v Cream. Co., 215-415; 246 NW 41

Paraphrasing allegations of injuries. The court, in stating the issues to the jury, may very properly paraphrase an allegation as to the injuries which plaintiff claims to have suffered.

McCoy v Cole, 216-1320; 249 NW 213
See Mitchell v Burgher, 216-869; 249 NW 357

Permissible paraphrasing of issue—fraud. A plea that the signing of a promissory note was induced by trickery and fraud (1) in that the note was misread, and (2) in that the payee misstated the note which was being signed may very properly be paraphrased in the instruction as a defense of "fraud."

State Bank v Deal, 200-490; 203 NW 293

Paraphrasizing assignment of negligence. The court may very properly paraphrase in his own language one or more assignments of negligence, and if such paraphrasing is correctly done no claim will lie, of course, that an issue was submitted aside the pleadings.

Rulison v X-ray Corp., 207-895; 223 NW 745

Statement of issues—copying pleadings. A statement of issues to jury by trial court in a condemnation case was not open to the charge that it was a mere copy of the pleading where such statement of the case was as succinctly stated as could well be done and at the same time give an intelligent and understandable resume of the elements upon which plaintiffs based their claim for damages and the amount thereof.

Stoner v Hy. Comm., 227-115; 287 NW 269

Undue submission of issues. A preliminary recital in the language of an unquestioned pleading, of an issue of negligence in maintaining a sidewalk, which embraces statements of the method by which and the source from which the alleged nuisance was created on the walk, reveals no error when the definite legal issue was alone actually submitted to the jury.

Fosselman v City, 211-1213; 233 NW 491

Copying censorious and inflammatory pleading—effect. A censorious and somewhat inflammatory pleading of grounds of contest of a will should, if the context presents support for such action, be so paraphrased in the instructions as to present the simple issues of (1) want of testamentary capacity and (2) undue influence. To copy the entire pleading into the instructions constitutes reversible error.

In re Thompson, 211-935; 234 NW 841
Welton v Highway Com., 211-625; 233 NW 876

(g) DEFINING AND EXPLAINING TERMS

Failure to define "issues". It is not erroneous for the court to fail to define the term "issue".

McQuillen v Meyers, 213-1366; 241 NW 442

Failure to define "prescribe". Instructions which defined "prescribe" reviewed, and held unobjectionable.

State v Hueser, 205-132; 215 NW 643

"Family" defined. Instructions which define a "family" as "a collection or collective body of persons who live under one roof and under one head or management" are all-sufficient.

Wilson v Else, 204-857; 216 NW 33

Instruction on "stated" amount for alleged services rendered to decedent. In probate claimant's action reciting decedent's agreement to pay to claimant for services from decedent's estate an amount more than claimant could expect to make teaching school, a reference by trial court in its instructions to decedent's agreement to pay a "stated amount per month" was not objectionable where, under allegations of claim there could be no recovery unless jury found that there was an agreement to pay a stated amount, and where there was evidence as to amount stated or fixed by decedent. The word "stated" means no more than determined, fixed, or settled, and was properly used in the instruction.

In re McKeon, 227-1050; 289 NW 915

Superfluous definition—"burden of proof". A nonmisleading but superfluous definition of "burden of proof" cannot be prejudicial.

State v Matthes, 210-178; 230 NW 522

"Probable cause"—negative definition. It is not necessarily erroneous to define want of probable cause in a negative form instead of in an affirmative form.

Hepker v Schmickle, 209-744; 229 NW 177

Negligence—erroneous definition. A definition of "negligence" which is so broad as to permit the jury to predicate a finding of negligence on the violation of a statute law of the road when the facts rendering such statute applicable are neither pleaded nor proven, is necessarily erroneous and prejudicial.

Gross v Bakery, 209-40; 227 NW 620

Definition of negligence approved. Instruction defining "negligence" and otherwise correct is not rendered erroneous because it includes the statement that "such care is proportionate to the apparent danger involved; where the apparent danger is great, a greater care is required than where such apparent danger is slight". So held against the contention that degrees of negligence are not recognized in this state.

Wolfe v Decker, 221-600; 266 NW 4

Injuries from operation — negligence — correct definition. Instruction reviewed and held to constitute a correct definition of actionable negligence.

Engle v Nelson, 220-771; 263 NW 505
Wolfe v Decker, 221-600; 266 NW 4

Obscure definition of "ordinary care." An instruction which, somewhat obscurely, defines ordinary care as such care as is commensurate with the danger to be apprehended from the circumstances surrounding or facing the actor may nevertheless be adequate.

Orr v Hart, 219-408; 258 NW 84

II FORM, REQUISITES, AND SUFFICIENCY—continued

(g) DEFINING AND EXPLAINING TERMS—concluded

Ordinary care—definition reaffirmed. The standard definition of ordinary care need not be augmented by adding an extra word "ordinarily" to the phrases "would do" or "would not do under the circumstances".

Schalk v Smith, 224-904; 277 NW 303

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Contributory negligence — degree of. No particular or fixed phraseology is required in conveying to a jury, in a case founded on negligence, the idea that plaintiff cannot recover if he has, by his own negligence, contributed in any degree to his own injury.

Bauer v Reavell, 219-1212; 260 NW 39

Contributory negligence—adequate definition. An instruction which defines "contributory negligence" as such negligence as "helps" to produce the injury complained of is not erroneous when accompanied by a correct definition of negligence generally.

Swan v Auto Co., 221-842; 265 NW 143

Negligence must "directly" contribute. Instruction reaffirmed requiring plaintiff's negligence to contribute "directly" to the injuries before it will defeat recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

"Inevitable accident"—failure to define. Failure to define the term "inevitable accident" does not result in error when the instruction is correct as far as it goes and when a request for a definition is not made.

Hamilton v Boyd, 218-885; 256 NW 290

"Notice" and "means of knowledge." Instructions defining "notice" and "means of knowledge" and concretely applying such definitions to the evidence, reviewed, and held adequate without further elaboration.

General Motors v Whiteley, 217-998; 252 NW 779

Failure to define "prima facie". An instruction characterizing certain acts of omission and commission, if found by the jury, as prima facie evidence of negligence, is not necessarily rendered erroneous because the court failed to define said term "prima facie".

Wolfe v Decker, 221-600; 266 NW 4

"Preponderance of evidence" defined. A definition of "preponderance of evidence is meaning the greater weight of evidence" is not rendered erroneous because of the additional phrase "the evidence of superior influence or efficacy".

Bauer v Reavell, 219-1212; 260 NW 39

"Preponderance of evidence." In defining "preponderance of evidence" as evidence which is "more convincing as to its truth", the court does not, in effect, say that evidence cannot constitute a preponderance unless the jury is satisfied that it is true.

Priest v Hogan, 218-1371; 257 NW 403

Preponderance of evidence erroneously defined. It is error to define "preponderance of the credible evidence" as the testimony which best satisfies the juror's mind "that it is true", because it implies that the jury must be fully convinced of the truth of the testimony which controls the decision on an issue.

Heacock v Baule, 216-311; 249 NW 437; 93 ALR 151; 36 NCCA 25

Duress—inadequate instructions. On the issue whether a settlement was invalid because of duress in the form of threats to arrest and imprison, it is not sufficient to define "duress" as "compulsion or restraint by which a person is illegally forced to do an act". The jury must be told, in effect, that the duress must be such as to deprive the party of the power to enter into a contract.

Gray v Shell Corp., 212-825; 237 NW 460

Instructions—evidence defined. Instruction that "evidence is whatever is admitted in the trial of a case as part of the record, whether it be an article or document marked as exhibit, other matter formally introduced and received, stipulation, or testimony of witnesses, in order to enable jury to pronounce with certainty, concerning the truth of any matter in dispute", considered with other instructions, and while not approved, could not have prejudicially misled the jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Abstract definition of "evidence". An abstract definition of "evidence" which, standing alone, might possibly invite the jury to consider matters not received in evidence is rendered harmless by other instructions which definitely limit the jury to the evidence submitted to it.

State v Speck, 202-732; 210 NW 913

Supposed computation illustrating rule. A mathematical rule for the computation of different elements of damages is not rendered erroneous by an accompanying, nonmisleading, supposed computation illustrating the application of the rule.

Glandon v Ins. Assn., 211-60; 232 NW 804

(h) SUFFICIENCY AS TO PARTICULAR SUBJECT-MATTERS

Verbal admissions—unbalanced instruction. An instruction to the effect that verbal admissions should be received by the jury with caution as they are subject to much imperfection and mistake, is reversibly erroneous unless balanced with further instruction to

the effect that "when such admissions are deliberately made, or often repeated, and are correctly given, they are often the most satisfactory evidence."

Davis v City, 209-1324; 230 NW 421
Duncan v Rhomberg, 212-389; 236 NW 638
Abraham v Ins. Co., 215-1; 244 NW 675

Unbalanced instructions. Failure of the court to balance an instruction,—to state the negative of a proposition as well as the affirmative,—does not necessarily constitute reversible error.

Kline v Transfer Co., 215-943; 247 NW 215

Balancing illustration. The court, after instructing that the taking of indecent liberties with the person of a woman may constitute an assault, and after employing an illustration descriptive of indecent liberty, need not balance the illustration by giving the converse thereof.

Ransom v McDermott, 215-594; 246 NW 266

Testamentary capacity of individual. Principle reaffirmed that mere weakness of the mental faculties is insufficient to invalidate a will if the testator knew and comprehended the natural objects of his bounty, the nature and extent of his property, and the disposition he desired to make of it.

In re Shields, 208-607; 224 NW 69

Testamentary capacity. Instructions reviewed generally, and held to properly present the rules for weighing the testimony on the issue of testamentary capacity.

In re Shields, 208-607; 224 NW 69

Civil liability—self-defense properly submitted. In an assault and battery case an instruction setting out elements of plaintiff's proof without referring to "self-defense" is not erroneous when "self-defense" is sufficiently explained to the jury in other instructions.

Hauser v Boever, 225-1; 279 NW 137

Self-defense—permissible degree of force. The degree of force which a defendant may employ in order to prevent injury to himself from an assault by one person is not necessarily the measure of defendant's permissible resistance when, at the same instant of time, he is menacingly threatened by several other persons in his immediate presence. This important fact must not be overlooked by the instructions.

Booton v Metcalfe, 201-311; 207 NW 386

Action for causing death—force in repelling assault. A defendant in repelling an assault upon his person has a right to use such force as appeared to him, as a reasonably prudent, courageous, and cautious man, to be necessary under the circumstances, and the trial court's words "reasonably appeared necessary to him as a cautious, courageous man", while inaccurate in an instruction, are not prejudicially erroneous, the trial court having correctly stated the rule in other paragraphs of the instruction of which complaint is made.

Boyle v Bornholtz, 224-90; 275 NW 479

Elements of self-defense—action for wrongful death. In a death action against a merchant policeman for shooting an alleged robber, the plea of self-defense being an affirmative one required defendant to prove (1) that the assailant was attempting to rob him; (2) that he was reasonably apprehensive of peril; (3) that he was acting as a reasonably cautious and courageous man; and (4) that he had reasonable grounds to believe it necessary to use the force he did use, and the court commits no error in so instructing.

Boyle v Bornholtz, 224-90; 275 NW 479

"Alibi" in civil cause — burden of proof. Where a defendant in a civil case enters a general denial to a charge of having committed a tort, and in support thereof testifies that at the time in question he was at his home not far from the scene of the alleged tort, the court has no right to instruct (1) that defendant's defense is that of an "alibi", and (2) that defendant has the burden to establish such alibi by evidence which will outweigh the evidence tending to show that defendant did commit the tort.

Gregory v Sorensen, 208-174; 225 NW 342

Duty owing to licensee. When a material issue is whether a person, injured in a public store because of a defect in the maintenance of the store, was at the time of the injury an invitee or a mere licensee, the court must plainly tell the jury that if the injured party was a mere licensee when injured he cannot recover even tho the operator of the store was negligent in maintaining the store unless the injured party shows that he was injured by some willful or affirmative action of the said operator.

Nelson v Woolworth, 211-592; 231 NW 665

Legal opinion as false representation. A representation, tho false, that a bank and the directors thereof are personally liable, as a matter of law, on certain paper rediscounted by the bank, cannot constitute a fraud when the parties concerned stand on equal footing as to all the material facts; otherwise, when such equality does not exist, and when the statement is made for the purpose of being relied on as a statement of fact, and is justifiably so relied on by the party to whom made; and instructions must make this distinction clear to the jury.

Commercial Bk. v Keitges, 206-90; 219 NW 44

II FORM, REQUISITES, AND SUFFICIENCY—continued

(h) SUFFICIENCY AS TO PARTICULAR SUBJECT-MATTERS—continued

"Payment" as issue. Instructions which, as a whole, plainly submit the plea of payment as pleaded, are all-sufficient.

Blakesburg Bk. v Blake, 207-843; 223 NW 895

Multiple quantum meruit counts. No error results from instructing fully as to the issues under each of several quantum meruit counts, all pertaining to the same transaction, when the court properly protects the defendant from a double liability.

Olson v Shuler, 208-70; 221 NW 941

Quantum meruit—independent judgment of jurors. A jury may be instructed that, in determining the reasonable value of services rendered, they may give due heed to their own knowledge and experience on the subject at issue.

Northrup v Herrick, 206-1225; 219 NW 419

Quantum meruit. A denied plea of quantum meruit, for services rendered must be established, or plaintiff must fail, irrespective of whether the defendant does or does not establish his defensive plea that the contract of employment was different, and that thereunder the plaintiff had been paid. Instructions are necessarily erroneous when to the effect that defendant is entitled to the verdict only in case he establishes his claim as to the contract.

Olson v Shuler, 203-518; 210 NW 453

Nominal damages—right to recover more. The court is not in error in instructing that a plaintiff is entitled to more than nominal damages ("such as one dollar or less") consequent on a wholly unjustified assault and battery resulting in admittedly substantial physical injury to plaintiff.

Ashby v Nine, 218-953; 256 NW 679

Damages—contract basis. Where parties have contracted that contemplated damages shall not exceed a certain amount, a particular measure of damages which will give practical effect to the agreement will be approved.

Riggs v Gish, 201-148; 205 NW 833

Present worth of estate—inadequate instructions. In an action for damages to the estate of a 17-year-old minor consequent on his wrongful death, the court should instruct that the present worth of said estate must be based on the minor's expectancy at the time of his majority.

Hart v Hinkley, 215-915; 247 NW 258

Sale of stock—damages as affected by 1929 depression. In an action for damages on account of false representations inducing the purchase of stock and under an instruction giving the correct measure of damages as the difference between the actual value of the stock and its value if it had been as represented, both values as of the time of purchase which was prior to the depression of 1929, it follows that the reduction of the stock's value because of the depression did not cause plaintiff's damage and defendant's motion for a directed verdict thereon was properly denied.

Smith v Utilities Co., 224-151; 275 NW 158

Frozen condition of shipment. An allegation that the frozen condition of a shipment was negligently caused by the delivering carrier (who was in court) is properly presented by an instruction substantially so directing the jury, even tho the plaintiff has alleged that the shipment was unfrozen when received by the initial carrier (who was not in court), and even tho the instructions made no mention of such latter allegation.

Dye Co. v Davis, 202-1008; 209 NW 744

Fraudulent representations—opinion (?) or fact (?). A representation may be one of fact per se, or it may be one of opinion per se, or it may be neither per se. In the latter case, whether the representation or statement be of fact or of opinion depends essentially on the subject-matter of the transaction and on all the material attending facts and circumstances thereof; and the court must, in its instructions, clearly differentiate between the two questions.

Boysen v Petersen, 203-1073; 211 NW 894

Mitigation—libel action. In an action for libel and defamation of character, the court should clearly differentiate between the purpose and effect of evidence (1) tending to show a good-faith belief in the truth of the charges in question, and (2) tending to show the actual truth of such charges.

Mowry v Reinking, 203-628; 213 NW 274

False imprisonment — elements. The jury should be definitely instructed that there cannot be false imprisonment unless the imprisonment is against the will of the person imprisoned.

Kelley v Gardner, 213-16; 238 NW 470

Uncertain or speculative testimony. The court should instruct the jury on request, in eminent domain proceedings, that it should not, on the issue of value, take into consideration anything which is remote, or imaginary, or uncertain or speculative even tho testified to by witnesses.

Welton v Highway Com., 211-625; 233 NW 876

Contract measure of damages—effect. A contract measure of damages in case of loss under a policy of insurance against theft pre-

cludes the court from instructing as to another and different measure of damages.

Salinger v Ins. Corp., 214-1021; 243 NW 183

Enticing and alienating—measure of damages. A husband's right of action for the wrongful alienation and enticing of his wife is based on the loss of her consortium,—not alone on the loss of her love. Instructions held inadequate.

McGlothlen v Mills, 221-204; 265 NW 117

Equal degree of care. Any basis in the instructions for claiming that a greater degree of care was required of one party than of the other, is fully effaced when the court otherwise instructs definitely to the contrary.

Stilson v Ellis, 208-1157; 225 NW 346

No-eyewitness rule. Instructions relative to the permissible inference of care which the law authorizes when there are no eyewitnesses to an accident reviewed and held correct.

Azeltine v Lutterman, 218-675; 254 NW 854

Intermingling general and specific allegations. Instructions which refer the jury to the general allegations of negligence and not to the specific allegations are of harmless consequence when the latter are simply an elaboration of the former.

Tissue v Durin, 216-709; 246 NW 806

Failure to instruct on general negligence. There was no prejudicial error in failing to instruct that an action was based on general negligence when, in assigning this alleged error, the defendant stated that the court set out the substance of the petition in stating the issues, but did not show in what manner the jury would have better understood the issues had the court instructed as to general negligence.

Porter v Elec. Co., 228- ; 292 NW 231

Proximate cause—requiring excessive proof. Instructions reviewed and held not subject to the objections that plaintiff was required to prove (1) not only that the negligence of defendant was the proximate cause of plaintiff's injuries, but (2) that said negligence was the sole cause of said injuries.

Rainey v Riese, 219-164; 257 NW 346

Proximate cause of injury — concurrent negligence. The fact that the negligence of two parties is concurrent does not render improper an instruction which states what acts of one of the parties would constitute negligence.

Reidy v Ry. Co., 220-1386; 258 NW 675

Contributory negligence — sufficiency. Instructions reviewed and held properly to present the issue of contributory negligence.

Becvar v Batesole, 218-858; 256 NW 297

Contributory negligence — inadequate submission. Defendant's specific allegations as to contributory negligence on the part of plaintiff should be specifically submitted to the jury when they have adequate support in the evidence.

Lang v Siddall, 218-263; 254 NW 783

Contributory negligence — burden of proof. A definite instruction that plaintiff has the burden of proof to show that he was not guilty of any negligence contributing to his injury, is in no degree overcome by later instructions wherein the court, with reference to contributory-fact issues, uses the expression "if you find"; in other words, such expression does not have the effect of impliedly placing the burden of proof as to contributory negligence upon the defendant.

Dean v Koolish, 212-238; 234 NW 179

Contributory negligence—model instruction. Courts, in instructing as to contributory negligence which will bar recovery, should employ the model instruction approved by the appellate court, viz: "If the injured party contributed in any way or in any degree directly to the injury complained of there can be no recovery", but it is not erroneous to substitute "coöperated" or an equivalent term for "contributed".

Hoegh v See, 215-733; 246 NW 787

Contributory negligence—fundamental error. An unobjectionable definition of contributory negligence is converted into fundamental error by the addition of the clause "and but for such negligence on the part of the person injured the injury would not have occurred".

Ryan v Rendering Wks., 215-363; 245 NW 301

Third party negligence as defense—burden of proof. A defendant who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant establishes that such negligence was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

Jordison v Jordison Bros., 215-938; 247 NW 491

Presumption of negligence. To instruct that a railroad company must overcome a presumption of negligence in setting out a fire "by negativing every fact that would justify a finding of negligence on defendant's part" is not misleading when defendant is, by instructions, fully exempted from liability on proof that its engine was properly equipped and properly operated.

Stickling v Railway, 215-1312; 247 NW 642

Statutory presumption of negligence. Failure to instruct on the statutory presumption of negligence in an action for wrongful injury from electricity, is not erroneous (1) when plaintiff has seemingly ignored such presump-

II FORM, REQUISITES, AND SUFFICIENCY—continued

(h) SUFFICIENCY AS TO PARTICULAR SUBJECT-MATTERS—continued

tion by alleging and attempting to prove specific acts of negligence, and (2) when plaintiff requests no such instruction.

Hanna v Elec. Co., 210-864; 232 NW 421

Recklessness particulars unchallenged before answer. Error may not be predicated on the submission of certain particulars alleging recklessness when their sufficiency is not raised before answer filed and when evidence exists to sustain them.

Claussen v Johnson's Est., 224-990; 278 NW 297

Limiting impeaching evidence. The failure of the court on its own motion in its instructions to specifically limit impeaching testimony to that particular purpose is not erroneous when the testimony in question is of such a nature that it could not be considered for any other purpose.

State v Brewer, 218-1287; 254 NW 834

Expert testimony. Instructions to the effect that a jury is not necessarily compelled to give controlling effect to expert testimony, reviewed and held correct.

Crouch v Remedy Co., 210-849; 231 NW 323; 38 NCCA 81

Compensation—instructions—jurors' experience. An instruction in eminent domain proceedings that jurors have the right to weigh the testimony of experts as to values in the light of their own experience is not subject to the vice that they were told to substitute their own knowledge of values.

Cutler v State, 224-686; 278 NW 327

Personal injury—reducing verdict. An instruction in a personal injury action held not prejudicially objectionable on the ground that it did not specifically tell the jury that the amount the deceased plaintiff would have spent should be considered only for the purpose of reducing the amount to be recovered.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Future and anticipatory damages. In an action to recover damages for personal injuries resulting from an automobile collision where petition alleged damages for future medical expenses and the evidence showed plaintiff received severe permanent injuries to his back and spine, suffered intense pain, and received two hernias, together with other injuries, an instruction on future and anticipatory expenses was held proper and supported by the evidence.

Kramer v Henely, 227-504; 288 NW 610

Statute of limitation—unnecessary instructions. There is no occasion to instruct relative to the statute of limitation when the parties join no issue thereon.

Dravis v Sawyer, 218-742; 254 NW 920

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of a sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instuction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Disability continuing to time of trial—insurance benefits. When an insurance policy provides that, in order to recover permanent disability benefits, an insured must be disabled "for life", an instruction that the jury must find insured disabled at the time of trial is correct.

Wood v Federal Life Ins., 224-179; 277 NW 241

Proofs of loss under policy—comprehensiveness. Instructions relative to the inconsistency between the testimony of plaintiff and her statements in her proofs of loss under an accident policy of insurance reviewed, and held to be sufficiently comprehensive properly to present the matter to the jury.

Harrington v Surety Co., 206-925; 221 NW 577

Theft insurance — inadequate instructions. In an action on a policy of insurance against theft, the court, after properly placing the burden on plaintiff to show that the taker intended to steal the insured property, must also instruct that plaintiff supplies that element of proof, prima facie, by testimony that the insured property disappeared from the place where plaintiff left it, without the knowledge or consent of plaintiff or of any other person having control of the property.

Tullar v Ins. Co., 214-166; 239 NW 534

Application attached to policy—illegibly reduced photo copy—not "true copy". In action on life policies, where defense was based on false representations in application for policy, and it is shown original application is plainly printed in legible letters of fair size, while copy furnished and attached to policy is so reduced in size and so dim or blurred that it can only be read by persons with normal vision by use of a strong magnifying glass, the statute requiring "true copy" of application to be attached to policy is not complied with, and the submission of question to the jury as to

legibility under an instruction that a true copy must be readable was not erroneous.

New York Ins. v Miller, 73 F 2d, 350

Delivery of mortgage—actual or constructive delivery. The delivery of a mortgage on insured property, in order to have the effect of invalidating the insurance on the property, may be actual or constructive, and reversible error results from requiring the jury to find an actual delivery when the record might justify a finding of constructive delivery.

Hoover v Ins. Co., 218-559; 255 NW 705

All elements of offense charged. Comprehensive and correct instructions as to all elements of a charged offense render unnecessary, in the absence of a request, an elaborate exposition of defendant's particular theory of the case.

State v Kendall, 200-483; 203 NW 806

(i) ARGUMENTATIVE INSTRUCTIONS

Instructions—argumentative language—issues stated. The court should not instruct the jury in argumentative language, but the issues should be fairly stated without undue repetition, undue emphasis, or minimization of specific facts or circumstances.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

(j) READING OR QUOTING STATUTES

Contributory negligence—instructions—error in quoting statute only. In submitting specifications of alleged contributory negligence, the court commits error in simply quoting the statute relating to these grounds without defining just what acts of plaintiff, under the evidence, would constitute contributory negligence, and without applying the law to the facts.

Jakeway v Allen, 226-13; 282 NW 374

(k) CONFUSED OR MISLEADING INSTRUCTIONS

Conflicting instructions—when reversible error. When read as a whole, if instructions are conflicting, confusing, and misleading to the jury, they are reversibly erroneous.

Tallmon v Larson, 226-564; 284 NW 367

Cured by construction as whole. Tho an instruction standing alone may be confusing, yet it may be all-sufficient if, when the instructions are viewed and construed as a whole, the confusion necessarily disappears.

Hanrahan v Sprague, 220-867; 263 NW 514

Copying defendant's answer improper. Instructions should not substantially copy defendant's answer as jury may easily be confused and misled thereby.

White v Zell, 224-359; 276 NW 76

"Testimony" used instead of "evidence"—jury not confused. Use of the word "testimony" in an instruction in place of the word "evidence" held nonprejudicial in that the jury could not have been misled.

Moran v Kean, 225-329; 280 NW 543

Grounds for new trial. The granting of a new trial will not be interfered with by the appellate court when probably granted by the court in the belief that its withdrawal of certain issues and its unfortunate references to these defenses at inopportune times in the instructions were prejudicial.

Christensen v Bank, 218-892; 256 NW 687; 255 NW 520

Hopeless confusion—credibility of witnesses. A hopelessly confusing instruction as to what matters the jury might take into consideration in determining the credibility of witnesses, constitutes error.

Starry v Starry, 208-228; 225 NW 268

Hopeless confusion—validity of instrument. To base the validity of an instrument on the manner in which a party thereto treated it, and on the attitude which he maintained toward it, may result in such confusion on the part of the jury as to constitute reversible error.

Cornett v Ins. Assn., 208-450; 224 NW 524

Hopeless conflict—street maintenance. An instruction from which the jury would be wholly unable to determine whether a city was bound to maintain a reasonably safe traveled way to the full width of the street, or to the full width of the graded portion of the street, is prejudicially erroneous.

Morse v Town, 213-1225; 241 NW 304

Fatally confusing—action on note. An instruction may, manifestly, be so confusing as to constitute reversible error. So held as to an instruction relative to the execution of a promissory note and the renewal thereof and the consideration therefor.

Suntken v Suntken, 223-347; 272 NW 132

Hopeless conflict—duty of carrier. Hopelessly conflicting instructions relative to the duty owing by a carrier to a passenger constitute reversible error.

Boston v Elec. Co., 206-753; 221 NW 508

Confusedly worded. An unfortunately worded instruction does not constitute reversible error if its meaning is fairly discernible.

Olson v Tyner, 219-251; 257 NW 538

Reciting claims and then withdrawing them. Instructions which recite or paraphrase all the claims made in the pleadings and later withdraw certain of the claims will not be deemed erroneous when it can be said that the jury was not misled.

Ryerson v Roth Bros., 210-1179; 232 NW 500

Confused use of word "accident". The use in instruction of the word "accident", both (1)

II FORM, REQUISITES, AND SUFFICIENCY—continued

(k) CONFUSED OR MISLEADING INSTRUCTIONS—concluded

in the sense of an occurrence that was inevitable, and (2) in the sense of an occurrence happening because of negligence, is not necessarily confusing.

Keller v Gartin, 220-78; 261 NW 776

Correct and incorrect instructions. In an action for damages consequent on malpractice in sewing up a sponge in a wound, instructions which, in part, definitely confine the jury to the one ground of negligence alleged, and which, in part, fail so to confine them, constitute reversible error.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Ordinary care—unallowable standard. Error results from instructing that a party would not be guilty of negligence if he moved machinery across a railroad track in the manner in which he usually so moved it, unless he knew such manner to be dangerous.

Graves v Railway, 207-30; 222 NW 344

Liability of defendants—conspiracy. An instruction to the effect that, in order to render defendants individually liable, it must be found that they were parties to the conspiracy charged, or that they "personally participated" in making the representations which were the basis of the conspiracy, is not erroneous when the record reveals ample testimony of the "personal participation" of all of the defendants in the making of the said representations.

Pullan v Struthers, 201-1179; 207 NW 235

Statute of limitations—tolled by fraudulent concealment. In an action for damages for fraud in the sale of stock where the defense was the statute of limitations, an instruction that fails to tell the jury that the statute of limitations would run unless tolled by some affirmative act of fraudulent concealment on the part of the fraud perpetrator is prejudicially erroneous.

Smith v Utilities Co., 224-151; 275 NW 158

(l) INCONSISTENT OR CONTRADICTORY INSTRUCTIONS

Correct and incorrect instruction on same subject matter. A correct and an incorrect instruction on the same subject matter presents a hopeless contradiction to the jury.

Hoover v Haggard, 219-1232; 260 NW 540

Contributory negligence — minors. An instruction, in a personal injury action, that the burden of proof is on plaintiff to establish his freedom from contributory negligence is not nullified by an instruction that the plaintiff, if of the age of eight years only, is presumed to be incapable of such negligence, and that, to find to the contrary, defendant must so show.

Stutzman v Younkerman, 204-1162; 216 NW 627

Inconsistent instructions — genuineness of signature. Inconsistent instructions on a material issue furnish grounds for a new trial. So held where the court instructed that the only issue submitted to the jury was the genuineness of an indorsing signature on a note, but later instructed that the jury must determine the genuineness of the signature to the note itself.

In re Richardson, 202-328; 208 NW 374

Fatal inconsistency—liability of warehouseman. A definite and unqualified instruction which, in effect, holds a warehouseman to liability as an insurer, and an additional instruction holding him to liability for negligence only, presents a fatal inconsistency.

Kline v Transfer Co., 215-943; 247 NW 215

Fatal contradiction—malicious prosecution. In an action for damages consequent on a malicious prosecution, instructions to the effect, (1) that plaintiff must negative good faith on the part of defendant in instituting the prosecution, and (2) that good faith on the part of defendant constituted no defense, are prejudicially erroneous in that they are mutually conflicting.

Dobbins v Todd & Kraft, 218-878; 256 NW 282

Conflicting instructions—proof in will contest. Instructions relative to what proponent in a will contest must establish reviewed, and held not conflicting.

In re Merrill, 202-837; 211 NW 361

Contradictory instructions—defense on note. Contradictory and misleading instructions may be ground for new trial. So held where the court unequivocally instructed that a defense to a promissory note was waived by the act of the maker in executing a renewal with full knowledge of the defense, and later instructed, in effect, that such waiver did not occur unless the holder of the new note had changed his position by reason thereof.

Euclid Bank v Nesbit, 201-506; 207 NW 761
Fisher v Tullar, 209-35; 227 NW 580

Recoverable and nonrecoverable damages—failure to differentiate. In an action for malpractice in that, after performing a successful operation except that the defendant negligently left a piece of gauze in the wound, which negligence necessitated a second operation, instructions relative to damages arising from, (1) scars, (2) bodily and mental pain, and (3) expenses paid for household servants, must clearly differentiate, in view of the two operations, between such damages as are,

under each heading, recoverable, and those that are not recoverable.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

(m) CAUTIONARY INSTRUCTIONS

Cautionary instructions—discretion of court. The giving or refusal of cautionary instructions designed to allay prejudice or sympathy on the part of the jury is discretionary with the court.

Siesseger v Puth, 211-775; 234 NW 540

Orwig v Railway, 217-521; 250 NW 148; 90 ALR 258

Precautionary instructions — recovery of rents. A jury may very properly be told not to allow a recovery of rents prior to a specified time, even tho no claim is made in the pleadings for such prior rents, when it is manifest the court was simply guarding against possible confusion, because of the state of the record.

Bigelow v Ins. Co., 206-884; 221 NW 661

Duty of jury to arrive at verdict. After jury had been out several hours it was not improper to call them for cautionary instruction that it was their duty, if possible, to arrive at an agreement.

Nelson v Hemminger, (NOR); 224 NW 49

Provisional or conditional admission of evidence. Evidence provisionally or conditionally received on a pending issue may require a cautionary instruction to the jury to disregard such evidence if the issue is removed from the case.

Stoner v Ins. Co., 215-665; 246 NW 615

Undenied statement as admission—cautionary instruction—failure to request. Court did not err in failing to give a cautionary instruction concerning evidence of damaging statements against defendant, made in his presence, to which he failed to reply or deny, when no such instruction was requested, nor when such claimed error was not raised in the trial court.

Doherty v Edwards, 227-1264; 290 NW 672

Instructions considered as a whole. A cautionary instruction to the jury that court did not attempt to embody all applicable law in any one instruction, but in considering any one instruction jury should consider each in light of and in harmony with all other given instructions and apply them as a whole to the evidence would be proper; however, a failure to do so would not be reversible error.

Churchill v Briggs, 225-1187; 282 NW 280

"Guarded" judgment of jurors. Instructions which require jurors to exercise a "guarded" judgment in finding a fact are not necessarily and prejudicially erroneous.

Ferber v Railway, 205-291; 217 NW 880

Undue limitation—harmless error. An instruction as to the caution with which proof of certain alleged statements and declarations of an alleged donor (and tending to establish an executed gift) should be considered by the jury, is not erroneous because unduly limited; neither may it be deemed harmful when analogous statements and declarations tending to show the nonmaking of said gift and to which said instruction was not made applicable, were fully, properly and correctly covered by another and separate instruction.

Malcor v Johnson, 223-644; 273 NW 145

(n) UNDUE PROMINENCE TO PARTICULAR MATTERS

Undue prominence to certain evidence. Instruction containing recitations of facts or circumstances which have probative force upon issues tendered, or which militate against one party, without a recitation of facts favorable to his contention, are improper and erroneous; as also are instructions which give undue prominence to evidentiary facts to be determined by the jury.

State v Proost, 225-628; 281 NW 167

Undue particularization or emphasis. Instructions should not attempt to marshal the evidence, or to emphasize particular phases or circumstances, and thereby by silence minimize or obscure other phases or circumstances. Instructions working such results are properly refused, especially when the instructions fairly and comprehensively cover the subject matters in such requests.

State v Blair, 209-229; 223 NW 554

State v Martin, 210-376; 228 NW 1

Undue elaboration on nonsubmitted issues.

Seddon v Richardson, 200-763; 205 NW 307

Estoppel to object. Defendant may not successfully claim that an instruction given at his request unduly magnified the importance of certain evidence.

State v Brown, 216-538; 245 NW 306

Speculative damages. Instructions in eminent domain proceedings held not subject to the vice that they emphasized evidence tending to prove speculative damages.

Kemmerer v Highway Com., 214-136; 241 NW 693

See In re Davis, 217-509; 248 NW 497

III APPLICABILITY TO PLEADINGS AND EVIDENCE

(a) APPLICABILITY TO PLEADINGS AND ISSUES

Instructions coordinated with pleadings and evidence. Instructions must always be coordinated with and limited to the pleadings and evidence.

Waldman v Motor Co., 214-1139; 243 NW 555

Necessity for pleadings as basis. It is quite elementary that issues should not be submitted

III APPLICABILITY TO PLEADINGS AND EVIDENCE—continued

(a) APPLICABILITY TO PLEADINGS AND ISSUES—continued

unless there is an appropriate pleading as a basis therefor.

Harrington v Surety Co., 206-925; 221 NW 577

Hart v Hinkley, 215-915; 247 NW 258

Plea and proof as basis. Instructions without plea or proof, as a basis thereof, are erroneous.

Enfield v Butler, 221-615; 264 NW 546

Applicability to pleadings—nonviolation of rule. The rule which condemns instruction on nonpleaded issues is not violated by instructions which are responsive to the testimony and relative to the bona fides of an affirmative defense—instructions which really go to the heart of the question whether the defense has been established.

Cary v Waybill, 200-432; 203 NW 8

Unrevealed theory not covered. A theory not brought to the attention of the court need not, of course, be covered by the instructions.

Sutton v Moreland, 214-337; 242 NW 75

Unpleaded issue. The submission to the jury of an issue, and the placing of the burden on a party to prove the affirmative thereof, when the party was in no manner presenting such issue, constitute reversible error.

Granteer v Thompson, 203-127; 208 NW 497

In re Stencil, 215-1195; 248 NW 18

Unpleaded defense. Reversible error results from submitting to the jury and requiring it to make a finding on a possible defense not presented by the defendant.

State v Dunn, 202-1188; 211 NW 850

Submission of nonpleaded issues. The submission of a nonpleaded issue of negligence constitutes reversible error.

Morse v Town, 213-1225; 241 NW 304

Sergeant v Challis, 213-57; 238 NW 442

Inaccurate submission of issue. Slight inaccuracy in submitting a pleaded item of damages will not be deemed the submission of an unpleaded issue when the jury could not have been misled.

Siesseger v Puth, 211-775; 234 NW 540

Submission of noncontested issue. It is not erroneous to submit to the jury an issue actually made by the pleadings even tho in a practical sense there was no dispute during the trial as to said issue.

Glass v Hutchinson Co., 214-825; 243 NW 352

Abstract statement of law. Instructions stating an abstract proposition of law, not wholly applicable to the subject matter on trial, are not erroneous when a later paragraph concretely applies the law to the facts.

Goben v Paving Co., 218-829; 252 NW 262

Inferential withdrawal of count. Failure of the court to instruct on a pleaded count constitutes an effectual withdrawal of the count from the jury.

Cox v Fleisher Co., 208-458; 223 NW 521

Pleadings not supported by proof. A plaintiff who has failed to establish the material allegations of his petition, and is therefore not entitled to recover in any event, cannot be deemed harmed by the failure of the court adequately to present to the jury his pleaded cause of action; nor may he be deemed harmed by an inadequate verdict.

Comparet v Metz Co., 222-1328; 271 NW 847

Reasonable value—admissions from pleadings. In action to recover price of corn sold to elevator, an instruction injecting element of reasonable value was erroneous where the pleading alleged express agreement on price, and a further erroneous instruction stating what defendant's answer admitted, but omitting qualification in defendant's pleadings, was not cured by instruction referring to a substituted oral agreement.

Hartwig v Elev. Co., (NOR); 226 NW 116

Submitting fact not in issue. The submission of the issue of mistake in a duly pleaded settlement of partnership affairs without plea of such mistake constitutes reversible error.

Tabler v Evans, 202-1386; 212 NW 161

Injecting unpleaded issue. On the one duly joined issue whether plaintiff was orally employed to render services for defendant in a certain matter, the court commits reversible error by injecting into the instructions the unpleaded issue whether defendant knew that plaintiff was performing services for defendant and accepted the benefits of such services.

Graeser v Jones, 217-499; 251 NW 162

Evidence on stricken plea. After striking from a pleading a claim for damages, error necessarily results from receiving evidence as to the claim and leaving the instructions in such form that the jury may give consideration to such evidence in arriving at their verdict.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Justifiable submission without plea. The unpleaded mitigating fact that a plaintiff knew of a fire at the time it was wrongfully set out upon his premises, and made no effort to put out the fire, or to lessen his damages, is properly presented to the jury when plaintiff's own testimony tended to prove such fact. (§11173.)

Ferber v Railway, 205-291; 217 NW 880

"Assault" admitted in pleadings—use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

Estoppel to question submission of issue. A claimant in probate who advantages himself of the very liberal rules of pleadings recognized in the probate court and who files a claim, which, if established, will justify a recovery on the basis of either an express contract or implied contract, may not complain that the court submitted to the jury the issue of express contract, especially when the verdict was in his favor.

Wilson v Else, 204-857; 216 NW 33

Recital of nonissuable matter—effect. The mere recital in the preamble to instructions of an immaterial fact allegation of an answer does not constitute a submission of the truth or falsity of such alleged fact, when the actual charging part of the instructions studiously ignores such immaterial allegation.

Wheeler v Woods, 205-1240; 219 NW 407

Unpleaded issue of general negligence. Instruction injecting unpleaded and unproved specification of general negligence is reversible error.

Keller v Dodds, 224-935; 277 NW 467

Variation between allegation and instruction. Prejudicial error may not be predicated on instructions which incidentally refer to the negligence of a city in "constructing" a walk, when the assigned negligence is in "maintaining" the walk.

Greenlee v City, 204-1055; 216 NW 774

Inadequate submission of grounds of negligence. Prejudicial error results from failure to submit to the jury all well-pleaded, separate specifications of negligence which have been established as jury questions and as the alleged compound negligence attending a given transaction, it appearing that the plaintiff has been defeated on an inadequate submission.

Hanson v Manning, 213-625; 239 NW 793

Real estate commission—issues correctly submitted. In a suit for breach of oral commission contract, instructions plainly stating that burden was on plaintiff to establish by a preponderance of evidence, (1) the terms of his contract, and (2) that through his efforts a sale was "effected, obtained, and procured", reviewed and held to correctly submit the issues under the pleadings.

Maher v Breen, 224-8; 276 NW 52

Chattel mortgages—notice only issue—unnecessary instructions. Where the plaintiff claimed the right to possession of an automobile under a conditional sales contract and the defendant claimed under two chattel mortgages acquired subsequent to the conditional sale but recorded first, instructions which submitted only the issue of whether the chattel mortgagee had notice of the prior conditional sale were not erroneous in failing to define "subsequent purchaser" as used in recording statutes and in failing to require the jury to determine whether the defendant gave value so as to constitute himself a "subsequent purchaser".

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Improper shifting of burden of proof. Plaintiff who bases his claim for damages on the alleged execution and breach by defendant of a specified contract to convey various tracts of land is not relieved of the burden of establishing said alleged contract by the fact that defendant, after pleading a general denial, sees fit, unnecessarily, to plead, in defense, the contract as he claims it to be. Instruction held erroneous as violative of this principle.

Chismore v Marion Bank, 221-1256; 268 NW 137

Master's liability for injuries—assumption of risk. Instructions to the effect that an employee may not recover damages sustained or resulting from the ordinary and inherent hazards and dangers of an employment are wholly insufficient to submit the pleaded and supported defensive issue that plaintiff had knowledge of the defects in the instrumentalities used by him and of the deficiencies and faults in the methods of using such instrumentalities and that he fully appreciated the danger which might arise therefrom.

McClary v Railway, 209-67; 227 NW 646

Justifiable ignoring of negligence. Grounds of negligence which, if proven, would not establish a cause of action, are properly withheld from the jury.

Fleming v Thornton, 217-183; 251 NW 158

Dual proximate liability. The court, manifestly, cannot properly instruct, in a personal injury action based on negligence, that defendant would not be liable if the injuries were caused by the negligence of a third party, when, under the pleadings and evidence, the jury could find that both defendant and said third party were proximately liable.

Dennis v Merrill; 218-1259; 257 NW 322; 1 NCCA(NS) 175

Acts not constituting submission of issue. It may not be said that an unsustained or unsustainable allegation of negligence is submitted to the jury because the court briefly, tho unfortunately, mentioned such allegation in a preliminary recital of plaintiff's allegations, it appearing that such objectionable

III APPLICABILITY TO PLEADINGS AND EVIDENCE—continued

(a) APPLICABILITY TO PLEADINGS AND ISSUES—continued

grounds of recovery were thereafter studiously ignored in the instructions.

Williams v Railway, 205-446; 214 NW 692

Governmental immunity—law question raised in reply — recognizing issue—when proper. The defense of "governmental immunity" of an employee, in a personal injury action, should properly be assailed by motion or demurrer. However, if the law question of sufficiency of this defense is raised in the reply and not challenged by the defendant, and the case tried on that theory, then the court is correct in recognizing the issue and instructing on the inadequacy of that defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Pleaded but unsupported damages—instruction as a whole. No error results from instructing that no recovery can be allowed plaintiff in excess of the pleaded amount for a named element of damages (the evidence concededly showing that plaintiff had not suffered said maximum amount) when other instructions definitely charged the jury to base damages solely on the evidence.

Danner v Cooper, 215-1354; 246 NW 223

Failure to limit damages—fatal error. An instruction which fails to limit the jury in its return of damages (1) to the amount claimed for each item of damages, and (2) to such amount only as shown by the evidence, is prejudicially erroneous.

Andersen v Christensen, 222-177; 268 NW 527

Future pain—sufficiency. Damages for "future" physical and mental pain may not be submitted to the jury under a pleading (1) which makes no specific reference to such damages, and (2) which expressly pleads that such pain continued for a stated period, to wit, three weeks. This is true even though the pleading alleges that the injury alleged resulted in permanent, visible scars upon the "arm and wrist".

Pettijohn v Halloran, 200-1355; 206 NW 631

Measure of damages—instruction following rescission theory. In vendee's action for damages for fraudulent representations of value in the sale of real estate, no rescission being asked, it is error to instruct that the measure of damages is the amount paid less the reasonable rental value for the time occupied, which error, however, is without reversible prejudice to the vendor, when the amount of recovery is so small that the hope for a more favorable verdict on a retrial is, under the evidence, too remote.

Neal v Miller, 225-252; 280 NW 499

Limiting damages—issue not raised in trial. Where an action in replevin by one claiming an automobile under a conditional sales contract was brought against a chattel mortgagee who had given some cash and extended credit in return for his mortgage, the plaintiff, having permitted the trial to be concluded on the issue of possession without raising any other issue or requesting instructions on any other issue, could not complain that the mortgagee's recovery should have been limited to the amount of actual cash given for the mortgage.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Trespassers—abortive issue. The plea in an action for personal injury that plaintiff was a trespasser on defendant's property presents no jury question when defendant neither pleads nor proves (1) that he had requested plaintiff to depart and that plaintiff had refused to do so, or (2) that any force was necessary to remove plaintiff,—in short, when defendant does not plead or show that he was ejecting plaintiff as a trespasser.

Pettijohn v Halloran, 200-1355; 206 NW 631

Preliminary statement of controversy—effect. An issue or controversial fact is not necessarily submitted to the jury because embraced within the court's preliminary statement of the contentions of the parties.

Persia Bk. v Wilson, 214-993; 243 NW 581

Submission of unsupported issue. The submission of a material but wholly unsupported issue constitutes reversible error.

Parrack v McGaffey, 217-368; 251 NW 871
Winter v Davis, 217-424; 251 NW 770
Shaw v Carson, 218-1251; 257 NW 194; 38 NCCA 192
Deweese v Transit Lines, 218-1327; 256 NW 428
Bebensee v Blumer, 219-261; 257 NW 768
Orr v Hart, 219-408; 258 NW 84
Lukin v Marvel, 219-773; 259 NW 782
Miller v Mutual Assn., 219-689; 259 NW 572
Dougherty v McFee, 221-391; 265 NW 176
State v Johnston, 221-933; 267 NW 698
Porter v Decker, 222-1109; 270 NW 897

Unsupported issue. Nonsupported issues must not be submitted to the jury.

Seddon v Richardson, 200-763; 205 NW 307
State v Wright, 200-772; 205 NW 325
Millard v Mfg. Co., 200-1063; 205 NW 979
Veith v Cassidy, 201-376; 207 NW 328
Graves v Ry. Co., 207-30; 222 NW 344
Dickeson v Lzicar, 208-275; 225 NW 406
Balik v Flacker, 212-1381; 238 NW 467
Kuhn v Kjose, 216-36; 248 NW 230
Mitchell v Burgher, 216-869; 249 NW 357
Engle v Nelson, 220-771; 263 NW 505

Supported issue—failure to submit. Error results from a refusal, especially on a request, to submit a material issue having substantial support in the record.

Gibson v Miller, 215-631; 246 NW 606

In re unsupported or immaterial issues. Reversible error results from the giving of instructions on a wholly unsupported issue, or on a supported immaterial issue.

Chismore v Bank, 221-1256; 268 NW 137

Unsupported charge of negligence. Unsupported charges of negligence should not be submitted to the jury.

Wilkinson v Lbr. Co., 203-476; 212 NW 682

Unsupported theory. The court must not instruct on a theory which the record affirmatively shows has no support whatever.

Klinkel v Saddler, 211-368; 233 NW 538

Submission of unsupported issue. Error results in stating in instructions to the jury a material, unsupported claim of one of the parties, without stating that such claim is unsupported.

Miller v Fire Assn., 219-689; 259 NW 572

Unsupported issue of permanent injury. Instructions reviewed, and held not subject to the vice of submitting an unsupported issue of permanent injury.

Groshens v Lund, 222-49; 268 NW 496

Withdrawn issue. The court having once withdrawn from the jury an unsupported issue by sustaining a motion to that effect, need not in its instructions repeat the withdrawal.

Sutton v Moreland, 214-337; 242 NW 75

Taking case from jury—failure to present objection. Error may not be predicated on the submission to the jury of a supported issue when complainant failed to request the withdrawal of said issue.

Rosenstein v Smith, 218-1381; 257 NW 397

Eminent domain—necessity for condemnation. In the absence of an issue thereon, there is no occasion whatever for the court, in eminent domain proceedings, to instruct on the subject of the necessity for such condemnation.

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

Instructions in re benefits in eminent domain. In eminent domain proceedings, an instruction that the compensation allowed should not leave the landowner "poorer or worse off or better off" because of the taking, is not subject to the vice of leading the jury to understand that in computing compensation, benefits accruing to the landowner because of the taking should be deducted, when the jury is repeatedly and explicitly told elsewhere in the instructions that they should not consider benefits.

Witt v State, 223-156; 272 NW 419

Failure to submit all issues. Reversible error results in the submission of only part of several pleaded and issuable fact questions, any one of which, if affirmatively found to exist, would justify a landlord in re-entering leased land.

Durflinger v Heaton, 219-528; 258 NW 543

Unpleaded and unsupported issue. On the narrow issue whether a defendant personally signed the promissory note sued upon, it is error for the court to submit the additional and unsupported issue whether the note was signed by someone other than the defendant, but under authority from him.

Conner v Henry, 201-253; 207 NW 119

Instructing on immaterial, nonprejudicial evidence. A will contestant's contention that it was error to instruct regarding a nonmaterial exhibit—a memorandum by a deceased attorney, who drew the will—although well founded, held to be error without prejudice when the paper and the conversation connected therewith were not necessary for proponents to make a prima facie case of the due and legal execution of the will and the genuineness of the signatures.

In re Iwers, 225-389; 280 NW 579

Requested instructions—will contestants bound by own theory. Contestants alleging that a will was not duly and legally executed may not amplify their claim thereunder after requesting instructions proceeding solely on the theory that their construction of their claim was that the signatures of the testator and one witness, now deceased, were not genuine. In such case it is not error, when otherwise unobjected to, for the court on its own motion to add an instruction which in effect limits the case to the theory propounded in contestants' requested instructions.

In re Iwers, 225-389; 280 NW 579

Submission of withdrawn issue. The submission to the jury in a will contest of the issue of testamentary capacity, when said issue had been wholly withdrawn by the contestant, (even tho in the presence of the jury) is necessarily erroneous and prejudicial.

In re Narber, 211-713; 234 NW 185

Nonissuable matters. In an action by an attorney for services based on an express contract to assist in the settlement of an appeal, the court, in its instructions, should not make plaintiff's recovery dependent on proof that defendant was apprised of just what efforts plaintiff was making to effect a settlement.

Graeser v Jones, 220-354; 261 NW 439

Attorney—contract of employment. Instructions reviewed, in an action by an attorney on a contract of employment, and held to adequately protect every right of the defendant.

Coughlon v Pedelty, 211-138; 233 NW 63

Establishing agency. The thought that a plaintiff must establish the authority of an alleged agent of the defendant's before the de-

III APPLICABILITY TO PLEADINGS AND EVIDENCE—continued

fendant can be bound by what the alleged agent says and does is sufficiently expressed in an instruction which requires the jury to find that defendant acted "by their duly authorized agent."

Farmers Bank v Planters Elev., 200-434; 204 NW 298

(b) APPLICABILITY TO EVIDENCE

Applicability to evidence. An instruction applicable to no evidence in the record is erroneous.

Millard v Mfg. Co., 200-1063; 205 NW 979

Presumption of supporting evidence. Presumptively an instruction has support in testimony not abstracted to the appellate court.

State v Metcalfe, 203-155; 212 NW 382

Unsupported issue of negligence. Reversible error results from submitting several different allegations of negligence, one of which is without support in the evidence.

Graves v Ry. Co., 207-30; 222 NW 344

Unsupported negligence. Reversible error results from so instructing that the jury may base negligence not on proof of an ultimate fact, but on proof of a simple item of evidence bearing on such ultimate fact.

Graves v Ry. Co., 207-30; 222 NW 344

Contributory negligence — lack of evidence —effect. An instruction which properly directs the jury, in determining the issue of contributory negligence of an injured party, to take into consideration certain enumerated matters as shown by the evidence, is not necessarily erroneous because it makes no reference to the effect of a lack of evidence on the subject.

Engle v Nelson, 220-771; 263 NW 505

Non-issue as to signature. When it is practically conceded, under the evidence, that a party did not himself sign a promissory note (tho his name is signed thereto), the fact that the record contains an admitted signature of the party imposes no obligation on the court to permit the jury, by a comparison of signatures, to find that the party did, himself, sign the note.

West Chester Bank v Dayton, 217-64; 250 NW 695

Performance of contract—burden of proof. The defendant in an action to recover for materials furnished under a building contract may not complain of instructions which clearly impose on plaintiff the burden to show that he has complied with the contract.

Granette v Neumann, 208-24; 221 NW 197

Nonapplicability to evidence—nonsupport. An instruction to the effect that a husband would not be guilty of failure to support his wife if he procured a home at a named place and if the wife without good cause refused to live at said place is erroneous when the applicable evidence was solely to the effect that the husband offered to procure such home and that the wife refused such offer.

State v Wright, 200-772; 205 NW 325

Nonapplicability to evidence—horse worried by dog. Reversible error results from so instructing that the jury may wander afield and base its verdict on a fact of which there is no evidence. So held where, in an action for being thrown from a horse because of its fright from the barking of a dog, the evidence was confined solely to the act of the dog in worrying the horse, but the instructions permitted a verdict for plaintiff if the dog did anything that would justify the killing of the dog.

Luick v Sondrol, 200-728; 205 NW 331

Recovery on unsupported condition. Instructions which permit a recovery on a condition which the evidence affirmatively shows never existed, constitute error, and the error must be deemed prejudicial when numerous items are in dispute and it is quite impossible to determine what various items were allowed by the jury.

Tabler v Evans, 202-1386; 212 NW 161

Unsupported ratification. Instruction authorizing a finding of ratification by partners of a nonpartnership obligation, is fundamentally erroneous when there is no sufficient evidence to support a finding of ratification.

Maxfield v Heishman, 209-1061; 229 NW 681

Unsupported issue of partnership. In an action of replevin for two articles, of which plaintiff was the absolute owner of one and the holder of a chattel mortgage on the other, defendant's issue of partnership is properly rejected when supported only by a showing that the parties had temporarily shared equally in the net earnings of the two articles.

Dieter v Coyne, 201-823; 208 NW 359

Permitting recovery not shown by evidence. Instructions which permit a recovery in excess of that shown by the evidence are erroneous.

Looney v Parker, 210-85; 230 NW 570

Failure of court to limit return of damages. Reversible error results from the failure of the court in its instructions to limit the jury in its return of damages, on various items of claimed damages, to the amount claimed in the pleadings; and limiting damages "as shown by the evidence" does not necessarily cure the error.

Desmond v Smith, 219-83; 257 NW 543

Unsupported issues of permanent injuries. Instructions relative to damages for permanent injuries are improper where there is no testimony tending to show permanent injuries.

Wilkinson v Lbr. Co., 203-476; 212 NW 682
Shuck v Keefe, 205-365; 218 NW 31

Permitting return of unproven damages. Reversible error results from so instructing as to allow the jury to find damages on account of a loss not shown by the evidence, when the amount of the verdict, viewed in the light of the evidence, quite clearly shows that the jury made allowance for such unproven loss.

Herring Motor v Myerly, 207-990; 222 NW 1

Unsupported matters of illustration. An instruction which is couched in the form of an illustration to the jury is not prejudicially erroneous because there is no evidence bearing on the subject-matter of the illustration.

Eves v Littig Co., 202-1338; 212 NW 154

Measure of damages—unsupported element. Instructions to the effect that a measure of damages would be the difference between the value of property as it actually was when a party received it, and its value had it been as represented, are manifestly erroneous when the record contains no testimony of the latter value.

Vanarsdol v Farlow, 200-495; 203 NW 794

Submitting earning capacity of child. Elements of damage not sustained by evidence should not be submitted, which applies to the earning capacity of a 10-year-old school girl in the absence of supporting evidence, but, in the instant case, the error was harmless, as the jury's possibility of considering such element was very remote.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Fatal contradiction. An instruction which directs the jury, (1) to determine the value of land solely on the testimony introduced, and (2) to determine said value in the light of "your experience and knowledge concerning such valuation", is fundamentally erroneous, (1) because authorizing the jurors to become silent witnesses in the case, and (2) because of the fatal contradiction therein contained.

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

Damages limited by evidence. Instructions which permit the jury to find damages in the form of profits lost, without limiting such findings "as shown by the evidence", are prejudicially erroneous.

Smith v Standard Oil, 218-709; 255 NW 674

Direct damages only recoverable. It is mandatory on the court to instruct that damages recoverable because of a defendant's negligence are limited to those damages which the evidence shows directly resulted from such negligence.

Schelldorf v Cherry, 220-1101; 264 NW 54

Exemplary damages — malice as essential basis. The submission of the question of exemplary damages, without supporting evidence of malice, is prejudicially erroneous. (See also under §11216.)

Sokolowske v Wilson, 211-1112; 235 NW 80

Nonapplicability to pleading or evidence. Reversible error results from instructing a jury that plaintiff, in an action against a city for damages consequent on a defect in a sidewalk, need not show that the city had actual knowledge of the defect if the defect resulted from the original defective construction of the walk, when neither pleading nor evidence presented such issue.

Ritter v City, 212-564; 234 NW 814

Unsafe place in partially opened street. Reversible error results from submitting whether a city was negligent in not filling depressions and tamping soft places in a street (1) when, owing to an unusual unfitness of the street for travel, the city had opened it only to the extent of a narrow roadway and there is no evidence that the failure to fill and tamp said opened roadway was the cause of the injury and (2) when, under the evidence, the injury may have occurred at a place in the street where the city was under no duty to fill and tamp—at a place which the city had never assumed to put in condition for use.

McKeehan v City, 213-1351; 242 NW 42

Submission of pleaded but unsupported amount. In condemnation proceeding for highway purposes, instruction that verdict could not be more than the amount claimed in petition which was over $5,000 whereas the plaintiff's witnesses fixed damage at $4,455, was not prejudicial, since verdict was for only $2,000.

Stoner v Hy. Comm., 227-115; 287 NW 269

Undue burden—estoppel. A litigant may not claim that instructions place an undue burden upon him when the instructions are strictly in harmony with his pleadings and evidence.

Nigut v Hill, 200-748; 205 NW 312

Belated and unsupported amendment. It is doubly erroneous for the court, after argument has closed, (1) to permit an amendment assigning a new ground of negligence which is without support in the evidence, and (2) to submit such alleged negligence to the jury.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Emergency as legal excuse — evidentiary support. Question of emergency as being legal excuse should not be submitted to the jury without competent evidence to support it.

III APPLICABILITY TO PLEADINGS AND EVIDENCE—concluded

(b) APPLICABILITY TO EVIDENCE—concluded

Held, instruction amply supported in instant case.

Edwards v Perley, 223-1119; 274 NW 910

Sustaining verdict for either party. Where, under proper instructions and supporting testimony, the jury may properly find for either party, the supreme court will not disturb the verdict.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Photographs — essentials for admission. Within the sound discretion of the court, a photograph is admissible in evidence when taken under conditions similar to those material to the inquiry to which it relates, and an instruction may call the jury's attention to the difference in lighting conditions at time an injury occurred, and at the time the picture was taken.

Riggs v Pan-American Co., 225-1051; 283 NW 250

In re "inevitable accident". Instructions with reference to an "inevitable" accident and defendant's nonliability therefor are wholly out of place when there is no applicable evidence in the record.

Keller v Gartin, 220-78; 261 NW 776

(c) ABSTRACT INSTRUCTIONS

Abstract statements of law. The inclusion in instructions of abstract statements of the law does not necessarily constitute material error.

Birmingham Bank v Keller, 205-271; 215 NW 649

IV CONSTRUCTION AND OPERATION

Reasonable construction of phraseology. Phraseology of instructions must receive, not a strained or forced construction, but a reasonable construction, in view of all the circumstances.

Henriott v Main, 225-20; 279 NW 110

Construction of single instruction. An instruction which contains a statement which, standing alone, would be incorrect may be rendered perfectly proper by a subsequent limiting statement in the same instruction.

Blakely v Cabelka, 203-5; 212 NW 348
Siesseger v Puth, 216-916; 248 NW 352

Construction as a whole. Instructions are all-sufficient if, when construed as a whole, they fairly present the issues to the jury.

Cuthbertson v Hoffa, 205-666; 216 NW 733
Cox v Const. Co., 208-458; 223 NW 521

Complete as a whole. It is not required that each and every paragraph of instructions be complete in itself. They are all-sufficient if they are complete as a whole.

Elmore v Railway, 207-862; 224 NW 28
Siesseger v Puth, 216-916; 248 NW 352

Construction as a whole — technical errors inconsequential. Technical errors, in single paragraphs of instructions, which lose any prejudicial significance when the instructions are construed as a whole, will not justify a reversal.

Olson v Cushman, 224-974; 276 NW 777

Instructions construed as a whole. Instructions will be considered in their entirety.

State v Ferguson, 226-361; 283 NW 917

Instructions construed together when reviewed. Supreme court in construing an instruction will consider the other instructions given.

Tallmon v Larson, 226-564; 284 NW 367

Confusing instructions not cured. An instruction may be so manifestly erroneous and confusing as to be incurable under the rule that the instructions must be construed as a whole.

McAdams v Railway, 200-732; 205 NW 310

Error cured by instructions as a whole. Different instructions may, when construed together, so fairly present the real issue to the jury as to cure a material inaccuracy which exists in one of the instructions when viewed by itself.

Dahna v Fun House, 204-922; 216 NW 262

Omitting reference to defendant's omission to act. An instruction that the jury, in determining an issue of negligence, should take into consideration "what the defendant did", need not be accompanied by any instruction for the jury to consider what the defendant omitted to do, when the jury is fully instructed to consider all the facts and circumstances bearing on the issue.

Leete v Hays, 211-379; 233 NW 481

Negligence directly contributing to injury. Instructions are correct which, as a whole, direct the jury that plaintiff must show that he did not by any negligence on his part directly contribute in any degree to his injury, even tho one of the instructions does not carry the limiting clause, "in any degree".

O'Hara v Chaplin, 211-404; 233 NW 516

Covering different elements in separate instructions. An instruction relative to a master's plea of assumption of risk by his servant will not be deemed to deprive the master of his plea of contributory negligence on the part of the servant when the latter element is correctly covered by a separate instruction.

Oestereich v Leslie, 212-105; 234 NW 229

Correct as a whole. On defendant's issue that plaintiff was working on an agreed salary and not on quantum meruit, as contended by plaintiff, the court commits no error against defendant by instructing, in effect, that if plaintiff in cashing checks did not know, as the memorandum thereon indicated, that they were tendered in full payment to date, then such checks might be treated as payment on account, the other instructions fully protecting the defendant.

Olson v Shuler, 208-70; 221 NW 941

Inaccurate use of words corrected. The inaccurate use of a word or term in one instruction may wholly disappear when the instructions are viewed as a whole. So held as to the terms "value" and "fair and reasonable market value".

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

"Assault" admitted in pleadings—use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

Presumption that jury obeyed. It will be presumed, nothing appearing to the contrary, that the jury obeyed an explicit instruction not to allow on an item of damages more than was claimed by plaintiff.

Lukin v Marvel, 219-773; 259 NW 782

Separating personal injury damage claims. Instructions limiting the amount of total recovery which could be allowed the plaintiff, but not advising how much was claimed for pain and suffering and for permanent disability, were erroneous, and, being erroneous, prejudice is presumed unless the record is such as to overcome the presumption.

Remer v Takin Bros., 227-903; 289 NW 477

Assault and battery—excessive force used to eject—instructions limiting recovery. When the jury was told that if it found that the defendant used more force than was reasonably necessary to eject the plaintiff from his home, they must find the defendant liable for the injuries caused by the excessive force, the instructions, when considered as a whole, were not subject to the objection that the right of recovery was not limited in the event that the injuries were due to the excessive force.

Wessman v Sundholm, 228- ; 291 NW 137

Compensation in eminent domain—abutting tract. In a condemnation action where an 80-acre tract abutting and farmed in connection with, but only partly owned by the owner of the farm involved in condemnation, an instruction that no damage to the abutting 80 acres could be assessed, but that the jury could consider the farming control advantage of the two tracts, while not approved, held not prejudicial.

Cutler v State, 224-686; 278 NW 327

V QUESTIONS PRESENTABLE BY INSTRUCTIONS

Validity of release—avoidance for fraud—burden of proof. The burden of proof to avoid a written release of damages, on the ground that said release was obtained by fraud, rests on the party who alleges the fraud. Instructions reviewed and held adequately to impose such burden in substance tho not in words, assuming ordinary intelligence on the part of the jury.

Engle v Ungles, 223-780; 273 NW 879

VI CURING ERROR BY ORAL OR WRITTEN INSTRUCTIONS

(a) IN RE MISCONDUCT OR ERROR GENERALLY

Conduct of counsel in argument. A reference in argument to the corporate capacity of one of the parties to the action tho manifestly improper may not be reversible error when objection is promptly sustained, when the error is not repeated, and when the jury is promptly instructed to wholly disregard the reference.

Henriksen v Stages, Inc., 216-643; 246 NW 913

Misleading statement of fact cured by clearly stated issues. The erroneous insertion into the court's preliminary statement of the issues, of a statement (copied from the pleadings) which conceivably might confuse and mislead the jury, may be quite fully effaced by the subsequent very concise statement of the real issues.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Arguments and conduct of counsel—curing error by instruction. Argument and ruling thereon briefly reviewed and held to reveal no error, but, if error, that the same was effectively cured by an instruction to disregard the matter referred to by counsel.

West Branch Bank v Farmers Exc., 221-1382; 268 NW 155

Improper argument cured by instructions. A quite pointed and positive instruction to the jury to the effect that it must take and act solely on the law given by the court, cures, ordinarily, any error of counsel in argument in asserting what is the applicable law of the case.

Wolfson v Lumber Co., 210-244; 227 NW 608

Curing error in argument. An oral admonition by the court to the jury, during argument

VI CURING ERROR BY ORAL OR WRITTEN INSTRUCTIONS—continued

(a) IN RE MISCONDUCT OR ERROR GENERALLY—concluded

not to consider a certain statement by counsel, ordinarily cures any error resulting from the making of the statement.

Stingley v Crawford, 219-509; 258 NW 316
West Branch Bank v Farmers Exc., 221-1382; 268 NW 155

Curing error. Error consequent on improper argument is ordinarily cured or negatived by a ruling striking the improper remarks and directing the jury to disregard them.

State v Dobry, 217-858; 250 NW 702

Curing error by remittitur.

Shockley v Davis Co., 200-1094; 205 NW 966
Starry v Hanold, 202-1180; 211 NW 696
In re Anderson, 203-985; 213 NW 567
In re Willmott, 215-546; 243 NW 634

Remittitur of nonrecoverable damages. Error in including nonrecoverable damages in a verdict is not cured by the subsequent filing of a remittitur in a named sum, when the instructions are framed in such form that no one can determine what amount the jury allowed for nonrecoverable damages.

Gardner v Boland, 209-362; 227 NW 902
See Cocklin v Ins. Assn., 207-4; 222 NW 368

Subjects of damages — elements in mental anguish — curing by remittitur. Humiliation and mortification being included in mental anguish, an instruction in an assault and battery case allowing one recovery for mental anguish and another recovery for humiliation and mortification is erroneous as allowing for double damages for the element of mental anguish; however, the defect is cured by requiring the plaintiff to remit the entire amount allowed for humiliation and mortification.

Hauser v Boever, 225-1; 279 NW 137

Remittitur—entry on combination docket—effect. The indorsement and signing on the combination docket of the court of a remittitur constitutes a "filing" of a remittitur within the meaning of a court order to the effect that a new trial would automatically follow the failure "to file" such remittitur.

Fox v McCurnin, 210-429; 228 NW 582

Striking supported issue. Error in striking, at the close of all the evidence, an adequate and supported allegation of negligence, is cured by adequately submitting the issue notwithstanding the striking order.

Townsend v Armstrong, 220-396; 260 NW 17

Contributory negligence — incurable error. An instruction which summarizes all the elements that plaintiff must prove to make a case, and directs the jury that if these elements and conditions existed, the plaintiff is entitled to recover, is fatally defective when no reference whatever is made to plaintiff's freedom from contributory negligence. And, in such case, the error is not cured by the fact that in other instructions the jury is instructed that plaintiff must be free from contributory negligence.

Bobst v Hoxie Line, 221-823; 267 NW 673

Error cured by verdict. Instructions which, in stating the issues, give the plaintiff a chance for a recovery to which he was not entitled are harmless when the jury finds that plaintiff was not entitled to recover in any event.

Ferber v Ry. Co., 205-291; 217 NW 880

Inaccurate remark by court cured by instructions. A remark by the court in the presence of the jury and during the argument as to the issues involved, even tho somewhat inaccurate, is rendered inconsequential by the subsequent giving of full and explicit instructions as to the issues.

State v Heeron, 208-1151; 226 NW 30

Unpleaded element of damages. The submission of a nonpleaded element of damages is erroneous, but the error will be cured by deducting from the amount of the verdict the highest amount which the jury could have allowed, under the record, on such element.

Hepker v Schmickle, 209-744; 229 NW 177

Undue burden. An error in imposing an undue burden on a litigant may become inconsequential in view of the record and in view of the fact that the instruction is unduly favorable to complainant.

Ryan v Cooper, 201-220; 205 NW 302

Curing error in later instruction. Error in failing, in one instruction, to impose on plaintiff the necessity of proving a certain all-essential fact, before he will be entitled to a verdict, may be wholly effaced by other instructions which definitely supply the former erroneous omission.

Foy v Metropolitan Life, 220-628; 263 NW 14

Estoppel to question. A party may not question an instruction which gives him a chance for a verdict to which he is not entitled; and especially when such instruction was not excepted to in the trial court.

Granette v Neumann, 208-24; 221 NW 197
Sergeant v Challis, 213-57; 238 NW 442

(b) IN RE RECEIPT OF TESTIMONY

Assignment of error. Error, if any, of the court, during the trial, in striking evidence or tendered issues cannot be reached by an assignment of error to the effect that the court erred in failing to instruct on said stricken matters. The assignment must be on the original alleged erroneous striking of said matters.

Reidy v Railway, 220-1386; 258 NW 675

Improper admission of testimony. An error in the reception of testimony is cured by instructions which protect the adverse party from an unauthorized recovery.

Tabler v Evans, 202-1386; 212 NW 161

Improper reception of conclusions. Error in receiving in evidence the improper conclusions of a witness may be cured by striking the same from the record and by specifically cautioning the jurors to wholly disregard the same.

State v Folger, 204-1296; 210 NW 580
McKee v Iowa Co., 204-44; 214 NW 564

Withdrawal of incompetent evidence. Error in receiving incompetent testimony which is not inherently prejudicial is rendered harmless by the subsequent withdrawal of such testimony by the court, and by the court's admonition to the jury to disregard it.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419
State v Slycord, 210-1209; 232 NW 636

Evidence res inter alios. Evidence res inter alios will ordinarily be regarded as harmless when the court specifically directs the jury to disregard it.

Olson v Shuler, 203-518; 210 NW 453

Oral admonitions. The oral admonition of the court to the jury not to consider withdrawn testimony, and the giving of later pointed instructions to the same effect, are quite effective in removing and curing any error in the original reception of the testimony.

Dewey v Ins. Co., 218-1220; 257 NW 308

Striking evidence—jury admonition—curing error. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

Error in admission of evidence cured by instructions. In an action on a note given by the defendant for the purchase of lands under partition, any error in allowing the referee to testify that he did not recollect sending to the plaintiff any money received, was cured by instructions that payment to the referee would relieve the defendant from liability on the notes.

Ballard v Ballard, 226-699; 285 NW 165

Unsupported instruction—error cured by limitation. An instruction without evidence to support it may be so guarded as to remove all prejudicial error.

Ferber v Ry. Co., 205-291; 217 NW 880

Improper evidence excluded by proper submission. In an action for damages resulting solely from the "inconvenience and discomfort in the occupancy and enjoyment of property" because of a nuisance, evidence tending to show that the nuisance was unsanitary and might be injurious to health, becomes harmless when the court submits the issues strictly in accordance with the pleadings.

Chase v City, 203-1361; 214 NW 591; 37 NCCA 228

Error cured by testimony. A party's admissions and testimony may render an inaccurate instruction quite harmless.

Heflen v Brown, 208-325; 223 NW 763

Error cured by testimony. Where an indorser of a promissory note pleaded an estoppel as consisting (1) of a mere promise by the payee to collect the note from the maker and a prior indorser, and (2) of a later statement by the payee that the note had been paid, the submission of said pleaded promise in one instruction, and of said statement as to payment in another instruction, thereby inferentially indicating that there were two estoppels, will not be deemed reversible error when the record reveals the fact that the maker and prior indorser both remained solvent up to and after the statement as to payment was made.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

Error cured by jury finding. On the issue whether total disability resulted "immediately" upon the occurrence of an accident, an instruction that "immediate" means "within twenty-four hours" is harmless (even tho it be conceded to be erroneous) when the jury has found on clearly supporting testimony that the disability was total from the very day of the accident.

Harrington v Sur. Co., 206-925; 221 NW 577

Erroneous instruction cured by verdict. The erroneous exclusion of testimony bearing on damages suffered by a party, or the giving of an erroneous instruction relative to proof of sole ownership of the injured property, is quite harmless when it is manifest that the jury found that the party in question was not entitled to recover in any event, because of his own negligence.

Wiley v Dobbins, 204-174; 214 NW 529; 62 ALR 432

VII LAW OF CASE

Inapplicable instructions. Instructions relative to a rule of law which is inapplicable to the facts of the case should not be given.

Hamilton v Boyd, 218-885; 256 NW 290

Misconduct of jury — disregarding instructions. It is the duty of the jury to follow the instructions of the court, and where it clearly appears that the jury, in arriving at its verdict, disregarded the instructions, a new trial must be granted.

Mitchell v Heaton, 227-1071; 290 NW 39

Disregard of instruction. Record reviewed, and held insufficient to show that the jury disregarded the instruction in question.

Love v Railway, 207-1278; 224 NW 815

Disregard of instructions. An instruction to the effect that no damage for the flooding of land could be recovered if such damages resulted partly from the wrongful act of the defendant in erecting an embankment and partly from the natural overflow of a natural stream, constitutes the law of the case, and a verdict for the plaintiff must be set aside if the evidence conclusively shows that the damages were caused in part by the natural overflow of the stream.

Pfannebecker v Railway, 208-752; 226 NW 161

Instructions as law of case—disregard of. A clear disregard by the jury of instructions—the law of the case whether they be right or wrong —necessitates a disregard by the court of the verdict returned. So held where a verdict was returned for plaintiff under instructions which rendered such a verdict legally impossible.

In re Stevens, 223-369; 272 NW 426

Verdict contrary to instructions — verdict illegal—setting aside. Where the court instructs the jury to base their verdict solely on the evidence and, guided by the instructions, to arrive at the very truth of the matter and base their conclusions solely on evidence and instructions and not to indulge in speculations or conjectures, and at hearing on motion for new trial it is shown that it was agreed in advance that the jury would be bound by a majority vote, such verdict was illegal and it was the duty of the court to set the verdict aside.

Mitchell v Heaton, 227-1071; 290 NW 39

Unexcepted instructions. If there be no exceptions to instructions, the verdict is final if it has support in the evidence. In such case no inquiry can be made whether the instructions are right or wrong.

Commer. Credit v Hazel, 214-213; 242 NW 47

11495 Exceptions to instructions.

ANALYSIS

I FORMER STATUTE RULE
II NECESSITY FOR EXCEPTIONS
III SUFFICIENCY OF EXCEPTIONS
IV TIMELY EXCEPTIONS

Instructions in criminal cases. See under §13876
Motion for new trial. See under §11551

I FORMER STATUTE RULE

Failure to enter exceptions. Failure to enter exceptions to instructions before argument to the jury (statute now repealed) precludes review on appeal.

Beardmore v New Albin, 203-721; 211 NW 430

II NECESSITY FOR EXCEPTIONS

Failure to except. Failure to except to an instruction which submits an unsupported issue is fatal to the right of review on appeal.

Lange v Bedell, 203-1194; 212 NW 354
Chase v City, 203-1361; 214 NW 591
First Bank v Tobin, 204-456; 215 NW 767
State v Dunham, 206-354; 220 NW 77
Southhall v Berry, 207-605; 223 NW 480
State v Bamsey, 208-796; 223 NW 873
State v Bourgeois, 210-1129; 229 NW 231
State v Phillips, 212-1332; 236 NW 104
Wood v Branning, 215-59; 244 NW 658

Failure to present defect. The objection that an instruction withdrew from the jury matter which bore on the credibility of a witness is waived if not specifically raised in the trial court in the exceptions to the instructions.

Conner v Henry, 205-95; 215 NW 506

Estoppel to question. A party may not question an instruction which gives him a chance for a verdict to which he is not entitled; and especially when such instruction was not excepted to in the trial court.

Sergeant v Challis, 213-57; 238 NW 442

Instructions unexcepted to as law of case. If there be no exceptions to instructions, the verdict is final if it has support in the evidence. In such case no inquiry can be made as to whether the instructions are right or wrong.

Commer. Credit v Hazel, 214-213; 242 NW 47

Incomplete record—instructions—presumed correct. Where the record on appeal does not contain all the instructions necessary to determine the questions raised, the supreme court must presume their correctness.

Reardon v Hermansen, 223-1207; 275 NW 6

Law of case—guest—evidence—sufficiency. An instruction to the effect that claimant under the "guest statute" in order to recover must prove by a preponderance of the evidence that his decedent was a guest, when unobjected to and not appealed from, remains the law of the case, and evidence that automobile trip, like similar prior trips, with operator as host to friends for purpose of attending a school function, was sufficient to sustain jury finding that passenger was a "guest".

Claussen v Johnson's Estate, 224-990; 278 NW 297

Verdict contrary to evidence — preserving question in lower court—no review if first raised on appeal. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence and should be set aside, cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

III SUFFICIENCY OF EXCEPTIONS

Exceptions—sufficiency. Exceptions to instructions must specifically and definitely point out the error complained of, and no others will be considered.

Wilson v Else, 204-857; 216 NW 33
State v Grigsby, 204-1133; 216 NW 678
Duncan v Rhomberg, 212-389; 236 NW 638

Indefinite exceptions. Objections to instructions will be disregarded unless they specify the part of the instruction objected to and the grounds of the objection.

State v Burch, 202-348; 209 NW 474
State v Derry, 202-352; 209 NW 514
Farwark v Railway, 202-1229; 211 NW 875
State v Dillard, 207-831; 221 NW 817

Fatal indefiniteness. Exceptions to instructions on ground that they are incompetent, irrelevant, and immaterial and contrary to law and prejudicial, are not sufficiently specific.

Hackley v Robinson, (NOR); 219 NW 398

Failure to specify grounds. An exception to an instruction must specify the grounds of such exception. This requirement is in no degree complied with by simply referring to the instruction by number and by asserting that "the court erred" in refusing to give it.

Oestereich v Leslie, 212-105; 234 NW 229

Grounds for exception not stated—nonreviewability. No error may be predicated on rejected proposed instructions when the grounds for the exceptions to the court's ruling are not specified.

Thomas v Charter, 224-1278; 278 NW 920

Fatal indefiniteness. An exception to the effect that instructions "are contrary to the law", or "do not clearly state the rules of law applicable to this case" presents no question to either the trial or appellate court.

State v Shearer, 206-397; 220 NW 13
Bodholdt v Townsend, 208-1350; 227 NW 404

Inadequate exceptions. Plaintiff who fails, in his exceptions to a charge as given, to point out the fact that the court has omitted a certain element of his cause of action does not raise such point by a general exception to the refusal to give a requested instruction which, inter alia, does embrace such omission.

Whitmore v Herrick, 205-621; 218 NW 334

Failure to obtain ruling. The filing of exceptions to instructions and a motion for a new trial, after the entry of judgment on the verdict, is rendered wholly abortive by the failure to call the exceptions or the motion to the attention of the court, and to obtain a ruling thereon.

Linn v Kendall, 213-33; 238 NW 547

Naked exception to refusal to give. The mere entry of a naked, unelaborated exception to the failure to give a requested instruction presents no question either to the trial or appellate court, even tho counsel argues certain grounds on appeal.

Humphrey v Muscatine, 217-795; 253 NW 57

Fatal generality. The general assertion that "The court erred in giving instruction No. 2 to the jury" is, in legal effect, no exception whatever, and presents no question to the court.

Iowa Corp. v Credit Co., 217-1243; 253 NW 23

IV TIMELY EXCEPTIONS

Belated exceptions without authorizing order. When no extension of time in which to file exceptions to instructions appears of record, the appellant may not supply such essential record by the simple expedient of alleging in his abstract that his exceptions were filed "within the time fixed by the court."

State v Ivey, 200-649; 203 NW 38

Belated filing. A motion for new trial and objections to instructions will be ignored on appeal when filed after the time fixed by the court.

Lein v Morrell & Co., 207-1271; 224 NW 576

Belated exceptions disregarded. Exceptions to instructions in criminal cases must be made within the time provided by law or they will be disregarded.

State v Kirkpatrick, 220-974; 263 NW 52

Belated motion for new trial. A motion for new trial and exceptions to instructions filed 16 days after verdict, where no extension is secured, are filed too late, and questions raised therein cannot be considered on appeal. In such case when extension of time has been granted, such fact should be shown in abstract.

Roggensack v Ahlstrom, (NOR); 209 NW 429

Nongermane amendment. An amendment to an exception to an instruction will not be considered when not filed within the time fixed by the statute or the court, and when said amendment is not germane to the original exception.

In re Dvorak, 213-250; 236 NW 66

11496 View of premises.

Unauthorized view of premises. It is reversible error for a juror on his own motion to visit the scene of an accident and to make estimates of the ability of witnesses to see the accident as they had testified, and otherwise to make measurements in order to determine how the accident happened.

Skinner v Cron, 206-338; 220 NW 341

Juror visiting accident location—misconduct not shown. It is not misconduct for a juror to stop at a gasoline station near the scene of the accident in litigation, when there is no evidence that he discussed with other jurors what he saw there.

Tharp v Rees, 224-962; 277 NW 758

View of premises—instructions. Instructions relative to the purpose for which the jury had been permitted to view the scene of an accident reviewed, and held neither contradictory nor inconsistent.

Sloan v City, 205-823; 218 NW 301

Exhibiting wounds to jury. During the final arguments in a personal injury case, the court may permit the plaintiff to seat himself alongside the jury in order that the jury may have a close-up view of wounds which, during the taking of testimony have been fully described and exhibited to the jurors while some of them were 20 feet from the witnesses.

Mizner v Lohr, 213-1182; 238 NW 584

View and inspection of object in controversy. It is proper to permit a jury, under proper supervision, to view and inspect an object which is the subject of the action, e. g., a monument.

Gibson v Miller, 215-631; 246 NW 606

View of object by jurors — instructions. Principle reaffirmed that when jurors are permitted to view an object which is the subject of the action, they must be instructed that they must base their verdict solely on the evidence received judged in the light of their observation of the object.

Gehlbach v McCann, 216-296; 249 NW 144

11497 Rules as to jury—deliberation —kept together.

Coercion of jury. Requiring the jury in a civil case to continue their deliberations for a period of some 46 hours, including two nights, reveals no abuse of discretion on the part of the court.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Custody of jury—bailiff's witticism not prejudicial. Bailiff's remark that jury might be kept for 30 days before the court would accept a verdict that they had "agreed to disagree" is not prejudicial when the jury themselves treated the remark as a joke.

Tharp v Rees, 224-962; 277 NW 758

Unauthorized communication with jurors. Statements by a bailiff to jurors to the effect that they must remain in session until they had agreed on a verdict, coupled with the refusal by the bailiff either to conduct the jury to the court, or to deliver any message to the court, constitute such misconduct as to require the granting of a new trial, it appearing that said conduct had such controlling and coercive influence on certain jurors as caused them to change their views as to the merits of the case.

State v Terpstra, 206-408; 220 NW 357

Juror advocating his belief—not misconduct. It is neither misconduct nor ground for new trial for a juror to advocate his conclusions

in the jury room, even tho he emphatically and persistently favors one party or the other.

Tharp v Rees, 224-962; 277 NW 758

Jurors substituting own knowledge for evidence—effect. In an action for injuries resulting from a collision on a bridge between a truck and an automobile, where the record discloses that one juror injected into the discussion her own observation of the fast-driving habits of the motorist with whom plaintiff was riding, and where other jurors at the scene of the accident noticed and commented on the fact that most drivers, in rounding the same curve where plaintiff approached the scene of the accident, were across the center of the highway, when coupled with the short time taken to arrive at a verdict in view of the voluminous evidence, held no abuse of discretion in granting a new trial.

Hawkins v Burton, 225-1138; 281 NW 790

Juror's affidavit of conduct while deliberating—effect. Verdicts and trials cannot be destroyed ordinarily by an affidavit of a juror as to what took place during deliberations in the jury room.

Kirchner v Dorsey, 226-283; 284 NW 171

Juror visiting accident location—misconduct not shown. It is not misconduct for a juror to stop at a gasoline station near the scene of the accident in litigation, when there is no evidence that he discussed with other jurors what he saw there.

Tharp v Rees, 224-962; 277 NW 758

Appellant's jury examination inducing insurance discussion—review. Jury room discussion of liability insurance suggested by plaintiff's examination of the jurors is not misconduct of which plaintiff can complain.

Tharp v Rees, 224-962; 277 NW 758

11499 Discharge of juror.

Illness of juror—held nonprejudicial. Evidence held to show that illness of a juror was not prejudicial to defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

11500 Discharge of jury.

Deliberations of jury—coercion of. Requiring the jury in a civil case to continue their deliberations for a period of some 46 hours, including two nights, reveals no abuse of discretion on the part of the court.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

11503 What jury may take with them.

Use of unauthorized evidence. Prejudicial error results from permitting a jury to take with them to their jury room and to consider the entire sheet of a letter when only the signature thereon was introduced in evidence, and when the unintroduced matter is materially prejudicial to complainant.

In re Merrill, 202-837; 211 NW 361

Improper reception — effect. The improper reception in evidence of a written notice to an accused to produce a written instrument or to submit to secondary evidence of its contents, and the possession of such notice by the jury, do not necessarily work prejudicial error.

State v Gardiner, 205-30; 215 NW 758

Failure to send exhibit to jury room. The fact that a duly introduced exhibit in a criminal case was not given to the jury when it first retired, but was sent to the jury some hours before the verdict was returned, reveals no prejudicial error; especially when the contents of the exhibit were fully revealed to the jury by both parties during the arguments.

State v Twine, 211-450; 233 NW 476

Taking plat to jury room. The court may permit a plat of the scene of an accident to be taken by the jury upon its retirement when the plat contains nothing that could mislead or prejudice the jury.

Waldman v Motor Co., 214-1139; 243 NW 555

11505 Further testimony to correct mistake.

Order of proof. See under §11485

Reopening cause. The court may at the close of plaintiff's testimony, and in the exercise of a fair discretion, reopen the case and permit a witness to be recalled for further examination.

State v Andrioli, 216-451; 249 NW 379

Reopening case. The trial court has a large discretion in reopening a cause for the reception of additional testimony.

Fair v Ida Co., 204-1046; 216 NW 952
Seeger v Manifold, 210-683; 231 NW 479
Lee v Ins. Assn., 214-932; 241 NW 403
State v Andrioli, 216-451; 249 NW 379
Shultz v Shultz, 224-205; 275 NW 562

Discretion in reopening—new trial for abuse. Granting or refusing a motion to reopen a case to admit further evidence is within the sound discretion of the court, but if a refusal to reopen is an abuse of discretion, a new trial should be granted on appeal.

In re Canterbury, 224-1080; 278 NW 210

Refusal to open for omitted testimony. The refusal of the court to open a cause, after submission, in order to receive omitted testimony will not be disturbed except on a showing that the court abused its discretion.

In re Fetterman, 207-252; 222 NW 872

Unjustifiable refusal to reopen case. A cause should be reopened for the reception of additional testimony which the court has throughout the trial held unnecessary, but on account

of the absence of which the court finally renders judgment against the party who was under a duty to produce such testimony.

Simpson College v Executors, 203-447; 212 NW 684

Refusal to reopen—when error. Refusal to open up a cause in order that a party to the action may be cross examined as to highly material documentary evidence in order to lay the foundation for impeachment, is reversible error when the party asking for such reopening has been persistently diligent to discover the whereabouts of such documents, and was successful only during the evening following the resting by both parties and prior to the convening of court on the next day, at which latter time the application to reopen the case was made.

Schipfer v Stone, 206-328; 218 NW 568

Wills—construction — identifying legatee — reopening for widow's testimony. In an action to construe a will to determine which of two similarly named churches the testator intended to designate as a beneficiary, the evidence being closed when discovery is made that testator's widow, though present in court but not testifying, had knowledge as to which church was intended to be designated, the trial court abuses its discretion by refusing to reopen to admit her testimony.

In re Canterbury, 224-1080; 278 NW 210

Final submission to court. When defendant's motion for a directed verdict in his favor on plaintiff's evidence is argued and submitted to the court, and the court orally and by appropriate entry on the docket sustains said motion, it is too late for plaintiff to assert that there has been no final submission of the action to the court. It necessarily follows, under such circumstances, that plaintiff has lost his right to voluntarily dismiss his action without prejudice.

Marion v Ins. Assn., 205-1300; 217 NW 803

Setting aside for retrial on new theory. After a cause has been fully tried on the theory that intervenors are entitled to recover from plaintiff the amount for which their property had been sold on execution by the sheriff, and after the resulting judgment has been entered and paid, and the proceeds accepted by intervenors, it is quite too late to reopen the case and try it anew on the theory that intervenors are entitled to recover the reasonable value of the property so sold.

Peoples Bank v McCarthy, 211-40; 231 NW 482

11506 Additional instructions.

Verdict-urging instructions. See under §11493 (I)

11508 Verdict—how signed and rendered.

ANALYSIS

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I SUFFICIENCY IN GENERAL

Noninconsistent verdict. A verdict against two of three defendants may not be said to be inconsistent with itself when the record reveals the fact that the testimony against the exonerated defendant was less persuasive than that against the other two defendants.

Pullan v Struthers, 201-709; 207 NW 794

Construction in light of record. The certain and unmistakable data furnished by the trial record may quite clearly point out the intention of a jury in returning a somewhat indefinite verdict.

Reinertson v Struthers, 201-1186; 207 NW 247

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Conflicting evidence—conclusiveness of verdict. A jury verdict on competent but conflicting testimony, relative to the consideration, if any, for a chattel mortgage, is conclusive on the appellate court.

McDonald v Webb, 222-1402; 271 NW 521

Verdict sustainable for either party—finality on appeal. Where, under proper instructions and supporting testimony, the jury may properly find for either party, the supreme court will not disturb the verdict.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Jury verdict—reasonable minds differing—finality. If testimony and a fact question exist upon which reasonable minds may fairly differ, the supreme court will not review the result reached by the jury.

Finley v Lowden, 224-999; 277 NW 487

Responsive to issues—sufficiency. A verdict, in an action on promissory notes, for "$5,000 and interest dollars" is all-sufficient to authorize the court to compute the interest, add it to the principal, and enter judgment accordingly.

Grimes Bk. v McHarg, 213-969; 236 NW 418; 36 NCCA 205

Nonexcessive damages—death of 54-year-old WPA carpenter. Verdict for $21,886.50 to a 54-year-old WPA carpenter who was crushed beneath a descending elevator, and who lived thereafter for 14 months in excruciating pain and suffering, which verdict was reduced by the trial court to $15,000, held not excessive nor the result of passion and prejudice.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Speculative verdict for damages. A verdict for damages consequent on the death from congestion of the lungs of stock during shipment will not be permitted to stand when, on the record, the cause of said congestion can be equally attributed either (1) to the act of the shipper in unduly exerting the hogs prior to the complete loading of the stock, or (2) to the rough handling of the train while the stock was being transported.

Wiederin v Railway, 212-1103; 237 NW 344

Causal connection with injury—conjecture and speculation. There must be causal connection between an injury caused by falling from a fire escape because of an alleged defect in the top step. When the allegation is not substantiated by the evidence, any more than by the plaintiff's testimony, stating that "something moved", that he "caught his heel on the step", it would be mere conjecture and speculation to base a verdict thereon, and verdicts must rest on something more substantial.

Gowing v Field Co., 225-729; 281 NW 281

Railway viaduct—injuries—burden of proof—causal negligence. Plaintiff has the burden to show wherein a railway was negligent in maintaining a viaduct crossing, since jury's verdict may not rest upon surmise, speculation, or guess, and this burden is not met when plaintiff fails to show that injuries received from being thrown against top of car while going over viaduct were caused by a condition of the viaduct resulting from negligence.

Harris v Railway, 224-1319; 278 NW 338

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Trust v Acc. Assn., 222-20; 268 NW 507

Action for causing death—evidence—sufficiency. Evidence as to the cause of death reviewed and held ample to support the verdict.

Groves v Webster City, 222-849; 270 NW 329

Double recovery. The submission to the jury of duplicate counts—counts praying recovery on the same elements of damages—and permitting recovery on both such counts is clearly erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Unallowable verdicts. In a joint action for damages against the driver and owner of an automobile, based, as to the driver, on his negligence, and as to the owner, on his consent to the driving (as to which consent the proof is substantially conclusive), there cannot legally be separate verdicts, one holding the driver liable, and one holding the owner nonliable.

Hoover v Haggard, 219-1232; 260 NW 540

Verdict sustaining part of gift as establishing mental competency. In a replevin action by executor to recover property held under claim of gift inter vivos from decedent, a jury verdict validating part of the gift made on a later date, from which part of the verdict no appeal is taken, also establishes the donor's mental competency to consummate that part of the gift made on an earlier date.

Wilson v Findley, 223-1281; 275 NW 47

II QUOTIENT VERDICTS

Nonquotient verdict. The executed agreement of the jurors to each vote the amount of damages to be allowed, and to divide the sum total by twelve, with no agreement to be bound by the result, followed by further fair and open discussion, and the return of a verdict accordingly, does not constitute a quotient verdict.

Peak v Rhyno, 200-864; 205 NW 515

Conflicting evidence. A finding by the trial court on conflicting evidence that a verdict was a quotient verdict, and the entry of an

II QUOTIENT VERDICTS—concluded

order for a new trial, will not be disturbed on appeal.

Thornton v Boggs, 213-849; 239 NW 514

Insufficient evidence. The fact that a verdict is less than the amount authorized under instruction is not in itself evidence that it is a quotient or compromise verdict, or that it is result of passion or prejudice.

Jackson v Kubias, (NOR); 211 NW 245

III CORRECTION BY COURT

Unallowable reduction by court. The court has no power to reduce the verdict of a jury in an action for unliquidated damages, and to render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to such reduction.

Crawford v Emerson Co., 222-378; 269 NW 334

Reckless operation of automobile—unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most-favorable-view-of-evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

IV CORRECTION BY JURY

No annotations in this volume

V IMPEACHMENT OF VERDICT

Evidentiary support required. Verdicts will not be allowed to stand unless they have support in the evidence.

Reynolds v Oil Co., 227-163; 287 NW 823

Unallowable impeachment. A juror may not impeach his verdict by a showing that he was influenced by a calculation supported by no evidence in the case.

Conway v Alexander, 200-705; 205 NW 351

Unallowable impeachment. In a personal injury action, a verdict may not be impeached by the affidavits of jurors to the effect that a certain allowance was made for an element of damages as to which there was no evidence.

McQuillen v Meyers, 213-1366; 241 NW 442

Misconduct of jurors—facts admissible for determination. On a motion for new trial, jurors may not impeach their own verdict by evidence of jury-room discussion which influenced but inheres in their verdict. However, misconduct prejudicially affecting the result may be shown, and the court may hear all the facts to determine if misconduct exists.

Keller v Dodds, 224-935; 277 NW 467

Trucker's statutory insurance requirement—jurors' discussion not misconduct. Jurors' discussion of statutory requirement that certain truckers carry liability insurance—being a discussion of law that all were presumed to know—is neither misconduct nor justification for a new trial.

Keller v Dodds, 224-935; 277 NW 467

VI MOTION FOR DIRECTED VERDICT

Refusal to direct verdict as new trial ground. See under §11550 (I)

(a) MOTION IN GENERAL

Discussion. See 9 ILB 169—Direction of verdicts; 9 ILB 131—Statutes prohibiting directed verdicts

Motion sustained generally—showing necessary on appeal. On appeal from trial court's action in sustaining generally a motion for directed verdict predicated on several grounds, it is incumbent upon appellants to establish that the motion was not good upon any ground thereof before error can be predicated upon the sustaining of such motion.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Motion generally sustained—reversal on appeal. The plaintiff is not entitled to a reversal on an appeal from a ruling generally sustaining the defendant's motion for directed verdict containing several grounds unless it is established that the motion was not good on any ground.

St. Peter v Theatre, 227-1391; 291 NW 164

Most favorable view. In reviewing the action of the trial court in overruling the defendant's motion for a directed verdict, the supreme court must consider the evidence, determining, not what the facts were, but what the jury was warranted in finding them to be, viewing the record in the light most favorable to the plaintiff.

Wessman v Sundholm, 228- ; 291 NW 137

Motion for—effect. The overruling of defendant's motion for a directed verdict at the close of plaintiff's evidence, in a cause tried solely to the court, is inconsequential when the final decision of the court is correct.

Pressley v Stone, 214-449; 239 NW 567

Failure to rule on motion. Error, if any, in trial court's failure in replevin action to rule on defendant's motion to direct verdict at close of plaintiff's evidence is not prejudicial where case is tried to court.

Prehn v Kindig, (NOR); 232 NW 812

Unsuccessful motion — failure to renew. When defendant at the close of plaintiff's evidence unsuccessfully moves for a directed verdict, and does not thereafter renew his motion, the state of the evidence at the close of the

entire trial is the criterion for the purpose of assignment of error.

De Bruin v Studer, 206-129; 220 NW 116

Absence of jurors—effect. When the court sustains a motion for a directed verdict, it is quite immaterial that all the jurors were not present.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Belated motion for directed verdict. An overruled motion to direct the jury to return a verdict for movant, filed long subsequent to the return of verdict by the jury, will be given no review on appeal.

Luther v Investment Co., 222-305; 268 NW 589

Trial by jury—waiver—hostile motions for verdict. Hostile motions for a directed verdict, made by plaintiff and defendant at the close of all the evidence, do not, in and of themselves, constitute a waiver of the jury; otherwise, when such motions are followed by a stipulation of record, by the parties, "that the court may render a decision of said case during term time or vacation".

Bukowski v Security Assn., 221-416; 265 NW 132

Appeal delayed beyond 60 days. An appeal from a directed verdict in favor of defendant cannot be considered by the supreme court where it appears that the appeal from the directed verdict was not perfected within 60 days after the entry of an order overruling a motion for new trial.

Lotz v United Food Markets, 225-1397; 283 NW 99

By court sua sponte. When a judgment rests solely on a question of law, the court may peremptorily enter it, without mandatory direction to the jury to return a formal verdict.

Dubuque Fruit Co. v Emerson, 201-129; 206 NW 672

Direction on questions of law only. Directed verdicts have no place in jury trials unless the record clearly presents controlling questions of law. Record evidence held wholly insufficient to justify a directed verdict against plaintiff on the ground that as a matter of law the contract for damages for assault—on which plaintiff sued—was based in part (1) on an agreement by plaintiff to compound or conceal the commission of a public offense, or (2) on an agreement by plaintiff as an employee to refrain from circulating scandalous information concerning his employer.

In re Cuykendall, 223-526; 273 NW 117

Law of case—directed verdict. An insurer may not have a directed verdict on the ground that the insured had, in his application, incorrectly stated his occupation, (1) when, on a former appeal, the law of the case had been settled to the effect that recovery might be had if the insurer had full knowledge of such occupation notwithstanding such incorrect statement, and (2) when the record presents a jury question on such issue of knowledge.

Murray v Ins. Co., 204-1108; 216 NW 702

Evidence overcome by physical facts and circumstances — effect. While, on defendant's motion for a directed verdict, plaintiff is entitled to have his evidence viewed in the light as favorable to his contention as reasonably possible, and while it is the province of the jury, generally speaking, to weigh the credibility of witnesses, yet, on such motion, the court must determine whether a verdict for plaintiff would be legally sustainable, and in so determining will, if necessary, pass on the question whether plaintiff's evidence is wholly overcome by the undisputed physical facts and circumstances attending the transaction.

Reid v Brooke, 221-808; 266 NW 477

Isolated testimony. In ruling on a motion for a directed verdict the court should not look alone to some isolated statement in the testimony of a witness but should treat it as a whole.

Faust v Parker, 204-297; 213 NW 794

Presumption as basis of jury question. The common-law presumption that a death was not a suicide does not necessarily create a jury question, because the presumption may be wholly negatived by the attending facts and circumstances.

Warner v Ins. Co., 219-916; 258 NW 75

Establishing "efficient and procuring cause" —rebutting presumption. In an action by a real estate broker for commission, on the theory that he was the efficient and procuring cause for a sale, his showing that he was authorized to sell and had contacted a buyer who afterwards purchased directly from the owner, raises no jury question but only a rebuttable presumption which defendant successfully rebuts by direct evidence to the contrary.

Donahoe v Denman, 223-1273; 275 NW 154

Witness' conclusion without direct testimony—no jury question. Conclusion of a lay witness, without other direct testimony, that water through percolation or washing caused damage to building is not sufficient probative evidence of the cause of the damage to create a jury question.

Covell v Sioux City, 224-1060; 277 NW 447

Sale contract—time indefinite. A contract for storage and sale of corn, "seller's option as to time", being indefinite as to what constitutes a reasonable time, the trial court's exclusion of defendants' proffered evidence on this point and direction of a verdict for the plaintiff was error.

Andreas v Hempy, 224-561; 276 NW 791

VI MOTION FOR DIRECTED VERDICT—continued

(a) MOTION IN GENERAL—continued

Consent of automobile owner—evidence—jury question. Evidence that 15-year-old son, who often drove family car, had permission to drive the car to choir practice and also to a high school pep meeting, raised a jury question as to whether or not the son was driving with his father's consent at the time of the accident which occurred after the pep meeting.

McCann v Downey, 227-1277; 290 NW 690

Sidewalk defect — city's negligence — jury question. Where a woman sustains injuries by falling on pavement at intersection, when her heel caught in crevice, between the sidewalk and curb, as she stepped off sidewalk, a jury question on the liability of the city was created under evidence showing the injuries were sustained in nighttime while plaintiff was slowly and carefully walking in a strange part of city, and when this condition of the street had been created by the city 10 years before and never remedied, altho considered so unsafe by pedestrians in neighborhood that beaten paths were formed on either side in avoiding it.

Thomas v Ft. Madison, 225-822; 281 NW 748

Negligence—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab, and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendant's motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Evidence insufficient for jury. Where recovery is sought because a minute particle of metal, apparently chipped off of operator's hammer, flew into plaintiff's eye while his truck tire was being repaired by filling station operator, and where there was no showing that tools and methods used by the operator were not those ordinarily used, motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Employee injured by falling derrick—evidence. Evidence that employee engaged in tearing down silo was injured when derrick fell on him did not warrant submission of case to jury on issues of employer's negligence, negligence of fellow servant, and assumption of risk, where the employee was acting on the request of fellow servant or limited vice-principal in charge of the work, where steel pins which gave way were of harder steel than that blacksmiths ordinarily use and were of a type successfully used on derrick in the past, but were not scientifically tested for tensile strength or secured from a manufacturer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Concurrent negligence — effect. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

Negligence of different agencies—proximate cause — jury question. Where the evidence demonstrates that an injury resulted from the negligence of two agencies, the question of proximate cause is peculiarly one for the jury.

Schwind v Gibson, 220-377; 260 NW 853

Payment of rent—sufficiency of evidence. Direction of verdict in action to recover on rent note from tenant was erroneous when there was sufficient evidence of payment by tenant in turning over proceeds of crop to warrant submission of the case to jury.

McCann v McCann, (NOR); 226 NW 922

Claims against deceased. On the question whether a verdict should be directed in favor of a claimant, the record may present such circumstances that some consideration should be given to the fact that the claim is against the estate of a deceased.

In re Talbott, 204-363; 213 NW 779

Fraud in sale of stock—damages as affected by 1929 depression. In an action for damages on account of false representations inducing the purchase of stock and under an instruction giving the correct measure of damages as the difference between the actual value of the stock and its value if it had been as represented, both values as of the time of purchase which was prior to the depression of 1929, it follows that the reduction of the stock's value because of the depression did not cause plaintiff's damage, and defendant's motion for a directed verdict thereon was properly denied.

Smith v Utilities Co., 224-151; 275 NW 158

Manslaughter—elements of self-defense. In a prosecution for murder under a plea of self-defense, the accused must (1) not be the aggressor, (2) retreat as far as possible, (3) have an actual honest belief in imminent danger and (4) have reasonable grounds for such belief, in view of which a motion for a directed verdict was properly denied under evidence

enabling jury to reject a self-defense plea in arriving at a verdict of manslaughter.

State v Johnson, 223-962; 274 NW 41

Willful destruction of property. Evidence tending to show that a garnishee had, subsequent to garnishment, willfully destroyed the property in his possession belonging to the defendant in garnishment, generates a jury question as to the liability of the garnishee.

Schooley v Efnor, 202-141; 209 NW 408

(b) DEFECTIVE PLEADING

Denial of motion based on stricken pleadings—nonreviewable. Denying a directed verdict based on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

(c) FAILURE OF PROOF OF ESSENTIAL ELEMENT

Directed verdicts—constitutionality. Principle reaffirmed that the constitutional right of trial by jury is not infringed by the action of the court in directing a verdict for defendant whenever the evidence is such that the court would not hesitate to set aside a verdict against defendant.

Cashman v Railway, 217-469; 250 NW 111

Improbability of testimony. A jury question may exist even tho material portions of plaintiff's testimony strongly suggest improbability.

Ransom v McDermott, 215-594; 246 NW 266

Rescission of contract—plaintiff's burden. The failure of a party seeking to rescind a contract to plead or prove a restoration of the fruits of the contract received by him may very properly be presented by a motion for a directed verdict.

Continental Bank v Greene, 200-568; 203 NW 9

Guardianship of insane—nonjury question. In an action for the appointment of a guardian of the property of an alleged mental incompetent, the court may direct a verdict for the defendant if the evidence fails to show that the mental incompetency of defendant deprives him of the ability to care for his property, and to understand the nature and effect of what he does.

Richardson v Richardson, 217-127; 250 NW 897

Dismissal of prima facie case. The court, in trying an action, in lieu of a jury, may be fully justified in dismissing it on motion because of the inconclusive and unsatisfactory character of the evidence, even tho the plaintiff has, technically, made a prima facie case for recovery. So held in an action for money had and received.

Griffith v Arnold, 204-1216; 216 NW 728

Confession and avoidance—assault and battery. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v Sundholm, 228- ; 291 NW 137

Burden of proof—necessity to meet. Proof that a preparation was fed to animals and that immediately, or shortly thereafter, some of them died, and the others became permanently stunted in growth, does not justify a presumption that the said preparation caused the deaths or stunting.

Hildebrand v Oil Co., 205-946; 219 NW 40

Justifiable dismissal of counterclaim. An unsupported counterclaim for damages consequent on the negligent handling of a claim by an attorney who sued for fees due him, is, of course, properly dismissed by the court.

Hunt, etc. v Moore, 213-1323; 239 NW 112

Fraud—insufficiency of evidence. In an action against the incorporators of an investment company for damages for fraud in the sale of bonds, a directed verdict in favor of the incorporators was proper when the evidence, other than the outlawed printed representations on the back of the bonds, showed the fraud, if any, was committed by a bank trustee of the securities.

McGrath v Dougherty, 224-216; 275 NW 466

Fraud — evidence — insufficiency — directed verdict warranted. In a damage action arising out of fraudulent procurement of plaintiff's signature to note and conditional sale contract, where plaintiff predicates error on granting defendant a directed verdict on the ground that defendant's fraud was not proved —the evidence showing that plaintiff could read and write English language but failed to read instruments while having an opportunity to do so—and where plaintiff's reasons for not reading instruments were (1) he did not have his glasses, and (2) he thought he was signing an ordinary order for automobile, held, plaintiff's conduct precludes him from asserting fraud, and the ruling on the motion was warranted.

Griffiths v Brooks, 227-966; 289 NW 715

Malpractice—root of tooth in lung. In a malpractice action against dentist, the court erroneously directed a verdict for defendant on

VI MOTION FOR DIRECTED VERDICT—continued

(c) FAILURE OF PROOF OF ESSENTIAL ELEMENT—continued

the ground that there was no showing that the presence of the root of a tooth in plaintiff's right lung was the proximate cause of the injury to plaintiff, under evidence that plaintiff was given a general anesthetic, was completely unconscious at time six teeth were extracted, and that plaintiff lost 60 pounds between the day of the extractions and the day he expectorated, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Plaintiff's burden—proving negligence allegations. A plaintiff's failure to carry the burden of proving at least some of his allegations of negligence properly results in a directed verdict against him.

King v Gold, 224-890; 276 NW 774

Negligence wholly unproved. In an action for personal injuries, where plaintiff fails to prove any of the grounds of negligence alleged in his petition, defendant's motion for directed verdict should be granted, but this rule is confined to cases where plaintiff fails to introduce evidence tending to show defendant's negligence; however, where there is evidence in the record sufficient to make conflict on the question, an entirely different rule applies.

Hawkins v Burton, 225-1138; 281 NW 790

Malicious prosecution — malice — want of probable cause. In action for malicious prosecution malice may be inferred from want of probable cause for the prosecution.

Bair v Schultz, 227-193; 288 NW 119

Defense—directing verdict. In action for malicious prosecution, whether the defendant acted on advice of the county attorney is generally a question for the jury, and assuming he so acted, if he failed to make a full disclosure of the facts, he did not so conclusively establish this defense as to sustain a directed verdict.

Bair v Schultz, 227-193; 288 NW 119

Foreign corporation—compliance with statutes—burden of proof. A foreign corporation for pecuniary profit, suing on an Iowa contract, has the burden to plead and prove its compliance with the statutes requiring permit to do business herein, without which a directed verdict in its favor is error.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Gratuitously loaned corn shredder—injury in use of—nonliability of owner. Directing a verdict is proper against a plaintiff, a farm machinery mechanic and salesman, seeking recovery for an injury sustained when his hand was caught in a corn shredder which had been gratuitously loaned by defendant to a neighbor on whose farm plaintiff was operating the machine, the evidence showing plaintiff was an adult familiar with such machinery and in full possession of his faculties, and that there was no negligence attributable to defendant.

Davis v Sanderman, 225-1001; 282 NW 717

Public contracts under Simmer law—no general judgment for cost. Simmer law prohibits payment of construction cost of a municipal electric plant from taxation, and precludes rendering a general judgment for such cost, including a judgment for cost of engineering services in preparing plans and specifications for construction of such public utility, when such services were performed under contract, subsequent to the election and passage of the ordinance providing for construction payment from future earnings. Consequently, in an action by the engineers against a city to recover compensation for their services, a directed verdict for the city was proper.

Burns v Iowa City, 225-1241; 282 NW 708

Personal injuries — evidence reviewed—motion sustainable. Under the evidence and record in a law action for personal injuries to an independent contractor, case reversed and remanded with instructions to direct a verdict for defendant.

Gowing v Field Co., 225-729; 281 NW 281

Error which becomes inconsequential. Error in overruling a motion for a directed verdict at the close of plaintiff's evidence when certain all-essential testimony was not then in the record becomes inconsequential when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record.

Newland v McClelland, 217-568; 250 NW 229

Action for compensation—purchaser obtained by real estate agent. Where the defendant had sent circular letters to real estate agents, listing farms for sale and stating the commission to be paid for any farm sold, and the plaintiff obtained a prospective buyer for a certain farm, but the sale was consummated by another real estate agent to whom the commission was paid, the defendant was entitled to a directed verdict in an action to collect the commission.

Santee v Lutheran Society, 226-1109; 285 NW 685

Contract unenforceable — directed verdict proper. In buyer's action on an oral contract for sale of a business college where there was no competent evidence taking case out of statute of frauds, a directed verdict for defendant was proper.

Patterson v Beard, 227-401; 288 NW 414

Insufficiency of evidence. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence failed to establish relation of employer and employee. Hence, company's

motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Unproved master and servant relation. In a damage action arising out of a collision between the defendant's truck and a motorcycle upon which plaintiff was riding as a guest, in which action it was alleged that the corporation-defendant's truck was being driven by a person "in the course of his employment for * * * his employer"—the employer denying both this allegation and his consent to use of truck, and when the evidence showed that the corporation employed the truck driver for making deliveries during the week, excluding Sunday, on which day the collision occurred while the truck driver was assisting a personal friend tow a stalled car, held, after plaintiff alleged liability under the master and servant theory rather than under the statute making the owner of the motor vehicle liable, a directed verdict for the corporation was proper when plaintiff's evidence failed to support his theory.

Alcock v Kearney, 227-650; 288 NW 785

Directed verdict for insurer. In an action on a fraternal life insurance policy, when evidence did not show complete payment of premiums, and there was no waiver of terms of the policy providing for lapse for nonpayment of premiums, nor reinstatement after lapse of the policy, a motion for a directed verdict for the insurer should have been sustained.

Craddock v Life Assn., 226-744; 285 NW 169

Insufficiency for directed verdict. In a law action by a beneficiary to recover for the death of the insured on a policy containing additional benefits on account of accidental death, to which defendant insurer pleaded an affirmative defense of suicide and at the close of testimony moved for a directed verdict in favor of plaintiff beneficiary for amount of premiums paid, such motion was properly overruled where the question decided was that the results of insured's own actions, as reconstructed from the circumstances and surroundings, may have been intentional or may have been accidental, the evidence not being of such weight as to make it appear conclusively on the whole record that insured died by suicide.

Waddell v Ins. Co., 227-604; 288 NW 643

(d) UNDISPUTED TESTIMONY

Direction of verdict—positive testimony. A jury question is presented on the issue whether an oral contract was entered into when the record reveals: (1) positive testimony that it was entered into; (2) no direct testimony that it was not entered into; but (3) collateral circumstances justifying the inference that it was not entered into. Especially is this true when from the very nature of the transaction no direct contradictory testimony is available to the party who denies the contract.

Schulte v Ideal Co., 203-676; 213 NW 431

Nonliability per se. Unquestioned evidence that an automobile was loaned by the owner to a party for a specific purpose, and that said party wrongfully used said car for a specifically different purpose, and that the injury in question occurred in the operation of the car while it was being so wrongfully used, establishes the nonliability of the owner as a matter of law.

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

Unimpeached and uncontradicted testimony. The positive and wholly uncontradicted testimony of an unimpeached and disinterested witness that he saw the purported maker of a promissory note sign it, plus the unqualified opinion of a competent and unimpeached witness to the effect that the signature to the note was genuine, justifies a directed verdict when the genuineness of the signature is the sole issue.

In re Work, 212-31; 233 NW 28

When necessarily granted. Plaintiff is necessarily entitled to verdict on motion when his claim is established by uncontradicted testimony.

Kern v Keifer, 204-490; 215 NW 607
Hunt, etc. v Moore, 213-1323; 239 NW 112

Assault and battery—directing jury to award damages to plaintiff. Undisputed evidence held to establish that plaintiff and defendant mutually consented to engage in a fight, and that defendant unlawfully committed an assault and battery on plaintiff, warranting an instruction to the jury to return a verdict for plaintiff in some amount.

Schwaller v McFarland, 228- ; 291 NW 852

Defensive plea of forfeited policy. A defendant insurance company is entitled to a directed verdict on its defensive plea that the policy sued on had, because of the nonpayment of premiums, etc., become forfeited prior to the death of the insured, when, at the close of all testimony, the record reveals clear and convincing proof of such forfeiture by competent and satisfactory testimony which is wholly uncontradicted and unimpeached, directly or indirectly, by any fact, circumstance, or condition. And this is true tho it be assumed that defendant has the burden to establish his said plea.

Baker v Life Ins. Co., 222-184; 268 NW 556

Mental competency and elements of gift inter vivos—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

VI MOTION FOR DIRECTED VERDICT—continued

(e) "SCINTILLA OF EVIDENCE" RULE

Directing verdict—amount of evidence—rule. Court in directing a verdict is guided by not whether there is literally no evidence, but whether there is any evidence which ought reasonably to satisfy the jury that the fact is established.

Wilson v Findley, 223-1281; 275 NW 47

Scintilla of evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 154

Physical facts—exception to most favorable evidence rule. On appeal from an order overruling defendant's motion for directed verdict, the supreme court need not follow the most favorable evidence rule, as urged by plaintiff, to the exclusion of the physical facts and other uncontradicted matters which plaintiff not only conceded, but affirmatively and intentionally established.

Scott v Hansen, 228- ; 289 NW 710

(f) CONFLICTING TESTIMONY

Conflicting evidence. The fact that the testimony of a plaintiff in support of his cause of action is met by positive testimony to the contrary by the defendant, both witnesses being of equal credibility, does not, of itself, show that plaintiff has failed to establish his case by a preponderance of the evidence.

Reichenbach v Bank, 205-1009; 218 NW 903

Conflicting evidence. The court, manifestly, has no right to direct a verdict on an issue which is, under the evidence, a question for the jury.

Oestereich v Leslie, 212-105; 234 NW 229
Central Shoe v Kraft, 213-445; 239 NW 238
Donahoe v Gagen, 217-88; 250 NW 892

War of expert testimony. Whether a death resulted from an accident "independent of all other causes" is necessarily a jury question under a war of conflicting and contradictory expert testimony.

Martin v Life Co., 216-1022; 250 NW 220

Unjustifiable direction. A party may not have a directed verdict in his favor on the assumption that his testimony is truthful and that all testimony to the contrary is untruthful.

Olson v Shafer, 207-1001; 221 NW 949

Directed verdicts—function of court. It is not the function of the court to determine which of a series of irreconcilable theories of experts, as to the death of a person, is correct. All the court can do or is permitted to do is (1) to consider the war of testimony in the permissible light most favorable to the party on whom rests the burden of proof, and (2) to determine whether a verdict in favor of such party would be adequately supported by the testimony.

Martin v Life Co., 216-1022; 250 NW 220

Holdership in due course — jury question. The court has no right to say that the holder of a negotiable note is a holder in due course and to direct a verdict accordingly when conflicting inferences may be drawn from the facts, whether viewed individually or collectively.

Grimes Bank v McHarg, 204-322; 213 NW 798

Clear evidentiary conflict. Where a clear conflict of evidence exists as to a defendant motorist's negligence and as to plaintiff's contributory negligence, so that the jury could have found for either, the court cannot direct a verdict for either party.

Thomas v Charter, 224-1278; 278 NW 920

Positive vs. negative evidence. Positive evidence of the existence of lights in full operation on a parked automobile is in no degree detracted from by evidence of a witness that he did not see any lights at a material time when his view was obstructed by an intervening object.

Harvey v Knowles Co., 215-35; 244 NW 660

Fraudulent representations. Competent evidence of fraud in the execution of a lease and promissory notes, though not free from inconsistencies, and contradicted in part, generates a jury question.

Ottumwa Bank v Starns, 202-412; 210 NW 455

Gifts inter vivos—unallowable directed verdict. An alleged donee of bonds may not, as defendant in replevin proceedings, have a verdict directed in her favor, (1) on the strength of her claimed exclusive possession, or (2) on the strength of lack of evidence of ownership in the alleged donor, when the jury might properly find that the possession of the alleged donee was not exclusive, and when the alleged donor was manifestly the owner of the bonds if the jury found there had been no gift.

Malcor v Johnson, 223-644; 273 NW 145

Loss on fidelity bond—recovery by surety. In action against a person covered by a fidelity bond, to indemnify plaintiff, as surety, for a loss sustained because it executed the bond, a direct evidentiary conflict precludes a directed verdict for plaintiff.

Fidelity Dep. Co. v Ryan, 225-1260; 282 NW 721

Oral contract of sale—disputed facts—jury question. Disputed evidence in buyer's action against seller over oral contract to deliver corn makes a jury question requiring a motion for directed verdict to be overruled.

Willers v Flanley Co., 224-409; 275 NW 474

(g) MOTION TO DIRECT AS ADMISSION

Most-favorable-view-of-evidence rule. On motion to direct verdict, evidence must be viewed in its strongest reasonable aspect in favor of adverse party.

Robertson v Carlgren, 211-963; 234 NW 824; 35 NCCA 555
Blecher v Schmidt, 211-1063; 235 NW 34
Harvey v Knowles, 215-35; 244 NW 660
Lynch v Railway, 215-1119; 245 NW 219
White v Center, 218-1027; 254 NW 90
Schwind v Gibson, 220-377; 260 NW 853
McWilliams v Beck, 220-906; 262 NW 781
Heintz v Packing Co., 222-517; 268 NW 607
Mueller v Auto Assn., 223-888; 274 NW 106
Russell v Leschensky, 224-334; 276 NW 608
Willers v Flanley Co., 224-409; 275 NW 474
Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233
Youngman v Sloan, 225-558; 281 NW 130
Gowing v Field Co., 225-729; 281 NW 281
Hill v Rolfsema, 226-486; 284 NW 376
Crabb v Shanks, 226-589; 284 NW 446
Gipp v Lynch, 226-1020; 285 NW 659
Reynolds v Oil Co., 227-163; 287 NW 823
O'Neill v Keeling, 227-754; 288 NW 887
McCann v Downey, 227-1277; 290 NW 690
Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Most-favorable-view-of-evidence rule. On motion for directed verdict in determining whether plaintiff was guilty of contributory negligence as a matter of law, the evidence must be considered in the light most favorable to him.

Trailer v Schelm, 227-780; 288 NW 865

Most-favorable-view-of-evidence rule — no showing of negligence. While, on a motion for directed verdict, plaintiff is entitled to the most favorable view of the evidence, yet, if the evidence and physical facts show that defendant is not guilty of any negligence which is the proximate cause of, or contributed to, plaintiff's injury, then the motion should be sustained.

McDaniel v Stitsworth, 224-289; 275 NW 572

Crossing railroad in front of oncoming train —contributory negligence. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed and with the train plainly to be seen had he looked, or if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

(h) GENERAL RULES IN RE DIRECTION OF VERDICTS

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

Court indicating directed verdict—dismissal motion properly denied. A motion to dismiss, made after court indicated an intention to sustain defendant's motion for directed verdict, held properly denied.

Yarn v Railway, 31 F 2d, 717

Submission to court. Parties will not be permitted to deny that an action was fully submitted to the court (1) when, at the close of all the evidence, motions were made by both parties for a directed verdict; (2) when the jury was excused, but not discharged; and (3) when the court, without objection, took the motions under advisement, and at a later term, without objection, sustained one of the motions and entered judgment accordingly.

Hart v Wood, 202-58; 209 NW 430

Multifarious motion. The sustaining, generally, of a multifarious motion for a directed verdict requires the appellate court to determine whether any one of the grounds is sustainable.

Bell v Brown, 214-370; 239 NW 785

Sustainable and unsustainable grounds. Principle reaffirmed that the sustaining of a motion to direct a verdict must be upheld if one of the grounds is legally good tho other grounds may be legally unsustainable.

Phillips v Briggs, 215-461; 245 NW 720

Direction sustained on any good ground. Trial court's direction of a verdict must be sustained if any of the grounds of the motion are good.

Dodds v West Liberty, 225-506; 281 NW 476

Directing verdict generally on several grounds—appellant's burden to reverse. Before the supreme court can reverse the trial court's ruling in sustaining generally a motion for directed verdict, which contained several grounds, appellant must show that no one of such grounds was sufficient to support such ruling.

Lotz v United Markets, 225-1397; 283 NW 99

Directing verdict—motion generally sustained—reversal on appeal. The plaintiff is not entitled to a reversal on an appeal from a ruling generally sustaining the defendant's motion for directed verdict containing several grounds unless it is established that the motion was not good on any ground.

St. Peter v Theatre, 227-1391; 291 NW 164

VI MOTION FOR DIRECTED VERDICT—continued

(h) GENERAL RULES IN RE DIRECTION OF VERDICTS—continued

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency, and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Actions on policies—suicide. An insurer is not entitled to a directed verdict on its defensive plea of suicide unless the facts and circumstances preclude every reasonable hypothesis except that of suicide. Evidence held insufficient to overcome presumption of nonsuicide.

Wilkinson v Life Assn., 203-960; 211 NW 238

Death by accident (?) or suicide (?). In an action on a policy of insurance covering death by accident but excluding liability in case of suicide, the court, in view of the legal presumption against suicide, cannot properly direct a verdict on the theory of suicide unless the record is such as to conclusively establish the fact of suicide.

Jovich v Benefit Assn., 221-945; 265 NW 632

Direction improper when fact questions exist. In an action against an automobile insurance company to collect under the collision clause of a policy after transferring the original policy to another automobile on which a conditional sale was outstanding, a directed verdict is properly refused when fact questions exist as to the company's knowledge of the outstanding conditional sale at time of transfer.

Mougin v Ins. Assn., 224-1202; 278 NW 336

Granting after defendant's evidence. If there is sufficient evidence to take a case to a jury at the close of the plaintiff's testimony, a defendant cannot claim at the close of his evidence that there is nothing for the jury to determine, except when the testimony by the party having the burden of proof is in conflict with undisputed facts, or is such that under the circumstances it cannot be true, or shows that the witnesses must have been mistaken.

Ward v Zerzanek, 227-918; 289 NW 443

Conflicting evidence — directed verdict precluded. In an action against a railroad to recover the value of a stallion which died during transportation, conflict in evidence may preclude directing of verdict for the railroad on the ground that human agency causing stallion's death was not shown, irrespective of special finding by jury indicating that stallion died of an inherent propensity or weakness.

Vander Beek v Railway, 226-1363; 286 NW 452

Duty to direct verdict for defendant. The court should exclude the issues from the jury and direct a verdict for defendant whenever the record is such that the court would be compelled to set aside a verdict for plaintiff.

Raible v Bernstein, 209-1083; 229 NW 753

Will—directed verdict—when required. When the real issue is as to testator's mental competency, the court should sustain the will, by a directed verdict, when a contrary jury verdict would be without adequate evidentiary support, or, in other words, when contestant has failed to show that testator was so mentally deficient that he did not comprehend the nature and purpose of the instrument, the extent of his property, the distribution he wanted to make, or those who had claim on his bounty. (Directed verdict held proper.)

In re Fitzgerald, 219-988; 259 NW 455

Evidence—direct and circumstantial—record facts. Circumstantial evidence, supplemented by oral and written confessions of guilt may be such as to have the weight of direct evidence, and the court was right in overruling defendant's motion for directed verdict when, under the record, the established facts and circumstances were not only consistent with defendant's guilt but were inconsistent with any other reasonable hypothesis.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

One conclusion by all reasonable men—court question. Ordinarily the questions of proximate cause and contributory negligence are matters for the jury, and it is only where the facts are such that all reasonable men must draw the same conclusion, that these questions become of law for the court.

Gowing v Field Co., 225-729; 281 NW 281

Reasonable minds differing as to conclusions. If reasonable men may differ as to conclusions drawn from the evidence, the question is one for the jury.

Yale v Hanson, 227-813; 288 NW 905

Contributory negligence per se. Where the facts disclose contributory negligence as a matter of law, the court must direct a verdict against the plaintiff on his own proof.

Denny v Augustine, 223-1202; 275 NW 117

Contributory negligence—when evidence conclusive. Contributory negligence is for the jury, and a directed verdict should be denied except in cases where the facts are clear and undisputed and the cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn.

In re Green, 224-1268; 278 NW 285

Proximate cause of injury—when jury question. Whether certain negligence was the proximate cause of a certain injury is always

a jury question when different minds might reasonably reach different conclusions.

Bell v Brown, 214-370; 239 NW 785

Finding as to proximate cause conclusive on court. A finding by the jury, on supporting testimony, that the negligence of one of two alleged joint tort-feasors was the sole proximate cause of the injury in question, is necessarily conclusive on the court.

Hanna v Elec. Co., 210-864; 232 NW 421

Railroad crossing — motorist's contributory negligence per se. A motorist, who approaches a railroad crossing on a clear day, over a good road, with no obstructions and no diverting circumstances, and who, had he looked, must have seen but nevertheless is struck and killed by an approaching train which from a point 141 feet from the crossing was visible 2,500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Person thrown from one caterpillar tractor under another. Where plaintiff, standing on the endless track, filling the gas tank of one of defendant's caterpillar tractors used in road construction, was thrown, by a sudden movement of the tractor, in front of another oncoming tractor, an allegation attributing the injury sustained to the negligence of both drivers was not too general nor indefinite as to warrant a directed verdict and an instruction thereon was proper.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Errors against prevailing party. While a defendant, on an appeal from an order granting plaintiff a new trial, may not ordinarily show that he was sinned against by the adverse and erroneous rulings of the trial court, yet he may assign error on the refusal of the trial court at the close of all the evidence to sustain his motion for a directed verdict, because, if he was legally entitled to a directed verdict, such fact would ordinarily be fatal to plaintiff's motion for a new trial.

Bennett v Ryan, 206-1263; 222 NW 16

Subsequent errors harmless after refusal to direct verdict. Where the court should have directed a verdict for the defendant at the completion of testimony, subsequent errors on rulings or orders were not prejudicial and could not be relied on by the plaintiff as grounds for a new trial, after a verdict was rendered for the defendant.

Paulson v Hanson, 226-858; 285 NW 189

Erroneous denial—jury question revealed. When plaintiff, at the close of his evidence, has not made a jury question for recovery, the erroneous overruling of defendant's motion for a directed verdict will not be deemed reversible error when, at the close of all the evidence, the evidence does reveal such jury question.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

Unreasonableness of contract — effect. It would require a very clear showing which would justify the court in holding as a matter of law that a contract was not entered into because some of its terms were unreasonable.

Goben v Paving Co., 214-834; 239 NW 62

Last clear chance—evidence—insufficiency. The doctrine of "last clear chance" is not applicable unless peril of injured party is actually discovered and appreciated in time to prevent his injury by the exercise of ordinary care. So where plaintiff drives his truck at a speed of four or five miles per hour onto a railroad track, and is struck by a train going four or five miles per hour, and it is shown engineer of train felt a jar and, looking out of cab, saw some object in front of locomotive and immediately applied brakes and placed locomotive in reverse, held, evidence insufficient to submit to jury, and a motion for directed verdict was rightfully sustained.

Kinney v Railway, 17 F 2d, 708

Shifting defense after denial of directed verdict. In an action on a note, when the defendant asked for a directed verdict on the grounds of lack of consideration, he was not in a position to complain of the refusal to direct the verdict when he later shifted his defense admitting the signature on the note and setting up affirmative defenses, thereby placing the burden of proof on himself.

Ballard v Ballard, 226-699; 285 NW 165

(I) WAIVER OF ERROR IN OVERRULING MOTION

Giving evidence after denial of directed verdict. Introduction of testimony by defendant after motion for directed verdict is overruled, and failure to renew motion at close of evidence, waive error in denying directed verdict.

Hackley v Robinson, (NOR); 219 NW 398

Motion for—waiver. Error in refusing a directed verdict at the close of part of the testimony is waived by the failure to renew the motion at the close of all the testimony.

Yaus v Egg Co., 204-426; 213 NW 230
Linn v Kendall, 213-33; 238 NW 547
Commercial Co. v Hazel, 214-213; 242 NW 47

Motion for—error waived by nonrenewal at close of evidence. If a defendant's motion for a directed verdict at close of plaintiff's evidence is denied and not renewed at the close of all the evidence, the error, if any, in overruling the motion is deemed waived.

Newton Bank v Strand Co., 224-536; 277 NW 491

Error not waived by requesting instruction. Where a motion for a directed verdict is erroneously overruled, the defeated party does

VI MOTION FOR DIRECTED VERDICT—concluded

(i) WAIVER OF ERROR IN OVERRULING MOTION—concluded

not waive said error by asking instructions which correctly state the law of the case as fixed by the ruling of the court on the motion. (Overruling Martens v Martens, 181-350, and McDermott v Ida County, 186-736)

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

Motion based on stricken pleading of settlement—nonreview. Since a settlement must be pleaded, the overruling of a motion for directed verdict alleging a settlement of the action is not reviewable when the pleading setting forth the settlement has been ordered stricken and such order stands unchallenged.

Pearson v Butts, 224-376; 276 NW 65

Exception to rule. The rule of law (206 Iowa 1263) that the trial court should not set aside the verdict of the jury and grant a new trial, when such verdict is the verdict which the court erroneously refused to direct at the close of the evidence, is not applicable when the grounds for new trial are predicated solely on the grounds of, (1) misconduct of the jury, and (2) exceptions to the instructions.

Jordan v Schantz, 220-1251; 264 NW 259

11510 Sealed verdict.

Correction of verdict generally. See under §11508 (III, IV), Vol I

By agreement. Permitting the jury to return a sealed verdict and to separate and reassemble when the verdict is opened, is proper when the state and the defendant have agreed in writing to that effect. Nor is it erroneous for the court to read such agreement to the jury.

State v Ferro, 211-910; 232 NW 127

11511 General or special.

General verdict on multiple issues—presumption. The court will not, the rights of third parties being involved, assume that a general verdict, unaided by any special findings, was based on one of several different and permissible grounds.

Eclipse Lbr. v Davis, 201-1283; 207 NW 238

11512 "Special" defined.

Discussion. See 8 ILB 1—Special verdicts

Right to confine jury to special verdict. The court has the right to confine the jury to a special verdict when the answer to a special interrogatory will reveal the ultimate fact in accordance with the pleadings and evidence, and leave nothing for the court to do but to draw the proper conclusion of law and to enter judgment accordingly.

Bobbitt v Van Eaton, 208-404; 226 NW 79

Special finding of fact as special verdict. A special finding by a jury must be of ultimate, not evidentiary, facts which determine some issue of the case, and if the interrogatory presents to the jury all the ultimate facts or issues so that the answer is decisive of the case, it may constitute a special verdict which will be in lieu of a general verdict.

Olinger v Tiefenthaler, 226-847; 285 NW 137

11513 Findings.

ANALYSIS

I POWER OF JURY
II POWER OF COURT
III SPECIAL FINDINGS IN GENERAL
IV TIME OF REQUEST
V SUBMISSION TO COUNSEL
VI FORM OF INTERROGATORIES
VII EVIDENTIARY AND ULTIMATE FACTS AND CONCLUSIONS OF LAW
VIII ANSWERS

I POWER OF JURY

Jury verdict—reasonable minds differing—finality. If testimony and a fact question exist upon which reasonable minds may fairly differ, the supreme court will not review the result reached by the jury.

Finley v Lowden, 224-999; 277 NW 487

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

II POWER OF COURT

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

III SPECIAL FINDINGS IN GENERAL

Negligence of host—proximate cause. The submission to the jury of interrogatories bearing on the negligence of the driver of a conveyance (in an action by a guest against a third party for damages) is not erroneous when the negligence of the driver was material on, and strictly confined to, the issue of proximate cause.

Schlinkert v Skaalia, 203-672; 213 NW 219

Proximate cause of injury—inconsistent findings by jury. Findings by the jury, in response to special interrogatories, (1) that the negligence of the operator of an automobile was the proximate cause of an accident, and (2) that the recklessness of said operator was the proximate cause of the accident, are fatally inconsistent.

Stanbery v Johnson, 218-160; 254 NW 303

Special interrogatories — whether plaintiff employee. Whether plaintiff was an employee

(or guest) of defendant, when injured in defendant's automobile, held improperly refused submission to the jury.

Porter v Decker, 222-1109; 270 NW 897

Special finding of fact as special verdict. A special finding by a jury must be of ultimate, not evidentiary, facts which determine some issue of the case, and if the interrogatory presents to the jury all the ultimate facts or issues so that the answer is decisive of the case, it may constitute a special verdict which will be in lieu of a general verdict.

Olinger v Tiefenthaler, 226-847; 285 NW 137

IV TIME OF REQUEST

No annotations in this volume

V SUBMISSION TO COUNSEL

Lump sum verdict on several counts—waiver. The defendant may not predicate error on the fact that the jury returned a lump sum as the amount allowed on different counts, when he failed to avail himself of special interrogatories to the jury, and sought to accomplish the same object by requested instructions which embodied certain findings, but failed to submit his substitute for interrogatories to the opposing attorneys before argument.

Ransom v McDermott, 215-594; 246 NW 266

VI FORM OF INTERROGATORIES

Harmless error—submission of dual controlling propositions. In an action for services rendered a deceased, prejudicial error does not result from submitting to the jury the interrogatories (1) whether there was an express contract for payment, and (2) whether there was a mutual expectation between the parties to pay and receive pay for the services, even tho the express contract was established beyond doubt.

In re Willmott, 215-546; 243 NW 634

Improper submission of interrogatories. The submission to the jury, at the request of the defendant, of special interrogatories improper in form and without prior submission to counsel for plaintiff, does not constitute prejudicial error, when the jury was told to answer the interrogatories only in case it found for plaintiff, and when the jury found for defendant.

Baron v Indemnity Co., 218-305; 255 NW 496

VII EVIDENTIARY AND ULTIMATE FACTS AND CONCLUSIONS OF LAW

Submission of ineffectual question to jury—effect. No error results from submitting to the jury a question which calls for a fact already conceded by the parties, and which is answered by the jury in accordance with said concession.

Foy v Ins. Co., 220-628; 263 NW 14

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Interrogatories—stated or agreed amount—services rendered to decedent. In probate action to establish a claim for services rendered to decedent, wherein the court submitted two interrogatories to the jury to determine (1) amount per month, if any, decedent agreed to pay claimant out of his estate at his decease, and (2) whether amount per month was to be paid for 9 or 12 months of each year, the interrogatories being submitted under an instruction to be answered in event jury found for claimant and not to be answered if verdict was for defendant, such instruction was not erroneous, since, before interrogatories could be answered, the jury must have found under the evidence that there was a stated or agreed amount, and the findings therein conformed to the verdict.

In re McKeon, 227-1050; 289 NW 915

VIII ANSWERS

Estoppel. One who causes a special interrogatory to be submitted to the jury is estopped thereafter to claim that the record contains no sufficient evidence to support the answer.

Tigue Sales v Motor Co., 207-567; 221 NW 514

11515 Assessment of recovery.

Automobile cases, damages. See under §§5037.09, 5037.10
Libel and slander cases, damages. See under §12412
Nuisances, damages. See under §12395
Sales, nonacceptance of goods, damages. See under §9933

Discussion. See 9 ILB 187—Quantity and value in damages; 14 ILR 94—Damages in cases of accession; 18 ILR 366—Liability for fright; 18 ILR 404—Damages reduced by trial court

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

Action based on fraud. In an action based on a conspiracy to defraud, the issue of conspiracy is not determinative, the important factor being that in order to be granted relief, it is necessary that the plaintiff establish the necessary elements of actionable fraud, the amount of recovery being dependent upon the extent of damage resulting from the fraudulent conduct.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Instruction as to allowable damages. Instruction specifying that damages should be such as were rendered necessary by the injuries as disclosed by the evidence and which

the evidence shows that plaintiff sustained and endured, sufficiently informed the jury that only such damages could be allowed as were caused by, and the direct result of, injuries sustained because of defendant's negligence.

Jakeway v Allen, 227-1182; 290 NW 507

Harmless error—curing erroneous submission of damages. The submission of a nonpleaded element of damages or the submission of an unproven element of damages will be deemed harmless when the instruction carries the limitation "if any".

Hepker v Schmickle, 209-744; 229 NW 177

Harmless error — erroneous submission of unsupported damages. The submission to the jury, in an action for damages, of an unsupported measure of damages constitutes error, but record reviewed and held harmless to the complaining defendant.

Carpenter v Wolfe, 223-417; 273 NW 169

$2,500 increase in damages on retrial of personal injury case—nonexcessiveness. A verdict of $10,000 on second trial of automobile accident case, altho $2,500 larger than first verdict, did not under the circumstances indicate passion or prejudice and was not excessive.

Jakeway v Allen, 227-1182; 290 NW 507

Remittitur of nonrecoverable damages—effect. Error in including nonrecoverable damages in a verdict is not cured by the subsequent filing of a remittitur in a named sum, when the instructions are framed in such form that no one can determine what amount the jury allowed for nonrecoverable damages.

Gardner v Boland, 209-362; 227 NW 902

Permitting return of unproven damages. Reversible error results from so instructing as to allow the jury to find damages on account of a loss not shown by the evidence, when the amount of the verdict, viewed in the light of the evidence, quite clearly shows that the jury made allowance for such unproven loss.

Herring Co. v Myerly, 207-990; 222 NW 1

Instructions — nonapplicability to evidence. Instructions which permit the jury to find damages in the form of profits lost, without limiting such findings "as shown by the evidence", are prejudicially erroneous.

Smith v Oil Co., 218-709; 255 NW 674

Damages—failure to limit. Reversible error results from the failure of the court in its instructions to limit the jury in its return of damages, on various items of claimed damages, to the amount claimed in the pleadings; and limiting damages "as shown by the evidence" does not necessarily cure the error.

Desmond v Smith, 219-83; 257 NW 543

Measure of damages—failure to limit findings. An instruction which directs the jury, in determining the damages to an article, "to consider" its value before the injury and its value after injury is erroneous, because it fails to confine the jury in its findings of damages.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Loss of buildings. The measure of damages for the wrongful destruction of buildings is their fair, reasonable value at the time of destruction.

Walters v Iowa Co., 203-471; 212 NW 884

Measure of damages—wrongful act without profit to wrongdoer. The lessee of coal lands who seeks to recover damages consequent on the wrongful act of the owner of the land in taking coal from the land, need not show that the defendant-owner made any profit from his wrongful operations. Plaintiff need only show wherein and to what extent he was damaged.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Loss of grove. The measure of damages for the wrongful destruction of a grove on a farm is the difference between the value of the farm immediately before and immediately after the destruction.

Walters v Iowa Co., 203-471; 212 NW 884

Carriage of goods—failure to deliver. In an action against a carrier for a shortage in the delivery of a shipment of coal, the value of the shortage at the point of shipment is not an improper measure of damages.

Smith v Railway, 202-292; 209 NW 465

Delay in shipment—special damages. A carrier is not liable for special damages consequent on its negligent delay in delivering a shipment unless at or before the time of shipment the carrier is notified of the special purpose for which the shipment is intended and of the necessity for prompt shipment. So held as to a shipment of cans by the consignor to itself, followed by damages to corn which the ultimate consignee was unable to can, owing to negligent delay in delivering shipment.

Percy v Railway, 207-889; 223 NW 879; 28 NCCA 717

Contracts—breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Measure of damages—contract basis. Where parties have contracted that contemplated damages shall not exceed a certain amount, a particular measure of damages which will

give practical effect to the agreement will be approved.

Riggs v Gish, 201-148; 205 NW 833

Loss of commissions on sales—price raised after orders taken. Where a manufacturer contracted with a dealer who was to take orders for twine at a certain price and the manufacturer later refused to fill the orders taken except at a higher price, in an action by the dealer for loss of commissions, damages were sufficiently proven by evidence that the dealer had incurred expenses in taking the orders, and that only about 25 percent of the orders were accepted by customers because of the increased price, while normally 95 percent of the orders would have been accepted.

Lee v Sundberg, 227-1375; 291 NW 146

Sale of real estate—error without prejudice under evidence. In vendee's action for damages for fraudulent representations of value in the sale of real estate, no rescission being asked, it is error to instruct that the measure of damages is the amount paid less the reasonable rental value for the time occupied, which error, however, is without reversible prejudice to the vendor, when the amount of recovery is so small that the hope for a more favorable verdict on a retrial is, under the evidence, too remote.

Neal v Miller, 225-252; 280 NW 499

Real estate without rental value—use as measure of damages. When real property has no rental value, upon dissolution of a wrongful injunction restraining erection of a municipal light plant thereon, the measure of damages is the use value, including net profits.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Fraud—measure of damages. Principle reaffirmed that the measure of damages for fraudulent representations as to the condition of land sold is the difference between the reasonable value of the land at the time in question and what would have been said value had the land been as represented.

Fry Co. v Gould, 214-983; 241 NW 666

Subject matter — wholly unallowable counterclaim. The amount which a vendee of land claims to have expended on land foisted upon him because of fraudulent representations by the vendor, in order to render the land "suitable, productive, and usable," is wholly unallowable as a counterclaim because said amount as a measure of damages for the wrong suffered is unknown to the law.

Fry Co. v Gould, 214-983; 241 NW 666

Mutual assumptions on exchange of lands—repudiation — effect. When two parties exchange lands, and each assumes the mortgage of the other on the land received by him in the exchange, and one of them is sued on his assumption, he may, by proper plea and proof, reduce his liability on his assumption to the extent of the damages suffered by him consequent on the act of his co-assumptor in repudiating his assumption by obtaining a discharge therefrom in bankruptcy.

Johnston v Grimm, 209-1050; 229 NW 716

Breach of covenant—improper measure of damages. In an action for damages consequent on a breach of the covenant of warranty of title contained in a mortgage, the amount of the mortgage is not the proper measure of damages when the mortgagor received no consideration for executing the mortgage, and when the mortgagee parted with no consideration, except to forbear the enforcement of his judgment against a third party.

Churchman v Wilson, 204-1017; 216 NW 726

Indemnity bond as tantamount to covenant of seizin. An indemnity bond conditioned to hold the obligee harmless from any loss which he may sustain by reason of a defect of title to certain real estate is equivalent to a covenant of seizin and governed by the same rule, to wit: no action for substantial damages is maintainable on the bond until a hostile, paramount title is asserted.

Duke v Tyler, 209-1345; 230 NW 319

Employer paying doctor bills—negligent person still liable for damages. Payment of an injured truck driver's doctor bills, by his employer, whether the motive be philanthropy or contract, constitutes a bounty from which a negligent defendant motorist can derive no benefit in reduction of his liability, inasmuch as he owes compensation for all damages as to which his negligence was the proximate cause.

Clark v Seed Co., 225-262; 280 NW 505

Hospital expense—board and lodging—when allowable. In personal injury action, allowance of board and lodging in hospital is not error where such items are inseparably tied up with treatment.

Jakeway v Allen, 227-1182; 290 NW 507

Pain, suffering, etc. — judgment of jurors. Jurors must necessarily rely on their own fair and unbiased judgment as to the amount of damages recoverable for pain and suffering and for disability as a wife and homekeeper.

Rulison v X-ray Corp., 207-895; 223 NW 745

Future disability—submission not erroneous when permanent injury alleged. When petition, alleging that plaintiff was permanently injured, contained a general allegation for damages, an instruction on damages for future disability was not objectionable on the ground that the petition did not ask for such damages, and it was not necessary for plaintiff to specifically plead such elements of damage.

Schwaller v McFarland, 228- ; 291 NW 852

Nervous injury—evidence—sufficiency. There may be a recovery of damages consequent upon nervous injury even tho there is no medical testimony showing the connection between the injury and the nervous disturbance.

McDougal v Bormann, 211-950; 234 NW 807

Aggravation of disease—liability in general. One who is predisposed to disease which is aggravated or accelerated by negligence is entitled to recover damages necessarily and proximately resulting from such aggravation or acceleration.

Hackley v Robinson, (NOR); 219 NW 398

Humiliation, insult or indignity—proximate cause. The act of a party in proposing marriage to a married woman at a time when the husband was supposed to be on his death bed, and the act of said party in abusing the said wife, both verbally and physically, when she rejected said proposal, will not enable the husband to predicate damages on allegation and proof that when his wife recited the aforesaid occurrence to him several months later he was much distressed in mind and suffered a relapse in health.

Manning v Spees, 216-670; 246 NW 603

Mental pain and anguish. An injured plaintiff may recover for mental pain resulting from personal physical injury, even tho no special claim for such recovery is made in the petition; especially may he so recover when the petition fairly presents such claim.

Lang v Siddall, 218-263; 254 NW 783

Nominal damages—right to recover more. The court is not in error in instructing that a plaintiff is entitled to more than nominal damages ("such as one dollar or less") consequent on a wholly unjustified assault and battery resulting in admittedly substantial physical injury to plaintiff.

Ashby v Nine, 218-953; 256 NW 679

Duty to minimize damages — instructions. The duty of a physically injured person to do all those reasonable things which will reduce and minimize his damages does not require that he submit to a surgical operation which, while simple in itself, would entail large expense and be attended by possible danger. Instructions relative to such duty reviewed, and held correct.

Updegraff v Ottumwa, 210-382; 226 NW 928

Malpractice — recoverable and nonrecoverable damages. In an action for malpractice in that, after performing a successful operation except that the defendant negligently left a piece of gauze in the wound, which negligence necessitated a second operation, instructions relative to damages arising from (1) scars, (2) bodily and mental pain, and (3) expenses paid for household servants, must clearly differentiate, in view of the two operations, between such damages as are, under each heading, recoverable, and those that are not recoverable.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Malpractice — pain incident to injury. No recovery may be had, in an action for malpractice, for pain (1) incident to an injury, or (2) incident to the usual and ordinary treatment of an injury; and, on request, the court must clearly differentiate, in its instructions, between such pain and pain caused by the negligence of the physician.

Lemon v Kessel, 202-273; 209 NW 393

Permanent cripple—future pain. In a personal injury action arising from a motor vehicle collision, an allegation that plaintiff has been crippled for life, sustained by some evidence, justifies an instruction that the jury may allow such sum as in their judgment will fairly compensate plaintiff for future pain and for being crippled.

Clark v Berry Seed Co., 225-262; 280 NW 505

Employment — wrongful discharge — prima facie measure of damages. The prima facie measure of damages for the wrongful discharge of a servant is the contract wage. The master has the burden to show the extent to which this prima facie measure should be reduced.

Breen v Power Co., 207-1161; 224 NW 562

Separate occupation of wife — decreased earning capacity. In an action by an injured married woman to recover for decreased earning capacity in her separate occupation, it is of no consequence that, after she was injured, she removed from the place where she was employed when injured, to another locality.

Rulison v X-ray Corp., 207-895; 223 NW 745

Wrongful discharge—duty to seek employment. A teacher wrongfully discharged is under obligation to exercise reasonable diligence to secure like employment in the same locality,—not like employment at distant places, or similar employment of a lower or different grade.

Shill v School Twp., 209-1020; 227 NW 412

Insurance—negligence in passing on application. In an action for damages consequent on the alleged negligence of an insurer in passing on an application for insurance, the plaintiff must fail, irrespective of his evidence of negligence, unless he establishes, to the extent of furnishing a measure for his damages, the substance of the contract which he was prevented from entering into.

Winn v Ins. Co., 216-1249; 250 NW 459

Insurance—collision damage to automobile. In an action on an automobile collision insurance policy, the measure of damages is (1) the reasonable cost to repair or replace the dam-

aged parts with others of like kind and quality, if the evidence shows it can be so repaired, or (2) if the evidence shows it cannot be repaired, then the difference between the fair and reasonable market value before and such value after the collision—and fact that insured advantageously traded the wrecked automobile to a dealer on a new automobile does not affect the measure of damage.

Kellogg v National Ins., 225-230; 280 NW 485

Fully reparable injury. If the injury to an article is fully reparable, then the measure of damages is the reasonable cost of the repairs, not the difference between the reasonable value of the article before and after the injury.

Looney v Parker, 210-85; 230 NW 570

Reparable injury to article. The measure of damages for negligent injury to an article is the reasonable cost of restoring the article to the condition it was in immediately before the injury, not exceeding in any case the reasonable value of the article at the time of injury.

Laizure v Railway, 214-918; 241 NW 480

Article of personalty—reparable and irreparable injury. The measure of damages for injury to an article is: (1) for total destruction, the reasonable value at the time of destruction; (2) for a fully reparable injury, the reasonable cost of the repairs, plus the reasonable value of the use of the article during a reasonable time for repair; (3) for a partially reparable injury, the difference in the reasonable value of the article before and after the injury.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Failure to make repairs. The measure of damages for breach of a contract to make all necessary repairs to a pavement is the fair and reasonable cost of such repairs, and not the difference in value of the real estate with and without said repairs.

Armstrong Inc. v Nielsen, 215-238; 245 NW 278

Bank collections — negligence — measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks. Substantial but conflicting testimony reviewed and held to present a jury question.

Schooler Motor Co. v Trust Co., 216-1147; 247 NW 628; 38 NCCA 361

Corporate stock—no market value—net value of assets. If there is no evidence of the market value of corporate stock, in an action for damages consequent on a fraudulently induced sale, said value must be determined by ascertaining the net value of the assets of the corporation.

Humphrey v Baron, 223-735; 273 NW 856

Municipal light plant earnings—anticipated profits neither nominal nor speculative. In a city's action on a public utility's injunction bond indemnifying city's loss on account of delayed construction of a municipal light plant, even tho plant had not been in operation, loss of profits and loss of use of the plant not in being, are not too speculative nor nominal, and anticipated profits, if established with reasonable certainty, may be recovered as damages.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Sick and unhealthy animals. Evidence of the fair, reasonable value of sound, healthy, marketable hogs is not admissible to prove the value of admittedly unhealthy and sick hogs.

Tracy v Oil Co., 208-882; 226 NW 178

Thoroughbred cow served by nonthoroughbred bull. Principle reaffirmed that the measure of damages resulting from the serving of a thoroughbred cow by a nonthoroughbred bull is the difference between the value of said cow for breeding purposes before and after such serving.

Madison v Hood, 207-495; 223 NW 178

Surface water damages—flowage increased by tile. Surface water collected by one landowner and drained by tile to the land of another's servient estate, where it is there conveyed by the latter's tile to the lands of a second servient estate, all through the natural course of drainage, is not such subject of damages as to entitle the third estate owner to equitable relief, especially when it is not shown that he was substantially damaged thereby.

Johannsen v Otto, 225-976; 282 NW 334

Exemplary damages—purpose. Punishment of the defendant is one of the purposes in permitting an allowance of exemplary damages in a proper case; and it is proper for the court so to instruct the jury.

Gregory v Sorenson, 214-1374; 242 NW 91

Exemplary damages — recovery permissive only. Reversible error results from instructing, in substance and in effect, that the jury is under obligation to return a verdict for exemplary damages in case it finds that plaintiff has suffered actual damages.

Boom v Boom, 206-70; 220 NW 17

Exemplary damages — nonexcessive verdict. A verdict for exemplary damages which is fairly in proportion to the actual damages will not be disturbed by the court.

Gregory v Sorenson, 214-1374; 242 NW 91

Exemplary damages—malice as essential basis. The submission of the question of exemplary damages without supporting evidence of malice is prejudicially erroneous.

Sokolowske v Wilson, 211-1112; 235 NW 80

Exemplary damages — failure to submit—effect. Failure of the court to submit to the jury the question of exemplary damages is not error, even tho plaintiff's pleading was broad enough to embrace such damages, when the plaintiff neither claimed such damages in the pleadings nor requested the court to submit such issue.

Morris v Scoville, 206-1134; 221 NW 802

Assault and battery—nonexcessive damages—exemplary damages. In an assault and battery case verdict for $1,680, reduced by remittitur to $1,180, held not so excessive as to evince passion and prejudice, when verdict included exemplary damages.

Hauser v Boever, 225-1; 279 NW 137

Assault—loss of earnings. In an action for injuries received in an assault and battery, evidence that the plaintiff had been incapacitated for 41 days and that his earnings prior to the injury were about $10 per day, was sufficient to submit to the jury an issue of loss of earnings.

Wessman v Sundholm, 228- ; 291 NW 137

Instructions—assault and battery—directing jury to award damages to plaintiff. Undisputed evidence held to establish that plaintiff and defendant mutually consented to engage in a fight, and that defendant unlawfully committed an assault and battery on plaintiff, warranting an instruction to the jury to return a verdict for plaintiff in some amount.

Schwaller v McFarland, 228- ; 291 NW 852

Taxation of attorney fees as matter of right. A defendant in attachment who counterclaims on the bond and recovers both actual and exemplary damages is entitled to a taxation of reasonable attorney fees as a matter of right, even tho the sureties on the bond are not made parties to the counterclaim.

Mogler v Nelson, 211-1288; 234 NW 480

11516 Joint or several verdicts.

Allowable joint verdict. A joint verdict in an action for an unlawful arrest and false imprisonment is allowable against those shown to be acting in concert.

Schultz v Enlow, 201-1083; 205 NW 972

Justifiable submission. The submission to the jury of a joint verdict against joint defendants is proper when the evidence supports such submission.

Sokolowske v Wilson, 211-1112; 235 NW 80

Unallowable joint verdict. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted, if requested.

Broderick v Barry, 212-672; 237 NW 481

Jarvis v Stone, 216-27; 247 NW 393; 75 ALR 1530

Submission of separate forms. In an action against the driver and owner of a truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error, the court having specifically and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker, 218-54; 253 NW 923

11517 Form.

Correction of verdict. See under §§11508, 11510, Vol I

Form on single issue. One form of verdict only need be submitted when but one question is at issue: i. e., damages.

Millard v Mfg. Co., 200-1063; 205 NW 979

Improper form. A form of verdict submitted to the jury is seriously defective when framed in such a manner as to lead the jury to understand that, if such form were returned, it would absolve a party who was not contesting his liability.

Starry v Starry, 208-228; 225 NW 268

Adoption of trial theory. One of two defendants may not complain that the court, in the submission of various forms of verdicts, adopted his trial theory of nonjoint liability.

Zieman v Amusement Assn., 209-1298; 228 NW 48

11518 Entered of record.

Sufficiency of verdicts and correction thereof. See under §11508

11519 Waiver of jury trial.

Waiver of jury trial. See also Const Art I, §9; §§11435, 11581

Deprivation of jury—constitutionality. An action by the receiver of an insolvent bank against stockholders for the purpose of determining the necessity for an assessment on stock holdings, and adjudicating the amount of such assessment, is not inherently a law action and, therefore, the legislature may provide that the action shall be brought in equity.

Broulik v Henderson, 218-640; 254 NW 63

Party in default. A party in default may not complain that he was deprived of a jury trial.

State v Murray, 219-108; 257 NW 553

Default as jury waiver. Failure to appear for trial is a waiver of the right to trial by jury and a consent to trial by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Waiver by agreement of attorneys—validity. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Chemical Co., 222-347; 268 NW 581; 106 ALR 198

Hostile motions for verdict — nonwaiver. Hostile motions for a directed verdict, made by plaintiff and defendant at the close of all the evidence, do not, in and of themselves, constitute a waiver of the jury; otherwise, when such motions are followed by a stipulation of record, by the parties, "that the court may render a decision of said case during term time or vacation".

Bukowski v Security Assn., 221-416; 265 NW 132

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Submission to court. Parties will not be permitted to deny that an action was fully submitted to the court (1) when, at the close of all the evidence, motions were made by both parties for a directed verdict; (2) when the jury was excused, but not discharged; and (3) when the court, without objection, took the motions under advisement, and at a later term, without objection, sustained one of the motions and entered judgment accordingly.

Hart v Wood, 202-58; 209 NW 430

Finding equivalent to jury verdict—conclusiveness on appeal. In a law action tried to the court without a jury, its finding on the fact question as to whether a check was accepted for collection or as payment has the same effect as a verdict of the jury, and cannot be disturbed on appeal if there is evidence to support it.

Hockert v Ins. Co., 224-789; 276 NW 422

Findings of trial court in law action. The finding and judgment of trial court on claim against decedent's estate has the effect of a jury verdict and may not be set aside if it finds any substantial support in the record.

In re Green, 227-702; 288 NW 881

11520 Reference—by consent.

Inaccurate judgment — correction without new trial. When parties to an action voluntarily (tho irregularly) submit to a referee certain counts only of the petition, and later judgment is entered on the report of the referee in such form as to indicate that all counts of the petition had been so submitted, the court, on proper proof, is under mandatory duty, during the term at which the judgment was entered, to exercise its statutory and inherent power and, itself, correct said inaccuracy.

Watters v Knutsen, 223-225; 272 NW 420

11521 Without consent.

Condition precedent. A party may not have an accounting unless he first pleads and proves that something is due him.

Oskaloosa Bk. v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Unavoidable preliminary issue. The court has no authority, in an action for an accounting, to appoint, without the consent of the defendant, a referee to take the accounting, until defendant's plea that he is under no legal duty to account is first determined adversely to the defendant.

Benson v Weitz, 211-489; 231 NW 431

Accounting—appealable order. An order appointing a referee to take an accounting without first determining defendant's plea that he was under no legal duty to account, is appealable.

Benson v Weitz, 211-489; 231 NW 431

11526 Report—judgment.

ANALYSIS

I Referees and Proceedings
II Report and Findings

I REFEREES AND PROCEEDINGS

Stipulations—indefiniteness as to time—effect accorded. An oral agreement or understanding between opposing counsel that one of them should have time, additional to that specified by statute, in which to file exceptions to the report of a referee, tho the extent of such additional time is quite indefinite, will be construed and recognized by the court in the spirit and to the extent reasonably contemplated by the parties.

Holdorf et al. v Miller, 220-1380; 264 NW 602

II REPORT AND FINDINGS

Failure to except to report. The filing of exceptions to the report of a referee within the time permitted by statute, or by order of

II REPORT AND FINDINGS—concluded

the trial court, is a condition precedent to the right to an appellate review of said report.

State v Cas. Co., 213-200; 238 NW 726

Equity cause tried on exceptions to referee's report. When a cause in equity is tried on exceptions to the report of a referee, and the appeal is from the judgment rendered on said exceptions, the review on appeal is limited to the exceptions presented to the trial court and to the record there made.

Hogan v Perkins Co., 213-1175; 238 NW 608

11534 Acceptance by referee.

Reference—procedure—justifiable findings. Whether a referee in probate must accept the appointment, qualify, hold hearings, make a timely report and accompany the same by affidavit as required of referees appointed in ordinary civil cases (§11530, et seq. C., '31), quaere; but the court may well find that such requirements (if they are such) were complied with when an unquestioned amended report of the referee recites such compliance.

In re Cochran, 220-33; 261 NW 514

11535 Proceed as court.

Accounting—trial de novo—limitation. An appeal from a ruling on objections to a referee's report must be tried de novo on the objections specified to such report.

Fleming v Fleming, 211-1251; 230 NW 359

Equity cause tried on exceptions to referee's report. When a cause in equity is tried on exceptions to the report of a referee, and the appeal is from the judgment rendered on said exceptions, the review on appeal is limited to the exceptions presented to the trial court and to the record there made.

Hogan v Perkins Bros., 213-1175; 238 NW 608

11536 "Exception" defined.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I NECESSITY FOR EXCEPTIONS
- (a) IN GENERAL
- (b) IN RE MISCONDUCT
- (c) EXCEPTION TO JUDGMENT
- (d) EXCEPTIONS IN EQUITY
- (e) WAIVER OF EXCEPTIONS

Exceptions generally. See under §11548

I NECESSITY FOR EXCEPTIONS

(a) IN GENERAL

Assenting to action complained of. A party who, in one part of the record, permits the introduction of testimony without objection, may not predicate error on the reception in another part of the record, over his objection, of testimony of substantially the same nature.

Lewis v Grain Co., 214-143; 241 NW 469

Necessity for. Error (if it be error) in dismissing an action (1) without prejudice, (2) in the absence of the defendant, (3) without notice to him, and (4) without taking evidence thereon, will not be considered on appeal when the record shows that no exception was entered to the ruling in the trial court.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Necessity for. Failure to except to an adverse ruling on a motion for new trial precludes appellate review of exception embodied in the motion.

Pullan v Struthers, 201-709; 207 NW 794

Exception necessary. Rulings relative to the transfer of a cause from law to equity, or vice versa, will not be reviewed in the absence of exceptions to the rulings.

Hogan v Perkins Bros., 213-1175; 238 NW 608

Van Dyck v Abramsohn, 214-87; 241 NW 461

Failure to reserve error. The appellate court may not review the reception of testimony which is admissible against a part of the defendants only, when the testimony was received without objection, and no instruction limiting the application of the testimony was requested.

Weyer v Vollbrecht, 208-914; 224 NW 568

Belated filings. A party, on appeal, may not predicate error on the belated filing of a pleading to which he interposes no exception.

Royal Ins. v Hughes, 205-563; 218 NW 251

Failure to except to report of referee. The filing of exceptions to the report of a referee within the time permitted by statute, or by order of the trial court, is a condition precedent to the right to an appellate review of said report.

State v Cas. Co., 213-200; 238 NW 726

Failure to except. Failure to except to rulings on the introduction of evidence and to the giving of instructions precludes review on appeal.

State v Jackson, 205-592; 218 NW 273
State v Slycord, 210-1209; 232 NW 636
Wood v Branning, 215-59; 244 NW 658

Unexcepted instructions as law of case. If there be no exceptions to instructions, the verdict is final if it has support in the evidence. In such case no inquiry can be made whether the instructions are right or wrong.

Commer. Credit v Hazel, 214-213; 242 NW 47

Failure to give promised instruction. Failure of the court to instruct as promised during the course of the trial will not be reviewed in the absence of an exception to such failure.

Lee v Ins. Assn., 214-932; 241 NW 403

Exception by noncomplainant. Defendant may not predicate error on an exception entered by the plaintiff.

Mizner v Lohr, 213-1182; 238 NW 584

Dead man statute—failure to object. Failure to object to testimony as to a personal transaction between an interested party and a deceased precludes assignment of error, on appeal, in receiving such testimony.

In re Willmott, 215-546; 243 NW 634

Total absence of exceptions — necessary affirmance. If the record on appeal is barren of any exception to the rulings complained of, the appellate court will affirm the judgment of the lower court.

Garner v Cherokee County, 223-712; 273 NW 842

Constitutionality of statute not raised in lower court. When a district court order, granting an extension of the time for redemption of land on which a mortgage had been foreclosed, contained a provision that if the statute under which the extension was granted were repealed or held invalid the order would be terminated, such provision did not warrant an appeal challenging the constitutionality of the statute when the question of constitutionality was not raised in the lower court.

N. Y. Ins. v Breen, 227-738; 289 NW 16

(b) IN RE MISCONDUCT

Misconduct of court. Failure to except to alleged misconduct of court precludes review on appeal.

State v Johnson, 210-167; 230 NW 513

Extension of time for new trial motion—canvass of jury as to misconduct of court. An extension of time for filing a motion for new trial to enable counsel to canvass the jury and learn the prejudicial effect of remarks made by the court during the trial was properly refused when there was attached to the motion an affidavit by a juror that the remarks of the court had led the jury to disbelieve a witness, the affidavit not supporting its conclusion, and when no exceptions were taken to the remarks by the court.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Misconduct in argument. Misconduct in argument is waived by a failure to except thereto.

Pullan v Struthers, 201-709; 207 NW 794
State v Myers, 207-555; 223 NW 166

Objections—sufficiency. An objection to a flagrantly improper argument by the county attorney may be all-sufficient even tho not couched in specific language; a priori, when the attorney and court cannot but know the very subject matter to which reference is made.

State v Voelpel, 213-702; 239 NW 677

Arguments and conduct of counsel—curing error by instruction. Argument and ruling thereon briefly reviewed and held to reveal no error, but, if error, that the same was effectively cured by an instruction to disregard the matter referred to by counsel.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

(c) EXCEPTION TO JUDGMENT

Failure to except. Failure to have exception to a judgment properly noted precludes review on appeal.

Des M. Marble v Seevers, 201-642; 207 NW 743
Leach v Bank, 201-1323; 207 NW 326
Stork v Stork, 202-196; 209 NW 276
Continental Bk. v Railway, 202-579; 210 NW 787; 50 ALR 139
Campfield v Rutt, 211-1077; 235 NW 59
State v Phillips, 212-1332; 236 NW 104

Judgment record clarified by later entry. When the court stated in its entry of judgment: "The defendant excepts to said judgment. Exceptions allowed and granted.", and in ruling on a motion for a new trial, made an entry that the above-quoted was intended to save an exception for the defendant, the court was correct in its action to clarify the record, and on appeal the defendant could not contend that the entry could only be interpreted to mean that the exception to the judgment was sustained.

Wessman v Sundholm, 228- ; 291 NW 137

(d) EXCEPTIONS IN EQUITY

No annotations in this volume

(e) WAIVER OF EXCEPTIONS

Requested instruction nonwaiver of objections. A party whose objections to the submission of a subject matter to the jury have been erroneously overruled by the court does not waive his objections by asking an instruction which is in harmony with his objections as to said subject matter.

Ballinger v Democrat Co., 207-576; 223 NW 375

Reservation of grounds—objectionable argument. Failure to have an objectionable argument made of record and to except thereto constitutes a waiver of the error, if any.

Schram v Johnson, 208-222; 225 NW 369

11537 Time to except.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I TIMELY EXCEPTIONS
II TIME FOR OBJECTIONS IN GENERAL

I TIMELY EXCEPTIONS

Presentation of grounds of review—prerequisite for appeal. A ruling and exception thereto in the lower court, or a showing of a request for a ruling and a refusal, are necessary prerequisites to a review in the appellate court.

In re Scholbrock, 224-593; 277 NW 5

Argument not made of record. Error may not be based on alleged misconduct of counsel in argument unless the specific misconduct is made of record, and exceptions entered thereto.

State v Harrington, 220-1116; 264 NW 24

Stipulation indefinite as to time—effect accorded. An oral agreement or understanding between opposing counsel that one of them should have time, additional to that specified by statute, in which to file exceptions to the report of a referee, tho the extent of such additional time is quite indefinite, will be construed and recognized by the court in the spirit and to the extent reasonably contemplated by the parties.

Holdorf v Miller, 220-1380; 264 NW 602

II TIME FOR OBJECTIONS IN GENERAL

Objections first made on appeal. Objections to evidence must be made when it is offered, not for the first time on appeal.

State v Harrington, 220-1116; 264 NW 24

Belated objections to evidence. A party may not, on a motion for a new trial, interpose objections to testimony, other than the objections interposed at the trial.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

Larceny — value — competency of witness — fatal delay in objecting. Objections to the competency of a witness to testify to the value of stolen articles must be made when the witness is asked as to said values, not later when the articles are offered in evidence.

State v Endorf, 219-1321; 260 NW 678

Fatal delay. The court may very properly refuse to strike testimony when it has been received without objection, and when the motion to strike is delayed until after the entire testimony is in the record.

Greco v Ins. Co., 219-150; 257 NW 201

Belated objections. The objection that a petition does not state a cause of action may be deemed waived when made for the first time in a motion for a new trial.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Gambling on answer. A party will not be permitted to withhold his objection to a question until he discovers that the answer is unfavorable to him.

State v Plew, 207-624; 223 NW 362
State v Slycord, 210-1209; 232 NW 636
State v Woodmansee, 212-596; 233 NW 725
Lewis v Grain Co., 214-143; 241 NW 469

Stipulations in re evidence and objections thereto. Litigants may validly agree of record (at least with the consent of the court) that, in the taking of testimony, objections thereto need not be made at the time of offer, but that such testimony shall be deemed objected to on "all grounds known to the law".

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Performance of contract—merchantable title—belated objections. Objections to a land title as shown by the abstract introduced at the trial, not made until after the entry of the decree, will be ignored.

Vanderwilt v Broerman, 201-1107; 206 NW 959

11538 Bill of exceptions.

Report of trial and certification. See under §§11456, 11457

Absence of time limit. Evidence taken in an equitable action need not be certified by the trial judge and reporter until there exists a necessity for such certification. Conceding, arguendo, that the certification should be made within a reasonable time after such necessity arises, then the presence or absence of prejudice will materially control the question as to what is such reasonable time.

Andrew v Bank, 206-1368; 222 NW 553

Ex-judge's affidavit—no part of record. A judge's affidavit made after termination of his office, and three months after perfection of the appeal, is no part of the record and cannot be considered against the appellant as a basis for an alleged waiver.

In re Metcalf, 227-985; 289 NW 739

Improper argument. Improper argument by the county attorney, which argument has not been taken down by the reporter as part of the record, but as to which proper exception has been entered, may be made part of the record by a bill of exceptions signed by the judge.

State v Voelpel, 213-702; 239 NW 677

Unreported trial to court—bill of exceptions—belated filing—effect. Where a law action is tried to the court without a reporter's record being made—appellant electing to preserve the necessary record in the form of a bill of exceptions, but failing to file exceptions within statutory time—errors relating to rulings on and as to sufficiency of the evidence cannot be considered on appeal. The lack of

an extension of time and the failure to properly preserve the record leave nothing for consideration, and an affirmance necessarily follows.

Berner v Jordan, 227-1106; 290 NW 53

11539 When bill unnecessary.

Failure to preserve record. Tho a motion to vacate a final decree for erroneous proceedings which preceded the decree be treated in the appellate court as a motion for a new trial, yet movant cannot prevail when he deliberately permitted such proceedings to take place in the trial court without any record preservation, and seeks in his motion proceedings to establish them by mere affidavit and extraneous testimony.

Radle v Radle, 204-82; 214 NW 602

Nonnecessity in equity. The fact that the record on appeal in an equitable action fails to disclose any exception by the appellant is not grounds for dismissing the appeal.

Roeper v Danese, 206-964; 221 NW 506

Necessary corrections in trial court. An attack on the record as duly certified to the supreme court on appeal cannot be originated in the supreme court. If the record in the trial court is incorrect it must be there corrected by amendment on proper application.

Melman Fruit v Melman, 216-45; 245 NW 743

Correction of certificate to shorthand notes. A purported certificate of the trial reporter to the correctness of the shorthand notes, which certificate is fatally defective because not signed by the reporter, may be corrected by said reporter by the subsequent execution of a new and duly signed certificate.

Melman Fruit v Melman, 216-45; 245 NW 743

Abstract—filing when notes and transcript not with clerk. An abstract filed with the clerk of the supreme court within the time provided by statute (§12847, C., '31) is a proper and valid abstract notwithstanding the fact that, at the time of said filing, the shorthand notes had not been returned to, nor had the transcript been filed with, the clerk of the trial court.

Melman Fruit v Melman, 216-45; 245 NW 743

11541 Certification by successor.

Time for certification.

Andrew v Bank, 206-1368; 222 NW 553

11542 Form and grounds of exception.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I EXCLUSIVENESS OF OBJECTION
II OBJECTIONS—SUFFICIENCY
(a) GENERAL GROUNDS—INCOMPETENT, IRRELEVANT, IMMATERIAL
(b) SPECIFIC GROUNDS

I EXCLUSIVENESS OF OBJECTION

Evidence—motorcycle automobile collision—speed remote from accident—admissibility. Where a motorcycle coming over a viaduct at high speed collides with an automobile leaving and making a left-hand turn at the foot of the viaduct, speed of the motorcycle at the instant of or immediately before the collision is admissible, but, with nothing to indicate to the trial court the materiality of speed some distance away, the exclusion of such evidence will not be disturbed.

Thomas v Charter, 224-1278; 278 NW 920

Waiver by introducing exhibit. Objections made by the defendant to testimony given by the plaintiff's witness on direct examination were not waived when the defendant introduced an exhibit containing written statements made by the witness which tended to weaken his oral testimony. But objections by the defendant to other testimony in the direct examination were waived by statements in the exhibit supporting the testimony to which objections had been made.

Goodale v Murray, 227-843; 289 NW 450

II OBJECTIONS—SUFFICIENCY

(a) GENERAL GROUNDS—INCOMPETENT, IRRELEVANT, IMMATERIAL

Withholding objection—effect. An objection to the reception of hearsay evidence will be given scant consideration when made for the first time at the conclusion of the testimony and then in the form of a motion so couched as to be practically impossible of application by the court.

Walker v Speeder Corp., 213-1134; 240 NW 725

Dragnet objection. An overruled objection in the trial court to the effect that certain expert testimony was "incompetent, irrelevant, and immaterial" does not raise on appeal the point that the qualification of the witness was not shown.

McColl v Jordan, 200-961; 205 NW 838

Dragnet objection. The all-inclusive objection that a question is "incompetent, immaterial, and irrelevant" is insufficient to present the point that the question invades the province of the jury.

Crouch v Remedy Co., 205-51; 217 NW 557

Dragnet objection. A dragnet objection to an exhibit is properly overruled when the exhibit is clearly admissible in part, and when the objector makes no effort to separate the admissible from the inadmissible or to expunge from the record the inadmissible part.

State v Bevins, 210-1031; 230 NW 865

Presentation and reservation of grounds of review—motion to strike—omnibus motion. A blanket motion to strike intermingled compe-

II OBJECTIONS—SUFFICIENCY—concluded

(a) GENERAL GROUNDS—INCOMPETENT, IRRELEVANT, IMMATERIAL—concluded

tent and incompetent testimony is improper, and will not be reviewed on appeal.

Koopman v Ins. Assn., 209-958; 229 NW 221

General reputation—sufficiency. The point that a question calls for testimony of the "reputation" of a witness, instead of testimony of the general reputation, is not raised by the objection of incompetency and immateriality.

State v Dillard, 205-430; 216 NW 610

Fraudulent banking—insolvency—evidence—other deposits. Upon a prosecution for receiving deposits while insolvent, testimony of deposits other than that alleged in the indictment is admissible, over the objection of incompetency, irrelevancy, immateriality, and failure to lay proper foundation.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

Relevancy, materiality, and competency—quantum meruit. On the issue of quantum meruit for services rendered, a former contract between the same parties for similar services performed under like conditions, and specifying the compensation, is admissible as a circumstance for the jury's consideration.

Olson v Shuler, 203-518; 210 NW 453

Reception of evidence—waiver of incompetency. Error may not be predicated on the reception of irrelevant and incompetent testimony relative to the condition of a nuisance at a place remote from the place in controversy when the complainant fails to avail himself of a later indicated willingness on the part of the court to strike such testimony.

Chase v Winterset, 203-1361; 214 NW 591

Cancellation of indorsements. On the issue whether indorsements of payments on a note had been improperly canceled, evidence by the maker of the payments to the effect that he had never authorized such cancellation is manifestly relevant, competent, and material.

First St Bank v Tobin, 204-456; 215 NW 767

"Incompetent and immaterial". The objection that evidence is "incompetent and immaterial" is all-sufficient when such grounds are perfectly obvious, and especially so when the objector specifically calls the attention of the court to the fact that the offered testimony "does not tend to prove any issue in the case".

State v Cordaro, 211-224; 233 NW 51

Triple objection—sufficiency. Ordinarily an objection to the introduction of testimony on ground that it is incompetent, irrelevant, and immaterial does not constitute a proper basis for reversal unless objectionable nature of the evidence is also specified. However, such general objection is sufficient where grounds of the objection are discernible or where the evidence could not have been made competent.

Floy v Hibbard, 227-149; 287 NW 829

Objections to evidence—immateriality apparent. Where the immateriality of evidence objected to is plainly discernible and no further particularity is required to apprise the trial court of grounds of objections, it is not necessary that these same identical matters be again presented to trial court by way of motion for new trial before they may be considered by supreme court.

Floy v Hibbard, 227-149; 287 NW 829

Poor practice—admitting evidence on promise to amend. In a law case, especially, it is poor practice to permit evidence, objected to as incompetent, to be admitted on the promise that amendments would later be filed to meet the proof. Such objections coming after the witness has answered should be followed by motions to strike.

Osceola v Gjellefald Co., 225-215; 279 NW 590

(b) SPECIFIC GROUNDS

Specific objections. Objections to testimony in criminal cases must be as specific as is required in civil cases, in order to receive review on appeal.

State v Vandewater, 203-94; 212 NW 339

Correct ruling on faulty objection. The exclusion of incompetent evidence on an insufficient objection will not be deemed error.

Kent Bank v Campbell, 208-341; 223 NW 403

Scope of objection. The objection that a question calls for an unallowable conclusion of the witness is quite different than the objection that no foundation had been laid for the testimony in question.

Lane v Varlamos, 213-795; 239 NW 689

Minutes of testimony—nonimpeachable. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

11545 Signing by judge or bystanders.

Bystanders' bill. Misconduct in argument may not be made of record by a writing which is not presented to or signed by the judge, and which is signed solely by the counsel for the complaining party.

Rudd v Jackson, 203-661; 213 NW 428

Affidavit (?) or bill of exceptions (?). Misconduct of an attorney in argument (not taken down and made of record) must be presented by bill of exceptions and not by affidavit attached to the motion for new trial.

Hornish v Overton, 206-780; 221 NW 483

Appellant not "bystander". A bill of exceptions signed by appellant as a "bystander" is a nullity.

Music v DeLong, 209-1068; 229 NW 673

11548 Must be on material point.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

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Assignment of error. See under §12869
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Variance between allegation and proof. See under §11177 et seq.

I PRESUMPTION OF REGULARITY AND CORRECTNESS

Presumption as to sustaining facts. On appeal in an action involving the title to real estate, it will be assumed, in support of the judgment, that the plaintiffs were the proper parties in interest, though the record is indefinite, when they were so treated without objection in the trial below.

Bullock v Smith, 201-247; 207 NW 241

Executors and administrators—attorney fee allowance—evidentiary support required. Tho a presumption of correctness exists in favor of trial court's decision fixing compensation for administrator's attorney, yet, where objection is made to application for allowance, and no evidence is introduced as to the services other than a bare statement in the applicant's affidavit, the trial court is not warranted in making a finding involving both nature and value of services.

Glynn v Bank, 227-932; 289 NW 722

Attorney fee for extraordinary probate services. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

II AFFIRMATIVE SHOWING OF PREJUDICIAL ERROR

(a) IN GENERAL

Discussion. See 18 ILR 304—Offer of testimony

Presentation of grounds of review—prerequisite for appeal. A ruling and exception thereto in the lower court, or a showing of a request for a ruling and a refusal, are necessary prerequisites to a review in the appellate court.

In re Scholbrock, 224-593; 277 NW 5

Dead man statute—failure to object. Failure to object to testimony as to a personal transaction between an interested party and a deceased precludes assignment of error on appeal in receiving such testimony.

In re Willmott, 215-546; 243 NW 634

Persistent objections. The act of counsel in persistently but unsuccessfully objecting to the cross-examination of an expert witness (who has testified to the genuineness of a signature) to the effect that what was being called for by the examination was as evident to the jury as to the witness, does not, in and of itself, constitute prejudicial misconduct.

Keeney v Arp, 212-45; 235 NW 745

Cross-examination—unallowable scope. Reversible error results in permitting a cross-examination to develop testimony which is highly prejudicial to the party calling the witness, and which has no relation to the testimony developed on the direct examination. So held where a direct examination was strictly confined to that which the witness observed at the time and place of an accident, while the cross-examination developed the fact that the witness declared at the time of the accident that the defendant was not to blame for the accident.

McNeely v Conlon, 216-796; 248 NW 17

Repetition of misconduct. Repeated attempts in the cross-examination of a defendant in a personal injury action to show that he had, on prior occasions, run over people constitute prejudicial error.

Shuck v Keefe, 205-365; 218 NW 31

Refusal to strike testimony. Failure to strike testimony which has been received with

II AFFIRMATIVE SHOWING OF PREJUDICIAL ERROR—continued

(a) IN GENERAL—concluded

out objection does not constitute reversible error when ruling on the motion to strike was reserved, when no ruling was subsequently requested, and when the said testimony was so similar to other properly received testimony as to negative prejudice.

State v Hughey, 208-842; 226 NW 371

Dismissal of issue—striking evidence. The court should not permit testimony bearing on a dismissed issue to remain in the record when it has no material bearing on any remaining issue.

In re Muhr, 218-867; 256 NW 305

Allowable and unallowable services. Affirmative prejudicial error appears from a record which shows that the trial court, acting without a jury in a law action involving the allowance of attorney fees, received evidence of both allowable and unallowable services.

Iowa Co. v Scott, 206-1217; 220 NW 333

Abstract statements of law. The inclusion in instructions of abstract statements of the law does not necessarily constitute material error.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

Failure to send exhibit to jury room. The fact that a duly introduced exhibit in a criminal case was not given to the jury when it first retired, but was sent to the jury some hours before the verdict was returned, reveals no prejudicial error.

State v Twine, 211-450; 233 NW 476

Assessment under repealed statute. An apportionment or assessment of drainage improvement costs under a statute which fixed "volume of water discharged" as a basis, but which, before the improvement in question had been initiated, had been repealed and supplanted by a statute which fixed "benefits" as a basis, is prejudicially erroneous unless the prejudice is obviated by a showing that an apportionment or assessment on either basis would be the same.

Board v Board, 214-655; 241 NW 14

Facts provable by witness—absence—prejudice not presumed. Where the record fails to show the facts to be proved by a witness and prejudice resulting therefrom, none will be presumed and no reviewable error is preserved.

Pearson v Butts, 224-376; 276 NW 65

(b) EXCLUSION OF QUESTIONS AND ANSWERS

Exclusion of nonexplanatory question. No reviewable error results from excluding a question which does not, in and of itself, reveal that which the questioner is seeking to show, and the court is not, by proper offer, otherwise enlightened.

Schooley v Efnor, 202-141; 209 NW 408
Antes v Coal Co., 203-485; 210 NW 767
First Bank v Tobin, 204-456; 215 NW 767
Fox v McCurnin, 205-752; 218 NW 499
Anderson v Railway, 208-369; 226 NW 151
In re Johnson, 210-891; 232 NW 282
Morrow v Downing, 210-1195; 232 NW 483
Thielen v Schechinger, 211-470; 233 NW 750
Campfield v Rutt, 211-1077; 235 NW 59
Birum-Olson v Johnson, 213-439; 239 NW 123

No review without proffer of testimony. Sustaining objection to a question creates no reviewable error when no proffer of testimony was made and the record is bare as to what the answers would have been.

Mitchell v Underwriters, 225-906; 281 NW 832

Failure to make offer of proof. Where objection to the offer of testimony was sustained, the court is unable to say whether such ruling is prejudicial error when no offer of proof was made indicating what was expected to be proved.

In re Wagner, 226-667; 284 NW 485

Exception to rule. The rule that the exclusion of questions which in no manner indicate the prospective answer is presumptively without prejudice has little, if any, application to the cross-examination of a witness.

Schulte v Ideal Co., 203-676; 213 NW 431

Exception to rule. The rule that the appellate court will not review the exclusion of questions which do not reveal what is proposed to be proven, has no application to a question and answer appearing in a deposition.

Jensen v Sorenson, 211-354; 233 NW 717

Appeal—hopelessly deficient record. Errors predicated on the exclusion of evidence tending to prove nonperformance of the contract sued on cannot be considered on appeal when appellant has not included in the abstract any part of such proffered evidence or the objections or rulings thereon.

McManus v Kucharo, 219-865; 259 NW 926

Authority of agent — evidence — refusal. Prejudicial error results from the exclusion of evidence tending to show the authority of an agent to sell a promissory note under a qualified indorsement only, such authority being material under the issues.

Falcon v Falcon, 208-8; 222 NW 869

Reservation of grounds—insufficient record. The exclusion of a transcript of the testimony of a witness on a former trial may not be reviewed on a record which fails to show affirmatively that the transcript was offered in evidence, or what matter was contained therein.

Blakely v Cabelka, 203-5; 212 NW 348

Nonprejudicial exclusion of question. A witness who is incompetent to testify to material conversations with a deceased person may be asked and permitted to answer the general question whether he had a conversation with the deceased on a certain occasion on the subject matter in issue; but the exclusion of such question is nonprejudicial.

Southhall v Berry, 207-605; 223 NW 480

Self-illuminating questions. The rule has no application when the questions themselves manifestly indicate what the witness would have testified to, had he been permitted to answer.

Falcon v Falcon, 208-8; 222 NW 869

III PRESUMPTION OF PREJUDICE

Conflicting and unfair rulings. Reversible error results from (1) receiving incompetent testimony over plaintiff's objection, (2) striking such testimony at the close of defendant's testimony, and (3) reinstating such testimony, without warning to plaintiff, after plaintiff had dismissed his witnesses and made his opening argument.

Braverman v Naso, 203-1297; 214 NW 574

Presumption as to action of court. The exclusion by the court in an action tried solely to the court, of material testimony, on the ground that it was wholly inadmissible, generates the presumption that the court must have disregarded other identical testimony received without objection.

Jensen v Sorenson, 211-354; 233 NW 717

Allowable and unallowable recovery. Instructions which permit a recovery of an allowable and an unallowable element of damages cannot be said to be harmless as to the unallowable part when the court cannot determine whether the jury did or did not return anything on the unallowable element.

Cocklin v Ins. Assn., 207-4; 222 NW 368
See Gardner v Boland, 209-362; 227 NW 902

Error both prejudicial and harmless—procedure on appeal. It may happen that an error by the court in the rejection of evidence is presumptively prejudicial as to one subject matter, and quite harmless as to another subject matter; and if the record reveals the amount of the presumptive prejudice, the appellate court may give the prevailing party the option to omit the amount of presumptive prejudice or suffer a reversal.

Lantz v Goodwin, 210-605; 231 NW 331

Exclusion of nonexplanatory question. The erroneous refusal of the court, in a prosecution for assault to rape, to permit a witness, proffered by the defendant, to answer a question whether the witness knew the general reputation of the prosecutrix as to truth and veracity in the community where she lived, cannot be deemed harmless error on the ground that the question did not reveal whether the witness would answer "yes" or "no", when, in connection with the proffer of the witness, defendant offered to show that said prosecutrix was "wholly unreliable in her word and statements".

State v Teager, 222-392; 269 NW 348

Facts provable by witness—absence—prejudice not presumed. Where the record fails to show the facts to be proved by a witness and prejudice resulting therefrom, none will be presumed and no reviewable error is preserved.

Pearson v Butts, 224-376; 276 NW 65

IV HARMLESS ERROR

(a) IN GENERAL

Striking legal conclusion only.

Merchants Bk. v Roline, 200-1059; 205 NW 863

Refusal to compel election. Record reviewed, and held that the refusal to compel a defendant to elect whether he would proceed on tort or on contract was quite harmless.

Riggs v Gish, 201-148; 205 NW 833

Misconduct of jury. Misconduct of the jury is not ground for a new trial when the prevailing party is entitled, as a matter of law, to the judgment accorded to him.

Butler Co. v Elliott, 211-1068; 233 NW 669

Slightly excessive recovery. The reception in evidence in a personal injury action of a hospital bill which includes a charge for "board" for the patient, is not reversible error when the amount of the nonrecoverable item is not shown, and when, apparently, the matter was not called to the attention of the trial court.

Sutton v Moreland, 214-337; 242 NW 75

(b) ERRORS NOT AFFECTING RESULT

Improper fixing of value in replevin. The fact that in replevin the court fixes the value of the property, instead of submitting such issue to the jury, becomes of no consequence when the plaintiff avails himself of the right to take the actual property.

Schmoller Co. v Smith, 204-661; 215 NW 628

Incompetent evidence—effect. In an equitable proceeding for the revocation of the license of a physician, the reception of immaterial or incompetent evidence will be deemed harmless, because it will be presumed that all such testimony was rejected in arriving at the final decision.

State v Knight, 204-819; 216 NW 104

Failure to submit issue. Failure to submit an issue of partnership is harmless when such failure does not change the result, especially

IV HARMLESS ERROR—continued
(b) ERRORS NOT AFFECTING RESULT—concluded

when the evidence supporting the issue is indefinite.

First N. Bank v Schram, 202-791; 211 NW 406

Failure to enter formal judgment on collateral order. The failure of the court, following a dismissal of a quantum meruit count by plaintiff, to enter a formal judgment of dismissal of the said count cannot possibly detrimentally affect the defendant on his appeal from a judgment against him on the remaining count.

Hunt, etc. v Moore, 213-1323; 239 NW 112

Failure to enter formal judgment of dismissal. Failure of the court, following its order dismissing a counterclaim, to enter a formal judgment of dismissal of said counterclaim, cannot possibly prejudice the appellant in his appeal from the final judgment on the merits.

Hunt, etc. v Moore, 213-1323; 239 NW 112

Subsequent errors harmless after refusal to direct verdict. Where the court should have directed a verdict for the defendant at the completion of testimony, subsequent errors on rulings or orders were not prejudicial and could not be relied on by the plaintiff as grounds for a new trial, after a verdict was rendered for the defendant.

Paulson v Hanson, 226-858; 285 NW 189

Striking of material allegation. No injury results from striking a material allegation from a pleading when the record shows that in the trial the matter stricken was treated as at issue, was duly tried out, and was properly submitted to the jury.

Insull v McDaniels, 201-533; 207 NW 533
Main v Brown, 202-924; 211 NW 232
Rudd v Jackson, 203-661; 213 NW 428

Fraud—instruction following rescission theory. In vendee's action for damages for fraudulent representations of value in the sale of real estate, no rescission being asked, it is error to instruct that the measure of damages is the amount paid less the reasonable rental value for the time occupied, which error, however, is without reversible prejudice to the vendor, when the amount of recovery is so small that the hope for a more favorable verdict on a retrial is, under the evidence, too remote.

Neal v Miller, 225-252; 280 NW 499

Remarks of court. Remarks of the trial court during examination of a witness, which the court might well have refrained from making, are not prejudicially erroneous, when the subject matter appearing in the record at this point would not change the result.

King v Gold, 224-890; 276 NW 774

(c) ERROR AFFECTING PARTY NOT ENTITLED TO RECOVER

Error against party not entitled to recover.

Dye Co. v Davis, 202-1008; 209 NW 744
Wiley v Dobbins, 204-174; 214 NW 529; 62 ALR 432
Anderson Co. v Reinking, 204-239; 213 NW 775
Whitmore v Herrick, 205-621; 218 NW 334
McLain v Risser, 207-490; 223 NW 162
Blakely v Cabelka, 207-959; 221 NW 451
Foley v Mathias, 211-160; 233 NW 106; 71 ALR 696
Butler v Elliott, 211-1068; 233 NW 669

Unjustifiable chance for recovery. Instructions which, in stating the issues, give the plaintiff a chance for a recovery to which he was not entitled are harmless when the jury finds that plaintiff was not entitled to recover in any event.

Ferber v Railway, 205-291; 217 NW 880

Error against noncomplainant.

Klass v Ins. Co., 210-78; 230 NW 314

Unnecessary proof of a negative. Incompetent proof of the negative of a proposition cannot be deemed prejudicial to a party who cannot recover under any circumstances unless he proves the affirmative of the same proposition, and proffers no such proof.

Range v Ins. Co., 216-410; 249 NW 268

Nonright to recover — inadequate instructions. A plaintiff who has failed to establish the material allegations of his petition, and is therefore not entitled to recover in any event, cannot be deemed harmed by the failure of the court adequately to present to the jury his pleaded cause of action; nor may he be deemed harmed by an inadequate verdict.

Comparet v Metz Co., 222-1328; 271 NW 847

Erroneous instructions cured where directed verdict proper. Errors in instructions made by the trial court are not prejudicial to the appellant when appellee is entitled to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

(d) ERRORS FAVORABLE TO PARTY COMPLAINING

Unprayed-for relief.

Conn v Heaps, 205-248; 216 NW 73

Error in favor of complainant.

Morrow v Scoville, 206-1134; 221 NW 802
Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Striking proper testimony. A party who seeks, on cross-examination, to secure from the witness an admission of facts derogatory to the credibility of the witness, and is met by a positive denial, may not be deemed prejudiced by the striking out of such denials, tho the cross-examination was proper.

Glass v Hutchinson Co., 214-825; 243 NW 352

Exclusion of unnecessary evidence. An appellant cannot be deemed harmed by the rejection of proof of a fact which the instructions relieve appellant from proving.

Faber v Ins. Co., 221-740; 265 NW 305

Instructions favorable to complainant. Error may not be predicated on the giving of an instruction which is favorable to the complainant.

Rosenstein v Smith, 218-1381; 257 NW 397

Appellant not adversely affected by error. If the appellant is not adversely affected by the lower court's decision, even if erroneous, nothing is left for review by the appellate court on that appeal.

In re Keeler, 225-1349; 282 NW 362

(e) NATURE OR FORM OF REMEDY

Equity (?) or law (?)—refusal to transfer.

Westerman v Raid, 203-1270; 212 NW 134

Refusal to transfer action.

Lex v Selway Corp., 203-792; 206 NW 586

Premature consolidation of actions.

Lex v Selway Corp., 203-792; 206 NW 586

Premature appointment of receiver.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Irregular but manifestly correct adjudication. Where the record reveals that a judgment creditor legally acquired a landlord's lien through garnishment proceedings against a tenant, the appellate court will not be inclined to inquire into the strict regularity of the proceedings whereby such adjudication was had.

Kinart v Churchill, 210-72; 230 NW 349

(f) PLEADING

Refusal to strike pleading.

Dean v Atkinson, 201-818; 208 NW 301

Overruling plea.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Denial of right to implead.

Bookhart v Younglove, 207-800; 218 NW 533

Establishing immaterial reply.

Hiller v Felton, 208-291; 225 NW 452

Receiving pleadings in evidence.

Kemmerer v Highway Com., 214-136; 241 NW 693

Belated reply. A reply filed without leave of court and after the trial is concluded, and purporting to conform the pleadings to the evidence, may be considered, notwithstanding its untimeliness, when neither party is deprived thereby of any testimony.

McDonald Co. v Morrison, 211-882; 228 NW 878

Technical inaccuracy in plea.

Cochran v Sch. Dist., 207-1385; 224 NW 809

Striking of superfluous count. The striking by the court of one of several counts of a petition must be deemed quite harmless when the matter stricken is substantially repeated in an unstricken count.

McGlothlen v Mills, 221-204; 265 NW 117

Striking plea under which pleader could not recover.

Johnson Co. Bank v Creston, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

(g) SELECTION AND IMPANELING OF JURORS

Challenges overruled—waiver. A party may not predicate error on the overruling of his challenge for cause to a juror when he fails to utilize his unused peremptory challenges.

Tobin v Budd, 217-904; 251 NW 720

(h) CONDUCT OF TRIAL OR HEARING IN GENERAL

Refusal of postponement of trial.

Farmers Bank v Bunge, 211-1357; 231 NW 651

Error which becomes inconsequential. Error in overruling a motion for a directed verdict at the close of plaintiff's evidence when certain all-essential testimony was not then in the record, becomes inconsequential when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record.

Newland v McClelland, 217-568; 250 NW 229

Custody of jury. Bailiff's remark, that jury might be kept for 30 days before the court would accept a verdict that they had "agreed to disagree", is not prejudicial when the jury themselves treated the remark as a joke.

Tharp v Rees, 224-962; 277 NW 758

(i) RULINGS AS TO EVIDENCE IN GENERAL

Reception of non res gestae statement.

State v Ayles, 205-1024; 219 NW 41

Inconsequential testimony. The reception of immaterial and inconsequential testimony is not ground for reversal.

Graeser v Jones, 217-499; 251 NW 162

Refusal to exclude testimony otherwise in record.

Eilers v Frieling, 211-841; 234 NW 275

Conclusion of witness.

State v Thomlinson, 209-555; 228 NW 80

Erroneous striking of counterclaim.

Harriman v Roberts, 211-1372; 235 NW 751

Error as to abandoned pleading.

Butler Co. v Elliott, 211-1068; 233 NW 669

Exclusion of inconsequential photographs.

State v Smith, 215-374; 245 NW 309

IV HARMLESS ERROR—continued

(i) RULINGS AS TO EVIDENCE IN GENERAL—concluded

Striking paragraph of pleading without change of issues.

Cleophas v Walker, 211-122; 233 NW 257

Withdrawal of specific ground of negligence. The withdrawal by the court from the jury of an allegation of a specific act of negligence cannot be deemed harmful when the court submits the case to the jury under the "res ipsa loquitur" rule.

Anderson v Railway, 208-369; 226 NW 151

Offer of evidence—discrimination. Permitting one party to introduce opinion evidence on a certain point and denying to the opposing party the right to counter with like evidence do not necessarily constitute reversible error.

Slinger v Ins. Assn., 219-329; 258 NW 101

(j) RULINGS ON QUESTIONS TO WITNESSES

Mathematical calculation.

Zabawa v Osman, 202-561; 210 NW 602

Striking hypothetical question.

Blakely v Cabelka, 203-5; 212 NW 348

Striking preliminary question.

Blakely v Cabelka, 203-5; 212 NW 348

Excluding question — record demonstrating nonerror. No error results from excluding a question as to what a party to the action said during a named conversation, when the record otherwise shows that said party was not present at said conversation.

Nortman v Lally, 204-638; 215 NW 713

Competency — probate claimant's wife. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However, since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Unanswered question.

State v Slycord, 210-1209; 232 NW 636

(k) ADMISSION OF EVIDENCE

Undue license as to evidence.

State v Speck, 202-732; 210 NW 913

Conclusion answers. Error may not be predicated on the fact that a witness was permitted to give a conclusion answer when the witness had, prior thereto, without objection, stated the facts relative to said matter.

First St. Bank v Tobin, 204-456; 215 NW 767

Conclusions—nonfatal admission. Admission of conclusions of witnesses that they sawed lumber according to instructions, that the logs of appellee were better than others, and other similar conclusions held not prejudicial when the same testimony was elicited by proper questions and answers.

Waterman v Gaynor, (NOR); 215 NW 641

Exclusion of exhibits but not of related testimony. The action of the court in withdrawing from the record certain exhibits, but refusing to withdraw the oral testimony relating thereto, does not necessarily constitute reversible error.

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Erroneous but harmless evidence. Tho the cause of death of a deceased was a question for the jury to decide, yet permitting a physician to testify that death resulted from certain injuries must be deemed harmless when the cause of death never was in issue,—when the jury would necessarily have found in accordance with said testimony had it not been received.

Lukin v Marvel, 219-773; 259 NW 782

Reception of immaterial evidence. In an action for damages consequent on a nuisance, evidence to the effect that a septic tank has the power to destroy disease germs reviewed and, in view of the record, held immaterial, but nonprejudicial.

Hill v Winterset, 203-1392; 214 NW 592

Reception of improper evidence.

Kness v Kommes, 207-137; 222 NW 436
O'Hara v Chaplin, 211-404; 233 NW 516

Proper question with improper answer — effect. A properly framed question on a relevant and material matter is not rendered improper by the contents of the answer which is in no manner attacked, and as to which no relief is asked.

Rulison v X-ray Corp., 207-895; 223 NW 745

Incompetent testimony harmless.

Nortman v Lally, 204-638; 215 NW 713

Incompetent evidence of value. Conceding, arguendo, that certain received evidence of value was incompetent, yet the error becomes inconsequential when the parties stipulate as to the value and the court adopts the stipulation.

In re Manning, 215-746; 244 NW 860

Competent and incompetent evidence.

Olson v Shuler, 208-70; 221 NW 941

Incompetent testimony on otherwise competently proven fact. The reception of incompetent testimony in proof of a fact becomes quite harmless when the said fact is otherwise

unquestionably established by competent testimony.

School District v Sass, 220-1; 261 NW 30
Crawford v Emerson, 222-378; 269 NW 334

Professional memorandum by deceased—incompetent when stating no fact. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

Incidentally received matter. Incidentally received testimony relative to the scattering of salt on an icy sidewalk after an accident does not constitute reversible error.

Burke v Lawton (Town), 207-585; 223 NW 397

Inconsequential testimony. Error in receiving wholly inconsequential testimony must be treated as harmless.

Diesing v Spencer, 221-1143; 266 NW 567

Reception of nonprejudicial testimony.

Comparet v Coal Co., 200-922; 205 NW 779

Unapplied evidence. Evidence tending to prove that a defendant-sheriff was attempting to make an arrest for an offense committed in his presence is harmless when no such issue was presented to the jury.

Lawyer v Stansell, 217-111; 250 NW 887

Reception of evidence already in record.

State v Plew, 207-624; 223 NW 362

Evidence received with and without objection.

Legler v Clinic, 207-720; 223 NW 405

Procedure in governmental office.

Farmers Bk. v Bunge, 211-1357; 231 NW 651

Reception of belated nonrebuttal testimony. The reception of nonrebuttal testimony after parties have rested will not be deemed reversible error unless it affirmatively appears that the court abused its discretion.

Hoegh v See, 215-733; 246 NW 787

Undue particularity of proof. Needless or unjustifiable particularity in proving just when a public sale took place—said date being material—does not necessarily constitute error.

Moen v Fry, 215-344; 245 NW 297

(l) EXCLUSION OF EVIDENCE

Correct decision notwithstanding excluded evidence.

In re Work, 212-31; 233 NW 28

Loss of business—nonprejudicial exclusion. Exclusion of testimony that plaintiff's business fell off after his injury, if improper, was not prejudicial when favorable answer would not have permitted plaintiff's recovery.

Rauch v Dengle, (NOR); 218 NW 470

Exclusion of relevant and material evidence.

Butler Co. v Elliott, 211-1068; 233 NW 669

Exclusion of material evidence. The exclusion of a part of the testimony offered to show a material fact will not constitute error when in the further progress of the case the fact in question is treated as fully established.

Van Gorden v City, 216-209; 245 NW 736

Rejection of inconsequential testimony.

Insell v McDaniels, 201-533; 207 NW 533
In re Newson, 206-514; 219 NW 305
State v Smith, 207-1345; 224 NW 594
Darden v Railway, 213-583; 239 NW 531
Glessner v Railway, 216-850; 249 NW 138

Exclusion of noncontrolling testimony. The exclusion of noncontrolling testimony held harmless.

Valentine v Morgan, 207-232; 222 NW 412

Refusing cumulative evidence. Refusal to admit testimony, which at the best is merely cumulative, is not prejudicially erroneous.

Hawkins v Burton, 225-707; 281 NW 342

Exclusion of evidence on established fact.

State v Troy, 206-859; 220 NW 95
Ankeney v Brenton, 214-357; 238 NW 71
Rodskier v Ins. Co., 216-121; 248 NW 295

Striking defensive matter.

In re Carpenter, 210-553; 231 NW 376

Withdrawal of incompetent evidence.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Remote speed—materiality first presented on appeal. Defendant's claim that plaintiff's speed remote from the collision was material as showing that at the time defendant looked back before making a left turn, plaintiff was too distant to be seen over a viaduct, may not, when such evidence is excluded, be urged first on appeal as ground for reversal when such purpose for introducing such evidence was not stated to the trial court.

Thomas v Charter, 224-1278; 278 NW 920

(m) SAME OR SIMILAR EVIDENCE OTHERWISE ADMITTED

Unallowable opinion on otherwise established fact.

Walters v Elec. Co., 203-467; 212 NW 886

Opinion evidence—harmless exclusion—evidence otherwise in record making jury question. Error in striking testimony is harmless when

IV HARMLESS ERROR—continued

(m) SAME OR SIMILAR EVIDENCE OTHERWISE ADMITTED—concluded

the facts sought are otherwise in the record, and when if admitted the record would still present a jury question.

In re Willer, 225-606; 281 NW 155

Exclusion of evidence otherwise received.

First Bank v Tobin, 204-456; 215 NW 767

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Ankeney v Brenton, 214-357; 238 NW 71

Excluded testimony otherwise received. Parties charged with conspiracy may not predicate error on the exclusion of documentary evidence tending to show the lawfulness of their purposes when the essential facts revealed in the excluded evidence are otherwise shown in their testimony.

State v Moore, 217-872; 251 NW 737

Rejection and reception of same evidence.

Handlon v Henshaw, 206-771; 221 NW 489

Exclusion and subsequent reception of evidence.

Norton v Lally, 204-638; 215 NW 713

State v McCook, 206-629; 221 NW 59

Olson v Shafer, 207-1001; 221 NW 949

Morrow v Downing, 210-1195; 232 NW 483

West Chester Bank v Dayton, 217-64; 250 NW 695

Excluding facts otherwise shown. Sustaining an objection to a question is harmless and nonreviewable when the matter involved is otherwise in evidence from the same witness.

Mosher v Snyder, 224-896; 276 NW 582

Other competent proof. The supreme court was not required to pass on the soundness of sustained objections to evidence that a certain road was a county trunk highway when there was other competent proof of the point, and no offer of controverting testimony was made.

Davis v Hoskinson, 228- ; 290 NW 497

Cross-examination—evidence previously covered. Where an offer of evidence was made during cross-examination, and was covered by other testimony, there was no prejudice in sustaining an objection to the offer.

Maddy v City Council, 226-941; 285 NW 208

Refusal to admit all of conversation. Error in refusing to permit a witness to fully detail a conversation with another party is harmless when the excluded part is otherwise brought out by other witnesses.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Curtailed cross-examination. Conceding that a cross-examination was unduly curtailed, yet no error results when the complaining party offered the witness as his own witness, and brought out the testimony excluded on cross-examination.

Goben v Pav. Co., 218-829; 252 NW 262

Oral testimony as to foreign statutes. No reversible error occurs in permitting a layman (without objection to his competency) to testify relative to the statute laws of a foreign state when such statutes, relative to the subject matter in question, were ultimately introduced in evidence.

Richmond v Whitaker, 218-606; 255 NW 681

(n) JUDGMENT OR ORDER

Refusal of proportional distribution on sale.

Hedges Co. v Holland, 203-1149; 212 NW 480

Error affecting only co-party.

Fellers v Sanders, 202-503; 210 NW 530

Form of judgment. Where a trustee under a trust agreement sues the maker of promissory notes on a series of notes the beneficial interest of which is in different parties, the defendant may not complain that a separate judgment is rendered on each count, and an aggregate judgment for the sum of all the separate judgments, the defendant being amply protected, by the terms of the judgments, from a double liability.

Iowa Co. v Clark, 215-929; 247 NW 211

Disregard of incompetent evidence. A competently supported judgment will not be reversed because of incompetent evidence.

Koht v Dean, 220-86; 261 NW 491

Schoolhouse site—permissible order of court. An order of court commanding the school board forthwith to erect a schoolhouse on a specified site is unobjectionable when such site had already been legally selected by the board.

Sanderson v Board, 211-768; 234 NW 216

Failure to enter formal order for foreclosure. In the foreclosure of a real estate mortgage and of a chattel mortgage clause embraced therein, the fact that the lower court failed to enter an order for the formal foreclosure of the chattel mortgage is quite inconsequential when the court did appoint a receiver of said mortgaged chattels and properly ruled that plaintiff's lien was superior to that of appellant's.

Equitable v Brown, 220-585; 262 NW 124

(o) ERRONEOUS SUBMISSION OF ISSUES TO JURY

Interpretation of contract by jury.

Riggs v Gish, 201-148; 205 NW 833

Submission of dual controlling propositions. In an action for services rendered a deceased, prejudicial error does not result from submitting to the jury the interrogatories, (1) whether there was an express contract for payment, and (2) whether there was a mutual

expectation between the parties to pay and receive pay for the services; even tho the express contract was established beyond doubt.

In re Willmott, 215-546; 243 NW 634

Verdicts—submission of separate forms. In an action against the driver and owner of a truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error, the court having specifically and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker, 218-54; 253 NW 923

Submitting unpleaded issue. Slight inaccuracy in submitting a pleaded item of damages will not be deemed the submission of an unpleaded issue when the jury could not have been misled.

Siesseger v Puth, 211-775; 234 NW 540

Erroneous submission of unsupported damages. The submission to the jury, in an action for damages, of an unsupported measure of damages constitutes error, but record reviewed and held harmless to the complaining defendant.

Carpenter v Wolfe, 223-417; 273 NW 169

Improper submission of interrogatories. The submission to the jury, at the request of the defendant, of special interrogatories improper in form and without prior submission to counsel for plaintiff, does not constitute prejudicial error, when the jury was told to answer the interrogatories only in case it found for plaintiff, and when the jury found for defendant.

Baron v Indemnity Co., 218-305; 255 NW 496

Will contests—contract of settlement—fraud and undue influence. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

(p) INSTRUCTIONS TO JURY

Harmless error—stating who asked instructions. Stating in instructions that certain instructions were given at the request of a named party does not constitute reversible error, but such practice should be avoided.

Johnson v McVicker, 216-654; 247 NW 488

Failure to find conclusively proven fact.

Schipfer v Stone, 206-328; 218 NW 568

Hypercritical objection.

State v Joy, 203-536; 211 NW 213

Submission of unsupported issue.

State v Lambertti, 204-670; 215 NW 752

Instructions as regards note not in issue.

Farmers Bk. v DeWolf, 212-312; 233 NW 524

Omission of conclusively established fact. The erroneous omission from an instruction of a fact element which stands conclusively established in the testimony is harmless.

State v Cordaro, 206-347; 218 NW 477
McClary v Railway, 209-67; 227 NW 646

Obviating error by construction as a whole. Inferential error in one instruction may be wholly removed by construing the instructions as a whole.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Nonprejudicial instructions. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Imputed negligence. Instruction on the subject of imputed negligence held nonprejudicial.

Sutton v Moreland, 214-337; 242 NW 75

Probate claim—agreement with decedent—claimant incompetent to testify. In probate action to establish a claim based upon an express agreement of decedent that claimant's services should be paid for from decedent's estate, an instruction that claimant was not permitted to testify as to agreement between her and decedent, and that if any agreement was in fact made between the parties, it must be proved by testimony other than that of claimant, was not prejudicial to defendant in that jury would believe that it applied to the communication of the contract to claimant through her father, who had been informed by decedent as to the nature of the agreement—there being other testimony of the communication, and the trial court having excluded the testimony of the father after objection of defendant.

In re McKeon, 227-1050; 289 NW 915

Instruction on immaterial, nonprejudicial evidence. A will contestant's contention that it was error to instruct regarding a nonmaterial exhibit—a memorandum by a deceased attorney, who drew the will—although well founded, held to be error without prejudice when the paper and the conversation connected therewith were not necessary for proponents to make a prima facie case of the due and legal execution of the will and the genuineness of the signatures.

In re Iwers, 225-389; 280 NW 579

Fraud of one defendant only. An instruction to the effect that, if any of several defendants by fraudulent concealment prevented the plaintiff from discovering an original fraud

IV HARMLESS ERROR—concluded
(p) INSTRUCTIONS TO JURY—concluded

perpetrated upon him, the statute of limitation would thereby be tolled, is harmless (if erroneous) when the record quite conclusively established the wrongful connection of all of the defendants with such fraudulent concealment.

Pullan v Struthers, 201-1179; 207 NW 235

Harmless inaccuracy. Instructions relative to acquiring negotiable promissory notes by "assignment," instead of by "indorsement," are quite harmless, when complainant does not claim the rights of a holder in due course.

First St. Bank v Tobin, 204-456; 215 NW 767

Inadvertent use of words in instructions.

State v Hughey, 208-842; 226 NW 371

Undue burden on appellee.

Lange v Bedell, 203-1194; 212 NW 354

V CURING ERROR

Curing error by oral or written instructions. See under §§11491–11493, 13944 (VI)

Error cured by granting new trial. An erroneous ruling against a party necessarily becomes harmless when he is granted a new trial.

Murray v Ins. Co., 204-1108; 216 NW 702

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

Error cured by verdict. Error in instructions relative to manslaughter is inconsequential when the jury convicts the accused of first degree murder.

State v Troy, 206-859; 220 NW 95

Erroneous instructions rendered harmless by verdict.

Rawleigh Co. v Moel, 215-843; 246 NW 782

Remittitur. An erroneous and manifestly inadvertent instruction as to damages may be such as to be curable by a remittitur.

Lee v Ins. Co., 214-932; 241 NW 403

Error harmless because of remittitur. Error in instructions relative to the computation of the amount of a verdict may be cured by a remittitur.

In re Willmott, 215-546; 243 NW 634

Remittitur cures error. In an action against an estate to recover a money judgment for one-third of the value thereof (tried prior to the closing of the estate), any error in submitting to the jury the question of the net value of the estate is rendered harmless by the action of the plaintiff in stipulating to remit from the judgment a proportional amount of the ultimate costs of administration.

In re Anderson, 203-985; 213 NW 567

Dual judgments—remittitur. When two separate judgments are entered in the same action —one on the return of the verdict, and one on the ruling for new trial—the formal remitting of the prior judgment removes all error.

Lynch v Railway, 215-1119; 245 NW 219

Motion to direct verdict—curing erroneous denial. When plaintiff, at the close of his evidence, has not made a jury question for recovery, the erroneous overruling of defendant's motion for a directed verdict will not be deemed reversible error when, at the close of all the evidence, the evidence does reveal such jury question.

Carr v Bankers Assn., 222-411; 269 NW 494; 107 ALR 1080

Excessive damages. Error in instructions which might authorize an excessive recovery may be conclusively negatived by special jury findings.

Rulison v X-ray Corp., 207-895; 223 NW 745

Inaccurate limitation on recovery cured by instruction. Where a plaintiff itemized his general and particular damages in a personal injury action, the failure of the court to specifically say to the jury that it must not allow more on any item than the amount as stated in the petition, nor more than the aggregate of said items, is nonprejudicial when the evidence would not support a greater verdict on any particular item than as itemized, and when the verdict was materially less than the claim for general damages, and when the court specifically instructed the jury that it could not allow any item of damages in a greater sum than "established by the evidence."

Wosoba v Kenyon, 215-226; 243 NW 569

Abstract curing error. Error of the court in improperly taking judicial notice of the pendency of another action becomes quite harmless when the appellant demonstrates by his abstract of the record that said other action was actually pending.

Benjamin v Jackson, 207-581; 223 NW 383

Inaccurate instruction cured by testimony. A party's admissions and testimony may render an inaccurate instruction quite harmless.

Heflen v Brown, 208-325; 223 NW 763

Nullifying error. The act of the court in wholly withdrawing the issue of "reckless" operation of an automobile nullifies any former error of the court in refusing to direct a verdict on the ground of absence of evidence of reckless operation.

Thompson v Farrand, 217-160; 251 NW 44

Curing error in argument. An oral admonition by the court to the jury, during argument,

not to consider a certain statement by counsel, ordinarily cures any error resulting from the making of the statement.

Stingley v Crawford, 219-509; 258 NW 316

Improper evidence excluded by proper submission. In an action for damages resulting solely from the "inconvenience and discomfort in the occupancy and enjoyment of property" because of a nuisance, evidence tending to show that the nuisance was unsanitary, and might be injurious to health, becomes harmless when the court submits the issues strictly in accordance with the pleadings.

Chase v Winterset, 203-1361; 214 NW 591; 37 NCCA 228

Reception of evidence. Error in the reception of incompetent testimony relative to the physical condition of an injured party is ordinarily nullified by striking the testimony and specifically admonishing the jury to disregard such stricken testimony.

McKee v Iowa Co., 204-44; 214 NW 564

Errors against prevailing party. While a defendant, on an appeal from an order granting plaintiff a new trial, may not ordinarily show that he was sinned against by the adverse and erroneous rulings of the trial court, yet he may assign error on the refusal of the trial court, at the close of all the evidence, to sustain his motion for a directed verdict, because, if he were legally entitled to a directed verdict, such fact would ordinarily be fatal to plaintiff's motion for a new trial.

Bennett v Ryan, 206-1263; 222 NW 16
See Jordan v Schantz, 220-1251; 264 NW 259

Death of absent witness. An order refusing a continuance which was asked for because of the absence of a witness will be sustained when it appears that the absent witness has died since the trial.

Suiter v Wehde, 218-200; 254 NW 33

Handwriting expert — jury admonition. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

Points presentable by nonappellant. An appellee, without presentation of error points, may show, if he can, that he was so erred against as to entirely neutralize any errors against appellant.

Ford v Dilley, 174-243; 156 NW 513
Taylor v Sch. Dist., 181-544; 164 NW 878
State v Sch. Dist., 188-959; 176 NW 976
Finley v Thorne, 209-343; 226 NW 103
Miller v Surety Co., 209-1221; 229 NW 909
See Voorhees v Arnold, 108-77; 78 NW 795

Satisfaction of unlawfully taxed costs. Error in taxing attorney fees when the instrument sued on does not provide therefor is fully cured by a statement in the written argument on appeal by the attorney in whose favor the taxation was had to the effect that he had fully released and satisfied the judgment for such fees, such statement, tho irregularly presented, being irrevocably binding on the attorney.

Koontz v Clark Bros., 209-62; 227 NW 584

Withdrawn testimony. Testimony, in an action for malicious prosecution, relative to the return of an indictment against plaintiff but without proof that defendant was connected therewith, reveals no prejudicial error when the court ultimately withdrew said testimony in toto.

Richmond v Whitaker, 218-606; 255 NW 681

Instructions — reasonable value—admissions from pleadings. In action to recover price of corn sold to elevator, an instruction injecting element of reasonable value was erroneous where the pleading alleged express agreement on price, and a further erroneous instruction stating what defendant's answer admitted, but omitting qualification in defendant's pleadings, was not cured by instruction referring to a substituted oral agreement.

Hartwig v Elevator Co., (NOR); 226 NW 116

VI INVITED ERROR

Inviting court to err—not permitted. A litigant will not be permitted to entrap the court by an invitation to commit error.

In re Iwers, 225-389; 280 NW 579

Nonreviewable subject matter—invited rulings of court. A litigant who moves to strike a pleading or to require it to be made more specific may not have the rulings on his motion reviewed on certiorari; and this is necessarily true even tho it be conceded, arguendo, that the pleading in question was not legally on the calendar.

Holcomb v Franklin, 212-1159; 235 NW 474

Party entitled to allege error. A party may not lodge a complaint against the reception in evidence of matter which he himself caused to be introduced.

In re O'Hara, 204-1331; 217 NW 245

Estoppel to allege error. A defendant may not question the action of the court in sustaining his motion to withdraw allegations of specific negligence and to submit the cause on a general allegation of negligence.

Anderson v Railway, 208-369; 226 NW 151

Estoppel to allege error. Counsel will not be permitted to equivocate relative to proper and material questions asked him by the court and thereupon base error on the ensuing colloquy.

State v Woodmansee, 212-596; 233 NW 725

VI INVITED ERROR—concluded

Hearsay testimony—reception—inviting error. Defendant who, on cross-examination of the state's witness, first enters the forbidden field of hearsay testimony on a certain point, is not in an advantageous position to object when the state, on redirect, follows into the same field of inquiry, especially when the testimony erroneously received is not inherently prejudicial and is practically that which was brought out by defendant on cross-examination.

State v Philpott, 222-1334; 271 NW 617

Instructions inviting excess recovery.

Siesseger v Puth, 211-775; 234 NW 540
McQuillen v Meyers, 213-1366; 241 NW 442

Claims — statute of limitations — equitable avoidance by court. Whether the "peculiar circumstances" pleaded as an excuse for not presenting a claim before the expiration of the statutory one year are sufficient to justify the granting of equitable relief is a question for the court, but claimant may not acquiesce in trying the issue to the jury and then predicate error thereon.

Peterson v Johnson, 205-16; 212 NW 138

11549 "New trial" defined.

Communicating with jury. See under §11497
Curing error and misconduct. See under §§11493, 11548 (V), 13944 (VI)
Directed verdicts. See under §11508
Erroneous instructions. See under §11493
Findings inconsistent with general verdict. See under §11514, Vol. I
Necessity for objections and timeliness thereof. See under §11536
New trial after term. See under §12788
New trial in criminal cases. See under §13944
Quotient verdicts. See under §11508
Separation of jury. See under §11498, Vol. I
Verdicts contrary to instructions. See under §11493 (VII)
Verdict-urging or coercive instructions. See under §11493 (I)

Dismissal of part of defendants. Under a plea that the affections of a wife had been alienated by the joint and several acts and conduct of several defendants, the court may, on a motion for a new trial, sustain the motion as to certain defendants and dismiss the action as to such defendants.

Weyer v Vollbrecht, 208-914; 224 NW 568

Remand—right to amend. A plaintiff manifestly does not set up a new and different cause of action when, after remand on appeal in a law action based on negligence, he, by allowable pleadings, rephrases and elaborates an unadjudicated ground of negligence which was embraced in his pleadings at the time of the original trial.

Lahr v Railway, 218-1155; 252 NW 525

Remand—utilizing unadjudicated ground of negligence. Plaintiff, in an action based on negligence, who fails on appeal to sustain a verdict in his favor against an employer based solely on the doctrine of respondeat superior, may, on remand and retrial, avail himself of a ground of negligence which was alleged by him on the original trial, but which was unadjudicated, and which, if established, would render the defendant liable irrespective of the doctrine of respondeat superior.

Lahr v Railway, 218-1155; 252 NW 525

11550 Grounds for new trial.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

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Motion for new trial not always necessary to obtain review. See under §12828
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I NATURE AND SCOPE OF REMEDY

(a) IN GENERAL

Decisions reviewable—restricting appeal to matters in notice. A notice of appeal specifying only the overruling of a motion for a new trial restricts the appeal to such matters as were raised in the trial court on said motion.

Shultz v Shultz, 224-205; 275 NW 562

Appellant bound by election of remedies. A litigant who chooses to move for a new trial, and is granted such, and therefore allows the time for appeal from the judgment against him to elapse without action, and thereafter suffers an adverse order setting aside the order for a new trial, may not, in appealing from said latter order, so frame his appeal as to secure a review of any question except the question of the correctness of said latter order.

Selby v McDonald, 219-823; 259 NW 485

Objections to evidence—reraising unnecessary. Where the immateriality of evidence objected to is plainly discernible and no further particularity is required to apprise the trial court of grounds of objections, it is not necessary that these same identical matters be again presented to trial court by way of motion for new trial before they may be considered by supreme court.

Floy v Hibbard, 227-149; 287 NW 829

Granting on untenable grounds—appeal by appellee. Whether on appeal from an order granting a new trial on an untenable ground, appellee may save the ruling by taking a cross-appeal, and show that the trial court erred in not sustaining the motion for a new trial on grounds assigned by him that were tenable, quaere. (See State v School Dist., 188-959.)

Kessel v Hunt, 215-117; 244 NW 714

Administrator—liability on bond—existing judgment—when new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Rendering judgment on appeal instead of new trial. Where appeal is not only from order denying new trial but from all other erroneous rulings and where evidence as to completed gift inter vivos would not change on retrial, the supreme court may render such judgment as inferior court should have done.

Wilson v Findley, 223-1281; 275 NW 47

Nonliability of city—reversible error. It is reversible error to grant a new trial because the court had omitted to submit to the jury the question whether the city was negligent in permitting an alley crossing to remain in a slightly sunken saucer-shaped condition, and in permitting water to accumulate in the depression and to freeze in a smooth condition, such acts, if done, not being such as to render the city liable in case of an accident.

Turner v Winterset, 210-458; 229 NW 229; 37 NCCA 524

(b) POWER AND DUTY OF COURT IN GENERAL

Grounds for ruling—correction of order. The trial court has power to so correct an order for a new trial as to show the grounds upon which the order was made.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Record required. An order for a new trial entered on the motion of the court must (at least on the demand of the adverse party) be accompanied by a record showing of the facts which caused the court so to act.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Order for new trial—effect. An order, on appeal, for a new trial on the ground of a conceded mutual mistake in entering into a written stipulation for judgment necessarily works a setting aside, not only of the judgment, but of the stipulation; and, after procedendo, the trial court does not exceed its jurisdiction in entering a formal order to said effect.

Hall v Dist. Court, 206-179; 215 NW 606

Refusal to direct verdict as ground. The rule of law (206 Iowa 1263) that the trial court should not set aside the verdict of the jury and grant a new trial, when such verdict is the verdict which the court erroneously refused to direct at the close of the evidence, is not applicable when the trial court, under the record, properly denied a directed verdict.

Jordan v Schantz, 220-1251; 264 NW 259

Verdict set aside—criminal more readily than civil. Where the verdict is clearly against the weight of evidence, a new trial should be granted, and the appellate court will interfere more readily in a criminal case than in a civil one.

State v Carlson, 224-1262; 276 NW 770

Taking case from jury—scintilla evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 155

Lower court's discretion—reviewability. Action of district court in passing on motion for new trial is largely a discretionary matter, and, unless abuse of discretion is shown, such ruling will not be disturbed on appeal.

Meyer v Noel, (NOR); 206 NW 290

Court mistakenly directing verdict—new trial proper. Ordinarily the question of contributory negligence, being peculiarly for the jury, where the trial court mistakenly directs a verdict for defendant on the ground of plaintiff's negligence, the court does not err in later granting a new trial.

Williams v Kearney, 224-1006; 278 NW 180

I NATURE AND SCOPE OF REMEDY—continued

(b) POWER AND DUTY OF COURT IN GENERAL—concluded

Verdict for plaintiff allowable under evidence. A defendant truck driver's contention, in a case involving a truck and passenger automobile collision on a bridge, that under the evidence a verdict should have been directed for him and that therefore when a verdict was returned in his favor, the granting of a new trial was error, is a contention without merit, when the evidence was such that the jury could have found the defendant negligent, that his negligence was the proximate cause of the accident, and that neither plaintiff nor plaintiff's driver was contributorily negligent.

Hawkins v Burton, 225-1138; 281 NW 790

Municipal court—filing motions after verdict—extending time—jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Municipal Ct., 225-501; 281 NW 441

(c) NUMEROUSLY POINTED MOTION

Numerously pointed motion. An order which grants a new trial on a numerously pointed motion therefor will not be interfered with on appeal when one of the grounds is that the verdict is contrary to the evidence, and the record shows the testimony is in serious conflict.

Lange v Nissen, 204-1080; 216 NW 697
In re Younggren, 225-348; 280 NW 556
Hawkins v Burton, 225-1138; 281 NW 790

Numerously pointed motion. A numerously pointed motion for a new trial, sustained generally by the trial court, will not be reviewed on appeal, especially when the basis of the alleged errors in sustaining the motion does not appear in the record.

Hanna v Ins. Co., 202-1351; 212 NW 114

Numerously pointed motion. The sustaining generally of a many-pointed motion for a new trial will be affirmed if any of the grounds are meritorious.

In re Richardson, 202-328; 208 NW 374
Dunnegan v Railway, 202-787; 211 NW 364

Many-pointed motion. Principle reaffirmed that the sustaining, generally, of a many-pointed motion for a new trial will not be disturbed on appeal unless it is made to appear that the motion could not have been properly sustained on any of the assigned grounds.

Jelsma v English, 210-1065; 231 NW 304
Bell v Brown, 214-370; 239 NW 785
Doty v Jamison, 214-1321; 243 NW 359

Duty to contest. Where several grounds were stated in a motion for a new trial, there could be no reversal of the order granting such new trial when the appellant made no attempt to show that none of the grounds were good.

Olinger v Tiefenthaler, 226-847; 285 NW 137

Order for new trial—when conclusive on appellate court. An order granting a new trial will not be disturbed when any one of several grounds therefor appears to be well founded, or when, conceding the insufficiency of any one ground, all the grounds when viewed collectively, fairly justify the conclusion that the party granted a new trial has not had a fair trial.

Jordan v Schantz, 220-1251; 264 NW 259

(d) DISCRETION OF COURT

False testimony. The granting of a new trial because of the false testimony of the prevailing party will not be disturbed in the absence of a strong showing of abuse of discretion by the court.

Moore v Goldberg, 205-346; 217 NW 877

Discretion of court. Principle reaffirmed that the discretion of the trial court to order a new trial is greater than that of the appellate court.

Lewellen v Haynes, 215-132; 244 NW 701

Court's inherent power to set aside verdict. Where a party has not received a fair and impartial trial, the trial court has inherent power to set aside the verdict.

Brunssen v Parker, 227-1364; 291 NW 535

Abuse of discretion needed for review. A broad discretion is lodged in the trial court in the matter of granting a new trial, which order, in the absence of abuse, will not be disturbed on appeal.

McQuillen v Meyers, 211-388; 233 NW 502
Eby v Sanford, 223-805; 273 NW 918
Williams v Kearney, 224-1006; 278 NW 180
Hawkins v Burton, 225-1138; 281 NW 790

Granting new trial—sustained unless discretion abused. It must clearly appear that there has been an abuse of the discretion lodged in the trial court before the supreme court will interfere with the ruling granting a new trial.

Mitchell v Heaton, 227-1071; 290 NW 39

Abuse of discretion necessary for reversal. Where evidence is conflicting, the granting of a new trial because the verdict is contrary to the evidence will not be reversed unless an abuse of discretion by the trial court appears.

Brunssen v Parker, 227-1364; 291 NW 535

Inconsistent and improbable evidence. A new trial was properly granted by lower court when defendant secured a verdict on evidence that abounded with inconsistencies and improbabilities, and ruling cannot be disturbed on appeal unless new trial could not have

been sustained on any of the grounds urged, or abuse of discretion by court.

Christensen v Howson, (NOR); 226 NW 34

Discretion of court. A large discretion is lodged in the trial court in determining whether a new trial should be granted on the ground of newly discovered evidence, since the trial court has a much better opportunity for seeing and judging how the testimony given, and that afterward discovered, bears upon the issues, and for determining whether the facts offered are similar or dissimilar.

Larson v Meyer, 227-512; 288 NW 663

Order for new trial—reviewability. Principles reaffirmed that:

1. A trial court order for a new trial upon a definite question of law, is reversible, if erroneous, like every other erroneous ruling at law, if prejudicial, is reversible, while,
2. A trial-court order in general terms for a new trial will be deemed discretionary and reversible only when the trial court has abused its discretion.

Kessel v Hunt, 215-117; 244 NW 714
Manders v Dallam, 215-137; 244 NW 724
Piper v Brickley, 220-1090; 264 NW 29

Refusing new trial reviewed more readily than granting. While error may arise in granting a new trial, appellate court will more readily interfere when a refusal than when a grant of new trial occurs.

White v Zell, 224-359; 276 NW 76

Order overruling motion—case scanned more closely. Supreme court scans cases on appeal from order overruling motion for new trial more closely than where such motion is sustained.

Meyer v Noel, (NOR); 206 NW 290

Granting new trial—review on appeal. A ruling by the trial court granting a new trial will be reviewed on appeal and, if erroneous, will be reversed, altho the supreme court will interfere more readily when the new trial is refused than when it is granted.

Hupp v Doolittle, 226-814; 285 NW 247

Lower court's discretion—reviewability—retrial. Unless there is an abuse of discretion by lower court in granting motion for new trial, the supreme court will not interfere with such ruling on appeal, and when new trial is granted the case stands for trial the same as it did when issues were joined.

Upp v Walker, (NOR); 212 NW 114

Deference to trial court. An order for a new trial will not be disturbed on an imperfect appellate record which, however, reveals the fact (1) that the court was not satisfied with his submission of the cause, and (2) that the instruction did not clearly present the outstanding issue.

Turner v Motor Co., 204-421; 213 NW 765

Granting new trial—noninterference without abuse of discretion. The trial court's conclusion that it erred in giving instructions and therefore grants a new trial will not, except in a clear case of abuse of its broad discretion, be disturbed on appeal.

Bletzer v Wilson, 224-884; 276 NW 836

Discretion in reopening—new trial for abuse. Granting or refusing a motion to reopen a case to admit further evidence is within the sound discretion of the court, but if a refusal to reopen is an abuse of discretion, a new trial should be granted on appeal.

In re Canterbury, 224-1080; 278 NW 210

Nonabuse of discretion. In action for forcible entry and detainer, where there was evidence of error in instructions, in that court assumed that an alleged lease was made with agent of plaintiff with authority to make an oral lease, and that court did not specifically define to jury necessary elements of an oral lease, and there was also question that verdict was not supported by evidence, granting new trial held not an abuse of discretion.

Holman v Rook, (NOR); 271 NW 612

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

Absence of defendant at trial. When no continuance was asked, trial court held not to have abused discretion in refusing new trial on ground that defendant was not present at trial.

Bergen v Baker, (NOR); 205 NW 327

(e) NEW TRIAL AS TO PART OF ISSUES OR PARTIES

Denial of new trial—appeal—questions reviewable. A party who appeals from an adverse ruling on his motion for a new trial may have a review of the grounds specifically assigned by him in his said motion even tho he does not appeal from the main or final judgment.

Spaulding v Miller, 216-948; 249 NW 642

Granting—as to some of parties—as to one or more counts. A new trial may be granted as to some defendants and denied as to others, and may be awarded as to one or more counts and refused as to other counts where this can be done without danger of confusion of prejudice.

Olinger v Tiefenthaler, 226-847; 285 NW 137

I NATURE AND SCOPE OF REMEDY—concluded

(f) ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT

Time of application—fatal delay. A defendant is very properly denied a new trial when she had knowledge of the entry of the default judgment almost simultaneously with its entry, and negligently delayed filing her petition for a new trial until after the lapse of nine months and the passing of three terms of court, especially when her petition presents no fact coming to her knowledge since the entry of the judgment complained of.

Anderson v Anderson, 209-1143; 229 NW 694

Waiver of motion—insufficient showing. A party will not be deemed to waive his motion for a new trial by having his motion non obstante veredicto sustained when both motions were prepared, filed, and treated as one motion, and where the motion for new trial was properly sustained, and the motion non obstante veredicto was improperly sustained.

Pomerantz v Cement Corp., 212-1007; 237 NW 443

(g) SUCCESSIVE APPLICATIONS

No annotations in this volume

II GENERAL ERRORS AND IRREGULARITIES

Failure of justice in general. The broad discretion lodged in the trial court to grant a new trial embraces the right to grant a new trial because of a series of errors against the defeated party, even tho no one of said errors would, in and of itself, justify such order.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Inconsistent and improbable evidence. A new trial was properly granted by lower court when defendant secured a verdict on evidence that abounded with inconsistencies and improbabilities, and ruling cannot be disturbed on appeal unless new trial could not have been sustained on any of the grounds urged, or abuse of discretion by court.

Christensen v Howson, (NOR); 226 NW 34

Conclusion of witness usurping jury function. Prejudicial error results from permitting the question whether a party to an action had ever "agreed" to accept a named sum in satisfaction of his claim, and permitting a negative answer, when the existence of such agreement is the sole question before the jury.

Strand v Bleakley, 214-1116; 243 NW 306

Control of car—undue degree of care. An instruction, which, in effect, imposes upon the operator of an automobile an absolute duty to have his car under such control as to avoid injury to others, under all circumstances, is fundamentally erroneous because imposing an undue degree of care, and necessarily justifies an order for new trial.

Gregory v Suhr, 221-1283; 268 NW 14

Instructions ignoring grounds of negligence. The trial court is within its legal discretion in granting a new trial to plaintiff because the instructions, in fact, ignored a material allegation by the plaintiff as to the speed of defendant's car.

Lewellen v Haynes, 215-132; 244 NW 701

Reference to speed—granting new trial. A reference in an instruction to a motor vehicle speed of 60 miles per hour when the allegation in the petition of such speed was coerced by a ruling of the court, while not in itself sufficient to warrant a reversal, still justifies the trial court in granting a new trial when considered along with other alleged errors.

White v Zell, 224-359; 276 NW 76

Conflicting and unfair rulings. Reversible error results from (1) receiving incompetent testimony over plaintiff's objection, (2) striking such testimony at the close of defendant's testimony, and (3) reinstating such testimony, without warning to the plaintiff, after plaintiff had dismissed his witnesses and made his opening argument.

Braverman v Naso, 203-1297; 214 NW 574

Errors of commission and omission. The granting of a new trial, generally, will not be disturbed on appeal, when the record reveals the giving of instructions which were erroneous, and the failure to give instructions which the court was under duty to give without request.

Flickinger v Phillips, 221-837; 267 NW 101

Failure to submit nominal damages. Grounds for a new trial may not be predicated on a failure to submit to the jury the question of nominal damages.

Whittington v Bedford, 202-442; 210 NW 460

Erroneous direction of verdict. An order for a new trial is, of course, proper when the judgment entered was ordered by the court on an erroneous theory of the law on a material point. So held where the court treated both plaintiff and defendant as joint adventurers and directed a verdict against plaintiff on the erroneous theory that defendant's negligence was imputable to the plaintiff.

Thompson v Farrand, 217-160; 251 NW 44; 34 NCCA 398

Court mistakenly directing verdict. Ordinarily the question of contributory negligence, being peculiarly for the jury, where the trial court mistakenly directs a verdict for defendant on the ground of plaintiff's negligence, the court does not err in later granting a new trial.

Williams v Kearney, 224-1006; 278 NW 180

Cross-examination—discretion of court. The discretionary power of the trial court over cross-examinations will not be interfered with by the appellate court except in cases of clear abuse.

Rawleigh Co. v Bane, 218-154; 254 NW 18

Errors against prevailing party. While a defendant, on an appeal from an order granting plaintiff a new trial, may not, ordinarily, show that he was sinned against by the adverse and erroneous rulings of the trial court, yet he may assign error on the refusal of the trial court, at the close of all the evidence, to sustain his motion for a directed verdict because, if he was legally entitled to a directed verdict, such fact would ordinarily be fatal to plaintiff's motion for a new trial.

Bennett v Ryan, 206-1263; 222 NW 16

Election bribery—electric rate reduction—fulfillment after trial immaterial. When the court, after hearing an election contest, finds that candidates to municipal office did not participate in an illegal bribe by a local electric company offering a rate reduction and a rebate of impounded charges if the municipal ownership opponents were elected, the fact that, after the trial, the council repeals the municipal ownership ordinance and the company does reduce rates and repay impounded funds to consumers, adds nothing new to the proof of participation and does not warrant a new trial.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

III CONDUCT OF PARTIES

Talking with juror. A naked showing that a party to an action was seen talking to a juror in the court room and during a recess of the court is quite insufficient on which to base an order for a new trial.

Blakely v Cabelka, 207-959; 221 NW 451

Improper remarks in presence of jurors. Misconduct of a proponent of a will in the form of improper remarks in the presence of jurors must be shown to have been heard by said jurors.

Blakely v Cabelka, 207-959; 221 NW 451

Undue association of party and juror. The fact that the defendant in an action and one of the jurors, during a noon recess in the trial, rode together to the home of the defendant and had dinner together, and looked over the defendant's premises and then returned to the court without mentioning the action then on trial, furnishes plaintiff against whom verdict was rendered absolute grounds for a new trial.

Lynch v Kleindolph, 204-762; 216 NW 2; 55 ALR 745

Intimidation of witness. Misconduct of a proponent of a will in so intimidating a witness as to cause her to forget to testify to unstated and unrevealed matters is too indefinite to justify an order for a new trial.

Blakely v Cabelka, 207-959; 221 NW 451

Eavesdropping by witness. Misconduct of a proponent of a will in that after being excluded from the courtroom during the trial he attempted to listen to the testimony through a doorway must, at the least, be accompanied by a showing that proponent was successful in his attempt.

Blakely v Cabelka, 207-959; 221 NW 451

Exhibiting wounds to jury. During the final arguments in a personal injury case, the court may permit the plaintiff to seat himself alongside the jury in order that the jury may have a close-up view of wounds which, during the taking of testimony, have been fully described and exhibited to the jurors while some of them were twenty feet from the witnesses.

Mizner v Lohr, 213-1182; 238 NW 584

Exhibition of injured body. An injured party, in an action for damages, has a right to disrobe and exhibit to the jury his actual injury and the result thereof tho they present a most pitiable sight.

Olson v Tyner, 219-251; 257 NW 538

Fraud, etc. Evidence held insufficient to set aside a decree of divorce and to grant a new trial on the grounds of fraud and unavoidable casualty and misfortune.

McAtlin v McAtlin, 205-339; 217 NW 864

Inhering fraud. A final order of discharge of an administrator may not be set aside, opened up, or otherwise questioned on a showing of fraud which inheres in said order of discharge.

Murphy v Hahn, 208-698; 223 NW 756

Perjury. Perjury as to any intrinsic matter in an action is not a ground for a new trial.

Hewitt v Blaise, 202-1114; 211 NW 481

Perjury. Perjury on a material issue in a cause will not be recognized in an equitable action as sufficient ground to vacate a judgment or decree and to grant a new trial after the expiration of one year from the entry thereof.

Abell v Partello, 202-1236; 211 NW 868

False testimony. The granting of a new trial because of the false testimony of the prevailing party will not be disturbed in the absence of a strong showing of abuse of discretion by the court.

Moore v Goldberg, 205-346; 217 NW 877

Justifiable refusal of new trial. Refusal to grant a new trial on the ground that testi-

III CONDUCT OF PARTIES—concluded

mony on behalf of the prevailing party was perjured will not be overruled on appeal on a record showing that the perjury, if any, was not committed by the prevailing party himself or with his knowledge.

Weinhart v Smith, 211-242; 233 NW 26

Offer of false testimony. The fact that a party to an action has made a statement out of court inconsistent with his statements in court does not, manifestly, justify the conclusion that his statements in court are false and perjured.

Danner v Cooper, 215-1354; 246 NW 223

IV CONDUCT OF COUNSEL

Curing errors by instructions. See under §11493.

Finding of fact by trial court conclusive. A finding of fact by the trial court on a motion for new trial that alleged misconduct on the part of an attorney did not occur is conclusive on appeal.

Kessel v Hunt, 215-117; 244 NW 714

Discretion of court. The matter of granting a new trial for alleged misconduct of counsel is peculiarly within the discretion of the trial court.

State v Wheelock, 218-178; 254 NW 313

Revealing offer of compromise. Statements by plaintiff's counsel in his opening statement to the jury to the effect that defendant had offered to compromise the claim sued on, together with testimony by plaintiff to the same effect, constitutes reversible error, even tho said testimony is stricken from the record and the jury is admonished not to consider it.

Hoover v Ins. Co., 218-559; 255 NW 705

Persistent offer of immaterial matter. Persistent and flagrant efforts to inject immaterial and inflammatory matters into the record for the purpose of prejudicing the jury may constitute reversible error.

Vanarsdol v Farlow, 200-495; 203 NW 794

Reference to corporate capacity of party. A reference in argument to the corporate capacity of one of the parties to the action tho manifestly improper may not be reversible error when objection is promptly sustained, when the error is not repeated, and when the jury is promptly instructed to wholly disregard the reference.

Henriksen v Crandic Stages, 216-643; 246 NW 913

Voir dire examination as to casualty insurance. Asking jurors, in a personal damage action, whether any of them were directly or indirectly interested in any casualty insurance company is not necessarily prejudicially erroneous.

Tissue v Durin, 216-709; 246 NW 806

Improper reference to insured liability. The rule of law, in actions for personal injuries, that reversible error results from the willful injection, by plaintiff, into the record and before the jury, of the fact that defendant is carrying insurance against the liability sued on, is not violated:

1. By asking in good faith a juror on voir dire whether he is interested in any such insurance company; or
2. By asking a witness, in good faith, for legitimate testimony, and receiving an answer which, inter alia, reveals the fact of such insurance. (And especially when defendant's cross-examination accentuates the objectionable answer.)

Bauer v Reavell, 219-1212; 260 NW 39

Injecting liability insurance. In an automobile accident case where, in argument to jury, plaintiff's counsel developed an idea that the only party interested in preventing a verdict was the insurance company, the court recognized such tactics as being misconduct on the part of counsel.

Floy v Hibbard, 227-149; 287 NW 829

Persistent improper examination. Repeated attempts in the cross-examination of a defendant in a personal injury action to show that he had, on prior occasions, run over people, constitutes prejudicial error.

Shuck v Keefe, 205-365; 218 NW 31

Argument. Parading before the jury the poverty of the plaintiff and the riches of the defendant constitutes, in and of itself, reversible error.

Vanarsdol v Farlow, 200-495; 203 NW 794

Belittling injuries—retaliatory statements. Counsel who, in argument, belittles the personal injuries of the opposing party, may not complain if opposing counsel in reply figuratively magnifies said injuries.

Hoegh v See, 215-733; 246 NW 787

Asking improper (?) questions on cross-examination. Questions asked and excluded on an unjustifiably curtailed cross-examination reviewed, and held to reveal no misconduct on the part of the counsel in merely asking the questions.

Duncan v Rhomberg, 212-389; 236 NW 638

Figure of speech. The employment in an argument of quite vivid figures of speech does not necessarily constitute prejudicial error.

Starry v Hanold, 202-1180; 211 NW 696

Responsive argument. Error may not be predicated on an argument which is responsive to the argument made by complainant, and especially so when the trial court affirmatively found that the argument was responsive.

Stilson v Ellis, 208-1157; 225 NW 346

Argument—latitude allowed. Counsel has the right to draw his own conclusions from the testimony even tho his logic may be faulty, or the opinions expressed or conclusions drawn may be unjust, so long as he keeps within the record and does not appeal to passion and prejudice rather than to reason.

Lawyer v Stansell, 217-111; 250 NW 887

Improper argument—presumptive cure. A party, whose objection to the argument of his opponent to the jury is sustained, must, in the absence of any additional demand, be presumed fully satisfied with the curative effect of the ruling of the court.

Engle v Nelson, 220-771; 263 NW 505

V CONDUCT OF COURT

Absence of judge—effect. A defendant may not predicate error on the sole fact that the judge was absent from the courtroom during defendant's argument, when it appears the judge was at all times within call, and when nothing happened detrimental to the defendant.

State v Dobry, 217-858; 250 NW 702

Unjustifiable refusal to call jurors. When jurors are present in court when a motion for a new trial comes on for hearing, it is reversible error for the court to refuse to order their personal examination as to specified misconduct which, if established, would reveal grounds for a new trial; and especially so when it appears that the jurors had refused to make their personal affidavits as to the facts.

Skinner v Cron, 206-338; 220 NW 341

Assumption of fact. It is not error for the court to refer to the testimony of a witness as a "fact" when such reference is manifestly for the purpose of correcting counsel in the assertion that the testimony was an "opinion" or "conclusion".

State v Bourgeoise, 210-1129; 229 NW 231

Examination by court. An impartial examination of a witness by the court is proper.

State v Weber, 204-137; 214 NW 531

Examination by court—error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Cross-examination—fatal undue limitation. Undue limitation on the cross-examination of a witness may constitute reversible error. So held where the examining party offered to prove, on cross-examination, material matter which went to the heart of the controversy.

West Branch Bank v Farmers Exchange, 221-1382; 268 NW 155

Withdrawal of material and competent testimony. The action of the court in withdrawing from the jury material and competent testimony relative to the limited facilities of a carrier necessarily furnishes ground for a new trial.

Dunnegan v Railway, 202-787; 211 NW 364

Exclusion of relevant and material evidence. The exclusion of relevant and material evidence offered by an appellant is quite harmless when a review of the entire record, including the rejected evidence, reveals the fact that appellee was legally entitled to the judgment rendered in his favor.

Butler Co. v Elliott, 211-1068; 233 NW 669

Court's own conclusion of error. The granting of a new trial on the ground that the court was convinced that it had made error, prejudicial to the defeated party, in summarily withdrawing from the jury, without explanation, material exhibits, will not be interfered with by the appellate court.

White v Walker, 212-1100; 237 NW 499

Undue advantage to party. On the issue whether an oral contract was in fact entered into, the court must not allow one party to testify to his intention and understanding and refuse the other party the same right.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Recital of unsupported issue. The inclusion, in the court's recital of the issues, of the defendant's wholly unsupported allegation that the deceased was intoxicated at the time of the collision in question, without any withdrawal of said issue, justifies the court in granting plaintiff, against whom verdict was rendered, a new trial.

Fort v Ferguson, 218-756; 255 NW 501

Confused instructions. The granting of a new trial will not be interfered with by the appellate court when probably granted by the court in the belief that its withdrawal of certain issues and its unfortunate references to these defenses at inopportune times in the instructions were prejudicial.

Christensen v Bank, 218-892; 255 NW 520

New trial—overruling order. Notwithstanding the deference due the trial court when it grants a new trial, nevertheless, if the direction of a verdict for the defendant was right as a matter of law, the action of the court in

setting aside the verdict and granting a new trial will be reversed.

Hart v Stence, 219-55; 257 NW 434; 97 ALR 535; 36 NCCA 716

V-a1 CONDUCT OF BAILIFF

Unsworn bailiff—effect. Where a jury is ordered kept together during the trial of a criminal case, the fact that the court bailiff who accompanied the jurors on the first adjournment of court was not specially sworn as required (§13861, C., '31), does not constitute reversible error when it appears the bailiff protected the jurors exactly as he would have protected them had he been so sworn and had respected his oath.

State v Miller, 217-1283; 252 NW 121

Bailiff's witticism not prejudicial. Bailiff's remark, that jury might be kept for 30 days before the court would accept a verdict that they had "agreed to disagree", is not prejudicial when the jury themselves treated the remark as a joke.

Tharp v Rees, 224-962; 277 NW 758

VI CONDUCT OF JURORS

Discussion. See 11 ILR 268—Jurors' affidavits as to misconduct

False answers on voir dire. False answers by a juror on his voir dire do not constitute grounds for new trial unless shown to be prejudicial.

Elmore v Railway, 207-862; 224 NW 28

Disregarding instructions. It is the duty of the jury to follow the instructions of the court, and where it clearly appears that the jury, in arriving at its verdict, disregarded the instructions, a new trial must be granted.

Mitchell v Heaton, 227-1071; 290 NW 39

Misconduct of jurors not appearing of record. Argument based on the alleged misconduct of jurors, when such misconduct does not appear of record, will be wholly ignored.

McDonald v Webb, 222-1402; 271 NW 521

Discretion of court. The discretion of the trial court in granting a new trial because of the conduct of a juror will not be interfered with in the absence of a showing of abuse.

Chicago JSL Bank v Eggers, 214-710; 243 NW 193

Harmless error. Misconduct of the jury is not ground for a new trial when the prevailing party is entitled, as a matter of law, to the judgment accorded to him.

Butler Co. v Elliott, 211-1068; 233 NW 669

New trial — overruling motion to strike amendment—no prejudice. Even tho the overruling of a motion to strike an amendment to plaintiff's motion for new trial was error, there was no prejudice to defendant where motion for new trial was sustained generally, and where grounds of original motion, to wit: that verdict was not sustained by evidence and that plaintiff did not receive a fair and impartial trial, were good—in which case there can be no reversal.

Mitchell v Heaton, 227-1071; 290 NW 39

Arbitrary rejection of evidence. A new trial must be granted when the jury, in a case in which plaintiff is legally entitled to recover substantial damages, arbitrarily ignores and rejects the uncontroverted evidences as to damages.

Mendenhall v Struck, 207-1094; 224 NW 95

Ignoring unquestioned evidence and instructions. Grounds for a new trial result from the action of the jury in returning a "no damage" verdict in the face of an unquestioned instruction as to the measure of damages, and in the face of definite and undisputed testimony of substantial damages.

Madison v Hood, 207-495; 223 NW 178; 39 NCCA 393

Use of unauthorized evidence. Prejudicial error results from permitting a jury to take with them to their jury room and to consider the entire sheet of a letter when only the signature thereon was introduced in evidence, and when the unintroduced matter is materially prejudicial to complainant.

In re Merrill, 202-837; 211 NW 361

Allegations stricken from motion—not supported by affidavit. There was no prejudicial error in striking on motion, from a motion for new trial in a criminal case, allegations that the jury had considered matters not in evidence, when the only affidavit in support of the allegations was by an attorney who said no more than that he believed the allegations to be true, and there was no request that the jurors be called for examination.

State v McDowell, 228- ; 290 NW 65

Juror riding with county attorney. Action of trial juror in riding with county attorney to and from place of trial, while not intentional misconduct and even tho no actual wrong resulted, casts suspicion on jury's verdict, is against public policy, and is ground for a new trial.

State v Neville, 227-329; 288 NW 83

Illness of juror—held nonprejudicial. Evidence held to show that illness of a juror was not prejudicial to defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

Conflicting affidavits. The findings by the trial court on conflicting affidavits, relative to alleged misconduct of jurors, is conclusive on the appellate court.

Hoegh v See, 215-733; 246 NW 787

Juror as jury-room witness. It is not necessarily ground for a new trial that a juror proffers in the jury room a statement of fact of which there is no evidence. Complainant must show prejudice.

Conway v Alexander, 200-705; 205 NW 351

Evidence proffered by juror. The assertion by a juror during the deliberations of the jury that one of the interested litigants had "approached" him and attempted to "influence" him may constitute prejudicial error.

In re Merrill, 202-837; 211 NW 361

Assertion of prejudicial facts outside record. A defeated party is entitled to a new trial as a matter of right when he establishes that different jurors during their deliberations and for the purpose of inducing the adverse verdict gave utterance to prejudicial and inflammatory statements of fact, derogatory to said party, and wholly outside of any evidence before the jury.

Farmers Bk. v Smith, 212-529; 234 NW 798

Juror as jury-room witness. A juror who, during the deliberations of the jury, asserts statements of fact which are vitally material on the pending issues and which are wholly outside the record, and which are, in some degree, relied on by other jurors, is guilty of such misconduct as to require a new trial.

City N. Bank v Steele, 220-736; 263 NW 233

Verdict impeachable for misconduct—facts admissible for determination. On a motion for new trial, jurors may not impeach their own verdict by evidence of jury-room discussion which influenced but inheres in their verdict. However, misconduct prejudicially affecting the result may be shown, and the court may hear all the facts to determine if misconduct exists.

Keller v Dodds, 224-935; 277 NW 467

Juror advocating his belief—not misconduct. It is neither misconduct nor ground for new trial for a juror to advocate his conclusions in the jury room, even though he emphatically and persistently favors one party or the other.

Tharp v Rees, 224-962; 277 NW 758

Juror's affidavit of conduct while deliberating—effect. Verdicts and trials cannot be destroyed ordinarily by an affidavit of a juror as to what took place during deliberations in the jury room.

Kirchner v Dorsey, 226-283; 284 NW 171

Misconduct of jury—insufficiency of evidence. In prosecution for subornation of perjury, where defendant complains of the denial of his motion for new trial involving the misconduct of the jury, where evidence, by juror examined on the subject, of matters discussed by jury related to defendant's father's estate and a school controversy in which defendant had been engaged, both of which were referred to in cross-examination of certain character witnesses in the trial and which were admitted by the court, and where juror admitted she agreed to verdict and did not consider anything said by anyone which was not admitted in evidence, there was nothing to indicate any misconduct on the part of the jury, and the court's ruling was correct.

State v Hartwick, 228- ; 290 NW 523

Order for personal examination. When jurors are present in court when a motion for a new trial comes on for hearing, it is reversible error for the court to refuse to order their personal examination as to specified misconduct which, if established, would reveal grounds for a new trial; and especially so when it appears that the jurors had refused to make their personal affidavits as to the facts.

Skinner v Cron, 206-338; 220 NW 341

Visiting locus in quo. The conduct of jurors in visiting, on their own motion, the locus in quo of an accident, and in taking certain measurements therein, and in asserting in argument in the jury room opinions contrary both to the record measurements and to their own measurements, may constitute reversible error.

Johnson v Railway, 201-1044; 207 NW 984
Skinner v Cron, 206-338; 220 NW 341

Visiting scene of accident. The court on motion for new trial may properly refuse to hear testimony to the effect that a juror during the trial visited the scene of an accident, and verified a fact conceded by both parties to the litigation to be true.

Elmore v Railway, 207-862; 224 NW 28

Visiting locus in quo. The fact that during the trial of an action some of the jurors pass by the place where the accident (which is the subject of the action) occurred, constitutes no prejudicial misconduct when the jurors testified that they based their verdict solely on the introduced testimony, and when no dispute whatever existed relative to said place, its location and surroundings.

Liddle v Hyde, 216-1311; 247 NW 827

Juror visiting accident location—misconduct not shown. It is not misconduct for a juror to stop at gasoline station near the scene of the accident in litigation, when there is no evidence that he discussed with other jurors what he saw there.

Tharp v Rees, 224-962; 277 NW 758

Jurors substituting own knowledge for evidence—effect. In an action for injuries resulting from a collision on a bridge between a truck and an automobile, where the record discloses that one juror injected into the discussion her own observation of the fast-driving habits of the motorist with whom plaintiff was

riding, and where other jurors at the scene of the accident noticed and commented on the fact that most drivers, in rounding the same curve where plaintiff approached the scene of the accident, were across the center of the highway, when coupled with the short time taken to arrive at a verdict in view of the voluminous evidence, held no abuse of discretion in granting a new trial.

Hawkins v Burton, 225-1138; 281 NW 790

VII VERDICTS CONTRARY TO EVIDENCE OR LAW

Sustaining verdict for either party. Where, under proper instructions and supporting testimony, the jury may properly find for either party, the supreme court will not disturb the verdict.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Directed verdict refused—findings by jury reviewed. In determining whether or not the court erred in overruling a motion for a directed verdict at the close of the testimony and in overruling a motion for a new trial on the ground that the evidence did not sustain the verdict, the supreme court is not to determine the facts, but is limited to a consideration of what the jury is warranted in finding the facts to be.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Disregard of instructions. A verdict against a common carrier for damages growing out of a shipment of animals is necessarily contrary to an instruction to the effect that the carrier would not be liable if the animals were infected with disease prior to and at the time of shipment, when the record testimony unquestionably shows that the animals were so infected.

Siegel v Railway, 201-712; 208 NW 78

Verdict contrary to instructions—verdict illegal—setting aside. Where the court instructs the jury to base their verdict solely on the evidence and, guided by the instructions, to arrive at the very truth of the matter and base their conclusions solely on evidence and instructions and not to indulge in speculations or conjectures, and at hearing on motion for new trial it is shown that it was agreed in advance that the jury would be bound by a majority vote, such verdict was illegal and it was the duty of the court to set the verdict aside.

Mitchell v Heaton, 227-1071; 290 NW 39

Instructions—law of case. An instruction to the effect that no damage for the flooding of land could be recovered if such damages resulted partly from the wrongful act of the defendant in erecting an embankment and partly from the natural overflow of a natural stream constitutes the law of the case, and a verdict for the plaintiff must be set aside if the evidence conclusively shows that the damages were caused in part by the natural overflow of the stream.

Pfannebecker v Railway, 208-752; 226 NW 161

Contradictory instructions. Contradictory and misleading instructions may be ground for new trial. So held where the court unequivocally instructed that a defense to a promissory note was waived by the act of the maker in executing a renewal with full knowledge of the defense, and later instructed, in effect, that such waiver did not occur unless the holder of the new note had changed his position by reason thereof.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Inconsistent instructions. Inconsistent instructions on a material issue furnish grounds for a new trial. So held where the court instructed that the only issue submitted to the jury was the genuineness of an indorsing signature on a note, but later instructed that the jury must determine the genuineness of the signature to the note itself.

In re Richardson, 202-328; 208 NW 374

Conflicting instructions. Doubt and uncertainty consequent on conflicting instructions relative to the right of the operator of an automobile to assume that another operator would not use the highway unlawfully, presents ample justification for granting the prejudiced party a new trial.

Jelsma v English, 210-1065; 231 NW 304

Unsupported issue. Instructions on unsupported material issues constitute grounds for a new trial.

Dunnegan v Railway, 202-787; 211 NW 364

Sustaining untenable grounds. Granting a new trial on the ground that a jury question had not been presented, when the contrary is true, under the record, constitutes an abuse of discretion.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Evidentiary support required. Verdicts will not be allowed to stand unless they have support in the evidence.

Reynolds v Oil Co., 227-163; 287 NW 823

Evidence—insufficiency. Evidence held such, on the issue of negligence, as to justify the court in refusing a new trial on the ground that the evidence was insufficient to sustain the verdict.

Miller v Kooker, 208-687; 224 NW 46

New trial refused. Where evidence was sufficient to take a case to the jury on the question of whether the injury of the insured came within the terms of his policy, and it was submitted under proper instructions, there was no error in overruling a motion for new trial made on the ground that the verdict was contrary to the evidence.

Dykes v Washington Co., 226-771; 285 NW 201

Affirmatively nonsupported issue. A new trial must necessarily be granted when the court refuses to direct a verdict, and the jury finds in favor of plaintiff's essential issue, and the record affirmatively shows that the contrary of such issue is true.

Pease v Bank, 204-70; 214 NW 486

Omission of defensive and supported issue. New trial is necessarily proper when based on the established ground that the court failed to submit a defensive issue as to which the testimony makes a jury question.

Goben v Paving Co., 204-466; 215 NW 508

Nonsupported issue. The court cannot be deemed to have abused its discretion in granting a new trial in an action on two promissory notes when, in the first instance, it directed a verdict for plaintiff (1) when, as to one note, there was no evidence on the duly joined issue of the genuineness of defendant's signature, and (2) when, as to the other note, the evidence on said issue was by no means conclusive, and (3) when there was evidence of want of consideration for both of said notes.

Wilhite v Sterrett, 222-770; 269 NW 860

Unjust verdict. The granting of a new trial will not be interfered with when there is reasonable ground to believe that an unjust verdict has been returned, and that the injustice may be avoided on a retrial.

Rupp v Kohn, 210-969; 232 NW 174

Unsustained verdict. Evidence reviewed and held insufficient to sustain a jury finding that defendant was a partner, and, as a consequence, that the trial court properly set aside the verdict and ordered a new trial.

Spurway v Milling Co., 207-1332; 224 NW 564

Allowance of future medical expenses without evidence. A quite modest verdict for future necessary medical expenses will not be disturbed, even tho there is no evidence bearing on the amount, when, in the nature of the case, the amount cannot but be an estimate.

Rulison v X-ray Corp., 207-895; 223 NW 745

Quotient verdict—conflicting evidence. A finding by the trial court on conflicting evidence that a verdict was a quotient verdict, and the entry of an order for a new trial will not be disturbed on appeal.

Thornton v Boggs, 213-849; 239 NW 514

Rendering judgment on appeal instead of new trial. Where appeal is not only from order denying new trial but from all other erroneous rulings and where evidence as to completed gift inter vivos would not change on retrial, the supreme court may render such judgment as inferior court should have done.

Wilson v Findley, 223-1281; 275 NW 47

VIII EXCESSIVE VERDICTS

Showing required. A quite clear showing of error, improper bias, influence, or prejudice must be made before the court will declare excessive a verdict for damages for malicious prosecution.

Kness v Kommes, 207-137; 222 NW 436

Excessiveness indicating passion and prejudice. Unless a verdict is so excessive as to indicate clearly, passion and prejudice on the part of the jury, it should not be disturbed.

Stoner v Hy. Comm., 227-115; 287 NW 269

Accident insurance. Verdict held excessive under a policy of accident insurance which guaranteed indemnity for injuries which prevented the insured from performing "each and every kind of duty" pertaining to his occupation.

Elmore v Surety Co., 207-872; 224 NW 32

Eminent domain—compensation. Evidence held to reveal a grossly excessive verdict on a condemnation for highway purposes.

Jenkins v Hy. Comm., 208-620; 224 NW 66

Conclusiveness. In condemnation proceedings, a verdict for damages which is fairly within the range of the legitimate testimony is ordinarily conclusive on the appellate court, even tho the amount is concededly larger than a court itself would have granted, and even tho it appears that the jury substantially split the difference between the witnesses in their estimate of damages.

Cory v State, 214-222; 242 NW 100

Inadequate or excessive verdicts in eminent domain—control power of court. The verdict of a common-law jury in eminent domain proceedings is subject to the same review by the court for inadequacy or excessiveness as other verdicts in other proceedings. Record in highway condemnation proceedings reviewed, and held verdict so grossly excessive as to evidence passion and prejudice.

Campbell v Hy. Comm., 222-544; 269 NW 20

Remittitur cures error. In an action against an estate to recover a money judgment for one-third of the value thereof (tried prior to the closing of the estate), any error in submitting to the jury the question of the net value of the estate is rendered harmless by the action of the plaintiff in stipulating to remit from the judgment a proportional amount of the ultimate costs of administration.

In re Anderson, 203-985; 213 NW 567

Remittitur—effect on prior judgment entry. A duly entered judgment, followed by an unexcepted order for a new trial unless a remittitur be filed, automatically becomes a judgment in the lesser amount immediately upon the due filing of the remittitur.

Fox v McCurnin, 210-429; 228 NW 582

Instructions—computation of amount. Error in instructions relative to the computation of

VIII EXCESSIVE VERDICTS—concluded

the amount of a verdict may be cured by a remittitur.

In re Willmott, 215-546; 243 NW 634

Unsupported or excessive verdict—conditional order. The court may, on the duly presented grounds that a verdict is unsupported or excessive, grant a new trial, even tho the evidence is conflicting, unless a specified amount of the verdict is remitted, such motion presenting a question peculiarly addressed to the sound discretion of the court—not a legal proposition only.

Manders v Dallam, 215-137; 244 NW 724

Option to remit excessive part of verdict. It is proper for the court to give plaintiff the option to remit that portion of a verdict which the court deems excessive, and refuse a new trial (on that ground) if the remittitur is filed.

Bobst v Hoxie Line, 221-823; 267 NW 673

Excessive and exemplary damages—remittitur or new trial. Excessive damages showing passion and prejudice vitiate the entire verdict. A remittitur will not cure the error and a new trial should be granted. Where the jury returned a verdict of $1,500 actual damages and $2,500 exemplary damages, held the total amount of damages awarded and the difference between the actual damages and punitive damages were not so excessive as to show passion and prejudice; and, the entire verdict not being vitiated, the verdict for $1,500 actual damages was not affected by the erroneous submission of the question of exemplary damages and such error was cured by remittitur of all such punitive damages.

Boyle v Bornholtz, 224-142; 275 NW 479

Wrongful death of wife. In an action for the wrongful death of a wife, the statutory power to allow "such sum as the jury may deem proportionate to the injury" is not an unbridled discretion. Evidence reviewed and held that a verdict of $10,000 was excessive to the extent of $4,000. The deceased was childless and illiterate, had accumulated no property, was a beet weeder for a small part of the year at small wages, and also operated a boarding house, but whether at a profit did not appear.

Hanna v Elec. Co., 210-864; 232 NW 421

IX VERDICTS HELD EXCESSIVE

Discussion. See 18 ILR 405—Reduction by trial court; 18 ILR 561—Prejudicial verdict—remittitur

Unallowable reduction by court. The court has no power to reduce the verdict of a jury in an action for unliquidated damages, and to render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to such reduction.

Crawford v Emerson Co., 222-378; 269 NW 334

$2,130 for personal injuries. Verdict for $2,130 for personal injuries held excessive and conditionally reduced to $1,850.

Kimmel v Mitchell, 216-366; 249 NW 151

$2,500 for personal injury.

Tissue v Durin, 216-709; 246 NW 806

$3,500 for indecent assault. Verdict of $1,500 actual and $2,000 punitive damages held excessive as to the actual damages.

Ransom v McDermott, 215-594; 246 NW 266

$3,600 for personal injury.

McKee v Iowa Co., 204-44; 214 NW 564

$5,000 for libel in filing an information charging insanity.

Plecker v Knottnerus, 201-550; 207 NW 574

Aged man with small earning capacity. In a personal injury action, evidence reviewed relative to past and future pain, loss of time, and decreased earning capacity, of a 67-year old plaintiff, and held, a verdict of $5,000 was excessive and should be reduced to $4,000.

Johnson v Sioux City, 220-66; 261 NW 536

Death—excessiveness. Verdict for damages in the sum of $5,750 for the death of an eight-year-old boy held excessive, and reduced conditionally to $4,500.

Allen v Railway, 218-286; 253 NW 143

$6,000 for death of 10-year-old child. Verdict of $6,000 for death of 10-year-old school girl held excessive and conditionally reduced on appeal to $4,500.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

$7,500 for fatal personal injury. Verdict for $7,500 for fatal personal injury held excessive and conditionally reduced to $4,000.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

$10,000 for death of wife.

Hanna v Elec. Co., 210-864; 232 NW 421

$15,000 fatal personal injury. Verdict for $15,000 for death of a 17-year-old boy, reduced by trial court to $10,000, held subject to a further reduction to $7,500.

Hart v Hinkley, 215-915; 247 NW 258

$16,750 in an action for criminal conversation and alienating the affections of a wife.

Peak v Rhyno, 200-864; 205 NW 515

$17,000 for wrongful death.

Cerny v Secor, 211-1232; 234 NW 193

$27,000 for wrongful death. Verdict for $27,000 for wrongful death reduced by trial court to $17,000 and by appellate court to $14,500.

Scott v Hinman, 216-1126; 249 NW 249

$30,000 conditionally reduced to $12,000. Verdict of $30,000 for wrongful death reduced by the trial court to $21,000, and by the appellate court, on condition, to $12,000.

Shutes v Weeks, 220-616; 262 NW 518

$40,000 for libel and defamation of character.

Mowry v Reinking, 203-628; 213 NW 274

X VERDICTS HELD NONEXCESSIVE

$500 for assault and battery. Verdict for $500 for assault and battery held nonexcessive.

Ashby v Nine, 218-953; 256 NW 679

$1,000 for personal injury.

Hoegh v See, 215-733; 246 NW 787

$1,000 for injury to an automobile and to the person.

Comparet v Coal Co., 200-922; 205 NW 779

$1,680 for assault and battery—exemplary damages. In an assault and battery case verdict for $1,680, reduced by remittitur to $1,180, held not so excessive as to evince passion and prejudice, when verdict included exemplary damages.

Hauser v Boever, 225-1; 279 NW 137

Nonexcessive damages. Evidence held to support a verdict of $1,500 for personal injuries.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Personal injuries—award. Verdict for $1,800 for personal injuries sustained.

Beardmore v New Albin, 203-721; 211 NW 430

$2,000 as actual damages for libel, reduced one-half by the trial court.

Taylor v Hungerford, 205-1146; 217 NW 83

Eminent domain—$2,000 for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80-acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Hy. Comm., 227-115; 287 NW 269

$1,328 for personal injury and property loss. Verdict for $1,328 for personal injury and property loss held manifestly nonexcessive.

Wolfe v Decker, 221-600; 266 NW 4

$1,500 for assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

$1,500 for personal injury.

Stutzman v Younkerman, 204-1162; 216 NW 627

$2,175 for personal injuries. Verdict of $2,175 for personal injuries, held not excessive.

Shadduck v Railway, 218-281; 252 NW 772

$2,800 for personal injuries.

O'Hara v Chaplin, 211-404; 233 NW 516

$2,989 for personal injuries.

Burke v Town, 207-585; 223 NW 397

$3,250 for personal injuries reduced conditionally by the trial court to $2,250.

Duncan v Rhomberg, 212-389; 236 NW 638

$3,500 for personal injury.

Raines v Wilson, 213-1251; 239 NW 36

Personal injuries—$3,750 not excessive. Damages are generally within the province of the jury and an appellate court hesitates to interfere with the amount unless it is so grossly excessive as to indicate passion or prejudice, or some other reason appears, and ordinarily the trial court's granting or refusing a new trial on the ground of excessiveness of a verdict will not be disturbed on appeal unless an abuse of discretion is shown. Held, a $3,750 personal injury verdict was not excessive when based on a fracture of the skull, broken left shoulder, four broken ribs, eye and ear injuries, unconsciousness for five days, and severe headaches.

Rogers v Jefferson, 226-1047; 285 NW 701

$5,000 for personal injury.

Nederhiser v Railway, 202-285; 208 NW 856

$5,000 for personal injury. A visible and lifelong personal disfigurement is necessarily a very persuasive element of damages. Verdict held nonexcessive.

Siesseger v Puth, 216-916; 248 NW 352

Excessive damages — $5,170. Verdict of $5,170 for injury to person and property reviewed and held nonexcessive.

Winter v Davis, 217-424; 251 NW 770

$5,733 in eminent domain proceedings.

Sherwood v Reynolds, 213-539; 239 NW 137

$5,950 for personal injuries.

Mizner v Lohr, 213-1182; 238 NW 584

$7,500 for services rendered to a decedent during a series of years.

Halstead v Rohret, 212-837; 235 NW 293

$8,000 for personal injury.

Starry v Hanold, 202-1180; 211 NW 696
McCoy v Cole, 216-1320; 249 NW 213

X VERDICTS HELD NONEXCESSIVE—concluded

$10,000 for grave personal injuries, reduced to $6,500.

Wolfson v Lbr. Co., 210-244; 227 NW 608

$10,000 for personal injuries.

Elmore v Railway, 207-862; 224 NW 28

$10,000 on retrial of personal injury case. A verdict of $10,000 on second trial of automobile accident case, altho $2,500 larger than first verdict, did not under the circumstances indicate passion or prejudice and was not excessive.

Jakeway v Allen, 227-1182; 290 NW 507

$11,755 as damages for land taken for highway purposes.

Shimerda v Hy. Comm., 210-154; 230 NW 335

$12,000 for personal injury.

Henriksen v Stages, Inc., 216-643; 246 NW 913

$13,400 for personal injuries.

Dean v Koolish, 212-238; 234 NW 179

$20,000 for personal injury consequent on the malpractice of a physician.

Legler v Clinic, 207-720; 223 NW 405

$20,000 for personal injuries. A verdict of $20,000 for personal injuries of an extraordinary nature and largely permanent held nonexcessive.

Engle v Ungles, 223-780; 273 NW 879

$22,500 for death, reduced by the trial court to $14,500.

Rastede v Railway, 203-430; 212 NW 751

When court will interfere. It is not the province of a court to interfere with the amount of a verdict in a personal injury action unless it is clearly made to appear that the verdict is the result of passion or prejudice or of a palpable disregard of the evidence. Verdict of $10,000 held nonreviewable.

Engle v Nelson, 220-771; 263 NW 505

Exemplary damages. A verdict for exemplary damages which is fairly in proportion to the actual damages will not be disturbed by the court.

Gregory v Sorenson, 214-1374; 242 NW 91

XI INADEQUATE VERDICTS

Inadequacy of verdict. The court has a very large discretion in ruling on a motion for a new trial on the ground of the inadequacy of a verdict for personal injuries.

Strayer v O'Keefe, 202-643; 210 NW 761
Herrman v O'Connor, 209-1277; 227 NW 584

Inadequate verdict for wrongful death. The sustaining of plaintiff's motion for a new trial, because of a verdict of $150 for the wrongful death of an active young man of substantial earning power, is eminently proper.

Leake v Azinger, 214-927; 243 NW 196

Manifestly inadequate verdict. A manifestly inadequate verdict demands a new trial.

DeMoss v Cab Co., 218-77; 254 NW 17

Ignoring unquestioned evidence and instructions. Grounds for a new trial result from the action of the jury in returning a "no damage" verdict in the face of an unquestioned instruction as to the measure of damages, and in the face of definite and undisputed testimony of substantial damages.

Madison v Hood, 207-495; 223 NW 178; 39 NCCA 393

Arbitrary rejection of evidence. A new trial must be granted when the jury, in a case in which plaintiff is legally entitled to recover substantial damages, arbitrarily ignores and rejects the uncontroverted evidence as to damages.

Mendenhall v Struck, 207-1094; 224 NW 95

XII PASSION OR PREJUDICE

Excessive verdict—presumption. An apparently excessive verdict does not necessarily show that it is the result of passion and prejudice.

Peak v Rhyno, 200-864; 205 NW 515

$2,500 increase in damages on retrial of personal injury case. A verdict of $10,000 on second trial of automobile accident case, altho $2,500 larger than first verdict, did not under the circumstances indicate passion or prejudice and was not excessive.

Jakeway v Allen, 227-1182; 290 NW 507

Abuse of discretion. The granting of a new trial on the ground of passion and prejudice, and as contrary to law and the instructions, will not be disturbed unless the record shows an abuse of the wide discretion of the court.

Utilities Corp. v Chapman, 210-994; 232 NW 116

Moving considerations. The inconsistencies, contradictions, variations, and improbabilities of plaintiff's testimony, coupled with the amount of the verdict, may quite certainly point to the fact that the verdict was the result of passion and prejudice.

Kelley v Gardner, 213-16; 238 NW 470

Eminent domain proceedings. A verdict in eminent domain proceedings will not be disturbed, even tho the amount suggests excessiveness, if it is well within the supporting evidence.

Kemmerer v Highway Com., 214-136; 241 NW 693

XIII SURPRISE, ACCIDENT, INADVERTENCE, OR MISTAKE

Inadvertently misleading counsel. The court may grant a new trial on the ground that it inadvertently misled counsel, prior to the argument, as to the nature of the instructions which would be given to the jury.

Printy v Reimbold, 200-541; 202 NW 122; 205 NW 211

Surprise—waiver. A litigant is not entitled to a new trial because he was surprised by the testimony of his adversary when he asked for no continuance or for time in which to produce counter testimony.

Southhall v Berry, 207-605; 223 NW 480

Surprise—ruling on objection to exhibit. In action on written contract, a new trial is not justified on the ground of surprise based on a ruling as to the admissibility of an exhibit when that ruling is not shown to be erroneous.

Clare v Pearson, 227-928; 289 NW 737

XIV NEWLY DISCOVERED EVIDENCE

(a) POWER AND DUTY OF COURT IN GENERAL

Inability to discover evidence. The discretion of the court is abused in denying a new trial to a defeated party who diligently sought, during the trial, to learn the truth as to a material and issuable claim, but was prevented from so doing until after the trial.

Millard v Mfg. Co., 200-1063; 205 NW 979

Reception of evidence—discretion in reopening—new trial for abuse. Granting or refusing a motion to reopen a case to admit further evidence is within the sound discretion of the court, but if a refusal to reopen is an abuse of discretion, a new trial should be granted on appeal.

In re Canterbury, 224-1080; 278 NW 210

Amendments allowable after reversal and remand. Defendant, in an action at law, may, after reversal and remand on plaintiff's appeal, amend his answer by pleading new and additional grounds of defense.

Flood v Bank, 220-935; 263 NW 321

Discretion of court. A large discretion is lodged in the trial court in determining whether a new trial should be granted on the ground of newly discovered evidence, since the trial court has a much better opportunity for seeing and judging how the testimony given, and that afterward discovered, bears upon the issues, and for determining whether the facts offered are similar or dissimilar.

Larson v Meyer, 227-512; 288 NW 663

Defense arising or discovered since judgment entered. The fact that a claim, when judgment was entered thereon, had been discharged in bankruptcy is not a "defense which has arisen or been discovered since the judgment was rendered", and therefore within the power of a court of equity to annul or modify.

Harding v Quilan, 209-1190; 229 NW 672

(b) DILIGENCE IN PROCURING EVIDENCE

Due diligence rule. On the ground of newly discovered evidence, where due diligence has been exercised in attempting to discover the evidence before trial, a new trial should be granted, but, in the absence of due diligence, refused.

Wilbur v Iowa Co., 223-1349; 275 NW 43

Finding as to diligence. The conclusion of the trial court that due diligence was exercised in the discovery of new testimony will not ordinarily be disturbed on appeal.

Moore v Goldberg, 205-346; 217 NW 877
Utseth v Pratt, 208-1324; 227 NW 115

Finding of nonnegligence. The appellate court is very reluctant to overturn the holding of the trial court that a mover for a new trial has not been negligent in discovering or obtaining testimony and that such testimony, if produced, would have some force with the jury.

Doty v Jamieson, 214-1321; 243 NW 359

Due diligence—wholesale search unnecessary. With nothing to suggest its propriety or necessity, a party is not required to interrogate all persons living within five or six miles of an accident in order to have exercised due diligence as a prerequisite for a new trial on the ground of newly discovered evidence.

Wilbur v Iowa Co., 223-1349; 275 NW 43

Forgotten deed. A new trial will, in some instances, be granted because of newly discovered evidence even tho the applicant might have discovered such evidence before trial and decree. So held where a party in partition proceedings, soon after trial and an adverse decree, discovered a forgotten deed which apparently confirmed her title.

Mills v Hall, 202-340; 209 NW 291

Negligent discovery. A new trial will not be granted because of the discovery of testimony which the movant might readily have discovered at the trial already had, especially when such testimony does not carry any reasonable probability of bringing about a different result if the cause is retried.

Southhall v Berry, 207-605; 223 NW 480

Lack of diligence. A new trial will not be granted for newly discovered evidence when such evidence was manifestly easily obtainable during the trial, especially when such evidence is for impeaching purposes.

Elmore v Railway, 207-862; 224 NW 28

XIV NEWLY DISCOVERED EVIDENCE —continued

(b) DILIGENCE IN PROCURING EVIDENCE—concluded

Lack of diligence. Lack of diligence in the discovery of new testimony justifies the overruling of the motion.

First Bank v Tobin, 204-456; 215 NW 767
North Amer. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492
Anderson v Railway, 216-230; 249 NW 256
Heintz v Packing Co., 222-517; 268 NW 607

Lack of diligence. An applicant for a new trial may not be held to have exercised diligence in discovering evidence which he might, in reason and from the inception of the action, have known or supposed was in existence and easily obtainable, but as to which he took no action until after the verdict had been rendered against him; especially is this true in view of the broad discretionary powers of the court in such proceedings.

Danner v Cooper, 215-1354; 246 NW 223

(c) RELEVANCY, MATERIALITY, AND COMPETENCY

Evidence bearing on nonissue. New trial because of newly discovered evidence is properly denied when there is no issue to which the newly discovered evidence could apply.

Andrew v Bank, 204-570; 215 NW 807

Immateriality. Manifestly, newly discovered evidence cannot constitute grounds for a new trial when it is not material to the controlling issue in the case.

Gilmore v Moulton, 216-618; 246 NW 601

Sagging wires on highway after storm—knowledge. In a case where a woman is burned by contacting a high tension electric line, sagging over a highway after a storm, and who testifies she had no knowledge it was there, newly discovered evidence to show that she was seen stepping over the broken poles prior to the accident, is not cumulative but tends directly to establish a material fact affecting the result of the case on retrial.

Wilbur v Iowa Co., 223-1349; 275 NW 43

(d) CUMULATIVE EVIDENCE

Cumulative evidence. Newly discovered evidence which is purely cumulative is not a ground for new trial.

Cuthbertson v Hoffa, 205-666; 216 NW 733
Rauch v Elec. Co., 206-1155; 221 NW 788
Simons v Harris, 215-479; 245 NW 875

Negligence and cumulativeness. Evidence in the form of office records, and claimed to have been newly discovered, is properly rejected as sufficient ground for new trial (1) when said records are simply cumulative to testimony already introduced by the applicant, and (2) when said records have been in the exclusive possession of the applicant and to his knowledge since the inception of the suit.

Warren v Railway, 219-723; 259 NW 115

Cumulative evidence not ground. Claimed newly discovered evidence, in the nature of statements of a highway patrolman bearing on his observation of wheel tracks of an automobile, as tending to show where the car left the highway, being merely cumulative, when the sheriff of the county had testified at the trial as to said tracks, is not ground for new trial.

Moran v Kean, 225-329; 280 NW 543

Cumulative evidence — insufficient ground. Where a jury returned a verdict in favor of payee in an action on a note executed by a partnership wherein the defense of payment was pleaded and evidence was introduced to show a tender of payment by the partnership to payee, but with payee's consent the money was retained by one partner as a personal loan from payee to such partner, defendants' motion for new trial based on newly discovered evidence consisting of other admissions at different times of the same facts presented at the trial was properly overruled, as such evidence of the same kind and to the same point was merely cumulative.

Larson v Meyer, 227-512; 288 NW 663

Well drilling — casing damage — discovery. In action on oral contract to recover for drilling well where, more than four months after judgment, defendant discovered damage to casing caused by plaintiff in digging the well, and thereupon moved for new trial, held that newly discovered evidence was not cumulative, and that under peculiar circumstances existing, the defendant was not guilty of lack of diligence in making such discovery.

Ross v Fahey, (NOR); 205 NW 855

(e) IMPEACHMENT OF WITNESS

Newly discovered impeaching evidence. Newly discovered evidence, in an action for damages for personal injury, which tends to show that the length of plaintiff's disability was much less than as claimed by plaintiff on the trial, is impeaching in character and consequently not ground for new trial.

Danner v Cooper, 215-1354; 246 NW 223

Extrinsic and collateral fraud—impeachment of witnesses. Evidence newly discovered after trial and verdict, and apparently demonstrating that the verdict was obtained by extrinsic and collateral fraud, is ground for new trial within the time limit and conditions provided by the statute; and it is no objection that said evidence also tends to impeach witnesses. So held where the newly discovered evidence tended strongly to show that the stamp "Paid", as it appeared on an obligation sued on, had been willfully fabricated.

Bates v Carter, 222-1263; 271 NW 307

Inviting perjury—improper offer of money or property. A new trial must be granted when, after a verdict adverse to proponent in a will contest, the fact is promptly discovered and shown to the court that the contestant, during said first trial, and on condition that he win the contest, had made, to divers of the witnesses testifying at the trial, offers of a substantial part of the estate as an inducement for said witnesses to testify in behalf of contestant; and this is true even tho it be conceded that said contestant in making said offers was not intending thereby actually to bribe said witnesses to commit perjury.

In re Whitehouse, 223-91; 272 NW 110

(f) SUFFICIENCY AND PROBABLE EFFECT

Affidavits—statutory denial. Affidavits relative to newly discovered evidence as grounds for new trial (on petition) are denied by operation of law. (§12789, C., '31.)

Anderson v Railway, 216-230; 249 NW 256

Newly discovered evidence—sufficiency and probable effect. If a different result is not reasonably probable on account of newly discovered evidence, a new trial should not be granted.

Larson v Meyer, 227-512; 288 NW 663

Sufficiency and probable effect. Newly discovered evidence will not be deemed sufficient to justify an order for a new trial when its competency is questionable, and when it can throw but little light on the issues joined.

Mill Owners v Petley, 210-1085; 229 NW 736

XV MAKING ERROR OR MISCONDUCT OF RECORD

Nonrecord matter. Litigants may not, on appeal, avail themselves of a nonrecord matter bearing on their motion for new trial.

Besco v Mahaska County, 200-684; 205 NW 459

Failure to preserve record. Tho a motion to vacate a final decree for erroneous proceedings which preceded the decree, be treated in the appellate court as a motion for a new trial, yet movant cannot prevail when he deliberately permitted such proceedings to take place in the trial court without any record preservation, and seeks in his motion proceedings to establish them by mere affidavit and extraneous testimony.

Radle v Radle, 204-82; 214 NW 602

Improper showing. Misconduct of the county attorney in argument cannot be presented by motion for new trial supported by affidavits.

State v Phillips, 212-1332; 236 NW 104

New trial — overruling motion to strike amendment. Even tho the overruling of a motion to strike an amendment to plaintiff's motion for new trial was error, there was no prejudice to defendant where motion for new trial was sustained generally, and where grounds of original motion, to wit: that verdict was not sustained by evidence and that plaintiff did not receive a fair and impartial trial, were good—in which case there can be no reversal.

Mitchell v Heaton, 227-1071; 290 NW 39

XVI PROCEEDINGS TO PROCURE NEW TRIAL

Fatally delayed motion. A motion for a new trial must be made within the five-day statutory period.

State v Brennan, (NOR); 215 NW 615

Failure to obtain ruling—effect. The filing of exceptions to instructions and a motion for a new trial, after the entry of judgment on the verdict, is rendered wholly abortive by the failure to call to the attention of the court, the exceptions or the motion, and to obtain a ruling thereon.

Linn v Kendall, 213-33; 238 NW 547

Lack of specification. Motions for new trial must be specific, in criminal as well as in civil cases, as to the grounds, or they will not be reviewable.

State v Vandewater, 203-94; 212 NW 339

Omnibus assignment. An omnibus assignment of error in a motion for new trial presents nothing to the trial court or to the appellate court.

Liddle v Salter, 180-840; 163 NW 447
In re Kahl, 210-903; 232 NW 133

What considered on appeal. Where an appeal is merely from an order overruling a motion for new trial, only such questions as were raised by such motion for new trial can be considered on appeal.

Lotz v United Markets, 225-1397; 283 NW 99

Belated presentation. The overruling of a motion for new trial will not be disturbed on appeal when such motion was filed after appeal and issuance of procedendo, and on the ground that the applicant inadvertently overlooked in the trial of the case certain available testimony. (See §12255, C., '24.)

Tutt v Smith, 202-1389; 212 NW 127

Fatally delayed motion. A court-directed verdict (in a jury trial) is the verdict of the jury within the meaning of the statute limiting applications for new trial to five days "after the verdict is rendered" and the court has no jurisdiction to grant an application made after said time irrespective of the time when formal judgment was entered on the verdict. (Verdict rendered in 1916; judgment entered in 1930.)

Selby v McDonald, 219-823; 259 NW 485

11551 Application—use of affidavits.

ANALYSIS

I MOTION FOR NEW TRIAL IN GENERAL
II TIMELY AND UNTIMELY MOTIONS
III AMENDMENTS
IV AFFIDAVITS

Motion for new trial not always necessary to obtain review. See under §12828

I MOTION FOR NEW TRIAL IN GENERAL

Motion—what constitutes. A motion which requests the court to reconsider a certain order theretofore made, and to enter a different order, constitutes a motion for a new trial, within the meaning of statute pertaining to the time of taking appeals. Especially is this true when the motion was so treated by the court and by the parties.

Home Bank v Klise, 205-1103; 216 NW 109

Objections to evidence—reraising in motion unnecessary. Where the immateriality of evidence objected to is plainly discernible and no further particularity is required to apprise the trial court of grounds of objections, it is not necessary that these same identical matters be again presented to trial court by way of motion for new trial before they may be considered by supreme court.

Floy v Hibbard, 227-149; 287 NW 829

Unallowable combination of motions.

Miller v Surety Co., 209-1221; 229 NW 909

Jurors as witnesses—refusal to call. On a motion for a new trial in a criminal case, the court may very properly refuse to permit the oral examination of jurymen for the purpose of establishing misconduct which the defendant induced—for which he was responsible.

State v Mutch, 218-1176; 255 NW 643

Extension of time for motion—canvass of jury as to misconduct of court. An extension of time for filing a motion for new trial to enable counsel to canvass the jury and learn the prejudicial effect of remarks made by the court during the trial was properly refused when there was attached to the motion an affidavit by a juror that the remarks of the court had led the jury to disbelieve a witness, the affidavit not supporting its conclusion, and when no exceptions were taken to the remarks by the court.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Matter of discretion—matter of law—when reviewable. An order phrased in general terms granting a new trial will be deemed discretionary and not reviewable except for an abuse of discretion, but where granted on specific legal grounds it is reviewable like any other error of law.

Thompson v Butler, 223-1085; 274 NW 110

Correct ruling on erroneous grounds—valid grounds existing—effect. An error in sustaining a motion for new trial on two particular grounds cannot be prejudicial if other grounds exist on which it should be sustained, all of which will be considered on appeal.

Thompson v Butler, 223-1085; 274 NW 110

Verdict contrary to evidence—preserving question in lower court—no review if first raised on appeal. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence, and should be set aside, cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

II TIMELY AND UNTIMELY MOTIONS

Verdict—scope of term—fatally delayed motion. A court-directed verdict (in a jury trial) is the verdict of the jury within the meaning of the statute limiting applications for new trial to five days "after the verdict is rendered" and the court has no jurisdiction to grant an application made after said time irrespective of the time when formal judgment was entered on the verdict. (Verdict rendered in 1916; judgment entered in 1930.)

Selby v McDonald, 219-823; 259 NW 485

Setting aside default judgment—time limit five days. A motion to set aside a default judgment in the district court must be made within five days after rendition of the judgment, unless the time is extended by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Belated motion and exceptions to instructions—effect. A motion for new trial and exceptions to instructions filed 16 days after verdict, where no extension is secured, are filed too late, and questions raised therein cannot be considered on appeal. In such case, when extension of time has been granted, such fact should be shown in abstract.

Roggensack v Ahlstrom, (NOR); 209 NW 429

Journal entry extending time valid. A statute requiring that an application for a new trial must be made within five days after the verdict is rendered unless the court grants an extension of time, contemplates orders which are only temporary and incidental to the case, and an order extending the time for such application was effective to extend the time beyond the five-day limit, when it was entered on the judge's calendar before the five days were up, even tho not entered on the record book until seven days after judgment was rendered.

Street v Stewart, 226-960; 285 NW 204

Waiver of belated filing. The right to object to a motion for a new trial because not filed within the time provided by statute is waived by failing to interpose such objection in the trial court.

Home Bank v Klise, 205-1103; 216 NW 109

Belated presentation. The overruling of a motion for new trial will not be disturbed on appeal when such motion was filed after appeal and issuance of procedendo, and on the ground that the applicant inadvertently overlooked in the trial of the case certain available testimony. (See §12255, C., '24.)

Tutt v Smith, 202-1389; 212 NW 127

Belated filing. A motion for a new trial and objections to instructions will be ignored on appeal when filed after the time fixed by the court.

Lein v Morrell, 207-1271; 224 NW 576

Motion delayed more than five days. A motion for new trial when not based on newly discovered evidence is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

Belated filing—effect on appeal—waiver of lateness. The belated filing of a motion for new trial and exceptions to instructions is fatal thereto and precludes consideration on appeal, but the lateness may be waived and the matters heard on their merits.

Thompson v Butler, 223-1085; 274 NW 110

Motion not germane to non obstante veredicto. A motion for new trial is not germane to a motion for judgment notwithstanding the verdict and cannot be considered if made after a lapse of five days from the verdict.

In re Larimer, 225-1067; 283 NW 430

Nunc pro tunc order for more time—ineffective after five days from verdict. An application for a nunc pro tunc order for an extension of time to file motion for new trial is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

III AMENDMENTS

Belated amendment to exception to an instruction. An amendment to an exception to an instruction will not be considered when not filed within the time fixed by the statute or the court, and when said amendment is not germane to the original exception.

Reif v Beese, 213-250; 236 NW 66

Amendment to motion after extended time for filing—when permitted. An amendment to a motion for a new trial may be filed after the statutory or extended time for filing the motion if it is germane to the original motion.

Mitchell v Heaton, 227-1071; 290 NW 39

Amendment to motion after extended time—majority verdict as germane matter. Where a motion for a new trial is based on the grounds, among others, that verdict was contrary to law, was not the result of due deliberation by the jury, and was contrary to court's instructions, an amendment, alleging that the verdict was illegal and was the result of an agreement made in advance that jury would be bound by a majority vote, was germane to original motion and could be considered altho filed after extended time for filing motion for new trial.

Mitchell v Heaton, 227-1071; 290 NW 39

Motion for new trial—overruling motion to strike amendment. Even tho the overruling of a motion to strike an amendment to plaintiff's motion for new trial was error, there was no prejudice to defendant where motion for new trial was sustained generally, and where grounds of original motion, to wit: that verdict was not sustained by evidence and that plaintiff did not receive a fair and impartial trial, were good—in which case there can be no reversal.

Mitchell v Heaton, 227-1071; 290 NW 39

IV AFFIDAVITS

Hearsay affidavit. An unattacked and unchallenged affidavit may be sufficient in some cases to establish such misconduct on the part of jurors as to demand a new trial, even tho the contents of the affidavit may be hearsay.

Skinner v Cron, 206-338; 220 NW 341

Optional methods of proof. The grounds for a new trial need not necessarily be established by affidavits. In proper cases, such grounds may be established by the testimony of witnesses.

Skinner v Cron, 206-338; 220 NW 341

Unjustifiable refusal to call jurors. When jurors are present in court when a motion for a new trial comes on for hearing, it is reversible error for the court to refuse to order their personal examination as to specified misconduct which, if established, would reveal grounds for a new trial; and especially so when it appears that the jurors had refused to make their personal affidavits as to the facts.

Skinner v Cron, 206-338; 220 NW 341

Ineffectual affidavits. A new trial will not be granted on the basis of affidavits by jurors relative to the consideration of extraneous and improper testimony when the affidavits signally fail to show that the jurors were in any manner influenced by such testimony.

Bauer v Reavell, 219-1212; 260 NW 39

11553 Judgment notwithstanding verdict.

Criminal law—unrecognized practice. Motions for judgment notwithstanding the ver-

dict are not recognized in our practice governing criminal cases.

State v Stennett, 220-388; 260 NW 732

Judgment notwithstanding verdict — scope of. A motion for judgment non obstante veredicto is based wholly on a defective pleading, in that it omits to aver some material fact necessary to complete a cause of action or defense, and the motion must clearly point out the omission.

In re Larimer, 225-1067; 283 NW 430

Arrest of judgment—motion goes to sufficiency of petition. A motion in arrest of judgment raises only the question of whether the petition wholly fails to state a cause of action, not whether the petition should have been more specific.

Kirchner v Dorsey, 226-283; 284 NW 171

Pleadings complete — motion overruled. Where pleadings of the successful party averred all material facts necessary to a complete cause of action or defense, a motion for judgment notwithstanding the verdict was properly overruled.

Lee v Sundberg, 227-1375; 291 NW 146

Untimely motion. A motion for judgment notwithstanding the verdict is not germane to a motion for new trial, and cannot be considered if filed as an amendment to the motion for new trial after the lapse of five days from verdict.

Miller v Surety Co., 209-1221; 229 NW 909

Motion for new trial not germane to non obstante veredicto. A motion for new trial is not germane to a motion for judgment notwithstanding the verdict, and cannot be considered if made after a lapse of five days from the verdict.

In re Larimer, 225-1067; 283 NW 430

Untenable motion. A motion for judgment non obstante veredicto will not lie to a petition which recites the facts out of which plaintiff's injury arose, and contains a general allegation of negligence on the part of the defendant.

Pomerantz v Cement Corp., 212-1007; 237 NW 443

Unallowable procedure. Plaintiff against whom a verdict has been rendered in an action on a promissory note may not so avail himself of a motion for judgment notwithstanding the adverse verdict, or of a motion in arrest of judgment, as to obtain a judgment in his favor on a theory of estoppel neither pleaded nor proven.

Millard v Herges, 213-279; 236 NW 89; 238 NW 604

Proper rejection. Plaintiff's motion for judgment notwithstanding a verdict for defendant, because defendant's answer failed to plead want of consideration for the signing of the note sued on, is properly overruled when defendant's answer impliedly pleaded want of consideration, and when plaintiff so construed the answer throughout the trial.

Persia Bk. v Wilson, 214-993; 243 NW 581

Waiver. The right of plaintiff to file a motion for judgment notwithstanding a verdict in favor of defendant, on the ground that defendant's answer fails to plead a defense, is not waived by plaintiff because of his failure to demur to said answer.

Persia Bk. v Wilson, 214-993; 243 NW 581

Verdict contrary to evidence—preserving question—when nonreviewable. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence, and should be set aside, cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

11554 Arrest of judgment.

Unallowable procedure. Plaintiff against whom a verdict has been rendered in an action on a promissory note may not so avail himself of a motion for judgment notwithstanding the adverse verdict, or of a motion in arrest of judgment, as to obtain a judgment in his favor on a theory of estoppel neither pleaded nor proven.

Millard v Herges, 213-279; 236 NW 89

Facts alleged generally—arrest of judgment not tenable. A motion in arrest of judgment will not lie to a petition which recites the facts out of which plaintiff's injury arose, and which contains a general allegation of negligence on the part of the defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

Motion goes to sufficiency of petition. A motion in arrest of judgment raises only the question of whether the petition wholly fails to state a cause of action, not whether the petition should have been more specific.

Kirchner v Dorsey, 226-283; 284 NW 171

11555 Filing of motion.

Waiver of motion—insufficient showing. A party will not be deemed to waive his motion for a new trial by having his motion non ob-

stante veredicto sustained when both motions were prepared, filed, and treated as one motion, and where the motion for new trial was properly sustained, and the motion non obstante veredicto was improperly sustained.

Pomerantz v Cement Corp., 212-1007; 237 NW 443

11556 Time of filing.

Untimely motion. A motion for judgment notwithstanding the verdict is not germane to a motion for new trial, and cannot be considered if filed as an amendment to the motion for new trial after the lapse of five days from verdict.

Miller v Surety Co., 209-1221; 229 NW 909

Belated nunc pro tunc order for extension. An application for a nunc pro tunc order for an extension of time to file motion for new trial is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

Motion for new trial not germane to non obstante veredicto. A motion for new trial is not germane to a motion for judgment notwithstanding the verdict, and cannot be considered if made after a lapse of five days from the verdict.

In re Larimer, 225-1067; 283 NW 430

11557 Curative amendments—time of filing.

Conforming pleadings to proof. Amendments which conform the pleadings to the proofs are allowable.

State v Carney, 208-133; 217 NW 472
Henriott v Main, 225-20; 279 NW 110

11561 Conditions.

Conditions in re excessive verdicts. See under §11550 (VIII)

11562 Dismissal of action.

ANALYSIS

I DISMISSAL IN GENERAL
II BY PLAINTIFF BEFORE SUBMISSION
III BY THE COURT FOR NONPROSECUTION
IV DISMISSAL WITHOUT PREJUDICE
V REINSTATING DISMISSED CAUSE

I DISMISSAL IN GENERAL

Wrong venue—motion to transfer as sole remedy. An action commenced on due and proper service, and concerning a subject matter of which the court has jurisdiction, should not be dismissed because commenced in the wrong county. Motion to transfer to the proper county is the sole remedy.

Baker v Bank, 205-1259; 217 NW 621

Dismissal of prima facie case. The court, in trying an action, in lieu of a jury, may be fully justified in dismissing it on motion because of the inconclusive and unsatisfactory character of the evidence, even tho the plaintiff has technically made a prima facie case for recovery. So held in an action for money had and received.

Griffith v Arnold, 204-1216; 216 NW 728

Dismissal before court sustains motion. When, at the close of plaintiff's testimony, the court orally states that defendant's motion for a directed verdict would be sustained, and plaintiff thereupon announces in open court his dismissal of the action without prejudice, the court may treat plaintiff's announcement as a motion to dismiss without prejudice and sustain such motion over the objection of defendant.

Rush v Barnhill, 218-425; 255 NW 491

Court indicating directed verdict—dismissal motion properly denied. A motion to dismiss, made after court indicated an intention to sustain defendant's motion for directed verdict, held properly denied.

Yarn v Railway, 31 F 2d, 717

Dismissal after death of party. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Nonjurisdiction to dismiss. When a cause is assigned to, and tried by, a judge of the district court, all other judges of the same court are thereby deprived of jurisdiction to dismiss the cause while it is pending before said trial judge.

Dunkelbarger v Myers, 211-512; 233 NW 744

Dismissal because of lack of subject matter. An action is properly dismissed when by the lapse of time no issue remains for trial.

Peoples Bank v McCarthy, 210-952; 231 NW 487

Dismissal—effect. The dismissal of an action solely for injunctional relief necessarily dissolves the temporary injunction issued therein.

Peoples Bank v McCarthy, 210-952; 231 NW 487

Dismissal of issue—striking evidence. The court should not permit testimony bearing on a dismissed issue to remain in the record when it has no material bearing on any remaining issue.

In re Muhr, 218-867; 256 NW 305

I DISMISSAL IN GENERAL—concluded

Involuntary—failure of service. The dismissal of an action is proper when it appears that no defendant has been legally served with the original notice.

Thompson v Butler, 214-1123; 243 NW 164

Dismissal of partnership suit. A partnership action cannot be legally dismissed by one half of the partners against the wishes of the remaining half of the partners when such dismissal would be materially injurious to the partnership.

Lunt Co. v Hamilton, 217-22; 250 NW 698

Nonrecord dismissal. An application by the surety on the bond of an administrator wherein the prayer was (1) for the removal of the administrator or (2) for the filing of a report, may not be deemed dismissed, insofar as the prayer for removal is concerned, simply because the surety informed the administrator that he (the surety) would not insist on an order of removal, such matter not being made a matter of record.

In re Donlon, 201-1021; 206 NW 674

Motion to dismiss equitable action. There is no statutory authority for a motion to dismiss an equitable action at the close of plaintiff's testimony.

Appanoose Bureau v Board, 218-945; 256 NW 687

Motion to dismiss—operation and effect. A defendant who, at the close of plaintiff's testimony in an equitable action, makes and stands on a motion for judgment in his own favor, and for dismissal of plaintiff's petition, in effect announces that he rests his case.

Haggin v Derby, 209-939; 229 NW 257

More specific statement—order—impossible compliance. A plaintiff who is ordered to make his petition more specific in certain particulars which he is actually or reasonably unable to state, and so demonstrates in a good-faith effort to comply with the order, must be deemed to have complied with the order, and must not be disciplined by a dismissal of his action.

Lamp v Williams, 222-298; 268 NW 543

Failure to enter formal judgment of dismissal. Failure of the court, following its order dismissing a counterclaim, to enter a formal judgment of dismissal of said counterclaim, cannot possibly prejudice the appellant in his appeal from the final judgment on the merits.

Hunt v Moore, 213-1323; 239 NW 112

Failure to enter formal judgment on collateral order. The failure of the court, following a dismissal of a quantum meruit count by plaintiff, to enter a formal judgment of dismissal of the said count cannot possibly detrimentally affect the defendant on his appeal from a judgment against him on the remaining count.

Hunt v Moore, 213-1323; 239 NW 112

Certiorari—when writ lies—illegal setting aside of dismissal. Certiorari is a proper remedy to review the action of a trial court in illegally setting aside the dismissal, prior to the return day, of an action, and in proceeding with the cause as tho no dismissal had been filed.

Lyon v Craig, 213-36; 238 NW 452

Pleadings unamendable after dismissal. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties plaintiffs and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 104 ALR 566

Neglect to file cost bond within time ordered —effect. The nonwillful neglect to file a cost bond by the time ordered by the court will not justify a dismissal of the action when the bond is filed prior to the ruling on the motion to dismiss.

Arthaud v Griffin, 205-141; 217 NW 809

Splitting action — subjecting insurance to probate claim—establishing one policy in foreign court. A claimant in probate, alleging an oral contract assigning all of decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

II BY PLAINTIFF BEFORE SUBMISSION

Necessary loss of jurisdiction. The voluntary dismissal of an action by plaintiff prior to the return day, and the record entered by the clerk of such dismissal, necessarily deprives the court of all jurisdiction to proceed with said cause.

Lyon v Craig, 213-36; 238 NW 452

Dismissal—effect. Principle recognized that while a plaintiff may dismiss his own action, such dismissal cannot affect defendant's properly pleaded cross-petition.

Randolph v Ins. Co., 216-1414; 250 NW 639

Dismissal before trial—effect. The dismissal of an action by plaintiff before trial, even tho

it is an equitable action which involves the liability of a defendant city relative to various claimants for work and materials on a public improvement, deprives the court of all jurisdiction thereafter to proceed with the trial and adjudicate any right of the dismissing plaintiff, when the pleadings of the defendant are solely defensive.

Eclipse Lbr. v City, 204-278; 213 NW 804
Eclipse Lbr. v Kepler, 204-286; 213 NW 809

Final submission to court. When defendant's motion for a directed verdict in his favor on plaintiff's evidence is argued and submitted to the court, and the court orally and by appropriate entry on the docket sustains said motion, it is too late for plaintiff to assert that there has been no final submission of the action to the court. It necessarily follows, under such circumstances, that plaintiff has lost his right to voluntarily dismiss his action without prejudice.

Marion v Ins. Assn., 205-1300; 217 NW 803

Final submission withheld by order for briefs. When at the close of the evidence in an action tried to the court, time is given each party, at the request of the defendant, in which to file briefs, no final submission to the court takes place until the briefs are filed, or until the time for such filing has expired. It follows that in such circumstances a plaintiff may dismiss his action at any time before the time for filing briefs has expired.

Crane v Leclere, 204-1037; 216 NW 622

Insufficient showing to overcome. A judgment recital that a plaintiff appeared and requested the dismissal of the action will not be expunged on motion on testimony which is in equipoise on the issue whether such recital is correct.

Sullivan v Coakley, 205-225; 217 NW 820

Implied dismissal. The dropping of an action from the court calendar for some 25 years without explanation from the plaintiff, coupled with conduct on the part of the plaintiff inconsistent with the further pendency of such neglected action, clearly justifies the court in treating such action as dismissed.

Benjamin v Jackson, 207-581; 223 NW 383

III BY THE COURT FOR NONPROSECUTION

Rules in re failure to prosecute action. Rules of the district court for the dismissal of actions, for want of reasonable prosecution thereof, are proper.

Workman v Dist. Court, 222-364; 269 NW 27

Want of prosecution—court rules construed with statute. A district court rule, providing for dismissal of actions for want of prosecution if not noticed for trial within one year, must be construed in conjunction with statute requiring trial notices to be filed.

Thoreson v Elec. Co., 225-1406; 283 NW 253

Refusal to reinstate action. A dismissal of plaintiff's action is properly ordered when plaintiff fails to appear at the time the action is assigned for trial; and the refusal of the court to reinstate the action will not be disturbed in the absence of a showing of manifest abuse of discretion.

Bliss v Watson, 208-1199; 227 NW 108

Court acting on own motion contrary to agreement of counsel. Consolidated actions, dismissed by the court on its own motion in the absence of counsel, for want of prosecution, are properly reinstated on a showing of "unavoidable casualty and misfortune" in that there was no negligence on the part of plaintiffs or their counsel and that they were relying on an agreement between counsel that certain motions would not be made nor issues made up until convenient to all counsel.

Thoreson v Elec. Co., 225-1406; 283 NW 253

Jurisdiction to dismiss pending appeal. An appeal from the municipal court to the supreme court from an interlocutory order involving part of an answer (order striking pleaded set-offs from part of the divisions of the answer), without supersedeas bond in, or stay order by, the appellate court, does not deprive the municipal court of jurisdiction to dismiss the action, in accordance with its rules, for want of attention.

DM & CI Ry. v Powers, 215-567; 246 NW 274

Notice—sufficiency. A rule of court to the effect that the court may dismiss nonprosecuted actions after prescribed published notice of the proposed dismissal has been had is not invalid because the rule provides that the docket number only shall be stated in the publication.

Scott v Cas. Co., 217-390; 252 NW 85

Want of prosecution — negligence. Negligence of plaintiff, in prosecuting his action after commencing it, furnishes ample justification for the action of the court in refusing to set aside a dismissal of the action for want of prosecution.

Scott v Cas. Co., 217-390; 252 NW 85

Dismissal for want of prosecution. The dismissal of an action for want of prosecution is eminently proper (1) when plaintiff knew that defendant was insisting on immediate trial, (2) when the cause was twice assigned for trial at the same term, and (3) when defendant failed to appear at the time finally set for trial and filed no motion for continuance.

Pride v Kittrell, 218-1247; 257 NW 204

Justifiable dismissal. An unsupported counterclaim for damages consequent on the negligent handling of a claim by an attorney who

sued for fees due him, is, of course, properly dismissed by the court.

Hunt, etc. v Moore, 213-1323; 239 NW 112

IV DISMISSAL WITHOUT PREJUDICE

Dismissal for nonappearance—effect. The dismissal of an action by the court solely because of the nonappearance of the plaintiff at the time of trial must be deemed a dismissal without prejudice to the bringing of a new action.

Galloway v Hobson, 206-507; 220 NW 74

Nonadjudication of merits. The dismissal of an action because of a failure to comply with a rule of court respecting the filing of trial notice does not constitute an adjudication of the action.

Fryman v McCaffrey, 208-531; 222 NW 19; 224 NW 95

Dismissal with and without prejudice. A plaintiff has the unqualified right to dismiss a part of his cause of action with prejudice, and the remaining part without prejudice, and later maintain an action on the part dismissed without prejudice.

Hall v Ins. Co., 217-1005; 252 NW 763

V REINSTATING DISMISSED CAUSE

Reinstatement. The district court has jurisdiction to reinstate a cause which, under order of court, has been "dropped from the calendar" if such dropping from the calendar was not with the intent to dismiss.

Bank. Tr. Co. v Dist. Ct., 209-879; 227NW536

Voluntary dismissal—jurisdiction to set aside. The voluntary dismissal of an action may not, even during the same term, be set aside and the action reinstated when such dismissal was brought about by the negligence of the dismissing party and such negligence is wholly unexplained and unexcused. Whether the court has jurisdiction in any case to set aside a voluntary dismissal, quaere.

Ryan v Ins. Co., 204-655; 215 NW 749

Nonjurisdiction to set aside dismissal. A municipal court having entered a valid order of dismissal of an action has no jurisdiction, seven months later, to set aside said order and reinstate said action without notice to the defendant.

DM & CI Ry. v Powers, 215-567; 246NW274

Setting aside—insufficient grounds. A party who compromises and settles his claim for damages consequent on an alleged fraudulent sale, and voluntarily and under no additional fraud does so on the basis of his then knowledge of the claimed fraud, may not have the compromise set aside on the claim that he later discovered an additional element of fraud in the sale not known to him when he compromised.

Williams v Herman, 216-499; 249 NW 215

Reinstatement justified. When an action for death benefits was dismissed for failure to prosecute, reinstatement was not an abuse of discretion when it was shown that: there was a valid cause of action; witnesses were difficult to obtain; there was a change in the plaintiff's counsel; the court records erroneously showed an amended answer which might have misled the new counsel; there was no personal neglect on the part of the plaintiff; and a dismissal at that time, under the terms of the policy, prevented having any trial on the merits of the case.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Refusal to reinstate—discretion.

Bliss v Watson, 208-1199; 227 NW 108

Setting aside dismissal. When an action to collect death benefits was dismissed for want of prosecution, the court was justified in setting aside the dismissal when the petition for reinstatement showed the fact of the accident resulting in death, and that witnesses had been located, and the order of the court complied with a statute in making an adjudication that the plaintiff had a valid cause of action.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Justifiable setting aside. The court is, manifestly, within its discretion in setting aside the dismissal of an action when the dismissal was entered by the plaintiff's counsel at a time when he had been discharged.

Pilcher Co. v Clark, 218-150; 253 NW 907

Setting aside—time limit. The time limit for filing petition to vacate an order dismissing an action for want of prosecution, on the ground of unavoidable casualty or misfortune preventing a party from prosecuting the action, is not limited to a time on or before the second day of the term succeeding the entry of the order.

Seiders, Inc., v Adel Clay, 218-612; 255 NW 656

Judgment of dismissal—nonjurisdiction to set aside. The district court, having at one term entered a judgment of dismissal of an action for want of prosecution of the action as required by the rules of the court, has no jurisdiction at a subsequent term, tho the judgment entry remains unsigned, to set aside said judgment under §10801, C., '35, and reinstate the action. The governing procedure, under such circumstances, is provided by §12787 et seq., C., '35.

Workman v Dist. Court, 222-364; 269 NW 27

Dismissal after death of party. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term

to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

No reinstatement of nol-prossed indictment. An indictment against a corporation for maintaining a liquor nuisance, nol-prossed, without fraud at the sole instance of the county attorney, on the mistaken assumption that defendant was not a corporation and, therefore, could not be held to answer, may not later be reinstated when it is discovered that defendant is in fact a corporation. (Keokuk v Schultz, 188 Iowa 937, overruled in part.)

State v Veterans, 223-1146; 274 NW 916; 112 ALR 383

State v Moose, 223-1146; 274 NW 918

11563 Decision on the merits.

Discretion of court—trial on merits preferred. The law favors trial on merits, and the trial court exercises considerable discretion in setting aside default judgments so as to give preference to trial of causes on merits.

Lemley v Hopson, (NOR); 232 NW 811

11564 Counterclaim tried.

Effect on cross-petition. An executor who institutes an authorized action against a corporate receiver in the county of the receiver's appointment, for relief against an alleged fraud-induced contract by the deceased, and (1) is met by a cross-petition for judgment on the said contract, and (2) has his action properly consolidated with divers other actions under duly joined issues which might have been the basis of an original action against the executor in said county of suit, may not thereupon, after dismissing his action, have all proceedings against himself and the estate dismissed on the claim that the probate court which appointed him had sole jurisdiction to render a judgment against him or against the estate.

Lex v Selway Corp., 203-792; 206 NW 586

Splitting action—dismissal of part of claim—effect on cross-petition. A claimant in probate who seeks to have proceeds of life policies subjected to payment of claim does not, by dismissal as to a part of amendment to his claim, deprive the court of jurisdiction to adjudicate the rights to such proceeds as claimed by cross-petitioner.

In re Hazeldine, 225-369; 280 NW 568

11566 Dismissal in vacation.

Necessary loss of jurisdiction. The voluntary dismissal of an action by plaintiff prior to the return day, and the record entered by the clerk of such dismissal, necessarily deprives the court of all jurisdiction to proceed with said cause.

Lyon v Craig, 213-36; 238 NW 452

11567 Judgment—final adjudication.

ANALYSIS

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Alimony decrees, res adjudicata effect. See under §10481 (III)
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I NATURE AND ESSENTIALS IN GENERAL

Discussion. See 2 ILB 142—Federal courts following state court decisions; 7 ILB 81—The declaratory judgment; 12 ILR 62—The declaratory judgment—its application to constitutional controversies

Judgment as debt. A judgment, whether based on contract or tort, is a "debt" within the meaning of the exemption statutes.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Admissions—plea of guilty in criminal prosecution. A plea of guilty in a criminal prosecution may be admissible as an admission when the judgment entered thereon would not be admissible.

In re Johnston, 220-328; 261 NW 908; 262 NW 488

Necessary allegation and proof. In order to defeat, under §12032, C., '31, the application of a surviving widow for an allowance out of her husband's estate, the objector must distinctly allege and prove that the widow feloniously took, or feloniously caused or procured another to take, the life of her said husband, and must so do irrespective of the outcome or result of any criminal proceedings against said widow.

In re Johnston, 220-328; 261 NW 908; 262 NW 488

Amount in controversy — pleadings determinative. In determining the amount in controversy under the statute limiting supreme

I NATURE AND ESSENTIALS IN GENERAL—continued

court appeals to cases involving over $100, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy, but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35, amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

General inequitableness—nonmutuality—innocent third parties. A decree awarding specific performance cannot be justified (1) when the party awarded such performance has neither tendered performance nor specifically shown his ability to perform, (2) when the decree contains mandates on parties over whom the court has no jurisdiction, (3) when the decree awards such performance both in favor of and against parties who are not and never have been parties to the contract in question, and (4) when the decree compels parties who are strangers to the contract in question to change their position to their possible financial loss.

Anders v Crown, 210-469; 229 NW 744

Judgment against insane person—validity. The validity of a judgment obtained in a law action against an insane defendant is not affected by such insanity, or by fact that a guardian had been appointed for his property.

In re Simpson, 225-1194; 282 NW 283

Findings by court. Whether a mere finding by the court as to the extent of the administrator's liability to the estate, entered on an application by the surety to remove the administrator, is an adjudication binding on the surety on the bond, quaere.

In re Donlon, 201-1021; 206 NW 674

Dismissal before trial—effect. The dismissal of an action by plaintiff before trial, even tho it is an equitable action which involves the liability of a defendant city relative to various claimants for work and materials on a public improvement, deprives the court of all jurisdiction thereafter to proceed with the trial and adjudicate any right of the dismissing plaintiff, when the pleadings of the defendant are solely defensive.

Eclipse Lbr. v City, 204-278; 213 NW 804
Eclipse Lbr. v Kepler, 204-286; 213 NW 809

Loss of right to equitable relief. A duly entered judgment against plaintiff on the merits in a law action, and affirmed on appeal, constitutes a final judgment, and §11017, C., '31, furnishes no authority to plaintiff thereafter to file in the adjudicated law action a "substituted petition in equity" (and motion to transfer to equity) involving the same subject matter, and no authority or jurisdiction to the court to entertain such attempted action.

Phoenix Ins. Co. v Fuller, 216-1201; 250 NW 499

Motion to dismiss—pleading over in equity. Plaintiff, in an action triable in equity, who has his action dismissed on motion because of defenses in point of law appearing on the face of the petition, must be accorded the right (1) to plead over, or (2) to elect to stand upon the ruling of the court.

Marcovis v Inv. Co., 223-801; 273 NW 888

Insufficient showing to overcome recital. A judgment recital that a plaintiff appeared and requested the dismissal of the action will not be expunged on motion on testimony which is in equipoise on the issue whether such recital is correct.

Sullivan v Coakley, 205-225; 217 NW 820

Collateral attack—nonpermissible impeachment. The judgment of a court having jurisdiction of the parties and of the subject matter cannot be collaterally impeached.

King City v Surety Co., 212-1230; 238 NW 93

Unallowable collateral attack. In the foreclosure of a mortgage, executed by an administrator on lands of the deceased and on due order and authorization of the court, the defending heirs, who were parties to the order and authorization for the mortgage, will not be permitted to collaterally attack the validity of the mortgage on the ground that part of the land was the homestead of the deceased and therefore descended to the heirs exempt from the debts of the deceased.

Reinsurance Life v Houser, 208-1226; 227 NW 116

Appointment of administrator — collateral attack. In an action by an administrator, an answer alleging that plaintiff is not a legal administrator because he is a nonresident and secured his appointment by concealing that fact from the court is properly stricken because (1) the plaintiff's nonresidence did not render the appointment void, and, therefore, (2) the answer is but an unallowable attempt to collaterally attack the probate order of appointment.

Reidy v Railway, 216-415; 249 NW 347

Unserved and nonappearing parties. In rendering a decree the court may very properly insert a precautionary clause to the effect that the decree is not binding on unserved and nonappearing parties.

Gunn v Gould Co., 206-172; 218 NW 895

Partition proceedings—unborn child. A statute empowering the court in partition proceedings (1) to assume, through a guardian

ad litem, jurisdiction over the contingent interest of an unborn child as a possible cotenant of the land, (2) to order a sale of the land, and (3) to exercise a continuing jurisdiction over the resulting fund insofar as such possible child may have an interest, is violative of neither the federal nor state constitution relative to depriving persons of property without due process.

Mennig v Howard, 213-936; 240 NW 473

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

Involved matters—broad power under general prayer for relief. A court of equity, in dealing with and adjusting involved and complicated matters of fact, has exceptionally broad power to effect equity and justice when both parties pray for general equitable relief. Illustrated where defendant, who was the owner of coal lands, and those working in conjunction with him, had wrongfully interfered with the rights of lessees, and were held liable in a reasonable amount for permanent improvements placed in the mine by lessees, even tho said improvements became worthless—it appearing that defendant's misconduct had materially contributed to said latter condition.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Primary jurisdiction of equity in personam—decree affecting status of bank deposit. Primarily and fundamentally, courts of equity act only in personam, and it is only by statute that they have acquired jurisdiction to act directly in rem. The fact that a decree determines the rights of parties to a bank deposit from insurance proceeds, and indirectly affects the status thereof, does not make the proceeding one in rem.

In re Hazeldine, 225-369; 280 NW 568

Collateral attack — judgment on defective notice. Principle reaffirmed that a judgment rendered on notice such as to give the court jurisdiction, tho the notice may be defective, cannot be collaterally attacked.

Bauer v Bauer, 221-782; 266 NW 531

Void decree—collateral attack. A decree of divorce, wheresoever rendered, is always open to collateral attack by proof that the court was without jurisdiction to render it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Collateral attack—orders in bankruptcy. An order in federal bankruptcy proceedings for the sale of the bankrupt's equity of redemption in land sold under foreclosure proceedings is immune from collateral attack on the ground that the land embraced the bankrupt's homestead.

Lincoln Bank v Brown, 219-630; 258 NW 770

Void probate order. Void orders of the probate court may be attacked collaterally.

Irwin v Bank, 218-477; 255 NW 671

Ruling on motion as adjudication. An order overruling plaintiff's motion (1) to strike an answer, and (2) for judgment nil dicit (assuming the propriety of such procedure) constitutes an adjudication that plaintiff has no legal right to a judgment on the pleadings as they then stand; and plaintiff has no right later to present, to another judge of the same court, a motion for judgment on the same pleadings, and said latter judge has no right to review the rulings of the former judge by sustaining said latter motion.

Taylor v Canning Corp., 218-1281; 257 NW 353

Ruling on motion as adjudication. Whether a ruling sustaining a motion to strike a pleading on the ground that it improperly joins causes of action and party defendants constitutes (in the absence of an appeal) a final adjudication in the further progress of the cause, quaere.

Ontjes v McNider, 218-1356; 256 NW 277

Motion to dismiss—ruling as adjudication. The overruling of a motion to dismiss a petition in an equitable action does not amount to an adjudication unless the defendant stands on his motion and allows judgment to be entered against him.

Frazier v Wood, 219-36; 255 NW 647; 257 NW 768

Absence of issues. A decree quieting title in certain defendants against other defendants cannot be rendered when no issues whatever were joined between said defendants.

Grandy v Adams, 219-51; 256 NW 684

Nonlitigated issue. A judgment or decree cannot be deemed an adjudication of an issue which was not expressly or impliedly embraced in the proceedings leading up to the judgment.

Wunder v Schram, 217-920; 251 NW 762

Appeal—dismissal on technical grounds—noneffect as adjudication. The dismissal, by the supreme court, of an appeal, and the affirmance by said court of the judgment appealed from, on the technical ground that appellant had failed to make timely filing of an abstract of the record, cannot be deemed an adjudication of the jurisdictional legality of the judgment so affirmed. In other words, while the appeal has proven abortive, the said judgment is nevertheless subject to an action for its cancellation on the ground that the trial court was wholly without jurisdiction to enter it.

Dallas v Dallas, 222-42; 268 NW 516

I NATURE AND ESSENTIALS IN GENERAL—concluded

Public utility contracts under Simmer law—engineering cost—no general judgment. Simmer law prohibits payment of construction cost of a municipal electric plant from taxation, and precludes rendering a general judgment for such cost, including a judgment for cost of engineering services in preparing plans and specifications for construction of such public utility, when such services were performed under contract, subsequent to the election and passage of the ordinance providing for construction payment from future earnings. Consequently, in an action by the engineers against a city to recover compensation for their services, a directed verdict for the city was proper.

Burns Co. v Iowa City, 225-1241; 282 NW 708

Refunding erroneous tax — administrative remedies exhausted before resorting to court. Under the statute providing for refunding erroneous tax, stockholders of a national bank are not entitled to money judgment in alternative of statute. All adequate administrative remedies must be exhausted to recover tax illegally collected before resorting to the courts.

First Nat. Bk. v Harrison County, 57 F 2d, 56
Hammerstrom v Toy Nat. Bk., 81 F 2d, 628

II EVIDENCE OF JUDGMENT

Competent evidence of judgment. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record, and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Parol to explain judgment. The use of ambiguous words in a judgment or decree of court may open the door to parol evidence to establish what the court actually decided.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Evidence available against vouchee. In an action for breach of warranty because of an existing mortgage on the property, the foreclosure proceedings and judgment entry therein are admissible against the covenantor-defendant to prove the plaintiff's measure of damages, it appearing that the covenantor had been duly vouched into said foreclosure proceedings.

Kellar v Lindley, 203-57; 212 NW 360

Decree of dissolution. A decree of dissolution of a corporation based on the fraud of the corporation is admissible, on the issue of fraud and want of consideration, against an alleged bona fide holder of a negotiable promissory note which was given to the corporation as the purchase price for its corporate stock, even tho neither of the parties to the action on the note were parties to the dissolution suit.

Andrew v Peterson, 214-582; 243 NW 340

Admissibility against stranger. A final decree and the pleadings relating thereto may, in some cases, be admissible in a subsequent action to prove an ultimate fact, even tho the party against whom the decree is offered was not a party to the decree. So held where the decree was received to prove the judicial cancellation of a contract of sale upon which cancellation depended the validity of a promissory note sued on.

Pierce v Lichtenstein, 214-315; 242 NW 59

Divorce—former decree—effect. In a second action for divorce, evidence of events antedating the first decree and including the history of the parties and their relations is not objectionable insofar as such evidence throws light upon the conduct of the parties subsequent to the former decree.

Garside v Garside, 208-534; 224 NW 586

III ON MOTION

Additional annotations. See under §11608

Motion to strike and judgment on pleadings. A motion to strike an answer and for judgment on the pleadings manifestly cannot be properly sustained when the answer, both by general and specific denials, puts in issue the very gist of plaintiff's cause of action.

Ind. School Dist. v School Dist., 216-1013; 250 NW 192

Nonallowable. Motions for judgment on the pleadings are not allowable.

Perry-Fry Co. v Gould, 217-958; 251 NW 142

Judgment on pleadings—motion for—permissibility. The practice of entertaining motions for judgment on the pleadings will be recognized, on appeal, not as a matter of right in movant, but as a matter of mutual agreement between litigants.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Judgment on pleadings denied. Where an unverified petition is filed in action on a written agreement, the contents of which are challenged by general and specific denials under oath, plaintiff is not entitled to judgment on pleadings, even tho genuineness of signature is not properly challenged.

Clare v Pearson, 227-928; 289 NW 737

IV FINAL JUDGMENTS

Decree after remand from appeal—finality. The decree entered by the district court in

conformity to an opinion of the supreme court is the final adjudication in the case.

Goltry v Relph, 224-692; 276 NW 614

Will — acceptance of bequest — unappealed order extending testator's limitation. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

Failure to appeal—effect. A defendant who fails to appeal from any part of a decree which (1) established certain claims for labor (as contended for by plaintiff), but (2) held that such claims were not liens on certain property (as contended for by defendant), may not question the decretal establishment of said claims on a successful appeal by the plaintiff from the latter part of the decree.

Soodhalter v Coal Co., 203-688; 213 NW 213

Decretal portion inconsistent with recital of facts. The decretal portion of a decree, when in conflict with recital of facts, takes precedence, and the decree is not void because of the inconsistency, and appeal lies only on the decretal portion of the decree that is final judgment.

Higley v Kinsman, (NOR); 216 NW 673

Conclusiveness. An order of court confirming a deed in partition, approving the final report of the referee and discharging him and his bondsman from further responsibility, coupled with a recital and finding that the referee had made full distribution of the purchase price and had fully complied with all orders of the court (one of which was to the effect that the purchase price must be paid in cash) is final and conclusive until set aside by a direct proceeding, even tho as a matter of fact no money ever actually passed from the purchaser to the referee.

State Bank v Uglow, 208-1241; 227 NW 118

Foreclosure — decree — nonjurisdiction to amend. The district court has no jurisdiction, long after a duly rendered decree in mortgage foreclosure has become final, to amend said decree by striking therefrom a provision for redemption from execution sale, and by substituting therefor a provision directing the sheriff to issue deed forthwith upon making such sale. So held where the judgment plaintiff sought such amendment on the theory that the judgment defendant had lost his right to redeem because of a stay of execution obtained by him pending ineffectual bankruptcy proceedings.

Nibbelink v DeVries, 221-581; 265 NW 913

Judgment on remand for amount confessed. A plaintiff-appellant who, on appeal, is unsuccessful in his effort to establish liability in excess of defendant's offer to confess judgment, is entitled on remand to procedendo directing the trial court to enter judgment in his favor for the amount of said offer and for costs to date of said offer.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

Harmless error—form of judgment. Where a trustee under a trust agreement sues the maker of promissory notes on a series of notes, the beneficial interest of which is in different parties, the defendant may not complain that a separate judgment is rendered on each count, and an aggregate judgment for the sum of all the separate judgments—the defendant being amply protected, by the terms of the judgments, from a double liability.

Iowa Co. v Clark, 215-929; 247 NW 211

Permanent injunction—conditional order for —compliance—effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue, enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

Scope of—potentially litigated question. A duly rendered judgment of a court of bankruptcy that its trustee has no interest in or title to an article of personal property because said article belongs to one who sold it to said bankrupt under a conditional sale contract which has been duly forfeited, constitutes in legal effect, inter alia, a final adjudication that said bankrupt had no redeemable interest in said article—conceding, arguendo, that he might, under some circumstances, have had such right.

Smith v Russell, 223-123; 272 NW 121

IV FINAL JUDGMENTS—concluded

Custodial order as adjudication. An order in divorce proceedings awarding to the mother, without fraud on her part, the unconditional custody of her children, constitutes a final adjudication in her favor of each and every fact then bearing on her fitness for such custody.

Wood v Wood, 220-441; 262 NW 773

Ruling on demurrer—when an adjudication. Timely filing of an amendment to an answer by party entitled so to amend, after a demurrer to the answer was sustained, deprived the ruling on the demurrer of all effect as a final adjudication. Such ruling on demurrer in and of itself settles nothing and it becomes an adjudication only if defeated party chooses to make it such.

Schwartz v School Dist., 225-1272; 282 NW 754

V ENTRY, RECORD, AND DOCKETING

Entry all-essential.

State v Wieland, 217-887; 251 NW 757

Confession of judgment—clerk's mandatory duty. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

Competent evidence of judgment. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record, and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Entry—calendar and record book. From a statute requiring that all judgments and orders must be entered in the record book, it may be inferred that the judge's calendar is in the nature of a memorandum book ordinarily used by the judge to guide the clerk in entering judgments and orders in the record book which is their final place of repose, and that the clerk's entry in the record book is the legal evidence of a judgment or order.

Street v Stewart, 226-960; 285 NW 204

Record of judgment clarified by later entry. When the court stated in its entry of judgment: "The defendant excepts to said judgment. Exceptions allowed and granted.", and in ruling on a motion for a new trial, made an entry that the above-quoted was intended to save an exception for the defendant, the court was correct in its action to clarify the record, and on appeal the defendant could not contend that the entry could only be interpreted to mean that the exception to the judgment was sustained.

Wessman v Sundholm, 228- ; 291 NW 137

Filing for record after term time—effect. A judgment is not rendered erroneous because signed, filed, and entered of record after the adjournment of the trial term when the decision was rendered in term time and then noted on the court calendar and on the appearance docket, with directions to the attorneys to prepare a decree in accordance with the decision.

Andrew v Bank, 209-1149; 229 NW 819

Inaccurate judgment — correction without new trial. When parties to an action voluntarily (tho irregularly) submit to a referee certain counts only of the petition, and later judgment is entered on the report of the referee in such form as to indicate that all counts of the petition had been so submitted, the court, on proper proof, is under mandatory duty, during the term at which the judgment was entered, to exercise its statutory and inherent power and, itself, correct said inaccuracy.

Watters v Knutsen, 223-225; 272 NW 420

Validity of long-delayed entry. The duty of the clerk of the district court, without any direction from the court, to enter judgment on the general verdict of the jury,—no contrary order being made by the court,—is imperative and continues without limitation as to time. So held where the judgment was entered 14 years after return of the verdict.

Selby v McDonald, 219-823; 259 NW 485

Judgment on note—entry before surrender of note. The purpose of a statute providing that the clerk shall not enter upon the records any judgment based on a note unless the note is first delivered to the clerk, being to retire the instrument from circulation so that the maker and others will not be subjected to other suits, was accomplished altho a judgment was entered eight days before the note was surrendered. When two years elapsed before an action was brought to set aside the judgment because of noncompliance with the statute,

and no defense to the note was shown, the action should be dismissed.

Jensen v Martinsen, 228- ; 291 NW 422

Judgment entry in eminent domain—insufficiency. Record entry in proceedings relative to eminent domain reviewed, and held, notwithstanding its recitals, not to constitute a judgment for damages, but to specify the conditions under which the plaintiff property owner would be entitled to a provisional injunction.

Wheatley v Fairfield, 221-66; 264 NW 906

What constitutes judgment—entry in record book essential. Neither the mental conclusion of the judge presiding at a trial, nor the oral announcement of such conclusion, nor his written memorandum entered in his calendar, nor the abstract entered in the judgment docket, constitutes a judgment. A judgment cannot be said to be entered until it is spread by the clerk upon the record book.

Lotz v United Markets, 225-1397; 283 NW 99

VI CONSTRUCTION

General verdict on multiple issues—presumption. The court will not, the rights of third parties being involved, assume that a general verdict, unaided by any special findings, was based on one of several different and permissible grounds.

Eclipse Co. v Davis, 201-1283; 207 NW 238

Conflicting findings. An unappealed decree which is sustainable only on a finding of a certain fact must prevail over a contrary finding of fact in the decree.

Leach v Bank, 202-265; 209 NW 422

Recitals accompanying decree — effect. A recital in a so-called judgment entry in real estate mortgage foreclosure that plaintiff "shall have a lien against all property kept on said premises" and that said lien shall be superior to a named chattel mortgage, when not carried into the decree which follows the recital, is no part of the decree, and is not binding on anyone, a fortiori when such recital finds no support in the pleadings or in the stipulation filed in the case.

Van Alstine v Hartnett, 210-999; 231 NW 448

Record of judgment clarified by later entry. When the court stated in its entry of judgment: "The defendant excepts to said judgment. Exceptions allowed and granted.", and in ruling on a motion for a new trial, made an entry that the above-quoted was intended to save an exception for the defendant, the court was correct in its action to clarify the record, and on appeal the defendant could not contend that the entry could only be interpreted to mean that the exception to the judgment was sustained.

Wessman v Sundholm, 228- ; 291 NW 137

Decretal portion inconsistent with recital of facts. The decretal portion of a decree, when in conflict with recital of facts, takes precedence, and the decree is not void because of the inconsistency, and appeal lies only on the decretal portion of the decree that is final judgment.

Higley v Kinsman, (NOR); 216 NW 673

Recital of facts—effect on nonparty. The recital of facts in a decree cannot have binding force on a nonparty to the proceedings.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Invalid stipulation. A stipulation in divorce proceedings, even tho carried into the decree, is a nullity in so far as it seeks to render land exempt from the claims of creditors of the fee title owner.

Putensen v Dreeszen, 206-1242; 219 NW 490

Accrued and unpaid installments of alimony unchangeable. While the court, in divorce proceedings, has ample power, on a showing of change of conditions of the parties, to modify a former order or judgment for alimony or support money, yet the court is wholly without jurisdiction to cancel installments which have accrued and which remain unpaid under said former order or judgment.

Horn v Horn, 221-190; 265 NW 148

Enjoining proceedings—unallowable venue. An action will not lie in one county to enjoin proceedings on a judgment rendered in another court in another county, even tho plaintiff's action is based on the claim that the judgment is wholly void.

Ferris v Grimes, 204-587; 215 NW 646

Inconsistent remedies—irrevocable election—effect. A judgment creditor who, instead of satisfying his judgment (1) by enforcing his lien on personal property which his judgment debtor had assigned to him as security, satisfies said judgment, (2) by buying in the same property under a general execution levy and sale under his said judgment, must be deemed to have irrevocably waived all right under his said assignment as security, it appearing that after said levy but before the sale thereunder, the said judgment creditor learned that the judgment defendant had also assigned said property to another party.

Zimmerman v Horner, 223-149; 272 NW 148

Remittitur—effect on prior judgment entry.

Fox v McCurnin, 210-429; 228 NW 582

Unauthorized contracts. A judicial holding that municipal warrants issued for the erection of a municipal waterworks are void because the erection had not been authorized by the voters, is necessarily a holding that the contract under which the warrants are issued is also void.

Roland Co. v Town, 215-82; 244 NW 707

VI CONSTRUCTION—concluded

When lien effective. A decree which establishes in plaintiff a lien on real estate "subject to the payment" of a named claim, and which provides for a sale of the land subject to said claim, cannot properly be construed as requiring plaintiff to pay and discharge said claim as a condition precedent to the attaching of plaintiff's lien.

Farber v Ritchie, 212-1396; 238 NW 436

Judgment not contract. A judgment is not a contract in the ordinary sense of said latter term.

Berg v Berg, 221-326; 264 NW 821

Reservation of unpleaded issue. In an action to enjoin a public utility company from maintaining an electric light and power plant within a city, the reservation in the final decree of the question of the right of the company to maintain a similar plant running through the city and supplying points outside the city—a plant distinct from the company's city plant—is proper when the pleadings do not fairly embrace said latter plant.

Iowa Co. v Town, 217-291; 251 NW 609

Where reasonable minds disagree—judgment affirmed. In action for damages to plaintiff's automobile, judgment will be affirmed, on appeal, where reasonable minds might reasonably disagree on the fact issues.

Schenk v Moore, 226-1313; 286 NW 445

Construction and operation—decree as entirety for res judicata. A mortgage foreclosure decree will be construed in its entirety to determine the precise matter adjudicated.

Titus Co. v Natural Gas, 223-944; 274 NW 68

Construction as entirety—resort to pleadings. A decree is construed in its entirety, and obscurity or ambiguity may be clarified by resort to the pleadings and proceedings.

Sutton v Schnack, 224-251; 275 NW 870

Approval of executor's report not construction of will. The fact that the court had approved an executor's report, wherein he had attempted to relieve an estate of inheritance tax on the ground that all devises in the will were contingent, does not mean that such holding is a construction of the will, since the construction of the will was not in issue.

Flanagan v Spalti, 225-1231; 282 NW 347

Conclusiveness—nonadjudication. It is quite captious to claim that a decree adjudicates a matter which is specifically left open for future determination.

Lehr v Switzer, 213-658; 239 NW 564

Granting unallowable relief. The court may not decree the cancellation of an unquestioned judgment or decree a reconveyance of land when the validity of the original conveyance was not properly in issue.

Benson v Sawyer, 216-841; 249 NW 424

Quieting title—relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple", the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Land subjected to bank's judgment—attorney lien—belated cost modification. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Bank v Jordan, 224-28; 276 NW 71

Right of subrogation—deducting set-off. A vendor who is compelled to discharge a judgment lien on real estate after the amount of the judgment has been deducted from the purchase price is entitled to be subrogated to the rights of the judgment plaintiff against a subsequent purchaser who is not a purchaser for value and without notice, subject to any indebtedness owed by the vendor to the vendee, and growing out of the same transaction.

Home Co. v Burrows, 207-1071; 224 NW 72

Deception constituting fraud—requisites to nullify judgment. Fraud as will invalidate a duly entered decree must be perpetrated by or in some manner connected with the opposing party or his attorney.

Ware v Eckman, 224-783; 277 NW 725

Enforcement—void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

Corporation judgment compromised—former stockholder—no authority. Stockholders who had sold their stock after the corporation had

recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

VII ACTIONS AND DEFENSES MERGED, BARRED, AND CONCLUDED

Splitting causes—pleading. See under §11111 (II)

Matters concluded which might have been litigated. An adjudication operates as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

In re Christensen, 227-1028; 290 NW 34

Conclusiveness—unappealed judgment. Principle reaffirmed that an unappealed judgment for fraud is conclusive on the fraud-doer as to all elements of the fraud.

Breza v Federal Soc., 200-507; 205 NW 206

Reversal as to one count—effect on adjudicated counts.

Pease v Bank, 210-331; 228 NW 83

Recitals not an adjudication. Recitals in the nondecretal portions of a foreclosure decree that the wife of the maker of the note in question was an accommodation maker are not evidence in a subsequent hearing in probate on the wife's claim against the estate that she was such accommodation maker, especially when the foreclosure order left such question open for future determination.

In re Cohen, 216-649; 246 NW 780

Bid for full amount of claim—effect on pre-existing fire loss. A mortgagee who forecloses after a fire loss, but who therein makes no claim to an insurance fund paid to the titleholder on account of said loss, and who bids in the property for the full amount of his judgment, interest, and costs, and later receives a sheriff's deed, must be deemed to have irrevocably waived all claim to said insurance fund, even though the titleholder received said fund under an agreement to rebuild the burned buildings.

Union Ins. v Bracewell, 209-802; 229 NW 185

Vendor's agreement with mortgagee adjudicated in foreclosure—no effect on purchaser. When the mortgagor of a tract of land had an agreement with the mortgagee to release a lot, which was part of the tract, after the buyer of that lot had paid a certain part of the price, and in an action to foreclose the mortgage, the agreement was adjudicated adversely to the mortgagor who had not obtained the release, in a later action to recover payments the buyer could not be affected by such agreement to which he was not a party.

Trammel v Kemler, 226-918; 285 NW 196

Matter excluded from judgment. Tho a subject matter is fully covered by pleading, yet there can be no adjudication thereof if the court specifically excludes said subject matter from its final determination—reserves said matter for future determination.

Central Bank v Herrick, 214-379; 240 NW 242

Insufficient plea. A naked showing that plaintiff had at a former time brought an action against another party on the same subject matters and that such action had been "settled", affords no basis for a plea of res judicata.

Goben v Akin, 208-1354; 227 NW 400

Plea—technical inaccuracy. The pleading of an adjudication in a reply instead of in the petition, does not necessarily constitute an error of consequence, even tho it be conceded that the technical rules of pleading are violated.

Cochran v School Dist., 207-1385; 224 NW 809

Plea—sufficiency. An informal and defective plea of a former adjudication may be sufficient, in the absence of a proper attack thereon.

Murphy v Hahn, 208-698; 223 NW 756

Special plea required. He who relies on a prior adjudication must plead it.

Andrew v Bank, 205-237; 216 NW 12

Prior adjudication—pleading prerequisite to proof. A prior adjudication must be pleaded before evidence thereof is admissible. Rule applicable to interpleaders.

Boone College v Forrest, 223-1260; 275 NW 132

Unpleaded homestead exemption. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff and that plaintiff's judgment was a lien on the land is immune from subsequent attack on the ground that the land was, at the time of the conveyance, the homestead of the grantor and grantee, such fact not being pleaded in the action.

Reining v Nevison, 203-995; 213 NW 609

Adjudication of homestead status. An unquestioned order in bankruptcy setting off to a bankrupt certain land as a homestead is, as to all parties to the proceedings, a final adjudication that said land was then a homestead.

Bracewell v Hughes, 214-241; 242 NW 66

VII ACTIONS AND DEFENSES MERGED, BARRED, AND CONCLUDED—continued

Unpleaded discharge in bankruptcy. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff is immune from subsequent attack on the ground that, when the decree was rendered, the judgment in question had been discharged in bankruptcy, such fact not having been pleaded in said action.

Reining v Nevison, 203-995; 213 NW 609

Setting aside conveyance—res judicata. An adjudication in bankruptcy trustee's action to set aside conveyance, as constituting unlawful preference in bankruptcy, bars a subsequent action for the same purpose based on lack of consideration and fraud upon creditors.

Bagley v Bates, 223-836; 273 NW 924

Ruling on motion to dismiss—res judicata. A ruling on a motion to dismiss garnishment proceedings on the grounds that the property was in custodia legis and not subject to garnishment was not premature and was res judicata even tho made before the garnishee was examined and the garnishment proceedings completed, when the court had jursidiction of the parties and subject matter.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Matters concluded—issue raised by rejected amendment. An application to amend the petition offered after submission of the case, tho overruled by the court, makes the issue raised by the amendment res judicata when the identical issue is raised in a subsequent action, especially when no appeal is taken from the ruling on such application.

Bagley v Bates, 223-836; 273 NW 924

Title to nonlitigated lands. An adjudication in partition that a wife did not take under her husband's will, and a due accounting in that action by the widow of all sums received by her, may constitute a full adjudication of the title to property purchased with said proceeds, even tho such property was not specifically involved in said partition proceedings.

Roquette v Marr, 200-751; 205 NW 359

Preliminary and interlocutory injunctions—inevitable dissolution. A temporary injunction in an untried action in one county should be dissolved when it is made to appear that, since the commencement of the action, the right to such injunction has been determined adversely to the plaintiff by the supreme court in an action instituted in another county involving, inter alia, the same subject matter.

Bratt v Life Co., 209-881; 226 NW 724

Judgment in rem—nonmerger of debt sued on. In an action aided by attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation, —if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Conclusiveness—attachment proceedings. An unappealed holding in attachment proceedings that plaintiff, tho entitled to judgment against defendant, had acquired no lien on certain real estate is a finality. In other words, plaintiff may not, years afterwards, between other parties dispute said adjudication.

Nagl v Hermsen, 219-223; 257 NW 583

Actually litigated matters concluded. In proceedings on executor's application for authority to mortgage real estate for purpose of paying claims and administration expense, objections as to validity of claims which had been finally adjudicated adversely to objectors in former proceedings wherein the objectors all appeared, filed claims, and were represented by counsel, could not be relitigated, and likewise objectors' right to an accounting against executor in such proceedings could not be relitigated since it had been previously adjudicated that such matter had no proper place therein.

In re Christensen, 227-1028; 290 NW 34

Ruling on demurrer conclusive. A ruling sustaining a demurrer in mortgage foreclosure proceeding on the ground that the estate of the mortgagor is not personally liable on the mortgage because of the failure of the mortgagee to file said claim against the estate within the time provided by statute, constitutes a final adjudication of such nonliability when plaintiff neither pleads over nor appeals from the ruling.

Oates v College, 217-1059; 252 NW 783

Demurrer—ruling as adjudication. In an action at law on a money demand, aided by attachment on the ground that defendant had fraudulently conveyed his land, the overruling of defendant's demurrer based on the ground that the action was barred because not brought within five years after the recording of said deed, cannot be deemed an adjudication of the ground of said demurrer so as to prevent defendant from asserting the same ground against a later-brought action in equity to set aside said alleged fraudulent deed.

Bristow v Lange, 221-904; 266 NW 808

Inhering subject matters. A final opinion of the supreme court in an equitable action is conclusive as to all inhering subject matters

except such as the court may and does specifically except therefrom.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Conclusiveness—adjudication as to legal effect of contract. A final holding on appeal that a certain agreement between a corporation and a purchaser of its corporate shares constituted an absolute rescission of a contract of purchase of such shares, becomes the law of the case and precludes the after-presented contention that such agreement was a contract of indemnity only.

In re Selway Co., 211-89; 232 NW 831

Adjudication of validity of sale. An adjudication to the effect that the foreclosure sale of a railroad was valid, bars, needless to say, subsequent proceedings based on the assumption or allegation that such sale was wholly void.

Beaton v Town, 209-1254; 228 NW 109

Dual presentation of same issue in same action. A hearing on the merits of a motion to dissolve an attachment on the grounds that movant, and not the principal defendant, was the absolute owner of the property, does not necessarily preclude the movant from again presenting and trying out, in the same action, his claim of ownership, on a petition of intervention.

Citizens Bank v Haworth, 208-1100; 222 NW 428

Nondual presentation. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in defense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Judgment for installment as adjudication. A judgment for the amount of one installment and interest on a promissory note, being all that was then due on the note, is not an adjudication of an action to recover a future maturing installment and interest, the note not containing an accelerating clause maturing the entire indebtedness in case of a default.

Andrew v Stearns, 215-5; 244 NW 670

Acquittal—nonbar to injunction. A verdict of "not guilty" under an indictment charging the keeping of an intoxicating liquor nuisance on certain property is no bar to an action to enjoin the same defendant from maintaining a liquor nuisance on the same property, and based on the same transaction on which the indictment was based.

State v Osborne, 207-636; 223 NW 363

Setting aside for retrial on new theory. After a cause has been fully tried on the theory that intervenors are entitled to recover from plaintiff the amount for which their property had been sold on execution by the sheriff, and after the resulting judgment has been entered and paid and the proceeds accepted by intervenors, it is quite too late to reopen the case and try it anew on the theory that intervenors are entitled to recover the reasonable value of the property so sold.

Peoples Bk. v McCarthy, 211-40; 231 NW 482

Evidence necessary for res judicata. Without evidence as to extent and value of extraordinary services, an allowance therefor to executor and his attorney is not res judicata as to factual matters, and the attorney's statement which fails to separate time spent in courtroom from time spent in briefing and consultation will not furnish proper legal basis for any final adjudication.

In re Metcalf, 227-985; 289 NW 739

Iowa judgment for death damages under compensation act—effect in foreign state. Where a judgment fixing the compensation for a railroad employee's death, due to an accident in Iowa, was rendered by an Iowa court under the Iowa compensation act, it may be pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act, since both courts had jurisdiction to decide whether deceased was engaged in intrastate or interstate commerce, and that the Iowa judgment, being the earlier one rendered, was res judicata in the other action, altho the other action was brought first.

Chicago RI Ry. v Schendel, 270 US 611

Splitting actions—res judicata—persons and matters concluded. Under the doctrine of res judicata a party must try his entire cause without splitting the issues or defenses, and so a former judgment of a court of competent jurisdiction rendered on the merits between the same parties or privies and on the same cause of action estops and bars relitigation of, not only matters raised, but also matters which might properly have been raised.

Bagley v Bates, 223-836; 273 NW 924

VIII JUDGMENTS OPERATIVE AS BAR

Acquittal as bar to civil action—penalties—forfeitures. The general rule is that a defendant's acquittal in a criminal prosecution is neither a bar to a civil action against him, nor evidence in such action of his innocence; but, when the subsequent action, altho civil in form, is quasi criminal in nature, as to recovering penalties or declaring forfeitures, the second action may be barred by the former.

Bates v Carter, 225-893; 281 NW 727

Splitting action. A party to a continuing, executory contract may, notwithstanding the

VIII JUDGMENTS OPERATIVE AS BAR —continued

wrongful repudiation of the contract by the other party, insist on the contract and sue and recover the matured installments to date; and such action is no bar to a subsequent action to recover henceforth for the wrongful breach of the contract.

Collier v Rawson, 202-1159; 211 NW 704

Splitting actions—res judicata—persons and matters concluded. Under the doctrine of res judicata a party must try his entire cause without splitting the issues or defenses, and so a former judgment of a court of competent jurisdiction rendered on the merits between the same parties or privies and on the same cause of action estops and bars relitigation of, not only matters raised, but also matters which might properly have been raised.

Bagley v Bates, 223-836; 273 NW 924

Liability of bank superintendent for failure to collect claims. When there was no evidence of wrongdoing on the part of the superintendent of banking in his capacity as bank receiver, nor sufficient evidence to show negligence on the part of the bank examiner, a previous decision that the superintendent was negligent in not filing claims within the statutory time for filing in order to collect them, does not control when an objection was made because there was no accounting of these claims in the final report of the receiver when neither the issues nor parties are identical with the previously decided case.

Bates v Niles, 226-1077; 285 NW 626

Conclusiveness — bank stock assessment claim. State superintendent of banking, who in a final decree in equity was denied right of recovery on stock assessment against executor and beneficiaries under will of decedent, could not thereafter recover the same assessment by way of a claim filed in the estate, even tho in the latter instance he acted in statutory capacity as receiver. So held in reaffirming principles that one not a party to a suit, who assumes control of the litigation, employs counsel and has a right to control and conduct the same, is bound by the judgment, and that a judgment is conclusive as to all parties to a suit and all parties in privity.

In re Lyman, 227-1191; 290 NW 537

Adjudication of insured's physical condition —not binding in later action. Where an insured's claim is embodied in a series of suits, an adjudication of a plaintiff-insured's physical condition, determined in one action, does not adjudicate said condition in a subsequent independent action.

Eller v Guthrie, 226-467; 284 NW 412

Future payments—total disability. In action on life insurance policy for total disability payments, where supreme court ordered insurance company in prior case decided in 1931 to pay annual benefits up to that time, the decision of the trial court in a subsequent action on the same policy ordering payments up to 1937 and thereafter, was erroneous as to that part requiring future payments, particularly since opinion in first appeal is binding not only under the doctrine of stare decisis, but also under the rule of res adjudicata, when the first opinion held that "continuance of such disability must be established by later proofs".

Kurth v Ins. Co., 227-242; 288 NW 90

Matters subsequent to decree. A judgment is not res judicata of matters subsequent thereto.

Crow v Mtg. Co., 202-38; 209 NW 410

Adjudication of present conditions. An adjudication which goes no further than to adjudicate conditions as they exist at the date of the decree, necessarily constitutes no adjudication of subsequent conditions attending the same subject matter; and especially so when the decree retains jurisdiction in the court to review subsequent conditions.

In re Cool, 210-30; 230 NW 353

Probate claim denied—no bar in subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Retention of jurisdiction to administer trust —effect. A decree of the trial court to the effect that a conveyance was not fraudulent as to creditors, but that the court should retain jurisdiction of the action for the sole purpose of administering a trust therein involved, all of which was duly affirmed on appeal, constitutes a final adjudication of all matters save the administration of said trust.

Central Shoe v Rashid, 210-415; 229 NW 171

Decisions involving former assessments not res judicata. Taxes do not arise out of contract and each years taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

Former assessments not res judicata. The assessment of property for taxation is separate for each year, being based on a separate

valuation, and an adjudication for one year cannot definitely fix the value for succeeding years.

Trustees v Board, 226-1353; 286 NW 483

"Finding of fact" and "judgment" contrasted. A proceeding in which the trial court makes a finding of fact only, but in which no judgment is entered may not be deemed an adjudication of a pending proceeding between the same parties which does result in a judgment in conformity with an appellate order.

State v Beaton, 205-1139; 217 NW 255

Issues specifically withheld. The rights of a party necessarily cannot be adjudicated by a decree which specifically excludes such rights from the scope of the decree.

Parkinson v Fleming, 208-345; 223 NW 685
Central Bank v Herrick, 214-379; 240 NW 242

Issues specifically withheld. Parties, in agreeing to a compromise, may specifically withhold or exclude certain issues or questions from the adjudication. Needless to say that such issues are not adjudicated.

Jones v Surety Co., 210-61; 228 NW 98

Lack of opportunity to litigate issue.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Withdrawal of intervention—effect on adjudication.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Abortively tendered issue. An action by a mechanic's lien claimant against the owner of the premises to recover for the work done and for the material furnished, is necessarily not barred because the same issues were abortively tendered in a former action and not tried out.

Matthews v Quaintance, 200-736; 205 NW 361

Nonadjudicated issues. A decree which grants plaintiff's prayer for a rescission of a contract of purchase of land and fixes the terms of accounting by the vendor is not an adjudication of an issue of accounting by other prior vendors and purchasers to whom part of plaintiff's money was paid by mistake or inadvertence, said other parties having appeared only as intervenors, and tendered issues foreign to any accounting by them.

Winn v Williams, 200-905; 205 NW 541

Nonpleaded claim. The right of a purchaser of real estate to recover the purchase price paid will not, in the absence of a plea therefor, be deemed adjudicated in an action in which the vendor is seeking specific performance.

Benedict v Nielsen, 204-1373; 215 NW 658

Boundary line. A decree that a specified portion of a line between adjoining landowners is a boundary line by acquiescence is not an adjudication of the true location of the remaining portion of said boundary line.

Turner v Sandhouse, 205-1151; 216 NW 58

Scope of decree. A decree to the effect that a contract between a contractor and a city was void, and enjoining the city from in any manner making any further payment under the contract, is not an adjudication of another action then pending at law wherein the contractor was seeking to recover on the same subject matter irrespective of the contract. Especially is this true when the decree shows that the court excluded such pending action from the scope of its decree.

Hargrave v City, 208-559; 223 NW 274

Decree as to special assessment not adjudication of damages. A decree fixing the amount of special assessment on property consequent on a street improvement, cannot be deemed an adjudication of the damages suffered by the property owner consequent on the improvement's cutting off the owner's ingress to and egress from the property even tho the decree markedly reduced the assessment made by the city council.

Ashman v City, 209-1247; 228 NW 316; 229 NW 907

Equitable action—adjudication. The general equitable action authorized by section 10313, C., '31, in favor of any party interested under a public improvement contract, may be utilized for two purposes, to wit: (1) to adjudicate the rights of the various parties to the contract funds retained by the public corporation, and (2) to adjudicate the liability, to said parties, of the surety on the contractor's bond to the municipality; but a decree in such action is not an adjudication of the right of the municipality to recover on the said bond when such issue was in no manner presented in such action.

Waukon v Surety Co., 214-522; 242 NW 632

Judgment against maker of note—effect on indorser. A judgment obtained by the indorsee of a promissory note solely against the maker thereof, does not adjudicate or affect any right or obligation of the indorser.

Callaway v Hauser, 211-307; 233 NW 506

Ownership of note—effect. A judgment in an action between the payee of a promissory note and a former collateral holder to the effect that the latter had become and was the unqualified owner of the note precludes the maker of the note, when sued on the note by the adjudged owner, from readjudicating the ownership of the note on the basis of the same facts existing in the former action.

Commercial Bank v Allaway, 207-419; 223 NW 167

VIII JUDGMENTS OPERATIVE AS BAR —continued

Judgment on note alone—mortgage unaffected. A separate judgment on a note does not discharge the mortgage securing it.

Beckett v Clark, 225-1012; 282 NW 724

Different fraud in same transaction. A decree in an action for fraudulent representation in the sale of the corporate stock of one corporation is not an adjudication of an action for materially different fraudulent representations in the sale of the corporate stock of another and different corporation; and this is true tho said actions grew out of the same written contract of purchase.

Reinertson v Prod. Co., 205-417; 216 NW 68

Dismissal of temporary injunction not adjudication. Dismissal of a temporary injunction even after answer is not an adjudication of the cause, as ordinarily a plaintiff asking a permanent injunction is entitled to a trial on the merits.

McMurray v Faust, 224-50; 276 NW 95

Judgment on account stated. A judgment of dismissal rendered strictly on the issue whether there was an account stated is not res judicata of a subsequent action on open account involving the same items.

Hanson v Drug Co., 203-384; 212 NW 731

Eminent domain—compensation—fixtures on mortgaged premises—res judicata. In a proceeding to condemn right of way for a gas pipe line, the fact that the pipe was already installed under an easement which was held in a foreclosure action to be inferior to a prior mortgage, did not thereby give the mortgagee through his foreclosure decree title and ownership of the pipe and fixtures installed on the mortgaged premises, nor is such foreclosure decree res judicata as to title to such pipe and fixtures without trying the issue thereon.

Titus Co. v Natural Gas, 223-944; 274 NW 68

Reformation of deed. A decree in mortgage foreclosure that the mortgagee is not entitled to the reformation of a deed from the mortgagor to a subsequent purchaser so as to show an assumption by such purchaser of the mortgage debt is not an adjudication that the mortgagor is not entitled to such reformation, even tho the mortgagor was a party to the foreclosure, but not a party to the mortgagee's petition for reformation.

American Bank v Borcherding, 205-633; 216 NW 719

All available issues. The purchaser of mortgaged property, duly made a party to the foreclosure of the mortgage, may not afterwards relitigate any issue which was tendered in the foreclosure proceedings or which was available to the parties therein; otherwise, of course, as to nonavailable issues, e. g., whether the purchaser had been credited with all the payments made by him on his contract of purchase.

Heppe v Bank, 209-1017; 227 NW 334

Foreclosure — rents — adjudication against chattel mortgage. On the issue, in real estate mortgage foreclosure, whether an outstanding lease between the owner and his tenant (parties to the action) was superior to the mortgagee's right to a receiver for said premises and for the rents thereof, an unappealed decree which orders the appointment of such receiver works an eviction of said tenant and the consequent nullification of a chattel mortgage by the landlord on his share of the crop rent under said lease, it appearing that the real estate mortgagee had no notice or knowledge of such chattel mortgage until after the entry of his decree of foreclosure.

Keenan v Jordan, 204-1338; 217 NW 248

Failure to enforce all security—res judicata. A mortgagee who, without changing his position in any degree, receives the written agreement of a junior incumbrancer to pay the interest on the mortgage, and the taxes on the mortgaged property, simply acquires a new and additional security for his existing mortgage debt; and if he forecloses his mortgage by personal service on the mortgagor and on said junior incumbrancer (even for a sum less than is due) without asking any relief on said additional security, he will be absolutely precluded from maintaining further action on such agreement. (A fortiori is this true when it otherwise appears that the mortgagee was fully satisfied by his foreclosure.)

Schnuettgen v Mathewson, 207-294; 222 NW 893

Adjudging priority on publication service. A decree, rendered on service by publication, in the foreclosure of a second mortgage, adjudging that said second mortgage is senior and superior to a first mortgage, in accordance with a definite pleading and prayer to said effect based on a good faith but mistaken belief that said first mortgage had been paid, is binding and conclusive on the holder of said first mortgage, and may not be collaterally assailed by said first mortgagee in an action to foreclose his mortgage. (It appears that said first mortgagee had allowed the time to elapse in which to attack said decree under §11595, C., '27.)

Lyster v Brown, 210-317; 228 NW 3

Foreclosure—sale—delinquent taxes paid by mortgagee omitted from judgment—effect. A mortgagee who bids in the property at foreclosure sale, without protecting himself by adding thereto the delinquent taxes he had previously paid under a clause in the mortgage, may not, after he is appointed receiver during the redemption year, collect and apply the rents and profits to reimburse himself for such delinquent taxes. The owner when redeeming,

by paying the judgment and costs, takes title free from the lien of such taxes.

Monroe v Busick, 225-791; 281 NW 486

Appointment of receiver. An unappealed decree appointing a receiver of real estate and of the rents and profits thereof must, in a subsequent intervention in the cause, be deemed an adjudication against the owner, of all the issues involved in said appointment.

Canfield v Sec. Co., 216-747; 249 NW 646

Order fixing fiduciary's liability binding on surety. An unappealed order of court, entered on the objections of a beneficiary to the report of a fiduciary, fixing the amount of liability of the fiduciary, is conclusive (in the absence of fraud) on the surety and those claiming under said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Matters litigated in prior action. In an action by heirs of intestate against a son of intestate to have property received by such son decreed to be an advancement and be deducted from the son's interest in the estate, wherein it is shown that such son had instituted a prior action in partition to have his interest in realty determined, held that such issue of advancement should have been raised as an affirmative defense and litigated in the prior partition action, and therefore is now res judicata.

Robbins v Daniel, 226-678; 284 NW 793

Enjoining action in foreign state. When a claim or cause of action has been fully and finally adjudicated between residents of this state, injunction will lie to enjoin the attempt of the defeated party to relitigate the issue in a foreign jurisdiction.

Oates v College, 217-1059; 252 NW 783; 91 ALR 563

Unappealed but erroneous order dismissing party defendant. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

Collateral attack—immunity from. Conceding, arguendo, that the municipal court was in error in overruling defendant's motion for change of venue to the county of his conceded residence, yet the court manifestly had jurisdiction to rule on the motion, and defendant having failed to seek correction of the error by appeal or other appropriate direct proceedings, the ruling becomes a finality, and the subject matter thereof cannot properly be injected into subsequent collateral proceedings wherein the judgment entered on the merits is sought to be enforced. So held where the collateral proceeding was an action to recover on a stay bond.

Educational Film v Hansen, 221-1153; 266 NW 487

Partition sale not subject to collateral attack. A partition sale, regular on its face, cannot be collaterally attacked in a subsequent proceeding on objections to a guardian's final report.

In re Delaney, 227-1173; 290 NW 530

Identity of issues, parties, and subject matter. An adjudication that plaintiff was not entitled to an injunction restraining the condemnation of land for highway purposes, necessarily precludes the subsequent relitigation of the same issue, between the same parties, and concerning the same land.

Hoover v Highway Com., 210-1; 230 NW 561

Lack of identity in res and parties. In injunction action involving title to real estate, the rights of the parties could not be affected by decrees in previous litigation concerning other lands or other parties not connected in interest with present parties or their predecessors in title.

Arnd v Harrington, 227-43; 287 NW 292

Matters actually and potentially in issue. Two proceedings were consolidated for trial only:

1. An action for injunction, general equitable relief, and specifically enumerated damages consequent on a trespass by a city in overflowing plaintiff's land, and
2. An appeal from an award in proceedings by the city to condemn said land.

On the trial, plaintiff was awarded no judgment for the damages claimed by him in his equitable action because he made no attempt to establish them—probably on the assumption that he would be made whole by the payment of the final award in the condemnation proceedings. But the city refused to pay the final award in the condemnation proceeding and abandoned said proceeding.

Plaintiff then commenced a new action for damages, including, inter alia, the identical damages formerly claimed in said equitable action. Held, all damages which plaintiff had suffered prior to the trial of said equitable action, whether they were then in issue or not, were res judicata.

Wheatley v Fairfield, 221-66; 264 NW 906

Setting aside conveyance—res judicata. An adjudication in bankruptcy trustee's action to set aside conveyance, as constituting unlawful preference in bankruptcy, bars a subsequent

VIII JUDGMENTS OPERATIVE AS BAR —continued

action for the same purpose based on lack of consideration and fraud upon creditors.

Bagley v Bates, 223-836; 273 NW 924

Matter incidental to ruling on motion not res judicata. In a libel action brought against a newspaper and others as joint tort-feasors, when affiants testified as to the matter of agency at a hearing on a motion to strike part of the petition, a ruling by the court denying the motion was not res judicata on the question of agency, as agency question was only incidental to the question of misjoinder raised by the motion to strike and could be raised in a subsequent trial on the merits of the case.

Cooper v Gazette Co., 226-737; 285 NW 147

Decree denying injunction decisive on bond liability. A bankruptcy trustee's injunction action against a bankrupt, which action effectuated a dispossession of certain land to which the bankrupt's wife held title, and such action, after appeal, being finally determined adversely to the trustee's claimed right to possession, under which possession he had sold the crops, becomes an adjudication decisive on the issues in a subsequent action on the injunction bond for damages for wrongful issuance of the writ of injunction.

Goltry v Relph, 224-692; 276 NW 614

Necessarily involved but unpleaded issue. A vendor of real estate who seeks specific performance of a written contract without asserting any oral modification of the contract, and is decreed not entitled to such performance, may not, when sued for a return of the purchase price, plead in defense that said written contract was orally modified by the parties and that the purchaser refused to carry out such modified contract. This is true because the subject matter of this latter plea was necessarily adjudicated in the action for specific performance.

Benedict v Nielsen, 204-1373; 215 NW 658

Conclusiveness—jurisdiction of court. Where a court adjudicates the nature and scope of a bond, in an action praying (1) for a money judgment on the bond, and (2) for reformation of the bond and a money judgment thereon, it may not be said that the adjudication of the nature and scope of the bond is not res judicata because beyond the jurisdiction of the court, when the record shows that the nature and scope of said bond was the very keystone in the arch of plaintiff's alleged cause of action, and that the prayer for reformation was only incidental thereto.

King City v Sur. Co., 212-1230; 238 NW 93

Partition — conclusiveness of proceeding. Where testator devised real estate to certain wards on condition that they pay $8,000 into decedent's estate within one year after his death and where, in a partition proceeding to which the wards were parties, court found such condition was not met and that devise had lapsed and the land was sold for $7,200, the wards could not in a subsequent proceeding on objections to guardian's final report maintain position that they still owned the land and were entitled to rents and profits therefrom, since the partition proceedings constituted an adjudication as to every matter there in issue and as to all questions necessarily in issue.

In re Delaney, 227-1173; 290 NW 530

Adjudication and loss of right. The right to foreclose a mechanic's lien is wholly lost by the act of the claimant, when made a party to mortgage foreclosure, (1) in filing a cross-petition for foreclosure of his lien without service of notice of such filing and of hearing thereon; (2) in filing an answer which, in effect, repeats all the allegations of the cross-petition; (3) in allowing the proceedings to go to decree, which omitted any foreclosure of the mechanic's lien, but determined the status and priority of all parties, and which ordered a sale of the premises and foreclosed all subordinate parties of all rights after sale, except the right of redemption; and (4) in failing to appeal from said decree.

Matthews v Quaintance, 200-736; 205 NW 361

Conclusiveness of adjudication—lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

Enjoining proceedings—proper court. An action to enjoin proceedings on a judgment rendered in a municipal court cannot be maintained in the district court, even tho both courts are located in the same county.

Keeling v Priebe, 219-155; 257 NW 199

Equitable relief—fraud—burden of proof. A judgment regular on its face must prevail when directly attacked by a stranger thereto unless the latter clearly and satisfactorily establishes his charge of fraud; and until the latter has so established the fraud, the judgment plaintiff is under no obligation to establish the validity of the indebtedness underlying the judgment.

Yungclas v Yungclas, 213-413; 239 NW 22

Mandamus to compel calling of election. A judicial holding to the effect that a petition for the calling of an election to vote on the question of granting an electric light and power franchise was in due form and substance, and that mandamus should issue to compel the calling of such election, is res

judicata of a subsequent petition by the same petitioner for the same relief.

Iowa Co. v Tourgee, 208-198; 225 NW 372

Motion to quash execution—when timely—dead judgment creditor. When innocent third parties are not involved, a motion to quash an execution for nonconformity to statutes prescribing procedure after death of judgment creditor, is not too late, though filed four months after the entry of a garnishment judgment to which only two of the eight heirs interested therein were parties. Such garnishment judgment is an incomplete adjudication and not sufficient to warrant payment by the judgment debtor to the two represented heirs.

Gohring v Koonce, 224-1186; 278 NW 283

Muniment of title. In an action by a son against a bank to recover funds which the son claimed his father had deposited for him, a previous adjudication that the funds belonged to the father and not to the son, rendered in an action by the father against the bank and the son, was not res judicata, but constituted a muniment of title showing that the son had no title to the funds, and barred the present action.

Bennett v Bank, 226-705; 285 NW 266

Pensions—findings and orders. An unquestioned, nonfraudulent order or finding by the board of trustees of the policemen's pension fund, on a due application for retirement on a pension, that the applicant was not entitled to such pension, constitutes a conclusive adjudication of the right to such pension, even tho the board did not act on the advice of a physician as required by statute, and even tho the board otherwise acted irregularly.

Riley v Board, 210-449; 228 NW 578

IX PARTIES CONCLUDED

Discussion. See 12 ILR 426—Judgment against indemnitors and persons liable over.

Substituted service—presumption. A return of service of an original notice which reveals service on defendant by service on a proper member of his family is presumed correct, and judgment rendered thereon is valid tho defendant never learned of the notice. Evidence held insufficient to overcome said presumption.

Dickerson v Utterback, 202-255; 207 NW 752

Conclusiveness as to all parties in privity—bank stock assessment claim. State superintendent of banking, who in a final decree in equity was denied right of recovery on stock assessment against executor and beneficiaries under will of decedent, could not thereafter recover the same assessment by way of a claim filed in the estate, even tho in the latter instance he acted in statutory capacity as receiver. So held in reaffirming principles that one not a party to a suit, who assumes control of the litigation, employs counsel and has a right to control and conduct the same, is bound by the judgment, and that a judgment is conclusive as to all parties to a suit and all parties in privity.

In re Lyman, 227-1191; 290 NW 537

Nonparty to action. As a general rule, a party is not bound by an adjudication to which he is not a party.

Citizens Bank v Martens, 204-1378; 215 NW 754

Conclusiveness—insurance rights—beneficiaries not parties. A decree establishing rights to insurance does not adjudicate rights of a beneficiary not a party to the action.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Reversal—decree does not inure to nonappellant. Where an equitable decree adjudged (1) that one of two assignees of the same fund took priority over the other assignee, but (2) that certain mechanics and dealers had lienable claims on said fund prior to both of said assignees, and where, on appeal solely by the defeated assignee, it was adjudged not only (1) that the appellant-assignee took priority over the appellee-assignee, but (2) that said mechanics and dealers had no lienable claims on said fund, held that the judgment on appeal that the mechanics and dealers had no lienable claims on said fund did not inure to the benefit of the appellee-assignee. In other words, the appellee-assignee was still bound by the decree of the trial court because he did not appeal therefrom.

Ottumwa Works v O'Meara, 208-80; 224 NW 803

Defendant by implication. A third party who is not a party defendant in an action legally submits himself to the jurisdiction of the court by directing the actual defendant to appear for and on behalf of said third party and to protect his interest.

Davis v Agr. Soc., 208-957; 226 NW 90

Bad-faith defense by vouchee. One who is vouched by a defendant into an action and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a codefendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee, knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

IX PARTIES CONCLUDED—continued

Conclusiveness on personal representative. A decree that a defendant is the absolute owner of certain personal property is conclusive on the personal representative of the plaintiff.

Howell v Howell, 211-70; 232 NW 816

Nonparty to action. A decree or order to the effect that a deposit in an insolvent bank belonged to a municipality but was not entitled to an equitable preference in the liquidation of the assets of the bank is not binding on a party who actually made the deposit, but who was in no manner made a party to, or had any control over, the proceedings which resulted in said decree or order, tho he had requested the municipality and its treasurer to apply to the court for an order granting said preference.

Leach v Bank, 206-265; 217 NW 865

Nonidentity of parties. An adjudication (in mortgage foreclosure) solely between the mortgagee and the grantee of the premises, that the grantee had not assumed the mortgage debt, is no bar to a subsequent independent action by the mortgagor-grantor against said grantee so to reform the deed to grantee as to embrace such assumption, and to recover of said grantee the deficiency which resulted from the foreclosure sale, said deficiency having been paid by said mortgagor-grantor. And this is true even tho the mortgagor-grantor was a party to said foreclosure.

Betzenderfer v Wilson, 206-879; 221 NW 497

Different parties and issues. A decree in an action between a residuary legatee and the donee of a gift, on the issues whether donor was mentally competent to make the gift, and whether he had been fraudulently imposed upon, cannot act as an adjudication of an action by the executor of the donor to set aside said gift as a fraud on the creditors of the donor.

Chamberlain v Fay, 205-662; 216 NW 700

Lack of identity in res and parties. In injunction action involving title to real estate, the rights of the parties could not be affected by decrees in previous litigation concerning other lands or other parties not connected in interest with present parties or their predecessors in title.

Arnd v Harrington, 227-43; 287 NW 292

Persons not parties or privies. A party who purchases a municipal improvement certificate, lienable on certain property, is not privy to (and therefore not bound by) a subsequently instituted action to quiet title, and the decree entered therein, when he is not made a party to said action.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Nonparty and nonprivy. A judgment to the effect that drainage improvement costs (designed ultimately to be apportioned among several separate districts) must be assessed in accordance with a specified statute is not conclusive in a subsequent proceeding against a district which was not a party to the first proceedings and which was not privy to any party to said first proceeding.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Appeal—effect on assignee of prematurely issued certificates. The assignee of paving assessment certificates who takes his assignment during the pendency of an appeal to the district court by the property owners (the certificates being prematurely issued) is bound, as far as the property owners are concerned, by the final decree on appeal, even though said assignee was not a party to such appeal.

Western Corp. v City, 203-1324; 214 NW 687

Conclusiveness on contractor. A decree which sustains objections of property owners to a proposed drainage assessment on the assigned ground that certain specified contracts are illegal and void is conclusive on the contractor and his assignees, even tho they are not in fact represented at such hearing, because in law the board of supervisors is, in such proceeding, made the representative, not only of the district, but of every interested party except the adversary parties.

First N. Bk. v County, 204-720; 216 NW 8

Successive actions by several beneficiaries. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond.

Philip Carey v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Estoppel to relitigate adjudicated fact. A judgment of a court of competent jurisdiction that a bond given to a municipality inured solely to the benefit of the municipality—in other words, that the bond was not a statutory bond, and therefore, did not inure to the benefit of materialmen—works an estoppel on the defeated party to ever thereafter relitigate said issue between the same parties relative to the same bond.

King City v Sur. Co., 212-1230; 238 NW 93

Taxpayer protected by decree. An unappealed decree, in litigation between a city and its contractor, wholly invalidating a compromise agreement relative to the amount which should be paid the contractor on a public improvement, is conclusive on the contractor in subsequent litigation between the contractor and taxpayers of the city involving said compromise.

Roland Co. v Town, 215-82; 244 NW 707

Conclusiveness against rent claimant. A party who intervenes in a real estate mortgage foreclosure, after final decree and after the

appointment of a receiver of the rents, and lays claim to said rents as a trustee under an assignment and chattel mortgage thereof antedating the foreclosure, has no standing when it is made to appear that said "trustee" has no personal interest in said rents and is a "trustee" only in the sense that he is the agent of a party who was duly made a party to the foreclosure, and whose rights were fully adjudicated by the final decree.

Virtue v Teget, 209-157; 227 NW 635

Foreclosure—decree in re rents—effect on nonparty. A decree in mortgage foreclosure that the receiver therein appointed is entitled to the rents of the mortgaged premises, during the redemption period, is not an adjudication binding on one who is not a party to the foreclosure and who holds prior executed rent obligations for the same premises and for the same period.

White v Peterson, 222-720; 269 NW 878

Holding on appeal in receivership proceedings. A holding on appeal in foreclosure proceedings that a deficiency judgment debtor will be entitled to credit on the deficiency judgment in the full amount of funds realized in the receivership proceedings, is necessarily conclusive on all parties to the appeal.

Hansen v Bowers, 211-931; 234 NW 839

Order without issue joined. An order of court approving the report of the receiver of an insolvent bank as to the amount of various deposits owing by the bank does not constitute an adjudication against the receiver precluding him from later setting off against a particular deposit the amount owing by the depositor to the bank, it appearing that the approving order was entered without the joining of any issue as to the right of set-off.

Andrew v Bank, 218-489; 255 NW 871

Administrators—liabilities on bonds—existing judgment against executor—surety's new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Amount necessary to effect tax redemption. A holding on appeal as to the amount which the owner of land must pay in order to effect redemption from tax sale is necessarily conclusive on the parties.

Fidelity Inv. v White, 212-782; 237 NW 518

Judgment against insured — conclusive against insurer. A judgment determining liability of insured for damages for death resulting from use of automobile was conclusive against liability insurance company as to its liability on policy where there was no fraud or collusion in obtaining the judgment and insurance company had timely notice of suit and elected to make no defense, in view of provision of policy and of statute permitting injured person to maintain action against insurance company for amount of judgment against insured after return of execution unsatisfied, irrespective of insured's insolvency.

International Co. v Steil, 30 F 2d, 654

Judgment of illegality of election — effect. The judgment of a contest court holding the election in question illegal is valid and conclusive upon both parties to the contest, unless appealed from and reversed.

Leslie v Barnes, 201-1159; 208 NW 725

Private bank depositors—claims against estate—property available for payment. Where an estate consists of two general classes of assets, to wit: (1) assets employed by decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is temporarily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

Privity—heirs and administrator. The heirs of an intestate, as parties to an action to partition the lands of said intestate, must be deemed to stand in privity with the administrator of the estate who files a cross-petition in said action and thereon obtains a decree that an insolvent heir has no interest in said lands because of his unpaid indebtedness to said estate.

Bauer v Bauer, 221-782; 266 NW 531

Quieting title — virtual representation. All living members of a class, when properly brought into court in an action to quiet title, are deemed (under the doctrine of virtual representation) to represent all after-born persons who would belong to that class.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

"Equitable representation" — limit to doctrine. The rule that in some instances a person may, on the principle of "equitable representation", be bound by an adjudication bearing

IX PARTIES CONCLUDED—concluded

on the title to realty, tho said person is not a party to the action in which the adjudication is had, cannot be extended to include persons who are in being and subject to being brought under the jurisdiction of the court, and who are entitled to notice and hearing as to the matter in question.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

Unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant, arising out of the terms of a testamentary devise, is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189

Inheritance taker as "representative" of contingent remainderman. A decree setting aside the probate of a will and cancelling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

Decree for attorney fees in divorce—nonadjudication as to attorney. A decree in divorce proceedings awarding plaintiff (in addition to a divorce) a specified sum as attorney fees is not an adjudication as to the amount owing by plaintiff to her attorney for services rendered in the action,—the attorney, of course, not being a party to the action.

Duke v Park, 220-889; 262 NW 799
Maddy v Park, 220-899; 262 NW 796
Jones v Park, 220-894; 262 NW 797

Attempt by party to intervene—effect. A judgment quieting title in plaintiff on the ground that the defendant had fraudulently obtained the possession of a deed by plaintiff to defendant and had recorded the same, is not an adjudication of the right of a subsequent purchaser from said defendant because said purchaser attempted to intervene in said action, the record revealing the fact that the intervention was denied on grounds not going to the merits of said purchaser's rights.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Quieting title—relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple", the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

X ASSIGNMENT

Double liability assessments—judgment nonassignable. An assessment against a holder of corporate bank stock in an insolvent bank, ordered by the court under the so-called "double liability" statute (§9251, C., '31), even tho said assessment is in the form of a judgment, is nonassignable by the receiver, even under an authorizing order of court, and if formally assigned, is nonenforceable by the assignee, said attempted assignment being for a purpose other than the payment of creditors.

Roe v King, 217-213; 251 NW 81

XI COMPETENT EVIDENCE AS BASIS

Evidence supporting verdict — judgment finality. Where competent evidence exists to support the verdict, the judgment is final.

State v De Kraai, 224-464; 276 NW 11

Allowance of claim in probate—calculating administrator's assets—conclusiveness. Altho based upon calculations, the finding of a probate court in a claim allowance hearing, based upon evidence that an administrator has or should have sufficient funds to pay a claim, is an adjudication conclusive against attack that the calculations were wrong.

In re Davie, 224-1177; 278 NW 616

Court findings in law action—conclusive on appeal. Findings of trial court in a law action, when supported by the evidence, are conclusive on appeal.

Younkin v Rubio Bank, 226-343; 284 NW 151

XII FOREIGN JUDGMENTS

Discussion. See 5 ILB 230—Foreign equitable decree; 22 ILR 461—Full faith and credit

Divorce—void decree—collateral attack. A decree of divorce, wheresoever rendered, is always open to collateral attack by proof that the court was without jurisdiction to render it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Divorce—"full faith and credit"—comity. The "full faith and credit" clause of the federal constitution does not compel the courts of this state to recognize as valid a default decree of divorce against a defendant domiciled in this state, rendered in a foreign state in appropriate proceedings in rem; but such a decree, when valid on its face, will, as a matter of reciprocal comity between the states, be

recognized as valid in this state, in the absence of allegation and proof of fraud in obtaining it.

Miller v Miller, 200-1193; 206 NW 262

Custody of child—foreign decree—res judicata. A foreign decree of divorce fixing the custody of a child is not res judicata of the rights of a third party in this state to such custody. In any event, such third party may show that, by statute in such foreign state, the custodial decree is not conclusive and unalterable; or he may rest on the presumption that the foreign statute is the same as in this state, relative to such decree's being non res judicata as to subsequent changed conditions.

Barnett v Blakley, 202-1; 209 NW 412

Foreign divorce—when not recognized. A foreign decree of divorce will not be recognized in this state when it is made to appear that the defendant (1) was at all times domiciled in this state, the matrimonial domicile, (2) was never subject to the jurisdiction of such foreign court, and (3) had never consented to, or justified by misconduct, the acquisition by plaintiff of a domicile in such foreign country. Especially is this true when there is no showing that the plaintiff ever acquired a domicile in such foreign country.

Bonner v Reandrew, 203-1355; 214 NW 536

Foreign court refusing to enforce judgment. The full faith and credit clause requires the courts of one state to give to the judgment of a court of another the same effect that is accorded such judgment in the latter state, but, where an Iowa judgment has been adjudicated to be valid in Iowa, an Indiana court should have enforced such judgment, and where it refuses to do so there is no authority to support the proposition that an Iowa court must then follow the example of the Indiana court and also refuse to enforce such judgment in Iowa.

Martin Bros. v Fritz, 228- ; 292 NW 143

Foreign judgment — full faith and credit clause. An unmodified judgment in personam in a court of competent jurisdiction of a foreign state which is then the matrimonial domicile of both husband and wife, for the maintenance of the wife, payable in monthly installments, is entitled to the full faith and credit clause of the federal constitution as to all matured installments, even tho, subsequent to the entry of such judgment, the judgment defendant departs from the matrimonial domicile and obtains in this state a naked decree of divorce on service by publication.

Bennett v Tomlinson, 206-1075; 221 NW 837

Fraudulent decree—new trial. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state, and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

Foreign judicial records—improper certification first raised on appeal. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Nonright to relitigate issue. A defendant who, when sued in a foreign state, litigates the issue that he was immune from the service of process in said state because he was then temporarily and involuntarily therein as a military officer of the federal government and on land owned and used exclusively by said government for military purposes, and who fails to appeal from a ruling denying his claimed immunity, may not relitigate said issue when sued in this state on the foreign judgment.

Northwest. Cas. Co. v Conaway, 210-126; 230 NW 548; 68 ALR 1465

Merger of note in foreclosure decree. The fact that a promissory note sued on has been merged in a foreclosure decree in a foreign state on good personal service, must be specifically pleaded.

Pfeffer v Corey, 211-203; 233 NW 126

Foreclosure—land situated wholly in foreign state. A mortgage on land situated wholly within a foreign state may not be foreclosed in this state, tho the mortgagee may maintain, in this state, an action at law on the note so secured.

Beach v Youngblood, 215-979; 247 NW 545

Matters inhering in judgment. A defendant sued in this state on a nonfraudulent judgment rendered in a foreign state, on the assumption of a mortgage on land, may not counterclaim for damages based on the plea that said assumption was fraudulently imposed upon him.

Perry Fry v Gould, 214-983; 241 NW 666

Insurance—actions on policies—submission to foreign courts—insufficient showing. An

Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent, nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Iowa Assn., 222-969; 270 NW 407

11569 Pleading in abatement and bar.

Necessity for plea. There can be no abatement or stay of an action until another action has been determined, when there is no pleading requesting such abatement or stay.

Music v DeLong, 209-1068; 229 NW 673

Delay in pleading—effect. Defendant's right to plead in abatement is wholly lost when delayed until the plaintiff might legally have brought his action.

Larsen v Ins. Co., 212-943; 237 NW 468

Modification of judgment to avoid apparent bar. A judgment which is essentially in abatement, but which on its face purports to be in bar, will be so modified on appeal as to show that it is in abatement.

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Other action pending. A motion or proceeding for the abatement of an action of forcible entry and detainer, because an equitable action by movant is pending in the district court for relief consequent on the alleged fraud of plaintiff in the forcible detention action, is properly overruled.

Music v DeLong, 209-1068; 229 NW 673

Remand when basis of dismissal uncertain. When the appellate court is quite uncertain whether the trial court dismissed the cause on the erroneous basis of matter in bar or on the basis of insufficiency of evidence to sustain the action in any event, a remand for new trial must be entered.

Bonner v Reandrew, 203-1355; 214 NW 536

Want of demand. Replevin will not be abated for want of demand on defendants for possession prior to the institution of the action (1) when one defendant had incapacitated himself from complying with a demand, and (2) when the other defendant asserted unqualified title against the plaintiff.

Hart v Wood, 202-58; 209 NW 430

Receivership—effect. An action for specific performance is not abated by the subsequent appointment of a receiver for the defendant.

Hawkeye Ins. v Trust Co., 210-284; 227 NW 637

Nonabatement of action by receivership. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bank v McHarg, 217-636; 251 NW 51

Abatement of authorized action. A court having ordered its receiver in partnership to begin action against the partners, in order to collect funds with which to pay creditors, has discretionary power, after such action has been commenced, and on a showing that the receiver has in his possession a very large amount of unliquidated partnership assets, to abate the action until such assets are liquidated.

Day v Power, 219-138; 257 NW 187

Foreign corporations — dissolution and receivership—effect. A foreign decree of dissolution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Foreign corporations—dissolution—effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement, (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streater Co., 221-690; 266 NW 548

11570 Special execution—pleading.

Lien—nonwaiver by taking general judgment. The plaintiff in landlord's attachment by failing to ask for a special execution for the sale of the attached property, and by taking a general judgment against the lessee, does not thereby waive his landlord's lien. On the

contrary, the lien follows the general judgment upon which a special execution may issue notwithstanding the failure to pray therefor, and notwithstanding the failure of the judgment to provide therefor.

Wunder v Schram, 217-920; 251 NW 762

11571 Several judgment.

Judgment against vouchee. Judgment may be rendered not only against the defendant in an action, but against one who has been vouched into the action and who has assumed exclusive charge of the defense, and whose conduct of the defense has been such as to render him, in legal effect, a codefendant.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

11572 Judgment against one of joint defendants.

Rendition of judgment against party—effect. The fact that judgment has been rendered against one of two defendants, on the pleaded cause of action, does not render said judgment-defendant a competent witness to testify, on behalf of the remaining defendant, against an administrator as to a personal transaction with the deceased, said transaction being vital to the defensive plea of said remaining defendant.

Stookesberry v Burgher, 220-916; 262NW820

Submission of separate forms. In an action against the driver and owner of a truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error, the court having specifically and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker, 218-54; 253 NW 923

11573 What relief granted.

ANALYSIS

I RELIEF IN GENERAL
II CONFORMITY TO PROCESS
III CONFORMITY TO PLEADING
IV CONFORMITY TO PROOF

Limitations on judgments by default. See under §11587

I RELIEF IN GENERAL

Void sale — venue. A proceeding wherein relief is sought on the theory that the petitioner bought property at a void judicial sale and received nothing for his purchase price must be brought in the court and in the proceedings out of which the execution arose.

State v Beaton, 205-1139; 217 NW 255

Defective pleading. A defendant may not ignore a suit against him and allow judgment to be entered, and then have the judgment set aside for want of jurisdiction because of merely defective pleading, as distinguished from absence of pleading and prayer.

Nelson v Higgins, 206-672; 218 NW 509

Defect of parties—effect. In mandamus to obtain an order cancelling a tax sale and the certificate issued thereunder (assuming the propriety of such action) the court manifestly cannot disturb the certificate holder when he is not a party to the action.

Wren v Berry, 214-1191; 243 NW 375

Excessive decree. A motion to set aside an award as a statutory award does not empower the court to decree the legal effect and conclusiveness of the award as a common-law award.

Bureker v County, 201-251; 207 NW 115

Accounting — proper form of judgment. Where an accounting proceeding instituted by the widow of a deceased partner in order to determine her dower interest in the partnership property is tried on the mutual theory that her interest when determined should be impressed as a trust on the entire partnership property, a judgment in rem against the partnership property should be entered, and not a personal judgment against the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Jurisdiction—accounting—opening de novo —exceptions. In some cases of gross fraud, mistake, or disadvantage, equity will open the whole accounting de novo, but if all items are not so affected, equity may (1) allow the account to stand except to the extent invalidated by the opposing party, who has the burden to prove errors, or (2) open the account to contest as to such items as are specified to be erroneous; otherwise the accounting is conclusive.

Clark v Iowa-D. M. Bank, 223-1176; 274 NW 919

Relief notwithstanding partial failure of recovery. A subcontractor on a public improvement who, in an equitable action, establishes a contract right of recovery against the principal contractor, is entitled to judgment accordingly, notwithstanding the fact that, because of his noncompliance with the statute, he is denied recovery either against the surety for the principal contractor, or against the municipality, or against the undistributed funds in the hands of the municipality.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Recovery for partial performance. Principle reaffirmed that if the failure to fully perform a contract by one party thereto is caused by the breach of that contract by the other party thereto, the nonbreaching party may recover for his partial performance at the contract rate.

Goben v Paving Co., 214-834; 239 NW 62

I RELIEF IN GENERAL—concluded

Trust property — personal liability. Individuals who voluntarily associate themselves in a business venture in the form of a trust are each personally liable for the authorized acts of their agent.

Daries v Hart, 214-1312; 243 NW 527

Right of trustee. The decree in an action by a trustee in bankruptcy to set aside a conveyance by the bankrupt as fraudulent, should be, not that the trustee is the owner in fee of the property, but that the trustee has a superior lien on the property to the amount of the lienable claims in his hands as such trustee.

Hoskins v Johnston, 205-1333; 219 NW 541

Unallowable procedure. The probate court on entering an order, on due application, modifying a former order relative to the compensation of an executor, has no authority to recognize judicially, on its own motion, the pendency in said court of a petition to remove said executor, and peremptorily and on its own motion, to enter an order suspending or removing the executor on the basis of the testimony already received in the proceedings relative to compensation.

Gray v Mann, 208-1193; 225 NW 261

II CONFORMITY TO PROCESS

Absence of any issue. The court may not decree who is principal in a transaction and who is surety, and render a personal judgment in favor of the surety and against the principal for sums paid by the surety, when the original notice and petition are silent as to such matters, and when there is no other pleading which prays such relief.

Sutton v Rhodes, 205-227; 217 NW 626

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Unallowable personal judgment. A personal judgment cannot legally be entered against a defaulting defendant (1) when no claim is made against him in the original notice, (2) when no cause of action is alleged against him in the petition, and (3) when the prayer of the petition simply asks that defendant's alleged lien be declared inferior to plaintiff's lien; and it is immaterial that defendant was present during the trial and to some extent participated therein, and that after the trial plaintiff, by a belated amendment, injected into the petition a prayer for personal judgment.

Manassa v Garland, 200-1129; 206 NW 33

III CONFORMITY TO PLEADING

Default—amount confined to averments of petition. When a defendant defaults, he is still protected by the law, and plaintiff's recovery must be confined and responsive to the averments in his petition.

Rayburn v Maher, 227-274; 288 NW 136

Failure to limit recovery to specifically pleaded amounts.

Sergeant v Challis, 213-57; 238 NW 442
Albert v Maher, 215-197; 243 NW 561
Wosoba v Kenyon, 215-226; 243 NW 569

Unpleaded theory. Appellant's demand, on appeal, for judgment on an unpleaded theory will be ignored.

Forsberg v Const. Co., 218-818; 252 NW 258

Unallowable relief. The court may not decree the cancellation of an unquestioned judgment or decree a reconveyance of land when the validity of the original conveyance was not properly in issue.

Benson v Sawyer, 216-841; 249 NW 424

Teachers' pension—employment prerequisite —no relief outside issues. A public-school teacher, after 30 years service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

Amendment after default. A personal judgment may not be validly entered on an amendment filed after default, of which amendment the defendant has no notice.

Chandler v Sinaiko, 201-791; 208 NW 323
Sutton v Rhodes, 205-227; 217 NW 626

Recovery dependent on pleading. In an action on a nonnegotiable promissory note, by a transferee thereof, defendant's plea that he be given a set-off in a stated sum because of an account held by defendant against the original payee will not be construed as embracing a demand for interest on said "stated sum".

Lewis v Grain Co., 214-143; 241 NW 469

Conclusiveness of one's own plea. A plaintiff who, in an action on a promissory note, specifically pleads a definite consideration, must stand or fall thereon. Having fallen, he will not be permitted to advantage himself of a consideration possibly reflected in the record, but not embraced within his own chosen plea.

Persia Bk. v Wilson, 214-993; 243 NW 581

Multifarious theories in one count. A cause of action which is not barred until 10 years after the execution and delivery of a deed is shown by a pleading which (1) pleads a contract of purchase of land by the acre, and the deed in fulfillment thereof, (2) shows payment for the acreage represented in the deed, and (3) alleges actual material shortage in the said acreage; and this is true even tho the pleading does allege "mutual mistake" of the parties as to the acreage, and asks for the reformation of a mortgage for the purchase price.

Mahrt v Mann, 203-880; 210 NW 566

Indivisible transaction. A party who is entitled to judgment for the return of a promissory note is necessarily entitled, on proper prayer, to a judgment for the return of another note which grew out of the same transaction and was attended by the same conditions.

Breza v Loan Soc., 200-507; 205 NW 206

Issues, proof, and variance—proof justifying recovery. Under a plea of (1) conspiracy to commit a wrongful act and (2) joint participation in the wrongful act, recovery may be had on proof of the latter allegation only.

De Bruin v Studer, 206-129; 220 NW 116

Decree appropriate to facts proven. A court of equity having acquired jurisdiction of an action praying the setting aside of a conveyance because actually fraudulent, may, on proof of constructive fraud only, enter a decree appropriate to said proven facts.

McFarland v Johnston, 219-1108; 260 NW 32

Scope of relief. In equitable action where pleading "was not as clear as it might have been", yet prayed for general equitable relief, court enforced express provisions of legal contract to preserve rents and profits under the rule that where general equitable relief is prayed, any relief may be granted consistent with the pleadings and the evidence.

Wagner v Securities Co., 226-568; 284 NW 461

General equitable relief prayed. In equity action seeking the appointment of a receiver, defendant's contention, that a receiver could not be appointed because no main cause of action was stated, was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal in technicalities, but rather it seeks to ascertain the true intent of the pleading filed".

Wagner v Securities Co., 226-568; 284 NW 461

Duty to set aside fraud-induced deed. When a deed has been manifestly obtained by the fraud of the grantee, and without consideration, a court of equity must set it aside, on a distinct prayer for such relief, and not assume to reform it, without any prayer therefor, and decree a life interest in the defrauded grantor.

Guenther v Kurtz, 204-732; 216 NW 39

Petition — statutory requirements — prayer limits relief. Statute specifies the component parts of a petition, and the relief permitted thereunder is limited by the prayer therein.

In re Collicott, 226-106; 283 NW 869

Absence of prayer — effect. No decree of injunction should be rendered against an intervenor when plaintiff answered the petition of intervention but prayed for no relief.

Red Top v McGlashing, 204-791; 213 NW 791

Insufficient prayer. A personal judgment without a specific prayer therefor is erroneous, and a prayer for "other and further relief" is not such prayer.

Richardson v Short, 201-561; 207 NW 610

Unprayed-for relief. A surviving spouse who, in a contest with an heir of the intestate, claims absolute ownership of the entire homestead, and who is decreed to own only an undivided fractional part thereof, may be decreed the right to elect to occupy the homestead for life, even tho there is no prayer for such relief.

Myrick v Bloomfield, 202-401; 210 NW 428

Relief limited by pleading. A chattel mortgagor who, in foreclosure proceedings, pleads a counterclaim against the mortgagee for conversion of one of two separate articles covered by the mortgage, with no prayer for general equitable relief, may not have like relief as to the second article, tho conversion thereof is made to appear; and especially when the mortgagor fails to prove the value of such second article.

Wetmore v Wooster, 212-1365; 237 NW 430

Judgment in equitable action. The holder of unquestioned, matured promissory notes, secured by a real estate mortgage, is entitled to judgment on the notes, on a proper prayer in an equitable proceeding, even tho the proceeding is not for the foreclosure of the mortgage.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Injunction decree not justified by pleadings. When the petition asked for an injunction restraining the county treasurer from selling at tax sale, lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the

III CONFORMITY TO PLEADING—concluded

evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Divorce in lieu of separate maintenance. The court has no right to decree a divorce on a cross-petition which alleges cruel and inhuman treatment but specifically prays for separate maintenance only; and this is true tho there is also a prayer for general equitable relief, it appearing that cross-petitioner's attitude on the trial was in strict accord with said prayer.

Davis v Davis, 209-1186; 229 NW 855

IV CONFORMITY TO PROOF

Common-law rule for recovery — modification. Principle reaffirmed that the common-law rule that there can be no recovery on a written contract without a showing that it has been strictly performed has been modified in this state.

Gibson v Miller, 215-631; 246 NW 606

Failure to prove damages. No relief can be granted in a law action because of fraud unless there be proof of damages.

Rawleigh v Cook, 200-412; 205 NW 57

Contract price (?) or quantum meruit (?). A plaintiff who pleads that he partially performed an express contract for services, and thereupon abandoned the work because of a breach of the contract by defendant, must not be permitted to recover the contract price for the work actually performed unless he establishes his pleaded justifiable abandonment; and if he fails to establish justifiable abandonment, he may not recover on the basis of a quantum meruit which does not exceed the contract price when he neither pleads nor proves a quantum meruit.

Goben v Paving Co., 208-1113; 224 NW 785
See Goben v Pav. Co., 214-834; 239 NW 62

Conversion. Plaintiff in an action for the conversion of bonds may recover on proof of the conversion, and of the value, of the bonds. Proof that bonds found in the possession of the conversioner or of his executor are the identical bonds converted is material only in case plaintiff elects to recover the bonds in kind.

Annis v Morgan, 210-478; 231 NW 457

Fatal inadequacy of proof. The court has no legal right to enter judgment against a corporation on promissory notes purporting to be signed by the corporation by its president (1) when there is no proof as to the actual or apparent authority of the president, and (2) no evidentiary explanation as to the nature of the transaction.

Schooler v Avon Corp., 216-1419; 250 NW 629

Scope of relief. In equitable action where pleading "was not as clear as it might have been", yet prayed for general equitable relief, court enforced express provisions of legal contract to preserve rents and profits under the rule that where general equitable relief is prayed, any relief may be granted consistent with the pleadings and the evidence.

Wagner v Securities Co., 226-568; 284 NW 461

Conditional sales—unallowable foreclosure. In an action to foreclose a conditional sales contract on a specifically described article, foreclosure may not be decreed on another and different article but of the same general nature, in the absence of allegation and proof that the latter article had been mutually substituted for the former.

Des M. Music v Lindquist, 214-117; 241 NW 425

No quiet title decree on unsworn evidence—burden. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments, the nonconformity of plat to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and, the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Co., 223-987; 274 NW 103

11575 Judgment on verdict.

Directed verdicts—constitutionality. Principle reaffirmed that the constitutional right of trial by jury is not infringed by the action of the court in directing a verdict for defendant whenever the evidence is such that the court would not hesitate to set aside a verdict against defendant.

Cashman v Railway, 217-469; 250 NW 111

Verdict—scope of term—fatally delayed motion. A court-directed verdict (in a jury trial) is the verdict of the jury within the meaning of the statute limiting applications for new trial to five days "after the verdict is rendered" and the court has no jurisdiction to grant an application made after said time irrespective of the time when formal judgment was entered on the verdict. (Verdict rendered in 1916; judgment entered in 1930.)

Selby v McDonald, 219-823; 259 NW 485

Duty of clerk. It is the duty of the clerk, in the absence of a court order to the contrary, to enter judgment immediately upon the return of the verdict.

Cox v Surety Co., 208-1252; 226 NW 114

Entry—validity of long delayed entry. The duty of the clerk of the district court, without any direction from the court, to enter judg-

ment on the general verdict of the jury, no contrary order being made by the court, is imperative and continues without limitation as to time. So held where the judgment was entered 14 years after return of the verdict.

Selby v McDonald, 219-823; 259 NW 485

Right to formal judgment. A verdict which denies one of several plaintiffs a right of recovery necessarily arms the defendant with right to a formal judgment dismissing the petition of such unsuccessful claimant.

Eclipse Lbr. v Davis, 201-1283; 207 NW 238

Judgment against partners only—effect. A joint, personal judgment solely against the members of a partnership, on a partnership transaction, does not constitute a judgment against the partnership itself.

Bankers Trust v Knee, 222-988; 270 NW 438

Remittitur—effect on prior judgment entry. A duly entered judgment which is followed by an unexcepted order for a new trial unless a remittitur be filed, automatically becomes a judgment in the lesser amount immediately upon the due filing of the remittitur. It is not necessary to formally cancel the old judgment entry and to enter a new one for the lesser amount.

Fox v McCurnin, 210-429; 228 NW 582

Dual judgments—remittitur. When two separate judgments are entered in the same action —one on the return of the verdict, and one on the ruling for new trial—the formal remitting of the prior judgment removes all error.

Lynch v Railway, 215-1119; 245 NW 219

11576 When verdict is special.

Judgment on inconsistent findings. See under §11514, Vol I

Reversal as to one count—effect on other adjudicated counts. While a general reversal in a law action ordinarily gives the parties a retrial on all issues, yet where plaintiff is successful as to one count and defeated as to all other counts, and does not appeal, a general reversal on defendant's appeal as to the one count on which plaintiff was successful does not give plaintiff a right to a retrial of any of the counts on which he was defeated. Plaintiff's defeats stand as a final adjudication even tho the formal judgment of dismissal of plaintiff's unsuccessful counts was not entered until after the issuance of procedendo on the reversal.

Pease v Bank, 210-331; 228 NW 83

11577 Principal and surety—order of liability.

Discussion. See 15 ILR 47—Casual and corporate sureties

ANALYSIS

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Appeal bond liability. See under §10602
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I GUARANTY AND SURETYSHIP GENERALLY

Discussion. See 7 ILB 1—Notice to the guarantor

Contracts—delivery on secular day. A written guaranty executed on Sunday but delivered on a secular day under express or implied authority of the guarantor is perfectly valid.

Simmons v Simmons, 215-654; 246 NW 597

Strict construction against paid surety. A contract of suretyship will be most strongly construed against the surety who is paid a consideration for entering into the contract.

Iowa Bank v Soppe, 215-1242; 247 NW 632

Suretyship—want of consideration. A plea of want of consideration, interposed by a gratuitous surety on a promissory note may be very properly ignored in the instructions of the court when the record shows (1) that the surety signed the note without fraud imposed upon him, and (2) that there was a consideration between the principal and the payee.

Granner v Byam, 218-535; 255 NW 653

Signing guaranty in blank—effect. One who signs a guaranty in blank and entrusts it to his own agent for the purpose of filling in the amount of the guaranty, and for the purpose of making delivery, is bound by the instrument as delivered to the innocent guarantee, even tho the agent fills in a larger amount than the agent represented necessary at the time of the signing.

Simmons v Simmons, 215-654; 246 NW 597

Surety—authority of agent. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

I GUARANTY AND SURETYSHIP GENERALLY—concluded

Oral guaranty by bank of payment of director's mortgage. Testimony that a bank, acting through its board of directors, orally guaranteed the payment of the personal mortgage of one of said directors, is incompetent under the statute of frauds.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Form and sufficiency between sureties. Judgment entry as to sureties reviewed, construed, and held proper.

School Dist. v Sass, 220-1; 261 NW 30

Long-continued mutual construction. The mutual construction which parties have for years placed on a guaranty against loss on bank stock, arising from the uncollectibility of bank loans, is very, very influential with the court, especially when the definite and comprehensive terms of the guaranty support said mutual construction.

Nelson v Hamilton, 213-1231; 240 NW 738

Guaranty of described bank notes—erroneous description—effect. An officer of a bank who, on demand of the state banking department, guarantees in writing the payment of certain separately described bills receivable belonging to the bank, is not liable on a bill receivable which does not strictly correspond to that described in the guaranty. So held where the difference between the bill receivable in the bank and that described in the guaranty was (1) as to the amount, or (2) as to name of debtor, or (3) as to the aggregate amount of several bills receivable.

Andrew v Austin, 213-963; 232 NW 79

Parol as affecting writings—varying written description of notes guaranteed. In an action on a written guaranty of payment of separately and unambiguously described notes, parol evidence is inadmissible to show what notes were intended, and that they are different from those described in the guaranty.

Andrew v Austin, 213-963; 232 NW 79

Identification of instrument guaranteed. Plaintiff in an action on a guaranty of payment of a promissory note, which guaranty is separate from the note, manifestly cannot recover unless he clearly shows that the note in question is the very note that is guaranteed.

Andrew v Overbeck, 214-578; 241 NW 435

Signing—evidence. In an action on a written guaranty which plaintiff introduces in evidence, the fact that plaintiff dismisses his action, without prejudice, as to one alleged signer, does not render said dismissed defendant incompetent to testify that he never signed said guaranty.

Rawleigh Co. v Moel, 215-843; 246 NW 782

Insufficient showing—imputation of knowledge. The fact that the payee of two promissory notes signed by the same maker but by different sureties caused the maker to be consulted relative to which of the notes should be indorsed with a certain payment, and then made the indorsement in accordance with the maker's wishes, cannot have the effect of creating any agency and thereby charging said payee with knowledge of an agreement between the maker and one of the sureties for a different application of the payment.

Mitchell v Burgher, 216-869; 249 NW 357

Mortgage of director—guaranty by bank. Evidence quite exhaustively reviewed and held insufficient to establish a contract of guaranty of payment by a bank of the personal mortgage of a director.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

II CREATION AND EXISTENCE OF RELATION

Creation of relation — effect. The implied promise of a principal to reimburse his surety if the surety is compelled to pay the debt, brings into existence the relation of debtor and creditor between the principal and surety immediately upon the execution of the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Immateriality of receipt under issues. On the issue whether defendant had contracted to indemnify plaintiff against liability as surety on an appeal bond in a criminal case, and whether defendant had received funds from the accused with which to perform such indemnity contract, evidence is wholly inadmissible that defendant had received funds from the father or brother of the accused for a purpose wholly foreign to said indemnity contract.

State v Cordaro, 211-224; 233 NW 51

Assumption of mortgage — recovery by mortgagor—surety. As between a mortgagor and a subsequent purchaser who assumes and agrees to pay the mortgage, the purchaser becomes the primary debtor, and the prior mortgagor the secondary debtor; but in case foreclosure and sale reveal a deficiency judgment the mortgagor may not recover the amount thereof from the assuming purchaser until he, the mortgagor, has paid such deficiency.

Thomsen v Kopp, 204-1176; 216 NW 725

Writing construed as guaranty. A dealer who transfers without recourse a note and mortgage which represents the unpaid purchase price of an automobile, nevertheless becomes a guarantor of payment of said note by agreeing in writing with the transferee that if the latter is compelled to repossess the car because of default in payment of installments thereon and delivers said repossessed

car to the dealer, the latter will repurchase the car and pay the balance due on said note.

Securities Corp. v Noltze, 222-678; 269 NW 866

Nature and extent of liability of surety. Where a creditor agrees with his debtor on two conditions to cancel and surrender a large amount of indebtedness, viz, (1) that the debtor pay a stated amount by a stated time, and (2) that the debtor then deliver certain notes signed by a stated surety, the creditor may, without affecting the surety, legally waive compliance with the first condition and cancel and surrender the specified indebtedness and receive legal delivery of the notes signed by the surety, the surety having full knowledge of all said facts and interposing no objection to delivery of the notes until sued.

North Side Bank v Schreiber, 219-380; 258 NW 690

When indorser primarily liable. A vendor of land who negotiates the purchase-price note received by him, and later either acquiesces in the abandonment of the contract by the purchaser or himself rescinds the contract and conveys the land to a new purchaser, thereby becomes primarily liable on the negotiated note, as between himself and a surety on said note.

First N. Bank v LeBarron, 201-853; 208 NW 364

Conditional signing—nonestoppel. A surety on a promissory note who signs and delivers the note on the condition that another named party also signs, is not bound because he makes no response to a later notification from the payee that other parties have been substituted as signers in lieu of the one named and specified by the surety.

Andrew v Hanson, 206-1258; 222 NW 10

Stockholders' assessment to replace impaired capital—jury question. Conflicting evidence reviewed and held to present a jury question on the issue whether an assessment on bank stockholders was for the purpose of making good the impaired capital of bank or whether it was a voluntary arrangement among the stockholders to form a pool and purchase from the bank certain assets of doubtful value and thereby to relieve, in part, the individual guarantors thereon.

Andrew v Austin, 213-963; 232 NW 79

Cross-examination—whole of writing—admissibility. A surety who denies in toto the execution, delivery, and consideration of the promissory note in question, but sees fit to cross-examine his co-defendant principal with reference to a letter written by the principal to the payee with reference to said denied matter, may not complain of the reception in evidence of said letter as a part of his own cross-examination.

Granner v Byam, 218-535; 255 NW 653

Appearance by vouchee. A vouchee who has voluntarily taken over the defense of an action may not file a special appearance to a motion for judgment against him on the judgment rendered against the defendant.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Bad-faith defense by vouchee. One who is vouched by a defendant into an action, and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a co-defendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee, knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

III NATURE AND EXTENT OF LIABILITY

Conditional guaranty — when absolute. A written guaranty of a loan on condition that the guarantee will renew the loan from time to time provided the borrower pays the accrued interest each six months must be construed as imposing an absolute liability on the guarantor when six months interest matures and is not paid.

In re Shangle, 222-442; 269 NW 428

Guaranty—absolute (?) or conditional (?). Guaranty of the payment of a claim construed and held conditional and not absolute.

Commercial Bank v Crissman, 214-217; 242 NW 355

Finding of fact in re suretyship. The finding of the court as to the amount of the liability of a surety on a bond, not based on a mathematical computation, but on a determination of disputed questions of fact, is conclusive on the appellate court.

Iowa Bank v Soppe, 215-1242; 247 NW 632

Surety bound by adjudication. The surety on the bond of an administrator is conclusively bound by the nonfraudulent adjudication of the amount of the administrator's liability, even tho the surety had no notice of the hearing preceding such adjudication.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Equitable estoppel — pleading one's own wrong. In an action on a bond given by a bank as principal and by its directors as sureties to secure a trust fund which was in the possession of the bank, the defensive plea that plaintiff was estopped from prosecuting the action by his laches in so doing, is not avail-

III NATURE AND EXTENT OF LIABILITY—continued

able to the sureties when they at all times, before the bank became insolvent, had unhampered opportunity to compel compliance with the bond, and thus protect themselves, but, on the contrary, manifestly connived at a continuous breach of the bond in order to conserve the interest of their bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Cross-complaint. In an action on the bonds of a public officer and his bondsmen to recover a shortage, one surety may not cross-petition against a party who he alleges wrongfully received the funds resulting in the shortage, said latter party not being a party to the bond sued on.

School District v Sass, 220-1; 261 NW 30

Indemnification of one of two sureties—effect. In an action against a public officer and his bondsmen to recover a shortage in public funds, it is quite immaterial, as far as plaintiff is concerned, that one of the sureties has received property from the public officer as partial indemnity.

School District v Sass, 220-1; 261 NW 30

Unallowable defense. It is no defense on the part of one of two sureties on the bond of a public officer that said officer, while so acting, was also acting as cashier of a bank; that, as cashier, he was short in his account with the bank; that said other surety was also surety on the private bond of the cashier; and that said other surety and said cashier conspired to use and did use the public funds with which to make good the cashier's shortage to the bank.

School District v Sass, 220-1; 261 NW 30

Liability on official bond. In an action on the bond of a school treasurer to recover a shortage in his accounts, it is no defense that the plaintiff district has a cause of action against a third party who is unlawfully in possession of the funds constituting the shortage.

School District v Sass, 220-1; 261 NW 30

Bonds—enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

When enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Nonpermissible credit. A surety is not entitled to a credit, on the penalty carried by the bond, to the extent that the contract guaranteed has been carried out. He is liable for the full delinquency which remains, not exceeding the amount of the bond.

Weitz v Guar. Co., 206-1025; 219 NW 411

Bond—statutory amount—maximum liability. The surety on the bond of a dealer in securities under the Iowa securities act (Ch 393-C1, C., '31) is not liable beyond the statutory amount of the bond—$5,000—irrespective of the number or amount of the claims sought to be enforced against it. Order impounding a bond as a trust fund for the pro rata benefit of numerous claimants affirmed.

Witter v Ins. Co., 215-1322; 247 NW 831; 89 ALR 1065

Discharge of surety—statutory bond—failure to make timely filing of claim. Under a statute making the liability of a surety on a statutory bond for the performance of a public contract dependent on the filing by the claimant of a verified statement of the goods sold within a specified time after the goods are "furnished," it is not necessarily sufficient to file such statement within the time specified by the statute after the goods are "used" by the buyer, even tho the goods were bought under a contract providing that the buyer might return such portion as he did not use.

Queal Co. v Anderson, 211-210; 229 NW 707

Discharge of surety—consideration for extension of time of payment. An express or implied agreement by the payee and principal debtor in a promissory note to the effect that the time of paying the note shall be extended for one year is supported by ample consideration, in that the payee forbears suit for one year, and in that the maker secures the benefit of the forbearance.

Eilers v Frieling, 211-841; 234 NW 275

Signature of surety obtained by fraudulent representations — nonliability. Extension of mortgage debt would be sufficient consideration to support signature of mortgagor's daughter to extension agreement if extension were granted on condition that such daughter sign, but where such signature of the daughter is obtained by fraudulent misrepresentations,

it is without consideration and void as to the daughter.

Beal v Milliron, (NOR); 267 NW 83

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Cross-defendant. In mandamus action by county treasurer to obtain salary warrant where county board of supervisors answered, alleging indebtedness on part of treasurer to county for which set-off was claimed, and where county board brought treasurer's surety into the action as a cross-defendant, held, allegation in surety's answer, indicating that shortage in treasurer's office was due to the embezzlement by a third party, was not binding on board in view of its affirmative allegation that treasurer was indebted to the county.

Briley v Board, 227-55; 287 NW 242

IV DISCHARGE

Exceeding limit on credit. A guarantor who guarantees a credit to a named amount is released from all liability if the amount of the credit is exceeded.

Dewey Works v Ryan, 206-1100; 221 NW 800

Extension of time of payment. An extension of time of payment of a promissory note will not work a release of the surety when the note contains the consent of all parties to all such extensions.

Johnson v Hollis, 205-965; 218 NW 615

Extension of time of payment. One who, in buying land, assumes a mortgage (and thereby becomes a principal debtor) and who, without the consent of the party who has become secondarily liable on the mortgage debt, assigns to the mortgagee a lease on the land, under an agreement that the mortgagee will collect the rent and apply it on the debt, does not thereby work such an extension of time of payment as will release the party secondarily liable, especially (1) when there was no consideration for such so-called extension, and (2) when there was no fixed time of extension.

Union Ins. v Mitchell, 206-45; 218 NW 40

Extension of time of payment—effect. An extension of time of payment granted to an assumptor of a note and mortgage does not release the maker of the note and mortgage, and prior assumptors, even tho the extension was granted without their knowledge or consent.

Koontz v Clark, 209-62; 227 NW 584
Royal Ins. v Wagner, 209-94; 227 NW 599

Transfer of mortgaged property—assumption by vendee of debt—extension of time—effect. The principle that the holder of an obligation releases the surety on the obligation by granting an extension of time of payment to the principal without the consent of the surety has no application to a case where the maker of a mortgage-secured promissory note sells the mortgaged property to a vendee who assumes and agrees to pay the note, and where the holder of the note subsequently grants an extension of time of payment to the assuming grantee without the consent of the original maker of the note.

Iowa Co. v Clark, 209-169; 224 NW 774
Herbold v Sheley, 209-384; 224 NW 781

Extension of time of payment. The surety on a promissory note is released from all liability whenever the payee makes a binding agreement with the principal debtor, without the consent of the surety, to extend the time of payment to a certain definite time.

Eilers v Frieling, 211-841; 234 NW 275

Disaffirmance by minor of promissory note and contract—release of surety. The disaffirmance by a minor of his contract of purchase and of his negotiable promissory note given in connection therewith, before the property is delivered to him, releases the surety on the note of all liability to the payee, even tho the surety signed the note because of the known minority of the principal. In case the note has passed to a holder in due course by indorsement by the payee, the liability of the indorser becomes primary and the liability of the surety becomes secondary.

Lagerquist v Guaranty Co., 201-430; 205 NW 977; 43 ALR 585

Discharge of surety. The repeal of a statute which gives the state, when it is a depositor in a bank, a preferential right to be paid in full if the bank passes into the hands of a receiver does not constitute a release of security in such sense as to release a surety on a bond which secures said deposit.

Leach v Bank, 205-1154; 213 NW 517

When assignment constitutes payment. One who secures title to land under foreclosure of a second mortgage may not then take an assignment of the first mortgage and enforce it against the maker thereof who has become a surety thereon. Such purchase constitutes a payment of the mortgage debt as to the maker-surety.

Hult v Temple, 201-663; 208 NW 70; 46 ALR 317

IV DISCHARGE—concluded

Discharge of surety—subsequent compromise and satisfaction—effect. The surety on a bond staying the collection of judgments is wholly released by the subsequent acts of the trustee in bankruptcy for the judgment defendant and the receiver for the insolvent judgment plaintiff entering into a legally authorized compromise settlement and satisfaction of the judgment, in order to avoid threatened and doubtful litigation growing out of the execution of said stay bond, and the subsequent insolvency of all the parties thereto.

State v Cas. Co., 213-211; 238 NW 709

Release of principal, etc. — effect. The obligee in a joint appeal bond is not entitled to judgment on the bond when, pending the appeal, and without notice to or knowledge of the surety, he (1) releases some of the principals in the bond, (2) extends the time of payment of the judgment, and (3) accepts in part the obligation of a new party as part payment of the judgment.

Warman v Ranch Co., 202-198; 207 NW 532

Nonmaterial changes—effect on surety. A surety on a bond executed by a trustee and conditioned to carry out a specified trust is not discharged by changes and alterations in the trust agreement which work no legal change in the liability of the trustee or surety.

Throp v Chaloupka, 202-360; 208 NW 299

Identity of partnership and corporation. A bona fide corporation which is engaged in one business, and a bona fide partnership which is engaged in a different business may not, even in equity, be deemed identical—one and the same entity—even tho the corporate stock of the corporation is owned entirely by the partnership entity and by the individual partners, and even tho the individual partners of the partnership constitute the board of directors of the corporation. So held on the plea that a contract of the corporation worked a change in a former contract of the partnership, and thereby released the surety.

Weitz v Guar. Co., 206-1025; 219 NW 411

Failure to sue all sureties—effect. In an action by an executor against a surety on the bond of a former executor, the failure of the executor to file a claim against the estate of a co-surety does not work a discharge of the defendant surety.

In re Carpenter, 210-553; 231 NW 376

Nonpayment — failure to notify surety. A surety may not complain that he was not notified of the nonpayment of the note by the principal when the surety had expressly waived notice of nonpayment.

Davenport v Mullins, 200-836; 205 NW 499

Failure to file claim in probate. Failure of a ward to file a claim against the estate of an embezzling guardian works no release of the surety on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Violation of agreement. A surety who signs a note to a bank in order to enable his principal to obtain a loan, with the specific agreement that no part of the loan will be used to pay the principal's then existing indebtedness to the bank, is (in a suit by the bank on the note) wholly released by the action of the bank in applying part of the loan contrary to the agreement.

Lindquist v Bank, 206-1131; 221 NW 845

Nonrelease by conduct of guarantee. The guarantor of the payment of the amount due on a contract of sale of land is not relieved of his contract of guaranty because the assignee-guarantee of the contract failed to control the action of the purchaser of the land in disbursing building funds, when the assignee-guarantee had no knowledge of the wrongful disbursement.

Buser v Land Co., 211-659; 234 NW 241

Forfeiture of contract — effect on surety. The surety on a promissory note given as part of the contract price of land, ceases, as a matter of law, to be liable thereon to the original payee-vendor whenever the latter legally forfeits the contract.

Smith v Tullis, 219-712; 259 NW 202

V RIGHTS AND REMEDIES

(a) IN GENERAL

Ambiguity — intent — conduct of parties as evidence. In searching for the actual intention of both parties to an ambiguous written guaranty—in other words, in searching for the proper construction to place on such contract —the court may receive evidence of the conduct of the party to whom the guaranty was given, tending to show that said party, shortly after the time the guaranty was executed, and contrary to his present attitude, was placing the same construction thereon as contended for by the guarantor.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Permissible plea of counterclaim. In an action against the principal and surety on an attachment bond for damages consequent on the alleged wrongful issuance of the writ, the principal in said bond may plead a counterclaim which neither arises out of or is connected with the transaction on which plaintiff sues, nor in which the surety has any personal ownership (§11151, C., '35). A surety is not primarily liable on the bond and the principal who is primarily liable should be permitted to defeat recovery on the bond if he can so do.

Imes v Hamilton, 222-777; 269 NW 757

Decisions reviewable—order refusing judgment against vouchee. An order refusing a

judgment against a vouchee (who was, in substance, a party) is appealable.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Action—condition. A bond of indemnity to hold the obligee free of any loss which he may sustain is not broken, and no right of action accrues, until a loss has been suffered against which the covenant runs.

Duke v Tyler, 209-1345; 230 NW 319

Removal of administrator—surety as applicant. A surety on the bond of an administrator has such "interest in the estate" as empowers him to make application for the removal of the administrator, even tho such surety has taken steps to terminate his future suretyship.

In re Donlon, 201-1021; 206 NW 674

(b) GUARANTOR AND SURETY

Accommodation and interested guarantors distinguished. Principle reaffirmed that guarantors, who become such solely as an accommodation, occupy a very materially different position in the law than guarantors who become such in order to protect matters in which they have a financial interest. Stockholders, for instance, in guaranteeing payment of the debts of the corporation are not favorites of the law.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Application of payment prejudicial to surety. The fact that the common maker of two promissory notes signed by different sureties and payable to the same payee was aided by a loan by one of the sureties in order to enable the common maker to make up the amount of a payment to the payee, with the understanding that the total payment would be applied—indorsed—on the note on which said surety was obligated, does not estop or prevent the payee long afterwards (five years) from applying said payment (in accordance with the wishes of the common maker) on the note on which said surety was not obligated, the payee having no knowledge of said agreement. And this is true tho the common maker, and the surety on the note receiving the application, had, in the meantime, become insolvent.

Mitchell v Burgher, 216-869; 249 NW 357

Notes—delivery as nonjury question. The plea of a surety (1) of want of consideration for, and (2) of improper delivery of, the notes sued on, is wholly ineffective:

1. When the surety signed and forwarded the notes for delivery on the prearranged and contracted condition that the payee would receive delivery only on condition that he—payee—would first cancel and surrender specified indebtedness held by him against the principal maker of the notes; and

2. When the surety knew that the payee had complied with said condition and had received delivery of the notes; and

3. When the surety thereafter, until sued, interposed no objection of illegality in the notes or improper delivery thereof, but on the contrary promised to pay them and negotiated for additional time in which to pay.

North Side Bank v Schreiber, 219-380; 258 NW 690

Equitable estoppel — evidence — degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that the payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

Surety as beneficiary—secret change—effect. A debtor who, pursuant to an agreement with his surety, makes the surety a beneficiary in a life policy in order to indemnify the surety against loss on the suretyship, and agrees not to change such beneficiary during the life of the suretyship, may not later secretly change such beneficiary and endow such new beneficiary with right to the proceeds of the policy, when the new beneficiary knew at all times of the suretyship and of the pledging of the policy as indemnity; and it matters not that the new beneficiary actually kept the policy alive by paying the premium.

Beed v Beed, 207-954; 222 NW 442

Pledge of collateral — consideration. The naming of a surety as beneficiary in a life insurance policy, and the pledging of the policy in order to indemnify the said surety on signing a renewal note, are supported by a sufficient consideration.

Beed v Beed, 207-954; 222 NW 442

Removal of administrator — jurisdiction. Jurisdiction to remove an administrator is furnished by an application by the surety on the bond wherein he prays for an order (1) removing the administrator or (2) requiring the filing of a report and the making of distribution, when notice of the application is duly served on all interested parties and when no part of the prayer has been withdrawn of record. The filing of a report under a mutual arrangement between the parties does not exhaust the jurisdiction of the court.

In re Donlon, 201-1021; 206 NW 674

Unsigned notice to creditor to sue—effect. A written notice by a surety to a creditor re-

V RIGHTS AND REMEDIES—concluded
(b) GUARANTOR AND SURETY—concluded

quiring the creditor to sue on the obligation or to permit the surety to do so in the name of the creditor is valid and effective though wholly unsigned, (1) when it is addressed to the creditor, (2) when the context thereof suggests that it is being given by the surety, and (3) when the surety personally delivers the notice to the creditor.

Cleophas v Walker, 211-122; 233 NW 257

Income tax paid by surety. A surety whose bond was held for a compromise of corporate federal income taxes holds no lien upon the corporate assets, but has merely a right to be paid from assets held by receiver before payment to other claimants, and a receiver authorized to continue a business is not personally liable to such surety for diminishment of assets during receivership, tho such assets at the time of receiver's appointment would have been sufficient to pay the surety.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Judgment against vouchee. Judgment may be rendered not only against the defendant in an action, but against one who has been vouched into the action and who has assumed exclusive charge of the defense, and whose conduct of the defense has been such as to render him, in legal effect, a co-defendant.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

(c) CREDITOR

Remedies of creditors — pleading — prima facie sufficiency. A prima facie cause of action against guarantors is presented by a pleading based on an instrument which purports to reveal a principal debtor and a guaranty of the promise of such debtor and an allegation that the debtor has defaulted.

Foundation Press v Bechler, 211-1217; 233 NW 666

Application of partnership assets and assets of partners. Where partnership property and the individual property of all the partners are in the hands of the partnership receiver, a creditor whose claim is against the partnership because of a partnership transaction, and also against an individual partner because the partner has individually guaranteed the claim, may have the assets so marshaled that he will share in the partnership property along with the other partnership creditors, and then resort to the individual property of the guaranteeing partner to the exclusion of partnership creditors.

Simmons v Simmons, 215-654; 246 NW 597

11578 Judgment on counterclaim—affirmative relief.

Unquestioned establishment — proper procedure. A duly pleaded counterclaim which is unquestionably established by the evidence should not be submitted to the jury, but should be summarily allowed by the court; and in a personal injury action the court should direct the jury how to proceed if plaintiff's recovery be more than the amount of the counterclaim; likewise how to proceed if plaintiff's recovery be less than the amount of the counterclaim.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

11579 Judgment by agreement.

Consent by adversely interested party. One of two adversely interested defendants may not, as a matter of law, appear in court on behalf of such other defendant. It follows that a consent decree entered on such appearance may be set aside.

Graettinger Tile v Paine, 202-804; 211 NW 366

Consent decree — insufficient showing. The mere fact that a defendant in divorce proceedings makes, during the trial, certain concessions of fact, does not render the decree a consent decree.

Radle v Radle, 204-82; 214 NW 602

Consent decree — authority of attorney. While counsel cannot exceed their authority in making contract or settlement affecting their clients' rights, an attorney having full charge of client's action for mandatory injunction is authorized to consent to decree substantially complying with supreme court order.

Vaughan v Dist. Court, (NOR); 226 NW 49

Vacation—consent decree. Equity will not set aside a consent judgment for attorney fees for both parties in divorce proceedings, against the defeated party and his land, when no fraud is shown, and when the court had personal jurisdiction over both parties to the proceeding.

Coulter v Smith, 201-984; 206 NW 827

Written stipulation for decree—effect. The signing, by a plaintiff and defendant in an action for separate maintenance, of an agreement which specifies the amount and terms of such maintenance, and provides for the entry of decree in accordance therewith, and the filing of such stipulation in the action, constitute an appearance by the defendant to said action.

Kalde v Kalde, 207-121; 222 NW 351

Stipulation—enforceability. The court will enforce a duly filed stipulation by the parties to an action of forcible entry and detainer to the effect that if defendant fails to comply with specified conditions, judgment shall be entered against defendant for the possession of said premises.

Peak v Mulvaney, 215-1400; 245 NW 748

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

11581 Court acting as jury.

Discussion. See 22 ILR 609—Trial technique
Findings of court as jury verdict. See also under §11435
Jury findings, reviewability. See under §11429 (III)
Special interrogatories. See under §11513

Findings of court. The findings of the trial court, in a law action, under waiver of a jury, and on supporting but conflicting testimony, are conclusive on the appellate court.

Frum v Kueny, 201-327; 207 NW 372 (Maturing of crops)
Crail v Jones, 206-761; 221 NW 467 (Abandonment of homestead)
First N. Bank v McCartan, 206-1036; 220 NW 364 (Accommodation note—intention)
Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200 (Exemptions)
Eilers v Frieling, 211-841; 234 NW 275 (Release of surety on note)
Barth Co. v Kelly, 211-1154; 235 NW 471 (Quality of eggs)
Miller v Hurburgh, 212-970; 235 NW 282 (Oral contract to operate hotel)
Jefferies v Prall, 215-763; 246 NW 816 (Oral contract for commission)

Law actions tried to court—when findings final on appeal. In law actions tried without a jury, supported court findings of fact have the same force and effect as like findings by the jury, and are consequently nonreviewable on appeal.

Maddy v Park, 220-899; 262 NW 796
Duke v Park, 220-889; 262 NW 799
Jones v Park, 220-894; 262 NW 797
Younkin v Bank, 226-343; 284 NW 151
Crouse v Cadwell, 226-1083; 285 NW 623

Findings of fact by court—conclusiveness. In an action at law tried to the court without a jury, the court's decision on disputed questions of fact has the same effect as jury verdict, and findings of fact may be set aside only if there is no substantial supporting evidence. In such cases the supreme court may not determine facts but merely decide what the court was warranted in finding them to be.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Weight given to findings. The finding of the lower court is a circumstance to be considered in dealing with questions of fact.

Matalone v Bank, 226-1031; 285 NW 648

Presumption as to evidence legally inadmissible. In a trial to the court, it will be presumed that testimony which is inadmissible as a matter of law was not considered by the court, tho actually admitted in evidence.

James v School Twp., 210-1059; 229 NW 750

Review of findings. On an appeal from a judgment granted by the lower court in an action tried without a jury, the evidence will not be weighed except for the purpose of determining whether the findings of fact are supported by the record.

Crouse v Cadwell, 226-1083; 285 NW 623

Conflicting testimony — scope of review. When the trial court, acting as a jury, finds, on conflicting testimony, that the truth lies with the defendant, the court, on appeal can review no further than to determine whether the judgment of the trial court has support in such testimony.

Macksburg Bank v Lillard, 206-950; 221 NW 505

Court findings—effect on trial de novo. In an equitable proceeding where there is conflict in evidence, the supreme court must give weight to findings of trial court altho case is tried de novo.

Horn v Ins. Co., 227-1045; 290 NW 8

Appeals—weight of court's findings. In the trial of an equity case where the credibility of the witnesses is in issue, great weight will be given to the findings of the trial court.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Directed verdict — motion for — effect. The overruling of defendant's motion for a directed verdict at the close of plaintiff's evidence in a cause tried solely to the court is inconsequential when the final decision of the court is correct.

Pressley v Stone, 214-449; 239 NW 567

Jury — waiver — hostile motions for verdict. Hostile motions for a directed verdict, made by plaintiff and defendant at the close of all the evidence, do not, in and of themselves, constitute a waiver of the jury; otherwise, when such motions are followed by a stipulation of record, by the parties, "that the court may render a decision of said case during term time or vacation".

Bukowski v Sec. Assn., 221-416; 265 NW 132

Misconduct of attorney — finding by trial court. A finding of fact by the trial court on a motion for new trial that alleged misconduct on the part of an attorney did not occur is conclusive on appeal.

Kessel v Hunt, 215-117; 244 NW 714

Discretion and findings of court. An order setting aside the dismissal of an action for want of prosecution will be set aside by the appellate court only on a clear showing of abuse of discretion. In fact, supported legal

findings as a basis for such an order are conclusive on the appellate court.

Seiders v Adel Co., 218-612; 255 NW 656

Findings. The appellate court will not overrule a finding by the trial court that the claimant of an automobile did not know that the car was being used in the unlawful transportation of intoxicating liquors, if there is substantial testimony in the record supporting such finding.

State v Sedan, 209-791; 229 NW 173

Finding by court. A finding by the court on conflicting and supporting testimony, in a proceeding to set aside a judgment on a bail bond, that the surety had, at his own expense, caused the principal in the bond to be delivered to the sheriff, is not reviewable on appeal.

State v Robinson, 205-1055; 218 NW 918

Finding by court. A finding by the trial court on supporting testimony in an action tried to it that a nondrawee bank was not, and that the drawee bank was, negligent in cashing a check, is conclusive on the appellate court.

Bank of Pulaski v Bank, 210-817; 232 NW 124

Conclusiveness of findings. Whether the facts and circumstances attending the receipt by a creditor from a debtor of a check for an amount less than claimed by the creditor, and the cashing of the check by the creditor, constituted an accord and satisfaction, may be a question of fact, and the findings of the court thereon in a law action tried to the court, on conflicting and supporting testimony, is necessarily conclusive on the appellate court.

Barth Co. v Kelly, 211-1154; 235 NW 471

Finding by court—conclusiveness. The finding of the court in a trial to the court on supporting evidence on the issue whether an insured died "solely through external, violent, and accidental means" or from disease, is conclusive on the appellate court. And it is immaterial that the court determines its findings by sustaining a motion to dismiss at the close of all the evidence rather than by overruling such motion and later dismissing the action on its own motion.

Cherokee v Ins. Co., 215-1000; 247 NW 495

Supported findings of fact. On the issue whether the indebtedness of a municipal corporation exceeded the constitutional limit, the supported finding of the trial court that a certain indebtedness was created prior to the indebtedness in question, or that the indebtedness in question "did not precede" said other indebtedness, is not reviewable by the appellate court.

Trepp v School Dist., 213-944; 240 NW 247

Wholly inadequate evidence. In an equitable action to enforce against an estate "double" liability on bank stock, a finding and decree (based almost exclusively on the testimony of the record owner of said stock) that the deceased had actually owned said stock for some 30 years and was such owner at the time of his death, will (notwithstanding the deference accorded to the trial court in judging of the credibility of witnesses) be annulled on appeal as without adequate support in the evidence when the actions and conduct of said record owner during substantially all of said time in asserting exclusive ownership in himself, even after the death of the deceased, is wholly at war with his present testimony that he had never owned said stock and that the deceased had always owned it.

Andrew v Bank, 220-219; 261 NW 810

Eminent domain — award — conclusiveness. An award in condemnation proceedings is conclusive on the appellate court when it has support in the evidence and does not appear to be wholly unfair and unreasonable.

Wheatley v Fairfield (town), 213-1187; 240 NW 628

Paving assessments over 25 per cent—reduction. In an appeal by a city from a ruling by the trial court that an assessment for paving was more than 25 per cent of the value of the adjoining lot and from the resulting order reducing the assessment, evidence reviewed and held that the court's finding was sustained by the weight of the evidence.

Lee v Ames, 225-1061; 283 NW 427

Electric plant earnings — fact findings in trial to court—conclusive on appeal. Where an injunction wrongfully restrained and delayed, for 11 months, construction of a municipal light plant and in an action on the injunction bonds, tried without a jury, where the trial court had evidence to determine the plant's net earnings for first year of operation and there was sufficient evidence to support his findings that earnings during 11 months lost by delay would have been substantially same, damages in that amount for such period are not too speculative, remote, and uncertain, and such findings are conclusive on appeal.

Corning v Iowa-Neb. Co., 225-1380; 282 NW 791

Finding of fact in re suretyship. The finding of the court as to the amount of the liability of a surety on a bond, not based on a mathematical computation, but on a determination of disputed questions of fact, is conclusive on the appellate court.

Iowa Bank v Soppe, 215-1242; 247 NW 632

Special proceedings—findings. A finding of fact by the court, on supporting testimony, on a motion for judgment against an officer for

money in his hands, is conclusive on the appellate court.

Andresen v Andresen, 219-434; 258 NW 107

Finding equivalent to jury verdict—conclusiveness on appeal. In a law action tried to the court without a jury, its finding on the fact question as to whether a check was accepted for collection or as payment has the same effect as a verdict of the jury and cannot be disturbed on appeal if there is evidence to support it.

Hockert v Ins. Co., 224-789; 276 NW 422

Supported court findings — conclusiveness. Supported findings by the court of material facts, in a law action submitted to the court under a waiver of jury, are as conclusive as like findings by the jury. So held as to findings relative to fraud and misrepresentation in obtaining a policy of life insurance.

Bukowski v Security Assn., 221-416; 265 NW 132

Joint enterprise — accounting — oral agreement between attorney and promoter. An attorney who, in an action against a promoter for an accounting, alleges that he acted with the promoter to establish a corporation for conducting "sales contests", which corporation was later dissolved, and that the promoter alone then formed a similar second corporation from which by oral agreement the attorney was to share in the profits, properly has his petition for accounting dismissed, when he fails to establish the alleged oral agreement upon which his action was based.

Davies v Stayton, 226-79; 283 NW 436

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a sharecropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

Divorce—appeal de novo—weight given decision of lower court. Altho a divorce action, being in equity, is triable de novo on appeal, yet the supreme court will give serious consideration to the decision of the lower court when there is a conflict in the testimony. Evidence reviewed and held to justify award of separate maintenance to the wife and to deny divorce to the husband.

Blew v Blew, 225-832; 282 NW 361

Waiver of dower interest — findings — when conclusive. A finding by the trial court on supporting testimony that a wife signed both the note and mortgage of her husband solely for the purpose of waiving her dower interest, and received no actual consideration herself, is conclusive on the appellate court.

Bates v Green, 219-136; 257 NW 198

Grounds presentable by appellee. When the lower court in an equity cause sustains plaintiff's action on one presented ground, but overrules all other presented grounds, the appellee on appeal may very properly argue the correctness of the overruled grounds.

Reason: The appellate court must affirm the decree of the lower court if it is sustainable on any ground properly presented in the lower court, irrespective of the findings of the lower court.

Wyatt v Manning, 217-929; 250 NW 141

Supported findings in probate. Supported findings of fact by the probate court have the force and effect of a verdict of a jury and will not be reviewed on appeal.

In re Fish, 220-1247; 264 NW 123
In re Fish, 220-1328; 264 NW 542

Findings of fact in probate. The findings of the probate court, on supporting testimony, as to the amount of the excess charges made by a guardian for the support and education of the ward, is conclusive on the appellate court.

In re Nolan, 216-903; 249 NW 648

Court findings as jury verdict. When jury trial is waived in action to terminate guardianship, facts found by court have same binding effect as verdict of jury.

In re Hawk, 227-232; 288 NW 114

Guardian—accounting—findings by court—conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case have force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

Findings in probate. A supported finding by the probate court that an administrator had failed to exercise ordinary care to preserve the funds of the estate is conclusive on the appellate court.

In re Foster, 218-1202; 256 NW 744

Findings in probate. The finding by the trial court, on supporting testimony, that a transfer of real property was made "in contemplation of death" will not be disturbed on appeal.

In re Mann, 219-597; 258 NW 904

Execution of will—findings of court. The supported findings of the court relative to the facts attending the formal execution of a will have the same force and effect as the verdict of a jury.

In re Droge, 216-331; 249 NW 209

Establishment of lost will. Proceedings to establish a lost will are within the jurisdiction

of the court to act without a jury, as first the court must determine whether the proof is sufficient to establish the terms of the lost instrument and, if the court finds it to be properly proved and established, then the matter stands as do all wills when offered for probate and, if contested, may be tried to a jury.

Goodale v Murray, 227-843; 289 NW 450

Court findings upheld. In proceedings to establish a lost will, the loss of the will and the search for it were proved by evidence that the will could not be found altho the home of the deceased and other places where the will might have been kept were thoroughly searched. The conclusion of the trial judge on the sufficiency of such evidence will not be disturbed unless discretion is abused.

Goodale v Murray, 227-843; 289 NW 450

Allowance of claims — conclusiveness. The allowance of a claim by the probate court on supporting testimony is conclusive on the appellate court, even tho the supporting testimony is not wholly satisfactory to the judicial mind.

Olson v Roberts, 218-410; 255 NW 461

Findings in re homestead. On an application by an executor for an order to sell real estate to pay debts, a finding by the court that certain land was not the homestead of the deceased is conclusive on appeal (1) unless such finding is without substantial support in the evidence, or (2) unless the court erroneously applied the law to conceded facts.

In re McClain, 220-638; 262 NW 666

Findings of fact in probate. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams, 219-374; 258 NW 682

Hearings in probate. Where the issue whether a trustee should be credited with a loss of trust funds was heard by the probate court without a jury (as a continuation of the probate proceedings out of which the trust arose), the holding of the court, granting such credit, will be sustained if the evidence pro and con would have presented a jury question had the hearing been before a jury.

In re Moylan, 219-624; 258 NW 766

11582 Judgments and orders entered.

Record entry necessary. Orders for publication of notice of hearings in probate must be entered of record.

In re Durham, 203-497; 211 NW 358

Competent evidence of judgment. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Calendar and record book. From a statute requiring that all judgments and orders must be entered in the record book, it may be inferred that the judge's calendar is in the nature of a memorandum book ordinarily used by the judge to guide the clerk in entering judgments and orders in the record book which is their final place of repose, and that the clerk's entry in the record book is the legal evidence of a judgment or order.

Street v Stewart, 226-960; 285 NW 204

Entry—surrender of notes as condition precedent. When a statute required that notes on which a judgment was based be delivered to the clerk of court before he entered the judgment on record, if a foreclosure of a trust deed given to secure notes was void for violation of the statute, it could not affect the validity of a previous court order appointing a receiver.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Form and sufficiency between sureties. Judgment entry as to sureties reviewed, construed, and held proper.

School District v Sass, 220-1; 261 NW 30

Recitals accompanying decree — effect. A recital in a so-called judgment entry in real estate mortgage foreclosure that plaintiff "shall have a lien against all property kept on said premises" and that said lien shall be superior to a named chattel mortgage, when not carried into the decree which follows the recital, is no part of the decree, and is not binding on anyone, a fortiori when such recital finds no support in the pleadings or in the stipulation filed in the case.

Van Alstine v Hartnett, 210-999; 231 NW 448

Form of decree—nonassignment of error—no consideration on appeal. Form of decree, complained of in appellant's brief, will not be considered when not assigned as error.

Bredt v Franklin County, 227-1230; 290 NW 669

Extending time to file motion—journal entry valid. A statute requiring that an application for a new trial must be made within five days after the verdict is rendered unless the court grants an extension of time, contemplates orders which are only temporary and incidental to the case, and an order extending the time for such application was effective to extend

the time beyond the five-day limit, when it was entered on the judge's calendar before the five days were up, even tho not entered on the record book until seven days after judgment was rendered.

Street v Stewart, 226-960; 285 NW 204

Calendar memorandum—superseded by subsequent decree. Where trial judge made calendar memorandum of findings of fact which he did not sign, and the clerk's record thereof was not signed, the signing of the recorded entry of a subsequent decree was convincing proof that the subsequent decree and not the memorandum was the final decree.

Rance v Gaddis, 226-531; 284 NW 468

Moratorium—denial order cancels restraining order on sheriff. An order restraining the sheriff from issuing a deed, pending a hearing on a moratorium application for extension of period for redemption, is automatically dissolved when the application is denied, and a deed issued is valid when a nunc pro tunc order places the moratorium denial order on record as of a date prior to the issuance of deed.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Pleas—arbitrary right to withdraw. An accused under an indictment has an arbitrary right to withdraw a plea of guilty at any time before the oral sentence passed upon him has taken the form of a final judgment by entry in the record book of the court. This is true, irrespective of any other entries in the court records.

State v Wieland, 217-887; 251 NW 757

11582.1 Surrender of written obligations.

Atty. Gen. Opinion. See AG Op July 17, '39

Entry—surrender of note as condition precedent. The statutory direction to the clerk of the district court not to enter judgment on a promissory note, unless said note is first surrendered to him, will be presumed to have been complied with when the record shows the introduction of said note as an exhibit and that a transcript of the evidence was filed with said clerk.

Selby v McDonald, 219-823; 259 NW 485

Condition precedent to judgment entry. Evidence held to establish a surrender of notes to the clerk of the district court under the provisions of this section prior to the entry of judgment.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Entry — surrender of notes as condition precedent. When a statute required that notes on which a judgment was based be delivered to the clerk of court before he entered the judgment on record, if a foreclosure of a trust deed given to secure notes was void for violation of the statute, it could not affect the validity of a previous court order appointing a receiver.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Judgment on note—entry before surrender of note. The purpose of a statute providing that the clerk shall not enter upon the records any judgment based on a note unless the note is first delivered to the clerk, being to retire the instrument from circulation so that the maker and others will not be subjected to other suits, was accomplished altho a judgment was entered eight days before the note was surrendered. When two years elapsed before an action was brought to set aside the judgment because of noncompliance with the statute, and no defense to the note was shown, the action should be dismissed.

Jensen v Martinsen, 228- ; 291 NW 422

11583 Satisfaction of judgment.

Damages for failure to satisfy. Damages for failure to enter a record satisfaction of a paid judgment are properly denied when there is no evidence of such damages.

Taylor v Heiny, 210-1320; 232 NW 695

Irretrievable nullification of lien. The filing by an insolvent judgment defendant of his petition in bankruptcy, within four months following the entry of judgment, discharges the judgment (it not being based on fraud or willful injuries) and irretrievably nullifies an execution levy on property, whether the property be exempt or nonexempt. In other words, the judgment plaintiff may not thereafter proceed in equity in the state court and have his discharged judgment enforced against property set aside to the judgment defendant as exempt, even tho, were it not for the bankruptcy proceedings, plaintiff would be able to show that said property was not exempt from levy under plaintiff's particular judgment.

McMains v Cunningham, 214-300; 233 NW 129; 242 NW 106

11585 Discharge on motion.

Ruling on motion to set aside default. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

Motion to set aside default—errors in proving damages. Where appeal is taken from an order overruling a motion to set aside a default judgment, errors in the trial in determining damages are reviewable even tho no appeal is taken on the judgment itself, the situation being directly analogous to an appeal from an

order overruling a motion for a new trial based upon errors in the trial.

Rayburn v Maher, 227-274; 288 NW 136

11587 Default—when made and entered.

Discussion. See 24 ILR 146—Default—when entered

ANALYSIS

I DEFAULTS IN GENERAL
II DEFAULT IN PLEADING
III RELIEF AWARDED ON JUDGMENT BY DEFAULT

I DEFAULTS IN GENERAL

Default—definition. "Default" is a term signifying failure to appear for trial, as well as failure to answer.

Vaux v Hensal, 224-1055; 277 NW 718

Default as jury waiver. Failure to appear for trial is a waiver of the right to trial by jury and a consent to trial by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Default no admission of cause of action. Principle reaffirmed that a default is not an admission of a valid cause of action where none is pleaded.

Neilan v Lytle Co., 223-987; 274 NW 103

Quiet title—equity—proof. Being in equity, a default judgment in a quiet title action must by statute be based upon both pleadings and testimony (§11592, C., '35).

Neilan v Lytle Co., 223-987; 274 NW 103

Setting aside default judgment—effect—failure to secure stay order. Fact that proceedings in district court could have been stayed pending appeal will not, on the ground that misfortune was avoidable, preclude setting aside a default judgment rendered pending appeal without customary notice between counsel.

Lunt v Van Gorden, 225-1120; 281 NW 743

Notice of taking default—attorneys' custom. Defendants may have a default judgment set aside, where two reputable attorneys, one of which resided in the county where the action was brought, were employed, and where such attorneys rely on a practice among the attorneys in that county to inform opposing counsel of intention to take default, and where a default without notice pending appeal would not have been anticipated.

Lunt v Van Gorden, 225-1120; 281 NW 743

Setting aside default—"practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Default judgment—custom of giving notice—setting aside for failure. Practice of attorneys of informing opposing counsel of intention to take default is not repugnant nor void under this section, providing for default judgment upon failure to file or amend pleadings within required time, and such practice may be considered under petition to set aside default judgment rendered without such notice.

Lunt v Van Gorden, 225-1120; 281 NW 743

II DEFAULT IN PLEADING

Amendment after default. A personal judgment may not be validly entered on an amendment filed after default, and of which amendment the defendant has no notice.

Sutton v Rhodes, 205-227; 217 NW 626

Judgment by default—improper entry when cause at issue. When an unquestioned answer is on file, self-evidently no default can be properly entered for want of a plea, and no default can thereafter be properly entered for want of appearance until the case is regularly assigned for trial or comes on for hearing in accordance with the rules of the court.

La Forge v Cooter, 220-1258; 264 NW 268

III RELIEF AWARDED ON JUDGMENT BY DEFAULT

When fraud no defense. When fraud in obtaining a judgment is not available to have the judgment set aside (because of the lapse of time), such fraud necessarily ceases to be a defense to an auxiliary proceeding to enforce the judgment.

Wade v Swartzendruber, 206-637; 220 NW 67

Setting aside judgment—discretion of court. Refusals to set aside defaults will not be interfered with on appeal in the absence of a showing of abuse of discretion on the part of the court. So held where the entry of default, in an action for partition, and the refusal to set the default aside, appear to have been harmless to defendant.

Bleakley v Long, 222-76; 268 NW 152

Quieting title—no decree on unsworn evidence—burden. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments, the nonconformity of plat to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and, the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Co., 223-987; 274 NW 103

11588 Failure to appear.

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Partition — adopting pleading stating valid defense—default set aside. A default order unaccompanied by any judgment may be validly set aside at a subsequent term. So held in a partition suit where defendant, an 84-year-old mother holding a life estate, after defaulting, adopted the answer and cross-petition of the defendant children, which pleadings, if true, would effectually prevent partition—a sound reason for setting aside the default.

Redding v Redding, 226-327; 284 NW 167

11589 Setting aside default.

ANALYSIS

I NATURE AND SCOPE OF REMEDY
II DISCRETION OF COURT
III TIMELY APPLICATION
IV EXCUSE FOR DEFAULT
V MERITORIOUS CAUSE OF ACTION OR DEFENSE
VI PLEADING ISSUABLY AND FORTHWITH
VII TERMS
VIII REVIEW ON APPEAL

I NATURE AND SCOPE OF REMEDY

Inherent power of court. The district court has inherent power to set aside a judgment during the term at which it was rendered on proof that the judgment was obtained by fraud, extrinsic and collateral to the judgment, even tho there was no default.

Cedar Rapids Co. v Bowen, 211-1207; 233 NW 495

Setting aside by court sua sponte. A judge of the municipal court has no jurisdiction to set aside, on his own motion, a duly rendered and journalized order of another judge of the same court sustaining a motion to set aside a default; and equally without jurisdiction, thereupon, to overrule said motion.

Denman v Sawyer, 211-56; 232 NW 819

Errors in proving damages—reviewability. Where appeal is taken from an order overruling a motion to set aside a default judgment, errors in the trial in determining damages are reviewable even tho no appeal is taken on the judgment itself, the situation being directly analogous to an appeal from an order overruling a motion for a new trial based upon errors in the trial.

Rayburn v Maher, 227-274; 288 NW 136

Collateral attack—irregular petition for appointment of guardian. Irregularities in the form of a petition for the appointment of a guardian, while perhaps subject to direct attack, were not sufficient to justify a collateral attack in an action to set aside a default judgment obtained by the guardian.

Jensen v Martinsen, 228- ; 291 NW 422

Peremptory cancellation of judgment. Principle reaffirmed that a default judgment against a party over whom the court has no jurisdiction may be peremptorily set aside.

Dewell v Suddick, 211-1352; 232 NW 118

Personal jurisdiction assumed when unchallenged. Where the jurisdiction of the person is not challenged in an action to set aside a default judgment, it must be assumed that the court had such jurisdiction and, if it also had jurisdiction of the subject matter, it was warranted in entering judgment.

Jensen v Martinsen, 228- ; 291 NW 422

Nonjurisdiction over surety. The court acquires no jurisdiction of a surety on a bond to discharge an attachment when the bond is executed after the sheriff has levied the writ and made return thereon to the clerk, and the bond is not approved by said clerk, as required by statute. It follows that a default judgment against the surety, under such circumstances, is properly set aside, on timely motion.

Brenton v Lewiston, 204-892; 216 NW 6

Default against county treasurer. A default judgment entered against a county treasurer who had been substituted as defendant in lieu of a former treasurer, in an action to enjoin the sale of land for taxes, must be set aside when the substitution is made without the service of original notice upon him, and without knowledge on his part, even tho the former treasurer had been negligent in not entering an appearance; and especially is this true when the application to set aside is timely, and accompanied by an affidavit of merit and an apparently good answer.

Dewell v Suddick, 211-1352; 232 NW 118

II DISCRETION OF COURT

Trial on merits preferred. The law favors trial on merits, and the trial court exercises considerable discretion in setting aside default judgments so as to give preference to trial of causes on merits.

Lemley v Hopson, (NOR); 232 NW 811

Discretion of court. Ordinarily the appellate court will not interfere with the action of the trial court in refusing to set aside a default.

Standard v Marvill, 201-614; 206 NW 37

Discretion of court. The action of the municipal court, on timely motion, in vacating a judgment for irregularity in obtaining the

II DISCRETION OF COURT—concluded

judgment will not be disturbed on appeal in the absence of a clear showing of abuse on the part of the court.

Mitchell v Brennan, 213-1375; 241 NW 408

Bank receivership classification. The court in bank receivership proceedings has discretionary power to set aside an order relative to the classification of claims as general or preferential.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Local customs and practices. In passing upon a motion to set aside a default judgment, the court may give due consideration to the customs and practices of the local bar relative to pending actions.

Chandler Co. v Sinaiko, 201-791; 208 NW 323

Discretion of court. The action of the trial court in setting aside a default judgment and granting a new trial will not be disturbed on appeal when, on the record, the trial court could find that defendant apparently had a good defense, honestly intended to present such defense, and justifiably supposed he had arranged for such presentation.

Tate v Delli, 222-635; 269 NW 871

Setting aside default. Refusals to set aside defaults will not be interfered with on appeal in the absence of a showing of abuse of discretion on the part of the court. So held where the entry of default, in an action for partition, and the refusal to set the default aside, appear to have been harmless to defendant.

Bleakley v Long, 222-76; 268 NW 152

Nonservice of notice—disregarding bailiff's return of service—receivability. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick Co. v Dillon, 226-244; 283 NW 872

Affirmative abuse of discretion. The court abuses its discretion in refusing to set aside a calendar entry ordering judgment for plaintiff because (owing to a misunderstanding between counsel) defendant did not, after the issues were all made up, appear on the day set for trial.

Rounds v Butler, 208-1391; 227 NW 417

III TIMELY APPLICATION

Setting aside default judgment—time limit five days. A motion to set aside a default judgment in the district court must be made within five days after rendition of the judgment, unless the time is extended by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Ruling on motion — timeliness of appeal. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

Fatal delay. A defendant is very properly denied a new trial when she had knowledge of the entry of the default judgment almost simultaneously with its entry, and negligently delayed filing her petition for a new trial until after the lapse of nine months and the passing of three terms of court, and especially when her petition presents no fact coming to her knowledge since the entry of the judgment complained of.

Anderson v Anderson, 209-1143; 229 NW 694

Right to set aside after term. An order declaring that defendant is in default for want of appearance—in other words, a "simple" or "naked" default unaccompanied by any judgment on the claim sued on—may be validly set aside at a subsequent term on proper showing.

Weinhart v Meyer, 215-1317; 247 NW 811

Adopting pleading stating valid defense—default against aged defendant. A default order unaccompanied by any judgment may be validly set aside at a subsequent term. So held in a partition suit where defendant, an 84-year-old mother holding a life estate, after defaulting, adopted the answer and cross-petition of the defendant children, which pleadings, if true, would effectually prevent partition—a sound reason for setting aside the default.

Redding v Redding, 226-327; 284 NW 167

Fatal delay. A delay of over five months in instituting proceedings to set aside a default judgment in municipal court bars relief.

Harding v Quinlan, 209-1190; 229 NW 672

Municipal courts—defaults—nonapplicable statutes. The statute requiring applications to set aside defaults in the district court, to be made "at the term" in which default is entered, is not applicable to defaults in municipal courts because said latter courts have no terms.

La Forge v Cooter, 220-1258; 264 NW 268

IV EXCUSE FOR DEFAULT

Inexcusable default. A party to a divorce proceeding who knows that an attorney consulted by him will not appear unless paid a

retainer fee, and who makes no such payment, will not be heard to assert that the resulting default worked a fraud upon him.

McNary v McNary, 206-942; 221 NW 580

Effect of neglect. In the absence of culpable neglect, a party is entitled to set aside a default on "a prima facie showing".

Hatt v McCurdy, 223-974; 274 NW 72

Unexpected withdrawal of appearance. The sudden and unexpected withdrawal by an attorney of his appearance in a case, attended by no fault or negligence on the part of the client, necessitates a setting aside, on proper showing, of the resulting default.

Ferris v Wulf, 216-289; 249 NW 156

Sickness of counsel. Default judgment in mortgage foreclosure may be set aside on a showing that it was entered without fault on the part of defendant but solely because of the sickness of his attorney.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Showing—day in court. Where a case is set for trial and counsel tho notified by letter is out of the state when the case is called for trial and a default is entered, the court erred in refusing to set aside the default since reputable counsel were employed, the parties themselves were not negligent, and they should "have had their day in court".

Hatt v McCurdy, 223-974; 274 NW 72

Setting aside default—no rule obtainable. In setting aside a default judgment, each case must rest upon its own facts.

Hatt v McCurdy, 223-974; 274 NW 72

Oral agreements. Oral agreements between litigants or their attorneys when not brought to the attention of the court are entitled to little favor on hearings to set aside default judgments.

Standard Oil v Marvill, 201-614; 206 NW 87

Notice of taking default—attorneys' custom. Defendants may have a default judgment set aside where two reputable attorneys, one of which resided in the county where the action was brought, were employed, and where such attorneys rely on a practice among the attorneys in that county to inform opposing counsel of intention to take default, and where a default without notice pending appeal would not have been anticipated.

Lunt v Van Gorden, 225-1120; 281 NW 743

"Practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Inexcusable negligence. The refusal of the trial court, in divorce proceedings, to set aside a default decree, resulting from the inexcusable negligence of the applicant, will not be interfered with.

Bossenberger v Bossenberger, 210-825; 229 NW 833

Double recovery on one claim. Even where defendant failed to plead after being thrice ordered to do so after his special appearance was overruled, and tho he had not excused his default or stayed the proceedings, defendant seeking to set aside the default was entitled to relief when the record showed that plaintiff was allowed to recover two commissions on the same 2,000 cases of 7up under duplicate averments in his petition.

Rayburn v Maher, 227-274; 288 NW 136

V MERITORIOUS CAUSE OF ACTION OR DEFENSE

Affidavit of merit necessary. Defaults will not be set aside in the absence of an affidavit of merit.

Bates v Ely Bank, 219-1356; 261 NW 614

Affidavit of merit. Defaults in municipal courts may not be set aside in the absence of an affidavit which specifically sets forth the facts relied on as a defense to the action sued on.

Boody v Sawyer, 201-496; 207 NW 589

Belated motion — absence of affidavit of merit. Judgments by default in municipal courts, after proper service, may not be set aside in the absence of an affidavit of merit, nor may such judgments be set aside on a motion filed more than ten days after the default is entered, nor are such defects remedied by renewing the motion, after the ruling of the court, with an affidavit of merit.

Borden v Voegtlin, 215-882; 245 NW 331

When affidavit of merit unnecessary. A default may be legally set aside tho the mover therefor files no affidavit of merit, when the court, in entering the default, stated that he would set aside the default if a motion so asking be filed, and when the applicant for the default then affirmatively acquiesced in such purpose of the court.

Wagoner v Ring, 213-1123; 240 NW 634

Insufficient showing. A default judgment will not be set aside on a motion and affidavit of merit which assert that the applicant will plead a specified defense when certain matters

V MERITORIOUS CAUSE OF ACTION OR DEFENSE—concluded

then pending on appeal in the supreme court have been finally determined.

Wade v Swartzendruber, 206-637; 220 NW 67

Falsity of testimony. Motion to vacate a judgment on the ground that the testimony on which the judgment was rendered was false is properly overruled.

Genco v Mfg. Co., 203-1390; 214 NW 545

Setting aside because of unauthorized amendment. A default judgment is very properly set aside on the ground that plaintiff, after the entry of default, amended his pleadings by increasing the amount of his claim, and took judgment on such amended pleadings.

Chandler Co. v Sinaiko, 201-791; 208 NW 323
See Sutton v Rhodes, 205-227; 217 NW 626

VI PLEADING ISSUABLY AND FORTHWITH

No annotations in this volume

VII TERMS

Nonappearance—trial to court. Where an action on a promissory note had been assigned for trial, continued to the next day because of defendant's nonappearance for trial, and at such time called for trial a second time with defendant still not appearing until after the jury panel had been dismissed, a default having been entered, and plaintiff being allowed to prove up his case to the court, held on defendant's belated appearance and demand for jury trial, an offer by the court to require plaintiff to reintroduce his evidence but requiring a trial to the court without a jury, otherwise, permitting default and judgment thereon to stand, was not error.

Vaux v Hensal, 224-1055; 277 NW 718

VIII REVIEW ON APPEAL

Annulment of marriage—insanity. Evidence reviewed and held sufficient to authorize default decree annulling marriage on ground of insanity at time of marriage.

Kurtz v Kurtz, 228- ; 290 NW 686

Order setting aside unappealable. An order setting aside a default judgment is inherently unappealable.

Barber v Shattuck, 207-842; 223 NW 864
Baker v Ry. Exp., 207-1350; 224 NW 513
Welty v Ins. Assn., 211-1135; 235 NW 80
Wagoner v Ring, 213-1123; 240 NW 634

Double recovery on one claim. Even where defendant failed to plead after being thrice ordered to do so after his special appearance was overruled, and tho he had not excused his default or stayed the proceedings, defendant seeking to set aside the default was entitled to relief when the record showed that plaintiff was allowed to recover two commissions on the same 2,000 cases of 7up under duplicate averments in his petition.

Rayburn v Maher, 227-274; 288 NW 136

Foreign judicial records—improper certification first raised on appeal. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is, that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

11590 Amount of judgment—how determined.

Amount confined to averments of petition. When a defendant defaults, he is still protected by the law, and plaintiff's recovery must be confined and responsive to the averments in his petition.

Rayburn v Maher, 227-274; 288 NW 136

Errors in proving damages—reviewability. Where appeal is taken from an order overruling a motion to set aside a default judgment, errors in the trial in determining damages are reviewable even tho no appeal is taken on the judgment itself, the situation being directly analogous to an appeal from an order overruling a motion for a new trial based upon errors in the trial.

Rayburn v Maher, 227-274; 288 NW 136

11592 Default in equitable proceeding.

Relief in default cases. See under §11587

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Quieting title—proof. Being in equity, a default judgment in a quiet title action must by statute be based upon both pleadings and testimony.

Neilan v Lytle Co., 223-987; 274 NW 103

Quieting title—insufficiency of evidence—burden. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments, the nonconformity of plat

to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and, the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Co., 223-987; 274 NW 103

11593 Setting aside, if on notice by publication.

Estoppel to question submission of issue. A claimant in probate who advantages himself of the very liberal rules of pleading recognized in the probate court, and who files a claim which, if established, will justify a recovery on the basis of either an express contract or implied contract, may not complain that the court submitted to the jury the issue of express contract, especially when the verdict was in his favor.

Wilson v Else, 204-857; 216 NW 33

Nonservice of notice—disregarding bailiff's return of service—receivability. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick Co. v Dillon, 226-244; 283 NW 872

11595 New trial after judgment, on publication.

Nonapplicability of statute. The statutory provision for a new trial for a defaulting defendant served by publication only does not apply to divorce proceedings.

Girdey v Girdey, 213-1; 238 NW 432

Minor served by publication only. A nonappearing, nonresident minor, defendant in partition, and served by due publication only, is entitled to a new trial on timely and sufficient application therefor, even tho, on the original trial, a guardian ad litem was duly appointed for him, and the issue of his interest in the property was fully adjudicated.

Clark v Robinson, 206-712; 221 NW 217

Computation of period. The two years within which a nonresident, nonappearing defendant served by publication may appear and have an action in partition retried, commences to run from the date of the judgment which confirms the partition and apportions the costs, and not from the date when the court approves the referee's report of distribution.

Tracy v McLaughlin, 207-793; 223 NW 475

Decree adjudging superiority of second mortgage. A decree, rendered on service by publication in the foreclosure of a second mortgage, adjudging that said second mortgage is senior and superior to a first mortgage, in accordance with a definite pleading and prayer to said effect based on a good faith but mistaken belief that said first mortgage had been paid, is binding and conclusive on the holder of said first mortgage, and may not be collaterally assailed by said first mortgagee in an action to foreclose his mortgage. (It appears that said first mortgagee had allowed the time to elapse in which to attack said decree under §11595, C., '27.)

Lyster v Brown, 210-317; 228 NW 3

Fraudulent decree — new trial. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state, and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

11596 Judgment on retrial.

Default for nonappearance—trial to court. Where an action on a promissory note had been assigned for trial, continued to the next day because of defendant's nonappearance for trial, and at such time called for trial a second time with defendant still not appearing until after the jury panel had been dismissed, a default having been entered, and plaintiff being allowed to prove up his case to the court, held on defendant's belated appearance and demand for jury trial, an offer by the court to require plaintiff to reintroduce his evidence but requiring a trial to the court without a jury, otherwise, permitting default and judgment thereon to stand, was not error.

Vaux v Hensal, 224-1055; 277 NW 718

11600 Judgment on publication service.

Garnishment, in rem judgments. See under §12169

Judgment in rem as basis for creditor's bill. A judgment in rem against the real estate of a nonresident furnishes sufficient basis for the institution of an action in the nature of a creditor's bill to set aside a fraudulent transfer of the property and to subject the property to the payment of the judgment.

Porter v Wingert, 200-1371; 206 NW 295

Judgment in rem. An in rem judgment cannot affect personal property in the possession of a nonresident who is not personally served in Iowa and who is located in another state.

McGaffin v Helmts, 210-108; 230 NW 532

Garnishment—proceedings to support or enforce—judgment in rem. In an action aided by

attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation,—if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Deceased partner and surviving partners—accounting. Where an accounting proceeding instituted by the widow of a deceased partner, in order to determine her dower interest in the partnership property, is tried on the mutual theory that her interest, when determined, should be impressed as a trust on the entire partnership property, a judgment in rem against the partnership property should be entered, and not a personal judgment against the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Mortgage forclosure — deficiency judgment in rem. A receiver may, on a proper showing, be appointed to collect pledged rents, and thereby discharge a deficiency judgment, whether the deficiency arises on a judgment in personam or in rem.

Inter-State Assn. v Nichols, 213-12; 238 NW 435

Foreclosure decree—construction — application of rents. A foreclosure decree which covers a first and second mortgage, and which is in rem only, and which appoints a receiver, with direction to pay the final balance of rents "on deficiency judgment", entitles the second mortgagee to such final balance of rents in preference to the then owner of the land, the first mortgagee being fully satisfied by the foreclosure sale.

Union Bank v Lyons, 206-441; 220 NW 43

Foreclosure action in rem—state court—not stayed by bankruptcy proceedings. Where mortgagees on foreclosure did not ask personal judgment, but only a judgment in rem, and trustee in bankruptcy for mortgagors had secured an order releasing and discharging the real estate as assets in bankruptcy matter, state court was justified in proceeding with foreclosure and in not staying proceedings until adjudication of mortgagors as bankrupts, bankruptcy act, §11 [11 USC, §29], contemplating only suits in personam and from which a discharge in bankruptcy would be a release.

Mayer v Imig, (NOR); 227 NW 328

11601 Personal judgment—when authorized.

Personal judgment—insufficient prayer. A personal judgment without a specific prayer therefor is erroneous, and a prayer for "other and further relief" is not such prayer.

Richardson v Short, 201-561; 207 NW 610

Nature and essentials—nonparty to action. Personal judgment may not be rendered against one who is not a party defendant.

Tracey v Judy, 202-646; 210 NW 793

Personal judgment unallowable. A nonresident minor may, in a proper case, be made a party to litigation in this state, by service in this state on the foreign guardian, but such service will not confer jurisdiction on the court to enter a personal judgment against the minor.

Irwin v Bank, 218-474; 255 NW 670

Service outside state—effect. Jurisdiction in personam of an Iowa corporation is constitutionally obtained by proper service of a proper original notice in a foreign state on one of the last known or acting officers of the corporation, as shown by the last statutory annual report of the corporation on file with the secretary of state of this state.

Bennett v Coal Co., 201-770; 208 NW 519

Nonpermissible personal judgment on foreign service. A corporation organized under federal law, with its principal place of business or domicile in a foreign state, does not become a "resident" of this state by doing business in this state. It follows that service outside this state of an original notice on the corporation, it having no officer or agent in this state, does not authorize the entry in this state of a personal judgment against the corporation.

Fisher & Van Gilder v Bank, 210-531; 231 NW 671; 69 ALR 1340

11602 Liens of judgments.

Discussion. See 13 ILR 203—**Lien of federal court judgments**

Atty. Gen. Opinion. See AG Op Aug. 12, '39

ANALYSIS

I LIEN IN GENERAL
II COMMENCEMENT OF LIEN
III DURATION OF LIEN
IV PROPERTY OR INTEREST AFFECTED
V PARTIES AFFECTED
VI DEATH OF JUDGMENT DEBTOR
VII PRIORITY

Judgment creditors as nonpurchasers. See under §10105 (III), Vol I
Lien of judgment on homestead. See under §10155

I LIEN IN GENERAL

Displacement of liens. Railway companies which knowingly permit the receiver of an insolvent railway to collect interline freight charges may not, as intervenors in an action to foreclose a mortgage on the receiver's road, have their claims established as prior to judg-

ment liens on the naked showing that said freight charges were used by the receiver in operating his railway.

Continental Bk. v Railway, 202-579; 210 NW 787; 50 ALR 139

Junior mortgagee—loss of rights. A junior mortgagee who makes no redemption from the sale under senior foreclosure to which he and the common mortgagor were parties may not, after the sale under such senior decree, obtain a judgment on his junior mortgage note and enforce it against the land in the hands of the mortgagor's grantee who has redeemed, or in the hands of a party who claims under said grantee.

Stiles v Bailey, 205-1385; 219 NW 537

Superintendent of banking as receiver—extent of lien. A judgment against the superintendent of banking as receiver of a particular bank becomes a lien only on land held for that bank in the county wherein the judgment is rendered or to which transcripted and does not become a lien on land held as receiver of some other bank.

Bates v Nichols, 223-878; 274 NW 32

Guardian and ward—disposing of solvent estate—not intended by statute. The statutes providing for guardians for property of incompetents do not contemplate disposition of ward's assets, except in instances where ward's estate is insolvent, or probably will be insolvent. The statutes intend that the business of the ward shall be conducted by a guardian instead of by the ward himself.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

II COMMENCEMENT OF LIEN

Effective from recorded date. A judgment lien is effective from the recorded date thereof, not from the date when the court, in some subsequent proceedings, has occasion to, and does, confirm said lien.

Kramer v Hofmann, 218-1269; 257 NW 361

When lien effective. A decree which establishes in plaintiff a lien on real estate "subject to the payment" of a named claim, and which provides for a sale of the land subject to said claim, cannot properly be construed as requiring plaintiff to pay and discharge said claim as a condition precedent to the attaching of plaintiff's lien.

Farber v Ritchie, 212-1396; 238 NW 436

Levy under invalid attachment—subsequent personal judgment—effect. While plaintiff obtains no lien on realty by virtue of a levy under an invalid attachment, yet, if he obtains personal judgment on the claim sued on, he will, from the entry of such judgment, have a lien notwithstanding the futility of the attachment proceedings.

Andrew v Miller, 221-316; 263 NW 845

III DURATION OF LIEN

Voluntary payment by stranger. One who, solely on his own volition, intentionally pays and discharges a judgment as to which he is a legal stranger, may not (1) have the lien of the judgment plaintiff re-established on land and be subrogated to the rights of said lien, nor (2) may he be given a personal judgment against the judgment defendant who was benefited by such voluntary payment and discharge.

Wragg v Wragg, 208-939; 226 NW 99; 64 ALR 1292

Four months liens. A judgment lien is in no manner displaced or affected by bankruptcy proceedings instituted by the judgment defendant more than four months after the lien attached.

Kramer v Hofmann, 218-1269; 257 NW 361

Irrevocable termination. A judgment rendered on May 28, 1926, in favor of a state bank, and later assigned by the receiver of said bank, absolutely ceases to exist on January 1, 1934, for any purpose whatsoever, except as a counterclaim, unless, prior to said latter date, the holder of said judgment and the judgment debtor file in said cause a written stipulation continuing the life of said judgment. (§11033-e1, C., '35 [§11033.1, C., '39])

Johnson v Keir, 220-69; 261 NW 792

IV PROPERTY OR INTEREST AFFECTED

Judgment is debt—action thereon is ex contractu. A judgment procured upon a judgment creates a lien of the same force and effect upon the real estate of the judgment debtor as does any other judgment of the district court.

Chader v Wilkins, 226-417; 284 NW 183

Lien on real property—attaches by operation of law. A judgment on a judgment is a lien on the real property of the debtor for ten years and where debtor's father died, leaving real estate to the debtor-son's wife, who then in turn died intestate, the lien attaches to the debtor's one-third interest therein, even tho he quitclaimed his interest to his daughter within ten days after his wife's death and before execution on the judgment issued.

Chader v Wilkins, 226-417; 284 NW 183

Judgment creditor of devisee. A demurrer to objections to the probate of a will should have been overruled when it admitted as facts that the contestant held judgments against the devisee who was a son and heir of the decedent who died seized of real estate, that the judgments were liens against any real estate the son would inherit as heir, and that the decedent was of unsound mind when the will was made, as, if the decedent were incompetent, the will was void and he died intestate. So the title to the son's share in the real estate vested at the father's death, and,

IV PROPERTY OR INTEREST AFFECTED—concluded

at the same instant, the judgments became liens on his share of the real estate.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of heir. Judgments held against a son and heir of the decedent and recorded where real estate owned by the decedent was located became liens upon the real estate at the time the title thereto vested in the son, and were a beneficial interest entitling the creditor to contest the probate of a will which would deprive him of that interest.

In re Duffy, 228- ; 292 NW 165

Contest of will by judgment creditor. The creditor of an heir who holds a judgment against him which would be a lien upon any real estate which he would inherit from an ancestor has an interest which entitles him to contest the ancestor's will.

In re Duffy, 228- ; 292 NW 165

Sale—motion to set aside by stranger to proceeding. The owner of land which has been levied upon and sold under execution as the property of the judgment defendant on the theory that the judgment became a lien on the land before said owner acquired the land may maintain a motion to set aside the sale on the ground that said judgment was not, and never had been, a lien on the land. (§11734, C., '27)

Dorsey v Bentzinger, 209-883; 226 NW 52

Mortgage foreclosure—decree fixing lien on other assets in different court. Court may authorize a mortgagee's foreclosure action against the receiver in a county where the property is located, tho different from county where receivership is pending and such court, after hearing the foreclosure proceeding, has the right, where such relief is proper, not only to foreclose but to impose a lien for a deficiency judgment on the other receivership assets in the other court.

Klages v Freier, 225-586; 281 NW 145

General and partnership creditors. The equity of partnership creditors is superior to the lien of a judgment against an individual partner.

Lefebure v Lefebure Sons, 202-1053; 208 NW 853

Equitable conversion precluding lien. A judgment is not a lien on real estate which has been equitably converted by a will into personalty prior to the date of the judgment.

Dever v Turner, 200-926; 205 NW 755

Reformation of mortgage against judgment creditors. A mortgage may be so reformed as to correct the mutual mistake of mortgagor and mortgagee in omitting certain lands from the mortgage, even against a judgment creditor of the mortgagor who became such since the mortgage was executed.

Davis v Bunnell, 207-1181; 225 NW 6

Quasi-judgment subsequent to death of party. An order growing out of a proceeding instituted after the death of a party, and declaring a contingent liability against the estate of the deceased party, is not a lien on the real estate of which the deceased died seized.

In re Hager, 212-851; 235 NW 563

Divorce—alimony—nonlienable decree for money. A decree (in divorce proceedings) which, inter alia, simply "orders" defendant to pay to the clerk for the use of plaintiff a stated sum each month, but renders against defendant no present judgment for money, but authorizes the clerk to enter such judgment for payments in default, neither becomes a lien on defendant's lands, nor authorizes the issuance of an execution.

Millisack v O'Brien, 223-752; 273 NW 875

Superintendent of banking as receiver—extent of lien. A judgment against the superintendent of banking as receiver of a particular bank becomes a lien only on land held for that bank in the county wherein the judgment is rendered or to which transcripted, and does not become a lien on land held as receiver of some other bank.

Bates v Nichols, 223-878; 274 NW 32

V PARTIES AFFECTED

Judgment against insane person—validity. The validity of a judgment obtained in a law action against an insane defendant is not affected by such insanity, or by fact that a guardian had been appointed for his property.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

VI DEATH OF JUDGMENT DEBTOR

Discussion. See 22 ILR 557—Limitations and claims against estate

Substitution of administrator—judgment—effect. A plaintiff who, upon the death of the defendant, prosecutes his claim to judgment by substituting the defendant's administrator as defendant, simply accomplishes a legal adjudication of his claim against the estate. Plaintiff, by such procedure, does not obtain any lien on the real property belonging to the estate.

Marion Bank v Smith, 205-203; 217 NW 857

Judgment against insane person—priority in estate—lien. A judgment rendered against an insane person at a time when the guardianship was entirely insolvent, with no proceedings then pending nor contemplated relative to dissolution or distribution of assets of guardianship, becomes a lien upon his realty,

and upon his death the district court could properly order administrator of his estate to pay the judgment prior to payment of claims against the estate.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

VII PRIORITY

Mortgage for future advancements. A mortgage on realty actually given to secure future advances of money to the mortgagor is prior in right to subsequently rendered judgments against the mortgagor as to advances made after the rendition of the judgments, it not appearing that the mortgagee had actual knowledge of said judgments.

Everist v Carter, 202-498; 210 NW 559

Priority of mortgage. One who holds an absolute deed as a mortgage and, under agreement with the mortgagor, sells the property, may not, as against a subsequent judgment lienholder, enforce priority to the proceeds of the sale, except to the amount or extent that he applies the proceeds on his mortgage debt.

Everist v Carter, 202-498; 210 NW 559

Right of subrogation—deducting set-off. A vendor who is compelled to discharge a judgment lien on real estate after the amount of the judgment has been deducted from the purchase price is entitled to be subrogated to the rights of the judgment plaintiff against a subsequent purchaser who is not a purchaser for value and without notice, subject to any indebtedness owed by the vendor to the vendee, and growing out of the same transaction.

Home Loan Co. v Burrows, 207-1071; 224 NW 72

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may, in partition proceedings, be offset against his interest in the real estate of testator, and such right is superior to the right of a judgment creditor who obtained his judgment against the devisee subsequent to the death of the testator.

Schultz v Locke, 204-1127; 216 NW 617

Offsetting debt of insolvent heir against realty—creditors. Where an heir, as a defendant in a partition action, admits insolvency and an indebtedness to parents' estate in excess of his interest in parents' realty, decree was proper holding heir had no interest in such realty and, accordingly, heir's creditors who obtain judgments after commencement of partition action but before entry of decree, and making no claim of fraud in securing the decree, have no interest in any of funds received from sale of realty.

Petty v Hewlett, 225-797; 281 NW 731

Antagonistic judgments—priority. The lien of a judgment obtained by an executor against an insolvent devisee for sums owed by the devisee to the estate (obtained in order to avoid unfairness to other equally-sharing devisees) is superior to the lien of a prior judgment against said devisee obtained by a general creditor, on lands acquired by the estate subsequent to both judgments.

Johnson v Smith, 210-591; 231 NW 470

Liénable judgment during receivership. A judgment rendered against a debtor at a time when he is under temporary receivership for purposes other than the winding up of the affairs of the debtor (even tho the receiver is not a party to the action) is valid and lienable on the lands of the debtor in preference to other creditors, even tho, subsequent to the rendition of such judgment, the said receivership is converted into a proceeding for the winding up of the affairs of the debtor.

Britten v Oil Co., 205-147; 217 NW 800

Equitable mortgage—priority. Where one who stands in the position of a vendor of land assigns his interest in the contract of sale as security, and the court subsequently decrees a cancellation of the contract, but also decrees that such cancellation shall be without prejudice to the rights of said assignee, said assignee will be deemed to hold an equitable mortgage on the land reverting to the vendor, superior to the lien of a judgment against the vendor obtained subsequent to the original assignment.

Johnson v Smith, 210-591; 231 NW 470

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

11603 When judgment lien attaches.

Nunc pro tunc entry—effect. The recital in a judgment entry of the date on which a cause came on for trial does not, in and of itself, constitute a nunc pro tunc order that a subsequently entered judgment shall be a lien from said recited date of trial.

Andrew v Winegarden, 205-1180; 219 NW 326

Special assessment—when lien or incumbrance. A special assessment for a street improvement which has been undertaken by the city without the letting of a contract does not become a lien or incumbrance on the land

from the point of time when the assessment is finally approved by the council.

Frankel v Blank, 205-1; 213 NW 597

Assignment by heir—effect. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor.

Berg v Shade, 203-1352; 214 NW 513
Funk v Grulke, 204-314; 213 NW 608

Judgment in vacation. Where a cause is tried, submitted, and taken under advisement under a stipulation that judgment may be entered "during term time or vacation", a subsequently rendered judgment becomes a lien on the defendant's land from the date of its actual entry, and not from the date of actual trial and submission under said stipulation, even tho the judgment entry recites such day of trial and submission.

Andrew v Winegarden, 205-1180; 219 NW 326

Burden of proof. A judgment creditor who claims that his transcript of judgment was filed prior to the delivery of a deed of conveyance by the judgment debtor has the burden of so showing.

Richardson v Estle, 214-1007; 243 NW 611

Superintendent of banking as receiver—extent of lien. A judgment against the superintendent of banking as receiver of a particular bank becomes a lien only on land held for that bank in the county wherein the judgment is rendered or to which transcripted and does not become a lien on land held as receiver of some other bank.

Bates v Nichols, 223-878; 274 NW 32

Homestead—liabilities enforceable against—subsequent loan to pay prior debt. A judgment on a loan made to the owners of a homestead long after the acquisition of the homestead is not a lien on the homestead, because of the fact that said loan was made and used for the specific purpose of paying off a debt antedating the acquisition of said homestead.

Brauch v Freking, 219-556; 258 NW 892

11608 Judgments on motion.

Additional annotations. See under §11567 (III)
Judgments generally. See under §11567
Suretyship generally. See under §11577

Summary proceedings—non de novo hearing. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Summary proceedings—findings conclusive. In a summary proceeding by a client against his attorney, the finding by the trial court on conflicting testimony is conclusive on the appellate court.

Norman v Bennett, 216-181; 246 NW 378

Nonapplicability of summary remedy. The statutory remedy of summary judgments on motion against attorneys for property collected by attorneys for clients cannot be employed as the basis of an action to require performance of a contract between an attorney and a client not involving collection of property.

Bradford v Dawson, 214-130; 241 NW 420

Rights and remedies of surety—contribution—nonestoppel. A surety who unsuccessfully contends, when sued on bond, that he is not liable for any defalcation occurring prior to the bond—that said bond is a substitute for a prior bond of the same guardian—does not thereby estop himself from enforcing contribution from the sureties on said prior and contemporary bond.

Federal Co. v France, 212-1403; 238 NW 460

Findings of trial court. A finding of fact by the court, on supporting testimony, on a motion for judgment against an officer for money in his hands, is conclusive on the appellate court.

Andresen v Andresen, 219-434; 258 NW 107

Insurance contract—construction—effect of reinsurance. A contract performance bond which, in effect, binds the insured to reimburse the insurer and any reinsurer for any loss which the insurer or reinsurer may be compelled to pay is not multiplied or divided by a subsequent reinsurance contract. In other words, the liability of the original insured remains a single liability, and the risk carried by both insurers remains as one risk.

Iowa Cas. Co. v Wagner Co., 203-179; 210 NW 775

11612 No written pleadings.

Unnecessary pleadings. In summary proceedings against a clerk of the court for judgment for funds collected by the clerk, the filing of an answer by the clerk does not cast any greater burden on the plaintiff.

Prudential v Hart, 205-801; 218 NW 529

Belated presentation of defense. In summary proceedings between an attorney and a client, the defense that a contract between the parties was champertous, or against public policy, must be presented in some manner in the trial court, even tho such summary proceedings are heard by the trial court without written pleadings.

Norman v Bennett, 216-181; 246 NW 378

11613 Conveyance by commissioner.

Wrongful release of conditionally cancelled mortgage. Where, in rescission proceedings,

a decree in effect provided that a promissory note and recorded real estate mortgage given for the purchase price of goods should be null and void from and after the return of the goods by the mortgagor to the mortgagee, and where the goods were never so returned, and where the mortgage was wrongfully released of record by a court-appointed commissioner, the mortgage may be foreclosed against a purchaser of the land who innocently bought in reliance on the wrongful release. This is true because, while both the mortgagee and the subsequent purchaser were innocent, yet the purchaser had the means of knowing whether the goods had been returned to the mortgagee,—the very act which, under the decree, would work a nullification of the mortgage and note and justify a release.

Moore v Crawford, 210-632; 231 NW 363

11621 Satisfaction of judgment—penalty.

Damages for failure to satisfy. Damages for failure to enter a record satisfaction of a paid judgment are properly denied when there is no evidence of such damages.

Taylor v Heiny, 210-1320; 232 NW 695

Agreement to release judgment—costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

CHAPTER 497

COSTS

11622 Recoverable by successful party.

ANALYSIS

I Costs in General
II Liability in General
III Probate Proceedings
IV Taxation Against Defendant
V Taxation Against Plaintiff

Costs, criminal cases. See under §13964

I COSTS IN GENERAL

Contempt — imprisonment for costs. Imprisonment for nonpayment of costs in contempt proceedings is unauthorized.

Hammer v Utterback, 202-50; 209 NW 552

No inherent right to tax costs. Principle reaffirmed that the court has no inherent right to tax costs.

Hensen v Hensen, 212-1226; 238 NW 83

Taxation—apportionment—showing on appeal. The discretion of the trial court in apportioning costs will not be disturbed on appeal, in the absence of some fairly definite showing of the items entering into the total taxation and the responsibility of each party therefor.

Parks & Co. v Howard Co., 200-479; 203 NW 247

Agreement to release judgment—costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Voluntary compliance with costs judgment—review. A voluntary payment of an entire judgment prior to appeal by the superintendent of banking tho such judgment be only for costs, entered against him by the court, and not merely taxed by the clerk, is such an acquiescence and submission to the judgment as precludes an appeal thereon. (Distinguishing Boone v Boone, 160 Iowa 284.)

Bates v Nichols, 223-878; 274 NW 32

II LIABILITY IN GENERAL

Persons acting officially. Costs should not be taxed against a county auditor in a matter in which he acts officially, in good faith, and on the advice of counsel.

Northwest. Bk. v Van Roekel, 202-237; 207 NW 345

Submission without action. When the issues in a controversy are made up by pleadings and the pleadings then abandoned and the matter submitted to the court on a stipulation of fact, the costs are properly taxed against the wholly unsuccessful party.

Chambers v Bank, 218-63; 254 NW 309

Agreement to release judgment—costs included. Under a settlement in which a judg-

ment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

III PROBATE PROCEEDINGS

Unsuccessful will contestant. Costs accruing in an unsuccessful contest of a will should be taxed to the contestant.

Schroeder v Cable, 211-1107; 235 NW 63

Against losing party in probate. Costs in probate consequent on objections filed to an intermediate report of an executor, and on a trial on such objections before a referee, are properly taxed to the objector if the objections be overruled.

In re Cochran, 220-33; 261 NW 514

Property in probate—equity action. There being no statutory authority therefor, costs and expenses of litigation are not allowable to a plaintiff in an equitable action to determine ownership of property involved in probate, even tho the action was begun in the interests of all persons interested in the estate.

Carpenter v Lothringer, 224-439; 275 NW 98

IV TAXATION AGAINST DEFENDANT

Successful party — statutory rule. Costs must be taxed to the defendant when the plaintiff is successful on his demand.

Burghardt v Burghardt, 209-1171; 229 NW 761

Nonparties and parties not liable. Costs cannot be taxed to a defendant against whom plaintiff has established no liability, and necessarily not to a party who is not a party to the action.

Commercial Bk. v Broadhead, 212-688; 235 NW 299

V TAXATION AGAINST PLAINTIFF

Fence-viewing proceedings. Costs in certiorari proceedings to annul the void proceedings of fence viewers are properly taxed to the party who initiated the proceedings before the fence viewers, such party being a party to the certiorari proceedings by consolidation of other actions therewith.

Sinnott v Dist. Court, 201-292; 207 NW 129

Mistrial. When a mistrial is declared for no fault of plaintiff, the accrued costs may not be taxed to plaintiff but must abide the final determination of the case.

Slinger v Ins. Assn., 219-329; 258 NW 101

11623 Witness fees—limitation.

Taxation of witness fees. See under §§11330, 13880, Vol I

11624 Apportionment generally.

Insufficient grounds. In an action by the vendor of land for the purchase price, the defendant is not entitled to an apportionment of the court costs, because the vendor had not described the land by metes and bounds, when the defendant did not, prior to suit, demand such description, and would have been furnished such description by simply asking for it.

Elliott v Horton, 205-156; 217 NW 829

Nonright to apportionment. The naked fact that defendant was awarded a general verdict, but with no recovery on his counterclaim, does not entitle plaintiff to an apportionment of the cost.

Priest v Hogan, 218-1371; 257 NW 403

Equity court's discretion—apportionment between bankruptcy trustee and heirs—renounced devise. In equity, the court has a wide discretion in taxing costs, which will not be interfered with except in case of manifest injustice; so, where a sister renounced benefits under her father's will and conveyed realty to her brother before she took bankruptcy, in action by the bankruptcy trustee to set aside renunciation and the conveyance as fraudulent, the apportionment of one half of costs against trustee and other half against sister and brother was proper.

McGarry v Mathis, 226-37; 282 NW 786

11626 Liability of successful party.

Remedies for collection—motion to retax—special proceeding. A motion by a city to retax unpaid clerk's costs against the plaintiff is a special proceeding.

Great West. Ins. v Saunders, 223-926; 274 NW 28

11630 Referee fees.

Atty. Gen. Opinion. See '28 AG Op 252

11633 Dismissal of action or abatement.

Effect on taxation of attorney fees. The action of plaintiff in divorce proceedings in dismissing his action pending defendant's application for suit money, deprives the court of jurisdiction thereafter to tax to plaintiff, as costs, any allowance to compensate defendant for attorney fees for services performed prior to said dismissal.

Dallas v Dallas, 222-42; 268 NW 516

11634 Between coparties.

Right to contribution. Principle recognized that a coparty paying all the costs taxed against coparties may enforce contribution from other coparties.

Read v Gregg, 215-792; 247 NW 199

11636 Costs taxable.

Unliquidated demand set off against court costs. On a motion by an administrator to tax court costs against a defeated claimant in probate, the latter may not have a duly filed but unliquidated claim in his favor and against the estate adjudicated and set off against said costs and a judgment rendered against the estate for the excess.

In re Nairn, 215-920; 247 NW 220

Rents — wrongful application on costs. While rents of mortgaged premises in the hands of a receiver are properly applicable solely to the discharge of a deficiency judgment, yet, manifestly, the mortgagor may validly consent to their application in discharge of the costs taxed in the foreclosure proceedings.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Amount in controversy—including interest on judgment. In determining the amount in controversy under the statute limiting supreme court appeals to cases involving over $100, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy, but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35, amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

11638 Retaxation.

Motions generally. See under §11229

Motion to retax—exclusive function. The exclusive function of a motion to retax costs is to reach and correct errors of the court's own officer—its clerk—in taxing costs, not to reach and correct errors of the court in adjudging the right to recover an item of costs or the amount thereof, e.g., in re attorney fees as costs. (Bankers Iowa State Bank v Jordan, 111 Iowa 324, Rogers v Crandall, 143 Iowa 249, insofar as inconsistent, overruled.) Appeal is the proper procedure for the correction of the errors of the court.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Motion to retax—limited applicability. A motion to retax costs can reach only errors of the clerk and not errors inhering in a judgment.

Grimes Bank v Jordan, 224-28; 276 NW 71

Attorney fees. Error in the taxation of attorney fees may be reached by motion to retax.

Everist v Carter, 202-498; 210 NW 559

Sufficient ground. Retaxation of costs will not, manifestly, be ordered because of proceedings had as to which no costs were incurred.

Webber v King, 205-612; 218 NW 282

Motion to retax—laches as bar. A delay of some six years on the part of a defendant in moving for a retaxation of costs, held not such laches as to bar the motion, defendant having moved as soon as assured of the illegality in the taxation, and no one being materially prejudiced by the delay.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Supersedeas bond — retaxation of costs — effect. The surety on a supersedeas bond by executing the bond makes himself a party to the record, and is bound by an unappealed order retaxing the costs entered by the court on motion of principal in the bond after the appeal had been dismissed by the appellate court and after said principal had paid a part of the costs.

Springer v Ins. Co., 216-1333; 249 NW 226

Land subjected to bank's judgment—attorney lien—belated cost modification—review. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and, (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Bank v Jordan, 224-28; 276 NW 71

11641 Costs in supreme court.

Taxation of costs on appeal. See under §12874

11643 Interest.

Interest generally. See under §§9404-9409

Amount in controversy—including interest on judgment. In determining the amount in controversy under the statute limiting supreme court appeals to cases involving over

$100, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy, but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35, amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

11644 Attorney's fees.

Atty. Gen. Opinion. See '25-26 AG Op 186

Nonpermissible allowance by court. The allowance by the court of attorney fees to a party not contemplated by the statute is manifestly erroneous.

Teget v Drain. Ditch, 202-747; 210 NW 954

See Nichol v Neighbour, 202-406; 210 NW 281

Harmless error—taxation of attorney fees. Error in taxing attorney fees when the instrument sued on does not provide therefor is fully cured by a statement in the written argument on appeal by the attorney in whose favor the taxation was had, to the effect that he had fully released and satisfied the judgment for such fees, such statement, tho irregularly presented, being irrevocably binding on the attorney.

Koontz v Clark Bros., 209-62; 227 NW 584

Fee recoverable only when damage shown. An attorney's fee paid by the insured could not be recovered when evidence of the value of the services rendered by the attorney was not shown as a basis for establishing the measure of damages.

Gipp v Lynch, 226-1020; 285 NW 659

Unjust enrichment not shown. In an action by the insured to recover a retainer fee paid to an attorney, the evidence was insufficient to sustain a verdict based on unjust enrichment when it was not shown that the insurer was obligated to pay such attorney fee.

Gipp v Lynch, 226-1020; 285 NW 659

Breach of covenant of warranty. Attorney fees may be a proper element of recovery in an action for breach of a covenant of warranty.

Kellar v Lindley, 203-57; 212 NW 360

Corporate notes—state's nonliability in dissolution proceeding. Where dissolution of a mining corporation is sought, a partial cost judgment against the state of Iowa including statutory attorney fees to a cross petitioner on notes secured by chattel mortgage and signed by the corporation is erroneous.

State v Fuel Co., 224-466; 276 NW 41

Action on divorce settlement stipulation—fees unallowable. A stipulation or contract of settlement in a divorce action as a basis for a money recovery is in no different category from any other contract and, unless provided for therein, attorney fees are not taxable in an action based thereon.

Johnstone v Johnstone, 226-503; 284 NW 379

Insolvency proceedings. Attorney fees are properly allowed under a chattel mortgage which stipulates for such fees and which is filed as a claim in assignment proceedings for the benefit of creditors.

In re Cutler & Horgen, 204-739; 212 NW 573; 54 ALR 527

Nonallowable attorney fees. An attorney who, under employment by a debtor whose property is under receivership, successfully defends an attempt to throw the debtor into bankruptcy, may not have his attorney fees paid from the receivership funds, when the receiver and his attorney, under order of court, also appeared and successfully contested said bankruptcy proceeding.

Cook v McHenry, 208-442; 223 NW 377

Persons liable—assignee of written lease. Attorney fees may be taxed as costs under a written lease so providing, when the action for rent is against the written assignee of the lease who orally accepted the assignment.

Central Bk. v Herrick, 214-379; 240 NW 242

Grantee of mortgaged premises. An attorney fee may not be taxed in mortgage foreclosure proceedings against a subsequent grantee who has not assumed the payment of the mortgage debt.

Cooper v Marsh, 201-1262; 207 NW 403

When not allowable. Attorney fees, tho provided in a note and mortgage, are not taxable on foreclosure on that part of the debt which the mortgagee, by bringing suit, has matured under authority of an acceleration clause in the mortgage, unless the mortgagee shows that the mortgagor had reasonable notice of the intended acceleration, and reasonable opportunity to pay the debt before suit, even tho the note is payable at a named place.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Improper attorney fees. Tho the lien of a materialman may, in a certain case, be superior to the lien of a prior mortgage on the land, yet the court is in error in computing interest at a rate in excess of 6% and in allowing an attorney's fee and taxing it as costs and decreeing a lien for such excess interest and costs, even tho the claim of the materialman is evidenced by a promissory note calling for such excess interest and attorney fees.

Spieker v Fair Assn., 216-424; 249 NW 415

Recovery of fraudulently induced fee. Ordinarily, one who has paid an attorney for

services and seeks to recover the entire fee on the ground that payment was fraudulently induced, must show that the services were of no value, and the evidence is fatally deficient if services are performed, but their value is not shown, as the plaintiff thereby fails to establish the amount of his damage.

Gipp v Lynch, 226-1020; 285 NW 659

Land subjected to bank's judgment—attorney lien—belated cost modification—review. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Bank v Jordan, 224-28; 276 NW 71

Injunction—nonallowable attorney fees. In a successful action to enforce plaintiff's right to redeem from execution sale, the fact that plaintiff secured a temporary injunction to protect his possession (and solely as a collateral remedy) furnishes no justification for the taxation against plaintiff of an attorney fee in favor of defendant, especially when the said injunction was ordered dissolved only in event plaintiff failed to exercise his right to redeem.

Werner v Hammill, 219-314; 257 NW 792

Simultaneously executed notes — proper computation. In a single action by a trustee on several promissory notes, each containing an agreement to pay attorney fees, and all simultaneously executed as part of one transaction, to wit, the financing of a mortgage loan, the attorney fees must be computed as tho there were but one note for the total amount due on all the notes sued on. And this is true tho the different notes actually belong to different parties.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Wrongful refusal to defend—attorney fees. A title insurer who wrongfully refuses to comply with his contract to defend an action hostile to the title is liable to the insured for reasonable attorney fees, whether such fees have or have not been paid by the insured.

Jones v Surety Co., 210-61; 228 NW 98

Action to recover fee. A company which had insured only civil liability was not bound to pay the attorney fees in a criminal action arising from an automobile accident of the insured because of a statement of the company's own attorney that it would pay such fees, when there was no proof to show any authority for the company's attorney to impose such obligation on the company.

Gipp v Lynch, 226-1020; 285 NW 659

Agreement to release judgment—attorney fee included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Dissolution of partnership—accounting—unallowable credits. In an accounting between the representative of a deceased partner and the surviving partners, who continued the partnership business as tho no dissolution had occurred, attorney fees in the accounting proceedings, and personal, family, and household expenses of the surviving partners, are properly rejected by the referee as a credit.

Fleming v Fleming, 211-1251; 230 NW 359

11646 Affidavit required.

Improper allowance. Attorney fees cannot be properly allowed in the absence of the required statutory affidavit.

Temple Lbr. v Lattner, 211-465; 233 NW 522

Affidavit subsequent to service. Right to taxation of attorney fee is not lost by filing the petition in the action and the statutory affidavit, after the service of the original notice.

Equitable v Cole, 214-235; 242 NW 58

Absence of affidavit—effect. In proceedings by an executor for an order for the sale of lands devised to an insolvent devisee, in order to effect collection of the amount owing the estate by said devisee on promissory notes, attorney fees may not be taxed (tho the notes provide for such) in the absence of the affidavit required by statute.

In re Flannery, 221-265; 264 NW 68

11647 Opportunity to pay.

Presumption. The taxation of an attorney fee under a contract provision therefor will not be disturbed on appeal unless complain-

ant presents a record which affirmatively shows facts which render the taxation unauthorized.

Fellers v Sanders, 202-503; 210 NW 530

When not allowable. Attorney fees, tho provided in a note and mortgage, are not taxable on foreclosure on that part of the debt which the mortgagee, by bringing suit, has matured under authority of an acceleration clause in the mortgage, unless the mortgagee shows that the mortgagor had reasonable notice of the intended acceleration, and reasonable opportunity to pay the debt before suit, even tho the note is payable at a named place.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

First Trust v Kruse, 219-1229; 260 NW 665

CHAPTER 498

EXECUTIONS

11648 Enforcement of judgments and orders.

Nature. Execution constitutes judicial process.

Heesel v Bank, 205-508; 218 NW 298

Execution before but sale after judgment barred—validity. If execution proceedings are instituted and levy made during the lifetime of the judgment, a sale thereunder is valid, tho held after the judgment is barred by the statute of limitations.

Deaton v Hollingshead, 225-967; 282 NW 329

Impressment of lien in equity—special execution. A court of equity upon impressing a lien on property should order the issuance of a special execution for the sale of the property and the satisfaction of the lien.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Alimony—nonlienable decree for money. A decree (in divorce proceedings) which, inter alia, simply "orders" defendant to pay to the clerk for the use of plaintiff a stated sum each month, but renders against defendant no present judgment for money, but authorizes the clerk to enter such judgment for payments in default, neither becomes a lien on defendant's lands, nor authorizes the issuance of an execution.

Millisack v O'Brien, 223-752; 273 NW 875

Mortgages—2-year limitation on foreclosure judgments—statute construed. Statutory provision that no judgment rendered in foreclosure proceedings "shall be enforced and * * * no force or vitality given thereto for any purpose" after two years from entry thereof, means that after two years, no action could be brought on judgment, no execution could issue thereon, the judgment would not be lien, no proceedings to enforce the judgment could be commenced by issuance of an execution; and, generally, the judgment would be without force or effect.

Deaton v Hollingshead, 225-967; 282 NW 329

Void judgment—subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

Specific performance—allowable relief under general prayer. In bank receiver's specific performance action to compel heirs to perform contract to purchase receiver's interest in estate property, a prayer for general equitable relief warrants a decree establishing vendor's lien, ordering a special execution sale of the receiver's interest, and a general execution for any deficiency.

Utterback v Stewart, 224-1135; 277 NW 735

Continuing jurisdiction of lower court. An appeal simply from an order appointing a receiver in auxiliary proceedings to enforce a judgment leaves all other portions of said proceedings within the jurisdiction of the district court.

Wade v Swartzendruber, 206-637; 220 NW 67

11649 Within what time—to what counties.

Nunc pro tunc entries. See under §10803

Execution before but sale after judgment barred—validity. If execution proceedings are instituted and levy made during the lifetime of the judgment, a sale thereunder is valid, tho held after the judgment is barred by the statute of limitations.

Deaton v Hollingshead, 225-967; 282 NW 329

11650 Limitation on number.

Plurality of writs prohibited. The issuance of an execution at a time when another execution on the same judgment is in existence, is unlawful, and all proceedings under such unlawfully issued execution are void.

Richardson v Rusk, 215-470; 245 NW 770

Amendment valid when nonprejudicial to third parties. Even after sale under a second execution, the return on the first execution, when third persons are not prejudiced, may be amended by the sheriff to show the true facts that the first execution had been returned and was not in existence when the second execution was issued.

Luke v Bank, 224-847; 278 NW 230

Moratorium application—waiver of sale irregularities. Mortgagor's application under

the mortgage moratorium acts to extend the period of redemption from an execution sale is a waiver of any right to attack the validity of such sale made under a second special execution the validity of which is challenged because of the alleged existence of another and prior execution.

Luke v Bank, 224-847; 278 NW 230

11659 Form of execution.

Erroneous entry of amount. The inadvertent entry on the appearance docket of the amount of a judgment, followed by the issuance of an execution in the erroneous amount, sale thereunder, and issuance of sale certificate, must, on proper motion, be corrected by expunging the erroneous entry, recalling the execution, setting aside the sale, and canceling the certificate, no rights of third parties having intervened.

Equitable v Carpenter, 202-1334; 212 NW 145

11660 Property in hands of others.

Levy on property of deceased. See under §§11736, 11753

Right to income from trust dependent on election or demand by cestui—effect. A trust which provides that the income therefrom shall be paid to a named beneficiary "from time to time as she may elect during her lifetime" effectually places said income beyond the reach of the creditors of said beneficiary so long as said beneficiary makes no such election.

Ober v Dodge, 210-643; 231 NW 444

Creditor's rights in trust proceeds. When the testator's will created a trust for his son, providing that the proceeds of the trust be paid to the son "yearly or oftener if collected for shorter periods," and contained no words showing an intent to place the trust income beyond the reach of the son's creditors, a debt due the son from the trustee was created, which was a vested right which could be assigned and was subject to claims of creditors.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trusts. If the terms of a trust provide that the income be applied to the cestui at the discretion of the trustee, or the income is payable to the cestui at his demand, or the trust is for a special purpose, or in general where no debt is owed the cestui by the trustee, the creditors of the cestui cannot appropriate the benefaction.

Standard Chemical v Weed, 226-882; 285 NW 175

11663 Receipt and return.

Return—fatal insufficiency. The delivery, by plaintiff's attorney to the clerk, of an execution and the indorsement thereon, by the clerk, of the words "Returned not satisfied" does not constitute a legal return.

Richardson v Rusk, 215-470; 245 NW 770

Delayed return — intervening mortgage — priority. Even tho an officer physically performs all the acts which would constitute a valid levy on chattels if said acts were embodied at the time of the acts in a return indorsed on or attached to the execution, yet where the officer delays making said return for six days after said acts were performed, and in the meantime a chattel mortgage on said chattels is executed and recorded, the mortgage will be superior in right to the belated (and alleged) levy.

Farmers Bk. v Mallicoat, 209-335; 228 NW 272

Insolvency—preferable proof. Principle reaffirmed that in an action to set aside a conveyance as fraudulent, the preferable proof of the grantor's insolvency at the time of the conveyance is the return nulla bona on a duly issued execution.

Williams Bk. v Murphy, 219-839; 259 NW 467

Amendment valid when nonprejudicial to third parties. Even after sale under a second execution, the return on the first execution, when third persons are not prejudiced, may be amended by the sheriff to show the true facts that the first execution had been returned and was not in existence when the second execution was issued.

Luke v Bank, 224-847; 278 NW 230

Moratorium application—waiver of sale irregularities. Mortgagor's application under the mortgage moratorium acts to extend the period of redemption from an execution sale is a waiver of any right to attack the validity of such sale made under a second special execution the validity of which is challenged because of the alleged existence of another and prior execution.

Luke v Bank, 224-847; 278 NW 230

11664 Indorsement by officer.

Sales legalized. See §10383.1

Curative acts—omissions of levying officer. The failure of an officer to indorse on an execution the procedural matters required by statute may be legalized by an act of the legislature.

Francis v Todd, 219-672; 259 NW 249
Nelson v Hayes, 222-701; 269 NW 861

Sale—validity approved. Record, relative to the sale under special execution of personal property, reviewed and held to reveal no invalidating fact.

McFerrin v Grain Co., 220-1086; 264 NW 45

Indorsements—presumption. Undated but duly signed indorsements on an execution (1)

that the execution was received by the sheriff on a named date, and (2) that on a named date the sheriff levied on certain described property, carries the presumption, in the absence of contrary evidence, that the indorsement relative to the receipt was made when the execution was received, and that the indorsement relative to the levy was made when the levy was made.

Ebinger v Wahrer, 213-84; 238 NW 587
Cramer v McDonald, 213-454; 239 NW 101

Presumption—burden to overcome. A party who claims that the various entries of the acts done under an execution and constituting the officers "return" were not entered at the time the various acts were done, has the burden to so show. In the absence of such showing, it must be presumed that the officer did his duty and made the entries at the time required by statute.

Northwestern Ins. v Block, 216-401; 249 NW 395

Return—noninvalidating irregularity. The return on a real estate mortgage foreclosure execution is not, as a basis of the title conveyed, invalidated by the fact that the recital in the return (1) of the receipt of the execution, and (2) of the levy thereunder, and (3) of the date of such receipt and levy, is signed by a deputy sheriff in his own name with the added designation of "deputy sheriff" (instead of in the name of the sheriff by said deputy), when the entire return embracing a timely recital of the doing of every required act thereunder (including that recited by said deputy), is signed by the sheriff in his official capacity.

Nelson v Hayes, 222-701; 269 NW 861

Permissible amendment. The return of the levy of an attachment may be so amended as (1) to definitely locate the property levied on, and (2) to specifically describe the kind of property levied on.

Salinger v Elev. Co., 210-668; 231 NW 366

Correcting inadvertent error. An inadvertent error in the return of a mortgage foreclosure sale may be corrected by an amendment by the sheriff after the land has gone to sheriff's deed, provided the judgment plaintiff and defendant are the only persons affected. In such case oral testimony showing the error is quite unnecessary.

Equitable v Ryan, 213-603; 239 NW 695

Belated amendment. An application to amend the return on an execution, so as to show the essential facts constituting a levy, is properly denied when the application is made four months after the attempted levy, and is hostile to a stranger with a prior interest in the property sought to be levied on.

Cramer v McDonald, 213-454; 239 NW 101

Essentials of levy. An attempted levy on corporate shares of stock is, as to a stranger with a prior interest in the property, a nullity (1) unless the president of the company or other officer designated by the statute is notified in writing that the stock has been levied on, and (2) unless the return on the writ states that such notice was given. (§§11676, 12098, C., '31.)

Cramer v McDonald, 213-454; 239 NW 101

Return—fatal insufficiency. A narrative statement in the form of a return, and purporting to state what had been done under an execution, and indorsed thereon after a purported sale thereunder, and signed by the sheriff who succeeded the sheriff who made the sale, is a nullity.

Richardson v Rusk, 215-470; 245 NW 770

Return as "unsatisfied"—effect. The return of a writ of execution as wholly unsatisfied deprives the execution plaintiff of all basis for impressing a trust on the proceeds of property on the theory that the property was once validly levied on under the said returned writ.

Whitaker v Tiedemann, 200-901; 205 NW 468

11665 Principal and surety—order of liability.

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Permissible plea of counterclaim. In an action against the principal and surety on an attachment bond for damages consequent on the alleged wrongful issuance of the writ, the principal in said bond may plead a counterclaim which neither arises out of or is connected with the transaction on which plaintiff sues, nor in which the surety has any personal ownership (§11151, C., '35). A surety is not primarily liable on the bond and the principal who is primarily liable should be permitted to defeat recovery on the bond if he can so do.

Imes v Hamilton, 222-777; 269 NW 757

11667 Surety subrogated.

ANALYSIS

I SUBROGATION IN GENERAL
II SURETIES—SUBROGATION RIGHTS

Suretyship generally. See under §11577

I SUBROGATION IN GENERAL

Discussion. See 2 ILB 86—Subrogation to government claim for taxes

Origin and theory. The doctrine of subrogation is purely of equitable origin and grew out of the need, in aid of natural justice, in placing a burden where it of right ought to rest.

HOLC v Rupe, 225-1044; 283 NW 108

Creation of relation—effect. The implied promise of a principal to reimburse his surety if the surety is compelled to pay the debt, brings into existence the relation of debtor and creditor between the principal and surety immediately upon the execution of the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Legal and conventional subrogation distinguished. Legal subrogation exists only in favor of one who, to protect his own rights, pays the debt of another. Conventional subrogation arises only upon agreement, between the lender and the debtor or old creditor, that the lender shall be subrogated to the old lien.

HOLC v Rupe, 225-1044; 283 NW 108

Conventional subrogation in favor of indorser.

Callaway v Hauser Bros., 211-307; 233 NW 506

Conventional subrogation. A conventional subrogation takes place when a debtor expressly or impliedly agrees that one paying a claim shall stand in the creditor's shoes.

Mains v Barnhouse, 209-963; 229 NW 218

Subrogation of paid surety. The right of a surety to be subrogated to the rights of his principal against a third party is not affected by the fact that he is a paid surety.

American Co. v Bank, 218-1; 254 NW 338

Garnishor subrogated to statutory lien.

Kinart v Churchill, 210-72; 230 NW 349

Surety on guardian's bond. The surety on a guardian's bond who is compelled to pay the amount due on a mortgage held by the guardian for his ward, because of the breach of official duty by the guardian in releasing the mortgage without payment and without authority of court so to do, is, by such payment, subrogated, as a matter of course, to all the rights of the guardian and ward in such mortgage, and may foreclose such mortgage even against purchasers of the land subsequent to the release.

Randell v Fellers, 218-1005; 252 NW 787

Fraud—tracing proceeds. The drawer of a fraud-induced check who traces the check and the proceeds thereof immediately and directly into the satisfaction of a mortgage may, against the wrongdoer and against all others who necessarily profit by the satisfaction without parting with value, be subrogated to the former right of the satisfied mortgage.

Bogle v Goldsworthy, 202-764; 211 NW 257

Wife's suretyship for husband—effect in husband's bankruptcy. Where land owned jointly by husband and wife is mortgaged and the wife signs the note and mortgage on her separate interest to secure the loan to the husband who received and used the loan for his own personal debts and later conveyed his one-half interest in the land to his wife, then, in an action by the husband's trustee in bankruptcy to set aside the conveyance as in fraud of creditors, the wife, as surety, is entitled to have the husband's interest in the land applied first to the satisfaction of the mortgage debt in preference to the claims of the trustee in bankruptcy, and the conveyance accomplishing her subrogation thereto was valid.

Clindinin v Graham, 224-142; 275 NW 475

Repeal of preferential deposit law. Sureties on a bank depositary bond conditioned to hold the state harmless on deposit of state funds in said bank, and given at a time when the state possessed a statutory preferential right, in case the bank was thrown into receivership, to be paid in full prior to the payment of general depositors, are not entitled, upon the payment of a loss, in case of such receivership, to be subrogated to such right on the part of the state when, prior to such payment, the statute giving such right has been repealed. This is on the principle that a surety is entitled to subrogation only upon payment of the principal's debt, and only to the rights then possessed by the creditor.

Leach v Bank, 205-1154; 213 NW 517

Reimbursement from co-surety. A surety who has paid a note given for the accommodation of the corporation of which he is an officer may not be defeated in his action to compel a co-surety to make proper reimbursement, by the fact that the plaintiff allowed or permitted or directed the corporate funds to be applied on other corporate obligations, and not on the accommodation note.

Brown v Conway, 201-117; 206 NW 665

Stockholder's advance of clay pit rent—extent of priority. After a clay products company has gone into receivership, neither delinquent nor accruing rent on its clay pit, advanced by a stockholder taking an assignment of the clay pit lease, is collectible in full from the receiver as expenses of administration nor as a rent obligation to which the stockholder became subrogated, when the sale price of the clay pit lease was less than the claim for rent advanced thereon, but an order allowing priority for the rent claim to the extent of the sale price of the clay pit lease and establishing the balance of the advanced rent as a general claim was correct.

Parks v Carlisle Co., 224-1024; 277 NW 731

I SUBROGATION IN GENERAL—concluded

Identification of instrument guaranteed. Plaintiff in an action on a guaranty of payment of a promissory note, which guaranty is separate from the note, manifestly cannot recover unless he clearly shows that the note in question is the very note that is guaranteed.

Andrew v Overbeck, 214-578; 241 NW 435

Application of payment prejudicial to surety. The fact that the common maker of two promissory notes signed by different sureties and payable to the same payee was aided by a loan by one of the sureties in order to enable the common maker to make up the amount of a payment to the payee, with the understanding that the total payment would be applied—indorsed—on the note on which said surety was obligated, does not estop or prevent the payee long afterwards (five years) from applying said payment (in accordance with the wishes of the common maker) on the note on which said surety was not obligated, the payee having no knowledge of said agreement. And this is true tho the common maker, and the surety on the note receiving the application, had, in the meantime, become insolvent.

Mitchell v Burgher, 216-869; 249 NW 357

Want of consideration. A plea of want of consideration, interposed by a gratuitous surety on a promissory note, may be very properly ignored in the instructions of the court when the record shows (1) that the surety signed the note without fraud imposed upon him, and (2) that there was a consideration between the principal and the payee.

Granner v Byam, 218-535; 255 NW 653

Subrogation—filing claim against estate. A surety who, in a foreclosure suit which was personal as to himself, but solely in rem as to the estate for which he was surety, pays off a deficiency judgment, must file his claim against the estate in order to render effective his right of subrogation.

In re Angerer, 202-611; 210 NW 810

Administrator's wrongful payments—right of surety. When an administrator of an estate wrongfully pays out estate funds to one who has no right whatever to receive them, and the surety for the administrator is compelled to make good the loss, the legal right of the estate to compel the wrongful recipient to repay the funds because of his primary liability is, as a matter of equity, presumed to continue in order to enable a court of equity to subrogate the said surety to the same right.

American Co. v Bank, 218-1; 254 NW 338

Assumption of mortgage—recovery by mortgagor-surety. As between a mortgagor and a subsequent purchaser who assumes and agrees to pay the mortgage, the purchaser becomes the primary debtor, and the prior mortgagor the secondary debtor; but, in case foreclosure and sale reveal a deficiency judgment, the mortgagor may not recover the amount thereof from the assuming purchaser until he, the mortgagor, has paid such deficiency.

Thomsen v Kopp, 204-1176; 216 NW 725

Protection and loss of right of subrogee. When the holder of a certificate of sale under a junior mortgage foreclosure discharges (in order to protect his interest) an interest payment falling due on the senior mortgage, by taking an assignment of said interest installment, he thereby impliedly acquires a pro tanto interest in said senior mortgage, and may foreclose it accordingly against a subsequent purchaser for value of the land; but when said certificate holder simply pays such interest installment, he wholly loses his claim as to a subsequent purchaser who purchased for value, and without notice that the interest installment had been paid by the junior certificate holder.

Miller Bank v Collis, 211-859; 234 NW 550

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting actions. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Prior sureties as party defendants. Defendant in an action on a guardian's bond has no right to demand that a surety on a prior bond of the guardian be made a party defendant on the theory that the defendant has a right to demand contribution from such prior surety.

Brooke v Bank, 207-668; 223 NW 500

Surety — recoupment. A bank, which acts as a collection agency for a trustee in bankruptcy in gathering in the funds belonging to the bankrupt's estate and in good faith accounts to the trustee for the collections, is not a "depositor" of said funds within the meaning of the federal statutes and rules of court governing depositors of bankrupt funds. So held where a surety who had paid the amount embezzled by the trustee sought recoupment from the said collecting bank on the theory that the bank had violated such federal statutes and rules.

Southern Sur. Co. v Bank, 207-910; 223 NW 865

Voluntary payment of judgment by stranger. One who, solely on his own volition, intentionally pays and discharges a judgment as to which he is a legal stranger, may not (1) have the lien of the judgment plaintiff

re-established on land and be subrogated to the rights of said lien, nor (2) may he be given a personal judgment against the judgment defendant who was benefited by such voluntary payment and discharge.

Wragg v Wragg, 208-939; 226 NW 99; 64 ALR 1292

II SURETIES—SUBROGATION RIGHTS

Discussion. See 10 ILB 249—Surety's subrogation

Subrogation of paid surety. The right of a surety to be subrogated to the rights of his principal against a third party is not affected by the fact that he is a paid surety.

American Sur. Co. v Bank, 218-1; 254 NW 338

Conditional order. An order subrogating a surety to all the rights of his principal—a trustee—in unauthorized investments of trust funds is properly conditioned on payment being first made of all sums due the trust.

In re Riordan, 216-1138; 248 NW 21

Payment of obligation. One who, in the sale of commercial paper, guarantees its payment to the extent of a named percentage of its face value becomes the owner of such paper to the extent that he subsequently discharges his guaranty.

Liscomb Bk. v Leise, 201-353; 207 NW 330

Surety holding indemnity. An officer of a corporation who as surety signs a corporate note for borrowed money which the corporation employs in its business, and in good faith receives bonds of the corporation to indemnify him in case he is compelled to pay the note, will, upon payment of the note, be accorded the same rights under a trust deed or mortgage executed to secure the payment of said bonds as will be accorded to good-faith purchasers of other portions of said bonds.

Gunn v Gould Co., 206-172; 218 NW 895; 220 NW 127

Equitable set-off by surety of insolvent. In an action by the receiver of an insolvent, the defendant may set off, against the obligation sued on, the amount which the defendant, as surety for the insolvent, has been compelled to pay on the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Deducting set-off. A vendor who is compelled to discharge a judgment lien on real estate after the amount of the judgment has been deducted from the purchase price, is entitled to be subrogated to the rights of the judgment plaintiff against a subsequent purchaser who is not a purchaser for value and without notice, subject to any indebtedness owing by the vendor to the vendee and growing out of the same transaction.

Home Co. v Burrows, 207-1071; 224 NW 72

Subrogation as affecting junior mortgagee. Where tenants in common of land as principal and surety jointly mortgaged their undivided interests in order to secure the debt of the principal, the surety may, after the land is partitioned and set off in severalty, compel the satisfaction of the mortgage as far as possible out of the lands assigned in severalty to the principal, and be subrogated to all the rights of the mortgagee in case he is compelled to pay the principal's debt; and this right is enforceable against a subsequent mortgagee of the principal's undivided interest alone, when such mortgagee takes his mortgage with actual knowledge that the mortgagors in the prior mortgage occupied the relation of principal and surety.

Toll v Toll, 201-38; 206 NW 117

Right of junior mortgagee to pay interest on senior mortgage. The common-law right of a junior mortgagee, in order to protect his own lien, to pay the interest on a senior mortgage, and thereby to be subrogated by proper action to the rights of a senior mortgagee under said senior mortgage to the extent of said payment, has not been abrogated by the enactment of Ch 501.

Miller Bank v Collis, 211-859; 234 NW 550
Jones v Knutson, 212-268; 234 NW 548

Subrogation. If a second mortgagee uses his own funds in discharging a first mortgage in order to save the property, he will be subrogated to the rights of said first mortgagee; on the other hand, if funds are obtained through a new mortgage, and used in the discharge of said first mortgage, then the new mortgagee will acquire said right of subrogation, and in either case, the homestead character of part of the mortgaged property is quite immaterial.

Clark v Chapman, 213-737; 239 NW 797

Subrogation of second mortgagee. A second mortgagee whose mortgage represents money advanced for the specific purpose of discharging prior mortgages, or in redeeming from foreclosure of prior mortgages, will, in order to effect the ends of justice, be subrogated to all the rights and remedies of said former mortgagees.

Burmeister v Walz, 216-265; 249 NW 197

Loan to discharge mortgage — subsequent mortgage subrogated to former's rights. A governmental loaning agency, set up to meet an emergency, by making loans to save homes from foreclosure, is entitled to be subrogated to the rights of the original mortgagee, when it discovers that there is an heir of one of the original mortgagors who has an interest in the title and who did not join in the mortgage it holds, and when through no fault or negligence on its part, said heir's interest was not discovered and he was not prejudiced by

II SURETIES — SUBROGATION RIGHTS —continued

this latter mortgage, but was given the right to redeem in the event of foreclosure.

HOLC v Rupe, 225-1044; 283 NW 108

Grantee of mortgaged land—assumption default—effect. The grantee of land who, in the deed and as part of the consideration therefor, assumes and agrees to pay all unsatisfied mortgages theretofore placed on the land by the grantor, becomes, as between himself and said grantor, the principal debtor on said mortgages, and should the grantor be compelled as surety to pay said indebtedness, he will thereupon be entitled to be subrogated to all the prior rights of said mortgagees to enforce said mortgages against said grantee.

Monticello Bk. v Schatz, 222-335; 268 NW 602

Receiver's certificates — subrogation. The holder of certificates of indebtedness issued and sold by the receiver of an insolvent bank in order to raise funds with which to pay the debts of the bank will, in an action by the receiver to enforce an assessment on corporate stock in order to pay the certificates, be deemed to stand in the shoes of the original creditors of the bank.

Andrew v Bank, 206-869; 221 NW 668

Depositor by subrogation. In settling and adjusting the affairs of an insolvent bank, a claimant who is not a depositor in fact may not be decreed to be subrogated to the rights of certain depositors who are not parties to the controversy over the claim in question.

Leach v Bank, 207-471; 220 NW 10

Co-sureties—rights. Accommodation and nonaccommodation sureties on bonds given to secure public funds on deposit in banks are co-sureties and each, in case of payment by him, is entitled to contribution from the others, and to be subrogated to the rights of the municipality.

Andrew v Bank, 205-878; 219 NW 34
Leach v Bank, 205-975; 213 NW 612

Surety on guardian's bond. The surety on a guardian's bond who is compelled to pay the amount due on a mortgage held by the guardian for his ward, because of the breach of official duty by the guardian in releasing the mortgage without payment and without authority of court so to do, is, by such payment, subrogated, as a matter of course, to all the rights of the guardian and ward in such mortgage, and may foreclose such mortgage even against purchasers of the land subsequent to the release.

Randell v Fellers, 218-1005; 252 NW 787

Contribution—nonestoppel. A surety who unsuccessfully contends, when sued on the bond, that he is not liable for any defalcation occurring prior to the bond—that said bond is a substitute for a prior bond of the same guardian—does not thereby estop himself from enforcing contribution from the sureties on said prior and contemporary bond.

Fed. Sur. Co. v France, 212-1403; 238 NW 460

Co-sureties—obligations constituting. When an administrator gives bond on his original appointment, and later is ineffectually discharged, and at once reappointed, and gives a new bond, the two bonds will be treated as cumulative, and the sureties thereon as co-sureties, with the sole right in each to enforce proportional contribution from the other.

In re Donlon, 203-1045; 213 NW 781

Contribution enforceable against surety on separate bond. Where an executor has executed and filed two separate bonds for the faithful discharge of his duties, the surety who pays a devastavit in full may enforce contribution from the other surety; and it is immaterial that the surety enforcing contribution signed the bond for a consideration and that the other surety signed as an accommodation.

New Amst. Cas. Co. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Right of subrogation. When an administrator of an estate wrongfully pays out estate funds to one who has no right whatever to receive them, and the surety for the administrator is compelled to make good the loss, the legal right of the estate to compel the wrongful recipient to repay the funds because of his primary liability is, as a matter of equity, presumed to continue in order to enable a court of equity to subrogate the said surety to the same right.

American Sur. Co. v Bank, 218-1; 254 NW 338

Remedies of surety — attacking conveyance. The surety on an administrator's bond who has paid the shortage of the administrator consequent on the failure of the private bank in which the estate funds were deposited, may not, in an action to recoup his loss, question a conveyance by a former partner in the bank when, prior to the giving of the bond, the said partner had, in good faith and to the full knowledge of the administrator, sold his interest in the bank at a time when the bank had ample funds with which to pay the administrator's deposit.

Fidelity Co. v Bank, 218-1083; 255 NW 713

Statutory bonds — surety (?) or assignee (?). A surety who takes over the work of a defaulting public drainage contractor and proceeds to pay off claims which are statutorily lienable against the funds due under the contract acquires a right of subrogation superior to that of a prior assignee of said funds.

Ottumwa Works v O'Meara, 206-577; 218 NW 920

Statutory bond—subrogation of surety. A surety on a statutory bond for the performance of a public improvement contract who has performed his statutory contract at an expense which exceeds the balance on hand and due under the contract is ipso facto subrogated to the right of the principal contractor to such balance, in preference to subcontractors who hold claims which arise out of contract obligations which are not contemplated by the statute, but which were, nevertheless, inserted into the contract.

Monona Co. v O'Connor, 205-1119; 215 NW 803

Salary of public officer exempt. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety having paid the judgment, and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Cas. Co. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Discharge of surety. The repeal of a statute which gives the state, when it is a depositor in a bank, a preferential right to be paid in full if the bank passes into the hands of a receiver does not constitute a release of security in such sense as to release a surety on a bond which secures said deposit.

Leach v Bank, 205-1154; 213 NW 517
Andrew v Bank, 205-883; 213 NW 531

Discharge of surety—forfeiture of contract. The surety on a promissory note given as part of the contract price of land, ceases, as a matter of law, to be liable thereon to the original payee-vendor whenever the latter legally forfeits the contract.

Smith v Tullis, 219-712; 259 NW 202

Loss of right. Where on appeal in an equitable action the money judgment of the trial court against the appealing judgment defendant is ordered "superseded and set aside", and a new money judgment is entered against appellant "in lieu, place, and stead of that entered in the district court", the surety on the supersedeas bond on payment of the new judgment is not subrogated to the lien which the judgment plaintiff had under the old or first entered judgment.

Eland v Carter, 212-777; 237 NW 520; 77 ALR 448

11668 Levy—how made and indorsed.

Abuse of process.

Myers v Watson, 204-635; 215 NW 634

Contingent remainder. A contingent remainder—contingent because of the uncertainty of the person who will take the property—is not subject to attachment or execution levy and sale.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Immature crops. Immature crops are not leviable.

Rodgers v Oliver, 200-869; 205 NW 513

Crops raised during redemption period. The right of the owner of land after mortgage foreclosure to the possession of the property during the 12 months redemption period does not embrace the right to hold exempt from levy under the mortgage deficiency judgment the harvested grain which has been raised on the premises during said redemption period, and which constitutes the said owner's share as rent.

Starits v Avery, 204-401; 213 NW 769
See Goldstein v Mundon, 202-381; 210 NW 444

Rents and profits after foreclosure. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof during the redemption period to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

Debtor's right of possession. A debtor's statutory "right of possession" of real estate during the year given for redemption from sale on execution is not, in and of itself, leviable.

Sayre v Vander Voort, 200-990; 205 NW 760; 42 ALR 880

Renounced and rejected gift.

Gottstein v Hedges, 210-272; 228 NW 93; 67 ALR 1218
Lehr v Switzer, 213-658; 239 NW 564

Renunciation of legacy. The act of a testamentary beneficiary in executing and making of record an unconditional and final renunciation of all benefits granted him under the will legally places such benefits beyond the reach of his creditors.

Berg v Shade, 203-1352; 214 NW 513
Funk v Grulke, 204-314; 213 NW 608

Right to renounce devise or bequest. The legal right of a beneficiary under a will to file an unconditional and final renunciation of all benefits granted him by the will, and thereby exclude his creditor from acquiring any right to the devised property, may be exercised even after a creditor of said beneficiary has levied upon, sold, and obtained a sheriff's deed to the land devised to said beneficiary, it appearing that the renouncing beneficiary had in no manner misled the creditor.

Lehr v Switzer, 213-658; 239 NW 564

Beneficiary's right to renounce benefits under will—effect on creditors. A beneficiary under a will has the right to renounce all benefits granted him under will, and creditors cannot complain of such renunciation; but such rule is limited to cases where no acceptance of provisions of will has been made by beneficiary.

McGarry v Mathis, 226-37; 282 NW 786

Income from trust dependent on election or demand by cestui. A trust which provides that the income therefrom shall be paid to a named beneficiary "from time to time as she may elect during her lifetime", effectually places said income beyond the reach of the creditors of said beneficiary so long as said beneficiary makes no such election. Evidence held to show an election as to one monthly payment.

Ober v Dodge, 210-643; 231 NW 444

Sale—validity approved. Record relative to the sale under special execution of personal property reviewed and held to reveal no invalidating fact.

McFerrin v Grain Co., 220-1086; 264 NW 45

Irretrievable nullification of lien. The filing by an insolvent judgment defendant of his petition in bankruptcy, within four months following the entry of judgment, discharges the judgment (it not being based on fraud or willful injuries) and irretrievably nullifies an execution levy on property, whether the property be exempt or nonexempt. In other words, the judgment plaintiff may not thereafter proceed in equity in the state court and have his discharged judgment enforced against property set aside to the judgment defendant as exempt, even tho, were it not for the bankruptcy proceedings, plaintiff would be able to show that said property was not exempt from levy under plaintiff's particular judgment.

McMains v Cunningham, 214-300; 233 NW 129; 242 NW 106

11669 Acts necessary.

Essential acts necessary. Principle reaffirmed that, to make a valid levy on personal property, the officer must do something which will amount to a change of possession, or which is equivalent to a claim of dominion over the property, coupled with the power to enforce it.

Whitaker v Tiedemann, 200-901; 205 NW 468

Sufficiency. A sufficient levy is made by the act of the officer in invoicing the property and leaving it in the possession of his agent.

First N. Bk. v Schram, 202-791; 211 NW 405

Insufficient levy. An officer makes no legal levy on a truck by simply looking it over, noting a levy on the execution, and allowing the owner to drive away with the truck under a promise to deliver it to the execution plaintiff at a future time.

City Fuel Co. v Roof. Co., 207-860; 223 NW 751

Wrongful levy—damages. One who seeks a money judgment for the value of property wrongfully levied on may not also recover for the loss of the use of the property.

Wertz v Hale, 202-305; 208 NW 859

Void sale — relief — venue. A proceeding wherein relief is sought on the theory that the petitioner bought property at a void judicial sale and received nothing for his purchase price must be brought in the court and in the proceedings out of which the execution arose.

State v Beaton, 205-1139; 217 NW 255

11670 Selection of property.

Life estate. When judgment creditor of a life tenant, by virtue of execution, levies upon a life estate and purchases the life estate on execution sale, he assumes all the duties of a life tenant and is obligated to pay delinquent taxes, or else lose the advantage of the life estate.

Rich v Allen, 226-1304; 286 NW 434

11671 Lien on personalty.

Delayed return—intervening mortgage—priority. Even tho an officer physically performs all the acts which would constitute a valid levy on chattels if said acts were embodied, at the time of the acts, in a return indorsed on or attached to the execution, yet, where the officer delays making said return for six days after said acts were performed, and in the meantime a chattel mortgage on said chattels is executed and recorded, such mortgage will be superior in right to the belated (and alleged) levy.

Farmers Bk. v Mallicoat, 209-335; 228 NW 272

11672 Choses in action.

Unadjudicated cause of action. The statute which provides for execution levy on "things in action" authorizes a levy on an unadjudicated cause of action which the judgment defendant is prosecuting against the judgment plaintiff for breach of contract.

Brenton Bros. v Dorr, 213-725; 239 NW 808

Execution sale of promissory note — purchase by maker — effect. The maker of a promissory note and mortgage may, by himself or through others, validly purchase said note and mortgage at execution sale against the payee or holder thereof, and thereby completely discharge the same.

Buter v Slattery, 212-677; 237 NW 232

Execution—action to set aside—incompetent appraisers. Where a cause of action for alleged wrongful attachment was sold under execution after an appraisement of "no value", held that the incompetency of the appraisers to justly appraise such property would not be assumed because one was an attorney of some-

what limited experience and one was the editor of a newspaper devoted to the publication of court proceedings.

Francis v Todd, 219-672; 259 NW 249

Grossly inadequate price. Where a cause of action for alleged wrongful attachment was levied on under execution and, after an appraisement of "no value", was sold for substantially $100, held that the record on appeal did not reveal a sale at such a grossly inadequate price as to warrant the setting aside of the sale.

Francis v Todd, 219-672; 259 NW 249

Stay under inherent power of court. If the sale under execution of a cause of action is liable to be inequitable to, or oppressive on, the judgment defendant, e.g., where the cause of action may be such as to practically defy a just appraisement, it is suggested that relief may be had, in a proper case, by resorting to the inherent discretionary power of the court to order a stay.

Francis v Todd, 219-672; 259 NW 249

11674 Persons indebted may pay officer.

Payment to officer by garnishee. See under §12167, Vol I

11676 Corporation stock—debts—property in hands of third persons.

Corporate shares — essentials of levy. An attempted levy on corporate shares of stock is, as to a stranger with a prior interest in the property, a nullity (1) unless the president of the company or other officer designated by the statute is notified in writing that the stock has been levied on, and (2) unless the return on the writ states that such notice was given. (§12098, C., '31.)

Cramer v McDonald, 213-454; 239 NW 101

Appeal does not vacate or affect judgment. A judgment which releases and discharges an execution levy on corporate shares of stock is a self-executing judgment, and is in full force and effect from the date thereof to the time the judgment is reversed on appeal and the execution levy reinstated, and one who purchases said stock after the entry of said judgment and before the reversal thereof, (from the owners thereof as shown by the corporate stock books) will be protected in his ownership when he purchased in good faith, for value, and without knowledge of said litigation.

Hewitt v Cas. Co., 212-316; 232 NW 835

Failure to serve notice on defendant—effect. Failure of the officer making the levy to serve notice on judgment defendant of the levy on a chose in action furnishes ample grounds for quashing the writ and staying sale thereunder.

Brenton v Dorr, 213-725; 239 NW 808

11677 Garnishment.

Garnishment carries landlord's lien. A judgment creditor, by perfecting a garnishment of the tenant of the judgment debtor, legally steps into the shoes of the latter, armed with full power, if the tenant-garnishee's debt is for rent, to enforce, by appropriate action, the landlord's lien theretofore held by the judgment debtor.

Kinart v Churchill, 210-72; 230 NW 349

Unadjudicated cause of action. The statute (§11672, C., '31) which provides for execution levy on "things in action", authorizes a levy on an unadjudicated cause of action which the judgment defendant is prosecuting against the judgment plaintiff for breach of contract.

Brenton v Dorr, 213-725; 239 NW 808

Beneficiaries' interest in estate funds. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

11679 Return of garnishment—action docketed.

Proceedings under attachment applicable. The statute providing, where parties have been garnished under an execution, the officer shall return to the next term thereafter a copy of the execution, and that thereafter the proceedings shall conform to proceedings in garnishments under attachments, permits the claimants of liens upon or interests in money or property held by garnishment on execution to intervene and proceed under statute permitting intervention in attachment proceedings.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

Right to docket action. A judgment creditor after perfecting a garnishment of the tenant of the judgment debtor has a right to have an action docketed, without fee, for the purpose of enforcing the landlord's lien theretofore held by said judgment debtor, and such action may not be deemed a "creditor's bill" in the ordinary sense.

Kinart v Churchill, 210-72; 230 NW 349

Beneficiaries' interest in estate funds—attorney's lien—intervention. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator with will an-

nexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

11680 Joint or partnership property.

Levies on partnership realty — procedure. Holding reaffirmed that this section applies solely to levies on personal property.

Bankers Tr. v Knee, 222-988; 270 NW 438

Jointly owned property. No enforceable lien can be created by levy on execution against property owned jointly, unless the property is inventoried and appraised as provided by statute with a view to determining the interest of the individual execution defendant.

Whitaker v Tiedemann, 200-901; 205 NW 468

Judgment lien on partner's interest—limitation. A judgment decreeing to a judgment-creditor a lien on the uncertain interest of the judgment-debtor in a private banking partnership in process of voluntary liquidation, must not exceed the interest which the said partner would be entitled to after final partnership accounting.

Anthony v Heiny, 215-1347; 244 NW 902

Unincorporated association. An association name may be regarded as designating the individuals which it represents, altho the members own no proportionate share of its property. Such members have joint use and enjoyment of the property, which right ceases upon termination of membership.

Lamm v Stoen, 226-622; 284 NW 465

11681 Lien—equitable proceeding—receiver.

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

11682 Mortgaged personal property—payment of mortgage.

Sale—validity approved. Record, relative to the sale under special execution of personal property, reviewed and held to reveal no invalidating fact.

McFerrin v Grain Co., 220-1086; 264 NW 45

11689 Sale—costs—surplus.

Sale—appraisement. A sale under execution will not be deemed invalidated because one of the appraisers did not inspect the property at the very time the appraisement was made—it appearing that he was familiar with the property and had shortly theretofore inspected it.

McFerrin v Grain Co., 220-1086; 264 NW 45

11695 Other remedies.

Order discharging levy under execution — attachment procedure inapplicable. The statutory provision for preserving a lien under attachment notwithstanding an order discharging the attachment by announcing an appeal and perfecting the same within two days (§12141) has no application to an order discharging a levy under execution.

Hewitt v Cas. Co., 212-316; 232 NW 835

11698 Duty to levy—notice of ownership or exemption.

Atty. Gen. Opinion. See '32 AG Op 270

ANALYSIS

I INDEMNITY IN GENERAL
II INDEMNIFYING BOND
III NOTICE OF OWNERSHIP
IV EXEMPT PROPERTY

I INDEMNITY IN GENERAL

Discussion. See 12 ILR 426—Judgment against indemnitors and persons liable over

Indemnification of one of two sureties—effect. In an action against a public officer and his bondsmen to recover a shortage in public funds, it is quite immaterial, as far as plaintiff is concerned, that one of the sureties has received property from the public officer as partial indemnity.

School District v Sass, 220-1; 261 NW 30

Possession by execution defendant — presumption — instructions. In an action against a sheriff for the wrongful sale of plaintiff's machinery as the property of an execution defendant, no error results from the failure to instruct that the finding of the property on the premises of the execution defendant raised a presumption of ownership in the latter when the court specifically placed the burden on plaintiff to prove his ownership of said property. (No request for the instruction was made.)

Rosander v Knee, 222-1164; 271 NW 292

II INDEMNIFYING BOND

Notice of ownership—sufficiency. The sworn, written notice of ownership, which is given an officer who has levied on the property, is sufficient in form and contents if it actually en-

ables the officer to secure an indemnifying bond.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

III NOTICE OF OWNERSHIP

Defective notice of ownership—effect. The fact that the notice to an attaching officer of the interest of a chattel mortgagee in attached property is defective becomes of no consequence when it is made to appear that the mortgagee was in open and undisputed possession of the mortgaged chattels and was proceeding to foreclose the mortgage when the officer levied the attachment.

Smith Co. v Goldberg, 204-816; 215 NW 956

Chattel mortgagee—allowable procedure. A chattel mortgagee may, when the property is levied on by an attaching creditor of the mortgagor, serve notice of his interest, on the levying officer, and thereafter, if the property is not released, maintain an action for conversion against the attaching plaintiff and the levying officer.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

Notice of ownership—sufficiency. Notice of ownership of machinery, wrongfully levied on, held quite sufficient and sustained by the evidence.

Rosander v Knee, 222-1164; 271 NW 292

IV EXEMPT PROPERTY

Tools employed as capital. Tools which comprise the equipment of an automobile machine shop, operated by the owner through his employed mechanics as a side line to the owner's principal business of an automobile salesman, are not exempt to the owner as a mechanic.

First N. Bk. v Larson, 213-468; 239 NW 134

11702 Indemnifying bond—sale and return.

Atty. Gen. Opinion. See '32 AG Op 270

Replevin in lieu of action for conversion. A plaintiff, it is true, may not employ an action of replevin in order to recover for a conversion, but plaintiff may maintain a good-faith action in replevin against a levying officer when the officer had possession of the property when plaintiff served his notice of ownership and when the officer received an indemnifying bond, even tho the officer had parted with possession under an order of court before the replevin action was actually commenced.

Dvorak v Avery, 208-509; 225 NW 947

11703 Failure to give bond.

Atty. Gen. Opinion. See '32 AG Op 270

11706 Stay of execution—exceptions.

Atty. Gen. Opinion. See '28 AG Op 236

Inherent power of court to stay. The district court has inherent, discretionary power, in order to prevent injustice, to order a reasonable stay of execution, even without bond if it be made to appear that the judgment plaintiff will not be prejudiced by the order. But if said order is made because the chose or thing in action, which has been already levied on, has not been adjudicated, the order should be conditional on a reasonably prompt adjudication of said chose or thing in action.

Brenton v Dorr, 213-725; 239 NW 808

Stay bond—subsequent compromise and satisfaction—effect. The surety on a bond staying the collection of judgments is wholly released by the subsequent acts of the trustee in bankruptcy for the judgment defendant and the receiver for the insolvent judgment plaintiff entering into a legally authorized compromise settlement and satisfaction of the judgment, in order to avoid threatened and doubtful litigation growing out of the execution of said stay bond, and the subsequent insolvency of all the parties thereto.

State v Cas. Co., 213-211; 238 NW 709

Stay under inherent power of court. If the sale under execution of a cause of action is liable to be inequitable to, or oppressive on, the judgment defendant, e. g., where the cause of action may be such as to practically defy a just appraisement, it is suggested that relief may be had, in a proper case, by resorting to the inherent discretionary power of the court to order a stay.

Francis v Todd, 219-672; 259 NW 249

11712 Execution against principal and sureties.

Extension to principal available to surety — abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Permissible plea of counterclaim. In an action against the principal and surety on an attachment bond for damages consequent on the alleged wrongful issuance of the writ, the principal in said bond may plead a counterclaim which neither arises out of or is connected with the transaction on which plaintiff sues, nor in which the surety has any personal ownership (§11151, C., '35). A surety is not primarily liable on the bond and the principal who is

primarily liable should be permitted to defeat recovery on the bond if he can so do.

Imes v Hamilton, 222-777; 269 NW 757

11717 Labor claims preferred.

Atty. Gen. Opinions. See '28 AG Op 160; '30 AG Op 268

Construction — preferred labor claim act. This section does not embrace a seizure under execution at the instance of the labor claimant. In other words, the labor claimant may not base a preference on an execution seizure instigated by himself.

Heesel v Bank, 205-508; 218 NW 298

Labor claims—extent of priority. Under a voluntary assignment for the benefit of creditors, all claims for personal service rendered to the assignor within ninety days next preceding the assignment are payable in full irrespective of the amount (§12732, C., '31), and irrespective of the rights of a landlord who asserts his lien simply under his lease and not under a levy. This is true because the rights of parties to a voluntary assignment for the benefit of creditors are exclusively controlled by the chapter pertaining to such assignment, and, consequently, this section, limiting the priority of labor claims to $100 in case property is seized under proceeding not voluntary on the part of the creditor, does not apply.

In re Brady, 216-320; 249 NW 344

11722 Notice of sale.

Unnecessary recitals as to absence of right to redeem. A notice of sale of land under special foreclosure execution need not recite that the land will be sold without any right of redemption in a named defendant (because he has appealed), when the right of redemption from the sale exists in other party defendants.

Ebinger v Wahrer, 213-84; 238 NW 587

Unnecessary recital as to foreclosed rights of parties. A notice of sale of land under special foreclosure execution need not recite that the land will be sold free and clear from the "right, title, interest, liens, or claims" of party defendants.

Ebinger v Wahrer, 213-84; 238 NW 587

11727 Setting aside sale.

Venue in action to set aside sale.

Brownell v Bank, 201-781; 208 NW 210

Inadequacy of bid—estoppel to object. A debtor cannot have an execution sale set aside on the ground that the accepted bid was inadequate when such inadequacy was brought about by the conduct of the debtor, or his attorney, in reading to the assembled bidders at the time of sale a disquieting notice relative to the title which a successful bidder would receive.

Ebinger v Wahrer, 213-84; 238 NW 587

11728 Time and manner.

ANALYSIS

I Sales in General
II Mistake
III Fraud
IV Inadequacy of Price
V Opening or Vacating Sale
VI Title and Rights of Purchaser

I SALES IN GENERAL

Presumption of compliance with statute. A sheriff in making a sale under execution will be presumed, nothing appearing to the contrary, to have complied with the statutes governing such sales.

Ebinger v Wahrer, 213-84; 238 NW 587

Bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under the order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Inconsistent remedies—irrevocable election—effect. A judgment creditor who, instead of satisfying his judgment (1) by enforcing his lien on personal property which his judgment debtor had assigned to him as security, satisfies said judgment, (2) by buying in the same property under a general execution levy and sale under his said judgment, must be deemed to have irrevocably waived all right under his said assignment as security, it appearing that after said levy but before the sale thereunder, the said judgment creditor learned that the judgment defendant had also assigned said property to another party.

Zimmerman v Horner, 223-149; 272 NW 148

II MISTAKE

Vacation—insufficient ground. A sale on execution will not be set aside solely on the plea of the purchaser that he made a mistake in the amount of his bid.

Aronson v Hoskins, 201-389; 207 NW 389

Right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he was bidding on two separate tracts of land, when only one tract was being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

III FRAUD

Improper procedure. An execution sale will not, in a collateral proceeding, be set aside as invalid, even on a showing of inadequacy of price and fraud.

Coburn v Davis, 206-649; 221 NW 186

Cancellation of fraudulently acquired deed. A person who secretly buys up a certificate of execution sale and takes a sheriff's deed in his own name, in violation of his agreement with the judgment defendant to pay off the judgment in question and thereby satisfy his own debt to the judgment defendant, has no standing to contest an action by the latter for the cancellation of said deed.

Swearingen v Neff, 204-1167; 216 NW 621

IV INADEQUACY OF PRICE

Inadequacy of price. Record reviewed and held insufficient to show that a mortgage-secured note was sold on execution for such an inadequate amount as to equitably invalidate the sale.

Buter v Slattery, 212-677; 237 NW 232

Inadequacy of bid—effect. An execution sale of personal property will not be set aside simply because of the inadequacy of the accepted bid, when all inference of fraud is affirmatively disproven, and especially when the inadequate bid was owing to some extent to the fault of the execution defendant.

Coburn v Davis, 206-649; 221 NW 186

Inadequacy of bid—estoppel to object. A debtor cannot have an execution sale set aside on the ground that the accepted bid was inadequate when such inadequacy was brought about by the conduct of the debtor, or his attorney, in reading to the assembled bidders at the time of sale a disquieting notice relative to the title which a successful bidder would receive.

Ebinger v Wahrer, 213-84; 238 NW 587

Grossly inadequate price. Where a cause of action for alleged wrongful attachment was levied on under execution and, after an appraisement of "no value", was sold for substantially $100, held that the record on appeal did not reveal a sale at such a grossly inadequate price as to warrant the setting aside of the sale.

Francis v Todd, 219-672; 259 NW 249
See Adams v Morrison, 219-852; 259 NW 582

V OPENING OR VACATING SALE

Sale en masse—validity. The sale en masse of several tracts of land (after unsuccessfully offering the tracts separately) without adjourning the sale, furnishes no ground for setting aside the sale.

Adams v Morrison, 219-852; 259 NW 582

Sale en masse of lienable and nonlienable property. A sale en masse, under execution, of several tracts of land belonging to the execution defendant, along with other tracts in which said defendant had no interest, is illegal, and will be set aside in a proper action.

Adams v Morrison, 219-852; 259 NW 582

Setting aside. Where a cause of action for alleged wrongful attachment was levied on under execution and, after an appraisement of "no value", was sold for substantially $100, held that the record on appeal did not reveal a sale at such a grossly inadequate price as to warrant the setting aside of the sale.

Francis v Todd, 219-672; 259 NW 249
See Adams v Morrison, 219-852; 259 NW 582

Right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he is bidding on two separate tracts of land, when only one tract is being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

VI TITLE AND RIGHTS OF PURCHASER

Highest bid—confirmation. Highest bidder at public sale is not entitled as a matter of right to have the sale confirmed by the court, and where a higher substantial bid is made, even tho tardy, a large discretion lies with the court as to which bid shall be accepted.

Criswell v Criswell, 227-212; 288 NW 130

Status of highest bidder. In partition action where property was sold at public auction in regular manner for $4,600, the court did not abuse its discretion in amending referee's report and accepting a higher bid made subsequently to the public sale, the uniform holding in Iowa being that the high bidder at judicial sales, other than at sales under execution or by a trustee under a power, acquires no absolute or vested right, since the sale must be approved by the court and is considered merely a preferred bidder until such approval is given.

Criswell v Criswell, 227-212; 288 NW 130

11729 Sale postponed.

Inadequate bid — failure to continue sale. The sheriff in conducting a levy en masse on land under an execution abuses his discretion in not continuing the sale when the bid is grossly inadequate, e.g., about one-seventh of

the value of the land. Deeds issued under such circumstances will be set aside.

McCann v McCann, 207-610; 223 NW 393

Sale en masse—validity. The sale en masse of several tracts of land (after unsuccessfully offering the tracts separately) without adjourning the sale furnishes no ground for setting aside the sale.

Adams v Morrison, 219-852; 259 NW 582

11730 Overplus.

Homestead and nonhomestead property—sale en masse—appropriation of surplus. A junior execution creditor who, at a senior mortgage foreclosure sale, buys in property which, in accordance with the mortgagor's agreement to that effect, is sold en masse, and regardless of the homestead character of part of the property, and who, in so buying, bids an amount in excess of the senior mortgage debt, on the express condition that said excess be indorsed on his junior execution (which is done), and who, with the full knowledge of the mortgagor, and without objection by him, complies with his bid, and after a year for redemption takes a deed is not thereafter liable to the mortgagor for the amount of said excess on the theory that such excess represents the mortgagor's homestead, on which the junior execution creditor admittedly had no lien.

Phoenix Co. v Vaught, 201-450; 205 NW 792

Homestead and nonhomestead property—sale en masse—apportionment of surplus. Tho it be conceded, arguendo, that, where mortgaged property is sold on foreclosure en masse, and regardless of the homestead character of part of the property, to a junior execution creditor on an indivisible bid in excess of the mortgage debt, the mortgagor would have a recoverable interest in the excess on the theory that it represented his homestead, on which the junior creditor had no lien, nevertheless the mortgagor would not be entitled to recover the entire excess, because equity would require the bid to be apportioned between the homestead and the nonhomestead property, in order that the homestead should bear its just proportion of the mortgage debt.

Phoenix Co. v Vaught, 201-450; 205 NW 792

11732 Plan of division of land.

Inadequate bid—failure to continue sale. The sheriff in conducting a levy en masse on land under an execution abuses his discretion in not continuing the sale when the bid is grossly inadequate, e. g., about one-seventh of the value of the land. Deeds issued under such circumstances will be set aside.

McCann v McCann, 207-610; 223 NW 393

Return—correcting inadvertent error. An inadvertent error in the return of a mortgage foreclosure sale may be corrected by an amendment by the sheriff after the land has gone to sheriff's deed, provided the judgment plaintiff and defendant are the only persons affected. In such case oral testimony showing the error is quite unnecessary. Especially is this true when complainant shows no injury consequent on such correcting amendment.

Equitable v Ryan, 213-603; 239 NW 695

Homestead—exhausting other property. A sheriff in selling a homestead forty, and a nonhomestead forty (under special mortgage-foreclosure execution) may very properly call for and receive, in turn, separate, substantial, and good faith bids, (1) on the nonhomestead forty, (2) on the homestead forty, and (3) on the two forties en masse, and, over the objections of the debtor, may accept the bid en masse and sell thereunder when said bid en masse is substantially in excess of the aggregate of the other two bids, tho insufficient to completely satisfy the execution.

Prudential v Westfall, 219-1119; 260 NW 344
American Bk. v Davis, 221-1183; 268 NW 9

11733 Failure of purchaser to pay—optional procedure.

Nonright to withdraw bid. The purchaser at a judicial sale in partition has no right arbitrarily to withdraw his bid prior to confirmation of the sale.

Reece v Cartwright, 209-706; 228 NW 641

Sale—right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he was bidding on two separate tracts of land, when only one tract was being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

11734 Sales vacated for lack of lien.

Nonright to have sale set aside. A judgment plaintiff in mortgage foreclosure who levies upon the mortgaged premises after the expiration of six months, and before the expiration of nine months from a sale under a foreclosure of a prior mortgage, and bids in the property, subject to the rights of the first mortgage, for the full amount of his judgment, may not, after his right to redeem has expired, have his sale set aside and canceled and his judgment reinstated, on the mistaken claim that his judgment was not a lien on the land at the time of the levy.

Home Bk. v Klise, 205-1103; 216 NW 109

Motion to set aside by stranger to proceeding. The owner of land which has been levied upon and sold under execution as the property of the judgment defendant on the theory that the judgment became a lien on the land before said owner acquired the land, may maintain a motion to set aside the sale on the ground that said judgment was not and never had been a lien on the land.

Dorsey v Bentzinger, 209-883; 226 NW 52

11736 Real estate of deceased judgment debtor.

Quasi-judgment subsequent to death of party. An order growing out of a proceeding instituted after the death of a party, and declaring a contingent liability against the estate of a deceased party, is not a lien on the real estate of which the deceased died seized.

In re Hager, 212-851; 235 NW 563

11740 Mutual judgments—set-off.

Set-off of judgments — effect on lien of attorney. The offsetting of the larger against the smaller of two mutual judgments wholly terminates an unadjudicated attorney's lien duly noticed in the judgment docket of the smaller judgment, when the indebtedness represented by the larger judgment antedates the indebtedness represented by the smaller judgment.

McIntosh v McIntosh, 211-750; 234 NW 234

Unliquidated demand set off against court costs. On a motion by an administrator to tax court costs against a defeated claimant in probate, the latter may not have a duly filed but unliquidated claim in his favor and against the estate adjudicated and set off against said costs and a judgment rendered against the estate for the excess.

In re Nairn, 215-920; 247 NW 220

11741 Personal property and leasehold interests—appraisement.

Sale — appraisement — noninvalidating circumstance. A sale under execution will not be deemed invalidated because one of the appraisers did not inspect the property at the very time the appraisement was made, it appearing that he was familiar with the property and had shortly theretofore inspected it.

McFerrin v Grain Co., 220-1086; 264 NW 45

Incompetent appraisers. Where a cause of action for alleged wrongful attachment was sold under execution after an appraisement of "no value", held that the incompetency of the appraisers to justly appraise such property would not be assumed because one was an attorney of somewhat limited experience and one was the editor of a newspaper devoted to the publication of court proceedings.

Francis v Todd, 219-672; 259 NW 249

11743 Deed or certificate.

Atty. Gen. Opinion. See '30 AG Op 84

Life estate — interest acquired. Judgment creditor of a life tenant in purchasing a life estate at execution sale cannot acquire any greater interest than that held by the life tenant.

Rich v Allen, 226-1304; 286 NW 434

Redemption by interloper — effect. The holder of a certificate of sale under execution may not question a timely redemption made by an interloper, in the name of the person who had the right to redeem; especially is this true when the person paying the redemption money had contracted for a deed, and when the certificate holder has once surrendered his certificate and accepted the redemption money.

Dixon Lbr. v Cole, 213-554; 239 NW 131

Equitable assignment—sheriff's certificate —homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Expiration of redemption—effect on nonredeeming junior lienholder—sale certificate assignment. In a mortgage foreclosure action where a defendant junior lienholder fails to redeem, an assignment by the mortgagee of his foreclosure sale certificates to the defendant mortgagor after expiration of the period of redemption, vests in the mortgagor all of mortgagee's rights unburdened by the claims of any party to the suit.

Bates v Mullins, 223-1000; 274 NW 117

Transfer—expiration of redemption—mortgagor's acquisition of sale certificates—nonmerger with fee. Where a mortgagor-defendant after the expiration of the right of redemption took by assignment the sale certificates from the mortgagee-plaintiff in foreclosure, no merger of the mortgage and the fee title occurred thereby to reinstate or give priority to junior liens, and mortgagor could sell to a third party free and clear of all claims of parties to the foreclosure.

Bates v Mullins, 223-1000; 274 NW 117

Sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-

owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Delinquent taxes—purchaser's duty to pay. When judgment creditor of a life tenant, by virtue of execution, levies upon a life estate and purchases the life estate on execution sale, he assumes all the duties of a life tenant and is obligated to pay delinquent taxes, or else lose the advantage of the life estate.

Rich v Allen, 226-1304; 286 NW 434

11744 Deed.

Notice of homestead right. The holder of a sheriff's deed under execution sale necessarily takes the deed subject to the homestead rights of the execution defendant of which he had actual or constructive notice.

Frum v Kueny, 201-327; 207 NW 372

Deed carries unaccrued rents. Principle reaffirmed that unaccrued rents pass to the grantee in a sheriff's deed.

Wilson v Wilson, 220-878; 263 NW 830

Rent—implied obligation. Proof that the holder of a first mortgage on real estate was himself in occupancy of the premises, and continued such occupancy after the issuance of a sheriff's deed under a junior lien, generates the presumption that such occupancy was with the assent of the said occupant and the said deedholder, with consequent obligation of the occupant to pay reasonable rental to said deedholder until such time as a deed might be executed under foreclosure of the first mortgage.

Norman v Dougan, 201-923; 208 NW 366

Ownership of existing crops. On the issue whether the holder of a sheriff's deed was the owner of a crop of corn grown on the land, or whether the crop had matured, and therefore belonged to the tenant, the court will not take judicial notice that corn will mature on any particular date. The holding of the trial court on clearly competent and conflicting testimony is final.

Frum v Kueny, 201-327; 207 NW 372

Homestead—noncontiguous tracts. One-half of a double garage, situated on property used by the owner solely for rental purposes, may not be deemed an appurtenance of the said owner's homestead, composed of a nearby, separate, independent and wholly different tract, noncontiguous to the rental property. So held in an action involving the validity of a sheriff's deed based on a sale en masse—a sale without platting.

Van Law v Waud, 223-208; 272 NW 523

When deedholder deemed trustee. The original mortgagee in a third mortgage who fraudulently redeems in his own name from the foreclosure of the second mortgage and obtains a sheriff's deed, when in fact he had, long prior thereto, assigned said third mortgage, must be deemed to hold said deed as a trustee for his assignee, but he will not be deemed also to hold said deed as trustee for the first mortgagee who has suffered an adverse foreclosure of his mortgage because of the fraud of said redemptioner.

Lyster v Brown, 210-317; 228 NW 3

Judgment creditor's deed after mortgage foreclosure—insufficiency. A sheriff's deed issued under execution sale to a judgment creditor, after expiration of the judgment creditor's right of redemption as a defendant junior lienholder in a mortgage foreclosure, is a nullity and will not sustain an action to quiet title thereon.

Bates v Mullins, 223-1000; 274 NW 117

Staying deed under moratorium act—loss of right. A defendant in mortgage foreclosure may not, after execution sale, have an order under the emergency moratorium act (45 GA, Ch 179) staying the execution of sheriff's deed and extending the period for redemption, when, at the time of the application for the order, the defendant, on his own application, has been adjudged a bankrupt, and his equity of redemption in the land in question has been sold under an order issued out of the bankruptcy court.

Lincoln Bank v Brown, 219-630; 258 NW 770

Denying moratorium cancels restraining order on sheriff. An order restraining the sheriff from issuing a deed, pending a hearing on a moratorium application for extension of period for redemption, is automatically dissolved when the application is denied, and a deed issued is valid when a nunc pro tunc order places the moratorium denial order on record as of a date prior to the issuance of deed.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Execution sale of life estate—remainderman unaffected. Where a judgment creditor purchases a life estate at execution sale and then purchases tax certificates outstanding against such life estate, he is merely redeeming the taxes and cannot acquire any interest adverse to the remainderman.

Rich v Allen, 226-1304; 286 NW 434

11747 Damages for injury to property.

Subsequent damages to land. A mortgagee who purchases the land at foreclosure sale for the full amount of his judgment is entitled, after he obtains the sheriff's deed, to the proceeds of gravel wrongfully removed from the premises after the sale, and before the issuance of the deed.

LeValley v Buckles, 206-550; 221 NW 202

Waste—recovery for, when mortgage satisfied. While a mortgagee of land may maintain an action to protect his security against waste,

yet after he has foreclosed and bought in the property for the full amount of the debt, he cannot maintain an action for gravel and standing timber removed from the land during the time the mortgage was being foreclosed.

Kulp v Trustees, 217-310; 251 NW 703

Rights to unaccrued rents. The principle that one who receives a sheriff's deed is entitled to unaccrued rents under an outstanding lease, can have no application when the lease had terminated immediately prior to the issuance of said sheriff's deed.

Kerr v Horn, 211-1093; 232 NW 494

Deed carries unaccrued rents. Principle reaffirmed that unaccrued rents pass to the grantee in a sheriff's deed.

Wilson v Wilson, 220-878; 263 NW 830

11749 Death of holder of judgment.

Judgment creditor dead—when garnishment judgment void. Where, after the testate death of a judgment creditor, two of his eight beneficiaries secure an execution on the judgment, garnish the judgment debtor's interest in an estate, and take a judgment under the garnishment proceedings applying the proceeds to the original judgment, an order thereafter quashing the execution and the return thereon for nonconformity to statute also invalidates the garnishment judgment.

Gohring v Koonce, 224-1186; 278 NW 283

11752 Execution quashed.

Motion—when timely—dead judgment creditor. When innocent third parties are not involved, a motion to quash an execution for nonconformity to statutes, prescribing procedure after death of judgment creditor, is not too late, tho filed four months after the entry of a garnishment judgment to which only two of the eight heirs interested therein were parties. Such garnishment judgment is an incomplete adjudication and not sufficient to warrant payment by the judgment debtor to the two represented heirs.

Gohring v Koonce, 224-1186; 278 NW 283

Judgment creditor dead—when garnishment judgment void. Where, after the testate death of a judgment creditor, two of his eight beneficiaries secure an execution on the judgment, garnish the judgment debtor's interest in an estate, and take a judgment under the garnishment proceedings applying the proceeds to the original judgment, an order thereafter quashing the execution and the return thereon for nonconformity to statute also invalidates the garnishment judgment.

Gohring v Koonce, 224-1186; 278 NW 283

11753 Death of part of defendants.

Judgment claims against deceased. See under §§11957–11959

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

11754 Fee bill execution.

Atty. Gen. Opinion. See '32 AG Op 198

Costs—remedies for collection—motion to retax—special proceeding. A motion by a city to retax unpaid clerk's costs against the plaintiff is a special proceeding.

Great West. Ins. v Saunders, 223-926; 274 NW 28

Limitation of actions—clerk's costs barred after five years. Clerk's costs inuring to the general fund when collected are no part of the judgment to which they are incident, but are only a debt, not necessarily arising out of a governmental function, which costs are such debts as become outlawed at the expiration of five years and may not then be retaxed and collected.

Great West. Ins. v Saunders, 223-926; 274 NW 28

CHAPTER 499

EXEMPTIONS

11755 "Family" defined.

Persons entitled to exemptions. See under §11760

Discussion. See 23 ILR 215—Legal controls in family law

Family relation. Instructions which define a "family" as a "collection or collective body of persons who live under one roof and under one head or management" are all-sufficient.

Wilson v Else, 204-857; 216 NW 33

11756 Who deemed resident.

Atty. Gen. Opinions. See '34 AG Op 270, 442

11757 Failure to claim exemption.

Estoppel. A debtor who makes a selection of exempt property in compliance with a proper demand therefor by the levying officer may not, after the officer has acted thereon, change such selection.

Wertz v Hale, 202-305; 208 NW 859

Necessity for proof. A chattel mortgagor who pleads that the mortgage covers exempt property and that the mortgage is void because his wife did not join therein, can be given no relief in the absence of proof of the facts upon which exemption can be based.

Citizens Bank v Scott, 217-584; 250 NW 626

11758 Absconding debtor.

Right of spouse to sell. The statutory provision which, in effect, provides that if a debtor "absconds", the property exempt to him shall be exempt to his wife and children, does not deprive the debtor, who is about to be sentenced to the penitentiary, of his legal right validly to sell, in good faith, his exempt property without the consent of his wife.

Brayman v Brayman, 215-1183; 247 NW 621

11759 Purchase money.

Payment by indorser revests original rights. The payee of a promissory note who indorses with recourse, necessarily continues to be a party to the note and if he pays the note when due because of the default of the maker, he thereby re-acquires his original rights under the note. It follows that if the note was originally given for the purchase price of property, the indorser may enforce said note against such property, and it is quite immaterial that he does so under a duly assigned judgment obtained by the indorsee against the maker.

Callaway v Hauser, 211-307; 233 NW 506

Purchase of car—wife not joining in chattel mortgage—payment by employer. Where defendant was unable to meet payments on car, and employer, under an agreement with defendant, made delinquent and future payments to the finance company and took an assignment of the note and chattel mortgage, the employer was entitled to the possession of the car as against contentions that intervenor (defendant's wife) did not join in the execution of the chattel mortgage, that the assignment to employer did not create any right or lien sufficient to sustain writ of replevin, and that the payments made by the employer constituted a satisfaction and payment and not a purchase of the chattel mortgage.

Simpson v McConnell, 228- ; 291 NW 862

Exempt property—debts enforceable against —unallowable procedure. After a court of bankruptcy has adjudged a debtor to be a bankrupt and after the court has set off a homestead to said debtor, a creditor holding a duly scheduled, unliquidated, and unsecured debt has no right to proceed in equity in the state court, and have his debt adjudicated and enforced as a lien on the said homestead because said debt antedates the acquisition of said homestead. And it is immaterial that the creditor, preceding his action in the state court, obtained an order staying the final discharge of the bankrupt.

Bracewell v Hughes, 214-241; 242 NW 66

11760 General exemptions.

Atty. Gen. Opinion. See '34 AG Op 628

ANALYSIS

I NATURE IN GENERAL
II PERSONS ENTITLED
III PROPERTY AND RIGHTS EXEMPT
IV TRANSFER OR INCUMBRANCE OF EXEMPT PROPERTY
V PROTECTION AND ENFORCEMENT OF RIGHT

Homestead exempt. See under §§10135–10155
Insurance policy exemptions. See under §§8684.13, 8776, 8796, 11919
Notice of ownership. See under §11698 (III)

I NATURE IN GENERAL

Discussion. See 12 ILR 167—Set-off or counterclaim against exemptions

Purely statutory. Exemptions being purely statutory, one may not base his claim to exemption on the doctrine of public policy, but must come within the statutory requirements.

Briley v Board, 227-55; 287 NW 242

Binding on state and municipalities. Exemption statutes are binding on the state and on the municipalities thereof.

Ohio Cas. Co. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Signing chattel mortgage—effect. The mere signing of a chattel mortgage in a partnership name does not, in and of itself, estop the signer from denying that the mortgaged property is partnership property.

Citizens Bank v Scott, 217-584; 250 NW 626

II PERSONS ENTITLED

Applicability. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

Owner of automobile not "other laborer". A person whose principal occupation is selling automobiles, and who operates for profit an automobile machine shop through employed mechanics, cannot be deemed an "other laborer" within the meaning of the statute rendering vehicles exempt in certain cases.

First N. Bk. v Larson, 213-468; 239 NW 134

Ownership of automobile. Evidence that the head of a family bought an automobile, paid for it, used it for the purpose of making a living, and has never parted with the possession, is sufficient to prove his ownership on the question of exemption.

Shepard v Findley, 204-107; 214 NW 676

Chattel mortgage—jury question. In replevin action by assignee of alleged chattel mortgage to recover possession of mortgaged property, whether mortgage had ever been executed or whether property was exempt to alleged mortgagor who claimed he was a married man, the head of a family, and that he made his living with such property, held to be jury question.

Brown v Heising, (NOR); 282 NW 345

Administrator's debt to decedent—exemptions. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

III PROPERTY AND RIGHTS EXEMPT

Discussion. See 15 ILR 244—Radio

Radio receiving set. The statutory exemption from execution of "musical instruments" does not embrace a radio receiving set.

Dunbar v Spratt-Snyder, 208-490; 226 NW 22; 63 ALR 1016

Barber chairs as "tools". The exemption term "proper tools" of a mechanic presents always a question of fact. The term is not necessarily limited to the precise tools which the mechanic personally handles or ordinarily himself uses alone, nor does it embrace tools which are in effect capital owned and used for the purpose of profit. Held, on instant record, that more than one barber chair and a "gum" machine were not exempt, while other miscellaneous paraphernalia designed for carrying on the business and caring for customers were exempt, tho some of the separate articles were physically larger than necessary.

Hoyer v McBride, 202-1278; 211 NW 847

Automobile in addition to team and harness. A debtor, a resident of this state and the head of a family, may not hold exempt from execution an automobile in addition to a team and harness.

Wertz v Hale, 212-294; 234 NW 534

Rentals during redemption period. The rental of land for the statutory redemption period following sale on mortgage foreclosure is not exempt from attachment levy at the instance of creditors other than the foreclosing mortgagee.

Clouse v Reeves, 205-154; 217 NW 833

Tools of mechanic—conclusion affidavit. A debtor who seeks to have tools released from levy does not meet the burden of proof resting upon him by simply asserting the conclusion "that he is a mechanic" and "that said tools are exempt". The facts showing that he is, in fact, a mechanic and the facts showing consequent exemption must be stated.

First N. Bk. v Larson, 213-468; 239 NW 134

Tools employed as capital. Tools which comprise the equipment of an automobile machine shop, operated by the owner through his employed mechanics as a side line to the owner's principal business of an automobile salesman, are not exempt to the owner as a mechanic.

First N. Bk. v Larson, 213-468; 239 NW 134

IV TRANSFER OR INCUMBRANCE OF EXEMPT PROPERTY

Mortgage of exempt personal property. See under §10013

Proceeds of exempt property. Judgment may not be rendered against a garnishee for the proceeds of exempt personal property fraudulently mortgaged by the mortgagor-owner.

Northwestern Bk. v Muilenburg, 209-1223; 229 NW 813

Rent and advances—unrecorded contract lien. An unrecorded lease giving the landlord a lien on exempt property kept on the premises is not effective against a purchaser of the exempt property without notice of the written lease.

Sparks v Flesher, 217-1086; 252 NW 529

Rent and advances—purchaser of nonexempt property. Pigs farrowed on leased premises but removed from said premises before they were six months old, and not thereafter returned to said premises, are not subject to the landlord's lien for rent.

Sparks v Flesher, 217-1086; 252 NW 529

Bankruptcy — effect on existing liens. The discharge in bankruptcy of the mortgagor of exempt chattels does not discharge the lien of such mortgage.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

See McMains v Cunningham, 214-300; 233 NW 129; 242 NW 106

V PROTECTION AND ENFORCEMENT OF RIGHT

Federal jurisdiction in bankruptcy. The jurisdiction of the federal bankruptcy court over the exempt property of the bankrupt extends no further than to enter an order setting off such property to the bankrupt. Irrespective of the proceedings in such court, the right to the exempt property, as between

V PROTECTION AND ENFORCEMENT OF RIGHT—concluded

the owner and a mortgagee thereof, must be determined in the state court.

Eckhardt v Hess, 200-1308; 206 NW 291
Bracewell v Hughes, 214-241; 242 NW 66
See Drees v Armstrong, 180-29; 161 NW 40

Wrongful levy—damages. One who seeks a money judgment for the value of property wrongfully levied on may not also recover for the loss of the use of the property.

Wertz v Hale, 202-305; 208 NW 859

Duty of guardian. The guardian of a mentally incompetent is under duty to plead the exemptions of the ward.

Appanoose Co. v Henke, 207-835; 223 NW 876

Presumption as to expenditures. Presumptively a guardian in making expenditures for the ward will use nonexempt funds rather than exempt funds.

Appanoose Co. v Henke, 207-835; 223 NW 876

Automobile—insufficient showing of exemption. An automobile is not shown to be exempt to the head of a family and a resident of this state on the naked assertion "that it is necessary for the owner to use an automobile in the earning of a livelihood".

First N. Bk. v Larson, 213-468; 239 NW 134

Rent and advances—burden of proof to show lien. A landlord seeking to enforce a landlord's lien on pigs must show that they were kept on the leased premises after they became six months old.

Sparks v Flesher, 217-1086; 252 NW 529

11760.1 Motor vehicle.

Bankruptcy — irretrievable nullification of lien. The filing by an insolvent judgment defendant of his petition in bankruptcy within four months following the entry of judgment, discharges the judgment (it not being based on fraud or willful injuries) and irretrievably nullifies an execution levy on property whether the property be exempt or nonexempt. In other words, the judgment plaintiff may not thereafter proceed in equity in the state court and have his discharged judgment enforced against property set aside to the judgment defendant as exempt, even tho, were it not for the bankruptcy proceedings, plaintiff would be able to show that said property was not exempt from levy under plaintiff's particular judgment.

McMains v Cunningham, 214-300; 233 NW 129

11761 Pension money.

Atty. Gen. Opinions. See '28 AG Op 338, 340; '34 AG Op 699

Interest on pension money. The principal of pension money is exempt from seizure by creditors, but not the interest thereon when the amount of interest is determinable, notwithstanding the commingling of principal and interest.

Appanoose Co. v Henke, 207-835; 223 NW 876

Pension funds in hands of administrator. Original federal pension funds in the hands of an administrator are not exempt, under either state or federal statutes, from sequestration by the creditors of the pensioner. [Revised Statutes, §4747 (38 USC §54); 38 USC §96.]

Appanoose Co. v Carson, 210-801; 229 NW 152

Preference in payment. The fact that the subject matter of a time certificate of deposit in a bank is the depositor's pension money furnishes no legal basis for a preference in payment in settling up the affairs of the insolvent bank, even tho the federal and state statutes exempt pension money from seizure for the debts of the pensioner.

Andrew v Bank, 205-872; 219 NW 62

Compensation of guardian. Section 454, title 38, USC, providing that federal funds granted to a World War veteran "shall not be subject to the claims of creditors", does not prohibit the courts of this state from allowing the guardian of such veteran and from such funds, compensation not only for ordinary services but for extraordinary services rendered the ward,—the guardian not being a "creditor" within the meaning of said statute.

Hines v McKenzie, 216-1388; 250 NW 687

11763 Personal earnings.

"Head of family". See under §11760

Atty. Gen. Opinions. See '34 AG Op 546, 699; '36 AG Op 611

Purely statutory. Exemptions being purely statutory, one may not base his claim to exemption on the doctrine of public policy, but must come within the statutory requirements.

Briley v Board, 227-55; 287 NW 242

Fact findings of trial court. The findings of the trial court, on supporting testimony, as to the fact bearing on a question of exemptions is conclusive on the appellate court.

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200

Divorce — effect. A man loses his family headship, and consequently his right of exemption of personal earnings, by the rendition of a divorce decree against him which gives the wife absolute custody of all the minor children, permanent alimony, and continuing alimony through future payments.

Sparks v East, 202-718; 210 NW 969

Personal earnings represented by bank deposit. A joint bank deposit in the name of a husband and wife, which represents the

earnings of the husband for his personal services at any time within ninety days preceding a levy, is exempt from an execution against both husband and wife, the wife being made a joint depositor as a matter of convenience in the payment of bills.

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200

Salary of public officer. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety having paid the judgment, and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Cas. Co. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Judgment as "debt". A judgment, whether based on contract or tort, is a "debt" within the meaning of the exemption statutes.

Ohio Cas. Co. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

11764 Exception under divorce decree.

Overruled case. The opinion in Schooley v Schooley, 184-835; 169 NW 56, is hereby overruled.

Malone v Moore, 212-58; 236 NW 100

11766 Workmen's compensation.

Exemption from debts of testator. Workmen's compensation, already collected as the result of a commutation settlement and in the hands of testator's attorney, is subject to the debts of the employee's estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

11771 Public property.

Levy of tax to pay judgment. See under §11675. Vol I; §12440

CHAPTER 500

REDEMPTION

11773 When sale absolute.

Unity of ownership and right of redemption. Ownership of land and the right of redemption are inseparable.

Central Life v Spangler, 204-995; 216 NW 116

11774 Redemption by debtor.

ANALYSIS

I REDEMPTION IN GENERAL
II NATURE OF RIGHT
III PERIOD OF REDEMPTION
IV RIGHTS ATTENDING REDEMPTION

Moratorium on issuance of sheriff's deed—mortgage foreclosures. See under §12372 (VII)
Redemption in mortgage foreclosures. See under §12376 (IV)

I REDEMPTION IN GENERAL

Voluntary conveyance—insufficient showing. A conveyance by a husband to his wife will not be deemed voluntary solely on the ground that the conveyance was (1) by quitclaim, and (2) in consideration "of $1.00 and other valuable consideration".

Tirrill v Miller, 206-426; 218 NW 303

Quieting title — judgment creditor's deed after mortgage foreclosure—insufficiency. A sheriff's deed issued under execution sale to a judgment creditor, after expiration of the judgment creditor's right of redemption as a defendant junior lienholder in a mortgage foreclosure, is a nullity and will not sustain an action to quiet title thereon.

Bates v Mullins, 223-1000; 274 NW 117

Nonallowable attorney fees. In a successful action to enforce plaintiff's right to redeem from execution sale, the fact that plaintiff secured a temporary injunction to protect his possession (and solely as a collateral remedy) furnishes no justification for the taxation against plaintiff of an attorney fee in favor of defendant, especially when the said injunction was ordered dissolved only in event plaintiff failed to exercise his right to redeem.

Werner v Hammill, 219-314; 257 NW 792

II NATURE OF RIGHT

Conclusiveness of adjudication—lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

"Matured crops" defined. Crops are matured whenever they have reached such a stage of maturity that they no longer draw sustenance from the soil.

Goldstein v Mundon, 202-381; 210 NW 444

Receiver—unauthorized appointment. Upon a sale of land on execution under an ordinary judgment at law, the court has no authority to appoint a receiver to collect the rents and

profits of the land during the period of redemption.

Anthony v Heiny, 215-1347; 244 NW 902

III PERIOD OF REDEMPTION

Time of redemption—extension prohibited. Neither the court nor the clerk may grant an extension of time in which to redeem and thereby amend the statute.

Paulsen v Hanson, (NOR); 216 NW 762

IV RIGHTS ATTENDING REDEMPTION

Amount for redemption—taxes—deficiency judgment. The amount necessary to redeem land after sheriff's sale properly included the amount of taxes paid by the purchaser, but did not include the amount of the deficiency judgment, notwithstanding an agreement that the deficiency judgment should be included in the amount.

New York Ins. v Breen, 227-738; 289 NW 16

11775 Redemption prohibited.

Redemption in mortgage foreclosures. See under §12376 (IV)

Redemption — nonforfeiture of right. The right to redeem from an execution sale of a life interest in real estate under a judgment at law from which no appeal is taken, is not forfeited by the taking of an appeal from a decree in an equitable action which is auxiliary to and in aid of said judgment at law.

Anthony v Heiny, 215-1347; 244 NW 902

11776 Redemption by creditors.

ANALYSIS

I IN GENERAL
II TIME FOR REDEMPTION
III REDEMPTION PERMITTED
IV REDEMPTION DENIED

Redemption in mortgage foreclosures. See under §12376 (IV)

I IN GENERAL

Statutory rights cannot be enlarged. Redemption from sheriff's sale under execution must meet statutory requirements to be effectual, and statutory rights cannot be enlarged.

Paulsen v Hanson, (NOR); 216 NW 762

Redemption of homestead by judgment creditor. A judgment creditor who was made a defendant in a foreclosure action against appellant's 120-acre farm is a junior lienholder under the statute, not a stranger nor interloper, and is entitled to redeem from sheriff's sale, even tho the judgment was not a lien on the 40 acres constituting appellant's homestead.

Ackerman v Bank, 228- ; 291 NW 150

Homestead—sheriff's certificate—equitable assignment to judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Redemption — who may question. Whether any person other than the execution-purchaser is in a position to complain of the right of redemption exercised by a junior creditor, quaere.

Quinn v Bank, 200-1384; 206 NW 271

Mechanic's lien debtor's right of redemption. A mechanic's lien debtor's right of redemption and right of possession are not subject to levy nor to junior mechanic's lien judgments obtained more than nine months after the sale, but within the year for redemption.

Murray v Kelroy, 223-1331; 275 NW 21

Failure of junior mortgagee to redeem. The holder of a junior mortgage on both homestead and nonhomestead property of a bankrupt, who is not satisfied out of the proceeds of a "free-from-lien" sale of the nonhomestead property by the trustee in bankruptcy, does not lose his lien on the homestead property by failing to redeem from the foreclosure of senior mortgages which are satisfied out of said proceeds, because the satisfaction of said senior mortgages left nothing from which redemption could be made.

First Bank v Kleih, 201-1298; 205 NW 843

Conclusiveness of adjudication—lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

II TIME FOR REDEMPTION

Fatal delay. The act of a junior creditor in attempting to redeem after the expiration of nine months from the sale of land on execution is a nullity especially when his lien (assuming it to be such) was acquired after the expiration of said nine months.

Pierce v White, 204-1116; 216 NW 764

"Subject to liens of record." The expression "subject to liens of record", when embraced in the habendum clause of a deed of conveyance does not have the effect of continuing the lien of a judgment after the holder thereof had failed to exercise his right to redeem.

Paulsen v Jensen, 209-453; 228 NW 357

III REDEMPTION PERMITTED

Execution — sale — redemption — appeal by junior creditor—effect. The statutory provision that "no party" who has appealed from the district court shall be entitled to redeem (§11775, C., '24), does not embrace a junior creditor in a mortgage foreclosure. Especially is this true (1) when the appeal by the junior creditor was on the issue of priority between him and another junior creditor, and (2) when the appeal was perfected after the execution sale.

Quinn v Bank, 200-1384; 206 NW 271

IV REDEMPTION DENIED

Wife joining to release dower forfeits redemption right. Redemption being purely statutory, a wife who joins in executing a note and mortgage for the sole purpose of relinquishing her dower interest, and being decreed not a debtor, is therefore not within the prescribed class of redemptioners.

Fitch v Cornelison, 224-1252; 278 NW 309

Junior mechanic's lien—loss of right—lien debtor's grantee. A person holding both senior and junior mechanics' liens, who forecloses only the senior lien, loses his junior lien when he fails to reduce his junior lien to judgment and redeem under it within the statutory nine months. The mechanic's lien debtor's quitclaim grantee, who does redeem, takes the property free from said junior liens.

Murray v Kelroy, 223-1331; 275 NW 21

11777 Mechanic's lien before judgment.

Nonright of mechanic's-lien claimant. Principle recognized that a mechanic's-lien claimant whose claim has not gone to judgment may not redeem from a mortgage foreclosure.

Magnesite Products Co. v Bensmiller, 207-1303; 224 NW 514
Cochran v Ory, 222-772; 269 NW 764

Lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

Junior mechanic's lien—loss of right—lien debtor's grantee. A person holding both senior and junior mechanics' liens, who forecloses only the senior lien, loses his junior lien when he fails to reduce his junior lien to judgment and redeem under it within the statutory nine months. The mechanic's lien debtor's quitclaim grantee, who does redeem, takes the property free from said junior liens.

Murray v Kelroy, 223-1331; 275 NW 21

11778 Probate creditor.

Redemption by probate creditor. The holder of a legally established claim in probate need not rely on his right to be paid from the funds—if sufficient—arising from the administration of the estate, but may become a redemptioner of the real estate of the decedent which has been sold on execution and which is yet subject to redemption by creditors.

Aronson v Hoskins, 201-389; 207 NW 389

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

11779 Redemption by creditors from each other.

Who entitled—holder of barred lien. The owner of a judgment which has ceased to be a lien has no right to redeem from a sale under a mortgage lien prior to his judgment.

Johnson v Leese, 223-480; 273 NW 111

11782 Terms.

Redemption under mortgage foreclosure. See under §12376

Amount for redemption — taxes—deficiency judgment. The amount necessary to redeem land after sheriff's sale properly included the amount of taxes paid by the purchaser, but did not include the amount of the deficiency judgment, notwithstanding an agreement that the deficiency judgment should be included in the amount.

New York Ins. v Breen, 227-738; 289 NW 16

11784 By holder of title.

Voluntary, unnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt, and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of

taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

11789 Mode of redemption.

Statutory rights cannot be enlarged. Redemption from sheriff's sale under execution must meet statutory requirements to be effectual, and statutory rights cannot be enlarged.

Paulsen v Hanson, (NOR); 216 NW 762

Fatally defective affidavit. An attempt by a junior lienholder to redeem on an affidavit which materially and misleadingly misstates the amount of his lien claim is a nullity as to another junior lienholder who had no knowledge as to the actual amount of said first lien.

Green Bay Lbr. v Leitzen, 204-594; 215 NW 639

Redemption by creditor of one of two separate owners — apportionment of mortgage debt. Where separate owners of separate tracts of land jointly mortgage their lands for the debt of one of them, and on foreclosure, the sale is made en masse, and redemption is made by a judgment creditor of one of the owners, the other owner may, after paying to the clerk the entire amount necessary to effect redemption, maintain an equitable action to have the mortgage debt apportioned between the different tracts.

Hansen v Bank, 209-1352; 230 NW 415

Equitable assignment—sheriff's certificate—homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

11792 Contest determined.

Cancellation of sheriff's certificate—issuance of deed restrained. An action to enjoin issuance of sheriff's deed and to cancel certificate held properly brought in equity as against contention that this section furnished exclusive remedy.

Paulsen v Hanson, (NOR); 216 NW 762

Mortgage—amount for redemption—taxes—deficiency judgment. The amount necessary to redeem land after sheriff's sale properly included the amount of taxes paid by the purchaser, but did not include the amount of the deficiency judgment, notwithstanding an agreement that the deficiency judgment should be included in the amount.

New York Ins. v Breen, 227-738; 289 NW 16

11794 Redemption of part of property.

Unallowable partial redemption by heirs. After a mortgage which secures the debt of a husband, and which covers different tracts belonging to the husband and wife separately, is legally foreclosed, and sale made en masse (no other method being required by the debtors), and after junior lienholders on the husband's land have redeemed from the entire sale, the guardian of the wife's heirs may not redeem the lands which belonged to the wife by depositing with the clerk a proportional amount of the mortgage debt, costs, and expense on the theory that the mortgage was on an acreage basis.

Northwestern Ins. v Hansen, 205-789; 218 NW 502

11795 Interest of tenant in common.

Redemption by cotenant. One who, during the period for redemption from mortgage foreclosure and sale en masse, purchases, by quitclaim, the undivided interests in the land of a part of the personal judgment defendants, can redeem only by paying the full amount of the sheriff's certificate of purchase plus interest and costs, the remedy of such redemptioner being to enforce contribution from his cotenants.

Kupper v Schlegel, 207-1248; 224 NW 813

11796 Transfer of debtor's right.

Effect on prior judgment creditor. The grantee of premises which have been sold under mortgage foreclosure for the full amount of the judgment, even tho such grantee was a debtor in the foreclosure proceedings, may redeem, and will take the property unless redemption is made from him by a prior judgment creditor of the grantor.

Tirrill v Miller, 206-426; 218 NW 303

Failure of junior judgment holder to redeem —effect. A sale under general execution on a senior judgment frees the land in the hands of the grantee of the judgment debtor (even tho he bought "subject to liens of record") from the lien of a junior judgment, when the holder of such junior judgment fails to redeem within the nine months following the sale. The same rule would apply if the sales were under a special execution under mortgage foreclosure, and the junior judgment were obtained after the date of the foreclosure decree.

Paulsen v Jensen, 209-453; 228 NW 357

Junior mechanic's lien—loss of right—lien debtor's grantee. A person holding both senior and junior mechanics' liens, who forecloses only the senior lien, loses his junior lien when he fails to reduce his junior lien to judg-

ment and redeem under it within the statutory nine months. The mechanic's lien debtor's quitclaim grantee, who does redeem, takes the property free from said junior liens.

Murray v Kelroy, 223-1331; 275 NW 21

Redemption by vendee's quitclaim grantee from real estate forfeiture. An assignee of mechanics' liens who, after foreclosing thereon, purchases the real estate contract covering part of the land subject to the mechanics' liens, and who then forfeits the real estate contract, but fails to file the statutory proof of service, cannot prevent a redemption from the foreclosure sale by a person taking a quitclaim deed from the vendee, such quitclaim owner having neither actual nor constructive knowledge of the claimed forfeiture.

Murray v Kelroy, 223-1331; 275 NW 21

Mechanic's lien debtor's right of redemption. A mechanic's lien debtor's right of redemption and right of possession are not subject to levy nor to junior mechanic's lien judgments obtained more than nine months after the sale, but within the year for redemption.

Murray v Kelroy, 223-1331; 275 NW 21

CHAPTER 501

PROTECTION OF ADVANCEMENTS

11797 Lienholder's advancements protected—affidavit filed.

Statute remedy not exclusive. The common-law right of a junior mortgagee, in order to protect his own lien, to pay the interest on a senior mortgage, and thereby to be subrogated by proper action to the rights of a senior mortgagee under said senior mortgage to the extent of said payment, has not been abrogated by the enactment of this chapter.

Miller Bk. v Collis, 211-859; 234 NW 550
Jones v Knutson, 212-268; 234 NW 548

Second mortgagee—subrogation. If a second mortgagee uses his own funds in discharging a first mortgage in order to save the property, he will be subrogated to the rights of said first mortgagee; on the other hand, if funds are obtained through a new mortgage, and used in the discharge of said first mortgage, then the new mortgagee will acquire said right of subrogation, and in either case, the homestead character of part of the mortgaged property is quite immaterial.

Clark v Chapman, 213-737; 239 NW 797

Protection and loss of right of subrogee. When the holder of a certificate of sale under a junior mortgage foreclosure discharges (in order to protect his interest) an interest payment falling due on the senior mortgage, by taking an assignment of said interest installment, he thereby impliedly acquires a pro tanto interest in said senior mortgage, and may foreclose it accordingly against a subsequent purchaser for value of the land; but when said certificate holder simply pays such interest installment, he wholly loses his claim as to a subsequent purchaser who purchased for value, and without notice that the interest installment had been paid by the junior certificate holder.

Miller Bk. v Collis, 211-859; 234 NW 550

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting actions. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by this chapter to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Redemption—tacking on delinquent taxes paid. The act of the assignor of a certificate of sale, subsequent to said assignment, in paying delinquent taxes on the premises and in causing said payment to be entered on the records in the clerk's office as a part of the amount necessary to redeem, inures to the benefit of said assignee, it appearing that said procedure by the assignor was for the purpose of protecting said assigned certificate.

Gronstal v Van Druff, 219-1385; 261 NW 638

Lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by a failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

11798 Redemption—payment of advances.

Voluntary, unnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt, and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

CHAPTER 502

PROCEEDINGS AUXILIARY TO EXECUTION

11800 Debtor examined.

Order nonappealable. An order in proceedings auxiliary to execution, for the appearance and examination of the execution defendant and his wife, is not appealable, even tho the wife is not an execution defendant.

Lehigh Co. v Gjellefald, 205-778; 218 NW 475

11802 By whom order granted.

Ex parte orders. An order for the appearance and examination of an execution defendant in proceedings auxiliary to execution is ex parte.

Lehigh Co. v Gjellefald, 205-778; 218 NW 475

11805 Disposition of property.

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

11815 Equitable proceedings.

Atty. Gen. Opinion. See '36 AG Op 670

ANALYSIS

I TRANSFERS AND TRANSACTIONS ATTACKED (Page 1912)
(a) IN GENERAL
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Action by administrator to set aside conveyances of decedent. See under §11889
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Deeds generally. See under §10084
Fictitious grantee—resulting trust. See under §10049 (II)
Undue influence, deeds. See under §10084 (I)

I TRANSFERS AND TRANSACTIONS ATTACKED

(a) IN GENERAL

Gifts — incompetency of donor — evidence. Evidence held insufficient to establish the mental incompetency of a donor.

Humphrey v Norwood, 213-912; 240 NW 232

Mental unsoundness — fraud — degree of proof. A deed of conveyance will be set aside on the ground of fraud or grantor's mental unsoundness, only on clear and convincing evidence in support of the charge. Evidence held insufficient.

Ellis v Allman, 217-483; 250 NW 172

Secret trust as badge of fraud. A secret trust for a grantor's benefit is a badge of fraud.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Estoppel to dispute husband's title. A wife who permits her husband to take and record title to her lands, and for a long series of years to exercise the usual and customary indicia of ownership, is estopped to assert her title against the claims of the husband's creditors who have extended credit to him in reliance on his apparent title.

Farmers Bk. v Pugh, 204-580; 215 NW 652

Wife's deed for husband's debt—cancellation —consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Nonestoppel against wife. One who purchases a promissory note without any consultation whatever with the maker or the maker's wife, may not successfully assert that the wife is estopped to lay claim to lands which stood in the name of the husband-maker at the time of said purchase.

Jordan v Sharp, 204-11; 214 NW 572

Marriage settlements—validity. A marriage settlement, duly and in good faith executed, and confirmed by the subsequent marriage of the parties, is valid against the creditors of the husband when not grossly out of proportion to the husband's station and circumstances.

Benson v Burgess, 214-1220; 243 NW 188

Termination of property interest regardless of creditors. No present title to land passes

under a contract to the effect (1) that a daughter, so long as she outlived her father and paid certain annual rentals and other charges, should have the possession and profits of named lands, (2) that title should remain in the father, but at the death of the father she should receive an absolute deed to the land, which deed was put in escrow under the control of the father during his lifetime, (3) that if she defaulted in said payments the contract could be forfeited on notice, and (4) that all her interest terminated instantly on her death prior to that of the father. It follows that upon the insolvency of the daughter and her default on said payments, the father and daughter may voluntarily cancel said contract regardless of the creditors of the daughter.

Tilton v Klingaman, 214-67; 239 NW 83

Fraudulent claim to rents. Record reviewed and held that the claim that rents had been transferred prior to proceedings for the appointment of a receiver in mortgage foreclosure was fraudulent.

First N. Bk. v Murtha, 212-415; 236 NW 433

Fraudulent rescission of contract. A rescission of a contract of purchase of real estate between a vendor and a bankrupt vendee is voidable by the trustee in bankruptcy when the rescission is made immediately preceding the bankruptcy proceedings, and when it is in fraud of the rights of the bankrupt's creditor or works a preference to the vendor-creditor.

Wilson v Holub, 202-549; 210 NW 593; 58 ALR 646

Mortgagee's knowledge of contemplated exchange—not innocent purchaser. Where mortgagee knew that mortgagor had contracted to exchange city property for farm at time mortgage covering city property was executed, mortgagee was not "innocent purchaser", and his mortgage was subject to rights of holder of contract to city property.

Bandemer v Benson, (NOR); 270 NW 353

Priority to diligent creditor. A creditor who obtains title to land by virtue of his judgment and a creditor's bill under which an existing mortgage was decreed to be fraudulent will not, on the theory of superior diligence, be given priority over a known prior attaching creditor who levied on the land regardless of the said mortgage and because he deemed the mortgage fraudulent, and who, prior to the decree under the creditor's bill, obtained the same result obtained under the creditor's bill, by securing from the fraudulent mortgagee, not only a verbal promise to release the mortgage, but an actual release of said mortgage.

Elson v Clayton, 200-935; 205 NW 745

Creditor's right to be diligent. The act of a creditor in doing no more than to be swift, and thereby securing his claim by a conveyance from his debtor, is not deemed fraudulent.

Van Pelt v Willemsen, 208-1326; 227 NW 110

Right of insolvent partnership to prefer creditor. A partnership engaged in the operation of a private bank may, in good faith, validly pledge promissory notes belonging to it, as collateral security for its outstanding obligations, even tho the partnership is insolvent.

Second N. Bk. v Millbrandt, 211-1299; 235 NW 577

Special assignment for particular creditors. An assignment by an insolvent debtor of all his property to a trustee for the purpose of securing and paying in a named order the claims of certain named existing bona fide creditors and providing for the payment of any balance to the assignor-debtor does not constitute a general assignment for the benefit of creditors (and invalid because of the preference) when executed pursuant to an agreement with said creditors, or when ratified by said creditors prior to the acquisition of rights by others; and this is true even tho there probably will be no balance to pay to the assignor-debtor.

Eicher v Baird, 204-188; 215 NW 236

Assignments for benefit of creditors—validity — no showing of knowledge and fraud participation. A debtor may prefer creditors; and an assignment to preferred creditors is not invalid because hindering, delaying, or defeating other creditors when there is no evidence that the preferred creditors knew of and participated in a fraud in making the assignment.

Friedmeyer v Lynch, 226-251; 284 NW 160

Action by trustee—fraudulent conveyance—sufficiency of evidence. Trustee in bankruptcy who introduces testimony given on examination in bankruptcy court is bound thereby, and evidence was insufficient to sustain trustee's claim that transfer of note by bankrupt to sister was in fraud of creditors.

Cooney v Graves, (NOR); 230 NW 407

(b) FRAUDULENT CONVEYANCES GENERALLY

Actual or constructive fraud required. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Deed from parent to child—constructive fraud—presumption. The doctrine of constructive fraud arises from the existence of a fiduciary relationship, and equity raises a presumption against the validity of a transaction where the superior party obtains a possible benefit, as in a case where a parent has become the dependent person in his re-

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(b) FRAUDULENT CONVEYANCES GENERALLY—continued

lationship with a child, trusting his interests to the advice and guidance of the child, and has deeded his land to the child.

Stout v Vesely, 228- ; 290 NW 116

Evidence insufficient to show fraud. Evidence held sufficient to sustain a judgment refusing to set aside a conveyance of realty by devisee thereof to claimant against estate on ground of lack of consideration or fraud in making conveyance.

First N. Bank v Adams, (NOR); 266 NW 484

Evidence—insufficiency. Evidence reviewed, and held wholly insufficient to support a conveyance.

Ransom v Lochmiller, 207-1315; 224 NW 469

Evidence—sufficiency. Evidence held sufficient to establish the fraudulent nature of a conveyance of real estate.

Porter v Wingert, 200-1371; 206 NW 295
Hansen v Richter, 208-179; 225 NW 361

Fraud — sufficiency of evidence. Evidence held to show that conveyance by judgment debtor was with intent to hinder, delay, and defraud creditor in collection of judgment.

Phillips v McIlrath, (NOR); 237 NW 212

Indebtedness — evidence. Evidence held to show that the grantor in an alleged fraudulent conveyance was indebted at the time of the execution of the conveyance.

Scovel v Pierce, 208-776; 226 NW 133

Evidence—insufficiency. Evidence held insufficient to show that transfer of a promissory note was fraudulent.

Hoyer v Jordan, 208-1256; 224 NW 574

Transfers reviewed — fraud — insufficiency. Series of transfers reviewed, and held insufficient, in and of themselves, to justify the imputation of fraud.

Citizens Bank v Hamilton, 209-626; 227 NW 112

Fraud—evidence—sufficiency. On the issue of receivership for the rents and profits of real estate under mortgage foreclosure, evidence held to establish the fraudulent nature of a lease of said premises.

Webber v King, 205-612; 218 NW 282

Quitclaim deed to avoid judgment against grantor—effect. Evidence reviewed, and held to show that a quitclaim deed to plaintiff was a mere subterfuge to avoid defendant's judgment against the grantor.

Rogers v Rutherford, 210-1313; 232 NW 720

Transfer without advantage or injury. A deed and trust agreement may not be deemed fraudulent when the good-faith beneficiaries thereunder acquire substantially no greater advantage than formerly possessed by them, and when creditors who are not parties thereto suffer no substantial diminution in their rights.

Central Shoe v Rashid, 203-1103; 212 NW 559

Nonfraudulent conveyance. A conveyance under which the grantor neither accomplishes anything for himself, nor prejudices his general creditors, cannot be deemed fraudulent or to constitute a preference under the federal bankruptcy act.

Hoyne v Iowa T. & L. Co., 219-278; 257 NW 799

Conveyance harmless to creditors. Equity will not set aside a conveyance, irrespective of its nature as regards fraud, when it appears (1) that a 40-acre tract was the homestead of the grantor, and (2) that the remainder of the land was, at the time of the conveyance, already mortgaged beyond its value.

Hagge v Gonder, 222-954; 270 NW 371

Mutual intent. An action to set aside a conveyance as fraudulent necessitates proof of a mutual intent to defraud.

Newman v Callahan, 212-1003; 237 NW 514

Intent of grantor. A mortgage by an insolvent debtor on nonexempt real estate and on certain other real estate, on the condition that the court finds it not to constitute a homestead, does not reveal such a distinctive badge of fraud as to condemn the entire instrument as fraudulent, it not appearing that the mortgagees joined in any fraudulent intent (if any) of the mortgagor.

Corn Belt Bk. v Burnett, 203-271; 211 NW 217

Knowledge and intent of grantee. A bona fide creditor may in satisfaction of his debt, take a conveyance from his debtor at a fair valuation, even tho such creditor knows that the debtor is otherwise financially involved, and that the conveyance will work a preference against other creditors. The all-essential requisite is that the creditor participates in no fraud.

Com. Bk. v McLaughlin, 203-1368; 214 NW 542

Good-faith grantee. Principle reaffirmed that a conveyance will be sustained in favor of a grantee who in good faith paid an adequate consideration, without participating in the fraudulent purpose, if any, of the grantor.

First N. Bk. v Currier, 218-1041; 256 NW 734

Knowledge and intent of grantee. A conveyance to a creditor in payment of a bona fide debt is unassailable so long as the creditor moves solely for his own protection.

Hewitt v Blaise, 202-1109; 211 NW 479

Acquiescence of creditor — evidence. Evidence held insufficient to show that a creditor had advised and acquiesced in the execution of the very deed which he was seeking to set aside.

Dolan v Newberry, 200-511; 202 NW 545; 205 NW 205

Personal property of other partner—liability. In equity action to subject junior partner's personal property to payment of judgment against senior partner, evidence held insufficient to show that former acted fraudulently or that he was estopped as against partner's senior judgment creditors to claim such personal property.

Creston Bk. v Wessels, (NOR); 232 NW 496

Material considerations. On a charge of fraud, the fact that the alleged defrauded party himself initiated the transaction and absolutely dictated the terms thereof is influential and persuasive that no fraud existed.

Crawford v Raible, 206-732; 221 NW 474

Creditor's nonparticipation in fraud. A creditor will be protected in taking a conveyance from his debtor when the creditor acts solely for his own protection and not to aid the debtor in defrauding other creditors.

Jordan v Sharp, 204-11; 214 NW 572

Badges of fraud—effect. The inference of fraud which arises from the taking of an absolute deed as security only, and the unreasonable withholding of such deed from record, must yield to proof that the grantee was actuated by no purpose except to protect himself on a bona fide indebtedness due him from the insolvent grantor.

Hanneman v Olson, 209-372; 222 NW 566

Concealment. An heir may not predicate fraud in the sale of his share in an estate on the claim that his stepmother, the purchaser, concealed from him the amount of the estate, when the inventory was on file, when the uncertainty attending the existence of debts and a possible will was equally known to all parties, and when the heir possessed the same opportunity to learn the full amount of the estate as was possessed by the stepmother.

Ward v Ward, 207-647; 223 NW 369

Open and unconcealed transaction — effect. The fact that a conveyance is made openly and without concealment, and with the aid of those who later question the conveyance, has material bearing on the issue of fraud.

McCloud v Bates, 220-252; 261 NW 766

Wife as nonparticipant in fraud.

Malcolm Bk. v Mehlin, 200-970; 205 NW 788

Wife as noncreditor. A husband who takes title to land paid for by the wife, without any agreement to repay the wife, may not later, by a conveyance to the wife, validly prefer the wife over his creditors on the theory that the wife was a creditor.

Farmers Bk. v Pugh, 204-580; 215 NW 652

Defeating creditors as admitted purpose—debt to wife unavailing. A transfer of property from husband to wife, admittedly made to defeat a judgment creditor, even where the husband owed the wife a debt of long standing but the wife never surrendered the note nor considered it paid, fails in the two essentials necessary to avoid the badge of fraud, to wit: (1) that there was a consideration, or (2) that the wife had no notice of the fraud.

Martin v Langfitt, 224-633; 276 NW 594

Wife's suretyship for husband. Where land owned jointly by husband and wife is mortgaged and the wife signs the note and mortgage on her separate interest to secure the loan to the husband who received and used the loan for his own personal debts and later conveyed his one-half interest in the land to his wife, then, in an action by the husband's trustee in bankruptcy to set aside the conveyance as in fraud of creditors, the wife, as surety, is entitled to have the husband's interest in the land applied first to the satisfaction of the mortgage debt in preference to the claims of the trustee in bankruptcy, and the conveyance accomplishing her subrogation thereto was valid.

Clindinin v Graham, 224-142; 275 NW 475

Estoppel to question transfer. Where a judgment creditor holds, or has converted to his own use, securities to the full amount of his judgment, he may not maintain an action to set aside a conveyance by the debtor even tho the conveyance was made with the mutual intent on the part of both the debtor and the grantee to defraud said judgment creditor.

Steckel v Million, 210-1139; 231 NW 387

Original parties — right of grantor. The principle that a grantor may not question a conveyance made by him for the purpose of placing his property beyond the reach of his creditors has no application when the conveyance was made because of an unfounded fear that an action might be brought, and when there is no showing that the grantor ever had a creditor.

Warner v Tullis, 206-680; 218 NW 575

Constructive trust—secret intent not to perform condition attending conveyance. A grantee of land who receives the conveyance on the oral condition that the land will be reconveyed to grantor on the happening of a named event, e. g., on return from a trip abroad, and who secretly intends not to comply with said condition, will be deemed in equity a trustee ex maleficio.

Carlson v Smith, 213-231; 236 NW 387; 80 ALR 186

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(b) FRAUDULENT CONVEYANCES GENERALLY—continued

Equitable estoppel—fraud as essential element. If there be no fraud, actual or constructive, in the execution and delivery of a deed of conveyance, there can be no estoppel against the grantee.

McCloud v Bates, 220-252; 261 NW 766

Insolvency — evidence — insufficiency. Evidence reviewed and held insufficient to establish the insolvency of a partner in a private bank at the time of the execution of conveyances by him.

Anthony v Heiny, 215-1347; 244 NW 902

Overthrowing consideration or solvency of grantor. A judgment creditor does not prima facie establish the fraudulent character of a transfer by his judgment debtor when he fails to disprove the testimony of the grantee (called as a witness by himself) that there was a consideration, and also fails to establish the insolvency of the grantor or that the grantee participated in the fraud of the grantor.

Meredith v Schmidt, 205-841; 216 NW 634

Remedies of creditors — evidence — sufficiency. Proof (1) that the vendee of personal property did not record or file his bill of sale as required by law, (2) that there was no change of possession following the bill of sale, and (3) that the vendee actively aided the vendor in disposing of the property as the property of the vendor, furnishes ample justification for the holding that the rights of a good-faith and innocent attaching creditor of the vendor were superior to the asserted rights of the vendee.

Beno Co. v Perrin, 221-716; 266 NW 539

Burden of proof. A creditor, seeking to set aside an alleged fraudulent conveyance which recites a consideration which is apparently valid and substantial tho indefinite in amount, must carry his proof beyond showing that the grantor and grantee were husband and wife and that the grantor was insolvent when he delivered the conveyance. In other words, such proof does not cast upon grantee the burden, (1) to sustain the adequacy of the consideration, and (2) to negative bad faith in the transaction, or (3) to show that the grantor at the time retained sufficient other property to pay his creditors.

First N. Bk. v Currier, 218-1041; 256 NW 734

Burden of proof. In an action to set aside as fraudulent a deed of conveyance which recites an apparently valid, substantial consideration, tho indefinite in amount, the burden rests on plaintiff to impeach the deed.

Williams Bk. v Murphy, 219-839; 259 NW 467

Adverse party as witness—contradictory testimony—court's discretion. Where plaintiff calls adverse party as witness he vouches for his competency, credibility, and truthfulness; however, he is entitled to the benefit of any conflict, inconsistency, or incongruity which might be found in his testimony and is not precluded from calling other witnesses to contradict testimony or if the testimony of the adverse party appears to be inherently improbable or lacking in credit or made to appear so by the testimony of other witnesses, the court is not bound by the language in which the witnesses frame their answers, and may enter a decree setting aside a conveyance as fraudulent, notwithstanding that husband and wife, as adverse witnesses called by creditor, testified to sustain conveyances.

Goeb v Bush, 226-1224; 286 NW 492

Property conveyed — ownership not paramount title at issue. In an action between a creditor and a grantee to set aside a deed, ownership by the grantor being the question in issue rather than recovery by virtue of a superior title, an uncontradicted public record showing ownership in grantor at time the deeds were made is conclusive on that issue.

Bagley v Bates, 224-637; 276 NW 797

Insolvency—preferable proof. Principle reaffirmed that in an action to set aside a conveyance as fraudulent, the preferable proof of the grantor's insolvency at the time of the conveyance is the return nulla bona on a duly issued execution.

Williams Bk. v Murphy, 219-839; 259 NW 467

Discharge in bankruptcy. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff is immune from subsequent attack on the ground that, when the decree was rendered, the judgment in question had been discharged in bankruptcy, such fact not having been pleaded in said action.

Reining v Nevison, 203-995; 213 NW 609

Testator's contract to devise to son—will changed after loan relying thereon. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor-son.

Emerson Bk. v Cole, 225-281; 280 NW 515

Consideration—earnings of minor. The fact that a parent has received the earnings of his unemancipated minor child will not support a conveyance to the minor when the conveyance leaves the parent without property sufficient to pay his debts.

Scovel v Pierce, 208-776; 226 NW 133

Conveyance by father to son—indefinite evidence of debt to son. On application of a creditor bank, a father's conveyance of real property to his son a few days after title vested in the father by the law of descent was properly set aside when the evidence, reviewed by the supreme court, contains an abundance of vague and uncertain testimony by both father and son as to an alleged debt owed by the father to the son, but which evidence is wholly insufficient to establish such debt.

Brunskill v Wallace, 224-629; 276 NW 598

Withholding from record. The withholding of a mortgage from record until after the mortgagor became involved in litigation is not, in and of itself, sufficient to justify an inference of fraud, in the face of unquestioned evidence that the debt secured was genuine.

Citizens Bk. v Hamilton, 209-626; 227NW112

(c) CONFIDENTIAL OR FIDUCIARY RELATIONS

Fiduciary and confidential relations defined —synonymous use. Tho the terms are used synonymously, a fiduciary relation exists when one person is under a duty to act for the benefit of another as to matters within the scope of the relation, while a confidential relation may exist without a fiduciary relation and arises when one person has gained the confidence of another and purports to act or advise with the other's interest in mind.

Merritt v Easterly, 226-514; 284 NW 397

Trust—what constitutes. A person is said to receive money in a fiduciary capacity when it does not belong to him or for his benefit, but is received for the benefit of another person to whom the receiver stands in a relation implying great confidence and trust on the one part and a high degree of good faith on the other.

Vertman v Drayton, 223-380; 272 NW 438

Undue influence—evidence. Influence, to be undue, within the meaning of the law, must be such as to substitute the will of the person exercising the influence for the will of the party upon whom the influence is brought to bear.

Arndt v Lapel, 214-594; 243 NW 605

Presumption — burden of proof. The law presumes that a deed of conveyance is fraudulent and void whenever it is made to appear that, when the deed was executed, the grantee occupied a position of trust and confidence as regards the grantor, or held a dominating and controlling influence over the grantor. It follows that the grantee must overthrow the presumption by a showing of the eminent fairness and legality of the transaction. Evidence held insufficient to overthrow the presumption.

McNeer v Beck, 205-196; 217 NW 825

Fraud—confidential relationship established —grantee's failure to sustain burden. In an action to set aside a deed from a deceased mother, 83 years of age and ill at the time of execution of the deed, to her daughter, who had handled her mother's business for a number of years, who had the deed prepared by an attorney, and who was the only person present when mother signed the deed, evidence held to establish that there was a confidential relationship between mother and daughter, thus placing burden of proof on daughter to show that deed was not procured by fraud and, such burden not having been met, the deed could not be sustained.

Tiernan v Brulport, 227-1152; 290 NW 53

Deed—fiduciary relation. When a deed of conveyance is attacked because of the mental incompetency of the grantor, or because of fraud and duress, the burden rests on the grantee to sustain the deed, provided a fiduciary relation existed between grantor and grantee when the deed was executed; otherwise the burden rests on plaintiff to invalidate the deed.

Ellis v Allman, 217-483; 250 NW 172

Pleading and proof. The rule that a party who claims under an instrument executed by one to whom he occupies a fiduciary relation must establish the absolute good faith of the transaction has no application in the absence of plea and proof of such relation.

Steenhoek v Schoonover Co., 205-1379; 219 NW 492

Fraud — cancellation — grounds. When a grantee in securing a deed to land acquires an unconscionable and inequitable advantage over the grantor, equity will infer fraud; likewise when the grantee obtains the deed through a promise which he intends to breach in the future.

Bruner v Myers, 212-308; 233 NW 505; 235 NW 726

Undue influence—abuse of confidence forfeits gain. Where a confidential relationship results in one gaining an influence over another, and the one gaining the influence abuses it to the disadvantage of the other, he will not be permitted to retain the fruits of his advantage. Held, no abuse of confidence.

Reeves v Lyon, 224-659; 277 NW 749

Bona fides of transaction—shifting burden. One asserting the existence of a fiduciary relationship must prove it by (1) a reposal of confidence and (2) positions of dominance and subservience, respectively, occupied by the repository and cestui, before he can shift the burden of proving the bona fides of the transaction to the other party.

Mastain v Butschy, 224-68; 276 NW 79

Burden of proof. The mere showing that the grantor and grantee in a deed of conveyance are related by blood creates no presumption of confidential relationship such as to cast

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(c) CONFIDENTIAL OR FIDUCIARY RELATIONS—continued

upon the grantee the burden to establish the bona fides of the transaction.

Osborn v Fry, 202-129; 209 NW 303

Absence of presumption. A fiduciary relationship will not be presumed. It must be established by direct evidence or by the established circumstances and condition of the parties.

O'Neil v Morrison, 211-416; 233 NW 708

Gifts—fiduciary relation—evidence. A fiduciary relationship is not established or even presumed from the naked fact that the parties are closely related by blood, or live and reside in the same house.

Humphrey v Norwood, 213-912; 240 NW 232

Family transactions scrutinized. Transactions between members of family are not fraudulent when made in good faith and for the purpose of securing a bona fide indebtedness, but are carefully scrutinized where interests of creditors are involved.

Citizens Bk. v Arndt, (NOR); 205 NW 466

Burden of proof—fiduciary relation. A fiduciary relationship is not predicable solely on family relationship.

Scott v Seabury, 220-655; 262 NW 804

Confidential or fiduciary relationship—presumption of fraud. A gift of a deed to one who stands in a confidential or fiduciary relationship to the donor raises a presumption of constructive fraud, and the burden is on the donee to make such showing of fact as to overcome the presumption.

Jensen v Phippen, 225-302; 280 NW 528

Conveyances between relatives. A conveyance between relatives on an actual, bona fide, and adequate consideration without intent on the part of either grantor or grantee to defraud anyone, is unassailable, even tho the transaction results in giving one creditor a preference over another.

Erusha v Wisnewski, 207-1187; 224 NW 517

Conveyance — consideration — proof—sufficiency. Evidence held to establish a contract between a father and son sufficient to support a conveyance.

Williams Bk. v Murphy, 219-839; 259 NW 467

Constructive fraud not inevitable from blood relationship. As to constructive fraud arising from the gift of real property to one standing in a confidential or fiduciary relationship to the grantor, the rule placing the burden of proof on the grantee, to show the bona fides of the transaction, is of necessity applied according to the peculiar circumstances of each particular case, and not necessarily applied because mere blood relationship exists.

Jensen v Phippen, 225-302; 280 NW 528

Family relationship — effect. Principle reaffirmed that on the issue whether a conveyance is fraudulent the family relationship of the parties is a circumstance to be considered.

Schulein Co. v Lipschutz, 208-1315; 227 NW 141

Fiduciary relation between husband and wife. A fiduciary relation within the meaning of the law is not established by a showing that the parties were husband and wife and that the wife frequently aided her husband in the transaction of his business,—it appearing that the husband was physically infirm.

Arndt v Lapel, 214-594; 243 NW 605

Fiduciary relation between husband and wife. Whether in an action by an heir to set aside a conveyance by a wife to her husband on the ground of undue influence the burden of disproof of said ground shifts to the defendant-husband, quaere.

Browne v Johnson, 218-498; 255 NW 862

Confidential relations. A conveyance by a husband to his wife, executed and received for the sole purpose of paying an actual bona fide debt of the husband to the wife, is beyond the reach of other creditors provided the property conveyed is not substantially in excess of the debt.

Johnson v Warrington, 213-1216; 240 NW 668
Madison v Phillips, 216-1399; 250 NW 598

Husband and wife—knowledge of fraud. Principle reaffirmed that a wife may validly take a conveyance from her husband for the sole purpose of securing payment of her claim, even tho she knows of the fraudulent purpose of her husband.

Harris v Carlson, 201-169; 205 NW 202

Securing wife against loss on homestead mortgage. A bona fide conveyance of personal property by a husband to his wife, to secure her from liability on a mortgage on her homestead, executed for the purpose of raising money to discharge a debt of the husband, is prior in right to subsequently rendered judgments against the husband and levies thereunder on the said conveyed property; but the security will be sustained only insofar as will make the wife whole.

Sherman v Linderson, 204-532; 215 NW 501

Nonimpeachable transfer to wife. A nonexcessive conveyance by a husband to his wife in satisfaction of an actual and good-faith indebtedness owing by him to her is unimpeachable when in taking the conveyance the wife is motivated by the sole purpose of obtaining payment of her claim; and this is true

irrespective of her knowledge of the financial condition of her husband.

Steffy v Schultz, 215-837; 246 NW 910

Between husband and wife. A wife who has a bona fide claim against her husband may, when actuated by the sole and good-faith purpose of obtaining payment, take a nonexcessive conveyance of property from her husband, even tho she knows at the time that the husband is financially embarrassed and that he intends by the conveyance to circumvent another of his creditors.

Clark v Clark, 209-1179; 229 NW 816
Johnson v Warrington, 213-1216; 240 NW 668

Preference to wife. A conveyance of land by a husband to his wife for the sole purpose on his part of repaying, and for the sole purpose on her part of receiving, that which he is actually owing to her, (no question of adequacy of consideration being raised) is unassailable, even tho such conveyance works a direct preference in favor of the wife; and especially is this true when the party attacking the conveyance fails to plead and prove that the conveyance left the husband insolvent.

Bartlett v Webber, 218-632; 252 NW 892

Husband and wife—allowable preference. A wife who permits her husband to use her personal funds in payment for land purchased by him in his own name, and so permits under circumstances fairly justifying the inference that said use was as a loan and not as a gift, may thereafter (some 20 years in present case) validly take from the husband a conveyance of said land at a fair valuation and for the sole and only purpose of satisfying said loan; and this is true tho such conveyance works a preference in her favor over other creditors of the husband. (No issue of estoppel in the case.)

Bates v Maiers, 223-183; 272 NW 444

Right of wife—burden of proof. A wife as a bona fide creditor of her husband has the legal right to take from her husband a conveyance of all his real and personal property provided she is actuated by the sole purpose of obtaining payment of her claim. And if the property received is out of proportion to the debt, the party questioning the conveyance has the burden to so show.

Farmers Bank v Ringgenberg, 218-86; 253 NW 826
Andrew v Martin, 218-19; 254 NW 67

Evidence—sufficiency. Record reviewed and held that a deed from a husband to his wife was executed for the sole purpose of repaying the wife a bona fide indebtedness, and was without any intent to defraud the husband's creditors.

Farmers Bk. v Skiles, 220-462; 261 NW 643

Actual fraud—evidence. Evidence held insufficient to establish actual fraud in the execution of a deed by a father to a son.

Williams Bk. v Murphy, 219-839; 259 NW 467

Confidential relations. A conveyance between parent and child generates no presumption of fraud, but necessarily invites critical examination of the attending circumstances. Circumstances indicative of fraud reviewed, and held to outweigh positive testimony tending to show good faith.

First N. Bk. v Hartsock, 202-603; 210 NW 919

Confidential relations—presumption of fraud. The act of a mother, in causing a certificate of deposit to be changed from her own name to that of a son who, it is made to appear, occupied a very close and confidential relation with his mother, is presumptively fraudulent, and will be sustained only on proof by the son that the transfer was free from all undue influence and fraud.

Roller v Roller, 201-1077; 203 NW 41

Confidential relations of parties. A conveyance of land by an insolvent mother to her daughter for a fair and adequate consideration in hand paid is unassailable when the daughter had no knowledge of her mother's financial condition, and did not participate in any fraudulent purpose or design of the mother.

Pike v Coon, 217-1068; 252 NW 888

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Confidential relations. A conveyance by an insolvent son to his parent for a valid and adequate consideration will not be decreed fraudulent if the parent acted with the one intent to protect himself on his claim against the son, even tho the son was known to be insolvent, and even tho the son was actuated by a fraudulent purpose.

Hogeboom v Milliman, 202-817; 211 NW 396

Undue influence—parent and child. There was sufficient evidence to warrant setting aside a deed on the ground of undue influence when it was made by an aged, eccentric father who was not in the best of health and had a limited business experience and had a kindly feeling toward all his children, the deed to the farm, which consisted of almost all his property, being made to a son, without the

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(c) CONFIDENTIAL OR FIDUCIARY RELATIONS—continued

father having an independent adviser, seven days after the father had gone to live with the son who handled his business affairs and to whom he had at one time sold the farm, receiving a reconveyance when the payments were not kept up.

Stout v Vesely, 228- ; 290 NW 116

Undue influence — claim not supported by evidence. When two daughters had cared for their aged mother for about 20 years while the mother was in good health, neat in appearance, mentally alert, and did much reading in a foreign language altho she could not read English, and the daughters went with the mother to a lawyer's office, but remained outside while deeds were drawn up by which the mother granted property to them to be effective after her death, there was no showing of mental weakness, fraud, or undue influence upon which to base a decree setting aside the deeds.

Tedemandson v Morris, 227-774; 289 NW 1

Mother to son gift for mother's life support —donee's burden. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Right to prefer creditor. A debtor, in paying his valid, bona fide debts, may legally prefer his own child as a creditor over other creditors by conveying to the child property of a value substantially equal to the debt owing to the child.

Andrew v Nabholz, 219-75; 257 NW 587
Williams Bk. v Murphy, 219-839; 259 NW 467

Conveyance by father to son. Record reviewed at length and held that an ancient indebtedness of father to son was bona fide; that certain badges of fraud were satisfactorily negatived, and that a conveyance by the father to the son in satisfaction of the indebtedness was a valid conveyance, even tho it worked a preference over other creditors.

Jeffries v Teale, 218-582; 255 NW 636

Gift to daughter — no fiduciary relation. Where a daughter, receiving a real estate gift from her parents, did not transact, nor advise concerning, her parents' business, nor dominate nor support them but, on the contrary, was more or less dependent upon them, such gift does not present a case of fiduciary or confidential relationship sufficient to nullify the deed on the ground of constructive fraud.

Jensen v Phippen, 225-302; 280 NW 528

Burden of proof—relationship. A creditor, seeking to set aside as fraudulent a conveyance from a father to son, is not aided, from the family relationship alone, by any presumption of fraud, but, on the contrary, must clearly, satisfactorily, and convincingly establish the fraudulent character of the conveyance by proof that more than preponderates over counterproof.

Royer v Erb, 219-705; 259 NW 584

Conveyance and assignment to stepson. Where an elderly but unusually self-willed woman executed a deed to her stepson during time in which she managed her own affairs, and relationship with grantee was only that which ordinarily exists between a mother and son, evidence in action to set aside the deed did not warrant finding that confidential relationship existed so as to raise presumption of fraud, but as to the assignment of a mortgage procured by this stepson after he came to live with her and had taken over management of her affairs, evidence justified finding that such relationship did exist.

O'Brien v Stoneman, 227-389; 288 NW 447

Burden of proof. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Evidence required to establish fraud. Principle reaffirmed that fraud, actual or constructive, duress, and undue influence must be established by clear, convincing and satisfactory evidence. Evidence held wholly insufficient to show such fraud in the assignment by a grandmother to a grandson of a note and mortgage.

Scott v Seabury, 220-655; 262 NW 804

Family transaction — careful scrutiny for fraud. A transaction wherein an insolvent mortgagor, also in arrears on interest and taxes, makes an assignment to his father-in-law of a lease on his mortgaged premises, being a family transaction, will be carefully scrutinized for fraud, but without specific evidence indicating an incorrect conclusion by the lower court, its decision validating such transaction will not be disturbed on appeal.

First JSL Bk. v Ver Steeg, 223-1165; 274 NW 883

Confidential relations—brothers and sisters. It will not be presumed that a confidential relation exists between parties on the simple showing that they are brothers and sisters.

Stonewall v Danielson, 204-1367; 217 NW 456

Impeaching recited consideration. The general recital in a deed of conveyance of a valuable consideration may be impeached, in an action to cancel the deed for fraud, by showing that no consideration passed, and by showing that the only relation of grantor and grantee was that of aunt and niece.

Guenther v Kurtz, 204-732; 216 NW 39

Gifts inter vivos—joint (?) bank account. Where during her lifetime decedent permitted defendant, for years her confidential advisor, to sign with her the bank's signature card applying to decedent's personal bank account, whereupon the bank added the defendant's name thereto as a joint bank account, but decedent kept her passbook and an interest in and control over the account, then under these circumstances, defendant, whose custody of the account during decedent's lifetime was never inconsistent with decedent's sole ownership, cannot after her death claim a gift of the deposit on the sole basis of the signature card.

Taylor v Grimes, 223-821; 273 NW 898

Burden of proof. No confidential relation may be said to exist between the officers of a mortgagee and the mortgagor because of the fact that on a few occasions the officers had aided the mortgagor in closing ordinary business transactions.

Charlson v Bank, 201-120; 206 NW 812

Confidential relation — insufficient showing. The ordinary relation between a banker and a depositor affords no basis for the claim of confidential relation.

Klatt v Bank, 206-252; 220 NW 318

Fiduciary relation—burden of proof. Plaintiff, in an action to avoid a deed of conveyance, makes a prima facie case of constructive fraud by proof that, when the deed was executed, the grantor, tho mentally competent, was, in the transaction of his business and in his conduct generally, under the absolute domination of the grantee. After such proof, the grantee must take on the burden of affirmatively showing the complete bona fides of the transaction. Proof that the deed left grantor practically penniless, that grantee paid no consideration and was aggressively active in obtaining the deed, accentuates the presumption of fraud instead of overcoming it.

Ennor v Hinsch, 219-1076; 260 NW 26

(d) CONSIDERATION IN GENERAL

Transfer by solvent grantor. A conveyance of property by a solvent grantor without consideration therefor may not be questioned by creditors. A like conveyance by an insolvent grantor is presumptively fraudulent, and may be set aside in the interest of creditors.

Chamberlain v Fay, 205-662; 216 NW 700

Bona fide consideration. A conveyance by an insolvent as security for a bona fide indebtedness which is largely in excess of the value of the property conveyed is unassailable.

Anthony v Heiny, 215-1347; 244 NW 902

Agreement as to dividends—want of consideration—effect. An agreement that one of two stockholders shall draw all dividends up to a certain time, unsupported by any consideration, is properly canceled in an action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Partially valid consideration. A fraud-participating grantee will not be permitted to hold the title because a portion of the consideration was bona fide.

Leach v Edgerton, 203-512; 211 NW 538

Consideration—value of homestead. On the issue whether a creditor took a conveyance of real property at a fair valuation, the value of that part of the land which represented the debtor's homestead must be excluded from the computation.

Com. Bank v McLaughlin, 203-1368; 214 NW 542

Value of property—conflicting evidence. In determining the value of property, the court is often compelled to fix an amount which is intermediate between values which are presumptively exaggerated and presumptively overconservative.

Cover v Wyland, 205-915; 218 NW 915

Love and affection—when not consideration. A conveyance of property in consideration of love and affection is voluntary as against existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Future support—when not consideration. A conveyance of property in consideration of future support is voluntary as to existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Future promises — voluntary consideration negatived by full performance. Conveyances in consideration of future support and medical bills are purely voidable and prima facie voidable as to existing creditors, except that, to the extent the consideration has been subsequently paid, the conveyance will be upheld.

Rummel v Zeigler, 225-613; 281 NW 159

Voluntary conveyance by insolvent. Evidence reviewed and held, a conveyance by an insolvent was voluntary—without consideration—and therefore void as to creditors.

Biddle v Worthington, 216-102; 248 NW 301

Banker's conveyance — balancing sister's false entries—no consideration. Transfers of land to the superintendent of banking as receiver of an insolvent bank by a banker in order to balance false entries made by sister,

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(d) CONSIDERATION IN GENERAL—continued

as cashier, on the bank books, are, in an action by trustee in bankruptcy to set the deeds aside, fraudulent as to creditors of the banker because lacking consideration, when it is shown that the banker's sister and not the banker himself was personally indebted to the bank on account of the false entries.

Bagley v Bates, 224-637; 276 NW 797

Consideration—inadequacy at time of transfer. Inadequacy of consideration, such as will suffice to set aside a deed on the petition of an executor as in fraud of creditors, is inadequacy at the time of execution of the deed and not at some time subsequent thereto.

Rummel v Zeigler, 225-613; 281 NW 159

Inadequacy of price paid — presumption. Principle reaffirmed that a material disproportion between the price paid for, and the value of, property conveyed renders the conveyance constructively fraudulent as to existing creditors, with consequent burden on the grantee to overthrow the presumption by showing that the deed did not render the grantor-debtor insolvent.

Savings Bk. v Mehlin, 200-970; 205 NW 788

Adequate consideration. A conveyance in liquidation of the indebtedness of the grantor to the grantee, not fraudulent in fact, will not be set aside at the instance of other creditors if the consideration is adequate.

Wood Co. v Cordle, 201-593; 207 NW 576

Honest but inadequate consideration. Even tho a conveyance of land by an insolvent father to his son may not be actually fraudulent, yet it may be constructively fraudulent to the extent of the substantial difference between the actual value of the land and the lesser price paid therefor by the son; and in such case a court of equity may make such order as will protect both the grantee and the complaining creditor.

Williams Bk. v Murphy, 219-839; 259 NW 467

Inadequate consideration — constructive fraud. A creditor may be unable to prove actual fraud in a conveyance carrying substantially all of the debtor's property, but may be able to prove a constructive fraud in said conveyance, to wit: that the consideration paid by the grantee was substantially inadequate in view of the value of the property conveyed. And, on such proof, the power of a court of equity is so boundless as to justify the entry of most any decree which will equitably protect both the grantee in the conveyance, the complaining creditor, and all other parties involved.

McFarland v Johnston, 219-1108; 260 NW 32

Good-faith conveyance to daughter. Land conveyed to daughter and recorded eight months before judgment against father-grantor cannot be subjected to the payment of the judgment when the daughter paid a complete and good-faith consideration for the conveyance.

Witousek & Co. v Holt, (NOR); 224 NW 530

Conveyance by husband to wife—"$1.00 and other valuable consideration"—sufficiency. A deed from husband to wife, executed two years prior to the rendition of a judgment against the husband and which deed recites a consideration of "$1.00 and other valuable consideration", is not fraudulent as against such judgment creditor of the grantor-husband, when it is shown that the "other consideration" consisted of $3,000 actually paid by the wife.

Donovan v White, 224-138; 275 NW 889

Wages of minor as consideration—burden of proof. A deed from a father to a son of a $2,500 town property for admittedly no consideration, and a deed of a $12,000, partly encumbered farm, in fulfillment of an alleged contract that the son (at the time of contract, an unemancipated, unmarried, 19-year-old minor) should, when married, be given said farm if he remained on, and helped in the management of said farm, are, irrespective of any actual fraud, constructively fraudulent as to a prior existing creditor of the grantor, because of want of, or grossly inadequate, consideration, it appearing that the son married within a month after attaining majority; and grantee must, in order to sustain said deeds, prove that grantor still continued to retain sufficient property to pay his said creditor.

Com. Bank v Balderston, 219-1250; 260 NW 728

Assignments—consideration—adequacy. Evidence reviewed relative to an assignment of a note and mortgage for $5,000, and held that a life annuity of $200 per year to the assignor was sufficiently adequate to prevent any imputation of fraud, actual or constructive.

Scott v Seabury, 220-655; 262 NW 804

Barred claim. A conveyance by a husband to his wife will not be set aside on the sole ground that the conveyance was in satisfaction of an indebtedness against which the statute of limitations had fully run.

Cover v Wyland, 205-915; 218 NW 915

Burden on wife. In a creditor's suit, a wife, in order to sustain a conveyance to herself from her husband, must show (1) that she parted with a fair and valuable consideration, and (2) that the husband, at the time of the conveyance, had sufficient property remaining to pay his debts.

Burgess v Stinson, 207-1; 222 NW 362

Continued solvency of grantor. The grantee in a conveyance which is voluntary and without consideration has the burden to show that the conveyance in question did not render the grantor insolvent.

Hansen v Richter, 208-179; 225 NW 361

Impeachment by inconsistencies. Positive testimony tending to show that a conveyance was on a supporting consideration and not a mere gift may be effectually overthrown by the circumstances and inconsistencies attending the transaction, and by the contradictions running through the testimony as a whole.

Lietz v Grieme, 212-1305; 236 NW 395

(e) VOLUNTARY CONVEYANCES

Voluntary conveyance. Principle reaffirmed that a voluntary conveyance is constructively fraudulent as to existing creditors of the grantor unless the grantee establishes the fact that the grantor at the time of the conveyance retained sufficient property to pay his creditors.

First N. Bk. v Currier, 218-1041; 256 NW 734

Transfer of exempt property. Evidence held to show that the property in question was, at the time of a conveyance by a husband to his wife, the homestead of the grantor and grantee, and therefore not fraudulent as to creditors.

Hansen v Richter, 208-179; 225 NW 361

Validity of deed—age of grantor—insufficient to invalidate deed. Before the supreme court will set aside a deed executed by a person advanced in years, there must be evidence that such individual was not capable of carrying on his business transactions, and that he did not understand the nature of the transaction into which he was entering.

Gilligan v Jones, 226-86; 283 NW 434

Voluntary conveyance—presumption. Principle reaffirmed that a voluntary conveyance by an insolvent is presumptively fraudulent.

Browning v Kannow, 202-465; 210 NW 596

Voluntary conveyance. A conveyance by a husband to his wife will not be deemed voluntary solely on the ground that the conveyance was (1) by quitclaim, and (2) in consideration "of $1.00 and other valuable consideration".

Tirrill v Miller, 206-426; 218 NW 303

Voluntary conveyance. Voluntary conveyances between husband and wife or between parent and child are presumptively fraudulent.

Dolan v Newberry, 200-511; 202 NW 545; 205 NW 205

Evans v Evans, 202-493; 210 NW 564

See Leach v Sorenson, 202-919; 211 NW 540

Shaffer v Zubrod, 202-1062; 208 NW 294

Forfeiture of policy for breach of condition subsequent—change of title. A conveyance, without consideration, by a husband to his wife of a stock of insured goods with the intent to place the goods beyond the reach of his apprehended creditors, without any actual change of possession or use taking place, followed later by a reconveyance, without consideration, by the wife to the husband, constitutes no such change in the interest or title of the insured as will void the policy, the wife never having had any financial interest in the property.

McVay v Ins. Co., 218-402; 252 NW 548

Voluntary conveyance. A voluntary conveyance by a parent to his child which leaves the parent without property sufficient to discharge his debts is constructively fraudulent.

Scovel v Pierce, 208-776; 226 NW 133

Collection of estate—setting aside deed—future care as consideration—burial expense. In an action by administrator to set aside as voluntary a deed given by parents to their sons,—in return for certain agreed future care and expense,—burial and medical expenses furnished to parents as agreed were properly allowed by the court to the sons.

Rummel v Zeigler, 225-613; 281 NW 159

Knowledge of creditor. When land, which was part of an estate, was purchased by decedent's two sons, who paid no cash consideration, but occupied, paying rent to the other heirs, and who later, in order to protect the land from creditors, deeded it to two sisters who did not know of the indebtedness of the brothers, and when the sons made a contract with the sisters at the time of the deed protecting the other heirs in case the land were sold, a creditor of one of the brothers who knew of the rent payments and knew of the deed, but made no objection, could neither have it set aside as a fraudulent conveyance nor have the real estate subjected to a judgment against the debtor-brother, as the deed and contract conveyed the mere legal title to the sisters in trust for the heirs who were the persons entitled to the property.

Lakin v Eittreim, 227-882; 289 NW 433

Other sufficient property—debtor's burden to show. A debtor who voluntarily conveys his property to others has the burden to prove that he retained sufficient other property to pay his debts and failing this, it follows that the conveyance was fraudulent as to existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

II RIGHTS AND LIABILITIES OF PARTIES

Seeker for equity must do equity. The full equitable titleholder of land held under a dry trust who asks equity to invest him with the full legal title must do equity to the extent of reimbursing the trustee for good-faith expenditures made by him at the request or with the consent and acquiescence of the equitable titleholder in improving or preserving the property, even tho the trustee's claims for such

II RIGHTS AND LIABILITIES OF PARTIES—continued

expenditures are barred at law by the statute of limitations.

Warner v Tullis, 206-680; 218 NW 575

Consideration—who may not question. A plaintiff has no standing to attack a conveyance of land for want of consideration when, if he be successful, his only interest in the land would be that of an heir of the grantor.

O'Neil v Morrison, 211-416; 233 NW 708

Naked legal titleholder as real party in interest. A judgment plaintiff may maintain an action to set aside conveyances as fraudulent even tho he has transferred the equitable title to the judgment and holds only the legal title.

Grimes Bk. v McHarg, 217-636; 251 NW 51

Attorney's lien as assignment—effect. The duly perfected lien of an attorney with reference to the judgment obtained by him for his client, is tantamount to an assignment of an interest in the judgment. It follows that the attorney has such interest in the judgment as to support an intervention by him in an action by the judgment plaintiff to set aside certain conveyances as fraudulent.

Grimes Bk. v McHarg, 217-636; 251 NW 51

Different parties and issues. A decree in an action between a residuary legatee and the donee of a gift, on the issues whether the donor was mentally competent to make the gift and whether he had been fraudulently imposed upon, cannot act as an adjudication of an action by the executor of the donor to set aside said gift as a fraud on the creditors of the donor.

Chamberlain v Fay, 205-662; 216 NW 700

Good-faith grantee for value. A good-faith grantee for value will be protected irrespective of the fraudulent purpose and intent of the grantor; and this is true even tho such grantee will thereby be given a preference over other creditors.

Cherokee Auto v Stratton, 210-1236; 232 NW 646

Oelke v Howey, 210-1296; 232 NW 666

Protection of nonfraudulent grantee. A wife who takes a deed from her husband without actual intent to defraud will, even tho the deed is constructively fraudulent, be protected to the extent to which she has become surety for her husband and has secured such debt by mortgage on the land.

Burgess v Stinson, 207-1; 222 NW 362

Credit to grantee. The grantee in a deed of conveyance which is taken on an inadequate consideration and which is voluntary because it leaves the grantor insolvent, will, in an action to subject the land to the claim of an existing creditor of the grantor, be credited with the amount in good faith paid or assumed by the grantee for the land.

Peoples Bk. v Prettyman, 209-462; 227 NW 900

Assignment pending action—right of grantee. One who becomes an assignee of a real estate mortgage after the commencement of a successful action to set aside the mortgage as fraudulent (the action being legally lis pendens by proper index), and who, during the trial of said action, to which he had been made a party, redeems the land from tax sale, must be deemed a mere volunteer payer of taxes with no right to have the amount paid by him made a lien on the land.

Clarkson v McCoy, 215-1008; 247 NW 270

Disallowance of interest. Where, in setting aside a conveyance as fraudulent, the court decrees grantee a lien for the amount which grantor was owing grantee, the failure of the court to allow interest on the claim will not be disturbed on a record showing that grantee has been in possession of the land for some two years without accounting to grantor for the rents, and that the trial court deemed said rents as ample to meet the said interest,—said interest being a matter of future adjustment on any balance remaining after satisfying the creditor's claim.

Lietz v Grieme, 212-1305; 236 NW 395

Charging vendee with exempt property. When a conveyance of real estate from a husband to his wife is sustained as nonfraudulent to the extent of the balance which the husband was owing his wife for money loaned, the wife may not complain that in arriving at such balance the court charged her with the value of exempt property received by her from her husband.

Citizens Bk. v Frank, 212-707; 235 NW 30

Setting aside fraudulent deed on condition. The grantee in a deed of conveyance executed for the primary purpose of preserving a means of support for the aged grantor (tho not so expressed in the deed) has a right, in an equitable action by grantor's executor to set aside the deed, to demand that his reasonable claim for furnishing the grantor a very substantial support be first paid as a condition precedent to any judgment setting aside the deed; and this is true tho said deed would have been declared fraudulent and invalid had it been attacked by the grantor's existing creditors.

Meyers v Schmidt, 220-370; 261 NW 502

Nongood-faith purchaser. The purchaser of land from a fraudulent grantee will not be protected as a purchaser in good faith and for a valuable consideration when, at the time notice of the fraud is brought home to him, the purchase-price note was in the hands of the grantor, and unpaid.

Reining v Nevison, 203-995; 213 NW 609

Equitable garnishment — school district as defendant. A judgment plaintiff may not, as a matter of public policy, maintain against a school district an equitable proceeding to subject to the satisfaction of the judgment funds in the hands of such corporation and belonging to the judgment defendant.

Julander v Reynolds, 206-1115; 221 NW 807

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

Stock—wrongful issuance—cancellation in equity. Where a corporation which succeeds to the business of two partners agrees to pay all outstanding debts of the partnership, a hypothecation of corporate stock of one of the two stockholders as security for one of said debts manifestly works no transfer of title to said stock to the corporation, and where the debt is paid with corporate funds, and the stock certificate is returned, the wrongful act of the nonhypothecating stockholder in causing a new stock certificate to be issued to himself for one-half of the returned shares will be canceled by proper action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Fraud—when wife not creditor. A wife does not, against her husband's creditors, become the creditor of her husband by turning over to him her money for indiscriminate use in the family, and without any agreement for or expectation of repayment.

Harris v Carlson, 201-169; 205 NW 202

Defense of noncreditorship. The grantee in a conveyance which is attacked as fraudulent by an alleged creditor of the grantor may, even tho the grantor makes no defense, defend on the ground that the attacking plaintiff is not in fact a creditor of the grantor.

Fidelity Co. v Bank, 218-1083; 255 NW 713

Nonabatement of action by receivership. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bk. v McHarg, 217-636; 251 NW 51

Discharge of bankrupt—effect on liens. The fact that a bankrupt has been discharged presents no legal obstacle to proceedings by the bankrupt's trustee to enforce lien against property which is legally a part of the bankrupt's estate but as to which the bankrupt wrongfully disclaims any interest.

Bogenrief v Law, 222-1303; 271 NW 229

Creditor—effect of securing lien. A creditor who has his claim decreed a lien on land voluntarily transferred by the debtor for an inadequate price, but subject to the amount actually paid by the transferee, does not, by operation of law, become personally obligated to pay said superior lien.

Bond v Bank, 201-1175; 207 NW 233

Fraudulent conveyances—participation with knowledge—loss of rights. A party knowing conveyances were executed to him for the purpose of hindering, delaying, and defrauding creditors, is not entitled to a lien or interest in the property involved to the extent of the value of services rendered before the debt was contracted.

Grimes Bk. v McHarg, 224-644; 276 NW 781

III REMEDIES OF CREDITORS AND PURCHASERS

Novation—substitution of new debtor—consent. A creditor may, by his actions and conduct, consent to the substitution of a new debtor.

Andrew v Trust Co., 219-1059; 258 NW 921

Decree appropriate to facts proven. A court of equity having acquired jurisdiction of an action praying the setting aside of a conveyance because actually fraudulent, may, on proof of constructive fraud only, enter a decree appropriate to said proven facts.

McFarland v Johnston, 219-1108; 260 NW 32

Equitable interest—procedure. Plaintiff does not, by alleging (under authority of §12106, C., '24), in an action on a promissory note, that the maker had fraudulently conveyed his property, and by praying for an attachment on the property and for a decree subjecting the property to plaintiff's judgment, thereby eliminate the necessity of equitable proceedings to reach said property.

Federal Bank v Geannoulis, 203-1385; 214 NW 576

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

III REMEDIES OF CREDITORS AND PURCHASERS—continued

Curing misjoinder. Any claim of misjoinder of causes of action as to defendants and of misjoinder of parties-defendant because plaintiff joined an action at law on bonds against one defendant with an action in equity to set aside an alleged fraudulent conveyance against the other defendant is effectually effaced by an order of court dismissing the action as to the equitably charged defendant.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Objection first presented on appeal. In equitable proceedings supplementary to execution, the defendant may not for the first time on appeal present the objection that plaintiff has not reduced his claim to judgment.

Ober v Dodge, 210-643; 231 NW 444

Defensive matter specially pleadable. The defense that a waiver by a wife of her asserted right to a divorce constitutes a valid consideration for a conveyance by the husband to the wife must be specially pleaded.

Burgess v Stinson, 207-1; 222 NW 362

Copy of petition. In an action to subject real estate to the lien of plaintiff's personal judgment, brought against the alleged fraudulent titleholder and alleged equitable owner only, no copy of the petition need be served on the defendants in order to acquire jurisdiction.

Lawrence v Stanton, 212-949; 237 NW 512

Judgment in rem as basis. A judgment in rem against the real estate of a nonresident furnishes sufficient basis for the institution of an action in the nature of a creditor's bill, to set aside a fraudulent transfer of the property and to subject the property to the payment of the judgment.

Porter v Wingert, 200-1371; 206 NW 295

Nonnecessity for judgment.

Mallow v Walker, 115-238; 88 NW 452

Necessity for judgment. The obtaining of a judgment against a purported partner in an insolvent private bank is a condition precedent to the right of the receiver to maintain a general equitable action to set aside an alleged fraudulent conveyance by the partner.

Cooper v Erickson, 213-448; 239 NW 87

Attacking conveyance — conditions precedent. The surety on an administrator's bond who has paid the shortage of the administrator consequent on the failure of the private bank in which the estate funds were deposited, may not, in an action to recoup his loss, question a conveyance by a former partner in the bank when, prior to the giving of the bond, the said partner had, in good faith and to the full knowledge of the administrator, sold his interest in the bank at a time when the bank had ample funds with which to pay the administrator's deposit.

Fidelity Co. v Bank, 218-1083; 255 NW 713

Claims against estate—filing—right to enforce all security. The filing of a claim against the estate of the deceased debtor does not preclude claimant from maintaining an equitable action to enforce said claim against lands which were made liable for the payment of said claim by the probated will of another decedent.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Diligent creditor. The creditor of an estate may not, for his own exclusive benefit, attack a fraudulent conveyance by the deceased.

Marion Bank v Smith, 205-203; 217 NW 857

Right to set aside conveyance—condition precedent—laches. The right of a creditor to have the fraudulent conveyance of his debtor judicially set aside is not a matured right—a matured cause of action—until the creditor obtains, by judgment or attachment, a lien on the land in question. But the creditor will not be permitted negligently to delay maturing his own cause of action, and if he does so delay for a period equal to or greater than the five years allowed by statute for bringing the action, he will be deemed guilty of such laches as will completely bar his action, even tho it be conceded that, strictly speaking, the action is not barred by the statute of limitation.

Bristow v Lange, 221-904; 266 NW 808

Creditor's right to follow assets. A creditor of a banking corporation may, for the satisfaction of his claim, follow the assets of the corporation into the hands of another like corporation which has bodily taken over said assets and paid therefor by an issuance of its corporate shares of stock, it appearing that the latter corporation had assumed the liabilities of the former but had become insolvent.

Andrew v Bank & Trust, 219-1059; 258 NW 921

Absence of equity—effect. A fraudulent conveyance will not be set aside at the instance of a judgment creditor of the grantor's when there is no equity in the property over and above the unquestioned incumbrances thereon.

Imholt v McCoy, 202-679; 210 NW 906
Hewitt v Blaise, 202-1109; 211 NW 479

Recovery of money against innocent third party. One who is defrauded of his money may not recover the same of an innocent third party to whom the wrongdoer paid it in discharge of the bona fide debt of the wrongdoer to the innocent third party.

Bogle v Bank, 203-203; 212 NW 547

Right of trustee in bankruptcy. A trustee in bankruptcy who, in the interest of creditors,

seeks to set aside a fraudulent conveyance by the bankrupt, is entitled to the same relief as the creditor would have been entitled to, had he (the creditor) prosecuted the action.

Crowley v Brower, 201-257; 207 NW 230

Persons entitled to assert invalidity. An actual, nonfraudulent, but voluntary conveyance may not be impeached by a trustee in bankruptcy on behalf of subsequent creditors.

Crowley v Brower, 201-257; 207 NW 230

Nonright to question. A creditor may not have his claim decreed a lien on the property of a nonfraudulent trust which the debtor has created for the specific purpose of discharging an obligation as to which the said creditor is a stranger; and especially is this true when the said creditor fails to show that he was injured by the creation of said trust.

Clark v Langerak, 205-748; 218 NW 280

Extent of relief. An actual, nonfraudulent, voluntary conveyance should not, in an action by a trustee in bankruptcy on behalf of creditors, be wholly set aside and the title vested in the trustee, but a lien on the land may be decreed in favor of antecedent creditors.

Crowley v Brower, 201-257; 207 NW 230

Form of judgment in favor of trustee. The decree in an action by a trustee in bankruptcy to set aside a conveyance by the bankrupt as fraudulent, should be, not that the trustee is the owner in fee of the property, but that the trustee has a superior lien on the property to the amount of the lienable claims in his hands as such trustee.

Hoskins v Johnston, 205-1333; 219 NW 541

Preferences by bankrupt—right to set aside. The right of a trustee in bankruptcy to set aside a fraudulent conveyance is equal to the right of a creditor of the bankrupt to set aside the same conveyance, even tho said conveyance was not made within the four months preceding the filing of the petition in bankruptcy.

Scovel v Pierce, 208-776; 226 NW 133

Remedy of trustee. Where property sold under a conditional sale contract is replevined by the vendor and thereafter bankruptcy proceedings are instituted against the vendee, the trustee in bankruptcy necessarily has notice of the rights and claims of the vendor, and occupies, as to such property, the legal position of a judgment creditor holding an execution duly returned unsatisfied.

Internat. Harv. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Action by trustee to set aside—conditions. A trustee in bankruptcy may not maintain an action to set aside a fraudulent conveyance by the bankrupt unless he pleads and proves that such setting aside is necessary in order to pay claims allowed in the bankruptcy proceedings.

Newman v Callahan, 212-1003; 237 NW 514

Action by trustee—conditions. A trustee in bankruptcy has no right to maintain an action to set aside as fraudulent a conveyance by the bankrupt unless he shows that claims have been filed and allowed against the bankrupt, and that he as trustee has not sufficient funds with which to pay said claims.

Shaw v Plaine, 218-622; 255 NW 686

Unallowable action for damages. A trustee in bankruptcy cannot maintain an action at law against a grantee of the bankrupt to recover the value of property collusively and fraudulently transferred to said grantee in fraud of creditors. This is not saying that the trustee may not treat the property in the hands of the grantee as belonging to the bankrupt, or impress a trust on the proceeds of the property if grantee has disposed of it.

Lambert v Reisman, 207-711; 223 NW 541

Unallowable action for damages. A judgment plaintiff may not maintain an action at law for damages against the fraudulent grantee of land transferred by the judgment defendant, even tho the action is aided by an allegation of conspiracy to defraud plaintiff.

McKay v Barrick, 207-1091; 224 NW 84

Unallowable counterclaim. A fraudulent grantee of land may not, in an action by the judgment creditor of the grantor to set aside the conveyance, set up a counterclaim for money due to said grantee from said judgment creditor.

Evans v Evans, 202-493; 210 NW 564

Nonright to personal judgment. A judgment creditor upon securing a decree setting aside a fraudulent conveyance of the judgment defendant's interest in a partnership to the copartners, is not entitled to a personal judgment against the vendee-partners for the amount of his judgment.

Schulein Co. v Lipschutz, 208-1315; 227 NW 141

Evidence. Evidence held to establish a fraudulent transfer.

Dimick v Munsinger, 207-354; 223 NW 115
Northwest. Bank v Muilenburg, 209-1223; 229 NW 813
Schnurr v Miller, 211-439; 233 NW 699

Evidence. Evidence held insufficient to establish fraud in a conveyance.

Aldrich v Van Hemert, 205-460; 218 NW 311
Cass v Ney, 209-17; 227 NW 512
Holliday v Hepler, 213-488; 239 NW 66

Evidence — sufficiency. A showing that a conveyance by a debtor is attended by a mere suspicion of fraud is not sufficient foundation

III REMEDIES OF CREDITORS AND PURCHASERS—continued

for decreeing its invalidity. Fraud must be clearly and satisfactorily established.

First N. Bk. v Lynch, 202-795; 211 NW 381

See County Bk. v Jacobson, 202-1263; 211 NW 864

Self-impeaching evidence. The court cannot say, at least ordinarily, that wholly undisputed testimony tending to show that a conveyance was bona fide and for value, is so self-impeaching as to establish the very contrary.

Hawkins v Vermeulen, 211-1279; 231 NW 361

Evidence—failure of grantor to list indebtedness. Failure of the grantor in a conveyance to list, in an application for credit, any of the indebtedness which he claims was satisfied by the conveyance, is material on the issue of fraud.

Oelke v Howey, 210-1296; 232 NW 666

Evidence—failure to return notes for assessment. Failure of the alleged grantee in a conveyance to list for assessment the notes which he claims were satisfied by the conveyance is material on the issue of fraud.

Oelke v Howey, 210-1296; 232 NW 666

Connected transactions. Fraudulent transactions may be so related, connected, and interwoven that evidence thereof may be admissible against a party who was not present at the transaction.

Leach v Edgerton, 203-512; 211 NW 538

Conclusiveness on party calling witness. A party who calls a witness is not necessarily bound by the testimony of the witness, yet, when a party calls a witness on the issue of fraud and want of consideration in a conveyance, he will not be permitted to say that affirmative, uncontradicted, and positive testimony of the witness that there was no fraud and that there was a consideration establishes the direct contrary.

Pike v Coon, 217-1068; 252 NW 888

Evidence—consideration—disregard of testimony. A creditor who is seeking to set aside as fraudulent a conveyance by his debtor may not have testimony disregarded which he alone has introduced, and which tends to show the consideration paid by the grantee for the deed.

Savings Bk. v Mehlin, 200-970; 205 NW 788

Pro tanto cancellation. An absolute deed for which grantee parts with no consideration except to assume a mortgage indebtedness on which he was theretofore liable, but only secondarily, as between himself and the grantor, will be deemed (no actual fraud being charged) constructively fraudulent to the extent that the value of the land exceeds the amount of the said assumed mortgage, unless grantee shows that the grantor had sufficient property remaining to pay his existing creditors.

Buell v Waite, 200-1021; 205 NW 974

Disparity in values. The disparity between $2,600, at which a creditor-grantee took conveyance of real estate and $3,200, the highest value placed on the property, is not so great as to constitute a badge of fraud.

Van Pelt v Willemsen, 208-1326; 227 NW 110

Husband and wife—decree warranted allocating property to wife and creditor. In an action in equity by creditor to set aside as fraudulent husband's conveyances to wife allegedly made in satisfaction of indebtedness, a decree is warranted which, in view of court's valuations of the realty, allocated enough property to wife to compensate her for what husband was able to recall of the alleged indebtedness, and allocated enough to judgment creditor to satisfy his claim.

Goeb v Bush, 226-1224; 286 NW 492

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Fraud—personal liability of grantee. A wife who, knowing that her husband intended to hinder and delay his creditors, accepts a voluntary transfer of his bank deposit is, nevertheless, not personally liable to the husband's subsequently appointed trustee in bankruptcy for that part of the deposit which is expended prior to the bankruptcy proceedings in carrying on in good faith the ordinary business of the husband.

Barks v Kleyne, 201-308; 207 NW 329

Mortgage by grantee to undo wrong. A creditor, on learning that his debtor has made a voluntary conveyance of his property, may validly secure his debt by taking mortgage security from the voluntary grantee on the voluntarily conveyed property, and will thereby secure a right which will be superior to the right of another creditor who, subsequent to the mortgage, and after the death of the common debtor, reduces his claim to a so-called judgment against the latter, and, for his own exclusive benefit, levies on the voluntarily conveyed property.

Marion Co. Bk. v Smith, 205-203; 217 NW 857

Renounced gift. The act of the life beneficiary of an annual interest charge imposed as a gift in her favor in a deed (which the

grantee duly accepted) in formally and unconditionally renouncing and rejecting all benefits "which do, may, or might accrue" to her under the deed, legally places such interest charge beyond the reach of a judgment creditor who duly institutes an equitable action to subject such interest charge to the satisfaction of his judgment, even tho the said renunciation was not made until long after the said action was duly instituted.

Gottstein v Hedges, 210-272; 228 NW 93; 67 ALR 1218

Fraudulent conveyances — termination of property interest regardless of creditors. No present title to land passes under a contract to the effect (1) that a daughter, so long as she outlived her father and paid certain annual rentals and other charges, should have the possession and profits of named lands, (2) that title should remain in the father, but at the death of the father she should receive an absolute deed to the land, which deed was put in escrow under the control of the father during his lifetime, (3) that if she defaulted in said payments the contract could be forfeited on notice, and (4) that all her interest terminated instantly on her death prior to that of the father. It follows that upon the insolvency of the daughter and her default on said payments, the father and daughter may voluntarily cancel said contract regardless of the creditors of the daughter.

Tilton v Klingaman, 214-67; 239 NW 83

Right to reach income from trust depending on cestui electing to take income.

Ober v Dodge, 210-643; 231 NW 444

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Voluntary, nonfraudulent conveyance—valid against judgment on subsequent bank stock assessment. Altho wholly voluntary, a conveyance executed when the grantor has no fraudulent intent cannot be impeached by a subsequent creditor, so a real estate conveyance by a husband to his wife many years before he becomes a bank stockholder cannot be invalidated by the creditors of the bank, seeking to collect a judgment on stock liability assessment.

Bates v Kleve, 225-255; 280 NW 501

Withholding deed from record. Principle reaffirmed that the mere withholding of a deed from record is not in itself evidence of a fraudulent intent, and that a creditor who has not been misled thereby to his damage cannot complain.

Crowley v Brower, 201-257; 207 NW 230

Will—necessity to construe. In an equitable proceeding by a judgment creditor to discover property belonging to the judgment defendant, and to subject said property to the satisfaction of said judgment, the court, on the issue of ownership of property in question, may be called upon, and properly so, to construe a will —all necessary parties being before the court.

Bankers Tr. v Garver, 222-196; 268 NW 568

Debt-encumbered remainder—equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some 30 years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Intestate property—void remainders. Property embraced in a void, testamentary limitation—void because prohibited by the statute relating to perpetuities—passes to those persons who would have been entitled thereto under the laws of intestacy had the limitation been omitted from the will, and a judgment creditor may, by proper procedure, have a lien established thereon.

Bankers Tr. v Garver, 222-196; 268 NW 568

11817 Lien created.

Lis pendens—service of action. The filing and due indexing of a petition to subject real estate to the lien of a personal judgment creates a lis pendens, and personal service of the action on the defendants outside the state establishes jurisdiction in rem, even tho the petition may be subject to a corrective motion or to a demurrer.

Lawrence v Stanton, 212-949; 237 NW 512

Remedies of creditors and purchasers—jurisdiction—copy of petition. In an action to subject real estate to the lien of plaintiff's person-

al judgment, brought against the alleged fraudulent titleholder and alleged equitable owner only, no copy of the petition need be served on the defendants in order to acquire jurisdiction.

Lawrence v Stanton, 212-949; 237 NW 512

Impressment of lien—special execution. A court of equity upon impressing a lien on property should order the issuance of a special execution for the sale of the property and the satisfaction of the lien.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Effect of securing lien. A creditor who has his claim decreed a lien on land voluntarily transferred by the debtor for an inadequate price, but subject to the amount actually paid by the transferee, does not, by operation of law, become personally obligated to pay said superior lien.

Bond v Bank, 201-1175; 207 NW 233

11818 Surrender of property enforced.

Scope of inquisitorial proceedings. In strictly inquisitorial proceedings for the discovery of assets belonging to an estate, the court has no authority to order property turned over to the administrator when the title to such property is in dispute; especially is this true when the property apparently does not belong to the estate.

In re Brown, 212-1295; 235 NW 754

Collection of estate—discovery of assets—scope of jurisdiction. In inquisitorial proceedings for the discovery of assets belonging to an estate, the jurisdiction of the court to continue said proceedings abruptly terminates at the point of time when it is actually made to appear that an actual controversy exists as to the title to the property in question.

Findley v Jordan, 222-46; 268 NW 515

Title dispute—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

TITLE XXXII

PROBATE

CHAPTER 503

PROBATE COURT

11819 Probate court always open.

Findings by probate court—conclusiveness. Findings of fact by a probate court are conclusive on the appellate court when they are fairly supported by competent testimony.

In re Fish, 220-1247; 264 NW 123

Findings on objections to administrator's final report. Trial court's ruling on objection to administrator's final report will not be disturbed on appeal where fact question was involved, as supreme court would not substitute its judgment for that of court below.

In re Windhorst, 227-808; 288 NW 892

Lost will—probate jurisdiction exclusive. An action to establish a lost will must be brought in the probate court.

Coulter v Petersen, 218-512; 255 NW 684

Ordinary probate proceedings—noninterference by equity court. An equity court may not interfere with the ordinary proceedings of the probate court in exercising its exclusive jurisdiction in the administration of estates. Rule applies when probate court is following the manner and the method provided by the testator in the will.

First Methodist Church v Hull, 225-306; 280 NW 531

Calendars—application for order. Applications for orders in probate which necessitate a construction of a will have no place on the jury calendar, and reversible error results from a refusal to exclude them from such calendar on application of an interested litigant.

In re Watters, 201-884; 208 NW 281

Proceedings — continuance and dismissal — legality. An order in partition proceedings brought by the guardian of an incompetent to the effect that the cause "be continued until certain conditions are complied with, which being fulfilled the cause should be dismissed", and a later order dismissing said cause on a recital that said "conditions" had been fulfilled, cannot be said to be illegal, and beyond the jurisdiction of the court, even tho such "conditions" were not recited in the record, it appearing that the court had personal knowledge of them.

Salomon v Newby, 210-1023; 228 NW 661

Supported findings in probate. Supported findings of fact by the probate court have the force and effect of a verdict of a jury and will not be reviewed on appeal.

In re Fish, 220-1328; 264 NW 542

11820 Time and place of hearings.

Notice—essential requirements. Notices of hearings in probate must specify both the time and the place of hearings, in order to confer jurisdiction.

In re Durham, 203-497; 211 NW 358

Orders—record entry necessary. Orders for publication of notice of hearings in probate must be entered of record.

In re Durham, 203-497; 211 NW 358

11822 Notice.

Collateral attack. The sufficiency of a notice of hearing on an application for the appointment of an administrator de bonis non (assuming the necessity for such notice) cannot be questioned in a purely collateral proceeding.

Giberson v Henness, 219-359; 258 NW 708

Appointment without notice. When a probate record simply shows that the final report of an executor "was approved and the executor discharged", the court may, at a later time, and irrespective of the statutory limitation of five years for appointment for original administration, appoint, without notice to interested parties, an administrator de bonis non for the purpose of selling property of the estate and purchasing and erecting a monument which was required by the will and not provided and erected by the original executor.

Giberson v Henness, 219-359; 258 NW 708

Guardianship — nonadversary proceedings. The good-faith compromise by a guardian with the approval of the court, of pending litigation to which the minor is a party, is not a proceeding adversary to the minor.

Kreamer v Wendel, 204-20; 214 NW 712

Proceedings by guardian—legality. The dismissal of an action in partition brought by the permanent guardian of an incompetent, in accordance with a compromise and settlement at which neither the guardian ad litem nor his attorney was present, may not be said to be illegal.

Salomon v Newby, 210-1023; 228 NW 661

11825 Extent of jurisdiction.

Jurisdiction in probate. See under §10763

Presumption. Orders in probate appointing guardians are presumptively regular.

Marsh v Hanna, 219-682; 259 NW 225

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of coordinate authority.

First Methodist Church v Hull, 225-306; 280 NW 531

Probate application by trustee—transfer to equity. Where an application in probate brought by a trustee under a will asking for directions of the court was transferred to equity on a motion by intervenors after a hearing at which all parties appeared and submitted arguments but did not except to the transfer, it was proper for the court to refuse a motion made eight months later asking that the transfer be canceled, when it was not shown that the rights of the parties could be better determined in probate than in equity, the question being a matter of forum rather than of jurisdiction.

In re Proestler, 227-895; 289 NW 436

Nature of probate proceedings. Probate proceedings by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding in rem, and is one as to which all the world is charged with notice.

In re Harsh, 207-84; 218 NW 537

Jurisdiction when will exists. The appointment of an administrator cannot be said to be without jurisdiction even tho a will existed.

Murphy v Hahn, 208-698; 223 NW 756

Presumption—collateral attack. The record of the appointment in a county of an administrator and his due qualification is a finality and beyond collateral attack, even tho the record fails affirmatively to show the existence of the facts upon which the jurisdiction of the court depends; otherwise if the record affirmatively reveals want of jurisdiction.

Ferguson v Connell, 210-419; 230 NW 859

Ordinary probate proceedings—noninterference by equity court. An equity court may not interfere with the ordinary proceedings of the probate court in exercising its exclusive jurisdiction in the administration of estates. Rule applies when probate court is following the manner and the method provided by the testator in the will.

First Methodist Church v Hull, 225-306; 280 NW 531

Jurisdiction of nonprobate court. An executor who institutes an authorized action against a corporate receiver in the county of the receiver's appointment, for relief against an alleged fraud-induced contract by the deceased, and (1) is met by a cross-petition for judgment on the said contract, and (2) has his action properly consolidated with divers other actions under duly joined issues which might have been the basis of an original action against the executor in said county of suit, may not thereupon, after dismissing his action,

have all proceedings against himself and the estate dismissed on the claim that the probate court which appointed him had sole jurisdiction to render a judgment against him or against the estate.

Lex v Selway Corp., 203-792; 206 NW 586

Application to continue business—jurisdiction. A lessor who voluntarily appears in probate and successfully objects to the application of the lessee's administrators for an order authorizing the continuation of the business covered by the lease may not thereafter assert that the refusal of the court to grant the application was discretionary with the probate court, and that, in any view, the court had no jurisdiction to grant the application.

In re Grooms, 204-746; 216 NW 78

Unauthorized satisfaction of bequest. An order of the probate court authorizing an executor to discharge a cash bequest to a minor by transferring to the father of the minor as natural guardian a note and mortgage, belonging to the estate, is wholly void when said order is entered without the appearance of any guardian, regular or ad litem, for the minor.

Irwin v Bank & Trust, 218-477; 255 NW 671

Title — nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

Objections to executrix's report—real estate title issue not misjoinder—statewide jurisdiction. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

11828 Bonds filed—approval.

Atty. Gen. Opinion. See '28 AG Op 47

CHAPTER 504

CLERK OF PROBATE COURT

11832 Probate powers of clerk.

Atty. Gen. Opinion. See '28 AG Op 47

Jurisdiction to appoint nonresident. The clerk of the district court has ample power to appoint a nonresident as administrator.

Finnerty v Shade, 210-1338; 228 NW 886
Reidy v Railway, 216-415; 249 NW 347

Presumption—collateral attack. The record of the appointment in a county of an administrator and his due qualification is a finality and beyond collateral attack, even tho the record fails affirmatively to show the existence of the facts upon which the jurisdiction of the court depends; otherwise if the record affirmatively reveals want of jurisdiction.

Ferguson v Connell, 210-419; 230 NW 859
Reidy v Railway, 216-415; 249 NW 347

Allowance and payment of claims—clerk's or executor's allowance not final adjudication. The allowance of a claim against an estate by the clerk of the probate court does not result in a final adjudication at the end of a year under a statute permitting objections to the clerk's orders to be filed within a year, as there is no adjudication of a claim against an estate allowed by the clerk or an executor or administrator until it has been passed upon by the court.

In re Baker, 226-1071; 285 NW 641

11834 Clerk's actions reviewed.

Administrator—appointment by clerk—review—burden of proof. When the appointment of an administrator by the clerk is attacked by motion under the statute, the appointee has the burden to sustain his appointment.

Moreland v Lowry, 213-1096; 241 NW 31

Attacking allowance of probate claim—assignment of error necessary. An application by an executor to set aside the clerk's allowance of a claim against an estate is a law case requiring assignments of error upon appeal.

In re Baker, 226-690; 285 NW 143

Clerk's or executor's allowance not final adjudication. The allowance of a claim against an estate by the clerk of the probate court does not result in a final adjudication at the end of a year under a statute permitting objections to the clerk's orders to be filed within a year, as there is no adjudication of a claim against an estate allowed by the clerk or an

executor or administrator until it has been passed upon by the court.

In re Baker, 226-1071; 285 NW 641

11835 Docketing and hearing.

Appointment by clerk — burden of proof. When the appointment of an administrator by the clerk is attacked by motion under the statute, the appointee has the burden to sustain his appointment.

Moreland v Lowry, 213-1096; 241 NW 31

Collateral attack. Probate proceedings cannot be collaterally attacked until it is shown that fraud was perpetrated on the court inducing it to take jurisdiction.

Ferguson v Connell, 212-1155; 237 NW 354

11842 Probate record.

Record as evidence. Where a will provides that the residue of the estate shall pass to an educational institution of this state as a part of its endowment fund, exemption from taxation on lands will not be granted except on the production in evidence of the probate records showing judicially (1) that the estate has been fully settled, and (2) that the lands in question constitute part of the residue of said estate, and, as a consequence, belong, legally or equitably, to said institution.

Wapello Bank v County, 209-1127; 229 NW 721

Constructive knowledge of record. One who takes a mortgage from a mortgagor who, under the recording acts, appears to be the sole owner of the fee is not charged with constructive knowledge of matter which appears in the "probate record" and which suggests or implies that some person other than the apparent fee owner has an interest in the property.

Booth v Cady, 219-439; 257 NW 802

Private bank depositors—property available for payment of estate claims. Where an estate consists of two general classes of assets, to wit: (1) assets employed by decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is temporarily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

CHAPTER 505

WILLS AND LETTERS OF ADMINISTRATION

GENERAL PROVISIONS

11846 Disposal of property by will.

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Confidential communications. See §11263

Dower right unaffected by will. See under §12006

Joint and mutual wills. See under §11852 (II)

Lost wills. See under §11863 (I)

Merger of realty interests generally. See under §10084 (II)

Probate of will. See under §11863

Revocation and cancellation. See under §11855

Specific legacies. See under §11978
Testamentary guardianships. See under §12574
Testamentary trusts. See under §11876
Validity and sufficiency generally. See under §11852
Will contests. See also under §11864

I TESTAMENTARY POWER IN GENERAL

Discussion. See 3 ILB 170—Conveyances to take effect on death of grantor; 14 ILR 1, 172, 283, 428—Statute law of wills

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

When will speaks. Principle reaffirmed that a will speaks only from the time of the death of testator and that if, at said time, testator owns no property—because the descent of his property has been fixed and determined by prior contract—there will be nothing to which the will can be applied.

Conlee v Conlee, 222-561; 269 NW 259

Devise and bequest identical with statute of descent—effect. A will is a nullity which devises and bequeaths to a devisee and legatee the same quantity and quality of real and personal property which the devisee and legatee would take under the law of descent. So held where a spouseless and childless son devised all his property to his sole surviving parent.

In re Warren, 211-940; 234 NW 835

Authority to sell real estate. A testator may unconditionally authorize and empower his executor to make full conveyances of testator's real estate.

In re Wicks. 207-264: 222 NW 843

Conversion under will—effect. In probate proceedings where testator directs the executor of his estate to sell all of the property of the estate, including realty, as soon as convenient after his death and distribute proceeds, while the executor has some discretion as to the time and manner of the sale, the direction is mandatory, and effects an equitable conversion of the real estate into personalty at the instant of testator's death, and thereafter the real estate is to be treated as personalty, and be subject to the rules governing personal property.

In re Sheeler, 226-650; 284 NW 799

Agreement—effect. An agreement between an aged mother and her heirs that a named person should act as attorney in fact for the mother, coupled with an agreement between the heirs that none of them should borrow from or obtain advancements from the mother, presents no impediment to the mother's conveying her property to certain of her heirs in order to equalize the distribution of her property.

Rollins v Jarrett, 207-183; 222 NW 365

Descent — when determinable by contract. Tenants in common of real estate who embark their holdings, and the personal property used in connection therewith, in a partnership violate no rights of heirship or testamentary rights of their brothers and sisters by including in their partnership contract an agreement that upon the death of one of the partners the survivor shall become the absolute owner of all the partnership property.

Conlee v Conlee, 222-561; 269 NW 259

Appointment of nominated executor required unless disqualified. Altho a certain discretion lies with the probate court in the appointment of personal representatives, nevertheless an executor named in a will as the one in testator's judgment best fitted to administer his estate should be appointed by the court in the absence of disqualification, which must be more than the objections of collateral relatives.

In re Schneider, 224-598; 277 NW 567

Proceeds of life insurance. The proceeds of life insurance payable to the estate of the insured or to his executors or administrators may be disposed of by will. Section 8776, C., '24, which in substance provides that insurance so payable "shall inure to the separate use" of the surviving spouse and children, supplements said right, because said section simply directs in legal effect who shall take the avails of life insurance so payable when there is no will.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Proceeds of life insurance. A testator may validly dispose by will of the proceeds of life insurance payable to his estate, and make such proceeds subject to the payment of his debts. Such result is effected by a will (1) which provides for the payment of testator's debts, and (2) which devises the life insurance proceeds subject to such debt proviso.

In re Caldwell, 204-606; 215 NW 615

Prohibiting incumbrance — legality. A testator who makes an absolute devise, of a certain interest in property, may not validly prohibit the devisee from thereafter incumbering the property.

Bogenrief v Law, 222-1303; 271 NW 229

Intention to render homestead subject to debts. A testator in devising a homestead will not be deemed to have intended to render it subject to his debts—even to his funeral expenses—unless such intention is clearly and unequivocally expressed in the will.

Buck v MacEachron, 209-1168; 229 NW 693

Inheritance tax on bequest—right of testator to pay. A testator may validly provide that the inheritance tax on a specific devise or bequest made by him in his will shall be paid

from the residuary part of his estate, provided he clearly expresses his intention to that effect. Will construed and held clearly so to provide.

In re Johnson, 220-424; 262 NW 811

Payment of taxes. Will construed, and held properly to justify an order directing the testamentary trustee to pay certain taxes on the trust property.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Limitations void ab initio. Testamentary attempts by means of limitations to create in property contingent interests or estates, which will not necessarily become vested within the period of time prescribed by the statute prohibiting perpetuities, are futile, all such limitations being void ab initio. (§10127, C., '35.)

Bankers Tr. v Garver, 222-196; 268 NW 568

Repugnant limitation following devise of property in fee—void. Principle reaffirmed that a testator cannot make an absolute devise of his property in fee and in a subsequent clause destroy or place a limitation on such title. The subsequent limitation is void for repugnancy.

In re Bigham, 227-1023; 290 NW 11

Bequest for paving roads. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Lack of education. In an action to contest a will under which a son receives eight times as much property as the children of a deceased son and the evidence is disputed as to whether testator had sufficient understanding of English that when will was read over to her in English, unexplained, she fully understood its contents, a jury question is presented.

In re Younggren, 226-1377; 286 NW 467

II CONTRACTS TO DEVISE OR BEQUEATH

General principles. A parol contract on due consideration to devise or leave property to another, if shown by clear and convincing testimony, is enforceable, especially when the contract is corroborated by declarations of the alleged grantor against his own interest, and when the equities are strongly in favor of the alleged grantee.

Kisor v Litzenberg, 203-1183; 212 NW 343

Mutual wills enforced as contract. Clear and satisfactory evidence that husband and wife entered into a mutual contract, and in accordance therewith executed mutual and reciprocal wills providing for the disposition of all their property to each other and to certain named beneficiaries upon the death of survivor, entitles beneficiaries to specific performance thereof and to restrain probating of another will, executed by husband after the wife's death, making provision contrary thereto.

Child v Smith, 225-1205; 282 NW 316

Mutual wills—enforcement in equity. Mutual wills are those made as separate wills of two people which are reciprocal in provision. Such wills may be enforced in equity.

Child v Smith, 225-1205; 282 NW 316

Antenuptial contract. An antenuptial contract under which the wife agrees to accept a named fractional part of the husband's property in case she survives does not have the legal effect of depriving her of her statutory right to occupy the homestead, free of all rent, until her share is actually set off to her or otherwise actually disposed of.

Fraizer v Fraizer, 201-1311; 207 NW 772

Irrevocability of contract. A will in the form of a contract to devise property in return for care and support of the testator during his lifetime is irrevocable except by the mutual action of the parties.

Burmeister v Hamann, 208-412; 226 NW 10

Irrevocableness of will based on contract. A will is irrevocable when executed in compliance with a contract which is (1) in writing, and (2) contains mutual promises then and there executed by the parties; nor is such a will rendered revocable by the death of the beneficiary therein prior to the death of the testator.

Powell v McBlain, 222-799; 269 NW 883

Evidence — sufficiency. Proof of an oral contract to will property must be so clear and convincing as to leave nothing to be supplied by the court.

In re Shinn, 207-103; 222 NW 569

Requisites and degree of proof. An oral contract to leave, devise, or bequeath property must, in the first place, be so certain and definite as to leave nothing to conjecture or to be supplied by the court, and, in the second place, must be supported by such clear, satisfactory, and convincing testimony as establishes such contract, for all practical purposes, beyond a reasonable doubt.

Brewer v King, 212-665; 237 NW 508

Evidence — sufficiency. Evidence reviewed and held wholly insufficient to establish the genuineness of an alleged written contract to will property.

Shisler v Cemetery Assn., 207-306; 222 NW 838

II CONTRACTS TO DEVISE OR BEQUEATH—continued

Failure of proof of material allegation. A fatal failure of proof results from a failure to prove an allegation to the effect that services were to be paid for at the time of the death of the promisor, and where the court instructs to such effect.

Ballard v Miller, 210-1144; 229 NW 159

Condition precedent—general allegation of performance — denial — effect. The statutory rule that a general allegation of performance of a condition precedent is not put in issue by a general denial (§11208, C., '27), has no application to a general allegation of performance of a promise or agreement which was the consideration for the promise or agreement sued on. So held where plaintiff's promise was to discharge a certain promissory note, and in return the promisee agreed to make a will in favor of plaintiff.

In re Fetterman, 207-252; 222 NW 872

Ownership of property. A contract which provides, in effect, that a child shall become owner of all the property possessed by its foster parents at the time of their death is necessarily not confined to the property possessed by the foster parents at the time the contract was entered into.

Kisor v Litzenberg, 203-1183; 212 NW 343

Oral contract to devise or convey. An oral offer to convey or devise land in consideration of services to be performed for the offerer, and an oral acceptance thereof by the offeree, are specifically enforceable when both the execution of the contract and the performance thereof are established by clear, convincing, and satisfactory evidence, and when the acts of performance are referable exclusively to such contract.

Houlette v Johnson, 205-687; 216 NW 679

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband, who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Compensation through bequest — breach — effect. An agreement that compensation for services shall, in part, be made through or by means of a testamentary bequest implies that the bequest shall be in an amount which will afford reasonable compensation for the services rendered.

In re Newson, 206-514: 219 NW 305

Measure of damages—contract to give, deed, or will personal property. The measure of damages for breach of a contract to give, deed, or will all of the personal property of the promisor in payment of services must be computed on the basis of the gross personal property in kind, as of the death of the promisor.

Ballard v Miller, 210-1144; 229 NW 159

Parol contract to will or deed land. A parol contract to will or deed land, followed by possession of the land by the contemplated devisee or grantee, and by the making of valuable improvements on the land by the latter, in reliance on the contract, is specifically enforceable if the proof is sufficient, in the light of all the circumstances, to carry conviction to the mind of its essential credibility.

Ozias v Scarcliff, 200-1078; 205 NW 986

Acceptance — conclusive presumption. It must be presumed that an advantageous contract, entered into by an uncle for and on behalf of his motherless and paternally abandoned infant nephew and niece, has been accepted by the beneficiaries, when for some 40 years they have been fulfilling their part of the contract.

Kisor v Litzenberg, 203-1183; 212 NW 343

Abandonment—presumption. The abandonment of a contract which is, in effect, a contract to devise property, and which is highly advantageous to the party who is alleged to have done the abandonment, must be established by very clear and cogent testimony.

Kisor v Litzenberg, 203-1183; 212 NW 343

Agreement to give, deed or will property—constructive breach. One who orally contracts that upon his death he will pay for certain services by "giving, deeding or willing" certain real property to the promisee, constructively breaches his contract by failing to either give, deed or will the property as promised, and thereby opens the door to the promisee to maintain an action at law for damages; and especially is this true when the promisee establishes the contract by the same degree of proof as would be required in equity, and

moreover, offers to accept a deed to the property in lieu of damages allowed for the breach.

Ballard v Miller, 210-1144; 229 NW 159

Agreement as to right to inherit. A provision in an antenuptial contract to the effect that the children of the husband shall have the same right of inheritance in the property of the wife as they would have if they were her own children is effective as a contract of inheritance.

Kalsem v Froland, 207-994; 222 NW 3

Testator's contract to devise to son—will changed after loan relying thereon. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor son.

Emerson Bank v Cole, 225-281; 280 NW 515

Contract not to change will—not guaranty of son's debt. A son being indebted to a bank in the sum of $10,000, the father entered into a contract with the bank, that he would not alter his will wherein said son was bequeathed that sum, in consideration of which the bank would not press payment while the father lived. Held that such contract was not an absolute guarantee that the son was to have $10,000 from his father's estate regardless of its condition at the father's death, nor an undertaking that would nullify other provisions of the will.

Evans v Cole, 225-756; 281 NW 230

Love and affection — consideration — sufficiency. In an action to enforce grandfather's oral promise to will property to grandson in return for naming grandson after him, court held that love and affection, while being a "good" consideration, was not a sufficient consideration when unsupported by a pecuniary or material benefit, and created, at most, a bare moral obligation.

Lanfier v Lanfier, 227-258; 288 NW 104

Assignment of property—will—contract to support. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Survivor of dual beneficiaries. An executed contract which provides, in effect, that two infant children shall enter the home of foster parents and there remain as tho they were the natural-born children of such parents, and in return shall become the owners of the property of such parents at the death of the latter, casts upon the survivor of said beneficiaries the entire property in case one beneficiary dies prior to the death of the foster parents.

Kisor v Litzenberg, 203-1183; 212 NW 343

Allowance of claims—partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the fourteen years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Settlement of claim—adding additional burden. An unambiguous written stipulation and agreement, duly filed in a will contest, providing in effect that defendant will pay, and plaintiff will accept, a named sum of money in full settlement of any and all claims which plaintiff may have against the estate cannot be added to by proof of an oral contemporaneous agreement to the effect that defendant would also execute a will devising and bequeathing all his property to plaintiff.

In re Simplot, 215-578; 246 NW 396

Codicil as deed. A duly signed, acknowledged, and recorded contract to the effect that a specified devise in the will of one of the parties to the contract should act as a deed to the other party to the contract will prevail over a subsequent conveyance of the property by the testator, especially when the grantee had actual notice of the contents of the will and of the contract in reference thereto.

Kremar v Kremar, 202-1166; 211 NW 699

Disposal during lifetime—validity. A contract that one will make a will and devise and bequeath to the promisee "all property which I may own at the time of my death" and the due execution of a will of the same scope, leaves the promisor (testator) free to use, control and dispose of his property in his lifetime, and nonfraudulent transfers and conveyances by him before his death are valid.

Powell v McBlain, 222-799; 269 NW 883

III TESTAMENTARY CAPACITY

(a) DEGREE OF MENTAL CAPACITY REQUIRED

General standard of competency. One who has an intelligent knowledge and understanding (1) of the act of executing a will, (2) of the property he possesses, (3) of the disposition which he desires to make of his property, and (4) of those who are the natural objects of his bounty, is competent to execute

III TESTAMENTARY CAPACITY—cont.
(a) DEGREE OF MENTAL CAPACITY REQUIRED—concluded

a will, even tho he is physically and mentally weak.

Cookman v Bateman, 210-503; 231 NW 301

Validity of deeds—mental incompetency. Courts must be zealous to guard the right of every man to dispose of his own property as he sees fit, so long as he has the mental capacity (1) to know what property he possesses, (2) to know what he desires to do with it, and (3) to exercise his free and voluntary will in such disposition.

Coughlin v Church, 201-1268; 203 NW 812

Physical and mental deterioration. Mere old age or some deterioration in physical or mental power or peevishness, childishness, and eccentricity are not sufficient to carry to the jury the issue of mental unsoundness.

In re Koll, 200-1122; 206 NW 40
In re Johnson, 201-687; 207 NW 748
Albright v Moeckly, 202-565; 210 NW 813
In re Paczoch, 202-849; 211 NW 500
In re Ramsdell, 215-1374; 244 NW 744

Mere mental weakness. Mere weakness of the mental faculties is insufficient to invalidate a will if the testator knew and comprehended the natural objects of his bounty, the nature and extent of his property, and the disposition he desired to make of it.

In re Shields, 208-607; 224 NW 69

Mental capacity to contract—existence—burden to disprove. Mental weakness from disease does not deprive a person of capacity to dispose of property until the power of intelligent action is destroyed, and executor relying thereon to recover gift made by decedent to sister has burden of proof.

Wilson v Findley, 223-1281; 275 NW 47

Demurrer to will contest—fatal admission. A demurrer to objections to the probate of a will should have been overruled when it admitted as facts that the contestant held judgments against the devisee who was a son and heir of the decedent who died seized of real estate, that the judgments were liens against any real estate the son would inherit as heir, and that the decedent was of unsound mind when the will was made, as, if the decedent were incompetent, the will was void and he died intestate. So the title to the son's share in the real estate vested at the father's death, and, at the same instant, the judgments became liens on his share of the real estate.

In re Duffy, 228- ; 292 NW 165

Monomania—essential requirements. Monomania in the form of a belief on the part of a testator that his child was immoral, in order to be a sufficient basis on which to set aside a will, must be shown to have been without any evidence to support it. In a case where the testator asserted that he possesed such evidence, but never revealed it, held that no jury question was created.

Firestine v Atkinson, 206-151; 218 NW 293

Insane delusion—evidence—sufficiency. An insane delusion sufficient to overthrow and invalidate a will, is, generally speaking, a wholly unfounded belief to which testator clings in spite of all disproving evidence, and which controls the making of the will.

Lockie v Baker, 208-1293; 227 NW 160
Hult v Ins. Co., 213-890; 240 NW 218

(b) PRESUMPTION AND BURDEN OF PROOF

Burden of proof. Evidence held insufficient to cast upon proponents of a will the burden of establishing testamentary capacity.

In re Shields, 208-607; 224 NW 69

Mental incapacity — evidence — sufficiency. Principle reaffirmed that the courts will zealously guard the right of every person to make such legal disposition of his property as he sees fit, and to that end will demand the production of very convincing evidence in support of the plea of mental incapacity interposed by strangers to the transaction.

Keating v Augustine, 213-1336; 241 NW 429

Guardianship—presumption. One who is under guardianship because of mental defect is presumptively incapable of executing a valid will. Evidence pro and con held to sustain the presumption.

Brogan v Lynch, 204-260; 214 NW 514

Drunkard guardianship—incapacity not presumed—fact question. One under guardianship is not necessarily incompetent to make a will; for instance, as to a drunkard under guardianship incapacity is not presumed. Evidence failed to establish that testator was intoxicated when he made his will, and his competency, being a fact question when decided in his favor by the court after waiver of a jury, will not be disturbed on appeal.

In re Willer, 225-606; 281 NW 155

Negativing presumption of continued insanity. A testator will not be presumed insane at the time he executed his will because of the production of a finding some 26 years prior thereto by the commissioners of insanity that he was insane and "a fit subject for treatment in the hospital for the insane", (1) when there is no showing that his condition at said remote time was one of general and settled unsoundness of mind, and (2) when it appears that he was then confined in a private hospital for some seven months, and left the hospital in a state of mental soundness, and thereafter at all times managed his business as a normal man.

Waters v Waters, 201-586; 207 NW 598

Burden of proof—failure to meet. In an action to set aside the probate of a will, and to cancel a deed (1) on the ground of the mental

incapacity of the testator-grantor, and (2) on the ground of the undue influence of the devisee-grantee, the burden rests on plaintiff to establish at least one of said grounds. Evidence quite elaborately reviewed and held, plaintiff had failed to meet the burden of proof resting upon him.

Walters v Heaton, 223-405; 271 NW 310

Will contest—burden of proof—testamentary capacity—how determined. In a will contest, after proponent's formal proofs, the burden of showing lack of mental capacity of testatrix is on contestant. Mere deterioration in physical or mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable to intelligently comprehend the estate of which he is possessed and the natural objects of his bounty and to intelligently exercise judgment and discretion in the disposition of his property.

In re Behrend, 227-1099; 290 NW 78

Assignment of property and will—mother to son transfer—burden of proof. In an action by one son to set aside an assignment of his mother's property, based on a contract for her support made with another son, which assignment was paralleled by a similar provision in her will, duly probated, an answer and general denial of the donee son, to the effect that the disinherited son had no rights thereto under the will, placed on the disinherited son, in order to establish his right to relief, the burden of showing the invalidity of the will on account of mental incapacity or undue influence.

Reed v Reed, 225-773; 281 NW 444

Lack of education—proponents' burden. In an action to contest a will under which one son receives over eight times as much property as the children of his deceased brother and evidence discloses dispute as to testator's understanding of English language in which the will is written, and such circumstances lead the court to suspect testator may have been imposed upon, an additional burden is imposed upon proponents of will to show testator was acquainted with the provisions of the will.

In re Younggren, 226-1377; 286 NW 467

(c) EVIDENCE—ADMISSIBILITY, WEIGHT, AND SUFFICIENCY

1 Mental Capacity in General

Distribution of property—mental weakness. Mere weakness of mental power will not constitute mental incapacity if the person retains mind enough to know and comprehend in a general way the nature and extent of his estate, the natural objects of his bounty, and the distribution he desires to make of his property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Jury question. Evidence held to present a jury question on the issue of testamentary capacity.

In re Shields, 208-607; 224 NW 69

Lack of education. In an action to contest a will under which a son receives eight times as much property as the children of a deceased son and the evidence is disputed as to whether testator had sufficient understanding of English that when will was read over to her in English, unexplained, she fully understood its contents, a jury question is presented.

In re Younggren, 226-1377; 286 NW 467

Mental competency and undue influence. Evidence held to present no jury question in a will contest as to the mental competency of the testator, or as to any undue influence in the execution of the will.

Woodman v Morgan, 200-500; 203 NW 298

Evidence — insufficiency. Evidence reviewed and held insufficient to make a jury question on the issue of testamentary capacity.

Green v Ellsworth, 221-1098; 267 NW 714

Evidence — sufficiency — jury question. Record reviewed and held to present a jury question on the issue of mental competency to execute a will.

Diesing v Spencer, 221-1143; 266 NW 567

Jury question. The mere fact that there is some testimony of mental unsoundness does not necessarily require the question to be submitted to the jury.

In re Diver, 214-497; 240 NW 622

Evidence—sufficiency. Evidence held insufficient per se to establish testamentary incapacity.

Walkington v Ide, 206-645; 220 NW 5
In re Kenney, 213-360; 239 NW 44; 78 ALR 1189
White v White, 213-1244; 241 NW 1
Bishop v Scharf, 214-644; 241 NW 3

Unsound mind and undue influence. In proceeding to probate a will, where the will was set aside on ground testatrix was of unsound mind and acted under undue influence, and proponent did not seek to withdraw issue of undue influence from jury, verdict could not be set aside, tho evidence was insufficient to sustain verdict on ground of undue influence alone.

In re Hepp, (NOR); 249 NW 129

Instructions. Instructions reviewed generally, and held to properly present the rules for weighing the testimony on the issue of testamentary capacity.

In re Shields, 208-607; 224 NW 69

Directed verdict. When the real issue is as to testator's mental competency, the court

III TESTAMENTARY CAPACITY—cont.
(c) EVIDENCE — ADMISSIBILITY, WEIGHT, AND SUFFICIENCY—continued
1. Mental capacity in general—concluded

should sustain the will, by a directed verdict, when a contrary jury verdict would be without adequate evidentiary support.

In re Fitzgerald, 219-988; 259 NW 455

Evidence of unsound mind — jury question. Evidence tending to show a lessening of testator's physical and mental powers, eccentricities, childishness, forgetfulness, unclean personal habits, and inability to transact business generally, is not necessarily sufficient to generate a jury question on the issue of a testator's mental competency to execute a will. Evidence reviewed at length and held insufficient.

In re Johnson, 222-787; 269 NW 792

Lack of testamentary capacity—evidence sufficiency—jury question. On appeal from directed verdict against contestant in a will contest where the evidence shows, by testimony of physician who attended testatrix over a period of years, that testatrix was a woman prematurely old at 66, suffering from toxic goiter and other ailments which prevented proper nutrition of her organs and kept her body poisoned, that such ailments were of progressive nature resulting in rapid increase of her apparent age and accelerated physical and mental decline and that in his opinion testatrix's mentality was impaired to such extent at time of execution of will she was of unsound mind, held, that evidence of lack of testamentary capacity was sufficient to support a verdict for contestant, if jury so found, and refusal to submit case to the jury was erroneous.

In re Behrend, 227-1099; 290 NW 78

Drunkenness. Evidence held insufficient to establish mental incompetency owing to drunkenness.

Matthewson v Fahnestock, 217-348; 251 NW 643

Assumption of capacity. When the sole issue in a will contest is that of undue influence, the court is not in error in instructing that the jury should consider as an established fact that the testator was possessed of testamentary capacity at the time of the execution of the will.

In re Muhr, 218-867; 256 NW 305

Mental incapacity and undue influence—evidence insufficient. Evidence reviewed, as to the mental capacity of a 90-year-old mother who, to the exclusion of one son, willed and assigned her property to another son, in exchange for life support and care, and held that she still was sane and that the charge of undue influence was not substantiated.

Reed v Reed, 225-773; 281 NW 444

Will contest—burden of proof—testamentary capacity—how determined. In a will contest, after proponent's formal proofs, the burden of showing lack of mental capacity of testatrix is on contestant. Mere deterioration in physical or mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable to intelligently comprehend the estate of which he is possessed and the natural objects of his bounty and to intelligently exercise judgment and discretion in the disposition of his property.

In re Behrend, 227-1099; 290 NW 78

Mental capacity to contract—existence—burden to disprove. Mental weakness from disease does not deprive a person of capacity to dispose of property until the power of intelligent action is destroyed, and executor relying thereon to recover gift made by decedent to sister has burden of proof.

Wilson v Findley, 223-1281; 275 NW 47

Adjudication of insanity. An adjudication or finding by the commissioners of insanity is admissible on the issue of testator's testamentary capacity, but is subject to explanation.

Waters v Waters, 201-586; 207 NW 598

Instructions — "comprehending legal form". The court should not say to a jury that "testator need not be able to comprehend the provisions of his will in their legal form".

Blakely v Cabelka, 203-5; 212 NW 348

Neutralizing effect of immaterial testimony —refusal—effect. Letters written by the son of a testator 20 years prior to a will contest, and requesting financial help from the parent, (while admissible as bearing on the issue of unequal distribution of the estate) are wholly immaterial to the issue of want of testamentary capacity and undue influence, and a refusal to so instruct constitutes error.

In re Thompson, 211-935; 234 NW 841

2 Opinion Evidence

Opinion evidence—usurping jury function. No witness, expert or otherwise, in testifying to matters bearing on the soundness or unsoundness of mind of the testator, must be permitted to testify to the existence or nonexistence of the very facts which the jury must determine.

Hann v Hann, 202-807; 211 NW 495

Nonexpert opinion. A nonexpert may base his opinion that a testator is sane on a recital of his acquaintance and knowledge of the testator. A nonexpert must base his opinion of insanity on a recital of facts which indicate insanity.

In re Mott, 200-948; 205 NW 770
Zander v Cahow, 200-1258; 206 NW 90
In re Diver, 214-497; 240 NW 622

Nonexpert opinion — insufficient basis. A nonexpert witness may not express an opinion that a testator was of unsound mind on a recital of facts which pertain solely to his physical condition.

Hann v Hann, 202-807; 211 NW 495
In re Paczoch, 202-849; 211 NW 500

Nonexpert opinions—credibility. The opinion of a nonexpert witness that a testator was of unsound mind is no stronger than the facts testified to by the witness as a basis for such opinion.

Bailey v Bank, 208-1265; 227 NW 129

Nonexpert opinion as to insanity—necessary foundation. Nonexpert opinion as to unsoundness of mind is inadmissible unless the nonexpert witness first details such facts as tend, in the judgment of the court, to show an abnormal state of mind of the person whose mentality is under investigation; and the discretion of the court will not be interfered with unless there is a clear showing of abuse of such discretion.

Campfield v Rutt, 211-1077; 235 NW 59

Unqualified expert. A physician may not testify that a person was, in his opinion, mentally unsound, on the sole basis that he had at times casually noticed the person on the street, but had paid no attention to, or ever made any examination of, his mental condition.

In re Cooper, 200-1180; 206 NW 95

Hypothetical question — fundamentally required instructions. Expert testimony tending to show that a party is of unsound mind, based solely on a hypothetical state of fact, is wholly without value unless the jury finds that the assumed state of fact is true, and fundamental error results in failure so to instruct.

Anspach v Littler, 215-873; 245 NW 304

Harmless error—noninjurious ruling. In an attempt to prove the unsoundness of mind of a testator, the striking of portions of a hypothetical question becomes inconsequential when the witness answers that, in his opinion, the testator was of unsound mind.

Blakely v Cabelka, 203-5; 212 NW 348

Examination of expert — questions — form and sufficiency. On the trial of the issue whether a deceased was mentally competent to execute a will, counsel has the right to shape his hypothetical questions to his expert witnesses in accordance with his (counsel's) theory of the case,—the right to embrace in said questions such proven facts as he deems relevant and material to said theory and the right to omit all other facts, provided his questions as finally framed furnish adequate basis for an expert opinion as to mental soundness.

Diesing v Spencer, 221-1143; 266 NW 567

Evidence—erroneous exclusion. On the contest of a will, it is error, on the issue of testamentary capacity, to exclude the opinions of qualified witnesses as to the mental soundness of testator and testimony tending to show increasing feebleness and childishness with advancing years; but such error becomes quite immaterial when the testimony admitted and rejected fails to warrant a finding that testator was so lacking in mental capacity when the will was executed that he did not (1) intelligently know the property possessed by him, (2) intelligently know the natural objects of his bounty, and (3) intelligently exercise judgment and discretion in the disposition of his said property.

In re Cooper, 200-1180; 206 NW 95

Harmless exclusion—evidence otherwise in record making jury question. Error in striking testimony is harmless when the facts sought are otherwise in the record, and when if admitted the record would still present a jury question.

In re Willer, 225-606; 281 NW 155

3 Mental Condition Prior or Subsequent to Execution of Will

Unusual life history — contest. Testimony relative to testator's unusual life history, involving inter alia two commitments to and discharges from an asylum for the insane, and events subsequent thereto, held insufficient to show that testator was lacking in capacity to execute a valid will.

In re Haga, 222-1313; 271 NW 296

Adjudication of insanity—parol explanation. An adjudication of insanity on the part of a testator which is silent as to the character of the insanity may not, of course, be contradicted, but may be explained by showing the nature and extent of testator's affliction at the time of such adjudication.

Waters v Waters, 201-586; 207 NW 598

Insufficient evidence. When two daughters had cared for their aged mother for about 20 years while the mother was in good health, neat in appearance, mentally alert, and did much reading in a foreign language altho she could not read English, and the daughters went with the mother to a lawyer's office, but remained outside while deeds were drawn up by which the mother granted property to them to be effective after her death, there was no showing of mental weakness, fraud, or undue influence upon which to base a decree setting aside the deeds.

Tedemandson v Morris, 227-774; 289 NW 1

4 Unjust, Unnatural, or Unreasonable Disposition

Unreasonableness of will. On the issue whether a deceased was mentally competent to execute the will in question, evidence of the property owned by the principal beneficiaries under said alleged will may be admissible as

III TESTAMENTARY CAPACITY—cont.
(c) EVIDENCE — ADMISSIBILITY, WEIGHT, AND SUFFICIENCY—concluded

an item of evidence having some bearing on the allowable query whether the deceased had failed (and if so, why she had failed) to distinguish between the relative needs of those having claims on her bounty.

Diesing v Spencer, 221-1143; 266 NW 567

5 Declarations of Testator

Declarations — rejection. Written memoranda made by a witness which it is claimed were dictated by the testatrix and which pertained to her expressions concerning the making of a will are properly rejected.

Bailey v Bank, 208-1265; 227 NW 129

Declarations by testator — general admissibility. Great latitude is permitted in will contests in the introduction of statements made by a testator, and they are admissible, not as proof of the facts alleged therein, but as tending to throw light on the condition and attitude of mind of the person making them and as bearing on the question of the mental capacity of such person to execute a valid will.

Diesing v Spencer, 221-1143; 266 NW 567

6 Declarations of Proponents, Devisees, Legatees, and Contestants

Exclusion of hearsay. Testimony by a will contestant to the effect that a subscribing witness to the will had told him that testator had stated to the subscribing witness that she (testator) did not want contestant about her premises is properly excluded.

Bailey v Bank, 208-1265; 227 NW 129

IV UNDUE INFLUENCE

(a) UNDUE INFLUENCE IN GENERAL

Discussion. See 12 ILR 430—Proof and presumptions of undue influence

Definition. Influence, to be "undue", within the meaning of the law of wills, must be equivalent to moral coercion, must operate at the very time the will is made, and must dominate and control the making of it.

Wackman v Wiegold, 202-1391; 212 NW 122

Rule of sufficiency. Undue influence, in order to be sufficient to overthrow a will, must take such form and be of such nature that the will of the wrongdoer is substituted for the will of the testator. The mere presence of the devisee (a husband) in the room when the will was executed, and the fact that the testator had made a former will, more advantageous to the contestant, are not sufficient to establish undue influence.

Hann v Hann, 202-807; 211 NW 495
Wolfe v Shroyer, 206-1021; 221 NW 546
Worth v Pierson, 208-353; 223 NW 752
Cookman v Bateman, 210-503; 231 NW 301
In re Diver, 214-497; 240 NW 622
In re Ramsdell, 215-1374; 244 NW 744

Mental competency and undue influence—evidence. Evidence held to present no jury question in a will contest as to the mental competency of the testator, or as to any undue influence in the execution of the will.

Woodman v Morgan, 200-500; 203 NW 298

Free agency destroyed. Influence, to become "undue", must in some degree destroy testator's free agency. Opportunity and disposition to employ undue influence, and mere persuasion and importunity, are insufficient.

In re Mott, 200-948; 205 NW 770

Insufficient proof. Principle reaffirmed that opportunity and disposition to exercise undue influence, plus persuasion and importunity as to the disposition of testator's property, are not sufficient, in and of themselves, to establish undue influence.

In re Muhr, 218-867; 256 NW 305

Insufficient evidence. When two daughters had cared for their aged mother for about 20 years while the mother was in good health, neat in appearance, mentally alert, and did much reading in a foreign language altho she could not read English, and the daughters went with the mother to a lawyer's office, but remained outside while deeds were drawn up by which the mother granted property to them to be effective after her death, there was no showing of mental weakness, fraud, or undue influence upon which to base a decree setting aside the deeds.

Tedemandson v Morris, 227-774; 289 NW 1

Solicitation, etc. Mere solicitation, request, or importunity is not sufficient to invalidate a will unless it takes such form that the will of the wrongdoer is substituted for the will of the testator.

In re Paczoch, 202-849; 211 NW 500

Undue influence as phase of fraud. Undue influence, a phase of actual fraud, will invalidate a transaction between persons in a confidential relationship.

Merritt v Easterly, 226-514; 284 NW 397

Abuse of confidence forfeits gain. Where a confidential relationship results in one gaining an influence over another, and the one gaining the influence abuses it to the disadvantage of the other, he will not be permitted to retain the fruits of his advantage. Held, no abuse of confidence.

Reeves v Lyon, 224-659; 277 NW 749

(b) PRESUMPTION AND BURDEN OF PROOF

Burden of proof. Burden of proving undue influence, and its invalidating effect on a transaction, rests on him who makes the allegation.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Burden of proof. He who alleges that a will was the result of undue influence must establish (1) the undue influence, and (2) that

the undue influence operated on the mind of the testator at the very time the will was executed,—in fact, that the will was the will of the undue influencer, and not the will of testator.

In re Cooper, 200-1180; 206 NW 95
Hult v Ins. Co., 213-890; 240 NW 218

Burden of proof. A party alleging undue influence in the execution of a will must not only establish it, but must show that it operated on the mind of the testator at the very time the will was executed, and to such an extent that the will was the result thereof.

Bailey v Bank, 208-1265; 227 NW 129

Assignment of property and will—mother to son transfer—burden of proof. In an action by one son to set aside an assignment of his mother's property, based on a contract for her support made with another son, which assignment was paralleled by a similar provision in her will, duly probated, an answer and general denial of the donee son, to the effect that the disinherited son had no rights thereto under the will, placed on the disinherited son, in order to establish his right to relief, the burden of showing the invalidity of the will on account of mental incapacity or undue influence.

Reed v Reed, 225-773; 281 NW 444

Proponents' burden. In an action to contest a will under which one son receives over eight times as much property as the children of his deceased brother and evidence discloses dispute as to testator's understanding of English language in which the will is written and such circumstances lead the court to suspect testator may have been imposed upon, an additional burden is imposed upon proponents of will to show testator was acquainted with the provisions of the will.

In re Younggren, 226-1377; 286 NW 467

(c) EVIDENCE—ADMISSIBILITY, WEIGHT, AND SUFFICIENCY

1 In General

Insufficient evidence.

In re Wientjes, 206-1314; 221 NW 935
In re Shields, 208-607; 224 NW 69
White v White, 213-1244; 241 NW 1
In re Diver, 214-497; 240 NW 622

Unsound mind and undue influence. In proceeding to probate a will, where the will was set aside on ground testatrix was of unsound mind and acted under undue influence, and proponent did not seek to withdraw issue of undue influence from jury, verdict could not be set aside, tho evidence was insufficient to sustain verdict on ground of undue influence alone.

In re Hepp, (NOR); 249 NW 129

Opportunity, etc. Neither disposition and opportunity to exercise undue influence nor persuasion and importunity will generate a jury question on the issue of undue influence in the execution of a will.

In re Johnson, 201-687; 207 NW 748

Fraud constituting undue influence. Whether a will induced by fraudulent representations may be set aside because of fraud, altho the evidence is insufficient to constitute undue influence, quaere. Conceding the affirmative, evidence held insufficient to show such fraud.

Worth v Pierson, 208-353; 223 NW 752

Duress. The fact that a devisee furnished a home to testator, and at times counseled with him in a general way, is quite insufficient to justify the court in submitting the issue of duress.

In re Haga, 222-1313; 271 NW 296

Age of grantor. In an action contesting deeds on the ground of undue influence, the age of the grantor is an important consideration, but it is not conclusive.

Tedemandson v Morris, 227-774; 289 NW 1

2 Unequal, Unreasonable, or Unnatural Disposition

Lack of education or physical defects. In an action to contest a will under which one son receives over eight times as much property as the children of his deceased brother and evidence discloses dispute as to testator's understanding of English language in which the will is written and such circumstances lead the court to suspect testator may have been imposed upon, an additional burden is imposed upon proponents of will to show testator was acquainted with the provisions of the will.

In re Younggren, 226-1377; 286 NW 467

3 Declarations of Testator

Declarations of testator. Declarations of a testator that he intended to make disposition of his property in a manner different than that provided in the subsequently executed will are inadmissible on the issue of undue influence.

In re Diver, 214-497; 240 NW 622

Statements of intention to devise to others. Statements by a person of his intention to leave his property to persons other than to the beneficiaries named in his will, are not admissible, as tending to establish undue influence in the execution of the will, but, undue influence being established, prima facie, such statements may be admissible as tending to show testator's susceptibility to such influence and his capacity to resist it.

In re Johnson, 222-787; 269 NW 792

4 Declarations of Proponents, Devisees, Legatees, and Contestants

Declarations of beneficiary. Declarations of a testamentary beneficiary which tend to show that he employed undue influence on testator in order to secure the execution of the will are inadmissible when the will carries separate

IV UNDUE INFLUENCE—concluded

(c) EVIDENCE — ADMISSIBILITY, WEIGHT, AND SUFFICIENCY—concluded

4 Declarations of Proponents, et al.—concluded

and independent bequests to beneficiaries other than the declarant.

Albright v Moeckly, 202-565; 210 NW 813
Wackman v Wiegold, 202-1391; 212 NW 122

Insufficient showing. The fact that prior to the execution of a manifestly inequitable will the chief beneficiary thereof was a chronic complainer to the effect that testator had done nothing for her, but had done much for her brother, and that she would see to it that she got all of testator's property, is not, in and of itself (in view of the provisions of the will), sufficient to make a prima facie case of undue influence in the execution of the will.

McCollister v Showers, 216-108; 248 NW 363

(d) JOINT SUBMISSION OF MENTAL INCAPACITY AND UNDUE INFLUENCE

Submission of dual issues. Testimony which supports the issue of undue influence necessarily has material bearing on the supported issue of the testamentary capacity of an aged and infirm person, but both issues are properly submitted on supporting testimony.

Brogan v Lynch, 204-260; 214 NW 514

Burden of proof—failure to meet. In an action to set aside the probate of a will, and to cancel a deed (1) on the ground of the mental incapacity of the testator-grantor, and (2) on the ground of the undue influence of the devisee-grantee, the burden rests on plaintiff to establish at least one of said grounds.

Walters v Heaton, 223-405; 271 NW 310

V CONSTRUCTION OF WILLS

(a) CONSTRUCTION IN GENERAL

Discussion. See 15 ILR 361—"Die without issue"; 16 ILR 195—Decree determining heirs, distribution; 21 ILR 552—Equity jurisdiction; 22 ILR 543—Renunciation of life estate

Probate court—jurisdiction. Where a clear and unambiguous will is admitted to probate and administration is being had thereon in probate court, the jurisdiction of such court to determine any rights thereunder, and to administer and direct the disposition of the property involved, cannot be interfered with by a court of equity.

Anderson v Meier, 227-38; 287 NW 250

Nonnecessity to construe. In equitable action for construction of wills of deceased husband and wife, where husband's will provided for payment of debts and funeral expenses and devised to his wife all his estate, and where wife's will contained certain specific bequests and directed that remainder and after-acquired property be divided into equal shares for distribution, held, both wills to be clear and unambiguous and therefore not open to construction. Actions for that purpose are entertained by a court of equity or probate only when there is uncertainty or ambiguity.

Anderson v Meier, 227-38; 287 NW 250

Absence of necessary parties bar to construction.

Windsor v Barnett, 201-1226; 207 NW 362

Disinterested party without standing. One who is adjudged to have no interest under a will may not object to a construction placed thereon by the court.

Schroeder v Cable, 211-1107; 235 NW 63

Lex rei sitae. The title to real estate in this state under a will must be determined by the courts of this state, and under the law of this state.

Scofield v Hadden, 206-597; 220 NW 1

What law governs—lex rei sitae. Whether a legatee has the legal right to elect to take real estate instead of the proceeds of said real estate will be determined by the lex rei sitae.

In re Warner, 209-948; 229 NW 241

Conflict of laws—reaching majority—law of testator's domicile controls. When the property is situated and the testator was domiciled in Iowa, provisions of the will as to real and personal property and question as to named devisee attaining majority are to be determined according to the law of testator's domicile.

Boehm v Rohlfs, 224-226; 276 NW 105

Time from which will speaks—value of realty bequest determined as of date of testator's death. Where, prior to his death, testator had given land of the value of $15,600 to 4 of his 5 children and directed his executors to purchase, for a daughter who had rejected partial distribution before his death, good Iowa land of the value of $15,600, the will, which was clear and definite as to the intention of testator, spoke as of date of testator's death, and the value of $15,600 fixed for land to be purchased for daughter was required to be determined as of the date of testator's death.

In re Holdorf, 227-977; 289 NW 756

Devise identical with statute of descent—effect. A testamentary devise is inoperative when the property devised is exactly identical with the property which the statute law of descent grants in the absence of a will. If there be not such identity, the devise is operative.

Wehrman v Farmers & M. Bank, 221-249; 259 NW 564; 266 NW 290

Survivorship and substitution. The heirs of a devisee cannot be deemed to be substituted for the devisee (§11861, C., '24) when it appears that the testator and the devisee perished in a common disaster, and that there is no evi-

dence that the devisee died before the testator died.

Carpenter v Severin, 201-969; 204 NW 448; 43 ALR 1340

Devise to class individually named. A devise to a class, the members of which are individually named, is presumptively a separate devise to each separate individual.

Friederichs v Friederichs, 205-505; 218 NW 271

Named beneficiaries—not "gift to a class". Where a will makes a gift to beneficiaries by name, the gift is not one to a class, even though the individuals named possess some quality or characteristic in common.

Anderson v Anderson, 227-25; 286 NW 446

Disinheriting not favored by court. In construing wills the court will not look favorably upon a construction tending to disinherit those who would take under the law had there been no will.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Intestacy avoided when possible. Courts will construe wills so as to avoid intestacy if possible. However, where the will is plain and the meaning of the testator free from doubt, and property is conveyed for lifetime only, without any gift over, the will can be construed only so as to make the remainder over intestate property.

Anderson v Anderson, 227-25; 286 NW 446

Intestacy because of erroneous adjudication. An unappealed adjudication, tho erroneous, that one clause of a will conveyed no personal property except the "household goods and effects" of testator necessarily results in intestacy as to all other forms of personal property when the residuary clause is specifically confined to a conveyance of testator's "real or mixed" property.

In re Scheiner, 215-1101; 247 NW 532

Failure of specific legacy. The general rule is that the failure of a specific legacy to vest or become effective causes the amount so released to fail.

Anderson v Anderson, 227-25; 286 NW 446

Construction. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one-third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Rule as to vesting. The use of the word "surviving" or an expression akin to it, in a will, to describe a class who are to take after an intervening life estate, refers to the termination of such life estate and not to the death of the testator. Such use indicates the testator intended to postpone the vesting of the gift over to the time when the life estate would end. However, this is not a rule of substantive law but one of interpretation and therefore will never be used to defeat a contrary intention where one appears with reasonable certainty.

Smith v Harris, 227-127; 287 NW 255

Title under will (?) or law of descent (?)—attending rights. Devisees whose shares under a will are, both in quantity and quality, exactly the shares which they, in the absence of a will, would take under the statute law of descent, are deemed to take title, not under the will, but under the said statutes of descent—the worthier title—and so taking they necessarily take the statutory exemptions, if any, attending the property.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Issue of ownership—will—necessity to construe. In an equitable proceeding by a judgment creditor to discover property belonging to the judgment defendant, and to subject said property to the satisfaction of said judgment, the court, on the issue of ownership of property in question, may be called upon, and properly so, to construe a will—all necessary parties being before the court.

Bankers Tr. v Garver, 222-196; 268 NW 568

Devises—uncertainty—how cured. A devise for charitable purposes though apparently uncertain will be enforced if the court can from extrinsic evidence discover the testator's meaning.

In re Durham, 203-497; 211 NW 358

Uncertainty of titles not favored. Uncertainty as to titles to property is not favored and, when not in violation of the manifest intention of a testator, the court will construe a remainder to be vested rather than contingent, and will hold a lesser estate to be merged with the larger, or an estate for years to be merged with a remainder.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Devisees' or legatees' title under will—nonnecessity to file claim. A controversy over the ownership of property devised or bequeathed in a will is properly determinable in equity, and devisees or legatees of such property need not file claims against the estate therefor.

Carpenter v Lothringer, 224-439; 275 NW 98

Fee devised but alienation restricted—coexistence impossible. The fee simple title to real property cannot be devised coupled

V CONSTRUCTION OF WILLS—continued
(a) CONSTRUCTION IN GENERAL—concluded

with a restriction on alienation of said property.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Probate—what adjudicated—nonestoppel to construe will after final report. Probate of a will being conclusive only as to its due execution and publication, a petition to construe a will is not a collateral attack on the order of probate; and such petition may be filed after the executor's final report, before which the petitioners were not aware of the construction which the executor would place on the will and therefore no estoppel arises from permitting executor to proceed with administration of the estate.

Maloney v Rose, 224-1071; 277 NW 572

Subscribing witnesses—sufficiency of request to sign. A will, to be valid, must be witnessed at the request of testator; however, the request need not be spoken but may be by acquiescence, by act or motion, or even by his silence when he knows that the witnesses are signing, though at the request of another, and he makes no objections, but the question of due execution should be left to the jury when it develops from testimony that one witness signed at the request of a beneficiary and that testator may not have, in any manner, requested the witnesses to sign.

Burgan v Kinnick, 225-804; 281 NW 734

Property and rights exempt—life insurance. The formal statement in a will that testator's debts shall be paid out of his estate is wholly insufficient to justify the conclusion that testator intended to appropriate to the payment of his debts the avails of life insurance payable to his personal representatives or to his estate, even tho, as a matter of law, such avails do become a part of his estate.

In re Grilk, 210-587; 231 NW 327

Disposal of insurance payable to estate—specific legacy. When life insurance is payable to an insured's estate, he may specifically dispose of the proceeds other than as provided by statute, but there must be an agreement or assignment to contrary; however, a specific disposition of insurance proceeds by terms of a will satisfies such requirement. (§8776, C., '35.)

In re Clemens, 226-31; 282 NW 730

When annuity vests. A testamentary life annuity becomes vested on the date when the annuity becomes due.

In re Hekel, 205-521; 218 NW 297

Testamentary provision in re guardianship. A testamentary request that "the court" appoint a guardian of the property devised to minors does not give the presiding judge a personal power to appoint, but contemplates an appointment by the court acting as a judicial tribunal.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Establishing claim against deceased's realty—not action to construe will. In an equity action to establish a claim against deceased's real estate for services rendered deceased's widow to whom deceased devised such realty for life, with right to dispose of real estate for her necessary support, held, such action was not a "suit for construction" of will, merely because trial court's opinion mentioned word "construction", but not in such manner as to indicate that trial court held action to be for that purpose. A will which in plain and uncertain terms makes disposition of property is one which needs no construction.

Hoskin v West, 226-612; 284 NW 809

Codicil—improper delegation of duties to executor. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Approval of executor's report not construction of will. The fact that the court had approved an executor's report, wherein he had attempted to relieve an estate of inheritance tax on the ground that all devises in the will were contingent, does not mean that such holding is a construction of the will, since the construction of the will was not in issue.

Flanagan v Spalti, 225-1231; 282 NW 347

(b) GENERAL PRINCIPLES OF CONSTRUCTION

Discussion. See 13 ILR 90—Individuals named in class gifts

Intention of testator. Intention of testator governs construction of will when not in contravention of some established rule of law or public policy.

Bell v Bell, 223-874; 273 NW 906
Smith v Harris, 227-127; 287 NW 255

General rule. In the construction of a will every provision thereof must be given effect, if possible, in order that the actual intention of the testator—the pole star of all construction—may govern.

In re Dodge, 207-374; 223 NW 106

Intention of testator. In construing provisions of a will, precedents and principles of interpretation are nothing more than aids employed as a means of ascertaining the expressed intent of the testator.

Smith v Harris, 227-127; 287 NW 255

Testator's intention. In construing a will the principal concern will be to ascertain and determine the intention of the testator, and it is the duty of the court, if it be reasonably possible, to give effect to all of the will's provisions.

Anderson v Anderson, 227-25; 286 NW 446

Construction—when unnecessary. It is not necessary to construe a will where the intention of the testator is expressed in clear and unequivocal language.

Anderson v Anderson, 227-25; 286 NW 446

Court's duty — testator's plain intention — technical words. Where the plain meaning of a will is to devise a life estate only, the supreme court will be bound by the plainly expressed intention of the testator—technical words being used in their technical sense.

Anderson v Anderson, 227-25; 286 NW 446

Testator's intention. When the language of a will specifically devises a life estate to three named children of the testator as tenants in common, and the intention of the testator is clearly and unequivocally expressed that each of said children was entitled under the will to an undivided one-third interest for life only, it is unnecessary to resort to other parts of the will for further construction of such provision.

Anderson v Anderson, 227-25; 286 NW 446

Testator's intention—ascertainment. The intentions of a testator must be ascertained from the terms of the will and such intentions must prevail. In a matter of doubtful construction, circumstances surrounding the execution of the will may be shown to aid in determining what the testator meant by the language used. The conduct of a testamentary trustee is not such a circumstance and is therefore not a material, evidential matter in determining testator's intention.

Freier v Longnecker, 227-366; 288 NW 444

Language plain and unequivocal—rules of construction inapplicable. It is a fundamental doctrine in the construction of wills that where language is plain and unequivocal, both in expression and meaning, there is no reason for construction and the rules of construction are inapplicable.

In re Holdorf, 227-977; 289 NW 756

Testator's intention—rules of construction—when used. Intention of testator will be determined from the actual language of the entire will, but if this is not possible, then rules of construction will be employed, not including rule in Shelley's case abrogated by statute.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Intention of testator—derived from entire instrument. The provisions of a will should be construed, not as standing alone, but as related to all other provisions of the will, so that the intent of the testator may be gathered from the entire instrument.

Smith v Harris, 227-127; 287 NW 255

Unqualified provision needs no construction. A testatrix who, in her original will devises:

1. Separate specific bequests to named nephews and nieces, and
2. The remainder of her estate to nine named nephews and nieces,

And later, by codicil, not only names four additional nephews and nieces as residuary legatees, but declares "it being my intention to divide my estate among all my nephews and nieces", must be deemed to have intended that nephews and nieces not named in the will or codicil should share in the residuary estate along with those named in the will or codicil as residuary legatees.

Reason: A will and a codicil constitute but one instrument. Every clause in a will must be given a meaning. No construction is necessary as to clause which is perfectly clear in expression and meaning.

In re Thomas, 220-50; 261 NW 622

Unambiguous will. Parol evidence bearing on the intent of a testator in an unambiguous will is wholly inadmissible.

Mann v Seiber, 209-76; 227 NW 614

Unambiguous will needs no construction. There is no occasion for an equity court to construe a will unless it appears that the will is ambiguous or uncertain in its terms.

First Methodist Church v Hull, 225-306; 280 NW 531

Nonnecessity to construe. In equitable action for construction of wills of deceased husband and wife, where husband's will provided for payment of debts and funeral expenses and devised to his wife all his estate, and where wife's will contained certain specific bequests and directed that remainder and after-acquired property be divided into equal shares for distribution, held, both wills to be clear and unambiguous and therefore not open to construction. Actions for that purpose are entertained by a court of equity or probate only when there is uncertainty or ambiguity.

Anderson v Meier, 227-38; 287 NW 250

Unambiguous terms—residuary legacy. The words "rest, residue, and remainder" are plain, unambiguous terms in a will providing a residuary legacy and need no construction.

Carpenter v Lothringer, 224-439; 275 NW 98

Punctuation as evincing intention. A comma may be so employed in a will as to be the fair equivalent of the words, "and also".

Buck v MacEachron, 209-1168; 229 NW 693

Informal will revealing animus testandi. An instrument, duly signed and witnessed, which

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(b) GENERAL PRINCIPLES OF CONSTRUCTION—continued

is ambulatory in character and revocable at pleasure, and passes an interest only upon the death of the maker, is a valid will.

In re White, 209-1210; 229 NW 705

Intention controlling as of time will is made. The rule of intention in construing wills has reference to intention at time of execution of will, interpreted in light of facts and circumstances existing at time will is made.

In re Keeler, 225-1349; 282 NW 362

Death—presumption as to time. A provision in a will as to how property shall pass in case of the death of a devisee or legatee, presumptively refers to a death which occurs prior to the death of the testator.

Moore v Dick, 208-693; 225 NW 845

Daughter's interest under will — intent of testator considered. In a suit in equitable attachment against the interest of a daughter under her father's will, the intent of the testator is to be considered in determining whether he intended the daughter to have any right other than to part of the income.

Friedmeyer v Lynch, 226-251; 284 NW 160

Surrounding circumstances—when used. In construing a will, the intention of the testator as it appears from the will must control and, if the language be doubtful, surrounding circumstances may be shown to aid in determining what the testator intended by the language used.

Starr v Newman, 225-901; 281 NW 830

Parol or extrinsic evidence—children, grandchildren, nephews—testator's meaning admissible. Where such terms as children, grandchildren, or nephews are used in a will or a deed, and there are both legitimates and illegitimates and the testator has full knowledge of such fact, and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption, but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of will, but also in the light of the circumstances surrounding the execution of the will, and parol evidence is admissible to prove the intent of the testator or grantor.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Misdescription of church as legatee—evidence supporting judgment. In probate proceedings where testator made bequests to the "First Adventis Church located on Bigley avenue in Charleston, West Virginia", whereas such church was located on Randolph street in Charleston, and Elmore Memorial Adventist Church was located on Bigley avenue, evidence sustained judgment that testator designated the First Adventis Church as legatee.

In re Canterbury, 226-586; 284 NW 807

Transposing clauses in order to ascertain intent. Where the residuary clause of a will grants a fee title, and is later followed by a clause empowering a third party to buy, on named terms, certain corporate shares of stock belonging to the deceased, the court will construe the will as tho the residuary clause were transferred to the end of the will, when such transposition clearly reflects the intent of the testator, and will avoid the claim that testator has granted an absolute fee and then, later, attempted the unallowable thing of controlling or clogging such fee.

In re Richter, 212-38; 234 NW 285

Partial invalidity—effect on valid part. The invalidity of a testamentary limitation—invalid because prohibited by the statute against perpetuities—will not affect the validity of preceding limitations which are otherwise valid, when it is manifest from the will that testator had no intent to make said preceding limitations dependent on said subsequent limitations—ultimately rejected as void.

Bankers Tr. v Garver, 222-196; 268 NW 568

Partial intestacy avoided. Will is to be construed if possible to avoid partial intestacy when language is uncertain or ambiguous, but where there is no ambiguity there is no room for construction.

Starr v Newman, 225-901; 281 NW 830

Intestacy avoided when possible. Courts will construe wills so as to avoid intestacy if possible. However, where the will is plain and the meaning of the testator free from doubt, and property is conveyed for lifetime only, without any gift over, the will can be construed only so as to make the remainder over intestate property.

Anderson v Anderson, 227-25; 286 NW 446

Failure of specific legacy. The general rule is that the failure of a specific legacy to vest or become effective causes the amount so released to fail.

Anderson v Anderson, 227-25; 286 NW 446

Identifying legatee—reopening for widow's testimony. In an action to construe a will to determine which of two similarly named churches the testator intended to designate as a beneficiary, the evidence being closed when discovery is made that testator's widow, who though present in court but not testifying, had knowledge as to which church was intended to be designated, the trial court abuses its discretion by refusing to reopen to admit her testimony.

In re Canterbury, 224-1080; 278 NW 210

Devise to class—predeceased children—intention from antenuptial contract. A testa-

tor's intention, when ascertainable is controlling, and the general rule which limits a devise to a class to only such devisees as are alive at testator's death, is not applicable where a contrary intent appears. So held in construing a will dividing the residue "among my children" where an antenuptial contract mentioned in the will, altho an extrinsic matter, was admitted to show testator's intention to include the heirs of his predeceased children among his children.

In re Huston, 224-420; 275 NW 149

Remainder to class — rule as to vesting. When there is an immediate gift to a class of persons, the gift vests in the members of that class who are existent at the time testator dies, unless a different intention appears from the context of the will. So held where the gift was "to the children living of my brothers and sisters living or dead".

In re Gordon, 213-6; 236 NW 37

Gift to a class. Where testator devised property to his wife and provided that "after the death of my said wife * * * I hereby give * * * said remaining property to my surviving children, but if there be no surviving children then said property shall go to my heirs at law * * *" and where the widow of testator's son, who predeceased the testator's wife, brought partition action and claimed interest in property through testator's son under said provision of testator's will, held, that the remainder "to my surviving children" constituted a gift to a class and did not refer to those children surviving the testator but instead referred only to those children surviving his wife, hence it followed that the son, who outlived the testator but predeceased testator's wife, took no part of the remainder and that upon the son's death intestate no interest therein passed to his widow.

Smith v Harris, 227-127; 287 NW 255

Named beneficiaries. Where a will makes a gift to beneficiaries by name, the gift is not to a class, even though the individuals named possess some quality or characteristic in common.

Anderson v Anderson, 227-25; 286 NW 446

Intention of testator—remainders—"surviving grandchildren" interpreted. Where a will giving life estates to testatrix's surviving spouse and children provides on termination of the life estates that fee title shall pass "to the surviving grandchildren", this means surviving grandchildren of testatrix as a class and does not mean that in each separate tract the surviving children of that respective life tenant take the remainder, nor do testatrix's heirs take as a whole under rules of descent as in cases of intestacy.

Bell v Bell, 223-874; 273 NW 906

Construction—joint life tenants. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one-third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Demurrer admitting paternity of illegitimate child. In an application in probate to construe the word "grandchild" in a will which left the residuary estate to children and grandchildren of testatrix's deceased brother-in-law, and a contention that an illegitimate child of brother-in-law's son was included in such word "grandchild", a demurrer to the petition admitted allegations that brother-in-law's son was father of such illegitimate, and that testatrix knew of such relationship at time will was executed.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Named legatees surviving testator—legatee dead when will executed—heirs excluded. A will giving the residuary estate "unto those of the following named persons who are living at my death" will not be construed to include the heirs of one of those named persons on the ground that such particular named person was known by the testator to be dead at the time he made the will. This situation is not such a latent ambiguity as will warrant court in disregarding plainly expressed intent of testator to bequeath to named persons surviving testator.

In re Kubbernus, 224-1077; 277 NW 717

"Heirs" not synonymous with "children"—intention controlling. The word "heirs" when used in a will cannot be construed to mean "children" unless that was the manifest intention of testator gathered from a reading of the will as a whole.

Hudnutt v Ins. Co., 224-430; 275 NW 581

"Heirs" — inaccurate use of term — intent controls. A testamentary provision that testator's "heirs" shall participate in a specified trust fund will be deemed to include a granddaughter, even tho under the then existing circumstances she is not, technically, an heir, it appearing that testator had in other parts of his will listed his heirs and had therein included his said granddaughter.

Slavens v Bailey, 222-1091; 270 NW 367

Limitation on term "lawful heirs". A devise to "my lawful heirs", followed immediately by a specific enumeration of named children of testator, may, in view of the circumstances surrounding testator, necessitate a construc-

V CONSTRUCTION OF WILLS—continued
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tion that testator intended to exclude all his children except those specifically named.

Westerfelt v Smith, 202-966; 211 NW 380

"Death without heirs". Will construed and, in view of the environment of the testator and of the facts concededly known to him, held (1) that a provision to the effect that, if the beneficiary of a trust "dies without leaving any heirs", the remainder shall go to some old ladies' home, embraced a death either before or after the death of testator; and (2) that the term "heirs" must be construed as tho followed by the words "of his body".

In re Clifton, 207-71; 218 NW 926

Adopted child not direct heir. A devise to "my heirs", naming two sons and a daughter, with proviso that if the daughter die "without direct heirs", the property should be divided between the two named sons, carries no interest to an adopted daughter of the deceased daughter, the will clearly evincing testator's intention to devise his property to his own blood.

Cook v Underwood, 209-641; 228 NW 629

Residuary devise to "estate" of another. A clause in a will devising the residuary part of testator's estate "to the estate of my mother" passes nothing to the heirs of the mother.

Cookman v Lindsay, 215-564; 246 NW 268

Deed (?) or will (?). A warranty deed subject to a life estate in grantor's surviving spouse will not be deemed testamentary because of a clause wherein grantor ineffectually attempted to restrain the alienation of the land by the grantee.

Goodman v Andrews, 203-979; 213 NW 605

Deed (?) or will (?). An executed and delivered deed of conveyance in the ordinary form conveys an interest in praesenti—is not testamentary—even tho it provides (1) that "it shall not take effect until after the death" of the grantor, and (2) that the grantor does not "give up possession" to the grantee during the life of the grantor, and (3) that the grantor "reserves the use and income of the premises as long as he lives".

Hall v Hall, 206-1; 218 NW 35
Bardsley v Spencer, 215-616; 244 NW 275

"May"—"must". "May" cannot, manifestly, be given the imperative meaning of "must", unless there be substantial warrant for such construction.

Brickson v Schwebach, 219-1368; 261 NW 518

Precatory words. The provision of a will to the effect that the executor shall "see" that a named legacy is invested in a home for the legatee at a named place creates no trust, and must be deemed precatory only.

Davenport v Sandeman, 204-927; 216 NW 55

Precatory words—ineffectiveness and repugnancy. When property, real and personal, is absolutely and unconditionally devised, the subsequent expression by the testator of a naked "wish" that the devisee will make a named disposition of certain of the property will be treated as nugatory, both because the expression is a mere wish, binding on no one, and because, if it be deemed more than a mere wish it is repugnant to the absolute devise.

In re Campbell, 209-954; 229 NW 247

Trusts—precatory statements—legal effect. The construction of a testamentary trust cannot be controlled by a written, precatory statement made by the testatrix subsequent to the execution of the will and not even made a part thereof.

In re Whitman, 221-1114; 266 NW 28

Trust—precatory words as basis. Expression in a will, following an absolute devise of property, of an apparent wish that said devisee will, on his death, distribute said property among named persons, cannot be deemed to create a trust on behalf of said persons unless it is clear from the will as a whole that said so-called wish was not, in fact, a wish, but a mandatory direction.

In re Hellman, 221-552; 266 NW 36

Trusts—rent-free occupancy by beneficiary. A testamentary trust manifestly cannot be construed to authorize one of the beneficiaries to occupy a portion of the trust estate free of rent when the trust instrument contains no such authorization, but clearly provides that the net income of the entire trust estate shall be divided in a stated manner among named beneficiaries.

In re Whitman, 221-1114; 266 NW 28

Trusts—"net income" defined. "Net income" does not mean the general income of the estate without provision for the payment of just charges, taxes, and reasonable repair and upkeep. On the contrary, it means the income remaining, if any, after such charges and expenses are taken care of. (So held as to a testamentary trust which provided for the keeping of the trust estate intact and for the annual distribution of the net income.)

In re Whitman, 221-1114; 266 NW 28

Power of sale—repugnancy. There is no repugnancy between a testamentary provision to the effect that the executor may freely sell the testator's real estate and a provision to the effect that testator's wife shall be given the balance of the estate after certain charges are paid.

In re Wicks, 207-264; 222 NW 843

Equitable conversion and right to reconvert. When a testator directs that named real estate be sold by his executor and the entire proceeds be paid to a legatee, said legatee may make and enforce an election to take the real estate, instead of the proceeds, especially when such election does not interfere with the rights and duties imposed on the executor.

In re Warner, 209-948; 229 NW 241

Absolute devise with subsequent limitation —nonapplicability of rule. The rule of construction to the effect that a devise of property in fee is unaffected by a subsequent clause which seeks to limit the fee, has no application to a will which in one clause devises property without specifying any particular estate which the devisee shall take, and in a subsequent clause provides that the devised property shall be placed in trust for the benefit of the devisee and pass to named remaindermen on the death of the devisee.

In re McCauley, 213-262; 235 NW 738

Contradictory devises. An unconditional devise and bequest by testator to his wife of all of testator's property "in case she survives" testator necessarily renders nugatory all subsequent contrary devises and bequests in said will, when the wife survives testator.

Phillips v Phillips, 217-374; 251 NW 511

Absolute bequest—later repugnant provision disregarded. Where a codicil made an absolute bequest of a residuary estate to a county to be used in paving a highway, and a later provision in the codicil gave certain directions to the executor and imposed conditions for acceptance of the bequest by the county, such later conditions were repugnant and would defeat the purpose of the testator and must be disregarded when void in delegating power to the executor in violation of statute, and the intention of the testator as expressed in the first provision must be given effect to prevent intestacy.

Blackford v Anderson, 226-1138; 286 NW 735

Repugnant limitation following devise of property in fee—void. Principle reaffirmed that a testator cannot make an absolute devise of his property in fee and in a subsequent clause destroy or place a limitation on such title. The subsequent limitation is void for repugnancy.

In re Bigham, 227-1023; 290 NW 11

Irreconcilable provisions — controlling force of codicil. As between two irreconcilable provisions,—one in the will as originally executed, and the other in a codicil to said will,—the provision in the codicil must control as the last expression of the intent of the testator. So held where the irreconcilable provisions related to the right of a legatee and devisee to take his legacy and devise free from his debts to the estate.

In re Flannery, 221-265; 264 NW 68

Will and two codicils construed together—equivocal expressions of revocation. A will and first codicil were not revoked by a second codicil providing that it should prevail in case of conflict between it and the two previous instruments, and the three instruments stood as the final testamentary disposition of the testator with the second codicil displacing the others only insofar as it was clearly inconsistent with them, altho the second codicil was referred to as a "last will and testament" and declared the previous will and codicil to be revoked, as the revocation of a will depends on intent to be gathered from all the papers and attending circumstances and cannot be overridden by equivocal expressions of revocation.

Blackford v Anderson, 226-1138; 286 NW 735

Dependent relative revocation. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

Devise subject to unenforceable debts — requirements. The will of a spouseless testator will not be held to devise testator's homestead to his children subject to debts which could not be otherwise enforced against said homestead, unless the intent so to do is evidenced by testamentary language which is unequivocal and imperative. The usual and formal paragraph in the preliminary part of a will directing the payment of "all my just debts" is quite insufficient to evince such intent.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Devise of unidentified property — effect on residuary clause. A definite residuary clause in a will must be given effect as testator wrote it, even tho other paragraphs of the will make bequests of property which cannot be identified, and thereby the residuary legatee is unintentionally enriched.

In re Spahr, 210-17; 230 NW 434

Equitable conversion — reconversion. Real estate which has once been theoretically converted into personal property ipso facto by the terms of a will (which directed that the property be sold and the proceeds divided) is not necessarily reconverted into real estate by

V CONSTRUCTION OF WILLS—continued
(b) GENERAL PRINCIPLES OF CONSTRUCTION—concluded

the institution of partition proceedings for a sale of the land and a division of the proceeds, nor by an agreement in such proceedings, signed by the attorney of an heir whose interest was involved, to the effect that the land should be sold and the "interest" of such heir be held to abide the determination of such interest.

Dever v Turner, 200-926; 205 NW 755

Equitable conversion — nonapplicability of doctrine. The doctrine of "equitable conversion" will not be applied to a will (1) from a naked, nonmandatory power to sell the real estate; (2) when no absolute necessity to sell exists in order to execute the will; (3) when there is no such blending in the will of realty and personalty as to evince an intention by testator to create a fund out of both realty and personalty and to bequeath the same as money; and (4) when residuary beneficiaries will be detrimentally affected by the application of such doctrine, contrary to the intent of the testator.

In re Dodge, 207-374; 223 NW 106

Equitable conversion as necessity. The distribution provided in a will may conclusively imply a purpose on the part of testator to convert his real estate into money.

Emmack v Tish, 214-794; 243 NW 517

Equitable conversion under will. The proceeds of foreign real estate sold by an administrator with the will annexed, under explicit direction of the will, and for the purpose of making distribution under the will, must be deemed personalty with resulting consequence that the administrator is responsible therefor; and it is quite immaterial that he did not probate the will in said foreign state.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Equitable conversion—when doctrine applicable. A will which provides that "all (my) real estate * * * shall be divided as follows: $1,000 shall go to my son John, and the balance shall be divided equally among my other nine children" (naming them) works no equitable conversion of said real estate into personalty. Said provision in favor of John creates no absolute necessity to sell said real estate in order to execute the will.

Grady v Grady, 221-561; 266 NW 285

Equitable conversion—deduction from share. Tho testator's lands are, from the moment of testator's death, deemed equitably converted into personalty by a mandatory, testamentary direction to the executor to sell and divide the proceeds among testator's children, yet the rentals of said lands, accruing prior to an actual sale of the lands, belong to the estate, and in case the lessee be a legatee and fails to pay said rentals, the amount thereof may be deducted by the executor from the share of said legatee, a right which is superior to the right of one who, with knowledge of said rental proceedings, acquires an equitable lien of said legatee's share in the estate.

Ihle v Ihle, 222-1086; 270 NW 452

Equitable conversion—absolute necessity for required. A testator may, in his will, effect an equitable conversion as to his realty, or personalty, or both, (1) by explicitly directing the sale of the property and a division of the money thus and so, or (2) by so blending and treating both classes of property as to reveal an intention to effect such conversion, but if he does neither, no equitable conversion will be implied unless absolutely necessary in order to execute the will.

Brickson v Schwebach, 219-1368; 261 NW 518

Shares—mathematical formula for computing. When a will provides that twenty devisees shall share equally in the residue of the estate except that a named devisee shall have "a share and a half", the said residue must be divided by twenty and one-half. The quotient will represent the share of each of nineteen devisees, and the balance of the total residue will represent the share of the favored devisee.

In re Thomas, 220-50; 261 NW 622

Nondisposition of property—effect. An instrument which purports to be a will, but which not only neglects to make any disposition of property but specifically disclaims any intent to make such disposition, is not a valid will.

In re Manatt, 214-432; 239 NW 524

Nontestamentary instrument. A declaration of trust in and over real estate for the benefit of the trustor and named beneficiaries and a contemporaneously executed and delivered warranty deed to the same property to the trustee cannot be deemed a will even tho the trustor-grantor reserves in the declaration of trust complete control, management, and dominion over the property during his lifetime, even to the power to revoke the trust and to demand a reconveyance, or to dispose of the property by testament.

Keck v McKinstry, 206-1121; 221 NW 851

Joint and mutual wills. Will construed and held to be an individual will.

Mann v Seiber, 209-76; 227 NW 614

(c) NATURE OF ESTATE OR INTEREST CREATED

1 Estates in General

Discussion. See 1 ILB 87—Power of disposal

Perpetuities—limitations void ab initio. Testamentary attempts by means of limitations to create in property contingent interests or estates, which will not necessarily become vested within the period of time prescribed by the

statute prohibiting perpetuities, are futile, all such limitations being void ab initio. (§10127, C., '35.)

Bankers Tr. v Garver, 222-196; 268 NW 568

Share of devisee—per capita (?) or per stirpes (?). A devise which makes provision in a named amount for all the heirs of a known deceased daughter of testator's, and an identical provision in the same amount for each of several named living children, and then provides that the remainder of the estate shall be "equally divided between my above named children, their heirs or assigns share and share alike", precludes the heirs of the deceased daughter from taking per capita.

Canfield v Jameson, 201-784; 208 NW 369

Devise requiring taking per stirpes. A devise to testator's unnamed grandchildren by a living son; also to testator's unnamed grandchildren by a deceased son; and also to certain other of testator's individually named and living children, "share and share alike", will be deemed to devise to each set of grandchildren one child's share or portion. In other words, each set of grandchildren takes per stirpes and not per capita, such being the general indicated intent of the will as a whole; especially is this true in view of the law's favor for such result in case of doubt.

Claude v Schutt, 211-117; 233 NW 41; 78 ALR 1375

Conveyance and devise of same property. A deed of conveyance in the ordinary form and placed in proper escrow for delivery immediately after the death of grantor conveys full title even tho the grantor a few days after the execution of the deed devises the same property to the same grantee.

In re Champion, 206-6; 218 NW 37

Life estate (?) or fee (?). A devise of testator's entire estate to his wife, "for and during all the term of her natural life in fee simple", conveys an absolute estate—one in fee simple. (It is noted that the will makes no mention of a "remainder", and that no children had been born to the parties.)

Luitjens v Larson, 222-1320; 271 NW 239

Fee (?) or life (?). A testamentary devise, to testator's wife of specified real estate "to be and become the absolute property" of said wife, must be deemed to convey a fee simple estate unless accompanied by some other valid and enforceable provision manifesting a contrary intent. So held where the contrary intent was sought to be drawn from other provisions of the will which were either (1) precatory, or (2) repugnant to the granted fee.

Baker v Elder, 223-395; 272 NW 153

Equal standing of specific devises. Neither of two different, specific devises of real estate, irrespective of their particular location or position in the will, can be deemed junior or inferior to the other when neither is made subject to the other.

In re Glandon, 219-1094; 260 NW 12

Specific devise—liability for debts. A specific devise of real estate which not only devises the property, but requires the testator's estate to discharge the mortgage thereon, cannot, in case the estate and all nonspecific devises are insufficient to pay said mortgage and other debts, be construed as casting upon another specific devise of real estate which is not made subject to the former devise, the entire burden of discharging said mortgage and other debts. Each of said specific devises must bear said burden in the ratio of their separate value to their combined value.

In re Glandon, 219-1094; 260 NW 12

Particular estate. A "particular estate" is an estate for life or for years for the reason that it is only a small part or portion of the inheritance.

Anderson v Anderson, 227-25; 286 NW 446

Words "to own"—conveying absolute title. A devise of "one-half of all property I may own at the time of my death" to testator's wife "to own, hold and enjoy as her own", conveys an absolute title to one half of testator's estate.

In re Bigham, 227-1023; 290 NW 11

Prohibiting incumbrance. A testator who makes an absolute devise, of a certain interest in property, may not validly prohibit the devisee from thereafter incumbering the property.

Bogenrief v Law, 222-1303; 271 NW 229

Devise for charity—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good". Will construed and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library were conditions subsequent and not conditions precedent to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

Estate "to heirs of father at death of husband"—vested interest. A will devising a portion of an estate "to the legal heirs of my father to be distributed * * * at the death of my husband" vests this portion in such heirs of the father as were living at the time of testatrix's death—the father being dead at that time.

Flanagan v Spalti, 225-1231; 282 NW 347

Devisee predeceasing testator—rights of devisee's heirs. Where testator devised to his wife one half of all the property he should

V CONSTRUCTION OF WILLS—continued
(c) NATURE OF ESTATE OR INTEREST CREATED—continued
1. Estates in General—concluded

own at time of his death, "to own, hold and enjoy as her own", and when the wife predeceased him, her heirs inherited one half of all the property of the testator in fee simple, under the anti-lapse statute.

In re Bigham, 227-1023; 290 NW 11

Paragraph limiting devise to specific heirs—noneffect on devise to wife in preceding paragraph. Where, in a will, a testator devised to his wife one half of all the property owned at the time of his death, "to own, hold and enjoy as her own", and when, in subsequent paragraph "subject to clauses one and two of this will", he devised all of his property to named devisees or their children "in case of the death of any of the beneficiaries named herein" and, if no children, then to the other beneficiaries "named in this clause of the will equally", then, even tho devise to wife was not absolute, it was neither limited nor modified by the language bequeathing estate to named devisees, since the wife was excluded from such paragraph.

In re Bigham, 227-1023; 290 NW 11

Selling homestead for debts—necessity of election between will and dower. An order of court to an executrix to sell real estate, to pay claims, is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

Trusts which vest no inheritable interest in beneficiary. A testator who bequeaths directly to his wife a specific fund in trust, with directions to the wife to pay to their daughter for the latter's "care and support" such part of the accruing interest on said fund as the wife "shall deem advisable", and such part of the principal of said fund as the wife "shall deem advisable", will not be deemed to have intended to vest in the daughter any interest in said fund which would survive her death, it appearing as side lights that the daughter was debt-ridden, was possessed of an impecunious, inefficient, and likewise debt-ridden husband, and that the testator, prior to his death, had supported said daughter.

In re Bunting, 220-186; 261 NW 922

Unambiguous life income trust—annuity policy substitution nonpermissible. Under a clear, unambiguous will setting up a trust fund and providing for a $30-per-month bequest to be paid therefrom to a beneficiary as long as she lived, a different method of paying said bequest, by purchase of an annuity for said beneficiary, not permitted.

First Methodist Church v Hull, 225-306; 280 NW 531

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

2 Qualified, Defeasible, or Conditional Fee

Distinction between a vested and a contingent interest. In an action to partition land, it is not uncertainty of time of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks difference between a vested and a contingent interest.

Flanagan v Spalti, 225-1231; 282 NW 347

Restraint of marriage. That part of a devise to a testator's widowed daughter-in-law which provides that the property shall pass to her children upon her remarriage is not void because in undue restraint of marriage.

Anderson v Crawford, 202-207; 207 NW 571; 45 ALR 1216

Devise of conditional ownership. Where a will created a trust, and provided, in legal effect, that, if the beneficiary died without heirs of his body, the corpus of the trust should pass in trust to another designated beneficiary, the interest which the first beneficiary takes is a conditional or determinable ownership, and is wholly terminated by the death of the said first beneficiary unsurvived by any heir of his body.

In re Clifton, 207-71; 218 NW 926

Conditional limitation — obligation to pay taxes. A testamentary proviso which provides that if the life tenant "neglects to pay the taxes on said real estate within six months after they become delinquent", the life estate shall automatically terminate, must be deemed to refer to all the taxes payable during a given year, and not to an installment thereof. It follows that a six months delinquency on

the first yearly installment of taxes works no forfeiture.

Churchill v Bank, 211-1168; 235 NW 480

Conditional designation of beneficiaries. A will which is executed when the testator is an unmarried man and which, in one paragraph, appoints as his beneficiaries (1) testator's mother if she be living at the time of his death, (2) testator's nephews and nieces, if the mother be not living at the time of his death, and (3) testator's wife if testator be married at the time of his death,—carries the entire estate to testator's wife even tho testator's mother survives him.

In re Pottorff, 216-1370; 250 NW 463

Conditional bequest. A testamentary bequest payable on condition that the beneficiary shall "abstain from all those things that lead him into a dissipated life and make him an undesirable citizen" and that at a named age he shall be "a reasonable good citizen" must be construed as vesting the trustees with a fair and good-faith discretion in determining whether the conditions have been complied with. Evidence held not to show an abuse of such discretion.

In re Sams' Est., 219-374; 258 NW 682

Conditional bequest. A testamentary bequest payable on condition that the beneficiary "go on and complete his education through the high school and four years of college course", coupled with a provision that the "substantial" fulfillment of such condition is left to the "fair judgment and opinion" of the trustees, must be construed as authorizing the trustees, in good faith, to find a fulfillment on the basis of an acquired education other than that acquired under a regular and established high school and college curriculum, but, in their fair judgment, equal thereto.

In re Sams' Est., 219-374; 258 NW 682

Nature of estate—conditional fee. Altho a person has, under a bequest, only a conditional fee in certain property, it is nonetheless a fee which gives complete right of ownership to the grantee until the condition arises under which the fee is broken. It follows that, if there is a reverter, only the original sum received is returnable to the estate of the testator.

Frazier v Wood, 219-36; 255 NW 647; 257 NW 768

Remainder over—absence of issue—no lapse. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

3 Life Estates

Shelley's case—intent of testator to nullify rule. While the rule in Shelley's case applied to wills as well as deeds, yet, wills being construed more liberally than deeds, if the intent of the testator appears to create a life estate, the rule did not apply.

Friedmeyer v Lynch, 226-251; 284 NW 160

Life estate (?) or fee (?). An unambiguous will of property for the devisee's "perfectly free use during his lifetime", without any gift over, conveys a life estate only. It is not permissible to construe such a will as conveying the fee simply to avoid intestacy.

Horak v Stanley, 216-318; 249 NW 166

Life estate (?) or fee, in effect (?). A bequest of "the annual income from $7,000 invested in securities and held by my executor for this purpose", construed and, in view of the entire will, and the various bequests therein contained, held, to grant a life estate only of the income, and not an absolute grant of the $7,000.

In re Vail, 223-551; 273 NW 107

Life estate (?) or fee (?). A clear grant of a life estate, with remainder over, is not converted into a fee because of the addition of a power in the life tenant to dispose of the property.

Carpenter v Lothringer, 224-439; 275 NW 98

Life estates — remainder over in fee per stirpes to lawful issue. When a will provides for a devise of realty to wife for life, then to three named children for life as tenants in common and remainder over in fee per stirpes to their lawful issue, held, life estate vested in children after wife's death with contingent remainder over in fee, as provided by statute —the life estates being the particular estate supporting the contingent estate which would vest, upon death of each of testator's named children, in that child's lawful issue, if any.

Anderson v Anderson, 227-25; 286 NW 446

Life estate with remainder over—absence of issue. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

V CONSTRUCTION OF WILLS—continued
(c) NATURE OF ESTATE OR INTEREST CREATED—continued
3. Life Estates—concluded

Power to dispose of during lifetime only. A will, giving a widow a life estate and in the same clause giving her "full power to dispose of any and all property," and containing other bequests to remaindermen, does not authorize widow as life tenant to dispose of the property by her will.

Carpenter v Lothringer, 224-439; 275 NW 98

Life estate with power of disposal. A devise of property to a wife "for * * * life with power to dispose of and pass clear title to * * * said property during her lifetime, if she so elects", with remainder over, does not create an estate in fee, but creates a life estate, with unqualified power in the wife, during her lifetime, to dispose of said property for any purpose, even without receiving value therefor.

In re Cooksey, 203-754; 208 NW 337

Power to convey. A will which couples a life estate with substantially unlimited power in the life tenant to dispose of the corpus of the estate for the support of testator's daughter arms the life tenant with power to execute a legal conveyance of the entire estate to the daughter.

Karolusson v Paonessa, 207-127; 222 NW 431

Life estate with power to sell. A life estate coupled with a superadded power to sell, and to reinvest, and to use any of the property or income, construed and held to authorize the life tenant to sell only for the purpose of her maintenance, and that any unconsumed income remained in the estate of the testator and passed to the remainderman.

Brown v Brown, 213-998; 240 NW 910

Life use with power to convey — scope of power. A devise by a husband to his wife of the "absolute use and control" of all his property, with power to "dispose of the same in such manner as she may see fit", with devise to his children of "whatever of my property may be left", at the wife's death, arms the wife with power absolutely to convey the property for purposes other than her support and maintenance.

Volz v Kaemmerle, 211-995; 234 NW 805

Life estate with power to sell not devise in fee. The devise of a life estate with broad power in the devisee to sell any or all the property as he may see fit, free from any duty to account for the proceeds, does not constitute a devise of a fee simple estate when the testator clearly manifests in her will an intent to devise, and does devise, as a remainder that part of the property which the life devisee does not sell.

Mann v Seibert, 209-76; 227 NW 614

Power to dispose of property—transfer to self. A widow as life tenant, under a will permitting her to "dispose" of property, may not transfer to herself, as such transaction would be receiving instead of disposing of such property.

Carpenter v Lothringer, 224-439; 275 NW 98

Life estate—right to rents and profits. A devise of real estate to testator's wife "she to have the use, benefit and rents from the same during her lifetime, it being my intention to give her a life estate in all of my property only", conveys to the remaindermen no right to the rents and profits of the land accruing after the death of testator and before the death of the wife.

Whitehill v Whitehill, 211-475; 233 NW 748

Right of possession—lease. A will (1) containing the usual provisions relative to debts, funeral expenses, etc., (2) devising the "revenue" derived from the remainder of the property, partly real estate, to a named beneficiary, and (3) appointing an executor and delegating to him full power to administer the estate "in the best manner that his judgment shall dictate in the interest of my beneficiary", gives to the executor, and not to the beneficiary, the right to the possession of the property. It follows that a lease of the real estate, executed by the executor, is valid.

In re Jensen, 216-15; 247 NW 392

Life tenant as remainderman. A devise of land for life, and of the remainder under a condition which may wholly fail, may very clearly evince an intent that, in case the devise of the remainder does fail, the life tenant shall take not only the life estate, but the remainder, as well; and under such circumstances, it is quite immaterial whether this result be deemed to come about through devise by implication or by descent of an intestate estate, the life tenant being testator's sole heir.

Harvey v Clayton, 206-187; 220 NW 25

4 Remainders

Discussion. See 7 ILB 111—Remainder created by direction to divide on death of life tenant; 9 ILB 313—Acceleration of vested remainders by renunciation

Void remainders. Property embraced in a void, testamentary limitation—void because prohibited by the statute relating to perpetuities—passes to those persons who would have been entitled thereto under the laws of intestacy had the limitation been omitted from the will, and a judgment creditor may, by proper procedure, have a lien established thereon.

Bankers Tr. v Garver, 222-196; 268 NW 568

Vested remainder—transfer and alienation. Remainders, whether vested or contingent, may be transferred, alienated, or incumbered.

Bogenrief v Law, 222-1303; 271 NW 229

Rights of children — devise of remainder. Homestead property passing by will to testator's children by way of remainder after the termination of a life estate in the surviving spouse is not exempt from the antecedent debts of such children.

Arispe Bank v Werner, 201-484; 207 NW 578

Will subjecting homestead to debts of life tenant. A provision in a will, setting up a life estate with remainder over to certain devisees, after all indebtedness and funeral expenses of the life tenant are paid, subjects the estate to a claim for funeral expenses of the life tenant, even if it was his homestead, such provision being a condition upon the devise to the remaindermen.

De Cook v Johnson, 226-246; 284 NW 118

Vested or contingent estates. The estate of a remainderman must be deemed vested upon the probate of a will devising a life estate to testator's wife with remainder to testator's children.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Remainders—vested (?) or contingent (?) —general rule. A remainder must be deemed vested, generally speaking, when a designated taker is living and ready to go into possession instantly upon the termination of the preceding estate, even tho such person may, in the course of time, die prior to the preceding life tenant.

Bogenrief v Law, 222-1303; 271 NW 229

Remainders—vested (?) or contingent (?). A vested remainder is an estate which passes by will or other conveyance with possession and enjoyment postponed until a particular preceding estate terminates—an estate which is invariably fixed by the will or other conveyance "to remain to certain determinate persons". A remainder is not vested when it is dependent on the grantee being alive when the preceding life tenant dies or remarries.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

Intention of testator—remainders—"surviving grandchildren" interpreted. Where a will giving life estates to testatrix's surviving spouse and children provides on termination of the life estates that fee title shall pass "to the surviving grandchildren", this means surviving grandchildren of testatrix as a class and does not mean that in each separate tract the surviving children of that respective life tenant take the remainder, nor do testatrix's heirs take as a whole under rules of descent as in cases of intestacy.

Bell v Bell, 223-874; 273 NW 906

Gift to a class. Where testator devised property to his wife and provided that "after the death of my said wife * * * I hereby give * * * said remaining property to my surviving children, but if there be no surviving children then said property shall go to my heirs at law * * *" and where the widow of testator's son, who predeceased the testator's wife, brought partition action and claimed interest in property through testator's son under said provision of testator's will, held, that the remainder "to my surviving children" constituted a gift to a class and did not refer to those children surviving the testator but instead referred only to those children surviving his wife, hence it followed that the son, who outlived the testator but predeceased testator's wife, took no part of the remainder and that upon the son's death intestate no interest therein passed to his widow.

Smith v Harris, 227-127; 287 NW 255

Remainder to class—rule as to vesting. The use of the word "surviving" or an expression akin to it, in a will, to describe a class who are to take after an intervening life estate, refers to the termination of such life estate and not to the death of the testator. Such use indicates the testator intended to postpone the vesting of the gift over to the time when the life estate would end. However, this is not a rule of substantive law but one of interpretation and therefore will never be used to defeat a contrary intention where one appears with reasonable certainty.

Smith v Harris, 227-127; 287 NW 255

Equalizing devises. Will construed and held to devise a remainder to devisees equally, and to require one devisee to take a designated property at a stated price.

In re Bowman, 209-49; 227 NW 510

Remainder—contingent (?) or vested (?). The remainder is contingent in a devise of a life estate to a daughter with the remainder to the "surviving children", if any, of the life tenant at the time of her death; otherwise to certain designated devisees.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Vested (?) or contingent (?) remainder—postponement of enjoyment. A will which provides that "At the death of my said wife I devise and bequeath" to a named person "the balance of my estate", creates a remainder which vests absolutely upon the death of the testator.

In re Phearman, 211-1137; 232 NW 826; 82 ALR 674

Remainder to nephew—death after majority by marriage—vested (?) or contingent (?) estate. A will giving a life estate to a sister and the remainder to a nephew receivable immediately upon sister's death if nephew had reached majority, or if he had not attained majority, providing for a guardianship during minority, creates not a contingent but a vested

V CONSTRUCTION OF WILLS—continued
(c) NATURE OF ESTATE OR INTEREST CREATED—continued
4. Remainders—continued

remainder with only the enjoyment postponed, and as such, on the death of the nephew after reaching majority by marriage, goes to his widow rather than as residuary property in the estate.

Boehm v Rohlfs, 224-226; 276 NW 105

Right to possession on expiration of life estate—vested remainder. A person in being who, under a will, would have an immediate right to possession of the lands devised upon the termination of a life tenancy therein provided, has a vested remainder.

Flanagan v Spalti, 225-1231; 282 NW 347

Devise with remainder over—remaindermen eligible. The rule that survivorship refers to the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred, and where a devise is preceded by a life estate or other prior interest it takes effect in favor of only those who survive the period of distribution.

Smith v Harris, 227-127; 287 NW 255

Remainders—absurd results. A testator who has, in one clause of his will, clearly devised a vested remainder will not, by a later clause, be deemed to have devised a contingent remainder only, when such construction would lead to absurd results.

Moore v Dick, 208-693; 225 NW 845

Devise of remainder "at", "upon", or "from" named event. The rule that, when a devise is to a remainderman "at", "upon", or "from" the death of the life tenant, such words ordinarily are employed as indicating the time when the estate is to be enjoyed, and not to the time of the vesting of the estate, cannot have application in the construction of a will which manifestly indicates that such terms are used for the purpose of fixing the time when the estate shall vest.

Scofield v Hadden, 206-597; 220 NW 1

Devise of remainder "at time of death" of life tenant. A will which provides that "at the time of the death" of a life tenant, the property shall pass in fee to the children of the life tenant, but if the life tenant "shall die without issue", the property shall descend to specified devisees, conveys to the children of the life tenant a contingent remainder which will ripen into a vested remainder only in the event they outlive their parent, the life tenant.

Scofield v Hadden, 206-597; 220 NW 1

Life estate—title vests on termination. Will bequeathing income of property to widow for life with remainder equally to (1) his then living brothers and sisters, (2) a woman not related to testator, and (3) a business associate also not related, construed to vest title at widow's death rather than at death of testator so as to entitle unrelated legatees to take entire remainder as against heirs of brothers and sisters all of whom predeceased widow.

Rice v Yockey-Klein, 227-175; 288 NW 63

Devise to son—termination—no contingent remainder. A devise of land to a son for his use until son's youngest child becomes 20 years old, or if such child dies before such age, then until January 1, 1940, is neither uncertain as to time nor persons so as to make the remainder contingent.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Devise to class—equal taking. Where testator devised a trust fund to an incompetent daughter for life, with remainder over to his heirs "having the care and actual keeping" of said daughter, held, that the remainder would be taken by said heirs in equal shares and not in proportion to the number of weeks which each had cared for said daughter,—it appearing that compensation for such care had been paid to said heirs prior to the death of said life tenant.

Slavens v Bailey, 222-1091; 270 NW 367

Remainder over in fee per stirpes to lawful issue. When a will provides for a devise of realty to wife for life, then to three named children for life as tenants in common and remainder over in fee per stirpes to their lawful issue, held, life estate vested in children after wife's death with contingent remainder over in fee, as provided by statute—the life estates being the particular estate supporting the contingent estate which would vest, upon death of each of testator's named children, in that child's lawful issue, if any.

Anderson v Anderson, 227-25; 286 NW 446

Death of joint life tenant without issue—remainder over in fee. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Remainder over—absence of issue. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in

children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

Inheritance taker as representative of contingent remaindermen. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

Quieting title—virtual representation. All living members of a class, when properly brought into court in an action to quiet title, are deemed (under the doctrine of virtual representation) to represent all after-born persons who would belong to that class.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Renunciation of devise. The devisee of a cash remainder does not per se renounce said remainder by executing, with other devisees, a writing under which the signers severally contribute to the augmentation of said life devise and explain their action by stating their belief that the life beneficiary (an incompetent) should have said augmented sum "as his own".

Bare v Cole, 220-338; 260 NW 338

(d) LAPSING OF DEVISES AND BEQUESTS

1 In General

Prohibited devise as intestate property. Property devised to one who is prohibited by law from taking becomes intestate property when the will provides no remainderman or provision for reversion.

Karolusson v Paonessa, 207-127; 222 NW 431

Death of legatee. A bequest, even tho in terms directly to an infant legatee, "to be used to further his education, said amount to be placed in a savings account and be allowed to run until he has arrived at the age of 18 years when it shall be used for that purpose," reveals an intention to let the bequest lapse in case the legatee dies before the testator dies.

In re Best, 206-786; 221 NW 369

Nonlapse of devise. A devise to one whom the testator knows to be dead when the will is executed does not lapse on the death of the testator, the will not manifesting a contrary intent.

Friederichs v Friederichs, 205-505; 218 NW 271

Legacy lapsing by death of legatee. A contingent legacy in favor of a daughter is created by a will which, after devising a life estate to testator's wife, devises certain land to a son on condition that "within one year" after the death of the wife the son shall pay his sister a named sum of money. In other words, the legacy to the daughter lapses by her death prior to the death of the mother.

In re Phearman, 211-1137; 232 NW 826; 82 ALR 674

Residuary clause — effect. The naked expression or clause in a will, viz: "the remaining land to" (a named person) may not be sufficient to create a residuary estate within the meaning of the rule that lapsed devises fall into the residuary estate.

Nichols v Swickard, 211-957; 234 NW 846

Offsetting debt against devisee. When a devisee dies in the lifetime of the testator, and is then indebted to the testator, the executor may retain the devise, to apply on the indebtedness.

In re Mikkelsen, 202-842; 211 NW 254

Lapsing of legacy. A condition in a charitable bequest, that if the legatee takes no steps within a named time to augment said bequest the same shall revert to testator's estate, must be deemed a condition precedent and not a condition subsequent. It follows that said bequest lapses upon the expiration of said time if the legatee, with actual knowledge of the bequest, fails to signify any acceptance of the bequest, and fails to take any steps to augment said bequest.

In re Hillis, 215-1015; 247 NW 499

Action to determine ownership. When property fails to pass under a will to nonpecuniary corporations because the devise is in excess of the amount permitted by statute, any person may maintain an action to establish his claimed interest therein.

Karolusson v Paonessa, 207-127; 222 NW 431

Life estate—remainder over—fee per stirpes —absence of issue—nonlapse. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder,

V CONSTRUCTION OF WILLS—concluded
(d) LAPSING OF DEVISES AND BEQUESTS—concluded
1. In General—concluded

which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

Acceptance of bequest—court's extension of testator's time limitation—effect of unappealed order. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

2 Ademption

Discussion. See 25 ILR 290—Ademption—history

"Ademption" and "satisfaction" distinguished. Where a thing or fund which is the subject of a specific legacy has been extinguished, an "ademption" has occurred, whereas doctrine of "satisfaction" applies when the legacy is general, and depends largely, if not entirely, on the intent of the testator.

In re Keeler, 225-1349; 282 NW 362

Ademption. A testator who, subsequent to the execution of his will, turns over to a devisee property of the same general nature as that devised to the devisee in the will, thereby works an ademption or pro tanto satisfaction of the testamentary devise, provided such was the intention of the testator.

Rodgers v Reinking, 205-1311; 217 NW 441
Heileman v Dakan, 211-344; 233 NW 542

Testator—payment of debt of legatee. A testator who bequeaths his property in equal shares to his children will be presumed to have intended to effect an ademption by voluntarily and on his own motion paying off, subsequent to the execution of his will, a debt owed wholly by one of the legatees; and in a proper proceeding, the amount of such payment may be ordered set off against the share of said legatee.

Russell v Smith, 210-563; 231 NW 468

Ademption—real estate for note and mortgage. A bequest is specific in a will where a note and real estate mortgage securing it were bequeathed to a son of testatrix, and the residuary estate was bequeathed to such son and her grandson; and cancellation by testatrix of the note and mortgage and the taking of title to such real estate in lieu thereof adeems the bequest as respects son's claim that subject matter of bequest still existed but was only changed in form.

In re Keeler, 225-1349; 282 NW 362

VI RIGHTS AND LIABILITIES OF LEGATEES AND DEVISEES . .

Discussion. See 5 ILB 253—Bequests for masses

Survivorship—absence of presumption. When a testator and his devisee die in a common disaster, there is no presumption at common law either (1) that one died before the other, or (2) that they died simultaneously.

Carpenter v Severin, 201-969; 204 NW 448; 43 ALR 1340

Owner. The term "owner" may be used in a sense other than absolute and unconditional title.

Bare v Cole, 220-338; 260 NW 338

Words "to own"—conveying absolute title. A devise of "one-half of all property I may own at the time of my death" to testator's wife "to own, hold and enjoy as her own", conveys an absolute title to one half of testator's estate.

In re Bigham, 227-1023; 290 NW 11

Rights of devisees—statutes controlling. The rights of devisees are controlled by the statutes which exist at the time the will is probated.

In re Culbertson, 204-473; 215 NW 761

Devise with remainder over—remaindermen eligible. The rule that survivorship refers to the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred, and where a devise is preceded by a life estate or other prior interest it takes effect in favor of only those who survive the period of distribution.

Smith v Harris, 227-127; 287 NW 255

Named legatees surviving testator—legatee dead when will executed—heirs excluded. A will giving the residuary estate "unto those of the following named persons who are living at my death" will not be construed to include the heirs of one of those named persons on the ground that such particular named person was known by the testator to be dead at the time he made the will. This situation is not such a latent ambiguity as will warrant court in disregarding plainly expressed intent of testator to bequeath to named persons surviving testator.

In re Kubbernus, 224-1077; 277 NW 717

When annuity vests. A testamentary life annuity becomes vested on the date when the annuity becomes due.

In re Hekel, 205-521; 218 NW 297

Dower — nonforfeiture by taking foreign homestead. A wife, who is legally disinherited by her husband's will executed in a foreign state where the parties had their domicile, is not deprived of her dower or distributive share in the husband's Iowa real estate because of the fact that in said foreign state the homestead there situated was set off to her by the probate court or her application. In other words, the Iowa statute according to a wife the right to take the homestead in lieu of dower applies solely to an Iowa homestead.

Ehler v Ehler, 214-789; 243 NW 591

Election by spouse—nonestoppel. The heirs of a surviving wife are not estopped to insist that the wife took her dower interest, and did not take under the will, by the fact that, separately and apart from the will, and prior to its execution, the husband had turned over certain funds to a society, under an agreement that the society should pay interest on the funds to him and to the wife during their lifetime, and that the wife received such interest after the death of the husband.

In re Culbertson, 204-473; 215 NW 761

Rights of surviving spouse—homestead or distributive share—election. The distributive share being the primary and more worthy right of the surviving spouse, evidence that the survivor elected to take the homestead right in lieu thereof should be clear and satisfactory.

Prichard v Anderson, 224-1152; 278 NW 348

Probate claim—no bar to subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Settlement between devisees. An alleged oral agreement between widow and other devisees, vesting in widow the right to certain personalty, was superseded by a subsequent written agreement between the same parties for partition and settlement of the estate providing that it should not affect the personalty which should remain in the hands of the executrix until final settlement.

In re David, 227-352; 288 NW 418

Right of devisee—estoppel. An heir who, upon the death of his mother, becomes entitled to a fractional part of a promissory note in which the mother and father are joint payees does not estop himself from asserting such right by subsequently taking, under the father's will, a portion of the father's interest in said note.

Hoffman v Hoffman, 205-1194; 219 NW 311

Declarations and admissions of heirs and devisees. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Devisees and heirs joining in deed. A conveyance of land carries the entire fee when properly joined in (1) by all those who could take under the probated will of the fee owner, and (2) by all those who would take the property under the laws of inheritance in case said property proved to be intestate property.

Bahls v Dean, 222-1291; 270 NW 861

Consideration—benefit to third person. A written agreement between devisees to divide the devised property in such proportions that certain nondevisees will also share in the property is supported by a sufficient consideration in that the agreeing devisees suffer a detriment by relinquishing part of the devise and the nondevisees acquire a benefit.

Clayman v Bibler, 210-497; 231 NW 334

Settlement without administration—agreement of heirs binding. An agreement by heirs to settle estate without administration and providing for payment of legacies is legal and binding, and a widow of one of such heirs in a subsequent partition action cannot complain of denial of legacy to deceased heir where legacies due to other heirs were larger and such heirs received no part of their legacies.

Meeker v Meeker, (NOR); 283 NW 873

Renunciation of devise. The devisee of a cash remainder does not per se renounce said remainder by executing, with other devisees, a writing under which the signers severally contribute to the augmentation of said life devise and explain their action by stating their belief that the life beneficiary (an incompetent) should have said augmented sum "as his own".

Bare v Cole, 220-338; 260 NW 338

Devise and bequest—consideration unnecessary—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when

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the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Truthful answer to inquiry. The holder of a mortgage on the individual share of an heir does not estop himself from insisting on his mortgage because, upon receiving a subsequent inquiry whether there was any incumbrance on the estate, he truthfully answered in the negative.

Halbert v Halbert, 204-1227; 214 NW 535

Establishing claim against realty—not action to construe will. In an equity action to establish a claim against deceased's real estate for services rendered deceased's widow to whom deceased devised such realty for life, with right to dispose of real estate for her necessary support, held, such action was not a "suit for construction" of will, merely because trial court's opinion mentioned word "construction", but not in such manner as to indicate that trial court held action to be for that purpose. A will which in plain and uncertain terms makes disposition of property is one which needs no construction.

Hoskin v West, 226-612; 284 NW 809

Devisee takes homestead exempt from testator's debts. Homestead may be devised exempt from the debts of the testator contracted subsequent to its acquisition. (See In re Schultz, 192 Iowa 436.)

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

Payment of claims—specific devises—when resorted to. Specific devises cannot be resorted to for the payment of debts, in the settlement of an estate, until all other property of the estate has been resorted to and exhausted.

In re Glandon, 219-1094; 260 NW 12

Homestead—liability for debts of children. Children who take a homestead under the will of their spouseless parent, take it subject to their own debts created subsequent to the acquisition of the homestead by their parent.

Luglan v Lenning, 214-439; 239 NW 692

Homestead—purchase (?) or descent (?). A homestead cannot be deemed to descend under the laws of descent to the children of a spouseless parent when the parent leaves a will which provides that no child contesting the will shall take anything under the will, altho the will otherwise gives to the children the identical shares which the laws of descent would give.

Luglan v Lenning, 214-439; 239 NW 692

Satisfaction of legacy prior to death of testator. A general legacy provided for in a will is satisfied in toto when the testator, subsequent to the making of the will, pays to the legatee a lesser sum with intent to effect such satisfaction; and such payment and satisfaction may be established by extrinsic evidence.

Rodgers v Reinking, 205-1311; 217 NW 441
Heileman v Dakan, 211-344; 233 NW 542

Advancement (?) or gift (?). The cancellation by a testator, after making his will, of notes held by him against a legatee, and the surrender of said notes to the legatee (after carefully computing the amount due thereon), are not sufficient to overcome the presumption of an advancement, in view of the declaration in the will (1) that testator intended an equal division between his legatees, and (2) that all loans to legatees, as shown by testator's account book (made part of the will) should be deemed part of his estate, and in view of the fact that said account book listed the notes in question as loans, and not as gifts.

In re Francis, 204-1237; 212 NW 306

Contesting will and claiming property as gift. The fact that a daughter contests the probate of her father's will does not estop her from later claiming as a gift a portion of the devised property; nor does the judgment admitting the will to probate constitute an adjudication against her of her claim of gift.

Rapp v Losee, 215-356; 245 NW 317

Advancements—nonapplicability of doctrine. The doctrine of advancements applies only in cases where the decedent dies intestate, unless specifically provided for by language in the will.

In re Manatt, 214-432; 239 NW 524
In re Morgan, 225-746; 281 NW 346

Advancements to part of residuary legatees—deduction—when improper. Without special provision in the will therefor, an executor is in error in paying to himself, as a residuary legatee, $1,000 on the theory that the four other such legatees had each received advance-

ments in that sum and that such payment was equivalent to charging off such advancements against the shares of the other legatees.

In re Morgan, 225-746; 281 NW 346

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Rights of beneficiaries—contingent legacy—effect. Where a will provided that testator's niece should receive $1,000 (1) if the wife survived and did not take under will, or (2) if wife did not survive, and when the widow accepted the provisions of will giving her the personal property and a life estate in real estate, niece took nothing thereunder, since neither contingency arose.

Starr v Newman, 225-901; 281 NW 830

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may, in partition proceedings, be offset against his interest in the real estate of testator, and such right is superior to the right of a judgment creditor who obtained his judgment against the devisee subsequent to the death of the testator.

Schultz v Locke, 204-1127; 216 NW 617

Substituted legatees—offsetting debts. Unless a will provides otherwise, a legacy to one who predeceases the testator passes to the heirs of the deceased legatee subject to the right of the executor to apply the legacy on the unpaid debt of the deceased legatee to the estate. It follows that if the debt equals or exceeds the legacy the heirs take nothing.

In re Rueschenberg, 213-639; 239 NW 529

Lien for debts of devisee. A mortgage on real estate executed during the settlement of an estate, by the insolvent devisee of the land, is subject to the prior lien of the estate for the debts owing by the devisee to testator and contracted subsequent to the execution of the will.

Bell v Bell, 216-837; 249 NW 137

Refund to pay debts. The heirs of an estate who unconditionally purchase the interest of their mother in the estate have no legal right, thereafter, to compel the mother to contribute any sum toward the discharge of unpaid debts of the estate, unpaid taxes against the estate, or unpaid probate costs and fees.

In re Jones, 217-288; 251 NW 651

Debt-encumbered remainder—equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some 30 years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Formal direction to "pay debts"—no priority over other testamentary dispositions. The usual, formal, first paragraph of a will directing the payment of "all my just debts", held, being a mere recitation of an executor's duty, does not alone give priority and subject the property of the estate to all claims allowed irrespective of other provisions directing the disposition of the corpus of the estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

Bequests payable from "cash assets"—not charge on realty. Bequests payable from "cash assets", in the absence of a statement or implication in the will to the contrary, are payable from personal estate only and are no charge on the realty.

Boehm v Rohlfs, 224-226; 276 NW 105

Interest of remainderman passes to trustee in bankruptcy.

Noonan v Bank, 211-401; 233 NW 487

Accounting by life tenant. A life tenant with testamentary power to encroach upon the principal, with remainder over, may be compelled to make full disclosure to a trustee in bankruptcy of a possible remainderman, of the property reeeived by her under the will (the probate records not revealing such fact), but may not be compelled to account to such trustee as to her use of the property, in the absence of any allegation and proof of waste, fraud, or improper use or disposal.

Nelson v Horsford, 201-918; 208 NW 341; 45 ALR 515

Income—gradual increase in value of corporate assets. A legatee who is unconditionally given for life the income arising from corporate stock is not entitled to receive, as income, any part of the principal of a liquidating dividend arising from the final dissolution of the corporation and sale of its assets, when said liquidating dividend reveals a very material increase in value of the original stock investment due to the gradual increase in value of corporate assets during the life of the corporation. Such liquidating dividend constitutes a part of the corpus of the estate, and passes to the remainderman, subject to the right of the life tenant to receive the income

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thereon—such being the manifest intent of the testator.

In re Etzel, 211-700; 234 NW 210

Allowable failure to collect rents. A widow who is entitled to receive during life from the executor the annual rents accruing on lands belonging to residuary devisees may allow such devisee to occupy the land free of rent, and objections to the executor's final report will not lie because of such action.

In re Murphy, 209-679; 228 NW 658

Rent—incident to land — passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Withholding distribution. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

Trusts—nontermination by beneficiaries. The beneficiaries of a testamentary trust may not, by mutual agreement, even tho approved and confirmed by the court, terminate the trust and accelerate the final vesting of the corpus of the trust, when the testator has clearly demonstrated a contrary intent.

Windsor v Barnett, 201-1226; 207 NW 362

Trust estate—nonvested interest. Lands which are under testamentary trusteeship for a stated or discretionary time are not subject to partition by the ultimate beneficiary until his interest becomes vested. Trust construed, and held to clearly empower the trustee to continue the trust.

Schaal v Schaal, 203-667; 213 NW 207

Devise in fee in connection with trusteeship —effect. An unqualified devise in fee arms the devisee with power and right to mortgage the premises even tho the testator sees fit to embody in his will a provision for a trustee and to grant power in such trustee to execute mortgages.

First N. Bk. v Torkelson, 209-659; 228 NW 655

Trustee and beneficiary as same person—conveyance to self-quieting title. A sister, as the only heir in her brother's estate, who conveys by a trust instrument to a nonrelated person her entire interest in such estate, in exchange for the trustee providing her life support, and upon fulfillment of which the trustee became the beneficiary and was directed to convey the balance of the property from himself, as a trustee, to himself, individually, evidence, in trustee-beneficiary's quieting title action against settlor's heirs, held to establish soundness of mind and freedom of action by settlor in executing the trust instrument.

Goodman v Bauer, 225-1086; 281 NW 448

Renunciation of trust by one beneficiary—effect.

Windsor v Barnett, 201-1226; 207 NW 362

Renunciation of legacy. The act of a testamentary beneficiary in executing and making of record an unconditional and final renunciation of all benefits granted him under the will legally places such benefits beyond the reach of his creditors.

Funk v Grulke, 204-314; 213 NW 608

Right to renounce devise or bequest. The legal right of a beneficiary under a will to file an unconditional and final renunciation of all benefits granted him by the will, and thereby exclude his creditor from acquiring any right to the devised property, may be exercised even after a creditor of said beneficiary has levied upon, sold, and obtained a sheriff's deed to, the land devised to said beneficiary, it appearing that the renouncing beneficiary had in no manner misled the creditor.

Lehr v Switzer, 213-658; 239 NW 564

Renounced devise as intestate property. Where one of several residuary devisees wholly renounces his interest under the will, the portion so renounced becomes intestate property, and necessarily descends under the statutory rules of descent. In other words, the nonrenouncing residuary devisees do not necessarily take said renounced portion.

Lehr v Switzer, 213-658; 239 NW 564

Renunciation of devise—loss of right. A devisee or legatee who, by unequivocal conduct, has once accepted the devise or bequest, may not thereafter renounce it to the detriment of his creditors. So held where the devisee had mortgaged or pledged the devise as security for his debts.

Bogenrief v Law, 222-1303; 271 NW 229

Renunciation of gift—no control by creditors —not a conveyance. A creditor has no control over a beneficiary's right to refuse or accept a gift, as a renunciation is not equivalent to a conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Beneficiary's right to renounce benefits under will—creditors—no complaint. A beneficiary under a will has the right to renounce all benefits granted him under will and creditors cannot complain of such renunciation; but such rule is limited to cases where no acceptance of provisions of will has been made by beneficiary.

McGarry v Mathis, 226-37; 282 NW 786

Costs—equity court's discretion—renounced devise. In equity, the court has a wide discretion in taxing costs, which will not be interfered with except in case of manifest injustice; so, where a sister renounced benefits under her father's will and conveyed realty to her brother before she took bankruptcy, in action by the bankruptcy trustee to set aside renunciation and the conveyance as fraudulent, the apportionment of one half of costs against trustee and other half against sister and brother was proper.

McGarry v Mathis, 226-37; 282 NW 786

Distribution of estate—erroneous payments—recovery. Funds paid to legatees under an interlocutory but erroneous order for distribution may be recovered from the legatees to whom paid.

Dillinger v Steele, 207-20; 222 NW 564

Recovery of unpaid legacy — bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank, 218-961; 256 NW 681

Settlement of estate—estoppel. A residuary legatee who causes the executor to obtain a new mortgage as security for an indebtedness due the estate, and thereupon to cancel a preexisting mortgage which secured the same debt, is necessarily precluded from holding the executor personally liable in case the new mortgage proves inadequate as a security.

Wilson v Norris, 204-867; 216 NW 46

Objections—compromise and settlement—conclusiveness. A residuary devisee may not object to an accounting by an executor on a ground theretofore fully compromised and settled by such devisee.

In re Murphy, 209-679; 228 NW 658

Irretrievably abandoned contract. An irretrievably abandoned contract necessarily cannot be specifically enforced. So held where the heirs of an estate sought specific performance of an alleged contract by the donee of a deceased donor to reconvey the gift to the donor's estate and to take the share of a general heir, and where it developed that said heirs had, regardless of said alleged contract, fully settled the estate among themselves to the exclusion of the said donee.

McGaffin v Helmts, 210-108; 230 NW 532

Delay in closing estate. Devisees could not complain of delay in closing estate where no loss resulted and delay was due in part to their own failure to pay inheritance taxes and their share of administration costs and rental moneys due the estate, and where they took no action to require executrix to close the estate altho their attorney, who was also a devisee, was aware of the facts.

In re David, 227-352; 288 NW 418

Sale and conveyance—compromise of litigation. The statutory provision (§12587, C., '24) that the real property of a minor may be mortgaged or sold "when not in violation of the terms of a will by which the minor holds" it, has no application to a compromise by the guardian in a will contest, under which compromise the minor receives incumbered real property in lieu of unincumbered real property devised by the will.

Kreamer v Wendel, 204-20; 214 NW 712

Assignment of expectancy—effect. An assignment by a debtor to his creditor of the debtor's expectancy in an estate, as collateral security to the debt, with a proviso that, if the debtor does not pay within a stated time, the assignment shall operate as a "full receipt" against said expectancy, simply extends to the creditor an option to so treat the proviso. The creditor may ignore the proviso and maintain an action on his claim.

Smoley v Smoley, 203-685; 213 NW 229

Assignment of share—construction. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor. (See Funk v Grulke, 204-314.)

Berg v Shade, 203-1352; 214 NW 513

Assignment of testamentary interest—ratification by certain creditors—no general assignment. An assignment of the interest of beneficiary of a testamentary trust for the benefit of certain creditors, ratified by the creditors benefited, is not a general assignment and need not be for the benefit of all creditors.

Friedmeyer v Lynch, 226-251; 284 NW 160

Assignments for benefit of creditors—requisites. Where the interest of a beneficiary of a testamentary trust is assigned for the benefit of creditors, such assignment need not be recorded to be valid against existing creditors without notice.

Friedmeyer v Lynch, 226-251; 284 NW 160

Father promising son's creditor not to change son's legacy—property transfers—other legatees. Simply because a testator contracts with a bank not to change his will bequeathing $10,000 to a son who was indebted to the bank, and when the father did not contract to pay the son's debt, there is no "unjust enrichment" of devisees and legatees who accept property willed to them, altho father during his lifetime had depleted his estate by

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property transfers and conveyances to his other children.

Evans v Cole, 225-756; 281 NW 230

Agreement not to probate. Beneficiaries under a will may validly agree, and have their agreement confirmed by an order of court, that the will shall not be probated, and that the property shall be shared on a basis different than that provided by the rejected instrument —no question as to the right of trust beneficiaries or of estate creditors being involved.

In re Murphy, 217-1291; 252 NW 523

Contract not to change son's legacy—creditor-bank estopped as to other legacies. Where a son is indebted to a bank, and his father contracts with the bank to make no change in his will respecting a $10,000 bequest to the son, and bank seeks liability against all of father's property, there is no estoppel against the other heirs claiming the son's indebtedness be deducted from any bequest payable to him.

Evans v Cole, 225-756; 281 NW 230

Father-son partnership—probate of father's estate—son's partnership rights. A son's rights as a partner in a partnership with his father and mother, which partnership was continued with mother after father's death, were not adjudicated by the probate of his father's will and mother's discharge as executrix, since son was not a party to such proceeding as a partner, and since the probate court administered only the property owned by the father at the time of his death.

Eggleston v Eggleston, 225-920; 281 NW 844

Exemption to educational institution—essential proof. Where a will provides that the residue of the estate shall pass to an educational institution of this state as a part of its endowment fund, exemption from taxation on lands will not be granted except on the production in evidence of the probate records, showing judicially (1) that the estate has been fully settled, and (2) that the lands in question constitute part of the residue of said estate, and, as a consequence, belong, legally or equitably, to said institution.

Wapello Bank v Keokuk Co., 209-1127; 229 NW 721

Indefinitely named charitable beneficary. A testamentary devise in trust to "some old ladies' home" in a named locality necessarily implies a substantial institution devoted to said purposes, and manifestly the court will not be compelled to bestow such bounty only on one of those who apply for such bounty.

In re Clifton, 207-71; 218 NW 926

Indefinite description of devise—devisee's right to select. A devise by a testator of "160 acres" of land, without other designation or description, by a testator who was seized of some 2,000 acres, may impliedly authorize the devisee to make a selection of the land. Held, certain acts of the devisee constituted such selection.

Nichols v Swickard, 211-957; 234 NW 846

Equitable conversion—right to reconvert—consent of spouse. The right of a legatee to make and enforce an election to take real estate in lieu of a devise of the proceeds thereof does not depend in any degree on the consent of the spouse of such legatee.

In re Warner, 209-948; 229 NW 241

Equitable conversion — nonapplicability of doctrine. An assignment by an heir of all his interest in the "personal property" of an estate carries to the assignee the assignor's interest in funds derived from the sale of real estate for the purpose of paying debts and remaining in the hands of the administrator as an unused balance. The doctrine of equitable conversion has no application to such a state of facts.

In re Wilson, 218-368; 255 NW 489

Treating realty as personalty—sale required. Land acquired by an executor through foreclosure on a note and mortgage coming into his hands as part of the estate, will be treated as personalty for the purpose of making a final division of the estate; and the court is in error in refusing to order a sale for said purpose—especially when all existing testamentary beneficiaries so request.

Langfitt v Langfitt, 223-702; 273 NW 93; 110 ALR 1390

"Worthier title" rule nonapplicable. In probate proceedings, before the "worthier title" rule can be applied where property is left to testator's heirs by will in the same manner and proportion in which they would have taken were there no will, it must definitely appear that there is exact identity in every way, and where testator definitely directs that real estate be converted into personalty and then divided equally among his children, each beneficiary receiving all personalty and no real estate, held, a beneficiary of such estate did not take her interest by "worthier title" so as to preclude executor from exercising the right of retainer against the beneficiary's interest which is assigned as security for a note for purchase of real estate by beneficiary—it being immaterial whether beneficiary is solvent or insolvent.

In re Sheeler, 226-650; 284 NW 799

"Worthier title" rule.

In re Davis, 204-1231; 213 NW 395
In re Warren, 211-940; 234 NW 835

Mutual wills in nature of contract—survivor and third-party rights fixed. In joint or mutual wills for benefit of survivor or third parties, there is an element of contract, and if there be no revocation before death of one of testators, the rights of the survivor or third

parties are thereby fixed and determined according to terms of the mutual will.

Child v Smith, 225-1205; 282 NW 316

Partition (?) or sale and division under will (?). One of several devisees in common of real property (the estate being fully settled) may maintain partition, even tho the will specifically authorizes the executor to sell the property and divide the proceeds.

Ruggles v Powers, 201-284; 207 NW 116

Stock dividend issued on previously earned surplus—conflicting claims. A legacy of "one thousand dollars par value of the capital stock" of a named corporation (being a part of the stock holding of the estate) entitles the legatee to a stock dividend declared and issued by the corporation subsequent to the death of testator on surplus earnings accumulated by the corporation prior to the death of testator; also to an ordinary cash dividend declared on the stock subsequent to testator's death and subsequent to the formal transfer of said stock to the legatee.

In re Etzel, 211-700; 234 NW 210

Father-son partnership—no claim in father's estate—no estoppel. Estoppel would not prevent a son from maintaining an action against his mother for an accounting and dissolution of a partnership which was established between son and father and mother and upon father's death was continued with mother, theory being that estoppel arose on account of son's acquiescence in mother's taking possession of and disposing of certain partnership assets as executrix and sole beneficiary of her husband's estate under his will. Son, having no claim against estate of his father, and not knowing of mother's claim that she was sole partner with her husband, could not be estopped thereby.

Eggleston v Eggleston, 225-920; 281 NW 844

11847 Presumption attending devise to spouse.

Election between will and dower. See under §12007

Presumption negatived. No election by a surviving spouse between the will and the dower right is required when the will shows on its face that its provisions for the surviving spouse were not intended to be in lieu of dower rights. So held where the will devised to the wife the sum of one dollar.

Fay v Smiley, 201-1290; 207 NW 369

Widow as devisee—nonallowance. Since widow of decedent was a devisee under his will, an order allowing her exempt property of decedent under §11918, C., '39, was improper in view of this §11847, C., '39, providing that a devise to a spouse is presumed to be in lieu of exemptions unless contrary intention is clearly and explicitly shown.

In re David, 227-352; 288 NW 418

Lapse of devise to spouse. A devise by a husband to his wife is deemed to lapse upon his death when the devise is identical in quality and quantity with what the wife would have taken under the statute, had there been no will; but not so of a devise which gives the wife one-third of his entire estate (1) after converting all real estate, including homestead, into personalty and (2) after paying all debts.

In re Davis, 204-1231; 213 NW 395
See In re Warren, 211-940; 234 NW 835

Total failure of surviving spouse to elect—effect. A surviving wife who is willed by her deceased husband all his property, real and personal, after the payment of all his debts, including the expense of his last sickness and burial, and who dies some three days later without doing anything affirmatively indicating her acceptance of the terms of said will, must be held to have taken her distributive one-third share only.

Hahn v Dunn, 211-678; 234 NW 247; 82 ALR 1503

Renunciation by daughter as beneficiary—effect on rights in intestate property. Where a father's will left property in equal shares to a son and daughter, subject to a life estate in their mother, and where the daughter renounced all benefits under the will, as heir she took undivided one half of one-half portion of estate that became intestate property as result of renunciation, subject to life estate.

McGarry v Mathis, 226-37; 282 NW 786

11848 Limitation on disposal by will.

Law governing. The right of a surviving spouse to take under the will of the deceased spouse, or to take a distributive one-third share, is governed by the statutes existing at the time of the death of the testate spouse; likewise, the right of a corporation to take under a will.

Ross v Seminary, 204-648; 215 NW 710

Restriction on corporations. A statute which limits the power of corporations which are organized under the laws of this state to take a testamentary devise will not be extended by the courts to include foreign corporations.

Ross v Seminary, 204-648; 215 NW 710

Devise or bequest to corporation—limitation. A bequest to trustees for the perpetual maintenance of testator's burial lot is not violative of the statute limiting devises and bequests to a nonpecuniary corporation tho the lot in question is located in a cemetery owned by such a corporation.

Hipp v Hibbs, 215-253; 245 NW 247

Prohibited devise as intestate property. Property devised to one who is prohibited by law from taking becomes intestate property

when the will provides no remainderman or provision for reversion.

Karolusson v Paonessa, 207-127; 222 NW 431

Who may question. No one can question the validity of a devise to a nonpecuniary corporation in excess of one-fourth of testator's property except testator's surviving spouse, child, child of a deceased child, or parent.

Karolusson v Paonessa, 207-127; 222 NW 431

Action to determine ownership. When property fails to pass under a will to nonpecuniary corporations because the devise is in excess of the amount permitted by statute, any person may maintain an action to establish his claimed interest therein.

Karolusson v Paonessa, 207-127; 222 NW 431

11849 After-acquired property.

Discussion. See 23 ILR 380—After-acquired property

11850 Verbal wills.

Gift—causa mortis—essential elements. A gift causa mortis is a gift of personal property, intentionally made, even orally, by the mentally competent owner of said property, in expectation of his or her imminent death from an impending disorder or peril (tho not necessarily so imminent as to exclude the opportunity to execute a will), and made and delivered by the donor to the donee on the essential condition that, if the gift be not in the meantime revoked, the property shall belong to the donee in case the donor dies, as anticipated, of the disorder or peril, leaving said donee surviving.

Flint v Varney, 220-1241; 264 NW 277

11852 Formal execution.

ANALYSIS

I VALIDITY AND SUFFICIENCY IN GENERAL
II FORM AND CONTENTS OF INSTRUMENT
(a) WILL DISTINGUISHED FROM OTHER DISPOSITIONS OF PROPERTY
(b) JOINT WILLS
III SIGNATURE OR SUBSCRIPTION BY OR FOR TESTATOR
IV ATTESTATION AND SUBSCRIPTION BY WITNESSES

I VALIDITY AND SUFFICIENCY IN GENERAL

Findings of court. The supported findings of the court relative to the facts attending the formal execution of a will have the same force and effect as the verdict of a jury.

In re Droge, 216-331; 249 NW 209

Waiver of right to dispute. A contestant may not question the admissibility or sufficiency of testimony tending to show the due execution of a will when he proffers no issue as to such execution.

In re Mott, 200-948; 205 NW 770

Revival and reinstatement of revoked will. Even tho a second will unquestionably revokes a first will, nevertheless said first will is revived and reinstated by the due and formal testamentary execution of a later instrument wherein testator declares that "my will and wish as expressed in my will and testament under date of January 29, 1914" (the first will) "is the only will and testament I have ever knowingly and willingly made, and I wish it to be so considered after my death," said last instrument being, in itself, a will.

In re Cameron, 215-63; 241 NW 458

Evidence — sufficiency. Evidence reviewed and held not to establish per se the legal execution of a will.

In re Wood, 213-254; 237 NW 237

What adjudicated—nonestoppel to construe will after final report. Probate of a will being conclusive only as to its due execution and publication, a petition to construe a will is not a collateral attack on the order of probate; and such petition may be filed after the executor's final report, before which the petitioners were not aware of the construction which the executor would place on the will and therefore no estoppel arises from permitting executor to proceed with administration of the estate.

Maloney v Rose, 224-1071; 277 NW 572

Requested instructions — will contestants bound by own theory. Contestants alleging that a will was not duly and legally executed may not amplify their claim thereunder after requesting instructions proceeding solely on the theory that their construction of their claim was that the signatures of the testator and one witness, now deceased, were not genuine. In such case it is not error, when otherwise unobjected to, for the court on its own motion to add an instruction which in effect limits the case to the theory propounded in contestants' requested instructions.

In re Iwers, 225-389; 280 NW 579

Professional memorandum by deceased—incompetent when stating no fact. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

Harmless error—instructing on immaterial, nonprejudicial evidence. A will contestant's contention that it was error to instruct re-

garding a nonmaterial exhibit—a memorandum by a deceased attorney, who drew the will —altho well founded, held to be error without prejudice when the paper and the conversation connected therewith were not necessary for proponents to make a prima facie case of the due and legal execution of the will and the genuineness of the signatures.

In re Iwers, 225-389; 280 NW 579

II FORM AND CONTENTS OF INSTRUMENT

(a) WILL DISTINGUISHED FROM OTHER DISPOSITIONS OF PROPERTY

Deed—requisites and validity—delivery—evidence—sufficiency. On the issue of delivery of a deed, the recitals in the will of the grantor that he was then deeding the property to said grantee, and other oral statements of the purported grantor to the same effect, may have material and influential bearing.

Arndt v Lapel, 214-594; 243 NW 605

Deed (?) or will (?). A warranty deed subject to a life estate in grantor's surviving spouse will not be deemed testamentary because of a clause wherein grantor ineffectually attempted to restrain the alienation of the land by the grantee.

Goodman v Andrews, 203-979; 213 NW 605

Deed (?) or will (?). An executed and delivered deed of conveyance in the ordinary form conveys an interest in praesenti—is not testamentary—even tho it provides (1) that "it shall not take effect until after the death" of the grantor, and (2) that the grantor does not "give up possession" to the grantee during the life of the grantor, and (3) that the grantor "reserves the use and income of the premises as long as he lives".

Hall v Hall, 206-1; 218 NW 35

Deed (?) or will (?). An instrument which passes the title to real estate in praesenti, tho the right to its possession and enjoyment is deferred to a future time, is a deed of conveyance and not a testamentary instrument.

Bardsley v Spencer, 215-616; 244 NW 275

Trust — construction — nontestamentary instrument. A declaration of trust in and over real estate for the benefit of the trustor and named beneficiaries, and a contemporaneously executed and delivered warranty deed to the same property to the trustee, cannot be deemed a will, even tho the trustor-grantor reserves in the declaration of trust complete control, management, and dominion over the property during his lifetime, even to the power to revoke the trust and to demand a reconveyance, or to dispose of the property by testament.

Keck v McKinstry, 206-1121; 221 NW 851

(b) JOINT WILLS

Discussion. See 4 ILB 189—Right to revoke mutual wills

Joint and mutual wills. Will construed, and held to be an individual will.

Mann v Seibert, 209-76; 227 NW 614

Mutual wills defined. Mutual wills are those executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other. Such wills, if they contain no provisions for third persons, constitute a single will, and is the will of the first to die, and have no further existence as the will of the survivor.

Maurer v Johansson, 223-1102; 274 NW 99
Maloney v Rose, 224-1071; 277 NW 572

Separate or same instrument—revocation. Principle reaffirmed that mutual wills may be in the same or separate instruments, and either party, while both are living, may validly revoke the will by giving notice of the revocation to the other party.

Maurer v Johansson, 223-1102; 274 NW 99

Mutual wills ipso facto establish prior contract—other evidence unnecessary. Where wills of husband and wife, each acting with knowledge of other, are drawn at substantially same time, at their joint request, and each contains reciprocal provisions, such wills and circumstances are sufficient to establish prior contract to make mutual wills, even when the wills contain no memorandum of the agreement.

Maurer v Johansson, 223-1102; 274 NW 99
Child v Smith, 225-1205; 282 NW 316

III SIGNATURE OR SUBSCRIPTION BY OR FOR TESTATOR

Discussion. See 14 ILR 323—Location of signature

Signing by "mark". A mentally competent testator may validly sign his will by "his mark".

In re Burcham, 211-1395; 235 NW 764

Place of signature immaterial. A testator signs his will if he places his signature at any place thereon with the intention of authenticating the writing as his last will and testament. Will held properly signed.

In re Johnson, 209-757; 229 NW 261

Fatal defect. A written instrument purporting to be a last will and testament is not admissible to probate when it appears that the purported testator, (1) did not sign the instrument in the presence of the subscribing witnesses, and (2) did not in any manner adopt or confirm said signature in the presence of said witnesses.

In re McElderry, 217-268; 251 NW 610

III SIGNATURE OR SUBSCRIPTION BY OR FOR TESTATOR—concluded

Handwriting expert — striking evidence — jury admonition—curing error. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

IV ATTESTATION AND SUBSCRIPTION BY WITNESSES

Attestation by witnesses. An attestation of a will by competent witnesses with the full knowledge and approval of the testator is all-sufficient.

In re Burcham, 211-1395; 235 NW 764

Execution—sufficiency. Proof that a will was signed by the testatrix in the presence of one of the subscribing witnesses who thereupon, in her presence, signed as a witness, and that the other witness signed as a witness in the presence of both the testatrix and the first witness under circumstances clearly justifying the implication that testatrix was acknowledging her signature and requesting the second witness so to sign, establishes the due execution of the will.

In re Droge, 216-331; 249 NW 209

Witnessing—fatal defect. A will is not "witnessed by two competent persons" when one of the two persons signing as witnesses has no personal knowledge that the instrument was signed by testator.

In re Pike, 221-1102; 267 NW 680

Sufficiency of request to sign. A will, to be valid, must be witnessed at the request of testator; however, the request need not be spoken but may be by acquiescence, by act or motion, or even by his silence when he knows that the witnesses are signing, tho at the request of another, and he makes no objections, but the question of due execution should be left to the jury when it develops from testimony that one witness signed at the request of a beneficiary and that testator may not have, in any manner, requested the witnesses to sign.

Burgan v Kinnick, 225-804; 281 NW 734

Witnesses signing in testator's presence—quaere. Whether attesting witnesses must sign will in testator's presence, quaere.

Burgan v Kinnick, 225-804; 281 NW 734

11853 Defect cured by codicil.

Will and codicil as one instrument. A testatrix who, in her original will devises:

1. Separate specific bequests to named nephews and nieces, and

2. The remainder of her estate to nine named nephews and nieces,

And later, by codicil, not only names four additional nephews and nieces as residuary legatees, but declares "it being my intention to divide my estate among all my nephews and nieces", must be deemed to have intended that nephews and nieces not named in the will or codicil should share in the residuary estate along with those named in the will or codicil as residuary legatees.

Reasons: A will and a codicil constitute but one instrument. Every clause in a will must be given a meaning. No construction is necessary as to a clause which is perfectly clear in expression and meaning.

In re Thomas, 220-50; 261 NW 622

Dependent relative revocation—codicil with invalid provision. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

Absolute bequest—later repugnant provision disregarded. Where a codicil made an absolute bequest of a residuary estate to a county to be used in paving a highway, and a later provision in the codicil gave certain directions to the executor and imposed conditions for acceptance of the bequest by the county, such later conditions were repugnant and would defeat the purpose of the testator and must be disregarded when void in delegating power to the executor in violation of statute, and the intention of the testator as expressed in the first provision must be given effect to prevent intestacy.

Blackford v Anderson, 226-1138; 286 NW 735

Codicil creating charitable trust. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Equivocal expressions of revocation. A will and first codicil were not revoked by a second codicil providing that it should prevail in case of conflict between it and the two previous instruments, and the three instruments stood as the final testamentary disposition of the testator with the second codicil displacing the others only insofar as it was clearly inconsistent with them, altho the second codicil was referred to as a "last will and testament" and declared the previous will and codicil to be revoked, as the revocation of a will depends on intent to be gathered from all the papers and attending circumstances and cannot be overridden by equivocal expressions of revocation.

Blackford v Anderson, 226-1138; 286 NW 735

Bequest for paving roads. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Revocation of codicil by tearing. A codicil to a will is completely revoked when the testator, with the intent to revoke it, directs the custodian thereof to destroy it, and when said custodian, in the absence of testator, complies with said direction by tearing said codicil into many pieces, of which act the testator had knowledge before her death; and this is true tho the custodian preserves said pieces and later physically reconstructs said instrument by pasting the same on another piece of paper.

In re Nish, 220-45; 261 NW 521; 100 ALR 1516

11855 Revocation—cancellation.

ANALYSIS

I REVOCATION BY SUBSEQUENT WILL OR CODICIL
II REVOCATION BY OPERATION OF LAW
III DESTRUCTION, CANCELLATION, OBLITERATION, OR ALTERATION

Birth of child after execution of will. See under §11858, Vol I

I REVOCATION BY SUBSEQUENT WILL OR CODICIL

Cancellation by subsequent, lost will—evidence required. A prior will is not shown to be revoked by evidence which tends to prove the execution of a subsequent will containing a clause revoking the prior will, but which is, otherwise, wholly indefinite as to the contents of such subsequent will and as to the witnesses thereto, and as to its whereabouts.

In re Rutledge, 210-1256; 232 NW 674

Revival and reinstatement of revoked will. Even tho a second will unquestionably revokes a first will, nevertheless said first will is revived and reinstated by the due and formal testamentary execution of a later instrument wherein testator declares that "my will and wish as expressed in my will and testament under date of January 29, 1914" (the first will) "is the only will and testament I have ever knowingly and willingly made, and I wish it to be so considered after my death," said last instrument being, in itself, a will.

In re Cameron, 215-63; 241 NW 458

Equivocal expressions of revocation. A will and first codicil were not revoked by a second codicil providing that it should prevail in case of conflict between it and the two previous instruments, and the three instruments stood as the final testamentary disposition of the testator with the second codicil displacing the others only insofar as it was clearly inconsistent with them, altho the second codicil was referred to as a "last will and testament" and declared the previous will and codicil to be revoked, as the revocation of a will depends on intent to be gathered from all the papers and attending circumstances and cannot be overridden by equivocal expressions of revocation.

Blackford v Anderson, 226-1138; 286 NW 735

Dependent relative revocation—codicil with invalid provision. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

Codicil creating charitable trust. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Mutual will of surviving spouse—failure to revoke—anti-lapse statute. Inasmuch as mu-

tual wills constitute in law but one will, the will of the first to die, and the will of the survivor, being a nullity, has no existence such as to require revocation by the surviving spouse under this section, nor as to permit the heirs of the surviving spouse to inherit under §11861, C., '35.

Maurer v Johansson, 223-1102; 274 NW 99

II REVOCATION BY OPERATION OF LAW

Mutual wills ipso facto establish prior contract—other evidence unnecessary. Where wills of husband and wife, each acting with knowledge of other, are drawn at substantially same time, at their joint request, and each contains reciprocal provisions, such wills and circumstances are sufficient to establish prior contract to make mutual wills, even when the wills contain no memorandum of the agreement.

Child v Smith, 225-1205; 282 NW 316

Mutual wills defined. Mutual wills are those executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other. Such wills, if they contain no provisions for third persons, constitute a single will, and is the will of the first to die, and have no further existence as the will of the survivor.

Maurer v Johansson, 223-1102; 274 NW 99
Maloney v Rose, 224-1071; 277 NW 572

Mutual—separate or same instrument—revocation. Principle reaffirmed that mutual wills may be in the same or separate instruments, and either party, while both are living, may validly revoke the will by giving notice of the revocation to the other party.

Maurer v Johansson, 223-1102; 274 NW 99

III DESTRUCTION, CANCELLATION, OBLITERATION, OR ALTERATION

Discussion. See 8 ILB 52—Later will destroyed —first will revived

Revocation of codicil by tearing—reconstructing pieces—effect. A codicil to a will is completely revoked when the testator, with the intent to revoke it, directs the custodian thereof to destroy it, and when said custodian, in the absence of testator, complies with said direction by tearing said codicil into many pieces, of which act the testator had knowledge before her death; and this is true tho the custodian preserves said pieces and later physically reconstructs said instrument by pasting the same on another piece of paper.

In re Nish, 220-45; 261 NW 521; 100 ALR 1516

Lost will—required proof. In proceedings to establish a lost will, the proponent must prove (1) the due execution and existence of the instrument; (2) that it has been lost and could not be found through diligent search; (3) that the presumption of its destruction by the testator with intention to revoke it, arising from its absence on his death, has been rebutted, and (4) the contents or provisions of the will.

Goodale v Murray, 227-843; 289 NW 450

Lost will—presumption of revocation rebutted. In the establishment of a lost will, there is a presumption that a will which was in the custody of the testator at his death, and which cannot be found, was destroyed by him with the intention of revoking it. The presumption may be rebutted or strengthened by proof of declarations of the testator, his circumstances, or his relations to the persons involved.

Goodale v Murray, 227-843; 289 NW 450

11857 Executors.

Supplanting resident appointee. A duly appointed foreign executor, even tho nominated as such in the will, has no arbitrary right to supplant an executor appointed in this state, where part of the estate is situated.

In re Gray, 201-876; 208 NW 358

Appointment of nominated executor required unless disqualified. Altho a certain discretion lies with the probate court in the appointment of personal representatives, nevertheless an executor named in a will as the one in testator's judgment best fitted to administer his estate should be appointed by the court in the absence of disqualification, which must be more than the objections of collateral relatives.

In re Schneider, 224-598; 277 NW 567

Codicil giving executor highway construction powers. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

11858 After-born children.

Discussion. See 3 ILB 128—Rights of unborn infants

11859 Claims in disregard of will.

Specific devise — liability for debts. A specific devise of real estate which not only de-

vises the property, but requires the testator's estate to discharge the mortgage thereon, cannot, in case the estate and all nonspecific devises are insufficient to pay said mortgage and other debts, be construed as casting upon another specific devise of real estate which is not made subject to the former devise, the entire burden of discharging said mortgage and other debts. Each of said specific devises must bear said burden in the ratio of their separate value to their combined value.

In re Glandon, 219-1094; 260 NW 12

11860 Devise—legacy—bequest.

Designation of devisee. The fact that the name of the beneficiary of a religious or charitable trust as specified in the will is different than the name of the claimant of the devise becomes unimportant, in the face of ample testimony that the designated beneficiary and the claimant are one and the same institution.

Ross v Seminary, 204-648; 215 NW 710

Equal standing of specific devises. Neither of two different, specific devises of real estate, irrespective of their particular location or position in the will, can be deemed junior or inferior to the other when neither is made subject to the other.

In re Glandon, 219-1094; 260 NW 12

11861 Heirs of devisee.

Discussion. See 19 ILR 1—Anti-lapse problems

"Death without heirs." Will construed and, in view of the environment of the testator and of the facts concededly known to him, held (1) that a provision to the effect that, if the beneficiary of a trust "dies without leaving any heirs," the remainder shall go to some old ladies' home, embraced a death either before or after the death of testator; and (2) that the term "heirs" must be construed as though followed by the words "of his body."

In re Clifton, 207-71; 218 NW 926

Death in common disaster. The heirs of a devisee cannot be deemed to be substituted for the devisee when it appears that both the testator and devisee perished in a common disaster and there is no evidence that the devisee died before the testator died.

Carpenter v Severin, 201-969; 204 NW 448; 43 ALR 1340

Lapse of devise to spouse. A devise by a husband to his wife is deemed to lapse upon his death when the devise is identical in quality and quantity with what the wife would have taken under the statute, had there been no will; but not so of a devise which gives the wife one third of his entire estate (1) after converting all real estate, including homestead, into personalty and (2) after paying all debts.

In re Davis, 204-1231; 213 NW 395

Devise and bequest identical with statute of descent. A will is a nullity which devises and bequeaths to a devisee and legatee the same quantity and quality of real and personal property which the devisee and legatee would take under the law of descent. So held where a spouseless and childless son devised all his property to his sole surviving parent.

In re Warren, 211-940; 234 NW 835

Prior death of devisee. A devise to a devisee who dies prior to the testator passes to the heirs of the deceased devisee, in the absence of a contrary intent, as expressed in the will.

Rodgers v Reinking, 205-1311; 217 NW 441

Devisee predeceasing testator—rights of devisee's heirs. Where testator devised to his wife one-half of all the property he should own at time of his death, "to own, hold and enjoy as her own", and when the wife predeceased him, her heirs inherited one half of all the property of the testator in fee simple, under the anti-lapse statute.

In re Bigham, 227-1023; 290 NW 11

Nonlapse of devise. A devise to one whom the testator knows to be dead when the will is executed does not lapse on the death of the testator, the will not manifesting a contrary intent.

Friederichs v Friederichs, 205-505; 218 NW 271

Intended lapse. A bequest, even tho in terms directly to an infant legatee, "to be used to further his education, said amount to be placed in a savings account and be allowed to run until he has arrived at the age of 18 years when it shall be used for that purpose", reveals an intention to let the bequest lapse in case the legatee dies before the testator dies.

In re Best, 206-786; 221 NW 369

Substituted legatees — offsetting debts. Unless a will provides otherwise, a legacy to one who predeceases the testator passes to the heirs of the deceased legatee subject to the right of the executor to apply the legacy on the unpaid debt of the deceased legatee to the estate. It follows that if the debt equals or exceeds the legacy the heirs take nothing.

In re Mikkelsen, 202-842; 211 NW 254
In re Rueschenberg, 213-639; 239 NW 529

Collateral heirs — burden of proof. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had

been taken, by a Caesarean operation, from the womb of a dead mother.

Wehrman v Farmers Bank, 221-249; 259 NW 564; 266 NW 290

Devise to class and individuals thereof. A devise to a class of persons lapses as to all devisees who die prior to the testator; but when the devise is to a class and the persons in that class are individually named, the devise is presumptively a devise to each individual, and the death of a devisee prior to the death of testator does not cause that devise to lapse; and a proviso that the devise shall be held jointly does not overthrow said presumption.

In re Carter, 203-603; 213 NW 392

Devise to class individually named. A devise to a class, the members of which are individually named, is presumptively a separate devise to each separate individual.

Friederichs v Friederichs, 205-505; 218 NW 271

Devise to class—predeceased children—intention from antenuptial contract. A testator's intention when ascertainable is controlling and the general rule which limits a devise to a class to only such devisees as are alive at testator's death, is not applicable where a contrary intent appears. So held in construing a will dividing the residue "among my children" where an antenuptial contract mentioned in the will, altho an extrinsic matter, was admitted to show testator's intention to include the heirs of his predeceased children among his children.

In re Huston, 224-420; 275 NW 149

Mutual will of surviving spouse—failure to revoke—anti-lapse statute. Inasmuch as mutual wills constitute in law but one will, the will of the first to die, and the will of the survivor, being a nullity, has no existence such as to require revocation by the surviving spouse under §11855, C., '35, nor as to permit the heirs of the surviving spouse to inherit under §11861, C., '35.

Maurer v Johansson, 223-1102; 274 NW 99

Settlement without administration—agreement of heirs binding. An agreement by heirs to settle estate without administration and providing for payment of legacies is legal and binding, and a widow of one of such heirs in a subsequent partition action cannot complain of denial of legacy to deceased heir where legacies due to other heirs were larger and such heirs received no part of their legacies.

Meeker v Meeker, (NOR); 283 NW 873

11862 Custodian—filing—penalty.

Lost will—evidence—sufficiency. Evidence to establish a lost will and the contents thereof must be very clear and satisfactory.

In re Delaney, 207-448; 223 NW 484

Petition to probate unnecessary. A person having the custody of a will must file it with the clerk, and a petition to probate the will is no part of our probate practice.

In re Young, 224-419; 275 NW 558

11863 Probate.

ANALYSIS

I PROBATE IN GENERAL
II NECESSITY OF PROBATE
III PLEADINGS, EVIDENCE, AND TRIAL

I PROBATE IN GENERAL

Remand with order to dismiss. A holding on appeal that an instrument is not admissible to probate as a last will and testament necessitates a remand to the trial court with direction to dismiss the petition for probate.

In re McElderry, 217-268; 251 NW 610

Lost will. An action to establish a lost will must be brought in the probate court.

Coulter v Petersen, 218-512; 255 NW 684

Lost will—required evidence. Evidence sufficient to probate a lost will must clearly and satisfactorily establish (1) the due execution, and (2) the contents, of such will; and such rule is not relaxed by the fact that such will was last seen in the possession of the testator's wife. Evidence held insufficient.

Miller v Miller, 203-888; 210 NW 537
In re Delaney, 207-448; 223 NW 484

Cancellation by subsequent, lost will—clear and convincing evidence required. A prior will is not shown to be revoked by evidence which tends to prove the execution of a subsequent will containing a clause revoking the prior will, but which is otherwise wholly indefinite as to the contents of such subsequent will and as to the witnesses thereto and as to its whereabouts.

In re Rutledge, 210-1256; 232 NW 674

Mutual wills—probating one nullifies second—evidence—no jury question. Where mutual wills have been executed and one previously admitted to probate, the remaining will being a nullity, an order denying it to probate is proper, and indefinite evidence of testator's statements offered in an attempt to create validity was speculative, properly stricken, and raised no jury question.

Maurer v Johansson, 223-1102; 274 NW 99

Approval of executor's report not construction of will. The fact that the court had approved an executor's report, wherein he had attempted to relieve an estate of inheritance tax on the ground that all devises in the will were contingent, does not mean that such holding is a construction of the will, since the construction of the will was not in issue.

Flanagan v Spalti, 225-1231; 282 NW 347

II NECESSITY OF PROBATE

Agreement not to probate. Beneficiaries under a will may validly agree, and have their agreement confirmed by an order of court, that the will shall not be probated, and that the property shall be shared on a basis different than that provided by the rejected instrument —no question as to the right of trust beneficiaries or of estate creditors being involved.

In re Murphy, 217-1291; 252 NW 523

III PLEADINGS, EVIDENCE, AND TRIAL

Petition to probate unnecessary. A person having the custody of a will must file it with the clerk, and a petition to probate the will is no part of our probate practice.

In re Young, 224-419; 275 NW 558

Lost will. Evidence sufficient to probate a lost will must clearly and satisfactorily establish (1) the due execution, and (2) the contents, of such will; and such rule is not relaxed by the fact that such will was last seen in the possession of the testator's wife.

Miller v Miller, 203-888; 210 NW 537
In re Delaney, 207-448; 223 NW 484

Lost will—required proof. In proceedings to establish a lost will, the proponent must prove (1) the due execution and existence of the instrument; (2) that it has been lost and could not be found through diligent search; (3) that the presumption of its destruction by the testator with intention to revoke it, arising from its absence on his death, has been rebutted, and (4) the contents or provisions of the will.

Goodale v Murray, 227-843; 289 NW 450

Establishment of lost will. Proceedings to establish a lost will are within the jurisdiction of the court to act without a jury, as first the court must determine whether the proof is sufficient to establish the terms of the lost instrument, and, if the court finds it to be properly proved and established, then the matter stands as do all wills when offered for probate, and, if contested, may be tried to a jury.

Goodale v Murray, 227-843; 289 NW 450

Hostile petitions—refusal to consolidate. Possibly the hearing on different petitions for the probate of hostile wills might be consolidated and the validity of said wills tried out in one action, yet an order which refuses such consolidation is not erroneous when the rights of all parties are fully protected by the order.

In re Fitzgerald, 219-988; 259 NW 455

Undue influence—insufficient proof. Principle reaffirmed that opportunity and disposition to exercise undue influence, plus persuasion and importunity as to the disposition of testator's property, are not sufficient, in and of themselves, to establish undue influence. Record reviewed and held wholly insufficient to support the submission of the issue.

In re Muhr, 218-867; 256 NW 305

Directed verdict—when required. When the real issue is as to testator's mental competency, the court should sustain the will, by a directed verdict, when a contrary jury verdict would be without adequate evidentiary support, or, in other words, when contestant has failed to show that testator was so mentally deficient that he did not comprehend the nature and purpose of the instrument, the extent of his property, the distribution he wanted to make, or those who had claim on his bounty. (Directed verdict held proper.)

In re Fitzgerald, 219-988; 259 NW 455

Grounds—verdict contrary to evidence. Where proponents of a will move for a new trial, setting up five specific grounds, one being that the verdict is contrary to the evidence, as to which ground the record shows a conflict in the testimony, an order granting a new trial will not be disturbed on appeal.

In re Younggren, 225-348; 280 NW 556

11864 Contest—jury trial.

ANALYSIS

I CONTESTS IN GENERAL
II COSTS

I CONTESTS IN GENERAL

Burden of proof—testamentary capacity—how determined. In a will contest, after proponent's formal proofs, the burden of showing lack of mental capacity of the testatrix is on contestant. Mere deterioration in physical or mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable to intelligently comprehend the estate of which he is possessed and the natural objects of his bounty and to intelligently exercise judgment and discretion in the disposition of his property.

In re Behrend, 227-1099; 290 NW 78

Lack of testamentary capacity—evidence sufficiency—jury question. On appeal from directed verdict against contestant in a will contest where the evidence shows, by testimony of physician who attended testatrix over a period of years, that testatrix was a woman prematurely old at 66, suffering from toxic goiter and other ailments which prevented proper nutrition of her organs and kept her body poisoned, that such ailments were of progressive nature resulting in rapid increase of her apparent age and accelerated physical and mental decline and that in his opinion testatrix's mentality was impaired to such extent at time of execution of will she was of unsound mind, held, that evidence of lack of testamentary capacity was sufficient to support a ver-

I CONTESTS IN GENERAL—continued

dict for contestant, if jury so found, and refusal to submit case to the jury was erroneous.

In re Behrend, 227-1099; 290 NW 78

Administration in general — irregular and improper. The fact that, in a will contest, verdict has been returned and judgment entered thereon to the effect that the alleged will in question is not a valid will, does not, in and of itself, legally justify the court in terminating an existing special administratorship and in appointing a general administrator. Said latter appointment would probably be void.

In re Whitehouse, 223-91; 272 NW 110

Establishment of lost will. Proceedings to establish a lost will are within the jurisdiction of the court to act without a jury, as first the court must determine whether the proof is sufficient to establish the terms of the lost instrument, and, if the court finds it to be properly proved and established, then the matter stands as do all wills when offered for probate, and, if contested, may be tried to a jury.

Goodale v Murray, 227-843; 289 NW 450

False representations. A representation to the effect that if a will is contested the property of the estate must be divided equally among the heirs, interwoven inter alia with the statement that the testator "had no business (right)" to will all the property to a particular heir, and a false statement as to the expense attending such contest, constitute a legal fraud if made for the purpose of inducing action, and if justifiably believed and justifiably relied on by the party to whom made to his detriment.

Smith v Smith, 206-606; 219 NW 512

Contract of settlement—fraud and undue influence. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

Copying censorious and inflammatory pleading. A censorious and somewhat inflammatory pleading of grounds of contest of a will should, if the context presents support for such action, be so paraphrased in the instructions as to present the simple issues of (1) want of testamentary capacity and (2) undue influence. To copy the entire pleading into the instructions constitutes reversible error.

In re Thompson, 211-935; 234 NW 841

Submission of withdrawn issue. The submission to the jury in a will contest of the issue of testamentary capacity, when said issue had been wholly withdrawn by the contestant (even tho in the presence of the jury), is necessarily erroneous and prejudicial.

In re Narber, 211-713; 234 NW 185

Unallowable contestant — assignee of expectancy. An assignee—even for value—of the interest which an heir expects to inherit in the property of his parent, may not contest the will of the parent in case the assignor-heir be disinherited by the last will and testament of the parent.

Burk v Morain, 223-399; 272 NW 441; 112 ALR 79

Judgment creditor of devisee-heir. When a father's will left property to a son and heir in trust so that it could not be subjected to the son's debts, a judgment creditor of the son was an interested person who had a beneficial and pecuniary interest in the estate of the deceased and in the son's share therein, of which he would be deprived to his prejudice if the will were probated.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of heir. The creditor of an heir who holds a judgment against him which would be a lien upon any real estate which he would inherit from an ancestor has an interest which entitles him to contest the ancestor's will.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of heir. Judgments held against a son and heir of the decedent and recorded where real estate owned by the decedent was located became liens upon the real estate at the time the title thereto vested in the son, and were a beneficial interest entitling the creditor to contest the probate of a will which would deprive him of that interest.

In re Duffy, 228- ; 292 NW 165

Mutual wills—probating one nullifies second —evidence—no jury question. Where mutual wills have been executed and one previously admitted to probate, the remaining will being a nullity, an order denying it to probate is proper, and indefinite evidence of testator's statements offered in an attempt to create validity was speculative, properly stricken, and raised no jury question.

Maurer v Johansson, 223-1102; 274 NW 99

Nonconfusing instruction. Instructions reviewed in a will contest and held not subject to the vice of being inconsistent or confusing.

In re Wood, 213-254; 237 NW 237

Harmless error—instructing on immaterial, nonprejudicial evidence. A will contestant's contention that it was error to instruct regarding a nonmaterial exhibit—a memorandum by a deceased attorney, who drew the will—although well founded, held to be error without prejudice when the paper and the conversation connected therewith were not necessary for proponents to make a prima facie case of the

due and legal execution of the will and the genuineness of the signatures.

In re Iwers, 225-389; 280 NW 579

Will contest—immaterial and prejudicial matter. In a will contest, evidence that the wife of a witness gave birth to a child materially earlier than the ordinary period of gestation is quite improper and immaterial.

In re Thompson, 211-935; 234 NW 841

Newly discovered evidence—inviting perjury—improper offer of money or property. A new trial must be granted when, after a verdict adverse to proponent in a will contest, the fact is promptly discovered and shown to the court that the contestant, during said first trial, and on condition that he win the contest, had made, to divers of the witnesses testifying at the trial, offers of a substantial part of the estate as an inducement for said witnesses to testify in behalf of contestant; and this is true even tho it be conceded that said contestant in making said offers was not intending thereby actually to bribe said witnesses to commit perjury.

In re Whitehouse, 223-91; 272 NW 110

Instituting noninconsistent action. The commencement by the proponents of a will of an action in partition after the return of a verdict holding the will invalid is not a waiver of the right to appeal from the adverse verdict denying probate of the will, when the petition in partition definitely asserted the intent and right to appeal, and assumed to make the outcome of the partition proceedings dependent on the outcome of said appeal.

In re Narber, 211-713; 234 NW 185

II COSTS

Taxation — unsuccessful will contestant. Costs accruing in an unsuccessful contest of a will should be taxed to the contestant.

Schroeder v Cable, 211-1107; 235 NW 63

11865 Notice of hearing.

Sufficiency. The probate clerk, under his discretionary statutory powers, may order less than ten days notice of the probate of a will, and may also vary the ordinary statutory method of giving the notice.

In re McKinstry, 204-487; 215 NW 497

11866 Proof—depositions.

Lost will—proof necessary to establish. To establish a lost will, the evidence must be clear, satisfactory and convincing, but need not be free from doubt.

Goodale v Murray, 227-843; 289 NW 450

Lost will—required proof. In proceedings to establish a lost will, the proponent must prove (1) the due execution and existence of the instrument; (2) that it has been lost and could not be found through diligent search; (3) that the presumption of its destruction by the testator with intention to revoke it, arising from its absence on his death, has been rebutted, and (4) the contents or provisions of the will.

Goodale v Murray, 227-843; 289 NW 450

Proof of state of mind. Decedent's statements, made to the person who drew a will for him, that he wished to make a will and that he wished a certain person to have all his property, were admissible after his death as an exception to the hearsay rule to prove his existing state of mind at the time and to show that his plan was put into effect by making such a will.

Goodale v Murray, 227-843; 289 NW 450

State of mind. When a person who had talked with the decedent shortly before decedent's death testified that the decedent told him that he had made a will, where it was made, and who were witnesses to the will, the testimony, when not objected to, could be given its full probative effect, and came under an exception to the hearsay rule to show the then state of mind of the decedent, tending to prove the prior execution of the will.

Goodale v Murray, 227-843; 289 NW 450

Court findings upheld. In proceedings to establish a lost will, the loss of the will and the search for it were proved by evidence that the will could not be found altho the home of the deceased and other places where the will might have been kept were thoroughly searched. The conclusion of the trial judge on the sufficiency of such evidence will not be disturbed unless discretion is abused.

Goodale v Murray, 227-843; 289 NW 450

Lost will—presumption of revocation rebutted. In the establishment of a lost will, there is a presumption that a will which was in the custody of the testator at his death, and which cannot be found, was destroyed by him with the intention of revoking it. The presumption may be rebutted or strengthened by proof of declarations of the testator, his circumstances, or his relations to the persons involved.

Goodale v Murray, 227-843; 289 NW 450

Lost will—contents shown by subscribing witness. The contents of a lost will were sufficiently established by testimony of a subscribing witness who heard the testator tell the scrivener how he wanted to dispose of his property, and heard the will read aloud to the testator who signed it without suggesting any change in the contents, when the testimony met all the requirements justifying an exception to the hearsay rule.

Goodale v Murray, 227-843; 289 NW 450

Proof of testamentary intentions. Testimony by a witness to a will that the will was read

aloud in the presence of himself and the testator, and that the testator signed it and did not object to the contents, was proper to show that the instrument was executed with the belief that it disposed of the testator's property in accordance with his intentions.

Goodale v Murray, 227-843; 289 NW 450

11876 Trustees to give bond.

Trusts generally. See under §10049

Discussion. See 21 ILR 651—Relation of resulting trusts to partial intestacy

Atty. Gen. Opinion. See '30 AG Op 225

Successive bonds. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

Bonds—necessary conditions. It seems that the official bonds of executors, administrators, court-appointed trustees, and similar officers are necessarily conditioned as the bonds of public officers are conditioned. (§1059, C., '31.)

Whisler v Estes, 216-491; 249 NW 264

Powers of trustee. Principle reaffirmed that the power of a trustee to dispose of trust property is limited to the powers granted in the trust agreement.

In re Barnett, 217-187; 251 NW 59

Trustees — powers — execution of notes. Power in a testamentary trustee to invest and reinvest the subject matter of the trust and generally to do substantially whatever the testator might do, were he alive, necessarily embraces the power to purchase lands and to execute promissory notes therefor.

Arnette v Watson, 203-552; 213 NW 270

Devise in fee in connection with trusteeship —effect. An unqualified devise in fee arms the devisee with power and right to mortgage the premises even tho the testator sees fit to embody in his will a provision for a trustee and to grant power in such trustee to execute mortgages.

First Bank v Torkelson, 209-659; 228 NW 655

No failure of trust for want of trustee. A trust estate will not fail for want of a trustee. So held where the bank, named as trustee in a will, failed.

First Methodist Church v Hull, 225-306; 280 NW 531

Death of trustee—revesting of title. Upon the death of a trustee, the title to the trust property vests in the beneficiary of the trust.

Copple v Morrison, 221-183; 264 NW 113

Trusts — property held by administrator. Where trust property in the possession of an administrator is identifiable and not affected by rights of innocent third parties, equity may impress a trust therein.

Carpenter v Lothringer, 224-439; 275 NW 98

Testamentary trustee's conduct. The intentions of a testator must be ascertained from the terms of the will and such intentions must prevail. In a matter of doubtful construction, circumstances surrounding the execution of the will may be shown to aid in determining what the testator meant by the language used. The conduct of a testamentary trustee is not such a circumstance and is therefore not a material, evidential matter in determining testator's intention.

Freier v Longnecker, 227-366; 288 NW 444

Validity. A testamentary trust will be sustained when the intent of testator is evident, even tho the bequest runs to an unincorporated entity.

Meeker v Lawrence, 203-409; 212 NW 688

Trustee by contract—jurisdiction of court. A trustee who is such by contract between himself and the beneficiaries, but who applies to the district court for formal appointment, who is so appointed, who qualifies as such trustee under order of court, and who, in compliance with a prayer therefor, is authorized to take possession of, and manage the property in question under "orders of court", is subject to the jurisdiction of the court in the matter of reports, the rejection thereof, and final accounting.

In re Skinner, 215-1021; 247 NW 484

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Findings of fact in probate—conclusiveness. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams, 219-374; 258 NW 682

Execution of trust. The discretion of a trustee in carrying out the purposes of the trust is always subject to review by the court.

In re Cool, 210-30; 230 NW 353

Conditional bequest—fulfillment—discretion of trustees. A testamentary bequest payable on condition that the beneficiary shall "abstain from all those things that lead him into a dissipated life and make him an undesirable citizen" and that at a named age he shall be "a reasonable good citizen" must be construed as vesting the trustees with a fair and good-faith discretion in determining whether the conditions have been complied with. Evidence held not to show an abuse of such discretion.

In re Sams, 219-374; 258 NW 682

Conditional bequest—fulfillment—discretion of trustees. A testamentary bequest payable on condition that the beneficiary "go on and complete his education through the high school and four years of college course", coupled with a provision that the "substantial" fulfillment of such condition is left to the "fair judgment and opinion" of the trustees, must be construed as authorizing the trustees, in good faith, to find a fulfillment on the basis of an acquired education other than that acquired under a regular and established high school and college curriculum, but, in their fair judgment, equal thereto.

In re Sams, 219-374; 258 NW 682

Execution of trust — trustees (?) or receiver (?). A court of equity may not terminate or violate a trust agreement between the issuer of bonds and trustees to the effect that the former will transfer to the latter securities for the benefit of bondholders, and that if the issuer defaults in the payment of interest on, or principal of, the bonds, the trustees, on notice from the unpaid bondholders, shall liquidate said securities and apply the proceeds to the payment of the bonds. It follows that, if the issuer of the bonds becomes insolvent, the trustees, in the absence of any counterwish of the bondholders, have a right, superior to that of the receiver, to liquidate the securities, the securities being less than the outstanding bonds; and this is true even tho the securities in question are not actually transferred to the trustees but only delivered to them.

In re Trusteeship, 214-884; 241 NW 308

Action against joint parties. Two or more persons acting jointly in a fiduciary capacity in relation to the same property for the same beneficiary, are properly made joint defendants in an action to enforce the trust.

Burger v Krall, 211-1160; 235 NW 318

Reports—burden of proof. A trustee has the burden to justify his own reports.

In re Bartholomew, 207-109; 222 NW 356

Reports—disapproval. A trustee who, in his acceptance of a nontestamentary trust, agrees to report annually to the district court, and does so report, and who invokes the jurisdiction of the probate court to pass upon his reports, may not thereafter question the power and right of such court to act upon such reports.

In re Bartholomew, 207-109; 222 NW 356

Preservation of property by administrator. In proceeding to recover from surety on administrator's bond, principle held applicable that a trustee is presumed to have preserved the property and that such presumption stands until overcome by evidence. Fact that such proceeding is at law does not preclude application of equitable principles.

In re Willenbrock, 228- ; 290 NW 503

Loss of trust funds. Where the issue whether a trustee should be credited with a loss of trust funds was heard by the probate court without a jury (as a continuation of the probate proceedings out of which the trust arose), the holding of the court, granting such credit, will be sustained if the evidence pro and con would have presented a jury question had the hearing been before a jury.

In re Moylan, 219-624; 258 NW 766

Credit for overpayment of income. On final accounting, a trustee will be credited with an overpayment to the beneficiary of income even tho such payment was made in advance of the actual receipt of the income.

In re Siberts, 216-336; 249 NW 196

Receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Self-enrichment of trustee. A testamentary trustee of a coal mining company who, personally or in connection with employees of the company, with their own funds, buys up lands or mining rights in lands, and leases to the company the right to mine coal from said lands under a royalty, will not be compelled, long afterward, to account to the legatees and devisees for the royalties so received and for salary drawn during said time, (1) when the trustee had been vested under the will with substantially the same power over the business as the deceased possessed when living, (2) when the policy of operating on leases was but a continuance of the life-long policy of the deceased, (3) when the royalties paid were the royalties ordinarily and customarily paid in said locality, and (4) when the existence and history of said transactions were carried openly on the books of the company, and were

either personally known or capable of being easily known by all the legatees and devisees.

In re Evans, 212-1; 232 NW 72

Investments without authorizing order — subsequent confirmation. Assuming, arguendo, that an authorizing order of court is absolutely necessary in order to render legal an investment of trust funds, yet a trustee, who, without such order, has made an investment in good faith, and without loss to the estate, may, subsequently, on a full showing of the controlling facts, and at a time when the estate has suffered no loss, be granted **a valid order** confirming said investment. (But see §12772, C., '31.)

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Adjudication of liability. An unappealed order of court adjudicating the amount of the liability of a trustee to the beneficiary is conclusive on the trustee and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Fraud of trustee. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

Liability on trustee's bond. A court-appointed trustee of cemetery funds and the sureties on his bond are liable for said funds deposited, without authority of court, in a bank of which both the trustee and the sureties were officers, and lost because of the insolvency of said bank.

Belmond Assn. v Luick, 217-805; 253 NW 521

Voluntarily augmented funds. A court-appointed, testamentary trustee and the surety on his official, statutory bond are liable not only for the money which comes into his hands as specifically required by the will, but for additional amounts of the testamentary funds which come into the hands of the trustee, as such, consequent on the generous action of the devisees, generally, in voluntarily augmenting said trust funds from the testamentary funds.

Whisler v Estes, 216-491; 249 NW 264

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Trustee borrowing from himself—accounting in cash (?) or in investments (?). A trustee, duly appointed by the court to execute a contract trusteeship, who loans the trust funds to himself, and uses the same in the purchase and improvement of various properties, without any authorizing order of court and without the knowledge or consent of the beneficiaries of the trust, will, on final report, be ordered to account in cash for said funds, and not in the physical properties bought by him, especially when said properties are inferior to the standard of investments required by said contract.

In re Skinner, 215-1021; 247 NW 484

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

Nonpermissible purchase by trustee. A trustee of property may not sell trust property to himself, nor to a co-trustee, nor to his or her spouse, without the consent of all beneficiaries of the trust, nor may the court authorize or approve such a sale without the consent of said beneficiaries.

In re Holley, 211-77; 232 NW 807

Negligence—evidence. Evidence held to support a finding that a trustee had failed to exercise a fair and sound discretion in investing trust funds.

In re Bartholomew, 207-109; 222 NW 356

Unauthorized investments. Trust funds invested by a trustee in questionable or worthless securities without an authorizing order of court must, on settlement, be accounted for in cash, such securities not being "securities approved" as provided by section 12772, C., '31.

Whisler v Estes, 216-491; 249 NW 264

Unauthorized investment—advice of counsel. An illegal and unauthorized investment by a trustee will not, on an accounting, be treated as legal and authorized on a showing that the investment was made on the advice of an attorney.

In re Skinner, 215-1021; 247 NW 484

Unallowable investments. The court may charge a court-appointed trustee with the amount of an investment purchased by the trustee from himself at a profit and without an authorizing order of court.

In re Siberts, 216-336; 249 NW 196

Right to impeach action of trustee. The act of a trustee in individually buying in property at tax sale and in receiving a tax sale certificate when a mortgage on the property constituted part of the trust fund is unimpeachable except by the cestui que trust; in other words, the subsequent purchaser of said property at foreclosure sale may not impeach such act, especially when such purchaser had

both actual and constructive knowledge when he purchased that the taxes had not been paid.

Eyres v Koehler, 212-1290; 237 NW 351

Redemption from tax sale. The act of a testamentary trustee in individually buying in property at tax sale and receiving a tax sale certificate when a mortgage on the property constituted a part of the trust funds cannot be deemed a redemption of the property from the taxes for the benefit of a subsequent purchaser of the property at mortgage foreclosure sale.

Eyres v Koehler, 212-1290; 237 NW 351

Improper allowance of attorney fees. A trust created by a legislative appropriation act, solely for the "education, care, and keep" of a designated person, may not be depleted by the allowance by the court of attorney fees for services rendered, not in the administration of the trust, but in inducing the legislature to make the appropriation.

In re Gage, 208-603; 226 NW 64

Receivership for insolvent trustee creates vacancy — power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfers, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprives said insolvent trustee of power further to act in said trusteeship, and (3) necessarily creates a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Trustee — disqualification — effect. Equity will not permit a trust to fail simply because a particular trustee is disqualified from acting.

State v Cas. Co., 206-988; 221 NW 585

Trustees — control and removal by court. Trustees are subject to control or removal by the court.

In re Sexauer's Trust, (NOR); 287 NW 247

Termination or removal of trustee by court. Evidence sustained trial court's refusal to terminate a spendthrift trust, or discharge trustees, upon application of beneficiary who alleged mismanagement and lack of cooperation on part of trustees, and also that beneficiary was not a spendthrift and that trust was not accomplishing purpose intended.

In re Sexauer's Trust, (NOR); 287 NW 247

11878 Foreign wills—procedure.

Jurisdiction to appoint nonresident administrator. The clerk of the district court has ample power to appoint a nonresident as administrator.

Finnerty v Shade, 210-1338; 228 NW 886

11882 Probate conclusive—setting aside.

ANALYSIS

I EFFECT OF PROBATE
II SETTING ASIDE PROBATE BY APPELLATE OR ORIGINAL PROCEEDINGS

Setting aside probate, limitation of action. See under §11007 (XIX)

I EFFECT OF PROBATE

Discussion. See 16 ILR 195—Decree determining heirs, distribution

Findings by probate court—conclusiveness. Findings of fact by a probate court are conclusive on the appellate court when they are fairly supported by competent testimony.

In re Fish, 220-1247; 264 NW 123

What adjudicated—nonestoppel to construe will after final report. Probate of a will being conclusive only as to its due execution and publication, a petition to construe a will is not a collateral attack on the order of probate; and such petition may be filed after the executor's final report, before which the petitioners were not aware of the construction which the executor would place on the will and therefore no estoppel arises from permitting executor to proceed with administration of the estate.

Maloney v Rose, 224-1071; 277 NW 572

Father-son partnership—probate of father's estate—son's partnership rights not adjudicated. A son's rights as a partner in a partnership with his father and mother, which partnership was continued with mother after father's death, were not adjudicated by the probate of his father's will and mother's discharge as executrix, since son was not a party to such proceeding as a partner, and since the probate court administered only the property owned by the father at the time of his death.

Eggleston v Eggleston, 225-920; 281 NW 844

II SETTING ASIDE PROBATE BY APPELLATE OR ORIGINAL PROCEEDINGS

Inheritance taker as representative of contingent remainderman. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the prin-

II SETTING ASIDE PROBATE BY APPELLATE OR ORIGINAL PROCEEDINGS—concluded

ciple or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

Statute of limitation — creditor's suit. Record involving an equitable proceeding to discover property belonging to a judgment defendant, and to subject said discovered property to the satisfaction of said judgment, reviewed, and held not barred by §§10378, 11007, C., '35, nor by this section.

Bankers Tr. v Garver, 222-196; 268 NW 568

Management in general — employment of counsel—extraordinary expense. An executor is under duty to defend a will after it is duly probated, and may employ counsel at the expense of the estate to contest an action to set aside the probate and to contest the will, even tho he has already employed counsel to advise him in his ordinary duties, and even tho he is personally interested in sustaining the will; and the court should, irrespective of the amount which the executor has agreed to pay, make a reasonable allowance to the executor for such expense when it is extraordinary.

In re Jewe, 201-1154; 208 NW 723

Burden of proof — failure to meet. In an action to set aside the probate of a will and to cancel a deed on the grounds (1) of the mental incapacity of the testator-grantor, and (2) of the undue influence of the devisee-grantee, the burden rests on plaintiff to establish at least one of said grounds. Evidence quite elaborately reviewed and held, plaintiff had failed to meet the burden of proof resting upon him.

Walters v Heaton, 223-405; 271 NW 310

11883 Administration granted.

ANALYSIS

I GRANTING OF ADMINISTRATION IN GENERAL
II PREFERENCE AND QUALIFICATION OF APPOINTEES

Right of testamentary nominee. See under §11857

I GRANTING OF ADMINISTRATION IN GENERAL

Jurisdiction—appointment—recital of residence in petition. The district court of the county in which deceased resided at time of his death has exclusive jurisdiction to appoint an administrator and petition for appointment need not recite the place of residence of the deceased.

Crawford County v Kock, 227-1235; 290 NW 682

Jurisdiction—domicile of deceased—evidence. Evidence reviewed and held to warrant finding that deceased was resident of Boone county at time of death, giving the district court of that county exclusive jurisdiction to appoint an administrator for his estate.

Crawford County v Kock, 227-1235; 290 NW 682

Appointment—jurisdiction. The district court of the county in which an unsatisfied judgment was rendered has jurisdiction to appoint administration upon the estate of the nonresident judgment plaintiff.

Edwards v Popham, 206-149; 220 NW 16

Appointment—petitioning creditor indebted to estate—effect. A county asserting a claim and an individual claimant were "creditors" of the estate, and appointment of an administrator on their petition was valid even tho the individual might owe the estate more than the amount of his claim, since the validity of claims was not before the court.

Crawford County v Kock, 227-1235; 290 NW 682

Presumption. The record of the appointment in a county of an administrator and his due qualification is a finality and beyond collateral attack, even tho the record fails affirmatively to show the existence of the facts upon which the jurisdiction of the court depends; otherwise if the record affirmatively reveals want of jurisdiction.

Ferguson v Connell, 210-419; 230 NW 859

Collateral attack. Probate proceedings cannot be collaterally attacked until it is shown that fraud was perpetrated on the court inducing it to take jurisdiction.

Ferguson v Connell, 212-1155; 237 NW 354

Settlement without administrator. The act of those legally entitled to an estate, consisting solely of personal property, in paying all debts of the deceased and claims against the estate, and dividing the balance among themselves, all without the appointment of an administrator, renders improper the subsequent appointment of an administrator; and if such be appointed he will be without legal power because he will have nothing on which to administer.

Heinz v Vawter, 221-714; 266 NW 486

II PREFERENCE AND QUALIFICATION OF APPOINTEES

Application—sufficient showing. Application for appointment of administrator de bonis non held sufficient in form and contents.

Giberson v Henness, 219-359; 258 NW 708

Discretion as to appointee. The court may, in view of the relation which a nominee as executor holds to the estate and to the heirs, refuse to appoint him, even tho personally highly qualified, and appoint some other fit, proper and qualified person.

In re Tracey, 214-881; 243 NW 309

Next of kin—no degrees of nearness. "Next of kin" within the meaning of this statute, embraces those persons who take the personal property of the deceased, and there are no degrees of nearness in said class. For instance, a sister of the deceased has no necessarily preferential right over a niece of the deceased.

In re Wright, 210-25; 230 NW 552

Qualification—effect of adoption of deceased. Adopting parent's second wife held to be a proper administratrix in contest between the heirs of adopting parents and the natural parents.

In re Smith, 223-817; 273 NW 891

Collateral attack. In an action by an administrator, an answer alleging that plaintiff is not a legal administrator because he is a nonresident and secured his appointment by concealing that fact from the court is properly stricken because (1) the plaintiff's nonresidence did not render the appointment void, and, therefore, (2) the answer is but an unallowable attempt to collaterally attack the probate order of appointment.

Reidy v Railway, 216-415; 249 NW 347

Nonresident alien. A nonresident alien is not necessarily disqualified from acting as an administrator.

In re Rugh, 211-722; 234 NW 278
Reidy v Railway, 216-415; 249 NW 347

Superior right to make application and receive appointment. An alien, nonresident half-sister of a deceased, as next of kin, has the statutory right, superior to that of the resident paternal grandmother, during the 20 days following the burial of the deceased, to make application for the appointment (1) of herself, or (2) of any other suitable person as administrator, and an order of the probate court appointing a suitable person on the half-sister's application, and discharging the paternal grandmother who has in the meantime caused herself to be appointed, will not be disturbed.

In re Rugh, 211-722; 234 NW 278

Judgment creditor of heir. A judgment creditor of an heir of an intestate is a proper person to make application for the appointment of an administrator even tho the judgment is pending on appeal under a supersedeas bond, it appearing that the deceased left several heirs and a small quantity of real and personal property.

Moreland v Lowry, 213-1096; 241 NW 31

Application by agent—estoppel to object. An application for the appointment of an administrator made by a proper party, but made apparently by or through an agent or representative, must be deemed the application of said proper party and not by the agent or representative, when the latter claim is manifestly a belated afterthought of those hostile to the application.

Moreland v Lowry, 213-1096; 241 NW 31

Ex parte revocation. A peremptory, ex parte court order to the effect that the appointment of an administrator is revoked and the simultaneous reappointment of the same administrator and the execution of another bond, does not effect a legal revocation, and consequently does not operate as a discharge of the bond given pursuant to the original appointment.

In re Donlon, 203-1045; 213 NW 781

11884 Time allowed.

Right of heirs—absence of administration. When administration is not granted during the five years following the death, in this state, of an intestate, an heir may maintain an action to foreclose a mortgage to the extent of his vested interest therein as an heir; and especially so when the absence of any debts is made to appear.

Hoffman v Hoffman, 205-1194; 219 NW 311

Nonpremature application. When there is no surviving spouse (class No. 1), and when the "next of kin" (class No. 2) have made no application for the appointment of an administrator within the preferred time given them by statute, and when there are no creditors of the estate (class No. 3), a creditor of an heir of the intestate (class No. 4) has the legal right immediately to make said application.

Moreland v Lowry, 213-1096; 241 NW 31

11885 Special administrators.

Administration in general—irregular and improper. The fact that, in a will contest, verdict has been returned and judgment entered thereon to the effect that the alleged will in question is not a valid will, does not, in and of itself, legally justify the court in terminating an existing special administratorship and in appointing a general administrator. Said latter appointment would probably be void.

In re Whitehouse, 223-91; 272 NW 110

Administrator de bonis non—when authorized. When a probate record simply shows that the final report of an executor "was approved and the executor discharged", the court may, at a later time, and irrespective of the statutory limitation of five years for appointment for original administration, appoint, without notice to interested parties, an administrator de bonis non for the purpose of

selling property of the estate and purchasing and erecting a monument which was required by the will and not provided and erected by the original executor.

Giberson v Henness, 219-359; 258 NW 708

Appointment—constructive notice—peculiar circumstances—equitable relief. When an administrator gives proper notice of his appointment, claimants are held to have constructive notice thereof, and a claim filed nearly two years after notice of publication may be properly dismissed in the absence of any showing of peculiar circumstances entitling claimant to equitable relief.

Joy v Bank, 226-1251; 286 NW 443

Appointment—lack of actual knowledge not peculiar circumstances. When a claim in probate is not filed until two years after notice of appointment of administrator has been published, the fact that claimant did not have actual knowledge of the appointment of the administrator is not a peculiar circumstance entitling claimant to equitable relief under the statute barring claims not filed within the required time.

Joy v Bank, 226-1251; 286 NW 443

11886 Inventory—preservation of property.

Special administrators. The authority to proceed further under an order granted under special administration ceases upon the appointment of a general executor.

Malone v Moore, 208-1300; 227 NW 169

Corporate shares of stock. The heirs of an intestate may not be said to own the corporate shares of stock of the intestate, and may not, therefore, be said to be stockholders, (1) when they have never held themselves out as such owners, (2) when there has been no administration on the estate, and (3) when there is no showing as to the extent or distribution of the estate, or as to the debts and the discharge thereof.

Andrew v Dunn, 202-364; 210 NW 425

Improper order to turn over funds. A special administrator cannot be legally ordered to turn over the funds in his hands to a subsequently appointed general executor of the estate, when the said special administrator is a party to an unadjudicated action in equity by the administrator de bonis non of another and different estate, in which action claim is made to all the funds in the hands of said special administrator.

In re Wood, 214-867; 243 NW 347

11887 Bond—oath.

Atty. Gen. Opinions. See '28 AG Op 47; '30 AG Op 198

Suretyship generally. See under §11577

ANALYSIS

I LIABILITY OF ADMINISTRATORS AND EXECUTORS
II NECESSITY, REQUISITES, AND VALIDITY OF BONDS
III ACTIONS ON THE BOND

I LIABILITY OF ADMINISTRATORS AND EXECUTORS

Preservation of property by administrator. In proceeding to recover from surety on administrator's bond, principle held applicable that a trustee is presumed to have preserved the property and that such presumption stands until overcome by evidence. Fact that such proceeding is at law does not preclude application of equitable principles.

In re Willenbrock, 228- ; 290 NW 503

Execution of unauthorized contract—effect. An executor or administrator who signs a contract of subscription in the name of the estate and by himself as such officer, without authority so to do, thereby personally binds and obligates himself.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Liability—devastavit. A claim of devastavit will not be deemed established on the mere showing that an administrator upon making a collection on behalf of the estate gave the estate his promissory note therefor.

In re Donlon, 203-1045; 213 NW 781

Deposits in banks—negligence.

In re Enfield, 217-273; 251 NW 637
In re Rorick, 218-107; 253 NW 916
In re Foster, 218-1202; 256 NW 744

Liability—lost bank deposits. The principle that an administrator is not liable for estate funds which have been lost because of the failure of a bank in which he has in good faith and without negligence deposited them has no application to deposits made by an administrator in his own private bank.

Bookhart v Younglove, 207-800; 218 NW 533

Disobeying order of court. An administrator and the surety on his bond are liable for a shortage in estate funds occasioned by the failure of the administrator's own private bank in which the funds were deposited, the administrator having been ordered by the court prior to the insolvency of said bank to remove the funds to another depository, and, while able to comply with said order, had neglected so to do.

In re Kendrick, 214-873; 243 NW 168

Disobeying order of court—unallowable defense. An administrator who disobeys an order of court as to the bank in which he should deposit estate funds, may not, in case of loss, plead in defense that, had he complied with the order, his own private bank in which the funds in fact were on deposit, would have been rendered insolvent.

In re Kendrick, 214-873; 243 NW 168

Disbursement by administrator for bond. An administrator is properly given credit for the reasonable amount paid by him to a surety company for his official bond even tho he is agent for the company signing the bond.

In re Atkinson, 210-1245; 232 NW 640

Expenditures—premium on bond. The reasonable premium paid by an executor or administrator for his official bond is a proper charge against the estate, even tho the settlement of the estate be delayed but without willful or fraudulent purpose on the part of said officer.

In re Paulson, 221-706; 266 NW 563

Father-administrator not accounting to daughter—effect of inheritance from father. Where administrator for his deceased spouse died without accounting for funds belonging to their daughter, an only child, who nevertheless received through the administration of her father's estate an amount larger than the amount she was entitled to in her mother's estate, held, in a proceeding brought by an administrator de bonis non against the sureties on bond of the deceased administrator, that there could be no recovery for the daughter's share in the mother's estate since that obligation had been satisfied.

In re Willenbrock, 228- ; 290 NW 503

Voluntarily augmented funds. A court-appointed, testamentary trustee and the surety on his official, statutory bond are liable not only for the money which comes into his hands as specifically required by the will, but for additional amounts of the testamentary funds which come into the hands of the trustee, as such, consequent on the generous action of the devisees, generally, in voluntarily augmenting said trust funds from the testamentary funds.

Whisler v Estes, 216-491; 249 NW 264

Equitable conversion under will. The proceeds of foreign real estate sold by an administrator with the will annexed, under explicit direction of the will, and for the purpose of making distribution under the will, must be deemed personalty with resulting consequence that the administrator is responsible therefor; and it is quite immaterial that he did not probate the will in said foreign state.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Probate findings. The supported finding of the court in probate on the issue whether funds received by a person were received by him as guardian or as trustee (bond in each case having been given) is conclusive on the appellate court.

In re Baldwin, 217-279; 251 NW 696

Findings in probate. A supported finding by the probate court that an administrator had failed to exercise ordinary care to preserve the funds of the estate is conclusive on the appellate court.

In re Foster, 218-1202; 256 NW 744

Finding as to executor's shortage. A finding by the probate court in the settlement of the estate of a deceased executor that said deceased executor had failed to account in a named sum to the estate of which he was executor, is binding on the sureties of the deceased executor in the absence of fraud or mistake, even tho the sureties are not parties to the proceedings in which the court makes the finding.

In re Carpenter, 210-553; 231 NW 376

Adjudicating shortage without notice to surety. The sureties on the bond of an administrator are not entitled to notice of the proceedings wherein the probate court determines the amount the administrator is short in his accounts.

In re Kessler, 213-633; 239 NW 555

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Surety bound by adjudication. The surety on the bond of an administrator is conclusively bound by the nonfraudulent adjudication of the amount of the administrator's liability, even tho the surety had no notice of the hearing preceding such adjudication.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Adjudicating administrator's liability—surety not necessary party. A surety on an administrator's bond, neither being entitled to notice nor being a necessary party in the probate proceeding to determine the administrator's shortage and liability, the adjudication thereon determining the administrator's liability, in the absence of fraud or mistake, is binding on the surety.

In re Davie, 224-1177; 278 NW 616

Removal of executor — surety as applicant. A surety on the bond of an administrator has such "interest in the estate" as empowers

I LIABILITY OF ADMINISTRATORS AND EXECUTORS—concluded

him to make application for the removal of the administrator, even tho such surety has taken steps to terminate his future suretyship.

In re Donlon, 201-1021; 206 NW 674

Removal of administrator — jurisdiction. Jurisdiction to remove an administrator is furnished by an application by the surety on the bond wherein he prays for an order (1) removing the administrator or (2) requiring the filing of a report and the making of distribution, when notice of the application is duly served on all interested parties and when no part of the prayer has been withdrawn of record. The filing of a report under a mutual arrangement between the parties does not exhaust the jurisdiction of the court.

In re Donlon, 201-1021; 206 NW 674

Liability on bond—improvident order not adjudication. An order of court, in an insolvent estate, authorizing, without notice to creditors, the executrix (she being the surviving widow) to pay to herself the proceeds of a sale of the exempt property of the deceased, based solely on an agreement to that effect between the widow and heirs, is a mistake, an improvident act, and therefore a nullity and not an adjudication binding on creditors, when the testator made his exempt property liable for the payment of his debts and the widow elected to take under the will.

In re Durey, 215-257; 245 NW 236

II NECESSITY, REQUISITES, AND VALIDITY OF BONDS

Successive bonds by administrator. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

Necessary conditions. It seems that the official bonds of executors, administrators, court-appointed trustees, and similar officers are necessarily conditioned as the bonds of public officers are conditioned. (§1059, C., '31.)

Whisler v Estes, 216-491; 249 NW 264

Executor's bond as statutory bond. Sureties who sign the bond of an executor in order to save the expense of a surety company bond, necessarily execute a statutory bond.

New Amst. Cas. Co. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Illegal release of surety. Where the court without jurisdiction assumed to release the surety on the bond of an executor, and to substitute a newly filed bond in lieu of such former bond, the formal cancellation of such illegal order of release does not affect the liability of the so-called substituted surety.

New Amst. Cas. Co. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

III ACTIONS ON THE BOND

Pleadings in probate—informality. Pleadings in probate do not require the particularity and formality of pleadings in actions generally.

In re Willenbrock, 228- ; 290 NW 503

Liability on bond—reduction of widow's allowance—effect. Where the amount allowed a widow for her support for the year following the death of the husband is taken by her from the funds of the estate (she being executrix) and spent, a subsequent order, in an adversary proceeding, reducing said former amount is conclusive on the surety—and, of course, on the executrix—and in an action against the principal and surety the reduced amount is the limit of the allowable credit.

In re Durey, 215-257; 245 NW 236

Void release of surety. The release of a surety on the bond of an executor or administrator is a nullity unless made in strict compliance with the statute governing such release. So held where the release was entered on the ex parte application of the executor, instead of the surety.

Bookhart v Younglove, 207-800; 218 NW 533
Brooke v Bank, 207-668; 223 NW 500

Ordering accounting and suit on bond. Where an executor of an executor filed in the first estate a final report, as the deceased executor ought to have done, the court, on hearing on such report, may fix the amount for which the deceased executor should have accounted, and require accounting from his estate, and provide, in case of default, that action shall be brought against his estate, and on his bond.

In re Mowrey, 210-923; 232 NW 82

Liability—insufficient proof. No liability is shown in an action on the bond of an administrator by evidence (1) that the petition for the appointment of the administrator alleged the value of the estate in a named amount, and (2) that while the deceased was under guardianship certain of his property was sold for a definite amount which had been embezzled by the custodian thereof.

Sheridan v Guar. Co., 204-397; 213 NW 784

Liability—presentable issues. In a controversy solely between an administrator and his bondsmen, the court will not, on the issue of a bondsman's liability, determine whether there has been a binding settlement between the administrator and an heir.

In re Donlon, 203-1045; 213 NW 781

Liability for prior defalcation. The surety on a guardian's bond, conditioned as provided by statute, is liable for the defalcation of the guardian occurring prior to the execution of the bond, whether the bond be a "substitute"

bond or simply security in addition to a prior existing bond.

Brooke v Bank, 207-668; 223 NW 500

Liability on bond—existing judgment against executor—surety's new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Adjudication of liability — avoidance by fraud. Sureties on the bond of a deceased executor are liable for a shortage in the latter's accounts, even tho no claim for said shortage is made against the estate of said deceased executor. It follows that if claim is made against the estate of the deceased executor, and the amount of the shortage is adjudicated (but not paid), the sureties are bound thereby, even tho the administrator of the deceased executor's estate failed to plead that the claim was barred by the statute of limitation, such failure to so plead not being a fraud as to said sureties.

In re Kessler, 213-633; 239 NW 555

Failure to file claim—when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Co-sureties. When an administrator gives bond on his original appointment, and later is ineffectually discharged and at once reappointed and gives a new bond, the two bonds will be treated as cumulative, and the sureties thereon as co-sureties with the sole right in each to enforce proportional contribution from the other.

In re Donlon, 203-1045; 213 NW 781

Contribution enforceable against surety on separate bond. Where an executor has executed and filed two separate bonds for the faithful discharge of his duties, the surety who pays a devastavit in full may enforce contribution from the other surety; and it is immaterial that the surety enforcing contribution signed the bond for a consideration and that the other surety signed as an accommodation.

New Amst. Cas. Co. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Right of surety. When an administrator of an estate wrongfully pays out estate funds to one who has no right whatever to receive them, and the surety for the administrator is compelled to make good the loss, the legal right of the estate to compel the wrongful recipient to repay the funds because of his primary liability, is, as a matter of equity, presumed to continue in order to enable a court of equity to subrogate the said surety to the same right.

American Sur. Co. v Bank, 218-1; 254 NW 338

11889 Letters.

ANALYSIS

I LETTERS TESTAMENTARY OR OF ADMINISTRATION IN GENERAL
II ASSETS OF ESTATE
III MANAGEMENT OF ESTATE
(a) AUTHORITY IN GENERAL
(b) AUTHORITY AS TO REAL PROPERTY
IV ACTIONS
(a) ACTIONS BY ADMINISTRATORS
(b) ACTIONS AGAINST ADMINISTRATORS
(c) COUNTERCLAIMS

Court findings as jury verdict generally. See under §§11435, 11581

I LETTERS TESTAMENTARY OR OF ADMINISTRATION IN GENERAL

Conflicting appointments—domestic and foreign administrators. As between a domestic and a foreign administrator of the same estate, an asset will (without passing on the question of principal administratorship) be ordered paid to the domestic administrator when the only claims against the estate are on file with the Iowa administrator, when the latter has funds to pay them, when some of the distributees reside in this state, and when the general convenience of all parties will be subserved by such order.

Andrew v Bank, 205-237; 216 NW 12

II ASSETS OF ESTATE

Administrator holds estate as trustee. An administrator of an intestate estate takes possession of and holds the same, as an express trustee thereof, for the claimant creditors of

II ASSETS OF ESTATE—concluded

the decedent and of the estate, the heirs, the surviving spouse, and any others who may have a proper interest in the property.

In re Willenbrock, 228- ; 290 NW 503

Collections—presumptions. All funds coming into the hands of an administrator will, in the absence of a counter showing, be presumed to be in the form of cash.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Conflicting appointments. As between a domestic and a foreign administrator of the same estate, an asset will (without passing on the question of principal administratorship), be ordered paid to the domestic administrator when the only claims against the estate are on file with the Iowa administrator, when the latter has funds to pay them, when some of the distributees reside in this state, and when the general convenience of all parties will be subserved by such order. (See annos. under §11894.)

Andrew v Bank, 205-237; 216 NW 12

Administrator's bank account—decedent's debt—no offset. Receiver of insolvent bank held unauthorized to set off amount of checking account standing in name of administrator against indebtedness owing to bank by intestate where, immediately on appointment of administrator, checking account passed to administrator who added to account by deposits at various times and drew checks against account until closing of bank.

In re Schwarting, (NOR); 257 NW 189

III MANAGEMENT OF ESTATE

(a) AUTHORITY IN GENERAL

Discussion. See 3 ILB 175—Power of representative to bind estates to creditors

Trustee for beneficiaries. The administrator is a trustee for the benefit of persons interested in the estate.

Goodman v Bauer, 225-1086; 281 NW 448

Personal property—right of heirs to protect. Tho the title to the personal property of a deceased does not pass directly to his heirs, they may, in the absence of any administration, maintain an action to protect or recover such property.

Powell v McBlain, 222-799; 269 NW 883

Accounting and settlement—credits—disbursements to protect assets of estate. An administrator who, in good faith, pays a valid debt owed by the estate in order to redeem valuable securities belonging to the estate and held by the creditor as collateral in an amount far in excess of the debt, will be credited as for a prudent expenditure, irrespective of the subsequent claims of general creditors, and irrespective of the fact that the administrator did not wait for the filing of the claim or secure the authority of the court to make such payment.

Elliott v Bank, 209-1258; 228 NW 274

Payment of unfiled claims. Principle reaffirmed that an executor may voluntarily pay valid claims against the estate tho they are not filed.

In re Plendl, 218-103; 253 NW 819

Investments without authorizing order—subsequent confirmation. Assuming, arguendo, that an authorizing order of court is absolutely necessary in order to render legal an investment of trust funds, yet a trustee, who, without such order, has made an investment in good faith, and without loss to the estate, may, subsequently, on a full showing of the controlling facts, and at a time when the estate has suffered no loss, be granted a valid order confirming said investment.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Execution of unauthorized contract. An executor or administrator who signs a contract of subscription in the name of the estate and by himself as such officer, without authority so to do, thereby personally binds and obligates himself.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Sales and conveyances—application and order—implied authority to pay debt. An order of court granting an application by an administrator to borrow money on real estate mortgage security in order to pay a specified debt owed by the estate impliedly carries authority and direction to use the money in the payment of said debt.

Elliott v Bank, 209-1258; 228 NW 274

Releasing mortgage without order. An executor, upon receiving payment of a note and mortgage belonging to the estate, has authority, without an authorizing order of court, to release the mortgage even tho the payment is in the form of a new note and mortgage executed by new parties.

Steffy v Schultz, 215-831; 246 NW 907

Unauthorized bank deposit. An executor who, on his own motion and without any authorizing order of court, deposits the funds of the estate in a financially embarrassed bank of which he was president and in which he was heavily interested, and which later failed, must account to the estate in cash for the loss. The president of a bank must be held to have knowledge of the general financial condition of the bank.

In re Rorick, 218-107; 253 NW 916

Depositor's agreement—conditions. An order of the probate court, authorizing a national bank acting as executor of an estate to execute a depositor's agreement relative to the estate funds, should specifically provide that said

order is entered on the condition that the same shall not prejudice the right of the heirs, (1) to a lien upon any securities in possession of the executor, (2) to the right of action against the executor to recover the amount due, and (3) to any existing rights under federal law.

In re McElfresh, 218-97; 254 NW 84

Death of guardian—duty of personal representative. The surety on the bond of a guardian has no right, on the death of the guardian, to take possession of the ward's estate and administer it. Such property passes in trust to the guardian's personal representative who should report the situation to the probate court and await instructions.

Kies v Brown, 222-54; 268 NW 910

Property in controversy—refusal of receivership—presumption. The refusal of a receivership for property in controversy in the probate court, even tho the petition for said appointment is strictly in compliance with the statute and is supported by affidavits, and is resisted only orally and informally, is presumptively correct. Appellant must negative the presumption.

Frazier v Wood, 214-237; 242 NW 78

(b) AUTHORITY AS TO REAL PROPERTY

Testamentary capacity. Principle reaffirmed that a testator may unconditionally authorize and empower his executor to make full conveyances of testator's real estate. Will held to grant such authority.

In re Wicks, 207-264; 222 NW 843

Unlawful delivery of deed. An administrator who has in his possession a deed of conveyance purporting to have been executed by the deceased, has no authority to deliver said deed to the grantee in said deed without an authorizing order of court.

Blain v Blain, 215-69; 244 NW 827

Power to sell passes to subsequent appointee. The power of an executor to convert real estate into money for the purpose of making testamentary distribution, arising under explicit testamentary direction so to do, passes to an administrator with will annexed.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

IV ACTIONS

(a) ACTIONS BY ADMINISTRATORS

Actions by heirs to set aside conveyances of decedent. See under §11927
Fraudulent conveyances generally. See under §11815

Pleadings in probate—informality. Pleadings in probate do not require the particularity and formality of pleadings in actions generally.

In re Willenbrock, 228- ; 290 NW 503

Pleading—verification. Plaintiff suing as an administrator need not verify his pleadings.

Markworth v Bank, 217-341; 251 NW 857

Who may appeal—executors. An executor or administrator may very properly maintain an appeal from an order for the payment of legacies, such order directly affecting residuary legatees.

Packer v Overton, 200-620; 203 NW 307

Defect not remedied by appearance. Lack of capacity to act as party plaintiff cannot be remedied by the appearance of the defendant in the action.

Pearson v Anthony, 218-697; 254 NW 10

Unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Father-administrator not accounting to daughter—effect of inheritance from father. Where administrator for his deceased spouse died without accounting for funds belonging to their daughter, an only child, who nevertheless received through the administration of her father's estate an amount larger than the amount she was entitled to in her mother's estate, held, in a proceeding brought by an administrator de bonis non against the sureties on bond of the deceased administrator, that there could be no recovery for the daughter's share in the mother's estate since that obligation had been satisfied.

In re Willenbrock, 228- ; 290 NW 503

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Appeal in name of deceased party. Altho plaintiff died during pendency of action below, supreme court took jurisdiction of appeal taken in name of such decedent, because parties treated cause as one properly before the court

IV ACTIONS—continued

(a) ACTIONS BY ADMINISTRATORS—concluded

and because it was a case where court's constitutional authority could be invoked.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Collection and management — inconsistent attitude. One who is administrator of different estates should not be permitted to appear in the dual and inconsistent capacity as administrator of both estates in a matter wherein the interests of the separate estates are absolutely hostile.

In re Clark, 203-224; 212 NW 481

Setting aside fraudulent conveyance — authority. Authority to an administrator to institute an action to set aside a fraudulent conveyance need not also contain authority to sell the land in order to pay the debts of the estate, when the record clearly shows the existence of the debts, and insufficient property with which to pay them.

Level v Church, 217-317; 251 NW 709

Fraudulent conveyance—sufficient showing. A deed from a mother to her son will be set aside as fraudulent, in a proper action by the administrator of the mother, on a showing that the mother, when the deed was executed, was in serious financial embarrassment, of which the son had full knowledge, and that the son, who then occupied a close fiduciary relation to his mother, presented no competent evidence of any consideration for the deed, or evidence overcoming the presumption of fraud and bad faith.

Howell v Howell, 211-70; 232 NW 816

Fraudulent conveyance—insufficient showing. An action by an administrator to set aside an alleged fraudulent conveyance by the testate must be dismissed (1) when the property conveyed was grantor's homestead, and the accrual date of the unpaid claim against the estate is not shown; (2) when the grantor is not shown to have been insolvent when the deed was executed; and (3) when there is no showing that the probate court has either authorized the action or judicially ordered the sale of real estate to pay debts.

Richman v Ady, 211-101; 232 NW 813

Transfers and transactions invalid—homestead. Evidence held to show that a residence was not the homestead of a deceased at the time of a fraudulent conveyance thereof.

Level v Church, 217-317; 251 NW 709

Deed—fiduciary relation. When a deed of conveyance is attacked because of the mental incompetency of the grantor, or because of fraud and duress, the burden rests on the grantee to sustain the deed, provided a fiduciary relation existed between grantor and grantee when the deed was executed; otherwise the burden rests on plaintiff to invalidate the deed.

Ellis v Allman, 217-483; 250 NW 172

Deeds—fiduciary relation—burden of proof. Executor, in an action to avoid a deed of conveyance, makes a prima facie case of constructive fraud by proof that, when the deed was executed, the grantor, tho mentally competent, was, in the transaction of his business and in his conduct generally, under the absolute domination of the grantee. After such proof, the grantee must take on the burden of affirmatively showing the complete bona fides of the transaction. Proof that the deed left grantor practically penniless, that grantee paid no consideration and was aggressively active in obtaining the deed, accentuates the presumption of fraud instead of overcoming it.

Ennor v Hinsch, 219-1076; 260 NW 26

Corporations—right to examine books and records. An administrator and the heirs at law of a deceased stockholder in a corporation, when refused an examination by the corporation, have the right, without any plea of good faith, to an order of court, in an appropriate proceeding, permitting them and their necessary assistants to examine the books and records of the corporation in order to determine the financial condition of the corporation and the value of its stock.

Becker v Trust Co., 217-17; 250 NW 644

Enforcement of legacy—laches. The fact that a legatee deferred the enforcement of the legacy pending the outcome of pending litigation over other identical claims is material on the issue of laches.

Packer v Overton, 200-620; 203 NW 307

Insurance policy—recovery on. Under a policy providing for the payment, (1) of total disability benefits to the insured himself, and (2) of death benefits to another, the disability benefits alleged to have accrued to the insured prior to his death may not be recovered by the executrix of the insured when the insured, tho physically and mentally able so to do, failed to furnish during his lifetime, to the insurer, proofs of such disability, the furnishing of such proofs being clearly contemplated and required by the policy as a condition precedent to the attaching of liability on the part of the insurer.

Kantor v Ins. Co., 219-1005; 258 NW 759

(b) ACTIONS AGAINST ADMINISTRATORS

Pleadings in probate—informality. Pleadings in probate do not require the particularity and formality of pleadings in actions generally.

In re Willenbrock, 228- ; 290 NW 503

Change of venue—action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal

injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

Management in general — employment of counsel—extraordinary expense. An executor is under duty to defend a will after it is duly probated, and may employ counsel at the expense of the estate to contest an action to set aside the probate and to contest the will, even tho he has already employed counsel to advise him in his ordinary duties, and even tho he is personally interested in sustaining the will; and the court should, irrespective of the amount which the executor has agreed to pay, make a reasonable allowance to the executor for such expense when it is extraordinary.

In re Jewe, 201-1154; 208 NW 723

Recovery of unpaid legacy—bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank, 218-961; 256 NW 681

Special administrator — improper order to turn over funds. A special administrator cannot be legally ordered to turn over the funds in his hands to a subsequently appointed general executor of the estate when the said special administrator is a party to an unadjudicated action in equity by the administrator de bonis non of another and different estate in which action claim is made to all the funds in the hands of said special administrator.

In re Wood, 214-867; 243 NW 347

(c) COUNTERCLAIMS

Cross-complaint — when allowable. In an action by an administrator for damages consequent on the alleged negligent killing by defendant of the intestate in a collision between automobiles, the defendant may cross-petition for damages against the administrator personally under the allegation that the deceased at the time of said collision was negligently operating an automobile which was personally owned by said administrator and was so doing with the consent of said owner. And this is true irrespective of the personal residence of the administrator.

Ryan v Amodeo, 216-752; 249 NW 656

Debts due decedent from heir—retainer or offset against realty. General rule recognized that real estate passes to devisee direct from testator, and not through executor, and that title vests in devisee immediately upon death of testator, and as a general rule, there is no right of retainer or offset for debt of devisee to estate, as against devisee of real estate; but there may be cases where, on account of the insolvency of the debtor, or other cause, equity will interfere for protection of the estate.

Petty v Hewlett, 225-797; 281 NW 731

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a secured note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl. Bk. v Malone, 76 F 2d, 251

11890 Notice of appointment.

Failure to give notice—effect.

Spicer v Administrator, 201-99; 202 NW 604

Notice—effect. After an executor has given due notice of his appointment, all parties interested in the settlement of the estate must be deemed in court for all purposes incident to such settlement.

Dillinger v Steele, 207-20; 222 NW 564

Constructive notice. When an administrator gives proper notice of its appointment, claimants are held to have constructive notice thereof, and a claim filed nearly two years after notice of publication may be properly dismissed in the absence of any showing of peculiar circumstances entitling claimant to equitable relief.

Joy v Bank, 226-1251; 286 NW 443

Proof of service. Parol evidence of the posting, as officially directed, of a notice of the appointment of an executor is admissible, and positive evidence to such effect will not be overcome by evidence of witnesses to the effect that they had not "observed" such posted notice.

Peterson v Johnson, 205-16; 212 NW 138

Notice to creditors—order—record required. An order or direction of the probate clerk as to the manner in which an administrator or executor shall give notice of his appointment, after being entered at length on the letters testamentary or letters of administration, need not also be entered at length on the probate docket. An abstract or notation of such order on said docket is all-sufficient.

Anthony v Wagner, 216-571; 246 NW 748

Lack of actual knowledge not peculiar circumstances. When a claim in probate is not filed until two years after notice of appointment of administrator has been published, the fact that claimant did not have actual knowledge of the appointment of the administrator is not a peculiar circumstance entitling claimant to equitable relief under the statute barring claims not filed within the required time.

Joy v Bank, 226-1251; 286 NW 443

Filing "within twelve months". Conceding, arguendo, that in the settlement of an estate, the statute of limitation commences to run from the date of the last newspaper publication, yet, when the last publication was on April 16, 1931, a claim filed April 16, 1932, is not filed "within 12 months from the giving of the notice" as provided by §11972, C., '31.

First JSL Bank v Terbell, 217-624; 252 NW 769

11891 Limitation on administration.

Right of heirs. When administration is not granted during the five years following the death, in this state, of an intestate, an heir may maintain an action to foreclose a mortgage to the extent of his vested interest therein as an heir; and especially so when the absence of any debts is made to appear.

Hoffman v Hoffman, 205-1194; 219 NW 311

Administrator de bonis non—when authorized. When a probate record simply shows that the final report of an executor "was approved and the executor discharged", the court may, at a later time, and irrespective of the statutory limitation of five years for appointment for original administration, appoint, without notice to interested parties, an administrator de bonis non for the purpose of selling property of the estate and purchasing and erecting a monument which was required by the will and not provided and erected by the original executor.

Giberson v Henness, 219-359; 258 NW 708

11892 Exception—newly discovered personalty.

Unallowable opening of settled estate. The holder of a court-established claim which is legally enforceable against property which passed to an heir, on the settlement of the estate of the person primarily liable on said claim, has no occasion, and no right, in the absence of any showing of fraud or mistake, to have the settlement of said estate opened up for the re-establishment in probate of said claim.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

APPOINTMENT OF FOREIGN ADMINISTRATOR

11894 Authorization.

Supplanting resident appointee. A duly appointed foreign executor, even tho nominated as such in the will, has no arbitrary right to supplant an executor appointed in this state, where part of the estate is situated.

In re Gray, 201-876; 208 NW 358

Conflicting domestic and foreign appointments.

Andrew v Bank, 205-237; 216 NW 12

CHAPTER 506

ESTATES OF ABSENTEES

11901 Administration authorized—petition.

Discussion. See 6 ILB 236—Waiver of presumption of death

Unexplained absence—presumption. A rebuttable presumption of death arises from the unexplained disappearance of a person for seven years from his usual place of living.

McCoid v Norton, 207-1145; 222 NW 390

Presumption—evidence. Evidence that an insured, thirty years of age, and in fair health, went to a distant part of the country and obtained employment, and corresponded solely with his mother, of whom he was especially fond, but made no response to a message informing him of her death, is, in and of itself, insufficient to create a presumption of death at any particular time short of seven years.

Hicks v Woodmen, 203-596; 213 NW 236

Presumption—fugitive from justice. Seven years of continued and unexplained absence of an insured, notwithstanding efforts of relatives to locate him, create a jury question on the issue of death, even tho the original disappearance was at a time when the insured was a defaulter to a large amount.

Axen v Ins. Co., 203-555; 213 NW 247
Rodskier v Ins. Co., 216-121; 248 NW 295

Mutual benefit insurance—contract in re evidentiary effect of disappearance—validity. An agreement in a mutual benefit insurance certificate to the effect that the unexplained disappearance or long-continued absence of the insured from his family or place of residence shall not be regarded as evidence of the death of the insured or of any right to recover under the certificate until after the expiration of the life expectancy of the insured is reasonable, valid, and binding on the beneficiary.

Lunt v Grand Lodge, 209-1138; 229 NW 323

Residence—presumption. The fact that an adult person had been a resident, from birth, of a county in this state and had there accumulated property of substantial value and left it and gone on a visit to a distant state, and was not thereafter heard from or heard of for seven years, justifies the presumption that he remained a resident of the county aforesaid.

In re Schlicht, 218-114; 253 NW 847

11909 Decree as to heirs.

Heirs of absentee. The heirs of an absentee who, without known cause, has absented himself from his usual place of residence for a period of seven years, are those persons who are his heirs on the day when the law first indulges the presumption that said absentee is dead, to wit, on the day which marks the end of said absence of seven years.

In re Schlicht, 221-889; 266 NW 556

CHAPTER 507

SETTLEMENT OF ESTATES

11913 Inventory and report.

Fraud in concealing personal liability of executrix. An executrix, in inventorying a promissory note and mortgage as assets of the estate, is guilty of no fraud in failing to mention or indicate the fact that she personally signed said instruments, when such signing was for the sole purpose of waiving her dower interest.

Albright v Albright, 209-409; 227 NW 913

Administrator's debt to decedent—extent of liability. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

Reports as evidence against administrator. Statements in the various interlocutory reports of an administrator, relative to the items of assets belonging to the estate, may be persuasive evidence against the administrator on the final accounting.

In re Manning, 215-746; 244 NW 860

Joint payees—rebuttable presumption of equal ownership. The presumption, that joint payees of a promissory note and of a mortgage securing the same are equal, must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Fact findings in probate not triable de novo on appeal. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Rent—incident to land—passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Proceeds payable to estate—trusteed for statutory beneficiaries—exemption. Where a testator willed to his second wife all of his property requiring legal transmission, but made no mention of his life insurance, payable to his second wife if she survived him, otherwise to his estate, and, when testator's second wife predeceased him, then upon his death, his surviving children, being a daughter by his first marriage and a son by his second marriage, became entitled under the statute, to the proceeds of the insurance, and such proceeds passed into the hands of his personal representative or estate, only as a trust fund, to be distributed equally to such daughter and son. (§8776, C., '35.)

In re Clemens, 226-31; 282 NW 730

11917 Qualification—duties.

Atty. Gen. Opinion. See '30 AG Op 268

11918 Exempt personal property.

Pension funds in hands of administrator. Original federal pension funds in the hands of an administrator are not exempt, under either state or federal statutes, from sequestration by the creditors of the pensioner. [Revised Statutes, §4747 (38 USC §54); 38 USC §96.]

Appanoose Co. v Carson, 210-801; 229 NW 152

Waiver by surviving spouse. A surviving spouse waives her right to her husband's exempt property when she, apparently in furtherance of her own personal interest, allows the property to be sold and the proceeds applied on the debts of the deceased.

In re Angerer, 202-611; 210 NW 810

Widow as devisee—nonallowance. Since widow of decedent was a devisee under his

will, an order allowing her exempt property of decedent under this section was improper in view of §11847, C., '39, providing that a devise to a spouse is presumed to be in lieu of exemptions unless contrary intention is clearly and explicitly shown.

In re David, 227-352; 288 NW 418

Improvident order not adjudication. An order of court, in an insolvent estate, authorizing, without notice to creditors, the executrix (she being the surviving widow) to pay to herself the proceeds of a sale of the exempt property of the deceased, based solely on an agreement to that effect between the widow and heirs, is a mistake, an improvident act, and, therefore, a nullity and not an adjudication binding on creditors, when the testator made his exempt property liable for the payment of his debts and the widow elected to take under the will.

In re Durey, 215-257; 245 NW 236

Cemetery lot. The interest of an intestate in a burial lot in a cemetery (he dying without issue and survived only by his widow and mother) may not be set aside as exempt property to the widow. The interest,—the right to use said lot for burial purposes,—passes in such a case in equal shares to the widow and mother.

In re Paulson, 221-706; 266 NW 563

Refund to pay debts. The heirs of an estate who unconditionally purchase the interest of their mother in the estate have no legal right, thereafter, to compel the mother to contribute any sum toward the discharge of unpaid debts of the estate, unpaid taxes against the estate, or unpaid probate costs and fees.

In re Jones, 217-288; 251 NW 651

Workmen's compensation—nonexempt from debts of testator. Workmen's compensation, already collected as the result of a commutation settlement and in the hands of testator's attorney, is subject to the debts of the employee's estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

11919 Proceeds of insurance.

Discussion. See 21 ILR 153—Property purchased with proceeds

Exemption statutes—applicability. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

Receiver—solvency of mortgagor. In mortgage receivership proceedings, and on the issue whether a wife, one of the obligated mortgagors, is solvent, no consideration can be given to the proceeds of life insurance (up to $5,000) on the life of the husband, and in the hands of the wife as a beneficiary, the mortgage debt antedating the death of the husband.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Life insurance to widow—termination of exemption by death. The unexpended proceeds of a policy of life insurance payable to a surviving widow are not exempt, after her death, from liability for debts contracted by her prior to the death of the insured husband. In other words, the exemption accorded to her does not survive her death.

In re Tellier, 210-20; 230 NW 545

Proceeds of life insurance. A testator may validly dispose by will of the proceeds of life insurance payable to his estate, and make such proceeds subject to the payment of his debts. Such result is effected by a will (1) which provides for the payment of testator's debts, and (2) which devises the life insurance proceeds subject to such debt proviso.

In re Caldwell, 204-606; 215 NW 615

Testamentary subjects. The proceeds of life insurance payable to the estate of the insured or to his executors or administrators may be disposed of by will. Section 8776, C., '24, which in substance provides that insurance so payable "shall inure to the separate use" of the surviving spouse and children, supplements said right, because said section simply directs in legal effect who shall take the avails of life insurance so payable when there is no will.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Life insurance. The formal statement in a will that testator's debts shall be paid out of his estate, is wholly insufficient to justify the conclusion that testator intended to appropriate to the payment of his debts the avails of life insurance payable to his personal representatives or to his estate, even tho as a matter of law such avails do become a part of his estate.

In re Grilk, 210-587; 231 NW 327

See Buck v MacEachron, 209-1168; 229 NW 693

Estate as beneficiary—exemption. Policies of life insurance made payable to insured's estate, or to the administrator thereof, are not subject to the claims of creditors, unless the insured during his lifetime agreed, orally or in writing, to the contrary.

In re Hazeldine, 225-369; 280 NW 568

Assignment by deceased — convincing evidence necessary. An oral contract assigning insurance, made with a deceased, must be established by clear, satisfactory, and convincing evidence and leave no doubt as to the sufficiency of the consideration.

In re Hazeldine, 225-369; 280 NW 568

Deceased's insurance as security—oral contract—original holder incompetent witness tho debt assigned. Altho having assigned his claim and altho the claim is duly allowed in probate, the original party to an oral contract with a deceased is incompetent as a witness, when the assignee of such contract seeks to subject the proceeds of the deceased's life insurance to payment thereof by reason of an oral contract claimed to have been entered into with the deceased.

In re Hazeldine, 225-369; 280 NW 568

Dead man statute—failure to prosecute claim or disclaimer of interest ineffective. A divorced wife of a deceased may not become a competent witness to an oral contract made jointly between herself, her mother, and the deceased, in order to subject his insurance to payment of her mother's valid probate claim, merely by failing to prosecute a similar claim of her own and disclaiming any interest in the claim in litigation, since she still has her claim and may enforce payment if the contract is established.

In re Hazeldine, 225-369; 280 NW 568

Proceeds payable to estate — trusteed for statutory beneficiaries. Where a testator willed to his second wife, all of his property requiring legal transmission but made no mention of his life insurance, payable to his second wife if she survived him, otherwise to his estate; and, when testator's second wife predeceased him, then upon his death, his surviving children, being a daughter by his first marriage and a son by his second marriage, became entitled under the statute to the proceeds of the insurance, and such proceeds passed into the hands of his personal representative or estate only as a trust fund, to be distributed equally to such daughter and son. (§8776, C., '35.)

In re Clemens, 226-31; 282 NW 730

Life policy payable in Iowa pledged in another state—jurisdiction. Tho a life policy payable to the estate of a deceased Iowa resident is deposited in a foreign state, as security for a debt, the proceeds are not beyond the jurisdiction of the Iowa probate court, inasmuch as the right to such proceeds depends, not upon their location, but upon the terms of the policy, supplemented by any contract relating thereto.

In re Hazeldine, 225-369; 280 NW 568

Subjecting insurance to probate claim — splitting action. A claimant in probate, alleging an oral contract assigning all of decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

Computation of amount of exemption. Where a widow as beneficiary in life insurance policies on her husband received some $11,200 and disposed of some $7,300 before any proceedings were commenced to subject said fund in excess of the $5,000 statutory exemption to the payment of a debt of the widow antedating the death of the husband (§8776, C., '31), the said statutory exemption of $5,000 must be computed on the basis of the unexpended fund. In other words, her exemption cannot be deemed to be embraced within the $7,300 expenditure.

Booth v Propp, 214-208; 242 NW 60; 81 ALR 919

Funeral expenses nonallowable against insurance proceeds. Claims for funeral expenses consequent on the burial of the intestate deceased are not allowable against funds in the hands of the administrator when said funds constitute the proceeds of insurance on the life of deceased, the latter being survived by a minor son. (§8776, C., '35.)

In re Galloway, 222-159; 269 NW 7

11920 Damages for wrongful death.

Administrator as real party in interest. In an action by an administrator for damages consequent on the wrongful death of the deceased, the defendant may not raise the issue whether the plaintiff is the real party in interest.

Reidy v Railway, 216-415; 249 NW 347

Measure of damages. The measure of damages for death is the reasonable present value of the life of the deceased to his estate.

Droullard v Rudolph, 207-367; 223 NW 100

Damages for death—evidence. In an action for damages for wrongful death, evidence is admissible of the recent purchase, solely on credit, by decedent, of a business, and of the marked reduction by decedent of his indebtedness subsequent to such purchase, together with evidence of his ability, health, and other kindred matters.

Scott v Hinman, 216-1126; 249 NW 249

Submitting earning capacity of child—no evidence introduced. Elements of damage not sustained by evidence should not be submitted, which applies to the earning capacity of a 10-year-old school girl in the absence of supporting evidence, but, in the instant case, the error was harmless, as the jury's possibility of considering such element was very remote.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Intemperate habits bearing on damages. In an action for damages consequent on wrongful death, evidence is admissible tending to show the intemperate habits of the deceased.

Townsend v Armstrong, 220-396; 260 NW 17

Verdicts—amount—when court will interfere. It is not the province of a court to interfere with the amount of a verdict in a personal injury action unless it is clearly made to appear that the verdict is the result of passion or prejudice or of a palpable disregard of the evidence. Verdict of $10,000 held nonreviewable.

Engle v Nelson, 220-771; 263 NW 505

Verdict—excessiveness. Verdict of $30,000 for wrongful death reduced by the trial court to $21,000, and by the appellate court, on condition, to $12,000.

Shutes v Weeks, 220-616; 262 NW 518

Occupation and earnings of parent. The occupation and earnings of the father of a minor child may be shown in an action for the wrongful death of the child, as an element to be considered by the jury on the issue of damages to the child's estate.

McDowell v Oil Co., 212-1314; 237 NW 456

Interest on funeral expenses. The measure of damages for wrongful death, while not including reasonable funeral expenses, does include simple interest at a legal rate on such expenses for the time intervening between the premature death and the time when, in the ordinary course of events, the deceased would have died.

Lukin v Marvel, 219-773; 259 NW 782

Measure of damages—before and after death—exemplary damages. The measure of damages in an action commenced during the lifetime of an injured person is what will right the wrong done, including exemplary damages, which are still recoverable if he dies during the pendency of the action; but if commenced by the administrator after death, the measure is the reasonable present value of his life without recovery for pain and suffering or exemplary damages.

Boyle v Bornholtz, 224-90; 275 NW 479

Excessive and exemplary damages—remittitur. Excessive damages showing passion and prejudice vitiate the entire verdict. A remittitur will not cure the error and a new trial should be granted. Where the jury returned a verdict of $1,500 actual damages and $2,500 exemplary damages, held the total amount of damages awarded and the difference between the actual damages and punitive damages were not so excessive as to show passion and prejudice; and, the entire verdict not being vitiated, the verdict for $1,500 actual damages was not affected by the erroneous submission of the question of exemplary damages and such error was cured by remittitur of all such punitive damages.

Boyle v Bornholtz, 224-90; 275 NW 479

Workmen's compensation — nonexemption from testator's debts. Workmen's compensation, already collected as the result of a commutation settlement and in the hands of testator's attorney, is subject to the debts of the employee's estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

Bastards—rights of inheritance. In Iowa, illegitimate children have inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

11923 Allowance to widow and children.

Additional allowance. The court may, in a proper case, increase an allowance already made to a surviving spouse.

Crouse v Ashford, 208-333; 223 NW 510

Reduction of widow's allowance—effect. Where the amount allowed a widow for her support for the year following the death of the husband is taken by her from the funds of the estate (she being executrix) and spent, a subsequent order, in an adversary proceeding, reducing said former amount is conclusive on the surety—and, of course, on the executrix—and in an action against the principal and surety the reduced amount is the limit of the allowable credit.

In re Durey, 215-257; 245 NW 236

Widow's groceries—nonliability of administrator. Administrator, who has paid testator's widow more than amount to which she was entitled prior to alleged promise to pay for groceries furnished to widow, held not authorized to make payment out of estate for such groceries.

Yoss v Sampson, (NOR); 269 NW 22

Interest on security. A widow to whom support allowance is awarded in the form of a bond or security, belonging to the estate, is under no duty as administratix to account for the interest subsequently accruing on said bond.

In re Paulson, 221-706; 266 NW 563

Fatally delayed application. A widow may not be granted an allowance from her husband's estate for her support during the year following the death of her husband when application for such allowance is not made until after the estate is duly closed.

In re Weidman, 209-603; 228 NW 571

Antenuptial contract—effect on homestead occupancy. An antenuptial contract under which the wife agrees to accept a named fractional part of the husband's property in case she survives, does not have the legal effect of depriving her of her statutory right to occupy the homestead, free of all rent, until her share is actually set off to her or otherwise actually disposed of.

Fraizer v Fraizer, 201-1311; 207 NW 772

Expense attending hostile litigation. A surviving spouse is not, especially on the theory of necessities, entitled to an allowance from the estate to reimburse her for expenses suffered by her (because of the hostile litigation of the heirs) in defending her rights as a surviving spouse.

Crouse v Crouse, 219-736; 259 NW 443

Death of bankrupt after adjudication—widow's rights. On the death of a bankrupt after adjudication and qualification of trustee, surviving wife is held entitled to distributive share in his realty under state statute providing dower rights, and also entitled to sufficient of bankrupt's property of such kind as is appropriate to her support for 12 months from bankrupt's death under state statute providing allowance to widow.

In re Payne, 20 F 2d, 665

Death of bankrupt—widow's rights—allowance and dower. Where a husband secures a receiver for his property in a state court and, with his wife, makes a conveyance of property to such receiver, and thereafter is adjudged an involuntary bankrupt, but dies before the disposition of his property by the trustee, and application is made for widow's allowance in the bankruptcy proceeding, held, that the bankruptcy adjudication and vesting of realty was not such "other judicial sale" as will defeat her right of dower, and her relinquishment by deed to husband's receiver of her contingent rights in his property became void by bankruptcy proceedings. In construing statutes for allowance to widows and children, equity court should be careful to do them no injustice.

Johnson v Payne, 26 F 2d, 450

Defeating because of felonious homicide—necessary allegation and proof. In order to defeat, under §12032, C., '31, the application of a surviving widow for an allowance out of her husband's estate, the objector must distinctly allege and prove that the widow feloniously took, or feloniously caused or procured another to take, the life of her said husband, and must so do irrespective of any previous conviction of said widow of manslaughter.

In re Johnston, 220-328; 261 NW 908

11925 Discovery of assets.

Scope of inquisitorial proceeding. In strictly inquisitorial proceedings for the discovery of assets belonging to an estate, the court has no authority to order property turned over to the administrator when the title to such property is in dispute, especially when the property apparently does not belong to the estate.

In re Brown, 212-1295; 235 NW 754

Collection of estate—scope of jurisdiction. In inquisitorial proceedings for the discovery of assets belonging to an estate, the jurisdiction of the court to continue said proceedings abruptly terminates at the point of time when it is actually made to appear that an actual controversy exists as to the title to the property in question.

Findley v Jordan, 222-46; 268 NW 515

Jurisdiction terminated by title dispute. When in the statutory summary proceedings in probate for discovery of estate assets it appears that title to the property sought is in dispute, the probate court is without jurisdiction to order the delivery of the property to the estate.

In re Enright, 224-603; 276 NW 839

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

Failure of discovery proceedings. In probate discovery proceedings where controversy arose as to ownership of property involved, the court rightly denied relief because of insufficiency of evidence to establish ownership in the estate, such denial being without prejudice to administrator's right to bring other appropriate proceeding to determine ownership.

In re Hoffman, 227-973; 289 NW 720

Bills and notes—requisites and validity—joint payees—rebuttable presumption of equal ownership. The presumption, that joint payees of a promissory note and of a mortgage securing the same are equal, must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Setting aside fraudulent deed on condition. The grantee in a deed of conveyance executed for the primary purpose of preserving a means of support for the aged grantor (tho not so expressed in the deed) has a right, in an equitable action by grantor's executor to set aside the deed, to demand that his reasonable claim for furnishing the grantor a very substantial support be first paid as a condition precedent to any judgment setting aside the deed; and this is true tho said deed would have been declared fraudulent and invalid had it been attacked by the grantor's existing creditors.

Meyers v Schmidt, 220-370; 261 NW 502

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate

holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Rent — incident to land — passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Collection of estate—discovery—automobile replevied after testator's death. An automobile finance company, as conditional seller, may not replevy automobiles immediately after the death of conditional buyer having absolute ownership and possession at the time of his death, since the right to possession of all personal property for administration purposes passed to executor, who in a proceeding to discover probate assets may recover the automobiles or their value from such conditional seller, whose proper remedy should have been the filing of a claim against the administrator.

In re Sweet, 224-589; 277 NW 712

11927 Recovering transferred real estate.

Actions by administrators. See under §11889
Fraudulent conveyances generally. See under §11815

Setting aside deed—when action will not lie. A nonfraudulent deed, even tho without consideration, executed and delivered by a mentally competent grantor, cannot be set aside either by the grantor or, after his death, by an heir.

Stauffer v Milner, 207-776; 223 NW 686

Title not impeached by subsequent declarations of grantor. The title conveyed by a warranty deed could not be impeached by testimony of sisters of the grantee that after the execution of the deed the wife of the grantor had said that she intended that all the children should share in the land, especially when the declarations were not made in the presence of the grantee.

Huxley v Liess, 226-819; 285 NW 216

Warranty deed and contemporaneous trust. A warranty deed which absolutely and unconditionally conveys real estate to the grantee and to "his heirs and assigns forever" will, in equity, be restricted, in its apparently limitless legal effect and operation, to such extent as will bring it into harmony with the terms of a contemporaneously executed instrument of trust covering the same property, which trust the grantee has acquiesced in and agreed to carry out as trustee.

Keck v McKinstry, 206-1121; 221 NW 851

Deed (?) or will (?). A warranty deed subject to a life estate in grantor's surviving spouse will not be deemed testamentary because of a clause wherein grantor ineffectually attempted to restrain the alienation of the land by the grantee.

Goodman v Andrews, 203-979; 213 NW 605

Deed of conveyance (?) or will (?). An executed and delivered deed of conveyance in the ordinary form conveys an interest in praesenti —is not testamentary—even tho it provides (1) that "it shall not take effect until after the death" of the grantor, and (2) that the grantor does not "give up possession" to the grantee during the life of the grantor, and (3) that the grantor "reserves the use and income of the premises as long as he lives".

Hall v Hall, 206-1; 218 NW 35

Deed (?) or will (?). An instrument which passes the title to real estate in praesenti, tho the right to its possession and enjoyment is deferred to a future time, is a deed of conveyance and not a testamentary instrument.

Bardsley v Spencer, 215-616; 244 NW 275

Creation of vested interest—inviolability. A deed, (1) which is conditioned on grantee paying, after the death of grantor, named sums to each of grantee's two sisters, and (2) which is executed and delivered by grantor and accepted by grantee in accordance with a plan entered into by all of said parties for the settlement of their inherited interests in said land, creates, instanter, in said sisters a vested landed interest which is immune from change without their consent. So held where the grantor, later, erroneously assumed the right to treat the deed as testamentary and, by a new deed, to reduce the payments to the sisters.

Carlson v Hamilton, 221-529; 265 NW 906

Delivery—presumption attending acceptance. Principle reaffirmed that the acceptance of a deed of conveyance implies an agreement by the grantee to perform legal conditions imposed on him by the deed, e. g., the payment of stated sums to named persons.

Carlson v Hamilton, 221-529; 265 NW 906

Homestead. Evidence held to show that a residence was not the homestead of a deceased at the time of a fraudulent conveyance thereof.

Level v Church, 217-317; 251 NW 709

Fraudulent assignment—evidence—failure of proof. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Diligent creditor. The creditor of an estate may not, for his own exclusive benefit, attack a fraudulent conveyance of the deceased.

Marion Bk. v Smith, 205-203; 217 NW 857

Undue influence—degree of proof. A deed to land is not to be disturbed on the ground of undue influence unless the proof clearly and convincingly establishes that the said instrument is not the free and voluntary act of the grantor, but is the will and purpose of the grantee.

Hess v Pittman, 214-269; 242 NW 113

Undue influence—evidence to negative. On the issue of undue influence in the execution of a deed to land, it seems that the grantee may show that the grantor, subsequent to the execution of the deed, repeatedly expressed his full satisfaction with, and approval of, said deed.

Hess v Pittman, 214-269; 242 NW 113

Gift—fiduciary relation—constructive fraud not inevitable from blood relationship. As to constructive fraud arising from the gift of real property to one standing in a confidential or fiduciary relationship to the grantor, the rule placing the burden of proof on the grantee, to show the bona fides of the transaction, is of necessity applied according to the peculiar circumstances of each particular case, and not necessarily applied because mere blood relationship exists.

Jensen v Phippen, 225-302; 280 NW 528

Gift to daughter—no fiduciary relation—no fraud. Where a daughter, receiving a real estate gift from her parents, did not transact, nor advise concerning, her parents' business, nor dominate nor support them but, on the contrary, was more or less dependent upon them, such gift does not present a case of fiduciary or confidential relationship sufficient to nullify the deed on the ground of constructive fraud.

Jensen v Phippen, 225-302; 280 NW 528

Gift inter vivos—confidential or fiduciary relationship—presumption of fraud. A gift of a deed to one who stands in a confidential or fiduciary relationship to the donor raises a presumption of constructive fraud, and the burden is on the donee to make such showing of fact as to overcome the presumption.

Jensen v Phippen, 225-302; 280 NW 528

Devise and bequest—consideration unnecessary—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

11928 Compounding claims.

Compounding claim. An application in probate by a national bank as executor of an estate for authority to execute a depositor's agreement on behalf of the estate presents no question of the compounding of a claim against a debtor of the estate within the meaning of this section.

In re McElfresh, 218-97; 254 NW 84

11929 Mortgage as assets—satisfaction.

Real estate and personalty distinguished. Principle reaffirmed that upon the sale of land through the medium of a contract for a deed, the purchaser acquires "land" while the vendor acquires "personal property".

Wood v Schwartz, 212-462; 236 NW 491

Treating realty as personalty—sale required. Land acquired by an executor through foreclosure on a note and mortgage coming into his hands as part of the estate will be treated as personalty for the purpose of making a final division of the estate; and the court is in error in refusing to order a sale for said purpose—especially when all existing testamentary beneficiaries so request.

Langfitt v Langfitt, 223-702; 273 NW 93; 110 ALR 1390

Authority to release without order. An executor, upon receiving payment of a note and mortgage belonging to the estate, has authority, without an authorizing order of court, to release the mortgage even tho the payment is in the form of a new note and mortgage executed by new parties.

Steffy v Schultz, 215-831; 246 NW 907

11931 Funds collected—paid out.

Collections—presumptions. All funds coming into the hands of an administrator will, in the absence of a counter showing, be presumed to be in the form of cash.

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Pension funds in hands of administrator. Original federal pension funds in the hands of an administrator are not exempt, under either state or federal statutes, from sequestration by the creditors of the pensioner. [§11761, C., '27; Revised Statutes, §4747 (38 USC §54); 38 USC §96.]

Appanoose Co. v Carson, 210-801; 229 NW 152

Joint payees—rebuttable presumption of equal ownership. The presumption that joint payees of a promissory note and of a mortgage securing the same are equal must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Replevin—testator's gift inter vivos to sister—object of bounty. In a case where decedent,

an unmarried man 60 years of age, a physician and capable business man, high in public affairs, is starting on a vacation trip, his gift of all his property to his mother and sister, they being the natural objects of his bounty, cannot be said to be unreasonable or contrary to public policy when in a replevin action the validity of the gift is challenged by decedent's executor at the instance of decedent's second wife whom he married during the vacation trip and just ten days before his death.

Wilson v Findley, 223-1281; 275 NW 47

Action to recover. An executor is the proper party to maintain an action against his predecessor and his bondsmen to recover the funds of the estate, even tho such funds ultimately belong to testamentary devisees.

Bookhart v Younglove, 207-800; 218 NW 533

Death of annuitant—balance due. The executor of a deceased annuitant is entitled to recover the balance of the annuity due at the time of the annuitant's death.

Peterson v Floberg, 214-1398; 242 NW 18

Nonestoppel to enforce claim. An executor is not estopped to enforce a liability against a surety on the bond of a former executor by reason of the fact that his attorney has represented to such surety that the estate intends to enforce said liability solely against the estate of another surety, even tho said surety acted on such representation and did not file any contingent claim against the estate of the other surety.

In re Carpenter, 210-553; 231 NW 376

Breach of contract. An executor may maintain an action for the breach of a contract between the deceased and an heir of deceased by which the latter agreed to pay, as part of the estate, a named sum to another heir.

Rodgers v Reinking, 205-1311; 217 NW 441

Election of remedy. An administrator who has credible information for the belief and does believe that a wrongdoer has caused bank certificates of deposit belonging to the deceased to be paid by the bank on forged indorsements, and who, in an action between said wrongdoer and himself involving the estate, cross-petitions for judgment for the amount of the proceeds of said certificates, and who successfully prosecutes said cross-petition to judgment against the wrongdoer, thereby makes an election of remedies which precludes said administrator from subsequently maintaining an action against the bank on said certificates.

Sackett v Bank, 209-487; 228 NW 51

Failure to compel contribution—effect. An administrator is properly given credit for payments made by him on promissory obligations on which the deceased was a guarantor, even tho he has not yet compelled co-guarantors to make their proper contribution to such payment.

In re Atkinson, 210-1245; 232 NW 640

Erroneous payments—recovery. Funds paid to legatees under an interlocutory but erroneous order for distribution may be recovered from the legatees to whom paid.

Dillinger v Steele, 207-20; 222 NW 564

Indorsement of note. An executor may, for a proper consideration, and under a duly authorized permissive order by the court, indorse a promissory note belonging to the estate, and bind the estate to liability on the indorsement.

University Bank v Johnson, 202-654; 210 NW 785

Authority to release mortgage without order. An executor, upon receiving payment of a note and mortgage belonging to the estate, has authority, without an authorizing order of court, to release the mortgage even tho the payment is in the form of a new note and mortgage executed by new parties.

Steffy v Schultz, 215-831; 246 NW 907

Unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Inconsistent attitude. One who is administrator of different estates should not be permitted to appear in the dual and inconsistent capacity as administrator of both estates in a matter wherein the interests of the separate estates are absolutely hostile.

In re Clark, 203-224; 212 NW 481

Preference to protect estate. A president or director of an insolvent banking corporation will not be permitted to surrender his personal deposits in the bank and to take the good assets of the bank in payment therefor; otherwise if the deposits represent the funds of an estate of which the bank official is administrator, and the exchange involves no element of personal gain to the administrator.

Leach v Beazley, 201-337; 207 NW 374

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may be set off against the testamentary devise to said devisee.

Rodgers v Reinking, 205-1311; 217 NW 441

Insolvent heir's debts offset against share in real estate. The right to offset debts of an heir against his share of real estate exists only when the heir is insolvent. Evidence held insufficient to show heirs were insolvent.

Wilson v Wilson, 226-199; 283 NW 893

Lien for debts of devisee. A mortgage on real estate executed during the settlement of an estate by the insolvent devisee of the land is subject to the prior lien of the estate for the debts owing by the devisee to testator and contracted subsequent to the execution of the will.

Bell v Bell, 216-837; 249 NW 137

Insolvent heir's unpaid debt to estate—jurisdiction of court to offset. The court has jurisdiction, in an equitable action to partition the lands of an intestate (to which action all heirs are parties), to entertain a cross-petition by one of the heirs as administrator of said estate, and, under proper pleading and proof:

1. To decree that a certain insolvent heir has no interest in said land because his unpaid indebtedness to said estate equals or exceeds the value of the share in said lands which he would take were he not so indebted, and

2. To decree that said lands belong solely to the other heirs who are not so indebted, and to the surviving widow, if any.

Bauer v Bauer, 221-782; 266 NW 531

Offsetting debts of devisee or legatee. A legacy due an insolvent legatee, and the proceeds of lands devised to an insolvent devisee may, in the settlement of the estate, be retained by the executor to the extent that the insolvent legatee or devisee is indebted to the estate; and, if necessary, the devised lands may, under appropriate application, be sold and the proceeds applied on said indebtedness, on the resulting costs, and on the inheritance tax, if any, due the state from the insolvent.

In re Flannery, 221-265; 264 NW 68

Bankruptcy of heir—debt to estate remains—offset. A discharge in bankruptcy of a legatee puts an end to the remedy on the debt of said heir to the estate and affords a complete defense to an action on the debt; however, the debt remains an asset of the estate and the discharge does not affect the right of retainer or offset.

In re Morgan, 226-68; 283 NW 267

Distributees—offsetting debts against share in estate. The amount of the indebtedness of a distributee, solvent or insolvent, to an estate, may be set off against his share in the personal property. If the personal property is insufficient, his share of the real estate may be set off against the debt, if the heir is insolvent.

In re Morgan, 226-68; 283 NW 267

Allowable payment by administrator to himself. An administrator is properly given credit for a just claim paid to himself with the approval and at the request of all adversely interested parties, and after due consultation with a co-administrator, even tho no formal written claim was ever filed.

In re Atkinson, 210-1245; 232 NW 640

Payment of voluntary assessment on bank stock owned by estate. An administrator is properly given credit for paying a voluntary assessment on bank stock owned by the estate when such payment was in the interest of the estate and was necessary in order to reorganize the bank and to maintain it as a going concern.

In re Atkinson, 210-1245; 232 NW 640

Widow's support denied—no bar to subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

11932 Sale of personal property.

Sale of lease which prohibits sale. The probate court may validly order the administrator of an insolvent estate to sell and assign a lease of realty of which the deceased was lessee, notwithstanding the fact that the lease prohibits the lessee from assigning the lease without the lessor's consent, and provides that the terms of the lease are binding on the heirs, executors, and administrators of the parties, but contains no provision specifically applicable to a sale or assignment by operation of law.

In re Owen, 219-750; 259 NW 474

11933 Sale or mortgage of real estate—application.

ANALYSIS

I Sales of Real Estate in General
II Application and Order of Sale
III Time for Making Application for Sale
IV Determination of Necessity for Sale
V Property or Interest Subject to Sale

I SALES OF REAL ESTATE IN GENERAL

Authority to sell real estate. A testator may unconditionally authorize and empower his executor to make full conveyances of testator's real estate.

In re Wicks, 207-264; 222 NW 843

I SALES OF REAL ESTATE IN GENERAL —concluded

Mortgage — noninvalidating effect. A provision to the effect that a policy of insurance shall be invalidated by the creation of a lien on the insured property without the consent of the insurer is not violated by the execution of a mortgage as security for claims which are already liens on the property by operation of statutory law.

Jack v Ins. Assn., 205-1294; 217 NW 816

Power to sell passes to subsequent appointee. The power of an executor to convert real estate into money for the purpose of making testamentary distribution, arising under explicit testamentary direction so to do, passes to an administrator with will annexed.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under the order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Voluntary conveyance to persons entitled to property. When land which was part of an estate was purchased by decedent's two sons who paid no cash consideration, but occupied, paying rent to the other heirs, and who later, in order to protect the land from creditors, deeded it to two sisters who did not know of the indebtedness of the brothers, and when the sons made a contract with the sisters at the time of the deed protecting the other heirs in case the land were sold, a creditor of one of the brothers who knew of the rent payments and knew of the deed, but made no objection, could neither have it set aside as a fraudulent conveyance nor have the real estate subjected to a judgment against the debtor-brother, as the deed and contract conveyed the mere legal title to the sisters in trust for the heirs who were the persons entitled to the property.

Lakin v Eittreim, 227-882; 289 NW 433

Sale of mortgaged lands—basis for computing compensation. Compensation to an administrator for the sale of incumbered land is properly computed by figuring the statutory percentage on the expressed consideration less the amount of the existing incumbrance.

In re Lindell, 220-431; 262 NW 819

II APPLICATION AND ORDER OF SALE

Sales and conveyances—approval as interlocutory order. The approval by the probate court of a sale and conveyance of land belonging to an estate, must be deemed an interlocutory order.

In re Doherty, 222-1352; 271 NW 609

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

III TIME FOR MAKING APPLICATION FOR SALE

Timely application. An application for the sale of the real estate of a deceased in order to pay debts is timely if presented within a reasonable time after the necessity for such action is apparent. Especially is this true when the necessity for such action has been long delayed by the litigation carried on by the party who objects to the sale.

In re Spicer, 203-393; 212 NW 689

IV DETERMINATION OF NECESSITY FOR SALE

Inaccurate listing of debts—effect. An order for the sale by an administrator of lands belonging to the estate is not rendered illegal because the petition for the order listed as debts of the estate not only debts for which the estate was personally liable, but unpaid special assessments for street improvements for which the estate was not personally liable.

In re Oelwein, 217-1137; 251 NW 694

Setting aside fraudulent conveyance — authority. Authority to an administrator to institute an action to set aside a fraudulent conveyance need not also contain authority to sell the land in order to pay the debts of the estate, when the record clearly shows the existence of the debts, and insufficient property with which to pay them.

Level v Church, 217-317; 251 NW 709

V PROPERTY OR INTEREST SUBJECT TO SALE

Property subject to levy. Lands which belong to an estate and which have been ordered sold in probate in order to pay debts, are not subject to attachment in actions against heirs.

In re Collins, 207-1074; 224 NW 82

Specific devise—liability for debts. A specific devise of real estate which not only devises the property, but requires the testator's estate to discharge the mortgage thereon, cannot, in case the estate and all nonspecific devises are insufficient to pay said mortgage and other debts, be construed as casting upon another specific devise of real estate which is not made subject to the former devise, the entire burden of discharging said mortgage and

other debts. Each of said specific devises must bear said burden in the ratio of their separate value to their combined value.

In re Glandon, 219-1094; 260 NW 12

Findings in re homestead — conclusiveness. On an application by an executor for an order to sell real estate to pay debts, a finding by the court that certain land was not the homestead of the deceased is conclusive on appeal (1) unless such finding is without substantial support in the evidence, or (2) unless the court erroneously applied the law to conceded facts.

In re McClain, 220-638; 262 NW 666

Private bank depositors—property available for payment. Where an estate consists of two general classes of assets, to wit: (1) assets employed by decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is temporarily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Treating realty as personalty—sale required. Land acquired by an executor through foreclosure on a note and mortgage coming into his hands as part of the estate, will be treated as personalty for the purpose of making a final division of the estate; and the court is in error in refusing to order a sale for said purpose—especially when all existing testamentary beneficiaries so request.

Langfitt v Langfitt, 223-702; 273 NW 93; 110 ALR 1390

Rent — incident to land — passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

11935 Time, place of hearing, and service.

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

11937 Method of sale.

Shortage in acreage—evidence. Where lands of an estate are ordered sold for a lump sum, parol evidence is admissible to show that the land was, in realty, sold at a certain price per acre and that the acreage fell short of what was supposed to be the acreage, and that the administrator properly made a deduction for said shortage.

In re Oelwein, 217-1137; 251 NW 694

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

Realty values—evidence. In probate proceedings on objections to executor's final report, evidence supported trial court's fixing value of farm land at $125 per acre for the purpose of accounting.

In re Sheeler, 226-650; 284 NW 799

11940 Borrowing money.

Court's discretion in authorizing mortgage to pay claims. The granting of authority to an executor to mortgage real estate to pay claims is discretionary with district court.

In re Christensen, 227-1028; 290 NW 34

Previously litigated matters concluded. In proceedings on executor's application for authority to mortgage real estate for purpose of paying claims and administration expense, objections as to validity of claims which had

been finally adjudicated adversely to objectors in former proceedings wherein the objectors all appeared, filed claims, and were represented by counsel, could not be relitigated, and likewise objectors' right to an accounting against executor in such proceedings could not be relitigated since it had been previously adjudicated that such matter had no proper place therein.

In re Christensen, 227-1028; 290 NW 34

Unallowable collateral attack. In the foreclosure of a mortgage, executed by an administrator on lands of the deceased and on due order and authorization of the court, the defending heirs, who were parties to the order and authorization for the mortgage, will not be permitted to collaterally attack the validity of the mortgage on the ground that part of the land was the homestead of the deceased and therefore descended to the heirs exempt from the debts of the deceased.

Reinsurance Life v Houser, 208-1226; 227 NW 116

Implied authority to pay debt. An order of court granting an application by an administrator to borrow money on real estate mortgage security in order to pay a specified debt owed by the estate, impliedly carries authority and direction to use the money in the payment of said debt.

Elliott v Bank, 209-1258; 228 NW 274

11946 Approval by court required.

Approval as interlocutory order. The approval by the probate court of a sale and conveyance of land belonging to an estate, must be deemed an interlocutory order.

In re Doherty, 222-1352; 271 NW 609

Approval by court—estoppel. A vendee who contracts for the purchase of the real estate of an estate "subject to the approval of the court" may not deny the power of the court to reject such contract, even tho the executor was vested by the will with ample power to make a sale without the approval of the court.

In re Wicks, 207-264; 222 NW 843

Title—nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Clapp, 221-1270; 268 NW 56

11951 Limitation of action.

Similar provision in re guardianship. See §12596, Vol I

11952 Possession of real property.

Real estate—custodia legis. Lands and the rents and profits thereof may not be said to be in the custody of the executor of the deceased owner (1) when the will does not so provide, (2) when the executor has never taken possession, and (3) when the rents have never been treated as belonging to the estate.

First N. Bk. v Murtha, 212-415; 236 NW 433

Rent—incident to land—passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Fire insurance premiums—proper allowance. An administrator is properly given credit for fire insurance premiums paid out by him, in proper amount, for insurance on farm buildings, there being no heirs or devisees present to take possession.

In re Atkinson, 210-1245; 232 NW 640

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

11953 Proceeds—account.

Taxes—duty to pay. Taxes are a charge against an estate and must be paid by the administrator.

In re Oelwein, 217-1137; 251 NW 694

Division of rents. A surviving wife is not entitled to one third of the gross rents accumulating in the estate prior to the setting off of her distributive share, but to one third after deducting taxes, proper charges for upkeep and receivership charges, if any.

Crouse v Crouse, 219-736; 259 NW 443

11954 Minor heirs—payment of taxes.

Inheritance tax on bequest—right of testator to pay. A testator may validly provide that the inheritance tax on a specific devise or bequest made by him in his will shall be paid from the residuary part of his estate, provided he clearly expresses his intention to that effect. Will construed and held clearly so to provide.

In re Johnson, 220-424; 262 NW 811

11955 Procedure prescribed by will.

Whether will or statute controls. A statute which specifies the securities and the nature thereof in which trust funds may be invested (§12772, C., '27) does not control the investment of testamentary trust funds created under a will which—no rights of creditors being involved—clearly directs investments to be made in more lucrative securities.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Testator's intention. In construing a will the principal concern will be to ascertain and determine the intention of the testator, and it is the duty of the court, if it be reasonably possible, to give effect to all of the will's provisions.

Anderson v Anderson, 227-25; 286 NW 446

Ordinary probate proceedings—noninterference by equity court. An equity court may not interfere with the ordinary proceedings of the probate court in exercising its exclusive jurisdiction in the administration of estates. Rule applies when probate court is following the manner and the method provided by the testator in the will.

First Methodist Church v Hull, 225-306; 280 NW 531

Acceptance of bequest—extension of testator's limitation—effect. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

Equitable conversion under will. In probate proceedings where testator directs the executor of his estate to sell all of the property of the estate, including realty, as soon as convenient after his death and distribute proceeds, while the executor has some discretion as to the time and manner of the sale, the direction is mandatory, and effects an equitable conversion of the real estate into personalty at the instant of testator's death, and thereafter the real estate is to be treated as personalty, and be subject to the rules governing personal property.

In re Sheeler, 226-650; 284 NW 799

Absolute bequest—later repugnant provision disregarded. Where a codicil made an absolute bequest of a residuary estate to a county to be used in paving a highway, and a later provision in the codicil gave certain directions to the executor and imposed conditions for acceptance of the bequest by the county, such later conditions were repugnant and would defeat the purpose of the testator and must be disregarded when void in delegating power to the executor in violation of statute, and the intention of the testator as expressed in the first provision must be given effect to prevent intestacy.

Blackford v Anderson, 226-1138; 286 NW 735

Appointment of nominated executor required unless disqualified. Altho a certain discretion lies with the probate court in the appointment of personal representatives, nevertheless an executor named in a will as the one in testator's judgment best fitted to administer his estate should be appointed by the court in the absence of disqualification, which must be more than the objections of collateral relatives.

In re Schneider, 224-598; 277 NW 567

11956 Business continued—inventory.

Order—validity. An order in probate authorizing an administrator to continue the private banking business of the deceased is not void because entered without notice to creditors.

In re Harsh, 207-84; 218 NW 537

Continuing partnership. An administrator, without an authorizing order of court, has no power to bind the estate by continuing a partnership of which the deceased was a member or by creating a new partnership. And under such circumstances the ex parte statements or pretenses of the surviving partners are quite inconsequential.

Williams v Schee, 214-1181; 243 NW 529

Implied authority to continue partnership. Where a deceased had been a member of a

banking partnership, an order in probate allowing a claim against the estate, consequent on a defalcation of a former employee of the bank, cannot be deemed an implied authorization to the administrator to continue the partnership after the death of the deceased.

Williams v Schee, 214-1181; 243 NW 529

11957 Claims against estate—form.

Discussion. See 22 ILR 557—**Limitations and** claims against estate

ANALYSIS

I PRESENTATION AND PRESERVATION OF CLAIMS—PLEADINGS
II CLAIMS CHARGEABLE AGAINST THE ESTATE

Funeral expenses. See under §11969

I PRESENTATION AND PRESERVATION OF CLAIMS—PLEADINGS

Executor may file own claim. Executrix of estate may file her own claim against the estate, or proceed for the appointment of a temporary administrator, as provided by statute.

In re Dunn, (NOR); 224 NW 38

Substitution of administrator—judgment—effect. A plaintiff who, upon the death of the defendant, prosecutes his claim to judgment by substituting the defendant's administrator as defendant, simply accomplishes a legal adjudication of his claim against the estate. Plaintiff, by such procedure, does not obtain any lien on the real property belonging to the estate.

Marion Bank v Smith, 205-203; 217 NW 857

Findings—conclusiveness. A supported finding in probate that a claim should be disallowed is conclusive on appeal.

Chamberlain v Fay, 205-662; 216 NW 700

Appeal—non de novo hearing. Claims against an estate are triable at law. Consequently, on appeal, an allowance by the probate court will not be disturbed if it is not excessive and has support in the evidence.

In re Anderson, 216-1017; 250 NW 183

Fact findings in probate not triable de novo on appeal. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Probate claims—not triable de novo. Probate claims are not triable de novo in the supreme court, as credibility of witnesses and weight of testimony are involved.

In re Martens, 226-162; 283 NW 885

Claims—strict pleading unnecessary—prayer not required. Claims in probate, not being subject to strict rules of pleading, require no specific form or prayer.

In re Davie, 224-1177; 278 NW 616

Presentation form — technicalities not required. Technical accuracy and fullness of allegation, or that degree of particularity of pleading and conformity of pleading to proof required in ordinary actions, are not required in the presentation of claims in probate.

In re Newson, 206-514; 219 NW 305
In re Onstot, 224-520; 277 NW 563
In re McKeon, 227-1050; 289 NW 915

Contract binding "heirs" — claim in estate necessary. A contract with a decedent, altho binding on his heirs, executors, and administrators, must be enforced by filing a claim in the estate as provided by law.

In re Sterner, 224-617; 278 NW 216

Filing excused. One who holds a promissory note under the authorized indorsement of the executor of the estate to which the note once belonged, need not file his claim against the estate.

University Bank v Johnson, 202-654; 210 NW 785

Dual filing of same claim unnecessary. When a collaterally secured promissory note against an estate is duly filed with and approved by the administrator and by the court and, with the approval of the court, is taken up and merged into a new note signed by the administrator and accompanied by the same collateral, no necessity exists for the filing of the new note as a claim against the estate.

Elliott v Bank, 209-1258; 228 NW 274

Notes of deceased—prima facie case. In an action in probate by payees of notes to establish notes as claims against maker's estate, the conceded signature of deceased and admission of the notes in evidence establish a prima facie case for claimants.

In re Humphrey, 226-1230; 286 NW 488

Execution and delivery of notes—consideration presumed. In an action in probate to establish notes of deceased as claims, proof of the execution and delivery being established, it is presumed that notes were issued for a valuable consideration and the burden of showing lack of consideration is on the defense.

In re Humphrey, 226-1230; 286 NW 488

Premature filing. The filing of a claim against an estate prior to the doing of some act which is necessary to fully mature the claim, i.e., a demand for payment, will not render the filing premature when such act is done prior to the hearing.

In re Prunty, 201-670; 207 NW 785

Bank officers' duty to protect assets—filing probate claim. A duty is imposed on bank

officers and directors to file a claim against the estate of a deceased bank director when the bank's bills receivable are covered by a guaranty agreement executed by such deceased director.

In re Sterner, 224-617; 278 NW 216

Belated filing—equitable proceeding. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Peculiar circumstances relieving limitation on filing claim. Statute being liberally construed, peculiar circumstances to afford relief from the one-year limitation on filing probate claims, and to permit thereafter the superintendent of banking to file a claim on decedent's guaranty of bank's bills receivable, exist when decedent was a director in the bank, when his son and executor had been a bookkeeper and cashier in the bank, knowing bank's financial condition, and as such officer had a duty to file a claim on the guaranty against the estate, and when the financial condition of the bank at the time the receiver took control was so concealed in the books and records that the receiver was unable to learn at once the necessity for filing such claim.

In re Sterner, 224-617; 278 NW 216

Fatally belated claim to estate. A surviving widow (who is administratrix of her husband's estate) may not, in her final report and on the hearing thereof, present for the first time, and litigate, the claim that the estate left by her husband was the result of the joint earnings of herself and her husband during his lifetime, and that she is entitled to half of the estate either as earnings or as joint owner.

In re Paulson, 221-706; 266 NW 563

Action in lieu of filing in probate. Principle reaffirmed that the bringing of an action at law against an estate is equivalent to filing the claim in probate.

Van Iperen v Hays, 219-715; 259 NW 448

Claims overlooked. A claim against an estate, duly verified and filed, and not allowed or disallowed by the administrator, cannot be deemed adjudicated by an order approving the final report of the administrator when the claim, the claimant and his representative were, by mistake and oversight, wholly overlooked both in said final report and in the notice of hearing thereon. It follows that an equitable action will lie, subsequent to said approval, to open up the estate and to allow the claim.

Harding v Troy, 217-775; 252 NW 521

Conversion by guardian—failure to file claim. Failure of a ward to file a claim against the estate of an embezzling guardian works no release of the surety on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Subrogation. A surety who, in a foreclosure suit which was personal as to himself, but solely in rem as to the estate for which he was surety, pays off a deficiency judgment, must file his claim against the estate in order to render effective his right of subrogation.

In re Angerer, 202-611; 210 NW 810

Defect of parties in re objections to accounting. A guardian, after purchasing a residence property for his ward at a price authorized by the court, paid the vendor a trifling part of the contract price and obtained a deed from the vendor to the ward who thereafter for years remained in undisturbed possession of the property. The guardian in a later report credited himself with the full amount of the contract price. Later, the deception being discovered, the ward filed objections to the report. The guardian dying, his administrator appeared in re said objections.

Held, the court was in error in establishing a claim in favor of the ward and against the guardian's estate in the amount of the credit improperly taken by the guardian, on condition that the ward reconvey the property to the unpaid vendor,—that the court was per se without jurisdiction to adjudicate said controversy in the absence of said unpaid vendor as a party to said proceedings.

In re Bennett, 221-518; 266 NW 6

Right to enforce all security. The filing of a claim against the estate of the deceased debtor does not preclude claimant from maintaining an equitable action to enforce said claim against lands which were made liable for the payment of said claim by the probated will of another decedent.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Probate claim denied—no bar to subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Widow's support—equity allowing more than probate claim. In an equity action to establish a claim for support of testator's widow, the increasing of amount of such claim in excess of a claim for the same services filed in testator's estate, which was disallowed, held, not important or showing of bad faith, where

I PRESENTATION AND PRESERVATION OF CLAIMS—PLEADINGS—continued

evidence of witnesses is uncontradicted and claim is reasonable. It is not unusual in actions at law or in equity to increase the amount claimed by amendment or on a second trial.

Hoskin v West, 226-612; 284 NW 809

Equitable set-off. Where an insolvent bank in the hands of a receiver owes an estate on a deposit, an heir who owes the bank, tho he is the executor of the estate, may have his interest in the deposit set off against his indebtedness to the bank, subject, of course, to claims which may be filed against the estate.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Debt-encumbered remainder — equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some 30 years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Probate — claim payable "on or before" death. An oral contract to pay for services, payable "on or before" the death of the promisor, matures at his death and therefore is not barred by the statute of limitations, even tho the claim was running for over 20 years.

Gardner v Marquis, 224-458; 275 NW 493

Mutual expectation. One suing for the value of services rendered need not show that he expected to receive payment and that the decedent expected to make payment, when the claimant was not a member of the decedent's family.

Nortman v Lally, 204-638; 215 NW 713

Pleading express contract and proving quantum meruit. A claim in probate "for personal services performed by claimant for and in behalf of decedent at her special instance and request" is sufficiently supported by proof that personal services of a certain value were rendered by claimant for decedent and accepted by decedent, without any proof of an express oral or written contract.

In re Walton, 213-104; 238 NW 577

Evidence—competency. On a claim for services rendered to a deceased during his lifetime, evidence is inadmissible as to what claimant did relative to the funeral of decedent.

In re Walton, 213-104; 238 NW 577

Presumptive credits. In an action against an estate on a contract by deceased to pay for services rendered to her, payments of money by deceased to claimant are, presumptively, credits on the contract.

In re Willmott, 211-34; 230 NW 330; 71 ALR 1018

Defense of payment—burden on defendant. In an action in probate to establish claim based on promissory note, the burden of proving payment is upon defense.

In re Humphrey, 226-1230; 286 NW 488

Admissions of wife against husband. Admissions by a wife in the absence of the husband, tending to show that a claimant in probate had been employed in the business and had not been paid, are admissible against the estate of the husband when it appears that the wife was both the general manager of the business in question, and a partner therein with her husband.

Nortman v Lally, 204-638; 215 NW 713

Contracts—consideration—claim in probate. On a wife's claim against her deceased, divorced husband's estate, a promissory note expressly stating a consideration, which, however, is invalid to support the claim, will not, under §9440, C., '35, import a valid consideration, so as to generate a jury question. Section 9440, C., '35, was not intended to furnish the consideration but only import it when not stated, which in any event could not be different than that stated in the contract.

In re Straka, 224-109; 275 NW 490

Defense—lack of consideration. In probate action to establish as claims notes signed by deceased, evidence submitted by defense to show lack of consideration, was properly held to be insufficient to present a jury question.

In re Humphrey, 226-1230; 286 NW 488

Self-serving declarations. Self-serving declarations of a husband or wife during their lifetime are inadmissible to negative a claim in probate against the estate of the husband.

Nortman v Lally, 204-638; 215 NW 713

Oral contract to convey land at death—absence of strong equities. Absence of strong equities in favor of the plaintiff, a son trying to establish an oral contract with his father, since deceased, does not tend to weaken his corroborating testimony.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract to devise—evidence to establish—duty of court. Evidence to establish an alleged oral contract between a father and son, that the father would leave to the son a farm when he died, must be established by clear, satisfactory, and convincing evidence, and it is the duty of the court to subject the evidence

to every fair test which may tend to weaken its credibility.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract to devise—convincing evidence necessary. An alleged oral contract between a childless couple and a neighbor, that such couple would leave all their property to the neighbor's minor son when he became of age, if he would live with them until that time, must be established by clear, satisfactory, and convincing evidence, and when so established, along with proof of compliance by the son, entitles the son to specific performance of the contract.

Ford v Young, 225-956; 282 NW 324

Partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the 14 years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Transactions with deceased. A claimant in probate must not be permitted to testify that he relied and acted on statements made by the deceased to a third party in a conversation in which claimant took part; otherwise as to statements made by deceased in conversation in which claimant did not take part.

In re Newson, 206-514; 219 NW 305

Collection of estate—discovery—automobile replevied after testator's death. An automobile finance company, as conditional seller, may not replevy automobiles immediately after the death of conditional buyer having absolute ownership and possession at the time of his death, since the right to possession of all personal property for administration purposes passed to executor, who in a proceeding to discover probate assets may recover the automobiles or their value from such conditional seller, whose proper remedy should have been the filing of a claim against the administrator.

In re Sweet, 224-589; 277 NW 712

Redemption in lieu of payment from estate. The holder of a legally established claim in probate need not rely on his right to be paid from the funds—if sufficient—arising from the administration of the estate, but may become a redemptioner of the real estate of the decedent which has been sold on execution and which is yet subject to redemption by creditors, (1) by pursuing, within the statutory period, the course prescribed for redemption by creditors in general, and (2) by applying during said period to the district court (or to a judge thereof) of the county wherein the land is situated, for an order, on due notice and hearing, permitting and confirming such right of redemption.

Aronson v Hoskins, 201-389; 207 NW 389

Action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

Appearance and continuance in state court—nonwaiver of federal jurisdiction. Agreed postponements of a probate hearing in the state court will not prevent the Reconstruction Finance Corporation, a party authorized by act of Congress to sue in the federal courts, from thereafter commencing action thereon in the federal courts.

RFC v Dingwell, 224-1172; 278 NW 281

Federal courts—probate claims—jurisdiction from diversity of citizenship. Tho proceedings for settlement of an estate may be pending in a state court, the federal courts may on account of diversity of citizenship assume jurisdiction to determine the validity of claims against the estate.

RFC v Dingwell, 224-1172; 278 NW 281

State and federal courts—comity—certiorari coercing state court's release of jurisdiction. The necessity for comity between state and federal courts demands that controversies shall not arise concerning their respective jurisdictional powers on account of unsubstantial considerations, and certiorari from the supreme court of Iowa will lie to require a district court of the state to relinquish jurisdiction over a probate matter after the federal court, through diversity of citizenship, has assumed jurisdiction.

RFC v Dingwell, 224-1172; 278 NW 281

II CLAIMS CHARGEABLE AGAINST THE ESTATE

Rebutting presumption of gratuity.

Spicer v Administrator, 201-99; 202 NW 604

Contract for repayment—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

Transaction with deceased—expectation of payment. A claimant for services rendered as a member of the family of a decedent is incompetent to testify against the executor that she expected to receive compensation for the services performed.

In re Docius, 215-1193; 247 NW 796

II CLAIMS CHARGEABLE AGAINST THE ESTATE—continued

"Family" defined. Instructions which define a "family" as "a collection or collective body of persons who live under one roof and under one head or management" are all-sufficient.

Wilson v Else, 204-857; 216 NW 33

Persons in family relation. The existence of a family relation in a legal sense creates a presumption that services performed in the family by the members thereof were gratuitous; but the fact that a mother "lived in the house" occupied by a daughter and "ate at the same table" does not per se establish such family relation.

In re Butterbrodt, 201-871; 208 NW 297

Family relation — presumption. Services rendered in a family by one member thereof to another member are presumptively gratuitous; but claimant may overthrow the presumption by proof of an express contract to pay for such services, or by proof of such circumstances as will justify a finding that the member rendering the services expected to be paid therefor, and that the member receiving the services expected to pay therefor.

Wilson v Else, 204-857; 216 NW 33

Persons in family relation. The rendition on one hand and the acceptance on the other of valuable services (board and lodging) for a series of years generates a presumption that the one rendering was to receive pay and that the one receiving was to pay; and this is true tho the receiver and the giver were lifelong associates and related, but were not members of the same family.

Peterson v Johnson, 205-16; 212 NW 138

Services rendered for decedent—evidence—sufficiency. Evidence held sufficient to support a verdict of $7,500 for services rendered to a decedent during a series of years.

Halstead v Rohret, 212-837; 235 NW 293

Services in family—presumption. There can be no presumption that services performed for a deceased were gratuitous when claimant and deceased were not related and not members of the same family.

In re Walton, 213-104; 238 NW 577

Persons in family relation. A daughter-in-law who enters the home of her father-in-law and cares for him for many years while performing the duties of a housewife, as had formerly been done by other relatives, cannot recover from the estate of the father-in-law for said services in the absence of an express or implied contract; and an implied contract is not established by proof that on occasions the father-in-law expressed appreciation for the personal care rendered him, and a purpose to pay therefor.

In re Unangst, 213-1064; 240 NW 618

Wife's claim for services—public policy. When necessarily including compensation for purely domestic duties, a wife's claim against the estate of her deceased, divorced husband, furnishes in itself sufficient ground for denying it, under the rule that agreements that a wife be compensated for the performance of obligations incident to the marital relation violate public policy and are void.

In re Straka, 224-109; 275 NW 490

Widow's groceries—nonliability of administrator. Administrator, who has paid testator's widow more than amount to which she was entitled prior to alleged promise to pay for groceries furnished to widow, held not authorized to make payment out of estate for such groceries.

Yoss v Sampson, (NOR); 269 NW 22

Probate claim—nonfraudulent allowance—conclusiveness. A daughter's claim on promissory notes against her father's estate upon which there was a hearing to the court, at which hearing the administrator, her brother, appeared personally and by counsel, and at the conclusion of which judgment was entered allowing the claim, altho it was apparent to the court from the face of the notes that the statute of limitations had run, is a situation where the allowance will not be disturbed on appeal without a showing of fraud upon the court. Held, fraud not shown.

In re Sterner, 224-605; 277 NW 366

Living with and caring for parents at their request — nongratuitous services. Reciprocal services rendered by and between members of a family are presumed to be gratuitous, yet, the court, a jury being waived, may find that a married daughter, who with her family, returns to the home of her aged parents at their request to care for them, for which she expected to receive and the parents expected to pay remuneration, did not reestablish a family relationship with her parents so as to raise the presumption of gratuitous services. Such finding will be binding on the appellate court.

Clark v Krogh, 225-479; 280 NW 635

Note found in decedent's safe—no delivery. In spite of a mother's declarations as to the existence of a note and her instructions to her daughter to get it after the mother's death, a promissory note executed by a mother, with her daughter as payee, in repayment of money allegedly borrowed from the daughter, and found by said daughter in the mother's safe after her death, is not a valid claim against the estate of the mother—there having been no sufficient delivery thereof to payee. Quaere, as to validity of claim if based on the debt independent of the note.

In re Martens, 226-162; 283 NW 885

Rents from dower interest — nonliability. Rents arising from the distributive share of a surviving spouse, during the time when such

share is being held in common with the shares of other owners, are not liable for the debts of the estate or of the costs of administration.

Crouse v Crouse, 219-736; 259 NW 443

Share of heir as mere contract claim—how paid. Where the share or interest of a child in the estate of his or her alleged parent takes the form of a mere contract obligation against the estate, the child becomes a mere claimant against the estate and is payable as such, and not from the mere residue of the estate. So held where the parentage was in issue and was compromised by a court-approved agreement wherein the executor agreed, on behalf of the estate, (1) to set up a specified trust fund, the annuity of which was to be payable to said child during its lifetime, and (2) annually to pay said annuity to said child until the trust fund was actually set up.

In re Griffin, 220-1028; 262 NW 473

Premium on bond—refusal to allow. The probate court is clearly within its discretion in refusing to allow against an estate and to the surety on an executor's bond (the executor being deceased and his estate insolvent) the amount of unpaid premiums on the bond, especially when such allowance would burden the estate with a double charge for premiums consequent on the mismanagement of the estate by the executor.

In re Mowrey, 218-992; 255 NW 511

Allowable payment by administrator to himself. An administrator is properly given credit for a just claim paid to himself with the approval and at the request of all adversely interested parties, and after due consultation with a co-administrator, even tho no formal written claim was ever filed.

In re Atkinson, 210-1245; 232 NW 640

Allowance of credit—review on appeal. An order of the probate court granting an executor credit on his final report for the amount paid by him on his own motion, on a claim against the estate, is conclusive on the appellate court if the record reveals supporting testimony as to the genuineness of the claim.

In re Plendl, 218-103; 253 NW 819

Payment of unfiled claims. Principle reaffirmed that an executor may voluntarily pay valid claims against the estate tho they are not filed.

In re Plendl, 218-103; 253 NW 819

Administrator's claim—ex parte allowance—correction before final settlement. A personal claim of an administrator allowed on an ex parte hearing without a special administrator, without a hearing, without notice, and containing a joint obligation of administrator and decedent, is subject to correction any time before final settlement and should be disallowed until it appears sufficient funds exist to pay all other claims and costs of administration.

In re Sterner, 224-605; 277 NW 366

Conditional rejection of item in interlocutory report. The court may, very properly, in ruling upon an item in an interlocutory report, allow part of the item and continue the remainder for more adequate showing in the administrator's final report.

In re Atkinson, 210-1245; 232 NW 640

Interest on antenuptial-contract allowance. A provision in an antenuptial contract that the wife shall be paid a named sum within a named time after the death of the husband contemplates interest on said sum from the maturity date, even tho said contract also provides that the widow shall be paid a monthly sum until the former main sum is paid.

In re Shepherd, 220-12; 261 NW 35

Husband's breach of antenuptial contract—wife's heirs' claim against husband's estate. An antenuptial contract preserving the respective property rights of the parties will support a claim in favor of the wife's collateral heirs against the estate of the husband who appropriated his deceased wife's separate property that otherwise and rightfully should have gone to such collateral heirs.

In re Onstot, 224-520; 277 NW 563

Harmless error. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However, since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Instruction on "stated" amount for alleged services rendered to decedent. In probate claimant's action reciting decedent's agreement to pay to claimant for services from decedent's estate an amount more than claimant could expect to make teaching school, a reference by trial court in its instructions to decedent's agreement to pay a "stated amount per month" was not objectionable where, under allegations of claim there could be no recovery unless jury found that there was an agreement to pay a stated amount, and where there was evidence as to amount stated or fixed by decedent. The word "stated" means no more than determined, fixed, or settled, and was properly used in the instruction.

In re McKeon, 227-1050; 289 NW 915

Finding of duplication in claims. Since appellant-claimant failed to challenge finding of trial court that two claims against a decedent's

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estate based on a note and a loan were a duplication, the sufficiency of other grounds of judgment disallowing claim for the loan was immaterial.

In re Green, 227-702; 288 NW 881

Setting aside fraudulent deed on condition. The grantee in a deed of conveyance executed for the primary purpose of preserving a means of support for the aged grantor (tho not so expressed in the deed) has a right, in an equitable action by grantor's executor to set aside the deed, to demand that his reasonable claim for furnishing the grantor a very substantial support be first paid as a condition precedent to any judgment setting aside the deed; and this is true tho said deed would have been declared fraudulent and invalid had it been attacked by the grantor's existing creditors.

Meyers v Schmidt, 220-370; 261 NW 502

Declarations and admissions of heirs and devisees. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Heir's assignment of interest subject to estate claims—rights of assignee. In a probate proceeding where one of the heirs, who is indebted to the estate, purchases a farm from the executor and assigns her one-tenth interest in the estate as security for a purchase note to the executor, who in turn assigns the note to a third party, held, that such assignment of interest is taken subject to the estate claims, and whatever interest remains should be paid to the holder of the note irrespective of the fact the executor is also indebted to the estate on his final account.

In re Sheeler, 226-650; 284 NW 799

Refund to pay debts. The heirs of an estate who unconditionally purchase the interest of their mother in the estate have no legal right, thereafter, to compel the mother to contribute any sum toward the discharge of unpaid debts of the estate, unpaid taxes against the estate, or unpaid probate costs and fees.

In re Jones, 217-288; 251 NW 651

Formal direction in will to "pay debts"—no priority over other testamentary dispositions. The usual, formal, first paragraph of a will directing the payment of "all my just debts", held, being a mere recitation of an executor's duty, does not alone give priority and subject the property of the estate to all claims allowed irrespective of other provisions directing the disposition of the corpus of the estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a secured note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl. Bk. v Malone, 76 F 2d, 251

Bank stockholder — double liability — how enforced against estate. A claim by the receiver of an insolvent state bank for the statutory, superadded, contingent liability on capital stock (§9251, C., '35) need not, as to the liability of a stockholder who has died prior to the insolvency of the bank, be filed as a claim against the stockholder's estate. Such claim may be enforced by action against the executor or administrator as such.

Bates v McGill, 223-62; 272 NW 535

Loss of improperly created trust fund—reimbursement. Where an executor is devised a named sum of money in trust for a named person, and where the executor assumes to set aside or hold certain bank stock as said trust fund, which stock becomes worthless by the failure of the bank, the estate must make good the resulting loss (or pro rata if the estate is insufficient to pay all legacies) less any payments made to the cestui que trust.

Mills v Manchester, 213-95; 237 NW 228; 238 NW 718

Monument ordered by heirs. The court may allow the purchase price of a monument against a solvent estate even tho the contract therefor was entered into by one heir with the approval of all other heirs, and not by the administrator.

In re McMath, 209-414; 228 NW 11

Trust property held by ward. A contract by the guardian of an incompetent, for the sale of land owned by the ward solely as trustee, tho approved by the court, cannot, in any sense, be deemed the contract of the ward; therefore, such contract cannot, in the event of the death of the ward, be deemed to create any indebtedness against the estate of the ward.

Copple v Morrison, 221-183; 264 NW 113

11958 Verification and filing.

Payment of unfiled claims. Principle reaffirmed that an executor may voluntarily pay valid claims against the estate tho they are not filed.

In re Plendl, 218-103; 253 NW 819

Payment of unfiled but valid claims. An executor will be credited with the amount of valid, enforceable claims paid by him even

tho such claims were not formally filed against the estate.

In re Bourne, 210-883; 232 NW 169

Payment of valid unfiled claim without court authorization. The administrator of an apparently large estate (of which he is the sole beneficiary) has the right, without waiting for the formal filing of a claim, and without obtaining authority from the court, to forthwith make a partial payment on the only debt then existing against the estate, when such payment effects (1) a pro tanto reduction in interest on the debt, and (2) a pro tanto redemption of apparently valuable securities belonging to the estate, and held by the creditor in an amount far in excess of the debt. The administrator having the right to pay, the creditor has the right to receive.

Elliott v Bank, 209-1258; 228 NW 274

"Equitable" filing and allowance. Equity will treat and regard a valid claim against an estate as having been presented to, and approved and allowed by, the administrator, as of the date when the administrator paid said claim, even tho there has been no formal statutory filing and approval.

Elliott v Bank, 209-1258; 228 NW 274

Bank depositors—nonnecessity to file claims. A probate order which authorizes, generally, an administrator to continue the private banking business of the deceased in the same manner in which deceased carried on the business ipso facto constitutes (1) an approval by the court of the claims of depositors as they, on the bank records, ostensibly or indisputably exist, from time to time, and (2) an authority to pay such claims, and renders the formal filing of such claims with the administrator wholly unnecessary.

In re Harsh, 207-84; 218 NW 537

Mistake—effect. The filing of a claim against an estate will not estop the party from abandoning such claim and instituting an action for a partnership accounting with deceased when such latter proceeding was his sole allowable remedy.

Hull v Padgett, 207-430; 223 NW 154

11959 Notice of hearing—exceptions.

ANALYSIS

I NOTICE
II ALLOWANCE OF CLAIMS BY ADMINISTRATOR

I NOTICE

Service by attorney. Notice of hearing of claims against an estate may be served by the attorney for claimants.

Schroeder v Dist. Court, 213-814; 239 NW 806

Unauthorized acceptance of notice. An unauthorized but good-faith acceptance by an attorney of notice of hearing on a claim in probate, is ratified by the conduct of the administratrix (1) in making no objection to said acceptance when informed thereof, (2) in negotiating for a settlement of the claim, and (3) in causing the hearing to be twice continued.

Story Co. Bk. v Youtz, 199-444; 200 NW 700

Insufficient notice. A notice of hearing on a duly filed claim in probate is insufficient when no copy of the claim accompanies the said notice.

Lucas v Ruden, 220-494; 260 NW 60

County's claim for insane support—notice of hearing. County's maintenance claim against estate of deceased who was inmate of state insane hospital is a general claim, and notice of hearing thereon must be served on the administrator within 12 months after notice of his appointment as provided by statute.

In re Wagner, 226-667; 284 NW 485

Barred claim—negligence precludes equitable relief. Negligence of a fourth-class claimant in probate in filing his claim and serving notice of hearing thereon bars all equitable relief even tho no element of estoppel accompanies such negligence.

Lucas v Ruden, 220-494; 260 NW 60

Fatal delay. Failure of a claimant against an estate to offer any evidence of any peculiar circumstance equitably excusing his failure to serve timely and legal notice of hearing on his duly filed but unallowed fourth class claim, deprives him of all right to be relieved from the resulting bar of the statute of limitation.

Meier v Briggs' Est., 221-482; 265 NW 189

Death of claimant's attorney—peculiar circumstances relieving barred claim. Where an attorney files a probate claim for a nonresident claimant, but dies one day before the expiration of the year and without serving a notice of hearing on such claim—claimant not learning of his attorney's death until later, and tho then delaying several months while his new attorney negotiated with the estate, held to have shown peculiar circumstances entitling him to equitable relief considering the estate was still unsettled and solvent.

Hagen v Nielsen, 225-127; 279 NW 94; 281 NW 356

II ALLOWANCE OF CLAIMS BY ADMINISTRATOR

Payment of valid unfiled claim without court authorization—effect. The administrator of an apparently large estate (of which he is the sole beneficiary) has the right, without waiting for the formal filing of a claim, and without obtaining authority from the court, to forthwith make a partial payment on the only debt then existing against the estate, when such payment effects (1) a pro tanto reduction in in-

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terest on the debt and (2) a pro tanto redemption of apparently valuable securities belonging to the estate and held by the creditor in an amount far in excess of the debt. The administrator having the right to pay, the creditor has the right to receive.

Elliott v Bank, 209-1258; 228 NW 274

Advance by executor—repayment and interest. An executor who, because of a temporary shortage in estate funds, advances sums from his own private funds and therewith pays legal claims against the estate, rather than to sell, on a poor market, assets of the estate, is properly allowed interest on the amount so advanced.

In re Shepherd, 220-12; 261 NW 35

Personal advancements by executor—preference. When an executor, owing to a temporary shortage of estate funds, advances from his personal funds and pays to a widow sums of money in the nature of monthly support (provided for in an antenuptial contract), he will not only be reimbursed but will be given a preference in repayment over payment to the widow of other sums due her under said contract.

In re Shepherd, 220-12; 261 NW 35

Insolvent estates—unallowable payment in full. The act of the administratrix of an insolvent estate in applying estate funds to the full payment of a debt, which is the personal obligation of both the deceased and the administratrix, is fundamentally unallowable. It follows that the creditor, by receiving such payment, becomes a trustee of the fund for the use and benefit of the estate, especially when he knew that the estate was insolvent.

Reason: The administratrix could not legally make such payment, even on an authorizing order of the court.

Andrew v Bank, 217-69; 251 NW 23

Pleading fraud. An allegation that an administrator "fraudulently and collusively" caused the allowance of a claim against the estate is wholly insufficient to constitute a good plea of fraud.

In re Kessler, 213-633; 239 NW 555

Administrator's settlement of unenforceable lien—homestead's nonliability. Although a settlement agreement was made between a claimant and an administrator, a decedent's homestead may not be subjected to a mortgage or judgment which has never become a lien thereon, which was not filed or allowed against the estate, which was not enforced within two years after judgment entry, and when such settlement was never approved by the probate court.

Finn v Grant, 224-527; 278 NW 225

11961 Claims deemed denied.

Nonnecessity for administrator to deny claims. Failure of the court to sustain a motion non obstante veredicto made on the ground that administrator failed to plead any defense to a claim against the estate was not error, since under the statute the administrator was not required to plead any defense.

In re Larimer, 225-1067; 283 NW 430

Delivery of note by decedent—validity—dead man statute. In the absence of contrary evidence, a valid delivery was proved by the statutory presumption of delivery arising from possession of a note, aided by evidence, secured without violating the dead man statute, to the effect that the note was in decedent maker's hands while visiting payee during an illness and after decedent left, the note was reposing on payee's bed.

In re Cheney, 223-1076; 274 NW 5

Consideration and delivery of note—proof by presumptions—instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Defense of payment—burden on defendant. In an action in probate to establish claim based on promissory note, the burden of proving payment is upon defense.

In re Humphrey, 226-1230; 286 NW 488

Plea of payment. In an action in probate to establish a claim based upon a promissory note, a plea of payment must be based upon something done after the execution of the instrument, and a note being merely evidence of indebtedness cannot be paid prior to its execution. Evidence submitted held insufficient for jury's consideration.

In re Humphrey, 226-1230; 286 NW 488

Gifts inter vivos—consideration—note as future gift—presumption—burden. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note, the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

11962 Burden of proof.

Burden of proof. An executor must sustain his plea of payment of a claim filed in probate.

Wilson v Else, 204-857; 216 NW 33

Defense of payment—burden on defendant. In an action in probate to establish claim based on promissory note, the burden of proving payment is upon defense.

In re Humphrey, 226-1230; 286 NW 488

Payments applied on debts due—presumption. In a probate action to establish claim for housekeeping services rendered to decedent, where decedent promised to pay claimant small amounts from time to time to cover cost of her clothing and personal expenses, with an additional amount upon his death out of his estate, it would be presumed that small payments made by decedent in his lifetime were to be applied on debts which were due for such expenses, no showing having been made to the contrary.

In re McKeon, 227-1050; 289 NW 915

Burden to prove payment. A claimant in probate who prima facie establishes his claim is entitled to judgment, in the absence of proof by the administrator of payment.

Kern v Kiefer, 204-490; 215 NW 607

Payment. The burden of proof to establish payment of an obligation is not met by testimony which goes no further than to create an inference of payment.

Slezak v Krisinger, 202-422; 210 NW 436

Plea of payment. In an action in probate to establish a claim based upon a promissory note, a plea of payment must be based upon something done after the execution of the instrument, and a note being merely evidence of indebtedness cannot be paid prior to its execution. Evidence submitted held insufficient for jury's consideration.

In re Humphrey, 226-1230; 286 NW 488

Contract for repayment—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

Notes of deceased—prima facie case. In an action in probate by payees of notes to establish notes as claims against maker's estate, the conceded signature of deceased and admission of the notes in evidence establish a prima facie case for claimants.

In re Humphrey, 226-1230; 286 NW 488

Plea of mutual mistake in execution of notes. In an action in probate to establish as claims against estate two notes signed by deceased, a plea that notes were executed as result of mutual mistake is held to be insufficient for jury's consideration, where the maker does not dispute the validity of the notes and pays interest on them for a long period of time.

In re Humphrey, 226-1230; 286 NW 488

Defense—lack of consideration. In probate action to establish as claims notes signed by deceased, evidence submitted by defense to show lack of consideration was properly held to be insufficient to present a jury question.

In re Humphrey, 226-1230; 286 NW 488

Sufficient consideration. In an action in probate to establish a claim against the estate based upon a note which was the third renewal of a note originally given as the result of an accounting and settlement between deceased and claimants in 1913, such note is supported by consideration.

In re Humphrey, 226-1230; 286 NW 488

Payment of claim—erroneous instructions. In an action against an estate on a claim for services, reversible error results from instructing that the defendant has the burden to establish payment of the claim when there is no issue of payment.

In re Stencil, 215-1195; 248 NW 18

Allowance of claims—conclusiveness. The allowance of a claim by the probate court on supporting testimony is conclusive on the appellate court, even tho the supporting testimony is not wholly satisfactory to the judicial mind.

Olson v Roberts, 218-410; 255 NW 461

Examination of claimant. No error can result to a claimant in probate by an instruction which simply recites the statutory right of an administrator to examine a claimant on the subject of payment of the claim.

Wilson v Else, 204-857; 216 NW 33

Partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the 14 years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Administrator supporting sister's claim—not fraud. Testimony by an administrator in support of a sister's claim against estate does not amount to fraud.

In re Sterner, 224-605; 277 NW 366

Improper joinder of claims. One who files a claim for a simple money demand against the estate of a deceased may not join in the probate proceedings actions against other parties for the same claim for which the estate is alleged to be liable.

Ontjes v McNider, 218-1356; 256 NW 277

11963 Hearing—trial by jury.

Discussion. See 22 ILR 557—Limitations and claims against estate

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I JURISDICTION OF CLAIMS
II TRIAL AND ALLOWANCE BY COURT

Counterclaims. See under §11889, Vol I
Court findings as jury verdict generally. See under §§11435, 11581

I JURISDICTION OF CLAIMS

Proper transfer to equity. A claim in probate is properly transferred to the equity docket for trial on a showing that a confidential relation existed between claimant and the deceased, and that deceased had fraudulently concealed from claimant the existence of certain trust funds belonging to claimant, and had failed to account therefor.

In re Sibert, 220-971; 263 NW 5

Nontransferability to equity. A simple, unsecured claim for money, filed against an estate by the surviving widow, is not, against the objections of the administrator, transferable to equity for trial. So held as to a claim due the widow under an alleged antenuptial contract.

In re Mason, 223-179; 272 NW 88

Belated filing—equitable proceeding. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Federal courts—probate claims—jurisdiction from diversity of citizenship. Tho proceedings for settlement of an estate may be pending in a state court, the federal courts may on account of diversity of citizenship assume jurisdiction to determine the validity of claims against the estate.

RFC v Dingwell, 224-1172; 278 NW 281

II TRIAL AND ALLOWANCE BY COURT

Claims—form and contents—technical rules of pleading nonapplicable. Probate claims need not be stated with the same degree of care required in ordinary pleading, nor conform to the technical rules of pleading.

In re McKeon, 227-1050; 289 NW 915

Weight and sufficiency—testimony incapable of direct contradiction—credibility tested. Where the only person who can deny the testimony of a witness is dead, it is incumbent on the court to look upon such testimony with great jealousy and to weigh it in the most scrupulous manner to see what is the character and position of the witness generally, and whether he is corroborated to such an extent as to secure confidence that he is telling the truth.

Peterson v Citizens Bank, 228- ; 290 NW 546

Pleading—burden of proof. An executor must sustain his plea of payment of a claim filed in probate.

Wilson v Else, 204-857; 216 NW 33

Amount of proof. A claim against an estate triable at law is established by a fair preponderance of the testimony, and reversible error results from instructing that such claim must be established only by "strict and satisfactory" proof.

In re Dolmage, 204-231; 213 NW 380
In re Newson, 206-514; 219 NW 305

Appeal — non de novo hearing. Claims against an estate are triable at law. Consequently, on appeal, an allowance by the probate court will not be disturbed if it is not excessive and has support in the evidence.

Anderson Est. v Stason, 216-1017; 250 NW 183

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Allowance of claims—conclusiveness. The allowance of a claim by the probate court on supporting testimony is conclusive on the appellate court, even tho the supporting testimony is not wholly satisfactory to the judicial mind.

Olson v Roberts, 218-410; 255 NW 461

Supported findings of trial court. The finding and judgment of trial court on claim against decedent's estate has the effect of a jury verdict and may not be set aside if it finds any substantial support in the record.

In re Green, 227-702; 288 NW 881

Payments applied on debts due—presumption. In a probate action to establish claim for housekeeping services rendered to decedent, where decedent promised to pay claimant small amounts from time to time to cover cost of her clothing and personal expenses, with an additional amount upon his death out of his estate, it would be presumed that small payments made by decedent in his lifetime were to be applied on debts which were due for such expenses, no showing having been made to the contrary.

In re McKeon, 227-1050; 289 NW 915

Payment specially pleaded—burden of proof —jury question. In probate action to establish

claim for services rendered to decedent under an express agreement, where defendant specially pleaded a defense of payment as a part of a different contract of employment, the burden rested upon defendant to establish such different contract, including payment, and, if evidence justified, it was the duty of the court to submit the issue to the jury, but, where defendant's evidence is also consistent with and does not negative plaintiff's claim as to her express contract, it is admissible and proper to be considered by the jury as tending to show that the present claim was an afterthought, or that claimant had failed under suitable circumstances to advance the demand now relied upon, and as tending to support defendant's theory of the nature of her employment. However, such evidence failed to establish the specially pleaded defense of payment, and the court's failure to submit the question of payment to the jury was not erroneous.

In re McKeon, 227-1050; 289 NW 915

Services rendered to decedent—evidence of agreement admissible—jury question. In probate action where a claimant seeks to recover for services rendered to decedent under an express contract, the performance of such services must have been induced by a proposal and must have been in accordance therewith. Testimony by a witness to a conversation with decedent, who stated that he intended to see that claimant was properly cared for, that he would give her spending money (the little she would need), and at the end of his life he would leave her a home, was admissible and proper evidence for the jury to consider on question of whether or not there was any such arrangement or agreement. What the parties agreed to must be determined by the jury.

In re McKeon, 227-1050; 289 NW 915

Substitution of administrator—judgment—effect. A plaintiff who, upon the death of the defendant, prosecutes his claim to judgment by substituting the defendant's administrator as defendant, simply accomplishes a legal adjudication of his claim against the estate. Plaintiff, by such procedure, does not obtain any lien on the real property belonging to the estate.

Marion Bank v Smith, 205-203; 217 NW 857

Judgment—recitals not an adjudication. Recitals in the nondecretal portions of a foreclosure decree that the wife of the maker of the note in question was an accommodation maker are not evidence in a subsequent hearing in probate on the wife's claim against the estate that she was such accommodation maker, especially when the foreclosure order left such question open for future determination.

In re Cohen, 216-649; 246 NW 780

Clerk's or executor's allowance not final adjudication. The allowance of a claim against an estate by the clerk of the probate court does not result in a final adjudication at the end of a year under a statute permitting objections to the clerk's orders to be filed within a year, as there is no adjudication of a claim against an estate allowed by the clerk or an executor or administrator until it has been passed upon by the court.

In re Baker, 226-1071; 285 NW 641

Final report—claims overlooked. A claim against an estate, duly verified and filed, and not allowed or disallowed by the administrator, cannot be deemed adjudicated by an order approving the final report of the administrator when the claim, the claimant and his representative were, by mistake and oversight, wholly overlooked both in said final report and in the notice of hearing thereon. It follows that an equitable action will lie, subsequent to said approval, to open up the estate and to allow the claim.

Harding v Troy, 217-775; 252 NW 521

Unimpeached and uncontradicted testimony. The positive and wholly uncontradicted testimony of an unimpeached and disinterested witness that he saw the purported maker of a promissory note sign it, plus the unqualified opinion of a competent and unimpeached witness to the effect that the signature to the note was genuine, justifies a directed verdict when the genuineness of the signature is the sole issue.

In re Work, 212-31; 233 NW 28

Directed verdict. On the question whether a verdict should be directed in favor of a claimant, the record may present such circumstances that some consideration should be given to the fact that the claim is against the estate of a deceased.

In re Talbott, 204-363; 213 NW 779

Evidence of express contract for services—jury question. In probate action to establish claim against estate based on express contract, where evidence that claimant acted as housekeeper, assisted with clerical work, and performed other duties about the farm for decedent, pursuant to his agreement to pay her a small amount sufficient to cover cost of her clothing and other personal expenses, and in addition thereto to compensate her out of his estate at his decease in such amount as would be in excess of any amount she could earn teaching school, a jury question was presented as to the existence of an enforceable contract and as to its nature.

In re McKeon, 227-1050; 289 NW 915

Submission of issue. The issue of the "net value" of an estate is properly submitted on evidence showing the gross value, all contested and pending claims and the facts attending the same, and the amount of the debts.

In re Anderson, 203-985, 213 NW 567

Assets sufficient tho dissipated—immediate payment order proper. Probate hearing dis-

II TRIAL AND ALLOWANCE BY COURT—continued

closing that administrator should possess funds sufficient to pay, among other things, all third-class claims justifies not only allowance of a bona fide third-class claim, but an order for its immediate payment.

In re Davie, 224-1177; 278 NW 616

Valid probate claim—no duty to interpose limitation statute. An administrator is not required to resist a valid existing claim nor interpose the statute of limitations against a claim he believes is just.

In re Sterner, 224-605; 277 NW 366

Claim based on book of accounts. Where claimant's evidence of loan of $1,000 based on book of accounts is held inadmissible, testimony of payment of interest and admission of existence of loan by decedent standing alone, held insufficient to prove all facts necessary to establish claim against estate of decedent, as required by statute.

In re Cummins, 226-1207; 286 NW 409

Finding of duplication in claims. Since appellant-claimant failed to challenge finding of trial court that two claims against a decedent's estate based on a note and a loan were a duplication, the sufficiency of other grounds of judgment disallowing claim for the loan was immaterial.

In re Green, 227-702; 288 NW 881

Probate claimant for services—incompetency as witness. In probate action to establish a claim against an estate based on an express contract for services rendered to decedent, claimant could not testify as to existence of contract.

In re McKeon, 227-1050; 289 NW 915

Instruction — agreement with decedent — claimant incompetent to testify. In probate action to establish a claim based upon an express agreement of decedent that claimant's services should be paid for from decedent's estate, an instruction that claimant was not permitted to testify as to agreement between her and decedent, and that if any agreement was in fact made between the parties, it must be proved by testimony other than that of claimant, was not prejudicial to defendant in that jury would believe that it applied to the communication of the contract to claimant through her father, who had been informed by decedent as to the nature of the agreement —there being other testimony of the communication, and the trial court having excluded the testimony of the father after objection of defendant.

In re McKeon, 227-1050; 289 NW 915

Instruction on "stated" amount for alleged services rendered to decedent. In probate claimant's action reciting decedent's agreement to pay to claimant for services from decedent's estate an amount more than claimant could expect to make teaching school, a reference by trial court in its instructions to decedent's agreement to pay a "stated amount per month" was not objectionable where, under allegations of claim there could be no recovery unless jury found that there was an agreement to pay a stated amount, and where there was evidence as to amount stated or fixed by decedent. The word "stated" means no more than determined, fixed, or settled, and was properly used in the instruction.

In re McKeon, 227-1050; 289 NW 915

Harmless error. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However, since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Harmless error—submission of dual controlling propositions. In an action for services rendered a deceased, prejudicial error does not result from submitting to the jury the interrogatories (1) whether there was an express contract for payment, and (2) whether there was a mutual expectation between the parties to pay and receive pay for the services, even tho the express contract was established beyond doubt.

In re Willmott, 215-546; 243 NW 634

Interrogatories—stated or agreed amount—services rendered to decedent. In probate action to establish a claim for services rendered to decedent, wherein the court submitted two interrogatories to the jury to determine (1) amount per month, if any, decedent agreed to pay claimant out of his estate at his decease, and (2) whether amount per month was to be paid for 9 or 12 months of each year, the interrogatories being submitted under an instruction to be answered in event jury found for claimant and not to be answered if verdict was for defendant, such instruction was not erroneous, since, before interrogatories could be answered, the jury must have found under the evidence that there was a stated or agreed amount, and the findings therein conformed to the verdict.

In re McKeon, 227-1050; 289 NW 915

Improper joinder in probate. One who files a claim for a simple money demand against the estate of a deceased may not join in the probate proceedings actions against other parties for the same claim for which the estate is alleged to be liable.

Ontjes v McNider, 218-1356; 256 NW 277

Administrator supporting sister's claim—not fraud. Testimony by an administrator in

support of a sister's claim against estate does not amount to fraud.

In re Sterner, 224-605; 277 NW 366

Nonfraudulent allowance — conclusiveness. A daughter's claim on promissory notes against her father's estate upon which there was a hearing to the court, at which hearing the administrator, her brother, appeared personally and by counsel, and at the conclusion of which judgment was entered allowing the claim, altho it was apparent to the court from the face of the notes that the statute of limitations had run, is a situation where the allowance will not be disturbed on appeal without a showing of fraud upon the court. Held, fraud not shown.

In re Sterner, 224-605; 277 NW 366

Proof—legal conclusion of fraud—no defense. In an action on an administrator's bond, the surety's pleading of a legal conclusion of fraud between administrator and a claimant will not constitute a defense.

In re Davie, 224-1177; 278 NW 616

Peculiar circumstances excusing service of notice of hearing. Altho claimant is executor's wife, peculiar circumstances excusing a claimant's failure to serve notice of hearing may be found in evidence showing that the claim was filed within six months from executor's appointment, that executor told claimant he had knowledge of the matters upon which the claim was based, and that it would be unnecessary to serve notice. Suspicious circumstances surrounding the claim are to be considered in the trial of the claim on its merits.

In re Hill, 225-527; 281 NW 500

Consideration—claim in probate. On a wife's claim against her deceased, divorced husband's estate, a promissory note expressly stating a consideration, which, however, is invalid to support the claim, will not under §9440, C., '35, import a valid consideration, so as to generate a jury question. Section 9440, C., '35, was not intended to furnish the consideration but only import it when not stated, which in any event could not be different than that stated in the contract.

In re Straka, 224-109; 275 NW 490

Allowance — unallowable setting aside. An allowance by the court of a claim in probate, after issue is joined thereon and after due hearing, becomes a final adjudication in the absence of fraud or collusion and may not thereafter be set aside without hearing or evidence.

In re Kinnan, 218-572; 255 NW 632

Collateral attack—void probate order. Void orders of the probate court may be attacked collaterally.

Irwin v Bank, 218-477; 255 NW 671

Distribution of estate — disaffirmance by minor. A void order of the probate court authorizing the executor to satisfy a cash bequest to a minor by transferring a note and mortgage to the father of the minor as the latter's natural guardian may be disaffirmed and repudiated by the minor on reaching his majority.

Irwin v Bank, 218-477; 255 NW 671

Payment of claim after final report. Instead of opening up an estate, after final report and discharge, for the allowance and payment of an overlooked claim, the court may accomplish the same result by allowing the claim and ordering it paid from funds derived from the sale of lands under pending partition proceedings.

Harding v Troy, 217-775; 252 NW 521

Calculating administrator's assets—conclusiveness. Altho based upon calculations, the finding of a probate court in a claim allowance hearing, based upon evidence, that an administrator has or should have sufficient funds to pay a claim, is an adjudication conclusive against attack that the calculations were wrong.

In re Davie, 224-1177; 278 NW 616

Verdict contrary to evidence—no review if first raised on appeal. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence and should be set aside cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

Unliquidated demand set off against court costs. On a motion by an administrator to tax court costs against a defeated claimant in probate, the latter may not have a duly filed but unliquidated claim in his favor and against the estate adjudicated and set off against said costs and a judgment rendered against the estate for the excess.

In re Nairn, 215-920; 247 NW 220

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a secured note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl. Bk. v Malone, 76 F 2d, 251

Declarations of heirs and devisees—admissibility. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is

II TRIAL AND ALLOWANCE BY COURT—concluded

the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Heir's assignment of interest subject to estate claims—rights of assignee. In a probate proceeding where one of the heirs, who is indebted to the estate, purchases a farm from the executor and assigns her one-tenth interest in the estate as security for a purchase note to the executor, who in turn assigns the note to a third party, held, that such assignment of interest is taken subject to the estate claims, and whatever interest remains should be paid to the holder of the note irrespective of the fact the executor is also indebted to the estate on his final account.

In re Sheeler, 226-650; 284 NW 799

11964 Demands not due.

Contract binding "heirs"—claim in estate necessary. A contract with a decedent, altho binding on his heirs, executors, and administrators, must be enforced by filing a claim in the estate as provided by law.

In re Sterner, 224-617; 278 NW 216

11965 Contingent liabilities.

When barred. A contingent claim based on a guaranty by a deceased of payment of an unmatured promissory note is barred if not filed against the estate within 12 months from the giving of notice of the appointment of administrator.

Nichols v Harsh, 202-117; 209 NW 297

Foreclosure against estate. In an equity foreclosure action on a realty note and mortgage, where administrators were defendants and the petition prayed for judgment and for general equitable relief, and where the foreclosure decree established a claim against administrators of the estate of deceased owner, to which decree objection was made that the relief granted in establishing such claim was greater than the prayer of petition, held, judgment against the administrators, if proper, could have been in no other form than as a claim established against the estate, and could not be enforced by execution.

Federal Bank v Ditto, 227-475; 288 NW 618

11966 Referees.

Set-off or retainer against beneficiary. In probate proceedings wherein a beneficiary is indebted to the estate, the right of set-off or retainer is not restricted to a court of equity, but rests upon wholesome principles of right and justice which can be administered in probate courts without the aid of a court of conscience.

In re Sheeler, 226-650; 284 NW 799

Set-off or retainer—executor's equitable right—nonstatutory. In probate proceedings the right which the executor or an administrator has, in the nature of a right of retainer, to set off debts owing by a beneficiary of an estate against his share therein, is an equitable right of its own nature, and not at all dependent upon any statute.

In re Sheeler, 226-650; 284 NW 799

"Worthier title" rule re executor's set-off or retainer. In probate proceedings, before the "worthier title" rule can be applied where property is left to testator's heirs by will in the same manner and proportion in which they would have taken were there no will, it must definitely appear that there is exact identity in every way, and where testator definitely directs that real estate be converted into personalty and then divided equally among his children, each beneficiary receiving all personalty and no real estate, held, a beneficiary of such estate did not take her interest by "worthier title" so as to preclude executor from exercising the right of retainer against the beneficiary's interest which is assigned as security for a note for purchase of real estate by beneficiary—it being immaterial whether beneficiary is solvent or insolvent.

In re Sheeler, 226-650; 284 NW 799

11967 Actions pending.

Judgment—effect. A plaintiff who, upon the death of the defendant, prosecutes his claim to judgment by substituting the defendant's administrator as defendant simply accomplishes a legal adjudication of his claim against the estate. Plaintiff by such procedure does not obtain any lien on the real property belonging to the estate.

Marion Bk. v Smith, 205-203; 217 NW 857

Foreclosure against estate. In an equity foreclosure action on a realty note and mortgage, where administrators were defendants and the petition prayed for judgment and for general equitable relief, and where the foreclosure decree established a claim against administrators of the estate of deceased owner, to which decree objection was made that the relief granted in establishing such claim was greater than the prayer of petition, held, judgment against the administrators, if proper, could have been in no other form than as a claim established against the estate, and could not be enforced by execution.

Federal Bank v Ditto, 227-475; 288 NW 618

11968 Executor interested.

Executor may file own claim. Executrix of estate may file her own claim against the estate, or proceed for the appointment of a temporary administrator, as provided by statute.

In re Dunn, (NOR); 224 NW 38

Enforcement of claim against executor on final report.

In re Parker, 189-1131; 179 NW 525
In re Bourne, 210-883; 232 NW 169

Administrator's claim—ex parte allowance—correction before final settlement. A personal claim of an administrator allowed on an ex parte hearing without a special administrator, without a hearing, without notice, and containing a joint obligation of administrator and decedent, is subject to correction any time before final settlement and should be disallowed until it appears sufficient funds exist to pay all other claims and costs of administration.

In re Sterner, 224-605; 277 NW 366

Allowable payment by administrator to himself. An administrator is properly given credit for a just claim paid to himself with the approval and at the request of all adversely interested parties, and after due consultation with a co-administrator, even tho no formal written claim was ever filed.

In re Atkinson, 210-1245; 232 NW 640

Justifiable advance by executor—repayment and interest. An executor who, because of a temporary shortage in estate funds, advances sums from his own private funds and therewith pays legal claims against the estate, rather than to sell, on a poor market, assets of the estate, is properly allowed interest on the amount so advanced.

In re Shepherd, 220-12; 261 NW 35

Personal advancements by executor—preference in repayment. When an executor, owing to a temporary shortage of estate funds, advances from his personal funds and pays to a widow sums of money in the nature of monthly support (provided for in an antenuptial contract), he will not only be reimbursed but will be given a preference in repayment over payment to the widow of other sums due her under said contract.

In re Shepherd, 220-12; 261 NW 35

Nonfraudulent allowance—conclusiveness. A daughter's claim on promissory notes against her father's estate upon which there was a hearing to the court, at which hearing the administrator, her brother, appeared personally and by counsel, and at the conclusion of which judgment was entered allowing the claim, altho it was apparent to the court from the face of the notes that the statute of limitations had run, is a situation where the allowance will not be disturbed on appeal without a showing of fraud upon the court. Held, fraud not shown.

In re Sterner, 224-605; 277 NW 366

Claims—peculiar circumstances excusing service of notice of hearing. Altho claimant is executor's wife, peculiar circumstances excusing a claimant's failure to serve notice of hearing may be found in evidence showing that the claim was filed within six months from executor's appointment, that executor told claimant he had knowledge of the matters upon which the claim was based, and that it would be unnecessary to serve notice. Suspicious circumstances surrounding the claim are to be considered in the trial of the claim on its merits.

In re Hill, 225-527; 281 NW 500

11969 Expenses of funeral—allowance to widow.

Funeral expenses—priority. Funeral expenses of a deceased are accorded a preference in payment from the estate of the deceased over all other claims except the expense of administering the estate. No such preference is accorded to the funeral expenses of other members of the family.

In re Porter, 212-29; 236 NW 108

Nonallowable against insurance proceeds. Claims for funeral expenses consequent on the burial of the intestate deceased are not allowable against funds in the hands of the administrator when said funds constitute the proceeds of insurance on the life of deceased, the latter being survived by a minor son. (§8776, C., '35.)

In re Galloway, 222-159; 269 NW 7

Priority of widow. In the distribution of the proceeds of real estate sold in order to pay the debts and charges against an estate, the widow must be first paid (1) the amount personally advanced by her as expenses of administration (she being executrix), (2) the amount of her distributive share in the land sold, and (3) the amount allowed by the court for the maintenance of herself and children for the statutory year.

Carlson v Layman, 214-114; 241 NW 457

Will subjecting homestead to debts of life tenant. A provision in a will, setting up a life estate with remainder over to certain devisees, after all indebtedness and funeral expenses of the life tenant are paid, subjects the estate to a claim for funeral expenses of the life tenant, even if it was his homestead, such provision being a condition upon the devise to the remaindermen.

De Cook v Johnson, 226-246; 284 NW 118

Last sickness—excludes treatments ending three months before death. Money loaned to pay for medical treatments, which terminated three months before the patient died, is not an expense of the last sickness and not entitled to a preferential claim.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

11970 Other demands—order of payment.

Atty. Gen. Opinions. See '30 AG Op 188; '34 AG Op 410

Property available for payment. Personal property of an estate will be first resorted to for the payment of the cost of administration; specific devises will be last resorted to.

In re Engels, 210-36; 230 NW 519

Taxes—duty to pay. Taxes are a charge against an estate and must be paid by the administrator.

In re Oelwein, 217-1137; 251 NW 694

Recording after death of mortgagor. The recording of a chattel mortgage after the death of an insolvent mortgagor does not, as between the mortgagee and other creditors of the estate, give the mortgage any preferential standing over what it had prior to the recording.

Raybourn v Creger, 204-961; 216 NW 272

County's claim for insane support. County's maintenance claim against estate of deceased who was inmate of state insane hospital is not a public rate or tax so as to make the filing of the claim against the estate unnecessary.

In re Wagner, 226-667; 284 NW 485

Priority of third-class claims. Depositors in a private bank, the business of which has been continued by the administrator of the deceased owner under an order of court which in effect established said claims as claims of the third class, must be paid in full prior to the payment of fourth-class claims which, by grace of the court, were filed and proven after the expiration of one year from the notice of administration.

In re Harsh, 207-84; 218 NW 537

Marriage settlements—sum payable not a preferred claim. The parties to an antenuptial contract which simply and generally provides that the wife shall, on the death of the husband, "be paid" a named sum by the latter's personal representative, will not be deemed to have intended that in the settlement of the estate of the husband, the said sum to be paid the wife should have priority over third and fourth class claims. (Holding based on the intent of the parties as reflected in the contract and surrounding circumstances.)

In re Shepherd, 220-12; 261 NW 35

Personal advancements by executor—preference. When an executor, owing to a temporary shortage of estate funds, advances from his personal funds and pays to a widow sums of money in the nature of monthly support (provided for in an antenuptial contract), he will not only be reimbursed but will be given a preference in repayment over payment to the widow of other sums due her under said contract.

In re Shepherd, 220-12; 261 NW 35

Claim under antenuptial contract—preference—"existing creditors". On the issue whether a widow has the right in the settlement of her husband's estate to be paid, prior to all third and fourth class claimants, a sum provided for her in an unrecorded, antenuptial contract, said third and fourth class claimants will be deemed "existing creditors" within the meaning of section 10015, C., '31 (relating to sales or mortgages of personal property), there being no evidence that said third and fourth class claimants had any knowledge of said antenuptial contract until after the death of the husband.

In re Shepherd, 220-12; 261 NW 35

Share of heir as mere contract claim—how paid. Where the share or interest of a child in the estate of his or her alleged parent takes the form of a mere contract obligation against the estate, the child becomes a mere claimant against the estate and is payable as such, and not from the mere residue of the estate. So held where the parentage was in issue and was compromised by a court-approved agreement wherein the executor agreed, on behalf of the estate, (1) to set up a specified trust fund, the annuity of which was to be payable to said child during its lifetime, and (2) annually to pay said annuity to said child until the trust fund was actually set up.

In re Griffin, 220-1028; 262 NW 473

Noticing claim for hearing—fatal delay. Failure of a claimant against an estate to offer any evidence of any peculiar circumstance equitably excusing his failure to serve timely and legal notice of hearing on his duly filed but unallowed fourth-class claim deprives him of all right to be relieved from the resulting bar of the statute of limitation.

Meier v Briggs, 221-482; 265 NW 189

11971 Labor as preferred claim.

Atty. Gen. Opinion. See '30 AG Op 268

11972 When claims of fourth class barred.

Discussion. See 21 ILR 152—Criticism of statute; 21 ILR 648—Nonclaim statute—surety's liability; 22 ILR 557—Limitations and claims against estate; 22 ILR 704—Fraud tolling statute of limitations

ANALYSIS

I SCOPE AND NATURE OF LIMITATION
II EQUITABLE RELIEF AGAINST STATUTORY BAR

Claims against estate generally. See under §11957

I SCOPE AND NATURE OF LIMITATION

Trial—proper transfer to equity. A claim in probate is properly transferred to the equity docket for trial on a showing that a confidential relation existed between claimant and the deceased, and that deceased had fraudulently concealed from claimant the existence of certain trust funds belonging to claimant, and had failed to account therefor.

In re Sibert, 220-971; 263 NW 5

Belated filing—equitable proceeding. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Ruling on equitable circumstances—not appealable. In probate on a hearing to determine whether or not peculiar circumstances exist to relieve claimant of the bar of the statute for failure to file claim within statutory period, an order finding the existence of such circumstances and entitling claimant to a trial on the merits of such claim is not appealable as a "final order" nor "an intermediate order involving the merits or materially affecting the final decision."

Ontjes v McNider, 224-115; 275 NW 328

Filing—when unnecessary. A specific direction by a testator that his estate pay a mortgage on property devised by him works a dual result, to wit: first, that the mortgage becomes a claim against the estate, and second, renders unnecessary a filing of a claim by the mortgagee.

In re Glandon, 219-1094; 260 NW 12

Heirs' title under will—nonnecessity to file claim. A controversy over the ownership of property devised or bequeathed in a will is properly determinable in equity, and devisees or legatees of such property need not file claims against the estate therefor.

Carpenter v Lothringer, 224-439; 275 NW 98

Failure to file — when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Premature filing—curing defect.

In re Prunty, 201-670; 207 NW 785

Belated filing—neglect. A claim against a solvent and unsettled estate is absolutely barred when not filed, because of the mere neglect of the claimant or his attorney, until after the lapse of the statutory 12 months.

Simpson v Burnham, 209-1108; 229 NW 679
New London Bk. v McKee, 213-1248; 238 NW 464

Fatally delayed presentation. A claim arising out of a partnership is wholly barred against the solvent and unsettled estate of one of the partners when in no manner presented against said estate until several years after the expiration of the year for the presentation of such claims, and no explanation or reason is given for such delay.

Williams v Schee, 214-1181; 243 NW 529

Filing "within 12 months". Conceding, arguendo, that in the settlement of an estate, the statute of limitation commences to run from the date of the last newspaper publication, yet, when the last publication was on April 16, 1931, a claim filed April 16, 1932, is not filed "within 12 months from the giving of the notice" as provided by this section.

First JSL Bank v Terbell, 217-624; 252 NW 769

County's claim for insane support. County's maintenance claim against estate of deceased who was inmate of state insane hospital is a general claim, and notice of hearing thereon must be served on the administrator within 12 months after notice of his appointment as provided by statute.

In re Wagner, 226-667; 284 NW 485

Amendment setting up new cause of action —statute of limitation. A claim in probate bottomed on a judgment on a bond, and a so-called amendment thereto bottomed on the bond itself, present different causes of action, and if the amended claim is filed after the statute of limitation has run it is barred notwithstanding the original filing.

In re Skiles, 210-935; 229 NW 235

Contingent liabilities. A contingent claim based on a guaranty by a deceased of payment of an unmatured promissory note is barred if not filed against the estate within 12 months from the giving of notice of the appointment of administrator.

Nichols v Harsh, 202-117; 209 NW 297

Escheat proceedings—notice to claimants—nonwaiver of required filing time. Administrator's notice to possible claimants and heirs in escheat proceedings given in pursuance to court order did not, in effect, amount to a waiver of statute of limitations as to filing claims in probate nor constitute a new invitation to creditors to file claims.

Joy v Bank, 226-1251; 286 NW 443

Independent action reopening estate—judgment appealable. A judgment for plaintiff in a separate, independent action in equity brought, not against an administrator but against the surviving spouse and heir, seeking to set aside the order in probate approving the final report and closing the estate, is such final judgment as will entitle the defendant to appeal.

Federal Bk. v Bonnett, 226-112; 284 NW 97

I SCOPE AND NATURE OF LIMITATION —concluded

Erroneously reopened estate—belated claim allowed — reversal. A judgment allowing a claim against a reopened estate must be reversed on appeal when it develops that the court was in error in reopening the estate and allowing the claim to be filed after it was barred by the statute. The defendant-administratrix was not a party to the action reopening the estate.

Federal Bk. v Bonnett, 226-126; 284 NW 105

Demurrer conclusive as to liability. A ruling sustaining a demurrer in mortgage foreclosure proceeding on the ground that the estate of the mortgagor is not personally liable on the mortgage because of the failure of the mortgagee to file said claim against the estate within the time provided by statute, constitutes a final adjudication of such nonliability when plaintiff neither pleads over nor appeals from the ruling.

Oates v College, 217-1059; 252 NW 783; 91 ALR 563

Discrediting own witness—claimant against estate. A claimant against an estate who puts the administratrix on the stand as his witness may not discredit her by attempting to show that she tried to deceive him as to the fact of decedent's death so that his claim against the estate would be barred.

Federal Bk. v Bonnett, 226-112; 284 NW 97

Liabilities on bonds — avoidance by fraud. Sureties on the bond of a deceased executor are liable for a shortage in the latter's accounts, even tho no claim for said shortage is made against the estate of said deceased executor. It follows that if claim is made against the estate of the deceased executor, and the amount of the shortage is adjudicated (but not paid) the sureties are bound thereby, even tho the administrator of the deceased executor's estate failed to plead that the claim was barred by the statute of limitation, such failure to so plead not being a fraud as to said sureties.

In re Kessler, 213-633; 239 NW 555

Notice of hearing when claimant dies. When service of notice of hearing of a fourth-class claim in probate is not had within the required 12 months because of the death of claimant, then claimant's estate may cause said service to be made but must do so within a reasonable time after it has an executor or administrator who can act; and such reasonable time will, ordinarily, be limited to a time not longer than that which claimant had when he died.

Lucas v Ruden, 220-494; 260 NW 60

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

Stockholder in bank—double liability—how enforced. A claim by the receiver of an insolvent state bank for the statutory, superadded, contingent liability on capital stock (§9251, C., '35) need not, as to the liability of a stockholder who has died prior to the insolvency of the bank, be filed as a claim against the stockholder's estate. Such claim may be enforced by action against the executor or administrator as such.

Bates v McGill, 223-62; 272 NW 535

II EQUITABLE RELIEF AGAINST STATUTORY BAR

Equitable relief. Whether equitable relief will be granted is a question for the court.

Peterson v Johnson, 205-16; 212 NW 138

Failure to give notice of appointment of administrator—effect.

Spicer v Administrator, 201-99; 202 NW 604

Constructive notice—peculiar circumstances. When an administrator gives proper notice of its appointment, claimants are held to have constructive notice thereof, and a claim filed nearly two years after notice of publication may be properly dismissed in the absence of any showing of peculiar circumstances entitling claimant to equitable relief.

Joy v Bank, 226-1251; 286 NW 443

Ex parte hearing—jurisdiction. The probate court has no jurisdiction, on an ex parte hearing, to find and order that a belated claimant against an estate has an equitable excuse for not having filed the claim until long after the year for filing claims has expired, and that the executor is estopped to question such belated filing.

Storie v Dist. Court, 204-847; 216 NW 25

Statute liberally construed. The statute bars claims filed against an estate more than one year after the administrator serves notice of appointment, but being remedial, and liberally construed to effectuate justice, belated filing of claims is permitted on a showing of peculiar circumstances.

Federal Bk. v Bonnett, 226-112; 284 NW 97

Noticing claim for hearing—fatal delay. Failure of a claimant against an estate to offer any evidence of any peculiar circumstance

equitably excusing his failure to serve timely and legal notice of hearing on his duly filed but unallowed fourth-class claim, deprives him of all right to be relieved from the resulting bar of the statute of limitation.

Meier v Briggs' Est., 221-482; 265 NW 189

Negligence precludes equitable relief. Negligence of a fourth-class claimant in probate in filing his claim and serving notice of hearing thereon bars all equitable relief even tho no element of estoppel accompanies such negligence.

Lucas v Ruden, 220-494; 260 NW 60

Claimant's excuse for want of diligence. Claimant, on failure to file claim in probate within the limited period prescribed by statute, can only be granted equitable relief by pleading and showing adequate excuse for want of diligence.

Joy v Bank, 226-1251; 286 NW 443

Equitable relief denied. A claim not filed against an estate within 12 months as provided by statute is wholly barred notwithstanding the fact (1) that the estate is solvent, and (2) that the estate will suffer no legal prejudice because of the belated filing, when claimant had actual knowledge of the administration some three months prior to the expiration of the year provided for the filing of claims.

First JSL Bk. v Terbell, 217-624; 252 NW 769

Allowance and payment of claims—solvent and unsettled condition as factor. Where a claim is sought to be filed against an estate after the lapse of one year after the administrator gives notice of his appointment, the fact that the estate is then solvent and unsettled is material to show that no one will be injured provided claimant can establish the statutory special circumstances justifying the belated filing.

Chicago NW Ry. v Moss, 210-491; 231 NW 344; 71 ALR 936

Belated filing of claim. Fact that estate is solvent and not yet closed does not constitute such peculiar circumstances as to entitle claimant to equitable relief for failure to file claim within 12 months as required by statute.

In re Wagner, 226-667; 284 NW 485

Peculiar circumstances. That an estate is open and solvent, and that the claim is just, are not "peculiar circumstances" within the meaning of the statute prescribing the time within which probate claims must be filed.

Joy v Bank, 226-1251; 286 NW 443

Equitable circumstances—solvency of estate. The peculiar circumstances which will entitle a claimant against an estate to the equitable relief of filing and prosecuting his claim after the year for settling the estate has expired, must be something more than the circumstance that the estate is solvent and unsettled tho said latter fact is material as showing that other creditors will not be prejudiced by the belated filing.

Anthony v Wagner, 216-571; 246 NW 748

Unsettled estate. The fact that an estate is solvent and unsettled does not constitute, in and of itself, such peculiar circumstances as will entitle a creditor to file his claim against the estate after the expiration of the statutory 12 months period for filing claims in probate. There must be a showing of diligence in the matter or a showing of permissible excuse for the want of such diligence.

Anderson v Storie, 208-1172; 227 NW 93; 66 ALR 1410

Claim barred tho estate solvent. The fact that an estate is closed and solvent, while entitled to consideration, is not of itself sufficient to warrant the court in allowing a claim barred for want of timely notice of hearing on the claim; diligence must appear.

In re Jackson, 225-359; 280 NW 563

Fatally delayed filing. The fact that the holder of an unpaid draft, voluntarily and on his own motion, first files his claim with the receiver of the insolvent drawer-bank (commendably but secretly intending thereby to lessen the damages to a guarantor of the payment of the draft), presents no statutory special circumstance justifying claimant in filing his claim against the estate of said guarantor four years after the administrator had given due notice of his appointment, even tho the estate is then unsettled and solvent.

Chicago NW Ry. v Moss, 210-491; 231 NW 344; 71 ALR 936

Equitable relief — insufficient showing. The fact that a claimant in probate neglected or failed to discover the requirements of the law of this state relative to the time of filing claims until the statutory time had expired is wholly insufficient as a basis for equitable relief,—said claimant not being misled in any manner by those managing the estate.

In re Palmer, 212-21; 236 NW 58

Belated filing — insufficient justification. A claimant in probate must justify his neglect to file and serve notice of his claim within the statutory one year. He signally fails by showing (1) that his claim is just, (2) that the estate is solvent and unsettled, (3) that he expected the deceased to satisfy his claim by a testamentary provision and consequently was searching for a will, and (4) that he also relied on an indefinite talk with the administrator as to when the year expired and as to the administrator formally preparing the claim.

Taylor v Jackson, 213-844; 239 NW 519

Belated filing as afterthought. A showing that the filing of a claim against an estate

II EQUITABLE RELIEF AGAINST STATUTORY BAR—continued

long after the time fixed by statute is an afterthought based on a change of attitude by claimant as to the adequacy of the security held by him, is quite conclusive against his right to make such belated filing; and it is quite immaterial that the claim is just and the estate solvent.

Doyle v Jennings, 210-853; 229 NW 853

Belated presentation. An application to file a claim against an estate long after the expiration of the time provided by statute is properly denied (1) when claimant at all times knew that the estate was being settled, and (2) when claimant manifestly intended, at one time, to rely solely on his security, and sought to file his claim as the result of a belated afterthought.

Schram v Kissinger, 201-324; 207 NW 355

Barred claim — death of claimant — effect. Where claimant duly filed his fourth-class claim in probate, and, without having served any notice of hearing, died shortly before the expiration of the year in which said notice should have been served, and where said year expired shortly before claimant's executor was appointed, held, that whatever force and effect the death of claimant might otherwise have had as a peculiar circumstance entitling claimant to equitable relief on his barred claim, was wholly lost by the negligence of claimant's executor, for at least 10 months, in failing to serve the omitted notice of hearing or to take any action relative to the claim.

Lucas v Ruden, 220-494; 260 NW 60

Belated filing—insufficient excuse for delay. A depositor in a private bank will not be permitted to file and prosecute his claim against the estate of a deceased partner, after the lapse of four years after notice of administration was given, on a showing that the executor soon after his appointment believed the bank as continued by the surviving partners was insolvent, and stipulated for the possible filing, at a later period, by the surviving partners, of a contingent claim against the estate, said stipulation not being shown to be fraudulent and not deceiving said depositor; especially is this true when the attempt of the depositor to file his claim was evidently an afterthought.

Anthony v Wagner, 216-571; 246 NW 748

Delayed filing—relief—insufficient showing. The liquidating receiver of an insolvent bank who makes no timely filing of a claim against the estate of a deceased debtor of the bank, presents no peculiar circumstances entitling him to equitable relief from said delay, by proof (1) that the property of said debtor had for years been under guardianship, (2) that he, the receiver, did not actually know that said debtor had died, and that said former guardian had been appointed administrator and had given due notice of his appointment and was settling the estate of his former ward, but, on the contrary, (3) that said receiver supposed that said debtor was alive, and supposed that said guardian was continuing to act as guardian, it appearing that the receiver was in no manner misled by the administrator—that the predicament of the receiver was due to his own lack of due diligence.

Bates v Remley, 223-654; 273 NW 180

Tardy claimant—insufficient showing. Peculiar circumstances entitling a tardy claimant to have a closed estate reopened are not found in (1) solvency of the estate, (2) traceability of assets, (3) diligence after receiving notice of decedent's death, (4) lack of knowledge of the death, (5) validity and justness of the claim when claimant had an agent living in the same small town with decedent and who had known him intimately for 40 years.

Federal Bk. v Bonnett, 226-112; 284 NW 97

Lack of actual knowledge not peculiar circumstances. When a claim in probate is not filed until two years after notice of appointment of administrator has been published, the fact that claimant did not have actual knowledge of the appointment of the administrator is not a peculiar circumstance entitling claimant to equitable relief under the statute barring claims not filed within the required time.

Joy v Bank, 226-1251; 286 NW 443

County's claim for insane support—negligence in filing. Where county officials opened estate as creditor to collect county's claim against estate for maintenance of deceased in state insane hospital, and the county auditor was appointed administrator, the county's negligence in not filing the claim for more than four and one-half years did not constitute such peculiar circumstances as to entitle county to equitable relief for failure to file claim within 12 months under statute requiring filing within such time, in absence of peculiar circumstances excusing it.

In re Wagner, 226-667; 284 NW 485

Improper setting aside of bar. The peculiar circumstances which will justify the probate court in setting aside the one-year bar of the statute of limitation, on a claim in probate, must be such as to establish a preponderating equity in favor of the claimant. In other words, the equities of the estate of deceased must be considered as well as the equities of the claimant. So held where the claim was one secured by mortgage on property which, during the period of claimant's delay, had markedly decreased in value.

Berends v Brady, 219-522; 258 NW 752

Not entitled to hotchpot. A claimant against an estate who, by grace of the statute and by grace of the court, is permitted because

of peculiar circumstances to file and prove his claim after the expiration of the 12 months given for the filing of claims, has no right, when the estate is found to be insolvent, to pursue other fourth-class claimants who have filed and had their claims allowed within said 12 months, and to recapture and to put in hotchpot the payments legally made to them in order that a new distribution may be made.

Elliott v Bank, 209-1258; 228 NW 274

Assessment on bank stock—liability of assets of settled estate. An assessment on corporate bank stock standing on the corporate bank books in the name of a deceased stockholder may, by an action in equity, be enforced against the assets comprising the estate of the deceased stockholder, tho the estate has been legally settled and closed, and the said assets have passed into the hands of a testamentary devisee, when the necessity for, and right to said assessment arose, and the assessment was made, long after the settlement of said estate.

Andrew v Bank, 219-1244; 260 NW 849

Operation of limitation bar—continuing liability accruing after death. For the liability of a decedent accruing against his estate on account of ownership of a bank, an action thereon, commenced within 5 years after the closing of the bank and appointment of a receiver, is neither barred by the general statute of limitation nor by the one-year limitation on filing claims against an estate, when peculiar circumstances concealed the estate's liability thereon.

Daniel v Best, 224-1348; 279 NW 374

Death of claimant's attorney—peculiar circumstances relieving barred claim. Where an attorney files a probate claim for a nonresident claimant, but dies one day before the expiration of the year and without serving a notice of hearing on such claim—claimant not learning of his attorney's death until later, and tho then delaying several months while his new attorney negotiated with the estate, held to have shown peculiar circumstances entitling him to equitable relief considering the estate was still unsettled and solvent.

Hagen v Nielsen, 225-127; 279 NW 94; 281 NW 356

False promise of payment. Failure to file a claim against a solvent and unsettled estate within the statutory one year is amply excused on a showing that the executor paid part of the claim and stated to claimant that the filing of the claim was unnecessary because the balance of the claim would be paid.

Smallwood v O'Bryan, 208-785; 225 NW 848

Misconduct of administrator—promise to pay. Failure to serve notice of hearing on a fourth-class claim on an administrator, within the 12 months period, bars the claim unless peculiar circumstances exist tending to excuse the failure. Alleged, but unproven fraud, collusion, and misconduct of the administrator and heirs do not constitute such peculiar circumstances, nor does a mere promise by the administrator to pay excuse the failure to serve the notice of hearing on the claim.

In re Jackson, 225-359; 280 NW 563

Ignorance of death. The fact that a claimant against an unsettled and solvent estate does not know, and has no reason to know, that the debtor has died, is such peculiar statutory circumstance as justifies (1) the prompt filing of the claim after learning of the death, and (2) the granting of equitable relief.

In re Helmts, 203-503; 211 NW 234

Ill health. Ill health will not necessarily constitute such peculiar circumstances as will justify the granting of equitable relief from failure to file claims within the statutory one-year period.

Peterson v Johnson, 205-16; 212 NW 138

Misleading circumstances. The holder of a claim against an unsettled and solvent estate will be permitted to file and prove his claim after the expiration of 12 months from the giving of notice by the administrator (1) when he had never visited the place where the deceased did business, and lived a great distance therefrom, (2) when his claim is "contingent", (3) when he justifiably believed, and was led to believe, that his claim was against a banking corporation, and (4) when he finally discovered that the assumed bank was only a "trade name", and that the deceased was the sole owner of the business, and the real contingent debtor.

Nichols v Harsh, 202-117; 209 NW 297

Supported allowance conclusive. Support for an order allowing, against an estate, a fourth-class claim filed after the expiration of the year for such filing, is found in a showing that, until shortly prior to said filing, the creditor was laboring under an apparently excusable mistake as to the identity of his debtor. Therefore, said allowance, being in a proceeding at law and having support in the record, cannot be set aside by the appellate court.

In re Turner, 219-30; 257 NW 443

Peculiar circumstances excusing service of notice of hearing. Altho claimant is executor's wife, peculiar circumstances excusing a claimant's failure to serve notice of hearing may be found in evidence showing that the claim was filed within six months from executor's appointment, that executor told claimant he had knowledge of the matters upon which the claim was based, and that it would be unnecessary to serve notice. Suspicious circumstances surrounding the claim are to be considered in the trial of the claim on its merits.

In re Hill, 225-527; 281 NW 500

II EQUITABLE RELIEF AGAINST STATUTORY BAR—concluded

Claim against proceeds of realty. An equity petition which alleged that widow elected to take under will devising to her a life estate, with the right to dispose of realty for her necessary support, and which prayed that a claim for support of widow, pursuant to a contract with her, be established and declared a lien against the realty, was held to plead sufficient facts, and, together with the evidence in the case, was sufficient to warrant its submission.

Hoskin v West, 226-612; 284 NW 809

Escheat proceedings—notice to claimants—nonwaiver of required filing time for claims. Administrator's notice to possible claimants and heirs in escheat proceedings given in pursuance to court order did not, in effect, amount to a waiver of statute of limitations as to filing claims in probate nor constitute a new invitation to creditors to file claims.

Joy v Bank, 226-1251; 286 NW 443

11973 Payment of claims—classes.

Payment to clerk—effect. Payment by an administrator to the clerk of the district court of the amount of an allowed claim is an authorized and legal payment and discharges the estate from further liability.

In re Nairn, 209-52; 227 NW 585

Specific devises—when resorted to. Specific devises cannot be resorted to for the payment of debts, in the settlement of an estate until all other property of the estate has been resorted to and exhausted.

In re Glandon, 219-1094; 260 NW 12

Payment of unfiled but valid claims. An executor will be credited with the amount of valid, enforceable claims paid by him, even tho such claims were not formally filed against the estate.

In re Bourne, 210-883; 232 NW 169

11976 Order of payment—dividends.

Unallowable payment in full. The act of the administratrix of an insolvent estate in applying estate funds to the full payment of a debt which is the personal obligation of both the deceased and the administratrix, is fundamentally unallowable. It follows that the creditor, by receiving such payment, becomes a trustee of the fund for the use and benefit of the estate, especially when he knew that the estate was insolvent.

Andrew v Bank, 217-69; 251 NW 23

Delivery of note an essential element—restatement of common law. Section 9476, C., '35, providing that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto, is a restatement of the common-law rule.

In re Martens, 226-162; 283 NW 885

11978 Delivery of specific legacies—security.

Property available for payment. Personal property of an estate will be first resorted to for the payment of the cost of administration; specific devises will be last resorted to.

In re Engels, 210-36; 230 NW 519

Specific devises. Specific devises cannot be resorted to for the payment of debts, in the settlement of an estate, until all other property of the estate has been resorted to and exhausted.

In re Glandon, 219-1094; 260 NW 12

Equal standing of specific devises. Neither of two different, specific devises of real estate, irrespective of their particular location or position in the will, can be deemed junior or inferior to the other when neither is made subject to the other.

In re Glandon, 219-1094; 260 NW 12

"Ademption" and "satisfaction" distinguished. Where a thing or fund which is the subject of a specific legacy has been extinguished, an "ademption" has occurred, whereas doctrine of "satisfaction" applies when the legacy is general, and depends largely, if not entirely, on the intent of the testator.

In re Keeler, 225-1349; 282 NW 362

Ademption—real estate for note and mortgage. A bequest is specific in a will where a note and real estate mortgage securing it were bequeathed to a son of testatrix, and the residuary estate was bequeathed to such son and her grandson; and cancellation by testatrix of the note and mortgage and the taking of title to such real estate in lieu thereof adeems the bequest as respects son's claim that subject matter of bequest still existed but was only changed in form.

In re Keeler, 225-1349; 282 NW 362

Contingent legacy—effect. Where a will provided that testator's niece should receive $1,000 (1) if the wife survived and did not take under will, or (2) if wife did not survive, and when the widow accepted the provisions of will giving her the personal property and a life estate in real estate, niece took nothing thereunder, since neither contingency arose.

Starr v Newman, 225-901; 281 NW 830

Trusts—construction—gift "when funds are available"—when due. Where a will and trust instrument, designed to support two trustors as long as either one of them lived, contains also a $5,000 gift for each of two named beneficiaries, payable as soon as funds are avail-

able, such gifts may not be paid until after the death of last trustor, when it appears uncertain from the encumbered status of the trusted property whether or not the property is adequate to provide the required support for last surviving trustor, and even then the gifts or legacies with interest thereon are not due until one year after death of the last trustor.

In re Jeffrey, 225-316; 280 NW 536

Realty bequest—value determined as of date of testator's death. Where, prior to his death, testator had given land of the value of $15,600 to four of his five children and directed his executors to purchase, for a daughter who had rejected partial distribution before his death, good Iowa land of the value of $15,600, the will, which was clear and definite as to the intention of testator, spoke as of date of testator's death, and the value of $15,600 fixed for land to be purchased for daughter was required to be determined as of the date of testator's death.

In re Holdorf, 227-977; 289 NW 756

Bequest—acceptance—district court's power to extend testator's limitation—effect. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

Offsetting debts of devisee or legatee. A legacy due an insolvent legatee, and the proceeds of lands devised to an insolvent devisee may, in the settlement of the estate, be retained by the executor to the extent that the insolvent legatee or devisee is indebted to the estate; and if necessary, the devised lands may, under appropriate application, be sold and the proceeds applied on said indebtedness, on the resulting costs, and on the inheritance tax, if any, due the state from the insolvent.

In re Flannery, 221-265; 264 NW 68

Withholding distribution. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

Bankruptcy of heir—remedy extinguished—debt to estate—offset. A discharge in bankruptcy of a legatee puts an end to the remedy on the debt of said heir to the estate and affords a complete defense to an action on the debt; however, the debt remains an asset of the estate and the discharge does not affect the right of retainer or offset.

In re Morgan, 226-68; 283 NW 267

11979 Money.

Legacy lapsing by death of legatee. A contingent legacy in favor of a daughter is created by a will which, after devising a life estate to testator's wife, devises certain land to a son on condition that "within one year" after the death of the wife the son shall pay his sister a named sum of money. In other words, the legacy to the daughter lapses by her death prior to the death of the mother.

In re Phearman, 211-1137; 232 NW 826; 82 ALR 674

Lapsing of legacy. A condition in a charitable bequest, that if the legatee takes no steps within a named time to augment said bequest the same shall revert to testator's estate, must be deemed a condition precedent and not a condition subsequent. It follows that said bequest lapses upon the expiration of said time if the legatee, with actual knowledge of the bequest, fails to signify any acceptance of the bequest, and fails to take any steps to augment said bequest.

In re Hillis, 215-1015; 247 NW 499

Ademption — presumption. A testator who bequeaths his property in equal shares to his children will be presumed to have intended to effect an ademption by voluntarily and on his own motion paying off, subsequent to the execution of his will, a debt owed wholly by one of the legatees, and in a proper proceeding the amount of such payment may be ordered set off against the share of said legatee.

In re Smith, 210-563; 231 NW 468

Satisfaction of legacy prior to death of testator. A general legacy provided for in a will is satisfied in toto when the testator, subsequent to the making of the will, pays to the legatee a lesser sum with intent to effect such satisfaction; and such payment and satisfaction may be established by extrinsic evidence.

Heileman v Dakan, 211-344; 233 NW 542

Equitable conversion and right to reconvert. When a testator directs that named real estate be sold by his executor and the entire proceeds be paid to a legatee, said legatee may make and enforce an election to take the real estate instead of the proceeds, especially when such election does not interfere with the rights and duties imposed on the executor.

In re Warner, 209-948; 229 NW 241

Stock dividend issued on previously earned surplus—conflicting claims. A legacy of "one

thousand dollars par value of the capital stock" of a named corporation (being a part of the stock holding of the estate) entitles the legatee to a stock dividend declared and issued by the corporation subsequent to the death of testator on surplus earnings accumulated by the corporation prior to the death of testator; also to an ordinary cash dividend declared on the stock subsequent to testator's death and subsequent to the formal transfer of said stock to the legatee.

In re Etzel, 211-700; 234 NW 210

Gradual increase in value of corporate assets. A legatee who is unconditionally given for life the income arising from corporate stock is not entitled to receive, as income, any part of the principal of a liquidating dividend arising from the final dissolution of the corporation and sale of its assets, when said liquidating dividend reveals a very material increase in value of the original stock investment due to the gradual increase in value of corporate assets during the life of the corporation. Such liquidating dividend constitutes a part of the corpus of the estate, and passes to the remainderman, subject to the right of the life tenant to receive the income thereon—such being the manifest intent of the testator.

In re Etzel, 211-700; 234 NW 210

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may, in partition proceedings, be offset against his interest in the real estate of testator, and such right is superior to the right of a judgment creditor who obtained his judgment against the devisee subsequent to the death of the testator.

Schultz v Locke, 204-1127; 216 NW 617

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may be set off against the testamentary devise to said devisee.

In re Mikkelsen, 202-842; 211 NW 254
Rodgers v Reinking, 205-1311; 217 NW 441
See Lusby v Wing, 207-1287; 224 NW 554
In re Rueschenberg, 213-639; 239 NW 529

Offsetting debts of insolvent heirs. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share of real estate as well as against his share of personal property.

Yungclas v Yungclas, 213-413; 239 NW 22

Setting off debt against heir's share. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share in real estate as well as against his share of personal property, when the share of the insolvent in the personal property of the estate is insufficient to discharge said debt.

Kramer v Hofmann, 218-1269; 257 NW 361

Distributees—offsetting debts against share in estate. The amount of the indebtedness of a distributee, solvent or insolvent, to an estate, may be set off against his share in the personal property. If the personal property is insufficient, his share of the real estate may be set off against the debt, if the heir is insolvent.

In re Morgan, 226-68; 283 NW 267

Insolvent heir's debts offset against share in realty. The right to offset debts of an heir against his share of real estate exists only when the heir is insolvent. Evidence held insufficient to show heirs were insolvent.

Wilson v Wilson, 226-199; 283 NW 893

Lien for debts of devisee. A mortgage on real estate executed during the settlement of an estate, by the insolvent devisee of the land, is subject to the prior lien of the estate for the debts owing by the devisee to testator and contracted subsequent to the execution of the will.

Bell v Bell, 216-837; 249 NW 137

Liability of devisee to estate—antagonistic judgments—priority. The lien of a judgment obtained by an executor against an insolvent devisee for sums owing by the devisee to the estate (obtained in order to avoid unfairness to other equally-sharing devisees) is superior to the lien of a prior judgment against said devisee obtained by a general creditor, on lands acquired by the estate subsequent to both judgments.

Johnson v Smith, 210-591; 231 NW 470

Advancements to part of residuary legatees—deduction. Without special provision in the will therefor, an executor is in error in paying to himself, as a residuary legatee, $1,000 on the theory that the four other such legatees had each received advancements in that sum and that such payment was equivalent to charging off such advancements against the shares of the other legatees.

In re Morgan, 225-746; 281 NW 346

Loss of improperly created trust fund—reimbursement. Where an executor is devised a named sum of money in trust for a named person, and where the executor assumes to set aside or hold certain bank stock as said trust fund, which stock becomes worthless by the failure of the bank, the estate must make good the resulting loss (or pro rata if the estate is insufficient to pay all legacies) less any payments made to the cestui que trust.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Interest on unpaid legacy. An executor may be chargeable with interest on an unpaid cash legacy to a minor, even tho his actions have been in perfect good faith.

Irwin v Bank, 218-477; 255 NW 671

Renunciation of devise. The devisee of a cash remainder does not per se renounce said remainder by executing, with other devisees, a writing under which the signers severally contributed to the augmentation of said life devise and explain their action by stating their belief that the life beneficiary (an incompetent) should have said augmented sum "as his own".

Bare v Cole, 220-338; 260 NW 338

Unauthorized satisfaction of bequest. An order of the probate court authorizing an executor to discharge a cash bequest to a minor by transferring to the father of the minor as natural guardian a note and mortgage, belonging to the estate, is wholly void when said order is entered without the appearance of any guardian, regular or ad litem, for the minor.

Irwin v Bank, 218-477; 255 NW 671

Disaffirmance by minor. A void order of the probate court authorizing the executor to satisfy a cash bequest to a minor by transferring a note and mortgage to the father of the minor as the latter's natural guardian, may be disaffirmed and repudiated by the minor on reaching his majority.

Irwin v Bank, 218-477; 255 NW 671

Recovery of unpaid legacy. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank, 218-961; 256 NW 681

Erroneous payments — recovery. Funds paid to legatees under an interlocutory but erroneous order for distribution may be recovered from the legatees to whom paid.

Dillinger v Steele, 207-20; 222 NW 564

Accrual of action. An action to recover estate funds paid out by an executor under an interlocutory but erroneous order for distribution accrues when the erroneous order is set aside and the executor is ordered to proceed to recover the erroneous payments.

Dillinger v Steele, 207-20; 222 NW 564

11980 Legacies—payment after twelve months.

Interest on unpaid legacy. Interest, but not compound interest, should be allowed on a legacy not paid when due.

In re Mann, 212-17; 235 NW 733

Interest. An estate is not liable to interest on a legacy when the legatee acquiesces in an agreed long delay in probating the will and accepts a collateral agreement for the payment of his legacy, and when no undue delay in probating the will under the agreement is made to appear.

In re Sharpless, 202-386; 210 NW 528

Designation of devisee. The fact that the name of the beneficiary of a religious or charitable trust as specified in a will is different from the name of the claimant of the devise becomes unimportant in the face of ample testimony that the designated beneficiary and the claimant are one and the same institution.

Ross v Seminary, 204-648; 215 NW 710

Renounced devise as intestate property. Where one of several residuary devisees wholly renounces his interest under the will, the portion so renounced becomes intestate property and necessarily descends under the statutory rules of descent. In other words, the nonrenouncing residuary devisees do not necessarily take said renounced portion.

Lehr v Switzer, 213-658; 239 NW 564

Trusts—construction—trustor's life support—gift "when funds are available"—when due. Where a will and trust instrument, designed to support two trustors as long as either one of them lived, contains also a $5,000 gift for each of two named beneficiaries, payable as soon as funds are available, such gifts may not be paid until after the death of last trustor, when it appears uncertain from the encumbered status of the trusted property whether or not the property is adequate to provide the required support for last surviving trustor, and even then the gifts or legacies with interest thereon are not due until one year after death of the last trustor.

In re Jeffrey, 225-316; 280 NW 536

11981 Order of paying legacies.

Pro rata distribution—procedure. In determining the pro rata payments to be made on legacies in an estate which proves insufficient to pay all legacies in full, the amounts owing by legatees to testator at the time of the death of testator, and deducted by the executor in paying legacies, must be taken into consideration.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Legacy paid out of order. Interest on an unpaid legacy should not be ordered paid out of its legal order.

In re Mann, 212-17; 235 NW 733

11983 Estate insufficient.

Overpayment on legacy—refund. The appellate court may, it seems, authorize and direct an executor to proceed to recover an overpayment on a legacy.

In re Moe, 213-95; 237 NW 228; 238 NW 718

11984 Failure to pay claims.

Suretyship generally. See under §11577

Summary judgment. Summary judgment (on 10 days notice) may be rendered against sureties on the bond of an executor after the probate court, in a proper proceeding, has determined the amount of the executor's shortage.

In re Carpenter, 210-553; 231 NW 376

Administrator's failure to pay claim—summary judgment against surety. After administrator's noncompliance with an order for immediate payment of a probate claim based on a finding that the administrator should have sufficient assets to pay the same, a summary judgment may be entered against his bond under this section and section 11985, C., '35.

In re Davie, 224-1177; 278 NW 616

Adjudicating administrator's liability—surety not necessary party. A surety on an administrator's bond, neither being entitled to notice nor being a necessary party in the probate proceeding to determine the administrator's shortage and liability, the adjudication thereon determining the administrator's liability, in the absence of fraud or mistake, is binding on the surety.

In re Carpenter, 210-553; 231 NW 376
In re Kessler, 213-633; 239 NW 555
In re Davie, 224-1177; 278 NW 616

11985 Hearing and judgment.

Court findings as jury verdict generally. See under §§11435, 11581

Administrator's failure to pay claim—summary judgment against surety. After administrator's noncompliance with an order for immediate payment of a probate claim based on a finding that the administrator should have sufficient assets to pay the same, a summary judgment may be entered against his bond under section 11984 and this section C., '35.

In re Davie, 224-1177; 278 NW 616

CHAPTER 508

DESCENT AND DISTRIBUTION OF INTESTATE'S PROPERTY

11986 Personal property.

ANALYSIS

I PERSONAL ESTATE IN GENERAL
II LAW GOVERNING DISTRIBUTION OF PERSONALTY
III INTEREST OF SURVIVING SPOUSE
IV INTEREST OF HEIRS
(a) RIGHT TO POSSESSION
(b) SETTLEMENT OF ESTATE WITHOUT ADMINISTRATION

Advancements. See under §12029

I PERSONAL ESTATE IN GENERAL

Rents. Principle reaffirmed that rents accruing on land after the death of the owner are chattels real and distributable as land is distributed.

Crouse v Crouse, 219-736; 259 NW 443

Setting off debt against heir's share. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share in real estate as well as against his share of personal property, when the share of the insolvent in the personal property of the estate is insufficient to discharge said debt.

Kramer v Hofmann, 218-1269; 257 NW 361

Insolvency of bank—assessment—when heir not liable. An heir is not liable to a statutory assessment on state bank stock owned by his deceased, intestate ancestor when, in the final settlement of the ancestor's estate, said heir, under contract with other heirs, receives his share solely in property other than said stock.

Bates v Bank, 218-1320; 256 NW 286

Insolvency of bank—assessment—when estate beneficiary liable. One who, in the final settlement of an estate, receives the corporate bank stock of the deceased intestate as his or her share of the estate, becomes a "stockholder", and is subject to assessment like other stockholders, even tho the stock has not been transferred on the stock books of the bank.

Bates v Bank, 218-1320; 256 NW 286

II LAW GOVERNING DISTRIBUTION OF PERSONALTY

Inheritance—creature of statute. The right to take property by descent or inheritance is strictly a statutory right.

In re Fitzgerald, 223-141; 272 NW 117

Advancements as rule of intestate descent. The doctrine of advancements applies only in cases where the decedent dies intestate, unless specifically provided for by language in the will.

In re Morgan, 225-746; 281 NW 346

Simultaneous death of spouses—effect.

Carpenter v Severin, 201-969; 204 NW 448; 43 ALR 1340

War-risk insurance. Unaccumulated installments of war-risk insurance which exist at the time of the death of the beneficiary and which, under congressional act, are payable

to the estate of the soldier, must be distributed, in case of intestacy, to the soldier's heirs who exist at the time the soldier dies.

In re Pivonka, 202-855; 211 NW 246; 55 ALR 570

III INTEREST OF SURVIVING SPOUSE

Right of surviving spouse. The right of the surviving spouse of an intestate deceased to a balance of rentals accruing during redemption period and remaining after satisfaction of mortgage foreclosure judgment cannot exceed one third of such balance.

In re Angerer, 202-611; 210 NW 810

Lapse of devise to spouse. A devise by a husband to his wife is deemed to lapse upon his death when the devise is identical in quality and quantity with what the wife would have taken under the statute had there been no will; but not so of a devise which gives the wife one-third of his entire estate (1) after converting all real estate, including homestead, into personalty and (2) after paying all debts.

In re Davis, 204-1231; 213 NW 395

IV INTEREST OF HEIRS

(a) RIGHT TO POSSESSION

Administrator holds estate as trustee. An administrator of an intestate estate takes possession of and holds the same as an express trustee thereof for the claimant creditors of the decedent and of the estate, the heirs, the surviving spouse, and any others who may have a proper interest in the property.

In re Willenbrock, 228- ; 290 NW 503

Instant vesting of realty at death—possession and disposal by heirs. The title to real estate of which a decedent dies seized, upon his death, descends to and vests immediately in his heirs with the quantity to each definitely ascertained, and from that instant, subject to the debts of the deceased, they may dispose of the property as owners and are entitled to the possession and to the rents and profits.

In re Duffy, 228- ; 292 NW 165

Debts due decedent from heir—retainer or offset against realty. General rule recognized that real estate passes to devisee direct from testator, and not through executor, and that title vests in devisee immediately upon death of testator and, as a general rule, there is no right of retainer or offset for debt of devisee to estate, as against devisee of real estate; but there may be cases where, on account of the insolvency of the debtor, or other cause, equity will interfere for protection of the estate.

Petty v Hewlett, 225-797; 281 NW 731

(b) SETTLEMENT OF ESTATE WITHOUT ADMINISTRATION

Agreement—effect. An agreement between an aged mother and her heirs that a named person should act as attorney in fact for the mother, coupled with an agreement between the heirs that none of them should borrow from or obtain advancements from the mother, presents no impediment to the mother's conveying her property to certain of her heirs in order to equalize the distribution of her property.

Rollins v Jarrett, 207-183; 222 NW 365

Agreement of heirs binding. An agreement by heirs to settle estate without administration and providing for payment of legacies is legal and binding, and a widow of one of such heirs in a subsequent partition action cannot complain of denial of legacy to deceased heir where legacies due to other heirs were larger and such heirs received no part of their legacies.

Meeker v Meeker, (NOR); 283 NW 873

Right of heirs to protect. Tho the title to the personal property of a deceased does not pass directly to his heirs, they may, in the absence of any administration, maintain an action to protect or recover such property.

Powell v McBlain, 222-799; 269 NW 883

11987 Payment of shares.

Withholding distribution. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

Acceptance of bequest—extension of testator's limitation—effect. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

11988 In kind—proceeds distributed.

Heirs' rights—evidence of shares. Where a farm, comprising a part of an estate which is settled without administration by vesting con-

trol in one of the heirs under a trust agreement, is sold, and several first and second mortgages are taken in part payment and divided among the heirs, and title subsequently reverts to trustee without foreclosure, the mortgages, altho losing their effect as liens, serve as evidencing respective share of each heir.

Meeker v Meeker, (NOR); 283 NW 873

Withholding distribution. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

11990 Dower.

ANALYSIS

I POWER OF LEGISLATURE TO ALTER DOWER RIGHT
II EXTENT AND NATURE OF THE DOWER INTEREST
III PROPERTY SUBJECT TO DOWER RIGHT
IV BAR, WAIVER, OR RELINQUISHMENT OF DOWER
(a) ANTENUPTIAL AGREEMENTS
(b) GRANT OR CONVEYANCE
(c) DIVORCE
(d) FORECLOSURE AND PAYMENT OF MORTGAGES
(e) JUDICIAL SALE
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Election between will and dower. See under §§12007–12012
Evidence of antenuptial agreements. See under §11285 (III)
Postnuptial agreements. See under §10447
Separation agreements. See under §10447

I POWER OF LEGISLATURE TO ALTER DOWER RIGHT

Dower interest determined by law at time of spouse's death. The dower interest of a widow is determined by the law in force at the time of the husband's death.

Bullock v Smith, 201-247; 207 NW 241

II EXTENT AND NATURE OF THE DOWER INTEREST

Discussion. See 11 ILR 97—Specific performance and dower rights

Law governing. The right of dower, or what under our law is designated as "distributive share" in Iowa real estate, is not governed by a marriage contract entered into in a foreign state where the parties have their domicile, but is governed by the law of this state.

Ehler v Ehler, 214-789; 243 NW 591

Law governing. The distributive share or dower interest of a widow in the estate of her deceased husband is determined by the law in force at the time of his death.

Bullock v Smith, 201-247; 207 NW 241

Property rights determinable after death. Principle reaffirmed that the mutual property rights of a husband and wife may be determined after the death of one of the parties.

Melvin v Lawrence, 203-619; 213 NW 420

Fraudulent conveyance—inchoate right of dower nonexistent. Where a debtor, as grantor, made a conveyance to sister-in-law without consideration in order to escape payment of judgment which he feared would be rendered against him, and where 25 days after settlement of claim for which grantor was being sued she reconveyed without consideration, sister-in-law obtained no beneficial interest in the property. Hence, her husband could not claim a one-third interest in property upon her death, altho he signed deed of reconveyance only as a witness.

Renne v Tumbleson, 227-159; 287 NW 839

Tenants in common—surviving spouse and children. Upon the death of the owner of land, the surviving spouse and children become tenants in common of said land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718
Prichard v Anderson, 224-1152; 278 NW 348

Vesting and divesting. Principle reaffirmed that instantly upon the death of the intestate owner of land the surviving spouse and children, as tenants in common, become vested with the title to said land in the proportion of one third in the spouse and two thirds in the children, which vesting may later be divested by the action of the spouse in the exercise of his or her optional rights.

Crouse v Crouse, 219-736; 259 NW 443
Jackson v Grant, 224-579; 278 NW 190

Interest of surviving spouse—time of vesting—divesting. Principle reaffirmed that interest of surviving spouse in property vests immediately upon death of other spouse altho subsequently defeasible by an election to take under the will, if any, or to take a homestead right.

Prichard v Anderson, 224-1152; 278 NW 348

Homestead—no presumption of election from mere occupancy. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

Surviving spouse's occupancy not conclusive on taking homestead. Inasmuch as the surviving spouse's occupancy of the homestead may be as a tenant in common, as a life tenant, or under the statute pending administration, such occupancy, altho being evidence, is not conclusive of her election to take the homestead right, but the true character of the oc-

cupancy is determinable from all the surrounding facts and circumstances.

Jackson v Grant, 224-579; 278 NW 190
Prichard v Anderson, 224-1152; 278 NW 348

Rents—proper charges against surviving spouse. A surviving wife is not entitled to one third of the gross rents accumulating in the estate prior to the setting off of her distributive share, but to one third after deducting taxes, proper charges for upkeep and receivership charges, if any.

Crouse v Crouse, 219-736; 259 NW 443

Rents from dower. Rents arising from the distributive share of a surviving spouse, during the time when such share is being held in common with the shares of other owners, are not liable for the debts of the estate or of the costs of administration.

Crouse v Crouse, 219-736; 259 NW 443

Homestead—right to free occupancy. In case rents accumulate in an estate prior to the setting off of the wife's distributive share, the wife, in the division of said rents with the other tenants in common, cannot be charged with the rental value of the homestead occupied by her. Moreover, if the other tenants have wrongfully ousted the wife for a time from her said occupancy, they must account to her for the rentals received. Reason: The right of the wife to the free occupancy of the homestead until otherwise disposed of, is independent of, and is in addition to, her right to a distributive share.

Crouse v Crouse, 219-736; 259 NW 443

Exemption from debt. Principle reaffirmed that a homestead, set aside to the widow as her dower or distributive share, passes to her free from the debts of the husband-owner.

Southwick v Strong, 218-435; 255 NW 523
Crouse v Crouse, 219-736; 259 NW 443

Selling homestead for debts—necessity of election between will and dower. An order of court to an executor to sell real estate, to pay claims, is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

Not subject to mechanic's lien. A mechanic's lien filed after the death of the title holder is not a lien on the unassigned dower, of the surviving spouse, in the property in question.

Fullerton Lbr. Co. v Miller, 217-630; 252 NW 760

III PROPERTY SUBJECT TO DOWER RIGHT

Death of bankrupt after adjudication—widow's rights. On the death of a bankrupt after adjudication and qualification of trustee, surviving wife is held entitled to distributive share in his realty under state statute providing dower rights, and also entitled to sufficient of bankrupt's property of such kind as is appropriate to her support for 12 months from bankrupt's death under state statute providing allowance to widow.

In re Payne, 20 F 2d, 665

Nonforfeiture by taking foreign homestead. A wife, who is legally disinherited by her husband's will executed in a foreign state where the parties had their domicile, is not deprived of her dower or distributive share in the husband's Iowa real estate because of the fact that in said foreign state the homestead there situated was set off to her by the probate court on her application. In other words, the Iowa statute according to a wife the right to take the homestead in lieu of dower applies solely to an Iowa homestead.

Ehler v Ehler, 214-789; 243 NW 591

Lands subject to — gifts. A surviving wife has no interest in lands which the husband bought and paid for, and which he, without working any fraud upon the wife and without intending such fraud, caused to be conveyed directly by his vendor to grantees other than himself, as a gift.

Grout v Fairbairn, 204-727; 215 NW 963

Devise identical with statute of descent. A testamentary devise is inoperative when the property devised is exactly identical with the property which the statute law of descent grants in the absence of a will.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

IV BAR, WAIVER, OR RELINQUISHMENT OF DOWER

(a) ANTENUPTIAL AGREEMENTS

Antenuptial contract—proof. Record held to establish, by copy, an antenuptial contract, the original being lost.

Fraizer v Fraizer, 201-1311; 207 NW 772

Antenuptial contract — consideration. The consideration for an antenuptial contract necessarily inheres in the resulting marriage.

Kalsem v Froland, 207-994; 222 NW 3

Validity. Antenuptial contracts, the same as other contracts, if fair and free from fraud, are valid, binding, and enforceable, being based upon the consideration of marriage which is of the very highest known to the law.

In re Onstot, 224-520; 277 NW 563

Sufficiency of evidence. Evidence held sufficient to show execution of antenuptial agreement precluding widow from dower share.

In re Dunn, (NOR); 224 NW 38

IV BAR, WAIVER, OR RELINQUISHMENT OF DOWER—continued

(a) ANTENUPTIAL AGREEMENTS—concluded

Antenuptial contract—validity. When from the evidence it is found that an antenuptial contract was in fact entered into before the marriage, it is valid and binding on the parties.

Finn v Grant, 224-527; 278 NW 225

Acknowledgment — when unnecessary. A simple antenuptial contract, not involving the conveyance of real property, needs no acknowledgment to be valid.

Finn v Grant, 224-527; 278 NW 225

Antenuptial contract—homestead rights. An antenuptial contract will not be construed to embrace a waiver of homestead rights in the absence of plain and unmistakable language to that effect. Such waiver must have a more secure basis than a mere inference from broad and sweeping language referable to waiver of right to dower or distributive share.

Mill Owners Ins. v Petley, 210-1085; 229 NW 736

Antenuptial contract. A written instrument purporting to be an antenuptial contract waiving all interest which each of the contracting parties would have after marriage in the property of the other, but shown to have been actually signed after marriage, will not bar such property interest when the instrument neither recites (1) that it was executed for the purpose of furnishing evidence of a previous antenuptial oral contract nor (2) that it was executed in consideration of a previous oral antenuptial contract.

Battin v Bank, 202-976; 208 NW 343

Antenuptial contract—validity. Antenuptial contract reviewed and held not invalid on the grounds of unfairness, unconscionableness, and nonmutuality or because it contained an invalid provision in relation to property interest and the right to children which in no manner affected the consideration actually received by the wife.

Kalsem v Froland, 207-994; 222 NW 3

Marriage settlements — sum payable to wife not preferred claim. The parties to an antenuptial contract which simply and generally provides that the wife shall, on the death of the husband, "be paid" a named sum by the latter's personal representative, will not be deemed to have intended that in the settlement of the estate of the husband, the said sum to be paid the wife should have priority over third and fourth class claims. (Holding based on the intent of the parties as reflected in the contract and surrounding circumstances.)

In re Shepherd, 220-12; 261 NW 35

Husband's breach of antenuptial contract—wife's heirs' claim against husband's estate. An antenuptial contract preserving the respective property rights of the parties will support a claim in favor of the wife's collateral heirs against the estate of the husband who appropriated his deceased wife's separate property that otherwise and rightfully should have gone to such collateral heirs.

In re Onstot, 224-520; 277 NW 563

(b) GRANT OR CONVEYANCE

Discussion. See 17 ILR 245—Note signed with husband

Warranty deed—effect. A warranty deed duly signed by both husband and wife necessarily constitutes a complete subordination and waiver of all the rights of both husband and wife, including homestead and dower.

Clark v Chapman, 213-737; 239 NW 797

Signing to release. A promissory note and mortgage for the pre-existing debt of a husband are without consideration as to the wife who signs the same for the sole purpose of releasing her dower interest.

Gorman v Sampica, 202-802; 211 NW 429

Fraudulent antenuptial conveyance. A wife who pleads that her deceased husband fraudulently disposed of his property prior to marriage in order to deprive her of the interest which she would take as a wife must establish (1) an existing contract of marriage between herself and the deceased at the time of the conveyance by the deceased, and (2) that she had no knowledge of such conveyance prior to her marriage.

In re Mann, 201-878; 208 NW 310

Lien of mortgage executed by husband only. A real estate mortgage executed by the husband, but not by the wife, becomes a lien upon the entire mortgaged premises instantly upon the subsequent execution by the husband and wife of a conveyance of the property to a third party.

Louisa County v Grimm, 203-23; 212 NW 324

Refund to pay debts. The heirs of an estate who unconditionally purchase the interest of their mother in the estate have no legal right, thereafter, to compel the mother to contribute any sum toward the discharge of unpaid debts of the estate, unpaid taxes against the estate, or unpaid probate costs and fees.

In re Jones, 217-288; 251 NW 651

Fraudulent conveyance — inchoate right of dower nonexistent. Where a debtor, as grantor, made a conveyance to sister-in-law without consideration in order to escape payment of judgment which he feared would be rendered against him, and where 25 days after settlement of claim for which grantor was being sued she reconveyed without consideration, sister-in-law obtained no beneficial interest in the property. Hence, her husband could not claim a one-third interest in property upon

her death, altho he signed deed of reconveyance only as a witness.

Renne v Tumbleson, 227-159; 287 NW 839

(c) DIVORCE

No annotations in this volume

(d) FORECLOSURE AND PAYMENT OF MORTGAGES

Wife signing mortgage and note to release dower. Evidence to the effect that a wife signed not only the mortgage of her husband, but also the promissory note, and did so in order to enable the husband to obtain the loan and complete the deal, does not establish that the note was without consideration as to her, even tho she asserts that she signed solely to release her dower interest.

Des Moines JSL Bank v Allen, 220-448; 261 NW 912

Mortgage on unadmeasured dower. A mortgage executed by a surviving wife on her unadmeasured distributive share attaches to the subsequently admeasured lands.

In re Caylor, 208-1208; 227 NW 103

Setting off free from existing joint mortgage. A distributive share cannot be set off to a surviving wife free from a mortgage on the land when the evidence indicates that the mortgage debt was the debt of the wife equally with that of the deceased husband who owned the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Existing liens. The distributive share of a surviving husband or wife in lands must bear its pro rata amount of a mortgage executed by the deceased and the survivor.

In re Caylor, 208-1208; 227 NW 103

(e) JUDICIAL SALE

Death of bankrupt—widow's rights—allowance and dower. Where a husband secures a receiver for his property in a state court and, with his wife, makes a conveyance of property to such receiver, and thereafter is adjudged an involuntary bankrupt, but dies before the disposition of his property by the trustee, and application is made for widow's allowance in the bankruptcy proceeding, held, that the bankruptcy adjudication and vesting of realty was not such "other judicial sale" as will defeat her right of dower, and her relinquishment by deed to husband's receiver of her contingent rights in his property became void by bankruptcy proceedings. In construing statutes for allowance to widows and children, equity court should be careful to do them no injustice.

Johnson v Payne, 26 F 2d, 450

(f) ESTOPPEL

Election of spouse under Code of 1873. The fact that a surviving husband to whom the wife had devised a life estate in lands which had long been their home accepted the administratorship of his wife's estate and for a long series of years continued his possession of the lands and paid taxes and repairs on the land, without being called upon to account to anyone, is not sufficient, under §2452, C., '73, to estop the husband from asserting a one-third distributive share interest in the property, in lieu of said life interest.

Ross v Seminary, 204-648; 215 NW 710

Vesting and divesting. The unadmeasured distributive share (dower) of a surviving spouse vests immediately upon the death of the other spouse, subject to being divested by the subsequent election of the surviving spouse to take under the will, if there be one, or to take homestead rights in lieu of distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Mortgage on life estate changed to cover "undivided one-third" interest—effect on lien. Where a bank has knowledge of an arrangement whereby a mother had a life estate in the entire property and makes a mortgage accordingly, but in a later mortgage attempts to change its position by a mortgage on her interest as an "undivided one-third", its answer, admitting this allegation in the petition, estops the bank from claiming the mother had a greater interest, and, when her interest develops to be a life estate, the bank's mortgage attaches only to an undivided one third of this life estate.

Redding v Redding, 226-327; 284 NW 167

Surviving spouse—failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

Election—dower (?) or will (?). A widow who, with full knowledge of every material fact affecting the extent of her husband's estate, freely and voluntarily accepts the provisions of her husband's will in her behalf is estopped to change her election. So held where the material fact was that the husband had, prior to marriage, incorporated his landed holdings and distributed his corporate stock to his children.

In re Mann, 201-878; 208 NW 310

Estoppel to dispute election. A widow who is given a life estate, subject to the payment of debts, and whose conduct for some three years following the probate of the will is unmistakably on the theory that she was taking under

IV BAR, WAIVER, OR RELINQUISHMENT OF DOWER—concluded

the will, is estopped to then shift her position to the prejudice of creditors and deny the effect of her acts; and this is true tho she made no formal election under the statute.

Phillips v Phillips, 204-78; 214 NW 548

(g) MISCELLANEOUS BARS AND WAIVERS

Rights of devisees—election between will and dower. A widow will not be held, under §2452, C., '73, to have elected to accept a life estate devised to her in her husband's will, in lieu of her statutory dower or distributive share, from the naked fact (1) that, for some 26 years following the death of her husband, and until her death, she occupied, took charge of, and managed the real estate in which the said will gave her a life interest, and (2) that, shortly after her husband's death, she released all possible dower or testamentary right in a portion of the property.

Bullock v Smith, 201-247; 207 NW 241

Admeasurement—nonestoppel. A widow is not estopped to demand the admeasurement of her distributive share by the fact (1) that she, as executrix, procures an order for the sale of an "undivided two thirds" of the land in question in order to pay the debts of the estate, or (2) that she individually mortgages an "undivided one third" of the land and that said mortgage has not been foreclosed.

In re Caylor, 208-1208; 227 NW 103

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness, that her signature would have no other effect than to release her dower interest in the husband's land (which was embraced in the accompanying mortgage which she signed), yet that constitutes no defense to a personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

Reason: The application of such theory would nullify the notes for any purpose.

First N. Bk. v Mether, 217-695; 251 NW 505

Life estate—proof—mortgage recitals—sufficiency. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

11991 Coextensive right of husband.

Nonright of husband to exempt personalty. See under §11918

Husband of title holder as improper plaintiff in partition. A husband may not maintain an action to partition lands of which his wife holds the legal title, and in which he has no interest except the contingent interest of a husband.

Jones et al. v Park, 220-903; 262 NW 801

Selling homestead for debts—necessity of election between will and dower. An order of court to an executrix to sell real estate to pay claims is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

11992 Dower to embrace homestead.

Additional citations. See under §§10145, 10146

Nonright to claim particular lands. The surviving husband or wife has no right, in an application to have a distributive share admeasured, to demand that certain nonhomestead lands be included in the admeasurement.

In re Caylor, 208-1208; 227 NW 103

Impossibility of including homestead. The distributive share cannot be so set off as to include the dwelling house and other buildings used in connection therewith and the land which is appurtenant to such buildings, when the value of such buildings and land exceeds the value of the allowable distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Reservation of homestead right—evidence. Where a form book used for the recordation of warranty deeds in the office of the recorder of deeds contained a printed relinquishment by a spouse of "dower and homestead", the fact that in a certain instance the word "homestead" has been erased furnishes no evidence that the grantors had orally reserved a homestead right in the conveyed property.

Clark v Chapman, 213-737; 239 NW 797

Antenuptial contract specifying manner of property descent—dower lost. An antenuptial contract, preserving the property of each party for the benefit of their respective heirs, operates to extinguish the homestead right, and, in the absence of children to the union, the property of each descends to his heirs as though no marriage existed.

Finn v Grant, 224-527; 278 NW 225

11994 Setting off dower—time limit.

ANALYSIS

I ADMEASUREMENT IN GENERAL
II PROCEEDINGS FOR ADMEASUREMENT OF DOWER
III APPORTIONMENT OF LIENS

I ADMEASUREMENT IN GENERAL

Nonestoppel. A widow is not estopped to demand the admeasurement of her distributive share by the fact (1) that she, as executrix, procures an order for the sale of an "undivided two thirds" of the land in question in order to pay the debts of the estate, or (2) that she, individually, mortgages an "undivided one third" of the land and that said mortgage has not been foreclosed.

In re Caylor, 208-1208; 227 NW 103

Homestead — undue length of occupation. The heirs of an intestate will not be heard to complain of the extreme length of time the surviving spouse has maintained the free occupancy of the homestead when they were the direct cause of delaying the admeasurement of the spouse's distributive share.

Crouse v Crouse, 219-736; 259 NW 443

II PROCEEDINGS FOR ADMEASUREMENT OF DOWER

Recognized methods. The statutory provisions for admeasurement of dower do not exclude the setting off of dower by an action in equity, by partition, or by any other appropriate action.

Ehler v Ehler, 214-789; 243 NW 591

Conclusive bar to admeasurement. A final order in probate, entered on due notice, including notice to the wife of the deceased, wherein, inter alia, provision is made for carrying out the terms of an antenuptial contract in favor of the wife (wherein she waived her distributive share) is a complete bar to a subsequent action by the wife to recover said distributive share.

Weidman v Money, 205-1062; 219 NW 39

Antenuptial agreement precluding dower. Evidence held sufficient to show execution of antenuptial agreement precluding widow from dower share.

In re Dunn, (NOR); 224 NW 38

III APPORTIONMENT OF LIENS

Setting off free from existing joint mortgage. A distributive share cannot be set off to a surviving wife free from a mortgage on the land when the evidence indicates that the mortgage debt was the debt of the wife equally with that of the deceased husband who owned the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

12001 Sale—division of proceeds.

Dower — impossibility of including homestead. The distributive share cannot be so set off as to include the dwelling house and other buildings used in connection therewith and the land which is appurtenant to such buildings, when the value of such buildings and land exceeds the value of the allowable distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

12006 Dower right unaffected by will.

Law governing. The right of a surviving spouse to take under the will of the deceased spouse, or to take a distributive one-third share, is governed by the statutes existing at the time of the death of the testate spouse; likewise the right of a corporation to take under a will.

Ross v Seminary, 204-648; 215 NW 710

Devise in lieu of dower—acceptance from conduct. A surviving spouse, tho she has made no formal, record acceptance of a devise to her by her husband of a life estate in real and personal property in lieu of distributive share (dower), must be deemed to have accepted said devise when, for some 16 years following the probate of her husband's will, she has, without question, accepted the full benefit of said devise of a life estate.

Kinnett v Ritchie, 223-543; 273 NW 175

12007 Election between will and dower—notice.

Discussion. See 22 ILR 543—Renunciation of life estate

ANALYSIS

I RIGHT OF ELECTION IN GENERAL
II NOTICE AND RECORD
III PROOF OF ELECTION
IV DEVISE IN LIEU OF DOWER
V EFFECT OF ELECTION

Devise presumed to be in lieu of dower, homestead, and exemption. See under §11847

I RIGHT OF ELECTION IN GENERAL

Nonstatutory election. The statutory method for a surviving wife to elect to take under her husband's will does not prevent her from so electing by some other method. A wife may, by the act of making a will during the two days intervening between the death of her husband and her own death, and by the circumstances and incidents attending the making of such will, clearly effect an election, even tho she did not know that an election was necessary.

Hahn v Dunn, 216-637; 247 NW 672

Vesting and divesting. The unadmeasured distributive share (dower) of a surviving spouse vests immediately upon the death of

I RIGHT OF ELECTION IN GENERAL—concluded

the other spouse, subject to being divested by the subsequent election of the surviving spouse to take under the will, if there be one, or to take homestead rights in lieu of distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Dower—when vested—divesting by choosing homestead. Instantly on the death of a married intestate, an undivided one-third interest and estate in his real estate vests in the surviving spouse as tenant in common, which vested estate is subject to being divested by a later election to take the homestead for life in lieu of such distributive share.

Jackson v Grant, 224-579; 278 NW 190

Interest of surviving spouse—time of vesting—divesting. Principle reaffirmed that interest of surviving spouse in property vests immediately upon death of other spouse altho subsequently defeasible by an election to take under the will, if any, or to take a homestead right.

Prichard v Anderson, 224-1152; 278 NW 348

Selling homestead for debts—necessity of election between will and dower. An order of court to an executrix to sell real estate to pay claims is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

Total failure to elect. A surviving wife who dies prior to the probate of her husband's will without having made, or been notified to make, any election either (1) to take the life estate devised to her "in lieu of dower and statutory right", or (2) to take her distributive share under the statute, will be deemed to have taken her primary right, to wit, her distributive share.

Peckenschneider v Schnede, 210-656; 227 NW 335

Total failure of surviving spouse to elect. A surviving wife who is willed by her deceased husband all his property, real and personal, after the payment of all his debts, including the expense of his last sickness and burial, and who dies some three days later without doing anything affirmatively indicating her acceptance of the terms of said will, must be held to have taken her distributive one-third share only.

Hahn v Dunn, 211-678; 234 NW 247; 82 ALR 1503

Failure to elect during lifetime. In a probate proceeding where husband's will gives the widow a life estate in property with a right to dispose of property for her necessary support, and where widow takes charge of estate as administratrix, without closing the estate during her lifetime and without making an election to take under such will, held, she elected to take under the will.

Hoskin v West, 226-612; 284 NW 809

II NOTICE AND RECORD

Election by spouse. A surviving wife who, for two years following the death of her testate husband, and until her death, actively participates as executor in the settlement of the estate, who has full knowledge of the provisions of the will in her behalf, who expresses a desire and intention to abide by the will, and who treats herself as a beneficiary under the will, must be deemed to have elected to take under the will and not her distributive share, even tho no notice to elect is ever served on her.

In re Culbertson, 204-473; 215 NW 761

III PROOF OF ELECTION

Code, '73—election between will and dower. A widow will not be held, under §2452, C., '73, to have elected to accept a life estate devised to her in her husband's will, in lieu of her statutory dower or distributive share, from the naked fact (1) that, for some 26 years following the death of her husband, and until her death, she occupied, took charge of, and managed the real estate in which the said will gave her a life interest, and (2) that, shortly after her husband's death, she released all possible dower or testamentary right in a portion of the property.

Bullock v Smith, 201-247; 207 NW 241

Election of spouse under C., '73. The fact that a surviving husband to whom the wife had devised a life estate in lands which had long been their home, accepted the administratorship of his wife's estate and for a long series of years continued his possession of the lands and paid taxes and repairs on the land, without being called upon to account to anyone, is not sufficient, under §2452, C., '73, to estop the husband from asserting a one-third distributive share interest in the property, in lieu of said life interest.

Ross v Seminary, 204-648; 215 NW 710

Homestead or distributive share—election—evidence necessary. The distributive share being the primary and more worthy right of the surviving spouse, evidence that the survivor elected to take the homestead right in lieu thereof should be clear and satisfactory.

Prichard v Anderson, 224-1152; 278 NW 348

Surviving spouse's occupancy not conclusive on taking homestead. Inasmuch as the surviv-

ing spouse's occupancy of the homestead may be as a tenant in common, as a life tenant, or under the statute pending administration, such occupancy, although being evidence, is not conclusive of her election to take the homestead right, but the true character of the occupancy is determinable from all the surrounding facts and circumstances.

Jackson v Grant, 224-579; 278 NW 190
Prichard v Anderson, 224-1152; 278 NW 348

No presumption of election from mere occupancy by spouse. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

Election by spouse—nonestoppel. The heirs of a surviving wife are not estopped to insist that the wife took her dower interest, and did not take under the will, by the fact that, separate and apart from the will, and prior to its execution, the husband had turned over certain funds to a society, under an agreement that the society should pay interest on the funds to him and to the wife during their lifetime, and that the wife received such interest after the death of the husband.

In re Culbertson, 204-473; 215 NW 761

Release of dower for annuity—fraud—evidence. Evidence held insufficient to show that a contract by which a surviving spouse accepted an annuity in lieu of distributive share was fraudulently obtained.

Silkett v Silkett, 209-417; 227 NW 905

Surviving spouse—failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

IV DEVISE IN LIEU OF DOWER

When election not required. No election by a surviving spouse between the will and the dower right is required when the will shows on its face that its provisions for the surviving spouse were not intended to be in lieu of dower rights. So held where the will devised to the wife the sum of one dollar.

Fay v Smiley, 201-1290; 207 NW 369

V EFFECT OF ELECTION

Discussion. See 24 ILR 714—Effect of election

Claims — attorney fees — employment for partisan purpose. An executrix who, as widow, has renounced the will and elected to take her statutory distributive share may not, at the expense of the estate, employ attorneys to take a partisan attitude in a rival contest as to heirship.

In re Leighton, 210-913; 224 NW 543

Devise (?) or dower (?). Long acquiescence by a surviving spouse in the testamentary provisions made for her may constitute an irrevocable election to waive her statutory distributive share.

Pabbeldt v Schroeder, 202-689; 210 NW 958

Dower (?) or will (?). A widow who, with full knowledge of every material fact affecting the extent of her husband's estate, freely and voluntarily accepts the provisions of her husband's will in her behalf, is estopped to change her election. So held where the material fact was that the husband had, prior to marriage, incorporated his landed holdings and distributed his corporate stock to his children.

In re Mann, 201-878; 208 NW 310

Estoppel to dispute election. A widow who is given a life estate subject to the payment of debts, and whose conduct for some three years following the probate of the will is unmistakably on the theory that she was taking under the will, is estopped to then shift her position to the prejudice of creditors and deny the effect of her acts; and this is true tho she made no formal election under the statute.

Phillips v Phillips, 204-78; 214 NW 548

Renunciation of trust by wife—effect. A testamentary trust embracing all of testator's property, and for the benefit of the testator's wife and other named beneficiaries in named proportions, is not terminated by the renunciation of the will by the wife. The trust will proceed as to two thirds of the property, for the benefit of the remaining beneficiaries.

Windsor v Barnett, 201-1226; 207 NW 362

12010 Election by law—exception.

Election by spouse—inapplicability of statute. The statutory provision to the effect that a surviving spouse of a deceased testator, when executor of the estate, shall be conclusively presumed to consent to the provisions of the will in his or her behalf unless a refusal so to consent is filed within six months after the will is probated, has no application under a will which was probated before the enactment of such statutory provision.

In re Culbertson, 204-473; 215 NW 761

Homestead or distributive share—election—evidence necessary. The distributive share being the primary and more worthy right of the surviving spouse, evidence that the survivor elected to take the homestead right in lieu thereof should be clear and satisfactory.

Prichard v Anderson, 224-1152; 278 NW 348

Total failure of surviving spouse to elect—effect. A surviving wife who is willed by her deceased husband all his property real and personal after the payment of all his debts, including the expense of his last sickness and burial, and who dies some three days later, without doing anything affirmatively indicating her acceptance of the terms of said will, must be held to have taken her distributive one-third share only.

Hahn v Dunn, 211-678; 234 NW 247; 82 ALR 1503

Failure to elect during lifetime. In a probate proceeding where husband's will gives the widow a life estate in property with a right to dispose of property for her necessary support, and where widow takes charge of estate as administratrix, without closing the estate during her lifetime and without making an election to take under such will, held, she elected to take under the will.

Hoskin v West, 226-612; 284 NW 809

Notice—right of wife as cestui to ignore. A wife who ignores a notice requiring her to elect whether she would take under her husband's will, does not estop herself from alleging and proving that the property which the husband assumed to devise was held by him in trust for her.

Spring v Spring, 210-1124; 229 NW 147

12012 Election between dower and homestead occupancy—notice.

Election between homestead and dower. See under §10146

Life occupancy—unprayed-for relief. A surviving spouse who, in a contest with an heir of the intestate's, claims absolute ownership of the entire homestead, and who is decreed to own only an undivided fractional part thereof, may be decreed the right to elect to occupy the homestead for life, even tho there is no prayer for such relief.

Myrick v Bloomfield, 202-401; 210 NW 428

Antenuptial contract specifying manner of property descent—dower lost. An antenuptial contract, preserving the property of each party for the benefit of their respective heirs, operates to extinguish the homestead right and, in the absence of children to the union, the property of each descends to his heirs as tho no marriage existed.

Finn v Grant, 224-527; 278 NW 225

12015 Setting off dower.

Exemption from debt. Principle reaffirmed that a homestead, set aside to the widow as her dower or distributive share, passes to her free from the debts of the husband-owner.

Southwick v Strong, 218-435; 255 NW 523

12016 Descent to children.

Fiduciary relations, wills. See under §11846
Gifts causa mortis. See under Ch 445, Note 1

Discussion. See 4 ILB 280—Rights of widow as heir; 7 ILB 251—Breaking descent; 16 ILR 244—Child born prior to execution; 20 ILR 626—Descent and distribution

Inheritable existence—criterion. An infant acquires existence capable of taking an inheritance only when it acquires an independent circulation of its blood after being fully separated from the body of the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Purchase (?) or descent (?). A homestead cannot be deemed to descend under the laws of descent to the children of a spouseless parent when the parent leaves a will which provides that no child contesting the will shall take anything under the will, altho the will otherwise gives to the children the identical shares which the laws of descent would give.

Luglan v Lenning, 214-439; 239 NW 692

Title under will (?) or law of descent (?)—attending rights. Devisees whose shares under a will are, both in quantity and quality, exactly the shares which they, in the absence of a will, would take under the statute law of descent, are deemed to take title, not under the will, but under the said statutes of descent—the worthier title—and so taking they necessarily take the statutory exemptions, if any, attending the property.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Instant vesting of realty at death—possession and disposal by heirs. The title to real estate of which a decedent dies seized, upon his death, descends to and vests immediately in his heirs with the quantity to each definitely ascertained, and from that instant, subject to the debts of the deceased, they may dispose of the property as owners and are entitled to the possession and to the rents and profits.

In re Duffy, 228- ; 292 NW 165

Tenants in common—surviving spouse and children. Upon the death of the owner of land, the surviving spouse and children become tenants in common of said land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Prichard v Anderson, 224-1152; 278 NW 348

Dower or distributive share—vesting and divesting. Principle reaffirmed that instantly upon the death of the intestate owner of land the surviving spouse and children, as tenants in common, become vested with the title to said land in the proportion of one third in the spouse and two thirds in the children, which vesting may later be divested by the action of the spouse in the exercise of his or her optional rights.

Crouse v Crouse, 219-736; 259 NW 443

Substitution of heirs. Upon the death of an intestate parent subsequent to the death of his child, the law, for the purpose of descent, substitutes the heirs of the predeceased child in lieu of such child. It necessarily follows that the property descending to these substituted heirs never in any sense becomes a part of the estate of said predeceased child.

In re Rees, 204-610; 215 NW 726

Agreement as to right to inherit. A provision in an antenuptial contract to the effect that the children of the husband shall have the same right of inheritance in the property of the wife as they would have if they were her own children is effective as a contract of inheritance.

Kalsem v Froland, 207-994; 222 NW 3

Antenuptial contract specifying manner of property descent. An antenuptial contract, preserving the property of each party for the benefit of their respective heirs, operates to extinguish the homestead right and, in the absence of children to the union, the property of each descends to his heirs as tho no marriage existed.

Finn v Grant, 224-527; 278 NW 225

Heirs of absentee. The heirs of an absentee who, without known cause, has absented himself from his usual place of residence for a period of seven years, are those persons who are his heirs on the day when the law first indulges the presumption that said absentee is dead, to wit, on the day which marks the end of said absence of seven years.

In re Schlicht, 221-889; 266 NW 556

Declarations and letters as to paternity. Ante litem motam declarations and letters of deceased parties relating to the parentage of a certain person, even tho they are not related to such person by blood or marriage, are admissible on the issue of parentage when such declarants and writers stood in such relation to the person in question as to give assurance that they would know the real truth as to such parentage and could not be mistaken. For a stronger reason, similar declarations and letters of those related by blood or marriage to the person in question are admissible.

In re Frey, 207-1229; 224 NW 597

Creation of vested interest—inviolability. A deed, (1) which is conditioned on grantee paying, after the death of grantor, named sums to each of grantee's two sisters, and (2) which is executed and delivered by grantor and accepted by grantee in accordance with a plan entered into by all of said parties for the settlement of their inherited interests in said land, creates, instanter, in said sisters a vested landed interest which is immune from change without their consent. So held where the grantor, later, erroneously assumed the right to treat the deed as testamentary and, by a new deed, to reduce the payments to the sisters.

Carlson v Hamilton, 221-529; 265 NW 906

Heirs' rights—evidence of shares. Where a farm, comprising a part of an estate which is settled without administration by vesting control in one of the heirs under a trust agreement, is sold, and several first and second mortgages are taken in part payment and divided among the heirs, and title subsequently reverts to trustee without foreclosure, the mortgages, altho losing their effect as liens, serve as evidencing respective share of each heir.

Meeker v Meeker, (NOR); 283 NW 873

Share of heir as mere contract claim—how paid. Where the share or interest of a child in the estate of his or her alleged parent takes the form of a mere contract obligation against the estate, the child becomes a mere claimant against the estate and is payable as such, and not from the mere residue of the estate. So held where the parentage was in issue and was compromised by a court-approved agreement wherein the executor agreed, on behalf of the estate, (1) to set up a specified trust fund, the annuity of which was to be payable to said child during its lifetime, and (2) annually to pay said annuity to said child until the trust fund was actually set up.

In re Griffin, 220-1028; 262 NW 473

Prohibited devise as intestate property. Property devised to one who is prohibited by law from taking becomes intestate property when the will provides no remainderman or provision for reversion.

Karolusson v Paonessa, 207-127; 222 NW 431

Renounced devise as intestate property. Where one of several residuary devisees wholly renounces his interest under the will, the portion so renounced becomes intestate property, and necessarily descends under the statutory rules of descent. In other words, the nonrenouncing residuary devisees do not necessarily take said renounced portion.

Lehr v Switzer, 213-658; 239 NW 564

Will — renunciation by daughter — effect. Where a father's will left property in equal shares to a son and daughter, subject to a life estate in their mother, and where the daughter renounced all benefits under the will, as heir she took undivided one half of one-half portion of estate that became intestate property as result of renunciation, subject to life estate.

McGarry v Mathis, 226-37; 282 NW 786

Assignment of expectancy.

Jones v Jones, 46-466
Mally v Mally, 121-169; 96 NW 735
Richey v Rowland, 130-523; 107 NW 423
Betts v Harding, 133-7; 109 NW 1074

Assignment of expectancy as security. An assignment of an expectancy in a contemplated estate as security for a debt is supported by adequate consideration.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Assignment of expectancy. Principle reaffirmed that while an assignment of an expectancy is not a favorite of the law, yet if, after careful scrutiny, it appears to have been made in good faith, for an adequate consideration, without fraud, and is not unconscionable or otherwise invalid, equity will sustain and enforce it.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050
Burk v Morain, 223-399; 272 NW 441

Assignment of expectancy as collateral security. An assignment by a debtor to his creditor of the debtor's expectancy in an estate, as collateral security to the debt, with a proviso that, if the debtor does not pay within a stated time, the assignment shall operate as a "full receipt" against said expectancy, simply extends to the creditor an option to so treat the proviso. The creditor may ignore the proviso and maintain an action on his claim. (See Funk v Grulke, 204-314.)

Smoley v Smoley, 203-685; 213 NW 229

Assignment of expectancy—construction. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor. (See Funk v Grulke, 204-314.)

Berg v Shade, 203-1352; 214 NW 513

Discharge of bankrupt—effect on assignment. When a debtor assigns his expectancy in an estate as security for the payment of the debt, a subsequent discharge of the debt in bankruptcy ipso facto discharges said assignment and all unadjudicated equitable rights thereunder, even tho the ancestor creates a legacy for the debtor, and dies after the debtor is adjudged a bankrupt, and before the debtor is decreed a final discharge.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050
Burk v Morain, 223-399; 272 NW 441

Ineffectual assignment. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

Fraudulent assignment. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Action to set aside conveyance. In an action by heirs to set aside an assignment of note and mortgage and transfer of realty by an intestate to a son, who had lived with and cared for her a number of years, on ground of mother's mental incapacity, evidence which tended to show preference to son is insufficient to support claim of mental incapacity.

Robbins v Daniel, 226-678; 284 NW 793

Advancements. In an action by heirs of intestate against a son of intestate to have property received by such son decreed to be an advancement and be deducted from the son's interest in the estate, wherein it is shown that such son had instituted a prior action in partition to have his interest in realty determined, held that such issue of advancement should have been raised as an affirmative defense and litigated in the prior partition action, and therefore is now res judicata.

Robbins v Daniel, 226-678; 284 NW 793

Advancements—deduction—when improper. Without special provision in the will therefor, an executor is in error in paying to himself, as a residuary legatee, $1,000 on the theory that the four other such legatees had each received advancements in that sum and that such payment was equivalent to charging off such advancements against the shares of the other legatees.

In re Morgan, 225-746; 281 NW 346

Insolvency of bank—assessment—when heir not liable. An heir is not liable to a statutory assessment on state bank stock owned by his deceased, intestate ancestor when, in the final settlement of the ancestor's estate, said heir, under contract with other heirs, receives his share solely in property other than said stock.

Bates v Bank, 218-1320; 256 NW 286

Offsetting debts of insolvent heir.

Townsley v Townsley, 167-226; 149 NW 262
Lohman v Mockler, 190-578; 180 NW 644
Woods v Knotts, 196-544; 194 NW 953
In re Mikkelsen, 202-842; 211 NW 254
Schultz v Locke, 204-1127; 216 NW 617
Rodgers v Reinking, 205-1311; 217 NW 441
Lusby v Wing, 207-1287; 224 NW 554
Johnson v Smith, 210-591; 231 NW 470
Yungclas v Yungclas, 213-413; 239 NW 22

Insolvent heir's debts offset against share in real estate. The right to offset debts of an heir against his share of real estate exists only when the heir is insolvent. Evidence held insufficient to show heirs were insolvent.

Wilson v Wilson, 226-199; 283 NW 893

Setting off debt against heir's share. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share in real estate as well as against his share of personal property, when the share of the insolvent in the personal property of the estate is insufficient to discharge said debt.

Kramer v Hofmann, 218-1269; 257 NW 361

Offsetting debts against share in estate. The amount of the indebtedness of a distributee, solvent or insolvent, to an estate, may be set off against his share in the personal property. If the personal property is insufficient, his share of the real estate may be set off against the debt, if the heir is insolvent.

In re Morgan, 226-68; 283 NW 267

Insolvent heir's unpaid debt to estate—jurisdiction of court to offset. The court has jurisdiction, in an equitable action to partition the lands of an intestate (to which action all heirs are parties), to entertain a cross-petition by one of the heirs as administrator of said estate, and, under proper pleading and proof:

1. To decree that a certain insolvent heir has no interest in said land because his unpaid indebtedness to said estate equals or exceeds the value of the share in said lands which he would take were he not so indebted, and
2. To decree that said lands belong solely to the other heirs who are not so indebted, and to the surviving widow, if any.

Bauer v Bauer, 221-782; 266 NW 531

Offsetting debt of insolvent heir against realty—creditors—judgments. Where an heir, as a defendant in a partition action, admits insolvency and an indebtedness to parents' estate in excess of his interest in parents' realty, decree was proper holding heir had no interest in such realty and, accordingly, heir's creditors who obtain judgments after commencement of partition action but before entry of decree, and making no claim of fraud in securing the decree, have no interest in any of funds received from sale of realty.

Petty v Hewlett, 225-797; 281 NW 731

Fiduciary relationship—intestate and heir receiving property. In an action by heirs of intestate to set aside a conveyance of realty made by intestate to son, on the ground of an alleged fiduciary relationship existing between aged intestate and son, held, that evidence was insufficient to establish such relationship, and even tho such relationship existed, whatever property the son received from his mother was by her voluntary and intelligent act, and without duress, dominance, or overreaching on his part.

Robbins v Daniel, 226-678; 284 NW 793

Fiduciary or confidential relationship. In an action by heirs of an intestate against a son and heir of intestate, to recover money allegedly wrongfully obtained while acting in a fiduciary and confidential capacity, evidence held insufficient to show such relationship or that son wrongfully withdrew money from testate's bank account and misappropriated the same, together with rentals obtained from farm land, where the son lived with his aged mother and attended to her business and property affairs.

Robbins v Daniel, 226-678; 284 NW 793

12017 Absence of issue.

Discussion. See 22 ILR 145—Inheritance by adopted children

Infants—inheritable existence—criterion. An infant acquires existence capable of taking an inheritance only when it acquires an independent circulation of its blood after being fully separated from the body of the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Collateral heirs. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had been taken, by a Caesarean operation, from the womb of a dead mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

Articles of adoption — liberal construction against collateral heirs. Articles of adoption, executed under §3251, C., '97, will not, in an action involving the right of the alleged adopted child to inherit from the alleged foster parents in preference to collateral heirs, be held invalid simply because the name of the father of said child is not stated in said articles, tho said section literally requires such statement.

Eggimann-Eckard v Evans, 220-762; 263 NW 328

Adoption—collateral heirs over natural parents. The estate of a legally adopted, intestate, spouseless and issueless person whose adopting parents are both dead leaving surviving collateral heirs only, descends to said collateral heirs and not to the surviving natural parents or parent of said adopted person. (See also §10501-b6 [§10501.6, C., '39], §12027, C., '35.)

In re Fitzgerald, 223-141; 272 NW 117

Devise identical with statute of descent—effect. A testamentary devise is inoperative when the property devised is exactly identical with the property which the statute law of descent grants in the absence of a will.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Descent — when determinable by contract. Tenants in common of real estate who embark their holdings, and the personal property used in connection therewith, in a partnership violate no rights of heirship or testamentary rights of their brothers and sisters by including in their partnership contract an agreement that upon the death of one of the partners the survivor shall become the absolute owner of all the partnership property.

Conlee v Conlee, 222-561; 269 NW 259

Assignees. An assignment by an heir of all his interest in the "personal property" of an estate carries to the assignee the assignor's interest in funds derived from the sale of real estate for the purpose of paying debts and remaining in the hands of the administrator as an unused balance. The doctrine of equitable conversion has no application to such a state of facts.

In re Wilson, 218-368; 255 NW 489

War-risk insurance. Congress has power, after the issuance of war-risk insurance, to provide that unaccumulated installments which exist at the time of the death of the beneficiary shall be paid to the estate of the insured soldier.

In re Pivonka, 202-855; 211 NW 246; 55 ALR 570

War-risk insurance. Unaccumulated installments of war-risk insurance which exist at the time of the death of the beneficiary and which, under congressional act, are payable to the estate of the soldier, must be distributed, in case of intestacy, to the soldier's heirs who exist at the time the soldier dies.

In re Pivonka, 202-855; 211 NW 246; 55 ALR 570

12025 Heirs of parents.

Heirs of spouseless, childless, and parentless intestate. In the search for an heir of a spouseless, childless, and parentless intestate, the quest along any line of ascending ancestors and their issue must necessarily terminate at the place where inheritable blood disappears.

In re Bradley, 210-1013; 231 NW 661

Collateral heirs. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had been taken, by a Caesarean operation, from the womb of a dead mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

Adopting or natural parents—widow. The heirs as a class of each adopting parent, each class receiving one half, rather than the natural parents or their heirs, inherit the estate of an adopted child dying intestate to the exclusion of adopting father's surviving second wife who was decreed no part of the estate and did not appeal—but, quaere, if surviving second wife had claimed a dower interest.

In re Smith, 223-817; 273 NW 891

Adoption—right of inheritance. The legally adopted child of the deceased brother of an intestate, parentless, spouseless and childless sister inherits from said sister just as he would were he the actual child of his adopting parent.

McCune v Oldham, 213-1221; 240 NW 678

"Surviving grandchildren" interpreted. Where a will giving life estates to testatrix's surviving spouse and children provides on termination of the life estates that fee title shall pass "to the surviving grandchildren", this means surviving grandchildren of testatrix as a class and does not mean that in each separate tract the surviving children of that respective life tenant take the remainder, nor do testatrix's heirs take as a whole under rules of descent as in cases of intestacy.

Bell v Bell, 223-874; 273 NW 906

Surviving spouse. No part of the property of an unmarried and issueless deceased who survived both his parents and his issueless and only sister passes to the surviving spouse of such sister.

In re Farrell, 205-331; 217 NW 876

12026 Spouse and heirs.

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Heirs of spouse—evidence to establish. In probate proceeding, certain heirs, who are claiming under statute providing "If heirs are not thus found, the portion uninherited shall go to the spouse of the intestate, or heirs of such spouse if dead, according to like rules * * *.", having established they were heirs of deceased spouse of intestate, cannot be required to go further and establish by proof that no heirs of such intestate exist, since the statute places no such burden upon them, nor is it reasonable to suppose that the legislature so intended. The degrees of heirship are without limit in Iowa.

In re Clark, 228- ; 290 NW 13

Census report—evidence of heirs. In probate proceedings to establish heirship of certain claimants through the deceased spouse of an intestate (who died without issue), the trial court erroneously disregarded a census enumerator's report which showed that intestate was married and that she had no children. While such record was a hearsay statement, yet because of circumstances under which it was made, and because it is a part of a public record, it would have been admissible as an exception to the hearsay rule.

In re Clark, 228- ; 290 NW 13

Evidence of marriage—heirs claiming estate. In probate proceedings by heirs claiming under the deceased spouse of intestate, the evidence was sufficient to establish the marriage between the intestate and deceased spouse, tho the trial court found that there was insufficient evidence to establish heirship and rendered judgment that the property escheat to the state as uninherited property.

In re Clark, 228- ; 290 NW 13

Unmarried and issueless deceased. No part of the property of an unmarried and issueless deceased who survives both his parents and his issueless and only sister passes to the surviving spouse of such sister.

In re Farrell, 205-331; 217 NW 876

Denial of escheat—distribution to heirs. In probate proceeding, tried as in equity, wherein the trial court wholly disregarded the finding of fact by a refereee, who was also administrator, that no heirs of intestate had been found, and wherein judgment was rendered for the property to escheat to the state, as against certain heirs claiming heirship through the deceased spouse of intestate, upon trial de novo on appeal, the findings of the trial court were found to be without support in the evidence, and judgment was reversed with instructions to enter a decree for a division of the property among the heirs as their interests may appear in the record.

In re Clark, 228- ; 290 NW 13

Heirship under spouse—denial of escheat. In probate proceedings where judgment was rendered for property to escheat to state, findings of the trial court that intestate might have left a husband from whom she had not been divorced, and if she left a daughter a point was raised whether the daughter might have children of her own who would inherit under our laws, on trial de novo on appeal, were determined to be mere speculations of the court, without any factual or evidential basis, and the evidence of the heirs claiming under a deceased spouse of intestate definitely established that heirs of the intestate's own family and lineage, either through blood or marriage, had not been found.

In re Clark, 228- ; 290 NW 13

Persons entitled and their respective shares—cemetery lot. The interest of an intestate in a burial lot in a cemetery (he dying without issue and survived only by his widow and mother) may not be set aside as exempt property to the widow. The interest, the right to use said lot for burial purposes, passes in such a case in equal shares to the widow and mother.

In re Paulson, 221-706; 266 NW 563

12027 Heirs of parents by adoption.

Discussion. See 22 ILR 144—Inheritance by adopted children

Collateral heirs over natural parents. The estate of a legally adopted, intestate, spouseless and issueless person whose adopting parents are both dead leaving surviving collateral heirs only, descends to said collateral heirs and not to the surviving natural parents or parent of said adopted person. (See also §10501-b6 [§10501.6, C., '39], §12017, C., '35.)

In re Fitzgerald, 223-141; 272 NW 117

Adopting or natural parents—widow. The heirs as a class of each adopting parent, each class receiving one half, rather than the natural parents or their heirs, inherit the estate of an adopted child dying intestate to the exclusion of adopting father's surviving second wife who was decreed no part of the estate and did not appeal—but, quaere, if surviving second wife had claimed a dower interest.

In re Smith, 223-817; 273 NW 891

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

12029 Advancements.

ANALYSIS

I CHARACTER AND PROOF OF ADVANCEMENTS
II WHAT CONSTITUTES AN ADVANCEMENT

Gifts inter vivos generally. See under Ch 445
Wills—fiduciary relations—burden of proof. See under §11846

I CHARACTER AND PROOF OF ADVANCEMENTS

How issue tried. A proceeding in probate on the issue whether a conveyance by a father

I CHARACTER AND PROOF OF ADVANCEMENTS—concluded

to his son constituted an advancement is triable, both in the trial and appellate court, as an action at law. It follows that a supported finding by the trial court is conclusive on the appellate court.

In re O'Hara, 204-1331; 217 NW 245

Advancements—nonapplicability of doctrine. Principle reaffirmed that the doctrine of "advancements" has no application to the settlement of an estate under a will.

In re Manatt, 214-432; 239 NW 524

Advancements as rule of intestate descent. The doctrine of advancements applies only in cases where the decedent dies intestate, unless specifically provided for by language in the will.

In re Morgan, 225-746; 281 NW 346

Set-off or retainer — executor's equitable right—nonstatutory. In probate proceedings the right which the executor or an administrator has, in the nature of a right of retainer, to set off debts owing by a beneficiary of an estate against his share therein, is an equitable right of its own nature, and not at all dependent upon any statute.

In re Sheeler, 226-650; 284 NW 799

Set-off or retainer against beneficiary. In probate proceedings wherein a beneficiary is indebted to the estate, the right of set-off or retainer is not restricted to a court of equity, but rests upon wholesome principles of right and justice which can be administered in probate courts without the aid of a court of conscience.

In re Sheeler, 226-650; 284 NW 799

Presumption—weakness of. Substantial gifts of money, made by a parent during his lifetime to his children, are presumed to be advancements, but the presumption is not strong and must yield to slight evidence of a contrary intent.

In re Wiese, 222-935; 270 NW 380

Advancements to child—when gift—intestacy rule. In cases of intestacy where a parent advances money or property to a child, or pays debts for the child, the law presumes it is a gift by advancement, unless otherwise competently shown as intended to be held as a debt against the child.

Yagge v Tyler, 225-352; 280 NW 559

Heir's assignment of interest subject to estate claims—rights of assignee. In a probate proceeding where one of the heirs, who is indebted to the estate, purchases a farm from the executor and assigns her one-tenth interest in the estate as security for a purchase note to the executor, who in turn assigns the note to a third party, held that such assignment of interest is taken subject to the estate claims, and whatever interest remains should be paid to the holder of the note irrespective of the fact the executor is also indebted to the estate on his final account.

In re Sheeler, 226-650; 284 NW 799

"Worthier title" rule nonapplicable to prevent executor's set-off or retainer. In probate proceedings, before the "worthier title" rule can be applied where property is left to testator's heirs by will in the same manner and proportion in which they would have taken were there no will, it must definitely appear that there is exact identity in every way, and where testator definitely directs that real estate be converted into personalty and then divided equally among his children, each beneficiary receiving all personalty and no real estate, held, a beneficiary of such estate did not take her interest by "worthier title" so as to preclude executor from exercising the right of retainer against the beneficiary's interest which is assigned as security for a note for purchase of real estate by beneficiary—it being immaterial whether beneficiary is solvent or insolvent.

In re Sheeler, 226-650; 284 NW 799

Gift—renunciation—no control by creditors —not a conveyance. A creditor has no control over a beneficiary's right to refuse or accept a gift, as a renunciation is not equivalent to a conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Verdict sustaining part of gift as establishing mental competency. In a replevin action by executor to recover property held under claim of gift inter vivos from decedent, a jury verdict validating part of the gift made on a later date, from which part of the verdict no appeal is taken also establishes the donor's mental competency to consummate that part of the gift made on an earlier date.

Wilson v Findley, 223-1281; 275 NW 47

II WHAT CONSTITUTES AN ADVANCEMENT

Advancement (?) or gift (?).

In re Francis, 204-1237; 212 NW 306

Advancement (?) or debt (?)—interest. An ordinary promissory note executed by an heir to his ancestor, and representing money received by the heir from the ancestor, must, in the settlement of the estate, be deemed, presumptively, a debt and not an advancement; consequently, interest is chargeable as provided in the note.

In re Manatt, 214-432; 239 NW 524

Essential elements of gift. A gift causa mortis is a gift of personal property, intentionally made, even orally, by the mentally competent owner of said property, in expecta-

tion of his or her imminent death from an impending disorder or peril (tho not necessarily so imminent as to exclude the opportunity to execute a will), and made and delivered by the donor to the donee on the essential condition that, if the gift be not in the meantime revoked, the property shall belong to the donee in case the donor dies, as anticipated, of the disorder or peril, leaving said donee surviving.

Flint v Varney, 220-1241; 264 NW 277

Burden of proof. An irrevocable gift by a parent to a child is presumptively an advancement, but the child may show, by any competent evidence, that the parent did not intend the gift to be an advancement. Evidence held to overthrow the presumption.

Fell v Bradshaw, 205-100; 215 NW 595

Difference between value of property and amount paid. An advancement to an heir may consist of the substantial difference which may exist between the actual money consideration paid by the heir for property and its actual value at the time of the conveyance, but not necessarily so when, as part of the consideration, the grantor-ancestor reserves a room on the premises for life, and when the grantee-heir agrees to pay the funeral expenses of said grantor and adequately to support him for life.

In re O'Hara, 204-1331; 217 NW 245

Tenant in common paying mortgage to protect undivided interest—not gift to cotenant. Payment, by a mother, of a mortgage on property she holds as a tenant in common with her adopted son, held to be for the preservation and protection of her share in the property, when otherwise unexplained.

Yagge v Tyler, 225-352; 280 NW 559

Debts due decedent from heir—retainer or offset against realty. General rule recognized that real estate passes to devisee direct from testator, and not through executor, and that title vests in devisee immediately upon death of testator and, as a general rule, there is no right of retainer or offset for debt of devisee to estate, as against devisee of real estate; but there may be cases where, on account of the insolvency of the debtor, or other cause, equity will interfere for protection of the estate.

Petty v Hewlett, 225-797; 281 NW 731

Setting off debt against heir's share. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share in real estate as well as against his share of personal property, when the share of the insolvent in the personal property of the estate is insufficient to discharge said debt.

Kramer v Hofmann, 218-1269; 257 NW 361

Pro rata distribution—procedure. In determining the pro rata payments to be made on legacies in an estate which proves insufficient to pay all legacies in full, the amounts owing by legatees to testator at the time of the death of testator, and deducted by the executor in paying legacies, must be taken into consideration.

Mills v Manchester, 213-95; 237 NW 228; 238 NW 718

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Equitable conversion—deduction from share. Tho testator's lands are, from the moment of testator's death, deemed equitably converted into personalty by a mandatory, testamentary direction to the executor to sell and divide the proceeds among testator's children, yet the rentals of said lands, accruing prior to an actual sale of the lands, belong to the estate, and in case the lessee be a legatee and fails to pay said rentals, the amount thereof may be deducted by the executor from the share of said legatee, a right which is superior to the right of one who, with knowledge of said rental proceedings, acquires an equitable lien on said legatee's share in the estate.

Ihle v Ihle, 222-1086; 270 NW 452

Offsetting executor's debt against compensation. A debt due from an executor to the estate may not be set off against the amount allowed the executor for services as such executor when the will provides that such debt shall be treated as an advancement. So held where assignees of the compensation were making claim thereto.

In re Bourne, 210-883; 232 NW 169

Advancements—deduction—when improper. Without special provision in the will therefor, an executor is in error in paying to himself, as a residuary legatee, $1,000 on the theory that the four other such legatees had each received advancements in that sum and that such payment was equivalent to charging off such advancements against the shares of the other legatees.

In re Morgan, 225-746; 281 NW 346

Insolvent heir's debts offset against share in real estate. The right to offset debts of an heir against his share of real estate exists only when the heir is insolvent. Evidence held insufficient to show heirs were insolvent.

Wilson v Wilson, 226-199; 283 NW 893

Matters which may have been litigated in prior action—res judicata. In an action by

heirs of intestate against a son of intestate to have property received by such son decreed to be an advancement and be deducted from the son's interest in the estate, wherein it is shown that such son had instituted a prior action in partition to have his interest in realty determined, held that such issue of advancement should have been raised as an affirmative defense and litigated in the prior partition action, and therefore is now res judicata.

Robbins v Daniel, 226-678; 284 NW 793

12030 Illegitimate children—inherit from mother.

Bastards—rights of inheritance. In Iowa, illegitimate children have inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Illegitimate children. Tho at common law an illegitimate child, or filius nullius, could not inherit because he was son of nobody, the statutes permitting illegitimate to inherit from mother and father abrogate common-law concept that child born out of wedlock is child of nobody, and without inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Rights of recognized illegitimate child. Under the statutes, a duly recognized illegitimate child has all the rights of inheritance of a legitimate child. The reason for denying inheritable blood is gone and remains a fiction only.

In re Clark, 228- ; 290 NW 13

Meaning of "children"—legitimate or illegitimate—rule. At common law, the word "children", when used in wills, deeds, or other conveyances, means legitimate children unless will reveals a clear intention to use the generic term "children" so as to include an illegitimate child, or it is impossible under the circumstances that legitimate children could take.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Legitimate children of illegitimate child. In probate proceedings, where it is shown that intestate died without issue and the intestate's deceased husband was an illegitimate child of the same mother through whom claimants seek to establish heirship, the evidence was sufficient to definitely establish the relationship as to both intestate's deceased husband and intestate.

In re Clark, 228- ; 290 NW 13

Children, grandchildren, nephews—parol evidence to determine meaning. Where such terms as children, grandchildren, or nephews are used in a will or a deed, and there are both legitimates and illegitimates and the testator has full knowledge of such fact, and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption, but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of will, but also in the light of the circumstances surrounding the execution of the will, and parol evidence is admissible to prove the intent of the testator or grantor.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

12031 From father.

Recognition—sufficiency. Evidence held to show such recognition of the paternity of an illegitimate child as to entitle the child to inherit.

Schermerhorn v Snell, 206-939; 221 NW 567

Birth during lawful wedlock—presumption. The presumption of legitimacy of a child born in lawful wedlock is so strong that it will yield only to clear, satisfactory and practically conclusive proof that the husband was:

1. Impotent, or
2. Entirely absent so as to have no access to the mother, or
3. Entirely absent from the mother at the period during which the child must have been begotten, or
4. Present with the mother under circumstances negativing sexual intercourse with her.

Craven v Selway, 216-505; 246 NW 821

Unknown pregnancy — evidence. Evidence reviewed and held insufficient to rebut the presumption of legitimacy which attends a child born in lawful wedlock.

Heath v Heath, 222-660; 269 NW 761

Child begotten out of, but born in, wedlock. A child manifestly begotten out of wedlock but born during wedlock is presumed to be the child of such intermarried persons.

Ryke v Ream, 212-126; 234 NW 196

Adjudication of bastardy—effect on child. That part of a decree of divorce which adjudges that a child of the wife is not the child of the husband is a nullity as far as the child is concerned.

Ryke v Ream, 212-126; 234 NW 196

Nonallowable evidence. The illegitimacy of a child born in lawful wedlock, without proof that the husband was impotent or had no sexual access to the mother, cannot be established by the declarations of the mother, or of the putative father, or of said child, nor by proof of the mother's adultery.

(This does not imply that after illegitimacy has been made to appear, by competent proof, the declarations of the putative father and of the mother are not admissible to identify the actual father.)

Craven v Selway, 216-505; 246 NW 821

Declarations of mother admissible. Declarations of the deceased mother of a child born out of lawful wedlock, as to who was the father of said child, are admissible on the issue of paternity; also like declarations of other members of the family as a matter of family history. Evidence reviewed and held insufficient to establish plaintiff's paternity.

Hopp v Petkin, 222-609; 269 NW 758

Recognition by father—heirs of child's spouse. In probate proceedings by claimants to establish heirship through the father of an illegitimate son, the evidence established such mutual recognition between the father and such son, during their lifetime, that entitled the heirs, as grandchildren of the father, to inherit from the illegitimate son's deceased widow, who died intestate and without issue.

In re Clark, 228- ; 290 NW 13

Illegitimate children — common-law rule. Tho at common law an illegitimate child, or filius nullius, could not inherit because he was son of nobody, the statutes permitting illegitimate to inherit from mother and father abrogate common-law concept that child born out of wedlock is child of nobody, and without inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Bastards—rights of inheritance. In Iowa, illegitimate children have inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Rights of recognized illegitimate child. Under the statutes, a duly recognized illegitimate child has all the rights of inheritance of a legitimate child. The reason for denying inheritable blood is gone and remains a fiction only.

In re Clark, 228- ; 290 NW 13

Share of heir as mere contract claim—how paid. Where the share or interest of a child in the estate of his or her alleged parent takes the form of a mere contract obligation against the estate, the child becomes a mere claimant against the estate and is payable as such, and not from the mere residue of the estate. So held where the parentage was in issue and was compromised by a court-approved agreement wherein the executor agreed, on behalf of the estate, (1) to set up a specified trust fund, the annuity of which was to be payable to said child during its lifetime, and (2) annually to pay said annuity to said child until the trust fund was actually set up.

In re Griffin, 220-1028; 262 NW 473

12032 Feloniously causing death.

Discussion. See 7 ILB 111—Profiting through murder

Forfeiture by causing death. Evidence which is insufficient to show, even by a preponderance, that a wife caused the death of her husband by involuntary manslaughter, manifestly, is insufficient to exclude her from participating in his estate.

Crouse v Crouse, 214-725; 240 NW 213

Homestead occupancy—duty of court to protect. The court is under an affirmative duty to protect a widow, especially when she is insolvent, in her presumptive right to occupy the homestead until her distributive share is set aside to her, and until a charge that she feloniously killed her husband has been established.

Crouse v Crouse, 210-508; 229 NW 850

Forfeiture of right by surviving spouse. Evidence reviewed, in an action to quiet title to real estate, and held insufficient to establish the guilt of a surviving wife of manslaughter in the death of her husband.

Crouse v Crouse, 217-814; 253 NW 122

Allowance to surviving spouse — defeating because of felonious homicide. In order to defeat, under this section, the application of a surviving widow for an allowance out of her husband's estate, the objector must distinctly allege and prove that the widow feloniously took, or feloniously caused or procured another to take, the life of her said husband, and must so do irrespective of any previous conviction of said widow of manslaughter.

In re Johnston, 220-328; 261 NW 908

12035 Escheat.

Escheat proceeding — striking allegations asking for new administrator—not appealable. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Possibility of heirs — speculation — escheat denied. In probate proceedings where judgment was rendered for property to escheat to state, findings of the trial court that intestate might have left a husband from whom she had not been divorced, and if she left a daughter a point was raised whether the daughter might have children of her own who would inherit under our laws, on trial de novo on appeal, were determined to be mere speculations of the court, without any factual or evidential basis, and the evidence of the heirs claiming under a deceased spouse of intestate definitely established that heirs of the intestate's own family and lineage, either through blood or marriage, had not been found.

In re Clark, 228- ; 290 NW 13

Heirship established—proof of marriage. In probate proceedings by heirs claiming under the deceased spouse of intestate, the evidence was sufficient to establish the marriage between the intestate and deceased spouse, tho the trial court found that there was insufficient evidence to establish heirship and rendered judgment that the property escheat to the state as uninherited property.

In re Clark, 228- ; 290 NW 13

12036 Proceedings for escheat.

Notice to claimants—nonwaiver of required filing time for claims. Administrator's notice to possible claimants and heirs in escheat proceedings given in pursuance to court order did not, in effect, amount to a waiver of statute of limitations as to filing claims in probate nor constitute a new invitation to creditors to file claims.

Joy v Bank, 226-1251; 286 NW 443

Denial of escheat—distribution to heirs. In probate proceeding, tried as in equity, wherein the trial court wholly disregarded the finding of fact by a referee, who was also administrator, that no heirs of intestate had been found, and wherein judgment was rendered for the property to escheat to the state, as against certain heirs claiming heirship through the deceased spouse of intestate, upon trial de novo on appeal, the findings of the trial court were found to be without support in the evidence, and judgment was reversed with instructions to enter a decree for a division of the property among the heirs as their interests may appear in the record.

In re Clark, 228- ; 290 NW 13

12037 Notice to persons interested.

Notice to claimants—nonwaiver of required filing time for claims. Administrator's notice to possible claimants and heirs in escheat proceedings given in pursuance to court order did not, in effect, amount to a waiver of statute of limitations as to filing claims in probate nor constitute a new invitation to creditors to file claims.

Joy v Bank, 226-1251; 286 NW 443

CHAPTER 509

ACCOUNTING OF EXECUTORS AND ADMINISTRATORS

12041 Reference—examination of accounts—fees.

Atty. Gen. Opinions. See '28 AG Op 252; '34 AG Op 308; '38 AG Op 208; AG Op Jan. 10, '39

Reference—procedure—justifiable findings. Whether a referee in probate must accept the appointment, qualify, hold hearings, make a timely report and accompany the same by affidavit as required of referees appointed in ordinary civil cases (§11530, et seq. C., '31), quaere; but the court may well find that such requirements (if they are such) were complied with when an unquestioned amended report of the referee recites such compliance.

In re Cochran, 220-33; 261 NW 514

Costs. Costs in probate consequent on objections filed to an intermediate report of an executor, and on a trial on such objections before a referee, are properly taxed to the objector if the objections be overruled.

In re Cochran, 220-33; 261 NW 514

Excessive allowance to referee. Allowance to referee in probate reviewed and held excessive to the extent of fifty per cent thereof.

In re Cochran, 220-33; 261 NW 514

12043 Additional reports.

Accounting by life tenant. A life tenant with testamentary power to encroach upon the principal, with remainder over, may be compelled to make full disclosure to a trustee in bankruptcy of a possible remainderman, of the property received by her under the will (the probate records not revealing such fact), but may not be compelled to account to such trustee as to her use of the property, in the absence of any allegation and proof of waste, fraud, or improper use or disposal.

Nelson v Horsford, 201-918; 208 NW 341; 45 ALR 515

Conditional rejection of item. The court may, very properly, in ruling upon an item in an interlocutory report, allow part of the item and continue the remainder for more adequate showing in the administrator's final report.

In re Atkinson, 210-1245; 232 NW 640

Evidence against administrator. Statements in the various interlocutory reports of an administrator, relative to the items of assets belonging to the estate, may be persuasive evidence against the administrator on the final accounting.

In re Manning, 215-746; 244 NW 860

Executor trust company in receivership—court accountable to. Failure of the probate court to appoint a successor-executor for an insolvent trust company which had been a co-executor in a pending estate and which trust company had been placed in receivership, does not cause the receiver of such insolvent trust company to be accountable to probate court—a court not appointing him.

Bates v Evans, 226-438; 284 NW 385

Receiver of insolvent executor bank—not accountable to probate court—duty. Where the Scott county district court appoints a receiver to take charge of an insolvent trust company, which company had been previously appointed by the Johnson county district court as co-executor in an estate pending in the Johnson county district court, such receiver did not become an officer accountable to the Johnson county district court but was an officer of the Scott county district court having possession of the property and his duty was only to deliver such property under direction of the Scott county district court to the person entitled thereto.

Bates v Evans, 226-438; 284 NW 385

Reference—procedure—justifiable findings. Whether a referee in probate must accept the appointment, qualify, hold hearings, make a timely report and accompany the same by affidavit as required of referees appointed in ordinary civil cases (§11530 et seq., C., '31), quaere; but the court may well find that such requirements (if they are such) were complied with when an unquestioned amended report of the referee recites such compliance.

In re Cochran, 220-33; 261 NW 514

Costs—against losing party. Costs in probate consequent on objections filed to an intermediate report of an executor, and on a trial on such objections before a referee, are properly taxed to the objector if the objections be overrruled.

In re Cochran, 220-33; 261 NW 514

12044 Final settlement—time limit.

Atty. Gen. Opinion. See '28 AG Op 310

Long continued delay—effect. Objections by a devisee on final report that an estate was not closed within the statutory three years are quite futile when made for the first time long subsequent to the expiration of said period; and it is immaterial that the estate has been held open for a materially longer period without an authorizing court order when the court finds on final report that such delayed settlement was advisable.

In re Bourne, 210-883; 232 NW 169

Compensation—wrongful conduct—effect. An executor who not only inexcusably fails to close an estate at the end of the statutory three-year period, and to turn the unexpended funds over to a designated testamentary trustee, but continues wrongfully, for a series of years, to act as executor, is very properly denied a right to the compensation which the testamentary trustee would have been entitled to during said years.

In re Mowrey, 210-923; 232 NW 82

Indefinite maturity. A promissory note which is payable "on settlement of William Dagel estate after date" is nonnegotiable because the final settlement of estates within three years is not a certainty.

Scott v Dagel, 200-1090; 205 NW 859

Delay in closing estate. Devisees could not complain of delay in closing estate where no loss resulted and delay was due in part to their own failure to pay inheritance taxes and their share of administration costs and rental moneys due the estate, and where they took no action to require executrix to close the estate altho their attorney, who was also a devisee, was aware of the facts.

In re David, 227-352; 288 NW 418

12045 Examination of executor.

Expert audit—expense not chargeable to trustee. A testamentary trustee of a going concern will not, on hearing on his final report, be charged with the expense of an expert audit of the books of the concern when such books are in the exclusive possession of the objectors together with expert annual audits thereof, the correctness of which is not questioned.

In re Evans, 212-1; 232 NW 72

12046 Accounting at inventoried value.

Atty. Gen. Opinion. See '28 AG Op 310

Sale price of property. The court cannot do less than to charge an executor with the amount which he admits he received on a sale of estate property.

In re Mowrey, 210-923; 232 NW 82

Realty values. In probate proceedings on objections to executor's final report, evidence supported trial court's fixing value of farm land at $125 per acre for the purpose of accounting.

In re Sheeler, 226-650; 284 NW 799

Surety bound by adjudication. The surety on the bond of an administrator is conclusively bound by the nonfraudulent adjudication of the amount of the administrator's liability, even tho the surety had no notice of the hearing preceding such adjudication.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Objections to report—conversion issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

Fact findings in probate not triable de novo. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims

cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Liability on bond—existing judgment against executor. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Executor's indebtedness to estate—interest charged. In probate proceedings on objections to executor's final report, where the executor owed a note to the estate bearing interest which was not added to principal, held, interest should be charged in the absence of any evidence to warrant a finding for the principal only.

In re Sheeler, 226-650; 284 NW 799

Administrator's debt to decedent—extent of liability. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

12047 Presumption from appraisement.

Realty values—sufficiency of evidence. In probate proceedings on objections to executor's final report, evidence supported trial court's fixing value of farm land at $125 per acre for the purpose of accounting.

In re Sheeler, 226-650; 284 NW 799

12048 Profit and loss.

Self-enrichment of trustee—insufficient evidence.

In re Evans, 212-1; 232 NW 72

Nonchargeable with interest. Evidence reviewed and held that a testamentary trustee, vested with unusually broad managerial powers, was not chargeable with interest on bank deposits, even tho he was a stockholder in the bank.

In re Evans, 212-1; 232 NW 72

Distribution of estate—interest on unpaid legacy. An executor may be chargeable with interest on an unpaid cash legacy to a minor, even tho his actions have been in perfect good faith.

Irwin v Bank, 218-477; 255 NW 671

Executor's indebtedness to estate—interest charged. In probate proceedings on objections to executor's final report, where the executor owed a note to the estate bearing interest which was not added to principal, held, interest should be charged in the absence of any evidence to warrant a finding for the principal only.

In re Sheeler, 226-650; 284 NW 799

Losses—when not liable. A testamentary trustee of a business, especially when it is a hazardous one, is not chargeable with a loss attending operations which were in keeping with the general practices of the business.

In re Evans, 212-1; 232 NW 72

Funds lost in bank closing. Evidence sustained finding of trial court that executrix was not negligent and therefore exonerated from personal liability for estate funds lost by closing of bank in which decedent had also kept funds during his lifetime, where there was no showing as to bank's insolvency prior to receivership, nor that executrix had any knowledge of its failing condition.

In re David, 227-352; 288 NW 418

Estoppel. The devisees of an estate who cause the executor to withdraw estate funds from the bank in which the deceased had them on deposit are estopped thereafter to complain of a loss of said funds resulting from the subsequent insolvency of the new depository, the executor having acted in good faith and with due prudence.

In re Olson, 206-706; 219 NW 401

Shortage in acreage. Where lands of an estate are ordered sold for a lump sum, parol evidence is admissible to show that the land was, in reality, sold at a certain price per acre and that the acreage fell short of what was supposed to be the acreage, and that the administrator properly made a deduction for said shortage.

In re Oelwein, 217-1137; 251 NW 694

Non de novo hearing. An appeal from an order adjudging the final liability of an administrator is not heard de novo. In other words, the supported findings of the trial court are conclusive on the appellate court.

In re Enfield, 217-273; 251 NW 637

Findings in probate. A supported finding by the probate court that an administrator had failed to exercise ordinary care to preserve the funds of the estate is conclusive on the appellate court.

In re Foster, 218-1202; 256 NW 744

Chargeable with compound interest. An executor who wrongfully fails to close an estate within the statutory 3-year period and uses the estate funds for his personal enrichment, is properly charged with interest at 6 percent with annual rests from the expiration of said 3 years, even tho the net interest would only have been 4 percent had the executor closed the estate within the time required by statute and turned the remaining assets over to a trustee, as directed by the will.

In re Mowrey, 210-923; 232 NW 82

Reduction of widow's allowance — effect. Where the amount allowed a widow for her support for the year following the death of the husband is taken by her from the funds of the estate (she being executrix) and spent, a subsequent order, in an adversary proceeding, reducing said former amount is conclusive on the surety—and, of course, on the executrix—and in an action against the principal and surety the reduced amount is the limit of the allowable credit.

In re Durey, 215-257; 245 NW 236

Keeping funds in insolvent bank. An executor or administrator who, on his own motion and authority, deposits and keeps estate funds in an insolvent bank of which he is cashier, must account for the resulting loss.

In re Foster, 218-1202; 256 NW 744

Unauthorized bank deposit. An executor who, on his own motion and without any authorizing order of court, deposits the funds of the estate in a financially embarrassed bank of which he was president, and in which he was heavily interested, and which later failed, must account to the estate in cash for the loss. The president of a bank must be held to have knowledge of the general financial condition of the bank.

In re Rorick, 218-107; 253 NW 916

Funds used by executor—interest. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at 6 percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

12049 Mistakes corrected.

Intermediate accounts. Mistakes in ex parte orders, made during settlement of an estate, are subject to correction at any time before final settlement of the estate.

In re Metcalf, 227-985; 289 NW 739

Finding as to executor's shortage—conclusiveness.

In re Carpenter, 210-553; 231 NW 376

Adjudicating shortage without notice to surety. The sureties on the bond of an administrator are not entitled to notice of the proceedings wherein the probate court determines the amount the administrator is short in his accounts. It follows that such adjudication, in the absence of fraud or mistake, is final as to said sureties.

In re Kessler, 213-633; 239 NW 555

Accounting—burden of proof. One who demands an accounting of a finally discharged administrator must assume the burden of establishing his claim.

Murphy v Hahn, 208-698; 223 NW 756

Burden of proof. Principle reaffirmed that when there are inconsistencies between the final report of an administrator and his previous reports he has the burden of proof to sustain his final report.

In re Manning, 215-746; 244 NW 860

Setting aside final report. The final report of an executor or administrator, after due approval and discharge, will be set aside only on a clear and satisfactory showing of fraud, mistake, or other equitable grounds.

Becker v Becker, 202-7; 209 NW 447

Inhering fraud. A final order of discharge of an administrator may not be set aside, opened, or otherwise questioned on a showing of fraud which inheres in said order of discharge.

Murphy v Hahn, 208-698; 223 NW 756

Reports—self-impeachment by administrator. An administrator will not be heard to say that he did not have notice of his own verified reports. It follows that he has frail ground upon which to impeach his own reports, especially when all other heirs and interested parties acquiesce therein.

In re Olson, 213-784; 239 NW 527

Final discharge—effect. A final order of discharge of an administrator is not conclusive as to property fraudulently omitted by him from his accounts.

Murphy v Hahn, 208-698; 223 NW 756

Fraudulent allowance — annulment. The fraudulent allowance of the claim that certain property belongs to claimant, and not to the estate, may be set aside on proper application at any time before the estate is finally settled, and especially so when the applicant was not a party to the original allowance.

In re Sarvey, 206-527; 219 NW 318

Correction—erroneous advice of attorney. The fact that the attorney for an administrator, without fraud, erroneously advised the widow of the deceased that she was not entitled to an allowance for her support owing to the fact that an antenuptial agreement ex-

isted, and the fact that the widow relied on such advice, does not constitute a "mistake in settlement" such as will allow the widow, after the estate is closed, to make application for such allowance.

In re Weidman, 209-603; 228 NW 571

Mistakes—right of heirs to disregard administration. Notwithstanding the fact that in the administration of an estate the tangible interest of the deceased in a partnership has been sold to the surviving partners under order of court, and the proceeds accounted for, and the administrator discharged, the heirs may maintain, against the surviving partners, an action for an accounting as to the share of said deceased in elements of partnership property other than the tangible property, such, for instance, as profits, and going concern and good-will values. And especially is this true when the surviving partners fraudulently concealed said latter elements of value at the time of the administration aforesaid.

Anderson v Droge, 216-159; 248 NW 344

Improvident order not adjudication. An order of court, in an insolvent estate, authorizing, without notice to creditors, the executrix (she being the surviving widow) to pay to herself the proceeds of a sale of the exempt property of the deceased, based solely on an agreement to that effect between the widow and heirs, is a mistake, an improvident act, and, therefore, a nullity and not an adjudication binding on creditors, when the testator made his exempt property liable for the payment of his debts and the widow elected to take under the will.

In re Durey, 215-257; 245 NW 236

Claims overlooked. A claim against an estate, duly verified and filed, and not allowed or disallowed by the administrator, cannot be deemed adjudicated by an order approving the final report of the administrator when the claim, the claimant and his representative were, by mistake and oversight, wholly overlooked both in said final report and in the notice of hearing thereon. It follows that an equitable action will lie, subsequent to said approval, to open up the estate and to allow the claim.

Harding v Troy, 217-775; 252 NW 521

Failure to list debt owed. When two sons, as executors of their deceased father's estate, in their final report failed to list as an asset of the estate a note and mortgage owed by one son to the father, altho both sons knew of the debt, in an action in which the other son as heir to half the estate sought to collect the note and foreclose the mortgage, the court's adjudication that all property in the estate had been administered estopped him from obtaining relief when the final settlement was not attacked on the grounds of fraud or mistake.

Joor v Joor, 227-870; 289 NW 463

Payment of claim after final report. Instead of opening up an estate, after final report and discharge, for the allowance and payment of an overlooked claim, the court may accomplish the same result by allowing the claim and ordering it paid from funds derived from the sale of lands under pending partition proceedings.

Harding v Troy, 217-775; 252 NW 521

Unallowable setting aside. An allowance by the court of a claim in probate, after issue is joined thereon and after due hearing, becomes a final adjudication in the absence of fraud or collusion and may not thereafter be set aside without hearing or evidence.

In re Kinnan, 218-572; 255 NW 632

12050 Settlement contested.

Atty. Gen. Opinion. See '28 AG Op 310

ANALYSIS

I CONTESTING SETTLEMENT OF ACCOUNTS
II FINAL SETTLEMENT AND DISCHARGE

I CONTESTING SETTLEMENT OF ACCOUNTS

Burden of proof. One who demands an accounting of a finally discharged administrator must assume the burden of establishing his claim.

Murphy v Hahn, 208-698; 223 NW 756

Administrator—fraudulent omission. A final order of discharge of an administrator is not conclusive as to property fraudulently omitted by him from his accounts.

Murphy v Hahn, 208-698; 223 NW 756

Burden of proof. An administrator has the burden of proof to establish the nonprejudicial nature of his irregular report.

In re Eschweiler, 202-259; 209 NW 273

Inconsistent reports. Principle reaffirmed that when there are inconsistencies between the final report of an administrator and his previous reports, he has the burden of proof to sustain his final report.

In re Manning, 215-746; 244 NW 860

Evidence against administrator. Statements in the various interlocutory reports of an administrator, relative to the items of assets belonging to the estate, may be persuasive evidence against the administrator on the final accounting.

In re Manning, 215-746; 244 NW 860

Irregular expenditures. Irregular but nonfraudulent disbursements by an administrator may be sustained on a showing that neither the estate nor the creditors thereof have been prejudiced.

In re Eschweiler, 202-259; 209 NW 273

Trustee borrowing from himself—accounting in cash (?) or in investments (?). A trustee, duly appointed by the court to execute a contract trusteeship, who loans the trust funds to himself, and uses the same in the purchase and improvement of various properties, without any authorizing order of court and without the knowledge or consent of the beneficiaries of the trust, will, on final report, be ordered to account in cash for said funds, and not in the physical properties bought by him, especially when said properties are inferior to the standard of investments required by said contract.

In re Skinner, 215-1021; 247 NW 484

Improper payments — assessment on bank stock. An executor will not be given credit for estate funds voluntarily used by him in discharging an assessment on bank stock which is held by the estate solely as collateral security.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Executor's indebtedness to estate—interest charged. In probate proceedings on objections to executor's final report, where the executor owed a note to the estate bearing interest which was not added to principal, held, interest should be charged in the absence of any evidence to warrant a finding for the principal only.

In re Sheeler, 226-650; 284 NW 799

Funds used by executor — interest chargeable. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at 6 percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

Collection and management of estate—depositing funds in bank—negligence. An executor or administrator, while not an insurer of the safety of estate funds, must exercise ordinary care and prudence in preserving such funds. Evidence reviewed in detail, and held to support a finding and order that the administrator had been negligent in depositing and keeping the estate funds in a bank of which he was cashier.

In re Enfield, 217-273; 251 NW 637

Compromise and settlement. A residuary devisee may not object to an accounting by an executor on a ground theretofore fully compromised and settled by such devisee.

In re Murphy, 209-679; 228 NW 658

Estoppel. A residuary legatee who causes the executor to obtain a new mortgage as security for an indebtedness due the estate, and thereupon to cancel a pre-existing mortgage which secured the same debt, is necessarily precluded from holding the executor personally liable in case the new mortgage proves inadequate as a security.

Wilson v Norris, 204-867; 216 NW 46

Attorney fee for extraordinary services—review. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Objections in probate—securities ownership issue. The probate court having jurisdiction to compel executrix to account for all assets, and the burden to sustain her accounts being on executrix, objections to her accounts raising the issue of ownership of certain securities are triable in probate without a jury.

In re Rinard, 224-100; 275 NW 485

Striking objections in probate — affidavits improper. A motion to strike objections to probate accounts on the grounds of misjoinder of actions is determinable only on the contents of the pleading attacked without aid of affidavits.

In re Rinard, 224-100; 275 NW 485

Objections—conversion issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

II FINAL SETTLEMENT AND DISCHARGE

Burden of proof. An executor carries the burden to sustain his final report.

In re Mowrey, 210-923; 232 NW 82
In re Moe, 213-95; 237 NW 228; 238 NW 718

Final report of administrator — hearing. Hearings on final reports of administrators are not reviewed de novo in the appellate court.

In re Manning, 215-746; 244 NW 860

Reports not reviewed de novo on appeal. The trial court's findings in probate proceedings relating to executor's reports are not triable or reviewable de novo on appeal to the supreme court. If the findings have support in the record, they cannot be disturbed.

In re Sheeler, 226-650; 284 NW 799
In re Smith, 228- ; 289 NW 694

Enforcing claim against executor on final report. A claim in favor of the estate and against an executor may be enforced on hearing on the executor's final report.

In re Bourne, 210-883; 232 NW 169

II FINAL SETTLEMENT AND DISCHARGE—continued

Final order—conclusiveness. A final order in probate, entered on due notice, including notice to the wife of the deceased, wherein, inter alia, provision is made for carrying out the terms of an antenuptial contract in favor of the wife (wherein she waived her distributive share) is a complete bar to a subsequent action by the wife to recover said distributive share.

Weidman v Money, 205-1062; 219 NW 39

Decisions—conclusiveness. The decision of the probate court is conclusive on the appellate court when the record reveals evidentiary support for such decision. So held where the court on objections to the final report of an executor held that a certain promissory note was not an asset of the estate because testatrix came into possession thereof by payment and not by purchase.

In re Finarty, 219-678; 259 NW 112

Improper vacation of order. An order approving the final report of an executor and discharging him, on due notice to all parties interested, cannot be later set aside on the ex parte application of the former executor.

In re Brockmann, 207-707; 223 NW 473

Payment of claim after final report. Instead of opening up an estate, after final report and discharge, for the allowance and payment of an overlooked claim, the court may accomplish the same result by allowing the claim and ordering it paid from funds derived from the sale of lands under pending partition proceedings.

Harding v Troy, 217-775; 252 NW 521

Unallowable credit. An administrator is properly refused credit for a claim due the administrator when the claim has never been filed against the estate, and when there is no evidence sustaining the claim.

In re Manning, 215-746; 244 NW 860

Credit for unauthorized expenditures. An executor who is sole testamentary devisee (the widow having ultimately elected to claim her statutory distributive share) should be given credit on his final report for proper sums in good faith paid by him as repairs, taxes, and interest on incumbrances on the real estate of the deceased, in order to protect and preserve such real estate, even tho such payments were not authorized by the court; and this is true even tho the mortgages ultimately absorbed all of said real estate.

In re Clark, 203-224; 212 NW 481

Co-executors—failure to list debt owed by one—other estopped. When two sons, as executors of their deceased father's estate, in their final report failed to list as an asset of the estate a note and mortgage owed by one son to the father, altho both sons knew of the debt, in an action in which the other son as heir to half the estate sought to collect the note and foreclose the mortgage, the court's adjudication that all property in the estate had been administered estopped him from obtaining relief when the final settlement was not attacked on the grounds of fraud or mistake.

Joor v Joor, 227-870; 289 NW 463

Accounting and settlement—compensation—supported allowances. Allowances made by the court as compensation to the executor and to his assistants and attorney, which have ample support in the evidence, will not be disturbed on appeal.

In re Mann, 217-1134; 251 NW 83

Fees for extraordinary services. An executor has the burden to prove the extraordinary services and the reasonableness of additional compensation.

In re Metcalf, 227-985; 289 NW 739

Disbursements to protect assets of estate. An administrator who in good faith pays a valid debt owing by the estate in order to redeem valuable securities belonging to the estate, and held by the creditor as collateral in an amount far in excess of the debt, will be credited as for a prudent expenditure irrespective of the subsequent claims of general creditors, and irrespective of the fact that the administrator did not wait for the filing of the claim, or secure the authority of the court to make such payment.

Elliott v Bank, 209-1258; 228 NW 274

Payment of unfiled but valid claims. An executor will be credited with the amount of valid, enforceable claims paid by him even tho such claims were not formally filed against the estate.

In re Bourne, 210-883; 232 NW 169

Allowance of credit. An order of the probate court granting an executor credit on his final report for the amount paid by him on his own motion, on a claim against the estate, is conclusive on the appellate court if the record reveals supporting testimony as to the genuineness of the claim.

In re Plendl, 218-103; 253 NW 819

Allowable failure to collect rents. A widow who is entitled to receive during life from the executor the annual rents accruing on lands belonging to residuary devisees, may allow such devisee to occupy the land free of rent, and objections to the executor's final report will not lie because of such action.

In re Murphy, 209-679; 228 NW 658

Certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a

certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

Delay in closing estate. Devisees could not complain of delay in closing estate where no loss resulted and delay was due in part to their own failure to pay inheritance taxes and their share of administration costs and rental moneys due the estate, and where they took no action to require executrix to close the estate altho their attorney, who was also a devisee, was aware of the facts.

In re David, 227-352; 288 NW 418

Withholding distribution until devisee's debt to estate paid. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

Justifiable refusal to discharge. The surety on the bond of an executor may not complain of an order of court which simply refuses a discharge of the executor and his bond because of the possession by the executor of a sum of money received by him for one who is not a party to the proceeding.

In re Clark, 203-224; 212 NW 481

Taxation—exemption to educational institution—essential proof. Where a will provides that the residue of the estate shall pass to an educational institution of this state as a part of its endowment fund, exemption from taxation on lands will not be granted except on the production in evidence of the probate records, showing judicially (1) that the estate has been fully settled, and (2) that the lands in question constitute part of the residue of said estate, and, as a consequence, belong, legally or equitably, to said institution.

Wapello Bank v Keokuk Co., 209-1127; 229 NW 721

12051 Opening settlement.

Atty. Gen. Opinion. See '28 AG Op 310

Absence of adverse party. An order approving the final report of an executor may be set aside on application of a party adversely interested when such party was never made a party to the hearing on said order.

In re Durham, 203-497; 211 NW 358

Failure of state to observe statute—effect. When the state allows an estate to be fully settled, and the executor to be duly and finally discharged without the payment of an inheritance tax, and makes no application to open up the accounts of the executor, it may not thereafter enforce the statutory personal liability of the executor to pay said tax.

In re Meinert, 204-355; 213 NW 938

Negligence. A delay of some three years after entry of an order discharging an administrator before instituting an action to open up an estate, for the correction of a mistake, does not necessarily constitute such negligence as to bar the action.

Harding v Troy, 217-775; 252 NW 521

Adjudication of liability — conclusiveness. An unappealed order of court adjudicating the amount of the liability of a trustee to the beneficiary is conclusive on the trustee and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Surety bound by adjudication. The surety on the bond of an executrix is not entitled to notice of the hearing on the final report of the executrix. It follows that said surety is not necessarily entitled to have the final order adjudging the liability of the executrix set aside "within 3 months" of its entry, and to have said liability readjudicated, especially when no fraud or mistake is charged.

Reason: The surety is in privity with the executrix and is legally in the probate court when the liability of the executrix is determined.

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Ex parte order—review. A ruling on a motion to vacate ex parte order allowing executor's and attorney's fees for extraordinary services does not constitute res judicata and, on objections to final report, is not a bar to a review of question of reasonableness of charges for such services.

In re Metcalf, 227-985; 289 NW 739

Unallowable opening of settled estate. The holder of a court-established claim which is legally enforceable against property which passed to an heir, on the settlement of the estate of the person primarily liable on said claim, has no occasion, and no right, in the absence of any showing of fraud or mistake, to have the settlement of said estate opened up for the re-establishment in probate of said claim.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

12052 Discharge.

Atty. Gen. Opinion. See '28 AG Op 310

Probate orders. An order approving the final report of an administrator is not, on appeal, reviewable de novo.

In re Oelwein, 217-1137; 251 NW 694
In re Mann, 217-1134; 251 NW 83
In re Fish, 220-1328; 264 NW 542

Setting aside — conditions. Principle reaffirmed that an order discharging an executor may be impeached only for fraud or mistake extrinsic or collateral to the questions tried and inhering in the order or judgment assailed.

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Failure of executor to pay tax. When the state allows an estate to be fully settled and the executor to be duly and finally discharged without the payment of an inheritance tax, and makes no application to open up the accounts of the executor, it may not thereafter enforce the statutory personal liability of the executor to pay said tax. This is true on two fundamental propositions, to wit: (1) that the court, being prohibited by statute from discharging the executor until the tax is paid, must be presumed, in entering such discharge, to have found that no tax was due; and (2) that the state, by designating the court as its special statutory representative, will not be permitted to deny such presumption.

In re Meinert, 204-355; 213 NW 938

Subsequent demand for accounting. An administrator may not, after the lapse of more than 5 years from his final discharge, be compelled to account for funds claimed to have been fraudulently withheld by him, when the evidence of such withholding was accessible to the complainant at and prior to the time the order of discharge was entered.

Murphy v Hahn, 208-698; 223 NW 756

12057 Failure to account.

Funds lost in bank closing. Evidence sustained finding of trial court that executrix was not negligent and therefore exonerated from personal liability for estate funds lost by closing of bank in which decedent had also kept funds during his lifetime, where there was no showing as to bank's insolvency prior to receivership, nor that executrix had any knowledge of its failing condition.

In re David, 227-352; 288 NW 418

12058 Executor of executor.

Ordering accounting and suit on bond. Where an executor of an executor filed in the first estate a final report as the deceased executor ought to have done, the court, on hearing on such report, may fix the amount for which the deceased executor should have accounted, and require accounting from his estate, and provide, in case of default, that action shall be brought against his estate, and on his bond.

In re Mowrey, 210-923; 232 NW 82

Trust property held by ward. A contract by the guardian of an incompetent, for the sale of land owned by the ward solely as trustee, tho approved by the court, cannot, in any sense, be deemed the contract of the ward; therefore, such contract cannot, in the event of the death of the ward, be deemed to create any indebtedness against the estate of the ward.

Copple v Morrison, 221-183; 264 NW 113

12059 Executors in their own wrong.

Discussion. See 6 ILB 65, 7 ILB 40—Executor of his own wrong

Wrongfully acting executor chargeable with interest. An executor who wrongfully fails to close an estate within the statutory three-year period, and uses the estate funds for his personal enrichment, is properly charged with interest at 6 percent, with annual rests, from the expiration of said three years, even tho the net interest would only have been 4 percent, had the executor closed the estate within the time required by statute and turned the remaining assets over to a trustee, as directed by the will.

In re Mowrey, 210-923; 232 NW 82

Improper handling of estate—action to recover loss. In an action to recover against the estate of a deceased executor for losses caused by improper handling of an estate, the plaintiffs had no right to appeal from a ruling sustaining a demurrer filed by the defendants when the plaintiffs did not elect to stand on the pleadings nor suffer final judgment to be entered against them.

Hayes v Selzer, 227-693; 289 NW 25

Executors de son tort—liability. A legatee of a strictly personal-property, debt-free estate who, with the approval of all other legatees, distributes the entire estate in strict accord with the will of the testator is thereafter under no obligation to account to a subsequently appointed executor who does not question the correctness of her distribution. Especially is this true when such legatee offers to pay the cost of such unnecessary administration.

Davenport v Sandeman, 204-927; 216 NW 55

Heirs as trustees—nonliability. Heirs who held property of deceased as trustees under an agreement by heirs to settle estate without administration could not be held administrators de son tort, in absence of any misconduct toward trust.

Meeker v Meeker, (NOR); 283 NW 873

Right to appoint successor. An order of the probate court appointing an executor in place of an executor ordered removed, is perfectly valid and such new appointee after qualifying is not an intermeddler even tho the order of removal is subsequently reversed on appeal, when the order of removal was in no manner stayed pending the appeal.

In re Mann, 217-1134; 251 NW 83

12061 Specific performance—how enforced.

Specific performance generally. See under Ch 420, Note 1 (X)

Conditions precedent. Principle reaffirmed that a contract may not be specifically enforced (1) unless the execution is established by very clear and definite proof, and (2) unless the terms of the contract as established are equally clear and definite.

Lockie v Baker, 206-21; 218 NW 483

Oral contract to devise or convey lands. An oral offer to convey or devise land in consideration of services to be performed for the offerer, and an oral acceptance thereof by the offeree, are specifically enforceable when both the execution of the contract and the performance thereof are established by clear, convincing, and satisfactory evidence, and when the acts of performance are referable exclusively to such contract. Evidence held ample to establish such a contract and the performance thereof.

Houlette v Johnson, 205-687; 216 NW 679

Compulsory deed. The court will order an executor to execute a deed to real property, and to the proper person, on proof that the deceased personally owned no interest in the property and was holding the legal title in consequence of a resulting trust; but the evidence must be so explicit and decisive as to leave the existence of no essential fact to conjecture, or to remote and uncertain inference.

In re Moore, 211-804; 232 NW 729

Contracts enforceable. The fractional owner of property who quitclaims his interest to his co-owner in order to enable the co-owner to mortgage the entire property for his own purpose, and who receives from the co-owner an agreement to reconvey, free of incumbrance, within a named time or to pay a named sum, may not, after the mortgage is executed, and after the mortgagee has in good faith agreed to take over the property in satisfaction of the mortgage debt, obtain specific performance of the agreement to reconvey, even tho the mortgagee, before the deal was fully closed, had notice of the agreement to reconvey.

Clarkson v Bank, 218-326; 253 NW 25

Past consideration for contract to will property. Altho past services or past indebtedness may be a lawful consideration for an agreement, the parol evidence of such past services or indebtedness will not establish a contract by which the debtor agrees to sell or transfer his property by will in satisfaction of such services or debt.

Fairall v Arnold, 226-977; 285 NW 664

Oral contract to will property. Where the plaintiff had done work for a woman who was ill, and had been promised that she would give him certain property in her will in return for the services, and plaintiff seeks specific performance of the agreement, claiming as consideration his oral agreement not to file a claim against the estate for the services until after such claim had been barred by the statute of limitations, such oral agreement was only the manner adopted for extinguishing the claim for the past services and the consideration for the oral agreement was the cancellation of the claim for the services and the discharge and compromise of the obligation which had accrued.

Fairall v Arnold, 226-977; 285 NW 664

12063 Compensation.

Compensation and attorney fees. The court has a discretion to allow attorney fees and compensation to an executor in a less sum than the statutory maximum.

Albright v Albright, 209-409; 227 NW 913

Traveling expenses. An administrator is properly given credit for his reasonable traveling expenses necessitated by the discharge of his official duties.

In re Atkinson, 210-1245; 232 NW 640

Maximum percentage allowable for ordinary services. An administrator is not necessarily entitled, for ordinary services, to the maximum percentage provided by the statute.

In re Lindell, 220-431; 262 NW 819

Statutory fees as limit. Record held to support the action of the trial court in confining the compensation of an executor to the statutory percentage, he having rendered no extraordinary services.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Excessive allowance to referee. Allowance to referee in probate reviewed and held excessive to the extent of fifty percent thereof.

In re Cochran, 220-33; 261 NW 514

Supported allowances. Allowances made by the court as compensation to the executor and to his assistants and attorney, which have ample support in the evidence, will not be disturbed on appeal.

In re Mann, 217-1134; 251 NW 83

Evidence supporting allowance. In probate proceedings on objections to executor's report, evidence held sufficient to support allowance of fee of $750 where executor was required to look after several hundred acres of land, collecting rents, attending to the digging of two wells, making repairs, and attempting to find purchasers for land at a time when it was almost impossible to sell land or collect rents.

In re Sheeler, 226-650; 284 NW 799

Ex parte allowance of executor's and attorney's fees. Tho unsupported by affidavits, every material allegation in a verified motion

attacking an ex parte order allowing executor's and attorney's fees for extraordinary services will, in the absence of attack thereon or resistance thereto, be taken as true.

In re Metcalf, 227-985; 289 NW 739

Offsetting executor's debt against compensation. A debt due from an executor to the estate may not be set off against the amount allowed the executor for services as such executor, when the will provides that such debt shall be treated as an advancement. So held where assignees of the compensation were making claim thereto.

In re Bourne, 210-883; 232 NW 169

Drawing fees in partial payments. It is not improper for an administrator to draw a portion of the fees due him and to use the same in retiring an obligation due from himself to the estate.

In re Atkinson, 210-1245; 232 NW 640

Forfeiture of compensation. An executor who not only inexcusably fails to close an estate at the end of the statutory three-year period, and to turn the unexpended funds over to a designated testamentary trustee, but continues wrongfully, for a series of years, to act as executor, is very properly denied a right to the compensation which the testamentary trustee would have been entitled to during said years.

In re Mowrey, 210-923; 232 NW 82

Forfeiture of compensation. The failure of an executor to keep the estate funds separate from his personal funds, and the failure to keep reasonably complete and accurate accounts, may justify the court in denying the executor any compensation.

In re Mowrey, 210-923; 232 NW 82

Sale of mortgaged lands—basis for computing compensation. Compensation to an administrator for the sale of incumbered land is properly computed by figuring the statutory percentage on the expressed consideration less the amount of the existing incumbrance.

In re Lindell, 220-431; 262 NW 819

12064 Attorney fee.

Permissible employment. The good-faith employment by an executor of two firms to handle, in a large estate, proceedings for the construction of a cumbersome and involved will is not necessarily improper.

In re Leighton, 210-913; 224 NW 543

Burden of proof. The burden of proof is on attorney claiming fees for services, whether ordinary or extraordinary, and, while court may to a certain extent use its own judgment, claim should be based on evidence.

Glynn v Bank, 227-932; 289 NW 722

Determining factors. The court's allowance of administrator's attorney fees is largely discretionary, yet discretion must be reasonable, and the allowance should represent the fair and reasonable value of services rendered, taking into consideration the character of the services, the amount and extent of estate, and other pertinent matters.

Glynn v Bank, 227-932; 289 NW 722

Evidentiary support required. Tho a presumption of correctness exists in favor of trial court's decision fixing compensation for administrator's attorney, yet, where objection is made to application for allowance, and no evidence is introduced as to the services other than a bare statement in the applicant's affidavit, the trial court is not warranted in making a finding involving both nature and value of services.

Glynn v Bank, 227-932; 289 NW 722

Review. The appellate court will review an attorney's allowance for ordinary or extraordinary services to an estate where it appears from the record that the allowance is excessive or the claim therefor is not supported by sufficient evidence.

Glynn v Bank, 227-932; 289 NW 722

Review of order on appeal. On appeal from an order approving a referee's report in probate, the appellate court will not review an ex parte order of the probate court made two days after the making of the order appealed from, and pertaining to the amount of attorney fees allowed to the attorneys for the executor in said reference proceedings.

In re Cochran, 220-33; 261 NW 514

Employment for partisan purpose. An executrix who, as widow, has renounced the will, and elected to take her statutory distributive share, may not, at the expense of the estate, employ attorneys to take a partisan attitude in a rival contest as to heirship.

In re Leighton, 210-913; 224 NW 543

Allowable practice. An attorney may present his claim for services rendered to an administrator directly to the court.

In re Leighton, 210-913; 224 NW 543

Attorney fees charge against estate. An attorney who, in good faith, performs services in the probate of a will and in the appointment of the executrix with the knowledge and active assistance of the widow who was nominated executrix by the will and appointed by the court, has a claim against the estate for the value of said services.

In re Anderson, 216-1017; 250 NW 183

Services to trustee. While the statute seems to make no provision for the allowance of attorney fees for services rendered to trustees, yet such allowance is proper when the settle-

ment of the estate and the carrying on of the trust is one integral and interwoven matter.

In re Leighton, 210-913; 224 NW 543

Improper allowance of attorney fees. A trust created by a legislative appropriation act solely for the "education, care, and keep" of a designated person may not be depleted by the allowance by the court of attorney fees for services rendered not in the administration of the trust, but in inducing the legislature to make the appropriation.

In re Gage, 208-603; 226 NW 64

Partial payment. An administrator is properly given credit for an apparently reasonable sum advanced to the attorney for the estate as partial payment for services rendered.

In re Atkinson, 210-1245; 232 NW 640

Irregular payment—approval. Fees to an attorney for an administrator may, within safe limits, be allowed under interlocutory orders pending the administration; but if such fees are irregularly paid, e. g., paid without the advance approval of the court, nevertheless the court will, on a proper application, approve such payments if they are shown to be reasonable and legally authorizable.

In re Olson, 213-784; 239 NW 527

Fee fixed by agreement of heirs—when conclusive. The fee of an administrator's attorney may be fixed by agreement of the heirs and the amount is of no concern to anyone else, where no rights of creditors are involved.

In re Schropfer, 225-576; 281 NW 139

Revoking allowance — material evidence withheld from court. An executor being an officer of the court, the matter of his expenses is at all times subject to revision, so an order fixing his attorney's fees should be set aside when it appears that material matters were not before the court at the hearing.

In re Schropfer, 225-576; 281 NW 139

12065 Expenses and extraordinary services.

Burden of proof. An executor has the burden to prove the extraordinary services and the reasonableness of additional compensation.

In re Metcalf, 227-985; 289 NW 739

Extraordinary services—burden. The court may not in probate proceedings make an allowance to attorneys for "extraordinary" services in the absence of allegation and proof that they were such.

In re Murphy, 209-679; 228 NW 658

Extra fees—substantial showing required. An indefinite and unsubstantial showing of extraordinary services rendered by an executor will not permit an award of additional compensation.

In re Morgan, 225-746; 281 NW 346

Fees for extraordinary services. Without evidence as to extent and value of extraordinary services, an allowance therefor to executor and his attorney is not res judicata as to factual matters, and the attorney's statement which fails to separate time spent in court room from time spent in briefing and consultation will not furnish proper legal basis for any final adjudication.

In re Metcalf, 227-985; 289 NW 739

Extraordinary services. While court may take judicial notice of its own records in same case, this does not obviate necessity for proof of services and the reasonable value as to an attorney fee claim for extraordinary services to estate.

Glynn v Bank, 227-932; 289 NW 722

Evidence supporting allowance. In probate proceedings on objections to executor's report, evidence held sufficient to support allowance of fee of $750 where executor was required to look after several hundred acres of land, collecting rents, attending to the digging of two wells, making repairs, and attempting to find purchasers for land at a time when it was almost impossible to sell land or collect rents.

In re Sheeler, 226-650; 284 NW 799

Statutory fees as limit. Record held to support the action of the trial court in confining the compensation of an executor to the statutory percentage, he having rendered no extraordinary services.

Mills v Manchester, 213-95; 237 NW 228; 238 NW 718

Attorney fees—extraordinary services. It was not error to allow attorneys for executrix twice the statutory fee where record showed that substantial extraordinary legal services were rendered and that the allowance was reasonable and proper.

In re David, 227-352; 288 NW 418

Allowance by court—conclusiveness. An allowance by the court to an executor for ordinary and extraordinary services is conclusive on the appellate court when supported by competent and sufficient testimony.

In re Conkling, 221-1332; 268 NW 67

Ex parte allowance—proper attack by motion. While an estate is being administered, an ex parte order allowing executor's and attorney's fees for ordinary and extraordinary services is properly attacked by motion.

In re Metcalf, 227-985; 289 NW 739

Extraordinary services. Proceedings (1) for the construction of a will, (2) for the determination of a contested heirship, and (3) for the adjustment of the federal inheritance tax, are all in the nature of extraordinary matters within the meaning of this statute.

In re Leighton, 210-913; 224 NW 543

Appeal from the construction of a will. A reasonable allowance of attorney fees for services rendered on a good-faith appeal by the executor from an order of the trial court construing a cumbersome and involved will, is proper.

In re Leighton, 210-913; 224 NW 543

Extraordinary expense. An executor is under duty to defend a will after it is duly probated, and may employ counsel at the expense of the estate to contest an action to set aside the probate and to contest the will, even tho he has already employed counsel to advise him in his ordinary duties, and even tho he is personally interested in sustaining the will; and the court should, irrespective of the amount which the executor has agreed to pay, make a reasonable allowance to the executor for such expense when it is extraordinary.

In re Jewe, 201-1154; 208 NW 723

Inheritance tax claim—extraordinary services. Ordinarily, service rendered by attorney in settlement of inheritance tax claim is part of usual service in settlement of estate, but where litigation arises, or is likely to arise, apart from ordinary computation of tax, payment for extraordinary services may be allowed.

Glynn v Bank, 227-932; 289 NW 722

Traveling expenses. An administrator is properly given credit for his reasonable traveling expenses necessitated by the discharge of his official duties.

In re Atkinson, 210-1245; 232 NW 640

Disbursement for protection of interest in failing bank. An administrator may be given credit for estate funds paid out by him for notes purchased of a bank in which the estate was materially interested, in order to enable the bank to realize sufficient cash successfully to overcome a run on the bank, it appearing that the estate had reimbursed or could reimburse itself by collecting the notes so purchased.

In re Atkinson, 210-1245; 232 NW 640

Payment of voluntary assessment on bank stock. An administrator is properly given credit for paying a voluntary assessment on bank stock owned by the estate, when such payment was in the interest of the estate, and necessary in order to reorganize the bank and to maintain it as a going concern.

In re Atkinson, 210-1245; 232 NW 640

Justifiable advance by executor of his own funds. An executor who, because of a temporary shortage in estate funds, advances sums from his own private funds and therewith pays legal claims against the estate, rather than to sell, on a poor market, assets of the estate, is properly allowed interest on the amount so advanced.

In re Shepherd, 220-12; 261 NW 35

Compensation — attorney fees — temporary guardianship. An allowance of reasonable compensation to a temporary guardian and to his attorney in conserving and caring for the estate of the ward is proper, even tho no permanent guardian is appointed.

In re Barner, 201-525; 207 NW 613

Premium on bond—refusal to allow. The probate court is clearly within its discretion in refusing to allow against an estate and to the surety on an executor's bond (the executor being deceased and his estate insolvent) the amount of unpaid premiums on the bond, especially when such allowance would burden the estate with a double charge for premiums consequent on the mismanagement of the estate by the executor.

In re Mowrey, 218-992; 255 NW 511

12066 Removal of executor.

Surety as applicant. A surety on the bond of an administrator has such "interest in the estate" as empowers him to make application for the removal of the administrator, even though such surety has taken steps to terminate his future suretyship.

In re Donlon, 201-1021; 206 NW 674

Grounds. Jurisdiction to remove an administrator is furnished by an application by the surety on the bond wherein he prays for an order (1) removing the administrator, or (2) requiring the filing of a report and the making of distribution, when notice of the application is duly served on all interested parties, and when no part of the prayer has been withdrawn of record. The filing of a report under a mutual arrangement between the parties does not exhaust the jurisdiction of the court.

In re Donlon, 201-1021; 206 NW 674

Removal discretionary—inadvertency insufficient grounds. The removal of an executor being, under the statute, discretionary with the court, no abuse in refusing is shown where the evidence is entirely lacking in proof of waste, maladministration, disobedience of court orders, or misappropriation of funds by an executrix, a housewife, not familiar with the statutory requirements, and where her inadvertent failure to list certain assets and sell certain property caused no loss to estate.

In re Amick, 225-829; 281 NW 786

Removal for neglect—burden of proof. In an action by a testamentary beneficiary to remove an executor from office on the alleged ground of neglect to fully collect the assets of the estate, the plaintiff has the burden to establish (1) negligence on the part of the execu-

tor, and (2) resulting damage to the estate,—it appearing that the executor's purported final report is then on file and undisposed of.

In re Smith, 223-172; 271 NW 888

Petition to remove — nonpermissible adjudication. In an action in probate for the purpose, primarily, of removing an executor from office, substantially on the ground of alleged neglect to fully collect the amount of a bank certificate of deposit belonging to the estate, the court may not, after refusing an order of removal, properly enter an order releasing said executor from the duty further to account for said certificate.

In re Smith, 223-172; 271 NW 888

Future conduct (?) or invalidating former acts (?) as removal ground. A proper petition for removal of an administrator pursuant to the provisions of this section contemplates action incident to the future handling of the estate and future accounting as to past transactions. It does not contemplate an invalidation of previous handling of the estate, and, such relief being improper in a petition under this section, such petition is properly stricken on motion.

In re Collicott, 226-106; 283 NW 869

Superior right to make application and receive appointment. An alien, nonresident half-sister of a deceased, as next of kin, has the statutory right, superior to that of the resident paternal grandmother, during the 20 days following the burial of the deceased, to make application for the appointment (1) of herself, or (2) of any other suitable person as administrator, and an order of the probate court appointing a suitable person on the half-sister's application, and discharging the paternal grandmother who has in the meantime caused herself to be appointed, will not be disturbed.

In re Rugh, 211-722; 234 NW 278

Right to appoint successor. An order of the probate court appointing an executor, in place of an executor ordered removed, is perfectly valid and such new appointee after qualifying is not an intermeddler, even tho the order of removal is subsequently reversed on appeal, when the order of removal was in no manner stayed pending the appeal.

In re Mann, 217-1134; 251 NW 83

Unallowable procedure. The probate court on entering an order, on due application, modifying a former order relative to the compensation of an executor, has no authority to recognize judicially, on its own motion, the pendency in said court of a petition to remove said executor, and peremptorily, and on its own motion, to enter an order suspending or removing the executor on the basis of the testimony already received in the proceedings relative to compensation.

Gray v Mann, 208-1193; 225 NW 261

Ex parte revocation—effect. A peremptory, ex parte court order to the effect that the appointment of an administrator is revoked, and the simultaneous reappointment of the same administrator and the execution of another bond, does not effect a legal revocation, and consequently does not operate as a discharge of the bond given pursuant to the original appointment.

In re Donlon, 203-1045; 213 NW 781

Vacation of removal order. An order removing an administrator will not be vacated (1) when there is no showing that the administrator has any defense to the order, (2) when the extent of his liability to the estate as found by the court is admitted to be correct, (3) when he has held the estate open beyond the time contemplated by law, and (4) when he is largely indebted to the estate and is financially embarrassed.

In re Donlon, 201-1021; 206 NW 674

Failure to hear evidence. An order by the court removing an administrator will not necessarily be deemed invalid because the court did not formally receive any testimony.

In re Donlon, 201-1021; 206 NW 674

Petition for removal—when not demurrable. When the allegations of a petition for removal of an administrator are sufficient to warrant a hearing on the application because of a showing of a tangible and substantial reason to believe that damage will accrue to the estate, the petition is not vulnerable to a demurrer.

In re Arduser, 226-103; 283 NW 879

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfers, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprives said insolvent trustee of power further to act in said trusteeship, and (3) necessarily creates a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer

perform any duty as active trustee was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Findings as to liability. Whether a mere finding by the court as to the extent of the administrator's liability to the estate, entered on an application by the surety to remove the administrator, is an adjudication binding on the surety on the bond, quaere.

In re Donlon, 201-1021; 206 NW 674
See In re Carpenter, 210-553; 231 NW 376

12067 Petition.

Petition failing to state grounds. A petition, challenging the appointment of an administrator with will annexed and the correctness of the report filed on behalf of the deceased executrix, concluding with a prayer that the letters of administration be set aside, is insufficient inasmuch as it fails to state any ground for such removal as contemplated by §12066, C., '35.

In re Collicott, 226-106; 283 NW 869

12070 Probate reports—accounts.

Burden of proof. An administrator has the burden of proof to establish the nonprejudicial nature of his irregular report.

In re Eschweiler, 202-259; 209 NW 273

Self-impeachment by administrator. An administrator will not be heard to say that he did not have notice of his own verified reports. It follows that he has frail ground upon which to impeach his own reports, especially when all other heirs and interested parties acquiesce therein.

In re Olson, 213-784; 239 NW 527

Findings by court — conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case has force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

Care of property — standard required — accounting methods. A property guardian must exercise degree of care commensurate with responsibilities of the position and, while infallibility of judgment is not required, accurate accounts and self-explanatory vouchers should be kept.

McBurney v McBurney, (NOR); 210 NW 568

Order fixing fiduciary's liability. An unappealed order of court, entered on the objections of a beneficiary to the report of a fiduciary, fixing the amount of liability of the fiduciary, is conclusive (in the absence of fraud) on the surety and those claiming under said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

12071 Final report.

Hearings in probate. Hearings on the final reports of executors are at law and on appeal are reviewed as at law.

In re Mann, 217-1134; 251 NW 83
In re Oelwein, 217-1137; 251 NW 694

Notice of appeal—administrator failing to serve all objectors—effect. Notice of appeal from a judgment sustaining objections to an administrator's final report must be served on all heirs objecting to the report, and a failure will result in a dismissal of the appeal.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Lien—unauthorized order. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Reports not reviewed de novo on appeal. The trial court's findings in probate proceedings relating to executor's reports are not triable or reviewable de novo on appeal to the supreme court. If the findings have support in the record, they cannot be disturbed.

In re Sheeler, 226-650; 284 NW 799
In re Smith, 228- ; 289 NW 694

Presumption of regularity—review. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Findings on objections to final report. Trial court's ruling on objection to administrator's final report will not be disturbed on appeal where fact question was involved, as supreme court would not substitute its judgment for that of court below.

In re Windhorst, 227-808; 288 NW 892

Final report—effect—not decree of heirship or adjudication of interests. Altho a final report indicated names of devisees and legatees, the order approving it did not determine anything except that the executor had made a proper accounting and was entitled to be discharged; and, moreover, it did not establish rights and interests of all persons in estate's property.

McGarry v Mathis, 226-37; 282 NW 786

Administrator's debt to decedent—extent of liability. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

Renunciation by beneficiary — receipt and waiver of notice—no estoppel. A daughter was not estopped from renouncing benefits under father's will, even after approval of the final report in father's estate, merely because she signed an instrument called "receipt and waiver of notice" of the hearing on the final report, altho such instrument acknowledged receipt of all money and property due her as her father's heir, when she actually had received nothing and when creditors were not shown to have been misled to their injury.

McGarry v Mathis, 226-37; 282 NW 786

Executor trust company in receivership—court accountable to. Failure of the probate court to appoint a successor-executor for an insolvent trust company which had been a co-executor in a pending estate and which trust company had been placed in receivership, does not cause the receiver of such insolvent trust company to be accountable to probate court —a court not appointing him.

Bates v Evans, 226-438; 284 NW 385

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Maladministration by executor or trustee—definiteness of allegation. When the final report of an executor and trustee of an estate was objected to on the ground of maladministration, the objection was sufficient tho it did not state whether the alleged wrongful acts were performed while the trustee was acting in its official capacity as executor or trustee.

In re Carson, 227-941; 289 NW 30

Objections to final report—failure to dispose of securities. Objections to the final report of a trust company are not subject to a motion for more specific statement when officers of the trust company have equal or better knowledge of the facts called for by the motion, especially where the motion calls for evidentiary facts. Held, also, that trustee was charged with maladministration and not fraud.

In re Carson, 227-941; 289 NW 30

Wrongful retention of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor of an estate is sufficient in alleging generally that the trust company wrongfully retained securities which it should have disposed of altho it does not state on what dates the securities should have been sold and what their values were on those dates.

In re Carson, 227-941; 289 NW 30

Wrongful purchase of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated, and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

12072 Orders in probate—applications.

Removal of executor—unallowable procedure. The probate court, on entering an order, on due application, modifying a former order relative to the compensation of an executor, has no authority to recognize judicially, on its own motion, the pendency in said court of a petition to remove said executor and peremptorily and on its own motion to enter an order suspending or removing the executor on the basis of the testimony already received in the proceedings relative to compensation.

In re Mann, 208-1193; 225 NW 261

Notice of appeal—sufficiency of recitals. A notice of appeal which describes the proceeding by proper title and the order appealed from by proper date of rendition is all-sufficient, and brings up for review each and every feature of the order. So held where the final determination of the court embraced two orders, one germane to the proceeding before the court and one wholly non-germane.

In re Mann, 208-1193; 225 NW 261

12073 Notice of application for discharge.

Atty. Gen. Opinions. See '28 AG Op 310; '38 AG Op 273

Final report of administrator—review. Hearings on final reports of administrators are not reviewed de novo in the appellate court.

In re Manning, 215-746; 244 NW 860

No abstract, no review. An order of probate court, entered on testimony duly taken, sustaining objections to the final report of executors, cannot be reviewed on appeal in the absence of the presentation of said testimony in

accordance with the statutes, and rules of the appellate court.

In re Andrews, 221-818; 265 NW 187

Improper vacation of order. An order approving the final report of an executor and discharging him, on due notice to all parties interested, cannot be later set aside on the ex parte application of the former executor.

In re Brockmann, 207-707; 223 NW 473

Discharge—setting aside—conditions. Principle reaffirmed that an order discharging an executor may be impeached only for fraud or mistake extrinsic or collateral to the questions tried and inhering in the order or judgment assailed.

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Burden of proof. Principle reaffirmed that when there are inconsistencies between the final report of an administrator and his previous reports he has the burden of proof to sustain his final report.

In re Manning, 215-746; 244 NW 860

Absence of notice. The approval of the final report of a receiver in foreclosure proceedings and the discharge of the receiver, when entered without prior notice to the mortgagee, may be set aside on a showing that the receiver made an unauthorized distribution of the funds in his hands; and a delay of some four years by the mortgagee will not necessarily bar relief, especially when no one has changed his position because of the delay.

Farmers Bank v Pomeroy, 211-337; 233 NW 488

Absence of notice. Notice to the beneficiary of a trust, of the hearing on an application by the trustee for an order of court confirming an investment already made by the trustee, is not necessary, such application not being an adversary proceeding, and the record revealing the perfect good faith of the trustee.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Surety bound by adjudication. The surety on the bond of an executrix is not entitled to notice of the hearing on the final report of the executrix. It follows that said surety is not necessarily entitled to have the final order adjudging the liability of the executrix set aside "within three months" of its entry (§12051, C., '31) and to have said liability readjudicated, especially when no fraud or mistake is charged.

Reason: The surety is in privity with the executrix and is legally in the probate court when the liability of the executrix is determined.

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Excluding reports as evidence. Reports of an administrator are properly excluded in toto as evidence in his behalf when they contain self-serving declarations and recitals of personal transactions with the deceased as to which the administrator would be incompetent to testify, and when there is no offer to separate the competent matter from the incompetent matter.

In re Manning, 215-746; 244 NW 860

Incompetent ex parte statements. On hearing on final report of an administrator, an ex parte statement of a claim against the estate is properly excluded when the statement is apparently wholly immaterial, and when no effort is made to enlighten the court as to its materiality.

In re Manning, 215-746; 244 NW 860

Unallowable credit. An administrator is properly refused credit for a claim due the administrator when the claim has never been filed against the estate, and when there is no evidence sustaining the claim.

In re Manning, 215-746; 244 NW 860

12077.1 Small legacies to minors—payment.

Atty. Gen. Opinion. See AG Op June 5, '40

TITLE XXXIII

PARTICULAR ACTIONS AND SPECIAL PROCEEDINGS

CHAPTER 510

ATTACHMENT

12078 Method.

Statutory origin. Principle reaffirmed that proceedings in attachment are of statutory origin only, and in derogation of the common law.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Equity jurisdiction. A court of equity has no general jurisdiction to order an attachment without bond.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally levied on the property of the ward, and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

Federal conservator—authority. The federal statute that the conservator of a national bank shall act "under the direction" of the comptroller of the currency does not require the conservator to secure specific authority from the comptroller for the bringing of an attachment and the execution of a bond on behalf of the bank.

Ross v Long, 219-471; 258 NW 94

12079 Proceedings auxiliary.

Levy under invalid attachment—subsequent personal judgment — effect. While plaintiff obtains no lien on realty by virtue of a levy under an invalid attachment, yet, if he obtains personal judgment on the claim sued on, he will, from the entry of such judgment, have a lien notwithstanding the futility of the attachment proceedings.

Andrew v Miller, 221-316; 263 NW 845

Separate petition—when required. In order to convert an action which is unaided by attachment into an action which is aided by attachment, the filing of a separate petition is mandatorily required in order to furnish a jurisdictional basis for the attachment.

Fletcher v Gordon, 219-661; 259 NW 204

12080 Grounds.

ANALYSIS

I PETITION IN GENERAL
II STATEMENT OF GROUNDS

I PETITION IN GENERAL

Daughter's interest under will—intent of testator considered. In a suit in equitable attachment against the interest of a daughter under her father's will, the intent of the testator is to be considered in determining whether he intended the daughter to have any right other than to part of the income.

Friedmeyer v Lynch, 226-251; 284 NW 160

II STATEMENT OF GROUNDS

Remedies of creditors—evidence—sufficiency. Proof (1) that the vendee of personal property did not record or file his bill of sale as required by law, (2) that there was no change of possession following the bill of sale, and (3) that the vendee actively aided the vendor in disposing of the property as the property of the vendor, furnishes ample justification for the holding that the rights of a good-faith and innocent attaching creditor of the vendor were superior to the asserted rights of the vendee.

Beno Co. v Perrin, 221-716; 266 NW 539

12083 On contract—amount due.

Nonwaiver of unknown right to equitable lien. Where a father had orally contracted with a bank to pledge his son's share in his estate as security for a note executed by his son, later a bankrupt, on the understanding that payment from the father would not be sought while he lived, and where the father's copy of the contract contained an additional notation, made by a bank officer, that the bank would seek payment only from the son's share in the estate, which notation was unknown to the succeeding officers of the bank at the time of commencing an attachment action based on the father's attempted disposal of the pledged real estate, the bank's equitable lien on the real estate was not waived by the proceeding in attachment.

Emerson Bank v Cole, 225-281; 280 NW 515

12085 Allowance of value in other cases.

Unauthorized attachment. The statutory power of a judge of the district court in action for divorce to order an attachment, with or without bond, does not authorize him to enter such order in an action for separate maintenance.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

12086 For debts not due—grounds.

Nonwaiver of unknown right to equitable lien. Where a father had orally contracted with a bank to pledge his son's share in his estate as security for a note executed by his son, later a bankrupt, on the understanding that payment from the father would not be sought while he lived, and where the father's copy of the contract contained an additional notation, made by a bank officer, that the bank would seek payment only from the son's share in the estate, which notation was unknown to the succeeding officers of the bank at the time of commencing an attachment action based on the father's attempted disposal of the pledged real estate, the bank's equitable lien on the real estate was not waived by the proceeding in attachment.

Emerson Bank v Cole, 225-281; 280 NW 515

Testator's contract to devise to son—will changed after loan relying thereon—lien impressed. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor-son.

Emerson Bank v Cole, 225-281; 280 NW 515

12088 Bond.

Equity jurisdiction. A court of equity has no general jurisdiction to order an attachment without bond.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Substituting new bond. A new bond, sufficient in amount, may, after levy, be substituted for an original bond which was insufficient in amount.

Carson & Co. v Long, 219-444; 257 NW 815

Presumption. A bond executed in the name of a plaintiff in attachment, by the attorney appearing for such plaintiff, is presumptively valid.

Carson & Co. v Long, 219-444; 257 NW 815

12089 Additional security.

Substituting new bond. A new bond, sufficient in amount, may, after levy, be substituted for an original bond which was insufficient in amount.

Carson & Co. v Long, 219-444; 257 NW 815

12090 Action on bond.

Attorney fee—improper allowance. Attorney fees may not be allowed both by the jury and by the court.

Siegel Mkt. v Billings, 203-190; 210 NW 749

Attorney fees as matter of right. A defendant in an attachment who counterclaims on the bond and recovers both actual and exemplary damages is entitled to a taxation of reasonable attorney fees as a matter of right, even tho the sureties on the bond are not made parties to the counterclaim.

Mogler v Nelson, 211-1288; 234 NW 480

Counterclaim on deficiency judgment. In suit on attachment bond for damages, principal on bond could file counterclaim based on deficiency judgment obtained in foreclosure action although counterclaim was not in favor of surety on bond, since principal was primarily liable.

Imes v Hamilton, 222-777; 269 NW 757

Liability on bond—attorney's fee as costs. In an action for money due on a written instrument aided by attachment, to which a counterclaim on the bond was filed, and under an instruction providing that both plaintiff and defendant could recover, one against the other in equal amounts, the jury found for the defendant and of necessity that the attachment was wrongful thereby as a matter of law entitling defendant to a reasonable attorney's fee taxable as part of the costs.

Rodman v Ladwig, 223-884; 274 NW 1

Unallowable damages. A defendant in attachment who does not question plaintiff's claim, and who has never been disturbed or injured by the levy on his land, or sought to have the attachment levy discharged, may not, in an action on the bond, recover for loss of time and expense in securing attorneys to bring suit on the bond; neither may he recover such attorney fees.

Thielen v Schechinger, 211-470; 233 NW 750

12091 Remedy for falsely suing out—counterclaim.

Nonright to question grounds of attachment. An intervenor in attachment proceedings may not question the truthfulness of the grounds on which the attachment was issued. His statutory right to question the "validity" of the attachment (§12136) extends no further than to show that it is invalid as to him because he has an interest in the property superior to the attachment.

Thielen v Schechinger, 210-224; 230 NW 516

Incompetent testimony as to damage. In an action on an attachment bond, plaintiff will not be permitted to testify to his opinion as to the effect which the attachment had on a possible sale of the land upon which levy was made, there having been theretofore no negotiations whatever for such sale.

Thielen v Schechinger, 211-470; 233 NW 750

12092 Writ to sheriff.

Change in writ. A change in a writ of attachment as to the county in which it may be served, made at the direction of the clerk issuing the writ and prior to levy, is valid.

Carson & Co. v Long, 219-444; 257 NW 815

12093 Several writs to different counties.

Subsequent writs authorized. When a landlord's attachment is timely in that it was commenced within six months after the expiration of the lease, and the writ is improperly levied on property in a foreign county, a new writ may issue, even after the six months has expired, and a valid levy made thereunder on the same property if it has, in the meantime, been brought into the county of suit.

Welch v Welch, 212-1245; 238 NW 81

12094 Surplus levy.

Burden of proof. Burden to show that a levy is excessive rests on complainant.

Carson & Co. v Long, 219-444; 257 NW 815

12095 Property attached.

ANALYSIS

I LEVY IN GENERAL
II PROPERTY SUBJECT TO LEVY
III VALIDITY OF LEVY
IV RIGHTS AND PRIORITIES
V WRONGFUL LEVY

Sufficiency of levy. See under §12102, Vol I

I LEVY IN GENERAL

Abuse of process. The fact that a tenant's creditor is present at a public sale of the tenant's property and threatens to levy an attachment on said property does not constitute such abuse of process as will invalidate a check given by the landlord to the creditor in payment of his claim and to prevent such levy.

Myers v Watson, 204-635; 215 NW 634

II PROPERTY SUBJECT TO LEVY

Property under administration. Lands which belong to an estate and which have been ordered sold in probate in order to pay debts, are not subject to attachment in actions against heirs.

In re Collins, 207-1074; 224 NW 82

Custodia legis—burden of proof. If property is not subject to attachment or garnishment because undergoing partition, and, therefore, in the custody of the law, the mover for dissolution must show that no order for distribution has been entered in the partition proceedings.

Carson & Co. v Long, 219-444; 257 NW 815

Guardian and ward — unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally levied on the property of the ward, and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

Trust funds—exempt from trustee's creditors. In an attachment action against a defendant, engaged in business of selling grain on commission, funds received by defendant from sale of such third parties' grain and deposited in a bank are held in trust for payment to seller and not subject to garnishment by depositor's creditors.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Rentals—lease assignment—father-in-law's loan as consideration. Where an assignment of a lease on mortgaged lands is given to mortgagor's father-in-law as payment on a preexisting, bona fide, unpaid loan, altho the notes evidencing such loan had been returned by the father to the daughter with the understanding that the debt would, if possible, be paid during his lifetime, such an assignment is a payment on the debt to the extent of the rentals and is supported by ample consideration.

First JSL Bank v Ver Steeg, 223-1165; 274 NW 883

III VALIDITY OF LEVY

Levy—sufficiency. A sufficient levy is made by the act of the officer in invoicing the property and leaving it in the possession of his agent.

First N. Bk. v Schram, 202-791; 211 NW 405

Return—belated amendment. An application to amend the return on an execution, so as to show the essential facts constituting a levy, is properly denied when the application is made four months after the attempted levy, and is hostile to a stranger with a prior interest in the property sought to be levied on.

Cramer v McDonald, 213-454; 239 NW 101

Jurisdiction as sole question. Jurisdiction of the court is the only question which can be tried out on special appearance. So held where attempt was made, on such appearance,

to try out the question whether attached property was exempt from attachment or execution levy.

Scott v Wamsley, 215-1409; 245 NW 214

IV RIGHTS AND PRIORITIES

Priority to diligent creditor. A creditor who obtains title to land by virtue of his judgment and a creditor's bill under which an existing mortgage was decreed to be fraudulent will not, on the theory of superior diligence, be given priority over a known prior attaching creditor who levied on the land regardless of the said mortgage, and because he deemed the mortgage fraudulent, and who, prior to the decree under the creditor's bill, obtained the same result obtained under the creditor's bill, by securing from the fraudulent mortgagee, not only a verbal promise to release the mortgage, but an actual release of said mortgage.

Elson v Clayton, 200-935; 205 NW 745

Mortgage by grantee. A creditor, on learning that his debtor has made a voluntary conveyance of his property, may validly secure his debt by taking mortgage security from the voluntary grantee on the voluntarily conveyed property, and will thereby secure a right which will be superior to the right of another creditor who, subsequent to the mortgage, and after the death of the common debtor, reduces his claim to a so-called judgment against the latter, and, for his own exclusive benefit, levies on the voluntarily conveyed property.

Marion Bank v Smith, 205-203; 217 NW 857

V WRONGFUL LEVY

Liability on bond—instruction—attorney's fee as costs. In an action for money due on a written instrument aided by attachment, to which a counterclaim on the bond was filed, and under an instruction providing that both plaintiff and defendant could recover, one against the other in equal amounts, the jury found for the defendant and of necessity that the attachment was wrongful, thereby as a matter of law entitling defendant to a reasonable attorney's fee taxable as part of the costs.

Rodman v Ladwig, 223-884; 274 NW 1

12098 Corporation stock.

Appeal does not vacate or affect judgment. A judgment which releases and discharges an execution levy on corporate shares of stock is a self-executing judgment, and is in full force and effect from the date thereof to the time the judgment is reversed on appeal and the execution levy reinstated, and one who purchases said stock after the entry of said judgment and before the reversal thereof, from the owners thereof as shown by the corporate stock books, will be protected in his ownership when he purchased in good faith, for value, and without knowledge of said litigation.

Hewitt v Cas. Co., 212-316; 232 NW 835

Essentials of levy. An attempted levy on corporate shares of stock is, as to a stranger with a prior interest in the property, a nullity (1) unless the president of the company or other officer designated by the statute is notified in writing that the stock has been levied on, and (2) unless the return on the writ states that such notice was given. (§11676, C., '31.)

Cramer v McDonald, 213-454; 239 NW 101

12099 Judgments—money—things in action.

Unadjudicated cause of action. The statute (§11672, C., '31) which provides for execution levy on "things in action" authorizes a levy on an unadjudicated cause of action which the judgment defendant is prosecuting against the judgment plaintiff for breach of contract.

Brenton v Dorr, 213-725; 239 NW 808

Failure to serve notice on defendant. Failure of the officer making the levy to serve notice on judgment defendant of the levy, on a chose in action, furnishes ample grounds for quashing the writ and staying sale thereunder.

Brenton v Dorr, 213-725; 239 NW 808

12100 Property in possession of another.

Property in possession of another. See under §12095

Right to income from trust dependent on election or demand by cestui—effect. A trust which provides that the income therefrom shall be paid to a named beneficiary "from time to time as she may elect during her lifetime", effectually places said income beyond the reach of the creditors of said beneficiary so long as said beneficiary makes no such election.

Ober v Dodge, 210-643; 231 NW 444

Spendthrift trust. If the terms of a trust provide that the income be applied to the cestui at the discretion of the trustee, or the income is payable to the cestui at his demand, or the trust is for a special purpose, or in general where no debt is owed the cestui by the trustee, the creditors of the cestui cannot appropriate the benefaction.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trust—creditor's rights. When the testator's will created a trust for his son, providing that the proceeds of the trust be paid to the son "yearly or oftener if collected for shorter periods," and contained no words showing an intent to place the trust income beyond the reach of the son's creditors, a debt due the son from the trustee was created, which was a vested right which could be assigned and was subject to claims of creditors.

Standard Chemical v Weed, 226-882; 285 NW 175

12101 Garnishment.

Garnishment. See under Ch 513

Unadjudicated cause of action. The statute (§11672, C., '31) which provides for execution levy on "things in action" authorizes a levy on an unadjudicated cause of action which the judgment defendant is prosecuting against the judgment plaintiff for breach of contract.

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Trust funds—exempt from trustee's creditors. In an attachment action against a defendant, engaged in business of selling grain on commission, funds received by defendant from sale of such third parties' grain and deposited in a bank are held in trust for payment to seller and not subject to garnishment by depositor's creditors.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Discharge on motion. The statute authorizing the discharge of an attachment upon motion before trial is summary in character and the showing in support of a motion filed thereunder should be made clear and entirely satisfactory, but the legislative intent in providing proceedings under attachment that will be expeditious should not be overlooked nor in any casual manner thwarted.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

12102 When property bound.

Levy in general. See under §12095

Atty. Gen. Opinion. See AG Op Feb. 28, '39

12103 Real estate.

Execution debtor's "right of possession". A debtor's statutory "right of possession" of real estate during the year given for redemption from sale on execution is not, in and of itself, leviable.

Sayre v Vander Voort, 200-990; 205 NW 760; 42 ALR 880

Contingent remainder. A contingent remainder—contingent because of the uncertainty of the person who will take the property—is not subject to attachment or execution levy and sale.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Crops raised during redemption period.

Howe v Briden, 201-179; 206 NW 814
Goldstein v Mundon, 202-381; 210 NW 444
Starits v Avery, 204-401; 213 NW 769

Immature crops.

Rodgers v Oliver, 200-869; 205 NW 513

Renunciation of legacy—effect.

Funk v Grulke, 204-314; 213 NW 608

Right to renounce devise or bequest. The legal right of a beneficiary under a will to file an unconditional and final renunciation of all benefits granted him by the will, and thereby exclude his creditor from acquiring any right to the devised property, may be exercised even after a creditor of said beneficiary has levied upon, sold, and obtained a sheriff's deed to, the land devised to said beneficiary, it appearing that the renouncing beneficiary had in no manner misled the creditor.

Lehr v Switzer, 213-658; 239 NW 564

Attachment—nonwaiver of unknown right to equitable lien. Where a father had orally contracted with a bank to pledge his son's share in his estate as security for a note executed by his son, later a bankrupt, on the understanding that payment from the father would not be sought while he lived, and where the father's copy of the contract contained an additional notation, made by a bank officer, that the bank would seek payment only from the son's share in the estate, which notation was unknown to the succeeding officers of the bank at the time of commencing an attachment action based on the father's attempted disposal of the pledged real estate, the bank's equitable lien on the real estate was not waived by the proceeding in attachment.

Emerson Bank v Cole, 225-281; 280 NW 515

Testator's contract to devise to son—will changed after loan relying thereon—lien impressed. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor-son.

Emerson Bank v Cole, 225-281; 280 NW 515

12104 Lien.

When levy, lien, and notice effected. A levy on real estate under a writ of attachment is made and a lien is created and notice to third parties effected by the proper signed entry of the sheriff on the incumbrance book in the office of the clerk of the district court.

(Prior to the Code of 1897, the levy was made and lien was created by the proper signed return of the sheriff on the writ of attachment, and notice to third parties was effected by the proper signed entry of the sheriff on the incumbrance book. §§3010, 3022, C., '73.)

First N. Bk. v Kindwall, 201-82; 206 NW 241

Sufficiency of entry. A lien on real estate is effected under a writ of attachment by a duly signed entry in the incumbrance book wherein the land is described as "SE¼, Sec. 8-91-38 in Buena Vista County, Iowa."

First N. Bk. v Kindwall, 201-82; 206 NW 241

Denial of lien—conclusiveness. An unappealed holding in attachment proceedings that plaintiff, tho entitled to judgment against defendant, had acquired no lien on certain real estate is a finality. In other words, plaintiff may not, years afterwards, between other parties dispute said adjudication.

Nagl v Hermsen, 219-223; 257 NW 583

12105 Levy on equitable interest.

Life estate—delinquent taxes. When judgment creditor of a life tenant, by virtue of execution, levies upon a life estate and purchases the life estate on execution sale, he assumes all the duties of a life tenant and is obligated to pay delinquent taxes, or else lose the advantage of the life estate.

Rich v Allen, 226-1304; 286 NW 434

Daughter's interest under will—intent of testator considered. In a suit in equitable attachment against the interest of a daughter under her father's will, the intent of the testator is to be considered in determining whether he intended the daughter to have any right other than to part of the income.

Friedmeyer v Lynch, 226-251; 284 NW 160

12106 Lands fraudulently conveyed.

Fraudulently conveyed property. See under §§11815, 12095

Mutual intent. An action to set aside a conveyance as fraudulent necessitates proof of a mutual intent to defraud.

Newman v Callahan, 212-1003; 237 NW 514

Equitable interest—procedure. Plaintiff by alleging under this section in an action on a promissory note that the maker had fraudulently conveyed his property, and by praying for an attachment on the property, and for a decree subjecting the property to plaintiff's judgment, does not thereby eliminate the necessity of equitable proceedings to reach said property.

Fed. Res. Bank v Geannoulis, 203-1385; 214 NW 576

Right to set aside conveyance—condition precedent—laches. The right of a creditor to have the fraudulent conveyance of his debtor judicially set aside is not a matured right—a matured cause of action—until the creditor obtains, by judgment or attachment, a lien on the land in question. But the creditor will not be permitted negligently to delay maturing his own cause of action, and if he does so delay for a period equal to or greater than the 5 years allowed by statute for bringing the action, he will be deemed guilty of such laches as will completely bar his action, even tho it be conceded that, strictly speaking, the action is not barred by the statute of limitation.

Bristow v Lange, 221-904; 266 NW 808

Setting aside—limitation of actions—laches. A suit in equity by trustee in bankruptcy to set aside deed by bankrupt to husband on grounds of want of consideration, fraud, and failure to take possession of land, brought more than 6 years after recording of deed, is barred by laches under statute of limitations where only one creditor secured allowance of claim, which claim was based on note past due when deed was recorded.

Monroe v Ordway, 103 F 2d, 813

Fraudulent conveyance—action by trustee to set aside. A trustee in bankruptcy may not maintain an action to set aside a fraudulent conveyance by the bankrupt unless he pleads and proves that such setting aside is necessary in order to pay claims allowed in the bankruptcy proceedings.

Newman v Callahan, 212-1003; 237 NW 514

Void remainders created by will. Property embraced in a void, testamentary limitation—void because prohibited by the statute relating to perpetuities—passes to those persons who would have been entitled thereto under the laws of intestacy had the limitation been omitted from the will, and a judgment creditor may, by proper procedure, have a lien established thereon.

Bankers Tr. v Garver, 222-196; 268 NW 568

Voluntary, nonfraudulent conveyance—valid against judgment on subsequent bank stock assessment. Altho wholly voluntary, a conveyance executed when the grantor has no fraudulent intent cannot be impeached by a subsequent creditor, so a real estate conveyance by a husband to his wife many years before he becomes a bank stockholder cannot be invalidated by the creditors of the bank, seeking to collect a judgment on stock liability assessment.

Bates v Kleve, 225-255; 280 NW 501

Testator's contract to devise to son—will changed after loan relying thereon—lien impressed. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor-son.

Emerson Bank v Cole, 225-281; 280 NW 515

12107 Notice to defendant—return.

Failure to serve notice. Failure of the officer making the levy to serve notice on judgment defendant of the levy, on a chose in action, furnishes ample grounds for quashing the writ and staying sale thereunder.

Brenton v Dorr, 213-725; 239 NW 808

Failure to give notice. The failure of the levying officer to give the defendant in attachment notice of the levy on a judgment does not necessarily work any invalidating effect on the levy.

Edwards v Tracy, 203-1083; 212 NW 317

Waiver of notice. The failure of the levying officer to notify the defendant in attachment of a levy on a judgment is waived when the duly served original notice gave defendant such notice and he did not question such levy until some two months thereafter.

Edwards v Tracy, 203-1083; 212 NW 317

12108 Notice to party in possession.

Notice to clerk. The clerk of the court is not in possession of a judgment in such sense that notice of a levy thereon need be served on such clerk.

Edwards v Tracy, 203-1083; 212 NW 317

12110 Examination of defendant.

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

12114 Lien acquired—action to determine interest.

Right to set aside conveyance—condition precedent—laches. The right of a creditor to have the fraudulent conveyance of his debtor judicially set aside is not a matured right—a matured cause of action—until the creditor obtains, by judgment or attachment, a lien on the land in question. But the creditor will not be permitted negligently to delay maturing his own cause of action, and if he does so delay for a period equal to or greater than the 5 years allowed by statute for bringing the action, he will be deemed guilty of such laches as will completely bar his action, even tho it be conceded that, strictly speaking, the action is not barred by the statute of limitation.

Bristow v Lange, 221-904; 266 NW 808

12116 Mortgaged personal property.

Levies on mortgaged personalty. See §11682, Vol. I

12117 Indemnifying bond.

Indemnifying bonds. See under §11702
Atty. Gen. Opinion. See '32 AG Op 270

Notice of ownership—sufficiency. The sworn, written notice of ownership, which is given an officer who has levied on the property, is sufficient in form and contents if it actually enables the officer to secure an indemnifying bond.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

Defective notice of ownership. The fact that the notice to an attaching officer of the interest of a chattel mortgagee in attached property is defective becomes of no consequence when it is made to appear that the mortgagee was in open and undisputed possession of the mortgaged chattels and was proceeding to foreclose the mortgage when the officer levied the attachment.

Smith v Goldberg, 204-816; 215 NW 956

Chattel mortgagee—allowable procedure. A chattel mortgagee may, when the property is levied on by an attaching creditor of the mortgagor, serve notice of his interest, on the levying officer, and thereafter, if the property is not released, maintain an action for conversion against the attaching plaintiff and the levying officer.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

12118 Bond to discharge.

Failure of clerk to approve—effect. The court acquires no jurisdiction of a surety on a bond to discharge an attachment when the bond is executed after the sheriff has levied the writ and made return thereon to the clerk, and the bond is not approved by said clerk, as required by statute. It follows that a default judgment against the surety, under such circumstances, is properly set aside on timely motion.

Brenton v Lewiston, 204-892; 216 NW 6

12121 Delivery bond.

Breach. A statutory delivery bond is breached by the failure to redeliver the at-

tached property or its appraised value to the sheriff within 20 days after the entry of the judgment upon the verdict, irrespective of the subsequent entry of orders denying a new trial.

Cox v Surety Co., 208-1252; 226 NW 114

12122 Appraisement.

Bond—measure of damages. The measure of recovery on a delivery bond is the appraised value of the property, not exceeding, however, the amount of the judgment recovered in the main action.

Cox v Surety Co., 208-1252; 226 NW 114

12127 Sheriff's return.

Amendment of return. See under §12143

Permissible amendment. The return of the levy of an attachment may be so amended as (1) to definitely locate the property levied on and (2) to specifically describe the kind of property levied on.

Salinger v Elev. Co., 210-668; 231 NW 366

Fatal insufficiency. The delivery, by plaintiff's attorney to the clerk, of an execution and the indorsement thereon, by the clerk, of the words "Returned not satisfied" does not constitute a legal return.

Richardson v Rusk, 215-470; 245 NW 770

12132 Judgment—satisfaction—special execution.

Execution sale of promissory note—purchase by maker. The maker of a promissory note and mortgage may, by himself or through others, validly purchase said note and mortgage at execution sale against the payee or holder thereof, and thereby completely discharge the same.

Buter v Slattery, 212-677; 237 NW 232

Lien—nonwaiver by taking general judgment. The plaintiff in landlord's attachment by failing to ask for a special execution for the sale of the attached property, and by taking a general judgment against the lessee, does not thereby waive his landlord's lien. On the contrary, the lien follows the general judgment upon which a special execution may issue notwithstanding the failure to pray therefor, and notwithstanding the failure of the judgment to provide therefor.

Wunder v Schram, 217-920; 251 NW 762

Voluntary conveyance—knowledge of creditor. When land, which was part of an estate, was purchased by decedent's two sons, who paid no cash consideration, but occupied, paying rent to the other heirs, and who later, in order to protect the land from creditors, deeded it to two sisters who did not know of the indebtedness of the brothers, and when the sons made a contract with the sisters at the time of the deed protecting the other heirs in case the land were sold, a creditor of one of the brothers who knew of the rent payments and knew of the deed, but made no objection, could neither have it set aside as a fraudulent conveyance nor have the real estate subjected to a judgment against the debtor-brother, as the deed and contract conveyed the mere legal title to the sisters in trust for the heirs who were the persons entitled to the property.

Lakin v Eittreim, 227-882; 289 NW 433

Sale—right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he was bidding on two separate tracts of land, when only one tract was being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

12135 Surplus.

Excessive levy—burden of proof. Burden to show that a levy is excessive rests on complainant.

Carson & Co. v Long, 219-444; 257 NW 815

12136 Intervention—petition.

Proceedings applicable to garnishment on execution. The statute providing, where parties have been garnished under an execution, the officer shall return to the next term thereafter a copy of the execution, and that thereafter the proceedings shall conform to proceedings in garnishments under attachments, permits the claimants of liens upon or interests in money or property held by garnishment on execution to intervene and proceed under statute permitting intervention in attachment proceedings.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

When allowable. In an equitable action aided by attachment, a party claiming the attached property may present his claim by petition of intervention, even tho he has been made a defendant in the main action.

Citizens Bank v Haworth, 208-1100; 222 NW 428

Unallowable plea. An intervenor who claims recovery for property seized by plaintiff on an attachment, may not, after so recovering, inject into his intervention another and separate demand for property wholly disconnected with said attachment.

Peoples Bk. v McCarthy, 211-40; 231 NW 482

Nonright to question grounds of attachment. An intervenor in attachment proceedings may not question the truthfulness of the grounds on which the attachment was issued. His statutory right to question the "validity" of the attachment extends no further than to show that it is invalid as to him because he has an interest in the property superior to the attachment.

Thielen v Schechinger, 210-224; 230 NW 516

Irrevocable abandonment of action. An intervenor who pleads a personal claim to specific attached property but later joins with other intervenors in a joint demand for judgment for all the property seized on the attachment belonging to all the intervenors, and receives a part of the resulting judgment when it is paid, must be held to have irrevocably abandoned her formerly pleaded personal claim.

Peoples Bk. v McCarthy, 211-40; 231 NW 482

Motion to discharge attachment—rights asserted by fiduciary of funds. Defendant engaged in business of selling grain on commission for his customers and depositing money in a bank, properly files a motion to discharge attachment by garnishment of such funds as against contention that such motion urged third parties' claims which should have been raised by them in intervening petitions, where defendant asserts his rights, duties, and liabilities as trustee or custodian of funds garnished.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Garnishment—attorney's lien against estate funds. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

12137 Hearing and orders.

Proceedings applicable to garnishment on execution. The statute providing, where parties have been garnished under an execution, the officer shall return to the next term thereafter a copy of the execution, and that thereafter the proceedings shall conform to proceedings in garnishments under attachments, permits the claimants of liens upon or interests in money or property held by garnishment on execution to intervene and proceed under statute permitting intervention in attachment proceedings.

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New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

12138 Costs.

Attorney's fee as costs. In an action for money due on a written instrument aided by attachment, to which a counterclaim on the bond was filed, and under an instruction providing that both plaintiff and defendant could recover, one against the other in equal amounts, the jury found for the defendant and of necessity that the attachment was wrongful thereby as a matter of law entitling defendant to a reasonable attorney's fee taxable as part of the costs.

Rodman v Ladwig, 223-884; 274 NW 1

12139 Discharge on motion.

ANALYSIS

I Motion to Discharge in General
II Availability of Motion
III Nonavailability of Motion

I MOTION TO DISCHARGE IN GENERAL

Motion—fatally delayed presentation. The objection that a motion to discharge an attachment was not timely may not be raised for the first time on appeal.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Statute construed. The statute authorizing the discharge of an attachment upon motion before trial is summary in character and the showing in support of a motion filed thereunder should be made clear and entirely satisfactory, but the legislative intent in providing proceedings under attachment that will be expeditious should not be overlooked nor in any casual manner thwarted.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Motion confesses petition. Defendant who moves to dissolve an attachment, because of want of authority in plaintiff to maintain the action, must be deemed to confess the truth of the well-pleaded allegations of the petition.

Ross v Long, 219-471; 258 NW 94

Motion — adjudication. A hearing on the merits of a motion to dissolve an attachment

I MOTION TO DISCHARGE IN GENERAL —concluded

on the grounds that movant, and not the principal defendant, was the absolute owner of the property does not necessarily preclude the movant from again presenting and trying out, in the same action, his claim of ownership, on a petition of intervention.

Citizens Bank v Haworth, 208-1100; 222 NW 428

Conclusion affidavit. A debtor who seeks to have tools released from levy does not meet the burden of proof resting upon him by simply asserting the conclusion "that he is a mechanic" and "that said tools are exempt". The facts showing that he is, in fact, a mechanic and the facts showing consequent exemption must be stated.

First N. Bk. v Larson, 213-468; 239 NW 134

Insufficient showing of exemption. An automobile is not shown to be exempt to the head of a family and a resident of this state on the naked assertion "that it is necessary for the owner to use an automobile in the earning of a livelihood".

First N. Bk. v Larson, 213-468; 239 NW 134

Loss of appeal. No appeal will lie from an order discharging a garnishee unless the purpose or intent to appeal is announced at the time of the discharge, even tho the motion to discharge has been taken under advisement by the court, and even tho the garnishing creditor is not present when the order is made; and especially is this true when the garnishing creditor had fair warning of the adverse ruling.

Woods v Brown, 207-944; 223 NW 868

Time to perfect appeal—procedure. Under mandatory statute, a garnishing creditor whose levy is discharged by court order must, when such order is made, announce his intention to appeal therefrom followed by perfection of the appeal within two days, and his noncompliance therewith is fatal.

Sioux Falls Assn. v Henry Field Co., 224-655; 277 NW 284

Motion to dismiss garnishee—burden of sustaining on appeal. On an appeal from an order overruling a motion to dismiss a garnishee, the burden of sustaining the motion was on the garnishee.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Foreign corporations—dissolution and receivership—effect. A foreign decree of dissolution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Foreign corporations — dissolution — effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement, (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

II AVAILABILITY OF MOTION

Ruling on motion to dismiss—res judicata. A ruling on a motion to dismiss garnishment proceedings on the grounds that the property was in custodia legis and not subject to garnishment was not premature and was res judicata even tho made before the garnishee was examined and the garnishment proceedings completed, when the court had jurisdiction of the parties and subject matter.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Rights asserted by fiduciary of funds. Defendant engaged in business of selling grain on commission for his customers and depositing money in a bank, properly files a motion to discharge attachment by garnishment of such funds as against contention that such motion urged third parties' claims which should have been raised by them in intervening petitions, where defendant asserts his rights, duties, and liabilities as trustee or custodian of funds garnished.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally

levied on the property of the ward, and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

III NONAVAILABILITY OF MOTION

Oral motion at close of testimony. Oral motion to dismiss attachment at close of testimony held properly overruled where no motion to discharge was made as provided in this section.

Collings v Gibson, (NOR); 220 NW 338

12141 Perfecting appeal from order of discharge.

Loss of appeal. No appeal will lie from an order discharging a garnishee unless the purpose or intent to appeal is announced at the time of the discharge, even tho the motion to discharge has been taken under advisement by the court, and even tho the garnishing creditor is not present when the order is made; and especially is this true when the garnishing creditor had fair warning of the adverse ruling.

Woods v Brown, 207-944; 223 NW 868

Timely appeal. Where, under stipulation, a garnishment proceeding is transferred to equity along with the controversy between different parties as to the ownership of the money sought to be condemned, and the entire matter there tried as an equity cause, an appeal from the final decree need not be perfected within two days as provided by statute in attachment proceedings.

Hoyer v Jordan, 208-1256; 224 NW 574

Execution—attachment procedure inapplicable. The statutory provision for preserving a lien under attachment notwithstanding an order discharging the attachment by announcing an appeal and perfecting the same within two days, has no application to an order discharging a levy under execution.

Hewitt v Cas. Co., 212-316; 232 NW 835

Garnishment — uncontested order — appeal requirements not waived. The fact that a receiver in a foreclosure proceeding does not resist an order, directing him to withhold sufficient funds to satisfy a judgment creditor, will not amount to an adjudication of creditors' rights in the funds nor constitute a waiver of the statute regulating time to appeal from a release of a garnishment, nor confer jurisdiction on the appellate court to review the dismissal of the garnishment proceedings, since such jurisdiction cannot be conferred by consent of the parties.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

Garnishment—dissolution—perfection of appeal. Under mandatory statute, a garnishing creditor whose levy is discharged by court order must, when such order is made, announce his intention to appeal therefrom followed by perfection of the appeal within two days, and his noncompliance therewith is fatal.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

12143 Liberal construction—amendments.

Statutory origin—common law. Principle reaffirmed that proceedings in attachment are of statutory origin only, and in derogation of the common law.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Substituting new bond. A new bond, sufficient in amount, may, after levy, be substituted for an original bond which was insufficient in amount.

Carson & Co. v Long, 219-444; 257 NW 815

CHAPTER 513

GARNISHMENT

12157 How effected—notice.

ANALYSIS

I JURISDICTION
II PERSONS AND PROPERTY SUBJECT TO GARNISHMENT
III WRIT
IV NOTICE
V SERVICE
VI RETURN
VII LIEN OF GARNISHMENT
VIII LIABILITY OF GARNISHEE
IX CLAIMS BY THIRD PERSONS
X OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT

I JURISDICTION

Special appearance—jurisdiction as sole question. Jurisdiction of the court is the only question which can be tried out on special appearance. So held where attempt was made, on such appearance, to try out the question whether attached property was exempt from attachment or execution levy.

Scott v Wamsley, 215-1409; 245 NW 214

Judgment—equitable relief—erroneous finding against garnishee. Concede that a finding by the court that the garnishee was indebted to the defendant in attachment was erroneous,

nevertheless such fact furnishes no basis for enjoining the enforcement of the judgment entered on such finding, when the court was proceeding under fully acquired jurisdiction.

Farmers Union Exch. v Iowa Adj. Co., 201-78; 203 NW 283

II PERSONS AND PROPERTY SUBJECT TO GARNISHMENT

Discussion. See 13 ILR 164—Garnishment of alimony

Unmatured and contingent debt. Principle reaffirmed that a person is not garnishable on a debt which is not due and payable and which, under a certain contingency, will never be payable.

Malone v Moore, 208-1300; 227 NW 169

Alimony not debt "to become due". The defendant in a decree for alimony (assuming such decree to create a "debt") is not garnishable on an installment which is unmatured on the date of the garnishment, and the maturity of which will be wholly defeated by the death of the plaintiff in alimony before the maturity date as provided by the decree.

Malone v Moore, 204-625; 215 NW 625; 55 ALR 356

Decree for alimony. A decree for alimony in fixed monthly payments does not create a "debt". It follows that the defendant in alimony cannot be legally garnished for unpaid installments as a debtor of the plaintiff in alimony, even tho the claim on which the garnishment is based is for necessaries sold to the plaintiff in alimony since the entry of the decree and in reliance on said decree.

Malone v Moore, 212-58; 236 NW 100

Allowance for children. Money awarded to a mother in a decree of divorce "for the support and maintenance" of her minor children, is not subject to process of garnishment under a personal judgment against the mother.

Peck v Peck, 207-1008; 222 NW 534

Special deposit superior to garnishment. Money deposited or caused to be deposited by a depositor in a bank for the sole use and benefit of a bona fide creditor of the depositor, and under an agreement to that effect between the depositor and said creditor, of which arrangement the bank had full knowledge, constitutes a special deposit. It follows that a subsequent garnishment of the fund is subject to the prior rights of the creditor for whom the deposit was made.

Hamilton v Imes, 216-855; 249 NW 135

Deposits—changing into special trust deposit. A seizure by garnishment proceedings of a general bank deposit, followed (1) by a direction by the garnishing plaintiff to the garnishee bank to hold said deposit in a named amount (which was 150% of the amount sued for), and (2) by an answer by the garnishee in accordance with said direction, does not have the legal effect of changing said sum from the status of a general deposit to the status of a special deposit—to the status of a trust fund—with consequent right to preferential payment in case the bank becomes insolvent.

Andrew v Bank, 220-712; 263 NW 495

Property in custodia legis. Property in custodia legis is not garnishable in the absence of an authorizing statute.

Malone v Moore, 208-1300; 227 NW 169

Custodia legis. A ruling on a motion to dismiss garnishment proceedings on the grounds that the property was in custodia legis and not subject to garnishment was not premature and was res judicata even tho made before the garnishee was examined and the garnishment proceedings completed, when the court had jurisdiction of the parties and subject matter.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Garnishment of receivers. A receiver is ordinarily exempt from garnishment because the funds in his possession are in custodia legis, but if he has funds which he is not authorized to possess under the order appointing him or which are not the property of the estate for the preservation of which he was appointed, such property is subject to garnishment.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Creditor's rights against receiver. When a company in receivership had no right to property in the possession of the receiver at the time of a garnishment, the rights of the garnishing creditor against the receiver-garnishee could be no greater than the rights of the company.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Rents and profits. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Trustees and trust funds. A trustee cannot be made a garnishee by a creditor of the cestui que trust when, at the time of garnishment, the net income only of the trust is (under the terms of the trust) payable to the cestui, and then only on his optional demand, and when such net income was not only then

undeterminable, but the cestui had not exercised his option to demand it.

Darling v Dodge, 200-1303; 206 NW 266

Trustee without funds. Where an estate was, under a decree of divorce, owing a divorcee on the last day of a month an installment of alimony payable through a trustee, and where the executor failed to make a deposit with the trustee to meet said payment, held, that the trustee was not garnishable as a debtor of the divorcee, even tho such trustee had on hand estate funds which had been deposited for another purpose, but out of which the trustee had no right to make such payment of alimony.

Malone v Moore, 208-1300; 227 NW 169

Wrongful payment by trustee — effect. Where an estate was, under a decree of divorce, owing a divorcee on the last of a month an installment of alimony payable through a trustee, and where the executor failed to make a deposit with the trustee to meet said payment, nevertheless the executor is not garnishable as a debtor of the divorcee when the trustee, without authority, had, prior to the garnishment of the executor, paid the divorcee in full out of other estate funds in his possession, such wrongful payment having been ratified by the executor.

Malone v Moore, 208-1300; 227 NW 169

Matured debt due from trustee. Where an order of court directed a special administrator to deposit with a trustee on the last day of each month, a stated sum and directed the trustee to pay said sum forthwith to the former wife of the deceased if she be then living, held that the trustee was garnishable on the last day of a month as a debtor of the wife, she being then alive; and in such case it is of no consequence that the special administrator had made a premature and excessive deposit with the trustee, for the purpose of complying with the order.

Malone v Moore, 208-1300; 227 NW 169

Right to income from trust dependent on election or demand by cestui. A trust which provides that the income therefrom shall be paid to a named beneficiary "from time to time as she may elect during her lifetime" effectually places said income beyond the reach of the creditors of said beneficiary so long as said beneficiary makes no such election. Evidence held to show an election as to one monthly payment.

Ober v Dodge, 210-643; 231 NW 444

Spendthrift trusts. If the terms of a trust provide that the income be applied to the cestui at the discretion of the trustee, or the income is payable to the cestui at his demand, or the trust is for a special purpose, or in general where no debt is owed the cestui by the trustee, the creditors of the cestui cannot appropriate the benefaction.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trust — creditor's rights in. When the testator's will created a trust for his son, providing that the proceeds of the trust be paid to the son "yearly or oftener if collected for shorter periods," and contained no words showing an intent to place the trust income beyond the reach of the son's creditors, a debt due the son from the trustee was created, which was a vested right which could be assigned and was subject to claims of creditors.

Standard Chemical v Weed, 226-882; 285 NW 175

Renounced legacy. The act of a testamentary beneficiary in executing and making of record an unconditional and final renunciation of all benefits granted him under the will legally places such benefits beyond the reach of his creditors.

Funk v Grulke, 204-314; 213 NW 608

Special administrator. A special administrator is not subject to garnishment on a general claim due from the estate to the defendant in garnishment.

Malone v Moore, 208-1300; 227 NW 169

Administrator—income from life estate. Administrator who was garnished by judgment creditor of decedent's widow, who was life tenant, held liable only for property constituting income of life estate which was in his hands at time of service of notice of garnishment, and not for such income that might come into his hands thereafter.

Yoss v Sampson, (NOR); 269 NW 22

Judgment creditor dead—when garnishment judgment void. Where, after the testate death of a judgment creditor, two of his eight beneficiaries secure an execution on the judgment, garnish the judgment debtor's interest in an estate, and take a judgment under the garnishment proceedings applying the proceeds to the original judgment, an order thereafter quashing the execution and the return thereon for nonconformity to statute also invalidates the garnishment judgment.

Gohring v Koonce, 224-1186; 278 NW 283

III WRIT

No annotations in this volume

IV NOTICE

Insufficiency cured by appearance. The appearance of a garnishee in response to a pleading controverting his answer renders the sufficiency of the notice of garnishment quite immaterial.

Farmers Exch. v Iowa Adj. Co., 201-78; 203 NW 283

V SERVICE

No annotations in this volume

VI RETURN

Return of answer—jurisdiction—notice unnecessary. A garnishee who makes answer to the garnishing officer, even tho all indebtedness is unequivocally denied, is in court, on due return of said answer, and is not entitled to notice of the controverting of said answer by the execution plaintiff and of the hearing on said controverting pleading.

Iowa Stock Remedy Co. v Broderson, 201-1039; 203 NW 386

VII LIEN OF GARNISHMENT

Unmatured crops. A judgment creditor of a landlord by garnishing the tenant acquires no lien on the crop share which, after the maturity of the crop, will belong to the landlord.

Rodgers v Oliver, 200-869; 205 NW 513

Garnishment carries statutory lien. A judgment creditor, by perfecting a garnishment of the tenant of the judgment debtor, legally steps into the shoes of the latter, armed with full power, if the tenant-garnishee's debt is for rent, to enforce, by appropriate action, the landlord's lien theretofore held by the judgment debtor.

Kinart v Churchill, 210-72; 230 NW 349

Mortgage on crop-share rent superior to garnishment of tenant. The lien of a chattel mortgage on a landlord's share of crops reserved as rent, but in the possession of the tenant, is, as to matured crops actually set aside to the landlord or otherwise actually determined as belonging to the landlord, superior to a subsequent garnishment of the tenant by a judgment creditor of the landlord.

Pierre v Pierre, 210-1304; 232 NW 633

No lien acquired. No lien is acquired by a garnishment.

Pierre v Pierre, 210-1304; 232 NW 633

Priority over receivership. The receiver of a defunct corporation takes the property of the corporation subject to the prior positive rights acquired by a creditor under a duly perfected garnishment of the admitted debtors of the corporation.

Watts v Surety Co., 216-150; 248 NW 347

Proceeds from sale under chattel mortgage. A chattel mortgagee who consents to a sale of the mortgaged property on condition that the proceeds be paid to him acquires a right to such proceeds superior to the rights of the garnishing creditor of the mortgagor.

Scurry v Quaker Oats Co., 201-1171; 208 NW 860

VIII LIABILITY OF GARNISHEE

No presumption of liability. The liability of a garnishee must not be presumed, and the right of the garnishing creditor cannot be superior to those of the principal defendant.

Davis v Paul, 205-491; 218 NW 276

Corporation as garnishee—procedure. A corporation may be validly garnished by serving the notice of garnishment on an agent employed in the office of the corporation in the general management of the corporation's business, e. g., on one employed as a bookkeeper and for general office work, and who looks after the office when the manager is absent, who signs as "cashier" checks issued by the corporation, and who has on occasions, to the knowledge of, and without objection by, the corporation, accepted notice of garnishment on the corporation.

Waterloo Co. v Court, 214-1169; 243 NW 287

Unharvested crop—evidence. On the theory, unquestioned in the trial court, that a tenant-garnishee was liable as garnishee for the value of crops which he willfully refused to harvest in accordance with his contract obligation, no error results from permitting witnesses to testify to the value of the crops if harvested.

Schooley v Efnor, 202-141; 209 NW 408

Rental value—evidence. On the issue whether a tenant-garnishee was liable for the reasonable rental value of land, the reception of evidence of such value will not constitute prejudicial error even tho the record reveals the fact that the rent was fixed by written lease, when the reasonable rental value was fixed at a sum less than that fixed by the lease.

Schooley v Efnor, 202-141; 209 NW 408

IX CLAIMS BY THIRD PERSONS

Beneficiaries' interests in estate funds—attorney's lien—intervention. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

Mortgagee's right to proceeds. The sale and converting into money of incumbered chattels under agreement between the lienholder, the debtor, and a third party, under which the third party agrees to collect the proceeds and

apply the same on the existing lien, create in the lienholder a right to said proceeds which is superior to garnishments of said third party by the creditors of the debtor.

Korner v McKirgan, 202-515; 210 NW 562

Assignee of claim—priority. An assignment of a bank deposit in an insolvent bank, with notice thereof to the receiver, is prior in right to a subsequent garnishment of the receiver, assuming that the receiver is subject to garnishment.

Newell v Edwards, 208-1214; 227 NW 151

X OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT

Sale under chattel mortgage—proceeds—lien. An agreement between chattel mortgagees and the chattel mortgagor that the mortgaged property shall be sold at public sale and the proceeds turned over to the mortgagees in the order of their liens is valid and enforceable in equity. In other words equity, in order to enforce the agreement, will impress a trust on said proceeds in favor of said mortgagees, even tho the occasion so to do arises in a proceeding at law, to wit, a garnishment.

Jasper Bank v Klauenberg, 218-578; 255 NW 884

Quashing execution—motion—when timely. When innocent third parties are not involved, a motion to quash an execution for nonconformity to statutes, prescribing procedure after death of judgment creditor, is not too late, tho filed four months after the entry of a garnishment judgment to which only two of the eight heirs interested therein were parties. Such garnishment judgment is an incomplete adjudication and not sufficient to warrant payment by the judgment debtor to the two represented heirs.

Gohring v Koonce, 224-1186; 278 NW 283

12158 Who may be garnished.

See annotations under §12157 (II)

Discussion. See 21 ILR 641—Safety deposit boxes

12159 Municipal corporations.

Equitable garnishment against municipality—school district as defendant. A judgment plaintiff may not, as a matter of public policy, maintain against a school district an equitable proceeding to subject to the satisfaction of the judgment funds in the hands of such corporation and belonging to the judgment defendant.

Julander v Reynolds, 206-1115; 221 NW 807

12160 Fund in court.

Custodia legis — burden of proof. If property is not subject to attachment or garnishment because undergoing partition, and, therefore, in the custody of the law, the mover for dissolution must show that no order for distribution has been entered in the partition proceedings.

Carson v Long, 219-444; 257 NW 815

12168 Answer controverted.

Unknown ownership of property. A garnishee who does not know whether the property held by him belongs to the attachment or execution debtor has a right to deny ownership in such debtor and thereby force the garnishing creditor to prima facie proof of such ownership. So held where the property held by the garnishee was cash bail.

Simmons v Beeson, 201-144; 206 NW 667

Declarations of defendant in garnishment. Declarations made by the attachment defendant after the garnishee has been duly served, are not admissible in favor of the garnishee and against the attaching plaintiff.

Schooley v Efnor, 202-141; 209 NW 408

12168.1 Notice of controverting pleadings.

Contrary holding under prior statute.

Iowa Rem. Co. v Broderson, 201-1039; 203 NW 386

Insufficient notice cured by appearance. The appearance of a garnishee in response to a pleading controverting his answer renders the sufficiency of the notice of garnishment quite immaterial.

Farmers Exch. v Iowa Co., 201-78; 203 NW 283

12169 Judgment against garnishee.

Liability of garnishee. See under §12157 (VIII)

Erroneous finding that garnishee was indebted—effect.

Farmers Exch. v Iowa Co., 201-78; 203 NW 283

Fraudulent conveyance—effect. Judgment may not be rendered against a garnishee for the proceeds of exempt personal property fraudulently mortgaged by the mortgagor-owner.

Northwest. Bk. v Muilenburg, 209-1223; 229 NW 813

Judgment in rem—nonmerger of debt sued on. In an action aided by attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation, if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Foreign corporations — dissolution — effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Willful destruction of property. Evidence tending to show that a garnishee had, subsequent to garnishment, willfully destroyed the property in his possession belonging to the defendant in garnishment, generates a jury question as to the liability of the garnishee.

Schooley v Efnor, 202-141; 209 NW 408

12170 Notice.

Waiver of notice. When judgment debtors appear in garnishment proceeding and file pleadings, voluntary appearance invoking jurisdiction renders it unnecessary to serve statutory notice of garnishment.

Bookhart v New Amsterdam Co., 226-1186; 286 NW 417

12171 Pleading by defendant—discharge of garnishee.

Foreign corporations — dissolution — effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

12172 When debt not due.

Contingent debt. A garnishee is properly discharged when he is a trustee holding funds for the payment of a debt which has not matured at the time of garnishment, and which, under a certain contingency will never mature and be payable to the defendant in execution.

Malone v Moore, 208-1300; 227 NW 169

Nonmatured debt — liability of garnishee. On a judgment against a garnishee on a debt not yet due, execution must be suspended until the debt is due.

Popofsky v Wearmouth, 216-114; 248 NW 358

12174 Judgment conclusive.

Judgment conclusive. See under §12157

12175 Docket to show garnishments.

Judgment in rem—nonmerger of debt sued on. In an action aided by attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation, if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

12176 Appeal.

Loss of right to appeal. No appeal will lie from an order discharging a garnishee unless the purpose or intent to appeal is announced at the time of the discharge, even tho the motion to discharge has been taken under advisement by the court, and even tho the garnishing creditor is not present when the order is made; and especially is this true when the garnishing creditor had fair warning of the adverse ruling.

Woods v Brown, 207-944; 223 NW 868

Dissolution—time to perfect appeal—procedure. Under mandatory statute, a garnishing creditor whose levy is discharged by court order must, when such order is made, announce his intent to appeal therefrom followed by perfection of the appeal within two days, and his noncompliance therewith is fatal.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

Motion to dismiss garnishee—burden on appeal. On an appeal from an order overruling a motion to dismiss a garnishee, the burden of sustaining the motion was on the garnishee.

Sioux Falls Assn. v Field Co., 226-874; 285 NW 155

Estate funds—attorney's lien—intervention. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator

with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

CHAPTER 514

REPLEVIN

12177 Where brought—petition.

ANALYSIS

I REPLEVIN IN GENERAL
II PROPERTY SUBJECT TO REPLEVIN
III DEMAND, PAYMENT, OR TENDER
IV JURISDICTION, VENUE, AND PARTIES
V PETITION
VI ANSWER
VII ISSUE, PROOF, AND VARIANCE
VIII EVIDENCE
IX TRIAL

Replevin conditioned on notice. See under §§11698, 12117, Vol I

I REPLEVIN IN GENERAL

Replevin in lieu of action for conversion. A plaintiff, it is true, may not employ an action of replevin in order to recover for a conversion, but plaintiff may maintain a good-faith action in replevin against a levying officer when the officer had possession of the property when plaintiff served his notice of ownership, and when the officer received an indemnifying bond, even tho the officer had parted with possession under an order of court before the replevin action was actually commenced.

Dvorak v Avery, 208-509; 225 NW 947

Noninconsistent remedies. The commencement of an action of replevin to recover the possession of promissory notes does not constitute the election of a remedy which will preclude the subsequent filing of a substituted petition presenting the controversy in the form of an action in equity.

Pickford v Smith, 215-1080; 247 NW 256

Foreclosure—replevin pending. The right of a mortgagee to foreclose a chattel mortgage by notice and sale (1) under the statute (Ch 523, C., '31), or (2) under the terms of the mortgage itself, may not be transferred to the district court on the application of the mortgagor on the ground of fraud and want of consideration in obtaining the mortgage, when an action of replevin involving the mortgaged chattels, and pending against the mortgagor furnishes him ample opportunity to test the mortgagee's right to foreclose by interposing said plea of fraud and want of consideration.

McDonald v Johnston, 218-1352; 256 NW 676

II PROPERTY SUBJECT TO REPLEVIN

Sale of goods—unenforceable contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

Absence of annexation or connection of fixtures—effect. An oil tank buried entirely in the parking of a public street and covered with cement, and a pump connected with said tank and bolted into said cement, tho wholly used in connection with the operation of an automobile service garage on a lot abutting said street and adjacent to said tank and pump, do not become fixtures to said lot (1) when said tank and pump are in no manner in contact with said lot or with any building thereon or fixture thereof, and (2) when the parties to the original installation distinctly intended that the title to said tank and pump should remain in the party installing them, the latter not being the owner of said lot.

McCoun v Drews, 221-227; 265 NW 160

Collection of estate—discovery—automobile replevied after testator's death. An automobile finance company, as conditional seller, may not replevy automobiles immediately after the death of conditional buyer having absolute ownership and possession at the time of his death, since the right to possession of all personal property for administration purposes passed to executor, who, in a proceeding to discover probate assets, may recover the automobiles or their value from such conditional seller, whose proper remedy should have been the filing of a claim against the administrator.

In re Sweet, 224-589; 277 NW 712

Deed deliverable after death. Whether replevin is the proper remedy to recover a deed executed but not deliverable until after grantor's death, quaere.

Orris v Whipple, 224-1157; 280 NW 617

Constructive severance doctrine inapplicable to movable chattel. When a tenant purchases an electric lighting plant on agreement with the landlord that he may take it with him upon termination of the tenancy, and when, at the termination of such tenancy, the tenant

II PROPERTY SUBJECT TO REPLEVIN—concluded

purchases the reversion, there is no occasion to apply the doctrine of constructive severance, because the plant maintained at all times its character as a movable chattel.

Equitable v Chapman, 225-988; 282 NW 355

Fixtures—farm light plant—not part of realty. In a replevin action for a lighting plant placed on a concrete block in the basement of a farm house, such electric plant is not essential to the main business of operating the farm, but is a mere convenience, and is not a part of the realty when it is easily removable, along with the batteries resting on a shelf, and without damage to the house, the wiring being capable of use with any other electrical installation, and when there is no evidence of an intent that it be permanently fixed.

Equitable v Chapman, 225-988; 282 NW 355

Purchase of car—wife not joining in chattel mortgage—payment by employer. Where defendant was unable to meet payments on car, and employer, under an agreement with defendant, made delinquent and future payments to the finance company and took an assignment of the note and chattel mortgage, the employer was entitled to the possession of the car as against contentions that intervenor (defendant's wife) did not join in the execution of the chattel mortgage, that the assignment to employer did not create any right or lien sufficient to sustain writ of replevin, and that the payments made by the employer constituted a satisfaction and payment and not a purchase of the chattel mortgage.

Simpson v McConnell, 228- ; 291 NW 862

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

III DEMAND, PAYMENT, OR TENDER

Want of demand. Replevin will not be abated for want of demand on defendants for possession prior to the institution of the action (1) when one defendant had incapacitated himself from complying with a demand, and (2) when the other defendant asserted unqualified title against the plaintiff.

Hart v Wood, 202-58; 209 NW 430

When tender unnecessary. In an action of replevin based on a conditional sale contract which provides for possession by the vendor in case of condition broken, tender of payments already made is not a condition precedent to the institution of the action.

Schmoller Piano v Smith, 204-661; 215 NW 628

Continued tender—materiality. Plaintiff in replevin action may elect to take money judgment in lieu of return of property. A continued tender of defendant can be material only on question of cost or right to judgment for value of property.

Prehn v Kindig, (NOR); 232 NW 812

IV JURISDICTION, VENUE, AND PARTIES

Collection of estate—discovery—automobile replevied after testator's death. An automobile finance company, as conditional seller, may not replevy automobiles immediately after the death of conditional buyer having absolute ownership and possession at the time of his death, since the right to possession of all personal property for administration purposes passed to executor, who in a proceeding to discover probate assets may recover the automobiles or their value from such conditional seller, whose proper remedy should have been the filing of a claim against the administrator.

In re Sweet, 224-589; 277 NW 712

Justices of the peace—exceeding amount—replevin a nullity. Under the statute allowing an enlarged jurisdiction for a justice of the peace up to $300 by written agreement, he is without authority to issue a writ of replevin for automobiles whose value exceeds such amount limiting his jurisdiction.

In re Sweet, 224-589; 277 NW 712

V PETITION

Replevin—substituted petition in equity—mandatory transfer. A plaintiff who, as the maker of promissory notes, brings an action of replevin against the holder, and obtains possession of the notes on the ground of fraudulent representations and want and failure of consideration in the inception of the notes, and who, without his legal right so to do being questioned, thereupon files an amended and substituted petition in equity praying the cancellation of the notes on the grounds pleaded in the replevin action, is entitled to a transfer to the equity docket and to a trial in equity. This is true because of the favorable rule in equity that fraudulent representations may be established without proof of scienter.

Pickford v Smith, 215-1080; 247 NW 256

VI ANSWER

General denial—chattel mortgage not admissible thereunder in replevin action. General denial puts in issue only facts pleaded in the petition. So, under a general denial to a replevin action for an automobile, evidence of a prior mortgage is properly excluded, when

not pleaded, inasmuch as, under a general denial, the court is not called upon to decide which lien is first but only the question of whether plaintiff is entitled to possession.

General Motors v Koch, 225-897; 281 NW 728

VII ISSUE, PROOF, AND VARIANCE

Unsupported issue of partnership. In an action of replevin for two articles, of which plaintiff was the absolute owner of one and the holder of a chattel mortgage on the other, defendant's issue of partnership is properly rejected when supported only by a showing that the parties had temporarily shared equally in the net earnings of the two articles.

Dieter v Coyne, 201-823; 208 NW 359

Pleading and evidence. Plaintiff in replevin, in order to recover, must show, by the strength of his own title, that, when the writ was issued, he was entitled to the possession of the property in question. Evidence held quite insufficient so to show.

Chorpening v Nickerson, 223-791; 273 NW 843

Decedent's gift to sister—executor's burden. In a replevin action for property held under claim of gift, plaintiff has the burden throughout the trial to establish right to immediate possession.

Wilson v Findley, 223-1281; 275 NW 47

VIII EVIDENCE

Allegation of ownership. Evidence reviewed, and held, plaintiff's allegation of unqualified ownership in himself of the property involved in an action of replevin was sufficiently proven.

Luther v Inv. Co., 222-305; 268 NW 589

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Conditional sales — replevin of automobile conditionally sold under "trust receipt". Trust receipt for automobile delivered by a finance company was in effect conditional sale when accompanied by promissory note and agreement to return the automobile on demand. Held, in a replevin action the finance company sustained its burden to prove its right to immediate possession by a showing of default in payment, which gave the right to possession.

General Motors v Koch, 225-897; 281 NW 728

Election to take money judgment or property —tender by defendant. Plaintiff in replevin action may elect to take money judgment in lieu of return of property. A continued tender of defendant can be material only on question of cost or right to judgment for value of property.

Prehn v Kindig, (NOR); 232 NW 812

IX TRIAL

Nonright to directed verdict. A plaintiff in replevin claiming possession under a chattel mortgage and met by the mortgagor defendant with a plea of (1) general denial and (2) fraud in the execution of the mortgage is not entitled to a directed verdict upon the withdrawal by the court of the plea of fraud, the record revealing evidence that the defendant never had title to the property. Plaintiff must proceed and recover on the strength of his own title.

Conway v Alexander, 200-705; 205 NW 351

Instructing on basis of counsel's admissions. The court is not in error in peremptorily instructing in an action of replevin that plaintiff is entitled to the immediate possession of all property claimed by him (except specifically enumerated articles) when said instruction is in strict accord with the explicit admission in court of defendant's counsel, tho no such admission appears in defendant's answer.

Luther v Inv. Co., 222-305; 268 NW 589

Decedent's gift to sister—executor's burden to recover. In a replevin action for property held under claim of gift, plaintiff has the burden throughout the trial to establish right to immediate possession.

Wilson v Findley, 223-1281; 275 NW 47

Limiting damages—issue not raised in trial. Where an action in replevin by one claiming an automobile under a conditional sales contract was brought against a chattel mortgagee who had given some cash and extended credit in return for his mortgage, the plaintiff, having permitted the trial to be concluded on the issue of possession without raising any other issue or requesting instructions on any other issue, could not complain that the mortgagee's recovery should have been limited to the amount of actual cash given for the mortgage.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Res judicata—acquittal of crime—nonconclusive as to payment in civil action. Where a contract for bailment of cattle provided for their purchase at a stipulated price and also provided for their surrender on demand if not paid for, and where defendant had been acquitted of a forgery charge based on a forged "Paid" stamp giving the appearance the contract price had been paid, his acquittal, when interposed in a replevin action for the cattle, was not res judicata on the issue of payment and did not bar the replevin action.

Bates v Carter, 225-893; 281 NW 727

12178 Ordinary proceedings—joinder or counterclaim.

Replevin nontransferable. An action in replevin, insofar as plaintiff claims a lien on the property replevied may not be transferred to equity.

Commer. Credit v Hazel, 214-213; 242 NW 47

Replevin—unallowable transfer to equity. An action of replevin involving mortgaged chattels, and wherein the only issue joined is that of fraud and want of consideration in the execution of the mortgage, cannot be legally transferred to equity for the equitable foreclosure of the mortgage.

McDonald v Johnston, 218-1352; 256 NW 676

12183 Writ issued.

Abuse of process.

Myers v Watson, 204-635; 215 NW 634

Justices of the peace—exceeding amount—replevin a nullity. Under the statute allowing an enlarged jurisdiction for a justice of the peace up to $300 by written agreement, he is without authority to issue a writ of replevin for automobiles whose value exceeds such amount limiting his jurisdiction.

In re Sweet, 224-589; 277 NW 712

12191 Return of writ.

Belated return. Failure to make timely return does not invalidate the writ.

Gibson v Collings, 200-721; 205 NW 304

12192 Assessment of value and damages—right of possession.

Demand and refusal—evidence—jury question. The innocent possessor of personal property is not, because of such possession, liable in damages to one who is entitled to the immediate possession of said property unless he refuses, on demand of the latter, to surrender the property. Evidence reviewed and held to present a jury question on the issue of demand and refusal.

Luther v Inv. Co., 222-305; 268 NW 589

Verdict—forms on submission. Forms of verdict reviewed and held unobjectionable.

Luther v Inv. Co., 222-305; 268 NW 589

12193 Judgment.

Failure to fix value. An unsuccessful defendant in replevin who, under a delivery bond, has retained the property in his possession, may insist that the judgment show the value of the property, provided that he is prejudiced by the failure of the judgment to so show.

Hart v Wood, 202-58; 209 NW 430

Officers and agents—liability for corporate tort. The managing officer of a corporation who causes the corporation of which he is such officer wrongfully to withhold personal property from a person who is entitled to the immediate possession of said property, is guilty of a tort, and is personally liable for said tort along with his said corporation.

Luther v Inv. Co., 222-305; 268 NW 589

12195 Plaintiff's option.

When money judgment effective. That part of a judgment in replevin which provides a money judgment in event that the possession of the property cannot be obtained, becomes immediately effective (or at least authorizes the judgment plaintiff to so treat it) (1) when a demand for possession is made and refused, or (2) when the judgment defendant has by his own acts incapacitated himself from returning the property in a substantially undepreciated condition, compared with the condition when he took it.

Brown Co. v Motor Co., 200-913; 205 NW 841

Election to take money judgment or property—tender by defendant. Plaintiff in replevin action may elect to take money judgment in lieu of return of property. A continued tender of defendant can be material only on question of cost or right to judgment for value of property.

Prehn v Kindig, (NOR); 232 NW 812

Improper fixing of value. The fact that in replevin the court fixes the value of the property, instead of submitting such issue to the jury, becomes of no consequence when the plaintiff availed himself of the right to take the actual property.

Schmoller Piano v Smith, 204-661; 215 NW 628

Absence of annexation or connection of fixtures—effect. An oil tank buried entirely in the parking of a public street and covered with cement, and a pump connected with said tank and bolted into said cement, tho wholly used in connection with the operation of an automobile service garage on a lot abutting said street and adjacent to said tank and pump, do not become fixtures to said lot (1) when said tank and pump are in no manner in contact with said lot or with any building thereon or fixture thereof, and (2) when the parties to the original installation distinctly intended that the title to said tank and pump should remain in the party installing them, the latter not being the owner of said lot.

McCoun v Drews, 221-227; 265 NW 160

CHAPTER 515

LOST PROPERTY

12204 Lost goods or money.

Noninconsistent statutes. The statutory provision that the finder of lost goods shall make restitution to the owner if known is not inconsistent with the statutory provision that the finder shall be paid a stated compensation for making restitution. (§12211, C., '31)

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Buried money—unknown ownership. Money found buried on land of another is not "lost property" within the meaning of this chapter, when the true owner cannot be found, but comes within the doctrine of "treasure-trove", which doctrine is not merged into our statutes, and the finder is entitled to possession as against everyone except the true owner.

Zornes v Bowen, 223-1141; 274 NW 877

12205 When owner unknown.

Buried money—finder entitled. Money found buried on land of another is not "lost property" within the meaning of this chapter, when the true owner cannot be found, but comes within the doctrine of "treasure-trove", which doctrine is not merged into our statutes, and the finder is entitled to possession as against everyone except the true owner.

Zornes v Bowen, 223-1141; 274 NW 877

12206 Advertisement.

Buried money—unknown ownership. Money found buried on land of another is not "lost property" within the meaning of this chapter, when the true owner cannot be found, but comes within the doctrine of "treasure-trove", which doctrine is not merged into our statutes, and the finder is entitled to possession as against everyone except the true owner.

Zornes v Bowen, 223-1141; 274 NW 877

12211 Compensation.

Compensation for finding lost property. The statutory provision that the finder of lost goods shall be paid a named compensation is not violative of the due process clause of the constitution.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

"Lost" goods defined. Money taken from the owner thereof by robbery, and the whereabouts of which money is thereafter unknown to said owner until it is returned to him by one who found it, where the robber had hidden it, constitutes "lost" money within the meaning of the statute which provides compensation to the finder of "lost" money and other property.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Noninconsistent statutes. The statutory provision that the finder of lost goods shall make restitution to the owner if known (§12204, C., '31) is not inconsistent with the statutory provision that the finder shall be paid a stated compensation for making restitution.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Noninconsistent statutes. The statutory provision that the finder of lost goods shall be paid a named compensation when he makes restitution to the owner is not inconsistent with the statutory provision that he who unlawfully converts found property to his own use is guilty of larceny. (§13018, C., '31.)

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Statutory reward applicable to national banks. The statute which obligates the owner of lost goods, money, etc., to compensate the finder of such property, is applicable to a national bank as owner, even tho the federal statutes are silent on the subject, as said statute does not impair the efficiency of said bank as a federal, governmental agency.

Flood v Bank, 220-935; 263 NW 321

Offer of reward — insufficient revocation. Where an unincorporated bankers association offered, in the form of a printed poster, a reward for facts leading to the conviction of bank robbers, the act of the cashier of a member bank in removing said poster from his bank and destroying it, and in declining, for his bank, to pay further dues to the association, will not, in and of itself, constitute a revocation of the offered reward, the evident intent of the offerer being to continue the offer for a reasonable time, and the offer being acted on within such time.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

Offer by nonlegal entity — liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

CHAPTER 516

PROPERTY STOLEN OR EMBEZZLED

12219 Proof of title.

Atty. Gen. Opinion. See '28 AG Op 377

CHAPTER 517

RECOVERY OF REAL PROPERTY

12230 Ordinary proceedings—joinder—counterclaim.

Fraudulent representations—unavailing inspection—effect. The plea that the party complaining of false and fraudulent representations in an exchange of land had inspected the land prior to accepting it, and had full opportunity to learn all relevant facts, must necessarily fall when it is shown that an inspection at said time would not reveal the falsity of the particular representations relied on.

Baumhover v Gerken, 200-551; 203 NW 15

Unallowable counterclaim. A defendant in an action for the recovery of real property whose possession originated in a contract of purchase which has been formally and legally forfeited may not counterclaim for rescission of the contract and for judgment against plaintiff for the amount paid on the contract, and for the value of improvements placed on the property; especially when plaintiff was never a party to said contract.

Detmers v Russell, 212-767; 237 NW 494

Trust in real estate — jurisdictional venue. An action by the beneficiaries of a trust in real estate (located in this state) to compel the trustee holding title to convey the land, in accordance with the terms of the trust agreement, to a newly designated trustee, must be brought and litigated in the county in which the land, or some part thereof, is located. If not so brought, the court is under mandatory duty, on motion for change of venue, to transfer the action to a proper county.

Titus Co. v Kelsey, 221-1368; 268 NW 23

Deed deliverable after death. Whether replevin is the proper remedy to recover a deed executed but not deliverable until after grantor's death, quaere.

Orris v Whipple, 224-1157; 280 NW 617

Deed to ancestor—previous and subsequent chain of title lacking—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant received and recorded a deed to the land from another is insufficient to overthrow plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Secondary evidence. Where title to real estate is not in issue, secondary evidence of title is admissible when proper foundation for its introduction has been laid; otherwise, if title is in issue.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

12231 Parties.

Quieting title (?) or action for possession (?). The vendor of lands who has effected a complete forfeiture of a contract of sale may institute action in equity to quiet title, even tho he might have instituted an action at law for possession.

Westerman v Raid, 203-1270; 212 NW 134

Right of possession. A religious organization is not entitled to the unconditional possession of real property of which it is the equitable owner, but the legal title of which is vested in trustees, when the property and the income therefrom are being used and employed, and the property improved, by a duly organized federation of different churches, all with the knowledge, approval, and express authorization of the said equitable owner.

Church v Gardner, 204-907; 215 NW 970

Injunction nonavailable in lieu of possessory action at law. One who claims the possession of realty against another who is in actual possession as a tenant at will may not resort to injunction proceedings to adjudicate his claimed right of possession.

Austin v Perry, 219-1344; 261 NW 615

12232 Title.

Title—nonnecessity to plead. The vendor in an executory contract of sale of land in an action against the vendee to recover possession of the land after the contract has been forfeited need not plead or prove that he has good title to the land.

O'Connor v Hassett, 207-155; 222 NW 530

Right of action and defenses — estoppel. A recorded titleholder who learns that his grantor, without authority, has contracted to sell the property, and thereupon consents that the contract may be consummated provided he —the titleholder—receives the purchase price, is not estopped to insist on his title and right to possession thereunder, by receiving part of said sale price, it appearing that the contract-

ing purchaser had no knowledge of such consent and made no payment in reliance on such consent.

Fitch v Stephenson, 217-458; 252 NW 130

12233 Tenant in common.

Purchase of outstanding lease, etc. One of several tenants in common of the fee to land who, on his own behalf, purchases of a lessee both an outstanding long-time lease on the said land and the building thereon, erected and owned by the lessee under said lease, may not enforce contribution from his co-tenants for his outlay; nor may said co-tenants legally demand the right to make contribution to the purchasing tenant and become tenants in common of the building.

Fleming v Casady, 202-1094; 211 NW 488

12236 Abstract of title.

Abstract of title. The holder of a tax deed need not, in an action to recover the property, attach to his petition an abstract of title showing the chain of title which antedated the tax deed.

Shaffer v Marshall, 206-336; 218 NW 292

12239 Answer.

Burden of proof. A defendant in an action to recover real estate who claims an interest in the land derived from a source other than the plaintiff must plead and prove such interest.

O'Connor v Hassett, 207-155; 222 NW 530

12242 Purchase pending suit.

Lis pendens. See under §11093

12243 Order to enter and survey.

Official survey on court order—evidence sufficient to support confirming report. In an action for reformation of description by metes and bounds in realty mortgages and for their foreclosure, evidence held sufficient to support judgment confirming surveyor's report, where surveyor is permitted to testify, without objection, that he was qualified to make the survey and that the plat of survey prepared by him is a true and correct survey showing the property in question and made in accordance with a previous order of court and such plat, after identification, was introduced in evidence without objection.

State Bank v Mapel, 226-1328; 286 NW 517

12247 Judgment for damages.

Torts — fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

12248 Use and occupation.

Rents as set-off. See under §10128

12249 Improvements set off.

Occupying claimant—loss of remedy. An unsuccessful defendant in an action for the recovery of real property who is afforded no opportunity therein to interpose a claim for permanent improvements (§§12235, 12249, C., '27), must necessarily resort to the occupying claimants' act (§10128 et seq., C., '27) for relief, and when he fails to resort to such remaining and exclusive remedy, and quits and surrenders the premises, he will not be permitted, when subsequently sued on a supersedeas bond growing out of the litigation, to interpose a claim for such improvements as a set-off.

Bigelow v Ins. Co., 206-884; 221 NW 661

12252 Growing crops—bond.

"Matured crops" defined. Crops are matured whenever they have reached such a stage of maturity that they no longer draw sustenance from the soil.

Goldstein v Mundon, 202-381; 210 NW 444

12255 New trial.

New trial generally. See under §11550

Belated presentation. The overruling of a motion for new trial will not be disturbed on appeal when such motion was filed after appeal and issuance of procedendo, and on the ground that the applicant inadvertently overlooked in the trial of the case certain available testimony.

Tutt v Smith, 202-1389; 212 NW 127

Nonapplicability of statute. The statutory provision for new trial in actions for the recovery of real property by ordinary proceedings can have no application to an equitable proceeding to have a deed decreed a mortgage and for an accounting of rents and profits.

Hinman v Sage, 213-1320; 241 NW 406

CHAPTER 519

FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY

12263 Grounds.

ANALYSIS

I FORCIBLE ENTRY AND DETAINER IN GENERAL
II PRIOR POSSESSION BY PLAINTIFF
III HOLDING OVER
IV POSSESSION AFTER EXECUTION SALE
V NONPAYMENT OF RENT

I FORCIBLE ENTRY AND DETAINER IN GENERAL

Dual forfeitures. A vendor who has initiated a forfeiture of his vendee's contract for an existing default, and commenced an action of forcible entry and detainer, may, pending such proceedings, initiate a forfeiture of the contract for a new and subsequently accruing default, and proceed thereon if he is unsuccessful in the first proceeding.

Cassiday v Adamson, 208-417; 224 NW 508

Vendor and vendee. A vendee who has agreed (1) to pay for the property in monthly installments, and (2) to have the paid installments treated as payment for the use of the property in case the contract is forfeited, becomes, in case of forfeiture, the tenant of the vendor, and may be removed through an action of forcible entry and detainer.

Cassiday v Adamson, 208-417; 224 NW 508
Music v De Long, 209-1068; 229 NW 673

Enjoining action. Injunction will lie to enjoin an action of forcible entry and detention only on a very clear showing that a certain and manifestly irreparable injury will result unless the writ is issued.

Farber v Ritchie, 212-1396; 238 NW 436

Foreclosure (?) or forcible entry and detainer (?). Tho a mortgage extension agreement provides for the execution by the mortgagor to the mortgagee of an absolute deed to the mortgaged premises and for the delivery of the deed and the possession of the premises to the grantee in case of default, yet if the agreement as a whole reveals the intent simply to furnish additional security, it must follow that the relation of landlord and tenant is not created, and that the relation of mortgagor and mortgagee is continued. It follows that, at the expiration of the extension time, forcible entry and detainer will not lie to obtain possession of the premises.

Mickelson v Rehnstrom, 215-1056; 247 NW 275

Appeal—nonright to maintain. Defendant in an action involving the sole question whether he was wrongfully detaining possession of premises after a refusal to pay rent, may not, after voluntarily surrendering possession in compliance with an order of removal, maintain an appeal from said order.

Sherman v Moore, 222-1359; 271 NW 606

Landlord's title—estoppel to dispute. A tenant who remains in undisturbed possession of realty under a lease with an executor, and refuses to quit and surrender said premises at the termination of said lease, may not defend his wrongful possession by or under the plea that the executor had no legal right to lease the land.

Wright v Zachgo, 222-1368; 271 NW 512

Tenancies at will—termination. In a forcible entry and detainer action where the petition alleged a notice dated January 12th terminating a tenancy at will "within 30 days from the date of this notice", such notice being served on January 13th, a demurrer should have been sustained, as only 29 and not the statutory 30 days written notice was given.

Murphy v Hilton, 224-199; 275 NW 497

Lease—husband's oral termination invalid. An oral agreement between the landlord and the tenant-husband, to terminate a joint lease of the husband and wife will not terminate their homestead rights in 40 acres of the land, so as to permit a forcible entry and detainer action, since a homestead can be terminated only in writing by both husband and wife signing the same joint instrument containing a legal description of the homestead.

Wright v Flatterich, 225-750; 281 NW 221

Nonabuse of discretion. In action for forcible entry and detainer, where there was evidence of error in instructions, in that court assumed that an alleged lease was made with agent of plaintiff with authority to make an oral lease, and that court did not specifically define to jury necessary elements of an oral lease, and there was also question that verdict was not supported by evidence, granting new trial held not an abuse of discretion.

Holman v Rook, (NOR); 271 NW 612

Involuntary surrender preserves right of appeal. An involuntary surrender of premises by execution or to avoid forcible removal does not constitute an acquiescence in, and performance of, the judgment such as to waive the right of appeal; however, a voluntary surrender would constitute a voluntary performance of the judgment so that there would be no detainer; the case would be moot; and an appeal would be dismissed.

Schuldt v Lee, 226-189; 284 NW 89

Remedy statutory—injunctive interference by equity limited. The summary remedy of

forcible entry and detainer, and an appeal from a decision therein, are statutory and a court of equity will not interfere in the absence of fraud or mistake or a showing of manifest irreparable injury.

Schuldt v Lee, 226-189; 284 NW 89

Title involved—waiver of right to transfer. A defendant in an action of forcible entry and detainer waives his right to have said action transferred to the district court, on the ground that title to real estate is involved, when, after the commencement of the action and before answer, he enters into a stipulation, as a part of the files in the case, to the effect that if he fails to make specified payments on the real estate in question judgment shall be entered against him for the possession of said premises; likewise he waives such right when, after answer, he moves for such transfer but obtains no ruling on the motion.

Peak v Mulvaney, 215-1400; 245 NW 748

Review—scope and extent—moot case. An appeal from a judgment in forcible entry and detainer proceedings will be dismissed when it is manifest on the record that the lease under which appellant claims has expired, and that he has no further interest in the premises, and that nothing is involved except a matter of costs.

Manning v Heath, 206-952; 221 NW 560

Striking definitely pleaded defense. Definitely pleaded defensive matter should not, manifestly, be stricken from an answer. So held where defendant in forcible entry and detainer definitely pleaded that nothing was due under the contract which plaintiff had assumed to forfeit on the alleged ground that defendant was in arrears on payments.

Meredith v Miller, 209-849; 228 NW 14

II PRIOR POSSESSION BY PLAINTIFF

Injunction nonavailable in lieu of possessory action at law. One who claims the possession of realty against another who is in actual possession as a tenant at will may not resort to injunction proceedings to adjudicate his claimed right of possession.

Austin v Perry, 219-1344; 261 NW 615

III HOLDING OVER

Oral agreement to surrender. A so-called demurrer, to a defendant-lessee's answer of lack of consideration for an oral agreement to surrender the premises, which does not admit the truth of the answer, but in effect denies it, is properly overruled. Such application is not the function of demurrer.

Wright v Flatterich, 225-750; 281 NW 221

IV POSSESSION AFTER EXECUTION SALE

Repurchase option after foreclosure—no defense in forcible entry action. After foreclosure of a mortgage and just prior to the expiration of the period of redemption, a lease and contract giving the mortgagor's heirs then in possession an option to buy the property but providing for monthly rentals to be applied on the purchase price in the event the option is exercised, being neither in the nature of a new mortgage nor re-establishment of the foreclosed mortgage, is subject to demurrer when interposed as a defense to a forcible entry and detainer action.

Wallerstein v Palmer, 224-260; 276 NW 605

V NONPAYMENT OF RENT

Landlord and tenant—rent—writ of attachment—legality. The issuance of a landlord's writ of attachment for rent admittedly due is not rendered unlawful because the tenant subsequently pleads and establishes a counterclaim which cancels the landlord's admitted claim for rent.

Kelp v McManus, 218-226; 253 NW 813

12265 Notice to quit.

Sufficiency. A notice by a landlord to his tenant (whose tenancy has expired) to vacate and surrender the premises forthwith is a sufficient preliminary notice on which to base an action of forcible entry and detainer.

Ashpole v Delaney, 217-792; 253 NW 30

Undue length of service — effect. The written notice to the tenant, to quit and surrender the premises at the expiration of the lease, is not rendered invalid because served on the tenant some seven months prior to the expiration of said lease.

Wright v Zachgo, 222-1368; 271 NW 512

12267 Jurisdiction—transfer—appeal.

Justice assuming jurisdiction. A justice of the peace who, after an action of forcible entry and detainer has been returned to him on a writ of error, enters an authorized order of dismissal, has no jurisdiction, so long as said order of dismissal remains on the docket, to enter in said assumed proceedings "The decision of Justice Jones reversed. Order of removal cancelled."; moreover, assuming jurisdiction, the form of such entry is quite nugatory.

Rasmussen v Alberts, 215-644; 246 NW 620

Involuntary surrender preserves right of appeal. An involuntary surrender of premises by execution or to avoid forcible removal does not constitute an acquiescence in, and performance of, the judgment such as to waive the right of appeal; however, a voluntary sur-

render would constitute a voluntary performance of the judgment so that there would be no detainer; the case would be moot; and an appeal would be dismissed.

Schuldt v Lee, 226-189; 284 NW 89

Remedy statutory — injunctive interference by equity limited. The summary remedy of forcible entry and detainer, and an appeal from a decision therein, are statutory, and a court of equity will not interfere in the absence of fraud or mistake or a showing of manifest irreparable injury.

Schuldt v Lee, 226-189; 284 NW 89

12268 Petition.

Former conflict with municipal court act.

Owens v Smith, 200-261; 204 NW 439

Necessity for plea. There can be no abatement or stay of an action until another action has been determined, when there is no pleading requesting such abatement or stay.

Music v De Long, 209-1068; 229 NW 673

Other action pending. A motion or proceeding for the abatement of an action of forcible entry and detainer, because an equitable action by movant is pending in the district court for relief consequent on the alleged fraud of plaintiff in the forcible detention action, is properly overruled.

Music v De Long, 209-1068; 229 NW 673

12274 Title in issue.

Necessity for issue. A defendant in forcible entry and detainer who tenders therein no issue of title to the property may not contend that title is nevertheless involved because of the pendency of another action separate and different than the action of forcible entry and detainer.

Music v De Long, 209-1068; 229 NW 673

Title—when not in issue. The issue of title is not involved in an action of forcible entry and detainer when admittedly the plaintiff held the legal title, and when the sole controversy centered around the question whether plaintiff had legally forfeited the contract under which defendant was in possession.

Cassiday v Adamson, 208-417; 224 NW 508

Waiver of right to transfer. A defendant in an action of forcible entry and detainer waives his right to have said action transferred to the district court, on the ground that title to real estate is involved, when, after the commencement of the action and before answer, he enters into a stipulation, as a part of the files in the case, to the effect that if he fails to make specified payments on the real estate in question judgment shall be entered against him for the possession of said premises; likewise he waives such right when, after answer, he moves for such transfer but obtains no ruling on the motion.

Peak v Mulvaney, 215-1400; 245 NW 748

12275 Transfer to district court.

Improper transfer from municipal court. In an action in the municipal court to obtain possession of premises after the expiration of the lease between plaintiff as landlord and defendants as tenants, title to the premises cannot properly be injected into the case, as a basis for transfer of the action to the district court, by a plea by an intervenor to the effect that he owns said premises and has an action then pending in the district court to quiet his title.

Braga v Stowell, 219-855; 259 NW 767

Unexercised option to buy real property—title issue unavailable. After foreclosure, a lease and an unexercised repurchase contract option providing for rentals to be applied on the purchase price in the event the option is exercised do not as a defense to a forcible entry and detainer action put title in issue, nor necessitate transfer of the cause to the district court.

Wallerstein v Palmer, 224-260; 276 NW 605

12276 How title tried.

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

Borrowed defense. It is no defense to an action of forcible entry and detainer that the defendant was holding under a contract for the purchase of the real estate, and that the plaintiff, in assuming to forfeit the contract, had not served notice of the forfeiture on a third party who held an assignment from defendant of the contract as security.

Votruba v Hanke, 202-658; 210 NW 753

12280 No joinder or counterclaim.

Non-allowable counterclaim. A counterclaim has no place in an action of forcible entry and detainer.

Votruba v Hanke, 202-658; 210 NW 753

12282 Appeal or writ of error.

Futility when possession surrendered. It is futile for defendant in an action of forcible entry and detainer to sue out a writ of error after he has been found guilty, and after he has surrendered possession of the premises in controversy.

Rasmussen v Alberts, 215-644; 246 NW 620

Involuntary surrender preserves right of appeal. An involuntary surrender of premises by execution or to avoid forcible removal does not constitute an acquiescence in, and performance of, the judgment such as to waive the right of appeal; however, a voluntary surrender would constitute a voluntary performance of the judgment so that there would be no detainer; the case would be moot; and an appeal would be dismissed.

Schuldt v Lee, 226-189; 284 NW 89

Remedy statutory—injunctive interference by equity limited. The summary remedy of forcible entry and detainer, and an appeal from a decision therein, are statutory, and a court of equity will not interfere in the absence of fraud or mistake or a showing of manifest irreparable injury.

Schuldt v Lee, 226-189; 284 NW 89

12283 Judgment.

Dismissal—effect. A justice of the peace who, after an action of forcible entry and detainer has been returned to him on a writ of error, enters an authorized order of dismissal, has no jurisdiction, so long as said order of dismissal remains on the docket, to enter in said assumed proceedings "The decision of Justice Jones reversed. Order of removal canceled."; moreover, assuming jurisdiction, the form of such entry is quite nugatory.

Rasmussen v Alberts, 215-644; 246 NW 620

Stipulations—enforceability. The court will enforce a duly filed stipulation by the parties to an action of forcible entry and detainer to the effect that if defendant fails to comply with specified conditions judgment shall be entered against defendant for the possession of said premises.

Peak v Mulvaney, 215-1400; 245 NW 748

Appeal—nonright to maintain. Defendant in an action involving the sole question whether he was wrongfully detaining possession of premises after a refusal to pay rent, may not, after voluntarily surrendering possession in compliance with an order of removal, maintain an appeal from said order.

Sherman v Moore, 222-1359; 271 NW 606

Order of removal—when completely executed. An order of removal issued on a judgment rendered in forcible entry and detainer proceedings cannot be deemed fully executed so long as the officer has in his possession on the premises in question personal property of the defendant upon which the officer has levied in order to collect the costs. And this is true tho the defendant has personally been removed from the premises. So held on the question whether the perfecting of an appeal and the obtaining of a stay order by the defendant were timely.

Usailis v Jasper, 222-1360; 271 NW 524

Repeated trespasses on realty—dissolution of injunction. Injunction will lie to restrain a party from trespassing upon and wrongfully resuming possession of real estate from which he has been removed under and by virtue of an order of removal duly issued in forcible entry and detainer proceedings; but if appeal be perfected from said order of removal and stay order obtained, before the said order has been completely executed, the court may properly dissolve the temporary writ.

Usailis v Jasper, 222-1360; 271 NW 524

12284 Restitution.

Writ of error—order of restitution. The district court has no jurisdiction, on writ of error, in an action of forcible entry and detainer, to enter an order restoring the defendant to the possession of the premises in question.

Rasmussen v Alberts, 215-644; 246 NW 620

CHAPTER 520

QUIETING TITLE

12285 Who may bring action.

Discussion. See 23 ILR 233—Action to quiet title

ANALYSIS

I REMEDY IN GENERAL
II WHO MAY MAINTAIN ACTION
III WHO MAY NOT MAINTAIN ACTION
IV PARTIES
V DEFENSES
VI EVIDENCE
VII SCOPE AND EXTENT OF RELIEF
VIII DECREE AND ENFORCEMENT THEREOF
IX FACT CASES
X ADVERSE POSSESSION

Adverse possession. See also under §11007 (XXVIII)
Equitable proceedings applicable. See under §12290

I REMEDY IN GENERAL

Government ownership. Government lands lose by erosion and gain by accretion.

Bigelow v Herrink, 200-830; 205 NW 531

When possession not notice of adverse claim.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Dual grounds. A party in an action to quiet title may rely both on a will and on an executed oral contract for the land.

Kisor v Litzenberg, 203-1183; 212 NW 343

Broad scope of remedy. An action in equity to quiet title to real estate and for an order ousting defendant from the possession, may be

I REMEDY IN GENERAL—concluded

maintained tho the defendants claim no right, title or interest adverse to plaintiff other than possession as tenants.

Davis v Niemann, 219-620; 258 NW 761

Accretions. The owner of land along the bank of a navigable stream is entitled to accretions to the land even tho such accretions extend over the exact spot where another person formerly owned land eroded by the river, because the complete erosion of land works a complete destruction of the title and of all governmental descriptions pertaining thereto.

Bone v May, 208-1094; 225 NW 367

Accretion — apportionment — estoppel. Riparian land owners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop themselves, in an action to quiet title, from asserting that land did not pass under their deed because it was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho plaintiff also prays for the cancellation of the promissory notes—a proceeding which would be transitory if separately brought.

Eckhardt v Trust Co., 218-983; 249 NW 244; 252 NW 373

Recovery of realty — jurisdictional venue. An action by the beneficiaries of a trust in real estate (located in this state) to compel the trustee holding title to convey the land, in accordance with the terms of the trust agreement, to a newly designated trustee, must be brought and litigated in the county in which the land, or some part thereof, is located. If not so brought, the court is under mandatory duty, on motion for change of venue, to transfer the action to a proper county.

Titus Co. v Kelsey, 221-1368; 268 NW 23

Strength of plaintiff's title. Principle reaffirmed that plaintiff in an action to quiet title to realty must assume the burden of proof and must recover on the strength of his own title and not on the weakness of that of the defendant.

Lockie v White, 221-1044; 267 NW 671
Bohle v Brooks, 225-980; 282 NW 351

Statutes of limitations—nonapplicability to nonaccepted street. In a quiet title action where land was dedicated but never accepted as street in unincorporated village, the rule that statute of limitations will not run against a municipality exercising a governmental function, does not apply.

Brewer v Claypool, 223-1235; 275 NW 34

Admission by nominal defendant not binding on principal defendant—guardianship. A wife seeking to quiet title in herself by virtue of a deed from her deceased husband, recorded by a trustee after the husband's death, must prevail on the strength of her own title as opposed by her insane son's title, obtained through a deed from her, also in the hands of the trustee, the two deeds being executed at the same time; but she gains nothing because the trustee concedes her title, when the real party in interest, the son, through his guardian, made no such admission in his separate answer.

Bohle v Brooks, 225-980; 282 NW 351

Statutory presumption of validity to tax deeds—no abandonment by pleading later corrective deeds. A defendant in a quiet title action may not claim that the plaintiff by first pleading title by invalid tax deeds, and then amending by pleading second corrective tax deeds, had abandoned the statutory presumption of their validity, nor must he, therefore, resort to the common law to prove his title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

II WHO MAY MAINTAIN ACTION

Right of election. The vendor of lands who has effected a complete forfeiture of a contract of sale may institute action in equity to quiet title, even tho he might have instituted an action at law for possession.

Westerman v Raid, 203-1270; 212 NW 134

Protection of remainder from execution sale. Principle reaffirmed that a contingent remainderman may maintain an action to protect his contingent interest from execution sale.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

Deed to trustees—grantor's subsequent land contract invalid. An absolute warranty deed subject only to a trust created therein precludes the grantor from later contracting to sell the property to another and will support an action to quiet title in the trustees.

Beemer v Challas, 224-411; 276 NW 60

Supplemental petition after answer—pleading valid second tax deed—first deed defective. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without reserving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

III WHO MAY NOT MAINTAIN ACTION

Bona fide purchaser—who is not. A grantee of land who buys, receives, and goes into possession of the exact land and acreage which he intended to buy cannot be deemed a bona fide purchaser of another tract of which he has never been in possession even tho such other tract was originally an integral part of the land actually purchased.

Taylor v Lindenmann, 211-1122; 235 NW 310

Judgment creditor's deed after mortgage foreclosure. A sheriff's deed issued under execution sale to a judgment creditor, after expiration of the judgment creditor's right of redemption as a defendant junior lienholder in a mortgage foreclosure, is a nullity and will not sustain an action to quiet title thereon.

Bates v Mullins, 223-1000; 274 NW 117

Purchase by drainage district bondholder—validity. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

IV PARTIES

Substitution—irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased defendants are for the first time enumerated and named as the defendants, and, under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

Inheritance taker as "representative" of contingent remainderman. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action, or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51
See Mennig v Graves, 211-758; 234 NW 189

Separate owners of separate tracts. Various parties, each of whom claims exclusive ownership in separate and different tracts of land formerly held by a railway company as right of way, may join as plaintiffs in an equitable action against said railway company to quiet title in each separate party to the particular tract owned by him.

Duggleby v Railway, 214-776; 243 NW 198

Creditor of estate as intervenor. In an action by an heir against an executor to quiet title in himself to land which the testator purported to devise, a general creditor of the estate has no standing as an intervenor.

Rapp v Losee, 215-356; 245 NW 317

Municipal improvement certificate holder. A party who purchases a municipal improvement certificate, lienable on certain property is not privy to (and therefore not bound by) a subsequently instituted action to quiet title, and the decree entered therein, when he is not made a party to said action.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Purchaser from estate. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

V DEFENSES

Avoidance of matter first appearing in reply. An answer to a reply seems to be unknown to our practice. But when the defendant in an action to quiet title answers that he is the owner of the property, and is met by a reply that defendant is estopped by his own contract from claiming title, and defendant wishes to plead that said contract was obtained from him by fraud and without consideration, quaere: must defendant plead his said defense (a) by way of amendment to his answer, or (b) does the law impliedly supply such plea?

Carr v McCauley, 215-298; 245 NW 290

Tax sale—notice to redeem—necessity of service on wife of tenant. In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband

V DEFENSES—concluded

and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

Nonpermissible plea by tenant. In an action to quiet title to lands, a defendant who is in peaceable possession of the premises under a lease from plaintiff will not be permitted to assert that plaintiff had no title when the lease was executed.

McKenney & Seabury v Nelson, 220-504; 262 NW 101

Action against state. Allegations in a petition to quiet title to land and to obtain a writ of possession for said land, (1) that defendants constitute the entire membership of the state board of control—an agency of the state—and (2) that said defendants are wrongfully withholding said possession from plaintiff, furnish no sufficient basis for the holding that said action, in truth and fact, is against the state in its sovereign capacity.

Ia. Elec. Co. v Board, 221-1050; 266 NW 543

Issues under general denial—question of delivery. In an action to quiet title where plaintiff's claim of ownership arose out of a deed deposited with a bank for delivery, and delivered to plaintiff after grantor's death, a general denial puts in issue both the execution and the delivery of the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

VI EVIDENCE

Uncontroverted evidence may be insufficient unless corroborated. Positive evidence of the truth of an all-controlling fact may be insufficient to establish such fact when such evidence is, from its very nature, incapable of contradiction by any other witness, and when, if the evidence be true, corroborative facts necessarily exist, and are not shown. So held where it was sought to trace title through a secret trust.

Nehring v Hamilton, 210-1292; 232 NW 655

Dead man statute—contract with deceased. In an action against an administrator and against a devisee, to quiet title to real estate, plaintiff is wholly incompetent to testify with respect to a contract between the plaintiff and the deceased.

Black v Nichols, 213-976; 240 NW 261

Failure to prove title—effect. A plaintiff in an action to quiet title must necessarily fail when he bases his title both on (1) accretion, and (2) adverse possession and establishes neither; and this, too, irrespective of the weakness of defendant's title.

McFerrin v Wiltse, 210-627; 231 NW 438
See Dubuque v Fischer, 215-433; 245 NW 758

Tax deed—prima facie case. Plaintiff in quiet title action, claiming under tax deed issued by county treasurer, establishes a prima facie case when the tax deed is received in evidence.

Tesdell v Greenwalt, 228- ; 290 NW 676

Deed to ancestor—chain of title lacking—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant received and recorded a deed to the land from another is insufficient to overthrow plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Trustee and beneficiary as same person—conveyance to self. A sister, as the only heir in her brother's estate, who conveys by a trust instrument to a nonrelated person her entire interest in such estate, in exchange for the trustee providing her life support, and upon fulfillment of which the trustee became the beneficiary and was directed to convey the balance of the property from himself, as a trustee, to himself, individually, evidence, in trustee-beneficiary's quieting title action against settlor's heirs, held to establish soundness of mind and freedom of action by settlor in executing the trust instrument.

Goodman v Bauer, 225-1086; 281 NW 448

Acquiescence in title by grantor. When the grantor of a warranty deed had acquiesced for five years in the title of the grantee, he could not set aside the deed and quiet title in himself without establishing a plain, clear, and decisive case.

Huxley v Liess, 226-819; 285 NW 216

Permissible cross-examination. In quiet title action brought by the husband of the former owner of land who had continued in possession after her mother had obtained the tax deed under an agreement with the daughter, it was proper to cross-examine the plaintiff as to whether he recalled the time the mother-in-law gave him certain bonds, because of the inference which might be drawn from such testimony as to the purpose for which the mother-in-law acquired the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Conclusion—material covered in other testimony. In a quiet title action it was not prejudicial to sustain an objection to a question asking the plaintiff if the defendant had made any claim to land at, or prior to, a certain time, when the question asked for a conclusion of the witness, and the witness had answered the question in other testimony.

McCormick v Anderson, 227-888; 289 NW 440

Overcoming presumption from possession—amount of proof. A mere preponderance of the evidence is not sufficient to overcome the

presumption arising from the possession of the legal title to real property. The evidence for that purpose must be clear, convincing, and satisfactory.

Wagner v Wagner, (NOR); 224 NW 583

VII SCOPE AND EXTENT OF RELIEF

Appointment of receiver pending action to quiet title.

Korf v Howerton, 201-428; 205 NW 323

Mere inference of invalidity. A mere alleged inference of fraud or illegality cannot overthrow a deed of conveyance.

Carr v McCauley, 215-298; 245 NW 290

Undecided issue. When plaintiff in an action to quiet title is unable to establish the deed of conveyance and the delivery thereof under which he claims, it is quite immaterial that the court did not decide plaintiff's tendered issue whether defendant was the wife of the alleged grantor.

Blain v Blain, 215-69; 244 NW 827

Parties—fatal defect in parties. In an action by the purchaser of land to quiet title against certain claims for mechanics' liens, the decree confirmed the claims as liens on the land, and ordered said land sold for the payment—at least pro tanto—of said liens, and, in addition, entered personal judgments against a former owner of the land for the amount of each of said claims. Plaintiff appealed from the decree insofar as it established said claims as liens.

Held, the appeal could not be maintained without service of notice of appeal on said former owner.

Gordon-Van Tine Co. v Ideal Co., 223-313; 271 NW 523

Judgment—illegal confession—execution lien—rights of property owners. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

VIII DECREE AND ENFORCEMENT THEREOF

Reformation of deed—refusal to surrender advantage. The grantee in a deed of conveyance who has obtained a decree quieting his title on the plea that the deed was in satisfaction of the grantor's prior mortgage on the land may not, while insisting on all the advantages accruing to him under the decree, have the deed so reformed as to include the grantor's homestead, on the claim that the homestead was mistakenly or fraudulently omitted from the deed.

Galvin v Taylor, 203-1139; 212 NW 709

Pendency of another action. Indefinite evidence of the pendency of an action by the defendant as an occupying claimant presents no obstacle to the entry of a decree quieting title in the plaintiff.

Korf v Howerton, 205-534; 218 NW 274

Improvements. In an action to quiet title the court may, on proper pleading and proof, decree a lien on the land in defendant's favor for improvements made in good faith on the property.

Rainsbarger v Rainsbarger, 208-764; 224 NW 45

Persons concluded by decree — unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant, arising out of the terms of a testamentary devise, is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189
See Harris v Randolph, 213-772; 236 NW 51
Mennig v Howard, 213-936; 240 NW 473

Ineffectual reversal. On an appeal from a decree quieting title, the appellant has no standing to ask a reversal when the record reveals the fact that the decree deprived the appellant of nothing, and that a reversal could award him nothing.

Duggleby v Railway, 214-776; 243 NW 198

Absence of issues. A decree quieting title in certain defendants against other defendants cannot be rendered when no issues whatever were joined between said defendants.

Grandy v Adams, 219-51; 256 NW 684

Accretions — construction of decree. A decree quieting title to accretions, and based on adverse possession, will be deemed to quiet title up to the high-water mark of the river in question, even tho when literally and hypercritically construed it seemingly quiets title only to the high-water mark as it existed when

VIII DECREE AND ENFORCEMENT THEREOF—concluded

the action to quiet title was commenced. So held where, pending the action, trial and entry of decree, the river continued to recede.

Harrington v Foster, 220-1066; 264 NW 51

Inadequate pleadings — effect. Title to realty cannot be quieted in a party litigant in the absence of adequate pleadings as a basis for such decree.

Foote v Soukup, 221-1218; 266 NW 904

Reversal — fact theory controlling. On reversal in the supreme court of an equitable action to quiet title, the successful appellant will not be permitted to take decree other than in strict accord with the fact theory on which the action was commenced and prosecuted by appellant, and reversed by the appellate court. This may require the withholding of final decree until appellant returns property which he has received and in which he admittedly has no interest under the fact theory of his action.

McCloud v Bates, 222-1047; 270 NW 373

Virtual representation. All living members of a class, when properly brought into court in an action to quiet title, are deemed (under the doctrine of virtual representation) to represent all after-born persons who would belong to that class.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple"; the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Defaulted contract—vendee's deed before decree—invalidity. In a quieting title action against a real estate contract vendee, the decree ends all rights of the vendee under a defaulted contract, and if he deeds to another before the decree, the grantee takes nothing.

Forrest v Otis, 224-63; 276 NW 102

Decree should describe real estate. A description of the real estate should appear in a decree quieting title.

Rance v Gaddis, 226-531; 284 NW 468

IX FACT CASES

Navigable waters—ownership of lands—accretions. The owner of land along the bank of a navigable stream is entitled to accretions to the land even tho such accretions extend over the exact spot where another person formerly owned land eroded by the river, because the complete erosion of land works a complete destruction of the title and of all governmental descriptions pertaining thereto.

Bone v May, 208-1094; 225 NW 367

Riparian rights — islands — accretion. An island in a navigable stream cannot be deemed an accretion to another island when the surface of said islands at the point where they connect is not visible even at ordinary stage of the water, let alone being visible when the water is at its high-water mark.

Meeker v Kautz, 213-370; 239 NW 27

X ADVERSE POSSESSION

Boundary dispute on fenced land—adverse possession. In a dispute involving title to a strip of land between two town lots which were separated by a fence, where there was no acquiescence in the fence as the true boundary line, and one party had no intent to claim beyond the true boundary line, held that title was acquired by the other party by adverse possession when he claimed both title and possession to the strip irrespective of the location of the fence.

Patrick v Cheney, 226-853; 285 NW 184

Possession which will bar action. Under a statute limiting the time in which an action may be brought for the recovery of real estate sold for taxes, the possession by the owner necessary to bar an action by the tax title holder is ordinarily not the possession required under the general statute of limitations and need not be adverse, but need be only such possession as would entitle the tax titleholder to maintain an action against the owner.

McCormick v Anderson, 227-888; 289 NW 440

Presumption in favor of tax deed holder. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

12286 Petition.

See annotations under §12285

12288 Disclaimer—costs.

Belated disclaimer. A belated and long delayed disclaimer by a defendant of any interest

in the subject matter of an action to quiet title may not absolve him from liability for the costs of the action.

Korf v Howerton, 205-534; 218 NW 274

Disclaimer filed—confused description. In an action foreclosing a mortgage and also asking for the reformation of the description of land in said mortgage in which one of the defendants by way of answer denies that plaintiff is entitled to reformation of description because of confusion as to the property covered by said mortgage as a result of a shifting river channel between the mortgaged land and the defendant's adjoining land, and alleging the plaintiff is estopped from asserting any interest in such adjoining land on account of a disclaimer filed by plaintiff's predecessor in a prior foreclosure action involving said adjoining land, held that such estoppel and disclaimer in the present action is ineffective in the absence of any evidence of any confusion or encroachment upon the adjoining land.

State Bank v Mapel, 226-1328; 286 NW 517

12289 Demand for quitclaim—attorney's fees.

Atty. Gen. Opinion. See '25-26 AG Op 125

Banking superintendent as good-faith plaintiff. The superintendent of banking as a good-faith, tho unsuccessful, plaintiff in a quiet title action is not liable to the defendant for attorney fees.

Bates v Mullins, 223-1000; 274 NW 117

12290 Equitable proceedings.

See also annotations under §12285

Guiding principles. In an action to quiet title, the court of equity will view the case in the broad aspect of the equitable rights of the parties, rather than upon narrow and technical legal grounds.

Eckert v Sloan, 209-1040; 229 NW 714

Seeker for equity must do equity. The full equitable titleholder of land held under a dry trust who asks equity to invest him with the full legal title must do equity to the extent of reimbursing the trustee for good-faith expenditures made by him at the request, or with the consent and acquiescence of the equitable titleholder, in improving or preserving the property, even tho the trustee's claims for such expenditures are barred at law by the statute of limitations.

Warner v Tullis, 206-680; 218 NW 575

Mortgage without exceptions — effect. A municipality which mortgages an integral body of land owned by it without excepting any part thereof, necessarily loses all interest in all the land under a proper foreclosure without redemption, even tho in conveyances subsequent to the mortgage certain reservations were made.

Dubuque v Fischer, 215-433; 245 NW 758

Repudiating one's own chain of title. A titleholder who, by contract, repudiates the deeds under which he claims title and agrees that they shall be deemed null and void, thereby estops himself from asserting said deeds against parties who subsequently acquire title in reliance on said repudiation.

Carr v McCauley, 215-298; 245 NW 290

Prayer for writ of possession. An equitable action (1) to quiet title, and (2) in addition, to obtain a writ ousting defendant from the premises is proper.

McKenney & Seabury v Nelson, 220-504; 262 NW 101

Transaction with deceased — intervenor — competency. In equity action to quiet title and to declare a trust in realty, an intervenor who claims same relief as plaintiff may not testify to alleged oral agreement between parties, some of whom are deceased.

Wagner v Wagner, (NOR); 224 NW 583

Dismissal—improper notice of appeal. In appeal from decree quieting title in city to streets and alleys, but continuing hearing as to park, it was necessary to serve notice of appeal on city's attorney, and notice of appeal served on attorneys for cross-petitioners joining in prayer of appellee's petition was not binding on the city and entitled city to a dismissal.

Iowa City v Balluff, (NOR); 225 NW 942

CHAPTER 521

DISPUTED CORNERS AND BOUNDARIES

12298 Specific issues—acquiescence.

Burden of proof — hearsay. A property owner who repudiates the line of a division fence as the true boundary line has the burden to prove the true line to be other than the division line of the fence; and he may not make such proof by a recital of what a surveyor told him.

Sorenson v Mosbacher, 210-156; 230 NW 656

12299 Commission.

Disqualification. An engineer who, unbeknown to one of the parties to a boundary line controversy, has already surveyed and located the line for the other party under private employment, is disqualified to act as a commissioner under an order of the court for the purpose of surveying and locating said line.

Kraft v Tennigkeit, 204-15; 214 NW 562

12301 Hearing.

Government monuments. Duly identified government survey monuments are controlling, and will override every call of the field notes for measurements.

Cooper v Horridge, 200-711; 205 NW 454

Burden to show government line. A landowner who concedes that a long existing highway was by agreement to be located equally upon both sides of the government line between adjoining tracts, but who disputes the accuracy of the location, has the burden to show the actual location of the government line.

Sedore v Turner, 202-1373; 212 NW 61

Federal survey conclusive. A section corner established by a government survey is conclusive.

Fair v Ida Co., 204-1046; 216 NW 952

Testimony without notice. A commissioner appointed to survey and locate a disputed boundary line and to report thereon to the court may not legally take the testimony of one of the parties to the controversy without notice to the other party.

Kraft v Tennigkeit, 204-15; 214 NW 562

12302 Finding as to acquiescence.

Elements. On the issue of acquiescence by both parties to a boundary line, the intention of the parties is important. Acquiescence is consent inferred from silence, involving notice or knowledge of the claim of the other party, and occurs where one who is entitled to impeach a transaction or enforce a right neglects to do so, from which the other party may infer that he has abandoned such right.

Patrick v Cheney, 226-853; 285 NW 184

Boundary dispute on fenced land. In a dispute involving title to a strip of land between two town lots which were separated by a fence, where there was no acquiescence in the fence as the true boundary line, and one party had no intent to claim beyond the true boundary line, held that title was acquired by the other party by adverse possession when he claimed both title and possession to the strip irrespective of the location of the fence.

Patrick v Cheney, 226-853; 285 NW 184

12304 Exceptions—hearing in court.

Official surveys—manner of making. In an action for reformation of description in realty mortgage and for foreclosure, wherein a surveyor or civil engineer is appointed by the court to make a survey of property covered by mortgages, and no objections are made to his appointment nor exceptions taken thereto, objection to the surveyor's report on appeal cannot be predicated on alleged failure to strictly follow the statutory provisions applicable to the reference of an equity case to a referee when the parties have agreed to procedure.

State Bank v Mapel, 226-1328; 286 NW 517

12305 Decree conclusive.

Decree based on acquiescence — conclusiveness. A decree that a specified portion of a line between adjoining landowners is a boundary line by acquiescence is not an adjudication of the true location of the remaining portion of said boundary line.

Turner v Sandhouse, 205-1151; 216 NW 58

Official survey on court order—evidence sufficient to support confirming report. In an action for reformation of description by metes and bounds in realty mortgages and for their foreclosure, evidence held sufficient to support judgment confirming surveyor's report, where surveyor is permitted to testify, without objection, that he was qualified to make the survey and that the plat of survey prepared by him is a true and correct survey showing the property in question and made in accordance with a previous order of court and such plat, after identification, was introduced in evidence without objection.

State Bank v Mapel, 226-1328; 286 NW 517

Official surveys—objections. In an action for reformation of description in realty mortgage and for foreclosure, wherein a surveyor or civil engineer is appointed by the court to make a survey of property covered by mortgages, and no objections are made to his appointment nor exceptions taken thereto, objection to the surveyor's report on appeal cannot be predicated on alleged failure to strictly follow the statutory provisions applicable to the reference of an equity case to a referee when the parties have agreed to procedure.

State Bank v Mapel, 226-1328; 286 NW 517

12306 Boundaries by acquiescence established.

ANALYSIS

I Boundary Lines in General
II Acquiescence
III Adverse Possession and Acquiescence
IV Mistake

Adverse possession generally. See under §11007 (XXVIII)

I BOUNDARY LINES IN GENERAL

Part of single ownership conveyed—implied easement or reservation—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement

right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

Recorded plat—conclusiveness. The recorded plat of an addition must be held to control boundary lines, in the absence of evidence sufficient to establish the acquiescence of the interested parties in other boundary lines.

Jackson v Snyder, 202-262; 208 NW 321

Lands under water—high watermark. The high watermark of a navigable river is that upper line which ordinary floods permanently mark along the course of the river.

Curtis v Schmidt, 212-1279; 237 NW 463

Homestead—noncontiguous tracts. One-half of a double garage, situated on property used by the owner solely for rental purposes, may not be deemed an appurtenance of the said owner's homestead, composed of a nearby, separate, independent and wholly different tract, noncontiguous to the rental property. So held in an action involving the validity of a sheriff's deed based on a sale en masse—a sale without platting.

Van Law v Waud, 223-208; 272 NW 523

Evidence insufficient to establish boundary by agreement. In special action, tried as in equity, to determine boundaries, evidence was insufficient to support a finding that grantor and grantee had agreed that a line just north of buildings should be taken and established as the south boundary line of land being conveyed.

Dyer v Knowles, 227-1038; 289 NW 911

Boundary line between farm buildings—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential, to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Estoppel—disclaimer filed—foreclosure of adjoining property in prior action. In an action foreclosing a mortgage and also asking for the reformation of the description of land in said mortgage in which one of the defendants by way of answer denies that plaintiff is entitled to reformation of description because of confusion as to the property covered by said mortgage as a result of a shifting river channel between the mortgaged land and the defendant's adjoining land, and alleging the plaintiff is estopped from asserting any interest in such adjoining land on account of a disclaimer filed by plaintiff's predecessor in a prior foreclosure action involving said adjoining land, held that such estoppel and disclaimer in the present action is ineffective in the absence of any evidence of any confusion or encroachment upon the adjoining land.

State Bank v Mapel, 226-1328; 286 NW 517

II ACQUIESCENCE

Discussion. See 16 ILR 409—Doctrine of acquiescence

Acquiescence for ten years. A boundary line marked by a fence and mutually acquiesced in by the property owners for more than ten years becomes irrevocable.

Downing v Glassburner, 200-715; 205 NW 354

Taylor v Olmstead, 201-760; 206 NW 88

Norton v Ferguson, 203-317; 211 NW 417

Pleading governmental descriptions—effect. A landowner who seeks to enjoin interference with a boundary line by acquiescence, irrespective of the true governmental line, will not be held to abandon his claim to a line by acquiescence from the mere fact that in his petition for injunction he describes the different tracts of land involved by their governmental descriptions.

Norton v Ferguson, 203-317; 211 NW 417

Acquiescence—immaterial matters. If landowners have, in truth and in fact, acquiesced for more than ten years in a fence as the boundary line between their adjoining lands, it becomes quite immaterial (1) who built the fence, or (2) to what extent the parties are assessed on their lands, or (3) whether, on a government survey, one of the parties would have more acreage and the other less acreage.

Brown v Bergman, 204-1006; 216 NW 731

Acquiescence in erroneous line. A fence which is acquiesced in as the true boundary line for the proper period of time and accompanied by possession of the land in accordance therewith becomes the true boundary line, even tho time reveals the fact that an error occurred in the original location of the fence.

Stone v Richardson, 206-419; 218 NW 332

Recognition and acquiescence. Adjoining owners of land who, for ten years or more, recognize and acquiesce in a line as marking the boundary between the two tracts, are bound thereby, notwithstanding such line is not the line fixed by government survey.

Kotze v Sullivan, 210-600; 231 NW 339

Acquiesced-in line. A line between adjoining tracts of land, definitely marked by a fence

II ACQUIESCENCE—concluded

which, for ten years, has been acquiesced in and recognized by the owners of the tracts as the division line, becomes, as between the parties, the conclusive line irrespective of the true line in fact; and this is true altho neither party intended to claim more than his deed calls for. It follows that either party has a legal right to build in reliance on said acquiesced-in line.

Minear v Furnace Co., 213-663; 239 NW 584

Effect after ten years. Adjoining landowners who, for ten years, acquiesced in a fence as marking the boundary line between their lands, are bound thereby and the claim of a subsequent owner of one of the properties that, when he bought, the fence had largely disappeared, is not of controlling importance, especially when the fact is manifest that the two properties had been improved with reference to said acquiesced-in line.

Mullahey v Serra, 220-1177; 264 NW 63

Acquiescence in line—effect. Where plaintiffs for over 10 years and plaintiffs and their grantors for over 20 years acquiesced in a certain fence as the boundary of defendant's property and acquiesced in the use of the land south of the fence as a traveled highway, the fence becomes the boundary altho it may not be the true line.

Brewer v Claypool, 223-1235; 275 NW 34

Street between properties. In controversies between private owners over boundaries, the fact that a highway is between their respective properties does not affect the doctrine of acquiescence.

Brewer v Claypool, 223-1235; 275 NW 34

Elements. On the issue of acquiescence by both parties to a boundary line, the intention of the parties is important. Acquiescence is consent inferred from silence, involving notice or knowledge of the claim of the other party and occurs where one, who is entitled to impeach a transaction or enforce a right, neglects to do so, from which the other party may infer that he has abandoned such right.

Patrick v Cheney, 226-853; 285 NW 184

III ADVERSE POSSESSION AND ACQUIESCENCE

Time of adverse possession. A division line between adjoining lands becomes the true line when maintained adversely for ten years, or when acquiesced in by the parties for the same period.

Kraft v Tennigkeit, 210-81; 230 NW 333

Failure to object to erection. A real estate property owner who, in erecting a valuable and expensive improvement on his property, places it on a line which he in good faith believes to be the true boundary line, cannot be thereafter disturbed in his improvement by an adjoining property owner who, during all the time of the erection, stood by and made no objection tho he knew the improvement maker was acting in perfectly good faith.

Minear v Furnace Co., 213-663; 239 NW 584

Accretions. A decree quieting title to accretions, and based on adverse possession, will be deemed to quiet title up to the high watermark of the river in question, even tho when literally and hypercritically construed it seemingly quiets title only to the high watermark as it existed when the action to quiet title was commenced. So held where, pending the action, trial and entry of decree, the river continued to recede.

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Boundary dispute on fenced land. In a dispute involving title to a strip of land between two town lots which were separated by a fence, where there was no acquiescence in the fence as the true boundary line, and one party had no intent to claim beyond the true boundary line, held that title was acquired by the other party by adverse possession when he claimed both title and possession to the strip irrespective of the location of the fence.

Patrick v Cheney, 226-853; 285 NW 184

IV MISTAKE

Adverse possession—nature and requisites—hostile character of possession—mistake—effect. One may not be said to be in the adverse possession of land beyond the governmental line when, during his entire possession, he never intended to claim beyond the true line. Evidence reviewed, and principle held inapplicable in the instant case.

Kotze v Sullivan, 210-600; 231 NW 339

12309 Boundaries by agreement.

Oral agreement—statute of frauds. An oral agreement to change a long established boundary fence is enforceable when taken out of the statute of frauds (1) by the mutual taking of a new survey, (2) by the building of a new fence in accordance with the said survey, and (3) by taking possession of the lands inclosed by such new fence.

Cheshire v McCoy, 205-474; 218 NW 329

Oral agreement to change. A naked oral agreement to change an established boundary line is unenforceable.

Stone v Richardson, 206-419; 218 NW 332

Estoppel to dispute. A naked oral agreement to resurvey an established boundary line will not work an estoppel to insist on the old established boundary.

Stone v Richardson, 206-419; 218 NW 332

CHAPTER 522

PARTITION

12310 Nature of action.

ANALYSIS

I PARTITION IN GENERAL
II PROPERTY SUBJECT TO PARTITION
III PERSONS ENTITLED TO SUE
IV TIME TO SUE

I PARTITION IN GENERAL

Proceedings strictly statutory. A proceeding to partition real estate in Iowa is strictly statutory.

Criswell v Criswell, 227-212; 288 NW 130

Scope of proceeding. Where all the parties are before the court in a partition proceeding, equity has jurisdiction to adjudicate all matters and rights of the respective parties.

In re Delaney, 227-1173; 290 NW 530

Conclusiveness of proceeding. Where testator devised real estate to certain wards on condition that they pay $8,000 into decedent's estate within one year after his death and where, in a partition proceeding to which the wards were parties, court found such condition was not met and that devise had lapsed and the land was sold for $7,200, the wards could not in a subsequent proceeding on objections to guardian's final report maintain position that they still owned the land and were entitled to rents and profits therefrom, since the partition proceedings constituted an adjudication as to every matter there in issue and as to all questions necessarily in issue.

In re Delaney, 227-1173; 290 NW 530

Recovery of real property (?) or partition (?). An action for the partition of real property by parties who are in possession of the property, and who claim to be co-owners thereof, may not be deemed an action for the recovery of real property, within the meaning of the statute of limitation, because an intervenor pleads a recorded deed which would deprive plaintiffs of all title, but which deed plaintiffs by reply claim was never delivered.

Gibson v Gibson, 205-1285; 217 NW 852

Dower—assignment or setting off—recognized methods. The statutory provisions for admeasurement of dower do not exclude the setting off of dower by an action in equity, by partition, or by any other appropriate action.

Ehler v Ehler, 214-789; 243 NW 591

Resulting trust denied—deed from father to son—conduct of parties. In a partition action involving a decedent's property, tried on issues raised by defendant's cross-petition, alleging that another property of decedent, which had been deeded by decedent to one of his sons, should be included in the partition action—in the absence of fraud—such deed therefor will not be set aside on the theory of a resulting trust in favor of the decedent's estate, when there is no evidence that either the grantor or grantee so considered it altho they both lived several years after the deed was made.

Gilligan v Jones, 226-86; 283 NW 434

Joint tenancies not favored—strict construction. The rule of joint tenancy with right of survivorship is not favored in public policy, and the mere inclusion of the words in a deed "said real estate being taken jointly" will not be sufficient to establish a joint tenancy, especially when followed by words tending to negative such assumption, such as, "to the grantees, their assigns, heirs, and devisees forever".

Albright v Winey, 226-222; 284 NW 86

Parol partition of common interest. Parol partition by persons competent so to do, holding land in common, may effect a partition of the same so as to enjoy their respective shares in severalty, but this cannot be done where other interests intervene.

Anderson v Anderson, 227-25; 286 NW 446

II PROPERTY SUBJECT TO PARTITION

Trust estate — nonvested interest. Lands which are under testamentary trusteeship for a stated or discretionary time are not subject to partition by the ultimate beneficiary until his interest becomes vested. Trust construed, and held to clearly empower the trustee to continue the trust.

Schaal v Schaal, 203-667; 213 NW 207

Co-existing estates in fee. In an action in partition of realty in which two brothers each own an undivided one-third for life and an undivided one-sixth in fee, partition will not be allowed when it involves interests in remainder over after termination of life estates.

Anderson v Anderson, 227-25; 286 NW 446

Realty in probate. In rare instances on a showing of extreme necessity the right of partition of realty may be allowed where the preservation of an estate of a decedent depends upon it.

Anderson v Anderson, 227-25; 286 NW 446

Parol partition of common interest. Parol partition by persons competent so to do, holding land in common, may effect a partition of the same so as to enjoy their respective shares in severalty; but this cannot be done where other interests intervene.

Anderson v Anderson, 227-25; 286 NW 446

III PERSONS ENTITLED TO SUE

Devisees of estate. One of several devisees in common of real property (the estate being

III PERSONS ENTITLED TO SUE—concluded

fully settled) may maintain partition, even tho the will specifically authorizes the executor to sell the property and divide the proceeds.

Ruggles v Powers, 201-284; 207 NW 116

Life tenant. A life tenant is not entitled to partition against a nonconsenting minor reversioner of the fee (even tho he has also acquired the interest of a like reversioner) in the absence of pleading and proof that such partition will not be to the detriment of such minor.

Farmers Mtg. Co. v Walker, 207-696; 223 NW 497

Duplicate actions—priority. When two actions involving the same subject matter are commenced by different parties (e. g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones v Park, 220-903; 262 NW 801

Husband of titleholder as improper plaintiff. A husband may not maintain an action to partition lands of which his wife holds the legal title, and in which he has no interest except the contingent interest of a husband.

Jones v Park, 220-903; 262 NW 801

Administrator and heirs as plaintiffs. Tho an administrator may have no authority, as such, to maintain an action for the partition of the lands of his intestate, yet the fact that he joins as plaintiff, along with some of the actual owners of the land as plaintiffs, is quite harmless.

Bleakley v Long, 222-76; 268 NW 152

Several interests. Partition may be maintained only when the parties plaintiff and defendant are entitled to the present possession of their several interests.

Anderson v Anderson, 227-25; 286 NW 446

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

IV TIME TO SUE

Right of action when interest becomes vested. Lands which are under testamentary trusteeship for a stated or discretionary time are not subject to partition by the ultimate beneficiary until his interest becomes vested. Trust construed, and held to clearly empower the trustee to continue the trust.

Schaal v Schaal, 203-667; 213 NW 207

12311 Joinder and counterclaims.

Adjustments of all rights. In the equitable action of partition the court has ample power to adjust and settle the rights of the various parties pertaining to and growing out of the subject matter of the action, and thereby avoid a multiplicity of suits. In other words, the general rule as to separate actions does not apply.

Creger v Fenimore, 216-273; 249 NW 147

Duplicate actions—which abatable. While an action in partition in which service of the original notice is incomplete in whole or in part is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Insolvent heir's unpaid debt to estate—jurisdiction of court to offset. The court has jurisdiction, in an equitable action to partition the lands of an intestate (to which action all heirs are parties), to entertain a cross-petition by one of the heirs as administrator of said estate, and, under proper pleading and proof:

1. To decree that a certain insolvent heir has no interest in said land because his unpaid indebtedness to said estate equals or exceeds the value of the share in said lands which he would take were he not so indebted, and
2. To decree that said lands belong solely to the other heirs who are not so indebted, and to the surviving widow, if any.

Bauer v Bauer, 221-782; 266 NW 531

Claim for widow's support—lien on proceeds of partition. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

12312 Petition.

Unrecorded conveyance — burden of proof. Where children, holding undivided interests in lands as heirs, vest their mother, by an unrecorded instrument, with actual possession of the lands during her widowhood, a subsequent deedholder of the interest of one of the children may not have partition of the land, unless he pleads and proves (1) his subsequent purchase, (2) that he paid value therefor, and (3) that he had no notice of said unrecorded instrument.

Young v Hamilton, 213-1163; 240 NW 705

Substituted petition constituting new action. The filing, by plaintiff in partition, of an amended and substituted petition, in which the name of his wife is omitted as a defendant and appears as a joint plaintiff, must be deemed the commencement of an entirely new action.

Jones v Park, 220-903; 262 NW 801

Cross-petition — notice of — sufficiency. In an action for the partition of lands, a notice by one co-defendant to another co-defendant of the filing by the former of a cross-petition, denying all interest of the latter in the lands in question, is not a nullity because said notice fails to specifically describe or identify said lands, when said notice makes proper reference to the original petition in the action for a correct description of said lands.

Bauer v Bauer, 221-782; 266 NW 531

Explanatory allegations—nonappealable motion to strike. In a partition action the overruling of a motion to strike various explanatory allegations of a petition, being interlocutory and not going to the merits, is not appealable.

Lunt v Van Gorden, 224-4; 275 NW 579

12314 Lien creditors.

Failure to distribute funds to lienholders. Assuming that the failure of a referee in partition to make distribution to claimants of funds in his possession, as ordered by the court, may be excused as to claimants whose shares are encumbered by liens or garnishments, yet such excuse manifestly cannot be recognized as to claimants whose shares are not so encumbered.

Peterson v Younker, 219-32; 257 NW 442
Hoskin v West, 226-612; 284 NW 809

Offsetting debt of insolvent heir against realty—creditors—judgments. Where an heir, as a defendant in a partition action, admits insolvency and an indebtedness to parents' estate in excess of his interest in parents' realty, decree was proper holding heir had no interest in such realty and, accordingly, heir's creditors who obtain judgments after commencement of partition action but before entry of decree, and making no claim of fraud in securing the decree, have no interest in any of funds received from sale of realty.

Petty v Hewlett, 225-797; 281 NW 731

12315 Party defendants.

"Necessary parties"—failure to join. In a partition action, on appeal from a decree fixing parties' interest in a cemetery lot, the widow and children of one of the original grantees are "necessary parties" in whose absence the supreme court cannot consider such appeal.

Paulson v Paulson, 226-1290; 286 NW 431

12316 Jurisdiction over property.

Custodia legis—burden of proof. If property is not subject to attachment or garnishment because undergoing partition, and, therefore, in the custody of the law, the mover for dissolution must show that no order for distribution has been entered in the partition proceedings.

Carson v Long, 219-444; 257 NW 815

Lien on proceeds of partition subject to costs. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

Service by publication—jurisdiction. In partition proceedings, service by publication only, on a nonresident, nonappearing defendant, arms the court with jurisdiction to adjudicate the title to the property.

Clark v Robinson, 206-712; 221 NW 217

12319 Issues—trial—costs.

Mortgage reciting life estates. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

Lien on proceeds of partition subject to costs. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such

realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

12320 Reference to ascertain incumbrances.

Belated filing of judgment transcript. A referee in partition who, after sale, reports, in accordance with an order of court, all incumbrances then appearing against the share of a party to the proceeding, is under no legal obligation to withhold distribution of the proceeds of sale in favor of the holder of a subsequently filed transcript of judgment of which said referee has no notice or knowledge.

Ferguson v Hamilton, 206-1285; 221 NW 947

12323 Lien on undivided interests.

Subrogation as affecting junior mortgagee. Where tenants in common of land as principal and surety jointly mortgage their undivided interests in order to secure the debt of the principal, the surety may, after the land is partitioned and set off in severalty, compel the satisfaction of the mortgage as far as possible out of the lands assigned in severalty to the principal, and be subrogated to all the rights of the mortgagee in case he is compelled to pay the principal's debt; and this right is enforceable against a subsequent mortgagee of the principal's undivided interest alone, when such mortgagee takes his mortgage with actual knowledge that the mortgagors in the prior mortgage occupied the relation of principal and surety.

Toll v Toll, 201-38; 206 NW 117

Tenants in common—accounting. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common property, until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

Offsetting debt of insolvent heir against realty. Where an heir, as a defendant in a partition action, admits insolvency and an indebtedness to parents' estate in excess of his interest in parents' realty, decree was proper holding heir had no interest in such realty and, accordingly, heir's creditors who obtain judgments after commencement of partition action but before entry of decree, and making no claim of fraud in securing the decree, have no interest in any of funds received from sale of realty.

Petty v Hewlett, 225-797; 281 NW 731

Lien on proceeds of partition subject to costs. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

12324 Not to delay distribution.

Failure to distribute funds—excuse. Assuming that the failure of a referee in partition to make distribution to claimants of funds in his possession, as ordered by the court, may be excused as to claimants whose shares are encumbered by liens or garnishments, yet such excuse manifestly cannot be recognized as to claimants whose shares are not so encumbered.

Peterson v Younker, 219-32; 257 NW 442

12325 Confirmation.

ANALYSIS

I ADJUSTING EQUITIES
II DECREE

I ADJUSTING EQUITIES

Contribution for taxes, interest, repairs, and tiling. A surviving mother, in partition of lands left by the deceased husband, is entitled to proper contribution from the children for money paid by her for taxes, interest on mortgages, and necessary repairs, but not (under certain facts) for tiling of the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

II DECREE

Allowance to co-tenant for improvements. A co-tenant who, in good faith, makes valuable and beneficial improvements upon the common property, even without the knowledge or consent of the other co-tenant, will, on final decree in partition, be protected to the extent which the improvements have enhanced the sale value of the land.

Nelson v Pratt, 212-441; 230 NW 324; 236 NW 386

Co-tenants—nonduty to account for rents. A surviving wife is under no legal obligation, in partition proceedings, to account to her children for the rent of their shares of the land left by the deceased husband and father, when, upon the death of the latter, the wife and children continued to jointly occupy and farm the land in the usual way, and to apply the resulting profits and products to their joint maintenance and education.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

12326 Referees to partition—sale.

Appointing referees—division in kind inequitable. Proper and better practice in partition is to appoint referees following a showing and judicial determination that a division of the property in kind cannot be equitably made.

Murphy v Bates, 224-389; 276 NW 29

Sale (?) or division in kind (?). On the question whether certain property should be in part divided in kind and in part sold, due weight must be given to the judgment of disinterested referees, especially when the testimony is in hopeless conflict.

Town v Town, 203-254; 212 NW 471

Division in kind depreciating value—sale justified. Uncontradicted evidence in partition tending to establish that land, if divided, will have a less aggregate value, justifies the court in ordering the property sold as a unit.

Murphy v Bates, 224-389; 276 NW 29

Impracticable and ill-advised division. A tract of land will not, in partition proceedings, be divided into small tracts when such division will substantially depreciate the value of the shares of the several owners.

Snyder v Snyder, 211-445; 233 NW 498

Setting off in kind—burden of proof. A plaintiff in partition who owns a small fractional unincumbered interest in land while the major interest is owned by heirs whose interest has been ordered sold in probate to pay the debts of the estate, may not successfully complain that his fractional interest is not set off to him in kind when he fails to show that such setting off would not unduly impair the value of the remaining land.

Nehls v Walker, 215-167; 244 NW 850

Rights and obligations of bidder and court. Highest bidder at partition sale makes proposed contract from which he cannot arbitrarily withdraw, and is obligated to complete the contract if sale is approved, nor can the court arbitrarily refuse confirmation, the bidder having become possessed of a right which can be extinguished only by refusing confirmation in the exercise of a sound judicial discretion.

Criswell v Criswell, 227-212; 288 NW 130

Public auction—status of highest bidder. In partition action where property was sold at public auction in regular manner for $4,600, the court did not abuse its discretion in amending referee's report and accepting a higher bid made subsequently to the public sale, the uniform holding in Iowa being that the high bidder at judicial sales, other than at sales under execution or by a trustee under a power, acquires no absolute or vested right, since the sale must be approved by the court and is considered merely a preferred bidder until such approval is given.

Criswell v Criswell, 227-212; 288 NW 130

Public sale—highest bid. Highest bidder at public sale is not entitled as a matter of right to have the sale confirmed by the court, and where a higher substantial bid is made, even tho tardy, a large discretion lies with the court as to which bid shall be accepted.

Criswell v Criswell, 227-212; 288 NW 130

Reopening sale for further bids. Where $4,600 was bid at public sale in partition, the trial court was within its jurisdiction in opening the sale for further offers when a subsequent higher bid was made, provided all active and present bidders were treated fairly and without discrimination, particularly when one of the bidders was an owner of the property, part of which was his homestead.

Criswell v Criswell, 227-212; 288 NW 130

Partition deed—assuming mortgage. Where a referee in partition sells at private sale for an amount in excess of an only existing mortgage, and the deed, referring to the report of sale, recites an assumption and agreement to pay the mortgage, the purchaser is prima facie liable.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11, 275 NW 392

Referees—removal. The court, in partition proceedings, has wide discretionary power to discharge a referee for cause and to appoint his successor.

Humphrey v Ralls, 223-770; 273 NW 865

Proceeds — distribution — improper form of check. A referee in partition who, in making distribution of the proceeds of a sale, makes a check payable to an "estate" must account for such share in case the money never reaches said estate. Payment should be made to the administrator.

Albright v Moeckley, 209-1304; 230 NW 351

12330 Report of referees.

Unallowable procedure. A hearing on objections to the report of a referee in partition, without any reference to the question of approving or disapproving said report, seems to be a procedure unknown to our practice.

Peterson v Younker, 219-32; 257 NW 442

Partition deed—assuming mortgage. Where a referee in partition sells at private sale for an amount in excess of an only existing mortgage, and the deed, referring to the report of sale, recites an assumption and agreement to pay the mortgage, the purchaser is prima facie liable.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

12332 Partition of part.

Partition in kind (?) or by sale (?). A partition partly in kind and partly by sale will not be permitted when some of the parties would be prejudiced thereby.

Clayman v Bibler, 210-497; 231 NW 334

12333 Report set aside.

Vacating order. An order approving the distribution made by a referee in partition must be set aside, on timely and proper application, when it is made to appear that distribution was made to the wrong party, and it is quite immaterial that the applicant may have an action against the bank for the improper payment of the check by means of which distribution was attempted.

Albright v Moeckley, 209-1304; 230 NW 351

New report releasing purchaser's assumption of mortgage—validity. After foreclosure has been started on land previously partitioned, it is improper to re-open the partition and file a new report relieving the purchaser of an assumption and agreement to pay the mortgage on the land partitioned, therefore any order granting such release is void as against the rights of a foreclosure plaintiff relying on such assumption and agreement to pay.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Order overruling objections to referee's report. An order overruling objections to the report of a referee in partition seems to be appealable.

Peterson v Younker, 219-32; 257 NW 442

Questions first raised on appeal. Whether an action to set aside an order of approval of the distribution report of a referee in partition is proper in form or timely cannot be raised for the first time on appeal.

Albright v Moeckley, 209-1304; 230 NW 351

12334 Decree.

Retrial—computation of period. The two years within which a nonresident, nonappearing defendant served by publication may appear and have an action in partition retried commences to run from the date of the judgment which confirms the partition and apportions the costs, and not from the date when the court approves the referee's report of distribution.

Tracy v McLaughlin, 207-793; 223 NW 475

Objections to referee's report—unallowable procedure. A hearing on objections to the report of a referee in partition, without any reference to the question of approving or disapproving said report, seems to be a procedure unknown to our practice.

Peterson v Younker, 219-32; 257 NW 442

Incidental relief—unallowable claim. In an action to partition the remainder in real estate after the termination of a preceding testamentary life estate—which had existed for some 16 years—the court may not allow and decree as payable out of the proceeds of the partition sale, a claim against the former estate in probate out of which the life estate arose when there is no proof of said claim (1) either in the former probate proceedings, or (2) in said partition proceedings.

Kinnett v Ritchie, 223-543; 273 NW 175

Adjustment of equities—paving assessments — fatally indefinite proof. On the issue whether certain parties to an action to partition land should be equitably reimbursed for paving assessments paid for the common betterment of the common property, record evidence reviewed and held entirely too indefinite and uncertain to justify the allowance of the claimed reimbursement.

Kinnett v Ritchie, 223-543; 273 NW 175

Conclusiveness of proceeding. Where testator devised real estate to certain wards on condition that they pay $8,000 into decedent's estate within one year after his death and where, in a partition proceeding to which the wards were parties, court found such condition was not met and that devise had lapsed and the land was sold for $7,200, the wards could not in a subsequent proceeding on objections to guardian's final report maintain position that they still owned the land and were entitled to rents and profits therefrom, since the partition proceedings constituted an adjudication as to every matter there in issue and as to all questions necessarily in issue.

In re Delaney, 227-1173; 290 NW 530

12339 Costs generally.

Lien on proceeds of partition subject to costs. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

12340 Attorney's fees.

Attorney fees—when unallowable. Principle reaffirmed that when the title of property involved in partition proceedings is put in issue, and all parties are represented by counsel, neither may have attorney fees taxed at the expense of the common property.

Kinnett v Ritchie, 223-543; 273 NW 175

12341 Sale—referees to give bond—removal.

Referees—liability. A referee in partition may place himself in a very precarious position by depositing and retaining partition funds in his own bank which is in a failing condition.

Peterson v Younker, 219-32; 257 NW 442

Surety—agreement to indemnify—joint and several liability. A written agreement in an application for a surety bond by two duly appointed referees in partition to the effect and in the language of "we hereby agree" to indemnify said surety for any damage suffered by him because of said bond, is jointly and severally binding on both principals even tho one of them received no part of the funds covered by the bond and was guilty of no personal failure to account.

Ind. Co. v Opdycke, 223-502; 273 NW 373

Validity of bond—estoppel to question. A duly appointed referee in partition will not be permitted to question the authorized execution in his name of a bond as such referee, when, subsequent to the said execution and filing of said bond, he reports to the court and under oath, that he had given said bond and had effected a sale of said property.

Ind. Co. v Opdycke, 223-502; 273 NW 373

12343 Private sale—appraisement.

Failure to file appraisal report—effect. When partition proceedings have progressed through all the various steps up to and including the surrender of possession of the land to the purchaser, the sale will not be set aside on the sole ground that, while the land was appraised and report thereof made before the sale, the said report was not formally filed before said sale.

Dickson v Dickson, 220-882; 262 NW 803

Partition deed—assuming mortgage. Where a referee in partition sells at private sale for an amount in excess of an only existing mortgage, and the deed, referring to the report of sale, recites an assumption and agreement to pay the mortgage, the purchaser is prima facie liable.

First Tr. JSL Bk. v Thomas, 223-1018; 274 NW 11; 275 NW 392

Consideration and acceptance. Where a note was sent for the purchase price of land in partition, and tho objections were made to it because the signature was not in ink, a judgment for the plaintiff on the note was warranted when there was evidence on which the jury could have found consideration for the note and that it was later accepted by the plaintiff after learning that the penciled signature was valid.

Ballard v Ballard, 226-699; 285 NW 165

12344 Report of sale.

Discretion to reject report and re-offer property. The court has a legal discretion, in partition proceedings, to reject the referee's report of sale to the highest bidder, and, in open court, to call for and accept and confirm a materially larger bid than that received by the referee.

Dyer v Dyer, 220-405; 262 NW 671

Approval—refusal to set aside—discretion. The refusal of the court to set aside the referee's report of sale and the court's approval thereof will not be disturbed on appeal in the absence of a showing that the court abused its discretion.

Bleakley v Long, 222-76; 268 NW 152

Amending report to accept higher bid. In partition action where property was sold at public auction in regular manner for $4,600, the court did not abuse its discretion in amending referee's report and accepting a higher bid made subsequently to the public sale, the uniform holding in Iowa being that the high bidder at judicial sales, other than at sales under execution or by a trustee under a power, acquires no absolute or vested right, since the sale must be approved by the court and is considered merely a preferred bidder until such approval is given.

Criswell v Criswell, 227-212; 288 NW 130

Increased bids for small amounts not accepted after sale. While the general rule is that the court will not approve acceptance of a bid which has been increased by only a small, proportionate amount over a previously accepted bid, yet where a tardy bidder had lived on the tract for many years as a homesteader, and where the money involved was of secondary importance, the court exceeded its jurisdiction in not accepting the higher bid, altho the trial court would have been affirmed if the bidder had been anyone other than the owner, and under the latter circumstance this case is not to be considered as a precedent.

Criswell v Criswell, 227-212; 288 NW 130

New report releasing purchaser's assumption of mortgage—validity. After foreclosure has been started on land previously partitioned, it is improper to re-open the partition and file a new report relieving the purchaser of an assumption and agreement to pay the mortgage on the land partitioned, therefore any order granting such release is void as against the rights of a foreclosure plaintiff relying on such assumption and agreement to pay.

First Tr. JSL Bk. v Thomas, 223-1018; 274 NW 11; 275 NW 392

Partition plaintiff as purchaser assuming mortgage—parol evidence. A plaintiff in a partition action, becoming the purchaser, who

accepts, from the referee with knowledge of its contents, a deed reciting an assumption of a mortgage together with a reference to the referee's report of sale, and who also retains an amount equal to the mortgage, does thereby assume and agree to pay such mortgage. Such a reference incorporates the report into the deed and the actual consideration may be shown by parol evidence.

First Tr. JSL Bk. v Thomas, 223-1018; 274 NW 11; 275 NW 392

Sale—bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under an order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Distribution—improper form of check. A referee in partition who, in making distribution of the proceeds of a sale, makes a check payable to an "estate" must account for such share in case the money never reaches said estate. Payment should be made to the administrator.

Albright v Moeckley, 209-1304; 230 NW 351

Appeal—inadequacy of bid. The approval by the trial court of a referee's sale in partition will not be disturbed on appeal on the ground of inadequacy of bid, even tho the bid is substantially lower than the bid made at a former, rejected sale, when only a minority of the interested parties (all of whom are adults) object to confirmation, and when there is no prospect that a more advantageous bid can be received.

Fallers v Latimer, 217-261; 251 NW 612

Questions first raised on appeal. Whether an action to set aside an order of approval of the distribution report of a referee in partition is proper in form or timely cannot be raised for the first time on appeal.

Albright v Moeckley, 209-1304; 230 NW 351

12345 Conveyance.

Deed pending appeal—effect. The vendee in a referee's deed in partition who takes his deed pending an appeal from the order for the deed takes at his peril.

Fraizer v Fraizer, 204-724; 215 NW 946

Approval of deed—conclusiveness. An order of court confirming a deed in partition, approving the final report of the referee and discharging him and his bondsman from further responsibility, coupled with a recital and finding that the referee had made full distribution of the purchase price and had fully complied with all orders of the court (one of which was to the effect that the purchase price must be paid in cash) is final and conclusive until set aside by a direct proceeding, even tho as a matter of fact no money ever actually passed from the purchaser to the referee.

State Bank v Uglow, 208-1241; 227 NW 118

Foreclosure — deficiency judgment — purchaser from partition referee. Where the referee's deed and report of sale recite an assumption of a mortgage, a deficiency judgment may in a proper case be rendered against one who purchases from a referee in partition.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Partition deed—assuming mortgage. Where a referee in partition sells at private sale for an amount in excess of an only existing mortgage, and the deed, referring to the report of sale, recites an assumption and agreement to pay the mortgage, the purchaser is prima facie liable.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Sale not subject to collateral attack. A partition sale, regular on its face, cannot be collaterally attacked in a subsequent proceeding on objections to a guardian's final report.

In re Delaney, 227-1173; 290 NW 530

12348 Sales disapproved.

Right to impose additional terms. An order of court to the effect that a very belated bidder at a referee's sale in partition make a deposit or down payment greater than was required of regular bidders is presumptively within the discretion of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under the order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

12350 Life estates.

Life estates created by will. See under §11846 (V)
Life estates, enlargement into fee. See under §10060
Life estates generally. See under §10042 (II)

When action lies—life tenant. A life tenant is not entitled to partition against a nonconsenting minor reversioner of the fee (even tho he has also acquired the interest of a like reversioner) in the absence of pleading and proof that such partition will not be to the detriment of such minor.

Farmers Mtg. Co. v Walker, 207-696; 223 NW 497

Valuable improvements—nonliability of remainderman. Principle recognized that a life tenant of realty may not, on his own initiative, place valuable improvements on the property,

and legally hold the remainderman liable for the value of such improvements.

Kinnett v Ritchie, 223-543; 273 NW 175

Adopting pleading stating valid defense—default against aged defendant set aside. A default order unaccompanied by any judgment may be validly set aside at a subsequent term. So held in a partition suit where defendant, an 84-year-old mother holding a life estate, after defaulting, adopted the answer and cross-petition of the defendant children, which pleadings, if true, would effectually prevent partition—a sound reason for setting aside the default.

Redding v Redding, 226-327; 284 NW 167

12351.1 Unborn parties.

Constitutionality. This section is violative of neither the federal nor state constitution relative to depriving persons of property without due process.

Mennig v Howard, 213-936; 240 NW 473

Inheritance taker as "representative" of contingent remainderman. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

See Mennig v Graves, 211-758; 234 NW 189

Unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant, arising out of the terms of a testamentary devise, is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189

CHAPTER 523

FORECLOSURE OF CHATTEL MORTGAGES

12352 Notice and sale.

Atty. Gen. Opinion. See '30 AG Op 100

ANALYSIS

I FORECLOSURE IN GENERAL
II FORECLOSURE UNDER CONTRACT
III FORECLOSURE IN COURT

I FORECLOSURE IN GENERAL

Pledge and mortgage distinguished. The deposit of collateral securities with a trustee, in order to secure the payment of bonds issued by the depositor, constitutes a pledge and not a mortgage.

Central Bk. v Secur. Co., 206-75; 218 NW 622

Election between securities. The holder of both a chattel and real estate mortgage securing the same debt has the right to elect to proceed to the foreclosure of his mortgages and to abandon all interest in a block of trust bonds secured by trust deed on other real estate and held by him as collateral security for said debt, and in such case the foreclosure by the trustee of the trust deed and the buying in of the trust property by the trustee in the interest of the bondholders will not be deemed a payment to any extent of the chattel and real estate mortgage secured debt.

Silver v Farms, Inc., 209-856; 227 NW 97

Combined real estate and chattel mortgage—independent foreclosure of latter. When a mortgage on real estate, and a chattel mortgage on the rents of said real estate, are combined in the same instrument as security for the same debt, the chattel mortgage is foreclosable without regard to the real estate mortgage except, of course, as to the proper application of payments realized.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Liabilities of parties. A senior chattel mortgagee who, without foreclosure, takes possession of the mortgaged property and sells it at private sale must account to a junior mortgagee for such part of the proceeds as he applies to unsecured claims due him.

Money v Bank, 202-106; 209 NW 275

Foreclosure subsequent to judgment at law. A chattel mortgagee may obtain a judgment at law on the promissory notes secured by the mortgage, and later maintain an action in equity to establish his lien on the mortgaged chattels and to subject said chattels to the satisfaction of his judgment, even tho there are junior liens on the same property.

Hamilton v Henderson, 211-29; 230 NW 347

Mortgage on rents—exclusive power of mortgagee to collect. A chattel mortgage on the rents and income of real estate, tho combined in a real estate mortgage as dual security for the same debt, vests the mortgagee with full and exclusive power to collect said rents and income.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

I FORECLOSURE IN GENERAL—concluded

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Dissolution by state—corporate officer's lien denied—mining property. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Fuel Co., 224-466; 276 NW 41

Breach of warranty as defense. In action by seller to foreclose a chattel mortgage on a tractor, the trial court's finding that the tractor would not operate properly as warranted was sustained by the evidence.

Cunningham v Drake, (NOR); 224 NW 48

II FORECLOSURE UNDER CONTRACT

Conditional sales contract. A conditional sales contract which provides that on default the vendor may seize the property and sell at public or private sale and credit the vendee with the net proceeds may be foreclosed by judicial proceedings.

Central Motors v Clancy, 206-1090; 221 NW 774

Conditional sales—unallowable foreclosure. In an action to foreclose a conditional sales contract on a specifically described article, foreclosure may not be decreed on another and different article but of the same general nature, in the absence of allegation and proof that the latter article had been mutually substituted for the former.

D. M. Co. v Lindquist, 214-117; 241 NW 425

III FORECLOSURE IN COURT

Agreed public sale—lien on proceeds. An agreement between chattel mortgagees and the chattel mortgagor that the mortgaged property shall be sold at public sale and the proceeds turned over to the mortgagees in the order of their liens, is valid and enforceable in equity. In other words equity, in order to enforce the agreement, will impress a trust on said proceeds in favor of said mortgagees, even tho the occasion so to do arises in a proceeding at law, to wit, a garnishment.

Jasper Co. Bank v Klauenberg, 218-578; 255 NW 884

Conditional sale contract. A conditional sale contract which retains title in the vendor but which binds the vendee to pay the entire price, and provides for foreclosure in case of default of payment, arms the vendor, in case of such default, to proceed in equity for the foreclosure of his lien.

Jensen v Kissick, 204-756; 215 NW 962

Co-executors—failure to list debt owed by one—other estopped to foreclose. When two sons, as executors of their deceased father's estate, in their final report failed to list as an asset of the estate a note and mortgage owed by one son to the father, altho both sons knew of the debt, in an action in which the other son as heir to half the estate sought to collect the note and foreclose the mortgage, the court's adjudication that all property in the estate had been administered estopped him from obtaining relief when the final settlement was not attacked on the grounds of fraud or mistake.

Joor v Joor, 227-870; 289 NW 463

Review, scope of. In the foreclosure of a real estate mortgage and of a chattel mortgage clause embraced therein, the fact that the lower court failed to enter an order for the formal foreclosure of the chattel mortgage is quite inconsequential when the court did appoint a receiver of said mortgaged chattels and properly ruled that plaintiff's lien was superior to that of appellant's.

Equitable v Brown, 220-585; 262 NW 124

12358 Attorneys' fees.

Fees on corporate notes—state's nonliability. Where dissolution of a mining corporation is sought, a partial cost judgment against the state of Iowa including statutory attorney fees to a cross-petitioner on notes secured by chattel mortgage and signed by the corporation is erroneous.

State v Fuel Co., 224-466; 276 NW 41

12360 Evidence of service perpetuated.

Nunc pro tunc correction of manifest error. A decree in chattel mortgage foreclosure may be so corrected by nunc pro tunc entry that the detailed enumeration of the mortgaged property will appear in the corrected decree exactly as the court unquestionably intended such enumeration to appear in the original judgment entry.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

12361 Validity of sales.

Treating collateral security as one's own. The collateral holder of mortgage-secured

bonds is guilty of conversion if, when the mortgage is foreclosed, he so treats said bonds as his individual property that they pass beyond the control of himself and of the real owner, without the knowledge or consent of said real owner.

Leonard v Sehman, 206-277; 220 NW 77

Mechanic's lien release thru fraud—insufficient evidence. Where a landowner desiring to refinance a mortgage on his land is unable to do so, unless he also satisfies a mechanic's lien thereon, and when the landowner's son, seeking to aid his father by securing a release of the mechanic's lien, executes to a bank a chattel mortgage, after which the mechanic's lien is released because of a special account set up by the bank for the mechanic's lienholder, but which account is available, however, only in such amounts and at such times as the son paid off the chattel mortgage to the bank, and when the same bank later took another chattel mortgage from both the landowner and son, which it later foreclosed, and in the sale disposed of the property, previously mortgaged for the benefit of the mechanic's lienholder, without crediting to the mechanic's lienholder's benefit the proceeds therefrom, a fraud action by the mechanic's lienholder against the bank held not to have been proven.

Shimp Bros. v Place, 225-1098; 281 NW 471

12362 How contested.

Foreclosure — transfer to court. The right of a mortgagee to foreclose a chattel mortgage by notice and sale (1) under the statute, or (2) under the terms of the mortgage itself, may not be transferred to the district court on the application of the mortgagor on the ground of fraud and want of consideration in obtaining the mortgage, when an action of replevin involving the mortgaged chattels, and pending against the mortgagor furnishes him ample opportunity to test the mortgagee's right to foreclose by interposing said plea of fraud and want of consideration.

McDonald v Johnston, 218-1352; 256 NW 676

Sale of horses covered by prior mortgage—misdescription. In an action against a bank for conversion of horses sold in a chattel mortgage foreclosure and allegedly being the same horses mortgaged previously to induce the release of a mechanic's lien, held, evidence failed to establish that the horses sold were the same ones described in the prior chattel mortgage.

Shimp Bros. v Place, 225-1098; 281 NW 471

12363 Deeds of trust.

Right to collect collateral. Trust deed held to authorize unequivocally the pledgor of collateral as security for a bond issue to collect the principal and interest maturing on the collateral so long as the pledgor was not 60 days in default in himself paying the maturing principal and interest of the bonds, in which latter case the right and duty to collect devolved on the trustee.

Walker v Howell, 209-823; 226 NW 85

Unauthorized transfer of collateral. The act of a trustee, holding collateral as security for a particular bond issue, in transferring, without authority, the collateral so held to another and different series of bonds in order that the said latter bonds may be better secured or the transfer of such collateral to any other foreign purpose, constitutes a conversion, and renders the trustee and the corporate officers who connive thereat personally responsible to the bondholders for the loss suffered by them.

Walker v Howell, 209-823; 226 NW 85

Right to withdraw and substitute. Where the pledgor of collateral as security for a bond issue had the right under the trust deed to withdraw matured collateral and collect the amount due thereon so long as the pledgor was not 60 days in default in himself paying the matured bonds, held that the power to substitute collateral in lieu of those withdrawn for collection was necessarily implied.

Walker v Howell, 209-823; 226 NW 85

CHAPTER 524

FORECLOSURE OF PLEDGES

12364 Notice and sale.

Pledge and mortgage distinguished. The deposit of collateral securities with a trustee in order to secure the payment of bonds issued by the depositor constitutes a pledge and not a mortgage.

Central Bk. v Secur. Co., 206-75; 218 NW 622

Non-possession of subject matter. A party may not be deemed a pledgee of a note and mortgage which has never been in his possession.

Reyelts v Feucht, 206-1326; 221 NW 937

Pledgee as purchaser—non-allowable lien on sale price. An assignee of a promissory note as collateral security who takes his assignment without delivery to him of the note may not have a lien for the amount of his claim established on the sum paid for the note by a subsequent pledgee of the note at a judicial foreclosure sale of said pledged note, it appearing that said pledgee acted in perfect good faith and without notice of the assignee's equity in said note.

Reyelts v Feucht, 206-1326; 221 NW 937

Assignment—recording—scope of constructive notice. The recording of an assignment

of a promissory note and of a real estate mortgage securing the note charges the world with no constructive notice except of the assignee's interest in the land. Such record does not charge a subsequent pledgee of the note and mortgage with constructive notice of the assignee's equity in the note as personal property.

Reyelts v Feucht, 206-1326; 221 NW 937

Duty to protect collateral—burden of proof. A pledgee of a note and mortgage, as collateral security, must exercise ordinary diligence to protect the rights of the pledgor in the property pledged, but, under an allegation that the pledgee has failed in his said duty, the pledgor must establish the value of the collateral—what he has lost because of the neglect of the pledgee.

Carter v McClain, 215-19; 244 NW 671

Sale—burden of proof. Merely showing that the relation of pledgor and pledgee existed does not cast on the pledgee the burden of proving that his sale of the pledge was bona fide.

Williams v Herman, 216-499; 249 NW 215

Pledge for pre-existing debt—effect. Principle recognized that one who acquires property as security for antecedent debts only is not a bona fide holder for value as against pre-existing equities.

Aetna Ins. v Morlan, 221-110; 264 NW 58

12369 Sale—pledgee as bidder.

Sale—legality. A good-faith sale by a pledgee to his son of corporate stock pledged as collateral security for a debt is valid, no relation of principal and agent existing.

Williams v Herman, 216-499; 249 NW 215

Accounting. A pledgee who sells the pledge for the full amount of the secured note makes a sufficient accounting by marking the note "paid" and returning it to the pledgor.

Williams v Herman, 216-499; 249 NW 215

Title acquired. The purchaser of a municipal electric light and power plant, under a foreclosure of a pledge thereof, does not automatically acquire a franchise to operate the plant.

Greaves v Villisca, 217-590; 251 NW 766

12371 Equitable action.

Plaintiffs—bondholders (?) or trustees (?). When trustees for a bondholder have, under the terms of the bonds, the exclusive right to maintain an action for the protection of the bondholder, the latter may not maintain such action and thereby convert himself into a trustee, on the naked allegation, in substance, that the trustees will, because of partiality, be less aggressive in prosecuting such action than the bondholder.

McPherson v Sec. Co., 206-562; 218 NW 306

CHAPTER 525

FORECLOSURE OF REAL ESTATE MORTGAGES

12372 Equitable proceedings.

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I REQUISITES AND VALIDITY

(a) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY

1 Generally

"Mortgagor" defined. A "mortgagor" is he who holds title to the premises mortgaged. A wife who joins in a mortgage of the husband's land for the purpose of releasing her distributive share is not a mortgagor.

Wood v Schwartz, 212-462; 236 NW 491

Purchase money mortgage — indispensable element.

Ely Bank v Graham, 201-840; 208 NW 312

Equitable mortgages. Equity will treat any written instrument as a mortgage when from the instrument itself, or when aided by attending circumstances, it resolves itself into an intended security.

Parry v Reinertson, 208-739; 224 NW 429; 63 ALR 1051

Equitable mortgage—priority. Where one who stands in the position of a vendor of land assigns his interest in the contract of sale as security, and the court subsequently decrees a cancellation of the contract, but also decrees that such cancellation shall be without prejudice to the rights of said assignee, said assignee will be deemed to hold an equitable mortgage on the land reverting to the vendor, superior to the lien of a judgment against the vendor obtained subsequent to the original assignment.

Johnson v Smith, 210-591; 231 NW 470

Reservation of right to repurchase—effect. A recital in a conveyance that the grantor "reserves the right to repurchase said premises under his contract with said grantee" does not, in and of itself, show that said deed was intended as a mortgage.

Sheley v Engle, 204-1283; 213 NW 617

Surrender of equity of redemption. Evidence held insufficient to show that mortgage security had, by a subsequent agreement, been converted into an absolute deed.

Central Tr. Co. v Estes, 206-83; 218 NW 480

2 Other Instruments as Mortgages

Discussion. See 15 ILR 192—Conveyance as equitable mortgage

Deed as mortgage. Oral testimony is admissible to show that a deed of conveyance was intended as a mortgage, especially against one who is a stranger thereto and who has never acted thereon.

Morton Ins. v Farquhar, 200-1206; 206 NW 123

Deed as mortgage. A warranty deed will be deemed a mortgage (1) when the transaction had its inception in an application by the grantor for a loan; (2) when redemption by the grantor was mutually contemplated; (3) when the value of the land exceeded the amount advanced by the grantee; (4) when the evidence justifies a finding that the deed was exacted as a means of avoiding the foreclosure statutes; and (5) when, in its last analysis, the grantor and grantee occupied the relation of creditor and debtor, even tho they did not always consistently maintain such relation.

Tansil v McCumber, 201-20; 206 NW 680

Warranty deed as mortgage—rule of evidence. On the issue whether a warranty deed was in fact a mortgage, the pleader must prove, by clear and satisfactory evidence, (1) that the consideration for said deed was a definite and existing debt, and (2) that said debt was not extinguished by the deed.

Clark v Chapman, 213-737; 239 NW 797

Absolute deed as mortgage — evidence — sufficiency. Evidence reviewed at length and held that a deed of conveyance, absolute in form, was intended to be such, and not a mortgage.

Shanda v Bank, 220-290; 260 NW 841

Absolute deed as mortgage. Proof that an absolute deed was intended as a mortgage must be clear, satisfactory and convincing.

I REQUISITES AND VALIDITY—continued

(a) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY—concluded

2 Other Instruments as Mortgages—concluded

Evidence reviewed and held wholly inconsistent with the plea of mortgage.

McKenney v Nelson, 220-504; 262 NW 101

Wife's deed to husband's creditors as mortgage. Wife's deed to creditors in payment of husband's notes, under circumstances, construed as mortgage with right to creditors to foreclose.

Allen v Hume, 227-1224; 290 NW 687

Degree of required proof. An absolute deed of conveyance may be shown to have been intended as a mortgage only, but such intent must be established beyond all reasonable doubt.

Maytag v Morgan, 208-658; 226 NW 93

Deed as mortgage—consideration. A warranty deed may not be decreed to be a mortgage when the daughter-grantee pays a good-faith and complete consideration to her father, the grantor.

Witousek v Holt, (NOR); 224 NW 530

Nonapplicability of statute. The statutory provision for new trial in actions for the recovery of real property by ordinary proceedings (§12255, C., '31) can have no application to an equitable proceeding to have a deed decreed a mortgage and for an accounting of rents and profits.

Hinman v Sage, 213-1320; 241 NW 406

Foreign deed as mortgage. The district court, when it has jurisdiction of all parties to a controversy, has jurisdiction to determine their contract relations to lands situated in a foreign state: e. g., whether an absolute deed to such lands was an absolute conveyance or a mortgage.

Tansil v McCumber, 201-20; 206 NW 680

Contract for deed as mortgage. Contract for deed, and attendant circumstances, and interpretation placed on such contract by the parties, reviewed, and held actually to convey the equitable title to one party and to leave the legal title in the other as security for the purchase price.

First JSL Bank v Galagan, 220-173; 261 NW 920

Chattel clause in real estate mortgage. A real estate mortgage which, in addition to the land, conveys the crops raised on the land "from now until the debt secured is paid," is also a chattel mortgage, to the extent of the crops.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Expectancies — ineffectual instrument. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues, and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

Showing of debt essential. An absolute deed may not be decreed to be a mortgage unless it be made to appear, inter alia, that a debt existed between the grantor and grantee.

Hinman v Sage, 208-982; 221 NW 472

3 Consideration Generally

Consideration — pre-existing debt. A pre-existing indebtedness is ample consideration, as between the debtor and creditor, for the execution of a mortgage securing its payment.

Charlson v Bank, 201-120; 206 NW 812

Consideration—surrender of old obligations. A showing that a mortgagee surrendered outstanding notes and mortgages of the mortgagor and took from the mortgagor a new note and mortgage necessarily shows full consideration for the latter obligations.

Winterset Bk. v Iiams, 211-1226; 233 NW 749

Consideration—absence of—burden of proof. The beneficiaries of a trust, defendants in an action on a note and mortgage executed by their authorized agent, have the burden to show want of consideration.

Daries v Hart, 214-1312; 243 NW 527

Consideration—burden of proof. A husband who signs a note and mortgage along with his wife has the burden to show failure of consideration for his signature, and he does not meet such burden by proof that his wife received all of the money borrowed and that he signed the mortgage in order to waive his dower interest.

Penn Ins. v Orr, 217-1022; 252 NW 745

(b) FORM AND CONTENTS OF INSTRUMENTS

Change in name of mortgagee—presumption.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Mistake—omission of lands from mortgage. A mortgage may be so reformed as to correct the mutual mistake of mortgagor and mortgagee in omitting certain lands from the mortgage, even against a judgment creditor of the mortgagor's who became such after the mortgage was executed.

Davis v Bunnell, 207-1181; 225 NW 6

Discrepancy in names—effect. The fact that in the body of a mortgage, and in the certificate of acknowledgment of said mortgage, the name of the wife of the mortgagor-owner appears as "Mary F. McNeff" instead of "Mary T. McNeff" (her correct name) is not of controlling importance on the issue as to the

validity of the mortgage as to the wife, it appearing that she was correctly identified in said certificate of acknowledgment "as the wife" of said mortgagor-owner.

First JSL Bank v McNeff, 220-1225; 264 NW 105

(c) EXECUTION AND DELIVERY

Signature — genuineness — evidence — sufficiency. Evidence held to support finding that signatures to note and mortgage were genuine.

Rieper v Berner, 222-1399; 271 NW 519

Execution—evidence—sufficiency. Evidence that the signature to a mortgage is the genuine signature of the mortgagor and that the mortgage is in the possession of the mortgagee is prima facie evidence of the due execution of the mortgage.

Citizens Bk. v Hamilton, 209-626; 227 NW 112

Signing without reading. A party will not be permitted to say that he was defrauded into signing an instrument without knowing its contents when he could read, did not read, and was in no manner prevented from reading.

Legler v Ins. Assn., 214-937; 243 NW 157

Apparent authority to execute mortgage. Evidence reviewed and held quite insufficient to support the contention that an agent, in executing a mortgage in the name of his principal, was acting within the scope of his apparent authority.

Hagensick v Koch, 220-1055; 264 NW 13

Mortgage of life estate and remainder. A court of equity, in an emergency, has inherent power, on the application of life tenants and remaindermen—tho some of the latter be minors—to authorize the execution of a mortgage on the entire fee title in the property in question regardless of the respective interest of the parties among themselves, when such order or authorization is necessary to preserve the property for all said parties and prevent loss to any of them. And this is true tho the creator of the two estates did not contemplate such emergency.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Failure to sign note—effect. A duly executed mortgage is valid and enforceable even the the promissory note purporting to be secured was never signed by the mortgagors, when a debt actually exists and when the parties intended to secure that debt.

Finken v Schram, 212-406; 236 NW 408

Conditional delivery. The plea that a mortgage was conditionally delivered must fall in the face of evidence that the condition contended for was not to precede delivery, but had relation to the enforcement of the instrument after delivery.

Farmers Bk. v Weeks, 209-26; 227 NW 508

Authority of trustee. Trust agreement construed and held to authorize the trustee to execute mortgages and to bind the beneficiaries of the trust for the payment thereof.

Daries v Hart, 214-1312; 243 NW 527

(d) VALIDITY

1 Generally

Insane maker. Neither a negotiable promissory note nor a mortgage given by the makers to secure the same, even tho the mortgage is on a homestead, is subject, when in the hands of a holder in due course, to the plea that the maker was insane at the time of the execution of such note and mortgage.

Farmers Ins. v Ryg, 209-330; 228 NW 63

Fictitious mortgagee. A mortgage which is executed to a fictitious mortgagee with the acquiescence of the mortgagor, but which is wholly free from fraud, is valid between the mortgagor and the actual mortgagee and likewise valid between the mortgagor and one who has acquired all the interest of the actual mortgagee. And this is true tho it be conceded, arguendo, that the note was nonnegotiable, and that the mortgage was not entitled to recordation.

Richardson v Stewart, 216-683; 247 NW 273

Defaulting plaintiff—equitable relief denied. Plaintiff vendee, after first defaulting under a contract for the sale of real estate, may not in equity, while still in default, rescind the contract because defendant vendor had later allowed a prior mortgage on the real estate to be foreclosed, and, therefore, had no title to deliver if plaintiff fully performed.

Fitchner v Walling, 225-8; 279 NW 417

Forgery—insufficient evidence. Evidence held insufficient to show forgery of a mortgage.

McDaniel v Life Co., 210-1279; 232 NW 649
McDaniel v Bank, 210-1287; 232 NW 653

Alteration of instruments after delivery. Alteration apparent on face of instrument does not raise presumption alteration was made after delivery. Evidence held insufficient to carry burden of showing mortgage was altered after delivery.

Durr v Pratt, (NOR); 240 NW 681

2 Dragnet Mortgages

Dragnet mortgage. A mortgage clause providing in effect that the mortgage shall stand as security for all debts which the mortgagee holds or may acquire against the mortgagor, while suggestive of fraud, is nevertheless enforceable in the absence of an affirmative showing of fraud.

Corn Belt Bk. v Kriz, 207-11; 219 NW 503

Oppressive and unconscionable dragnet mortgage as violative of public policy.

Sullivan v Murphy, 212-159; 232 NW 267

I REQUISITES AND VALIDITY — concluded

(d) VALIDITY—concluded

2 Dragnet Mortgages—concluded

Dragnet mortgage—reformation. A dragnet clause in a mortgage to the effect that the mortgage shall stand as security for any other debt which the mortgagee may hold or acquire against the mortgagor will be stricken from the mortgage on proper plea for reformation, and on proof that by the use of a printed form the said clause was inadvertently embraced in the mortgage by both parties.

Pospishil v Jensen, 205-1360; 219 NW 507

Dragnet clause securing multiple debts—reformation. A general clause in a mortgage to the effect that the mortgage shall stand as security for any debt in addition to the debt specifically secured which the mortgagee may hold or acquire against the mortgagors or either of them, will be wholly eliminated on a prayer for reformation on proof that said clause was contrary to the mutual intent of the mortgagors and mortgagee when the mortgage was executed, because to hold that said clause was enforceable under such circumstances would be to countenance a legal fraud. And all this is true tho the mortgagors did not read and were not prevented from reading the mortgage when it was executed.

Comm. Bk. v Ireland, 215-241; 245 NW 224

3 Mortgagor Estopped to Deny Title

Mortgageable interest — presumption. A mortgagor is presumed to have a mortgageable interest in the property mortgaged, and is estopped to assert the contrary.

Watts v Wright, 201-1118; 206 NW 668

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Mortgagors estopped to deny title in re estate mortgaged. Mortgagors will not be permitted to deny that they own the quality of title which they have assumed to mortgage.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Personal liability—estoppel to deny. An officer of a national bank who, being unable to obtain a loan for his bank on the bank's own real estate, from a first trust joint stock land bank, because such land banks are prohibited by federal statutes from making loans to a corporation such as a national bank, enters into a plan, without the knowledge of the land bank, to circumvent the federal statutes and obtain the loan for his bank by falsely representing to the land bank that he personally owns the land in question, and who successfully consummates said fraudulent scheme and obtains the loan on his personal note and mortgage, is estopped to deny his personal responsibility on said note and mortgage.

First JSL Bk. v Diercks, 222-534; 267 NW 708

Estoppel. Bank directors may not question the legality of individual mortgages executed by them when through such execution they obtain (1) the surrender of their formerly executed guaranty in behalf of their bank, (2) an extension of time in which to pay the guaranteed obligations, and (3) the surrender by the mortgagee of assets of which the director-mortgagors individually avail themselves.

Live Stock Bk. v Irwin, 207-1083; 224 NW 76

Invalidity—estoppel. A husband, by accepting from his wife a conveyance of homestead property subject to a named existing mortgage thereon, thereby estops himself from questioning the validity of said mortgage on the ground that he never joined in the execution thereof.

Truro Bank v Foster, 206-432; 220 NW 20

Bank's mortgage on life estate changed to cover "undivided one-third" interest—effect on lien. Where a bank had knowledge of an arrangement whereby a mother had a life estate in the entire property and made a mortgage accordingly, but in a later mortgage attempts to change its position by a mortgage on her interest as an "undivided one-third", its answer, admitting this allegation in the petition, estops the bank from claiming the mother had a greater interest and, when her interest develops to be a life estate, the bank's mortgage attaches only to an undivided one-third of this life estate.

Redding v Redding, 226-327; 284 NW 167

II CONSTRUCTION AND OPERATION

(a) GENERAL RULES OF CONSTRUCTION

Discussion. See 15 ILR 192—Conveyance as equitable mortgage

Conflict between note and mortgage. In case of a conflict between the note and the mortgage securing it, as to the conditions under which the mortgagee may treat the entire debt as due for the nonpayment of interest, the note will prevail.

Wilson v Tolles, 210-1218; 229 NW 724

Right to insurance. A second mortgagee who forecloses and, after redeeming from a first-mortgage foreclosure, takes a sheriff's deed, is entitled to the proceeds of a fire insurance policy taken out by the mortgagor for the benefit of the first mortgagee; and this is true even tho the fire occurred during the period for redemption from the second mortgage.

In re Hackbart, 203-763; 210 NW 544; 52 ALR 895

Discharge as affecting assignment of expectancy as security. When a debtor assigns his expectancy in an estate as security for the payment of the debt, a subsequent discharge of the debt in bankruptcy ipso facto discharges said assignment and all unadjudicated equitable rights thereunder, even tho the ancestor creates a legacy for the debtor, and dies

after the debtor is adjudged a bankrupt, and before the debtor is decreed a final discharge.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Burk v Morain, 223-399; 272 NW 441

Option to pay proportionate amount—effect. In a mortgage on several lots, a clause giving the mortgagor the option to pay a "proportionate amount" of the principal debt at any time and have any lot released from the mortgage, does not have the effect of distributing the debt into component parts over the entire number of lots and giving the mortgagee a lien on each lot to the extent of the value thereof only.

Marker v Davis, 200-446; 204 NW 287

Negotiability—provisions not incorporated in note. The provisions of a mortgage will not be deemed incorporated into the mortgage-secured promissory note by a statement in such note to the effect that the note is secured by a first mortgage on real estate in a named county.

D. M. Bank v Stanley, 206-134; 220 NW 80

Mortgage embraces conveyance. A valid prohibition against the "conveyance" of real property embraces a mortgage.

Iowa F. C. Corp. v Halligan, 214-903; 241 NW 475

Increased rate after default. Interest on a note and mortgage is necessarily computable, after default in payment, at the increased rate provided by the mortgage for such a contingency, provided said rate does not exceed the maximum legal rate.

Penn Ins. v Orr, 217-1022; 252 NW 745

Interest on accelerated debt. Where a mortgage provides for an increased but legal rate of interest on all sums due and unpaid, and foreclosure is instituted (1) on sums due and in default, and (2) because of an acceleration clause, on the balance called for by the mortgage, interest on the accelerated part of the debt can only be computed from the date when foreclosure was commenced.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Real estate contract—merging unpaid payments into mortgage. Provision in contract of purchase reviewed and held simply to contemplate the merging of unpaid payments into a mortgage, and not to authorize the vendor to execute a mortgage on the property sold.

Ely Bank v Graham, 201-840; 208 NW 312

Life estate—proof—mortgage recitals. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

(b) PARTIES AND DEBTS OR LIABILITIES SECURED

1 Generally

For part of debt—preserving lien for balance. Where a mortgagee is entitled to foreclose for only a part of the secured indebtedness, the lien of the mortgage for the remaining indebtedness should be preserved.

Wilson v Tolles, 210-1218; 229 NW 724

Different obligations secured by same mortgage. If, before the execution of a mortgage, the mortgagee and the broker who negotiated the loan agree that the proceeds of a named fractional part of the interest rate to be inserted in the mortgage shall belong to the broker as his commission for negotiating the loan, the broker thereby acquires a vested interest or right to participate, on foreclosure, in the total mortgage debt, insofar as is necessary to protect his fractional part of the matured interest.

Metropolitan v Steiner, 219-785; 259 NW 234

2 Taxes

Mortgagee reimbursed for taxes. The court, in the disposition of rents in mortgage foreclosure, manifestly may order the mortgagee reimbursed for interest advanced on a prior mortgage and for taxes when all the parties to the foreclosure had so stipulated.

Olson v Abrahamson, 214-150; 241 NW 454

Taxes—nonduty of wife to pay. A wife who, for the purpose of releasing her distributive share, joins with her husband in a mortgage of the husband's lands is not bound by the husband's covenants or legal obligation to pay future accruing taxes on the land.

Wood v Schwartz, 212-462; 236 NW 491

Usurious transactions—agreement to pay lender's taxes. A note and mortgage which calls for less than the maximum legal rate of interest, but requires the mortgagor to pay in addition certain known charges, and taxes assessable to the mortgagee, will not be deemed usurious in the absence of proof that the interest contracted for, plus the added exactions, when computed over the full term of the note and mortgage, will exceed the said maximum legal rate.

Penn Ins. v Orr, 217-1022; 252 NW 745

When taxes "due". An obligation on the part of a receiver to pay taxes on mortgaged property "as they become due" embraces taxes which are owing on and after the first Monday in January following the levy, even tho they are not delinquent. In other words, nondelinquent taxes are due in the sense that they are owing.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

II CONSTRUCTION AND OPERATION—continued

(b) PARTIES AND DEBTS OR LIABILITIES SECURED—concluded

2. Taxes—concluded

Protection of mortgagee against taxes. A mortgagee who bids in the property under a deficiency bid at foreclosure sale without at any time protecting himself against delinquent taxes as he might have done under the mortgage and foreclosure decree, and later takes a sheriff's deed to the property, may not have the rents collected during the redemption period applied to the discharge of said taxes.

Hartford Ins. v Alexander, 215-573; 246 NW 404

Sale—inclusion of taxes—effect. A mortgagee who, on foreclosure, takes judgment for the taxes paid by him and, on sale, bids the full amount of his judgment, thereby fully satisfies the claim for said taxes; and neither he nor one claiming under him can collect said taxes a second time, even from a grantee obligated to pay them.

Marx v Clark, 201-1219; 207 NW 357

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting actions. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch. 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Recovery of payments—voluntary, unnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt, and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

(c) PROPERTY COVERED BY MORTGAGE

Contingent remainders—sale under execution. A contingent remainder, being legally mortgageable, is necessarily subject to sale on mortgage foreclosure execution.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Fixtures—removal against mortgagee. A steam boiler and a bake oven so erected on mortgaged real estate that they become fixtures, in lieu of former articles of the same kind, cannot be legally removed, even tho sold under a contract providing for retention of title in the vendor until paid for, when such removal would materially diminish the security of the said mortgagee.

Comly v Lehmann, 218-644; 253 NW 501

Parol or extrinsic evidence affecting writings—oral addition to mortgage. Evidence is inadmissible that, at the time of the execution of a purchase-money mortgage, an oral contemporaneous agreement was entered into to the effect that, if the mortgagor was unable to finance (pay) the mortgage, the mortgagee would pay to the mortgagor the value of any improvements placed on the land by the mortgagor.

Felton v Thompson, 209-29; 227 NW 529

(d) LIEN AND PRIORITY

Several mortgages, priority of right to rents. See under §12383.1

1 Lien and Priority Generally

A Lien Generally

Duration of lien. Principle reaffirmed that the lien of a mortgage continues until the debt is paid, irrespective of the form in which the debt is evidenced.

Equitable v Rood, 205-1273; 218 NW 42

Ancient mortgage—debt extended—effect on lien. An admission of an old indebtedness, extending the debt another ten years, starts the running of the statute of limitations anew, and the lien of a mortgage securing the debt is thereby extended for 20 years from its execution date, but as to whether the lien continues thereafter until the indebtedness secured by it would be barred, quaere.

Lackey v Melcher, 225-698; 281 NW 225

Bankruptcy—discharge—effect on lien. The discharge in bankruptcy of a mortgagor does not affect the lien of the mortgage.

Webber v King, 205-612; 218 NW 282

Vested interest—curtailing right of mortgagee. Whether a mortgagee of unimproved land may constitutionally be deprived of a lien on future-erected and permanent improvements on the land, quaere.

Crawford v Mann, 203-748; 211 NW 225

Mortgage on partner's undivided interest. The mortgagee of an undivided interest in land taken on the supposition or assumption that the mortgagor's interest was absolute, is subject to a showing that the owners of the land were partners and that the land was the property of the partnership, and needed for the payment of partnership obligations, when the fact of such partnership and its ownership of the property in question could readily have

been discovered by the mortgagee by the exercise of reasonable diligence before he accepted the mortgage.

Norwood v Parker, 208-62; 224 NW 831

Recitals — effect. One who in good faith and for value purchases a note and a mortgage which from its face and recording date is a first lien, is not charged with notice that another mortgage of later date and recordation is in fact the first lien on the same land because the latter mortgage runs to a Federal Land Bank (which is prohibited from taking second mortgages) and recites that the land is free from incumbrance.

Federal Bank v Sherburne, 213-612; 239 NW 778

Chattel mortgage clause—reference to realty mortgage provisions for interpretation. In a realty mortgage, a chattel mortgage clause conveying all the rents, issues, uses, profits and income therefrom and crops raised thereon "from date of this agreement until the terms of this instrument are complied with and fulfilled" was not invalid on ground that such provision required reference to realty mortgage provisions for interpretation or effect.

Bankers Life v Garlock, 227-1335; 291 NW 536

Lien for debts of devisee. A mortgage on real estate executed during the settlement of an estate by the insolvent devisee of the land is subject to the prior lien of the estate for the debts owing by the devisee to testator and contracted subsequent to the execution of the will. Evidence held to establish the debt in question and the insolvency of the devisee.

Bell v Bell, 216-837; 249 NW 137

Mortgage on interest of joint adventurer. Lands belonging to a joint adventure become individually owned land when the joint adventurers execute and place of record an instrument which specifically states the fractional individual ownership of each in the land. It follows that a subsequent mortgagee who in good faith relies on such record cannot be detrimentally affected by equities arising out of the joint adventure and existing between the joint adventurers.

State Bank v Calvert, 219-539; 258 NW 713

Injunction against lien claimant—dissolution. An injunction restraining the owner of land from interfering with the possession by a trustee in bankruptcy should be forthwith dissolved when it appears that said trustee has substantially no interest in the land—that his lien is valueless because of the foreclosure of a superior lien, and that he has no purpose to redeem.

Relph v Goltry, 213-1118; 240 NW 646

B Priority Generally

Priority—mortgages executed on same day on same property. As between mortgages executed and delivered on the same day on the same property, it will be presumed, nothing appearing to the contrary, that the mortgage first recorded was first executed and delivered, and consequently entitled to priority.

Miller v Miller, 211-901; 232 NW 498

Priority—failure to record. The failure of the assignee of a duly recorded first mortgage on real estate to record his assignment does not deprive him of his position of priority over the assignee of subsequently executed mortgages on the same property.

Kuhn v Larson, 220-365; 259 NW 765

Priority as between equally dated and maturing notes. Neither of two promissory notes secured by the same mortgage has priority over the other when they carry the same date of execution and maturity.

Templeton v Stephens, 212-1064; 233 NW 704

Series of equally maturing notes. A series of promissory notes secured by the same mortgage and all falling due on the same day, and in the hands of different holders, are each entitled to share pro rata in the proceeds of a mortgage foreclosure.

Whitney v Eichner, 204-1178; 216 NW 625

Chattel mortgage clause—effective date—priority over subsequent assignee of rents and profits. A clause in realty mortgage duly recorded and indexed, providing that mortgagor conveyed in addition to realty "also all the rents, issues, uses, profits and income therefrom, and all the crops raised thereon from the date of this agreement until the terms of this instrument are complied with and fulfilled", created a valid chattel mortgage, effective from date of execution of the mortgage and not from date of filing the foreclosure petition in which appointment of receiver is asked, and subsequent assignee of property, described in instrument, took subject to lien provided in such chattel mortgage clause.

Bankers Life v Garlock, 227-1335; 291 NW 536

Landlord mortgagor's assignment of lease —no effect on chattel clause of realty mortgage. A lien on rents and profits created by chattel mortgage clause in realty mortgage duly recorded and indexed was not invalid as to mortgagor's share of crops produced under 2-year lease, because such crops did not belong to mortgagor at time they came into existence and, the landlord having assigned the lease, the subsequent assignee of property described in mortgage would take subject to the lien provided therein.

Bankers Life v Garlock, 227-1335; 291 NW 536

Equitable mortgage—priority. Where one who stands in the position of a vendor of land assigns his interest in the contract of sale as security, and the court subsequently decrees a

II CONSTRUCTION AND OPERATION—continued

(d) LIEN AND PRIORITY—continued

1. Lien and Priority Generally—concluded

cancellation of the contract, but also decrees that such cancellation shall be without prejudice to the rights of said assignee, said assignee will be deemed to hold an equitable mortgage on the land reverting to the vendor superior to the lien of a judgment against the vendor obtained subsequent to the original assignment.

Johnson v Smith, 210-591; 231 NW 470

Adjustment of equities. A party may not complain of the adjustment of equities between parties over neither of whom he has priority.

Templeton v Stephens, 212-1064; 233 NW 704

Purchase-money mortgage. A mortgage on land, given to secure a balance due the mortgagee from the mortgagor on a transaction disconnected with the land, is not a purchase-money mortgage in such sense as to give the mortgagee priority over pre-existing liens.

Miller v Miller, 211-901; 232 NW 498

Lien of miner—priority over mortgage. A miner who opens and works a coal mine for a lessee has a lien on the leasehold prior to a mortgage on the entire tract of land, the mortgage not assuming to cover such leasehold.

Ford v Dayton, 201-513; 207 NW 565

Estoppel to assert lien. Naked proof that, during the time the mortgagee of land neglected to record his mortgage, the mortgagor obtained credit from another, who placed his claim in judgment, is wholly insufficient to estop the mortgagee from insisting on the priority of his mortgage lien. Additional proof of fraud or deception in some form is indispensable.

Brauch v Freking, 219-556; 258 NW 892

Marshaling assets. An assignee of property subject to a prior judgment is not entitled to the benefit of the doctrine of marshaling of assets by simply alleging and proving the naked fact that the judgment holder has mortgage security on other property for his judgment debt.

Iowa Co. v Clark, 213-875; 237 NW 336

Marshaling of assets. In the foreclosure of a valid and good-faith real estate mortgage by a mortgagee who also holds chattel security for the same debt, a judgment creditor and a junior lienholder may not have a marshaling of assets in the absence of any duly joined issue relating thereto, and when the real estate is of a value sufficient to satisfy all liens against it; neither may the court arbitrarily decree that the plaintiff's mortgage shall have priority over the junior lien to an amount less than the full amount due on the mortgage.

White v Smith, 210-787; 231 NW 309

2 Agreements as to Priority

Priority—agreement to reverse. The different holders of different mortgages may, in good faith and on a proper consideration, agree to reverse the legal order of priority of said mortgages, and such agreement is enforceable against the receiver of one of the parties.

James v Allen, 205-962; 218 NW 916

Oral agreement for priority. Oral evidence that when a promissory note and the mortgage securing it were assigned, it was agreed that the indorsee should have priority over other prior maturing notes secured by the same mortgage and then held by the assignor, is not violative of the "parol evidence rule".

White v Gutshall, 213-401; 238 NW 909

Oral agreement of parties. The assignee of one of two simultaneously executed mortgages on the same property to different parties may show, in an action wherein the foreclosure of each mortgage is asked, that just prior to the execution of said mortgages it was orally agreed by all parties to both mortgages that a certain one of said mortgages should be the first lien on the property.

Wuennecke v Hausman, 216-725; 247 NW 531

Series of notes—agreement for priority. Where a mortgage is given to secure a series of notes which mature on different dates, and the notes are disposed of to different parties, the notes first maturing have priority over those subsequently maturing; otherwise, if the indorsee of subsequently maturing notes has an agreement for priority, and the holder or indorsee of prior maturing notes has knowledge of such agreement when he buys.

White v Gutshall, 213-401; 238 NW 909

Representations as to priority of mortgages—owner's liability. Where owner of property represented to bank from which he was borrowing money that only specified mortgages were superior to those offered to bank as security for loans, and bank relied thereon, law of estoppel will not permit owner to acquire mortgage and assert its priority contrary to representation and agreement, since to allow such mortgage priority would constitute fraud, and equity requires owner to make his promises and representations good.

Stoner v Cook, (NOR); 229 NW 696

Consideration—detriment to promisee. The holder of tax-sale certificates covering mortgaged real estate who, in writing, waives the priority of said certificates over the lien of said mortgage, in order to enable the mortgagor to ward off foreclosure by obtaining an extension of time in which to pay the mortgage debt, may not, after the mortgagor has obtained said extension on the strength of the waiver, successfully assert that said waiver was without consideration.

Goff v Milliron, 221-998; 266 NW 526

Tax certificate priority waived—extension of time of payment of mortgage—consideration. Extension of the time of payment on bonds secured by mortgage held sufficient consideration to support waiver of priority of tax certificate owned by mortgagor's daughter.

Beal v Milliron, (NOR); 267 NW 83

3 Notice Generally

Imputation of notice or knowledge. A party who, as managing officer of a company, transfers the company's mortgage-secured promissory notes, and orally agrees that the indorsee shall have priority over other prior maturing notes secured by the same mortgage, must be held to have knowledge of said agreement when said prior maturing notes are subsequently transferred by the company to him as trustee of an estate.

White v Gutshall, 213-401; 238 NW 909

Probate record — constructive knowledge. One who takes a mortgage from a mortgagor who, under the recording acts, appears to be the sole owner of the fee is not charged with constructive knowledge of matter which appears in the "probate record" (§11842, C., '31) and which suggests or implies that some person other than the apparent fee owner has an interest in the property.

Booth v Cady, 219-439; 257 NW 802

Omitted tract—reformation against noninnocent incumbrancers. A plaintiff mortgagee, after having foreclosed his purchase-money mortgage and purchased the land at execution sale, discovering that one 80-acre tract was erroneously omitted from the mortgage and sale, and that mortgagor, having discovered the error, had executed another mortgage thereon as security for an old loan to parties with notice and knowledge of plaintiff's equitable right in the land, is entitled to a reformation of his mortgage, since later mortgagees were not innocent incumbrancers.

Winker v Tiefenthaler, 225-180; 279 NW 436

Tract omitted from mortgage—subsequent mortgage—reformation. Equity will not only reform a mortgage between the parties by including an omitted tract so as to carry out their intentions but also against subsequent purchasers with notice.

Winker v Tiefenthaler, 225-180; 279 NW 436

Reconveyance of property—estoppel. The fractional owner of property who quitclaims his interest to his co-owner in order to enable the co-owner to mortgage the entire property for his own purpose, and who receives from the co-owner an agreement to reconvey, free of incumbrance, within a named time or to pay a named sum, may not, after the mortgage is executed, and after the mortgagee has in good faith agreed to take over the property in satisfaction of the mortgage debt, obtain specific performance of the agreement to reconvey, even tho the mortgagee, before the deal was fully closed, had notice of the agreement to reconvey.

Clarkson v Bank, 218-326; 253 NW 25

Senior lienholder jeopardizing junior lienholder. The holder of a senior lien will not be permitted to jeopardize the rights of a junior lienholder in the security where the senior lienholder had actual notice of the rights of the junior lienholder.

Perpetual Assn. v Van Atten, 211-435; 233 NW 746

Unrecorded conveyance of interest of co-tenant. A tenant in common who, while in possession under a deed granting such tenancy, orally purchases his co-tenant's interest, may not thereafter claim that his continued possession is notice to the world of his newly acquired right to his co-tenant's share. It follows that, if the co-tenant who has sold his interest subsequently mortgages his apparent record interest to a good faith mortgagee without notice of the oral purchase, the mortgage will take priority over the said purchase.

Oxford Jct. Bk. v Hall, 203-320; 211 NW 389

Priority over second mortgage. A mortgagee who takes a first mortgage with knowledge (apparently) that a former owner of the premises has sold the premises to the mortgagor and accepted a second mortgage for the purchase price in order to enable the mortgagor-purchaser to execute the first mortgage and secure funds to improve the property is not a trustee charged with the duty to know that every advancement of funds made by him under the first mortgage is actually applied on the improvements.

Iowa Co. v Plewe, 202-79; 209 NW 399

Mortgagee's knowledge of contemplated exchange — not "innocent purchaser". Where mortgagee knew that mortgagor had contracted to exchange city property for farm at time mortgage covering city property was executed, mortgagee was not "innocent purchaser", and his mortgage was subject to rights of holder of contract to city property.

Bandemer v Benson, (NOR); 270 NW 353

4 Parties in Possession

Right of parties in possession. Assuming, arguendo, that a person who is negotiating with the record grantee of land for an interest in the land (e. g., as mortgagee), is under duty to make inquiry as to the rights of the former warranty-deed grantor who has remained in actual possession, yet said duty is fully performed when the negotiator is assured by said former grantor that said grantee is the absolute owner of the land. It follows that said grantor will not thereafter be permitted to assert that when he conveyed the land by warranty deed he orally reserved an equitable interest in the land.

Clark v Chapman, 213-737; 239 NW 797

II CONSTRUCTION AND OPERATION—continued

(d) LIENS AND PRIORITY—continued

4. Parties in Possession—concluded

Rights of grantor in possession. One who acquires a mortgage from the record warranty-deed grantee is not chargeable with notice of the rights of the warranty-deed grantor who continues in possession of the property, when said grantor wholly fails to overthrow the legal presumption that his possession is in subordination to the said deed—that his possession is without claim of right, and by sufferance of his grantee.

Clark v Chapman, 213-737; 239 NW 797

Rights of person in possession. A mortgagee is not chargeable with notice that one of the members of the mortgagor's family residing upon the mortgaged property is a lessee of the land, when to all appearances the possession of said person is the possession of the mortgagor.

Ferguson v White, 213-1053; 240 NW 700

Party in possession. A party who in good faith takes a mortgage of land from the record owner thereof, who was then and had been for years in the unrestricted possession, control, and management of the land, is not chargeable with notice of the rights of a nonrecord owner from the simple fact that said nonrecord owner had moved some household goods into a small building on the land and had lived there "part of the time".

Burmeister v Walz, 216-265; 249 NW 197

Mortgagee in possession. A mortgagee who, under an agreement with the mortgagor, takes possession of the mortgaged premises, and rents the land and applies the rents in accordance with the agreement, must be deemed a mortgagee in possession.

Richardson v Rusk, 215-470; 245 NW 770

5 Second Mortgage to Discharge First

Second mortgage to discharge first mortgage. A mortgage remains subject to a valid prior mortgage until the prior mortgage is satisfied, even tho the subsequent mortgage was negotiated for the very purpose of obtaining funds with which to discharge the prior mortgage.

Mandel v Siverly, 213-109; 238 NW 596

Second mortgage to secure items secured by first mortgage—effect. Even tho a first mortgage on land is, by its terms, security for both accruing interest and taxes, nevertheless where the owner of the land, after the first mortgage-secured notes had passed into the hands of holders in due course, executes to the mortgagee additional promissory notes in the amount of the then accrued interest and taxes and secures such notes by an additional mortgage which is distinctly made subject to the first mortgage, the holders of such latter notes may not, as against said holders in due course, claim that such notes are secured by the first mortgage.

Des M. Bank v Stanley, 206-134; 220 NW 80

6 Other Liens—Priorities as to Mortgage

A Generally

Priority—subsequent easement in land. A permanent easement in land, granted subsequent to the recording of a mortgage on the land, is subsequent in right to said mortgage.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

Displacement of liens. Railway companies which knowingly permit the receiver of an insolvent railway to collect inter-line freight charges may not, as intervenors in an action to foreclose a mortgage on the receiver's road, have their claims established as prior to judgment liens on the naked showing that said freight charges were used by the receiver in operating his railway.

Continental Bank v Railway, 202-579; 210 NW 787; 50 ALR 139

Mortgage prior to judgment. A creditor, on learning that his debtor has made a voluntary conveyance of his property, may validly secure his debt by taking mortgage security from the voluntary grantee on the voluntarily conveyed property, and will thereby secure a right which will be superior to the right of another creditor who, subsequent to the mortgage, and after the death of the common debtor, reduces his claim to a so-called judgment against the latter, and, for his own exclusive benefit, levies on the voluntarily conveyed property.

Marion Bank v Smith, 205-203; 217 NW 857

Unknown lessee — estoppel. A lessee of mortgaged land, whose rights are such that the mortgagee is not chargeable with notice thereof, will not be permitted to assert his rights when he deliberately withholds such assertion until after the court enters a decree making permanent the receivership over the rents.

Ferguson v White, 213-1053; 240 NW 700

B Chattel Mortgages

Chattel mortgage clause — lien — when acquired. Under a combined real estate and chattel mortgage of the rents, the mortgagee, as against parties not subsequent purchasers for value and without notice, acquires a lien from the date of the execution of the mortgage.

Soehren v Hein, 214-1060; 243 NW 330

Chattel mortgage clause—failure to index—effect. A recorded real estate mortgage containing a mortgage on the rents of the mortgaged real estate, but not indexed in the chattel mortgage index, is, as regards the rents, subject to a subsequent like mortgage taken by one for value and without notice of the former chattel mortgage clause, even tho

the latter mortgage is not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060, 243 NW 330

Future grown crops—death of mortgagor—effect. A chattel mortgage on crops to be grown in the future (combined in a real estate mortgage as additional security) does not become a lien on crops grown subsequent to the death of the mortgagor.

Fawcett Co. v Rullestad, 218-654; 253 NW 131; 94 ALR 800

C Mechanics' Liens

Enforcement—sale en masse and division of proceeds. Where land with a residence thereon was mortgaged and the residence burned and was replaced by a new one, the court cannot order a sale of the land and so divide the proceeds as to give the mortgagee priority on the land, and the mechanic's lien claimant priority on the new residence, when there is no evidence demonstrating how the division should be made; and especially when the mortgagee has surrendered the insurance on the old residence and allowed it to be expended on the new residence.

First Bk. v Westendorf, 213-475; 239 NW 73

Waiver—obligation of mortgagee. A mortgagee who consents that insurance money collected by him on a destroyed building on the mortgaged premises may be used by the mortgagor in the construction of a new building on the premises, tho said consent is communicated to a materialman, does not thereby obligate himself to pay the deficiency in the cost of said new building after applying the insurance money, nor does the mortgagee thereby waive the priority of his mortgage in favor of the materialman; and this is true tho the mortgagee knew that the insurance money would not be sufficient to pay the cost of the new building.

First Bk. v Westendorf, 213-475; 239 NW 73

Priority—estoppel. A mortgagee cannot be held estopped to insist on the priority of his mortgage over the mechanic's lien of a materialman on an indefinite showing of the conduct of the mortgagee on which the materialman never relied.

First Bk. v Westendorf, 213-475; 239 NW 73

Waiver—mortgage to secure funds. Proof, provided it is clear, satisfactory, and convincing, that a materialman agreed that the owner of land should, by a mortgage on the land, raise the funds with which to pay for the materials going into an improvement, and that such mortgage was so executed during the period of construction, subordinates the lien of said materialman to the lien of the mortgage.

Eclipse Co. v Bitler, 213-1313; 241 NW 696

Belated filing. A mechanic's lien, tho not filed within the statutory limit of time, is prior in right to a mortgage on the premises executed during the construction of the improvement in question.

American Bk. v West, 214-568; 243 NW 297

Mortgage to finance improvement. A mortgage on unimproved land in an amount much in excess of the value of the land, made for the specific purpose of enabling the owner to obtain funds with which to erect, and with which he does erect, an improvement on the land, (1) carries in equity a lien on the entire property, as improved, superior to the mechanic's lien of a claimant who at all times had full knowledge of the purpose of the mortgage, and (2) carries, under the statute (§3095, C., '97), a superior right to the entire proceeds of a sale of the improved property.

Crawford v Mann, 203-748; 211 NW 225

7 Loss of Lien—Release—Merger

Subordination in favor of other mortgages. The act of a corporation in waiving its priority and subordinating its mortgage to a mortgage held by another party, finds ample consideration in the fact that such waiver and subordination enabled the creditor of the corporation to obtain a new loan and to so refinance his obligations as to avoid foreclosures, and thereby protect the corporation from the necessity of paying off prior mortgages in order to protect its own mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Subordination of first mortgage by release. A first mortgagee of record who, on the maturity of his mortgage, renews the same by accepting a new note and mortgage, and thereupon unconditionally enters of record a release of the original mortgage, thereby subordinates his new mortgage to an existing duly recorded second mortgage of which he had no actual knowledge—it appearing that the promissory notes secured by the latter mortgage were acquired by the holders thereof (1) for value, (2) after the aforesaid release was entered, (3) before said notes were due, (4) without notice of any prior equity, and (5) in the bona fide belief that said latter mortgage was a first lien.

Long v Taggart, 214-941; 243 NW 200

Sale for installment—lien wholly exhausted. The holder of a claim payable in monthly installments during the lifetime of the claimant, and secured by record lien on land which is owned by a grantee who is not personally obligated to pay said claim, completely exhausts his lien on the land by foreclosing and selling the land for matured installments, without obtaining in said foreclosure decree, under proper allegation and prayer, the preservation of said lien against said land for future maturing installments.

Cadd v Snell, 219-728; 259 NW 590

Collateral security—waiver—effect. A creditor who holds the agreement of the debtor to

II CONSTRUCTION AND OPERATION—continued

(d) LIENS AND PRIORITY—concluded

7. Loss of Lien—Release—Merger—concluded

convey lands as collateral security, but, knowing that the debtor has quitclaimed the land to his wife in lieu of alimony, accepts new collateral in substitution of the old collateral, may not have his judgment made a lien on the lands standing in the name of the wife.

First N. Bk. v Ramsey, 200-790; 205 NW 464

Release or subordination of mortgage. A corporation is bound by the act of its president in subordinating its mortgage to another mortgage (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached, and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Merger and cancellation. The fact that the holder of trust or mortgage-secured bonds later acquired an incomplete title to the mortgaged premises, and later conveys both the premises and bonds in trust, as security to a creditor, and yet later has his title to the premises fully completed, does not work a merger and cancellation of the bonds, it appearing that such merger and cancellation would have been to the disadvantage of said title holder and his transferee in trust.

Sunset Park Co. v Eddy, 205-432; 216 NW 93

Nonmerger of lien. A mortgagee who, subsequent to the execution of his mortgage, acquires the fee title to the mortgaged land does not thereby merge the lien of the mortgage into the fee when such was not his intention and when such merger would be detrimental to his interest.

Andrew v Woods, 217-453; 252 NW 112

Fee holder acquiring mortgage—nonmerger. Where a trust company secures a first mortgage by assignment from one bank and later from another bank secures blank deeds together with a contract for the sale of the mortgaged realty, upon default of which an action was started to foreclose the first mortgage, there was no merger of the first mortgage lien with the fee so as to advance a second mortgage to a position of priority.

Bankers Trust v Stallcop, 223-1344; 275 NW 120

Transfer of property mortgaged—merger—general rule. Where a title holder of real estate pays off a prior existing mortgage thereon, the mortgage lien merges in the fee, but where a mortgagee acquires the fee to the mortgaged premises his mortgage lien does not thereby merge therewith if this would be detrimental to his interest unless he intends such merger.

Bankers Trust v Stallcop, 223-1344; 275 NW 120

Quitclaim to avoid foreclosure—effect of existing junior liens—insurance unaffected. A mortgagee's status as such, as affecting his rights under a fire insurance policy, is not lost by merger when he takes a quitclaim deed from mortgagor, agreeing not to foreclose if no junior liens exist against the property, when thereafter it is found that such liens do exist, the presence of which would cause a merger to be against the interest of and inconsistent with the intention of the mortgagee.

Guaranty Ins. v Farmers Assn., 224-1207; 278 NW 913

(e) MISTAKES—REFORMATION

Reformation — complainant's burden. An instrument will not be reformed on the ground of mutual mistake unless the supporting testimony is clear, satisfactory, and convincing beyond a mere preponderance of the evidence, nor will such reformation be granted if the complainant has been guilty of inexcusable neglect in not having the instrument read; and especially is this true when a reformation will detrimentally affect the intervening rights of innocent third parties.

Galva Bank v Reed, 205-7; 215 NW 732

Reformation of deed. A decree in mortgage foreclosure that the mortgagee is not entitled to the reformation of a deed from the mortgagor to a subsequent purchaser so as to show an assumption by such purchaser of the mortgage debt is not an adjudication that the mortgagor is not entitled to such reformation, even tho the mortgagor was a party to the foreclosure, but not a party to the mortgagee's petition for reformation.

American Bank v Borcherding, 205-633; 216 NW 719

Evidence of mistake—sufficiency. Evidence reviewed and held to clearly, satisfactorily, and convincingly establish a mutual mistake in the execution of a mortgage, whereby a portion of the homestead of the mortgagors was omitted from the mortgage.

Rankin v Taylor, 204-384; 214 NW 725

Ineffectual reformation. A contract between a mortgagor of real estate and a purchaser of the land, wherein the purchaser assumes the payment of the mortgage, will not be reformed in proceedings to foreclose the mortgage, by inserting in the contract a maturity date which is different from the admittedly true maturity date as specified in the mortgage, because such

reformation could not possibly affect the mortgagee.

Richardson v Short, 201-561; 207 NW 610

Adopting wrong instrument to accomplish purpose. The execution of an ordinary, unconditional promissory note and mortgage on the mutual supposition of the parties thereto that said instruments would exactly carry out their agreement that one of them would pay the other a life annuity only, is not such mistake of law as will prevent reformation of the note and mortgage to meet the mutual purpose of the parties; but, of course, the proof of mutual mistake must be clear, satisfactory, and convincing.

Floberg v Peterson, 214-1364; 242 NW 13

Reformation—belated claim of mutual mistake. Long-delayed objection by a purchaser of land to a known clause in his deed which provided that he assumed the payment of an existing mortgage militates very strongly against his belated claim for a reformation on the ground that the clause in question was the result of a mutual mistake.

Smith v Godfrey, 201-768; 205 NW 366

Assumption of mortgage debt—no consideration. Where an instrument is executed without consideration on the part of a grantee to assume and pay the mortgage debt, the contract is not binding upon him, or if the deed is delivered in blank, or the conveyance made as security only, or if the clause is inserted by fraud, inadvertence, or mistake, without the knowledge or acquiescence of the grantee, he may have the instrument reformed in equity so as to make it express the true intent and understanding of the parties.

Guarantee Co. v Cox, 201-598; 206 NW 278

Receiver's lease not conclusive of mutual rescission. In vendee's action to cancel a real estate contract and note, a mutual rescission is not established by showing that the receiver in a mortgage foreclosure proceeding against the real estate had leased the premises to vendee, when the lease, by its very terms, was not to become effective unless vendee paid all obligations to vendor.

Fitchner v Walling, 225-8; 279 NW 417

III RIGHTS AND LIABILITIES OF PARTIES

(a) IN GENERAL

Agency—nonrelation. The act of the owner of a note and mortgage in selling them and the act of the purchaser in purchasing said note and mortgage do not, in and of themselves, create the relation of principal and agent.

Fed. Bk. v Sherburne, 213-612; 239 NW 778

Insurable interest of mortgagee. Principle recognized that a mortgagee has an insurable interest in the mortgaged property.

Boyce v Ins. Assn., 209-11; 227 NW 523

Waste—recovery for, when mortgage fully satisfied. While a mortgagee of land may maintain an action to protect his security against waste, yet after he has foreclosed and bought in the property for the full amount of the debt, he cannot maintain an action for gravel and standing timber removed from the land during the time the mortgage was being foreclosed.

Kulp v Trustees, 217-310; 251 NW 703

Recovery of realty—jurisdictional venue. An action by the beneficiaries of a trust in real estate (located in this state) to compel the trustee holding title to convey the land, in accordance with the terms of the trust agreement, to a newly designated trustee, must be brought and litigated in the county in which the land, or some part thereof, is located. If not so brought, the court is under mandatory duty, on motion for change of venue, to transfer the action to a proper county.

Titus Co. v Kelsey, 221-1368; 268 NW 23

Subsequent tax deed—purchase by wife who joined in mortgage—effect. A wife who joins with her husband in a mortgage on the husband's land, but who assumes no obligation, contractual or otherwise, to pay subsequently accruing taxes on the land, may, after the land has gone to tax deed to a stranger without collusion with her and while she was not in possession, purchase the land of the tax deed holder and acquire his title, viz, a fee simple indefeasible title—a title free from the lien of said mortgage.

Wood v Schwartz, 212-462; 236 NW 491

Legatee requesting executor to secure new mortgage. A residuary legatee who causes the executor to obtain a new mortgage as security for an indebtedness due the estate, and thereupon to cancel a pre-existing mortgage which secured the same debt, is necessarily precluded from holding the executor personally liable in case the new mortgage proves inadequate as a security.

Wilson v Norris, 204-867; 216 NW 46

Judgment—collateral attack—orders in bankruptcy. An order in federal bankruptcy proceedings for the sale of the bankrupt's equity of redemption in land sold under foreclosure proceedings is immune from collateral attack on the ground that the land embraced the bankrupt's homestead.

Lincoln JSL Bank v Brown, 219-630; 258 NW 770

Redemption by creditor of one of separate owners—apportionment of mortgage debt. Where separate owners of separate tracts of land jointly mortgage their lands for the debt of one of them and, on foreclosure, the sale is made en masse, and redemption is made by the judgment creditor of one of the owners, the other owner may, after paying to the

III RIGHTS AND LIABILITIES OF PARTIES—continued

(a) IN GENERAL—concluded

clerk the entire amount necessary to effect redemption, maintain an equitable action to have the mortgage debt apportioned between the different tracts.

Hansen v Bank, 209-1352; 230 NW 415

Joint defendants—right of contribution. The doctrine of contribution between joint defendants recognized.

Creger v Fenimore, 216-273; 249 NW 147

Carrying charges—apportionment. Bank president who purchased foreclosed premises was required to contribute to bank which advanced carrying charges an amount in proportion to his interest in the property.

National Ins. v Michelwait, (NOR); 255 NW 455

Tenants in common—right to accounting. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common property until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

Insurance to protect mortgagee. When a mortgagor complied with the terms of a mortgage and obtained insurance on property to protect the mortgagee, and then procured another policy, in the absence of a provision in the mortgage or in the second policy making its proceeds payable to the mortgagee, the mortgagee had no interest in funds paid into court as a compromise payment of a fire loss on the second policy. So an assignee from the mortgagee could not collect from the fund the amount paid in obtaining the assignment, as the assignee's rights could rise no higher than those of the assignor.

Calendro v Ins. Co., 227-829; 289 NW 485

(b) RENTS AND PROFITS—LEASES

Discussion. See 18 ILR 251—Mortgagee's right to rents

1 In General

Synonymous terms for "rent". A sale and conveyance in a real estate mortgage of "all the rents, issues, uses, profits and income therefrom and all crops raised thereon" as security additional to that afforded by the land, and in connection with a receivership clause, simply constitutes a chattel mortgage on "all the rents" (in whatever represented), said various terms in such case being deemed synonymous.

Equitable v Brown, 220-585; 262 NW 124

Failure of consideration. Tho a lease of mortgaged premises for the redemption year is entered into prior to the commencement of foreclosure proceedings, yet a decree in said proceedings that the plaintiff-mortgagee is entitled to the rents for said year, and the appointment of a receiver therefor (1) constructively evicts the tenant (party to the action) from said premises, (2) nullifies the tenant's then lease because of failure of consideration, and (3) invests the receiver, under a new lease with said tenant, with right to said rents, even tho the holder of said former lease and the rent notes thereunder is not a party to the foreclosure.

Equitable v Leaven, 214-121; 241 NW 446

Failure of consideration. The consideration for a lease of mortgaged premises (which mortgage pledges the rents) and for the promissory note given for the rent, wholly fails when the assignee in an unrecorded assignment of the lease and note stands by, during foreclosure, and, without asserting his claim by intervention or otherwise, knowingly permits the mortgagee to foreclose and oust the mortgagor and his tenant, and obtain a decree against the rents and a receiver therefor, in order to discharge a deficiency judgment.

Miller v Sievers, 213-45; 238 NW 469

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Field Co., 226-874; 285 NW 155

Grantee of mortgaged lands must account for rents. The grantee of mortgaged lands who has in his hands rents, on which the mortgagee has a lien, must account to the mortgagee therefor.

Des M. Bank v Allen, 220-448; 261 NW 912

Mortgagee reimbursed from rents for advances. The court, in the disposition of rents in mortgage foreclosure, manifestly may order the mortgagee reimbursed for interest advanced on a prior mortgage and for taxes when all the parties to the foreclosure had so stipulated.

Olson v Abrahamson, 214-150; 241 NW 454

Agreement in re rents. An agreement between a mortgagee and the president of the titleholder (1) that the mortgagee will, at foreclosure sale, bid the full amount of the judgment, and will consent to the appointment of the president as receiver of the rents, and (2) that said president as receiver will keep the property in repair and deliver it to the mortgagee at the close of the redemption period free of all taxes, is enforceable when the president is so appointed, the property so bid in, and the provision for the payment of taxes by the receiver is embraced in the final decree.

And this is true tho the mortgage neither pledges the rents nor provides for a receiver.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Surplus of rental—right of surviving spouse. The right of the surviving spouse of an intestate deceased to a balance of rentals accruing during redemption period and remaining after satisfaction of mortgage foreclosure judgment cannot exceed one third of such balance.

In re Angerer, 202-611; 210 NW 810

Rent during redemption. A decree, which recites that a real estate mortgage is also foreclosed as a chattel mortgage and that the receiver shall collect the rents "during the period of redemption", will, when construed as a whole—resort being taken to the pleadings—be taken to mean that the receiver collect the rents, "pending foreclosure, sale, and redemption"—the petition neither alleging nor asking for such foreclosure but instead praying for a receiver from the date of the petition.

Sutton v Schnack, 224-251; 275 NW 870

2 Accrual of Rents-Pledge Lien

Pledge of rents. A provision in a mortgage to the effect that, in case of foreclosure, a receiver may be appointed to collect the rents and to apply the same to the payment of taxes, and principal and interest, constitutes a pledge of the rents.

Wilson v Tolles, 210-1218; 229 NW 724

Pledge of possession—effect. A pledge in a real estate mortgage of the right of possession of the premises is in substance a pledge of the rents and profits of the premises.

Mickelson v Rehnstrom, 215-1056; 247 NW 275

Mortgagor's right to enforce pledge. In mortgage foreclosure, strictly in rem and solely against the owner of the premises who bought subject to the mortgage, the mortgagor-debtor may intervene and, whether solvent or insolvent, enforce, in conjunction with the plaintiff, and through receivership proceedings, a mortgage-pledge of the rents, issues, and profits in order to discharge a deficiency judgment; and this is true notwithstanding the fact that the foreclosure sale terminated the foreclosure judgment and the lien thereof.

American Bk. v McCammond, 213-957; 238 NW 77; 78 ALR 866

Mortgage on rents — exclusive power of mortgagee to collect. A chattel mortgage on the rents and income of real estate, tho combined in a real estate mortgage as dual security for the same debt, vests the mortgagee with full and exclusive power to collect said rents and income.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

General pledge of rents—accrual of lien. A general pledge of the rents of mortgaged real property gives the mortgagee a lien thereon only from the point of time when the appointment of a receiver of such rents is prayed for in foreclosure proceedings.

Kooistra v Gibford, 201-275; 207 NW 399
Young v Stewart, 201-301; 207 NW 401
Cooper v Marsh, 201-1262; 207 NW 403
Webber v King, 205-612; 218 NW 282
Andrew v Haag, 215-282; 245 NW 436
Andrew v Bank, 215-401; 246 NW 48
First Tr. Bk. v Conway, 215-1031; 247 NW 253

First Tr. Bk. v Stevenson, 215-1114; 245 NW 434

General pledge of rents. A mortgage pledge of rents creates no lien on the rents until foreclosure action is commenced and a receiver is prayed for, even tho it provides that, after default in payment, etc., said rents shall be payable solely to the mortgagee.

John Hancock Ins. v Linnan, 205-176; 218 NW 46

Perfecting right to rents. A mortgagee, whose mortgage contains a receivership clause covering the rents during the redemption period, perfects his right to such remedy (1) by duly filing his petition for foreclosure, (2) by praying for the appointment of such receiver, and (3) by causing his action to be indexed as a lis pendens. And this is true even tho the original notice filed with the petition is a nullity. It follows that his right to such remedy is prior to all other mortgagees subsequently foreclosing mortgages which embrace like clauses.

Union Trust v Carter, 214-1131; 243 NW 523

Indirect pledge. The rents of mortgaged premises are sufficiently pledged to the payment of the mortgage debt by a provision to the effect that a receiver shall be appointed for the rents if the mortgagee or his assignee bids in the property at foreclosure sale for less than the foreclosure judgment.

Security Inv. v Ose, 205-1013; 219 NW 36

Rents—lis pendens—effect. The filing of a petition for the foreclosure of a real estate mortgage, with prayer for the appointment of a receiver of the rents pledged by said mortgage, and the due indexing of said petition as a lis pendens, matures the mortgagee's lien on the pledged rents, even tho at said time the original notice of the action has not been served on the mortgagor. It necessarily follows that said matured lien has priority over a subsequent assignment of the said rents.

First JSL Bk. v Jansen, 217-439; 251 NW 711

Secondary security after exhausting land. A pledge of rents and profits in a real estate mortgage, being secondary and unavailable until the land as primary security is exhausted, the filing of a petition in foreclosure does not

III RIGHTS AND LIABILITIES OF PARTIES—continued
(b) RENTS AND PROFITS—LEASES—continued
2. Accrual of Rents—Pledge Lien—concluded

immediately entitle mortgagee to a receiver prior to the sale, without a showing both of mortgagor's insolvency and the insufficiency of the land alone to pay the mortgage indebtedness.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Rent pledge effective when mortgage executed. The lien on the rents and profits created by a chattel mortgage clause in a real estate mortgage is effective from the date of the execution of the mortgage, and not from the date when petition for foreclosure and for the appointment of a receiver is filed.

Equitable v Brown, 220-585; 262 NW 124

3 Leased Mortgaged Premises and Rent Assignments

Leases

Lease—assignment—recordation—effect. A lease of real estate and the assignment thereof are recordable for the purpose of conveying constructive notice to a mortgagee and his subsequently appointed receiver under a mortgage which contains a pledge of the rents, even tho said parties are not entitled, as a matter of right, to such notice.

King v Good, 205-1203; 219 NW 517

Lease—assigned rent note. A mortgagor may, in the absence of fraud, deed his land to another who, as owner, may lease for an ensuing term within the period of redemption and assign to a bank his lease and rent note, which assignment made prior to any foreclosure action will be superior to the lien of the chattel mortgage clause and entitle the bank to the rent as against the receiver in the foreclosure action claiming under such chattel mortgage clause.

Equitable v Hastings, 223-808; 273 NW 908

Nonfraudulent lease to son—assignment to creditor. When executed prior to a foreclosure action asking appointment of a receiver, fraud did not inhere in a lease from a father on his mortgaged lands to a mature tho unmarried son, followed on the next day by an assignment of the lease to a bona fide creditor of the father.

First JSL Bk. v Ver Steeg, 223-1165; 274 NW 883

Rentals—lease assignment—father-in-law's loan as consideration. Where an assignment of a lease on mortgaged lands is given to mortgagor's father-in-law as payment on a pre-existing, bona fide, unpaid loan, altho the notes evidencing such loan had been returned by the father to the daughter with the understanding that the debt would, if possible, be paid during his lifetime, such an assignment is a payment on the debt to the extent of the rentals and is supported by ample consideration.

First JSL Bk. v Ver Steeg, 223-1165; 274 NW 883

Fraud—evidence—sufficiency. On the issue of receivership for the rents and profits of real estate under mortgage foreclosure, evidence held to establish the fraudulent nature of a lease of said premises.

Webber v King, 205-612; 218 NW 282

Renting on shares—three-year lease—six-months lien limitation. The term of a three-year lease (March 1, 1934, to March 1, 1937) cannot, as to the 1935 crops, be said to expire on March 1, 1936, under the provisions of section 10262, C., '35, giving the landlord a lien on the crops for six months after "the expiration of the term".

Sutton v Schnack, 224-251; 275 NW 870

Order approving lease — nonappealability. An order approving a lease in accordance with a foreclosure decree appointing a receiver is not reviewable on a purported appeal from the order itself. The validity of such order necessarily depends on the validity of the decree from which it springs.

Union Life v Eggers, 212-1355; 237 NW 240

Treating lease as cash. When the mortgagee in foreclosure is entitled to all the rents accruing during the redemption period, the court may order that the lease be assigned to the mortgagee at face value and terminate the receivership.

Olson v Abrahamson, 214-150; 241 NW 454

Deed—rights to unaccrued rents. The principle that one who receives a sheriff's deed is entitled to unaccrued rents under an outstanding lease can have no application when the lease had terminated immediately prior to the issuance of said sheriff's deed.

Kerr v Horn, 211-1093; 232 NW 494

Assignments

Assignee of lease—rights limited to interest of mortgagor-landlord. The assignee of a lease from a landlord-mortgagor cannot take, as against mortgagee, any greater interest than held by the landlord-mortgagor.

Bankers Life v Garlock, 227-1335; 291 NW 536

Right to assign rents prior to foreclosure. An owner of premises which are under mortgage pledging the rents may, before the commencement of foreclosure, validly assign the accruing rents (not beyond the redemption period) and the rights of the good-faith assignee will be superior to the mortgage even as to installments of rent actually maturing

after the appointment of a receiver for the rents.

Ransier v Worrell, 211-606; 229 NW 663

First JSL Bk. v Cuthbert, 215-718; 246 NW 810

Right to assign rents. A receivership pending mortgage foreclosure cannot reach rents in good faith transferred by the mortgagor prior to the foreclosure suit.

Parker v Coe, 200-862; 205 NW 505

Rents—right to transfer. Rents transferred by the owner of mortgaged premises to a good-faith holder prior to the commencement of foreclosure proceeding are beyond the reach of the mortgagee when the mortgage carries simply a pledge of the rents.

First JSL Bk. v Cuthbert, 215-718; 246 NW 810

Rents—transfer. Under a mortgage which carries a simple pledge of the rents, an unconditional transfer, by the mortgagor prior to foreclosure proceedings, of rent notes for the redemption period passes the rents beyond the reach of the mortgagee, the transferee being a good-faith holder for consideration.

First JSL Bk. v Conway, 215-1031; 247 NW 253

Pre-existing debt as consideration. A pre-existing indebtedness furnishes ample consideration for a transfer by a mortgagor of rent notes.

First JSL Bk. v Conway, 215-1031; 247 NW 253

Receiver for rents which have been assigned. A receiver for the rents and profits which may accrue during the redemption period on mortgaged premises will not be appointed under a mortgage which simply pledges the possession during said period, and when it is made to appear that the rents for said period have been contracted for and in good faith assigned prior to the commencement of foreclosure proceedings.

Keokuk Co. v Campbell, 205-414; 215 NW 960

Subsequent assignment of rents. A mortgage providing, in case of foreclosure, for the appointment of a receiver to take charge of the rents up to and until the expiration of the redemption period, and to apply them on the mortgage indebtedness, incapacitates the mortgagor, after the petition in foreclosure is filed, from conveying a title to after-accruing rents which will be superior to the rights of the receiver.

Hakes v North, 202-324; 208 NW 305

Agent of party claiming rent. A party who intervenes in a real estate mortgage foreclosure after final decree and after the appointment of a receiver of the rents, and lays claim to said rents as a trustee, under an assignment and chattel mortgage thereof, antedating the foreclosure, has no standing when it is made to appear that said "trustee" has no personal interest in said rents and is a "trustee" only in the sense that he is the agent of a party who was duly made a party to the foreclosure and whose rights were fully adjudicated by the final decree.

Virtue v Teget, 209-157; 227 NW 635

Prior assignment—effect. Even tho a real estate mortgage pledges the rents of the mortgaged premises, nevertheless the rights of a good-faith assignee of said rents, for value, prior to the institution of foreclosure proceedings are superior to said pledge.

King v Good, 205-1203; 219 NW 517

Receiver denied when rent note transferred. The appointment of a receiver in real estate mortgage foreclosure to take charge of pledged rents is properly refused when it is made to appear that, prior to foreclosure proceedings, the legal titleholder has made a bona fide transfer of the promissory note representing the rents in question. Especially is this true when neither the tenant note-maker nor the assignee of the note is a party to the foreclosure.

Hatcher v Forbes, 202-64; 209 NW 305

Fraudulent claim to rents. Record reviewed and held that the claim that rents had been transferred prior to proceedings for the appointment of a receiver in mortgage foreclosure was fraudulent.

First N. Bk. v Murtha, 212-415; 236 NW 433

Subsequent sale of rent notes. A mortgagee of land who institutes foreclosure proceeding and prays for a receiver under a pledge of the rents acquires a right to the accruing rents superior to a subsequent purchaser of the rent notes.

Ferguson v White, 213-1053; 240 NW 700

Rents — "pledge" and "chattel mortgage" contrasted—priority. A mere pledge of rents written into a real estate mortgage remote from the granting clause of the mortgage cannot be deemed a chattel mortgage. It follows that such pledge is inferior to the rights of the good-faith assignee of a lease and rent notes executed subsequent to the real estate mortgage and prior to an action to foreclose such mortgage, and accompanying pledge.

Owen v Fink, 218-412; 255 NW 459

Rents — assignee (?) or mortgagee (?). Rents accruing during the year in which a mortgage is foreclosed, and based on crops harvested or matured by the time the period starts to run, belong to the assignee of such rents who (1) became such assignee prior to the commencement of foreclosure, (2) was not made a party to the foreclosure, and (3) had no knowledge of the foreclosure.

Bain v Washburn, 214-609; 243 NW 286

III RIGHTS AND LIABILITIES OF PARTIES—continued

(b) RENTS AND PROFITS—LEASES—continued

3. Leased Mortgaged Premises and Rent Assignments—concluded

Ineffectual assignment. Rent notes payable to the mortgagor-owner and given for the rent of the mortgaged premises for the year of redemption, and transferred in good faith by said payee to his wife, and held by her in her own right when foreclosure is instituted, are subject to the lien of said mortgage, and a subsequent good-faith transfer of the notes by the wife does not displace said lien, it appearing that the secured note and mortgage were executed by both husband and wife, and that the mortgage contained a pledge of said rents.

John Hancock Ins. v Stowe, 215-324; 245 NW 295

When lien perfected. A mortgagee's lien on the rents of the mortgaged premises under a pledge of the rents, accrues only when the mortgagee makes proper prayer or request, in his duly commenced foreclosure suit, for the appointment of a receiver. It follows that, if prior to such prayer or request said rents have been unconditionally transferred, the good-faith transferee thereof has an unassailable title thereto.

First Tr. Bank v Stevenson, 215-1114; 245 NW 434

Rents—assignment. The simple delivery by a landlord to his creditor of his real estate lease and rent notes, with the intent thereby to effect an assignment to his creditor as collateral security, is valid against a mortgagee who subsequently institutes foreclosure action on a mortgage pledging the rents.

First JSL Bk. v Bank, 217-620; 252 NW 519

Right to rents after sheriff's deed. Upon the execution and delivery of a deed by the sheriff in real estate mortgage foreclosure, the grantee becomes vested eo instanti with the right to future-maturing rents—no contract or stipulation to the contrary appearing—even tho such rents accrued in part during the period of redemption and in part afterward. In other words, the right of the grantee to such rents may be superior to that of the assignee of the lease and of the rent notes executed thereunder.

First JSL Bk. v Ingels, 217-705; 251 NW 630

Transfer of rents—consideration. Record reviewed and held that a written transfer of the right to the use and occupancy of mortgaged premises during the period of redemption was supported by adequate consideration and was free from fraud.

Andrew v Miller, 218-301; 255 NW 492

Assignment of rents by dummy corporation. On the issue, in mortgage foreclosure, whether an assignment of the rents of the mortgaged premises placed the rents beyond the power of the receiver, if one were appointed, evidence reviewed and held insufficient, in the absence of any showing of fraud, to justify the court in holding that the assignor corporation and the assignee corporation were in fact one corporation,—that the assignor corporation was a mere dummy.

First JSL Bank v Galagan, 220-173; 261 NW 920

Chattel mortgage as part of real estate mortgage—lien and priority. A clause (inserted in a mortgage of real estate) which sells and conveys to the mortgagee "all the rents" of the mortgaged land, as security for the payment of the debt in question, constitutes a legal chattel mortgage which, inter alia, (1) gives to the mortgagee, as against the mortgagor and others having actual knowledge thereof, a first lien on all subsequently executed leases of said land and on the promissory notes which represent the rental under said leases, and (2) gives to the mortgagee a first lien on such leases and notes against all assignees thereof provided that when the assignees became such the real estate mortgage had been duly recorded as such, and the record thereof had been duly indexed in the chattel-mortgage index book. (No plea in this case of holdership in due course.)

Equitable v Brown, 220-585; 262 NW 124

Chattel mortgage clause—effective date—priority over subsequent assignee of rents and profits. A clause in realty mortgage, duly recorded and indexed, providing that mortgagor conveyed in addition to realty "also all the rents, issues, uses, profits and income therefrom, and all the crops raised thereon from the date of this agreement until the terms of this instrument are complied with and fulfilled," created a valid chattel mortgage, effective from date of execution of the mortgage and not from date of filing the foreclosure petition in which appointment of receiver is asked, and subsequent assignee of property, described in instrument, took subject to lien provided in such chattel mortgage clause.

Bankers Life v Garlock, 227-1335; 291 NW 536

4 Conflicting Rent Claimants

Rents and profits pledged—priority as of date of filing petition. In foreclosing a mortgage with a pledge of rents and profits and asking appointment of a receiver, questions of priority between mortgagee and others as to rents and profits are fixed as of date of filing petition with request for receiver, provided receiver is actually appointed.

Union Tr. v Carter, 214-1131; 243 NW 523
First JSL Bk. v Blount, 223-1339; 275 NW 64
Sutton v Schnack, 224-251; 275 NW 870

Superior rights to rents. When land is subject to several mortgages, each of which pledges the rents and profits to the payment

of the debt secured and provides for a receiver, the superior right to said rents and profits vests in the mortgagee who first files his petition in foreclosure and first prays for a receiver. (But now see §12383-e1, C., '35 [§12383.1, C., '39]).

Andrew v Haag, 215-282; 245 NW 436
First JSL Bk. v Smith, 219-658; 259 NW 192

Conflicting claims of receiver and chattel mortgagee. The rights of a receiver duly appointed for the rents of land under mortgage foreclosure is superior to the rights of a chattel mortgagee of crops which were not in existence when the foreclosure was commenced.

Virtue v Teget, 209-157; 227 NW 635

Conflicting pledges. Proof that a bank had in its possession a duly executed deed to mortgaged lands, except that no grantee was named therein, together with proof that the bank had rented the land after the commencement of foreclosure proceedings and after prayer had been entered for a receiver for the rents, is not sufficient to establish such assignment of the rents as will take priority over the mortgage pledge of the rents.

First JSL Bk. v Beall, 208-1107; 225 NW 943

Rents—application of. A foreclosure decree covering a first and second mortgage, which is in rem only, and which appoints a receiver with direction to pay the final balance of rents "on deficiency judgment", entitles the second mortgagee to such final balance of rents in preference to the then owner of the land, the first mortgagee being fully satisfied by the foreclosure sale.

Union Bk. v Lyons, 206-441; 220 NW 43

Rents pledged to both senior and junior mortgagees—priority. A junior mortgagee whose mortgage carries a mere pledge of the rents, and who makes such pledge effective by first commencing an action to foreclose, is entitled, in case of a deficiency judgment, to such rents in preference to a senior mortgagee whose mortgage likewise carries the same pledge, but whose action to foreclose was subsequent to the junior mortgagee's action.

Lynch v Donohoe, 205-537; 215 NW 736; 218 NW 144

Rents pledged to both senior and junior mortgagee. The lien on matured crops, acquired by virtue of the commencement of foreclosure proceedings on a second mortgage carrying simply a pledge of the rents, is inferior to the lien acquired under the first mortgage, which is a duly recorded, combined real estate and chattel mortgage on the land and on the rents and crops thereof. This is true because the lien under the first mortgage necessarily attaches ahead of the lien of the second mortgage. Likewise the lien acquired by such second mortgage on unmatured rents is inferior to the lien of the first mortgage because, while both liens attach at the same instant of time, the first mortgage lien is first in time of origin.

Equitable v Read, 215-700; 246 NW 779

Chattel mortgage clause—effect on landlord's agreement to rent to third party. Where a valid chattel mortgage clause is contained in a realty mortgage, duly recorded and indexed, providing that mortgagor conveyed, in addition to realty, all the rents, issues, uses, profits and income therefrom and all crops raised thereon from date of instrument until payment of debt, an agreement by mortgagor to rent land to a third party was subject to such chattel mortgage clause, as against contention that agreement to rent was not the same as rents, issues, income, profit, or crops.

Bankers Life v Garlock, 227-1335; 291 NW 536

Trustee in bankruptcy (?) or mortgagee (?) —priority. The right of a receiver in mortgage foreclosure proceedings to the rents and profits reserved in the mortgage is superior to the rights of a subsequently appointed trustee in bankruptcy of the then owner of the land.

Robertson v Roe, 203-654; 213 NW 422

Trustee in bankruptcy (?) or mortgagee (?)—priority. The title of a bankrupt mortgagor to the rents and profits of the mortgaged land passes to his trustee in bankruptcy as of the date of the adjudication in bankruptcy, even tho the mortgagor has previously pledged such rents and profits for the mortgage debt, and such title in the trustee is superior to any after-instituted proceeding in foreclosure for the appointment of a receiver for such rents and profits.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Pledge of rents and subsequent chattel mortgage. A pledge, in a duly recorded real estate mortgage, of the rents of the mortgaged premises is superior to a subsequently executed and duly recorded chattel mortgage on crops which the chattel mortgagee was obligated to grow on said premises, but which crops were not in existence when the real estate mortgagee instituted his foreclosure proceedings.

Bunting v Berns, 212-1127; 237 NW 220

Receiver and chattel mortgagee — priority. A chattel mortgage on a landlord's crop-rental share of growing crops is prior in right to the claim of a receiver appointed in real estate mortgage foreclosure proceedings instituted subsequent to the execution of the chattel mortgage even tho the real estate mortgage was executed prior to the chattel mortgage, and pledged the rents to the payment of the real estate mortgage debt.

Hansen v Sheffer, 205-1191; 219 NW 529

Pledge for pre-existing debt. A pledge of rents contained in a real estate mortgage and

III RIGHTS AND LIABILITIES OF PARTIES—continued
(b) RENTS AND PROFITS—LEASES—continued
4. Conflicting Rent Claimants—continued

taken as security for a pre-existing indebtedness is not entitled to priority over chattel mortgage clauses in prior real estate mortgages for value on the same land even tho said prior mortgages are not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Mortgagee (?) or assignee (?). The right of the receiver under mortgage foreclosure to the pledged rents during the redemption period is superior to the right of an assignee of such rents (tho the assignee became such prior to the commencement of foreclosure proceedings) when the foreclosing mortgagee had no knowledge of such assignment, and when the assignee, with full knowledge of the mortgage and its contents permitted the foreclosure decree to be entered, and thereafter brought action against the tenant for the rent.

Hoogestraat v Danner, 209-672; 228 NW 632

Mortgagee (?) or assignee (?). A receiver who, under real estate mortgage foreclosure (to which the owner and his occupying tenant are parties) is awarded immediate possession of the premises and the right to the rents during the redemption period, and who thereupon rents the premises to said evicted tenant, is entitled to the rent money in preference to the assignee of rent obligations executed to the owner prior to said foreclosure by the same tenant and for the same period of time.

White v Peterson, 222-720; 269 NW 878

Rent notes subject to prior chattel mortgage. The receiver of an insolvent takes the land of said insolvent subject to the lien of a prior unsatisfied, combined real estate and chattel mortgage covering both the said real estate and the "rents, issues, use and profits" thereof. It necessarily follows that notes taken by the receiver for the rent of said mortgaged premises for the year embracing foreclosure proceedings and the redemption period are subject to said chattel mortgage lien.

Capital Bank v Riser, 215-680; 246 NW 763

Senior mortgagee without pledge—junior with pledge. A senior mortgagee whose mortgage contains no pledge of the rents and no receivership clause is subordinate in right, as to the rents, to a junior mortgagee whose mortgage does contain such pledge and receivership clause; and this is true tho the senior mortgagee shows that the mortgagor is at the time insolvent.

McBride v Comley, 204-622; 215 NW 613

Prior right of bank receiver. The superintendent of banking, upon being appointed receiver of an insolvent bank, takes over a lease of the bank's mortgaged real estate, with the same rights as a creditor of the bank would take were the creditor an assignee of the lease, as payment or security for his debt. It follows that said superintendent is entitled to the rent money in preference to the mortgagee who subsequently institutes foreclosure action and therein seeks to enforce the receivership clause in his mortgage. (Overruled. See 215-963.)

Schlesselman v Martin, 207-907; 223 NW 762

Rents—priority over receiver. The receiver of an insolvent bank who forecloses a second mortgage belonging to the insolvent and receives a sheriff's deed, acquires by said deed simply the rights formerly possessed by the mortgagor-owner. It follows that the receiver holds said land subject to the right of the first mortgagee subsequently to perfect and enforce a pledge of the undisposed of rents, in order to satisfy a deficiency judgment, as provided in the first mortgage. (Schlesselman v Martin, 207-907, overruled)

Northwestern Ins. v Gross, 215-963; 247 NW 286
Metropolitan v Smith, 215-1052; 247 NW 503
Lincoln Bank v Barlow, 217-323; 251 NW 501
See §12383.1, C., '39

Rents—priority over receiver. The receiver of an insolvent bank must be deemed to hold the insolvent's mortgaged land subject to the right of the mortgagee, in order to satisfy a deficiency judgment, to perfect and enforce a pledge of the undisposed of rents as provided in the mortgage. In other words, the receiver may no more deny the mortgagee's right to said rents than might the insolvent deny such right.

Metropolitan v Sheldon, 215-955; 247 NW 291
Willey v Andrew, 215-1104; 247 NW 501
Lincoln Bank v Barlow, 217-323; 251 NW 501

Priority over receiver. The receiver of an insolvent bank who, pending receivership, acquires, on behalf of the insolvent, a deed to real estate "subject to" a specified first mortgage, holds the rent notes and the proceeds thereof, covering the redemption period, subject to the said mortgagee's right thereto under his mortgage pledge thereof.

Connecticut Ins. v Stahle, 215-1188; 247 NW 648
Lincoln Bank v Barlow, 217-323; 251 NW 501

Judgment creditor holding deed. A mortgage pledge of rents becomes vested upon the commencement of foreclosure proceedings with prayer for the appointment of a receiver, and a judgment creditor who subsequently obtains a deed to the mortgaged premises is not entitled to the rents accruing during the redemption period, especially when his judgment lien was decreed inferior to the mortgage.

Olson v Abrahamson, 214-150; 241 NW 454

Grantee not entitled to retain. The grantee under quitclaim deed of premises which are subject to a duly recorded mortgage pledging the rents and profits, even tho he does not assume the payment of said mortgage, is not entitled to collect and retain the rents accruing during the redemption period following foreclosure of the mortgage with a deficiency judgment. This is true because the grantee takes the premises subject to the same burdens under which the mortgagor held them.

Equitable v Jeffers, 215-696; 246 NW 784

Tenant's right of offset against pledge to mortgagee. The right which a mortgagee has as pledgee of the rents, and as assignee of a lease executed by the mortgagor-owner, is subordinate to the right of the tenant under said lease to offset against the rents owing by him to the insolvent landlord-mortgagor, an unpaid indebtedness which was due to the tenant from said landlord-mortgagor prior to the time when the mortgage and lease were executed.

Loots v Clancey, 209-442; 228 NW 77

Decree in re rents—effect on nonparty. A decree in mortgage foreclosure that the receiver therein appointed is entitled to the rents of the mortgaged premises, during the redemption period, is not an adjudication binding on one who is not a party to the foreclosure and who holds prior executed rent obligations for the same premises and for the same period.

White v Peterson, 222-720; 269 NW 878

Enforcement of rent pledge against so-called lessee. The commencement of foreclosure proceedings on a mortgage which pledges the rents as security entitles the plaintiff to the appointment of a receiver for all then unpaid rents, notwithstanding an outstanding subsequently executed instrument, in the nature of a lease, for a specified consideration, giving to grantee the "right to the use, possession, occupancy, and income of said premises" until all sums due the grantee have been paid.

Union Ins. v Goode, 222-716; 269 NW 762

Assignments by partnership and partners—priority. An unrecorded assignment by a partnership to a partnership creditor of a lease of real estate and of the rents accruing thereunder is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Misapplication of rents.

Hansen v Bowers, 211-931; 234 NW 839

Rents during redemption. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof, during the redemption period, to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

Improper disposal of rents. A receiver under mortgage foreclosure who collects rents which he actually and constructively knows are claimed by an assignee thereof, and who pays out said funds under an order which he obtains without notice to the court of such claim, and without notice to said assignee, must account to such assignee for such funds when such assignee promptly intervenes in the receivership proceeding prior to its termination and legally establishes his prior claim to said funds.

King v Good, 205-1203; 219 NW 517

Rents prior to deed—exception to general rule. Ordinarily the owner of mortgaged real estate is entitled to the rents until the issuance of the sheriff's deed on foreclosure sale, but where substantially at the close of the redemption period litigation arose over the right to redeem, and where it was agreed that the rights of the parties should remain in statu quo without the issuance of a deed until the litigation was determined, and where the court later decreed the ownership of the property as of the date when redemption expired, held that the rents accruing subsequent to the expiration of the period of redemption belonged to the parties so decreed to be the owners, even tho the sheriff's deed was executed long subsequent to said expiration.

People's Bank v McCarthy, 209-1283; 228 NW 7

Rents subsequent to deed. Upon the execution and delivery of a deed by the sheriff in mortgage foreclosure, the grantee becomes vested eo instanti with the right to future maturing rents, even tho such rents accrued in part during the redemption period and in part afterwards, nothing to the contrary appearing in the mortgage, or in the lease, or in any contract or stipulation relative thereto.

First JSL Bk. v Ogle, 208-15; 221 NW 537

Nonpledge of rents. A receiver will not be appointed in real estate foreclosure to take charge of the rents during redemption period when the mortgage contains no provision for such appointment and does not pledge the rents.

Huber v Gaines, 202-69; 209 NW 412

Pledge of rents—priority reversed by statute. A second mortgagee who, under a naked pledge of rents, fully matures a chattel mortgage lien on existing rents and a right to future-accruing rents, by first commencing foreclosure and praying for a receiver, even tho the first mortgagee is not made a party defendant, is not affected by the later enacted statute (§12383-e1, C., '35 [§12383.1, C., '39]) which

III RIGHTS AND LIABILITIES OF PARTIES—continued

(b) RENTS AND PROFITS—LEASES—continued

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reverses the order of priority under such pledges.

Reason: Said statute is specifically made nonapplicable to pending litigation.

First JSL Bk. v Armstrong, 220-416; 262 NW 815

Rents pledge attaching to crops. A clause in a real estate mortgage pledging rents and profits in the future is a valid chattel mortgage but the lien will not attach until the crops come into being.

Equitable v Hastings, 223-808; 273 NW 908

5 Crops

Immature crops. The commencement of foreclosure proceedings on a real estate mortgage which pledges the rents as security gives the mortgagee a lien on the crop rent of the legal titleholder superior to a prior attempted levy on the immature crops; and this is true even tho the mortgage is not indexed in the chattel mortgage record.

Rodgers v Oliver, 200-869; 205 NW 513

Chattel mortgage on rents covers crops. A real estate mortgage which, in addition to the land, conveys the crops raised on the land "from now until the debt secured is paid", is also a chattel mortgage to the extent of the crops.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Landlord mortgagor's assignment of lease —no effect on chattel clause of realty mortgage. A lien on rents and profits created by chattel mortgage clause in realty mortgage, duly recorded and indexed, was not invalid as to mortgagor's share of crops produced under 2-year lease, because such crops did not belong to mortgagor at time they came into existence and, the landlord having assigned the lease, the subsequent assignee of property described in mortgage would take subject to the lien provided therein.

Bankers Life v Garlock, 227-1335; 291 NW 536

Lien on crops pending foreclosure. The remedial provisions of a mortgage, including a pledge of the rents and profits, are such a part of the subject matter of a foreclosure action that indexing in lis pendens imparts to a purchaser of the mortgagor-landlord's share of the corn constructive notice of the mortgagee's lien on the corn.

Sutton v Schnack, 224-251; 275 NW 870

Crop rents. Receiver of mortgaged premises held not entitled to recover landlord's share of crop rents where evidence showed that landlord's share had been delivered to him and sold prior to filing of petition for foreclosure.

Shaum v Bank, (NOR); 263 NW 815

Crops raised during redemption period. The right of the owner of land, after mortgage foreclosure, to the possession of the property during the 12 months redemption period does not embrace the right to hold exempt from levy under the mortgage deficiency judgment the harvested grain which has been raised on the premises during said redemption period, and which constitutes the said owner's share as rent.

Starits v Avery, 204-401; 213 NW 769

Rents pledged—intervening chattel mortgage on crops. The right to the appointment of a receiver under a receivership clause in a real estate mortgage, and the right to have the rents accruing during the redemption year applied to discharge a foreclosure deficiency, are superior to a chattel mortgage executed subsequent to the real estate mortgage, on crop to be grown by the mortgagor on said land during said year, said crop not being yet in existence when the real estate foreclosure was commenced.

Phelps v Taggart, 207-164; 219 NW 528

Crops wasting. Under a mortgage on lands and on the crops and rentals thereafter accruing, without a receivership clause, the appointment of a receiver is proper after the land has been sold under foreclosure, when it has been made to appear (1) that all parties personally liable are insolvent, (2) that the land has proved inadequate to satisfy the debt, and (3) that the crops are going to waste.

Robertson v Roe, 203-654; 213 NW 422

Conversion of corn—liabilities. After indexing in lis pendens an action asking foreclosure of a real estate mortgage containing a pledge of rents and profits, a person, altho prior to appointment of a receiver and decree of foreclosure, who without consent of the mortgagee purchases corn harvested during pendency of the foreclosure, may nevertheless be liable to the receiver for conversion of the corn.

Sutton v Schnack, 224-251; 275 NW 870

6 Rents Accrued or Paid Before Foreclosure

Rents paid prior to foreclosure. A general pledge of the rents of mortgaged real property gives the mortgagee no right to rents which have accrued, and which have been paid or delivered by the tenant, prior to the commencement of foreclosure proceedings, to a subsequent grantee-landlord who had not assumed payment of the mortgage debt. Necessarily the mortgagee is not entitled to a receiver for such rents.

Cooper v Marsh, 201-1262; 207 NW 403

Owner's right to collect rent in advance. An owner of real estate which is under a mort-

gage pledging the rents, but which mortgage the said owner is under no obligation to pay, has a legal right, prior to the institution of a foreclosure action, to rent the land and collect the rent in advance, and thus place said rents effectually beyond the reach of the mortgagee.

Andrew v Bank, 215-401; 246 NW 48

Payment in advance—ouster—right to recover. A tenant who pays the rent in advance to the landlord and is legally evicted by foreclosure proceedings before the commencement of the term may recover of the landlord the sum so paid as for a total failure of consideration.

Ransier v Worrell, 211-606; 229 NW 663

Accrued rents. A mortgagee of real estate has, under his mortgage, no lien or claim on rents which have fully accrued prior to the commencement of foreclosure. Especially is this true when such rents have been fully sequestered in prior foreclosure proceedings.

Haning v Dunlop, 203-48; 212 NW 351

Dual accounting not required. A mortgagee whose mortgage pledges the rents of the mortgaged premises for the payment of the mortgage debt, may not, in equity and good conscience, require a nonmortgagor-owner of the premises to account for that portion of said rents which has already been applied (1) on the interest accruing on said mortgage debt, or (2) on the taxes due on said premises.

Greenleaf v Bates, 223-274; 271 NW 614

Rents during redemption. The tenant of a mortgagor of real estate for the year for redemption from foreclosure sale who has paid his rent in advance is entitled to (1) all crops raised by him on the premises and matured by the time foreclosure deed is issued, and (2) all crop shares due him from his subtenants and likewise matured by the time said deed is issued.

Goldstein v Mundon, 202-381; 210 NW 444
See Rodgers v Oliver, 200-869; 205 NW 513

7 Loss of Right to Rents

Loss of right to rents. A mortgagor who, knowing that a receiver is being asked for in the foreclosure of a second mortgage, consents to and acquiesces in a decree which, inter alia, appoints a receiver with direction (1) to lease the premises during the redemption year, (2) to pay the taxes on the premises, and the interest on a first mortgage, and (3) to hold the balance subject to the orders of court, loses all claim to the rents, even tho the second mortgagee bid in the property for the full amount of his judgment, it appearing that the receiver will hold no balance after complying with the orders of the court.

Hakes v Phillips, 204-603; 215 NW 645

Surplus rent money—waiver of pledge. Rent money in the hands of a receiver in senior mortgage foreclosure after said mortgage is satisfied in full is payable to the mortgagor or his assignee, in preference to a junior mortgagee who, while his mortgage contained a pledge of the rents, foreclosed his mortgage on cross-petition, without in any manner perfecting any lien on said rents by the appointment of a receiver for such rents.

Stamp v Eckhardt, 204-541; 215 NW 609

Loss of pledge of rents. A general pledge of the rents of mortgaged real property gives the mortgagee no right to rents which have accrued, and which have been paid or delivered by the tenant, prior to the commencement of foreclosure proceedings, to a subsequent grantee-landlord who had not assumed payment of the mortgage debt. Necessarily the mortgagee is not entitled to a receiver for such rents.

Cooper v Marsh, 201-1262; 207 NW 403

Failure to redeem. A second mortgagee who has wholly lost his lien on the land because of his failure to redeem from the first mortgage foreclosure acquires no lien on the matured rents which have accrued during the redemption year following such foreclosure, (1) by instituting foreclosure on his second mortgage, (2) by praying for the establishment of a lien on said rents, and (3) by resting such proceeding on a prior receivership which was legally nonexistent.

Le Valley v Buckles, 206-550; 221 NW 202

Delayed receivership—nonwaiver of rents. A mortgagee after perfecting his contract lien on accrued and future accruing rents (by instituting foreclosure with prayer for receiver) may not be held to have waived his right to any part of said rents by the fact that the receiver, appointed in his behalf, long delayed qualifying as such receiver, it appearing that there was no intention to waive, and that no one had been harmed by said delay.

Greenleaf v Bates, 223-274; 271 NW 614

IV ASSIGNMENT OF MORTGAGE OR DEBT

Payment by taking assignment. One who secures title to land under foreclosure of a second mortgage may not then take an assignment of the first mortgage and enforce it against the maker thereof who has become a surety thereon. Such purchase constitutes a payment of the mortgage debt as to the maker-surety.

Hult v Temple, 201-663; 208 NW 70; 46 ALR 317

Transfer of part of debt. A transfer of part of a mortgage-secured debt operates ipso facto as a pro tanto assignment of the mortgage security.

Miller Bk. v Collis, 211-859; 234 NW 550

Assignment of mortgage debt. The rights acquired by a holder in due course of a nego-

IV ASSIGNMENT OF MORTGAGE OR DEBT—concluded

tiable promissory note attach to and accompany the mortgage securing said note, even tho the mortgage is simply "assigned" to said holder.

Fed. Bk. v Sherburne, 213-612; 239 NW 778

Assignment to titleholder — irrevocable merger. The legal titleholder of real estate who acquires or pays off a first and a second mortgage on the land, and records releases thereof with the deliberate intent thereby to show a complete satisfaction of said liens, and does so with the knowledge (which he has negligently forgotten) that there was a third mortgage outstanding on the land, will not, in the foreclosure of said third mortgage, be subrogated to the rights of said former first and second mortgagees; especially is this true when said titleholder had sold said third mortgage to the foreclosing plaintiff under the implied representation that it was a first mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

Assignment reserving interest. A broker who, in negotiating a loan, takes the note and mortgage in his own name and, pursuant to an agreement, adds to the rate of interest due the actual mortgagee a fractional percent to cover his commission, and who, in assigning the note and mortgage to said actual mortgagee, reserves to himself said fractional percent of the interest "when and as the interest matures and is paid, without right of priority or interest in the mortgage," thereby deprives himself of all interest in the mortgage in case the mortgagor voluntarily, or involuntarily because of foreclosure, ceases to pay interest.

Metropolitan v Sutton, 219-879; 259 NW 788

Mortgage assignment to insurer when policy voided by insured. When an insurance company, in addition to insuring property mortgaged to a certain mortgagee, agreed that if any property owner should by any act void the insurance as to himself, the insurance company would purchase from the mortgagee the note and mortgage on the property and obtain an assignment of the mortgagee's rights against the property owner, the company's payment of the amount of a note and mortgage to the mortgagee to obtain an assignment according to the agreement did not extinguish the note and mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

Fire policy—validity as to mortgagee's assignee. Where property was covered by fire insurance policy containing a clause that the policy would be void if other insurance on the property was procured, and where, after obtaining a second policy, the insured sustained a fire loss which the second company compromised and paid the amount thereof into court, the second policy was valid as to the insured to the extent of the amount paid into court, and the first policy which had been obtained to protect a mortgagee was valid as to an assignee of the mortgagee to the extent of the amount paid to obtain an assignment of the mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

V PROPERTY TRANSFER—ASSUMPTION OF MORTGAGE

Discussion. See 15 ILR 79—Extension of time after assumption

Scope and effect of assumption. A purchaser of land who contracts, both in his contract of purchase and in the deed of conveyance accepted by him, to assume and agree to pay an existing mortgage on the land, thereby becomes the principal debtor on such obligation, both as to the holder of the obligation and as to all prior parties obligated thereon.

Grimes v Kelloway, 204-1220; 216 NW 953

Assumption of mortgage—sufficiency. An inartistically framed assumption of "mortgages now of record" may be amply sufficient to impose personal liability on the assumptor. Moreover, the term "assume", in such a transaction, imports personal liability.

Northwest. Academy v Edmonds, 214-310; 242 NW 49

Assumption and agreement to pay—evidence. Evidence held to constitute a prima facie showing of assumption and agreement to pay an existing mortgage.

Bridges v Sams, 202-310; 202 NW 558

Assumption of mortgage debt—insufficiency. An agreement between partners in their contract of partnership to pay mortgages on land to which they have taken title "subject" to existing mortgages, will be deemed an agreement solely for their own mutual benefit, and not for the benefit of third parties, to wit, said mortgagees.

Bankers Tr. v Knee, 222-988; 270 NW 438

Assumption—primary debtorship. As between a mortgagor and a subsequent purchaser who assumes and agrees to pay the mortgage, the purchaser becomes the primary debtor and the prior mortgagor the secondary debtor; but in case foreclosure and sale reveal a deficiency judgment, the mortgagor may not recover the amount thereof from the assuming purchaser until he (the morgagor) has paid such deficiency.

Thomsen v Kopp, 204-1176; 216 NW 725

Conveyance with assumption of mortgage—liability of grantee and maker. A grantee assuming and agreeing to pay a mortgage becomes thereby the primary debtor even tho his immediate grantor was not personally liable. The maker of the mortgage becomes secondarily liable.

First JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Successive assumptions—effect on primary liability. The maker of a promissory note secured by mortgage remains, in the absence of a novation, primarily liable to the mortgagee notwithstanding subsequent assumptions of the mortgage debt by other parties; likewise an assumptor of the mortgage debt remains primarily liable to the mortgagee notwithstanding still later assumptions by other parties.

Hakes v Franke, 210-1169; 231 NW 1

Evidence of assumption—discharge of maker—insufficient. Evidence held insufficient to establish oral agreement discharging makers from liability on note and substituting purchaser of property for maker.

Citizens Bank v Probasco, (NOR); 233 NW 510

Joint assumption. A joint agreement by joint purchasers of mortgaged property that they will pay the mortgage will not admit of the construction that each purchaser binds himself to pay one half of the mortgage and no more.

Royal Ins. v Wagner, 209-94; 227 NW 599

Assumption not conclusive. The purchaser of a promissory note secured by mortgage will not be permitted to base an estoppel on the fact that, before he purchased, he examined the records and found recorded a subsequent deed wherein the grantee (a stranger to the mortgage) assumed and agreed to pay said note and mortgage, and bought in sole reliance on such record. On the contrary, such purchaser is bound to know that such assumption is not conclusive—is subject to oral explanation, i. e., (1) that the grantee accepted the deed solely as collateral security; (2) that neither the grantee nor his grantor ever contemplated that the grantee would assume such an obligation; and (3) that there was no consideration for such assumption and agreement to pay.

Guar. Fin. Co. v Cox, 201-598; 206 NW 278

Assumption of mortgage not necessarily absolute. An agreement between a vendor and purchaser of land that the purchaser will assume and pay an existing mortgage on the land, must be taken by the mortgagee subject to the inherent equities arising out of the transaction between the vendor and purchaser.

Johnston v Grimm, 209-1050; 229 NW 716

Nonimplied assumption. Recitals in a land contract that one party sells and the other buys on a fixed consideration payable in a prescribed manner cannot furnish basis for an implied assumption of an existing mortgage by the grantee in the face of definite proof that the parties were in fact trading equity for equity, and mutually refusing to assume existing mortgages.

Lockin v Welty, 207-142; 222 NW 354

Nonimplied assumption of mortgage. The grantee of mortgaged lands cannot be deemed to have impliedly assumed said mortgage because of the fact that the grantee accepted the deed in partial satisfaction of an indebtedness due from grantor to grantee, and that to determine said credit grantor and grantee agreed on the value of the land per acre, and deducted from the total agreed value the amount of the mortgage, it clearly appearing that there was no actual intent to assume said mortgage.

Des M. Bank v Allen, 220-448; 261 NW 912

Deed recitals of assumption. The recital in a deed to real estate that the grantee assumed and agreed to pay an existing mortgage is conclusive unless the grantee overcomes the presumption that the deed correctly expresses the final contract of the parties, even tho the original contract of sale is silent as to such agreement to pay.

Royal Ins. v Hughes, 205-563; 218 NW 251

Assumption contrary to original intent. A grantee of land who, in buying the land, does not agree or intend to agree to assume an existing mortgage on the land, yet accepts a deed which provides for such assumption, and subsequently discovers such fact, and thereupon recognizes and accepts such obligation as binding upon him, is bound thereby; and it is not prejudicially erroneous for the court in instructions to refer to such "recognition and acceptance" as a ratification.

Carney v Jacobson, 210-485; 231 NW 436

Unauthorized assumption—ratification. Conceding that land was conveyed to a grantee without his knowledge or authority, and that he did not learn for several years of said conveyance and of the fact that it contained an assumption by him of existing mortgages of record, yet his plea must fall when, after actually learning said facts, he clearly ratifies the transaction.

Northwest. Academy v Edmonds, 214-310; 242 NW 49

Consideration. When mortgaged premises have been conveyed, and the grantee has agreed in the deed to pay the mortgage, the foreclosing plaintiff may, under proper pleading, prove that such agreement was because of a consideration which passed from himself to said grantee. Held that an unquestioned allegation to the effect that said agreement to pay was "as a part consideration of said conveyance and of said transaction" was sufficient to justify such proof.

Sheley v Engle, 204-1283; 213 NW 617

Absence of consideration. An oral agreement by the grantee of land to assume and pay an existing mortgage on the land whether made before or after the execution of a written contract of sale which was silent as to such assumption is without consideration when in the final closing of the sale the grantor was paid not only the full and conceded value of

V PROPERTY TRANSFER—ASSUMPTION OF MORTGAGE—continued

his equity in the land but the amount of said mortgage.

Crane v Leclere, 206-1270; 221 NW 925

Consideration—sufficiency. Consideration for an agreement to pay an existing mortgage on land is prima facie shown by proof (1) that the grantee accepted a deed which recited such agreement to pay "as part of the consideration" for the land, and (2) that he went into full possession under such deed.

First N. Bank v McDonough, 205-1329; 219 NW 329

First N. Bank v Gurnett, 206-1290; 221 NW 958

Consideration necessary. The grantee of mortgage-incumbered land by absolute deed of conveyance but for the purpose of effecting security only, is not liable on his agreement to assume and pay the existing mortgage unless a consideration for such assumption and agreement is made to appear.

Herbold v Sheley, 209-384; 224 NW 781

Consideration—burden of proof. A mortgagee who, in foreclosure proceedings, asks for judgment on an assumption clause in a subsequent deed of conveyance not signed by the assumptor, and pleads a specified consideration for said assumption, must, if met by a denial, establish said consideration by a preponderance of the evidence.

Peilecke v Cartwright, 213-144; 238 NW 621

Reformation to show assumption. The holder of a mortgage on land may not have a deed to a subsequent purchaser so reformed as to embrace an assumption by the purchaser of the payment of the mortgage, on the naked plea that the purchaser, in buying the land, contracted to pay such mortgage. This is true because such contract assumption was subject to cancellation by the vendor and purchaser at any time before the mortgagee had assented to the assumption, and the passing of a deed without the incorporation therein of such assumption generates a presumption that the contract assumption had been abrogated or in some manner canceled.

Amer. Bank v Borcherding, 201-765; 208 NW 518

Reformation — nonadjudication. An adjudication (in mortgage foreclosure) solely between the mortgagee and the grantee of the premises, that the grantee had not assumed the mortgage debt, is no bar to a subsequent independent action by the mortgagor-grantor against said grantee so to reform the deed to grantee as to embrace such assumption, and to recover of said grantee the deficiency which resulted from the foreclosure sale, said deficiency having been paid by said mortgagor-grantor. And this is true even tho the mortgagor-grantor was a party to said foreclosure.

Betzenderfer v Wilson, 206-879; 221 NW 497

Reformation of deed — evidence—sufficiency. A deed will not be reformed by striking therefrom a clause wherein grantee assumes an existing mortgage when the testimony of mutual mistake consists wholly of the conclusions of the witness, and is otherwise uncertain.

Peilecke v Cartwright, 213-144; 238 NW 621

Parol nullification. A written clause in a deed to mortgaged premises purporting to bind the grantee to pay the mortgage debt may be nullified by parol evidence—the mortgagee not being a party to the deed or to the contract of sale preceding the deed.

Andrew v Naglestad, 216-248; 249 NW 131

Available defenses. A mortgagee in an action to recover on an assumption of the mortgage is subject to any defense which would be good against the mortgagor.

Crane v Leclere, 206-1270; 221 NW 925

Debts included — plain and literal meaning controlling. In construing an "assumption-and-agreement-to-pay" clause in a deed of conveyance which, concededly, was executed and delivered in connection with a compromise and settlement agreement between a creditor and debtor, the court has no choice but to give effect to the plain and literal meaning of the words employed in said clause, there being no competent evidence dehors the written clause reflecting a different intention.

Monticello Bank v Schatz, 222-335; 268 NW 602

Ineffectual avoidance. A purchaser who goes into and retains undisputed possession of the purchased premises may not, because of some defect in the title, defeat an action to recover on his agreement to pay an existing incumbrance.

Richardson v Short, 201-561; 207 NW 610

Nonright of mortgagee to enforce. The fact that purchasers of land contract with their grantors to assume and pay an existing mortgage on the land (to which mortgage the grantees are strangers) does not necessarily arm the holder of the mortgage with legal right to enforce such contracts. The immediate parties to a conveyance may by their conduct, and in good faith, so consummate their deal as to deprive the mortgage holder of a right for which he has paid nothing.

Scovel v Gauley, 209-1100; 229 NW 684

Oral contradiction. One who contracts for and receives a deed to land, and in both instances assumes payment of an existing mortgage on the land, may wholly avoid such apparent obligation, as regards the mortgagee, by oral testimony—the rule against contradicting written instruments by parol evidence

to the contrary notwithstanding—to the effect that he never had any interest in the land, and without consideration therefor contracted for and received a deed, and conveyed the land simply as a matter of convenience for the real owner.

Nissen v Sabin, 202-1362; 212 NW 125; 50 ALR 1216

Including mortgage as credit. The fact that the owner of land of an agreed or proven value in exchanging it for other land of an agreed or proven value receives a credit for the full value of his equity in his land plus the amount of the mortgage thereon is pointedly corroborative (and ordinarily conclusively confirmatory) of the grantee's contention that he did not assume said mortgage.

Crane v Leclere, 206-1270; 221 NW 925

Construction in view of punctuation. A contract to the effect that certain land is taken subject to two described mortgages, followed by the clause "which second parties assume and agree to pay", will not, so far as the assumption clause is concerned, be construed to apply to the last described mortgage only, simply because the descriptions of the two mortgages are separated by a semicolon.

Seeger v Manifold, 210-683; 231 NW 479

Reacquisition of title by mortgagor-grantor —effect. An owner of land who, after mortgaging it, conveys and receives from his grantee a second mortgage, has no right, after reacquiring title under foreclosure of the second mortgage (subject to the first mortgage) and after paying off the said first mortgage, to recover said latter payment from said grantee even tho said grantee when he received said land, assumed said first mortgage.

McCrum v Rubbert, 219-454; 257 NW 766; 97 ALR 1073

Assumption of forged mortgage. A grantee who buys land for a nominal consideration, and agrees to pay, as part of the purchase price, an existing mortgage, but with the secret intention of defeating the mortgage on the plea that it was a forgery, may not complain that the court, in foreclosure proceeding, accepted his plea of forgery, but subrogated the foreclosing plaintiff to the rights of a former mortgage which was discharged with the proceeds of the forged mortgage, and of which said grantee had knowledge; nor might said grantee have complained had the court enforced the forged mortgage, in view of proof that the forgery had been fully ratified by the injured party before grantee bought the land.

Union-Dav. Bank v Lyons, 203-104; 212 NW 380

Novation—insufficient showing. A purchaser of real estate who has assumed the payment of existing incumbrances may not base a novation of his obligation on the simple expedient of causing the deed to be made to his wife as grantee.

Richardson v Short, 201-561; 207 NW 610

Breach of assumption as offset. When two parties exchange lands and each assumes the mortgage of the other on the land received by him in the exchange, and one of them is sued on his assumption, he may, by proper plea and proof, reduce his liability on his assumption to the extent of the damages suffered by him consequent on the act of his co-assumptor in repudiating his assumption by obtaining a discharge therefrom in bankruptcy.

Johnston v Grimm, 209-1050; 229 NW 716

Repudiation of assumption. A vendee of land who has never agreed to assume and pay a mortgage on the land cannot be made so liable by the act of the vendor in executing and recording, without the knowledge or consent of the vendee, a deed containing such assumption and agreement to pay, it appearing that the vendee promptly repudiated and rejected said deed.

Steffes v Hale, 204-226; 215 NW 248

Conveyance to junior mortgagee. In an equity action for foreclosure of realty mortgage, where it is shown mortgagor made a conveyance of land to junior mortgagee who surrendered note and mortgage and accepted land in payment, and who, at the same time, assumed payment of first mortgage and thereafter took possession and rented the land, held, sufficient consideration to bind junior mortgagee on his assumption agreement as to first mortgage.

Federal Bank v Ditto, 227-475; 288 NW 618

Agreement to defer — consideration. An owner of mortgaged premises who has not assumed the mortgage, but who makes a payment thereon on the express or implied agreement that the mortgagee will defer foreclosure for a stated time, may recover back the payment from the mortgagee if the latter breaches the agreement.

First JSL Bank v Cuthbert, 215-718; 246 NW 810

VI PAYMENT, PERFORMANCE AND RELEASE

(a) IN GENERAL

Assumed purchase by agent—effect. Where a note and mortgage on land were executed by a principal to his agent and sold by the agent in order to acquire funds with which to discharge a pre-existing note and mortgage on the same land, and where the agent embezzled the funds so acquired, the subsequent act of the agent in assuming to purchase said pre-existing note and mortgage by taking from the holder (who acted in good faith) both an assignment in blank, and also a satisfaction piece, cannot be deemed a satisfaction and discharge of said pre-existing note and mort-

VI PAYMENT, PERFORMANCE AND RELEASE—continued

(a) IN GENERAL—concluded

gage (1) when no satisfaction was, in fact, intended, (2) when the agent wholly discarded the satisfaction piece and consummated the assumed purchase by means of funds belonging solely to an innocent and good-faith re-transferee, and by forthwith delivering said pre-existing note and mortgage to said re-transferee together with said blank assignment properly made out in the latter's favor; and it is immaterial that the re-transferee took said note and mortgage when they were overdue.

Mandel v Siverly, 213-109; 238 NW 596

Release—consideration—presumption. Presumptively, a written release by a mortgagee of a mortgage is supported by a sufficient consideration.

Shaffer v Zubrod, 202-1062; 208 NW 294

Conclusiveness of settlement. A mortgagee who, with full knowledge of all items of his claim, settles with a party who has assumed and agreed to pay the mortgage, is absolutely bound thereby, in the absence of fraud, mistake, or other invalidating circumstance.

Gilmore v Geiger, 206-161; 220 NW 7

Mortgage assignment to insurer when policy voided by insured—effect. When an insurance company, in addition to insuring property mortgaged to a certain mortgagee, agreed that if any property owner should by any act void the insurance as to himself, the insurance company would purchase from the mortgagee the note and mortgage on the property and obtain an assignment of the mortgagee's rights against the property owner, the company's payment of the amount of a note and mortgage to the mortgagee to obtain an assignment according to the agreement, did not extinguish the note and mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

(b) PAYMENT AND PERFORMANCE GENERALLY

Payment—burden of proof. A plaintiff who alleges the nonpayment of the note and mortgage which he is seeking to foreclose must prove such nonpayment, even tho defendant pleads payment.

Larson v Church, 213-930; 239 NW 921

Payment — receipt of proceeds by mutual agent. Where the mortgagor of an unmatured mortgage authorizes his agent to negotiate a new mortgage and with the proceeds pay off the unmatured mortgage, and where the holder of the unmatured mortgage authorizes the same agent to collect and release his unmatured mortgage, the mere receipt by the mutual agent of the proceeds of the new mortgage, in the form of checks, etc., does not ipso facto constitute a payment of the unmatured mortgage, and especially so when the mutual agent, on receipt of said proceeds, and pending the final approval of the new mortgage, deposits the said proceeds in his overdrawn general bank account and credits the mortgagor of the unmatured mortgage with the amount thereof. Payment of the unmatured mortgage can only result when the agent has, expressly or impliedly, appropriated the proceeds to said unmatured mortgage.

In re Schanke & Co., 201-678; 207 NW 756

Note as payment. A mortgagee who accepts from the mortgagor the latter's promissory note for an item of interest and in his then and subsequent conduct treats such note as payment of said interest will not be permitted to enforce payment of such interest against one who has assumed and agreed to pay said mortgage.

Gilmore v Geiger, 206-161; 220 NW 7

Application of payments. A mortgagor who executes the mortgage for the mutually understood purpose of securing funds with which to pay off existing mortgages on the premises may not complain if the mortgagee pays off said existing mortgages from the proceeds of the new loan and accounts to him—the mortgagor—for the balance.

Williamson v Craig, 204-555; 215 NW 664

Application of funds—unallowable change. A mortgagee who, with the acquiescence of the mortgagor, applies funds coming into his hands and belonging to the mortgagor, to the payment of future accruing installments, may not thereafter change the application and foreclose, under an acceleration clause, on the claim that default has been made in the payment of said installments.

First JSL Bk. v Poor, 216-1181; 250 NW 474

Application of funds. A creditor who has come into the possession of funds belonging to his debtor, but originally without the consent of the debtor, express or implied, must, at the least, obey the direction of the debtor as to the particular debt upon which the said funds shall be applied.

First B. & T. Co. v Welch, 219-318; 258 NW 96

Release and satisfaction—presumption. A marginal release of a mortgage, executed by the agent of the holder, constitutes prima facie evidence of payment and discharge of both the note and the mortgage securing the note.

Larson v Church, 213-930; 239 NW 921

Wrongful release of conditionally canceled mortgage. Where, in rescission proceedings, a decree in effect provided that a promissory note and recorded real estate mortgage given for the purchase price of goods should be null and void from and after the return of the goods by the mortgagor to the mortgagee, and where the goods were never so returned, and where the mortgage was wrongfully released of record by a court-appointed commissioner,

the mortgage may be foreclosed against a purchaser of the land who innocently bought in reliance on the wrongful release. This is true because, while both the mortgagee and the subsequent purchaser were innocent, yet the purchaser had the means of knowing whether the goods had been returned to the mortgagee.

Moore v Crawford, 210-632; 231 NW 363

Purchase in reliance on ineffective release. The purchaser of real estate pending foreclosure of a mortgage may not avoid the effect of the constructive notice imparted by such proceedings by the claim that he purchased in reliance on a release of the mortgage by the mortgagee, (1) when he knew that the consideration for the release had wholly failed, and (2) when neither he nor the mortgagor acted in good faith in the transaction.

Eckert v Sloan, 209-1040; 229 NW 714

Novation—estoppel. A mortgagee who, at a time when the real estate security is ample, releases his mortgage and surrenders the evidence thereof to the mortgagor, and in return receives from the mortgagor's grantee a new mortgage and note for the balance due on the former mortgage, and retains said new mortgage and note until the real estate has so materially depreciated in value that the security is at least questionable, will not be permitted to say that the new mortgage was not taken in payment of the old or original mortgage.

Steffy v Schultz, 215-831; 246 NW 907

Time as essence of contract. Time will not, in equity, be deemed of the essence of a contract when the parties thereto have neither expressly so stipulated nor, by their conduct, revealed that such was their understanding of the contract. So held as to the time of performance of a compromise settlement of mortgage indebtedness.

First JSL Bk. v Hanlon, 223-440; 273 NW 114

Implied agency—insufficient "holding out". The holder of notes and mortgage who accepts payment of one of the notes from a maker thereof, in form of part cash and part check payable to the holder, from one who had bought the property subject to the mortgage, cannot be held thereby to have held out the said maker as his agent to receive payment of the remaining note; nor will the added fact that, on two occasions subsequent to the payment in question and on one occasion prior thereto, the said holder had authorized the said maker to receive payments on wholly different transactions, constitute such "holding out".

Ritter v Plumb, 203-1001; 213 NW 571

Assumed agency—ratification. The holder of a note and mortgage was informed by one who had subsequently bought the mortgaged property that he had, without requiring the production of the note, paid the note to one of the original makers of the note. Thereupon, the holder admitted that he had received part payment from the said maker, and exhibited the mortgage papers to the informant. Held insufficient to show ratification of the payment to the said maker.

Ritter v Plumb, 203-1001; 213 NW 571

Payment—authority of corporate president. Principle reaffirmed that the president of an investment corporation has no implied authority to agree on behalf of the company that a real estate mortgage held by the company shall be considered as an absolute deed, and that the company will accept the equity of redemption of the mortgagors as full payment of the mortgage debt.

Central Co. v Estes, 206-83; 218 NW 480

(c) CANCELLATION GENERALLY

Satisfaction of mortgages. See under §12364

Contract to reconvey on default—effect. An agreement by a purchase-money mortgagor that if he fails to pay maturing installments he will reconvey the property to the mortgagee carries no implied obligation that the mortgagee will accept such reconveyance in satisfaction of the mortgage debt. Such provision being for the sole benefit of the mortgagee, he may accept or reject as he sees fit.

Satchell v Alsop, 215-161; 244 NW 838

Quitclaim—prior claims — nonapplicability of rule. The principle that one who acquires title by quitclaim takes with notice of prior bona fide claims has no application to a case where a mortgagee receives his mortgage for a valuable consideration and without notice of any infirmity, and later, in order to avoid the expense of a foreclosure, receives a quitclaim deed to the land in satisfaction of the mortgage.

Brenton v Bissell, 214-175; 239 NW 14

Offer to cancel mortgage—ineffectual acceptance. An offer by a mortgagor to deed the mortgaged land to the mortgagee on condition that the mortgage notes would be deemed canceled from the time the deed was received is not accepted by the act of the mortgagee in forwarding for execution a blank deed on condition that the mortgage notes would be deemed canceled from the time the deed was recorded.

O'Brien v Fitzhugh, 204-787; 215 NW 944

Cancellation—relief barred by fraud. A mortgagor's prayer for cancellation of a mortgage on the plea of payment will be denied when, in connection with the transaction on which the claim of payment is based, he dishonestly obtained from the mortgagee, and without the knowledge of the latter, a sum exactly equal to the claimed payment.

Strahan v Strahan, 205-92; 217 NW 436

Guardian's unauthorized release of mortgage. The act of a guardian in releasing,

VI PAYMENT, PERFORMANCE AND RELEASE—continued

(c) CANCELLATION GENERALLY—concluded

without an order of court, a mortgage which represented an investment of funds derived from a sale of the ward's real estate, constitutes a breach of the bond specially given by the guardian in order to effect said sale, it appearing that the guardian was, by said release, rendered incapable of personally accounting to the ward for the amount of said mortgage.

In re Brubaker, 214-413; 239 NW 536

Executor—authority to release mortgage without order. An executor, upon receiving payment of a note and mortgage belonging to the estate, has authority, without an authorizing order of court, to release the mortgage even tho the payment is in the form of a new note and mortgage executed by new parties.

Steffy v Schultz, 215-831; 246 NW 907

(d) SUBROGATION TO SUBSEQUENT MORTGAGEE

Subrogation defined.

Millowners Co. v Goff, 210-1188; 232 NW 504

Origin and theory of subrogation. The doctrine of subrogation is purely of equitable origin and grew out of the need, in aid of natural justice, in placing a burden where it of right ought to rest.

HOLC v Rupe, 225-1044; 283 NW 108

Subrogation. If a second mortgagee uses his own funds in discharging a first mortgage in order to save the property, he will be subrogated to the rights of said first mortgagee; on the other hand, if funds are obtained through a new mortgage, and used in the discharge of said first mortgage, then the new mortgagee will acquire said right of subrogation, and in either case, the homestead character of part of the mortgaged property is quite immaterial.

Clark v Chapman, 213-737; 239 NW 797

Subrogation of second mortgage. A second mortgagee whose mortgage represents money advanced for the specific purpose of discharging prior mortgages, or in redeeming from foreclosure of prior mortgages, will, in order to effect the ends of justice, be subrogated to all the rights and remedies of said former mortgagees.

Burmeister v Walz, 216-265; 249 NW 197

Mortgagee paying first mortgage. Mortgagee was entitled to subrogation to extent of amount expended by it in payment of first mortgage.

Templeton v Stephens, 212-1064; 233 NW 704

Subrogation of grantor to assuming grantee in default. The grantee of land who, in the deed and as part of the consideration therefor, assumes and agrees to pay all unsatisfied mortgages theretofore placed on the land by the grantor, becomes, as between himself and said grantor, the principal debtor on said mortgages, and should the grantor be compelled as surety to pay said indebtedness, he will thereupon be entitled to be subrogated to all the prior rights of said mortgagees to enforce said mortgages against said grantee.

Monticello Bk. v Schatz, 222-335; 268 NW 602

Loan to discharge mortgage—subsequent mortgagee subrogated to former's rights. A governmental loaning agency, set up to meet an emergency, by making loans to save homes from foreclosure, is entitled to be subrogated to the rights of the original mortgagee, when it discovers that there is an heir of one of the original mortgagors who has an interest in the title and who did not join in the mortgage it holds, and when through no fault or negligence on its part, said heir's interest was not discovered and he was not prejudiced by this latter mortgage, but was given the right to redeem in the event of foreclosure.

HOLC v Rupe, 225-1044; 283 NW 108

Legal and conventional subrogation distinguished. Legal subrogation exists only in favor of one who, to protect his own rights, pays the debt of another. Conventional subrogation arises only upon agreement, between the lender and the debtor or old creditor, that the lender shall be subrogated to the old lien.

HOLC v Rupe, 225-1044; 283 NW 108

Subrogation as affecting junior mortgagee. Where tenants in common of land as principal and surety jointly mortgage their undivided interests in order to secure the debt of the principal, the surety may, after the land is partitioned and set off in severalty, compel the satisfaction of the mortgage as far as possible out of the lands assigned in severalty to the principal, and be subrogated to all the rights of the mortgagee in case he is compelled to pay the principal's debt; and this right is enforceable against a subsequent mortgagee of the principal's undivided interest alone, when such mortgagee takes his mortgage with actual knowledge that the mortgagors in the prior mortgage occupied the relation of principal and surety.

Toll v Toll, 201-38; 206 NW 117

Junior mortgagee—right to pay interest on senior mortgage. The common-law right of a junior mortgagee, in order to protect his own lien, to pay the interest on a senior mortgage, and thereby to be subrogated by proper action to the rights of a senior mortgagee under said senior mortgage to the extent of said payment, has not been abrogated by the enactment of Ch 501, C., '27.

Jones v Knutson, 212-268; 234 NW 548

Assignment to titleholder—no subrogation. The legal titleholder of real estate who acquires or pays off a first and a second mortgage on the land, and records releases thereof with the deliberate intent thereby to show a complete satisfaction of said liens, and does so with the knowledge (which he has negligently forgotten) that there was a third mortgage outstanding on the land, will not, in the foreclosure of said third mortgage, be subrogated to the rights of said former first and second mortgagees; especially is this true when said titleholder had sold said third mortgage to the foreclosing plaintiff under the implied representation that it was a first mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

(e) EXTENSIONS

Discharge of surety—extension of time of payment. One who, in buying land, assumes a mortgage (and thereby becomes a principal debtor) and who, without the consent of the party who has become secondarily liable on the mortgage debt, assigns to the mortgagee a lease on the land, under an agreement that the mortgagee will collect the rent and apply it on the debt, does not thereby work such an extension of time of payment as will release the party secondarily liable, especially (1) when there was no consideration for such so-called extension, and (2) when there was no fixed time of extension.

Union Ins. v Mitchell, 206-45; 218 NW 40

Assumptor of mortgage-secured note—extension of time—effect. Principle reaffirmed that the maker of a mortgage-secured promissory note is not released by the act of the mortgagee in granting an extension of time of payment to an assumptor of the note without the consent of the said maker.

Koontz v Clark, 209-62; 227 NW 584

Extension of time of payment—effect. An extension of time of payment granted to an assumptor of a note and mortgage does not release the maker of the note and mortgage and prior assumptors, even tho the extension was granted without their knowledge or consent.

Royal Ins. v Wagner, 209-94; 227 NW 599

Extension of mortgage. An agreement between a mortgagee and an assumptor of the mortgage for an extension of time of payment does not constitute a novation when the prior existing obligations for the same debt are not referred to and when such extension agreement was entered into without the knowledge or consent of prior existing obligors.

Royal Ins. v Wagner, 209-94; 227 NW 599

Extension of time — effect. The principle that the holder of an obligation releases the surety on the obligation by granting an extension of time of payment to the principal without the consent of the surety, has no application to a case where the maker of a mortgage-secured promissory note sells the mortgaged property to a vendee who assumes and agrees to pay the note, and where the holder of the note subsequently grants an extension of time of payment to the assuming grantee without the consent of the original maker of the note.

Blank v Michael, 208-402; 226 NW 12
Iowa Co. v Clark, 209-169; 224 NW 774
Herbold v Sheley, 209-384; 224 NW 781

Mortgage extension by mortgagor's grantee —no assumption. A note and mortgage extension agreement between mortgagee and mortgagor's grantees, with no assumption of the mortgage, and for the sole purpose of preserving a foreclosure cause of action about to be barred by statute, which extension continues the note and mortgage in force and effect as per their original terms, will justify a foreclosure decree but is not an assumption of the debt on which a personal judgment against mortgagor's grantees may be rendered.

Woollums v Anderson, 224-264; 275 NW 472

Agreement extending time. The extension of the time for the payment of the debt was sufficient consideration for an agreement extending a mortgage, even tho the holder reserved the right to sue at any time any person who did not consent in writing to the extension.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Mortgage assumed by grantee. When grantees of property accepted a deed by which they assumed a mortgage debt on the property, the statute of limitations began to run from the time of the acceptance of the deed, but the grantees were still liable after the 10 years when they had extended the time of maturity.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Signature of surety obtained by fraudulent representations — nonliability. Extension of mortgage debt would be sufficient consideration to support signature of mortgagor's daughter to extension agreement if extension were granted on condition that such daughter sign, but where such signature of the daughter is obtained by fraudulent representations, it is without consideration and void as to the daughter.

Beal v Milliron, (NOR); 267 NW 83

Novation—mere extension of note at reduced interest. An agreement to extend the time of payment of a promissory note and mortgage securing it, at a reduced rate of interest does not constitute a novation.

Des Moines JSL Bank v Allen, 220-448; 261 NW 912

Extension agreement—foreclosure notwithstanding. Even tho, to ward off foreclosure, there be executed a valid extension to a future definite date for the payment of a mortgage

VI PAYMENT, PERFORMANCE AND RELEASE—concluded

(e) EXTENSIONS—concluded

debt, yet, if the mortgage so provides, the right to foreclose prior to said extended date will be reinstated by the nonpayment of interest accruing subsequent to said extension agreement.

Goff v Milliron, 221-998; 266 NW 526

Estoppel to deny. A grantee of land who accepts a deed in which he agrees to pay an existing mortgage is bound thereby even tho, prior to recording the deed, he causes his name to be erased and another name to be inserted as grantee.

Royal Ins. v Hughes, 205-563; 218 NW 251

Estoppel to deny assumption. A grantee of mortgaged property cannot be held estopped to deny liability on an assumption clause in the deed when, owing to the peculiar circumstances attending the transfer, he never saw the deed; especially is this true when there was no plea of estoppel.

Peilecke v Cartwright, 213-144; 238 NW 621

Estoppel to dispute. The grantee of mortgaged premises by paying interest on the mortgage debt does not necessarily estop himself from disputing the validity of a clause in his deed purporting to bind him for the payment of said debt.

Andrew v Naglestad, 216-248; 249 NW 131

VII FORECLOSURE

(a) IN GENERAL

Title of mortgagor. It cannot be said that a mortgagee, by bringing an action to foreclose, is questioning the title of the mortgagor.

Hoffman v Hoffman, 205-1194; 219 NW 311

Right of mortgagee to possession. A general provision in a real estate mortgage empowering the mortgagee to take possession of the premises when there is a default by the mortgagor does not contemplate or authorize a possession of the premises by the mortgagee except a possession obtained by a foreclosure and by the appointment of a receiver thereunder.

Andrew v Haag, 215-282; 245 NW 436

First JSL Bank v Stevenson, 215-1114; 245 NW 434

Foreclosure (?) or forcible entry and detainer (?). Tho a mortgage extension agreement provides for the execution by the mortgagor to the mortgagee of an absolute deed to the mortgaged premises and for the delivery of the deed and the possession of the premises to the grantee in case of default, yet, if the agreement as a whole reveals the intent simply to furnish additional security, it must follow that the relation of landlord and tenant is not created, and that the relation of mortgagor and mortgagee is continued. It follows that, at the expiration of the extension time, forcible entry and detainer will not lie to obtain possession of the premises.

Mickelson v Rehnstrom, 215-1056; 247 NW 275

Presumption attending foreign foreclosure. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

State control over federal agencies. In proceedings instituted by a federal agency for the foreclosure of a mortgage, the state court, manifestly, cannot compel such agency to come to the relief of the debtor, even tho the federal government has advanced funds to the said agency for the primary purpose of relieving debtors.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Economic conditions and fluctuations in values. Equity cannot refuse to foreclose a mortgage because of a depressed economic condition existing throughout the country, nor, in foreclosing, may it assume to adjust the judgment to the fluctuating value of the legal tender as declared by the federal government.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Combined real estate and chattel mortgage—independent foreclosure of latter. When a mortgage on real estate, and a chattel mortgage on the rents of said real estate, are combined in the same instrument as security for the same debt, the chattel mortgage is foreclosable without regard to the real estate mortgage except, of course, as to the proper application of payments realized.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Failure to enforce all security—res judicata. A mortgagee who, without changing his position in any degree, receives the written agreement of a junior incumbrancer to pay the interest on the mortgage, and the taxes on the mortgaged property, simply acquires a new and additional security for his existing mortgage debt, and if he forecloses his mortgage by personal service on the mortgagor and on said junior incumbrancer (even for a sum less than is due) without asking any relief on said additional security, he will be absolutely precluded from maintaining further action on such agreement. (A fortiori is this true when it otherwise appears that the mortgagee was fully satisfied by his foreclosure.)

Schnuettgen v Mathewson, 207-294; 222 NW 893

Lands subject to mortgage—contingent interest. Lands devised by will are mortgageable by the devisee tho the devise be subject (1) to a preceding life estate in another, and (2) to the payment, after the death of the life tenant, of a named legacy; being thus legally mortgageable, the mortgage is legally foreclosable during the life of the life tenant, but subject, of course, to all outstanding superior equities.

State Bank v Bolton; 223-685; 273 NW 121

Restoration of status quo. An incompetent, through his guardian, may, on proper grounds, maintain an action to set aside and annul a judgment in foreclosure without offering to restore the status quo when the incompetent received no part of the money secured by the mortgage.

Engelbercht v Davison, 204-1394; 213 NW 225

Fraud — evidence — insufficiency. Evidence held quite insufficient to establish a charge to the effect that a plaintiff was fraudulently induced to withhold mortgage foreclosure proceeding.

Andrew v Bank, 215-401; 246 NW 48

Perfecting appeal—notice—necessary parties. An appeal by a cross-petitioner in mortgage foreclosure because of the denial of his plea to have title quieted in himself and against the mortgagor-defendant, cannot be maintained unless notice of the appeal is duly served on said mortgagor-defendant; and it is quite immaterial that the record indicates that said mortgagor-defendant was manifestly friendly to the plea of said cross-petitioner.

Crawford Bank v Butler, 201-1281; 208 NW 284

Requisites and proceedings for transfer of cause—failure to serve coparty. On an appeal by an intervenor in foreclosure proceedings from a decree awarding rent notes to plaintiff because intervenor was a fraudulent indorsee thereof, and taxing costs against intervenor and the landlord-indorser, the failure to serve notice of appeal on the nonappealing landlord-indorser and tenant-maker of the notes constitutes a fatal defect of parties because a reversal—a decree that intervenor was a bona fide indorsee—(1) would restore the liability of the landlord-indorser on his indorsement, (2) would leave the landlord-indorser liable for all the costs without right to contribution from intervenor, and (3) would subject the tenant to a double liability for the rent.

Read v Gregg, 215-792; 247 NW 199

Co-parties—failure to serve. Failure of an intervenor in mortgage foreclosure to serve defendants with notice of his appeal is fatal to the appeal if a decision on appeal in favor of intervenor would prejudice the nonserved parties.

First JSL Bk. v Yarcho, 217-95; 250 NW 903

(b) RIGHT TO FORECLOSE—DEFENSES

1 In General

Statute of limitations. The right to foreclose a mortgage is not barred so long as the secured debt is not barred.

Randell v Fellers, 218-1005; 252 NW 787

Real party in interest. A mortgagee may enforce the mortgage in his own name, even tho the mortgage is for the benefit of a third party.

Turnis v Ballou, 201-468; 205 NW 746

Party to contract but without beneficial interest. A party may maintain foreclosure proceedings on a mortgage in which he is named as mortgagee, tho he has no beneficial interest in the mortgage.

Brauch v Freking, 219-556; 258 NW 892

Assignee may foreclose. A mortgage which provides that it "shall stand as security for any other indebtedness the mortgagee may hold or acquire against the mortgagor", secures not only (1) the debt which is specifically described and secured by the mortgage, but also (2) a pre-existing, unsecured debt then owed by the mortgagor to the mortgagee, even tho, unbeknown to the mortgagor when he executed the mortgage, the debt specifically described and secured by the mortgage did not belong to the mortgagee, but belonged to a third party. It follows that an assignment by the mortgagee to said third party of the mortgage and the specifically described notes, and an assignment of the notes representing the pre-existing debt, arm the assignee with right to foreclose the mortgage for all the debts secured thereby.

Turnis v Ballou, 201-468; 205 NW 746

Second mortgagee may foreclose. The fact that a second mortgage provides, following the description of the mortgaged lands, that it is "subject to" a described first mortgage does not estop said second mortgagee (1) from availing himself of that part of his mortgage which contains a naked pledge of the rents, (2) from first perfecting and maturing, by proper foreclosure proceedings, his potential rights under said pledge, and (3) from thereby acquiring a right in and to said rents superior to the potential rights of the first mortgagee under a like pledge, in his mortgage, of said rents. (But now see §12383-e1, C., '35 [§12383.1, C., '39].)

First JSL Bank v Armstrong, 220-416; 262 NW 815

Trust deed foreclosed by trustee. An owner of land under trust deed to secure a bond issue, who unqualifiedly consents to a change of trustee, may not thereafter claim that the new trustee is not the proper party to foreclose the trust deed, especially when the bondholders unanimously approve of such change.

Central Bk. v Benson, 209-1176; 229 NW 691

VII FORECLOSURE—continued
(b) RIGHT TO FORECLOSURE—DEFENSES—continued
1. In General—concluded

Optional remedies to enforce payment. The trustee in a deed of trust securing bonds cannot be deemed to be limited simply to a foreclosure of the deed—cannot be deemed to be excluded from maintaining an action at law against the maker—when the deed confers upon the trustee the widest discretion as to the remedy which he may choose to enforce collection.

Minn. Co. v Hannan, 215-1060; 247 NW 536

Election between securities. The holder of both a chattel and a real estate mortgage securing the same debt has the right to elect to proceed to the foreclosure of his mortgages and to abandon all interest in a block of trust bonds secured by trust deed on other real estate and held by him as collateral security for said debt, and in such case the foreclosure by the trustee of the trust deed and the buying in of the trust property by the trustee in the interest of the bondholders will not be deemed a payment to any extent of the chattel and real estate mortgage-secured debt.

Silver v Farms, Inc., 209-856; 227 NW 97

Allowable successive foreclosures. The foreclosure of a recorded real estate mortgage for the installments first falling due, and a sale, and redemption therefrom by the assignee of the mortgagor, does not destroy the lien of the mortgage for future maturing installments and principal when the mortgage specifically provides for successive foreclosures, and when the lien of said mortgage for future maturing installments and principal was distinctly preserved, as a matter of record, at every material step in said first foreclosure.

Fremont JSL Bank v Foster, 215-1209; 247 NW 815

Lincoln JSL Bank v Williams, 216-659; 246 NW 841

Unconscionable mortgage. Equity will not foreclose an unconscionable mortgage,—i. e., a mortgage pyramided with usury and given as additional security for part of a debt already secured by mortgage; and especially is this true when the mortgagee is manifestly seeking to sequester the property situated in a foreign state and covered by the original security without accounting for the value thereof.

Tansil v McCumber, 201-20; 206 NW 680

Pendency of foreclosure in foreign state—effect. The right of a party to maintain in this state an action at law to recover of the maker of bonds the balance due after foreclosure, in a foreign state, of the securing mortgage, will not be denied on the plea that the foreclosed property is yet in the hands of the foreclosing receiver and that the amount of rents which will be derived thereunder is not made to appear, when the evidence demonstrates that the utmost that can be realized will not pay taxes and other expenses.

Minn. Co. v Hannan, 215-1060; 247 NW 536

Who may determine right. When, in the execution of a mortgage, and solely as a means of paying to the broker his commission for negotiating the loan, a small fractional percent is added to the interest rate due the mortgagee, the interest or right in the mortgage so acquired by the broker cannot be deemed such as to prevent the mortgagee, without the consent of the broker, from accelerating the maturity of the mortgage according to its terms.

Metropolitan v Sutton, 219-879; 259 NW 788

Recovery of payments—voluntary, unnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

2 Acceleration of Maturity

Option under acceleration clause. Principle reaffirmed that a mortgagee may avail himself of the contract option to declare the debt due for breach of conditions.

Corn Belt Bk. v Kriz, 207-11; 219 NW 503

Accelerating clause—presentment and demand.

Johnson v Ballou, 201-202; 204 NW 427

Maturity—accelerating clause—presentment and demand A mortgagee who has the option to declare the secured debt due for nonpayment of interest is under no obligation to present the note and demand payment of the interest, when the note is payable at a named town, without other specific designation of place. Especially is this true when the debtor well knows where the note is kept and makes no tender.

Collins v Nagel, 200-562; 203 NW 702

Acceleration — sole right to determine. A party who, tho unnamed in a mortgage, has, because of a contract with the mortgagee, a right to participate, on foreclosure, in the total mortgage debt to the extent of a small fractional part of the interest will not be deemed to have such interest as to have a voice in determining whether the maturity of the mortgage debt shall be accelerated because of a default of the mortgagor.

Metropolitan v Steiner, 219-785; 259 NW 234

Acceleration of maturity. A mortgage provision for foreclosure in case the matured interest be not paid is not waived per se by the acceptance by the mortgagee of part of such interest.

Jewell v Logsdon, 200-1327; 206 NW 136

Maturity—accelerating clause—nonwaiver by accepting part of interest. The right of a mortgagee to declare a mortgage-secured debt due for nonpayment of interest, as provided in an accelerating clause, is not waived by accepting a part of said matured interest.

Collins v Nagel, 200-562; 203 NW 702

Acceleration clause. A mortgage provision empowering the mortgagee to declare the entire debt due and payable in case of nonpayment of an installment of principal, or of interest, taxes, etc., imposes no penalty on the mortgagor; likewise a provision fixing one rate of interest on unmatured sums, and a different and higher rate on matured and unpaid sums, provided the legal rate is not exceeded.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Exercising option under accelerating clause —subsequent tender—effect. A tender of overdue interest after the mortgagee has exercised his option to declare the entire debt due for nonpayment of interest, as provided in a clause accelerating payment, is not effective.

Collins v Nagel, 200-562; 203 NW 702

Maturity — accelerating clause — notice. A mortgagor is not entitled, under a clause accelerating maturity, to notice, prior to suit, that the mortgagee elects to declare the entire debt due for the nonpayment of interest.

Collins v Nagel, 200-562; 203 NW 702

Uncertainty of maturity date. A mortgagee will not be permitted to avail himself of an accelerating clause and foreclosure in toto, because of the failure to pay interest in accordance with this theory of the maturity thereof, when the mortgagor promptly and in good faith pays the interest on the date which the indefinite and uncertain language of the note reasonably justified him in believing was the proper maturity date. So held where the uncertainty arose from the loose use of the word "after".

McKee v Stewart, 211-1185; 235 NW 286

Nonpayment of delinquent taxes. The contract option in a mortgage to treat the entire debt as due, and to foreclose for the nonpayment of taxes, will not be deemed to apply to taxes which are delinquent and unpaid when the mortgage is executed.

Wilson v Tolles, 210-1218; 229 NW 724

3 Defenses

Default of loan agent—no defense. A mortgagor may not assert failure of consideration for the mortgage because his own duly authorized agent to procure the loan and receipt for the proceeds did not remit the proceeds to him.

Hedges v Holland, 203-1149; 212 NW 480

Extension agreement—foreclosure notwithstanding. Even tho, to ward off foreclosure, there be executed a valid extension to a future definite date for the payment of a mortgage debt, yet, if the mortgage so provides, the right to foreclose prior to said extended date will be reinstated by the nonpayment of interest accruing subsequent to said extension agreement.

Goff v Milliron, 221-998; 266 NW 526

Unallowable collateral attack. In the foreclosure of a mortgage executed by an administrator on lands of the deceased on due order and authorization of the court, the defending heirs, who were parties to the order and authorization for the mortgage, will not be permitted to collaterally attack the validity of the mortgage on the ground that part of the land was the homestead of the deceased and therefore descended to the heirs exempt from the debts of the deceased.

Reinsurance Co. v Houser, 208-1226; 227 NW 116

Judgment on note—no defense. A mortgage foreclosure action is maintainable after securing judgment on the note secured thereby.

Hamilton v Henderson, 211-29; 230 NW 347

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

(c) JURISDICTION—VENUE

Land situated wholly in foreign state. A mortgage on land situated wholly within a foreign state may not be foreclosed in this state, tho the mortgagee may maintain, in this state, an action at law on the note so secured.

Beach v Youngblood, 215-979; 247 NW 545

Foreclosure in state court—bankruptcy proceedings. Where mortgagees on foreclosure did not ask personal judgment, but only a judgment in rem, and trustee in bankruptcy for mortgagors had secured an order releasing and discharging the real estate as assets in bankruptcy matter, state court was justified in proceeding with foreclosure and in not staying proceedings until adjudication of mortgagors as bankrupts—bankruptcy act, §11 [11 USC 29], contemplating only suits in personam, and from which a discharge in bankruptcy would be a release.

Mayer v Imig, (NOR); 227 NW 328

(d) PARTIES—PROCESS

Land banks nonpreferential litigants in state courts. There is nothing to show that congress contemplated that land banks should occupy a preferential status as litigants in the state courts.

First JSL Bank v Lehman, 225-1309; 283 NW 96

VII FORECLOSURE—continued
(d) PARTIES—PROCESS—concluded

Inadvertently omitted party—opening proceeding to supply. A court of equity, in the exercise of a sound discretion, may reopen a foreclosure proceeding on application of the purchaser at, and deed holder under, execution sale in order to bring in a party who was inadvertently omitted as a party defendant in the original institution of the action, and whose claim is manifestly barred by the statute of limitation.

Johnson v Leese, 223-480; 273 NW 111

Process — foreclosure — establishing claim against estate. In an equity foreclosure action on a realty note and mortgage, where administrators were defendants and the petition prayed for judgment and for general equitable relief, and where the foreclosure decree established a claim against administrators of the estate of deceased owner, to which decree objection was made that the relief granted in establishing such claim was greater than the prayer of petition, held, judgment against the administrators, if proper, could have been in no other form than as a claim established against the estate, and could not be enforced by execution.

Federal Bank v Ditto, 227-475; 288 NW 618

(e) PLEADING

Irrelevant matter on foreclosure. An allegation by a mortgagor in mortgage foreclosure that he had sold the property to one who had not been brought into the foreclosure, and was holding the property as a tenant of said grantee, is irrelevant to any issue in the foreclosure, and is properly stricken on motion.

Kaeser v Manderschied, 203-773; 211 NW 379

Superfluous allegation—effect. An allegation in mortgage foreclosure that the mortgagor was, when the mortgage was executed, a fee simple owner of the property need not be proven.

Colby v Forbes, 207-9; 216 NW 722

Insufficient prayer. A personal judgment without a specific prayer therefor is erroneous, and a prayer for "other and further relief" is not such prayer.

Richardson v Short, 201-561; 207 NW 610

Wife as party—plea of want of consideration. Even tho a wife who had joined with her husband in the execution of rent obligations was not made a party to subsequent mortgage foreclosure wherein her husband and the landlord were evicted by the appointment of a receiver, yet she may, when sued on the rent obligations by the landlord or by his assignee, plead the foreclosure decree as establishing a total failure of consideration.

Miller v Laing, 212-437; 236 NW 378

Amendment unnecessary for claim acquired during foreclosure. Where, pending foreclosure action, plaintiff acquires an additional claim against the defendant, he is not bound to amend and assert said claim in the foreclosure proceedings, but may maintain a subsequent and independent action on the newly acquired claim, even tho it pertains to the subject matter of the foreclosure.

Central Bk. v Herrick, 214-379; 240 NW 242

Unpleaded usury—evidence. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (i. e., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

(f) RECEIVER

Receivership generally. See under §§12713, 12716

Discussion. See 11 ILR 174—Receivership clause

1 In General

Court's jurisdiction of entire controversy. In action for a money judgment, foreclosure of a mortgage and appointment of a receiver, the equity court had jurisdiction of the controversy and parties. The action having been properly brought in equity, all issues, legal and equitable, are triable therein.

Deaton v Hollingshead, 225-967; 282 NW 329

Freight charges to pay operating expenses. Railway companies which knowingly permit the receiver of an insolvent railway to collect inter-line freight charges may not, as intervenors in an action to foreclose a mortgage on the receiver's road, have their claims established as prior to judgment liens on the naked showing that said freight charges were used by the receiver in operating his railway.

Continental Bank v Railway, 202-579; 210 NW 787; 50 ALR 139

Mortgagee suing receiver—decree fixing lien on other assets in different court. Court may authorize a mortgagee's foreclosure action against the receiver in a county where the property is located, tho different from county where receivership is pending, and such court, after hearing the foreclosure proceeding, has the right, where such relief is proper, not only to foreclose but to impose a lien for a deficiency judgment on the other receivership assets in the other court.

Klages v Freier, 225-586; 281 NW 145

Federal income tax on operating receiverships. The federal statute requiring operating receiverships to pay income tax applies to a receiver where a substantial part of business both before and after the appointment was

the investment of corporation funds in securities and the collection of rents and profits, even tho the receiver was appointed to liquidate the business.

State v American B. & C. Co., 225-638; 281 NW 172

Agreement in re rents. An agreement between a mortgagee and the president of the titleholder (1) that the mortgagee will, at foreclosure sale, bid the full amount of the judgment, and will consent to the appointment of the president as receiver of the rents, and (2) that said president as receiver will keep the property in repair and deliver it to the mortgagee at the close of the redemption period free of all taxes, is enforceable when the president is so appointed, the property so bid in, and the provision for the payment of taxes by the receiver is embraced in the final decree. And this is true tho the mortgage neither pledges the rents nor provides for a receiver.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Crops planted subsequent to receiver's appointment—payment from receivership. Claimant who, before institution of foreclosure suit in which receiver for mortgagor was appointed, had furnished and planted seed under oral agreement with mortgagor's heirs held entitled to reasonable value of labor and material from receivership fund.

Chicago JSL Bank v Hargrove, (NOR); 234 NW 801

New mortgage and loan as benefit to receivership. A receiver, being granted authority to pay off an old mortgage, who executes new notes and a mortgage therefor, and after selling the property and collecting a substantial part payment which the receivership retains upon default of the buyer, is precluded from claiming that the receivership was in no way benefited by the new mortgage as a new loan.

Klages v Freier, 225-586; 281 NW 145

Estoppel—benefits accepted under unconstitutional statute. No objection could be made to the constitutionality of a law extending the period of redemption after mortgage foreclosures by parties who accepted benefits under a court order extending the period and appointing a receiver whose acts benefited both parties.

New York Ins. v Breen, 227-738; 289 NW 16

Sale—delinquent taxes paid by mortgagee omitted from judgment—effect. A mortgagee who bids in the property at foreclosure sale, without protecting himself by adding thereto the delinquent taxes he had previously paid under a clause in the mortgage, may not, after he is appointed receiver during the redemption year, collect and apply the rents and profits to reimburse himself for such delinquent taxes. The owner when redeeming, by paying the judgment and costs, takes title free from the lien of such taxes.

Monroe v Busick, 225-791; 281 NW 486

Receiver of unpledged rents—effect. The appointment in mortgage foreclosure of a receiver of the rents solely on the ground that the rents are being wasted will not enable the foreclosing plaintiff to have the rents applied to the extinguishment of the mortgage debt.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Receiver for assigned rents. A receiver for the rents and profits which may accrue during the redemption period on mortgaged premises will not be appointed under a mortgage which simply pledges the possession during said period, and when it is made to appear that the rents for said period have been contracted for and in good faith assigned prior to the commencement of foreclosure proceedings.

Keokuk Co. v Campbell, 205-414; 215 NW 960

Appointment of receiver—subsequent intervenor. An unappealed decree appointing a receiver of real estate and of the rents and profits thereof must, in a subsequent intervention in the cause, be deemed an adjudication against the owner, of all the issues involved in said appointment.

Canfield v Sec. Co., 216-747; 249 NW 646

2 Appointment and Scope of Receivership

General grounds. Justification for the appointment of a receiver in mortgage foreclosure is found in proof (1) that the owner of the land, who has assumed the mortgage, is insolvent, (2) that the security is inadequate to pay the debt, and (3) that the taxes are overdue.

Bogenrief v Leaming, 205-48; 217 NW 428

Naked statutory authority. The court will not, in mortgage foreclosure proceedings, appoint a receiver (1) when the mortgage neither provides for such receiver nor pledges the rents, and (2) when there is no showing of waste, or of impairment or destruction of the security actually pledged.

Huber v Gaines, 202-69; 209 NW 412
Iowa Bk. v Rons, 203-51; 212 NW 362

All-essential showing required. Assuming, arguendo, that a naked stipulation in a mortgage authorizing the mortgagee to take possession of the premises on default and to rent the premises is equivalent to a pledge of the rents, and might authorize the appointment of a receiver, yet no such appointment can be legally made in the absence of proof of the insolvency of the mortgagors, in addition to a showing of inadequacy of security.

First N. Bk. v Witte, 216-17; 245 NW 762

Adequate showing. The appointment of a receiver in mortgage foreclosure is proper

VII FORECLOSURE—continued
(f) RECEIVER—continued
2. Appointment and Scope of Receivership—continued

when it appears (1) that the rents were pledged up to the close of the redemption period, (2) that the lands afford inadequate security, (3) that waste is impending, and (4) that the mortgagors are nonresidents and are presenting no defense.

Equitable v Carpenter, 203-1377; 214 NW 485

Appointment clause in mortgage. In an equity action for foreclosure of realty mortgage also asking appointment of receiver, where inadequacy of security is shown and mortgage provided for appointment of receiver, court is authorized to appoint a receiver without proof of insolvency.

Federal Bank v Ditto, 227-475; 288 NW 618

Showing required when rents pledged. A receiver of the rents and profits of mortgaged premises, even tho the mortgage stipulates therefor, will not be appointed in the absence of a showing that (1) the mortgagor is insolvent, and (2) the security is inadequate; and insolvency is not established by an offer by plaintiff to accept less than the amount of his mortgage.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Deficiency after sale. Appointment of a receiver in foreclosure proceeding is proper (1) when the mortgage pledges the rents, (2) when the property on sale has proved inadequate to satisfy the debt, and is going to waste, and (3) when the parties personally obligated to pay are insolvent.

Fellers v Sanders, 202-503; 210 NW 530

Deficiency after sale. A receiver to take charge of mortgage-pledged and unassigned rents should be appointed when, after foreclosure and sale, a deficiency judgment remains against an insolvent mortgagor.

First JSL Bk. v Beall, 208-1107; 225 NW 943

Deficiency after sale. Under a mortgage on lands and on the crops and rentals thereafter accruing, without a receivership clause, the appointment of a receiver is proper after the land has been sold under foreclosure, when it has been made to appear (1) that all parties personally liable are insolvent, (2) that the land has proved inadequate to satisfy the debt, and (3) that the crops are going to waste.

Robertson v Roe, 203-654; 213 NW 422

Deficiency judgment in rem. A receiver may, on a proper showing, be appointed to collect pledged rents, and thereby discharge a deficiency judgment, whether the deficiency arises on a judgment in personam or in rem.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Deficiency—insolvent mortgagor. A receiver to take charge of mortgage-pledged rents should be appointed when, after foreclosure and sale, a deficiency judgment remains against an insolvent mortgagor.

Prudential v Strong, 219-816; 259 NW 491

Belated application after deficiency. A plaintiff in mortgage foreclosure who has been denied the appointment of a receiver for the rents may not, after the execution sale has revealed a deficiency judgment, institute new proceedings for such appointment (assuming the same to be proper) when, at the time of filing such new proceeding, the right, title, and interest of the mortgagor in said rents have passed to the mortgagor's trustee in bankruptcy.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Inadequate security. Record reviewed, and held that the appointment of a receiver in mortgage foreclosure was not erroneous, when the property was but slightly in excess of the incumbrance.

Harlow v Larson, 204-328; 213 NW 417

Inadequate security. A receiver of the rents and profits of mortgaged premises must be appointed when the mortgage pledges the rents and profits and provides for such receiver, and when it is made to appear that the security has proven substantially inadequate to satisfy the obligations called for by the mortgage, and that the judgment debtor is insolvent.

N. W. Ins. v Block, 216-401; 249 NW 395

Inadequate security. Principle reaffirmed that a real estate mortgagee is entitled to the appointment of a receiver when the mortgage pledges the rents, provides for a receiver, and when the real estate itself is inadequate security, irrespective of the insolvency of the mortgagor.

First Tr. Bk. v Jansen, 217-439; 251 NW 711
Des M. Bank v Allen, 220-448; 261 NW 912

Security slightly exceeding incumbrance. Record reviewed, and held that the appointment of a receiver in mortgage foreclosure was not erroneous when the property was but slightly in excess of the incumbrance.

Harlow v Larson, 204-328; 213 NW 417

Absconding mortgagor. A receiver may be appointed, without notice, in mortgage foreclosure against an absconding mortgagor.

Davenport v Thompson, 206-746; 221 NW 347

Conditions—evidence—sufficiency. Evidence held sufficient to show (1) the inadequacy of mortgage security and (2) the insolvency of the mortgagor, as a basis for the appointment

of a receiver in the foreclosure of a mortgage which pledged the rents.

Davenport v Thompson, 206-746; 221 NW 347

On homestead—right to receiver. In the foreclosure of a mortgage solely on a homestead and for the purchase price thereof, the mortgagee is entitled (except under exceptional circumstances) to the appointment of a receiver without proof of the insolvency of the debtor, (1) when the mortgage pledges a lien on the rents in case of default in payment, and provides for a receiver in case of foreclosure, and (2) when the inadequacy of the security is clearly made to appear.

Ia. D.M. Bk. v Crawford, 217-609; 252 NW 97

Homestead. On the issue whether a receiver for pledged rents should be appointed in the foreclosure of a mortgage solely on a homestead, the court cannot give consideration to the plea that extensive improvements have been made on the property since the mortgage was given when there is no proof that the mortgagee is the grantor of the defendant-homestead owner.

Ia. D.M. Bk. v Crawford, 217-609; 252 NW 97

Homestead. The purchaser of property who, simultaneously with the purchase, mortgages the property for the purchase price, and therein pledges the rents in case of default, and agrees to a receivership in case of foreclosure, does not, by subsequently occupying the property as a homestead, acquire a homestead right which will be superior to the right of the mortgagee to enforce, by receivership, the pledge of rents in order to pay a deficiency judgment.

Ia. D.M. Bk. v Crawford, 217-609; 252 NW 97

Premature appointment. Harmless error results from appointing, prior to sale under foreclosure proceedings, a receiver for the entire mortgaged property including the homestead when the record reveals a sale of the entire mortgaged premises for less than the mortgage debt.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Superfluous appointment. No necessity exists in foreclosure proceedings for the appointment of a receiver, tho plaintiff is entitled to such appointment, when the property is already in the hands of a duly appointed receiver who is a party to the proceeding.

N. W. Ins. v Gross, 215-963; 247 NW 286

Court's discretion. Whether, on mortgage foreclosure, the court will, before or after final judgment and sale under execution, determine the question as to the appointment of a receiver, rests largely if not wholly in the discretion of the court.

First JSL Bank v Schmidt, 215-103; 244 NW 866

Discretion of court uncontrolled—necessary showing. The discretion of the court in appointing receivers or granting injunctions cannot be controlled by a provision in a mortgage; consequently, by filing a motion for a temporary receiver under a mortgage pledging rents and profits the mortgagee undertook to show both the mortgagor's insolvency and insufficiency of the security.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Absence of agreement therefor. A receiver should be appointed in foreclosure proceedings on a proper showing of necessity when the rents are pledged by the mortgage, even tho the mortgage is silent as to such appointment.

Cooley v Will, 212-701; 237 NW 315

Unquestioned appointment of receiver. The court will, on appeal, treat the appointment of a receiver in mortgage foreclosure as a verity, even tho the mortgage does not provide for such receiver, when such appointment is unquestioned in either the trial or appellate court.

Whitney v Eichner, 204-1178; 216 NW 625

Receiver without proof of insolvency. Where a mortgage pledges the rents and profits, and provides for the appointment of a receiver, and the proof shows inadequacy of the security, a receiver should be appointed without proof of insolvency of the mortgagors. But proof that the mortgagor is a nonresident and has no property in this state other than the mortgaged real estate would be sufficient to show insolvency.

Prudential v Puckett, 216-406; 249 NW 142

Insolvency of mortgagor—exception to rule. The rule that where the title of property under foreclosure is in the original mortgagor it is necessary to show his insolvency before a receiver of the rents may be appointed does not apply when the original mortgagor has sold the property and is no longer in possession thereof and not even a party to the action.

Metropolitan v Smith, 215-1052; 247 NW 503

Solvency of mortgagor—proceeds of insurance. In mortgage receivership proceedings, and on the issue whether a wife, one of the obligated mortgagors, is solvent, no consideration can be given to the proceeds of life insurance (up to $5000) on the life of the husband, and in the hands of the wife as a beneficiary, the mortgage debt antedating the death of the husband.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Secondary security after exhausting land—showing for immediate receiver. A pledge of rents and profits in a real estate mortgage, being secondary and unavailable until the land as primary security is exhausted, the filing of a petition in foreclosure does not immediate-

VII FORECLOSURE—continued
(f) RECEIVER—continued
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ly entitle mortgagee to a receiver prior to the sale, without a showing both of mortgagor's insolvency and the insufficiency of the land alone to pay the mortgage indebtedness.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Value of land uncertain. On the issue whether the appointment of a receiver for the rents of mortgaged premises is proper, the court, in addition to the conflicting evidence as to value, may be materially influenced by the fact that the pledge of the rents is quite conditional.

Security Inv. v Ose, 205-1013; 219 NW 36

Unmatured crops under foreclosure. A receiver is properly appointed, in foreclosure proceedings, to care for unmatured crops which are in litigation.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Insolvency of assuming grantees. A grantee who has assumed payment of a mortgage on the land may not, in mortgage foreclosure, defeat the appointment of a receiver on the ground that there is no proof of insolvency on the part of prior grantees who likewise had assumed said mortgage.

Bogenrief v Leaming, 205-48; 217 NW 428

Authorized receivership. Under a mortgage on lands and on the crops and rentals thereafter accruing, without a receivership clause, the appointment of a receiver is proper after the land has been sold under foreclosure, when it has been made to appear (1) that all parties personally liable are insolvent, (2) that the land has proved inadequate to satisfy the debt, and (3) that the crops are going to waste.

Robertson v Roe, 203-654; 213 NW 422

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Right to continue application. A mortgagee whose mortgage pledges the rents of the mortgaged land may, in foreclosure, very properly continue his application for the appointment of a receiver for the rents until after decree and sale, and then demand a hearing on such application. Held that the dismissal without prejudice of such application simply worked, in legal effect, a continuance.

Equitable v Rood, 205-1273; 218 NW 42

Expiration of redemption period. A pledge of rents in a real estate mortgage entitles the mortgagee, even tho the redemption period has expired, (a deficiency judgment existing) to the appointment of a receiver to collect unpaid rents which had accrued when the lien on the rents attached, and rents which accrued thereafter prior to the expiration of the redemption period. And this is true tho the rent be in the form of an agreement by lessee to support and maintain the mortgagor- lessors during their lifetime, and to pay said lessors such sums as they might request.

Metropolitan v Andrews, 215-1049; 247 NW 551

Receiver appointed before return day—notice necessary—sufficiency. Where application for receiver in foreclosure action was presented to judge before return day, notice to mortgagor would be required, and where such notice is given and the return of service is merely defective, court's finding that it was sufficient could not be collaterally attacked.

Salinger v McNeill, (NOR); 239 NW 548

Priority of right between senior and junior mortgagees. The recital in a junior mortgage that the land is free of incumbrance except a named first mortgage, is not sufficient to make the junior mortgage inferior to the first in the matter of right to a receiver to collect pledged rents.

Lynch v Donahoe, 205-537; 215 NW 736; 218 NW 144

Appointment — effect between landlord and tenant. On the issue, in real estate mortgage foreclosure, whether an outstanding lease between the owner and his tenant (parties to the action) was superior to the mortgagee's right to a receiver for said premises and for the rents thereof, an unappealed decree which orders the appointment of such receiver works an eviction of said tenant and the consequent nullification of a chattel mortgage by the landlord on his share of the crop rent under said lease, it appearing that the real estate mortgagee had no notice or knowledge of such chattel mortgage until after the entry of his decree of foreclosure.

Keenan v Jordan, 204-1338; 217 NW 248

Right to receiver superior to mortgage on crops. The right to the appointment of a receiver under a receivership clause in a real estate mortgage, and the right to have the rents accruing during the redemption year applied to discharge a foreclosure deficiency, are superior to a chattel mortgage executed subsequent to the real estate mortgage on crop to be grown by the mortgagor on said land during said year, said crop not being yet in existence when the real estate foreclosure was commenced.

Louis v Hansen, 205-1216; 219 NW 523
Phelps v Taggart, 207-1f4; 219 NW 528
Finken v Schram, 212-406; 236 NW 408

Prior mortgages—effect. A mortgagee who is otherwise entitled to the appointment of a receiver of the rents during the redemption period following foreclosure is not deprived of such right because of the mere existence of other prior mortgages on the land.

Finken v Schram, 212-406; 236 NW 408

Right of subsequent purchaser. Under an enabling clause in a mortgage, a subsequent purchaser of the property who has agreed to pay the mortgage debt, and who has resold the property to a grantee who has likewise agreed to pay, may have a receiver of the rents appointed against his grantee,—a defendant in foreclosure,—on a showing that the security is inadequate and that said last grantee is insolvent.

Grimes v Kelloway, 204-1220; 216 NW 953

Application for appointment not splitting action. A mortgagee who, in foreclosure, continues, until after decree and sale, his application for the appointment of a receiver for the pledged rents does not thereby "split" his cause of action.

Equitable v Rood, 205-1273; 218 NW 42

Effect of appointment on subsequent relief. A plaintiff in mortgage foreclosure who enters upon the hearing of his application for the appointment of a receiver may very properly be denied (1) a continuance in order to enable him to secure the note and mortgage as evidence, (2) the right to dismiss his application, with the option to refile the same after execution sale, and (3) the right so to withdraw the application that the court would retain jurisdiction thereover and act thereon after the result of the execution sale became known.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Unallowable dual hearing. A plaintiff in mortgage foreclosure, who has had full hearing on the merits of his application for the appointment of a receiver, may not have a rehearing on the same issue after the execution sale has revealed a deficiency judgment.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Estoppel. A mortgagee who consents to the appointment of a receiver in foreclosure proceedings, in which the court would not otherwise have made the appointment, may not, on change of mind, recover of the receiver funds properly applied by him.

Malvern Bk. v Swain, 203-616; 213 NW 216

Estoppel to question. A mortgagor is estopped, in foreclosure proceedings, to question the appointment of a receiver for the rents of the mortgaged premises when it was made with his consent, and for his benefit, and recognized by him without objection throughout some three years of protracted proceedings.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Title taken by receiver.

Capital Bank v Riser, 215-680; 246 NW 763
Metropolitan v Sheldon, 215-955; 247 NW 291
N. W. Ins. v Gross, 215-963; 247 NW 286
Metropolitan v Smith, 215-1052; 247 NW 503
Willey v Andrew, 215-1104; 247 NW 501
Conn. Ins. v Stahle, 215-1188; 247 NW 648

Prior right of bank receiver. The superintendent of banking, upon being appointed receiver of an insolvent bank, takes over a lease of the bank's mortgaged real estate with the same rights as a creditor of the bank's would take, were the creditor an assignee of the lease as payment or security for his debt. It follows that said superintendent is entitled to the rent money, in preference to the mortgagee who subsequently institutes foreclosure action, and therein seeks to enforce the receivership clause in his mortgage.

Schlesselman v Martin, 207-907; 223 NW 762

Pledge of rents not a chattel mortgage. A decree, which recites that a real estate mortgage is also foreclosed as a chattel mortgage and that the receiver shall collect the rents "during the period of redemption", will, when construed as a whole—resort being taken to the pleadings—be taken to mean that the receiver collect the rents "pending foreclosure, sale, and redemption"—the petition neither alleging nor asking for such foreclosure but instead praying for a receiver from the date of the petition.

Sutton v Schnack, 224-251; 275 NW 870

Misapplication of rents. A receiver of the rents and profits of property under foreclosure cannot, to the detriment of a deficiency judgment debtor, legally apply any portion of said funds to the discharge of obligations not authorized by the mortgage in question.

Hansen v Bowers, 211-931; 234 NW 839

Rents — wrongful application on costs. Where rents of mortgaged premises in the hands of a receiver are properly applicable solely to the discharge of a deficiency judgment, yet, manifestly, the mortgagor may validly consent to their application in discharge of the costs taxed in the foreclosure proceedings.

Wenstrand v Kiddoo, 222-284; 268 NW 574

3 Postponing and Denying Receivership

Postponing appointment. The order of the court in mortgage foreclosure, postponing until after execution sale the hearing on the appointment of a receiver, will not be disturbed except on a showing of prejudice.

Prudential v Puckett, 216-406; 249 NW 142

VII FORECLOSURE—continued
(f) RECEIVER—continued
3. Postponing and Denying Receivership—concluded

Withholding appointment. The right of a homestead to be protected from receivership in mortgage foreclosure is fully protected by delaying the appointment of a receiver until after the sale of all the mortgaged lands under foreclosure has revealed a deficiency judgment.

Finken v Schram, 212-406; 236 NW 408

Withholding appointment. The court will, under some circumstances arising under mortgage foreclosure, hold in abeyance until after sale on execution a contract provision for the appointment of a receiver, and will then make the appointment if the sale reveals a deficiency. So held where the testimony as to the value of the property was quite conflicting.

Jewell v Logsdon, 200-1327; 206 NW 136
John Hancock Ins. v Linnan, 205-176; 218 NW 46

Refusing receivership. The appointment of a receiver to collect past, and future maturing, installments on a claim, secured as a lien on lands, is properly refused when the lien for matured installments has been foreclosed and the land sold, when no judgment for other installments has been obtained, and when there is no showing of waste.

Cadd v Snell, 219-728; 259 NW 590

Rents during redemption period. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof during the redemption period to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

Denial when rent note transferred. The appointment of a receiver in real estate mortgage foreclosure, to take charge of pledged rents, is properly refused when it is made to appear that, prior to foreclosure proceedings, the legal titleholder has made a bona fide transfer of the promissory note representing the rents in question. Especially is this true when neither the tenant note-maker nor the assignee of the note is a party to the foreclosure.

Hatcher v Forbes, 202-64; 209 NW 305

No receiver—conditional pledge of rents. A mortgage provision to the effect that, (1) in case of foreclosure, a receiver may be appointed, and (2) that all rents derived from the premises shall be applied on the mortgage debt, does not embrace rents which have accrued and which have been paid to a landlord-owner prior to the commencement of foreclosure proceedings. Necessarily the mortgagee is not entitled to a receiver for such rents.

Cooper v Marsh, 201-1262; 207 NW 403

Receiver when rents not pledged. A receiver of the rents of mortgaged premises may not be appointed in foreclosure proceedings when the mortgage is silent as to the rents and a receiver therefor, and when the premises are held by a subsequent grantee who has not assumed payment of the mortgage. An appointment in such a case must be for the sole purpose of preserving the security specified in the mortgage, and then only on a very persuasive showing of necessity.

Young v Stewart, 201-301; 207 NW 401

Proper denial. A real estate mortgagee is, manifestly, not entitled to the appointment of a receiver (1) when his mortgage contains no provision for such appointment, (2) when he is not a mortgagee in possession, and (3) when he furnishes no proof that the security is inadequate and that the mortgagor is insolvent.

Jacobson v Cooper, 216-1375; 250 NW 501

When land adequate security. A receivership for the rents and profits pending mortgage foreclosure is improper when the land itself is adequate security.

Parker v Coe, 200-862; 205 NW 505
John Hancock Ins. v Linnan, 205-176; 218 NW 46

When appointment improper. When mortgage does not pledge rents and profits of mortgaged premises as security for mortgaged debt or does not contain any provision for appointment of receiver and no waste or impairment of security is shown, the appointment of a receiver is improper.

Jeffers v Leeson, (NOR); 213 NW 210

Appointment—loss of right. Plaintiff in foreclosure who takes a decree which is silent as to a receiver for the rents, he having neither prayed for the appointment of such receiver nor established a lien on said rents, bars himself from thereafter applying for such receiver.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Waste—showing required. Plaintiff in mortgage foreclosure may not have a receiver of the rents appointed on the theory of improper care of the crops in the absence of a showing that the ruin of the crops would leave the security inadequate.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Waste—insufficient showing. The act of a mortgagor in obtaining the rents of the mortgaged premises and in not paying the taxes on the premises does not constitute legal waste.

Security Inv. v Ose, 205-1013; 219 NW 36

4 Discharge

Discharge—insufficient reasons. The fact that mortgaged property is sold at foreclosure sale for the full amount of the mortgage

debt and costs is no reason for the discharge of a receivership which has been stipulated for in the foreclosure decree for the purpose of discharging an indebtedness other than the mortgage debt.

Van Alstine v Hartnett, 207-236; 222 NW 363

Discharge without notice. The approval of the final report of a receiver in foreclosure proceedings and the discharge of the receiver, when entered without prior notice to the mortgagee, may be set aside on a showing that the receiver made an unauthorized distribution of the funds in his hands; and a delay of some four years by the mortgagee will not necessarily bar relief, especially when no one has changed his position because of the delay.

Farmers Bk. v Pomeroy, 211-337; 233 NW 488

Treating lease as cash to end receivership. When the mortgagee in foreclosure is entitled to all the rents accruing during the redemption period, the court may order that the lease be assigned to the mortgagee at face value and terminate the receivership.

Olson v Abrahamson, 214-150; 241 NW 454

5 Review

Appointment as appealable order. A provisional remedy is one which is provided for present needs, or for the occasion: that is, one adapted to meet a particular exigency,—e. g., the appointment of a receiver in mortgage foreclosure. It follows that an order granting such remedy is appealable.

Davenport v Thompson, 206-746; 221 NW 347

Scope of review. In the foreclosure of a real estate mortgage and of a chattel mortgage clause embraced therein, the fact that the lower court failed to enter an order for the formal foreclosure of the chattel mortgage is quite inconsequential when the court did appoint a receiver of said mortgaged chattels and properly ruled that plaintiff's lien was superior to that of appellant.

Equitable v Brown, 220-585; 262 NW 124

Waste — moot case. The issue whether in mortgage foreclosure a receiver should be appointed in order to insure the proper handling and harvesting of the crops becomes moot whenever such improper handling has already fully and completely taken place.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Dismissal of appeal—moot case. An appeal from an order denying a writ to place a receiver in possession of premises under mortgage foreclosure will be dismissed when it appears that sale has been had, that the period for redemption has expired, and that the defendant has surrendered possession of the premises to plaintiff.

Upton v Gephart, 205-235; 217 NW 630

When question moot. An issue whether a mortgagee in real estate foreclosure is entitled, under a pledge of the rents, to a receiver to take possession of the mortgaged premises becomes moot when the period for redemption expires.

Metropolitan v Andrews, 215-1049; 247 NW 551

(g) TRIAL—EVIDENCE

Useless amendment — no continuance. An amendment to a petition in a real estate mortgage foreclosure to the effect that "the mortgagor was the owner of the land when the mortgage was executed" is unnecessary and, if made, furnishes no basis for a continuance on the ground of surprise.

Fitz v Forbes, 208-970; 226 NW 117

Unallowable intervention. An intervention involving the right to rents in foreclosure proceedings is unallowable, after decree has been entered, as to all issues pending at the time of such decree.

First JSL Bank v Cuthbert, 215-718; 246 NW 810

Burden of proof—fraud—extending time on debt as consideration. In an action by a bank to foreclose a mortgage on land, the defendants had the burden of proving their defenses of fraud and want of consideration and, altho there was testimony that the mortgage was given to enable the bank to make a good showing to bank examiners and that there had been a promise that it would never be foreclosed, the court was justified in finding from other evidence that there was no fraud and that the consideration was the granting of an extension of time on a past-due mortgage on other land.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Adverse interest of witness. Self-evident principle applied that the most positive assertion of fact by a witness may be wholly overcome by the adverse interest of the witness, and by impeaching circumstances and sidelights. So held as to testimony relative to the signing and acknowledgment of a mortgage.

Hagensick v Koch, 220-1055; 264 NW 13

Setting aside default—sickness of counsel. Default judgment in mortgage foreclosure may be set aside on a showing that it was entered without fault on the part of defendant but solely because of the sickness of his attorney.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Signatures—burden to establish genuineness. Principle reaffirmed that plaintiff in foreclosure has the burden to establish the genuineness of

VII FORECLOSURE—continued
(g) TRIAL—EVIDENCE—concluded

the signatures to the mortgage and accompanying promissory notes when the genuineness of said signatures is specifically denied under oath by the purported maker. Evidence reviewed in detail and held that plaintiff had not successfully carried said burden.

Hagensick v Koch, 220-1055; 264 NW 13

Spurious mortgage—insufficient ratification. Evidence held quite insufficient to show that a purported mortgagor had ratified a spurious mortgage on his property.

Hagensick v Koch, 220-1055; 264 NW 13

Parol evidence — contradicting mortgage. Parol evidence to the effect that, at the time of the delivery of a mortgage, the mortgagee agreed that he would extend the mortgage indefinitely, and that in no event would a certain portion of the mortgaged property be taken under the mortgage, is wholly inadmissible.

Farmers Bank v Weeks, 209-26; 227 NW 508

(h) PROCEEDS—SURPLUS

Additions, repairs, and betterments—refusal of proportional distribution on sale. Failure of the court to decree a proportional part of the proceeds of a mortgage foreclosure sale to the prior mortgagee and a proportional part to the subsequent mechanic's lienholder for additions, repairs, and betterments is harmless error when the property sold simply for the amount of the mortgage and the mechanic's lienholder did not redeem.

Hedges Co. v Holland, 203-1149; 212 NW 480

(i) OPERATION AND EFFECT

Eviction of husband—effect. The eviction of a husband, by foreclosure decree, of lands of which he and his wife are both tenants is, to all practical purposes, an eviction of the wife.

Miller v Laing, 212-437; 236 NW 378

Ouster effected. A mortgage foreclosure decree which condemns the rents and appoints a receiver therefor, in order to discharge a deficiency judgment, works a constructive ouster of the titleholder and of his tenant.

Miller v Sievers, 213-45; 238 NW 469

Claim acquired during foreclosure. A junior mortgagee who, pending the foreclosure of his mortgage, pays the interest on a senior mortgage, is under no legal duty to include said payment in his foreclosure proceedings. He may subsequently assert such claim in an independent proceeding.

Jones v Knutson, 212-268; 234 NW 548
Cent. Bank v Herrick, 214-379; 240 NW 242

Repurchase option after foreclosure—no defense in forcible entry action. After foreclosure of a mortgage and just prior to the expiration of the period of redemption, a lease and contract giving the mortgagor's heirs then in possession an option to buy the property but providing for monthly rentals to be applied on the purchase price in the event the option is exercised, being neither in the nature of a new mortgage nor re-establishment of the foreclosed mortgage, is subject to demurrer when interposed as a defense to a forcible entry and detainer action.

Wallerstein v Palmer, 224-260; 276 NW 605

Sale—subsequent damages to land. A mortgagee who purchases the land at foreclosure sale for the full amount of his judgment is entitled, after he obtains the sheriff's deed, to the proceeds of gravel wrongfully removed from the premises after the sale and before the issuance of the deed.

LeValley v Buckles, 206-550; 221 NW 202

Decree adjudging superiority of second mortgage—conclusiveness. A decree rendered on service by publication in the foreclosure of a second mortgage, adjudging that said second mortgage is senior and superior to a first mortgage, in accordance with a definite pleading and prayer to said effect, based on a good-faith but mistaken belief that said first mortgage had been paid, is binding and conclusive on the holder of said first mortgage, and may not be collaterally assailed by said first mortgagee in an action to foreclose his mortgage. (It appears that said first mortgagee had allowed the time to elapse in which to attack said decree under §11595, C., '27.)

Lyster v Brown, 210-317; 228 NW 3

Inconsistent remedies. A creditor who is faced by the dilemma (1) of foreclosing his mortgage and treating the mortgagor as the sole debtor, or (2) of proceeding against a third party on the theory that said third party actually received the money in question under circumstances giving rise to an implied promise to return said money, and who chooses the former procedure, is irrevocably bound by his election. In other words, after taking personal judgment against the mortgagor and foreclosing against and selling the land with unfavorable results, he will not be permitted to proceed against said third party on the remaining, inconsistent theory.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Tax sale—mortgagee as redemptioner. The holder of a mortgage on land has a legal right to redeem from tax sale; and if tax deed be improperly issued, he may maintain the equitable action to redeem provided by §7278, C., '35.

Bates v Pabst, 223-534; 273 NW 151

(j) MORATORIUM ACTS

Discussion. See 19 ILR 108—Constitutionality; 19 ILR 334—Minnesota statute; 19 ILR 560—After the moratorium; 21 ILR 639—Factors determining right to extension; 21 ILR 646—Effect on receivership clauses

1 Redemption Period Extended

Constitutionality of statute. The emergency act extending the time for redemption from mortgage foreclosure is constitutional.

Conn. Ins. v Roth, 218-251; 254 NW 918
Hawkeye Ins. v Ogg, 218-261; 254 NW 847
Conn. Ins. v Clingan, 218-1213; 257 NW 213

Police power—extending redemption period. Neither the federal nor state constitutional prohibitions against (a) the impairment of the obligations of contracts, or (b) the deprivation of vested property rights without due process of law, are violated by a statute (1) which is enacted during, and for the purpose of ameliorating, an existing public financial emergency, (2) which grants to the owner of real estate during the existence of said emergency the right to possession and a time, very materially in excess of that otherwise granted by law, in which to redeem from mortgage foreclosure sale—even tho the sale precedes the passage of the emergency act—and (3) which sequesters the rents during said extended time and fairly and reasonably applies them to the protection of the mortgagee and his security. (45 GA, Ch 179)

Reason: Contract rights and vested interests must reasonably yield to the paramount right of the state, through the reservoir of its reserved police power, to protect, by appropriate legislation, its sovereignty, its government, its people and their general welfare, against exigencies arising out of a great emergency.

D. M. Bk. v Nordholm, 217-1319; 253 NW 701
Connecticut Ins. v Roth, 218-251; 254 NW 918
Hawkeye Ins. v Ogg, 218-261; 254 NW 847
Conn. Life v Clingan, 218-1213; 257 NW 213

Purpose of act—insolvency and inadequacy of security—limitation on court. Moratorium act of the 47th GA was designed to afford landowners an opportunity, by refinancing or paying up their indebtedness, to save their lands within moratorium period, but, merely because insolvency of mortgagor and inadequacy of security are not of themselves good cause for refusing a continuance, a court is not mandatorially required to grant a continuance regardless of mortgagor's ability or probability of refinancing his indebtedness within period of moratorium act. (47 GA, Ch 78.)

Prudential v Hinton, 225-1008; 282 NW 722

Nugatory or ineffective amendments to statute. The mortgage foreclosure redemption act of the 45th GA, Ch 179, which became a law March 19, 1933, and which provided that "In any action * * * which has been commenced" for the foreclosure of a real estate mortgage, the court should, under named conditions, grant an extension of time in which to redeem from sale, manifestly ex vi termini, had no application to mortgages executed on or after January 1, 1934. It follows that the later amendment of the 45th Ex. GA, Ch 137, which specifically declared the inapplicability of said moratorium act to mortgages executed "on or after January 1, 1934" was nugatory—took naught from and added naught to said original moratorium act.

Metropolitan v Reeve, 222-255; 268 NW 531

Limitation on moratorium act. The moratorium statute (45 GA, Ch 179) which provides that "In any action * * * which has been commenced" for the foreclosure of a mortgage, an extension of time in which to redeem from the sale may, under named conditions, be granted by the court, applies solely to actions which had been commenced prior to the taking effect of said act.

Metropolitan v Reimer, 220-1162; 263 NW 826
Conn. Ins. v Crozier, 221-38; 265 NW 166
Metropolitan v Gullord, 221-768; 266 NW 497

Independent action unallowable. An independent action in equity to secure, under the moratorium act, an extension of time in which to redeem from mortgage foreclosure sale, and to enjoin the plaintiff in foreclosure from procuring a writ of possession, is not maintainable, all such matters of relief being determinable in said foreclosure proceedings.

Brown v Bank, 221-42; 265 NW 115

Nonright under emergency act. No one other than the owner of real estate under mortgage foreclosure has the right to an extension of time in which to redeem under the emergency mortgage redemption act. (45 GA, Ch 179.)

Prudential v Claassen, 217-1076; 252 NW 553

Receiver as "owner". The duly qualified and acting receiver of an insolvent private bank is the "owner" of the mortgaged real estate of said bank within the meaning of the moratorium statute (46 GA, Ch 110) relative to extension of time in which to redeem from foreclosure sale.

Metropolitan v Van Alstine, 221-763; 266 NW 514

"Immediately" construed. Moratorium act provision requiring court, on filing of motion for further extension, to "immediately" fix time for hearing and prescribe notice thereof, should be construed as meaning within a reasonable time.

Prudential v Lowry, 225-60; 279 NW 132

Notice of hearing jurisidictional. Provisions of the moratorium acts requiring notice of the hearing are jurisdictional, and where mortgagor-defendant filed his application and secured his order for hearing within the year of redemption but failed to serve on plaintiff the notice of such hearing, he was not entitled to an order of extension under Ch 78, Acts 47th GA.

Ditto v Edwards, 224-243; 276 NW 20

VII FORECLOSURE—continued
(j) MORATORIUM ACTS—continued
1. Redemption Period Extended—continued

Fixing all pending moratorium hearings by general order—validity. A general order fixing time and place for hearing and providing for notice on all pending applications for extensions of the period of redemption under the moratorium act of the 47th GA is a sufficient compliance with §6 of that act.

First JSL Bk. v Albers, 224-865; 277 NW 451

Moratorium act—inapplicability to lands in severalty. The moratorium act (45 GA, Ch 179) relative to granting to landowners extension of time in which to redeem from mortgage foreclosure sale, cannot be made applicable to a condition where a mortgage on land consisting of two different tracts owned in severalty by two different parties is foreclosed and the land sold en masse, and where one of said parties, by delay, has wholly lost his right to such extension.

Reason: The nondelaying landowner could avail himself of an extension of time only by redeeming the entire land. By so doing he would be redeeming for another owner. Such latter redemption is not permitted by said legislative act.

Metropolitan v Hodapp, 220-1159; 263 NW 829

Redemption of part of land. The court in mortgage foreclosure proceedings under which land was sold en masse has no power, under the emergency act known as 45 GA, Ch 179, to grant to a junior creditor, who was a party to the foreclosure and who holds a sheriff's deed to a part of said land, an extension of time in which to redeem a part of the land from the foreclosure sale.

Co. Bluffs Inv. v Kay, 218-515; 255 NW 721

Loss of right by proceedings in bankruptcy. A mortgagor who, subsequent to a sale under foreclosure, makes application for a discharge in bankruptcy and is adjudged a bankrupt, thereby deprives himself of all right to an extension of time in which to redeem from said foreclosure and sale, because, upon being adjudged a bankrupt, the title to his equity of redemption ipso facto passed to his trustee in bankruptcy.

Prudential v Lininger 220-1212; 263 NW 534

Staying deed under moratorium act. A defendant in mortgage foreclosure may not, after execution sale, have an order under the emergency moratorium act of the 45th GA, Ch 179, staying the execution of sheriff's deed and extending the period for redemption, when, at the time of application for the order, the defendant, on his own application, has been adjudged a bankrupt, and his equity of redemption in the land in question has been sold under an order issued out of the bankruptcy court.

Lincoln Bank v Brown, 219-630; 258 NW 770

Denying moratorium cancels restraining order on sheriff. An order restraining the sheriff from issuing a deed, pending a hearing on a moratorium application for extension of period for redemption, is automatically dissolved when the application is denied, and a deed issued is valid when a nunc pro tunc order places the moratorium denial order on record as of a date prior to the issuance of deed.

Lincoln Bank v Brown, 224-1256; 278 NW 294

Mortgagor's administrator not bound by heir's moratorium waiver. Where a will providing for equitable conversion of the realty is ignored by deceased mortgagor's children who quitclaim their interest in real estate to one of them who, then as titleholder in a mortgage foreclosure, stipulates to waive all rights under the moratorium statutes, such stipulation will not estop one of the same children, after being appointed administrator with will annexed of the mortgagor's estate, from securing an extension of the period of redemption under the moratorium act of the 47th GA, inasmuch as title passed to the administrator and not to the heirs, who could make no agreement binding on such administrator.

Baurer v Myers, 224-854; 278 NW 302

Unallowable extension of period. A junior mortgagee who has foreclosed and received a sheriff's deed is not entitled to an order extending the time in which redemption may be made from a foreclosure sale under the senior mortgage (45 GA, Ch 179), it appearing that both mortgagees were before the court, primarily, as creditors and lienholders, and not as debtors or owners.

Equitable v Kramer, 218-80; 253 NW 809

Fraudulent prevention—immateriality. The fact, if it be a fact, that defendant in mortgage foreclosure action was fraudulently induced not to make application under either of our moratorium acts for extension of time in which to redeem from sale, is quite immaterial when such application, if made, would have been futile because neither of said acts had any application to the foreclosure proceedings in question. So held where the action was commenced after the first act (45 GA, Ch 179) took effect and where the time for redemption had wholly expired before the second act (46 GA, Ch 110) took effect.

John Hancock Ins. v Roeder, 221-1375; 268 NW 64

Loss of right by delay. The court has no jurisdiction under the moratorium act to grant an extension of time in which to redeem from mortgage foreclosure sale, when the application for such extension is filed on the last day allowed for effecting ordinary redemption, and is not, by the court, made the basis for an order for hearing thereon until the following

day—when the ordinary time for redemption had wholly expired.

Iowa Bank v Alta Casa, 222-712; 269 NW 798

Fatally delayed application. Application under the moratorium act (45 GA, Ch 179) for an extension of time in which to redeem from mortgage foreclosure sale is without legal effect when delayed until after execution and delivery of sheriff's deed.

Metropolitan v Reimer, 220-1162; 263 NW 826

Moratorium — fatally delayed application. Application under the moratorium acts for an extension of time in which to redeem from mortgage foreclosure sale is wholly without legal effect when delayed until the ordinary period for redemption has fully expired.

Metropolitan v Hodapp, 220-1159; 263 NW 829

Metropolitan v Reimer, 220-1162; 263 NW 826

Conn. Ins. v Crozier, 221-38; 265 NW 166

Iowa Bank v Alta Casa, 222-712; 269 NW 798

See Mohns v Kasperbauer, 220-1168; 263 NW 833

Loss of right. The mere filing, under the first moratorium act (45 GA, Ch 179), of an application for an extension of time in which to redeem from mortgage-foreclosure sale of realty does not, in and of itself, either give the court jurisdiction to grant such extension, or stop the running of the one-year period granted, generally, for redemption; and if said latter period is allowed to elapse under such naked filing, the applicant cannot legally be given an extension under the succeeding moratorium act (46 GA, Ch 110).

Mohns v Kasperbauer, 220-1168; 263 NW 833

Application—waiver of sale irregularities. Mortgagor's application under the mortgage moratorium acts to extend the period of redemption from an execution sale is a waiver of any right to attack the validity of such sale made under a second special execution the validity of which is challenged because of the alleged existence of another and prior execution.

Luke v Bank, 224-847; 278 NW 230

Nondeprivation of right—no application for continuance. The owner of mortgaged premises by failing, when foreclosure suit is instituted, to apply for and obtain a continuance under the moratorium continuance act (45 GA, Ch 182) does not thereby deprive himself of the right, after foreclosure and sale, to apply for and obtain, under the moratorium redemption act (45 GA, Ch 179), an order for extension of time in which to redeem from said sale.

First JSL Bk. v Merrick, 221-585; 266 NW 279

Emergency act—disposition of rents. Rent money deposited with the clerk under order of court for the payment of current taxes and insurance should be applied on the principal indebtedness insofar as it exceeds said taxes and insurance.

Hawkeye Ins. v Ogg, 218-261; 254 NW 847

Rentals — unallowable condition. The court, having fixed the monthly rental which a mortgagor in possession of residence property should pay during the extended time for redemption from foreclosure sale, is wholly without authority to penalize the mortgagee by providing that if the latter appeals from the order of the court, the mortgagor need not pay any rental.

Union Ins. v Waddell, 221-1373; 268 NW 149

Rentals—discretion of court. The court in fixing the monthly rental of residence property for the period covered by an extension of time in which to redeem from foreclosure sale, may be amply justified in rejecting a conditional offer of rent and in accepting instead a materially less but unconditional offer.

Union Ins. v Waddell, 221-1373; 268 NW 149

Extension under emergency act—conditions. An order under the emergency act (45 GA, Ch 179) granting an extension of time in which to redeem from mortgage foreclosure sale, and fixing the monthly rental to be paid by the mortgagor to the mortgagee during the extension period, should be made conditional on the payment of said monthly rental as it falls due.

Union Ins. v Waddell, 218-1367; 257 NW 319

Extension of time—reasonableness. An order fixing the rent to be paid by the mortgagor to the mortgagee during a granted extension of time in which to redeem may be conclusive on the appellate court in view of the nature of the very meager testimony presented.

Union Ins. v Waddell, 218-1367; 257 NW 319

Nondeprivation of right by assignment of rents. The mere fact that the owner of mortgaged realty, shortly prior to the commencement of foreclosure proceedings, assigned the rents accruing during the year for redemption, tho such rents were pledged in the mortgage, does not deprive said owner of the right to avail himself of the moratorium statute relative to an extension of time in which to redeem.

First JSL Bk. v Merrick, 221-585; 266 NW 279

Extension under moratorium act approved. Order granting an extension of time in which to redeem from mortgage foreclosure reviewed and affirmed, it appearing that the farm and improvements thereon were in part the homestead of the owners, some being minors; were of exceptional quality; were of a value substantially in excess of the mortgage debt; that the mortgagor had reasonable prospects of redeeming or refinancing his obligations during the extended time, and that said

VII FORECLOSURE—continued
(j) MORATORIUM ACTS—continued
1. Redemption Period Extended—continued

order was, by its terms, subject to modification to meet future contingencies.

Augustana Fund v Nagle, 219-1337; 261 NW 771

Extension under emergency act. An order granting an extension of time to a defendant in mortgage foreclosure (moratorium act, 45 GA, Ch 179) will not be disturbed when the record reveals the fact that, with the aid of the extension, defendant will probably be able to effect a redemption.

Conn. Ins. v Roth, 218-251; 254 NW 918

Extension under moratorium act sustained (apparent border-line case). Order granting an extension of time for redemption from mortgage foreclosure sale sustained in view of (1) the improvement in economic conditions, (2) the large equity in the property, (3) the apparently good-faith effort of the landowner (who had neither executed nor assumed said mortgage) to refinance the debt, and (4) the superior facilities of the trial court to correctly weigh the facts,—even tho the mortgagee had, prior to instituting foreclosure, offered to extend the mortgage on seemingly equitable terms, and even tho the record somewhat suggests that the extension was sought as a means of forcing the granting of more favorable financing terms.

Prudential v Brown, 221-31; 265 NW 153

Facts warranting extension. Where the real estate is fertile and productive, the improvements in good repair, the mortgagor having a substantial amount of farm equipment and livestock, and almost half of the deficiency judgment paid out of the farm receivership, it cannot be said that mortgagor could not meet the carrying charges and taxes, nor that he is without prospects of redeeming the property so as to deny to him a further extension of the redemption period.

First JSL Bk. v Albers, 224-865; 277 NW 451

Good cause to refuse moratorium not shown. The moratorium act of the 47th GA requires that extensions of the period of redemption be granted unless good cause is shown to the contrary; so, where land bearing about $120 an acre incumbrance and probably worth about $150 per acre has been kept in excellent repair, together with the addition of several new buildings by mortgagors, who are hard working, industrious people having great probability of refinancing their indebtedness, an extension is properly granted.

First JSL Bk. v Spencer, 224-1224; 278 NW 333

Hopeless insolvency. An order, under the moratorium statute, granting an extension of time in which to redeem from mortgage foreclosure sale will not be disturbed on appeal on the plea that the owner of the land is hopelessly insolvent, when the record is such that the appellate court cannot say that there is no reasonable probability that the owner can save the land.

First JSL Bk. v Merrick, 221-585; 266 NW 279

Extension to receiver—hopeless insolvency not presumed. Where the receiver of a private bank has been granted an extension of time in which to redeem lands sold under foreclosure proceedings against the individual members of the bank and against the receiver, it will not be presumed, in the absence of any evidence pertaining thereto, that the receiver is, in his official capacity, so hopelessly insolvent that he will not be able to effect redemption.

Metropolitan v Van Alstine, 221-763; 266 NW 514

Mortgagee's burden—failure of proof. Trial court did not abuse its discretion in granting an extension of period for redemption, under the moratorium act of the 47th GA, where the mortgagee did not prove mortgagor's lack of possibility and good-faith efforts to refinance, nor insolvency, nor inadequacy of the security, thereby failing to maintain his burden of showing good cause for denying the extension.

Ronan v Larson, 224-1248; 278 NW 641

Showing efforts to refinance not mortgagor's burden. The moratorium act of the 47th GA places no burden on a mortgagor seeking its benefits to show his good-faith efforts to refinance or redeem before being entitled to the extended period of redemption.

First JSL Bk. v Albers, 224-865; 277 NW 451

Failure to do equity—insufficient proof. The owner of mortgaged land cannot, in foreclosure proceedings, be said to have failed to do equity, and thereby deprived himself of the benefits of the moratorium acts, on the simple showing that he failed to pay either the interest on the mortgage or the taxes on the land. To temporarily relieve the owner from such failure is the very purpose of said moratorium acts.

First JSL Bk. v Merrick, 221-585; 266 NW 279

Redemption—bad faith necessary for refusal. In the absence of bad faith on the part of a mortgagor, coupled with insolvency and inadequacy of the security, a moratorium extension should be granted.

First JSL Bank v Burke, 225-55; 280 NW 467

Moratorium refusal—lack of good faith—property depreciation. Good cause for refusing a third moratorium redemption extension is shown by a lack of good faith and willingness of mortgagors to refinance a steadily increasing and already excessive mortgage debt, by a

lack of repair and upkeep on buildings and fences, and by the fact that the mortgagee had been paying the taxes.

Fed. Bk. v Sutherlin, 224-1219; 278 NW 323

Chance to redeem hopeless—lack of good faith. Where there was not the remotest chance of mortgagor ever paying amount necessary to redeem, and an extension of time would only result in additional loss to the mortgagee, an application for extension of redemption period under the moratorium act of the 47th GA was not made in good faith within requirement of moratorium statute, and furnishes good cause to deny the extension.

First JSL Bk. v Closner, 225-851; 283 NW 79

Waste precludes moratorium extension. Waste of the premises coupled with insolvency of the mortgagors, and the further fact that there is no indication that they will ever be able to redeem, warrants the court in holding that the period of redemption should not be extended under the moratorium act.

First JSL Bk. v Abkes, 224-877; 278 NW 183

Speculators and rent scalpers. "Good cause" for refusing an extension of time in which to redeem from sale under mortgage foreclosure is established per se by affirmative proof that the applicant for the extension acquired the legal title to the land, (1) from the mortgagor, (2) after the moratorium statute was enacted, (3) before foreclosure proceedings were commenced, and (4) solely for speculative purposes, chief of which was to lease the land for a future period and simultaneously to collect thereunder in advance, thus effectively placing said rents beyond the mortgage pledge thereof.

Equitable v Kirby, 221-1150; 266 NW 520

No moratorium continuance to land speculator. The moratorium act of the 47th GA was not enacted as an aid to land speculators. One who acquires land after foreclosure in the hope that, by obtaining a continuance, he may settle the mortgage for a fraction of its face value, is not entitled to such continuance when, at all times, he is financially able to redeem in full.

Fed. Corp. v Murdock, 225-1306; 283 NW 95

Insolvency or inadequacy of security. "Good cause" for denying an extended period of redemption under the moratorium law must be more than a showing of present insolvency and present inadequacy of the security.

First JSL Bk. v Abkes, 224-877; 278 NW 183

Showing of cause to contrary. Where evidence indicated land was worth not over $14,500 altho total indebtedness exceeded $26,000, and that mortgagor did not own any other property, nor had he lived on the land since before the foreclosure action was started, nor did any basis exist on which to allow for any substantial increase in the land value, nor was there any other source from which mortgagor could hope to pay indebtedness, nor was there prospect that it would be paid within period of moratorium, trial court erred in granting a continuance under the moratorium act of the 47th GA.

Prudential v Hinton, 225-1008; 282 NW 722

Pending actions — jurisdiction under later moratorium. Where an application for a continuance under the moratorium act of the 46th GA was filed before, and a decision thereon was not made until after, the effective date of the later moratorium act of the 47th GA, the application was "pending" under the provisions of the moratorium, keeping pending applications in full force and effect, so as to invest the court with jurisdiction to hear the same, and its finding that it lacked jurisdiction was erroneous.

Equitable v McNamara, 224-859; 278 NW 910

Subsequent extension — timely application preserving jurisdiction. Trial court has jurisdiction to hear an application for further extension of the redemption period under the moratorium act of the 47th GA, where the application made before expiration of the prior extension was followed by a hearing in due course, altho several months later.

Prudential v Lowry, 225-60; 279 NW 132
Prudential v Soloth, 225-172; 279 NW 399
Prudential v Kelley, 225-175; 279 NW 416
First JSL Bank v Burke, 225-55; 280 NW 467

Subsequent moratorium extending previous extension. Under the moratorium act of the 47th GA, in those cases where a previous extension had been granted and the application for a further extension was filed before March 1, 1937, the period of redemption was specifically extended to the time of the hearing thereon, and being so extended beyond the time previously granted, the court retained and possessed jurisdiction to hear such application.

First JSL Bk. v Albers, 224-865; 277 NW 451

Previous extensions prolonged to hearing. The court has jurisdiction to hear an application for additional moratorium redemption extension, under the act of the 47th GA, in all cases wherein an order had previously been so granted, and wherein the application was filed before March 1, 1937, in which cases the moratorium act further extended the period until after the hearing on the application.

First JSL Bank v Spencer, 224-1224; 278 NW 333

Nonapplicability—unsuccessful prior moratorium applicants. The terms of the redemption moratorium of the 47th GA exclude from its benefits a mortgagor who was denied an extension under either of the two previous moratorium acts, the period of redemption of

VII FORECLOSURE—continued
(j) MORATORIUM ACTS—continued
1. Redemption Period Extended—concluded

which had expired, and when the sheriff's deed had already issued.

Lincoln Bank v Brown, 224-1256; 278 NW 294

Sheriff's deed withheld—previous extension. Under the moratorium act passed by 47th GA, provision prohibiting issuance of sheriff's deed after filing of application and before hearing thereon, held applicable only to cases where previous extensions have been granted.

Ditto v Edwards, 224-243; 276 NW 20

New moratorium hearing on previous record —no review of new nonrecord matters. The supreme court will not consider, in a resistance to a moratorium extension, claims that the act was unconstitutional and did not apply to a federal government agency, when the record of a former hearing, stipulated as constituting the evidence to be considered by the court, contains neither contention.

First JSL Bank v Burke, 225-55; 280 NW 467

Moratorium act of 47th GA—amendment by same session—effect. Where the moratorium act of the 47th GA after taking effect is amended during the same session, such amendment, not being in effect at the time a particular application for extension thereunder was ruled upon, will not be construed as part of the original act in reviewing such ruling.

Ditto v Edwards, 224-243; 276 NW 20

Statutes in pari materia — amendment to clear ambiguity. Statutes in pari materia being construed together, a later statute may be used to clear up an ambiguity, such as in the moratorium statutes where an amending act was passed at the same session of the legislature.

Prudential v Lowry, 225-60; 279 NW 132

Moratorium acts of 47th GA — emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Moratorium acts of 47th GA — unconstitutionality. Moratorium acts of the 47th GA extending foreclosure of mortgages, and extending time in which to redeem, are unconstitutional as an impairment of the obligation of contract, when such acts are not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

First JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Court order based on unconstitutional statute—voidability by appeal. When the district court made an order extending the period for redemption of land on which a mortgage had been foreclosed, and the supreme court later declared the statute under which the extension was granted to be unconstitutional, the order granting such extension was not void, but was voidable by reversal on appeal, and when no appeal was taken, the order could not be attacked.

New York Ins. v Breen, 227-738; 289 NW 16

Order to be terminated if statute invalid—not automatic termination. A court order extending the time of redemption of land on which a mortgage had been foreclosed, providing that, if the statute under which the order was entered be held invalid, the order "shall be terminated", did not automatically revoke the order when the statute was declared unconstitutional, but could be terminated only by action of the court.

New York Ins. v Breen, 227-738; 289 NW 16

Court order to be terminated if statute invalid—issue of constitutionality not raised. When a district court order, granting an extension of the time for redemption of land on which a mortgage had been foreclosed, contained a provision that if the statute under which the extension was granted were repealed or held invalid the order would be terminated, such provision did not warrant an appeal challenging the constitutionality of the statute when the question of constitutionality was not raised in the lower court.

New York Ins. v Breen, 227-738; 289 NW 16

Constitutionality—first raised on appeal. When the constitutionality of a statute permitting the extension of the time for redemption of land upon which a mortgage had been foreclosed was not put in issue at a hearing at which the district court granted an extension, the order granting the extension became the law of the case, and the question of constitutionality could not first be raised in the supreme court in another action after the redemption had been made.

New York Ins. v Breen, 227-738; 289 NW 16

Benefits accepted under unconstitutional statute. No objection could be made to the constitutionality of a law extending the period of redemption after mortgage foreclosures by

parties who accepted benefits under a court order extending the period and appointing a receiver whose acts benefited both parties.

New York Ins. v Breen, 227-738; 289 NW 16

2 Continuance of Action

Continuance under financial emergency—constitutionality. The legislative power of the state may, for the purpose of ameliorating an existing, public, financial emergency, constitutionally grant to a mortgagor, on equitable conditions, the right, in an action to foreclose the mortgage, to a continuance which is very materially in excess of that ordinarily permitted or sanctioned by law. (For fundamental reason see Des Moines Bank v Nordholm, 217-1319.)

Craig v Waggoner, 218-876; 256 NW 285
Tusha v Eberhart, 218-1065; 256 NW 740

Judicial notice—purpose of act. Tho the moratorium act makes no distinction between individual and corporate debtors, supreme court may take judicial notice of fact that Iowa, being an agricultural state, moratorium acts were passed primarily for purpose of preserving farm and other homes of distressed debtors.

Mass. Ins. Co. v Schenkberg, 225-1148; 281 NW 825

Noninterference with federal land bank as governmental agency. There was no substantial or direct interference with accomplishment of purposes for which congress created joint stock land banks, by reason of the moratorium act of the 47th GA providing for continuance of foreclosure of real estate mortgage actions.

First JSL Bk.v Lehman, 225-1309;283 NW 96

Land banks as nonpreferential litigants in state courts. There is nothing to show that congress contemplated that land banks should occupy a preferential status as litigants in the state courts.

First JSL Bk.v Lehman, 225-1309;283 NW 96

Plainness of meaning excluding construction. There can be no construction of a statute which is expressed in such plain and simple language that he who runs may read and understand it. So held as to that clause of the moratorium act which declares: "The provisions of this act shall not apply to any mortgage * * * executed subsequent to January 1, 1934 * * *."

HOLC v Dist. Court, 223-269; 272 NW 416

"Owner" defined. An "owner" within the meaning of the moratorium foreclosure act may be such tho his interest is less than a fee ownership.

Prudential v Kraschel, 222-128; 266 NW 550

Requirement as to owners. Applications, under the moratorium act, for a continuance of mortgage foreclosure proceedings, should be joined in by all owners of the mortgaged premises; and if an owner is legally such in more than one capacity, he should join in each and every capacity in which he is such owner.

Prudential v Kraschel, 222-128; 266 NW 550

Bank receiver not "owner". The duly appointed and acting receiver of an insolvent state bank is not such "owner" of the bank's undivided, fractional interest in mortgage-incumbered land as entitles him, in case action is brought to foreclose said mortgage, to apply for and be granted a continuance under the moratorium act (46 GA, Ch 115).

Metropolitan v Laufersweiler, 221-1008; 267 NW 74

Dependency on factual situation. Every application for continuance under moratorium act of the 47th GA must be determined on its own peculiar facts.

Mass. Ins. Co. v Schenkberg, 225-1148; 281 NW 825

Present insolvency or inadequacy of security. In the moratorium act, a new section removing insolvency or inadequacy of security as good cause for refusing a continuance, held to add little if anything to the existing decisions thereon, which have never denied a continuance for present insolvency or inadequacy of security alone.

Replogle v Ebert, 223-1007; 274 NW 37

Nonliberal construction as to corporation-mortgagor. Where the receiver of a defunct corporation sought the benefit of the moratorium act of the 47th GA against another corporation, as mortgagee, held that altho the act applied to corporations, yet in view of the rapidly mounting debt, with no outlook for a material reduction in the mortgage, the acting receiver should be discharged and the mortgagee should be substituted as receiver during the period of the extension.

Mass. Ins. Co. v Schenkberg, 225-1148; 281 NW 825

Burden of proof. A mortgage debtor, on proper application in foreclosure proceedings, is entitled to a continuance under the emergency moratorium act unless the mortgagee establishes the impropriety of such continuance.

Mudra v Brown, 219-867; 259 NW 773
Anderson v Fall, 221-24; 265 NW 165
Mutual Ins. v Dean, 221-591; 266 NW 282

Burden to prevent. Mortgagors, as a matter of law and equity, are entitled to moratorium continuances unless good cause is shown to the contrary, the burden of which showing is upon the mortgagee.

Prudential v Schaefer, 224-1243; 278 NW 602

Redemption—crop outlook—judicial notice. Tho at present hopelessly insolvent yet when

VII FORECLOSURE—continued
(j) MORATORIUM ACTS—continued
2. Continuance of Action—continued

operating on shares an 840-acre farm with the pledge from a neighbor of financial aid for farm operating expenses, together with the outlook for a favorable crop season, which the court must judicially notice, it cannot be held that a mortgagor is without probability of saving at least part of his holdings and a ruling based thereon granting a continuance under the moratorium act is not erroneous. (47 GA, Ch 80.)

Replogle v Ebert, 223-1007; 274 NW 37

Good cause for refusal not shown. Where 180 acres purchased for over $41,000, having been depressed in value to $15,300, carry an incumbrance of $16,320, where mortgagor paid insurance on the property in addition to rentals to mortgagee, where a reasonable expectation exists as to increased crops and prices, and mortgagor is not shown to be insolvent, there is no hopeless impossibility of mortgagor's redeeming, nor evidence of mortgagor's bad faith, so as to constitute good cause for refusing a continuance under the moratorium act of the 47th GA.

Metropolitan v Henderson, 224-1238; 278 NW 621
First JSL Bank v Burke, 225-55; 280 NW 467

Continuance—"good cause" to defeat—insufficiency. A mortgagee does not, under the moratorium act (46 GA, Ch 115) show "good cause" justifying the rejection of mortgagor's prayer for a continuance of foreclosure suit by simply showing:

1. That the mortgagor had not applied the rents for the preceding year on the interest due on the mortgage or in payment of taxes on the mortgaged premises.
2. That the mortgagor had just recently disposed of real estate not covered by said mortgage.
3. That, when the mortgagor applied for a continuance, he was in default.

First JSL Bank v Kilpatrick, 221-993; 267 NW 688

Continuance—"good cause to reject"—insufficiency. A mortgagee does not, under the moratorium act, establish "good cause" justifying the refusal of a continuance of mortgage foreclosure proceedings:

1. By proof that the mortgagor does not reside upon, or operate the land in question, especially when the land is in possession of a receiver appointed under a continuance granted under a prior moratorium act, or
2. By proof that the mortgagor had not refinanced the loan, the court taking judicial notice of the fact that during the period in question the financial condition of the country was such that it was substantially impossible to refinance farm loans, or
3. By equivocal or questionable evidence as to the applicant's solvency.

First JSL Bk. v Jelsma, 221-1191; 268 NW 76

Continuance—"good cause"—insufficient evidence. "Good cause" justifying the rejection of an application, under the moratorium act, for continuance of foreclosure suit, is not shown per se by proof that the applicant, owner of the land, (1) did not occupy the land as a homestead, or (2) did not personally farm the premises, or (3) was not personally obligated to pay the mortgage debt.

First JSL Bk. v Riddle, 221-1313; 268 NW 45

Court's duty—showing to avoid continuance. Without an affirmative showing of good cause, which cannot be limited to showing of present insolvency and present inadequacy of security, there is no warrant for any court to deny an application for continuance under the moratorium act of the 47th GA.

Mass. Ins. Co. v Schenkberg, 225-1148; 281 NW 825

Inadequacy of security insufficient for refusal. Present insolvency and inadequacy of security are not alone "good cause" for refusing a mortgage continuance under the moratorium act of the 47th GA, and, therefore, if inadequacy of security alone is shown, the continuance should be granted.

Prudential v Redmond, 225-166; 279 NW 392

Discretion of court. Evidence reviewed on the issue whether the owner of mortgaged land had an equity in the land over and above the amount of the mortgage and held, the court did not abuse its discretion in granting a continuance under the moratorium act.

First JSL Bk. v Riddle, 221-1313; 268 NW 45

Working capital not applied to mortgage delinquencies—not bad faith. A mortgagor, admittedly solvent, does not show bad faith to the extent necessary to deny a moratorium continuance because of his failure to pay mortgage delinquencies, when by so doing he would impair his capital so that he would be unable to continue his farming operations.

Prudential v Schaefer, 224-1243; 278 NW 602

Third moratorium continuance — $8 delinquency not "good cause" to refuse. Mortgagee's contention, in an action for a third continuance under the moratorium act of the 47th GA, that mortgagor has not done equity in that he was $8 delinquent in his rent on a 154-acre farm, cannot be seriously considered as "good cause" for refusing the continuance.

Prudential v Redmond, 225-166; 279 NW 392

Insufficient showing of "good cause" to deny. "Good cause" for refusing a continuance of mortgage foreclosure proceedings under the moratorium act (46 GA, Ch 115) is not shown by proof that the applicant for continuance

had, before the commencement of the action, fully disposed of the rents for the year in which the action was commenced, he otherwise doing full equity.

First JSL Bk. v Bridson, 221-1302; 268 NW 25

Rents — failure to account for. A mortgagor will not, under 46 GA, Ch 115, be denied a moratorium continuance because of the fact that, prior to the commencement of foreclosure proceedings, he, without fraud, rents the land for the current year for cash, and does not, in his application for the continuance, account for or offer to account for the cash rent so collected.

First JSL Bk. v Wood, 222-1395; 271 NW 606

Duty to determine occupancy and rents. The imperative duty of the court under the moratorium act to grant, on a proper showing, a continuance of foreclosure proceedings, is no more imperative than is the duty of the court, in such case, to fix and determine the right of occupancy of the premises (even tho they constitute a homestead), and the reasonable rental to be paid for such occupancy, during said continuance; and especially is this true when the mortgagors have, in the mortgage, waived all homestead rights.

Rhoades v Allyn, 220-474; 262 NW 788

Accounting for rents as condition precedent. The right of a titleholder to have a continuance, under the second moratorium act, of mortgage foreclosure suit is not dependent on an accounting by him of rents which have been legally disposed of prior to the commencement of foreclosure suit. (46 GA, Ch 115, §§3, 6.)

First JSL Bk. v Wood, 222-985; 270 NW 416

Unallowable apportionment of rent. When the security for a debt is a combination (1) of a mortgage on the land, and (2) of a chattel mortgage on the rents and crops of the said land, the court, on granting under the moratorium act a continuation of foreclosure proceedings, has no authority under said act (nor could it constitutionally be given such authority) to apportion or set off to the mortgagor any portion of said rents.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Rents assigned — effect. The fact that a portion of the future accruing rents of mortgaged premises has, by assignment, been placed beyond the reach of the mortgagee does not prevent the court from continuing the foreclosure, under the mortgage emergency act (45 GA, Ch 182), and equitably applying the remaining rents accruing during the period of the continuance.

Prudential v Brennan, 218-666; 252 NW 497

Pledge of rents — receiver — refusal to appoint — justification. The refusal of the court, in foreclosure proceedings, to appoint a temporary receiver to conserve the rents pledged in the mortgage for the payment of the debt, cannot be deemed erroneous (1) when a continuance is granted under the moratorium act, (2) when there is no showing of waste, (3) when the all-important question is as to what equitable portion of the accruing rents should be paid to the clerk for application on the mortgage, and (4) when such portion is determined by the court in its order granting a continuance.

First JSL Bank v Ferguson, 221-987; 267 NW 103

Moratorium denial due to misinterpretation of supreme court opinion. Where the trial court under a misinterpretation of a supreme court opinion orders a mortgagor to account for rents and profits collected prior to foreclosure proceedings, or suffer a denial of a continuance sought under the moratorium act of the 45th GA, and the mortgagor fails to so account within the time limit set by the order, such erroneous order and subsequent judgment cannot be an adverse prior adjudication, nor terminate jurisdiction to determine the merits of the mortgagor's rights to a continuance under the later moratorium act of the 46th GA.

Equitable v McNamara, 224-859; 278 NW 910

Unauthorized continuance. A continuance of mortgage foreclosure proceedings, under the emergency act known as 45 GA, Ch 182, without any provision being made as to the rents and the application thereof, is wholly unauthorized.

McDonald v Ferring, 218-593; 255 NW 719

Unauthorized continuance. A continuance of mortgage foreclosure proceedings, under the emergency moratorium act (46 GA, Ch 115), without any provision being made relative to the possession of the real estate, the rental terms to be paid, and the application and distribution of said rents, is wholly unauthorized.

First JSL Bank v Dennison, 221-984; 267 NW 681

Discretion to refuse. The discretion of the trial court to refuse a second continuance of mortgage foreclosure proceedings will not be disturbed in the absence of a record showing abuse of such discretion. So held where it appeared that the owner was, aside from the property in question, financially able to refinance the mortgage debt, but unwilling so to do.

Prudential v Kraschel, 222-128; 266 NW 550

Solvent estate—continuance denied executor. Where a claim was filed against an estate, based on a note signed by decedent and secured by mortgage on realty, a continuance under the moratorium statute was properly refused where estate was solvent and, at time of her

VII FORECLOSURE—continued
(j) MORATORIUM ACTS—continued
2. Continuance of Action—continued

death, decedent owned 1,440 acres of land of which 1,120 acres were unencumbered.

Equitable v Christensen, 225-1258; 282 NW 721

Continuance denied—showing. In an action to foreclose a mortgage, held court's refusal to grant a moratorium continuance was proper in view of the facts that (1) conflict in equities was not between owner and mortgagee but between mortgagee and bank depositors holding trust certificates, (2) the bank was not person in possession as a home whom the statute was designed to protect, (3) the foreclosure was merely a contest between creditors, the bank and the mortgagee, and (4) none of the parties offered or promised to make any attempt to redeem.

Service Ins. v Sutton, 223-1013; 274 NW 57

Hopeless insolvency—effect. A continuance, under the moratorium act, of mortgage foreclosure proceedings is properly denied when the mortgagor has long been in default in payment of interest and taxes and is hopelessly insolvent.

Mudra v Brown, 222-709; 269 NW 753

Continuance under emergency act. The emergency act for the continuance of mortgage foreclosure proceedings (45 GA, Ch 182) was not designed to grant a continuance to a mortgagor of nonhomestead property who is so hopelessly insolvent that a continuance would, manifestly, work no benefit to him but would work material harm to the mortgagee.

Reed v Snow, 218-1165; 254 NW 800

Continuance—avoidance. Under the mortgage emergency act (45 GA, Ch 182) a continuance should be granted, unless the mortgagee shows good cause why such continuance should not be granted. Held that the court did not abuse its limited discretion in refusing such continuance to a debtor who had substantially abandoned the mortgaged premises, had for a material time failed to apply any part of the rents and profits to the protection of the land, was hopelessly insolvent, and wholly without prospect to redeem the property.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Unauthorized continuance. The mortgage moratorium act does not, and constitutionally could not, authorize a continuance thereunder to a mortgagor when the record affirmatively shows (1) that the mortgaged land is of a value substantially less than the mortgage debt, and (2) that, irrespective of the foregoing fact, the mortgagor-owner is in such financial condition as to exclude any possible redemption by him.

John Hancock Ins. v Schlosser, 222-447; 269 NW 435

Denial—redemption not possible. A continuance of mortgage foreclosure should not be granted where a titleholder has no property and would not be able to redeem, where the incumbrance is increasing each year and where there is little, if any, income from mortgaged premises.

Prudential v Mathis, 225-1314; 283 NW 265

Moratorium denial—no hope of refinancing. The purpose of the moratorium statutes is to afford the owner an opportunity to refinance or pay up the indebtedness and save the farm within the moratorium period. When from the evidence there is nothing to indicate the remotest possibility that this can be done, the continuance should be denied.

First JSL Bk. v Baxter, 224-1229; 279 NW 125

Unallowable continuance. A mortgagor is not entitled, under the moratorium act, to a continuance of foreclosure suit (1) when the land is worth far less than the amount due on the mortgage, (2) when the income from the land will scarcely pay the taxes, and (3) when the mortgagor admits he has no intent to redeem from the mortgage, and would not so do were he financially able.

First JSL Bk. v Runde, 221-995; 267 NW 691

Nonright to continuance. A mortgagor is not entitled, under the emergency moratorium act, to have foreclosure proceedings continued:

1. When, since the date of the mortgage, he has paid practically nothing on the principal debt,—originally $20,000,
2. When, in addition, he is in default for the nonpayment of interest, taxes and other legal charges,
3. When, manifestly, the mortgaged land will fall far short of paying the accumulated debt,—some $35,000,
4. When the said mortgagor is hopelessly insolvent,
5. When refinancing the accumulated debt to save the land is out of the question, and finally and quite pertinently,
6. When said mortgagor has never been willing to do equity, but, on the contrary, has clearly evinced a purpose to oppress the mortgagee who is also in financial distress.

Miller v Ellison, 221-1174; 265 NW 908

Continuance—justifiable refusal. Refusal of the trial court, under the moratorium act, to grant a continuation of mortgage foreclosure proceeding, finds ample justification in the facts (1) that the mortgaged premises are insufficient to satisfy the amount due on the mortgage, (2) that the mortgagor is hopelessly insolvent, (3) that the mortgagor evinces no disposition to "do equity", and (4) that the application for continuance was not made in good faith.

First JSL Bk. v Lewis, 221-437; 265 NW 141

Continuance—justifiable refusal. A mortgagor is not entitled, under the mortgage mor-

atorium act, to a continuance of foreclosure proceedings when it is made to appear that he has been offered by the mortgagee a reasonable refinancing of the mortgage debt and that he has refused such offer, tho possessed of very ample nonexempt and unincumbered property which he could employ for such refinancing. Especially is this true when the mortgagor's conduct quite strongly suggests that he is attempting to employ said act as a club with which to bludgeon the mortgagee into an involuntary reduction of a manifestly just debt.

Decorah Bk. v Sexton, 220-1047; 264 NW 41

Proper denial of continuance. A defendant in mortgage foreclosure proceedings is very properly denied a continuance under the emergency moratorium act (45 GA, Ch 182) when it is made to appear that he is not in financial distress, and even refuses to do equity.

Butenschoen v Frye, 219-570; 258 NW 769

Continuance — "good cause" for refusal. "Good cause" for refusing a moratorium continuance of mortgage foreclosure suit is necessarily found—a border-line case—on a record showing (1) that the mortgage represents a loan of actual money, has been twice renewed by the mortgagee at reduced rates of interest, and constitutes a material and necessary part of the mortgagee's personal support, and (2) that the mortgagor, applicant for continuance, does not reside on the land, bought and holds the land solely for speculative purposes, has no equity in said land because of the incumbrances thereon, owns substantial properties in addition to said land, and has manifested a disposition to force the mortgagee to consent to a reduction of the admitted debt.

Fossler v Breniman, 222-124; 268 NW 521

Proper denial of continuance. A continuance, under the moratorium act, of mortgage foreclosure proceedings, is very properly denied when the farm in question (1) has been practically abandoned by the several owners thereof, (2) is in a shocking state of disrepair which the owners refuse to correct (tho some of them are financially able), and (3) is of a value less than half the incumbrance,—when, in short, the continuance is sought in the hope that the owners may speculate by the delay.

First JSL Bk. v Wylie, 221-27; 265 NW 181

No moratorium continuance to land speculator. The moratorium act of the 47th GA was not enacted as an aid to land speculators. One who acquires land after foreclosure in the hope that, by obtaining a continuance, he may settle the mortgage for a fraction of its face value, is not entitled to such continuance when, at all times, he is financially able to redeem in full.

Fed. Corp. v Murdock, 225-1306; 283 NW 95

Continuance — cancellation — justifiable grounds. An order, under the moratorium act, granting a continuance in mortgage foreclosure suit, may be set aside at any time during the life of the continuance on a showing that the applicant for the order has substantially failed to comply with the conditions imposed by the court in the granting of the order, even tho, in granting the order, the court did not specifically retain jurisdiction over the order for a possible future cancellation thereof.

John Hancock Ins. v McFee, 222-403; 269 NW 332

Unallowable continuance. The court has no jurisdiction (46 GA, Ch 115) to grant a moratorium continuance of mortgage foreclosure proceedings on a mortgage executed subsequent to January 1, 1934, there being no claim that any continuance had theretofore been granted under the preceding moratorium act (45 GA, Ch 182).

HOLC v Dist. Court, 223-269; 272 NW 416

Moratorium acts of 47th GA — emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW445

Moratorium acts of 47th GA—unconstitutionality. Moratorium acts of the 47th GA extending foreclosure of mortgages, and extending time in which to redeem, are unconstitutional as an impairment of the obligation of contract, when such acts are not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

First JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

12373 Deeds of trust.

When life estate not subject to sale. A trust agreement and a deed of conveyance accompanying it, executed as security for a named debt, and granting the trustee immediate possession with right and duty to apply the rents to the secured debt, may not be foreclosed and the grantor's life estate sold, when the trust agreement and conveyance recite (1) the grantor's interest as a life estate only, but (2)

contain no agreement or inference that the trustee may alienate said life estate.

In re Barnett, 217-187; 251 NW 59

Fraudulent trust deed. Trustees were not entitled to foreclose bridge company's trust deed securing bonds, most of which were issued to corporation controlled by bridge company's president, inasmuch as trust deed and bonds, with certain exceptions, were tainted with fraud, and, as to nonfraudulent bonds, equity could be done by sequestering company's revenues in excess of necessary operating expenses and taxes, and retaining property in receivership until valid bonds, with interest, were paid.

First Tr. Bank v Bridge Co., 98 F 2d, 416

12374 Venue.

Action in county where realty located. As to an equity action to foreclose a realty mortgage in one county against mortgagor and administrators of deceased junior mortgagee, where probate proceedings are pending in another county, and the jurisdiction of the court in foreclosure proceedings is challenged, the statute providing that foreclosure of mortgages of real property shall be brought in the county where the property is located is mandatory and jurisdictional.

Federal Bank v Ditto, 227-475; 288 NW 618

12375 Separate suits on note and mortgage.

Allowable legal and equitable actions at same time. Where each of a series of matured, mortgage-secured, promissory notes of the same maker possesses the same grade of lien, and is by a trust agreement executed by the various noteholders, placed in the hands of a trustee with power to institute such actions as he may deem fit in order to effect collection, the trustee may maintain and carry on at the same time an action at law on a portion of said notes, and an action in equity to foreclose the mortgage for the remainder of the notes.

Iowa Co. v Clark, 215-929; 247 NW 211

Judgment on note alone—mortgage unaffected. A separate judgment on a note does not discharge the mortgage securing it.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

Nonsplitting of action. A mortgagee is not guilty of splitting his cause of action (1) by suing at law on his secured note and proceeding against property of the mortgagor other than the mortgaged property, and (2) by instituting foreclosure proceeding as trustee for other secured noteholders without making any claim therein on his own note.

Iowa Co. v Clark, 213-875; 237 NW 336

Notice of appeal—mortgagor as adverse and necessary party. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Optional remedies to enforce payment. The trustee in a deed of trust securing bonds cannot be deemed to be limited simply to a foreclosure of the deed—cannot be deemed to be excluded from maintaining an action at law against the maker—when the deed confers upon the trustee the widest discretion as to the remedy which he may choose to enforce collection.

Minn. Co. v Hannan, 215-1060; 247 NW 536

Pendency of foreclosure in foreign state—effect. The right of a party to maintain in this state an action at law to recover of the maker of bonds the balance due after foreclosure, in a foreign state, of the securing mortgage will not be denied on the plea that the foreclosed property is yet in the hands of the foreclosing receiver and that the amount of rents which will be derived thereunder is not made to appear, when the evidence demonstrates that the utmost that can be realized will not pay taxes and other expenses.

Minn. Co. v Hannan, 215-1060; 247 NW 536

Prima facie showing for recovery. In an action on a promissory note, the introduction of the note with proof of the genuineness of the signature thereto makes a prima facie case for the plaintiff.

Pfeffer v Corey, 211-203; 233 NW 126

Right of mortgagee to sue at law. A mortgagee has a legal right to sue at law on his mortgage-secured note, and to enforce the resulting judgment against leviable property of the mortgagor other than the mortgaged property.

Iowa Co. v Clark, 213-875; 237 NW 336

Splitting actions — mortgage foreclosure after judgment on note. A mortgage foreclosure action is maintainable after securing judgment on the note secured thereby.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

12376 Judgment—sale and redemption.

ANALYSIS

I JUDGMENT OR DECREE IN GENERAL
II PERSONAL JUDGMENT
III SALE
IV REDEMPTION

Moratorium—redemption period extended. See under §12372 (VII)

I JUDGMENT OR DECREE IN GENERAL

Conclusiveness against rent claimant. A party who intervenes in a real estate mortgage foreclosure, after final decree and after the appointment of a receiver of the rents, and lays claim to said rents as a trustee under an assignment and chattel mortgage thereof antedating the foreclosure, has no standing when it is made to appear that said "trustee" has no personal interest in said rents and is a "trustee" only in the sense that he is the agent of a party who was duly made a party to the foreclosure and whose rights were fully adjudicated by the final decree.

Virtue v Teget, 209-157; 227 NW 635

Conclusiveness of judgment. The purchaser of mortgaged property, duly made a party to the foreclosure of the mortgage, may not afterwards relitigate any issue which was tendered in the foreclosure proceedings or which was available to the parties therein; otherwise, of course, as to nonavailable issues, e. g., whether the purchaser had been credited with all the payments made by him on his contract of purchase.

Heppe v Bank, 209-1017; 227 NW 334

Construction—application of rents. A foreclosure decree which covers a first and second mortgage, and which is in rem only, and which appoints a receiver, with direction to pay the final balance of rents "on deficiency judgment", entitles the second mortgagee to such final balance of rents in preference to the then owner of the land, the first mortgagee being fully satisfied by the foreclosure sale.

Union Bank v Lyons, 206-441; 220 NW 43

Foreclosure—effect of decree on pipe-line fixtures. A mortgagee having foreclosed and taken a sheriff's deed may not require a gas pipe-line company to pay for its pipe and fixtures previously installed across the mortgaged premises in addition to the damages for right of way on the theory that the foreclosure decree vested in mortgagee the title to such pipe and fixtures.

Titus Co. v Natural Gas, 223-944; 274 NW 68

Allowable successive foreclosures. The foreclosure of a recorded real estate mortgage for the installments first falling due, and a sale and redemption therefrom by the assignee of the mortgagor, does not destroy the lien of the mortgage for future maturing installments and principal when the mortgage specifically provides for successive foreclosures, and when the lien of said mortgage for future maturing installments and principal was distinctly preserved, as a matter of record, at every material step in said first foreclosure.

Lincoln JSL Bank v Williams, 216-659; 246 NW 841

Increased rate of interest—when effective. A mortgage clause to the effect that, upon the exercise by the mortgagee of his right to declare the entire debt due because of default in payment of any part of the matured debt, the mortgage debt shall bear an increased rate of interest, is valid, and such increased rate commences to run from the date of action to foreclose.

Whitney v Krasne, 209-236; 225 NW 245

Issue in re assumption of mortgage—nonidentity of parties. An adjudication (in mortgage foreclosure) solely between the mortgagee and the grantee of the premises that the grantee had not assumed the mortgage debt is no bar to a subsequent independent action by the mortgagor-grantor against said grantee so to reform the deed to grantee as to embrace such assumption and to recover of said grantee the deficiency which resulted from the foreclosure sale, said deficiency having been paid by said mortgagor-grantor. And this is true even tho the mortgagor-grantor was a party to said foreclosure.

Betzenderfer v Wilson, 206-879; 221 NW 497

Land banks as nonpreferential litigants in state courts. There is nothing to show that congress contemplated that land banks should occupy a preferential status as litigants in the state courts.

First JSL Bk. v Lehman, 225-1309; 283 NW 96

Matter excluded from judgment. Tho a subject matter is fully covered by pleading. yet there can be no adjudication thereof if the court specifically excludes said subject matter from its final determination—reserves said matter for future determination.

Central Bk. v Herrick, 214-379; 240 NW 242

Mortgagee suing receiver—decree fixing lien on other assets in different court. Court may authorize a mortgagee's foreclosure action against the receiver in a county where the property is located, tho different from county where receivership is pending and such court, after hearing the foreclosure proceeding, has the right, where such relief is proper, not only to foreclose but to impose a lien for a deficiency judgment on the other receivership assets in the other court.

Klages v Freier, 225-586; 281 NW 145

Nonprejudicial judgment. In the foreclosure of a second mortgage, a defendant who is personally liable for taxes paid and interest advanced by plaintiff, to protect the property and to prevent a foreclosure of the prior mortgage, may not complain that the court rendered judgment in rem for the amount of said interest and taxes, instead of entering a personal judgment therefor against complainant.

Collentine v Johnson, 203-109; 202 NW 535; 208 NW 318

I JUDGMENT OR DECREE IN GENERAL —concluded

Order as to rents—conclusiveness. In mortgage foreclosure proceedings, an unappealed order to the receiver to rent the property during the redemption period and to pay the taxes from the rentals is conclusive on all party defendants.

In re Angerer, 202-611; 210 NW 810

Presumption attending foreign foreclosure. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court, on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

Recitals accompanying decree. A recital in a so-called judgment entry in real estate mortgage foreclosure that plaintiff "shall have a lien against all property kept on said premises," and that said lien shall be superior to a named chattel mortgage, when not carried into the decree which follows the recital, is no part of the decree, and is not binding on anyone, a fortiori when such recital finds no support in the pleadings or in the stipulation filed in the case.

Van Alstine v Hartnett, 210-999; 231 NW 448

Requisites and proceedings for transfer of cause—failure to serve coparty. On an appeal by an intervenor in foreclosure proceedings from a decree awarding rent notes to plaintiff because intervenor was a fraudulent indorsee thereof, and taxing costs against intervenor and the landlord-indorser, the failure to serve notice of appeal on the nonappealing landlord-indorser and tenant-maker of the notes constitutes a fatal defect of parties because a reversal—a decree that intervenor was a bona fide indorsee—(1) would restore the liability of the landlord-indorser on his indorsement, (2) would leave the landlord-indorser liable for all the costs without right to contribution from intervenor, and (3) would subject the tenant to a double liability for the rent.

Read v Gregg, 215-792; 247 NW 199

Return—noninvalidating irregularity. The return on a real estate mortgage foreclosure execution is not, as a basis of the title conveyed, invalidated by the fact that the recital in the return (1) of the receipt of the execution, and (2) of the levy thereunder, and (3) of the date of such receipt and levy, is signed by a deputy sheriff in his own name with the added designation of "deputy sheriff" (instead of in the name of the sheriff by said deputy) when the entire return embracing a timely recital of the doing of every required act thereunder (including that recited by said deputy) is signed by the sheriff in his official capacity.

Nelson v Hayes, 222-701; 269 NW 861

Technically incorrect decree. A decree arising out of foreclosure proceedings which is fair and equitable to appellant will not be disturbed even tho appellee was given a lien on the land to which he was not strictly entitled.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Vacating decree in foreclosure after lapse of year—insufficient showing. A mortgagor is not entitled to have a decree in foreclosure set aside on the ground of misunderstanding and inefficiency of his attorney, when he applies more than a year after entry of the decree, and it appears that the proceedings were regular in every way, and it further appears that his attorney did everything possible in his behalf.

Snyder v Bank, 226-341; 284 NW 157

II PERSONAL JUDGMENT

Assumption of mortgage—scope and effect. A purchaser of land who contracts, both in his contract of purchase and in the deed of conveyance accepted by him, to assume and agree to pay an existing mortgage on the land, thereby becomes the principal debtor on such obligation and as to all prior parties obligated thereon.

Grimes v Kelloway, 204-1220; 216 NW 953

Assumption by subsequent vendee—right to cancel. Principle reaffirmed that the assumption by a vendee of payment of an outstanding mortgage on the land may be canceled prior to the time the holder of the mortgage has knowledge of such assumption.

Collentine v Johnson, 203-109; 202 NW 535; 208 NW 318

Consideration—failure of, as to wife. Parol evidence is admissible between the original parties to a note and mortgage to show that the wife signed the obligations without any consideration flowing to her, and solely for the purpose of releasing her possible dower interest, and without any knowledge that her signature was being required or demanded by the payee.

Cooley v Will, 212-701; 237 NW 315

Expectancies—ineffectual instrument. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues, and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

Indorsee "without recourse". The indorsee of a mortgage-secured note is not entitled to a personal judgment against the indorser for the amount due on the note when such indorsee is holding the note (1) under an indorsement "without recourse" and (2) under an

agreement by the indorser to repurchase the note in case of nonpayment by the maker at maturity, and when, after the indorser refuses to repurchase, the indorsee continues to treat the note and mortgage as his own property and sues in foreclosure as such owner.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Interest on mortgage. When foreclosure of a mortgage is refused in toto because of the fact that unconscionable usury permeated the entire debt except as to one item, and when the court separates such item from the rest of the contract and, without objection, renders personal judgment against the mortgagor therefor, it should grant the plaintiff legal interest thereon. In other words it is not justified in rendering judgment for interest on such item in favor of the school fund.

Tansil v McCumber, 201-20; 206 NW 680

Mortgage extension by mortgagor's grantee —no assumption. A note and mortgage extension agreement between mortgagee and mortgagor's grantees, with no assumption of the mortgage, and for the sole purpose of preserving a foreclosure cause of action about to be barred by statute, which extension continues the note and mortgage in force and effect as per their original terms, will justify a foreclosure decree but is not an assumption of the debt on which a personal judgment against mortgagor's grantees may be rendered.

Woollums v Anderson, 224-264; 275 NW 472

Signature of spouse to mortgage only—effect. The defeasance clause in a real estate mortgage on the lands of a husband, to the effect that the mortgage shall be void if the signers shall "pay or cause to be paid" the secured notes, does not, in and of itself, impose personal liability on the wife who is one of the signers to the mortgage.

Fairfax Bk. v Coligan, 211-670; 234 NW 537

Undisclosed principal—liability. One who, through a broker with whom land is listed for sale, and without the knowledge of the owner of the land, secretly arranges to buy the land, and obligates himself to pay the purchase price thereof, and who, through said broker, causes an impecunious and fictitious buyer to enter into the contract of purchase and to execute the notes and mortgage and to become the grantee in the deed of conveyance, and who receives from the said fictitious buyer an assignment of the said contract and a deed under which he assumes no personal liability on the mortgage debt, will, nevertheless, be held personally liable to the actual vendor for the full purchase price as an undisclosed principal; and if the agent goes beyond the scope of his authority in negotiating the said contract, the undisclosed principal may not complain, if, with full knowledge of the terms of said contract, and before parting with anything of value, he appropriates to himself the full benefits of the contract.

Collentine v Johnson, 203-109; 202 NW 535; 208 NW 318

Wife signing to release dower. A finding by the trial court on supporting testimony that a wife signed both the note and mortgage of her husband solely for the purpose of waiving her dower interest, and received no actual consideration herself, is conclusive on the appellate court.

Bates v Green, 219-136; 257 NW 198

Signing note to release dower—effect. A wife is not personally liable to the original payee of a promissory note which grew out of her husband's real estate transaction to which she was an entire stranger, except that she signed said note (and mortgage) for the sole and only purpose of releasing her possible dower interest.

Jones v Wilson, 219-324; 258 NW 82

Wife as party—plea of want of consideration. Even tho a wife who had joined with her husband in the execution of rent obligations was not made a party to subsequent mortgage foreclosure wherein her husband and the landlord were evicted by the appointment of a receiver, yet she may, when sued on the rent obligations by the landlord or by his assignee, plead the foreclosure decree as establishing a total failure of consideration.

Miller v Laing, 212-437; 236 NW 378

Consideration — wife signing mortgage and note to release dower. Evidence to the effect that a wife signed not only the mortgage of her husband but also the promissory note, and did so in order to enable the husband to obtain the loan and complete the deal, does not establish that the note was without consideration as to her, even tho she asserts that she signed solely to release her dower interest.

D. M. JSL Bk. v Allen, 220-448; 261 NW 912

Debts secured — future advances, etc. A mortgage securing a specified indebtedness will not be enforced insofar as it contains an indefinite clause providing that it shall stand as security for future advances and after-contracted indebtedness, (1) when the present owner acquired the land before the advances were made and (2) when the wife of the mortgagor signed solely to release her possible dower interest and was a stranger to the said advances.

First Bk. v Welch, 219-318; 258 NW 96

Impeaching signature but not acknowledgment — effect. Even tho it appears that the purported signature of a wife to a promissory note and mortgage (admittedly executed by the husband on his own land) was affixed by someone other than the wife, yet if the mortgage carries a certificate of acknowledgment in due and proper form as required by law and re-

II PERSONAL JUDGMENT—concluded

citing an acknowledgment by said wife of said mortgage as her voluntary act and deed, the wife must, in order to avoid the mortgage as to herself, overcome, by clear, satisfactory and convincing evidence, the facts affirmed in said certificate.

First Tr. JSL Bank v McNeff, 220-1225; 264 NW 105

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness that her signature would have no other effect than to release her dower interest in the husband's land (which was embraced in the accompanying mortgage which she signed), yet that constitutes no defense to a personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

Reason: The application of such theory would nullify the notes for any purpose.

First N. Bk. v Mether, 217-695; 251 NW 505

Signing to release dower—effect. Principle recognized that a wife who is an entire stranger to her husband's note and mortgage, except to sign the same solely for the purpose of releasing her possible dower interest, is not personally liable thereon.

First Bk. v Welch, 219-318; 258 NW 96
See Bank v Mether, 217-695; 251 NW 505

Personal liability — wife signing husband's note. A wife who signs the note and mortgage of her husband cannot escape personal liability thereon on the ground of want of consideration as to her—because she signed simply to release her dower interest—when, without her signature, the husband would be unable to obtain the loan.

First Tr. JSL Bk. v Diercks, 222-534; 267 NW 708

Wife signing to release dower—inadequate evidence to show lack of consideration. The presumption of consideration for a promissory note and mortgage, signed jointly by a husband and wife but evidencing and securing an originally created debt of the husband only, is not overcome, as to the wife, by evidence that she was a stranger to the negotiations for the loan, received no part of the loan, had no interest in the mortgaged lands except a contingent dower interest, signed the instruments without reading them and solely at the request of the husband and solely to release said contingent interest. The fatal defect in such evidence is its failure to establish the fact that the loan would have been made without the wife's signature—that the payee-mortgagee did not part with the money in reliance on the wife's signature.

Northern Trust v Anderson, 222-590; 262 NW 529

III SALE

Bidding full amount. A mortgagee by bidding in the mortgaged property at foreclosure sale for the full amount of his judgment thereby satisfies his debt, even tho the property is subject to a prior lien of which he has constructive notice only.

Leach v Bank, 200-954; 205 NW 790
Iowa Co. v Bank, 200-952; 205 NW 744

Bidding full amount. A mortgagee who, after instituting foreclosure, discovers that his mortgagor has granted to a railway company a permanent easement to overflow the land and to construct additional structures thereon may make the company a party, foreclose as to all other parties, sell the property, and take deed, and thereafter, under the continued proceedings against the company, foreclose the rights of such company, even tho at the foreclosure sale he bid the full amount of his judgment.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

Bidding full amount. A second mortgagee who has not paid the taxes on the land or the interest on the first mortgage, but who buys the property in for the amount of his foreclosure judgment, may not afterwards and during the period of redemption recover the amount of said unpaid taxes and interest from a junior incumbrancer who has agreed, generally, to pay them.

Schnuettgen v Mathewson, 207-294; 222 NW 893

Bidding full amount. A judgment plaintiff in mortgage foreclosure who levies upon the mortgaged premises after the expiration of six months and before the expiration of nine months from a sale under a foreclosure of a prior mortgage, and bids in the property, subject to the rights of the first mortgage, for the full amount of his judgment, may not, after his right to redeem has expired, have his sale set aside and canceled and his judgment reinstated, on the mistaken claim that his judgment was not a lien on the land at the time of the levy. (§11734, C., '27.)

Home Bk. v Klise, 205-1103; 216 NW 109

Bidding full amount. A mortgagee who, on foreclosure, takes judgment for the taxes paid by him, and, on sale, bids the full amount of his judgment, thereby fully satisfies the claim for said taxes; and neither he nor one claiming under him can collect said taxes a second time, even from a grantee obligated to pay them.

Marx v Clark, 201-1219; 207 NW 357

Bidding full amount. A mortgagee who forecloses after a fire loss, but who therein makes no claim to an insurance fund paid to the titleholder on account of said loss, and who bids in the property for the full amount of his judgment, interest and costs and later receives a sheriff's deed, must be deemed to have irrevocably waived all claim to said insurance fund, even tho the titleholder received said fund under an agreement to rebuild the burned buildings.

Union Ins. v Bracewell, 209-802; 229 NW 185

Deed carries unaccrued rents. Principle reaffirmed that unaccrued rents pass to the grantee in a sheriff's deed.

Wilson v Wilson, 220-878; 263 NW 830

Dismissal of appeal—moot case. An appeal from an order denying a writ to place a receiver in possession of premises under mortgage foreclosure will be dismissed when it appears that sale has been had, that the redemption has expired, and that the defendant has surrendered possession of the premises to plaintiff.

Upton v Gephart, 205-235; 217 NW 630

Lands in different counties. Under an ordinary mortgage foreclosure decree covering land both in the county in which the decree is rendered and in an adjoining county, the clerk has authority to issue a special execution embracing the lands in both counties, and the sheriff of the county in which the execution is issued has authority to make a valid sale in his county of all said lands.

Tice v Tice, 208-145; 224 NW 571

Nonenforceable judgment. A junior mortgagee who makes no redemption from the sale under senior foreclosure to which he and the common mortgagor were parties may not, after sale under such senior decree, obtain a judgment on his junior mortgage note and enforce it against the land in the hands of the mortgagor's grantee who has redeemed, or in the hands of a party who claims under said grantee.

Stiles v Bailey, 205-1385; 219 NW 537

Notice of mechanic's lien—evidence. Evidence held insufficient to show that a purchaser at mortgage foreclosure had notice of the claim to a mechanic's lien.

Magnesite Co. v Bensmiller, 207-1303; 224 NW 514

Recitals as to absence of right to redeem. A notice of sale of land under special foreclosure execution need not recite that the land will be sold without any right of redemption in a named defendant (because he has appealed), when the right of redemption from the sale exists in other party defendants.

Ebinger v Wahrer, 213-84; 238 NW 587

Recital as to foreclosed rights of parties. A notice of sale of land under special foreclosure execution need not recite that the land will be sold free and clear from the "right, title, interest, liens, or claims" of party defendants.

Ebinger v Wahrer, 213-84; 238 NW 587

Redemption—unallowable extension of period. A junior mortgagee who has foreclosed and received a sheriff's deed is not entitled to an order extending the time in which redemption may be made from a foreclosure sale under the senior mortgage (45 GA, Ch 179), it appearing that both mortgagees were before the court, primarily, as creditors and lienholders, and not as debtors or owners.

Equitable v Kramer, 218-80; 253 NW 809

Return—correcting inadvertent error. An inadvertent error in the return of a mortgage foreclosure sale may be corrected by an amendment by the sheriff after the land has gone to sheriff's deed, provided the judgment plaintiff and defendant are the only persons affected. In such case oral testimony showing the error is quite unnecessary.

Equitable v Ryan, 213-603; 239 NW 695

Sale—delinquent taxes paid by mortgagee omitted from judgment—effect. A mortgagee who bids in the property at foreclosure sale, without protecting himself by adding thereto the delinquent taxes he had previously paid under a clause in the mortgage, may not, after he is appointed receiver during the redemption year, collect and apply the rents and profits to reimburse himself for such delinquent taxes. The owner when redeeming, by paying the judgment and costs, takes title free from the lien of such taxes.

Monroe v Busick, 225-791; 281 NW 486

Title acquired by purchaser. The purchaser at a mortgage foreclosure sale takes, through the sheriff's deed, the full title to the land which the mortgagor had at the time of the execution and recording of the mortgage.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

Sale for installment—lien exhausted. The holder of a claim payable in monthly installments during the lifetime of the claimant, and secured by record lien on land which is owned by a grantee who is not personally obligated to pay said claim, completely exhausts his lien on the land by foreclosing and selling the land for matured installments, without obtaining in said foreclosure decree, under proper allegation and prayer, the preservation of said lien against said land for future maturing installments.

Cadd v Snell, 219-728; 259 NW 590

IV REDEMPTION

Unenforceable judgment. A junior mortgagee who makes no redemption from the sale

IV REDEMPTION—continued

under senior foreclosure to which he and the common mortgagor were parties may not, after sale under such senior decree, obtain a judgment on his junior mortgage note and enforce it against the land in the hands of the mortgagor's grantee who has redeemed, or in the hands of a party who claims under said grantee.

Stiles v Bailey, 205-1385; 218 NW 537

Appeal by junior creditor—effect. The statutory provision that "no party" who has appealed shall be entitled to redeem, does not embrace a junior creditor in a mortgage foreclosure. Especially is this true (1) when the appeal by the junior creditor was on the issue of priority between him and another junior creditor, and (2) when the appeal was perfected after the execution sale.

Quinn v Bank, 200-1384; 206 NW 271

Apportionment of mortgage debt. Where separate owners of separate tracts of land jointly mortgage their lands for the debt of one of them, and on foreclosure, the sale is made en masse, and redemption is made by a judgment creditor of one of the owners, the other owner may, after paying to the clerk the entire amount necessary to effect redemption, maintain an equitable action to have the mortgage debt apportioned between the different tracts.

Hansen v Bank, 209-1352; 230 NW 415

"Debtor" defined. The grantee of land who buys subject to an existing mortgage is a "debtor", within the meaning of the redemption statutes; and the original mortgagor is not entitled to the possession of the land or to the value of such possession during the redemption period following foreclosure, even tho such mortgagor is the only "debtor" who is personally liable for the mortgage debt.

Marx v Clark, 201-1219; 207 NW 357

Decree—nonjurisdiction to amend. The district court has no jurisdiction, long after a duly rendered decree in mortgage foreclosure has become final, to amend said decree by striking therefrom a provision for redemption from execution sale, and by substituting therefor a provision directing the sheriff to issue deed forthwith upon making such sale. So held where the judgment plaintiff sought such amendment on the theory that the judgment defendant had lost his right to redeem because of a stay of execution obtained by him pending ineffectual bankruptcy proceedings.

Nibbelink v De Vries, 221-581; 265 NW 913

Dismissal when question becomes moot. An appeal by a surviving mortgagor from an order which grants to a probate claimant a right to redeem from a sale under foreclosure will be dismissed when it is made to appear that appellant has allowed his time for redemption to elapse without any attempt by him to redeem.

Central Bank v Lord, 204-439; 215 NW 716

Execution debtor's "right of possession". A debtor's statutory "right of possession" of real estate during the year given for redemption from sale on execution is not, in and of itself, leviable.

Sayre v Vander Voort, 200-990; 205 NW 760; 42 ALR 880

Fraudulent redemption and deed. The original mortgagee in a third mortgage who fraudulently redeems in his own name from the foreclosure of the second mortgage and obtains a sheriff's deed, when in fact he had, long prior thereto, assigned said third mortgage, must be deemed to hold said deed as a trustee for his assignee, but he will not be deemed also to hold said deed as trustee for the first mortgagee who has suffered an adverse foreclosure of his mortgage because of the fraud of said redemptioner.

Lyster v Brown, 210-317; 228 NW 3

Loss of right by appeal. Mortgagors and subsequent mortgagees forfeit their statutory right to redeem from first mortgage foreclosure sale by appealing in the latter proceedings from an interlocutory order, even tho appellants obtain a reversal on their appeal.

First JSL Bank v Armstrong, 222-425; 269 NW 502; 107 ALR 873

"Ownership" sufficient to redeem. A deed of conveyance which purports to be a warranty deed carries such ownership of the land as will enable the grantee to redeem from a mortgage foreclosure sale, when the habendum clause clearly evinces an intention to transfer an estate of inheritance, even tho the granting clause seems to limit the conveyance to the "right to redeem".

Central Life v Spangler, 204-995; 216 NW 116

Redemption by co-tenant. One who, during the period for redemption from mortgage foreclosure and sale en masse, purchases by quitclaim the undivided interests in the land of a part of the personal judgment defendants, can redeem only by paying the full amount of the sheriff's certificate of purchase, plus interest and costs, the remedy of such redemptioner being to enforce contribution from his co-tenants.

Kupper v Schlegel, 207-1248; 224 NW 813

Expiration of redemption—effect on nonredeeming junior lienholder—sale certificate assignment. In a mortgage foreclosure action where a defendant junior lienholder fails to redeem, an assignment by the mortgagee of his foreclosure sale certificates to the defendant mortgagor after expiration of the

period of redemption, vests in the mortgagor all of mortgagee's rights unburdened by the claims of any party to the suit.

Bates v Mullins, 223-1000; 274 NW 117

Equitable assignment—sheriff's certificate—homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Redemption by interloper—effect. The holder of a certificate of sale under execution may not question a timely redemption made by an interloper, in the name of the person who had the right to redeem; especially is this true when the person paying the redemption money had contracted for a deed, and when the certificate holder has once surrendered his certificate and accepted the redemption money.

Dixon Lbr. v Cole, 213-554; 239 NW 131

Redemption by grantee—fraud. Redemption by a grantee of premises which have been sold under mortgage foreclosure for the full amount of the judgment may not be declared fraudulent simply on the showing that the grantee and her husband, the grantor (both debtors in the foreclosure proceedings), raised the money with which to effect redemption through a joint mortgage on the property.

Tirrill v Miller, 206-426; 218 NW 303

Failure of junior judgment holder to redeem. A sale under general execution on a senior judgment frees the land in the hands of the grantee of the judgment debtor (even tho he bought "subject to liens of record") from the lien of a junior judgment, when the holder of such junior judgment fails to redeem within the nine months following the sale. The same rule would apply if the sale were under a special execution under mortgage foreclosure, and the junior judgment were obtained after the date of the foreclosure decree.

Paulsen v Jensen, 209-453; 228 NW 357

Judgment creditor as junior lienholder—time to redeem—extent of protection. A judgment creditor becoming a junior lienholder on land loses his lien on account of a mortgage foreclosure by a senior lienholder, unless redeemed within 12 months after the foreclosure sale therein, and the statutory right to redeem is his only protection.

Bates v Mullins, 223-1000; 274 NW 117

Redemption of homestead by judgment creditor. A judgment creditor who was made a defendant in a foreclosure action against appellant's 120-acre farm is a junior lienholder under the statute, not a stranger nor interloper, and is entitled to redeem from sheriff's sale, even tho the judgment was not a lien on the 40 acres constituting appellant's homestead.

Ackerman v Bank, 228- ; 291 NW 150

Quieting title—judgment creditor's deed after mortgage foreclosure — insufficiency. A sheriff's deed issued under execution sale to a judgment creditor, after expiration of the judgment creditor's right of redemption as a defendant junior lienholder in a mortgage foreclosure, is a nullity and will not sustain an action to quiet title thereon.

Bates v Mullins, 223-1000; 274 NW 117

Mechanic's lien claimant without judgment. A mechanic's lien claimant may not redeem from mortgage foreclosure when his claim has not been reduced to judgment.

Magnesite Co. v Bensmiller, 207-1303; 224 NW 514

Cochran v Ory, 222-772; 269 NW 764

Redemption by omitted party. A plaintiff who, subsequent to mortgage foreclosure sale, brings a supplementary action to foreclose against a purchaser of the mortgaged premises (because plaintiff after knowledge of such purchase had failed to make such purchaser a party to the original foreclosure) may not, in the absence of some showing of inequitableness, complain that the court gave said purchaser a year in which to redeem.

White v Melchert, 208-1404; 227 NW 347; 73 ALR 595

Unallowable partial redemption by heirs. After a mortgage which secures the debt of a husband and which covers different tracts belonging to the husband and wife separately is legally foreclosed, and sale made en masse (no other method being required by the debtors), and after junior lienholders on the husband's land have redeemed from the entire sale, the guardian of the wife's heirs may not redeem the lands which belonged to the wife by depositing with the clerk a proportional amount of the mortgage debt, costs, and expense on the theory that the mortgage was on an acreage basis.

Northwestern Ins. v Hansen, 205-789; 218 NW 502

Crops raised during redemption period. The right of the owner of land after mortgage foreclosure to the possession of the property during the 12 months redemption period, does not embrace the right to hold exempt from levy under the mortgage deficiency judgment the harvested grain which has been raised on the premises during said redemption period,

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and which constitutes the said owner's share as rent.

Starits v Avery, 204-401; 213 NW 769

Failure of vendor to redeem—recovery of payments by vendee. An action to recover payments made on the purchase of a lot was not barred by a quitclaim deed given by the purchaser to one who had bought the land at a foreclosure sale, when it was given for the purpose of transferring possession during the period of redemption and in order to reduce the loss to the purchaser, after the vendor had failed to obtain a release of the lot from a mortgage and had no intention of redeeming after the mortgage was foreclosed.

Trammel v Kemler, 226-918; 285 NW 196

Rents during redemption period. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof during the redemption period to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

Rents and profits during redemption. The tenant of a mortgagor of real estate for the year for redemption from foreclosure sale who has paid his rent in advance is entitled to (1) all crops raised by him on the premises and matured by the time foreclosure deed is issued, and (2) all crop shares due him from his subtenants and likewise matured by the time said deed is issued.

Goldstein v Mundon, 202-381; 210 NW 444

Rental during redemption period. The rental of land for the statutory redemption period following sale on mortgage foreclosure is not exempt from attachment levy at the instance of creditors other than the foreclosing mortgagee.

Clouse v Reeves, 205-154; 217 NW 833

Receiver for rents which have been assigned. A receiver for the rents and profits which may accrue during the redemption period on mortgaged premises will not be appointed under a mortgage which simply pledges the possession during said period, when it is made to appear that the rents for said period have been contracted for and in good faith assigned prior to the commencement of foreclosure proceedings.

Keokuk Co. v Campbell, 205-414; 215 NW 960

Right to rents prior to sheriff's deed—exception to general rule. Ordinarily, the owner of mortgaged real estate is entitled to the rents until the issuance of the sheriff's deed on foreclosure sale; but where, substantially at the close of the redemption period, litigation arose over the right to redeem, and where it was agreed that the rights of the parties should remain in statu quo without the issuance of a deed until the litigation was determined, and where the court later decreed the ownership of the property as of the date when redemption expired, held that the rents accruing subsequent to the expiration of the period of redemption belonged to the parties so decreed to be the owners, even tho the sheriff's deed was executed long subsequent to said expiration.

Peoples Bk. v McCarthy, 209-1283; 228 NW 7

Effect on mortgage—pledge of rent. The redemption of land from foreclosure sale by a quitclaim grantee, who became such after said sale, does not extinguish the right of the mortgagee to enforce his decreed mortgage right to subject the rents and profits of the land to the satisfaction of his deficiency judgment.

Union Life v Eggers, 212-1355; 237 NW 240

Order as to rents—conclusiveness. In mortgage foreclosure proceedings, an unappealed order to the receiver to rent the property during the redemption period and to pay the taxes from the rentals is conclusive on all party defendants.

In re Angerer, 202-611; 210 NW 810

Right to proceeds—sheriff's deed holder. A second mortgagee who forecloses and, after redeeming from a first mortgage foreclosure, takes a sheriff's deed, is entitled to the proceeds of a fire insurance policy taken out by the mortgagor for the benefit of the first mortgagee; and this is true even tho the fire occurred during the period for redemption from the second mortgage.

In re Hackbart, 203-763; 210 NW 544; 53 ALR 895

Sale—delinquent taxes paid by mortgagee omitted from judgment—effect. A mortgagee who bids in the property at foreclosure sale, without protecting himself by adding thereto the delinquent taxes he had previously paid under a clause in the mortgage, may not, after he is appointed receiver during the redemption year, collect and apply the rents and profits to reimburse himself for such delinquent taxes. The owner when redeeming, by paying the judgment and costs, takes title free from the lien of such taxes.

Monroe v Busick, 225-791; 281 NW 486

Statutory redemption supplants equitable redemption. One who is duly made a party to mortgage foreclosure proceedings and against whom foreclosure decree is duly entered, may not resort to equity for an equitable redemption. Statutory redemption supplants equitable redemption under said circumstances.

John Hancock Ins. v Roeder, 221-1375; 268 NW 64

Stay or appeal forfeits right to redeem. By a stay of execution or an appeal from a foreclosure judgment, whether in the state or fed-

eral courts, a mortgagor thereafter forfeits his right of redemption.

Fitch v Cornelison, 224-1252; 278 NW 309

Unauthorized redemption by stranger to title—effect. One who redeems from a mortgage foreclosure sale on a false affidavit that he is a junior lienholder, and who receives a deed on the expiration of the year for redemption by the owner, will not be held to hold the land in trust for said owner who was in no manner impeded by said unauthorized redemption from making redemption, and who allowed his year for redemption to expire without taking any steps whatever to redeem. This is true because the conduct of said owner must be deemed either an acquiescence in the unauthorized redemption or inexcusable negligence.

Eliason v Stephens, 216-601; 246 NW 771

Vendor and purchaser both defaulting—equity directing performance, rescission, and redemption. In a vendee's action to rescind a real estate contract and promissory note, supreme court may invoke broad equitable power to protect both vendor and vendee by allowing vendor, after his mortgage on the real estate had been foreclosed, to negotiate vendee's note to provide funds with which to redeem, on the condition that he apply the proceeds to the mortgage indebtedness and then pay the remaining mortgage indebtedness so as to deliver a clear title to vendees at the time fixed in the contract, or suffer a cancellation of the real estate contract and note.

Fitchner v Walling, 225-8; 279 NW 417

Voluntary, unnnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt, and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

Who entitled—holder of barred lien. The owner of a judgment which has ceased to be a lien has no right to redeem from a sale under a mortgage lien prior to his judgment.

Johnson v Leese, 223-480; 273 NW 111

Wife joining to release dower forfeits redemption right. Redemption being purely statutory, a wife who joins in executing a note and mortgage for the sale purpose of relinquishing her dower interest, and being decreed not a debtor, is therefore not within the prescribed class of redemptioners.

Fitch v Cornelison, 224-1252; 278 NW 309

12377 Deficiency—general execution.

Deficiency judgment as basis for receivership. See under §12372 (VII)

Deficiency, two-year limitations. See under §11033.1 et seq.

Amount for redemption—taxes—deficiency judgment. The amount necessary to redeem land after sheriff's sale properly included the amount of taxes paid by the purchaser, but did not include the amount of the deficiency judgment, notwithstanding an agreement that the deficiency judgment should be included in the amount.

New York Ins. v Breen, 227-738; 289 NW 16

Deficiency after foreclosure—action to recover—lex loci contractus. In an action in this state on promissory notes executed in Nebraska, and secured by mortgage on Nebraska land, to recover the balance due after foreclosure of said mortgage, the substantive rights of the parties must be determined by the lex loci contractus.

Federal Trust v Nelson, 221-759; 266 NW 509

Foreclosure—deficiency judgment—purchaser from partition referee. Where the referee's deed and report of sale recite an assumption of a mortgage, a deficiency judgment may in a proper case be rendered against one who purchases from a referee in partition.

First JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Receiver—deficiency judgment in rem. A receiver may, on a proper showing, be appointed to collect pledged rents, and thereby discharge a deficiency judgment, whether the deficiency arises on a judgment in personam or in rem.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Receiver—insolvent mortgagor. A receiver to take charge of mortgage-pledged rents should be appointed when, after foreclosure and sale, a deficiency judgment remains against an insolvent mortgagor.

Prudential v Strong, 219-816; 259 NW 491

Rents and profits—mortgagor's right to enforce pledge. In mortgage foreclosure, strictly in rem and solely against the owner of the premises who bought subject to the mortgage, the mortgagor-debtor may intervene and, whether solvent or insolvent, enforce, in conjunction with the plaintiff, and through receivership proceedings, a mortgage-pledge of the rents, issues and profits, in order to discharge a deficiency judgment; and this is true notwithstanding the fact that the foreclosure

sale terminated the foreclosure judgment and the lien thereof.

American Bk. v McCammond, 213-957; 238 NW 77; 78 ALR 866

Rents during redemption period. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof, during the redemption period, to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

12378 Overplus.

Right of second mortgagee. A foreclosure decree covering a first and a second mortgage, which is in rem only, and which appoints a receiver with direction to pay the final balance of rents "on deficiency judgment", entitles the second mortgagee to such final balance of rents in preference to the then owner of the land, the first mortgagee being fully satisfied by the foreclosure sale.

Union Bank v Lyons, 206-441; 220 NW 43

12379 Junior incumbrancer entitled to assignment.

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting action. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Protection and loss of right of subrogee. When the holder of a certificate of sale under a junior mortgage foreclosure discharges (in order to protect his interest) an interest payment falling due on the senior mortgage, by taking an assignment of said interest installment, he thereby impliedly acquires a pro tanto interest in said senior mortgage, and may foreclose it accordingly against a subsequent purchaser for value of the land; but when said certificate holder simply pays such interest installment, he wholly loses his claim as to a subsequent purchaser who purchased for value, and without notice that the interest installment had been paid by the junior certificate holder.

Miller Bk. v Collis, 211-859; 234 NW 550

Right to pay interest on senior mortgage. The common-law right of a junior mortgagee, in order to protect his own lien, to pay the interest on a senior mortgage, and thereby to be subrogated by proper action to the rights of a senior mortgagee under said senior mortgage to the extent of said payment, has not been abrogated by the enactment of Ch. 501, C., '27.

Miller Bk. v Collis, 211-859; 234 NW 550
Jones v Knutson, 212-268; 234 NW 548

12380 Payment of other liens—rebate of interest.

Insurance to protect mortgagee—no rights under second policy. When a mortgagor complied with the terms of a mortgage and obtained insurance on property to protect the mortgagee, and then procured another policy, in the absence of a provision in the mortgage or in the second policy making its proceeds payable to the mortgagee, the mortgagee had no interest in funds paid into court as a compromise payment of a fire loss on the second policy. So an assignee from the mortgagee could not collect from the fund the amount paid in obtaining the assignment, as the assignee's rights could rise no higher than those of the assignor.

Calendro v Ins. Co., 227-829; 289 NW 485

12382 Foreclosure of title bond.

Discussion. See 1 ILB 53—Specific performance for the purchase price; 11 ILR 97—Specific performance and dower rights

Action against estate—evidence—sufficiency. The rule of law, that he who asks the specific performance of a contract must establish said contract by clear, satisfactory, and convincing evidence, is pre-eminently and with added force applicable to prayers for the specific performance of oral contracts against the estates of deceased persons. Alleged contract to convey property, in return for privilege of naming a child, held unproven.

Baker v Fowler, 215-1157; 247 NW 676

Avoidance of technical remand. The claim on appeal that an equitable action for the foreclosure of a contract for the sale of real estate is premature, and that judgment was rendered for the entire amount prior to its full maturity, will be disregarded on the de novo review on appeal, when it then appears that the entire amount is due and unpaid, and that no plea in abatement of the action, or other objection because of prematurity, was made in the trial court.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Breach justifying rescission. One who agrees to convey certain real estate, and tenders a deed in which he wrongfully reserves a portion of the land which he has contracted to convey, thereby breaches his contract and arms the other party with the right to rescind.

Pickett v Comstock, 209-968; 229 NW 249

Contracts enforceable — writing repudiated before fully signed. Specific performance of a contract of purchase of real estate will not

be decreed when the purchaser, prior to the actual signing of the contract by the actual titleholder, rejected the title except on a condition which the said owner never complied with after he did sign the writing.

Jones v Anderson, 213-788; 239 NW 522

Contracts enforceable—fatal indefiniteness. A written contract for the sale of real estate is not specifically enforceable when it is silent as to (1) the date of final settlement, (2) when possession is to be given, and (3) what kind of conveyance shall be executed.

Donovan v Murphy, 203-214; 212 NW 466

Performance of contract—waiver of time element—effect. When the vendee in a contract of sale of real estate waives the time element for the performance of the contract, he, in legal effect, arms the vendor with right to perform within a reasonable time, and to enforce specific performance if vendee then refuses to perform.

Andrew v Miller, 216-1378; 250 NW 711

Contract procured by misrepresentation. Where purchaser of grain elevator falsely represented to vendor that another person would furnish necessary financial assistance to perform the contract, and vendor relied thereon, held, purchaser was not entitled to specific performance of the contract.

Dunkelbarger v Brasted, (NOR); 212 NW 676

Contract of sale in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession, or (2) title, or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Deed to trustees—grantor's subsequent land contract invalid. An absolute warranty deed subject only to a trust created therein precludes the grantor from later contracting to sell the property to another and will support an action to quiet title in the trustees.

Beemer v Challas, 224-411; 276 NW 60

Delay in rescinding induced by promises of other party. When the purchaser's delay in rescinding a contract to buy real estate was induced by promises and representations of the vendor, there could be no complaint because rescission was not made within a reasonable time.

Trammel v Kemler, 226-918; 285 NW 196

Failure of vendor to redeem—recovery of payments by vendee. An action to recover payments made on the purchase of a lot was not barred by a quitclaim deed given by the purchaser to one who had bought the land at a foreclosure sale, when it was given for the purpose of transferring possession during the period of redemption and in order to reduce the loss to the purchaser, after the vendor had failed to obtain a release of the lot from a mortgage and had no intention of redeeming after the mortgage was foreclosed.

Trammel v Kemler, 226-918; 285 NW 196

Foreclosure. A contract for the purchase of real estate may be foreclosed upon breach of the contract by vendee.

Montgomery v Beller, 207-278; 222 NW 846

Foreclosure for installments. A vendor of real estate in foreclosure of the contract is not entitled to judgment and special execution except for installments due and unpaid, when the decree is rendered, (the contract containing no acceleration clause) but is entitled to have the court retain jurisdiction of the proceeding in order to protect him by the application of any surplus to future maturing installments.

Witmer v Fitzgerald, 209-997; 229 NW 239

Liability of assignee. One who receives, from a purchaser, an assignment of a contract for a deed, which assignment binds the said assignee to perform fully the assigned contract, must be deemed to have ratified the terms of said assignment and be bound thereby when, henceforth, he treats said land as his land and said contract as his obligation, even tho the assignee did not sign said instrument of assignment.

Gables v Kleaveland, 220-1280; 263 NW 339

Nonformal tender of deed. A contract of sale of lands may be foreclosed without any prior formal tender of a deed when the contract calls for a deed only when the purchase price is paid; and especially is the absence of such tender inconsequential when tender of deed is made in the pleadings.

Bortz v Wright, 206-698; 214 NW 552

Nontender of abstract and deed. In an action against a defaulting vendee to foreclose a contract of sale of real estate for matured and unpaid installments, no tender of abstract and deed is necessary as a condition precedent to maintaining the action when the right to said abstract and deed has not yet matured under the contract.

Dimon v Wright, 206-693; 214 NW 673

Payments induced by vendor not waiver of vendor's default. Payments made by the purchaser of land, after the vendor had defaulted by failing to obtain a release of a mortgage on the land, did not waive the default when such continued payments were induced by the

vendor's promises to perform and when the purchaser was not bound to require timely performance by the vendor.

Trammel v Kemler, 226-918; 285 NW 196

Power of city to acquire property—burden of proof. A municipality as defendant in an action for specific performance of its alleged contract for the purchase of land, has the burden to establish its plea that its attempted purchase of said land was for a purpose not authorized by law. Record reviewed and held said burden had not been met.

Golf View Co. v Sioux City, 222-433; 269 NW 451

Remedies of purchaser—ceasing payments when mortgage release not obtained by vendor. Where the vendor of property agreed to use payments received to obtain the release of a mortgage on the property, and the amount unpaid was less than the amount of the mortgage, the failure to obtain the release was a default by the vendor, and even tho the vendor claimed that in obtaining the release time was not of the essence, the purchaser was entitled to cease payments, since he was not protected as he would have been had the amount unpaid on the price been greater than the amount of the mortgage.

Trammel v Kemler, 226-918; 285 NW 196

Real estate and personalty distinguished. Principle reaffirmed that upon the sale of land through the medium of a contract for a deed, the purchaser acquires "land" while the vendor acquires "personal property".

Wood v Schwartz, 212-462; 236 NW 491

Recovery of payment by defaulting purchaser. A defaulting purchaser may not recover payment made by him to the nondefaulting vendor.

Dimon v Wright, 206-693; 214 NW 673

Rents—agreed lien on—transfers—validity. A contract for a deed, tho specifically providing that the vendor shall have a first lien on the accruing rents of the premises for all sums payable under the contract, will be construed as creating no lien on such rents until from and after the filing of a petition for foreclosure and for the appointment of a receiver for said rents. It follows that all good-faith transfers by the purchaser and prior to the attaching of said lien—not extending, of course, beyond the period of redemption—are valid and, consequently, place such transferred rents beyond the reach of the vendor.

Junkin v McClain, 221-1084; 265 NW 362

Requirements for relief. Specific performance of a contract to sell real estate is not a matter of absolute right, but is an equitable remedy which may be granted by the court in the exercise of sound discretion to one who has performed all the conditions of the contract, or is ready, willing, and able to perform, and has tendered performance and kept the tender good pending the litigation.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

Rights and liabilities—destruction of buildings—justifiable refusal to perform. A purchaser of real estate may validly decline to specifically perform his contract of purchase, even tho he be deemed the holder of the equitable title, (1) when the buildings on the land were totally destroyed prior to the contract day for performance, and (2) when the vendor had contracted to deliver such buildings to the purchaser "in as good condition as they are at the date of the contract."

Rhomberg v Zapf, 201-928; 208 NW 276; 46 ALR 1124

Specific performance—in personam (?) or in rem (?). Principle recognized that an action for the specific performance of a contract, for the sale of real estate, is an action in personam—at least when service of notice of the action is made on the defendant in this state.

Dunlop v Bank, 222-887; 270 NW 362

Specific performance of real estate sale contract. In an action to recover rent a counterclaim for specific performance of a contract to sell the property was properly prepared when it contained allegations that the purchaser was at that time, and at all times had been, ready, willing, and able to perform, and had made a tender of performance which was refused, and a copy of the letter constituting such tender was attached to the counterclaim.

First Tr. JSL Bank v Resh, 226-780; 285 NW 192

Specific performance—real estate purchase contract. One who had agreed to obtain a loan to be used for the purchase of land did not make a sufficient showing that he was ready, willing, and able to perform the alleged contract to buy the land so as to entitle him to specific performance when it was never shown that he had the purchase money, when an attempted loan of the money was never completed, when there was no application on file for the loan at the time of trial, and when it was not shown that the loan would have been granted had the application been made.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

Specific performance — good intention not sufficient. Good intention alone is not the equivalent of the ability to perform, which is necessary to entitle the purchaser to specific performance of a contract to convey real estate.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

Damages in lieu of specific performance. A party who has failed to establish his right to specific performance may not complain that the court of equity refused to allow damages in lieu of specific performance and relegated him to an action at law as to such damages.

Dunlop v Wever, 209-590; 228 NW 562

Tender of abstract. The plea, in an action to foreclose a land sale contract, that the vendor has made no tender of abstract of title will be disregarded (the necessity for such tender being assumed) when the record shows a possibly defective tender at the proper time, and when the vendor tendered full performance in his pleadings.

Bortz v Wright, 206-698; 214 NW 552

Tender of conveyance. Tender of a deed is not a condition precedent to the beginning of an equitable action by a vendor to enforce a contract for the sale of land. A tender in the petition is all-sufficient.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Tender of performance. A vendor of real estate is under no obligation, prior to instituting an action to foreclose the contract, to tender performance, in order to place the vendee in default, when said vendee is already in defiant default.

Bortz v Wright, 206-698; 214 NW 552

Title—sufficiency of showing. A vendor in an action to foreclose a land sale contract need not do more than show prima facie title in himself. (See under §12372.)

Bortz v Wright, 206-698; 214 NW 552

Unjust enrichment—vendor not conveying property but retaining payments. Where the purchaser of land was at no time delinquent in his payments or other conditions to be performed on his part, it would be unjust and inequitable to allow the vendor to retain the payments when, through his own fault, he failed to perform his part of the contract.

Trammel v Kemler, 226-918; 285 NW 196

Vendor's agreement with mortgagee adjudicated in foreclosure—effect on purchaser. When the mortgagor of a tract of land had an agreement with the mortgagee to release a lot, which was part of the tract, after the buyer of that lot had paid a certain part of the price, and in an action to foreclose the mortgage, the agreement was adjudicated adversely to the mortgagor who had not obtained the release, in a later action to recover payments the buyer could not be affected by such agreement to which he was not a party.

Trammel v Kemler, 226-918; 285 NW 196

When not necessary to plead. The purchaser of real estate when defendant in an action for the specific performance of the contract need not plead for a recovery of the purchase money paid by him.

Benedict v Nielsen, 204-1373; 215 NW 658

12383 Vendee deemed mortgagor.

Action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho plaintiff also prays for the cancellation of the promissory notes—a proceeding which would be transitory if separately brought.

Eckhardt v Trust Co., 218-983; 249 NW 244; 252 NW 373

Contract for deed as mortgage. Contract for deed, and attendant circumstances, and interpretation placed on such contract by the parties, reviewed, and held actually to convey the equitable title to one party and to leave the legal title in the other as security for the purchase price.

First Tr. JSL Bk. v Galagan, 220-173; 261 NW 920

Enforcement of vendee's lien — burden of proof. A vendee who rescinds, and seeks to establish a lien on the land for his proper advancements, need not show that a subsequent titleholder had knowledge of his (vendee's) rights. The subsequent titleholder must show his want of knowledge.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Remedies of purchaser. A purchaser of land who rescinds, and obtains against the vendor judgment at law for the amount advanced as purchase price and for other proper expenditures, does not thereby waive his right to bring an action in equity to have the judgment declared a lien on the land.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Title and status of parties. Principles reaffirmed that under a contract for a deed:

1. The purchaser acquires the full equitable title to the land, while the vendor continues to hold the legal title as security for the performance of the contract, and
2. That, for the purpose of foreclosure, the purchaser will be deemed a mortgagor and the vendor a mortgagee.

Junkin v McClain, 221-1084; 265 NW 362

Vendee's right to lien. A vendee of land is entitled in equity, on proper rescission by him of the contract of purchase, to a lien on the land (1) for the amount of the purchase price advanced by him, (2) for the reasonable value of all proper improvements made on the land by him, and (3) for any other proper expenditure suffered by him and growing out

of the contract—a right enforceable against all parties who take rights in the land with knowledge, actual or constructive, of vendee's rights.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Warranty deed as mortgage—rule of evidence. On the issue whether a warranty deed was in fact a mortgage, the pleader must prove, by clear and satisfactory evidence (1) that the consideration for said deed was a definite and existing debt, and (2) that said debt was not extinguished by the deed. Evidence held signally insufficient to satisfy said rule.

Clark v Chapman, 213-737; 239 NW 797

RENTALS AND RECEIVERSHIP

12383.1 Pledge of rents—priority.

Receivers in mortgage foreclosures generally. See under §12372 (VII)

Rents and profits, mortgage foreclosures. See under §12372 (III)

Agreed lien on rents—transfers—validity. A contract for a deed, tho specifically providing that the vendor shall have a first lien on the accruing rents of the premises for all sums payable under the contract, will be construed as creating no lien on such rents until from and after the filing of a petition for foreclosure and for the appointment of a receiver for said rents. It follows that all good-faith transfers by the purchaser and prior to the attaching of said lien—not extending, of course, beyond the period of redemption—are valid and, consequently, place such transferred rents beyond the reach of the vendor.

Junkin v McClain, 221-1084; 265 NW 362

Holding under prior statute. When land is subject to several mortgages, each of which pledges the rents and profits to the payment of the debt secured and provides for a receiver, the superior right to said rents and profits vests in the mortgagee who first files his petition in foreclosure and first prays for a receiver.

First Tr. JSL Bk. v Smith, 219-658; 259 NW 192

Naked pledge of rents—finality of matured and perfected lien. A second mortgagee who, under a naked pledge of rents, fully matures a chattel mortgage lien on existing rents and a right to future-accruing rents, by first commencing foreclosure and praying for a receiver, even tho the first mortgagee is not made a party defendant, is not affected by the later enacted statute which reverses the order of priority under such pledges.

Reason: Said statute is specifically made nonapplicable to pending litigation.

First JSL Bank v Armstrong, 220-416; 262 NW 815

Receiver for rents which have been assigned. A receiver for the rents and profits which may accrue during the redemption period on mortgaged premises will not be appointed under a mortgage which simply pledges the possession during said period, when it is made to appear that the rents for said period have been contracted for and in good faith assigned prior to the commencement of foreclosure proceedings.

Keokuk Co. v Campbell, 205-414; 215 NW 960

Second mortgagees—nonestoppel to perfect pledge of rents. The fact that a second mortgage provides, following the description of the mortgaged lands, that it is "subject to" a described first mortgage does not estop said second mortgagee (1) from availing himself of that part of his mortgage which contains a naked pledge of the rents, (2) from first perfecting and maturing, by proper foreclosure proceedings, his potential rights under said pledge, and (3) from thereby acquiring a right in and to said rents superior to the potential rights of the first mortgagee under a like pledge, in his mortgage, of said rents.

First JSL Bank v Armstrong, 220-416; 262 NW 815

Vested rights—right to rents in mortgage foreclosure. The statutory provision, which provides, in substance, that a pledge in a mortgage of the rents of the land shall carry the same priority of right over said rents as the mortgage carries over the land itself, cannot constitutionally apply to a mortgagee who, prior to the enactment of the statute, had fully acquired priority of right to the rents under the law then prevailing, to wit, the law which granted priority to the mortgagee who first filed petition for foreclosure and first prayed for a receiver.

First Tr. JSL Bank v Smith, 219-658; 259 NW 192

Chattel clause in realty mortgage—priority over subsequent assignee of rents and profits. A clause in realty mortgage duly recorded and indexed, providing that mortgagor conveyed, in addition to realty, "also all the rents, issues, uses, profits and income therefrom, and all the crops raised thereon from the date of this agreement until the terms of this instrument are complied with and fulfilled", created a valid chattel mortgage, effective from date of execution of the mortgage and not from date of filing the foreclosure petition in which appointment of receiver is asked, and subsequent assignee of property, described in instrument, took subject to lien provided in such chattel mortgage clause.

Bankers Life v Garlock, 227-1335; 291 NW 536

Landlord mortgagor's assignment of lease—no effect on chattel clause of realty mortgage. A lien on rents and profits created by chattel mortgage clause in realty mortgage duly re-

corded and indexed was not invalid as to mortgagor's share of crops produced under 2-year lease, because such crops did not belong to mortgagor at time they came into existence, and, the landlord having assigned the lease, the subsequent assignee of property described in mortgage would take subject to the lien provided therein.

Bankers Life v Garlock, 227-1335; 291 NW 536

Chattel mortgage clause—effect on landlord's agreement to rent to third party. Where a valid chattel mortgage clause is contained in a realty mortgage duly recorded and indexed, providing that mortgagor conveyed, in addition to realty, all the rents, issues, uses, profits and income therefrom and all crops raised thereon from date of instrument until payment of debt, an agreement by mortgagor to rent land to a third party was subject to such chattel mortgage clause, as against contention that agreement to rent was not the same as rents, issues, income, profit, or crops.

Bankers Life v Garlock, 227-1335; 291 NW 536

12383.2 Preference in receivership—application of rents.

Atty. Gen. Opinion. See AG Op Jan. 24, '40

Pledge of rents—what constitutes. A provision in a mortgage to the effect that, in case of foreclosure, a receiver may be appointed to collect the rents and to apply the same to the payment of taxes and principal and interest constitutes a pledge of the rents.

Wilson v Tolles, 210-1218; 229 NW 724

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

CHAPTER 526

SATISFACTION OF MORTGAGES

12384 Dual methods.

Assignment to titleholder — irrevocable merger. The legal titleholder of real estate who acquires or pays off a first and a second mortgage on the land, and records releases thereof with the deliberate intent thereby to show a complete satisfaction of said liens, and does so with the knowledge (which he has negligently forgotten) that there was a third mortgage outstanding on the land, will not, in the foreclosure of said third mortgage, be subrogated to the rights of said former first and second mortgagees; especially is this true when said titleholder had sold said third mortgage to the foreclosing plaintiff under the implied representation that it was a first mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

Change in name of mortgagee—presumption. A recital in a formal release of a mortgage, to the effect that the mortgagee has by proper amendment to its articles of incorporation, changed its name to the name indicated by the one executing the release, will be deemed presumptively true.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Conditional sale contract not mortgage. An ordinary conditional sale contract — one in which the seller retains title until the purchase price is fully paid—is not a "mortgage" within the meaning of this and the following section.

Stull v Davidson, 211-239; 233 NW 114

Insurance obtained by mortgagee—assignment to insurer when policy voided by insured—mortgage not extinguished. When an insurance company, in addition to insuring property mortgaged to a certain mortgagee, agreed that if any property owner should by any act void the insurance as to himself, the insurance company would purchase from the mortgagee the note and mortgage on the property and obtain an assignment of the mortgagee's rights against the property owner, the company's payment of the amount of a note and mortgage to the mortgagee to obtain an assignment according to the agreement did not extinguish the note and mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

Marginal release—presumption. A marginal release of a mortgage, executed by the agent of the holder, constitutes prima facie evidence of payment and discharge of both the note and the mortgage securing the note.

Larson v Church, 213-930; 239 NW 921

Mortgage—purchase by wife who joined in—effect. A wife who joins with her husband in a mortgage on the husband's land, but who assumes no obligation, contractual or otherwise, to pay subsequently accruing taxes on the land, may, after the land has gone to tax deed to a stranger without collusion with her

and while she was not in possession, purchase the land of the tax deed holder and acquire his title, viz, a fee simple indefeasible title—a title free from the lien of said mortgage.

Wood v Schwartz, 212-462; 236 NW 491

Power of corporate president. Authority granted to the president of a corporation in articles of incorporation to "release and satisfy" mortgages, embraces the power in the president to subordinate a mortgage owned by the corporation to another mortgage not owned by it, when such subordination is to the financial advantage of the corporation.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Satisfaction under mistake of law—effect. A mortgagee who, without being mistaken as to any matter of fact, or the victim of any fraud, accepts from the mortgagor a conveyance of the mortgaged land in full satisfaction of the mortgaged debt, and thereupon releases and satisfies his mortgage of record,—and so acts solely on the mistaken belief that a discharge of the mortgagor in bankruptcy ipso facto worked a cancellation of a junior judgment against the mortgagor and the lien of said judgment against the mortgaged land,—may not, after discovering his mistake as to the legal effect of said discharge in bankruptcy, successfully ask a court of equity to re-establish his canceled mortgage.

Connecticut Ins. v Endorf, 220-1301; 263 NW 284

Release and satisfaction — assumed purchase by agent — effect. Where a note and mortgage on land were executed by a principal to his agent and sold by the agent in order to acquire funds with which to discharge a pre-existing note and mortgage on the same land, and where the agent embezzled the funds so acquired, the subsequent act of the agent in assuming to purchase said pre-existing note and mortgage by taking from the holder (who acted in good faith) both an assignment in blank, and also a satisfaction piece, cannot be deemed a satisfaction and discharge of said pre-existing note and mortgage (1) when no satisfaction was, in fact, intended, (2) when the agent wholly discarded the satisfaction piece and consummated the assumed purchase by means of funds belonging solely to an innocent and good faith re-transferee, and by forthwith delivering said pre-existing note and mortgage to said re-transferee together with said blank assignment properly made out in the latter's favor; and it is immaterial that the re-transferee took said note and mortgage when they were overdue.

Mandel v Siverly, 213-109; 238 NW 596

Release of mortgage without court authorization. A guardian has no legal right, except under court authorization, to release, without payment, a court-authorized, real estate mortgage executed to, and held by, him as such guardian; and subsequent purchasers of the land are chargeable with knowledge of the statute invalidating such release. (§12773, C., '31.)

Randell v Fellers, 218-1005; 252 NW 787

Subordination of first mortgage by release. A first mortgagee of record who, on the maturity of his mortgage, renews the same by accepting a new note and mortgage, and thereupon unconditionally enters of record a release of the original mortgage, thereby subordinates his new mortgage to an existing duly recorded second mortgage of which he had no actual knowledge—it appearing that the promissory notes secured by the latter mortgage were acquired by the holders thereof (1) for value, (2) after the aforesaid release was entered, (3) before said notes were due, (4) without notice of any prior equity, and (5) in the bona fide belief that said latter mortgage was a first lien.

Long v Taggart, 214-941; 243 NW 200

12387 Entry of foreclosure.

Atty. Gen. Opinion. See '32 AG Op 222

CHAPTER 527

FORFEITURE OF REAL ESTATE CONTRACTS

12389 Conditions prescribed.

Discussion. See 21 ILR 158—Caveat emptor

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I SCOPE OF SECTION IN GENERAL

Contract—foreclosure. A contract for the purchase of real estate may be foreclosed upon breach of the contract by vendee.

Montgomery v Beller, 207-278; 222 NW 846

Default on payments — nonright to forfeit contract. A contract for a deed is not legally forfeitable on notice by the vendor on the ground that the purchaser is in default on his contract payments, when, at the time of the attempted forfeiture, the purchaser, consequent on the vendor's fraudulent representations, has a valid unpaid claim for damages against the vendor in excess of the amount of said defaulted payments.

Holman v Wahner, 221-1318; 268 NW 168

Defaulting vendor. A vendor of land may not forfeit the contract at a time when he himself is in default.

Keifer v Dreier, 200-798; 205 NW 472

Effect on surety. The surety on a promissory note given as part of the contract price of land, ceases, as a matter of law, to be liable thereon to the original payee-vendor whenever the latter legally forfeits the contract.

Smith v Tullis, 219-712; 259 NW 202

Justifiable forfeiture. Record held legally to justify the forfeiture of contract of purchase of real estate.

Darragh v Knolk, 218-686; 254 NW 22

Nonright of defaulting purchaser to recover amount paid. Purchaser in default, when vendor, failing to apply proper credits on price of realty, serves notice of forfeiture, cannot recover amount paid.

Martin v Harvey, (NOR); 245 NW 432

II VENDOR AND PURCHASER GENERALLY

(a) REQUISITES AND VALIDITY OF CONTRACT

Absence of provision for forfeiture—effect. A contract for a deed is not legally forfeitable on notice when the contract makes no provision for forfeiture, and fails to provide that time is the essence of the contract.

Holman v Wahner, 221-1318; 268 NW 168

Exchange of property — consideration. Instruments duly executed in exchange of property cannot be impeached without convincing proof of fraud, and values of exchanged properties are liberally regarded in determining adequacy of consideration.

Ragan v Lehman, (NOR); 216 NW 717

Exchange of property—fraudulent representations — unavailing inspection — effect. The plea that the party complaining of false and fraudulent representations in an exchange of land had inspected the land prior to accepting it, and had full opportunity to learn all relevant facts, must necessarily fall when it is shown that an inspection at said time would not reveal the falsity of the particular representations relied on.

Baumhover v Gerken, 200-551; 203 NW 15

Exchange of property—fraud—nonwaiver by exercising acts of ownership. Fraud in an exchange of properties is not waived by the victim of the fraud by exercising acts of ownership over the land received, at a time when he had not fully discovered the fraud practiced on him, and at a time when the other party was asserting that the contract was not fraudulent, and that the deal, if not satisfactory, would be mutually rescinded.

Baumhover v Gerken, 200-551; 203 NW 15

Mutuality—evidence. Evidence relative to an exchange of lands reviewed, and held to show that there was no meeting of the minds, and therefore no contract.

Cloud v Burnett, 201-733; 206 NW 283

Nonforfeitable contracts. A contract of sale of real estate located in this state, containing no provision for the forfeiture of the contract, and not stipulating that time is the essence of the contract, is not subject to statutory forfeiture.

Lake v Bernstein, 215-777; 246 NW 790; 102 ALR 846

Parol contract—nature of proof. A parol contract for the purchase of real estate may not be deemed established unless the sustaining testimony is clear, definite, unequivocal, satisfactory, and convincing, nor unless the acts which are claimed to have been done under such contract are clearly referable to such contract. Evidence held insufficient to meet this rule of law.

Lane v Bank, 209-437; 227 NW 911

Proposal and acceptance—belated and unallowable withdrawal. An offerer may not withdraw his offer after having received an acceptance thereof, even tho the offerer imposed as a condition that the deal should be closed "at once", it appearing that the parties manifestly intended that "at once" meant a reasonable time, in view of the circumstances.

Harris v Bills, 203-1034; 213 NW 929

Proposal and acceptance—imposing implied law condition. An offer by mail of certain lands and of a certain sum of money in exchange for certain corporate stock, followed by a timely acceptance by mail if the land was free of incumbrance, constitutes a binding contract, as the condition imposed exactly what the law would impose; and it is quite immaterial that, in the subsequent dealings between the parties, the party ultimately denying the existence of a contract injected conditions to which the other party did not object.

Harris v Bills, 203-1034; 213 NW 929

II VENDOR AND PURCHASER GENERALLY—continued

(a) REQUISITES AND VALIDITY OF CONTRACT—concluded

Requisites of contract — indispensable elements. An obligation on the part of the owner of real estate to sell, and of another party to buy, are all-essential elements of an executory contract of purchase of said land. Writing reviewed and held to constitute a mere option to buy which became a nullity on failure of optionee to exercise the option.

Burmeister v Council Bluffs Co., 222-66; 268 NW 188

Statute of frauds—inapplicability—part performance. An oral contract for the sale of land is not within the statute of frauds when the owner of the land executes and delivers to the buyer a deed of conveyance even tho said deed is blank as to grantee.

Gilbert v Plowman, 218-1345; 256 NW 746

(b) CONSTRUCTION AND OPERATION OF CONTRACT

Discussion. See 3 ILB 168—Conversion in option contracts

Agreed lien on rents—transfers—validity. A contract for a deed, tho specifically providing that the vendor shall have a first lien on the accruing rents of the premises for all sums payable under the contract, will be construed as creating no lien on such rents until from and after the filing of a petition for foreclosure and for the appointment of a receiver for said rents. It follows that all good-faith transfers by the purchaser and prior to the attaching of said lien—not extending, of course, beyond the period of redemption—are valid and, consequently, place such transferred rents beyond the reach of the vendor.

Junkin v McClain, 221-1084; 265 NW 362

Assumption of mortgage—scope and effect. A purchaser of land who contracts, both in his contract of purchase and in the deed of conveyance accepted by him, to assume and agree to pay an existing mortgage on the land, thereby becomes the principal debtor on such obligation and as to all prior parties obligated thereon.

Grimes v Kelloway, 204-1220; 216 NW 953

Change in form of debt guaranteed—scope of guaranty. A vendor who, upon assigning his contract for the sale of land, guarantees the payment of the amount due on the contract, must be held to guarantee the payment of a mortgage for said amount subsequently accepted by the assignee, when the converting of the amount due on the contract into a mortgage was of the very essence of the contract of sale.

Buser v Land Co., 211-659; 234 NW 241

Construction against party using words. Principle reaffirmed that, speaking generally, a contract will be construed most strongly against the author of the words employed in the contract.

Buser v Land Co., 211-659; 234 NW 241

Contract for deed as mortgage. Contract for deed, and attendant circumstances, and interpretation placed on such contract by the parties, reviewed, and held actually to convey the equitable title to one party and to leave the legal title in the other as security for the purchase price.

First Tr. Bank v Galagan, 220-173; 261 NW 920

Contract of sale in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession, or (2) title, or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Forfeitable contracts. A time-of-the-essence contract of purchase which provides that it shall be "null and void" on failure to perform its conditions is forfeitable under the statute, no express provision for forfeiture being necessary.

Westerman v Raid, 203-1270; 212 NW 134

Forfeiture of payments—effect. A provision in a contract of sale of land that, in case of default by the purchaser, the initial payment shall be retained by the vendor as liquidated damages, is no impediment to the foreclosure of the contract.

Ettinger v Malcolm, 208-311; 223 NW 247

Forfeiture notwithstanding supplemental contracts. That part of a land sale contract which provides for the forfeiture of the contract, in case of nonpayment of stipulated sums applies to supplemental contracts (1) which simply extend the time of payments, or (2) which simply make a new division and new time of payment of former agreed payments, and in addition specifically provide that the provisions of the original contract shall not be deemed otherwise changed.

Schwab v Roberts, 220-958; 263 NW 19

"Fractional" forty—scope. A contract to convey the "fractional NW¼ of the SE¼" embraces a tract carved therefrom for highway purposes and later redeeded by the county to the vendor.

Pickett v Comstock, 209-968; 229 NW 249

Future (?) or past (?) damages. A bond of indemnity conditioned to hold the obligee

harmless from any damages which he may suffer because of failure of title contemplates future damage only.

Duke v Tyler, 209-1345; 230 NW 319

Merger of contract and deed. One who acquires a warranty deed to land, and also an assignment of the vendor's interest in an existing bond-for-a-deed contract covering the same land, does not thereby merge the said contract into the deed, and may proceed to foreclose said contract, even tho he has also acquired, for the purpose of security, an imperfect assignment of the purchaser's interest in said contract.

Harrington v Feddersen, 208-564; 226 NW 110; 66 ALR 59

Merger of general into specific. A contract of sale, couched in general terms, and contemplating and providing for a definite and specific contract at a later date, is necessarily supplanted by the execution and delivery of such later contract.

Westerman v Raid, 203-1270; 212 NW 134

Merging unpaid payments into mortgage. Provision in contract of purchase reviewed, and held simply to contemplate the merging of unpaid payments into a mortgage, and not to authorize the vendor to execute a mortgage on the property sold.

Ely Bank v Graham, 201-840; 208 NW 312

Nonmutuality. Record reviewed, and held that a contract was not nonmutual because of the existence of a mortgage on the land.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Noninvalidating uncertainty. An agreement by a vendor (especially when prepared by himself) to accept, under named conditions, a second mortgage for the balance due him, in order to enable the purchaser to raise building funds by a first mortgage in an unnamed amount, will not be construed as void for uncertainty in the amount of the first mortgage when the contract as a whole and the attending circumstances fairly and reasonably indicate the approximate amount contemplated by the parties.

Buser v Land Co., 211-659; 234 NW 241

Part of single ownership conveyed—implied easement—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

Boundary line—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential, to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Oral sale with part payment. An oral agreement to sell land, accompanied at the time by part payment, constitutes a "sale," within the terms of a lease which provides that, in case of a sale of the premises, the tenancy may be terminated.

Luse v Elliott, 204-378; 213 NW 410

Purchase from nontitleholder — equitable ownership. A contract purchaser of real estate becomes the equitable owner, and his actual possession is notice to the world of his rights, even tho he purchases from a person who has no title whatever, but who assumed equitable ownership, and who later had such assumption ratified and confirmed in himself by a contract of purchase and by a deed of conveyance from the legal titleholder.

Ely Bank v Graham, 201-840; 208 NW 312

Purchase price—who entitled to payment. The act of successive owners of land in conveying it subject to a prior and outstanding contract to sell, executed by a former grantor-owner, carries the right to each grantee to receive the amount due on said outstanding contract, even tho said contract was not formally delivered to him, in preference to one who bases his right on an assignment of said contract by one who had parted with all interest in the land.

Jansen v Clark, 201-333; 207 NW 338

Real estate and personalty distinguished. Principle reaffirmed that, upon the sale of land through the medium of a contract for a deed, the purchaser acquires "land" while the vendor acquires "personal property".

Wood v Schwartz, 212-462; 236 NW 491

Rights to possession and rents. A grantee of land who takes possession under his deed at a time when the purchaser under an outstanding, unforfeited bond-for-a-deed contract of sale of the land is entitled to possession, cannot be deemed a "mortgagee in possession,"

II VENDOR AND PURCHASER GENERALLY—continued

(b) CONSTRUCTION AND OPERATION OF CONTRACT —concluded

and must account to said purchaser or to his grantees for rents.

Harrington v Feddersen, 208-564; 226 NW 110; 660 ALR 59

Right to lien—vendee's contract to keep in repair. An executory contract by a vendee of premises that he will keep the premises in reasonably good repair cannot be construed as authorizing the vendee to install entirely new bathroom equipment, and to bind the vendor's interest therefor.

Darragh v Knolk, 218-686; 254 NW 22

Time of performance—relative rights of parties. The vendor in a contract specifically requiring the vendee to pay first before getting the deed need only get himself in readiness to perform, and need make no tender until payment is made or offered by vendee, and the vendor is not in default until this is done.

Foft v Page, 215-387; 245 NW 312

Title and status of parties. Principles reaffirmed that under a contract for a deed:

1. The purchaser acquires the full equitable title to the land, while the vendor continues to hold the legal title as security for the performance of the contract, and
2. That, for the purpose of foreclosure, the purchaser will be deemed a mortgagor and the vendor a mortgagee.

Junkin v McClain, 221-1084; 265 NW 362

(c) MODIFICATION OR RESCISSION OF CONTRACT

Amendments—conforming pleading to proof. One who pleads fraud in the inception of a contract and prays for rescission on that ground may, at any proper time, and in order to conform the pleadings to the proof, amend by pleading that no contract ever existed, because of the failure of the minds of the parties to meet on the terms of the contract.

Cloud v Burnett, 201-733; 206 NW 283

Breach by vendor—effect. A purchaser of real estate may not rescind for breach of contract by the vendor unless the vendor has abandoned the contract, or his acts and conduct are such as to show that he intends to be no longer bound by the contract.

Shupe v Thede, 205-1019; 218 NW 611

Essential requirements. A vendee may not rescind a contract of sale of land and recover the payments made when he not only fails to tender performance, but is unable to perform, and makes no effort to restore the status quo.

Messenbrink v Bliesman, 204-223; 215 NW 232

Forfeiture (?) or rescission (?). A contract which provides for the forfeiture of the entire amount paid by a purchaser on a land deal will be enforced—even tho forfeitures are in disfavor in the law—when the contract and the attending facts and circumstances show that a forfeiture was intended, and not a rescission of the original contract of purchase.

Converse v Elliott, 200-1023; 205 NW 867

Forfeitable contracts. A time-of-the-essence contract of purchase which provides that it shall be "null and void" on failure to perform its conditions is forfeitable under the statute (§12389 et seq., C., '24), no express provision for forfeiture being necessary.

Westerman v Raid, 203-1270; 212 NW 134

Forfeiture—tenable and untenable grounds. A forfeiture of a contract of sale on one valid ground is effective even if the vendor assigns other untenable grounds.

Westerman v Raid, 203-1270; 212 NW 134

Forfeiture by assignee of contract. The assignee of a contract of sale of real estate has the same right to forfeit the contract as the assignor had.

Moore v Elliott, 213-374; 239 NW 32

Innocent false representations. False representations, when material and justifiably relied on, furnish ample grounds for an equitable decree of rescission, even tho it be conceded that the representations were innocently made.

Cahail v Langman, 204-1011; 216 NW 765

Intervening liens—protection of vendor. Rescission may be granted notwithstanding the fact that judgments have been rendered in the meantime against the vendee, when the court adequately protects the vendor against harm therefrom.

Dickerson v Morse, 203-480; 212 NW 933

Justifiable refusal. The rescission of an executed contract of purchase of real estate is properly refused when it is made to appear that the prayer for rescission was made for the first time after the purchaser had been in unrestricted possession and control of the land for some three years, with knowledge of the fraud pleaded, or with the means to know of such fraud, and after the land had very materially decreased in value.

Hogan v Ross, 200-519; 205 NW 208

Mental incompetency of purchaser. Evidence reviewed and held insufficient to justify the rescission and cancellation of a contract of purchase of real estate on the ground of the mental incompetency of the purchaser.

Ridenour v Jamison, 218-277; 254 NW 802

Realty exchange — mental incompetency — duty to restore status quo. Where one of the parties to an exchange contract of realty is mentally incompetent, such contract is only voidable, not void, being valid until disaffirmed, and it can only be disaffirmed as a whole, not

in part, and when party seeks to avoid such contract it is necessary to restore, or offer to restore, status quo.

In re Gensicke, (NOR); 237 NW 333

Mutual mistake. Mutual mistake of a vendor and a purchaser of land as to the description thereof, its quantity, location, and title, furnishes ample grounds for an equitable decree of rescission, and it is no answer that the vendor offers the purchaser something else "just as good."

Lorenzen v Langman, 204-1096; 216 NW 768

Mutual rescission by both defaulting parties—recovery of consideration. Mutual default of a vendor and a purchaser in the performance of a contract of purchase is no impediment to a mutual rescission; and the purchase price already advanced may be recovered, in the absence of an agreement to the contrary. Evidence held insufficient to show such mutual rescission.

McLain v Smith, 201-89; 202 NW 239

Novation — evidence — sufficiency. Evidence held ample to establish a novation under a contract for the purchase of real estate.

Montgomery v Beller, 207-278; 222 NW 846

Offer to reconvey at discount—effect. After failure to complete abstracts because of attorney's objections thereto, purchaser's offer to reconvey property to vendor at stated discount below original purchase price held not a rescission of contract.

Gripp v Scherer, (NOR); 212 NW 113

Possession under lease — effect. The fact that a contracting purchaser of land was in possession of the land under a lease with the consent of the vendor, held, under recited facts, not to affect said purchaser's right to rescind the contract of purchase.

Dolliver v Elmer, 220-348; 260 NW 85

Receiver's lease not conclusive of mutual rescission. In vendee's action to cancel a real estate contract and note, a mutual rescission is not established by showing that the receiver in a mortgage foreclosure proceeding against the real estate had leased the premises to vendee, when the lease, by its very terms, was not to become effective unless vendee paid all obligations to vendor.

Fitchner v Walling, 225-8; 279 NW 417

Remedies of purchaser—surrender of possession. A purchaser in possession who attempts to rescind his contract must offer to surrender the premises, and if he has rented the property, must establish the tenant's consent to surrender his possession.

Gutz v Holahan, 209-839; 227 NW 504

Repudiation — effect — rights of parties. Where a vendor and purchaser of real estate mutually agree to an extension of time for the final performance of the contract, the purchaser may not put the vendor in default by a tender and demand during said extension of time. But, nevertheless, the vendor may acquiesce in the act of the purchaser in repudiating the extension agreement, and, within a reasonable time, put himself in a position to fulfill his contract to sell, and make tender and demand accordingly.

Foft v Page, 215-387; 245 NW 312

Rescission and forfeiture contrasted. Principle recognized that there is a broad distinction between the rescission and the forfeiture of a contract.

McLain v Smith, 201-89; 202 NW 239

Rescission by purchaser. Mere shortage in the acreage of land contracted for does not constitute grounds for rescission of the contract.

Golly v College, 204-319; 213 NW 252

Rescission — defaulting plaintiff — equitable relief denied. Plaintiff vendee, after first defaulting under a contract for the sale of real estate, may not in equity, while still in default, rescind the contract because defendant vendor had later allowed a prior mortgage on the real estate to be foreclosed, and, therefore, had no title to deliver if plaintiff fully performed.

Fitchner v Walling, 225-8; 279 NW 417

Rescission—failure to furnish abstract. The failure of the vendor in a contract for the sale of real estate to furnish abstract of title of the kind and within the time required by the contract, necessarily furnishes the nondefaulting purchaser with ground for rescission of the contract.

Hardin v Ins. Co., 222-1283; 271 NW 176

Rescission in entirety. When land is sold in its entirety, the contract, in a proper case, may be rescinded in its entirety.

Dickerson v Morse, 203-480; 212 NW 933

Rescission by vendor in default—not valid. In an action in equity to cancel and avoid an attempted forfeiture of a real estate contract, where it is shown that the vendor did not have clear title to the realty because of a sheriff's certificate against the property for an unpaid judgment, and vendor quitclaims the property and the assignee's wife purchases the tax certificate during the 30-day period for notice of cancellation of said contract, vendor must himself be able to perform his undertaking before declaring default against purchaser.

Sarazin v Kunz, 226-1309; 286 NW 471

Specific performance and rescission—justifiable denial. Antagonistic prayers (1) for the rescission of a contract of exchange of lands,

II VENDOR AND PURCHASER GENERALLY—continued

(c) MODIFICATION OR RESCISSION OF CONTRACT —concluded

and (2) for the specific performance of the contract, are both properly denied when, on the one hand, the proof of the plea of mental incompetency as a basis for rescission simply shows a degree of mental weakness, but not inability to enter into a contract, and when, on the other hand, the pleader for specific performance is confronted with the fact that his land was actually worth substantially less than the land of the other party, that it was attended with an uncertainty in the title, and that the other party was mentally weak.

Dunlop v Wever, 209-590; 228 NW 562

Status quo—market depreciation. The general market depreciation of land after the making of a contract of sale is not a matter that affects the right of rescission.

Dickerson v Morse, 203-480; 212 NW 933

Status quo—rents—permanent improvements. A decree confirmatory of a rescission of a real estate contract of purchase should, inter alia, charge the rescinding purchaser with the fair and reasonable rental of the property during the time he was in possession, and credit said purchaser with the reasonable value of permanent improvements placed on the property.

Kunde v O'Brian, 214-921; 243 NW 594

Technical breach. Principle reaffirmed that a purely technical and nonsubstantial breach of a contract affords no proper grounds for a rescission.

White v Massee, 202-1304; 211 NW 839; 66 ALR 1434

Tender of performance to trustee. The guardian of an incompetent has no authority, even with the approval of the court, to contract for the sale of lands held by the ward as trustee only, yet the purchaser under such a contract may not base a rescission of the contract on such a lack of authority only, and recover payments already made, if, on the death of the trustee-ward, and before full performance of the contract is due, the guardian is also appointed successor-trustee, thereby enabling said purchaser to tender performance to the trustee.

Copple v Morrison, 221-183; 264 NW 113

Title defects cured—nonrestoration of status quo. Where objections to title were cured by legislative act and purchaser exercised full dominion over premises without attempting to restore status quo, held, purchaser was not entitled to rescission of contract of sale.

Gripp v Scherer, (NOR); 212 NW 113

Vendor and purchaser both defaulting—equity directing performance, rescission, and redemption. In a vendee's action to rescind a real estate contract and promissory note, supreme court may invoke broad equitable power to protect both vendor and vendee by allowing vendor, after his mortgage on the real estate had been foreclosed, to negotiate vendee's note to provide funds with which to redeem, on the condition that he apply the proceeds to the mortgage indebtedness and then pay the remaining mortgage indebtedness so as to deliver a clear title to vendee at the time fixed in the contract, or suffer a cancellation of the real estate contract and note.

Fitchner v Walling, 225-8; 279 NW 417

Vendor repossessing himself of land. The act of a vendor in repossessing himself of the land which he has turned over to the purchaser does not necessarily constitute a rescission of the contract of sale.

McLain v Smith, 201-89; 202 NW 239

When indorser primarily liable. A vendor of land who negotiates the purchase-price note received by him, and later either acquiesces in the abandonment of the contract by the purchaser or himself rescinds the contract and conveys the land to a new purchaser, thereby becomes primarily liable on the negotiated note, as between himself and a surety on said note.

First N. Bank v LeBarron, 201-853; 208 NW 364

Wife denying husband's agency but accepting benefits not permitted. A wife, owning a rooming house, sold on the fraudulent representation of her husband, made in response to purchaser's direct question, that the furnace heated the upstairs rooms, will not, in purchaser's action to rescind and recover the down payment, be permitted to deny her husband's authority to represent her and at the same time retain the down payment as fruits of the deceit.

Smith v Miller, 225-241; 280 NW 493

Waiver—payment of interest and taxes. The right to rescind will not be deemed to be waived by the act of the vendee in paying interest on the mortgage when such payment was made by vendee under protest and to protect himself in case he failed to establish grounds for rescission.

Dickerson v Morse, 203-480; 212 NW 933

(d) PERFORMANCE OF CONTRACT GENERALLY

Discussion. See 13 ILR 93—Time of the essence and forfeiture

Acreage—representations in deed—effect. Principle reaffirmed that a deed covenant which specifies the acreage, "be it more or less," constitutes a representation that the specified acreage is approximately correct.

Mahrt v Mann, 203-880; 210 NW 566

Affirmative action to avoid default. A contract for a deed which (1) provides for a

forfeiture of vendee's right in case of nonpayment of the purchase price, (2) makes time the essence of the contract, and (3) provides that, if the vendee makes a specified payment at a specified time, the vendor will then furnish the proper abstract and deliver a specified deed, imposes no obligation on the vendor to tender the deed and abstract at the said specified time. On the contrary, under such a contract vendee must make or tender his payment at the specified time and demand the proper transfer papers, or he will be in default and the contract subject to forfeiture.

Martin v Work, 201-444; 206 NW 288

Bona fide purchaser—who is not. A grantee of land who buys, receives, and goes into possession of, the exact land and acreage which he intended to buy, cannot be deemed a bona fide purchaser of another tract of which he has never been in possession, even tho such other tract was originally an integral part of the land actually purchased.

Taylor v Lindenmann, 211-1122; 235 NW 310

Breach justifying rescission. One who agrees to convey certain real estate, and tenders a deed in which he wrongfully reserves a portion of the land which he has contracted to convey, thereby breaches his contract and arms the other party with the right to rescind.

Pickett v Comstock, 209-968; 229 NW 249

Executed (?) or executory (?). It may not be said that a contract has been executed, when the testimony demonstrates that no contract ever existed, because of the failure of the minds of the parties to meet.

Cloud v Burnett, 201-733; 206 NW 283

Interest on purchase price—proper allowance. Interest on the purchase price is properly decreed from the time the purchase price was due and payable.

In re Hager, 212-851; 235 NW 563

Material mistake—effect. A vendor's action for specific performance of a contract is properly dismissed when, subsequent to the execution of the contract, it is discovered that the building on the land sold is situated very materially farther on an adjoining lot than the parties understood when they contracted.

Finch v Gates, 210-859; 229 NW 832

Merchantable title defined. A merchantable title is one which a reasonably prudent man would accept in the ordinary course of business after being apprised of the facts and law applicable thereto.

In re Hager, 212-851; 235 NW 563

Mortgage foreclosure—nonconclusive against vendor's future clear title. Fact that a real estate vendor has lost his title by foreclosure of a prior mortgage is not conclusive as to his inability to perform and furnish a clear title at the proper time—it appearing he has specially contracted with the mortgagee to redeem before arrival of his time to perform under the real estate contract. A vendor may perfect his title at any time before the time fixed to furnish clear title.

Fitchner v Walling, 225-8; 279 NW 417

Mutual inability to perform—effect. So long as a vendor and a purchaser of real estate are mutually unable to perform, each is incapacitated from putting the other in default; and the contract necessarily continues in full force, without right in either party to maintain an action against the other. So held where a defaulting purchaser attempted to recover the purchase price paid, and where a defaulting vendor attempted to forfeit the contract.

McLain v Smith, 201-89; 202 NW 239

Noneffectual novation. A purchaser of land wholly fails to establish a release from his obligation to the vendor by a mere showing that he assigned the contract to another, who assumed and agreed to carry out the obligation of the original contract.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Oral contract to devise or convey lands. An oral offer to convey or devise land in consideration of services to be performed for the offerer, and an oral acceptance thereof by the offeree, are specifically enforceable when both the execution of the contract and the performance thereof are established by clear, convincing, and satisfactory evidence, and when the acts of performance are referable exclusively to such contract. Evidence held ample to establish such a contract and the performance thereof.

Houlette v Johnson, 205-687; 216 NW 679

Partial failure of title—alley as nonincumbrance. A vendor who seeks to recover the entire contract price of land which he had contracted to convey, even tho a portion thereof proves to be a public alley, cannot support his claim on the theory that the public alley was a benefit to that portion of the land to which he had good title, and was not an incumbrance.

Van Duzer v Engeldinger, 209-150; 227 NW 591

Payment of price—deduction for deficiency in case of sale in gross. A purchaser of land at a stated price and not according to some superficial unit of measurement—in other words, a purchase in gross—is not, in the absence of fraud, entitled to an abatement on the purchase price because of an unexpected shortage in quantity, unless such shortage is gross, or of such a character that the court can say that the purchase would not have been made had the facts been known.

In re Hager, 212-851; 235 NW 563

II VENDOR AND PURCHASER GENERALLY—continued

(d) PERFORMANCE OF CONTRACT GENERALLY—concluded

Performance of contract—foreclosure—nontender of abstract and deed. In an action against a defaulting vendee, to foreclose a contract of sale of real estate for matured and unpaid installments, no tender of abstract and deed is necessary as a condition precedent to maintaining the action, when the right to said abstract and deed has not yet matured under the contract.

Dimon v Wright, 206-693; 214 NW 673

Provision for abstract of title. Contract construed and held not to require the purchaser of land to make full payment therefor before being entitled to an abstract of marketable title.

Hardin v Ins. Co., 222-1283; 271 NW 176

Reasonable time. Principle reaffirmed that a clause in a contract of sale of real estate giving the vendor "whatever time he finds necessary" to perfect his title, must be construed as giving to the vendor a reasonable time only, in view of the circumstances.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Shortage in acreage — effect. A vendor of land is not in default under his contract of sale simply because he declines to make any allowance for a shortage in acreage, even tho subsequent examination revealed the fact that there was such shortage.

Golly v Grinnell, 204-319; 213 NW 252

Specific performance—tender of deeds before suit. In an equity action for specific performance of a land contract, a vendor need not formally tender the deeds before starting suit, and when vendee specifically contracts to first pay the purchase price before getting the deed, the vendor need only get himself in readiness to perform.

Utterback v Stewart, 224-1135; 277 NW 735

Tender of performance — nonnecessity. A vendor of real estate is under no obligation, prior to instituting an action to foreclose the contract, to tender performance in order to place the vendee in default, when said vendee is already in defiant default.

Bortz v Wright, 206-698; 214 NW 542

Title—essential elements. Open, continuous, and good-faith possession of land under claim of right and with the knowledge of the record titleholder, by virtue of an oral contract of purchase, matures in the possessor an absolute title by adverse possession, even tho the contract price has never been paid.

Burch v Wickliff, 209-582; 227 NW 133

Transfers and transactions invalid — nonexecutory contract. Manifestly, a substantially executed contract accompanying a conveyance cannot be treated as executory.

Cherokee Co. v Stratton, 210-1236; 232 NW 646

Variance between contract and deed—estoppel. A purchaser of land will not be heard to complain of a variance between the contract and deed which was inserted in the deed with his full knowledge and approval.

In re Hager, 212-851; 235 NW 563

(e) MERCHANTABLE TITLE—ABSTRACTS

Discussion. See 12 ILR 295—Liability of abstracter to one other than his employer

Construction and operation of contract—inconsistent provisions as to title. A purchaser may not insist on a "marketable" title, in accordance with the printed provisions of a blank form of contract, when the typewritten provisions very clearly provide for a title of lesser quality.

Herman v Engstrom, 204-341; 214 NW 588

Definition. A merchantable title is one which a reasonably prudent man would accept in the ordinary course of business after being apprised of the facts and law applicable thereto.

In re Hager, 212-851; 235 NW 563

Indemnity bond as tantamount to covenant of seizin. An indemnity bond conditioned to hold the obligee harmless from any loss which he may sustain by reason of a defect of title to certain real estate is equivalent to a covenant of seizin and governed by the same rule, to wit: no action for substantial damages is maintainable on the bond until a hostile, paramount title is asserted.

Duke v Tyler, 209-1345; 230 NW 319

Merchantability test—tax deed on invalid redemption notice—abstract insufficient. The test as to whether an abstract shows a good, merchantable title depends upon whether or not a reasonably prudent person, familiar with the facts and apprised of the question of law involved, would accept such title in the ordinary course of business; and a tax title upon an invalid redemption notice is not such a title.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Mortgage foreclosure—nonconclusive against vendor's future clear title. Fact that a real estate vendor has lost his title by foreclosure of a prior mortgage is not conclusive as to his inability to perform and furnish a clear title at the proper time—it appearing he has specially contracted with the mortgagee to redeem before arrival of his time to perform under the real estate contract. A vendor may perfect his title at any time before the time fixed to furnish clear title.

Fitchner v Walling, 225-8; 279 NW 417

Performance of contract—belated objections. Objections to a land title as shown by the abstract introduced at the trial, not made until after the entry of the decree, will be ignored.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Performance of contract—abstract of title. A purchaser who refuses to examine an abstract of title when tendered may not later assert objections which are based solely on an inadvertent oversight on the part of the abstracter.

Carson v Mikel, 205-657; 216 NW 60

Reasonable time to perfect title. Principle reaffirmed that a clause in a contract of sale of real estate giving the vendor "whatever time he finds necessary" to perfect his title, must be construed as giving to the vendor a reasonable time only, in view of the circumstances.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Remedies of purchaser—nonmerger by deed—rescission. A vendee of land by accepting a deed with the mutual understanding that the delayed abstract of title will be furnished as per the original contract does not thereby merge the contract in the deed, and may rescind the contract when the vendor fails to deliver the required abstract.

Dickerson v Morse, 203-480; 212 NW 933

Rescission of contract—breach of contract—abstract—failure to furnish. The failure of the vendor in a contract for the sale of real estate to furnish abstract of title of the kind and within the time required by the contract, necessarily furnishes the nondefaulting purchaser with ground for rescission of the contract.

Hardin v Ins. Co., 222-1283; 271 NW 176

Rescission—untenable grounds. A vendee of land may not rescind on the ground that the abstract of title is defective when the defects arise from judgments rendered against himself.

Messenbrink v Bliesman, 204-223; 215 NW 232

Specific performance—contract of sale in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession or (2) title or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Tender of abstract. The plea in an action to foreclose a land sale contract that the vendor had made no tender of abstract of title will be disregarded (the necessity for such tender being assumed) when the record shows a possibly defective tender at the proper time, and when the vendor tendered full performance in his pleadings.

Bortz v Wright, 206-698; 214 NW 542

Waiver of timely delivery. Timely delivery of an abstract of title in accordance with the terms of the contract is waived (1) by not taking the abstract when tendered, (2) by going into and remaining in undisturbed possession of the land, and (3) by so using the land that the status quo cannot be restored.

Vanderwilt v Broerman, 201-1107; 206 NW 959

(f) RIGHTS AND LIABILITIES OF PARTIES GENERALLY

Discussion. See 12 ILR 179—Rights and liabilities to executory contract; 13 ILR 87—Liability of intended purchaser for occupancy; 25 ILR 340—Liability to remote grantee

Bona fide purchaser—quitclaim claimant. Principle reaffirmed that a quitclaim deedholder is not entitled to be considerd a bona fide purchaser and does not acquire priority over equities which are valid against the grantor.

Howell v Howell, 211-70; 232 NW 816

Bona fide purchaser—recital in deed—effect. A grantee of real estate is bound by a recital in his deed that the land is taken subject to all recorded mortgages.

Citizens Bank v Hamilton, 209-626; 227 NW 112

Construction and operation of contract—reservation as to title. A purchaser of land who buys under explicit contract provision and notice that his vendor has no right to the "coal, oil, and minerals underlying said premises," because the same were reserved in the deed of a former specifically named grantor, is, in the absence of fraud, charged with notice of the full details of such former reservation.

Herman v Engstrom, 204-341; 214 NW 588

Construction and operation of contract—time of performance. The vendor in a contract specifically requiring the vendee to pay before getting the deed need only get himself in readiness to perform, and need make no tender until payment is made or offered by vendee, and the vendor is not in default until this is done.

Foft v Page, 215-387; 245 NW 312

Custody and care of ward's estate—release of mortgage without court authorization. A guardian has no legal right, except under court authorization, to release, without payment, a court-authorized, real estate mortgage executed to, and held by, him as such guardian; and subsequent purchasers of the land are charge-

II VENDOR AND PURCHASER GENERALLY—continued

(f) RIGHTS AND LIABILITIES OF PARTIES GENERALLY—continued

able with knowledge of the statute invalidating such release. (§12773, C., '31.)

Randell v Fellers, 218-1005; 252 NW 787

Defaulting purchaser may not recover payments. The purchaser of real estate who, after making a payment on the contract, and when the vendor is in no manner in default, abandons and refuses further to perform the contract, may not take advantage of his own wrong and recover of the vendor the payment made, on the ground that the vendor resold the property after the said abandonment and refusal to perform.

Lake v Bernstein, 215-777; 246 NW 790; 102 ALR 846

Debt of another—original promise. An agreement by a vendor of real property with his purchaser to pay for the making of certain improvements on the property is an original promise, and not within the statute of frauds.

Madden Co. v Becker Co., 205-783; 218 NW 466

Destruction of buildings—justifiable refusal to perform. A purchaser of real estate may validly decline to specifically perform his contract of purchase, even tho he be deemed the holder of the equitable title, (1) when the buildings on the land were totally destroyed prior to the contract day for performance, and (2) when the vendor had contracted to deliver such buildings to the purchaser "in as good condition as they are at the date of the contract."

Rhomberg v Zapf, 201-928; 208 NW 276; 46 ALR 1124

Discharge of guarantor—nonrelease by conduct of guarantee. The guarantor of the payment of the amount due on a contract of sale of land is not relieved of his contract of guaranty because the assignee-guarantee of the contract failed to control the action of the purchaser of the land in disbursing building funds, when the assignee-guarantee had no knowledge of the wrongful disbursement.

Buser v Land Co., 211-659; 234 NW 241

Fraudulent conveyances — termination of property interest regardless of creditors. No present title to land passes under a contract to the effect (1) that a daughter, so long as she outlived her father and paid certain annual rentals and other charges, should have the possession and profits of named lands, (2) that title should remain in the father, but at the death of the father she should receive an absolute deed to the land, which deed was put in escrow under the control of the father during his lifetime, (3) that if she defaulted in said payments the contract could be forfeited on notice, and (4) that all her interest terminated instantly on her death prior to that of the father. It follows that upon the insolvency of the daughter and her default on said payments, the father and daughter may voluntarily cancel said contract regardless of the creditors of the daughter.

Tilton v Klingaman, 214-67; 239 NW 83

Homestead rights subordinate to contract under which acquired. Homestead rights which are acquired under a contract of sale are necessarily subordinate to the contract under which they are acquired.

Westerman v Raid, 203-1270; 212 NW 134

Improvident contract. Equity cannot relieve a person of the duty to perform his contract simply because the contract turns out to be ill-advised, unprofitable, or disadvantageous.

Carson v Mikel, 205-657; 216 NW 60

Inquiry and constructive notice. A purchaser of real estate must be charged with actual notice of such facts as he would have ascertained had he made such inquiries as ordinary prudence reasonably suggested.

Young v Hamilton, 213-1163; 240 NW 705

Insurance—application of proceeds. The proceeds of fire insurance under a policy payable to the vendor and purchaser of real estate, "as their interests may appear", is not payable to the vendor when, at the time of the loss, the purchaser is in no manner in default on his contract. Such proceeds may be impounded and utilized, on the application of the purchaser, in the rebuilding of the burned structure.

Hatch v Ins. Co., 216-860; 249 NW 164

Joint purchase—liability. Parties entering into a joint mutual agreement to purchase land, and inducing the vendor to accept the note and mortgage of one of them, with the assurance that the financial responsibility of all is behind the deal, all become personally liable for the indebtedness, and especially so when such has been the interpretation of the transaction by all the parties.

Bond v O'Donnell, 205-902; 218 NW 898; 63 ALR 901

Landlord and tenant—change of relation—effect. Manifestly a landlord and his tenant may, at the close of the tenancy, take on and assume the relationship of vendor and purchaser, and thereby enable the former tenant to hold the premises in question adversely to the former landlord.

Burch v Wickliff, 209-582; 227 NW 133

Modification of contract—repudiation—effect. Where a vendor and purchaser of real estate mutually agree to an extension of time for the final performance of the contract, the

purchaser may not put the vendor in default by a tender and demand during said extension of time. But, nevertheless, the vendor may acquiesce in the act of the purchaser in repudiating the extension agreement, and, within a reasonable time, put himself in a position to fulfill his contract to sell, and make tender and demand accordingly.

Foft v Page, 215-387; 245 NW 312

Mortgagee's knowledge of contemplated exchange—not innocent purchaser. Where mortgagee knew that mortgagor had contracted to exchange city property for farm at time mortgage covering city property was executed, mortgagee was not "innocent purchaser", and his mortgage was subject to rights of holder of contract to city property.

Bandemer v Benson, (NOR); 270 NW 353

Mutual inability to perform—effect. So long as a vendor and a purchaser of real estate are mutually unable to perform, each is incapacitated from putting the other in default; and the contract necessarily continues in full force, without right in either party to maintain an action against the other. So held where a defaulting purchaser attempted to recover the purchase price paid, and where a defaulting vendor attempted to forfeit the contract.

McLain v Smith, 201-89; 202 NW 239

Nonformal tender of deed. A contract of sale of lands may be foreclosed without any prior formal tender of a deed when the contract calls for a deed only when the purchase price is paid; and especially is the absence of such tender inconsequential when tender of deed is made in the pleadings.

Bortz v Wright, 206-698; 214 NW 542

Nonright of defaulting purchaser to recover amount paid. Purchaser in default, when vendor, failing to apply proper credits on price of realty, serves notice of forfeiture, cannot recover amount paid.

Martin v Harvey, (NOR); 245 NW 432

Payment—check in escrow—effect. A vendor who causes the vendee to make payment of matured interest in the form of an interest-bearing certificate of deposit payable to himself, which certificate is placed in escrow with the issuing bank, pending the vendor's effort to make the title merchantable, must bear the loss resulting from the subsequent failure of the issuing bank.

Downey v Gifford, 206-848; 218 NW 488

Purchase price—deposit in bank—ownership. The purchaser of land who, on the day of performance, and with the knowledge and acquiescence of the vendor, and pending the perfecting and delivering of the deed, goes into possession, and deposits the purchase money in a bank, on condition that it be paid to the vendor when the deed is perfected and delivered, and himself retains the evidence of such deposit until he receives the deed, must be held to be the owner of the deposit and to suffer the loss which results from the subsequently discovered fact that the bank, immediately after receiving the deposit, dissipated it, the bank being then, without the knowledge of both parties, insolvent.

Bolte v Schenk, 205-834; 210 NW 797

Quitclaim grantees. The grantee of land under a quitclaim deed is conclusively presumed to have known of all prior equities in and to the land, and will be held to have taken and to hold said land subject to said equities.

Junkin v McClain, 221-1084; 265 NW 362

Rights and liabilities as to third persons—impossible ratification. A vendor of land who, upon discovering that his vendee has placed repairs and improvements upon the property, does nothing in the way of repudiating the actions of the vendee, cannot be held thereby to have ratified the actions of the vendee and constituted the vendee his agent to make the improvements, when the vendee in making said repairs and improvements never assumed to act for the vendor.

Knapp v Baldwin, 213-24; 238 NW 542

Self-imposed knowledge of vendor. A vendor of land will not be heard to claim that he did not know that his purchaser was holding adversely to him.

Burch v Wickliff, 209-582; 227 NW 133

Slander of title—loss of sale. Plaintiff in an action for damages consequent on the loss of a sale of his property because of a slander of his title by defendant may not recover when it appears that the ability of the prospective purchaser to buy the property on the terms proposed is a mere conjecture or guess.

Farmers Bank v Hintz, 206-911; 221 NW 540

Taxes maturing December 31st—obligation to pay. A vendor who, prior to December 31st, sells real estate "free of all incumbrances to day of sale" must, as between himself and the vendee, pay the taxes falling due on December 31st of said year.

Moore v Bank, 210-1020; 229 NW 666

Title—sufficiency of showing. A vendor in an action to foreclose a land sale contract need not do more than show prima facie title in himself.

Bortz v Wright, 206-698; 214 NW 542

Title—when not in issue. The issue of title is not involved in an action of forcible entry and detainer when admittedly the plaintiff held the legal title, and when the sole controversy centered around the question whether plaintiff had legally forfeited the contract under which defendant was in possession.

Cassiday v Adamson, 208-417; 224 NW 508

II VENDOR AND PURCHASER GENERALLY—continued

(f) RIGHTS AND LIABILITIES OF PARTIES GENERALLY—concluded

Transfer—assumption of mortgage not necessarily absolute. Principle reaffirmed that an agreement between a vendor and a purchaser of land that the purchaser will assume and pay an existing mortgage on the land must be taken by the mortgagee subject to the inherent equities arising out of the transaction between the vendor and the purchaser.

Johnston v Grimm, 209-1050; 229 NW 716

Validity of contract—fraud. On an allegation of fraud by the vendor in the sale of land, it is very material that the purchaser had the unobstructed opportunity to examine the land in the absence of the vendor and availed himself of such opportunity.

Carson v Mikel, 205-657; 216 NW 60

Vendee as owner under executory contract. The vendee of land under a contract calling for installment payments is the equitable titleholder, and therefore, the "owner" of the land within the mechanic's lien statutes, and may contract for improvements on the land and subject his interest to the resulting mechanics' liens.

Knapp v Baldwin, 213-24; 238 NW 542

Vendor's attorneys at vendee's bankruptcy—different claim involved—real estate contract unaffected. Fact that attorneys for a real estate contract vendor appeared in vendee's bankruptcy is not a submission to nor adjudication by the bankruptcy court of vendor's rights under the real estate contract, when no claim was filed thereon and purpose of appearance was to protect a different and unsecured indebtedness of the vendee to the vendor.

Blotcky v Silberman, 225-519; 281 NW 496

When possession not notice of adverse claim. The actual possession of real estate by the grantor in a duly recorded conveyance in fee during a reasonable time following the execution of such conveyance does not charge a good-faith subsequent purchaser for value of the land with notice that the one in possession continues to claim ownership of the land notwithstanding said conveyance.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

(g) REMEDIES OF VENDOR

Acceleration of maturity. A proviso in a contract for the purchase of real estate on installment payments, entered into without artifice or deception, to the effect that an assignment of the contract by the vendee without the written consent of the vendor will ipso facto mature the entire indebtedness, is valid, even tho our statute (§9452, C., '24) authorizes the assignment of such an instrument irrespective of the terms of any contract by the parties to the contrary.

Risser v Sec. Co., 200-987; 205 NW 648

Action for purchase price—novation—pleadings. A plaintiff-vendor who seeks to recover on a contract of sale of land, but pleads that, on performance day, he conveyed to a party other than the contract purchaser, but under an oral agreement that, by so doing, the contract purchaser would not be released, must stand or fall on his chosen theory. In other words, he must establish his own theory of non-novation.

Bobbitt v Van Eaton, 208-404; 226 NW 79

Action for price—defect in title. A purchaser who goes into and retains undisputed possession of the purchased premises may not, because of some defect in the title, defeat an action to recover on his agreement to pay an existing incumbrance.

Richardson v Short, 201-561; 207 NW 610

Action to enforce contract—tender of conveyance—sufficiency. Tender of a deed is not a condition precedent to the beginning of an equitable action by a vendor to enforce a contract for the sale of land. A tender in the petition is all-sufficient.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Avoidance of forfeiture by proper payment. A tender of delinquent payments at the contract place provided for payment, especially when acquiesced in by the vendor, is manifestly adequate to prevent a forfeiture.

May v Haynie, 212-66; 236 NW 98

Contract for benefit of third party. An oral contract between the joint purchasers of land that they would surrender their rights under the contract of purchase and reconvey to their vendor, upon certain terms, to be performed by the vendor, said contract being partially performed, is enforceable by the vendor, even tho he had no knowledge of such contract at the time it was entered into in his behalf.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Contract of sale. A provision in a contract of sale of land that in case of default by the purchaser, the initial payment shall be retained by the vendor as liquidated damages is no impediment to the foreclosure of the contract.

Ettinger v Malcolm, 208-311; 223 NW 247

Execution of mortgage by vendor after suit—effect. A vendor in a contract of sale of real estate who is fully able to perform when he commences his action for specific performance and so alleges in his petition, and who is not then in default, does not deprive himself of the right to a decree by later executing a

mortgage on the land to one (a) who had full knowledge of the superior interest of the defendant-purchaser, and (b) who released said mortgage prior to the decree in plaintiff's favor, said mortgage being executed by the vendor without any intent to abandon said contract of sale. And this result is peculiarly justified when said mortgage arose from an emergency for which the purchaser of the land was directly responsible.

Foft v Page, 215-387; 245 NW 312

Forfeiture of contract. The act of the purchaser in a written, forfeitable, land-sale contract in defaulting in his agreement to make, directly to the vendor, a certain payment, arms the vendor with the right to serve a 30-day notice of forfeiture, and thereupon to demand that the purchaser avoid his default by making the payment in question strictly in accordance with the contract, notwithstanding any mere statement by the vendor prior to the maturity of the payment that it might be made to a named bank, and that a few days delay in making payment "would make no difference".

Schwab v Roberts, 220-958; 263 NW 19

Forfeiture of contract—adequate avoidance. The purchaser of land under a forfeitable contract who, upon being served with notice of forfeiture for the nonpayment of a portion of the contract price, tenders the entire amount called for by the contract necessarily prevents a forfeiture of his contract.

May v Haynie, 212-66; 236 NW 98

Forfeiture of contract—ineffectual payment to avoid. Tho the purchaser in a forfeitable, land-sale contract be authorized by the vendor to make the defaulted payment at a named bank, and thereby avoid forfeiture of the contract under the statutory 30-day notice, yet said purchaser makes no effectual payment by depositing, in his own name and in said bank, the amount of said payment, and thereupon drawing a check payable to vendor, and delivering said check to the cashier of said bank (his own agent) with direction, in effect, to deliver said check to vendor only after the amount thereof has been indorsed on a promissory note which never existed.

Schwab v Roberts, 220-958; 263 NW 19

Forfeiture—vendee as tenant. A vendee of real estate who has agreed that he will pay in installments and in case of default the contract may be forfeited and the amount paid treated as payments for the use of the property, becomes, in case of a proper forfeiture, the tenant of the vendor, and may be removed from the premises through an action of forcible entry and detainer.

Music v DeLong, 209-1068; 229 NW 673

Forfeiture—delay—effect. The fact that a vendor delays more than 30 days after forfeiting a contract of sale, before instituting an action of forcible entry and detainer to recover possession of the property, does not work a cancellation of the forfeiture.

Music v DeLong, 209-1068; 229 NW 673

Forfeiture of contract — notice—sufficiency. A statute which requires a notice of forfeiture of a contract of sale of real estate to state "the reason" for such forfeiture is not complied with by the bald assertion, in effect, that the vendee "has failed to perform the contract", but is complied with if the notice gives as a reason for the forfeiture (1) the nonpayment of principal which is not due and (2) the nonpayment of interest which is due. The stating of one good and valid reason is ample, even tho coupled with another reason which is not good and valid.

Gibson v Thode, 209-368; 228 NW 91

Forfeiture of improvements—rights of chattel mortgagee. An equitable owner of land who, while holding the land under a contract of purchase which, in case of forefeiture, unconditionally forfeits all improvements thereon to the legal titleholder, erects a dwelling house on the land with materials sold for such purpose, and on individual credit, may not, after he has forfeited or surrendered his contract of purchase, and while he is in possession of the land solely as a tenant, execute a chattel mortgage on the house to the seller of the materials, as security for the past-due purchase price of the materials, and thereby invest the mortgagee with any right against the owner of the realty.

O'Bryon v Weatherly, 201-190; 206 NW 828

Foreclosure for nonpayment of installments —limitations. A vendor of real estate, in foreclosure of the contract, is not entitled to judgment and special execution except for installments due and unpaid when the decree is rendered (the contract containing no acceleration clause), but is entitled to have the court retain jurisdiction of the proceeding in order to protect him by the application of any surplus to future-maturing installments.

Witmer v Fitzgerald, 209-997; 229 NW 239

Interest on purchase price—proper allowance. Interest on the purchase price is properly decreed from the time the purchase price was due and payable.

In re Hager, 212-851; 235 NW 563

Quieting title. The vendor of lands who has effected a complete forfeiture of a contract of sale may institute action in equity to quiet title, even tho he might have instituted an action at law for possession.

Westerman v Raid, 203-1270; 212 NW 134

Real estate contract foreclosed against bankrupt. A real estate contract may be foreclosed in the state court and vendor is real party in interest regardless of the buyer's dis-

II VENDOR AND PURCHASER GENERALLY—continued

(g) REMEDIES OF VENDOR—concluded

charge in bankruptcy when the bankruptcy court entirely ignored this property as an asset of the bankrupt, upon which land the vendor had a valid pre-existing lien.

Blotcky v Silberman, 225-519; 281 NW 496

Real party in interest—equitable owner. An equitable owner of land who effects a sale of the land through an agent, but permits the contract of sale to be made between the purchaser and the legal titleholder, in order to secure to the latter the amount due him, remains the real party in interest in an action against the agent, to compel him to account for a consideration received by him in the sale of the land and concealed from the said equitable owner.

Hiller v Betts, 204-197; 215 NW 533

Title—nonnecessity to plead. The vendor in an executory contract of sale of land, in an action against the vendee to recover possession of the land after the contract has been forfeited, need not plead or prove that he has good title to the land.

O'Connor v Hassett, 207-155; 222 NW 530

Title—sufficiency of showing. A vendor in an action to foreclose a land sale contract need not do more than show prima facie title in himself.

Bortz v Wright, 206-698; 214 NW 552

Waiver and loss of lien. The grantor in a deed of conveyance in escrow who consents to the substitution in the deed of the name of a new grantee, and to the delivery of the deed to such new grantee, and who permits such new grantee to pay taxes and interest on incumbrances and ultimately to sell and convey the land to a good-faith purchaser for value, necessarily loses the right to establish a vendor's lien on the land.

Lindberg v Younggren, 209-613; 228 NW 574

When action maintainable. A vendee who has agreed (1) to pay for the property in monthly installments and (2) to have the paid installments treated as payment for the use of the property in case the contract is forfeited, becomes, in case of forefeiture, the tenant of the vendor, and may be removed through an action of forcible entry and detainer.

Cassiday v Adamson, 208-417; 224 NW 508

(h) REMEDIES OF PURCHASER

Action to establish and foreclose vendee's lien. An action by the vendee of land for rescission of the contract, for personal judgment against the defendant, and for the establishment and foreclosure of a lien on the land for the purchase money paid under mutual mistake, is properly brought in the county in which the land is located, irrespective of the residence of the defendant.

Lee v Bank, 209-609; 228 NW 570

Breach justifying rescission. One who agrees to convey certain real estate, and tenders a deed in which he wrongfully reserves a portion of the land which he has contracted to convey, thereby breaches his contract and arms the other party with the right to rescind.

Pickett v Comstock, 209-968; 229 NW 249

Ceasing payments when mortgage release not obtained by vendor. Where the vendor of property agreed to use payments received to obtain the release of a mortgage on the property, and the amount unpaid was less than the amount of the mortgage, the failure to obtain the release was a default by the vendor, and even tho the vendor claimed that in obtaining the release time was not of the essence, the purchaser was entitled to cease payments, since he was not protected as he would have been had the amount unpaid on the price been greater than the amount of the mortgage.

Trammel v Kemler, 226-918; 285 NW 196

Contract of sale—right to conveyance. The purchaser of real estate who has fully complied with the contract is entitled to specific performance, in the absence of some fact or condition which renders such decree inequitable.

May v Haynie, 212-66; 236 NW 98

Construction of contract. Provision in contract of purchase reviewed, and held to present no obstacle to the purchaser's claiming, against a mortgagee, the benefit of payments made to the vendor.

Ely Bank v Graham, 201-840; 208 NW 312

Delay—unallowable rescission. A purchaser may not rescind his contract of purchase because of a delay which was occasioned by his own agent.

Gutz v Holahan, 209-839; 227 NW 504

Election of remedies. A purchaser of land who rescinds, and obtains against the vendor judgment at law for the amount advanced as purchase price and for other proper expenditures, does not by that fact alone waive his right to bring an action in equity to have the judgment declared a lien on the land.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Enforcing partial performance. When a vendor has contracted to convey an entire property, but owns only a fractional part thereof, the purchaser who shows that he is entitled to specific performance may elect to take and may enforce specific performance as to the part which the vendor is able to convey;

and in such case, the purchaser will be entitled to a pro tanto abatement of the purchase price.

Anderson v Weirsmith, 209-714; 229 NW 199

Enforcement of vendee's lien — burden of proof. A vendee who rescinds, and seeks to establish a lien on the land for his proper advancements, need not show that a subsequent titleholder had knowledge of his (vendee's) rights. The subsequent titleholder must show his want of knowledge.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Inadequate tender to avoid forfeiture. A purchaser of real estate who makes an inadequate tender in an effort to avoid a forfeiture of his contract may not successfully claim that the deficiency was supplied by the rental value of the property then in possession of parties whose right to possession was traceable to said purchaser himself.

Moore v Elliott, 213-374; 239 NW 32

Multifarious theories in one count. A cause of action which is not barred until 10 years after the execution and delivery of a deed is shown by a pleading which (1) pleads a contract of purchase of land by the acre, and the deed in fulfillment thereof, (2) shows payment for the acreage represented in the deed, and (3) alleges actual material shortage in the said acreage; and this is true even tho the pleading does allege "mutual mistake" of the parties as to the acreage, and asks for the reformation of a mortgage for the purchase price.

Mahrt v Mann, 203-880; 210 NW 566

Noncontemplated damages. The purchaser of land may not recover damages because a belated delivery of the land to him prevented him from wrecking the building and using the salvage in other building operations, when the vendor was not apprised of such purpose of the purchaser when the sale was made.

In re Hager, 212-851; 235 NW 563

Nonmerger by deed—rescission. A vendee of land by accepting a deed with the mutual understanding that the delayed abstract of title will be furnished as per the original contract does not thereby merge the contract in the deed, and may rescind the contract when the vendor fails to deliver the required abstract.

Dickerson v Morse, 203-480; 212 NW 933

Novation—insufficient showing. A purchaser of real estate who has assumed the payment of existing incumbrances may not base a novation of his obligation on the simple expedient of causing the deed to be made to his wife as grantee.

Richardson v Short, 201-561; 207 NW 610

Option to repurchase—forfeiture. An absolute deed, coupled with an agreement that the grantor shall have the right to repurchase within a named time, requires no notice of forfeiture.

Hinman v Sage, 208-982; 221 NW 472

Partial failure of title—partial conveyance and abatement of price. In case a vendor contracts to sell an entire tract of land when he has title to a portion only of the tract, the purchaser who goes into possession of that portion only to which the vendor has title may, even tho he is undisturbed in his possession, compel the vendor to convey that portion to which the vendor has title, and compel the vendor to submit to an abatement of the purchase price on account of the portion which the vendor cannot convey.

Van Duzer v Engeldinger, 209-150; 227 NW 591

Performance of contract—payment of price —deduction for deficiency in case of sale in gross. A purchaser of land at a stated price and not according to some superficial unit of measurement—in other words, a purchase in gross—is not, in the absence of fraud, entitled to an abatement on the purchase price because of an unexpected shortage in quantity, unless such shortage is gross, or of such a character that the court can say that the purchase would not have been made had the facts been known.

In re Hager, 212-851; 235 NW 563

Recovery of consideration paid. A vendee of land who is and always has been in undisturbed possession of the land, and who has never rescinded the contract of purchase, but is distinctly standing thereon, may not recover the consideration paid because the vendor is unable to convey good title.

Weech v Read, 208-1083; 226 NW 768

Recovery of payment by defaulting purchaser. A defaulting purchaser may not recover payment made by him to the nondefaulting vendor.

Dimon v Wright, 206-693; 214 NW 673

Rescission of contract. A contract purchaser of land may rescind and recover the payment made by him when, at the contract time for performance, the vendor has no title, and in such case the purchaser need make no tender of performance by himself.

Dolliver v Elmer, 220-348; 260 NW 85

Right to lien. The contracting purchaser of land who rescinds, because the contracting vendor has no title whatever, is nevertheless entitled to a lien on the land for payments advanced in case the vendor, subsequent to the rescission, acquires such title.

Dolliver v Elmer, 220-348; 260 NW 85

II VENDOR AND PURCHASER GENERALLY—concluded

(h) REMEDIES OF PURCHASER—concluded

Silence—effect. A vendor who, in answer to an inquiry by a proposed purchaser concerning a fact having material relation to the property, speaks half the truth and remains silent as to the other half, may be guilty of actionable false representation. Evidence held insufficient to apply the principle.

Foreman v Dugan, 205-929; 218 NW 912

Vendee's right to lien. A vendee of land is entitled in equity, on proper rescission by him of the contract of purchase, to a lien on the land (1) for the amount of the purchase price advanced by him, (2) for the reasonable value of all proper improvements made on the land by him, and (3) for any other proper expenditure suffered by him and growing out of the contract—a right enforceable against all parties who take rights in the land with knowledge, actual or constructive, of vendee's rights.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Vendor not conveying property but retaining payments. Where the purchaser of land was at no time delinquent in his payments or other conditions to be performed on his part, it would be unjust and inequitable to allow the vendor to retain the payments when, through his own fault, he failed to perform his part of the contract.

Trammel v Kemler, 226-918; 285 NW 196.

Vendor's inability to perform—purchaser's tender unnecessary. When the vendor had put it out of his power to perform a contract to sell realty by permitting a mortgage on the property to be foreclosed, it was not necessary for the purchaser to tender the unpaid part of the purchase price before commencing suit for the amounts paid.

Trammel v Kemler, 226-918; 285 NW 196

Unconscionable forfeiture. The plea that the forfeiture of a contract of sale of real estate was unconscionable and should be ignored in equity cannot be sustained in behalf of one who is at fault and against those who are blameless.

Moore v Elliott, 213-374; 239 NW 32

When not necessary to plead. The purchaser of real estate when defendant in an action for the specific performance of the contract need not plead for a recovery of the purchase money paid by him.

Benedict v Nielsen, 204-1373; 215 NW 658

(i) RIGHTS OF THIRD PARTIES

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

Defaulted real estate vendee's deed after decree—invalidity. In a quieting title action against a real estate contract vendee, the decree ends all rights of the vendee under a defaulted contract, and if he deeds to another before the decree, the grantee takes nothing.

Forrest v Otis, 224-63; 276 NW 102

Liability of assignee of contract. One who receives, from a purchaser, an assignment of a contract for a deed, which assignment binds the said assignee to perform fully the assigned contract, must be deemed to have ratified the terms of said assignment and be bound thereby when, henceforth, he treats said land as his land and said contract as his obligation, even tho the assignee did not sign said instrument of assignment.

Gables v Kleaveland, 220-1280; 263 NW 339

Purchase pending foreclosure proceedings. One who purchases real estate pending a properly indexed foreclosure proceeding on the property purchases at his peril.

Eckert v Sloan, 209-1040; 229 NW 714

Right to lien—vendee under contract for deed—forfeiture of contract—effect. One who erects or installs an improvement on premises under a contract with a bond-for-deed vendee may establish a mechanic's lien against the vendee's interest; but if said vendee's contract for a deed be legally forfeited and he be left without interest, said lien cannot be established against the vendor's interest unless said vendor required or authorized said improvement.

Darragh v Knolk, 218-686; 254 NW 22

Right to lien—contract with purchaser—forfeiture—effect. One who erects an improvement on land solely under a contract with the purchaser of the land is not entitled to a mechanic's lien on the land when the purchaser has lost all interest in the land because of the legal forfeiture of his contract of purchase; and this is true, even tho the legal owner had knowledge that the improvement was being erected.

Nolan v Wick, 218-660; 254 NW 80

Right to remove fixture. A dealer who permanently installs a furnace in a house for a subvendee, under a contract that he (the dealer) shall retain title to the furnace and the right to remove it in case of nonpayment, may not lawfully remove the furnace for nonpayment, as against the vendor, who did not ex-

pressly or impliedly consent to such installation, and who sold under a written forfeitable contract, which was, subsequent to the installation of the furnace, forfeited and abandoned by both the original vendee and the subvendee.

Des M. Impr. v Furnace Co., 204-274; 212 NW 551

Right to remove fixture. A dealer who, under an unrecorded conditional sale contract, permanently installs for the vendee of real estate a furnace in the house situated thereon, may not legally remove said furnace, as against the vendor of the real estate who did not authorize or know of the installation, and who has sold under a contract which he has caused to be forfeited in accordance with the terms thereof.

Holland Co. v Pope, 204-737; 215 NW 943

12390 Notice.

Cancellation of forfeiture. The fact that a vendor delays more than 30 days after forfeiting a contract of sale, before instituting an action of forcible entry and detainer to recover possession of the property, does not work a cancellation of the forfeiture.

Music v DeLong, 209-1068; 229 NW 673

Dual forfeitures. A vendor who has initiated a forfeiture of his vendee's contract for an existing default, and commenced an action of forcible entry and detainer, may, pending such proceedings, initiate a forfeiture of the contract for a new and subsequently accruing default, and proceed thereon if he is unsuccessful in the first proceeding.

Cassiday v Adamson, 208-417; 224 NW 508

Erroneous description of land. Proceedings for the forfeiture of a contract of purchase of real estate are rendered nugatory by an erroneous description of the real estate.

Montgomery v Beller, 207-278; 222 NW 846

Forcible entry and detainer — unallowable defense. It is no defense to an action of forcible entry and detainer that the defendant was holding under a contract for the purchase of the real estate, and that the plaintiff, in assuming to forfeit the contract, had not served notice of the forfeiture on a third party who held an assignment from defendant of the contract as security.

Votruba v Hanke, 202-658; 210 NW 753

Forfeiture by assignee of contract. The assignee of a contract of sale of real estate has the same right to forfeit the contract as the assignor had.

Moore v Elliott, 213-374; 239 NW 32

Forfeiture no abandonment of contract. A vendor who is able to convey, who is not legally in default, and who has at all times insisted on performance by the purchaser, does not (1) by serving the 30-day notice of forfeiture, (2) by retaking possession, and (3) by instituting an action to quiet title, breach, abandon, or repudiate the contract in such sense that the purchaser may declare a rescission, and on the basis thereof recover the payments made by him.

Mintle v Sylvester, 202-1128; 211 NW 367

Forfeiture—nonwaiver by sufferance. The failure of the vendor of real estate to avail himself promptly of a contract provision for the forfeiture of the contract on a 30-day notice for the nonpayment of matured installments, and his acts in repeatedly accepting belated partial payments, do not work a waiver of the right, in case of a default, to initiate a forfeiture in accordance with the contract and the statute.

Janes v Towne, 201-690; 207 NW 790

Forfeiture of contract—ineffectual payment to avoid. Tho the purchaser in a forfeitable, land sale contract be authorized by the vendor to make the defaulted payment at a named bank, and thereby avoid forfeiture of the contract under the statutory 30-day notice, yet said purchaser makes no effectual payment by depositing, in his own name and in said bank, the amount of said payment, and thereupon drawing a check payable to vendor, and delivering said check to the cashier of said bank (his own agent) with direction, in effect, to deliver said check to vendor only after the amount thereof has been indorsed on a promissory note which never existed.

Schwab v Roberts, 220-958; 263 NW 19

Notice necessary. A contract for the sale of real property cannot be forfeited without giving the statutory notice of intention to forfeit, whether time is or is not of the essence of the contract.

Mintle v Sylvester, 202-1128; 211 NW 367

Notice—sufficiency. A statute which requires a notice of forfeiture of a contract of sale of real estate to state "the reason" for such forfeiture is not complied with by the bald assertion, in effect, that the vendee "has failed to perform the contract", but is complied with if the notice gives as a reason for the forfeiture (1) the nonpayment of principal which is not due and (2) the nonpayment of interest which is due. The stating of one good and valid reason is ample even tho coupled with another reason which is not good and valid.

Gibson v Thode, 209-368; 228 NW 91

Notice unnecessary. An absolute deed coupled with an agreement that the grantor shall have the right to repurchase within a named time requires no notice of forfeiture.

Hinman v Sage, 208-982; 221 NW 472

Redundant notice. A notice of the forfeiture of a contract for the sale of real estate

which properly specifies one sufficient ground for forfeiture renders redundant the specifications of other grounds.

Votruba v Hanke, 202-658; 210 NW 753

Sufficient signing. Notices of forfeiture of a real estate contract are all-sufficient when signed in the name of the vendor by his duly authorized attorney.

Cassady v Mott, 203-17; 212 NW 332

Tenable and untenable grounds. A forfeiture of a contract of sale on one valid ground is effective even if the vendor assigns other untenable grounds.

Westerman v Raid, 203-1270; 212 NW 134

Unconscionable forfeiture. The plea that the forfeiture of a contract of sale of real estate was unconscionable and should be ignored in equity cannot be sustained in behalf of one who is at fault and against those who are blameless.

Moore v Elliott, 213-374; 239 NW 32

12391 Service.

Manner of service. In serving a notice of forfeiture of a contract of purchase, the original of the notice need not be delivered to the person whose contract is sought to be forfeited.

Cassady v Mott, 203-17; 212 NW 332

Rescission of contract—acts not constituting. The act of a vendor of real estate in serving on the purchaser a statutory notice of forfeiture cannot be deemed an abandonment or rescission of the contract by the vendor, even tho the contract was not forfeitable under the statute.

Lake v Bernstein, 215-777; 246 NW 790; 102 ALR 846

12392 Compliance with notice.

Adequate avoidance. The purchaser of land under a forfeitable contract who, upon being served with notice of forfeiture for the nonpayment of a portion of the contract price, tenders the entire amount called for by the contract, necessarily prevents a forfeiture of his contract.

May v Haynie, 212-66; 236 NW 98

Inadequate tender to avoid forfeiture. A purchaser of real estate who makes an inadequate tender in an effort to avoid a forfeiture of his contract may not successfully claim that the deficiency was supplied by the rental value of the property then in possession of parties whose right to possession was traceable to said purchaser himself.

Moore v Elliott, 213-374; 239 NW 32

Inadequate tender—right to increase. Tho a tender of the amount due under a contract is slightly inadequate, the court, in an equitable action involving the contract, may very properly permit the purchaser to increase his tender to the required amount.

May v Haynie, 212-66; 236 NW 98

Ineffectual payment to avoid forfeiture. Tho the purchaser in a forfeitable, land sale contract be authorized by the vendor to make the defaulted payment at a named bank, and thereby avoid forfeiture of the contract under the statutory 30-day notice, yet said purchaser makes no effectual payment by depositing, in his own name and in said bank, the amount of said payment, and thereupon drawing a check payable to vendor, and delivering said check to the cashier of said bank (his own agent) with direction, in effect, to deliver said check to vendor only after the amount thereof has been indorsed on a promissory note which never existed.

Schwab v Roberts, 220-958; 263 NW 19

Payment not in conformity. The act of the purchaser in a written, forfeitable, land sale contract in defaulting in his agreement to make, directly to the vendor, a certain payment, arms the vendor with right to serve a 30-day notice of forfeiture, and thereupon to demand that the purchaser avoid his default by making the payment in question strictly in accordance with the contract, notwithstanding any mere statement by the vendor prior to the maturity of the payment that it might be made to a named bank, and that a few days delay in making payment "would make no difference".

Schwab v Roberts, 220-958; 263 NW 19

12393 Proof and record of service.

Mechanics' liens — assignment — redemption by vendee's quitclaim grantee from real estate forfeiture. An assignee of mechanics' liens, who, after foreclosing thereon, purchases the real estate contract covering part of the land subject to the mechanics' liens, and who then forfeits the real estate contract, but fails to file the statutory proof of service, cannot prevent a redemption from the foreclosure sale by a person taking a quitclaim deed from the vendee, such quitclaim owner having neither actual nor constructive knowledge of the claimed forfeiture.

Murray v Kelroy, 223-1331; 275 NW 21

12394 Scope of chapter.

Real estate contract—nonnegotiable instrument law inapplicable—assignor not liable to assignee. Under statute, assignor of nonnegotiable instruments guarantees payment thereof to assignee, but such statute is limited to commercial paper and does not embrace bilateral real estate purchase contract and does not create a right of action in vendor's assignee against such vendor as assignor under statute.

Nash v Rehmann Bros., 53 F 2d, 624

CHAPTER 528

NUISANCES

12395 Nuisance—what constitutes—action to abate.

Atty. Gen. Opinion. See AG Op July 10, '39

ANALYSIS

I NUISANCE IN GENERAL
II ABATEMENT AND INJUNCTION
III DAMAGES
(a) IN GENERAL
(b) MEASURE OF DAMAGES
IV EVIDENCE

Attractive nuisances:
Cities. See under §§5738, 5945
Electricity. See under §8323
Generally. See under Ch 484, Note 1 (I)
Railroads. See under §8156 (III)
What constitutes nuisance. See under §12396

I NUISANCE IN GENERAL

Property—use not to injure others. The ownership of property carries with it the obligation to so use the property that injuries to others will not result therefrom.

Casteel v Afton, 227-61; 287 NW 245

Private property—subservient use. A person who lives in a city, town, or village must, of necessity, submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce, and also for the enjoyment of property and the benefits of the inhabitants of the place, and matters which, altho in themselves annoying, are in the nature of ordinary incidents of city or village life and cannot be complained of as nuisances.

Casteel v Afton, 227-61; 287 NW 245

Property — reasonable use permitted. The owner of property may always put his property to reasonable use, dependent upon the locality and other conditions.

Casteel v Afton, 227-61; 287 NW 245

II ABATEMENT AND INJUNCTION

Discussion. See 16 ILR 422—Anti-aesthetic use of property

Annoyance and discomfort must be actual. Where annoyance and discomfort are alleged as ground for injunctive relief, the injury complained of must be of such character as to be of actual discomfort to one of ordinary sensibilities.

Casteel v Afton, 227-61; 287 NW 245

Injury to relative rights—nuisance. An action for damages consequent on a nuisance is not an action for injury to "relative rights" and is not, therefore, barred in two years.

Chase v City, 203-1361; 214 NW 591
Hill v City, 203-1392; 214 NW 592

Liquor nuisance—nonright of private citizen. A private citizen has no right—since the enactment of the liquor control act, Ch 93-F1, C., '35 [Ch 93.1, C., '39]—to institute an action to enjoin the maintenance of an intoxicating liquor nuisance which affects him only as one of the general body of citizens.

Doebler v Dodge, 223-218; 272 NW 144

Playground—not nuisance. In an action to enjoin as a nuisance the maintenance of a public playground and athletic field, used both during the day and at night, and attended generally by the people of the community, resulting in incidental annoyance and inconsequential injury to plaintiff, an adjoining property owner, held, facts did not warrant issuance of an injunction to restrain such use as a nuisance.

Casteel v Afton, 227-61; 287 NW 245

Remedy of private party. Assuming, arguendo, that advertising matter on a street traffic regulator constitutes a public nuisance, yet a private party may not enjoin such nuisance, in the absence of a proper plea and affirmative proof that such party will suffer a damage distinct from that of the general public.

Lytle Co. v Gilman, 201-603; 206 NW 108

Successive actions. Separate actions may be maintained for separately accruing damages caused by an abatable nuisance, even tho plaintiff might accomplish the same end by successive amendments to the pleadings in his first action.

Stovern v Town, 207-1123; 224 NW 24

Surface waters—unlawful diversion on one's own land. The owner of a dominant estate may not legally divert material quantities of surface waters from one natural watercourse on his land to another natural watercourse on his land, and thereby ultimately cast such diverted waters upon a public highway at a point where they would not naturally flow; nor may the board of supervisors, in order to dispose of said diverted waters, legally construct and maintain a culvert in said highway at said point of diversion, and thereby cause said diverted waters to pass through the highway and upon the land of the servient estate (to its substantial damage), at places where it would not naturally flow.

Anton v Stanke, 217-166; 251 NW 153

III DAMAGES

(a) IN GENERAL

District liabilities—torts. A school district, organized, existing, and acting under the laws of the state as a governmental agency, is not liable in damages consequent on the

III DAMAGES—concluded
(a) IN GENERAL—concluded

negligence of its employees, or in consequence of the maintenance by it, through its employees, of a nuisance.

Larsen v School Dist., 223-691; 272 NW 632

Issue-changing amendment—right to reject. The court does not abuse its discretion in refusing a belated amendment which would convert an action for damages for a permanent nuisance into an action to enjoin a nonpermanent nuisance and for damages.

Cary-Platt v Elec. Co., 207-1052; 224 NW 89

Nonapplicability of statute. Chapter 133, C., '31, has no application to a controversy wherein a private property owner seeks the abatement of a private nuisance.

Higgins v Produce Co., 214-276; 242 NW 109; 81 ALR 1199

(b) MEASURE OF DAMAGES

Decrease in rental value. An owner of land may recover, as one of his elements of damages consequent on the maintenance of a nonpermanent nuisance the difference in the rental value of the premises with and without the nuisance, it appearing that the nuisance was in existence at the time the property was rented.

Stovern v Town, 204-983; 216 NW 112

IV EVIDENCE

Action for damages—evidence. Evidence that a nuisance was a "health hazard" is fairly justified by a pleading that plaintiff and his family were, by reason of the nuisance, subject to "offensive, obnoxious, and poisonous odors * * * and detrimental to the comfort, use, and enjoyment of their property."

Hill v City, 203-1392; 214 NW 592; 37 NCCA 232

Fouling of stream. Evidence held to show the complete abatement of a nuisance consequent on the fouling of a stream.

Stovern v Calmar (Town), 207-1126; 224 NW 26; 37 NCCA 239

Harmless error—reception of immaterial evidence. In an action for damages consequent on a nuisance, evidence to the effect that a septic tank has the power to destroy disease germs reviewed, and, in view of the record, held immaterial, but nonprejudicial.

Hill v Winterset, 203-1392; 214 NW 592

Playground—not nuisance on facts considered. In an action to enjoin as a nuisance the maintenance of a public playground and athletic field, used both during the day and at night, and attended generally by the people of the community, resulting in incidental annoyance and inconsequential injury to plaintiff, an adjoining property owner, held, facts did not warrant issuance of an injunction to restrain such use as a nuisance.

Casteel v Afton, 227-61; 287 NW 245

Waiver of incompetency. Error may not be predicated on the reception of irrelevant and incompetent testimony relative to the condition of a nuisance at a place remote from the place in controversy when the complainant fails to avail himself of a later indicated willingness on the part of the court to strike such testimony.

Chase v City, 203-1361; 214 NW 591

12396 What deemed nuisances.

Atty. Gen. Opinions. See '38 AG Op 802; AG Op April 14, '39

ANALYSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE

I IN GENERAL

Arbitrarily vacating street to make defense to injunction. In an action to enjoin a town from maintaining a nuisance in a street or alley by allowing an adjoining owner to fence and use the street or alley, the action of the town council in arbitrarily vacating the street and the alley, without regard to the interests of the public, for the obvious purpose of creating a defense to the injunction suit, will be declared invalid.

Pederson v Radcliffe, 226-166; 284 NW 145

Enjoining maintenance of nuisance — gasoline pump. A gasoline pump erected in the parking of a public street is not only an "incumbrance" on the street, but, when erected without legal authority, is ipso facto a nuisance and, because of the mandatory duty of the municipality to keep its streets free from nuisances, is enjoinable by the city or town.

Lamoni v Smith, 217-264; 251 NW 706

Enjoining unauthorized maintenance of wires. The maintenance of electric transmission lines across the streets and alleys of a city or town without a franchise right so to do, constitutes not only a nuisance, but a trespass upon the property of the municipality, and may be enjoined by the municipality, irrespective of the fact whether it has been damaged by such maintenance.

Ackley v Elec. Co., 204-1246; 214 NW 879; 54 ALR 474

Obstruction of street. An obstruction of a street or highway is a nuisance.

Pederson v Radcliffe, 226-166; 284 NW 145

Playgrounds—not per se nuisances. Playgrounds and athletic fields are of advantage to the health and well-being of a community and are not per se nuisances, tho they can be so conducted as to become nuisances.

Casteel v Afton, 227-61; 287 NW 245

Pollution — limitation on right. Principle recognized that the right of a riparian owner to cast refuse into a natural stream may be quite materially limited after a portion of his land has been condemned for a public purpose.

Wheatley v City, 213-1187; 240 NW 628

Poultry and produce plant. While some of the incidents attending the operation of a live poultry and produce plant may be offensive to nearby residents of ordinary and reasonable sensibilities, and must be endured because of their inevitableness, yet abatement will be ordered of those acts which are not inevitable but avoidable, e. g., (1) the maintaining of offal in open containers, (2) the removal of such offal in open conveyances, and (3) the practice of using a dressing process until the contents thereof become offensive to reasonable sensibilities; and this is true tho the plant is located within an exclusively industrial district (but adjacent to a small residential district), represents a large investment, and is of great commercial importance.

Higgins v Prod. Co., 214-276; 242 NW 109; 81 ALR 1199

Practicing medicine without license. The statute authorizing injunction to restrain the practice of medicine and surgery without a license is constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances; and this is true irrespective of the question whether the district court may be constitutionally vested with an equitable jurisdiction not possessed by chancery courts when the state constitution was adopted.

State v Howard, 214-60; 241 NW 682

Rendering plant — nuisance per se. The operation of a rendering plant in a city or town for processing the carcasses of animals dying of disease will be peremptorily and permanently enjoined when it is demonstrated that the plant cannot be operated without being a public nuisance.

State v Drayer, 218-446; 255 NW 532

Repair shop in connection with garage. A repair shop in connection with a garage situated in what is in fact a residential district may be attended with such noise, smoke, gases, and odors as to constitute an abatable private nuisance, provided such shop cannot be so operated as to avoid such objectionable conditions.

Pauly v Montgomery, 209-699; 228 NW 648

Trap door in leased coliseum—res ipsa loquitur. Trap door in leased coliseum opened only to dispose of refuse held not a nuisance. Doctrine of res ipsa loquitur held inapplicable where person fell into opening, especially in view of fact that trap door was not wholly under control of defendant-lessees.

Work v Coliseum Co., (NOR); 207 NW 679

Undertaking establishment. The operation, under formal municipal permit, of an undertaking and embalming establishment in a city, in a territory designated by a duly enacted zoning ordinance as a commercial district, will not be enjoined on the sole ground that, being adjacent to a residence, said operation will have a depressing mental effect on the occupant and owner of said residence and on the members of his family.

Kirk v Mabis, 215-769; 246 NW 759; 87 ALR 1055

Funeral home. The operating of an undertaking business or so-called funeral home in a strictly residential section of a municipality under circumstances which bring to the families in the immediate neighborhood a constant reminder of death, a resulting feeling of mental depression, an appreciable lessening of their happiness and disease-resisting powers, and an appreciable depreciation of the value of their properties, constitutes a nuisance and is enjoinable as such.

Bevington v Otte, 223-509; 273 NW 98

Use of public places—expired franchise—unexpired street light contract—poles in streets lawful. Electric company's occupancy of town streets to supply street lighting under a valid contract is not a trespass nor a nuisance merely because its franchise has expired.

Miller v Milford, 224-753; 276 NW 826

II INDICTMENT

No annotations in this volume

III EVIDENCE

Gasoline service station—evidence. A gasoline service station located in a city is not a nuisance per se. Evidence reviewed and held the station in question was not a nuisance in fact.

Yeanos v Oil Co., 220-1317; 263 NW 834

Intoxicating liquors. Evidence reviewed, and held ample to sustain a conviction for nuisance.

State v Japone, 202-450; 209 NW 468

Streets—obstructions—negligence per se. A pedestrian who, on a dark and rainy night, passes over a parking in a public street in close proximity to a pile of broken cement, with full knowledge of the presence of such obstruction and of its dangerous character, and is injured by stumbling over a detached piece of the cement, is guilty of contributory negligence per se when it appears that a very slight deviation in his course would have placed him in a zone of perfect safety.

Roppel v Mt. Pleasant, 208-117; 224 NW 579

12397 Penalty—abatement.

Abatement—evidence. Evidence held to show the complete abatement of a nuisance consequent on the fouling of a stream.

Stovern v Town, 207-1126; 224 NW 26; 37 NCCA 239

Avoidance of peremptory abatement. A sewer system which is being maintained by a municipality for sanitary purposes, but which is a nuisance, should not be peremptorily and finally abated, but the court should (while retaining jurisdiction) enter an interlocutory order of abatement and give the municipality a reasonable time in which to effect the abatement.

Stovern v Town, 204-983; 216 NW 112

12401 Expenses—how collected.

Atty. Gen. Opinion. See '38 AG Op 318

CHAPTER 529

WASTE AND TRESPASS

12402 Treble damages.

Excessive use of surface—damages. A mine owner in casting refuse upon the surface of the soil in his mining operations is liable to the owner of such surface to the extent only that he reduces the value of the surface by a use which is beyond the call of reasonable necessity.

Grell v Lumsden, 206-166; 220 NW 123

Measure of damages. Where refuse is wrongfully cast upon realty and is of such nature that it cannot be readily removed and causes permanent injury, the measure of damages is the difference between the value of the property immediately before and immediately after the injury.

Grell v Lumsden, 206-166; 220 NW 123

Restoration at nominal expense. If a ditch wrongfully dug upon the land of another is such that the soil can be restored to its former condition at a nominal or trifling expense, then such expense measures the utmost that can be recovered in the way of actual damages.

Grell v Lumsden, 206-166; 220 NW 123

12404 Who deemed to have committed.

Waste—insufficient showing. The act of a mortgagor in obtaining the rents of the mortgaged premises and in not paying the taxes on the premises does not constitute legal waste.

Security Co. v Ose, 205-1013; 219 NW 36

12405 Treble damages for injury to trees.

Wrongful cutting of trees. The measure of actual damages for the wrongful cutting of trees which are not designed for shade, beautification of the premises, or other particular use, is the fair and reasonable value of such trees when severed from the soil, and not the difference in value of the entire land immediately before and immediately after such severance.

Grell v Lumsden, 206-166; 220 NW 123

12406 Estate of remainder or reversion.

Devise—life estate (?) or fee (?)—mortgage validity. Where a will devised land to a son to use until son's youngest child became 20 years old, or if such child died before such age, then until January 1, 1940, when the land became the property of the "son and his heirs", a mortgage placed on the land by the son, altho before 1940, is a valid lien, not merely on a life estate, but on the fee, and an equitable action by son's children against the mortgagee and others to establish title in the land was properly dismissed.

Hudnutt v Ins. Co., 224-430; 275 NW 581

12408 Purchaser at execution sale.

Purchaser's right to recover damages to property. See under §11747

Recovery for, when mortgage fully satisfied. While a mortgagee of land may maintain an action to protect his security against waste, yet after he has foreclosed and bought in the property for the full amount of the debt, he cannot maintain an action for gravel and standing timber removed from the land during the time the mortgage was being foreclosed.

Kulp v Trustees, 217-310; 251 NW 703

CHAPTER 530

LIBEL AND SLANDER

12412 Pleading.

Discussion. See 12 ILR 77—Injunction against libel

ANALYSIS

I IN GENERAL
II PARTICULAR WORDS AND IMPUTATIONS
III PRIVILEGED COMMUNICATIONS
IV JUSTIFICATION, MITIGATION, AND RETRACTION
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VI SLANDER OF TITLE

Criminal liability. See under §§13256–13262
Newspapers, retraction, damages. See under §§12413, 12416

I IN GENERAL

Corporation as plaintiff. A corporation may maintain an action for libel.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Effect of statute. This statute does away with the technical rules of pleading relative to "inducement", "colloquium" and "innuendo" required by the common law.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Innuendo—scope. Principle reaffirmed that while an innuendo cannot extend the expressions in an alleged libel beyond their ordinary meaning, yet when the words used are ambiguous or admit of different applications an innuendo may confine or direct them.

Salinger v Capital, 206-592; 217 NW 555

Libel not avoided because published as an opinion. A published attack on a person, otherwise libelous per se, is not rendered nonlibelous because it only stated what the publisher thought.

McCuddin v Dickinson, 226-304; 283 NW 886

Libel tho party libeled is unnamed. A publication may be libelous tho plaintiff is not named therein.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Motions—more specific—nonpermissible objects. Motion seeking names and addresses of persons to whom alleged slanderous statements were made held properly overruled.

Johns v Cooper, (NOR); 205 NW 791

Repeating hearsay matter. A person is liable for the publication of slanderous words in regard to another even tho he is but repeating what he has heard.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Repetition of slander. Reversible error results from instructing, in an action for slander, where actual damages only were prayed for, that in determining the nature and extent of the injuries or damages the jury might take into consideration the fact, if it be a fact, that defendant had repeated the slander, such repetitions not being declared on in the petition.

Bond v Lotz, 214-683; 243 NW 586

Statutory definition—applicability. Principle reaffirmed that the statutory definition of libel is applicable to civil as well as to criminal actions.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Writing identifying libeled person—inference sufficient. A writing to be libelous need not necessarily name the person libeled, but it must by inference or innuendo at least refer to him in an intelligent way.

Boardman v Gazette Co., 225-533; 281 NW 118

II PARTICULAR WORDS AND IMPUTATIONS

Accusation of crime. The defamation of a person by accusing him of having been drunk is not actionable per se because such accusation drops within the general rule that a charge of crime in order to be actionable per se must be of a crime which is indictable.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Advertisement not assailing one's integrity or moral character. An advertisement to the effect that garments cleaned at half price are only half cleaned is not libelous per se as to a competitor who has been advertising the cleaning of garments at half price, said advertisement not assailing the integrity or moral character of said competitor.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Charge of infidelity. A charge of infidelity on the part of a married woman necessarily charges unchastity per se.

Ballinger v Demo. Co., 203-1095; 212 NW 557

Communication not libelous per se. A written notification by a bank to the consignee of

II PARTICULAR WORDS AND IMPUTATIONS—concluded

sheep to the effect that "the bank has a chattel mortgage on said shipment of sheep and the proceeds of said sale should be held intact subject to said claim" is not libelous per se as to the consignor.

Miller v Bank, 220-1266; 264 NW 272

Defamatory attack on integrity—element of libel per se. A published attack upon the integrity and moral character of a person is defamatory, and if it tends to provoke to wrath, tends to expose to public hatred, contempt, or ridicule, or tends to deprive the person defamed of the benefits of public confidence and social intercourse, it is libelous per se.

McCuddin v Dickinson, 226-304; 283 NW 886

Intoxication in connection with profession. The defamation of a physician by accusing him of having been drunk and because thereof unable to attend a professional call is actionable per se.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Libel per se. A newspaper article which characterizes a public officer as being an "ignorant" and "coarse" ruffian is defamatory and libelous per se.

Taylor v Hungerford, 205-1146; 217 NW 83

Newspaper attack on attorney—requisites for libel per se. A newspaper attack upon attorneys stating, among other things, that they were attempting "to stall off" an appeal, tho ill-natured, vexatious, and untrue, yet is not libelous per se, since it lacks one essential element as such, to wit, malicious defamation, and unless special damages are pleaded, is not actionable.

Boardman v Gazette Co., 225-533; 281 NW 118

Nonactionable words. A written publication which charges that a member of the supreme court is advocating an increase in the membership of the court is not libelous; likewise a charge that such member was accepting sleeping accommodations from the state to which he was not entitled under the law, even tho such latter charge is given the meaning, by an innuendo, of a violation of good taste and self-respect.

Salinger v Capital, 206-592; 217 NW 555

Violation of official duty. A written publication which, in reference to a named member of the supreme court, charges that the decisions of the court were the judgments of one member only is libelous when given the meaning by an innuendo, that said member was violating his duty as a member of the court.

Salinger v Capital, 206-592; 217 NW 555

Words actionable. The naked statement that a person is such a dope fiend that no one can believe a thing he says, is not actionable.

Kluender v Semann, 203-68; 212 NW 326

Words actionable—"dirty trash" as slander per se. Woman's statement that son's wife was "dirty trash" admissible as proof of slander per se when understood by hearer to mean a prostitute.

Shultz v Shultz, 224-205; 275 NW 562

III PRIVILEGED COMMUNICATIONS

Charge of unchastity—damages presumed. To call a woman a whore is slanderous per se, and, when there is no plea of justification and proof thereof, the law presumes substantial damages. Verdict of $1,000 held nonexcessive tho the record revealed no evidence relative to mental pain and suffering.

Simons v Harris, 215-479; 245 NW 875

Judicial proceedings. Defamatory matter, tho false and malicious, contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, are absolutely privileged, even tho said matter pertains to a party who is not party to the action or suit.

Anderson v Hartley, 222-921; 270 NW 460

Nonprivileged communication. The publisher of a newspaper is not privileged to publish the grounds of divorce as "infidelity" on the part of the wife when the actual ground was "cruel and inhuman treatment".

Ballinger v Demo. Co., 203-1095; 212 NW 557

IV JUSTIFICATION, MITIGATION, AND RETRACTION

Defense—negligent signing of information. One who files an information charging another with being insane, and does not believe at the time that the charge is true, and who appears at the hearing and actively supports the charge cannot avoid the presumption of legal malice and damages by a plea that he signed the information without reading it, and under a misunderstanding as to its nature.

Plecker v Knottnerus, 201-550; 207 NW 574

Import of words. A witness may not testify that in the use of certain words he intended to express or imply a meaning which could not, as matter of fact, be reasonably inferred from such words.

Ballinger v Demo. Co., 203-1095; 212 NW 557

Mitigation of damages — evidence. Under proper plea and proof, evidence of the general bad professional reputation of the plaintiff in the place where he is practicing his profession is admissible in mitigation of damages, even tho the slander was spoken at a nearby place.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

V ACTIONS

(a) IN GENERAL

When question for court. Whether an unambiguous publication is libelous per se is a question for the court.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

(b) PARTIES, PLEADING, AND ISSUES

Demurrer — when bad. A demurrer to a petition in an action for slander will not lie solely on the ground that the petition shows on its face that defendant, at the time of speaking the words in question, was acting in a governmental capacity, because defendant's right to assert the privileged character of the spoken words is not an absolute right but a qualified right only. The demurrer—if employed under such circumstances—must point out wherein said petition fails to state a cause of action against defendant.

Brown v Cochran, 222-34; 268 NW 585

Special damages—insufficient plea. A general allegation of loss of many customers consequent on an alleged libel, and an equally general allegation of damages in a gross amount, are quite insufficient to meet the legal rule that such plea must be specific.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Writing and publication when an issue—effect of "no recollection" by witness. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing; but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot, as a matter of law, establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

(c) EVIDENCE, PROOF, AND TRIAL GENERALLY

Acts antedating conspiracy. In an action for damages for conspiracy to libel plaintiff and to defame his character, growing out of the World war activities, evidence is wholly inadmissible which tends to show that, long prior to the alleged conspiracy, the defendants and the community generally in which they lived sought to perpetuate and did perpetuate the military habits, customs, and practices of the foreign people and government of which the defendants were formerly a part.

Mowry v Reinking, 203-628; 213 NW 274

Damages — actual and exemplary—mitigation. In an action for libel and defamation of character, the court should clearly differentiate between the purpose and effect of evidence (1) tending to show a good-faith belief in the truth of the charges in question, and (2) tending to show the actual truth of such charges.

Mowry v Reinking, 203-628; 213 NW 274

Evidence of crime withdrawn from jury—proof beyond reasonable doubt not required. In an action for libel based on a defamatory publication that the plaintiff could not tell the truth when on the witness stand, in which action defendant offered to show that plaintiff perjured himself in a previous foreclosure hearing as to the existence of a certain fence, the court errs in withdrawing this evidence from the jury on the ground of indefiniteness, since in this civil action the defendant was not required to prove perjury beyond a reasonable doubt.

McCuddin v Dickinson, 226-304; 283 NW 886

Incompetent declarations. Declarations of alleged co-conspirators evincing hostility toward the plaintiff in an action for conspiracy to libel are wholly inadmissible when it cannot be said that they were made in furtherance of the alleged conspiracy. Especially are declarations evincing hostility to plaintiff inadmissible when made by persons who are not party defendants nor shown to be conspirators, and whose declarations spring solely from personal hostility wholly disconnected with the conspiracy in question.

Mowry v Reinking, 203-628; 213 NW 274

More specific pleading—erroneous denial. In an action for general and special damages, under general and somewhat meager pleading, based on an alleged libelous publication resulting (1) in loss of customers, (2) in being refused credit, and (3) in loss of earnings in business, plaintiff should, on motion for more specific statement of the action, be compelled to set forth the names of customers lost, the names of those who refused him credit, and the ultimate facts upon which he bases his demand for judgment on account of injury to his earnings.

Dorman v Credit Co., 213-1016; 241 NW 436

Meaning of words—exemplary and compensatory damages. Evidence that witness understood slanderous words to mean woman was a prostitute is sufficient to authorize submission to the jury the question of exemplary and compensatory damages.

Shultz v Shultz, 224-205; 275 NW 562

Words actionable—evidence admissible as alleged. In a slander action it is not error to admit in evidence the very statements that plaintiff alleged in his petition were spoken.

Shultz v Shultz, 224-205; 275 NW 562

Writing and publication—effect of "no recollection" by witness. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing, but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot as a matter of law establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

V ACTIONS—concluded

(d) INSTRUCTIONS

Loss of income—causal connection to libel as prerequisite. In a libel action before damages are recoverable for loss of income it is proper to instruct as to the necessity of showing a causal connection between such libel and the loss of income.

Thompson v Butler, 223-1085; 274 NW 110

Malice. In an action for actual damages only, consequent of a slander, an instruction accurately defining legal malice is proper—no instruction being given as to actual malice—malice in fact—and the jury being told that there could be no recovery of exemplary damages.

Bond v Lotz, 214-683; 243 NW 586

(e) VERDICT, JUDGMENT, AND DAMAGES

Actual and exemplary damages—slander per se. A verdict in a slander action for $3,000 cannot be held to be excessive or resulting from passion and prejudice, when the petition alleged slander per se, and the jury might have found both actual and exemplary damages.

Shultz v Shultz, 224-205; 275 NW 562

Exemplary damages. The publication of a known false libel renders the offender liable for exemplary damages.

Plecker v Knottnerus, 201-550; 207 NW 574

Verdict—excessiveness. Record reviewed, and held that a verdict of $40,000 for libel and defamation of character was excessive and the result of passion and prejudice.

Mowry v Reinking, 203-628; 213 NW 274

(f) REVIEW

Actionable words—charge of unchastity. To call a woman a whore is slanderous per se, and, when there is no plea of justification and proof thereof, the law presumes substantial damages. Verdict of $1,000 held nonexcessive tho the record revealed no evidence relative to mental pain and suffering.

Simons v Harris, 215-479; 245 NW 875

Harmless error—exclusion of evidence otherwise received. The exclusion of testimony tending to prove certain facts is harmless when such facts have been otherwise unquestionably established.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Husband and wife—enticing and alienating—sufficient pleading. An allegation that the affections of a wife were alienated by slandering the plaintiff-husband and by cultivating in the wife a dislike for plaintiff is sufficient without setting out the words uttered and the persons in whose presence they were spoken; likewise an allegation that defendants "jointly and severally" conspired to alienate the affections of the wife from the husband.

Depping v Hansmeier, 202-314; 208 NW 288

VI SLANDER OF TITLE

Evidence—competency. Plaintiff in an action for damages consequent on the loss of a sale of his property because of a slander of his title by defendant manifestly will not be permitted to establish by hearsay evidence that the prospective purchaser would have been able to procure a first mortgage loan in a certain amount, such being a condition of the contemplated sale, let alone by evidence of a less satisfactory nature.

Farmers Bank v Hintz, 206-911; 221 NW 540

Loss of sale—insufficient showing. Plaintiff in an action for damages consequent on the loss of a sale of his property because of a slander of his title by defendant may not recover when it appears that the ability of the prospective purchaser to buy the property on the terms proposed is a mere conjecture or guess.

Farmers Bank v Hintz, 206-911; 221 NW 540

Slander of property or title—essential elements—when petition demurrable. A petition in an action for damages for slander of title is demurrable unless, inter alia, it alleges, in some proper form, (1) the utterance and publication of the alleged slanderous words, and (2) the special legal damages suffered by plaintiff. Pleading reviewed and held fatally deficient in both particulars.

Witmer v Bank, 223-671; 273 NW 370

12413 Libel—retraction—actual damages.

Libel generally. See under §12412

Allowable special damages. Special damages consequent on the loss of an official position by reason of libel are allowable.

Taylor v Hungerford, 205-1146; 217 NW 83

Nonexcessive verdict. Verdict of $2,000 as actual damages for libel, reduced one-half by the trial court, held not so excessive as to indicate passion and prejudice per se.

Taylor v Hungerford, 205-1146; 217 NW 83

12416 Proof of malice.

Libel generally. See under §12412

Insufficient basis. Exemplary damages may not be allowed solely on the basis of the implication of malice which the law attaches to a libel per se.

Ballinger v Demo. Co., 207-576; 223 NW 375

Exemplary damages. The publication of a knowingly false libel renders the offender liable for exemplary damages.

Plecker v Knottnerus, 201-550; 207 NW 574

Malice—evidence to rebut. The defendant in an action for libel may, when express malice is charged, show (1) the source of the information from which the published article was written, and (2) his good faith and freedom from malice in publishing the article.

Ballinger v Demo. Co., 203-1095; 212 NW 557

Meaning of words—exemplary and compensatory damages. Evidence that witness understood slanderous words to mean woman was a prostitute is sufficient to authorize submission to the jury the question of exemplary and compensatory damages.

Shultz v Shultz, 224-205; 275 NW 562

Negligence as defense. One who files an information charging another with being insane, and does not believe at the time that the charge is true, and who appears at the hearing and actively supports the charge, cannot avoid the presumption of legal malice and damages by a plea that he signed the information without reading it, and under a misunderstanding as to its nature.

Plecker v Knottnerus, 201-550; 207 NW 574

CHAPTER 531

QUO WARRANTO

12417 For what causes.

ANALYSIS

I NATURE AND GROUNDS
II PROCEEDINGS AND RELIEF

Patents on inventions. See under §9885

I NATURE AND GROUNDS

County supervisor-elect—death before qualifying. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office, to be filled in the manner provided by subsection 5 of §1152, C., '35.

State v Best, 225-338; 280 NW 551

Nonpermissible equitable action. Quo warranto, and not an action in equity aided by injunction, is the proper procedure to determine title to a public office.

Young v Huff, 209-874; 227 NW 122

Title to office. In an action of mandamus by a duly appointed, qualified, and acting public officer to compel the legal warrant-issuing officer to issue warrants for salary due plaintiff, the court will not determine whether plaintiff was eligible to receive said appointment.

Reason: Quo warranto is the sole remedy to test title to such office.

Clark v Murtagh, 218-71; 254 NW 54

Optional remedies. When the state demands the complete ouster of a corporation, it may proceed in equity under §8402, C., '24, or at law in the form of quo warranto under this chapter.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Statute of limitations—public not barred. An action to oust an alleged franchise holder from public streets because of the invalidity of the alleged franchise, tho brought by the county attorney in quo warranto, cannot be barred by the lapse of time.

State v Munn, 216-1232; 250 NW 471

Transfer from equity to law—effect. A law action, e. g., quo warranto, commenced as an equitable action and properly transferred by the court to law, will, on appeal, be disposed of as a law action.

State v Murray, 219-108; 257 NW 553

II PROCEEDINGS AND RELIEF

Demurrer—defective form. A demurrer to a petition in quo warranto—a law action—on the ground that "the facts stated do not entitle plaintiff to the relief demanded" presents no question for the court beyond those wherein the demurrant specifically points out wherein said facts are insufficient.

State v Munn, 216-1232; 250 NW 471

Office—weakness of adversary's title—effect. It is quite elementary that a person who asserts a right to hold a public office must prevail because of the strength of his own right, and not because of the weakness of his adversary's right.

State v Claussen, 216-1079; 250 NW 195

Persons entitled to relief. One claiming right to an office must prevail solely on the strength of his own right, not on the weakness of his adversary.

State v Murray, 219-108; 257 NW 553

Title to and possession of office—estoppel and waiver. Where, on the erroneous assumption that a vacancy existed in a public office, two persons are formally nominated, by different political parties, to fill the supposed vacancy and are voted on at the ensuing election, the failure of the candidate who is already serving under a valid appointment to withdraw his nomination and legally to question the nominations made, furnishes no basis for the claim that he thereby waived his right

longer to hold the office, and estopped himself from objecting to the result of the election.

State v Claussen, 216-1079; 250 NW 195

12418 Joinder or counterclaim.

Unallowable cross-petition. In an action of quo warranto against a particular claimant to the office, brought, under authorization of the court, in the name of the state on the relation of a private party, the defendant will not be permitted to cross-petition against a third party claimant to the same office, and thereunder bring said third party into the proceeding for an adjudication of his right to the office.

State v Murray, 217-1091; 252 NW 556

12420 By private person.

Collateral attack. An order of court granting to a party the right to institute an action of quo warranto may not be collaterally attacked.

State v Bobst, 205-608; 218 NW 253

12423 Right to an office.

Quo warranto—relief—determining term of office. In quo warranto to test the right of a party to hold office under an appointment, the court should determine the term during which the successful party may legally hold the office—such matter being properly in issue.

State v Claussen, 216-1079; 250 NW 195

12424 Several claimants.

Unallowable cross-petition. In an action of quo warranto against a particular claimant to the office, brought, under authorization of the court, in the name of the state on the relation of a private party, the defendant will not be permitted to cross-petition against a third party claimant to the same office, and thereunder bring said third party into the proceeding for an adjudication of his right to the office.

State v Murray, 217-1091; 252 NW 556

Venue. The district court of one county of a judicial district, in duly authorized quo warranto proceedings in said county involving the rival claims of two parties to the office of district judge, may acquire jurisdiction of both parties even tho one of them is a nonresident of the county of suit and is sole defendant in the county of his residence in a proceeding in quo warranto involving the same office.

State v Murray, 219-108; 257 NW 553

12427 Action for damages.

Atty. Gen. Opinions. See '34 AG Op 60, 402

12428 Judgment of ouster.

Evidence—decree of dissolution. A decree of dissolution of a corporation based on the fraud of the corporation is admissible, on the issue of fraud and want of consideration, against an alleged bona fide holder of a negotiable promissory note which was given to the corporation as the purchase price for its corporate stock, even tho neither of the parties to the action on the note were parties to the dissolution suit.

Andrew v Peterson, 214-582; 243 NW 340

Foreign corporations — dissolution — effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

12431 Action against officers of corporation.

Dissipation of assets—liability. The act of the directors of a financially embarrassed corporation in selling their individually owned corporate shares of stock to a third party, and in receiving pay therefor out of the partly frozen bank deposits of the corporation, under an understanding that said third party would replace said dissipated deposits with securities of equal value, is per se fraudulent, and necessarily violative of the law-imposed trust relationship of the directors to existing and future-contemplated corporate creditors; and this is true irrespective of the plea that the directors in good faith believed that said third party would carry out the said understanding. It follows that the receiver of the corporation may repudiate such transaction and recover the dissipated assets from the directors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

CHAPTER 532

MANDAMUS

12440 Definition.

Discussion. See 20 ILR 667, 835—Mandamus
Atty. Gen. Opinion. See '36 AG Op 17

ANALYSIS

I NATURE AND SCOPE OF REMEDY IN GENERAL
II ACTS AND PROCEEDINGS
(a) OF COURTS, JUDGES, AND JUDICIAL OFFICERS
(b) OF PUBLIC OFFICERS, BOARDS, AND MUNICIPALITIES
(c) OF PRIVATE CORPORATIONS AND INDIVIDUALS
III JURISDICTION, PROCEEDINGS, AND RELIEF

I NATURE AND SCOPE OF REMEDY IN GENERAL

Soldiers preference cases. See under §1162
Discussion. See 14 ILR 218—Modern mandamus

Equitable proceeding. A mandamus proceeding, altho originally an action at law under Iowa practice, is now triable in equity and, in the determination of such action, the court must necessarily apply equitable principles.

Briley v Board, 227-55; 287 NW 242
Bredt v Franklin County, 227-1230; 290 NW 669

Ministerial and discretionary duties. Principle reaffirmed that mandamus lies to compel the performance of a purely ministerial duty, not to control a discretionary duty.

Phinney v Montgomery, 218-1240; 257 NW 208

New action after failure of former action. An action in equity to mandamus the board of supervisors to order the refund of a tax which has been illegally exacted from plaintiff may not be deemed a continuation of a former action at law by the same plaintiff against the county and its treasurer for a personal judgment for the amount of said illegally exacted tax.

Murphy v Board, 205-256; 215 NW 744

Partially void tax sale. Mandamus (assuming the propriety of the remedy) will not lie to wholly cancel a tax sale which is only partially void.

Wren v Berry, 214-1191; 243 NW 375

Question first presented on appeal. Whether an action was properly brought in mandamus may not be presented for the first time on appeal.

Employment Bur. v State Com., 209-1046; 229 NW 677

Recordation of instrument by county recorder.

Weyrauch v Johnson, 201-1197; 208 NW 706

II ACTS AND PROCEEDINGS

(a) OF COURTS, JUDGES, AND JUDICIAL OFFICERS

Indeterminate sentence—fixing maximum or minimum confinement—surplusage. That part of a sentence of confinement in the penitentiary or in the men's or women's reformatory for a felony other than treason, murder, or rape, which assumes to fix the maximum or minimum term of confinement is surplusage under the indeterminate sentence act, even tho the statute under which the conviction is had fixes both a maximum and minimum term of confinement.

Cave v Haynes, 221-1207; 268 NW 39

(b) OF PUBLIC OFFICERS, BOARDS, AND MUNICIPALITIES

Soldiers preference cases. See under §1162
Discussion. See 16 ILR 53—Review of commission orders

Aid to blind. The discretion of the board of supervisors to refuse public aid to a blind person may not be controlled by mandamus.

Addison v Loudon, 206-1358; 222 NW 406

Appropriation for farm bureau. Mandamus is the proper remedy to compel the board of supervisors to make an appropriation of public funds to a farm bureau organization, even tho the board must, as a preliminary matter, determine whether the facts exist justifying the appropriation.

Taylor County Bureau v Board, 218-937; 252 NW 498

Official newspapers — number — nondiscretionary power of supervisors. Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

Arbitrary zone reductions—state board correcting local board. The state board of assessment and review has supervision over, and power to direct, the local board and the city assessor of Des Moines, Iowa, to correct an arbitrary and discriminatory practice as to cubical content and zone of assessments, and in a mandamus action may enforce its order for the correction of such discrimination as may already have resulted. Such an order is not a re-assessment nor a revision of individual assessments of individual owners, since it dealt with aggregate valuation in several zones.

State v Local Board, 225-855; 283 NW 87

II ACTS AND PROCEEDINGS—continued
(b) OF PUBLIC OFFICERS, BOARDS, AND MUNICIPALITIES—continued

Assessment for drainage—correction of description. Mandamus will lie, by one landowner within a drainage district, to compel the board of supervisors to so correct the description of other assessed lands that the latter may be sold under the assessment against them.

Plumer v Board, 203-643; 213 NW 257

Assessments — inability to meet bonds. Where a drainage district was created and a sufficient assessment to pay all bonds was levied and collected but not at all times carried in a separate account by the county treasurer, with the result that on maturity date of the bonds no sufficient balance was available to retire them, a mandamus action on the theory of an insufficient assessment (§7509, C., '35) brought by the bondholders to require the drainage district trustees to make an additional levy was properly denied.

Western Assn. v Barrett, 223-932; 274 NW 55

Attorney general's salary. A statute, altho in the code because of its general and permanent nature, which sets the salary of the attorney general, a state officer, is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment for the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

Bridges—construction over ditches. The statutory duty of the board of supervisors to construct bridges over public ditches at points where such ditches intersect secondary roads is enforceable by action of mandamus, such duty being in no manner limited or controlled by the statutory powers granted the county board of approval in adopting secondary road programs.

Robinson v Board, 222-663; 269 NW 921

Certification of nomination. Mandamus will lie to compel the secretary of state to certify a legal nomination to the county auditor.

Zellmer v Smith, 206-725; 221 NW 220

Construction of drainage improvement. Mandamus will not lie to compel the board of supervisors to proceed with the construction of a drainage improvement which, in effect, the board has never established.

Eller v Board, 208-285; 225 NW 375

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

Denial of policemen's pension. Mandamus is not the proper remedy to test the legality of the action of the trustees of a policemen's pension fund in denying a pension to an applicant.

Riley v City, 203-1240; 212 NW 716

Drains—tax sale—nonduty of supervisors to purchase certificate. The statutory provision that the board of supervisors or the drainage trustees "may" purchase an outstanding certificate evidencing a sale of land, for the nonpayment of drainage assessments, simply invests the board or trustees with discretion so to purchase. No mandatory duty so to purchase in order to protect the bondholder is imposed, even tho the bondholder must look solely to assessments for payment of his bond.

Bechtel v Board, 217-251; 251 NW 633

Execution of teacher's contract. Principle reaffirmed that, in an action of mandamus against the president and secretary of a school board to compel the execution of a teacher's contract, the validity of the action of the directors in closing the school in question may not be inquired into.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

Ex-soldier preference—refusal. On mandamus to right the alleged wrong in refusing to grant to an ex-soldier a preference in a public appointment or employment, the sole and only issue before the court is whether the appointing officer or board was justified, within the range of fair discretion, in finding on the law-required investigation, as to relative qualifications, that the qualifications of the ex-soldier were not equal to the qualifications of the non-soldier appointee.

Bender v Iowa City, 222-739; 269 NW 779

Failure to maintain pension fund. An action at law against a city for judgment consequent on the failure of the council to perform its mandatory duty to levy a tax sufficient to meet and pay pensions for firemen and policemen, will not lie either on the theory of contract or damages. Mandamus is the proper remedy.

Lage v City, 212-53; 235 NW 761

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land

over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed; and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Issuance of county warrant. Mandamus is the proper remedy to compel the county auditor to issue a warrant in payment of legal claims against the county.

Miller Tractor v Hope, 218-1235; 257 NW 312

Issuance of treasurer's salary warrant. In mandamus suit by county treasurer to obtain warrant for salary, defendant's answer alleging, in effect, that treasurer owed county money for which a right of set-off existed, that treasurer was insolvent, and that he was not the head of a family and had not offered to do equity, raised issue as to treasurer's right to equitable relief.

Briley v Board, 227-55; 287 NW 242

Levy of tax. Mandamus will lie to compel a board of school directors to levy a tax to pay a judgment, there being no money in the fund in question, and no effort having been employed to secure such funds.

Looney v Sch. Dist., 201-436; 205 NW 328

Ordinance—arbitrary action. A mayor, exercising his power under an ordinance to direct the nonissuance of a license, may not be said to act "arbitrarily" when he, in accordance with the ordinance, notifies the applicant of the time and place of hearing on the application and when the applicant ignores the notice.

Talarico v Davenport, 215-186; 244 NW 750

Presumption as to official conduct. Presumptively a public officer will perform his duties as prescribed by law.

Banta v Clarke County, 219-1195; 260 NW 329

Proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of §7164, C., '35. The state board of assessment and review has no power to correct this failure.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Recovery of tax paid—mandamus as remedy—voluntary payment—effect. Taxes illegally exacted through county auditor's failure to comply with statute requiring budget deduction of moneys and credits tax may be recovered in a mandamus action against the board of supervisors, even tho paid voluntarily and without protest.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Refusal of liquor permit. The good-faith exercise of the discretion vested in a town council to refuse an application for a class "B" permit to sell beer, on the ground that the applicant is not "of good moral character and repute", is not controllable by mandamus.

Madsen v Oakland, 219-216; 257 NW 549

Refund of tax. A taxpayer may not maintain an action for a general money judgment against a county, arising out of the fact that he has paid in the same year and on the same property an illegal bridge tax levied by a city and a legal bridge tax levied by the board of supervisors. Whatever remedy he has against the county, if any, must be worked out through mandamus to compel a refund.

Murphy v Berry, 200-974; 205 NW 777

Refund of erroneously exacted tax. Mandamus is the proper remedy to compel the board of supervisors to refund to a tax certificate holder the amount paid on an illegal sale of real estate for personal taxes not entered on delinquent personal tax list.

Schoenwetter v Oxley, 213-528; 239 NW 118

School district. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute. The proper remedy of the plaintiff was mandamus to compel the school district to perform its mandatory duty.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

School fund estimates omitting money on hand—taxes valid. School districts, in submitting their budgets for their fiscal year beginning July 1, are not required to include money on hand derived from taxes levied and estimated two years before and collected a year later to be expended during the current school year, and taxes collected accordingly will not be refunded in a mandamus action.

Lowden v Woods, 226-425; 284 NW 155

Schoolhouse site—permissible order of court. An order of court commanding the school board forthwith to erect a schoolhouse on a specified site is unobjectionable when such site had been already legally selected by the board.

Sanderson v Board, 211-768; 234 NW 216

Statute of limitation. The statute of limitation commences to run against an action of mandamus to compel the board of supervisors to levy an additional assessment to pay drainage warrants even tho the board had not levied or otherwise provided for the additional as-

II ACTS AND PROCEEDINGS—concluded
(b) OF PUBLIC OFFICERS, BOARDS, AND MUNICIPALITIES—concluded

sessment to complete the fund from which the warrants are to be paid.

Lenehan v Drain. Dist., 219-294; 258 NW 91

Teachers — pension—employment prerequisite. A public school teacher, after 30 years service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment, and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

Title to office. In an action of mandamus by a duly appointed, qualified, and acting public officer to compel the legal warrant-issuing officer to issue warrants for salary due plaintiff, the court will not determine whether plaintiff was eligible to receive said appointment.

Reason: Quo warranto is the sole remedy to test title to such office.

Clark v Murtagh, 218-71; 254 NW 54

(c) OF PRIVATE CORPORATIONS AND INDIVIDUALS

Certificates of assessment—paramount right of holder. The holder of special paving assessment certificates who obtains an assignment of a tax sale certificate, issued on a sale of the lots or land for general taxes, may be compelled by mandamus to reassign said tax sale certificate (on proper payment) to the holder of special sewer assessment certificates which affect the same lots or land and which latter certificates are legally prior in point of time and right to said paving certificates.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Corporation having first option to buy—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock and mandamus will lie to compel the transfer of said stock on its records.

McDonald v Farley Co., 226-53; 283 NW 261

Duty enjoined from "station". Mandamus is a proper remedy to compel the holder of a tax sale certificate to assign the same to a party who has a prior, paramount, legal right to such certificate. This is true because of the "station" which said obligated party has legally taken upon himself.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Examination of corporate records. One who, as an attorney in fact (tho not an attorney at law), is in good faith interested on behalf of his principal in a transfer of corporate stock, and who will become entitled to a compensation if he succeeds in collecting his client's claim, has such interest as will enable him to maintain mandamus to compel the corporation to permit an examination of the stock books and transfer records of the corporation.

Drennan v Ins. Co., 200-931; 205 NW 735

Right to examine books and records. An administrator and the heirs at law of a deceased stockholder in a corporation, when refused an examination by the corporation, have the right, without any plea of good faith, to an order of court, in an appropriate proceeding, permitting them and their necessary assistants to examine the books and records of the corporation in order to determine the financial condition of the corporation and the value of its stock.

Becker v Trust Co., 217-17; 250 NW 644

III JURISDICTION, PROCEEDINGS AND RELIEF

Action relative to drainage bonds. An action against the board of supervisors relative to public drainage bonds must be brought in the county of which such supervisors are officials (§11036, C., '27) even tho such bonds provide for payment in some other county (§11040, C., '27). It follows that when not so brought a motion for change of venue to the proper county must be sustained. So held where the action sought not only a judgment at law against the supervisors for the amount due on the bonds, but sought mandamus to compel the levy of assessments.

Board v Dist. Court, 209-1030; 229 NW 711

Calling of election—adjudication. A judicial holding to the effect that a petition for the calling of an election to vote on the question of granting an electric light and power franchise was in due form and substance, and that mandamus should issue to compel the calling of such election, is res judicata of a subsequent petition by the same petitioner for the same relief.

Iowa Co. v Tourgee, 208-198; 225 NW 372

Civil service—showing required. On mandamus to compel a city to comply with an order of the civil service commission, plaintiff must, of course, establish jurisdiction in said commission to enter said order. So held where the order was entered for the reinstatement of an employee who had never taken an examination and had no civil service rights.

Larson v City, 216-42; 247 NW 38

Selection of official county newspapers—speedy and adequate remedy — jurisdiction. Mandamus to compel county supervisors to

select petitioner's newspaper as one of three official newspapers was a proper procedure where petitioner was one of three applicants and had no plain, speedy, and adequate remedy at law, since there was no contest in the selection from which an appeal would lie under §5406, C., '39.

Bredt v Franklin County, 227-1230; 290 NW 669

Official newspapers — proprietor as proper party to compel selection. The rule is now well established that the proprietor of a newspaper has such interest in the selection of official newspapers that he can maintain an action of mandamus in his own name to compel the selection by the county supervisors.

Bredt v Franklin County, 227-1230; 290 NW 669

Equitable relief. In mandamus suit by county treasurer to obtain warrant for salary, defendant's answer alleging, in effect, that treasurer owed county money for which a right of set-off existed, that treasurer was insolvent, and that he was not the head of a family and had not offered to do equity, raised issue as to treasurer's right to equitable relief.

Briley v Board, 227-55; 287 NW 242

Erection of bridge. Mandamus to compel the board of supervisors to erect a bridge on an established and existing highway at the point where the highway is crossed by a public drainage improvement is not barred by the lapse of time.

Perley v Heath, 201-1163; 208 NW 721

Formal demand—nonnecessity for. A formal demand that a public body perform a mandatory, statutory duty is not required, as a condition to maintaining an action of mandamus, when the body knows of the demand, neglects to act and does not intend to act unless commanded by the court to act.

Robinson v Board, 222-663; 269 NW 921

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed; and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Public aid—sufficiency of petition. In mandamus to compel an appropriation by a board of supervisors to a farm bureau association, the failure of the petition to state the amount of aid furnished the bureau by the federal government is not fatal when the petition was not attacked in the trial court.

Appanoose Bureau v Board, 218-945; 256 NW 687

Petition—motion to dismiss as proper attack. Attack on mandamus petition should have been made by a motion to dismiss rather than by a demurrer, since statutes provide that mandamus shall be tried as an equitable action, and that a petition in equity may be attacked by motion to dismiss.

Bredt v Franklin County, 227-1230; 290 NW 669

Appeal—demurrer treated as motion to dismiss. In mandamus action, where parties treat a demurrer as a motion to dismiss, it will be so viewed on appeal.

Bredt v Franklin County, 227-1230; 290 NW 669

Submission of franchise. Upon the filing, with the mayor of a city, of a legally sufficient petition for the calling of an election to vote on the granting of a franchise to operate a public utility, under Ch 312, C., '27, and after the lapse of a reasonable time for a canvass of the legal sufficiency of the petition, a mandatory and nondiscretionary duty, enforceable by mandamus, devolves on the mayor to call the election and make the submission.

Iowa Co. v Tourgee, 208-36; 222 NW 882

12441 Discretion—exercise of.

Atty. Gen. Opinion. See '36 AG Op 17

Appointment under preference law—nonreview of discretion. The legal freedom of the board of supervisors to determine according to its own judgment—in other words, its discretion to determine—that an applicant who is not an honorably discharged soldier has qualifications for the position of steward of the county home superior to the qualifications of an applicant who is such soldier, will not be reviewed in an action of mandamus unless the record is such as to clearly show that the board abused its discretion—acted in bad faith.

Miller v Hanna, 221-56; 265 NW 127

Discretion. The directors of a school district have a fair discretion as to the method to be employed in teaching a subject which the electors have directed to be taught—a discretion not controllable by mandamus.

Neilan v Board, 200-860; 205 NW 506

Discretion—control of. Principle reaffirmed that mandamus will not lie to control the discretion vested in a public official.

Bernstein v City, 215-1168; 248 NW 26; 86 ALR 782

Dissolution of school district. When under due application for the dissolution of a consolidated school corporation (§4188, C., '27), it is made to appear that bonds have been is-

sued by the district, the county superintendent is vested with a discretion to disapprove the application, and in such case mandamus will not lie to compel approval.

Sarby v Morey, 207-521; 221 NW 492

Employment of teacher—school board's discretion. Re-employment of a teacher is a matter wholly within the discretionary power vested in the school board and may not be controlled through the courts by mandamus.

Driver v Sch. Dist., 224-393; 276 NW 37

Permit for oil station. Mandamus will not lie to compel a city council to grant a permit for the erection and maintenance of a gasoline filling station when the council, in the exercise of its legal discretion, has refused such permit.

Cecil v Toenjes, 210-407; 228 NW 874

12442 Nature of action.

Equitable proceeding. A mandamus proceeding, altho originally an action at law under Iowa practice, is now triable in equity and, in the determination of such action, the court must necessarily apply equitable principles.

Briley v Board, 227-55; 287 NW 242

Bredt v Franklin County, 227-1230; 290 NW 669

Unallowable joinder of law and mandamus. An action at law against a county for judgment for taxes illegally exacted may not be joined with an equitable action of mandamus for an order on the board of supervisors directing the county treasurer to refund such taxes.

First N. Bk. v Board, 217-702; 247 NW 617; 250 NW 887

Petition—motion to dismiss as proper attack. Attack on mandamus petition should have been made by a motion to dismiss rather than by demurrer, since statutes provide that mandamus shall be tried as an equitable action, and that a petition in equity may be attacked by motion to dismiss.

Bredt v Franklin County, 227-1230; 290 NW 669

12443 Order issued.

Proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of §7164, C., '35. The state board of assessment and review has no power to correct this failure.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

12445 "Enforceable duty" defined.

Proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of §7164, C., '35. The state board of assessment and review has no power to correct this failure.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

12446 Other plain, speedy, and adequate remedy.

Assessments—inability to meet bonds—mandamus not remedy. Where a drainage district was created and a sufficient assessment to pay all bonds was levied and collected but not at all times carried in a separate account by the county treasurer, with the result that on maturity date of the bonds no sufficient balance was available to retire them, a mandamus action on the theory of an insufficient assessment (§7509, C., '35) brought by the bondholders to require the drainage district trustees to make an additional levy was properly denied.

Western Assn. v Barrett, 223-932; 274 NW 55

12447 When order granted.

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed; and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

12448 Petition.

Misjoinder of causes—when noneffective. In a mandamus action against board of supervisors in which the petition originally prayed for refund of taxes already paid, as well as the remission of unpaid taxes, and no attack is made on such misjoinder by motion, and the decree recites that party, with permission of court, withdrew that portion of the prayer asking for refund of taxes already paid, no error can be predicated upon such alleged misjoinder.

Brunner v Floyd County, 226-583; 284 NW 814

12449 Other pleadings.

Nature of proceedings—jurisdiction—statutory provisions. While mandamus was originally an action at law, and a statute (now §12449, C., '39) provided that pleadings and proceedings should be the same, as nearly as may be, as ordinary actions, the proceeding was changed to an action in equity by a statute (now §12442, C., '39) which, altho it did not expressly amend the statute in question

(now §12449, C., '39), requires equity pleadings and procedure.

Bredt v Franklin County, 227-1230; 290 NW 669

Appeal—demurrer treated as motion to dismiss. In mandamus action, where parties treat a demurrer as a motion to dismiss, it will be so viewed on appeal.

Bredt v Franklin County, 227-1230; 290 NW 669

12449.1 Trial in vacation.

Vacation orders in mandamus before present statute.

Weyrauch v Johnson, 201-1197; 208 NW 706

12450 Injunction may issue—joinder.

Joinder—law and equity. Principle reaffirmed that two actions, one at law and one in equity, may not be joined.

Murphy v Board, 205-256; 215 NW 744

County supervisors—duties imposed by law. A statute requiring the board of supervisors to remit unpaid taxes on the capital stock of a bank which fails imposes a positive duty on the board of supervisors to comply with statute irrespective of any demand or notice; and the fact that the stockholders petitioned for a refund of taxes already paid, which is not contemplated by such statute, in addition to remission of unpaid taxes, does not excuse the failure of the board to remit such taxes as come within the purview of the statute, since the performance of this duty is imposed upon the board by law.

Brunner v Floyd County, 226-583; 284 NW 814

Damages. An action of mandamus to compel the board of supervisors to proceed to the assessment of damages consequent on the taking of land in order to effect a change in a highway is properly stricken on motion when joined with an action against the county for damages for the taking of said land.

Valentine v Board, 206-840; 221 NW 517

12451 Peremptory order.

Defect of parties—effect. In mandamus to obtain an order cancelling a tax sale and the certificate issued thereunder (assuming the propriety of such action) the court manifestly cannot disturb the certificate holder when he is not a party to the action.

Wren v Berry, 214-1191; 243 NW 375

CHAPTER 533

CERTIORARI

12456 When writ may issue.

Atty. Gen. Opinion. See '25-26 AG Op 435

ANALYSIS

I NATURE AND SCOPE OF REMEDY IN GENERAL
II DISCRETION AS TO GRANT OF WRIT
III WHEN WRIT LIES
IV WHEN WRIT DOES NOT LIE
V EXISTENCE OF OTHER REMEDY
VI LOSS OF RIGHT TO OTHER REMEDY

Contempt cases. See under §12550
Municipal zoning board decisions. See under §§6466, 6469
Soldier's preference cases. See under §1163

I NATURE AND SCOPE OF REMEDY IN GENERAL

Discussion. See 19 ILR 137—Common law statutes; 18 ILR 263—Judicial discretion abused; 19 ILR 366—Defect of jurisdiction of person; 19 ILR 467—Judicial process reviewed; 19 ILR 609—Nonjudicial bodies

Adequate remedy—writ annulled. Where a writ of certiorari is issued by the supreme court, based upon the contention that the lower court exceeded its jurisdiction in the interpretation of one of its rules of practice, and where the amount involved is also in dispute, and where an appeal on the same judgment is also pending before the supreme court, which, after consolidating the two causes, determines the amount involved to be appealable, the certiorari proceedings are unnecessary and the writ will be annulled, since the petitioner has a complete remedy by appeal.

Yost v Gadd, 227-621; 288 NW 667

Cancellation of mortgage as real action—venue change to land situs. Ultimate test of applicability of §11034, C., '35, is not whether proceeding is in personam or in rem but whether determination of a right in real estate is involved, and therefor an action for cancellation of mortgages involving a determination of a right in real estate, which is the subject of the action, must be brought in the county where the land is located, and granting change of venue thereto will be upheld on certiorari.

Whalen v Ring, 224-267; 276 NW 409

Competent sustaining evidence necessary—hearsay ignored on review. Where, in a proceeding before the civil service commission, incompetent hearsay evidence, in the form of minutes of testimony before a grand jury, is considered on the question of whether suspended police officers should be reinstated, the supreme court on review in certiorari must examine the record to ascertain if there is

I NATURE AND SCOPE OF REMEDY IN GENERAL—concluded

other competent evidence to support the commission's ruling.

Luke v Civil Service, 225-189; 279 NW 443

Essential purposes of writ. On certiorari to review an order of the district court relative to the production of books and papers, the sole inquiry is whether the lower court had jurisdiction to enter the order in question, not whether the lower court made errors in exercising its jurisdiction which were correctible on appeal.

Main v Ring, 219-1270; 260 NW 859
Ind. Order v Scott, 223-105; 272 NW 68

Findings of fact—when reviewed. In certiorari action by city to annul decision of civil service commission, it is not the court's duty to review findings of fact if sustained by any competent and substantial evidence, unless such lower tribunal otherwise acted illegally and there is no other plain, speedy, and adequate remedy at law. However, a lack of such evidence constitutes such illegality as would warrant a review of the findings below.

Des Moines v Board, 227-66; 287 NW 288

Foreign corporations—visitatorial power of state. A foreign corporation transacting business within this state is subject to all the remedies available against a domestic corporation. So held under an application for an order for the production of papers and documents.

Ind. Order v Scott, 223-105; 272 NW 68

Injunction violation by labor union—no trial de novo. In certiorari to review a judgment finding the defendants guilty of violating an injunction, the case was not triable de novo in the supreme court.

Carey v Dist. Court, 226-717; 285 NW 236

Judgment by default—setting aside—when affidavit of merit unnecessary. A default may be legally set aside tho the mover therefor files no affidavit of merit, when the court, in entering the default, stated that he would set aside the default if a motion so asking be filed, and when the applicant for the default then affirmatively acquiesced in such purpose of the court.

Wagoner v Ring, 213-1123; 240 NW 634

Jurisdiction—evidence—limitation on court. It is not within the province of the courts, on certiorari, to review the findings of an inferior tribunal, but to determine jurisdiction and examine the record to ascertain if there was sufficient competent evidence to sustain its findings, or if it was otherwise acting illegally.

Luke v Civil Service, 225-189; 279 NW 443

Jurisdiction—time at which essential. In certiorari to review trial court's ruling sustaining motion to set aside default, supreme court is not concerned with jurisdiction at time judgment is entered, but is concerned with the jurisdiction of court at time ruling is made on motion.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

II DISCRETION AS TO GRANT OF WRIT

District court's power to enjoin unlicensed person practicing law—certiorari thereon annulled. Whether attorneys admitted to practice law are possessed of valuable right, privilege, or franchise which may be unlawfully encroached upon by an unlicensed person, thereby causing irreparable damage and injury to such attorneys and others similarly situated, and whether they are entitled to injunctive relief in equity, were all questions determinable by the district court after hearing of evidence, so a writ of certiorari, issued by the supreme court to the district court, for want of jurisdiction of subject matter, must be quashed and annulled.

Johnson v Purcell, 225-1265; 282 NW 741

Return—other evidence admissible. In certiorari proceedings the district court is not limited to the actual return to the writ in determining whether or not the inferior tribunal acted illegally or without jurisdiction, but by statute other evidence bearing on that question is admissible.

Steeves v New Market, 225-618; 281 NW 162

Sua sponte determination by court. The court having issued a writ of certiorari will, on the final hearing, determine whether the writ is allowable even tho such question is not raised by the party litigants.

Samek v Taylor, 203-1064; 213 NW 801
Dickson Co. v Dist. Ct., 203-1028; 213 NW 803
Kommelter v Dist. Ct., 225-273; 280 NW 511

III WHEN WRIT LIES

Acts of administrative officers. Certiorari may be the proper remedy to review the action of the commissioner of insurance and attorney general (§8688, C., '35) in refusing to approve amended articles of incorporation of an assessment association.

National Ben. Assn. v Murphy, 222-98; 269 NW 15

Change of venue—unimpeached showing of prejudice. The refusal, in a criminal prosecution, to grant a change of venue to the state constitutes an abuse of discretion, and therefore an illegal action, when the state has made a prima facie showing of such prejudice and excitement in the county as will, judging it prospectively, prevent the state from receiving a fair and impartial trial, and when such showing stands substantially unimpeached by the resistance.

State v Jefferson County, 213-822; 238 NW 290

Refusal of change of venue. The refusal of a mayor to grant defendant a change of venue in a prosecution for assault and battery, on the ground "that the mayor was prejudiced against him", constitutes an illegality reviewable on certiorari, an appeal from the judgment of the mayor on the merits not being a plain, speedy, and adequate remedy.

Shearer v Sayre, 207-203; 222 NW 445

Refusal of change of venue to state. Certiorari will lie, in the form of an original action in the supreme court, to review the alleged abuse of discretion, and consequent illegal action of the district court in refusing the state a change of venue in a criminal prosecution for a felony.

State v Dist. Court, 213-822; 238 NW 290

Unallowable change of venue. Tho in an action of tort the husband and wife are sued jointly in a county other than the county of their common residence, the action of the wife in entering a general appearance and filing answer precludes the court thereafter from granting her a change of place of trial to the county of her residence. So held where the court, on the application of the husband, properly granted him a change of place of trial, and later dismissed the entire action because the plaintiff failed to pay, as ordered, the costs consequent on bringing the action in the wrong county.

Mansfield v Municipal Court, 222-61; 268 NW 908

Civil service—"hearing and determination" —what constitutes. In certiorari to determine the legality of proceedings of civil service commission in removing a city employee, the commission's statutory duty to "hear and determine" is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony by both sides, from a consideration of which the relief sought by the moving party is either granted or denied.

Sandahl v Des Moines, 227-1310; 290 NW 697

Civil service commission ruling—remedy. No appeal being allowed from a ruling of the civil service commission, and there being no other plain, speedy, and adequate remedy if the commission exceeded its proper jurisdiction, or otherwise acted illegally, a writ of certiorari will lie.

Luke v Civil Service, 225-189; 279 NW 443

Collateral attack on budget appeal board. A suit in mandamus to compel the county auditor to ignore the decision of the state board of appeal in local budget matters on the ground that such decision was made after the board had ceased to exist, is a collateral attack on the board's action, certiorari being the method for a direct attack; and if the mandamus suit is dismissed by the lower court, the supreme court on appeal will determine only if the acts of the board show on their face by their dates alone that they were illegal acts because the board had ceased to exist as such.

Woodbury Conference v Carr, 226-204; 284 NW 122

Court of contest—jurisdiction. Certiorari will lie to review the alleged unauthorized exercise of jurisdiction by a contest court selected for the purpose of deciding who had been elected to a state office, even tho it be true that the decree of said contest court is final under the statute.

Haas v Contest Court, 221-150; 265 NW 373

Criminal case—statute of limitation. Tho an invalid original entry of judgment in a criminal cause may be beyond review by certiorari because of the statute of limitation, yet certiorari will lie, if timely, to review a subsequent order of court revoking the suspended part of said former judgment and ordering the accused committed to jail.

Dayton v Bechly, 213-1305; 241 NW 416

Denial of policemen's pension. Certiorari is the proper remedy to test the legality of the action of the trustees of a policemen's pension fund in denying a pension to an applicant.

Gaffney v Young, 200-1030; 205 NW 865
Riley v City, 203-1240; 212 NW 716

Discovery of assets—scope of jurisdiction. In inquisitorial proceedings for the discovery of assets belonging to an estate, the jurisdiction of the court to continue said proceedings abruptly terminates at the point of time, when it is actually made to appear that an actual controversy exists as to the title to the property in question.

Findley v Jordan, 222-46; 268 NW 515

Excess jurisdiction — reviewable illegality. The granting by the court, in manifest opposition to the statute, of a moratorium continuance of mortgage foreclosure proceedings, is in excess of the jurisdiction of the court, and constitutes an illegality, reviewable on certiorari.

Home Owners Corp. v Dist. Court, 223-269; 272 NW 416

Illegal action of fence viewers. Certiorari will lie to review the proceedings of township trustees in acting as fence viewers without jurisdiction of the subject matter, even tho an appeal is provided for in such proceedings.

Sinnott v Dist. Court, 201-292; 207 NW 129

Illegal order—when nonparty may question. An appointee to a public position who has been deprived of said position by the action of the civil service commission may maintain in the district court certiorari to review said action,

III WHEN WRIT LIES—continued

even tho he was not a party to the proceedings which resulted in said action.

Ash v Board, 215-908; 247 NW 264

Illegal setting aside of dismissal. Certiorari is a proper remedy to review the action of a trial court in illegally setting aside the dismissal, prior to the return day, of an action, and in proceeding with the cause as tho no dismissal had been filed.

Lyon v Craig, 213-36; 238 NW 452

Improper order to produce instrument. The district court has no jurisdiction to enter an order requiring plaintiff in mortgage foreclosure action to deposit with the clerk the original note and mortgage sought to be foreclosed, for the inspection of a nonanswering defendant, when the application upon which the order is entered is unverified and contains no allegation concerning the materiality of said inspection. It follows said order is subject to review on certiorari.

Dunlop v Dist. Court, 214-389; 239 NW 541

Injunction—conditional order for—compliance—effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

Jurisdiction—strict construction. The jurisdiction of the superintendent of public instruction over appeals from decisions and orders of a county superintendent cannot, by the conduct of a party to the appeal, be enlarged beyond the jurisdiction actually conferred by law.

School Dist. v Samuelson, 222-1063; 270 NW 434

Land subjected to bank's judgment—attorney lien—belated cost modification—review. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Bk. v Jordan, 224-28; 276 NW 71

Order for production of books. Certiorari may be proper for the review of an order for the production of evidence in the form of books.

Stagg v Bank, 203-84; 212 NW 342

Original notice—failure to state nature of cause of action. Jurisdiction is not conferred on the court by an original notice of suit which simply notifies defendant that plaintiff claims a stated sum of money—which contains no statement whatever as to the nature of the cause of action—and said notice is not aided by an inserted statement directing defendant to examine the petition, when filed, for further particulars.

Farley v Carter, 222-92; 269 NW 34

Production of books and papers—illegal rule. When an action is predicated by plaintiff on the plea that a corporation in entering into a contract with plaintiff was acting as the agent of one or both of two other corporations, and also on the plea that said contract was in furtherance of a joint adventure of said three parties, the court in granting plaintiff a rule for the production of books and papers acts illegally insofar as it fails to confine said rule to books and papers which tend to support the affirmative of either or both of said issues.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Pupils—attendance in foreign district—nonconsent of superintendent. Certiorari will lie to review the discretion of the county superintendent of schools in refusing to consent that a pupil, residing in one school corporation, may (at the expense of the pupil's district) attend school in an adjoining but different school corporation.

Moles v Daland, 220-1170; 264 NW 74

Review of condemnation proceedings. Certiorari will lie to review condemnation proceeding by the state highway commission.

Jenkins v Hy. Com., 205-523; 218 NW 258

Review of decision on question of facts. Certiorari will lie to review the action of the trustees of a statutory pension fund in denying relief to an applicant when the conceded

or proven facts mandatorily require the granting of such relief.

Dempsey v Alber, 212-1134; 236 NW 86; 238 NW 33

Right to take depositions. Certiorari is the proper remedy to test the legal right of the district court to order defendants in an action to submit to the taking of their depositions by plaintiff in the said action.

Bagley v Dist. Court, 218-34; 254 NW 26

State and federal courts—comity. The necessity for comity between state and federal courts demands that controversies shall not arise concerning their respective jurisdictional powers on account of unsubstantial considerations, and certiorari from the supreme court of Iowa will lie to require a district court of the state to relinquish jurisdiction over a probate matter after the federal court, through diversity of citizenship, has assumed jurisdiction.

Reconstruction F. Corp. v Dingwell, 224-1172; 278 NW 281

State commerce commission—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley (town) v Conway, 226-268; 284 NW 136

Time of trial—mandatory discharge for delay. The court, on proper motion therefor, is under mandatory duty to dismiss an indictment which, during the first term of court following its return, was, on motion for change of venue, transferred to another county, and was not there tried during the term pending when the transfer was ordered, nor during the following term—lasting two months—because of the very large assignment of equity cases and matters local to said county.

And this is true tho the defendant during said delay made no demand for a trial.

Davison v Garfield, 221-424; 265 NW 645

Want of jurisdiction. A party may resort to certiorari whenever he is faced by a wholly unauthorized proceeding, and with court orders with reference to such proceedings which the court had no jurisdiction to enter. In other words, he is under no legal obligation to enter a general appearance in such proceedings and appeal from the final judgment.

Phoenix Ins. v Fuller, 216-1201; 250 NW 499

IV WHEN WRIT DOES NOT LIE

Adequate remedy—writ annulled. Where a writ of certiorari is issued by the supreme court, based upon the contention that the lower court exceeded its jurisdiction in the interpretation of one of its rules of practice, and where the amount involved is also in dispute, and where an appeal on the same judgment is also pending before the supreme court, which, after consolidating the two causes, determines the amount involved to be appealable, the certiorari proceedings are unnecessary and the writ will be annulled, since the petitioner has a complete remedy by appeal.

Yost v Gadd, 227-621; 288 NW 667

Appeal as remedy. Certiorari will not lie when an appeal will furnish an adequate remedy.

McCarthy Co. v Dist. Court, 201-912; 208 NW 505

Appeal excludes certiorari. An order of the district court, refusing a hearing of an application to compel the county attorney to file and enter upon the appearance docket indictments alleged to have been returned against the applicant, is appealable, and therefore certiorari will not lie.

Hoskins v Carter, 212-265; 232 NW 411

Appealable rulings on motions—certiorari not available. The sole function of certiorari is to annul illegal action and not to review mere errors arising out of rulings on motions when by appeal there is a remedy for the correction of the latter.

Kommelter v Dist. Ct., 225-273; 280 NW 511

Change of venue — fatally delayed motion. It is mandatory that a motion for a change of venue from the county of suit to the county of defendant's residence be filed before answer. Manifestly, certiorari will not lie to question the overruling of such belated motion.

Thornburg v Mershon, 216-455; 249 NW 202

Failure of proof. Writ of certiorari, to review discharge of ex-soldier from a public appointive position, cannot be sustained when plaintiff predicates his right to relief solely on the unproven allegation that he was discharged by defendant.

Johnson v Herring, 222-1126; 271 NW 175

Jurisdiction to enter judgment—remedy by appeal. Remedy to question of trial court's jurisdiction to enter judgment is by appeal and not by certiorari.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Moot question. An order by the supreme court on appeal that the trial court enter a decree of divorce in favor of plaintiff, and all proper orders relative to the custody of the children, renders moot the legality of all prior orders of the trial court in injunctional proceedings relative to the custody of such children.

McGrath v Dist. Court, 205-191; 217 NW 823

IV WHEN WRIT DOES NOT LIE—concluded

Order for production of books. The legal discretion of the court to enter an order for the production of books and papers cannot be controlled by certiorari.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Order relative to interrogatories. The statute (§11185 et seq., C., '24) relative to the right to attach interrogatories to pleadings, and providing for answers thereto by the adversary, simply creates a rule of evidence, and an order which overrules objections to such interrogatories on the naked ground of irrelevancy, incompetency, and immateriality, and which requires the adversary to answer such interrogatories is not reviewable by certiorari.

Winneshiek Bank v Dist. Court, 203-1277; 212 NW 391

Refusing appointment of receiver. Certiorari will not lie to review the discretion of the court in refusing the appointment of a temporary receiver to close up the affairs of a corporation whose charter has expired, especially when appeal would furnish an adequate remedy for a review of every question presented.

McCarthy Co. v District Court, 201-912; 208 NW 505

Review of finding of fact. Certiorari will not lie to review a finding of the trial court that a movant for a change of venue on the ground of fraud in the inception of the contract sued on, was a resident of the very county in which the action was brought.

McEvoy v Cooper, 208-649; 226 NW 13

Right of appeal—effect. Certiorari will not lie to review an order of court, entered on its own motion, striking from the files defendant's cross-petition against a co-defendant.

Collins v Cooper, 215-99; 244 NW 858

Rulings on motions — correction—certiorari (?) or appeal (?). Certiorari will not lie to review rulings of the court on motions submitted to the court by the hostile litigants, the sole function of the writ being to annul illegal action and not to review mere errors. Appeal is the sole remedy for the correction of the latter.

Morrison v Patterson, 221-883; 267 NW 704

Rulings on pleadings. A litigant who moves to strike a pleading or to require it to be made more specific may not have the rulings on his motion reviewed on certiorari; and this is necessarily true even tho it be conceded, arguendo, that the pleading in question was not legally on the calendar.

Holcomb v Franklin, 212-1159; 235 NW 474

Searches and seizures—execution of warrant. In a certiorari proceeding a conviction for contempt in resisting the execution of a search warrant will not be reversed where the evidence indicated defendant knew purpose of search and disposed of evidence by dumping liquor before officers could seize it. Defendant's contention ineffectual that "dumping" occurred prior to execution of warrant.

Krueger v Municipal Court, 223-1363; 275 NW 122

When writ lies—suing state appeal board. Certiorari will not lie to review the action of the trial court in overruling a motion by the state appeal board for a change of venue of a trial questioning a decision of such board.

State Board v Dist. Ct., 225-296; 280 NW 525

V EXISTENCE OF OTHER REMEDY

Adequate remedy—writ annulled. Where a writ of certiorari is issued by the supreme court, based upon the contention that the lower court exceeded its jurisdiction in the interpretation of one of its rules of practice, and where the amount involved is also in dispute, and where an appeal on the same judgment is also pending before the supreme court, which, after consolidating the two causes, determines the amount involved to be appealable, the certiorari proceedings are unnecessary and the writ will be annulled, since the petitioner has a complete remedy by appeal.

Yost v Gadd, 227-621; 288 NW 667

Appeal as sole remedy. An order which sets aside a judgment some five years after its rendition, on the asserted ground that the cause had never been set for trial after issue had been joined, such order being made on motion, service, and appearance of all parties, is a finality in the absence of an appeal therefrom.

Dickson Co. v Dist. Ct., 203-1028; 213 NW 803

Appeal as sole remedy. The nunc pro tunc correction of an unsigned decree in order to make it conform to the original order of the court, such correction being made on motion, service, and appearance of all parties, is a finality in the absence of an appeal therefrom.

Samek v Taylor, 203-1064; 213 NW 801

Appeal as nonexclusive remedy. Either certiorari or appeal will lie to review the action of the board of supervisors in attempting to exclude lands from a drainage district after its establishment and construction, such attempted action being wholly beyond the jurisdiction of the board.

Estes v Board, 204-1043; 217 NW 81

Improper to review setting aside of default —appeal proper. Appeal, not certiorari, is the proper method to proceed to attack an alleged erroneous order of the municipal court in sustaining a motion to set aside a default judgment where the court had jurisdiction to enter the order.

Weston v Allen, 225-835; 282 NW 278

Jurisdiction to enter judgment—remedy by appeal. Remedy to question of trial court's jurisdiction to enter judgment is by appeal and not by certiorari.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Jurisdiction—ruling on motion after judgment—remedy by appeal. Where a trial court has jurisdiction, and rules on a motion to set aside a default and judgment, review cannot be had by certiorari, as remedy for review is by appeal.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Motion to dismiss—nonincriminating grand jury testimony—no resulting immunity. A person involuntarily appearing before the grand jury, tho not asked self-incriminating questions, who later is charged by county attorney's information with falsification of records, a subject connected with the grand jury investigation, may not, by certiorari, review the overruling of a motion to dismiss the information on the ground of immunity because of such grand jury appearance, when a remedy by appeal exists.

Kommelter v Dist. Ct., 225-273; 280 NW 511

Supreme court issuing writ—propriety of remedy determined subsequently. The supreme court, having issued a writ of certiorari in the first instance, may, with the record before it, determine whether certiorari is proper remedy.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

VI LOSS OF RIGHT TO OTHER REMEDY

Injunction in lieu of certiorari—procedure. It seems that when a plaintiff brings an action in equity for injunction when certiorari is the proper action, the defendant's sole remedy is to move for a transfer of the injunction proceedings into certiorari proceedings.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Loss of right to equitable relief. A duly entered judgment against plaintiff on the merits in a law action, and affirmed on appeal, constitutes a final judgment, and §11017, C., '31, furnishes no authority to plaintiff thereafter to file in the adjudicated law action a "substituted petition in equity" (and motion to transfer to equity) involving the same subject matter, and no authority or jurisdiction to the court to entertain such attempted action.

Phoenix Ins. v Fuller, 216-1201; 250 NW 499

Nunc pro tunc correction—appeal as sole remedy. The nunc pro tunc correction of an unsigned decree in order to make it conform to the original order of the court, such correction being made on motion, service, and appearance of all parties, is a finality, in the absence of an appeal therefrom.

Samek v Taylor, 203-1064; 213 NW 801

Vacating judgment—appeal as sole remedy. An order which sets aside a judgment some five years after its rendition, on the asserted ground that the cause had never been set for trial after issue had been joined, such order being made on motion, service, and appearance of all parties, is a finality, in the absence of an appeal therefrom.

Dickson Fruit Co. v Dist. Court, 203-1028; 213 NW 803

12457 By whom granted.

Dismissal for want of abstract. Certiorari to a district judge will be dismissed when petitioner, having ample time to do so, fails to file an abstract as specifically ordered by the court.

Wilson v Ring, 215-511; 245 NW 761

Failure to file brief and argument. Where the supreme court issues an order for a writ of certiorari and, pursuant to such order, respondent judge makes a return of the proceedings below, and thereafter nothing further is done and no abstract or argument filed, the petitioners are presumed to have abandoned their cause, and the writ will be annulled.

Phoenix Fin. v Jordan, 226-630; 284 NW 820

Limited jurisdiction of supreme court. Neither a judge of the supreme court, nor the court itself, has jurisdiction to issue a writ of certiorari to other than an inferior judicial tribunal. So held where the writ was inadvertently issued to the superintendent of public instruction and to a county superintendent of schools.

School District v Samuelson, 220-170; 262 NW 169

12459 Petition.

Motion to dismiss in lieu of demurrer. A motion to dismiss a petition for a writ of certiorari will be treated as a demurrer when based on statutory grounds for demurrer.

Fehrman v Sioux City, 216-286; 249 NW 200

Nonnecessary party. On certiorari to review the action of fence viewers, the party who initiated the proceedings is not a necessary party.

Sinnott v Dist. Court, 201-292; 207 NW 129

12462 Service and return.

Defective service—no jurisdiction through special appearance nor return to writ. Where mandatory statute requiring service of writ of certiorari had neither been complied with nor service accepted, the supreme court acquires no jurisdiction of the inferior tribunal

and a proper special appearance will not waive defective service nor does the return to the writ constitute a pleading to the merits.

Collins v Powell, 224-1015; 277 NW 477

Mandatory statutory service—strict compliance required. Where jurisdiction of the person depends upon service of either notice or process, the mandatory provision of statutes in regard to such service must be strictly complied with.

Collins v Powell, 224-1015; 277 NW 477

12463 Defective return.

Amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Insertion of nonrecord matter. On certiorari to review the action of a trial court in proceedings for contempt, it is wholly unallowable to insert, in the return, matter which was not made of record by the court at the time of the entry of the order in question, and matters so inserted will be stricken on motion.

Crosby v Clock, 208-472; 225 NW 954

Permissible abstract and amended return. Where, in certiorari, the cause is ordered submitted substantially as civil cases are submitted, the respondent may, on his own motion, very properly file an amended abstract setting forth the entire proceedings, and may likewise on his own motion, amend his original return by setting forth the transcript of the shorthand notes and exhibits, together with an explanation why it was impossible to include said transcript in the original return.

Roberts v Fuller, 210-956; 229 NW 163

Return—estoppel to question. A respondent in certiorari may not complain if the court which issues the writ accepts his certified return.

Adams Co. v Maxwell, 202-1327; 212 NW 152

Striking nonrecord matter. An argument of counsel, purporting to have been made to the court on the occasion of the entry of an order by the court, embodied in the return to a writ of certiorari, tho not made of record, is properly stricken on motion.

Dunlop v Dist. Court, 214-389; 239 NW 541

12464 Trial—judgment.

Certified record conclusive. A proceeding in certiorari must be heard on the record, proceedings, and facts as certified, not on unsupported assertions of fact made by the petitioner in his brief and argument.

Hale v Ring, 215-446; 245 NW 704

Contempt — sufficiency of evidence. The court, on certiorari, will, on conflicting evidence, be reluctant to interfere with a conviction of contempt in violating an injunction; yet it does not necessarily follow that the conviction will be affirmed on such evidence. The evidence must clearly and satisfactorily show guilt.

Andreano v Utterback, 202-570; 210 NW 780

Costs. Costs in certiorari proceedings to annul the void proceedings of fence viewers are properly taxed to the party who initiated the proceedings before the fence viewers, such party being a party to the certiorari proceedings by consolidation of other actions therewith.

Sinnott v Dist. Court, 201-292; 207 NW 129

Dismissal of writ. A writ of certiorari will be dismissed when there is a total failure to comply with an order that the cause be submitted in accordance with the rules for the submission of civil causes, even tho the parties to the writ have stipulated for a submission without abstract or argument.

Touche v Franklin, 201-480; 207 NW 337

Evidence to supplement return. Certiorari to review an order by the board of adjustment in re municipal zoning is not necessarily triable de novo on the return to the writ. Plaintiff, on proper allegation, has the legal right to introduce testimony (when it is not already in the return or when the facts are in dispute) to show that the order of the board is (1) clearly arbitrary and unreasonable or (2) is contrary to the public interest and to the spirit of the zoning ordinance.

Anderson v Jester, 206-452; 221 NW 354

Exclusiveness of return. A party may not withhold from a tribunal an evidentiary fact and later, in a petition for a writ of certiorari, assert and prove such fact as a reason for sustaining the writ.

Dickey v Civil Service, 201-1135; 205 NW 961

Extent of proof. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

Evidence — admissibility. On certiorari by the state to review the alleged illegal action of the district court in refusing an application by the state for a change of venue as to numerous defendants, similarly charged, a transcript of the testimony taken upon the trial of one defendant who was acquitted is admissible for the purpose of showing the circumstances and nature of the acts charged.

State v Dist. Court, 213-822; 238 NW 290

Improper form. Upon sustaining a writ of certiorari relative to the alleged illegal act of the commissioner of insurance in refusing to approve amended articles of incorporation of an insurance company, the trial court has no authority by its judgment to decree such approval, other than substantially to direct the defendant to take such action as will give full force and effect to the decision of the court.

National Ben. Assn. v Murphy, 222-98; 269 NW 15

Questions undeterminable. On certiorari to test the legality of an order denying petitioner a change of venue to the county of his residence, the supreme court cannot determine whether the respondent judge correctly determined (1) that a cause of action was pleaded against petitioner's co-defendant, or (2) that said co-defendant was, in fact, a resident of the county of suit or (3) that the cause of action pleaded in the original suit was for injury to real estate.

Reason: The lower court had jurisdiction to rule on all said matters and said rulings, tho erroneous, are not illegal acts within the law of certiorari.

Adams v Smith, 216-1365; 250 NW 466

Reinstatement of discharged employee—unallowable order. The court, in certiorari, is manifestly without authority to order the state executive council to reinstate, in a department of the state government, a discharged state employee, when said council has no legal authority to employ or discharge employees in said department.

Pittington v Herring, 220-1375; 264 NW 712

Respondent's right to appear specially. A respondent in certiorari has a right to appear specially to question jurisdiction, in the absence of a statute to the contrary, regardless of whether or not this right is conferred by §11088, C., '35.

Collins v Powell, 224-1015; 277 NW 477

Review—scope. A writ of certiorari will not be sustained when to do so would effect no change in the status of the subject matter in controversy. So held where the writ was brought to test the legality of an actual dismissal of search warrant proceedings wherein intoxicating liquors had been seized.

State v Beem, 201-373; 207 NW 361

Return—other evidence admissible. In certiorari proceedings the district court is not limited to the actual return to the writ in determining whether or not the inferior tribunal acted illegally or without jurisdiction, but by statute other evidence bearing on that question is admissible.

Steeves v New Market, 225-618; 281 NW 162

Review—scope and extent. A writ of certiorari presents only a question of law, and does not entitle the petitioner to have a review of the facts, unless the return reveals such an absence of facts as to present a law question of arbitrary action.

Dickey v Civil Service Com., 201-1135; 205 NW 961

Ruling on demurrer—no review by certiorari. Where neither the writ of certiorari nor the petition therefor encompassed a review of lower court's alleged error in overruling demurrer to indictment, and where no authorities were cited sustaining the proposition that alleged error was reviewable by certiorari, court will refuse to review the ruling on the demurrer by this writ.

Harris v District Court, 226-606; 284 NW 451

Soldiers preference — hearing before discharge—waiver. Tho the soldiers preference law requires, as grounds for and prior to discharge, a hearing on charges of misconduct against a public employee, yet, when no such hearing is held and in a certiorari action the parties join issue on misconduct, they waive this hearing provided by the soldiers preference law. Evidence held to establish such misconduct.

Butler v Curran, 224-1339; 279 NW 89

Unallowable amendment. On certiorari to test the jurisdiction of the district court to enter certain ex parte orders, the return may not be amended by a recital by the responding judge of nonrecord matters and his conclusions as to what took place at the hearing.

Storie v Dist. Court, 204-847; 216 NW 25

12466 Appeal.

Refusal to quash certiorari. An appeal will not lie from an order refusing to quash a writ of certiorari.

Riley v Board, 207-177; 222 NW 403

Abandonment in supreme court—failure to file abstract or argument. Petitioners for writ of certiorari are presumed to have abandoned their cause when no abstract or argument is filed either on their behalf or on behalf of respondents.

Sentner v Dist. Court, 226-335; 284 NW 166

Failure to file brief and argument. Where the supreme court issues an order for a writ of certiorari and, pursuant to such order, respondent judge makes a return of the proceedings below, and thereafter nothing further is done and no abstract or argument filed, the petitioners are presumed to have abandoned their cause, and the writ will be annulled.

Phoenix Fin. v Jordan, 226-630; 284 NW 820

Failure to meet printed abstract requirements—dismissal. A proceeding in certiorari before supreme court will be dismissed where

petitioner fails to comply with order or rules requiring printed abstracts.

Eller v Hunter, (NOR); 209 NW 281

Filing motions after verdict—extending time—jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Municipal Ct., 225-501; 281 NW 441

Permissible abstract and amended return. Where, in certiorari, the cause is ordered submitted substantially as civil cases are submitted, the respondent may, on his own motion, very properly file an amended abstract setting forth the entire proceedings, and may likewise on his own motion amend his original return by setting forth the transcript of the shorthand notes and exhibits, together with an explanation why it was impossible to include said transcript in the original return.

Roberts v Fuller, 210-956; 229 NW 163

12467 Limitation.

Section applied.

Thornburg v Mershon, 216-455; 249 NW 202

Criminal procedure. Tho an invalid original entry of judgment in a criminal cause may be beyond review by certiorari because of the statute of limitation, yet certiorari will lie, if timely, to review a subsequent order of court revoking the suspended part of said former judgment and ordering the accused committed to jail.

Dayton v Bechly, 213-1305; 241 NW 416

Limitation of action. A decree adjudging defendant in contempt because of a violation of a former injunctional decree against the unlawful transportation of intoxicating liquors, both decrees having been entered without jurisdiction, is reviewable on certiorari even tho more than 12 months have elapsed since the entry of the injunctional decree.

Dayton v Patterson, 216-1382; 250 NW 595

Rule of timeliness. An application for, and the issuance of, a writ of certiorari within 12 months of the occurrence of the illegality complained of, is timely.

Gaffney v Young, 200-1030; 205 NW 865

CHAPTER 534

HABEAS CORPUS

12468 Petition.

Discussion. See 13 ILR 199—Antecedent errors reviewable

Appeal—de novo hearing. An appeal in habeas corpus proceedings—a law action—involving the custody and best welfare of a child necessarily and unavoidably gravitates to a review de novo.

Adair v Clure, 218-482; 255 NW 658

Appeal excludes habeas corpus. Habeas corpus will not lie to test the sufficiency of the evidence to sustain a judgment of conviction by a justice of the peace under an information which actually charges an offense the punishment for which does not exceed either a fine of $100 or imprisonment for 30 days.

Hallway v Byers, 205-936; 218 NW 905

Conclusion allegation. A petition in habeas corpus does not show on its face that the petitioner is entitled to a discharge when it simply alleges the naked conclusion that he has served the full statutory time prescribed as a penalty for "arson", the crime of arson being covered by various and different statutes and being attended by various and different terms of imprisonment.

Bailey v Hollowell, 209-729; 229 NW 189

Custody of child—appeal—trial de novo. An appeal in habeas corpus proceedings involving the custody and best welfare of a child, necessarily and unavoidably gravitates to a review de novo; obviously such review is proper when distinctly equitable issues are involved.

Jensen v Sorenson, 211-354; 233 NW 717

Defectively charged offense. A prisoner will not, on habeas corpus, be released from imprisonment on the ground that the indictment or trial information defectively and unskillfully charges the offense for which he was convicted and imprisoned; otherwise if the defect is so total that the indictment or information is a nullity.

McBain v Hollowell, 202-391; 210 NW 461

Defectively drawn information. The writ of habeas corpus will not lie to test the legality of imprisonment under an indictment or trial information of which the court has jurisdiction, even tho such indictment or information is defectively drawn.

Conkling v Hollowell, 203-1374; 214 NW 717

Erroneous proceedings on county attorney information. The act of the district court in formally approving a county attorney information, and forthwith entering judgment against the accused on a plea of guilty, is in

effect a finding that the grand jury was not then actually in session, (§13645, C., '31) and tho it be conceded that such finding was erroneous, such error furnishes no allowable basis for a writ of habeas corpus six years later to test the legality of the judgment.

Marsh v Hollowell, 215-950; 247 NW 304

Failure to determine degree of murder. A judgment of life imprisonment for murder rendered by the district court under a proper charge and on a plea of guilt of such crime, is not rendered void by the failure of the court, before imposing such judgment, to call witnesses and determine the degree of said crime, and enter said determination on the record. It follows that such failure, tho it be conceded to be error and reversible on appeal, furnishes no ground for release under a writ of habeas corpus.

McCormick v Hollowell, 215-638; 246 NW 612

Federal court's jurisdiction limited—persons detained by state. The federal court, in the absence of exceptional circumstances or emergencies, held without jurisdiction on habeas corpus action to determine constitutionality of Iowa statutes as applying to state banks on receiving deposits while insolvent and providing penalty therefor. The supreme court of Iowa has jurisdiction therein.

Ketcham v State, 41 F 2d, 38

Indeterminate sentences not made concurrent—habeas corpus not available. That defendant's imprisonment, if he is compelled to serve full time for each offense, would cover 82 years affords no legal ground for discharge from custody under indeterminate sentences in habeas corpus proceedings, even tho defendant was only 18 years of age and had not been represented by counsel at time pleas of guilty were entered.

Randall v Hollowell, (NOR); 227 NW 139

Insufficient petition. A writ of habeas corpus is properly denied when the petition therefor fails to state the matters mandatorily required by the statute.

Smith v Hollowell, 216-1219; 250 NW 646
Davis v Hollowell, 216-1178; 250 NW 647

Insufficiency of indictment. Objections to the sufficiency of an indictment of which the court has jurisdiction may not be raised in subsequent habeas corpus proceedings. Demurrer to the indictment in such case is the sole remedy.

Furey v Hollowell, 203-376; 212 NW 698

Insufficiency of indictment. Habeas corpus will not lie to question the sufficiency of an indictment or information of which the nisi prius court had jurisdiction.

Smith v Hollowell, 209-781; 229 NW 191

Invalid and valid nonconcurrent sentences. Petitioner in habeas corpus may establish his right to a discharge from custody by showing (1) that he is being confined under two nonconcurrent sentences; (2) that the first sentence is void because rendered by a court which had no jurisdiction of the subject matter; and (3) that he has served a time equal to that imposed by the second sentence.

Bennett v Hollowell, 203-352; 212 NW 701

Pre-eminent right of parent. The pre-eminent natural and statutory right of fit and proper parents to the custody of their child must prevail over those who hold no blood relation to the child, even tho the parents are in very humble financial circumstances, and even tho the parents may have temporarily yielded the custody of the child to another.

Adair v Clure, 218-482; 255 NW 658

Custody of child obtained by parent—principles. The scope of habeas corpus extends to controversies concerning the custody of children, resting on the assumption that the state has the right, paramount to any parental or other claim, to dispose of children as their best interests require, being governed not so much by the consideration of strictly legal rights of the parents as by those of expediency and equity and, above all, the interests of the child.

Allender v Selders, 227-1324; 291 NW 176

Proceeding for child custody. Habeas corpus actions involving the custody of minor children treated as equitable proceeding.

Ellison v Platts, 226-1211; 286 NW 413

The relation—evidence. Evidence reviewed, and held to establish that plaintiff, a relator in habeas corpus, is the mother of the child in question.

Tilton v Tilton, 206-998; 221 NW 552

Sufficiency of indictment. The sufficiency or validity of an indictment or information, of which the court had jurisdiction, may not be tried in habeas corpus proceedings.

Wilson v Haynes, 218-1370; 256 NW 678

Unallowable challenge to the jurisdiction of court. One who has been duly convicted of an escape from the penitentiary may not, in subsequent habeas corpus proceedings, challenge the jurisdiction of the court in which he was so convicted, on the ground that the former judgment under which he was being restrained at the time of his escape was wholly void.

Bennett v Hollowell, 203-352; 212 NW 701

Assignments of error. Where only assignment of error was to the effect that trial court erred in sustaining a writ of habeas corpus because record showed that plaintiff was a fugitive from justice, but there being several other grounds in addition to finding on this

fact question which might have justified court's order granting the writ, which order being general in nature, affirmance was necessary, even if plaintiff was a fugitive, because the sufficiency of such other grounds was not before the supreme court upon assignments of error, and therefore could not be determined, since in proceedings at law, such as habeas corpus, only matters presented for review in assignments of error are decided.

Ross v Alber, 227-408; 288 NW 406

12501 Demurrer or reply—trial.

Proceeding for child custody. Habeas corpus actions involving the custody of minor children treated as equitable proceeding.

Ellison v Platts, 226-1211; 286 NW 413

12502 Commitment questioned.

Sufficiency of evidence. The right in habeas corpus to review the sufficiency of evidence arises only in those cases in which the petitioner has been held to the grand jury.

Hallway v Byers, 205-936; 218 NW 905

12503 Nonpermissible issues.

Jurisdiction—adverse ruling on demurrer—conditions for review. Where a defendant was sentenced and imprisoned upon failing to plead after his demurrer to the indictment was overruled, an appeal will be dismissed from an adverse ruling on demurrer in a habeas corpus action to test the validity of such imprisonment, when the defendant does not (1) elect to stand upon his pleadings, or (2) suffer judgment to be entered against him in the lower court.

Besch v Haynes, 224-166; 276 NW 13

12504 Discharge.

Excessive sentence — when prisoner discharged. A prisoner will not be discharged on habeas corpus on the ground that the sentence is excessive until the expiration of that part of the sentence which the court could legally impose.

Smith v Hollowell, 209-781; 229 NW 191

Fugitive from justice. Principle reaffirmed that on habeas corpus to test the legality of extradition proceedings, the determination of the governor that the party sought to be extradited is, in fact, a fugitive from justice, is not conclusive on the court.

Drumm v Pederson, 219-642; 259 NW 208

CHAPTER 535

INJUNCTIONS

12512 Writ as independent remedy.

ANALYSIS

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I NATURE AND GROUNDS IN GENERAL

Acts already performed. Rights already lost and wrongs already committed are not subject to injunctive relief, especially when there is no showing that the wrong will be repeated.

Universal Loan v Jacobson, 212-1088; 237 NW 436

Conditional order for — compliance — effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

District court—enjoining unlicensed person practicing law. In an equity suit brought by

members of bar for injunction to restrain an unlicensed person from professing to be an attorney and from practicing law, where irreparable damage was the gist of the action, this subject matter was within the jurisdiction of the district court.

Johnson v Purcell, 225-1265; 282 NW 741

Enforcement of unconstitutional statute. Injunction will lie to enjoin the enforcement of an alleged unconstitutional statute which fixes a standard of conduct for a professional practitioner, e. g., a dentist.

Craven v Bierring, 222-613; 269 NW 801

Labor union injunction — state as party. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v District Court, 226-717; 285 NW 236

Moot case. An appeal in an action for injunctional relief only, and from an order continuing the injunction to a named date, will be deemed to present a moot question when on presentation of the appeal it appears that the injunction has been automatically dissolved by the lapse of time.

Humble v Carter, 210-551; 231 NW 341

Moot question. Injunction to restrain the issuance and payment of warrants for certain claims, because of the alleged unconstitutionality of the statute purporting to authorize such claims, presents a moot case when it appears that a portion of the claims has been actually paid and the remaining claims are barred by a statute of limitation.

Gallarno v Long, 214-805; 243 NW 719

Municipal property owner. A property owner who owns property adjacent to a building being erected in violation of a town ordinance, relating to constructions within the fire limits of the town, has such interest as will entitle him to an injunction against the erection and maintenance of such building.

Boehner v Williams, 213-578; 239 NW 545

Optometry—corporation practicing through employee-physician. A corporation is practicing optometry when it employs a physician—a licensed optometrist—to carry on his business under the company's control, and such practice may be enjoined.

State v Ritholz, 226-70; 283 NW 268

Optometry—when not unlawful practice—physician and optical company. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examinations and the physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company, and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

Presumption of continuance of condition. Proof that enjoinable acts were being committed at the time of the commencement of an action carries the presumption that the condition complained of existed at the time of the trial.

State v Optical Co., 216-1157; 248 NW 332

Supreme court—no power to enjoin unlicensed person practicing law. Supreme court has no implied power, by virtue of its exclusive statutory power to admit persons to practice as attorneys, to enjoin unlicensed law practice, for it has no original jurisdiction to grant injunctive relief, and an equity action therefor by members of bar is in no way related to the matter of admission to bar or disbarment.

Johnson v Purcell, 225-1265; 282 NW 741

II SUBJECTS OF PROTECTION AND RELIEF

(a) ACTIONS AND OTHER LEGAL PROCEEDINGS

Enjoining action of forcible entry and detention. Injunction will lie to enjoin an action of forcible entry and detention only on a very clear showing that a certain and manifestly irreparable injury will result unless the writ is issued.

Farber v Ritchie, 212-1396; 238 NW 436

Enjoining action in foreign state. A defendant who is a resident of this state may, even after he has filed formal answer, enjoin a plaintiff who is a resident of this state from maintaining in a foreign state an action on a contract arising in this state, when said action is sought to be maintained for the purpose of vexatiously harassing the defendant and subjecting him to unnecessary costs, part of which are untaxable as costs.

Bankers Life v Loring, 217-534; 250 NW 8

Oates v College, 217-1059; 252 NW 783; 91 ALR 563

Forcible entry and detainer—injunctive interference by equity limited. The summary remedy of forcible entry and detainer, and an appeal from a decision therein, are statutory and a court of equity will not interfere in the absence of fraud or mistake or a showing of manifest irreparable injury.

Schuldt v Lee, 226-189; 284 NW 89

Labor union injunction violation. Where a grave situation existed in the locality at the time, the state had the right to be made a

II SUBJECTS OF PROTECTION AND RELIEF—continued

(a) ACTIONS AND OTHER LEGAL PROCEEDINGS——concluded

party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Law of the case—injunction—substantial compliance. Decree of lower court on retrial reviewed by certiorari and held to be in substantial compliance with supreme court opinion requiring respondent, by mandatory injunction, to remove obstructions from bayou outlet.

Vaughan v Dist. Court, (NOR); 226 NW 49

Multifarious, vexatious, and bad faith litigation. Injunction will lie to restrain the bringing of an action, which has been adjudicated, on a clear showing (1) that the defendant intends in bad faith to institute other and repeated actions on said adjudicated cause of action, (2) that plaintiff has and will continue to suffer irreparable damage and injury in loss of credit and business, and (3) that plaintiff has no remedy for such harassment except to interpose the wholly inadequate plea of adjudication.

Benedict v Mfg. Co., 211-1312; 236 NW 92

Obstructions—mandatory removal—limitations. A mandatory injunction requiring the removal of obstructions from a watercourse should be limited to removal of what the enjoined party placed therein.

Fennema v Nolin, (NOR); 212 NW 702

Restraint of vexatious suits. Restraint by injunction of one claiming to have cause of action against another should be granted only when the purpose of it is shown clearly to have been in bad faith and for the purpose of vexation and annoyance. Rule applied where successive actions were brought by stockholders against corporation.

Strasburger v Witousek, (NOR); 211 NW 713

Right to interpleader. The pre-code, equitable action of "interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution against him of separate actions on the policy by said warring parties.

Equitable v Johnston, 222-687; 269 NW 767; 108 ALR 257

Void search warrant. Injunction will lie to restrain the search of premises under a void warrant, but not otherwise.

Des M. Drug v Doe, 202-1162; 211 NW 694

(b) PROPERTY, CONVEYANCES, AND INCUMBRANCES

Bequest for paving roads. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Cancellation of sheriff's certificate—issuance of deed restrained. An action to enjoin issuance of sheriff's deed and to cancel certificate held properly brought in equity as against contention that §11792, C., '24, furnished exclusive remedy.

Paulsen v Hansen, (NOR); 216 NW 762

Easement—extent of right—decree—scope and extent. Where a right of way is jointly used by the fee owner, and by the owner of a duly granted easement therein, (1) the width of said easement, (2) the duty of the owner of the easement to close the gates leading thereto, (3) the duty of each party to refrain from interfering with the use by the other, (4) the mutual right to repair the way, and (5) the proper division of the expense of such repairs, should, under proper evidence, be specifically decreed, and all violations thereof enjoined.

Bina v Bina, 213-432; 239 NW 68; 78 ALR 1216

Easement—termination—violating conditions—effect. The owner of a duly established right of way easement in the land of another does not forfeit the right to said easement by inadvertently or carelessly leaving open the gates leading to said easement even tho the duty to close said gates is made mandatory by the conveyance granting said easement; but the easement owner will be enjoined from violating said mandatory duty.

Bina v Bina, 213-432; 239 NW 68; 78 ALR 1216

Nonavailable in lieu of possessory action at law. One, who claims the possession of realty against another who is in actual possession as a tenant at will, may not resort to injunction proceedings to adjudicate his claimed right of possession.

Austin v Perry, 219-1344; 261 NW 615

Right to maintain fences. In the absence of a division of a partition fence by agreement of the parties or by proper order of the fence viewers, either of the adjoining owners has the right to build and maintain all or any part of

the fence; and an injunction which curtails such right is unallowable.

Sinnott v Dist. Court, 201-292; 207 NW 129

Stipulation in sidewalk dispute—creation of easement. A stipulation disposing of litigation over use of sidewalk, and providing for joint use, creates an easement for said purpose, and injunction would lie for interference with such right.

McEachron v Schick, (NOR); 218 NW 955

Surface waters—dominant and servient estates—artificial ditch. The owner of the dominant estate has the right to have the surface waters accumulating thereon flow unobstructed in the usual and natural course of drainage upon the adjoining lower or subservient estate, but he may not create an artificial ditch on the servient estate, nor enjoin the servient owner from filling such artificial ditch.

Clark v Pierce, 224-1068; 277 NW 711

(c) CONTRACTS

Contract employing physician—future practice restraint unaffected by indefinite employment extension. When a physician is employed by a medical clinic in a locality where he is not acquainted, his contract, agreeing that at its termination he will not practice his profession for ten years within a certain locality, is not invalidated by reason of an indefinite extension of the employment period mutually acted upon by all parties, and injunctive relief was properly granted to employer.

Larsen v Burroughs, 224-740; 277 NW 463

Contract for equality in stock holdings. Equity will by injunction and other proper orders protect a stockholder of a corporation from a violation of his contract with another stockholder under which equality of stockholdings of the two stockholders was clearly intended.

Holsinger v Herring, 207-1218; 224 NW 766

Contract not to practice profession. Injunction will lie to restrain the violation of a contract wherein the defendant has agreed not to practice his profession in a named place for a stated period, the contract not being oppressive, unreasonable, or inequitable; and this is true even tho the plaintiff might have a remedy at law in the form of damages.

Proctor v Hansel, 205-542; 218 NW 255; 58 ALR 153

Contract restraining competition—liquidated damages—nonbar. Injunction is a proper remedy to restrain one physician from practicing his profession contrary to the provisions of his contract not to engage in competitive practice in the same county for a specified period. A provision in the contract for liquidated damages will not bar injunctive relief.

McMurray v Faust, 224-50; 276 NW 95

Contract not to competitively engage in guarding property—enforceability. Where a discharged employee of a company engaged in guarding business houses at night threatens to breach his contract prohibiting him from entering into competition therewith, a petition seeking injunctive relief against him and alleging these facts sets up a good cause of action for an injunction.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Inducing breach of contract. Injunction will lie to prevent a third party from inducing parties to a contract to violate it.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Interference with performance of contract. One who is not in default on her contract with her father to care for him and at his death to have certain property in return for such care, may have a permanent injunction which will restrain others from interfering and preventing performance of the contract; but, to meet exceptional circumstances which arise out of an unseemly controversy over the father's property, the court may, notwithstanding the strict legal rights of the parties, impose conditions which will insure right conduct on the part of plaintiff and protect the father.

White v Massee, 202-1304; 211 NW 839; 66 ALR 1434

Partnership personnel changes after contract therewith. A physician as a party to a contract of employment with a medical clinic partnership is not in a position to question its validity on the ground that there had been a change in the members of the partnership and consequently no contract with the new entity, when his full performance of and under the contract had been with the new entity, including an extension of the contract.

Larsen v Burroughs, 224-740; 277 NW 463

Reasonable restraint on trade. An agreement by the vendor of a furniture business and its good will that he will not sell, or offer for sale, furniture "so long as the vendee is in business" in a named town, is reasonable as far as the time element is concerned—and is enforceable by injunction; and such agreement will not be held unlimited as to scope of territory (and therefore unreasonable) when the contract as a whole and the attending circumstances clearly show that the parties had in mind the town in question and the trade territory adjacent thereto.

Haggin v Derby, 209-939; 229 NW 257

Price cutting—goods purchased before notice to desist. A wholesaler who had a contract to market a trademarked product at a certain price, after he gave a retailer notice to desist from selling the product at less than the established price and was refused, was entitled to an injunction to restrain the un-

II SUBJECTS OF PROTECTION AND RELIEF—continued

(c) CONTRACTS—concluded

fair trade practice, even tho he had refused to sell the product to the retailer who had made an attempt to buy, not in good faith, but as an attempt to establish a defense in the threatened injunction suit, and altho the retailer's stock was purchased before the notice to desist was received.

Barron Motor v May's Drug Stores, 227-1344; 291 NW 152

Unilateral contract as to wage scale—enforcement. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral—when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Airline Co., 215-855; 246 NW 753

(d) PUBLIC OFFICERS AND MUNICIPALITIES

Discussion. See 18 ILR 1—Federal jurisdiction

Municipality exceeding constitutional limitation of indebtedness. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

Absence of jurisdiction. Principle reaffirmed that injunction is the proper remedy to restrain the board of supervisors from proceeding with a drainage improvement over which it has no jurisdiction.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

Allowance of attorney fees. In injunction to annul the allowance by the board of supervisors of a claim for attorney fees in drainage proceedings, the court will not, in the absence of fraud, review either the allowance of the claim or the proper amount of such allowance.

Kemble v Weaver, 200-1333; 206 NW 83

Arbitrarily vacating street to make defense to injunction. In an action to enjoin a town from maintaining a nuisance in a street or alley by allowing an adjoining owner to fence and use the street or alley, the action of the town council in arbitrarily vacating the street and the alley, without regard to the interests of the public, for the obvious purpose of creating a defense to the injunction suit, will be declared invalid.

Pederson v Radcliffe, 226-166; 284 NW 145

Citizen's right to challenge council's official acts. A citizen of a community has the right to challenge the validity of the actions of his city council in proceeding to establish a municipal electric plant and to apply for injunctive relief where by no other proceedings can public or private interests be fully protected.

Abbott v Iowa City, 224-698; 277 NW 437

City officers exceeding authority. To warrant an injunction against the officers of a city or town, there must be some present, tangible, existent infraction or threatened infraction of legal power and authority, with resultant injury and damage to the petitioners.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Electric plant under Simmer law—attack by taxpayer. An action by a taxpayer to enjoin the operation of a municipal electric plant, payable from the earnings, does not lie because such plants do not impose any additional burden on the taxpayers.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Enforcement of ordinance. A permanent injunction against a mayor and his successor to enjoin the enforcement, against plaintiff's nonresident employees, of a penal ordinance, on the theory that such employees are transient peddlers, will not be entered at a time when it does not appear that said transient employees are in the city in question, or that plaintiff's property rights will be invaded, or that plaintiff will be irreparably injured by enforcement.

Cook v Davis, 218-335; 252 NW 754

Enjoining electric plant operation — moot question. Altho the federal court on application of a taxpayer holds that it will not enjoin an act already done, to wit, to enjoin the construction of a municipal electric plant already built, such holding will not bar a citizen from bringing action to enjoin the operation of the plant.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Public utility construction enjoined. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses,

as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

Equity retaining jurisdiction on counterclaim —law issues. An action in equity by one school district to enjoin another school district and the county treasurer from transferring, to the defendant school, certain funds claimed to be due from the plaintiff school as tuition, remains in equity altho the defendant school files a cross-petition raising issues at law as to determination of the amount due, if any, and for judgment accordingly, since equity, acquiring jurisdiction, may determine all issues.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Farm bureau aid appropriation. A plaintiff who seeks to enjoin the appropriation of county funds in aid of a farm bureau organization on the ground that the bureau was not organized to cooperate with stated governmental agencies, must specially plead and prove said fact.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

Grounds in general. An injunction will not issue to restrain a municipality from doing an act when there is no proof that it intends to do said act.

Mote v Town, 211-392; 233 NW 695

Highways—tree removal—valid exercise of power. Injunction will not lie to restrain county authorities from removing trees along a highway when they are acting strictly within their statutory powers.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Encroachment on highway—supervisors removing landowner's fences. Injunction by landowner will not lie to prevent county supervisors from removing landowner's fences encroaching on highway even tho such fences have existed for 70 years.

Richardson v Derry, 226-178; 284 NW 82

Road fenced less than established width. Injunction will not lie on behalf of a landowner to prevent a county from removing fences as obstructions in the highway—the fences having been built more than 50 years ago on a 40-foot width—when the road record shows not only a 66-foot road but all the mandatory prerequisites for establishment.

Davelaar v Marion Co., 224-669; 277 NW 744

Illegal modification in zoning ordinance. A detrimentally affected property owner may maintain injunction to restrain the carrying out of a wholly illegal modification of a zoning ordinance when he had no notice of such modification until after the expiration of the 30 days provided by statute (§6466, C., '31) for certiorari, especially in view of the fact that the two proceedings are both tried de novo, and that no motion was made to transfer from equity to law.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots from Polk County Home inmates who do not expect to be absent from the county or prevented by illness from going to the polls should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

Issuance of illegal bonds. A taxpayer may maintain an action to enjoin the board of supervisors from issuing county bonds for a purpose not authorized by law.

Harding v Board, 213-560; 237 NW 625

Legal discretion uncontrollable. The court cannot compel the state highway commission to expend county primary road funds in the improvement of the primary roads of the county; nor can the court control said commission in the legal expenditure of other funds under the control of the commission.

Scharnberg v Highway Com., 214-1041; 243 NW 334

Objection to assessments. When the board of supervisors exercises discretion in repairing a drainage ditch and their action in levying an assessment is not absolutely void for lack of jurisdiction, the proper remedy for one aggrieved by such action is by appeal to the district court, and not by injunction against the assessment levy.

Baldozier v Mayberry, 226-693; 285 NW 140

Perpetuation of unlawful drainage by bridge. The board of supervisors may not, by the construction and maintenance of a culvert in the public highway, supplement, continue, and perpetuate an unlawful and material diversion of surface waters by a dominant estate holder, all to the substantial damage of the servient estate holder.

Anton v Stanke, 217-166; 251 NW 153

Plaintiffs — uninjured taxpayer. A public utility corporation, operating in a city under a duly granted franchise, may not, solely as a taxpayer, maintain injunction to test the legality of an ordinance granting a franchise to a competitor, on the grounds (1) that the

II SUBJECTS OF PROTECTION AND RELIEF—continued

(d) PUBLIC OFFICERS AND MUNICIPALITIES—concluded

ordinance rates for private consumers are unreasonable, and (2) that the city has an option, under the ordinance, to take over the ownership of the plant after it has paid for itself out of its own earnings, when it appears that such possible "taking over" will be without the creation of any debt on the part of the city and without resort to any taxation—in other words, when it appears that there is no present or threatened danger to the plaintiff, except the danger of competition.

Iowa Co. v Emmetsburg, 210-300; 227 NW 514

Presumption as to official conduct. Presumptively a public officer will perform his duties as prescribed by law.

Banta v Clarke County, 219-1195; 260 NW 329

Prohibited condemnation. Injunction will lie against the members of the state highway commission to enjoin a prohibited condemnation of private property for highway purposes, even tho such commission is an arm of the state.

Hoover v Highway Com., 207-56; 222 NW 438

Real estate without rental value—use as measure of damages. When real property has no rental value, upon dissolution of a wrongful injunction restraining erection of a municipal light plant thereon, the measure of damages is the use value, including net profits.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Relief granted—pleading and evidence. Decree relative to injunction against the levy of special assessments, and to the issuance of bonds, held to be in compliance with the pleadings and evidence.

Jackson v Creston, 206-244; 220 NW 92

Review of school board action. When school directors are invested by statute with control over a named subject matter, their action with reference to such subject matter must be reviewed through an appeal to the county superintendent, and not through a resort to the courts; and this is true howsoever inexpedient, improper, and ill-advised the action may appear to be. Court action is permissible only when the board steps outside the statutory zone of legal action.

Security Bank v Bagley, 202-701; 210 NW 947; 49 ALR 705

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract, e. g., (1) that he owns property which will be specially assessed, or (2) that he is a taxpayer and must contribute to the improvement fund from which payment of a deficit must be made.

Donovan Co. v City, 211-506; 231 NW 499

Streets—obstruction by wires. Injunction will lie on behalf of a town to enjoin the overhead obstruction by wires of its streets.

Ackley v Elec. Co., 206-533; 220 NW 315

(e) PERSONAL RIGHTS AND DUTIES

Injunction against labor union. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation, and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

(f) EMINENT DOMAIN PROCEEDINGS

Judgment in eminent domain—insufficiency. Record entry in proceedings relative to eminent domain proceedings reviewed, and held, notwithstanding its recitals, not to constitute a judgment for damages, but to specify the conditions under which the plaintiff property owner would be entitled to a provisional injunction.

Wheatley v Fairfield, 221-66; 264 NW 906

(g) HIGHWAYS

Condemnation of land—identity of issues, parties, and subject matter. An adjudication that plaintiff was not entitled to an injunction restraining the condemnation of land for highway purposes necessarily precludes the subsequent relitigation of the same issue, between the same parties, and concerning the same land.

Hoover v Iowa Com., 210-1; 230 NW 561

Trees—removal for drainage. In landowner's action to restrain county from cutting down seven trees in the construction of a highway, where evidence showed that trees were too far apart to constitute a windbreak, that trees were on the highway right of way, and that their destruction was necessary to provide a drainage ditch, lower court properly refused to enjoin destruction, under statute prohibiting such destruction unless "materially interfering with improvement of the road".

Harrison v Hamilton County, (NOR); 284 NW 456

(h) NUISANCES

Issue-changing amendment—right to reject. The court does not abuse its discretion in refusing a belated amendment which would convert an action for damages for a permanent

nuisance into an action to enjoin a nonpermanent nuisance and for damages.

Cary-Platt v Elec. Co., 207-1052; 224 NW 89

Nuisance per se. The operation of a rendering plant in a city or town for processing the carcasses of animals dying of disease will be peremptorily and permanently enjoined when it is demonstrated that the plant cannot be operated without being a public nuisance.

State v Drayer, 218-446; 255 NW 532

Playground—not nuisance. In an action to enjoin as a nuisance the maintenance of a public playground and athletic field, used both during the day and at night, and attended generally by the people of the community, resulting in incidental annoyance and inconsequential injury to plaintiff, an adjoining property owner, held, facts did not warrant issuance of an injunction to restrain such use as a nuisance.

Casteel v Afton, 227-61; 287 NW 245

Playgrounds—not per se nuisances. Playgrounds and athletic fields are of advantage to the health and well-being of a community and are not per se nuisances, tho they can be so conducted as to become nuisances.

Casteel v Afton, 227-61; 287 NW 245

Practicing medicine without license—injunction—constitutionality. The statute authorizing injunction to restrain the practice of medicine and surgery without a license is constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances; and this is true irrespective of the question whether the district court may be constitutionally vested with an equitable jurisdiction not possessed by chancery courts when the state constitution was adopted.

State v Howard, 214-60; 241 NW 682

Private nuisance—funeral home. The operating of an undertaking business or so-called funeral home in a strictly residential section of a municipality under circumstances which bring to the families in the immediate neighborhood a constant reminder of death, a resulting feeling of mental depression, an appreciable lessening of their happiness and disease-resisting powers, and an appreciable depreciation of the value of their properties, constitutes a nuisance and is enjoinable as such.

Bevington v Otte, 223-509; 273 NW 98

Undertaking establishment. The operation, under formal municipal permit, of an undertaking and embalming establishment in a city, in a territory designated by a duly enacted zoning ordinance as a commercial district, will not be enjoined on the sole ground that being adjacent to a residence, said operation will have a depressing mental effect on the occupant and owner of said residence and on the members of his family.

Kirk v Mabis, 215-769; 246 NW 759; 87 ALR 1055

(i) PROMISSORY NOTES, ETC.

No annotations in this volume

(j) TAXATION

Alleged unconstitutional tax. Injunction will lie to test the constitutionality of a tax imposed tho accompanied by a penal provision.

Solberg v Davenport, 211-612; 232 NW 477

Assessments—irregularities. Injunction will not lie to restrain a mere irregularity in the levying of a drainage assessment.

Seabury v Adams, 208-1332; 225 NW 264

Assessment—wrongful classification. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bank v Mitts, 220-271; 261 NW 625

Special assessment tax sales. When the petition asked for an injunction restraining the county treasurer from selling at tax sale lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Construction of permanent sidewalks. Injunction will not lie to enjoin the collection of a special assessment for a permanent sidewalk when the city or town council had acquired jurisdiction over such construction and assessment, even tho the procedure leading up to such jurisdiction was somewhat indefinite.

Perrott v Balkema, 211-764; 234 NW 240

Enjoining assessment. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment

II SUBJECTS OF PROTECTION AND RELIEF—continued

(j) TAXATION—concluded

and filed objections thereto and did not appeal from the adverse ruling thereon.

Chicago, NW Ry. v Sedgwick, 203-726; 213 NW 435

Establishment of drainage district—incorrect name of mortgagee—nonjurisdictional defect. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor, and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend through or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

National bank stock taxed in excess of other moneyed capital. The action of taxing officials in classifying a national bank's shares of stock as "moneyed capital" under the state laws, while placing competing capital of individuals in class of "moneys and credits", resulting in higher tax rates on banks, held, prohibited discrimination against national bank, and entitled bank to an injunction against the county treasurer restraining collection of discriminatory tax, notwithstanding bank's alleged failure to seek a hearing before state board of review.

Knowles v Bank, 58 F 2d, 232

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v Bank, 42 F 2d, 30

Crawford Bk. v Crawford County, 66 F 2d, 971

(k) TRESPASS

Construction of dam. Injunction will lie to enjoin the construction of a dam and the consequent overflow of private property for the public use, until the damages are paid; and this is true even tho the taker is solvent.

Scott v Price Bros., 207-191; 217 NW 75

Levee construction. Evidence justified denying to landowner a decree for injunction against construction and maintenance by private persons of levee on adjoining property when landowners' claims were that levee would result in essential interference with flood waters or appreciably increase their volume or height along owner's property or that levee would prevent extraordinary flood water, which might flow over dike protecting land on other side, from running back to river when flood waters receded.

Kellogg v Hottman, 226-1256; 286 NW 415

Repeated trespasses on realty. Injunction will lie to restrain repeated trespasses and threatened injury to real property so as to avoid multiplicity of suits and prevent irreparable injury.

Casteel v Afton, 227-61; 287 NW 245

Repeated trespasses on realty—dissolution of writ. Injunction will lie to restrain a party from trespassing upon and wrongfully resuming possession of real estate from which he has been removed under and by virtue of an order of removal duly issued in forcible entry and detainer proceedings; but if appeal be perfected from said order of removal and stay order obtained, before the said order has been completely executed, the court may properly dissolve the temporary writ.

Usailis v Jasper, 222-1360; 271 NW 524

Threatened trespass. Injunction will lie to prevent a threatened trespass.

Rasmussen v Alberts, 215-644; 246 NW 620

Trespass on real estate. Allegations to the effect that defendants on a certain occasion tore down plaintiff's fence, trespassed upon plaintiff's land, and wrongfully removed a building belonging to plaintiff disclose no equitable jurisdiction for the issuance of a mandatory injunction for the restoration of the fence and building; and such action is properly transferred to the law calendar.

Griffiths v Allen, 212-831; 237 NW 219

Water easement. Where a contract easement exists to pipe water from the premises of the owner of land to the premises of the easement owner, it necessarily follows that the latter's right to go upon said premises of the former to make reasonable repairs to the pipes and related equipment will be protected from interference by injunction.

Hawkeye Cement v Williams, 213-482; 239 NW 120

(l) WASTE

No annotations in this volume

(m) CRIMINAL ACTS, CONSPIRACIES, AND PROSECUTIONS

Discussion. See 13 ILR 206—Control of crime by equity

Peacefully picketing not secondary boycott —no injunction. A threat to do something that a person has a right to do is not a threat in a legal sense. Held that union officials by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers, and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott, and an injunction will not lie.

Smythe Co. v Local Union, 226-191; 284 NW 126

Sale of aspirin. A corporation may be restrained by injunction from selling or offering or exposing for sale aspirin, on proof that aspirin is a drug, and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Jewett Co., 209-567; 228 NW 288

Search without warrant. One who is shown to be a violator of the law relative to the sale and possession of intoxicating liquors will be accorded no standing in a court of equity in an action by him to enjoin peace officers from picketing his place of business, interfering with his business, or searching his customers without a search warrant.

Dietz v Cavender, 201-989; 208 NW 354

Secondary boycott—essential elements. A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw from their beneficial business intercourse by threats that, unless they do so, the combination will cause similar loss to them; or by the use of such means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm.

Smythe Co. v Local Union, 226-191; 284 NW 126

III ACTIONS

(a) PARTIES

Evidence—sufficiency. In an action for injunction, where plaintiffs advanced capital to organize a corporation for the purpose of putting invention on market—the inventor in turn assigning to them an absolute interest in patent, and where plaintiffs thereafter organize a separate corporation to engage in marketing the patented device both directly and by license, the evidence held sufficient to entitle plaintiffs to injunction restraining inventor from circulating to plaintiffs' prospective customers material to effect plaintiffs had no interest in patent, and restraining the threatening of such prospective customers with litigation in event they should buy from plaintiffs.

Burlington Corp. v Debrey, 226-1190; 286 NW 473

Nonjoinder. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

Taxpayer must show adverse interest to enjoin city erecting light plant. One suing to enjoin town's contract for purchase of machinery for electric lighting plant must show interest adversely affected.

Christensen v Kimballton, (NOR); 231 NW 502

(b) PLEADINGS

Amended and supplemental pleadings—seeming illegality. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Farm bureau aid appropriations. A plaintiff who seeks to enjoin the appropriation of county funds in aid of a farm bureau organization on the ground that the bureau was not organized to cooperate with stated governmental agencies, must specially plead and prove said fact.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

IV DECREE

Absence of prayer—effect. No decree of injunction should be rendered against an intervener when plaintiff answered the petition of intervention but prayed for no relief.

Red Top Co. v McGlashing, 204-791; 213 NW 791

Decree not justified by pleadings. When the petition asked for an injunction restraining the county treasurer from selling at tax sale lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining

IV DECREE—concluded

tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Dismissal of temporary injunction not adjudication. Dismissal of a temporary injunction even after answer is not an adjudication of the cause, as ordinarily a plaintiff asking a permanent injunction is entitled to a trial on the merits.

McMurray v Faust, 224-50; 276 NW 95

Evidence—sufficiency. In an action for injunction, where plaintiffs advanced capital to organize a corporation for the purpose of putting invention on market—the inventor in turn assigning to them an absolute interest in patent, and where plaintiffs thereafter organize a separate corporation to engage in marketing the patented device both directly and by license, the evidence held sufficient to entitle plaintiffs to injunction restraining inventor from circulating to plaintiffs' prospective customers material to effect plaintiffs had no interest in patent, and restraining the threatening of such prospective customers with litigation in event they should buy from plaintiffs.

Burlington Corp. v Debrey, 226-1190; 286 NW 473

Judgment—reservation of unpleaded issue. In an action to enjoin a public utility company from maintaining an electric light and power plant within a city, the reservation in the final decree of the question of the right of the company to maintain a similar plant running through the city and supplying points outside the city—a plant distinct from the company's city plant—is proper when the pleadings do not fairly embrace said latter plant.

Iowa Light Co. v Grand Junction, 217-291; 251 NW 609

12513 Writ as auxiliary remedy.

Law action with prayer for injunction. In an action at law for damages with auxiliary prayer for injunction to prevent a repetition of the injury, the injunction feature of the action is not transferable to the equity calendar for trial.

Pisny v Railway, 207-515; 221 NW 205; 222 NW 609

12514 Temporary or permanent.

Fatally indefinite decree. A decree which enjoins a party from doing any act which "would infringe upon the rights of the plaintiff" under a specified contract, is fatally indefinite and therefore unallowable.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Preliminary and interlocutory injunctions—inevitable dissolution. A temporary injunction in an untried action in one county should be dissolved when it is made to appear that since the commencement of the action the right to such injunction has been determined adversely to the plaintiff by the supreme court in an action instituted in another county involving, inter alia, the same subject matter.

Bratt v Life Co., 209-881; 226 NW 724

12515 Temporary—when allowed.

Discussion. See 23 ILR 2—Injunctions—sit-down strikes

"Balance-of-convenience" rule. A temporary order restraining the board of railroad commissioners from collecting a tax, pending the determination of the constitutionality of the statute under which the commissioners are acting, should not be dissolved in the absence of a showing by the commissioners that the bond exacted by the court as a condition of the issuance and continuance of the restraining order will not adequately protect the state.

Iowa Motor v Board, 202-85; 209 NW 511

"Balance-of-convenience" rule. The consummation of a perfectly legal reorganization of a corporation will not be held up by injunction pending the determination of the value of the interest of a dissenting stockholder when said stockholder can be amply protected by a deposit of money or bond by the corporation.

Ontjes v Bagley, 217-1200; 250 NW 17

Construction—necessity for determination. The court will not, on an order dissolving a temporary injunction pending the trial of the main action, pass upon the constitutionality of the statute under attack.

Iowa Assn. v Board, 202-85; 209 NW 511

Contempt — unallowable defense. In contempt proceedings for the violation of a temporary injunction, duly served, it is no defense that the injunction was improvidently or improperly granted.

Orr v Hamilton, 202-345; 209 NW 285

Dissolving temporary injunction not operative as demurrer—nonadjudication. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Injunction violation—passion and prejudice negatived. There was no merit in a contention that a decision finding the defendants guilty of violating an injunction against a labor union was based on passion and prejudice, when evidence showed that they aided and abetted in mass picketing which was unlawful and which was restrained by the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Labor union injunction. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation, and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

Nonallowable attorney fees. In a successful action to enforce plaintiff's right to redeem from execution sale, the fact that plaintiff secured a temporary injunction to protect his possession (and solely as a collateral remedy) furnishes no justification for the taxation against plaintiff of an attorney fee in favor of defendant, especially when the said injunction was ordered dissolved only in event plaintiff failed to exercise his right to redeem.

Werner v Hammill, 219-314; 257 NW 792

Peacefully picketing not secondary boycott—no injunction. A threat to do something that a person has the right to do is not a threat in a legal sense. Held that union officials by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott and an injunction will not lie.

Smythe Co. v Local Union, 226-191; 284 NW 126

Vaccination of school children. The appellate court will be slow to interfere with an order by the trial court refusing a temporary injunction against the enforcement by a school board of its order which temporarily excluded unvaccinated pupils from the public school; and especially when it affirmatively appears that the order of the board has expired ex vi termini.

Baehne v Sch. Dist., 201-625; 207 NW 755

12516 By whom granted.

Injunction against governor—writ denied. Writ of prohibition not granted to test the jurisdiction of the district court and validity of an order enjoining the governor from dispossessing the chairman of the greater Iowa commission of the books and records of the commission.

State v Dist. Court, (NOR); 275 NW 108

12520 Notice to defendant.

Knowledge negatives notice. The court had jurisdiction to adjudge the defendants guilty of contempt for violating an injunction, altho they contended that no notice of the injunction was served upon them, when evidence showed that they all must have known of the injunction and its contents.

Carey v Dist. Court, 226-717; 285 NW 236

12521 When notice necessary.

Knowledge negatives requirement of notice. The court had jurisdiction to adjudge the defendants guilty of contempt for violating an injunction, altho they contended that no notice of the injunction was served upon them, when evidence showed that they all must have known of the injunction and its contents.

Carey v Dist. Court, 226-717; 285 NW 236

12524 Motion to dissolve.

Motion before answer. A plaintiff in injunction proceedings who, without objection, goes to a hearing on defendant's motion to dissolve the writ may not on appeal and for the first time contend that such motion was improper in the absence of an answer.

Peoples Bk. v McCarthy 207-162; 222 NW 372

Dissolving temporary injunction not operative as demurrer—nonadjudication. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

12526 Bond.

ANALYSIS

I AMOUNT OF BONDS
II ACTION ON BOND
III SURETIES
IV DEFENSES
V DAMAGES

Suretyship generally. See under §11577

I AMOUNT OF BONDS

No annotations in this volume

II ACTION ON BOND

Liability—necessary showing. In an action on an injunction bond to recover damages, plaintiff must show that the injunction was wrongful in its inception or was wrongfully continued. The dissolution by the court of the temporary order constitutes, at least, pri-

II ACTION ON BOND—concluded

ma facie evidence that the injunction was wrongful.

Chrisman v Schmickle, 209-1311; 230 NW 550

Evidence. The pleadings in an action for injunction are admissible on the issue whether an injunction was the sole relief sought in the action, or whether the injunction was auxiliary to some other main issue.

Chrisman v Schmickle, 209-1311; 230 NW 550

Decree denying injunction decisive on bond liability. A bankruptcy trustee's injunction action against a bankrupt, which action effectuated a dispossession of certain land to which the bankrupt's wife held title, and such action, after appeal, being finally determined adversely to the trustee's claimed right to possession, under which possession he had sold the crops, becomes an adjudication decisive on the issues in a subsequent action on the injunction bond for damages for wrongful issuance of the writ of injunction.

Goltry v Relph, 224-692; 276 NW 614

III SURETIES

No annotations in this volume

IV DEFENSES

No annotations in this volume

V DAMAGES

Discussion. See 21 ILR 584—Recovery in general

Damages nonrecoverable. No damages are recoverable on an injunction bond when the injunction was purely auxiliary to the main action and enjoined defendant from doing an act which he never intended or desired to do, and when the defendant permitted the injunction to operate until automatically dissolved by a judgment in his favor on the merits of the main action.

Schmidt v Meredith, 209-621; 228 NW 568

Liability on injunction bond—construction of municipal light plant restrained. In an action by a city on injunction bonds put up by a light and power company to restrain construction of a lighting plant, the city was entitled to all damages that naturally and proximately resulted from wrongful injunctions, and the city was not necessarily limited to damages arising only while the injunctions were in force, if the damages flowing directly from the injunctions continued for a period of time beyond date of their dissolution.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Nonallowable attorney fees. In a successful action to enforce plaintiff's right to redeem from execution sale, the fact that plaintiff secured a temporary injunction to protect his possession (and solely as a collateral remedy) furnishes no justification for the taxation against plaintiff of an attorney fee in favor of defendant, especially when the said injunction was ordered dissolved only in event plaintiff failed to exercise his right to redeem.

Werner v Hammill, 219-314; 257 NW 792

Permissible recovery. When an injunction is the only relief sought, and the temporary writ is dissolved on final hearing, defendant may recover on the bond the reasonable and necessary costs, expenses, and attorney fees expended in procuring such dissolution.

Chrisman v Schmickle, 209-1311; 230 NW 550

Subjects of damages—anticipated profits neither nominal nor speculative. In a city's action on a public utility's injunction bond indemnifying city's loss on account of delayed construction of a municipal light plant, even tho plant had not been in operation, loss of profits and loss of use of the plant not in being, are not too speculative nor nominal, and anticipated profits, if established with reasonable certainty, may be recovered as damages.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

12527 Restraint on proceedings or judgment—venue.

Enjoining proceeding in action. The district court of one county has no jurisdiction to enjoin a plaintiff in an action pending in another county from proceeding with his action and carrying the same to trial and judgment.

Bankers Tr. Co. v Scott, 215-1107; 246 NW 836

Enjoining proceedings on judgment—proper court. An action to enjoin proceedings on a judgment rendered in a municipal court cannot be maintained in the district court, even tho both courts are located in the same county.

Keeling v Priebe, 219-155; 257 NW 199

Inherent power of court to stay execution. The district court has inherent, discretionary power, in order to prevent injustice, to order a reasonable stay of execution, even without bond if it be made to appear that the judgment plaintiff will not be prejudiced by the order. But if said order is made because the chose or thing in action, which has been already levied on, has not been adjudicated, the order should be conditional on a reasonably prompt adjudication of said chose or thing in action.

Brenton Bros. v Dorr, 213-725; 239 NW 808

Municipal court — enjoining proceedings to enforce judgment. A municipal court of one county has no jurisdiction to enjoin proceedings to enforce a judgment entered by a municipal court of another county.

Educational Film v Hansen, 221-1153; 266 NW 487

Unallowable venue. An action will not lie in one county to enjoin proceedings on a judgment rendered in another court in another county, even tho plaintiff's action is based on the claim that the judgment is wholly void.

Ferris v Grimes, 204-587; 215 NW 646

12531 Application for dissolution.

Automatic dissolution. Under an order providing that defendant's motion to dissolve a temporary injunction "be sustained" if defendant, within a named time, paid plaintiff a named sum and also certain costs, the injunction is automatically dissolved both (1) by the act of defendant in paying, within said time, the said costs and tendering to plaintiff the named sum (tho plaintiff refused the tender), and (2) by the affirmance of the order on appeal by plaintiff. It follows that a further unnecessary order, subsequent to the affirmance finally dissolving the injunction, is not erroneous, even tho defendant had not kept good his tender.

Peoples Bank v McCarthy, 210-952; 231 NW 487

Dismissal because of lack of subject matter. An action is properly dismissed when by the lapse of time no issue remains for trial.

Peoples Bank v McCarthy, 210-952; 231 NW 487

Dissolution by dismissal of action. The dismissal of an action solely for injunctional relief necessarily dissolves the temporary injunction issued therein.

Peoples Bank v McCarthy, 210-952; 231 NW 487

12533 Dissolution.

Absence of equity. An injunction restraining the owner of land from interfering with the possession by a trustee in bankruptcy should be forthwith dissolved when it appears that said trustee has substantially no interest in the land, that his lien is valueless because of the foreclosure of a superior lien, and that he has no purpose to redeem.

Relph v Goltry, 213-1118; 240 NW 646

Dismissal of temporary injunction not adjudication. Dismissal of a temporary injunction even after answer is not an adjudication of the cause, as ordinarily a plaintiff asking a permanent injunction is entitled to a trial on the merits.

McMurray v Faust, 224-50; 276 NW 95

Dissolving temporary injunction not operative as demurrer. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

12535 Proceedings for violation.

Review by certiorari. See under §12550

Distinction between "court" and "judge". Statutes, providing for the prosecution of injunction violators, which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v Dist. Court, 226-717; 285 NW 236

In re divorce proceedings. The violation of an order to the defendant in pending divorce proceedings not to interfere with the person of the plaintiff or with plaintiff's peaceable possession of her home is properly punished as a contempt.

Blunk v Walker, 206-1389; 222 NW 358

Violation by labor union officials. There was no denial of the right of freedom of speech in holding officers of a trade union in contempt of court for violating an injunction, when they counseled, aided, abetted, and assisted in the violation of the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

12539 Contempt punished.

Applicable statute. The violation of an injunction against injuring or interfering with specified property is punishable only as provided by §12543, C., '35.

Eicher v Tinley, 221-293; 264 NW 591

CHAPTER 536

CONTEMPTS

12540 "Court" defined.

Discussion. See 21 ILR 595—Legislative power to regulate punishment of contempt

Distinction between "court" and "judge". Statutes, providing for the prosecution of injunction violators, which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v Dist. Court, 226-717; 285 NW 236

12541 Acts constituting contempt.

Refusal to disclose property. See under §11810, Vol I

Discussion. See 11 ILR 85—Resistance to process; 18 ILR 64—Alimony payments enforced; 20 ILR 121—Contempts

Disobedience of divorce decree—willfulness necessary for contempt. In an equity action involving alleged nonpayment of support under a divorce decree and seeking punishment for alleged disobedience of the decree, a contempt order will not issue unless the disobedience was willful and the proof thereof clear and satisfactory, and where a father is willing to pay a reasonable sum for his son's expenses at college, a refusal to cite for contempt is proper.

Johnstone v Johnstone, 226-503; 284 NW 379

Fatally insufficient evidence. When a lodge and the officers thereof are subject to contempt for failure to reinstate a member "upon the payment of all dues and fines", no basis for contempt proceedings is shown by testimony that a representative of the member attended a session of the lodge, made an inquiry as to said member, discovered that the members present were hostile, and thereupon sat down without producing or offering to produce the money for said dues and fines and without even giving notice that he was representing said member.

St. George's Soc. v Sawyer, 204-103; 214 NW 877

Injunction violation by labor union officials. There was no denial of the right of freedom of speech in holding officers of a trade union in contempt of court for violating an injunction, when they counseled, aided, abetted, and assisted in the violation of the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Injunction violation—passion and prejudice negatived. There was no merit in a contention that a decision finding the defendants guilty of violating an injunction against a labor union was based on passion and prejudice, when evidence showed that they aided and abetted in mass picketing which was unlawful and which was restrained by the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Searches and seizures—contempt for "dumping" liquor. In a certiorari proceeding a conviction for contempt in resisting the execution of a search warrant will not be reversed where the evidence indicated defendant knew purpose of search and disposed of evidence by dumping liquor before officers could seize it. Defendant's contention ineffectual that "dumping" occurred prior to execution of warrant.

Krueger v Municipal Court, 223-1363; 275 NW 122

12543 Punishment.

Exclusively applicable statute. The violation of an injunction against injuring or interfering with specified property is punishable only as provided by this section.

Eicher v Tinley, 221-293; 264 NW 591

Injunction violation—passion and prejudice negatived. There was no merit in a contention that a decision finding the defendants guilty of violating an injunction against a labor union was based on passion and prejudice, when evidence showed that they aided and abetted in mass picketing which was unlawful and which was restrained by the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Jury trial. A party charged with contempt is not entitled to a jury trial.

Hammer v Utterback, 202-50; 209 NW 522

Legislative limitation on punishment. While the general assembly has no power to wholly deprive a constitutionally created court of its inherent power to inflict punishment for acts which are in contempt of such court, yet it may constitutionally impose a reasonable limitation on such courts as to the punishment which may be imposed.

Eicher v Tinley, 221-293; 264 NW 591

Power to prescribe. The general assembly has constitutional power to prescribe the punishment which shall be imposed by the courts in proceedings to punish contempts.

State v Baker, 222-903; 270 NW 359

Violators of injunction—maximum penalty excessive. Sentences of six months in jail and a $500 fine each, the maximum permitted by statute, when imposed against labor union officials for violating an injunction against the union, were excessive in view of the circumstances.

Carey v Dist. Court, 226-717; 285 NW 236

12544 Imprisonment.

Bastardy — imprisonment for contempt as cruel and unusual punishment. Statutes providing for commitment to jail for contempt, upon default in payment of support money awarded in bastardy proceedings, without citation, charge, or hearing and without allowing defendant an opportunity to purge himself of any alleged contempt, contravene the constitutional prohibition against cruel and unusual punishment.

State v Devore, 225-815; 281 NW 740

Willful avoidance of decree of alimony. A willful refusal to pay an award of alimony may be punished as a contempt of court by imprisonment until the award is paid.

Roberts v Fuller, 210-956; 229 NW 163

12545 Affidavit necessary.

State as party—affidavits. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

12546 Notice to show cause.

Distinction between "court" and "judge". Statutes, providing for the prosecution of injunction violators, which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v Dist. Court, 226-717; 285 NW 236

Knowledge negatives requirement of notice. The court had jurisdiction to adjudge the defendants guilty of contempt for violating an injunction, altho they contended that no notice of the injunction was served upon them, when evidence showed that they all must have known of the injunction and its contents.

Carey v Dist. Court, 226-717; 285 NW 236

Power to punish — due process. Contempt proceedings which are in accordance with that provided by this chapter are not violative of the due process clauses of the federal and state constitutions.

State v Baker, 222-903; 270 NW 359

Unallowable defense. In contempt proceedings for the violation of a temporary injunction duly served it is no defense that the injunction was improvidently or improperly granted.

Orr v Hamilton, 202-345; 209 NW 285

12547 Testimony reduced to writing.

Amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Failure to file and preserve evidence. Failure to file and preserve the evidence upon which a judgment of conviction of contempt is entered is fatal to the validity of such conviction.

Ciccio v Utterback, 205-482; 218 NW 253

Hearing—ruling on testimony. A referee appointed by the supreme court to hold hearing, and report to the court as to the facts in original contempt proceedings pending in said court, pursues the proper course by reporting his entire proceedings to the court without ruling on objections made to the testimony offered.

State v Baker, 222-903; 270 NW 359

Insertion of non-record matter. On certiorari to review the action of a trial court in proceedings for contempt, it is wholly unallowable to insert in the return matter which was not made of record by the court at the time of the entry of the order in question, and matters so inserted will be stricken on motion.

Crosby v Clock, 208-472; 225 NW 954

Mandatory requirements. There can be no legal judgment for contempt unless the record made by the court at the time of the judgment entry shows every fact which is necessary to the guilt of the party. Nothing must be left to inference. This is one instance where the law refuses to presume that the judgment was supported by sufficient evidence.

Crosby v Clock, 208-472; 225 NW 954

Preservation of evidence. Evidence in contempt proceedings is properly preserved when the duly certified shorthand notes and exhibits

are filed prior to the entry of the order adjudging the contempt, and where the transcript of said notes was duly extended and likewise filed, all within a reasonable time.

Hammer v Utterback, 202-50; 209 NW 522
Roberts v Fuller, 210-956; 229 NW 163

Record evidence mandatory. Judgment for contempt on evidence which has not been made of record is a nullity.

Sergio v Utterback, 202-713; 210 NW 907
Leonetti v Utterback, 202-923; 211 NW 403

Review of finding of contempt. The finding of a trial court that a party is guilty of a contempt, while entitled to great respect, is not conclusive on the supreme court when reviewing the finding on certiorari. A contempt must be clearly and satisfactorily established.

Mason v Dist. Court, 209-774; 229 NW 168

Scope of inquiry. In contempt proceedings for the violation of an injunction against the practice of medicine and surgery without a license, the testimony may very properly cover the entire time from the issuance of the writ to the date of hearing.

State v Baker, 222-903; 270 NW 359

12548 Personal knowledge of court—record required.

Facts personally known to judge but not made of record. In contempt proceedings, a fact personally known to the trial judge cannot be deemed a part of the record when "preserved" only in the form of a written "statement" made by the judge and filed in the proceedings long subsequent to the entry of the judgment for contempt.

Mason v Dist. Court, 209-774; 229 NW 168

12550 Revision by certiorari.

Belated presentation of objection. On certiorari to review a conviction for contempt in violating an intoxicating liquor injunction, the petitioner will not be permitted to present the objection that testimony taken in the trial court should not be considered because taken in his absence, and under a stipulation entered into by an unauthorized attorney, such objection not having been presented in the trial court.

Hammer v Utterback, 202-50; 209 NW 522

Mandatory record.

Sergio v Utterback, 202-713; 210 NW 907

Grounds for new trial—insufficient record. Record reviewed in an action wherein plaintiff appeared pro se in the trial court, and held insufficient to authorize the court (1) to set aside a former order denying a new trial, and (2) thereupon—11 months after the entry of judgment on a directed verdict—to grant a new trial.

Spoor v Price, 223-362; 272 NW 305

Injunction violation—no trial de novo. In certiorari to review a judgment finding the defendants guilty of violating an injunction, the case was not triable de novo in the supreme court.

Carey v Dist. Court, 226-717; 285 NW 236

Proceedings and determination—method of trial—extent of proof. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

Review not by appeal—by certiorari. The supreme court is without jurisdiction to review a contempt proceeding by appeal, regardless of whether the order was for punishment or for discharge.

Metzger v Metzger, 224-546; 278 NW 187

Review—extent. On certiorari to review a judgment holding a party guilty of contempt, the findings by the respondent court are not conclusive on the reviewing court, tho due regard will be accorded such findings.

Roach v Oliver, 215-800; 244 NW 899

Review of finding. The finding of a trial court that a party is guilty of a contempt, while entitled to great respect, is not conclusive on the supreme court when reviewing the finding on certiorari. A contempt must be clearly and satisfactorily established.

Mason v Dist. Court, 209-774; 229 NW 168

Unallowable appeal. Upon the discharge of one accused of contempt in violating an injunction, an appeal may not be maintained under the title under which the injunction was obtained.

Cedar Falls Bank v Boslough, 218-502; 255 NW 665

CHAPTER 537

OFFICIAL BONDS, FINES, AND FORFEITURES

12552 Official bonds construed.

Acts constituting breach. A statutory bond conditioned to secure the prompt paying over to the proper authorities of public funds on deposit in a bank is breached on the failure to promptly make such payment, and not from the time when the authorities suffer an actual loss.

Leach v Bank, 205-987; 213 NW 528

Adjudication of liability. An unappealed order of court adjudicating the amount of the liability of a trustee to the beneficiary is

conclusive on the trustee and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Affirmance or disaffirmance. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

12553 Prior judgment no bar.

Liability on official bonds—sureties. The liability of the surety on the bond of a public officer—under §§1059, 1060, C., '31—is not limited solely to the failure of the official to make proper accounting for all public money and property officially coming into his possession, but embraces liability for the failure of said officer to "faithfully and impartially, without fear, favor, fraud, or oppression, discharge all duties * * * required of his office by law".

Brown v Cochran, 222-34; 268 NW 585

12554 Fines and forfeitures.

Atty. Gen. Opinions. See '32 AG Op 135; AG Op May 5, '39

CHAPTER 539

GUARDIANS FOR MINORS

12573 Natural guardian of the person.

ANALYSIS

I NATURAL GUARDIANS OF MINORS
II RIGHT TO CUSTODY OF MINOR CHILDREN
III RECOVERY OF CUSTODY BY HABEAS CORPUS
IV RECOVERY FOR SERVICES OF MINOR CHILDREN
V EMANCIPATION OF MINOR CHILDREN
VI AGREEMENTS AS TO CUSTODY OF MINOR CHILDREN

Probate jurisdiction over guardianships. See under §10763
Testamentary guardianships. See under §12574

I NATURAL GUARDIANS OF MINORS

Custody of child—presumption. Presumptively, the welfare of a minor child will be best subserved in the care and control of its parents. Evidence held to confirm said presumption, even tho the child (immature) in its testimony expressed a preference in favor of the nonparent.

In re McFarland, 214-417; 239 NW 702

Custody—pre-eminent right of parent. The pre-eminent natural and statutory right of fit and proper parents to the custody of their child must prevail over those who hold no blood relation to the child, even tho the parents are in very humble financial circumstances, and even tho the parents may have temporarily yielded the custody of the child to another.

Adair v Clure, 218-482; 255 NW 658

Parent as guardian of child—rights—relinquishment. Parents are the natural guardians of their minor child, being equally entitled to its care and custody. Upon the death of one parent the survivor has an absolute right to the custody of the child unless such right has been relinquished by abandonment, contract, or otherwise, or unless the best interests and welfare of the child call for other care and custody.

Allender v Selders, 227-1324; 291 NW 176

Unauthorized satisfaction of bequest. An order of the probate court authorizing an executor to discharge a cash bequest to a minor by transferring to the father of the minor as natural guardian a note and mortgage, belonging to the estate, is wholly void when said order is entered without the appearance of any guardian, regular or ad litem, for the minor.

Irwin v Bank & Trust, 218-477; 255 NW 671

II RIGHT TO CUSTODY OF MINOR CHILDREN

Presumptive right of parent. A father is necessarily given the custody of his motherless child when he has neither abandoned the child, nor surrendered his right to the custody of the child, and when there is no showing that the welfare of the child requires its custody to be awarded to another.

Bonnarens v Klett, 213-1286; 241 NW 483

Presumptions—right of parent to custody of child. Presumptively, the welfare of a child will be best served in the care and control of its parents, and a showing of such relationship makes a strong prima facie case for parents claiming the care of their children. The presumption is rebuttable in cases of extreme neglect of natural and legal duty by the parents, the controlling consideration being the present and best future interests of the children, with due regard to the natural rights of the parents.

Allender v Selders, 227-1324; 291 NW 176

Custody determined early—changes minimized. It is desirable that the status and custody of a child be fixed as quickly as possible and that it be disturbed thereafter as little as possible. Where a child of tender

II RIGHT TO CUSTODY OF MINOR CHILDREN—concluded

years was being cared for by its aged maternal grandparents, and it appeared that before many years some change in its custody would be necessary, it was better for the present and future welfare of the child to give his custody to his father than to wait and make a change in the custody later.

Allender v Selders, 227-1324; 291 NW 176

Selecting parent—custody—when not disturbed. Where children are old enough to elect with which parent they will live, the refusal of the lower court to disturb their custody sustained on appeal.

Johnstone v Johnstone, 226-503; 284 NW 379

Return to father's home after death of mother. Where the father never abandoned his rights to a son whom the mother took from the home where he was well cared for and where he was never neglected nor mistreated, and where, at the death of the mother, the boy was left with the mother's sister and later surrendered to the mother's aged parents who had never before had the care of the child, the custody of the boy should be given to the father who had a home where he was well able to care for the boy, who could then be brought up with his sister already in the father's care.

Allender v Selders, 227-1324; 291 NW 176

Modification of order of custody—considerations. In an action for the modification of an order for the custody of a 10-year-old child, where the affection and care received in the homes of each of the divorced parents was satisfactory, the wishes of the child cannot have great weight, the controlling consideration being the welfare of the child, and, when there was no change in circumstances to require the action of the court, a previous adjudication that the child remain with his mother should not be modified.

Vierck v Everson, 228- ; 291 NW 865

III RECOVERY OF CUSTODY BY HABEAS CORPUS

Proceeding for child custody. Habeas corpus actions involving the custody of minor children treated as equitable proceeding.

Ellison v Platts, 226-1211; 286 NW 413

Custody of child obtained by parents—principles. The scope of habeas corpus extends to controversies concerning the custody of children, resting on the assumption that the state has the right, paramount to any parental or other claim, to dispose of children as their best interests require, being governed not so much by the considerations of strictly legal rights of the parents as by those of expediency and equity and, above all, the interests of the child.

Allender v Selders, 227-1324; 291 NW 176

Review de novo—habeas corpus proceedings—custody of child. An appeal in habeas corpus proceedings—a law action—involving the custody and best welfare of a child necessarily and unavoidably gravitates to a review de novo.

Adair v Clure, 218-482; 255 NW 658

Allender v Selders, 227-1324; 291 NW 176

IV RECOVERY FOR SERVICES OF MINOR CHILDREN

Personal services of ward to guardian offsetting charges. A guardian will not, without an authorizing order of court, be permitted to charge the ward's funds with the cost of board, clothing, education, and other necessities for the ward (who resided with the guardian) when the services rendered to the guardian by the ward equaled or exceeded in value the said charges.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

V EMANCIPATION OF MINOR CHILDREN

Emancipation by desertion—effect. A parent who deserts and abandons his minor child thereby emancipates him, and may not maintain an action based on a plea of loss of services consequent upon the wrongful killing of the child.

Lipovac v Railway, 202-517; 210 NW 573

VI AGREEMENTS AS TO CUSTODY OF MINOR CHILDREN

Adoption of ward by guardian. The statutory requirement that a guardian consent to the adoption of his ward is complied with when the guardian consents that he adopt the child himself.

Darrah v Burkholder, 211-1222; 233 NW 702

12574 Surviving parent.

ANALYSIS

I SURVIVING PARENT AND OTHER RELATIVES AS GUARDIANS
II APPOINTMENT OF GUARDIANS

I SURVIVING PARENT AND OTHER RELATIVES AS GUARDIANS

Presumptive right of parent. A father is necessarily given the custody of his motherless child when he has neither abandoned the child, nor surrendered his right to the custody of the child, and when there is no showing that the welfare of the child requires its custody to be awarded to another.

Bonnarens v Klett, 213-1286; 241 NW 483

Parent as guardian of child—rights—relinquishment. Parents are the natural guardians of their minor child, being equally entitled to its care and custody. Upon the death of one parent the survivor has an absolute right to the custody of the child unless such right has been relinquished by abandonment,

contract, or otherwise, or unless the best interests and welfare of the child call for other care and custody.

Allender v Selders, 227-1324; 291 NW 176

Custody of child—return to father's home after death of mother. Where the father never abandoned his rights to a son whom the mother took from the home where he was well cared for and where he was never neglected nor mistreated, and where, at the death of the mother, the boy was left with the mother's sister and later surrendered to the mother's aged parents who had never before had the care of the child, the custody of the boy should be given to the father who had a home where he was well able to care for the boy, who could then be brought up with his sister already in the father's care.

Allender v Selders, 227-1324; 291 NW 176

Invalid appointment as to parent. The right of a fit and proper father to the custody of his minor child whom he has never abandoned, and whose custody he has neither forfeited nor waived, is in no manner affected by orders of court (1) appointing, without notice to said parent, the maternal grandfather as guardian of said child, and (2) authorizing said guardian to proceed and adopt said child; especially is this true when the petition by the mother for the appointment of the grandfather was not filed until after the appointment was made.

In re McFarland, 214-417; 239 NW 702

Invalid appointment—procedure. Application or motion to set aside a guardianship appointment involving a minor, and invalid as to a parent because made without notice to him, is proper procedure.

In re McFarland, 214-417; 239 NW 702

II APPOINTMENT OF GUARDIANS

Presumption. Orders in probate appointing guardians are presumptively regular.

Marsh v Hanna, 219-682; 259 NW 225

Testamentary guardian of person. Principle recognized that a testamentary guardianship of the person is unknown to our law.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

12575 Guardian of property.

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Guardian's nonliability. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

12576 Minor may choose.

Abuse of discretion by court. In proceedings for the appointment of a guardian or trustee of the property of a minor who is over 14 years of age and under no legal disability, the court abuses its discretion when it refuses to appoint the concededly competent and qualified person formally requested by the ward for such appointment. So held where the court ignored the request solely because the person whose appointment was requested resided just outside the judge's judicial district and some short distance from the location of the trust property.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Appointment by court. A testamentary request that the court appoint a guardian of the property devised to minors does not give the presiding judge a personal power to appoint, but contemplates an appointment by the court acting as a judicial tribunal.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Selecting parent—custody—when not disturbed. Where children are old enough to elect with which parent they will live, the refusal of the lower court to disturb their custody sustained on appeal.

Johnstone v Johnstone, 226-503; 284 NW 379

12577 Bond and oath of guardian of property.

Suretyship generally. See under §11577

Action on bond — accrual. Action on the bond of a guardian is barred in ten years (1) from the death of the guardian, or (2) from the death of the ward, or (3) from the attainment by the ward of his majority.

Armon v Craig, 203-1338; 214 NW 556

Bonds—nonliability of surety. A guardianship is terminated by the death of the guardian, and if, on the occurrence of such death, the guardianship funds are intact, the surety on the statutory bond of the deceased guardian is not liable for a subsequent loss occasioned by the officious conduct of the natural guardian (the father of the ward) in handling said funds, even tho the surety took no steps to obtain the legal appointment of a guardian to succeed the deceased guardian.

Kies v Brown, 222-54; 268 NW 910

Conversion—effect. Conversion by a guardian of the guardianship funds does not start the running of the statute of limitation on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Conversion—failure to file claim in probate. Failure of a ward to file a claim against the estate of an embezzling guardian works no release of the surety on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Death of guardian—duty of personal representative. The surety on the bond of a guardian has no right, on the death of the guardian, to take possession of the ward's estate and administer it. Such property passes in trust to the guardian's personal representative who should report the situation to the probate court and await instructions.

Kies v Brown, 222-54; 268 NW 910

Foreign ancillary guardianship—delivery of property to foreign guardian. On an application by a foreign guardian of the property of a minor for an order directing a domestic guardian to deliver the funds in his hands to said foreign guardian, the plea that if said funds are so delivered the foreign guardian will squander them will be given no consideration if the foreign guardian files the bond required by the statute.

In re Hanson, 213-643; 239 NW 701

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

"Lawful representatives." The bond of a guardian which purports to bind the sureties "and our lawful representatives" does not bind the heirs of the surety.

Conley v Jamison, 205-1326; 219 NW 485; 59 ALR 835

Liability for prior defalcation. The surety on a guardian's bond, conditioned as provided by statute, is liable for the defalcation of the guardian occurring prior to the execution of the bond whether the bond be a "substitute" bond or simply security in addition to a prior existing bond.

Brooke v Bank, 207-668; 223 NW 500

Liability for proceeds of real estate sale. The general bond of a guardian of property—the bond which all such guardians give when they qualify following appointment or which are later required and given for the same purpose—must be deemed to embrace liability for the proceeds of a promissory note which is in the hands of the guardian when he gives such bond and which represents the sale price of real estate sold under order of court, but without a sale bond being given by the guardian. (Holding under §§1183, 3197, C., '97, and §1177-a, S., 1913.)

Iowa Bank v Soppe, 215-1242; 247 NW 632

Receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Release—strict compliance with statute. The release and discharge of the surety on a guardian's bond under any judicial procedure other than that prescribed by statute is a nullity, and in such case a new bond cannot be deemed a "substitute bond" but must be deemed additional security. So held where the surety filed no petition for a release.

Brooke v Bank, 207-668; 223 NW 500
Bookhart v Younglove, 207-800; 218 NW 533

Nonallowable set-off. In an action on the bond of a guardian to recover a lost bank deposit, the surety is not entitled to have his liability reduced by the amount of a dividend paid by the receiver of the bank on a deposit for the loss of which the surety was not liable.

Baitinger v Elmore, 208-1342; 227 NW 344

Successive bonds. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

12579 Bond and oath of guardian of person.

Defect of parties in re objections. A guardian, after purchasing a residence property for his ward at a price authorized by the court, paid the vendor a trifing part of the contract price and obtained a deed from the vendor to the ward who thereafter for years remained in undisturbed possession of the property. The guardian in a later report credited himself with the full amount of the contract price. Later, the deception being discovered, the ward filed objections to the report. The guardian dying, his administrator appeared in re said objections.

Held, the court was in error in establishing a claim in favor of the ward and against the guardian's estate in the amount of the credit improperly taken by the guardian, on condition that the ward reconvey the property to the unpaid vendor—that the court was per se without jurisdiction to adjudicate said controversy in the absence of said unpaid vendor as a party to said proceedings.

In re Bennett, 221-518; 266 NW 6

12581 Duties.

ANALYSIS

I POWERS OF GUARDIANS OF THE PROPERTY
II LIABILITY, ACCOUNTING, AND SETTLEMENT OF GUARDIANS

Additional annotations under §12772

I POWERS OF GUARDIANS OF THE PROPERTY

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Actions—form of. The fact that a guardian brings an action in behalf of the ward as "next friend" does not necessarily affect the validity of the proceedings.

Bennett v Ryan, 206-1263; 222 NW 16

Actions—proper plaintiff. The guardian is the proper plaintiff in an action to recover the property of the minor, even tho the matter is one in which the minor had assumed to act for himself.

McFerren v Bank, 214-198; 238 NW 914

Actions—prompt appointment of guardian during trial. No prejudicial error is committed when, after a trial has proceeded for some time, it develops that one of the defendants is a minor, a fact previously unknown to the court, whereupon the court promptly appoints the minor's attorney as his guardian ad litem, inasmuch as the minor's rights had been fully protected, since said attorney, being present all the time, was fully cognizant of the proceedings up to that point.

Brien v Davidson, 225-595; 281 NW 150

Findings by court—conclusiveness. A finding of fact by the court in guardianship proceedings, on supporting testimony, is conclusive on appeal, such proceedings not being reviewable de novo.

In re Roland, 212-907; 237 NW 349

Judgment against minor unallowable. A nonresident minor may, in a proper case, be made a party to litigation in this state, by service in this state on the foreign guardian, but such service will not confer jurisdiction on the court to enter a personal judgment against the minor.

Irwin v Bank & Trust, 218-474; 255 NW 670

Nonadversary proceedings. The good-faith compromise by a guardian with the approval of the court, of pending litigation to which the minor is a party, is not a proceeding adversary to the minor.

Kreamer v Wendel, 204-20; 214 NW 712

Nonrecoverable interest. A guardian in a successful action to cancel an exchange of property which the minor ward assumed to enter into may not recover of the other party to the exchange interest on money which was never in the hands of such other party, and from which he derived no interest, but which was held by a third party as custodian pending the litigation, especially when the deposit was made with the custodian without any arrangement as to interest.

Cloud v Burnett, 207-593; 223 NW 379

Unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally levied on the property of the ward, and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

Compromise settlement. An order in guardianship proceedings approving a settlement of a claim on behalf of the ward is conclusive until set aside by some direct and appropriate proceedings in the probate court.

Bennett v Ryan, 206-1263; 222 NW 16

Power to compromise litigation. The guardian of a minor has power, without notice to the minor, and without the appointment of a guardian ad litem, but with the approval of the probate court, in good faith to enter into a valid, irrevocable written compromise and settlement of a dispute arising out of the attempt by the minor to probate a will in which he was a devisee, even tho such compromise and settlement set aside to the minor property of a materially different quality and quantity than that devised by the will; and especially is this true when the guardian on his final report again presented said matter to the court, and when, on due notice to the minor and after the appointment of a guardian ad litem, the court approved said final report.

Kreamer v Wendel, 204-20; 214 NW 712

Settlement of claim—irregularities. The validity of a settlement of a claim on behalf of a ward is not affected by the fact that the settlement was signed shortly before the guardian was actually appointed or that there was some delay in filing the order of court approving the settlement.

Bennett v Ryan, 206-1263; 222 NW 16

Disaffirmance of contract. The guardian of an incompetent may disaffirm the contract of his ward without going into equity, and re-

I POWERS OF GUARDIANS OF THE PROPERTY—continued

cover the amount paid by the ward on the contract.

Ayres v Nopoulis, 204-881; 216 NW 258

Valid contract by ward. A mentally competent adult person who has, on her own voluntary application, been placed under guardianship solely because of her physical inability to freely move about and transact her business —tho no statute existed which authorized the appointment of a guardian under such application—is not deprived of power to enter into a valid oral contract for necessaries in the form of board and lodging and personal care for herself. And such contract, when executed, will be binding on her estate even tho never approved by the probate court having jurisdiction over the guardianship.

Dean v Atwood, 221-1388; 212 NW 371

Authority to borrow—scope. Court authority to a guardian to borrow money for the support and education of the ward is no authority to hypothecate the ward's property as security for the loan.

Fansher v Bank, 204-449; 215 NW 498

Disaffirmance of contracts. The guardian of an insane person may disaffirm the contracts of his ward. Evidence held not only sufficient to show mental incompetency of the maker and indorser of promissory notes, but also sufficient to show that the beneficiaries of such instruments knew of such incompetency, and, in addition, obtained the instruments by fraud.

Norelius v Home Bank, 200-613; 203 NW 809

Disbursements to parents for ward's support. Disbursements by a guardian to the parents of a ward for the support and maintenance of the ward, made under a preceding authorizing order of court on due showing of existing conditions, are perfectly legal.

In re Lemley, 219-765; 259 NW 481

Expenditure of principal of fund. The principal of the ward's fund may, of course, be expended for the care, support, and education of the ward when the accruing interest is not sufficient.

Guardianship v Benson, 213-492; 239 NW 79

Funds expended without order of court. Guardianship funds expended by a guardian in the purchase of property, without an authorizing order of court, may be recovered back from the seller who had knowledge of the trust nature of the funds when he received them.

Kowalke v Evernham, 210-1270; 232 NW 670

Giving ward money. The practice of a guardian in giving the ward modest sums of money for his care and support may not be wise and prudent, but the guardian will be given proper credit when the money was not squandered or needlessly spent.

Guardianship v Benson, 213-492; 239 NW 79

Irregular advance to ward. A guardian will be credited with an advance of money to one ward tho it was made in the form of a loan to another ward, which latter ward subsequently paid the full amount to the first ward.

Guardianship v Benson, 213-492; 239 NW 79

Deposits without order of court. A deposit in a bank by a guardian of guardianship funds as a loan without a directing or approving order of court is wrongful, and the bank at once becomes a trustee of the fund for the benefit of the ward.

Andrew v Bank, 207-394; 223 NW 249

Deposit without authority of court. The temporary deposit by a guardian of guardianship funds in a bank for safekeeping is not rendered wrongful because made without an authorizing order of the court or judge, such deposit not being within the scope of either §9285 or this section.

Andrew v Bank, 205-1248; 218 NW 24

Wrongful bank deposits. A deposit in a bank by a guardian of guardianship funds withdrawable only on 60 days notice, without an authorizing order of court, is legally wrongful.

Baitinger v Elmore, 208-1342; 227 NW 344

Guardian dealing with himself. A guardian will not (at least in the absence of an authorizing order of court) be permitted to expend guardianship funds in the purchase, from himself individually, of a note and mortgage. And it matters not how many times the court has approved interlocutory reports embracing the subject matter when the inherent nature of the transaction is concealed from the court.

In re Arrak, 218-117; 254 NW 307

Insanity—order for mental examination of ward. In an action by a guardian to enjoin the transfer of a note and mortgage, procured from the ward by alleged fraudulent means, a motion by defendant for an order for the personal appearance and mental examination of the ward is properly overruled.

Scott v Seabury, 216-1214; 250 NW 468

Guardian disposing of solvent estate—not intended by statute. The statutes providing for guardians of property of incompetents do not contemplate disposition of ward's assets, except in instances where ward's estate is insolvent, or probably will be insolvent. The statutes intend that the business of the ward shall be conducted by a guardian instead of by the ward himself.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

Duty to plead exemption. The guardian of a mentally incompetent person is under duty to plead the exemptions of the ward.

Appanoose Co. v Henke, 207-835; 223 NW 876

Funds to retry issue of sanity. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

Investment — demand certificate of deposit. A guardian cannot be deemed to have made a loan or investment of guardianship funds by depositing them in a bank and taking in return therefor a certificate of deposit payable on demand.

Kies v Brown, 222-54; 268 NW 910

Investment of funds—when ward estopped to object. A mentally competent adult person, who, on his own application, causes a guardian of his property to be appointed (§12617, C., '35), will be estopped to object to fair and honest investment of guardianship funds in real estate, when said investment, tho made without first securing the approval of the court, was made with the knowledge, consent, and approval of the ward, and when the ward at once entered into possession of the property and thereon resided for some seven years without payment of rent of any kind. (Investment made prior to effective date of §12772, C., '31.)

In re Meinders, 222-236; 268 NW 537

Ratification of unauthorized acts. The district court may, by a subsequent order, ratify and approve a previously unauthorized act performed by a guardian in the management of his ward's estate. Ratification refused in the case of the unauthorized compromise of interest on a promissory note of which the guardian was one of several individual makers.

Guardianship v Benson, 213-492; 239 NW 79

Unauthorized investments — subsequent approval nugatory. An investment of guardianship funds, in order to protect the guardian from resulting loss, must be preceded by an order of the court or judge approving the proposed investment, and, since the enactment of §12772, C., '31, the approval by the court or judge of the investment after it has been made, is a nullity.

In re Nolan, 216-903; 249 NW 648

Unauthorized investment—ratification. The act of a newly appointed guardian in foreclosing, under order of court, the illegal and unauthorized investment of a prior guardian, cannot be deemed a ratification of said investment.

In re Nolan, 216-903; 249 NW 648

Unauthorized investment—reconveyance. A guardian, after fully accounting in cash for an unauthorized and illegal investment in real estate of guardianship funds, will be entitled to a reconveyance of the land to himself, individually.

In re Arrak, 218-117; 254 NW 307

Unauthorized, provident investment—subsequent approval by court. Principle reaffirmed that a provident investment of guardianship funds by a guardian without a pre-authorizing order of court, may, on proper application, be subsequently approved by the court with the same resulting force and effect as tho the court had, on due application entered a pre-authorizing order.

(Ruling was on transaction prior to enactment of the 43rd GA., Ch 259.)

Richardson v Lampe, 221-410; 265 NW 629

Unauthorized and imprudent investments. A guardian who, without authorization from the court, invests his ward's funds in real estate, does so at his peril, and irrespective of his good faith; nor may he compel the ward to accept such property even tho the ward did not promptly disavow the investment on attaining his majority.

Guardianship v Pharmer, 211-1285; 235 NW 478

Validating an unauthorized investment. A provident investment made by a guardian long prior to, and maintained long subsequent to, the enactment of §12772, C., '31, but made originally without an authorizing order of court, is validated by the subsequent action of the court in specifically approving the same, and in repeatedly approving the guardian's annual reports with reference to the receipt of income from said investment.

In re Lemley, 219-765; 259 NW 481

Life insurance premiums. A guardian will not be given credit for payments of life insurance premiums on policies which he caused to be issued to his ward (apparently with some profit to himself) unless, by proper evidence, the necessity or desirability of such policies is made to appear.

Guardianship v Benson, 213-492; 239 NW 79

Loan by guardian to himself—authorization. The probate court, when it finds that such a course will essentially promote the physical and mental welfare of a ward, may validly authorize a guardian, as such, to make a specified loan of guardianship funds to himself, individually, and, as guardian, to receive from himself, individually, the proper and legally required security for said loan.

In re Fish, 220-1328; 264 NW 542

I POWERS OF GUARDIANS OF THE PROPERTY—concluded

Nonapplication of payments against unmatured obligation. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

Partition — continuance and dismissal — legality. An order in partition proceedings brought by the guardian of an incompetent to the effect that the cause "be continued until certain conditions are complied with, which being fulfilled, the cause should be dismissed", and a later order dismissing said cause on a recital that said "conditions" had been fulfilled, cannot be said to be illegal and beyond the jurisdiction of the court, even tho such "conditions" were not recited in the record, it appearing that the court had personal knowledge of them.

Salomon v Newby, 210-1023; 228 NW 661

Personal contract reformed to show contract as representative of another. A written contract of sale of property purporting to obligate the purchaser personally will, on clear, satisfactory, and convincing evidence that the purchaser was acting as guardian only, be so reformed as to avoid the mutual mistake or oversight.

Kowalke v Evernham, 210-1270; 232 NW 670

Presumption as to expenditures. Presumptively a guardian in making expenditures for the ward will use nonexempt funds rather than exempt funds.

Appanoose Co. v Henke, 207-835; 223 NW 876

Proceedings by guardian—legality. The dismissal of an action in partition brought by the permanent guardian of an incompetent, in accordance with a compromise and settlement at which neither the guardian ad litem nor his attorney was present, may not be said to be illegal.

Salomon v Newby, 210-1023; 228 NW 661

Release of mortgage without court authorization. A guardian has no legal right, except under court authorization, to release, without payment, a court-authorized, real estate mortgage executed to, and held by, him as such guardian; and subsequent purchasers of the land are chargeable with knowledge of the statute invalidating such release. (§12773, C., '31.)

Randell v Fellers, 218-1005; 252 NW 787

Restoration of status quo. An incompetent, through his guardian, may, on proper grounds, maintain an action to set aside and annul a judgment in foreclosure without offering to restore the status quo, when the incompetent received no part of the money secured by the mortgage.

Engelbercht v Davison, 204-1394; 213 NW 225

Right of possession. A guardian appointed on application of the ward himself is entitled to the possession of property which the ward, prior to the guardianship, placed in the hands of a third party under a written contract solely for preservation and management and with no intent to pass title.

Schultz v Gay, 207-738; 223 NW 495

II LIABILITY, ACCOUNTING, AND SETTLEMENT OF GUARDIANS

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Care of property—standard required—accounting methods. A property guardian must exercise a degree of care commensurate with responsibilities of the position, and, while infallibility of judgment is not required, accurate accounts and self-explanatory vouchers should be kept.

McBurney v McBurney, (NOR); 210 NW 568

Demand for accounting by guardian of insane ward—burden of proof. In an action by the guardian of an insane ward to compel defendant to account for property paid or delivered by the ward to defendant, without consideration, and at various periods of time prior to the time the ward was adjudged insane, the guardian must establish the insanity of the ward at each particular transaction, or must establish such fact condition as compels an accounting. Evidence held insufficient to meet the burden of proof as to one transaction.

Davidson v Piper, 221-171; 265 NW 107

Death of guardian—duty of personal representative. The surety on the bond of a guardian has no right, on the death of the guardian, to take possession of the ward's estate and administer it. Such property passes in trust to the guardian's personal representative who should report the situation to the probate court and await instructions.

Kies v Brown, 222-54; 268 NW 910

Depositing funds—subsequent approval. The due approval by the probate court of a guardian's report wherein he recited that he had deposited the funds of the ward in a bank and had received a stated amount of interest

on such deposit, is in legal effect an authorization to the guardian to continue the deposit, with resulting consequence that the guardian is relieved of personal responsibility in case the bank subsequently becomes insolvent. All this is true irrespective of §9285.

Robinson v Irwin, 204-98; 214 NW 696

Deposit in bank—subsequent approval by court. The rule of law that the approval by the probate court or a judge thereof of a guardian's report showing the depository of the ward's funds is in legal effect an authorization to deposit said funds with said depository is a rule which necessitates a showing that said report was actually called to the attention of the court.

Snyder v Ind. Co., 214-1055; 243 NW 343

Corporate guardian—depositing funds with itself. A corporate guardian and its surety will not be permitted to escape liability for guardianship funds on the plea that the guardian on its own motion but in good faith deposited said funds with itself.

Snyder v Ind. Co., 214-1055; 243 NW 343

Deposit of funds—fraud. A guardian who, without authority from the court, keeps estate funds on deposit in a bank for an extended period of time, and after he knew the bank was probably insolvent, will be held personally responsible for the loss resulting from the insolvency of the bank, and a belated order of court authorizing such deposit will afford him no protection when he obtained the order by concealing the facts from the court.

Cronk v Surety Co., 208-267; 225 NW 454

Disobeying order of court. An administrator and the surety on his bond are liable for a shortage in estate funds occasioned by the failure of the administrator's own private bank in which the funds were deposited, the administrator having been ordered by the court prior to the insolvency of said bank to remove the funds to another depository, and, while able to comply with said order, had neglected so to do.

In re Kendrick, 214-873; 243 NW 168

Borrowing and hypothecating without authority. A ward's estate is liable for money borrowed by the guardian and actually used for the use and benefit of the ward's estate, even tho such borrowing was without authority of the court; but if the guardian has, without authority, hypothecated the ward's property as security for the loan, the hypothecation must be released, on proper application, to the guardian, especially when the hypothecation embraced the entire property of the ward.

Fansher v Bank, 204-449; 215 NW 498

Interest on uninvested funds. A guardian may be charged with a reasonable rate of interest on estate funds which he might have invested by the exercise of reasonable diligence.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

Investment in second mortgage. Where two separate guardianships exist with the same guardian—one over an adult, and one over a minor—authority granted by the court in the adult guardianship to execute a second mortgage on the lands of the adult, and to invest in said second mortgage the money held by the guardian under the guardianship of the minor, constitutes no protection to the guardian (in view of §12772, C., '24) if the ward in the minorship proceedings objects. (In this case, no entries whatever were made in the latter proceedings.)

In re Galloway, 217-284; 251 NW 619

Loaning to self — who may question. The invalidity which attends the act of a guardian in loaning guardianship funds to himself, individually, and in securing such loan by a first mortgage on real estate—all without any preauthorizing order of court—may not be pleaded by a second mortgagee of the land on the theory that such invalidity absolutely voided the said note and mortgage to the guardian, and thereby left the purported second mortgage as the first lien on the land. The sole right to question the legality of said acts of the guardian rests in the ward, or in his heirs, or in those properly representing said ward or heirs.

Richardson v Lampe, 221-410; 265 NW 629

Unauthorized deposit as loan. A guardian who, without an authorizing order of court, permits the funds of the ward to remain in a bank where they had originally been placed by the ward, and who, without such authorization, accepts as evidence of said funds a certificate of deposit payable at a fixed date in the future, thereby makes an unauthorized loan to the bank and must make good the loss in case of the insolvency of the bank.

In re Fahlin, 218-121; 254 NW 296

Unauthorized investments — rejection by ward. A ward, on the hearing on the final report of the guardian, may reject any or all loans or investments made by the guardian without the authority or approval of the court.

In re Jefferson, 219-429; 257 NW 783

Unauthorized interest-bearing, time certificates of deposit. A guardian who, without authority from the probate court, deposits guardianship funds in a bank, and in return therefor receives interest-bearing, time certificates of deposit, must personally account for the loss in case the bank becomes insolvent.

In re Fish, 220-1328; 264 NW 542

II LIABILITY, ACCOUNTING, AND SETTLEMENT OF GUARDIANS—concluded

Findings by court — conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case have force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

Foreign and ancillary guardianship—custody of property. A resident guardian of a nonresident ward, with whom no claims have been filed, should be ordered to turn over all funds and property of the ward in his possession, to the original foreign guardian, upon the payment of all taxes against the estate and upon the filing, by the foreign guardian, of a certified copy of his bond. (§12610, C., '31.)

In re Cihlar, 216-327; 249 NW 254

Nonapplication of payments against unmatured obligation. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

Ratification of unauthorized acts. The district court may, by a subsequent order, ratify and approve a previously unauthorized act performed by a guardian in the management of his ward's estate. Ratification refused in the case of the unauthorized compromise of interest on a promissory note of which the guardian was one of several individual makers.

In re Benson, 213-492; 239 NW 79

Review at law. Supported findings and orders of the probate court on the hearing on the final report of a guardian are conclusive on the appellate court, the proceedings being at law.

In re Jefferson, 219-429; 257 NW 783

Unauthorized release of mortgage. The act of a guardian in releasing, without an order of court, a mortgage which represented an investment of funds derived from a sale of the ward's real estate, constitutes a breach of the bond specially given by the guardian in order to effect said sale, it appearing that the guardian was, by said release, rendered incapable of personally accounting to the ward for the amount of said mortgage.

In re Brubaker, 214-413; 239 NW 536

Transfer of trust funds—recovery. Funds transferred from one trust fund by the trustee thereof to another trust fund of which he is also the trustee, in order to make good a wrongful shortage in the latter fund, may be recovered by the beneficiary of the wrongfully depleted fund.

In re Aasheim, 212-1300; 236 NW 49

12582 Suits by guardians.

When reply not necessary. In an action by a guardian of a minor on a certificate of deposit issued to the minor by the defendant bank, an answer alleging that the minor, in the reorganization of the bank, waived a named portion of the deposit is denied by operation of law. In other words, no reply is required.

McFerren v Bank, 214-198; 238 NW 914

12583 Nonabatement of actions.

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

12587 Sale or mortgage of property.

Nonapplicability of statute. The statutory provision that the real property of a minor may be mortgaged or sold "when not in violation of the terms of a will by which the minor holds it", has no application to a compromise by the guardian of a will contest under which compromise the minor receives encumbered real property in lieu of nonencumbered real property devised by the will.

Kreamer v Wendel, 204-20; 214 NW 712

Authority to borrow—scope. Court authority to a guardian to borrow money for the support and education of the ward is no authority to hypothecate the ward's property as security for the loan.

Fansher v Bank, 204-449; 215 NW 498

Trust property held by ward. A contract by the guardian of an incompetent, for the sale of land owned by the ward solely as trustee, tho approved by the court, cannot, in any sense, be deemed the contract of the ward; therefore, such contract cannot, in the event of the death of the ward, be deemed to create any indebtedness against the estate of the ward.

Copple v Morrison, 221-183; 264 NW 113

12592 Bond.

Liability in general. See under §12577

Successive bonds by administrator. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

Unauthorized release of mortgage. The act of a guardian in releasing, without an order of court, a mortgage which represented an investment of funds derived from a sale of the ward's real estate, constitutes a breach of the bond specially given by the guardian in order to effect said sale, it appearing that the guardian was, by said release, rendered incapable of personally accounting to the ward for the amount of said mortgage.

In re Brubaker, 214-413; 239 NW 536

12595 Applicable procedure.

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Clapp, 221-1270; 268 NW 56

12596 Validity of sale—limitation to question.

Similar provision. See under §11951, Vol I

12597 Account.

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Absence of vouchers—effect. The absence from a guardian's report of vouchers for expenditures may be excused by other evidence by the guardian that the expenditures were actually made.

Guardianship v Benson, 213-492; 239 NW 79

Deposit in bank—subsequent approval by court. The due approval by the probate court of a guardian's report wherein he recited that he had deposited the funds of the ward in a bank and had received a stated amount of interest on such deposit is, in legal effect, an authorization to the guardian to continue the deposit, with resulting consequence that the guardian is relieved of personal responsibility in case the bank subsequently becomes insolvent; and this is true irrespective of the provisions of §9285, C., '24.

Robinson v Irwin, 204-98; 214 NW 696

Findings by court—conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case have force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

Findings of fact. The findings of the probate court, on supporting testimony, as to the amount of the excess charges made by a guardian for the support and education of the ward, are conclusive on the appellate court.

In re Nolan, 216-903; 249 NW 648

Liability of surety. A formal accounting by a guardian is not a necessary prerequisite to an action against the surety when (1) the breach of the bond and (2) the resulting loss can be readily and definitely determined in the action on the bond.

Baitinger v Elmore, 208-1342; 227 NW 344

Nonapplication of payments against unmatured obligation. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

Personal services offsetting charges. A guardian will not, without an authorizing order of court, be permitted to charge the ward's funds with the cost of board, clothing, and education and other necessities for the ward (who resided with the guardian) when the services rendered to the guardian by the ward equaled or exceeded in value the said charges.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

Ratification of settlement—failure to disaffirm. In guardianship proceeding, wherein father acting as guardian made a settlement with his children after son had reached his majority, but daughter lacked three months of being 21 years of age, and suit against the father for an accounting was not brought

until two and one-half years after the settlement, held, evidence sufficient to support finding of trial court in approving the guardian's report which, in effect, approved the settlement, the same having been ratified by failure to disaffirm within a reasonable period of time.

In re Fisher, 226-596; 284 NW 821

Review at law. Supported findings and orders of the probate court on the hearing on the final report of a guardian are conclusive on the appellate court, the proceedings being at law.

In re Jefferson, 219-429; 257 NW 783
In re Fish, 220-1328; 264 NW 542

12599 Compensation.

Accounting and settlement—personal services offsetting charges. A guardian will not, without an authorizing order of court, be permitted to charge the ward's funds with the cost of board, clothing, education, and other necessities for the ward (who resided with the guardian) when the services rendered to the guardian by the ward equaled or exceeded in value the said charges.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

Attorney fees in abortive action. Attorneys employed by a temporary guardian to prosecute the main action on the issue whether a permanent guardian shall be appointed, may not be paid from the ward's estate when the action for a permanent guardian fails; and it matters not that the court assumed to authorize the temporary guardian to make such employment.

In re Barner, 201-525; 207 NW 613

Attorney fees—temporary guardianship. An allowance of reasonable compensation to a temporary guardian and to his attorney in conserving and caring for the estate of the ward is proper, even tho no permanent guardian is appointed.

In re Barner, 201-525; 207 NW 613

Denial. The court may very properly refuse to grant any compensation to a guardian who has been guilty of neglect and malfeasance in the management of the ward's estate.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

Poor business management — effect. The poor business management of an estate may have a material bearing on the compensation to be allowed a guardian.

Guardianship v Benson, 213-492; 239 NW 79

12600 Disobedience of orders.

Equitable estoppel—report—failure to rely. A party will not be permitted to say that he relied, to his financial disadvantage, on the long delay of a guardian to file his final report, when it appears that he did not change his position because of said delay—did not, because of his own lack of due diligence, have knowledge of said delay until long after he had acted to his disadvantage.

Bates v Remley, 223-654; 273 NW 180

12603 Action on bond.

See also under §12577

Accounting and settlement—who may object. In the guardianship of military veterans, the federal veterans administration has legal right to appear and contest the legality of investment of guardianship funds.

In re Arrak, 218-117; 254 NW 307

12604 Removal—new bond.

Absence of formal notice—legality. An order discharging a guardian and appointing a new one without formal notice to the incompetent may not be said to be illegal when the latter appointment was made with the knowledge, consent, and acquiescence of the ward, who himself petitioned for the appointment in the original proceedings.

Salomon v Newby, 210-1023; 228 NW 661

CHAPTER 540

FOREIGN GUARDIANS

12606 Appointment.

Foreign courts — jurisdiction. Record reviewed, and held to show jurisdiction in the courts of a foreign state validly to appoint a guardian of the property and person of an adult former resident of this state who has been a mental defect (tho not an imbecile or idiot) from birth, and who has lived in said foreign state continuously for some 25 years with a protecting chaperon.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Personal judgment unallowable. A nonresident minor may, in a proper case, be made a party to litigation in this state, by service in this state on the foreign guardian, but such service will not confer jurisdiction on the court to enter a personal judgment against the minor.

Irwin v Bank & Trust, 218-474; 255 NW 670

12610 Copy of bond.

Delivery of property to foreign guardian. On an application by a foreign guardian of the

property of a minor for an order directing a domestic guardian to deliver the funds in his hands to said foreign guardian, the plea that if said funds are so delivered the foreign guardian will squander them will be given no consideration if the foreign guardian files the bond required by the statute.

In re Hanson, 213-643; 239 NW 701

12611 Order for delivery.

Custody of property. A resident guardian of a nonresident ward, with whom no claims have been filed, should be ordered to turn over all funds and property of the ward in his possession, to the original foreign guardian, upon the payment of all taxes against the estate and upon the filing, by the foreign guardian, of a certified copy of his bond. (§12610, C., '31.)

In re Cihlar, 216-327; 249 NW 254

CHAPTER 541

GUARDIANS FOR DRUNKARDS, SPENDTHRIFTS, LUNATICS, AND PERSONS OF UNSOUND MIND

12614 Petition—appointment.

ANALYSIS

I NATURE AND RESULT OF GUARDIANSHIP
II UNSOUNDNESS OF MIND

I NATURE AND RESULT OF GUARDIANSHIP

Advancing funds to retry issue of sanity—discretion of court. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

Continuances. A motion for a continuance, even in proceedings for the appointment of a guardian, is addressed, peculiarly, to the sound legal discretion of the court, and the order overruling such motion is conclusive on the appellate court unless it clearly appears that the trial court has abused its discretion and thereby perpetrated an injustice.

Anspach v Littler, 217-787; 253 NW 120

Foreign courts — jurisdiction. Record reviewed, and held to show jurisdiction in the courts of a foreign state validly to appoint a guardian of the property and person of an adult former resident of this state who has been a mental defect (tho not an imbecile or idiot) from birth, and who has lived in said foreign state continuously for some 25 years with a protecting chaperon.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Presumption. Orders in probate appointing guardians are presumptively regular.

Marsh v Hanna, 219-682; 259 NW 225

Testamentary capacity—drunkard guardianship. One under guardianship is not necessarily incompetent to make a will; for instance, as to a drunkard under guardianship, incapacity is not presumed. Evidence failed to establish that testator was intoxicated when he made his will, and his competency, being a fact question when decided in his favor by the court after waiver of a jury, will not be disturbed on appeal.

In re Willer, 225-606; 281 NW 155

II UNSOUNDNESS OF MIND

Guardianship — presumption. One who is under guardianship because of mental defect, is presumptively incapable of executing a valid will. Evidence pro and con held to sustain the presumption.

Brogan v Lynch, 204-260; 214 NW 514

Unnecessary amendment. In proceedings for the appointment of a guardian, the allegation of unsoundness of mind made when the petition is filed may be supported by testimony of unsoundness at the time of the trial, tho the proceedings be long protracted. It follows that the unnecessary allowance of an amendment alleging such subsequent unsoundness is quite harmless.

Anspach v Littler, 217-787; 253 NW 120

Jury question. A jury question is created on the issue of mental unsoundness in proceedings for the appointment of a guardian of property, by testimony that the person in question, by reason of the impairment of his mental faculties, has no clear understanding of what he has done, or the probable effect of what he has done on his estate, and that his property is being mismanaged and is in danger of being lost thereby.

Zander v Cahow, 200-1258; 206 NW 90

Nonjury question. In an action for the appointment of a guardian of the property of an alleged mental incompetent, the court may direct a verdict for the defendant if the evidence fails to show that the mental incompetency of defendant deprives him of the ability

II UNSOUNDNESS OF MIND—concluded

to care for his property and to understand the nature and effect of what he does.

Richardson v Richardson, 217-127; 250 NW 897

Termination (?) or continuance (?) of guardianship. In determining whether guardianship should be terminated, the accepted test of mental unsoundness is the ability and competency of a person to manage his property and business affairs in a rational manner, and the object of a statute making unsoundness of mind a basis for appointment of a guardian is the protection of the property of the affected person—cited cases being of little aid except to fix general principles.

In re Hawk, 227-232; 288 NW 114

Refusal to terminate. Where record disclosed that ward was unable to cope with those having designs on his property, that he was still lacking in business judgment, that he owned 80 acres of good land on which, with good crops, the mortgage could be retired in another year, and that unscrupulous persons would be ready and anxious to take advantage of his weakness, court's action in refusing to terminate guardianship was not error, it being clearly evident the ward was mentally deficient.

In re Hawk, 227-232; 288 NW 114

Unsoundness of mind — proof required. A guardian for the property of a person should be appointed whenever it is made to appear that such person has lost his reasoning powers to the extent that he cannot manage his property and business affairs in a rational manner.

Claussen v Claussen, 216-269; 249 NW 397

12616 Guardian of drunkard.

Inebriacy defined. Inebriacy is the state of drunkenness or habitual intoxication.

Maher v Brown, 225-341; 280 NW 553

12617 Party may apply for guardianship.

Appointment—absence of formal notice. An order discharging a guardian and appointing a new one without formal notice to the incompetent, may not be said to be illegal when the latter appointment was made with the knowledge, consent, and acquiescence of the ward, who himself petitioned for the appointment in the original proceedings.

Salomon v Newby, 210-1023; 228 NW 661

Right of possession. A guardian appointed on application of the ward himself is entitled to the possession of property which the ward, prior to the guardianship, placed in the hands of a third party under a written contract solely for preservation and management and with no intent to pass title.

Schultz v Gay, 207-738; 223 NW 495

Valid contract by ward. A mentally competent adult person who has, on her own voluntary application, been placed under guardianship solely because of her physical inability to move about freely and transact her business —tho no statute existed which authorized the appointment of a guardian under such application—is not deprived of power to enter into a valid oral contract for necessaries in the form of board and lodging and personal care for herself. And such contract, when executed, will be binding on her estate even tho never approved by the probate court having jurisdiction over the guardianship.

Dean v Atwood, 221-1388; 212 NW 371

When ward estopped to object to investment. A mentally competent adult person, who, on his own application, causes a guardian of his property to be appointed, will be estopped to object to fair and honest investment of guardianship funds in real estate, when said investment, tho made without first securing the approval of the court, was made with the knowledge, consent, and approval of the ward, and when the ward at once entered into possession of the property and thereon resided for some seven years without payment of rent of any kind. (Investment made prior to effective date of §12772, C., '31.)

In re Meinders, 222-236; 268 NW 537

12619 Petition—answer.

Irregular petition for appointment—collateral attack. Irregularities in the form of a petition for the appointment of a guardian, while perhaps subject to direct attack, were not sufficient to justify a collateral attack in an action to set aside a default judgment obtained by the guardian.

Jensen v Martinsen, 228- ; 291 NW 422

Irregularities in petition for appointment—right to bring action. A petition by the wife of an inmate of a state hospital for the insane, asserting that she was the wife of the inmate who had property, and asking that she be appointed guardian, altho insufficient to meet the statutory requirements for a petition for the appointment of a guardian, was sufficient for the appointment of a temporary guardian, and when notice was accepted by the superintendent of the institution and wife was appointed, she was at least a temporary guardian, and, as such, could maintain an action in behalf of the incompetent.

Jensen v Martinsen, 228- ; 291 NW 422

12620 Temporary guardian.

Validity. The appointment of a temporary guardian on proper and sufficient notice to the person sought to be placed under guardianship is valid, even tho the statute authorizing such appointment is silent as to notice.

Franklin v Bonner, 201-516; 207 NW 778
In re Barner, 201-525; 207 NW 613

Irregularities in petition for appointment—right to bring action. A petition by the wife of an inmate of a state hospital for the insane, asserting that she was the wife of the inmate who had property, and asking that she be appointed guardian, altho insufficient to meet the statutory requirements for a petition for the appointment of a guardian, was sufficient for the appointment of a temporary guardian, and when notice was accepted by the superintendent of the institution and wife was appointed, she was at least a temporary guardian, and, as such, could maintain an action in behalf of the incompetent.

Jensen v Martinsen, 228- ; 291 NW 422

Compensation—attorney fees. An allowance of reasonable compensation to a temporary guardian and to his attorney in conserving and caring for the estate of the ward is proper, even tho no permanent guardian is appointed.

In re Barner, 201-525; 207 NW 613

Compensation — attorney fees in abortive action. Attorneys employed by a temporary guardian to prosecute the main action on the issue whether a permanent guardian shall be appointed, may not be paid from the ward's estate when the action for a permanent guardian fails; and it matters not that the court assumed to authorize the temporary guardian to make such employment.

In re Barner, 201-525; 207 NW 613

12621 Trial.

Hypothetical question—fundamentally required instructions. Expert testimony tending to show that a party is of unsound mind, based solely on a hypothetical state of fact, is wholly without value unless the jury finds that the assumed state of fact is true, and fundamental error results in failure so to instruct.

Anspach v Littler, 215-873; 245 NW 304

12622 Presumption of fraud.

Contracts by insane person—validity—demand for accounting—burden of proof. In an action by the guardian of an insane ward to compel defendant to account for property paid or delivered by the ward to defendant, without consideration, and at various periods of time prior to the time the ward was adjudged insane, the guardian must establish the insanity of the ward at each particular transaction, or must establish such fact condition as compels an accounting. Evidence held insufficient to meet the burden of proof as to one transaction.

Davidson v Piper, 221-171; 265 NW 107

Valid contract by ward. A mentally competent adult person who has, on her own voluntary application, been placed under guardianship solely because of her physical inability to move about freely and transact her business —tho no statute existed which authorized the appointment of a guardian under such application—is not deprived of power to enter into a valid oral contract for necessaries in the form of board and lodging and personal care for herself. And such contract, when executed, will be binding on her estate even tho never approved by the probate court having jurisdiction over the guardianship.

Dean v Atwood, 221-1388; 212 NW 371

12623 Petition to terminate.

Burden of proof. A ward has the burden to show that he is no longer a proper subject of guardianship.

Perry v Roberts, 206-303; 220 NW 85

Refusal to discontinue. On appeal from a judgment refusing to discontinue a guardianship, the appellate court, while conceding a large discretion in the trial court, will most carefully scan the record in order that no possible injustice may be done the applicant.

Perry v Roberts, 206-303; 220 NW 85

Selfish interest of expectant heir. The fact that an expectant heir is in the background of a proceeding to continue a guardianship will prompt the court to great scrutiny of the testimony.

Coomes v Mayer, 201-405; 205 NW 645
See 198-1113; 197 NW 476

Termination of guardianship. Allegation, in petition to terminate guardianship, that 37 percent of the receipts of the guardianship had been paid to guardian and his attorney for fees and expenses, was properly stricken out on motion as not being material to the issue before the court.

In re Hawk, 227-232; 288 NW 114

Unsupported apprehension. The court will not continue a guardianship simply on the unsupported apprehension that the ward, who has attained a great age, may be despoiled of her property by her husband, when it appears that the ward is otherwise competent to direct her business affairs.

Coomes v Mayer, 201-405; 205 NW 645

12625 Trial.

Refusal to terminate. Where record disclosed that ward was unable to cope with those having designs on his property, that he was still lacking in business judgment, that he owned 80 acres of good land on which, with good crops, the mortgage could be retired in another year, and that unscrupulous persons would be ready and anxious to take advantage of his weakness, court's action in refusing to terminate guardianship was not error, it being clearly evident the ward was mentally deficient.

In re Hawk, 227-232; 288 NW 114

Termination of guardianship—court findings as jury verdict. When jury trial is waived in

action to terminate guardianship, facts found by court have same binding effect as verdict of jury.

In re Hawk, 227-232; 288 NW 114

Termination of guardianship—discretion of court. In action to terminate guardianship, large discretion is lodged in the trial court to determine whether the ward is a proper subject for the continuation of the property guardianship, and whether ward's best interests will be best served by such continuance.

In re Hawk, 227-232; 288 NW 114

12628 Sale or mortgage of real estate.

Probate record—constructive knowledge. One who takes a mortgage from a mortgagor who, under the recording acts, appears to be the sole owner of the fee is not charged with constructive knowledge of matter which appears in the "probate record" (§11842, C., '31) and which suggests or implies that some person other than the apparent fee owner has an interest in the property.

Booth v Cady, 219-439; 257 NW 802

12630 Insolvent estates.

Disposing of solvent estate—not intended by statute. The statutes providing for guardians for property of incompetents do not contemplate disposition of ward's assets, except in instances where ward's estate is insolvent, or probably will be insolvent. The statutes intend that the business of the ward shall be conducted by a guardian instead of by the ward himself.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

Judgment against insane person—priority in estate—lien. A judgment rendered against an insane person at a time when the guardianship was entirely insolvent, with no proceedings then pending nor contemplated relative to dissolution or distribution of assets of guardianship, becomes a lien upon his realty, and upon his death the district court could properly order administrator of his estate to pay the judgment prior to payment of claims against the estate.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

CHAPTER 542

GUARDIANS FOR ABSENTEES

12640 Qualifications—powers and duties.

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

CHAPTER 542.1

GUARDIANSHIP OF VETERANS

12644.13 Compensation.

Right to allow. Section 454, title 38, U. S. Code, providing that federal funds granted to a world war veteran "shall not be subject to the claims of creditors", does not prohibit the courts of this state from allowing the guardian of such veteran and from such funds, compensation not only for ordinary services but for extraordinary services rendered the ward—the guardian not being a "creditor" within the meaning of said statute.

Hines v McKenzie, 216-1388; 250 NW 687

12644.14 Investment of funds.

Who may object. In the guardianship of military veterans, the federal veterans administration has legal right to appear and contest the legality of investment of guardianship funds.

In re Arrak, 218-117; 254 NW 307

Loan by guardian to himself—authorization. The probate court, when it finds that such a course will essentially promote the physical and mental welfare of a ward, may validly authorize a guardian, as such, to make a specified loan of guardianship funds to himself, individually, and, as guardian, to receive from himself, individually, the proper and legally required security for said loan.

In re Fish, 220-1328; 264 NW 542

12644.15 Use of funds.

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person or-

dinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Nonapplication of payments against unmatured obligation. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

CHAPTER 543

CHANGING NAMES

Atty. Gen. Opinion. See '25-26 AG Op 303

CHAPTER 544.1

PATERNITY OF ILLEGITIMATE CHILDREN AND OBLIGATION OF PARENTS THERETO

12667.01 Obligation of parents.

Divorce — effect as to children. Principle reaffirmed that the duties and liabilities of the parents to a minor child do not terminate by a decree of divorce.

Hensen v Hensen, 212-1226; 238 NW 83

12667.02 Recovery by mother from father.

Separate maintenance. An action for separate maintenance presupposes the existence of the marriage relation and a wife who institutes such action while the marriage relation exists may not, after the entry of a valid decree of divorce, and after the remarriage of both parties, maintain the action, even to the extent of recovering (1) for her own past support up to the time of her remarriage, or (2) for the past and future support of her minor child.

Freet v Holdorf, 205-1081; 216 NW 619

12667.07 Proceedings to establish paternity.

Repeal of statute—effect. The repeal of the former statutes relative to establishing the paternity of an illegitimate child and charging the father with the support of such child did not in any manner affect an existing right to institute such proceeding, even tho no proceedings were pending at the time of the repeal.

State v Shepherd, 202-437; 210 NW 476

Unallowable proceedings. The paternity of a child is a subject matter not cognizable in an equitable action of divorce at the instance of the plaintiff, who is suing in her own personal behalf, it appearing that the parties were not, in fact, husband and wife.

Reppert v Reppert, 214-17; 241 NW 487

Birth during lawful wedlock—presumption —proof to overthrow. The presumption of legitimacy of a child born in lawful wedlock is so strong that it will yield only to clear, satisfactory, and practically conclusive proof that the husband was:

1. Impotent, or
2. Entirely absent so as to have no access to the mother, or
3. Entirely absent from the mother at the period during which the child must have been begotten, or
4. Present with the mother under circumstances negativing sexual intercourse with her.

Craven v Selway, 216-505; 246 NW 821

Nonallowable evidence. The illegitimacy of a child born in lawful wedlock, without proof that the husband was impotent or had no sexual access to the mother, cannot be established by the declarations of the mother, or of the putative father, or of said child, nor by proof of the mother's adultery.

This does not imply that after illegitimacy has been made to appear, by competent proof, the declarations of the putative father and of the mother are not admissible to identify the actual father.

Craven v Selway, 216-505; 246 NW 821

Paternity statutes — proceedings are civil, not criminal. The statutory proceeding to determine paternity and for support money is not a criminal proceeding but is tried as an ordinary action.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

12667.08 Who may institute proceedings.

Unallowable proceedings. The paternity of a child is a subject matter not cognizable in an equitable action of divorce at the instance of the plaintiff who is suing in her own personal behalf, it appearing that the parties were not, in fact, husband and wife.

Reppert v Reppert, 214-17; 241 NW 487

12667.18 Method of trial.

ANALYSIS

I IN GENERAL
II EVIDENCE
(a) IN GENERAL
(b) CONDUCT OF PROSECUTRIX
(c) RESEMBLANCE OF CHILD
(d) TIME OF INTERCOURSE AND BIRTH
(e) PRESUMPTIONS
(f) INSTRUCTIONS

I IN GENERAL

Paternity statutes—proceedings are civil, not criminal. The statutory proceeding to determine paternity and for support money is not a criminal proceeding but is tried as an ordinary action.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

Former statute—jail sentence as imprisonment for debt—unconstitutional. Proceeding to establish paternity and to provide support money, being a civil proceeding, the statutory punishment by commitment to jail for nonpayment contravenes the constitutional prohibition against imprisonment for debt.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

II EVIDENCE

(a) IN GENERAL

Evidence of good character or reputation. Conceding, arguendo, that one accused of being the father of a child may sustain his denial by proof of good character or reputation, yet such evidence must be confined to the traits involved in the charge.

Moen v Fry, 215-344; 245 NW 297

Declarations admissible. Declarations of the deceased mother of a child born out of lawful wedlock, as to who was the father of said child, are admissible on the issue of paternity; also like declarations of other members of the family as a matter of family history. Evidence reviewed and held insufficient to establish plaintiff's paternity.

Hopp v Petkin, 222-609; 269 NW 758

Evidence—permissible range. Evidence in bastardy proceedings reviewed and held not to be beyond the permissible range of testimony in such cases.

State v Andrioli, 216-451; 249 NW 379

(b) CONDUCT OF PROSECUTRIX

Incompetent declarations by prosecutrix. On the issue as to the paternity of a child, statements by the prosecutrix, not in the presence of the defendant, to the effect that defendant was the father of her child, are wholly incompetent.

Moen v Fry, 215-344; 245 NW 297

Paternity—incompetent evidence. On an issue as to the paternity of a child, testimony by the family pastor that at the time the child was baptized prosecutrix charged another person with the paternity of said child does not justify, on cross-examination, testimony as to what said accused party said and did, and what talk the pastor had with members of the family, relative to said charge.

Moen v Fry, 215-344; 245 NW 297

Paternity—incompetent evidence. On an issue as to the paternity of a child, the material fact that prosecutrix had at a former time charged another party with said paternity, presents no justification for the reception in evidence of substantially the entire judicial proceeding growing out of said former accusation.

Moen v Fry, 215-344; 245 NW 297

(c) RESEMBLANCE OF CHILD

No annotations in this volume

(d) TIME OF INTERCOURSE AND BIRTH

Reopening cause to permit additional testimony of prosecutrix. The court may at the close of plaintiff's testimony, and in the exercise of a fair discretion, reopen the case and permit a witness to be recalled for further examination.

State v Andrioli, 216-451; 249 NW 379

(e) PRESUMPTIONS

Child begotten out of, but born in, wedlock. A child manifestly begotten out of wedlock but born during wedlock is presumed to be the child of such intermarried persons.

Ryke v Ream, 212-126; 234 NW 196

(f) INSTRUCTIONS

No annotations in this volume

12667.21 Death, absence, or insanity of mother—testimony receivable.

Declarations of mother admissible. Declarations of the deceased mother of a child born out of lawful wedlock, as to who was the father of said child, are admissible on the issue of paternity; also like declarations of other members of the family as a matter of family history. Evidence reviewed and held insufficient to establish plaintiff's paternity.

Hopp v Petkin, 222-609; 269 NW 758

12667.24 Judgment in general.

Former statute—imprisonment for contempt as cruel and unusual punishment. Statutes providing for commitment to jail for contempt, upon default in payment of support money awarded in bastardy proceedings, without citation, charge, or hearing and without allowing defendant an opportunity to purge himself of any alleged contempt, contravene the constitutional prohibition against cruel and unusual punishment.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

CHAPTER 545

JUDGMENT BY CONFESSION

12670 Statement.

Statement of confession defined—mandatory duties of clerk—recording not entry of judgment. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

12671 Judgment—execution.

Mandatory duties of clerk—recording not entry of judgment. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

CHAPTER 546

OFFER TO CONFESS JUDGMENT

12675 Offer to confess after action brought.

Erroneous docketing—effect. An applicant for condemnation of realty who erroneously causes its appeal from the award of the sheriff's jury to be docketed in the name of itself as plaintiff, and in the name of the landowner as defendant, and files petition, and thereby induces the landowner to file answer thereto, is in no position, after causing its own error to be corrected by a proper redocketing, either to demand the entry of judgment in accordance with its own offer to confess judgment, or to object to the action of the court in granting to the landowner (the proper plaintiff) a continuance over the term in which to file a proper petition.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

12676 Nonacceptance—costs.

Judgment on remand for amount confessed. A plaintiff-appellant who, on appeal, is unsuccessful in his effort to establish liability in excess of defendant's offer to confess judgment is entitled on remand to procedendo directing the trial court to enter judgment in his favor for the amount of said offer and for costs to date of said offer.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

12680 Effect of nonaccepted offer.

Revealing offer of compromise. Statements by plaintiff's counsel in his opening statement to the jury to the effect that defendant had offered to compromise the claim sued on, together with testimony by plaintiff to the same effect, constitutes reversible error, even tho said testimony is stricken from the record and the jury is admonished not to consider it.

Hoover v Ins. Co., 218-559; 255 NW 705

CHAPTER 547

SUBMITTING CONTROVERSIES WITHOUT ACTION OR IN ACTION

12686 Agreed statement of facts.

Construction of undefined term. A stipulation that certain property was sold for the purpose of using the same as prizes in the operation of a punch board is a concession that the term "punch board" has a general recognized meaning which must control the construction of the stipulation.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Submission with and without action. The filing of a petition and answer, without service of an original notice, and the submission of the matter to the court on an agreed statement of facts which stipulated for judgment for plaintiff in case the court found that a recovery should be allowed, and followed by a motion by defendant for a verdict in his favor, shows the institution and prosecution of an ordinary action, and not the submission of a controversy to the court without action as provided by this chapter.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851

Trial by court—submissions contrasted. The submission of a pending law action and of the pleadings and stipulations of fact filed therein, for trial by the court without a jury, cannot be deemed a submission under and subject to the provisions of this chapter relating to the submission of controversies without action.

Rogers v Davis, 223-373; 272 NW 539

12691 Submission of cause pending.

Stipulation of fact. A stipulation of facts upon which a cause is submitted is conclusive on both parties. In other words, no fact not embraced in the stipulation can be considered on appeal.

Andrew v Bank, 209-277; 227 NW 899

Stipulation of fact may act as amendment. A duly signed stipulation as to the ultimate facts in a case may become, in legal effect, an amendment to the petition in the case, for the purpose of a subsequently interposed motion to dismiss the petition.

Pierre v Pierre, 210-1304; 232 NW 633

Questions or issues specially withheld—effect. Parties, in agreeing to a compromise, may specifically withhold or exclude certain issues or questions from the adjudication. Needless to say that such issues are not adjudicated.

Jones v Sur. Co., 210-61; 230 NW 381

12693 Submission of question of law—agreement as to judgment.

Stipulation—enforceability. The court will enforce a duly filed stipulation by the parties to an action of forcible entry and detainer to the effect that if defendant fails to comply with specified conditions judgment shall be entered against defendant for the possession of said premises.

Peak v Mulvaney, 215-1400; 245 NW 748

12694 Costs.

Taxation—submission without action. When the issues in a controversy are made up by pleadings and the pleadings then abandoned and the matter submitted to the court on a stipulation of fact, the costs are properly taxed against the wholly unsuccessful party.

Chambers v Bk. & Tr., 218-63; 254 NW 309

CHAPTER 548

ARBITRATION

12695 What controversies.

Discussion. See 6 ILB 113—Arbitration

Contract for—effect. A party who has contracted that a matter in controversy shall be submitted to arbitration and permits such matter to go to such arbitration is bound by the decision.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

12696 Written agreement.

ANALYSIS

I STATUTORY SUBMISSION
II COMMON-LAW SUBMISSION

I STATUTORY SUBMISSION

Defective acknowledgment. An agreement for statutory arbitration is rendered fatally defective by the failure of the notary public to attach his notarial seal to the certificate of acknowledgment of one of the parties to the agreement.

Koht v Towne, 201-538; 207 NW 596

Ineffective curing of defects. A notary public may not, after his term of appointment has expired, voluntarily or under order of court validly attach a new certificate of acknowledgment to a statutory agreement for arbitration executed during his expired term, even tho, at the time of attaching such new

certificate, he was a notary public under a new appointment.

Koht v Towne, 201-538; 207 NW 596

Written compromise—effect. A definite written agreement in which one party agrees to pay the other a named sum in settlement of their actual differences furnishes ample basis for a future action within ten years after default, even tho, when it was entered into, the said differences had been submitted to statutory arbitrators, and even tho the agreement contemplated that the arbitrators would report to the court in accordance with the agreement —which was done but without filing in court.

In re Powers, 205-956; 218 NW 941

II COMMON-LAW SUBMISSION

Arbiter's power to change decision. The power of an arbiter is gone after his final decision, and he may not subsequently modify, revoke, or annul it, or make a new award upon the same issues.

Granette v Neumann, 208-24; 221 NW 197

Insurance—adjustment of loss—arbitration — inadequate award — fraud — effect. Equity will vacate a grossly inadequate award by arbitrators, especially when an element of fraud exists in the appointment and proceedings of the arbitrators.

Koopman v Ins. Assn., 209-958; 229 NW 221

Weights and measures—admeasurement to landlord—"bushel" construed. The admeasurement to a landlord by an agreed arbitrator of a certain number of bushels of corn as rent for a certain year will not be construed as calling for that number of bushels of "shelled" corn when the parties knew at all times that the admeasurement was on the basis of crib measurement, and when the landlord receives in shelled corn all that was set aside to him "on the cob," the rent must be deemed fully paid.

Salinger v Elev. Co., 210-668; 231 NW 366

12706 Rejection—rehearing.

Excessive decree. A motion to set aside an award as a statutory award does not empower the court to decree the legal effect and conclusiveness of the award as a common-law award.

Bureker v County, 201-251; 207 NW 115

12707 Force and effect of award.

Discussion. See 21 ILR 155—Judgment on award—vacation for fraud

12712 Arbitration by agreement.

Execution—effect. A party who has contracted that a matter in controversy shall be submitted to arbitration and permits such matter to go to such arbitration is bound by the decision.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

CHAPTER 549

RECEIVERS

12713 Appointment.

ANALYSIS

I APPOINTMENT IN GENERAL
II GROUNDS FOR APPOINTMENT
III PARTICULAR SUBJECT MATTERS
(a) IN GENERAL
(b) RENTS AND PROFITS INVOLVED
IV EFFECT OF RECEIVERSHIP IN GENERAL

Bank receiverships. See under §9239
Receivers in mortgage foreclosures. See under §12372 (VII)

I APPOINTMENT IN GENERAL

Appointment — conclusiveness. An unappealed decree appointing a receiver of real estate and of the rents and profits thereof must, in a subsequent intervention in the cause, be deemed an adjudication against the owner, of all the issues involved in said appointment.

Canfield v Sec. Co., 216-747; 249 NW 646

Appointment—ancillary to primary relief. The generally accepted doctrine, in the absence of statutes to the contrary, is that a receiver cannot be appointed except to preserve property involved in litigation pending the final outcome thereof, and as a result thereof, a receiver can only be ancillary to some other or primary relief demanded.

Wagner v Securities Co., 226-568; 284 NW 461

Appointment—effect on agency. A contract of agency is terminated by the insolvency of the agent, and the placing of his business affairs in the hands of a receiver.

Andrew v Ins. Co., 211-282; 233 NW 473

Concurrent jurisdiction—receivership—possession of res. The court appointing a receiver and having possession of the res has exclusive jurisdiction to hear and determine all controversies affecting title, possession, and control of the property, which jurisdiction must be respected by all other courts, except that another court may entertain another cause concerning the same subject matter if it does not oust the appointing court from possession

I APPOINTMENT IN GENERAL—concluded

of the res, or appropriate disposal of the cause there entertained.

Bates v Evans, 226-438; 284 NW 385

Continuing business. On creditor's petition for appointment of receiver, the court, in the interest of the parties, may direct him to continue temporarily the corporation's business. Obligations incidental thereto are a necessary expense of receivership and payable from assets even before distribution of any funds to preferred creditors.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Current statutory law applicable. Receivership proceedings and the method of distribution thereunder are governed by the statute in force at the time of the appointment of the receiver.

Dickinson County v Leach, (NOR); 211 NW 542

Federal appointment—effect on state courts. The mere pendency of federal receivership proceedings over a party does not necessarily oust the jurisdiction of the state courts over the party and over his property.

Lippke v Milling Co., 215-134; 244 NW 845

Motion to dismiss appointment—waiver by filing answer. A motion by defendant to dismiss an application for the appointment of a receiver, and not ruled on, is waived by the subsequent filing by defendant of an answer and resistance to said application.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Preliminary hearing — decision on merits. The court has no legal right, against the clearly expressed purpose of a plaintiff, to convert a preliminary hearing as to the appointment of a receiver pendente lite into a hearing on the full merits of the entire action, and to enter a dismissal accordingly.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

Second appointment for same property. The fact that a party purchases property at a receiver's sale does not exhaust the power of the court to appoint a second receiver of the property so purchased in order to protect rights relative to said property which accrued after said sale and by reason of the wrongful acts of said purchaser.

State v Beaton, 205-1139; 217 NW 255

Refusing appointment of temporary receiver. Certiorari will not lie to review the discretion of the court in refusing the appointment of a temporary receiver to close up the affairs of a corporation whose charter has expired, especially when appeal would furnish an adequate remedy for a review of every question presented.

McCarthy v Dist. Ct., 201-912; 208 NW 505

Justifiable refusal. The appointment of a receiver to collect past and future maturing installments on a claim, secured as a lien on lands, is properly refused when the lien for matured installments has been foreclosed and the land sold, when no judgment for other installments has been obtained, and when there is no showing of waste.

Cadd v Snell, 219-728; 259 NW 590

Superintendent of banking as sole receiver. The statutory declaration (§9242, C., '27) that the superintendent of banking shall be the sole and only receiver or liquidating officer for state incorporated banks has no application (1) when the receiver is prayed for, not by said superintendent, but by private parties, and for a bank which has largely closed out its business as a bank and is preparing to dissolve, and (2) when the receiver is prayed for as an auxiliary remedy in an action for the adjudication of matters in which the superintendent of banking is interested adversely to plaintiff.

Harris Est. v Bank, 207-41; 217 NW 477

II GROUNDS FOR APPOINTMENT

Material considerations. On the issue whether a temporary receiver should be appointed in an action by minority stockholders to liquidate the affairs of a corporation whose charter had expired, the court, always proceeding cautiously, will, inter alia, give due consideration to the following matters: (1) The fact that ordinarily such liquidation is effected through the corporate organization; (2) the relative financial holdings of the contending parties; (3) the fact that the parties agree that the inherent nature of the business requires a temporary continuation of the business as a part of the liquidation; (4) whether, from the nature of the business, the court would be practically compelled to choose a receiver from the management which is under attack; (5) the integrity of the past and present corporate management; (6) whether liquidation has been unduly delayed, in view of general economic conditions; (7) the probability of loss or impairment of assets under the present corporate management; (8) the solvency or insolvency of the corporation.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

General equitable relief prayed. In equity action seeking the appointment of a receiver, defendant's contention that a receiver could not be appointed because no main cause of action was stated was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal

in technicalities, but rather it seeks to ascertain the true intent of the pleading filed".

Wagner v Securities Co., 226-568; 284 NW 461

Insolvency not necessary. In an equity action for foreclosure of realty mortgage also asking appointment of receiver, where inadequacy of security is shown and mortgage provided for appointment of receiver, court is authorized to appoint a receiver without proof of insolvency.

Federal Bank v Ditto, 227-475; 288 NW 618

Right of minority stockholders. A receiver may, in an action by minority stockholders, very properly be appointed for a solvent corporation which is no longer a going concern and is in process of liquidation, on a showing that the management is inefficient, negligent, and fraudulent, to the manifest detriment of the plaintiffs.

Crow v Mtg. Co., 202-38; 209 NW 410

III PARTICULAR SUBJECT MATTERS

(a) IN GENERAL

Receiver pending action to quiet title.

Korf v Howerton, 201-428; 205 NW 323

Receivership—who may not object to. Alleged partners in an alleged private banking business may not object to the appointment of a permanent receiver for the business on the prayer of those who are admittedly partners when the order of appointment in no manner disturbs complainants in their property and specifically withholds adjudication of the issues whether complainants are partners.

Tillinghast v Courson, 215-957; 247 NW 252

Refusal of receivership—presumption. The refusal of a receivership for property in controversy in the probate court, even tho the petition for said appointment is strictly in compliance with the statute, is supported by affidavits, and is resisted only orally and informally, is presumptively correct. Appellant must negative the presumption.

Frazier v Wood, 214-237; 242 NW 78

Mechanic's lien foreclosure. The appointment in mechanic's lien foreclosure proceedings of a receiver of the rents, at the instance of a vendor and lien claimants, may be proper when the equitable owner of the property in question is insolvent, and when the property itself is inadequate security for the established claims.

D M Marble v McConn, 210-266; 227 NW 521

(b) RENTS AND PROFITS INVOLVED

Deficiency judgment in rem. A receiver may, on a proper showing, be appointed to collect pledged rents, and thereby discharge a deficiency judgment, whether the deficiency arises on a judgment in personam or in rem.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Injury or loss as essential element. A receiver of the rents and profits of land, properly in the hands of an executor of an estate, is properly denied when there is no evidence that said rents and profits are in danger of being lost or injured if left in the hands of the executor.

Farber v Ritchie, 212-1396; 238 NW 436

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Unauthorized appointment. Upon a sale of land on execution under an ordinary judgment at law, the court has no authority to appoint a receiver to collect the rents and profits of the land during the period of redemption.

Anthony v Heiny, 215-1347; 244 NW 902

IV EFFECT OF RECEIVERSHIP IN GENERAL

Failure to file claim—effect. The failure of a creditor to file his claim in receivership proceedings against his debtor does not bar the creditor from asserting his claim against the debtor after the termination of said proceedings.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Nonabatement of action by receivership. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bank v McHarg, 217-636; 251 NW 51

12714 Permissible proofs.

Insolvency not necessary. In an equity action for foreclosure of realty mortgage also asking appointment of receiver, where inadequacy of security is shown and mortgage provided for appointment of receiver, court is authorized to appoint a receiver without proof of insolvency.

Federal Bank v Ditto, 227-475; 288 NW 618

12715 Oath and bond of.

Suretyship generally. See under §11577

Breach of unauthorized contract. Sureties on a receiver's bond are not liable for a breach

by the receiver of a contract of lease which the court has never authorized or approved.

Matson v Surety Co., 204-632; 215 NW 630

Nonrelease of surety. The surety on the bond of a receiver appointed to take charge of grain and await the further orders of the court is not released because without notice to the surety and without his consent the court subsequently ordered the receiver to convert the grain into money, said bond specifically calling for a full accounting of all money received.

McClatchey v Marquis, 203-76; 212 NW 374

12716 Powers.

Discussion. See 20 ILR 113—Foreign assets; 22 ILR 60—Tort claims in receiverships

ANALYSIS

I POWERS IN GENERAL
II ACTIONS
III TITLE AND POSSESSION OF PROPERTY
IV MANAGEMENT AND DISPOSITION OF PROPERTY
V ALLOWANCE AND PAYMENT OF CLAIMS
(a) IN GENERAL
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VI ACCOUNTING AND DISCHARGE
VII COMPENSATION
VIII FOREIGN RECEIVERSHIP

Bank receiverships. See under §9239
Receivers in mortgage foreclosures. See under §12372 (VII)

I POWERS IN GENERAL

Chattel mortgage — nonright to question. The receiver of an insolvent corporation has no such standing as will enable him to advantage himself of technical defects in a chattel mortgage executed by the corporation when solvent. So held where the description of the property was indefinite.

Silver v Farms, Inc., 209-856; 227 NW 97

Employees' contracts for arbitration—not binding unless approved by court. In a receivership proceeding neither an agreement with employees for arbitration of differences nor award thereunder is binding on receivers of street railway company without advance authorization from the court or subsequent approval.

Amalgamated Assn. v Railway, 14 F 2d, 836

Insolvent partnership—authority to authorize suit against partners. In an action for the dissolution of an insolvent partnership, a court of equity has power to authorize its receiver to bring suit against the partners to collect the funds necessary to pay the debts of the partnership in full.

Bierma v Ellis, 212-366; 236 NW 402

II ACTIONS

Abatement of authorized action. A court having ordered its receiver in partnership to begin action against the partners, in order to collect funds with which to pay creditors, has discretionary power, after such action has been commenced, and on a showing that the receiver has in his possession a very large amount of unliquidated partnership assets, to abate the action until such assets are liquidated.

Day v Power, 219-138; 257 NW 187

Certificates—absence of notice. The fact that a stockholder in an insolvent bank was not made a party to proceedings which resulted in the issuance of receiver's certificates becomes quite immaterial when, in an action by the receiver to enforce an assessment to pay said certificates, the stockholder is afforded full opportunity to question the legality of such certificates.

Andrew v Bank, 206-869; 221 NW 668

Certificates—subrogation. The holder of certificates of indebtedness issued and sold by the receiver of an insolvent bank in order to raise funds with which to pay the debts of the bank, will, in an action by the receiver to enforce an assessment on corporate stock in order to pay the certificates, be deemed to stand in the shoes of the original creditors of the bank.

Andrew v Bank, 206-869; 221 NW 668

Collections of assessments—petition—sufficiency. A foreign bank receiver, in an action in this state to collect "double" stock liability, need not allege that the defendant stockholder had notice of the hearing on the necessity for such assessment; nor need the petition set forth a copy of the order entered by the foreign court on such hearing.

Baird v Cole, 207-664; 223 NW 514

Compromise — approval by court — review. The action of the court in bank receivership proceedings in approving a compromise on a written guaranty by the directors of payment of certain assets of the bank will not be set aside in the absence of a showing that such approval is not in the interest of the depositors; and especially is this true when an element of uncertainty exists as to the extent of the legal recovery under the guaranty.

Andrew v Bank, 205-712; 218 NW 520

Creditor's bill—conditions. The obtaining of a judgment against a purported partner in an insolvent private bank is a condition precedent to the right of the receiver to maintain a general equitable action to set aside an alleged fraudulent conveyance by the partner.

Cooper v Erickson, 213-448; 239 NW 87

Foreign receivership—right to maintain action in this state. A foreign receiver of a foreign insolvent banking corporation may maintain an action in this state to collect a "double" liability assessment on the stock of a stock-

holder who is a resident of this state when the receiver is charged by statute with the duty to make such collection and to distribute the proceeds among creditors.

Baird v Cole, 207-664; 223 NW 514

Order ratifying oral contemporaneous contract—effect. In an action by a receiver to recover mining royalties accruing under a written contract, the defendant may show that the court has, on due notice and hearing, approved, confirmed, and ratified an oral contract which was contemporaneous with the written contract and which varied and altered the terms of said written contract.

Dinning v Krapfel, 211-888; 232 NW 490

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Unpaid stock subscriptions — liability determined in receivership proceedings. An ancillary bill by a receiver of insolvent corporation to enforce collection upon unpaid stock subscriptions cannot be maintained in equity in the same court where receivership proceedings are pending, since the stockholders are not necessary parties to the receivership action as they are represented by the corporation, itself, which is a party to the action, and the liability of such stockholders can be determined in the receivership action after which the receiver may proceed by action at law against the various subscribers for the unpaid stock subscriptions.

Britton v Andrews, 8 F 2d, 950

Unpaid stock subscriptions—exclusive right of general receiver to maintain action. After the appointment of a general receiver for the purpose of winding up the affairs of a corporation, or after appointment of a trustee in bankruptcy, such officer has the sole and exclusive right to maintain suits for the collection of unpaid stock subscriptions. So, where a judgment creditor started an action for the collection of such unpaid stock subscriptions after having established his claim in receivership and also obtaining judgment thereon in the state court, a motion to dismiss such creditor's suit was properly sustained. The appointment of receiver affects ordinary procedural rights of creditors of corporation where the pursuit thereof interferes with rights of receiver.

Reagan v Midland Co., 8 F 2d, 954

III TITLE AND POSSESSION OF PROPERTY

Acts constituting conversion. One who is in possession of property as agent of a duly appointed receiver is not guilty of a conversion of the property by refusing to give it up without the consent of the receiver, even tho such agent is plaintiff in the action in which the receiver was appointed and even tho a full settlement of the action has been consummated but not yet called to the attention of the court.

McCarthy v Cutchall, 209-193; 225 NW 865

Agent of court only—trustee of funds. A receiver is not an agent of anyone except the court appointing him, but he holds any fund at least as quasi trustee for the benefit of whoever may eventually establish title thereto.

Andrew v Bk. & Tr., 225-929; 282 NW 299

Commercial paper held for collection. The receiver of an insolvent bank takes no title to commercial paper coming into his hands and received by the bank for collection only.

Leach v Bank, 201-349; 207 NW 332

Unexecuted rescission of fraudulent contract. A subscriber for corporate shares of stock who, while the corporation is a going concern, enters into a bona fide agreement with the corporation for the complete rescission of the stock subscription contract, will be entitled to judgment against a subsequently appointed receiver for the amount of the stock subscription notes executed by him and transferred by the corporation and not returned to him as provided in the contract of rescission.

Lex v Selway Corp., 203-792; 206 NW 586

Fraud in incorporation—effect on title of receiver. Even tho the court in proceedings for the dissolution of a so-called corporation found and decreed, in effect, that the concern was conceived, born, and nurtured in fraud, nevertheless, in receivership proceedings for the ordering of an assessment on those who had contracted for stock in the concern and had not paid therefor, the receiver will be deemed to have prima facie title to such contracts of subscriptions.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Garnishment — priority over receivership. The receiver of a defunct corporation takes the property of the corporation subject to the prior positive rights acquired by a creditor under a duly perfected garnishment of the admitted debtors of the corporation.

Watts v Surety Co., 216-150; 248 NW 347

Liens and equities unchanged. The title to property is not changed by the appointment of

III TITLE AND POSSESSION OF PROPERTY—concluded

a receiver, as he takes it subject to existing liens and equities, and his taking exclusive possession thereof does not interfere with or disturb any pre-existing liens, preferences, or priorities.

Andrew v Bk. & Tr., 225-929; 282 NW 299

Mortgages—rents—priority over receiver. The receiver of an insolvent bank must be deemed to hold the insolvent's mortgaged land (which it took "subject to said mortgage") subject to the right of the mortgagee, in order to satisfy a deficiency judgment, to perfect and enforce a pledge of the undisposed of rents as provided in the mortgage.

Reason: The receiver may no more deny the mortgagee's right to said rents than might the insolvent deny such right.

Lincoln JSL Bank v Barlow, 217-323; 251 NW 501

Right of review—receivers. The receiver of an insolvent bank has a right to appeal from an order which grants to a depositor an equitable preference over all other creditors in the payment of his claim.

Andrew v Bank, 205-1248; 218 NW 24

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced, unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason: Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

IV MANAGEMENT AND DISPOSITION OF PROPERTY

Action to enforce partner's liability — waiver. The liquidating receiver of a private bank, when appointed with power to bring action against the partners on their individual liability, may, with the approval of the court, and notwithstanding the objections of a creditor, settle and compromise the liability of a partner when the creditor has appeared in the receivership proceedings and secured the allowance of his claim.

Reason: The creditor, by submitting himself to the jurisdiction of the receivership court, irrevocably elects his remedy.

Ellis v Bank, 218-750; 251 NW 744

Borrowing under order of court—expense of administration—priority. Money borrowed by a receiver under authority of an order of court must be repaid as an expense of administration, and the lender is entitled to a preference over other creditors.

Klages v Freier, 225-586; 281 NW 145

Continuing business—expenses incurred. On creditor's petition for appointment of receiver, the court, in the interest of the parties, may direct him to temporarily continue the corporation's business. Obligations incidental thereto are a necessary expense of receivership and payable from assets even before distribution of any funds to preferred creditors.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Death of bankrupt—widow's rights—allowance and dower. Where a husband secures a receiver for his property in a state court and, with his wife, makes a conveyance of property to such receiver, and thereafter is adjudged an involuntary bankrupt, but dies before the disposition of his property by the trustee, and application is made for widow's allowance in the bankruptcy proceeding, held, that the bankruptcy adjudication and vesting of realty was not such "other judicial sale" as will defeat her right of dower, and her relinquishment by deed to husband's receiver of her contingent rights in his property became void by bankruptcy proceedings. In construing statutes for allowance to widows and children, equity court should be careful to do them no injustice.

Johnson v Payne, 26 F 2d, 450

Dissolution and annulment of incorporation. Even tho a so-called incorporation is dissolved and its life wholly annulled, nevertheless, the receiver appointed for the purpose of winding up its affairs must be deemed to represent the corporation for said purpose.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Partnership—dissolution—receiver's general sale power. A receiver in a partnership dissolution, while having no inherent powers but only those conferred by the appointing decree and subsequent orders, may, nevertheless, under a decree definitely granting general power to sell property without prior application to the court, make a sale of stock at an adequate price involving no bad faith, which sale, being by an officer of the court requiring court approval, is, when set out in and approved as part of an annual report, a completed valid sale entitling purchaser to a stock transfer on the proper corporation records.

Van Alstine v Bank, 224-1311; 278 NW 604

Execution of trust — trustees (?) or receiver (?). A court of equity may not terminate or violate a trust agreement between the issuer of bonds and trustees to the effect that the former will transfer to the latter se-

curities for the benefit of bondholders, and that if the issuer defaults in the payment of interest on, or principal of, the bonds, the trustees, on notice from the unpaid bondholders, shall liquidate said securities and apply the proceeds to the payment of the bonds. It follows that, if the issuer of the bonds becomes insolvent, the trustees, in the absence of any counterwish of the bondholders, have a right superior to that of the receiver to liquidate the securities, the securities being less than the outstanding bonds; and this is true even tho the securities in question are not actually transferred to the trustees but only delivered to them.

In re Trusteeship, 214-884; 241 NW 308

Federal income tax on operating receiverships—nature of business. The federal statute requiring operating receiverships to pay income tax applies to a receiver, where a substantial part of business both before and after the appointment was the investment of corporation funds in securities and the collection of rents and profits, even tho the receiver was appointed to liquidate the business.

State v Cas. Co., 225-638; 281 NW 172

Improvident judicial sale—setting aside after confirmation—review. The court has jurisdiction to set aside a judicial sale after confirmation where improvidently and inadvertently made; but, in the absence of any showing to that effect, a review will be denied.

Parks v Carlisle Co., 224-193; 276 NW 591

Insolvent corporation assets—appraiser as buyer—setting aside sale. Generally, an appraiser individually may not purchase the property he appraised, but the fact that one of three court-appointed appraisers for a corporation in receivership, later with two other persons as trustees for bondholders, bought the appraised property at judicial sale, will not suffice to set aside such sale on motion, in the absence of showing that stockholders or creditors were prejudiced thereby, or that the buyer was interested in the property when he acted as a joint appraiser, or that the price was inadequate.

Parks v Carlisle Co., 224-193; 276 NW 591

Liability on bond—breach of unauthorized contract. Sureties on a receiver's bond are not liable for a breach by the receiver of a contract of lease which the court has never authorized or approved.

Matson v Surety Co., 204-632; 215 NW 630

Management of property—source of authority. A receiver's authority is measured by the order of appointment, the powers reasonably inferred therefrom, and subsequent directions of the court.

Sutton v Schnack, 224-251; 275 NW 870

Receiver's lease not conclusive of mutual rescission. In vendee's action to cancel a real estate contract and note, a mutual rescission is not established by showing that the receiver in a mortgage foreclosure proceeding against the real estate had leased the premises to vendee, when the lease, by its very terms, was not to become effective unless vendee paid all obligations to vendor.

Fitchner v Walling, 225-8; 279 NW 417

Right of creditors. Creditors of an insolvent whose affairs are under receivership have a right to appear in such proceedings and enter their objections to improper orders.

Schubert v Andrew, 205-353; 218 NW 78

Right of set-off. In receivership matters the rights of all parties as to set-off are to be determined as of the date of the appointment of the receiver.

Andrew v Trust Co., 217-657; 251 NW 48

Sale—bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under the order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Stock—corporation having first option to buy—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock, and mandamus will lie to compel the transfer of said stock on its records.

McDonald v Farley Co., 226-53; 283 NW 261

Waiver of valuable rights. A chancery receiver may not waive a valuable right without the authority of the court, nor may an agent of a statutory receiver (e. g., the superintendent of banking) waive such valuable right without the authority of such statutory receiver. So held under the bulk sales act.

Andrew v Rivers, 207-343; 223 NW 102

V ALLOWANCE AND PAYMENT OF CLAIMS

(a) IN GENERAL

Belated filing. It is within the discretion of the court to recognize a belatedly filed claim, no dividends having been paid.

Andrew v Bank, 203-546; 213 NW 245

Order permitting belated filing of claim. Appeal will not lie from an order which grants to a claimant in receivership proceedings the naked right to file and prove his claim after the time originally fixed for the filing of claims.

In re Hamburg, 203-1399; 214 NW 561

Compromise of claims. A receiver may not compromise claims except under prior author-

V ALLOWANCE AND PAYMENT OF CLAIMS—continued

(a) IN GENERAL—continued

ity of, or under subsequent ratification by, the court.

Sherman v Linderson, 204-532; 215 NW 501

Failure to file—effect. The failure of a creditor to file his claim, in receivership proceedings, against his debtor does not bar the creditor from asserting his claim against the debtor after the termination of said proceedings.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Failure to object to claim. A receiver may contest the allowance of a claim filed with him even tho he files no formal objections to the claim.

Leach v Bank, 207-471; 220 NW 10

Filing—unavoidable lack of details—effect. A claimant in receivership proceedings who formally brings his claim to the attention of the court and to the receiver within the time fixed by the court for the filing of claims, and in so doing sets forth the general facts as definitely as he is then able to discover them, may very properly be granted relief even tho the particular and detailed facts are discovered long afterwards.

In re Selway, 211-89; 232 NW 831

Liberality in pleadings. In the adjudication of claims pending in receivership proceedings, compliance with the strict rules of pleadings will not ordinarily be demanded.

Andrew v Bank, 207-948; 222 NW 8

Nonnecessity for formal objections. The receiver of an insolvent bank is under no legal obligation to file formal objections to a claim which asserts a right to an equitable preference in payment of a deposit. In other words, he may contest the claim without formal pleadings.

Andrew v Church, 216-1134; 249 NW 274

Notice. Claims which are filed in receivership proceedings may be validly allowed by the court without individual notice to all other creditors of the filing of such claims.

Schubert v Andrew, 205-353; 218 NW 78

Payment to third party. Where a corporation agrees to a rescission of a contract of sale of its corporate shares of stock, and agrees to obtain and pay the purchaser's promissory note which had been transferred, the receiver for the corporation may, very properly, be directed to pay dividends direct to the holder of the note, the said holder and maker of the note joining in such request.

In re Selway Co., 211-89; 232 NW 831

Proof of claim. Claims treated by all parties in the trial court as sufficiently established will be so treated on appeal, the sole contention in the trial court being as to the legal liability of defendant therefor.

State v Cas. Co., 213-200; 238 NW 726

Status of claims—subsequent appeal—law of case. A final holding on appeal that certain claims in a receivership are general claims fixes the status of such claims regardless of any subsequent order of the trial court.

State v Cas. Co., 216-1221; 250 NW 496

Nonallowable attorney fees. An attorney who, under employment by a debtor whose property is under receivership, successfully defends an attempt to throw the debtor into bankruptcy, may not have his attorney fees paid from the receivership funds, when the receiver and his attorney under order of court also appeared and successfully contested said bankruptcy proceeding.

Cook v McHenry, 208-442; 223 NW 377

Unallowable claims. Attorney fees, disbursements, and costs incurred by a policyholder on his own behalf with reference to a policy of insurance, after the insurer had passed into the hands of a receiver, are not allowable against the receiver.

State v Cas. Co., 213-197; 238 NW 731

Interest. Where allowed claims in a receivership are all general claims and of the same class, any balance of funds remaining after paying said claims in full and costs of administration will be applied as interest on a pro rata basis among said claimants.

State v Cas. Co., 216-1221; 250 NW 496

Balance of funds as interest. Where allowed claims in a receivership are all general claims and of the same class, any balance of funds remaining after paying said claims in full and costs of administration will be applied as interest on a pro rata basis among said claimants.

State v Cas. Co., 216-1221; 250 NW 496

Election of remedy. A creditor of an insolvent banking partnership who, under an authorizing order of court, files proof of his claim with a duly appointed and unquestioned receiver of the partnership will not be permitted thereafter to maintain an independent action against the partners until after the receivership has been closed, when the receiver, under an order of court, has already instituted an action against all the partners to collect the amount necessary to settle the indebtedness of said bank; especially is this true when a multiplicity of suits is avoided.

Bierma v Ellis, 212-366; 236 NW 402

Federal income tax—statute of limitations not started by insufficient tax return. The

mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return as will start the statute of limitations operating against the income tax assessment.

State v Cas. Co., 225-638; 281 NW 172

Dissolution of corporation—federal income tax liability. The state, not owning the property, has no such interest in a corporation under receivership as to prevent the federal government from collecting income tax therefrom, even tho the receivership arose out of the state's action in its governmental capacity for a dissolution of the corporation.

State v Cas. Co., 225-638; 281 NW 172

Claims—lapsed time for hearing—reopening discretionary. Trial court administering receiverships has a discretion dependent upon equitable circumstances and not a mandatory duty to permit a claim to be presented and heard after the time fixed therefor.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Claims—disallowance—penitentiary confinement insufficient equitable ground to reopen. Penitentiary confinement of the president of a corporation, the claimant in a receivership, without a showing that no other representative of the claimant had sufficient information to object to a receiver's report, is not, when asserted four years after an order approving the report disallowing the claim, such equitable circumstance as will make court's refusal to hear the claim an abuse of discretion.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Claims—order approving disallowance construed. An order of court in an insolvent corporation receivership proceedings in the language, "The claims filed * * * be and the same are hereby allowed as classified by the receiver herein * * *", construed to mean an approval of the disallowance of a claim by the receiver.

Headford Co. v Associated Co., 224-1364; 278 NW 624

(b) PRIORITIES

Allowance and payment of claims—stockholder's advance of clay pit rent—extent of priority. After a clay products company has gone into receivership neither delinquent nor accruing rent on its clay pit advanced by a stockholder taking an assignment of the clay pit lease, is collectible in full from the receiver as expenses of administration nor as a rent obligation to which the stockholder became subrogated, when the sale price of the clay pit lease was less than the claim for rent advanced thereon, but an order allowing priority for the rent claim to the extent of the sale price of the clay pit lease and establishing the balance of the advanced rent as a general claim was correct.

Parks v Carlisle Co., 224-193; 277 NW 731

Augmentation of assets — nonpresumption. An equitable preference in payment of trust funds may not be decreed against the receiver of an insolvent trustee on a record which is absolutely silent as to the property taken over by the receiver and as to the value thereof.

Leach v Bank, 204-760; 216 NW 16

VI ACCOUNTING AND DISCHARGE

Discharge—settlement of action. The full and complete settlement by the parties to an action in which a receiver is appointed, does not, ipso facto, discharge the receiver and release the property which the receiver is holding.

McCarthy v Cutchall, 209-193; 225 NW 865

Dissipated trust funds. The receiver of an insolvent bank may not be charged with that part of a trust fund which has been wrongfully and unlawfully dissipated prior to the time when the balance of the fund came into his hands.

Leach v Bank, 206-675; 220 NW 113

Condition precedent. A party may not have an accounting unless he first pleads and proves that something is due him.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Courts' obligations—diligence in paying required. Courts and their officers, e. g., receivers, should be especially diligent in meeting the obligations of their receivership contracts, however unfortunate they may turn out.

Klages v Freier, 225-586; 281 NW 145

Federal income tax from receiver—burden of sustaining deductions. In an action involving a claim for federal income tax from an insolvent corporation, the assessment by the internal revenue collector must be treated as prima facie evidence of the amount due, and the state statutes do not control the matter of deduction for attorney fees, referee fees, court costs, and other expenses, but the burden is on the receiver to establish these deductions.

State v Cas. Co., 225-638; 281 NW 172

Final report and discharge—absence of notice—effect. The approval of the final report of a receiver in foreclosure proceedings and the discharge of the receiver, when entered without prior notice to the mortgagee, may be set aside on a showing that the receiver made an unauthorized distribution of the funds in his hands; and a delay of some four years by the mortgagee will not necessarily bar relief, especially when no one has changed his position because of the delay.

Farmers Bk. v Pomeroy, 211-337; 233 NW 488

VI ACCOUNTING AND DISCHARGE—concluded

Receiver of insolvent co-executor trust company—control by probate. Where the district court of Scott county appoints a receiver to take charge of an insolvent trust company which was also a co-executor and co-trustee in an estate pending in the district court of Johnson county, and when such receiver is ordered by the Johnson district court to report and account, such receiver does not, by filing a pleading and supporting it by evidence denying the jurisdiction of the Johnson district court, thereby make a "general appearance" in the Johnson district court.

Bates v Evans, 226-438; 284 NW 385

Statutory bond to discharge receiver and pay claims—effect. Where, in order to secure an order for the discharge of a receiver, the defendant in the receivership proceedings executes and delivers to a claimant in said proceeding a bond conditioned to pay said claimant whatever judgment he may obtain on his claim, it follows that the claimant's lien on the assets in the hands of the receiver is thereby transferred to the bond, and recovery may be had on said bond for whatever judgment the claimant secures on his claim.

Shanahan v Truck Co., 209-1231; 229 NW 748

VII COMPENSATION

Expenditures—allowance. The expenditures of a receiver are properly allowed to him when they are authorized or ratified by the court, and especially when they are distinctly in the interest of the creditors.

Sunset Park Co. v Eddy, 205-432; 216 NW 93

VIII FOREIGN RECEIVERSHIP

Comity. A foreign receiver may maintain in this state an action to recover of a corporate stockholder a statutory liability on stock holdings.

Hirning v Hamlin, 200-1322; 206 NW 617
Gruetzmacher v Quevli, 208-537; 226 NW 5

Foreign corporations—dissolution and receivership—effect. A foreign decree of dissolution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Right to maintain action in this state. A foreign receiver of a foreign insolvent banking corporation may maintain an action in this state to collect a "double" liability assessment on the stock of a stockholder who is a resident of this state, when the receiver is charged by statute with the duty to make such collection and to distribute the proceeds among creditors.

Baird v Cole, 207-664; 223 NW 514

12717 Priority of liens.

Lienable judgment during receivership. A judgment rendered against a debtor at a time when he is under temporary receivership for purposes other than the winding up of the affairs of the debtor (even tho the receiver is not a party to the action) is valid and lienable on the lands of the debtor in preference to other creditors, even tho, subsequent to the rendition of such judgment, the said receivership is converted into a proceeding for the winding up of the affairs of the debtor.

Britten v Oil Co., 205-147; 217 NW 800

Application of partnership assets and assets of partners. Where partnership property and the individual property of all the partners are in the hands of the partnership receiver, a creditor whose claim is against the partnership because of a partnership transaction, and also against an individual partner because the partner has individually guaranteed the claim, may have the assets so marshaled that he will share in the partnership property along with the other partnership creditors, and then resort to the individual property of the guaranteeing partner to the exclusion of partnership creditors.

Ia.-D. M. Bk. v. Lewis, 215-654; 246 NW 597

Notice—coparties. In an action by a municipality against the receiver of an insolvent bank and its surety, to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Ind. Dist. v Bank, 204-1; 213 NW 397

Rents—priority over receiver. The receiver of an insolvent bank who forecloses a second mortgage belonging to the insolvent and receives a sheriff's deed, acquires by said deed simply the rights formerly possessed by the mortgagor-owner. It follows that the receiver holds said land subject to the right of the first mortgagee subsequently to perfect and enforce a pledge of the undisposed of rents, in order to satisfy a deficiency judgment, as provided in the first mortgage. (Schlesselman v Martin, 207 Iowa 907, overruled.)

Metropolitan v Sheldon, 215-955; 247 NW 291
Northwestern Ins. v Gross, 215-963; 247 NW 286
Metropolitan v Smith, 215-1052; 247 NW 503
Willey v Andrew, 215-1104; 247 NW 501
Connecticut Ins. v Stahle, 215-1188; 247 NW 648
Lincoln Bank v Barlow, 217-323; 251 NW 501

Rents—priority over receiver. The receiver of an insolvent bank must be deemed to hold the insolvent's mortgaged land (which it took "subject to said mortgage") subject to the right of the mortgagee, in order to satisfy a deficiency judgment, to perfect and enforce a pledge of the undisposed of rents as provided in the mortgage.

Reason: The receiver may no more deny the mortgagee's right to said rents than might the insolvent deny such right.

Lincoln JSL Bank v Barlow, 217-323; 251 NW 501

12718 Taxes as prior claim—nonnecessity to file.

Estates—gross premiums tax as preferred claim. In estate and receivership proceedings, taxes have preference over other claims. Held, foreign corporations gross premiums tax allowable in receivership as preferred claim without interest.

State v National Life, 223-1301; 275 NW 26

Property in custodia legis—tax claim. A statute levying a tax is sufficient basis to support a claim in receivership against the property in custodia legis.

State v National Life, 223-1301; 275 NW 26

Taxes. Rents on real estate, fully accrued prior to the commencement of a foreclosure and in the hands of a receiver under a prior foreclosure, need not be applied by the court to the payment of taxes on the premises.

Haning v Dunlop, 203-48; 212 NW 351

12719 Claims entitled to priority.

Equitable trusts in bank receiverships. See under §9239

Atty. Gen. Opinion. See '28 AG Op 160

Common-law rule repudiated. The common-law rule relative to the preferential standing of claims due the state and its governmental subdivisions is not in force in this state.

In re Gates, 200-1039; 205 NW 968

Contra; Davis v Bargloff, 200-1160; 206 NW 251

Estates—gross premiums tax as preferred claim. In estate and receivership proceedings taxes have preference over other claims. Held, foreign corporation's gross premiums tax allowable in receivership as preferred claim without interest.

State v National Life, 223-1301; 275 NW 26

Interest on preferred claims. The holder of a preferential claim for public funds, which has been allowed against the receiver of an insolvent bank is not entitled to interest on the claim, tho payment be long delayed on account of litigation.

Leach v Bank, 210-613; 231 NW 497; 69 ALR 1206

Liquidation of banks. Principle reaffirmed that §9239, C., '24 and related sections on the same subject provide an exclusive procedure for the liquidation of an insolvent state bank, without preference to any depositor.

Leach v Bank, 202-97; 209 NW 421

Priority of claim over taxes. A chattel mortgagee may not have his claim reduced by taxes which have never been a lien on the mortgaged chattels superior to that of the mortgage.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Priority of public debts and taxes. This section does not embrace a tax levied on the shares of stock of a corporation and against the individual owners thereof in a year during which, and before the taxes become payable, the corporation passes into receivership, the corporation being statutorily liable, generally, for the payment on behalf of stockholders of taxes on shares of its stock.

Wilcoxen v Munn, 206-1194; 221 NW 823

"Receivership" defined. An assignment for the benefit of creditors may not be deemed a "receivership" for the purpose of determining claims entitled to preference in payment.

In re Gates, 200-1039; 205 NW 968

Repeal of preferential deposit law. Sureties on a bank depository bond conditioned to hold the state harmless on deposit of state funds in said bank, and given at a time when the state possessed a statutory preferential right, in case the bank was thrown into receivership, to be paid in full prior to the payment of general depositors, are not entitled, upon the payment of a loss, in case of such receivership, to be subrogated to such right on the part of the state, when, prior to such payment, the statute giving such right has been repealed. This is on the priniciple that a surety is entitled to subrogation only upon payment of the principal's debt, and only to the rights then possessed by the creditor.

Leach v Bank, 205-1154; 213 NW 517

Statutory recitals exclusive. A specific recital in an insolvency statute as to what claims shall be entitled to preference in payment is exclusive of all other claims.

In re Gates, 200-1039; 205 NW 968

Subrogation. Principle reaffirmed (1) that a surety on a public depository bond is not, on payment of the bond, entitled to be subrogated to the preferential rights of the municipality existing when the bond was given, when, at the time of such payment, the statute granting such payment had been repealed; and (2) that the repeal of such statute impaired no contract obligation and violated no vested right of such surety.

Andrew v Bank, 205-883; 213 NW 531

Tax paid by surety. A surety whose bond was held for a compromise of corporate federal income taxes holds no lien upon the corporate assets but has merely a right to be paid from assets held by receiver before payment to other claimants, and a receiver authorized to continue a business is not personally liable to such surety for diminishment of assets during receivership, tho such assets at the time of receiver's appointment would have been sufficient to pay the surety.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Vested right. A municipal corporation which, at the time an insolvent bank is placed under receivership, is entitled, under a statute as construed by the supreme court, to a priority in the payment of its municipal deposit, is not deprived of such priority by a subsequently enacted statute which denies such priority.

Murray v Bank, 202-281; 208 NW 212; 214 NW 975

Vested rights. The general assembly has constitutional power by legislative act to deprive a county of an existing right of preference in a deposit of money belonging to the county in an insolvent bank.

Kuhl v Bank, 203-71; 212 NW 337

Unallowable equitable action. An order of court which, in bank receivership proceedings, mistakenly grants, under a misapprehension of the law, an absolute preference in payment of the deposit of a municipality, may not, on the ground of such mistake, be set aside by an independent action in equity by other depositors and creditors of the insolvent bank, when such depositors and creditors neither (1) appealed from said order, nor (2) entered, in the receivership proceedings, any objection to such order.

Schubert v Andrew, 205-353; 218 NW 78

12719.1 Nonapplicability.

Appeal—receivership creditor. Depositors and creditors in a bank receivership have a right to appeal from an order of court which grants to a depositor an unallowable preference in the payment of his deposits.

Schubert v Andrew, 205-353; 218 NW 78

Nonpreference in payment of taxes. Taxes on corporate bank stock and against the individual owners thereof may not be collected from the receiver of a bank which is insolvent to the extent that it cannot pay its depositors.

Andrew v Munn, 205-723; 218 NW 526

12719.3 Discovery of assets.

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

Scope of inquisitorial proceeding. In strictly inquisitorial proceedings for the discovery of assets belonging to an estate, the court has no authority to order property turned over to the administrator when the title to such property is in dispute; especially is this true when the property apparently does not belong to the estate.

In re Brown, 212-1295; 235 NW 754
Findley v Jordan, 222-46; 268 NW 515

CHAPTER 550

ASSIGNMENT FOR BENEFIT OF CREDITORS

Bankruptcy generally. See Note 1 at end of chapter

Fraudulent conveyances. See under §11815

12720 Must be without preferences.

Discussion. See 20 ILR 113—Foreign assets

Assignment of testamentary interest—ratification by certain creditors. An assignment of the interest of beneficiary of a testamentary trust for the benefit of certain creditors, ratified by the creditors benefited, is not a general assignment and need not be for the benefit of all creditors.

Friedmeyer v Lynch, 226-251; 284 NW 160

Equity (?) or law (?). The court is inclined to treat an assignment for the benefit of creditors as a proceeding in equity; but howsoever this may be, a proceeding which involves the final report of the assignee and the accounting therein made, and which embraces equitable issues, will be heard on appeal as in equity when so treated by the litigants and trial court.

In re Stone, 220-1341; 264 NW 604

Requisites—recording not necessary. Where the interest of a beneficiary of a testamentary trust is assigned for the benefit of creditors, such assignment need not be recorded to be valid against existing creditors without notice.

Friedmeyer v Lynch, 226-251; 284 NW 160

Special assignment for particular creditors. An assignment by an insolvent debtor of all his property to a trustee for the purpose of

securing and paying in a named order the claims of certain named existing bona fide creditors and providing for the payment of any balance to the assignor-debtor does not constitute a general assignment for the benefit of creditors (and invalid because of the preference) when executed pursuant to an agreement with said creditors, or when ratified by said creditors prior to the acquisition of rights by others; and this is true even tho there probably will be no balance to pay to the assignor-debtor.

Eicher v Baird, 204-188; 215 NW 236

Subsequent modification—legality. After the execution of a composition agreement with the creditors of a bankrupt corporation, the further nonfraudulent execution by a stockholder of a guaranty under which certain creditors may ultimately receive more on their claims than other creditors have received is not illegal and unenforceable as between the parties thereto.

Shively v Mfg. Co., 205-1233; 219 NW 266

Validity—no showing of knowledge and fraud participation. A debtor may prefer creditors; and an assignment to preferred creditors is not invalid because hindering, delaying, or defeating other creditors when there is no evidence that the preferred creditors knew of and participated in a fraud in making the assignment.

Friedmeyer v Lynch, 226-251; 284 NW 160

12724 Effect of assignment.

Right of assignee. An assignee for the benefit of creditors stands in the shoes of the assignor in the enforcement of claims on behalf of the estate of the assignor.

Smallwood v O'Bryan, 208-785; 225 NW 848

12726 Inventory and appraisement—bond.

Loss notwithstanding reasonable care—liability of assignee. An assignee for the benefit of creditors, who deposits in a bank trust funds coming into his hands and loses them because the bank subsequently closes its doors in consequence of insolvency, while not protected from loss under an ex parte order of court authorizing such deposit (§9285, C., '35) yet he is protected from such loss if, in making such deposit, and in looking after and caring for said funds, he exercised that degree of care which a person of ordinary care and prudence would exercise under the same or similar circumstances.

In re Stone, 220-1341; 264 NW 604

12727 Notice of assignment—notice to creditors.

Assignment of testamentary interest—ratification by certain creditors—no general assignment. An assignment of the interest of beneficiary of a testamentary trust for the benefit of certain creditors, ratified by the creditors benefited, is not a general assignment and need not be for the benefit of all creditors.

Friedmeyer v Lynch, 226-251; 284 NW 160

Requisites—recording not necessary. Where the interest of a beneficiary of a testamentary trust is assigned for the benefit of creditors, such assignment need not be recorded to be valid against existing creditors without notice.

Friedmeyer v Lynch, 226-251; 284 NW 160

Validity—no showing of knowledge and fraud participation. A debtor may prefer creditors; and an assignment to preferred creditors is not invalid because hindering, delaying, or defeating other creditors when there is no evidence that the preferred creditors knew of and participated in a fraud in making the assignment.

Friedmeyer v Lynch, 226-251; 284 NW 160

12728 Claims filed.

Debts due federal government. An indebtedness due to the government of the United States (i. e., a claim for freight accruing during the management and control of the railroads by the federal government) is entitled to an unconditional preference in payment out of the estate of the insolvent debtor, irrespective of the law of any state or of the judgment of the courts thereof. Especially is this true in view of the personal liability of the assignee, under the federal statutes, for the payment of such claims when notified thereof. (§§6372, 6373, U. S. Comp. Stat.; 31 USC, §§191, 192.)

Davis v Bargloff, 200-1160; 206 NW 251

Interest on claims not necessarily allowable. An assignee for the benefit of creditors of an insolvent estate pays interest on claims at his peril. The court may wholly or partially disapprove of such payments; but where a fund belonging to a claimant has been drawing interest as a bank deposit claimant is entitled to the interest.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Labor claims—extent of priority. Under a voluntary assignment for the benefit of creditors, all claims for personal service rendered to the assignor within 90 days next preceding the assignment are payable in full irrespective of the amount, (§12732, C., '31) and irrespective of the rights of a landlord who asserts his lien simply under his lease and not under a levy. This is true because the rights of parties to a voluntary assignment for the benefit of creditors are exclusively controlled by the chapter pertaining to such assignment, and, consequently, §11717, C., '31, limiting the priority of labor claims to $100 in case property is seized under proceeding not voluntary on the part of the creditor, does not apply.

In re Brady, 216-320; 249 NW 344

Priority of claim over rents. A chattel mortgagee may not have his claim reduced by a claim for unpaid rent accruing subsequent to the mortgage and on the premises whereon the mortgaged chattels were kept.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Refusal of attorney fees. Attorney fees for services on behalf of an assignee for the benefit of creditors are properly rejected when such services were rendered without any expectation of receiving compensation therefor.

In re Cutler & Horgen, 204-739; 212 NW 573; 54 ALR 527

12729 Report required.

Appeal—equity (?) or law (?). The court is inclined to treat an assignment for the benefit of creditors as a proceeding in equity; but howsoever this may be, a proceeding which involves the final report of the assignee and the accounting therein made, and which embraces equitable issues, will be heard on appeal as in equity when so treated by the litigants and trial court.

In re Stone, 220-1341; 264 NW 604

12730 Claims contested.

Discussion. See 22 ILR 60—Tort actions in receiverships

Right of creditors to contest. Creditors whose claims have been allowed have a statutory right to appear and formally contest the allowance of a claim.

In re Lounsberry, 208-596; 226 NW 140

12731 Priority of taxes—nonnecessity to file claim.

Common-law rule repudiated. The common-law rule relative to the preferential standing of claims due the state and its governmental subdivisions is not in force in this state.

In re Gates, 200-1039; 205 NW 968

Debts due federal government. An indebtedness due to the government of the United States (i. e., a claim for freight accruing during the management and control of the railroads by the federal government) is entitled to an unconditional preference in payment out of the estate of the insolvent debtor, irrespective of the law of any state or of the judgment of the courts thereof. Especially is this true in view of the personal liability of the assignee, under the federal statutes, for the payment of such claims when notified thereof. (§§6372, 6373, U. S. Comp. Stat.; 31 USC, §§191, 192.)

Davis v Bargloff, 200-1160; 206 NW 251

Preferred claims. A specific recital in an insolvency statute as to what claims shall be entitled to preference in payment is exclusive of all other claims.

In re Gates, 200-1039; 205 NW 968

Priority of claim over taxes. A chattel mortgagee may not have his claim reduced by taxes which have never been a lien on the mortgaged chattels superior to that of the mortgage.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Statutory declaration of lien—effect. A statutory declaration that taxes are a lien does not necessarily mean that they are a first lien.

In re Cutler, 213-983; 234 NW 238; 238 NW 80

Unallowable preference. An assignment for the benefit of creditors may not be deemed a "receivership" for the purpose of determining claims entitled to preference in payment.

In re Gates, 200-1039; 205 NW 968

12732 Labor claims preferred.

Atty. Gen. Opinion. See '30 AG Op 268

Extent of priority. Under a voluntary assignment for the benefit of creditors, all claims for personal service rendered to the assignor within 90 days next preceding the assignment are payable in full irrespective of the amount, and irrespective of the rights of a landlord who asserts his lien simply under his lease and not under a levy. This is true because the rights of parties to a voluntary assignment for the benefit of creditors are exclusively controlled by the chapter pertaining to such assignment, and, consequently, §11717, C., '31, limiting the priority of labor claims to $100 in case property is seized under proceeding not voluntary on the part of the creditor, does not apply.

In re Brady, 216-320; 249 NW 344

12736 Disposal of property—time limit.

Appellate decision—subsequent appeal—law of case. A direction on appeal as to the manner in which the final distribution of the proceeds of an insolvent estate should be made becomes the law of such case.

In re Cutler, 213-983; 234 NW 238; 238 NW 80

Note 1 Bankruptcy generally.

Discussion. See 22 ILR 60—Tort claims in receiverships

ANALYSIS

I CONSTITUTIONAL AND STATUTORY PROVISIONS
II PROCEEDINGS IN GENERAL
III EFFECT OF BANKRUPTCY PROCEEDING
IV ADMINISTRATION AND DISTRIBUTION OF ESTATE
V RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT

Equitable assignments. See under §10941 (IX)
Fraudulent conveyances. See under §11815

I CONSTITUTIONAL AND STATUTORY PROVISIONS

Discussion. See 9 ILB 72—Jurisdiction of federal courts in suits by trustees; 18 ILR 534—Amendments to act

Extension to principal available to surety. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under 11 USC, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

No prejudice to creditors — nonfraudulent conveyance. A conveyance under which the grantor neither accomplishes anything for himself, nor prejudices his general creditors, cannot be deemed fraudulent or to constitute a preference under the federal bankruptcy act.

Hoyne v Loan Co., 219-278; 257 NW 799

II PROCEEDINGS IN GENERAL

Discussion. See 20 ILR 565—Trustees' actions—jurisdiction

Action against bankrupt—fraudulent conveyance. In an action by a bankruptcy trustee, where property was conveyed to a brother by a sister, who thereafter took bankruptcy and such property was considerably in excess of consideration therefor, the deeds were only constructively fraudulent as to grantee, and the setting aside of such deeds required that grantee be paid amount he gave as consideration for the conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Attachment liens set aside—insolvency. In an equity action brought by trustee in bankruptcy to set aside and annul an attachment lien upon the bankrupt's property, the provisions of the bankruptcy act are such that it is essential that the person attacking the lien must show that debtor was insolvent when the lien was obtained.

Matthews v Engineering Co., 228- ; 292 NW 64

Equitable estoppel—non-change in position. The plea of a mortgagee that a mortgagor was estopped to deny the validity of his signature to the mortgage because, when the mortgagor was thrown into bankruptcy, the mortgage prevented the mortgagee from participating in dividends to unsecured creditors, must fall when there is no showing that there were any such dividends.

State Bank v Nolan, 201-722; 207 NW 745

Nonfraudulent intent. A fraudulent intent is not necessarily an element of a voidable four months preference under the federal bankruptcy act.

Patrick v White, 203-239; 212 NW 469

Fraudulent conveyance — trustee in bankruptcy—remedy. A trustee in bankruptcy cannot maintain an action at law against a grantee of the bankrupt to recover the value of property collusively and fraudulently transferred to said grantee in fraud of creditors. This is not saying that the trustee may not treat the property in the hands of the grantee as belonging to the bankrupt, or impress a trust on the proceeds of the property if grantee has disposed of it.

Lambert v Reisman Co., 207-711; 223 NW 541

"Surety" as creditor. The act of a surety for an insolvent in receiving, within four months of the filing of a petition in bankruptcy, property of the insolvent, and paying the agreed value thereof on the surety obligation, constitutes a voidable preference, within the meaning of the federal bankruptcy act.

Patrick v White, 203-239; 212 NW 469

Discharge of surety—subsequent compromise and satisfaction—effect. The surety on a bond staying the collection of judgments is wholly released by the subsequent acts of the trustee in bankruptcy for the judgment defendant and the receiver for the insolvent judgment plaintiff entering into a legally authorized compromise settlement and satisfaction of the judgment, in order to avoid threatened and doubtful litigation growing out of the execution of said stay bond, and the subsequent insolvency of all the parties thereto.

State v Cas. Co., 213-211; 238 NW 709

Preliminary and interlocutory injunctions—dissolution. An injunction restraining the owner of land from interfering with the possession by a trustee in bankruptcy should be forthwith dissolved when it appears that said trustee has substantially no interest in the land—that his lien is valueless because of the foreclosure of a superior lien, and that he has no purpose to redeem.

Relph v Goltry, 213-1118; 240 NW 646

III EFFECT OF BANKRUPTCY PROCEEDING

Action by trustee—fraudulent conveyance—sufficiency of evidence. Trustee in bankruptcy who introduces testimony given on examination in bankruptcy court is bound thereby, and evidence is insufficient to sustain trustee's claim that transfer of note by bankrupt to sister was in fraud of creditors.

Cooney v Graves, (NOR); 230 NW 407

Adjudication—secured claims against bankrupt property—remedies of lienor. The federal bankruptcy act does not deprive a lienor of any remedy with which he is vested by state law, and one holding a secured claim against

III EFFECT OF BANKRUPTCY PROCEEDING—continued

a bankrupt is not bound to file formal proof of claim in the bankruptcy court. He may rely on his security and enforce it otherwise.

Blotcky v Silberman, 225-519; 281 NW 496

Scope of adjudication—potentially litigated question. A duly rendered judgment of a court of bankruptcy that its trustee has no interest in nor title to an article of personal property because said article belongs to one who sold it to said bankrupt under a conditional sale contract which has been duly forfeited, constitutes in legal effect, inter alia, a final adjudication that said bankrupt had no redeemable interest in said article—conceding, arguendo, that he might, under some circumstances have had such right.

Smith v Russell, 223-123; 272 NW 121

Adjudication—nonpresumption of prior insolvency. An adjudication of bankruptcy carries no presumption that the bankrupt was insolvent on a date several months prior to the date of the adjudication.

Stark v White, 215-899; 245 NW 337

Assignment — unlawful preference — burden of proof. A trustee in bankruptcy, who seeks to set aside a transfer of property by the bankrupt on the ground that such transfer constitutes an unlawful preference, must fail when he does not show that the property transferred belonged to the bankrupt. So held where the property in question had been received by the bankrupt on consignment and was returned to the consignor.

Dwight v Horn, 215-31; 244 NW 702

Exempt property—procedure. The jurisdiction of the federal bankruptcy court over the exempt property of the bankrupt extends no further than to enter an order setting off such property to the bankrupt. Irrespective of the proceedings in such court, the right to the exempt property, as between the owner and a mortgagee thereof, must be determined in the state court.

Eckhardt v Hess, 200-1308; 206 NW 291

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting to a maker of a negotiable promissory note an extension of time in which to make payment is not personal to said maker only, but inures, under Title 11, §204, USC, to the benefit of another maker of said note who in fact signed said note as surety only but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Foreclosure action in rem—state court—not stayed by bankruptcy proceedings. Where mortgagees on foreclosure did not ask personal judgment but only a judgment in rem, and trustee in bankruptcy for mortgagors had secured an order releasing and discharging the real estate as assets in bankruptcy matter, state court was justified in proceeding with foreclosure and in not staying proceedings until adjudication of mortgagors as bankrupts, bankruptcy act, §11 [11 USC, §29], contemplating only suits in personam and from which a discharge in bankruptcy would be a release.

Mayer v Imig, (NOR); 227 NW 328

Mortgages—rents and profits—priority. The right of a receiver in mortgage foreclosure proceedings to the rents and profits reserved in the mortgage is superior to the rights of a subsequently appointed trustee in bankruptcy of the then owner of the land.

Robertson v Roe, 203-654; 213 NW 422

Mortgages—staying deed under moratorium act—loss of right. A defendant in mortgage foreclosure may not, after execution sale, have an order under the emergency moratorium act (45 GA, Ch 179) staying the execution of sheriff's deed and extending the period for redemption, when, at the time of the application for the order, the defendant, on his own application, has been adjudged a bankrupt, and his equity of redemption in the land in question has been sold under an order issued out of the bankruptcy court.

Lincoln JSL Bank v Brown, 219-630; 258 NW 770

Redemption—orders in bankruptcy. An order in federal bankruptcy proceedings for the sale of the bankrupt's equity of redemption in land sold under foreclosure proceedings is immune from collateral attack on the ground that the land embraced the bankrupt's homestead.

Lincoln JSL Bank v Brown, 219-630; 258 NW 770

Release of mortgage under mistake of law. A mortgagee who, without being mistaken as to any matter of fact, or the victim of any fraud, accepts from the mortgagor a conveyance of the mortgaged land in full satisfaction of the mortgage debt, and thereupon releases and satisfies his mortgage of record—and so acts solely on the mistaken belief that a discharge of the mortgagor in bankruptcy ipso facto worked a cancellation of a junior judgment against the mortgagor and the lien of said judgment against the mortgaged land—may not, after discovering his mistake as to the legal effect of said discharge in bankruptcy, successfully ask a court of equity to re-establish his canceled mortgage.

Connecticut Ins. v Endorf, 220-1301; 263 NW 284

Right to sell in ordinary course of business. A conditional sale contract with proviso that the vendee may sell in the ordinary course of business remains and continues as a conditional sale contract as to all unsold goods. Especially is this true when the contract provides that the vendee shall hold the proceeds of goods sold for the benefit of the vendor.

International Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Rights of bankrupt—four-month liens. A judgment lien is in no manner displaced or affected by bankruptcy proceedings instituted by the judgment defendant more than four months after the lien attached.

Kramer v Hofmann, 218-1269; 257 NW 361

Rights under moratorium act—loss of. A mortgagor who, subsequent to a sale under foreclosure, makes application for a discharge in bankruptcy and is adjudged a bankrupt, thereby deprives himself of all right to an extension of time in which to redeem from said foreclosure and sale, because, upon being adjudged a bankrupt, the title to his equity of redemption ipso facto passed to his trustee in bankruptcy.

Prudential v Lininger, 220-1212; 263 NW 534

Setting aside—limitation of actions—laches. A suit in equity by trustee in bankruptcy to set aside deed by bankrupt to husband on grounds of want of consideration, fraud, and failure to take possession of land, brought more than six years after recording of deed, is barred by laches under statute of limitations where only one creditor secured allowance of claim, which claim was based on note past due when deed was recorded.

Monroe v Ordway, 103 F 2d, 813

Title—contract of purchase—specific performance. The beneficial right of a bankrupt to have specific performance of a contract for the purchase of real estate passes to his trustee in bankruptcy.

Wilson v Holub, 202-549; 210 NW 593; 58 ALR 646

Tort action in state court—appeal—moot question. An appeal from a district court ruling which in effect permitted the prosecution in the state court of a tort action against a bankrupt contrary to an order of the bankruptcy court that such action must be prosecuted solely in the bankruptcy court, will be dismissed on a proper showing by appellee that, since said ruling by the state court, the federal court has so modified its former order as specifically to authorize appellee to prosecute said action in the state court, even tho such showing requires a showing dehors the original appellate record.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Unlawful preference—required proof. A bona fide transfer of property by a debtor to his creditor within four months of the adjudication of bankruptcy cannot be set aside as an unlawful preference in the absence of evidence that the creditor knew or ought to have known that the debtor was insolvent at the time of the transfer.

Dwight v Horn, 215-31; 244 NW 702

IV ADMINISTRATION AND DISTRIBUTION OF ESTATE

Discussion. See 20 ILR 113—Foreign assets; 21 ILR 145—Definition of secured creditor

Conditional sales contract—defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

Conditional sales—right of forfeiture—effect. Tho the vendor in a conditional contract of sale has retained the right to forfeit the contract for nonpayment and to resume absolute ownership, yet, so long as he has not done so, his assignment of the contract invests the transferee with no greater right than the vendor had under the contract.

Soodhalter v Coal Co., 203-688; 213 NW 213

Conditional sales—unrecorded and imperfect contract valid against trustee in bankruptcy. A conditional sale contract which provides that the vendor shall retain his title to the goods and the right to the possession thereof until they are paid for, covering present and future purchases, is enforceable against the vendee and against anyone standing in the vendee's shoes—e. g., the vendee's assignee for the benefit of creditors or the vendee's trustee in bankruptcy; and this is true irrespective of the recording or filing of the contract and irrespective of the fact that the contract imperfectly describes the goods.

International Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Debts due federal government—preference. Bank deposits made by federal trustees in bankruptcy and belonging to pending estates in bankruptcy are not, in case of the insolvency of the bank, within the scope of the federal statutes which require a preference in the payment of debts due to the United States, even tho such deposits are secured by bonds running to the United States.

Andrew v Bank, 208-1248; 224 NW 499

Exempt property liable for debts—determined by state courts. While the homestead is liable for debts antedating its purchase the bankruptcy court is without jurisdiction over

IV ADMINISTRATION AND DISTRIBUTION OF ESTATE—continued

bankrupt's exempt property, except to make an order setting it aside to bankrupt and the right of any particular creditor as against bankrupt's exempt property can only be determined by state courts.

Bracewell v Hughes, (NOR); 235 NW 37

Interest of remainderman passes to trustee. The interest of a bankrupt as a real estate remainderman, whether the interest be vested or contingent, passes to the trustee in bankruptcy.

Noonan v Bank, 211-401; 233 NW 487

Fraudulent conveyance—action by trustee to set aside—conditions precedent. A trustee in bankruptcy may not maintain an action to set aside a fraudulent conveyance by the bankrupt unless he pleads and proves that such setting aside is necessary in order to pay claims allowed in the bankruptcy proceedings.

Newman v Callahan, 212-1003; 237 NW 514

Action by trustee—conditions. A trustee in bankruptcy has no right to maintain an action to set aside as fraudulent a conveyance by the bankrupt unless he shows that claims have been filed and allowed against the bankrupt, and that he, as trustee, has not sufficient funds with which to pay said claims. Especially is this true when the equity in the property in question is practically nothing.

Shaw v Plaine, 218-622; 255 NW 686

Action by trustee—fraudulent conveyance—sufficiency of evidence. Trustee in bankruptcy who introduces testimony given on examination in bankruptcy court is bound thereby, and evidence is insufficient to sustain trustee's claim that transfer of note by bankrupt to sister was in fraud of creditors.

Cooney v Graves, (NOR); 230 NW 407

Fraudulent conveyance—confidential relations—right to prefer. A conveyance by a husband to his wife, executed and received for the sole purpose of paying an actual bona fide debt of the husband to the wife is beyond the reach of other creditors provided the property conveyed is not substantially in excess of the debt.

Johnson v Warrington, 213-1216; 240 NW 668

Fraudulent conveyances — termination of property interest regardless of creditors. No present title to land passes under a contract to the effect (1) that a daughter, so long as she outlived her father and paid certain annual rentals and other charges, should have the possession and profits of named lands, (2) that title should remain in the father, but at the death of the father she should receive an absolute deed to the land, which deed was put in escrow under the control of the father during his lifetime, (3) that if she defaulted in said payments the contract could be forfeited on notice, and (4) that all her interest terminated instantly on her death prior to that of the father. It follows that upon the insolvency of the daughter and her default on said payments, the father and daughter may voluntarily cancel said contract regardless of the creditors of the daughter.

Tilton v Klingaman, 214-67; 239 NW 83

Fraudulent transfers—evidence. Evidence held to establish a fraudulent transfer by a bankrupt.

Schnurr v Miller, 211-439; 233 NW 699

Remedies of creditors—establishment of lien. An actual, nonfraudulent, voluntary conveyance should not, in an action by a trustee in bankruptcy on behalf of creditors, be wholly set aside and the title vested in the trustee, but a lien on the land may be decreed in favor of antecedent creditors.

Crowley v Brower, 201-257; 207 NW 230

Remedies of creditors—personal liability of grantee. A wife who, knowing that her husband intended to hinder and delay his creditors, accepts a voluntary transfer of his bank deposit is, nevertheless, not personally liable to the husband's subsequently appointed trustee in bankruptcy for that part of the deposit which is expended prior to the bankruptcy proceedings in carrying on in good faith the ordinary business of the husband.

Barks v Kleyne, 201-308; 207 NW 329

Life estates—accounting by life tenant. A life tenant with testamentary power to encroach upon the principal, with remainder over, may be compelled to make full disclosure to a trustee in bankruptcy of a possible remainderman of the property received by her under the will (the probate records not revealing such fact), but may not be compelled to account to such trustee as to her use of the property, in the absence of any allegation and proof of waste, fraud, or improper use or disposal.

Nelson v Horsford, 201-918; 208 NW 341; 45 ALR 515

Persons entitled to assert invalidity. An actual, nonfraudulent, but voluntary conveyance may not be impeached by a trustee in bankruptcy on behalf of subsequent creditors.

Crowley v Brower, 201-257; 207 NW 230

Right of trustee—form of judgment. The decree in an action by a trustee in bankruptcy to set aside a conveyance by the bankrupt as fraudulent should be, not that the trustee is the owner in fee of the property, but that the trustee has a superior lien on the property to the amount of the lienable claims in his hands as such trustee.

Hoskins v Johnston, 205-1333; 219 NW 541

Transfers by bankrupt—right of trustee. A trustee in bankruptcy who, in the interest of

creditors, seeks to set aside a fraudulent conveyance by the bankrupt, is entitled to the same relief as the creditor would have been entitled to, had he (the creditor) prosecuted the action.

Crowley v Brower, 201-257; 207 NW 230

Railroad reorganization—bank's nonallowable set off against bonds. Bank holding railroad bonds in default held not entitled to set off deposit in railroad's checking account after payment by bank of railroad's check in sum exceeding amount on deposit at time railroad filed its petition for reorganization, since under "first in, first out" rule there was no credit subject to set-off. (Bankruptcy act, §77; 11 USC, §205.)

Iowa-Des Moines Bk. v Lowden, 84 F 2d, 856

Recovery on excess corporate indebtedness—proper party plaintiff. A trustee in bankruptcy of a corporate bankrupt cannot maintain an action against the directors and officers of the corporation to enforce the statutory individual liability attaching to such directors and officers consequent on their act in knowingly consenting to a corporate indebtedness in excess of that permitted by law. Such right of action never, in any sense, belongs to the corporation, but, on the contrary, is a right extended to the corporation creditors, and is enforceable solely by such creditors, if necessary, irrespective of the bankruptcy proceedings.

Hicklin v Cummings, 211-687; 234 NW 530; 72 ALR 822

Partnership relation nonexistent—operation of bank. Where probate court set aside to decedent's widow a private bank which was thereafter operated for many years by her son, who received none of the profits thereof, held, evidence did not establish partnership as between the son and his mother. Hence, son's trustee in bankruptcy could claim no interest in said bank.

Duckworth v Manning's Estate, (NOR); 252 NW 559

Sale—manner and terms. Principle recognized that a trustee in bankruptcy may, if to the advantage of unsecured creditors, sell incumbered real property free of liens.

First Tr. Bk. v Kleih, 201-1298; 205 NW 843

Statutory liens—discharge. A statutory attorney's lien which is adjudicated by a foreclosure decree unappealed from, to have become a lien on defendant's land as of a date several years prior to the filing by defendant of a petition in bankruptcy (to which the attorney was not a party) is not discharged by §67f of the bankruptcy act [11 USC, §107f], even tho the foreclosure decree was entered within the four months period immediately preceding the filing of said petition in bankruptcy.

Sweatt v Acres, 209-1288; 228 NW 74

Trustee—surety—recoupment. A bank which acts as a collection agency for a trustee in bankruptcy in gathering in the funds belonging to the bankrupt's estate, and in good faith accounts to the trustee for the collections, is not a "depository" of said funds, within the meaning of the federal statutes and rules of court governing depositors of bankrupt funds. So held where a surety who had paid the amount embezzled by the trustee sought recoupment from the said collecting bank on the theory that the bank had violated such federal statutes and rules.

So. Surety v Bank, 207-910; 223 NW 865

Unlawful preference — inadmissible evidence. The duly filed schedules of indebtedness of a bankrupt which fail to reveal when the items of indebtedness accrued are not admissible (to prove insolvency) against the grantee in an instrument sought to be set aside as an unlawful preference.

Stark v White, 215-899; 245 NW 337

Unlawful preference—insufficient evidence. A chattel mortgage, executed within four months prior to the institution of bankruptcy proceedings against the mortgagor, cannot be established as an unlawful preference by evidence that the mortgagee had failed in his urgent effort to collect the debt due him, or that he may have suspected that the mortgagor was in some degree financially embarrassed.

Stark v White, 215-899; 245 NW 337

Unlawful preference — limitation on evidence. Where a chattel mortgage was executed within four months preceding the filing of bankruptcy proceedings against the mortgagor, and where, later, the mortgaged property was sold by the mortgagor and a new mortgage was executed by the purchaser on the same property to the former mortgagee, and where the original mortgage was thereupon released, and where the two transactions were attacked by the trustee in bankruptcy as an unlawful preference, the evidence must be confined to the conditions existing on the date of the first transaction.

Stark v White, 215-899; 245 NW 337

V RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT

Discussion. See 16 ILR 526—Assignment of expectancy

Adjudication of homestead status. An unquestioned order in bankruptcy setting off to a bankrupt certain land as a homestead is, as to all parties to the proceedings, a final adjudication that said land was then a homestead.

Bracewell v Hughes, 214-241; 242 NW 66

Chattel mortgage enforcement after contest in bankruptcy. The holder of a chattel mortgage on exempt property who appears in bankruptcy proceedings against the mortgagor and

V RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT—continued

unsuccessfully contests the asserted right of the mortgagor to have said property set off to him (the mortgagor) as exempt, is not thereby estopped to later, and after the mortgagor has been discharged, enforce the lien of said mortgagor.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Conclusiveness of judgment. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff is immune from subsequent attack on the ground that, when the decree was rendered, the judgment in question had been discharged in bankruptcy, such fact not having been pleaded in said action.

Reining v Nevison, 203-995; 213 NW 609

Discharge as affecting assignment of expectancy as security. When a debtor assigns his expectancy in an estate as security for the payment of the debt, a subsequent discharge of the debt in bankruptcy ipso facto discharges said assignment and all unadjudicated equitable rights thereunder, even tho the ancestor creates a legacy for the debtor and dies after the debtor is adjudged a bankrupt and before the debtor is decreed a final discharge.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Dischargeable debts—fraud. State courts will take judicial knowledge that, under the federal bankruptcy statutes, a debt arising from the fraud of the debtor is not dischargeable in bankruptcy.

Hills Bank v Cress, 205-306; 218 NW 74

Discharge—effect on existing liens. The discharge in bankruptcy of the mortgagor does not discharge the lien of such mortgage.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Webber v King, 205-612; 218 NW 282

Effect on liens. The fact that a bankrupt has been discharged presents no legal obstacle to proceedings by the bankrupt's trustee to enforce lien against property which is legally a part of the bankrupt's estate but as to which the bankrupt wrongfully disclaims any interest.

Bogenrief v Law, 222-1303; 271 NW 229

Failure to plead discharge—effect. A discharge in bankruptcy of a claim subsequently sued on avails nothing unless the discharge is pleaded as a defense; and this is true tho the plaintiff has knowledge of the discharge.

Harding v Quilan, 209-1190; 229 NW 672

Improper scheduling of debt. A discharge in bankruptcy is a nullity as to a debt which is improperly scheduled in that the bankrupt, well knowing the correct post office address of his creditor, scheduled an incorrect address. But the bankrupt may avoid the effect of the error by showing that the creditor actually did have timely notice of the bankruptcy proceedings.

Lundy v Skinner, 220-831; 263 NW 520

Nondischargeable debt. A tenant who fraudulently causes the consumption and disposal of property belonging to his landlord as rent, thereby matures a cause of action against himself for the "malicious injury" to the said property—a claim not dischargeable in bankruptcy.

Russell v Peters, 219-708; 259 NW 197

Exempt property—debts enforceable against—unallowable procedure. After a court of bankruptcy has adjudged a debtor to be a bankrupt and after the court has set off a homestead to said debtor, a creditor holding a duly scheduled, unliquidated, and unsecured debt has no right to proceed in equity in the state court, and have his debt adjudicated and enforced as a lien on the said homestead because said debt antedates the acquisition of said homestead. And it is immaterial that the creditor, preceding his action in the state court, obtained an order staying the final discharge of the bankrupt.

Bracewell v Hughes, 214-241; 242 NW 66

Irretrievable nullification of lien. The filing by an insolvent judgment defendant of his petition in bankruptcy within four months following the entry of judgment, discharges the judgment (it not being based on fraud or willful injuries) and irretrievably nullifies an execution levy on property whether the property be exempt or nonexempt. In other words, the judgment plaintiff may not thereafter proceed in equity in the state court and have his discharged judgment enforced against property set aside to the judgment defendant as exempt, even tho, were it not for the bankruptcy proceedings, plaintiff would be able to show that said property was not exempt from levy under plaintiff's particular judgment.

McMains v Cunningham, 214-300; 233 NW 129

Preferential transfer—all-essential proof. A trustee in bankruptcy may not have a transfer of property, made within four months of an adjudication of bankruptcy, set aside on the ground that said transfer gave the transferee an unlawful preference, in the payment of debts, unless he proves, inter alia, the fundamental, all-essential fact that said transfer was made by the grantor-bankrupt in payment, in whole or in part, of the latter's debt to the transferee.

Bagley v Bates, 219-1348; 261 NW 523

Revival of discharged debt. Principle recognized that the moral obligation to pay a debt which has been discharged in bankruptcy will

support an oral promise to pay the discharged debt.

Fierce v Fleming, 205-1281; 217 NW 806

Setting off homestead—effect. An unappealed order in bankruptcy proceedings setting off a homestead to the bankrupt does not constitute an adjudication of the bankrupt's rights in the homestead, e. g., the existence of liens and the order and priority thereof.

Kramer v Hofmann, 218-1269; 257 NW 361

CHAPTER 551

SECURITIES AND INVESTMENTS OF TRUST FUNDS

12751 Security to be by bond.

Additional annotations under §1059

Statutory bonds—construction—law governing. A statutory bond executed in a foreign state and delivered in this state will be construed under the laws of this state.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Construction—"lawful representatives". The bond of a guardian which purports to bind the sureties "and our lawful representatives" does not bind the heirs of the surety.

Conley v Jamison, 205-1326; 219 NW 485; 59 ALR 835

Attempt to limit liability. A statutory surety may not limit his statutory liability.

Andrew v Bank, 205-878; 219 NW 34

Common-law bond. A statutory bond may not be treated as a common-law bond.

Zeidler Co. v Ryan & Fuller, 205-37; 215 NW 801

Statutory bonds—effect. A statutory bond may not be added to or subtracted from.

Dallas Co. v Bank, 205-672; 216 NW 119
State v Gregory, 205-707; 216 NW 17
Queal Lbr. v Anderson, 211-210; 229 NW 707

Execution and delivery in foreign state. A statutory bond which is executed and delivered in a foreign state for the performance of a contract in this state will be construed in accordance with the laws of this state when such was the intention of the parties, as shown (1) by the nature of the transaction, (2) by the subject matter, and (3) by the attending circumstances.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Statutory bond—estoppel to question validity.

Plymouth Co. v Schulz, 209-81; 227 NW 622

Inclusion and exclusion. Statutory requirements will be read into a statutory bond, and nonstatutory requirements will be read out of such bond.

Curtis v Michaelson, 206-111; 219 NW 49
Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638
Bateson v County, 213-718; 239 NW 803
In re Durey, 215-257; 245 NW 236
Iowa Bank v Soppe, 215-1242; 247 NW 632

Statutory bonds—surplusage. Nonstatutory conditions inserted in a statutory bond will be treated as surplusage.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495
See Francesconi v Sch. Dist., 204-307; 214 NW 882

Successive bonds by administrator. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

Action—condition. A bond of indemnity to hold the obligee free of any loss which he may sustain is not broken, and no right of action accrues, until a loss has been suffered against which the covenant runs.

Duke v Tyler, 209-1345; 230 NW 319

Acts constituting breach. A statutory bond conditioned to secure the prompt paying over to the proper authorities of public funds on deposit in a bank is breached on the failure to promptly make such payment, and not from the time when the authorities suffer an actual loss.

Leach v Bank, 205-987; 213 NW 528

Assignee's liability—loss notwithstanding reasonable care. An assignee for the benefit of creditors, who deposits in a bank trust funds coming into his hands and loses them because the bank subsequently closes its doors in consequence of insolvency, while not protected from loss under an ex parte order of court authorizing such deposit (§9285, C., '35) yet he is protected from such loss if, in making such deposit, and in looking after and caring for said funds, he exercised that degree of care which a person of ordinary care and prudence would exercise under the same or similar circumstances.

In re Stone, 220-1341; 264 NW 604

Bank deposits bonded—time deposits excluded—nonliability. A surety on a bond covering bank deposits, but excluding "indebtedness not subject at all times to immediate withdrawal", held not liable for amount of depositor's savings account, where depositor also had checking account and bank's bylaws reserved right to notice of withdrawals of savings deposits as provided by state statute.

U.S. Guarantee Co. v Walsh Co., 67 F 2d, 679

Bank deposits without felonious intent. The act of the treasurer of a corporation in depositing the funds of his corporation in a bank (of which he is also an officer) in the manner in which deposits are ordinarily made, and the loss of such funds by the subsequent failure of the bank, do not constitute embezzlement. So held in an action on a surety bond which contracted against loss by embezzlement.

Williamstown Assn. v Surety Co., 205-830; 218 NW 474

Successive actions by several beneficiaries. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Bonds in excess of statutory call. A statutory bond is a nullity insofar as it attempts to bind the surety to do more than the statute requires.

Ottumwa Boiler Works v O'Meara & Son, 206-577; 218 NW 920

Bond of contractor—no piecemeal recovery. Recovery on a contractor's bond may not be piecemeal, consequently that part of trial court's decree, holding its judgment is not a bar nor an adjudication of any future claim against the bond, will be stricken on appeal.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Bovine tuberculosis examiner—non-required bond. In applying the bovine tuberculosis test, the examiner need not, nor may he be required to, post a bond to indemnify the owner against loss in case cattle are wrongfully destroyed, because the statute does not expressly or impliedly require such bond.

Peverill v Dept., 216-534; 245 NW 334

Conditional delivery — other signers — evidence of financial standing. On the issue whether a written guaranty was delivered on the condition that a named other party should sign it, no reversible error results from excluding evidence that such other party was a person of large financial responsibility.

Boyd v Miller, 210-829; 230 NW 851

Consideration—contract of reguaranty. A guarantor who, in a new written contract, reguarantees the payment of the amount past due on a former contract on which he is guarantor, and also guarantees the payment of future-accruing indebtedness, will not be heard to say that there was no consideration for the guaranty in the new contract of the old indebtedness, when by the new contract an extension of time of payment of the old indebtedness was secured.

Watkins v Peterson, 210-661; 231 NW 489

Contract limitations. Whether parties to a statutory bond will be permitted by contract to specify the time before which or after which an action can be maintained, quaere.

Page County v Fidelity Co., 205-798; 216 NW 957

Defective statutory bond as common-law bond. A fatally defective statutory bond may be enforced as a common-law bond.

Belmond Assn. v Luick, 217-805; 253 NW 521

Demand. In an action on the bond of a public officer to recover funds unaccounted for, no demand on the surety is necessary before commencing the action when proper demand has been made on the principal.

State v Carney, 208-133; 217 NW 472

Enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Failure to file claim—when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Fidelity bond—fraud in extension of credit by overdrafts—evidence. In action on fidelity bond of bank cashier the exclusion of evidence of bank's custom of deferring posting of checks creating an overdraft was not erroneous where the dishonest acts complained of were the extension of credit by means of overdrafts in violation of statute.

Fidelity Co. v Bates, 76 F 2d, 160

Forgery—statutory bond—sufficiency of evidence. Evidence reviewed and held that the signature to a depository bond was genuine.

School District v Bank, 218-91; 253 NW 920

Fraud of trustee—affirmance or disaffirmance. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

Highway—assessment—abortive appeal. An appeal from an order levying an assessment within a secondary road district is not perfected (1) by the timely giving of notice of appeal, and (2) by the timely filing of a purported appeal bond whch is not signed by the surety; nor is the defect cured by the filing, after the statutory time for appeal has expired, of an affidavit of qualification by a party who states "that I am surety in the above bond."

In re Road Dist., 213-988; 238 NW 66

Indemnity—right to maintain action without notice to indemnitor. An indemnitee may maintain an action on the contract of indemnity to recover the amount the indemnitee has been compelled to pay on account of a judgment rendered against him, even tho no notice was given the indemnitor of the pendency of the action which resulted in the judgment.

Surety Co. v Salinger, 213-188; 238 NW 715

Insurance contract—construction—effect of reinsurance. A contract performance bond which, in effect, binds the insured to reimburse the insurer and any reinsurer for any loss which the insurer or reinsurer may be compelled to pay, is not multiplied or divided by a subsequent reinsurance contract. In other words, the liability of the original insured remains a single liability, and the risk carried by both insurers remains as one risk.

Iowa Cas. Co. v Wagner Co., 203-179; 210 NW 775

Reinsurance—settlement with insured—effect. A reinsurer who agrees that the reinsured shall take charge of all matters arising under the bond, and effect all settlements, is bound by a settlement entered into between such reinsured and the original insured.

Iowa Cas. Co. v Wagner Co., 203-179; 210 NW 775

Intent of parties controls. A bond given to secure cemetery funds in the hands of a trustee will be construed in accordance with the undoubted intentions of the parties thereto. Held, bond not given to secure funds received during the one-year term of the bond only, but to secure the entire fund as it might exist at any time during said term.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Omission of penalty—effect. The omission from a duly approved school fund depository bond of the amount for which the surety is to be liable, is fatal to the validity of the bond, unless the defeasance clause of the bond imparts an obligation independent of the penalty clause. And this is true even tho the statute provides that the bond shall be in an amount double the amount deposited.

Ind. Sch. Dist. v Morris, 208-588; 226 NW 66

Oral modification. An agreement between the state treasurer and the accommodation sureties on a statutory bank deposit guaranty bond, to the effect that such bond shall be deemed automatically canceled when the deposit of state funds in the bank drops below the amount of existing non-accommodation surety bonds, is invalid, both as to the state and as to non-accommodation sureties who are seeking contribution.

Leach v Bank, 205-975; 213 NW 612

Probate findings. The supported finding of the court in probate on the issue whether funds received by a person were received by him as guardian or as trustee (bond in each case having been given) is conclusive on the appellate court.

In re Baldwin, 217-279; 251 NW 696

Administrators—liabilities on bonds—existing judgment against executor—surety's new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not, ipso facto, vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Nonpermissible assumption of liability. A statutory bond for the performance of a public improvement contract is void insofar as it attempts to assume liability for the nonperformance of independent obligations which the statute does not contemplate, but which are voluntarily inserted in the contract; and this is true as to the surety, even tho the public authorities have on hand and undistributed a fund arising under the contract and sufficient to discharge such nonstatutory obligations.

Monona Co. v O'Connor, 205-1119; 215 NW 803

Reformation of instruments. A statutory bond may not be so reformed as to defeat its purpose.

Leach v Bank, 205-975; 213 NW 612

Reformation—evidence required. To justify the reformation of a written instrument, the evidence must be clear, satisfactory, and convincing and free from reasonable doubt. So held in an action to reform the term of a bond, the evidence being held insufficient.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Right to secure deposits. The officers of a savings bank which is a duly selected and acting depository of county funds under a statutory depository bond may, in addition to the security afforded by said previously executed bond, validly transfer to the county, and the county through its fiscal officers may validly

accept, notes and mortgages of the bank as additional collateral security for said deposits.

Andrew v Bank, 203-1335; 214 NW 559

Road patrolmen. The statutory bond required of road patrolmen for the performance of their statutory duties in caring for the roads assigned to them does not embrace liability, to a traveler, in damages consequent on the negligent handling of road machinery.

Bateson v Marshall County, 213-718; 239 NW 803

Securities act—maximum liability. The surety on the bond of a dealer in securities under the Iowa securities act (Ch 393-C1, C., '31 [Ch 393.1, C., '39]) is not liable beyond the statutory amount of the bond—$5,000—irrespective of the number or amount of the claims sought to be enforced against it. Order impounding a bond as a trust fund for the pro rata benefit of numerous claimants affirmed.

Witter v Ins. Co., 215-1322; 247 NW 831; 89 ALR 1065

Surety—authority of agent—estoppel. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

Actions—evidence—sufficiency. Evidence reviewed, in action on a fidelity surety bond, and held to show abstraction of the employer's funds by the employee and consequent loss by the employer, within the terms of the bond.

Webster Bk. v Ins. Co., 203-1264; 212 NW 545

Surety—taking assignment of claim. Where, because of the peculations of a county auditor, a depository bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Cosureties — rights. Accommodation and nonaccommodation sureties on bonds given to secure public funds on deposit in banks are cosureties, and each, in case of payment by him, is entitled to contribution from the others, and to be subrogated to the rights of the municipality.

Andrew v Bank, 205-878; 219 NW 34

Contribution against surety on separate bond. Where an executor has executed and filed two separate bonds for the faithful discharge of his duties, the surety who pays a devastavit in full may enforce contribution from the other surety; and it is immaterial that the surety enforcing contribution signed the bond for a consideration and that the other surety signed as an accommodation.

New Amst. Cas. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Discharge of surety—stay bond—subsequent compromise and satisfaction—effect. The surety on a bond staying the collection of judgments is wholly released by the subsequent acts of the trustee in bankruptcy for the judgment defendant, and the receiver for the insolvent judgment plaintiff entering into a legally authorized compromise settlement and satisfaction of the judgment in order to avoid threatened and doubtful litigation growing out of the execution of said stay bond and the subsequent insolvency of all the parties thereto.

State v Cas. Co., 213-211; 238 NW 709

Extension to principal available to surety. An order of a court of bankruptcy granting to a maker of a negotiable promissory note an extension of time in which to make payment is not personal to said maker only, but inures, under 11 USC, §204, to the benefit of another maker of said note, who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Finding of fact in re suretyship. The finding of the court as to the amount of the liability of a surety on a bond, not based on a mathematical computation, but on a determination of disputed questions of fact, is conclusive on the appellate court.

Iowa Bank v Soppe, 215-1242; 247 NW 632

Public improvements — contract — assignment as releasing surety—inadequate proof. A surety on a bond for the construction of a city pavement who claims release from liability because the city consented to an assignment of the contract to a third party, must, at the least, establish such consent by evidence of some action on the part of the city council. Proof of consent by the city auditor, alone, to such assignment, is not sufficient. Especially is this true when the record otherwise shows that the original contractor was the only contractor recognized by the city.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Remedies of surety—agreement to indemnify—joint and several liability. A written agreement in an application for a surety bond by two duly appointed referees in partition to

the effect and in the language of "we hereby agree" to indemnify said surety for any damage suffered by him because of said bond, is jointly and severally binding on both principals even tho one of them received no part of the funds covered by the bond and was guilty of no personal failure to account.

Indemnity Ins. v Opdycke, 223-502; 273 NW 373

Voluntarily augmented funds. A court-appointed, testamentary trustee and the surety on his official, statutory bond are liable not only for the money which comes into his hands as specifically required by the will, but for additional amounts of the testamentary funds which come into the hands of the trustee, as such, consequent on the generous action of the devisees, generally, in voluntarily augmenting said trust funds from the testamentary funds.

Whisler v Estes, 216-491; 249 NW 264

Liability on trustee's bonds—receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Unauthorized deposit of trust funds. A court-appointed trustee of cemetery funds and the sureties on his bond are liable for said funds deposited, without authority of court, in a bank of which both the trustee and the sureties were officers, and lost because of the insolvency of said bank.

Belmond Assn. v Luick, 217-805; 253 NW 521

Unallowable limitation on liability. A statutory bond which is given for the express purpose of securing public deposits in a bank may not be limited in liability to less than the liability called for by the statute; and any such attempt will be deemed nugatory, even tho such bond is approved by the public governing board.

Leach v Bank, 205-1154; 213 NW 517

Unauthorized substitution. Public officers who are authorized to deposit in banks public funds only on the due execution of an indemnifying bond have no authority to accept collateral security in lieu of a statutory bond; and if taken, the same may be released, and the sureties on the statutory bonds may not complain.

Leach v Bank, 205-975; 213 NW 612

12752 Payee.

Action by subcontractor on public bond. See Ch 452

Breach—right to maintain immediate action. An action on a contractor's bond to repair a street may be maintained without allegation and proof that the city has made the repairs.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

Unallowable action by stranger. A bond which, in effect, is limited to the indemnification of the obligee only, for pecuniary loss sustained by the obligee through the dishonest acts of his officers or employees, is a contract of indemnity. In other words, such bond does not cover liability to a third party for loss sustained by said third party through the dishonesty of the officers or employees of the said obligee. (See §8581-c14, C., '31 [§8581.18, C., '39], for bonds covering liability.)

Allen v Bonding & Ins. Co., 218-294; 253 NW 498

12753 Defects rectified.

Omission of name of surety. The omission from the body of a bond of the name of the surety does not necessarily invalidate the bond.

Ind. Sch. Dist. v Morris, 208-588; 226 NW 66

12754 Qualifications of sureties.

Capacity of parties—evidence. Record reviewed, and held insufficient to show mental incapacity of a surety at the time of the execution of a bond.

Leach v Bank, 205-975; 213 NW 612

12755 Attorneys not receivable as surety.

Attorneys incompetent as sureties. See under §11251, Vol. I

12759.1 Appeal bonds—presumption.

Failure to formally approve. An appeal bond which has been presented to and retained by the clerk of the district court, and which has effected all the purposes for which it was manifestly presented, will not be held invalid because not formally accepted and approved.

State v Packing Co., 219-419; 258 NW 456

Drainage district assessment—appeal bond. Where, on appeal from action of county board of supervisors, with respect to classification and assessment of land in drainage district, the board urges that failure of the auditor to approve the appeal bond constituted a fatal defect and it is shown attorney for property owner delivered the notice of appeal and appeal bond to county auditor with instructions to file them, the delivery to and receipt by the auditor of the tendered appeal bond constituted a "filing" and generated statutory presumption that auditor approved the bond, sufficient to uphold appeal, in absence of evidence to overcome presumption.

Mills v Board, 227-1141; 290 NW 50

12763 Guaranty company as surety.

Guaranty and suretyship contracts generally. See under §11577

Atty. Gen. Opinion. See AG Op March 3, '39

Bond to pay taxes "incurred"—scope. A bond, (1) reciting that the principal therein had been licensed as a motor carrier under named statutes of the state, and (2) conditioned to pay "the taxes and penalties incurred" under said statutes—a positive liability—embraces liability to pay taxes and penalties incurred before, as well as after, the date of said bond.

State v USF&G Co., 221-880; 266 NW 501

Best evidence—unsigned copy of fidelity bond—inadmissible. In action by a surety company against defendant, who was covered by a fidelity bond and who agreed to indemnify plaintiff against loss sustained by reason of its executing fidelity bond in his behalf, it was error to admit in evidence instrument purporting to be a certified copy of the bond, but containing no signatures and which was admittedly no true and genuine copy of original bond.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

12764 Payment of premiums.

Refusal to allow. The probate court is clearly within its discretion in refusing to allow against an estate and to the surety on an executor's bond (the executor being deceased and his estate insolvent) the amount of unpaid premiums on the bond, especially when such allowance would burden the estate with a double charge for premiums consequent on the mismanagement of the estate by the executor.

In re Mowrey, 218-992; 255 NW 511

12768 Release.

Release—strict compliance with statute required.

Brooke v Bank, 207-668; 223 NW 500
Bookhart v Younglove, 207-800; 218 NW 533

Unauthorized release of bond—effect. The liability of a surety on an appeal (supersedeas) bond, attaches the moment when the bond is accepted. It follows that an order of court assuming to set aside and to cancel the bond and to authorize the filing of a new and different bond, without notice to the appellee-obligee, is a nullity as to the first filed bond.

State v Packing Co., 219-419; 258 NW 456

Permitting reliance on unauthorized bond. The surety on an appeal (supersedeas) bond is estopped to question its liability on the bond when, knowing of the execution of the bond by its agent and the filing and acceptance thereof, it permits the appellee-obligee and the clerk accepting the bond, innocently to act and rely on said bond until the full purpose of the bond has been accomplished.

State v Packing Co., 219-419; 258 NW 456

Continuing liability of surety. The liability of a surety on a statutory depository bond conditioned "to hold the county treasurer harmless" because of authorized deposit of public funds in a bank continues for a reasonable time after the expiration of the authorized period as to the undrawn balance of all deposits made during said period.

Dallas County v Bank, 205-672; 216 NW 119

Discharge of surety—settlement with principal. Principle reaffirmed that a contract of settlement which releases a principal ipso facto releases the surety.

Iowa Cas. Co. v Wagner Co., 203-179; 210 NW 775

Ex parte revocation—effect. A peremptory, ex parte court order to the effect that the appointment of an administrator is revoked, and the simultaneous reappointment of the same administrator, and the execution of another bond, do not effect a legal revocation, and consequently do not operate as a discharge of the bond given pursuant to the original appointment.

In re Donlon, 203-1045; 213 NW 781

Liability for prior defalcation. The surety on a guardian's bond, conditioned as provided by statute, is liable for the defalcation of the guardian occurring prior to the execution of the bond whether the bond be a "substitute" bond or simply security in addition to a prior existing bond.

Brooke v Bank, 207-668; 223 NW 500

Nonrelease by change in order of court. The surety on the bond of a receiver appointed to take charge of grain and await the further orders of the court is not released because, without notice to the surety, and without his consent, the court subsequently ordered the receiver to convert the grain into money, said bond specifically calling for a full accounting of all money received.

McClatchey v Marquis, 203-76; 212 NW 374

12769 Suit on bond—service.

Action without notice to indemnitor. An indemnitee may maintain an action on the contract of indemnity to recover the amount the indemnitee has been compelled to pay on account of a judgment rendered against him, even tho no notice was given the indemnitor of the pendency of the action which resulted in the judgment.

So. Sur. v Salinger, 213-188; 238 NW 715

Right to maintain immediate action. An action on a contractor's bond to repair a street may be maintained without allegation and

proof that the city has made the repairs.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

12771 Estoppel—stockholders liable.

Authority of agent—estoppel. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

12772 Authorized securities.

Investments by guardians. See under §12581

Discussion. See 19 ILR 354—Trust investment statutes; 19 ILR 441—Exclusion of statute by instrument

Atty. Gen. Opinion. See '28 AG Op 176

Applicability of statute. This statute has no application to a compromise by the guardian of a will contest under which compromise the minor receives certain property in lieu of the property devised to him by the will.

Kreamer v Wendel, 204-20; 214 NW 712

Investments—whether will or statute controls. A statute which specifies the securities and the nature thereof in which trust funds may be invested does not control the investment of testamentary trust funds created under a will which—no rights of creditors being involved—clearly directs investments to be made in more lucrative securities.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Funds used by executor—interest chargeable. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at six percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

Custody and care of ward's estate—interest on uninvested funds. A guardian may be charged with a reasonable rate of interest on estate funds which he might have invested by the exercise of reasonable diligence.

In re Anderson, 208-191; 225 NW 258; 64 ALR 687

Deposit in bank—subsequent approval by court. The due approval by the probate court of a guardian's report wherein he recited that he had deposited the funds of the ward in a bank and had received a stated amount of interest on such deposit is, in legal effect, an authorization to the guardian to continue the deposit, with resulting consequence that the guardian is relieved of personal responsibility in case the bank subsequently becomes insolvent; and this is true irrespective of the provisions of §9285, C., '24.

Robinson v Irwin, 204-98; 214 NW 696

Demand certificate of deposit not a loan. A guardian cannot be deemed to have made a loan or investment of guardianship funds by depositing them in a bank and taking in return therefor a certificate of deposit payable on demand.

Kies v Brown, 222-54; 268 NW 910

Legal deposit (?) or illegal investment (?). A deposit by a trustee of trust funds in a savings bank, at a stated rate of interest but with the legal right to withdraw said deposit at any time, does not constitute an "investment" within the meaning of this section.

In re Moylan, 219-624; 258 NW 766

Unauthorized deposit of trust funds. A court-appointed trustee of cemetery funds and the sureties on his bond are liable for said funds deposited, without authority of court, in a bank of which both the trustee and the sureties were officers, and lost because of the insolvency of said bank.

Belmond Assn. v Luick, 217-805; 253 NW 521

Unauthorized deposit as loan. A guardian who, without an authorizing order of court, permits the funds of the ward to remain in a bank where they had originally been placed by the ward, and who, without such authorization, accepts as evidence of said funds a certificate of deposit payable at a fixed date in the future, thereby makes an unauthorized loan to the bank and must make good the loss in case of the insolvency of the bank.

In re Fahlin, 218-121; 254 NW 296

Interest-bearing, time certificates of deposit. A guardian who, without authority from the probate court, deposits guardianship funds in a bank, and in return therefor receives interest-bearing, time certificates of deposit, must personally account for the loss in case the bank becomes insolvent.

In re Fish, 220-1328; 264 NW 542

Wrongful purchase of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated,

and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

Investments without authorizing order—subsequent confirmation. Assuming, arguendo, that an authorizing order of court is absolutely necessary in order to render legal an investment of trust funds, yet a trustee, who, without such order, has made an investment in good faith, and without loss to the estate, may, subsequently, on a full showing of the controlling facts and at a time when the estate has suffered no loss, be granted a valid order confirming said investment.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Invalid investments—who may question. The invalidity which attends the act of a guardian in loaning guardianship funds to himself, individually, and in securing such loan by a first mortgage on real estate—all without any pre-authorizing order of court—may not be pleaded by a second mortgagee of the land on the theory that such invalidity absolutely voided the said note and mortgage to the guardian, and thereby left the purported second mortgage as the first lien on the land. The sole right to question the legality of said acts of the guardian rests in the ward, or in his heirs, or in those properly representing said ward or heirs.

Richardson v Lampe, 221-410; 265 NW 629

When ward estopped to object to investment. A mentally competent adult person, who, on his own application, causes a guardian of his property to be appointed (§12617, C., '35), will be estopped to object to fair and honest investment of guardianship funds in real estate, when said investment, tho made without first securing the approval of the court, was made with the knowledge, consent, and approval of the ward, and when the ward at once entered into possession of the property and thereon resided for some seven years without payment of rent of any kind. (Investment made prior to effective date of this section.)

In re Meinders, 222-236; 268 NW 537

Investment in unallowable mortgage. Where two separate guardianships exist with the same guardian, one over an adult, and one over a minor, authority granted by the court in the adult guardianship to execute a second mortgage on the lands of the adult, and to invest in said second mortgage the money held by the guardian under the guardianship of the minor, constitutes no protection to the guardian (in view of this section, C., '24) if the ward in the minorship proceedings objects. (In this case, no entries whatever were made in the latter proceedings.)

In re Galloway, 217-284; 251 NW 619

Unauthorized investment—ratification. The act of a newly appointed guardian in foreclosing, under order of court, the illegal and unauthorized investment of a prior guardian, cannot be deemed a ratification of said investment.

In re Nolan, 216-903; 249 NW 648

Unauthorized investments. Trust funds invested by a trustee in questionable or worthless securities without an authorizing order of court must, on settlement, be accounted for in cash, such securities not being "securities approved" as provided by this section.

Whisler v Estes, 216-491; 249 NW 264

Unauthorized investments—subsequent approval nugatory. An investment of guardianship funds, in order to protect the guardian from resulting loss, must be preceded by an order of the court or judge approving the proposed investment, and, since the enactment of this section the approval by the court or judge of the investment after it has been made, is a nullity.

In re Nolan, 216-903; 249 NW 648

Unauthorized investments — rejection by ward. A ward, on the hearing on the final report of the guardian, may reject any or all loans or investments made by the guardian without the authority or approval of the court.

In re Jefferson, 219-429; 257 NW 783

Unauthorized, provident investment—subsequent approval. Principle reaffirmed that a provident investment of guardianship funds by a guardian without a pre-authorizing order of court, may, on proper application, be subsequently approved by the court with the same resulting force and effect as tho the court had, on due application, entered a pre-authorizing order.

(Ruling was on transaction prior to enactment of the 43rd GA, Ch 259.)

Richardson v Lampe, 221-410; 265 NW 629

Validating unauthorized investment. A provident investment made by a guardian long prior to, and maintained long subsequent to, the enactment of this section, but made originally without an authorizing order of court, is validated by the subsequent action of the court in specifically approving the same, and in repeatedly approving the guardian's annual reports with reference to the receipt of income from said investment.

In re Lemley, 219-765; 259 NW 481

Loan by guardian to himself—authorization. The probate court, when it finds that such a course will essentially promote the physical and mental welfare of a ward, may validly authorize a guardian, as such, to make a specified loan of guardianship funds to himself, individually, and, as guardian, to receive from himself, individually, the proper and legally required security for said loan.

In re Fish, 220-1328; 264 NW 542

Loans—required value of lands. Evidence reviewed and held to show substantial compliance with the law which requires lands to be of a value equal to twice the proposed loan of guardianship funds thereon.

In re Fish, 220-1328; 264 NW 542

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

12772.2 Existing investments.

Wrongful retention of securities by trustee or executor. An objection to the final report of a trust company acting as trustee and executor of an estate is sufficient in alleging generally that the trust company wrongfully retained securities which it should have disposed of altho it does not state on what dates the securities should have been sold and what their values were on those dates.

In re Carson, 227-941; 289 NW 30

12773 Security subject to court order.

Release of court-authorized investments. The statutory provision embraced in this section providing that court-authorized investments by guardians shall only be released by court authorization, is not limited to investments authorized by the court under §364, S., '13 [§12772, C., '39].

Randell v Fellers, 218-1005; 252 NW 787

Unauthorized release of mortgage. A guardian has no legal right, except under court authorization, to release, without payment, a court-authorized, real estate mortgage executed to, and held by, him as such guardian; and subsequent purchasers of the land are chargeable with knowledge of the statute invalidating such release.

Randell v Fellers, 218-1005; 252 NW 787

Unauthorized release of mortgage. The act of a guardian in releasing, without an order of court, a mortgage which represented an investment of funds derived from a sale of the ward's real estate constitutes a breach of the bond specially given by the guardian in order to effect said sale, it appearing that the guardian was, by said release, rendered incapable of personally accounting to the ward for the amount of said mortgage.

In re Brubaker, 214-413; 239 NW 536

12775 Annual accounting.

Guardianship — findings by court — conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case have force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

12776 Property or funds in litigation—deposit.

Property held by administrator. Where trust property in the possession of an administrator is identifiable and not affected by rights of innocent third parties, equity may impress a trust therein.

Carpenter v Lothringer, 224-439; 275 NW 98

12778 Inability to distribute trust funds—deposit.

Atty. Gen. Opinions. See '30 AG Op 355; '38 AG Op 411

12781.1 Final report of fiduciary—personal taxes.

Atty. Gen. Opinions. See AG Op July 17, '39; July 27, '39; Sept. 7, '39; Sept. 12, '39; AG Op Jan. 24, '40

12781.2 Compromise of personal taxes.

Atty. Gen. Opinion. See AG Op Jan. 24, '40

12783 Liability—reports required.

Atty. Gen. Opinion. See '30 AG Op 355

Not insurer of official funds. The clerk of the district court is not liable for loss of official funds coming into his hands and lost because of the failure of the bank in which they were deposited, when, at the time of deposit, he in good faith justifiably believed the bank to be solvent.

Prudential v Hart, 205-801; 218 NW 529

12784 Deposit with county treasurer.

Atty. Gen. Opinions. See '30 AG Op 355; '38 AG Op 411

12785 Duty of treasurer.

Atty. Gen. Opinion. See '38 AG Op 411

12786 Disbursement.

Atty. Gen. Opinion. See '38 AG Op 411

12786.1 Federal insured loans.

Atty. Gen. Opinion. See AG Op Feb. 28, '39

CHAPTER 552

PROCEDURE TO VACATE OR MODIFY JUDGMENTS

12787 Judgment vacated or modified—grounds.

Discussion. See 21 ILR 155—Judgment on arbitration award

ANALYSIS

I APPLICABILITY OF STATUTE
II JURISDICTION AND PROCEDURE IN GENERAL
III MISTAKE, NEGLECT, OR OMISSION OF CLERK
IV IRREGULARITIES IN OBTAINING JUDGMENT
V FRAUD IN OBTAINING JUDGMENT
VI MINORS AND INSANE PERSONS
VII DEATH OF PARTIES
VIII CASUALTY, MISFORTUNE, AND NEGLIGENCE

Correction of evident mistake. See under §10803

I APPLICABILITY OF STATUTE

Motion to set aside. A motion to set aside a duly entered judgment in a criminal case is unknown to our practice.

State v Hawks, 213-698; 239 NW 553

Failure to do equity. Equity will not set aside a judgment for a debt which complainant admits he owes, and which he in no manner offers to discharge.

Coulter v Smith, 201-984; 206 NW 827

Consent decree. Equity will not set aside a consent judgment for attorney fees for both parties in divorce proceedings against the defeated party and his land when no fraud is shown and when the court had personal jurisdiction over both parties to the proceeding.

Coulter v Smith, 201-984; 206 NW 827

Equal protection—litigant's day in court. Every litigant is entitled to his day in court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Non de novo hearing. A proceeding to vacate a default judgment and for new trial is not triable de novo on appeal.

R.I. Plow Co. v Brunkan, 215-1264; 248 NW 32

Bank examiner's final report vacated—procedure. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by Ch 552 of the code—the statutory procedure to vacate and modify judgments—which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Administrators—liabilities on bonds—existing judgment against executor—surety's new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Claims in probate — unallowable setting aside. An allowance by the court of a claim in probate, after issue is joined thereon and after due hearing, becomes a final adjudication in the absence of fraud or collusion and may not thereafter be set aside without hearing or evidence.

In re Kinnan, 218-572; 255 NW 632

Claims—disallowance—penitentiary confinement insufficient equitable ground to reopen. Penitentiary confinement of the president of a corporation, the claimant in a receivership, without a showing that no other representative of the claimant had sufficient information to object to a receiver's report, is not, when asserted four years after an order approving the report disallowing the claim, such equitable circumstance as will make court's refusal to hear the claim an abuse of discretion.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Wide discretion of court. The refusal to set aside a judgment will not be disturbed on appeal unless it is made to appear that the wide discretion of the trial court has been abused.

Swan v McGowan, 212-631; 231 NW 440

Failure to apply for correction in lower court. An order or judgment of the district court dismissing an action for want of prosecution (as provided by a court rule) will not be reviewed on appeal when the lower court has been given no opportunity either (1) on petition under this section or (2) on motion under §12827, C., '35, to correct the error, if any.

Hansen v McCoy, 221-523; 266 NW 1

Grounds for new trial—insufficient record. Record reviewed in an action wherein plaintiff appeared pro se in the trial court, and held insufficient to authorize the court (1) to set aside a former order denying a new trial, and (2) thereupon—11 months after the entry of judgment on a directed verdict—to grant a new trial.

Spoor v Price, 223-362; 272 NW 305

Mandatory duty of court to vacate. A judgment must be set aside on proper and timely application when an agreement or understanding existed between the respective counsel such that one of the counsel was justified in assuming, and in good faith did assume, that the cause would not be assigned for trial without notice to him, and when the judgment is the result of a violation of said agreement or understanding.

First N. Bank v Bank, 210-521; 231 NW 453; 69 ALR 1329

Newly discovered evidence. Cumulative newly discovered evidence is no adequate grounds for new trial, especially when it is quite speculative.

Rauch v Elec. Co., 206-1155; 221 NW 788

Newly discovered evidence. Newly discovered evidence which might sooner have been discovered by reasonable diligence is not ground for new trial.

Anderson v Railway, 216-230; 249 NW 256

Nonpermissible impeachment. The judgment of a court having jurisdiction of the parties and of the subject matter cannot be collaterally impeached.

King City v Surety Co., 212-1230; 238 NW 93

Reinstating dismissed action—showing of prima facie cause necessary. One seeking to reinstate an action which has been dismissed must do more than establish his ground for vacating the judgment; he must show that he has a valid cause of action or defense to the action in which the judgment was rendered. Held that the failure of plaintiffs to make a prima facie showing of a valid cause of action was fatal to their proceedings.

Thoreson v Central States Co., 225-1406; 283 NW 253

Clerk's dismissal for want of prosecution—reinstatement—statutory proceedings necessary. The power of the court to modify or set aside a judgment, when once entered, is purely statutory, and where clerk of court, under a general order of judges of judicial district, on April 20, 1935, entered an order dismissing action without prejudice for want of prosecution, and trial court's order of approval was entered on August 28, 1935, the trial court could set aside judgment of dismissal by statutory proceedings only, and by bringing defendants into court by same proceedings, respecting notice and service, as an ordinary action, hence, an order of reinstatement made September 8, 1938, was unauthorized where application for reinstatement was made on November 27, 1936, and a 5-day notice of hearing on application was given defendants by mail and defendants appeared specially in response to notice.

Hammon v Gilson, 227-1366; 291 NW 448

Vacating—nonpermissible issue. In an action to cancel a judgment by default on a promissory note, the defendant will not be permitted to present the issue that he was not personally liable on said note.

West v Heyman, 214-1173; 241 NW 451

Void judgment. A void judgment may be collaterally attacked.

Geneva v Thompson, 200-1173; 206 NW 132

Void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

II JURISDICTION AND PROCEDURE IN GENERAL

Consolidation—pending actions only—when not permissible at plaintiff's instance. A motion by plaintiff, whereby his independent separate acton to set aside a dismissal and to reinstate the cause would be consolidated with the original action to recover accident insurance dismissed by such order, is properly overruled upon defendant's resistance thereto, since, under the statute, such motion can only be made at instance of defendant and then only as to pending actions.

McKee v Natl. Assn., 225-1200; 282 NW 291

Default judgment—custom of giving notice—setting aside for failure. Practice of attorneys of informing opposing counsel of intention to take default is not repugnant nor void under §11587, C., '35, providing for default judgment upon failure to file or amend pleadings within required time, and such practice may be considered under petition to set aside default judgment rendered without such notice.

Lunt v Van Gorden, 225-1120; 281 NW 743

Judgment by default—setting aside unaffected by failure to secure stay order. Fact that proceedings in district court could have been stayed pending appeal will not, on the ground that misfortune was avoidable, preclude setting aside a default judgment rendered pending appeal without customary notice between counsel.

Lunt v Van Gorden, 225-1120; 281 NW 743

Judgment by default—setting aside—"practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged "practice of this court".

Lunt v Van Gorden, 225-1120; 281 NW 743

II JURISDICTION AND PROCEDURE IN GENERAL—continued

Appearance date agreed on—waiver of notice. Where the parties in a proceeding to vacate an order of court approving the final report of a bank receiver stipulate that the court may set a date for appearance later than the second day of the term, and that the bank examiner will file an appearance or pleading on or before that date, and that no other or further notice to him shall be necessary, the examiner may not assert the departure from the statutory requirements as to the appearance date as a ground for challenging the jurisdiction of the court by a special appearance.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Foreclosure — decree — nonjurisdiction to amend. The district court has no jurisdiction, long after a duly rendered decree in mortgage foreclosure has become final, to amend said decree by striking therefrom a provision for redemption from execution sale, and by substituting therefor a provision directing the sheriff to issue deed forthwith upon making such sale. So held where the judgment plaintiff sought such amendment on the theory that the judgment defendant had lost his right to redeem because of a stay of execution obtained by him pending ineffectual bankruptcy proceedings.

Nibbelink v De Vries, 221-581; 265 NW 913

Independent action to reinstate not permissible. An independent separate action to set aside a dismissal and to reinstate a cause, on the ground of unavoidable casualty and misfortune, made within one year but after term at which dismissal was made, is not permissible.

McKee v Natl. Assn., 225-1200; 282 NW 291

Former decision as res adjudicata. Where a salesman obtained an Iowa judgment against an Indiana company and after judgment the company filed a combination pleading, consisting of a special apperance (the propriety of which is doubtful) and a petition to vacate the judgment for lack of jurisdiction, and a decision is rendered thereon adversely to the company, from which no appeal was taken, such judgment becomes a final judgment, and where company subsequently brings a separate action in equity to vacate such judgment for lack of jurisdiction, the trial court properly dismissed the equity petition and refused to enjoin its enforcement, since the former decision on the jurisdiction question was res adjudicata. The company cannot relitigate the same questions that were, or might have been, determined upon its former petition to vacate the judgment.

Martin Bros. v Fritz, 228- ; 292 NW 143

Vacating final report of receiver. After the approval of the final report of the receiver of a closed bank which discharged both the receiver and the examiner in charge, an application by the receiver for vacation of the order consented to the jurisdiction of the court only as to the receiver, but the court had jurisdiction to deal summarily with the examiner by prescribing the form of notice to be served on him and to set the time for his appearance so long as the statutory provisions for vacating and modifying judgments were complied with and the application filed within one year from the date of rendition of the order attacked.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Judgment of dismissal — nonjurisdiction to set aside. The district court, having at one term entered a judgment of dismissal of an action for want of prosecution of the action as required by the rules of the court, has no jurisdiction at a subsequent term, tho the judgment entry remains unsigned, to set aside said judgment under §10801, C., '35, and reinstate the action. The governing procedure under such circumstances is provided by this section.

Workman v Dist. Court, 222-364; 269 NW 27

Modification — mistake. A consent decree which sets aside certain deeds, and which is participated in by all the legatees under a will for the sole and conceded purpose of facilitating the carrying out of the provisions of a will, is properly modified by striking therefrom a provision which mistakenly gives to some of the legatees a right or estate to which they were not entitled under the subsequent happenings of events clearly provided for in the will.

Reno v Avery, 203-645; 212 NW 564

Modification under legalizing act. A decree which adjudges the rights of the public under a statute as it exists at the date of the decree may, after the term and after the enactment of a curative and legalizing act, be so modified as to express the public rights under the statute as it exists under the curative act.

Wilcox v Miner, 201-476; 205 NW 847

Municipal court—filing motions after verdict —extending time. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Mun. Ct., 225-501; 281 NW 441

Opening and setting aside—different allowable procedures. When final judgment is erroneously rendered in municipal court against a defendant (1) because of the mistaken assumption by the court that defendant was in default for want of an answer, and (2) because of the fraud of plaintiff, said defendant may (at least when he acts diligently under the circumstances) proceed by petition under this section et seq., C., '35, for the setting aside of said judgment, instead of proceeding by motion

under §10681, C., '35, for the same relief. It necessarily follows that if defendant so proceeds, he is not bound by the 90-day limitation imposed by said last named section.

La Forge v Cooter, 220-1258; 264 NW 268

Rulings in re change of records. A ruling of the trial court relative to changing its records will not be interfered with by the appellate court in the absence of a clear and satisfactory showing that the trial court was in error.

Gow v Dubuque County, 213-92; 238 NW 578

Setting aside dismissal. When an action to collect death benefits was dismissed for want of prosecution, the court was justified in setting aside the dismissal when the petition for reinstatement showed the fact of the accident resulting in death, and that witnesses had been located, and the order of the court complied with a statute in making an adjudication that the plaintiff had a valid cause of action.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Void sale — relief — venue. A proceeding wherein relief is sought on the theory that the petitioner bought property at a void judicial sale and received nothing for his purchase price must be brought in the court and in the proceedings out of which the execution arose.

State v Beaton, 205-1139; 217 NW 255

III MISTAKE, NEGLECT, OR OMISSION OF CLERK

Unpardonable delay. A judgment may not be corrected for error of the clerk in computing the amount thereof, when the defendant, before the expiration of the year following the entry felt in his own mind that such error had been made, but, without explanation, delayed the filing of his application for correction until after the expiration of said year, and until after the land had been sold under the judgment; and especially when his application is accompanied by an inequitable demand.

Floyd Co. v Ramsey, 213-556; 239 NW 237

IV IRREGULARITIES IN OBTAINING JUDGMENT

Dismissal of cases for want of prosecution—validity of general order. The fact that an order of the judges of a judicial district, requiring the parties to cause each case to be finally determined within two years from date of filing petition, was a general order applicable to all cases or proceedings pending or to come before the courts of the district did not invalidate such order.

Hammon v Gilson, 227-1366; 291 NW 448

Irregularity in obtaining judgment. The fact that, in mortgage foreclosure, the court entered personal judgment against a subsequent grantee on a finding that he had assumed the mortgage debt, manifestly cannot be deemed an "irregularity" sufficient to demand the setting aside of the judgment even tho said assumption did not appear in the grantee's deed, and even tho such assumption was in issue between said grantee and his grantors.

Swan v McGowan, 212-631; 231 NW 440

Discretion of court. The action of the municipal court, on timely motion, in vacating a judgment for irregularity in obtaining the judgment will not be disturbed on appeal in the absence of a clear showing of abuse on the part of the court.

Mitchell v Brennan, 213-1375; 241 NW 408

Adoption — fabricated ground of abandonment—effect. A decree of adoption of a child, based solely on a finding that the child had been abandoned by its parent, and entered without notice to the parent of the hearing, tho her residence was known, will be set aside on a direct attack supported by affirmative and conclusive evidence that the child had never been so abandoned.

Pitzenberger v Schnack, 215-466; 245 NW 713

Unallowable equitable action. An order of court which, in bank receivership proceedings, mistakenly grants, under a misapprehension of the law, an absolute preference in payment of the deposit of a municipality, may not, on the ground of such mistake, be set aside by an independent action in equity by other depositors and creditors of the insolvent bank, when such depositors and creditors neither (1) appealed from said order, nor (2) entered, in the receivership proceedings, any objection to such order.

Schubert v Andrew, 205-353; 218 NW 78

V FRAUD IN OBTAINING JUDGMENT

Inherent power of court. The district court has inherent power to set aside a judgment during the term at which it was rendered on proof that the judgment was obtained by fraud, extrinsic and collateral to the judgment, even tho there was no default.

Cedar Rapids Co. v Bowen, 211-1207; 233 NW 495

Collateral attack—attorney omitting defense—belated attack ineffectual. A regularly entered decree against a person represented by reputable counsel will not seven years thereafter be set aside for alleged fraud of an attorney in failing to plead a bankruptcy discharge as a defense.

Ware v Eckman, 224-783; 277 NW 725

Deception constituting fraud—requisites to nullify judgment. Fraud as will invalidate a duly entered decree must be perpetrated by or in some manner connected with the opposing party or his attorney.

Ware v Eckman, 224-783; 277 NW 725

V FRAUD IN OBTAINING JUDGMENT—continued

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Evidence — sufficiency. Evidence held insufficient to set aside a decree of divorce and to grant a new trial on the grounds of fraud and unavoidable casualty and misfortune.

McAtlin v McAtlin, 205-339; 217 NW 864

Falsity of testimony. Motion to vacate a judgment on the ground that the testimony on which the judgment was rendered was false is properly overruled.

Genco v Mfg. Co., 203-1390; 214 NW 545

Fraud—motion to set aside decree. A motion to set aside a decree of divorce for fraud, in that plaintiff had not acquired a bona fide residence required by statute, is a proper procedure, but the burden of proof necessarily rests on the maker of the motion.

Girdey v Girdey, 213-1; 238 NW 432

Fraud of judgment plaintiff. A judgment entered against a defendant after plaintiff, for a sinister purpose, had assured defendant that he would not be held on his indorsement of the note in question, and after plaintiff had induced defendant to forego reimbursing himself by a settlement with the maker of the note, will be deemed fraudulent and set aside accordingly.

Foote v Bank, 201-174; 206 NW 819

Fraudulent allowance. The fraudulent allowance of the claim that certain property belongs to claimant and not to the estate may be set aside on proper application at any time before the estate is finally settled, and especially so when the applicant was not a party to the original allowance.

In re Sarvey, 206-527; 219 NW 318

Fraudulently obtained order. A fraudulently obtained order of court may, of course, be set aside on proper application.

In re Riordan, 216-1138; 248 NW 21

Bank examiner's final report vacated—procedure. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by this chapter, which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Fraudulently obtained decree of divorce—swift annulment. In view of the confidential relationship existing between a husband and wife, a court of equity should be swift to set aside a decree of divorce obtained by the husband by fraudulent means, the application by the innocent party for such annulment being made promptly after learning of the deception.

Petersen v Petersen, 221-897; 267 NW 719

Extrinsic and collateral fraud—impeachment of witnesses. Evidence newly discovered after trial and verdict, and apparently demonstrating that the verdict was obtained by extrinsic and collateral fraud, is ground for new trial within the time limit and conditions provided by the statute; and it is no objection that said evidence also tends to impeach witnesses. So held where the newly discovered evidence tended strongly to show that the stamp "Paid", as it appeared on an obligation sued on, had been willfully fabricated.

Bates v Carter, 222-1263; 271 NW 307

Non-extrinsic fraud. Principle reaffirmed that the fraud which will justify the setting aside of a decree must be extrinsic and collateral to the matter determined by the decree—something other than false swearing in procuring the decree.

Girdey v Girdey, 213-1; 238 NW 432

Intrinsic and extrinsic fraud. A default judgment on a promissory note is justifiably set aside and a new trial ordered on proof that the execution of the note was induced by false representations as to the consideration therefor, and that said fraud was repeated shortly prior to the entry of said judgment and the maker thereby induced to believe, until after judgment was entered, that he had no defense to said note.

Rock Island Plow Co. v Brunkan, 215-1264; 248 NW 32

Inhering fraud. A final order of discharge of an administrator may not be set aside, opened up, or otherwise questioned on a showing of fraud which inheres in said order of discharge.

Murphy v Hahn, 208-698; 223 NW 756

Perjury. Perjury on a material issue in a cause will not be recognized in an equitable action as sufficient ground to vacate a judgment or decree and to grant a new trial after the expiration of one year from the entry thereof.

Abell v Partello, 202-1236; 211 NW 868

Perjury. Perjury as to any intrinsic matter in an action is not a ground for a new trial.

Hewitt v Blaise, 202-1114; 211 NW 481

Procedure. A party against whom judgment has been rendered must, in order to have the judgment set aside for fraud, proceed by ordinary proceedings entitled as in the original action.

Swartzendruber v Polke, 205-382; 218 NW 62

Vacation — unallowable grounds. A decree of divorce, rendered on full jurisdiction, will not be set aside and canceled on the ground that the applicant for the cancellation fraudulently colluded with the other party to the action to obtain the decree.

Reppert v Reppert, 214-17; 241 NW 487

VI MINORS AND INSANE PERSONS

Insane persons—actions—guardian ad litem. Every person is presumed sane until the contrary appears, and, unless an adult person appearing in court has been judicially declared insane, there is no requirement that a guardian ad litem be appointed to represent him, this being especially true where, not being confined, he appears by counsel and presents a defense, and a judgment against him will not be set aside.

Ware v Eckman, 224-783; 277 NW 725

Restoration of status quo. An incompetent, through his guardian, may, on proper grounds, maintain an action to set aside and annul a judgment in foreclosure without offering to restore the status quo when the incompetent received no part of the money secured by the mortgage.

Engelbercht v Davison, 204-1394; 213 NW 225

Unknown insanity—effect. A judgment in foreclosure which was obtained by the holder in due course of the notes secured and which has passed to foreclosure deed will not be set aside on the ground that the defendant was at all times mentally incompetent and that the notes and mortgage were forgeries, (1) when neither the plaintiff nor the court had knowledge of such grounds, (2) when the defendant was personally served in the foreclosure and appeared by counsel and filed answer, and (3) when the defendant had never been adjudged to be insane, nor was he an inmate of a state hospital for the insane.

Engelbercht v Davison, 204-1394; 213 NW 225

Annulment of marriage—insanity. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

VII DEATH OF PARTIES

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

VIII CASUALTY, MISFORTUNE, AND NEGLIGENCE

Discretion of court. The appellate court will be quite reluctant to reverse an order setting aside a decree and granting a new trial on the somewhat questionably established ground of unavoidable casualty or misfortune, when the beneficiary of the order shows an apparently good defense. So held where the real issue was whether an original notice had been delivered to defendant's counsel.

Heater v Bagan, 206-1301; 221 NW 932

Court acting on own motion contrary to agreement of counsel. Consolidated actions, dismissed by the court on its own motion in the absence of counsel, for want of prosecution, are properly reinstated on a showing of "unavoidable casualty and misfortune" in that there was no negligence on the part of plaintiffs or their counsel and that they were relying on an agreement between counsel that certain motions would not be made nor issues made up until convenient to all counsel.

Thoreson v Central States Co., 225-1406; 283 NW 253

Defective pleading. A defendant may not ignore a suit against him and allow judgment to be entered, and then have the judgment set aside for want of jurisdiction because of merely defective pleading, as distinguished from absence of pleading and prayer.

Nelson v Higgins, 206-672; 218 NW 509

Evidence—sufficiency. Evidence held insufficient to set aside a decree of divorce and

VIII CASUALTY, MISFORTUNE, AND NEGLIGENCE—concluded

to grant a new trial on the grounds of fraud and unavoidable casualty and misfortune.

McAtlin v McAtlin, 205-339; 217 NW 864

Litigant's day in court. It is the policy of the law that every cause of action should be tried upon its merits and that every party to an action shall have his day in court.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Reinstatement justified. When an action for death benefits was dismissed for failure to prosecute, reinstatement was not an abuse of discretion when it was shown that: there was a valid cause of action; witnesses were difficult to obtain; there was a change in the plaintiff's counsel; the court records erroneously showed an amended answer which might have misled the new counsel; there was no personal neglect on the part of the plaintiff; and a dismissal at that time, under the terms of the policy, prevented having any trial on the merits of the case.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Dismissal of action—setting aside — time limit. The time limit for filing petition to vacate an order dismissing an action for want of prosecution, on the ground of unavoidable casualty or misfortune preventing a party from prosecuting the action, is not limited to a time on or before the second day of the term succeeding the entry of the order.

Seiders v Adel Co., 218-612; 255 NW 656

Vacating—decree in foreclosure after lapse of year—insufficient showing. A mortgagor is not entitled to have a decree in foreclosure set aside on the ground of misunderstanding and inefficiency of his attorney, when he applies more than a year after entry of the decree, and it appears that the proceedings were regular in every way, and it further appears that his attorney did everything possible in his behalf.

Snyder v Bank, 226-341; 284 NW 157

12788 Petition for new trial after term.

ANALYSIS

I PETITION
II NEWLY DISCOVERED EVIDENCE

I PETITION

Appeal as sole remedy. An order which sets aside a judgment some five years after its rendition, on the asserted ground that the cause had never been set for trial after issue had been joined, such order being made on motion, service, and appearance of all parties, is a finality in the absence of an appeal therefrom.

Dickson Fruit Co. v Dist. Court, 203-1028; 213 NW 803

Fraudulent decree. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state; and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

II NEWLY DISCOVERED EVIDENCE

Motion delayed more than five days. A motion for new trial when not based on newly discovered evidence is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

12789 Petition deemed denied—method of trial.

Affidavits—statutory denial. Affidavits relative to newly discovered evidence as grounds for new trial (on petition) are denied by operation of law.

Anderson v Railway, 216-230; 249 NW 256

12790 Time limit.

General equitable jurisdiction. After the expiration of the one year for vacating a judgment, as provided by statute, a court of equity will not decree a vacation, under its general equitable power, when it is made to appear that complainant has had, from the inception of the judgment, full knowledge of the grounds for the vacation.

Montagne v Cherokee County, 200-534; 205 NW 228

Equitable action after one year. What exact limitations a court of equity will impose on itself in exercising its power to vacate a judgment or decree and to grant a new trial because of evidence discovered after the expiration of the statutory one year for vacation and new trial, quaere; but such power will not be exercised either (1) when the new evidence was or ought to have been discovered during said statutory period, or (2) when such evidence falls far short of presenting strong equitable considerations, is largely incompetent, and, within the range of competency, is a double-edged sword which militates strongly against the equities of the applicant.

Abell v Partello, 202-1236; 211 NW 868

Unallowable equitable action. A party against whom judgment has been rendered may not, after the expiration of one year, maintain an equitable action to set aside the

judgment for fraud of which he had knowledge before the expiration of such year.

Swartzendruber v Polke, 205-382; 218 NW 62

Fatal delay. A judgment against an insane person may not be vacated, under the statute, because of erroneous proceedings or fraud not going to the jurisdiction of the court, when the proceedings to vacate are delayed beyond one year after the death of the insane person.

Montagne v Cherokee County, 200-534; 205 NW 228

Fatal delay. A defendant is very properly denied a new trial when she had knowledge of the entry of the default judgment almost simultaneously with its entry, and negligently delayed filing her petition for a new trial until after the lapse of nine months and the passing of three terms of court, and especially when her petition presents no fact coming to her knowledge since the entry of the judgment complained of.

Anderson v Anderson, 209-1143; 229 NW 694

Belated plea of fraud. A timely petition for the vacation of a judgment on the ground that the stipulation on which the judgment was rendered was wholly unauthorized, may not, after the lapse of one year after the rendition of the judgment, be so amended as to inject the issue of fraud as a basis for such vacation.

Haas v Nielsen, 200-1314; 206 NW 253

Laches—effect. A party may not, after the lapse of one year from the rendition of a judgment, maintain an equitable action to set aside the judgment for fraud, extrinsic and collateral to the proceedings, when he knew, or by reasonable diligence would have known, of such fraud during said one year.

Gehle v Hart, 209-736; 229 NW 149

Modification—timely action. An action to rectify a mistake in a decree against a minor is timely when the notice in the action to rectify is duly served within the year following the attainment of the majority of the minor, even tho the petition is not filed until after the lapse of said year, such action not being controlled by this section, C., '24.

Reno v Avery, 203-645; 212 NW 564

12791 Motion to correct mistake or irregularity.

Rules—general order—dismissal for want of prosecution. Under the recognized rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings in order to expedite the trial of cases, to keep their dockets clear, and to facilitate the administration of justice, the judges of a judicial district could adopt and enforce a general order requiring parties to cause each case to be finally determined within two years from date of filing petition and providing upon failure to comply with such order the clerk should enter upon the record, "Dismissed without prejudice for want of prosecution".

Hammon v Gilson, 227-1366; 291 NW 448

Dismissal of cases for want of prosecution —validity of general order. The fact that an order of the judges of a judicial district, requiring the parties to cause each case to be finally determined within two years from date of filing petition, was a general order applicable to all cases or proceedings pending or to come before the courts of the district did not invalidate such order.

Hammon v Gilson, 227-1366; 291 NW 448

Clerk's entry of dismissal under general order—nonreviewable when court approves entry. Where a general order of the judges of a judicial district provided for the dismissal of all actions and proceedings undetermined after a period of two years, and directed the clerk of court to enter the dismissal without prejudice, and where such order was so entered in the district court record by the clerk, the supreme court is not required to pass upon the question of whether such entry by the clerk would be an effective dismissal, when at the same term of court the presiding judge made an entry in the same record "approving, affirming and ratifying" this and all other orders of dismissal under the general order.

Hammon v Gilson, 227-1366; 291 NW 448

Clerk's dismissal for want of prosecution—reinstatement — statutory proceedings necessary. The power of the court to modify or set aside a judgment, when once entered, is purely statutory, and where clerk of court, under a general order of judges of judicial district, on April 20, 1935, entered an order dismissing action without prejudice for want of prosecution, and trial court's order of approval was entered on August 28, 1935, the trial court could set aside judgment of dismissal by statutory proceedings only, and by bringing defendants into court by same proceedings, respecting notice and service, as an ordinary action, hence, an order of reinstatement made September 8, 1938, was unauthorized where application for reinstatement was made on November 27, 1936, and a five-day notice of hearing on application was given defendants by mail and defendants appeared specially in response to notice.

Hammon v Gilson, 227-1366; 291 NW 448

Inherent power of court. The district court is but exercising its inherent power when, on motion, it corrects by nunc pro tunc order, and regardless of the one-year limitation imposed by this section, the unquestionably established error of its own clerk in entering a judgment against a judgment defendant for a less amount than theretofore ordered by the court —it appearing that the judgment plaintiff had

not, by laches, forfeited the right to demand such correction against the judgment defendant.

Murnan v Schuldt, 221-242; 265 NW 369

Motion as proper remedy. A motion to set aside and vacate an order which is in excess of the jurisdiction of the court is proper.

Guisinger v Guisinger, 201-409; 205 NW 752

Insufficient motion. A final decree of divorce may not be vacated, even during the term at which entered, on a motion by defendant which alleges that no witness was sworn or testified in the cause and no corroborating testimony was offered, but which is silent as to any showing that plaintiff had no cause of action, or that defendant had a defense to plaintiff's action, or that there was fraud in obtaining the decree.

Radle v Radle, 204-82; 214 NW 602

Mistake of clerk—unpardonable delay. A judgment may not be corrected for error of the clerk in computing the amount thereof, when the defendant, before the expiration of the year following the entry, felt in his own mind that such error had been made, but, without explanation, delayed the filing of his application for correction until after the expiration of said year, and until after land had been sold under the judgment; and especially when his application is accompanied by an inequitable demand.

Floyd County v Ramsey, 213-556; 239 NW 237

Unallowable modification. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Canning Corp., 218-1281; 257 NW 353

12792 Petition.

ANALYSIS

I Relief in General
II Petition
III Equitable Relief

I RELIEF IN GENERAL

Allowance of probate claim—unallowable setting aside. An allowance by the court of a claim in probate, after issue is joined thereon and after due hearing, becomes a final adjudication in the absence of fraud or collusion and may not thereafter be set aside without hearing or evidence.

In re Kinnan, 218-572; 255 NW 632

Time for filing petition. The time limit for filing petition to vacate an order dismissing an action for want of prosecution, on the ground of unavoidable casualty or misfortune preventing a party from prosecuting the action, is not limited to a time on or before the second day of the term succeeding the entry of the order.

Seiders v Clay Prod., 218-612; 255 NW 656

II PETITION

Setting aside dismissal. When an action to collect death benefits was dismissed for want of prosecution, the court was justified in setting aside the dismissal when the petition for reinstatement showed the fact of the accident resulting in death, and that witnesses had been located, and the order of the court complied with a statute in making an adjudication that the plaintiff had a valid cause of action.

Nickerson v Iowa Assn., 226-840; 285 NW 162

III EQUITABLE RELIEF

Granting unallowable relief. The court may not decree the cancellation of an unquestioned judgment, or decree a reconveyance of land when the validity of the original conveyance was not properly in issue.

Benson v Sawyer, 216-841; 249 NW 424

Former decision as res adjudicata. Where a salesman obtained an Iowa judgment against an Indiana company and after judgment the company filed a combination pleading, consisting of a special appearance (the propriety of which is doubtful) and a petition to vacate the judgment for lack of jurisdiction, and a decision is rendered thereon adversely to the company, from which no appeal was taken, such judgment becomes a final judgment, and where company subsequently brings a separate action in equity to vacate such judgment for lack of jurisdiction, the trial court properly dismissed the equity petition and refused to enjoin its enforcement, since the former decision on the jurisdiction question was res adjudicata. The company cannot relitigate the same questions that were, or might have been, determined upon its former petition to vacate the judgment.

Martin Bros. v Fritz, 228- ; 292 NW 143

12793 Time limit.

Service of notice. An action to modify a judgment for mistake therein is "commenced", under this section, C., '24, by the service of the notice of such action. (See §11012, C., '24.)

Reno v Avery, 203-645; 212 NW 564

Setting aside dismissal. The time limit for filing petition to vacate an order dismissing an action for want of prosecution, on the ground of unavoidable casualty or misfortune preventing a party from prosecuting the action, is not limited to a time on or before the second day of the term succeeding the entry of the order.

Seiders v Clay Prod., 218-612; 255 NW 656

Timely action. An action to rectify a mistake in a decree against a minor is timely when the notice in the action to rectify is duly served within the year following the attainment of the majority of the minor, even tho the petition is not filed until after the lapse of said year, such action not being controlled by §12790

Reno v Avery, 203-645; 212 NW 564

Unallowable equitable action. A party against whom judgment has been rendered may not, after the expiration of one year, maintain an equitable action to set aside the judgment for fraud of which he had knowledge before the expiration of such year.

Swartzendruber v Polke, 205-382; 218 NW 62

12794 Proceedings.

ANALYSIS

I PROCEDURE IN GENERAL
II NOTICE
III PARTIES
IV PLEADINGS AND ISSUES
V VENUE
VI METHOD OF TRIAL
VII APPEAL

I PROCEDURE IN GENERAL

Clerk's dismissal for want of prosecution—reinstatement — statutory proceedings necessary. The power of the court to modify or set aside a judgment, when once entered, is purely statutory, and where clerk of court, under a general order of judges of judicial district, on April 20, 1935, entered an order dismissing action without prejudice for want of prosecution, and trial court's order of approval was entered on August 28, 1935, the trial court could set aside judgment of dismissal by statutory proceedings only, and by bringing defendants into court by same proceedings, respecting notice and service, as an ordinary action, hence, an order of reinstatement made September 8, 1938, was unauthorized where application for reinstatement was made on November 27, 1936, and a five-day notice of hearing on application was given defendants by mail and defendants appeared specially in response to notice.

Hammon v Gilson, 227-1366; 291 NW 448

Bank examiner's final report vacated. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by this chapter, which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Mistake of clerk — unpardonable delay to make correction. A judgment may not be corrected for error of the clerk in computing the amount thereof, when the defendant, before the expiration of the year following the entry, felt in his own mind that such error had been made, but, without explanation, delayed the filing of his application for correction until after the expiration of said year, and until after land had been sold under the judgment; and especially when his application is accompanied by an inequitable demand.

Floyd County v Ramsey, 213-556; 239 NW 237

Modification of judgment—timely action. An action to rectify a mistake in a decree against a minor is timely when the notice in the action to rectify is duly served within the year following the attainment of the majority of the minor, even tho the petition is not filed until after the lapse of said year, such action not being controlled by §12790, C., '24.

Reno v Avery, 203-645; 212 NW 564

II NOTICE

Commencement of action. An action to modify a judgment for mistake therein is "commenced" by the service of the notice of such action. (See §11012, C., '24)

Reno v Avery, 203-645; 212 NW 564

Unallowable modification of ruling. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Grimes Corp., 218-1281; 257 NW 353

III PARTIES

Modification of mistake in consent decree by legatees. A consent decree which sets aside certain deeds, and which is participated in by all the legatees under a will for the sole and conceded purpose of facilitating the carrying out of the provisions of a will, is properly modified by striking therefrom a provision which mistakenly gives to some of the legatees a right or estate to which they were not entitled under the subsequent happenings of events clearly provided for in the will.

Reno v Avery, 203-645; 212 NW 564

IV PLEADINGS AND ISSUES

Unallowable modification of ruling. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Grimes Corp., 218-1281; 257 NW 353

V VENUE

Judgment—enjoining proceedings—unallowable venue. An action will not lie in one county to enjoin proceedings on a judgment rendered in another court in another county, even tho plaintiff's action is based on the claim that the judgment is wholly void.

Ferris v Grimes, 204-587; 215 NW 646

VI METHOD OF TRIAL

Nonallowable order as to merits. On the trial of a petition by a defendant for a new trial, the court should go no further than adequately to determine the matters of grounds for new trial and whether defendant has a prima facie good defense to the original action. The court may not, after granting a new trial, enter in connection therewith an order dismissing the original petition.

Heater v Bagan, 206-1301; 221 NW 932

VII APPEAL

Discretion and findings of court. An order setting aside the dismissal of an action for want of prosecution will be set aside by the appellate court only on a clear showing of abuse of discretion. In fact, supported legal findings as a basis for such an order are conclusive on the appellate court.

Seiders v Clay Prod., 218-612; 255 NW 656

Scope and extent—finding by court. A finding by the court, on conflicting and supporting testimony, in a proceeding to set aside a judgment on a bail bond, that the surety had, at his own expense, caused the principal in the bond to be delivered to the sheriff, is not reviewable on appeal.

State v Robinson, 205-1055; 218 NW 918

12796 Cause of action or defense—necessity.

Necessity for defense. Judgments, orders, or findings of the court will not be set aside in the absence of a showing of defense.

In re Donlon, 201-1021; 206 NW 674

Insufficiency of showing. An order removing an administrator will not be vacated (1) when there is no showing that the administrator has any defense to the order, (2) when the extent of his liability to the estate as found by the court is admitted to be correct, (3) when he has held the estate open beyond the time contemplated by law, and (4) when he is largely indebted to the estate and is financially embarrassed.

In re Donlon, 201-1021; 206 NW 674

Reinstating dismissed action—showing of prima facie cause necessary. One seeking to reinstate an action which has been dismissed must do more than establish his ground for vacating the judgment; he must show that he has a valid cause of action or defense to the action in which the judgment was rendered. Held that the failure of plaintiffs to make a prima facie showing of a valid cause of action was fatal to their proceedings.

Thoreson v Central States Co., 225-1406; 283 NW 253

Reinstatement justified. When an action for death benefits was dismissed for failure to prosecute, reinstatement was not an abuse of discretion when it was shown that: there was a valid cause of action; witnesses were difficult to obtain; there was a change in the plaintiff's counsel; the court records erroneously showed an amended answer which might have misled the new counsel; there was no personal neglect on the part of the plaintiff; and a dismissal at that time, under the terms of the policy, prevented having any trial on the merits of the case.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Setting aside dismissal. When an action to collect death benefits was dismissed for want of prosecution, the court was justified in setting aside the dismissal when the petition for reinstatement showed the fact of the accident resulting in death, and that witnesses had been located, and the order of the court complied with a statute in making an adjudication that the plaintiff had a valid cause of action.

Nickerson v Iowa Assn., 226-840; 285 NW 162

12798 Grounds to vacate first tried.

Reinstating dismissed action—showing of prima facie cause necessary. One seeking to reinstate an action which has been dismissed must do more than establish his ground for vacating the judgment; he must show that he has a valid cause of action or defense to the action in which the judgment was rendered. Held that the failure of plaintiffs to make a prima facie showing of a valid cause of action was fatal to their proceedings.

Thoreson v Central States Co., 225-1406; 283 NW 253

12800 Judgment affirmed.

Discussion. See 18 ILR 372—Damages—frivolous appeal

TITLE XXXIV

SUPREME COURT

CHAPTER 553

ORGANIZATION OF SUPREME COURT

12803 Submission to entire court—rules.

Discussion. See 13 ILR 398—Rules of court in Iowa

Consolidation of similar cases. A motion to dismiss an appeal or to set aside the submission thereof will be overruled when made by plaintiffs in a different but similar action, on the ground that the two actions were consolidated, and that no notice of the appeal was served on said plaintiffs, the record revealing that the two actions were consolidated only to the extent of hearing both causes at the same time and on the same evidence.

Mershon v School Dist., 204-221; 215 NW 235

Rules—allowable and unallowable waiver. The supreme court may waive its own rules governing appellate procedure. It may not waive a mandatory statutory rule governing such procedure.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Specified procedure — observance required. Statutory regulations and rules promulgated by the supreme court governing its procedure must be observed.

Harroun v Schultz, 226-610; 284 NW 450

12810 Divided court.

Affirmance by divided court. An affirmance, on appeal of an order setting aside the allowance of a claim in probate, constitutes a final adjudication even tho such affirmance resulted by operation of law from an equal division of the appellate court in the consideration of the appeal.

Doyle v Jennings, 210-853; 229 NW 853

Opinion by divided court. The fact that a final opinion by the supreme court is arrived at by a divided court, e. g., by a vote of five to four, does not, of itself, furnish any reason for repudiating it.

State v Grattan, 218-889; 256 NW 873

Substituted service on nonresident individual. Principle reaffirmed that an individual nonresident who maintains in this state an office or agency, even tho he has never personally been within this state, may be legally personally served in this state with original notice of suit as to matters growing out of such office or agency by service directed to him and made on his agent employed in said office or agency. (§11079, C., '31.)

Goodman v Doherty Co., 218-529; 255 NW 667

12813 Opinions to be filed.

Supreme court decisions in general. See under §§12871, 14010

Discussion. See 18 ILR 567—Arguments by counsel reported

Correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Costs judgment—voluntary payment. A voluntary payment of an entire judgment prior to appeal by the superintendent of banking, tho such judgment be only for costs entered against him by the court, and not merely taxed by the clerk, is such an acquiescence and submission to the judgment as precludes an appeal thereon. (Distinguishing Boone v Boone, 160 Iowa 284.)

Bates v Bank, 223-878; 274 NW 32

Decision—conclusiveness. A final opinion by the supreme court in an equitable action is conclusive as to all inhering subject matters except such as the court may and does specifically except therefrom.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Decisions as precedents. Prior decisions as binding precedents, affirming decisions resulting from divided court, and overruling of former opinions discussed.

Goodman v Doherty & Co., 218-529; 255 NW 667; affirmed 294 US 623; 55 SCR 553

Dictum—what is not. If a question is specifically presented to the supreme court on appeal, the opinion of the court on such question cannot be deemed dictum even tho it was not strictly necessary for the court to pass on the question.

Galvin v Bank, 217-494; 250 NW 729

Dictum—what is not—unquestioned pronouncement. Scant consideration will be given to the claim that a pronouncement of the court was pure dictum when it has stood unchallenged and been acted on for half a century.

Schoenwetter v Oxley, 213-528; 239 NW 118

Opinion by divided court. The fact that a final opinion by the supreme court is arrived at by a divided court, e. g., by a vote of five to four, does not, of itself, furnish any reason for repudiating it.

State v Grattan, 218-889; 256 NW 873

Prior action—appellant not party—res adjudicata—precedent. The judgment in a prior action decided by the supreme court involving the same guardianship is not res adjudicata as against appellant who was not a party to the former action; but what was there said, following the holding in Bookhart v Younglove, 207 Iowa 800, is binding upon this court as a precedent.

Federal Co. v France, 212-1403; 283 NW 460

Rights and remedies of surety—contribution—nonestoppel. A surety who unsuccessfully contends, when sued on bond, that he is not liable for any defalcation occurring prior to the bond—that said bond is a substitute for a prior bond of the same guardian—does not thereby estop himself from enforcing contribution from the sureties on said prior and contemporary bond.

Federal Co. v France, 212-1403; 238 NW 460

CHAPTER 555

PROCEDURE IN THE SUPREME COURT IN CIVIL ACTIONS

12822 Appellate jurisdiction.

ANALYSIS

I NATURE AND FORM OF REMEDY
II JUDGMENTS IN GENERAL
III JURISDICTION IN GENERAL
IV APPEALABLE DECISIONS
V NONAPPEALABLE DECISIONS
VI WHO MAY APPEAL
VII WHO MAY NOT APPEAL

Contempt orders—review on appeal. See under §12550
Denial of right to appeal, due process. See under Art I, §9 (VI)
Effect of appeal on jurisdiction of trial court. See under §12857
Judicial department, constitutional provisions. See under Const, Art V
Jurisdiction of supreme court. See Const, Art V, §4

I NATURE AND FORM OF REMEDY

Appeal dismissed—no bar to second appeal. Voluntary dismissal of an appeal does not preclude the right to again appeal within the statutory time.

Doonan v Winterset, 224-365; 275 NW 640

Correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Equitable and law issues in probate—appellate practice. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Contract to repurchase stock—equitable issues not presented. On appeal from a ruling sustaining plaintiff's demurrer to answer of a foreign corporation, in suit for breach of contract to repurchase from plaintiff its own stock, setting up defense that such purchase would impair its capital, which was prohibited under the statute of the state of its domicile, the supreme court could not exercise its inherent equitable power or give consideration to estoppel, ratification, implied contract, or theory that contract was loan, when proper pleading or proof relating thereto was lacking.

Bishop v Middle States Co., 225-941; 282 NW 305

Due process of law—appeal—absence of. The right of appeal is not a constitutional right, and it is wholly within the power of the legislature to grant or deny it, in either civil or criminal cases. So held under the juvenile court act.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

Jurisdictional defects—nonwaiver. Defects and objections that go to the jurisdiction of the appellate court cannot be waived.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

Probate—allowance of claim—review only by appeal. Errors in a probate proceeding for allowance of a claim as in law actions should be corrected by appeal, and no exceptions nor appeal therefrom being taken, a finding in such probate proceeding is a final adjudication.

In re Davie, 224-1177; 278 NW 616

Right of review—statutes govern appeal. The right of appeal, being purely statutory, is controlled by the statutes in effect at the time the judgment appealed from was rendered.

Ontjes v McNider, 224-115; 275 NW 328

Social welfare board—findings of fact—noninterference by court. The provisions as to powers and authority of the court on appeal, under the provisions of the social welfare law as to old-age assistance, are somewhat analogous to those of the workmen's compensation law, under which the holdings of our court have always been that, when supported by competent evidence, the findings of fact by the

commission will not be interfered with by the court.

Schneberger v Board, 228- ; 291 NW 859

Rulings on motions—correction—certiorari (?) or appeal (?). Certiorari will not lie to review rulings of the court on motions submitted to the court by the hostile litigants, the sole function of the writ being to annul illegal action and not to review mere errors. Appeal is the sole remedy for the correction of the latter.

Morrison v Patterson, 221-883; 267 NW 704

Taxation—collection—court lending aid. The supreme court will, within the limits of the power conferred by the legislature, lend its aid to the collection of the revenues upon which the state must depend.

Bittle v Cain, 224-1332; 278 NW 608

II JUDGMENTS IN GENERAL

Abstract—all-essential recitals. A naked statement, in an abstract on appeal, that the judgment appealed from was "rendered", is fatally insufficient in not revealing the all-essential fact that the judgment was duly entered of record.

Harmon v Hutchinson Co., 215-1238; 247 NW 623

Nonassignment of error—no consideration. Form of decree, complained of in appellant's brief, will not be considered when not assigned as error.

Bredt v Franklin County, 227-1230; 290 NW 669

Court findings on conflicting evidence—conclusiveness. Where different inferences reasonably may be drawn from undisputed facts and circumstances, the drawing of any one of such inferences by the court in a trial without a jury is a final finding which will not be disturbed on appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Decretal portion inconsistent with recital of facts. The decretal portion of a decree, when in conflict with recital of facts, takes precedence, and the decree is not void because of the inconsistency, and appeal lies only on the decretal portion of the decree that is final judgment.

Higley v Kinsman, (NOR); 216 NW 673

Dismissal—judgment appealed from, not entered—no appeal. The supreme court cannot consider an appeal where the record fails to show any judgment of record from which an appeal could be taken, when such appeal purports to be from a judgment.

Lotz v United Markets, 225-1397; 283 NW 99

Dismissal—insurer's attorney also defendant—sufficient judgment for appeal. In an action on an accident policy, the insured, an attorney, who makes the insurer's attorney a defendant along with the company, may not dismiss the company-attorney's appeal on the ground that there is no judgment against such company-attorney, when the judgment entry is against the company and "any person acting in its behalf".

Eller v Guthrie, 226-467; 284 NW 412

"Final decision." A statutory declaration that a decision by the court shall be "final" may carry the clear meaning that such decision is not an appealable decision.

State v Webster Co., 209-143; 227 NW 595

From final judgment—presumption. When the abstract recites, generally, the taking and perfecting of an appeal, and the jurisdiction of the appellate court is not attacked in written form as provided by §12885, the appeal will be presumed to be from the final judgment, even tho the abstract does not show the entry of a final judgment.

In re Kahl, 210-903; 232 NW 133

What constitutes judgment—entry in record book essential. Neither the mental conclusion of the judge presiding at a trial, nor the oral announcement of such conclusion, nor his written memorandum entered in his calendar, nor the abstract entered in the judgment docket, constitutes a judgment. A judgment cannot be said to be entered until it is spread by the clerk upon the record book.

Lotz v United Markets, 225-1397; 283 NW 99

Necessity for separate appeals. Where objections to an administrator's report are ruled on in part by two different judges and separate judgments are entered, an appeal from one of the judgments does not bring up for review the judgment from which no appeal has been taken.

In re Atkinson, 210-1245; 232 NW 640

Review—scope and extent. A party may not have a review of that part of a judgment which pertains to the costs when such part is not within the scope of his appeal.

Chicago, Burl. Ry. v Board, 206-488; 221 NW 223

Right to review—voluntary compliance with costs judgment. A voluntary payment of an entire judgment prior to appeal by the superintendent of banking, tho such judgment be only for costs entered against him by the court, and not merely taxed by the clerk, is such an acquiescence and submission to the judgment as precludes an appeal thereon. (Distinguishing Boone v Boone, 160 Iowa 284.)

Bates v Nichols, 223-878; 274 NW 32

Where reasonable minds disagree. In action for damages to plaintiff's automobile, judgment will be affirmed, on appeal, where reason-

able minds might reasonably disagree on the fact issues.

Schenk v Moore, 226-1313; 286 NW 445

III JURISDICTION IN GENERAL

Supreme court without original jurisdiction. The supreme court has no original jurisdiction.

Sch. Dist. v Samuelson, 220-170; 262 NW 169

Supreme court not trier of facts. The supreme court may not sit as a trier of facts and substitute its judgment as to the amount of damages to be awarded, for the judgment of the jury.

Stoner v Hy. Com., 227-115; 287 NW 269

Social welfare board—administrative duties—nonjudicial review. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

Appeal from unrecorded order — no complaint by appellant. After the unsuccessful termination of his appeal, an appellant may not later challenge the jurisdiction of the supreme court to entertain the appeal because the order appealed from was not spread upon the district court records.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Appeal statutory—unaffected by consideration of expediency. The right to appeal in any particular case being entirely governed by statute is not affected by fact that determination of appeal would facilitate and expedite trial on the merits in the lower court.

Ontjes v McNider, 224-115; 275 NW 328

Appearance to fatally defective service. Appearance in an appellate tribunal for the purpose of objecting because the notice of appeal was not served as required by law does not confer jurisdiction on the tribunal to hear the appeal.

Casey (Town) v Hogue, 204-3; 214 NW 729

Assignment of errors necessary. In a law action tried to a jury, jurisdiction of supreme court on appeal is confined to that of a court for correction of errors and, to invoke its jurisdiction, a proper assignment of error is necessary.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Consent to jurisdiction. Parties to litigation cannot, by agreement, confer jurisdiction upon the supreme court.

Hampton v Railway, 216-640; 249 NW 436

Continuing jurisdiction of lower court. An appeal simply from an order appointing a receiver in auxiliary proceedings to enforce a judgment leaves all other portions of said proceedings within the jurisdiction of the district court.

Wade v Swartzendruber, 206-637; 220 NW 67

Dismissal—improper procedure. The contention that the appellate court has no jurisdiction to entertain an appeal must be presented by motion to dismiss (§12886, C., '27), and not by a discussion in appellee's argument.

First T. & S. Co. v Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Jurisdiction on appeal—not conferred by consent—dismissal. Where an unauthorized appeal has been taken, it is the duty of the court upon ascertaining the situation to dismiss the appeal on its own motion. Jurisdiction of the court is statutory and cannot be conferred by consent of the litigants.

Eby v Phipps, 225-1328; 283 NW 423

Lack of jurisdiction—raised at any time—not conferred by consent. Objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and, when the law withholds from a court authority to determine a case, jurisdiction cannot be conferred, even by consent of parties.

Johnson v Purcell, 225-1265; 282 NW 741

Motion to dismiss appeal determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Requirements for valid decree. To be valid and binding, the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

Writ of prohibition—right of appeal. The jurisdiction of the supreme court to issue a writ of prohibition, commanding a district court to discontinue all assumption of jurisdiction over named actions pending in said latter court, is not necessarily defeated because the beneficiaries of said writ would have a right to appeal from an adverse judgment.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Wrong form of action below. Supreme court cannot assume jurisdiction on appeal where the matter in issue is not such as was triable in the form of action brought in the trial court below.

Anderson v Meier, 227-38; 287 NW 250

IV APPEALABLE DECISIONS

Court order based on unconstitutional statute—voidability by appeal. When the district court made an order extending the period for redemption of land on which a mortgage had been foreclosed, and the supreme court later declared the statute under which the extension was granted to be unconstitutional, the order granting such extension was not void, but was voidable by reversal on appeal, and when no appeal was taken, the order could not be attacked.

New York Ins. v Breen, 227-738; 289 NW 16

Decisions reviewable—motion to strike—ruling inheres in judgment. An order striking portions of a pleading inheres in the judgment and is presentable on appeal therefrom.

Doonan v Winterset, 224-365; 275 NW 640

Dismissal of action. A final judgment dismissing plaintiff's petition is appealable.

First Sec. Co. v U. S. Gyp., 211-1019; 233 NW 137; 73 ALR 1196

Enforcing uncontroverted part of judgment—effect. A plaintiff who contends for a lien on both of two tracts of land, and is conceded by all parties a lien on one of said tracts, may enforce his lien on said one tract, and thereafter maintain an appeal from the judgment denying his lien on the remaining tract.

Luglan v Lenning, 214-439; 239 NW 692

Exclusion of question—necessity to show prejudice. No reviewable error results from excluding a question which does not, in and of itself, reveal that which the questioner is seeking to show, and the court is not, by proper offer, otherwise enlightened.

Schooley v Efnor, 202-141; 209 NW 408

Independent action reopening estate—judgment appealable. A judgment for plaintiff in a separate, independent action in equity, brought not against an administrator but against the surviving spouse and heir, seeking to set aside the order in probate approving the final report and closing the estate, is a final judgment such as will entitle the defendant to appeal.

Federal Bank v Bonnett, 226-112; 284 NW 97

Motion to set aside default—timeliness of appeal. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

V NONAPPEALABLE DECISIONS

Appellant not adversely affected by error—no review. If the appellant is not adversely affected by the lower court's decision, even if erroneous, nothing is left for review by the appellate court on that appeal.

In re Keeler, 225-1349; 282 NW 362

Consent decree of reformation—nonreviewable. In an action where a consent judgment and decree is entered granting reformation of mortgages respecting description of lands involved, and no exception to the decree is entered nor appeal taken, the propriety of the court's granting such relief is not properly before supreme court on appeal from judgment and decree foreclosing such mortgages.

State Bank v Mapel, 226-1328; 286 NW 517

General appearance after stipulation—question first raised on appeal—no review. A stipulation purported to have been entered into between parties, after which it is claimed defendants filed a general appearance, will not be considered on appeal when not set out in the abstract and not called to the attention of the trial court. Matters not presented to the lower court will not be reviewed.

Johnston v Bank, 226-496; 284 NW 393

Nonappeal from inferential rulings. When the court finds in favor of the defendant on a specifically named defense, the inference will be indulged that the court found against him on his cross-petition for relief which is affirmative, and in the nature of an independent cause of action. It follows that defendant is not entitled, on an appeal by plaintiff, to a review of the inferential rulings on said affirmative and independent matters.

Toedt v Bollhoefer, 206-39; 218 NW 56

Motions—ruling on motion as adjudication—unallowable review. An order overruling plaintiff's motion (1) to strike an answer, and (2) for judgment nil dicit (assuming the propriety of such procedure) constitutes an adjudication that plaintiff has no legal right to a judgment on the pleadings as they then stand; and plaintiff has no right later to present, to another judge of the same court, a motion for judgment on the same pleadings, and said latter judge has no right to review the rulings of the former judge by sustaining said latter motion.

Taylor v Canning Corp.,218-1281; 257 NW 353

Order setting aside default. An order setting aside a default is not appealable.

Kirk v Betz, 216-1020; 250 NW 182

Preservation of error necessary—motor vehicles—insurance comment on voir dire. In a motor vehicle damage action, error may not be predicated on references to insurance in jurors' examination when no record is preserved for appeal.

McCornack v Pickerell, 225-1076; 283 NW 899

Simple finding of fact. An appeal will not lie from a so-called judgment which in fact is

only a statement or recital of findings by the court.

Harmon v Ice Cream Co., 215-1238; 247 NW 623

VI WHO MAY APPEAL

Appeal in name of deceased party. Altho plaintiff died during pendency of action below, supreme court took jurisdiction of appeal taken in name of such decedent, because parties treated cause as one properly before the court and because it was a case where court's constitutional authority could be invoked.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Dismissal—expiration of official term. An appeal in an action in which the county is the real party in interest will not be dismissed because the terms of office of the official party defendants have expired.

First Bank v Burke, 201-994; 196 NW 287

Order for more specific statement. A plaintiff may except to an order sustaining a motion for a more specific statement and obtain a review of such ruling by refusing to plead over and appealing from the final judgment dismissing his action. (See under §§12827, 12828.)

Depping v Hansmeier, 202-314; 208 NW 288

Receiver. The receiver of an insolvent bank has a right to appeal from an order which grants to a depositor an equitable preference over all other creditors in the payment of his claim.

Andrew v Bank, 205-1248; 218 NW 24

Receivership creditor. Depositors and creditors in a bank receivership have a right to appeal from an order of court which grants to a depositor an unallowable preference in the payment of his deposits.

Schubert v Andrews, 205-353; 218 NW 78

VII WHO MAY NOT APPEAL

Consent judgment. An election contestant may not appeal from the judgment of the contest board holding the election in question illegal and providing for the calling of a new election by said board, when he consented to the entry of such judgment; nor may an estoppel to question such appeal be based upon the fact that the official board of which appellees were members refused to recognize the validity of the new election called by the contest board.

Leslie v Barnes, 201-1159; 208 NW 725

Contempt in violation of injunction — discharge. Upon the discharge of one accused of contempt in violating an injunction, an appeal may not be maintained under the title under which the injunction was obtained.

Cedar Falls Bank v Boslough, 218-502; 255 NW 665

Nature of remedy—no constitutional right. Principle reaffirmed that a litigant has no constitutional right to an appeal.

Van der Burg v Bailey, 207-797; 223 NW 515

Petitioners for drainage district. Petitioners for the establishment of a drainage district may not maintain an appeal from an order setting aside the establishment by the board of supervisors of a drainage district when, up to the time of the entry of the said order of the district court, the board of supervisors and the drainage district were the sole defendants in the proceedings.

Chi., Burl. Ry. v Board, 206-488; 221 NW 223

12823 Appeals from orders.

ANALYSIS

I ORDERS IN GENERAL
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I ORDERS IN GENERAL

Appeal from unrecorded order—no complaint by appellant. After the unsuccessful termination of his appeal, an appellant may not later challenge the jurisdiction of the supreme court to entertain the appeal because the order appealed from was not spread upon the district court records.

Lincoln Bank v Brown, 224-1256; 278 NW 294

Belated presentation of defense. In summary proceedings between an attorney and a client, the defense that a contract between the parties was champertous, or against public policy, must be presented in some manner in the trial court, even tho such summary proceedings are heard by the trial court without written pleadings.

Norman v Bennett, 216-181; 246 NW 378

Constitutionality of mortgage redemption statute—first raised on appeal. When the constitutionality of a statute permitting the extension of the time for redemption of land upon which a mortgage had been foreclosed was not put in issue at a hearing at which the district court granted an extension, the order granting the extension became the law of the case, and the question of constitutionality could not first be raised in the supreme court in another action after the redemption had been made.

New York Ins. v Breen, 227-738; 289 NW 16

Court order based on unconstitutional statute—voidability by appeal. When the district court made an order extending the period for

redemption of land on which a mortgage had been foreclosed, and the supreme court later declared the statute under which the extension was granted to be unconstitutional, the order granting such extension was not void, but was voidable by reversal on appeal, and when no appeal was taken, the order could not be attacked.

New York Ins. v Breen, 227-738; 289 NW 16

Failure of cross-petitioners to appeal between each other. Defendant cross-petitioners in an action to enforce a contract for the sale of land, among whom judgments have been rendered on assignments and assumption of the contract sought to be enforced, may not have such judgments reviewed by simply appealing from the judgment rendered in favor of plaintiff.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Garnishment—uncontested order—appeal requirements not waived. The fact that a receiver in a foreclosure proceeding does not resist an order directing him to withhold sufficient funds to satisfy a judgment creditor will not amount to an adjudication of creditor's rights in the funds nor constitute a waiver of the statute regulating time to appeal from a release of a garnishment, nor confer jurisdiction on the appellate court to review the dismissal of the garnishment proceedings, since such jurisdiction cannot be conferred by consent of the parties.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

General appearance after stipulation—question first raised on appeal—no review. A stipulation purported to have been entered into between parties, after which it is claimed defendants filed a general appearance, will not be considered on appeal when not set out in the abstract and not called to the attention of the trial court. Matters not presented to the lower court will not be reviewed.

Johnston v Bank, 226-496; 284 NW 393

Lien—unauthorized order. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Refusal to grant old-age assistance—fraud—abuse of discretion—review. Review by the supreme court on the abstract and transcript of evidence of the action of the state board of social welfare in refusing to reinstate claimants to old-age assistance relief because of son's ability to support them held not to disclose either fraud or an abuse of discretion.

Schneberger v Board, 228- ; 291 NW 859

Nonpermissible enlargement. An appeal specifically from the refusal of the court to strike a petition cannot be deemed enlarged so as to stand as an appeal from the final judgment as well as from the refusal to strike, simply because appellee on appeal (1) amends the appellant's abstract and shows that subsequent to the taking of the appeal, appellant answered the petition and proceeded to trial, and (2) files an argument as to the merits of the final judgment.

Iowa N. Bank v Raffensperger, 208-1133; 224 NW 505

Order for appearance of execution defendant. An order in proceedings auxiliary to execution, for the appearance and examination of the execution defendant and his wife, is not appealable, even tho the wife is not an execution defendant.

Lehigh Co. v Gjellefald, 205-778; 218 NW 475

Order overruling objections to interrogatories—not appealable. An order overruling objections and exceptions to interrogatories attached to a plaintiff's petition in an action for accounting is not an order from which an appeal will lie.

Eby v Phipps, 225-1328; 283 NW 423

Order overruling motion for more specific statement. An appeal will lie directly from an order overruling a motion to require plaintiff, in an action to recover the contract price for medical services rendered by him, to state whether at the time of rendering the services he was duly licensed to practice medicine; otherwise as to requiring plaintiff to set forth the contents of the formula used by plaintiff tho said formula was a subject matter of the contract.

Hoxsey v Baker, 216-85; 246 NW 653

Order to be terminated if statute invalid—not automatic termination. A court order extending the time of redemption of land on which a mortgage had been foreclosed, providing that, if the statute under which the order was entered be held invalid, the order "shall be terminated", did not automatically revoke the order when the statute was declared unconstitutional, but could be terminated only by action of the court.

New York Ins. v Breen, 227-738; 289 NW 16

Rulings subsequent to final judgment. An appeal solely from a definite and specified final judgment precludes review on appeal of adverse rulings subsequent to the entry of said judgment, striking appellant's exceptions to instructions and motion for a new trial.

Schooley v Efnor, 202-141; 209 NW 408

Power of judge at chambers. An ex parte order of a judge at chambers to the effect that a party to an action may, on the trial, use a

I ORDERS IN GENERAL—concluded

transcript of the testimony taken in another and former action is a nullity.

Kostlan v Mowery, 208-623; 226 NW 32

Right of review—estoppel. An order which permits the filing of an issue-changing amendment will not be reviewed on appeal when it appears that appellant rejected an offered continuance.

Kellar v Lindley, 203-57; 212 NW 360

Sufficiency of recitals. A notice of appeal which describes the proceeding by proper title and the order appealed from by proper date of rendition is all-sufficient, and brings up for review each and every feature of the order. So held where the final determination of the court embraced two orders, one germane to the proceeding before the court and one wholly nongermane.

In re Mann, 208-1193; 225 NW 261

Waiver of error by pleading over. Plaintiff may not predicate error on orders for more specific statement with which orders he has complied by pleading over.

Pride v Kittrell, 218-1247; 257 NW 204

II ORDERS AFFECTING SUBSTANTIAL RIGHT

Belated filing of claim. Appeal will not lie from an order which grants to a claimant in receivership proceedings the naked right to file and prove his claim after the time originally fixed for the filing of claims.

In re Bank, 203-1399; 214 NW 561

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Clapp, 221-1270; 268 NW 56

Certiorari not available—appealable rulings on motions. The sole function of certiorari is to annul illegal action and not to review mere errors arising out of rulings on motions when by appeal there is a remedy for the correction of the latter.

Kommelter v Dist. Court, 225-273; 280 NW 511

Refusal to quash certiorari. An appeal will not lie from an order refusing to quash a writ of certiorari.

Riley v Board, 207-177; 222 NW 403

Order setting aside default. An order setting aside a default is nonappealable, a fact which the appellate court will enforce on its own motion.

Barber v Shattuck, 207-842; 223 NW 864
Baker v Ry. Exp. Co., 207-1350; 224 NW 513
Welty v Ins. Assn., 211-1135; 235 NW 80
Wagoner v Ring, 213-1123; 240 NW 634
Kirk v Betz, 216-1020; 250 NW 182

Motion to set aside default—timeliness of appeal. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

Improper to review setting aside of default—appeal proper. Appeal, not certiorari, is the proper method to proceed to attack an alleged erroneous order of the municipal court in sustaining a motion to set aside a default judgment, where the court had jurisdiction to enter the order.

Weston v Allen, 225-835; 282 NW 278

Order noted on calendar. A party may not appeal from an order in the form of a mere notation on the judge's calendar, which order is later incorporated into the final decree.

Brotherhood v Ressler, 216-983; 250 NW 169

Defendant—right to review tho not present at trial. Defendant in foreclosure proceedings may appeal from, and have a review of, an order (duly excepted to) appointing a receiver, when his answer joined issue on the plaintiff's allegation for such appointment, even tho he introduced no evidence and did not attend the trial when the receiver was appointed.

First N. Bk. v Witte, 216-17; 245 NW 762

Directing verdict—stricken pleading of settlement—nonreview. Since a settlement must be pleaded, the overruling of a motion for directed verdict alleging a settlement of the action is not reviewable when the pleading setting forth the settlement has been ordered stricken and such order stands unchallenged.

Pearson v Butts, 224-376; 276 NW 65

Order overruling motion for directed verdict. An order overruling a motion to direct a verdict is not appealable.

Benson v Weitz' Sons, 208-397; 224 NW 592

Posted signs of damage settlement offer—denying directed verdict based on stricken pleadings. Denying a directed verdict based

on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Motion to dismiss—failure to stand on motion. An order overruling a motion to dismiss an equitable action is not appealable unless the movant elects to stand on his motion or suffers judgment to be rendered against him.

Frazier v Wood, 215-1202; 247 NW 618

Motion to dismiss. When a motion to dismiss an equitable action is sustained, the plaintiff may (1) stand on his pleadings and appeal, or (2) amend.

Swartzendruber v Polke, 205-382; 218 NW 62

Overruled motion to dismiss equitable action —conditions attending appeal. An appeal will not lie from an order overruling a motion to dismiss an equitable action on the ground of misjoinder of parties unless the record shows (1) an election to stand on the pleading, or (2) that judgment was entered against the movant.

Fed. Sur. v Morris Plan, 209-339; 228 NW 293

Dismissal of equitable action on motion. An appeal will not lie from a ruling which sustains defendant's motion to dismiss plaintiff's petition in equity as the order of dismissal does not, in such case, terminate the litigation and is not, therefore, a final judgment.

Hawthorne v Andrew, 208-1364; 227 NW 402

Motion in equity to dismiss. An appeal will not lie from an order in an equity cause sustaining a motion to dismiss made at the close of plaintiff's testimony.

Bridges v Sams, 202-310; 202 NW 558

Order to strike and dismiss. An order overruling a motion to strike a pleading, and to dismiss parties, because of the improper joinder of actions and of party defendants, is appealable.

Ontjes v McNider, 218-1356; 256 NW 277

Motion to dismiss garnishee. On an appeal from an order overruling a motion to dismiss a garnishee, the burden of sustaining the motion was on the garnishee.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Order as to indictments returned. An order of the district court refusing a hearing of an application to compel the county attorney to file and enter upon the appearance docket indictments alleged to have been returned against the applicant, is appealable, and therefore certiorari will not lie.

Hoskins v Carter, 212-265; 232 NW 411

Ruling as to legal settlement of insane patient. No appeal lies from a decision of the trial court on a duly joined issue as to the legal settlement of an insane inmate of a state hospital for the insane.

State v Webster Co., 209-143; 227 NW 595

Overruled motion for mental examination. An order overruling defendant's motion that plaintiff-guardian be compelled to produce his ward and that she be examined as to her mental condition is not appealable.

Scott v Seabury, 216-1214; 250 NW 468

Order approving lease. An order approving a lease in accordance with a foreclosure decree appointing a receiver is not reviewable on a purported appeal from the order itself. The validity of such order necessarily depends on the validity of the decree from which it springs.

Union Ins. v Eggers, 212-1355; 237 NW 240

Misjoinder of parties. The action of the court in overruling a motion to set aside an ex parte order making movant a party to a pending action is appealable, the motion being based on the ground of misjoinder of parties.

Irwin v Bank & Trust, 218-961; 256 NW 681

Misjoinder — wrong calendar — waiver. A defendant in equity who files answer after the overruling of his motion (1) to strike alleged misjoined causes of action, and (2) to transfer from equity to law, may not maintain an appeal from the ruling on his said motion.

Thompson v Erbes, 221-1347; 268 NW 47

Order refusing separation of misjoined causes. The court, on proper motion, must correct an unallowable joinder of causes of action and an order refusing so to do is appealable.

Ellis v Bruce, 215-308; 245 NW 320

Motions—sustained if any ground is good. When a motion to strike an application by an executor to have a clerk's approval of claims against an estate set aside was based on several grounds and when the granting of the motion was assailed as to only one ground, on an appeal, the supreme court was precluded from reversing the case since, if the motion was good on any of its grounds, the ruling below was correct.

In re Baker, 226-1071; 285 NW 143

Motion for more specific statement. Orders which simply settle the issues in a case (e. g., an order overruling a motion for a more specific statement) are not ordinarily appealable.

So. Sur. v Salinger, 213-188; 238 NW 715

Motion for more specific statement. An order overruling a motion for a more specific statement of allegations of negligence is not appealable when the allegations so attacked

II ORDERS AFFECTING SUBSTANTIAL RIGHT—continued

are virtually nugatory—of such nature that evidence in purported support thereof will not be admissible on the trial.

Ferguson v Cannon, 214-798; 243 NW 175
See Dorman v Credit Co., 213-1016; 241 NW 436

Overruling motion for more specific statement. An order overruling a motion for a more specific statement is appealable when the ruling deprives the movant of a right which cannot be protected by appeal from the final judgment.

Fay v Dorow, 224-275; 276 NW 31

Order overruling motion for more specific statement. An appeal will lie directly from an order overruling a motion for a more specific statement of a cause of action, when the ruling deprives the movant of a right which cannot be protected by an appeal from the final judgment.

Dorman v Credit Co., 213-1016; 241 NW 436

Negligence—general allegation—reservation of ground of review—standing on motion to strike or make specific. To preserve an objection that an allegation of negligence was too general and indefinite to constitute basis of cause of action, a defendant should stand on its motion to strike and for more specific statement. Failing in this and filing its answer, it waived any error of court in overruling motion. A cause of action should be sufficiently precise to enable the defendant to prepare his defense.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Order refusing judgment on pleadings. An order refusing a judgment on the pleadings is not appealable.

Benson v Weitz' Sons, 208-397; 224 NW 592
Frazier v Wood, 215-1202; 247 NW 618

Order refusing judgment against vouchee. An order refusing a judgment against a vouchee (who was, in substance, a party) is appealable.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Ordering production of books. An order for the production of books is not appealable.

Stagg v Bank, 203-84; 212 NW 342

Order in re public deposits. An appeal lies from an order of court which adjudges the amount of public funds on deposit in an insolvent bank for the purpose of payment out of the "state sinking fund for public deposits".

Winnebago Co. v Horton, 204-1186; 216 NW 769

Order overruling objections to referee's report. An order overruling objections to the report of a referee in partition seems to be appealable.

Peterson v Younker, 219-32; 257 NW 442

Peremptory order appointing referee in accounting. An order appointing a referee to take an accounting without first determining defendant's plea that he was under no legal duty to account, is appealable.

Benson v Weitz' Sons, 211-489; 231 NW 431

Simple finding of fact. An appeal will not lie from a so-called judgment which in fact is only a statement or recital of findings by the court.

Harmon v Hutchinson Co., 215-1238; 247 NW 623

Special appearance—standing on. In appealing from an adverse ruling on the issues raised by a special appearance, it is not necessary for appellant especially to elect to stand upon his special appearance, or to suffer judgment to be entered against him.

Irwin v Bank & Trust, 218-470; 254 NW 806

Order overruling special appearance. An order of the district court overruling a special appearance, and thereby sustaining the jurisdiction of the court, is appealable.

In re Sioux City Yards, 222-323; 268 NW 18

Motion to strike—ruling inheres in judgment. An order striking portions of a pleading inheres in the judgment and is presentable on appeal therefrom.

Doonan v Winterset, 224-365; 275 NW 640

Nonappealable motion to strike. In a partition action the overruling of a motion to strike various explanatory allegations of a petition, being interlocutory and not going to the merits, is not appealable.

Lunt v Van Gorden, 224-4; 275 NW 579

Overruled motion to strike. An order overruling a motion to strike alleged immaterial or redundant allegations, or to strike matters which do not involve the merits of the case, is not appealable.

Morrison v Clinic, 204-54; 214 NW 705
Benson v Weitz' Sons, 208-397; 224 NW 592

Overruled motion to strike—standing on. An order overruling a motion to strike which is not the equivalent of a demurrer imposes no necessity on the appealing party to affirmatively stand on his motion and allow judgment to be entered against him on the merits.

Ontjes v McNider, 218-1356; 256 NW 277

Striking cross-petition. An order in foreclosure proceedings striking a defendant's cross-petition from the files is not appealable when defendant's answer, which remained on file, properly pleaded and prayed for the sole and identical relief pleaded and prayed for in said cross-petition.

Brotherhood v Ressler, 216-983; 250 NW 169

Order striking portion of answer. An order striking part of an answer is not appealable when defendant fails to stand upon his pleadings or to allow final judgment to be entered against him. In other words, he may not maintain an appeal and at the same time maintain his right in the trial court to amend.

Joslin v Bank, 213-107; 238 NW 715

Order striking defense. In an action to recover for death of guest resulting from motorcycle collision with automobile, an order striking allegation of defendant-car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Order overruling motion to strike. An order overruling a motion to strike a pleading is appealable when the ruling goes to the very merits of the controversy.

State v Murray, 217-1091; 252 NW 556

Ruling on motion to strike. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Denial of change of venue. While direct and immediate appeal will not lie from an order denying a change of venue, yet such order is reviewable on appeal from a subsequent order refusing to strike an improperly joined cause of action.

Smith v Morrison, 203-245; 212 NW 567

III INTERMEDIATE ORDERS INVOLVING MERITS

Denial of separate trial. An order refusing a separate trial to one of two joint defendants is appealable when it materially affects the "final decision".

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Escheat proceeding — striking allegations asking for new administrator—no appeal—dismissal. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Nonreviewable fact question. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Order striking defense. In an action to recover for death of guest resulting from motorcycle collision with automobile, an order striking allegation of defendant-car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Stay of proceedings—interlocutory orders. On appeals from intermediate or interlocutory orders in the trial court application should be made, in the first instance, to the district court for an order staying proceedings in the trial court pending the appeal.

Dorman v Credit Co., 213-1016; 241 NW 436

IV FINAL ORDERS IN SPECIAL ACTIONS

Appeal by assignee of beneficiary's interest. In probate proceeding on objection to executor's report, an appeal by an assignee of a beneficiary's interest in the estate will not be dismissed where he fails to serve notice of appeal upon beneficiary as a co-party when the beneficiary cannot be adversely affected by the supreme court's decision on the assignee's appeal.

In re Sheeler, 226-650; 284 NW 799

Appeal as sole remedy. An order which sets aside a judgment some five years after its rendition, on the asserted ground that the cause had never been set for trial after issue had been joined, such order being made on motion, service, and appearance of all parties, is a finality, in the absence of an appeal therefrom.

Dickson Co. v Dist. Court, 203-1028; 213 NW 803

Order sustaining default annulment. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of

IV FINAL ORDERS IN SPECIAL ACTIONS —concluded

defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Dual remedies—appeal or mandatory order. Where, after reversal and remand in an equity cause, the trial court, on procedendo, enters a judgment which it has no discretion to enter, the defendant may apply directly to the appellate court for a mandatory order to the trial court to obey the procedendo, even tho defendant might accomplish the same result by appealing from the entry of said judgment.

Ronna v Bank, 215-806; 246 NW 798

Order denying motion. Principle reaffirmed that an order of court denying a motion is appealable when such denial involves the merits or materially affects the final decision of the action.

Poole v Poole, 221-1073; 265 NW 653

Right to perfect appeal. In probate proceedings an administrator is entitled to appeal from a probate decree qualifiedly approving a final report of the preceding executor, notwithstanding he served no notice of appeal upon the beneficiaries under the will as co-parties, where he represents the beneficiaries, and their relations are not antagonistic, and where, tho they are interested in the outcome, they are not strictly co-parties.

In re Sheeler, 226-650; 284 NW 799

V PROVISIONAL REMEDIES

Granting provisional remedy. A provisional remedy is one which is provided for present needs, or for the occasion; that is, one adapted to meet a particular exigency, e. g., the appointment of a receiver in mortgage foreclosure. It follows that an order granting such a remedy is appealable.

Davenport v Thompson, 206-746; 221 NW 347

VI INJUNCTIONS

Violation and punishment—discharge—unallowable appeal. Upon the discharge of one accused of contempt in violating an injunction, an appeal may not be maintained under the title under which the injunction was obtained.

Cedar Falls N. Bank v Boslough, 218-502; 255 NW 665

Temporary injunction—vaccination of school children. The appellate court will be slow to interfere with an order by the trial court refusing a temporary injunction against the enforcement by a school board of its order which temporarily excluded unvaccinated pupils from the public school; and especially will the appellate court decline to disturb such refusal when it affirmatively appears that the order of the board has expired ex vi termini.

Baehne v School Dist., 201-625; 207 NW 755

VII ATTACHMENTS

Garnishment—dissolution—time to perfect appeal. Under mandatory statute, a garnishing creditor whose levy is discharged by court order must, when such order is made, announce his intent to appeal therefrom followed by perfection of the appeal within two days, and his noncompliance therewith is fatal.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

VIII NEW TRIAL

Court's inherent power to set aside verdict. Where a party has not received a fair and impartial trial, the trial court has inherent power to set aside the verdict.

Brunssen v Parker, 227-1364; 291 NW 535

Appeal by appellee. Whether on appeal from an order granting a new trial on an untenable ground, appellee may save the ruling by taking a cross-appeal, and show that the trial court erred in not sustaining the motion for a new trial on grounds assigned by him that were tenable, quaere.

Kessel v Hunt, 215-117; 244 NW 714

See State v School Dist., 188-959; 176 NW 976

Decisions reviewable—restricting appeal to matters in notice. A notice of appeal specifying only the overruling of a motion for a new trial restricts the appeal to such matters as were raised in the trial court on said motion.

Shultz v Shultz, 224-205; 275 NW 562

Questions reviewable. A party who appeals from an adverse ruling on his motion for a new trial may have a review of the grounds specifically assigned by him in his said motion even tho he does not appeal from the main or final judgment.

Spaulding v Miller, 216-948; 249 NW 642

Discretion of court — automobile collision. Granting a new trial in an intersection collision case being largely discretionary with the trial court will not be interfered with on appeal unless an abuse of discretion appears.

Eby v Sanford, 223-805; 273 NW 918

Abuse of discretion necessary for reversal. Where evidence is conflicting, the granting of a new trial because the verdict is contrary to the evidence will not be reversed unless an abuse of discretion by the trial court appears.

Brunssen v Parker, 227-1364; 291 NW 535

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

Dual appeals in same case. Where, after rendition of a final judgment, and after a motion for a new trial is overruled, separate appeals are perfected on different dates (1) from the main judgment and (2) from the order as to new trial, the latter appeal will be deemed properly before the court, even tho the appeal from the main judgment is dismissed because of failure to file abstract within 120 days. Whether, under such circumstances, the appeal from the main judgment worked a waiver of an appeal from the order denying a new trial (if the point had been presented) quaere.

In re Fetterman, 207-252; 222 NW 872

Granting or refusing—reviewability. A ruling by the trial court granting a new trial will be reviewed on appeal, and, if erroneous, will be reversed, altho the supreme court will interfere more readily when the new trial is refused than when it is granted.

Hupp v Doolittle, 226-814; 285 NW 247

Inconsistent and improbable evidence. A new trial was properly granted by lower court when defendant secured a verdict on evidence that abounded with inconsistencies and improbabilities, and ruling cannot be disturbed on appeal unless new trial could not have been sustained on any of the grounds urged, or abuse of discretion by court.

Christensen v Howson, (NOR); 226 NW 34

Directed verdict refused—findings by jury reviewed. In determining whether or not the court erred in overruling a motion for a directed verdict at the close of the testimony and in overruling a motion for a new trial on the ground that the evidence did not sustain the verdict, the supreme court is not to determine the facts, but is limited to a consideration of what the jury is warranted in finding the facts to be.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Legal and discretionary questions distinguished. Principle recognized that if a motion for a new trial is disposed of on a distinct legal proposition as distinguished from a matter of discretion, the ruling is reviewable and reversible on appeal on the same basis as other rulings on distinct legal propositions are reviewable and reversible.

Manders v Dallam, 215-137; 244 NW 724

Necessity of contesting grounds. Where several grounds were stated in a motion for a new trial, there could be no reversal of the order granting such new trial when the appellant made no attempt to show that none of the grounds were good.

Olinger v Tiefenthaler, 226-847; 285 NW 137

New trial—sustaining generally. An order sustaining generally a motion for new trial will be upheld if any of the grounds therefor are good.

Eby v Sanford, 223-805; 273 NW 918

Order for new trial. An order granting a new trial in favor of a defendant served by publication only is appealable.

Clark v Robinson, 206-712; 221 NW 217

IX DEMURRERS

Habeas corpus—adverse ruling on demurrer—conditions for review. Where a defendant was sentenced and imprisoned upon failing to plead after his demurrer to the indictment was overruled, an appeal will be dismissed from an adverse ruling on demurrer in a habeas corpus action to test the validity of such imprisonment, when the defendant does not (1) elect to stand upon his pleadings, or (2) suffer judgment to be entered against him in the lower court.

Besch v Haynes, 224-166; 276 NW 13

Answer after appeal on ruling on demurrer. A defendant who assumes to appeal from an adverse ruling on his demurrer without standing on his demurrer, and without suffering a judgment to be entered against himself, has a right to file an answer after his appeal has been dismissed and before default is entered.

Gow v Dubuque County, 213-92; 238 NW 578

Conditions attending appeal. An appeal does not lie from a ruling which sustains a demurrer unless the defeated party does one of two things, to wit: (1) elects to stand on his pleadings, or (2) suffers final judgment to be entered against him.

Devoe v Dusey, 205-1262; 217 NW 625
Hawthorne v Andrew, 208-1364; 227 NW 402
Neese v Furry, 209-854; 227 NW 510
Porterfield v Lodge, 212-1181; 236 NW 381
Fehrman v Sioux City, 216-286; 249 NW 200

Conditions precedent to appeal. An appeal from a ruling sustaining a motion to strike a plea of the statute of limitation in probate proceedings will not lie when the complainant fails to stand on the plea and fails to permit judgment to go against him.

In re Delaney, 207-451; 223 NW 486

IX DEMURRERS—concluded

Final judgment or election to stand on pleadings. In an action to recover against the estate of a deceased executor for losses caused by improper handling of an estate, the plaintiffs had no right to appeal from a ruling sustaining a demurrer filed by the defendants when the plaintiffs did not elect to stand on the pleadings nor suffer final judgment to be entered against them.

Hayes v Selzer, 227-693; 289 NW 25

Interlocutory order striking defense. An order sustaining a motion to strike certain matter defensively set up in the answer (said motion being treated as a demurrer) is not appealable in the absence of an election by the defendant to stand on his pleadings and in the absence of the entry of final judgment in accordance with such election.

Smith v Railway, 211-223; 233 NW 57

Motion to dismiss—ruling as adjudication. The overruling of a motion to dismiss a petition in an equitable action does not amount to an adjudication unless the defendant stands on his motion and allows judgment to be entered against him.

Frazier v Wood, 219-36; 255 NW 647

Nonwaiver—right of appeal. If it affirmatively appears that the unsuccessful party does not waive the error in ruling on demurrer, he may properly urge, on appeal, objection to such order.

Blessing v Welding, 226-1178; 286 NW 436

Appeal — mandamus — demurrer treated as motion to dismiss. In mandamus action, where parties treat a demurrer as a motion to dismiss, it will be so viewed on appeal.

Bredt v Franklin County, 227-1230; 290 NW 669

Order sustaining equitable demurrer—failure to stand on pleading or suffer judgment—effect. An order sustaining defendant's motion to dismiss plaintiff's action on the ground that the petition fails to state a cause of action, will not be reviewed on appeal when the record fails to show that plaintiff either (1) elected to stand on his pleadings, or (2) permitted final judgment to be entered against him. The ruling not being reviewable, the appeal will be dismissed.

Grimm v Bank, 221-667; 266 NW 517

Overruled demurrer to answer. Where plaintiff after answer moved for judgment of dismissal and also for judgment on the pleadings, held that if it be permissible to treat the latter motion as a demurrer to the answer, yet an adverse ruling thereon was not appealable unless plaintiff elected to stand thereon.

Morrison v Clinic, 204-54; 214 NW 705

Standing on demurrer—formal election. A pleader who (1) excepts to a ruling on demurrer, (2) does not plead over, and (3) suffers a final adverse judgment to be rendered, thereby affirmatively shows that he stands on his demurrer, with consequent right to appeal.

Hanson v Carl, 201-521; 207 NW 579

Overruled motion to dismiss. A ruling which denies a motion to dismiss (in lieu of the former equitable demurrer) is not appealable unless the movant unequivocally elects to stand upon his motion, and submits to a final adverse judgment; and this is true tho appellant asserts on his attempted appeal that he has nothing further to plead.

Morrison v Clinic, 204-54; 214 NW 705
Benjamin v Jackson, 207-581; 223 NW 383

Overruled motion to strike—suffering final judgment. Where a motion to strike which is not the equivalent of a demurrer is overruled, the defeated party is under no duty to suffer final judgment as a condition precedent to an appeal—assuming a right of appeal exists.

Dorman v Credit Co., 213-1016; 241 NW 436

Pleading over—issue abandoned. When district court determines, on demurrer, that restrictions on alienation in a will to avoid debts are invalid, and parties plead over and do not appeal from said ruling, the issue is abandoned and cannot be made the subject of an appeal.

Rich v Allen, 226-1304; 286 NW 434

Repleading—when not waiver of exception. Pleading a restatement of original allegations of petition does not constitute a waiver of exception to ruling on demurrer, and objection may be urged upon such ruling when the party duly excepts and allows judgment to be entered.

Blessing v Welding, 226-1178; 286 NW 436

Statute violations—assumed for purpose of demurrer. In an action for injuries resulting from a motor vehicle collision at an intersection where defendant's truck is alleged to have been parked so as to obscure the view of a stop sign, and where the violations of both city ordinance and state law are pleaded, the supreme court will assume, for the purpose of demurrer, that truck was parked within prohibited distance and did obscure the sign.

Blessing v Welding, 226-1178; 286 NW 436

X HABEAS CORPUS

Habeas corpus—custody of child—review as in equity. An appeal from habeas corpus proceedings by a parent to obtain the custody of a child is reviewable as in equity.

Adair v Clure, 218-482; 255 NW 658
Allender v Selders, 227-1324; 291 NW 176

XI PROBATE

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had

gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Filing claims against estate—ruling on equitable circumstances—not appealable. In probate on a hearing to determine whether or not peculiar circumstances exist to relieve claimant of the bar of the statute for failure to file claim within statutory period, an order finding the existence of such circumstances and entitling claimant to a trial on the merits of such claim is not appealable as a "final order" nor "an intermediate order involving the merits or materially affecting the final decision."

Ontjes v McNider, 224-115; 275 NW 328

Independent action reopening estate—judgment appealable. A judgment for plaintiff in a separate, independent action in equity brought, not against an administrator but against the surviving spouse and heir, seeking to set aside the order in probate approving the final report and closing the estate, is a final judgment such as will entitle the defendant to appeal.

Federal Bk. v Bonnett, 226-112; 284 NW 97

Lien—unauthorized order. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Non de novo hearing. Claims against an estate are triable at law. Consequently, on appeal, an allowance by the probate court will not be disturbed if it is not excessive and has support in the evidence.

Anderson Est. v Stason, 216-1017; 250 NW 183

Sanity of applicant—motion. In an application to set aside an ex parte order in probate wherein the defendant, inter alia, pleads mental incompetency of the plaintiff, a motion by defendant to set the matter for hearing solely on the issue of plaintiff's sanity is properly overruled.

In re Brockmann, 207-707; 223 NW 473

12827 Motion to correct error.

ANALYSIS

I Motion in General
II Questions First Raised on Appeal
III Following Trial Theory
IV Jurisdictional Matters

I MOTION IN GENERAL

Failure to obtain ruling—effect. The filing of exceptions to instructions and a motion for a new trial, after the entry of judgment on the verdict, is rendered wholly abortive by the failure to call the exceptions or the motion to the attention of the court, and to obtain a ruling thereon.

Linn v Kendall, 213-33; 238 NW 547

Prerequisite for appeal. A ruling and exception thereto in the lower court, or a showing of a request for a ruling and a refusal, are necessary prerequisites to a review in the appellate court.

In re Scholbrock, 224-593; 277 NW 5

Sua sponte determination by court. The court having issued a writ of certiorari will, on final hearing, determine whether the writ is allowable even tho such question is not raised by the party litigants.

Dickson Fruit Co. v Dist. Court, 203-1028; 213 NW 803

Unchallenged order striking pleading. Since a settlement must be pleaded, the overruling of a motion for directed verdict alleging a settlement of the action is not reviewable when the pleading setting forth the settlement has been ordered stricken and such order stands unchallenged.

Pearson v Butts, 224-376; 276 NW 65

Stricken pleadings not alleged as error. Denying a directed verdict based on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Equitable defenses not alleged or proved. On appeal from a ruling sustaining plaintiff's demurrer to answer of a foreign corporation, in suit for breach of contract to repurchase from plaintiff its own stock, setting up defense that such purchase would impair its capital, which was prohibited under the statute of the state of its domicile, the supreme court could not exercise its inherent equitable power or give consideration to estoppel, ratification, implied contract, or theory that contract was loan, when proper pleading or proof relating thereto was lacking.

Bishop v Middle States Co., 225-941; 282 NW 305

Invalid defense not attacked by motion. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

I MOTION IN GENERAL—concluded

Motion to set aside default. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

Withholding objection—effect. An objection to the reception of hearsay evidence will be given scant consideration when made for the first time at the conclusion of the testimony and then in the form of a motion so couched as to be practically impossible of application by the court.

Walker v Mach. Corp., 213-1134; 240 NW 725

Judgment for incorrect amount. Failure of the court to enter judgment for the correct amount should be corrected by motion in the trial court.

Burlington Bk. v Ins. Co., 206-475; 218 NW 949

Unsigned decree. The nunc pro tunc correction of an unsigned decree in order to make it conform to the original order of the court, such correction being made on motion, service, and appearance of all parties, is a finality in the absence of an appeal therefrom.

Samek v Taylor, 203-1064; 213 NW 801

Failure to mark exhibit. Failure during trial to identify by proper exhibit mark a volume, portions of which were offered in evidence, may, pending appeal, be corrected on motion before the trial court.

Orr v Hart, 219-408; 258 NW 84

Dismissal for lack of prosecution. An order or judgment of the district court dismissing an action for want of prosecution (as provided by a court rule) will not be reviewed on appeal when the lower court has been given no opportunity either, (1) on petition under §12787, or (2) on motion under this section, C., '35, to correct the error, if any.

Hansen v McCoy, 221-523; 266 NW 1

Alleging note as receipt—sham defense—striking. Where a written instrument sued upon contains the legal elements of a negotiable promissory note, an allegation in an answer that such written instrument was a receipt shows on its face that such pleading is false and should be stricken on motion.

Hillje v Tri-City Co., 224-43; 275 NW 880

II QUESTIONS FIRST RAISED ON APPEAL

Questions first presented on appeal.

Spicer v Administrator, 201-99; 202 NW 604
Riggs v Gish, 201-148; 205 NW 833
Minn. StL Ry. v Pugh, 201-208; 205 NW 758
Leach v Bank, 201-346; 207 NW 331
Wilcox v Miner, 201-476; 205 NW 847
Fellers v Sanders, 202-503; 210 NW 530
University Bk. v Johnson, 202-654; 210 NW 785
First Bk. v Tobin, 204-456; 215 NW 767
Andrew v Bank, 204-870; 216 NW 553
Standard v Kinseth, 204-974; 215 NW 972
Whitney v Eichner, 204-1178; 216 NW 625
State v Harding, 205-853; 216 NW 756
State v Packing Co., 206-405; 220 NW 6
Cavanaugh v Farm Co., 206-893; 221 NW 512
Gavin v Linnane, 206-917; 221 NW 462
Harrington v Sur. Co., 206-925; 221 NW 577
McNary v McNary, 206-942; 221 NW 580
Chas. Weitz v Guar. Co., 206-1025; 219 NW 411
Peoples Bk. v McCarthy, 207-162; 222 NW 372
State v McGee, 207-334; 221 NW 556
Heflen v Brown, 208-325; 223 NW 763
Benson v Weitz' Sons, 208-397; 224 NW 592
Cox v Const. Co., 208-458; 223 NW 521
Page & Crane v Clear Lake, 208-735; 225 NW 841
State v Bamsey, 208-796; 223 NW 873
Pennington v Nelson, 208-1310; 227 NW 163
Passcuzzi v Pierce, 208-1389; 227 NW 409
Employ. Bur. v Com., 209-1046; 229 NW 677
Kruckman v Kruckman, 209-1218; 229 NW 700
Albright v Moeckley, 209-1304; 230 NW 351
Ober v Dodge, 210-643; 231 NW 444
James v Sch. Twp., 210-1059; 229 NW 750
Kowalke v Evernham, 210-1270; 232 NW 670
Dilley v Service Co., 210-1332; 227 NW 173
Hartman v Transp. Co., 211-64; 233 NW 23
State v Henderson, 212-144; 232 NW 172
Duncan v Rhomberg, 212-389; 236 NW 638
State v Woodmansee, 212-596; 233 NW 725
New Amst. Cas. v Bookhart, 212-994; 235 NW 74; 76 ALR 897
Walker v Mach. Corp., 213-1134; 240 NW 725
Kaufman v Borg, 214-293; 242 NW 104
Heacock v Baule, 216-311; 249 NW 437; 93 ALR 151
Smith, etc. v Hollingsworth, 218-920; 251 NW 749
Phinney v Montgomery, 218-1240; 257 NW 208
Clark v Berry Seed Co., 225-262; 280 NW 505
In re Larimer, 225-1067; 283 NW 430
Fed. Bank v Trust Co., 228- ; 290 NW 512

Presentation and reservation of grounds—showing essential. A party who raises no question at the trial, interposes no objection at the trial, and saves no exception at the trial, has no standing on appeal.

Leach v Bank, 201-1323; 207 NW 326

Permissible change of position. A party who occupies in the trial court a purely defensive position, and in support thereof relies on an inapplicable statute, is not thereby precluded, on appeal, from relying on an applicable statute.

Leach v Bank, 202-97; 209 NW 421

Nontransfer from equity to law. A litigant may not allow an action in the trial court to remain on the equity side of the calendar without objection and, on appeal, claim, for the first time, that the action should have been at law.

Burmeister v Hamann, 208-412; 226 NW 10

Sufficiency of original notice—waiver. Objections to the sufficiency of an original notice as to form may not be presented for the first time on appeal.

Higdon v Bank, 223-57; 272 NW 93

Misjoinder of defendants. The objection that an insurance carrier was not a proper party defendant along with the employer in proceedings under the workmen's compensation act will not be considered when presented for the first time on appeal to the supreme court.

Walker v Mach. Corp., 213-1134; 240 NW 725

State as proper party to cross-petition. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross-petition, which question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Exline Co., 224-466; 276 NW 41

Belated filings. A party, on appeal, may not predicate error on the belated filing of a pleading to which he interposes no exception.

Royal Ins. v Hughes, 205-563; 218 NW 251

Pleadings — trial theory. A petition, the sufficiency of which has been acquiesced in by both parties in the trial court, may not be questioned for the first time on appeal.

Harm v Hale, 206-920; 221 NW 582

Nonapplicability of rule—legally insufficient defenses. The rule that a pleading which is legally insufficient to constitute a defense may nevertheless constitute a defense when unquestioned and unattacked can have no application to a so-called pleading which consists of evidentiary statements of fact only.

Hornish v Overton, 206-780; 221 NW 483

Objections to pleadings. Where claimant in probate proceedings appears at all stages of proceedings, in resistance to motion of administrator to dismiss claim, and makes no objection to the pleadings in the court below, he cannot attack them for the first time on appeal.

Joy v Bank, 226-1251; 286 NW 443

Ground of liability. An alleged ground of liability properly presentable to the trial court, tho not presented, will not be reviewed on appeal.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Timeliness of motion to discharge attachment. The objection that a motion to discharge an attachment was not timely may not be raised for the first time on appeal.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Timeliness of motion attacking answer. Question that a motion attacking an answer was not timely, raised for the first time on appeal, will not be considered by the appellate court.

Hillje v Tri-City Co., 224-43; 275 NW 880

Objections to evidence. One may not predicate error on the reception of evidence to which he enters no objection when it is offered.

In re Merrill, 202-837; 211 NW 361
State v Buick Sedan, 209-791; 229 NW 173

Confidential communications—failure to object. One who, without objection, allows an attorney to testify to confidential communications may not thereafter base error on the reception of such testimony.

Hepker v Schmickle, 209-744; 229 NW 177

Insufficiency of evidence. An insurer may not, on appeal, for the first time raise the question that the evidence does not show that the personal property was lost on the real property described in the policy.

Hall v Ins. Co., 217-1005; 252 NW 763

Evidence determining section line. Evidence in the record without objection by which a fence on the section line is definitely determined as the boundary of a highway cannot be objected to for the first time on appeal.

Davelaar v Marion Co., 224-669; 277 NW 744

Remote speed — materiality. Defendant's claim that plaintiff's speed remote from the collision was material as showing that, at the time defendant looked back before making a left turn, plaintiff was too distant to be seen over a viaduct, may not, when such evidence is excluded, be urged first on appeal as ground for reversal when such purpose for introducing such evidence was not stated to the trial court.

Thomas v Charter, 224-1278; 278 NW 920

Belated attack on stipulation. The contention that a stipulation in the trial court as to the testimony of a party was collusive and fraudulent may not be presented for the first time on appeal.

Bolte v Schenk, 205-834; 210 NW 797

Belated presentation of proposition. Where there is a failure to make a timely submission of a proposition in the court below, it will not be considered on appeal.

Whisenand v Van Clark, 227-800; 288 NW 915

Belated presentation of proposition. A legal contention not presented to the trial court nor

II QUESTIONS FIRST RAISED ON APPEAL—continued

to the appellate court on original submission is not available to the appellant in a petition for rehearing.

First N. Bank v Board, 217-702; 247 NW 617; 250 NW 887

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

Objection to improper argument. A party may not withhold his objection to an improper argument until after verdict.

In re Merrill, 202-837; 211 NW 361

Submission of issues. Error may not be predicated on the submission to the jury of a supported issue when complainant failed to request the withdrawal of said issue.

Rosenstein v Smith, 218-1381; 257 NW 397

Objections to instructions. Assignments of error relating to instructions not raised or passed upon by the lower court will not be considered on appeal.

Mitchell v Underwriters, 225-906; 281 NW 832

Simmering v Hutt, 226-648; 284 NW 459

Exceptions to rulings and instructions. Failure to except to rulings on the introduction of evidence and to the giving of instructions precludes review on appeal.

State v Jackson, 205-592; 218 NW 273

Insufficient exception to instructions. An exception to an instruction is quite insufficient when it fails to state the grounds thereof. Neither may instructions be excepted to for the first time on appeal.

In re Berry, 207-605; 223 NW 480

Findings of court under waiver of jury. The findings of the trial court in a law action under waiver of a jury, and on supporting but conflicting testimony, are conclusive on the appellate court.

First N. Bank v McCartan, 206-1036; 220 NW 364

Vacation orders in mandamus. The granting of a temporary order in mandamus in vacation will not be reviewed on appeal when complainant appears in the trial court on notice and proceeds to a hearing in vacation without objection.

Weyrauch v Johnson, 201-1197; 208 NW 706

Judgment in improper form. Objections to the form of a judgment entry in a law action, not presented to the trial court, will not be considered on appeal.

School District v Sass, 220-1; 261 NW 30

Record and proceedings not in record—non-introduced matters. A party to an appeal may not, by certificate, bring to the appellate court matters which he failed to introduce and make a part of the record in the trial court.

Robson v Kramer, 215-973; 245 NW 341

Fatally belated arguments. Argument on propositions first presented by appellant in his reply argument will be ignored.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Nonpresented constitutional questions. Constitutional questions not presented in the trial court will not be considered on appeal.

State v Johnson, 204-150; 214 NW 594

Talarico v Davenport, 215-186; 244 NW 750

Andrew v Bank, 215-1150; 247 NW 797

Terrell v Ringgold Co. Tel. Co., 225-994; 282 NW 702

Constitutional questions raised. Constitutional questions cannot be raised for the first times on appeal and, in order to present a constitutional question, specific reference must be made to the clause of the constitution relied upon and the reasons for the application of such clause must be asserted.

Martin Bros. v Fritz, 228- ; 292 NW 143

Constitutionality of moratorium act. When a district court order, granting an extension of the time for redemption of land on which a mortgage had been foreclosed, contained a provision that if the statute under which the extension was granted were repealed or held invalid the order would be terminated, such provision did not warrant an appeal challenging the constitutionality of the statute when the question of constitutionality was not raised in the lower court.

New York Ins. v Breen, 227-738; 289 NW 16

Moratorium—solvency of mortgagor. A foreclosing plaintiff seeking to show good cause for the rejection of defendant's application for a continuance under the moratorium act, will not, on appeal and for the first time, be heard on the claim that the defendant is not in financial distress.

First Tr. JSL Bank v Riddle, 221-1313; 268 NW 45

Construction of statute. Where the holder of a cashier's check on an insolvent bank is given, by the receiver, the preferential classification of a "depositor", the appellate court will not accord an enlarged preference under §9239-c1, C., '31 [§9239.1, C., '39], when said statute manifestly presents a grave problem of construction and is in no manner argued.

Andrew v Bank, 214-590; 243 NW 152

Construction of statute—seeming exception to rule. When the sole question before the trial court was whether a certain section of the statute (consisting of many separately

numbered paragraphs) exempts certain property from taxation, the appellate court in its review will consider and construe all relevant paragraphs of the section even tho it appears probable that one of said paragraphs was not called to the attention of the trial court.

McColl v Dallas Co., 220-434; 262 NW 824

Foreign judicial records—improper certification first raised on appeal. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Objections to abstract of title. On appeal from a foreclosure of a land sale contract, objections that the abstract of title produced by the vendor does not show good title will be disregarded when such objections were not made in the trial court.

Bortz v Wright, 206-698; 214 NW 542

Invalidity of contract. Failure to present in the trial court the proposition that a contract for grading was invalid, because not let to the lowest bidder, cannot be presented for the first time on appeal.

Carlson v Marshalltown, 212-373; 236 NW 421

Utility plant—contract and specifications—variation. A contended variation between the contract for a municipal public utility plant and the specifications, in that the contract omitted the right to call bonds at a certain time, will not be considered on appeal. when such variation, if any, was not an issue in the lower court.

Lahn v Primghar, 225-686; 281 NW 214

Agency—revocation—nonpleaded issue. In an action for real estate commission, contentions as to revocation of the agency arising from disposal of the subject matter of the agency and mental incapacity and death of one of the joint principals before the sale by the agent, will not be considered on appeal when the pleadings show no issue thereon, but the action is on a contract allegedly personally made with the defendant.

Maher v Breen, 224-8; 276 NW 52

Rent advanced as cost of administration. A stockholder of a clay products company in receivership, having advanced the rent due from the company on its clay pit lease, may not recover this rent as a cost of administration, especially when he advances this theory for the first time on appeal.

Parks v Carlisle Co., 224-1024; 277 NW 731

III FOLLOWING TRIAL THEORY

Fatal and inconsistent delay. A party may not, on appeal, predicate error on a theory which is wholly at variance with the theory maintained by him throughout the trial in the lower court.

Eves v Littig Co., 202-1338; 212 NW 154
Rocho v Dairy, 204-391; 214 NW 685
Loran v Des Moines, 205-1349; 219 NW 418
Rauch v Elec. Co., 206-309; 218 NW 340
Heflen v Brown, 208-325; 223 NW 763
White v Melchert, 208-1404; 227 NW 347; 73 ALR 595
Zieman v Association, 209-1298; 228 NW 48

Unpleaded theory. Appellant's demand, on appeal, for judgment on an unpleaded theory will be ignored.

Markworth v Bank, 217-341; 251 NW 857
Forsberg v Const. Co., 218-818; 252 NW 258
Smith v Tullis, 219-712; 259 NW 202

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to recover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit: (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff; consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

Agreed theory. A litigant who, in the trial court, acquiesces in the court's paraphrase of numerous assignments of negligence will not be permitted, on appeal, to contradict his former acquiescence.

Rulison v X-ray Corp., 207-895; 223 NW 745

Trial stipulation. A trial stipulation in the trial court as to the precise question presented cannot be departed from on appeal.

Equitable v Des Moines, 207-879; 223 NW 744

Permissible change of position. A party who occupies in the trial court a purely defensive position, and in support thereof relies on an inapplicable statute, is not thereby precluded on appeal from relying on an applicable statute.

Leach v Bank, 202-97; 209 NW 421

Parties entitled to allege error—contradicting trial theory. After an action by the widow of a deceased partner to determine her dower interest in her husband's partnership interest

III FOLLOWING TRIAL THEORY—concluded

is fully tried on the mutual theory of determining the amount and adjudging such amount as a trust against the entire property of the partnership, it is too late for the surviving partners to insist that the widow should take her interest in kind.

Fleming v Fleming, 211-1251; 230 NW 359

Legally insufficient defense. A legally insufficient defense is good when unquestioned, but this does not mean that such defense may be established by incompetent testimony.

Fairley v Falcon, 204-290; 214 NW 538
Strand v Bleakley, 214-1116; 243 NW 306

Wrong forum—law and equity. A defendant who, in the trial court, in an action on an unliquidated claim remains on the equity side of the calendar, without request for transfer to the law calendar, estops himself from complaining on appeal that he was denied a jury trial.

Ober v Dodge, 210-643; 231 NW 444

Wrong forum—probate and equity. A party who has not, in the trial court, questioned the right of his antagonist to prosecute the proceeding in probate, will not be heard to say on appeal that the proceeding must be in equity.

In re Weidman, 209-603; 228 NW 571

Trial de novo if cause tried in trial court as in equity. A cause mutually treated as in equity in the trial court will be so treated on appeal.

In re Moore, 211-804; 232 NW 729

Voluntary issues — trial — effect. Principle reaffirmed that parties who voluntarily litigate issues which are not within the pleadings are bound thereby.

Woodall v Woodall, 204-423; 214 NW 483

Newly presented objections. A party may, on appeal, abandon the objections which he made in the trial court to an instruction but he may not substitute an entirely new objection.

Gorham v Richard, 223-364; 272 NW 512

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Proof of claim. Claims treated by all parties in the trial court as sufficiently established will be so treated on appeal, the sole contention in the trial court being as to the legal liability of defendant therefor.

State v Cas. Co., 213-200; 238 NW 726

Notwithstanding verdict — proper rejection. Plaintiff's motion for judgment, notwithstanding a verdict for defendant, because defendant's answer failed to plead want of consideration for the signing of the note sued on, is properly overruled when defendant's answer impliedly pleaded want of consideration, and when plaintiff so construed the answer throughout the trial.

Persia Bk. v Wilson, 214-993; 243 NW 581

Rehearing — unallowable change of theory. A rehearing will not be granted on a theory wholly different than that presented by petitioner on original submission as determinative.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

IV JURISDICTIONAL MATTERS

Certiorari—jurisdictional question. In certiorari to review trial court's ruling sustaining motion to set aside default, supreme court is not concerned with jurisdiction at time judgment is entered, but is concerned with the jurisdiction of court at time ruling is made on motion.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Dismissal of appeal on technical grounds—non-effect as adjudication. The dismissal, by the supreme court, of an appeal, and the affirmance by said court of the judgment appealed from, on the technical ground that appellant had failed to make timely filing of an abstract of the record, cannot be deemed an adjudication of the jurisdictional legality of the judgment so affirmed. In other words, while the appeal has proven abortive, the said judgment is nevertheless subject to an action for its cancellation on the ground that the trial court was wholly without jurisdiction to enter it.

Dallas v Dallas, 222-42; 268 NW 516

Municipal court—collateral attack. Conceding, arguendo, that the municipal court was in error in overruling defendant's motion for change of venue to the county of his conceded residence; yet the court manifestly had jurisdiction to rule on the motion, and defendant having failed to seek correction of the error by appeal or other appropriate direct proceedings, the ruling becomes a finality, and the subject matter thereof cannot properly be injected into subsequent collateral proceedings

wherein the judgment entered on the merits is sought to be enforced. So held where the collateral proceeding was an action to recover on a stay bond.

Educational Film Exch. v Hansen, 221-1153; 266 NW 487

12828 Motion for new trial.

Nonnecessity for motion for new trial. When an appeal is from the final judgment, a motion for a new trial is not necessary in order to present to the supreme court on appeal erroneous rulings of the trial court on the reception or rejection of evidence.

In re Kahl, 210-903; 232 NW 133

Nonnecessity after refusal to direct verdict. Defendant who, at the close of all the testimony, suffers an adverse ruling on his motion for a directed verdict, and duly excepts to said ruling, is under no legal necessity to move for a new trial because of said ruling, as a condition precedent to a review thereof on appeal.

Taylor v Burgus, 221-1232; 262 NW 808

Objections to evidence—re-raising in new trial motion. Where the immateriality of evidence objected to is plainly discernible and no further particularity is required to apprise the trial court of grounds of objections, it is not necessary that these same identical matters be again presented to trial court by way of motion for new trial before they may be considered by supreme court.

Floy v Hibbard, 227-149; 287 NW 829

Ruling on special appearance. An appeal from a decree on the merits does not present for review a ruling of the trial court on a special appearance, it appearing that such ruling was based on matter wholly foreign to any matter in the pleadings on the merits.

Scott v Price Bros., 207-191; 217 NW 75

12829 Finding of facts—evidence certified.

Review—scope—absence of record. The holding of the trial court as to the legal effect of a written instrument is necessarily conclusive on the appellate court when such instrument has not been included in the appellate record.

O'Connor v Hassett, 207-155; 222 NW 530

12830 Title of cause.

Contempt. Upon the discharge of one accused of contempt in violating an injunction, an appeal may not be maintained under the title under which the injunction was obtained.

Cedar Falls Bank v Boslough, 218-502; 255 NW 665

Notice of appeal—fatal defect. An appeal will be dismissed when the notice of appeal described the appealing plaintiff as "D. W. Bates, Superintendent of Banking as receiver of" (insolvent bank); and it is made to appear that, as to the particular subject matter involved, no petition so describing said appealing plaintiff had ever been filed; that the petition actually filed and involving said particular subject matter was captioned "D. W. Bates, Superintendent of Banking, Plaintiff" and was docketed under the same caption and given the same docket number as that given to a former action wherein said official asked for his appointment as receiver of said bank, to wit: "D. W. Bates, Superintendent of Banking, Plaintiff".

Bates v Bank, 221-814; 267 NW 677

12831 Process.

Liberality in granting. The supreme court will, as a matter of course, issue a restraining order to maintain the status quo pending an appeal when such order is the only remedy available to the appellant.

Welton v Hy. Com., 208-1401; 227 NW 332

Dual remedies—appeal or mandatory order. Where, after reversal and remand in an equity cause, the trial court, on procedendo, enters a judgment which it has no discretion to enter, the defendant may apply directly to the appellate court for a mandatory order to the trial court to obey the procedendo, even tho defendant might accomplish the same result by appealing from the entry of said judgment.

Ronna v Bank, 215-806; 246 NW 798

Writs of prohibition. The supreme court has original jurisdiction, under the constitution, to issue common-law writs of prohibition; but, when the application is for a writ directed to a district court and commanding it to discontinue further jurisdiction over named actions pending in said lower court, the supreme court must act solely on the established facts as revealed in the proceedings in said district court, and, if material disputed issues of fact arise, the writ will be refused, as the supreme court has no power to take testimony on disputed questions of fact dehors said district court records.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Writ of prohibition—right to issue. The jurisdiction of the supreme court to issue a writ of prohibition commanding a district court to discontinue all assumption of jurisdiction over named actions pending in said latter court does not depend on whether the district court has made rulings as to special appearances entered in said actions.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Writ of prohibition—right of appeal—effect. The jurisdiction of the supreme court to issue a writ of prohibition, commanding a district court to discontinue all assumption of juris-

diction over named actions pending in said latter court, is not necessarily defeated because the beneficiaries of said writ would have a right to appeal from an adverse judgment.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Writ of prohibition — state as plaintiff. An original action in the supreme court for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; especially is this true when said private actions arose out of proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Overpayment on legacy—refund. The appellate court may, it seems, authorize and direct an executor to proceed to recover an overpayment on a legacy.

In re Moe, 213-95; 237 NW 228; 238 NW 718

12832 Time for appealing.

ANALYSIS

I TIME FOR TAKING
II QUESTIONS REVIEWABLE

I TIME FOR TAKING

Statute controlling. The time in which an appeal may be taken from a judgment is controlled by the statute existing at the time the judgment is rendered.

Hancock Bk. v McMahon, 201-657; 208 NW 74
Ontjes v McNider, 224-115; 275 NW 328

Legislative change—effect. The time allowed for an appeal cannot be reduced by legislative enactment after judgment.

Davis v Robinson, 200-840; 205 NW 520
Insell v McDaniels, 201-533; 207 NW 533

Sixty-day automatic extension. An appeal from the main judgment in an action must be taken within 60 days from the ruling on the motion for a new trial when such ruling occurs less than 60 days before the expiration of the ordinary four months period for such appeal.

Fox v McCurnin, 210-429; 228 NW 582

Directing verdict—appeal delayed beyond 60 days. An appeal from a directed verdict in favor of defendant cannot be considered by the supreme court where it appears that the appeal from the directed verdict was not perfected within 60 days after the entry of an order overruling a motion for new trial.

Lotz v United Markets, 225-1397; 283 NW 99

Order overruling motion for new trial. An appeal from an order which overrules a motion for a new trial is timely if taken within four months from the entry of such order.

Pride v Acc. Assn., 207-167; 216 NW 62; 62 ALR 31

Motion for new trial—what constitutes. A motion which requests the court to reconsider a certain order theretofore made, and to enter a different order, constitutes a motion for a new trial, within the meaning of statute pertaining to the time of taking appeals.

Home Bank v Klise, 205-1103; 216 NW 109

Appeal dismissed—no bar to second appeal. Voluntary dismissal of an appeal does not preclude the right to appeal again within the statutory time.

Doonan v Winterset, 224-365; 275 NW 640

Order of removal — when completely executed. An order of removal issued on a judgment rendered in forcible entry and detainer proceedings cannot be deemed fully executed so long as the officer has in his possession on the premises in question personal property of the defendant upon which the officer has levied in order to collect the costs. And this is true tho the defendant has personally been removed from the premises. So held on the question whether the perfecting of an appeal and the obtaining of a stay order by the defendant were timely.

Usailis v Jasper, 222-1360; 271 NW 524

II QUESTIONS REVIEWABLE

Belated appeal—matters reviewable. An appeal taken more than six (now four) months after the entry of judgment, but within said time after the overruling of a motion for a new trial, preserves for consideration on appeal all matters properly presented in the motion and not inhering in the judgment.

Frett v Holdorf, 201-748; 206 NW 609

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

12833 Amount in controversy.

ANALYSIS

I AMOUNT IN CONTROVERSY
II THE CERTIFICATE
III INTEREST IN REAL ESTATE

I AMOUNT IN CONTROVERSY

Several assessments aggregating over $100. When separate assessments on separate lots are each less than $100, but in the aggregate over $100, an appeal lies from an adverse judgment in the district court when the contro-

versy over the several assessments has been treated throughout as one proceeding.

Brush v Liscomb (Town), 202-1155; 211 NW 856

Including interest on judgment. In determining the amount in controversy under the statute limiting supreme court appeals to cases involving over $100, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy; but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35, amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

Unallowable computation. Where the court on separate applications in the same case orders separate changes of venue, and separately adjudges in favor of each party an allowance for expense and attorney fees for attending in the wrong county, the orders are not appealable simply because the sum total of the separate allowances is over $100.

In re Mann, 211-85; 232 NW 839

Chattel mortgage under $100, judgment for $330. Where in an action to foreclose a conditional sale contract on an automobile, the court granted priority of a lien of less than $100, and gave a judgment for $330 to the seller, an appeal therein involved more than $100 and was not subject to dismissal, altho no certificate had been filed by the trial court.

Hughes v Wessell, 226-811; 285 NW 200

II THE CERTIFICATE

Counterclaim over $100—certificate unnecessary. An appeal in an unsuccessful action to recover less than $100 because successfully met by a counterclaim for more than $100, pleaded solely as payment, will be dismissed, in the absence of the required certificate "that the appeal should be allowed".

Davis v Robinson, 200-840; 205 NW 520

Chattel mortgage under $100, judgment for $330—certificate not required. Where in an action to foreclose a conditional sale contract on an automobile, the court granted priority of a lien of less than $100, and gave a judgment for $330 to the seller, an appeal therein involved more than $100 and was not subject to dismissal, altho no certificate had been filed by the trial court.

Hughes v Wessell, 226-811; 285 NW 200

III INTEREST IN REAL ESTATE

No annotations in this volume

12834 Appeal by coparties.

Failure to serve interested coparty. Failure of an appellant to serve a notice of appeal on a party whose rights under the decree appealed from would be detrimentally affected by a reversal is fatal to the appeal.

Coggon Bk. v Woods, 212-1388; 238 NW 448
First Bank v Yarcho, 217-95; 250 NW 903

Failure to serve — effect and burden. A party who assumes to appeal from a decree in equity without serving notice of appeal on a nonjoining coparty has the burden to show that said coparty will not be adversely affected in any manner by any decree of the appellate court. In a case wherein the rights of various parties were much intertwined, held said burden had not been satisfied, and consequently the appeal must, on motion, be dismissed.

Jenkins v Beeler, 213-501; 239 NW 474
First Bank v Yarcho, 217-95; 250 NW 903

Party without interest in appeal. A party who appeals on an issue which is purely personal to himself need not serve notice of appeal on a coparty who has no possible interest in such issue.

Conner v Henry, 201-253; 207 NW 119

Noninterested coparties. Notice need not be served on coparties when the record fails to show that they may be adversely affected by the appeal.

Jackson v Snyder, 202-262; 208 NW 321

Unnecessary service on coparty. Appealing coparties need not serve notice of appeal on a nonappealing coparty when a reversal on appeal would necessarily accord to the nonserved coparty the exact relief prayed for by him in the trial court.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Legatees nonnecessary parties. In an appeal from a holding that a claim in probate was not payable from life insurance funds, notice of appeal is all-sufficient when served solely on the executor, the legatees not being parties to the controversy.

In re Caldwell, 204-606; 215 NW 615

Notice to heirs — when not necessary. In probate proceedings an administrator is entitled to appeal from a probate decree qualifiedly approving a final report of the preceding executor, notwithstanding he served no notice of appeal upon the beneficiaries under the will as coparties, where he represents the beneficiaries, and their relations are not antagonistic, and where, tho they are interested in the outcome, they are not strictly coparties.

In re Sheeler, 226-650; 284 NW 799

Intervenor — failure to serve. Where the petition and a petition of intervention, both

asking the same relief, were dismissed on their merits, the fact that intervenor fails to appeal or was not served with notice of appeal by plaintiff, is quite inconsequential as far as plaintiff's appeal is concerned.

Anderson v Dunnegan, 217-1210; 245 NW 326

Foreclosure proceedings—intervention. On an appeal by an intervenor in foreclosure proceedings from a decree awarding rent notes to plaintiff because intervenor was a fraudulent indorsee thereof, and taxing costs against intervenor and the landlord-indorser, the failure to serve notice of appeal on the nonappealing landlord-indorser and tenant-maker of the notes constitutes a fatal defect of parties because a reversal—a decree that intervenor was a bona fide indorsee—(1) would restore the liability of the landlord-indorser on his indorsement, (2) would leave the landlord-indorser liable for all the costs without right to contribution from intervenor, and (3) would subject the tenant to a double liability for the rent.

Read v Gregg, 215-792; 247 NW 199

Mortgagor as adverse and necessary party—dismissal. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor, as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Cross-petition in foreclosure. An appeal by a cross-petitioner in mortgage foreclosure because of the denial of his plea to have title quieted in himself and against the mortgagor-defendant, cannot be maintained unless notice of the appeal is duly served on said mortgagor-defendant; and it is quite immaterial that the record indicates that said mortgagor-defendant was manifestly friendly to the plea of said cross-petitioner.

Crawford Bk. v Butler, 201-1281; 208 NW 284

Failure of cross-petitioners to appeal between each other. Defendant cross-petitioners in an action to enforce a contract for the sale of land, among whom judgments have been rendered on assignments and assumption of the contract sought to be enforced, may not have such judgments reviewed by simply appealing from the judgment rendered in favor of plaintiff.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Coparty in partition. Failure of an appellant in partition to serve a coparty with notice of the appeal is fatal to the appeal when a reversal of the decree appealed from would reduce the share of the nonserved coparty; and this result is not obviated by a showing that the whereabouts of the nonserved party is unknown, and by an uncertain showing as to his heirs if he be dead.

Barkley v Henke, 209-731; 229 NW 156

Partition. In an appeal from a decision in partition that one defendant should account for all moneys received from an estate, it was necessary that notice of appeal be served upon each of the other parties or their attorneys under statutes requiring service upon all plaintiffs as adverse parties and upon all co-defendants who did not join in the appeal and might be adversely interested, since, if the appellant were permitted to keep the money, the interests of the other parties would be decreased.

Herrold v Herrold, 226-805; 285 NW 274

Failure to notify surety. In an action by a municipality against the receiver of an insolvent bank and its surety to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Independ. Dist. v Bank, 204-1; 213 NW 397

Insurer's attorney also defendant. In an action on an accident policy, the insured, an attorney, who makes the insurer's attorney a defendant along with the company, may not dismiss the company-attorney's appeal on the ground that there is no judgment against such company-attorney, when the judgment entry is against the company and "any person acting in its behalf".

Eller v Guthrie, 226-467; 284 NW 412

Attorney signing notice and accepting service thereof. An attorney who signs a notice of appeal on behalf of an appealing defendant, for whom he appeared in the trial court, may validly accept service of said notice on behalf of a nonappealing, co-defendant for whom said attorney also appeared in the trial court.

Osceola v Gjellefald Co., 220-685; 263 NW 1

12835 Coparties not joining.

ANALYSIS

I COPARTIES
II PARTIES GENERALLY

I COPARTIES

Decree does not inure to nonappellant. Where an equitable decree adjudged (1) that one of two assignees of the same fund took priority over the other assignee, but (2) that certain mechanics and dealers had lienable claims on said fund prior to both of said assignees, and where on appeal solely by the defeated assignee it was adjudged not only (1) that the appellant-assignee took priority over the appellee-assignee, but (2) that said mechanics and dealers had no lienable claims on said fund, held, that the judgment on appeal that the mechanics and dealers had no

lienable claims on said fund did not inure to the benefit of the appellee-assignee. In other words, the appellee-assignee was still bound by the decree of the trial court because he did not appeal therefrom.

Ottumwa Boiler v O'Meara, 208-80; 224 NW 803

Record—nonappealing parties—striking argument. Arguments filed in supreme court by nonappealing parties as appellants may be stricken.

In re Schropfer, 225-576; 281 NW 139

II PARTIES GENERALLY

Failure to appeal—effect. A defendant who fails to appeal from any part of a decree (1) which established certain claims for labor (as contended for by plaintiff), but (2) which held that such claims were not liens on certain property (as contended for by defendant), may not question the decretal establishment of said claims on a successful appeal by the plaintiff from the latter part of the decree.

Soodhalter v Coal Co., 203-688; 213 NW 213

Appellee defaulting on appeal—rights. An appellee who has not appealed may not have a more favorable judgment on appeal than was accorded to him in the trial court, even tho the appeal record reveals error against him.

Waxmonsky v Hoskins, 216-476; 249 NW 195

Nonjoinder by successful claimants against estate. The appellate court, in adjusting and determining claims for preferential payment of trust funds in the settlement of the estate of an insolvent, has no power to make a determination which will prejudice the rights of other parties who have been granted preference in payment and who are not parties to the appeal.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Nonassignment of errors by appellee—rights on appeal. A successful party as appellee may without assigning errors show, if he can, that he was so erred against as to neutralize entirely any errors against appellant.

Thompson v Butler, 223-1085; 274 NW 110

12836 Appeal from part of judgment or order—effect.

Continuing jurisdiction of lower court. An appeal simply from an order appointing a receiver in auxiliary proceedings to enforce a judgment leaves all other portions of said proceedings within the jurisdiction of the district court.

Wade v Swartzendruber, 206-637; 220 NW 67

Review limited to part appealed. A part of a decree on which no appeal is taken by the party adversely affected is not before the supreme court for review.

Scott v Waterloo, 223-1169; 274 NW 897

Limited appeal in equity limits de novo hearing. The de novo hearing on appeal in an equitable action is necessarily limited to the particular part of the decree from which the appeal is taken; and, under such an appeal, appellee cannot have a de novo hearing on some other part of the decree unless he perfects a cross-appeal.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

Voluntary payment of costs precludes appeal. A voluntary payment of an entire judgment, prior to appeal by the superintendent of banking, tho such judgment be only for costs, entered against him by the court, and not merely taxed by the clerk, is such an acquiescence and submission to the judgment as precludes an appeal thereon. (Distinguishing Boone v Boone, 160-284.)

Bates v Nichols, 223-878; 274 NW 32

Decretal establishment of claims. A defendant who fails to appeal from any part of a decree which (1) established certain claims for labor (as contended for by plaintiff), but (2) held that such claims were not liens on certain property (as contended for by defendant), may not question the decretal establishment of said claims on a successful appeal by the plaintiff from the latter part of the decree.

Soodhalter v Coal Co., 203-688; 213 NW 213

12837 Notice of appeal—service.

ANALYSIS

I NOTICE IN GENERAL
II PARTIES ENTITLED TO NOTICE
III FORM AND REQUISITES OF NOTICE

I NOTICE IN GENERAL

Service perfects appeal. An appeal is deemed perfected when the notice of appeal is served, not when it is filed.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Special appearance to defective notice. Appearance in an appellate tribunal for the purpose of objecting because the notice of appeal was not served as required by law does not confer jurisdiction on the tribunal to hear the appeal.

Casey (Town) v Hogue, 204-3; 214-NW 729

Nonwaiver of defects by appearance. A voluntary appearance by attorneys for appellee and the filing of a motion to dissolve a restraining order do not waive defective notice. Notice of appeal is jurisdictional and want of notice cannot be supplied by voluntary appearance.

Cheney v Board, (NOR); 222 NW 899

Failure to serve adversely interested party. An appeal will be dismissed on timely and proper application when an adversely inter-

I NOTICE IN GENERAL—concluded

ested party is not served with notice of the appeal, e. g., a party whose share under a testamentary instrument will be decreased should appellant prevail.

Piercy v Bronson, 206-589; 221 NW 193

Service on attorney. A notice of appeal addressed to the appellee only and served on his counsel is sufficient to give the appellate court jurisdiction.

Anderson v Dunnegan, 217-1210; 245 NW 326

Attorney signing notice and accepting service thereof. An attorney who signs a notice of appeal on behalf of an appealing defendant, for whom he appeared in the trial court, may validly accept service of said notice on behalf of a nonappealing, co-defendant for whom said attorney also appeared in the trial court.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Nonserved unnecessary parties—burden of proof. The burden is on an appellant to show —should the question arise—that parties not served with notice of appeal are not necessary parties to the appeal—that they will not be prejudiced or adversely affected in any manner by any order or decree of the appellate court.

State v So. Surety, 223-558; 273 NW 129

Notice to heirs—when not necessary. In probate proceedings an administrator is entitled to appeal from a probate decree qualifiedly approving a final report of the preceding executor, notwithstanding he served no notice of appeal upon the beneficiaries under the will as coparties, where he represents the beneficiaries, and their relations are not antagonistic, and where, tho they are interested in the outcome, they are not strictly coparties.

In re Sheeler, 226-650; 284 NW 799

Time of serving notice of appeal. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

II PARTIES ENTITLED TO NOTICE

Jurisdiction to consider appeal. Supreme court cannot consider an appeal in the absence of necessary parties.

Paulson v Paulson, 226-1290; 286 NW 431

Defendant not designated — fatal defect. Where title of notice of appeal does not designate name of defendant in action below, the supreme court has no jurisdiction.

Cheney v Board, (NOR); 222 NW 899

Substituted plaintiff. Failure to serve a notice of appeal on a substituted plaintiff in whose name judgment was entered is fatal to the appeal, even tho the attorneys who were served for the original plaintiff were attorneys for the substituted plaintiff.

Silberman v Ins. Co., 218-626; 255 NW 646

Intervenor—notice unnecessary. Where the petition, and a petition of intervention, both asking the same relief, were dismissed on their merits, the fact that intervenor fails to appeal, or was not served with notice of appeal by plaintiff, is quite inconsequential as far as plaintiff's appeal is concerned.

Anderson v Dunnegan, 217-1210; 245 NW 326

Defendants—notice by intervenor. Failure of an intervenor in mortgage foreclosure to serve defendants with notice of his appeal is fatal to the appeal if a decision on appeal in favor of intervenor would prejudice the nonserved parties.

First Tr. JSL Bk. v Yarcho, 217-95; 250 NW 903

Noninterested party. A notice of appeal need not be served on one who is in no manner a party to the proceedings in which the judgment or order appealed from is entered. So held where the court in its order assumed to grant relief to a party who was in no manner a party to the proceeding.

Gray v Mann, 208-1193; 225 NW 261

Noninterested parties—action on contract. An appellant who appeals from a decree which denies his prayer for a reformation of a contract and grants to the appellee a rescission of such contract need not serve notice on other parties who have no interest whatever in said issues of reformation or rescission.

Cahail v Langman, 204-1011; 216 NW 765

Partition—necessary parties. In a partition action, on appeal from a decree fixing parties' interest in a cemetery lot, the widow and children of one of the original grantees are "necessary parties" in whose absence the supreme court cannot consider such appeal.

Paulson v Paulson, 226-1290; 286 NW 431

Coparties in partition. Failure of an appellant in partition to serve a coparty with notice of the appeal is fatal to the appeal when a reversal of the decree appealed from would reduce the share of the unserved coparty; and this result is not obviated by a showing that the whereabouts of the unserved party is unknown, and by an uncertain showing as to his heirs, if he be dead.

Barkley v Henke, 209-731; 229 NW 156

Partition—plaintiff and co-defendants. In an appeal from a decision in partition that one defendant should account for all moneys received from an estate, it was necessary that notice of appeal be served upon each of the

other parties or their attorneys under statutes requiring service upon all plaintiffs as adverse parties and upon all co-defendants who did not join in the appeal and might be adversely interested, since, if the appellant were permitted to keep the money, the interests of the other parties would be decreased.

Herrold v Herrold, 226-805; 285 NW 274

Partition — co-fractional owners of land. When in partition the court has adjudicated the fractional ownership of land to be in the plaintiff and in certain named defendants, the plaintiff appealing from a subsequent order for a new trial in favor of a defendant served by publication only (and who had been denied all ownership on the original trial) need not serve notice of appeal on his co-fractional owners.

Clark v Robinson, 206-712; 221 NW 217

Mortgagor as adverse and necessary party. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor, as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Former owner—quiet title action—liens. In an action by the purchaser of land to quiet title against certain claims for mechanics' liens, the decree confirmed the claims as liens on the land, and ordered said land sold for the payment—at least pro tanto—of said liens, and, in addition, entered personal judgments against a former owner of the land for the amount of each of said claims. Plaintiff appealed from the decree insofar as it established said claims as liens.

Held, the appeal could not be maintained without service of notice of appeal on said former owner.

Gordon Co. v Ideal Co., 223-313; 271 NW 523

Creditors as "adverse parties". A liquidator (quasi-receiver) was appointed in a foreign state to liquidate an insolvent insurance company chartered in said state and doing business in Iowa.

The attorney general of Iowa at once, in his official capacity, instituted ancillary receivership in Iowa, and, in time, certain claims were duly allowed in said ancillary proceedings in favor of creditors of said insolvent.

The Iowa court later ruled, on intervention by the foreign liquidator (to which intervention the said creditors formally objected of record) that funds in the hands of the ancillary receiver should be retained by him and distributed under said ancillary receivership.

Held, an appeal by the foreign liquidator from said latter ruling imperatively necessitated service of notice of appeal on said creditors, even tho they had not appeared at the trial of the intervention—that service on the ancillary receiver was not sufficient as to said creditors.

State v So. Surety, 223-558; 273 NW 129

Adverse party. Under statute providing for service of notice of appeal, any party who would be prejudiced by a reversal is an "adverse party". So where plaintiff-administrator, as assignee, seeks certain insurance proceeds, but after an intervenor in the action claims the proceeds, plaintiff aids in the showing that intervenor rather than plaintiff should recover, and where defendant but not plaintiff appealed, a reversal could not adversely affect plaintiff who, therefore, was not an "adverse party" on whom notice of appeal must be served. The mere possibility of plaintiff being interested in the taxation of costs did not require dismissal because the appeal notice, which was served upon attorneys representing both plaintiff and intervenor, was not addressed to plaintiff.

Luce v Ins. Co., 227-532; 288 NW 681

Legatees—claim in probate. In an appeal from a holding that a claim in probate was not payable from life insurance funds, notice of appeal is all-sufficient when served solely on the executor, the legatees not being parties to the controversy.

In re Caldwell, 204-606; 215 NW 615

Legatees—order construing will. Residuary legatees are not necessary parties to an appeal from an order construing the will on the application of the executor.

Dillinger v Steele, 207-20; 222 NW 564

Beneficiary of estate as coparty. In probate proceeding on objection to executor's report, an appeal by an assignee of a beneficiary's interest in the estate will not be dismissed where he fails to serve notice of appeal upon beneficiary as a coparty when the beneficiary cannot be adversely affected by the supreme court's decision on the assignee's appeal.

In re Sheeler, 226-650; 284 NW 799

II PARTIES ENTITLED TO NOTICE—concluded

Objectors to final report. Notice of appeal from a judgment sustaining objections to an administrator's final report must be served on all heirs objecting to the report, and a failure will result in a dismissal of the appeal.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Administrator as adverse party—failure to serve. When, in an action to set aside alleged fraudulently procured deeds to lands, a party plaintiff is such, both (1) as an individual and (2) as administrator of the estate of the defrauded grantor, then the failure of the defendant, in appealing from a decree granting the prayer of the petition, to serve notice of the appeal on said party plaintiff as administrator is fatal to the appeal, tho said plaintiff is properly served as an individual.

Shea v Shea, 220-1347; 264 NW 590

Executor as adverse party. On an appeal by a ward from an order appointing a named party as guardian of the property of said ward, the executor of an estate, out of which said guardianship proceeding arose, is an "adverse party", it appearing that he was a party to said guardianship proceeding in opposition to the wishes of said ward. And this is true tho said executor had been discharged at the time said appeal was perfected.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Administratrix—nonnecessity to serve self as individual. When an administratrix appeals, in her official capacity, from rulings on her final report, the fact that the court taxed to her, individually, the court costs occasioned by the hearing on the report, creates no necessity for the appellant to cause said notice of appeal to be served upon herself as an individual, she not being, in fact or in law, a party, individually, to said final report and hearing thereon.

In re Paulson, 221-706; 266 NW 563

Guardian as nonadverse party. On an appeal by a ward from an order appointing a named person as the guardian of the property of said ward, notice of appeal need not be served on said appointee, he never having made, or attempted to make, himself a party to said guardianship proceedings.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

County. An appeal from an order striking certain portions of the petitions in an action nominally against the members of the board of supervisors, but in legal effect against the county, will be dismissed when no notice of the appeal is served on the county.

Valentine v Board, 206-840; 221 NW 517

City in quiet title action. In appeal from decree quieting title in city to streets and alleys, but continuing hearing as to park, it was necessary to serve notice of appeal on city's attorney, and notice of appeal served on attorneys for cross-petitioners joining in prayer of appellee's petition was not binding on the city and entitled city to a dismissal.

Iowa City v Balluff, (NOR); 225 NW 942

III FORM AND REQUISITES OF NOTICE

Improper caption. In an assignment for the benefit of creditors wherein certain creditors had successfully objected to the recognition of a claim, a notice of appeal which is in no manner directed to said objectors is fatally defective even tho served on said objectors. In such case it is not sufficient to direct the notice to the assignee as the representative of all the creditors.

In re Lounsberry, 208-596; 226 NW 140

Improper caption. An appeal will be dismissed when the notice of appeal described the appealing plaintiff as "W. D. Bates, Superintendent of Banking as receiver of" (insolvent bank); and it is made to appear that, as to the particular subject matter involved, no petition so describing said appealing plaintiff had ever been filed; that the petition actually filed and involving said particular subject matter was captioned "W. D. Bates, Superintendent of Banking, Plaintiff" and was docketed under the same caption and given the same docket number as that given to a former action wherein said official asked for his appointment as receiver of said bank, to wit: "W. D. Bates, Superintendent of Banking, Plaintiff".

Bates v Bank, 221-814; 267 NW 677

Not addressed to appellee. A notice of appeal by defendant must not only (1) be addressed to, but (2) be served on a duly substituted plaintiff (or his attorney) in order to confer jurisdiction on the appellate court. Service alone is wholly insufficient, even tho the name of the substituted plaintiff is carried in the title to the notice.

Snyder v Spirit Lake, 218-774; 254 NW 14

Unsigned notice. An unsigned notice of appeal is a nullity, even tho appellee and the clerk of the district court execute acknowledgment of service thereon, and even tho the reverse side of the notice carries the title of the case and an indorsement of the name of appellant's attorney.

Jensen v Adlum, 201-1042; 206 NW 129

Caption containing name of supreme court—nonprejudicial error. Error in heading notice of appeal "In the Supreme Court of Iowa" is not prejudicial, altho inaccurate, because at that stage of the proceeding jurisdiction is still in the district court.

Cheney v Board, (NOR); 222 NW 899

Sufficiency of recitals. A notice of appeal which describes the proceeding by proper title, and the order appealed from by proper date

of rendition, is all-sufficient and brings up for review all and every feature of the order. So held where the final determination of the court embraced two orders, one germane to the proceeding before the court, and one wholly nongermane.

Gray v Mann, 208-1193; 225 NW 261

Conclusiveness. Appellant's specification in his notice of appeal as to the particular part of the judgment appealed from is conclusive upon him.

Rule v Rule, 204-1122; 216 NW 629

Unappealed part of judgment. A party may not have a review of that part of a judgment which pertains to the costs when such part is not within the scope of his appeal.

C. B. & Q. Ry. v Board, 206-488; 221 NW 223

Identification of judgment appealed from. Notice of appeal must specifically identify judgment or decree appealed from.

Cheney v Board, (NOR); 222 NW 899

Notice of appeal—from verdict or judgment. A notice of appeal is valid if, after stating that it is an appeal from the verdict, it goes further and states that it is also an appeal from the judgment and all rulings of the court adverse to appellant.

Sullivan v Harris, 224-345; 276 NW 88

Fatally deficient record in lower court. An appeal cannot be entertained when the record affirmatively shows (1) that the appearance docket of the trial court carries no notation of the filing of a notice of appeal, and (2) that no notice of appeal can be found in the office of the clerk of said court.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Correction of record after appeal. If the date of perfecting an appeal as shown on the return of service is erroneous, the defect must be corrected by proper procedure in the trial court—not in the supreme court.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Service on attorney. Service of a notice of appeal on any one of several attorneys who appeared for the adverse party in the trial court is all-sufficient.

Home Bank v Klise, 205-1103; 216 NW 109

Service on attorney for deceased party. A notice of appeal addressed to a deceased plaintiff is without legal effect; likewise, a notice addressed to the attorney for such deceased plaintiff cannot be deemed a notice to a substituted plaintiff to whom the notice is not addressed.

Snyder v Spirit Lake, 218-774; 254 NW 14

Service on attorneys for part of appellees. When timely notice of appeal was served on attorneys for part of the appellees, the service on such attorneys was effective only as to the appellees they represented, and not effective as to other appellees represented by attorneys who received late service.

Herrold v Herrold, 226-805; 285 NW 274

Timely service mandatory. The law requiring that service of notice of appeal and filing of the abstract be timely is mandatory, and unless complied with, the appeal will be dismissed.

Herrold v Herrold, 226-805; 285 NW 274

City—mayor served. A notice of appeal addressed to a municipal corporation by name as the sole adverse party is all-sufficient, and service of such notice on the mayor of the city is likewise all-sufficient, even tho the notice is in no manner addressed to the mayor.

Lundy v Ames, 201-186; 206 NW 954
Western Corp. v Marshalltown, 203-1324; 214 NW 687

Service—return—filing. An appeal to the supreme court is not perfected unless, after the notice of appeal is properly served, said notice with return of service indorsed thereon or attached thereto is filed, within the time allowed for taking an appeal, with the clerk of the court wherein the proceedings were had.

Hampton v Railway, 216-640; 249 NW 436

Filing of notice. The filing of a duly served notice of appeal with the clerk of the trial court is an essential step in perfecting an appeal.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Failure to file served notice. An appeal to the supreme court is not perfected unless, after the notice of appeal is properly served, said notice, with return of service indorsed thereon or attached thereto, is filed, within the time allowed for taking an appeal, with the clerk of the court wherein the proceedings were had.

Bates v Bank, 222-1323; 271 NW 638

12839 Appeal prior to judgment entry —effect.

Premature service. The fact that notice of appeal is served before the judgment is entered upon the record is of no consequence when such entry is made before the abstract is filed on appeal.

Fryman v McCaffrey, 208-531; 222 NW 19; 224 NW 95

Premature filing—dismissal. An appeal must be dismissed when the abstract of the record is filed in the supreme court before the judgment appealed from has been entered upon the court record of the trial court.

Spear v Spear, 200-1222; 206 NW 102

Filing abstract—extension of time. It is suggested that an application by an appellant for an extension of time in which to file his abstract owing to the delay of the clerk of the trial court in entering the judgment in question on the trial court records will be granted as a matter of course.

Spear v Spear, 200-1222; 206 NW 102

Necessary recitals. Failure of the abstract to show that the order or judgment appealed from has been entered of record is fatal to the appeal, provided appellee properly presents the defect.

Deal v Marten, 214-769; 240 NW 686

All-essential recitals. A naked statement, in an abstract on appeal, that the judgment appealed from was "rendered", is fatally insufficient in not revealing the all-essential fact that the judgment was duly entered of record.

Harmon v Hutchinson Co., 215-1238; 247 NW 623

Presumption. When the abstract recites generally the taking and perfecting of an appeal, and the jurisdiction of the appellate court is not attacked in written form as provided by §12885, the appeal will be presumed to be from the final judgment, even tho the abstract does not show the entry of a final judgment.

In re Kahl, 210-903; 232 NW 133

12840 Service and filing with trial clerk.

Proper service. This section, which distinctly provides that a notice of appeal shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over 14 years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under §7133.

In re Sioux City Yards, 222-323; 268 NW 18

Constable's return of notice — verification. Return of service of notice of appeal by a constable must be verified in order to be valid.

Strasburger v Witousek, (NOR); 211 NW 713

Failure to file served notice. An appeal to the supreme court is not perfected unless, after the notice of appeal is properly served, said notice, with return of service indorsed thereon or attached thereto, is filed, within the time allowed for taking an appeal, with the clerk of the court wherein the proceedings were had.

Bates v Bank, 222-1323; 271 NW 638

Fatally deficient record. An appeal cannot be entertained when the record affirmatively shows (1) that the appearance docket of the trial court carries no notation of the filing of a notice of appeal, and (2) that no notice of appeal can be found in the office of the clerk of said court.

Educational Exch. v Thornburg, 217-178; 251 NW 66

12844 Payment of fees.

Failure to pay docket fees. An abstract duly filed in the time and manner provided by law cannot be deemed unfiled because the cause was docketed without the payment of the required fees.

Anderson v Dunnegan, 217-1210; 245 NW 326

12845 Abstracts.

ANALYSIS

I ABSTRACTS IN GENERAL
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Abstracts in criminal cases. See under §14010, also Rule 18

I ABSTRACTS IN GENERAL

No abstract, no review. An order of the probate court, entered on testimony duly taken, sustaining objections to the final report of executors, cannot be reviewed on appeal in the absence of the presentation of said testimony in accordance with the statutes and rules of the appellate court.

In re Andrews, 221-818; 265 NW 187

Extensions of time to be shown. A motion for new trial and exceptions to instructions filed 16 days after verdict, where no extension is secured, are filed too late, and questions raised therein cannot be considered on appeal. In such case, when extension of time has been granted, such fact should be shown in abstract.

Roggensack v Ahlstrom, (NOR); 209 NW 429

Deficient record—presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

Conclusiveness of record. The record as reflected in the abstract and amendments thereto is conclusive on the appellate court. Recourse may not be had to the arguments for the facts unless said facts are in accordance with the abstract.

Asher v Const. Co., 216-977; 250 NW 179

Cross-appeal—duplication of appellant's abstract unnecessary. A cross-appellant need not duplicate appellant's abstract. An amendment to appellant's abstract, accompanied by a certificate by counsel to the effect that appellant's abstract and the cross-appellant's amendment contain all the record, is all-sufficient.

Bergman v Coal Co., 200-419; 203 NW 697

Agreed abstracts. Needless to say that a party on appeal must stand on an agreed abstract.

O'Donell v Davis, 201-214; 205 NW 347

Record necessary for de novo trial. In order that an equitable action may be tried de novo on appeal it is imperative that appellant place before the court the record made in the trial court, and do so in the manner required by the statutes and rules of the court.

Merritt v Ludwig-Wiese, 212-71; 235 NW 292

Unallowable addition to record. On appeal, even in an equity case, the record as made in the trial court cannot be added to by the filing of affidavits bearing on the fact situation.

McDaniel v McDaniel, 218-772; 253 NW 803

Necessary corrections in trial court. An attack on the record as duly certified to the supreme court on appeal cannot be originated in the supreme court.

Melman Co. v Melman, 216-45; 245 NW 743

Utility plant—contract and specifications—variation first alleged on appeal. A contended variation between the contract for a municipal public utility plant and the specifications, in that the contract omitted the right to call bonds at a certain time, will not be considered on appeal, when such variation, if any, was not an issue in the lower court.

Lahn v Primghar, 225-686; 281 NW 214

II FORM AND ARRANGEMENT

Substantial compliance with court rules necessary. The failure of an appellant to comply substantially with the rules of the supreme court relative to the preparation and indexing of an abstract affords ample grounds for the peremptory dismissal of the appeal.

Hakes v North, 202-324; 208 NW 305

Failure to comply with rules—dismissal. A proceeding in certiorari before supreme court will be dismissed where petitioner fails to comply with order or rules requiring printed abstracts.

Eller v Hunter, (NOR); 209 NW 281

Abstracts in question and answer form. Unless necessary for appellate review of a particular error, abstracts should not be prepared in question and answer form, but in prescribed narrative form.

Swensen v Ins. Co., 225-428; 280 NW 600

Failure to index — dismissal. Adequate grounds for dismissing an appeal are furnished by failure to alphabetically index the abstract, and especially the exhibits contained therein.

Shively v Mfg. Co., 205-1233; 219 NW 266

Filing of defective abstract—effect. The filing, within the extended time granted by the court, of an abstract which is defective in that the testimony is set out in transcript form, followed by the filing of an amendment to the abstract wherein the testimony is properly abstracted, will prevent a dismissal of the appeal, but the unnecessary printing will be taxed to the appellant in any event.

Knapp v Baldwin, 213-24; 238 NW 542

III MATTERS INCLUDED OR EXCLUDED

(a) IN GENERAL

Record—abstract—contents—Rule 17. Abstracts in the supreme court should contain "everything material" and "omit everything else".

Brien v Davidson, 225-595; 281 NW 150

Nonrecord matter strikeable on motion. It is wholly unallowable to insert in an abstract matter which was not before the court, or of record therein, when the proceedings complained of were had.

La Forge v Cooter, 220-1258; 264 NW 268

Matters subsequent to entry of order. It is futile to insert in an abstract matter which has occurred subsequent to the entry of the order from which the appeal is taken.

In re Sarvey, 206-527; 219 NW 318

Hopelessly deficient record. Errors predicated on the exclusion of evidence tending to prove nonperformance of the contract sued on cannot be considered on appeal when appellant has not included in the abstract any part of such proffered evidence or the objections or rulings thereon.

McManus v Kucharo, 219-865; 259 NW 926

Deficient record—presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

III MATTERS INCLUDED OR EXCLUDED—concluded

(a) IN GENERAL—concluded

Treating improperly stricken plea in equity as in record.

Lawrence v Melvin, 202-866; 211 NW 410

Proceedings not in record—misconduct of jurors. Argument based on the alleged misconduct of jurors, when such misconduct does not appear of record, will be wholly ignored.

McDonald v Webb, 222-1402; 271 NW 521

Contents of excluded writing. The court cannot review a ruling excluding a writing when the appellate record reveals nothing as to the contents of the writing.

Rodskier v Ins. Co., 216-121; 248 NW 295

Moratorium hearing—nonrecord matters not considered. The supreme court will not consider, in a resistance to a moratorium extension, claims that the act was unconstitutional and did not apply to a federal government agency, when the record of a former hearing, stipulated as constituting the evidence to be considered by the court, contains neither contention.

First Tr. JSL Bk. v Burke, 225-55; 280 NW 467

(b) IN PARTICULAR

Nonintroduced matters. A party to an appeal may not, by certificate, bring to the appellate court matters which he failed to introduce and make a part of the record in the trial court.

Robson v Kramer, 215-973; 245 NW 341

Incomplete transcript of evidence. An appeal in an equitable action will not necessarily be dismissed nor a de novo hearing be refused, because all the evidence is not embraced in the abstract.

State v Baker, 212-571; 235 NW 313

Absence of evidence in equity. An appeal in an action brought and tried in equity will not be dismissed because the appellant fails to include the evidence in his abstract when the record reveals everything necessary for the court to decide the narrow question of law presented by appellant.

Carlson v Layman, 214-114; 241 NW 457

Chicago JSL Bk. v Eggers, 214-710; 243 NW 193

Total absence of evidence. An appeal in an equitable action must be dismissed when the only questions raised depend on the facts, and such facts are not presented.

Union County v Bank, 202-652; 210 NW 769

Evidence—allowance of attorney fee. The abstract on appeal need not contain evidence of a matter solely determinable by the trial court, to wit, the amount allowed as an attorney's fee, and such omission is not a basis for a motion to dismiss the appeal.

Rodman v Ladwig, 223-884; 274 NW 1

Fraud in equity action. Manifestly the appellate court cannot, on appeal in an equity action, review an issue of fact as to fraud when the appellate record presented to the court contains no evidence relating to fraud.

Goff v Milliron, 221-998; 266 NW 526

Appealed judgment not entered of record. Failure of the abstract to show that the order or judgment appealed from has been entered of record is fatal to the appeal, provided appellee properly presents the defect.

Deal v Marten, 214-769; 240 NW 686

Failure to show rulings. An abstract which fails to show that the rulings of which appellant complains were actually made, is necessarily fatally defective.

Shackelford v District, 203-243; 212 NW 467

Failure to show instructions. Assignments of error pertaining to instructions cannot be reviewed on appeal when the instructions do not appear in the abstract.

Hallowell v Van Zetten, 213-748; 239 NW 593

Unsupported allegations. Needless to say that the appellate court, on appeal in certiorari to test the right of the executive council to remove plaintiff from office, will ignore plaintiff's wholly unsupported allegation of prejudice on the part of said council.

Clark v Herring, 221-1224; 260 NW 436

Instructions and exhibits. The appellate court cannot review an instruction to the jury when the correctness of such instrument depends on the contents of exhibits not embraced in the abstract.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Incomplete instructions — nonreviewability. Instructions not set out in their entirety in the abstract will not be reviewed.

Wilkinson v Indianola, 224-1285; 278 NW 326

Cross-appeal not shown in abstract. Supreme court will not consider appellee's appeal from part of the lower court judgment when the abstract does not show any appeal or cross-appeal by appellee, and where appellee merely stated in its argument "from this part of the decree appellee has appealed".

Queal Lbr. v McNeal, 226-637; 284 NW 482

Reference to insurance. In a motor vehicle damage action, error may not be predicated on references to insurance in jurors' examination when no record is preserved for appeal.

McCornack v Pickerell, 225-1076; 283 NW 899

IV ABRIDGING MATTERS OF RECORD

Nonabridged abstract. An order of affirmance is justified when the so-called abstract consists of a substantial copy of the bill of exceptions, 50 percent of which is immaterial matter.

Pieczynski v Railway, 202-625; 210 NW 758

Unabbreviated abstract — penalty. A flagrant violation, in the preparation of an abstract, of the rule "to preserve everything material to the question to be decided, and to omit everything else", may be penalized by a taxation to appellant of all the cost of printing, even tho appellant is successful on appeal.

In re Higgins, 207-95; 222 NW 401

Certiorari—return—insertion of nonrecord matter. On certiorari to review the action of a trial court in proceedings for contempt, it is wholly unallowable to insert in the return matter which was not made of record by the court at the time of the entry of the order in question, and matters so inserted will be stricken on motion.

Crosby v Clock, 208-472; 225 NW 954

Record of contempt — mandatory requirements. There can be no legal judgment for contempt unless the record made by the court at the time of the judgment entry shows every fact which is necessary to the guilt of the party. Nothing must be left to inference. This is one instance where the law refuses to presume that the judgment was supported by sufficient evidence.

Crosby v Clock, 208-472; 225 NW 954

Deficient record — presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

V RECITALS

(a) IN GENERAL

Absence of record. The holding of the trial court as to the legal effect of a written instrument is necessarily conclusive on the appellate court when such instrument has not been included in the appellate record.

O'Connor v Hassett, 207-155; 222 NW 530

Fatally defective record. The appellate court cannot consider errors assigned on exhibits which are not embraced in the appellate record.

State v Wall, 218-171; 254 NW 71

Total absence of exceptions—necessary affirmance. If the record on appeal is barren of any exception to the directed verdict rulings complained of, the appellate court will affirm the judgment of the lower court.

Garner v Cherokee County, 223-712; 273 NW 842

(b) AS TO CONTENTS

All-essential recitals. A naked statement, in an abstract on appeal, that the judgment appealed from was "rendered", is fatally insufficient in not revealing the all-essential fact that the judgment was duly entered of record.

Harmon v Hutchinson Co., 215-1238; 247 NW 623

VI PRESUMPTIONS

Amendment presumptively correct. An amendment to appellant's abstract, which amendment shows no exception to a ruling of the court, will be presumed correct in the absence of a certification of the record.

State v Slycord, 210-1209; 232 NW 636

Undenied amendment presumed true. Appellee's amendment to appellant's abstract will be presumed to speak the truth in the absence of a denial thereof or a certification of the record.

Home Bank v Ratcliffe, 206-201; 220 NW 36

Abstract contains the record. An abstract which is not denied or corrected by subsequent abstract will be presumed to contain the record, even tho unaccompanied by any certificate to that effect.

Pullan v Struthers, 201-709; 207 NW 794
Perry Fry v Gould, 214-983; 241 NW 666

Denial of abstract—effect. A sweeping, all-inclusive and adequate denial by appellee of the correctness of appellant's abstract will be deemed true in the absence of a certification of the record.

People's Bk. v Smith, 212-124; 236 NW 30

Presumption attending unduly abbreviated abstract. When the complete record on which the trial court reached its conclusion on a fact proposition is not before the court on a de novo trial, and where the contrary does not appear, the presumption must be indulged that the trial court properly performed its duty and reached a proper conclusion.

Harrington v Foster, 220-1066; 264 NW 51

Deficient record—presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

Justification of court ruling. The presumption will be indulged that the testimony before the trial court justified its ruling when, on

VI PRESUMPTIONS—concluded

appeal, the abstract shows the existence of such testimony, but does not contain it.

In re Eschweiler, 202-259; 209 NW 273

Case reinstated after dismissal—court rules not in evidence—no review. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erroneously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

Instructions presumed correct. Where the record on appeal does not contain all the instructions necessary to determine the questions raised, the supreme court must presume their correctness.

Reardon v Hermansen, 223-1207; 275 NW 6

Appeal from judgment (?) or from order overruling motion for new trial (?). When the abstract recites generally the taking and perfecting of an appeal, and the jurisdiction of the appellate court is not attacked in written form, as provided by §12885, C., '27, the appeal will be presumed to be from the final judgment, even tho the abstract does not show the entry of a final judgment.

Koepke v Rohwer, 210-903; 232 NW 133

Facts provable by witness—absence—prejudice not presumed. Where the record fails to show the facts to be proved by a witness and prejudice resulting therefrom, none will be presumed and no reviewable error is preserved.

Pearson v Butts, 224-376; 276 NW 65

Plaintiffs as proper parties. On appeal in an action involving the title to real estate, it will be assumed, in support of the judgment, that the plaintiffs were the proper parties in interest, tho the record is indefinite, when they were so treated without objection in the trial below.

Bullock v Smith, 201-247; 207 NW 241

VII AMENDMENTS AND CORRECTIONS IN GENERAL

Nonapplicability of rule. The rule that an abstract cannot be amended, after a rehearing has been granted, has no application to a case where the court wholly withdraws an opinion, sets aside the former submission, and orders the appeal resubmitted.

State v Henderson, 215-276; 243 NW 289

Proceedings after judgment — amendment stricken. On an appeal from a judgment in mortgage foreclosure, the fact that execution has been issued and the property so sold as to leave a deficiency judgment is not properly made a part of the appellate record by including the same in an amendment to the abstract, and such amendment will be stricken, on motion.

John Hancock Ins. v Linnan, 205-176; 218 NW 46

Facts provable since trial. No procedure exists under which an insurance company may show, on appeal from a judgment against it on a policy, that since the appeal was taken judgment on another policy issued by another company on the same loss has been affirmed by the supreme court and paid, and that, therefore, appellant should be granted a reversal so that the loss may be prorated on the basis of all valid and collectible insurance.

Sargent v Ins. Co., 218-430; 253 NW 613

Failure to number lines—when stricken. An "additional abstract" containing a single short exhibit will not be stricken on appeal for failure to comply with rule as to numbering lines since reason for rule is to enable court to readily find testimony, and when the additional abstract is not essential to the decision of the case.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

Unallowable to amend after rehearing granted.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

In re Simplot, 215-578; 246 NW 396

Amendment filed when leave of court granted. Where the supreme court grants leave to file an amendment, a motion to dismiss such amendment will be overruled.

Allbaugh v Ashby, 226-574; 284 NW 816

VIII AMENDMENT BY APPELLANT

Belated filing—motion to strike. Appellant's amendment to his own abstract will not necessarily be stricken because it was filed after the expiration of the 120 days for filing the original abstract.

Knudson v Railway, 209-429; 228 NW 470

Amendment presumptively correct. An amendment to appellant's abstract, which amendment shows no exception to a ruling by the court, will be presumed correct, in the absence of a certification of the record.

State v Slycord, 210-1209; 232 NW 636

Unallowable amendment. An amendment to a petition, filed after the cause has been fully tried and submitted to the court, and without leave of the court, and brought to the appellate court as an amendment to the abstract, will be stricken on motion.

Fleming v Fleming, 211-1251; 230 NW 359

Amended abstract stricken—filing without leave. Appellant's amended additional abstract of testimony, filed three days prior to the submission of the case, and without leave of court, may be stricken on motion.

Harrison v Hamilton County, (NOR); 284 NW 456

Amendment by cross-appellant. A cross-appellant need not duplicate appellant's abstract. An amendment to appellant's abstract, accompanied by a certificate by counsel to the effect that appellant's abstract and the cross-appellant's amendment contain all the record, is all-sufficient.

Bergman v Coal Co., 200-419; 203 NW 697

Failure to certify record. Appellee's abstract and denial of appellant's abstract will not be stricken from the record when appellant makes no effort to sustain his abstract by a certification of the record.

McKay v Barrick, 207-1091; 224 NW 84

IX AMENDMENT BY APPELLEE

Amendment—unallowable method. An assertion by an appellee (by way of a so-called amendment to appellant's abstract) that the appellant actively procured the very order appealed from, will be disregarded when appellee neither denies the correctness of appellant's abstract nor supports his assertion by any record or by any allowable correction of the abstract.

Depping v Hansmeier, 202-314; 208 NW 288

Belated filing. The failure of appellee to file and serve his amended abstract within the time provided by the rules of the appellate court will not justify the striking of said amended abstract when the amendment contains material matter not in the originally filed abstract, when appellant has not been injured by the delay, and when appellee makes a reasonable excuse for his delay.

Richardson v Rusk, 215-470; 245 NW 770

X DENIALS

General denial—effect. The filing by appellee of a general denial of the correctness of appellant's abstract casts no duty on appellant to file an additional abstract conforming to appellee's complaint. The filing of such general denial effects no purpose whatever, except that, legally, it works a concession that the abstract thus attacked is correct.

Melman Co. v Melman, 216-45; 245 NW 743

Denial—effect. Appellant's assertion in his abstract of a fact relative to the filing of a motion availeth nothing in the face of a direct denial by appellee unless the assertion is sustained by a transcript of the record.

Mid-West Bk. v Struble, 203-82; 212 NW 377

Amendment — motion to strike. Appellee's abstract and denial of appellant's abstract will not be stricken from the record when appellant makes no effort to sustain his abstract by a certification of the record.

McKay v Barrick, 207-1091; 224 NW 84

Absence of amendment. An appellee who furnishes no amendment in support of his general denial of the correctness of appellant's abstract presents nothing to the appellate court by making reference to the original transcript of evidence.

Finley v Thorne, 209-343; 226 NW 103

Amendment—denial of correctness—certification of record. It is futile for appellant to deny the correctness of appellee's amendment to abstract unless appellant secures a certification of the record to the extent necessary to settle the dispute.

Harness v Tehel, 221-403; 263 NW 843

Correctness of abstract denied. Appellant's motion in supreme court to strike appellee's amendment to appellant's abstract was improper, since appellee in his amendment had made a specific denial of the correctness of appellant's abstract, and the proper procedure was for appellant to have the record certified to the supreme court as provided by its rules.

Rance v Gaddis, 226-531; 284 NW 468

XI FILING

Appellee need not file in case of cross-appeal. An appellant is the party who first gives notice of appeal, and he alone is required to file an abstract of the record, even tho the appellee perfects a cross-appeal.

Dunlop v Wever, 209-590; 228 NW 562
Hipp v Hibbs, 215-253; 245 NW 247

Time for filing abstracts. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

Failure to pay docket fees—effect. An abstract duly filed in the time and manner provided by law cannot be deemed unfiled because the cause was docketed without the payment of the required fees.

Anderson v Dunnegan, 217-1210; 245 NW 326

Failure to file—dismissal. Appellant's failure to file abstract is sufficient ground for dismissing appeal or regarding it as abandoned.

Leach v Bank, (NOR); 218 NW 907

Cross-appellant need not file. There is no occasion or requirement that a cross-appellant file a separate, duplicate abstract of the record.

Wheatley v Fairfield, 221-66; 264 NW 906

XI FILING—concluded

Amended abstract stricken—filing without leave. Appellant's amended additional abstract of testimony, filed three days prior to the submission of the case, and without leave of court, may be stricken on motion.

Harrison v Hamilton County, (NOR); 284 NW 456

12845.1 Presumption.

See under §12845 (VI)

12845.2 Denials—additional abstracts —transcripts.

Denials. See under §12845 (X)
See also under §12846

12846 Unnecessary abstract or denial.

Unnecessary and immaterial amendment. The costs attending unnecessary and immaterial amendments to an abstract will be taxed to the party presenting them.

Wilson v Stever, 202-1396; 212 NW 142

Motion to strike. The court will be slow to strike amendments to an abstract when the filing appears to be actuated by a good-faith desire to present with great thoroughness matters of unusual importance.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

Unnecessary abstract stricken. Appellee's abstract will be stricken when appellant's abstract is amply sufficient to enable the appellate court to decide all questions presented.

Reppert v Reppert, 214-17; 241 NW 487

Additional abstract containing filings subsequent to appeal stricken. On appeal from an order overruling special appearance, appellant's motion to strike appellee's additional abstract, containing only an amendment to plaintiff-appellee's petition filed in lower court subsequent to the appeal, would be sustained by supreme court.

Welsh v Ruopp, 228- ; 289 NW 760

12847 Time of filing.

Rulings under prior (C., '24) provisions.

Hogan v Ross, 200-519; 205 NW 208
Mullenix v Bank, 201-137; 206 NW 670
Marshall Inv. v McCoy, 201-757; 207 NW 740

Timely filing of abstract mandatory—dismissal for noncompliance. The law requiring that service of notice of appeal and filing of the abstract be timely is mandatory, and unless complied with, the appeal will be dismissed.

Herrold v Herrold, 226-805; 285 NW 274

Clerk's transcript submission—criminal—abstract—time limit. To avoid a submission on the clerk's short transcript, a criminal appellant who elects to present his case on printed abstract, brief, and argument must serve his notice under Rule 32 and file his abstract within the statutory time of 120 days from the giving of notice of appeal. Setting aside a submission is a matter of grace, not of right.

State v Johns, 224-487; 275 NW 559

Belated filing of abstract—review an transcript and argument. Where dependant failed to comply with Rule 32 and §12847, C., '39, requiring that abstract be filed within 120 days after perfecting appeal, but did file brief and argument within time fixed by said rule, held that only brief and argument would be considered, and that under §14010, C., '39, it was imperative duty of supreme court to review the record presented by clerk's transcript even tho the defendant had no right to have the abstract considered.

State v Dunley, 227-1085; 290 NW 41

Time of serving notice of appeal. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

Motion to dismiss appeal. A motion to dismiss an appeal, because the abstract was not served upon all the appellees within 120 days after perfecting the appeal, was filed on time when filed more than 10 days before the time the case was assigned for submission, and should be sustained.

Herrold v Herrold, 226-805; 285 NW 274

Belated filing of amendment — motion to strike. Appellant's amendment to his own abstract will not, necessarily, be stricken because it was filed after the expiration of the 120 days for filing the original abstract.

Knudson v Railway, 209-429; 228 NW 270

Delay in filing—effect. Delay in filing a printed abstract in certiorari in strict accord with the order made at the time the writ was granted is not necessarily irremediable.

Sell v Mershon, 202-627; 210 NW 758

Notice of appeal—service on attorneys for part of appellees. When timely notice of appeal was served on attorneys for part of the appellees, the service on such attorneys was effective only as to the appellees they represented, and not effective as to other appellees represented by attorneys who received late service.

Herrold v Herrold, 226-805; 285 NW 274

Filing when notes and transcript not with clerk. An abstract filed with the clerk of the supreme court within the time provided by

statute is a proper and valid abstract notwithstanding the fact that, at the time of said filing, the shorthand notes had not been returned to, nor had the transcript been filed with, the clerk of the trial court.

Melman Co. v Melman, 216-45; 245 NW 743

Failure to file abstract—dismissal. Appellant's failure to file abstract is sufficient ground for dismissing appeal or regarding it as abandoned.

Leach v Bank, (NOR); 218 NW 907

Failure to file brief and argument. When an appellant files an abstract but no brief and argument in support of his appeal, the judgment appealed from will be affirmed on the presumption that the said judgment is correct, and that appellant has abandoned his appeal.

Gordon-Van Tine v Sergeant, 215-106; 244 NW 712

Necessary extension of time. It is suggested that an application by an appellant for an extension of time in which to file his abstract owing to the delay of the clerk of the trial court in entering the judgment in question on the trial court records will be granted as a matter of course.

Spear v Spear, 200-1222; 206 NW 102

Filing of defective abstract—effect. The filing, within the extended time granted by the court, of an abstract which is defective in that the testimony is set out in transcript form, followed by the filing of an amendment to the abstract wherein the testimony is properly abstracted, will prevent a dismissal of the appeal, but the unnecessary printing will be taxed to the appellant in any event.

Knapp v Baldwin, 213-24; 238 NW 542

Belated filing—effect. The filing of an abstract within the time fixed by the statute or by the court is a condition precedent to the attaching of the jurisdiction of the appellate court to entertain the appeal.

Waterloo Bk. v Redfield, 213-871; 236 NW 61

Invalid extension of time. An order extending the time in which to file abstract on appeal, made after the statutory time of filing has expired, is a nullity.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Unallowable extension of time. An extension of time in which to file abstract on appeal in a criminal case may not be granted after the statutory time of 120 days for such filing has wholly expired.

State v Van Andel, 222-932; 270 NW 420

12848 Dismissal or affirmance.

Exclusive procedure. The exclusive procedure for presenting the question of the jurisdiction of the appellate court to entertain an appeal is by serving, ten days before the date assigned for the submission of the cause, a writing showing specifically such want of jurisdiction. Oral suggestion of want of jurisdiction cannot be recognized; likewise, appellee has the arbitrary right to serve such writing within the time provided by statute, the former doctrine of estoppel by delay having been abrogated by the statute.

Waterloo Bk. v Redfield, 213-871; 236 NW 61

Waiver of belated filing. Appellee, in order to avail himself of the appellant's failure to file his abstract within time, must act promptly and before the appellant has incurred expense in reliance on his filing.

Hewitt v Blaise, 202-1109; 211 NW 479

Fatally belated filing. An appeal must be dismissed when the abstract is not filed with the clerk of the supreme court within the statutory 120 days after the appeal is perfected and no extension of time is obtained, and it is immaterial that the appellee acknowledges timely service of the abstract.

Botna Valley Bk. v Cary, 205-913; 218 NW 926

Mandatory dismissal or affirmance. A timely motion to dismiss an appeal or to affirm the judgment appealed from because of the proven fact that the appellant has failed to file his abstract within the time required by statute leaves the appellate court with no alternative but to sustain the motion.

Farmers Bk. v Miles, 206-766; 221 NW 449

Alternative relief. When an appellant fails to file his abstract within the required statutory time, appellee's prayer for relief should be in the alternative, to wit: that the appeal be dismissed or that the judgment or order appealed from be affirmed.

Farmers Bk. v Miles, 206-766; 221 NW 449

Conflicting affidavits—effect. A war of conflicting affidavits between counsel as to what oral understanding was had relative to the time of filing an abstract on appeal will not necessarily be determined by the supreme court.

Farmers Bk. v Miles, 206-766; 221 NW 449

Dual appeals in same case—effect. Where, after rendition of a final judgment, and after a motion for a new trial is overruled, separate appeals are perfected on different dates (1) from the main judgment and (2) from the order as to new trial, the latter appeal will be deemed properly before the court, even tho the appeal from the main judgment is dismissed because of failure to file abstract within 120 days. Whether under such circumstances the appeal from the main judgment worked a waiver of an appeal from the order denying a new trial (if the point had been presented), quaere.

In re Fetterman, 207-252; 222 NW 872

Fatally belated filing—estoppel. An appellee who stands by and permits the appellant to print and file the abstract at a wholly unallowable time is not thereby estopped to move for a dismissal of the appeal.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Unallowable nunc pro tunc entry. The supreme court may not enter a nunc pro tunc order to the effect that an abstract was filed within the time provided by statute when in truth and in fact it was not so filed.

Farmers Bk. v Miles, 206-766; 221 NW 449

12849 Certification of record optional with party.

Record not certified — abstract considered correct. In supreme court appeal, where appellee made specific denial of correctness of appellant's abstract, and where entire questioned record is contained in appellee's amendment to appellant's abstract, the record as set out in appellee's amendment will be taken as correct upon failure of appellant to sustain his abstract by a certified record as provided by the rules of the court.

Rance v Gaddis, 226-531; 284 NW 468

General denial — effect. An appellee who furnishes no amendment in support of his general denial of the correctness of appellant's abstract, presents nothing to the appellate court by making reference to the original transcript of evidence.

Finley v Thorne, 209-343; 226 NW 103

12850 Certification on order of court.

Amendment—denial of correctness. It is futile for appellant to deny the correctness of appellee's amendment to abstract unless appellant secures a certification of the record to the extent necessary to settle the dispute.

Harness v Tehel, 221-403; 263 NW 843

12850.1 Shorthand reporter's transcript—filing.

Reporter's transcript—when filing necessary. Statute requiring the translation of the shorthand report of a trial to be filed with clerk of district court after service of abstract on opposite party must be strictly followed. Such requirement is not antagonistic to supreme court Rule 16.

Goltry v Relph, 224-692; 276 NW 614
First Tr. JSL Bank v Abkes, 224-877; 278 NW 183

Filing transcript mandatory. Where appellant failed to file transcript of the record with court clerk until more than six months after appellant's abstract was served on appellee, appeal was dismissed for noncompliance with statute which required filing "immediately after said abstract is served on the opposite party"—the statutory requirement being construed as mandatory.

Harroun v Schultz, 226-610; 284 NW 450

Dismissal—failure to file reporter's transcript. An appeal from an order overruling motion to set aside default annulment will be dismissed on motion when, almost three months after abstract was served, the shorthand reporter's transcript of the evidence had not been filed, the statute requiring that such transcript be filed immediately after service of the abstract.

Kurtz v Kurtz, 228- ; 290 NW 686

12851 Transcript of evidence—certification and return.

Function of transcript. The only function which a transcript serves in the supreme court on appeal is as an arbiter between conflicting abstracts. It follows that, in the absence of a proper denial of appellant's abstract, the transcript will not be referred to tho on file.

Melman Co. v Melman, 216-45; 245 NW 743

12852 What sent up.

Ex-judge's affidavit—no part of record. A judge's affidavit made after termination of his office and three months after perfection of the appeal, is no part of the record and cannot be considered against the appellant as a basis for an alleged waiver.

In re Metcalf, 227-985; 289 NW 739

12857 Perfecting record.

Correction of record after appeal. If the date of perfecting an appeal as shown on the return of service is erroneous, the defect must be corrected by proper procedure in the trial court—not in the supreme court.

Coggon Bk. v Woods, 212-1388; 238 NW 448
Melman Co. v Melman, 216-45; 245 NW 743

Unallowable amendment. A record cannot be amended by affidavits of counsel.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Unallowable corrections.

Sargent v Ins. Co., 218-430; 253 NW 613
McDaniel v McDaniel, 218-772; 253 NW 803

Correction in trial court. Corrections of the trial court record must be made in the trial court, not in the appellate court.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the

record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Municipal court—jurisdiction to dismiss pending appeal. An appeal from the municipal court to the supreme court from an interlocutory order involving part of an answer (order striking pleaded set-offs from part of the divisions of the answer), without supersedeas bond in, or stay order by, the appellate court, does not deprive the municipal court of jurisdiction to dismiss the action, in accordance with its rules, for want of attention.

D. M. Ry. v Powers, 215-567; 246 NW 274

12858 Stay of proceedings—supersedeas bond.

ANALYSIS

I SUPERSEDEAS IN GENERAL
II RESTRAINING ORDERS BY COURT
III EFFECT OF SUPERSEDEAS
IV LIABILITY ON BOND

I SUPERSEDEAS IN GENERAL

Failure to formally approve. An appeal bond which has been presented to and retained by the clerk of the district court, and which has effected all the purposes for which it was manifestly presented, will not be held invalid because not formally accepted and approved.

State v Packing Co., 219-419; 258 NW 456

Supersedeas not applicable to self-executing judgment. The execution of a supersedeas bond on an appeal from a judgment discharging an execution levy on corporate shares of stock would be wholly without legal effect.

Hewitt v Cas. Co., 212-316; 232 NW 835

Failure to file supersedeas—dismissal. An appeal will not be dismissed simply because appellee has, pending the appeal, enforced the judgment because of appellant's failure to file a supersedeas bond or obtain a restraining order on appellee.

Spring v Spring, 210-1124; 229 NW 147

Removal of executor—right to appoint successor. An order of the probate court appointing an executor in place of an executor ordered removed, is perfectly valid and such new appointee after qualifying is not an intermeddler even tho the order of removal is subsequently reversed on appeal, when the order of removal was in no manner stayed pending the appeal.

In re Mann, 217-1134; 251 NW 83

II RESTRAINING ORDERS BY COURT

Discretion of court. The matter of granting a stay pending appeal from an order overruling a motion to strike is one resting largely in the sound discretion of the trial court.

State v Murray, 219-108; 257 NW 553

Stay of proceedings—interlocutory orders. On appeals from intermediate or interlocutory orders in the trial court application should be made, in the first instance, to the district court for an order staying proceedings in the trial court pending the appeal.

Dorman v Credit Co., 213-1016; 241 NW 436

III EFFECT OF SUPERSEDEAS

Supersedeas—effect. A supersedeas bond on appeal does not work a vacation of the judgment which is superseded.

Higgins v Higgins, 204-1312; 216 NW 693

Effect of bond. The giving of a supersedeas bond on appeal does not affect the existence, force, effect, or validity of the judgment from which the appeal is taken.

Moreland v Lowry, 213-1096; 241 NW 31

Unallowable set-off. An unsuccessful defendant in an action for the recovery of real property who is afforded no opportunity therein to interpose a claim for permanent improvements (§§12235, 12249) must necessarily resort to the occupying claimants act (§10128 et seq.) for relief, and when he fails to resort to such remaining and exclusive remedy, and quits and surrenders the premises, he will not be permitted when subsequently sued on a supersedeas bond growing out of the litigation to interpose a claim for such improvements as a set-off.

Bigelow v Ins. Co., 206-884; 221 NW 661

Appointment of administrator — judgment creditor of heir. A judgment creditor of an heir of an intestate is a proper person to make application for the appointment of an administrator even tho the judgment is pending on appeal under a supersedeas bond, it appearing that the deceased left several heirs and a small quantity of real and personal property.

Moreland v Lowry, 213-1096; 241 NW 31

IV LIABILITY ON BOND

Action—parties plaintiff. The various obligees in a supersedeas bond given on appeal from a decree quieting title to different tracts of land in different parties are all proper and necessary parties in an action on the bond to recover rents during the period covered by the bond.

Bigelow v Ins. Co., 206-884; 221 NW 661

Judgment by appellate court. The supreme court has jurisdiction to enter judgment on a supersedeas bond.

State v Packing Co., 219-419; 258 NW 456

Acts releasing bond. The obligee in a joint appeal bond is not entitled to judgment on the bond when, pending the appeal, and without notice to or knowledge of the surety, he (1) releases some of the principals in the bond, (2) extends the time of payment of the

IV LIABILITY ON BOND—concluded

judgment, and (3) accepts in part the obligation of a new party as part payment of the judgment.

Warman v Ranch Co., 202-198; 207 NW 532

Unauthorized release. The liability of a surety on an appeal (supersedeas) bond, attaches the moment when the bond is accepted. It follows that an order of court assuming to set aside and to cancel the bond and to authorize the filing of a new and different bond, without notice to the appellee-obligee, is a nullity as to the first filed bond.

State v Packing Co., 219-419; 258 NW 456

Subrogation—loss of right. Where on appeal in an equitable action the money judgment of the trial court against the appealing judgment defendant is ordered "superseded and set aside", and a new money judgment is entered against appellant "in lieu, place, and stead of that entered in the district court", the surety on the supersedeas bond on payment of the new judgment is not subrogated to the lien which the judgment plaintiff had under the old or first entered judgment.

Eland v Carter, 212-777; 237 NW 520; 77 ALR 448

Liability of surety on retaxation of costs. The surety on a supersedeas bond by executing the bond makes himself a party to the record, and is bound by an unappealed order retaxing the costs entered by the court on motion of principal in the bond after the appeal had been dismissed by the appellate court and after said principal had paid a part of the costs.

Springer v Ins. Co., 216-1333; 249 NW 226

Reliance on unauthorized bond. The surety on an appeal (supersedeas) bond is estopped to question its liability on the bond when, knowing of the execution of the bond by its agent and the filing and acceptance thereof, it permits the appellee-obligee and the clerk accepting the bond, innocently to act and rely on said bond until the full purpose of the bond had been accomplished.

State v Packing Co., 219-419; 258 NW 456

Liability on bond—construction of municipal light plant restrained—damages. In an action by a city on injunction bonds put up by a light and power company to restrain construction of a lighting plant, the city was entitled to all damages that naturally and proximately resulted from wrongful injunctions, and the city was not necessarily limited to damages arising only while the injunctions were in force, if the damages flowing directly from the injunctions continued for a period of time beyond date of their dissolution.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

12860 Order to stay.

Default judgment—setting aside unaffected by failure to secure stay order. Fact that proceedings in district court could have been stayed pending appeal will not, on the ground that misfortune was avoidable, preclude setting aside a default judgment rendered pending appeal without customary notice between counsel.

Lunt v Van Gorden, 225-1120; 281 NW 743

12861 Effect of stay.

Appeal does not vacate or affect judgment. A judgment which releases and discharges an execution levy on corporate shares of stock is a self-executing judgment, and is in full force and effect from the date thereof to the time the judgment is reversed on appeal and the execution levy reinstated, and one who purchases said stock after the entry of said judgment and before the reversal thereof, (from the owners thereof as shown by the corporate stock books) will be protected in his ownership when he purchased in good faith, for value, and without knowledge of said litigation.

Hewitt v Cas. Co., 212-316; 232 NW 835

12869 Assignment of errors.

Curing error. See under §§11493 (VI), 11548 (V)
Harmless error. See under §11548 (IV)
Invited error. See under §11548 (VI)

Discussion. See 17 ILR—Rule 30; 21 ILR 693—Changes and construction of rules

Scope and effect. This section goes no further than to abolish the common-law pleading known as an assignment of error.

Brenton v Lewiston, 213-227; 236 NW 28

Power to require assignments. The supreme court has both constitutional and statutory right and power to require such adequate assignments of error in appeals in law actions as will concisely inform the appellate court and appellee of the definite action of the trial court sought to be reviewed.

Siesseger v Puth, 211-775; 234 NW 540

Brief points—necessary. Brief points are necessary on appeal for each presented proposition.

Ettinger v Malcolm, 208-311; 223 NW 247

Rule for preparation. Each assignment of error must be complete in itself—must definitely and briefly point out an action of the court and with equal definiteness and conciseness state wherein or for what reason said action of the court is erroneous. An assignment to the effect that the court erred in holding that an action was based on fraud is too general to present any question to the appellate court.

Morrow v Downing, 210-1195; 232 NW 483

Specific and concise language necessary. On appeal, where appellant fails to set out his complaint against the rulings of trial court and merely assigns the error, with brief of authorities on general principles of law, followed by argument enlarging upon matters in the brief, the supreme court will decline to attempt a decision. Rule 30 requires that appellant point out his complaint against a ruling specifically and in concise language.

Jones v Krambeck, 228- ; 290 NW 56

Reason or basis of point raised. An assignment of error must (1) state the point or proposition which the party seeks to present to the court and (2) the reason or basis therefor.

Ryan Bros. v Rate, 203-1253; 213 NW 218
Blakely v Cabelka, 207-959; 221 NW 451
Rawleigh Co. v Bane, 218-154; 254 NW 18
Dravis v Sawyer, 218-742; 254 NW 920
Gorham v Richard, 223-364; 272 NW 512

Essential requirement. In the preparation of an assignment of error, that part of the record upon which error is predicated should be incorporated into the assignment of error.

McCornack v Bank, 207-274; 222 NW 851

Omnibus assignment. Assignments of error which make no reference to any part of the record other than to the exceptions to the rulings of the court, with no specific complaint or reason assigned why the court was in error, must be deemed omnibus in form and fatally insufficient.

Luther v Inv. Co., 222-305; 268 NW 589
Wettengel v Ins. Co., 223-1; 272 NW 435
Rogers v Davis, 223-372; 272 NW 539
Shultz v Shultz, 224-205; 275 NW 562
Pickett v Wray, 225-288; 280 NW 519

Assignment of error—fatal generality. It is quite futile in framing an assignment of error on appeal to assert, generally, that "the court erred" in doing thus or so, especially when the action of the court was based on the sustaining of numerous-pointed motions.

Prudential v Burns, 223-714; 273 NW 845

Omnibus assignment—dismissal. Omnibus assignments of error coupled with a wholesale violation of other rules of the court force the court, on motion, to dismiss the appeal.

Dondore v Rohner, 224-1; 275 NW 886

Vague and general assignment of error—no review. A specification of error that the court erred in overruling a motion to set aside a verdict and order a new trial, is too vague and general to review when the motion contained some 20 grounds.

Hawkins v Burton, 225-707; 281 NW 342

Assignment of errors necessary. In a law action tried to a jury, jurisdiction of supreme court on appeal is confined to that of a court for correction of errors and, to invoke its jurisdiction, a proper assignment of error is necessary.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Equitable actions. Errors need not be assigned in an equitable action presenting questions of fact.

First Tr. JSL Bank v McNeff, 220-1225; 264 NW 105

Equitable proceedings—trial de novo. An action which plaintiff denominates when commenced as "in equity", and which is fully tried "in equity" without objection or effort to transfer to law, will, on appeal by defendant, be treated as "in equity" and tried de novo, without assignment of error.

Bates v Seeds, 223-70; 272 NW 515

Law action tried by equity procedure—errors must be assigned. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v Ins. Co., 225-293; 280 NW 521

Summary proceedings—appeal—no hearing de novo. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Unallowable amendment. An appellant may not, in his reply brief, amend the assignment of errors set forth in his original brief.

Blomgren v Ottumwa, 209-9; 227 NW 823

Unallowable amendment. Appellant may not amend his assignment of error after appellee has filed his brief and argument, especially when the points presented by the amendments were not argued in appellant's argument-in-chief.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Unallowable amendment. An appellant will not be permitted to amend his assignment of error after the cause has been fully argued.

Baker v Ins. Co., 222-184; 268 NW 556

Amended assignment on rehearing unallowable. An appellant must, on rehearing, stand or fall upon his original assignment of error.

Dailey v Oil Co., 213-244; 235 NW 756

Nonassignment of error—no consideration. Form of decree, complained of in appellant's brief, will not be considered when not assigned as error.

Bredt v Franklin County, 227-1230; 290 NW 669

Questions not raised in trial court. Assignments of error relating to instructions not raised or passed upon by the lower court will not be considered on appeal.

Simmering v Hutt, 226-648; 284 NW 459

Fatally indefinite assignments.

In re Mott, 200-948; 205 NW 770
Monona Co. v Gray, 200-1133; 206 NW 26
In re Butterbrodt, 201-871; 208 NW 297
Blakely v Cabelka, 203-5; 212 NW 348
Schmoller Piano v Smith, 204-661; 215 NW 628
State v Lambertti, 204-670; 215 NW 752
Central Trust v City, 204-678; 216 NW 41
State v Gibson, 204-1306; 214 NW 743
State v White, 205-373; 217 NW 871
Reichenbach v Bank, 205-1009; 218 NW 903
State v Cordaro, 206-347; 218 NW 477
Handlon v Henshaw, 206-771; 221 NW 489
Harrington v Sur. Co., 206-925; 221 NW 577
State v Briggs, 207-221; 233 NW 552
State v Dillard, 207-831; 221 NW 817
State v Terry, 207-916; 223 NW 870
Cary-Platt v Elec. Co., 207-1052; 224 NW 89
Lein v Morrell, 207-1271; 224 NW 576
Bodholdt v Townsend, 208-1350; 227 NW 404
State v Perkins, 208-1394; 227 NW 417
Blomgren v City, 209-9; 227 NW 823
Hedrick Bank v Hawthorne, 209-1013; 227 NW 403
Ashman v City, 209-1247; 229 NW 907
State v Martin, 210-376; 228 NW 1
Crouch v Remedy Co., 210-849; 231 NW 323
In re Kahl, 210-903; 232 NW 133
Morrow v Downing, 210-1195; 232 NW 483
Siesseger v Puth, 211-775; 234 NW 540
State v Bruns, 211-826; 232 NW 684
In re Work, 212-31; 233 NW 28
Oestereich v Leslie, 212-105; 234 NW 229
Peoples Bk. v Smith, 212-124; 236 NW 30
Duncan v Rhomberg, 212-389; 236 NW 638
Brenton v Lewiston, 213-227; 236 NW 28
Dailey v Oil Co., 213-244; 235 NW 756
State v Campbell, 213-677; 239 NW 715
Hallowell v Van Zetten, 213-748; 239 NW 593
Weymiller v Weymiller, 213-955; 240 NW 237
Lorimer v Ice Cream Co., 216-384; 249 NW 220

Fatal indefiniteness. An assignment of error to the effect that the court erred (1) in giving a certain instruction, or (2) in overruling motion for new trial, is so fatally indefinite as to present no question on appeal.

State v Campbell, 213-677; 239 NW 715

Fatal indefiniteness. It is quite futile for appellant in assigning errors to simply say that "the court erred" in doing thus and so. A specific reason must be given why the action complained of was erroneous.

Kramer v Hofmann, 218-1269; 257 NW 361
Richmond v Whitaker, 218-606; 255 NW 681

Estoppel to allege error. A litigant may not inject into the record a fact which may work to his disadvantage and then predicate error thereon.

Fisher v Tullar, 209-35; 227 NW 580

Inviting or causing error. A party who induces his antagonist to omit in the trial court proof of a certain fact may not, on appeal, predicate error on the absence of such proof.

State v Huntley, 210-732; 227 NW 337

Required on original error. Error, if any, of the court, during the trial, in striking evidence or tendered issues cannot be reached by an assignment of error to the effect that the court erred in failing to instruct on said stricken matters. The assignment must be on the original alleged erroneous striking of said matters.

Reidy v Railway, 220-1386; 258 NW 675

Error against appellee—when considered. An answer, in an action to recover personal judgment on a promissory note, to the effect that plaintiff had theretofore foreclosed a mortgage securing the note and had thereby elected his remedy and abandoned all claim to a personal judgment against defendant and was estopped to assert the contrary, is demurrable when there is no allegation (1) that personal judgment had been, or might have been, rendered in said foreclosure against defendant, or (2) that inconsistent remedies existed and that plaintiff had chosen one of them, or (3) that defendant had altered his position because of said foreclosure; but if error in sustaining the demurrer be conceded, yet the error is not such as an appellee may avail himself of, without appeal, in order to neutralize an error against appellant.

Northern Trust v Anderson, 222-590; 262 NW 529

Appellant not adversely affected by error—no review. If the appellant is not adversely affected by the lower court's decision, even if erroneous, nothing is left for review by the appellate court on that appeal.

In re Keeler, 225-1349; 282 NW 362

Party entitled to allege error—nonwaiver by examining witness. A litigant who is unsuccessful in his effort to exclude improper testimony does not waive the error by examining the witness as to his improper testimony.

Smith v Sioux City, 200-1100; 205 NW 956

Charitable construction. The appellate court, on appeals in grave criminal cases, is inclined to tolerate imperfect and unskillful assignments of error which would not be tolerated in civil cases.

State v Ingram, 219-501; 258 NW 186

Self-apparent error. A specie of legal charity may move the court to overlook noncompliance with Rule 30 when the appeal record is

very brief and the alleged error relied on self-apparent.

In re Finarty, 219-678; 259 NW 112

Insufficient assignment. Errors, unassigned in compliance with Rule 30 of the supreme court, will not be considered on appeal—a rule which has not been insisted on in a few cases wherein affirmances were entered.

Russell v Peters, 219-708; 259 NW 197

Assignment of error—good-faith compliance with rule. When there has been a good-faith attempt to comply with a supreme court rule regulating the manner of making assignments of error in the appellant's brief, and the essential elements involved in the appeal can readily be determined, the court will not refuse to consider the assignment even tho there has not been a technical compliance in every particular.

In re Baker, 226-1071; 285 NW 641

Absolute, mandatory requirement. The filing, by appellant, of a proper assignment of error, under Rule 30 of the supreme court, is absolute and mandatory, and the court is not disposed to waive it in any particular.

Andreas & Son v Hempy, 221-1184; 268 NW 13

Ignoring rule—consideration notwithstanding—justification. Justification for considering, on its merits, an appeal in certiorari proceedings, tho appellant has not assigned errors as provided by Rule 30, is found in the fact that the main, legal point in issue is of grave importance not only to the litigants, but to the people of the state in general, and is made perfectly clear to the appellate court by the brief points and arguments of both parties to the appeal. Especially is this true when no motion is filed to dismiss the appeal.

National Ben. Assn. v Murphy, 222-98; 269 NW 15

Failure to comply with rules. It is a violation of the supreme court rules to make assignments of error which simply state a proposition and cite one case without further comment.

In re Baker, 226-1071; 285 NW 143

Grounds for affirmance. Appellant's failure to make assignment of errors as required by Rule 30 is grounds for affirmance.

Yale Co. v Zink, (NOR); 212 NW 119

Sufficiency. Judgment for plaintiff will be reversed on defendant's appeal regardless of sufficiency of defendant's assignment of error, where plaintiff, having the burden to make out a case, fails to do so.

Sch. Dist. v Ida County, 226-1237; 286 NW 407

Briefs—reference to abstract necessary. Under Rule 30, statements of evidence in appellant's brief and argument and in the reply must be referred to the page and line of the abstract where found; however, in a short record, the court may be inclined not to enforce the rule.

Mosher v Snyder, 224-896; 276 NW 582

Assignment of error—Rule 30. Supreme court condemns departures from Rule 30 in preparation of arguments, but instant appeal not dismissed for such departure inasmuch as appellee not confused thereby.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Excluding testimony—fatal indefiniteness. An assignment of error based on the exclusion of the testimony of witnesses must be made more definite than simply to refer to the pages of the abstract.

Morrow v Downing, 210-1195; 232 NW 483

Failure to refer to lines of abstract—dismissal. Assignments of error not complying with rules of the supreme court may be dismissed on motion.

Swensen v Ins. Co., 225-428; 280 NW 600

Rule 30—failure to point out page and line of abstract. Where alleged errors relied upon for reversal are based upon what appellant claims was shown by the proof, but nowhere is any evidence connected with these alleged errors set out, nor any reference made to the page and line of the abstract where such evidence would be found, the supreme court, following Rule 30, will not consider such errors on appeal.

Lotz v United Markets, 225-1397; 283 NW 99

Assignment of error—Rule 30—reasonable construction. The purpose of supreme court rules is to facilitate review, so, when the appellee and the court have neither been confused nor inconvenienced by an allegedly omnibus assignment of errors, the court will not arbitrarily refuse to consider the appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Motion to dismiss. Appellant's resistance, to a motion to dismiss based on failure to comply with Rule 30, cannot be made by amendment to brief and argument by reassigning errors relied upon to conform to rule, which is the basis for motion to dismiss, nor can appellant's resistance be in the nature of a confession and avoidance, asking court's permission to file amendment to comply with Rule 30 seven days before submission of case.

Cowles v Joelson, 226-1202; 286 NW 419

Reference to records—insufficient. Where assignment of error fails to point out specifically and in concise language complaints against ruling of trial court, and where appellant fails to state grounds on which trial

court erred on sustaining defendant's demurrer, a motion to dismiss will be sustained.

Keefe v Price, (NOR); 282 NW 309

Assignment of error—sufficiency. Insufficient assignments of error will not be reviewed.

In re Collicott, 226-106; 283 NW 869

Assignment of errors—insufficiency. Assignment of error stating that "plaintiff should have been granted a new trial on ground of surprise occurring on the trial" does not comply with Rule 30.

Clare v Pearson, 227-928; 289 NW 737

Directed verdict—showing necessary. On appeal from trial court's action in sustaining generally a motion for directed verdict predicated on several grounds, it is incumbent upon appellants to establish that the motion was not good upon any ground thereof before error can be predicated upon the sustaining of such motion.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Habeas corpus—sufficiency. Where only assignment of error was to the effect that trial court erred in sustaining a writ of habeas corpus because record showed that plaintiff was a fugitive from justice, but there being several other grounds in addition to finding on this fact question which might have justified court's order granting the writ, which order being general in nature, affirmance was necessary, even if plaintiff was a fugitive, because the sufficiency of such other grounds was not before the supreme court upon assignments of error, and therefore could not be determined, since in proceedings at law, such as habeas corpus, only matters presented for review in assignments of error are decided.

Ross v Alber, 227-408; 288 NW 406

Absence of exceptions. An assignment of error in a law action is futile when the record reveals no exception to the ruling to which objection is made.

D. M. Co. v Seevers, 201-642; 207 NW 743

Instructions—insufficient exceptions. An exception to instructions to the effect that "the court erred in giving Instructions 1 to 12, inclusive," is fatally indefinite.

State v Feldman, 201-1089; 202 NW 90

Neutralizing errors against appellant. An appellee, without presentation of error points, may show, if he can, that he was so erred against as to neutralize entirely any errors against appellant.

Ford v Dilley, 174-243; 156 NW 513
Taylor v School Dist., 181-544; 164 NW 878
State v School Dist., 188-959; 176 NW 976
Miller v Surety Co., 209-1221; 229 NW 909
Thompson v Butler, 223-1085; 274 NW 110

Grounds presentable by appellee. When the lower court in an equity cause sustains plaintiff's action on one presented ground, but overrules all other presented grounds, the appellee on appeal may very properly argue the correctness of the overruled grounds.

Reason: The appellate court must affirm the decree of the lower court if it is sustainable on any ground properly presented in the lower court, irrespective of the findings of the lower court.

Wyatt v Town, 217-929; 250 NW 141

Off-setting errors against appellee. An appellee in a law action who has wholly won a verdict in the trial court may not, on appellant's appeal, have a review of errors, committed by the trial court against himself, and have them weighed against the errors committed against appellant.

Finley v Thorne, 209-343; 226 NW 103

Errors against prevailing party. While a defendant, on an appeal from an order granting plaintiff a new trial, may not ordinarily show that he was sinned against by the adverse and erroneous rulings of the trial court, yet he may assign error on the refusal of the trial court at the close of all the evidence to sustain his motion for a directed verdict, because if he were legally entitled to a directed verdict such fact would ordinarily be fatal to plaintiff's motion for a new trial.

Bennett v Ryan, 206-1263; 222 NW 16

Total absence of—effect. No question is presented to the appellate court by a record which fails to reveal any assignment of error or any argument which complies with the rules of the court.

McQuillen v Meyers, 211-388; 233 NW 502

Total failure to assign errors. In case appellant wholly fails to assign any error, the judgment of the trial court will be summarily affirmed.

In re Lunow, 220-39; 261 NW 499

Fatally belated filing. An assignment of error filed after both the appellant and appellee have filed their brief and arguments will be stricken, and the action of the trial court affirmed.

In re Rhodes, 221-821; 267 NW 679

Belated assignment—effect. A judgment appealed from will not be affirmed on appeal because of the total absence in the appellant's argument of any assignment of error when the contentions of the parties are manifest, and so treated by the parties, and when a formal assignment of error is made in the reply, and no additional argument is requested.

Woodard v Ins. Co., 201-378; 207 NW 351

Failure to comply with rules cured by affirmance. Where a case is affirmed it is un-

necessary to consider objections made by the appellee to the appellant's failure to comply with supreme court rules in making assignments of error.

Dykes v Washington Co., 226-771; 285 NW 201

Failure to file brief and argument. Where the supreme court issues an order for a writ of certiorari and, pursuant to such order, respondent judge makes a return of the proceedings below, and thereafter nothing further is done and no abstract or argument filed, the petitioners are presumed to have abandoned their cause, and the writ will be annulled.

Phoenix Fin. v Jordan, 226-630; 284 NW 820

Assignment inconsistent with trial theory. An assignment of error which is inconsistent with the theory on which the cause was tried in the trial court will not be considered.

McLain v Risser, 207-490; 223 NW 162

Argument ignoring adjudication. A cause will be summarily affirmed on appeal when the record prima facie shows a conclusively established plea of former adjudication, and appellant sees fit in his argument to ignore such condition of the record.

Franquemont v Munn, 208-528; 224 NW 39

Failure to argue. Unargued assignments of error will be disregarded on appeal.

Minn. StL Ry. v Pugh, 201-208; 205 NW 758
State v Derry, 202-352; 209 NW 514
State v Harding, 204-1135; 216 NW 642
Rauch v Elec. Co., 206-309; 218 NW 340
State v Neifert, 206-384; 220 NW 32
Bigelow v Ins. Co., 206-884; 221 NW 661
State v Andrioli, 216-451; 249 NW 379

Contrast between appeal from judgment and from denial of new trial. An appeal from a final judgment arms appellant with the right to make a proper assignment of error on any part of the entire trial record, and to have a review thereof.

An appeal solely from an order overruling a motion for a new trial arms appellant with no right to assign error on any ground except the grounds specified in said motion, and then only if such grounds are sufficient to meet the requirements of appellate practice.

Halstead v Rohret, 212-837; 235 NW 293

Excessive verdict. An assignment to the effect that the amount of the verdict is excessive and contrary to the instructions is sufficient.

Ryan Bros. v Rate, 203-1253; 213 NW 218

Nonrecord matter—scope of review. Assignments of error pertaining to instructions cannot be reviewed on appeal when the instructions do not appear in the abstract.

Hallowell v Van Zetten, 213-748; 239 NW 593

Conforming pleadings to proof—amendment not permitted. An assignment of error which stated that "the court abused its discretion when it refused to permit plaintiff to amend its amended and substituted petition to conform to the proof" is insufficient when the written contract sought to be enforced was not established by the proof; and the court's refusal to permit amendment to pleadings was not an abuse of discretion.

Clare v Pearson, 227-928; 289 NW 737

Assignment of errors—mandatory requirement. In appeals from law actions, the supreme court constitutes a court for correction of errors, and without assignments of error, as required under Rule 30, the appeal presents nothing for review.

Clare v Pearson, 227-928; 289 NW 737

12870 Motion book.

Motion to dismiss appeal—determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Motion to dismiss—timeliness. A motion to dismiss served and filed in the supreme court 17 days before submission of cause was timely.

Cowles v Joelson, 226-1202; 286 NW 419

Timeliness of motion. In a probate proceeding on appeal, a motion to dismiss served six days before cause is set for hearing must be denied as not being timely.

In re Sheeler, 226-650; 284 NW 799

Motion to dismiss—improper. Appellant's resistance, to a motion to dismiss based on failure to comply with Rule 30, cannot be made by amendment to brief and argument by reassigning errors relied upon to conform to rule, which is the basis for motion to dismiss, nor can appellant's resistance be in the nature of a confession and avoidance, asking court's permission to file amendment to comply with Rule 30 seven days before submission of case.

Cowles v Joelson, 226-1202; 286 NW 419

Motion to dismiss well grounded. On appeal to the supreme court, appellant's failure to comply with supreme court rules by omitting from his brief and argument that portion of the record referring to errors relied upon with the court's ruling thereon, and failing to point out specifically and precisely his complaints thereof, are sufficient grounds for a motion to dismiss the appeal.

Cowles v Joelson, 226-1202; 286 NW 419

Motion to dismiss where judgment paid. A motion to dismiss an appeal is proper where there has been compliance with and submission

to the judgment from which the appeal was taken.

Bates v Nichols, 223-878; 274 NW 32

Allowance of attorney's fee—motion to dismiss. The abstract on appeal need not contain evidence of a matter solely determinable by the trial court, to wit, the amount allowed as an attorney's fee, and such omission is not a basis for a motion to dismiss the appeal.

Rodman v Ladwig, 223-884; 274 NW 1

Escheat proceeding — striking allegations asking for new administrator—no appeal—dismissal. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

12871 Arguments—submission—decision.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I ARGUMENT
II DECISION
(a) IN GENERAL
(b) LAW OF CASE
III AFFIRMANCE
IV MODIFICATION
V REVERSAL
VI REMAND, FINAL JUDGMENT, AND RETRIAL
(a) IN GENERAL
(b) IN LAW
(c) IN EQUITY

Error without prejudice. See under §11548
Following trial theory. See under §12827 (III)
Moot cases. See under §12886
Questions and theories first raised on appeal. See under §12827
Review of verdict of jury. See under §11429

I ARGUMENT

Failure to file argument. An appellant by failing to file an argument abandons his appeal.

Aetna Bk. v Fremmer, 213-339; 239 NW 234
Gordon-Van Tine Co. v Sergeant, 215-106; 244 NW 712
Deaton v Hollingshead, 225-967; 282 NW 329
Sentner v Dist. Court, 226-335; 284 NW 166
Phoenix Fin. v Jordan, 226-630; 284 NW 820

Failure to file—estoppel to assert claim. In action by subcontractor against principal and drainage district jointly to establish claim as a lien on the district's fund, where drainage district filed no brief or argument, court need give no attention to its plea that subcontractor was estopped from asserting claim by his action in accepting auditor's warrant for a lesser amount than that to which he was entitled.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Abandonment—failure to argue alleged errors. Grounds of error alleged and relied upon for reversal, but not argued, will be deemed to be abandoned.

Lotz v United Food Markets, 225-1397; 283 NW 99

Unargued propositions abandoned. Failure to mention in argument certain grounds for recovery is an abandonment thereof.

Valley Bk. v Staves, 224-1197; 278 NW 346

Reservation of grounds—objectionable argument. Failure to have an objectionable argument made of record and to except thereto constitutes a waiver of the error, if any.

Schram v Johnson, 208-222; 225 NW 369

Brief points, authorities and arguments—requirements under Rule 24. Where appellant files an abstract of record and fails to serve copies of brief points, authorities and arguments on attorneys for appellee at least 40 days before the day assigned for hearing case, appellee's motion to submit the cause on the record as it was on the date the time expired for serving copies of brief points was sustained and the cause submitted without oral argument in its regular order, and case dismissed for failure to comply with Rule 24.

Rabenold v Morrison, 228- ; 290 NW 60

Dismissal—failure to file argument. Failure of appellant to file argument during rule time will not necessarily be visited by an order of affirmance or dismissal.

Finley v Thorne, 209-343; 226 NW 103

Review de novo—irrespective of failure to file brief. An action in equity to recover a judgment against the members of an alleged partnership and to impress a trust on certain funds is triable de novo on appeal, and the supreme court will examine the record despite parties' failure to furnish brief and argument.

Maybaum v Bank, (NOR); 282 NW 370

Grounds presentable by appellee. When the lower court in an equity cause sustains plaintiff's action on one presented ground, but overrules all other presented grounds, the appellee on appeal may very properly argue the correctness of the overruled grounds.

Reason: The appellate court must affirm the decree of the lower court if it is sustainable on any ground properly presented in the lower court, irrespective of the findings of the lower court.

Wyatt v Town, 217-929; 250 NW 141

Nonpermissible enlargement. An appeal specifically from the refusal of the court to strike

a petition cannot be deemed enlarged so as to stand as an appeal from the final judgment, as well as from the refusal to strike, simply because appellee, on appeal, (1) amends the appellant's abstract and shows that, subsequent to the taking of the appeal, appellant answered the petition and proceeded to trial, and (2) files an argument as to the merits of the final judgment.

Iowa Bank v Raffensperger, 208-1133; 224 NW 505

Fatally belated arguments. Argument on propositions first presented by appellant in his reply argument will be ignored.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Scurrilous matter stricken. Counsel who sees fit to indulge in his brief and argument in slurs and scurrilous statements, which are wholly unsupported by the record, need not be surprised if said filings are, on motion, stricken from the record.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

Nonappealing parties — striking argument. Arguments filed in supreme court by nonappealing parties as appellants may be stricken.

In re Schropfer, 225-576; 281 NW 139

Reply to reply—no legal standing. A reply to a reply brief and argument has no standing and will be stricken on motion. (See Cochran v School Dist., 207 Iowa 1385.)

In re Rinard, 224-100; 275 NW 485

Dismissal of writ. A writ of certiorari will be dismissed when there is a total failure to comply with an order that the cause be submitted in accordance with the rules for the submission of civil causes, even tho the parties to the writ have stipulated for a submission without abstract or argument.

Touche v Franklin, 201-480; 207 NW 337

Amendment filed when leave of court granted. Where the supreme court grants leave to file an amendment to brief and argument, a motion to dismiss such amendment will be overruled.

Allbaugh v Ashby, 226-574; 284 NW 816

II DECISION

(a) IN GENERAL

Discussion. See 13 ILR 188—Advisory opinions

Decision — conclusiveness. A final opinion of the supreme court in an equitable action is conclusive as to all inhering subject matters except such as the court may and does specifically except therefrom.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Conclusiveness—holding on appeal in receivership proceedings. A holding on appeal in foreclosure proceedings that a deficiency judgment debtor will be entitled to credit on the deficiency judgment in the full amount of funds realized in the receivership proceedings, is necessarily conclusive on all parties to the appeal.

Hansen v Bowers, 211-931; 234 NW 839

Allowance of claims — conclusiveness. On appeal from an order of assessment on stockholders who have not paid for their stock, the court will not, on the plea of the nonappealing receiver, determine whether the allowance of a claim against the corporation is conclusive on the said stockholders.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Absence of applicable evidence precludes review. The appellate court cannot review an instruction to the jury when the correctness of such instrument depends on the contents of exhibits not embraced in the abstract.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Absence of applicable evidence. Manifestly the appellate court cannot, on appeal in an equity action, review an issue of fact as to fraud when the appellate record presented to the court contains no evidence relating to fraud.

Goff v Milliron, 221-998; 266 NW 526

Opinion by divided court. The fact that a final opinion by the supreme court is arrived at by a divided court, e. g., by a vote of five to four, does not, of itself, furnish any reason for repudiating it.

State v Grattan, 218-889; 256 NW 273

Orders different from that appealed from. On appeal from an order approving a referee's report in probate, the appellate court will not review an ex parte order of the probate court made two days after the making of the order appealed from, and pertaining to the amount of attorney fees allowed to the attorneys for the executor in said reference proceedings.

In re Cochran, 220-33; 261 NW 514

Instituting new action pending appeal—effect. An appeal by a surviving spouse, in workmen's compensation proceedings, from a judgment that she had no right as surviving spouse to be substituted as plaintiff in a proceeding for compensation commenced by her husband in his lifetime, cannot be deemed abandoned by the act of said appealing spouse in subsequently filing with the industrial commissioner her formal application for compensation as a dependent, when said latter filing was for the sole purpose of avoiding the running of the statute of limitation and preserving her rights as a dependent in the event she, on the merits, lost her pending appeal.

Dille v Plainview Co., 217-827; 250 NW 607

II DECISION—continued
(a) IN GENERAL—concluded

Unruled matters. The appellate court will not pass on matters on which the lower court did not rule.

In re Hellman, 221-552; 266 NW 36

Absence of interested parties—effect. The appellate court will not, on appeal, assume to determine the rights of contending parties to property when it affirmatively appears that all interested parties are not before the court.

Woodward v Woodward, 222-145; 268 NW 540

Appeal—abandonment—answering over. An appeal from the refusal of the court to strike a petition must be deemed abandoned when it is made to appear that, subsequent to the perfecting of the appeal, the appellant answered the petition and went to trial on the merits.

Iowa Bank v Raffensperger, 208-1133; 224 NW 505

Disbarment of attorney—grounds—abandoned conviction. A conviction of an attorney in police court for keeping a disorderly house, followed by an appeal which has remained dormant for six years, must be deemed abandoned as a ground for disbarment of the attorney.

State v Metcalfe, 204-123; 214 NW 874

Veracity of witnesses — deference to trial court findings. In reviewing on appeal an action involving an alleged fraudulent transaction, the appellate court must of necessity rely quite largely on the judgment of the trial court as to the veracity of witnesses, especially as to the value of real estate.

Bates v Zehnpfennig, 220-164; 262 NW 141

Appellant bound by election of remedies. A litigant who chooses to move for a new trial, and is granted such, and therefore allows the time for appeal from the judgment against him to elapse without action, and thereafter suffers an adverse order setting aside the order for a new trial, may not, in appealing from said latter order, so frame his appeal as to secure a review of any question except the question of the correctness of said latter order.

Selby v McDonald, 219-823; 259 NW 485

Decisions adverse to nonappealing appellee. Matters decided against the appellee by the trial court are not to be considered by the supreme court when the appellee does not appeal.

Dawson v McKinnon, 226-756; 285 NW 258

Trial court's judgment—nonconclusive on appeal. Discretion of trial court in deciding whether guardianship should be terminated is not conclusive upon supreme court.

In re Hawk, 227-232; 288 NW 114

(b) LAW OF CASE

Appeal. Decisions on appeal constitute the law of the case.

Ryan v Trenkle, 203-443; 212 NW 888

Subsequent trials. The law announced on one appeal unqualifiedly continues to be the law of the case for subsequent trials.

Goben v Pav. Co., 218-829; 252 NW 262
White v McVicker, 219-834; 259 NW 465
Spaulding v Miller, 220-1107; 264 NW 8

Subsequent appeal—same case. A holding on appeal that the evidence is sufficient to present a jury question on the issues joined, including the issue as to the proximate cause of an injury, remains the law for all time as to that case. It follows that if the case reaches the court on a second or subsequent appeal, said adjudicated questions will not be again reviewed.

Crouch v Remedy Co., 210-849; 231 NW 323

Dictum—what is not. If a question is specifically presented to the supreme court on appeal, the opinion of the court on such question cannot be deemed dictum even tho it was not strictly necessary for the court to pass on the question.

Galvin v Bank, 217-494; 250 NW 729

Equal protection—ruling of U. S. supreme court. The chain store tax act (46 GA, Ch. 75; C., '35, Ch. 329-G1) is in violation of the equal protection clause of the federal constitution insofar as it attempts to levy an annual tax solely on the basis of the gross receipts of said stores, such being the holding of the U. S. supreme court and such holding necessarily being conclusive on the courts of this state.

Tolerton & Co. v Board, 222-908; 270 NW 427

Unallowable change of theory. One who has pleaded and tried his cause in the trial court on one theory may not, on appeal, change to an entirely different theory.

Larson v City, 216-42; 247 NW 38

Irregular but manifestly correct adjudication. Where the record reveals that a judgment creditor legally acquired a landlord's lien through garnishment proceedings against a tenant, the appellate court will not be inclined to inquire into the strict regularity of the proceedings whereby such adjudication was had.

Kinart v Churchill, 210-72; 230 NW 349

Matters not disposed of in law action.

In re Talbott, 204-363; 213 NW 779

Nonparties to appeal. The appellate court in adjusting and determining claims for preferential payment of trust funds in the settlement of the estate of an insolvent has no power to make a determination which will prejudice the rights of other parties who have

been granted preference in payment and who are not parties to the appeal.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Errors against nonappellant. An appellee who has not appealed may not have a more favorable judgment on appeal than was accorded to him in the trial court, even tho the appeal record reveals error against him.

Waxmonsky v Hoskins, 216-476; 249 NW 195

Injunction—substantial compliance. Decree of lower court on retrial reviewed by certiorari and held to be in substantial compliance with supreme court opinion requiring respondent, by mandatory injunction, to remove obstructions from bayou outlet.

Vaughan v Dist. Court, (NOR); 226 NW 49

Negligence. A holding on appeal that a jury question on the issue of negligence in operating an automobile was not generated by record evidence relative to the location and condition of wrecked automobiles, and as to marks and broken glass on the highway, is necessarily conclusive on the court on retrial on substantially the same evidence.

Reimer v Musel, 220-1095; 264 NW 47

Contributory negligence. A holding on appeal, that plaintiff in a personal injury action based on alleged negligence was himself guilty of contributory negligence, is the absolute law of the case on retrial on the same state of facts.

Spaulding v Miller, 220-1107; 264 NW 8

Contributory negligence. The law of a case on the subject of contributory negligence as declared on appeal cannot be avoided on a retrial by simply adding to the testimony of a witness, by implication, something that the witness did not say.

Russell v Gas & Elec. Co., 218-427; 255 NW 504

Proximate cause of injury. A retrial follows the appellate reversal of a cause on the ground of a failure to establish the proximate cause of an injury, unless the court can say, as a matter of law, that a retrial will necessarily be limited to the testimony produced on the former trial.

Eclipse Lbr. v Davis, 201-1283; 207 NW 238

Opinion evidence on retrial. On the retrial of a reversed and remanded cause, additional testimony in the form of expert opinion which is the merest conjecture—opinion which is not predicated upon any basis (1) of scientific knowledge, or (2) of general experience—is entirely too weak to lift the cause out of the evidential law of the case as first declared on appeal.

Hartford Ins. v Mellon, 206-182; 220 NW 331

Sufficiency of evidence. A holding on appeal of insufficiency of evidence to present a jury question on an issue necessarily controls a retrial on the same evidence.

Disalvo v Railway, 203-974; 213 NW 569
Pease v Bank, 210-331; 228 NW 83

Right to rents. A holding on appeal in mortgage foreclosure action that plaintiff is entitled to the rents and profits accruing during the period of redemption becomes the absolute law of the case in all future proceedings in the case.

Northwestern Life v Gross, 218-408; 255 NW 511

Agreement for rents pending appeal. Where, pending an appeal which involved the title to land, the rival claimants under a landlord's lien and under a chattel mortgage on the crop entered into an agreement for the harvesting and sale of the crop and the holding of the proceeds until the appeal was decided. Held that the contract evidently contemplated that the final holding on appeal would settle the right of one or the other of the parties to the controversy without further litigation.

Farber v Andrew, 208-964; 225 NW 850

Claims in receivership. A final holding on appeal that certain claims in a receivership are general claims fixes the status of such claims regardless of any subsequent order of the trial court.

State v Cas. Co., 216-1221; 250 NW 496

Will contest—evidence. A holding on appeal that the evidence was insufficient to submit the issue of undue influence in the execution of a will is necessarily conclusive on a retrial on substantially the same evidence.

Blakely v Cabelka, 207-959; 221 NW 451

Claim in probate. A holding on appeal that an order setting aside the allowance of a claim in probate is appealable becomes the law of the case, and precludes further review or rehearing on such question in said case.

Doyle v Jennings, 210-853; 229 NW 853

Distribution of estate proceeds. A direction on appeal as to the manner in which the final distribution of the proceeds of an insolvent estate should be made becomes the law of such case.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Cost only involved. The supreme court will not determine an appeal where the only question involved is one of costs.

Welton v Hy. Com., 208-1401; 227 NW 332

Unappealed but erroneous order dismissing employee. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the

legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

III AFFIRMANCE

Failure to assign errors. In case appellant wholly fails to assign any error, the judgment of the trial court will be summarily affirmed.

In re Lunow, 220-39; 261 NW 499

Total absence of exceptions—necessary affirmance. If the record on appeal is barren of any exception to the directed verdict rulings complained of, the appellate court will affirm the judgment of the lower court.

Garner v Cherokee County, 223-712; 273 NW 842

Summary affirmance in lieu of demand for dismissal. Except on a quite unusual appellate record, the appellate court, in reversing an ordinary action at law for damages, will not enter an order dismissing plaintiff's action, but will remand the cause for full retrial; and when defendant-appellant insists on appeal that under no circumstances does he desire a new trial, the appellate court may, rather than depart from said long established practice, decline to rule on appellant's assignment of error, and may summarily affirm the judgment of the trial court.

Taylor v Burgus, 221-1232; 262 NW 808

Dismissal of appeal on technical grounds—non-effect as adjudication. The dismissal, by the supreme court, of an appeal, and the affirmance by said court of the judgment appealed from, on the technical ground that appellant had failed to make timely filing of an abstract of the record, cannot be deemed an adjudication of the jurisdictional legality of the judgment so affirmed. In other words, while the appeal has proven abortive, the said judgment is nevertheless subject to an action for its cancellation on the ground that the trial court was wholly without jurisdiction to enter it.

Dallas v Dallas, 222-42; 268 NW 516

Reversal as to one cause of action, affirmance as to other. When plaintiff sues on two independent causes of action, the appellate court may, on appeal, reverse as to one cause of action, and affirm as to the other.

Keller v Gartin, 220-78; 261 NW 776

Remittitur to cure error. The fact that plaintiff, a layman, in a personal injury action, is permitted to testify as to the reasonable value of the medical services rendered him by a physician may not be sufficient to justify a reversal; yet such fact may demand a remittitur as a condition to affirming the case.

Wood v Branning, 215-59; 244 NW 658

Dual judgments—remittitur. When two separate judgments are entered in the same action —one on the return of the verdict, and one on the ruling for new trial—the formal remitting of the prior judgment removes all error.

Lynch v Railway, 215-1119; 245 NW 219

Remittitur—effect on prior judgment entry. A duly entered judgment, followed by an unexcepted order for a new trial unless a remittitur be filed, automatically becomes a judgment in the lesser amount immediately upon the due filing of the remittitur.

Fox v McCurnin, 210-429; 228 NW 582

Time given for election. A party, who in the trial court is decreed a specific time from final adjudication either in the trial or the supreme court in which to make an election, has such time after affirmance of the decree in the supreme court.

Myrick v Bloomfield, 202-401; 210 NW 428

IV MODIFICATION

Modification by eliminating excess in judgment.

In re Carpenter, 210-553; 231 NW 376

Modification of excessive order.

Drennan v Ins. Co., 200-931; 205 NW 735

Modification by deducting excess verdict.

Cox v Fleisher Co., 208-458; 223 NW 521

Modification of uncertain judgment.

Murphy v Berry, 200-974; 205 NW 777

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Modification to avoid uncertainty.

Kollmann v Kollmann, 204-950; 216 NW 77

Modification to avoid double liability.

Webber v King, 205-612; 218 NW 282

Modification by correcting erroneous calculations.

Junger v Bank, 208-336; 223 NW 381

V REVERSAL

Ineffectual reversal. On an appeal from a decree quieting title, the appellant has no standing to ask a reversal when the record reveals the fact that the decree deprived the appellant of nothing, and that a reversal could award him nothing.

Duggleby v Railway, 214-776; 243 NW 372

Reversal with order to dismiss—when justifiable. The appellate court, on entering an order of reversal in a law action, may, in the exercise of its broad statutory discretion, terminate long protracted litigation, by ordering the trial court to dismiss plaintiff's action. So ordered where an action on a policy of insurance had been four times tried and had been three times reversed on defendant's appeal.

Stoner v Ins. Co., 220-984; 263 NW 46

Peremptory direction as to judgment. On reversal, a cause will be returned to the trial court with peremptory order to enter the proper judgment when supreme court decision results in all questions of law and fact being fully settled in favor of recovery by the plaintiff.

Duncan v Brotherhood, 225-539; 281 NW 121

Reversal as to one count—effect on other adjudicated counts. While a general reversal in a law action ordinarily gives the parties a retrial on all issues, yet where the plaintiff is successful as to one count and defeated as to all other counts, and does not appeal, a general reversal on defendant's appeal as to the one count on which plaintiff was successful does not give plaintiff a right to a retrial of any of the counts on which he was defeated. Plaintiff's defeats stand as a final adjudication even tho the formal judgment of dismissal of plaintiff's unsuccessful counts was not entered until after the issuance of procedendo on the reversal.

Pease v Bank, 210-331; 228 NW 83

Reversal in equity—fact theory controlling. On reversal in the supreme court of an equitable action to quiet title, the successful appellant will not be permitted to take decree other than in strict accord with the fact theory on which the action was commenced and prosecuted by appellant, and reversed by the appellate court. This may require the withholding of final decree until appellant returns property which he has received and in which he admittedly has no interest under the fact theory of his action.

McCloud v Bates, 222-1047; 270 NW 373

Error both prejudicial and harmless—procedure on appeal. It may happen that an error by the court in the rejection of evidence is presumptively prejudicial as to one subject matter, and quite harmless as to another subject matter; and if the record reveals the amount of the presumptive prejudice, the appellate court may give the prevailing party the option to omit the amount of presumptive prejudice or suffer a reversal.

Lantz v Goodwin, 210-605; 231 NW 331

Presumption—disregard of incompetent evidence. A competently supported judgment will not be reversed because of incompetent evidence.

Koht v Dean, 220-86; 261 NW 491

Withdrawal of opinion—jurisdiction. The supreme court has jurisdiction in a criminal case to withdraw a reversing opinion and to order a resubmission of the appeal, provided procedendo has not issued to the lower court, and provided, if procedendo has not issued, the lower court has not assumed jurisdiction of the case by redocketing it.

State v Henderson, 215-276; 243 NW 289

VI REMAND, FINAL JUDGMENT, AND RETRIAL

(a) IN GENERAL

Retrial on former record. Parties will not, after reversal, be deemed to have retried the cause solely on the former record, even tho the former record is reintroduced in toto, when it is manifest that such reintroduction was made on the one issue whether a motion to dismiss should be sustained or overruled.

Eclipse Co. v Davis, 201-1283; 207 NW 238

Conclusiveness—proceedings not in conformity with order on appeal. A proceeding in which the trial court makes a finding of fact only, but in which no judgment is entered, and which is not in conformity with an order of the supreme court, on appeal, may not be deemed an adjudication of a proceeding between the same parties which does result in a judgment in conformity with said appellate order.

State v Beaton, 205-1139; 217 NW 255

Provisional and conditional order of condemnation. When the court on appeal in an action to adjudicate rights to a fund growing out of a public improvement, is in a quandary as to how far an admitted claim can be enforced against a fund belonging to a nonparty to the action, it may enter a provisional and conditional order of condemnation.

Comm. Bk. v Broadhead, 212-688; 235 NW 299

Rendering judgment instead of new trial. Where appeal is not only from order denying new trial but from all other erroneous rulings and where evidence as to completed gift inter vivos would not change on retrial, the supreme court may render such judgment as inferior court should have done.

Wilson v Findley, 223-1281; 275 NW 47

Remand with order to dismiss. A holding on appeal that an instrument is not admissible to probate as a last will and testament necessitates a remand to the trial court with direction to dismiss the petition for probate.

In re McElderry, 217-268; 251 NW 610

Administrator's debt to decedent—exemptions—remand. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

VI REMAND, FINAL JUDGMENT, AND RETRIAL—continued

(a) IN GENERAL—concluded

Presumption of regularity—review. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Injunction—substantial compliance. Decree of lower court on retrial reviewed by certiorari and held to be in substantial compliance with supreme court opinion requiring respondent, by mandatory injunction, to remove obstructions from bayou outlet.

Vaughan v Dist. Court, (NOR); 226 NW 49

(b) IN LAW

Reversal in law—remand—effect. Upon the reversal and remand of a once fully tried law action, the cause stands for retrial exactly as it would stand had there never been a trial.

Finley v Thorne, 209-343; 226 NW 103

Final judgment in law action.

Frank Cram v Trust Co., 205-408; 216 NW 71

Remand when basis of dismissal uncertain. When the appellate court is quite uncertain whether the trial court dismissed the cause on the erroneous basis of matter in bar or on the basis of insufficiency of evidence to sustain the action in any event, a remand for new trial must be entered.

Bonner v Reandrew, 203-1355; 214 NW 536

Retrial (?) or peremptory judgment (?). When an action at law is reversed because defendant had not sufficiently or properly proven his counterclaim, the cause, after procedendo, stands for retrial on said counterclaim, and the peremptory rendition of judgment by the trial court against defendant on said counterclaim is error.

Perry-Fry Co. v Gould, 217-958; 251 NW 142

Order for dismissal. A law action, reversed on appeal on a ground rendering recovery by plaintiff impossible, will be remanded with direction to the trial court to dismiss the action.

Pearson v Anthony, 218-697; 254 NW 10

Unadjudicated ground of negligence. Plaintiff, in an action based on negligence, who fails on appeal to sustain a verdict in his favor against an employer based solely on the doctrine of respondeat superior, may, on remand and retrial, avail himself of a ground of negligence which was alleged by him on the original trial, but which was unadjudicated, and which, if established, would render the defendant liable irrespective of the doctrine of respondeat superior.

Lahr v Railway, 218-1155; 252 NW 525

Remand—right to amend. A plaintiff manifestly does not set up a new and different cause of action when, after remand on appeal in a law action based on negligence, he, by allowable pleadings, rephrases and elaborates an unadjudicated ground of negligence which was embraced in his pleadings at the time of the original trial.

Lahr v Railway, 218-1155; 252 NW 525

(c) IN EQUITY

Avoidance of technical remand in equity.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Remand in equity—permissible scope.

Globe Ins. v Cas. Co., 200-847; 205 NW 504

Remand in equity for defect in parties.

Whitmer v Board, 210-239; 230 NW 413

Remand in equity to try additional issue.

Pauly v Montgomery, 209-699; 228 NW 648

Remand in equity for trial of untried issue.

Goode v Ry. Exp., 205-297; 215 NW 621; 217 NW 876

Pace v Mason, 206-794; 221 NW 455

Remand in equity to take testimony.

Miller v Perkins, 204-782; 216 NW 27

Dismissal of equitable action on plaintiff's testimony—effect on appeal.

Matthews v Quaintance, 204-520; 215 NW 707

Coen & Conway v Bank, 205-483; 218 NW 325

Remand for additional testimony. Where, on appeal in an equitable action of mandamus to compel the levy of assessments to defray the cost of maintaining the common outlet of several drainage districts, it appears that the trial court erroneously denied relief as to one of two expenditures, and the record so blends and combines the allowable and unallowable expenditures that the appellate court is unable to determine the matter, a reversal and remand may be entered with order to the trial court to receive additional testimony and determine the amount of the allowable expenditure.

Board v Board, 214-655; 241 NW 14

Mandatory procedendo for dismissal. On the reversal and remand in toto, on the merits, of a judgment for plaintiff in an equitable action, a procedendo directing the trial court, generally, to take "further proceedings not inconsistent with the opinion of the supreme court", must be deemed, in the absence of additional pleadings or evidence in the trial court, a mandatory direction to the trial court to dismiss

the action. In the absence of such pleadings or evidence, the trial court has no jurisdiction to enter a judgment on a basis not presented by the pleadings or authorized by the opinion.

Ronna v Bank, 215-806; 246 NW 798

Remand for hearing on dismissed application. The dismissal of an application for an order staying the issuance of a deed under mortgage foreclosure (on the erroneous theory that the emergency act is unconstitutional) may necessitate a remand by the appellate court for an actual hearing on the application.

Connecticut Ins. v Clingan, 218-1213; 257 NW 213

12871.1 Arguments in re constitutional test.

Constitutional questions raised. Constitutional questions cannot be raised for the first time on appeal and, in order to present a constitutional question, specific reference must be made to the clause of the constitution relied upon and the reasons for the application of such clause must be asserted.

Martin Bros. v Fritz, 228- ; 292 NW 143

12872 Judgment against sureties on bond.

See also annotations under §12858

Jurisdiction of appellate court. The supreme court has jurisdiction, subsequent to the affirmance of an appeal, and on motion therefor, to enter judgment against the surety on the appeal (supersedeas) bond for the amount of the money judgment, interest, and costs against the appellant.

State v Packing Co., 219-419; 258 NW 456

Jurisdiction pending appeal to U. S. supreme court. The supreme court has no constitutional, statutory, implied, or inherent jurisdiction to enter an original judgment on a stay bond given by an appellee in compliance with an order of a judge of said court pending an application by appellee to the supreme court of the United States for a writ of certiorari to review a decision of the supreme court of this state to the effect that the district court of this state was in error in refusing to enter a certain judgment.

Hoskins v Hotel, 206-932; 221 NW 442

Release of principal—effect. The obligee in a joint appeal bond is not entitled to judgment on the bond when, pending the appeal, and without notice to or knowledge of the surety, he (1) releases some of the principals in the bond, (2) extends the time of payment of the judgment, and (3) accepts in part the obligation of a new party as part payment of the judgment.

Warman v Ranch Co., 202-198; 207 NW 532

12873 Damages for delay.

Frivolous appeal—penalty. Record held insufficient to justify the imposition of a penalty for prosecuting an alleged frivolous appeal, especially when the decisive features of the litigation were close and doubtful.

Russell v Gas & Elec. Co., 218-427; 255 NW 504

Appeal bond—performance of contract. In buyer's action against seller for nonperformance of oral contract to deliver corn, an appeal by seller from verdict awarding amount prayed held not to entitle buyer appellee upon affirmance to damages on appeal bond under this section.

Willers v Flanley Co., 224-409; 275 NW 474

12874 Costs taxed.

Additional taxation of costs. See under §12846

Holding under prior rule. The citation by an appellee of Iowa cases by a reference to nonofficial reports only, will be grounds for refusing him any taxation for the costs of his briefs.

Walter v City, 203-1068; 213 NW 935

Holding under prior rule. The cost of printing a brief on appeal may be very properly taxed to a party who fails to cite the opinions of this court by the proper volume and page of the Iowa Reports. (Rule 30, Par. 7.)

Sheridan v Limbrecht, 205-573; 218 NW 278

Apportionment—grounds therefor. The fact that an appellee has, subsequent to the taking of the appeal, cured an error in the record furnishes grounds for an apportionment of the costs on appeal.

Koontz v Clark Bros., 209-62; 227 NW 584

Unauthorized certification. Costs attending the filing on appeal of an unauthorized certification of what purports to be a portion of the record will be taxed to the party making the filing.

Andrew v Bank, 216-60; 245 NW 241

Unabbreviated abstract—penalty. A flagrant violation, in the preparation of an abstract, of the rule "to preserve everything material to the question to be decided, and to omit everything else", may be penalized by a taxation to appellant of all the cost of printing even tho appellant is successful on appeal.

Higgins v Higgins, 207-95; 222 NW 401

Costs taxed to administratrix as individual. When an administratrix appeals, in her official capacity, from rulings on her final report, the fact that the court taxed to her, individually, the court costs occasioned by the hearing on the report creates no necessity for the appellant to cause said notice of appeal to be served upon herself as an individual, she not being,

in fact or in law, a party, individually, to said final report and hearing thereon.

In re Paulson, 221-706; 266 NW 563

12875 Remand—process.

Procedendo — competency. The supreme court, by virtue of its constitutional powers to issue writs necessary to the exercise of its powers, has power to provide, without the aid of a statute, for the writ of procedendo, in order to furnish the trial court with competent evidence of its final decision and of its release of jurisdiction.

State v Banning, 205-826; 218 NW 572

Order to dismiss. A holding on appeal that an instrument is not admissible to probate as a last will and testament, necessitates a remand to the trial court with direction to dismiss the petition for probate.

In re McElderry, 217-268; 251 NW 610

Order for dismissal. A law action, reversed on appeal on a ground rendering recovery by plaintiff impossible, will be remanded with direction to the trial court to dismiss the action.

Pearson v Anthony, 218-697; 254 NW 10

Procedendo—retrial (?) or peremptory judgment (?). When an action at law is reversed because defendant had not sufficiently or properly proven his counterclaim, the cause, after procedendo, stands for retrial on said counterclaim, and the peremptory rendition of judgment by the trial court against defendant on said counterclaim is error.

Perry-Fry Co. v Gould, 217-958; 251 NW 142

Remand when basis of dismissal uncertain. When the appellate court is quite uncertain whether the trial court dismissed the cause on the erroneous basis of matter in bar or on the basis of insufficiency of evidence to sustain the action in any event, a remand for new trial must be entered.

Bonner v Reandrew, 203-1355; 214 NW 536

Mandatory procedendo for dismissal. On the reversal and remand in toto, on the merits, of a judgment for plaintiff in an equitable action, a procedendo directing the trial court, generally, to take "further proceedings not inconsistent with the opinion of the supreme court", must be deemed, in the absence of additional pleadings or evidence in the trial court, a mandatory direction to the trial court to dismiss the action. In the absence of such pleadings or evidence the trial court has no jurisdiction to enter a judgment on a basis not presented by the pleadings or authorized by the opinion.

Ronna v Bank, 215-806; 246 NW 798

Judgment on remand for amount confessed. A plaintiff-appellant who, on appeal, is unsuccessful in his effort to establish liability in excess of defendant's offer to confess judgment, is entitled on remand to procedendo directing the trial court to enter judgment in his favor for the amount of said offer and for costs to date of said offer.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

Administrator's debt to decedent — exemptions—remand. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

12876 Decision certified.

Cancellation of reversed decree. A decree of the trial court which has been wholly reversed on appeal should be formally set aside in the final decree entered on procedendo.

Fidelity Inv. v White, 212-782; 237 NW 518

Decree after remand from appeal—finality. The decree entered by the district court in conformity to an opinion of the supreme court is the final adjudication in the case.

Goltry v Relph, 224-692; 276 NW 614

Reversal in equity — judgment — fact theory controlling. On reversal in the supreme court of an equitable action to quiet title, the successful appellant will not be permitted to take decree other than in strict accord with the fact theory on which the action was commenced and prosecuted by appellant, and reversed by the appellate court. This may require the withholding of final decree until appellant returns property which he has received and in which he admittedly has no interest under the fact theory of his action.

McCloud v Bates, 222-1047; 270 NW 373

Order—effect on decree and mistaken stipulation. An order on appeal for a new trial on the ground of a conceded mutual mistake in entering into a written stipulation for judgment, necessarily works a setting aside not only of the judgment but of the stipulation, and, after procedendo, the trial court does not exceed its jurisdiction in entering a formal order to said effect.

Hall v Dist. Court, 206-179; 215 NW 606

12877 Restitution of property.

Moratorium denial due to misinterpretation of supreme court opinion. Where the trial

court under a misinterpretation of a supreme court opinion orders a mortgagor to account for rents and profits collected prior to foreclosure proceedings, or suffer a denial of a continuance sought under the moratorium act of the 45th GA, and the mortgagor fails to so account within the time limit set by the order, such erroneous order and subsequent judgment cannot be an adverse prior adjudication, nor terminate jurisdiction to determine the merits of the mortgagor's rights to a continuance under the later moratorium act of the 46th GA.

Equitable v McNamara, 224-859; 278 NW 910

12878 Title not affected.

Deed pending appeal — effect. The vendee in a referee's deed in partition who takes his deed pending an appeal from the order for the deed takes at his peril.

Fraizer v Fraizer, 204-724; 215 NW 946

12879 Mandates enforced.

Dual remedies—appeal or mandatory order. Where, after reversal and remand in an equity cause, the trial court, on procedendo, enters a judgment which it has no discretion to enter, the defendant may apply directly to the appellate court for a mandatory order to the trial court to obey the procedendo, even tho defendant might accomplish the same result by appealing from the entry of said judgment.

Ronna v Bank, 215-806; 246 NW 798

12880 Petition for rehearing.

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

12881 Rehearing—notice.

Discussion. See 14 ILR 36—The rehearing evil

12883 Petition may constitute brief and argument.

Belated presentation of proposition. A legal contention not presented to the trial court nor to the appellate court on original submission is not available to the appellant in a petition for rehearing.

First N. Bk. v Board, 217-702; 247 NW 617; 250 NW 887

12884 Death of party—continuance.

Death of party—appeal not abated. Death of appellee during pendency of divorce appeal to the supreme court does not abate the action when property rights are involved.

Graham v Graham, 227-223; 288 NW 78

12885 Objection to jurisdiction.

Exclusive procedure—non-estoppel by delay. The exclusive procedure for presenting the question of the jurisdiction of the appellate court to entertain an appeal is provided by this section. Oral suggestion of want of jurisdiction cannot be recognized; likewise, appellee has the arbitrary right to serve such writing within the time provided by statute, the former doctrine of estoppel by delay having been abrogated by the statute.

Waterloo Bk. v Town, 213-871; 236 NW 61

Applicability of statute. This section has no application to an attempted appeal from an inherently unappealable order, e. g., an order setting aside a default judgment.

Barber v Shattuck, 207-842; 223 NW 864

Failure to question jurisdiction. The failure of an appellee to challenge the jurisdiction of the supreme court on an appropriate ground does not necessarily operate to confer jurisdiction.

Union Ins. v Eggers, 212-1355; 237 NW 240

Jurisdiction on appeal—not conferred by consent—dismissal. Where an unauthorized appeal has been taken, it is the duty of the court upon ascertaining the situation to dismiss the appeal on its own motion. Jurisdiction of the court is statutory and cannot be conferred by consent of the litigants.

Eby v Phipps, 225-1328; 283 NW 423

Jurisdictional questions determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Timely motion. A motion to dismiss an appeal for want of jurisdiction is timely even tho service of the motion was not made 10 days before the day assigned for the submission of the cause, when it appears that the cause was not submitted under said assignment but was continued and reassigned for submission at a later term, which afforded appellant much more than said 10 days notice.

Piercy v Bronson, 206-589; 221 NW 193

Motion to dismiss—timeliness. A motion to dismiss an appeal, because the abstract was not served upon all the appellees within 120 days after perfecting the appeal, was filed on time when filed more than 10 days before the time the case was assigned for submission, and should be sustained.

Herrold v Herrold, 226-805; 285 NW 274

Untimely motion. Motion to dismiss an appeal for want of jurisdiction because of de-

fective service must be filed 10 days prior to submission.

Aldrich v Van Hemert, 205-460; 218 NW 311

Appeal from unrecorded order. After the unsuccessful termination of his appeal, an appellant may not later challenge the jurisdiction of the supreme court to entertain the appeal because the order appealed from was not spread upon the district court records.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Appeal prior to judgment entry. Failure of the abstract to show that the order or judgment appealed from has been entered of record is fatal to the appeal, provided appellee properly presents the defect.

Deal v Marten, 214-769; 240 NW 686

Presumption. When the abstract recites, generally, the taking and perfecting of an appeal, and the jurisdiction of the appellate court is not attacked in written form, the appeal will be presumed to be from the final judgment, even tho the abstract does not show the entry of a final judgment.

In re Kahl, 210-903; 232 NW 133

Order overruling objections to interrogatories. An order overruling objections and exceptions to interrogatories attached to a plaintiff's petition in an action for accounting is not an order from which an appeal will lie.

Eby v Phipps, 225-1328; 283 NW 423

12886 Dismissal of appeal.

ANALYSIS

I WAIVER OF RIGHT OF APPEAL
(a) IN GENERAL
(b) BY JUDGMENT PLAINTIFF
(c) BY JUDGMENT DEFENDANT

Who may appeal. See under §12822

I WAIVER OF RIGHT OF APPEAL

(a) IN GENERAL

Fatally belated motion. A fatally belated motion to dismiss an appeal will be overruled.

Andrew v Bank, 216-60; 245 NW 241

Nonappealable order—dismissal sua sponte. On an attempted appeal from an order which the appellate court has no jurisdiction to review (e. g., an order striking portions of an answer) the court will dismiss sua sponte, even tho the opposing party does not move to dismiss.

Joslin v Bank, 213-107; 238 NW 715

Mandatory procedure. The contention that the appellate court has no jurisdiction to entertain an appeal must be presented by motion to dismiss, not by a discussion in appellee's argument.

First Sec. Co. v U. S. Gyp., 211-1019; 233 NW 137; 73 ALR 1196

Moot case—road completed. An appeal will be dismissed when the subject matter of the action becomes nonexistent pending the appeal. So held where the action was to enjoin road authorities from establishing a road through an orchard, and where, pending the appeal, the road was actually laid out and paved through the orchard owing to appellant's failure to obtain a restraining order from the appellate court.

Welton v Hy. Com., 208-1401; 227 NW 332

Moot case—child admitted to school. An appeal from an order refusing to compel the public authorities to admit a child into the public schools (owing to certain health regulations) will be dismissed on a showing that the child has, prior to the taking of the appeal, been admitted to the school.

Saner v Board, 211-1201; 235 NW 291

Moot questions — attachment proceedings. Jurisdictional defects in attachment proceedings become moot and inconsequential when it appears that the proceedings were auxiliary to a real estate foreclosure, and that general personal judgment has been rendered in the foreclosure proceedings against the defendant in attachment.

Grimes v Kelloway, 204-1220; 216 NW 953

Moot case—service of new notice. An appeal from a ruling upholding the sufficiency of the recitals of a duly served original notice becomes moot upon a showing that since the ruling in question a new notice unquestionably complying with the statute has been served.

Ransom v Mellor, 216-197; 248 NW 361

Moot case—contract expired. The court on appeal will not concern itself with a contract which ex vi termini has ceased to have legal effect.

Capitol Hill Co. v Wells, 202-577; 210 NW 754

Moot case—redemption period expired. An appeal from an order denying a writ to place a receiver in possession of premises under mortgage foreclosure will be dismissed when it appears that sale has been had, that the redemption has expired, and that the defendant has surrendered possession of the premises to plaintiff.

Upton v Gephart, 205-235; 217 NW 630

Foreclosure—receiver—when question moot. An issue whether a mortgagee in real estate foreclosure is entitled, under a pledge of the rents, to a receiver to take possession of the mortgaged premises becomes moot when the period for redemption expires.

Metropolitan v Andrews, 215-1049; 247 NW 551

Moot case—lease expired. An appeal from a judgment in forcible entry and detainer proceedings will be dismissed when it is manifest

on the record that the lease under which appellant claims has expired and that he has no further interest in the premises, and that nothing is involved except a matter of costs.

Manning v Heath, 206-952; 221 NW 560

Moot questions—legality of court orders. An order of the supreme court on appeal that the trial court enter a decree of divorce in favor of plaintiff, and all proper orders relative to the custody of the children, renders moot the legality of all prior orders of the trial court in injunctional proceedings relative to the custody of such children.

McGrath v Dist. Court, 205-191; 217 NW 823

Moot question—right to hold office. An appeal in an action to determine whether a person is ineligible to the office of congressman will be deemed to present a moot question, and will be dismissed, when, pending the appeal, it is made to appear that the person in question has actually been sworn in as congressman, and is acting as such.

Richman v Letts, 202-973; 210 NW 93

Moot question—plea in abatement. Whether the sustaining of a plea in abatement based on the pendency of an appeal in another action, is or is not erroneous, becomes quite moot after said appeal has been fully adjudicated.

McCarthy v Bank, 210-626; 231 NW 488

Moot case—automatic dissolution of injunction. An appeal in an action for injunctional relief only, and from an order continuing the injunction to a named date, will be deemed to present a moot question when, on presentation of the appeal, it appears that the injunction has been automatically dissolved by the lapse of time.

Humble v Carter, 210-551; 231 NW 341

Moot questions—insurance policy expired. Questions with reference to the reformation of a policy of insurance will not be reviewed on appeal when it appears that the policy has expired by its own terms and without loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Moot question—bar of statute of limitation. Injunction to restrain the issuance and payment of warrants for certain claims, because of the alleged unconstitutionality of the statute purporting to authorize such claims, presents a moot case when it appears that a portion of the claims have been actually paid and the remaining claims are barred by a statute of limitation.

Gallarno v Long, 214-805; 243 NW 719

Moot question—no funds to pay. Whether the rejection by the trial court of part of a claim was erroneous becomes moot when the fund out of which payment must be made is insufficient to pay the amount that was allowed.

So. Sur. v Jenner, 212-1027; 237 NW 500

Moot question—foreclosure deed on property. Whether land was fraudulently conveyed by the owner becomes moot when, before the determination of the question, mortgage foreclosure deed for the land is issued to a nonparty to the action.

Newman v Callahan, 212-1003; 237 NW 514

Moot case — unnecessary review. An appeal from an order sustaining a special appearance will be dismissed when it appears that since the entry of the order plaintiff has instituted a new action on the same subject matter and that defendant has entered a general appearance thereto.

Schnurr v Brazelton, 217-1125; 253 NW 152

Moot question—jurisdiction of court. An appeal from a district court ruling which in effect permitted the prosecution in the state court of a tort action against a bankrupt contrary to an order of the bankruptcy court that such action must be prosecuted solely in the bankruptcy court, will be dismissed on a proper showing by appellee that, since said ruling by the state court, the federal court has so modified its former order as specifically to authorize appellee to prosecute said action in the state court, even tho such showing requires a showing dehors the original appellate record.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Transfer of interest. An appeal may not be dismissed on the ground that the appellant has transferred to another the subject matter involved in the appeal.

Union Ins. v Eggers, 212-1355; 237 NW 240

Absence of subject matter. An appeal will be dismissed when it is made to appear (1) that the appeal involves the question whether a judgment lien on previously mortgaged premises is prior to a mechanic's lien on the same premises, and (2) that the land has gone to foreclosure and deed under the prior mortgage.

Eclipse Lbr. v Riley, 203-583; 213 NW 209

Absence of evidence in equity. An appeal in an action brought and tried in equity will not be dismissed because the appellant fails to include the evidence in his abstract when the record reveals everything necessary for the court to decide the narrow question of law presented by appellant.

Carlson v Layman, 214-114; 241 NW 457

Acceptance of uncontroverted part of litigated fund. An appellant who, after the taking of an appeal, claims and receives that part of the fund in litigation which admittedly belongs to him, does not thereby waive his appeal from that part of the judgment which deprives him of the controverted part.

Nickle v Mann, 211-906; 232 NW 722

I WAIVER OF RIGHT OF APPEAL—continued

(a) IN GENERAL—continued

Submission contrary to rules. A writ of certiorari will be dismissed when there is a total failure to comply with an order that the cause be submitted in accordance with the rules for the submission of civil causes, even tho the parties to the writ have stipulated for a submission without abstract or argument.

Touche v Franklin, 201-480; 207 NW 337

Failure to file reporter's transcript. An appeal from an order overruling motion to set aside default annulment will be dismissed on motion when, almost three months after abstract was served, the shorthand reporter's transcript of the evidence had not been filed, the statute requiring that such transcript be filed immediately after service of the abstract.

Kurtz v Kurtz, 228- ; 290 NW 686

Failure to file argument. Failure of appellant to file argument during rule time will not necessarily be visited by an order of affirmance or dismissal.

Finley v Thorne, 209-343; 226 NW 103

Failure to file brief and argument. When an appellant files an abstract but no brief and argument in support of his appeal, the judgment appealed from will be affirmed on the presumption that the said judgment is correct, and that appellant has abandoned his appeal.

Gordon-Van Tine v Sergeant, 215-106; 244 NW 712

Abstracts — failure to index. Adequate grounds for dismissing an appeal are furnished by a failure to index alphabetically the abstract, and especially the exhibits contained therein.

Shively v Mfg. Co., 205-1233; 219 NW 266

Abstract—incompleteness—effect. An appeal in an equitable action will not necessarily be dismissed nor a de novo hearing be refused because all the evidence is not embraced in the abstract. So held where only one of several defendants was affected by the appeal.

State v Baker, 212-571; 235 NW 313

Fatally belated filing of abstract. An appellee who stands by and permits the appellant to print and file the abstract at a wholly unallowable time is not thereby estopped to move for a dismissal of the appeal.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Institution of new action. The rule that a party waives his appeal by instituting a new action in the lower court on the same matters involved in the appeal, is not applicable to a case where, after the taking of an appeal, the appellant attempts to revive a dismissed cross-petition which involves the matters embraced in the appeal.

Matthews v Quaintance, 200-736; 205 NW 361

Instituting non-inconsistent action. The commencement, by the proponents of a will, of an action in partition, after the return of a verdict holding the will invalid, is not a waiver of the right to appeal from the adverse verdict denying probate of the will, when the petition in partition definitely asserted the intent and right to appeal, and assumed to make the outcome of the partition proceedings dependent on the outcome of said appeal.

In re Narber, 211-713; 234 NW 185

Death of appellant. An appeal in a criminal cause will be dismissed by the court on its own motion when it appears that the appellant has died pending the appeal.

State v Catron, 207-318; 222 NW 843

Nonabatement by death. The death of a party to whom a decree of divorce has been awarded does not abate an appeal insofar as property rights and the custody of children are affected by the decree.

Oliver v Oliver, 216-57; 248 NW 233

Dismissal—motion by nonparty. A motion to dismiss an appeal or to set aside the submission thereof will be overruled when made by plaintiffs in a different but similar action, on the ground that the two actions were consolidated, and that no notice of the appeal was served on said plaintiffs, the record revealing that the two actions were consolidated only to the extent of hearing both causes at the same time and on the same evidence.

Mershon v Sch. Dist., 204-221; 215 NW 235

Abandonment—answering over. An appeal from the refusal of the court to strike a petition must be deemed abandoned when it is made to appear that, subsequent to the perfecting of the appeal, the appellant answered the petition and went to trial on the merits.

Iowa Bk. v Raffensperger, 208-1133; 224 NW 505

Evidence improperly admitted—nonreview. In appeal from court's refusal to set aside default decree annulling marriage, alleged errors in admitting evidence are not reviewable, even tho raised on motion to set aside the decree, when the appeal from the order denying the motion is dismissed.

Kurtz v Kurtz, 228- ; 290 NW 686

Justifiable omission to instruct. The action of the court in omitting a certain subject matter from the instructions must be deemed justifiable when, after consultation with the litigants, the court understood that such omission was requested, and when complainant entered no exception when the instructions

were given, and made no objections to such omission.

McLain v Risser, 207-490; 223 NW 162

Dual appeals in same case—effect. Where, after rendition of a final judgment, and after a motion for a new trial is overruled, separate appeals are perfected on different dates (1) from the main judgment and (2) from the order as to new trial, the latter appeal will be deemed properly before the court, even tho the appeal from the main judgment is dismissed because of failure to file abstract within 120 days. Whether, under such circumstances, the appeal from the main judgment worked a waiver of an appeal from the order denying a new trial (if the point had been presented), quaere.

In re Fetterman, 207-252; 222 NW 872

Conditions precedent to appeal. An appeal from a ruling sustaining a motion to strike a plea of the statute of limitation in probate proceedings will not lie when the complainant fails to stand on the plea and fails to permit judgment to go against him.

In re Delaney, 207-451; 223 NW 486

Fatal defect in parties. In an action by the purchaser of land to quiet title against certain claims for mechanics' liens, the decree confirmed the claims as liens on the land, and ordered said land sold for the payment—at least pro tanto—of said liens, and, in addition, entered personal judgments against a former owner of the land for the amount of each of said claims. Plaintiff appealed from the decree insofar as it established said claims as liens.

Held, the appeal could not be maintained without service of notice of appeal on said former owner.

Gordon Co. v Ideal Co., 223-313; 271 NW 523

Fatally deficient record. An appeal cannot be entertained when the record affirmatively shows (1) that the appearance docket of the trial court carries no notation of the filing of a notice of appeal, and (2) that no notice of appeal can be found in the office of the clerk of said court.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Coerced compliance with order appealed from —effect. Coerced compliance with an order appealed from cannot be deemed a waiver by appellant of his right of appeal.

In re Carson, 221-367; 265 NW 648

Dismissal on technical grounds—noneffect as adjudication. The dismissal by the supreme court of an appeal, and the affirmance by said court of the judgment appealed from, on the technical ground that appellant had failed to make timely filing of an abstract of the record, cannot be deemed an adjudication of the jurisdictional legality of the judgment so affirmed. In other words, while the appeal has proven abortive, the said judgment is nevertheless subject to an action for its cancellation on the ground that the trial court was wholly without jurisdiction to enter it.

Dallas v Dallas, 222-42; 268 NW 516

Improper notice of appeal. In appeal from decree quieting title in city to streets and alleys, but continuing hearing as to park, it was necessary to serve notice of appeal on city's attorney, and notice of appeal served on attorneys for cross-petitioners joining in prayer of appellee's petition was not binding on the city and entitled city to a dismissal.

Iowa City v Balluff, (NOR); 225 NW 942

Motion to dismiss appeal—determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Notice of appeal—mortgagor as adverse and necessary party—dismissal. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor, as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Notice of appeal—administrator failing to serve all objectors—dismissal. Notice of appeal from a judgment sustaining objections to an administrator's final report must be served on all heirs objecting to the report, and a failure will result in a dismissal of the appeal.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Service of notice of appeal jurisdictional—extension forbidden—dismissal. The statutory period for service of notice of appeal cannot be extended by the court. Where appellant knew of the existence of parties who might be adversely affected by a reversal, knew their residence addresses, and could have served them with notice, but statutory time had elapsed, a dismissal must follow.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Coparty—failure to serve—effect and burden. A party who assumes to appeal from a decree in equity without serving notice of appeal on a nonjoining coparty has the burden to show that said coparty will not be adversely affected in any manner by any decree of the appellate court. In a case wherein the rights of various parties were much intertwined, held said burden had not been satisfied, and consequently the appeal must, on motion, be dismissed.

Jenkins v Beeler, 213-501; 239 NW 474

Dismissal — noncompliance with Rule 30. Where appellant's brief and argument containing 117 pages, the first 60 pages of which

I WAIVER OF RIGHT OF APPEAL—continued

(a) IN GENERAL—concluded

were rambling statement of testimony and comment thereon, nowhere containing a statement of how the case was decided in the lower court, the nature of the lawsuit being ascertainable therefrom only with difficulty, and when the brief and argument nowhere contained any statement that might be called an assignment of error, the appeal will be dismissed on motion for failure to substantially comply with Rule 30, which requires a short and clear statement of the above matters.

Ind. Dist. v Hartwick, 226-491; 284 NW 453

Motion to dismiss appeal—time for making. A motion to dismiss an appeal, because the abstract was not served upon all the appellees within 120 days after perfecting the appeal, was filed on time when filed more than 10 days before the time the case was assigned for submission, and should be sustained.

Herrold v Herrold, 226-805; 285 NW 274

Partial dismissal—effect. Where appellants for a consideration procured dismissal of an appeal as to a part of appellees and thereby prejudiced rights of remaining appellees in real estate involved in litigation, supreme court sustained motion by such remaining appellees to dismiss the appeal as to them.

Lynch v Life Co., 227-730; 288 NW 902

Assignment of error—ignoring rule. Justification for considering, on its merits, an appeal in certiorari proceedings, tho appellant has not assigned errors as provided by Rule 30, is found in the fact that the main, legal point in issue is of grave importance not only to the litigants, but to the people of the state in general, and is made perfectly clear to the appellate court by the brief points and arguments of both parties to the appeal. Especially is this true when no motion is filed to dismiss the appeal.

National Assn. v Murphy, 222-98; 269 NW 15

(b) BY JUDGMENT PLAINTIFF

Accepting benefits of judgment. A party litigant who receives and accepts substantially all the money paid into court, on a judgment in his favor, may not thereafter appeal from that part of the decree which denies him interest on the sum so paid into court.

Kelly v Bk. 217-725; 248 NW 9; 250 NW 171

Enforcement of judgment by appellee. An appeal will not be dismissed simply because appellee has, pending the appeal, enforced the judgment because of appellant's failure to file a supersedeas bond or obtain a restraining order on appellee.

Spring v Spring, 210-1124; 229 NW 147

Compliance with order. An appeal from an order requiring plaintiff to bring in certain parties as additional defendants is not maintainable when the record shows that the appellant has complied with the order.

Bruner v Myers, 203-570; 213 NW 217

Moot case—contract performed. An appeal by plaintiff-appellant from an order dismissing his action for specific performance will be dismissed on motion when it is made to appear that, since the ruling in the trial court, the defendant-appellee has specifically performed, and that such performance has been accepted by appellant. The court will not retain the appeal for the purpose of determining costs.

Fish v City, 210-862; 232 NW 118

Enforcing uncontroverted part of judgment. A plaintiff who contends for a lien on both of two tracts of land, and is conceded by all parties a lien on one of said tracts, may enforce his lien on said one tract, and thereafter maintain an appeal from the judgment denying his lien on the remaining tract.

Luglan v Lenning, 214-439; 239 NW 692

Instituting new action pending appeal—effect. An appeal by a surviving spouse, in workmen's compensation proceedings, from a judgment that she had no right as surviving spouse to be substituted as plaintiff in a proceeding for compensation commenced by her husband in his lifetime, cannot be deemed abandoned by the act of said appealing spouse in subsequently filing with the industrial commissioner her formal application for compensation as a dependent, when said latter filing was for the sole purpose of avoiding the running of the statute of limitation and preserving her rights as a dependent in the event she, on the merits, lost her pending appeal.

Dille v Coal Co., 217-827; 250 NW 607

(c) BY JUDGMENT DEFENDANT

Involuntary performance of judgment. The involuntary performance of a decree because of the issuance of an execution does not deprive the judgment defendant of the right of appeal.

Horan v Horan, 203-495; 211 NW 249

Waiver of appeal. A defendant does not waive his appeal from an adverse ruling, on his motion to strike, by filing an answer subsequent to the appeal when he is coerced by the ruling of the court into making such answer.

Ontjes v McNider, 218-1356; 256 NW 277

Moot question—redemption period expired. An appeal by a surviving mortgagor from an order which grants to a probate claimant a right to redeem from a sale under foreclosure will be dismissed when it is made to appear that appellant has allowed his time for redemption to elapse without any attempt by him to redeem.

Central Bank v Lord, 204-439; 215 NW 716

When question becomes moot. An appeal from an order refusing a moratorium continuance of mortgage foreclosure suit will be dismissed when it appears that said suit has gone to final decree because the appellant neither caused said suit to be stayed or filed supersedeas bond, and that said final decree is not appealable because of the lapse of time.

Lincoln JSL Bank v Hansen, 221-21; 263 NW 821

Loss of right. One who bases his attempt to enjoin interference with a public or private easement in a strip of land solely on the ground of his ownership of the abutting land loses such right by an unconditional conveyance of the abutting land.

Rider v Narigon, 204-530; 215 NW 497

Forcible detainer of premises—appeal—nonright to maintain. Defendant in an action involving the sole question whether he was wrongfully detaining possession of premises after a refusal to pay rent, may not, after voluntarily surrendering possession in compliance with an order of removal, maintain an appeal from said order.

Sherman v Moore, 222-1359; 271 NW 606

12887 Proceedings on motion to dismiss.

Partial dismissal. Where appellants for a consideration procured dismissal of an appeal as to a part of appellees and thereby prejudiced rights of remaining appellees in real estate involved in litigation, supreme court sustained motion by such remaining appellees to dismiss the appeal as to them.

Lynch v Life Co., 227-730; 288 NW 902

TITLE XXXV

CRIMINAL LAW

CHAPTER 556

PUBLIC OFFENSES

Discussion. See 17 ILR No. 4 Supp.—Iowa crime statistics

12889 Classification.

Discussion. See 19 ILR 437—Statutory crimes—mind at fault; 22 ILR 659—Negative acts in criminal law

Atty. Gen. Opinion. See '36 AG Op 361

Statutes defining crime. Principle reaffirmed that statutes definitive of crime are strictly construed and all doubt resolved in favor of the accused.

State v Cooper, 221-658; 265 NW 915

12890 "Felony" defined.

Discussion. See 12 ILR 407—Public torts and mens rea

Atty. Gen. Opinions. See '34 AG Op 563; '36 AG Op 690

Enactment of statute—legislature's power—felony for third conviction—liquor violation. Legislature possesses full authority to enact statute making third and subsequent offense of violating liquor law a felony.

State v Erickson, 225-1261; 282 NW 728

12891 "Misdemeanor" defined.

Atty. Gen. Opinions. See '34 AG Op 563; '36 AG Op 361

Nonindictable misdemeanor. A nonindictable misdemeanor may be prosecuted under an information filed and sworn to by a private individual.

State v Porter, 206-1247; 220 NW 100

12893 Prohibited acts—misdemeanors.

Atty. Gen. Opinion. See '32 AG Op 27

12894 Punishment for misdemeanors.

Atty. Gen. Opinion. See '36 AG Op 361

CHAPTER 557

PRINCIPALS AND ACCESSORIES

12895 Distinction between principal and accessory.

ANALYSIS

I IN GENERAL
II INDICTMENT
III CONSPIRACY
IV "AID AND ABET"
V INSTRUCTIONS

Evidence in conspiracy prosecutions. See under §13162
Indictment for conspiracy. See under §§13737, 13755
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Discussion. See 19 ILR 507—Doctrine of coercion

Accessories—how tried. Principle reaffirmed that an accessory before the fact is triable as a principal.

State v Pinkerton, 201-940; 208 NW 351

Accessories before fact. The distinction between an accessory before the fact and a principal does not exist in this state.

State v Carlson, 203-90; 212 NW 312

Knowledge as essential element. One cannot be an accessory unless he is knowingly such, and conflicting instructions as to such element constitute error.

State v McCarty, 210-173; 230 NW 379
State v Miner, 213-193; 238 NW 594

Accomplices—incest. A prosecutrix in a prosecution for incest is not an accomplice if she did not voluntarily submit to the acts of sexual intercourse.

State v Candler, 204-1355; 217 NW 233

Intoxicated driver—accomplice. The owner of an automobile who causes another person to operate the car while such other person is intoxicated because such other person is less drunk than the owner becomes an accomplice in the offense of operating an automobile while intoxicated.

State v Myers, 207-555; 223 NW 166

Bootlegging—purchaser not particeps criminis. Purchaser of liquor from bootlegger held not an accessory or accomplice.

State v McMahon, (NOR); 211 NW 409

Accessory—evidence. Evidence reviewed at length, and held to sustain a verdict of guilty against defendant as an accessory to the felonious breaking and entry of a building.

State v Ball, 220-595; 262 NW 115

Coercion of wife by husband. No presumption exists that a wife who commits a crime in the presence of her husband does so under the coercion of the husband.

State v Renslow, 211-642; 230 NW 316; 71 ALR 1111

Coercion—required nature and extent. The compulsion which will excuse a criminal act must be present, imminent, and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done.

State v Clay, 220-1191; 264 NW 77

Coercion—no presumption. In arson prosecution against husband and wife, it is no longer presumed that a wife, committing a crime in the presence of her husband, did so under his coercion.

State v Bazoukas, 226-1385; 286 NW 458

Crimes—effect of wife's presence or knowledge—nonpresumption. In prosecution for arson, in the absence of testimony tending to show participation or conspiracy on the part of the wife in a crime committed by her husband, her guilt will not be presumed, nor the fact that she may have knowledge of and even be present at the scene of the crime and fail to actively oppose the same, will not, in the absence of conspiracy or participation, render her likewise guilty.

State v Bazoukas, 226-1385; 286 NW 458

Accessory — fatally incompetent evidence. The theory of the state that its sole witness to a felonious homicide (tho confessedly a participant in the transaction which led to the death of deceased) was not in fact an accomplice, because said witness acted under duress of and in fear of the defendant who was on trial, may not be supported by testimony that said defendant made a felonious assault on said witness some four months after the commission of said homicide.

State v Clay, 220-1191; 264 NW 77

II INDICTMENT

Joint indictment—right to testify. An accomplice, jointly indicted with defendant, may testify against defendant.

State v Thompson, 222-642; 269 NW 774

III CONSPIRACY

Issues, proof, and variance — permissible theory of conspiracy, and aiding and abetting. Under an indictment for murder in which the defendant is charged with having actually fired the fatal shot, the state may avail itself, as a matter of evidence, of a conspiracy theory, and at the same time invoke the theory of

aider and abettor in the commission of the offense charged.

State v Bittner, 209-109; 227 NW 601

IV "AID AND ABET"

Aiding and abetting. Evidence held ample to justify the court in submitting to the jury the question whether the accused "aided and abetted" the illegal transportation of intoxicating liquors.

State v Canalle, 206-1169; 221 NW 847

Aiding and abetting. Evidence held ample to support a finding of aiding and abetting a homicide.

State v Griffin, 218-1301; 254 NW 841

Presumption of coercion—nonapplicability. The presumption that, when a wife, in the near presence of her husband, participates in the commission of a crime, she is acting under the coercion of her husband, cannot be employed by the state as affirmative proof or presumption of the husband's guilt.

State v Kuhlman, 206-622; 220 NW 118

Coercion—no presumption. In arson prosecution against husband and wife, it is no longer presumed that a wife, committing a crime in the presence of her husband, did so under his coercion.

State v Bazoukas, 226-1385; 286 NW 458

V INSTRUCTIONS

Accessories before the fact—instructions. Instructions as to when accessories are principals reviewed and held correct.

State v Slycord, 210-1209; 232 NW 636

Accessory before fact—basis for instruction. On a charge of murder by means of poison, evidence that one defendant manually procured the poison, and that he was aided and abetted therein by another defendant, furnishes adequate basis for an instruction relative to the full responsibility of the latter as an accessory before the fact.

State v Miner, 213-193; 238 NW 594

Failure to define. Failure to define the term "accomplice" is quite harmless when the jury is peremptorily told that the witness in question is an accomplice.

State v Gill, 202-242; 210 NW 120

Accessory before fact—knowledge as essential element. An instruction to the effect that one may be convicted on proof that he knowingly aided and abetted the commission of a crime is correct, but without the qualifying word "knowingly" or its equivalent it is prejudicially erroneous.

State v Miner, 213-193; 238 NW 794

Guilt of others—effect. Requested instructions to the effect that the jury cannot consider the guilt of parties other than the one on trial are properly refused when the one on trial is accused of having aided and abetted such other parties in committing the offense.

State v Hillman, 203-1008; 213 NW 603

Instructions correct but unelaborated. A correct instruction relative to "accessories" and "aiding and abetting" is not erroneous because the court failed elaborately to define said word and phrase.

State v Tibbits, 207-1033; 222 NW 423

Harmless instructions. An accused who is manifestly a principal, if guilty, is in no manner harmed by instructions to the effect that all accessories before the fact are principals.

State v Harding, 204-1135; 216 NW 642

Instructions. Instructions relative to an accessory knowingly aiding and abetting another in the commission of a crime, and the nature of such abetting, reviewed and held unobjectionable.

State v Griffin, 218-1301; 254 NW 841

Accomplice per se. Whether a witness, testifying for the state as to the commission of the offense on trial was an accomplice is not a jury question on a record which shows that the witness himself might be charged and convicted of said offense. On such a record the court must peremptorily instruct that the witness was an accomplice, and properly guide the jury as to the necessity for corroboration.

State v Clay, 220-1191; 264 NW 77

12896 Accessory after the fact.

Corroboration. An accessory after the fact is not an accomplice to the main crime and therefore not within the purview of §13901, C., '35, relating to corroboration.

State v Philpott, 222-1334; 271 NW 617

CHAPTER 559
HOMICIDE

12910 Murder.

ANALYSIS

I MURDER IN GENERAL
II "MALICE AFORETHOUGHT"
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(b) EXPRESS MALICE
(c) IMPLIED MALICE
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2 Deadly Weapon
III INDICTMENT
IV EVIDENCE
(a) IN GENERAL
(b) THREATS
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Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions, criminal cases generally. See under §13876
Instructions, first degree murder. See under §12911 (VIII)
Instructions, second degree murder. See under §12912 (IV)

I MURDER IN GENERAL

Discussion. See 19 ILR 445—Suicide

Optional venues. A prosecution for murder by means of an attempted abortion may be prosecuted in the county wherein the resulting death occurred even tho the unlawful operation was performed in another county of this state.

State v Sweeney, 203-1305; 214 NW 735

Insanity—fundamental rule. The dividing line between accountability and nonaccountability in the taking of human life is the power or ability to know and distinguish right from wrong.

State v Maharras, 208-127; 224 NW 537

Issue of insanity—fatally delayed presentation. In order to suspend the ordinary proceedings in a prosecution for murder, and to enter upon a trial as to the insanity of the accused, the question of insanity must be raised before the end of the trial. (Motion in this case filed after sentence of death had been passed and judgment thereon entered.)

State v Tracy, 219-1412; 261 NW 527

Sentence—absence of abuse of discretion. Record reviewed and held to present no abuse of discretion on the part of the trial court in passing death sentence on defendant's plea of guilty of murder in first degree.

State v Wheaton, 223-759; 273 NW 851

Deceased as peace officer. In a prosecution for murder it was proper to refuse to instruct the jury that the fact that the deceased was a merchant policeman had no bearing on the case.

State v Coleman, 226-968; 285 NW 269

II "MALICE AFORETHOUGHT"

(a) IN GENERAL

Justifiable submission to jury. Murder in both degrees is properly submitted to the jury on testimony which will justify a finding of malice, deliberation, and premeditation.

State v Reed, 205-858; 216 NW 759

(b) EXPRESS MALICE

Presumption (?) or assumption (?) of malice. The court may, under applicable evidence, instruct that the jury has a right, in the absence of evidence to the contrary, to presume the existence of malice from the use of a deadly weapon in a deadly manner; and in so instructing it is quite immaterial that the court employs the term "assume" instead of the term "presume".

State v Berlovich, 220-1288; 263 NW 853

Proof of intent. An instruction informing the jury how intent may be proved or arrived at was proper in a murder prosecution.

State v Coleman, 226-968; 285 NW 269

(c) IMPLIED MALICE

1 In General

Homicide—malice—nonconclusive presumption—instructions. Reversible error results from instructing that "malice" is conclusively presumed from a deliberate and intentional killing, when the record reveals a plea of justification and excuse, and supporting testimony relating thereto.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

2 Deadly Weapon

Presumption of malice—intent. The use of a deadly weapon in a deadly manner generates a presumption of malice, and, if death results, justifies the inference of intent to kill.

Klinkel v Saddler, 211-368; 233 NW 538

Malice—presumption from use of deadly weapon. In the absence of evidence to the contrary, the use of a deadly weapon in a deadly manner generates a presumption of malice, but not a presumption of willfulness or premeditation.

State v Woodmansee, 212-596; 233 NW 725

III INDICTMENT

Attempted abortion — sufficiency of allegation. Indictment for murder by means of an attempted abortion reviewed, and held to adequately, tho somewhat clumsily, allege the use by the accused of instruments as a means of effecting such abortion.

State v Sweeney, 203-1305; 214 NW 735

IV EVIDENCE

(a) IN GENERAL

Enlarged photograph of deceased. An enlarged photograph of the deceased in a prosecution for criminal homicide may be admissible.

State v Kneeskern, 203-929; 210 NW 465

Photographs—admissibility for limited purpose. In a prosecution for homicide the court committed no error in admitting in evidence photographs showing the condition of the body of the deceased at the time photographs were taken, said photographs so marked that laymen could properly interpret the meaning of markings thereon. Such evidence admissible even tho physician who performed post mortem and who identified abrasions and bruises so shown by these exhibits had not personally observed the condition of the body immediately prior to the taking of the photographs.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Expert witness—jury question. In prosecution for alleged homicide, evidence of expert witnesses' opinion of cause of death of deceased and kind of instrument used to inflict the wounds properly admitted and jury question on facts thereby generated.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Physician's cross-examination. In a murder prosecution, when a doctor on direct examination testified only as to what he found when he made physical examinations of the deceased, it was not error to deny cross-examination on the history of the patient.

State v Coleman, 226-968; 285 NW 269

Evidence that deceased was peace officer. Altho offered to show that the defendant knew the deceased to be a peace officer, it was error, in a murder prosecution, to admit evidence that about three weeks before the affray alleged to be the cause of the death, the deceased had seen the defendants fighting, and at that time a bystander was asked to take one defendant home because he was too drunk to drive.

State v Coleman, 226-968; 285 NW 269

Reception of exhibits—competency. The reception in evidence of an exhibit purporting to show the questions put to an accused in a homicide case very shortly after the occurrence in question and the answers of the accused to such questions, does not constitute reversible error when it appears that prior to the reception of the exhibit the witness had fully testified as of her own knowledge to all the facts shown by the exhibit.

State v Maharras, 208-127; 224 NW 537

Acts prior to time of homicide. On the trial of a charge of felonious homicide evidence of acts and the circumstances attending them, and of the participation of the accused therein —even tho said acts occurred prior to the actual homicide in question—may be admissible (because of their connection with the actual homicide in point of time, place and circumstances) for the purpose (1) of identifying the accused as the actual perpetrator of the homicide, and (2) of showing what the accused was then doing in the locality in question—that he had no legitimate mission therein. And this is true tho said evidence proves or tends to prove the commission by the accused of a crime independent of the crime for which he is on trial.

State v Johnson, 221-8; 264 NW 596

State's evidence not controlled by admission. The defendant cannot compel the state to accept his admission of a fact in lieu of evidence of such fact. In other words, the defendant cannot, by making certain admissions, control the state in its introduction of testimony.

State v Griffin, 218-1301; 254 NW 841

Bad feelings. On the trial of an indictment charging assault to murder wherein there is no issue as to self-defense, and consequently no issue as to which party was the aggressor, evidence tending to show the bad feeling existing between the defendant and the prosecuting witness is inadmissible.

State v Smith, 215-374; 245 NW 309

Limiting evidence on established fact. In the trial of a criminal cause, the court commits no reversible error by closing the floodgates of testimony in proof of a fact already abundantly established by other evidence. So held, in the prosecution of a wife for the murder of her husband, as to the contents of illicit correspondence (which had been destroyed) between the husband and another woman; also as to certain incidents taking place between the wife and her husband months before the fatal shooting, all as bearing on the already fully established relations existing between the accused and the deceased.

State v Johnston, 221-933; 267 NW 698

Hypothetical question — inadmissible when not based on evidence. In a prosecution for homicide where it was shown that the deceased was found with a fractured neck, with no marks on his neck or body nor any evidence of a quarrel or struggle, after he had been left alone for only about a minute and a half with the defendant who was a friend of about the same size and weight, it was reversible error to allow a physician to demonstrate a strangle hold, and to answer a hypothetical question, not based on evidence, that force could be applied from the rear so as to break a man's neck.

State v Hillman, 226-932; 285 NW 176

Motive—reconciliation—inapplicable instruction. In a prosecution for uxoricide, a re-

IV EVIDENCE—*continued*
(a) IN GENERAL—continued

quested instruction as to the effect of a reconciliation, as bearing on motive, is properly refused when there is no direct evidence of reconciliation, and when the difficulties between the parties appear to have continued down to the time of the death of the wife.

State v Flory, 203-918; 210 NW 961

Motive. Proof of motive is not necessary, to sustain a conviction for criminal homicide.

State v Kneeskern, 203-929; 210 NW 465

Evidence—motive. On a charge of murder, evidence tending to show that the accused and his associates were seeking to discover the hiding place of the contraband liquors of the deceased and his associates, and to this end were searching for the deceased, and maltreating and threatening to kill the associates of the deceased if they did not reveal said hiding place, is admissible for the purpose of showing a motive on the part of the accused.

State v Campbell, 213-677; 239 NW 715

Ill health of deceased. On a prosecution for murder by poison, the exclusion of evidence tending to show the diseased condition of the deceased five and more years prior to the alleged homicide is not erroneous, no offer being made to show that such diseased condition continued down to the time of the death of said deceased.

State v Flory, 203-918; 210 NW 961

Physical condition of defendant. In a murder prosecution, testimony that the defendant was not in good shape and was flighty, nervous, and weak at the time of an affray with the deceased should have been admitted.

State v Coleman, 226-968; 285 NW 269

Instructions—good reputation. The fact that an accused in a homicide case has the reputation of being a quiet, peaceable, law-abiding, and moral citizen, is a defensive circumstance bearing on the likelihood of such a person committing such a crime, but it is pre-eminently the right and duty of the jury to determine, in view of all the circumstances, what weight they will give to such circumstance.

State v Johnson, 215-483; 245 NW 728

Bad character or reputation—res gestae. In a homicide prosecution under a self-defense plea, the bad character or reputation of deceased may be proved as part of the res gestae.

State v Rhone, 223-1221; 275 NW 109

Bad character or reputation—when provable—manner. Under a self-defense plea in a homicide prosecution, bad character or reputation of a deceased may be proved by (1) defendant's personal knowledge of deceased's actual character, (2) information communicated to defendant, (3) defendant's actual knowledge of deceased's general reputation, and (4) fact of bad reputation plus long acquaintance between defendant and deceased, or residence in same community, as presumption of knowledge by defendant.

State v Rhone, 223-1221; 275 NW 109

Weight of reputation evidence. An instruction in a criminal trial with reference to the weight and effect of evidence of good reputation of the defendants was not reversible error when the defendants led the way in offering evidence of reputation rather than character.

State v Coleman, 226-968; 285 NW 269

Character and habits. In prosecution for murder, an objection was properly sustained to a question regarding deceased's conduct when deceased was requested to assist in repairing a road—the purpose of the question being to show that deceased had a violent disposition—since the question called for specific acts of deceased at a time remote from the date of crime, when it is not shown that the conduct referred to was known to defendant.

State v Norton, 227-13; 286 NW 476

Self-defense — character of accused. Not even a defendant in a charge of homicide is a competent witness to testify to the reputation of the deceased as to peaceableness or quarrelsomeness when he—the defendant—fails to show his qualification so to testify.

State v Reynolds, 201-10; 206 NW 635

Self-defense — uncommunicated threats by deceased. On the trial of a charge of murder, evidence that the deceased, some three months prior to the fatal encounter, proposed to a party that they rob the defendant, which proposal was never communicated to the defendant, is inadmissible on the question as to who was the aggressor in said encounter.

State v Matheson, 220-132; 261 NW 787

Defendant's oral admission that he knew deceased. In a murder prosecution, evidence of a conversation with the defendant while he was being taken to jail was admissible to show that the defendant recognized and was acquainted with the deceased, and the refusal to allow cross-examination on other parts of the conversation was not reversible error.

State v Coleman, 226-968; 285 NW 269

Admissions by accused. In prosecution for murder, defendant's voluntary written statement made by him which does not acknowledge guilt of crime charged, but which contains a statement of facts and circumstances from which guilt might be inferred, constitutes substantive evidence of facts stated, and may be admissible as an admission in support of the charge.

State v Norton, 227-13; 286 NW 476

Admissions and confessions. In prosecution for murder, defendant's voluntary written

statement, admitted in evidence and referred to as confession, which in fact did not acknowledge crime charged, merely containing a statement of facts and circumstances, an instruction that statement is not a confession, but an admission of the truth of the matters therein contained, is proper and not reversible error.

State v Norton, 227-13; 286 NW 476

Dying declarations — issue of competency. The time elapsing between the making of alleged dying declarations and the death of the declarant, may be very material on the issue whether the declarant was in extremis and had no hope of recovery at the time the declarations were made, and prejudicial error results from so instructing the jury as to deprive it of the right to consider said lapse of time on such issue.

State v Sweeney, 203-1305; 214 NW 735

Irrelevant and prejudicial matter. In a prosecution for murder by means of an abortion, the state, after the admission on motion of the accused of a letter from the party committing the abortion, should not be permitted to show that on the occasion of the writing of the letter the writer thereof had registered at the hotel under an assumed name.

State v Sweeney, 203-1305; 214 NW 735

Immaterial inquiry—poison content. Uncontradicted testimony as to the amount of poison contained in the particular embalming fluid injected into a body renders immaterial any inquiry into the amount of poison contained in other such fluids of the same manufacture.

State v Flory, 203-918; 210 NW 961

Insanity—irrelevant and immaterial evidence. On the issue of insanity in the trial of a criminal case, proof of a mental condition of the defendant which was neither progressive nor continuous is properly stricken from the record when there is no accompanying evidence that the defendant was in some degree subject to the influence of such condition at the time the crime was committed.

State v Brewer, 218-1287; 254 NW 834

Harmless error—repetition of testimony. On a trial for murder, the reception in evidence of a statement signed by defendant, and explanatory of the shooting in question, is quite unobjectionable and harmless when the statement is but a repetition of the testimony of the defendant on the trial.

State v Harness, 214-160; 241 NW 645

Curing error by striking incompetent testimony. Error, if any, in receiving in evidence a statement (part of a purported dying declaration) is cured by immediately striking the statement from the record with admonition to the jury to disregard it; especially when substantially the same statement is properly in the record as part of the res gestae.

State v Woodmansee, 212-596; 233 NW 725

Circumstantial evidence. Criminal homicide may be proved by circumstantial evidence. Evidence held to show that death was the result of criminal violence, rather than of fire accidentally communicated to the clothing of deceased.

State v Solomon, 203-954; 210 NW 448

Presumption of malice—intent. Principle reaffirmed that the use of a deadly weapon in a deadly manner generates a presumption of malice, and, if death results, justifies the inference of intent to kill.

Klinkel v Saddler, 211-368; 233 NW 538

Included offenses—absolutely discredited testimony. In a prosecution for murder by means of poison, the court is not required to submit assault with intent to kill or to inflict great bodily injury because of the presence in the record of evidence that the same poison was contained in the embalming fluid injected into the body of the deceased, and of evidence in the form of an official death certificate which gives the cause of death as disease, when the probative force of such evidence on the issue in question is wholly destroyed by unquestioned testimony that the poison found in the body, in addition to the quantity traceable to the embalming fluid, was over seven times sufficient to cause death, and by equally unquestioned testimony that the official certificate was incorrect in assigning disease as the cause of death.

State v Flory, 203-918; 210 NW 961

Other offenses shown on cross-examination. A defendant in a charge of first degree murder who testifies that there was no cooperation between him and a co-defendant, and that he did not intend to kill the deceased and did not know that his co-defendant intended to kill deceased, may be cross-examined as to the cooperation existing between himself and the co-defendant, even tho such examination reveals the commission of a robbery by said parties shortly prior to the homicide in question.

State v Griffin, 218-1301; 254 NW 841

Manner of inflicting wound. Instruction relative to the manner in which a wound was inflicted reviewed and held applicable to the record testimony.

State v Van Doran, 208-863; 226 NW 19

Hands and fists as deadly weapons. Since malice and criminal intent may be inferred from the intentional use of a deadly weapon in a deadly manner without legal justification, and premeditation need not exist for any particular length of time before the killing,

IV EVIDENCE—concluded
(a) IN GENERAL—concluded

and when hands and fists violently used to strangle and beat are dangerous weapons, there was sufficient evidence of premeditation to submit the question of first degree murder to the jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Murder. Evidence held ample to support a verdict of murder in the first degree.

State v Gaskill, 200-644; 204 NW 213

First degree—sufficiency. Evidence reviewed and held to justify the submission to the jury of the offense of first degree murder.

State v Matheson, 220-132; 261 NW 767

Jail delivery—cause of detention. On a prosecution for murder resulting from the attempt by prisoners in jail to escape, the state is privileged to show the reason for the defendant's detention in the jail.

State v Carlson, 203-90; 212 NW 312

Attempted suicide. The act of an accused in attempting to commit suicide after his arrest and incarceration for murder and after he has knowledge of the charge placed against him, constitutes a circumstance which is indicative of guilt, the force and effect of which the jury must determine.

State v Bittner, 209-109; 227 NW 601

Aiding and abetting. Evidence held ample to support a finding of aiding and abetting a homicide.

State v Griffin, 218-1301; 254 NW 841

Accessory—fatally incompetent evidence. The theory of the state that its sole witness to a felonious homicide (tho confessedly a participant in the transaction which led to the death of deceased) was not in fact an accomplice, because said witness acted under duress of and in fear of the defendant who was on trial, may not be supported by testimony that said defendant made a felonious assault on said witness some four months after the commission of said homicide.

State v Clay, 220-1191; 264 NW 77

(b) THREATS

Quarrelsome nature of deceased—right to show. Where deceased, tho forbidden, entered upon defendant's land, armed with deadly weapons and prior to the fatal shooting advanced upon the retreating defendant threatening to strike him with said weapons, the defendant in a prosecution for homicide under a plea of self-defense may show the rough, bullying, threatening nature and violent, dangerous character or reputation of the deceased prior to and up to the time of the killing.

State v Rhone, 223-1221; 275 NW 109

(c) INTOXICATION

Intoxication. The defense of drunkenness is available to an accused only when the degree of intoxication is so great as to deprive him of the power to form a specific intent.

State v Johnson, 211-874; 234 NW 263

Defenses—intoxication—burden of proof—instruction. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Intoxication of defendant. Evidence that the defendant had been drinking shortly before events occurred upon which a charge of murder was based against him was admissible.

State v Coleman, 226-968; 285 NW 269

Immaterial evidence — whether defendant drinks. In a murder prosecution, testimony by a witness that if he wanted a drink he took it was properly stricken as immaterial.

State v Coleman, 226-968; 285 NW 269

Defendants' previous drunken brawl. In a trial for murder, evidence that the defendants had been engaged in a drunken brawl about three weeks before the homicide should have been stricken on motion, and the error in refusing the motion was not cured by an instruction.

State v Coleman, 226-968; 285 NW 269

12911 First degree murder.

ANALYSIS

I By Means of Poison
II Lying in Wait
III Willfulness, Deliberation, and Premeditation
IV Perpetration or Attempt of Certain Felonies
V Test as to Degree
VI Indictment
VII Second Degree Charge
VIII Instructions

Evidence. See under §12910 (IV)
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I BY MEANS OF POISON

Murder by poison. The legislature may constitutionally declare that murder by poison shall constitute murder in the first degree.

State v Flory, 203-918; 210 NW 961

Remote ill health of deceased. On a prosecution for murder by poison, the exclusion of evidence tending to show the diseased condi-

tion of the deceased five and more years prior to the alleged homicide is not erroneous, no offer being made to show that such diseased condition continued down to the time of the death of said deceased.

State v Flory, 203-918; 210 NW 961

Included offenses. Principle reaffirmed that in a prosecution for murder by poison neither second degree murder nor manslaughter need be submitted.

State v Flory, 203-918; 210 NW 961

Included offenses—absolutely discredited testimony. In a prosecution for murder by means of poison, the court is not required to submit assault with intent to kill or to inflict great bodily injury because of the presence in the record of evidence that the same poison was contained in the embalming fluid injected into the body of the deceased, and of evidence in the form of an official death certificate which gives the cause of death as disease, when the probative force of such evidence on the issue in question is wholly destroyed by unquestioned testimony that the poison found in the body, in addition to the quantity traceable to the embalming fluid, was over seven times sufficient to cause death, and by equally unquestioned testimony that the official certificate was incorrect in assigning disease as the cause of death.

State v Flory, 203-918; 210 NW 961

Accessory before fact—basis for instruction. On a charge of murder by means of poison, evidence that one defendant manually procured the poison, and that he was aided and abetted therein by another defendant, furnishes adequate basis for an instruction relative to the full responsibility of the latter as an accessory before the fact.

State v Miner, 213-193; 238 NW 794

Murder by poison—plea of guilty. The entry of a plea of guilty to a charge of murder, alleged to have been perpetrated by means of poison, constitutes a plea of guilty to murder in the first degree and, therefore, no issue of degree is left for determination by the court. But, were it otherwise, there is no requirement, in such a case, that the court's findings be entered of record.

State v Harper, 220-515; 258 NW 886

II LYING IN WAIT

No annotations in this volume

III WILLFULNESS, DELIBERATION, AND PREMEDITATION

Premeditation and deliberation. Premeditation and deliberation need not exist for any particular length of time before the killing, and may be proved by circumstantial evidence.

State v Kneeskern, 203-929; 210 NW 465
State v Griffin, 218-1301; 254 NW 841

Evidence — sufficiency. Evidence reviewed under a first degree murder charge and held ample to support a finding of deliberation and premeditation.

State v Mitchem, 217-152; 251 NW 46
State v Brewer, 218-1287; 254 NW 834
State v Griffin, 218-1301; 254 NW 841

Information. Information charging that defendant murdered his wife by depositing dynamite or other explosive in a shotgun and inducing her to fire it is not demurrable as not charging defendant with first degree murder under the general statute, the demurrer alleging that if any crime was charged it was under a specific statute providing murder for causing death by high explosives.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

IV PERPETRATION OR ATTEMPT OF CERTAIN FELONIES

Commission of "burglary". The statute which declares murder to be in the first degree when committed in the perpetration or attempt to perpetrate a "burglary" refers solely to the burglary of a dwelling house (§12994, C., '24).

State v Pinkerton, 201-940; 208 NW 351

Jurisdiction to pass sentence. A trial information which charges three defendants jointly with making an assault with a deadly weapon while jointly attempting to commit a robbery, and that one of them fired the fatal shot with the specific intent to kill "of their malice aforethought", is not so fatally defective as to deprive the court, on a plea of guilty, of jurisdiction to pass sentence on all the defendants.

McBain v Hollowell, 202-391; 210 NW 461

Evidence—sufficiency. Evidence relative to a "hijacking" transaction reviewed and held to present a jury question as to every element of first degree murder.

State v Troy, 206-859; 220 NW 95

V TEST AS TO DEGREE

Use of deadly weapon. A specific intent to kill may justifiably be drawn from the deliberate use of a deadly weapon in a deadly manner.

State v Pinkerton, 201-940; 208 NW 351

First degree — evidence — sufficiency. Evidence reviewed and held to justify the submission to the jury of the offense of first degree murder.

State v Harness, 214-160; 241 NW 645
State v Matheson, 220-132; 261 NW 787

Presumption (?) or assumption (?) of malice. The court may, under applicable evidence, instruct that the jury has a right, in the absence of evidence to the contrary, to presume the existence of malice from the use of a deadly weapon in a deadly manner; and in so instructing it is quite immaterial that the court em-

V TEST AS TO DEGREE—concluded

ploys the term "assume" instead of the term "presume".

State v Berlovich, 220-1288; 263 NW 853

Felonious intent—presumption from use of deadly weapon. A self-confessed murderer, who long before had embarked upon a life of crime and carried a deadly weapon with the fixed purpose always in mind to use this weapon in a deadly manner on every occasion that might arise which threatened to thwart his criminal purposes, may not on a hearing to determine degree of punishment be heard to say that he had formed no felonious intent, when, with such weapon, he killed an officer, knowing said officer was attempting to arrest him for the commission of another crime.

State v Mercer, 223-1134; 274 NW 888

Hands and fists as deadly weapons. Since malice and criminal intent may be inferred from the intentional use of a deadly weapon in a deadly manner without legal justification, and premeditation need not exist for any particular length of time before the killing, and when hands and fists violently used to strangle and beat are dangerous weapons, there was sufficient evidence of premeditation to submit the question of first degree murder to the jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Conviction of second degree murder—as acquittal of first degree on retrial. When the jury in a murder trial found guilt in the second degree, on retrial the defendants could not be tried on a charge of first degree murder, but evidence of any other offense of which the defendants might have been guilty could be offered.

State v Coleman, 226-968; 285 NW 269

Jury not to act arbitrarily. An instruction in a murder case that a lower conviction or an acquittal should not rest on the notion that jury could arbitrarily do as it pleased was correct, but not commended, as it might have a coercive effect.

State v Coleman, 226-968; 285 NW 269

VI INDICTMENT

Failure to allege intent. An indictment, under the short form act, for murder in the first degree need not allege a specific intent to kill. It is sufficient if said charge is set forth in the language employed by the statute in defining said crime, to wit: "willfully, deliberately, premeditatedly, and with malice aforethought killed" a named person "by shooting him with a revolver".

State v Harness, 214-160; 241 NW 645

Allegation of intent—sufficiency. An allegation, in an indictment for murder, that the assault was made "with intent to kill" is all-sufficient; likewise instructions which follow such allegation. So held against the contention that the only proper allegation was "with specific intent to kill".

State v Berlovich, 220-1288; 263 NW 853

VII SECOND DEGREE CHARGE

Homicide — included offenses — murder by poison. Principle reaffirmed that in a prosecution for murder by poison neither second degree murder nor manslaughter need be submitted.

State v Flory, 203-918; 210 NW 961

Instructions—degree of murder—reasonable doubt. It was not error to instruct the jury in murder trial that if jury entertained a doubt as to the degree of the offense of which defendant was guilty, that is, of murder in the second degree or manslaughter, it should find him guilty only of the degree about which it entertained no reasonable doubt.

State v Shannon, 214-1093; 243 NW 507

VIII INSTRUCTIONS

Essential elements. Instructions should not lead a jury to understand that (1) premeditation, (2) deliberation, (3) malice aforethought, and (4) intent to kill need not exist prior to the striking of the fatal blow, but may exist at the very time of striking the fatal blow.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Inapplicable instruction. In a prosecution for uxoricide, a requested instruction as to the effect of a reconciliation, as bearing on motive, is properly refused when there is no direct evidence of reconciliation and when the difficulties between the parties appear to have continued down to the time of the death of the wife.

State v Flory, 203-918; 210 NW 961

Accident — instructions. Instructions held to present adequately the defendant's theory of accidental killing.

State v Troy, 206-859; 220 NW 95

Dying declarations—instructions. Requested instructions in disparagement of dying declarations are properly refused, the court properly covering the subject by its own instructions.

State v Troy, 206-859; 220 NW 95

Attempt to commit suicide. An attempt to commit suicide is not an unlawful act. It is erroneous, therefore, to instruct that if a person with a deadly weapon attempts to take his own life he is doing an unlawful act, and if, in such attempt, he takes the life of an innocent party he is guilty of murder.

State v Campbell, 217-848; 251 NW 717; 92 ALR 1176

Accessory—aiding and abetting. Instructions relative to an accessory knowingly aiding and abetting another in the commission of a crime, and the nature of such abetting, reviewed and held unobjectionable.

State v Griffin, 218-1301; 254 NW 841

Inconsistent instructions under inconsistent pleas. An accused may not plead inconsistent defenses—i. e., (1) that he fired the fatal shot in self-defense, and (2) that the fatal shot was not fired by him, but by a third party—and then predicate error on the claim that the court, by instructing on both pleas, placed the accused in an inconsistent light.

State v Reynolds, 201-10; 206 NW 635

Correct but inexplicit. Correct but inexplicit instructions are all-sufficient in the absence of a request for elaboration.

State v Griffin, 218-1301; 254 NW 841

Failure to except—effect. Failure to take and preserve exceptions to instructions in criminal cases in the manner and form provided by statute precludes review on appeal, irrespective of §14010, C., '31.

State v Griffin, 218-1301; 254 NW 841

Deceased as peace officer. In a prosecution for murder it was proper to refuse to instruct the jury that the fact that the deceased was a merchant policeman had no bearing on the case.

State v Coleman, 226-968; 285 NW 269

Rights and duties of peace officers. In a murder trial where the defendant was charged with killing a peace officer, it was proper to instruct as to the rights and duties of peace officers and the way testimony on that subject should be considered by the jury.

State v Coleman, 226-968; 285 NW 269

Murder—nonassumption of killing. Instructions to the effect that the use of a rifle in a deadly manner without legal excuse or justification raises a presumption of malice may not be said to assume that the accused used a rifle with which to kill the deceased.

State v Gibson, 204-1306; 214 NW 743

Malice—nonconclusive presumption. Reversible error results from instructing that "malice" is conclusively presumed from a deliberate and intentional killing, when the record reveals a plea of justification and excuse, and supporting testimony relating thereto.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Allegation of intent—sufficiency. An allegation, in an indictment for murder, that the assault was made "with intent to kill" is all-sufficient; likewise instructions which follow such allegation. So held against the contention that the only proper allegation was "with specific intent to kill".

State v Berlovich, 220-1288; 263 NW 853

Proof of intent. An instruction informing the jury how intent may be proved or arrived at was proper in a murder prosecution.

State v Coleman, 226-968; 285 NW 269

Instructions — intent — self-defense. In a prosecution for murder, an instruction on intent held not objectionable on omitting reference to defense of self-defense.

State v Norton, 227-13; 286 NW 476

Assuming guilt—nonprejudicial as entirety. An instruction defining the word "premeditated" and stating the defendant "considered the killing" and "killed him in pursuance of this specific intent", when read with the other instructions is not prejudicial as assuming the defendant committed the crime.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Hands and fists as deadly weapons. Since malice and criminal intent may be inferred from the intentional use of a deadly weapon in a deadly manner without legal justification, and premeditation need not exist for any particular length of time before the killing, and when hands and fists violently used to strangle and beat are dangerous weapons, there was sufficient evidence of premeditation to submit the question of first degree murder to the jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Intent inferable from use of weapon. An instruction under a charge of first degree murder, that, "if a person makes a wrongful assault upon another with a deadly weapon, and death ensues from the injury inflicted, the inference is warranted that he intended to commit murder in the absence of evidence that he intended a lesser injury," is correct, the elements of deliberation and premeditation being properly covered in other instructions.

State v Brewer, 218-1287; 254 NW 834

Limiting impeaching evidence. The failure of the court on its own motion in its instructions to specifically limit impeaching testimony to that particular purpose is not erroneous when the testimony in question is of such a nature that it could not be considered for any other purpose.

State v Brewer, 218-1287; 254 NW 834

Evidence—disposition of accused. Instructions relative to the consideration to be given, in a murder charge, to defendant's former disposition as a quiet and peaceable citizen, reviewed and held quite unobjectionable.

State v Harness, 214-160; 241 NW 645

VIII INSTRUCTIONS—concluded

Self-defense. Instructions in a murder case relative to (1) the right of a person to repel an assault upon another and (2) the nonright of a person to plead self-defense when he is the aggressor, reviewed and held correct, and that the accused waived his right to more explicit instructions by not asking therefor.

State v Matheson, 220-132; 261 NW 787

Self-defense. An instruction by the court on its own motion in a murder trial, giving the defendants all they were entitled to on the question of self-defense, was sufficient.

State v Coleman, 226-968; 285 NW 269

Deadly weapon. In prosecution for murder where defendant pleads self-defense in firing five shots from pistol, all of which entered deceased's body, any two of which may have caused death, no error is committed in refusing requested instruction, "defendant is not guilty if the fatal shot was fired while acting in self-defense, altho the defendant continued firing", where no evidence is submitted to show which shot caused death, and where the jury is properly instructed on self-defense, on question whether defendant was justified in firing all five shots which defendant testifies were "'fired about all at once.'"

State v Norton, 227-13; 286 NW 476

Reasonable doubt. On a prosecution for murder by poison, the jury need not be told that they must, before they can convict, find beyond a reasonable doubt that the accused bought the poison at the time and place claimed by the state, the record revealing other testimony tending to show the administration of the poison by the accused.

State v Flory, 203-918; 210 NW 961

Degrees of murder. Instructions relative to the distinctions between murder in the first and second degree reviewed, and held not prejudicially erroneous.

State v Johnson, 211-874; 234 NW 263

Instructing jury not to act arbitrarily. An instruction in a murder case that a lower conviction or an acquittal should not rest on the notion that you can do as you please arbitrarily was correct, but not commended, as it might have a coercive effect.

State v Coleman, 226-968; 285 NW 269

12912 Second degree murder.

ANALYSIS

I WHAT CONSTITUTES
II INDICTMENT
III EVIDENCE
IV INSTRUCTIONS

Evidence. See also under §12910 (IV)
Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I WHAT CONSTITUTES

Miscarriage with fatal result. Principle reaffirmed that a person who, in an attempt to produce a miscarriage, inflicts injury upon a woman from which she dies, is guilty of murder in the second degree, unless the miscarriage was necessary to save the woman's life.

State v Rowley, 216-140; 248 NW 340

Murder resulting from abortion. The crime of attempting to produce an abortion is not included in an indictment for murder in the second degree, even tho the indictment is based on an attempted abortion resulting in death.

State v Rowley, 216-140; 248 NW 340

Attempt to commit suicide. An attempt to commit suicide is not an unlawful act. It is erroneous, therefore, to instruct that if a person with a deadly weapon attempts to take his own life he is doing an unlawful act, and if, in such attempt, he takes the life of an innocent party he is guilty of murder.

State v Campbell, 217-848; 251 NW 717; 92 ALR 1176

II INDICTMENT

Willfulness. Under an indictment for murder in the second degree resulting from an abortion, it is not necessary to prove that the death was willfully caused.

State v Rowley, 216-140; 248 NW 340

III EVIDENCE

Evidence—sufficiency. Record held to support a conviction of murder in the second degree.

State v Trybom, 200-1248; 206 NW 246
State v Burzette, 208-818; 222 NW 394
State v Rowley, 216-140; 248 NW 340

Deliberation and premeditation. Deliberation and premeditation as an element of murder in the second degree are necessarily provable by the facts and circumstances attending the homicide.

State v Woodmansee, 212-596; 233 NW 725

IV INSTRUCTIONS

Instructions as a whole. Instructions relative to the distinctions between murder in the first and second degree reviewed, and held not prejudicially erroneous.

State v Johnson, 211-874; 234 NW 263

Nonapplicability to evidence. A requested instruction as to the right of one accused of homicide to defend his guest is properly refused when there is no testimony upon which to base the instruction.

State v Reynolds, 201-10; 206 NW 635

Inconsistent instructions under inconsistent pleas. An accused may not plead inconsistent defenses—i. e., (1) that he fired the fatal shot in self-defense, and (2) that the fatal shot was not fired by him, but by a third party—and then predicate error on the claim that the court, by instructing on both pleas, placed the accused in an inconsistent light.

State v Reynolds, 201-10; 206 NW 635

Defining "accident". Ordinarily, there is no occasion for the court in presenting to the jury the issues in homicide to define the term "accident".

State v Friar, 204-414; 214 NW 596

Accidental killing. Instructions must be considered as a whole on the question whether the court properly presented defendant's claim of accidental homicide.

State v Friar, 204-414; 214 NW 596

In re accidental shooting. Requested instructions as to the effect of an accidental shooting are properly refused when otherwise properly covered by the instructions of the court.

State v Johnston, 221-933; 267 NW 698

Manner of inflicting wound. Instruction relative to the manner in which a wound was inflicted reviewed, and held applicable to the record testimony.

State v Van Doran, 208-863; 226 NW 19

Good character and peaceable disposition — burden of proof. The instructions must not place upon the defendant the burden of proof to establish his alleged peaceable disposition and good character.

State v Johnson, 211-874; 234 NW 263

Instructions not necessary without supporting evidence. Where not supported by evidence, it is not reversible error to fail to instruct regarding accused's right to occupy a public highway at the time of shooting, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Knowledge of deceased's insanity as bearing on self-defense. Where a jury is instructed to the effect that "belief in" rather than the "fact of" necessity to kill is controlling, it is not reversible error to fail to instruct regarding accused's knowledge of deceased's insanity especially when such an instruction was not requested.

State v Johnson, 223-962; 274 NW 41

12913 Degree determined.

ANALYSIS

I By the Jury
II By the Court

I BY THE JURY

Justifiable submission to jury. Murder in both degrees is properly submitted to the jury on testimony which will justify a finding of malice, deliberation, and premeditation.

State v Reed, 205-858; 216 NW 759

Conviction of second degree murder—as acquittal of first degree on retrial. When the jury in a murder trial found guilt in the second degree, on retrial the defendant could not be tried on a charge of first degree murder, but evidence of any other offense of which the defendants might have been guilty could be offered.

State v Coleman, 226-968; 285 NW 269

Former jeopardy—no retrial for higher degree. On retrial, a defendant in a homicide case, convicted of manslaughter, cannot be tried for a higher degree of the crime than the jury formerly found him guilty.

State v Rhone, 223-1221; 275 NW 109

Instructions. In prosecution for murder an instruction, when read with other instructions, is not erroneous in that it impliedly directs jury to return a verdict of first degree murder, wherein the court states, "The fact that you have the power to return a verdict finding a lesser crime or an acquittal is, alone, no excuse for using such power. A lower conviction or an acquittal should not rest on the notion that you can do as you please, arbitrarily", especially where jury returns verdict of manslaughter.

State v Norton, 227-13; 286 NW 476

II BY THE COURT

Discretion of court. The discretion of the court, on a plea of guilty, to determine the degree or grade of a criminal homicide will not be disturbed except on a clear showing of abuse.

State v Grattan, 222-172; 268 NW 489

Imposition of death penalty—conclusiveness. The imposition by the trial court of a sentence of death on a plea of guilty of murder in the first degree will not be interfered with by the appellate court unless the record reveals a very clear abuse of discretion.

State v Tracy, 219-1412; 261 NW 527

Sentence of death—when final. The imposition of a sentence of death (1) on a plea of guilty of murder in the first degree, and (2) on confirmatory testimony duly taken subsequent to said plea, is a finality in the absence of a showing that the trial court clearly abused its legal discretion to impose either one of two allowable sentences, to wit: death or life imprisonment.

State v Breeding, 220-605; 262 NW 467

Felonious intent—presumption from use of deadly weapon. A self-confessed murderer, who long before had embarked upon a life of crime and carried a deadly weapon with the fixed purpose always in mind to use this weapon in a deadly manner on every occasion that

II BY THE COURT—concluded

might arise which threatened to thwart his criminal purposes, may not on a hearing to determine degree of punishment be heard to say that he had formed no felonious intent, when, with such weapon, he killed an officer, knowing said officer was attempting to arrest him for the commission of another crime.

State v Mercer, 223-1134; 274 NW 888

Plea of guilty—effect. The entry of a plea of guilty to a charge of murder, alleged to have been perpetrated by means of poison, constitutes a plea of guilty to murder in the first degree and, therefore, no issue of degree is left for determination by the court. But, were it otherwise, there is no requirement, in such a case, that the court's findings be entered of record.

State v Harper, 220-515; 258 NW 886

Insanity—ineffective expert testimony. The testimony of an expert to the effect that one who is unquestionably guilty of murder in the first degree is mentally responsible to receive a life sentence, but not mentally responsible to receive a death sentence, carries, at the best, very little element of persuasiveness.

State v Tracy, 219-1412; 261 NW 527

Findings by court—surplusage—effect. A judgment entry of murder in the first degree, on supported findings by the court, after a plea of guilty to an information charging, among other necessary averments, a "willful, deliberate, and premeditated" killing, without any averment that the killing was perpetrated in the commission of a "burglary", will not be disturbed because the findings unnecessarily recite that the parties were, at the time of the killing, burglarizing a mere office building—an offense technically unknown to our law.

State v Pinkerton, 201-940; 208 NW 351

Failure to determine degree of murder. A judgment of life imprisonment for murder rendered by the district court under a proper charge and on a plea of guilty of such crime, is not rendered void by the failure of the court, before imposing such judgment, to call witnesses and determine the degree of said crime, and enter said determination on the record. It follows that such failure, tho it be conceded to be error and reversible on appeal, furnishes no ground for release under a writ of habeas corpus.

McCormick v Hollowell, 215-638; 246 NW 612

12914 Fixing punishment in first degree murder.

Sentence of death—when final. The imposition of a sentence of death (1) on a plea of guilty of murder in the first degree, and (2) on confirmatory testimony duly taken subsequent to said plea, is a finality in the absence of a showing that the trial court clearly abused its legal discretion to impose either one of two allowable sentences, to wit: death or life imprisonment.

State v Breeding, 220-605; 262 NW 467

Procedure. Upon the entry of a plea of guilty of murder alleged to have been perpetrated by means of poison, the court is confronted by the single question whether the penalty should be death or life imprisonment—a question which it can determine in any manner which satisfies its sense of duty. It follows that if it sees fit to hold a hearing, error may not be predicated on the reception of unsworn, or hearsay, or incompetent testimony.

State v Harper, 220-515; 258 NW 886

Judgment entry. The formal entry of a plea of guilty to a charge of murder perpetrated by means of poison, followed by a sentence of life imprisonment, is all-sufficient, tho the better practice would be to first enter a formal judgment of conviction of the crime.

State v Harper, 220-515; 258 NW 886

Sentence—absence of abuse of discretion. Record reviewed and held to present no abuse of discretion on the part of the trial court in passing death sentence on defendant's plea of guilty of murder in first degree.

State v Wheaton, 223-759; 273 NW 851

Duty of jury to determine. The fact that a jury on the first trial fixed life imprisonment, instead of death, as the punishment has no such effect on a second trial as to prevent the court from again submitting to the jury the duty to determine whether the punishment shall be death or life imprisonment.

State v Kneeskern, 203-929; 210 NW 465

12915 Assault with intent to murder.

ANALYSIS

I IN GENERAL
II INTOXICATION
III INDICTMENT
IV EVIDENCE
V INSTRUCTIONS
VI SENTENCE

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Shooting as accident—evidence. On the issue whether the shooting and wounding of a prosecuting witness were accidental, the state may show that the accused discharged his gun in different directions, at the time in question, and wounded different persons.

State v Bingaman, 210-160; 230 NW 394

Defense of property—permissible force. A jury must not be peremptorily told, as a matter of law, in a criminal case not involving

a homicide, that the defendant (a private citizen) would not be justified in employing a deadly weapon (1) to make an arrest for a felony committed in his presence and within the curtilage of his home, or (2) to prevent the forcible carrying away of his property by the thieves. The essential issue (which must be explained to the jury) is, not the nature of the weapon employed, but whether the defendant employed only that degree of force to accomplish such purposes which a reasonable person would deem reasonably necessary under the existing circumstances as they in good faith appeared to the defendant.

State v Metcalfe, 203-155; 206 NW 620; 212 NW 382

II INTOXICATION

No annotations in this volume

III INDICTMENT

No annotations in this volume

IV EVIDENCE

Evidence—sufficiency. Record held insufficient to support a verdict of guilty of assault with intent to commit murder.

State v Woolman, 218-967; 255 NW 524

Corpus delicti. Evidence held to present a jury question whether death resulted from an assault.

State v Clay, 222-1142; 271 NW 212

Shooting as accident—evidence. On the issue whether the shooting and wounding of a prosecuting witness was accidental, the state may show that the accused at the time in question discharged his gun in different directions and wounded different persons.

State v Bingaman, 210-160; 230 NW 394

V INSTRUCTIONS

Instructions. Instructions reviewed and held adequately to present all the elements of assault with intent to murder and included offenses.

State v Messer, 213-1264; 238 NW 462

VI SENTENCE

Final commitment—excessive sentence under indeterminate sentence law. A sentence under the indeterminate sentence law cannot be deemed excessive.

State v Bingaman, 210-160; 230 NW 394

12919 Manslaughter.

ANALYSIS

I IN GENERAL
II VOLUNTARY MANSLAUGHTER
III INVOLUNTARY MANSLAUGHTER
(a) WHAT CONSTITUTES
(b) NEGLIGENCE
IV INDICTMENT
V EVIDENCE
VI INSTRUCTIONS

Assault with intent to commit manslaughter. See under §12933, Vol I
Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Nonapplicable statute. Section 5026-b1, C., '31 [§5037.10, C., '39], fixes civil liability in the operation of automobiles and has nothing to do with automobile operations resulting in manslaughter.

State v Richardson, 216-809; 249 NW 211

Voluntary intoxication. It is not the law that a defendant on trial for murder in the second degree must be acquitted of both murder in the second degree and manslaughter if at the time in question he was so intoxicated that he could not distinguish between right and wrong or know what he was doing.

State v Johnson, 215-483; 245 NW 728

Former jeopardy—no retrial for higher degree. On retrial, a defendant in a homicide case, convicted of manslaughter, cannot be tried for a higher degree of the crime than the jury formerly found him guilty.

State v Rhone, 223-1221; 275 NW 109

II VOLUNTARY MANSLAUGHTER

Homicide—trial—manslaughter—instruction—sufficiency. In prosecution for murder, the court's instruction, wherein manslaughter is defined as the unlawful killing of a human being without malice, expressed or implied, and without deliberation, as "upon a sudden quarrel or upon sudden adequate uncontrollable provocation", is not subject to objection that quoted words will tend to lead jury to believe that involved case is in fact manslaughter.

State v Norton, 227-13; 286 NW 476

III INVOLUNTARY MANSLAUGHTER

(a) WHAT CONSTITUTES

Recklessness definition — nonapplicability. The definition of "recklessness" as applied to civil cases under the motor vehicle guest statute [§5037.10, C., '39] has no application in a prosecution for manslaughter arising from an automobile accident.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Involuntary manslaughter—negligent exposure of poisoned beverage. The act of a person in so negligently exposing a beverage which contains a narcotic in a deadly quantity as to be consumed by another may constitute involuntary manslaughter, if the death of a human being results and the possession or use of such narcotic by the accused is unlawful. Evidence held insufficient to show that the accused placed the poison in the beverage in question or knew of its presence therein.

State v Korth, 204-1360; 217 NW 236

III INVOLUNTARY MANSLAUGHTER—concluded

(a) WHAT CONSTITUTES—concluded

Requisites — instructions. A manslaughter case was properly submitted to the jury by instructions defining involuntary manslaughter and requiring that, in order to convict the defendant, the state has the burden of proving beyond a reasonable doubt that the defendant committed one or more of certain unlawful acts in such a manner as to show wanton and reckless disregard and indifference to the safety of others who might reasonably be expected to be injured thereby, and that death was the natural and proximate result thereof.

State v Graff, 228- ; 282 NW 745; 290 NW 97

(b) NEGLIGENCE

Manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Instruction—contributory negligence of deceased. An instruction in a manslaughter prosecution that contributory negligence of deceased would not relieve the defendant of criminal responsibility if the death were caused by the defendant doing unlawful acts in a wanton and reckless disregard for the safety of others who might be expected to be injured thereby was sufficient to meet an objection that the jury was not sufficiently advised that, if the proximate cause of the death was the negligence of the deceased, the defendant was not guilty.

State v Graff, 228- ; 282 NW 745; 290 NW 97

IV INDICTMENT

Short form. An indictment for manslaughter in the language authorized by the short form act is sufficient against a demurrer which simply asserts the general and all-inclusive claim that the indictment "does not conform to the laws of the state".

State v Long, 215-494; 245 NW 726

Manslaughter by negligence. An indictment for manslaughter by negligence must specifically set out the facts constituting the negligence.

State v Sexsmith, 200-1244; 206 NW 100
State v Korth, 204-1360; 217 NW 236

Defects rendered immaterial by verdict. Defects in an indictment for murder become immaterial when manslaughter is properly charged and the accused is convicted of the latter offense.

State v Harness, 214-160; 241 NW 645

V EVIDENCE

Reckless driving — evidence — sufficiency. Testimony held to generate a jury question on the issue of manslaughter arising from reckless driving.

State v Thomlinson, 209-555; 228 NW 80
State v Richardson, 216-809; 249 NW 211

Automobile accident—criminal negligence—directed verdict. Conflicting evidence that witnesses had smelled liquor on the breath of the defendant who was charged with manslaughter as a result of an automobile collision, without evidence as to how the defendant was driving or who was at fault in the collision, was not sufficient to support a finding of guilt under instructions defining criminal negligence and intoxication and stating that if one becomes voluntarily under the influence of liquor so that he looses his self-restraint and becomes reckless and indifferent to the consequences of his act, this would be criminal negligence, making him liable for the death of another person. Under such evidence, the defendant was entitled to a directed verdict.

State v Weltha, 228- ; 292 NW 148

Use of intoxicants. Evidence that the defendant in a manslaughter case might have been to some extent under the influence of intoxicating liquor at the time of a fatal automobile accident warranted the court in giving a requested instruction that there was no evidence that the defendant was intoxicated, and in adding that the use of intoxicating liquor by the defendant might be considered in determining whether or not he had acted with reckless disregard for the safety of others.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Opinion evidence—speed of automobile. A witness who has operated an automobile for several years and whose business necessitates extensive travel by him over the country, mostly by automobile, is competent to give an opinion as to the speed at which an automobile was being operated on a certain occasion.

State v Thomlinson, 209-555; 228 NW 80

Speed at nonremote place. In a prosecution for manslaughter resulting from the reckless speed of an automobile, the state may show, by a duly qualified witness, the speed at which the automobile was being operated at a point 450 feet from the place where the deceased was hit by the automobile.

State v Thomlinson, 209-555; 228 NW 80
Waldman v Motor Co., 214-1139; 243 NW 555

Desire of defendant to kill self—inference of guilt. The jury in a manslaughter case arising from an automobile accident may consider evidence that, while standing by the body after the tragedy, the defendant asked a bystander

if he had a gun, saying, "I would like to finish everything right now".

State v Graff, 228- ; 282 NW 745; 290 NW 97

Marriage as inference of suppressing testimony. It is reversible error in a manslaughter case for the state to call accused's wife as a witness and, in the presence of the jury after discovering her relationship, to elicit testimony over accused's objection thereby creating the prejudicial inference that accused's marriage was purposefully to suppress testimony.

State v Chismore, 223-957; 274 NW 3

Quarrelsome nature of deceased—right to show. Where deceased, tho forbidden, entered upon defendant's land, armed with deadly weapons and prior to the fatal shooting advanced upon the retreating defendant threatening to strike him with said weapons, the defendant in a prosecution for homicide under a plea of self-defense may show the rough, bullying, threatening nature and violent dangerous character or reputation of the deceased prior to and up to the time of the killing.

State v Rhone, 223-1221; 275 NW 109

Blood test—authority to take. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence, over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

VI INSTRUCTIONS

Sufficiency. In prosecution for murder, the court's instruction, wherein manslaughter is defined as the unlawful killing of a human being without malice, expressed or implied, and without deliberation, as "upon a sudden quarrel or upon sudden adequate uncontrollable provocation", is not subject to objection that quoted words will tend to lead jury to believe that involved case is in fact manslaughter.

State v Norton, 227-13; 286 NW 476

Involuntary manslaughter — requisites. A manslaughter case was properly submitted to the jury by instructions defining involuntary manslaughter and requiring that, in order to convict the defendant, the state has the burden of proving beyond a reasonable doubt that the defendant committed one or more of certain unlawful acts in such a manner as to show wanton and reckless disregard and indifference to the safety of others who might reasonably be expected to be injured thereby, and that death was the natural and proximate result thereof.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Harmless error. Error in instructions relative to manslaughter is inconsequential when the jury convicts the accused of first degree murder.

State v Troy, 206-859; 220 NW 95

Disposition of accused — instructions. Instructions relative to the consideration to be given, in a murder charge, to defendant's former disposition as a quiet and peaceable citizen, reviewed and held quite unobjectionable.

State v Harness, 214-160; 241 NW 645

Wanton and reckless conduct. Instructions to the effect that, in order to constitute manslaughter, the operation of an automobile must be in such a wanton and reckless manner as to show utter disregard for the "safety" of others, are not erroneous because the court did not employ the phrase "safety and lives of others".

State v Richardson, 216-809; 249 NW 211

Unavoidable accident — failure to submit issue. Instructions, under a charge of manslaughter, which distinctly place on the state the burden to show beyond a reasonable doubt that the defendant was operating his automobile in a careless, reckless, and negligent manner in willful or wanton disregard of the safety of others, clearly protect the defendant from a conviction if the death was the result of unavoidable accident.

State v Richardson, 216-809; 249 NW 211

Intoxication. Refusal of an instruction to the effect that intoxication alone would not justify a conviction for manslaughter, results in no error when the court otherwise instructed that intoxication was a circumstance which the jury might consider along with all other proven facts.

State v Richardson, 216-809; 249 NW 211

Automobile accident — criminal negligence. Conflicting evidence that witnesses had smelled liquor on the breath of the defendant who was charged with manslaughter as a result of an automobile collision, without evidence as to how the defendant was driving or who was at fault in the collision, was not sufficient to support a finding of guilt under instructions defining criminal negligence and intoxication and stating that if one becomes voluntarily under the influence of liquor so that he loses his self-restraint and becomes reckless and indifferent to the consequences of his act, this would be criminal negligence, making him liable for the death of another person. Under such evidence, the defendant was entitled to a directed verdict.

State v Weltha, 228- ; 292 NW 148

VI INSTRUCTIONS—concluded

Use of intoxicants. Evidence that the defendant in a manslaughter case might have been to some extent under the influence of intoxicating liquor at the time of a fatal automobile accident warranted the court in giving a requested instruction that there was no evidence that the defendant was intoxicated, and in adding that the use of intoxicating liquor by the defendant might be considered in determining whether or not he had acted in a reckless disregard for the safety of others.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions in re accidental shooting—request. Requested instructions as to the effect of an accidental shooting are properly refused when otherwise properly covered by the instructions of the court.

State v Johnston, 221-933; 267 NW 698

Instructing jury not to act arbitrarily. An instruction in a murder case that a lower conviction or an acquittal should not rest on the notion that jury could arbitrarily do as it pleased was correct, but not commended, as it might have a coercive effect.

State v Coleman, 226-968; 285 NW 269

Contributory negligence of deceased. An instruction in manslaughter prosecution that contributory negligence of deceased would not relieve the defendant of criminal responsibility if the death were caused by the defendant doing unlawful acts in a wanton and reckless disregard for the safety of others who might be expected to be injured thereby was sufficient to meet an objection that the jury was not sufficiently advised that, if the proximate cause of the death was the negligence of the deceased, the defendant was not guilty.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Self-defense. In prosecution for murder, instruction on self-defense that if defendant had reason, as an ordinarily prudent and "courageous" man, to believe that he was in danger of being killed, then defendant will have the right to defend himself as may appear necessary to him as an ordinarily prudent and "courageous" man, the use of the word "courageous" is proper.

State v Norton, 227-13; 286 NW 476

CHAPTER 560

SELF-DEFENSE

12921 Lawful resistance in self-defense.

See annotations under §12922

12922 Cases in which permitted.

ANALYSIS

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(c) MURDEROUS ASSAULT
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II DEFENSE OF PROPERTY

Evidence in criminal cases generally. See under §13897 et seq.
Force to overcome resistance to arrest. See under §13472, Vol I
Instructions in criminal cases generally. See under §13876

I SELF-DEFENSE

Discussion. See 5 ILB 206—Duty to retreat

(a) IN GENERAL

Admitted aggression—effect. Whether defendant employed excessive force in repelling an assault upon him is the sole question at issue in a civil action for damages when plaintiff admits that he was the aggressor in the affray with defendant. In other words, in such a case neither the issue (1) whether the plaintiff was the aggressor nor (2) whether the defendant had the right of self-defense, should be submitted to the jury.

Booton v Metcalfe, 201-311; 207 NW 386

Excusable or justifiable homicide. If one person kills another in self-defense it is "justifiable" or "excusable homicide."

State v Norton, 227-13; 286 NW 476

Standard of action. An "ordinarily prudent and cautious" man is the standard set by the law as a condition for exercising the right of self-defense, and not an "ordinarily prudent and courageous" man.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Self-defense—nature of. Self-defense, unless negatived by the state beyond a reasonable doubt, is a complete defense to a charge of homicide; in other words, self-defense has no bearing whatever on the degrees of homicide.

State v Twine, 211-450; 233 NW 476

Elements of self-defense—directing verdict. In a prosecution for murder under a plea of self-defense, the accused must (1) not be the aggressor, (2) retreat as far as possible, (3) have an actual honest belief in imminent danger, and (4) have reasonable grounds for such belief, in view of which a motion for a directed verdict was properly denied under evidence enabling jury to reject a self-defense plea in arriving at a verdict of manslaughter.

State v Johnson, 223-962; 274 NW 41

Defense of intoxicating liquors. A person may validly resist an attempt to steal from him intoxicating liquors which are unlawfully in his possession, even tho the said liquor has no value in a commercial sense.

State v Shannon, 214-1093; 243 NW 507

(b) SIMPLE ASSAULT

Instructions—undue limitation. Instructions limiting the right of self-defense to one who believes himself in danger of (1) loss of life, or (2) great bodily injury, are erroneous when the offense of assault and battery is submitted as an included offense, and the defendant is convicted thereof.

State v Sanford, 218-951; 256 NW 650

(c) MURDEROUS ASSAULT

1 When Killing Assailant Justified

Forfeiture of right. One who, in the commission of a burglary, is armed with a deadly weapon with the manifest purpose of shooting his way to freedom if apprehended may not claim that he killed the owner of the property in self-defense because the owner resisted the taking of his property with a like deadly weapon, and did not attempt formally to arrest the accused.

State v Burzette, 208-818; 222 NW 394

Apprehension of death or great bodily injury. In prosecution for murder, to justify or excuse the killing of another in self-defense, the defendant must have a reasonable fear or apprehension that he is in danger of being killed or receiving great bodily injury and must have reasonable grounds for such apprehension.

State v Norton, 227-13; 286 NW 476

2 Apparent Danger

Honest belief. The danger necessitating self-defense need not in fact exist if an accused honestly believes he is in peril of great bodily harm.

State v Rhone, 223-1221; 275 NW 109

Reasonable grounds. In prosecution for murder, to justify or excuse the killing of another in self-defense, the defendant must have a reasonable fear or apprehension that he is in danger of being killed or receiving great bodily injury and must have reasonable grounds for such apprehension.

State v Norton, 227-13; 286 NW 476

3 Deadly Weapon

Felonious possession of weapon. A person wrongfully assaulted is not deprived, under proper circumstances, of defending himself with a dangerous weapon which he is unlawfully carrying concealed on his person.

State v Shannon, 214-1093; 243 NW 507

4 Duty to Retreat

Discussion. See 12 ILR 171—Duty to retreat

Non-duty to retreat. One who is subjected to a felonious assault not provoked by him is under no duty to retreat if the assault is committed on him while he is in his home, office, or place of business, or on property lawfully occupied by him.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Non-duty to retreat. The duty to retreat as a part of the law of self-defense does not exist when retreat would be dangerous or impossible.

State v Shannon, 214-1093; 243 NW 507

(d) ARREST

Arrest without warrant — validity — jury question. Whether an arrest or attempted arrest by an officer without warrant was valid, may, under applicable evidence, be a question for the jury to decide. So held where the accused claimed the right of self-defense because of the claimed invalidity of the arrest.

State v Fador, 222-134; 268 NW 625

Acting as peace officer or as individual. Under the record in a death action for shooting an alleged assailant, a peace officer under a self-defense plea had no different or greater rights in the exercise of this defense as a peace officer than he had as an individual.

Boyle v Bornholtz, 224-90; 275 NW 479

(e) EVIDENCE

1 In General

Immaterial evidence in re self-defense. Evidence held immaterial to the issue of self-defense.

State v Rourick, 211-447; 233 NW 509

Self-defense—weight and sufficiency. A jury question on the issue of self-defense may exist even tho the accused is the only witness as to what occurred at the time of the fatal encounter.

State v Twine, 211-450; 233 NW 476

I SELF-DEFENSE—continued
(e) EVIDENCE—concluded
1 In General—concluded

Physical prowess of prosecuting witness. It is not error to reject the argumentative testimony of the accused, on the issue of self-defense, as to his view of the physical prowess of the prosecuting witness.

State v Messer, 213-1264; 238 NW 462

2 Disposition of Deceased

Character of accused. Not even a defendant in a charge of homicide is a competent witness to testify to the reputation of the deceased as to peaceableness or quarrelsomeness when he—the defendant—fails to show his qualification to so testify.

State v Reynolds, 201-10; 206 NW 635

Ill feeling and hostility. On the trial of an indictment charging assault to murder wherein there is no issue as to self-defense, and consequently no issue as to which party was the aggressor, evidence tending to show the bad feeling existing between the defendant and the prosecuting witness is inadmissible.

State v Smith, 215-374; 245 NW 309

Bad character or reputation of deceased—res gestae. In a homicide prosecution under a self-defense plea, the bad character or reputation of deceased may be proved as part of the res gestae.

State v Rhone, 223-1221; 275 NW 109

Bad character or reputation of deceased—when provable—manner. Under a self-defense plea in a homicide prosecution, bad character or reputation of a deceased may be proved by (1) defendant's personal knowledge of deceased's actual character, (2) information communicated to defendant, (3) defendant's actual knowledge of deceased's general reputation, and (4) fact of bad reputation plus long acquaintance between defendant and deceased, or residence in same community, as presumption of knowledge by defendant.

State v Rhone, 223-1221; 275 NW 109

Quarrelsome nature of deceased—right to show. Where deceased, tho forbidden, entered upon defendant's land armed with deadly weapons, and prior to the fatal shooting advanced upon the retreating defendant threatening to strike him with said weapons, the defendant in a prosecution for homicide under a plea of self-defense may show the rough, bullying, threatening nature and violent dangerous character or reputation of the deceased prior to and up to the time of the killing.

State v Rhone, 223-1221; 275 NW 109

Character and habits. In prosecution for murder, an objection was properly sustained to a question regarding deceased's conduct when deceased was requested to assist in repairing a road—the purpose of the question being to show that deceased had a violent disposition—since the question called for specific acts of deceased at a time remote from the date of crime, when it is not shown that the conduct referred to was known to defendant.

State v Norton, 227-13; 286 NW 476

3 Physical Weakness of Deceased

Knowledge of deceased's insanity as bearing on self-defense. Where a jury is instructed to the effect that "belief in" rather than the "fact of" necessity to kill is controlling, it is not reversible error to fail to instruct regarding accused's knowledge of deceased's insanity especially when such an instruction was not requested.

State v Johnson, 223-962; 274 NW 41

4 Facts as to Defendant

Accused as only witness. A jury question on the issue of self-defense may exist even tho the accused is the only witness as to what occurred at the time of the fatal encounter.

State v Twine, 211-450; 233 NW 476

5 Threats by Deceased

Uncommunicated threats by deceased. On the trial of a charge of murder, evidence that the deceased, some three months prior to the fatal encounter, proposed to a party that they rob the defendant, which proposal was never communicated to the defendant, is inadmissible on the question as to who was the aggressor in said encounter.

State v Matheson, 220-132; 261 NW 787

6 Burden of Proof

Civil action for damages. A peace officer, in attempting an arrest for a misdemeanor, has no legal right, unless he acts in legal self-defense, to kill the offender. It follows that if he does kill, and is sued for damages consequent on the death, he has the burden to prove self-defense; especially so (1) when death was effected by a deadly weapon used in a deadly manner, (2) when the defendant distinctly pleaded self-defense as a defense, and (3) when plaintiff neither by plea nor proof presented the question of self-defense.

Klinkel v Saddler, 211-368; 233 NW 538

Instructions—self-defense. In a prosecution for murder, use of word "justified" in instruction on self-defense approved.

State v Norton, 227-13; 286 NW 476

(f) INSTRUCTIONS

1 In General

Inconsistent instructions under inconsistent pleas. An accused may not plead inconsistent defenses—i. e., (1) that he fired the fatal shot in self-defense, and (2) that the fatal shot was not fired by him, but by a third party—and then predicate error on the claim that the court, by instructing on both pleas, placed the accused in an inconsistent light.

State v Reynolds, 201-10; 206 NW 635

Justifiable failure to define terms. The terms "assault", "assault and battery", and "trespass", as used in the statement of the law on the subject of justification, need not be specifically defined, especially in the absence of request.

State v Reed, 205-858; 216 NW 759

Self-defense — prejudicial confusion. Definite and pointed instructions in a prosecution for homicide, to the effect that the state must prove beyond a reasonable doubt that the defendant did not act in self-defense, and that no duty to establish self-defense was upon the defendant (given in a case wherein the record facts do not per se negative such defense) are rendered prejudicially confusing and misleading by injecting therein a recital of the essential and necessary elements constituting a good plea of self-defense, and strongly implying that each and every one of such elements must be affirmatively proven by the defendant; especially is this true when such elements are imperfectly expressed.

State v Davis, 209-524; 228 NW 37

Undue limitation. Instructions limiting the right of self-defense to one who believes himself in danger of (1) loss of life, or (2) great bodily injury, are erroneous when the offense of assault and battery is submitted as an included offense, and the defendant is convicted thereof.

State v Sanford, 218-951; 256 NW 650

Instructions in re self-defense. Instructions in a murder case, relative to (1) the right of a person to repel an assault upon another, and (2) the nonright of a person to plead self-defense when he is the aggressor, reviewed and held correct, and that the accused waived his right to more explicit instructions by not asking therefor.

State v Matheson, 220-132; 261 NW 787

Absolute necessity—instructions. In covering the subject of self-defense, the court does not necessarily commit reversible error by employing the term "necessary self-defense", or "absolute necessity for". Instructions reviewed and held, as a whole, to fully protect the accused.

State v Johnston, 221-933; 267 NW 698

Force in repelling assault. A defendant in repelling an assault upon his person has a right to use such force as appeared to him, as a reasonably prudent, courageous, and cautious man, to be necessary under the circumstances, and the trial court's words "reasonably appeared necessary to him as a cautious, courageous man", while inaccurate in an instruction, are not prejudicially erroneous, the trial court having correctly stated the rule in other paragraphs of the instruction of which complaint is made.

Boyle v Bornholtz, 224-90; 275 NW 479

Trial—instructions—right to defend self. When, from the instructions, the jury may easily understand that one who is assailed may defend himself, it is not reversible error to fail to give a separate instruction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Applicability to defense of another. Where an instruction covering self-defense directs the jury to "rules hereafter given you" from which they could understand that defense of one's mother was governed by same rules, it was not reversible error to fail to give separate instructions on the defense of another.

State v Johnson, 223-962; 274 NW 41

Murder—self-defense. An instruction by the court on its own motion in a murder trial, giving the defendants all they were entitled to on the question of self-defense, was sufficient.

State v Coleman, 226-968; 285 NW 269

Instructions — intent — self-defense. In a prosecution for murder, an instruction on intent held not objectionable on omitting reference to defense of self-defense.

State v Norton, 227-13; 286 NW 476

2 Apparent Danger

Elements of self-defense—action for wrongful death. In a death action against a merchant policeman for shooting an alleged robber, the plea of self-defense, being an affirmative one, required defendant to prove (1) that the assailant was attempting to rob him; (2) that he was reasonably apprehensive of peril; (3) that he was acting as a reasonably cautious and courageous man; and (4) that he had reasonable grounds to believe it necessary to use the force he did use, and the court commits no error in so instructing.

Boyle v Bornholtz, 224-90; 275 NW 479

3 Death or Great Harm

Sufficiency. In prosecution for murder, instruction on self-defense that if defendant had reason, as an ordinarily prudent and "courageous" man, to believe that he was in danger of being killed, then defendant will have the right to defend himself as may appear necessary to him as an ordinarily prudent and "courageous" man, the use of the word "courageous" is proper.

State v Norton, 227-13; 286 NW 476

4 Necessity

Permissible degree of force. The degree of force which a defendant may employ in order to prevent injury to himself from an assault by one person is not necessarily the measure of defendant's permissible resistance when, at the same instant of time, he is menacingly threatened by several other persons in his

I SELF-DEFENSE—concluded
(f) INSTRUCTIONS—concluded

immediate presence. This important fact must not be overlooked by the instructions.

Booton v Metcalfe, 201-311; 207 NW 386

5 Deadly Weapon

Sufficiency. In prosecution for murder where defendant pleads self-defense in firing five shots from pistol, all of which entered deceased's body, any two of which may have caused death, no error is committed in refusing requested instruction, "'* * * defendant is not guilty if the fatal shot was fired while acting in self-defense, altho the defendant continued firing * * *'", where no evidence is submitted to show which shot caused death, and where the jury is properly instructed on self-defense, on question whether defendant was justified in firing all five shots which defendant testifies were "'fired about all at once.'"

State v Norton, 227-13; 286 NW 476

6 Retreat

Self-defense in one's home. Instruction relative to the right to exercise self-defense in one's own home without retreating, reviewed and held correct.

State v Harness, 214-160; 241 NW 645

7 Arrest

No annotations in this volume

8 The Aggressor

Provoking encounter. One who provokes an encounter may not plead self-defense in a resulting homicide.

State v Clay, 202-722; 210 NW 904

Civil liability. The aggressor in a physical encounter who is met by allowable self-defense necessarily has no cause of action against the party he assaults.

Lake v Moots, 215-126; 244 NW 693

9 When Instruction Required

Self-defense—absence of evidence. Instructions as to the law of self-defense are properly refused when the record reveals no evidence upon which to base such instructions.

State v Johnson, 211-874; 234 NW 263

10 Burden of Proof

Ignoring issue of self-defense—effect. Instructions are reversibly erroneous when they completely ignore the subject of burden of proof on the clearly presented issue of self-defense.

State v Rourick, 211-447; 233 NW 509

Elements of self-defense—action for wrongful death. In a death action against a merchant policeman for shooting an alleged robber, the plea of self-defense being an affirmative one required defendant to prove (1) that the assailant was attempting to rob him; (2) that he was reasonably apprehensive of peril; (3) that he was acting as a reasonably cautious and courageous man; and (4) that he had reasonable grounds to believe it necessary to use the force he did use, and the court commits no error in so instructing.

Boyle v Bornholtz, 224-90; 275 NW 479

II DEFENSE OF PROPERTY

Defense of property—permissible force. A jury must not be peremptorily told, as a matter of law, in a criminal case, not involving a homicide, that the defendant (a private citizen) would not be justified in employing a deadly weapon (1) to make an arrest for a felony committed in his presence and within the curtilage of his home, or (2) to prevent the forcible carrying away of his property by the thieves. The essential issue (which must be explained to the jury) is, not the nature of the weapon employed, but whether the defendant employed only that degree of force to accomplish such purposes which a reasonable person would deem reasonably necessary under the existing circumstances as they in good faith appeared to the defendant.

State v Metcalfe, 203-155; 212 NW 382

Unintended victim. A defendant who employs a justifiable degree of force to prevent thieves from carrying away his property is not criminally liable if his force, e. g., the discharge of a gun, takes effect on an unintended person.

State v Metcalfe, 203-155; 212 NW 382

12923 Persons aiding another.

Self-defense instructions — applicability to defense of another. Where an instruction covering self-defense directs the jury to "rules hereafter given you" from which they could understand that defense of one's mother was governed by same rules, it was not reversible error to fail to give separate instructions on the defense of another.

State v Johnson, 223-962; 274 NW 41

CHAPTER 503

ASSAULTS

12929 Assault and battery.

ANALYSIS

I In General
II Attempt to Commit Battery
III Putting in Fear
IV Battery
V Defenses
VI Information
VII Evidence
VIII Instructions

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Exemplary damages—malice as basis. Exemplary damages are allowable for malicious assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

Actions—immaterial evidence. In an action for assault and false imprisonment committed by a mayor and a city marshal, evidence of violations by plaintiff of an ordinance is inadmissible when it appears that, on the occasion in question, no attempt was made to arrest plaintiff for such violations, and when the pleadings are silent as to justification and mitigation.

Schultz v Enlow, 201-1083; 205 NW 972

Rape—conviction of included offense. Under an indictment for rape, the court need not submit the offense of assault with intent to do great bodily injury even tho the record reveals evidence tending to establish said latter offense.

State v Brown, 216-538; 245 NW 306

Rape — included offenses — when submitted. In a rape prosecution included offenses of assault and battery and simple assault should not be submitted to the jury where there is no allegation nor proof that force or threat of force was used, nor any resistance offered.

State v Beltz, 225-155; 279 NW 386

Verdicts—nonexcessiveness—$1,180 for assault and battery—exemplary damages. In an assault and battery case verdict for $1,680, reduced by remittitur to $1,180, held not so excessive as to evince passion and prejudice, when verdict included exemplary damages.

Hauser v Boever, 225-1; 279 NW 137

II ATTEMPT TO COMMIT BATTERY

No annotations in this volume

III PUTTING IN FEAR

No annotations in this volume

IV BATTERY

No annotations in this volume

V DEFENSES

Former jeopardy — conviction for assault and battery—effect on higher offense. A conviction in municipal court for assault and battery constitutes no bar to a subsequent prosecution under an indictment charging assault and battery, with intent to commit great bodily injury, based on the same act.

State v Smith, 217-825; 253 NW 130

Ignoring issue of self-defense—effect. Instructions are reversibly erroneous when they completely ignore the subject of burden of proof on the clearly presented issue of self-defense.

State v Rourick, 211-447; 233 NW 509

VI INFORMATION

No annotations in this volume

VII EVIDENCE

Included offenses—rape—rule for submission. Notwithstanding any prior decisions by this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes (1) assault with intent to commit rape, (2) assault and battery, and (3) simple assault. Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question were the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if nay, then do not submit.

Contradictory evidence held to show that the act in question was committed by force and against the will of the prosecutrix, and that, therefore, assault and battery should have been submitted to the jury.

State v Hoaglin, 207-744; 223 NW 548

Physical prowess of prosecuting witness. It is not error to reject the argumentative testimony of the accused, on the issue of self-defense, as to his view of the physical prowess of the prosecuting witness.

State v Messer, 213-1264; 238 NW 462

Robbery—included offenses. The court must, on the trial of a charge of robbery alleged to have been committed with force and violence, submit the included offense of assault and battery when the evidence is sufficient to support such verdict.

State v Buchan, 219-106; 257 NW 586

Identity of assailant. As against contention that the party assaulted could not definitely identify defendant as his assailant, evidence

held sufficient to sustain a conviction for assault committed by defendant striking another with his fist.

State v Chappel, 226-1392; 286 NW 432

VIII INSTRUCTIONS

Justifiable failure to define terms. The terms "assault", "assault and battery", and "trespass", as used in the statement of the law on the subject of justification, need not be specifically defined, especially in the absence of request.

State v Reed, 205-858; 216 NW 759

Self-defense—undue limitation. Instructions limiting the right of self-defense to one who believes himself in danger of (1) loss of life, or (2) great bodily injury, are erroneous when the offense of assault and battery is submitted as an included offense, and the defendant is convicted thereof.

State v Sanford, 218-951; 256 NW 650

Civil liability—instructions as whole—self-defense properly submitted. In an assault and battery case an instruction setting out elements of plaintiff's proof without referring to "self-defense" is not erroneous when "self-defense" is sufficiently explained to the jury in other instructions.

Hauser v Boever, 225-1; 279 NW 137

12930 Pointing gun at another.

Assault with weapon. See under §12929

12933 Assault with intent to commit a felony.

Assault with intent to commit rape. See under §12968

Corpus delicti—sufficiency. Evidence held to present a jury question whether death resulted from an assault.

State v Clay, 222-1142; 271 NW 212

Offense classifiable as "rape"—included offenses. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance", is legally classifiable as "statutory rape", tho the statute does not specifically so designate the offense; it follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

12934 Assault with intent to inflict bodily injury.

ANALYSIS

I In General
II Assault
III Intent to Injure
IV Indictment
V Evidence
VI Instructions

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Elements. In prosecution for assault with intent to inflict great bodily injury, principles applicable to determination of offense stated: (1) the crime is not susceptible to exact definition; (2) it is not necessary that an injury be inflicted; (3) extent of injury is a factor in determining intent; (4) the foundation of the offense is the intent; (5) intent in most cases must be established circumstantially and by legitimate inferences from the evidence; (6) a person is held to intend the natural consequences of his act; (7) when an act is committed which is unlawful, unless justified, specific intent may be inferred or presumed from the unlawful act.

State v Crandall, 227-311; 288 NW 85

II ASSAULT

Manner of commission. An assault with intent to inflict great bodily injury may be consummated without the use of any weapon or the infliction of any bodily injury.

State v Grimm, 206-1178; 221 NW 804

Elements of assault. In prosecution for assault with intent to inflict great bodily injury principles applicable to determination of offense stated: (1) the crime is not susceptible to exact definition; (2) it is not necessary that an injury be inflicted; (3) extent of injury is a factor in determining intent; (4) the foundation of the offense is the intent; (5) intent in most cases must be established circumstantially and by legitimate inferences from the evidence; (6) a person is held to intend the natural consequences of his act; (7) when an act is committed which is unlawful, unless justified, specific intent may be inferred or presumed from the unlawful act.

State v Crandall, 227-311; 288 NW 85

III INTENT TO INJURE

Former jeopardy—conviction for assault and battery—effect on higher offense. A conviction in municipal court for assault and battery constitutes no bar to a subsequent prosecution under an indictment charging assault and battery, with intent to commit great bodily injury, based on the same act.

State v Smith, 217-825; 253 NW 130

Anticipation of results. Defendant's act, in driving his fist through glass in car door causing a splinter to pierce prosecuting witness' eye so that he lost the sight of it, was an unlawful act for which there was no justification, and intent being inferable from an

unlawful act, defendant was bound to anticipate that such an injury might reasonably be a probable consequence of his act.

State v Crandall, 227-311; 288 NW 85

IV INDICTMENT

Failure to allege facts—waiver. An objection that an indictment is lacking in the specific recitals of fact necessary to constitute the offense of assault with intent to inflict great bodily injury is waived when raised for the first time in a motion in arrest of judgment.

State v Costello, 200-313; 202 NW 212

V EVIDENCE

Alibi—jury question. Evidence held to present a question for the jury as to the identity of defendant as one who committed an assault, notwithstanding evidence tending to establish an alibi.

State v Fador, 222-134; 268 NW 625

VI INSTRUCTIONS

Bodily injury. In prosecution for assault with intent to inflict great bodily injury principles applicable to determination of offense stated: (1) the crime is not susceptible to exact definition; (2) it is not necessary that an injury be inflicted; (3) extent of injury is a factor in determining intent; (4) the foundation of the offense is the intent; (5) intent in most cases must be established circumstantially and by legitimate inferences from the evidence; (6) a person is held to intend the natural consequences of his act; (7) when an act is committed which is unlawful, unless justified, specific intent may be inferred or presumed from the unlawful act.

State v Crandall, 227-311; 288 NW 85

12935 Assault with intent to commit certain crimes.

Included offenses. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and, depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

CHAPTER 564

WEAPONS, FIREARMS, AND TOY PISTOLS

12936 Carrying concealed weapons.

Atty. Gen. Opinion. See '30 AG Op 309

Not prohibited on own land. By statute, carrying a pistol on one's own land is not prohibited.

State v Rhone, 223-1221; 275 NW 109

Self-defense—felonious possession of weapon. A person wrongfully assaulted is not deprived, under proper circumstances, of defending himself with a dangerous weapon which he is unlawfully carrying concealed on his person.

State v Shannon, 214-1093; 243 NW 507

Passenger carrying pistol in automobile—joint enterprise with driver. One carrying a pistol in a motor vehicle on a common mission with the driver is jointly operating the vehicle and is also an accomplice liable as the principal in violating the statute prohibiting the carrying of such weapon by the operator of a motor vehicle.

State v Thomason, 224-499; 276 NW 619

Operator of motor vehicle—definition not controlling. The definition of an "operator" of a motor vehicle applicable to and contained in the motor vehicle law (§4960-d1, C., '35 [§5000.01, C., '39]) is not controlling in construing a criminal statute found in another, distinct part of the code.

State v Thomason, 224-499; 276 NW 619

Pistols not offered in evidence taken to jury room. In prosecution for carrying concealed weapons, permitting jury to take pistols, not technically offered in evidence, to jury room held not prejudicial where pistols were before jury, frequently referred to in evidence, and sent to jury room with knowledge of defendant's counsel and without his objection.

State v Busing, (NOR); 251 NW 620

12938 Permit to carry concealed weapon.

Territorial validity. A duly-issued permit, issued by the sheriff of one county, to carry a revolver is valid throughout the state.

Fisher v Tullar, 209-35; 227 NW 580

12939 Application.

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

CHAPTER 564.1

MACHINE GUNS

Atty. Gen. Opinion. See '32 AG Op 43

CHAPTER 565

INJURIES BY EXPLOSIVES

12961 Death caused by high explosives.

Civil liability. He who knowingly uses or handles violent explosives must anticipate and guard against the happening of any and all things which reasonably prudent human foresight might foresee might happen with injurious consequences to another.

Eves v Littig Co., 202-1338; 212 NW 154; 28 NCCA 155

Information. Information charging that defendant murdered his wife by depositing dynamite or other explosive in a shotgun and inducing her to fire it is not demurrable as not charging defendant with first degree murder under the general statute, the demurrer alleging that if any crime was charged it was under a specific statute providing murder for causing death by high explosives.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

CHAPTER 566

RAPE

12966 Definition—punishment.

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ANALYSIS

I RAPE IN GENERAL
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Corroboration in rape. See under §13900
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Instructions in criminal cases generally. See under §13876

I RAPE IN GENERAL

Discussion. See 11 ILR 272—New rape statute

Nature and elements — common-law and statutory rape. All violations of this section are legally classifiable as "rape".

State v Hoaglin, 207-744; 223 NW 548

Inflammatory questions and innuendoes. Reversible error results from the act of the county attorney in persistently asking and re-asking questions which bristle with prejudicial innuendoes against the accused, and which call for testimony of a highly inflammatory and incompetent nature; and the sustaining of objections to such questions is not a sufficient antidote for such poison.

State v Neifert, 206-384; 220 NW 32

II AGE OF CONSENT

No annotations in this volume

III INDICTMENT

Included offenses—assault and battery. An indictment which charges that the accused assaulted prosecutrix "with a felonious intent * * * to * * * ravish and carnally know and abuse * * * by force", does not charge the offense of assault and battery. It follows that said latter offense should not be submitted, even tho the evidence would support a finding of such offense.

State v Ellington, 200-636; 204 NW 307

Conviction of included offense—fundamental rule for submission. Principle reaffirmed that no included offense should be submitted on the trial of an indictment or trial information (1) unless the offense is expressly or impliedly charged in the indictment or information, and (2) unless the record reveals evidence tending to establish said offense.

State v Brown, 216-538; 245 NW 306

Indictment and information—time discrepancy immaterial. A rape conviction is valid altho for a date different than the date fixed in the indictment if within the statute of limitations and if no fatal variance occurs between the indictment and the proof.

State v Beltz, 225-155; 279 NW 386

Substantial language charging rape—validity. An indictment charging that defendant

"raped, carnally knew, and abused" a female sufficiently states an offense in terms of substantially the same meaning as the statute, so as to apprise the court and the accused that the offense of rape was intended to be charged.

State v Keturokis, 224-491; 276 NW 600

Amending indictment—validity. In a prosecution for rape, adding the words "a female, by force and against her will" as an amendment to an already valid indictment, which amendment affecting not substance but form only, and being merely surplusage, is not prejudicial and not error.

State v Keturokis, 224-491; 276 NW 600

Legislative definition—use of "rape" in title only. An indictment for rape by reference to the statute is not void on the ground that the statute does not use the word "rape", when the statute is merely a codification of a legislative act which amply indicated in the title that it was intended to define the common-law crime of rape.

State v Keturokis, 224-491; 276 NW 600

IV EVIDENCE

(a) IN GENERAL

Corpus delicti. The fact that the crime of rape has been committed may be established by the testimony of the prosecutrix alone.

State v Mueller, 202-1067; 208 NW 360

Conclusiveness of supported verdict. A conviction of rape on supporting testimony and on ample corroboration is conclusive on the court.

State v Steele, 209-550; 228 NW 75

Issues, proof, and variance—time of offense. The time of the commission of the offense of assault with intent to rape need not be proved in exact accord with the allegation of the indictment.

State v Ellington, 200-636; 204 NW 307

Separate and disconnected offenses. On the trial of an indictment for rape, evidence tending to show separate and distinct assaults to rape, upon females other than prosecutrix, and wholly disconnected with the transaction on trial, are inadmissible.

State v Huntley, 204-981; 216 NW 67

Evidence—sufficiency. Evidence on a prosecution for rape reviewed, and held not to present such showing of malice or desire for revenge or other indicia of falsehood upon the part of the prosecutrix as to justify the conclusion, as a matter of law that her testimony was false.

State v Pritchard, 204-417; 215 NW 256
State v Davenport, 208-831; 224 NW 557

Demonstrative evidence—identification. Exhibit held sufficiently identified, material, and relevant, and properly received in evidence.

State v Brown, 216-538; 245 NW 306

Motive of prosecutrix. Principle recognized that the motive of a witness may be shown as bearing on the question of credibility.

State v Ingram, 219-501; 258 NW 186

Angry feelings of prosecutrix. A prosecutrix in a charge of rape may be permitted to testify to her angry feelings toward the defendant.

State v Ingram, 219-501; 258 NW 186

Several offenses—election at close of direct evidence. In a statutory rape prosecution, where several acts of intercourse are shown, the state need not, before the close of the direct evidence, elect on which act it relies.

State v Beltz, 225-155; 279 NW 386

Other offenses — admissibility. Rule that other crimes may not be shown is not applicable in a statutory rape prosecution to other acts of sexual intercourse between the parties.

State v Beltz, 225-155; 279 NW 386

Ill feeling of third parties. Evidence of the acts of parties who are not witnesses, tending to show hostility against an accused in a prosecution for rape, is not admissible.

State v Speck, 202-732; 210 NW 913

Opinion evidence — impotency. An accused in a prosecution for rape may not establish his impotency by his wife's opinion as to the reason why she had not given birth to more than three children.

State v Steele, 209-550; 228 NW 75

Identification of accused. A prosecutrix in a charge of rape who had not known the accused prior to the commission of the offense, may very properly be permitted to testify that after the accused was arrested she identified him at the police station.

State v Mayer, 204-118; 214 NW 710

Eight-year-old witness. In prosecution for statutory rape where it is shown on preliminary examination of eight-year-old witness that she knew what "telling the truth" meant and knew what a lie was, that it was wrong to tell a lie, and that punishment was the penalty for not telling the truth, it was not error to permit such witness to testify, especially where no objection was made to witness' competency until the conclusion of her testimony, altho she did not understand the meaning of the word "oath", nor definition of word "witness".

State v Diggins, 227-632; 288 NW 640

Eight-year-old witness. In a prosecution for statutory rape where an eight-year-old

IV EVIDENCE—continued
(a) IN GENERAL—concluded

witness testified on direct examination in a clear, frank, direct, and intelligent manner as to what she had seen or heard on the occasion in controversy, a motion to strike such testimony was properly overruled, as the question of the credit and weight to be given her testimony was clearly for the jury. The testimony of a witness must be construed in its entirety.

State v Diggins, 227-632; 288 NW 640

Defendant as witness. In prosecution for statutory rape an instruction to the jury regarding defendant testifying in his own behalf as an interested witness from an interested standpoint, and that the jury should consider his testimony as such, is not objectionable on the ground that it singles out the testimony of the defendant from the testimony of other witnesses in a manner that makes it appear to the jury that his testimony is not worthy of belief, nor on the ground that it invades the province of the jury.

State v Diggins, 227-632; 288 NW 640

Misconduct of counsel—"sexual pervert". A cross-examination of defendant in a prosecution for rape whether he would object to his wife testifying against him, and the act of the county attorney referring to defendant as a "sexual pervert", while improper, does not necessarily constitute reversible error.

State v Ingram, 219-501; 258 NW 186

Divorced wife's testimony as to venereal disease—nonprejudicial. In a rape prosecution, an unsuccessful attempt to introduce objectionable testimony relative to defendant's affliction with venereal disease, during marriage, by asking divorced wife if she had observed his condition relative to venereal disease, and if she had testified in her divorce action that she had received venereal disease from him, held nonprejudicial error.

State v Donovan, (NOR); 263 NW 516

(b) AGAINST HER WILL

Opinion evidence—allowable conclusion. A witness on the trial of a charge of rape may very properly testify that the accused pushed prosecutrix under the fence and that "they scrapped" and "fought back and forth" and "that she tried to get away". Such testimony is not only an allowable conclusion but is also descriptive in character.

State v Mayer, 204-118; 214 NW 710

Resistance. The resistance of a prosecutrix in a charge of rape must be shown to have been to the full extent of her ability under the circumstances.

State v Brewster, 208-122; 222 NW 6
See State v Brown, 216-538; 245 NW 306

Included offenses—when submitted. In a rape prosecution included offenses of assault and battery and simple assault should not be submitted to the jury where there is no allegation nor proof that force or threat of force was used, nor any resistance offered.

State v Beltz, 225-155; 279 NW 386

(c) UNDER AGE OF CONSENT

Minor offenses. In the trial of a prosecution for rape on a child under the age of consent, the offenses of assault and battery and simple assault should not be submitted if the record is such that it would not support a verdict of guilt of such minor offenses had the prosecution charged such minor offenses only.

State v Ingram, 219-501; 258 NW 186

(d) PENETRATION

Ruptured hymen — physician's testimony proper. A physician may properly testify as to the physical condition of a prosecutrix in a charge of rape; that the hymen was ruptured; and that only a strain of some kind would have brought about such rupture.

State v Mayer, 204-118; 214 NW 710

(e) CONDUCT

Admissions—identification of offense. Admissions of guilt by an accused are not rendered inadmissible on the trial of an indictment because made when accused was arrested under an information which misstated the time of the commission of the offense as prior to the time alleged in the indictment, the record demonstrating that but one offense was being prosecuted.

State v Heath, 202-153; 209 NW 279

Flight subsequent to discharge. Evidence of flight and instructions as to the effect thereof may be proper even tho the flight took place after the accused had been once discharged under a prior preliminary information charging the same and identical offense and transaction.

State v Heath, 202-153; 209 NW 279

Seeking opportunity. Evidence, including certain writings of the defendant, and his conduct in general, exhaustively reviewed in a prosecution for rape on a child under 16 years of age, and held to reveal no sufficient corroboration of prosecutrix either on the theory (1) that he had been seeking an opportunity to commit said offense on prosecutrix, or (2) that he was the only person who could have committed the offense; or that a manifestation of guilty conscience furnished such corroboration.

State v Landes, 220-201; 262 NW 105

(f) COMPLAINT

No annotations in this volume

(g) CHARACTER OF PROSECUTRIX

Character of prosecutrix. Proof of particular acts or specific facts is not admissible, in

a prosecution for rape, to show the bad character of prosecutrix.

State v Speck, 202-732; 210 NW 913

Cross-examination—association with other men. Cross-examination in a prosecution for rape held not unduly restricted as to the association of prosecutrix with other men.

State v Steele, 209-550; 228 NW 75

Exclusion of nonexplanatory question—prejudice presumed. The erroneous refusal of the court, in a prosecution for assault to rape, to permit a witness, proffered by the defendant, to answer a question whether the witness knew the general reputation of the prosecutrix as to truth and veracity in the community where she lived, cannot be deemed harmless error on the ground that the question did not reveal whether the witness would answer "yes" or "no", when, in connection with the proffer of the witness, defendant offered to show that said prosecutrix was "wholly unreliable in her word and statements".

State v Teager, 222-391; 269 NW 348

(h) CONCEPTION

No annotations in this volume

(i) EXPERT TESTIMONY

Opinion evidence—recital of fact. A physician may properly testify as to the physical condition of a prosecutrix in a charge of rape; that the hymen was ruptured and that only a strain of some kind would have brought about such rupture.

State v Mayer, 204-118; 214 NW 710

Expert evidence. Expert testimony tending to show the possibility of sexual intercourse with a nine-year-old child may be proper.

State v Ingram, 219-501; 258 NW 186

V INSTRUCTIONS

Included offenses—rule for submission. Notwithstanding any prior decisions of this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes:

1. Assault with intent to commit rape, and
2. Assault and battery, and
3. Simple assault.

Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question was the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if nay, then do not submit.

State v Hoaglin, 207-744; 223 NW 548
State v Blair, 209-229; 223 NW 554

Conviction of included offense. Under an indictment for rape, the court need not submit the offense of assault with intent to do great bodily injury even tho the record reveals evidence tending to establish said latter offense.

State v Brown, 216-538; 245 NW 306

Included offenses—failure to charge—effect. Failure to charge that a rape was committed with force or against the will of prosecutrix, removes the necessity under any circumstances to instruct as to assault or assault and battery.

State v Tennant, 204-130; 214 NW 708

Included offenses—failure to define offense. The failure to define the included offenses of assault and battery and simple assault, or to set forth the elements of either of said offenses, under an indictment for rape does not constitute prejudicial error when the jury finds the accused guilty of rape.

State v Grimm, 212-1193; 237 NW 451

Other offenses as showing consent. In a prosecution for rape on a child under the age of consent, the court should not instruct that evidence of other offenses between the same parties can be considered on the question of consent on the part of the prosecutrix.

State v Ingram, 219-501; 258 NW 186

Duty to convict of highest offense. An instruction to the effect that the jury should find the defendant guilty of the highest degree of crime included in the indictment, of which the jury finds him guilty beyond a reasonable doubt, reviewed, and held unobjectionable.

State v Ingram, 219-501; 258 NW 186

Estoppel to object. Defendant may not successfully claim that an instruction given at his request unduly magnified the importance of certain evidence.

State v Brown, 216-538; 245 NW 306

Failure to define offense. The failure specifically to define an offense, in the absence of a request, does not constitute error when the elements of the offense are accurately set forth in the instructions.

State v Grimm, 212-1193; 237 NW 451

Fatal assumption of fact. An assumption by the court in its instructions in a criminal case that the prosecutrix and the defendant were together on a certain occasion material to the case, when such association was sharply in issue, constitutes reversible error.

State v Hubbard, 218-239; 250 NW 891

Flight subsequent to discharge. Evidence of flight and instructions as to the effect thereof

V INSTRUCTIONS—concluded

may be proper even tho the flight took place after the accused had been once discharged under a prior preliminary information charging the same and identical offense and transaction.

State v Heath, 202-153; 209 NW 279

Instruction on flight. An instruction that if defendant had reason to believe he would be charged with rape, and that if he fled from state to avoid arrest, his flight could be considered prima facie indicative of guilt, held not error as against objection that by use of words "had reason to believe" jurors were told they might consider flight without finding that defendant had any actual knowledge or suspicion that he would be charged with rape.

State v Donovan, (NOR); 263 NW 516

General in lieu of specific instructions. A general and all-inclusive instruction as to the conduct of a prosecutrix in a charge of rape and the right and duty of the jury to give due consideration thereto as affecting her credibility, may justify the court in refusing requested instructions on specific instances of conduct.

State v Mueller, 202-1067; 208 NW 360

Inferential instruction insufficient. Where defendant was convicted of assault with intent to commit rape, failure to instruct jury as to necessity of corroboration of prosecuting witness' testimony—an essential element of conviction—was prejudicial error, and the jury was not sufficiently instructed as to this necessity by inference from another instruction on corroboration given in connection with the court's statement that crime charged in indictment was rape, which included the lesser offense of assault with intent to commit rape. Nor was the error rendered nonprejudicial by the fact that record contained evidence of corroboration, since it is not the court's function to pass upon weight and sufficiency of corroborating evidence, except to determine whether it is sufficient to go to the jury.

State v Ervin, 227-181; 287 NW 843

Intent—applicable instruction. It is not erroneous to instruct that the jury has the right to infer that the defendant intended to do that which he voluntarily and willfully did, the charge being rape on a female incapable of consent, and there being evidence that the offense was consummated.

State v McIntyre, 203-451; 212 NW 757

Unsupported issue. Requested instructions on a wholly unsupported issue are properly refused.

State v Mueller, 202-1067; 208 NW 360

VI SENTENCE

Discussion. See 10 ILB 140—Indeterminate sentence—rape

Sentence—judicial discretion. Judicial discretion is vested in the court as to the sentence to be imposed on a conviction for rape —an exception to the indeterminate sentence act.

State v Steele, 209-550; 228 NW 75

Excessive sentence. In the absence of extenuating circumstances, the appellate court cannot say that a sentence of 40 years, passed on a supported verdict of guilt in a prosecution for rape, is excessive.

State v Ingram, 219-501; 258 NW 186

Sentence less than maximum—excessiveness —parole board's jurisdiction. Where defendant was sentenced to not more than 15 years for statutory rape, the supreme court would not consider contention that sentence was excessive and should be reduced, since sentence was less than maximum and defendant was subject to jurisdiction of parole board.

State v Banks, 227-1208; 290 NW 534

Statutory rape—sentence—unaffected by lack of chasity. Statutory rape is unaffected by a 14-year-old prosecutrix's lack of chastity and a 10-year sentence imposed upon a 50-year-old defendant is neither excessive nor indicates an abuse of trial court's discretion as justifies interference on appeal.

State v Beltz, 225-155; 279 NW 386

Instructions relative to punishment. It is to be regretted that there are courts which continue to instruct juries as to the punishment provided by law for the commission of an offense.

State v Tennant, 204-130; 214 NW 708

12966.1 Jurisdiction of the board of parole.

Excessiveness of sentence — parole board's jurisdiction. Where defendant was sentenced to not more than 15 years for statutory rape, the supreme court would not consider contention that sentence was excessive and should be reduced, since sentence was less than maximum and defendant was subject to jurisdiction of parole board.

State v Banks, 227-1208; 290 NW 534

12967 Carnal knowledge of imbecile.

ANALYSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Resemblance of child. See under §§12663, 12970, Vol I

I IN GENERAL

Offense classifiable as "rape"—included offenses. The offense of having "unlawful car-

nal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance", is legally classifiable as "statutory rape", tho the statute does not specifically so designate the offense; it follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

II INDICTMENT

Offenses included—submission to jury. An indictment charging rape upon an imbecile female also charges defendant with the included offense of assault with intent to commit rape, assault and battery, and simple assault, and these included offenses should have been submitted to the jury.

State v Swolley, 215-623; 244 NW 844

III EVIDENCE

Burden of proof. In a prosecution for unlawfully having carnal knowledge of an imbecile, the state must establish the imbecility of the prosecutrix beyond all reasonable doubt. Testimony held to present a jury question.

State v Patrick, 201-368; 207 NW 393

12968 Assault with intent to commit rape.

Atty. Gen. Opinion. See '36 AG Op 25

ANALYSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE
IV INSTRUCTIONS
V SENTENCE

Assault with intent to commit a felony. See under §12933
Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Offense classifiable as "rape"—included offenses. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance (§12967, C., '31) is legally classifiable as "statutory rape", tho the statute does not specifically so designate the offense. It follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

II INDICTMENT

Included offenses. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and, depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

Included offense. Under an indictment for rape, there may be a conviction for assault with intent to commit rape even tho the only evidence offered by the state is to the effect that a completed rape by actual penetration was accomplished.

State v Blair, 209-229; 223 NW 554

III EVIDENCE

Sufficiency. Evidence held sufficient to sustain a verdict of guilty of assault with intent to rape.

State v Ellington, 200-636; 204 NW 307

Evidence—sufficiency. Evidence of prosecutrix reviewed, and held not ipso facto incredible because of contradictions, inconsistencies, and admissions of unfavorable conduct on her part.

State v Mueller, 202-1067; 208 NW 360

Corroboration — sufficiency. Corroboration sufficient to sustain a verdict of guilty of assault to rape is found in testimony tending strongly to show that the accused was actually observed by witnesses other than prosecutrix in the attempt forcibly to have sexual intercourse with prosecutrix.

State v Mayer, 204-118; 214 NW 710

Corroboration — sufficiency. Corroboration sufficient to sustain a verdict of guilty of assault to rape may be found in testimony wherein defendant tacitly admitted his immoral relation with the prosecutrix and his departure from the state for the purpose of avoiding prosecution.

State v Tennant, 204-130; 214 NW 708

Corroboration — purpose — accused's admissions sufficient. Fact of the commission of a rape or an assault with intent to commit rape may be established by the sole evidence of the prosecutrix, and corroboration is necessary only to connect the accused with the crime, hence accused's voluntary admissions may furnish corroboration.

State v Beltz, 225-155; 279 NW 386

Included offenses—when submitted. In a rape prosecution included offenses of assault and battery and simple assault should not be submitted to the jury where there is no allegation nor proof that force or threat of force was used, nor any resistance offered.

State v Beltz, 225-155; 279 NW 386

IV INSTRUCTIONS

Circumstantial evidence—basis. In a charge of assault with intent to rape, alleged to have been committed in an automobile, evidence that

people saw the car, heard screams, and saw prosecutrix alight from the car in an excited and disheveled condition, furnishes sufficient basis for instructions relative to circumstantial evidence.

State v Mueller, 202-1067; 208 NW 360

Prejudicial recital of punishment. Prejudicial error results from a recital in the instructions of the punishment for rape (imprisonment for five years or for life with opportunity for parole under minimum sentence), and failing to recite the punishment for assault with intent to rape (imprisonment for an indeterminate term not exceeding 20 years with opportunity for parole), the defendant being convicted of the latter offense.

State v Mayer, 204-118; 214 NW 710
State v Tennant, 204-130; 214 NW 708

Instruction as to "intent to have or attempt to have sexual intercourse". Under an indictment charging assault with intent to commit rape, an instruction authorizing the jury to convict if the assault was made "with the intent to have or attempt to have sexual intercourse" with prosecutrix, is fundamentally erroneous because it submits an offense which does not exist.

State v Western, 210-745; 231 NW 657

Failure to define offense—effect. The failure to define the included offenses of assault and battery and simple assault, or to set forth the elements of either of said offenses, under an indictment for rape, does not constitute prejudicial error when the jury finds the accused guilty of rape.

State v Grimm, 212-1193; 237 NW 451

V SENTENCE

Statutory rape — sentence — unaffected by lack of chastity. Statutory rape is unaffected by a 14-year-old prosecutrix's lack of chastity, and a 10-year sentence imposed upon a 50-year-old defendant is neither excessive nor indicates an abuse of trial court's discretion as justifies interference on appeal.

State v Beltz, 225-155; 279 NW 386

CHAPTER 567

FORCIBLE MARRIAGE AND DEFILEMENT

12969 Compelling to marry or be defiled.

Conversations in the presence of prosecutrix. In a civil prosecution for forcible defilement, statements may become material when made in the presence of the injured female, and long after the commission of the alleged offense, and by a member of her family who was instrumental in later initiating the prosecution, to the effect that the accused was a good man, and that a person other than the accused was responsible for the woman's condition.

Wildeboer v Peterson, 201-1202; 203 NW 284

CHAPTER 568

SEDUCTION

12970 Definition—punishment.

ANALYSIS

I SEDUCTION IN GENERAL
II SEDUCTIVE ARTS
III CHASTE CHARACTER
IV INDICTMENT
V EVIDENCE

Civil liability for seduction. See under §10985
Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I SEDUCTION IN GENERAL

No annotations in this volume

II SEDUCTIVE ARTS

Non-reliance on artifice. A record in a prosecution for seduction which, in view of the character, conduct, and knowledge of the prosecutrix, fails to show that she relied on the alleged artifice and deception, necessarily shows an unsupported verdict.

State v Moss, 202-164; 209 NW 276

III CHASTE CHARACTER

Indecent language and conduct. The accused under a charge of seduction may, on the issue of chastity, show that prosecutrix was given to the use of indecent language and to the telling of obscene stories.

State v Wilcoxen, 200-1250; 206 NW 260

IV INDICTMENT

No annotations in this volume

V EVIDENCE

Corroboration. See under §13900

Association with other men. In a prosecution for seduction, the accused may, on the issue of chastity and on the issue whether he

and prosecutrix were engaged, show that, during the time of claimed engagement, the prosecutrix was continually keeping company with other men.

State v Wilcoxen, 200-1250; 206 NW 260

Unsupported instructions. An instruction relative to the conditions under which the birth of a child would be corroborative of the prosecutrix under an indictment for seduction is necessarily erroneous when there is no testimony in the record from which the jury could find such conditions.

State v Reynard, 205-220; 217 NW 812

CHAPTER 569

ATTEMPT TO PRODUCE ABORTION

12973 Administration of drugs—use of instruments.

ANALYSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Homicide—optional venues. A prosecution for murder by means of an attempted abortion may be prosecuted in the county wherein the resulting death occurred, even tho the unlawful operation was performed in another county of this state.

State v Sweeney, 203-1305; 214 NW 735

Miscarriage with fatal result. Principle reaffirmed that a person who, in an attempt to produce a miscarriage, inflicts injury upon a woman from which she dies, is guilty of murder in the second degree, unless the miscarriage was necessary to save the woman's life.

State v Rowley, 216-140; 248 NW 340

II INDICTMENT

Use of instruments—sufficiency of allegation. Indictment for murder by means of an attempted abortion reviewed, and held to allege adequately, tho somewhat clumsily, the use by the accused of instruments as a means of effecting such abortion.

State v Sweeney, 203-1305; 214 NW 735

Absence of essential allegations—waiver. Objections that an indictment fails to allege the character of certain instruments or the manner of using them as a means of bringing about an abortion are waived by the failure to demur to the indictment.

State v Sweeney, 203-1305; 214 NW 735

Included offenses. The crime of attempting to produce an abortion is not included in an indictment for murder in the second degree, even tho the indictment is based on an attempted abortion resulting in death.

State v Rowley, 216-140; 248 NW 340

Murder resulting from abortion—willfulness. Under an indictment for murder in the second degree resulting from an abortion, it is not necessary to prove that the death was willfully caused.

State v Rowley, 216-140; 248 NW 340

III EVIDENCE

Opinion of expert. A physician who has professionally attended a woman upon whom an abortion has been attempted, and who later performed an autopsy upon her body, may state whether in his opinion the abortion was necessary to save the life of the woman; otherwise as to a physician who bases his opinion on matters not appearing in the record.

State v Sweeney, 203-1305; 214 NW 735

Irrelevant and prejudicial matter. In a prosecution for murder by means of an abortion, the state, after the admission, on motion of the accused, of a letter from the party committing the abortion, should not be permitted to show that, on the occasion of the writing of the letter, the writer thereof had registered at the hotel under an assumed name.

State v Sweeney, 203-1305; 214 NW 735

Opinion evidence—operation by means of catheter. Whether a catheter could, against the resistance of a woman, be inserted into her uterus by an unskilled layman, and thereby produce a miscarriage, or whether the operation could be performed on a woman by the use of a catheter without a speculum and light to guide the operator, are not the subjects of expert testimony.

State v Candler, 204-1355; 217 NW 233

Negativing necessity and good faith. In a prosecution for aiding and abetting an attempted miscarriage by a regular practicing physician, the state must establish beyond a reasonable doubt (1) that the operation in question was not necessary to save the life of the woman, and (2) that the physician did not in good faith believe such operation was necessary.

State v Dunklebarger, 206-971; 221 NW 592

Necessity to save life. The condition of a woman's health prior to a miscarriage, and

III EVIDENCE—concluded

the nonprofessional character of the person attempting the miscarriage, together with the admission of the latter that she was in the habit of bringing about miscarriages, may quite clearly show that the miscarriage in question was brought about without any necessity to save the woman's life.

State v Rowley, 216-140; 248 NW 340

Cause of death. Evidence held ample to justify a finding that the use of an instrument on a woman in an attempt to produce a miscarriage was the cause of her death.

State v Rowley, 216-140; 248 NW 340

Murder resulting from abortion—evidence—sufficiency. Record reviewed, and held to sustain a verdict of guilty under a prosecution for murder in the second degree resulting from an attempted abortion.

State v Rowley, 216-140; 248 NW 340

CHAPTER 570

ADULTERY

12974 Punishment—prosecution.

Discussion. See 10 ILB 327—Adultery and conspiracy to commit adultery

Atty. Gen. Opinion. See '36 AG Op 353

Non-prosecution of co-defendant. It is no defensive plea to a charge of adultery that the co-defendant of the accused has not been prosecuted.

State v Rounds, 202-534; 210 NW 542

Common-law marriage. A written agreement between a man and a woman "to live as husband and wife until such time that we are lawfully married" is insufficient to constitute a common-law marriage, because the writing not only furnishes a cover for illicit relation but fails to carry on its face the required element of a present intention to assume the legal relation.

State v Grimes, 215-1287; 247 NW 664

CHAPTER 572

INCEST

12978 Definition—punishment.

ANALYSIS

I IN GENERAL
II RELATIONSHIP
III INDICTMENT
IV EVIDENCE

Evidence in criminal cases generally. See under §13897 et seq

Indictment generally. See under Chs 637, 638

I IN GENERAL

Accomplices. A prosecutrix in a prosecution for incest is not an accomplice if she did not voluntarily submit to the acts of sexual intercourse.

State v Candler, 204-1355; 217 NW 233

II RELATIONSHIP

"Sister" contemplates "half-sister". The statute (§10445, C., '27) which declares void a marriage between a man and his sister's daughter, embraces a marriage between a man and his half-sister's daughter. As a consequence carnal knowledge between a man and the daughter of his half-sister constitutes incest.

State v Lamb, 209-132; 227 NW 830

III INDICTMENT

Intercourse with stepdaughter—sufficient allegation. An allegation that a defendant had sexual intercourse with his wife's daughter charges incest.

Lockerby v Hollowell, 210-623; 231 NW 375

IV EVIDENCE

Election—incestuous disposition. When the state elects, in a prosecution for incest, to rely for conviction on a certain transaction, testimony which tends to show acts of sexual intercourse between the parties subsequent to said transaction is properly left in the record for its bearing on the claimed incestuous disposition of the accused.

State v Candler, 204-1355; 217 NW 233

Sufficiency of evidence. An element of improbability in the testimony of a prosecutrix in a prosecution for incest will not necessarily justify the court in ruling that the testimony is per se insufficient to support a verdict of guilty.

State v Candler, 204-1355; 217 NW 233

Accomplices — instructions. Principle reaffirmed that a prosecutrix in a prosecution for incest is not an accomplice if she did not voluntarily submit to the acts of sexual intercourse.

State v Candler, 204-1355; 217 NW 233

CHAPTER 573

SODOMY

12979 Definition.

Corroborating testimony. Corroboration of prosecuting witness may be shown by circumstantial evidence, and it is sufficient if corroborating witness' testimony is material and connects defendant with crime.

State v Donovan, (NOR); 229 NW 255

Penetration—jury question. Issues regarding penetration and sufficiency of testimony corroborating prosecuting witness in sodomy prosecution held properly submitted to jury.

State v Donovan, (NOR); 229 NW 255

Prosecuting witness as accomplice—jury question. Whether prosecuting witness in sodomy prosecution was accomplice held properly submitted to jury under proper instructions, where testimony was conflicting.

State v Donovan, (NOR); 229 NW 255

Defendant's testimony—weight—instruction. Instruction in prosecution for sodomy on weight to be given defendant's testimony held not erroneous.

State v Donovan, (NOR); 229 NW 255

Requested instructions. In sodomy prosecution, it is not error to refuse to give defendant's requested instructions which are unduly favorable and argumentative, especially when the charge already given contains the correct statements of law.

State v Donovan, (NOR); 229 NW 255

12980 Punishment.

Atty. Gen. Opinion. See '36 AG Op 456

CHAPTER 574

KIDNAPING

Atty. Gen. Opinion. See '34 AG Op 269

CHAPTER 575

ARSON

12991.1 Dwelling house and parcels thereof.

Atty. Gen. Opinion. See '32 AG Op 41

Circumstantial evidence. Circumstantial evidence may be ample to establish the corpus delicti in a charge of arson.

State v Henricksen, 214-1077; 243 NW 521

12991.2 Miscellaneous buildings.

Atty. Gen. Opinion. See '32 AG Op 41

Partial burning. In prosecution for arson, when proof shows partial burning of building, failure to submit offense of attempt to set fire is not error.

State v Bazoukas, 226-1385; 286 NW 458

"Juxtaposition" of circumstantial evidence not equivalent of direct evidence—instructions. Testimony in an arson prosecution, entirely unsubstantiated by direct evidence, will not justify an instruction defining "direct evidence", even on the theory that evidence showing a man, prior to the fire, was seen near the burned building, from which footprints led to defendant's home, constitutes circumstances in such "juxtaposition" as to be equivalent to direct evidence. Jury should be instructed case rests on circumstantial evidence.

State v Mikels, 224-1121; 278 NW 924

Instructions not substantiated by evidence—error. In arson trial, an instruction on the state's evidence that footprints "pointing toward and away from" burned store building was held erroneous, in absence of any evidence of footprints pointing toward building.

State v Neff, 228- ; 291 NW 415

Direct evidence instruction permitting collateral fact confusion with guilt. Evidence, altho being direct, may not be direct evidence of defendant's guilt; and instructing in such a manner that the jury may be confused into considering direct evidence of collateral facts as direct evidence of defendant's guilt is error.

State v Mikels, 224-1121; 278 NW 924

Erroneous instruction on fact not existing. It is error to assume or state in an instruction that certain facts exist which do not exist, and a presumption of prejudicial error arises therefrom. Therefore, in arson trial, circumstantial evidence was held insufficient to establish defendant's guilt so conclusively as to require a conviction notwithstanding an erroneous instruction on state's evidence of footprints "pointing toward and away from" burned store building when there was no evidence of footprints "pointing toward" such building.

State v Neff, 228- ; 291 NW 415

12991.4 Defrauding insurers.

Cross-examination—other fires. In prosecution for arson, where testimony relative to other fires is elicited on cross-examination without objection and defendant later moves to strike, whereupon the court admonishes jury not to consider the testimony and repeats this admonition in the instructions, the alleged overruling of objections relative to such other fires and refusing to strike the testimony presents no error.

State v Bazoukas, 226-1385; 286 NW 458

Evidence—sufficiency to support conviction. In prosecution for arson against husband and wife, evidence held sufficient to convict husband.

State v Bazoukas, 226-1385; 286 NW 458

12991.5 Attempts.

Failure to submit attempt. In prosecution for arson, when proof shows partial burning of building, failure to submit offense of attempt to set fire is not error.

State v Bazoukas, 226-1385; 286 NW 458

12991.6 Married women.

Wife as participant with husband. In prosecution for arson, evidence held insufficient to sustain conviction of wife as participant with husband.

State v Bazoukas, 226-1385; 286 NW 458

Wife not presumed coerced. In arson prosecution against husband and wife, it is no longer presumed that a wife, committing a crime in the presence of her husband, did so under his coercion.

State v Bazoukas, 226-1385; 286 NW 458

Wife's presence or knowledge—nonpresumption. In prosecution for arson, in the absence of testimony tending to show participation or conspiracy on the part of the wife in a crime committed by her husband, her guilt will not be presumed, nor the fact that she may have knowledge of and even be present at the scene of the crime and fail to actively oppose the same, will not, in the absence of conspiracy or participation, render her likewise guilty.

State v Bazoukas, 226-1385; 286 NW 458

CHAPTER 576

BURGLARY

12994 Definition—punishment.

ANALYSIS

I IN GENERAL
II BREAKING AND ENTRY
III DWELLING HOUSE
IV OFFENSE INTENDED
V INDICTMENT
VI EVIDENCE
(a) IN GENERAL
(b) POSSESSION OF STOLEN PROPERTY

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Other breakings and enterings. See under §§13001-13004

I IN GENERAL

Duplicity—compound offense. Principle reaffirmed that burglary is not a compound offense which includes larceny. (§13738, C., '27.)

State v Leasman, 208-851; 226 NW 61
State v Henderson, (NOR); 239 NW 588

Burglary—scope of term. All forms of felonious statutory breakings of buildings constitute burglary in view of §13738-b1, C., '31 [§13738.1, C., '39].

State v Engler, 217-138; 251 NW 88

II BREAKING AND ENTRY

Trespass — acts constituting and liability therefor. The mere opening of an unlocked door and entering premises, without right or authority, constitutes a breaking and entering within the law of trespass.

Girard v Anderson, 219-142; 257 NW 400

Time as surplusage. The time of day of burglariously breaking and entering a warehouse is no element of the offense and if alleged may be treated as surplusage.

State v Murray, 222-925; 270 NW 355

III DWELLING HOUSE

Murder—commission of burglary. The statute which declares murder to be in the first degree when committed in the perpetration of, or attempt to perpetrate a burglary (§12911, C., '24), refers solely to the burglary of a dwelling house (§12994, C., '24).

State v Pinkerton, 201-940; 208 NW 351

IV OFFENSE INTENDED

Discussion. See 7 ILB 254—Intent in burglary

Intent—larceny—justifiable inference. Under a charge of burglary with intent to commit larceny, the intent to commit larceny may be inferred by the jury from an unexplained breaking and entering in the nighttime of the building in question.

State v Woodruff, 208-236; 225 NW 254

Evidence—extent of intended theft. In a prosecution for burglary, evidence on behalf of defendant as to the extent of an intended theft is quite immaterial.

State v Murray, 222-925; 270 NW 355

V INDICTMENT

Compound offense. Principle reaffirmed that burglary is not a compound offense which includes larceny.

State v Leasman, 208-851; 226 NW 61

Permissible duplicity. Statutory burglary, and larceny from a building in the nighttime, tho separate offenses, may be charged in different counts in the same indictment, provided the second count alleges that the offense therein charged was committed in connection with the commission of the offense charged in the first count.

State v Stennett, 220-388; 260 NW 732

Statutory burglary—short form—failure to charge intent. An indictment for statutory burglary ("breaking and entering" in the language of the statute) which is otherwise sufficient is not rendered insufficient by failing to charge an intent; especially is this true when the indictment carries the allegation, to wit: "contrary to and in violation of §13001, C., '31."

State v Stack, 221-727; 266 NW 523

VI EVIDENCE

(a) IN GENERAL

Intent—justifiable inference. Under a charge of burglary with intent to commit larceny, the intent to commit larceny may be inferred by the jury from an unexplained breaking and entering in the nighttime of the building in question.

State v Woodruff, 208-236; 225 NW 254

Lack or absence of evidence—effect. Instructions reviewed and held sufficiently to cover the effect of the lack or absence of evidence of guilt.

State v Stennett, 220-388; 260 NW 732

Corpus delicti—sufficiency. Evidence reviewed, at length, under a charge of burglary and held ample to sustain a conviction.

State v Stennett, 220-388; 260 NW 732

Instructions—included offenses. Included offenses need not be submitted (1) when there is no supporting evidence in the record of the commission of said included offense, and (2) when under the record, the accused is guilty as charged or not guilty.

State v Stennett, 220-388; 260 NW 732

(b) POSSESSION OF STOLEN PROPERTY

Recent possession of burglarized property. No error results from instructing that the unexplained recent possession of property stolen by means of a burglary is sufficient to sustain a conviction.

State v Jackson, 205-592; 218 NW 273

12995 Aggravated offense.

Atty. Gen. Opinion. See '38 AG Op 334

13000 Possession of burglar's tools—evidence.

Expert testimony. Expert testimony is admissible as to the burglarious nature of certain tools.

State v McHenry, 207-760; 223 NW 535

Innocent tools possessed burglariously. The facts and circumstances surrounding and attending the possession of tools, instruments, and other articles each of which is admittedly capable of lawful uses, may be such as to justify the jury in finding that the possession was burglarious.

State v Furlong, 216-428; 249 NW 132

Opinion evidence. In a prosecution for possessing burglar's tools with felonious intent, the state may show by expert testimony that certain instruments could be used in the commission of a burglary, but erroneously asking the witness whether such instruments would be so used is not necessarily prejudicial.

State v Furlong, 216-428; 249 NW 132

Rifle. A rifle may be a tool incident to the use of burglar's tools, and on a charge of possession it is immaterial that the weapon belonged to a person other than the accused.

State v McHenry, 207-760; 223 NW 535

Burglar's tools—evidence. Properly qualified police officers may testify that certain instruments are burglar's tools.

State v Engler, 217-138; 251 NW 88

Admissibility. Burglar's tools are admissible if described or set forth in the indictment.

State v McHenry, 207-760; 223 NW 535

Miscellaneous and immaterial articles. Articles seized at the time of the seizure of alleged burglar's tools, but casting no light on the character, use, or purpose of such alleged burglar's tools are wholly inadmissible.

State v McHenry, 207-760; 223 NW 535

"Short-form" indictment—venue. An indictment for possessing burglar's tools with intent to commit a burglary need not specifically allege the venue.

State v Engler, 217-138; 251 NW 88

"Short-form" indictment. An indictment, under the "short-form" statute, charging in the language of the statute the possession of burglar's tools with intent to commit a burglary, is not subject to demurrer. The proper procedure is to demand a bill of particulars.

State v Engler, 217-138; 251 NW 88

Admissibility of tools. Under a "short-form" indictment for possessing burglar's tools

with intent to commit a burglary, the tools need not be described as a condition precedent to their admissibility in evidence, the accused making no demand for a bill of particulars.

State v Engler, 217-138; 251 NW 88

Recent burglaries. On a charge of having possession of burglar's tools with intent to commit a burglary, evidence is admissible to show recent burglaries, and that the accused had the fruits of such burglaries in his possession.

State v McHenry, 207-760; 223 NW 535

Possession. On the issue of the possession of burglar's tools, it is not necessarily a defense that the tools in question were not found on the person of the accused, or in the particular room occupied by her as a bedroom, it appearing that such tools were found in the house occupied by the accused under a lease executed by her.

State v McHenry, 207-760; 223 NW 535

Unnecessary allegation. An allegation of possession with the specified statutory intent, need not allege where or at what place the accused intended to carry out his intent.

State v Bamsey, 208-802; 226 NW 57

Instructions. Instructions under a charge of possession of burglar's tools with intent to commit a burglary reviewed and held not subject to the vice of not limiting the jury to the evidence introduced during the trial.

State v Engler, 217-138; 251 NW 88

Guilt of joint defendants. Instructions under a joint indictment for possessing burglar's tools with intent to commit a burglary reviewed, and held not to justify a conviction of all defendants on proof of possession by one defendant.

State v Engler, 217-138; 251 NW 88

13001 Other breakings and enterings.

ANALYSIS

I IN GENERAL
II OFFENSE INTENDED
III STATUTORY BREAKING AND ENTERING
IV INDICTMENT
V EVIDENCE
VI INSTRUCTIONS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Duplicity—compound offense. Principle reaffirmed that burglary is not a compound offense which includes larceny. (§13738, C., '27.)

State v Leasman, 208-851; 226 NW 61
State v Henderson, (NOR); 239 NW 588

Duplicity—necessary allegation to obviate. An indictment which charges in different counts (1) burglary of a granary and (2) larceny from a granary, even tho the location of the granary and the date of the commission of said offenses are the same in each count, is fatally defective—wholly bad—in the absence of an allegation that the larceny was committed in connection with the burglary.

State v Frey, 206-981; 221 NW 445
State v Leasman, 208-851; 226 NW 61

II OFFENSE INTENDED

No annotations in this volume

III STATUTORY BREAKING AND ENTERING

Schoolhouses. A schoolhouse is a "building" within the definition of statutory burglary.

State v Burzette, 208-818; 222 NW 394

Time as surplusage in burglary. The time of day of burglariously breaking and entering a warehouse is no element of the offense and if alleged may be treated as surplusage.

State v Murray, 222-925; 270 NW 355

IV INDICTMENT

Statutory burglary—short form—failure to charge intent. An indictment for statutory burglary ("breaking and entering" in the language of the statute) which is otherwise sufficient is not rendered insufficient by failing to charge an intent; especially is this true when the indictment carries the allegation, to wit: "contrary to and in violation of §13001, C., '31."

State v Stack, 221-727; 266 NW 523

Permissible duplicity. Statutory burglary, and larceny from a building in the nighttime, tho seperate offenses, may be charged in different counts in the same indictment, provided the second count alleges that the offense therein charged was committed in connection with the commission of the offense charged in the first count.

State v Stennett, 220-388; 260 NW 732

Non-fatal variance. An allegation in an indictment for burglary of ownership of the premises in a named party is sufficiently supported by evidence of possession by said party.

State v Archibald, 208-1139; 226 NW 186

Railroad car—sufficiency. An indictment which charges that a railway car (the subject of a burglary) was a place in which goods were kept for "use, deposit, and transportation" is a good indictment under this section, even tho the word "transportation" does not appear in said section.

State v Christofferson, 215-1282; 247 NW 819

V EVIDENCE

Possession of burglarized property — effect. The recent, unexplained possession of personal property which was, in the first instance, unquestionably obtained by some one in the commission of a burglary may justify the jury in finding that the possessor committed said burglary.

State v Harding, 204-1135; 216 NW 642

Alleged stolen articles—when immaterial. Evidence that automobile tires of a well known make and in general use throughout the country, were stolen from a garage at the time it was burglarized, and that when defendant was arrested he was using the same kind and size of tires on his automobile, is, in and of itself, wholly immaterial.

State v Sigman, 220-146; 261 NW 538

Imprint of heel of shoe—when immaterial. Evidence tending to show (1) that on the morning following the burglary of a garage a paper bearing the imprint of the heel of a well known and commonly-worn make of shoe, was found on the floor of the garage, and (2) that when the defendant was arrested he was wearing a pair of said make of shoes, is wholly immaterial and must not be allowed, over objections, to remain in the record unless supplemented by some evidence tending to prove (1) that the imprint was made at the time of the burglary, and (2) by the defendant's shoe.

State v Sigman, 220-146; 261 NW 538

Extent of intended theft. In a prosecution for burglary, evidence on behalf of defendant, as to the extent of an intended theft, is quite immaterial.

State v Murray, 222-925; 270 NW 355

Corroboration connecting defendant to crime. Corroboration of the testimony of an accomplice in breaking and entering is sufficient if it supports his testimony in some material fact tending to connect the defendant with the commission of the offense. Proof held sufficient.

State v Proost, 225-628; 281 NW 167

Corpus delicti—evidence—sufficiency. Evidence reviewed at length under a charge of burglary and held ample to sustain a conviction.

State v Stennett, 220-388; 260 NW 732
State v Ball, 220-595; 262 NW 115

VI INSTRUCTIONS

Recent possession — fatally erroneous instructions. Fatal error results from instructing that the law presumes a party guilty of breaking and entering if the property stolen by breaking and entering is recently thereafter found in the possession of said party; or by instructing that the recent possessor of stolen property must establish the honesty of his possession.

State v Taylor, 213-67; 238 NW 457

Stating punishment. The statement in an instruction as to the punishment provided by law for the commission of an offense is improper but not reversible error.

State v Loucks, 218-714; 253 NW 838

Intent — intoxication — instructions. Instructions on intoxication as bearing on the ability to form an intent are properly refused when there is no applicable evidence.

State v Murray, 222-925; 270 NW 355

13002 Entering bank with intent to rob.

Atty. Gen. Opinions. See '25-26 AG Op 376; '32 AG Op 240; '34 AG Op 614; '36 AG Op 25

Corporate capacity as surplusage. An indictment for entering a bank with intent to rob need not charge the corporate capacity of the said bank, and, if it is charged, it may be treated as surplusage.

State v Wagner, 202-739; 210 NW 901

Question of place being bank. In a criminal prosecution for entering a bank with intent to rob, evidence was sufficient to submit to the jury the question of whether or not the place involved was a bank.

State v Mikesh, 227-640; 288 NW 606

Voluntary confession. In a prosecution for the crime of entering a bank with intent to rob, a voluntary statement made by the defendant and introduced upon cross-examination of defendant for purpose of impeachment in absence of evidence to indicate statement was not voluntary, places the burden on the defendant to show statement incompetent, and the fact that statement was made without warning the accused that it might be used against him does not affect its admissibility in the absence of statute requiring that the accused be warned.

State v Mikesh, 227-640; 288 NW 606

Identification of defendant. In a criminal prosecution for entering a bank with intent to rob, the question of whether or not defendant was the person who entered the bank with intent to rob was, under the evidence, including the identification of both defendant and his car, sufficient to submit to the jury.

State v Mikesh, 227-640; 288 NW 606

Justifiable instruction. Evidence that an accused stated that he participated in the robbery charged, and that he was one of the three persons who entered the bank, and knew where some of the stolen bonds were, justifies the court in giving a properly balanced instruction on the subject of confession.

State v Davis, 212-131; 235 NW 759

Life imprisonment mandatory on conviction. On conviction of crime of entering a bank with intent to rob, the trial court has no discretion in fixing sentence—life imprisonment is mandatory.

State v Mikesh, 227-640; 288 NW 606

13004 Breaking and entering car.

Burglary—scope of term. All forms of felonious statutory breakings of buildings constitute burglary in view of §13738-b1, C., '31 [§13738.1, C., '39].

State v Engler, 217-138; 251 NW 88

Instructions in re breaking and entering. Under an indictment drawn under §13001, C., '31, instructions relative to intent and as to what acts would constitute a breaking and entering in case the jury found the car in question was "closed or sealed", cannot be deemed a submission of any element of fact under this section.

State v Christofferson, 215-1282; 247 NW 819

CHAPTER 577

LARCENY

13005 Definition.

Atty. Gen. Opinion. See AG Op Jan. 24, '39

ANALYSIS

I IN GENERAL
II "STEALING"
III "TAKING"
IV "CARRYING AWAY"
V "PROPERTY OF ANOTHER"
VI "ANY MONEY, GOODS, OR CHATTELS", ETC.
VII INDICTMENT
(a) IN GENERAL
(b) OWNERSHIP
VIII EVIDENCE
(a) IN GENERAL
(b) POSSESSION OF RECENTLY STOLEN PROPERTY
IX INSTRUCTIONS
(a) IN GENERAL
(b) POSSESSION OF RECENTLY STOLEN PROPERTY

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876
Receiving stolen goods. See under §13042

I IN GENERAL

Duplicity—compound offense. Principle reaffirmed that burglary is not a compound offense which includes larceny. (§13738, C., '27.)

State v Leasman, 208-851; 226 NW 61
State v Henderson, (NOR); 239 NW 588

Larceny and false pretenses distinguished. A false representation may result in the crime of (a) cheating by false pretenses or (b) larceny. If the representation induces the owner of property to transfer both title and possession, the resulting crime is cheating by false pretenses. If the representation induces the owner of the property simply to part with the possession, and the receiver takes with the intent fraudulently to convert the property to his own use, the resulting crime is larceny.

State v Chamberlain, 215-273; 245 NW 277

Provision for added punishment. The crime of larceny is created by §13005, C., '35. No other or different offense is created by §13008 of said code, which authorizes an enlarged punishment when the larceny is committed "in a building".

State v Morrison, 221-3; 265 NW 355

Accomplice—thief and receiver of property. One who steals property is not an accomplice of one who thereafter feloniously receives the stolen property.

State v Smith, 219-168; 256 NW 651

Error against state. Defendant in a prosecution for larceny may not predicate error on an unanswered question material to the state's case.

State v Philpott, 222-1334; 271 NW 617

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution a defendant may not complain that he has been denied a speedy trial where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

Time of trial—delay by defendant—certiorari to require dismissal denied. One convicted of larceny, who, on appeal, is granted a reversal, and who, then, each time thereafter as his case is assigned for retrial, delays trial on the merits by dilatory moves such as request for rehearing and change of venue, may not complain that he has been denied a speedy trial as provided by law, and certiorari will not lie to require dismissal of the indictment.

Ferguson v Bechly, 224-1049; 277 NW 755

Disposition on appeal—remand for proper sentence. Record held sufficient to sustain a conviction of larceny, but insufficient to sustain a finding of value of the stolen property

in excess of $20. The cause is therefore reversed and remanded with direction to the trial court to re-sentence the accused.

State v Morrison, 221-3; 265 NW 355

II "STEALING"

Instructions in re intent approved. Instructions reviewed and held, when construed as a whole, properly to state the law of intent applicable to larceny.

State v Philpott, 222-1334; 271 NW 617

Intent—inadequate instructions. An accused may, on request, be entitled to a specific instruction on the issue whether the taking was (1) with the intent to steal the property, or (2) with the intent to return the property to the owner.

State v Marshall, 206-373; 220 NW 106

Burglary — intent — justifiable inference of larceny. Under a charge of burglary with intent to commit larceny, the intent to commit larceny may be inferred by the jury from an unexplained breaking and entering in the nighttime of the building in question.

State v Woodruff, 208-236; 225 NW 254

Distinguished from embezzlement. An employee is guilty of larceny if, when he receives his master's property into his possession, he then intends to steal it. If such intent is subsequently formed, he is guilty of embezzlement.

State v Smith, 200-338; 202 NW 511

Non-consent to taking. Non-consent to the taking of property is inferable from the fact that the owner had delivered it to a common carrier who had placed it in a sealed car, and that the car had been broken open and the property removed.

State v Joy, 203-536; 211 NW 213

III "TAKING"

Consent to taking—collusion between employees. When goods are in the mere custody of a servant who is not actually or apparently authorized to pass the possession to another, his consent to the taking will not prevent the taking from being larceny, and especially when the custodian and taker collude in the taking.

State v Smith, 200-338; 202 NW 511

IV "CARRYING AWAY"

Asportation — separate offenses. A single larceny may be committed by more than one act of asportation.

State v Vandewater, 203-94; 212 NW 339

V "PROPERTY OF ANOTHER"

Discussion. See 25 ILR 351—Larceny of spouse's property

Larceny and false pretenses distinguished. A false representation may result in the crime of (a) cheating by false pretenses or (b) larceny. If the representation induces the owner of property to transfer both title and possession, the resulting crime is cheating by false pretenses. If the representation induces the owner of the property simply to part with the possession, and the receiver takes with the intent fraudulently to convert the property to his own use, the resulting crime is larceny.

State v Chamberlain, 215-273; 245 NW 277

VI "ANY MONEY, GOODS, OR CHATTELS", ETC.

No annotations in this volume

VII INDICTMENT

(a) IN GENERAL

Non-charged crime. It was reversible error to submit question of larceny to jury under indictment charging breaking and entering (§§13001, 13008, C., '27).

State v Henderson, (NOR); 238 NW 588

Duplicity—necessary allegation to obviate. An indictment which charges in different counts (1) burglary of a granary and (2) larceny from a granary, even tho the location of the granary and the date of the commission of said offenses are the same in each count, is fatally defective—wholly bad—in the absence of an allegation that the larceny was committed in connection with the burglary.

State v Frey, 206-981; 221 NW 445
State v Leasman, 208-851; 226 NW 61

(b) OWNERSHIP

Ownership — non-variance. No variance is presented by an allegation of the ownership of stolen property and mere proof that the said alleged owner had delivered the same to a common carrier and received a bill of lading showing shipment to another party.

State v Joy, 203-536; 211 NW 213

Ownership — right of possession as proof. An allegation, in an indictment for larceny, of ownership of the alleged stolen property, is supported by proof that said alleged owner had legal right to the possession of said property. So held as to coal which had been stolen from a public school corporation prior to its actual physical delivery to the district.

State v Philpott, 222-1334; 271 NW 617

VIII EVIDENCE

(a) IN GENERAL

Evidence — sufficiency. Record reviewed and held ample to sustain a verdict of guilt.

State v Henderson, 215-276; 243 NW 289
State v Cozad, 221-960; 267 NW 663

Evidence—ownership. Ownership of stolen property may be established by circumstantial evidence.

State v Johnson, 210-167; 230 NW 513

VIII EVIDENCE—continued
(a) IN GENERAL—concluded

Corpus delicti — sufficiency. Circumstantial evidence held to establish the corpus delicti in a prosecution for larceny.

State v Manly, 211-1043; 233 NW 110

Sufficiency of circumstantial evidence. Evidence reviewed, and, tho circumstantial, held to present a jury question on the issue of larceny of fowls.

State v Hester, 205-1047; 218 NW 616
State v Blake, 208-995; 221 NW 569

Extraneous motives. It is quite immaterial what motives moved an accused to commit a larceny which he unqualifiedly admits.

State v Leitzke, 206-365; 218 NW 936

Other offenses to show plan or scheme—limitation. In a prosecution for larceny, evidence of another prior and different larceny, even tho closely connected in point of time, is inadmissible on the theory of a plan or scheme to commit a series of larcenies, unless there is evidence in the record tending to establish such plan or scheme.

State v Renslow, 209-982; 229 NW 225

Admissions do not control state in making proof. An accused in a charge of larceny who, throughout the trial, openly admits the truth of every allegation of the indictment except the one relative to the value of the stolen property, may not object if the state is permitted to prove the truth of such admitted allegations notwithstanding the admissions.

State v Leitzke, 206-365; 218 NW 936

Value—competency of witness—fatal delay in objecting. Objections to the competency of a witness to testify to the value of stolen articles must be made when the witness is asked as to said values, not later when the articles are offered in evidence.

State v Endorf, 219-1321; 260 NW 678

Homing instinct of chickens. On the issue of the identification of stolen chickens, evidence is admissible that when the chickens in question were taken to the home of the alleged owner, they appeared familiar with their surroundings and with the former methods of handling and feeding them.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Identification of stolen chickens. To identify alleged stolen property—eight white plymouth rock hens—with spray-soiled feathers and with a numbered aluminum band on the leg of each hen—as the property of the alleged owner, evidence is admissible that at about the time in question and in the near vicinity where the defendant was apprehended, the alleged owner had suffered the disappearance of hens of the same breed, color, spray-soiled feathers, and with banded legs, identical with those found in the possession of the alleged thief.

State v Cozad, 221-960; 267 NW 663

Hogs taken from railroad car. Evidence that hogs had been stolen from railroad car and had been driven in direction of defendant's home, and were later found there, tended to prove larceny, and did not support conviction for receiving stolen goods.

State v Butler, (NOR); 205 NW 842

(b) POSSESSION OF RECENTLY STOLEN PROPERTY

Recent possession. The recent possession of stolen property may be such as to justify a verdict of guilty.

State v Vandewater, 203-94; 212 NW 339
See Tullar v Ins. Co., 214-166; 239 NW 534

Possession of burglarized property — effect. The recent, unexplained possession of personal property which was, in the first instance, unquestionably obtained by someone in the commission of a burglary may justify the jury in finding that the possessor committed said burglary.

State v Harding, 204-1135; 216 NW 642

Recent possession—justifiable inference. Unexplained possession of recently stolen property may justify the conviction of the possessor of the larceny in question; and especially when said possession is reinforced by proof of other incriminating circumstances with which the accused is connected.

State v Sweetman, 220-847; 263 NW 518
State v Cozad, 221-960; 267 NW 663
State v Kenny, 222-279; 268 NW 505

Recent joint possession. The recent possession of stolen property which will justify an inference of guilt of larceny may consist of a joint possession with others.

State v Blake, 208-995; 221 NW 569

Question of recency. Whether the possession of stolen property was or was not recent becomes of no consequence when it appears that such possession was not claimed in the trial court to be recent, nor was the jury given the right to find that it was recent.

State v Bohall, 207-219; 222 NW 389

Accused in vicinity of secreted property. Evidence that property had been stolen and had been secreted in a certain locality, and that the accused, when arrested, was in the immediate vicinity of said secreted property, furnishes no basis for an instruction relative to the effect of possession of recently stolen property.

State v Albertson, 206-344; 220 NW 39

Recent possession—burden to explain. Instruction, relative to recent possession by accused of stolen property, reviewed, and held

not to place, on the accused, the burden of proof to explain said possession.

State v Ferguson, 222-1148; 270 NW 874

Misdated check—admissibility. A check alleged to have been given to the accused in payment of allegedly stolen property may, in view of attending circumstances, be clearly admissible, even tho it is dated prior to the larceny in question.

State v Manly, 211-1043; 233 NW 110

IX INSTRUCTIONS

(a) IN GENERAL

Larceny—instructions—direct and circumstantial evidence—effect of recent possession. In a prosecution for larceny of sheep, instructions as to direct and circumstantial evidence regarding (1) how facts to be proven, (2) circumstances to prove guilt beyond reasonable doubt, (3) all circumstances taken together to prove moral certainty that the defendant is guilty of the crime charged, (4) every other reasonable hypothesis must be excluded, and (5) unexplained recent possession of stolen property warrants conviction—reviewed and held not erroneous.

State v De Koning, 223-951; 274 NW 25

Circumstantial evidence. Failure to instruct as to circumstantial evidence is not reversible error in a case wherein the evidence is not wholly circumstantial and especially when no such instruction was requested.

State v Shearer, 206-397; 220 NW 13

Joint defendants. Instructions must separate and submit to the jury the question of the separate guilt of each of jointly indicted parties. So held where instructions permitted the jury to find both of two jointly indicted parties guilty if the jury found one of them guilty.

State v Heffelfinger, 212-1041; 237 NW 364

Instructions—failure to request. In prosecution for larceny of sheep, held instructions eminently fair and in absence of request for certain instructions, defendant may not, on appeal, be heard to complain.

State v De Koning, 223-951; 274 NW 25

Instructions in re intent approved. Instructions reviewed and held, when construed as a whole, properly to state the law of intent applicable to larceny.

State v Philpott, 222-1334; 271 NW 617

Intent—inadequate instructions. An accused may, on request, be entitled to a specific instruction on the issue whether the taking was (1) with the intent to steal the property, or (2) with the intent to return the property to the owner.

State v Marshall, 206-373; 220 NW 106

Value (?) or market value (?). Instructions calling upon the jury to find the "value" of the property stolen, if stolen, instead of the "market value", are not reversibly erroneous when the record reveals both the wholesale and retail value.

State v McCarty, 210-173; 230 NW 379

Stating punishment. The statement in an instruction as to the punishment provided by law for the commission of an offense is improper but not reversible error.

State v Loucks, 218-714; 253 NW 838

(b) POSSESSION OF RECENTLY STOLEN PROPERTY

Possession of stolen property. The jury must not be instructed that, as a matter of law, the unexplained possession of recently stolen property warrants conviction.

State v McCarty, 210-173; 230 NW 379

Recent possession — fatally erroneous instructions. Fatal error results from instructing that the recent possessor of stolen property must establish the honesty of his possession.

State v Taylor, 213-67; 238 NW 457

Shifting burden of proof. An instruction to the effect that the recent, unexplained possession of stolen property creates a presumption that the possessor committed the larceny, is fundamentally erroneous; likewise a further clause therein imposing on the accused the burden to show that his possession was honestly obtained.

State v Delanty, 211-50; 230 NW 436

Presumption of guilt—burden of proof. Employing in instruction in a larceny case the expression "presumption of guilt arising from the possession of recently stolen property", is fatally erroneous when used, directly or inferentially, in the sense that the state has sufficiently established its case against the accused, and that the burden of overcoming the so-called presumption is shifted to the accused.

State v Davis, 214-329; 242 NW 51

Presumption—satisfactory explanation. It is fundamentally erroneous to instruct the jury in a larceny case that the possession of property immediately after it has been stolen is presumptive evidence of guilt of the larceny. Equally erroneous is it to instruct the jury to convict if the jury finds that the accused had possession of the property recently after it was stolen "unless the evidence satisfactorily explains the possession to have been honest and rightful".

State v Smith, 207-1345; 224 NW 594
State v Taylor, 213-67; 238 NW 457

Recent possession—burden to explain. Instruction relative to recent possession by accused of stolen property reviewed, and held

IX INSTRUCTIONS—concluded
(b) POSSESSION OF RECENTLY STOLEN PROPERTY —concluded

not to place on the accused the burden of proof to explain said possession.

State v Ferguson, 222-1148; 270 NW 874

Inference from possession. There is no legal difference between instructing in a prosecution for larceny that the jury "has a right" to infer guilt from recent possession of the stolen property, and instructing that the jury "may" infer such guilt from such possession.

State v Blake, 208-995; 221 NW 569

Inference — precautionary instruction. A defendant may not predicate error on a precautionary instruction to the substantial effect that the jury must not infer guilt of larceny from the recent possession of the stolen property, if the jury is satisfied that the defendant's possession was innocent, or if it has a reasonable doubt whether the possession was innocent or guilty.

State v Blake, 208-995; 221 NW 569

Accused in vicinity of secreted goods. Evidence that property had been stolen and had been secreted in a certain locality, and that the accused when arrested was in the immediate vicinity of said secreted property furnishes no basis for an instruction relative to the effect of possession of recently stolen property.

State v Albertson, 206-344; 220 NW 39

13008 Larceny in nighttime.

Information—using equivalent terms. An information charging larceny "from" a building is equivalent to charging larceny "in" a building, within the meaning of this section.

State v Morrison, 221-3; 265 NW 355

Added punishment—effect. The crime of larceny is created by §13005, C., '35. No other or different offense is created by this section of said code, which authorizes an enlarged punishment when the larceny is committed "in a building".

State v Morrison, 221-3; 265 NW 355

Included offense under aggravated charge. Larceny is an included offense in the charge of larceny from a building in the nighttime, and is properly submitted when there is supporting evidence.

State v Endorf, 219-1321; 260 NW 678

Statutes distinguished—larceny of poultry. Indictment reviewed and held to charge "larceny of poultry in the nighttime from a private building" under this section rather than plain larceny of poultry under §13015, C., '31.

Clark v Ireland, 215-560; 246 NW 262

Ownership of property. An allegation of ownership, in an indictment for larceny from a building in the nighttime, is supported by evidence that the alleged owner was in possession of the property. But ownership is not controlling in such a case.

State v Henderson, 215-276; 243 NW 289

Non-charged crime. Judgment on verdict of guilty of larceny at night under indictment for breaking and entering held reversible error (§§13001, 13008, C., '27).

State v Henderson, (NOR); 239 NW 588

13010 Larceny from building on fire or from the person.

Larceny from person. Larceny is necessarily included in a charge of larceny from the person, and must be submitted if the evidence is such as would justify the jury in finding the lesser offense, instead of the offense charged.

State v Marshall, 206-373; 220 NW 106

13015 Larceny of domestic fowls and animals.

Holding under prior statute. Evidence of the market value of hogs in the locality where stolen is sufficient, especially when the contrary evidence is as to the value at a more remote locality and concerning a different class of hogs.

State v Leitzke, 206-365; 218 NW 936

Market value—competency of witness—prior statute. A witness who is familiar with the market reports of an article is prima facie competent to testify to the value of such article.

State v Gill, 202-242; 210 NW 120

Statutes distinguished—larceny of poultry. Indictment reviewed and held to charge "larceny of poultry in the nighttime from a private building" under §13008, C., '31, rather than plain larceny of poultry under this section.

Clark v Ireland, 215-560; 246 NW 262

Evidence—sufficiency. In a prosecution for larceny of sheep, held conviction justified by the evidence and no reversible error in action of trial court.

State v De Koning, 223-951; 274 NW 25

Evidence—sufficiency. Evidence (1) that defendant's truck was seen near farm on the night sheep were stolen, (2) that two men were seen in the truck, (3) that defendant never allowed anyone else to drive the truck except one other who was convicted of a similar offense, and (4) that he cashed the check given in payment for the sheep, is competent to prove larceny.

State v De Kraai, 224-464; 276 NW 11

Sufficiency of circumstantial evidence. Evidence reviewed, and, tho circumstantial, held

to present a jury question on the issue of larceny of fowls.

State v Hester, 205-1047; 218 NW 616

Homing instinct of chickens. On the issue of the identification of stolen chickens, evidence is admissible that when the chickens in question were taken to the home of the alleged owner, they appeared familiar with their surroundings and with the former methods of handling and feeding them.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Domestic animals—homing instinct. It is common knowledge that cattle will return to a place to which they have long been accustomed, and it is characteristic of practically all domestic animals to seek the places where they have been sheltered and fed, and evidence of such behavior is admissible.

State v McAteer, 227-320; 288 NW 72

Identification of stolen chickens. To identify alleged stolen property—eight white plymouth rock hens—with spray-soiled feathers and with a numbered aluminum band on the leg of each hen—as the property of the alleged owner, evidence is admissible that at about the time in question and in the near vicinity where the defendant was apprehended, the alleged owner had suffered the disappearance of hens of the same breed, color, spray-soiled feathers, and with banded legs, identical with those found in the possession of the alleged thief.

State v Cozad, 221-960; 267 NW 663

Persistent questioning improper. In prosecution for stealing chickens, questions propounded to defendant insinuating that he was guilty of other offenses constituted grounds for reversal of conviction.

State v Archibald, (NOR); 221 NW 814

Cross-examination of co-indictee to show that he was a thief by profession. In the trial of one of two persons jointly indicted for larceny of chickens, the persistent cross-examination of the co-indictee, not on trial, but called as a witness by the one on trial, along the line of showing that the witness was in the business of stealing chickens, is prejudicially erroneous.

State v Huss, 210-1317; 232 NW 692

Instructions—direct and circumstantial evidence—effect of recent possession. In a prosecution for larceny of sheep, instructions as to direct and circumstantial evidence regarding (1) how facts to be proven, (2) circumstances to prove guilt beyond reasonable doubt, (3) all circumstances taken together to prove moral certainty that the defendant is guilty of the crime charged, (4) every other reasonable hypothesis must be excluded, and (5) unexplained recent possession of stolen property warrants conviction, reviewed and held not erroneous.

State v De Koning, 223-951; 274 NW 25

Instructions—failure to request—effect. In prosecution for larceny of sheep, held instructions eminently fair and in absence of request for certain instructions defendant may not, on appeal, be heard to complain.

State v De Koning, 223-951; 274 NW 25

Speedy trial not denied—delay by defendant occasioned by appellate review. In a prosecution for larceny of cattle a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

13017 Custody of property levied on or deposited by officer.

Atty. Gen. Opinion. See AG Op Feb. 28, '39

13018 Appropriating found property.

Noninconsistent statutes. The statutory provision that the finder of lost goods shall be paid a named compensation when he makes restitution to the owner (§12211, C., '31) is not inconsistent with the statutory provision that he who unlawfully converts found property to his own use is guilty of larceny.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

"Lost" goods defined. Money taken from the owner thereof by robbery, and the whereabouts of which money is thereafter unknown to said owner until it is returned to him by one who found it, where the robber had hidden it, constitutes "lost" money within the meaning of the statute which provides compensation to the finder of "lost" money and other property. (§12211, C., '31)

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

CHAPTER 578

EMBEZZLEMENT

13027 Embezzlement by public officers.

ANALYSIS

I IN GENERAL
II "PUBLIC OFFICER"
III CONVERSION
IV INDICTMENT
V EVIDENCE

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Discussion. See 11 ILR 255—Subsequent accounting of funds converted by officer

Division of sections — effect. The mere act of dividing an existing section of law and printing its parts in the code as separate sections works no change in the meaning of the law. So held as to §4840, C., '97 [§§13027-13029, C., '39].

State v Gardiner, 205-30; 215 NW 758

Record reviewed from transcript. The record of conviction of a public officer for embezzlement reviewed from clerk's transcript (appellant not having filed his abstract, brief, and argument within the statutory time), and held that the trial court committed no reversible error.

State v Johns, 224-487; 275 NW 559

II "PUBLIC OFFICER"

Informal creation of office. The appointee to a public position who duly qualifies, gives bond, and acts in the collection of public funds, is a public officer within the meaning of the statute prohibiting embezzlement by public officers even tho said position and the duties thereunder were very informally created at an unrecorded, impromptu meeting of a majority of the members of the official governing body.

State v Conway, 219-1155; 260 NW 88

III CONVERSION

Using public funds for private use. The acts of a county treasurer in wrongfully and repeatedly taking and using, for his own private purposes, public funds in his possession, ipso facto constitutes "willful misconduct and maladministration in office", notwithstanding the fact (1) that, prior to the commencement of an action to remove him from office he returns, to the public treasury, the amount of his peculations, and (2) that his bondsmen are liable for his wrongdoing; a priori is this true when he also knowingly connives at and permits like conduct by his official employee.

State v Smith, 219-5; 257 NW 181

IV INDICTMENT

Indictment — sufficiency. Indictment reviewed, and held adequately to charge embezzlement by a public officer.

State v Gardiner, 205-30; 215 NW 758

V EVIDENCE

Former jeopardy—proof of several supporting transactions—election—effect. When, upon the trial of a public officer for embezzlement charged in one count and in a lump sum, the state supports the charge by evidence of several different transactions, any one of which was sufficient to support the charge, and, on order of the court, elects to rely on one certain transaction, the defendant, after being convicted and after being granted a new trial, may not successfully contend that he has been put in jeopardy on all the transactions except the transaction on which the state elected to rely on the first trial—it appearing that the nonelected transactions were allowed to remain in the record as evidentiary matter bearing on the issue of fraudulent intent.

State v Huff, 217-41; 250 NW 581

13029 Funds received by virtue of office.

Conversion—evidence. Failure of a public officer (1) to enter on the official books of his office fees collected by him, and (2) to pay over to the proper receiving officer fees collected is competent evidence bearing on the issue of conversion.

State v Berg, 200-627; 204 NW 441

"Offer to account"—effect. The statutory element in embezzlement by a public officer of "failure to account" (§13027, C., '24), is wholly negatived by a good-faith offer by the officer properly to pay over any funds which may be shown to be due from him, such offer being made prior to the prosecution in question.

State v Berg, 200-627; 204 NW 441

Elements—"failure to account"—evidence. The failure of a municipal court bailiff to pay over to the city treasurer on or before the 10th day of each of a series of months all public fees collected during the preceding month of such series (§10671, C., '24), does not constitute such "failure to account," under §13027, C., '24, as will support a conviction for the embezzlement of the aggregate amount not so paid over, because each conversion and failure to pay over and account constitutes an offense in and of itself.

State v Berg, 200-627; 204 NW 441

Demand—sufficiency. In an indictment for embezzlement by a township clerk, an allegation that a demand for the funds was made

by the succeeding clerk, naming him, is all-sufficient.

State v Gardiner, 205-30; 215 NW 758

Proper demand for accounting. Where the board of control of state institutions legally creates an official position, and charges the incumbent with the duty of collecting and accounting for certain state funds, a demand for an accounting, as a basis for a prosecution for embezzlement, is properly made by the treasurer of state, said latter official being the official ultimately entitled to the custody of said funds.

State v Conway, 219-1155; 260 NW 88

13030 Embezzlement by bailee.

Intent—inapplicable instruction. An instruction that "the law presumes a man to intend the reasonable and natural consequences of his act deliberately and intentionally done", given in a prosecution for embezzlement by a bailee, is not necessarily erroneous.

State v Folger, 204-1296; 210 NW 580

Nonconsent of owner. In a prosecution for the unlawful retention of a storage battery, under §13111-a4, C., '27 [§13111.4, C., '39], the nonconsent of the owner is of the very gist of the offense.

State v See, 205-601; 218 NW 249

Sale or bailment—jury question. Conflicting testimony relative to the question whether a bailee charged with embezzlement understood that the delivery of the property constituted a sale to him or a bailment necessarily presents a jury question.

State v Folger, 204-1296; 210 NW 580

Mortgage payment. One who receives money in payment of a note and mortgage when he neither owns nor has authority to receive the money due thereon, and converts said money to his own use is guilty of embezzlement as a bailee, irrespective of any question of agency.

State v Cavanaugh, 214-457; 236 NW 96

Former jeopardy. An acquittal on an indictment which charges the defendant as agent with the embezzlement of the proceeds of grain delivered to him (§13031, C., '24) is no bar to an indictment which charges the defendant as bailee with the embezzlement of the same grain.

State v Folger, 204-1296; 210 NW 580

13031 Embezzlement by agents.

ANALYSIS

I In General
II The Relation
III "Embezzles or Fraudulently Converts"
IV Without Consent of Employer
V Indictment
VI Evidence

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Tender of embezzled funds—effect. An accused charged as agent with embezzlement may not complain that a given instruction to the effect that he must be found not guilty if he tendered the money to his principal before a preliminary information was filed against him is erroneous because it excludes his right to tender the money before an indictment was returned. He is not entitled to the instruction received or contended for.

State v Gripp, 208-1143; 226 NW 16

II THE RELATION

Agency—failure to establish. The failure of the state to prove the agency alleged in an indictment for embezzlement necessarily entitles the defendant to a directed verdict of not guilty.

State v Reynolds, 208-1046; 226 NW 717

Agency—sufficiency of proof. In a prosecution for embezzlement by an agent, an allegation of the defendant's agency may be supported by proof that the money in question was delivered by the owner thereof to the defendant for the special purpose of delivering it to the borrower notwithstanding the fact that the defendant was the agent of the borrower to procure the loan.

State v Reynolds, 209-543; 228 NW 283

Embezzlements by agent and bailee. An acquittal on an indictment which charges the defendant, as agent, with the embezzlement of the proceeds of grain delivered to him (this section C., '24) is no bar to an indictment which charges the defendant as bailee with the embezzlement of the same grain. (§13030, C., '24.)

State v Folger, 204-1296; 210 NW 580

III "EMBEZZLES OR FRAUDULENTLY CONVERTS"

Bank deposits without felonious intent. The act of the treasurer of a corporation in depositing the funds of his corporation in a bank (of which he is also an officer) in the manner in which deposits are ordinarily made, and the loss of such funds by the subsequent failure of the bank, do not constitute embezzlement. So held in an action on a surety bond which contracted against loss by embezzlement.

Williamstown Assn. v Surety Co., 205-830; 218 NW 474

Proceeds of bonds—right to sell. An allegation of the embezzlement of bonds by an agent is not supported by proof of the embezzlement of the proceeds of the bonds, it appearing that the accused had the right un-

der the agency to convert the bonds into money.

State v Reynolds, 209-547; 228 NW 285

IV WITHOUT CONSENT OF EMPLOYER

No annotations in this volume

V INDICTMENT

Former jeopardy. An acquittal on an indictment which charges the defendant as agent with the embezzlement of the proceeds of grain delivered to him is no bar to an indictment which charges the defendant as bailee with the embezzlement of the same grain.

State v Folger, 204-1296; 210 NW 580

VI EVIDENCE

Evidence—sufficiency. Evidence held to present jury question on issue of embezzlement.

State v Gripp, 208-1143; 226 NW 16

13036 Embezzlement by executor, administrator, or guardian.

Atty. Gen. Opinions. See '28 AG Op 310; AG Op March 2, '39

13037 Embezzlement of mortgaged property.

Atty. Gen. Opinion. See '28 AG Op 350

Parol consent to sale of mortgaged chattels. Evidence is admissible that a chattel mortgagee orally consented to the sale of the chattels by the mortgagor, notwithstanding the fact that the criminal statute denominates such sales criminal unless the consent is in writing.

Hepker v Schmickle, 209-744; 229 NW 177

Communication not libelous per se. A written notification by a bank to the consignee of sheep to the effect that "the bank has a chattel mortgage on said shipment of sheep and the proceeds of said sale should be held intact subject to said claim" is not libelous per se as to the consignor.

Miller v Bank, 220-1266; 264 NW 272

13037.1 Prima facie evidence of disposal.

Concealment by vendee under conditional sale—demand necessary. The state, in a prosecution for larceny based solely on the charge that the vendee in a conditional bill of sale "willfully and with intent to defraud concealed the property," must, in order to create, under this section, prima facie evidence of such concealment, establish the making of a demand by the vendor on the vendee that the latter pay for the property or produce and return it, and that the latter failed to comply with said demand.

State v Delevie, 219-1317; 260 NW 737

CHAPTER 579

ROBBERY

13038 Definition—punishment.

ANALYSIS

I LARCENY FROM THE PERSON
II FORCE OR FEAR
III INCLUDED OFFENSES
IV INDICTMENT
V EVIDENCE
VI INSTRUCTIONS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I LARCENY FROM THE PERSON

Included offense. Larceny is necessarily included in a charge of larceny from the person, and must be submitted if the evidence is such as would justify the jury in finding the lesser offense, instead of the offense charged.

State v Marshall, 206-373; 220 NW 106

II FORCE OR FEAR

Included offenses. The court must, on the trial of a charge of robbery alleged to have been committed with force and violence, submit the included offense of assault and battery when the evidence is sufficient to support such verdict.

State v Buchan, 219-106; 257 NW 586

III INCLUDED OFFENSES

Assault and battery. The court must, on the trial of a charge of robbery alleged to have been committed with force and violence, submit the included offense of assault and battery when the evidence is sufficient to support such verdict.

State v Buchan, 219-106; 257 NW 586

Included offenses—possible wide range. An indictment for robbery with aggravation may be so drawn and the evidence on the trial may be such as to require the court to submit as included offenses the crimes of (1) assault with intent to rob, (2) assault with intent to do great bodily harm, (3) assault and battery, and (4) simple assault.

State v Warneke, 219-1239; 260 NW 667

Larceny—when not included offense. Failure of the court, on the trial of a charge of robbery, to submit the crime of larceny as an

included offense is proper when the record unquestionably demonstrates that if the accused was guilty of larceny it was because he took the property from the prosecuting witness by force and violence.

State v Warneke, 219-1239; 260 NW 667

IV INDICTMENT

No annotations in this volume

V EVIDENCE

Demonstrative evidence—admissibility. All the facts and circumstances connected with the actual perpetration of a robbery are admissible whether there be one participant or many. So held as to certain exhibits offered and received in evidence.

State v Leftwich, 216-1226; 250 NW 489

Evidence wrongfully obtained—admissibility. In prosecution for robbery, objection to testimony regarding search of defendant's room for gun on ground that search of premises was unlawful held properly overruled.

State v La Barre, (NOR); 210 NW 918

Property left at roadside. The court has discretion, on the trial of an indictment for robbery, to permit the introduction in evidence of exhibits which disappeared from the bank at the time of the robbery and which were found several weeks later by a roadside, many miles from the scene of the robbery, even tho there is no direct evidence that said exhibits were ever in the possession of the accused.

State v Abbott, 216-1340; 249 NW 167

VI INSTRUCTIONS

Confession — justifiable instruction. Evidence that an accused stated that he participated in the robbery charged, and that he was one of the three persons who entered the bank, and knew where some of the stolen bonds were, justifies the court in giving a properly balanced instruction on the subject of confession.

State v Davis, 212-131; 235 NW 759

Misconduct — curative instructions. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

13039 Robbery with aggravation.

Information—sufficiency. A county attorney information which charges that the defendant aided and abetted other named parties in a robbery, and that one of said other parties was armed with a loaded revolver with the intent to kill the person robbed if he resisted, and which is accompanied by minutes of evidence tending to prove said allegations, is fully sufficient to apprise the accused of the fact that he is charged with robbery with aggravation, and, on a plea of guilty, justifies a sentence accordingly.

Deemy v Dist. Court, 215-690; 246 NW 833

Duress as defense. A motion for a directed verdict of not guilty, based on the ground that the defendant was dominated by his associate in crime and compelled to be an actor in the crime of said associate, is properly overruled when the evidence of duress is very slight and when the defendant was active in the commission of the crime.

State v Xanders, 215-380; 245 NW 361

Incriminative admissions. On the trial of an indictment for robbery with aggravation, the state may introduce the voluntary admissions or declarations of the accused when arrested to the effect that he had often been charged with such offense and had defeated such charges, and that he had thrown away numerous guns because after any of his holdups he had thrown away his gun in order to free himself of evidence that might prove to be incriminating.

State v Grimm, 221-652; 266 NW 19

Jury question as to identity. The identity of a person who is prosecuted for robbery with aggravation as the one who actually committed it is a question of fact for the jury, on conflicting testimony.

State v Ayles, 205-1024; 219 NW 41

CHAPTER 580

RECEIVING STOLEN GOODS

13042 Punishment.

ANALYSIS

I In General
II Stolen Property
III Indictment
IV Evidence

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Nature and elements. An instruction to the effect that, if one buys stolen property of a value exceeding $20, knowing that the said

I IN GENERAL—concluded

property has been stolen, he is guilty of a felony and punishable as provided by law, is correct and quite unobjectionable.

State v Friend, 210-980; 230 NW 425

Ownership — non-variance. No variance is presented by an allegation of the ownership of stolen property and mere proof that the said alleged owner had delivered the same to a common carrier and received a bill of lading showing shipment to another party.

State v Joy, 203-536; 211 NW 213

Knowledge—essential element. Knowledge that the property received had been stolen is necessarily an essential element of the crime of receiving stolen property, and a conviction will not be permitted to stand when the evidence of such element is insufficient.

State v Chanen, 209-784; 229 NW 143

Knowledge—instructions. In a prosecution for receiving stolen goods, it is sufficient for the state to establish that the facts and circumstances known to the accused were sufficient to satisfy him or cause him to believe that the goods had been stolen, and, after so instructing, subsequent references to "knowledge" will be deemed as referring to the instruction already given, and as so understood by the jury.

State v Friend, 210-980; 230 NW 425

Accomplice—thief and receiver of property. One who steals property is not an accomplice of one who thereafter feloniously receives the stolen property.

State v Smith, 219-168; 256 NW 651

Guilt of original larceny as defense. It is no defense to a prosecution for concealing stolen property in a named county that the accused was present at the perpetration of the larceny in another county.

State v Davis, 212-582; 234 NW 858

II STOLEN PROPERTY

Stolen bonds—when purchaser protected. The purchaser of stolen United States liberty bonds will be protected in his purchase when he purchases in good faith, for full value, in the ordinary course of business, and without actual notice or knowledge of any defect in the title of the seller, and without notice or knowledge of any fact which would put said purchaser on inquiry as to said seller's title.

State Bank v Bank, 223-596; 273 NW 160

Concealment—guilt of original larceny as defense. It is no defense to a prosecution for concealing stolen property in a named county that the accused was present at the perpetration of the larceny in another county.

State v Davis, 212-582; 234 NW 858

Cow—evidence of ownership in conflict. In prosecution for receiving and concealing a stolen cow, cause was properly submitted to jury when testimony of ownership was conflicting.

State v McAteer, 227-320; 288 NW 72

III INDICTMENT

Former jeopardy—acquittal of larceny—felonious receiving. An acquittal under an indictment charging larceny from a building in the nighttime constitutes no bar to a subsequent indictment charging the felonious receiving of the stolen property—said crimes being separate and distinct offenses.

State v Smith, 219-168; 256 NW 651

IV EVIDENCE

Evidence—sufficiency. Evidence held to sustain a conviction for receiving stolen property.

State v Feldman, 201-1089; 202 NW 90

Corpus delicti and venue—evidence. Evidence reviewed and held ample to establish the corpus delicti and venue in a prosecution for receiving stolen property.

State v Joy, 203-536; 211 NW 213

Larceny (?) or receiving stolen property (?). Evidence tending to show that an accused drove his conveyance to a certain place and there waited until his companion returned, a short time later, with stolen property, which was then loaded by both parties into the conveyance, is ample (guilty knowledge being shown) to justify a jury finding that the accused was guilty of receiving stolen property.

State v Joy, 203-536; 211 NW 213

Larceny (?) or receiving stolen property. Evidence that hogs had been stolen from railroad car and had been driven in direction of defendant's home, and were later found there, tended to prove larceny, and did not support conviction for receiving stolen goods.

State v Butler, (NOR); 205 NW 842

Domestic animals—homing instinct. It is common knowledge that cattle will return to a place to which they have long been accustomed, and it is characteristic of practically all domestic animals to seek the places where they have been sheltered and fed, and evidence of such behavior is admissible.

State v McAteer, 227-320; 288 NW 72

Receiving other stolen property. On a prosecution for receiving and concealing stolen property, evidence of the receiving and concealing by defendant, about the same time, of other stolen property is admissible on the issue of knowledge.

State v Renslow, 211-642; 230 NW 316; 71 ALR 1111

Other contemplated thefts on issue of knowledge. In a prosecution for concealing a stolen

cow, evidence is admissible on the issue of the knowledge of the accused, that on the evening preceding the larceny of the cow, the accused, together with other persons who were admittedly participants in the stealing of the cow, arranged to sell and deliver, that night, to a stock dealer, certain hogs, it being made to appear that none of the parties possessed any hogs.

State v Davis, 212-582; 234 NW 858

Conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony, and, since the weight to be given such testimony is for the jury, when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

CHAPTER 581

FALSE PRETENSES, FRAUDS, AND OTHER CHEATS

13045 False pretenses.

ANALYSIS

I IN GENERAL
II THE FALSE PRETENSE
III PROPERTY OBTAINED
IV SIGNATURE OBTAINED
V INDICTMENT
VI EVIDENCE
(a) IN GENERAL
(b) OTHER TRANSACTIONS
(c) INTENT TO DEFRAUD
VII INSTRUCTIONS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Discussion. See 9 ILB 204—Larceny by trick and false pretenses

Check on insufficient deposit. The obtaining of money on a check by the drawer thereof when he knows he has no sufficient funds in the drawee bank for the payment of the check may not be prosecuted as a felony under the false pretense statute when the legislature has specifically declared such a transaction to be a mere misdemeanor. (§§13047–13049.)

State v Marshall, 202-954; 211 NW 252

False and genuine instruments differentiated. An indictment charging the obtaining of property by means of a false and spurious order charges an offense as defined in this section and not as defined in §13047, the latter section dealing solely with genuine instruments.

Humphrey v Hollowell, 203-221; 212 NW 570
Furey v Hollowell, 203-376; 212 NW 698

Felony (?) or misdemeanor (?). The district court has no jurisdiction of an indictment or trial information which charges, in effect, the fraudulent obtaining of money (1) on a check drawn by himself in an assumed name, and (2) on the mere representation that the check was of face value which was untrue, as such charge constitutes an unindictable misdemeanor under §13047. (Note change in statute.)

Conkling v Hollowell, 203-1374; 214 NW 717

Felony (?) or misdemeanor (?). The presentation of, and the obtaining of property on, a spurious check purporting to be signed by one other than the presentor, constitutes a felony under this section and not a misdemeanor under §13047, the other essential elements of the felony being duly alleged and established.

Benny v Hollowell, 203-1351; 214 NW 496
Winfield v Hollowell, 204-179; 214 NW 491

Felony (?) or misdemeanor (?). An indictment which alleges the obtaining of money by the accused on false representation as to the value of a check drawn by himself and on other specifically alleged material and false representations of fact, charges a felony under this section, and not a misdemeanor under §13047.

Murphy v Hollowell, 204-64; 214 NW 734

Differentiation showing misdemeanor. On a record showing (1) that one "Jack Lusk" as the payee of a check signed by "T. L. Wood" was indicted on the mere allegation that defendant had falsely represented the check to be of face value, and (2) that upon the arraignment of the defendant he was thereafter proceeded against and convicted as "Thomas Lusk Woods", it will be presumed that the check was signed by the defendant and that the indictment charges an offense under §13047.

Woods v Hollowell, 204-186; 214 NW 675

Larceny and false pretenses distinguished. A false representation may result in the crime of (a) cheating by false pretenses or (b) larceny. If the representation induces the owner of property to transfer both title and possession, the resulting crime is cheating by false pretenses. If the representation induces the owner of the property simply to part with the possession, and the receiver takes with the intent fraudulently to convert the property to his own use, the resulting crime is larceny.

State v Chamberlain, 215-273; 245 NW 277

II THE FALSE PRETENSE

False statement of indebtedness. A false statement of one's indebtedness, made with the intent to fraudulently procure a loan of

II THE FALSE PRETENSE—concluded

money, will support a charge of false pretenses.

State v Detloff, 201-159; 205 NW 534

Representations in different transactions. A false statement in one transaction as to one's financial condition, not made with an intent to defraud, may afford a basis for a charge of false pretenses when the statement is reiterated and reaffirmed in a subsequent transaction, and with the intent to defraud.

State v Detloff, 201-159; 205 NW 534

III PROPERTY OBTAINED

False pretenses—indictment—failure to describe money—waiver. Failure to specifically describe the money obtained by false pretenses (assuming such necessity) is waived by delaying objection until after the jury is sworn.

State v Detloff, 201-159; 205 NW 534

False pretenses—indictment—indefinite identification of property. An indictment which charges the obtaining by false pretenses of "a stock of merchandise consisting of groceries, dry goods, drugs, and fixtures," must describe or point out the property in such manner as to individualize it from all other property of like character: e. g., by charging its exact location. An allegation of ownership is not, in and of itself, sufficient.

State v Hixson, 202-431; 210 NW 423

Larceny and false pretenses distinguished. A false representation may result in the crime of (a) cheating by false pretenses or (b) larceny. If the representation induces the owner of property to transfer both title and possession, the resulting crime is cheating by false pretenses. If the representation induces the owner of the property simply to part with the possession, and the receiver takes with the intent fraudulently to convert the property to his own use, the resulting crime is larceny.

State v Chamberlain, 215-273; 245 NW 277

IV SIGNATURE OBTAINED

No annotations in this volume

V INDICTMENT

Venue. The crime of obtaining property by false pretenses may be committed partly in one county and partly in another and thereby justify the return of an indictment in either county.

State v George, 206-826; 221 NW 344

Venue. An indictment for obtaining money by false pretenses may lay the venue in the county in which the false representations were made and in which the check was obtained, even tho the money on the check was obtained in a foreign county of this state.

State v Detloff, 201-159; 205 NW 534

Failure to describe money. Money charged to have been obtained by false pretenses need not be particularly described in the indictment.

State v Detloff, 201-159; 205 NW 534

Receipt of property—variance. An indictment charging the obtaining of money by false pretenses is properly supported by evidence that the accused obtained a check for the amount of money in question and later personally obtained the money by cashing the check.

State v Detloff, 201-159; 205 NW 534

Indefinite identification of property. An indictment which charges the obtaining by false pretenses of "a stock of merchandise consisting of groceries, dry goods, drugs, and fixtures" must describe or point out the property in such manner as to individualize it from all other property of like character: e. g., by charging its exact location. An allegation of ownership is not, in and of itself, sufficient.

State v Hixson, 202-431; 210 NW 423

Setting out pretense. An indictment for false pretenses need not set forth a written pretense, tho used in evidence, when the charge in question is based on a subsequent transaction and on the oral representations then made, even tho the oral representations were a substantial repetition of the former written one.

State v Detloff, 201-159; 205 NW 534

Short form indictment — erroneous designation of section. A short form indictment for obtaining money by false pretenses, even tho it specifically purports to be found under this section, but which, by the bill of particulars, is manifestly based on false pretenses on obtaining a refund of tax paid on motor vehicle fuel as provided by §5093-a8, C., '31 [§5093.31, C., '39], is sufficient to support a conviction under the latter section and a sentence solely thereunder.

State v Wall, 218-171; 254 NW 71

VI EVIDENCE

(a) IN GENERAL

Circumstantial evidence. Falsity may be established by circumstantial evidence. Evidence held to present jury question.

State v Huckins, 212-283; 234 NW 554

Ownership of land. Evidence held wholly insufficient to sustain a verdict of guilt of obtaining money by false representations as to ownership of certain indefinitely described land.

State v George, 206-826; 221 NW 344

Written statements of accused. The falsity of pretenses charged in an indictment may be shown by the written statements of the accused, executed both before and after the transaction charged in the indictment.

State v Detloff, 201-159; 205 NW 534

Financial statement. On the issue of false pretenses as to the amount of the unsecured indebtedness of the accused, the reception in evidence of promissory notes of the accused which did not evidence unsecured indebtedness is harmless when the falsity of the pretenses alleged is shown by other uncontradicted evidence.

State v Detloff, 201-159; 205 NW 534

Unallowable cross-examination. The state on the trial of one accused of false pretenses, may not, on the cross-examination of the accused, develop the fact that the federal post office authorities have entered an order which denies to the accused the use of the mails.

State v Yarham, 206-833; 221 NW 493

(b) OTHER TRANSACTIONS

Subsequent transaction not establishing crime. On the trial of an indictment for false pretenses, it may be shown that the accused, in a transaction subsequent to the one charged, reiterated the pretenses charged in the indictment, even tho such subsequent transaction does not reveal the commission of any crime.

State v Detloff, 201-159; 205 NW 534

Similar and nonremote false pretenses. The state, in a prosecution for obtaining property by false pretenses, may show the making by the accused of other like or similar nonremote false pretenses, but need not show that property was actually obtained by means of such latter pretenses.

State v Huckins, 212-283; 234 NW 554

Unallowable cross-examination. The state on the trial of one accused of false pretenses may not, on the cross-examination of the accused, lay the foundation for introducing testimony of other prior and like offenses by the accused.

State v Yarham, 206-833; 221 NW 493

Unallowable "other offense". The state, upon the trial of an indictment for false pretenses, may not show a prior transaction of the accused which furnishes no suggestion of criminal intent.

State v Yarham, 206-833; 221 NW 493

(c) INTENT TO DEFRAUD

Knowledge, design, and intent. In a prosecution for false pretenses, the state may, in showing other and like offenses, also show, as bearing on the defendant's knowledge, design, and intent, that money to finance the proposed deal was to be obtained by the person to whom the false representations were made by having his widowed mother mortgage her home and that the accused fully indorsed such plan; on the other hand, evidence that such plan was carried out is quite irrelevant and prejudicial.

State v Huckins, 212-283; 234 NW 554

VII INSTRUCTIONS

Falsity of pretense. The state must definitely allege and prove, in a prosecution for obtaining property by false pretenses, that the accused knew that the pretenses were false. Instructions held not to state the rule adequately.

State v Hixson, 205-1321; 217 NW 814

Invading province of jury. An instruction invades the province of the jury (in a prosecution for false pretenses) when it asserts that the law imputes or implies a fraudulent purpose on the part of a person who, in order to induce reliance on his statement, unqualifiedly states that a certain fact exists of his own knowledge, when, in truth and fact, such fact does not exist.

State v Huckins, 212-283; 234 NW 554

13047 False drawing or uttering of checks.

Differentiation of statutes. See under §13045

Atty. Gen. Opinions. See '30 AG Op 59; '34 AG Op 103, 139

Venue — proof by circumstantial evidence. The venue of a criminal offense may be established by circumstantial evidence and the just and allowable inferences deducible therefrom.

State v McCutchan, 219-1029; 259 NW 23

Venue—loss to bank first receiving check. The state, in order to show loss to the bank first receiving a check drawn without funds or arrangement for payment, may show that, with the connivance of the cashier of said bank, the said check was utilized in part as a basis for the payment of a former check drawn by the same drawer for a lesser amount.

State v McCutchan, 219-1029; 259 NW 23

Loss at place of venue. On a prosecution for the fraudulent drawing and uttering of a check without funds or arrangement for payment, proof that the credit entered by the bank because of said check was utilized, in part, in paying an outstanding check issued by the accused for freight due in another state, is sufficient proof that the bank granting the credit suffered a loss at the place where the bank was located.

State v McCutchan, 219-1029; 259 NW 23

Other offenses. On a prosecution for the fraudulent drawing and uttering of a check without funds or arrangement for payment, evidence is admissible that the defendant, with the manifest connivance of the cashier of the defrauded bank, drew and had cashed, during several months immediately preceding the transaction on trial, a series of checks on said defrauded bank in which he had no funds.

State v McCutchan, 219-1029; 259 NW 23

Knowledge of agent. On a prosecution for the fraudulent issuance and utterance of a check without funds or arrangement for pay-

ment, the knowledge of the cashier of the defrauded bank will not be imputed to the bank when said cashier was, manifestly, in the entire transaction particeps criminis with the drawer of the check.

State v McCutchan, 219-1029; 259 NW 23

Notes designed to resemble checks and so treated. Instruments for the payment of obligations, which papers resembled checks and were treated as such, but upon which the maker had cleverly executed certain qualifying words whereby he hoped that they could be treated as promissory notes, held to be in fact ordinary checks when it was noted that the payee was required to indorse them before payment.

State v Doudna, 226-351; 284 NW 113

Fraudulent intent necessary. An essential element of the crime of uttering a false bank check is fraudulent intent, and consists of securing a thing of value by giving a check knowing at the time that it cannot be paid when presented; however, the false representations must be more than a promise of future performance.

State v Doudna, 226-351; 284 NW 113

False check—postdating. While a postdated check may be held to be merely a promise to pay in the future, yet when the maker represents that the reason he postdates a check for only one day is because the bank is closed for the day and the check cannot be cashed until the next day, he in effect represents to the payee that the check is good when made.

State v Doudna, 226-351; 284 NW 113

Bad check—issued in trade name with maker as agent. A livestock buyer who issues a bad check under a trade name, with himself as manager, cannot by this device escape criminal liability, since it is not essential in a prosecution that he obtained the property for himself; and there is no doctrine of agency in the criminal law which will permit an officer of a corporation to shield himself on the ground that his wrongful acts were for the corporation.

State v Doudna, 226-351; 284 NW 113

False uttering of check—presentment and protest not necessary. Allegations of error in the admission of certain certificates of protest attached to a check, the subject matter of a criminal prosecution, were without merit since it was not essential to the state's case to prove presentment and protest, the crime of false uttering of the check being proven otherwise.

State v Doudna, 226-351; 284 NW 113

Check on insufficient deposit. The obtaining of money on a check by the drawer thereof when he knows he has no sufficient funds in the drawee bank for the payment of the check may not be prosecuted as a felony under the false pretense statute (§13045, C., '24) when the legislature has specifically declared such a transaction to be a mere misdemeanor. (§§13047–13049, C., '24.)

State v Marshall, 202-954; 211 NW 252

Differentiation showing misdemeanor. On a record showing (1) that one "Jack Lusk," as the payee of a check signed by "T. L. Wood," was indicted on the mere allegation that defendant had falsely represented the check to be of face value, and (2) that, upon the arraignment of the defendant, he was thereafter proceeded against and convicted as "Thomas Lusk Woods," it will be presumed that the check was signed by the defendant, and that the indictment charges an offense under this section, C., '24.

Woods v Hollowell, 204-186; 214 NW 675

False and genuine instruments differentiated. An indictment charging the obtaining of property by means of a false and spurious order charges an offense as defined in §13045, and not as defined in this section, C., '24, the latter section dealing solely with genuine instruments.

Humphrey v Hollowell, 203-221; 212 NW 570

Differentiation of statutes. Principle reaffirmed that the strict false pretense statute (§13045, C., '24) deals with false tokens and the offenses connected therewith, while this section, C., '24, deals with true tokens and the offenses connected therewith.

Furey v Hollowell, 203-376; 212 NW 698

Felony (?) or misdemeanor (?). The presentation of, and the obtaining of property on, a spurious check purporting to be signed by one other than the presentor constitutes a felony, under §13045, C., '24, and not a misdemeanor, under this section, C., '24; the other essential elements of the felony being duly alleged and established.

Benny v Hollowell, 203-1351; 214 NW 496

Fraud — felony (?) or misdemeanor (?). The district court has no jurisdiction of an indictment or trial information which charges, in effect, the fraudulent obtaining of money (1) on a check drawn by himself in an assumed name, and (2) on the mere representation that the check was of face value (which was untrue); as such charge constitutes an unindictable misdemeanor, under this section, C., '24. (Note change in C., '27.)

Conkling v Hollowell, 203-1374; 214 NW 717

Amount of check determines grade of offense —jurisdiction. In a prosecution for false uttering of a bank check, it is the amount of the check that determines the grade of the offense and not the amount received, provided something of value is received for it. Where a check was $20 or more, but only $2 in cash was received, the district court was in error in di-

recting a verdict for defendant on the ground that the offense should be prosecuted in the justice of the peace court.

State v Dillard, 225-915; 281 NW 842

Sufficiency of evidence. Evidence received and held to present a jury question on the issue of guilt of drawing and uttering a check when the drawer knowingly had no funds or arrangement for its payment.

State v McCutchan, 219-1029; 259 NW 23

Lack of funds or arrangement — evidence. On a prosecution for the fraudulent drawing and uttering of a bank check without funds or arrangement for payment, evidence is admissible that the state banking department, a few months prior to the uttering of the check in question, and to the knowledge of the defendant, had, in writing, explicitly prohibited the directors and officers of the defrauded bank from extending any financial credit to the defendant, and that the said prohibition was thereafter repeatedly violated by connivance between the defendant and the cashier of said bank.

State v McCutchan, 219-1029; 259 NW 23

13051 Fraudulent conveyances.

Fraudulent conveyances—civil actions to set aside. See under §11815

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

13057 Dealing in certain instruments.

Atty. Gen. Opinion. See '36 AG Op 59

13069 Fraudulent advertisements.

Atty. Gen. Opinion. See '28 AG Op 224

13070 Publishers acting in good faith.

Atty. Gen. Opinion. See '28 AG Op 224

13071 False entries in corporation books.

Motion to dismiss—nonincriminating grand jury testimony — no resulting immunity. A person involuntarily appearing before the grand jury, tho not asked self-incriminating questions, who later is charged by county attorney's information with falsification of records, a subject connected with the grand jury investigation, may not, by certiorari, review the overruling of a motion to dismiss the information on the ground of immunity because of such grand jury appearance, when a remedy by appeal existed.

Kommelter v Dist. Court, 225-273; 280 NW 511

13072 Transacting business without license.

Atty. Gen. Opinion. See '25-26 AG Op 85

CHAPTER 582

MALICIOUS MISCHIEF AND WILLFUL TRESPASS

13080 Malicious injury to buildings and fixtures.

Malice. One who wantonly destroys property furnishes ample evidence of malice and it is quite immaterial that he does not know who is the owner of the property.

State v Shaffer, 202-958; 211 NW 230

13092.1 Alteration of manufacturer's serial number.

Atty. Gen. Opinion. See '34 AG Op 415

CHAPTER 582.1

ALTERATION, SALE, AND CHARGING OF STORAGE BATTERIES

13111.4 Unlawful retention.

Nonconsent of owner. In a prosecution for the unlawful retention of a storage battery, the nonconsent of the owner is of the very gist of the offense.

State v See, 205-601; 218 NW 249

CHAPTER 583

INJURIES TO INTERNAL IMPROVEMENTS AND COMMON CARRIERS

13131 Jumping off cars in motion.

Accident insurance—violation of law. Proof that an insured at the time of his death was riding in a railroad freight car reveals no violation of a statute against "climbing upon or holding to" a moving railroad freight car.

Ragan v Ins. Co., 209-1075; 229 NW 702

CHAPTER 585

FORGERY AND COUNTERFEITING

13139 Forgery.

ANALYSIS

I IN GENERAL
II "INTENT TO DEFRAUD"
III "FALSELY MAKE, ALTER", ETC.
IV PUBLIC RECORD, ETC.
V INDICTMENT
VI EVIDENCE
VII VALIDITY OF INSTRUMENTS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Fictitious payee. Principle recognized that the indorsement of a check payable to a fictitious payee, by one to whom the drawer did not intend payment to be made, is forgery.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

General reference to check. Instructions which refer the jury to the "check in question" (under a charge of uttering a forgery) are not necessarily erroneous because the record reveals numerous other checks.

State v Miller, 217-1283; 252 NW 121

Sentence—dual statutes. If there be two statutes defining an offense in such language that the accused may be sentenced under either, and one of them is general in its terms, and the other limited and particular, and imposes a lesser penalty, the particular should be construed as an exception to the general, and the lesser penalty prescribed thereby imposed. (So held under §§13139 and 13144, C., '27.)

Drazich v Hollowell, 207-427; 223 NW 253

II "INTENT TO DEFRAUD"

Other offenses—uttering forged instrument. On the trial of an indictment for uttering a forged instrument, the state may, as bearing on the defendant's purpose, intent, and knowledge, show the uttering of other like forgeries, both before and after the offense charged, which are properly connected with the offense on trial, in point of time and circumstances.

State v Baugh, 200-1225; 206 NW 250

III "FALSELY MAKE, ALTER", ETC.

No annotations in this volume

IV PUBLIC RECORD, ETC.

Uttering and publishing—jury question. A jury question on the issue of uttering a forged receipt is generated by evidence that the accused, while a witness in a civil action against himself and another and on demand of the attorney of his co-defendant, produced said receipt and that the same was introduced in evidence, it appearing that the interest of said accused and his co-defendant under said receipt was identical.

State v Carter, 222-474; 269 NW 445

V INDICTMENT

Indictment under "short-form". A county attorney information which charges the forgery of a check, and which otherwise is sufficient under the "short-form" act, is not insufficient because it (1) does not describe the check in detail, (2) does not allege the actual or apparent legal efficacy of the check, and (3) does not set forth a copy of the check. Resort to a motion for a bill of particulars is defendant's remedy in such cases.

State v Solberg, 214-333; 242 NW 84

Joining forgery and uttering—effect. The joining, in separate counts, in one indictment of forgery and uttering of said forgery, when both offenses are committed by the same person, does not have the effect of combining the two offenses into one offense with consequent obligation on the state to establish both counts.

State v Miller, 217-1283; 252 NW 121

Amendment—wholly new and different offense. A county attorney information which charges forgery cannot be deemed an amendment of an abandoned information which charged the uttering of a forgery, even tho the former is denominated an "Amended and substituted information."

State v Solberg, 214-333; 242 NW 84

VI EVIDENCE

Evidence—sufficiency. Evidence held insufficient to establish defendant's connection with a forgery.

State v Glendening, 205-1043; 218 NW 939

Validity of mortgage. Evidence held insufficient to show forgery of a mortgage.

McDaniel v Life Co., 210-1279; 232 NW 649
McDaniel v Bank, 210-1287; 232 NW 653

Signature on statutory bond—sufficiency of evidence. Evidence reviewed and held that the signature to a depository bond was genuine.

School District v Bank, 218-91; 253 NW 920

Other offenses as bearing on intent. Upon the trial of an indictment for uttering a specifically described forged check, the state may show, on the issue of intent, that the accused has committed other like forgeries as a part of a general scheme to defraud the alleged maker of the check in question.

State v Cordaro, 206-347; 218 NW 477

VII VALIDITY OF INSTRUMENTS

Forgery after delivery—burden of proof. A pleader who wishes to avoid the legal effect of an instrument, because of a material and unauthorized alteration therein, must plead that the alteration was made after delivery.

Hartwick v Hartwick, 217-758; 252 NW 502

Statutory bond—forgery. Evidence reviewed and held that the signature to a depository bond was genuine.

School District v Bank, 218-91; 253 NW 920

Opinion evidence—signatures—jury question. The mere introduction in evidence of genuine signatures of a party in order to establish the plea that the purported signature of the party to a written release is a forgery does not generate a jury question on the issue of forgery, when other ample evidence persuasively shows that the signature to the release is genuine.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Rebutting presumption by possession—forgery. Transfers and assignments of property of a deceased, in the hands of certain heirs, raise a presumption that they were delivered. However, facts and circumstances may overcome this presumption, especially when it is shown that the signatures of the deceased to the instruments are forgeries.

Brien v Davidson, 225-595; 281 NW 150

13140 Uttering forged instrument.

ANALYSIS

I IN GENERAL
II INDICTMENT

Indictment generally. See under Chs 637, 638

I IN GENERAL

Similar offenses. On the trial of an indictment for uttering a forged instrument the state may, as bearing on the defendant's purpose, intent, and knowledge, show the uttering of other like forgeries, both before and after the offense charged, which are properly connected with the offense on trial, in point of time and circumstances.

State v Baugh, 200-1225; 206 NW 250
State v McWilliams, 201-8; 206 NW 114
State v Debner, 202-150; 209 NW 404

Evidence—sufficiency. Evidence held to sustain a verdict of guilty of uttering a forgery.

State v Cordaro, 206-347; 218 NW 477

Jury question. Testimony by the person whose name purports to be signed to a bill of exchange to the positive effect (1) that the signature is not his and was not authorized by him, (2) that the body of the bill was in defendant's handwriting, (3) that defendant falsely stated that the money obtained was desired by his employer as "change", and (4) that the defendant forthwith absconded, is ample, on a charge of uttering, to create a jury question on the issue of forgery and the defendant's knowledge of the forgery.

State v Miller, 217-1283; 252 NW 121

Evidence in former trial. A jury question on the issue of uttering a forged receipt is generated by evidence that the accused, while a witness in a civil action against himself and another and on demand of the attorney of his co-defendant, produced said receipt and that the same was introduced in evidence, it appearing that the interests of said accused and his co-defendant under said receipt were identical.

State v Carter, 222-474; 269 NW 445

Res judicata—acquittal of crime—nonconclusive as to payment in civil action. Where a contract for bailment of cattle provided for their purchase at a stipulated price and also provided for their surrender on demand if not paid for, and where defendant had been acquitted of a forgery charge based on a forged "Paid" stamp giving the appearance the contract price had been paid, his acquittal, when interposed in a replevin action for the cattle, was not res judicata on the issue of payment and did not bar the replevin action.

Bates v Carter, 225-893; 281 NW 727

II INDICTMENT

Other offenses as bearing on intent. Upon the trial of an indictment for uttering a specifically described forged check, the state may show, on the issue of intent, that the accused has committed other like forgeries as a part of a general scheme to defraud the alleged maker of the check in question.

State v Cordaro, 206-347; 218 NW 477

Joining forgery and uttering—effect. The joining, in separate counts, in one indictment of forgery and uttering of said forgery, when both offenses are committed by the same person, does not have the effect of combining the

II INDICTMENT—concluded

two offenses into one offense with consequent obligation on the state to establish both counts.

State v Miller, 217-1283; 252 NW 121

Form — statement of charge. Indictment charging offense substantially in language of statute and setting out copy of check alleged to have been forged and uttered held to charge offense of uttering forged instrument and not that of obtaining money or property by false pretenses.

Lewis v Hollowell, (NOR); 227 NW 140

13141 Public instruments.

Public security—dual general and particular statutes—proper procedure. When each of two statutes embraces the offense of uttering a forged or counterfeit public security, one general and the other particular, in that it is confined to said kind of securities, an indictment is properly returned under the latter statute. So held as to this section and §13144, C., '31.

State v Kirkpatrick, 220-974; 263 NW 52

13144 Uttering counterfeit securities.

Sentence—dual statutes. If there be two statutes defining an offense in such language that the accused may be sentenced under either, and one of them is general in its terms, and the other limited and particular, and imposes a lesser penalty, the particular should be construed as an exception to the general, and the lesser penalty prescribed thereby imposed. (So held under this section and §13139, C., '27.)

Drazich v Hollowell, 207-427; 223 NW 253

Public security—dual general and particular statutes—proper procedure. When each of two statutes embraces the offense of uttering a forged or counterfeit public security, one general and the other particular, in that it is confined to said kind of securities, an indictment is properly returned under the latter statute. So held as to §13141 and this section, C., '31.

State v Kirkpatrick, 220-974; 263 NW 52

CHAPTER 586

CONSPIRACY

13162 "Conspiracy" defined—common law.

Atty. Gen. Opinion. See '36 AG Op 591

ANALYSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE
(a) IN GENERAL
(b) ACTS, ETC., OF CO-CONSPIRATOR
IV INSTRUCTIONS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Civil liability—essential elements. A conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action.

Hall v Swanson, 201-134; 206 NW 671
Dickson v Young, 202-378; 210 NW 452

Verdict — excessiveness. Record reviewed, and held that a verdict of $40,000 for libel and defamation of character was excessive and the result of passion and prejudice.

Mowry v Reinking, 203-628; 213 NW 274

Concerted action without conspiracy. Joint liability may exist without allegation or proof of conspiracy.

Baumchen v Donahoe, 215-512; 242 NW 533

Legal acts not conspiracy. A conspiracy cannot be predicated on the doing of legal acts in a legal manner.

Olmsted v Cas. Co., 218-997; 253 NW 804

Action based on fraud. In an action based on a conspiracy to defraud, the issue of conspiracy is not determinative, the important factor being that in order to be granted relief, it is necessary that the plaintiff establish the necessary elements of actionable fraud, the amount of recovery being dependent upon the extent of damage resulting from the fraudulent conduct.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Damages—failure to establish. Proof that defendants have conspired to injure plaintiff's business or to employ unfair competition against plaintiff, becomes of no consequence in a law action when plaintiff fails to establish damages.

Roggensack v Monument Co., 211-1307; 233 NW 493

Peacefully picketing not secondary boycott. A threat to do something that a person has the right to do is not a threat in a legal sense. Held that union officials by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott and an injunction will not lie.

Smythe Co. v Union, 226-191; 284 NW 126

Secondary boycott—essential elements. A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw from their beneficial business intercourse, by threats that, unless they do so, the combination will cause similar loss to them, or by the use of such means as the infliction of bodily harm on them or such intimidation as will put them in fear of bodily harm.

Smythe Co. v Union, 226-191; 284 NW 126

Boycott — essential elements. Intimidation and coercion are essential elements of boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done.

Smythe Co. v Union, 226-191; 284 NW 126

II INDICTMENT

Description of offense. An indictment for conspiracy to commit a crime need not set forth the various elements of said crime. Indictment held properly to charge a conspiracy to engage in the unlawful transportation and sale of intoxicating liquors.

State v Terry, 207-916; 223 NW 870

Permissible theory of conspiracy and aiding and abetting. Under an indictment for murder in which the defendant is charged with having actually fired the fatal shot, the state may avail itself, as a matter of evidence, of a conspiracy theory, and at the same time invoke the theory of aider and abettor in the commission of the offense charged.

State v Bittner, 209-109; 227 NW 601

Indictment—"means" employed. An indictment which in effect charges that defendants conspired to injure the funds of a fraternal beneficiary society and of the certificate holders therein by doing the illegal act of loaning a named amount of said funds on real estate not worth double the amount loaned, as required by statute, and by converting a portion of said loan to their own use, sufficiently charges the "means" to be employed by said conspirators.

State v Blackledge, 216-199; 243 NW 534

Former jeopardy. A conviction on an indictment charging the obtaining, by an officer of a fraternal beneficiary society, of funds of the society, by means of false and fraudulent representations, is not a bar to an indictment for conspiracy based on the identical acts charged in the former indictment, the two charges not being sustainable by the same evidence.

State v Blackledge, 216-199; 243 NW 534

Indictment — duplicity. An indictment for conspiracy is not duplicitous because it sets forth numerous purposes or objects of the one conspiracy.

State v Moore, 217-872; 251 NW 737

III EVIDENCE

(a) IN GENERAL

Evidence—direct or circumstantial. Conspiracy may be established by either direct or circumstantial evidence.

State v Terry, 207-916; 223 NW 870

Circumstantial evidence. Circumstantial evidence in order to justify a conviction must not only show guilt beyond a reasonable doubt, but such evidence must be inconsistent with any other reasonable conclusion.

State v Lowenberg, 216-222; 243 NW 538

Establishing conspiracy. Conspiracy need not be shown by direct evidence, but may be shown by proof of concert of action and by the declarations, conduct, and acts of the parties. So held as to a conspiracy to effect a fraudulent sale of corporate shares of stock.

Reinertson v Struthers, 201-1186; 207 NW 247

State v Blackledge, 216-199; 243 NW 534

State v Lowenberg, 216-222; 243 NW 538

Evidence—order of introduction. The order of introducing testimony under a charge of conspiracy rests in the sound discretion of the court.

State v Terry, 207-916; 223 NW 870

Acts antedating conspiracy. In an action for damages for conspiracy to libel plaintiff and to defame his character, growing out of the world war activities, evidence is wholly inadmissible which tends to show that, long prior to the alleged conspiracy, the defendants and the community generally in which they lived, sought to perpetuate and did perpetuate the military habits, customs, and practices of the foreign people and government of which the defendants were formerly a part.

Mowry v Reinking, 203-628; 213 NW 274

Sale of stock. Evidence held ample to sustain a charge of conspiracy on the part of the officers of a corporation in the sale of the shares of stock.

Pullan v Struthers, 201-1179; 207 NW 235

Fraud not shown by evidence. Record reviewed and held insufficient to establish an alleged conspiracy to defraud plaintiff of his interest in property.

Bergman v Coal Co., 200-419; 203 NW 697

Malice—evidence to rebut. Competent testimony to rebut malice on the part of an alleged conspirator is manifestly admissible.

Mowry v Reinking, 203-628; 213 NW 274

Assault—evidence of conspiracy. Evidence held ample to establish a conspiracy to assault.

De Bruin v Studer, 206-129; 220 NW 116

III EVIDENCE—concluded

(b) ACTS, ETC., OF CO-CONSPIRATOR

Improper reception of testimony—curing error. The improper reception of testimony of the declaration of a co-conspirator after the conspiracy had been consummated is cured by oral and written instructions to the jury to disregard the same wholly, even tho the erroneously received testimony was read to the jury in order that the jury might definitely know just what was excluded from their consideration.

State v Lyons, 202-1195; 211 NW 702

Declarations of conspirators. Declarations of a co-conspirator which are made on the morning following the commission of the crime in question, and in the absence of the defendant on trial, are inadmissible against the latter.

State v Archibald, 204-406; 215 NW 258

Incompetent statements and declarations. Statements by one conspirator, not in the presence of the other conspirator, who is solely on trial, and which are not in furtherance of the conspiracy or a part of the res gestae thereof, are wholly inadmissible.

State v Huckins, 212-283; 234 NW 554

Incompetent declarations. The reception in evidence of the inflammatory acts and declarations of an alleged co-conspirator, not occurring in the presence or hearing of the accused who is solely on trial for the purpose of proving the conspiracy (there being no direct evidence), and the retention of such evidence before the jury for the major part of a long, sharply contested, and acrimonious trial before such evidence is withdrawn by the court, constitute such unfairness of trial that the error can only be cured by a new trial, notwithstanding the attempt of the trial court to supply an antidote through a cautionary instruction.

State v Hartman, 213-546; 239 NW 107

Declarations of co-conspirators. Acts and declarations of alleged conspirators which are not done or made in the presence or with the concurrence of the parties on trial for conspiracy are not admissible to establish the conspiracy, but are admissible in support of the state's case after the state has otherwise established a prima facie case.

State v Moore, 217-872; 251 NW 737

Declarations prior to conspiracy. Declarations of one joint defendant in a charge of conspiracy, tho made shortly before the time when it is alleged the conspiracy was entered into, are, if material on his state of mind, admissible against him, and his co-defendant on trial may not complain if the declarations are offered, received, and confined strictly to the maker thereof.

State v Moore, 217-872; 251 NW 737

Incompetent declarations. Declarations of alleged co-conspirators evincing hostility toward the plaintiff in an action for conspiracy to libel are wholly inadmissible when it cannot be said that they were made in furtherance of the alleged conspiracy. Especially are declarations evincing hostility to plaintiff inadmissible when made by persons who are not party defendants nor shown to be conspirators, and whose declarations spring solely from personal hostility wholly disconnected with the conspiracy in question.

Mowry v Reinking, 203-628; 213 NW 274

IV INSTRUCTIONS

Improper reception of testimony. The improper reception of testimony of the declaration of a co-conspirator after the conspiracy had been consummated, is cured by oral and written instructions to the jury to disregard the same wholly, even tho the erroneously received testimony was read to the jury, in order that the jury might definitely know just what was excluded from their consideration.

State v Lyons, 202-1195; 211 NW 702

Damages—actual and exemplary—mitigation. In an action for libel and defamation of character, the court should clearly differentiate between the purpose and effect of evidence (1) tending to show a good faith belief in the truth of the charges in question, and (2) tending to show the actual truth of such charges.

Mowry v Reinking, 203-628; 213 NW 274

Conspiracy—reception of incompetent testimony—incurable error. The reception in evidence of the inflammatory acts and declarations of an alleged co-conspirator, not occurring in the presence or hearing of the accused who is solely on trial for the purpose of proving the conspiracy (there being no direct evidence), and the retention of such evidence before the jury for the major part of a long, sharply contested, and acrimonious trial before such evidence is withdrawn by the court, constitutes such unfairness of trial that the error can only be cured by a new trial, notwithstanding the attempt of the trial court to supply an antidote through a cautionary instruction.

State v Hartman, 213-546; 239 NW 107

13163 Conspiracy to prosecute.

Malicious prosecution. See under §13728

CHAPTER 587

MALICIOUS THREATS

13164 Malicious threats to extort.

ANALYSIS

I IN GENERAL
II "MALICIOUSLY THREATEN"
III "WITH INTENT TO EXTORT," ETC.
IV INDICTMENT

Indictment generally. See under Chs 637, 638

I IN GENERAL

Dual offenses—failure to separate. Under a charge of "malicious threats to extort money", the accused cannot be properly convicted of "malicious threats to compel a person to do an act against his will", (said offenses being separate and distinct tho provided for in the same section) and instructions which infer the contrary are erroneous.

State v Essex, 217-157; 250 NW 895

Instructions — money paid because of fear. Instructions reviewed and held not to authorize the jury to convict, irrespective of any threats, if it found that the prosecuting witness paid money because of fear only.

State v Wilbourn, 219-120; 257 NW 571

II "MALICIOUSLY THREATEN"

Liability for mental pain. Willful threats made to a debtor for the purpose of producing in the mind of the debtor such mental pain, anguish, and harassment as will induce him to pay the debt, renders the offender liable in damages for the resulting pain and anguish, even tho there be no actual or threatened physical injury, provided the threats are not mere threats to resort to legal procedure.

Barnett v Service Co., 214-1303; 242 NW 25; 4 NCCA (NS) 223

III "WITH INTENT TO EXTORT," ETC.

Instructions — nonpermissible construction. The ordinary instruction defining "intent" cannot be deemed an authorization to the jury to infer that the defendant was responsible for the acts and statements of bystanders.

State v Wilbourn, 219-120; 257 NW 571

IV INDICTMENT

Failure to allege essential threat. A "short-form" indictment for malicious threat to extort is fatally defective when it fails to allege the statutory identifying threat made by the accused.

State v Goldenberg, 211-234; 233 NW 66

Failure to name injured party. A "short-form" of indictment for malicious threat to extort is fatally short in legal requirement when it fails to allege the name of the person threatened.

State v Goldenberg, 211-234; 233 NW 66

Indictment — sufficiency. An indictment for extortion may be sufficient tho the language relative to the threatened offense and the accompanying intent is bunglingly expressed.

State v Wilbourn, 219-120; 257 NW 571

CHAPTER 588

PERJURY

13165 Definition—punishment.

ANALYSIS

I OATH OR AFFIRMATION
II MATERIALITY OF MATTER
III INDICTMENT
IV EVIDENCE
V INSTRUCTIONS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I OATH OR AFFIRMATION

No annotations in this volume

II MATERIALITY OF MATTER

Record admissible to show materiality. In a prosecution for perjury, the record and instructions in the proceedings, in which the perjury is alleged to have been committed, may be admissible for the purpose of showing the materiality of the alleged false testimony.

State v Mutch, 218-1176; 255 NW 643

III INDICTMENT

Improper statement in indictment. Perjury may, manifestly, be predicated on the fact that the defendant had falsely sworn that a certain incriminating admission had not been made to him by another person. It is equally manifest that the indictment in such a case may predicate the perjury in such form as to render immaterial the entire assignment of perjury.

State v Morrison, 208-858; 226 NW 54

IV EVIDENCE

Contradictory testimony. Testimony on which a charge of perjury is based is not shown to be false beyond a reasonable doubt by proof that the accused, prior to the perjury alleged,

IV EVIDENCE—concluded

made a statement directly contradictory of said testimony.

State v Mutch, 218-1176; 255 NW 643

Libel action based on perjury—proof beyond reasonable doubt not required. In an action for libel based on a defamatory publication that the plaintiff could not tell the truth when on the witness stand, in which action defendant offered to show that plaintiff perjured himself in a previous foreclosure hearing as to the existence of a certain fence, the court errs in withdrawing this evidence from the jury on the ground of indefiniteness, since in this civil action the defendant was not required to prove perjury beyond a reasonable doubt.

McCuddin v Dickinson, 226-304; 283 NW 886

V INSTRUCTIONS

Instruction on material parts of indictment. In prosecution for subornation of perjury, where defendant assigns as error the court's omission to instruct the jury as to what were the material parts of the indictment—while it is true this is a duty of the court—a review of the instructions shows that defendant's argument is quite technical, and the instructions, as a whole, clearly and definitely point out to the jury what the material allegations of the indictment were and what was necessary for the jury to find before returning a verdict of guilty.

State v Hartwick, 228- ; 290 NW 523

Elements necessary for conviction—construction as a whole. In prosecution for subornation of perjury, where defendant complains of the instruction summarizing the elements necessary to conviction, while the instruction could not have been complete in and of itself and was not so intended, since the instruction called the jury's attention to other instructions defining perjury, subornation of perjury, and other essentials of the crime to be found by the jury, it was sufficient. Principle reaffirmed that instructions must be considered as a whole.

State v Hartwick, 228- ; 290 NW 523

Rule as to credibility of witness. In prosecution for subornation of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not instruct the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions), it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Other perjuries—sufficiency of instruction. In prosecution for subornation of perjury, where the court instructed the jury that "Certain evidence has been admitted in this case tending to prove other claimed perjuries and of other acts of the defendant and of his sister," the use of the words "certain evidence" does not indicate the opinion of the court as to quantity and weight of the evidence, and the use of the word "certain", so commonly used by practically all courts and all persons, could not have been understood by the jury to have meant fixed and established. It must have been considered as merely stating there was evidence of the nature described, and the use of the words "other acts of the defendant and of his sister" were not indefinite. They were sufficient to call the attention of the jury to the other facts, and it was not necessary that the court set out and review the testimony referred to.

State v Hartwick, 228- ; 290 NW 523

Offenses partly in county. In prosecution for subornation of perjury, an instruction as to venue was proper when it stated that evidence introduced tended to show defendant had solicited a witness to give the claimed perjured testimony in a trial, and that such solicitations, or some of them, were made in Appanoose county, and if defendant continued in his attempt to procure the witness and called and had witness testify as a witness in Davis county, knowing or believing witness would give perjured testimony, and if witness did in fact commit perjury in Davis county, the defendant could be prosecuted and convicted in Davis county.

State v Hartwick, 228- ; 290 NW 523

13166 Subornation of perjury.

See under §13165

CHAPTER 589

COMPOUNDING FELONIES

13168 Compounding certain felonies.

Contract to compound crime—proof. The plea that an obligation is invalid because executed in consideration of the compounding of a crime necessitates proof of an agreement, express or implied, (1) to compound or conceal the offense, or (2) not to prosecute the same, or (3) not to give evidence thereof.

Cotten v Halverson, 201-636; 207 NW 795

CHAPTER 590

OBSTRUCTING JUSTICE

13170 Interference with administration of justice.

Bribery as indicating unfavorable admission. Attempt by a defendant to bribe a witness is indicative of an admission on his part that his cause or claim is unjust, dishonest, and unrighteous; and the court may so instruct the jury on supporting testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

CHAPTER 591

PROSTITUTION

13174 Soliciting.

Atty. Gen. Opinion. See AG Op Jan. 27, '39

"Solicitation" defined. "Solicitation", within the meaning of the statute which prohibits solicitation for purpose of prostitution, requires no particular form of words. Acts and conduct may constitute such solicitation.

State v Render, 203-329; 210 NW 911

Defendant soliciting for personal gratification—not included. The statute providing a penalty for any person who solicits another to have carnal knowledge is intended to punish for the solicitation for purpose of prostitution and not to punish a defendant in soliciting by mail a female to have carnal knowledge with him for his personal gratification.

State v Oge, 227-1094; 290 NW 1

Demurrer—function—whether offense comes within statute. On appeal from judgment overruling a defendant's demurrer to indictment, the sole duty of the supreme court is to determine whether the offense with which the defendant is charged comes within the provisions of the statute under which he is charged, without regard to whether such or similar offenses may, or may not, come within any other criminal statute.

State v Oge, 227-1094; 290 NW 1

13175 Keeping house of ill fame.

Atty. Gen. Opinion. See '25 AG Op 319

ANAYLSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE
IV INSTRUCTIONS

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Continuance—neglect to procure counsel—no showing of prejudice. A person accused of operating a house of ill fame, whose counsel withdraws after trial wherein the jury disagreed, such person then having two months to secure new counsel, but neglecting so to do until three days before retrial, may not complain if a motion for continuance is overruled, there being no showing on appeal of injury from such ruling.

State v Hathaway, 224-478; 276 NW 207

II INDICTMENT

No annotations in this volume

III EVIDENCE

Reputation of keeper of bawdyhouse—when admissible. In a prosecution for keeping a house of ill fame, defendant's reputation for chastity may be shown when she resided on the premises and was also an inmate, under the rule that such reputation of the inmates of the house and those who resort thereto may be shown as bearing on the question as to whether or not the house was, in fact, one of ill fame.

State v Lewis, 226-98; 283 NW 424

Circumstantial evidence. The offense of keeping a house of ill fame may be established by circumstantial evidence.

State v Owen, 205-1052; 219 NW 23

House of ill fame—reputation. In establishing the general reputation of a place as being a house of ill fame, it is sufficient if from the entire series of questions and answers it is manifest that the reputation was confined to the time during which defendant occupied the house.

State v Owen, 205-1052; 219 NW 23

Licentious character of frequenters. The state may, but is not necessarily obliged to, establish the evil dispositions and tendencies of those who frequent an alleged house of ill fame.

State v Owen, 205-1052; 219 NW 23

Cross-examination — scope—categorical denial of guilt on direct examination. On direct examination, accused's categorical denial that she operated a house of ill fame, which being the very question that the jury is ultimately to decide, opens wide the gates for exploration

on cross-examination as to witness' conduct during the period covered by the question.

State v Hathaway, 224-478; 276 NW 207

IV INSTRUCTIONS

Female jurors—no presumption of prejudice. Contention that a fair trial was not obtained on account of female jurors, a majority of whom were on the jury, having an inborn prejudice against a woman accused of keeping a house of ill fame, denied because, in absence of a contrary showing, jurors, regardless of sex, are presumed to follow instructions and determine guilt upon the evidence.

State v Hathaway, 224-478; 276 NW 207

13176 Evidence—general reputation.

Reputation. In establishing the general reputation of a place as being a house of ill fame, it is sufficient, if from the entire series of questions and answers it is manifest that the reputation was confined to the time during which defendant occupied the house.

State v Owen, 205-1052; 219 NW 23

CHAPTER 592

OBSCENITY AND INDECENCY

13184 Lascivious acts with children.

Atty. Gen. Opinion. See '28 AG Op 315

Nonmitigating circumstance. One convicted of lascivious acts with an infant may not justly find mitigation in the waywardness of his victim.

State v Taylor, 202-189; 209 NW 287

Unallowable detail of hearsay and non res gestae statements. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, testimony of the parents of the child as to what they were told in detail by their children, singly and collectively, after they—the parents—returned home, relative to the acts of the defendant, and testimony of the prosecutrix as to what she detailed to her parents relative to the acts of the defendant are wholly incompetent for any purpose.

State v Rounds, 216-131; 248 NW 500

Other closely allied offense. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, evidence of the commission by the defendant of a similar offense with a child other than prosecutrix is admissible when the acts with the two children are so closely related in point of time and place, and so intimately associated with each other that they form one continuous transaction.

State v Rounds, 216-131; 248 NW 500

Included offenses. On the trial of an indictment charging the commission of lewd and lascivious acts with and upon the body of a child, the included offenses of assault and battery and simple assault should be submitted when there is supporting evidence and when there is no evidence of consent on the part of prosecutrix.

State v Rounds, 216-131; 248 NW 500

Unallowable instructions. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, it is wholly unallowable to instruct that the jury may convict if it finds that the defendant "hugged and kissed" prosecutrix or "placed his hand under her clothing".

State v Rounds, 216-131; 248 NW 500

Confession of crime—claim of intoxication. A purported confession as to lascivious acts with a child, the admissibility of which confession is objected to because of a claim of intoxication at the time the confession was made, raises a question properly submitted to the jury when it appears the defendant had not taken any liquor for 15 to 18 hours before the confession was made.

State v Hall, 225-1316; 283 NW 414

13190 Obscene literature—articles for immoral use.

Atty. Gen. Opinion. See '34 AG Op 690

13191 Circulating obscene matter.

Demurrer—druggist circulating birth control literature. An information charging the defendant, a druggist, with the crime of circulating advertisements of a device for the prevention of conception, charges facts which, if proven, would constitute a complete legal defense and a bar to prosecution, and is demurrable, druggists being specifically excepted from the provisions of the statute.

State v Chenoweth, 226-217; 284 NW 110

Title of act. The title, "An act to 'suppress' obscene literature", fails to intimate that a criminal penalty was provided for a violation.

State v Chenoweth, 226-217; 284 NW 110

Codification—code editor's catchwords—no part of law. Code section catchwords, "Circulating obscene matter", prepared by code editor, are no part of the law.

State v Chenoweth, 226-217; 284 NW 110

13195 Exceptions—doctors—druggists—artists.

Atty. Gen. Opinion. See '34 AG Op 690

Demurrer—druggist circulating birth control literature. An information charging the de-

fendant, a druggist, with the crime of circulating advertisements of a device for the prevention of conception, charges facts which, if proven, would constitute a complete legal defense and a bar to prosecution, and is demurrable, druggists being specifically excepted from the provisions of the statute.

State v Chenoweth, 226-217; 284 NW 110

CHAPTER 593

GAMBLING

13198 Keeping gambling houses.

Atty. Gen. Opinions. See '30 AG Op 230; '36 AG Op 441; '38 AG Op 298, 300

ANALYSIS

I WHAT CONSTITUTES
II INDICTMENT

I WHAT CONSTITUTES

Punch boards and slot machines as gambling devices. Legislature has specifically recognized punch boards and slot machines as gambling devices and they are subject to forfeiture when seized under a valid search warrant, unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited.

State v Doe, 227-1215; 290 NW 518

Evidence insufficiency. Evidence of defendant's guilt of keeping a gambling house held insufficient for jury.

State v McNuelty, (NOR); 266 NW 291

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

II INDICTMENT

Plea in bar—holding of inferior court. It is no defense to an indictment for keeping a gambling house that, before the acts were done which it is claimed constituted such keeping, a municipal court had held that said acts did not constitute gambling.

State v Striggles, 202-1318; 210 NW 137; 49 ALR 1270

Search warrant—lack of seal—noninvalidation. The lack of a seal in a search warrant issued by a magistrate does not invalidate proceedings in search for gambling devices.

State v Doe, 227-1215; 290 NW 518

13202 Gaming and betting—penalty.

Atty. Gen. Opinions. See '28 AG Op 257; '36 AG Op 57, 441; '38 AG Op 298

Presumption. The presumption, under the bucket shop act, that grain, the subject matter of a purported contract of sale, was never intended to be delivered by the broker is not overcome by the simple expedient of having the broker testify that he intended to deliver the grain unless he had sooner sold it prior to the date of delivery.

Yoerg v Geneser, 219-132; 257 NW 541

13203 Wagers—forfeiture.

Atty. Gen. Opinions. See '28 AG Op 104, 257

Forfeiture of contraband articles. The procedure for the seizure and condemnation of alleged lottery tickets under this and following sections is a civil action.

State v Lottery, 214-158; 241 NW 421

Condemnation proceedings—lack of knowledge of unlawful use—effect. In proceedings to condemn slot machines as gambling devices, it is quite immaterial that the lessor of the machines did not know that the lessees were using the machines for gambling purposes.

State v Doe, 221-1; 263 NW 529

When legitimate device becomes gambling device. Tho a slot machine of a given type be not a gambling device per se, yet it becomes subject to seizure and condemnation as such when actually used and operated for gambling purposes.

State v Doe, 221-1; 263 NW 529

13210 Possession of gambling devices prohibited.

Atty. Gen. Opinions. See '38 AG Op 300; AG Op Jan. 10, '39

Probable cause for issuance of warrant—determination—sufficiency. The existence of "probable cause" for the issuance of a search warrant is to be determined by the magistrate issuing such warrant and does not have to be shown in the information itself but may be shown by affidavit attached thereto or by sworn testimony taken before the magistrate prior to the issuance of the warrant; hence, warrant to search for gambling devices was not issued without "probable cause" where state agent who signed and swore to information was also examined under oath.

State v Doe, 227-1215; 290 NW 518

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

Search warrant—lack of seal—noninvalidation. The lack of a seal in a search warrant

issued by a magistrate does not invalidate proceedings in search for gambling devices.

State v Doe, 227-1215; 290 NW 518

Gambling devices—John Doe warrant—validity. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is a valid basis to search for gambling devices.

State v Doe, 227-1215; 290 NW 518

Nickel-in-the-slot machine. A nickel-in-the-slot vending machine which, when operated, invariably produces a stated article of merchandise, and sometimes, in addition, divers numbers of metal checks which are each "good for five cents in trade", is a gambling device, even tho a mechanism on the machine always indicates just what will be received on each operation of the machine.

State v Ellis, 200-1228; 206 NW 105

Slot-vending machine. A slot-vending machine which, upon the insertion of a coin, invariably produces a package of merchandise, and occasionally by chance a valueless disk or token which may be played into the machine, not for merchandise, but for amusement purposes only, is a gambling device.

State v Marvin, 211-462; 233 NW 486

Property sold in furtherance of gambling. A vendor of property which is capable of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Punch boards and slot machines as gambling devices. Legislature has specifically recognized punch boards and slot machines as gambling devices and they are subject to forfeiture when seized under a valid search warrant, unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited.

State v Doe, 227-1215; 290 NW 518

Stipulations—construction of "punch board." A stipulation that certain property was sold for the purpose of using the same as prizes in the operation of a punch board, is a concession that the term "punch board" has a general recognized meaning which must control the construction of the stipulation.

Parker-Gordon Co. v Benakis, 213-136; 238 NW 611

When legitimate device becomes gambling device. Tho a slot machine of a given type be not a gambling device per se, yet it becomes subject to seizure and condemnation as such when actually used and operated for gambling purposes.

State v Doe, 221-1; 263 NW 529

Condemnation of gambling devices—judicial notice of information and warrant. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant, and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

Condemnation proceedings—lack of knowledge of unlawful use—effect. In proceedings to condemn slot machines as gambling devices, it is quite immaterial that the lessor of the machines did not know that the lessees were using the machines for gambling purposes.

State v Doe, 221-1; 263 NW 529

Evidence of keeping gambling house. Evidence of defendant's guilt of keeping a gambling house held insufficient for jury.

State v McNuelty, (NOR), 266 NW 291

13218 Lotteries and lottery tickets.

Atty. Gen. Opinions. See '28 AG Op 257; '34 AG Op 741; '36 AG Op 19, 544; '38 AG Op 527; AG Op Jan. 9, '39; Feb. 25, '39; May 15, '39

Regulation and prohibition—consideration for chance indispensable element. A scheme for the distribution, by lot or chance, of valuable prizes does not constitute a lottery when the recipient of the prize neither pays nor hazards anything of value for the chance to obtain said prize. And it is quite immaterial that the donor of such prizes expects such distribution of prizes will work a financial betterment of his business.

State v Hundling, 220-1369; 264 NW 608; 103 ALR 861

Bank night—value of consideration in contract. A bank night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Pioneer Theatre, 227-1391; 291 NW 164

Prize money deposit—"contestant" not "winner"—award necessary. Where, after starting a contest to place small "R's" within a large "R", the sponsor company became insolvent and its receiver, under agreement with defendant bank, set up a special bank account as prize contest payment money—which account

was later applied by the bank on a note of the insolvent sponsor company—an individual contestant, altho complying with all contest rules, may not, without being declared to be the winner according to the contest rules, recover against the bank the amount of the first prize from such special account.

Bielen v Bank, 224-19; 276 NW 25

13219 Minors in billiard rooms—duty of owner.

Atty. Gen. Opinions. See '28 AG Op 123, 356; '38 AG Op 176

CHAPTER 594

AFFRAYS AND PRIZE FIGHTING

Atty. Gen. Opinion. See '28 AG Op 223

CHAPTER 596

DESECRATION OF SABBATH

13227 Breach of Sabbath—exceptions.

Atty. Gen. Opinions. See '28 AG Op 422; '38 AG Op 896

ANALYSIS

I In General
II What Acts Included
III What Not Included
IV Ratification
V Effect of Violation
VI Information

I IN GENERAL

Sales on Sunday—damages. Fact that beverage was sold on Sunday, in violation of this section, C., '35, does not deprive plaintiff of right to recover proven damages.

Anderson v Tyler, 223-1033; 274 NW 48

II WHAT ACTS INCLUDED

Appeal and error—review—scope and extent—nonpleaded matter. Failure to plead the invalidity of a contract because it was entered into on Sunday precludes review of the point on appeal.

Passcuzzi v Pierce, 208-1389; 227 NW 409

III WHAT NOT INCLUDED

Contracts—delivery on secular day. A written guaranty executed on Sunday but delivered on a secular day under express or implied authority of the guarantor, is perfectly valid.

Iowa D.M. Bk. v Lewis, 215-654; 246 NW 597

IV RATIFICATION

Subsequent ratification—effect. A plea that promissory notes were executed on Sunday is avoided by a plea, and proof thereof, that the maker of the notes subsequently ratified the execution of said notes.

Witmer v Fitzgerald, 209-997; 229 NW 239

V EFFECT OF VIOLATION

Execution on Sunday—collateral agreement. The fact that a promissory note was signed on Sunday has no legal bearing on an agreement growing out of and relating to said note, but wholly collateral thereto.

Hirtz v Koppes, 212-536; 234 NW 854

VI INFORMATION

No annotations in this volume

CHAPTER 598

DESERTION AND ABANDONMENT OF WIFE AND CHILDREN

13230 "Desertion" defined.

ANALYSIS

I In General
II Indictment
III Evidence
IV Instructions

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Discussion. See 9 ILB 97—Desertion and abandonment

Support by divorced mother. The father of a child is not guilty of willfully failing to support the child if the divorced mother is, in the discharge of her legal duty, supporting it to such extent that it is not "destitute" in a legal sense.

State v Brodie, 206-1340; 222 NW 23

I IN GENERAL—concluded

Maintenance by mother. A child may not be said to be in a "destitute condition" as to the father of the child if the mother of the child in the discharge of her legal duty to maintain her child has rendered it nondestitute, even tho the father and mother are divorced.

State v Sayre, 206-1334; 222 NW 20

Destitution—what constitutes. A child may be in a "destitute" condition even tho charitable people have voluntarily taken it into their homes and gratuitously supported it.

State v Herring, 200-1105; 205 NW 861
State v Sayre, 206-1334; 222 NW 20

Willfulness negatived. A father may not be said to willfully fail to support his infant child in the custody of its mother when it is made to appear that he had extended to the mother the privilege of drawing checks on his bank account for the support of herself and child and that the mother had declined to do so.

State v Herring, 200-1105; 205 NW 861

Essential intent. There can be no abandonment by a parent of his child in the absence of an intent to abandon.

Pitzenberger v Schnack, 215-466; 245 NW 713

Fugitive from justice—nonpresence in demanding state. A party cannot be a fugitive from justice of a demanding state, and therefore cannot be legally extradited to said state, when, admittedly, he has never been, physically, within the demanding state since a long time prior to the commission of the offense charged in said state, to wit, nonsupport of his child; and, legally, it matters not that the accused personally caused the pregnant mother to go to, and enter, and remain in, the demanding state.

Drumm v Pederson, 219-642; 259 NW 208

II INDICTMENT

Essential elements. Under a charge of child desertion "willfulness" and "without cause" are two indispensable elements.

State v Nichols, 219-309; 257 NW 813

III EVIDENCE

Destitute condition. Evidence reviewed in a prosecution for child desertion and held to present a jury question on the issue whether the child was in a destitute condition.

State v Sayre, 206-1334; 222 NW 20

Evidence—sufficiency. Evidence held to present a jury question on the issue of willful refusal of a husband and father to support a wife and child who were dependent upon the charity of others.

State v Anderson, 209-510; 228 NW 353; 67 ALR 1366

Essential elements. Proof of failure to support will not, in and of itself, sustain a conviction for failure of a husband to support his wife. The state must carry the burden of establishing every element of the offense.

State v Gude, 201-4; 206 NW 584

Burden of proof. In a prosecution for failure of a husband to support his wife and child, it is not incumbent on the accused to show that he was "without fault", and reversible error results from so instructing.

State v Gude, 201-4; 206 NW 584

Physical inability to support. Record reviewed and held to present a jury question on the issue whether a parent was physically able to support his child.

State v Sayre, 206-1334; 222 NW 20

Desertion of child—proof of paternity—reasonable doubt rule applicable. In a prosecution for child desertion, a claim of nonaccess creating a conflict in the evidence as to the paternity of the child requires the state to prove paternity beyond a reasonable doubt and submission of the question to the jury.

State v Heath, 224-483; 276 NW 35

IV INSTRUCTIONS

Nonapplicability to evidence. An instruction to the effect that a husband would not be guilty of failure to support his wife if he procured a home at a named place and if the wife without good cause refused to live at said place is erroneous when the applicable evidence was solely to the effect that the husband offered to procure such home and that the wife refused such offer.

State v Wright, 200-772; 205 NW 325

Separate estate of wife — instructions. An instruction that a husband may be criminally liable for failure to support his wife even tho "she has an estate of her own" is prejudicially confusing when not coupled with any explanation as to what would constitute, under said statute, a "destitute condition" on the part of the wife.

State v Wright, 200-772; 205 NW 325

Unallowable assumption. Record reviewed and held reversible error for the court to instruct that, as a matter of law, an accused had failed to show any conduct on the part of his wife which would justify him in refusing to support her.

State v Gude, 201-4; 206 NW 584

13235 Prima facie evidence.

Burden of proof. In a prosecution for the willful failure by a parent to support his child, no burden at any time rests on the defendant to establish to any extent or degree that his failure to support was not willful, even tho the statute does declare that the failure to support is prima facie evidence of willfulness.

State v Brodie, 206-1340; 222 NW 23

CHAPTER 602

INFRINGEMENT OF CIVIL RIGHTS

13251 Civil rights defined.

Discussion. See 8 ILB 129, 211—Race discrimination in naturalization; 14 ILR 63—Iowa "Civil Rights Act"

13252.1 Religious test.

Atty. Gen. Opinion. See '36 AG Op 629

13252.2 Evidence.

Atty. Gen. Opinion. See '36 AG Op 629

CHAPTER 604

LIBEL

13256 "Libel" defined.

Libel and slander generally. See under §12412 et seq

Libel per se. A writing which charges that certain parties are hypocrites, cheats, defrauders, and falsifiers is libelous per se.

State v Heptonstall, 209-123; 227 NW 616

13258 Indictment for libel.

Civil liability. See under §§12412–12416

Disjunctive acts charged conjunctively. When several nonrepugnant acts are enumerated disjunctively as constituting an offense, they may be alleged conjunctively without rendering the indictment subject to the vice of duplicity, and only one of said acts need be established in order to sustain a conviction.

State v Heptonstall, 209-123; 227 NW 616

13260 Publication.

Publication—evidence. Evidence held to amply sustain a finding of publication of a libel.

State v Heptonstall, 209-123; 227 NW 616

13262 Jury determines law and fact.

Duty to instruct. It is the duty of the court to instruct the jury that a writing is libelous per se (if it be such) even tho the jury has the discretionary right to determine the law of the case and is so instructed.

State v Heptonstall, 209-123; 227 NW 616

CHAPTER 605

BRIBERY AND CORRUPTION IN ELECTIONS

13263 Bribing electors—fine.

Conduct of election—candidates' statements. Statements made by candidates for municipal office as to their intentions respecting the acquisition of a public utility will not vitiate the election deciding the question of municipal ownership without a showing that the election was affected thereby.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291

Election bribery by third person—disqualifying effect. A candidate having been elected to office is not disqualified merely because some third person may have given or offered a bribe to the voters for the purpose of securing the election of said candidate, unless the candidate actually participated in and approved thereof.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

Electric company offering rate reduction—not candidates' bribery—election valid. Evidence held insufficient to establish bribery and an illegal election in that candidates for municipal office acquiesced in or ratified an advertised plan by which the local electric company offered to reduce its rates and pay back to its subscribers an accumulating sum as a rebate, in the event the voters would elect council members opposed to municipal ownership.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

13284 Political advertisements.

Conduct of election—candidates' statements. Statements made by candidates for municipal office as to their intentions respecting the acquisition of a public utility will not vitiate the election deciding the question of municipal ownership without a showing that the election was affected thereby.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291

CHAPTER 606

BRIBERY AND CORRUPTION OF PUBLIC OFFICIALS

13297 Bribery of jurors or referees.

Testimony tending to show distinct crime—admissibility. Testimony tending to show that the defendant, at a former trial, attempted to bribe the jurors is admissible, notwithstanding the fact that it tends to show the commission of a distinct and separate offense.

State v Friend, 210-980; 230 NW 425

Cross-examination of defendant in criminal case—scope. A defendant who is a witness in his own behalf stands upon the same footing as any other witness in relation to his memory, history, motives, or matters affecting his credibility. He may be asked if he did not, on a former trial, attempt to bribe the jurors.

State v Friend, 210-980; 230 NW 425

13301 Accepting reward for public duty.

Atty. Gen. Opinions. See '28 AG Op 75; '30 AG Op 165; '38 AG Op 363; AG Op Feb. 27, '39

13302 Corruptly influencing officials.

Atty. Gen. Opinion. See '30 AG Op 165

CHAPTER 607

MISCONDUCT OR NEGLECT IN OFFICE

13305 Oppression in official capacity.

Atty. Gen. Opinions. See '25-26 AG Op 270; '30 AG Op 142

13308 Stirring up quarrels and suits.

Discussion. See 18 ILR 266—Agreement with third party

13316.1 Private use of public property.

Atty. Gen. Opinions. See '38 AG Op 837; AG Op March 8, '39

CHAPTER 608

GRATUITIES AND TIPS

13317 Accepting or giving.

Atty. Gen. Opinions. See '28 AG Op 399; '30 AG Op 232

13320 Immunity from prosecution.

Motion to dismiss information—nonincriminating grand jury testimony. A person involuntarily appearing before the grand jury, tho not asked self-incriminating questions, who later is charged by county attorney's information with falsification of records, a subject connected with the grand jury investigation, may not, by certiorari, review the overruling of a motion to dismiss the information on the ground of immunity because of such grand jury appearance, when a remedy by appeal existed.

Kommelter v Dist. Ct., 225-273; 280 NW 511

13324 State employees not to be interested in contracts.

Atty. Gen. Opinions. See '30 AG Op 207; '34 AG Op 443; '36 AG Op 660

13327 Interest in public contracts.

Atty. Gen. Opinions. See '28 AG Op 296, 372; '30 AG Op 340; '34 AG Op 221; '38 AG Op 23; AG Op April 3, '39; April 26, '39

CHAPTER 609

RESISTANCE TO EXECUTION OF PROCESS

13331 Resisting execution of process.

Searches and seizures—execution of warrant—contempt for "dumping" liquor—certiorari review. In a certiorari proceeding a conviction for contempt in resisting the execution of a search warrant will not be reversed where the evidence indicated defendant knew purpose of search and disposed of evidence by dumping liquor before officers could seize it. Defendant's contention ineffectual that "dumping" occurred prior to execution of warrant.

Krueger v Municipal Court, 223-1363; 275 NW 122

Rights and duties of peace officers. In a murder trial where the defendant was charged with killing a peace officer, it was proper to instruct as to the rights and duties of peace officers

and the way testimony on that subject should be considered by the jury.

State v Coleman, 226-968; 285 NW 269

Murder—deceased as peace officer. In a prosecution for murder it was proper to refuse to instruct the jury that the fact that the deceased was a merchant policeman had no bearing on the case.

State v Coleman, 226-968; 285 NW 269

13336 Calling out military force or posse.

Officers—civil liability. Civil liability of officers of the militia and their agents in putting down, under orders of the governor, an insurrection, discussed.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

CHAPTER 612

ESCAPES

13355 Costs and fees.

Atty. Gen. Opinion. See AG Op July 19, '39

13358 Breaking jail—escape.

Atty. Gen. Opinion. See AG Op Jan. 10, '39

Cause of detention. On a prosecution for murder resulting from the attempt by prisoners in jail to escape, the state is privileged to show the reason for the defendant's detention in the jail.

State v Carlson, 203-90; 212 NW 312

CHAPTER 613

VAGRANCY

13371 "Vagrants" defined.

Inebriacy defined. Inebriacy is the state of drunkenness or habitual intoxication.

Maher v Brown, 225-341; 280 NW 553

13395 Compensation for keeping.

Atty. Gen. Opinions. See '30 AG Op 327; '38 AG Op 491

CHAPTER 614

HABITUAL CRIMINALS

13396 Third conviction of felony.

Aggravated punishment—constitutionality. A statute is not ex post facto because it attaches to a crime an increased punishment because of former convictions, even tho such former convictions were had prior to the enactment of the statute.

State v Norris, 203-327; 210 NW 922

Former conviction—sufficiency of charge. A charge of former conviction is all-sufficient when it distinctly alleges the time and place of such conviction and the record and page thereof where it may be found.

State v Lambertti, 204-670; 215 NW 752

Evidence of former convictions. Records of former convictions are not, in and of themselves, sufficient evidence that the defendant on trial and the defendant in the former convictions are one and the same person, even tho the names are the same.

State v Logli, 204-116; 214 NW 490

Identity of persons. The state, under an allegation of former conviction, must establish beyond a reasonable doubt and by evidence other than identity of names, that the defendant on trial and the defendant in a former proved conviction are one and the same person. Evidence held insufficient.

State v Parsons, 206-390; 220 NW 328
State v McCarty, 210-173; 230 NW 379
State v Anderson, 216-887; 247 NW 306

Judgment of former conviction. The record of a former conviction of an accused is admissible under an indictment which properly charges such conviction.

State v Lambertti, 204-670; 215 NW 752

Separate submission—issue of former conviction. On the trial of an indictment, the issue of former conviction should be separately submitted to the jury.

State v Parsons, 206-390; 220 NW 328

Objection first presented on appeal. An accused may not for the first time on appeal present the objection that the indictment pleads a former conviction which is legally unallowable.

State v McGee, 207-334; 221 NW 556

Unallowable former convictions. When an indictment charges a complete offense and is therefore not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Unauthorized allegation of former conviction. An unauthorized allegation in an indictment of a former conviction, and the reception in evidence of proof thereof, constitutes reversible error even tho on conviction the judgment imposed was within the limit provided for a first offense.

State v Bergman, 208-811; 225 NW 852

Submission of unsupported issue—harmless error. The submission to the jury of the unsupported issue of former conviction and the unauthorized finding by the jury that the accused had been so convicted is quite harmless when the sentence imposed was less than the maximum provided for the substantive and proven offense charged in the indictment.

State v Lambertti, 204-670; 215 NW 752

Conviction of primary offense. An accused may very properly be convicted of the primary offense alleged in an indictment, even tho the allegation of a former conviction is unproven.

State v Parsons, 206-390; 220 NW 328

Nonpermissible amendment. An indictment which charges a first offense may not be so amended as to charge a second offense.

State v Herbert, 210-730; 231 NW 318

13398 Evidence.

Judgment record as evidence. The permanent judgment record is admissible on the issue of former conviction.

State v McGee, 207-334; 221 NW 556

Identification of defendants. Proof that defendant, on trial under a certain name, admitted having been three times convicted in a named county of the felonious offense of breaking and entering, together with proof that the district court records of said county revealed said number of convictions (and no more) of a party by the same name, and for breaking and entering, present a jury question on the issue whether the defendant on trial and the defendant in said three convictions are one and the same person.

State v Clarke, 220-1188; 263 NW 837

Permissible proof. Proof of former convictions of violations of the intoxicating liquor statutes, when pleaded in aggravation of a present like charge, is properly proven by the production and proper identification of the original charge, written plea of guilty, and judgment entry of sentence, together with proof that the person therein prosecuted and the defendant presently on trial are one and the same person.

State v Roberts, 222-117; 268 NW 27

Successive offenses—proof by certified copies. Statutes which authorize proof of former convictions of crime to be made by duly authenticated copies of said judgments of convictions are constitutional.

State v Murray, 222-925; 270 NW 355

Possession of liquor—proof of prior convictions unnecessary under guilty plea. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pled guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

13399 Duties of jury and judge.

Method of trial. When the statute requires an allegation of former conviction to be inserted in the indictment, the resulting issue and the issue whether the present and former accused are one and the same person, are properly submitted to the jury on supporting evidence even tho the statute makes the record or a due authentication thereof prima facie evidence that a conviction has been had.

State v McGee, 207-334; 221 NW 556

13400 "Habitual criminal" defined.

Pleadable convictions. This section embraces a conviction accompanied by an indeterminate sentence of not less than one nor more than three years.

Haley v Hollowell, 208-1205; 227 NW 165

13401 Evidence.

Proof of identity of persons. An allegation in an indictment that the defendant has previously been convicted of an offense, as a basis for added punishment, necessarily demands affirmative proof that the person named in the record of the former conviction is the identical person who is on trial on the present indictment. Identity of names is not sufficient proof of identity of persons.

State v Parsons, 206-390; 220 NW 328
State v McCarty, 210-173; 230 NW 379
State v Anderson, 216-887; 247 NW 306

Former conviction. The permanent judgment record is admissible on the issue of former conviction.

State v McGee, 207-334; 221 NW 556

Identification of defendants. Proof that defendant, on trial under a certain name, admitted having been three times convicted in a named county of the felonious offense of "breaking and entering", together with proof

that the district court records of said county revealed said number of convictions (and no more) of a party by the same name, and for "breaking and entering", present a jury question on the issue whether the defendant on trial and the defendant in said three convictions are one and the same person.

State v Clarke, 220-1188; 263 NW 837

Operation while intoxicated—second offense. On the issue of former conviction of driving an automobile while intoxicated, it is highly prejudicial to receive in evidence on the trial to the jury, the files of said former case. So held where said files consisted of (1) the information of the county attorney with minutes of testimony attached, (2) the indictment with the minutes of some thirteen witnesses attached, (3) the bench warrant, and (4) mittimus.

State v De Bont, 223-721; 273 NW 873

TITLE XXXVI

CRIMINAL PROCEDURE

CHAPTER 615

MAGISTRATES, PEACE OFFICERS, AND SPECIAL AGENTS

13403 "Magistrate" defined.

Atty. Gen. Opinions. See '34 AG Op 363; '36 AG Op 313

13404 Power of magistrates.

Atty. Gen. Opinions. See '34 AG Op 363; '36 AG Op 313

Holding under former statute. A judge of the district court, tho a magistrate, may not issue a search warrant for intoxicating liquors.

Latta v Utterback, 202-1116; 211 NW 503

13405 "Peace officers" defined.

Atty. Gen. Opinions. See '25-26 AG Op 179; '28 AG Op 440; '34 AG Op 311; '36 AG Op 339

Peace officer as agent of public. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him. Therefore, the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

13405.1 Duties.

Atty. Gen. Opinions. See '28 AG Op 368; '34 AG Op 311; '36 AG Op 275; AG Op Jan. 16, '39

ANALYSIS

I IN GENERAL
II PERFORMANCE OF DUTIES
III BREACH OF DUTIES
(a) IN GENERAL
(b) FALSE ARREST AND FALSE IMPRISONMENT

I IN GENERAL

Malicious prosecution—ill feeling. Plaintiff in a prosecution for malicious prosecution may show that, many years prior to the prosecution in question, he had arrested the defendant, and that such arrest resulted in ill feeling on the part of defendant against plaintiff. But plaintiff should not make prominent the reason for such arrest.

Fisher v Tullar, 209-35; 227 NW 580

Murder of officer—instructions—rights and duties of peace officers. In a murder trial where the defendant was charged with killing a peace officer, it was proper to instruct as to the rights and duties of peace officers and the way testimony on that subject should be considered by the jury.

State v Coleman, 226-968; 285 NW 269

II PERFORMANCE OF DUTIES

Noncompensable injuries — dropping gun. The statutory provision (editorially classified as part of the workmen's compensation act, §1422, C., '31) which, inter alia, grants compensation to a city marshal when injured "while performing such official duties where there is peril or hazard peculiar to the work of his office", does not authorize compensation for an injury received by a marshal from the accidental discharge of his revolver as it dropped from his pocket while cleaning the floor of the city jail.

Roberts v Colfax, 219-1136; 260 NW 57; 37 NCCA 807

Blood test—authority to take. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a latter manslaughter prosecution against the patient, in receiving in evidence over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

III BREACH OF DUTIES

(a) IN GENERAL

Arrest without warrant—reasonable ground—excessive force. Testimony reviewed and held to present a jury question on the issues (1) whether a defendant-sheriff in an action for damages had reasonable cause to believe that plaintiff's automobile contained the persons who had just prior thereto committed a robbery, (2) whether the sheriff acted as a prudent and reasonable officer would act under similar circumstances, and (3) whether the sheriff employed more force than was apparently necessary to stop the car.

Lawyer v Stansell, 217-111; 250 NW 887

Arrest under warrant—rights and privileges of officer. An officer is privileged to make an arrest under a valid warrant in which the person is described therein by name only, when the person arrested bears that name or is commonly known by such name, and is the person intended, or where the officer in the exercise of due diligence in good faith reasonably believes him to be the person intended.

O'Neill v Keeling, 227-754; 288 NW 887

(b) FALSE ARREST AND FALSE IMPRISONMENT

Exemplary damages—malice as basis. Exemplary damages are allowable for malicious assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

Action for assault. In an action for assault and false imprisonment committed by a mayor and a city marshal, evidence of violations by plaintiff of an ordinance is inadmissible when it appears that, on the occasion in question, no attempt was made to arrest plaintiff for such violations, and when the pleadings are silent as to justification and mitigation.

Schultz v Enlow, 201-1083; 205 NW 972

Arrest without warrant—justification—burden of proof. A party who instigates an arrest without warrant and without later filing an information against the accused must, in an action for false imprisonment, assume the burden to legally justify his action.

Fox v McCurnin, 205-752; 218 NW 499

Civil liability—definite instruction as to elements. The jury should be definitely instructed that there cannot be false imprisonment unless the imprisonment is against the will of the person imprisoned.

Kelley v Gardner, 213-16; 238 NW 470

Civil liability—false imprisonment per se. An arrest without warrant and the imprisonment thereunder become per se unlawful by the failure of the peace officer (or private person) making the arrest to take, on his own motion, the arrested person, without unnecessary delay, before the nearest and most accessible magistrate in the county in which the arrest was made and there to state in affidavit form the grounds on which the arrest was made—and, incidentally, abide by the orders of said magistrate.

Norton v Mathers, 222-1170; 271 NW 321

Justification — jury question. In an action for wrongful arrest and false imprisonment where defendants, Polk county sheriff and deputies, acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury. Hence, court erred in sustaining motion for directed verdict.

Drake v Keeling, (NOR); 287 NW 596

Consent to extradition—no waiver of illegal arrest and detention. In an action for wrongful arrest and false imprisonment of plaintiff by Omaha, Nebr., police upon request of defendants, Polk county, Iowa, sheriff and deputies, where plaintiff waived extradition and was taken to Polk county, altho protesting he did not commit alleged offense, and where imprisonment continued in Iowa even after one of the defendant deputies stated that he was satisfied they had the wrong man, the waiver of extradition did not, as a matter of law, constitute a relinquishment of plaintiff's right to claim such arrest and detention to be unlawful.

Drake v Keeling, (NOR); 287 NW 596

Minutes of testimony—record basis for indictment. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

Arrest with warrant—issue as to person intended. In action for false arrest and imprisonment of plaintiff under an indictment and warrant for commission of an offense committed by another who falsely represented himself to be the plaintiff, issue as to what person was intended by the name used in the warrant could be shown by all the competent facts and circumstances surrounding the transaction out of which the indictment arose and warrant issued; and determination of such question was for jury.

O'Neill v Keeling, 227-754; 288 NW 887

Soldiers preference act—policeman assaulting prisoner—discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Militia officers—civil liability. Civil liability of officers of the militia and their agents in putting down, under orders of the governor, an insurrection, discussed.

State v Dist. Court, 219-1165; 260 NW 73

13411 Power of governor and attorney general.

Atty. Gen. Opinion. See '38 AG Op 780

CHAPTER 616

BUREAU OF CRIMINAL IDENTIFICATION

13416 Criminal identification.

Atty. Gen. Opinion. See '30 AG Op 66

13417.1 Finger and palm prints—duty of sheriff and chief of police.

Finger prints—expert testimony as to ultimate fact. A witness who is expert in the science of dactylography may testify that in his opinion, judgment, or belief, different finger prints were made by one and the same finger, but he may not testify that they were made by one and the same finger.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

CHAPTER 617

SEARCH WARRANTS

13441.01 Definition.

Unlawfully obtained evidence, admissibility. See under §13897 (I)

Injunction to restrain search. One who is shown to be a violator of the law relative to the sale and possession of intoxicating liquors will be accorded no standing in a court of equity in an action by him to enjoin peace officers from picketing his place of business, interfering with his business, or searching his customers without a search warrant.

Dietz v Cavender, 201-989; 208 NW 354

Holding under former statute. A judge of the district court, tho a magistrate, may not issue a search warrant for intoxicating liquors.

Latta v Utterback, 202-1116; 211 NW 503

Void warrant — injunction. Injunction will lie to restrain the search of premises under a void warrant, but not otherwise.

D. M. Drug Co. v Doe, 202-1162; 211 NW 694

Search and seizure act—nonapplicability of federal decisions. Certain recitals in the preface of this act, revising and codifying the search and seizure statutes, did not contemplate uniformity with similar proceedings of the federal government so as to make decisions of the federal courts control the construction of this chapter in preference to decisions of the Iowa supreme court.

Krueger v Mun. Ct., 223-1363; 275 NW 122

13441.03 When authorized.

Discussion. See 14 ILR 315—Searches and seizures

Liquor nuisance — search warrant as evidence. Search warrant proceedings are admissible on a prosecution for nuisance, in order to lay the foundation for the reception in evidence of liquors seized under such proceedings. (§1966-a1, C., '27 [§1966.1, C., '39].)

State v McGee, 207-334; 221 NW 556

13441.04 Information.

See also annotations under Const., Art. I, §8

Warrant by district judge. A judge of the district court was not authorized under §1970 as it existed in C., '24, to issue a search warrant for intoxicating liquors.

Latta v Utterback, 202-1116; 211 NW 503

Information filed with magistrate—issuance of warrant—validity. Where search warrant was issued by magistrate after court clerk's office was closed and information was kept by magistrate and filed with clerk following morning, held, issuance of warrant was proper in view of statute permitting filing of information before magistrate.

State v Doe, 227-1215; 290 NW 518

Information—sufficiency. A sworn information which makes distinct allegations of facts

showing illegal possession of intoxicating liquors, may not be said to be an affidavit of belief only.

State v Friend, 206-615; 220 NW 59

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

Condemnation of gambling devices—judicial notice of information and warrant. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

Presumption of legality. Search warrant proceedings, regular on their face, and shown to have been issued on a sworn information, and a separate oral examination of the informant, will, in the absence of any showing to the contrary, be presumed legal, even tho the facts or evidence showing probable cause do not actually appear in any of the proceedings leading up to the issuance of the warrant.

State v Bruns, 211-826; 232 NW 684

13441.05 Issuance of warrant.

Unlawfully obtained evidence, admissibility. See under §13897 (I)

Atty. Gen. Opinion. See AG Op Jan. 16, '39

Determining probable cause — affidavit together with testimony. An affidavit for a search warrant, to comply with the Iowa constitution, need not contain a recital of facts showing probable cause, as the magistrate may also examine witnesses in determining the existence of probable cause.

Krueger v Mun. Ct., 223-1363; 275 NW 122

Probable cause for issuance—determination—sufficiency. The existence of "probable cause" for the issuance of a search warrant is to be determined by the magistrate issuing such warrant and does not have to be shown in the information itself but may be shown by affidavit attached thereto or by sworn testimony taken before the magistrate prior to the issuance of the warrant; hence, warrant to search for gambling devices was not issued without "probable cause" where state agent who signed and swore to information was also examined under oath.

State v Doe, 227-1215; 290 NW 518

Recital of fact finding. A recital in a search warrant that "the court finds from the evidence that there is in fact sufficient ground and reason that a search warrant issue" conclusively shows that the warrant was not issued on mere belief.

State v Friend, 206-615; 220 NW 59

Presumption of legality. Search warrant proceedings, regular on their face, and shown to have been issued on a sworn information, and a separate oral examination of the informant, will, in the absence of any showing to the contrary, be presumed legal, even tho the facts or evidence showing probable cause do not actually appear in any of the proceedings leading up to the issuance of the warrant.

State v Bruns, 211-826; 232 NW 684

13441.06 Form of warrant.

Search warrant—lack of seal—noninvalidation. The lack of a seal in a search warrant issued by a magistrate does not invalidate proceedings in search for gambling devices.

State v Doe, 227-1215; 290 NW 518

Intoxicating liquors—John Doe warrant—when valid. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is valid as basis to search for intoxicating liquor.

Krueger v Mun. Ct., 223-1363; 275 NW 122

Gambling devices—John Doe warrant—validity. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is a valid basis to search for gambling devices.

State v Doe, 227-1215; 290 NW 518

Condemnation of gambling devices—judicial notice of information and warrant. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

13441.13 Receipt for property.

Failure to receipt for property—effect. Failure of the officer executing a search warrant to receipt for the property seized has no bearing on the question whether the property is receivable in evidence in a prosecution against the party from whom taken.

State v Wenks, 200-669; 202 NW 753

13441.16 Notice of hearing.

Failure to present proposition for reversal—effect. The point or proposition that a magistrate had no legal right to proceed to the

condemnation of liquors seized on a search warrant because he delayed such proceeding until after the lapse of 48 hours after the return on the warrant will not be reviewed on appeal when such point or proposition is not, on appeal, set forth as a reason for reversal or mentioned in the briefs.

State v Bruns, 211-826; 232 NW 684

13441.20 Procedure.

Condemnation of gambling devices. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

13441.21 Right to contest forfeiture.

Jurisdictional questions always presentable. The total want of jurisdiction to issue a search warrant may be raised at any stage of the proceeding.

Latta v Utterback, 202-1116; 211 NW 503

Punch boards and slot machines as gambling devices. Legislature has specifically recognized punch boards and slot machines as gambling devices and they are subject to forfeiture when seized under a valid search warrant, unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited.

State v Doe, 227-1215; 290 NW 518

13441.22 Insufficient description—effect.

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

13441.42 Appeal by state.

Certiorari. A writ of certiorari will not be sustained when to do so would effect no change in the status of the subject matter in controversy. So held where the writ was brought to test the legality of an actual dismissal of search warrant proceedings wherein intoxicating liquors had been seized.

State v Beem, 201-373; 207 NW 361

CHAPTER 618

LIMITATION OF CRIMINAL ACTIONS

13443 Eighteen months limitation.

ANALYSIS

I THE TIME
II HOW QUESTION RAISED
III PROOF
IV INSTRUCTIONS

I THE TIME

Time of commission—instructions. Instructions are proper to the effect that the exact and precise time of the commission of an offense is immaterial provided the jury, by harmonizing the testimony, can find and does find that the offense was committed at some time within the statute of limitation; and this is true even tho the state in its indictment and its testimony rests the charge on a specifically named date, and even tho the testimony of the accused definitely tends to fix his presence on said date at a place other than at the scene of the alleged offense but in the same neighborhood.

State v Davenport, 208-831; 224 NW 557

Harmless error. In stating that which was necessary to convict, the court's omission to state that the offense must have been committed within 18 months prior to an indictment, was without prejudice to defendant where there was no evidence that the crime was committed at any other time than the eighth day of the month preceding the month of trial.

State v Steffens, 116-227; 89 NW 974

II HOW QUESTION RAISED

Discussion. See 21 ILR 639—Pleading guilty—nonwaiver

III PROOF

Rape—time discrepancy in indictment immaterial. A rape conviction is valid altho for a date different than the date fixed in the indictment if within the statute of limitations and if no fatal variance occurs between the indictment and the proof.

State v Beltz, 225-155; 279 NW 386

IV INSTRUCTIONS

Election by state. An instruction that the jury must, in order to convict, find that the act charged was committed within 18 months prior to the finding of the indictment is not in conflict with an election by the state to rely on a transaction which was designated other than by the date when it occurred.

State v Speck, 202-732; 210 NW 913

13444 Three-year limitation.

Atty. Gen. Opinions. See '28 AG Op 310; '32 AG Op 80; AG Op March 2, '39

Proof of time of offense—instruction. It is not erroneous for the court to instruct as to the necessity for proof of the commission of the offense within the statute of limitation, naming the full period, even tho the testimony of guilt is solely confined to a specific day within said period.

State v Canalle, 206-1169; 221 NW 847

Instructions in re time and venue. Failure of instructions to require the jury to make any finding as to time and venue is quite harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

Instructions. An instruction which sets forth the material allegations of the indictment is not subject to the objection that the recital would apply to a transaction barred by the statute, when elsewhere the court specifically confines the jury to the transaction alleged in the indictment.

State v Friend, 210-980; 230 NW 425

Certiorari — revoking suspended sentence. Tho an invalid original entry of judgment in a criminal cause may be beyond review by certiorari because of the statute of limitation, yet certiorari will lie, if timely, to review a subsequent order of court revoking the suspended part of said former judgment and ordering the accused committed to jail.

Dayton v Bechly, 213-1305; 241 NW 416

Time of commission of offense. An instruction justifying a conviction for possessing intoxicating liquors at any time within three years prior to the return of the indictment is unobjectionable, when the indictment, proof, and trial were exclusively centered on one particular transaction occurring during said period.

State v Healy, 217-1155; 251 NW 649

Necessary identification of offense. Instructions that a defendant may be found guilty of maintaining a liquor nuisance if he committed the offense within three years prior to the return of the indictment will not be deemed to put the defendant on trial for an alleged liquor offense on which the defendant was acquitted within said three years when the specific nature of the latter offense is not made to appear.

State v Kelly, 217-1305; 253 NW 49

Limitation of prosecutions. In a prosecution for bootlegging it is proper to instruct the jury that the exact date of guilt is not material provided it is shown that the offense was committed at some time within three years just prior to the filing of the trial information, even tho the evidence is such that if the defendant be guilty he is guilty as of a definite date.

State v Howard, 223-767; 273 NW 849

13445 One-year limitation.

Harmless inaccuracy. An inaccuracy in the instructions as to the period of time during which the jury might find that the accused had committed the offense is quite harmless when all the evidence showed that, if the offense was committed, it was committed within one year prior to the filing of the information and on a specified day.

State v Brundage, 200-1394; 206 NW 607

CHAPTER 619

JURISDICTION OF PUBLIC OFFENSES

13448 Persons subject to laws of state.

Atty. Gen. Opinion. See AG Op Feb. 10, '39

Wrongfully brought within state. Persons wrongfully brought within the state are subject to the jurisdiction of the state.

State v Ross and Mann, 21-467
State v Day, 58-678; 12 NW 733

Custody of person essential. The district court has no jurisdiction over the person of an indicted party until it in some manner acquires, under the indictment, the actual custody of the person of the said party; and the court does not have such custody because of the fact that the state is holding the party in confinement in the penitentiary under a former conviction.

State v Judkins, 200-1234; 206 NW 119

Insufficient defect to exclude jurisdiction. A trial information which charges three defendants jointly with making an assault with a deadly weapon, while jointly attempting to commit a robbery, and that one of them fired the fatal shot with the specific intent to kill "of their malice aforethought", is not so fatally defective as to deprive the court, on a plea of guilty, of jurisdiction to pass sentence on all the defendants.

McBain v Hollowell, 202-391; 210 NW 461

13449 Jurisdiction of district court.

ANALYSIS

I LAYING VENUE
II PROOF OF VENUE
III MISSISSIPPI AND MISSOURI RIVERS

I LAYING VENUE

Failure to recognize venue—instructions. An instruction which may be deemed erroneous because it fails to recognize the venue in a

criminal action, is rendered unobjectionable by other instructions which clearly confine the jury to the venue alleged in the indictment.

State v Hughey, 208-842; 226 NW 371

Change of venue on application of state. The legislature may constitutionally grant to the state the right to a change of venue in a criminal prosecution.

State v Dist. Court, 213-822; 238 NW 290

Locality in indictment. An indictment against a defendant for keeping a house of prostitution is sufficient as to venue if it charges the offense as committed within the county.

State v Shaw, 35-575

Homicide—optional venues. A prosecution for murder by means of an attempted abortion may be prosecuted in the county wherein the resulting death occurred even tho the unlawful operation was performed in another county of this state.

State v Sweeney, 203-1305; 214 NW 735

Abortion. In a prosecution for abortion, the jurisdiction is with the county wherein the medicine intended to produce the miscarriage was administered, and not that where the miscarriage took place.

State v Hollenbeck, 36-112

Embezzlement—venue. The venue can be laid in a county where an agent failed to account.

State v Hengen, 106-711; 77 NW 453

Wife desertion. The venue in a prosecution for desertion of the wife by the husband may be laid in the county in this state in which the husband and wife had, at the husband's instigation, mutually agreed to live, and in which he refused to provide for her; and this is true even tho it be conceded that the husband retained his legal residence in a foreign state.

State v Jinkins, 189-1233; 179 NW 541

Larceny. The jurisdiction of the district court in a case of larceny is determined by the value of the property stolen as found in the indictment by the grand jury, and not by the value as ascertained by the verdict of the petit jury.

State v Stingley and McCormack, 10-488

Instructions in re venue. Failure of instructions to require the jury to make any finding as to time and venue is quite harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

Degree of offense. The defendant may be convicted in the district court of an offense of which said court had no original jurisdiction, under an indictment for a higher offense of which that court has jurisdiction.

State v Shepard, 10-126

II PROOF OF VENUE

Venue. Venue need not be made to appear by positive testimony. A jury question is created when the venue is fairly inferable from the testimony.

State v Caskey, 200-1397; 206 NW 280
State v Ostby, 203-333; 210 NW 934; 212 NW 550

Venue—evidence. Venue is established by the testimony of a witness who describes the locus in quo and who testifies that such place is in a named county.

State v Brewster, 208-122; 222 NW 6

Reopening case. The court may reopen a case after the state has rested, and permit the state to offer further testimony on the issue of venue.

State v Anderson, 209-510; 228 NW 353; 67 ALR 1366

Venue—proof by circumstantial evidence. The venue of a criminal offense may be established by circumstantial evidence and the just and allowable inferences deducible therefrom.

State v McCutchan, 219-1029; 259 NW 23

Venue—necessity for proof. In a prosecution for crime, a conviction cannot be sustained in the absence of proof of the venue. Evidence held insufficient to establish venue even by justifiable inference.

State v Brooks, 222-651; 269 NW 875

Judicial notice. Where a crime is shown to have been committed in close proximity to a certain town the court will take judicial notice of the location of the town, and failure to otherwise prove the venue is not fatal.

State v Mitchell, 139-455; 116 NW 808

Judicial notice of county seats. Courts are authorized to take judicial notice of the location of a county seat, and that it is within the limits of the county where the court is being held.

State v Laffer, 38-422

Venue. The location of incorporated municipalities within a certain county is a matter of judicial notice.

State v Fishel, 140-460; 118 NW 763

Territorial jurisdiction. Pottawattamie county is divided for judicial purposes by the west line of range 40, and where it is shown that a crime was committed in said county at a place 15 miles east of Council Bluffs, the supreme court will take judicial notice of the fact that such place is within the jurisdiction of the western division of the county.

State v Arthur, 129-235; 105 NW 422

Instructions in re time and venue. Failure of instructions to require the jury to make any finding as to time and venue is quite

harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

III MISSISSIPPI AND MISSOURI RIVERS

Mississippi river. District courts of counties bordering on the Mississippi river have jurisdiction over offenses on the river even tho past the middle stream.

State v Mullen, 35-199

See State v Moyers, 155-678; 136 NW 896

Jurisdiction—on boundary waters. The state of Iowa has jurisdiction to try and determine the offense known, under our game laws, as the unlawful use of decoys (in the form of live ducks), tho said offense be committed on a temporary sandbar located in the Missouri river and west of the middle of the main channel thereof.

State v Rorris, 222-1348; 271 NW 514

13451 Offenses partly in county.

Forgery. Where one signs another's name in one county, and fills in blanks in another county, he is guilty of forgery in the latter county, and venue will be properly laid there.

State v Spayde, 110-726; 80 NW 1058

False pretenses. An indictment for obtaining a signature to a deed by false representations, alleging that accused, being in Dallas county, represented that he was owner of certain property in Des Moines, and had authority to convey it for certain property in such county, and then and there offered to sell and procure a deed to such Des Moines property, properly lays the venue in Dallas county, the words "then and there" having reference to said county and not to the description of the property.

State v Tripp, 113-698; 84 NW 546

Offense committed in part in different counties. An indictment for obtaining money by false pretenses may lay the venue in the county in which the false representations were made, and in which the check was obtained, even tho the money on the check was obtained in a foreign county of this state.

State v Detloff, 201-159; 205 NW 534

Indictment—false pretenses. An indictment for false pretenses may lay the venue wholly in one county and be supported by evidence that it was in part committed in that county and in part in another county of this state.

State v Detloff, 201-159; 205 NW 534

False pretenses. The crime of obtaining property by false pretenses may be committed partly in one county and partly in another and thereby justify the return of an indictment in either county.

State v George, 206-826; 221 NW 344

Instruction as to venue. In prosecution for subornation of perjury, an instruction as to venue was proper when it stated that evidence introduced tended to show defendant had solicited a witness to give the claimed perjured testimony in a trial, and that such solicitations, or some of them, were made in Appanoose county, and if defendant continued in his attempt to procure the witness and called and had witness testify as a witness in Davis county, knowing or believing witness would give perjured testimony, and if witness did in fact commit perjury in Davis county, the defendant could be prosecuted and convicted in Davis county.

State v Hartwick, 228- ; 290 NW 523

13452 Offenses near boundary of two counties.

Atty. Gen. Opinion. See '28 AG Op 444

13453 Offenses on trains, boats, or aircraft.

Discussion. See 16 ILR 261—Former jeopardy

CHAPTER 620

PRELIMINARY INFORMATION AND WARRANTS OF ARREST

13459 Form.

Informations triable before a justice of the peace. See Ch 627

Preliminary complaint — total insufficiency. Unsigned and unverified paper received and held lacking in substantially every requirement of law and therefore insufficient to support a conviction.

State v Ford, 222-655; 269 NW 926

13460 Filing—issuing warrant.

Atty. Gen. Opinion. See AG Op March 30, '39

13461 Form of warrant.

Atty. Gen. Opinion. See '25-26 AG Op 205

Warrant sufficient. A warrant of arrest in a criminal case which follows substantially the form given in this section is legally sufficient.

Devine v State, 4-443

Wrong name. If the warrant was issued against the plaintiff in the wrong name, when his right name was unknown, such fact will not render his arrest illegal or void.

Allen v Leonard, 28-529

13462 Directed to peace officer—contents.

Searches and seizures—John Doe warrant—when valid. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is valid as basis to search for intoxicating liquor.

Krueger v Mun. Court, 223-1363; 275 NW 122

CHAPTER 621

ARREST: GENERAL PROVISIONS

13465 "Arrest" defined—time of making.

Discussion. See 25 ILR 201—Law of arrest

Distribution of reward. The individual members of a committee appointed by an unincorporated association of banks for the purpose of making distribution of a reward offered by the association for the apprehension of criminals are not responsible to third parties for an erroneous decision as to the manner in which such reward should be distributed.

Bird v Barrett, 207-1158; 224 NW 556

Offer of reward — insufficient revocation. Where an unincorporated bankers association offered, in the form of a printed poster, a reward for facts leading to the conviction of bank robbers, the act of the cashier of a member bank in removing said poster from his bank and destroying it, and in declining, for his bank, to pay further dues to the association, will not, in and of itself, constitute a revocation of the offered reward, the evident intent of the offerer being to continue the offer for a reasonable time, and the offer being acted on within such time.

Carr v Bankers Assn., 222-411; 269 NW 494; 107 ALR 1080

Offer of reward by nonlegal entity—liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Bankers Assn., 222-411; 269 NW 494; 107 ALR 1080

13466 Acts necessary.

Discussion. See 24 ILR 154—Deadly force—fleeing arrestee

Atty. Gen. Opinion. See '34 AG Op 563

13468 Arrests by peace officers.

Atty. Gen. Opinion. See '34 AG Op 563

ANALYSIS

I IN GENERAL
II WITH WARRANT
III WITHOUT WARRANT

I IN GENERAL

Reasonable ground—excessive force. Testimony reviewed and held to present a jury question on the issues (1) whether a defendant-sheriff in an action for damages had reasonable cause to believe that plaintiff's automobile contained the persons who had just prior thereto committed a robbery, (2) whether the sheriff acted as a prudent and reasonable officer would act under similar circumstances, and (3) whether the sheriff employed more force than was apparently necessary to stop the car.

Lawyer v Stansell, 217-111; 250 NW 887

False arrest—questions for jury. Evidence reviewed in action for damages for false arrest and malicious prosecution (padlocked schoolhouse case), and held such as to preclude the

I IN GENERAL—concluded

court from determining the question of want of probable cause, malice, and good-faith reliance on the advice of counsel.

Gripp v Crittenden, 223-240; 271 NW 599

Justification—jury question. In an action for wrongful arrest and false imprisonment, where defendants, Polk county sheriff and deputies, acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury, hence court erred in sustaining motion for directed verdict.

Drake v Keeling, (NOR); 287 NW 596

Consent to extradition—no waiver of illegal arrest and detention. In an action for wrongful arrest and false imprisonment of plaintiff by Omaha, Nebr., police upon request of defendants, Polk county, Iowa sheriff and deputies, where plaintiff waived extradition and was taken to Polk county, altho protesting he did not commit alleged offense, and where imprisonment continued in Iowa even after one of the defendant deputies stated that he was satisfied they had the wrong man, the waiver of extradition did not, as a matter of law, constitute a relinquishment of plaintiff's right to claim such arrest and detention to be unlawful.

Drake v Keeling, (NOR); 287 NW 596

II WITH WARRANT

Arrest of witness in contempt. A witness who is in contempt may be arrested upon a warrant directing the arrest in vacation, but the court may also order his discharge by the officers intrusted with the writ, upon bail fixed by the court. These proceedings, however, are authorized only in a case of actual contempt, and when necessary to the proper administration of justice.

State v Archer, 48-310

Issue as to person intended. In action for false arrest and imprisonment of plaintiff under an indictment and warrant for commission of an offense committed by another who falsely represented himself to be the plaintiff, issue as to what person was intended by the name used in the warrant could be shown by all the competent facts and circumstances surrounding the transaction out of which the indictment arose and warrant issued, and determination of such question was for jury.

O'Neill v Keeling, 227-754; 288 NW 887

III WITHOUT WARRANT

Discussion. See 16 ILR 434—Arrest without warrant

Arrest without warrant — justification. A party who instigates an arrest without warrant and without later filing an information against the accused must, in an action for false imprisonment, assume the burden to legally justify his action.

Fox v McCurnin, 205-752; 218 NW 499

Arrest without warrant — validity — jury question. Whether an arrest or attempted arrest by an officer without warrant was valid, may, under applicable evidence, be a question for the jury to decide. So held where the accused claimed the right of self-defense because of the claimed invalidity of the arrest.

State v Fador, 222-134; 268 NW 625

13469 Arrests by private persons.

Atty. Gen. Opinions. See '25-26 AG Op 91; '38 AG Op 170

13471 Manner of making.

Atty. Gen. Opinion. See '34 AG Op 563

13472 Resistance to arrest—use of force.

Atty. Gen. Opinion. See '34 AG Op 563

Death—burden of proof to show self-defense. A peace officer, in attempting an arrest for a misdemeanor, has no legal right, unless he acts in legal self-defense, to kill the offender. It follows that, if he does kill, and is sued for damages consequent on the death, he has the burden to prove self-defense, especially so (1) when death was effected by a deadly weapon used in a deadly manner, (2) when the defendant distinctly pleaded self-defense as a defense, and (3) when plaintiff neither by plea nor proof presented the question of self-defense.

Klinkel v Saddler, 211-368; 233 NW 538

Use of force. In making an arrest the defendant had no right to use any other means or greater force than was reasonably necessary to accomplish that purpose. In his effort to make such arrest he had no right to make use of a deadly weapon in a deadly manner to accomplish such purpose.

State v Towne, 180-339; 160 NW 10

Self-defense—as peace officer or as individual. Under the record in a death action for shooting an alleged assailant, a peace officer under a self-defense plea had no different or greater rights in the exercise of this defense as a peace officer than he had as an individual.

Boyle v Bornholtz, 224-90; 275 NW 479

13478 Arrests by private person—disposition of prisoner.

Atty. Gen. Opinion. See '38 AG Op 170

13479 Conveying prisoner to jail—fees and expenses.

Atty. Gen. Opinions. See '38 AG Op 326; AG Op Feb. 21, '39

CHAPTER 622

ARREST BY WARRANT

13481 In case of arrest for felony.

Atty. Gen. Opinion. See '25-26 AG Op 205

13482 In case of arrest for misdemeanor.

Atty. Gen. Opinion. See AG Op Sept. 13, '39

CHAPTER 623

ARREST WITHOUT WARRANT

13488 Disposition of prisoner.

Atty. Gen. Opinion. See '38 AG Op 47

False imprisonment per se. An arrest without warrant and the imprisonment thereunder become per se unlawful by the failure of the peace officer (or private person) making the arrest to take, on his own motion, the arrested person, without unnecessary delay, before the nearest and most accessible magistrate in the county in which the arrest was made and to there state in affidavit form the grounds on which the arrest was made—and, incidentally, abide by the orders of said magistrate.

Norton v Mathers, 222-1170; 271 NW 321

Insane person. The law governing the right to arrest without warrant a person for crime has no application to the right to arrest without warrant a person on the charge of being insane.

Bisgaard v Duvall, 169-711; 151 NW 1051

CHAPTER 624

FUGITIVES FROM JUSTICE

13497 Agents in extradition cases.

Discussion. See 19 ILR 462—Extradition

Atty. Gen. Opinions. See '25-26 AG Op 285; '28 AG Op 285; '36 AG Op 361; '38 AG Op 87, 366

Consent to extradition—no waiver of illegal arrest and detention. In an action for wrongful arrest and false imprisonment of plaintiff by Omaha, Nebr., police upon request of defendants, Polk county, Iowa, sheriff and deputies, where plaintiff waived extradition and was taken to Polk county, altho protesting he did not commit alleged offense, and where imprisonment continued in Iowa even after one of the defendant deputies stated that he was satisfied they had the wrong man, the waiver of extradition did not as a matter of law constitute a relinquishment of plaintiff's right to claim such arrest and detention to be unlawful.

Drake v Keeling, (NOR); 287 NW 596

13498 Fees and expenses.

Atty. Gen. Opinions. See '28 AG Op 285; '38 AG Op 87

13499 Payment of claims.

Atty. Gen. Opinion. See '38 AG Op 87

13501 Sworn evidence and copy of indictment necessary.

Atty. Gen. Opinion. See '36 AG Op 261

Form of accusation. Where it is a proper method of charging crime in the state where committed, a complaint or information duly sworn to will constitute the basis of an extradition proceeding.

Morrison v Dwyer, 143-502; 121 NW 1064

Nonpresence in demanding state. A party cannot be a fugitive from justice of a demanding state, and therefore cannot be legally extradited to said state, when, admittedly, he has never been, physically, within the demanding state since a long time prior to the commission of the offense charged in said state, to wit, nonsupport of his child; and, legally, it matters not that the accused personally caused the pregnant mother to go to, and enter, and remain in, the demanding state.

Drumm v Pederson, 219-642; 259 NW 208

Finding by governor not conclusive. Principle reaffirmed that on habeas corpus to test the legality of the extradition proceedings, the determination of the governor that the party sought to be extradited is, in fact, a fugitive from justice, is not conclusive on the court.

Drumm v Pederson, 219-642; 259 NW 208

13502 Warrant of arrest.

Atty. Gen. Opinions. See '25-26 AG Op 284; '38 AG Op 366

13503 Filing complaint and issuance of warrant.

Atty. Gen. Opinion. See '38 AG Op 348

Variance—extradition and indictment. Where defendant was extradited from Canada for setting fire to and burning a certain brick "house" occupied and inhabited as a retail shoe store, and was indicted for burning a certain store "building" then and there occupied as a store, the objection that the crimes charged in the information and in the indictment were not the same, was without merit.

State v Spiegel, 111-701; 83 NW 722

13509 Liability of complainant—costs.

Atty. Gen. Opinion. See '38 AG Op 348

CHAPTER 626

PRELIMINARY EXAMINATIONS

13527 Procedure—waiver.

Extent of waiver. The waiver of preliminary examination before the committing magistrate will not deprive the defendant of the right, in a habeas corpus proceeding, to introduce testimony for the purpose of showing he is detained upon insufficient evidence to sustain the charge.

Cowell v Patterson, 49-514

13540 Minutes of examination.

Defendant discharged. Statute does not require the minutes of a preliminary examination to be filed with the clerk of the district court in a case where the defendant is discharged upon such examination.

State v Helvin, 65-289; 21 NW 645

Magistrate's return as part of record. The entire return by a magistrate to the district court of a preliminary hearing is a part of the record of a trial on an indictment growing out of such hearing.

State v Japone, 202-450; 209 NW 468

13544 Commitment—indorsement on minutes.

Duty of defendant to answer. A defendant in a criminal proceeding who, on preliminary hearing, is "held to answer", and gives bail in the ordinary form (§13612, C., '31), must answer by appearance at each and every material stage of a proceeding either under an indictment or under county attorney information, even tho no bench warrant is issued or new bond given, under the final charge.

State v Walker, 217-229; 251 NW 56

13546 Warrant of commitment.

Warrant. The warrant of commitment, issuing to the sheriff of the county in which the examination is held, will authorize detention and custody by the sheriff of the next most convenient county having a jail.

Cowell v Patterson, 49-514

13551 Return to district court.

Return as part of record. The entire return by a magistrate to the district court of a preliminary hearing is a part of the record of a trial on an indictment growing out of such hearing.

State v Japone, 202-450; 209 NW 468

13555 Liability of informant—costs.

Malicious prosecution. See under §13728 (II)

Atty. Gen. Opinion. See '38 AG Op 94

CHAPTER 627

TRIAL OF NONINDICTABLE OFFENSES

13557 Jurisdiction.

Atty. Gen. Opinions. See '25-26 AG Op 205; '38 AG Op 47

Requirements for valid decree. To be valid and binding the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

Indictment charging fine and costs. A prosecution may not be maintained under an indictment which simply charges an offense which is punishable by a maximum fine of $100 and costs, and by imprisonment until the fine and costs are paid.

State v Wyatt, 207-319; 222 NW 866

Presumption of jurisdiction. When exclusive jurisdiction of any subject is conferred by law upon an inferior court, and it has acquired jurisdiction of the subject matter in the manner prescribed by law, every presumption thereafter is in favor of the validity of the proceedings, and objection to irregularity in its action can be taken only on appeal or by certiorari.

State v Berry, 12-58

Assault and battery. The offense of assault and battery is triable summarily before a justice of the peace or other officer authorized by law on information under oath without indictment or the intervention of a grand jury, and not otherwise.

State v Lee, 37-402

Liquor condemnation. The action for the condemnation and destruction of intoxicating liquor kept for illegal sale is a criminal case, and is not affected by the constitutional provision limiting the jurisdiction of justices of the peace in civil cases.

State v Arlen, 71-216; 32 NW 267

Illegal fishing—several counts. Several counts charging the seining of fish may be embraced in a single information, and the fact that the aggregate fine which may be

imposed upon conviction will exceed $100, or imprisonment for more than 30 days, will not deprive the justice of jurisdiction.

State v Denhardt, 129-135; 105 NW 385

Assault with intent. An information charging an assault with intent charges an indictable offense, and one which a justice of the peace has no jurisdiction to try. Nor would an appeal from a judgment of conviction, rendered by a justice in such case, confer any jurisdiction upon the district court.

State v Carpenter, 23-506

Appeal excludes habeas corpus. Habeas corpus will not lie to test the sufficiency of the evidence to sustain a judgment of conviction by a justice of the peace under an information which actually charges an offense, the punishment for which does not exceed either a fine of $100 or imprisonment for 30 days.

Hallway v Byers, 205-936; 218 NW 905

False check—amount of check determines grade of offense—jurisdiction. In a prosecution for false uttering of a bank check, it is the amount of the check that determines the grade of the offense and not the amount received, provided something of value is received for it. Where a check was $20 or more, but only $2 in cash was received, the district court was in error in directing a verdict for defendant on the ground that the offense should be prosecuted in the justice of peace court.

State v Dillard, 225-915; 281 NW 842

13558 Information.

Information by private prosecutor. A nonindictable misdemeanor may be prosecuted under an information filed and sworn to by a private individual.

State v Porter, 206-1247; 220 NW 100

Malicious prosecution. It is a complete defense to an action for malicious prosecution that the prosecuting witness in good faith disclosed to the county attorney all the facts possessed by him, and was advised by such attorney that such facts were (1) sufficient to show the commission of an offense, and (2) sufficient to warrant the institution of criminal proceedings against the accused; and it matters not that the proceedings were commenced by preliminary information, instead of by original proceedings before the grand jury, as suggested by the attorney.

Granteer v Thompson, 203-127; 208 NW 497

Disclosure to county attorney. A private prosecutor is not liable in damages for malicious prosecution when, before signing the preliminary information, he, in good faith, makes a full and fair statement to the county attorney of all the facts and circumstances within his knowledge concerning the offense in question and is, in effect, assured by said public official that he would be warranted in commencing the prosecution; and this is true even tho the county attorney did express a preference on his part to place the prosecution before the grand jury without the filing of a preliminary information.

Granteer v Thompson, 207-1204; 224 NW 528

Speeding charge—unsworn information first challenged on appeal. Where a municipal court information charging speeding was not sworn to, defendant did not waive his right to challenge its sufficiency to sustain a conviction, nor lose his right to raise such objection on appeal in supreme court, by failure to question the sufficiency of information before the trial.

State v Weston, 225-1377; 282 NW 774

13559 Contents of information.

Atty. Gen. Opinion. See '25-26 AG Op 205

ANALYSIS

I IN GENERAL
II FACTS CONSTITUTING OFFENSE
III AMENDMENT OF INFORMATION

I IN GENERAL

Formal requisites—waiver. The objection that an information for a nonindictable misdemeanor is indefinite, vague, and uncertain in its statement of facts is waived by defendant's failure to challenge the information prior to the entry of his plea.

State v Porter, 206-1247; 220 NW 100

Slipshod preparation of information. Where a defendant was convicted of a motor vehicle traffic offense in a municipal court under an information filed by a police officer, in a slipshod manner, which information defendant contended gave court no jurisdiction, and when, on appeal, the supreme court was unable to decipher written entries in the information, the construction placed by attorneys as to what such entries were could not be accepted by such court.

State v Weston, 225-1377; 282 NW 774

II FACTS CONSTITUTING OFFENSE

Total insufficiency. Unsigned and unverified paper reviewed and held lacking in substantially every requirement of law and, therefore, insufficient to support a conviction.

State v Ford, 222-655; 269 NW 926

Unsworn information—no basis to support conviction. An unsworn municipal court information charging defendant with speeding will not support a conviction.

State v Weston, 225-1377; 282 NW 774

III AMENDMENT OF INFORMATION

Striking unnecessary allegation in re nuisance. A trial information by the county attorney for maintaining an intoxicating liquor nuisance in a named county "in the city of Ce-

III AMENDMENT OF INFORMATION—concluded

dar Rapids" may, after the jury is sworn, be amended by striking therefrom the clause "in the city of Cedar Rapids", it appearing that the said clause was a manifest error, and that the accused so knew, and requested no further time for trial.

State v Japone, 202-450; 209 NW 468

Waiver of formal amendment. The objection that no formal amendment to an indictment was filed after the sustaining of the motion to amend, will be deemed waived when the trial was conducted precisely as it would have been conducted had the formal amendment been filed, and when the objection was withheld until exceptions to the instructions were filed.

State v Japone, 202-450; 209 NW 468

13560 Form of information.

Information in name of state. Under special charter of Cedar Rapids providing that proceedings for the violation of ordinances may be by information in the name of the state, an information for the violation of an ordinance of said city, entitled in the name of the state instead of the city is good.

State v Wilson, 109-93; 80 NW 230

13562 Warrant of arrest.

Atty. Gen. Opinion. See AG Op March 30, '39

13566 Wrong name—waiver.

Identity of accused. See under §13864

13567 Pleadings of defendant.

Formal requisites — waiver. The objection that an information for a nonindictable misdemeanor is indefinite, vague, and uncertain in its statement of facts is waived by defendant's failure to challenge the information prior to the entry of his plea.

State v Porter, 206-1247; 220 NW 100

13569 Change of venue—grounds.

Atty. Gen. Opinion. See '36 AG Op 313

13570 Change allowed—transmission of papers.

Atty. Gen. Opinion. See '36 AG Op 313

Refusal of change of venue—certiorari. The refusal of a mayor to grant defendant a change of venue in a prosecution for assault and battery, on the ground "that the mayor was prejudiced against him", constitutes an illegality reviewable on certiorari, an appeal from the judgment of the mayor on the merits not being a plain, speedy, and adequate remedy.

Shearer v Sayre, 207-203; 222 NW 445

13580 Jury of six.

Number of jurors. The trial of a nonindictable misdemeanor may legally be had in municipal court before a jury of six persons.

State v Porter, 206-1247; 220 NW 100

Constitutional provision. The constitution guarantees a right of trial by a jury of 12 men, but under Art. I, §9, the general assembly may authorize a trial by a jury of less than 12 for offenses cognizable by inferior courts.

Bryan v State, 4-349

Number of jurors. The accused is entitled to a jury of 12 men, but may be tried by a jury of less number in an inferior court, while a trial by a jury of 12 may be secured by an appeal to a higher court.

State v Beneke, 9-203

13587 Judgment—rules.

Unlawful suspension. The court has no power in a criminal case to enter a suspension of sentence during good behavior and on payment of the costs.

State v Hamilton, 206-414; 220 NW 313

13588 Imprisonment for nonpayment of fine.

Atty. Gen. Opinion. See '30 AG Op 329

Length of time. The judgment of a justice of the peace committing a defendant to prison until the payment of a fine imposed is not void because it does not specify the extent of the imprisonment, the limit in such case being determined by statute.

Jackson v Boyd, 53-536; 5 NW 734

13590 Costs taxed to prosecutor.

Malicious prosecution. See under §13728

Where taxable to county. Where a criminal action was dismissed by a justice of the peace at the time set for trial, and the costs were taxed to the state to be paid by the county, it will be presumed, in the absence of an affirmative showing to the contrary, that the discretion of the justice in not taxing the costs against the prosecuting witness, was properly and legally exercised.

Palo Alto v Moncrief, 58-131; 12 NW 142

13593 Correction of record.

Correction of transcript. The district court, on appeal from a mayor's court, may, on affidavit proof, correct an erroneous recital in the transcript relative to the taking of an appeal.

Creston v Kessler, 202-372; 210 NW 464

Presumption of not guilty plea. When the record discloses that in the trial before the justice the defendant was present and asked for a jury, a plea of not guilty is presumed if

the justice failed to enter it upon his docket. In such cases the district court may order a plea of not guilty to be supplied as an apparent omission on the face of the record.

State v McCombs, 13-426

13596 Fine—payment to justice.

Atty. Gen. Opinion. See '28 AG Op 150

13599 Appeal—how taken.

ANALYSIS

I IN GENERAL
II HOW TAKEN

I IN GENERAL

Includes trial before mayor. When a city charter vests the mayor with exclusive original jurisdiction for the violation of the ordinances of the city, and allows appeals from his decisions in the same cases, time, and manner as may at any time be allowed by law from those of other justices, held, that appeals were allowed from the judgment by the mayor in cases where his jurisdiction was exclusive.

Conboy v Iowa City, 2-90

II HOW TAKEN

Appeal excludes habeas corpus. Habeas corpus will not lie to test the sufficiency of the evidence to sustain a judgment of conviction by a justice of the peace under an information which actually charges an offense, the punishment for which does not exceed either a fine of $100 or imprisonment for 30 days.

Hallway v Byers, 205-936; 218 NW 905

13604 Trial on appeal—procedure.

ANALYSIS

I IN GENERAL
II SEVERAL COUNTS

I IN GENERAL

Jury may be waived.

Lovilia (Town) v Cobb, 126-557; 102 NW 496

Supreme court. It is only such errors as affect the substantial rights of a party that can be regarded by the supreme court even in criminal cases.

Hintermeister v State, 1-101

II SEVERAL COUNTS

No annotations in this volume

13607 Appeal to supreme court—procedure.

Jurisdiction. The supreme court will not acquire jurisdiction of a cause arising in police court unless the same was in the first instance appealable to the district court, and the fact that defendant did not appeal from an order of the district court overruling his motion to dismiss would not preclude his raising the question of jurisdiction in the supreme court, as the question of jurisdiction may be raised at any stage of the proceedings.

State v Ford, 161-323; 142 NW 984

CHAPTER 628

BAIL

13609 Bailable offenses.

Misconduct in opening statement—failure to give bail. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

Purpose of bail. The purpose of bail is to assure the attendance and punishment of criminals rather than to obtain profit for the state by the forfeiture of the bond.

State v Thomason, 226-1057; 285 NW 636

13611 Bail on commitment to answer.

Power of county judge. The county judge has power, under the statute, to admit to bail any person held to answer by another magistrate for a bailable offense; and a bail bond accepted and approved by the county judge of another county from the one in which the accused was examined and committed is not void for want of authority in that office to accept and approve such bonds.

State v Klingman, 14-404

Duty of defendant to answer. A defendant in a criminal proceeding who, on preliminary hearing, is "held to answer", and gives bail in the ordinary form, must answer by appearance at each and every material stage of a proceeding either under an indictment or under county attorney information, even tho no bench warrant is issued, or new bond given, under the final charge.

State v Walker, 217-229; 251 NW 56

Nonappearance for trial in misdemeanor cases. Where, before forfeiting a bail bond, the court waits two days for the defendant to appear for trial under a misdemeanor charge,

with no request from the defendant's attorney that the trial proceed in the absence of the defendant, it is too late to insist successfully that the sureties on the bail bond were exonerated because the trial might have proceeded in the absence of the defendant.

State v Walker, 217-229; 251 NW 56

13615 Officers required to take bail.

Validity. A recognizance executed before the clerk of the court of one county for the appearance of the defendant before the court of another county wherein the indictment is pending, and where the bond is filed is not invalid. (Under this section such matters are merely directory and failure to conform does not vitiate the bond.)

State v Wells, 36-238

13617 Bail on appeal—conditions.

Discussion. See 12 ILR 418—Appeal bond surety's liability for fine

Costs. An appeal bond on appeal from a judgment of conviction for felony does not embrace liability for costs.

Van Buren Co. v Bradford, 202-440; 210 NW 443

Nonliability for costs. An appeal bond on appeal from a judgment of imprisonment and fine, conditioned to "in all respects abide the orders and judgment of the supreme court" does not, in case of affirmance, embrace liability for costs.

State v Gregory, 205-707; 216 NW 17

Liability for fine. An appeal bond on appeal from a judgment of imprisonment and fine, and conditioned to "in all respects abide the orders and judgment of the supreme court" carries, in case of affirmance, liability for the payment of the fine, even tho the defendant is surrendered for imprisonment.

State v Gregory, 205-707; 216 NW 17

Bond secures fine. When an accused in a criminal cause is fined and, independent of fine, is ordered imprisoned for a named period, an appeal bond conditioned to perform the judgment is not satisfied by the surrender of the accused by the surety.

State v Crosser, 202-725; 210 NW 957

Surrender of defendant. Sections 4593-4595, C., '73 [§§13641-13643, C., '39] providing for the surrender of defendant in exoneration of bail, relate only to bail given on appeal from a judgment of imprisonment, and not to bail upon an appeal from a judgment imposing a fine only; and in the latter case, the sureties upon the appeal bond cannot surrender the defendant in their own exoneration, but must pay according to the terms of their bond.

State v Stommel, 89-67; 56 NW 263

Surety on appeal bond. On the issue whether defendant had contracted to indemnify plaintiff against liability as surety on an appeal bond in a criminal case, and whether defendant had received funds from the accused with which to perform such indemnity contract, evidence is wholly inadmissible that defendant had received funds from the father or brother of the accused for a purpose wholly foreign to said indemnity contract.

State v Cordaro, 211-224; 233 NW 51

Late appearance—defendant in federal penitentiary. When a criminal defendant who had posted an appeal bond did not appear after affirmance of the conviction, because he was incarcerated in a federal penitentiary, but was shortly thereafter brought to the court through the efforts of the surety on his bond, and was then taken to the state reformatory, all at the cost of the surety, there was delivery of the defendant into court so that the state could not recover on the bond.

State v Thomason, 226-1057; 285 NW 636

CHAPTER 629

UNDERTAKINGS OF BAIL AS LIENS

Atty. Gen. Opinion. See AG Op May 22, '39

CHAPTER 630

CASH BAIL

13627 Deposit in lieu of bail.

Discussion. See 11 ILR 372—Right to attach cash deposit when made by person other than defendant

Certificate of deposit as "money". A bank certificate of deposit, duly indorsed to and deposited with the clerk of the district court, by a party as bail for one accused of crime will be deemed "money" within the meaning of the statute.

State v Hart, 209-119; 227 NW 650

13630 Disposition of deposited money.

Right to apply cash bail on judgment. Cash or its equivalent voluntarily deposited with the clerk as bail for one accused of crime may be applied in satisfaction of so much of the judgment against the accused as requires the payment of money, even tho the said deposit does not belong to the accused.

State v Hart, 209-119; 227 NW 650

Accused deemed owner of deposit. Cash deposited by a third person as bail pending an appeal by an accused who has been convicted will be conclusively deemed to belong to the accused, as far as the state is concerned, and is forfeitable accordingly.

State v Friend, 212-136; 236 NW 20

Freedom pending abortive appeal as consideration. Cash deposited as bail pending an appeal is forfeitable for the nonappearance of the accused even tho the appeal, because of improper notice was abortive and was dismissed, when the accused by reason of said bail secured his unrestricted freedom pending the attempted appeal.

State v Friend, 212-136; 236 NW 20

CHAPTER 631

FORFEITURE OF BAIL

13631 Entry.

ANALYSIS

I IN GENERAL
II WHAT CONSTITUTES FORFEITURE
III WHAT IS NOT FORFEITURE
IV ORDER OF FORFEITURE
V ENTRY OF FORFEITURE

I IN GENERAL

Criminal prosecution—duty of defendant to answer. A defendant in a criminal proceeding who, on preliminary hearing, is "held to answer", and gives bail in the ordinary form (§13612, C., '31), must answer by appearance at each and every material stage of a proceeding either under an indictment or under county attorney information, even tho no bench warrant is issued, or new bond given, under the final charge.

State v Walker, 217-229; 251 NW 56

II WHAT CONSTITUTES FORFEITURE

Bail—forfeiture—mandatory essentials. A bail bond cannot legally be forfeited until after the principal is called in open court and his nonappearance is made to appear.

State v Kronstadt, 204-1151; 216 NW 707

III WHAT IS NOT FORFEITURE

Late appearance—defendant in federal penitentiary. When a criminal defendant who had posted an appeal bond did not appear after affirmance of the conviction, because he was incarcerated in a federal penitentiary, but was shortly thereafter brought to the court through the efforts of the surety on his bond, and was then taken to the state reformatory, all at the cost of the surety, there was delivery of the defendant into court so that the state could not recover on the bond.

State v Thomason, 226-1057; 285 NW 636

IV ORDER OF FORFEITURE

"Call" as condition precedent. Principle reaffirmed that a legal "call" of the prisoner in open court is a condition precedent to a legal forfeiture of the bail bond.

State v Robinson, 205-1055; 218 NW 918

V ENTRY OF FORFEITURE

No annotations in this volume

13633 Judgment.

Judgment on bail bond—appeal. The refusal of the trial court to enter judgment on an appeal bond in a criminal case will not be interfered with on appeal unless an abuse of discretion is shown.

State v Thomason, 226-1057; 285 NW 636

13634 Forfeiture in justice of the peace court.

Jurisdiction of district court. The district court has jurisdiction in actions on appearance bonds taken by justices of the peace acting as examining magistrates.

State v Emerson, 16-206

13636 Judgment set aside.

Construction. The effect to be given under this section to the surrender of an accused after judgment against the sureties on an appearance bond has no application to the effect to be given, under §13617, to the surrender of an accused after an unsuccessful appeal to the supreme court.

State v Gregory, 205-707; 216 NW 17

Vacation made conditional. An order vacating a judgment on a bail bond may be made conditional on the payment by the surety of all costs attending the recapture and surrender of the absconding prisoner.

State v Robinson, 205-1055; 218 NW 918

Delivery in foreign county. A surety in an application to set aside a judgment on a bail bond who shows that he caused the absconding principal in the bond to be delivered to the sheriff of the county wherein the criminal proceedings were pending, but in a foreign county to which the sheriff might have refused to go, establishes a "delivery" to such sheriff.

State v Robinson, 205-1055; 218 NW 918

Arrest in another county. The arrest and detention in another county of a prisoner who

is under bond for appearance does not have the effect to release the sureties upon his bond.

State v Merrihew, 47-112

Justifiable refusal to set aside. An application to set aside a judgment on a forfeited bail bond is properly overruled when the nonappearance of the principal in the bail bond at the time of trial is wholly unexplained, and when said principal was never surrendered to the sheriff of the county in which the bail was given.

State v Arioso, 207-1109; 224 NW 56

Refusal of court to enter judgment on bond. When a statute provides that a judgment granted on the forfeiture of bail shall not be set aside by the court unless the defendant appears within 60 days and all costs are paid, then the court also has the power to refuse to enter judgment on an appeal bond on hearing at the trial after forfeiture.

State v Thomason, 226-1057; 285 NW 636

CHAPTER 633

SURRENDER OF DEFENDANT

13641 Manner of surrendering defendant.

Surrender not satisfaction of appeal bond. When an accused in a criminal cause is fined, and, independent of the fine, is ordered imprisoned for a named period, an appeal bond conditioned to perform the judgment is not satisfied by the surrender of the accused by the surety.

State v Crosser, 202-725; 210 NW 957

13643 Return of money deposited.

Right to apply cash bail on judgment. Cash or its equivalent voluntarily deposited with the clerk as bail for one accused of crime may be applied in satisfaction of so much of the judgment against the accused as requires the payment of money even tho the said deposit does not belong to the accused.

State v Hart, 209-119; 227 NW 650

CHAPTER 634

INFORMATION BY COUNTY ATTORNEY

13644 Offenses prosecuted on information—jurisdiction.

Discussion. See 13 ILR 264—Trial information in Iowa

Constitutional law. The fifth amendment to the federal constitution (requiring infamous crimes to be presented by indictment) is no limitation upon the power of the state to provide for prosecution of infamous crimes without an indictment by a grand jury.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

Nonindictable offense. An indictment, or an information as a substitute for an indictment, which simply charges an offense which is punished by a maximum fine of $100 or 30 days imprisonment is a nullity.

State v Wyatt, 207-322; 222 NW 867

13645 Filing by county attorney.

Atty. Gen. Opinion. See AG Op June 9, '39

"Vacation" of court defined. The term "vacation" as employed in the county attorney information act (§13667, C., '31) means the interim which commences immediately after the expiration of a term of court and ends at the commencement of the next term of court. The court is not in vacation while it is in a recess.

Dayton v Bechly, 213-1305; 241 NW 416

Physician—institution of prosecution. Prosecutions for the enforcement of the laws regulatory of the practice of medicine and surgery may be instituted without any authority from the state department of health.

State v Hueser, 205-132; 215 NW 643

Erroneous proceedings on county attorney information. The act of the district court in formally approving a county attorney information, and forthwith entering judgment against the accused on a plea of guilty, is in effect a finding that the grand jury was not then actually in session, and tho it be conceded that such finding was erroneous, such error furnishes no allowable basis for a writ of habeas corpus six years later to test the legality of the judgment.

Marsh v Hollowell, 215-950; 247 NW 304
Bennett v Bradley, 216-1267; 249 NW 651

When grand jury not in session—determination of fact. The act of a judge of the district court in duly approving, and of the county attorney in duly filing, a trial information for felony, and the act of said judge (as a court), on the same day, in accepting and passing sentence on a plea of guilty, constitutes, in effect, a judicial determination that said information was duly filed—that the grand jury

was not "actually in session" when said information was filed.

Thrasher v Haynes, 221-1137; 264 NW 915

"Actually in session" defined. The statutory right of the county attorney to file a trial information "at any time when the grand jury is not actually in session" does not mean that he is prohibited from filing such information at any time of any day on which the grand jury was in session. So held where the information was filed on the day on which the grand jury was duly convened, but at a time on said day when said jury was not "actually" in session.

Thrasher v Haynes, 221-1137; 264 NW 915

13646 Indorsement.

Waiver of indorsement. The failure to indorse (1) "a true information", or (2) the names of the witnesses, on an information or to file any minutes of testimony, is waived by failure to move to set aside the information on such grounds.

State v Voss, 201-16; 206 NW 292

13647 Names of witnesses—minutes of evidence.

Witnesses not before grand jury. The statutory prohibition goes to the witness and not to the competency of his testimony. The defendant waives the objection by allowing him to be examined in part.

State v Hurd, 101-391; 70 NW 613

Discrepancy in name of witness. A discrepancy in the name of a witness as indorsed on the indictment or as written in a notice of additional testimony becomes quite inconsequential when the accused is in no manner misled.

State v Leitzke, 206-365; 218 NW 936

Minutes of testimony—sufficiency. The minutes of the evidence which are required to be attached to an information by the county attorney need not be signed or sworn to by the witness.

State v Hueser, 205-132; 215 NW 643
State v Van Klaveren, 208-867; 226 NW 81

Minutes of testimony as impeachment. Minutes of testimony attached to a trial information filed by a county attorney are not admissible to impeach a witness who neither prepared nor signed said minutes.

State v Davis, 212-582; 234 NW 858

Absence of indorsements—waiver. After conviction under a county attorney information, it is too late to raise the question that the names of the witnesses were not indorsed on the information, or that the minutes of testimony were not attached, or that the accused was not furnished a copy of the information.

Bennett v Bradley, 216-1267; 249 NW 651

Waiver of defects and objections—inadequacy of minutes—remedy. If an accused is dissatisfied with the lack of fullness of the statement of facts set forth in the minutes of testimony returned with an indictment, his remedy is to move for a bill of particulars.

State v McCutchan, 219-1029; 259 NW 23

13649 Verification by oath.

Unsworn information first challenged on appeal—no waiver. Where a municipal court information charging speeding was not sworn to, defendant did not waive his right to challenge its sufficiency to sustain a conviction, nor lose his right to raise such objection on appeal in supreme court, by failure to question the sufficiency of information before the trial.

State v Weston, 225-1377; 282 NW 774

13650 Approval by judge.

Filing before approval—effect. A county attorney information is not subject to a motion to set aside because the filing with the clerk momentarily preceded the formal indorsement of approval by the judge.

State v Harding, 204-1135; 216 NW 642

Irregular approval—effect. The irregular or equivocal approval of a trial information by the county attorney, arising out of the signing by the judge of a blank form of approval without erasing the provision for disapproval, does not deprive the court of jurisdiction over the information, especially when the indorsement by the judge otherwise reveals an approval.

State v Nova, 206-635; 220 NW 41

Failure of judge to approve—waiver. Failure of the judge to approve a trial information by the county attorney is waived when presented for the first time on appeal.

State v Nova, 206-635; 220 NW 41

13654 Amendments.

Amendment. An information may be amended upon application to any extent which the court may deem consistent and proper.

State v Doe, 50-541

Discretion of court. Where there is no uncertainty as to the nature of an offense charged in an information, it may, in the discretion of the court, be amended so as to charge the commission of the crime anywhere within the jurisdiction of the court, instead of within a particular subdivision.

State v Abrams, 131-479; 108 NW 1041

13655 Statutes applicable.

Atty. Gen. Opinion. See '32 AG Op 80

Indictment principles applicable. Principles announced in cases referring to indictments are applicable to cases based on county attorney's informations.

State v Albertson, 227-302; 288 NW 64

Duplicity—waiver. The claim that an indictment or trial information charges more than one offense will be disregarded when raised for the first time on appeal.

State v Voss, 201-16; 206 NW 292

Forgery. A county attorney information which charges the forgery of a check, and which otherwise is sufficient under the "short-form" act, is not insufficient because it (1) does not describe the check in detail, (2) does not allege the actual or apparent legal efficacy of the check, and (3) does not set forth a copy of the check. Resort to a motion for a bill of particulars is defendant's remedy in such cases.

State v Solberg, 214-333; 242 NW 84

13660 Time of making motion—rulings of court.

Absence of indorsements—waiver. After conviction under a county attorney information it is too late to raise the question that the names of the witnesses were not indorsed on the information, or that the minutes of testimony were not attached, or that the accused was not furnished a copy of the information.

Bennett v Bradley, 216-1267; 249 NW 651

13667 Place of arraignment.

"Vacation" of court defined. The term "vacation" as employed in the county attorney information act means the interim which commences immediately after the expiration of a term of court and ends at the commencement of the next term of court. The court is not in vacation while it is in a recess.

Dayton v Bechly, 213-1305; 241 NW 416

Illegal sentence under information. Sentence and final judgment under a county attorney information filed in one county cannot be legally rendered in another county of the same judicial district when a term of court is pending in the county in which the information is filed. And a term of court is pending even tho the court has temporarily recessed.

Dayton v Bechly, 213-1305; 241 NW 416

13669 Judgments on written pleas.

Written plea—when required. Written pleas of guilt are not required under the county attorney information act except when the plea is taken in vacation of the court.

Bennett v Bradley, 216-1267; 249 NW 651

Jurisdiction during vacation. A district judge has jurisdiction in vacation and while sitting in chambers in any county of his district, to receive a written plea of guilty under a trial information filed by the county attorney, and to enter sentence, even tho the offense is charged to have been committed in a county of his district other than the county in which he is sitting.

State v Voss, 201-16; 206 NW 292

13671 Place of rendition.

Rendition in vacation—validity. The court has no jurisdiction, on its own initiative, in a criminal case prosecuted by indictment, to order that prospective motions in arrest of judgment and for new trial, and exceptions to instructions be heard by the judge in vacation, and that final sentence be entered by the judge in vacation in case said motions and exceptions be overruled. It necessarily follows that the judge has no jurisdiction, even tho the accused be present, to rule on such matters in vacation, and no jurisdiction to pronounce final judgment in vacation, even tho it be conceded that the accused suffered no prejudice.

State v Rime, 209-864; 226 NW 925

Illegal sentence under information. Sentence and final judgment under a county attorney information filed in one county cannot be legally entered in another county of the same judicial district when a term of court is pending in the county in which the information is filed. And a term of court is pending even tho the court has temporarily recessed.

Dayton v Bechly, 213-1305; 241 NW 416

13673 Bail—construction.

Duty of defendant to answer. A defendant in a criminal proceeding who, on preliminary hearing, is "held to answer", and gives bail in the ordinary form (§13612, C., '31), must answer by appearance at each and every material stage of a proceeding either under an indictment or under county attorney information, even tho no bench warrant is issued, or new bond given, under the final charge.

State v Walker, 217-229; 251 NW 56

13674 Form of information.

Verification. The verification of a trial information by a county attorney as being true "as I verily believe", being in the language of the statute, is all-sufficient.

State v Japone, 202-450; 209 NW 468

Allegations of former convictions. In prosecution for illegal possession of intoxicating liquor, county attorney's action in seeking to place the federal convictions before the jury, such matter being entirely withdrawn from the consideration of the jury, was not prejudicial to defendant and did not entitle him to a reversal when there was ample competent evidence to sustain the jury's verdict.

State v Caringello, 227-305; 288 NW 80

Duplicity—demurrer. An information which charges that defendant willfully, premeditat-

edly, deliberately, with malice aforethought, and with specific intent to kill, murdered his wife, and also that he willfully deposited, in a shotgun, dynamite or other explosive material, and induced his wife to explode the gun, thereby killing her, is not duplicitous.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

CHAPTER 635

IMPANELING GRAND JURY

13678 Drawing grand jurors.

Selection of jurors. See Ch 482

Waiver of exemption. Persons over 65 may be exempt as under §10843 but such exemption is personal and may be waived.

State v Edgerton, 100-63; 69 NW 280

Irregularity. The provision requiring the names on the ballots prepared by the county auditor, from the lists of grand jurors returned by the judges of election, to be compared with said lists by the clerk and sheriff before the drawing of grand jurors commences, is directory only, and the comparison of names drawn, by the auditor and sheriff, with the lists as the ballots are taken from the box, is not such an irregularity as will affect the validity of the acts of the jury thus selected.

State v De Bord, 88-103; 55 NW 79

Drawn on precept. If a grand jury be once regularly drawn, and for any cause fails to appear at a subsequent term, a precept for a jury should, at that term, issue to the body of the county, and §240, C., '73 [§§10873, 10874, C., '39] providing that the jurors shall be drawn 20 days before the term, does not apply.

State v Beste, 91-565; 60 NW 112

Immaterial error. A slight deviation from the statute as to the number of names required for a grand jury list from which the panel is drawn is not a material error.

State v Clark, 141-297; 119 NW 719

13679 Additional drawings.

Talesmen. When all of the regular jurors are not in attendance, and the grand jury is completed by summoning talesmen, the talesmen serve for the term; and if the jury is discharged and recalled during the term, they must be summoned with the other jurors impaneled.

State v Reid, 20-413

13680 Challenge to panel—motion.

Fatally delayed motion. A motion to set aside an indictment on the ground that the accused has been unlawfully discriminated against in the selection of the grand jury is unallowable when interposed after the accused has entered a plea and has had one trial.

State v Twine, 211-450; 233 NW 476

13682 Grounds of challenge.

ANALYSIS

I In General
II Remedy

I IN GENERAL

Member of election board. Membership on an election board does not disqualify one from serving as a grand juror, and the mere fact that the name of one of the judges of election was returned by the board of which he was a member affords no proof that the same was done at his solicitation.

State v Clark, 141-297; 119 NW 719

II REMEDY

Appeal—objections—inadequate presentation in trial court. The proposition that the court declined to permit further examination of a juror after a challenge had been overruled is not presented to the trial court by the complainant's dictating into the record matter upon which the trial court cannot make a ruling.

State v Harding, 205-853; 216 NW 756

CHAPTER 636

DUTIES OF GRAND JURY

13702 Indictable offenses.

Physicians and surgeons—law enforcement. Prosecutions for the enforcement of the laws regulatory of the practice of medicine and surgery may be instituted without any authority from the state department of health.

State v Hueser, 205-132; 215 NW 643

Instigation of prosecution. Where county attorney made no independent investigation, made no recommendation to the grand jury, and, after making careful investigation of the evidence subsequent to the return of the indictment, dismissed the case, the defendant's appearance before the grand jury, when merely advised by the county attorney that he could do so if he cared to, raised a jury question of whether defendant instigated the prosecution.

Bair v Schultz, 227-193; 288 NW 119

13706 Right of county attorney to appear.

Presence of assistant county attorney. The presence of a duly appointed assistant county attorney in the grand jury room while the question of indictment was being considered did not render the indictment defective.

State v Coleman, 226-968; 285 NW 269

13711 Refusal of witness to testify.

Exemption from self-incrimination—nonwaiver. A witness who voluntarily appears before a grand jury, and, without duress or compulsion, testifies to matters which tend to render himself criminally liable for an offense as to which he is not given absolute immunity from prosecution (§11269, C., '35), does not thereby waive his natural, common-law, statutory, and constitutional right to refuse to testify to said matters on the subsequent trial of another party under an indictment returned in whole or in part on the original testimony of said witness.

Duckworth v Dist. Ct., 220-1350; 264 NW 715

13712 Minutes to be kept.

Inadequacy of minutes—remedy. If an accused is dissatisfied with lack of fullness of the statement of facts set forth in the minutes of testimony returned with an indictment, his remedy is to move for a bill of particulars.

State v McCutchan, 219-1029; 259 NW 23

13713 Minutes read—signing by witness.

Refreshing recollection. It is not improper for the county attorney, after a witness has testified to a certain extent, to hand to the witness the minutes of his testimony taken before the grand jury and to request the witness to refresh his memory in order to determine whether he had overlooked any matter; nor is it improper to permit the witness thereupon to testify to material matters which had been overlooked.

State v Friend, 206-615; 220 NW 59

Refreshing memory. A party producing a witness may very properly ask him a question designed to refresh his memory on a material subject matter.

State v Briggs, 207-221; 222 NW 552

13714 Evidence returned and filed.

Indictment as evidence. An indictment is wholly inadmissible to show the guilt of the defendant even tho offered, on cross-examination, in connection with an offer, by the accused, of the minutes of testimony returned with the indictment.

State v Huckins, 212-283; 234 NW 554

Exhibits—nonduty to return and file. Exhibits which are before the grand jury in its investigation of an offense by certain parties need not be returned and filed with an indictment of other and different parties for another and different offense, especially when said exhibits cannot be used as substantive evidence against complainants. And this is true tho all said charges had relation to a transaction in which all the parties were material actors.

State v Campbell, 213-677; 239 NW 715

Failure to file exhibits. The statute requiring the filing of exhibits in a criminal action in the office of clerk with minutes of testimony is not mandatory, but is directory only, and the failure to file such exhibits does not render such exhibits inadmissible where counsel for defendant is advised that exhibits are in the custody of the sheriff, subject to inspection, and where no application is made for such inspection and no apparent prejudice results from noncompliance with statute.

State v Bazoukas, 226-1385; 286 NW 458

Minutes of testimony—nonimpeachable. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

13725 Disclosure required.

Right to rebut impeaching testimony. Testimony by grand jurors which tends to show, by way of impeachment, that a witness for an accused made statements before the grand jury inconsistent with the statements of the witness at the trial arms the accused with right to show by the clerk of the grand jury that the grand jurors were mistaken—that the testimony of the witness in question was the same on both occasions.

State v Archibald, 204-406; 215 NW 258

Minutes of testimony—nonimpeachable. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

CHAPTER 637

FINDING AND PRESENTATION OF INDICTMENT

13728 Indictment at instance of private prosecutor.

Discussion. See 16 ILR 89—Malicious prosecution action

ANALYSIS

I IN GENERAL
II MALICIOUS PROSECUTION (CIVIL ACTIONS)
(a) IN GENERAL
(b) ELEMENTS
(c) ACTIONS

I IN GENERAL

Taxation of costs against prosecuting witness. In an action for malicious prosecution, the testimony of the magistrate to the effect that in dismissing the prosecution he taxed the costs to the prosecuting witness is harmless when the court instructs that neither want of probable cause nor malice could be inferred from such taxation.

Kness v Kommes, 207-137; 222 NW 436

II MALICIOUS PROSECUTION (CIVIL ACTIONS)

(a) IN GENERAL

Procuring signature to federal information. One who, in good faith, and at the request of a federal district attorney, procures another to sign a federal information, is not responsible in damages if the resulting prosecution fails.

Dickson v Young, 208-1; 221 NW 820

Prosecution under federal information. When a United States district attorney on his own motion institutes an investigation, and as the result thereof prepares an information charging a violation of a federal statute, the resulting prosecution must be deemed instituted by such district attorney, and not by a private citizen who, in good faith, and at the request of such district attorney, formally signs and swears to such information, even tho such citizen has never theretofore advised with the district attorney in reference to said prosecution.

Dickson v Young, 208-1; 221 NW 820

Motive—ill feeling. Plaintiff in a prosecution for malicious prosecution may show that, many years prior to the prosecution in question, he had arrested the defendant, and that such arrest resulted in ill feeling on the part of defendant against plaintiff. But plaintiff should not make prominent the reason for such arrest.

Fisher v Tullar, 209-35; 227 NW 580

Presence of family when arrest made. Evidence is receivable, in an action for malicious prosecution, to the effect that plaintiff's family was present when he was arrested.

Hepker v Schmickle, 209-744; 229 NW 177

Instructions—fatal contradiction. In an action for damages consequent on a malicious prosecution, instructions to the effect (1) that plaintiff must negative good faith on the part of defendant in instituting the prosecution and (2) that good faith on the part of defendant constituted no defense are prejudicially erroneous in that they are mutually conflicting.

Dobbins v Todd Co., 218-878; 256 NW 282

(b) ELEMENTS

Elements—burden of proof. In action for damages for malicious prosecution, plaintiff has burden to show (1) the prosecution; (2) instigation or procurement by defendant; (3) acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice.

Bair v Schultz, 227-193; 288 NW 119

Malice and probable cause—advice of counsel as defense. It is a complete defense to an action for malicious prosecution that the prosecuting witness in good faith disclosed to the county attorney all the facts possessed by him, and was advised by such attorney that such facts were (1) sufficient to show the commission of an offense, and (2) sufficient to warrant the institution of criminal proceedings against the accused; and it matters not that the proceedings were commenced by preliminary information, instead of by original proceedings before the grand jury, as suggested by the attorney.

Granteer v Thompson, 203-127; 208 NW 497

Defense—disclosure to county attorney. A private prosecutor is not liable in damages for malicious prosecution when, before signing the preliminary information, he makes, in good faith, a full and fair statement to the county attorney of all the facts and circumstances within his knowledge concerning the offense in question, and is, in effect, assured by said public official that he would be warranted in commencing the prosecution; and this is true even tho the county attorney did express a preference on his part to place the prosecution before the grand jury without the filing of a preliminary information.

Granteer v Thompson, 207-1204; 224 NW 528

Want of probable cause—advice of counsel—failure to divulge material fact. The advice of counsel is a complete defense to an action for malicious prosecution only when obtained in good faith and when based upon a full and fair disclosure of all the material facts.

Hepker v Schmickle, 209-744; 229 NW 177

Want of probable cause—advice of counsel. Principle recognized that a defendant in an action for damages for malicious prosecution presents a complete defense when he proves

II MALICIOUS PROSECUTION (CIVIL ACTIONS)—concluded
(b) ELEMENTS—concluded

that, prior to commencing the prosecution, he made a good-faith, full, and fair recital of the facts to his attorney, and was advised to commence the prosecution.

Beard v Wilson, 211-914; 234 NW 802

Malice inferred from want of probable cause. In action for malicious prosecution malice may be inferred from want of probable cause for the prosecution.

Bair v Schultz, 227-193; 288 NW 119

Want of probable cause — evidence — sufficiency. Principle reaffirmed that the question of probable cause may be one of law, or it may be one of fact. Evidence held to present a question of fact.

Hepker v Schmickle, 209-744; 229 NW 177

Negative definition of want of probable cause. It is not necessarily erroneous to define want of probable cause in a negative form, instead of in an affirmative form.

Hepker v Schmickle, 209-744; 229 NW 177

Probable cause per se. Record reviewed and held insufficient to show per se that defendant had probable cause for instituting against plaintiff a prosecution for embezzlement.

Weisz v Moore, 222-492; 269 NW 443

Want of probable cause—landlord's writ—improper submission. In an action for malicious prosecution in suing out a writ of landlord's attachment for rent admittedly due (but which was cancelled by a pleaded and established counterclaim), manifest error results from submitting to the jury the question whether the landlord had probable grounds to believe the truth of the ground alleged as a basis for the writ.

Kelp v McManus, 218-226; 253 NW 813

Want of probable cause—unallowable presumption. Principle reaffirmed that while malice may be inferred from a total want of probable cause, yet a want of probable cause cannot be inferred from malice, however great.

Dugan v Midwest Co., 213-751; 239 NW 697

(c) ACTIONS

Unpleaded issue. The submission to the jury of an issue, and the placing of the burden on a party to prove the affirmative thereof, when the party was in no manner presenting such issue, constitute reversible error. So held where, in an action for malicious prosecution, the court submitted the unpleaded issue of actual guilt of the plaintiff of the offense in question.

Granteer v Thompson, 203-127; 208 NW 497

Malicious prosecution growing out of auto collision—counterclaim. Defendant in an action for damages consequent on a collision between automobiles may not plead as a counterclaim damages consequent on a malicious prosecution instituted by the plaintiff against defendant for reckless driving at the time of the collision.

Harriman v Roberts, 211-1372; 235 NW 751

Jury question. In an action for malicious prosecution, record reviewed and held to present jury questions on both the issues of (1) want of probable cause, and (2) malice.

Richmond v Whitaker, 218-606; 255 NW 681

Harmless error—withdrawn testimony. Testimony, in an action for malicious prosecution, relative to the return of an indictment against plaintiff but without proof that defendant was connected therewith, reveals no prejudicial error when the court ultimately withdrew said testimony in toto.

Richmond v Whitaker, 218-606; 255 NW 681

Questions for jury. Evidence reviewed in action for damages for false arrest and malicious prosecution (padlocked schoolhouse case), and held such as to preclude the court from determining the question of want of probable cause, malice, and good-faith reliance on the advice of counsel.

Gripp v Crittenden, 223-240; 271 NW 599

Defense—acting on advice of county attorney. In action for malicious prosecution, whether the defendant acted on advice of the county attorney is generally a question for the jury, and assuming he so acted, if he failed to make a full disclosure of the facts, he did not so conclusively establish this defense as to sustain a directed verdict.

Bair v Schultz, 227-193; 288 NW 119

13729 Names of witnesses indorsed.

ANALYSIS

I IN GENERAL
II INDORSING NAMES OF WITNESSES
III FAILURE TO INDORSE
(a) IN GENERAL
(b) VARIANCE
(c) EFFECT OF FAILURE
IV RETURNING MINUTES OF TESTIMONY
V DOCUMENTARY EVIDENCE
VI PRESENTATION TO THE COURT
VII INDORSEMENT BY CLERK
VIII SUBSTITUTION OF LOST INDICTMENT

Notice of additional witnesses. See under §13851

I IN GENERAL

Criminal law—rebuttal and direct testimony—admissibility—witness' name not on indictment. Arresting officer's testimony as a rebuttal witness for the state that defendant made the statements "I was afraid of that", and "Well, I finally caught up with the guy",

held proper even tho the name of the rebuttal witness was not indorsed on the indictment and no notice of additional testimony was given where such testimony, altho not strictly rebuttal, had a tendency to disprove defendant's testimony, it oftentimes occurring that rebuttal testimony might also have been used as direct testimony in the state's case.

State v Crandall, 227-311; 288 NW 85

II INDORSING NAMES OF WITNESSES

Failure to use all witnesses before grand jury. There is no obligation resting upon the state to use upon the trial all the witnesses examined before the grand jury, and evidence of a failure so to do is not admissible to show the animus of the prosecution.

State v Dillon, 74-653; 38 NW 525

Failure to produce. The state is not bound to call all whose names are indorsed on the indictment.

State v Helm, 92-540; 61 NW 246

III FAILURE TO INDORSE

(a) IN GENERAL

Rebuttal witnesses. The state may, in rebuttal, call witnesses whose names are not indorsed upon the back of the indictment.

State v Ruthven, 58-121; 12 NW 235

When unnecessary. The statutory requirement that an indictment carry the names of the witnesses on whose testimony it is found and be accompanied by a minute of their testimony, has no application to the names and testimony of witnesses used on the trial in rebuttal.

State v Cozad, 221-960; 267 NW 663

Rebuttal witnesses not before grand jury. It is quite immaterial that witnesses called by the state in rebuttal were not before the grand jury.

State v Olson, 200-660; 204 NW 278

Rebuttal—witness' name not on indictment. Arresting officer's testimony as a rebuttal witness for the state that defendant made the statements "I was afraid of that," and "Well, I finally caught up with the guy," held proper even tho the name of the rebuttal witness was not indorsed on the indictment and no notice of additional testimony was given where such testimony, altho not strictly rebuttal, had a tendency to disprove defendant's testimony, it oftentimes occurring that rebuttal testimony might also have been used as direct testimony in the state's case.

State v Crandall, 227-311; 288 NW 85

Rebuttal of alibi. A defendant who relies on an alibi has the burden to prove it, and evidence tending to contradict that introduced to establish the alibi is rebutting evidence, and it is not required that the names of the witnesses giving such evidence should be on the back of the indictment.

State v McClintic, 73-663; 35 NW 696

Witness not named on indictment. This is a personal right of defendant and he may waive such right and allow the witness to be examined.

State v Ward, 73-532; 35 NW 617

Non-grand-jury witness—curing error. Any error in receiving the testimony of a witness not before the grand jury is cured by subsequently excluding such testimony and admonishing the jury to disregard it.

State v Christensen, 205-849; 216 NW 710

(b) VARIANCE

Waiver by defendant.

State v Voss, 201-16; 206 NW 292

Discrepancy—effect. A discrepancy in the name of a witness as indorsed on the indictment or as written in a notice of additional testimony becomes quite inconsequential when the accused is in no manner misled.

State v Leitzke, 206-365; 218 NW 936

Sufficiency of indorsement. The indorsement on an indictment of the name of a witness is all-sufficient when the name given is that by which he is commonly known. So held where the actual name, Edison Caster, was indorsed as Ed Caster.

State v Mullenix, 212-1043; 237 NW 483

(c) EFFECT OF FAILURE

Minutes of testimony—conclusiveness. The defendant in an indictment will not be permitted to show that witnesses other than those whose names are indorsed on the indictment were before the grand jury and gave testimony relative to the charge against defendant, and that minutes of testimony of such other witnesses were not returned with the indictment.

State v Martin, 210-376; 228 NW 1

Absence of indorsement—waiver. After conviction under a county attorney information, it is too late to raise the question that the names of the witnesses were not indorsed on the information, or that the minutes of testimony were not attached, or that the accused was not furnished a copy of the information.

Bennett v Bradley, 216-1267; 249 NW 651

IV RETURNING MINUTES OF TESTIMONY

Minutes may be filed separately.

State v Hamilton, 42-655

V DOCUMENTARY EVIDENCE

Evidence other than minutes. Other evidence than the minutes on the trial is admissible

V DOCUMENTARY EVIDENCE—concluded

to determine whether or not a witness was in fact examined before the grand jury or committing magistrate, altho the minutes returned with the indictment are made, by the statute, conclusive as to what names are or should be indorsed on the back of the indictment.

State v Marshall, 105-38; 74 NW 763

Exhibits—failure to return. Relevant exhibits are admissible upon the trial of an indictment even tho they have not been before the grand jury, or, if before such jury, have not been returned.

State v Bailey, 202-146; 209 NW 403

VI PRESENTATION TO THE COURT

No annotations in this volume

VII INDORSEMENT BY CLERK

No annotations in this volume

VIII SUBSTITUTION OF LOST INDICTMENT

No annotations in this volume

CHAPTER 638

INDICTMENT

13732 Definition.

Violation of replaced statute. Under the interpretation given subsection 1 of §63, an indictment for driving while intoxicated was not demurrable on the ground that the statutory penalty had been repealed and replaced by another statute which went into effect before the indictment was returned.

State v McDowell, 228- ; 290 NW 65

Nonindictable offense — appeal. A prosecution may not be maintained under an indictment which simply charges a nonindictable offense, and such contention may be presented for the first time on appeal.

State v Wyatt, 207-319; 222 NW 866

Jurisdictional question. The point that the trial court had no jurisdiction over an indictment because the indictment simply charges a nonindictable offense may be raised for the first time on appeal.

State v Wyatt, 207-322; 222 NW 867

Nonindictable offense. An indictment, or an information as a substitute for an indictment, which simply charges an offense which is punished by a maximum fine of $100 or 30 days imprisonment is a nullity.

State v Wyatt, 207-322; 222 NW 867

Indictment as evidence. An indictment is wholly inadmissible to show the guilt of the defendant even tho offered, on cross-examination, in connection with an offer, by the accused, of the minutes of testimony returned with the indictment.

State v Huckins, 212-283; 234 NW 554

13732.01 Form of indictment.

Applicability of short form act. The sufficiency of the charging part of an indictment will be determined by the short form indictment act, tho said act was enacted after the return of the indictment but before the sufficiency thereof was formally questioned, said act not being an ex post facto act.

State v Johnson, 212-1197; 237 NW 522

Short form indictment act. A bill for "an act to amend, revise, and codify" enumerated sections of law, embracing the former law governing the requisites and sufficiency of indictments, furnishes a sufficient title to support what is now known as the short form indictment act.

State v Henderson, 215-276; 243 NW 289

13732.02 Contents of indictment.

Designating offense by name and section violated. An indictment is sufficient in the charging part thereof when it specifies the statutory name of the offense, and the section of the statute violated.

State v Johnson, 212-1197; 237 NW 522

Conspiracy—description of offense. An indictment for conspiracy to commit a crime need not set forth the various elements of said crime. Indictment held to charge properly a conspiracy to engage in the unlawful transportation and sale of intoxicating liquors.

State v Terry, 207-916; 223 NW 870

Embezzlement—sufficiency. Indictment reviewed and held adequately to charge embezzlement by a public officer.

State v Gardiner, 205-30; 215 NW 758

Forgery under short form. A county attorney information which charges the forgery of a check, and which otherwise is sufficient under the short form act, is not insufficient because it (1) does not describe the check in detail, (2) does not allege the actual or apparent legal efficacy of the check, and (3) does not set forth a copy of the check. Resort to a motion for a bill of particulars is defendant's remedy in such cases.

State v Solberg, 214-333; 242 NW 84

Manslaughter by negligence. An indictment for manslaughter by negligence must specifically set out the facts constituting the negligence.

State v Sexsmith, 200-1244; 206 NW 100
State v Korth, 204-1360; 217 NW 236

Robbery—with aggravation. A county attorney information which charges that the defendant aided and abetted other named parties in a robbery, and that one of said other parties was armed with a loaded revolver with the intent to kill the person robbed if he resisted, and which is accompanied by minutes of evidence tending to prove said allegations, is fully sufficient to apprise the accused of the fact that he is charged with robbery with aggravation, and, on a plea of guilty, justifies a sentence accordingly.

Deemy v Dist. Court, 215-690; 246 NW 833

Threats—extortion. An indictment for extortion may be sufficient tho the language relative to the threatened offense and the accompanying intent is bunglingly expressed.

State v Wilbourn, 219-120; 257 NW 571

Grounds of remedy—defectively charged offense. A prisoner will not, on habeas corpus, be released from imprisonment on the ground that the indictment or trial information defectively and unskillfully charges the offense for which he was convicted and imprisoned. The rule is otherwise if the defect is so total that the indictment or information is a nullity.

McBain v Hollowell, 202-391; 210 NW 461

Crime defined by reference to statute. An indictment need not set out the elements of a crime to be valid, if it refers to a section of the statutes creating the crime charged.

State v Keturokis, 224-491; 276 NW 600

Failure to name injured party. A short form of indictment for malicious threat to extort is fatally short in legal requirement when it fails to allege the name of the person threatened.

State v Goldenberg, 211-234; 233 NW 66

Fraudulent banking—general allegation of intent. An indictment for fraudulent banking need not specifically allege the name of the person whom the defendant intended to defraud by receiving the deposit in question; but, nevertheless, an allegation that defendant (a private banker), knowing of his insolvency, received a named deposit from a named person, with intent to defraud, is, in effect, an allegation to defraud the named person.

State v Boysen, 214-46; 238 NW 581

Rape—time discrepancy in indictment immaterial. A rape conviction is valid altho for a date different than the date fixed in the indictment if within the statute of limitations and if no fatal variance occurs between the indictment and the proof.

State v Beltz, 225-155; 279 NW 386

Sufficiency—substantial language charging rape—validity. An indictment, charging that defendant "raped, carnally knew, and abused" a female, sufficiently states an offense in terms of substantially the same meaning as the statute, so as to apprise the court and the accused that the offense of rape was intended to be charged.

State v Keturokis, 224-491; 276 NW 600

Rape—use of "rape" in title only—validity. An indictment for rape by reference to the statute is not void on the ground that the statute does not use the word "rape", when the statute is merely a codification of a legislative act which amply indicated in the title that it was intended to define the common-law crime of rape.

State v Keturokis, 224-491; 276 NW 600

Specifying acts constituting nuisance—effect. An indictment for nuisance which specifies the acts done by the accused limits the state to proof of the specific acts charged.

State v Schuling, 216-1425; 250 NW 588

Negativing exceptions—possession of drugs. An indictment for the unlawful possession of narcotic drugs need not, in view of §3156, C., '24 [§3169.18, C., '39], negative the exception of the statute (§3154, C., '24 [§3169.05, C., '39]) relative to possession under the prescription of named medical practitioners.

State v Bailey, 202-146; 209 NW 403

13732.03 Absence of particulars—effect.

Absence of particulars. An indictment under the short form statute charging, in the language of the statute, the possession of burglar's tools with intent to commit a burglary, is not subject to demurrer. The proper procedure is to demand a bill of particulars.

State v Engler, 217-138; 251 NW 88

13732.04 Bill of particulars.

Short form—constitutionality. The plea that the short form indictment act does not provide for apprising the defendant of the offense with which he is charged, and is therefore unconstitutional, is untenable in view of the right of the defendant under said act to a bill of particulars.

State v Henderson, 215-276; 243 NW 289

Informing accused of accusation. The constitutional right of an accused "to be informed of the accusation against him" (Const. Art. I, §10)—formerly accorded to him through a technically and elaborately drawn indictment —is now, under the short form indictment act, fully accorded to him through a bill of particulars, to which he is arbitrarily entitled.

State v Engler, 217-138; 251 NW 88

Bill of particulars—function. It is not the function of a bill of particulars to supply a material allegation omitted from the indictment, but the insertion of such allegation in a

bill of particulars is of no consequence when the indictment is all-sufficient in itself.

State v Boysen, 214-46; 238 NW 581

Sufficiency. A notice of additional testimony in the trial of an indictment, substantially complying with the statute, is not subject to a motion for a bill of particulars.

State v Loucks, 218-714; 253 NW 838

Inadequacy of minutes. If an accused is dissatisfied with the lack of fullness of the statement of facts set forth in the minutes of testimony returned with an indictment, his remedy is to move for a bill of particulars.

State v McCutchan, 219-1029; 259 NW 23

Admissibility of burglar tools. Under a short form indictment for possessing burglar's tools with intent to commit a burglary, the tools need not be described as a condition precedent to their admissibility in evidence, the accused making no demand for a bill of particulars.

State v Engler, 217-138; 251 NW 88

False pretense. A short form indictment for obtaining money by false pretenses, even tho it specifically purports to be found under §13045, C., '31, but which, by the bill of particulars, is manifestly based on false pretenses on obtaining a refund of tax paid on motor vehicle fuel as provided by §5093-a8, C., '31 [§5093.29, C., '39], is sufficient to support a conviction under the latter section and a sentence solely thereunder.

State v Wall, 218-171; 254 NW 71

13732.05 Setting aside indictment.

Sufficiency not triable by habeas corpus. The sufficiency or validity of an indictment or information, of which the court had jurisdiction, may not be tried in habeas corpus proceedings.

Wilson v Haynes, 218-1370; 256 NW 678

Accused in state hospital—term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.

Maher v Brown, 225-341; 280 NW 553

13732.06 Identification of defendant.

Previous convictions—identification of defendants. Proof that defendant, on trial under a certain name, admitted having been three times convicted in a named county of the felonious offense of "breaking and entering", together with proof that the district court records of said county revealed said number of convictions (and no more) of a party by the same name, and for "breaking and entering", present a jury question on the issue whether the defendant on trial and the defendant in said three convictions are one and the same person.

State v Clarke, 220-1188; 263 NW 837

13732.07 Time of commission of offense.

Election between acts. The court need not require the state to elect, on an indictment charging illegal possession of intoxicating liquors, whether it will rely on possession in the defendant's shop or in his near-by chicken coop, the indictment not distinguishing between the different liquors in respect to the time or place of their possession.

State v Christensen, 205-849; 216 NW 710

Reception of evidence—election between acts. In a prosecution of municipal court bailiff for embezzlement in failing to account monthly for fees collected (§10671, C., '24),wherein appears evidence tending to show such failure for each of a series of months, the accused may compel the state to elect on which monthly transaction it will rely.

State v Berg, 200-627; 204 NW 441

Embezzlement by series of acts—applicability of statute. The provisions of the statute (§13032, C., '24) that, if money is embezzled by a series of acts during the same employment, the total amount so embezzled shall be considered as embezzled in one act, have no application to embezzlement by a public officer.

State v Berg, 200-627; 204 NW 441

Time of commission—instructions. Instructions are proper to the effect that the exact and precise time of the commission of an offense is immaterial provided the jury, by harmonizing the testimony, can find and does find that the offense was committed at some time within the statute of limitation; and this is true even tho the state in its indictment and its testimony rests the charge on a specifically named date, and even tho the testimony of the accused definitely tends to fix his presence on said date at a place other than at the scene of the alleged offense but in the same neighborhood.

State v Davenport, 208-831; 224 NW 557

Failure to allege time. An allegation in an indictment under the short form act that the accused committed the offense charged, without any allegation as to the time when or place where he committed it, carries the same legal force and effect as the formerly required allegation as to time and place.

State v Engler, 217-138; 251 NW 88

13732.08 Place of commission of offense.

Failure to allege place. An allegation in an indictment under the short form act that the accused committed the offense charged, without any allegation as to the time when or place where he committed it, carries the same legal force and effect as the formerly required allegation as to time and place.

State v Engler, 217-138; 251 NW 88

Venue. An indictment for possessing burglar's tools with intent to commit a burglary need not specifically allege the venue.

State v Engler, 217-138; 251 NW 88

13732.09 Means.

Threat to extort—failure to allege essential threat. A short form indictment for malicious threat to extort, under §13164, is fatally defective when it fails to allege the statutory identifying threat made by the accused.

State v Goldenberg, 211-234; 233 NW 66

13732.11 Ownership.

Larceny. An allegation of ownership in an indictment for larceny from a building in the nighttime is supported by evidence that the alleged owner was in possession of the property. But ownership is not controlling in such a case.

State v Henderson, 215-276; 243 NW 289

Burglary—ownership of premises. An allegation in an indictment for burglary of ownership of the premises in a named party is sufficiently supported by evidence of possession by said party.

State v Archibald, 208-1139; 226 NW 186

Right of possession as proof. An allegation, in an indictment for larceny, of ownership of the alleged stolen property, is supported by proof that said alleged owner had legal right to the possession of said property. So held as to coal which had been stolen from a public school corporation prior to its actual physical delivery to the district.

State v Philpott, 222-1334; 271 NW 617

13732.12 Intent.

Malice aforethought—joint defendants. A trial information which charges three defendants jointly with making an assault with a deadly weapon while jointly attempting to commit a robbery, and that one of them fired the fatal shot with the specific intent to kill "of their malice aforethought," is not so fatally defective as to deprive the court, on a plea of guilty, of jurisdiction to pass sentence on all the defendants.

McBain v Hollowell, 202-391; 210 NW 461

Murder — allegation of intent — sufficiency. An allegation in an indictment for murder that the assault was made "with intent to kill" is all-sufficient; likewise instructions which follow such allegation. So held against the contention that the only proper allegation was "with specific intent to kill".

State v Berlovich, 220-1288; 263 NW 853

Murder—failure to allege intent. An indictment, under the short form act, for murder in the first degree need not allege a specific intent to kill. It is sufficient if said charge is set forth in the language employed by the statute in defining said crime, to wit: "willfully, deliberately, premeditatedly, and with malice aforethought killed" a named person "by shooting him with a revolver".

State v Harness, 214-160; 241 NW 645

Short form burglary—failure to charge intent. An indictment for statutory burglary ("breaking and entering" in the language of the statute) which is otherwise sufficient is not rendered insufficient by failing to charge an intent; especially is this true when the indictment carries the allegation, to wit: "contrary to and in violation of §13001, C., '31."

State v Stack, 221-727; 266 NW 523

Fraudulent banking—general allegation of intent. An indictment for fraudulent banking need not specifically allege the name of the person whom the defendant intended to defraud by receiving the deposit in question; but, nevertheless, an allegation that defendant (a private banker), knowing of his insolvency, received a named deposit from a named person, with intent to defraud, is, in effect, an allegation to defraud the named person.

State v Boysen, 214-46; 238 NW 581

Instructions—intent to defraud. Instructions relative to intent to defraud and to the conditions under which it might be inferred, and to the presumption that a person intends the reasonable and natural consequences of acts deliberately and intentionally done by him, reviewed and held to reveal no error.

State v Boysen, 214-46; 238 NW 581

13732.15 Description of place or thing.

Corporate capacity of bank as surplusage. An indictment for entering a bank with intent to rob (§13002, C., '24) need not charge the corporate capacity of the said bank, and, if it is charged, it may be treated as surplusage.

State v Wagner, 202-739; 210 NW 901

13732.16 Identification of others than defendant.

Immaterial misdescription. In an indictment for the larceny of coal from a school district it is not a fatal defect that the district

is described as Grove Township School District instead of the Grove School District Township.

State v Philpott, 222-1334; 271 NW 617

Failure to name injured party. A short form indictment for malicious threat to extort is fatally short in legal requirement when it fails to allege the name of the person threatened.

State v Goldenberg, 211-234; 233 NW 66

13732.22 Negativing exception.

Requisites and sufficiency—negativing exceptions to securities act—nonnecessity. An indictment charging violation of securities act is not defective on ground that it fails to negative exceptions legalized by the act.

State v Dunley, 227-1085; 290 NW 41

Demurrer—druggist circulating birth control literature. An information charging the defendant, a druggist, with the crime of circulating advertisements of a device for the prevention of conception charges facts which, if proven, would constitute a complete legal defense and a bar to prosecution, and is demurrable, druggists being specifically excepted from the provisions of the statute.

State v Chenoweth, 226-217; 284 NW 110

Securities act—burden of proving exceptions—lack of basis for attack on validity. In prosecution for violation of securities act wherein defendant attacked validity of statute requiring that burden of proving exceptions to the act shall be on party seeking benefit thereof, and contended that such burden should be placed on state, held, defendant's contention was without merit in view of trial court's instructions which in fact did place such burden on the state.

State v Dunley, 227-1085; 290 NW 41

Securities act—lack of basis for attack on validity. As respects statute providing that exceptions to securities act need not be negatived in an indictment thereunder, a contention that such statute deprived defendant of information as to the nature of charge against him, and was therefore unconstitutional, could not be sustained on record showing that defendant was in fact provided with such information when summary of evidence to be introduced at trial was served on him.

State v Dunley, 227-1085; 290 NW 41

13732.26 Perjury.

Instruction on material parts of indictment. In prosecution for subornation of perjury, where defendant assigns as error the court's omitting to instruct the jury as to what were the material parts of the indictment—while it is true this is a duty of the court—a review of the instructions shows that defendant's argument is quite technical, and the instructions, as a whole, clearly and definitely point out to the jury what the material allegations of the indictment were and what was necessary for the jury to find before returning a verdict of guilty.

State v Hartwick, 228- ; 290 NW 523

13732.29 Surplusage.

Corporate capacity as surplusage. An indictment for entering a bank with intent to rob (§13002, C., '24) need not charge the corporate capacity of the said bank, and, if it is charged, it may be treated as surplusage.

State v Wagner, 202-739; 210 NW 901

13732.33 Permissible forms.

Discussion. See 12 ILR 209, 355—Abridged indictments and informations; 14 ILR 129—Short form of indictment; 14 ILR 385—Short Indictment Act

Short form indictment valid. A short form indictment is valid and the statute providing therefor is constitutional.

State v Keturokis, 224-491; 276 NW 600

Manslaughter. An indictment for manslaughter in the language authorized by the short form act is sufficient against a demurrer which simply asserts the general and all-inclusive claim that the indictment "does not conform to the laws of the state".

State v Long, 215-494; 245 NW 726

Burglary. An indictment which charges that a railway car (the subject of a burglary) was a place in which goods were kept for "use, deposit, and transportation" is a good indictment under §13001, C., '31, even tho the word "transportation" does not appear in said section.

State v Christofferson, 215-1282; 247 NW 819

Threat to extort—failure to allege essential threat. A short form indictment for malicious threat to extort, under §13164, is fatally defective when it fails to allege the statutory identifying threat made by the accused.

State v Goldenberg, 211-234; 233 NW 66

13737 Charging but one offense.

ANALYSIS

I Different Modes and Means
II One Transaction
III Several Acts—One Offense
IV Various Acts—Same Offense
V Conspiracy
VI Included Offenses
VII Distinct Offenses
VIII Separate Counts
IX Averments to Show Intent, Etc.
X Duplicity—When Question Raised
XI Requiring Prosecution to Elect

Overt act as necessary allegation. See under §13755

Verdicts for offenses of different degree. See under §13919

I DIFFERENT MODES AND MEANS

Bootlegging. Under this section an indictment charging the commission of the offense of bootlegging by any and all of the means denounced by §1927 is proper.

State v McMahon, (NOR); 211 NW 409

II ONE TRANSACTION

No annotations in this volume

III SEVERAL ACTS—ONE OFFENSE

Animals—health regulations—duplicity in indictment. The offense of permitting the carcass of a dead animal to lie about the premises of the owner or custodian undisposed of for more than 24 hours is complete when the law is violated as to any one animal. It follows that an indictment charges more than one offense when it charges a violation as to more than one animal, dying "at sundry and various times".

State v Redlinger, 207-1114; 224 NW 83

***Receiving bank deposits* while insolvent.** In a prosecution for receiving bank deposits with knowledge of the bank's insolvency, separate and distinct deposits by separate and distinct individuals may not be charged, even in separate counts.

State v McCarty, 202-162; 209 NW 288

Requisites and sufficiency—disjunctive acts charged conjunctively—libel. When several nonrepugnant acts are enumerated disjunctively as constituting an offense, they may be alleged conjunctively without rendering the indictment subject to the vice of duplicity, and only one of said acts needs to be established in order to sustain a conviction. So held in a prosecution for libel.

State v Heptonstall, 209-123; 227 NW 616

IV VARIOUS ACTS—SAME OFFENSE

Disjunctive acts charged conjunctively—libel. When several nonrepugnant acts are enumerated disjunctively as constituting an offense, they may be alleged conjunctively without rendering the indictment subject to the vice of duplicity, and only one of said acts need be established in order to sustain a conviction. So held in a prosecution for libel.

State v Heptonstall, 209-123; 227 NW 616

V CONSPIRACY

Duplicity. An indictment for conspiracy is not duplicitous because it sets forth numerous purposes or objects of the one conspiracy.

State v Moore, 217-872; 251 NW 737

VI INCLUDED OFFENSES

Finding offense of different degree. See under §13919

Rape—rule for submission. Notwithstanding any prior decisions by this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes (1) assault with intent to commit rape, (2) assault and battery, and (3) simply assault. Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question were the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if nay, then do not submit. Contradictory evidence held to show that the act in question was committed by force and against the will of the prosecutrix, and that, therefore, assault and battery should have been submitted to the jury.

State v Hoaglin, 207-744; 223 NW 548

Assault to commit offense. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

VII DISTINCT OFFENSES

Duplicity in indictment. The offense of permitting the carcass of a dead animal to lie about the premises of the owner or custodian undisposed of for more than 24 hours is complete when the law is violated as to any one animal. It follows that an indictment charges more than one offense when it charges a violation as to more than one animal dying "at sundry and various times".

State v Redlinger, 207-1114; 224 NW 83

Larceny not part of burglary. Principle reaffirmed that burglary is not a compound offense which includes larceny.

State v Leasman, 208-851; 226 NW 61

Bootlegging—submission of nuisance—effect. On a simple charge of "bootlegging" as defined by §1927, C., '27, it is reversible error to submit (along with said charge) the offense of maintaining a nuisance, even tho there be no evidence of the maintenance of a nuisance, and even tho the two offenses have common elements, and closely approach identity.

State v Moore, 210-743; 229 NW 701

VIII SEPARATE COUNTS

Election between counts. A motion to compel the state to elect on which count it will proceed will not lie when the indictment charges in separate counts a burglary and a larceny committed in connection with the burglary.

State v Loucks, 218-714; 253 NW 838

Fraudulent banking. In a prosecution for receiving bank deposits with knowledge of the bank's insolvency, separate and distinct de-

VIII SEPARATE COUNTS—concluded

posits by separate and distinct individuals may not be charged, even in separate counts.

State v McCarty, 202-162; 209 NW 288

Burglary and larceny. An indictment which charges in different counts (1) burglary of a granary, and (2) larceny from a granary, even tho the location of the granary and the date of the commission of said offenses are the same in each count, is fatally defective—wholly bad —in the absence of an allegation that the larceny was committed in connection with the burglary.

State v Leasman, 208-851; 226 NW 61

Joining forgery and uttering. The joining, in separate counts, in one indictment of forgery and uttering of said forgery, when both offenses are committed by the same person, does not have the effect of combining the two offenses into one offense with consequent obligation on the state to establish both counts.

State v Miller, 217-1283; 252 NW 121

IX AVERMENTS TO SHOW INTENT, ETC.

No annotations in this volume

X DUPLICITY—WHEN QUESTION RAISED

Waiver. The claim that an indictment or trial information charges more than one offense will be disregarded when raised for the first time on appeal.

State v Voss, 201-16; 206 NW 292

Objection revealed by testimony. An indictment may (speaking by way of argument) be duplicitous, and yet not reveal such fact on the face of the indictment.

State v Reinhard, 202-168; 209 NW 419

Amendment as cure. Whether an indictment which is wholly bad because duplicitous can be made all-sufficient by an amendment as provided by statute, quaere.

State v Leasman, 208-851; 226 NW 61

Dismissal of count—effect. The vice of duplicity in an indictment cannot be cured by the dismissal of one of the counts.

State v Leasman, 208-851; 226 NW 61

XI REQUIRING PROSECUTION TO ELECT

No annotations in this volume

13738 Charging several offenses.

Atty. Gen. Opinion. See '36 AG Op 59

13738.1 Miscellaneous separate offenses.

Scope of term "burglary". All forms of felonious statutory breakings of buildings constitute "burglary" in view of this section.

State v Engler, 217-138; 251 NW 88

Joining germane matters. The constitutional requirement that a legislative act "shall embrace but one subject and matters properly connected therewith" is not violated by an act (1) authorizing different offenses to be charged in the same indictment, and (2) regulating peremptory challenges under such charge—the latter being germane to the former.

State v Miller, 217-1283; 252 NW 121

Joining forgery and uttering. The joining, in separate counts, in one indictment of forgery and uttering of said forgery, when both offenses are committed by the same person, does not have the effect of combining the two offenses into one offense with consequent obligation on the state to establish both counts.

State v Miller, 217-1283; 252 NW 121

Election between counts. A motion to compel the state to elect on which count it will proceed will not lie when the indictment charges in separate counts a burglary and a larceny committed in connection with the burglary.

State v Loucks, 218-714; 253 NW 838

Permissible duplicity. Statutory burglary, and larceny from a building in the nighttime, tho separate offenses, may be charged in different counts in the same indictment, provided the second count alleges that the offense therein charged was committed in connection with the commission of the offense charged in the first count.

State v Stennett, 220-388; 260 NW 732

13738.2 Judgment.

Under conviction under different counts. Under a verdict of guilt of all jointly indicted parties under both counts (statutory burglary, and larceny from building in nighttime) judgment is properly entered on each count against each defendant.

State v Stennett, 220-388; 260 NW 732

13740 Name of person injured. (Repealed.)

Non-variance. No variance is presented by an allegation of the ownership of stolen property and mere proof that the said alleged owner had delivered the same to a common carrier and received a bill of lading showing shipment to another party.

State v Joy, 203-536; 211 NW 213

Non-fatal variance. An allegation in an indictment for burglary, of ownership of the premises in a named party is sufficiently supported by evidence of possession by said party.

State v Archibald, 208-1139; 226 NW 186

13742 Words of statute. (Repealed.)

Negativing exceptions. An indictment for the unlawful possession of narcotic drugs need

not, in view of §3156, C., '24 [§3169.18, C., '39], negative the exception of the statute (§3154, C., '24 [§3169.05, C., '39]) relative to possession under the prescription of named medical practitioners.

State v Bailey, 202-146; 209 NW 403

13743 Rule of sufficiency. (Repealed.)

Additional annotations. See under §13740
Sufficiency as to particular offenses. See under section defining offense.
Venue. See under Ch 619

Defectively charged offense. A prisoner will not, on habeas corpus, be released from imprisonment on the ground that the indictment or trial information defectively and unskillfully charges the offense for which he was convicted and imprisoned. The rule is otherwise if the defect is so total that the indictment or information is a nullity.

McBain v Hollowell, 202-391; 210 NW 461

Indefinite identification of property. An indictment which charges the obtaining by false pretenses of "a stock of merchandise consisting of groceries, dry goods, drugs, and fixtures" must describe or point out the property in such manner as to individualize it from all other property of like character, e. g., by charging its exact location. An allegation of ownership is not, in and of itself, sufficient.

State v Hixson, 202-431; 210 NW 423

Attempted abortion—sufficiency of allegation. Indictment for murder by means of an attempted abortion reviewed, and held to adequately, tho somewhat clumsily, allege the use by the accused of instruments as a means of effecting such abortion.

State v Sweeney, 203-1305; 214 NW 735

Ignoring material allegations. The court may not, in the trial of a criminal case, ignore material allegations in the indictment or information and thereby place the accused on trial for a higher and more severely punished offense than is charged in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

13744 Amendment.

[Note that some of the following were under the former statute which was much more limited in its scope than the present statute.]

Constitutionality. The statute authorizing an amendment to an indictment is not unconstitutional.

State v Schumacher, 162-231; 143 NW 1110

Failure to read. Failure to read to the jury an amendment to an indictment is waived by proceeding to trial.

State v Schumacher, 162-231; 143 NW 1110

Allowable amendment. An indictment may be amended by inserting a verb which had manifestly been inadvertently omitted.

State v Crisinger, 197-613; 195 NW 998

Allowable amendment. An indictment may, after the state has rested, be amended as to the date on which the offense is alleged to have been committed.

State v Brundage, 200-1394; 206 NW 607

Striking unnecessary allegation in re nuisance. A trial information by the county attorney for maintaining an intoxicating liquor nuisance in a named county "in the city of Cedar Rapids" may, after the jury is sworn, be amended by striking therefrom the clause "in the city of Cedar Rapids", it appearing that the said clause was a manifest error, and that the accused so knew, and requested no further time for trial.

State v Japone, 202-450; 209 NW 468

"Matter of form" illustrated. An indictment charging that a bank official "did accept a renewal of a deposit" while the bank was insolvent may be so amended as to charge that the defendant "did renew certificates of deposit", there being no question but that the original indictment and the amendment referred to the same certificates.

State v Childers, 202-1377; 212 NW 63

Name of person. An indictment which charges solicitation "to have carnal knowledge with one June Mills" may be amended during the trial by substituting the name of a different female in lieu of the one charged.

State v Render, 203-329; 210 NW 911

Unnecessary amendment. An accused may not object that the indictment was amended by inserting therein an entirely unnecessary allegation.

State v Dowling, 204-977; 216 NW 271

Striking surplusage—effect. An accused may not complain that an amendment to a valid indictment worked any injury to him when the sum total of the amendment was to eliminate surplusage, nor will he be heard to say that such elimination resulted in charging him with a different offense than first contemplated.

State v Gardiner, 205-30; 215 NW 758

Amendment under prior statute. An indictment was amendable under §13744, C., '24, in the description of an article or thing—e. g., a stock of goods.

State v Hixson, 205-1321; 217 NW 814

Allowable form. An application to amend an indictment by striking out certain words and by inserting certain words in lieu of the stricken words, is not objectionable because it also sets forth the form of the indictment as it will be if the amendment is permitted.

State v Bamsey, 208-802; 226 NW 57

Amendment as cure. Whether an indictment which is wholly bad because duplicitous

can be made all-sufficient by an amendment as provided by statute, quaere.

State v Leasman, 208-851; 226 NW 61

13745 Amendment before trial.

Waiver of formal amendment. The objection that no formal amendment to an indictment was filed after the sustaining of the motion to amend, will be deemed waived when the trial was conducted precisely as it would have been conducted, had the formal amendment been filed, and when the objection was withheld until exceptions to the instructions were filed.

State v Japone, 202-450; 209 NW 468

Procedure for amendment. An indictment cannot be legally amended before the commencement of the trial except through the instrumentality of a written application to amend, together with a copy of the proposed amendment, duly served on the defendant. The application and amendment may not in such case be dictated into the record, even tho the accused and his counsel are present in the court, proper objection being made.

State v Bamsey, 208-802; 226 NW 57

"Commencement" of trial defined. The trial on an indictment may not be said to have "commenced" at a time when the accused had not even been arraigned, even tho the accused and his counsel are present in court preparatory to proceeding with the trial.

State v Bamsey, 208-802; 226 NW 57

Failure to notify defendant. The refusal to strike an amendment to an indictment constitutes reversible error when the application to amend is made before the commencement of the trial and defendant is neither served with a copy of the proposed amendment nor given an opportunity to resist it.

State v Hyduck, 210-736; 231 NW 451

13747 Nonpermissible amendment.

Striking surplusage—effect. An accused may not complain that an amendment to a valid indictment worked any injury to him when the sum total of the amendment was to eliminate surplusage, nor will he be heard to say that such elimination resulted in charging him with a different offense than first contemplated.

State v Gardiner, 205-30; 215 NW 758

Nonpermissible amendment. An indictment which charges a first offense may not be so amended as to charge a second offense.

State v Herbert, 210-730; 231 NW 318

Wholly new and different offense. A county attorney information which charges forgery cannot be deemed an amendment of an abandoned information which charged the uttering of a forgery, even tho the former is denominated as an "amended and substituted information".

State v Solberg, 214-333; 242 NW 84

13754 Perjury. (Repealed.)

Materiality of testimony. Perjury may, manifestly, be predicated on the fact that the defendant had falsely sworn that a certain incriminating admission had not been made to him by another person. It is equally manifest that the indictment in such a case may predicate the perjury in such form as to render immaterial the entire assignment of perjury.

State v Morrison, 208-858; 226 NW 54

13755 Conspiracy—overt act. (Repealed.)

Overt act necessary. A conspiracy which is followed by no overt act furnishes no basis for a civil action.

Hall v Swanson, 201-134; 206 NW 671
Dickson v Young, 202-378; 210 NW 452

13757 Compounding offense.

Compromising certain offenses. See Ch 659, Vol I

CHAPTER 639

PROCESS AFTER INDICTMENT

13759 Bench warrant.

Jurisdiction — custody of person essential. The district court has no jurisdiction over the person of an indicted party until it in some manner acquires, under the indictment, the actual custody of the person of said party; and the court does not have such custody because of the fact that the state is holding a party in confinement in the penitentiary under a former conviction.

State v Judkins, 200-1234; 206 NW 119

CHAPTER 640

ARRAIGNMENT OF DEFENDANT

13773 Right to counsel.

Atty. Gen. Opinion. See AG Op Dec. 28, '39

13774 Fee for attorney defending.

Atty. Gen. Opinion. See AG Op Dec. 28, '39

Attorney appointed by juvenile court. The court by statute has power and authority to appoint attorneys to represent juvenile delinquents in municipal court, unable to employ counsel, and an obligation arises on the part of the county to pay a reasonable attorney fee, altho statute makes no provision therefor.

Ferguson v Pottawattamie, 224-516; 278 NW 223

Change of venue. The general provision of law that the county from which a criminal cause is sent on change of venue shall pay all costs consequent on such change includes attorney fees for defending the accused.

Cass Co. v Page Co., 203-572; 213 NW 426

Pauper defendant—counsel fees not determinable on appeal. The supreme court will not, on appeal, fix attorney fees for defending a pauper prisoner.

State v Froah, 220-840; 263 NW 525

13775 Affidavit required.

Failure to file. An attorney following, into the supreme court, a case in which he was selected to defend an accused, is not entitled to have that court fix the fee to which he is entitled, if that court can ever do so, where he did not file in the district court an affidavit to the effect that he "has not directly or indirectly received any compensation for such services from any source".

State v Behrens, 109-58; 79 NW 387

Irregular audit. The audit by a trial court of a claim for attorney fee for defending a prisoner on change of venue to a foreign county, on an affidavit which fails to show that the attorney has neither received nor contracted to receive compensation from any other source, is not void, and may not be collaterally attacked.

Cass Co. v Page Co., 203-572; 213 NW 426

13777 Arraignment—how made.

Jury question as to identity. The identity of one who is prosecuted for a crime as the one who actually committed it is a question of fact for the jury, on conflicting testimony.

State v Ayles, 205-1024; 219 NW 41

13778 Incorrect name—estoppel.

"Idem sonans" doctrine—applicability. The doctrine of idem sonans is recognized by Iowa courts and, while each case must be determined according to its own facts, the mere fact that names spelled differently from true name could be pronounced like the true name by a strained pronunciation would not make the doctrine applicable, but where the names, when general and ordinary rules of pronunciation are applied, are so identical in pronunciation and so alike that there is no possibility of mistake, the doctrine should be applied; or where two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even slight difference in their pronunciation is unimportant, if the attentive ear finds difficulty in distinguishing the two names when pronounced. Such names are "idem sonans" and, altho spelled differently, are to be regarded as the same.

Webb v Ferkins, 227-1157; 290 NW 112

CHAPTER 641

SETTING ASIDE INDICTMENT

13781 Grounds for setting aside indictment.

ANALYSIS

I In General
II Grounds Specified Are Exclusive
III Indorsement of "True Bill"
IV Indorsement of Names of Witnesses
V Minutes of Evidence Returned
VI Presentation and Filing
VII Presence of Outsiders
VIII Improper Selection, Etc., of Jury

Selection of grand jury. See under Chs 482, 635

I IN GENERAL

Power of court sua sponte. A motion to set aside an indictment, filed on behalf of an accused who was not in the custody of the court, is nugatory; yet, when the motion presents a proper ground, the sustaining of the motion will be deemed proper, because the court had power to take such action on its own motion.

State v Judkins, 200-1234; 206 NW 119

Improper testimony by wife. A defendant in a criminal case who knows, before the commencement of the trial, that his wife has, before the grand jury, improperly given material

testimony against him, must, if he wishes to attack the indictment on such ground, move to quash the indictment. He may not utilize such objection as the basis of a motion for a directed verdict.

State v Smith, 215-374; 245 NW 309

II GROUNDS SPECIFIED ARE EXCLUSIVE

Motion to dismiss improper—remedy by moving to quash. A defendant in a criminal case who knows, before the commencement of the trial, that his wife has, before the grand jury, improperly given material testimony against him, must, if he wishes to attack the indictment on such ground, move to quash the indictment. He may not utilize such objection as the basis of a motion for a directed verdict.

State v Smith, 215-374; 245 NW 309

III INDORSEMENT OF "TRUE BILL"

No annotations in this volume

IV INDORSEMENT OF NAMES OF WITNESSES

Minutes of testimony—conclusiveness. The defendant in an indictment will not be permitted to show that witnesses other than those whose names are indorsed on the indictment, were before the grand jury and gave testimony relative to the charge against defendant, and that minutes of testimony of such other witnesses were not returned with the indictment.

State v Martin, 210-376; 228 NW 1

V MINUTES OF EVIDENCE RETURNED

Conclusiveness. The defendant in an indictment will not be permitted to show that witnesses other than those whose names are indorsed on the indictment were before the grand jury and gave testimony relative to the charge against defendant, and that minutes of testimony of such other witnesses were not returned with the indictment.

State v Martin, 210-376; 228 NW 1

VI PRESENTATION AND FILING

Requisites and sufficiency—waiver. An accused who goes to trial without questioning the sufficiency of an indictment, may not thereafter raise the question of sufficiency by objections to evidence.

State v Phillips, 212-1332; 236 NW 104

VII PRESENCE OF OUTSIDERS

Disqualification of attorney—improper appearance before grand jury. An assistant county attorney (in this instance a special prosecutor) by accepting from a private person compensation for services rendered and to be rendered before the grand jury, in its investigation of certain pending charges of criminality, thereby ipso facto disqualifies himself henceforth from being present before said jury during said investigation. And his further presence before said jury during said investigation, in disregard of said disqualification, mandatorily necessitates the quashing, on proper motion, of all indictments returned by said jury on said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

Improper presence of county attorney. The presence of the county attorney before the grand jury during its investigation of certain charges of criminality, when he is confessedly disqualified from so appearing, necessitates the quashing of all indictments returned by said jury as a result of said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

Presence of assistant county attorney. The presence of a duly appointed assistant county attorney in the grand jury room while the question of indictment was being considered did not render the indictment defective.

State v Coleman, 226-968; 285 NW 269

VIII IMPROPER SELECTION, ETC., OF JURY

Fatally delayed motion. A motion to set aside an indictment on the ground that the accused has been unlawfully discriminated against in the selection of the grand jury, is unallowable when interposed after the accused has entered a plea and has had one trial.

State v Twine, 211-450; 233 NW 476

Grounds of challenge. An indictment for adultery against a woman will not be set aside because her husband's brother was one of the jurors who found it.

State v Russell, 90-569; 58 NW 915

Illegal selection of grand jury—insufficient showing. The claim of an accused that he has been discriminated against and has been denied the equal protection of the law in that the jury commissioners have willfully excluded members of his race from the grand jury list, is properly overruled when the showing of fact is largely on information and belief and hearsay, and otherwise insufficient.

State v Twine, 211-450; 233 NW 476

Two jurors from same township.

State v Judkins, 200-1234; 206 NW 119

13781.1 Exception.

Two jurors from same township. An indictment must be set aside when returned by a grand jury two members of which were from the same township.

State v Judkins, 200-1234; 206 NW 119

13783 Objections to selection of grand jury.

Qualifications of grand jurors. An accused who is held to answer to the grand jury is absolutely bound by his waiver of all challenges to the grand jury or to individual members thereof.

State v Hickman, 195-765; 193 NW 21

13785 Motion overruled—defendant must answer.

Going to trial—effect on unruled motion. Defendant in a criminal proceeding waives a motion filed by him by going to trial without demanding a ruling on said motion.

State v Wilson, 222-572; 269 NW 205

13787 Resubmission—bail.

Dismissal of indictment. Where a defendant has moved to set aside the indictment, for the reason that the grand jury which returned it was not legally constituted, he cannot complain of an order setting it aside for the same reason, which was subsequently entered on the motion of the county attorney. Nor can he complain of an order directing that he be retained in custody and that his case be resubmitted to another grand jury.

State v Hassan, 149-518; 128 NW 960

CHAPTER 642

PLEADINGS OF DEFENDANT

13790 Grounds of demurrer.

ANALYSIS

I In General
II What Are Grounds
III What Are Not Grounds

I IN GENERAL

Nonpresentable issue on habeas corpus. Objections to the sufficiency of an indictment of which the court has jurisdiction may not be raised in subsequent habeas corpus proceedings.

Furey v Hollowell, 203-376; 212 NW 698

Order sustaining demurrer to indictment as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under §13995, C., '39. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

Ruling on demurrer—no review by certiorari. Where neither the writ of certiorari nor the petition therefor encompassed a review of lower court's alleged error in overruling demurrer to indictment, and where no authorities were cited sustaining the proposition that alleged error was reviewable by certiorari, court will refuse to review the ruling on the demurrer by this writ.

Harris v Dist. Court, 226-606; 284 NW 451

Overruling demurrer—appeal—technicalities disregarded—judgment on record entered. On an appeal from a judgment entered on a plea of guilty, which is made subject to the exception to the ruling overruling defendant's demurrer to indictment, the supreme court is, by statute, required to examine the record without regard to technical errors or defects which do not affect substantial rights of the parties, and render such judgment on the record as the law demands.

State v Oge, 227-1094; 290 NW 1

II WHAT ARE GROUNDS

Duplicity—sole remedy. Demurrer is the only remedy by which to present a charge of duplicity in an indictment.

State v Leasman, 208-851; 226 NW 61

Indictment good in part. A demurrer to an indictment in toto, because the principal offense is not sufficiently charged, is properly overruled when included offenses are sufficiently charged.

State v Harness, 214-160; 241 NW 645

III WHAT ARE NOT GROUNDS

"Short-form"—manslaughter. An indictment for manslaughter in the language authorized by the "short-form" act is sufficient against a demurrer which simply asserts the general and all-inclusive claim that the indictment "does not conform to the laws of the state".

State v Long, 215-494; 245 NW 726

Burglary — "short-form" indictment — sufficiency. An indictment, under the "short-form" statute, charging, in the language of the statute, the possession of burglar's tools with intent to commit a burglary, is not subject to demurrer. The proper procedure is to demand a bill of particulars.

State v Engler, 217-138; 251 NW 88

13791 Failure to demur—waiver.

Nonapplicability of statute. The duty to object to an indictment in matters of "substance and form" before the jury is sworn does

not apply when a demurrer will not lie because the objection — former acquittal — does not appear on the face of the indictment and is revealed only by the testimony introduced on the trial.

State v Reinhard, 202-168; 209 NW 419

Belated objection. Objection to an indictment that it did not specifically describe the car broken and entered, which was not raised until after the jury was sworn, came too late to be available.

State v Stutches, 163-4; 144 NW 597

Absence of essential allegations — waiver. Objection that an indictment fails to allege the character of certain instruments or the manner of using them as a means of bringing about an abortion are waived by the failure to demur to the indictment.

State v Sweeney, 203-1305; 214 NW 735

Duplicity. An indictment is demurrable when it improperly charges more than one offense and such duplicity is waived if not presented by demurrer before the jury is sworn.

State v Frey, 206-981; 221 NW 445

Failure to describe money. Failure to specifically describe the money obtained by false pretenses (assuming such necessity) is waived by delaying objection until after the jury is sworn.

State v Detloff, 201-159; 205 NW 534

Fatally delayed objection. The insufficiency of an indictment may not be presented for the first time in a motion for a directed verdict.

State v Hawks, 213-698; 239 NW 553

Formal requisites. The objection that an information for a nonindictable misdemeanor is indefinite, vague, and uncertain in its statement of facts is waived by defendant's failure to challenge the information prior to the entry of his plea.

State v Porter, 206-1247; 220 NW 100

Unallowable former convictions—proper presentation. When an indictment charges a complete offense and is therefore not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Insufficient defect to exclude jurisdiction. A trial information which charges three defendants jointly with making an assault with a deadly weapon while jointly attempting to commit a robbery, and that one of them fired the fatal shot with the specific intent to kill "of their malice aforethought", is not so fatally defective as to deprive the court, on a plea of guilty, of jurisdiction to pass sentence on all the defendants.

McBain v Hollowell, 202-391; 210 NW 461

Irregularity of indictment. Irregularity in finding an indictment cannot be objected to after verdict, when the party goes to trial without objection.

Munson v State, 4 Greene 483
Wau-kon-chaw-neek-kaw v US, Morris 437

Matters of substance. The fact that an indictment fails to charge an offense, because of the absence of an essential allegation, may not be presented by way of objection to evidence.

State v Ostby, 203-333; 210 NW 934; 212 NW 550
State v Phillips, 212-1332; 236 NW 104

Nonpresentable issue — insufficiency of indictment. Habeas corpus will not lie to question the sufficiency of an indictment or information of which the nisi prius court had jurisdiction.

Smith v Hollowell, 209-781; 229 NW 191

Plea in abatement. The former statute which provided for waivers of "pleas in abatement" in criminal cases (§5289, S., '13 [§13791, C., '39]) had no application to a plea that the court had no jurisdiction because of the fact that the indictment or trial information was a nullity.

McBain v Hollowell, 202-391; 210 NW 461

13796 Absolute discharge.

Order sustaining demurrer to indictment as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under §13995, C., '39. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

13797 Resubmission.

Effect of sustaining demurrer. The sustaining of a demurrer to an indictment on the ground that it does not substantially comply with the requirements of the code (insufficient charge of manslaughter) becomes an absolute bar to any further prosecution for the offense attempted to be charged, unless the court orders the cause "resubmitted to the same or to another grand jury." "Authorizing" the county attorney to file a trial information is not within the statute as thus written.

State v Sexsmith, 202-537; 210 NW 555

Mere authorization of resubmission. Discretionary power in a court to order a resubmission of a cause to a grand jury because of the defective nature of the charge does not embrace the power simply to authorize a resubmission.

State v Sexsmith, 202-537; 210 NW 555

Sustaining demurrer — procedure. Principle reaffirmed that upon the sustaining of a demurrer to an indictment, the court must either enter an out-and-out dismissal, or resubmit the cause to the grand jury.

State v Leasman, 208-851; 226 NW 61

13798 Pleading over—final judgment.

Adverse ruling on demurrer—conditions for review. Where a defendant was sentenced and imprisoned upon failing to plead after his demurrer to the indictment was overruled, an appeal will be dismissed from an adverse ruling on demurrer in a habeas corpus action to test the validity of such imprisonment, when the defendant does not (1) elect to stand upon his pleadings or (2) suffer judgment to be entered against him in the lower court.

Besch v Haynes, 224-166; 276 NW 13

Ruling on demurrer—no review by certiorari. Where neither the writ of certiorari nor the petition therefor encompassed a review of lower court's alleged error in overruling demurrer to indictment, and where no authorities were cited sustaining the proposition that alleged error was reviewable by certiorari, court will refuse to review the ruling on the demurrer by this writ.

Harris v Dist. Court, 226-606; 284 NW 451

13799 Pleas to the indictment.

ANALYSIS

I GENERALLY
II SPECIAL DEFENSES

Alibi as defense. See under §13897 (XVI)
Former jeopardy. See under §13807
Insanity as defense. See under §13897 (XV)
Justification for assaults. See under §12929
Self-defense. See under §12922
Unwritten law. See under §12919 (I)

I GENERALLY

Coercion—required nature and extent. The compulsion which will excuse a criminal act must be present, imminent, and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done.

State v Clay, 220-1191; 264 NW 77

Inconsistent defenses—estoppel.

State v Reynolds, 201-10; 206 NW 635

II SPECIAL DEFENSES

Former acquittal—timely objection. The duty to object to an indictment in matters of "substance and form" before the jury is sworn (§13791, C., '24) does not apply when a demurrer will not lie because the objection—former acquittal—does not appear on the face of the indictment, and is revealed only by the testimony introduced on the trial.

State v Reinhard, 202-168; 209 NW 419

Intoxication—burden of proof—instruction. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Driving while intoxicated — instructions — dazed condition caused by accident. In a prosecution for driving while intoxicated, the thoughts of requested instructions were sufficiently embodied in instructions which stated that in determining whether the defendant was intoxicated at the time of the collision, or whether his condition immediately after was the result of injury or shock, the jury should consider the injury, its nature, extent and effect, and all other evidence.

State v McDowell, 228- ; 290 NW 65

Manslaughter—voluntary intoxication — effect. It is not the law that a defendant on trial for murder in the second degree must be acquitted of both murder in the second degree and manslaughter if at the time in question he was so intoxicated that he could not distinguish between right and wrong or know what he was doing.

State v Johnson, 215-483; 245 NW 728

Non-jurisdiction because of defect. A plea to the jurisdiction of the court because the indictment or trial information is so totally defective that it is a nullity, is allowable.

McBain v Hollowell, 202-391; 210 NW 461

13800 Plea of guilty—form—entry.

Imposition of death penalty—conclusiveness. The imposition by the trial court of a sentence of death, on a plea of guilty of murder in the first degree, will not be interfered with by the appellate court unless the record reveals a very clear abuse of discretion.

State v Tracy, 219-1412; 261 NW 527

Plea of guilty in criminal prosecution. A plea of guilty in a criminal prosecution may be admissible as an admission when the judgment entered thereon would not be admissible.

In re Johnston, 220-328; 261 NW 908

Plea of guilty in murder charge. When a prisoner on an indictment for murder pleads guilty, the court must ascertain by examination of witnesses whether the crime be murder or manslaughter, and the examination of witnesses and the decision of the judge must appear of record.

McCauley v U. S., Morris 641

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state

and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

Third conviction—proof of prior convictions unnecessary under guilty plea. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pleaded guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

Written plea—when required. Written pleas of guilt are not required under the county attorney information act except when the plea is taken in vacation of the court.

Bennett v Bradley, 216-1267; 249 NW 651

13802 Failure to plead.

Motion to set aside denied. When a motion to set aside an indictment is denied, the defendant must immediately demur or plead thereto; and upon his refusal to do either a plea of not guilty must be entered by the court.

State v Morris, 36-272

13803 Withdrawal of plea of guilty.

Arbitrary right to withdraw. An accused under an indictment has an arbitrary right to withdraw a plea of guilty at any time before the oral sentence passed upon him has taken the form of a final judgment by entry in the record book of the court. This is true, irrespective of any other entries in the court records.

State v Wieland, 217-887; 251 NW 757

Fatally delayed motion. A motion in a criminal case for a new trial and for the permission to withdraw a plea of guilty must be made before judgment.

State v Van Klaveren, 208-867; 226 NW 81

Right to withdraw. A plea of guilty may not be withdrawn after judgment has been entered on the plea.

State v Tracy, 219-1412; 261 NW 527
State v Harper, 220-515; 258 NW 886

13804 Issues of fact—trial.

Defendant cannot waive jury trial. An accused indicted for the crime of gambling nuisance may not waive a jury and the judgment of conviction and penalty imposed must be and are held to be void.

State v Stricker, 196-290; 194 NW 60

Degree of guilt in murder prosecution. The defendants' motion for a directed verdict in a murder trial was properly overruled when based on the idea that the state had not proved the defendants guilty of a crime of any degree, as that was a question for the jury.

State v Coleman, 226-968; 285 NW 269

13805 Plea of not guilty—evidence admissible.

Defenses in general—entrapment. Principle recognized that if a criminal intent and design originate in the mind of an accused, it is no defense that he was entrapped by the artifices of public officers.

State v Heeron, 208-1151; 226 NW 30

Good character as defense. Defendant in a criminal prosecution may place in issue that trait of his character which is questioned by the charge made against him, and may sustain his good character as to said trait (1) by evidence of his good reputation as to said trait, or (2) by the direct testimony of witnesses who, by knowledge, qualify to speak as to such good character.

State v Ferguson, 222-1148; 270 NW 874

13806 Personal presence at trial.

Presence at arraignment. See under §13771, Vol I
Presence at judgment. See §13952, Vol I
Presence when verdict rendered. See under §13924

Presence of accused. An accused in a charge of felony must be present when the jury is given additional instructions.

State v Wilcoxen, 200-1250; 206 NW 260

Appearance by counsel. An indictment for resisting an officer serving legal process charges a misdemeanor. In such case the defendant may appear by counsel and demand a trial, and it was error for the court to refuse a trial and order a forfeiture of bond for nonappearance of the defendant.

State v Conneham, 57-351; 10 NW 677

Drawing jurors in absence of defendant. The fact that, in impaneling a jury in a criminal case, the names of jurors were drawn from the panel box at a time when the defendant was not present will not be deemed prejudicial error in the absence of a showing that such drawing deprived defendant of a fair and impartial jury.

State v Sweetman, 220-847; 263 NW 518

Nonappearance for trial. Where, before forfeiting a bail bond, the court waits two days for the defendant to appear for trial under a misdemeanor charge, with no request from the defendant's attorney that the trial proceed in the absence of the defendant, it is too late to successfully insist that the sureties on the bail bond were exonerated because the trial might have proceeded in the absence of the defendant.

State v Walker, 217-229; 251 NW 56

13807 Conviction or acquittal—when a bar.

ANALYSIS

I IN GENERAL
II DISMISSAL OF PROSECUTION
(a) ARBITRARY DISMISSAL
(b) CAUSE FOR DISMISSAL
III TESTS OF IDENTITY OF OFFENSES
IV TWO CRIMES FROM SAME ACT
V ONE CRIME FROM TWO ACTS
VI SEPARATE OFFENSES
VII PLEADING
VIII EVIDENCE

Also see annotations under Const., Art I, §12
Dismissal by court. See under §14027
To indict for higher offense. See under §13866, Vol I

I IN GENERAL

Discussion. See 16 ILR 261—Offenses in several counties; 19 ILR 596—Need for statute

Final judgment. Statute does not exclude a conviction or acquittal without a verdict from having the same effect.

State v Fields, 106-406; 76 NW 802

General test. General principle recognized that an acquittal is a bar to a subsequent prosecution if proof of the subsequent allegations would have sustained a conviction under the indictment under which acquittal was had; otherwise not.

State v Folger, 204-1296; 210 NW 580

Holding of inferior court. It is no defense to an indictment for keeping a gambling house that, before the acts were done which it is claimed constituted such keeping, a municipal court had held that said acts did not constitute gambling.

State v Striggles, 202-1318; 210 NW 137; 49 ALR 1270

II DISMISSAL OF PROSECUTION

(a) ARBITRARY DISMISSAL

Acquittal as bar to civil action. The general rule is that a defendant's acquittal in a criminal prosecution is neither a bar to a civil action against him, nor evidence in such action of his innocence; but, when the subsequent action, altho civil in form, is quasi-criminal in nature, as to recovering penalties or declaring forfeitures, the second action may be barred by the former.

Bates v Carter, 225-893; 281 NW 727

Former jeopardy as rebuttal. When the state, in a prosecution for receiving deposits while the bank was insolvent, seeks to establish the insolvency by proof which tends to show that the accused had both embezzled funds of the bank and had made false reports concerning the assets of the bank, the accused may show, in rebuttal, that he has been indicted for both of said alleged offenses and acquitted.

State v Pierson, 204-837; 216 NW 43

Nolle prosequi—time to enter. A nolle prosequi may be entered (1) before the jury is impanelled, (2) while the case is before the jury, and (3) after the verdict.

State v Veterans, 223-1146; 274 NW 916; 112 ALR 383

State v Moose, 223-1146; 274 NW 918

(b) CAUSE FOR DISMISSAL

Former jeopardy—state's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

III TESTS OF IDENTITY OF OFFENSES

Necessary identification of offense. Instructions that a defendant may be found guilty of maintaining a liquor nuisance if he committed the offense within three years prior to the return of the indictment will not be deemed to put the defendant on trial for an alleged liquor offense of which the defendant was acquitted within said three years when the specific nature of the latter offense is not made to appear.

State v Kelly, 217-1305; 253 NW 49

IV TWO CRIMES FROM SAME ACT

Same transaction. A trial resulting in an acquittal upon an indictment for uttering and publishing as true a certain false and forged note and chattel mortgage, is a bar to a subsequent prosecution on an indictment for obtaining property, in exchange for said note and mortgage, upon false pretenses, when the transaction relied on in both indictments is the same.

State v Stone, 75-215; 39 NW 275

Conviction for assault and battery. A conviction in municipal court for assault and battery constitutes no bar to a subsequent prosecution under an indictment charging assault and battery with intent to commit great bodily injury, based on the same act.

State v Smith, 217-825; 253 NW 130

Embezzlements by agent and bailee. An acquittal on an indictment which charges the defendant as agent with the embezzlement of the proceeds of grain delivered to him (§13031, C., '24) is no bar to an indictment which charges the defendant as bailee with the embezzlement of the same grain. (§13030, C., '24.)

State v Folger, 204-1296; 210 NW 580

Former jeopardy—false pretense and conspiracy. A conviction on an indictment charging the obtaining, by an officer of a fraternal beneficiary society, of funds of the society by means of false and fraudulent representations, is not a bar to an indictment for conspiracy based on the identical acts charged in the for-

IV TWO CRIMES FROM SAME ACT—concluded

mer indictment, the two charges not being sustainable by the same evidence.

State v Blackledge, 216-199; 243 NW 534

Intoxicating liquors. A criminal prosecution for a violation of the intoxicating liquor statutes is not a bar to contempt proceedings based on the same act.

Touche v Bonner, 201-466; 205 NW 751

Larceny of several objects. Conviction for simple larceny for theft of a watch from one of defendant's roommates was a bar to a subsequent prosecution for larceny from the dwelling, based on the theft of money from another roommate at the same time.

State v Sampson, 157-257; 138 NW 473

Retrial. While a conviction for manslaughter amounts to an acquittal of a higher degree of crime, yet a retrial after a reversal is upon the same indictment and it is proper for the county attorney to send the same to the jury, altho it charges murder, and to state that the accused is to be tried for manslaughter, to which charge he has pleaded not guilty, and that such is the issue then to be tried.

State v Walker, 133-489; 110 NW 925

V ONE CRIME FROM TWO ACTS

Manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Subsequent overlapping charge. When the state bases an indictment for nuisance on a series of acts occurring during a specified period of time, it thereby segregates such acts from all subsequent acts, and irrevocably identifies and stamps said acts as one complete offense; and if it suffers an acquittal, it may not thereafter maintain an indictment based (1) on said segregated acts and (2) on other acts subsequent thereto; and the exclusion of said segregated acts on the trial of the last indictment will not avoid the bar resulting from the first acquittal.

State v Reinhard, 202-168; 209 NW 419

VI SEPARATE OFFENSES

Acquittal of larceny. An acquittal under an indictment charging larceny from a building in the nighttime constitutes no bar to a subsequent indictment charging the felonious receiving of the stolen property, said crimes being separate and distinct offenses.

State v Smith, 219-168; 256 NW 651

Intoxicating liquors. An acquittal on an indictment which charges the maintenance of an intoxicating liquor nuisance does not constitute a bar to an indictment which charges the unlawful possession of such liquors, even tho the same liquors may appear as evidence in both cases.

State v Boever, 203-86; 210 NW 571

Wife desertion. The former conviction of a husband for willful neglect to provide for his destitute wife is not a bar to another prosecution for the same offense, after expiration of his former sentence.

State v Morgan, 155-482; 136 NW 521

VII PLEADING

Former acquittal—timely objection. The duty to object to an indictment in matters of "substance and form" before the jury is sworn (§13791, C., '24) does not apply when a demurrer will not lie because the objection—former acquittal—does not appear on the face of the indictment and is revealed only by the testimony introduced on the trial.

State v Reinhard, 202-168; 209 NW 419

VIII EVIDENCE

Embezzlement—several supporting transactions—election—effect. When, upon the trial of a public officer for embezzlement charged in one count and in a lump sum, the state supports the charge by evidence of several different transactions, any one of which was sufficient to support the charge, and, on order of court, elects to rely on one certain transaction, the defendant, after being convicted and after being granted a new trial, may not successfully contend that he has been put in jeopardy on all the transactions except the transaction on which the state elected to rely on the first trial, it appearing that the nonelected transactions were allowed to remain in the record as evidentiary matter bearing on the issue of fraudulent intent.

State v Huff, 217-41; 250 NW 581

Identification of defendants. Proof that defendant, on trial under a certain name, admitted having been three times convicted in a named county of the felonious offense of "breaking and entering", together with proof that the district court records of said county revealed said number of convictions (and no more) of a party by the same name, and for "breaking and entering", present a jury question on the issue whether the defendant on trial and the defendant in said three convictions are one and the same person.

State v Clarke, 220-1188; 263 NW 837

13808 Prosecutions barred.

Former jeopardy. See Const, Art I, §12; §13807

Former jeopardy—manslaughter by negligent act. The unintentional killing, by one

act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Transporting intoxicating liquors. The conviction of an accused in the court of a justice of the peace of the nonindictable offense of transporting intoxicating liquors without properly labeling the same (§1936) is a bar to a subsequent prosecution based on the same transaction for the indictable offense of transporting intoxicating liquors (§1945-a1 et seq., C., '27 [§1945.1 et seq., C., '39]), the latter offense being necessarily embraced in the former.

State v Purdin, 206-1058; 221 NW 562

CHAPTER 643

CHANGE OF VENUE

13810 Right to change.

Discussion. See 17 ILR 399—Change of venue for state

Change of venue on application of state. The legislature may constitutionally grant to the state the right to a change of venue in a criminal prosecution.

State v Dist. Court, 213-822; 238 NW 290

13811 Petition by defendant.

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

13813 Petition by state.

Refusal of change of venue to state. Certiorari will lie, in the form of an original action in the supreme court, to review the alleged abuse of discretion, and consequent illegal action of the district court in refusing the state a change of venue in a criminal prosecution for a felony.

State v Dist. Court, 213-822; 238 NW 290

Unimpeached showing of prejudice. The refusal, in a criminal prosecution, to grant a change of venue to the state constitutes an abuse of discretion, and therefore an illegal action, when the state has made a prima facie showing of such prejudice and excitement in the county as will, judging it prospectively, prevent the state from receiving a fair and impartial trial, and when such showing stands substantially unimpeached by the resistance.

State v Dist. Court, 213-822; 238 NW 290

13816 Additional testimony.

Certiorari—evidence—admissibility. On certiorari by the state to review the alleged illegal action of the district court in refusing an application by the state for a change of venue as to numerous defendants, similarly charged, a transcript of the testimony taken upon the trial of one defendant who was acquitted is admissible for the purpose of showing the circumstances and nature of the acts charged.

State v Dist. Court, 213-822; 238 NW 290

13818 Discretion of court.

ANALYSIS

I In General
II Discretion of Court
III Particular Cases

I IN GENERAL

Insufficient record. A reversal cannot be had for alleged error in refusing a change of venue in a criminal case, when the record fails to show the grounds on which the change was asked.

State v Ball, 67-517; 25 NW 757

Refusal of change of venue to state. Certiorari will lie, in the form of an original action in the supreme court, to review the alleged abuse of discretion, and consequent illegal action of the district court in refusing the state a change of venue in a criminal prosecution for a felony.

State v Dist. Court, 213-822; 238 NW 290

II DISCRETION OF COURT

Discretion. The change of venue is left to the sound legal discretion of the district court, and the supreme court will interfere with its rulings on such applications only when it is made manifest that such discretion had been abused.

State v Baldy, 17-39
State v Spurbeck, 44-667
State v Boggs, 166-452; 147 NW 934
State v Sipes, 202-173; 209 NW 458; 47 ALR 407
State v Gibson, 204-1306; 214 NW 743
State v Smith, 219-168; 256 NW 651

III PARTICULAR CASES

Affidavits. Where a change of venue was asked on the ground of the prejudice of the

III PARTICULAR CASES—concluded

inhabitants, and supported by affidavits of 46 persons, and resisted by affidavits of 73 persons, held there was no abuse in court's discretion in overruling motion.

State v Stewart, 74-336; 37 NW 400

Newspaper accounts. A change need not be granted in a trial for rape, by reason of sensational newspaper articles in reference to the crime, which allege that the organization of a vigilance committee is seriously contemplated, and that it might take a hand in the proceedings if the preliminary trial is unduly prolonged, where no feeling against the defendant pervades the county, altho some exists in the vicinity where the crime was committed.

State v McDonough, 104-6; 73 NW 357

13824 Cost attending change.

Attorney fees. The general provision of law that the county from which a criminal cause is sent on change of venue shall pay all costs consequent on such change includes attorney fees for defending the accused.

Cass Co. v Page Co., 203-572; 213 NW 426

CHAPTER 644

TRIAL JURY

13826 Rules for drawing.

Discussion. See 16 ILR 20, 223—Proposed jury changes

Selection and return. The statutes governing the selection and return of jury lists by the judges of election are directory only, and substantial compliance therewith is sufficient unless it is made to appear that prejudice has resulted from a lack of strict compliance. Thus, a failure to return the number of names apportioned by the auditor to an election precinct, or of the judges of the election to certify the list selected, was not such a material departure from the statute as will authorize a defendant to complain that the statute was not followed; especially where all jurors upon the panel were qualified, and none resided in precincts where the judges of election failed to return the requisite number of names, or to certify to the lists, and there is no showing that such precincts contained the requisite number of qualified jurors.

State v Wilson, 166-309; 144 NW 47

Special jurors. In calling special jurors summoned on special venire, for the trial of a particular indictment, their names may be called in the order in which they are summoned by the sheriff, but the better practice is to place their names on ballots and draw them as regular jurors, and this is the proper practice when they are summoned for the entire term.

State v Green, 20-424

13827 Completion of panel.

Calling bystanders. Where 20 jurors were summoned for the term, and the court excused two, and nine of the remaining 18 were engaged on another case when this case was called, held that it was competent for the court to summon jurors from the bystanders for the trial of this case.

State v McCahill, 72-111; 30 NW 553

Excusing juror after opening case. After a jury had been impaneled and the case opened, the court excused a juror on account of his mother's illness. The parties declined to call one more juror, and the court discharged the panel and impaneled a new jury. Held, there were no grounds for the complaint.

State v Laughlin, 73-351; 35 NW 448

Jury panel exhausted. Out of a panel of 24 jurors, only 18 appeared, and the panel was exhausted before a jury for the trial of the indictment was procured. But before it was known that a jury could not be obtained from the regular panel in this case, a special venire was issued, "for the purpose of using the names of the jurors so drawn and summoned in the impaneling of a jury". When the regular panel was exhausted, the sheriff, under the direction of the court, called the names of the persons so drawn and summoned, in the order in which their names stood on the list, beginning with the first, until a jury was obtained; held that in all this there was no error.

State v Ryan, 70-154; 30 NW 397

13828 Challenges to the panel.

Drawing jurors in absence of defendant—effect. The fact that, in impaneling a jury in a criminal case, the names of jurors were drawn from the panel box at a time when the defendant was not present will not be deemed prejudicial error in the absence of a showing that such drawing deprived defendant of a fair and impartial jury.

State v Sweetman, 220-847; 263 NW 518

Evidence to sustain challenge. The refusal of the defendant to introduce evidence to sustain his challenge to the panel of the grand jury was sufficient to authorize the court to overrule the challenges.

State v Gillick, 10-98

Jury drawn from part of panel. An accused in a criminal cause who fails to show that he exercised any or all of his peremptory challenges, or that he did not obtain a fair and impartial jury, may not complain that he was

denied the right to have the jury drawn from the entire jury panel.

State v McHenry, 207-760; 223 NW 535

13830 Challenges for cause.

ANALYSIS

I IN GENERAL
II WANT OF PRESCRIBED QUALIFICATIONS
III TRIED ANOTHER DEFENDANT FOR THE OFFENSE
IV FORMED OR EXPRESSED AN OPINION
(a) IN GENERAL
(b) THE OPINION
(c) "FORMED OR EXPRESSED"
(d) NATURE OF THE OPINION
V OBJECTION STATED
VI TIME FOR OBJECTION
VII DISCRETION OF COURT
VIII ERROR WITHOUT PREJUDICE

I IN GENERAL

Unqualified right. The right to challenge jurors is absolute and without qualification.

Smith v State, 4 Greene 189

Client of public prosecutor. A juror is not subject to challenge in a criminal cause because he is the client of the public prosecutor.

State v Wilcoxen, 200-1250; 206 NW 260

Competency—waiver. The fact that a juror was an election judge at the election at which the jury list was selected and certified is not a ground for challenge for cause even tho his name is certified as a juror in violation of the statute (§10869, C., '24). In any event, any tenable objection to the juror is waived by not discovering the incompetency until after verdict.

State v Burch, 202-348; 209 NW 474

Immaterial issues. In the examination of a juror on his voir dire, it is immaterial what other members of the panel may have done bearing on their qualifications.

State v Wheelock, 218-178; 254 NW 313

Peremptory challenges not exercised. The overruling of defendant's challenges to jurors for cause cannot be said to have prejudiced him, where none of the jurors so challenged sat on the trial, all having been rejected on peremptory challenges, and he accepted the jury which tried him, without exhausting all of his peremptory challenges.

State v Winter, 72-627; 34 NW 475

II WANT OF PRESCRIBED QUALIFICATIONS

Female jurors—house of ill fame case—no presumption of prejudice. Contention that a fair trial was not obtained on account of female jurors, a majority of whom were on the jury, having an inborn prejudice against a woman accused of keeping a house of ill fame, denied because, in absence of a contrary showing, jurors, regardless of sex, are presumed to follow instructions and determine guilt upon the evidence.

State v Hathaway, 224-478; 276 NW 207

Nonresidence. Where a juror leaves the state for his health for 18 months, taking his family and some of his household goods, and without any intent to take up a residence elsewhere, but with intent to return, and that he did not vote during his absence, he is competent as a juror after his return.

State v Burke, 107-659; 78 NW 677

III TRIED ANOTHER DEFENDANT FOR THE OFFENSE

No annotations in this volume

IV FORMED OR EXPRESSED AN OPINION

(a) IN GENERAL

Hostile attitude of juror. The fact that a prospective juror, prior to the time when he was called and examined on his voir dire, took part, in the court room, in a demonstration hostile to the accused, does not necessarily show that the juror is disqualified as having formed an unqualified opinion as to guilt.

State v Wheelock, 218-178; 254 NW 313

(b) THE OPINION

Qualified opinion. An opinion formed by a juror as to the guilt of the defendant is not a sufficient cause for challenge unless it is unqualified in its character.

State v Hinkle, 6-380
State v Gillick, 10-98

(c) "FORMED OR EXPRESSED"

Opinion—effect. The fact that a prospective juror states that he has already formed an opinion on the subject of the guilt or innocence of the accused, which would require evidence to remove, does not necessarily render him an incompetent juror.

State v Burzette, 208-818; 222 NW 394

Opinion formed—insufficiency. In voir dire examination, refusal to sustain challenge to a juror who testified that he had read of the case, heard it discussed, had formed "some" opinion from such hearsay information which would require evidence to remove, and who, when asked if he could lay aside his opinions and try the case solely and entirely on the evidence introduced in the trial of the case, answered "Yes, sir" and when the question was repeated twice, answered "I think so" was not error where he also repeatedly testified that he could and would lay aside his opinion and decide the case solely on the evidence and instructions, the fact that he had formed an opinion, in the light of the entire examination, not establishing that he had

IV FORMED OR EXPRESSED AN OPINION—concluded

formed such a fixed and unqualified opinion as to prevent him from rendering a true verdict on the evidence.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

(d) NATURE OF THE OPINION

Disqualifying opinion. A juror is wholly incompetent when he has formed such an opinion relative to the guilt of the accused as (1) will remain with him throughout the trial, (2) will require contrary evidence to remove, and (3) will prevent the juror from giving the accused the benefit of the presumption of innocence; and prejudice will be presumed on a showing that, proper challenge for cause being overruled, the accused exercised all his peremptory challenges, one of which was against the juror in question.

State v Reed, 201-1352; 208 NW 308

Nondisqualifying opinion. A juror is not disqualified by an opinion as to guilt or innocence, formed on newspaper or hearsay sources, when the juror can and will lay aside such opinion and decide the cause solely on the evidence submitted on the trial.

State v Gibson, 204-1306; 214 NW 743
State v Mayer, 204-118; 214 NW 710

Opinion from hearsay. When a prospective juror has formed an opinion from hearsay, the test of whether he may be challenged for cause is whether his state of mind is such that he believes the hearsay is true, has made up his mind and has a conviction that the defendant is guilty, as distinguished from the state of mind of a juror who does not know whether the rumors are true and who bases his opinion on the mere assumption that the hearsay is true.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

V OBJECTION STATED

No annotations in this volume

VI TIME FOR OBJECTION

Competency of juror. The mere fact that a defendant in a criminal case may have talked with one of the jurors who was confined in the jail with him would not render the juror incompetent, unless he received some information or impressions tending to bias his judgment and prejudice him against the accused; and if such was the fact and it was discovered during the trial, it was the duty of the defendant to make the objection then, rather than speculate on a favorable verdict and in the event of disappointment insist upon the juror's incompetency as a basis of a motion for new trial.

State v Baker, 157-126; 135 NW 1097

Waiver. Where no examination of a juror is had before his acceptance, and it is not shown that an alleged disqualification was not known to defendant at the time, the right to object is waived.

State v Burke, 107-659; 78 NW 677

Waiver. It is not error to overrule a challenge for cause where defendant waived a peremptory challenge, by the exercise of which the juror might have been excused.

State v McIntosh, 109-209; 80 NW 349
State v Tyler, 122-125; 97 NW 983

VII DISCRETION OF COURT

Answers on voir dire—discretion of court. A juror will not necessarily be held inflexibly to his answer as to what he will do under certain circumstances when such answer is given before he understood just what his duty is and will be.

State v Mullenix, 212-1043; 237 NW 483

Challenge improperly overruled—compelling use of strike. It is error for the court to compel the use of a strike to remove a juror by improperly overruling a challenge to the juror.

State v Coleman, 226-968; 285 NW 269

Court's discretion. In voir dire examination a challenge for cause should be decided at discretion of the court, not from isolated answers, but on the entire examination of the juror.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

Discretion of court. Altho the court has a large discretion in passing upon the qualification of jurors, still in a criminal prosecution where the complaining witness is an officer, care should be taken to secure an unprejudiced jury.

State v Butler, 155-204; 135 NW 628

Existence of opinion. The fact that a juror has formed an opinion as to the guilt or innocence of the accused, and will carry such opinion into the jury box, will not disqualify such juror if the court, in the exercise of a fair discretion, is satisfied that the juror can and will try and decide the issues solely on the evidence.

State v Harding, 205-853; 216 NW 756

Finding of court—effect. The determination of the trial court that a juror can and will lay aside an existing opinion as to the guilt or innocence of the accused and try the cause solely on the trial evidence will not ordinarily be overruled on appeal.

State v Reed, 205-858; 216 NW 759

VIII ERROR WITHOUT PREJUDICE

Drawing jurors in absence of defendant—effect. The fact that, in impaneling a jury in a criminal case, the names of jurors were

drawn from the panel box at a time when the defendant was not present will not be deemed prejudicial error in the absence of a showing that such drawing deprived defendant of a fair and impartial jury.

State v Sweetman, 220-847; 263 NW 518

Overruled challenge to juror. An order overruling a challenge to a juror on the ground that the juror had a disqualifying opinion on the question of guilt or innocence, will not be reviewed when the record supports the evident conclusion of the trial court that the juror would be fair and impartial.

State v Twine, 211-450; 233 NW 476

Peremptory challenges not exercised. The overruling of defendant's challenges to jurors for cause cannot be said to have prejudiced him, where none of the jurors so challenged sat on the trial, all having been rejected on peremptory challenges, and he accepted the jury which tried him, without exhausting all of his peremptory challenges.

State v Winter, 72-627; 34 NW 475

Rejection of competent juror—effect. The rejection by the court of a qualified juror does not constitute reversible error in the absence of a showing that, because of such rejection, the complainant did not have a fair trial.

Boston v Elec. Co., 206-753; 221 NW 508

Voir dire examination—permissible range. The act of the county attorney, in a prosecution for maintaining a liquor nuisance, in asking a proposed juror (whose business was transporting beer) whether he would vote to convict the accused if the accused was proven guilty beyond all reasonable doubt, will not, in and of itself, be deemed prejudicial error.

State v Harrington, 220-1116; 264 NW 24

13831 Examination of jurors.

Challenges—improper voir dire. Questions on the voir dire of prospective jurors designed to reveal their attitude toward crimes because of the severity or lack of severity of the punishment attending such crimes are improper even as a basis for peremptory challenge.

State v Xanders, 215-380; 245 NW 361

13835 Peremptory challenges.

Improper overruling challenge for cause. An accused may not be compelled to exhaust his peremptory challenges upon jurors who should have been excused for cause.

State v Reed, 201-1352; 208 NW 308

Improper voir dire. Questions on the voir dire of prospective jurors designed to reveal their attitude toward crimes because of the severity or lack of severity of the punishment attending such crimes are improper even as a basis for peremptory challenge.

State v Xanders, 215-380; 245 NW 361

Jury drawn from part of panel. An accused in a criminal cause who fails to show that he exercised any or all of his peremptory challenges, or that he did not obtain a fair and impartial jury, may not complain that he was denied the right to have the jury drawn from the entire jury panel.

State v McHenry, 207-760; 223 NW 535

Peremptory challenges not exercised. The overruling of defendant's challenges to jurors for cause cannot be said to have prejudiced him, where none of the jurors so challenged sat on the trial, all having been rejected on peremptory challenges, and he accepted the jury which tried him, without exhausting all of his peremptory challenges.

State v Winter, 72-627; 34 NW 475

13836 Peremptory challenges—number.

Challenge improperly overruled—compelling use of strike. It is error for the court to compel the use of a strike to remove a juror by improperly overruling a challenge to the juror.

State v Coleman, 226-968; 285 NW 269

13841 Jurors sworn.

Jury not sworn. The supreme court will not disturb a judgment on the ground that the jurors by whom the case was tried in the court below were not sworn, in the absence of any showing that they were not sworn, or complaint on that ground in the court below.

State v Schlagel, 19-169

CHAPTER 645

TRIAL

Discussion. See 11 ILR 297—Absurdities in criminal procedure

13842 Joint indictment—separate trials.

Right to waive. The statutory right of jointly indicted parties to have separate trials is not such a right that it cannot be voluntarily waived.

State v Moore, 217-872; 251 NW 737

Separate presentation of guilt. Instructions must separate and submit to the jury the question of the separate guilt of each of jointly indicted parties.

State v Heffelfinger, 212-1041; 237 NW 364

13843 Continuances.

ANALYSIS

I IN GENERAL
II FURTHER TIME
III ABSENCE OF WITNESSES

Continuances in civil cases. See under §§11443-11445

I IN GENERAL

Burden to show prejudice. The movant for a continuance in a criminal case must affirmatively show that he has been prejudiced by the overruling of the motion.

State v Twine, 211-450; 233 NW 476

Elimination of issue. The voluntary elimination of an issue in a case affords no ground for a continuance.

State v Carney, 208-133; 217 NW 472

Noninterference without abuse of discretion. The ruling on a motion for a continuance is committed to the sound discretion of the trial court and will not be interfered with unless there is a clear abuse of judicial discretion.

State v Hathaway, 224-478; 276 NW 207

Waiving right. Joint defendants may not complain that they were granted a continuance only after they had agreed to waive their right to separate trial when their agreement was strictly voluntary.

State v Moore, 217-872; 251 NW 737

II FURTHER TIME

Neglect to procure counsel—no showing of prejudice. A person accused of operating a house of ill fame, whose counsel withdraws after trial wherein the jury disagreed, such person then having two months to secure new counsel but neglects so to do until three days before retrial, may not complain if a motion for continuance is overruled, there being no showing on appeal of injury from such ruling.

State v Hathaway, 224-478; 276 NW 207

Undue haste in trial. The action of the trial court, and county attorney, in bringing a criminal prosecution on for trial promptly after the alleged commission of the offense (15 days in this case) cannot be deemed prejudicially erroneous in the absence of any showing that the defendant was thereby deprived of a fair trial.

State v Berlovich, 220-1288; 263 NW 853

III ABSENCE OF WITNESSES

Discretion of court. The refusal in a criminal case of a continuance based on the absence of witnesses is largely in the discretion of the trial court, especially so when the applicant has been guilty of a measure of negligence, and when the testimony of the absent witness would have been cumulative to testimony appearing in the record.

State v Peacock, 201-462; 205 NW 738

Disappearance of witness. After the court has extended to defendant ample opportunity to find and produce a duly subpoenaed witness who has unexpectedly disappeared without fault of the defendant, it is not reversible error to refuse a continuance of the cause when, if the witness were finally produced (which was questionable) his testimony would be confined almost entirely to matters collateral to the main issue.

State v Leftwich, 216-1226; 250 NW 489

Due diligence essential. Motions for continuance grounded on the plea of absence of evidence must be accompanied by a showing of due diligence to obtain such evidence.

State v Twine, 211-450; 233 NW 476

Harmless error. The overruling of defendant's motion for a continuance, to enable defendant to take the deposition of an absent witness, must, if erroneous, be deemed harmless when defendant did secure said deposition prior to the trial.

State v Papst, 221-770; 266 NW 498

Insufficient showing. A motion for a continuance because of the absence of witnesses, with an affidavit in support thereof, is properly overruled when they fail to set forth the facts to which such witnesses will testify.

State v Candler, 204-1355; 217 NW 233

13844 Time to prepare for trial.

Right may be waived. Defendant waives his right to the three days, after plea, in which to prepare for trial, by requesting that the case be assigned, subject to a motion for continuance to a particular time, and by insist-

ing upon a trial at a much earlier date than that at which the case is tried.

State v King, 97-440; 66 NW 735

Undue haste in trial. The action of the trial court, and county attorney, in bringing a criminal prosecution on for trial promptly after the alleged commission of the offense (15 days in this case) cannot be deemed prejudicially erroneous in the absence of any showing that the defendant was thereby deprived of a fair trial.

State v Berlovich, 220-1288; 263 NW 853

13845 Mode and manner of trial.

Argument not made of record. Error may not be based on alleged misconduct of counsel in argument unless the specific misconduct is made of record, and exceptions entered thereto.

State v Harrington, 220-1116; 264 NW 24

Objections first made on appeal. Objections to evidence must be made when it is offered, not for the first time on appeal.

State v Harrington, 220-1116; 264 NW 24

Failure of justice. The facts that an accused (1) was promptly tried after the commission of the offense, (2) was handcuffed during the trial, and (3) that at the time of the trial public feeling ran high against the accused, do not, in and of themselves, justify an inference that the accused did not have a fair trial.

State v Brewer, 218-1287; 254 NW 834

Failure to object. The admissibility of testimony will not be reviewed on appeal when no objection was interposed in the trial court.

State v Davis, 212-582; 234 NW 858

Former jeopardy as rebuttal. When the state, in a prosecution for receiving deposits while the bank was insolvent, seeks to establish the insolvency by proof which tends to show that the accused had both embezzled funds of the bank and had made false reports concerning the assets of the bank, the accused may show, in rebuttal, that he has been indicted for both of said alleged offenses and acquitted.

State v Pierson, 204-837; 216 NW 43

Jury drawn from part of panel. An accused in a criminal cause who fails to show that he exercised any or all of his peremptory challenges, or that he did not obtain a fair and impartial jury, may not complain that he was denied the right to have the jury drawn from the entire jury panel.

State v McHenry, 207-760; 223 NW 535

13846 Order of trial.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I COURSE AND CONDUCT IN GENERAL
(a) IN GENERAL
(b) CONTROL BY COURT
(c) DISCRETION OF COURT
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(e) ASSISTANT PROSECUTORS
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Appeals to district court. See under §13599
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Pleadings of defendant. See under §§13789–13809
Verdict. See under §§13915–13932

I COURSE AND CONDUCT IN GENERAL

(a) IN GENERAL

State has burden of proving guilt. In a criminal case the burden of establishing guilt at every stage of the trial is upon the state.

State v Hillman, 226-932; 285 NW 176

(b) CONTROL BY COURT

Control by court. Defendant in a criminal case, by refusing to avail himself of the simple and expedient method of proof pointed out and proffered to him by the court, may be held to have waived his right to establish a fact which he deems material to his defense.

State v Philpott, 222-1334; 271 NW 617

(c) DISCRETION OF COURT

Conspiracy—evidence—order of introduction. Principle reaffirmed that the order of introducing testimony under a charge of conspiracy rests in the sound discretion of the court.

State v Terry, 207-916; 223 NW 870

Examination of witnesses. The form of questions propounded to a witness and rulings on objections to the examination are largely matters of discretion with the trial court, and will not be interfered with on appeal unless an abuse of such discretion is shown.

State v Finley, 147-563; 126 NW 699

I COURSE AND CONDUCT IN GENERAL —concluded

(c) DISCRETION OF COURT—concluded

Misconduct of jurors. The granting of a new trial because of misconduct of jurors is quite largely within the discretion of the court, especially when there is a dispute whether there was any misconduct.

State v Umphalbaugh, 209-561; 228 NW 266

New trial—misconduct of jurors—contradictory showing—effect. The discretion of the court in denying a new trial in a criminal case on a conflicting showing of misconduct of the jury will not ordinarily be disturbed on appeal.

State v Reynolds, 201-10; 206 NW 635

Proffer in presence of jury—discretion of court. The court has discretionary power to refuse to permit counsel to state, in the presence of the jury, the controversial facts which he expects to prove by a proffered witness.

State v Teager, 222-392; 269 NW 348

Testimony after rebuttal. When rebuttal is closed, it is within the discretion of the court to refuse time in which defendant may get witnesses who live in the city, in the absence of a showing for what the witnesses are wanted.

State v Osborne, 96-281; 65 NW 159

Trial—continuance. The refusal in a criminal case of a continuance based on the absence of witnesses is largely in the discretion of the trial court, especially so when the applicant has been guilty of a measure of negligence, and when the testimony of the absent witness would have been cumulative to testimony appearing in the record.

State v Peacock, 201-462; 205 NW 738

(d) REMARKS AND CONDUCT OF JUDGE

Examination of witness. It is not improper for the court, in the trial of a criminal cause, to put questions to a witness, (1) because of the hesitation of the witness, (2) in order to properly rule on a motion to strike the testimony, or (3) in order to secure pertinent answers.

State v Eggleston, 201-1; 206 NW 281

Examination by court. An impartial examination of a witness by the court is proper.

State v Weber, 204-137; 214 NW 531

Remarks of court to witness. It is within the province of the court, when it is justified in believing that a witness is not speaking frankly and fully of the matters inquired about, to remind the witness that he is under oath and must tell the whole truth.

State v Poder, 154-686; 135 NW 421

Witness questioned by judge. Where the state's witnesses show a disposition to evade giving direct answers, and to equivocate, and the questions of the state's attorney are not well calculated to develop material facts, it is not error for the trial court to question the witnesses and compel answers.

State v Spiers, 103-711; 73 NW 343

Witnesses—examination by court. It is not necessarily erroneous for the court, in a criminal case, to interrogate a witness.

State v Leftwich, 216-1226; 250 NW 489

(e) ASSISTANT PROSECUTORS

Appointment of assistant prosecutor. The appointment by the court of an assistant prosecutor after the jury had been impaneled was not error, where it was not shown that prejudice resulted to the defendant, in that he would have exercised his right of peremptory challenge differently had he known of the appointment.

State v Cobley, 128-114; 103 NW 99

(f) PRIVATE COUNSEL

Private counsel. Whether private counsel will be permitted to assist the county attorney in the trial of a criminal cause is a matter resting in the sound discretion of the court, with the exception always that private counsel interested in a civil action involving the same state of facts must not be permitted to so appear.

State v Lilteich, 195-1353; 191 NW 76

(g) WITNESSES

1 Recalling

Recalling witness. The right of recalling a witness is in the discretion of the court and such discretion will not be interfered with unless it has been greatly abused.

State v Shelledy, 8-477

2 Separation

Separation of witnesses. The separation of witnesses upon the trial is largely a matter of discretion and unless abused the appellate court will not interfere with the order.

State v Cristy, 154-514; 133 NW 1074

3 Exclusion

Exclusion of sheriff from courtroom. It is within the discretion of the court to receive the testimony of the sheriff and of a special officer assisting the county attorney even tho they had remained in the courtroom in violation of an order excluding witnesses.

State v Bittner, 209-109; 227 NW 601

Exclusion of witnesses—presumption. Complaint of an order of court excluding all witnesses from the courtroom during trial cannot be considered unless the record in some manner reveals prejudice to complainant.

State v Sampson, 220-142; 261 NW 769

II READING INDICTMENT AND PLEA

No annotations in this volume

III OPENING STATEMENTS

Misconduct—curative quality of instructions. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

Nonprejudicial opening statements. No reversible error results from overruling, in the trial of a charge of manslaughter, objections to the opening statements of the county attorney relative to the intoxication of the accused some 45 minutes after the fatal act, there being no showing of bad faith on the part of the county attorney and it appearing that offered testimony to prove such intoxication as thus stated was excluded.

State v Long, 215-494; 245 NW 726

Opening statement—unsustained objection. An unsustained objection by the state to an opening statement on behalf of an accused presents no reviewable matter.

State v Kendall, 200-483; 203 NW 806

Opening statement—reference to confession. No misconduct on the part of the county attorney is shown when he, in good faith and with reasonable ground for believing the evidence admissible, told the jury in his opening statement that the evidence would show that defendant made a written confession in the presence of the chief of police, which confession and attending conversation were later admitted as competent evidence.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

IV OFFER OF EVIDENCE

(a) IN GENERAL

Cross-examination—justifiable limitation. On the cross-examination of a witness who has identified an accused, the exclusion of questions which have no direct bearing, and but little incidental bearing, on the question of identity, is necessarily proper, especially when counsel has otherwise been given wide latitude in his examination.

State v Abbott, 216-1340; 249 NW 167

Hypothetical questions—inadmissible when not based on evidence. In a prosecution for homicide where it was shown that the deceased was found with a fractured neck, with no marks on his neck or body nor any evidence of a quarrel or struggle, after he had been left alone for only about a minute and a half with the defendant who was a friend of about the same size and weight, it was reversible error to allow a physician to demonstrate a strangle hold, and to answer a hypothetical question, not based on evidence, that force could be applied from the rear so as to break a man's neck.

State v Hillman, 226-932; 285 NW 176

Improper reception—effect. The improper reception in evidence of a written notice to an accused to produce a written instrument or to submit to secondary evidence of its contents, and the possession of such notice by the jury, do not necessarily work prejudicial error.

State v Gardiner, 205-30; 215 NW 758

Necessity to present and preserve error—absence of objection—effect. If there be no objection to an offer of testimony, there can be no review on appeal as to the reception of said testimony.

State v Slycord, 210-1209; 232 NW 636

Order of presenting. Order of introduction of testimony is largely in discretion of trial court and rulings thereon are reversible only on the clearest showing of prejudice.

State v Crandall, 227-311; 288 NW 85

Rebuttal—scope. Evidence introduced by the defendant in his behalf, in a criminal case, may, of course, be rebutted by the state.

State v Wheelock, 218-178; 254 NW 313

Refreshing recollection. It is not improper for the county attorney, after a witness has testified to a certain extent, to hand to the witness the minutes of his testimony taken before the grand jury and to request the witness to refresh his memory in order to determine whether he had overlooked any matter; nor is it improper to permit the witness thereupon to testify to material matters which had been overlooked.

State v Friend, 206-615; 220 NW 59

(b) ORDER OF PROOF

Introduction of evidence. The order of evidence is within the discretion of the court and there will be no reversal unless an abuse of such discretion is shown.

State v Gadbois, 89-25; 56 NW 272
See State v Sorenson, 157-534; 138 NW 411

Order of evidence. The order in which evidence shall be introduced rests, under the discretion of the court, within the discretion of the party introducing it.

State v Hudson, 50-157

Order of proof. Change in the order of proof is largely discretionary with the trial court, and prejudice will not always be presumed; and where it appears that evidence competent only in chief is admitted on rebuttal and the same corroborates rather than contradicts the defendant, there is no prejudicial error.

State v Seligman, 127-415; 103 NW 357

IV OFFER OF EVIDENCE—continued

(c) REBUTTAL EVIDENCE

See also Book of Anno., Vol I, §13851

Rebuttal testimony. The offering and receiving on rebuttal of testimony which is not strictly of that character do not necessarily work prejudicial error.

State v Gardiner, 205-30; 215 NW 758

Rebuttal testimony admissible tho admissible on direct. Testimony which in fact is rebuttal in character is not rendered inadmissible because the state might have used it as part of its direct testimony.

State v Slycord, 210-1209; 232 NW 636

Rebuttal testimony in re insanity. An accused who, through his counsel's opening statement, by the cross-examination of witnesses, and by his own testimony, sought to show that his mind was completely blank from a time prior to the homicide to a time subsequent thereto, thereby opens the door to the state to establish by rebuttal testimony the sanity of the defendant.

State v Woodmansee, 212-596; 233 NW 725

Evidence on rebuttal. A witness whose name is not indorsed on the indictment may testify on rebuttal in contradiction of the defendant's alibi even tho such testimony would have been proper while the state was making its case in chief.

State v McCumber, 202-1382; 212 NW 137

Indorsement of names of witnesses—when unnecessary. The statutory requirement that an indictment carry the names of the witnesses on whose testimony it is found and be accompanied by a minute of their testimony has no application to the names and testimony of witnesses used on the trial in rebuttal.

State v Cozad, 221-960; 267 NW 663

Proper rebuttal. Testimony offered by the state which actually rebuts in some degree the testimony of the accused is admissible even tho it might have been offered by the state in support of the indictment.

State v Graham, 203-532; 211 NW 244

Rebuttal to sustain confession. Presumptively, a confession by an accused in a criminal case is voluntary and if the accused attacks the presumption, the state necessarily must have the right to sustain the presumption by rebuttal testimony.

State v Kress, 204-828; 216 NW 31

Testimony after rebuttal. When rebuttal is closed, it is within the discretion of the court to refuse time in which defendant may get witnesses who live in the city, in the absence of a showing for what the witnesses are wanted.

State v Osborne, 96-281; 65 NW 159

Witnesses not before grand jury—permissible scope of testimony. No error results, in the trial of a criminal case, in receiving, without notice, evidence from witnesses not before the grand jury when said evidence was strictly rebuttal, or evidence which might have been introduced in the state's main case.

State v Smith, 215-374; 245 NW 309

(d) REOPENING CAUSE

Reopening case. It is not an abuse of discretion for the court to permit the state to introduce exhibits, which have been fully identified, after argument has begun, where there is no showing of prejudice; if the defendant is thereby taken by surprise he may apply for a continuance or offer further testimony if he so requests.

State v Leonard, 135-371; 112 NW 784

Reopening case. Reopening of a case for further testimony is largely a matter within the discretion of the trial court, and in the absence of an abuse of discretion a reversal will not be ordered for a refusal to do so.

State v Crayton, 138-502; 116 NW 597
State v Edwards, 205-587; 218 NW 266

Setting aside submission and receiving testimony. The submission of a criminal cause may be set aside, even after arguments are well under way, and the cause reopened for the reception of vitally material testimony.

State v Pritchard, 204-417; 215 NW 256

Venue—further evidence. The court may reopen a case after the state has rested, and permit the state to offer further testimony on the issue of venue.

State v Anderson, 209-510; 228 NW 353; 67 ALR 1366

(e) ADMISSIONS BY ACCUSED

Admission by accused. An accused in a charge of larceny who, throughout the trial, openly admits the truth of every allegation of the indictment except the one relative to the value of the stolen property may not object if the state is permitted to prove the truth of such admitted allegations notwithstanding the admissions.

State v Leitzke, 206-365; 218 NW 936

(f) OBJECTIONS

Habitual criminals—unallowable former convictions—proper presentation. When an indictment charges a complete offense, and is, therefore, not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Hearsay testimony — reception — inviting error. Defendant who, on cross-examination of the state's witness, first enters the forbidden field of hearsay testimony on a certain point,

is not in an advantageous position to object when the state, on redirect, follows into the same field of inquiry, especially when the testimony erroneously received is not inherently prejudicial and is practically that which was brought out by defendant on cross-examination.

State v Philpott, 222-1334; 271 NW 617

Striking immaterial testimony. Justification for striking testimony is found in the fact that said testimony stands wholly unconnected with any fact in issue in the prosecution which is on trial.

State v Johnson, 222-574; 269 NW 354

V MOTIONS

Operation of automobile. A motion to strike testimony of the operation of third party's automobile on afternoon preceding night of alleged assault when prosecuting witness testified that he did not know whether defendant had anything to do with the operation of the car, was not improperly overruled, defendant having made no objection to the testimony when given, and neither defendant nor the owner of the car having testified in regard to its operation.

State v Crandall, 227-311; 288 NW 85

13847 Arguments.

ANALYSIS

I ARGUMENTS
II RIGHT TO OPEN AND CLOSE

Misconduct in argument—new trial. See under §13944 (VI)

I ARGUMENTS

Agreement to limit time. Where state waived opening argument and by agreement of counsel the accused and state had 20 minutes to argue to jury, objection that county attorney did not confine himself to response to defendant's argument, and misstated facts to jury, could not be raised on appeal by accused who took no objection or exceptions at time of state's argument.

State v McGregor, (NOR); 266 NW 22

Bill of exceptions—improper argument. Improper argument by the county attorney, which argument has not been taken down by the reporter as part of the record, but as to which proper exception has been entered, may be made a part of the record by a bill of exceptions signed by the judge.

State v Voelpel, 213-702; 239 NW 677

Former conviction—unallowable comment. A statement in argument by the county attorney that a former conviction of the accused had been set aside upon technical grounds, constitutes reversible error. (§13945, C., '31.)

State v Voelpel, 213-702; 239 NW 677

Improper argument by defendant—reply by state. An accused may not complain that the county attorney replied to an improper argument by the accused as to the penalty attending a conviction.

State v Kendall, 200-483; 203 NW 806

Inference from inconsistent record. Where mother testified her son, the accused, had said "he was going to kill him" and the record was inconsistent as to whom was referred to, it was not a prejudicial misstatement of the record for counsel for the state to argue to the jury his inference that accused meant to kill his father.

State v Johnson, 223-962; 274 NW 41

Misconduct—failure to make of record. Improper argument by the county attorney cannot be shown by affidavits attached to motion for new trial.

State v Hixson, 208-1233; 227 NW 166

Noninflammatory argument. The fact that the county attorney in his argument characterized the defendant with quite blunt epithets is not necessarily reversible error.

State v Brewster, 208-122; 222 NW 6

Objections—sufficiency. An objection to a flagrantly improper argument by the county attorney may be all-sufficient even tho not couched in specific language; a priori, when the attorney and court cannot but know the very subject matter to which reference is made.

State v Voelpel, 213-702; 239 NW 677

Prosecutor's misconduct—court's discretion. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were not true, defendant's counsel would not jump up and squeal like a pig under a gate; and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

II RIGHT TO OPEN AND CLOSE

No annotations in this volume

13850 Instructions.

Instructions in civil cases. See under §§11491-11495
Instructions in criminal cases. See under §13876

13851 Notice of additional testimony.

ANALYSIS

I IN GENERAL
II WITNESSES NOT BEFORE GRAND JURY
III MINUTES OF EVIDENCE
IV INDORSEMENT OF NAMES
V NOTICE
(a) IN GENERAL
(b) ERRORS IN NOTICE
(c) SERVICE

Additional annotations. See under §13729
Names of witnesses on indictment. See under §13729
Rebuttal testimony. See under §13846 (IV)

I IN GENERAL

Scope of additional testimony. Witnesses who testify for the state under a notice of additional testimony are not confined in their testimony to the matters and things specified in such notice.

State v Harding, 204-1135; 216 NW 642

II WITNESSES NOT BEFORE GRAND JURY

Witness not before grand jury — evidence taken on notice. The examination of a witness whose evidence is taken upon notice need not be strictly confined to those matters specified in the notice.

State v Jackson, 156-588; 137 NW 1034

Error without prejudice. Error in admitting the testimony of witnesses who were not before the grand jury, and whose names were not on the indictment, and of whose evidence legal notice had not been given, is without prejudice, where the defendant in his testimony does not deny, but admits, every material allegation testified to by such witnesses.

State v Burk, 88-661; 56 NW 180

Non-grand-jury witness—curing error. Any error in receiving the testimony of a witness not before the grand jury is cured by subsequently excluding such testimony and admonishing the jury to disregard it.

State v Christensen, 205-849; 216 NW 710

Permissible scope of testimony. No error results in the trial of a criminal case in receiving, without notice, evidence from witnesses not before the grand jury when said evidence was strictly rebuttal, or evidence which might have been introduced in the state's main case.

State v Smith, 215-374; 245 NW 309

Witness' name not on indictment. Arresting officer's testimony as a rebuttal witness for the state that defendant made the statements "I was afraid of that," and "Well, I finally caught up with the guy," held proper even tho the name of the rebuttal witness was not indorsed on the indictment and no notice of additional testimony was given where such testimony, altho not strictly rebuttal, had a tendency to disprove defendant's testimony, it often times occurring that rebuttal testimony might also have been used as direct testimony in the state's case.

State v Crandall, 227-311; 288 NW 85

III MINUTES OF EVIDENCE

Additional testimony. Witnesses for the state who were before the grand jury, were examined and minutes of their testimony attached to the indictment, may testify upon the trial to matters not inquired about by the grand jury without notice to defendant of such additional matter.

State v Boggs, 166-452; 147 NW 934

IV INDORSEMENT OF NAMES

Indorsement of names of witnesses—when unnecessary. The statutory requirement that an indictment carry the names of the witnesses on whose testimony it is found and be accompanied by a minute of their testimony, has no application to the names and testimony of witnesses used on the trial in rebuttal.

State v Cozad, 221-960; 267 NW 663

Discrepancy — effect. A discrepancy in the name of a witness as indorsed on the indictment or as written in a notice of additional testimony becomes quite inconsequential when the accused is in no manner misled.

State v Leitzke, 206-365; 218 NW 936

V NOTICE

(a) IN GENERAL

Defective return—effect. The defectiveness of a return of service of notice of additional witnesses on the trial of an indictment becomes quite immaterial when unquestioned proof of such service is otherwise made.

State v Mullenix, 212-1043; 237 NW 483

Sufficiency. A notice of additional testimony in the trial of an indictment, substantially complying with the statute, is not subject to a motion for a bill of particulars.

State v Loucks, 218-714; 253 NW 838

(b) ERRORS IN NOTICE

Review on appeal. Where a witness whose name is not indorsed on the indictment, is permitted to testify over objection, after the prosecution states that notice was given, and presents what it claims was a notice to the court, on appeal it will not be presumed that the notice was insufficient, or was not properly served, such notice not being included in the abstract.

State v Bone, 114-537; 87 NW 507

Signing notice. The defendant in a criminal cause who has accepted the service of a notice that a witness not named in the indictment will be introduced on the trial, and who has agreed

to treat such notice as personally served, cannot object that it was not signed by the district attorney.

State v Watrous, 13-489

(c) SERVICE

Acceptance of service by attorney valid. Service of notice and copy thereof of the intention of the state, on the trial of an indictment, to offer stated testimony additional to that receivable under the indictment as returned, may be validly accepted in writing for and on behalf of the defendant, by the defendant's acting attorney of record.

State v Froah, 220-840; 263 NW 525

Service of notice. Service of notice of additional testimony is all-sufficient when made on one of defendant's attorneys of record (defendant not being found in the county), even tho such notice is addressed to the defendant and to an attorney of record for him other than the attorney receiving the service.

State v Debner, 202-150; 209 NW 404

13856 View of premises by jury.

View of premises. See under §11496

Discretion of court. The trial court has a wide discretion in determining when a jury in a criminal cause may be permitted to view the scene of a crime.

State v Carr, 200-306; 204 NW 218

Misconduct of jurors. The fact that two of the jurors, during the trial, visited the scene of an alleged rape and there talked the matter over among themselves, is held not to have amounted to misconduct, where it was shown that they said nothing about their observations to their fellow jurors and both testified that the visit had nothing to do with their verdict.

State v Crouch, 130-478; 107 NW 173

Proper denial. The refusal of the court to permit the jury to view the scene of a bank robbery finds justification in the fact that substantially the sole issue before the jury was the identity of the accused.

State v Papst, 221-770; 266 NW 498

View of automobile. The court is within its discretion in refusing to send the jury to examine an automobile for the purpose of determining whether it was physically possible (as had been testified) for a person to stand on one side of the car and reach across and take a bottle from a pocket on the opposite side of the car.

State v Ling, 198-598; 199 NW 285

Action for death by shooting—court's discretion. In action to recover for death by shooting, refusal to permit jury to view premises where murder occurred, being largely discretionary with court, held not error; and fact that one juror did visit premises was not ground for reversal where it was shown that juror did not disclose information to other jurors nor allow it to affect his judgment.

Collings v Gibson, (NOR); 220 NW 338

13859 Sickness of juror.

Illness of juror. Evidence held to show that illness of a juror was not prejudicial to defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

13860 Separation of jury.

See annotations under §§13878, 13944

13861 Officer sworn.

Unsworn bailiff. Where a jury is ordered kept together during the trial of a criminal case, the fact that the court bailiff who accompanied the jurors on the first adjournment of court was not specially sworn as required by this section, does not constitute reversible error when it appears the bailiff protected the jurors exactly as he would have protected them had he been so sworn and had respected his oath.

State v Miller, 217-1283; 252 NW 121

13864 Questions of law and fact.

Assumption of fact by instructions. See under §11493 (I)
Libel cases. See under §13262
Waiver of jury. See under §13804

Confession—justifiable instruction. Evidence that an accused stated that he participated in the robbery charged, and that he was one of the three persons who entered the bank, and knew where some of the stolen bonds were, justifies the court in giving a properly balanced instruction on the subject of confession.

State v Davis, 212-131; 235 NW 759

Demonstrative evidence—admissibility. All the facts and circumstances connected with the actual perpetration of a crime are admissible whether there be one participant or many. So held as to certain exhibits offered and received in evidence.

State v Leftwich, 216-1226; 250 NW 489

Jury question as to identity. The identity of one who is prosecuted for a crime as the one who actually committed it is a question of fact for the jury, on conflicting testimony.

State v Ayles, 205-1024; 219 NW 41

Mental disease — jury questions. Whether psychopathic personality of the excitable type is a mental disease is properly submitted to the jury on controversial testimony.

State v Buck, 205-1028; 219 NW 17

13866 Higher offense proved—procedure.

Conviction of lower degree than charged. See under §§13919, 13920

13874 No offense charged—resubmission.

Defective indictment. Upon the discharge of a jury, and the termination of a criminal trial by reason of a defective indictment, the court may in its discretion resubmit the case to the grand jury, when it will tend to prevent the failure of justice.

State v Kimble, 104-19; 73 NW 348

13876 Instructions.

ANALYSIS

I PROVINCE OF COURT AND JURY
II FORM, REQUISITES, AND SUFFICIENCY
III REQUESTS FOR INSTRUCTIONS
IV OBJECTIONS, REFUSAL, AND EXCEPTIONS

As to instructions dealing with specific crimes. See annotations under sections relating to various crimes.
Defendant as witness. See under §13890
Defendant's failure to testify. See under §13891 (III)
Good character—instructions. See under §13897 (XIX)
Included offenses. See under §13919 (IV)
Instructions, civil law applicable. See under §§11491-11495
Limitation of criminal actions. See under §13443 (IV)
Reasonable doubt. See under §§13917 (V), 13918
Self-defense. See under §12922 (I)

I PROVINCE OF COURT AND JURY

Accomplice per se. Whether a witness testifying for the state as to the commission of the offense on trial was an accomplice is not a jury question on a record which shows that the witness himself might be charged and convicted of said offense. On such a record the court must peremptorily instruct that the witness was an accomplice, and properly guide the jury as to the necessity for corroboration.

State v Clay, 220-1191; 264 NW 77

Duty of court and jury. The court may very properly instruct the jury that its sole duty is to determine the issue of guilt, and that if it finds the accused guilty, the extent of punishment is not a matter for its consideration.

State v Bell, 206-816; 221 NW 521

Weight given defendant's testimony. In a criminal prosecution it is not error to give an instruction that, in considering the testimony of the defendant, the jury should consider that he is charged with a crime and, whether the testimony was given in good faith or for the purpose of avoiding conviction, the jury should give such testimony such weight as they believe it fairly entitled to, and no more.

State v McDowell, 228- ; 290 NW 65

Duty to convict of highest offense. An instruction to the effect that the jury should find the defendant guilty of the highest degree of crime included in the indictment, of which the jury finds him guilty beyond a reasonable doubt, reviewed, and held unobjectionable.

State v Ingram, 219-501; 258 NW 186

Expert witness—jury question. In prosecution for alleged homicide, evidence of expert witnesses' opinion of cause of death of deceased and kind of instrument used to inflict the wounds properly admitted, and jury question on facts thereby generated.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Fatal assumption of fact. An assumption by the court in its instructions in a criminal case that the prosecutrix and the defendant were together on a certain occasion material to the case, when such association was sharply in issue, constitutes reversible error.

State v Hubbard, 218-239; 250 NW 891; 253 NW 834

Jury's competency to understand. Where trial court promptly and fully admonished the jury not to consider withdrawn testimony, and later made the same admonition in written instructions, the appellate court is bound to assume that the jury fully understood and obeyed his admonitions.

State v Caringello, 227-305; 288 NW 80

Limitation of actions—general instruction. It is not erroneous for the court to instruct as to the necessity for proof of the commission of the offense within the statute of limitation, naming the full period, even tho the testimony of guilt is solely confined to a specific day within said period.

State v Canalle, 206-1169; 221 NW 847

Limitation of prosecution. An instruction which sets forth the material allegations of the indictment is not subject to the objection that the recital would apply to a transaction barred by the statute, when elsewhere the court specifically confines the jury to the transaction alleged in the indictment.

State v Friend, 210-980; 230 NW 425

Unpleaded defense. Reversible error results from submitting to the jury and requiring it to make a finding on a possible defense not presented by the defendant. So held as to the possession of an official certificate explanatory of the alteration of a motor vehicle engine number.

State v Dunn, 202-1188; 211 NW 850

Use of intoxicants. Evidence that the defendant in a manslaughter case might have been to some extent under the influence of intoxicating liquor at the time of a fatal automobile accident warranted the court in giving a requested instruction that there was no evidence that the defendant was intoxicated, and in adding that the use of intoxicating liquor by the defendant might be considered in de-

termining whether or not he had acted in a reckless disregard for the safety of others.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Voluntary or involuntary confession—jury question. Principle reaffirmed that a confession, to be admissible in evidence, must be free and voluntary and not induced by threat or violence or any direct or implied promise or inducement. Held, in trial of defendant for alleged homicide that the fact that defendant was not represented by counsel at the time he signed confession would not render it involuntary, and that the court correctly submitted the question of the voluntary character of confession to jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

II FORM, REQUISITES, AND SUFFICIENCY

Alibi. Instructions relative to the defense of alibi are always justified when the record reveals a manifest purpose on the part of the accused to rely on such defense.

State v Parsons, 206-390; 220 NW 328

Alibi when not in issue. Evidence which is merely incidental to the denial of an accused that he is guilty does not present the issue of alibi, and, in such case, reversible error results from the giving of the usual instruction as to the nature of such defense.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Admissions. Instructions which aim to guide the jury in the consideration of statements which are claimed to have been made by the accused after his arrest, and which do not constitute "confessions", are not erroneous simply because the said instructions refer to them as "confessions of facts".

State v Bittner, 209-109; 227 NW 601

Admissions—balanced instruction. A well-balanced instruction relative to both the weakness and the strength of verbal admissions is unobjectionable on a supporting record.

State v Friend, 210-980; 230 NW 425

Admissions and declarations. The record may be such as to require cautionary instructions as to the legal effect to be given to admissions and declarations of the accused.

State v Johnson, 211-874; 234 NW 263
State v Johnson, 215-483; 245 NW 728

Admissions—refusal of disparaging instructions. Requested instructions in disparagement of admissions by an accused are properly refused when such admissions appear to have been deliberately and understandingly made.

State v Troy, 206-859; 220 NW 95

Assumption of fatal and erroneous fact. Prejudicial error results (1) from the mistaken assumption by the court that a named witness had remained in the courtroom during the taking of the testimony, in violation of the orders of the court to the contrary, and (2) from instructing that the jury might consider such conduct in determining the weight to be given to the testimony of said named witness.

State v McCook, 206-629; 221 NW 59

Inferential assumption of fact negatived. An inferential assumption of fact in instructions may manifestly be wholly negatived by other instructions.

State v Harding, 204-1135; 216 NW 642

Instructions—moral character—reasonable doubt. An instruction as to the weight to be given evidence of good moral character of the defendant was not incorrect in adding that if, under all the evidence, including that bearing on moral character, there was no reasonable doubt as to guilt, the jury should convict, however good the character may have been.

State v McDowell, 228- ; 290 NW 65

Burden of proof—defensive matter. Instructions to the effect that an accused has the burden to establish a purely defensive matter are not rendered prejudicially erroneous by the omission of the phrase "by a preponderance of the evidence".

State v Gardiner, 205-30; 215 NW 758

Co-defendants—sufficiency of forms of verdict. Instructions which clearly extend to the jury the privilege of finding either of two co-defendants guilty or of finding both guilty are all-sufficient, in the absence of any request from the defendants as to such subject matter.

State v Slycord, 210-1209; 232 NW 636

Colloquy with jury. A colloquy between the court and the foreman of the jury, in the presence of the jury, relative to the instructions already given, reviewed and held not to constitute oral instructions and, therefore, not improper.

State v Mullenix, 212-1043; 237 NW 483

Instructions considered as whole—each not complete in itself. Instructions are to be considered as a whole, and each need not be complete in and of itself. An instruction in a criminal case was not objectionable in that it did not contain a statement of reasonable doubt when reasonable doubt was covered in other instructions, nor was another instruction insufficient in failing to include the defendant's ground of defense which was covered in other instructions.

State v McDowell, 228- ; 290 NW 65

Elements necessary for conviction — construction as a whole. In prosecution for subornation of perjury, where defendant complains of the instruction summarizing the elements

II FORM, REQUISITES, AND SUFFICIENCY—continued

necessary to conviction, while the instruction could not have been complete in and of itself and was not so intended, since the instruction called the jury's attention to other instructions defining perjury, subornation of perjury, and other essentials of the crime to be found by the jury, it was sufficient. Principle reaffirmed that instructions must be considered as a whole.

State v Hartwick, 228- ; 290 NW 523

Construction as a whole. If instructions as a whole fairly present the law relative to a subject matter, e. g., alibi, they are not subject to the charge of being confusing and misleading.

State v Bird, 207-212; 220 NW 110

Instructions as a whole. Instructions which to a degree improperly limit the basis of defendant's insanity to "family troubles", in accordance with the oft repeated trial theory of defendant, are unobjectionable when the jury is specifically told to take into account all other facts and circumstances shown in evidence.

State v Buck, 205-1028; 219 NW 17

Construction as a whole. Instructions reviewed, and held adequately to tell the jury that it must base its verdict on the evidence.

State v McGee, 207-334; 221 NW 556

Sufficiency as a whole. A mere recital in an instruction of a statutory principle of law without embodying therein the essentials of the crime charged, constitutes no error when the said essentials are elsewhere stated.

State v Parsons, 209-540; 228 NW 307

Correct as a whole. Instructions are all-sufficient if they are correct as a whole.

State v Reynolds, 201-10; 206 NW 635

Conviction of guilty and acquittal of innocent. It is not improper to instruct, in substance, that, altho the good of society requires that crime be surely and promptly punished, it is equally important that the innocent be protected.

State v Derry, 202-352; 209 NW 514

Conviction of felony—legal effect. The law does not presume that a person who has been convicted of a felony is less worthy of belief than a person who has not been so convicted, and error results from so instructing.

State v Voelpel, 208-1049; 226 NW 770

Correct but nonelaborate. Correct but nonelaborate instructions are all-sufficient, in the absence of a request for further elaboration.

State v Peacock, 201-462; 205 NW 738
State v Sampson, 220-142; 261 NW 769

Corroboration—mandatory duty to instruct. The court must, on its own motion, instruct as to the necessity for corroboration of an accomplice.

State v Myers, 207-555; 223 NW 166; 29 NCCA 569

Correlated instructions — how construed. Correlated instructions must be read and construed together.

State v Berlovich, 220-1288; 263 NW 853

Credibility of accused. Instruction relative to the credibility of an accused as a witness reviewed, and held to reveal no error.

State v Parsons, 209-540; 228 NW 307

Credibility of accused. Instructions are proper which direct the jurors as to their right to consider the interest of the accused when they pass upon the credibility of his testimony, especially when the same rule is elsewhere applied to all the witnesses.

State v Conklin, 204-1131; 216 NW 704

Credibility of witness—rule as to presumption. In prosecution for subornation of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not instruct the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions), it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Custom as defense — sale (?) or bailment (?). Instructions reviewed, and held to fully and adequately present to the jury in a prosecution for embezzlement by a bailee the effect of a usage or custom in the warehousing business to sell the bailment; also to present fully and adequately the question whether the transaction in question was a bailment or a sale.

State v Folger, 204-1296; 210 NW 580

Defining "accident". Ordinarily there is no occasion for the court, in presenting to the jury the issues in homicide, to define the term "accident".

State v Friar, 204-414; 214 NW 596

Defining "felony" not necessary. The trial court, in the absence of a request therefor, need not define a common, nontechnical word, such as the word "felony".

State v Proost, 225-628; 281 NW 167

Indictment—instruction on material parts—sufficiency. In prosecution for subornation of

perjury, where defendant assigns as error the court's omission to instruct the jury as to what were the material parts of the indictment—while it is true this is a duty of the court—a review of the instructions shows that defendant's argument is quite technical, and the instructions, as a whole, clearly and definitely point out to the jury what the material allegations of the indictment were and what was necessary for the jury to find before returning a verdict of guilty.

State v Hartwick, 228- ; 290 NW 523

Duty to cover essential elements. Principle reaffirmed that the court is under a duty, without request, to direct the jury adequately as to the essential elements of the offense charged.

State v Hixson, 205-1321; 217 NW 814

Duty to cover issues. In a prosecution charging the unlawful possession of intoxicating liquors, the court must, without request, instruct on the supported issue whether defendant was consciously in possession of the liquors found on his person.

State v Wheeler, 216-433; 249 NW 162

Dying declarations—justifiable refusal. Requested instructions in disparagement of dying declarations are properly refused, the court properly covering the subject by its own instructions.

State v Troy, 206-859; 220 NW 95

Dying declaration—nonassumption of fact. Instructions that dying declarations could not be considered unless the jury found that the decedent was suffering from a mortal wound "which had been inflicted upon him by the defendant", may not (when the instructions are read as a whole) be said to assume that the defendant had inflicted such wound on the deceased.

State v Gibson, 204-1306; 214 NW 743

Evidence — similar offenses — election — instructions in re intent. When the state, after introducing evidence tending to establish several distinct offenses of a noncontinuing nature involving a specific intent, elects to rely upon one distinct transaction, the court may very properly instruct the jury that the remaining transactions of the same kind may be considered on the issue of intent.

State v Derry, 202-352; 209 NW 514

Circumstantial evidence. Instructions to the effect that circumstantial evidence must, beyond a reasonable doubt, be consistent with guilt and, beyond such doubt, inconsistent with any other rational theory than that of guilt, are all-sufficient in the absence of a request for more elaboration, especially when the record reveals materially more than a "chain of circumstances" against the accused.

State v Kneeskern, 203-929; 210 NW 465

Circumstantial evidence. There is no occasion to instruct on circumstantial evidence when the evidence connecting the accused with the offense is direct.

State v Johnson, 215-483; 245 NW 728

Confusion—direct evidence of collateral facts and direct evidence of guilt. Evidence, altho being direct, may not be direct evidence of defendant's guilt, and instructing in such a manner that the jury may be confused into considering direct evidence of collateral facts as direct evidence of defendant's guilt is error.

State v Mikels, 224-1121; 278 NW 924

Erroneous admission in evidence—not cured by instructions. In a trial for murder, evidence that the defendants had been engaged in a drunken brawl about three weeks before the homicide should have been stricken on motion, and the error in refusing the motion was not cured by an instruction.

State v Coleman, 226-968; 285 NW 269

Ignoring lack of evidence. An instruction which ignores the effect of "want of evidence," but directs the jury to determine guilt solely on the evidence "admitted" is not erroneous when it is manifest the instruction was given solely with reference to the effect to be given certain exhibits received in evidence, and without reference to the instruction on reasonable doubt which is not questioned.

State v Madison, 215-182; 244 NW 868

Arson—"juxtaposition" of circumstantial evidence not equivalent of direct evidence. Testimony in an arson prosecution, entirely unsubstantiated by direct evidence, will not justify an instruction defining "direct evidence", even on the theory that evidence showing a man, prior to the fire, was seen near the burned building, from which footprints led to defendant's home, constitutes circumstances in such "juxtaposition" as to be equivalent to direct evidence. Jury should be instructed case rests on circumstantial evidence.

State v Mikels, 224-1121; 278 NW 924

Lack or absence of evidence—effect. Instructions reviewed and held to sufficiently cover the effect of the lack or absence of evidence of guilt.

State v Stennett, 220-388; 260 NW 732

Instructions not substantiated by evidence—error. In arson trial, an instruction on the state's evidence that footprints "pointing toward and away from" burned store building was held erroneous, in absence of any evidence of footprints pointing toward building.

State v Neff, 228- ; 291 NW 415

Erroneous instruction on fact not existing—failure of circumstantial evidence to overcome error. It is error to assume or state in an instruction that certain facts exist which do not exist, and a presumption of prejudicial error arises therefrom. Therefore, in arson trial, circumstantial evidence was held insuffi-

II FORM, REQUISITES, AND SUFFICIENCY—continued

cient to establish defendant's guilt so conclusively as to require a conviction notwithstanding an erroneous instruction on state's evidence of footprints "pointing toward and away from" burned store building when there was no evidence of footprints "pointing toward" such building.

State v Neff, 228- ; 291 NW 415

Limiting impeaching evidence. The failure of the court on its own motion in its instructions to limit, specifically, impeaching testimony to that particular purpose is not erroneous when the testimony in question is of such a nature that it could not be considered for any other purpose.

State v Brewer, 218-1287; 254 NW 834

Other offenses. The court in the trial of a criminal case is under no legal duty, in the absence of a request, to instruct the jury as to the particular purpose for which evidence of other offenses had been admitted.

State v McCutchan, 219-1029; 259 NW 23

Instruction on other claimed perjuries. In prosecution for subornation of perjury, where the court instructed the jury that "Certain evidence has been admitted in this case tending to prove other claimed perjuries and of other acts of the defendant and of his sister," the use of the words "certain evidence" does not indicate the opinion of the court as to quantity and weight of the evidence, and the use of the word "certain", so commonly used by practically all courts and all persons, could not have been understood by the jury to have meant fixed and established. It must have been considered as merely stating there was evidence of the nature described, and the use of the words "other acts of the defendant and of his sister" were not indefinite. They were sufficient to call the attention of the jury to the other facts, and it was not necessary that the court set out and review the testimony referred to.

State v Hartwick, 228- ; 290 NW 523

Presumption (?) or assumption (?) of malice. The court may, under applicable evidence, instruct that the jury has a right, in the absence of evidence to the contrary, to presume the existence of malice from the use of a deadly weapon in a deadly manner; and in so instructing it is quite immaterial that the court employs the term "assume" instead of the term "presume".

State v Berlovich, 220-1288; 263 NW 853

Failure to define offense. The failure specifically to define an offense, in the absence of a request, does not constitute error when the elements of the offense are accurately set forth in the instructions.

State v Grimm, 212-1193; 237 NW 451

Failure to deny or explain res gestae statements. The refusal of the court to instruct as to the effect of defendant's failure to deny or explain statements against him, made in his presence, is not erroneous when the statements are properly in the record solely because they were part of the res gestae.

State v Woodmansee, 212-596; 233 NW 725

Flight — denial of identity. Instructions in re flight and denial of identity by defendant reviewed and held amply to protect the defendant.

State v Johnson, 222-574; 269 NW 354

Evidence — flight subsequent to discharge. Evidence of flight and instructions as to the effect thereof may be proper even tho the flight took place after the accused had been once discharged under a prior preliminary information charging the same and identical offense and transaction.

State v Heath, 202-153; 209 NW 279

Flight. An instruction that if defendant had reason to believe he would be charged with rape, and that if he fled from state to avoid arrest, his flight could be considered prima facie indicative of guilt, held not error as against objection that by use of words "had reason to believe" jurors were told they might consider flight without finding that defendant had any actual knowledge or suspicion that he would be charged with rape.

State v Donovan, (NOR); 263 NW 516

General reference to check. Instructions which refer the jury to the "check in question" (under a charge of uttering a forgery) are not necessarily erroneous because the record reveals numerous other checks.

State v Miller, 217-1283; 252 NW 121

Impeachment—duty of court. While in criminal cases the court must fairly present the issues to the jury, yet, after this is done, a defendant should ask for further instructions, if desired, or not be heard to complain; so, where the jury would have understood from the instructions given the purpose of introducing a written instrument for impeachment only and the meaning of the word "impeachment", it was not reversible error to fail to give a separate instruction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Improper argument — curing error. Statements by the county attorney in his argument to the jury to the effect that counsel for defendant knew that defendant was the same person who had formerly been convicted of a pleaded offense because counsel for defendant had then prosecuted defendant, do not constitute reversible error (1) when objection was withheld until after the arguments were closed, (2) when the court sustained the objection and

directed the jury not to consider said statements, and (3) when there was nothing before the appellate court showing precisely what statements were made and the circumstances attending them.

State v Anderson, 216-887; 247 NW 306

Inadequate enumerations of elements. Instructions which direct the jury to convict on proof of named elements of an offense are prejudicially erroneous when not all the elements of such offense are enumerated.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Inadvertent use of words. The inadvertent use in instructions of a word which could not have misled the jury will be treated as harmless.

State v Hughey, 208-842; 226 NW 371

Intent. Instructions relative to intent to defraud and to the conditions under which it might be inferred, and to the presumption that a person intends the reasonable and natural consequences of acts deliberately and intentionally done by him, reviewed and held to reveal no error.

State v Boysen, 214-46; 238 NW 581

Threats—nonpermissible construction. The ordinary instruction defining "intent" cannot be deemed an authorization to the jury to infer that the defendant was responsible for the acts and statements of bystanders.

State v Wilbourn, 219-120; 257 NW 571

Inapplicable instruction. An instruction that "the law presumes a man to intend the reasonable and natural consequences of his act deliberately and intentionally done," given in a prosecution for embezzlement by a bailee, is not necessarily erroneous. Instructions reviewed as a whole, and held unobjectionable.

State v Folger, 204-1296; 210 NW 580

Interchange of conjunctions. An objection to the use in instructions of the conjunction "but," instead of "and," is quite hypercritical when the same objection could, with equal plausibility, be lodged against the instruction, had the term "and" been used.

State v Davis, 212-131; 235 NW 759

Intoxication—inherently erroneous instruction. An instruction to the effect that an accused must be acquitted if the jury finds that he was "intoxicated" when he committed the act in question is inherently erroneous.

State v Patton, 206-1347; 221 NW 952

Intoxication—nonexpert testimony. No instruction need be given in regard to nonexpert evidence in relation to intoxication.

State v Wheelock, 218-178; 254 NW 313

Driving while intoxicated—dazed condition caused by accident. In a prosecution for driving while intoxicated, the thoughts of requested instructions were sufficiently embodied in instructions which stated that in determining whether the defendant was intoxicated at the time of the collision, or whether his condition immediately after was the result of injury or shock, the jury should consider the injury, its nature, extent and effect, and all other evidence.

State v McDowell, 228- ; 290 NW 65

Bootlegging—submission of nuisance. On a simple charge of "bootlegging" as defined by §1927, it is reversible error to submit (along with said charge) the offense of maintaining a nuisance, even tho there be no evidence of the maintenance of a nuisance, and even tho the two offenses have common elements and closely approach identity.

State v Moore, 210-743; 229 NW 701

Intoxicating liquor—nuisance. An appellant may not complain of instructions which are in harmony with his contention that the accused was charged with maintaining an intoxicating liquor nuisance.

State v Bryant, 208-816; 225 NW 854

Defenses in homicide—intoxication—burden of proof. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent, and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Essential instructions. Under an indictment for maintaining an intoxicating liquor nuisance, it is reversible error for the court in its instructions (1) to quote the statute which prohibits the mere "manufacture" of such liquors, (2) to tell the jury that the defendant was indicted thereunder, and (3) to fail to set out in some manner the elements of the statute prohibiting a nuisance.

State v Reid, 200-892; 205 NW 517

Intent to sell. Instructions reviewed at length and as a whole, and held fully to protect the accused against a conviction regardless of criminal intent.

State v Arluno, 222-1; 268 NW 179

Liquor nuisance—confusion of elements. An instruction which, in defining the term "nuisance" (of the maintenance of which defendant is charged), makes elaborate and somewhat unnecessary recital of the statutes relative to "bootlegging" is not necessarily subject to the vice of confusing the jury as to the elements of the offense charged—nuisance.

State v Harrington, 220-1116; 264 NW 24

Means and motive in effecting sale. It is proper to instruct that, if a sale of intoxicating

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liquors was in fact unlawful, then the means adopted by the buyer to effect the sale, and his motives, become quite immaterial.

State v Weber, 204-137; 214 NW 531

Preliminary explanation. In a prosecution for unlawful possession of intoxicating liquors, no prejudice results from setting forth in the instructions the various acts prohibited by the statute when the following instructions are specifically limited to the offense charged.

State v Matthes, 210-178; 230 NW 522

Right to possess liquor for own use—failure to instruct. The court, in a prosecution for maintaining a liquor nuisance, is fully justified in failing to instruct as to the right of defendant to possess in his own home and for his own use, the liquors which were seized in his home, when defendant in his testimony positively asserted that he did not have said seized liquors in his possession for his own use.

State v Harrington, 220-1116; 264 NW 24

Time of commission of offense. An instruction justifying a conviction for possessing intoxicating liquors at any time within three years prior to the return of the indictment is unobjectionable, when the indictment, proof, and trial were exclusively centered on one particular transaction occurring during said period.

State v Healy, 217-1155; 251 NW 649

Unsupported instruction. In a prosecution for illegal possession of intoxicating liquors, an instruction as to the statutory presumption attending an attempt, in the presence of peace officers, to destroy such liquors—as to which there was no supporting evidence—does not constitute reversible error, it appearing from the record that the defendant was, beyond question, guilty of the offense charged and, in addition, was an habitual violator of said liquor statutes.

State v Roberts, 222-117; 268 NW 27

Invading province of jury. Instruction held not to direct a verdict of guilt of one or the other of two offenses.

State v Shannon, 214-1093; 243 NW 507

Joint defendants. Instructions must separate and submit to the jury the question of the separate guilt of each of jointly indicted parties. So held where instructions permitted the jury to find both of two jointly indicted parties guilty if the jury found one of them guilty.

State v Heffelfinger, 212-1041; 237 NW 364

Oral direction to retire—nonnecessity for writing. An oral direction by the court to the jury, after long deliberation by the jury, to retire and resume their consideration of the case because the instructions already given fully and adequately cover the case, need not be in writing.

State v Johnston, 221-933; 267 NW 698

Instruction allowing recommendation of clemency—juror's affidavit explaining—effect—new trial. Where during its deliberations jury inquired of judge as to whether a verdict of guilty with recommendation of clemency would have any weight on sentence and judge instructed that any recommendations desired could be made on separate sheet of paper, signed and returned with verdict, held, instruction did not constitute error, and that jurors' affidavits stating that they were influenced by the instruction could not be considered by court in ruling on motion for new trial.

State v Cook, 227-1212; 290 NW 550

Oral instructions. If the court orally instructs the jury, and then later reduces the instructions to writing, such does not cure the defect of the oral instructions.

State v Harding, 81-599; 47 NW 877

Popular designation of offense. Designating an offense in instructions by its popular name is quite unobjectionable when the specific elements of the offense are correctly set forth.

State v Bevins, 210-1031; 230 NW 865

Punishment for offense. It is not reversible error for the court to instruct the jury that the punishment for grand larceny is greater than for petit larceny.

State v Leitzke, 206-365; 218 NW 936

Explaining punishment. The practice of instructing juries as to the punishment provided for an offense when the jury has nothing to do with such punishment is, while not reversible error, disapproved.

State v Marx, 200-884; 205 NW 518
State v Reid, 200-892; 205 NW 517
State v Tennant, 204-130; 214 NW 708
State v Loucks, 218-714; 253 NW 838

Prejudicial recital of punishment. Prejudicial error results from a recital in the instructions of the punishment for rape (imprisonment for five years or for life with opportunity for parole under minimum sentence, §12966, C., '27) and failing to recite the punishment for assault with intent to rape (imprisonment for an indeterminate term not exceeding 20 years, with opportunity for parole,

§12968, C., '24), the defendant being convicted of the latter offense.

State v Tennant, 204-130; 214 NW 708
State v Mayer, 204-118; 214 NW 710

Physical and mental condition—burden of proof. Instructions reviewed and held not subject to the vice of imposing on defendant, in a criminal case, any burden to establish his mental or physical condition.

State v Wheelock, 218-178; 254 NW 313

Ratification of wrongful act. Instructions reviewed, relative to the effect to be given to a ratification by a bailor of the wrongful act of the bailee in selling the bailment, and held to contain nothing of which the accused could complain.

State v Folger, 204-1296; 210 NW 580

Submission of unsupported offense. When an offense may be committed in different ways, and there is no evidence of one of the ways, error results from copying the entire statute into the instructions and directing the jury to convict "if the accused did any one of the things as in these instructions explained".

State v Smalley, 211-109; 233 NW 55

Summing up as to juror's duty. An instruction which impartially sums up the duty of the jurors both to the state and to the accused, is not objectionable.

State v Kneeskern, 203-929; 210 NW 465

Superfluous definition. A nonmisleading but superfluous definition of "burden of proof" cannot be prejudicial.

State v Matthes, 210-178; 230 NW 522

Time and venue. Failure of instructions to require the jury to make any finding as to time and venue is quite harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

Offenses partly in county—venue. In prosecution for subornation of perjury, an instruction as to venue was proper when it stated that evidence introduced tended to show defendant had solicited a witness to give the claimed perjured testimony in a trial, and that such solicitations, or some of them, were made in Appanoose county, and if defendant continued in his attempt to procure the witness and called and had witness testify as a witness in Davis county, knowing or believing witness would give perjured testimony, and if witness did in fact commit perjury in Davis county, the defendant could be prosecuted and convicted in Davis county.

State v Hartwick, 228- ; 290 NW 523

Failure to recognize venue. An instruction which may be deemed erroneous because it fails to recognize the venue in a criminal action is rendered unobjectionable by other instructions which clearly confine the jury to the venue alleged in the indictment.

State v Hughey, 208-842; 226 NW 371

Undue exaggeration. Instructions relative to circumstantial evidence reviewed and held not subject to the criticism that they exaggerated the effect of such evidence.

State v Rounds, 202-534; 210 NW 542

Violation of constitutional right. The constitutional right of an accused in a criminal case to be confronted by the witnesses against him is violated in a criminal case wherein the value of various items of property is material, by an instruction to the effect that the jurors "have the right to use their own knowledge of values * * * in connection with the testimony as to values which have been given by the different witnesses".

State v Henderson, 217-402; 251 NW 640

III REQUESTS FOR INSTRUCTIONS

Accessories—guilt of others—effect. Requested instructions to the effect that the jury cannot consider the guilt of parties other than the one on trial are properly refused when the one on trial is accused of having aided and abetted such other parties in committing the offense.

State v Hillman, 203-1008; 213 NW 603

Additional instructions—necessity of request. In prosecution for arson, allegedly based on circumstantial evidence, in the absence of a request for additional or more explicit instructions by accused, trial court does not commit reversible error in failing fully to instruct the jury upon the subject of circumstantial evidence.

State v Bazoukas, 226-1385; 286 NW 458

Circumstantial evidence — nonapplicability. There is no occasion to instruct on circumstantial evidence when the evidence connecting the accused with the offense is direct.

State v Johnson, 215-483; 245 NW 728

Circumstantial evidence—proof open to two constructions. An instruction that, in order to convict on circumstantial evidence alone, the proof must not only be consistent with the defendant's guilt but also inconsistent with a theory of innocence, sufficiently covered the defendant's request for an instruction that if the evidence was open to two constructions, one consistent with guilt and the other with innocence, the defendant should be acquitted.

State v McDowell, 228- ; 290 NW 65

Construction of law. Requested instructions relative to the duty of courts and jurors to so construe the intoxicating liquor statutes as to prevent evasions are properly refused.

State v Dunham, 206-354; 220 NW 77

III REQUESTS FOR INSTRUCTIONS—continued

Correct and incorrect request—rejection in toto. A requested instruction which, in connection with correct statements of the law, directs the jury to acquit the defendant, if it finds defendant to be a quiet, peaceful and law abiding citizen, is properly rejected in toto.

State v Fador, 222-134; 268 NW 625

Covering requested instructions. A requested instruction relative to the right of the jury to reject the testimony of a prosecuting witness who was actuated by a sinister motive and as to the effect of contradictory statements, is properly covered by the usual instructions relative to the interest of the witness and to the right of the jury to reject the testimony of a witness who has willfully testified falsely to a material fact.

State v Weber, 204-137; 214 NW 531

Duty to cover issues. An accused waives nothing by failing to request the court adequately to cover all the material allegations in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Estoppel to object. Defendant may not successfully claim that an instruction given at his request unduly magnified the importance of certain evidence.

State v Brown, 216-538; 245 NW 306

Evidence of "other offenses". The court in the trial of a criminal case is under no legal duty, in the absence of a request, to instruct the jury as to the particular purpose for which evidence of other offenses had been admitted.

State v McCutchan, 219-1029; 259 NW 23

Failure to request—effect. In a prosecution for larceny of sheep, held, instructions eminently fair, and in absence of request for certain instructions defendant may not, on appeal, be heard to complain.

State v De Koning, 223-951; 274 NW 25

Failure to request elaboration—effect. Instructions will be deemed all-sufficient when they appear to cover a subject matter correctly and no elaboration is requested.

State v Kneeskern, 203-929; 210 NW 465
State v Christensen, 205-849; 216 NW 710
State v Bourgeois, 210-1129; 229 NW 231
State v Miller, 217-1283; 252 NW 121
State v Griffin, 218-1301; 254 NW 841
State v Carlson, 224-1262; 276 NW 770

Good character generating reasonable doubt. The previous good character of an accused (as to the trait involved) shown either (1) by the general reputation of the accused, or (2) by actual personal experience of witnesses with the accused, may, in connection with all the evidence in the case, generate a reasonable doubt of the guilt of the accused, and entitle him to an acquittal. And the jury must, on request, be so instructed.

State v Ferguson, 222-1148; 270 NW 874

Impeachment—duty of court—failure to request. While in criminal cases the court must fairly present the issues to the jury, yet, after this is done, a defendant should ask for further instructions, if desired, or not be heard to complain; so, where the jury would have understood from the instructions given, the purpose of introducing a written instrument for impeachment only and the meaning of the word "impeachment", it was not reversible error to fail to give a separate instruction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Instructions in re accidental shooting. Requested instructions as to the effect of an accidental shooting are properly refused when otherwise properly covered by the instructions of the court.

State v Johnston, 221-933; 267 NW 698

Instructions not necessary without supporting evidence. Where not supported by evidence, it is not reversible error to fail to instruct regarding accused's right to occupy a public highway at the time of shooting, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Nonapplicability to evidence. A requested instruction as to the right of one accused of homicide to defend his guest is properly refused when there is no testimony upon which to base the instruction.

State v Reynolds, 201-10; 206 NW 635

Presentation of particular theory. Comprehensive and correct instructions by the court render unnecessary, in the absence of a request, the submission of defendant's particular theory of the case.

State v Dillard, 205-430; 216 NW 610

Refusing instructions otherwise given. It is not erroneous to refuse requested instructions which, so far as material, are otherwise embodied in the instructions given by the court on its own motion.

State v Moore, 217-872; 251 NW 737

Requests unsupported by evidence. Requested instructions which are without support in the evidence are properly refused. So held as to a requested instruction which assumed that a certain gunshot wound was fatal and that others were nonfatal.

State v Johnston, 221-933; 267 NW 698

Right to defend self. When from the instructions the jury may easily understand that one who is assailed may defend himself, it is not reversible error to fail to give a separate in-

struction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Sufficiency of forms of verdict. Instructions which clearly extend to the jury the privilege of finding either of two co-defendants guilty, or of finding both guilty, are all-sufficient in the absence of any request from the defendants as to such subject matter.

State v Slycord, 210-1209; 232 NW 636

Verdict—disregard of instructions. An instruction in a criminal cause that a witness for the state was an accomplice must be obeyed by the jury, even tho the court was in error in so instructing.

State v Lozier, 200-652; 204 NW 256

IV OBJECTIONS, REFUSAL, AND EXCEPTIONS

Belated exceptions disregarded. Exceptions to instructions in criminal cases must be made within the time provided by law or they will be disregarded.

State v Kirkpatrick, 220-974; 263 NW 52

Beer — nonintoxicating liquor — instruction refused. In prosecution for driving a motor vehicle while intoxicated, the refusal of accused's requested instruction that beer is not an intoxicating liquor held not error.

State v McGregor, (NOR); 266 NW 22

Correct and incorrect request—rejection in toto. A requested instruction which, in connection with correct statements of the law, directs the jury to acquit the defendant, if it finds defendant to be a quiet, peaceful, and law-abiding citizen, is properly rejected in toto.

State v Fador, 222-134; 268 NW 625

Failure to deny or explain res gestae statements. The refusal of the court to instruct as to the effect of defendant's failure to deny or explain statements against him, made in his presence, is not erroneous when the statements are properly in the record solely because they were part of the res gestae.

State v Woodmansee, 212-596; 233 NW 725

Failure to except. Failure to take and preserve exceptions to instructions in criminal cases in the manner and form provided by statute precludes review on appeal, irrespective of §14010, C., '31.

State v Griffin, 218-1301; 254 NW 841

Failure to instruct not cured by evidence. Where defendant was convicted of assault with intent to commit rape, failure to instruct jury as to necessity of corroboration of prosecuting witness' testimony—an essential element of conviction—was prejudicial error, and the jury was not sufficiently instructed as to this necessity by inference from another instruction on corroboration given in connection with the court's statement that crime charged in indictment was rape, which included the lesser offense of assault with intent to commit rape. Nor was the error rendered nonprejudicial by the fact that record contained evidence of corroboration, since it is not the court's function to pass upon weight and sufficiency of corroborating evidence, except to determine whether it is sufficient to go to the jury.

State v Ervin, 227-181; 287 NW 843

Failure to present and reserve error. Exceptions in a criminal case to instructions will not be reviewed when first presented on appeal. So held where it was objected on appeal that the instructions (1) were not sufficiently elaborate, (2) were inconsistent, (3) failed to explain the right of an owner to protect his property, and (4) failed to state the nonnecessity of malice aforethought in assault with intent to commit manslaughter.

State v Bingaman, 210-160; 230 NW 394

Former trial—attempt to bribe juror. An instruction to the effect that, if the jury believed that defendant had attempted to improperly influence the jury on a former trial, such conduct was a circumstance to be considered by the jury in determining the guilt of the defendant, is unobjectionable, even tho such instruction is based on a denial by defendant, on cross-examination, of such improper conduct, and on testimony by the state tending to show such misconduct, it appearing that the exceptions to the instruction did not embrace the point that the said testimony could only be used for impeaching purposes.

State v Friend, 210-980; 230 NW 425

General and indefinite exceptions. Nonspecific exceptions to instructions will be disregarded.

State v Derry, 202-352; 209 NW 514
State v Burch, 202-348; 209 NW 474

Intent—intoxication. Instructions on intoxication as bearing on the ability to form an intent are properly refused when there is no applicable evidence.

State v Murray, 222-925; 270 NW 355

In re circumstantial evidence—inapplicability in face of direct. Instructions to the effect that, in order to convict on circumstantial evidence, each fact in the chain of circumstances must be proven beyond a reasonable doubt; that all said facts must be connected with each other and with the main fact to be proven; and that said facts must produce a moral certainty of defendant's guilt, are properly refused on a record revealing both direct and circumstantial evidence of guilt.

State v Engler, 217-138; 251 NW 88
State v Ferguson, 222-1148; 270 NW 874

Reconciliation—inapplicable instruction. In a prosecution for uxoricide, a requested instruction as to the effect of a reconciliation, as bearing on motive, is properly refused when there is no direct evidence of reconciliation and when the difficulties between the parties appear to have continued down to the time of the death of the wife.

State v Flory, 203-918; 210 NW 961

Undue particularization or emphasis. Instructions should not attempt to marshal the evidence or to emphasize particular phases or circumstances, and thereby by silence minimize or obscure other phases or circumstances. Instructions working such results are properly refused, especially when the instructions fairly and comprehensively cover the subject matters in such requests.

State v Blair, 209-229; 223 NW 554

13878 Officers sworn.

ANALYSIS

I CUSTODY OF JURY
II SEPARATION OF JURY
III COMMUNICATION WITH JURY

Misconduct and new trial generally. criminal cases, §13944; civil cases, §11550

I CUSTODY OF JURY

Misconduct of bailiff — finding of court — conclusiveness. A finding by the court, on conflicting testimony, that a bailiff was not guilty of misconduct is conclusive on appeal.

State v Kurtz, 208-849; 225 NW 847

II SEPARATION OF JURY

Separation of, and communications with, jurors. The conduct of bailiffs in permitting jurors in a criminal trial to communicate with outsiders, personally and by telephone or in permitting slight separations of jurors, tho inexcusable, does not necessarily constitute reversible error.

State v Siegel, 221-429; 264 NW 613

III COMMUNICATION WITH JURY

Unaddressed question from jury room—ignored by court. Inquiries from the jury room, presented to the judge but not addressed to the court or to anyone in particular, are properly ignored.

State v Ferguson, 226-361; 283 NW 917

Unauthorized communication with jurors. Statements by a bailiff to jurors to the effect that they must remain in session until they had agreed on a verdict, coupled with the refusal by the bailiff either to conduct the jury to the court, or to deliver any message to the court, constitute such misconduct as to require the granting of a new trial, it appearing that said conduct had such controlling and coercive influence on certain jurors as caused them to change their views as to the merits of the case.

State v Terpstra, 206-408; 220 NW 357

CHAPTER 646

WITNESSES

13879 Subpoenas for witnesses.

Nonresident — immunity from process. A nonresident coming into the state as a party or witness and who is sued while attending the contest of her brother's will may appear specially to secure her common-law immunity from civil process of local courts which immunity exists and continues not only while in attendance, but for a reasonable time thereafter.

Moseley v Ricks, 223-1038; 274 NW 23

13880 Defense witnesses at expense of state.

Atty. Gen. Opinions. See '28 AG Op 142; '30 AG Op 177

13890 Defendant as witness.

Cross-examination of defendant generally. See under §13892
Criminating questions. See under §§11267, 11268

Compulsory examination of defendant's person. An examination of the defendant's person, while in jail, by a physician, cannot be said to have been compulsory, where the only evidence of compulsion was that the sheriff accompanied the physician, but it was not shown that he did or said anything in respect to the examination.

State v Struble, 71-11; 32 NW 1

Credibility of accused. Instructions are proper which direct the jurors as to their right to consider the interest of the accused when they pass on the credibility of his testimony, especially when the same rule is elsewhere applied to all the witnesses.

State v Conklin, 204-1131; 216 NW 704

Defendant as witness—correct instruction. In a criminal prosecution wherein the defendant alleges error on instruction relative to the defendant as a witness in his own behalf, and where the jury was instructed that it had the right to take into consideration the fact that defendant was on trial and was an interested witness, and that it was not required to receive blindly the testimony given by him, but could consider whether testimony was true and given

in good faith, or false, and for the purpose of avoiding conviction, and also being told that defendant's testimony was not to be discredited solely because he was interested, but that he had a right to testify in his own behalf, and his testimony should be fairly and impartially considered together with all the other facts and circumstances in the case, and weighed in the same manner and with the same fairness as that of other witnesses, and that it should give his testimony and the testimony of all other witnesses the weight to which it believed such testimony to be fairly entitled, held, a correct instruction.

State v Mikesh, 227-640; 288 NW 606

Defendant as witness—instruction. In prosecution for statutory rape an instruction to the jury regarding defendant testifying in his own behalf as an interested witness from an interested standpoint, and that the jury should consider his testimony as such, is not objectionable on the ground that it singles out the testimony of the defendant from the testimony of other witnesses in a manner that makes it appear to the jury that his testimony is not worthy of belief, nor on the ground that it invades the province of the jury.

State v Diggins, 227-632; 288 NW 640

Instructions—weight given defendant's testimony. In a criminal prosecution, it is not error to give an instruction that, in considering the testimony of the defendant, the jury should consider that he is charged with a crime and, whether the testimony was given in good faith or for the purpose of avoiding conviction, the jury should give such testimony such weight as they believe it fairly entitled to, and no more.

State v McDowell, 228- ; 290 NW 65

Failure of accused to testify—allowable reference. County attorney, during the trial of a criminal case, may properly refer to the fact that the accused has not testified in his own behalf, and constitutional due process is not thereby violated.

State v Ferguson, 226-361; 283 NW 917

Inference from accused's failure to testify. Any resulting inference or presumption of guilt arising from an accused's choice not to testify in his own behalf is not involved in the due process clause of the constitution.

State v Ferguson, 226-361; 283 NW 917

In re character witnesses. Correct instructions in a criminal prosecution relative to the weighing of defendant's testimony are not required to be accompanied by instructions relative to the testimony of defendant's good-character witnesses. If defendant desires the latter he should ask for them.

State v Schenk, 220-511; 262 NW 129

Instructions—credibility of accused as witness. The court may very properly specifically instruct the jury as to the rules for determining the weight and credibility of the testimony of an accused. Instructions held correct.

State v Kendall, 200-483; 203 NW 806

Mandatory instruction. The court must, on request, instruct the jury that an accused in a criminal case has a right not to be a witness in his own behalf, and that the exercise of such right shall not be considered by the jury for any purpose. Instruction held to meet the requirements of the rule.

State v Bell, 206-816; 221 NW 521

Proper cross-examination. A defendant in a criminal prosecution, as a witness in his own behalf, is subject to the same rules regulating cross-examination and impeachment as other witnesses.

State v Carter, 222-474; 269 NW 445

Self-incrimination. The statutory declaration (§1966-a1, C., '27 [§1966.1, C., '39]) that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Threat to commit offense. A party held to keep the peace in a preliminary examination upon an information charging him with threatening to commit a public offense is not a competent witness in his own behalf.

State v Darrington, 47-518

Undue prominence to defendant's testimony. When a defendant is a witness in his own behalf, it is not improper for the court in its instructions to direct the jurors as to their right to consider the interest of the accused when they pass on the credibility of his testimony.

State v Healey, 217-1155; 251 NW 649

13891 Failure to testify—effect. (Repealed.)

ANALYSIS

I COMMENT ON FAILURE TO TESTIFY
II CO-DEFENDANTS
III INSTRUCTIONS

I COMMENT ON FAILURE TO TESTIFY

Discussion. See 15 ILR 113—Rule abolished in Iowa

Argument in re undisputed facts. This inhibition is not violated by the act of the public prosecutor in asserting in argument that certain facts are undisputed, even tho the accused is the only person who could dispute them.

State v Solomon, 203-954; 210 NW 448

I COMMENT ON FAILURE TO TESTIFY —concluded

Allowable reference. It is not erroneous for the county attorney to refer, during the trial of a criminal case, to the fact that the accused has not testified in his own behalf.

State v Stennett, 220-388; 260 NW 732

Comment on failure to testify. The public prosecutor will not be deemed to have referred to defendant's failure to testify by assertions in argument to the effect that certain evidence is not denied or explained.

State v Harding, 205-853; 216 NW 756

Failure of accused to testify. County attorney, during the trial of a criminal case, may properly refer to the fact that the accused has not testified in his own behalf, and constitutional "due process" is not thereby violated.

State v Ferguson, 226-361; 283 NW 917

Comment by county attorney. The failure of the defendant in a criminal case to testify in his own behalf does not deprive him of the presumption of innocence, but the jury is entitled to consider it as an inference of guilt, and the county attorney may comment upon it.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Nullifying improper reference. Error in a reference by the state to the defendant's right to testify is obviated by the defendant's becoming a witness in his own behalf.

State v Fahey, 201-575; 207 NW 608

II CO-DEFENDANTS

Curative quality of instructions. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

Failure to call co-defendant. Failure of an accused to call in his behalf a co-defendant cannot properly be considered against him, and the court should so instruct in case the state makes improper use of such failure.

State v Hillman, 203-1008; 213 NW 603

Permissible reference. Principle recognized that the state may, in argument to the jury, very properly refer to the fact that a co-defendant who was not on trial had not been called as a witness.

State v Harding, 204-1135; 216 NW 642

III INSTRUCTIONS

Instructions. Defendant's failure to be a witness in his own behalf need not be covered by an instruction, in the absence of a request.

State v Reid, 200-892; 205 NW 517

Instructions. It is not error to instruct that the failure of the accused in a criminal prosecution to be a witness in his own behalf must not be considered against him.

State v Mueller, 202-1067; 208 NW 360

Mandatory instruction. The court must, on request, instruct the jury that an accused in a criminal case has a right not to be a witness in his own behalf, and that the exercise of such right shall not be considered by the jury for any purpose. Instruction held to meet the requirements of the rule.

State v Bell, 206-816; 221 NW 521

Weight given defendant's testimony. In a criminal prosecution, it is not error to give an instruction that, in considering the testimony of the defendant, the jury should consider that he is charged with a crime and, whether the testimony was given in good faith or for the purpose of avoiding conviction, the jury should give such testimony such weight as they believe it fairly entitled to, and no more.

State v McDowell, 228- ; 290 NW 65

13892 Cross-examination.

ANALYSIS

I CROSS-EXAMINATION — CRIMINAL CASES GENERALLY
II DEFENDANT—CROSS-EXAMINATION
(a) PERMISSIBLE SCOPE
(b) CREDIBILITY OR IMPEACHMENT
(c) OTHER OFFENSES
(d) INSTRUCTIONS
III CO-DEFENDANT—CROSS-EXAMINATION
IV OTHER WITNESSES—CROSS-EXAMINATION
V CROSS-EXAMINATION BY COURT

Direct examination—defendant as witness. See under §13890

I CROSS-EXAMINATION—CRIMINAL CASES GENERALLY

Conclusiveness of answers. The state is absolutely bound by the answers of the defendant on cross-examination in a criminal prosecution relative to the defendant's going under various assumed names, when the state makes no showing of connection between such inquiry and the commission of the crime charged.

State v McCumber, 202-1382; 212 NW 137

Cross-examination. Principle reaffirmed that the cross-examination of witnesses generally in any particular case is left to the sound discretion of the trial court, and his action will not be reviewed on appeal unless a clear abuse of discretion is shown.

State v Archibald, 208-1139; 226 NW 186

Discretionary limit to cross-examination. After a witness, on cross-examination, has testified (1) that he is a laborer, (2) that he has been convicted of a felony, and (3) that he is now residing in the county jail, the court may very properly curtail further cross-examination by excluding questions designed to show that the witness, instead of being a laborer, has been engaged, generally, in bootlegging, and in the commission of larcenies and burglaries.

State v Johnson, 215-483; 245 NW 728

II DEFENDANT—CROSS-EXAMINATION

(a) PERMISSIBLE SCOPE

Cross-examination. Principle reaffirmed that when a defendant in a criminal action is a witness in his own behalf, he stands upon the same footing as any other witness, insofar as his memory, history, motives, or matters affecting his credibility are concerned.

State v Holley, 203-192; 210 NW 749
State v Voelpel, 208-1049; 226 NW 770

Cross-examination — scope. An accused on trial for crime and a witness in his own behalf may, on cross-examination, be required to write certain matter in his own handwriting, the relevancy of such matter otherwise appearing in the record.

State v McHenry, 207-760; 223 NW 535

Cross-examination—scope. A defendant who is a witness in his own behalf stands upon the same footing as any other witness in relation to his memory, history, motives, or matters affecting his credibility. He may be asked if he did not, on a former trial, attempt to bribe the jurors.

State v Friend, 210-980; 230 NW 425

Estoppel to predicate error. An accused who introduces incompetent, immaterial, and irrelevant testimony may not predicate error on a cross-examination which is germane to such testimony.

State v Bowers, 208-1321; 227 NW 124

Evidence at preliminary examination. Defendant, on cross-examination, may be examined as to his apparently voluntary testimony given on a preliminary examination in which another was accused of the crime and not defendant.

State v Kneeskern, 203-929; 210 NW 465

Improper question—effect. The mere asking, on cross-examination of a defendant, of a wholly improper question does not necessarily result in reversible error.

State v Umphalbaugh, 209-561; 228 NW 266

Permissible cross-examination.

State v Shaw, 202-632; 210 NW 901

Permissible scope. An accused who attempts, in his direct testimony, to account for all his conduct and doings during a certain material period of time thereby opens the door to cross-examination on transactions occurring during said time and omitted in the direct examination, and it is no objection that the revelations take on a sinister aspect.

State v Davis, 212-582; 234 NW 858

Restriction. Cross-examination in a prosecution for rape held not unduly restricted as to the association of prosecutrix with other men.

State v Steele, 209-550; 228 NW 75

Same rules as for other witnesses. A defendant in a criminal prosecution, as a witness in his own behalf, is subject to the same rules regulating cross-examination and impeachment as other witnesses.

State v Carter, 222-474; 269 NW 445

Scope of cross-examination. The state is privileged, to the extent of a fair discretion, to cross-examine the defendant in a criminal cause as to his previous history, prior conduct, habits, and ways of living as affecting his credibility and for the purpose of impeaching him.

State v Bittner, 209-109; 227 NW 601

Scope—categorical denial of guilt on direct examination. On direct examination, accused's categorical denial that she operated a house of ill fame, which being the very question that the jury is ultimately to decide, opens wide the gates for exploration on cross-examination as to witness' conduct during the period covered by the question.

State v Hathaway, 224-478; 276 NW 207

Use of liquor. Even tho an accused on trial for driving an automobile while intoxicated is not asked on direct examination whether he had used intoxicating liquors on the day in question or was then sober or drunk, yet on cross-examination the state may make inquiry of defendant concerning his use of intoxicating liquors on the occasion in question, for the purpose of enabling the jury to properly weigh the defendant's testimony.

State v Wheelock, 218-178; 254 NW 313

(b) CREDIBILITY OR IMPEACHMENT

Association with accomplice. An accused who becomes a witness in his own behalf may be impeached by testimony tending to establish his personal association with an accomplice, the existence of such association being material, and having been denied by the accused.

State v Hart, 205-1374; 219 NW 405

Contemplated offense. The fact that a transaction tends to show that an accused was contemplating the commission of a crime is not a valid objection to its admissibility for impeaching purposes, when the transaction is

II DEFENDANT—CROSS-EXAMINATION —concluded

(b) CREDIBILITY OR IMPEACHMENT—concluded

inconsistent with and contradictory to the statements of the accused as to the facts attending the alleged offense for which he is on trial.

State v Davis, 212-582; 234 NW 858

Impeachment—collateral matters. An accused on trial for crime may, as a witness, be cross-examined as to his antecedents, but is not subject to impeachment on such matters, especially when such matters are collateral to the main issue.

State v McHenry, 207-760; 223 NW 535

Minutes before grand jury as impeaching material. The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness.

State v Hayden, 45-11

(c) OTHER OFFENSES

Cross-examination. A defendant in a charge of first degree murder who testifies that there was no cooperation between him and a co-defendant, and that he did not intend to kill the deceased and did not know that his co-defendant intended to kill deceased, may be cross-examined as to the cooperation existing between himself and the co-defendant, even tho such examination reveals the commission of a robbery by said parties shortly prior to the homicide in question.

State v Griffin, 218-1301; 254 NW 841

Other offenses. When the use and possession of intoxicating liquors by an accused is the subject of proper cross-examination of the accused, it matters not that the examination tends to prove the accused guilty of a criminal offense other than that for which he is on trial, to wit: the unlawful possession of such liquors.

State v Wheelock, 218-178; 254 NW 313

Permissible cross-examination. An accused in a criminal prosecution who, for the manifest purpose of placing himself in the light of an honorable and trusted character, testifies to his former membership on the police force may, on cross-examination, be shown to have secured his said position by falsely representing that he had never been convicted of a felony.

State v Shaw, 202-632; 210 NW 901

Unallowable cross-examination. The state on the trial of one accused of false pretenses, may not, on the cross-examination of the accused, develop the fact that the federal post office authorities have entered an order which denies to the accused the use of the mails.

State v Yarham, 206-833; 221 NW 493

Unallowable cross-examination. The state on the trial of one accused of false pretenses may not, on the cross-examination of the accused, lay the foundation for introducing testimony of other prior and like offenses by the accused.

State v Yarham, 206-833; 221 NW 493

Unallowable scope. Reversible error results from repeatedly and insistently injecting into the cross-examination of a defendant on trial for crime, and into the cross-examination of his character witnesses, insinuations and innuendoes to the effect that the accused had been guilty of other crimes prior to the time in question.

State v Rounds, 216-131; 248 NW 500

(d) INSTRUCTIONS

Attempt to bribe juror. An instruction to the effect that, if the jury believed that defendant had attempted to improperly influence the jury on a former trial, such conduct was a circumstance to be considered by the jury in determining the guilt of the defendant, is unobjectionable, even tho such instruction is based on a denial by defendant, on cross-examination, of such improper conduct, and on testimony by the state tending to show such misconduct, it appearing that the exceptions to the instruction did not embrace the point that the said testimony could only be used for impeaching purposes.

State v Friend, 210-980; 230 NW 425

Credibility of accused. Instruction relative to the credibility of an accused as a witness reviewed, and held to reveal no error.

State v Parsons, 209-540; 228 NW 307

Interest of accused as witness. Principle reaffirmed that an accused as a witness in his own behalf is an interested witness and that the court may so instruct.

State v Bird, 207-212; 220 NW 110

III CO-DEFENDANT—CROSS-EXAMINATION

Cross-examination of co-indictee. In the trial of one of two persons jointly indicted for larceny of chickens, the persistent cross-examination of the co-indictee, not on trial but called as a witness by the one on trial, along the line of showing that the witness was in the business of stealing chickens, is prejudicially erroneous.

State v Huss, 210-1317; 232 NW 692

Other offenses shown. A defendant in a charge of first degree murder who testifies that there was no cooperation between him and a co-defendant, and that he did not intend to kill the deceased and did not know that his co-defendant intended to kill deceased, may be cross-examined as to the cooperation existing between himself and the co-defendant, even tho

such examination reveals the commission of a robbery by said parties shortly prior to the homicide in question.

State v Griffin, 218-1301; 254 NW 841

IV OTHER WITNESSES—CROSS-EXAMINATION

Credibility—permissible cross-examination. A witness who has testified to the reputed good character of a party may, within the limits of good faith on the part of the cross-examiner, be examined along the line whether said good-character witness had "heard of" certain nefarious transactions in which the said party had been engaged.

State v Carter, 222-474; 269 NW 445

Cross-examination to show bias. The state, through the cross-examination of a witness called by the defendant, may always show the personal bias of the witness for the defendant.

State v Leftwich, 216-1226; 250 NW 489

Discretionary limit to cross-examination. After a witness, on cross-examination, has testified (1) that he is a laborer, (2) that he has been convicted of a felony, and (3) that he is now residing in the county jail, the court may very properly curtail further cross-examination by excluding questions designed to show that the witness, instead of being a laborer, has been engaged, generally, in bootlegging, and in the commission of larcenies and burglaries.

State v Johnson, 215-483; 245 NW 728

Good-character witness. A good-character witness, who testifies that the general reputation of an accused (charged with operating an automobile while intoxicated) for moral character is good, may, on cross-examination, be asked whether he has heard within a stated recent time that the defendant, while operating a motor vehicle and while in an intoxicated condition, had been involved in certain specified accidents.

State v Wheelock, 218-178; 254 NW 313

Testimony as to intoxication—cross-examination as to effect of blow on head. In a prosecution for driving while intoxicated, where the defense was that after an automobile accident the defendant was in a dazed condition due to a blow on the head, the witnesses who testified as to intoxication could not be asked on cross-examination how much effect the blow might have had on the defendant's condition, as the answer would have been no more than a guess. This question was for the jury and there was no foundation laid to give the answer probative value.

State v McDowell, 228- ; 290 NW 65

Justifiable limitation. On the cross-examination of a witness who has identified an accused, the exclusion of questions which have no direct bearing, and but little incidental bearing, on the question of identity, is necessarily proper, especially when counsel has otherwise been given wide latitude in his examination.

State v Abbott, 216-1340; 249 NW 167

Limit on cross-examination. A witness who has testified to the good reputation for honesty of an accused in the community where the accused lives can be cross-examined solely and alone as to what the witness has heard in the community in the way of rumors or reports derogatory to the honesty of the accused. In other words, the state may not, on such examination, ask the witness if he does not know that the accused has been charged with or convicted of this or that offense.

State v Bell, 206-816; 221 NW 521

Nonresponsiveness of answer. The party examining a witness has, ordinarily, the sole right to object to answers on the ground that they are not responsive to the questions asked.

State v Murray, 222-925; 270 NW 355

Penal abode of witness. An accused may not base error on the fact that the state, in the examination of the witness, brings out the fact that the witness is then an inmate of a penal institution.

State v Leitzke, 206-365; 218 NW 936

Speculative question—exclusion. After a witness has frankly admitted that he was mistaken in a portion of his testimony, the court commits no error in excluding the general query whether the witness is not apt to be mistaken in other matters to which he has testified.

State v Johnson, 215-483; 245 NW 728

Value—competency of witness—fatal delay in objecting. Objections to the competency of a witness to testify to the value of stolen articles must be made when the witness is asked as to said values, not later when the articles are offered in evidence.

State v Endorf, 219-1321; 260 NW 678

V CROSS-EXAMINATION BY COURT

Examination by court. It is not necessarily erroneous for the court, in a criminal case, to interrogate a witness.

State v Leftwich, 216-1226; 250 NW 489

13893 Attendance of witnesses outside state.

Discussion. See 18 ILR 70—Compelling return of witness

13896 Fees advanced—protection from service of process.

Discussion. See 14 ILR 468—Nonresident witnesses—immunity

CHAPTER 647

EVIDENCE

13897 Rules of evidence.

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As to evidence of specific crimes. See annotations under sections relating to various crimes.
Admissions distinguished from confessions. See under §13903
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I IN GENERAL

Discussion. See 8 ILB 263—Illegally procured evidence

Admission in chief of evidence excluded on cross-examination. In prosecution for bootlegging, the fact that evidence as to officers' search of defendant's car for liquor was excluded on defendant's cross-examination did not require its exclusion when offered in chief by state's witness.

State v Chase, (NOR); 221 NW 796

Appearance of deceased. A descriptive statement of the expression upon the face of the dead may be an allowable conclusion.

State v Kneeskern, 203-929; 210 NW 465

Bootlegging—evidence as to the delivery of bottles and money. Evidence tending to show the passing of bottles by the accused to others and the passing of money from such others to the accused is admissible on a charge of bootlegging, even tho such testimony is somewhat equivocal.

State v Smalley, 211-109; 233 NW 55

Brevity of minutes does not limit testimony. Mere brevity of the minutes of evidence taken before the grand jury will not prevent the witnesses from testifying as to the subject matter and facts embraced within them.

State v Van Vleet, 23-27

Crimes—presumption of coercion. The presumption that the participation of a wife, in the presence of her husband, in the commission of a crime is the result of the coercion of the husband applies only when the wife is in the near presence of her husband.

State v Kuhlman, 206-622; 220 NW 118

Coercion of wife by husband. No presumption exists that a wife who commits a crime in the presence of her husband does so under the coercion of the husband.

State v Renslow, 211-642; 230 NW 316; 71 ALR 1111

Coercion—required nature and extent. The compulsion which will excuse a criminal act must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done.

State v Clay, 220-1191; 264 NW 77

Competency. Evidence which tends to show the commission of the offense charged in the indictment, and to associate the defendant with it, is competent.

State v Bishel, 39-42

Rape—instruction on corroborating evidence—sufficiency. In a prosecution for statutory rape, the court instructed the jury that the state has the burden of proving that defendant was guilty beyond a reasonable doubt, and gave an instruction on corroborating testimony stating that the fact that the crime of rape or of assault with intent to commit rape has been committed by someone may be established by the testimony of the injured party alone if the jury is satisfied beyond a reasonable doubt that her testimony establishes such fact; but before the defendant can be convicted of the crime proven there must be other credible evidence than that of the injured party that singles out and points to the defendant as the guilty party and tends to connect him with the commission of the crime, to which the objection is raised to the use of the words "crime proven" as an assumption of the essential fact that the crime had been committed. The words "crime proven" obviously refer to the immediately preceding statement and the instruction when considered

in its entirety and in connection with other instructions is not subject to the criticism made.

State v Diggins, 227-632; 288 NW 640

Competency — permissible comparison. A witness may, in a proper case, be permitted to compare the size and shape of a package, the inside of which he could not see, with another article materially connected therewith.

State v Plew, 207-624; 223 NW 362

Contempt. The evidence in contempt proceedings must clearly and satisfactorily establish the guilt of the accused. Evidence reviewed, and held ample to meet the rule.

Tuttle v Peters, 206-435; 220 NW 22

"Conclusion" of ballistic expert. The province of a jury is not invaded by permitting a ballistic expert to testify that as a result of his detailed investigation he had "reached the conclusion" that a certain bullet had been fired through the barrel of a certain gun.

State v Campbell, 213-677; 239 NW 715

Before coroner's jury—best evidence rule. Oral proof of the testimony given by a witness at a coroner's inquest is not properly subject to the objection that it is not the best evidence.

State v Johnston, 221-933; 267 NW 698

Credit to be given testimony. The testimony of a witness whose reputation for truth is shown to be bad is not necessarily to be entirely disregarded, but should be considered under all the circumstances, and in connection with the other evidence, and given the weight to which the jury believe it entitled.

State v Miller & Kremling, 53-209; 4 NW 1083

Demonstrative evidence. It is discretionary with the court whether a witness shall or shall not produce demonstrative evidence.

State v Graham, 203-532; 211 NW 244

Demonstrative evidence—admissibility. All the facts and circumstances connected with the actual perpetration of a crime are admissible whether there be one participant or many. So held as to certain exhibits offered and received in evidence.

State v Leftwich, 216-1226; 250 NW 489

Demonstrative evidence—identification. Exhibit held sufficiently identified, material, and relevant, and properly received in evidence.

State v Brown, 216-538; 245 NW 306

Discretion of jury. Tho the jury are not bound to believe a witness and may disregard his testimony, they are not to disregard or disbelieve testimony without cause at their uncontrolled and unreasonable discretion; and they have no right to disregard the testimony of one who stands in every way unimpeached, and who shows that he has the means of information and speaks intelligently and consistently.

State v Guyer, 6-263

Evidence—immaterial but harmless. Error may not be predicated on immaterial but quite harmless testimony relative to the attitude of a deceased toward women.

State v Clay, 222-1142; 271 NW 212

Evidence tending to prove dismissed count. Evidence tending competently to prove any essential element of a count on which the state relies for a conviction is admissible even tho it may tend to prove elements of a count which the state has dismissed.

State v Miller, 217-1283; 252 NW 121

Examination—refreshing recollection. It is not improper for the county attorney, after a witness has testified to a certain extent, to hand to the witness the minutes of his testimony taken before the grand jury, and to request the witness to refresh his memory, in order to determine whether he had overlooked any matter; neither is it improper to permit the witness thereupon to testify to material matters which had been overlooked.

State v Friend, 206-615; 220 NW 59

Exclusion of evidence. Where evidence is excluded as inadmissible under any circumstances, tho offered out of its order, it need not be offered again to authorize an exception to the ruling.

State v Hunter, 118-686; 92 NW 872

Exclusion of sheriff from court room. It is within the discretion of the court to receive the testimony of the sheriff and of a special officer assisting the county attorney, even tho they had remained in the court room in violation of an order excluding witnesses.

State v Bittner, 209-109; 227 NW 601

Exhibit containing immaterial matter. The offer in evidence of the entire contents of a book of municipal traffic laws, containing manifestly much irrelevant and immaterial matter, is properly rejected.

State v Long, 215-494; 245 NW 726

Exhibits—excluding evidentiary statements. Properly identified bottles and their intoxicating contents are not rendered inadmissible because the labels thereon contain evidentiary statements when the jury is instructed to disregard such statements.

State v Christensen, 205-849; 216 NW 710

Exhibits—failure to return—effect. Relevant exhibits are admissible upon the trial of an indictment even tho they have not been before the grand jury, or if before such jury, have not been returned.

State v Bailey, 202-146; 209 NW 403

Failure to swear witness. A witness will be presumed, on appeal, to have been sworn before testifying, unless the contrary clearly appears from the record. Where it is known to the de-

I IN GENERAL—continued

fendant during the trial, that a witness for the state had not been sworn, and no objection to the testimony is made at the time, there is a waiver of the requirement.

State v Smith, 124-334; 100 NW 40

Finger prints—expert testimony as to ultimate fact. A witness who is expert in the science of dactylography may testify that in his opinion, judgment, or belief, different finger prints were made by one and the same finger, but he may not testify that they were made by one and the same finger.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

Form of oath—objection. Objection to the form of an oath must be made previous to its administration or it will be deemed waived.

State v Browning, 153-37; 133 NW 330

Hearsay. What an accused has been told about an offense for which he is on trial is immaterial and hearsay.

State v Papst, 221-770; 266 NW 498

Identity of part of exhibit—permissible conclusion. A witness may testify that an article found by him under named circumstances with which the accused is connected, is a detached or torn-off part of another exhibit with which the accused is likewise connected.

State v Japone, 202-450; 209 NW 468

Identification of ballistic photographs. Evidence held ample to identify certain ballistic photographs.

State v Campbell, 213-677; 239 NW 715

Imbecility of defendant. A non-expert can testify to the mental condition of the defendant only after detailing the facts on which he bases his opinion.

State v Pennyman, 68-216; 26 NW 82

Immaterial inquiry. Uncontradicted testimony as to the amount of poison contained in the particular embalming fluid injected into a body renders immaterial any inquiry into the amount of poison contained in other such fluids of the same manufacture.

State v Flory, 203-918; 210 NW 961

Inadmissible experiments. Evidence as to experiments is inadmissible when performed under unstated conditions, or under conditions materially different from those attending the particular fact in issue.

State v Fahey, 201-575; 207 NW 608
State v Kneeskern, 203-929; 210 NW 465

Incriminating another. Testimony which is intended to show, on behalf of the accused on trial, that a person other than said accused is, in fact, the guilty party, is wholly inadmissible when it furnishes the jury no basis for a finding of fact on such issue, but, on the contrary, simply furnishes the jury a basis for a mere conjecture or surmise.

State v Papst, 221-770; 266 NW 498

Identity of firearm.

State v Lyons, 202-1195; 211 NW 702

Indictment as evidence. An indictment is wholly inadmissible to show the guilt of the defendant even tho offered on cross-examination, in connection with an offer, by the accused, of the minutes of testimony returned with the indictment.

State v Huckins, 212-283; 234 NW 554

Intoxication. While the intoxication of a witness at the time of the transactions of which he testifies does not destroy his credibility, it undoubtedly impairs it; but if his testimony is corroborated, or his recollection of the transaction appears to be distinct and clear, he is entitled to belief.

State v Castello, 62-404; 17 NW 605

Intoxication—burden of proof. An accused who pleads intoxication as a defense has the burden to show that his intoxication was to such extent and in such a degree that he was incapable of forming a criminal intent.

State v Patton, 206-1347; 221 NW 952

Intoxication of defendant. Evidence that the defendant had been drinking shortly before events occurred upon which a charge of murder was based against him was admissible.

State v Coleman, 226-968; 285 NW 269

Purchaser of liquor not excused. Where the sale of intoxicating liquors is a crime under the prohibitory law, the purchaser is not a participant in the crime, and he cannot excuse himself from testifying as to such purchases made by him, on the ground that his testimony would tend to criminate himself.

Wakeman v Chambers, 69-169; 28 NW 498

Judicial notice—distance between cities, etc. The courts of this state may and do take judicial notice of the distance between cities in this state, and the direction of one from the other; also of the states which abut this state.

State v Johnson, 221-8; 264 NW 596

Leading questions. Where a defendant seeks to negative evidence of the state by testimony directly responsive thereto, counsel may direct the attention of the witness to the very statements proposed to be negatived, and the examination will not be considered as leading and suggestive.

State v Manigan, 164-434; 145 NW 869

Nonleading question—calling attention to topic. Where a question is framed so as only to call the witness' attention to the topic, it is not leading.

State v Hartwick, 228- ; 290 NW 523

Materiality—harmless error. No prejudicial error results from receiving in evidence a lease entered into by the accused in a name other than his own, the accused having already admitted such fact.

State v Gaskill, 200-644; 204 NW 213

Matter not testified to before grand jury. A witness who has been examined before the grand jury, and the minutes of his testimony have been preserved and filed, may be examined upon the trial as to all matters within his knowledge touching the defendant's guilt or innocence.

State v McCoy, 20-262
State v Perkins, 143-55; 120 NW 62

Medical experts. The opinion of medical men who are shown to be experts, as to the instrument produced, and the nature and consequences of wounds or the causes of disease, is competent evidence in a prosecution for homicide.

State v Morphy, 33-270

Minutes before grand jury as impeaching material. The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness.

State v Hayden, 45-11

Minutes of testimony—nonimpeachable. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

Motive. Proof of motive is not necessary to sustain a conviction for criminal homicide.

State v Kneeskern, 203-929; 210 NW 465

Objection to competency. An objection to the competency of a witness not made at the time he is offered is waived.

State v O'Malley, 132-696; 109 NW 491

Offer of privileged witness. The fact that the state offers as a witness defendant's doctor, who treated him for the alleged injury but who is not permitted to testify over defendant's objection on the ground of privilege, is not sufficient to warrant a reversal.

State v Booth, 121-710; 97 NW 74

Operation of automobile. A motion to strike testimony of the operation of third party's automobile on afternoon preceding night of alleged assault when prosecuting witness testified that he did not know whether defendant had anything to do with the operation of the car, was not improperly overruled, defendant having made no objection to the testimony when given, and neither defendant nor the owner of the car having testified in regard to its operation.

State v Crandall, 227-311; 288 NW 85

Testimony as to intoxication—cross-examination as to effect of blow on head. In a prosecution for driving while intoxicated, where the defense was that after an automoblie accident the defendant was in a dazed condition due to a blow on the head, the witnesses who testified as to intoxication could not be asked on cross-examination how much effect the blow might have had on the defendant's condition, as the answer would have been no more than a guess. This question was for the jury and there was no foundation laid to give the answer probative value.

State v McDowell, 228- ; 290 NW 65

Opinion of witnesses. A witness who has not been shown to be an expert cannot be permitted to testify respecting the mental condition of one who pleads insanity as a defense.

State v Geddis, 42-264

Photographs inadmissible unless relevant. Photographs of a stranger to the prosecution are, manifestly, inadmissible in the absence of evidence showing relevancy.

State v Papst, 221-770; 266 NW 498

Presumptions act prospectively only. Principle recognized that a presumption does not travel backward. It looks forward only.

State v Liechti, 209-1119; 229 NW 743

Private interview with witness. The court has no power to order a witness to submit to a private interview with defendant's counsel.

State v Wallack, 193-941; 188 NW 131

Privilege of witness. The refusal of a witness in a criminal trial to answer a question, upon the ground that he may thereby criminate himself, cannot be shown as a circumstance against him in a subsequent trial for the same offense.

State v Bailey, 54-414; 6 NW 589

Proffer in presence of jury—discretion of court. The court has discretionary power to refuse to permit counsel to state, in the presence of the jury, the controversial facts which he expects to prove by a proffered witness.

State v Teager, 222-391; 269 NW 348

Referring to minutes to refresh memory. It is not error to allow a witness in a criminal trial to refresh his memory by a reference to the minutes of his testimony given before the grand jury.

State v Miller & Kremling, 53-154; 4 NW 900

I IN GENERAL—concluded

Refusal to reshape question. An accused may not predicate error on the exclusion of a question when the sustained objection, in and of itself, very clearly points the way to an avoidance of the objection by a reshaping of the question, and the accused fails so to do.

State v McCook, 206-629; 221 NW 59

Responsive answers. In the examination of witnesses a party is entitled to answers responsive to the inquiry, and such portions as are not may be stricken on motion.

State v Nathoo, 152-665; 133 NW 129

Retention of nonresponsive answer. The court does not necessarily have to strike the nonresponsive answer of a witness when the answer reveals competent testimony. So held relative to the issue whether a party was intoxicated.

State v Fahey, 201-575; 207 NW 608

Right to recall witness. Where, under order of court, witnesses were excluded from the courtroom, the fact that, after examination, a witness remained in the room did not justify denial of permission to recall him.

State v Kissock, 111-690; 83 NW 724

Secondary evidence — preliminary showing. Secondary evidence of the contents of destroyed letters, shown to have been written by the accused in a criminal cause, is admissible when the originals would be admissible.

State v White, 205-373; 217 NW 871

Self-incrimination. While a witness is not bound to criminate himself, yet if he shall voluntarily testify to any matter tending to criminate, he may be compelled to testify in respect to that matter concerning all that is material to the issue.

State v Fay, 43-651

Test of credibility. The moral (general) character of a witness—that is, his reputation for morality in the vicinity of his residence—may be shown as a test of his credibility and it was error to exclude an inquiry of that kind in this case.

State v Froelick, 70-213; 30 NW 487

Trial—nonspecific objections. Objections to testimony in criminal cases must be as specific as is required in civil cases, in order to receive review on appeal.

State v Vandewater, 203-94; 212 NW 339

Unlawfully obtained evidence admissible.

Contra State v Sheridan, 121-164; 96 NW 730
State v Tonn, 195-94; 191 NW 530
State v Gorman, 196-237; 194 NW 225
Foley v Utterback, 196-956; 195 NW 721
Joyner v Utterback, 196-1040; 195 NW 594
State v Rowley, 197-977; 195 NW 881
Lucia v Utterback, 197-1181; 198 NW 626
State v Bogossian, 198-972; 200 NW 586
State v Weaver, 198-1048; 200 NW 705
State v Parenti, 200-333; 202 NW 77
State v Lozier, 200-652; 204 NW 256
State v Wenks, 200-669; 202 NW 753
Hammer v Utterback, 202-50; 209 NW 522
State v Korth, 204-667; 215 NW 706
State v Lambertti, 204-670; 215 NW 752
State v Bamsey, 208-796; 223 NW 873
State v Rollinger, 208-1155; 225 NW 841
State v Bourgeois, 210-1129; 229 NW 231
State v Rowley, 216-140; 248 NW 340

Unallowable self-corroboration. A witness may not corroborate himself by testifying that on other occasions out of court he has told the same story which he has told in court. Neither may a party prove such extra recitals by other witnesses.

State v Bell, 206-816; 221 NW 521

Wife may be witness. When the husband and wife were indicted for keeping a house where intoxicating liquors are unlawfully sold, and were tried together, it was held that the wife might be a witness for her husband, with the restriction that her testimony should not be considered in her own behalf.

State v Donovan, 41-587

Wife witness for husband. The testimony of a wife in behalf of her husband in a criminal case is to be received, and her credibility is to be tested by the same rules which apply to all other witnesses, and it is error to instruct the jury that her testimony should be examined with peculiar care.

State v Bernard, 45-234

Witnesses — excluding answer — necessity of error to appeal. When a witness is prevented, on objection, from answering, counsel should, by some proper offer or record, show what he intends to establish. Conjecture as to what the answer might be will not justify a reversal.

State v Madden, 170-230; 148 NW 995

Witnesses—oath. No particular form of oath to be administered to a witness is prescribed, but if of such character as to be regarded by the witness as binding upon his conscience it is sufficient, altho he may regard some other form as more solemn.

State v Browning, 153-37; 133 NW 330

II CO-DEFENDANTS

Conspiracy. See under §13162

Declaration of joint defendant. Declarations of one joint defendant in a charge of conspiracy, tho made shortly before the time when it is alleged the conspiracy was entered into, are, if material on his state of mind, admissible against him, and his co-defendant on trial may not complain if the declarations are offered, received, and confined strictly to the maker thereof.

State v Moore, 217-872; 251 NW 737

III TESTIMONY OF ACCOMPLICE

Accomplices—corroboration—sufficiency. If the testimony of an accomplice is corroborated by other witnesses in any material point tending to connect the defendant with the commission of the offense, it is sufficient. So held as to testimony relative to rings taken from the body of the deceased.

State v Clay, 222-1142; 271 NW 212

Accomplice per se. Whether a witness, testifying for the state as to the commission of the offense on trial, was an accomplice is not a jury question on a record which shows that the witness himself might be charged and convicted of said offense. On such a record, the court must peremptorily instruct that the witness was an accomplice, and properly guide the jury as to the necessity for corroboration.

State v Clay, 220-1191; 264 NW 77

Corroboration. Whether certain testimony was or was not corroborative of an accomplice is quite inconsequential when the record shows that such testimony was received for and limited to a purpose entirely foreign to the subject of corroboration.

State v Bohall, 207-219; 222 NW 389

Extent of corroboration. An accomplice need not be corroborated in all matters to which he testifies.

State v Gaskill, 200-644; 204 NW 213

Fatally incompetent evidence. The theory of the state that its sole witness to a felonious homicide (tho confessedly a participant in the transaction which led to the death of deceased) was not in fact an accomplice, because said witness acted under duress of and in fear of the defendant who was on trial, may not be supported by testimony that said defendant made a felonious assault on said witness some four months after the commission of said homicide.

State v Clay, 220-1191; 264 NW 77

At former trial. The transcript of the testimony of an accomplice given at former trial of the defendant in a criminal prosecution, is admissible on a retrial when the accomplice is found by the court to be out of the state and therefore beyond the reach of a subpoena.

State v Clay, 222-1142; 271 NW 212

Objections negatived by record. Manifestly there is no merit in the objection that testimony of an accomplice is inadmissible and should be stricken from the record when the record reveals no evidence that the witness was an accomplice, and when the record reveals ample corroboration of the witness' testimony.

State v Rowley, 216-140; 248 NW 340

IV DECLARATIONS AND ADMISSIONS OF DEFENDANT

Admissions. Evidence is admissible that after a party was arrested he inquired of the officer as to the punishment provided in this state for the offense which he was apparently attempting to commit.

State v Engler, 217-138; 251 NW 88

Admissions. Admissions of guilt by an accused are not rendered inadmissible on the trial of an indictment because made when accused was arrested under an information which misstated the time of the commission of the offense as prior to the time alleged in the indictment, the record demonstrating that but one offense was being prosecuted.

State v Heath, 202-153; 209 NW 279

Balanced instruction. A well-balanced instruction relative to both the weakness and strength of verbal admissions, is unobjectionable on a supporting record.

State v Friend, 210-980; 230 NW 425

Cautionary instructions. The record may be such as to require cautionary instructions as to the legal effect to be given to admissions and declarations of the accused.

State v Johnson, 211-874; 234 NW 263

Desire of defendant to kill self—inference of guilt. The jury in a manslaughter case arising from an automobile accident may consider evidence that, while standing by the body after the tragedy, the defendant asked a bystander if he had a gun, saying, "I would like to finish everything right now".

State v Graff, 228- ; 282 NW 745; 290 NW 97

Confession—justifiable instruction. Evidence that an accused stated that he participated in the robbery charged and that he was one of the three persons who entered the bank and knew where some of the stolen bonds were, justifies the court in giving a properly balanced instruction on the subject of confession.

State v Davis, 212-131; 235 NW 759

Confession—state not bound by exculpatory statements. The state by introducing defendant's written confession does not thereby preclude itself from showing, by direct or circumstantial evidence, the untruthfulness of exculpatory statements contained in said confession.

State v Ball, 220-595; 262 NW 115

Confessions—testimony of witness—admissibility. Testimony of witness that a confession was the free and voluntary act of the defendant is not an opinion or conclusion of the witness and may be received in evidence when

IV DECLARATIONS AND ADMISSIONS OF DEFENDANT—concluded

the circumstances to said confession are also in evidence.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Voluntary confession. In a prosecution for the crime of entering a bank with intent to rob, a voluntary statement made by the defendant and introduced upon cross-examination of defendant for purpose of impeachment in absence of evidence to indicate statement was not voluntary, places the burden on the defendant to show statement incompetent; and the fact that statement was made without warning the accused that it might be used against him does not affect its admissibility in the absence of statute requiring that the accused be warned.

State v Mikesh, 227-640; 288 NW 606

Confessions — when jury question. If the record affirmatively shows that confessions were obtained because of promises of a light sentence, they must be summarily rejected; if the record shows a fair conflict on the issue whether the confessions were so obtained, then said issue is for the jury.

State v Johnson, 210-167; 230 NW 513

Direct and circumstantial—directing verdict. Circumstantial evidence, supplemented by oral and written confessions of guilt may be such as to have the weight of direct evidence, and the court was right in overruling defendant's motion for directed verdict when, under the record, the established facts and circumstances were not only consistent with defendant's guilt but were inconsistent with any other reasonable hypothesis.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Letters—relevancy. Letters are properly received in evidence when shown to have been written by the accused in a criminal charge and to have relation to the transaction on which said charge is based.

State v Hixson, 208-1233; 227 NW 166

Nonvoluntary admission. The reception of admissions of guilt which were possibly nonvoluntary will not be deemed prejudicial when a voluntary written confession of guilt containing the same admissions is subsequently received.

State v Hammond, 217-227; 251 NW 95

Party bound by evidence. The state, by introducing certain testimony given by the defendant upon a former trial, is not bound thereby to admit that such testimony was true.

State v Lucas, 57-501; 10 NW 868

Plea of guilty in criminal prosecution. A plea of guilty in a criminal prosecution may be admissible as an admission when the judgment entered thereon would not be admissible.

In re Johnston, 220-328; 261 NW 908

Presumption. Admissions of guilt by an accused are presumptively voluntary.

State v Joy, 203-536; 211 NW 213

Refusal of disparaging instructions. Requested instructions in disparagement of admissions by an accused are properly refused when such admissions appear to have been deliberately and understandingly made.

State v Troy, 206-859; 220 NW 95

Review—self-invited error. An accused may not base error on the fact that matter detrimental to himself was brought out by himself.

State v Leitzke, 206-365; 218 NW 936

State's evidence not controlled by admission. The defendant cannot compel the state to accept his admission of a fact in lieu of evidence of such fact. In other words, the defendant cannot, by making certain admissions, control the state in its introduction of testimony.

State v Griffin, 218-1301; 254 NW 841

Voluntary inculpatory statements—warning of use against accused unnecessary. Police officer need not warn a person in custody that incriminating statements may be used against him, for, if voluntarily made, they are admissible in evidence without warning.

State v Beltz, 225-155; 279 NW 386

V RES GESTAE

Admissibility. Acts or declarations are always admissible as part of the res gestae when they are practically inseparable from the principal fact or transaction in question.

State v Woodmansee, 212-596; 233 NW 725

Competency—proper exclusion. The exclusion of declarations of unidentified bystanders, made shortly after an accident, to the effect that "the boys ran between the cars", does not constitute reversible error when ample evidence bearing on the same point was received in evidence, and when the said declarations were, in view of the entire record, quite inconsequential.

Riddle v Frankl, 215-1083; 247 NW 493

Evidence. What a person said about being sick and dizzy within a very few minutes after he had unwittingly drunk a lethal dose of poison is part of the res gestae.

State v Korth, 204-1360; 217 NW 236

Hearsay (?) or res gestae (?). Hearsay which is no part of the res gestae is inadmissible.

State v Kneeskern, 203-929; 210 NW 465

Loaded revolver. The fact that a loaded revolver was found upon the seat of an automo-

bile carrying intoxicating liquors at the time the defendant was arrested while seated in the automobile is part of the res gestae and admissible as such.

State v Anderson, 216-887; 247 NW 306

Non-res-gestae statement — effect. The reception of evidence under the mistaken belief that it was part of the res gestae will be deemed nonprejudicial when the jury was already in possession of competent evidence which, if believed, established every fact which could be deduced from the supposed res gestae statement.

State v Ayles, 205-1024; 219 NW 41

Unallowable detail of hearsay and non-res-gestae statements. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, testimony of the parents of the child as to what they were told in detail by their children, singly and collectively, after they—the parents—returned home, relative to the acts of the defendant, and testimony of the prosecutrix as to what she detailed to her parents relative to the acts of the defendant are wholly incompetent for any purpose.

State v Rounds, 216-131; 248 NW 500

VI DECLARATIONS OF CO-DEFENDANTS

Conspiracy. See under §13162

VII DECLARATIONS OF CO-CONSPIRATORS

Declarations of co-conspirators. See under §13162 (III)

VIII DECLARATIONS OF OTHERS IN GENERAL

Declarations of wife in presence of husband. Declarations of a wife in the presence and hearing of her husband, and undenied by the husband at the time, as to what the husband had done on a certain occasion, are admissible against the husband in a subsequent criminal proceeding against him, wherein the truth of said declarations is material, even tho the wife, if called as a witness against her husband, would not be competent to testify to the statements embodied in the declarations.

State v Sharpshair, 215-399; 245 NW 350

Material declaration of third party in presence of defendant. A material declaration by a third party in the presence of the defendant is admissible.

State v Slycord, 210-1209; 232 NW 636

Unallowable detail of hearsay and non-res-gestae statements. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, testimony of the parents of the child as to what they were told in detail by their children, singly and collectively, after they—the parents—returned home, relative to the acts of the defendant, and testimony of the prosecutrix as to what she detailed to her parents relative to the acts of the defendant are wholly incompetent for any purpose.

State v Rounds, 216-131; 248 NW 500

IX DYING DECLARATIONS

Dying declarations. Dying declarations and the circumstances attending the same reviewed, and held to justify their reception in evidence.

State v Gibson, 204-1306; 214 NW 743
State v Rowley, 216-140; 248 NW 340

Essential limitations. Dying declarations must be limited to the res gestae of the crime and to the facts and circumstances immediately surrounding the same. Declarations reviewed and held to violate this rule.

State v Sweeney, 203-1305; 214 NW 735

Admissibility. Principle recognized that the conduct of a defendant when first accused of the crime in question is admissible.

State v Johnson, 221-8; 264 NW 596; 267 NW 91

Flight and denial of identity. Instructions in re flight and denial of identity by defendant reviewed and held amply to protect the defendant.

State v Johnson, 222-574; 269 NW 354

Homicide—issue of competency. The time elapsing between the making of alleged dying declarations and the death of the declarant may be very material on the issue whether the declarant was in extremis, and had no hope of recovery, at the time the declarations were made; and prejudicial error results from so instructing the jury as to deprive it of the right to consider said lapse of time on such issue.

State v Sweeney, 203-1305; 214 NW 735

Instructions — justifiable refusal. Requested instructions in disparagement of dying declarations are properly refused, the court properly covering the subject by its own instructions.

State v Troy, 206-859; 220 NW 95

Theory of admissibility—instructions. Instructions as to the theory justifying the reception of evidence of dying declarations reviewed, and held to fully protect the accused.

State v Johnston, 221-933; 267 NW 698

X CONDUCT OF DEFENDANT

Attitude, actions, and conduct of accused. The attitude of an accused and what he said and did while under investigation relative to the charge against him may be admissible.

State v Vandewater, 203-94; 212 NW 339

Association with accomplice. An accused who becomes a witness in his own behalf may

X CONDUCT OF DEFENDANT—concluded

be impeached by testimony tending to establish his personal association with an accomplice, the existence of such association being material, and having been denied by the accused.

State v Hart, 205-1374; 219 NW 405

Attempt to bribe juror. An instruction to the effect that, if the jury believed that defendant had attempted to improperly influence the jury on a former trial, such conduct was a circumstance to be considered by the jury in determining the guilt of the defendant, is unobjectionable, even tho such instruction is based on a denial by defendant on cross-examination of such improper conduct, and on testimony by the state tending to show such misconduct, it appearing that the exceptions to the instruction did not embrace the point that the said testimony could only be used for impeaching purposes.

State v Friend, 210-980; 230 NW 425

Flight. The usual instructions relative to the effect of flight by one accused of crime are justified by evidence tending to show, (1) that the flight immediately followed the commission of the offense, and (2) that the accused was conscious that he was under suspicion as the perpetrator of the offense.

State v Loucks, 218-714; 253 NW 838

Flight or attempted escape. Flight or an attempt to escape is an indication of guilt and the court may very properly so instruct.

State v Harding, 204-1135; 216 NW 642

Flight subsequent to discharge. Evidence of flight and instructions as to the effect thereof may be proper even tho the flight took place after the accused had been once discharged under a prior preliminary information charging the same and identical offense and transaction.

State v Heath, 202-153; 209 NW 279

Liquor—unlawful transportation — incriminating circumstance. On a charge of unlawful transportation of liquors, evidence is admissible that, shortly before the accused was arrested with intoxicating liquors in his vehicle, he was seen on a somewhat remote highway, and near a cache containing such liquors.

State v Campbell, 209-519; 228 NW 22

Shooting as accident—evidence. On the issue whether the shooting and wounding of a prosecuting witness was accidental, the state may show that the accused at the time in question discharged his gun in different directions and wounded different persons.

State v Bingaman, 210-160; 230 NW 394

Failure of defendant to testify—comment by county attorney. The failure of the defendant in a criminal case to testify in his own behalf does not deprive him of the presumption of innocence, but the jury is entitled to consider it as an inference of guilt, and the county attorney may comment upon it.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions—weight given defendant's testimony. In a criminal prosecution, it is not error to give an instruction that, in considering the testimony of the defendant, the jury should consider that he is charged with a crime and, whether the testimony was given in good faith or for the purpose of avoiding conviction, the jury should give such testimony such weight as they believe it fairly entitled to, and no more.

State v McDowell, 228- ; 290 NW 65

XI HOSTILE FEELINGS

Hostile attitude of juror. The fact that a prospective juror, prior to the time when he was called and examined on his voir dire, took part, in the courtroom, in a demonstration hostile to the accused, does not necessarily show that the juror is disqualified as having formed an unqualified opinion as to guilt.

State v Wheelock, 218-178; 254 NW 313

XII INTENT

Discussion. See 24 ILR 471—Other crimes to show intent

Intoxication—burden of proof. An accused who pleads intoxication as a defense has the burden to show that his intoxication was to such extent and in such a degree that he was incapable of forming a criminal intent.

State v Patton, 206-1347; 221 NW 952

Intoxication as defense—burden of proof—instruction. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Proof of intent. An instruction informing the jury how intent may be proved or arrived at was proper in a murder prosecution.

State v Coleman, 226-968; 285 NW 269

XIII OTHER OFFENSES

(a) IN GENERAL

Discussion. See 24 ILR 471—Intent shown by other crimes

When admissible. Evidence which has material bearing on the issues in a criminal prosecution is admissible notwithstanding the fact that such evidence may tend to show that the accused is guilty of another and additional offense.

State v Campbell, 209-519; 228 NW 22

Allegations of former convictions. In prosecution for illegal possession of intoxicating liquor, county attorney's action in seeking to place the federal convictions before the jury, such matter being entirely withdrawn from the consideration of the jury, was not prejudicial to defendant and did not entitle him to a reversal when there was ample competent evidence to sustain the jury's verdict.

State v Caringello, 227-305; 288 NW 80

Contemplated offense. The fact that a transaction tends to show that an accused was contemplating the commission of a crime, is not a valid objection to its admissibility for impeaching purposes, when the transaction is inconsistent with and contradictory to the statements of the accused as to the facts attending the alleged offense for which he is on trial.

State v Davis, 212-582; 234 NW 858

Estoppel to allege error. A defendant may not predicate error on the reception of evidence of extraneous crimes claimed to have been committed by him when he interposes no objection at the time the evidence is offered, and when he later avails himself of the evidence under the claim that it tends to show his claimed insanity.

State v Mullenix, 212-1043; 237 NW 483

Evidence of former convictions. Records of former convictions are not, in and of themselves, sufficient evidence that the defendant on trial and the defendant in the former convictions are one and the same person, even tho the names are the same.

State v Logli, 204-116; 214 NW 490

Evidence of other offenses. The court in the trial of a criminal case is under no legal duty, in the absence of a request, to instruct the jury as to the particular purpose for which evidence of other offenses had been admitted.

State v McCutchan, 219-1029; 259 NW 23

Driving while intoxicated—second offense—unallowable evidence. On the issue of former conviction of driving an automobile while intoxicated, it is highly prejudicial to receive in evidence on the trial to the jury, the files of said former case. So held where said files consisted of (1) the information of the county attorney with minutes of testimony attached, (2) the indictment with the minutes of some 13 witnesses attached, (3) the bench warrant, and (4) mittimus.

State v De Bont, 223-721; 273 NW 873

Inquisition. In proceedings to determine the sanity of an indicted person, evidence is admissible which tends to show the commission by said person of crimes committed during a series of prior years, especially when such evidence is largely in rebuttal of testimony tending to show insanity.

State v Murphy, 205-1130; 217 NW 225

Other crimes. Evidence which has no other effect than to show that defendant had been guilty of other crimes than that charged in the indictment, is not admissible on the part of the state; neither is evidence of defendant's bad character, where he has not himself placed his character in issue.

State v Rainsbarger, 71-746; 31 NW 865

(b) SPECIFIC OFFENSES

Fraudulent banking—other offenses. In a prosecution for receiving bank deposits when the bank is insolvent, testimony tending to show a criminal diversion by the defendant of the funds of the bank, subsequent to the occurrence of the specific charge on which the indictment is based, is wholly inadmissible as bearing on the question of the solvency or insolvency of the bank on the prior date alleged in the indictment.

State v Brown, 215-600; 246 NW 258

Lascivious acts. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, evidence of the commission by the defendant of a similar offense with a child other than prosecutrix is admissible when the acts with the two children are so closely related in point of time and place, and so intimately associated with each other that they form one continuous transaction.

State v Rounds, 216-131; 248 NW 500

Similar offenses—instructions in re intent. When the state, after introducing evidence tending to establish several distinct offenses of a noncontinuing nature involving a specific intent, elects to rely upon one distinct transaction, the court may very properly instruct the jury that the remaining transactions of the same kind may be considered on the issue of intent.

State v Derry, 202-352; 209 NW 514

Successive offenses—guilty plea—needless proof. After a plea of guilty to a third offense of unlawful possession of intoxicating liquor, to require proof of the prior convictions would be a useless act, not contemplated by the legislature.

State v Erickson, 225-1261; 282 NW 728

Successive offenses—proof by certified copies. Statutes which authorize proof of former convictions of crime to be made by duly authenticated copies of said judgments of convictions are constitutional.

State v Murray, 222-925; 270 NW 355

Testimony tending to show distinct crime—admissibility. Testimony tending to show that the defendant, at a former trial, attempted to bribe the jurors is admissible, notwithstanding the fact that it tends to show the commission of a distinct and separate offense.

State v Friend, 210-980; 230 NW 425

XIII OTHER OFFENSES—concluded
(b) SPECIFIC OFFENSES—concluded

Unauthorized allegation of former conviction—effect. An unauthorized allegation in an indictment of a former conviction and the reception in evidence of proof thereof constitute reversible error, even tho, on conviction, the judgment imposed was within the limit provided for a first offense.

State v Bergman, 208-811; 225 NW 852

XIV MALICE

Murder — presumption of malice — intent. Principle reaffirmed that the use of a deadly weapon in a deadly manner generates a presumption of malice, and if death results, justifies the inference of intent to kill.

Klinkel v Saddler, 211-368; 233 NW 538

XV INSANITY

Burden to establish. Principle reaffirmed that a defendant must establish his plea of insanity by a preponderance of the evidence.

State v Maharras, 208-127; 224 NW 537

"Comprehension and consequence" rule. It is very firmly established that the nature, character, and degree of insanity which exonerate a party from criminal responsibility embrace inability rationally to comprehend the nature and consequences of the act in question.

State v Buck, 205-1028; 219 NW 17

Inquisition. In proceedings to determine the sanity of an indicted person, evidence is admissible which tends to show the commission by said person of crimes committed during a series of prior years, especially when such evidence is largely in rebuttal of testimony tending to show insanity.

State v Murphy, 205-1130; 217 NW 225

Irrelevant and immaterial evidence. On the issue of insanity in the trial of a criminal case, proof of a mental condition of the defendant which was neither progressive nor continuous is properly stricken from the record when there is no accompanying evidence that the defendant was in some degree subject to the influence of such condition at the time the crime was committed.

State v Brewer, 218-1287; 254 NW 834

Mental disease—jury questions. Whether psychopathic personality of the excitable type is a mental disease is properly submitted to the jury on controversial testimony.

State v Buck, 205-1028; 219 NW 17

Nonexpert witness. A nonexpert witness who has never seen an accused in a homicide case prior to the transaction which resulted in the homicide, may not express an opinion as to the then insanity of the accused.

State v Maharras, 208-127; 224 NW 537

Presumption of sanity. The presumption of sanity is not per se overcome by the peculiar atrocity accompanying a homicide.

State v Buck, 205-1028; 219 NW 17

Unsupported issue of insanity. The issue of insanity quite manifestly finds no support in testimony to the effect that the defendant is of such mentality that when he wants a thing he is not actuated by moral obligations, and, tho conscious of the wrong, proceeds to go and get the desired thing regardless of the rights of others.

State v Mullenix, 212-1043; 237 NW 483

XVI ALIBI

Burden of proof. The plea of alibi must be established by the accused by a preponderance of the evidence before he will be entitled to an acquittal on such plea.

State v Debner, 205-25; 215 NW 721

Burden of proof—instructions. A defendant who interposes an alibi must establish the same by a preponderance of the evidence. Instructions reviewed and held correct.

State v Sampson, 220-142; 261 NW 769

Essential elements. The plea of alibi in its true sense necessitates a showing by the accused to the extent of a preponderance of the testimony that he was so far away from the scene of the crime in question that he could not have committed it.

State v Debner, 205-25; 215 NW 721

Instructions. Instructions relative to the defense of alibi are always justified when the record reveals a manifest purpose on the part of the accused to rely on such defense.

State v Parsons, 206-390; 220 NW 328

Instructions. An accused who by his evidence manifestly seeks to show that at the time and place of the commission of the offense charged he was elsewhere may not on appeal deny the effect of such evidence and assert the inapplicability of correct instructions relative to the defense of alibi.

State v Bird, 207-212; 220 NW 110

Instructions in re alibi. Principle reaffirmed that the defense of alibi is easily manufactured and that jurors should scan the proofs with care and caution.

State v Bird, 207-212; 220 NW 110

Instructions construed as a whole. If instructions as a whole fairly present the law relative to a subject matter, e. g., alibi, they are not subject to the charge of being confusing and misleading.

State v Bird, 207-212; 220 NW 110

Insufficient basis. No basis for the usual instruction as to the defense of alibi is furnished (1) by evidence tending to show that

the accused spent several specifically named days in a named city in arranging for and purchasing certain materials with which to commit the crime out of which the prosecution arose, and (2) by counter evidence that the accused was not and in reason could not have been in said city on said days.

State v Carter, 222-474; 269 NW 445

Insufficient basis. A simple statement by an accused in his testimony that, at the time of the commission of the offense, he was in a place other than the place where the offense was committed does not necessarily arise to the dignity of an alibi and require any instructions relative thereto.

State v Hammond, 217-227; 251 NW 95

Jury question. Evidence held to present a question for the jury as to the identity of defendant as one who committed an assault, notwithstanding evidence tending to establish an alibi.

State v Fador, 222-134; 268 NW 625

Nature and requirements. Principle reaffirmed that an alibi is an affirmative defense, easily concocted, and calling for a preponderance of proof by the defendant.

State v Johnson, 221-8; 264 NW 596

Sufficiency. Testimony on behalf of an accused and tending to show that when the alleged offense was committed he was at a place which was not so located as to render impossible his presence at the scene of the alleged offense, does not constitute proof of an alibi or justify instructions on the theory of an alibi. Such testimony must be deemed merely incidental to the plea of not guilty.

State v Davenport, 208-831; 224 NW 557

When not in issue. Evidence which is merely incidental to the denial of an accused that he is guilty does not present the issue of alibi, and in such case reversible error results from the giving of the usual instruction as to the nature of such defense.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

When not an issue. Error results from instructing on the subject of alibi when the accused admits that he was in close proximity to the place where and when the alleged offense was committed, even tho he does account for his presence a few minutes prior thereto.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

XVII CIRCUMSTANTIAL EVIDENCE

Alleged stolen articles — when immaterial. Evidence that automobile tires of a well-known make, and in general use throughout the country, were stolen from a garage at the time it was burglarized and that when defendant was arrested he was using the same kind and size of tires on his automobile, is, in and of itself, wholly immaterial.

State v Sigman, 220-146; 261 NW 538

Arson. Circumstantial evidence may be ample to establish the corpus delicti in a charge of arson.

State v Henricksen, 214-1077; 243 NW 521

Bootlegging. An indictment for bootlegging may be sustained by circumstantial evidence.

State v Plew, 207-624; 223 NW 362

Circumstantial evidence.

State v Kneeskern, 203-929; 210 NW 465
State v Solomon, 203-954; 210 NW 448

Direct and indirect. The law recognizes that circumstances may indirectly, as well as directly, connect an accused with the commission of a crime.

State v Manly, 211-1043; 233 NW 110

Evidence — sufficiency. Circumstantial evidence held to establish the corpus delicti in a prosecution for larceny.

State v Manly, 211-1043; 233 NW 110

False pretenses—jury question. Falsity may be established by circumstantial evidence. Evidence held to present jury question.

State v Huckins, 212-283; 234 NW 554

Imprint of heel of shoe—when immaterial. Evidence tending to show, (1) that on the morning following the burglary of a garage a paper, bearing the imprint of the heel of a well known, and commonly worn make of shoe, was found on the floor of the garage, and (2) that when the defendant was arrested he was wearing a pair of said make of shoes, is wholly immaterial and must not be allowed, over objections, to remain in the record unless supplemented by some evidence tending to prove, (1) that the imprint was made at the time of the burglary and (2) by the defendant's shoe.

State v Sigman, 220-146; 261 NW 538

Instructions—proof open to two constructions. An instruction that, in order to convict on circumstantial evidence alone, the proof must not only be consistent with the defendant's guilt but also inconsistent with a theory of innocence, sufficiently covered the defendant's request for an instruction that if the evidence was open to two constructions, one consistent with guilt and the other with innocence, the defendant should be acquitted.

State v McDowell, 228- ; 290 NW 65

Inapplicability. Instructions to the effect that, in order to convict on circumstantial evidence, each fact in the chain of circumstances must be proven beyond a reasonable doubt; that all said facts must be connected with each other and with the main fact to be proven; and that said facts must produce a moral certainty

XVII CIRCUMSTANTIAL EVIDENCE—concluded

of defendant's guilt, are properly refused on a record revealing both direct and circumstantial evidence of guilt.

State v Ferguson, 222-1148; 270 NW 874

Instructions. Failure to instruct as to circumstantial evidence is not reversible error in a case wherein the evidence is not wholly circumstantial and especially when no such instruction was requested.

State v Shearer, 206-397; 220 NW 13

Instructions in re circumstantial evidence. An instruction that the state's case is based solely on circumstantial evidence is properly refused when the evidence is both direct and circumstantial.

State v Engler, 217-138; 251 NW 88

Nonapplicability—direct evidence. There is no occasion to instruct on circumstantial evidence when the evidence connecting the accused with the offense is direct.

State v Johnson, 215-483; 245 NW 728

Stolen property—ownership. Ownership of stolen property may be established by circumstantial evidence.

State v Johnson, 210-167; 230 NW 513

Possession of still—identification of exhibits. On the issue whether defendant was in possession of a still which was buried on defendant's premises, a coat and letters and documents therein, addressed to the defendant, and buried with the still, are admissible, there being some evidence that the coat belonged to defendant.

State v Trumbauer, 207-772; 223 NW 491

Refusal to instruct. A refusal of the court to instruct that the state's case rests solely on circumstantial evidence, even tho such is the record, is erroneous but not necessarily reversible error.

State v Glendening, 205-1043; 218 NW 939

Relevancy as test. Circumstances, if relevant and material, may be admissible, tho of no great weight or evidentiary importance.

State v Ferguson, 222-1148; 270 NW 874

Weight and sufficiency. Circumstantial evidence, when exclusively relied on to prove that a defendant did a certain wrongful act, must be of such a nature, and the facts embraced therein be so related to each other, that the theory that defendant did the act is the only conclusion that can fairly or reasonably be arrived at.

Gregory v Sorenson, 214-1374; 242 NW 91
State v Lowenberg, 216-222; 243 NW 538

Weight and sufficiency. Principle reaffirmed that circumstantial evidence when exclusively relied on to support a verdict of guilt in a criminal cause must point to the guilt of the defendant beyond all reasonable doubt and be inconsistent with any reasonable theory of the defendant's innocence. So held as to a charge of operating an automobile while intoxicated.

State v Hooper, 222-481; 269 NW 431

XVIII CORPUS DELICTI

Corpus delicti. Corpus delicti may be established by circumstantial evidence. So held as to charge of larceny.

State v Kelley, 193-62; 186 NW 834

Photographs—admissibility for limited purpose. In a prosecution for homicide the court committed no error in admitting in evidence photographs showing the condition of the body of the deceased at the time photographs were taken, said photographs so marked that laymen could properly interpret the meaning of markings thereon. Such evidence admissible even tho physician who performed post mortem and who identified abrasions and bruises so shown by these exhibits had not personally observed the condition of the body immediately prior to the taking of the photographs.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Unlawful transportation of liquor—proof of corpus delicti. Proof relative to the alcoholic nature of certain liquors reviewed and held ample to show they could be used for beverage purposes.

State v Anderson, 216-887; 247 NW 306

XIX CHARACTER AND REPUTATION

(a) IN GENERAL

Discussion. See 19 ILR 341—Recent reputation of crime; 24 ILR 498—Character testimony

Cross-examination. A good character witness, who testifies that the general reputation of an accused (charged with operating an automobile while intoxicated) for moral character is good, may, on cross-examination, be asked whether he has heard within a stated recent time that the defendant, while operating a motor vehicle and while in an intoxicated condition, had been involved in certain specified accidents.

State v Wheelock, 218-178; 254 NW 313

Cross-examination as to remote matters. The cross-examination of a good-character witness may not be carried into matters which are from eight to twelve years remote from the time of trial.

State v Bell, 206-816; 221 NW 521

General reputation—sufficiency. The point that a question calls for testimony of the "reputation" of a witness, instead of testimony of the general reputation, is not raised by the objection of incompetency and immateriality.

State v Dillard, 205-430; 216 NW 610

Good character as defense. Defendant in a criminal prosecution may place in issue that trait of his character which is questioned by the charge made against him, and may sustain his good character as to said trait (1) by evidence of his good reputation as to said trait, or (2) by the direct testimony of witnesses who, by knowledge, qualify to speak as to such good character.

State v Ferguson, 222-1148; 270 NW 874

Good moral character—reasonable doubt created. Evidence of good moral character of the defendant in a criminal prosecution is not in itself sufficient to generate a reasonable doubt of guilt so as to justify a reversal of a conviction on the ground that the lower court should have directed a verdict in the defendant's behalf, when the jury was justified in believing the evidence against the defendant.

State v McDowell, 228- ; 290 NW 65

Good character of defendant. Where the defendant has introduced evidence of his good character, the state, in rebuttal, is confined to general evidence that his character is not good in the particular in question, and evidence of particular acts indicative of bad character must be excluded.

State v Sterrett, 71-386; 32 NW 387

Bad moral character of defendant. Where the defendant in a criminal prosecution takes the stand in his own behalf, his bad moral character may be shown in derogation of his credibility.

State v Kirkpatrick, 63-554; 19 NW 660

Impeachment—unnecessary limitation. Testimony of general bad moral character of an accused and of his bad reputation for truth and veracity need not be limited to the very time of the commission of the offense on trial.

State v Parsons, 206-390; 220 NW 328

Impeachment—improper but harmless cross-examination. The cross-examination of a good-character witness for a defendant in a criminal case should be limited to reports and rumors in the community to negative good reputation. But ordinarily prejudicial and reversible error will not be deemed to result from an improper cross-examination when it is not extreme, when the answers are favorable to defendant, and when the court promptly admonishes the jury to wholly disregard such examination.

State v Clay, 222-1142; 271 NW 212

Objection to qualification. Objection to the qualification of witnesses to testify to the reputation of a party to an action cannot be raised for the first time on appeal.

State v Hamilton, 151-533; 132 NW 44

(b) INSTRUCTIONS

Good character. Reversible error results from instructing that "evidence of good character is a circumstance which may be shown for the purpose of rebutting the presumption of guilt arising from circumstantial evidence".

State v Dunn, 202-1188; 211 NW 850

Good character—effect. Evidence of the defendant's former good character must be considered by the jury, along with all other facts and circumstances, in determining the question of guilt or innocence; and it is error for the court, after so instructing, to say that, if the jury finds him guilty beyond all reasonable doubt, then evidence of good character is no defense and should not be considered.

State v Hillman, 203-1008; 213 NW 603

Good character generating reasonable doubt. The previous good character of an accused (as to the trait involved) shown either (1) by the general reputation of the accused, or (2) by actual personal experience of witnesses with the accused, may, in connection with all the evidence in the case, generate a reasonable doubt of the guilt of the accused, and entitle him to an acquittal. And the jury must, on request, be so instructed.

State v Ferguson, 222-1148; 270 NW 874

Instructions — moral character — reasonable doubt. An instruction as to the weight to be given evidence of good moral character of the defendant was not incorrect in adding that if, under all the evidence, including that bearing on moral character, there was no reasonable doubt as to guilt, the jury should convict, however good the character may have been.

State v McDowell, 228- ; 290 NW 65

Good character and peaceable disposition. The instructions must not place upon the defendant the burden of proof to establish his alleged peaceable disposition and good character.

State v Johnson, 211-874; 234 NW 263

Instructions. Instructions guiding the jury in the consideration of good-character evidence reviewed and held correct.

State v Bell, 206-816; 221 NW 521
State v Blair, 209-229; 223 NW 554
State v Harness, 214-160; 241 NW 645

Instructions—sufficiency. Instruction in re good character reviewed and held, in effect, to correctly direct the acquittal of the accused if, from a consideration of all the evidence, including the evidence as to good reputation, the jury had any reasonable doubt of his guilt.

State v Fador, 222-134; 268 NW 625

Instructions in re character witnesses. Correct instructions, in a criminal prosecution relative to the weighing of defendant's testimony, are not required to be accompanied by instructions relative to the testimony of defendant's good-character witnesses. If defendant desired the latter he should ask for them.

State v Schenk, 220-511; 262 NW 129

XIX CHARACTER AND REPUTATION—concluded

(b) INSTRUCTIONS—concluded

Questionable instruction. Defendant is entitled, on request, to a specific instruction to the effect that evidence of his good character may be sufficient to generate a reasonable doubt of guilt. Instruction substituted by the court for one requested, reviewed and criticized.

State v Reynard, 205-220; 217 NW 812

Right to rebut. A defendant is not entitled to an instruction to the effect that the state has the right to rebut his testimony of good moral character.

State v Wheelock, 218-178; 254 NW 313

Weight of reputation evidence. An instruction in a criminal trial with reference to the weight and effect of evidence of good reputation of the defendants was not reversible error when the defendants led the way in offering evidence of reputation rather than character.

State v Coleman, 226-968; 285 NW 269

13900 Corroboration in rape, seduction, and other crimes.

ANALYSIS

I IN GENERAL
II RAPE
(a) IN GENERAL
(b) OPPORTUNITY
(c) COMPLAINT
(d) ADMISSIONS AND CONFESSIONS
(e) COURT AND JURY
III SEDUCTION

I IN GENERAL

Incest. A father may be convicted for the crime of incest committed upon his daughter by her uncorroborated testimony, where the act was accomplished by force.

State v Rennick, 127-294; 103 NW 159

II RAPE

(a) IN GENERAL

Rape. Evidence that defendant was seen driving away from the place where the alleged crime of rape was committed; that no one else was present who could have committed the crime; that there were automobile tracks leading toward a highway from the place where the prosecutrix said that defendant stopped his machine; and that defendant had the opportunity, which was of his own making, to commit the crime, was sufficient corroborating evidence to take the case to the jury.

State v Lindsay, 161-39; 140 NW 903

Uncertain identification of accused. The identification of an accused, under a charge of rape, at the time of the occurrence in question, tho somewhat uncertain and equivocal, may justify the jury in finding that the corroboration is sufficient.

State v Mueller, 202-1067; 208 NW 360

Sufficiency. Corroboration sufficient to sustain a verdict of guilty of assault to rape is found in testimony tending strongly to show that the accused was actually observed by witnesses other than prosecutrix in the attempt forcibly to have sexual intercourse with prosecutrix.

State v Mayer, 204-118; 214 NW 710
State v Grimm, 212-1193; 237 NW 451

Corroboration. Evidence, aside from that of prosecutrix, reviewed, and held sufficient to point out the defendant, in a charge of rape, as the guilty party.

State v Grimm, 212-1193; 237 NW 451

Sufficiency. Evidence in a prosecution for assault to rape, reviewed, and held sufficient to submit to the jury on the issue of corroboration.

State v Teager, 222-392; 269 NW 348
State v Johnson, 222-574; 269 NW 354

Impeachment of witness. Where upon a trial for rape the prosecuting witness was corroborated by the testimony of another, whom the defendant sought to impeach, held, that it was for the jury to determine, in view of all the facts, whether or not the witness had been impeached.

State v Mylor, 46-192

Insufficiency. Corroboration of a charge of rape may not rest on the facts that the accused expressed his affection for the prosecutrix shortly after the commission of the alleged offense; that he then attempted to meet the prosecutrix; that, when arrested, he asked the officer if there was some way to settle the matter and avoid going to jail; and that he might have had the opportunity to commit the offense.

State v Lamberti, 200-1241; 206 NW 128

Insufficiency. The demeanor of the defendant when identified by the prosecutrix after his arrest, in simply "dropping his head and remaining silent", is wholly insufficient to constitute the required corroboration.

State v Greiner, 203-248; 212 NW 465

Child a proper corroborating witness—weight for jury. Age alone of a ten-year-old corroborating witness will not vitiate her testimony, since credibility and weight are matters for the jury.

State v Beltz, 225-155; 279 NW 386

Eight-year-old witness. In prosecution for statutory rape where it is shown on preliminary examination of eight-year-old witness that she knew what "telling the truth" meant and knew what a lie was, that it was wrong to tell a lie, and that punishment was the penalty for

not telling the truth, it was not error to permit such witness to testify, especially where no objection was made to witness' competency until the conclusion of her testimony, altho she did not understand the meaning of the word "oath", nor definition of word "witness".

State v Diggins, 227-632; 288 NW 640

Eight-year-old witness—credibility. In a prosecution for statutory rape where an eight-year-old witness testified on direct examination in a clear, frank, direct, and intelligent manner as to what she had seen or heard on the occasion in controversy, a motion to strike such testimony was properly overruled, as the question of the credit and weight to be given her testimony was clearly for the jury. The testimony of a witness must be construed in its entirety.

State v Diggins, 227-632; 288 NW 640

Fatally erroneous instruction. Fatal error results from instructing that corroboration of prosecutrix in a charge of rape may be found from "the evidence in the case or the lack thereof."

State v Pritchard, 204-417; 215 NW 256

Proof beyond reasonable doubt. An instruction in a criminal case requiring proof beyond a reasonable doubt, of every material fact issue, must be deemed to apply to the proof of corroboration in those criminal cases wherein proof of corroboration is required.

State v Ingram, 219-501; 258 NW 186

Inferential instruction insufficient. Where defendant was convicted of assault with intent to commit rape, failure to instruct jury as to necessity of corroboration of prosecuting witness' testimony—an essential element of conviction—was prejudicial error, and the jury was not sufficiently instructed as to this necessity by inference from another instruction on corroboration given in connection with the court's statement that crime charged in indictment was rape, which included the lesser offense of assault with intent to commit rape. Nor was the error rendered nonprejudicial by the fact that record contained evidence of corroboration, since it is not the court's function to pass upon weight and sufficiency of corroborating evidence, except to determine whether it is sufficient to go to the jury.

State v Ervin, 227-181; 287 NW 843

(b) OPPORTUNITY

Insufficiency. Evidence to the effect that one convicted of assault with intent to commit rape requested, on the occasion in question, the privilege of taking the prosecuting witness and her adult female relative to their home is wholly insufficient to show that the accused deliberately created an opportunity for committing the crime charged, which would, in itself, constitute sufficient corroboration.

State v Hatcher, 201-936; 208 NW 307

Opportunity only insufficient. Corroboration is quite insufficient when, in its last analysis, the testimony simply demonstrates that the accused had the opportunity to commit the offense in his home which was his place of business.

State v Brundidge, 204-111; 214 NW 569
State v Ashurst, 210-719; 231 NW 319

Seeking opportunity — precluding guilt of others—guilty conscience. Evidence, including certain writings of the defendant, and his conduct in general, exhaustively reviewed in a prosecution for rape on a child under 16 years of age, and held to reveal no sufficient corroboration of prosecutrix either on the theory (1) that he had been seeking an opportunity to commit said offense on prosecutrix, or (2) that he was the only person who could have committed the offense; or that a manifestation of guilty conscience furnished such corroboration.

State v Landes, 220-201; 262 NW 105

Planned opportunity — evidence — sufficiency. In a prosecution for rape or assault to commit rape, the required legal corroboration of prosecutrix may appear in testimony to the effect that defendant designedly planned an opportunity to commit the crime on prosecutrix. Evidence reviewed and held wholly insufficient to establish such planning.

State v Whitney, 220-1203; 263 NW 803

(c) COMPLAINT

No annotations in this volume

(d) ADMISSIONS AND CONFESSIONS

Defendant's admission. The admissions of a defendant charged with rape that he had sexual intercourse with the prosecutrix were sufficient corroborating evidence.

State v Haugh, 156-639; 137 NW 917

Admissions of accused. Statutory corroboration in a prosecution for rape may be found in the general admission of the accused that he had had sexual intercourse with the prosecutrix even tho such admissions did not specifically refer to the transaction on which the state elects to rely.

State v Speck, 202-732; 210 NW 913

Tacit admission. Corroboration sufficient to sustain a verdict of guilty of assault to rape may be found in testimony wherein defendant tacitly admitted his immoral relation with the prosecutrix and his departure from the state for the purpose of avoiding prosecution.

State v Tennant, 204-130; 214 NW 708

Purpose — accused's admissions sufficient. Fact of the commission of a rape or an assault with intent to commit rape may be established by the sole evidence of the prosecutrix, and corroboration is necessary only to connect the accused with the crime, hence accused's voluntary admissions may furnish corroboration.

State v Beltz, 225-155; 279 NW 386

II RAPE—concluded

(d) ADMISSIONS AND CONFESSIONS—concluded

Corroboration by confession—sufficiency. In prosecution for statutory rape, testimony of prosecutrix alone is sufficient to prove the commission of the offense, yet she must be corroborated by other evidence which points out the defendant as the guilty party, but defendant's voluntary confession of intercourse with prosecutrix is sufficient corroboration.

State v Banks, 227-1208; 290 NW 534

(e) COURT AND JURY

Conclusiveness of supported verdict. A conviction of rape on supporting testimony and on ample corroboration is conclusive on the court.

State v Steele, 209-550; 228 NW 75

Impeachment of witness. Where upon a trial for rape the prosecuting witness was corroborated by the testimony of another, whom the defendant sought to impeach, held, that it was for the jury to determine, in view of all the facts, whether or not the witness had been impeached.

State v Mylor, 46-192

Credibility of testimony—jury question. In a prosecution for statutory rape where an eight-year-old witness testified on direct examination in a clear, frank, direct, and intelligent manner as to what she had seen or heard on the occasion in controversy, a motion to strike such testimony was properly overruled, as the question of the credit and weight to be given her testimony was clearly for the jury. The testimony of a witness must be construed in its entirety.

State v Diggins, 227-632; 288 NW 640

Evidence warranting submission to jury. In a prosecution for statutory rape it is essential that the testimony of a prosecuting witness be corroborated by other testimony tending to connect the defendant with the commission of the crime, but it is not necessary that all of the material evidence of the prosecuting witness be corroborated. The question of whether there was statutory corroboration is a question for the trial court, and there was sufficient evidence of corroboration by an eight-year-old witness as to what she saw and heard to warrant the submission of the question of corroboration to the jury.

State v Diggins, 227-632; 288 NW 640

Instruction on corroborating evidence—sufficiency. In a prosecution for statutory rape, the court instructed the jury that the state has the burden of proving that defendant was guilty beyond a reasonable doubt, and gave an instruction on corroborating testimony stating that the fact that the crime of rape or of assault with intent to commit rape had been committed by someone may be established by the testimony of the injured party alone if the jury is satisfied beyond a reasonable doubt that her testimony establishes such fact; but before the defendant can be convicted of the crime proven there must be other credible evidence than that of the injured party that singles out and points to the defendant as the guilty party and tends to connect him with the commission of the crime, to which the objection is raised to the use of the words "crime proven" as an assumption of the essential fact that the crime had been committed. The words "crime proven" obviously refer to the immediately preceding statement and the instruction when considered in its entirety and in connection with other instructions is not subject to the criticism made.

State v Diggins, 227-632; 288 NW 640

Failure to instruct not cured by evidence. Where defendant was convicted of assault with intent to commit rape, failure to instruct jury as to necessity of corroboration of prosecuting witness' testimony—an essential element of conviction—was prejudicial error, and the jury was not sufficiently instructed as to this necessity by inference from another instruction on corroboration given in connection with the court's statement that crime charged in indictment was rape, which included the lesser offense of assault with intent to commit rape. Nor was the error rendered nonprejudicial by the fact that record contained evidence of corroboration, since it is not the court's function to pass upon weight and sufficiency of corroborating evidence, except to determine whether it is sufficient to go to the jury.

State v Ervin, 227-181; 287 NW 843

III SEDUCTION

Absence of testimony to support. An instruction relative to the conditions under which the birth of a child would be corroborative of the prosecutrix under an indictment for seduction is necessarily erroneous when there is no testimony in the record from which the jury could find such conditions.

State v Reynard, 205-220; 217 NW 812

Acquaintanceship, opportunity, or birth of child as corroboration. In seduction prosecution it is a well established rule that evidence of mere acquaintanceship, opportunity, or birth of a child, does not, singly or collectively, meet the statutory requirement on corroboration.

State v Moss, 202-164; 209 NW 276

Unsigned letters. Where a jury is warranted in a finding that defendant wrote unsigned letters which corroborated the claim

of seduction made, this is sufficient statutory corroboration.

State v Bradbury, 92-512; 61 NW 192

13901 Corroboration of accomplice.

ANALYSIS

I IN GENERAL
II WHO DEEMED ACCOMPLICE
III WHO NOT DEEMED ACCOMPLICE
IV CORROBORATION
(a) NATURE OF EVIDENCE
(b) EFFECT OF EVIDENCE
(c) JUDGE AND JURY

I IN GENERAL

Failure to define. Failure to define the term "accomplice" is quite harmless when the jury is peremptorily told that the witness in question is an accomplice.

State v Gill, 202-242; 210 NW 120

Objections negatived by record. Manifestly there is no merit in the objection that testimony of an accomplice is inadmissible and should be stricken from the record when the record reveals no evidence that the witness was an accomplice, and when the record reveals ample corroboration of the witness' testimony.

State v Rowley, 216-140; 248 NW 340

II WHO DEEMED ACCOMPLICE

Accomplice per se. Whether a witness, testifying for the state as to the commission of the offense on trial, was an accomplice is not a jury question on a record which shows that the witness himself might be charged and convicted of said offense. On such a record, the court must peremptorily instruct that the witness was an accomplice, and properly guide the jury as to the necessity for corroboration.

State v Clay, 220-1191; 264 NW 77

Intoxicated driver. The owner of an automobile who causes another person to operate the car while such other person is intoxicated because such other person is less drunk than the owner becomes an accomplice in the offense of operating an automobile while intoxicated.

State v Myers, 207-555; 223 NW 166

III WHO NOT DEEMED ACCOMPLICE

Bootlegging. A witness may not be deemed an accomplice in the crime of bootlegging from the mere fact that, while riding with the accused, he (the witness) directed the driver of the vehicle to stop at a point where the accused apparently obtained the liquor.

State v Brundage, 200-1394; 206 NW 607

Incest. Principle reaffirmed that a prosecutrix in a prosecution for incest is not an accomplice if she did not voluntarily submit to the acts of sexual intercourse.

State v Candler, 204-1355; 217 NW 233

Fatally incompetent evidence. The theory of the state that its sole witness to a felonious homicide (tho confessedly a participant in the transaction which led to the death of deceased) was not in fact an accomplice, because said witness acted under duress of and in fear of the defendant who was on trial, may not be supported by testimony that said defendant made a felonious assault on said witness some four months after the commission of said homicide.

State v Clay, 220-1191; 264 NW 77

Thief and receiver of property. One who steals property is not an accomplice of one who thereafter feloniously receives the stolen property.

State v Smith, 219-168; 256 NW 651
State v Wenks, 200-669; 202 NW 753

Abortion. The woman upon whom an abortion was attempted is not an accomplice to the crime, and corroboration of her testimony is not essential.

State v Stafford, 145-285; 123 NW 167

Accessory after fact — corroboration. An accessory after the fact is not an accomplice to the main crime and therefore not within the purview of this section.

State v Philpott, 222-1334; 271 NW 617

IV CORROBORATION

(a) NATURE OF EVIDENCE

Telegram to accomplice—permissible corroboration. The state may corroborate the testimony of its accomplice-witness, even tho such corroboration does not "tend to connect the defendant with the commission of the offense." So held where a telegram transmitting money to the accomplice was received in evidence in corroboration of the testimony of the accomplice that he had received money from the accused by means of such telegram.

State v Lozier, 200-652; 204 NW 256

Accused and accomplice at scene of crime. Corroboration of an accomplice may be found in independent evidence (1) that the accused and the accomplice were seen in the immediate vicinity of the place where the crime was consummated and (2) that the defendant's car was identified as the one employed in aid of the commission of the offense.

State v Loucks, 218-714; 253 NW 838

Corroboration as to exhibits. A material exhibit duly identified by an accomplice is admissible against an accused, even tho the evidence corroborative of the accomplice does not extend to said particular exhibit.

State v Lozier, 200-652; 204 NW 256

Reputation of corroborative witness. It does not necessarily follow that testimony corrob-

IV CORROBORATION—concluded
(a) NATURE OF EVIDENCE—concluded

orative of an accomplice is insufficient because the witness is of bad reputation.

State v Peacock, 201-462; 205 NW 738

Accomplices—corroboration evidencing separate offense. Testimony which fortifies the testimony of an accomplice is admissible on the issue of corroboration, even tho such testimony tends to show the commission of a crime by the defendant separate and distinct from the crime for which the defendant is on trial.

State v Burzette, 208-818; 222 NW 394

Circumstantial evidence. Corroboration of an accomplice may be found in the circumstances surrounding and attending the commission of an offense.

State v Gill, 202-242; 210 NW 120
State v Carlson, 203-90; 212 NW 312

By admissions. Admissions of an accused may, of course, be of such nature as to furnish the required corroboration of an accomplice.

State v Morrison, 221-3; 265 NW 355

Sufficiency—rings worn by deceased. If the testimony of an accomplice is corroborated by other witnesses in any material point tending to connect the defendant with the commission of the offense, it is sufficient. So held as to testimony relative to rings taken from the body of the deceased.

State v Clay, 222-1142; 271 NW 212

(b) EFFECT OF EVIDENCE

Corroboration sufficient.

State v Owen, 196-285; 194 NW 187

Evidence connecting defendant to crime. Corroboration of the testimony of an accomplice in breaking and entering is sufficient if it supports his testimony in some material fact tending to connect the defendant with the commission of the offense. Proof held sufficient.

State v Proost, 225-628; 281 NW 167

Part of testimony corroborated. If an accomplice is sufficiently corroborated as to any material part of his statements as a witness, then the jury is at liberty to believe any other part of his said statements, even tho there is no corroboration whatever as to such other part. Corroboration held ample in a prosecution for receiving stolen property.

State v Lozier, 200-652; 204 NW 256

Extent of corroboration. An accomplice need not be corroborated in all matters to which he testifies.

State v Gaskill, 200-644; 204 NW 213

Corroboration as to part of testimony. An accomplice need not be corroborated as to every fact testified to by him. Corroboration as to burglary held sufficient.

State v Hart, 205-1374; 219 NW 405

Sufficiency — murder. Corroboration of an accomplice, in a prosecution for murder, held ample.

State v Thompson, 222-642; 269 NW 774

Larceny. Evidence considered and held sufficient to corroborate an accomplice and support a verdict of guilty on a prosecution for larceny.

State v Blain, 118-466; 92 NW 650

Sufficiency. Evidence in a prosecution for robbery reviewed and held to furnish ample corroboration of the testimony of accomplices.

State v Williams, 218-780; 254 NW 42

Failure of accused to deny evidence. Whether a record contains sufficient evidence to support a conviction may be materially influenced by the failure of the accused, as a voluntary witness in his own behalf, to deny in part the incriminating evidence of an accomplice.

State v Lozier, 200-652; 204 NW 256

Testimony of accomplice unsupported. Corroborative testimony which depends for its materiality entirely upon the unsupported testimony of the accomplice is insufficient to meet the statutory requirement that such testimony must connect the defendant with the commission of the offense.

State v Pauley, 210-192; 230 NW 555

Absence of corroboration. Record reviewed and held to contain neither direct nor circumstantial evidence corroborative of an accomplice, and therefore insufficient to sustain a conviction.

State v Winters, 209-565; 228 NW 286

Testimony not for corroboration. Whether certain testimony was or was not corroborative of an accomplice is quite inconsequential when the record shows that such testimony was received for and limited to a purpose entirely foreign to the subject of corroboration.

State v Bohall, 207-219; 222 NW 389

(c) JUDGE AND JURY

Mandatory duty to instruct. The court must, on its own motion, instruct as to the necessity for corroboration of an accomplice.

State v Myers, 207-555; 223 NW 166; 29 NCCA 569

13902 Proof of overt acts.

Civil liability. A conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action.

Hall v Swanson, 201-134; 206 NW 671
Dickson v Young, 202-378; 210 NW 452

13903 Confession of defendant.

ANALYSIS

I WHAT CONSTITUTES CONFESSION
II VOLUNTARY CONFESSIONS
III INVOLUNTARY CONFESSIONS
IV MENTAL CONDITION AT TIME OF CONFESSION
V CORROBORATION NECESSARY

I WHAT CONSTITUTES CONFESSION

Discussion. See 18 ILR 73—Admissibility

Admissions and confessions. In prosecution for murder, defendant's voluntary written statement, admitted in evidence and referred to as confession, which in fact did not acknowledge crime charged, merely containing a statement of facts and circumstances, an instruction that statement is not a confession, but an admission of the truth of the matters therein contained, is proper and not reversible error.

State v Norton, 227-13; 286 NW 476

Admissions by accused. In prosecution for murder, defendant's voluntary written statement made by him which does not acknowledge guilt of crime charged, but which contains a statement of facts and circumstances from which guilt might be inferred, constitutes substantive evidence of facts stated, and may be admissible as an admission in support of the charge.

State v Norton, 227-13; 286 NW 476

Confessions (?) or contradictory statements (?). Evidence that an accused made contradictory statements as to how and of whom he obtained certain property imposes no obligation on the court to instruct on the subject of confessions of guilt.

State v Dunn, 202-1188; 211 NW 850

Confession—state not bound by exculpatory statements. The state by introducing defendant's written confession does not thereby preclude itself from showing, by direct or circumstantial evidence, the untruthfulness of exculpatory statements contained in said confession.

State v Ball, 220-595; 262 NW 115

Preliminary examination in re confession. No error results from denying to an accused the right to examine, apart from the jury, the witnesses for the state as to the voluntary character of a confession when the entire record clearly presents a jury question on such issue.

State v Harding, 204-1135; 216 NW 642

Proof of corpus delicti. A naked confession made out of court will not sustain a conviction unless the corpus delicti is otherwise proven. So held as to a charge of maintaining an intoxicating liquor nuisance, there being no evidence that the accused had ever, directly or indirectly, been engaged in trafficking in such liquors.

State v Thomsen, 204-1160; 216 NW 616

Two on trial. Instructions as to confession held correct inasmuch as the jury could not have inferred that any confessions made by K. were in any manner to prejudice B.

State v Kreiger, 71-32; 32 NW 13

II VOLUNTARY CONFESSIONS

Confessions—burden of proof. Principle reaffirmed that, where a confession of guilt appears to be free and voluntary, the burden is on the accused to establish the contrary.

State v Dunn, 202-1188; 211 NW 850

Confessions — jury question. A conflict of testimony on the issue whether an alleged confession was voluntary necessarily generates a jury question.

State v Kress, 204-828; 216 NW 31
State v Jackson, 205-592; 218 NW 273

Confessions — jury question. Whether a confession should be wholly rejected because improperly obtained is properly submitted to the jury when the only testimony which tends to show that the confession was not voluntary comes from the accused.

State v Harding, 204-1135; 216 NW 642

When jury question. If the record affirmatively shows that confessions were obtained because of promises of a light sentence, they must be summarily rejected. If the record shows a fair conflict on the issue whether the confessions were so obtained, then said issue is for the jury.

State v Johnson, 210-167; 230 NW 513

Accused's burden to show inadmissibility. In a prosecution for the crime of entering a bank with intent to rob, a voluntary statement made by the defendant and introduced upon cross-examination of defendant for purpose of impeachment in absence of evidence to indicate statement was not voluntary, places the burden on the defendant to show statement incompetent, and the fact that statement was made without warning the accused that it might be used against him does not affect its admissibility in the absence of statute requiring that the accused be warned.

State v Mikesh, 227-640; 288 NW 606

Admissibility. Where there is no suggestion in the evidence that a defendant was induced to make a statement concerning his connection with the offense charged, his direct and positive confession is admissible in evidence, even tho he had no attorney present at the time.

State v Neubauer, 145-337; 124 NW 312

Admissions by accused. In prosecution for murder, defendant's voluntary written statement made by him which does not acknowledge

II VOLUNTARY CONFESSIONS—concluded

guilt of crime charged, but which contains a statement of facts and circumstances from which guilt might be inferred, constitutes substantive evidence of facts stated, and may be admissible as an admission in support of the charge.

State v Norton, 227-13; 286 NW 476

Admissions and confessions. In prosecution for murder, defendant's voluntary written statement, admitted in evidence and referred to as confession, which in fact did not acknowledge crime charged, merely containing a statement of facts and circumstances, an instruction that statement is not a confession, but an admission of the truth of the matters therein contained, is proper and not reversible error.

State v Norton, 227-13; 286 NW 476

Burden to disprove. The burden is on the defendant to prove the incompetency of a confession appearing on its face to be free and voluntary.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Rape—corroboration—sufficiency. Corroboration sufficient to sustain a verdict of guilty of assault to rape may be found in testimony wherein defendant tacitly admitted his immoral relations with prosecutrix and his departure from the state for the purpose of avoiding prosecution.

State v Tennant, 204-130; 214 NW 708

Direct and circumstantial—directing verdict. Circumstantial evidence, supplemented by oral and written confessions of guilt may be such as to have the weight of direct evidence, and the court was right in overruling defendant's motion for directed verdict when, under the record, the established facts and circumstances were not only consistent with defendant's guilt but were inconsistent with any other reasonable hypothesis.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Opening statement—reference to confession—effect. No misconduct on the part of the county attorney is shown when he, in good faith and with reasonable ground for believing the evidence admissible, told the jury in his opening statement that the evidence would show that defendant made a written confession in the presence of the chief of police, which confession and attending conversation were later admitted as competent evidence.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Repetition of testimony. On a trial for murder, the reception in evidence of a statement signed by defendant, and explanatory of the shooting in question, is quite unobjectionable and harmless when the statement is but a repetition of the testimony of the defendant on the trial.

State v Harness, 214-160; 241 NW 645

Testimony of voluntary confession—admissibility. Testimony of witness that a confession was the free and voluntary act of the defendant is not an opinion or conclusion of the witness and may be received in evidence when the circumstances to said confession are also in evidence.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Voluntary or involuntary confession—jury question. Principle reaffirmed that a confession to be admissible in evidence must be free and voluntary and not induced by threat or violence or any direct or implied promise or inducement. Held, in trial of defendant for alleged homicide, that the fact that defendant was not represented by counsel at the time he signed the confession would not render it involuntary, and that the court correctly submitted the question of the voluntary character of confession to jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Voluntary inculpatory statements—warning of use against accused unnecessary. Police officer need not warn a person in custody that incriminating statements may be used against him, for, if voluntarily made, they are admissible in evidence without warning.

State v Beltz, 225-155; 279 NW 386

III INVOLUNTARY CONFESSIONS

Evidence — confessions — burden of proof. Principle reaffirmed that, where a confession of guilt appears to be free and voluntary, the burden is on the accused to establish the contrary.

State v Dunn, 202-1188; 211 NW 850

Evidence — confessions — jury question. Whether a confession should be wholly rejected because improperly obtained is properly submitted to the jury when the only testimony which tends to show that the confession was not voluntary comes from the accused.

State v Harding, 204-1135; 216 NW 642

Instructions—voluntary or involuntary confession—jury question. Principle reaffirmed that a confession to be admissible in evidence must be free and voluntary and not induced by threat or violence or any direct or implied promise or inducement. Held in trial of defendant for alleged homicide, that the fact that defendant was not represented by counsel at the time he signed confession would not render it involuntary, and that the court correctly submitted the question of the voluntary character of confession to jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

IV MENTAL CONDITION AT TIME OF CONFESSION

Confession of crime—claim of intoxication—jury question. A purported confession as to lascivious acts with a child, the admissibility of which confession is objected to because of a claim of intoxication at the time the confession was made, raises a question properly submitted to the jury when it appears the defendant had not taken any liquor for 15 to 18 hours before the confession was made.

State v Hall, 225-1316; 283 NW 414

V CORROBORATION NECESSARY

Argument—incurable misconduct. Reversible error results from the assertion by the county attorney in argument before the jury in a criminal case that he (not a witness in the case) personally knows that the defendant had made a confession of the crime charged, especially when the record evidence tending to show guilt is weak.

State v Thomson, 219-312; 257 NW 805

Corroboration. Evidence of guilt only being an admission by the defendant, held that such evidence was not sufficient to sustain a verdict of guilty, unless corroborated.

State v Penny, 70-190; 30 NW 561

13904 Photographs—measurements—Bertillon system.

Photographs—admissibility for limited purpose. In a prosecution for homicide the court committed no error in admitting in evidence photographs showing the condition of the body of the deceased at the time photographs were taken, said photographs so marked that laymen could properly interpret the meaning of markings thereon. Such evidence admissible even tho physician who performed post mortem and who identified abrasions and bruises so shown by these exhibits had not personally observed the condition of the body immediately prior to the taking of the photographs.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

CHAPTER 648

INSANITY OF DEFENDANT DURING TRIAL

13905 Doubt as to sanity—procedure.

Jurisdiction of insanity commission and court. See under §3540

Discussion. See 14 ILR 401—Mental defectives—criminal law; 18 ILR 521—Presumption of insanity overcome

Evidence—burden of proof. The defendant has the burden of proving the defense of insanity to the reasonable satisfaction of the jury, by a preponderance of the evidence.

State v Robbins, 109-650; 80 NW 1061
State v Sigler, 114-408; 87 NW 283
State v Thiele, 119-659; 94 NW 256
State v Humbles, 126-462; 102 NW 409

Exclusive jurisdiction of district court. The district court acquires exclusive jurisdiction to determine the sanity of an indicted person when he is taken into custody under an indictment, and, during the pendency of such indictment, such jurisdiction continues, and attaches under a subsequently returned indictment under which the person is taken into custody. It follows that an adjudication of insanity of such person by the commission of insanity subsequent to the first indictment and prior to the last indictment is a nullity.

State v Murphy, 205-1130; 217 NW 225

Expert testimony as to insanity. Instructions to the effect that certain expert testimony might be found quite reliable and satisfactory, or the reverse, and entitled to little, if any, consideration, reviewed and held quite nonprejudicial.

State v Mullenix, 212-1043; 237 NW 483

Fatally delayed presentation. In order to suspend the ordinary proceedings in a prosecution for murder, and to enter upon a trial as to the insanity of the accused, the question of insanity must be raised before the end of the trial. (Motion in this case filed after sentence of death had been passed and judgment thereon entered.)

State v Tracy, 219-1412; 261 NW 527

Fundamental rule. Principle reaffirmed that the dividing line between accountability and nonaccountability in the taking of human life is the power or ability to know and distinguish right from wrong.

State v Maharras, 208-127; 224 NW 537

Ineffective expert testimony. The testimony of an expert to the effect that one who is unquestionably guilty of murder in the first degree is mentally responsible to receive a life sentence, but not mentally responsible to receive a death sentence, carries, at the best, very little element of persuasiveness.

State v Tracy, 219-1412; 261 NW 527

Knowledge of deceased's insanity as bearing on self-defense. Where a jury is instructed to the effect that "belief in" rather than the "fact of" necessity to kill is controlling, it is not reversible error to fail to instruct regarding accused's knowledge of deceased's insanity, especially when such an instruction was not requested.

State v Johnson, 223-962; 274 NW 41

Presumption of sanity. The law presumes the sanity of a person, and the burden of proof is upon him who seeks relief from a legal obligation on the ground of insanity.

State v Geddis, 42-264

Right to open and close. Where, in a prosecution for murder, the defense does not controvert the killing, but denies the necessary malicious intent on the ground of insanity of the defendant, the burden of proof being upon the state, the defendant is not entitled to the opening and closing argument.

State v Felter, 32-49
State v Robbins, 109-650; 80 NW 1061

13906 Method of trial.

Burden to establish. Principle reaffirmed that a defendant must establish his plea of insanity by a preponderance of the evidence.

State v Maharras, 208-127; 224 NW 537

Inquisition—evidence. In proceedings to determine the sanity of an indicted person, evidence is admissible which tends to show the commission by said person of crimes committed during a series of prior years, especially when such evidence is largely in rebuttal of testimony tending to show insanity.

State v Murphy, 205-1130; 217 NW 225

13907 Finding of insanity—discharge.

Adjudication of insanity. Whether a defendant in a criminal case who causes himself, when placed on trial, to be adjudged insane can appeal from such adjudication, quaere; but if he has such right, it is a quite barren one.

State v Demara, 210-726; 231 NW 337

13908 Restored to reason—returned to custody.

Atty. Gen. Opinion. See '25-26 AG Op 342

13909 Insanity after commitment to jail.

Layman's affidavit—insufficiency. In a criminal prosecution for entering a bank with intent to rob, the overruling of a motion for a new trial on the ground that defendant was mentally incompetent was not error where the issue was not raised on the trial, when the affidavit in support of such motion was merely a conclusion of a layman who was an acquaintance of the defendant several years before the trial, and when affidavit referred to one interview a week or ten days before the commission of the offense.

State v Mikesh, 227-640; 288 NW 606

CHAPTER 649

JURY AFTER SUBMISSION

13910 Papers taken by jury.

Additional annotations. See under §13944 (II)

Inconsequential evidence. The fact that certain identifying pasters were allowed to remain on liquor receptacles when they were taken by the jury on final submission is of no consequence when such pasters furnished the jurors no fact not already legally in their possession.

State v McGee, 207-334; 221 NW 556

13911 Report for information.

Unaddressed question from jury room—ignored by court. Inquiries from the jury room, presented to the judge but not addressed to the court or to anyone in particular, are properly ignored.

State v Ferguson, 226-361; 283 NW 917

13912 Discharge of jury—grounds.

Sealed verdict by agreement. Permitting the jury to return a sealed verdict and to separate and reassemble when the verdict is opened, is proper when the state and the defendant have agreed in writing to that effect; nor is it erroneous for the court to read such agreement to the jury.

State v Ferro, 211-910; 232 NW 127

13913 Retrial—when allowed.

Reversal or jury disagreement—retrial at same term unnecessary. Tho reversal of a judgment against a criminal defendant is an order for a new trial and a jury disagreement a cause for retrial, he need not be retried at the same term of court.

Ferguson v Bechly, 224-1049; 277 NW 755

CHAPTER 650

VERDICT

13915 General and special verdicts.

ANALYSIS

I In General
II Specific Offenses
III Effect of Verdict
IV Directed Verdict

Directed verdicts, civil cases. See under §11508

I IN GENERAL

Conclusiveness. Verdicts in criminal cases when supported by substantial testimony will not be disturbed by the appellate court.

State v Harrington, 220-1116; 264 NW 24

Direct and circumstantial—record facts. Circumstantial evidence, supplemented by oral and written confessions of guilt may be such as to have the weight of direct evidence, and the court was right in overruling defendant's motion for directed verdict when, under the record, the established facts and circumstances were not only consistent with defendant's guilt but were inconsistent with any other reasonable hypothesis.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Evidence—sufficiency. An element of improbability in the testimony of a prosecutrix in a prosecution for incest will not necessarily justify the court in ruling that the testimony is per se insufficient to support a verdict of guilty.

State v Candler, 204-1355; 217 NW 233

Every material charge. A general verdict of guilty imports a conviction of the defendant in a criminal prosecution, on every material allegation or charge of the indictment. It is accordingly held, that an inquiry by the court of the jury, upon their returning a verdict of guilty, as to whether they found the defendant guilty of the particular offense charged in the indictment, was not erroneous.

State v Collins, 32-36

Former jeopardy—manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Jury request for court parole not misconduct. The fact that the jury accompanies its verdict of guilty with a recommendation that the court parole the accused cannot be deemed such misconduct as to require a new trial.

State v Sampson, 220-142; 261 NW 769

Motion for new trial—verdict—conclusiveness. Where verdict is not contrary to law nor against clear weight of evidence, the ruling of the lower court denying a motion for new trial on ground of insufficient evidence is correct and will not be disturbed on appeal.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Threats—evidence—sufficiency. Evidence reviewed and held to present a jury question of guilt under an indictment charging malicious threats.

State v Wilbourn, 219-120; 257 NW 571

Verbose verdict. Even tho a verdict is verbose and redundant, it is a good verdict if the jury's intention is clear regardless of the surplusage.

State v Douglass, 1 Greene 550

Unallowable impeachment. A verdict in a criminal case may not be impeached by affidavits as to matters which necessarily inhere in the verdict.

State v Kress, 204-828; 216 NW 31

II SPECIFIC OFFENSES

Instructions—good character. The fact that an accused in a homicide case has the reputation of being a quiet, peaceable, law-abiding and moral citizen, is a defensive circumstance bearing on the likelihood of such a person committing such a crime, but it is preeminently the right and duty of the jury to determine, in view of all the circumstances, what weight they will give to such circumstance.

State v Johnson, 215-483; 245 NW 728

Larceny—prosecution and punishment—instructions—value (?) or market value (?). Instructions calling upon the jury to find the "value", of the property stolen, if stolen, instead of the "market value", are not reversibly erroneous when the record reveals both the wholesale and the retail value.

State v McCarty, 210-173; 230 NW 379

Special interrogatories—proper refusal. The submission to the jury of special interrogatories in a prosecution for larceny is properly refused (1) when defendant's only plea is "not guilty", (2) when there is no claim that a witness is an accomplice, and (3) when there is no question of corroboration in the case.

State v Philpott, 222-1334; 271 NW 617

III EFFECT OF VERDICT

Indictment—defects rendered immaterial by verdict. Defects in an indictment for murder become immaterial when manslaughter is properly charged and the accused is convicted of the latter offense.

State v Harness, 214-160; 241 NW 645

IV DIRECTED VERDICT

Discussion. See 25 ILR 128—Directed verdict—guilty

Directed verdict refused. A motion for a directed verdict of not guilty, based on the ground that the defendant was dominated by his associate in crime and compelled to be an actor in the crime of said associate, is properly overruled when the evidence of duress is very slight and when the defendant was active in the commission of the crime.

State v Xanders, 215-380; 245 NW 361

Embezzlement—agency not established. The failure of the state to prove the agency alleged in an indictment for embezzlement necessarily

IV DIRECTED VERDICT—concluded

entitled the defendant to a directed verdict of not guilty.

State v Reynolds, 208-1046; 226 NW 717

Jury question—degree of guilt in murder prosecution. The defendants' motion for a directed verdict in a murder trial was properly overruled when based on the idea that the state had not proved the defendants guilty of a crime of any degree, as that was a question for the jury.

State v Coleman, 226-968; 285 NW 269

Jury question at close of trial. Conceding, arguendo, that the overruling of a motion for a directed verdict at the close of the state's testimony on direct is debatable, yet if at the close of all the testimony a jury question clearly exists on the issue of guilt, and the defendant is found guilty, the cause will not, on appeal, be remanded because of the former ruling.

State v McCutchan, 219-1029; 259 NW 23

Good moral character—reasonable doubt created. Evidence of good moral character of the defendant in a criminal prosecution is not in itself sufficient to generate a reasonable doubt of guilt so as to justify a reversal of a conviction on the ground that the lower court should have directed a verdict in the defendant's behalf, when the jury was justified in believing the evidence against the defendant.

State v McDowell, 228- ; 290 NW 65

Manslaughter — elements of self-defense — directed verdict. In a prosecution for murder under a plea of self-defense, the accused must (1) not be the aggressor, (2) retreat as far as possible, (3) have an actual honest belief in imminent danger, and (4) have reasonable grounds for such belief, in view of which a motion for a directed verdict was properly denied under evidence enabling jury to reject a self-defense plea in arriving at a verdict of manslaughter.

State v Johnson, 223-962; 274 NW 41

Motion to dismiss indictment — improper testimony by wife. A defendant in a criminal case who knows, before the commencement of the trial, that his wife has, before the grand jury, improperly given material testimony against him, must, if he wishes to attack the indictment on such ground, move to quash the indictment. He may not utilize such objection as the basis of a motion for a directed verdict.

State v Smith, 215-374; 245 NW 309

Prosecution—receiving stolen hogs—conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony, and since the weight to be given such testimony is for the jury when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

When remand for new trial not ordered. Irrespective of the sufficiency of the evidence at the time when the state rests, a remand, on appeal, will not be ordered when the evidence at the close of the entire case presents a jury question on the issue of guilt.

State v Sharpshair, 215-399; 245 NW 350

13916 Answers to interrogatories.

Special interrogatories — proper refusal. The submission to the jury of special interrogatories in a prosecution for larceny is properly refused (1) when defendant's only plea is "not guilty", (2) when there is no claim that a witness is an accomplice, and (3) when there is no question of corroboration in the case.

State v Philpott, 222-1334; 271 NW 617

Special interrogatory—nonmandatory duty to submit. When the sole question before the court and jury in a criminal case is the guilt of the accused under his general plea of "not guilty", the court is under no mandatory duty to submit special interrogatories.

State v Near, 214-1083; 243 NW 519

13917 Reasonable doubt.

ANALYSIS

I IN GENERAL
II AMOUNT OF EVIDENCE
III PROOF OF EACH "LINK"
IV BURDEN OF PROOF
V INSTRUCTIONS

Burden of proof, civil cases. See under §11487 (II)
Preponderance of evidence, civil cases. See under §11487 (III)

I IN GENERAL

Automobile—operating while intoxicated—insufficient evidence. Evidence which is not conclusive that an accused was intoxicated when arrested some three or four hours after he had operated an automobile, together with evidence that the accident which resulted from such operation might easily have happened to a sober man, is wholly insufficient to sustain a verdict of guilty of operating an automobile while intoxicated.

State v Liechti, 209-1119; 229 NW 743

Definition. A jury may very properly be told that a reasonable doubt does not mean a doubt "manufactured from sympathy for a defendant, nor a captious, strained, or unnatural doubt, nor one raised by some forced or unnatural meaning".

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Limiting jury to testimony. Juries should not be directed to determine a criminal prose-

cution solely on the instructions of the court and on the testimony "offered", or on the testimony actually "before them".

State v Patrick, 201-368; 207 NW 393

II AMOUNT OF EVIDENCE

Good moral character—reasonable doubt created. Evidence of good moral character of the defendant in a criminal prosecution is not in itself sufficient to generate a reasonable doubt of guilt so as to justify a reversal of a conviction on the ground that the lower court should have directed a verdict in the defendant's behalf, when the jury was justified in believing the evidence against the defendant.

State v McDowell, 228- ; 290 NW 65

Instructions — moral character — reasonable doubt. An instruction as to the weight to be given evidence of good moral character of the defendant was not incorrect in adding that if, under all the evidence, including that bearing on moral character, there was no reasonable doubt as to guilt, the jury should convict, however good the character may have been.

State v McDowell, 228- ; 290 NW 65

Evidence—sufficiency—nonreviewability. The weight and sufficiency of the evidence being for the jury, the supreme court, reviewing a case on the evidence, will not consider the question of reasonable doubt.

State v De Kraai, 224-464; 276 NW 11

Prosecution for perjury. Testimony on which a charge of perjury is based is not shown to be false beyond a reasonable doubt by proof that the accused, prior to the perjury alleged, made a statement directly contradictory of said testimony. Held, rule not applicable because of extrinsic corroborating evidence.

State v Mutch, 218-1176; 255 NW 643

Prosecution—receiving stolen hogs—conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony, and since the weight to be given such testimony is for the jury when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

III PROOF OF EACH "LINK"

Failure to support spouse—essential elements. Proof of failure to support will not, in and of itself, sustain a conviction for failure of a husband to support his wife. The state must carry the burden of establishing every element of the offense. (§13230, C., '24.)

State v Gude, 201-4; 206 NW 584

IV BURDEN OF PROOF

Corroboration beyond reasonable doubt. An instruction in a criminal case requiring proof beyond a reasonable doubt, of every material fact issue, must be deemed to apply to the proof of corroboration in those criminal cases wherein proof of corroboration is required.

State v Ingram, 219-501; 258 NW 186

Desertion of child—proof of paternity—reasonable doubt rule applicable. In a prosecution for child desertion, a claim of nonaccess creating a conflict in the evidence as to the paternity of the child requires the state to prove paternity beyond a reasonable doubt and submission of the question to the jury.

State v Heath, 224-483; 276 NW 35

Evidence—driving while intoxicated. In a prosecution for operating a motor vehicle while intoxicated, a conviction based solely on the self-contradictory statements of the state's witnesses, as to whether defendant was actually driving the vehicle, cannot be sustained.

State v Hamer, 223-1129; 274 NW 885

Evidence—driving while intoxicated. In a prosecution for driving while intoxicated the state must prove beyond a reasonable doubt that (1) defendant was operating the motor vehicle and (2) defendant was intoxicated.

State v Hamer, 223-1129; 274 NW 885

Evidence—weight and sufficiency—alibi. The plea of alibi must be established by the accused by a preponderance of the evidence before he will be entitled to an acquittal on such plea.

State v Debner, 205-25; 215 NW 721

Instructions—ignoring issue of self-defense—effect. Instructions are reversibly erroneous when they completely ignore the subject of burden of proof on the clearly presented issue of self-defense.

State v Rourick, 211-447; 233 NW 509

Instructions—good character and peaceable disposition. The instructions must not place upon the defendant the burden of proof to establish his alleged peaceable disposition and good character.

State v Johnson, 211-874; 234 NW 263

Instructions—physical and mental condition. Instructions reviewed and held not subject to the vice of imposing on defendant, in a criminal case, any burden to establish his mental or physical condition.

State v Wheelock, 218-178; 254 NW 313

Larceny — recent possession. Instructions, relative to recent possession by accused of stolen property, reviewed, and held not to place on the accused the burden of proof to explain said possession.

State v Ferguson, 222-1148; 270 NW 874

Recent possession of burglarized property—effect. No error results from instructing that

IV BURDEN OF PROOF—concluded

the unexplained recent possession of property stolen by means of a burglary is sufficient to sustain a conviction.

State v Jackson, 205-592; 218 NW 273

State has burden of proving guilt. In a criminal case the burden of establishing guilt at every stage of the trial is upon the state.

State v Hillman, 226-932; 285 NW 176

Securities act—burden of proving exceptions—lack of basis for attack on validity. In prosecution for violation of securities act wherein defendant attacked validity of statute requiring that burden of proving exceptions to the act shall be on party seeking benefit thereof, and contended that such burden should be placed on state, held, defendant's contention was without merit in view of trial court's instructions which in fact did place such burden on the state.

State v Dunley, 227-1085; 290 NW 41

V INSTRUCTIONS

Unfortunate attempt to define. It is unfortunate that some courts, in instructing juries as to the subject of a reasonable doubt, continue to employ the oft-condemned statement that "a doubt which entitles the defendant to acquittal must be reasonable and not unreasonable."

State v Sweeney, 203-1305; 214 NW 735

Instructions considered as whole—each not complete in itself. Instructions are to be considered as a whole, and each need not be complete in and of itself. An instruction in a criminal case was not objectionable in that it did not contain a statement of reasonable doubt when reasonable doubt was covered in other instructions, nor was another instruction insufficient in failing to include the defendant's ground of defense which was covered in other instructions.

State v McDowell, 228- ; 290 NW 65

Absence of evidence—instructions. Failure to instruct that a reasonable doubt may arise from the absence of evidence will not be deemed reversible error, especially when the definition of such doubt carries the clause "arising from the consideration of the whole case".

State v Gardiner, 205-30; 215 NW 758

Circumstantial evidence—inapplicability. Instructions to the effect that, in order to convict on circumstantial evidence, each fact in the chain of circumstances must be proven beyond a reasonable doubt; that all said facts must be connected with each other and with the main fact to be proven; and that said facts must produce a moral certainty of defendant's guilt, are properly refused on a record revealing both direct and circumstantial evidence of guilt.

State v Ferguson, 222-1148; 270 NW 874

Curing error. Failure of the court, in defining reasonable doubt, to refer to the absence or lack of evidence in the case is cured by other instructions to the effect that, in considering the issue of guilt or innocence, due consideration must be given to the want or lack of evidence, if any.

State v Pritchard, 204-417; 215 NW 256

Defensive matter. Instructions to the effect that an accused has the burden to establish a purely defensive matter are not rendered prejudicially erroneous by the omission of the phrase "by a preponderance of the evidence".

State v Gardiner, 205-30; 215 NW 758

Definition. It is not improper for the court, after having once accurately defined a reasonable doubt, to instruct the jury to the effect that a reasonable doubt does not mean one that is forced, strained, captious, or unnatural.

State v McGee, 207-334; 221 NW 556

Erroneous definition. It is unfortunate that there are courts which continue to instruct juries that a reasonable doubt is one arising out of the testimony adduced or introduced on the trial, thereby inferentially excluding the recognized rule of law that such doubt may very legitimately arise from the absence of testimony.

State v Tennant, 204-130; 214 NW 708

Duty to convict of highest offense. An instruction to the effect that the jury should find the defendant guilty of the highest degree of crime included in the indictment, of which the jury finds him guilty beyond a reasonable doubt, reviewed, and held unobjectionable.

State v Ingram, 219-501; 258 NW 186

Absence of evidence. A failure to instruct the jury that a reasonable doubt of guilt may arise from the absence of evidence constitutes reversible error.

State v Love, 210-741; 231 NW 392
State v Smalley, 211-109; 233 NW 55
State v Grattan, 218-889; 256 NW 273

Lack of evidence. Reversible error results from instructing that the jury must determine all matters "alone from the evidence before you", as such instruction distinctly denies to the jury the right to find a reasonable doubt because of the lack or want of evidence.

State v Comer, 198-740; 200 NW 185
State v Bogossian, 198-972; 200 NW 586
State v Burris, 198-1156; 198 NW 82
State v Speck, 202-732; 210 NW 913
State v Pritchard, 204-417; 215 NW 256
Dahna v Fun House, 204-922; 216 NW 262
State v Christensen, 205-849; 216 NW 710
State v Bamsey, 208-796; 223 NW 873
State v Hughey, 208-842; 226 NW 371.
State v Anderson, 209-510; 228 NW 353; 67 ALR 1366
State v Ferguson, 222-1148; 270 NW 874

Lack of evidence on material issue. A jury must not be instructed that a belief beyond a reasonable doubt may arise from a lack of evidence upon a material issue.

State v Matthes, 210-178; 230 NW 522

Ignoring lack of evidence. An instruction which ignores the effect of "want of evidence", but directs the jury to determine guilt solely on the evidence "admitted", is not erroneous when it is manifest the instruction was given solely with reference to the effect to be given certain exhibits received in evidence, and without reference to the instruction on reasonable doubt which is not questioned.

State v Madison, 215-182; 244 NW 868

Good character. Defendant is entitled, on request, to a specific instruction to the effect that evidence of his good character may be sufficient to generate a reasonable doubt of guilt.

State v Reynard, 205-220; 217 NW 812

Good character generating reasonable doubt. The previous good character of an accused (as to the trait involved) shown either (1) by the general reputation of the accused, or (2) by actual personal experience of witnesses with the accused, may, in connection with all the evidence in the case, generate a reasonable doubt of the guilt of the accused, and entitle him to an acquittal. And the jury must, on request, be so instructed.

State v Ferguson, 222-1148; 270 NW 874

In re good character — sufficiency. Instruction in re good character reviewed and held, in effect, to correctly direct the acquittal of the accused if, from a consideration of all the evidence including the evidence as to good reputation, the jury had any reasonable doubt of his guilt.

State v Fador, 222-134; 268 NW 625

Inapplicable instructions. On a prosecution for murder by poison, the jury need not be told that they must, before they can convict, find beyond a reasonable doubt that the accused bought the poison at the time and place claimed by the state, the record revealing other testimony tending to show the administration of the poison by the accused.

State v Flory, 203-918; 210 NW 961

Inferential duty to convict. Reversible error may result from instructing, in effect, that "a doubt, to justify an acquittal, must be reasonable".

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Instructions. An instruction is not objectionable because it directs the jury to convict if it is "satisfied" beyond a reasonable doubt of the defendant's guilt.

State v Healy, 217-1155; 251 NW 649

Instruction in re reasonable doubt need not be repeated. One definite instruction to the effect that the state must establish beyond all reasonable doubt every material element of an offense, is all-sufficient. Repetition is not required.

State v Ball, 220-595; 262 NW 115
State v Harrington, 220-1116; 264 NW 24

Necessary instructions. The jury must be specifically, or in effect, instructed, under every indictment, that guilt can only be predicated on a finding beyond all reasonable doubt.

State v Gude, 201-4; 206 NW 584

Repetitions. Manifestly, there is no occasion for the court to repeat throughout instructions in a criminal case the term "beyond a reasonable doubt".

State v Friend, 210-980; 230 NW 425
State v Davis, 212-131; 235 NW 759

13918 Reasonable doubt as to degree.

Conviction of lower degree. The principle that, if the jury has a reasonable doubt of the degree or grade of offense proved, it can convict of the lower degree or grade only, is not necessarily to be embraced in one paragraph of the charge, or even in a distinctive sentence. The very form of the instructions as a whole may amply express the thought to the jury.

State v Ellington, 200-636; 204 NW 307

Invading province of jury. Instruction held not to direct a verdict of guilt of one or the other of two offenses.

State v Shannon, 214-1093; 243 NW 507

Murder. Where a party is put upon his trial for murder in the first degree, all the degrees of criminal homicide should be explained and submitted to the jury.

State v Clemons, 51-274; 1 NW 546

Reasonable doubt. An instruction giving substantially this section, is not required on trial for larceny of hogs, where the uncontroverted evidence shows that the defendant, if guilty at all, was guilty of grand larceny.

State v Burton, 103-28; 72 NW 413

Larceny—value. Under an indictment for larceny the value of the property alleged to have been stolen must be established beyond a reasonable doubt, mere preponderance of evidence that it exceeds $20 not being sufficient to justify a conviction for the greater offense.

State v Wood, 46-116

13919 Finding offense of different degree.

ANALYSIS

I In General
II Lower Degrees or Included Offenses
III Effect of Conviction of Lower Offense

IV SUBMISSION AND INSTRUCTIONS
(a) IN GENERAL
(b) AS TO DEGREE CHARGED
(c) AS TO LOWER OFFENSE

I IN GENERAL

Manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Instructions — included offenses. Included offenses need not be submitted (1) when there is no supporting evidence in the record of the commission of said included offense, and (2) when under the record the accused is guilty as charged or not guilty.

State v Stennett, 220-388; 260 NW 732

II LOWER DEGREES OR INCLUDED OFFENSES

Assault to commit offense. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

Justifiable refusal to submit. Included offenses need not be submitted (1) when there is no supporting evidence in the record of the commission of said included offense, and (2) when, under the record, the accused is guilty as charged or not guilty.

State v Stennett, 220-388; 260 NW 732

Assault to inflict great bodily injury—included offenses—duty to exclude. Under a charge of assault with intent to inflict great bodily injury, the court must not submit the included offenses of assault, and assault and battery, when the record shows that, prior to return of the indictment, the accused was formally charged with assault and battery, and that the said charge was dismissed by the state, under §14027, C., '24.

State v Dickson, 200-17; 202 NW 225

Included offenses—unnecessary submission. An accused who is convicted of assault with intent to inflict great bodily injury may not complain that assault and battery (not charged in the indictment) was submitted to the jury.

State v Costello, 200-313; 202 NW 212

Larceny—as included offense under aggravated charge. Larceny is an included offense in the charge of larceny from a building in the nighttime, and is properly submitted when there is supporting evidence.

State v Endorf, 219-1321; 260 NW 678

Larceny—when not included offense. Failure of the court, on the trial of a charge of robbery, to submit the crime of larceny as an included offense is proper when the record unquestionably demonstrates that if the accused was guilty of larceny it was because he took the property from the prosecuting witness by force and violence.

State v Warneke, 219-1239; 260 NW 667

Lascivious acts with child—instructions—included offenses. On the trial of an indictment charging the commission of lewd and lascivious acts with and upon the body of a child, the included offenses of assault and battery and simple assault should be submitted when there is supporting evidence and when there is no evidence of consent on the part of prosecutrix.

State v Rounds, 216-131; 248 NW 500

Murder by poison. Principle reaffirmed that in a prosecution for murder by poison neither second degree murder nor manslaughter need be submitted.

State v Flory, 203-918; 210 NW 961

Conviction of second degree murder—as acquittal of first degree on retrial. When the jury in a murder trial found guilt in the second degree, on retrial the defendants could not be tried on a charge of first degree murder, but evidence of any other offense of which the defendants might have been guilty could be offered.

State v Coleman, 226-968; 285 NW 269

Degree or grade of offense. First and second degree murder and manslaughter are properly submitted under a first degree charge when the record reveals support for either of said charges.

State v Buck, 205-1028; 219 NW 17

Justifiable limitation. First and second degree murder and manslaughter are properly submitted and all other offenses properly excluded when the accused, under the record, is guilty of homicide or not guilty at all.

State v Buck, 205-1028; 219 NW 17
State v Johnson, 221-8; 264 NW 596

Murder—discredited testimony. In a prosecution for murder by means of poison, the court is not required to submit assault with intent to kill or to inflict great bodily injury because of the presence in the record of evidence that the same poison was contained in the embalming fluid injected into the body of the deceased, and of evidence in the form of an official death certificate which gives the cause of death as disease, when the probative force of such evidence on the issue in question is wholly destroyed by unquestioned testimony that the poison found in the body, in addition to the quantity traceable to the embalming fluid, was over seven times sufficient to cause death, and by equally unquestioned testimony that the

official certificate was incorrect in assigning disease as the cause of death.

State v Flory, 203-918; 210 NW 961

Rape—conviction of included offense—great bodily injury. Under an indictment for rape, the court need not submit the offense of assault with intent to do great bodily injury even tho the record reveals evidence tending to establish said latter offense.

State v Brown, 216-538; 245 NW 306

Rape—included offenses—when submitted. In a rape prosecution included offenses of assault and battery and simple assault should not be submitted to the jury where there is no allegation nor proof that force or threat of force was used, nor any resistance offered.

State v Beltz, 225-155; 279 NW 386

Assault with intent to commit rape—absence of evidence. Assault with intent to rape and simple assault should not be submitted when the record in a prosecution for rape on a female under 16 years of age is barren of any evidence of force or violence.

State v Speck, 202-732; 210 NW 913

Rape—failure to charge—effect. Failure to charge that a rape was committed with force or against the will of prosecutrix removes the necessity under any circumstances to instruct as to assault or assault and battery.

State v Tennant, 204-130; 214 NW 708

Rape—imbecile—carnal knowledge. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance" (§12967, C., '31) is legally classifiable as "statutory rape," tho the statute does not specifically so designate the offense. It follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

Robbery—included offenses—possible wide range. An indictment for robbery with aggravation may be so drawn and the evidence on the trial may be such as to require the court to submit as included offenses the crime of (1) assault with intent to rob, (2) assault with intent to do great bodily harm, (3) assault and battery, and (4) simple assault.

State v Warneke, 219-1239; 260 NW 667

III EFFECT OF CONVICTION OF LOWER OFFENSE

No annotations in this volume

IV SUBMISSION AND INSTRUCTIONS

(a) IN GENERAL

Included offenses. An indictment being a pleading, no issue should be submitted, not specifically, or, from the nature of the offense charged, necessarily included therein.

State v Woodworth, 168-263; 150 NW 25

Included offenses — justifiable limitation. First and second degree murder and manslaughter are properly submitted and all other offenses properly excluded when the accused, under the record, is guilty of a felonious homicide or not guilty at all.

State v Buck, 205-1028; 219 NW 17
State v Johnson, 221-8; 264 NW 596

Ignoring material allegations—effect. The court may not, in the trial of a criminal case, ignore material allegations in the indictment or information and thereby place the accused on trial for a higher and more severely punished offense than is charged in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Submission unnecessary. Where the evidence clearly shows that the defendant is either guilty or not guilty of the crime charged or of any crime, omission to instruct on the offense of simple larceny was not erroneous.

State v Haywood, 155-466; 136 NW 514
See State v Adams, 155-660; 136 NW 1051

Self-defense—undue limitation. Instructions limiting the right of self-defense to one who believes himself in danger of (1) loss of life, or (2) great bodily injury, are erroneous when the offense of assault and battery is submitted as an included offense, and the defendant is convicted thereof.

State v Sanford, 218-951; 256 NW 650

Unsupported claim of manslaughter. The court need not and should not instruct on manslaughter when the record reveals no element of such offense.

State v Woodmansee, 212-596; 233 NW 725

(b) AS TO DEGREE CHARGED

Improper submission—inconsequential error. The improper submission to the jury of murder in the first degree becomes of no consequence when the accused is found guilty of murder in the second degree, and on appeal a new trial is ordered for other reasons.

State v Davis, 209-524; 228 NW 37

Manslaughter. Where under no view of the case could defendant have been convicted of a crime less than manslaughter, no instructions as to included offenses below that of manslaughter were required.

State v Hessenius, 165-415; 146 NW 58

Assault and battery. It was not prejudicial error to instruct the jury that assault and battery was a crime included in assault with intent to commit murder, where the defendant was charged not only with assault but with battery also.

State v Graham, 51-72; 50 NW 285

IV SUBMISSION AND INSTRUCTIONS—concluded

(b) AS TO DEGREE CHARGED—concluded

Instructing jury not to act arbitrarily. An instruction in a murder case that a lower conviction or an acquittal should not rest on the notion that you can do as you please arbitrarily was correct, but not commended, as it might have a coercive effect.

State v Coleman, 226-968; 285 NW 269

(c) AS TO LOWER OFFENSE

Reasonable doubt. On a trial for rape, where the court instructed the jury that they might find the defendant guilty not only of rape, but of any of the inferior offenses included under the indictment, if the evidence showed that he was guilty of either, held that it was prejudicial error not to instruct further that, if they had any reasonable doubt as to the degree of the offense of which he was guilty, they should convict only of the lesser degree.

State v Neis, 68-469; 27 NW 46

Larceny from person and larceny. Larceny is necessarily included in a charge of larceny from the person, and must be submitted if the evidence is such as would justify the jury in finding the lesser offense, instead of the larger offense.

State v Marshall, 206-373; 220 NW 106

Homicide—included offenses—proper omission. The court should not instruct as to included offenses below manslaughter when the evidence without dispute demonstrates that defendant is guilty of a criminal homicide or not guilty.

State v Johnston, 221-933; 267 NW 698

Offense classifiable as rape—included offenses. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance" (§12967, C., '31) is legally classifiable as "statutory rape," tho the statute does not specifically so designate the offense. It follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

Rape—rule for submission. Notwithstanding any prior decisions by this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes (1) assault with intent to commit rape, (2) assault and battery, and (3) simple assault. Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question were the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if not, then do not submit.

State v Hoaglin, 207-744; 223 NW 548
State v Blair, 209-229; 223 NW 554

13920 Finding included offense.

Finding offense of different degree. See under §13919

Fundamental rule for submission. Principle reaffirmed that no included offense should be submitted on the trial of an indictment or trial information,

1. Unless the offense is expressly or impliedly charged in the indictment or information, and
2. Unless the record reveals evidence tending to establish said offense.

State v Brown, 216-538; 245 NW 306

Included offenses — estoppel to complain. Principle reaffirmed that an accused may not complain that the jury by its verdict was more lenient with him than the evidence warranted.

State v Blair, 209-229; 223 NW 554

Included offenses—failure to charge—effect. Failure to charge that a rape was committed with force or against the will of prosecutrix, removes the necessity under any circumstances to instruct as to assault or assault and battery.

State v Tennant, 204-130; 214 NW 708

Included offenses — proper omission. The court should not instruct as to included offenses below manslaughter when the evidence without dispute demonstrates that defendant is guilty of a criminal homicide or not guilty.

State v Johnston, 221-933; 267 NW 698

Justifiable refusal to submit. Included offenses need not be submitted (1) when there is no supporting evidence in the record of the commission of said included offense, and (2) when under the record, the accused is guilty as charged or not guilty.

State v Stennett, 220-388; 260 NW 732

Assault to commit offense. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and, depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

Larceny from person and larceny. Larceny is necessarily included in a charge of larceny from the person and must be submitted if the evidence is such as would justify the jury in finding the lesser offense instead of the larger offense.

State v Marshall, 206-373; 220 NW 106

Larceny as included offense under aggravated charge. Larceny is an included offense in the charge of larceny from a building in the night-

time, and is properly submitted when there is supporting evidence.

State v Endorf, 219-1321; 260 NW 678

Errors favorable to accused. In a prosecution for larceny from a building in the nighttime, failure to define the included offense of larceny from a building in the daytime, is inconsequential, the punishment for said latter offense being in excess of that of which the accused was convicted—larceny.

State v Endorf, 219-1321; 260 NW 678

Lewd and lascivious conduct. On the trial of an indictment charging the commission of lewd and lascivious acts with and upon the body of a child, the included offenses of assault and battery and simple assault should be submitted when there is supporting evidence and when there is no evidence of consent on the part of the prosecutrix.

State v Rounds, 216-131; 248 NW 500

Murder resulting from abortion. The crime of attempting to produce an abortion is not included in an indictment for murder in the second degree, even tho the indictment is based on an attempted abortion resulting in death.

State v Rowley, 216-140; 248 NW 340

Assault to murder. Under a charge of assault to murder, failure to instruct as to any included and supported offense below assault with intent to commit manslaughter does not constitute prejudicial error when the jury finds the defendant guilty as charged.

State v Smith, 215-374; 245 NW 309

Rape—rule for submission. Notwithstanding any prior decisions of this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes:

1. Assault with intent to commit rape, and
2. Assault and battery, and
3. Simple assault.

Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question was the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if nay, then do not submit.

State v Hoaglin, 207-744; 223 NW 548
State v Blair, 209-229; 223 NW 554

Rape—included offense. Under an indictment for rape, there may be a conviction for assault with intent to commit rape, even tho the only evidence offered by the state is to the effect that a completed rape by actual penetration was accomplished.

State v Blair, 209-229; 223 NW 554

Rape—great bodily injury. Under an indictment for rape, the court need not submit the offense of assault with intent to do great bodily injury even tho the record reveals evidence tending to establish said latter offense.

State v Brown, 216-538; 245 NW 306

Offense classifiable as "rape"—included offenses. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance", (§12967, C., '31) is legally classifiable as "statutory rape", tho the statute does not specifically so designate the offense; it follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

Rape—failure to define offenses. The failure to define the included offenses of assault and battery and simple assault, or to set forth the elements of either of said offenses, under an indictment for rape, does not constitute prejudicial error when the jury finds the accused guilty of rape.

State v Grimm, 212-1193; 237 NW 451

Rape. In the trial of a prosecution for rape on a child under the age of consent, the offenses of assault and battery and simple assault should not be submitted if the record is such that it would not support a verdict of guilt of such minor offenses had the prosecution charged such minor offenses only.

State v Ingram, 219-501; 258 NW 186

Robbery—when larceny not included offense. Failure of the court, on the trial of a charge of robbery, to submit the crime of larceny as an included offense is proper when the record unquestionably demonstrates that if the accused was guilty of larceny it was because he took the property from the prosecuting witness by force and violence.

State v Warneke, 219-1239; 260 NW 667

Necessary submission. The court must, on the trial of a charge of robbery alleged to have been committed with force and violence, submit the included offense of assault and battery when the evidence is sufficient to support such verdict.

State v Buchan, 219-106; 257 NW 586
State v Warneke, 219-1239; 260 NW 667

13922 Verdict as to several defendants.

Sufficiency of forms of verdict. Instructions which clearly extend to the jury the privilege of finding either of two co-defendants guilty, or to find both guilty, are all-sufficient in the absence of any request from the defendants as to such subject-matter.

State v Slycord, 210-1209; 232 NW 636

Conviction under different counts. Under a verdict of guilt of all jointly indicted parties under both counts (statutory burglary, and lar-

ceny from building in nighttime) judgment is properly entered on each count against each defendant.

State v Stennett, 220-388; 260 NW 732

13924 Presence of defendant—when necessary.

Presumption of presence. Where the record shows that a defendant in a criminal action was present at the commencement and conclusion of his trial, in the absence of any affirmative showing to the contrary, it will be presumed that he was present during the trial and at the rendition of the verdict.

State v Wood, 17-18

13927 Informal verdict.

Recommendations for leniency. A verdict otherwise adequate is not rendered fatally defective by the act of the jury in inserting therein a recommendation for leniency.

State v Purcell, 195-272; 191 NW 849

13929 Jury polled.

Sealed verdict. Where jury of its own volition sealed the verdict, the right of the defendant to have the jury polled before their verdict is recorded is a substantial one of which he cannot be deprived without his consent.

State v Callahan, 55-364; 7 NW 603

13932 Acquittal on ground of insanity—commitment.

Erroneous but nonprejudicial instruction. Failure to require the jury, if it finds a not-guilty verdict because of insanity of the defendant, to state such fact in the verdict is not prejudicially erroneous when the jury is peremptorily instructed to acquit the defendant if it finds the defendant insane.

State v Mullenix, 212-1043; 237 NW 483

CHAPTER 651

EXCEPTIONS

13933 Bill of exceptions—purpose.

Argument—failure to except—effect. Failure to enter exceptions to alleged improper argument, when made, precludes review on appeal.

State v Philpott, 222-1334; 271 NW 617

13934 What constitutes record—exceptions unnecessary.

Corresponding provisions in civil cases. See §§11536–11548

13935 Grounds for exceptions.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I IN GENERAL
II NATURE OF OBJECTION
III RESERVATION OF GROUNDS

I IN GENERAL

Failure to object — effect. The appellate court will not review assignments of error on the reception of testimony or on the giving of instructions to which complainant entered no objection.

State v Bourgeois, 210-1129; 229 NW 231

II NATURE OF OBJECTION

Argument—sufficiency of objection. An objection to a flagrantly improper argument by the county attorney may be all-sufficient even tho not couched in specific language; a priori, when the attorney and court cannot but know the very subject matter to which reference is made.

State v Voelpel, 213-702; 239 NW 677

Sufficiency. Exceptions to instructions must specifically and definitely point out the error complained of, and no others will be considered.

State v Grigsby, 204-1133; 216 NW 678

III RESERVATION OF GROUNDS

Estoppel to allege error. Counsel will not be permitted to equivocate relative to proper and material questions asked him by the court and thereupon base error on the ensuing colloquy.

State v Woodmansee, 212-596; 233 NW 725

Misconduct in argument—waiver. Misconduct in argument is waived by a failure to except thereto.

State v Myers, 207-555; 223 NW 166

Pistols not offered in evidence taken to jury room. In prosecution for carrying concealed weapons, permitting jury to take pistols, not technically offered in evidence, to jury room held not prejudicial, where pistols were before jury, frequently referred to in evidence, and sent to jury room with knowledge of defendant's counsel and without his objection.

State v Busing, (NOR); 251 NW 620

Question first presented on appeal. Failure in the trial court to question the form of the indictment precludes the presentation of such question on appeal.

State v Woodmansee, 212-596; 233 NW 725

Untimely objection to question. A party will not be permitted to deliberately withhold his objection to a question until he discovers that the answer is not to his liking.

State v Woodmansee, 212-596; 233 NW 725

13937 Bill by judge.

Improper argument. Improper argument by the county attorney, which argument has not been taken down by the reporter as part of the record, but as to which proper exception has been entered, may be made part of the record by a bill of exceptions signed by the judge.

State v Voelpel, 213-702; 239 NW 677

CHAPTER 652

NEW TRIAL

13942 Definition.

Writ of error coram nobis. The common-law writ of error coram nobis is not recognized in this state.

Boyd v Smyth, 200-687; 205 NW 522; 43 ALR 1381

State v Harper, 220-515; 258 NW 886

13943 Application—when made.

Fatally delayed motion. A motion in a criminal case for a new trial, and for permission to withdraw a plea of guilty must be made before judgment.

State v Van Klaveren, 208-867; 226 NW 81

Mandatory time for filing. Motions for new trial in criminal cases will be disregarded when filed after the time authorized by statute.

State v Kirkpatrick, 220-974; 263 NW 52

Time limit. Statutory requirements applied, that motions in arrest of judgment in criminal cases must be filed during the term, and motions for new trial before judgment.

State v Harper, 220-515; 258 NW 886

13944 Grounds.

ANALYSIS

I IN GENERAL
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Failure of accused to testify. See under §13891
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Misconduct in cross-examination. See under §13892
Misconduct of bailiff. See under §13878
New trial in civil cases. See under §11550
Use of affidavits in civil causes. See §11551

I IN GENERAL

After judgment. After judgment has been entered in a criminal case a petition for new trial will not be entertained.

State v Hayden, 131-1; 107 NW 929

Coercion of jury. That a rumor reached the jury at four o'clock on Saturday afternoon, after they had been out 25 hours, that the presiding judge was going away at noon on the following Monday, and that they would be held together until Monday, unless they agreed sooner, will not require a new trial, where it is not shown that they were influenced thereby.

State v Smith, 99-26; 68 NW 428

Conviction of second degree murder—as acquittal of first degree on retrial. When the jury in a murder trial found guilt in the second degree, on retrial the defendants could not be tried on a charge of first degree murder, but evidence of any other offense of which the defendants might have been guilty could be offered.

State v Coleman, 226-968; 285 NW 269

Excessive proof of fact. In a prosecution for driving an automobile while intoxicated, the fact that the gruesome details of a collision were oft detailed by a large number of witnesses furnishes no reason why the defendant should be given a new trial.

State v Wheelock, 218-178; 254 NW 313

Excessive sentence. The plea of excessive sentence in a criminal case is unavailable to one sentenced under the indeterminate sentence act.

State v Hixson, 208-1233; 227 NW 166
State v Bingaman, 210-160; 230 NW 394

I IN GENERAL—continued

Failure of accused to testify—allowable reference. County attorney, during the trial of a criminal case, may properly refer to the fact that the accused has not testified in his own behalf, and constitutional "due process" is not thereby violated.

State v Ferguson, 226-361; 283 NW 917

Failure of justice. The facts that an accused (1) was promptly tried after the commission of the offense, (2) was handcuffed during the trial, and (3) that at the time of the trial public feeling ran high against the accused, do not, in and of themselves, justify an inference that the accused did not have a fair trial.

State v Brewer, 218-1287; 254 NW 834

Failure to produce testimony. A defendant in a criminal prosecution may not have a new trial in order to produce material testimony which was at all times within his reach.

State v Carter, 192-196; 183 NW 318

Failure to subpoena defense witness. Failure of the sheriff to subpoena a witness for the defendant, whose testimony was not pointed out as material to the defense, and so far as it may have had a bearing on the conduct of an accomplice it could not have affected the result, was not ground for a new trial.

State v Brown, 130-57; 106 NW 379

Inadvertent reception of immaterial testimony. On a charge of illegally transporting intoxicating liquors, the reception of evidence as to the search of an automobile of which the accused was not in possession and as to the finding of such liquors therein does not constitute reversible error when the evidence was first received because of a misunderstanding of the court as to which automobile was being referred to, and when the court pointedly directed the jury not to consider it.

State v Canalle, 206-1169; 221 NW 847

Allegations stricken from motion—not supported by affidavit. There was no prejudicial error in striking on motion, from a motion for new trial in a criminal case, allegations that the jury had considered matters not in evidence, when the only affidavit in support of the allegations was by an attorney who said no more than that he believed the allegations to be true, and there was no request that the jurors be called for examination.

State v McDowell, 228- ; 290 NW 65

Improper exhibit withheld from record. The fact that the state, in identifying an accused, employs a photograph on the reverse side of which is printed the criminal record of the accused furnishes no basis for an assignment of error when the photograph was never in the hands of any juror, and was not received in evidence, and when the criminal record was not referred to in the presence of the jurors.

State v Kelly, 202-729; 210 NW 903

Inconsequential evidence. The fact that certain identifying pasters were allowed to remain on liquor receptacles when they were taken by the jury on final submission is of no consequence when such pasters furnished the jurors no fact not already legally in their possession.

State v McGee, 207-334; 221 NW 556

Jury question as to identity. The identity of one who is prosecuted for a crime as the one who actually committed it is a question of fact for the jury, on conflicting testimony.

State v Ayles, 205-1024; 219 NW 41

Lack of specification. Motions for new trial must be specific, in criminal as well as in civil cases, as to the grounds, or they will not be reviewable.

State v Vandewater, 203-94; 212 NW 339

Matters not in record. Without determining whether it is proper for the trial judge to advise himself as to matters not disclosed in the evidence as an aid in fixing punishment, it is at all events not grounds for a new trial but rather for an application to reduce the punishment.

State v Huff, 76-200; 40 NW 720

Mistake of witness. The fact that erroneous statements were made by a witness upon the trial because of his misunderstanding of a question put to him will not entitle the party affected thereby to a new trial in the absence of any showing of prejudice because of such evidence.

State v Viers, 82-397; 48 NW 732

Public prejudice. Public prejudice is not a ground for new trial where there were no demonstrations of such character as to intimidate the jury or to indicate that the verdict was anything other than the honest conclusion of the jury.

State v Gulliver, 163-123; 142 NW 948

Requiring undue deliberation of jury. The court, in the trial of a charge of murder, does not necessarily abuse its discretion by requiring the jury to continue its deliberations for a period of some 90 hours.

State v Siegel, 221-429; 264 NW 613

Undue haste in trial. The action of the trial court and county attorney in bringing a criminal prosecution on for trial promptly after the alleged commission of the offense (15 days in this case) cannot be deemed prejudicially erroneous in the absence of any showing that

the defendant was thereby deprived of a fair trial.

State v Berlovich, 220-1288; 263 NW 853

Witness' name not indorsed. No objections having been made to witness testifying in consequence of his name not having been indorsed on the back of the indictment, after his testimony had gone to the jury without objection, it is not on that account sufficient cause to authorize the court in granting a new trial.

Ray v State, 1 Greene 316

II EVIDENCE OUT OF COURT

Inconsequential remarks in jury room. No ground for new trial arises from a showing that some casual remarks were made in the jury room as to the pregnancy of the deceased and as to the accused's having thereby taken more than one life.

State v Kneeskern, 203-929; 210 NW 465

Jurors influenced by newspaper—matter inhering in verdict. In prosecution for rape, motion for new trial based on affidavit of two jurors that they found defendant guilty because they received newspaper stating that they would be locked up over Memorial Day constituted an attempt to impeach verdict upon a matter that inhered in it and presented nothing that the trial court could or should have considered.

State v Banks, 227-1208; 290 NW 534

III MISCONDUCT OF JURY

Additional annotations. See under §13860, Vol I

Discussion. See 11 ILR 268—Juror's affidavits as to misconduct

(a) SEPARATION WITHOUT LEAVE

Separation of, and communications with, jurors. The conduct of bailiffs in permitting jurors in a criminal trial to communicate with outsiders, personally and by telephone, or in permitting slight separations of jurors, tho inexcusable, does not necessarily constitute reversible error.

State v Siegel, 221-429; 264 NW 613

(b) OTHER MISCONDUCT

1 In General

Application of epithet. The application by a juror, in the jury room, to the defendant, of an inelegant epithet does not constitute reversible error.

State v Kurtz, 208-849; 225 NW 847

Discretion in case of dispute. The granting of a new trial because of misconduct of jurors is quite largely within the discretion of the court, especially when there is a dispute whether there was any misconduct.

State v Umphalbaugh, 209-561; 228 NW 266

Discretion of court. The discretion of the court in denying a new trial in a criminal case on a conflicting showing of misconduct of the jury will not ordinarily be disturbed on appeal.

State v Reynolds, 201-10; 206 NW 635

Examination of trial jurors. An unsupported request by an accused in a motion for a new trial that certain trial jurors be called for examination as to alleged misconduct on the part of the jury is properly overruled, especially when no affidavit of any juror had been filed.

State v Friend, 206-615; 220 NW 59

False answers. A new trial in a criminal case will not be granted on an unsatisfactory and uncertain showing that a juror on his voir dire made false answers as to his then opinion as to the guilt of the accused.

State v Kneeskern, 203-929; 210 NW 465

Immaterial fact statement. The making, by a juror during the deliberations of the jury, of a statement of fact which is immaterial to any issue before the jury, does not constitute reversible prejudice; likewise when the statement is in the nature of a conclusion by the juror.

State v Gripp, 208-1143; 226 NW 16

Improper statements during deliberation. In a prosecution for illegal possession of intoxicating liquors, statements by jurors to other jurors during the deliberation of the jury that defendant "does nothing but bootleg" and "is the king of bootleggers", constitute such misconduct as to require a new trial.

State v Clark, 210-724; 231 NW 450

Inconsequential remarks in jury room. No ground for new trial arises from a showing that some casual remarks were made in the jury room as to the pregnancy of the deceased and as to the accused's having thereby taken more than one life.

State v Kneeskern, 203-929; 210 NW 465

Indefinite statements dehors record. A new trial will not be granted on a showing of indefinite statements dehors the record, made by one juror to another, especially when made after the verdict had been agreed to.

State v Rounds, 202-534; 210 NW 542

Jury request for court parole. The fact that the jury accompanies its verdict of guilty with a recommendation that the court parole the accused cannot be deemed such misconduct as to require a new trial.

State v Sampson, 220-142; 261 NW 769

Juror riding with county attorney. Action of trial juror in riding with county attorney to and from place of trial, while not intentional misconduct and even tho no actual wrong resulted, casts suspicion on jury's verdict, is against public policy, and is grounds for a new trial.

State v Neville, 227-329; 288 NW 83

III MISCONDUCT OF JURY—continued
(b) OTHER MISCONDUCT—continued
1 In General—concluded

Jurors as witnesses—refusal to call. On a motion for a new trial in a criminal case, the court may very properly refuse to permit the oral examination of jurymen for the purpose of establishing misconduct which the defendant induced—for which he was responsible.

State v Mutch, 218-1176; 255 NW 643

Insufficiency of evidence. In prosecution for subornation of perjury, where defendant complains of the denial of his motion for new trial involving the misconduct of the jury, where evidence, by juror examined on the subject, of matters discussed by jury related to defendant's father's estate and a school controversy in which defendant had been engaged, both of which were referred to in cross-examination of certain character witnesses in the trial and which were admitted by the court, and where juror admitted she agreed to verdict and did not consider anything said by anyone which was not admitted in evidence, there was nothing to indicate any misconduct on the part of the jury, and the court's ruling was correct.

State v Hartwick, 228- ; 290 NW 523

Misconduct of jurors—proof required. Error cannot be predicated on the surmise that jurors or some of them may have read an improper newspaper article relative to the defendant in a criminal case.

State v Long, 215-494; 245 NW 726

Prejudicial effect. Misconduct of jurymen in a criminal case does not vitiate the verdict of guilt and necessitate a new trial, unless, from the entire showing of misconduct, the court finds that the jury was probably influenced or prejudiced by said misconduct in the rendition of said verdict. So held as to jury-room discussion relative to:

1. Charges or claims that the county attorney had not introduced all available testimony.
2. Charges that some of the jurors had been bribed.
3. Remarks, derogatory to the innocence of the accused, made by loiterers on the street, and in the presence of jurymen.

State v Siegel, 221-429; 264 NW 613

Presence of officers in jury room. Where, because of the small size of the room in which the jury was deliberating upon its verdict, and of the impurity of the air therein, the jury was permitted after midnight to remove to the courtroom, where during the greater part of the time of their further deliberation there were with them a deputy sheriff and a bailiff, but it appeared that during most of the time said officers were in one corner of the room and partly asleep, and neither of them had any conversation with the jurors, except to tell them to stay away from one of two tables that were in the room, held, that there was not such showing of prejudice as to entitle the defendant to a new trial.

State v Thompson, 87-670; 54 NW 1077

Refusal of personal examination. The court may very properly decline to call the jury, after verdict, for personal examination relative to their misconduct which has no support except in the hearsay affidavit of the counsel for defendant.

State v Woodmansee, 212-596; 233 NW 725

Statement of fact. No prejudicial error occurs from a statement by a juror during the deliberation of the jury that she knew that a certain date fell on a certain day of the week because she had personally looked it up on the calendar, when the record shows that whether the date fell on said day of the week was quite immaterial.

State v White, 205-373; 217 NW 871

2 Communications

Finding of court—conclusiveness. A finding by the court on conflicting testimony that a bailiff was not guilty of misconduct is conclusive on appeal.

State v Kurtz, 208-849; 225 NW 847

Separation of, and communications with, jurors. The conduct of bailiffs in permitting jurors in a criminal trial to communicate with outsiders, personally and by telephone or in permitting slight separations of jurors, tho inexcusable, does not necessarily constitute reversible error.

State v Siegel, 221-429; 264 NW 613

Jurors influenced by newspaper—matter inhering in verdict. In prosecution for rape, motion for new trial based on affidavit of two jurors that they found defendant guilty because they received newspaper stating that they would be locked up over Memorial Day constituted an attempt to impeach verdict upon a matter that inhered in it and presented nothing that the trial court could or should have considered.

State v Banks, 227-1208; 290 NW 534

3 Drinking Liquor

Drinking liquors. In a prosecution for maintaining a liquor nuisance, it is for the court to determine the extent to which the liquors introduced in evidence were drunk by the jurors and the effect of such drinking, and the finding of the court on such questions will not be disturbed if within the evidence bearing thereon.

State v Phillips, 212-1332; 236 NW 104

Drinking liquor after verdict. A conviction of unlawfully transporting intoxicating liquors within the state will not be disturbed on appeal on the ground of misconduct of certain jurors in drinking the contents of one of the bottles of beer transported by the defendant, after the

verdict was found, reduced to writing, and signed by the foreman.

State v Reilly, 108-735; 78 NW 680

Misconduct of juror. The mere fact that a material prosecuting witness treated two of the jurors to beer, in a saloon, before any deliberation on the verdict was commenced, is not sufficient to show that jurors were guilty of misconduct.

State v Minor, 106-642; 77 NW 330

Tasting or smelling liquors. In a prosecution for maintaining an intoxicating liquor nuisance it is not prejudicial error for the jurors to smell or taste the liquors introduced in evidence.

State v Phillips, 212-1332; 236 NW 104

4 Affidavits of Jurors

Affidavits. In overruling motion for new trial in manslaughter conviction where affidavits of county attorney and juror were presented that juror rode to and from place of trial with county attorney but that they did not discuss the case, it must be assumed that the trial court attached no credence to the allegation that the county attorney and juror had discussed the case or any part of it.

State v Neville, 227-329; 288 NW 83

Nonpermissible affidavits. Affidavits to the effect that a juror changed his vote from "not guilty" to "guilty" because of certain misconduct occurring during the deliberation of the jury will be given no consideration whatever.

State v Clark, 210-724; 231 NW 450

Nonpermissible affidavits. The affidavits of jurors that their verdict was or was not affected by certain verdict-inhering matters are not permissible. The effect of such matters must be determined by the court.

State v Siegel, 221-429; 264 NW 613

Instruction allowing recommendation of clemency—juror's affidavit explaining—effect—new trial. Where during its deliberations jury inquired of judge as to whether a verdict of guilty with recommendation of clemency would have any weight on sentence and judge instructed that any recommendations desired could be made on separate sheet of paper, signed and returned with verdict, held, instruction did not constitute error, and that jurors' affidavits stating that they were influenced by the instruction could not be considered by court in ruling on motion for new trial.

State v Cook, 227-1212; 290 NW 550

5 Affidavits of Others

Unallowable impeachment. A verdict in a criminal case may not be impeached by affidavits as to matters which necessarily inhere in the verdict.

State v Kress, 204-828; 216 NW 31

Allegations stricken from motion—not supported by affidavit. There was no prejudicial error in striking on motion, from a motion for new trial in a criminal case, allegations that the jury had considered matters not in evidence, when the only affidavit in support of the allegations was by an attorney who said no more than that he believed the allegations to be true, and there was no request that the jurors be called for examination.

State v McDowell, 228- ; 290 NW 65

IV INSTRUCTIONS

Instructions. See under §13876

V VERDICT CONTRARY TO EVIDENCE

Conflicting evidence. Where testimony is conflicting and both have substantial support in the evidence, it is the province of the jury to determine questions of fact and the court will not set aside their verdict unless it is clearly against the weight of the evidence and there is no substantial evidence to support it.

State v Crandall, 227-311; 288 NW 85

Motion for new trial — verdict — conclusiveness. Where verdict is not contrary to law nor against clear weight of evidence, the ruling of the lower court denying a motion for new trial on ground of insufficient evidence is correct and will not be disturbed on appeal.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Sufficiency of evidence of guilt. The appellate court will not substitute its judgment as to the weight of substantial and sufficient evidence of guilt.

State v Manly, 211-1043; 233 NW 110

Verdict set aside — criminal more readily than civil. Where the verdict is clearly against the weight of evidence, a new trial should be granted, and the appellate court will interfere more readily in a criminal case than in a civil one.

State v Carlson, 224-1262; 276 NW 770

VI OTHER CAUSES

(a) IN GENERAL

Change in attitude of jury. The fact that a majority of the jury in a criminal prosecution was, at one stage of its deliberations, in favor of an acquittal places no obligatory duty on the court to grant a new trial.

State v Taylor, 202-189; 209 NW 287

Hostile attitude of audience. Conclusion affidavits stressing the hostility of the audience present during the trial of an accused, which was manifested in alleged demonstrations against the accused, reviewed, and held insufficient to show that accused was not accorded a fair trial, especially in view of the overruling of the motion for new trial on that ground.

State v Mueller, 202-1067; 208 NW 360

VI OTHER CAUSES—continued
(a) IN GENERAL—concluded

Insufficient showing. Evidence held quite insufficient to show conduct on the part of a witness prejudicial to the defendant.

State v Long, 215-494; 245 NW 726

Misconduct—responsive argument by state. Nothing to the contrary appearing, the formal finding of record by the court that the closing argument of the state was justified by, and responsive to, the argument of counsel for the defendant is quite decisive and final.

State v Burzette, 208-818; 222 NW 394

Prosecutor's misconduct — admonition — court's discretion. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were not true, defendant's counsel would not jump up and squeal like a pig under a gate, and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

Misnaming offense on trial. Misnaming, during argument, the offense on trial constitutes no ground for new trial when from the record it is manifest the jury was not misled.

State v Ferro, 211-910; 232 NW 127

Unsworn bailiff. Where a jury is ordered kept together during the trial of a criminal case, the fact that the court bailiff who accompanied the jurors on the first adjournment of court was not specially sworn as required (§13861, C., '31), does not constitute reversible error when it appears the bailiff protected the jurors exactly as he would have protected them had he been so sworn and had respected his oath.

State v Miller, 217-1283; 252 NW 121

What absent witness would testify. The statement of the county attorney, on a prosecution for murder, that an absent witness, if present, would probably testify that defendant struck deceased, was not an unfair comment.

State v Fuller, 125-212; 100 NW 1114

(b) NEWLY DISCOVERED EVIDENCE

Newly discovered evidence. The plea of newly discovered evidence will be disregarded when the slightest diligence prior to trial would have revealed the evidence in question. Likewise, when, prior to trial, the accused knew of such testimony, and might doubtless have had the full benefit thereof by offering it.

State v Rounds, 202-534; 210 NW 542
State v Friend, 210-980; 230 NW 425
State v Leftwich, 216-1226; 250 NW 489

Newly discovered evidence — discretion of court. The court may recognize newly discovered evidence as a ground for a new trial, but its discretion in the matter is very broad.

State v Endorf, 219-1321; 260 NW 678

Newly discovered evidence. Newly discovered evidence is not a statutory ground for a new trial in criminal cases.

State v Tracy, 219-1412; 261 NW 527
State v Siegel, 221-429; 264 NW 613

(c) INCOMPETENCE OF DEFENDANT'S ATTORNEY

Unskillfulness of counsel. Neglect and incompetency of counsel for an accused in the trial of a criminal case are not ordinarily grounds for a new trial.

State v Vandewater, 203-94; 212 NW 339

(d) MISCONDUCT OF DEFENDANT'S ATTORNEY

Motion for new trial and in arrest—misconduct—jurors as witnesses—refusal to call. On a motion for a new trial in a criminal case, the court may very properly refuse to permit the oral examination of jurymen for the purpose of establishing misconduct which the defendant induced—for which he was responsible.

State v Mutch, 218-1176; 255 NW 643

(e) MISCONDUCT OF PROSECUTING ATTORNEY

1 In General

Argument not made of record. Error may not be based on alleged misconduct of counsel in argument unless the specific misconduct is made of record, and exceptions entered thereto.

State v Harrington, 220-1116; 264 NW 24

Argument—failure to except. Failure to enter exceptions to alleged improper argument, when made, precludes review on appeal.

State v Philpott, 222-1334; 271 NW 617

Argument—agreement to limit time. Where state waived opening argument and by agreement of counsel the accused and state had 20 minutes to argue to jury, objection that county attorney did not confine himself to response to defendant's argument, and misstated facts to jury, could not be raised on appeal by accused who took no objection or exceptions at time of state's argument.

State v McGregor, (NOR); 266 NW 22

Failure to make record. Improper argument by the county attorney cannot be shown by affidavits attached to motion for new trial.

State v Hixson, 208-1233; 227 NW 166
State v Phillips, 212-1332; 236 NW 104

Good-faith motives. County attorney's prompt withdrawal of exhibits and all testimony in connection with two federal convictions for liquor offenses when such matters were withdrawn from the consideration of the jury was persuasive evidence of his good faith and honest conviction that he had the right to introduce such evidence.

State v Caringello, 227-305; 288 NW 80

Improper argument. The refusal by the trial court of a new trial in a criminal cause because of alleged misconduct of the county attorney in argument will not be reversed in the absence of any showing that said argument was not in response to argument made by the attorneys for the accused.

State v Johnson, 221-8; 264 NW 596

Indefinite record. New trial because of misconduct of the county attorney in argument cannot be granted on a materially indefinite record.

State v Clay, 202-722; 210 NW 904

Insufficient record. An assignment of misconduct of the county attorney in argument will not be considered, in the absence on appeal of such argument.

State v Peacock, 201-462; 205 NW 738

Misconduct in argument—waiver. Misconduct in argument is waived by a failure to except thereto.

State v Myers, 207-555; 223 NW 166
State v Henderson, 212-144; 232 NW 172

Misconduct of county attorney—record required.

State v Feldman, 201-1089; 202 NW 90

Misnaming offense on trial. Misnaming, during argument, the offense on trial constitutes no ground for new trial when from the record it is manifest that the jury was not misled.

State v Ferro, 211-910; 232 NW 127

Prosecutor's misconduct — admonition — court's discretion. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were not true, defendant's counsel would not jump up and squeal like a pig under a gate, and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

Waiver of improper argument. Improper argument is deemed waived unless objection thereto is made in the trial court, ruled on, and an exception saved.

State v Halley, 203-192; 210 NW 749

Belated complaint. In prosecution for rape, complaint as to statements made in argument by county attorney, when raised for the first time in a motion for new trial, came too late to be considered on appeal.

State v Banks, 227-1208; 290 NW 534

2 Nonprejudicial Misconduct

Improper argument—curing error. Statements by the county attorney in his argument to the jury to the effect that counsel for defendant knew that defendant was the same person who had formerly been convicted of a pleaded offense because counsel for defendant had then prosecuted defendant, do not constitute reversible error (1) when objection was withheld until after the arguments were closed, (2) when the court sustained the objection and directed the jury not to consider said statements, and (3) when there was nothing before the appellate court showing precisely what statements were made and the circumstances attending them.

State v Anderson, 216-887; 247 NW 306

Improper characterization. A cross-examination of defendant in a prosecution for rape whether he would object to his wife testifying against him, and the act of the county attorney referring to defendant as a "sexual pervert", while improper, does not necessarily constitute reversible error.

State v Ingram, 219-501; 258 NW 186

Improper characterization of accused. The fact that the county attorney in his argument to the jury characterized the accused as "Public Enemy No. 1" will not, in and of itself, be deemed reversible error especially when the accused's objection to such argument was sustained by the court.

State v Berlovich, 220-1288; 263 NW 853

Improper question—effect. The mere asking on cross-examination of a defendant of a wholly improper question does not necessarily result in reversible error.

State v Umphalbaugh, 209-561; 228 NW 266

Asking improper questions. The conduct of the county attorney in asking improper questions, under the mistaken view that the answers thereto could be utilized for the purpose of impeachment, does not necessarily constitute prejudicial error.

State v Grimm, 212-1193; 237 NW 451

Incompetent and prejudicial testimony. The direct or inferential production of incompetent and prejudicial testimony relative to the defendant's business does not necessarily constitute reversible error when the court immediately excludes the objectionable matter and pointedly directs the jury to eliminate such matters from their minds.

State v Canalle, 206-1169; 221 NW 847

VI OTHER CAUSES—continued
(e) MISCONDUCT OF PROSECUTING ATTORNEY—continued
2 Nonprejudicial Misconduct—concluded

Noninflammatory argument. The fact that the county attorney in his argument characterized the defendant with quite blunt epithets is not necessarily reversible error.

State v Brewster, 208-122; 222 NW 6

Nonprejudicial opening statements. No reversible error results from overruling, in the trial of a charge of manslaughter, objections to the opening statements of the county attorney relative to the intoxication of the accused some 45 minutes after the fatal act, there being no showing of bad faith on the part of the county attorney and it appearing that offered testimony to prove such intoxication as thus stated was excluded.

State v Long, 215-494; 245 NW 726

Voir dire examination—permissible range. The act of the county attorney, in a prosecution for maintaining a liquor nuisance, in asking a proposed juror (whose business was transporting beer) whether he would vote to convict the accused if the accused was proven guilty beyond all reasonable doubt, will not, in and of itself, be deemed prejudicial error.

State v Harrington, 220-1116; 264 NW 24

Misconduct—curative quality of instructions. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

3 Prejudicial Misconduct

Cross-examination of co-indictee to show he was a thief by profession. In the trial of one of two persons jointly indicted for larceny of chickens, the persistent cross-examination of the co-indictee, not on trial but called as a witness by the one on trial, along the line of showing that the witness was in the business of stealing chickens, is prejudicially erroneous.

State v Huss, 210-1317; 232 NW 692

Failure to persistently object. The fact that objections to an argument are not specific or persistent will not be deemed a legal reason for denying a new trial when the argument in question was flagrantly and knowingly improper.

State v McIntyre, 203-451; 212 NW 757

Incurable misconduct. Reversible error results from the assertion by the county attorney in argument before the jury in a criminal case that he (not a witness in the case) personally knows that the defendant had made a confession of the crime charged, especially when the record evidence tending to show guilt is weak.

State v Thomson, 219-312; 257 NW 805

Improper cross-examination. Reversible error results from repeatedly and insistently injecting into the cross-examination of a defendant on trial for crime, and into the cross-examination of his character witnesses, insinuations and innuendoes to the effect that the accused had been guilty of other crimes prior to the time in question.

State v Rounds, 216-131; 248 NW 500

Inflammatory appeals in close case. Weaving into an address by the county attorney reference to sensational newspaper reports, unwarranted assertions of the defendant's guilt of other offenses, inferences that the state has been prevented from showing all the evidence against the accused, and the inconsequence of a verdict of guilty, because of the ease in securing paroles, may require the granting of a new trial, especially (1) when the record reveals such inconsistencies and improbabilities as would fully justify an acquittal, (2) when the case has been three times tried, and (3) when the verdict was clearly a compromise among the jurors.

State v McIntyre, 203-451; 212 NW 757

Inflammatory questions and innuendoes. Reversible error results from the act of the county attorney in persistently asking and reasking questions which bristle with prejudicial innuendoes against the accused, and which call for testimony of a highly inflammatory and incompetent nature; and the sustaining of objections to such questions is not a sufficient antidote for such poison.

State v Neifert, 206-384; 220 NW 32

Juror riding with county attorney. Action of trial juror in riding with county attorney to and from place of trial, while not intentional misconduct and even tho no actual wrong resulted, casts suspicion on jury's verdict, is against public policy, and is grounds for a new trial.

State v Neville, 227-329; 288 NW 83

Misconduct in argument. Argument reviewed and condemned as improper.

State v Burch, 195-427; 192 NW 287

Prejudicial cross-examination. Reversible error may result from the act of the county attorney, while cross-examining the good-character witnesses of the defendant, in persistently and insistently injecting into his questions and by-remarks (and in the face of repeated adverse rulings by the court) matter incompetent and irrelevant, highly derogatory to the character of the defendant, and naturally prejudicial to him.

State v Hixson, 202-431; 210 NW 423

Untoward episode requiring new trial. A new trial must be granted in a criminal case tried before a jury when the county attorney, during the cross-examination of the accused and of his witness, asserts, in an impassioned manner, that the testimony being given is false to his personal knowledge, and couples therewith, in the presence of the jury, a statement that he, himself, is under legal disability to testify, and when the county attorney does not thereafter testify in the case.

State v Gustoff, 213-817; 239 NW 572

4 Curing Error

Admission of evidence. The reception of admissions of guilt which were possibly nonvoluntary will not be deemed prejudicial when a voluntary, written confession of guilt containing the same admissions is subsequently received.

State v Hammond, 217-227; 251 NW 95

Conduct of counsel—curing error. Prejudice arising from misconduct of the county attorney in attempting to bring irrelevant and incompetent matter to the attention of the jury may, ordinarily, be cured or avoided by a very pointed admonition from the court to the jurors to wholly disregard such conduct.

State v Hixson, 208-1233; 227 NW 166
State v Dobry, 217-858; 250 NW 702

Failure of accused to testify—allowable reference. It is not erroneous for the county attorney to refer, during the trial of a criminal case, to the fact the accused has not testified in his own behalf.

State v Stennett, 220-388; 260 NW 732

5 Discretion of Court

Broad discretion of court. The refusal of a new trial in a criminal cause on the grounds of misconduct of the county attorney in examining witnesses, and in argument to the jury, will not be deemed erroneous, unless the record reveals a manifest abuse of the court's discretion.

State v Wheelock, 218-178; 254 NW 313
State v Smith, 219-168; 256 NW 651
State v Stennett, 220-388; 260 NW 732

Misconduct of county attorney—test. Test of whether county attorney's alleged misconduct will warrant a new trial is whether the alleged misconduct is so improper as to be prejudicial and deprive defendant of fair trial, and broad discretion is vested in the trial judge's rulings thereon.

State v Caringello, 227-305; 288 NW 80

(f) MISCONDUCT OF JUDGE

1 In General

Assumption of fact. It is not error for the court to refer to the testimony of a witness as a "fact" when such reference is manifestly for the purpose of correcting counsel in the assertion that the testimony was an "opinion" or "conclusion".

State v Bourgeois, 210-1129; 229 NW 231

Inferential assumption of falsity of testimony. Reversible error results from a statement by the court in the presence of the jury and to the counsel for an accused that "You can't manufacture a conversation with a third person and put it in as a defense."

State v Shearer, 206-397; 220 NW 13

Examination by court. It is not improper for the court, in the trial of a criminal cause, to put questions to a witness (1) because of the hesitation of the witness, (2) in order to properly rule on a motion to strike the testimony, or (3) in order to secure pertinent answers.

State v Eggleston, 201-1; 206 NW 281

Witnesses—examination by court. It is not necessarily erroneous for the court, in a criminal case, to interrogate a witness.

State v Leftwich, 216-1226; 250 NW 489

2 Absence of Judge

Absence of judge from courtroom. It is sufficient if the judge, during the arguments to the jury, was in a position where he could observe and hear all the proceedings in the courtroom, even tho he may not have been at all times actually inside the courtroom.

State v McGee, 207-334; 221 NW 556
State v Van Doran, 208-863; 226 NW 19
State v Twine, 211-450; 233 NW 476
State v Dobry, 217-858; 250 NW 702

Reversible error. The mere fact that the trial judge, during argument, retired to a room adjoining the courtroom, but was only a few feet from the jurors, and always remained within immediate call, reveals no reversible error.

State v McGee, 207-334; 221 NW 556

(g) JURORS NOT QUALIFIED

Drawing jurors in absence of defendant. The fact that, in impaneling a jury in a criminal case, the names of jurors were drawn from the panel box at a time when the defendant was not present will not be deemed prejudicial error in the absence of a showing that such drawing deprived defendant of a fair and impartial jury.

State v Sweetman, 220-847; 263 NW 518

13945 Effect of a new trial.

Unallowable comment. A statement in argument by the county attorney that a former conviction of the accused had been set aside upon technical grounds constitutes reversible error.

State v Voelpel, 213-702; 239 NW 677

CHAPTER 653

ARREST OF JUDGMENT

13946 "Motion in arrest" defined—grounds.

Argument—incurable misconduct. Reversible error results from the assertion by the county attorney in argument before the jury in a criminal case that he (not a witness in the case) personally knows that the defendant had made a confession of the crime charged, especially when the record evidence tending to show guilt is weak.

State v Thomson, 219-312; 257 NW 805

Motion in arrest unavailable. An accused may no longer avail himself of a motion in arrest of judgment on a ground which would be ground for demurrer.

State v Frey, 206-981; 221 NW 445

Motion to set aside. A motion to set aside a duly entered judgment in a criminal case is unknown to our practice.

State v Hawks, 213-698; 239 NW 553

Notwithstanding verdict—unrecognized practice. Motions for judgment notwithstanding the verdict are not recognized in our practice governing criminal cases.

State v Stennett, 220-388; 260 NW 732

Statutory ground exclusive. Motions for arrest of judgment must be based on the one ground specified by statute, viz: that on the whole record, no legal judgment can be pronounced.

State v Kirkpatrick, 220-974; 263 NW 52

Writ of error coram nobis. The common-law writ of error coram nobis is not recognized in this state.

Boyd v Smyth, 200-687; 205 NW 522; 43 ALR 1381

State v Harper, 220-515; 258 NW 886

13947 Time of making motion.

Time limit. Statutory requirements applied that motions in arrest of judgment in criminal cases must be filed during the term, and motions for new trial before judgment.

State v Harper, 220-515; 258 NW 886

CHAPTER 654

JUDGMENT

13951 Judgment of conviction—time for.

Consent to immediate sentence. Sentence may be imposed instanter on conviction when the accused consents to such action.

Bennett v Bradley, 216-1267; 249 NW 651

Fundamental limitation on sentence. A sentence must not exceed the punishment prescribed by law for the criminal elements charged in the indictment, notwithstanding the fact that other additional criminal elements may be unqualifiedly established by the evidence.

McWilliams v Walker, 209-769; 229 NW 183

Judgment entry—sufficiency. The formal entry of a plea of guilty to a charge of murder perpetrated by means of poison, followed by a sentence of life imprisonment, is all-sufficient, tho the better practice would be to first enter a formal judgment of conviction of the crime.

State v Harper, 220-515; 258 NW 886

Premature entry—effect. A sentence rendered less than three days after the return of a verdict will not be disturbed unless the accused shows that he has been prejudiced by such premature sentence.

State v Raney, 208-1238; 226 NW 916

Record entry omitted. A sentence imposed under a plea of guilty and a minute thereof entered on the judge's calendar is wholly without effect as a judgment until actually entered on the record book.

Jones v McClaughry, 169-281; 151 NW 210

Rendition in vacation—validity. The court has no jurisdiction, on its own initiative, in a criminal case prosecuted by indictment, to order that prospective motions in arrest of judgment and for a new trial, and exceptions to instructions be heard by the judge in vacation, and that final sentence be entered by the judge in vacation in case said motions and exceptions be overruled. It necessarily follows that the judge has no jurisdiction, even tho the accused be present, to rule on such matters in vacation, and no jurisdiction to pronounce final judgment in vacation, even tho it be conceded that the accused suffered no prejudice.

State v Rime, 209-864; 226 NW 925

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

Unlawful suspension. The court has no power in a criminal case to enter a suspension of sentence during good behavior and on payment of the costs.

State v Hamilton, 206-414; 220 NW 313

13955 Appearance for judgment—showing of cause.

Sentence—evidence in re mitigation. The court is under no obligation, at the time of passing sentence in a criminal cause, to receive evidence in mitigation of the offense, on the part of the accused.

State v Kendall, 200-483; 203 NW 806

13956 What may be shown for cause.

Mental incompetency — insufficiency. In a criminal prosecution for entering a bank with intent to rob, the overruling of a motion for a new trial on the ground that defendant was mentally incompetent was not error where the issue was not raised on the trial, when the affidavit in support of such motion was merely a conclusion of a layman who was an acquaintance of the defendant several years before the trial, and when affidavit referred to one interview a week or ten days before the commission of the offense.

State v Mikesh, 227-640; 288 NW 606

Plea of guilty—fatally delayed withdrawal. A plea of guilty may not be withdrawn after sentence has been passed and judgment entered thereon.

State v Tracy, 219-1412; 261 NW 527

13957 Insanity.

Ineffective expert testimony. The testimony of an expert to the effect that one who is unquestionably guilty of murder in the first degree is mentally responsible to receive a life sentence, but not mentally responsible to receive a death sentence, carries, at the best, very little element of persuasiveness.

State v Tracy, 219-1412; 261 NW 527

Issue of insanity—fatally delayed presentation. In order to suspend the ordinary proceedings in a prosecution for murder, and to enter upon a trial as to the insanity of the accused, the question of insanity must be raised before the end of the trial. (Motion in this case filed after sentence of death had been passed and judgment thereon entered.)

State v Tracy, 219-1412; 261 NW 527

13958.1 Motions—proceedings in vacation.

Rendition in vacation—validity. The court has no jurisdiction, on its own initiative, in a criminal case prosecuted by indictment, to order that prospective motions in arrest of judgment and for new trial, and exceptions to instructions be heard by the judge in vacation, and that final sentence be entered by the judge in vacation in case said motions and exceptions be overruled. It necessarily follows that the judge has no jurisdiction, even tho the accused be present, to rule on such matters in vacation, and no jurisdiction to pronounce final judgment in vacation, even tho it be conceded that the accused suffered no prejudice. (Decided prior to enactment of this section.)

State v Rime, 209-864; 226 NW 925

13958.2 Judgment entered.

Allowable correction. A judgment that a defendant be confined in the penitentiary for an indefinite period which is longer than permitted by law, may, without notice to the defendant or to his counsel and in their absence, be at once so corrected by the court that the period of imprisonment will conform to the period provided by law.

State v Grimm, 206-1178; 221 NW 804

Death of defendant. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment, and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Entry—necessity. Principle reaffirmed that the oral rendition by the court of his decision, the entry of such decision on the court calendar, and the transcribing of such entry into the appearance docket and fee book, does not constitute a judgment.

State v Wieland, 217-887; 251 NW 757

Impairment of defendant's right of appeal. After imposing, in a criminal case, a fine and imprisonment less than the maximum allowable limit, the court does not impair the defendant's right to appeal by embodying in the judgment a provision for the suspension of a portion of the sentence provided the defendant does not appeal.

State v Kelly, 217-1305; 253 NW 49

Judgment entry — sufficiency. The formal entry of a plea of guilty to a charge of murder perpetrated by means of poison, followed by a sentence of life imprisonment, is all-sufficient, tho the better practice would be to first enter a formal judgment of conviction of the crime.

State v Harper, 220-515; 258 NW 886

Judgment notwithstanding verdict—unrecognized practice. Motions for judgment notwithstanding the verdict are not recognized in our practice governing criminal cases.

State v Stennett, 220-388; 260 NW 732

Motion to set aside. A motion to set aside a duly entered judgment in a criminal case is unknown to our practice.

State v Hawks, 213-698; 239 NW 553

Murder—plea of guilty—findings by court—surplusage—effect. A judgment entry of murder in the first degree, on supported findings by the court, after a plea of guilty to an information charging, among other necessary averments, a "willful, deliberate, and premeditated" killing, without any averment that the killing was perpetrated in the commission of a "burglary," will not be disturbed because the findings unnecessarily recite that the parties were, at the time of the killing, burglarizing a mere office building, an offense technically unknown to our law.

State v Pinkerton, 201-940; 208 NW 351

Rendition in vacation—validity. The court has no jurisdiction, on its own initiative, in a criminal case prosecuted by indictment, to order that prospective motions in arrest of judgment and for new trial, and exceptions to instructions be heard by the judge in vacation, and that final sentence be entered by the judge in vacation in case said motions and exceptions be overruled. It necessarily follows that the judge has no jurisdiction, even tho the accused be present, to rule on such matters in vacation, and no jurisdiction to pronounce final judgment in vacation, even tho it be conceded that the accused suffered no prejudice.

State v Rime, 209-864; 226 NW 925

Sentence—dual statutes. If there be two statutes under either one of which an accused may be sentenced, the court must sentence under the statute which authorizes the shortest maximum term of imprisonment. (So held under §§13139 and 13144.)

Drazich v Hollowell, 207-427; 223 NW 253

Striking invalid provision. A provision in a judgment sentence to the county jail to the effect that the sentence shall be served in the penitentiary is a nullity, even tho the defendant consents thereto; and the court may at the same term, and in the absence of the defendant, strike said provision from the judgment entry and change the commitment to a county other than the county of trial.

State v Herzoff, 200-889; 205 NW 500

13959 Cumulative sentences.

Atty. Gen. Opinions. See '28 AG Op 282, 396; '34 AG Op 728; '38 AG Op 281

Consecutive running. Different sentences need not run concurrently.

State v Van Klaveren, 208-867; 226 NW 81

Invalid and valid nonconcurrent sentences. Petitioner in habeas corpus may establish his right to a discharge from custody by showing (1) that he is being confined under two nonconcurrent sentences; (2) that the first sentence is void because rendered by a court which had no jurisdiction of the subject matter; and (3) that he has served a time equal to that imposed by the second sentence.

Bennett v Hollowell, 203-352; 212 NW 701

Nonconcurrent imprisonment. Where the court sentences an accused to imprisonment on three separate indictments, the sentences under two of said indictments may be so imposed as to commence on the expiration of the imprisonment imposed under the other or third indictment.

Clark v Ireland, 215-560; 246 NW 262

13960 Indeterminate sentences.

Atty. Gen. Opinions. See '25-26 AG Op 376; '32 AG Op 240; '34 AG Op 614, 739; '36 AG Op 25, 353; '38 AG Op 334; AG Op March 8, '39

Allowable correction. A judgment that a defendant be confined in the penitentiary for an indefinite period which is longer than permitted by law may, without notice to the defendant or to his counsel, and in their absence, be at once so corrected by the court that the period of imprisonment will conform to the period provided by law.

State v Grimm, 206-1178; 221 NW 804

Excessive sentence. The plea of excessive sentence is not available to one who is sentenced under the indeterminate sentence law.

State v Christofferson, 215-1282; 247 NW 819

Fixing maximum or minimum confinement—surplusage. That part of a sentence of confinement in the penitentiary or in the men's or women's reformatory for a felony other than treason, murder, or rape, which assumes to fix the maximum or minimum term of confinement is surplusage under the indeterminate sentence act, even tho the statute under which the conviction is had fixes both a maximum and minimum term of confinement.

Cave v Haynes, 221-1207; 268 NW 39

Sentence—form. A sentence to the effect that the accused "be imprisoned in the penitentiary according to law" is all-sufficient, under the indeterminate sentence law.

State v Korth, 204-667; 215 NW 706

Indeterminate sentences not made concurrent—habeas corpus not available. That defendant's imprisonment, if he is compelled to serve full time for each offense, would cover 82 years affords no legal ground for discharge from custody under indeterminate sentences in habeas corpus proceedings, even tho defendant was only 18 years of age and had not been represented by counsel at time pleas of guilty were entered.

Randall v Hollowell, (NOR); 227 NW 139

Punishment—indeterminate sentence as excessive. The appellate court may not say that an indeterminate sentence is excessive when a sentence to the penitentiary was proper under the record.

State v Giles, 200-1232; 206 NW 133; 42 ALR 1496; 29 NCCA 578

State v Overbay, 201-758; 206 NW 634

State v Bird, 207-212; 220 NW 110

State v Hixson, 208-1233; 227 NW 166
State v Bingaman, 210-160; 230 NW 394
State v Hammond, 217-227; 251 NW 95

Rape not included. Judicial discretion is vested in the court as to the sentence to be imposed on a conviction for rape, an exception to the indeterminate sentence act.

State v Steele, 209-550; 228 NW 75

Weight of evidence. All the evidence in the case must be presented on appeal, or the supreme court will not consider the question whether or not the verdict was against the weight of evidence.

State v Carr & Brown, 43-418

13961 Sentences for two or more offenses.

Atty. Gen. Opinions. See '28 AG Op 282; '34 AG Op 728

13962 Discretion as to sentence.

Atty. Gen. Opinion. See '36 AG Op 353

Excessive sentence — review. Possibly a criminal case might be attended by such rare and extraordinary circumstances as to justify the appellate court in holding, notwithstanding the indeterminate sentence act, that the trial court abused its discretion in ordering a commitment to the state reformatory instead of ordering a commitment to the county jail.

State v Cooley, 220-1384; 264 NW 714

13964 Imprisonment for fine.

ANALYSIS

I IN GENERAL
II COSTS
III PAYMENT
IV JUDGMENT

Costs, civil cases generally. See under Ch 497
Imprisonment for debt. See under Art. I, §19, Constitution

I IN GENERAL

Punishment—contempt of liquor injunction. This section, authorizing imprisonment until fine is satisfied, is applicable to judgment imposing a fine as punishment for contempt of liquor injunction under §2029.

Scavo v Utterback, (NOR); 205 NW 858

Surrender of accused—effect. When an accused in a criminal cause is fined, and, independent of the fine, is ordered imprisoned for a named period, an appeal bond conditioned to perform the judgment is not satisfied by the surrender of the accused by the surety.

State v Crosser, 202-725; 210 NW 957

Unauthorized judgment. Authority to imprison in the penitentiary does not embrace authority to imprison in the county jail.

State v Gillman, 202-428; 210 NW 435; 29 NCCA 581

When imprisonment works satisfaction of fine.

State v Oliver, 203-458; 212 NW 572

II COSTS

Appeal—bond—conditions. An appeal bond on appeal from a judgment of conviction for felony does not embrace liability for costs. (§13617, C., '24.)

Van Buren County v Bradford, 202-440; 210 NW 443

Motor vehicles—sentence—imprisonment for nonpayment of costs. One convicted for operating an automobile while intoxicated and sentenced to pay a fine and costs, may not be imprisoned for the nonpayment of the costs.

State v Gillman, 202-428; 210 NW 435

Sentence — imprisonment for costs. There can be no legal imprisonment for the nonpayment of costs in a prosecution for the illegal transportation of intoxicating liquors.

State v Van Klaveren, 208-867; 226 NW 81

III PAYMENT

Intoxicating liquors—injunction—violation. A judgment that an accused in a prosecution for contempt in violating an intoxicating liquor injunction "pay a fine of $300, or in lieu of payment * * * be committed to jail for three months", is satisfied in toto by serving the term of imprisonment.

State v Oliver, 203-458; 212 NW 572

IV JUDGMENT

Bail—surrender of accused—effect. When an accused in a criminal cause is fined, and, independent of the fine, is ordered imprisoned for a named period, an appeal bond conditioned to perform the judgment is not satisfied by the surrender of the accused by the surety.

State v Crosser, 202-725; 210 NW 957

13965 Commitment to jail of another county.

Atty. Gen. Opinion. See AG Op Feb. 20, '39

Authorized change in entry. A provision in a judgment sentence to the county jail to the effect that the sentence shall be served in the penitentiary is a nullity, even tho the defendant consents thereto; and the court may at the same term, and in the absence of the defendant, strike said provision from the judgment entry and change the commitment to a county other than the county of trial.

State v Herzoff, 200-889; 205 NW 500

Presumption. It will be presumed, in the absence of any counter-showing, that the court had a legal reason for changing the place of commitment from the county jail of the county of trial to the jail of a foreign county.

State v Herzoff, 200-889; 205 NW 500

13966 Allowance of bail upon appeal.

Additional annotations. See under §13617
Bail in murder cases. See under §13609, Vol I

Failure to fix appeal bond—effect. The failure of the court, in entering judgment, to fix the amount of the bond upon appeal affects neither the validity nor the finality of the judgment.

State v Olson, 200-660; 204 NW 278

13968 Costs—when payable by state.

Death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment, and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

CHAPTER 655

LIEN OF JUDGMENTS AND STAY OF EXECUTIONS

13969 Fines lien on real estate.

Death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment, and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

13970 Stay of execution.

Atty. Gen. Opinions. See '28 AG Op 204, 236

CHAPTER 656

EXECUTIONS

13971 Copy of judgment as execution.

Atty. Gen. Opinions. See '28 AG Op 236; '38 AG Op 281

Illegal commitment—effect. The service by the sheriff of an illegal commitment does not satisfy the judgment.

State v Herzoff, 200-889; 205 NW 500

CHAPTER 657

EXECUTION OF DEATH PENALTY

Atty. Gen. Opinions. See '25-26 AG Op 207; '36 AG Op 107

CHAPTER 658

APPEALS

13994 Office of appeal—who may appeal.

ANALYSIS

I In General
II Appeal by State
III Appeal From Final Judgment
IV Time of Appeal

I IN GENERAL

Adjudication of insanity. Whether a defendant in a criminal case who causes himself, when placed on trial, to be adjudged insane can appeal from such adjudication, quaere; but if he has such right, it is a quite barren one.

State v Demara, 210-726; 231 NW 337

Appeal and error—no judgment on assumptions. Assumptions as basis of judgment in criminal case cannot be accepted by the supreme court.

State v Weston, 225-1377; 282 NW 774

Death of defendant. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment, and appeal, but before the final determination of the latter proceed-

ing, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Impairment of defendant's right of appeal. After imposing, in a criminal case, a fine and imprisonment less than the maximum allowable limit, the court does not impair the defendant's right to appeal by embodying in the judgment a provision for the suspension of a portion of the sentence provided the defendant does not appeal.

State v Kelly, 217-1305; 253 NW 49

Intermediate orders. Appeal does not lie from an intermediate order.

State v Swearengen, 43-336

Motion for new trial—misconduct of jurors—prejudicial effect. Misconduct of jurymen in a criminal case does not vitiate the verdict of guilt and necessitate a new trial, unless, from the entire showing of misconduct, the court finds that the jury was probably influenced or prejudiced by said misconduct in the rendition of said verdict. So held as to jury-room discussion relative to:

1. Charges or claims that the county attorney had not introduced all available testimony.
2. Charges that some of the jurors had been bribed.
3. Remarks, derogatory to the innocence of the accused, made by loiterers on the street, and in the presence of jurymen.

State v Siegel, 221-429; 264 NW 613; 299 US 586

Nonpermissible appeal. A city, in a criminal prosecution for the violation of its own ordinance, may not appeal from a judgment of conviction in the district court.

Creston v Kessler, 202-372; 210 NW 464

Statutory punishment excessive—legislature not controlled by court. Tho punishment is believed excessive, the supreme court has no power to change punishment fixed by specific enactment of legislature for third and subsequent offense of violating liquor law.

State v Erickson, 225-1261; 282 NW 728

Writ of error coram nobis. The common-law writ of error coram nobis is not recognized in this state.

Boyd v Smyth, 200-687; 205 NW 522; 43 ALR 1381

State v Harper, 220-515; 258 NW 886

II APPEAL BY STATE

Appeals by state from directed verdict.

State v Bailey, 202-146; 209 NW 403
State v Meyer, 203-694; 213 NW 220

Former jeopardy—state's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

Review—scope and extent—appeal by state—sufficiency of evidence. An appeal by the state from an order directing an acquittal in a criminal case will not be reviewed when nothing is involved but the question of the sufficiency of the evidence to sustain a conviction.

State v Little, 210-371; 228 NW 67

Review, scope of — appeal by state — sufficiency of evidence. An appeal by the state from an order directing an acquittal in a criminal case will not be reviewed insofar as the sufficiency of the evidence to sustain the order is concerned.

State v Niehaus, 209-533; 228 NW 308

III APPEAL FROM FINAL JUDGMENT

Demurrer overruled. The supreme court has no jurisdiction to determine an appeal from an order overruling a demurrer to an indictment.

State v Doty, 109-453; 80 NW 505

Demurrer sustained. A ruling sustaining a demurrer to an indictment on the ground that it contained matter which was a legal defense or bar to the prosecution and directing the discharge of the defendant and the release of his bondsmen is in legal effect a final judgment.

State v Fields, 106-406; 76 NW 802

Order sustaining demurrer to indictment as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under §13995, C., '39. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

IV TIME OF APPEAL

Abstract—filing—unallowable extension of time. An extension of time in which to file abstract on appeal in a criminal case may not be granted after the statutory time of 120 days for such filing has wholly expired.

State v Van Andel, 222-932; 270 NW 420

Circumventing statute—"record" defined—criminal cases. An appellant who allows the time for filing his abstract to expire may not circumvent the statute by filing what he denominates "motion to submit case on transcript of evidence and exhibits as a part of clerk's transcript", on the theory that §14010, C., '35, provides therefor. The word "record" in that section means only the record before the appellate court and not the entire evidence in the trial court.

State v Johns, 224-487; 275 NW 559

IV TIME OF APPEAL—concluded

Clerk's transcript submission—criminal—abstract—time limit. To avoid a submission on the clerk's short transcript, a criminal appellant who elects to present his case on printed abstract, brief, and argument must serve his notice under Rule 32 and file his abstract within the statutory time of 120 days from the giving of notice of appeal. Setting aside a submission is a matter of grace, not of right.

State v Johns, 224-487; 275 NW 559

13995 Time of taking—from final judgment only.

Appeal and error—right of appeal excludes certiorari. An order of the district court refusing to enter upon a hearing of an application to compel the county attorney to file and enter upon the appearance docket indictments alleged to have been returned against the applicant, is appealable, and therefore certiorari will not lie.

Hoskins v Carter, 212-265; 232 NW 411

Order sustaining demurrer to indictment as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under this section. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

13997 Taking and perfecting.

Service of notice. Service of notice of an appeal to the supreme court upon the clerk of the district court is necessary to give the supreme court jurisdiction of the cause, and in the absence of an affirmative showing of such service in the record, a case will be dismissed by the supreme court, notwithstanding an appearance of the parties to the merits without objection to the omission as to such service.

State v Rogers, 71-753; 32 NW 7
State v Clossner, 84-401; 51 NW 16

13998 Duty of clerk when appeal is taken.

Abstract and argument—failure to file in time. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstract by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

14000 Transcript at expense of county.

Ability to pay. Where one criminal defendant had considerable property in another state, and his co-defendant stated that he did not intend to press his appeal, a transcript of the record at public expense was properly refused.

State v Dewey, 155-469; 136 NW 533

Justifiable refusal. Refusal of the court, on appeal, in a criminal cause, to order a transcript of the evidence for the defendant at the expense of the county, may find justification in the fact that the defendant has voluntarily rendered himself financially unable to pay for said transcript.

State v Horton, 223-132; 272 NW 527

Transcript at expense of county. The statutory requirement that in criminal cases an impecunious defendant may, on appeal, have a transcript of the record at the expense of the county has no application to an appeal by a defendant in an equitable action to revoke his professional license.

State v Knight, 204-819; 216 NW 104

14001 Appeal by state—effect.

State's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

14002 Appeal by defendant—effect.

Freedom pending abortive appeal as consideration for bail. Cash deposited as bail pending an appeal is forfeitable for the nonappearance of the accused even tho the appeal, because of improper notice, was abortive and was dismissed, when the accused by reason of said bail secured his unrestricted freedom pending the attempted appeal.

State v Friend, 212-136; 236 NW 20

14003 Bail—proceedings when given.

Immateriality of receipt under issues. On the issue whether defendant had contracted to indemnify plaintiff against liability as surety on an appeal bond in a criminal case, and whether defendant had received funds from the accused with which to perform such indemnity contract, evidence is wholly inadmissible that defendant had received funds from the father or brother of the accused for a purpose wholly foreign to said indemnity contract.

State v Cordaro, 211-224; 233 NW 51

14004 Title of case—how docketed.

Abstract and argument—failure to file in time. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstract by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

14007 Assignment of error.

Additional assignment on rehearing. An appellant must, on rehearing, stand on the errors specified by him on the original submission.

State v Lozier, 200-652; 204 NW 256

Appellant's duty to submit brief. In appeal from conviction for illegally transporting intoxicating liquor, where case was submitted only on transcript of record and printed abstract, amendment, and denial, defendant had further duty to submit brief and argument, since court sits to correct errors of law, and the precise complaint must be substantially pointed out by appellant.

State v Korbel, 226-676; 284 NW 458

Charitable construction. The appellate court, on appeals in grave criminal cases, is inclined to tolerate imperfect and unskillful assignments of error which would not be tolerated in civil cases.

State v Ingram, 219-501; 258 NW 186

Failure to present proposition for reversal —effect. The point or proposition that a magistrate had no legal right to proceed to the condemnation of liquors seized on a search warrant because he delayed such proceeding until after the lapse of 48 hours after the return on the warrant, will not be reviewed on appeal when such point or proposition is not, on appeal, set forth as a reason for reversal or mentioned in the briefs.

State v Bruns, 211-826; 232 NW 684

Fatal indefiniteness. An assignment of error to the effect that the court erred (1) in giving a certain instruction, or (2) in overruling motion for new trial, is so fatally indefinite as to present no question on appeal.

State v Campbell, 213-677; 239 NW 715

Fatal generality. An assignment of error which, in effect, invites the court to search for errors will be wholly disregarded.

State v Terry, 207-916; 223 NW 870

Fatal indefiniteness. An assignment of error which simply asserts that the court erred in giving an instruction is fatally indefinite.

State v White, 205-373; 217 NW 871
State v Cordaro, 206-347; 218 NW 477
State v Dillard, 207-831; 221 NW 817
State v Perkins, 208-1394; 227 NW 417

Fatal insufficiency. An assertion on appeal in a criminal prosecution that the court erred in refusing to give an instruction, which may be found on a certain page of the abstract, is fatally insufficient. The refused instruction should be literally set forth in connection with the assignment.

State v Murray, 222-925; 270 NW 355

Insufficiency overlooked. Insufficiency of an assignment of error will not necessarily be insisted on in a grave criminal charge on appeal when the court can discover the alleged error intended to be pointed out.

State v Clay, 222-1142; 271 NW 212

Particularity required. If procedure in a criminal case violates a constitutional provision, the complainant must specifically set forth wherein or in what manner said provision has been violated.

State v Hawks, 213-698; 239 NW 553

14009 Rules of procedure.

Abstracts. See under §14010

Amendment of abstract on rehearing—non-applicability of rule. The rule that an abstract cannot be amended after a rehearing has been granted has no application to a case where the court wholly withdraws an opinion, sets aside the former submission, and orders the appeal resubmitted.

State v Henderson, 215-276; 243 NW 289

Assignment of errors—additional assignment on rehearing. An appellant must, on rehearing, stand on the errors specified by him on the original submission.

State v Lozier, 200-652; 204 NW 256

Clerk's transcript submission — abstract — time limit. To avoid a submission on the clerk's short transcript, a criminal appellant who elects to present his case on printed abstract, brief, and argument must serve his notice under Rule 32 and file his abstract within the statutory time of 120 days from the giving of notice of appeal. Setting aside a submission is a matter of grace, not of right.

State v Johns, 224-487; 275 NW 559

Death of appellant. An appeal in a criminal cause will be dismissed by the court on its own

motion when it appears that the appellant has died pending the appeal.

State v Catron, 207-318; 222 NW 843

Failure to file brief—abandonment presumed. Appellant has duty to file brief and argument pointing out errors at law relied on for reversal, and failure so to file will be presumed an abandonment of the appeal.

State v Korbel, 226-676; 284 NW 456

Nonrecord proceedings—improper showing. A certificate or written statement by the clerk of the district court is incompetent to show that the trial court remained in session more than three days after a verdict of guilty was rendered.

State v Raney, 208-1238; 226 NW 916

Unargued assignment of error. Unargued assignments of error will be deemed waived.

State v Derry, 202-352; 209 NW 514

14010 Decision of supreme court.

ANALYSIS

I IN GENERAL
II ERROR WITHOUT PREJUDICE
III REGULARITY BELOW PRESUMED
IV GROUNDS FOR REVERSAL
V RESERVATION OF GROUNDS
VI THE RECORD
VII PRINTED ABSTRACTS
VIII DECISION ON APPEAL
(a) IN GENERAL
(b) VERDICT CONTRARY TO EVIDENCE
(c) EXCESSIVE SENTENCE
1 In General
2 Sentence Reduced
3 Sentence Not Reduced

Abstracts in civil cases. See under §§12845–12847
Procedendo. See under §14016
Supreme court—arguments—decisions. See also §12871
Unsupported verdicts. See under §13944

I IN GENERAL

Appeal and error—no judgment on assumptions. Assumptions as basis of judgment in criminal case cannot be accepted by the supreme court.

State v Weston, 225-1377; 282 NW 774

Abstract and argument—failure to file in time—duty of court. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstract by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

Belated filing of abstract—review on transcript and argument. Where defendant failed to comply with Rule 32 and §12847, C., '39, requiring that abstract be filed within 120 days after perfecting appeal, but did file brief and argument within time fixed by said rule, held that only brief and argument would be considered, and that under §14010, C., '39, it was imperative duty of supreme court to review the record presented by clerk's transcript even tho the defendant had no right to have the abstract considered.

State v Dunley, 227-1085; 290 NW 41

Desertion of child—proof of paternity—reasonable doubt rule applicable. In a prosecution for child desertion, a claim of nonaccess creating a conflict in the evidence as to the paternity of the child requires the state to prove paternity beyond a reasonable doubt and submission of the question to the jury.

State v Heath, 224-483; 276 NW 35

Duplicity. Duplicity in an indictment cannot be first urged on appeal.

State v Callahan, 96-304; 65 NW 150

Estoppel to ask review. After the court has received defendant's testimony on a tenable theory, defendant may not complain of the striking out of the testimony when defendant insists for its retention solely on an untenable theory.

State v Buck, 205-1028; 219 NW 17

Instructions—failure to except. Failure to take and preserve exceptions to instructions in criminal cases in the manner and form provided by statute precludes review on appeal, irrespective of this section, C., '31.

State v Griffin, 218-1301; 254 NW 841

Intoxication as defense—burden of proof—instruction. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent, and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Questions of fact. The findings of fact by the jury in criminal cases, on fairly supporting testimony, are conclusive on appeal.

State v Kress, 204-828; 216 NW 31

Statute not construed to aid lawbreakers. Statute providing that the supreme court shall disregard technical immaterial errors is not to be construed to provide a means of allowing lawbreakers to escape.

State v Albertson, 227-302; 288 NW 64

Sufficiency of evidence of guilt. The appellate court will not substitute its judgment as to the weight of substantial and sufficient evidence of guilt.

State v Manly, 211-1043; 233 NW 110

Variance. An indictment charging the obtaining of money by false pretenses is properly supported by evidence that the accused obtained a check for the amount of money in question and later personally obtained the money by cashing the check.

State v Detloff, 201-159; 205 NW 534

Demurrer—function—whether offense comes within statute. On appeal from judgment overruling a defendant's demurrer to indictment, the sole duty of the supreme court is to determine whether the offense with which the defendant is charged comes within the provisions of the statute under which he is charged, without regard to whether such or similar offenses may, or may not, come within any other criminal statute.

State v Oge, 227-1094; 290 NW 1

Withdrawal of opinion — jurisdiction. The supreme court has jurisdiction, in a criminal case, to wholly withdraw a reversing opinion and to order a resubmission of the appeal, provided procedendo has not issued to the lower court, and provided, if procedendo has not issued, the lower court has not assumed jurisdiction of the case by redocketing it.

State v Henderson, 215-276; 243 NW 289

II ERROR WITHOUT PREJUDICE

Action favorable to accused. In a prosecution for fraudulent banking, the action of the court in withdrawing that part of the indictment which charges an "intent to receive a financial benefit" constitutes no error of which the accused may complain.

State v Boysen, 214-46; 238 NW 581

Admission of evidence. The reception of admissions of guilt which were possibly nonvoluntary will not be deemed prejudicial when a voluntary, written confession of guilt containing the same admissions is subsequently received.

State v Hammond, 217-227; 251 NW 95

Circumstantial evidence—refusal to instruct. A refusal of the court to instruct that the state's case rests solely on circumstantial evidence, even tho such is the record, is erroneous, but not necessarily reversible error.

State v Glendening, 205-1043; 218 NW 939

Continuance—harmless error. The overruling of defendant's motion for a continuance, to enable defendant to take the deposition of an absent witness, must, if erroneous, be deemed harmless when defendant did secure said deposition prior to the trial.

State v Papst, 221-770; 266 NW 498

Declarations of deceased—harmless error. Record reviewed relative to the admission of declarations of a deceased, alleged to have been part of the res gestae or dying declarations, and held to reveal no prejudicial error.

State v Johnston, 221-933; 267 NW 698

Curing harmless error. Error, if any, in receiving in evidence a statement (part of a purported dying declaration) is cured by immediately striking the statement from the record with admonition to the jury to disregard it; especially when substantially the same statement is properly in the record as part of the res gestae.

State v Woodmansee, 212-596; 233 NW 725

Defects rendered immaterial by verdict. Defects in an indictment for murder become immaterial when manslaughter is properly charged and the accused is convicted of the latter offense.

State v Harness, 214-160; 241 NW 645

Error against state. Defendant in a prosecution for larceny may not predicate error on an unanswered question material to the state's case.

State v Philpott, 222-1334; 271 NW 617

Errors favorable to accused. In a prosecution for larceny from a building in the nighttime, failure to define the included offense of larceny from a building in the daytime, is inconsequential, the punishment for said latter offense being in excess of that of which the accused was convicted—larceny.

State v Endorf, 219-1321; 260 NW 678

Defendant's appeal — technicalities disregarded—judgment rendered as law demands. On an appeal from a judgment entered on a plea of guilty, which is made subject to the exception to the ruling overruling defendant's demurrer to indictment, the supreme court is, by statute, required to examine the record without regard to technical errors or defects which do not affect substantial rights of the parties, and render such judgment on the record as the law demands.

State v Oge, 227-1094; 290 NW 1

Errors not affecting results. It is wrong for courts to reverse criminal cases for technical defects in instructions, or technical errors in the trial which do not affect the result.

State v Roberts, 222-117; 268 NW 27

Estoppel to allege error. A defendant may not predicate error on the reception of evidence of extraneous crimes claimed to have been committed by him when he interposes no objection at the time the evidence is offered, and when he later avails himself of the evidence under the claim that it tends to show his claimed insanity.

State v Mullenix, 212-1043; 237 NW 483

II ERROR WITHOUT PREJUDICE—continued

Exclusion of nonexplanatory question — prejudice presumed. The erroneous refusal of the court, in a prosecution for assault to rape, to permit a witness, proffered by the defendant, to answer a question whether the witness knew the general reputation of the prosecutrix as to truth and veracity in the community where she lived, cannot be deemed harmless error on the ground that the question did not reveal whether the witness would answer "yes" or "no", when, in connection with the proffer of the witness, defendant offered to show that said prosecutrix was "wholly unreliable in her word and statements".

State v Teager, 222-392; 269 NW 348

Failure to send exhibit to jury room—review. The fact that a duly introduced exhibit in a criminal case was not given to the jury when it first retired, but was sent to the jury some hours before the verdict was returned, reveals no prejudicial error, especially when the contents of the exhibit were fully revealed to the jury by both parties during the arguments.

State v Twine, 211-450; 233 NW 476

Pistols not offered in evidence taken to jury room. In prosecution for carrying concealed weapons, permitting jury to take pistols, not technically offered in evidence, to jury room held not prejudicial, where pistols were before jury, frequently referred to in evidence, and sent to jury room with knowledge of defendant's counsel and without his objection.

State v Busing, (NOR); 251 NW 620

Harmless error. The conclusion of a witness as to the size of a regulatory speed sign may be entirely harmless in view of other testimony as to the size of said sign.

State v Thomlinson, 209-555; 228 NW 80

Harmless error. The reception of evidence wholly harmless to the accused, constitutes no ground for reversal.

State v Fador, 222-134; 268 NW 625

Harmless error. An accused may not predicate error on the reception of evidence that his co-indictee (not on trial) "had been tried."

State v Graham, 203-532; 211 NW 244

Harmless error. On the issue of false pretenses as to the amount of the unsecured indebtedness of the accused, the reception in evidence of promissory notes of the accused which did not evidence unsecured indebtedness is harmless when the falsity of the pretenses alleged is shown by other uncontradicted evidence.

State v Detloff, 201-159; 205 NW 534

Harmless error. Error (if it be error) in permitting a witness to testify that he had learned a certain fact bearing solely on defendant's guilt becomes harmless when the evidence shows that defendant's admission of guilt embraced a recognition of the existence of such fact.

State v Cordaro, 206-347; 218 NW 477

Harmless error. Error may not be predicated on the reception of immaterial, nonprejudicial testimony.

State v Mullenix, 212-1043; 237 NW 483

Hearsay testimony — reception — inviting error. Defendant who, on cross-examination of the state's witness, first enters the forbidden field of hearsay testimony on a certain point, is not in an advantageous position to object when the state, on redirect, follows into the same field of inquiry, especially when the testimony erroneously received is not inherently prejudicial and is practically that which was brought out by defendant on cross-examination.

State v Philpott, 222-1334; 271 NW 617

Immaterial but harmless testimony. Error may not be predicated on immaterial but quite harmless testimony relative to the attitude of a deceased toward women.

State v Clay, 222-1142; 271 NW 212

Immaterial but incidental testimony. The reception of testimony as to what a witness observed upon approaching, and while at, a place where an accident had happened, even tho having no bearing on the issue on trial, does not necessarily constitute prejudicial error.

State v Thomlinson, 209-555; 228 NW 80

Improper submission—inconsequential error. The improper submission to the jury of murder in the first degree becomes of no consequence when the accused is found guilty of murder in the second degree, and on appeal a new trial is ordered for other reasons.

State v Davis, 209-524; 228 NW 37

Improper reception — effect. The improper reception in evidence of a written notice to an accused to produce a written instrument or to submit to secondary evidence of its contents, and the possession of such notice by the jury, do not necessarily work prejudicial error.

State v Gardiner, 205-30; 215 NW 758

Included offenses—failure to submit—when not error. Under a charge of assault to murder, failure to instruct as to any included and supported offense below assault with intent to commit manslaughter does not constitute prejudicial error when the jury finds the defendant guilty as charged.

State v Smith, 215-374; 245 NW 309

Instructions—harmless omission. Objection to an instruction permitting the jury to find a verdict of guilty of receiving stolen property if the accused received the property from "some person," instead of "some other person," is too hypercritical to warrant an inference of prejudice.

State v Joy, 203-536; 211 NW 213

Instructions in re time and venue. Failure of instructions to require the jury to make any finding as to time and venue is quite harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

Misconduct of juror—statement of fact. No prejudicial error occurs from a statement by a juror during the deliberation of the jury that she knew that a certain date fell on a certain day of the week because she had personally looked it up on the calendar, when the record shows that whether the date fell on said day of the week was quite immaterial.

State v White, 205-373; 217 NW 871

Non-grand-jury witness—curing error. Any error in receiving the testimony of a witness not before the grand jury is cured by subsequently excluding such testimony and admonishing the jury to disregard it.

State v Christensen, 205-849; 216 NW 710

Non-res-gestae statement—effect. The reception of evidence under the mistaken belief that it was part of the res gestae will be deemed nonprejudicial when the jury was already in possession of competent evidence which, if believed, established every fact which could be deduced from the supposed res gestae statement.

State v Ayles, 205-1024; 219 NW 41

Nonreversible error — unsupported instruction. In a prosecution for illegal possession of intoxicating liquors, an instruction as to the statutory presumption attending an attempt, in the presence of peace officers, to destroy such liquors—as to which there was no supporting evidence—does not constitute reversible error, it appearing from the record that the defendant was, beyond question, guilty of the offense charged and, in addition, was an habitual violator of said liquor statutes.

State v Roberts, 222-117; 268 NW 27

Questions in general. The exclusion of a question whether the county attorney had, on a certain occasion, attempted to talk with a witness for an accused is quite harmless.

State v Steele, 209-550; 228 NW 75

Pistols not offered in evidence taken to jury room. In prosecution for carrying concealed weapons, permitting jury to take pistols, not technically offered in evidence, to jury room held not prejudicial, where pistols were before jury, frequently referred to in evidence, and sent to jury room with knowledge of defendant's counsel and without his objection.

State v Busing, (NOR); 251 NW 620

Rape—divorced wife's testimony as to venereal disease. In a rape prosecution, an unsuccessful attempt to introduce objectionable testimony relative to defendant's affliction with venereal disease, during marriage, by asking divorced wife if she had observed his condition relative to venereal disease, and if she had testified in her divorce action that she had received venereal disease from him, held nonprejudicial error.

State v Donovan, (NOR); 263 NW 516

Repetition of testimony. On a trial for murder, the reception in evidence of a statement signed by defendant, and explanatory of the shooting in question, is quite unobjectionable and harmless when the statement is but a repetition of the testimony of the defendant on the trial.

State v Harness, 214-160; 241 NW 645

Trial—harmless error—exclusion of inconsequential evidence. The exclusion of testimony tending to show that the private prosecutor of a charge of crime had deliberately destroyed or made away with certain evidence does not constitute error when it appears that said prosecutor admitted the existence of every fact which the excluded evidence would establish.

State v Smith, 207-1345; 224 NW 594

Wife as witness against husband. The act of the state in calling a woman as a witness against the defendant (who was accused of a felonious assault on a third party) does not constitute reversible error when a preliminary examination, on prompt objection, reveals the fact that the witness is the common-law wife of the defendant, and when the witness was thereupon promptly excluded.

State v Smith, 215-374; 245 NW 309

III REGULARITY BELOW PRESUMED

No judgment on assumptions. Assumptions as basis of judgment in criminal case cannot be accepted by the supreme court.

State v Weston, 225-1377; 282 NW 774

Instructions—presumption. Presumptively, as against appellee, an instruction has support in testimony not abstracted to the appellate court.

State v Metcalfe, 203-155; 212 NW 382

IV GROUNDS FOR REVERSAL

Charging offense under nonexistent statute. Conviction for possession of fish of illegal length, under information charging violation of §208 of the conservation laws of the 47th GA, cannot be sustained when no such section exists even tho defendant makes no objection at any stage of the proceedings.

State v Albertson, 227-302; 288 NW 64

Excluded testimony otherwise received. Parties charged with conspiracy may not predicate error on the exclusion of documentary evidence tending to show the lawfulness of their purposes when the essential facts revealed in the excluded evidence are otherwise shown in their testimony.

State v Moore, 217-872; 251 NW 737

IV GROUNDS FOR REVERSAL—concluded

Extortion—failure to keep separate. Under a charge of "malicious threats to extort money", the accused cannot be properly convicted of "malicious threats to compel a person to do an act against his will", (said offenses being separate and distinct tho provided for in the same section) and instructions which infer the contrary are erroneous.

State v Essex, 217-157; 250 NW 895

Failure to present proposition for reversal—effect. The point or proposition that a magistrate had no legal right to proceed to the condemnation of liquors seized on a search warrant because he delayed such proceeding until after the lapse of 48 hours after the return on the warrant will not be reviewed on appeal when such point or proposition is not, on appeal, set forth as a reason for reversal or mentioned in the briefs.

State v Bruns, 211-826; 232 NW 684

Hypothetical questions not based on evidence. In a prosecution for homicide where it was shown that the deceased was found with a fractured neck, with no marks on his neck or body nor any evidence of a quarrel or struggle, after he had been left alone for only about a minute and a half with the defendant who was a friend of about the same size and weight, it was reversible error to allow a physician to demonstrate a strangle hold, and to answer a hypothetical question, not based on evidence, that force could be applied from the rear so as to break a man's neck.

State v Hillman, 226-932; 285 NW 176

Immaterial cross-examination. Error may not be predicated on the cross-examination of an accused on an immaterial and apparently inconsequential matter.

State v Graham, 203-532; 211 NW 244

Reception of evidence—competency. The reception in evidence of an exhibit purporting to show the questions put to an accused in a homicide case very shortly after the occurrence in question and the answers of the accused to such questions does not constitute reversible error when it appears that, prior to the reception of the exhibit, the witness had fully testified, as of her own knowledge, to all the facts shown by the exhibit.

State v Maharras, 208-127; 224 NW 537

V RESERVATION OF GROUNDS

Discussion. See 22 ILR 609—Trial technique

Duplicity—waiver. The claim that an indictment or trial information charges more than one offense will be disregarded when raised for the first time on appeal.

State v Voss, 201-16; 206 NW 292

Trial—effect on unruled motion. Defendant in a criminal proceeding waives a motion filed by him by going to trial without demanding a ruling on said motion.

State v Wilson, 222-572; 269 NW 205

Failure to except to improper argument—effect. Failure to except to improper argument either at the time of the argument or in motion for new trial precludes review on appeal.

State v Henderson, 212-144; 232 NW 172

Failure to object. The admissibility of testimony will not be reviewed on appeal when no objection was interposed in the trial court.

State v Davis, 212-582; 234 NW 858

Form of indictment—failure to question. Failure in the trial court to question the form of the indictment precludes the presentation of such question on appeal.

State v Woodmansee, 212-596; 233 NW 725

Habitual criminals—unallowable former convictions—proper presentation. When an indictment charges a complete offense, and is, therefore, not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Inadequate presentation in trial court. The proposition that the court declined to permit further examination of a juror after a challenge had been overruled is not presented to the trial court by the complainant's dictating into the record matter upon which the trial court cannot make a ruling.

State v Harding, 205-853; 216 NW 756

Indictment for nonindictable offense. A prosecution may not be maintained under an indictment which simply charges a nonindictable offense, and such contention may be presented for the first time on appeal.

State v Wyatt, 207-319; 222 NW 866

Jurisdictional question. The point that the trial court had no jurisdiction over an indictment because the indictment simply charged a nonindictable offense may be raised for the first time on appeal.

State v Wyatt, 207-322; 222 NW 867

Objectionable answer—waiver. Failure to move to strike an objectionable answer to a proper question waives the vice contained in the answer.

State v Gillman, 202-428; 210 NW 435

Estoppel to allege error. A defendant may not predicate error on the reception of evidence of extraneous crimes claimed to have been committed by him when he interposes no objection at the time the evidence is offered, and when he later avails himself of the evidence under the claim that it tends to show his claimed insanity.

State v Mullenix, 212-1043; 237 NW 483

Objections first presented on appeal. Alleged error in receiving in evidence, before an accused became a witness, a statement voluntarily signed by an accused wherein he stated that he had theretofore served a term in the penitentiary, will not be reviewed when first presented on appeal; especially when the objectionable statement had been made by defendant's counsel to the jury during the opening statements, and later confirmed by the testimony of the defendant himself.

State v Woodmansee, 212-596; 233 NW 725

Objections to evidence. Objections to evidence must be made when it is offered, not for the first time on appeal.

State v Harrington, 220-1116; 264 NW 24

Review—scope and extent—waiver. An accused may not, for the first time on appeal, present the objection that the indictment pleads a former conviction which is legally unallowable.

State v McGee, 207-334; 221 NW 556

VI THE RECORD

Certification of transcript. The original transcript of the evidence made by the reporter cannot be considered on appeal unless it is identified as being the evidence in the case by a certificate of the clerk of the court below.

State v Tower, 96-101; 64 NW 764

Circumventing statute—"record" defined. An appellant who allows the time for filing his abstract to expire may not circumvent the statute by filing what he denominates, "Motion to submit case on transcript of evidence and exhibits as a part of clerk's transcript" on the theory that this section provides therefor. The word "record" in this section means only the record before the appellate court and not the entire evidence in the trial court.

State v Johns, 224-487; 275 NW 559

Evidence not identified. The only way oral evidence introduced on the trial of a cause can be preserved and identified, for the purpose of an appeal to the supreme court, is by a bill of exceptions, signed by the trial judge; and certain alleged evidence in the case cannot be considered, unless so identified.

State v Hemrick, 62-414; 17 NW 594

Fatally defective record. The appellate court cannot consider errors assigned on exhibits which are not embraced in the appellate record.

State v Wall, 218-171; 254 NW 71

Failure to file brief—abandonment presumed. Appellant has duty to file brief and argument pointing out errors at law relied on for reversal, and failure so to file will be presumed an abandonment of the appeal.

State v Korbel, 226-676; 284 NW 458

Misconduct in argument—necessary record. An assignment of misconduct of the county attorney in argument will not be considered, in the absence on appeal of such argument.

State v Peacock, 201-462; 205 NW 738

Misconduct of county attorney. Complaint of the conduct of the county attorney in the trial will be disregarded, in the absence of a definite record relating thereto.

State v Feldman, 201-1089; 202 NW 90

VII PRINTED ABSTRACTS

Absence of abstract—effect. The appellate court cannot consider appellant's statement of fact in a criminal case in the absence of a certified transcript of the evidence or of an abstract thereof.

State v Soeder, 216-815; 249 NW 412

Abstract and argument — filing — requirements. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstract by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

Belated filing of abstract—review on transcript and argument. Where defendant failed to comply with Rule 32 and §12847, C., '39, requiring that abstract be filed within 120 days after perfecting appeal, but did file brief and argument within time fixed by said rule, held that only brief and argument would be considered, and that under §14010, C., '39, it was imperative duty of supreme court to review the record presented by clerk's transcript even tho the defendant had no right to have the abstract considered.

State v Dunley, 227-1085; 290 NW 41

Abstract of evidence. An abstract of the evidence presented on the first appeal will not be construed as the abstract on the second appeal, tho the evidence is the same.

State v Wolf, 118-564; 92 NW 673

Fatally defective record. The appellate court cannot consider errors assigned on exhibits which are not embraced in the appellate record.

State v Wall, 218-171; 254 NW 71

Review of instructions. Rulings upon instructions requested and refused, purporting to be predicated upon the evidence, will not be reviewed where the evidence is omitted from

VII PRINTED ABSTRACTS—concluded

the abstract, as their relevancy to the evidence is not made to appear.

State v Ayers, 163-631; 145 NW 276

Abstract—filing—unallowable extension of time. An extension of time in which to file abstract on appeal in a criminal case may not be granted after the statutory time of 120 days for such filing has wholly expired.

State v Van Andel, 222-932; 270 NW 420

VIII DECISION ON APPEAL

(a) IN GENERAL

Bill of exceptions. Failure to file a bill of exceptions leaves the supreme court no avenue of reversal on the evidence, but it must affirm.

State v Taylor, 53-759; 6 NW 39
State v Omeig, 54-761; 7 NW 124
State v Brewer, 70-384; 30 NW 646
State v Philpott, 222-1334; 271 NW 617

Conclusiveness of supported verdict. A conviction of rape on supporting testimony and on ample corroboration is conclusive on the court.

State v Steele, 209-550; 228 NW 75

Correction of sentence. Judgments for imprisonment for nonpayment of fine and cost must specify the definite term of imprisonment, but if this is omitted, such omission will be corrected on appeal.

State v McCoy, 196-278; 194 NW 265

Counsel fees not determinable on appeal. The supreme court will not, on appeal, fix attorney fees for defending a pauper prisoner.

State v Froah, 220-840; 263 NW 525

Disputed question of fact. The appellate court will not, in a criminal case, disturb a verdict based on a fair, disputed question of fact.

State v Derry, 202-352; 209 NW 514

Evidence — sufficiency — reasonable doubt. The weight and sufficiency of the evidence being for the jury, the supreme court, reviewing a case on the evidence, will not consider the question of reasonable doubt.

State v De Kraai, 224-464; 276 NW 11

Remand for proper sentence. Record held sufficient to sustain a conviction of larceny, but insufficient to sustain a finding of value of the stolen property in excess of $20. The cause is therefore reversed and remanded with direction to the trial court to re-sentence the accused.

State v Morrison, 221-3; 265 NW 355

When remand for new trial not ordered. Irrespective of the sufficiency of the evidence at the time when the state rests, a remand, on appeal, will not be ordered when the evidence at the close of the entire case presents a jury question on the issue of guilt.

State v Sharpshair, 215-399; 245 NW 350

(b) VERDICT CONTRARY TO EVIDENCE

Unlawful transportation—sufficiency of evidence. Examination of record on appeal from conviction for unlawful transportation of intoxicating liquor, as required by statute, disclosed sufficient evidence to sustain the conviction.

State v Korbel, 226-676; 284 NW 458

Unsustained verdict. Judgments of conviction in criminal cases will be set aside when they are clearly against the weight of the evidence and the instructions of the court.

State v Klein, 218-1060; 256 NW 741

(c) EXCESSIVE SENTENCE

1 In General

Nonsubstantial reasons. A sentence will not be disturbed in absence of a substantial reason therefor.

State v Bamsey, 208-796; 223 NW 873

Excessiveness — material considerations. Whether a sentence is excessive may depend to an extent on the recognized frequency of the offense in question and on the fact that the legislature has quite recently increased the punishment.

State v Hester, 205-1047; 218 NW 616

Indeterminate sentence as excessive. The appellate court may not say that an indeterminate sentence is excessive when a sentence to the penitentiary was proper under the record.

State v Giles, 200-1232; 206 NW 133; 42 ALR 1496; 29 NCCA 578
State v Overbay, 201-758; 206 NW 634
State v Hammond, 217-227; 251 NW 95

Indeterminate sentence. The plea of excessive sentence is not available to one who is sentenced under the indeterminate sentence law.

State v Christofferson, 215-1282; 247 NW 819

Law-imposed sentence. A sentence which the indeterminate sentence act ipso facto imposes as the result of a conviction may not be deemed excessive when formally imposed by the court.

State v Bird, 207-212; 220 NW 110

Reduction of sentence—record required. A sentence for violating the intoxicating liquor statutes will not, on appeal, be reduced, in the absence of a record which shows a substantial reason for such reduction.

State v Nolta, 205-595; 218 NW 144

Sentence—excessiveness. It is not for the judicial department to relieve an accused of a sentence because of the state of his health.

State v Van Klaveren, 208-867; 226 NW 81

Violators of injunction—maximum penalty excessive. Sentences of six months in jail and a $500 fine each, the maximum permitted

by statute, when imposed against labor union officials for violating an injunction against the union, were excessive in view of the circumstances.

Carey v Dist. Court, 226-717; 285 NW 236

2 Sentence Reduced

Operation while intoxicated. Sentence of one year in the penitentiary, for operating an automobile while intoxicated, reviewed, held excessive, and reduced to a fine of $1,000, and, in default of payment, to imprisonment in the county jail for 300 days.

State v Kendall, 200-483; 203 NW 806

3 Sentence Not Reduced

Sentence not reduced. In the absence of any mitigating circumstances, sentence imposed by the trial court for the unlawful sale of intoxicating liquors will not be disturbed on appeal.

State v Lammers, 199-820; 202 NW 504

14012 Decisions in appeals by state.

Appeal by state — sufficiency of evidence. An appeal by the state from an order directing an acquittal in a criminal case will not be reviewed when nothing is involved but the question of the sufficiency of the evidence to sustain a conviction.

State v Niehaus, 209-533; 228 NW 308
State v Little, 210-371; 228 NW 67
State v Friend, 213-544; 239 NW 132
State v Tibbetts, 213-552; 239 NW 133

State's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

14013 Reversal—effect.

Atty. Gen. Opinion. See AG Op Feb. 24, '39

Remand with directions. When it appears that certain rulings of a material nature have been made by the judge in vacation without jurisdiction so to rule in vacation, the cause will be remanded with directions to the trial court to proceed in term time to a ruling on said matters.

State v Rime, 209-864; 226 NW 925

Reversal or jury disagreement—retrial at same term unnecessary. Tho reversal of a judgment against a criminal defendant is an order for a new trial and a jury disagreement a cause for retrial, he need not be retried at the same term of court.

Ferguson v Bechly, 224-1049; 277 NW 755

14015 Opinion of supreme court.

Withdrawal of opinion—jurisdiction. The supreme court has jurisdiction, in a criminal case, to wholly withdraw a reversing opinion and to order a resubmission of the appeal, provided procedendo has not issued to the lower court, and provided, if procedendo has not issued, the lower court has not assumed jurisdiction of the case by redocketing it.

State v Henderson, 215-276; 243 NW 289

14016 Decision recorded and transmitted.

Procedendo—competency as evidence. The supreme court, by virtue of its constitutional powers to issue writs necessary to the exercise of its powers, has power to provide, without the aid of a statute for the writ of procedendo, in order to furnish the trial court with competent evidence of its final decision and of its release of jurisdiction.

State v Banning, 205-826; 218 NW 572

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

14018 Time of imprisonment deducted.

Atty. Gen. Opinions. See '28 AG Op 315; '38 AG Op 883

CHAPTER 660

DISMISSAL OF CRIMINAL ACTIONS

14024 Delay in trial.

Discussion. See 11 ILR 81—Speedy trial

Accused in state hospital—term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.

Maher v Brown, 225-341; 280 NW 553

Continuance on defendant's application. Where indicted defendant sought and secured a continuance at first term after return of the indictment, and case was not tried until fifth term, defendant's motion to dismiss and spe-

cial appearance was properly overruled under statute which states that no continuance shall extend beyond the following three terms of court, as cases continued upon defendant's application are not subject to dismissal under these statutes.

Harris v Dist. Court, 226-606; 284 NW 451

Delay by defendant—certiorari to require dismissal denied. One convicted of larceny, who, on appeal is granted a reversal, and who, then, each time thereafter as his case is assigned for retrial, delays trial on the merits by dilatory moves such as request for rehearing and change of venue, may not complain that he has been denied a speedy trial as provided by law, and certiorari will not lie to require dismissal of the indictment.

Ferguson v Bechly, 224-1049; 277 NW 755

Dismissal for delay—statute not applicable after reversal on appeal. Nothing contained in this section requires that a criminal case must be tried at the next term or any term after a reversal in the supreme court.

Ferguson v Bechly, 224-1049; 277 NW 755

Implied consent to delayed trial. A defendant who makes no request for a trial may not claim that he was denied a speedy trial.

State v Ferro, 211-910; 232 NW 127

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.

Maher v Brown, 225-341; 280 NW 553

Mandatory discharge for delay. The court, on proper motion therefor, is under mandatory duty to dismiss an indictment which, during the first term of court following its return, was, on motion for change of venue, transferred to another county, and was not there tried during the term pending when the transfer was ordered, nor during the following term—lasting two months—because of the very large assignment of equity cases and matters local to said county. And this is true tho the defendant during said delay made no demand for a trial.

Davison v Garfield, 221-424; 265 NW 645

Reversal or jury disagreement—retrial at same term unnecessary. Tho reversal of a judgment against a criminal defendant is an order for a new trial and a jury disagreement a cause for retrial, he need not be retried at the same term of court.

Ferguson v Bechly, 224-1049; 277 NW 755

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

Undue haste in trial. The action of the trial court and county attorney in bringing a criminal prosecution on for trial promptly after the alleged commission of the offense (15 days in this case) cannot be deemed prejudicially erroneous in the absence of any showing that the defendant was thereby deprived of a fair trial.

State v Berlovich, 220-1288; 263 NW 853

When court loses jurisdiction. An indictment which has neither been continued on defendant's application, nor brought to trial at the first regular term of court following its return, is, on a motion to dismiss, subject to a showing explaining and excusing the delay in trial, but the continuance of such an indictment beyond the third term following the return of the indictment, ipso facto deprives the court, after the expiration of said third term, of all jurisdiction over said indictment except to formally dismiss it.

Davison v Garfield, 219-1258; 257 NW 432; 260 NW 667

14025 Discharge on undertaking.

When court loses jurisdiction. An indictment which has neither been continued on defendant's application, nor brought to trial at the first regular term of court following its return, is, on a motion to dismiss, subject to a showing explaining and excusing the delay in trial, but the continuance of such an indictment beyond the third term following the return of the indictment, ipso facto deprives the court, after the expiration of said third term, of all jurisdiction over said indictment except to formally dismiss it.

Davison v Garfield, 219-1258; 257 NW 432; 260 NW 667

14027 Dismissal by court—effect.

Authorized dismissals. See under §13807

Acquittal—effect on subsequent overlapping charge. When the state bases an indictment for nuisance on a series of acts occurring during a specified period of time, it thereby segregates such acts from all subsequent acts, and irrevocably identifies and stamps said acts as one complete offense; and if it suffers an acquittal, it may not thereafter maintain an indictment based (1) on said segregated acts and (2) on other acts subsequent thereto; and the exclusion of said segregated acts on the trial of the last indictment will not avoid the bar resulting from the first acquittal.

State v Reinhard, 202-168; 209 NW 419

Death of defendant. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Delay in trial—continuance on defendant's application. Where indicted defendant sought and secured a continuance at first term after return of the indictment, and case was not tried until fifth term, defendant's motion to dismiss and special appearance was properly overruled under statute which states that no continuance shall extend beyond the following three terms of court, as cases continued upon defendant's application are not subject to dismissal under these statutes.

Harris v District Court, 226-606; 284 NW 451

Nolle prosequi—time to enter. A nolle prosequi may be entered (1) before the jury is impanelled, (2) while the case is before the jury, and (3) after the verdict.

State v Veterans, 223-1146; 274 NW 916; 112 ALR 383

State v Moose, 223-1146; 274 NW 918

ANNOTATIONS TO SUPREME COURT RULES

Rule 14-a1

Failure to file abstract—dismissal. Appellant's failure to file abstract is sufficient ground for dismissing appeal or regarding it as abandoned.

Leach v Bank, (NOR); 218 NW 907

Notice of appeal—service on attorneys for part of appellees—effect. When timely notice of appeal was served on attorneys for part of the appellees, the service on such attorneys was effective only as to the appellees they represented, and not effective as to other appellees represented by attorneys who received late service.

Herrold v Herrold, 226-805; 285 NW 274

Time of serving notice of appeal. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

Rule 15-a

Amended abstract stricken — filing without leave. Appellant's amended additional abstract of testimony, filed three days prior to the submission of the case, and without leave of court, may be stricken on motion.

Harrison v Hamilton County, (NOR); 284 NW 456

Motion to dismiss appeal—time for making. A motion to dismiss an appeal, because the abstract was not served upon all the appellees within 120 days after perfecting the appeal, was filed on time when filed more than 10 days before the time the case was assigned for submission, and should be sustained.

Herrold v Herrold, 226-805; 285 NW 274

Notice of appeal—service on attorneys for part of appellees—effect. When timely notice of appeal was served on attorneys for part of the appellees, the service on such attorneys was effective only as to the appellees they represented, and not effective as to other appellees represented by attorneys who received late service.

Herrold v Herrold, 226-805; 285 NW 274

Time of serving notice of appeal. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

Timely service of abstract mandatory—dismissal for noncompliance. The law requiring that service of notice of appeal and filing of the abstract be timely is mandatory, and unless complied with, the appeal will be dismissed.

Herrold v Herrold, 226-805; 285 NW 274

Rule 16

Abstract—question and answer form only in certain cases. Unless necessary for appellate review of a particular error, abstracts should not be prepared in question and answer form, but in prescribed narrative form.

Swensen v Union Life, 225-428; 280 NW 600

Dismissal—brief and argument—noncompliance with Rule 30. Where appellant's brief and argument containing 117 pages, the first 60 pages of which were rambling statement of testimony and comment thereon, nowhere containing a statement of how the case was decided in the lower court, the nature of the lawsuit being ascertainable therefrom only with difficulty, and when the brief and argument nowhere contained any statement that might be called an assignment of error, the appeal will be dismissed on motion for failure to substantially comply with Rule 30, which requires a short and clear statement of the above matters.

Ind. Sch. District v Hartwick, 226-491; 284 NW 453

Omnibus assignment—dismissal. Omnibus assignments of error coupled with a wholesale violation of other rules of the court force the court, on motion, to dismiss the appeal.

Dondore v Rohner, 224-1; 275 NW 886

Record—copying transcript—noncompliance with rule. Appellant does not comply with the court rules by practically copying the transcript, thereby including in the abstract much more than is necessary for a full understanding

of the issues. In such case the appeal may be affirmed.

Dondore v Rohner, 224-1; 275 NW 886

Shorthand reporter's transcript—when filing necessary. Statute requiring the translation of the shorthand report of a trial to be filed with clerk of district court after service of abstract on opposite party must be strictly followed. Such requirement is not antagonistic to this rule.

Goltry v Relph, 224-692; 276 NW 614
First Tr. JSL Bank v Abkes, 224-877; 278 NW 183

Rule 17

Abstracts of record—amendment—motion to strike. Appellee's abstract and denial of appellant's abstract will not be stricken from the record when appellant makes no effort to sustain his abstract by a certification of the record.

McKay v Barrick, 207-1091; 224 NW 84

Abstract—amendment—denial of correctness—certification of record. It is futile for appellant to deny the correctness of appellee's amendment to abstract unless appellant secures a certification of the record to the extent necessary to settle the dispute.

Harness v Tehel, 221-403; 263 NW 843

Abstract—contents. Abstracts in the supreme court should contain "everything material" and "omit everything else".

Brien v Davidson, 225-595; 281 NW 150

Abstract—question and answer form only in certain cases. Unless necessary for appellate review of a particular error, abstracts should not be prepared in question and answer form, but in prescribed narrative form.

Swensen v Union Life, 225-428; 280 NW 600

Amended abstract stricken—filing without leave. Appellant's amended additional abstract of testimony, filed three days prior to the submission of the case, and without leave of court, may be stricken on motion.

Harrison v Hamilton County, (NOR); 284 NW 456

Correctness of abstract denied—record certified. Appellant's motion in supreme court to strike appellee's amendment to appellant's abstract was improper, since appellee in his amendment had made a specific denial of the correctness of appellant's abstract, and the proper procedure was for appellant to have the record certified to the supreme court as provided by its rules.

Rance v Gaddis, 226-531; 284 NW 468

Record not certified — abstract considered correct. In supreme court appeal, where appellee made specific denial of correctness of appellant's abstract, and where entire questioned record is contained in appellee's amendment to appellant's abstract, the record as set out in appellee's amendment will be taken as correct upon failure of appellant to sustain his abstract by a certified record as provided by the rules of the court.

Rance v Gaddis, 226-531; 284 NW 468

Rule 18

Assignment of errors—omnibus assignment—dismissal. Omnibus assignments of error coupled with a wholesale violation of other rules of the court force the court, on motion, to dismiss the appeal.

Dondore v Rohner, 224-1; 275 NW 886

Cross-appeal not shown in abstract—not considered. Supreme court will not consider appellee's appeal from part of the lower court judgment when the abstract does not show any appeal or cross-appeal by appellee, and where appellee merely stated in its argument "from this part of the decree appellee has appealed."

Queal Lbr. Co. v McNeal, 226-637; 284 NW 482

Deficient record—presumption indulged. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

Failure to meet printed abstract requirements. A proceeding in certiorari before supreme court will be dismissed where petitioner fails to comply with order or rules requiring printed abstracts.

Eller v Hunter, (NOR); 209 NW 281

Imperfect preparation—effect. The failure of an appellant to comply substantially with the rules of the supreme court relative to the preparation and indexing of an abstract affords ample grounds for the peremptory dismissal of the appeal.

Hakes v North, 202-324; 208 NW 305

Incomplete record—instructions—presumed correct. Where the record on appeal does not contain all the instructions necessary to determine the questions raised, the supreme court must presume their correctness.

Reardon v Hermansen, 223-1207; 275 NW 6

Preservation of error necessary—insurance comment on voir dire. In a motor vehicle damage action, error may not be predicated on references to insurance in jurors' examination when no record is preserved for appeal.

McCornack v Pickerell, 225-1076; 283 NW 899

Setting out pleadings and arguments—noncompliance with rule. Unnecessarily setting out in the abstract pleadings containing arguments and conclusions is a violation of this rule.

Dondore v Rohner, 224-1; 275 NW 886

Unabbreviated abstract — penalty. A flagrant violation, in the preparation of an abstract, of the rule "to preserve everything material to the question to be decided, and to omit everything else," may be penalized by a taxation to appellant of all the cost of printing, even tho appellant is successful on appeal.

In re Higgins, 207-95; 222 NW 401

Rule 19

Belated motion to dismiss—ten-day notice. A motion to dismiss an appeal, the basis of which arose before the filing of abstract, is not timely and cannot be considered, when not served on the opposite party or attorney ten days before the morning on which causes for the district are set for hearing.

Prudential Ins. v Soloth, 225-172; 279 NW 399

Dismissal—timely motion. A motion to dismiss an appeal for want of jurisdiction is timely even tho service of the motion was not made ten days before the day assigned for the submission of the cause, when it appears that the cause was not submitted under said assignment, but was continued, and reassigned for submission at a later term, which afforded appellant much more than said ten days notice.

Piercy v Bronson, 206-589; 221 NW 193

Escheat proceeding — striking allegations. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Motion to dismiss—timeliness. A motion to dismiss served and filed in the supreme court 17 days before submission of cause was timely.

Cowles v Joelson, 226-1202; 286 NW 419

Motion to dismiss appeal—determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Motion to dismiss filed six days before hearing—not timely. In a probate proceeding on appeal, a motion to dismiss served six days before cause is set for hearing must be denied as not being timely.

In re Sheeler, 226-650; 284 NW 799

Rule 24

Record—nonappealing parties—striking argument. Arguments filed in supreme court by nonappealing parties as appellants may be stricken.

In re Schropfer, 225-576; 281 NW 139

Brief points, authorities, and arguments—requirements. Where appellant files an abstract of record and fails to serve copies of brief points, authorities, and arguments on attorneys for appellee at least 40 days before the day assigned for hearing case, appellee's motion to submit the cause on the record as it was on the date the time expired for serving copies of brief points was sustained and the cause submitted without oral argument in its regular order, and case dismissed for failure to comply with this rule.

Rabenold v Morrison, 228- ; 290 NW 60

Amendment filed when leave of court granted—effect. Where the supreme court grants leave to file an amendment to brief and argument, a motion to dismiss such amendment will be overruled.

Allbaugh v Ashby, 226-574; 284 NW 816

Reply to reply—no legal standing. A reply to a reply brief and argument has no standing and will be stricken on motion.

In re Rinard, 224-100; 275 NW 485

See Cochran v School Dist., 207-1385; 224 NW 809

Waiving first argument in equity—striking reply to reply. In an equity appeal, plaintiff appellee having the burden has the right to file the first argument, but waiving this, the arguments shall consist of the appellant's opening and appellee's reply. Appellant's reply to appellee's reply will be stricken on motion.

Utterback v Stewart, 224-1135; 277 NW 735

Rule 30

Discussion. See 9 ILB 115—Supreme court rules 53 and 55; 17 ILR 91—Assignments; 21 ILR 693—Construction

Abandonment—failure to argue alleged errors. Grounds of error alleged and relied upon for reversal, but not argued, will be deemed to be abandoned.

Lotz v United Markets, 225-1397; 283 NW 99

Abstract of record—imperative necessity. In order that an equitable action may be tried de novo on appeal, it is imperative that appellant place before the court the record made in the trial court, and do so in the manner required by the statutes and rules of the court.

Merritt v Ludwig-Wiese, 212-71; 235 NW 292

Assignment of error—absolute, mandatory requirement. The filing, by appellant, of a proper assignment of error, under this rule of the supreme court, is absolute and mandatory, and the court is not disposed to waive it in any particular.

Andreas & Son v Hempy, 221-1184; 268 NW 13

Assignment of error—departure condemned —effect. Supreme court condemns departures from this rule in preparation of arguments, but instant appeal not dismissed for such departure inasmuch as appellee not confused thereby.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Assignment of errors—fatal indefiniteness. An assignment of error which simply asserts that the court erred in overruling a 29-pointed motion is fatally lacking in definiteness. Likewise, statements or propositions of law, without any attempt to apply them to the rulings of the court.

Central Tr. Co. v City of Des Moines, 204-678; 216 NW 41

Assignment of error—ignoring rule. Justification for considering, on its merits, an appeal in certiorari proceedings, tho appellant has not assigned errors as provided by this rule, is found in the fact that the main, legal point in issue is of grave importance not only to the litigants, but to the people of the state in general, and is made perfectly clear to the appellate court by the brief points and arguments of both parties to the appeal. Especially is this true when no motion is filed to dismiss the appeal.

National Assn. v Murphy, 222-98; 269 NW 15

Assignment of errors — insufficiency. Assignment of error stating that "plaintiff should have been granted a new trial on ground of surprise occurring on the trial" does not comply with this rule.

Clare v Pearson, 227-928; 289 NW 737

Assignment of errors—mandatory requirement. In appeals from law actions, the supreme court constitutes a court for correction of errors, and without assignments of error, as required under this rule, the appeal presents nothing for review.

Clare v Pearson, 227-928; 289 NW 737

Nonassignment of error—no consideration. Form of decree, complained of in appellant's brief, will not be considered when not assigned as error.

Bredt v Franklin County, 227-1230; 290 NW 669

Omnibus assignment—dismissal. Omnibus assignments of error coupled with a wholesale violation of other rules of the court force the court, on motion, to dismiss the appeal.

Dondore v Rohner, 224-1; 275 NW 886

Omnibus assignment of error—no review. In an appeal in a law action on a promissory note, tried to the court, where all assigned errors violate this rule as being omnibus in form and supreme court, on its own initiative, could discover no errors, an affirmance and dismissal of the appeal on motion will result.

Pickett v Wray, 225-288; 280 NW 519

Omnibus assignment not permitted. Omnibus assignments of error do not comply with the rules of the supreme court.

Schultz v Schultz, 224-205; 275 NW 562

Assignment of error—reasonable construction. The purpose of supreme court rules is to facilitate review, so, when the appellee and the court have neither been confused nor inconvenienced by an allegedly omnibus assignment of errors, the court will not arbitrarily refuse to consider the appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

"Shotgun" Assignments of error. "Shotgun" assignments of error present no question for consideration on appeal.

State v Lambertti, 204-670; 215 NW 752

Assignment of error—substantial compliance with rule. While the court does not approve anything less than a strict compliance with this rule, still if assignments of error are plainly pointed out to the court in some other manner so as to constitute a substantial compliance with the rule, then the court will consider the errors relied on for reversal.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Assignment of error—substantial compliance with rule. If assignments of error are plainly pointed out in a manner constituting substantial compliance with this rule, the supreme court will not refuse to consider them.

Smith v Utilities Co., 224-151; 275 NW 158

Assignment of error — sufficiency. Judgment for plaintiff will be reversed on defendant's appeal regardless of sufficiency of defendant's assignment of error, where plaintiff having the burden to make out a case, fails to do so.

Ida Grove Sch. Dist. v Ida County, 226-1237; 286 NW 407

Assignment required on original error. Error, if any, of the court, during the trial, in

striking evidence or tendered issues cannot be reached by an assignment of error to the effect that the court erred in failing to instruct on said stricken matters. The assignment must be on the original alleged erroneous striking of said matters.

Reidy v Railway, 220-1386; 258 NW 675

Briefs—good-faith compliance with rule. When there has been a good-faith attempt to comply with a supreme court rule regulating the manner of making assignments of error in the appellant's brief, and the essential elements involved in the appeal can readily be determined, the court will not refuse to consider the assignment even tho there has not been a technical compliance in every particular.

In re Baker, 226-1071; 285 NW 641

Brief points—necessary. Brief points are necessary on appeal for each presented proposition.

Ettinger v Malcolm, 208-311; 223 NW 247

Conforming pleadings to proof—amendment not permitted. An assignment of error which stated that "the court abused its discretion when it refused to permit plaintiff to amend its amended and substituted petition to conform to the proof" is insufficient when the written contract sought to be enforced was not established by the proof; and the court's refusal to permit amendment to pleadings was not an abuse of discretion.

Clare v Pearson, 227-928; 289 NW 737

Dismissal—brief and argument. Where appellant's brief and argument containing 117 pages, the first 60 pages of which were rambling statement of testimony and comment thereon, nowhere containing a statement of how the case was decided in the lower court, the nature of the lawsuit being ascertainable therefrom only with difficulty, and when the brief and argument nowhere contained any statement that might be called an assignment of error, the appeal will be dismissed on motion for failure to substantially comply with this rule, which requires a short and clear statement of the above matters.

Ind. Sch. District v Hartwick, 226-491; 284 NW 453

Failure to file brief and argument—abandonment. An appellant is presumed to have abandoned his appeal by his failure to file brief and argument.

Deaton v Hollingshead, 225-967; 282 NW 329

Briefs—statement of facts—noncompliance with rule. Appellant's brief and argument containing as a statement of facts 27 pages of exhortation and argument is not a compliance with this rule.

Dondore v Rohner, 224-1; 275 NW 886

Essential requisites. An assignment of error presents no question upon which the court can pass unless it specifically (1) points out an action of the court, and (2) states wherein and for what reason such action was erroneous.

Dravis v Sawyer, 218-742; 254 NW 920

Failure to comply with rules of practice—motion to dismiss well grounded. On appeal to the supreme court, appellant's failure to comply with supreme court rules by omitting from his brief and argument that portion of the record referring to errors relied upon with the court's ruling thereon, and failing to point out specifically and precisely his complaints thereof, are sufficient grounds for a motion to dismiss the appeal.

Cowles v Joelson, 226-1202; 286 NW 419

Failure to comply with rules. It is a violation of the supreme court rules to make assignments of error which simply state a proposition and cite one case without further comment.

In re Baker, 226-1071; 285 NW 143

Appellant's failure to comply with rules cured by affirmance. Where a case is affirmed it is unnecessary to consider objections made by the appellee to the appellant's failure to comply with supreme court rules in making assignments of error.

Dykes v Ins. Co., 226-771; 285 NW 201

Failure to comply with rules. Assigning errors together instead of in separate divisions, failing to set out the part of the record referring to the errors, and failing to point out the complaints against the rulings of the trial court are not a compliance with the rules of the supreme court.

Younkin v Bank, 226-343; 284 NW 151

Failure to refer to lines of abstract—dismissal. Assignments of error not complying with rules of the supreme court may be dismissed on motion.

Swensen v Union Life, 225-428; 280 NW 600

Failure to point out page and line of abstract. Where alleged errors relied upon for reversal are based upon what appellant claims was shown by the proof, but nowhere is any evidence connected with these alleged errors set out, nor any reference made to the page and line of the abstract where such evidence would be found, the supreme court, following this rule, will not consider such errors on appeal.

Lotz v United Markets, 225-1397; 283 NW 99

Failure to argue assignment of error—effect. An assignment of error not argued as required by this rule will not be considered on appeal.

Roggensack v Ahlstrom, (NOR); 209 NW 429

Failure to file abstract or argument. Petitioners for writ of certiorari are presumed to have abandoned their cause, when no abstract

or argument is filed either on their behalf or on behalf of respondents.

Sentner v Dist. Court, 226-335; 284 NW 166

Improper citation of cases—effect. The citation of Iowa cases by an appellee on appeal by a reference to nonofficial reports only will be grounds for refusing him any taxation for the costs of his briefs. (Rule 30 since amended.)

Walter v Ida Grove, 203-1068; 213 NW 935

Improper presentation. Principle reaffirmed that assignments of error not presented in accordance with appellate rule will not be considered on appeal.

Hallowell v Van Zetten, 213-748; 239 NW 593

Insufficient assignment—exceptions. Errors, unassigned in compliance with this rule of the supreme court, will not be considered on appeal—a rule which has not been insisted on in a few cases wherein affirmances were entered.

Russell v Peters, 219-708; 259 NW 197

Law action in supreme court—assignment of errors necessary. In a law action tried to a jury, jurisdiction of supreme court on appeal is confined to that of a court for correction of errors and, to invoke its jurisdiction, a proper assignment of error is necessary.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Law action tried by equity procedure—errors must be assigned. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v Ins. Co., 225-293; 280 NW 521

Motion to dismiss—resistance by amending appellant's brief and argument. Appellant's resistance to a motion to dismiss, based on failure to comply with this rule, cannot be made by amendment to brief and argument by reassigning errors relied upon to conform to rule, which is the basis for motion to dismiss, nor can appellant's resistance be in the nature of a confession and avoidance, asking court's permission to file amendment to comply with this rule seven days before submission of case.

Cowles v Joelson, 226-1202; 286 NW 419

Motion sustained generally—showing necessary on appeal. On appeal from trial court's action in sustaining generally a motion for directed verdict predicated on several grounds, it is incumbent upon appellants to establish that the motion was not good upon any ground thereof before error can be predicated upon the sustaining of such motion.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Nonassignment of error—affirmance. Appellant's failure to make assignment of errors as required by this rule is grounds for affirmance.

Yale Co. v Zink, (NOR); 212 NW 119

Questions not raised in trial court—no review. Assignments of error relating to instructions not raised or passed upon by the lower court will not be considered on appeal.

Simmering v Hutt, 226-648; 284 NW 459

Record—nonappealing parties—striking argument. Arguments filed in supreme court by nonappealing parties as appellants may be stricken.

In re Schropfer, 225-576; 281 NW 139

Reference to records—insufficient. Where assignment of error fails to point out specifically and in concise language complaints against ruling of trial court, and where appellant fails to state grounds on which trial court erred on sustaining defendant's demurrer, a motion to dismiss will be sustained.

Keefe v Price, (NOR); 282 NW 309

Review de novo—irrespective of failure to file brief. An action in equity to recover a judgment against the members of an alleged partnership and to impress a trust on certain funds is triable de novo on appeal, and the supreme court will examine the record despite parties' failure to furnish brief and argument.

Maybaum v Bank, (NOR); 282 NW 370

Self-apparent error. A specie of legal charity may move the court to overlook noncompliance with this rule when the appeal record is very brief and the alleged error relied on self-apparent.

In re Finarty, 219-678; 259 NW 112

Statements of evidence—reference to abstract necessary. Under this rule, statements of evidence in appellant's brief and argument and in the reply must be referred to the page and line of the abstract where found; however, in a short record, the court may be inclined not to enforce the rule.

Mosher v Snyder, 224-896; 276 NW 582

Unargued propositions abandoned. Failure to mention in argument certain grounds for recovery is an abandonment thereof.

Valley Bank v Staves, 224-1197; 278 NW 346

Vague and general assignment of error—no review. A specification of error, that the court erred in overruling a motion to set aside a verdict and order a new trial, is too vague and general to review when the motion contained some 20 grounds.

Hawkins v Burton, 225-707; 281 NW 342

Rule 31

Cross-appeal not shown in abstract—not considered. Supreme court will not consider appellee's appeal from part of the lower court judgment when the abstract does not show any appeal or cross-appeal by appellee, and where appellee merely stated in its argument "from this part of the decree appellee has appealed".

Queal Lbr. Co. v McNeal, 226-637; 284 NW 482

Rule 32

Clerk's transcript submission — time limit. To avoid a submission on the clerk's short transcript, a criminal appellant who elects to present his case on printed abstract, brief, and argument must serve his notice under this rule and file his abstract within the statutory time of 120 days from the giving of notice of appeal. Setting aside a submission is a matter of grace, not of right.

State v Johns, 224-487; 275 NW 559

Belated filing of abstract—review on transcript and argument. Where defendant failed to comply with Rule 32 and §12847, C., '39, requiring that abstract be filed within 120 days after perfecting appeal, but did file brief and argument within time fixed by said rule, held that only brief and argument would be considered, and that under §14010, C., '39, it was imperative duty of supreme court to review the record presented by clerk's transcript even tho the defendant had no right to have the abstract considered.

State v Dunley, 227-1085; 290 NW 41

Abstract and argument—failure to file in time. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstraet by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

Criminal appellant's duty to submit brief. In appeal from conviction for illegally transporting intoxicating liquor, where case was submitted only on transcript of record and printed abstract, amendment, and denial, defendant had further duty to submit brief and argument, since court sits to correct errors of law, and the precise complaint must be substantially pointed out by appellant.

State v Korbel, 226-676; 284 NW 458

Failure to file brief — abandonment presumed. Appellant has duty to file brief and argument pointing out errors at law relied on for reversal, and failure so to file will be presumed an abandonment of the appeal.

State v Korbel, 226-676; 284 NW 458

Circumventing statute—"record" defined—criminal cases. An appellant who allows the time for filing his abstract to expire may not circumvent the statute by filing what he denominates, "Motion to submit case on transcript of evidence and exhibits as a part of clerk's transcript" on the theory that §14010, C., '35, provides therefor. The word "record" in that section means only the record before the appellate court and not the entire evidence in the trial court.

State v Johns, 224-487; 275 NW 559

Abstract—filing—unallowable extension of time. An extension of time in which to file abstract on appeal in a criminal case may not be granted after the statutory time of 120 days for such filing has wholly expired.

State v Van Andel, 222-932; 270 NW 420

Rule 34

Additional abstract—failure to number lines—when stricken. An "additional abstract" containing a single short exhibit will not be stricken on appeal for failure to comply with rule as to numbering lines since reason for rule is to enable court to readily find testimony, and when the additional abstract is not essential to the decision of the case.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

Rule 37

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

Rule 45

Notice of appeal—appellant not adverse party. When an administratrix appeals, in her official capacity, from rulings on her final report, the fact that the court taxed to her, individually, the court costs occasioned by the hearing on the report, creates no necessity for the appellant to cause said notice of appeal to be served upon herself as an individual, she not being, in fact or in law, a party, individually, to said final report and hearing thereon.

In re Paulson, 221-706; 266 NW 563

TABLE OF CORRESPONDING SECTIONS

From the 1935 Code to the 1939 Code

This abridged table of corresponding sections shows the sections in the 1935 Code which carried a combination number-letter citation and their respective equivalents in the 1939 Code carrying a decimal number. In this condensed form from the 1939 Code it is carried here for convenience in locating, in the 1939 Code, sections cited in opinions by a number-letter citation.

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130-a3	130.2
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1921-f52	1921.052
1921-f53	1921.053
1921-f54	1921.054
1921-f55	1921.055
1921-f56	1921.056
1921-f57	1921.057
1921-f58	1921.058
1921-f59	1921.059
1921-f60	1921.060
1921-f61	1921.061
1921-f62	1921.062
1921-f63	1921 063
1921-f64	1921.064
1921-f65	1921.065
1921-f66	1921.066
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1921-f75	1921.075
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1921-f77	1921.077
1921-f78	1921 078
1921-f79	1921.079
1921-f80	1921.080
1921-f81	1921.081
1921-f82	1921.082
1921-f83	1921.083
1921-f84	1921.084
1921-f85	1921.085
1921-f86	1921.086
1921-f87	1921.087
1921-f88	1921.088
1921-f89	1921.089
1921-f90	1921.090
1921-f91	1921.091
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1921-f95	1921.094
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1921-f111	1921.112
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1921-f114	1921.115
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1921-f119	1921.121
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1921-f121	1921.123
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2437-c2	2437.02
2437-c3	2437.03
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2582-d2	2582.2
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2585-c7	2585 06
2585-c8	2585 07
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2585-c11	2585 21
2585-c12	2585 22
2585-c13	2585 23
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2704-c2	2704 5
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2799-d4	2799 4
2799 d5	2799 5
2799-d6	2799 6
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2812-f2	2812 2
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2926-b1	2926 1
2948-g1	2948 1
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2948 g4	2948 4
2948-g5	2948 5
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2953-b4	2953 4
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3100-g20	3100 39
3100 g21	3100 40
3100-g22	3100 41
3100-g23	3100 42
3100 g24	3100 43
3100-g25	3100 44
3100-g26	3100 45
3100 g27	3100 46
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3112-b5	3112 5
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3142-b5	3142 05
3142-b6	3142 06
3142-b7	3142 07
3142-b8	3142 08
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3244 b3	3244 03
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3244-b5	3244 05
3244-b6	3244 06
3244-d1	3244 08
3244-d2	3244 09
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3661-a98	3661 112
3661-a99	3661 113
3661-a100	3661 114
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3872-e7	3872 07
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3872-e10	3872 10
3872-e11	3872 11
3872-e12	3872 12
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4118-d5	4118 5
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4216 c4	4216 04
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4216 c33	4216 33
4216-c34	4216 34
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4621-f4	4621.4
4621-f5	4621.5
4626-a1	4626.1
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4631-e1	4631.1
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6943-g18	6943.141
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6982-d6	6982.6
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7397-c13	7397.13
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7420-a13	7420.20
7420-a14	7420.21
7420-a16	7420.23
7420-a17	7420.24
7420-a18	7420.25
7420-a19	7420.26
7420-b1	7420.22
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7420-b10	7420.40
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7420-d7	7420.07
7420-d8	7420.08
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7420-g6	7420.35
7420-g7	7420.36
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7590-c4	7590.4
7590-c5	7590.5
7590-c6	7590.6
7590-g1	7590.7
7598-c1	7598.01
7598-c2	7598.02
7598-e1	7598.04
7598-e2	7598.05
7598-e3	7598.06
7598-e4	7598.07
7598-e5	7598.08
7598-e6	7598.09
7598-e7	7598.10
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7598-g5	7598.15
7598-g6	7598.16
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7626-a4	7626.4
7626-a5	7626.5
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7973-a3	7973 3
7973 a4	7973 4
7973-a5	7973 5
7973 a6	7973 6
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8308-f1	8308 1
8308-f2	8308 2
8308-f3	8308 3
8308 f4	8308 4
8308-f5	8308 5
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8338 c4	8338 17
8338 c5	8338 18
8338-c6	8338 19
8338 c7	8338 20
8338-c8	8338 21
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8338-f3	8338 03
8338-f4	8338 04
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8338-f40	8338 48
8338 f41	8338 49
8338 f42	8338 50
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8385-d1	8385 1
8385-d2	8385 2
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8419 c2	8419 02
8419 c3	8419 03
8419 c4	8419 04
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8419 c6	8419 06
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8419-c9	8419 09
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8419-c11	8419 11
8419 c12	8419 12
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8480 a5	8480 5
8480 a6	8480 6
8485 b1	8485 1
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8508-a3	8508 3
8508-a4	8508 4
8508 a5	8508 5
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8512 g6	8512 06
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8581 c4	8581 04
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8581 c6	8581 06
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8581-c9	8581 09
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8581 c13	8581 14
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8581-c18	8581 23
8581-c19	8581 24
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8581 c21	8581 26
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8581-c25	8581 30
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8581 f5	8581 17
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8613 c3	8613 3
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8684 e2	8684 02
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8684 e7	8684 07
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8842-b3	8842 3
8842 b4	8842 4
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9154 a4	9154 07
9154 a5	9154 08
9154-a6	9154 09
9154 a7	9154 10
9154-a8	9154 11
9154 f1	9154 01
9154-f2	9154 02
9154-f3	9154 03
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9221 c3	9221 3
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9283-b15	9283 63
9283 b16	9283 64
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9283 b22	9283 70
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9283 b24	9283 72
9283-b25	9283 73
9283 b26	9283 74
9283-c1	9283 01
9283-c2	9283 02
9283 c3	9283 03
9283-c4	9283 04
9283 e1	9283 05
9283 e2	9283 06
9283 e3	9283 07
9283-e4	9283 08
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9283 e20	9283 22
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9283 e23	9283 25
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9283 g4	9283 47
9283 g5	9283 48
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9305 a2	9305 02
9305-a3	9305 03
9305-a4	9305 04
9305 a5	9305 05
9305-a6	9305 06
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9305 a8	9305 08
9305 a9	9305 09
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9305-a11	9305 11
9305 a12	9305 12
9305 a13	9305 13
9305-a14	9305 14
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9305-a16	9305 16
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9305-a18	9305 18
9305 a19	9305 19
9305-a20	9305 20
9305-a21	9305 21
9305-a22	9305 22
9305 a23	9305 23
9308-e1	9308 1
9330 e1	9330 1
9340-b1	9340 01
9340 b2	9340 02
9354-f1	9354 1
9388 e1	9388 2
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9402-f3	9402 3
9402 f4	9402 4
9402-f5	9402 5
9402-f6	9402 6
9402-f7	9402 7
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9438-f2	9438 02
9438-f3	9438 03
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TABLE OF CORRESPONDING SECTIONS

From the 1897 Code to the 1939 Code

Suggestions have been made to the editor that attorneys when finding a reference in an opinion or elsewhere to the early codes are often inconvenienced to locate the statute in the present code—this situation usually arising when the tables of corresponding sections are not available. Furthermore this situation seems to occur more frequently with regard to 1897 Code citations than the earlier codes. As an aid in this connection, the following table has been prepared for the purpose of assisting users of the Annotations in locating in the Code of 1939 the equivalent or related sections of the Code of 1897, the Supplement of 1913, and the Supplemental Supplement of 1915. The usefulness of the table will arise perhaps more frequently in using Volume I of the Annotations since references to the 1897 Code and Supplements occur therein more often than in this Volume II.

["S" before a number in the first column indicates Supplement of 1913; "SS" indicates Supplemental Supplement of 1915; other numbers indicate Code of 1897. Sections which appear for the last time in either the Supplement of 1902 or the Supplement of 1907 are indicated in the footnotes.

"See" before a number in the last column indicates that the section as it appeared in the Code of 1897, Supplement of 1913, or Supplemental Supplement of 1915 has been repealed but that there will be found in the section or sections cited something identical to or analogous to the repealed section.

"Omitted" indicates a section that was temporary, special or repealing in character.

"R" indicates a repeal.

References to session laws are of four types, for example: 45-113-6, or 45 Ex-25-6, or 45 ExGA, ch 25, or 45 ExGA, SF 163. A reference such as 45-113-6 means 45th General Assembly, chapter 113, section 6. A reference such as 45 Ex-25-6 means 45th Extra General Assembly, chapter 25, section 6. A reference such as 45 ExGA, ch 25 means 45th Extra General Assembly, chapter 25, and a reference such as 45 ExGA, SF 163 means 45th Extra General Assembly, Senate File 163—a specific section reference in these instances not being obtainable.]

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ANNOTATION INDEX

Important: Read this explanatory note first

This index supplements the code index as an aid to the users of the Annotations in locating general subject matters. **This index does not relieve the searcher of looking in the code index for subjects there indexed.** Primarily, this index is to make available subjects, such as "Harmless Error" or "Last Clear Chance", not readily discoverable from the code index because such subjects are case law rather than statutory law, and consequently would not appear in the code. The existence of many such subjects has, perhaps, many times been overlooked because Volume I, lacking an index, failed to show their availability.

Since it was both logical and desirable to follow the scheme and general classifications of the Annotations in Volume I, it was necessary to ascertain the locations of such subjects under the various sections in Volume I in order that identical subjects would appear in identical places in both volumes—thus affording the proper annotation continuity. Duplications have been avoided and minimized, since this index, though not extensive, was also designed to facilitate the use of Volume I as well as this Volume, and all references should be followed back through Volume I. As to both Volume I and the supplements thereto, no record was available of the scheme of placement of the many case law subjects not readily discoverable through the code index. To properly annotate this volume and coordinate the annotations herein with Volume I, the editor compiled this index, chiefly for office use, and in printing it herewith is passing on to the users hereof the benefits to be gained therefrom. I believe it will be found both desirable and useful.

The roman numerals in parentheses following the section number references refer to a part of the classification under the section. The page numbers in parentheses following certain index references refer to the page on which the subject or its classification starts.

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ADDENDA

TO

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ADDENDA TO VOLUME II OF THE ANNOTATIONS TO THE CODE

The following annotations cover cases which could not appear in this permanent Volume II of the Annotations because these cases either (1) were finally released to the Reporter after the book had gone to press, or (2) were pending on rehearing and could not be finally inserted in a permanent volume, or (3) had been so recently decided by the Supreme Court (August 6, 1940) that their publication in this addenda was the only way they could be distributed at this time.

This addenda makes available through the annotations every recently decided case to the date of publication of this Volume II. Those annotations in this addenda containing a citation such as: 228- ; 292 NW 73, are final and will appear in Volume 228 of the Iowa Reports. Only a negligible portion of the other annotations will be affected by rehearing, but this possibility should be remembered.

When a regular supplement to this Volume II of the Annotations is published, these annotations, after a final check and with the omitted citations added, will be included therein. The policy of this office is to make available to the bench and bar of this state every decision of our Supreme Court at the earliest possible moment.

RICHARD REICHMANN,
Reporter of the Supreme Court and Code Editor

OFFICE OF THE REPORTER OF THE
SUPREME COURT AND CODE EDITOR
STATE HOUSE, DES MOINES, IOWA
AUGUST 15, 1940

ANNOTATIONS TO CONSTITUTION

Art. I, §1

Fraud in procuring party's presence in foreign state for service—no duty to defend. Where an action is commenced in a foreign state against a resident of Iowa, where service of notice is obtained through fraud in procuring the presence of such party in the foreign state, there is no duty devolving upon such party to either appear or defend in the foreign state, and a judgment so secured is void and not entitled to full faith and credit in this state.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

City renting water softeners to consumers—not engaging in private business. An ordinance authorizing a city to purchase individual water softeners for installation on the premises of water consumers on a rental basis is not invalid as authorizing the city to engage in private, competitive business, as the filters are a part of the process of furnishing water by the city under its statutory power to operate a waterworks plant with necessary filters, or under its implied authority to purify the water, rather than being the sale of an appliance utilized by the customer in consuming water after its delivery.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Art. I, §6

Agricultural land credit act—arbitrary classification. The Agricultural Land Credit Act granting tax benefits only to agricultural lands located in independent school districts and not to agricultural lands lying within consolidated districts held violative of the equal protection clause of the constitution since the classification adopted in that act is based solely upon the location of the property, and the basis for such classification has no reasonable relation to the purpose of the act, namely, "equalizing the burden of taxation to be borne by agricultural real estate".

Keefner v Porter. (Filed August 6, 1940)

Art. I, §9

Confession—disputed testimony—not shown to be involuntary. On disputed evidence as to whether a defendant's admission of the acts of the offense charged was made before or after he was advised to tell the truth and promises of leniency were made to him, and when he admitted that there was no loud talk at the time and that no one threatened to strike him, the evidence was not of the undisputed character required to show the confession to be involuntary because induced by promises of leniency and fear of threatened injury, and the securing of the confession was therefore held not to be a violation of the right of due process.

State v Strable. (Filed August 6, 1940)

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage

of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax — foreign corporation — mail order sales from outside state. Statutes requiring a retailer to collect a use tax on sales made without the state, when considered with other statutes providing that the tax is a debt owed to the state and that, upon a finding that the debt has not been paid, the retailer's permit to do business as a foreign corporation within the state must be revoked, are unconstitutional and void so far as they apply to mail order sales made by a foreign corporation from stores without the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Art. I, §17

Ordinance — excessive penalty — imposition necessary to question validity. Question of whether excessive penalties were provided in ordinances for violation of parking meter provisions is not justiciable in injunctive action by taxpayer questioning the legality of such ordinances, since no penalties were imposed upon plaintiff.

Brodkey v Sioux City, - ; 291 NW 171

Art. III, 1st §1

Lines of demarcation—overlapping duties. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

Acts not amounting to delegation. City commissioner's authority to designate parking meter locations.

Brodkey v Sioux City, - ; 291 NW 171

Parking meters—location—delegation of authority to city commissioner. Ordinances providing that public safety commissioner shall designate, "as traffic conditions require", 700 spaces for parking meters from 1,800 locations selected by the city council were not unconstitutional as an unlawful delegation of power since the establishment of principles or standards of conduct may not be delegated, but the application of those principles or standards to the facts as they arise and the determination whether or not those facts exist, being a function of administrative government, may be delegated to an administrative body.

Brodkey v Sioux City - ; 291 NW 171

Flexibility of rule — determining factors. The constitutional provisions prohibiting the delegation of legislative power are not regarded as denying lawmaking bodies resources that afford flexibility and practicality necessary to effective functioning of the laws they enact, and, while the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

Brodkey v Sioux City, - ; 291 NW 171

Ordinances—traffic problems—delegation of power. It is common knowledge that municipal traffic problems are being increasingly transferred for solution to a more or less developed sphere of expert investigation and deduction, and city ordinances authorizing public safety commissioner to designate locations for parking meters from zones previously selected by the city council are not unconstitutional as an unlawful delegation of legislative power, the courts being prone to give consideration to a showing that the authority delegated is to do things the lawmaking body could not understandingly or advantageously do itself.

Brodkey v Sioux City, - ; 291 NW 171

Principles established by ordinance—enforcement by city commissioner—nondelegation of power. Under ordinances authorizing public safety commissioner to designate, "as traffic conditions require", spaces for parking meters from locations selected by the city council, the installation of meters at places so designated is not the performance of a legislative function within the constitutional intendment of unlawful delegation of power, for it was the city council that had established the principles and standards of conduct required of the motorist.

Brodkey v Sioux City, - ; 291 NW 171

Art. III, §29

Municipal public utility bond sale—title of act not all-embracing—validity. When statutes

authorizing municipalities to establish public utilities and pay for them out of earnings were amended by an act providing for the issuance and sale of bonds to defray the cost of the plant, the act was not unconstitutional for failure to embrace in its title other statutes regulating the sale of public bonds, which were in effect amended by the act, when all the matters embraced in the act were definitely connected with the subject indicated in its title.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Nonreference to separate governmental corporation—legislative intent. Whether park board in city over 125,000 population, created under Ch. 293-D1, C., '35 [Ch. 293.1, C., '39], has a corporate existence independent of the parent municipality depends on legislative intent, and where the title to an act makes no reference to creation of separate corporation, in the face of constitutional requirement that such reference be prominent, and where the act itself is utterly silent on the subject, there can be no inference that the board is a distinct and corporate organization.

Des Moines Park Board v Des Moines, ; 290 NW 680

County engineer's appointment—title of legislative act—constitutionality. The act of the 43d G. A. with reference to the mandatory appointment of a county engineer and to change some of the duties of that office was only amendatory and substitutional, the position of county engineer being continued, and, since the title mentioned provisions concerning powers and duties of officers and employees with reference to secondary road construction, there was a compliance with Const. Art. III, §29, which provides that every act shall embrace but one subject and matters connected therewith.

McKinley v Clarke County. (Filed August 6, 1940)

Art. III, §30

Agricultural land credit act—arbitrary classification. The Agricultural Land Credit Act granting tax benefits only to agricultural lands located in independent school districts and not to agricultural lands lying within consolidated districts held violative of the equal protection clause of the constitution since the classification adopted in that act is based solely upon the location of the property, and the basis for such classification has no reasonable relation to the purpose of the act, namely, "equalizing the burden of taxation to be borne by agricultural real estate".

Keefner v Porter. (Filed August 6, 1940)

Art. IV, §1

Social welfare board — functions. Courts which have had the question of old-age benefits under consideration have determined the duties prescribed and to be performed by the commission are functions of the executive branch of the government.

Schneberger v Board, 228- ; 291 NW 859

Art. XI, §3

Bonds payable from anticipated special taxes. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

Art. XII, §1

Construction—presumption of constitutionality—burden of proof. The supreme court will not declare an act of the legislature unconstitutional unless the act clearly, plainly, palpably, and without doubt infringes the paramount law, and the burden is on the one making the attack to overcome the presumption in favor of the act.

Keefner v Porter. (Filed August 6, 1940)

Parking meters—income exceeding costs—invalidity of contract. The installation of parking meters by city under contracts providing that 75 percent of income from meters was to be paid to contract vendor until full purchase price was paid was illegal, since the imposition of parking charges for revenue-producing purposes was ultra vires, and justification therefor, if any, had to be founded on the measure being regulatory in character. And where the amounts exacted were many times more than was necessary to reimburse the city for necessary supervision and enforcement, the characteristics of justifiable regulatory measures were negatived.

Brodkey v Sioux City, - ; 291 NW 171

ANNOTATIONS TO STATUTES

2

Municipal boards and commissions—derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch. 293-D1, C., '35 [Ch. 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, ; 290 NW 680

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Doing business in state—mail orders from outside state—use tax. A foreign corporation limiting its activities to conducting a mail order business from stores outside the state would not be doing business in the state, could not be required to secure a license to do business in the state, and would not be subject to a use tax statute applicable to retailers conducting a retail business in Iowa. By also doing a retail business in the state under a permit from the state, the state is not given the right to attach, as a condition to its right to do such business, a requirement that the foreign corporation collect the use tax on sales made outside the state on which the corporation would otherwise have no obligation to the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—retail sales—stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

63

Two statutes affecting controversy — construction. When a court is confronted by two enactments, in each of which the legislature has spoken relative to the subject matter of a controversy, the court has the duty to accord to each enactment, so far as possible, that which the legislature intended.

Durst v Board, 228- ; 292 NW 73

Interpreting legislative language fairly and sensibly—plain meaning. In construing a statute the courts are required to interpret the language used by the legislature fairly and sensibly, in accordance with the plain meaning of the words used.

Green v Brinegar, 228- ; 292 NW 229

Title of act—nonreference to separate governmental corporation—legislative intent. Whether park board in city over 125,000 population, created under Ch. 293-D1, C., '35 [Ch. 293.1, C., '39], has a corporate existence independent of the parent municipality depends on legislative intent, and where the title to an act makes no reference to creation of separate corporation, in the face of constitutional requirement that such reference be prominent, and where the act itself is utterly silent on the subject, there can be no inference that the board is a distinct and corporate organization.

Des Moines Park Board v Des Moines, ; 290 NW 680

Unauthorized investment prior to statute requiring approval—court lacks approval power. After a statute was passed requiring investments of trust funds by fiduciaries to be first reported to the court for approval, the court did not have the power to approve a guardian's real estate investment which was made prior to the statute and without a court order.

In re Morris, 228- ; 292 NW 836

Tax-exempt property — strict construction. Principle reaffirmed that statutes passed for the purpose of exempting property from taxa-

tion must be strictly construed, and any doubt upon the question must be resolved against the exemption and in favor of taxation.

Board v Board, 228- ; 293 NW 38

Municipal franchise election — resubmission of question after defeat. In view of other statutes which permit subsequent elections in similar cases, statutes governing elections for municipal utility franchises and containing no bar to a subsequent election in case the proposal is defeated do not preclude a resubmission of the question of a franchise for an electric utility after the proposal has once been defeated.

Iowa P. & L. v Hicks, - ; 292 NW 826

Violation of replaced statute. Under the interpretation given subsection 1 of section 63 of the code, an indictment for driving while intoxicated was not demurrable on the ground that the statutory penalty had been repealed and replaced by another statute which went into effect before the indictment was returned.

State v McDowell, 228- ; 290 NW 65

Privileged communication—waiver of right in insurance application. A life insurance company has the right, before issuing a policy, to require a physical examination of an applicant and may incorporate in the application a waiver of the right to claim the privilege of confidential relation between physician and patient. It must take cognizance of the statute relating to privileged communications when it chooses to rely on representations as to health made in the application and does not require a physician's examination before issuing the policy.

Cross v Equitable Life. (Filed August 6, 1940)

"Apparent authority" defined. "Apparent authority" is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Liquidating distribution of corporate assets—"capital gains"—nontaxable as income. On the dissolution of a corporation, a cash dividend paid from the surplus in furtherance of the liquidation plan is not taxable as individual income, the liquidating distribution being simply the turning over to the stockholders of property they already own, rather than a distribution of income as in an ordinary dividend, and it is a capital gain, the income from which is specifically not taxable by statute.

Lynch v Board, - ; 291 NW 161

"Commissioner" as agent for process—nonresident motorist. In an automobile damage action brought by a resident of Iowa against a nonresident, where service of original notice was made by serving the "commissioner of motor vehicles" as provided by a statute existing at the time of the accident, which statute had been amended, however, so that at the time the action was commenced the statute provided for service to be made on the "commissioner of public safety", the trial court properly overruled a special appearance by defendant, since the only effect of such amendment was to terminate the services of the incumbent of the office, but not the office, as against the theory of defendant that the death of the agent terminates the agency.

Green v Brinegar, 228- ; 292 NW 229

"Compensable injury"—workmen's compensation. On appeal from order awarding compensation under workmen's compensation statute to claimant-employee, where record shows employee, responding to a call of nature, left his place of work and went over to a point between two lines of railway freight cars, to conceal himself from public gaze, and while so situated a switch engine moved one of the lines of cars, causing one car to strike and injure the employee, these facts warranted the application of the rule that a compensable injury is one arising in the course of the employment and occurring while the employee is doing what a man so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time.

Sachleben v Gjellefald Co., 228- ; 290 NW 48

"Improvidently issued." Lower court's use of term "improvidently issued" in quashing writ of certiorari because of park board's noncapacity to sue is unimportant when the real issue is whether the court should have sustained the writ after learning of the questions actually before it and determining the legal status of the persons involved.

Des Moines Park Board v Des Moines, - ; 290 NW 680

"Indebtedness"—bonds payable from anticipated special taxes. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

Death "in or caused by any aerial conveyance"—parachute jump. Death caused by the failure of a parachute to open after the insured

had been ordered to jump from an airplane when the gasoline supply was exhausted and the plane could not be landed because of low visibility did result "in or caused by any aerial conveyance" within the terms of an insurance policy, the jump not being the voluntary act of the insured.

Richardson v Trav. Assn., 228- ; 291 NW 408

"Interest in estate". When a father's will left property to a son and heir in trust so that it could not be subjected to the son's debts, a judgment creditor of the son was an interested person who had a beneficial and pecuniary interest in the estate of the deceased and in the son's share therein, of which he would be deprived to his prejudice if the will were probated.

In re Duffy, 228- ; 292 NW 165

"One dollar and other valuable consideration".

Knabe v Kirchner. (Filed August 6, 1940)

"Special appearance".

Gelvin v Hull. (Filed August 6, 1940)

"Three inches east of wall"—measured from wall foundation. A boundary line "three inches to the east of the main east wall" of the plaintiff's building is located three inches from the footing of the wall, tho the footing extends six inches beyond the brick wall, since the footing is a part of the wall, since the window sills protrude to a point perpendicular with footing, and since the plaintiff has paid taxes on land three inches east of the foundation. Consequently, in an action to enjoin trespass, any part of defendant's building erected and attached to the plaintiff's wall must be removed to or east of such boundary line.

Keith Co. v Minear, - ; 293 NW 36

Drainage assessments—"when collected".

Hartz v Truckenmiller. (Filed August 6, 1940)

64

Highways established and vacated—procedure—applicability construed. Rules of statutory construction and legislative intent require that the same rule of procedure apply throughout the chapter relating to establishment, alteration, and vacation of highways.

Magdefrau v Washington County. (Filed August 6, 1940)

78

Parole from misdemeanor — final discharge from governor necessary. AG Op July 11, '40

149

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

352

Atty. Gen. Opinion. See AG Op June 26, '40

Purchase of parking meters—statutory requirements—mandatory compliance. Before a city can enter into contracts for the purchase of parking meters, it must comply with statutory requirements in regard to advance estimates of annual expenditures, public hearings after proper notice, and supervisory control of the state appeal board.

Brodkey v Sioux City, - ; 291 NW 171

353

Atty. Gen. Opinion. See AG Op June 26, '40

354

Atty. Gen. Opinion. See AG Op June 26, '40

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Atty. Gen. Opinion. See AG Op June 26, '40

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Atty. Gen. Opinion. See AG Op June 26, '40

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Atty. Gen. Opinion. See AG Op June 26, '40

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Atty. Gen. Opinion. See AG Op June 26, '40

370

Purchase of parking meters—statutory requirements—mandatory compliance. Before a city can enter into contracts for the purchase of parking meters, it must comply with statutory requirements in regard to advance estimates of annual expenditures, public hearings after proper notice, and supervisory control of the state appeal board.

Brodkey v Sioux City, - ; 291 NW 171

761

Erection of municipal plant—code sections placed on ballots—incomplete list—voters not misled. In a town election on the question of establishing a municipal light and power plant, when the ballot provided that the plant would be paid for from its future earnings "as provided for by sections 6134-d1 to 6134-d7, inclusive, of the 1935 Code of Iowa," such provision was not objectionable on the ground that it would mislead the voter into believing that the ballot referred only to the named sections and not to other sections amending that law and pertaining to the same subject matter which had been inserted in the code following section 6134-d1.

Weiss v Woodbine (Town), 228- ; 289 NW 469

1022

Atty. Gen. Opinion. See AG Op May 23, '40

1146

Atty. Gen. Opinion. See AG Op June 26, '40

1159

Civil service—applicability. The soldiers preference law applies to promotions under civil service.

Herman v Sturgeon. (Filed August 6, 1940)

Civil service—list of eligibles—rank and preference—conclusiveness on appointing officer. A civil service commission's list and finding of eligibility for appointment may not be nullified by a public safety superintendent appointing therefrom to the fire department a nonsoldier in disregard of the rank and soldiers preference rights of other specified eligible persons and soldier veterans, even tho in the opinion of the fire chief the person appointed was best qualified. A nonsoldier must be better qualified to be entitled to appointment.

Herman v Sturgeon. (Filed August 6, 1940)

Eligibility list—preference does not supersede superior merit and fitness. A soldier-veteran is not entitled to a preference in disregard of his position on a list from which appointment is made.

Herman v Sturgeon. (Filed August 6, 1940)

Claim of preference—lack of knowledge by appointing officer—ineffective. A person may not be deprived of his rights under the soldiers preference law because one having power to appoint has no knowledge of that fact.

Herman v Sturgeon. (Filed August 6, 1940)

1161

Municipal employees—fire department—discretionary promotional appointment—mandamus affecting. A public safety superintendent's promotional appointment to a city fire department of a person under civil service entitled to a soldiers preference is not, even after an investigation under this section, such a discretionary appointment as will bar the court's rights to interfere by mandamus.

Herman v Sturgeon. (Filed August 6, 1940)

1162

Relief to rightful appointee. A person claiming a soldiers preference and challenging a promotional appointment of another from the civil service commission's certified list may proceed by mandamus rather than by appeal to the civil service commission.

Herman v Sturgeon. (Filed August 6, 1940)

1163

School janitor—definite period of employment—removal without hearing. An honorably discharged soldier employed as school janitor by a yearly contract had a definite tenure of appointment and could be removed by the school board at the end of the period of employment without the termination being effected in accordance with §1163 of the code.

Durst v Board, 228- ; 292 NW 73

Employment of school janitor—definite periods—knowlege imputed to employee. When a school board each year considered hiring the janitor at a specified salary, the board proceedings invited a contract with the janitor, the acceptance being evidenced by performance on his part. The employment was for definite yearly periods, and the board proceedings being public records accessible to the janitor, he should have known that the employment was yearly, and he could not avoid the terms of the contract and claim an indefinite period of employment when by the exercise of reasonable diligence he could have known upon what he was agreeing.

Durst v Board, 228- ; 292 NW 73

Inspectors for commerce commission—confidential relation—unallowable preference. In certiorari action by a world war veteran contending he was wrongfully discharged from his position as inspector for the Iowa State Commerce Commission, it was shown that duties to be performed were of such nature that the commission must have inspectors in whom they have the utmost faith and confidence as to their honesty and integrity, good common sense and judgment, and there existed a strictly confidential relationship so as to constitute an exception to the soldiers preference law.

Hannam v Commerce Com., 228- ; 292 NW 820

1165

Inspectors for commerce commission—confidential relation—unallowable preference. In certiorari action by a world war veteran contending he was wrongfully discharged from his position as inspector for the Iowa State Commerce Commission, it was shown that duties to be performed were of such nature that the commission must have inspectors in whom they have the utmost faith and confidence as to their honesty and integrity, good common sense and judgment, and there existed a strictly confidential relationship so as to constitute an exception to the soldiers preference law.

Hannam v Commerce Com., 228- ; 292 NW 820

1171.18

Atty. Gen. Opinion. See AG Op June 26, '40

1172

Atty. Gen. Opinion. See AG Op June 26, '40

Municipal public utility bond sale—title of act not all-embracing—validity. When statutes authorizing municipalities to establish public utilities and pay for them out of earnings were amended by an act providing for the issuance and sale of bonds to defray the cost of the plant, the act was not unconstitutional for

failure to embrace in its title other statutes regulating the sale of public bonds, which were in effect amended by the act, when all the matters embraced in the act were definitely connected with the subject indicated in its title.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Public utility construction enjoined—noncompetitive bidding on contract. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses, as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

1174

Atty. Gen. Opinion. See AG Op June 26, '40

1179.1

Atty. Gen. Opinion. See AG Op June 26, '40

1225.19

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1386

Memorandum agreement—representative capacity not denied. Where a memorandum agreement, made shortly after an injury to a grain elevator operator, recognized the relationship of employer and employee and provided for workmen's compensation payments for the injury and led the injured person to believe that he could rely on such memorandum, the employer and insurance carrier waived, and were estopped from asserting, just before the two-year statute of limitations would expire, that the claimant was engaged in a representative capacity and therefore was not entitled to reopen the case.

Trenhaile v Quaker Oats Co., 228- ; 292 NW 799

1421

Memorandum agreement—representative capacity not denied. Where a memorandum agreement, made shortly after an injury to a grain elevator operator, recognized the relationship of employer and employee and provided for workmen's compensation payments for the injury and led the injured person to believe that he could rely on such memorandum, the employer and insurance carrier waived, and were estopped from asserting, just before the two-year statute of limitations would expire, that the claimant was engaged in a representative capacity and therefore was not entitled to reopen the case.

Trenhaile v Quaker Oats Co., 228- ; 292 NW 799

Finding county engineer not an "official"—conclusion of law. In workmen's compensation action by a widow of a county engineer, the finding of the industrial commissioner that such engineer was not an "official" was not one of fact but was a conclusion of law and subject to review by the court.

McKinley v Clarke County. (Filed August 6, 1940)

County engineer's death—noncompensable. In workmen's compensation action a county engineer is an "official" and not an employee of the board of supervisors, where he was hired, posted a bond, and took an oath of office, and his duties were prescribed by statute, so that he was excluded from the provisions of the workmen's compensation act. The mere fact that he was performing duties classed as those of an "employee" at the time of his death would not make his death compensable under the statute.

McKinley v Clarke County. (Filed August 6, 1940)

Death from gastric ulcers caused by burns—evidence sufficient—conclusiveness. In workmen's compensation proceeding where a memorandum of agreement was executed, filed and approved by the industrial commissioner and a final compensation receipt given, after which the claimant died, the evidence before the industrial commissioner on a petition to reopen was sufficient and competent to sustain a finding that claimant died of gastric ulcers due to burns received in the course of and arising out of the employment, and such finding, being based on disputed questions of material facts, was conclusive.

Fickbohm v Chev. Co., - ; 292 NW 801

Injury "arising out of employment". Industrial commissioner's holding that claimant's injury arose out of his employment is not error for the reason that at the time of the injury claimant was violating a general rule and specific order of employer in failing to disconnect a battery from motor before using a steel

brush to clean the motor after wetting it down with kerosene. Claimant was at the place where he was required to be and doing the work directed and for which he was hired.

Fickbohm v Chev. Co., - ; 292 NW 801

Unchallenged compensation agreement—conclusiveness. In workmen's compensation proceeding where there was a final compensation settlement receipt, which was an acknowledgment and determination of the existence of the relationship of employer and employee, after which claimant died as result of alleged injuries, then, on a petition to reopen the proceedings, the employer is estopped to deny that the injury arose out of and in the course of the employment when the memorandum agreement, not being set aside nor attacked on the ground of mutual mistake or fraud, remains in the record unchallenged as a binding and enforceable agreement.

Fickbohm v Chev. Co., - ; 292 NW 801

Leaving place of work to heed call of nature—compensability. On appeal from order awarding compensation under workmen's compensation statute to claimant-employee, where record shows employee, responding to a call of nature, left his place of work and went over to a point between two lines of railway freight cars to conceal himself from public gaze, and while so situated a switch engine moved one of the lines of cars, causing one car to strike and injure the employee, these facts warranted the application of the rule that a compensable injury is one arising in the course of the employment and occurring while the employee is doing what a man so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time.

Sachleben v Gjellefald Co., 228- ; 290 NW 48

1425

Deputy commissioner's award—res adjudicata. In workmen's compensation case, where deputy commissioner made an award to claimant on November 9, 1936, from which neither party appealed, the compensation being paid and award satisfied, and where, on petition for review of such award, the deputy commissioner determined, on November 18, 1937, that claimant had failed to show any change in his condition since the previous award which would entitle him to an additional award, after which the industrial commissioner set aside both adjudications of the deputy under the statute permitting a review of award or settlement within 5 years, on appeal from such action of the industrial commissioner, the district court properly found that the award by the deputy on November 9, 1936, was res adjudicata and that the industrial commissioner had no jurisdiction to interfere with, disturb, or relitigate the matters adjudicated by the deputy commissioner.

Stice v Coal Co., - ; 291 NW 452

Decisions of deputy—delegated powers—nonright of commissioner to rehear or review. In workmen's compensation cases, the industrial commissioner is limited to proceedings authorized by statute, and there is no statutory authority for the commissioner to grant a rehearing when reviewing a decision by his deputy, since the commissioner cannot delegate to his deputy the power of his office to hear and determine a review under section 1457 of the code and thereafter assume jurisdiction to reexamine and re-determine the questions decided by the deputy.

Stice v Coal Co., - ; 291 NW 452

1431

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1436

Memorandum agreement—representative capacity not denied. Where a memorandum agreement, made shortly after an injury to a grain elevator operator, recognized the relationship of employer and employee and provided for workmen's compensation payments for the injury and led the injured person to believe that he could rely on such memorandum, the employer and insurance carrier waived, and were estopped from asserting, just before the two-year statute of limitations would expire, that the claimant was engaged in a representative capacity and therefore was not entitled to reopen the case.

Trenhaile v Quaker Oats Co., 228- ; 292 NW 799

Unchallenged agreement—conclusiveness. In workmen's compensation proceeding where there was a final compensation settlement receipt, which was an acknowledgment and determination of the existence of the relationship of employer and employee, after which claimant died as result of alleged injuries, then, on a petition to reopen the proceedings, the employer is estopped to deny that the injury arose out of and in the course of the employment when the memorandum agreement, not being set aside nor attacked on the ground of mutual mistake or fraud, remains in the record unchallenged as a binding and enforceable agreement.

Fickbohm v Chev. Co., - ; 292 NW 801

1447

Decisions of deputy—delegated powers—non-right of commissioner to rehear or review. In workmen's compensation cases, the industrial commissioner is limited to proceedings authorized by statute, and there is no statutory authority for the commissioner to grant a rehearing when reviewing a decision by his deputy, since the commissioner cannot delegate to his deputy the power of his office to hear and determine a review under section 1457 of the code and thereafter assume jurisdiction to re-examine and re-determine the questions decided by the deputy.

Stice v Coal Co., - ; 291 NW 452

1449

Deputy commissioner's award—res adjudicata. In workmen's compensation case, where deputy commissioner made an award to claimant on November 9, 1936, from which neither party appealed, the compensation being paid and award satisfied, and where, on petition for review of such award, the deputy commissioner determined, on November 18, 1937, that claimant had failed to show any change in his condition since the previous award which would entitle him to an additional award, after which the industrial commissioner set aside both adjudications of the deputy under the statute permitting a review of award or settlement within 5 years, on appeal from such action of the industrial commissioner, the district court properly found that the award by the deputy on November 9, 1936, was res adjudicata and that the industrial commissioner had no jurisdiction to interfere with, disturb, or relitigate the matters adjudicated by the deputy commissioner.

Stice v Coal Co., - ; 291 NW 452

1452

Death from gastric ulcers caused by burns—evidence sufficient—conclusiveness. In workmen's compensation proceeding where a memorandum of agreement was executed, filed and approved by the industrial commissioner and a final compensation receipt given, after which the claimant died, the evidence before the industrial commissioner on a petition to reopen was sufficient and competent to sustain a finding that claimant died of gastric ulcers due to burns received in the course of and arising out of the employment, and such finding, being based on disputed questions of material facts, was conclusive.

Fickbohm v Chev. Co., - ; 292 NW 801

Workmen's compensation—finding county engineer not an "official"—conclusion of law. In workmen's compensation action by a widow of a county engineer, the finding of the industrial commissioner that such engineer was not an "official" was not one of fact but was a conclusion of law and subject to review by the court.

McKinley v Clarke County. (Filed August 6, 1940)

1453

Death from gastric ulcers caused by burns—evidence sufficient—conclusiveness. In workmen's compensation proceeding where a memorandum of agreement was executed, filed and approved by the industrial commissioner and a final compensation receipt given, after which the claimant died, the evidence before the industrial commissioner on a petition to reopen was sufficient and competent to sustain a finding that claimant died of gastric ulcers due to burns received in the course of and arising out of the employment, and such finding, being based on disputed questions of material facts, was conclusive.

Fickbohm v Chev. Co., - ; 292 NW 801

1457

Decisions of deputy—delegated powers—non-right of commissioner to rehear or review. In workmen's compensation cases, the industrial commissioner is limited to proceedings authorized by statute, and there is no statutory authority for the commissioner to grant a rehearing when reviewing a decision by his deputy, since the commissioner cannot delegate to his deputy the power of his office to hear and determine a review under section 1457 of the code and thereafter assume jurisdiction to re-examine and re-determine the questions decided by the deputy.

Stice v Coal Co., - ; 291 NW 452

Deputy commissioner's award—res adjudicata. In workmen's compensation case, where deputy commissioner made an award to claimant on November 9, 1936, from which neither party appealed, the compensation being paid and award satisfied, and where, on petition for review of such award, the deputy commissioner determined, on November 18, 1937, that claimant had failed to show any change in his condition since the previous award which would entitle him to an additional award, after which the industrial commissioner set aside both adjudications of the deputy under the statute permitting a review of award or settlement within 5 years, on appeal from such action of the industrial commissioner, the district court properly found that the award by the deputy on November 9, 1936, was res adjudicata and that the industrial commissioner had no jurisdiction to interfere with, disturb, or relitigate the matters adjudicated by the deputy commissioner.

Stice v Coal Co., - ; 291 NW 452

1551.17

Employee—rescinding order for employment—discharge not illegal. Where the Iowa Un-

employment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1678

Fall in elevator shaft. Whether elevator guard rail was in place and whether lights were burning, held, jury question.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Use of word "rapid". Use of word "rapid" as applied to elevator's descent was not error where elevator had but one speed.

Dean v Koolish, 212-238; 234 NW 179

1703.50

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1828.18

Atty. Gen. Opinion. See AG Op June 6, '40

1828.19

Atty. Gen. Opinion. See AG Op June 6, '40

1831

Apportionment for construction and maintenance — subsequent grantee — enforcement. Where fence viewers have heard a partition line fence controversy between adjoining owners and determined the portion that each adjoining owner should construct and maintain, a subsequent grantee will be required to maintain that portion of the fence allocated to his predecessor in title. Evidence on appeal from fence viewers' decision reviewed and their order to maintain the designated portion of the fence along a private lane affirmed.

Trustees v Harkrader. (Filed August 6, 1940)

1851

Fence viewers' apportionment for construction and maintenance—subsequent grantee—enforcement. Where fence viewers have heard a partition line fence controversy between adjoining owners and determined the portion that each adjoining owner should construct and maintain, a subsequent grantee will be required to maintain that portion of the fence allocated to his predecessor in title. Evidence on appeal from fence viewers' decision reviewed and their order to maintain the designated portion of the fence along a private lane affirmed.

Trustees v Harkrader. (Filed August 6, 1940)

1905.41

Procuring cause—real estate sale by owner. A real estate broker, engaged to procure a buyer for certain property, who presented a prospective purchaser to the property owner and assisted in instituting negotiations which directly led to a sale upon terms satisfactory to the owner, was the efficient and procuring cause of the sale and therefore entitled to a commission.

Tilden v Zanias, 228- ; 292 NW 835

1921.016

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

1921.107

Advertising—coupons for free beer illegal. AG Op Aug. 12, '40

2057

Atty. Gen. Opinion. See AG Op June 5, '40

2191

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

2538

Malpractice—root of tooth in lung—proximate cause—directed verdict. In a malpractice action against dentist, the court erroneously directed a verdict for defendant on the ground that there was no showing that the presence of the root of a tooth in plaintiff's right lung was the proximate cause of the injury to plaintiff, under evidence that plaintiff was given a general anesthetic, was completely unconscious at time 6 teeth were extracted, and that plaintiff lost 60 pounds between the day of the extractions and the day he expectorated, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—other causes of injury—elimination—evidence. In a malpractice action against dentist for injuries caused by lodging of root of tooth in plaintiff's lung, other possible and reasonable causes of the injury were eliminated on the contentions that the object causing injury was not the root of a human tooth, when 6 laymen testified that it was, even tho there was no expert testimony to this effect; that the object was a calcareous deposit when the defendant, after viewing the object, failed to suggest that it was a calcareous deposit and stated, "We will see you through all this"; that no one saw the root at the time it was expectorated when it would have been impossible to see it in the bloody mass of sputum; and that plaintiff could have unknowingly sucked the root into his lung when such objects do not unknowingly pass into the windpipe.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—fact situations—res ipsa loquitur applicability. It has seldom been questioned that where the act of omission or commission upon the part of a surgeon has been plainly negligent, as where a sponge, gauze, instrument or needle has been left in the body, the rule of res ipsa loquitur applies, and that it is also unnecessary to show by expert testimony that such an act does not comport with the required standards.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—root of tooth in lung—res ipsa loquitur—exception to general rule. While the doctrine of res ipsa loquitur does not ordinarily apply in malpractice cases, the doctrine was held applicable under the pleadings and proof that plaintiff was given a general anesthetic, was completely unconscious and under the exclusive control of the defendant-dentist at the time his teeth were extracted, and that 9 months later he expectorated from his lungs, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—res ipsa loquitur generally inapplicable. As a general rule, the doctrine of res ipsa loquitur does not apply in malpractice cases for the reason that the professional man is required to exercise only that degree of care and skill ordinarily exercised by other members of the same profession, in like communities, under similar circumstances; also, the doctor does not have complete and exclusive control over the instrumentality with which he is working.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—expert and nonexpert testimony—competency. Ordinarily the question of whether a doctor or dentist exercised the requisite care or skill in any case cannot be determined by the testimony of laymen or nonexperts, nor be left to the judgment of a jury or court, unaided by expert testimony, and only those learned or experienced in the profession may testify as to what should or should not have been done. But there are exceptions to this rule depending wholly on the fact situation, and no ironclad rule can be laid down as to when the doctrine shall be applied.

Whetstine v Moravec, 228- ; 291 NW 425

2590

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

2896

County fair board—appointing special police. AG Op Aug. 14, '40

2898

County fair board—appointing special police. AG Op Aug. 14, '40

2979

Animals' death from stock powder—contributory negligence—jury question. In law action to recover for the death of sheep on account of the feeding of a product purchased from defendant, where defendant complains of refusal to direct a verdict for the reason the plaintiff also fed a homemade mixture of salts and earth, but since veterinarians, who performed post-mortem examinations, testified that homemade remedy would not be harmful to sheep, and the court gave an instruction regarding other food and remedies, the court did

not err in submitting the question of contributory negligence to jury.

Miller v Economy Co., 228- ; 293 NW 4

Animals' death from stock powder—jury question. In law action to recover damages for death of sheep allegedly caused by the feeding of a product purchased from defendant, evidence showing that veterinarians who examined the sheep found them to be free from disease or ailment except a gastritis and who testified that the feeding of a powder rich in proteins on a forced feeding, as recommended by defendant's sales manager, would be dangerous because some of the sheep would get too much of the mixture, sufficiently tended to prove that the death of such sheep was due to feeding them the powder so as to raise a question for the jury.

Miller v Economy Co., 228- ; 293 NW 4

Stock powder causing death—warranty—proper instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction by the court correctly stated that defendant would be bound by the representation of its general sales agent, made in furtherance of sales, that stock powder was harmless and not injurious to sheep in the condition of plaintiff's sheep. Such representation was not an unusual warranty nor a warranty of cure and was within the sales agent's scope of agency.

Miller v Economy Co., 228- ; 293 NW 4

Sheep kept under contract—proper care—jury question. In a replevin action to recover sheep which had been furnished by the plaintiff under a contract by which the defendant was to feed and care for the sheep, with the right reserved in the plaintiff to take possession in case proper care was not given, jury questions were raised by conflicting evidence concerning whether proper care was given and whether wool was sold without the plaintiff's consent in violation of the contract.

Mead v Palmer, 228- ; 292 NW 821

2980

Exposition or fair—unattended horse in aisle of barn. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

2985

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal, and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

3113

Animals' death from stock powder—contributory negligence—jury question. In law action to recover for the death of sheep on account of the feeding of a product purchased from defendant, where defendant complains of refusal to direct a verdict for the reason the plaintiff also fed a homemade mixture of salts and earth, but since veterinarians, who performed post-mortem examinations, testified that homemade remedy would not be harmful to sheep, and the court gave an instruction regarding other food and remedies, the court did not err in submitting the question of contributory negligence to jury.

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Miller v Economy Co., 228- ; 293 NW 4

3290

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

3661.009

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

3661.011

Supervisors on social welfare board—dual pay prohibited. AG Op June 27, '40

3661.057

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

3667

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

3786

Parole from misdemeanor — final discharge from governor necessary. AG Op July 11, '40

3790

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

3792

Atty. Gen. Opinion. See AG Op June 25, '40

3796

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

3797

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

3800

Parole from misdemeanor — final discharge from governor necessary. AG Op July 11, '40

3805

Parole from misdemeanor — final discharge from governor necessary. AG Op July 11, '40

3828.003

Social welfare board—administrative duties—nonjudicial review. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative, and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

Social welfare board—functions—executive branch of government. Courts which have had the question of old-age benefits under consideration have determined the duties prescribed and to be performed by the commission are functions of the executive branch of the government.

Schneberger v Board, 228- ; 291 NW 859

3828.014

Social welfare board—administrative duties—nonjudicial review. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative, and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

Refusal to grant—fraud—abuse of discretion—review. Review by the supreme court on the abstract and transcript of evidence of the action of the state board of social welfare in refusing to reinstate claimants to old-

age assistance relief because of son's ability to support them held not to disclose either fraud or an abuse of discretion.

Schneberger v Board, 228- ; 291 NW 859

Social welfare board—findings of fact—noninterference by court. The provisions as to powers and authority of the court on appeal, under the provisions of the social welfare law as to old-age assistance, are somewhat analogous to those of the workmen's compensation law, under which the holdings of our court have always been that, when supported by competent evidence, the findings of fact by the commission will not be interfered with by the court.

Schneberger v Board, 228- ; 291 NW 859

3828.023

Alimony and support awards—lien from time of entry. In a divorce action in which the court had jurisdiction of the parties and subject matter, the entering of judgment for alimony and child support would in itself make the awards be liens on any real estate owned by the defendant. Whether the defendant's mother, who was not a party to the action, owned certain property not described in the petition, which the defendant had previously claimed in order that the mother's old-age pension would not be a lien on the property, need not be determined in the divorce action.

Davis v Davis, - ; 292 NW 804

3828.039

Old-age assistance head tax—auditor's failure to certify—nonlien on realty. AG Op Aug. 14, '40

3828.067

Atty. Gen. Opinion. See AG Op May 15, '40

3828.068

Atty. Gen. Opinion. See AG Op May 15, '40

3828.071

Atty. Gen. Opinion. See AG Op May 15, '40

Ch 189.4

Atty. Gen. Opinion. See AG Op May 15, '40

3828.088

Atty. Gen. Opinion. See AG Op June 6, '40

Paupers—intention to remain as essential element. An intention to remain in a county without present intention to remove is an essential element of a legal settlement, and evidence that poor persons who were removed to another county on court order intended to reside wherever the litigating counties or the court decided their legal settlement to be does not establish their intent to remain indefinitely in the county to which they were removed.

Audubon County v Vogessor, 228- ; 291 NW 135

Residence—support by public funds—warning to depart. Poor persons receiving work relief and supplemental relief orders from county were supported by "public funds" and did not acquire a residence under §5311, C., '35 [§3828.088, C., '39], which makes a warning to depart unnecessary unless such persons have acquired a residence before receiving support from public funds.

Audubon County v Vogessor, 228- ; 291 NW 135

Involuntary removal to another county—no legal settlement acquired. Paupers do not acquire a legal settlement in a county to which they are involuntarily removed. So held where persons were removed to Audubon county from Cass county on order of lower court, which was reversed—the parties in the meantime remaining in Audubon county continuously for a period of one year without being warned to depart.

Audubon County v Vogessor, 228- ; 291 NW 135

3828.092

Residence—support by public funds—warning to depart. Poor persons receiving work relief and supplemental relief orders from county were supported by "public funds" and did not acquire a residence under §5311, C., '35 [§3828.088, C., '39], which makes a warning to depart unnecessary unless such persons have acquired a residence before receiving support from public funds.

Audubon County v Vogessor, 228- ; 291 NW 135

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Residence—support by public funds—warning to depart. Poor persons receiving work relief and supplemental relief orders from county were supported by "public funds" and did not acquire a residence under §5311, C., '35 [§3828.088, C., '39], which makes a warning to depart unnecessary unless such persons have acquired a residence before receiving support from public funds.

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Involuntary removal to another county—no legal settlement acquired. Paupers do not acquire a legal settlement in a county to which

they are involuntarily removed. So held where persons were removed to Audubon county from Cass county on order of lower court, which was reversed—the parties in the meantime remaining in Audubon county continuously for a period of one year without being warned to depart.

Audubon County v Vogessor, 228- ; 291 NW 135

3828.147

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

3828.159

Penitentiary parolees—expenses at University hospital—transportation. AG Op July 17, '40

4123

Boards and commissions—derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, riverfront improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch. 293-D1, C., '35 [Ch. 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Employment of school janitor—definite periods—knowledge imputed to employee. When a school board each year considered hiring the janitor at a specified salary, the board proceedings invited a contract with the janitor, the acceptance being evidenced by performance on his part. The employment was for definite yearly periods, and the board proceedings being public records accessible to the janitor, he should have known that the employment was yearly, and he could not avoid the terms of the contract and claim an indefinite period of employment when by the exercise of reasonable diligence he could have known upon what he was agreeing.

Durst v Board, 228- ; 292 NW 73

School district as trustee—individuals as cestuis—property not exempt. A school district which held real property in trust to use the income for college scholarships could not, in a mandamus action against the county supervisors, recover taxes paid on the property and prevent further collection of taxes on the ground that the property was exempt from taxation under §6944, C., '35, as the property and income were not used for a public purpose, the beneficiaries of the trust being the recipients of the scholarships, with the trust standing in the same position as if vested in any other qualified trustee.

Board v Board, 228- ; 293 NW 38

4228

Employment of school janitor—definite periods—knowledge imputed to employee. When a school board each year considered hiring the janitor at a specified salary, the board proceedings invited a contract with the janitor, the acceptance being evidenced by performance on his part. The employment was for definite yearly periods, and the board proceedings being public records accessible to the janitor, he should have known that the employment was yearly, and he could not avoid the terms of the contract and claim an indefinite period of employment when by the exercise of reasonable diligence he could have known upon what he was agreeing.

Durst v Board, 228- ; 292 NW 73

School janitor—definite period of employment—removal without hearing. An honorably discharged soldier employed as school janitor by a yearly contract had a definite tenure of appointment and could be removed by the school board at the end of the period of employment without the termination being effected in accordance with §1163 of the code.

Durst v Board, 228- ; 292 NW 73

4268

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

4269

Application to homestead tax credit. AG Op Aug. 27, '40

4274

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

4275

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

4283.01

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

4560

Vacation—damages to adjoining owners—allowance by county supervisors. In a proceeding to vacate a public highway, where an adjoining owner sustains damages not suffered by the public generally, the board of supervisors by statute has full authority and jurisdiction to determine the amount and allowance of such damages.

Magdefrau v Washington County. (Filed August 6, 1940)

Vacation—supervisors' denial of damage claim—appeal. An appeal to the district court lies from a refusal of the board of supervisors to allow a claim for damages for vacation of a highway.

Magdefrau v Washington County. (Filed August 6, 1940)

4586

Vacation—damages to adjoining owners—allowance by county supervisors. In a pro-

ceeding to vacate a public highway, where an adjoining owner sustains damages not suffered by the public generally, the board of supervisors by statute has full authority and jurisdiction to determine the amount and allowance of such damages.

Magdefrau v Washington County. (Filed August 6, 1940)

4597

Procedure—statutory applicability construed. Rules of statutory construction and legislative intent require that the same rule of procedure apply throughout the chapter relating to establishment, alteration, and vacation of highways.

Magdefrau v Washington County. (Filed August 6, 1940)

Vacation—supervisors' denial of damage claim. An appeal to the district court lies from a refusal of the board of supervisors to allow a claim for damages for vacation of a highway.

Magdefrau v Washington County. (Filed August 6, 1940)

4644.04

Appeal from exclusion of evidence—other competent proof. The supreme court was not required to pass on the soundness of sustained objections to evidence that a certain road was a county trunk highway when there was other competent proof of the point and no offer of controverting testimony was made.

Davis v Hoskinson, 228- ; 290 NW 497

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, although the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

4644.17

Title of legislative act constitutional. The act of the 43d G. A. with reference to the mandatory appointment of a county engineer and to change some of the duties of that office was only amendatory and substitutional, the position of county engineer being continued, and, since the title mentioned provisions concerning powers and duties of officers and employees with reference to secondary road construction, there was a compliance with Const. Art. III, §29, which provides that every act shall embrace but one subject and matters connected therewith.

McKinley v Clarke County. (Filed August 6, 1940)

Workmen's compensation—county engineer excluded. In workmen's compensation action by a widow of a county engineer, the finding of the industrial commissioner that such engineer was not an "official" was not one of fact but was a conclusion of law and subject to review by the court.

McKinley v Clarke County. (Filed August 6, 1940)

4644.19

County engineer's death—noncompensable under workmen's compensation. In workmen's compensation action a county engineer is an "official" and not an employee of the board of supervisors, where he was hired, posted a bond, and took an oath of office, and his duties were prescribed by statute, so that he was excluded from the provisions of the workmen's compensation act. The mere fact that he was performing duties classed as those of an "employee" at the time of his death would not make his death compensable under the statute.

McKinley v Clarke County. (Filed August 6, 1940)

4644.21

County engineer's death—noncompensable under workmen's compensation. In workmen's compensation action a county engineer is an "official" and not an employee of the board of supervisors, where he was hired, posted a bond, and took an oath of office, and his duties were prescribed by statute, so that he was excluded from the provisions of the workmen's compensation act. The mere fact that he was performing duties classed as those of an "employee" at the time of his death would not make his death compensable under the statute.

McKinley v Clarke County. (Filed August 6, 1940)

4663

Interstate highway connection—joint construction agreement. AG Op July 5, '40

4755.05

Atty. Gen. Opinion. See AG Op June 20, '40

4755.33

Interstate highway connection—joint construction agreement. AG Op July 5, '40

4833

Tree over transmission line—failure to remove. Where a tree limb on the plaintiffs' land had broken and lodged in the fork of a dead tree and hung two or three feet over the defendant's transmission line, and later electricity from the line set the tree on fire and

it spread to the plaintiffs' house, in an action to recover for the fire loss it could not be said as a matter of law that the plaintiffs were contributorily negligent in not removing the limb when they had acted as reasonable and prudent persons in twice requesting the defendant to take the line down or shut off the current so the tree could be cut down and the overhanging limb removed.

Porter v Elec. Co., 228- ; 292 NW 231

5000.01

"Commissioner" as agent for process—nonresident motorist. In an automobile damage action brought by a resident of Iowa against a nonresident, where service of original notice was made by serving the "commissioner of motor vehicles" as provided by a statute existing at the time of the accident, which statute had been amended, however, so that at the time the action was commenced the statute provided for service to be made on the "commissioner of public safety", the trial court properly overruled a special appearance by defendant, since the only effect of such amendment was to terminate the services of the incumbent of the office, but not the office, as against the theory of defendant that the death of the agent terminates the agency.

Green v Brinegar, 228- ; 292 NW 229

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, altho the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

5000.02

"Commissioner" as agent for process—nonresident motorist. In an automobile damage action brought by a resident of Iowa against a nonresident, where service of original notice was made by serving the "commissioner of motor vehicles" as provided by a statute existing at the time of the accident, which statute had been amended, however, so that at the time the action was commenced the statute provided for service to be made on the "commissioner of public safety", the trial court properly overruled a special appearance by defendant, since the only effect of such amendment was to terminate the services of the incumbent of the office, but not the office, as against the theory of defendant that the death of the agent terminates the agency.

Green v Brinegar, 228- ; 292 NW 229

5018.01

Parking meters—location—delegation of authority to city commissioner. Ordinances providing that public safety commissioner shall designate, "as traffic conditions require", 700 spaces for parking meters from 1,800 locations selected by the city council were not unconstitutional as an unlawful delegation of power since the establishment of principles or standards of conduct may not be delegated, but the application of those principles or standards to the facts as they arise and the determination whether or not those facts exist, being a function of administrative government, may be delegated to an administrative body.

Brodkey v Sioux City, - ; 291 NW 171

Traffic problems—delegation of power. It is common knowledge that municipal traffic problems are being increasingly transferred for solution to a more or less developed sphere of expert investigation and deduction, and city ordinances authorizing public safety commissioner to designate locations for parking meters from zones previously selected by the city council are not unconstitutional as an unlawful delegation of legislative power, the courts being prone to give consideration to a showing that the authority delegated is to do things the lawmaking body could not understandingly or advantageously do itself.

Brodkey v Sioux City - ; 291 NW 171

Parking meters—income exceeding enforcement costs—invalidity of contract. The installation of parking meters by city under contracts providing that 75 percent of income from meters was to be paid to contract vendor until full purchase price was paid was illegal, since the imposition of parking charges for revenue-producing purposes was ultra vires, and justification therefor, if any, had to be founded on the measure being regulatory in character. And where the amounts exacted were many times more than was necessary to reimburse the city for necessary supervision and enforcement, the characteristics of justifiable regulatory measures were negatived.

Brodkey v Sioux City, - ; 291 NW 171

5020.11

Testimony of patrolman—statutes inapplicable. In a prosecution arising from an automobile accident, testimony by a patrolman as to statements made by himself is admissible and not within the purview of statutes pertaining to accident reports and incriminating questions.

State v Weltha, 228- ; 292 NW 148

5022.01

Manslaughter—refreshing memory by grand jury testimony—denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory by showing him the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Manslaughter—driving while intoxicated—evidence—instructions. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

5022.02

Lack of evidence—instructions on criminal negligence—directed verdict. Conflicting evidence that witnesses had smelled liquor on the breath of the defendant who was charged with manslaughter as a result of an automobile collision, without evidence as to how the defendant was driving or who was at fault in the collision, was not sufficient to support a finding of guilt under instructions defining criminal negligence and intoxication and stating that if one becomes voluntarily under the influence of liquor so that he loses his self-restraint, and becomes reckless and indifferent to the consequences of his act, this would be criminal negligence, making him liable for the death of another person. Under such evidence, the defendant was entitled to a directed verdict.

State v Weltha, 228- ; 292 NW 148

Instructions—use of intoxicants—defendant not intoxicated. Evidence that the defendant in a manslaughter case might have been to some extent under the influence of intoxicating liquor at the time of a fatal automobile accident warranted the court in giving a requested instruction that there was no evidence that the defendant was intoxicated, and in adding that the use of intoxicating liquor by the defendant might be considered in determining whether or not he had acted in a reckless disregard for the safety of others.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Refreshing witness' memory by grand jury testimony re intoxication—denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory by showing him the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Manslaughter—evidence—instructions. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

Instructions—dazed condition caused by accident. In a prosecution for driving while intoxicated, the thoughts of requested instructions were sufficiently embodied in instructions which stated that in determining whether the defendant was intoxicated at the time of the collision, or whether his condition immediately after was the result of injury or shock, the jury should consider the injury, its nature, extent and effect, and all other evidence.

State v McDowell, 228- ; 290 NW 65

Violation of replaced statute. Under the interpretation given subsection 1 of section 63 of the code, an indictment for driving while intoxicated was not demurrable on the ground that the statutory penalty had been repealed and replaced by another statute which went into effect before the indictment was returned.

State v McDowell, 228- ; 290 NW 65

Testimony as to intoxication—cross-examination as to effect of blow on head. In a prosecution for driving while intoxicated, where the defense was that after an automobile accident the defendant was in a dazed condition due to a blow on the head, the witnesses who testified as to intoxication could not be asked on cross-

examination how much effect the blow might have had on the defendant's condition, as the answer would have been no more than a guess. This question was for the jury and there was no foundation laid to give the answer probative value.

State v McDowell, 228- ; 290 NW 65

5022.04

Recklessness definition not applicable to manslaughter prosecution. The definition of "recklessness" as applied to civil cases under the motor vehicle guest statute [§5026-b1, C., '35] has no application in a prosecution for manslaughter arising from an automobile accident.

State v Graff, 228- ; 282 NW 745; 290 NW 97

5023.01

Assured clear distance rule—jury question. In an automobile collision personal injury action, where defendant alleges error on denial of a directed verdict based on insufficiency of the evidence to submit to the jury defendant's violation of the assured clear distance statute, when the defendant-driver gave only evidence as to distance in which car could be stopped, speed, lights, and distance at which objects could be discerned on the highway, defendant further contending that there being nothing to the contrary, such evidence must be taken as a verity, tho the most favorable evidence rule and the circumstances surrounding the accident will be considered. The assured clear distance question was for the jury, and instructions relative thereto were not erroneous.

Janes v Roach, 228- ; 290 NW 87

Assured clear distance statute—sufficiency of pleading. In automobile damage action, a specification of negligence under the assured clear distance statute was sufficient when no one could read the petition and not understand that it charged that the car could not be brought to a stop within the assured clear distance ahead.

Janes v Roach, 228- ; 290 NW 87

Legal excuse—assured clear distance—emergency not fault of defendant. An instruction as to the legal excuse which will excuse the failure to stop within the assured clear distance ahead, which informed the jury that an emergency not of the defendant's own making will constitute such legal excuse, correctly stated the rule that the emergency must not arise from the fault of the defendant.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Quoting speed statute—assured clear distance—failure to divide statute. Instructions which quoted part of a speed statute (§5029, C., '35 [§5023.01, C., '39]) were not erroneous in failing to divide the quotation into two parts and instruct on the first half, as when the instructions are construed as a whole, the jury could not fail to know that the part concerning the duty to stop within the assured clear distance ahead was the part referred to, and when the court specifically pointed out that such was the plaintiff's claimed ground of negligence.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Unpleaded issue submitted—assured clear distance at intersection. In a motor vehicle damage case arising from a collision at a road intersection, an instruction reviewed and found to merit the objections that an unpleaded issue was submitted by permitting the jury to find negligence in the failure to reduce speed to a reasonable and prudent rate when approaching the intersection and that it was not a proper definition or application of the assured clear distance statute.

Davis v Hoskinson, 228- ; 290 NW 497

Visibility of parked car at night—lights burning. When the defendant's car came over the crest of a small hill on a dark night after it had been raining, and there was no fog, there was evidence to warrant a finding by the jury that the defendant could have seen another car parked on the right side of the pavement 450 feet away on the downgrade with headlights and tail light lighted.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Vehicle within town limits—no speed sign—speed standard. When the defendant's automobile had just entered the corporate limits of a town, and there was no speed sign at the corporate limit, the only speed standard with which the defendant was required to comply was the assured clear distance statute, defendant not yet having reached a sign indicating a residence zone.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Striking pedestrian after crossing lighted intersection—jury question. Upon evidence that the defendant approached a lighted intersection at a speed of 20 or 25 miles an hour with an unobstructed view and crossed the intersection where he struck an aged pedestrian who was crossing the street and had almost reached the curb on the defendant's right-hand side of the street, the question of assured clear distance ahead was properly for the jury.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Pedestrian crossing lighted intersection—jury question. A jury question of contributory negligence was presented by evidence that the plaintiff looked up and down the street before crossing at a lighted intersection and when he was within one step of the opposite curb was struck by defendant's automobile which had just crossed the intersection which it had

approached with an unobstructed view at a speed of 20 or 25 miles an hour.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Assured clear distance—running into parked car. Where the defendant-motorist struck the deceased who was standing behind a car parked on the highway at night, the jury was warranted in finding that the deceased had not been standing so as to obscure the tail light of the parked car, and that the defendant had violated the assured clear distance statute.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Visibility of parked car at night—tail light concealed (?)—jury question. When the deceased had walked to the rear of a parked automobile at night and was standing there when the defendant's automobile approached from the rear and struck her, conflicting evidence as to whether her body concealed the tail light presented a jury question as to whether the defendant should have seen the tail light as he approached.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Left turn at intersection—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

Hinrichs v Mengel. (Filed August 6, 1940)

Intersection collision—car making left turn —jury question. Upon evidence that the defendant, in full view of an intersection from a distance of over 300 feet, approached it at a speed of over 30 miles an hour and struck another car which had turned left and was just leaving the intersection after entering it from the opposite direction, the court properly submitted to the jury grounds of negligence (1) that the defendant was driving at an excessive rate of speed, (2) that he did not have his car under control when approaching an intersection, and (3) that he saw, or could have seen, the other car, and failed to so operate his own car so as to avoid a collision.

Hinrichs v Mengel. (Filed August 6, 1940)

Speed and distance as jury questions. In automobile damage action, where collision occurred about 8:30 a. m. at the intersection of two country highways, and where plaintiff, driving west, allegedly entered the intersection first at about 20 miles per hour and had the right of way, and defendant, driving south about 40 miles per hour in a truck loaded with 7 head of cattle, collided with plaintiff's automobile about 6 or 7 feet west of the center of (statutory) intersection, the trial court, deciding the issues as a matter of law by directing a verdict for defendant, was in error, since the question of speeds and distances, being estimates rather than certainties, raises a jury question on evidence submitted.

Short v Powell, 228- ; 291 NW 406

Collision at end of bridge—speed—jury questions—improper directed verdict. In automobile damage action on account of a collision between defendant's truck, moving westerly and leaving the westerly end of a bridge, and plaintiff's automobile, moving easterly as it came upon west end of such bridge, causing a sideswiping collision, where the facts and circumstances were such as would not compel the minds of reasonable persons to come to the same conclusion as to whether plaintiff (1) was driving at a careful and prudent speed, and (2) reduced the speed to a reasonable and proper rate while approaching a bridge, the trial court erroneously directed a verdict in favor of defendant, since the questions could have been decided adversely to him by a jury.

Graham v Orr, 228- ; 292 NW 838

Physical facts—effect on testimony as to speed. Decisions defining recklessness reviewed, and held that a jury question arises as to whether or not an automobile was operated recklessly when evidence indicated that car left a narrow dirt road after passing over a somewhat elevated wooden bridge, traveled in a ditch for some distance, and then crashed through a fence into a tree about 300 feet from point where car left the road. Under such circumstances jury would not be bound by driver's testimony that car was only going 35 miles per hour.

Fraser v Brannigan, 228- ; 293 NW 50

5023.04

Left turn at intersection—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

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Graham v Orr, 228- ; 292 NW 838

5023.05

Vehicle within town limits—no speed sign—speed standard. When the defendant's automobile had just entered the corporate limits of a town, and there was no speed sign at the corporate limit, the only speed standard with which the defendant was required to comply was the assured clear distance statute, defendant not yet having reached a sign indicating a residence zone.

State v Graff, 228- ; 282 NW 745; 290 NW 97

5023.11

"Asphalt plank" bridge flooring—approved construction—nonnegligence of bridge company. Where plaintiff, a motorist, attempting to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded thru the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5024.03

Repealed statute — requested instruction properly refused. In automobile guest's personal injury action resulting in jury verdict for defendant, plaintiff's request for new trial because of refusal to give an instruction to the effect that it was the duty of a driver of an overtaken automobile, upon signal, to drive to the "right center of the traveled way" and remain there until overtaking automobile shall have "safely passed" was properly refused, since such statute was repealed at time plaintiff was injured, and new statute only required such driver to "give way to the right" until overtaking vehicle had "completely passed".

Jones v Krambeck, 228- ; 290 NW 56

5025.04

Left turn at intersection—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

Hinrichs v Mengel. (Filed August 6, 1940)

5026.01

Striking pedestrian after crossing lighted intersection—jury question. Upon evidence that the defendant approached a lighted intersection at a speed of 20 or 25 miles an hour with an unobstructed view and crossed the intersection where he struck an aged pedestrian who was crossing the street and had almost reached the curb on the defendant's right-hand side of the street, the question of assured clear distance ahead was properly for the jury.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Pedestrian crossing lighted intersection—jury question. A jury question of contributory negligence was presented by evidence that the plaintiff looked up and down the street before crossing at a lighted intersection and when he was within one step of the opposite curb was struck by defendant's automobile which had just crossed the intersection which it had approached with an unobstructed view at a speed of 20 or 25 miles an hour.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Directed verdict—contributory negligence at intersection. The defendant was entitled to a directed verdict on the ground that the plaintiff failed to show herself free from contributory negligence when the evidence showed that the plaintiff entered a highway intersection at a speed of about 14 miles an hour, being able to stop in 3 or 4 feet, but, after seeing the defendant approaching from the left 100 feet away at a speed of 65 miles an hour, she attempted to accelerate her speed and cross the highway, and was struck by the defendant.

Davis v Hoskinson, 228- ; 290 NW 497

Unpleaded issue submitted — assured clear distance at intersection. In a motor vehicle damage case arising from a collision at a road intersection, an instruction reviewed and found to merit the objections that an unpleaded issue was submitted by permitting the jury to

find negligence in the failure to reduce speed to a reasonable and prudent rate when approaching the intersection and that it was not a proper definition or application of the assured clear distance statute.

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Speed and distance as jury questions. In automobile damage action, where collision occurred about 8:30 a. m. at the intersection of two country highways, and where plaintiff, driving west, allegedly entered the intersection first at about 20 miles per hour and had the right of way, and defendant, driving south about 40 miles per hour in a truck loaded with 7 head of cattle, collided with plaintiff's automobile about 6 or 7 feet west of the center of (statutory) intersection, the trial court, deciding the issues as a matter of law by directing a verdict for defendant, was in error, since the question of speeds and distances, being estimates rather than certainties, raises a jury question on evidence submitted.

Short v Powell, 228- ; 291 NW 406

5026.02

Contributory negligence—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

Hinrichs v Mengel. (Filed August 6, 1940)

Intersection collision — negligence — jury question. Upon evidence that the defendant, in full view of an intersection from a distance of over 300 feet, approached it at a speed of over 30 miles an hour and struck another car which had turned left and was just leaving the intersection after entering it from the opposite direction, the court properly submitted to the jury grounds of negligence (1) that the defendant was driving at an excessive rate of speed (2) that he did not have his car under control when approaching an intersection, and (3) that he saw, or could have seen, the other car, and failed to operate his own car so as to avoid a collision.

Hinrichs v Mengel. (Filed August 6, 1940)

5026.03

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, altho the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

5027.04

Pedestrian struck while crossing highway. A jury question as to the negligence of the defendant and the contributory negligence of a pedestrian was presented by evidence that the pedestrian, after looking in both directions, attempted to cross a highway in a city at night and at a well-lighted place near where the street formed a Y in joining the highway, and when about 5 feet from the opposite curb the pedestrian was struck by the defendant's car which was traveling at about 25 or 30 miles per hour after entering the highway from the adjoining street.

Scott v McKelvey, 228- ; 290 NW 729

Custom or usage—crossing street at place of accident. In an action for the death of a pedestrian who was struck by an automobile while she was crossing a highway, it was permissible to allow a witness to testify that he had seen people crossing the highway at the same place on previous occasions.

Scott v McKelvey, 228- ; 290 NW 729

Pedestrians at crosswalks—submitting unpleaded grounds. An instruction that altho a pedestrian must yield the right of way when crossing a highway at a place other than a marked or unmarked crosswalk, nevertheless the driver of a vehicle must exercise due care to avoid colliding with any pedestrian, was not subject to the objection that it submitted unpleaded grounds of negligence.

Scott v McKelvey, 228- ; 290 NW 729

Care required of person crossing highway. An instruction that if, in the exercise of reasonable care, a pedestrian was required to take any particular precaution while crossing a street, then she was under a duty to have taken such precaution, was not subject to the objection that it left the jury to determine whether the pedestrian was required to take precautions and failed to instruct as to the duty to keep a lookout and yield the right of way.

Scott v McKelvey, 228- ; 290 NW 729

Location of unmarked crosswalk—terminology. An instruction which located an unmarked crosswalk as being "substantially straight south of the intake", rather than definitely and accurately locating the lines of the crosswalk, was proper.

Scott v McKelvey, 228- ; 290 NW 729

"Crosswalks" defined—standards of care under statute. Instructions, defining crosswalks, presenting the question of whether a pedestrian crossing a highway within a city had crossed at an unmarked crosswalk, and setting forth the duties of care of pedestrians and motorists when pedestrians are crossing highways, correctly interpreted the statute with reference to crosswalks.

Scott v McKelvey, 228- ; 290 NW 729

5027.05

Pedestrian crossing lighted intersection—jury question. A jury question of contributory negligence was presented by evidence that the plaintiff looked up and down the street before crossing at a lighted intersection and when he was within one step of the opposite curb was struck by defendant's automobile which had just crossed the intersection which it had approached with an unobstructed view at a speed of 20 or 25 miles an hour.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Striking pedestrian after crossing lighted intersection—jury question. Upon evidence that the defendant approached a lighted intersection at a speed of 20 or 25 miles an hour with an unobstructed view and crossed the intersection where he struck an aged pedestrian who was crossing the street and had almost reached the curb on the defendant's right-hand side of the street, the question of assured clear distance ahead was properly for the jury.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Pedestrians at crosswalks—submitting unpleaded grounds. An instruction that altho a pedestrian must yield the right of way when crossing a highway at a place other than a marked or unmarked crosswalk, nevertheless the driver of a vehicle must exercise due care to avoid colliding with any pedestrian, was not subject to the objection that it submitted unpleaded grounds of negligence.

Scott v McKelvey, 228- ; 290 NW 729

Assured clear distance—running into parked car. Where the defendant-motorist struck the deceased who was standing behind a car parked on the highway at night, the jury was warranted in finding that the deceased had not been standing so as to obscure the tail light of the parked car, and that the defendant had violated the assured clear distance statute.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Pedestrian on dirt shoulder of pavement—ordinary care sufficient—jury question. In a damage action for personal injuries resulting from automobile accident where it is shown plaintiff was standing on the dirt shoulder of a paved highway in front of a stalled car, which was parked on the right side of highway with only the left rear wheel on pavement when defendant's car struck the rear of the stalled car and threw it against plaintiff, defendant's contention that plaintiff was guilty of contributory negligence as a matter of law was held without merit since plaintiff was not standing on the traveled portion of the paved highway and was not required to keep a constant lookout for approaching vehicles or anticipate another car would be driven against the stalled car. He was only required to exercise ordinary care and whether or not he did so was a question for jury.

Janes v Roach, 228- ; 290 NW 87

Child running into path of car—care—emergency—instructions considered as whole. In an action for physical injuries to a boy of 11 who was struck when he ran out into the street in front of the defendant's automobile, considering the instructions as a whole, the effect of a proper instruction as to the duties of a driver while approaching children who are near the highway was not nullified by another instruction on the duties of one confronted with a sudden emergency, which instruction could have been omitted as the child was struck at almost the instant he ran in front of the automobile, and anything done by the defendant after the collision had no connection with the injury.

Noland v Kyar, - ; 292 NW 810

Use of horn to warn children—conflicting evidence. Upon conflicting testimony by the defendant as to whether or not he blew his horn when approaching two small boys walking beside the highway, there was no error in giving an instruction submitting the question of whether the horn was sounded.

Noland v Kyar, - ; 292 NW 810

5029.05

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, although the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

5029.11

Appeal from exclusion of evidence—other competent proof. The supreme court was not required to pass on the soundness of sustained objections to evidence that a certain road was a county trunk highway when there was other

competent proof of the point and no offer of controverting testimony was made.

Davis v Hoskinson, 228- ; 290 NW 497

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, although the highway commission or board of supervisors may place stop signs at through-highway intersections, their erection is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

5030.01

Visibility of parked car at night—tail light concealed (?)—jury question. When the deceased had walked to the rear of a parked automobile at night and was standing there when the defendant's automobile approached from the rear and struck her, conflicting evidence as to whether her body concealed the tail light presented a jury question as to whether the defendant should have seen the tail light as he approached.

State v Graff, 228- ; 282 NW 745; 290 NW 97

5031.03

Use of horn to warn children—conflicting evidence. Upon conflicting testimony by the defendant as to whether or not he blew his horn when approaching two small boys walking beside the highway, there was no error in giving an instruction submitting the question of whether the horn was sounded.

Noland v Kyar, - ; 292 NW 810

5034.04

Visibility of parked car at night—tail light concealed (?)—jury question. When the deceased had walked to the rear of a parked automobile at night and was standing there when the defendant's automobile approached from the rear and struck her, conflicting evidence as to whether her body concealed the tail light presented a jury question as to whether the defendant should have seen the tail light as he approached.

State v Graff, 228- ; 282 NW 745; 290 NW 97

5037.09

Failure to sound horn—not negligence as a matter of law. A motorist failing to sound the horn of an automobile is not guilty of negligence as a matter of law.

Quick v Paulson, 228- ; 292 NW 853

Cutting corner at intersection—jury question. In automobile damage action where plaintiff testified he was driving in northerly direction on the right-hand side of a city street and that defendant in driving his car cut a corner of an intersection, striking plaintiff's car, and where defendant testified he did not cut the corner and that plaintiff was driving on the wrong side of the street, a jury question arises, and a motion for directed verdict was properly overruled.

Quick v Paulson, 228- ; 292 NW 853

Left turn at intersection—jury question. A jury question on whether the plaintiff was guilty of contributory negligence in (1) failing to maintain a lookout, (2) failing to ascertain that he had sufficient space to turn left in safety, (3) failing to keep his car under control, and (4) failing to yield the right of way, was presented by evidence that the plaintiff, driving slowly in low gear, entered an intersection, turned left and was partly out of the intersection when his car was struck by the car of the defendant who had approached from the opposite direction.

Hinrichs v Mengel. (Filed August 6, 1940)

Pedestrian crossing lighted intersection—jury question. A jury question of contributory negligence was presented by evidence that the plaintiff looked up and down the street before crossing at a lighted intersection and when he was within one step of the opposite curb was struck by the defendant's automobile which had just crossed the intersection which it had approached with an unobstructed view at a speed of 20 or 25 miles an hour.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Directed verdict—contributory negligence at intersection. The defendant was entitled to a directed verdict on the ground that the plaintiff failed to show herself free from contributory negligence when the evidence showed that the plaintiff entered a highway intersection at a speed of about 14 miles an hour, being able to stop in three or four feet, but, after seeing the defendant approaching from the left 100 feet away at a speed of 65 miles an hour, she attempted to accelerate her speed and cross the highway, and was struck by the defendant.

Davis v Hoskinson, 228- ; 290 NW 497

Pedestrian on dirt shoulder of pavement—ordinary care sufficient—jury question. In a damage action for personal injuries resulting from automobile accident where it is shown plaintiff was standing on the dirt shoulder of a paved highway in front of a stalled car, which was parked on the right side of highway with only the left rear wheel on pavement when defendant's car struck the rear of the stalled car and threw it against plaintiff, defendant's contention that plaintiff was guilty of contributory negligence as a matter of law was held without merit since plaintiff was not

standing on the traveled portion of the paved highway and was not required to keep a constant lookout for approaching vehicles or anticipate another car would be driven against the stalled car. He was only required to exercise ordinary care and whether or not he did so was a question for jury.

Janes v Roach, 228- ; 290 NW 87

Pedestrian struck while crossing highway. A jury question as to the negligence of the defendant and the contributory negligence of a pedestrian was presented by evidence that the pedestrian, after looking in both directions, attempted to cross a highway in a city at night and at a well-lighted place near where the street formed a Y in joining the highway, and when about 5 feet from the opposite curb the pedestrian was struck by the defendant's car which was traveling at about 25 or 30 miles per hour after entering the highway from the adjoining street.

Scott v McKelvey, 228- ; 290 NW 729

Contributory negligence—child running into path of car—care—emergency. In an action for physical injuries to a boy of 11 who was struck when he ran out into the street in front of the defendant's automobile, considering the instructions as a whole, the effect of a proper instruction as to the duties of a driver while approaching children who are near the highway was not nullified by another instruction on the duties of one confronted with a sudden emergency, which instruction could have been omitted as the child was struck at almost the instant he ran in front of the automobile, and anything done by the defendant after the collision had no connection with the injury.

Noland v Kyar, - ; 292 NW 810

Jury question—collision at end of bridge—speed. In automobile damage action on account of a collision between defendant's truck, moving westerly and leaving the westerly end of a bridge, and plaintiff's automobile, moving easterly as it came upon west end of such bridge, causing a sideswiping collision, where the facts and circumstances were such as would not compel the minds of reasonable persons to come to the same conclusion as to whether plaintiff (1) was driving at a careful and prudent speed, and (2) reduced the speed to a reasonable and proper rate while approaching a bridge, the trial court erroneously directed a verdict in favor of defendant, since the questions could have been decided adversely to him by a jury.

Graham v Orr, 228- ; 292 NW 838

Legal excuse—assured clear distance—emergency not fault of defendant. An instruction as to the legal excuse which will excuse the failure to stop within the assured clear distance ahead, which informed the jury that an emergency not of the defendant's own making will constitute such legal excuse, correctly stated the rule that the emergency must not arise from the fault of the defendant.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Assured clear distance rule—evidence sufficient for jury question. In an automobile collision personal injury action, where defendant alleges error on denial of a directed verdict based on insufficiency of the evidence to submit to the jury defendant's violation of the assured clear distance statute, when the defendant-driver gave only evidence as to distance in which car could be stopped, speed, lights, and distance at which objects could be discerned on the highway, defendant further contending that there being nothing to the contrary, such evidence must be taken as a verity, tho the most favorable evidence rule and the circumstances surrounding the accident will be considered. The assured clear distance question was for the jury, and instructions relative thereto were not erroneous.

Janes v Roach, 228- ; 290 NW 87

Pleading—sufficiency—assured clear distance statute. In automobile damage action, a specification of negligence under the assured clear distance statute was sufficient when no one could read the petition and not understand that it charged that the car could not be brought to a stop within the assured clear distance ahead.

Janes v Roach, 228- ; 290 NW 87

Evidence—custom or usage—crossing street at place of accident. In an action for the death of a pedestrian who was struck by an automobile while she was crossing a highway, it was permissible to allow a witness to testify that he had seen people crossing the highway at the same place on previous occasions.

Scott v McKelvey, 228- ; 290 NW 729

Visibility of parked car at night—lights burning. When the defendant's car came over the crest of a small hill on a dark night after it had been raining, and there was no fog, there was evidence to warrant a finding by the jury that the defendant could have seen another car parked on the right side of the pavement 450 feet away on the downgrade with headlights and tail light lighted.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Intersection collision—car making left turn. Upon evidence that the defendant, in full view of an intersection from a distance of over 300 feet, approached it at a speed of over 30 miles an hour and struck another car which had turned left and was just leaving the intersection after entering it from the opposite direction, the court properly submitted to the jury grounds of negligence (1) that the defendant was driving at an excessive rate of

speed, (2) that he did not have his car under control when approaching an intersection, and (3) that he saw, or could have seen, the other car, and failed to operate his own car so as to avoid a collision.

Hinrichs v Mengel. (Filed August 6, 1940)

Striking pedestrian after crossing lighted intersection. Upon evidence that the defendant approached a lighted intersection at a speed of 20 or 25 miles an hour with an unobstructed view and crossed the intersection where he struck an aged pedestrian who was crossing the street and had almost reached the curb on the defendant's right-hand side of the street, the question of assured clear distance ahead was properly for the jury.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Assured clear distance—running into parked car. Where the defendant-motorist struck the deceased who was standing behind a car parked on the highway at night, the jury was warranted in finding that the deceased had not been standing so as to obscure the tail light of the parked car, and that the defendant had violated the assured clear distance statute.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Visibility of parked car at night—tail light concealed (?)—jury question. When the deceased had walked to the rear of a parked automobile at night and was standing there when the defendant's automobile approached from the rear and struck her, conflicting evidence as to whether her body concealed the tail light presented a jury question as to whether the defendant should have seen the tail light as he approached.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Desire of defendant to kill self—inference of guilt. The jury in a manslaughter case arising from an automobile accident may consider evidence that, while standing by the body after the tragedy, the defendant asked a bystander if he had a gun, saying, "I would like to finish everything right now".

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions—location of unmarked crosswalk—terminology. An instruction which located an unmarked crosswalk as being "substantially straight south of the intake", rather than definitely and accurately locating the lines of the crosswalk, was proper.

Scott v McKelvey, 228- ; 290 NW 729

Instructions—negligence not presumed from accident. The plaintiff having the burden of proving negligence by a preponderance of the evidence, an instruction stating that the mere fact that an accident happened does not show negligence nor raise a presumption of negligence on the part of the defendant was not erroneous in stressing the point that an automobile accident was unavoidable.

Noland v Kyar, - ; 292 NW 810

Use of horn to warn children—conflicting evidence. Upon conflicting testimony by the defendant as to whether or not he blew his horn when approaching two small boys walking beside the highway, there was no error in giving an instruction submitting the question of whether the horn was sounded.

Noland v Kyar, - ; 292 NW 810

Pedestrians at crosswalks—submitting unpleaded grounds. An instruction that altho a pedestrian must yield the right of way when crossing a highway at a place other than a marked or unmarked crosswalk, nevertheless the driver of a vehicle must exercise due care to avoid colliding with any pedestrian, was not subject to the objection that it submitted unpleaded grounds of negligence.

Scott v McKelvey, 228- ; 290 NW 729

Care required of person crossing highway. An instruction that if, in the exercise of reasonable care, a pedestrian was required to take any particular precaution while crossing a street, then she was under a duty to have taken such precaution, was not subject to the objection that it left the jury to determine whether the pedestrian was required to take precautions and failed to instruct as to the duty to keep a lookout and yield the right of way.

Scott v McKelvey, 228- ; 290 NW 729

Evidence for impeachment erroneously admitted—no prejudice shown—no reversal. In a damage action to recover for personal injuries where witness testified that automobile struck a trolley coach, a previous written statement of such witness that trolley coach struck the automobile should not have been admitted in evidence—there being no such inconsistency as to make the statement admissible for purpose of impeachment. However, when appellant failed to make the necessary showing of prejudice, the error did not warrant a reversal.

Ceretti v Railway, 228- ; 293 NW 45

Through-highway intersections—rights and duties—no stop signs. Where there was evidence that a road upon which an automobile accident occurred at an intersection was a county trunk highway, it was error for the court to refuse instructions as to the rights of the parties at a through-highway intersection, basing its refusal on the ground that there were no stop signs at the intersection, as by statute a county trunk highway is a "through" highway, and, altho the highway commission or board of supervisors may place stop signs at through-highway intersections, their erec-

tion is not a requisite to the duty of traffic on local county roads to stop or yield the right of way at such intersections.

Davis v Hoskinson, 228- ; 290 NW 497

"Crosswalks" defined—standards of care under statute. Instructions, defining crosswalks, presenting the question of whether a pedestrian crossing a highway within a city had crossed at an unmarked crosswalk, and setting forth the duties of care of pedestrians and motorists when pedestrians are crossing highways, correctly interpreted the statute with reference to crosswalks.

Scott v McKelvey, 228- ; 290 NW 729

Instructions—quoting speed statute—assured clear distance—failure to divide statute. Instructions which quoted part of a speed statute (§5029, C., '35 [§5023.01, C., '39]) were not erroneous in failing to divide the quotation into two parts and instruct on the first half, as when the instructions are construed as a whole, the jury could not fail to know that the part concerning the duty to stop within the assured clear distance ahead was the part referred to, and when the court specifically pointed out that such was the plaintiff's claimed ground of negligence.

Swan v Dailey-Luce Auto Co. (Filed August 6, 1940)

Damages limited to amount proved. Instructions on items of damages must limit the jury to an amount shown by the evidence but not exceeding the amount asked in the petition. In a personal injury action, instructions allowing damages for reasonable expense in the conduct of the injured party's business and for pain and suffering, the amount for both items not to exceed $7,312, were erroneous as the only limitation placed on the damages for the business was the full amount asked, and the evidence showed such damage to be only about $180.

Hinrichs v Mengel. (Filed August 6, 1940)

Unpleaded issue submitted—assured clear distance at intersection. In a motor vehicle damage case arising from a collision at a road intersection, an instruction reviewed and found to merit the objections that an unpleaded issue was submitted by permitting the jury to find negligence in the failure to reduce speed to a reasonable and prudent rate when approaching the intersection and that it was not a proper definition or application of the assured clear distance statute.

Davis v Hoskinson, 228- ; 290 NW 497

Nonexcessive verdict—$5,091.26 for serious and painful injuries. In a personal injury action arising out of an automobile accident, a $6,750 verdict reduced by remittitur to $5,091.26 was not excessive where plaintiff, a laborer 37 years of age, received serious and painful injuries necessitating an operation, suffered headaches for a period of years, and incurred doctor and hospital bills in the sum of $591.26.

Janes v Roach, 228- ; 290 NW 87

5037.10

Recklessness definition not applicable to manslaughter prosecution. The definition of "recklessness" as applied to civil cases under the motor vehicle guest statute [§5026-b1, C., '35] has no application in a prosecution for manslaughter arising from an automobile accident.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Guest statute—recklessness defined—physical facts affecting testimony as to speed. Decisions defining recklessness reviewed, and held that a jury question arises as to whether or not an automobile was operated recklessly when evidence indicated that car left a narrow dirt road after passing over a somewhat elevated wooden bridge, traveled in a ditch for some distance, and then crashed through a fence into a tree about 300 feet from point where car left the road. Under such circumstances jury would not be bound by driver's testimony that car was only going 35 miles per hour.

Fraser v Brannigan, 228- ; 293 NW 50

Loose steering gear—legal excuse—previous knowledge of condition—effect. Refusal to submit to jury pleaded defense that a loose steering gear was an emergency condition which caused the automobile accident would not be error where evidence shows that both owner and driver knew of steering gear condition two weeks prior to accident.

Fraser v Brannigan, 228- ; 293 NW 50

Test for determining when jury question exists. A jury question is presented when different minds might reasonably reach different conclusions thereon. So held as to question of recklessness in action by automobile guest.

Fraser v Brannigan, 228- ; 293 NW 50

5038.01

Substituted service on nonresident motorist—dismissal of action—effect. In automobile damage action where original notice was served on a nonresident of this state, as provided by motor vehicle laws, in which action defendant entered a special appearance on account of defects in the notice, and, before it was submitted, the action was dismissed without prejudice, plaintiff recommencing her action by filing an identical petition and serving a new notice in the same manner, after correcting defects, a special appearance in the second action should have been sustained on account of statute barring the recommencement of same action unless accompanied by actual personal service on defendant in this state.

Gelvin v Hull. (Filed August 6, 1940)

5038.03

Substituted service on nonresident motorist —dismissal of action—effect. In automobile damage action where original notice was served on a nonresident of this state, as provided by motor vehicle laws, in which action defendant entered a special appearance on account of defects in the notice, and, before it was submitted, the action was dismissed without prejudice, plaintiff recommencing her action by filing an identical petition and serving a new notice in the same manner, after correcting defects, a special appearance in the second action should have been sustained on account of statute barring the recommencement of same action unless accompanied by actual personal service on defendant in this state.

Gelvin v Hull. (Filed August 6, 1940)

5038.04

"Commissioner" as agent for process—nonresident motorist. In an automobile damage action brought by a resident of Iowa against a nonresident, where service of original notice was made by serving the "commissioner of motor vehicles" as provided by a statute existing at the time of the accident, which statute had been amended, however, so that at the time the action was commenced the statute provided for service to be made on the "commissioner of public safety", the trial court properly overruled a special appearance by defendant, since the only effect of such amendment was to terminate the services of the incumbent of the office, but not the office, as against the theory of defendant that the death of the agent terminates the agency.

Green v Brinegar, 228- ; 292 NW 229

5038.14

Substituted service on nonresident motorist —dismissal of action—effect. In automobile damage action where original notice was served on a nonresident of this state, as provided by motor vehicle laws, in which action defendant entered a special appearance on account of defects in the notice, and, before it was submitted, the action was dismissed without prejudice, plaintiff recommencing her action by filing an identical petition and serving a new notice in the same manner, after correcting defects, a special appearance in the second action should have been sustained on account of statute barring the recommencement of same action unless accompanied by actual personal service on defendant in this state.

Gelvin v Hull. (Filed August 6, 1940)

5093.29

Gasoline for stationary engine used by city in construction work—no refund. AG Op July 18, '40

5100.26

Action against insurer—special appearance —burden of proof. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

5105.15

Action against insurer—special appearance —burden of proof. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

5128

Boards and commissions—derivative rights —separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, riverfront improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch. 293-D1, C., '35 [Ch. 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5130

Vacation of highway—allowance of damages to adjoining owners. In a proceeding to vacate a public highway, where an adjoining owner sustains damages not suffered by the public generally, the board of supervisors by statute

has full authority and jurisdiction to determine the amount and allowance of such damages.

Magdefrau v Washington County. (Filed August 6, 1940)

5180

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

5218

Blood test—specimen taken by coroner from another county. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

5238

Special deputies to police county fair—unlawful acts—sheriff's liability. AG Op August 14, 1940

5241

Special deputies to police county fair—unlawful acts—sheriff's liability. AG Op August 14, 1940

5241.1

Special deputies to police county fair—unlawful acts—sheriff's liability. AG Op August 14, 1940

5359

Atty. Gen. Opinion. See AG Op June 17, '40

5362

Atty. Gen. Opinion. See AG Op June 17, '40

5363

Atty. Gen. Opinion. See AG Op June 17, '40

5422

Dog licenses—penalties after April 1st. AG Op July 18, '40

5435

Dog licenses—penalties after April 1st. AG Op July 18, '40

5629

Atty. Gen. Opinion. See AG Op May 23, '40

5639

Mayor's fees—paid to county treasurer. AG Op July 26, '40

5663

Purchase of parking meters—statutory requirements—mandatory compliance. Before a city can enter into contracts for the purchase of parking meters, it must comply with statutory requirements in regard to advance estimates of annual expenditures, public hearings after proper notice, and supervisory control of the state appeal board.

Brodkey v Sioux City, - ; 291 NW 171

5670

Mayor's fees—paid to county treasurer. AG Op July 26, '40

5696.1

Soldiers preference applicable. The soldiers preference law applies to promotions under civil service.

Herman v Sturgeon. (Filed August 6, 1940)

5697

Employees—fire department—discretionary promotional appointment—mandamus affecting. A public safety superintendent's promotional appointment to a city fire department of a person under civil service entitled to a soldiers preference is not, even after an investigation under section 1161, C., '39, such a discretionary appointment as will bar the court's rights to interfere by mandamus.

Herman v Sturgeon. (Filed August 6, 1940)

List of eligibles—rank and preference—conclusiveness on appointing officer. A civil service commission's list and finding of eligibility for appointment may not be nullified by a public safety superintendent appointing therefrom to the fire department a nonsoldier in disregard of the rank and soldiers preference rights of other specified eligible persons and soldier veterans, even tho in the opinion of the fire chief the person appointed was best qualified. A nonsoldier must be better qualified to be entitled to appointment.

Herman v Sturgeon. (Filed August 6, 1940)

Soldiers preference applicable. The soldiers preference law applies to promotions under civil service.

Herman v Sturgeon. (Filed August 6, 1940)

5698

List of eligibles—rank and preference—conclusiveness on appointing officer. A civil service commission's list and finding of eligibility for appointment may not be nullified by a public safety superintendent appointing therefrom to the fire department a nonsoldier in disregard of the rank and soldiers preference rights of other specified eligible persons and soldier veterans, even tho in the opinion of the fire chief the person appointed was best qualified. A nonsoldier must be better qualified to be entitled to appointment.

Herman v Sturgeon. (Filed August 6, 1940)

5704

Mandamus—soldiers preference law—relief to rightful appointee. A person claiming a sol-

diers preference and challenging a promotional appointment of another from the civil service commission's certified list may proceed by mandamus rather than by appeal to the civil service commission.

Herman v Sturgeon. (Filed August 6, 1940)

5711

Mandamus—soldiers preference law—relief to rightful appointee. A person claiming a soldiers preference and challenging a promotional appointment of another from the civil service commission's certified list may proceed by mandamus rather than by appeal to the civil service commission.

Herman v Sturgeon. (Filed August 6, 1940)

5714

City renting water softeners to consumers—not engaging in private business. An ordinance authorizing a city to purchase individual water softeners for installation on the premises of water consumers on a rental basis is not invalid as authorizing the city to engage in private, competitive business, as the filters are a part of the process of furnishing water by the city under its statutory power to operate a waterworks plant with necessary filters, or under its implied authority to purify the water, rather than being the sale of an appliance utilized by the customer in consuming water after its delivery.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Pledging city's revenues—statutory authorization necessary. The pledging of a city's revenues is unauthorized in the absence of express statutory authority.

Brodkey v Sioux City, - ; 291 NW 171

Ordinances—parking meters—planning commission recommendation unnecessary. Ordinances providing for a parking meter system are not illegal because city council did not obtain the recommendation of the city planning commission pursuant to chapter 294-A1, C., '35 (Ch 294.1, C., '39) when the ordinances pertained to a subject matter unrelated to the provisions and purposes of such statutes.

Brodkey v Sioux City, - ; 291 NW 171

City renting water filters to consumers—injunction not granted. An action to enjoin a city council from purchasing individual water softeners to be rented to water consumers in accordance with a city ordinance because the acts authorized by the ordinance had not been submitted to the voters for approval was properly dismissed when it was conceded that the power to construct and operate the city waterworks plant had been granted by the voters.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Parking meters—location—delegation of authority to city commissioner. Ordinances providing that public safety commissioner shall designate, "as traffic conditions require", 700 spaces for parking meters from 1,800 locations selected by the city council were not unconstitutional as an unlawful delegation of power since the establishment of principles or standards of conduct may not be delegated, but the application of those principles or standards to the facts as they arise and the determination whether or not those facts exist, being a function of administrative government, may be delegated to an administrative body.

Brodkey v Sioux City, - ; 291 NW 171

Delegation of authority—flexibility—determining factors. The constitutional provisions prohibiting the delegation of legislative power are not regarded as denying lawmaking bodies resources that afford flexibility and practicality necessary to effective functioning of the laws they enact, and, while the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

Brodkey v Sioux City, - ; 291 NW 171

Traffic problems—delegation of power. It is common knowledge that municipal traffic problems are being increasingly transferred for solution to a more or less developed sphere of expert investigation and deduction, and city ordinances authorizing public safety commissioner to designate locations for parking meters from zones previously selected by the city council are not unconstitutional as an unlawful delegation of legislative power, the courts being prone to give consideration to a showing that the authority delegated is to do things the lawmaking body could not understandingly or advantageously do itself.

Brodkey v Sioux City, - ; 291 NW 171

Ordinance — excessive penalty — imposition necessary to question validity. Question of whether excessive penalties were provided in ordinances for violation of parking meter provisions is not justiciable in injunctive action by taxpayer questioning the legality of such ordinances, since no penalties were imposed upon plaintiff.

Brodkey v Sioux City, - ; 291 NW 171

Parking meters—income exceeding enforcement costs—invalidity of contract. The installation of parking meters by city under contracts providing that 75 percent of income from meters was to be paid to contract vendor until full purchase price was paid was illegal, since the imposition of parking charges for revenue-producing purposes was ultra vires, and justification therefor, if any, had to be founded on the measure being regulatory in character. And where the amounts exacted were many times more than was necessary to

reimburse the city for necessary supervision and enforcement, the characteristics of justifiable regulatory measures were negatived.

Brodkey v Sioux City, - ; 291 NW 171

Principles established by ordinance—enforcement by city commissioner—nondelegation of power. Under ordinances authorizing public safety commissioner to designate, "as traffic conditions require", spaces for parking meters from locations selected by the city council, the installation of meters at places so designated is not the performance of a legislative function within the constitutional intendment of unlawful delegation of power, for it was the city council that had established the principles and standards of conduct required of the motorist.

Brodkey v Sioux City, - ; 291 NW 171

5717

Resolution not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

5738

Boards and commissions—derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., '35 [Ch 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Park board—certiorari—capacity to sue. In a dispute between the park board and the city council over who has right to hire custodian of a cemetery, a writ of certiorari sought by the board was properly quashed for the reason that the park board has no capacity to sue.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Pledging city's revenues—statutory authorization necessary. The pledging of a city's revenues is unauthorized in the absence of express statutory authority.

Brodkey v Sioux City, - ; 291 NW 171

Resolution of council not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

Representations by city employee—knowledge of city. Representations by a city employee could not be considered as part of a contract by the city when there was no evidence that the city had knowledge of the representations nor that they had any part in the negotiations leading up to the contract.

Beh Co. v Des Moines, - ; 292 NW 69

Purchase of parking meters—statutory requirements—mandatory compliance. Before a city can enter into contracts for the purchase of parking meters, it must comply with statutory requirements in regard to advance estimates of annual expenditures, public hearings after proper notice, and supervisory control of the state appeal board.

Brodkey v Sioux City, - ; 291 NW 171

Icy street crossing—time to remedy defect not proved. In an action for damages for injuries sustained by a pedestrian in a fall while crossing an icy street intersection, the defendant city was entitled to a directed verdict when it was not shown how long prior to the accident the icy condition existed. Without such showing, in the absence of evidence of actual knowledge by the city of the icy condition, there was no basis for imputing such knowledge, nor for holding that there had been a reasonable opportunity for the city to remedy the situation.

Batie v Humboldt, 228- ; 292 NW 857

5750

Park board—cemetery custodian—authority to hire. In a dispute between the park board and the city council over who has right to hire custodian of a cemetery, a writ of certiorari sought by the board was properly quashed for

the reason that the park board has no capacity to sue.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5798

Derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., '35 [Ch 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5813.2

Title of act—nonreference to separate governmental corporation — legislative intent. Whether park board in city over 125,000 population, created under Ch 293-D1, C., '35 [Ch 293.1, C., '39], has a corporate existence independent of the parent municipality depends on legislative intent, and where the title to an act makes no reference to creation of separate corporation, in the face of constitutional requirement that such reference be prominent, and where the act itself is utterly silent on the subject, there can be no inference that the board is a distinct and corporate organization.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5813.6

Separate governmental corporation — nonreference in title of act—legislative intent. Whether park board in city over 125,000 population, created under Ch 293-D1, C., '35 [Ch 293.1, C., '39], has a corporate existence independent of the parent municipality depends on legislative intent, and where the title to an act makes no reference to creation of separate corporation, in the face of constitutional requirement that such reference be prominent, and where the act itself is utterly silent on the subject, there can be no inference that the board is a distinct and corporate organization.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., 35 [Ch 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Status of board—right to challenge city's conflicting actions. A park board in a city over 125,000 population, created under authority of Ch 293-D1, C., '35 [Ch 293.1, C., '39], is merely an agency or instrumentality of the city without authority to challenge, by certiorari, its parent municipality's actions or decisions.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Certiorari—capacity to sue. In a dispute between the park board and city council over who has right to hire custodian of a cemetery, a writ of certiorari sought by the board was properly quashed for the reason that the park board has no capacity to sue.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5822

Derivative rights—separate corporation—test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., '35 [Ch 293.1, C., '39]) is not given such authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

5829.10

Ordinances—parking meters—planning commission recommendation unnecessary. Ordinances providing for a parking meter system are not illegal because city council did not obtain the recommendation of the city planning commission pursuant to chapter 294-A1, C., '35 (Ch 294.1, C., '39) when the ordinances pertained to a subject matter unrelated to the provisions and purposes of such statutes.

Brodkey v Sioux City, - ; 291 NW 171

5836

City council's duty to levy tax—maximum levy not mandatory. AG Op August 12, 1940

5837

City council's duty to levy tax—maximum levy not mandatory. AG Op August 12, 1940

5838

City council's duty to levy tax—maximum levy not mandatory. AG Op August 12, 1940

5874

Degree of care in maintenance. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5889

"Asphalt plank" bridge flooring—approved construction—nonnegligence of bridge company. Where plaintiff, a motorist, attempting to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded thru the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5894

Use for travel—degree of care in maintenance. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5899.01

Use for travel—degree of care in maintenance. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

"Asphalt plank" bridge flooring—approved construction—nonnegligence of bridge company. Where plaintiff, a motorist, attempting to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded thru the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

5905

Resubmission of question after defeat. In view of other statutes which permit subsequent elections in similar cases, statutes governing elections for municipal utility franchises and containing no bar to a subsequent election in case the proposal is defeated do not preclude a resubmission of the question of a franchise for an electric utility after the proposal has once been defeated.

Iowa P. & L. v Hicks, - ; 292 NW 826

Mandamus—mayor compelled to call election on franchise. When a proposal to grant a franchise to an electric utility company was defeated in a municipal election and two petitions for subsequent elections were filed, altho mandamus to compel the mayor to call another election was refused in an action arising from the first petition, the writ should issue in an action based on the second petition, in which it was shown that a change in the voting population had taken place greater than the margin by which the proposition was defeated in the first election.

Iowa P. & L. v Hicks, - ; 292 NW 826

5938

Street accepted by general public—nontaxable—title void. In an action to set aside a tax deed to a strip of land allegedly used for a city street according to a filed and recorded plat, and which street, tho not accepted by the municipality but accepted by the public generally, became a public street, the purchaser obtained no title by tax deed since a public street is not taxable.

Wolfe v Kemler, 228- ; NW (Filed June 18, 1940)

Streets—nonconformity to statute—acceptance by public generally—effect. The statutory requirements for the acceptance and confirmation by a municipal corporation of the dedication of a street are inapplicable where a plat is filed with the county auditor and recorded in the county recorder's office showing the various parcels into which such tract of land has been divided and providing for such street—the lots being sold and such street being accepted generally by the public.

Wolfe v Kemler, 228- ; NW (Filed June 18, 1940)

5939

Streets—nonconformity to statute—acceptance by public generally—effect. The statutory requirements for the acceptance and confirmation by a municipal corporation of the

dedication of a street are inapplicable where a plat is filed with the county auditor and recorded in the county recorder's office showing the various parcels into which such tract of land has been divided and providing for such street—the lots being sold and such street being accepted generally by the public.

Wolfe v Kemler, 228- ; NW (Filed June 18, 1940)

Street accepted by general public—nontaxable—title void. In an action to set aside a tax deed to a strip of land allegedly used for a city street according to a filed and recorded plat, and which street, tho not accepted by the municipality but accepted by the public generally, became a public street, the purchaser obtained no title by tax deed since a public street is not taxable.

Wolfe v Kemler, 228- ; NW (Filed June 18, 1940)

6008

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

6037

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

6104

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

Resolution not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

6127

Individual water softeners rented to consumers—city ownership. Under a statute authorizing cities to maintain waterworks with necessary filters, a city may purchase individual water softeners and rent them to water consumers upon application, as the softeners are filters within the meaning of the statute and are city property used to furnish water of a necessary quality to the citizens. Altho attached to the consumer's water pipe, the softener does not become the consumer's private plant, but is a substitute for a central filter and is a part of the city waterworks plant.

Leighton Co. v Fort Dodge, - ; 292 NW 848

City renting water filters to consumers—injunction not granted. An action to enjoin a city council from purchasing individual water softeners to be rented to water consumers in accordance with a city ordinance because the acts authorized by the ordinance had not been submitted to the voters for approval was properly dismissed when it was conceded that the power to construct and operate the city waterworks plant had been granted by the voters.

Leighton Co. v Fort Dodge, - ; 292 NW 848

City renting water softeners to consumers—not engaging in private business. An ordinance authorizing a city to purchase individual water softeners for installation on the premises of water consumers on a rental basis is not invalid as authorizing the city to engage in private, competitive business, as the filters are a part of the process of furnishing water by the city under its statutory power to operate a waterworks plant with necessary filters, or under its implied authority to purify the water, rather than being the sale of an appliance util-

ized by the customer in consuming water after its delivery.

Leighton Co. v Fort Dodge, - ; 292 NW 848

6131

City renting water filters to consumers—injunction not granted. An action to enjoin a city council from purchasing individual water softeners to be rented to water consumers in accordance with a city ordinance because the acts authorized by the ordinance had not been submitted to the voters for approval was properly dismissed when it was conceded that the power to construct and operate the city waterworks plant had been granted by the voters.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Resubmission of question after defeat. In view of other statutes which permit subsequent elections in similar cases, statutes governing elections for municipal utility franchises and containing no bar to a subsequent election in case the proposal is defeated do not preclude a resubmission of the question of a franchise for an electric utility after the proposal has once been defeated.

Iowa P. & L. v Hicks, - ; 292 NW 826

6132

Erection of municipal plant—code sections placed on ballots—incomplete list—voters not misled. In a town election on the question of establishing a municipal light and power plant, when the ballot provided that the plant would be paid for from its future earnings "as provided for by sections 6134-d1 to 6134-d7, inclusive, of the 1935 Code of Iowa", such provision was not objectionable on the ground that it would mislead the voter into believing that the ballot referred only to the named sections and not to other sections amending that law and pertaining to the same subject matter which had been inserted in the code following section 6134-d1.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Resubmission of question after defeat. In view of other statutes which permit subsequent elections in similar cases, statutes governing elections for municipal utility franchises and containing no bar to a subsequent election in case the proposal is defeated do not preclude a resubmission of the question of a franchise for an electric utility after the proposal has once been defeated.

Iowa P. & L. v Hicks, - ; 292 NW 826

Calling of re-election on franchise. After a municipal election in which a proposal to grant a franchise to an electric utility company was defeated, and the mayor did not call another election on the same proposition altho proper petitions for such election were filed, a petition for a writ of mandamus to compel the mayor to call the election should have been granted unless peculiar facts presented some reason for refusing the writ.

Iowa P. & L. v Hicks, - ; 292 NW 826

Compelling calling of utility election—change of circumstances. The issuance of a writ of mandamus being not a matter of right, but resting in the discretion of the court, a court properly refused to issue a writ to compel a mayor to call an election on the proposition of granting a franchise to a public utility company when a reasonable time had not elapsed since a previous election in which the proposal was defeated, and there was no showing of a change of circumstances to warrant interference by the court.

Iowa P. & L. v Hicks, - ; 292 NW 826

Mandamus—mayor compelled to call election on franchise. When a proposal to grant a franchise to an electric utility company was defeated in a municipal election and two petitions for subsequent elections were filed, altho mandamus to compel the mayor to call another election was refused in an action arising from the first petition, the writ should issue in an action based on the second petition, in which it was shown that a change in the voting population had taken place greater than the margin by which the proposition was defeated in the first election.

Iowa P. & L. v Hicks, - ; 292 NW 826

6134.01

Public utility construction enjoined—noncompetitive bidding on contract. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses, as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Contract for construction of municipal plant—failure to include statutory provisions. A contract let by a town for the erection of a municipal light and power plant was not void for failure to require that ten percent of the contract price be retained to cover possible claims for labor and materials as required by statute, when the statute protects the persons furnishing labor and materials on public contracts without regard for the express provisions of the contract.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Municipal public utility bond sale—title of act not all-embracing—validity. When stat-

utes authorizing municipalities to establish public utilities and pay for them out of earnings were amended by an act providing for the issuance and sale of bonds to defray the cost of the plant, the act was not unconstitutional for failure to embrace in its title other statutes regulating the sale of public bonds, which were in effect amended by the act, when all the matters embraced in the act were definitely connected with the subject indicated in its title.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Erection of municipal plant—code sections placed on ballots—incomplete list—voters not misled. In a town election on the question of establishing a municipal light and power plant, when the ballot provided that the plant would be paid for from its future earnings "as provided for by §6134-d1 to §6134-d7, inclusive, of the 1935 Code of Iowa," such provision was not objectionable on the ground that it would mislead the voter into believing that the ballot referred only to the named sections and not to other sections amending that law and pertaining to the same subject matter which had been inserted in the code following §6134-d1.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Pledging city's revenues—statutory authorization necessary. The pledging of a city's revenues is unauthorized in the absence of express statutory authority.

Brodkey v Sioux City, - ; 291 NW 171

Injunction against issuing bonds for municipal light plant—not moot question. After the dismissal of a petition seeking to enjoin the construction of a municipal light plant and the issuance of revenue bonds in payment for it, altho the plant was completed the question of enjoining the issuance of the bonds was not moot when the action had been appealed and a stay order obtained against the town accepting the work, using the premises, or issuing bonds to the contractor in payment of the contract price.

Gunnar v Montezuma, 228- ; 293 NW 1

Municipal light plant construction—moot question on appeal. When a municipal light plant was completed after a petition to enjoin such construction had been dismissed, with no stay order to prevent such construction having been obtained, an appeal from the refusal to enjoin the construction presented a moot question, as the threatened action had become an accomplished fact.

Gunnar v Montezuma, 228- ; 293 NW 1

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

6134.02

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

6134.09

Public utility construction enjoined—noncompetitive bidding on contract. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses, as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

6147

Atty. Gen. Opinion. See AG Op June 26, '40

6149

Atty. Gen. Opinion. See AG Op June 26, '40

6159

Atty. Gen. Opinion. See AG Op June 26, '40

6176

Derivative rights — separate corporation — test. The authority of an agency of government to act independently of the parent municipality depends on whether the agency has been given express power to sue or be sued. Where cities and towns, park commissioners, counties, school districts, river-front improvement commissioners, and boards of waterworks trustees are given express authority to sue and be sued, and a park board in a city over 125,000 population (created by Ch 293-D1, C., '35 [Ch 293.1, C., '39]) is not given such

authority, such park board is merely an agency of the city and has no independent existence.

Des Moines Park Board v Des Moines, - ; 290 NW 680

6258

Public utility construction enjoined — noncompetitive bidding on contract. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses, as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

6261

"Indebtedness"—bonds payable from anticipated special taxes. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

6263

"Indebtedness"—bonds payable from anticipated special taxes. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

6943.026

Use tax — retail sales — stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

6943.034

School tuition offset against homestead tax credit. AG Op Aug. 27, 1940

6943.040

Liquidating distribution of corporate assets —capital gains—nontaxable as income. On the dissolution of a corporation, a cash dividend paid from the surplus in furtherance of the liquidation plan is not taxable as individual income, the liquidating distribution being simply the turning over to the stockholders of property they already own, rather than a distribution of income as in an ordinary dividend, and it is a capital gain, the income from which is specifically not taxable by statute.

Lynch v Board, - ; 291 NW 161

6943.103

Use tax—retail sales—stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

6943.109

Use tax — foreign corporation — mail order sales from outside state. Statutes requiring a retailer to collect a use tax on sales made without the state, when considered with other statutes providing that the tax is a debt owed to the state and that, upon a finding that the debt has not been paid, the retailer's permit to do business as a foreign corporation within the state must be revoked, are unconstitutional and void so far as they apply to mail order sales made by a foreign corporation from stores without the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Doing business in state—mail orders from outside state—use tax. A foreign corporation limiting its activities to conducting a mail order business from stores outside the state would not be doing business in the state, could not be required to secure a license to do business in the state, and would not be subject to a use tax statute applicable to retailers conducting a retail business in Iowa. By also doing a retail business in the state under a permit from the state, the state is not given the right to attach, as a condition to its right to do such business, a requirement that the foreign corporation collect the use tax on sales made outside the state on which the corporation would otherwise have no obligation to the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

6943.112

Use tax — foreign corporation — mail order sales from outside state. Statutes requiring a retailer to collect a use tax on sales made without the state, when considered with other statutes providing that the tax is a debt owed to the state and that, upon a finding that the debt has not been paid, the retailer's permit to do business as a foreign corporation within the state must be revoked, are unconstitutional and void so far as they apply to mail order sales made by a foreign corporation from stores without the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

6943.122

Use tax — foreign corporation — mail order sales from outside state. Statutes requiring a retailer to collect a use tax on sales made without the state, when considered with other statutes providing that the tax is a debt owed to the state and that, upon a finding that the debt has not been paid, the retailer's permit to do business as a foreign corporation within the state must be revoked, are unconstitutional and void so far as they apply to mail order sales made by a foreign corporation from stores without the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

6943.156

Constitutionality—arbitrary classification—violative of equal protection clause. The Agricultural Land Credit Act granting tax benefits only to agricultural lands located in independent school districts and not to agricultural lands lying within consolidated districts held violative of the equal protection clause of the constitution since the classification adopted in that act is based solely upon the location of the property, and the basis for such classification has no reasonable relation to the purpose of the act, namely, "equalizing the burden of taxation to be borne by agricultural real estate."

Keefner v Porter. (Filed August 6, 1940)

6944

Tax-exempt property — strict construction. Principle reaffirmed that statutes passed for the purpose of exempting property from taxation must be strictly construed, and any doubt upon the question must be resolved against the exemption and in favor of taxation.

Board v Board, 228- ; 293 NW 38

School district as trustee — individuals as cestuis—property not exempt. A school district which held real property in trust to use the income for college scholarships could not, in a mandamus action against the county supervisors, recover taxes paid on the property and prevent further collection of taxes on the ground that the property was exempt from taxation under §6944, C., '35, as the property and income were not used for a public purpose, the beneficiaries of the trust being the recipients of the scholarships, with the trust standing in the same position as if vested in any other qualified trustee.

Board v Board, 228- ; 293 NW 38

6946

Military service—exemptions from property tax—necessity of filing claim each year. Under the statute providing exemptions from property taxation for military service, it is necessary that the beneficiary file a claim for exemption each year, and where a widow of a deceased soldier, remaining unmarried, filed a claim but once (in 1915), and was thereafter allowed exemption each year until 1932, and next applied for exemption in 1931 and not again until 1938, when she received notice of expiration of a tax redemption period, it was her duty to file each year, and while it is unfortunate that she may have been misled by the practice of the taxing authorities in allowing exemption without application, that conduct cannot change the plain meaning of the statute.

Lewis v Vanier, - ; 290 NW 684

6985

Annuity insurance policy taxable as credits. AG Op Aug. 12, '40

7129.1

Atty. Gen. Opinion. See AG Op June 26, '40

7179

Exposition—reasonably safe place for visitors. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

7193

Delinquent taxes not entered—rights of tax deed purchaser. The failure of a county treasurer to record delinquent taxes opposite the real estate on which the taxes remain unpaid

causes the lien for the taxes to be lost, so that the purchaser of the land at a tax sale acquires only a claim against the owner for the taxes.

Flanders v Ins. Co., - ; 292 NW 795

Tax sale subject to special assessment liens —taxes not recorded. A tax deed received in a sale for ordinary taxes usually destroys the liens of special assessments on the property, but where the tax lien has been lost by the failure of the county treasurer to record the delinquent taxes opposite the real estate on which the tax is unpaid, the tax sale is subject to a lien evidenced by a special assessment certificate.

Flanders v Ins. Co., - ; 292 NW 795

7193.05

Tax sale subject to special assessment liens —taxes not recorded. A tax deed received in a sale for ordinary taxes usually destroys the liens of special assessments on the property, but where the tax lien has been lost by the failure of the county treasurer to record the delinquent taxes opposite the real estate on which the tax is unpaid, the tax sale is subject to a lien evidenced by a special assessment certificate.

Flanders v Ins. Co., - ; 292 NW 795

7203

Old-age assistance head tax—auditor's failure to certify—nonlien on realty. AG Op August 14, 1940

7227

Interest and penalties under redemption from scavenger sale—credited to general fund—apportionment. AG Op July 30, 1940

7244

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

7257

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

7259

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessments. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

7265

Tax deed—nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

Tax titles—liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

7266

Tax titles—liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank.

When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

7272

Liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

7286

Liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

Nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

Tax sale—error corrected by reselling at adjourned sale—tax deed nullifying special assessment. Where bid at annual tax sale for general taxes and special assessments was erroneously noted for only the specials, it was treasurer's duty to correct the error, and it was proper to re-offer the property at adjourned sale wherein the original bidder made purchase for full amount of delinquent general taxes, altho treasurer might have rectified the error by changing certificate so as to include the general taxes, and, since such sale was valid and tax deed was duly issued, the lien of subsequently accruing special assessments was extinguished.

Tesdell v Greenwalt, 228- ; 290 NW 676

Deed not mortgage—no secured debt. A deed given to one who paid delinquent taxes on the property satisfied the debt for the taxes, and no obligation existed under an option to repurchase given the grantor. There being no debt, there was nothing to be secured by the deed, and it could not be construed as a mortgage.

Ross v Ins. Co., 228- ; 292 NW 813

Ownership — deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

Assignment to one who paid taxes—policy not set out in abstract—coverage not determinable. In an appeal from an action for loss under a fire insurance policy which was assigned to one who was given a deed to the property when he paid delinquent taxes, the contention of the insurer that the coverage was limited to the plaintiff's investment in the property could not be determined without an interpretation of the policy, which could not be made when the policy was not set out in the abstract and only general reference to it was made in the pleadings.

Ross v Ins. Co., 228- ; 292 NW 813

Tax sale subject to special assessment liens —taxes not recorded. A tax deed received in a sale for ordinary taxes usually destroys the liens of special assessments on the property, but where the tax lien has been lost by the failure of the county treasurer to record the delinquent taxes opposite the real estate on which the tax is unpaid, the tax sale is subject to a lien evidenced by a special assessment certificate.

Flanders v Ins. Co., - ; 292 NW 795

7287

Claiming under tax deed—prima facie case. Plaintiff in quiet title action, claiming under tax deed issued by county treasurer, establishes a prima facie case when the tax deed is received in evidence.

Tesdell v Greenwalt, 228- ; 290 NW 676

7290

Special assessment lien—defense against tax deed subject to lien. A statute providing that

no person can question the title acquired by a tax deed without first showing that he, or the person under whom he claims title, had title at the time of sale, or that title was acquired from the state or United States after the sale, and that all taxes have been paid, does not preclude one from defending the lien of his special assessment certificate against a quiet title action based on a tax sale which was made subject to the prior lien of the special assessment.

Flanders v Ins. Co., - ; 292 NW 795

7291

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

7292

Nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

7293

Resolution of city council not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

7479

Additional drainage assessment—when not permissible. In mandamus action by drainage bondholders against the board of supervisors to require an additional levy for payment of bonds, a writ was properly denied where the original special assessments were sufficient to pay the bonds "when collected" and a deficiency was occasioned by the failure to collect the assessments on two tracts of land. While drainage statutes provide for additional levies to pay bonds where work exceeds the estimate, or the levy is insufficient to pay the bonds, nevertheless the drainage law appears to recognize the rule that one who fully paid his share of a levy sufficient to meet a bond issue is not liable for deficiencies resulting from failure of other lands to pay the tax where property values would support the assessment when made. The court will take judicial notice of the great shrinkage in land values.

Hartz v Truckenmiller. (Filed August 6, 1940)

District funds intermingled—deficiency—failure to collect assessments rather than diversion. In mandamus action by drainage bondholders against board of supervisors to require an additional levy for the benefit of the bonds, where district funds were intermingled in a consolidated account, a writ based on the theory there was a diversion of bond funds was properly denied where it is shown the deficiency was created by the failure to collect the special assessments on two tracts of land —the original assessment being sufficient to pay the bonds when collected.

Hartz v Truckenmiller. (Filed August 6, 1940)

7481

District funds intermingled—deficiency—failure to collect assessments rather than diversion. In mandamus action by drainage bondholders against board of supervisors to require an additional levy for the benefit of the bonds, where district funds were intermingled in a consolidated account, a writ based on the theory there was a diversion of bond funds was properly denied where it is shown the deficiency was created by the failure to collect the special assessments on two tracts of land—the original assessment being sufficient to pay the bonds when collected.

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7505

Additional drainage assessment—when not permissible. In mandamus action by drainage bondholders against the board of supervisors to require an additional levy for payment of bonds, a writ was properly denied where the original special assessments were sufficient to pay the bonds "when collected" and a deficiency was occasioned by the failure to collect the assessments on two tracts of land. While drainage statutes provide for additional levies to pay bonds where work exceeds the estimate, or the levy is insufficient to pay the bonds, nevertheless the drainage law appears to recognize the rule that one who fully paid his share of a levy sufficient to meet a bond issue

is not liable for deficiencies resulting from failure of other lands to pay the tax where property values would support the assessment when made. The court will take judicial notice of the great shrinkage in land values.

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7509

Additional drainage assessment—when not permissible. In mandamus action by drainage bondholders against the board of supervisors to require an additional levy for payment of bonds, a writ was properly denied where the original special assessments were sufficient to pay the bonds "when collected" and a deficiency was occasioned by the failure to collect the assessments on two tracts of land. While drainage statutes provide for additional levies to pay bonds where work exceeds the estimate, or the levy is insufficient to pay the bonds, nevertheless the drainage law appears to recognize the rule that one who fully paid his share of a levy sufficient to meet a bond issue is not liable for deficiencies resulting from failure of other lands to pay the tax where property values would support the assessment when made. The court will take judicial notice of the great shrinkage in land values.

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Hartz v Truckenmiller. (Filed August 6, 1940)

7563

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

7564

Action against drainage districts in different counties—where cause of action arose. Where several drainage districts were situated in more than one county, an action to compel them to levy assessments to pay their share of the cost of cleaning a main outlet ditch was properly brought in the county where the outlet ditch was located, such being the place where the work was done and where a commission to apportion the costs was appointed, as this was the county where the cause of action, or some part of it, arose.

Board of Trustees v Board, - ; 291 NW 141

7589

Board of supervisors—purchasing tax title. Where land is sold for taxes upon which drainage district assessments are unpaid and bonds are outstanding, the action of the board of supervisors in securing the tax titles was legal and was indicative of due diligence and good faith, and in compliance with statute.

Hartz v Truckenmiller. (Filed August 6, 1940)

7590

Board of supervisors—purchasing tax title—subject to drainage assessment. Where land is sold for taxes upon which drainage district assessments are unpaid and bonds are outstanding, the action of the board of supervisors in securing the tax titles was legal and was indicative of due diligence and good faith, and in compliance with statute.

Hartz v Truckenmiller. (Filed August 6, 1940)

7866

Inspectors for commerce commission—confidential relation—unallowable preference. In certiorari action by a world war veteran contending he was wrongfully discharged from his position as inspector for the Iowa State Commerce Commission, it was shown that duties to be performed were of such nature that the commission must have inspectors in whom they have the utmost faith and confidence as to their honesty and integrity, good common sense and judgment, and there existed a strictly confidential relationship so as to constitute an exception to the soldiers preference law.

Hannam v Commerce Com., 228- ; 292 NW 820

7869

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an

order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

8036

Bridge company not common carrier. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

8323

Tree over transmission line—failure to remove. Where a tree limb on the plaintiffs' land had broken and lodged in the fork of a dead tree and hung 2 or 3 feet over the defendant's transmission line, and later electricity from the line set the tree on fire and it spread to the plaintiffs' house, in an action to recover for the fire loss it could not be said as a matter of law that the plaintiffs were contributorily negligent in not removing the limb when they had acted as reasonable and prudent persons in twice requesting the defendant to take the line down or shut off the current so the tree could be cut down and the overhanging limb removed.

Porter v Elec. Co., 228- ; 292 NW 231

8338.47

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received five dollars per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only fifty cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

8341

Exposition—reasonably safe place for visitors. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

8357

Accrual of action—demand on corporation to repurchase stock—oral agreement. Altho a cause of action accrues on demand notes and instruments as soon as they are executed and the statute of limitations runs from that time, when a corporation sold stock with verbal agreements to repurchase the stock upon demand, no cause of action accrued against the corporation until the demand to repurchase was made and refused, and until that time the statute of limitations did not begin to run on the oral agreement.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Foreign corporation's stock repurchase agreement—impairment of capital—jury question. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Affirmative defense not established as matter of law—directed verdict denied. In damage action for failure to repurchase corporate stock and where defendant answered that plaintiffs had disposed of the stock prior to this action, defendant's motion for directed verdict was

properly refused—the affirmative defense not having been established as a matter of law.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral agreement to repurchase corporate stock—action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Affirmative defenses presenting jury questions—erroneous directed verdict. In damage action for alleged failure of defendant to repurchase from plaintiff certain shares of stock of defendant company, where defendant pleaded as affirmative defenses (1) that repurchase of stock would have impaired its capital in violation of Delaware laws under which corporate authority was granted, and (2) that plaintiffs did not own stock purchased, but had exchanged it, such defenses were questions for the jury, and the court was in error in directing a verdict for plaintiffs.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Burden of proof to show demand made within statutory period. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, and it is shown that demand to repurchase was not made until eight years after the original transaction, the burden of proof was on plaintiff to show demand was made within five years as provided by statute of limitations on unwritten contracts. On account of plaintiff's failure to sustain such burden of proof, the trial court erred in directing a verdict for plaintiff.

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

8378

Liquidating distribution of corporate assets—capital gains—nontaxable as income. On the dissolution of a corporation, a cash dividend paid from the surplus in furtherance of the liquidation plan is not taxable as individual income, the liquidating distribution being simply the turning over to the stockholders of property they already own, rather than a distribution of income as in an ordinary dividend, and it is a capital gain, the income from which is specifically not taxable by statute.

Lynch v Board, - ; 291 NW 161

8400

Testimony as to books showing corporate condition—prerequisites. Before one who has examined books of account or records can testify as to a finding on some particular matter, the books from which the testimony is based should be in evidence or at least available to the party against whom it is offered. Books of a central corporation which could not alone show the condition of the corporation without also using the books of the subsidiaries, which were not made available, were not admissible as a basis for proffered testimony concerning the financial condition of the corporation.

Gregg v Middle States Utilities, - ; 293 NW 66

8420

Use tax—retail sales—stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

Doing business in state—mail orders from outside state—use tax. A foreign corporation limiting its activities to conducting a mail order business from stores outside the state would not be doing business in the state, could not be required to secure a license to do business in the state, and would not be subject to a use tax statute applicable to retailers conducting a retail business in Iowa. By also doing a retail business in the state under a permit from the state, the state is not given the right to attach, as a condition to its right to do such business, a requirement that the foreign corporation collect the use tax on sales made outside the state on which the corporation would otherwise have no obligation to the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do

business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

8433

Oral agreement to repurchase corporate stock —action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Foreign corporation's stock repurchase agreement—impairment of capital—jury question. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

8436

Foreign corporation's stock repurchase agreement—impairment of capital—jury question. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

8581.22

Unemployment compensation commission employee—rescinding order for employment —discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

8582

Exposition—reasonably safe place for visitors. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

8613.1

Receiver—who may seek appointment—commissioner as receiver. The appointment of a receiver for an insurance company has been recognized by the legislature as a matter in which the public has an interest, and the procedure for such appointment is prescribed by statute whereby no receiver shall be appointed except upon application of the attorney general. The commissioner of insurance shall act as receiver, without compensation except for expenses. Therefore plaintiffs, as stockholders

of an insurance company, could not obtain the appointment of a receiver for such company.

Walling v Ins. Co., 228- ; 292 NW 157

8637

Receiver—who may seek appointment—commissioner as receiver. The appointment of a receiver for an insurance company has been recognized by the legislature as a matter in which the public has an interest, and the procedure for such appointment is prescribed by statute whereby no receiver shall be appointed except upon application of the attorney general. The commissioner of insurance shall act as receiver, without compensation except for expenses. Therefore plaintiffs, as stockholders of an insurance company, could not obtain the appointment of a receiver for such company.

Walling v Ins. Co., 228- ; 292 NW 157

8757

False statements in application—proof erroneously refused. In an action on a life insurance policy issued without physical examination, it is error to refuse to permit the insurer to show that it relied on false statements in the insurance application and that, had the truth been revealed, the application would not have been approved nor the policy issued.

Cross v Equitable Life. (Filed August 6, 1940)

8770

Policy provision—examination of insured. In law action to recover indemnity on an accident policy, plaintiff assigned as error an order of court, granted upon application of defendant, directing plaintiff to permit certain doctors to examine him respecting his injuries and their connection with any disability suffered by him. Such assignment of error was without merit where the policy provided "The company shall have the right and opportunity through its medical representative to examine the person of the insured while living when and so often as it may reasonably require during the pendency of a claim thereunder". Insurer was entitled to make such examination as the court ordered, without any such order.

Eller v Ins. Co., - ; 291 NW 866

Waiver of right of privileged communications. A life insurance company has the right, before issuing a policy, to require a physical examination of an applicant and may incorporate in the application a waiver of the right to claim the privilege of confidential relation between physician and patient. It must take cognizance of the statute relating to privileged communications when it chooses to rely on representations as to health made in the application and does not require a physician's examination before issuing the policy.

Cross v Equitable Life. (Filed August 6, 1940)

8776

Annuity insurance policy taxable as credits. AG Op Aug. 12, '40

Ch 401, Note 1 Life insurance generally.

Waiver of right of privileged communications. A life insurance company has the right, before issuing a policy, to require a physical examination of an applicant and may incorporate in the application a waiver of the right to claim the privilege of confidential relation between physician and patient. It must take cognizance of the statute relating to privileged communications when it chooses to rely on representations as to health made in the application and does not require a physician's examination before issuing the policy.

Cross v Equitable Life. (Filed August 6, 1940)

Physician-patient relation—nonwaiver by insurance applicant. When it is made to appear to the trial court that the relationship of physician and patient existed, the statutory bar to the admission of privileged communications should be held applicable. Statements made in an application for a life insurance policy that the applicant had consulted no physician and had no ulcer nor stomach trouble did not waive the privilege when the existence of the relationship appeared for the first time from the testimony of a physician appearing as the insurer's witness. Unless the assured had made an express waiver, or opened the door by introducing testimony on the privileged subject matter, the insurer could not enter the field.

Cross v Equitable Life. (Filed August 6, 1940)

New policy substituted for original contract—conclusiveness. Where a life policy is surrendered by insured to insurer, and a new policy issued therefor, the later executed policy is conclusive as to what the contract was, in the absence of mistake or fraud, and the probative force of the prior policy goes no further than the extent to which it may tend to prove there was a mistake.

Knott v Ins. Co., ; 290 NW 91

Reformation of policy. A life policy must be liberally construed in insured's favor and so as to avoid forfeiture, but to entitle a beneficiary of insured to reformation of a life policy so as to show true effective date thereof, it must appear that contract does not express parties' true agreement, and upon failure to establish such fact, contract is controlling. Evidence insufficient to warrant finding of either fraud or mutual mistake.

Wall v Ins. Co., 228- ; 289 NW 901

Time of payment—evidence insufficient for reformation. As a general rule, an issued and accepted life policy setting out the annual premium dates determines the date of lapse in the absence of the establishment of grounds for reformation, so where the policy, dated June 14, 1924, was received by agent July 1 or 2,

1924, and delivered to the insured, but not to become effective until the first annual premium was paid, and where the beneficiary claims delivery on or about August 5, 1924, but insured claims delivery about July 1, 1924, and where insured, having paid first year's premium, and such policy containing a 31-day grace period, met accidental death on August 14, 1925, no grounds for reformation were established and the policy by its terms had lapsed.

Wall v Ins. Co., 228- ; 289 NW 901

Evidence to be clear and satisfactory. A court of equity will only reform a written instrument when it is moved to do so by clear and satisfactory evidence of a mutual mistake or other reason for reformation.

Knott v Ins. Co., ; 290 NW 91

Reformation—mutual mistake and fraud. To entitle a person to reformation of a contract, there must be some showing of fraud, ambiguity, or mutual mistake, and the general rule is that proof must be clear, satisfactory, and convincing. A contract cannot be reformed on grounds of both mutual mistake and fraud, as such claims would be mutually destructive. Evidence insufficient to warrant finding of fraud or mutual mistake.

Wall v Ins. Co., 228- ; 289 NW 901

Reformation for mistake—insufficiency of showing. In an action on life policy by plaintiff-executors to recover proceeds payable to insured's estate, where insurer seeks to reform the policy, and the evidence shows that, at instance of insurer's agent, insured exchanged a life policy issued when insured was 45 years of age for a policy issued at a time when insured was 59 years of age and that by agreement the insurer issued a standard policy as of age 53 and the second policy contained practically the same guaranteed loan and surrender value as the first policy, evidence did not warrant an inference that insurer erroneously failed to insert a table based on 59 years of age in new policy as set out in the rate book. A reformation of new policy was not warranted.

Knott v Ins. Co., ; 290 NW 91

False statements in application—proof erroneously refused. In an action on a life insurance policy issued without physical examination, it is error to refuse to permit the insurer to show that it relied on false statements in the insurance application and that, had the truth been revealed, the application would not have been approved nor the policy issued.

Cross v Equitable Life. (Filed August 6, 1940)

Waiver not applicable to create noncontractual liability. In an action for death benefits under a policy of insurance, where the insurer contended that it was not liable because certain provisions of its bylaws exempting it from liability in case death occurred from certain causes were part of the insurance contract, it could not be contended that the insurer waived such exemptions, as the bylaws merely limited the risk, rather than being a forfeiture clause. The doctrine of waiver cannot be made to create a contractual liability not contained in the policy itself.

Richardson v Trav. Assn., 228- ; 291 NW 408

Death from airplane accident—restrictions on air travel. A policy of insurance which did not assume the risk of air travel except for passengers on planes licensed to carry passengers and operating regularly between two or more airports did not cover a passenger on a special trip in an army combat plane, the plane not being licensed to carry passengers and not operating on a regular schedule.

Richardson v Trav. Assn., 228- ; 291 NW 408

Parachute jump—airplane short of fuel—cause of death. Death caused by the failure of a parachute to open after the insured had been ordered to jump from an airplane when the gasoline supply was exhausted and the plane could not be landed because of low visibility did result "in or caused by any aerial conveyance" within the terms of an insurance policy, the jump not being the voluntary act of the insured.

Richardson v Trav. Assn., 228- ; 291 NW 408

8940

Policy covering all of insured's property. A fire insurance policy provision covering all property on the premises in which the insured had any interest does not make the policy cover only the interest of the insured's assignee for benefit of creditors, but is intended to complete the description of the property covered.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Assignment for benefit of creditors—insurance proceeds—rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance proceeds—rights of mortgagee. A mortgagee has no interest in an insurance policy issued to the mortgagor upon the mortgaged property, unless such interest be created by a covenant or condition, and in the absence of such covenant the insurance contract is strictly personal between the insurer and insured. When a mortgagor, under the terms of the mortgage, is bound to keep the

premises insured for the benefit of the mortgagee, an equitable lien arises in favor of the mortgagee.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance proceeds — mortgagee's rights against assignee. In an action by a chattel mortgagee against an assignee for the benefit of creditors who had received the proceeds from a fire insurance policy taken out by the mortgagor-assignor to secure the mortgage loan, a directed verdict against the assignee should be sustained to the extent of the net proceeds of the policy.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Assignment to one who paid taxes—policy not set out in abstract—coverage not determinable. In an appeal from an action for loss under a fire insurance policy which was assigned to one who was given a deed to the property when he paid delinquent taxes, the contention of the insurer that the coverage was limited to the plaintiff's investment in the property could not be determined without an interpretation of the policy, which could not be made when the policy was not set out in the abstract and only general reference to it was made in the pleadings.

Ross v Ins. Co., 228- ; 292 NW 813

Waiver not applicable to create noncontractual liability. In an action for death benefits under a policy of insurance, where the insurer contended that it was not liable because certain provisions of its bylaws exempting it from liability in case death occurred from certain causes were part of the insurance contract, it could not be contended that the insurer waived such exemptions, as the bylaws merely limited the risk, rather than being a forfeiture clause. The doctrine of waiver cannot be made to create a contractual liability not contained in the policy itself.

Richardson v Trav. Assn., 228- ; 291 NW 408

Indemnity payments—nonadmission of disability. In law action to recover indemnity under an accident policy, where plaintiff complains of the trial court's striking from his reply the allegation that defendant by admitting payment of indemnity up to March 21, 1938, was estopped to make any claim that plaintiff was not totally and continuously disabled up to that time, no error was committed in such ruling where defendant never at any time admitted that plaintiff was ever totally disabled at any time, and the fact indemnity had been paid was not an express or inferential admission of such disability.

Eller v Ins. Co., - ; 291 NW 866

Cross-examination and argument on subject of other indemnity insurance—when nonerroneous. In law action to recover indemnity under an accident policy where plaintiff is cross-examined with reference to other indemnity insurance carried by him, to which objections were sustained, there was no error, since the court instructed the jury to consider only such evidence as was admitted, and the reference to such matters by defendant's attorney, in argument to the jury, was not erroneous, since plaintiff's attorney first mentioned the subject and the record supported the statements made.

Eller v Ins. Co., - ; 291 NW 866

Examination of injured insured—policy provision—court order unnecessary. In law action to recover indemnity on an accident policy, plaintiff assigned as error an order of court, granted upon application of defendant, directing plaintiff to permit certain doctors to examine him respecting his injuries and their connection with any disability suffered by him. Such assignment of error was without merit where the policy provided "The company shall have the right and opportunity through its Medical Representative to examine the person of the insured while living when and so often as it may reasonably require during the pendency of a claim thereunder". Insurer was entitled to make such examination as the court ordered, without any such order.

Eller v Ins. Co., - ; 291 NW 866

Instruction as to amount of indemnity—nonerroneous—jury finding no liability. In law action to recover indemnity under an accident policy, where the court instructs the jury that any indemnity allowed for hospitalization should not exceed a certain amount, there was no error even tho the amount was incorrect, since the jury found there was no liability whatsoever.

Eller v Ins. Co., - ; 291 NW 866

Instruction on computation of indemnity—nonerroneous. In law action to recover indemnity under an accident policy, there was no error in court's instruction to the jury that it must determine for what period, if any, between March 21st and August 21st the plaintiff was disabled as alleged, and compute the indemnity for the period so found, but in no event to go beyond August 21, 1938.

Eller v Ins. Co., - ; 291 NW 866

Death from airplane accident—restrictions on air travel. A policy of insurance which did not assume the risk of air travel except for passengers on planes licensed to carry passengers and operating regularly between two or more airports did not cover a passenger on a special trip in an army combat plane, the plane not being licensed to carry passengers and not operating on a regular schedule.

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Richardson v Trav. Assn., 228- ; 291 NW 408

Action against insurer—special appearance—burden of proof. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

9018

Separate actions on note and mortgage—insurance involved — motion to elect denied. Where plaintiff brings a separate action on a note (secured by a mortgage) and in another action involving the mortgage seeks to adjudicate a fire loss, the latter action is not an action "on the mortgage given to secure" the note such as authorizes the defendant to require the plaintiff to elect under §12375, C., '39, which action he will prosecute.

Parsons v Kitt, 228- ; 292 NW 831

Deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

Assignment to one who paid taxes—policy not set out in abstract—coverage not determinable. In an appeal from an action for loss under a fire insurance policy which was assigned to one who was given a deed to the property when he paid delinquent taxes, the contention of the insurer that the coverage was limited to the plaintiff's investment in the property could not be determined without an interpretation of the policy, which could not be made when the policy was not set out in the abstract and only general reference to it was made in the pleadings.

Ross v Ins. Co., 228- ; 292 NW 813

Policy covering all of insured's property—mere description. A fire insurance policy provision covering all property on the premises in which the insured had any interest does not make the policy cover only the interest of the insured's assignee for benefit of creditors, but is intended to complete the description of the property covered.

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Central Natl. Bank v Simmer. (Filed August 6, 1940)

Policy as security for mortgage loan. When a fire insurance policy made no reference to a mortgage on the property which required the mortgagor to insure as the mortgagee might direct, and provided that the mortgagee could insure if the mortgagor failed to do so, and the mortgagor did insure, evidence indicated that the parties understood that the insurance was taken out as security for the mortgage loan.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

9169

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and credit-

ing the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Partnership receiver—bank director—defense of suit—nonparticipation in compromise—effect. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

9176

Deposits — misappropriation by officer—liability of bank. If a bank officer in active charge of bank's business receives at his usual place of business the money or credits of a customer, either as a time deposit or for credit on open account, the bank becomes at once chargeable therewith, and the fact that officer converts it to his own use is no defense to an action by the depositor if no collusion appears on the part of the depositor.

Peterson v Citizens Bank, 228- ; 290 NW 546

9217.3

Deposits — misappropriation by officer — liability of bank. If a bank officer in active charge of bank's business receives at his usual place of business the money or credits of a customer, either as a time deposit or for credit on open account, the bank becomes at once chargeable therewith, and the fact that officer converts it to his own use is no defense to an action by the depositor if no collusion appears on the part of the depositor.

Peterson v Citizens Bank, 228- ; 290 NW 546

9235

Insolvent bank liquidation without aid of courts. AG Op July 5, '40

9238

Insolvent bank liquidation without aid of courts. AG Op July 5, '40

9239

Fraud between banks—constructive trust not established. The plaintiff bank, in failing to establish that the defendant bank was guilty of fraudulent conduct in aiding the plaintiff's cashier to conceal a shortage in his accounts, thereby failed to establish any basis for a constructive trust against the assets of the defendant bank for the amount of the shortage, or a basis for requiring the defendant bank to be held to account for the loss.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Bank as executor and depositor—defaulting as fiduciary, not as depository. In a summary proceeding in probate to establish a surety's liability on a bond of a defaulting executor, the fact that funds of the estate were deposited in a bank, which bank was also the executor of the estate, and thereafter a stipulation was entered into to pay the funds of the estate to the heirs, which was approved by the court, was not such a transaction as constituted the selection of such bank as a depository, in compliance with the statutory provisions, so as to relieve the surety of liability—the bank being accountable for such funds in its fiduciary capacity, and not as a depository.

In re Tabasinsky. (Filed August 6, 1940)

Executor—investing estate funds without court order—surety's liability. In a summary proceeding in probate to determine the liability of a surety on the bond of a defaulting executor, wherein it is urged that the transaction between an executor bank and the heirs constituted an investment made in pursuance of statutory requirements for investment of funds, and a default in regard thereto would not make the surety liable, such contention was without merit when the approval of the court was not obtained in compliance with statutory requirements.

In re Tabasinsky. (Filed August 6, 1940)

Probate order fixing executor's liability same as bank receivership proceedings. In a summary proceeding in probate to determine liability of a surety on a bond of a defaulting executor bank, there was no prejudice to the surety in the entering of an order in probate fixing the amount of its liability to the heirs, since such amount had been determined in the receivership proceedings of the bank and was conclusive upon the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Executor bank defaulting—interest computed under decree in receivership proceedings. In summary proceeding in probate to determine

liability of a surety on a bond of a defaulting executor bank, wherein the surety complains of the method of computing interest, such complaint was without merit when the interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed—such decree being binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

9282

Deposits — misappropriation by officer — liability of bank. If a bank officer in active charge of bank's business receives at his usual place of business the money or credits of a customer, either as a time deposit or for credit on open account, the bank becomes at once chargeable therewith, and the fact that officer converts it to his own use is no defense to an action by the depositor if no collusion appears on the part of the depositor.

Peterson v Citizens Bank, 228- ; 290 NW 546

Admissions showing weakness of contentions. Where the cashier of the plaintiff bank had entered into two similar credit transactions with the defendant bank in order to cover a shortage in accounts, in an action to recover the amount of the shortage, the plaintiff's brief stating that there had been a full accounting between the two banks except as to one of the two transactions, such statement recognized a weakness in the plaintiff's contentions, as the amount claimed was equal to the amount involved in only one of the transactions, and, when both had been accounted for in the same manner, the accounting for both had to be either proper or improper.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Fraud between banks—constructive trust not established. The plaintiff bank, in failing to establish that the defendant bank was guilty of fraudulent conduct in aiding the plaintiff's cashier to conceal a shortage in his accounts, thereby failed to establish any basis for a constructive trust against the assets of the defendant bank for the amount of the shortage, or a basis for requiring the defendant bank to be held to account for the loss.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Fraud on bank by officer. Where the cashier of the plaintiff bank concealed a shortage with the bank by making fraudulent entries in its bond account, and, to further conceal the shortage, obtained credit with the defendant bank by using drafts on the plaintiff bank as security, and concealed the monthly statements of the defendant in order to continue to conceal the shortage, the defendant having nothing to gain by aiding him in his fraud, there was neither direct nor circumstantial evidence of any arrangement between the cashier and the defendant to support a claim that there was conspiracy between them.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

9285

Bank as executor and depositor—defaulting as fiduciary, not as depository. In a summary proceeding in probate to establish a surety's liability on a bond of a defaulting executor, the fact that funds of the estate were deposited in a bank, which bank was also the executor of the estate, and thereafter a stipulation was entered into to pay the funds of the estate to the heirs, which was approved by the court, was not such a transaction as constituted the selection of such bank as a depository, in compliance with the statutory provisions, so as to relieve the surety of liability—the bank being accountable for such funds in its fiduciary capacity, and not as a depository.

In re Tabasinsky. (Filed August 6, 1940)

Executor's stipulation of settlement with heirs—nonratification of maladministration—surety's liability. In a summary proceeding in probate to determine the liability of a surety on a bond of a defaulting executor, the fact that the heirs entered into a stipulation with an executor bank for the payment of distributive shares did not ratify the maladministration of the estate that preceded such stipulation, and such heirs were not estopped to assert a claim against the surety, altho the executor bank was in default under the stipulation when the bond was filed.

In re Tabasinsky. (Filed August 6, 1940)

9305.22

Atty. Gen. Opinion. See AG Op June 5, '40

9404

Executor bank defaulting—computation of interest. In summary proceeding in probate to

determine liability of a surety on a bond of a defaulting executor bank, wherein the surety complains of the method of computing interest, such complaint was without merit when the interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed—such decree being binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

9441

Consideration presumed from execution and delivery. In an action to collect a note, when execution and delivery of the note have been established, the note is presumed to have been issued for a valuable consideration, and the burden of showing lack of consideration is on the defendant.

Hoover v Hoover, - ; 291 NW 154

Consideration for note—renewal extending time and reducing interest. Where a contract for the sale of land was canceled and the defendant-vendor gave a note to the plaintiff for the amount of payments received, and later gave renewal notes for the unpaid principal and the interest which was subsequently reduced, and, in an action to collect on a renewal note, the defendant alleged that the first note was given as a part of the transaction by which the land was returned to him, this admission indicated a consideration for the original note, and the extension of time and reduced interest when the renewals were made furnished consideration for the renewal notes. So the question of lack of consideration should not have been submitted to the jury.

Hoover v Hoover, - ; 291 NW 154

Consideration—conditional delivery and payment—note given for services otherwise paid for. Where an oral contract for services was made, the salary being computed on the time actually spent in rendering the services, and, about three months after the services were begun, a note and mortgage were given the employee to secure payment, the note being of an amount to pay for a year of full time work, and thereafter the work was paid for in full each month, an action on the note and mortgage was properly dismissed, whether because no consideration was given when the note was made or because there was conditional delivery and a discharge by full payments for the services.

Kruse v Wickham, 228- ; NW
(Filed June 18, 1940)

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Stipulation permitting refusal of loan before finally made—validity. A stipulation in an application for a farm loan, providing that the approval of the application might be withdrawn at any time before the loan was finally made, was not void as an attempt to deprive the court of jurisdiction to hear disputes between the parties and was not void as a waiver of rights in futuro without consideration.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Ch 420, Note 1 Contracts generally.

Deed as mortgage — presumption — inadequate consideration. Principles reaffirmed that where a borrower, for a nominal consideration, executes a deed to the creditor, there is a presumption that the deed is a mortgage; that gross inadequacy of consideration for a deed constitutes a strong circumstance that a deed is intended as a mortgage; and that evidence to prove that a deed, absolute on its face, is intended as a mortgage must be clear, satisfactory, and convincing.

Ross v Ins. Co., 228- ; 292 NW 813

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Stipulation permitting refusal of loan before finally made—validity—consideration. A stipulation in an application for a farm loan, providing that the approval of the application might be withdrawn at any time before the loan was finally made, was not void as an attempt to deprive the court of jurisdiction to

hear disputes between the parties and was not void as a waiver of rights in futuro without consideration.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Dead man statute — decedent questioning claimant's wife—admissibility. In equity action for specific performance of alleged oral agreement under which plaintiff upon performance of certain services was to receive a farm of which the other contracting party died seized, and in which action the only evidence as to conversation between the parties was the testimony of plaintiff's wife, the fact that decedent, after the conversation with plaintiff, asked plaintiff's wife if plans discussed were agreeable to her did not constitute a part of the conversation, under the facts, so as to exclude her testimony under the dead man statute.

Williams v Harrison, 228- ; 293 NW 41

Oral contract with decedent for services—payment with realty—evidence requirements. In equity action for the specific performance of alleged oral agreement under which plaintiff, upon performance of certain services, was to receive a farm of which the other contracting party died seized, the evidence was insufficient to establish such contract by clear, substantial, satisfactory, and convincing evidence as required by law. Claims of this kind should be scrutinized with the greatest care and established only upon the most satisfactory evidence.

Williams v Harrison, 228- ; 293 NW 41

Consideration—conditional delivery and payment—note given for services otherwise paid for. Where an oral contract for services was made, the salary being computed on the time actually spent in rendering the services, and, about three months after the services were begun, a note and mortgage were given the employee to secure payment, the note being of an amount to pay for a year of full time work, and thereafter the work was paid for in full each month, an action on the note and mortgage was properly dismissed, whether because no consideration was given when the note was made or because there was conditional delivery and a discharge by full payments for the services.

Kruse v Wickham, 228- ; NW (Filed June 18, 1940)

Executor's stipulation of settlement with heirs—nondischarge of surety. In a summary proceeding in probate to determine the liability of a surety on the bond of a defaulting executor, wherein the surety contends that a transaction between a bank as executor and the heirs of an estate constituted a termination of the bank's functions as executor or a novation or pro tanto assignment, and was equivalent to a distribution of assets and an accounting by the executor so as to release and discharge the executor, such contention was without merit, since the instrument specifically provided that upon the division and complete distribution the bank should file a final report and be discharged as executor or trustee and the order of court approving such stipulation provided for the executor's discharge on the performance of the terms of the stipulation.

In re Tabasinsky. (Filed August 6, 1940)

Refusal of mortgage loan after initial approval—action for damages—incompleted contract. Where a farm loan application was approved providing that approval could be withdrawn at any time before completing the loan, and where the defendant sent out mortgages to the applicant who signed and recorded them without the knowledge or consent of the defendant, and the loan was later refused, then, in an action by the applicant to recover the amount of an equity in the land which was allegedly lost because of the failure to consummate the loan, the defendant was entitled to a directed verdict, as the mere approval of the application and the unauthorized recording of the mortgages did not result in a completed contract to make the loan.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Refusal to accept stock powder previously causing death—noneffect of rescission on previous damage. In law action to recover damages for the death of sheep allegedly caused by feeding stock powder purchased from defendant, the fact that plaintiff refused a shipment of powder which arrived after the death of many of the sheep did not constitute a rescission of the contract which would relieve defendant from liability upon its warranty.

Miller v Economy Co., 228- ; 293 NW 4

Unsigned notice of forfeiture—sufficiency. In a law action to recover rent, an unsigned notice of forfeiture of a written lease was sufficient where the record shows the tenants clearly understood such notice as constituting a forfeiture and surrendered possession of the building—there being no claim of prejudice because of lack of signatures.

Becker v Rute, 228- ; 293 NW 18

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being con-

summated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, ; 292 NW 130

Sheep kept under contract—proper care—jury question. In a replevin action to recover sheep which had been furnished by the plaintiff under a contract by which the defendant was to feed and care for the sheep, with the right reserved in the plaintiff to take possession in case proper care was not given, jury questions were raised by conflicting evidence concerning whether proper care was given and whether wool was sold without the plaintiff's consent in violation of the contract.

Mead v Palmer, 228- ; 292 NW 821

Mutual mistake of law—no relief in law action. A court of law properly refused to give relief on a counterclaim for a compromise agreement entered into because of mutual mistake of the law where there was room for differences of legal opinion as to decisions of the supreme court interpreting statutes.

Beh Co. v Des Moines, : 292 NW 69

Partnership receiver — compromise settlement—surrender of stock to obtain release as surety. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

Partnership receiver—defense of suit—nonparticipation in compromise—no breach of duty by incidental benefit. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, ; 292 NW 152

Salary dispute — overdraft by employee—settlement. In an employer's action against an employee to recover alleged overdrafts, where there was a dispute as to the salary and commissions the employee was to receive, and the employer failed to sustain the burden of proving the overdrafts, it was not necessary to decide whether a settlement between them, which the employer had successfully pleaded as a defense to a counterclaim for an accounting by the employee in a previous case, was a good defense in the present case.

Economy Co. v Honett, 228- ; 292 NW 825

Defects in note waived by renewals. One who executes a note and, subsequently, four renewals, and who for 15 years permits the income from a farm to be applied on the note without claiming nonliability, thereby indicates there was value in the original note and that he so understood, and he could not then claim that the original was void and that any defects in it were not waived by the execution of the renewals.

Hoover v Hoover, - ; 291 NW 154

Conditional delivery of note not shown—renewal of note—waiver. In an action on a note given as a renewal of an original note which had been delivered with an agreement that payment be made from a farm income, where part payment had been made from the in-

come, and the maker thereby having treated the note as valid and binding, the question of conditional delivery was properly withheld from the jury. Even assuming that there had been a conditional delivery of the original note, it was waived by the subsequent acts of the maker.

Hoover v Hoover, ; 291 NW 154

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

Demand to repurchase stock—"reasonable time" determined. In damage action where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiffs, and when demands to repurchase were all made within five years from date of purchase, and within the statutory period of limitations for actions on unwritten contracts, such demands, as a matter of law, were made within a "reasonable time".

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Delivery—testimony of party holding in escrow for grantee. Where intervenors claimed title to land under a deed prior to the deed of the plaintiff, testimony by the intervenors' father that the first deed was given him to hold until the grantor's death, then to be given to the intervenors and recorded, is proof of what the grantor intended and what was accomplished when the deed was given, even tho substantiating testimony by the grantor be ignored.

Pickworth v Whitford, 228- ; 293 NW 47

Delivery of deed—deferred enjoyment—testimony of escrow holder. The burden of proving that a deed delivered to a third party to be given to the grantees on the death of the grantor vested a present title with possession and enjoyment deferred while the grantor lived was carried by supported testimony of the third party as to the transaction in which the deed was delivered to him.

Pickworth v Whitford, 228- ; 293 NW 47

Impeachment of delivery of deed—subsequent acts of grantor. When valid delivery of a deed to a third party for grantees was proved, the status of the grantee is as good as a grantee in possession of a deed who can rely on a presumption of good delivery, and the rule applies that subsequent acts and declarations of a grantor, not made in the presence of the grantee, are not admissible to impeach the title of the grantee.

Pickworth v Whitford, 228- ; 293 NW 47

Ownership—deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

9451

Assignment for benefit of creditors—insurance proceeds—rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

9462

Payment from specific fund. Parol evidence is admissible to show that a note was conditionally delivered, but it is not admissible to show that the payment of the note was to be made out of a specific fund.

Hoover v Hoover, - ; 291 NW 154

9467

Accrual of action—demand on corporation to repurchase stock—oral agreement. Altho a cause of action accrues on demand notes and instruments as soon as they are executed and the statute of limitations runs from that time, when a corporation sold stock with verbal agreements to repurchase the stock upon demand, no cause of action accrued against the corporation until the demand to repurchase was made and refused, and until that time the statute of limitations did not begin to run on the oral agreement.

Gregg v Middle States Utilities Co., - ; 293 NW 66

9476

Conditional delivery of note—payment from specific fund. Parol evidence is admissible to show that a note was conditionally delivered, but it is not admissible to show that the payment of the note was to be made out of a specific fund.

Hoover v Hoover, - ; 291 NW 154

Conditional delivery not shown—renewal of note—waiver. In an action on a note given as a renewal of an original note which had been delivered with an agreement that payment be made from a farm income, where part payment had been made from the income, and the maker thereby having treated the note as valid and binding, the question of conditional delivery was properly withheld from the jury. Even assuming that there had been a conditional delivery of the original note, it was waived by the subsequent acts of the maker.

Hoover v Hoover, - ; 291 NW 154

9484

Consideration presumed from execution and delivery. In an action to collect a note, when execution and delivery of the note have been established, the note is presumed to have been issued for a valuable consideration, and the burden of showing lack of consideration is on the defendant.

Hoover v Hoover, - ; 291 NW 154

9485

Renewal extending time and reducing interest. Where a contract for the sale of land was canceled and the defendant-vendor gave a note to the plaintiff for the amount of payments received, and later gave renewal notes for the unpaid principal and the interest which was subsequently reduced, and, in an action to collect on a renewal note, the defendant alleged that the first note was given as a part of the transaction by which the land was returned to him, this admission indicated a consideration for the original note, and the extension of time and reduced interest when the renewals were made furnished consideration for the renewal notes. So the question of lack of consideration should not have been submitted to the jury.

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Defects in note waived by renewals. One who executes a note and, subsequently, four renewals, and who for 15 years permits the income from a farm to be applied on the note without claiming nonliability, thereby indicates there was value in the original note and that he so understood, and he could not then claim that the original was void and that any defects in it were not waived by the execution of the renewals.

Hoover v Hoover, - ; 291 NW 154

9511

Fraud in note settlement—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

9523

Oral guaranty—corporate note by individual. In law action to recover rent against an individual who originally leased premises and thereafter tendered in payment of back rent a note signed by a corporation of which such individual was president, a directed verdict for plaintiff as against such individual was sustained by undisputed evidence showing plaintiff refused to accept the note until after such individual orally acknowledged the debt as his own and understood his endorsement to be a guaranty of payment of such note in the event the corporate note was uncollectible.

Cummings v Iowa Household Credit Corp. (Filed August 6, 1940)

9580

Conditional delivery — discharge. Principle reaffirmed that parol evidence is admissible to show conditional delivery or discharge of a written instrument.

Kruse v Wickham, 228- ; NW (Filed June 18, 1940)

9581

Decedent's liability as guarantor of note even tho statute of limitations available to principal. In a probate proceeding wherein a claim is made on a note upon which the decedent was guarantor, the fact that the statute of limitations would be a bar to recovery as against the principal did not make such defense available to guarantor, nor relieve the decedent of liability on account of the principal's nonliability, since the claim in probate was filed within five years from the date of the demand note and within the time prescribed by statute for filing claims in probate.

In re Fuller, 228- ; 293 NW 55

9940

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received, without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the

consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

9941

Stock feed sales—evidence of warranty—jury question. In law action to recover for the death of sheep caused by feeding a stock powder purchased from defendant, wherein evidence shows plaintiff called defendant's sales manager by long distance telephone and advised him as to the condition of the sheep and allegedly relied on statement by sales manager that it would be proper to feed the powder to the sheep, the question of warranty was for the jury, and a motion to direct a verdict was properly overruled. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Miller v Economy Co., 228- ; 293 NW 4

Resolution of city council not containing warranty. A resolution by a city council authorizing the issuance of street assessment certificates made no express warranty against unpaid taxes on the properties when it made no reference to unpaid taxes and made no representations of fact affecting the certificates.

Beh Co. v Des Moines, - ; 292 NW 69

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

Representations by city employee — knowledge of city. Representations by a city employee could not be considered as part of a contract by the city when there was no evidence that the city had knowledge of the representations nor that they had any part in the negotiations leading up to the contract.

Beh Co. v Des Moines, - ; 292 NW 69

9944

Stock feed sales—evidence of warranty—jury question. In law action to recover for the death of sheep caused by feeding a stock powder purchased from defendant, wherein evidence shows plaintiff called defendant's sales manager by long distance telephone and advised him as to the condition of the sheep and allegedly relied on statement by sales manager that it would be proper to feed the powder to the sheep, the question of warranty was for the jury, and a motion to direct a verdict was properly overruled. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Miller v Economy Co., 228- ; 293 NW 4

Goods purchased by description—"merchantable quality"—"particular purpose".

Giant Co. v Yates Co., 111 F 2d, 360

9998

Stock feed sales—evidence of warranty—jury question. In law action to recover for the death of sheep caused by feeding a stock powder purchased from defendant, wherein evidence shows plaintiff called defendant's sales manager by long distance telephone and advised him as to the condition of the sheep and allegedly relied on statement by sales manager that it would be proper to feed the powder to the sheep, the question of warranty was for the jury, and a motion to direct a verdict was properly overruled. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Miller v Economy Co., 228- ; 293 NW 4

Stock powder causing death — warranty — proper instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction by the court correctly stated that defendant would be bound by the representation of its general sales agent, made in furtherance of sales, that stock powder was harmless and not injurious to sheep in the condition of plaintiff's sheep. Such representation was not an unusual warranty nor a warranty of cure and was within the sales agent's scope of agency.

Miller v Economy Co., 228- ; 293 NW 4

Agency (?) or independent dealer (?)—jury question. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant through an alleged agent, where defendant complains of the overruling of its motion for directed verdict

on ground that the court should have found as a matter of law that alleged agent was in fact an independent dealer, the evidence of the transactions was such as to constitute a jury question as to agency, and such motion was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Animals' death from stock food—jury question. In law action to recover damages for death of sheep allegedly caused by the feeding of a product purchased from defendant, evidence showing that veterinarians who examined the sheep found them to be free from disease or ailment except a gastritis and who testified that the feeding of a powder rich in proteins on a forced feeding, as recommended by defendant's sales manager, would be dangerous because some of the sheep would get too much of the mixture, sufficiently tended to prove that the death of such sheep was due to feeding them the powder so as to raise a question for the jury.

Miller v Economy Co., 228- ; 293 NW 4

Refusal to accept stock powder previously causing death—noneffect of rescission on previous damage. In law action to recover damages for the death of sheep allegedly caused by feeding stock powder purchased from defendant, the fact that plaintiff refused a shipment of powder which arrived after the death of many of the sheep did not constitute a rescission of the contract which would relieve defendant from liability upon its warranty.

Miller v Economy Co., 228- ; 293 NW 4

10002

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Fraudulent conveyance — relationship of grantor and grantee—effect. In equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and conveyance of realty, the fact that there was a family relationship between the grantors and grantees is a matter for careful consideration and scrutiny, but it is not, in itself, determinative of the issue of fraud. To establish the issue of bad faith and fraud in such case the proof must be clear, satisfactory, and convincing, since fraud is not ordinarily presumed, nor is mere ground for suspicion sufficient to grant such relief.

Knabe v Kirchner. (Filed August 6, 1940)

Fraud in conveyance by parents to children —burden of proof. In an equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and a conveyance of realty by parents to their children, a decree dismissing plaintiff's petition was proper where there was no evidence of any fraudulent intent nor any evidence that children knew of the financial condition of their parents. It must be shown that children-grantees were active participants in the fraud of the parent-grantors. Children cannot be considered creditor-purchasers without proof they were creditors of their parents.

Knabe v Kirchner. (Filed August 6, 1940)

10015

Chattel mortgage clause—not indexed—superior to lease assignment for pre-existing debt. In an action to foreclose a realty mortgage which contained a valid but not indexed chattel mortgage clause covering rents, and where an intervenor in such action, learning that the foreclosure of such mortgage would prevent the completion of a realty transaction in progress covering the same property, takes an assignment of a lease on the property as security for a pre-existing debt, then, even assuming intervenor did not have actual notice of the lien contained in the mortgage, he would not be a subsequent purchaser for value, and plaintiff would have a valid defense to the petition of intervention.

Sykes v Waring, - ; 293 NW 14

Priority of conditional bill of sale over subsequent chattel mortgage. In action commenced by search warrant proceedings to determine the right of possession and ownership of an automobile, wherein it is shown that a purchaser of an automobile under conditional sale contract duly recorded in the county of purchase also executed a chattel mortgage on the same car to secure a loan in another county, and, such chattel mortgage being duly recorded in such county, the holder of the conditional sale contract had prior right to the car, since the chattel mortgagee had no better right than his mortgagor, and a third party purchasing through the holder of the conditional sale contract was rightfully determined to be the owner of said car and entitled to its possession.

State v Doe. (Filed August 6, 1940)

Description of livestock—standard of sufficiency to impart notice. In mortgagee's damage action for conversion of mortgaged livestock purchased by defendant from mortgagor, trial court erred in dismissing plaintiff's petition on theory that the description in the recorded mortgage, to wit: "34 white face steers,

25,070 lbs. . . . now in sale yard of Oswald Strand located in Manly, Iowa, to be removed" to certain described real estate, was insufficient as a matter of law to impart notice to third parties. To impart constructive notice under our recording acts the description of property in a chattel mortgage is sufficient if it is of such character as to enable third persons, aided by inquiries which the instrument suggests, to identify the property.

Strand v Jones County. (Filed August 6, 1940)

Insurance policy—rights of mortgagee. A mortgagee has no interest in an insurance policy issued to the mortgagor upon the mortgaged property, unless such interest be created by a covenant or condition, and in the absence of such covenant the insurance contract is strictly personal between the insurer and insured. When a mortgagor, under the terms of the mortgage, is bound to keep the premises insured for the benefit of the mortgagee, an equitable lien arises in favor of the mortgagee.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance policy as security for mortgage loan. When a fire insurance policy made no reference to a mortgage on the property which required the mortgagor to insure as the mortgagee might direct, and provided that the mortgagee could insure if the mortgagor failed to do so, and the mortgagor did insure, evidence indicated that the parties understood that the insurance was taken out as security for the mortgage loan.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Assignment for benefit of creditors—insurance proceeds—rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Mortgagee's rights against assignee—proceeds of fire policy. In an action by a chattel mortgagee against an assignee for the benefit of creditors who had received the proceeds from a fire insurance policy taken out by the mortgagor-assignor to secure the mortgage loan, a directed verdict against the assignee should be sustained to the extent of the net proceeds of the policy.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Fraudulent conveyance — lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Fraud in conveyance by parents to children —burden of proof. In an equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and a conveyance of realty by parents to their children, a decree dismissing plaintiff's petition was proper where there was no evidence of any fraudulent intent nor any evidence that children knew of the financial condition of their parents. It must be shown that children-grantees were active participants in the fraud of the parent-grantors. Children cannot be considered creditor-purchasers without proof they were creditors of their parents.

Knabe v Kirchner. (Filed August 6, 1940)

Fraudulent conveyance — relationship of grantor and grantee—effect. In equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and conveyance of realty, the fact that there was a family relationship between the grantors and grantees is a matter for careful consideration and scrutiny, but it is not, in itself, determinative of the issue of fraud. To establish the issue of bad faith and fraud in such case the proof must be clear, satisfactory, and convincing, since fraud is not ordinarily presumed, nor is mere ground for suspicion sufficient to grant such relief.

Knabe v Kirchner. (Filed August 6, 1940)

10016

Priority of conditional bill of sale over subsequent chattel mortgage. In action commenced by search warrant proceedings to determine the right of possession and ownership of an automobile, wherein it is shown that a purchaser of an automobile under conditional sale contract duly recorded in the county of purchase also executed a chattel mortgage on the same car to secure a loan in another county, and, such chattel mortgage being duly recorded in such county, the holder of the conditional sale contract had prior right to the car, since the chattel mortgagee had no better right than his mortgagor, and a third party purchasing through the holder of the conditional sale contract was rightfully determined to be the owner of said car and entitled to its possession.

State v Doe. (Filed August 6, 1940)

10042

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Joint tenancy—estoppel by conveyance of tenant—termination. A devisee under a will devising property to two daughters in equal shares with an undivided half interest to each, who, in a mortgage and other papers, refers to her sister's share as a life estate, is held to recognize that the interests of the two sisters is not a joint tenancy, but a tenancy in common. The mortgage conveyance conveyed all of her interest and would have terminated a joint tenancy had one existed.

In re Heckmann, - ; 291 NW 465

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

10049

Trustees' powers to interpret agreement. In equity action to compel the acting trustees of a business trust to recognize the plaintiffs as persons legally elected to fill vacancies on the board of trustees, where the declaration of trust provided (1) that the number of trustees should at all times be not less than five nor more than seven, and (2) that the trustees should have broad powers of interpretation of the trust agreement, the action of the acting trustees in determining there were two vacancies on the board constituted an interpretation of the declaration of trust, and was within their rights.

Lambach v Anderson. (Filed August 6, 1940)

Vacancies on board of trustees—appointment—rights of remaining trustees and unit holders. In equity action to compel the acting trustees of a business trust to recognize plaintiffs as persons legally elected to fill vacancies on the board of trustees, where the declaration of trust provided that in the event the acting trustees failed to fill a vacancy within 60 days the majority of the unit holders could fill such vacancy, it was held under the terms of the trust agreement that the right of such unit holders was concurrent with the trustees, but not exclusive.

Lambach v Anderson. (Filed August 6, 1940)

Vacancy by increasing number of trustees—rights of acting trustees and unit holders. Under a declaration of a business trust which provided for not less than five nor more than seven trustees, and, in event of vacancy, the remaining trustees should fill the vacancy, and which further provided "if within sixty (60) days after the resignation, disability, death, removal or inability to act of any of said trustees, no successor or successors thereto shall be appointed, then, in such event, the holders of certificates of interest representing a majority of outstanding units by a writing or writings may appoint such successor or successors", the action of the trustees in increasing the number of trustees from six to seven did not create such a vacancy which would entitle the unit holders to fill such vacancy.

Lambach v Anderson. (Filed August 6, 1940)

Rights of acting trustees and unit holders. Where, by the terms of a business trust, both the acting trustees and a majority of the unit holders, under certain circumstances, had concurrent authority to fill a vacancy on the board of trustees, an appointment of a trustee by the acting trustees, agreed upon by the exchange of telegrams a few hours before the unit holders advised the trustees of their selection of a trustee and the acceptance of the trust by such trustee, was valid even tho the trustee appointed by the acting trustees did not accept the appointment until subsequent to notification from the unit holders of their trustee appointment. Under the trust agreement, the acting trustees had broad powers and the right of interpretation.

Lambach v Anderson. (Filed August 6, 1940)

School district as trustee—individuals as cestuis—property not exempt. A school district which held real property in trust to use the income for college scholarships could not, in a mandamus action against the county supervisors, recover taxes paid on the property and prevent further collection of taxes on the ground that the property was exempt from taxation under §6944, C., '35, as the property and income were not used for a public purpose, the beneficiaries of the trust being the recipients of the scholarships, with the trust standing in the same position as if vested in any other qualified trustee.

Board v Board, 228- ; 293 NW 38

Compromise and settlement of probate loan—sound judicial discretion. In probate pro-

ceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

Fee limited by subsequent limitation—non-applicability of rule. The rule of construction of limitation of a fee by a subsequent provision in a will has no application to a will which in one clause devises property without specifying any particular estate which the devisee shall take and in a subsequent clause specifies that the devised property shall be placed in trust.

In re Heckmann, - ; 291 NW 465

Devise to two daughters—request for guardianship—not trust. A will giving the residue to two daughters with the request that one be appointed guardian over the other with complete charge of her affairs during her lifetime did not create an express trust, nor was there language or extrinsic evidence to show fraud or unjust enrichment to indicate a constructive trust in favor of the life tenant.

In re Heckmann, - ; 291 NW 465

10054

Joint tenancy—estoppel by conveyance of tenant—termination. A devisee under a will devising property to two daughters in equal shares with an undivided half interest to each, who, in a mortgage and other papers, refers to her sister's share as a life estate, is held to recognize that the interests of the two sisters is not a joint tenancy, but a tenancy in common. The mortgage conveyance conveyed all of her interest and would have terminated a joint tenancy had one existed.

In re Heckmann, - ; 291 NW 465

Devise of undivided half interest—not joint tenancy. A will devising an estate to two daughters "jointly in equal shares" does not create a joint tenancy when such interpretation would attach no meaning to another part of the provision, "to each an undivided one-half thereof", which explains just what the testator intended when he devised the land, as, by statute, estates vested in two or more persons are deemed tenancies in common unless a different intent is clearly expressed in creating the estate.

In re Heckmann, - ; 291 NW 465

10058

Tax deed—nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

10084

Intent to surrender not proved—only one demand made. Intention to surrender possession of a deed was not proved by testimony of a claimant under a subsequent deed that surrender of the deed was not refused when demanded, but only an excuse being given that the deed was at a bank closed for the day, and, no other demand being made indicated that the claimant viewed the refusal as final.

Pickworth v Whitford, 228- ; 293 NW 47

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Fraud in conveyance by parents to children—burden of proof. In an equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and a conveyance of realty by parents to their children, a decree dismissing plaintiff's petition was proper where there was no evidence of any fraudulent intent nor any evidence that children knew of the financial condition of their parents—it must be shown that children-grantees were active participants in the fraud of the parent-grantors. Children cannot be considered creditor-purchasers without proof they were creditors of their parents.

Knabe v Kirchner. (Filed August 6, 1940)

Fraudulent conveyances — relationship of grantor and grantee—effect. In equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and conveyance of realty, the fact that there was a family relationship between the grantors and grantees is a matter for careful consideration and scrutiny, but it is not, in itself, determinative of the issue of fraud. To establish the issue of bad faith and fraud in such case the proof must be clear, satisfactory, and convincing, since fraud is not

ordinarily presumed, nor is mere ground for suspicion sufficient to grant such relief.

Knabe v Kirchner. (Filed August 6, 1940)

Fraudulent conveyances—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Mental incompetency — evidence. In equity action to set aside a deed of conveyance on the ground of mental incompetency, the evidence sustained a decree for defendant where it is shown that while grantor was indeed a sick man, suffering with a heart ailment which made it difficult for him to talk and breathe, yet he understood the nature of business in hand and he was capable of transacting such business at the time the deed was executed.

Keune v McCauley, 228- ; 293 NW 25

Undue influence and fiduciary relationship—insufficient evidence to set aside deed. In equity action to set aside a deed of conveyance on the ground of undue influence or fiduciary relationship, testimony of a bare statement made by grantor that (1) grantee and his wife were his best friends and (2) the fact that grantee on behalf of some of grantor's friends prevailed upon a hospital nurse to grant them admittance into grantor's hospital room falls far short of showing undue influence, neither did the mere fact that grantor and grantee were cousins amount to proof of a fiduciary relationship.

Keune v McCauley, 228- ; 293 NW 25

Testimony of party holding in escrow for grantee. Where intervenors claimed title to land under a deed prior to the deed of the plaintiff, testimony by the intervenors' father that the first deed was given him to hold until the grantor's death, then to be given to the intervenors and recorded, is proof of what the grantor intended and what was accomplished when the deed was given, even tho substantiating testimony by the grantor be ignored.

Pickworth v Whitford, 228- ; 293 NW 47

Deferred enjoyment — testimony of escrow holder. The burden of proving that a deed delivered to a third party to be given to the grantees on the death of the grantor vested a present title with possession and enjoyment deferred while the grantor lived was carried by supported testimony of the third party as to the transaction in which the deed was delivered to him.

Pickworth v Whitford, 228- ; 293 NW 47

Action to set aside deed—burden of proving nondelivery. In action by collateral heirs of grantor to set aside on the ground of nondelivery a deed which grantor had deposited in a safety box for transmittal upon his death to the grantee, and which grantee had obtained and recorded immediately after grantor's death, the burden of proving nondelivery was on such collateral heirs.

Smith v Fay. (Filed August 6, 1940)

Deed—delivery—escrow—safety deposit box—reserving no control—sufficiency of delivery. Where a grantor deposits in a safety deposit box in custody of a third person a deed to be transmitted to grantee upon grantor's death, and parts with all dominion and control, there is a sufficient delivery. (Distinguishing Orris v Whipple, 224-1157.)

Smith v Fay. (Filed August 6, 1940)

Impeachment of delivery of deed—subsequent acts of grantor. When valid delivery of a deed to a third party for grantees was proved, the status of the grantee is as good as a grantee in possession of a deed who can rely on a presumption of good delivery, and the rule applies that subsequent acts and declarations of a grantor, not made in the presence of the grantee, are not admissible to impeach the title of the grantee.

Pickworth v Whitford, 228- ; 293 NW 47

Nondelivery cannot be raised for first time on appeal. In equity action to set aside a deed, the question of nondelivery of the deed cannot be raised in the brief and argument and considered on appeal when such question is contrary to the trial theory and not in harmony with the pleadings which predicate the right of recovery, not on the theory that the transaction was not completed, but on the theory that grantor was in such condition as to be incompetent to accomplish that which was done.

Keune v McCauley, 228- ; 293 NW 25

Setting aside—opportunity for independent advice. In an action to set aside a deed, where grantor requested grantee to have a lawyer brought out to him, and grantee herself went to the lawyer and had him draw the deed in his office, no opportunity was given grantor for independent advice, and this fact alone has often been held sufficient to set aside deeds and contracts obtained under such conditions.

Sinco v Kirkwood, - ; 291 NW 873

Fictitious person in realty transaction—effect. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel

mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

Setting aside—general rule—adopted daughter's sister as confidential relation. Ordinarily in an action to set aside a deed the burden is on plaintiff except where confidential or fiduciary relations are established, and where grantor was an old man, ill, discouraged, and depressed by the recent death of an adopted daughter whom he loved, and had no one to turn to except that daughter's sister who was one of grantees, such confidential relationship existed as placed the burden of proof on defendants to establish the good faith and fairness of the transaction.

Sinco v Kirkwood, - ; 291 NW 873

Good faith — negativing —competency of evidence. In an action to set aside deed given to grantee where grantor expressed a desire that his grandson be taken care of, evidence that grantee had the grandson committed to an institution after grantor's death was admissible to negative the idea of any good-faith agreement to care for the boy after the death of the grandfather.

Sinco v Kirkwood, - ; 291 NW 873

Setting aside deed—insufficiency of evidence. In equity action to set aside two deeds from the grantor to her grandson for the benefit of his father (the grantor's son, who was heavily in debt), where plaintiff appeals from decree denying the relief prayed, the trial court's findings were reviewed and found to have ample support in the record, where it is shown that grantor, 88 years of age, looked after her own business affairs and expressed her desire, both before and after the execution of the deeds, to protect her son in this manner—there being no question of a fiduciary or confidential relationship between the parties. Because of the conflicts in the testimony and the interest and attitude of various witnesses, much reliance is placed on the findings of the trial court.

Tessman v Tessman, - ; 291 NW 530

10135

Plat by sheriff prior to execution sale. Where a sheriff, prior to execution sale of land, platted a homestead on the land, altho it had no buildings on it and was never used or occupied as a homestead, the former owner could not quiet title in himself after the sale by claiming under the homestead, as a sheriff has no power to create a homestead by merely making such plat.

Dirks v Venenga, 228- ; 292 NW 841

Abandonment determined by intent — law favors protection of homestead. On question of whether or not a homestead has been abandoned, it is largely a matter of intent to be determined on the particular facts in each case. The holdings of the supreme court lean strongly to the protection of the homestead estate.

Charter v Thomas, 228- ; 292 NW 842

Rooms leased for temporary period and purpose—nonabandonment of homestead. In action to enjoin the sale under general execution of real estate claimed exempt as a homestead, the evidence supported a decree enjoining such sale where plaintiff proved a definite and good-faith intention and plan to lease certain rooms of a dwelling for a temporary period and purpose only, and thereafter to again occupy such rooms as a part of his homestead.

Charter v Thomas, 228- ; 292 NW 842

10139

Plat by sheriff prior to execution sale. Where a sheriff, prior to execution sale of land, platted a homestead on the land, altho it had no buildings on it and was never used or occupied as a homestead, the former owner could not quiet title in himself after the sale by claiming under the homestead, as a sheriff has no power to create a homestead by merely making such plat.

Dirks v Venenga, 228- ; 292 NW 841

10159

Rights and liabilities after forfeiture of lease. In law action to recover rent where it is shown the landlords served a notice of forfeiture of a written lease on account of tenants' failure to pay rent according to provisions of such lease, and thereafter tenants surrendered possession of the premises, the tenants had no further rights under the lease, and the landlords were entitled to the rent that had matured at the time of the forfeiture.

Becker v Rute, 228- ; 293 NW 18

Unsigned notice of forfeiture—sufficiency. In a law action to recover rent, an unsigned notice of forfeiture of a written lease was sufficient where the record shows the tenants clearly understood such notice as constituting a forfeiture and surrendered possession of the building—there being no claim of prejudice because of lack of signatures.

Becker v Rute, 228- ; 293 NW 18

"Any provision of this lease"—violations included provision for payment of rent. In law action to recover rent under a written lease which provided for a forfeiture upon a violation of "any provision of this lease", the words "any provision" included all the terms, covenants and conditions in the contract and manifestly included the provision for payment of rent.

Becker v Rute, 228- ; 293 NW 18

Lease as part of petition—introduction in evidence unnecessary. In law action to recover rent under a written lease, which lease is made a part of the petition, and where defendants' answer admitted the execution of such lease, it is not necessary that the lease be introduced in evidence.

Becker v Rute, 228- ; 293 NW 18

Fictitious person in realty transaction—effect. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

10163

"Three inches east of wall"—measured from wall foundation. A boundary line "three inches to the east of the main east wall" of the plaintiff's building is located three inches from the footing of the wall, tho the footing extends six inches beyond the brick wall, since the footing is a part of the wall, since the window sills protrude to a point perpendicular with footing, and since the plaintiff has paid taxes on land three inches east of the foundation. Consequently, in an action to enjoin trespass, any part of defendant's building erected and attached to the plaintiff's wall must be removed to or east of such boundary line.

Keith Co. v Minear, - ; 293 NW 36

Ch 445, Note 1 Gifts.

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Oral contract with decedent for services—payment with realty—evidence requirements. In equity action for the specific performance of alleged oral agreement under which plaintiff, upon performance of certain services, was to receive a farm of which the other contracting party died seized, the evidence was insufficient to establish such contract by clear, substantial, satisfactory, and convincing evidence as required by law. Claims of this kind should be scrutinized with the greatest care and established only upon the most satisfactory evidence.

Williams v Harrison, 228- ; 293 NW 41

10260.4

Interest and penalties under redemption from scavenger sale—credited to general fund—apportionment. *AG Op July 30, 1940*

10261

Foreclosure—conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

"Any provision of this lease"—violations included provision for payment of rent. In law action to recover rent under a written lease which provided for a forfeiture upon a violation of "any provision of this lease", the words "any provision" included all the terms, covenants and conditions in the contract and manifestly included the provision for payment of rent.

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intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

Corporate note by individual for rent payment—oral guaranty. In law action to recover rent against an individual who originally leased premises and thereafter tendered in payment of back rent a note signed by a corporation of which such individual was president, a directed verdict for plaintiff as against such individual was sustained by undisputed evidence showing plaintiff refused to accept the note until after such individual orally acknowledged the debt as his own and understood his endorsement to be a guaranty of payment of such note in the event the corporate note was uncollectible.

Cummings v Iowa Household Credit Corp. (Filed August 6, 1940)

Account for rent proved. In an action to recover for rent, the testimony of one of the plaintiffs, who had charge of the property, that the rent was due and unpaid was sufficient to sustain a judgment for plaintiffs as against the testimony of defendants, by way of a general conclusion, that all bills were paid when their partnership was dissolved and that they had no books, checks, or other memoranda and that such matters were handled by office girls who were not called as witnesses and no explanation given as to why they could not be present to testify other than "they do not live here".

Read v Ferguson. (Filed August 6, 1940)

Continuous rental—statement presented for partial period—not account stated. In action to recover rent for a period from September 1, 1920, to September 3, 1926, the fact that plaintiff presented a statement to defendants for rent under date of September 3, 1926, for rent from January 1, 1926, to September 1, 1926, did not result in the cancellation of all rents that had been due before January 1, 1926, and such presentation did not result in an account stated, since under the facts and circumstances the statement presented could not have had such effect for two reasons: (1) it was not so intended, and (2) it was not accepted as such, but was met with a claim of offset.

Read v Ferguson. (Filed August 6, 1940)

Continuous rental — new agreement — noneffect on limitation. In action to recover rent for a period from September 1, 1918, to December 31, 1926, the trial court erred in ruling the statute of limitations barred the claim for rent from September 1, 1918, to September 1, 1920, because on the latter date the defendants, desiring more space, made a new rental agreement, because there was no settlement of accounts and because the occupancy during the entire peroid was with the full understanding that rent was to be paid.

Read v Ferguson. (Filed August 6, 1940)

10264

Lien—foreclosure — conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

10436

Marriage ceremonies—justice of peace—jurisdiction coextensive within county. AG Op Aug. 14, 1940

10474

Cruel and inhuman treatment. Corroboration in a divorce action is required to prevent collusion between the parties. It may be by either direct or circumstantial evidence and need not alone sustain the decree nor support the plaintiff's testimony at all points. Sufficient testimony was produced, including corroboration, to sustain a petition for divorce on the ground of cruel and inhuman treatment, where it was shown that the husband was abusive and mistreated his wife during pregnancy.

Davis v Davis - ; 292 NW 804

10475

Inhuman treatment not proved—cross-petition for adultery. In an action by the wife for divorce on the ground of inhuman treatment, where the record failed to show that her life was endangered or her health impaired, the husband was entitled to the divorce on a cross-petition grounded on adultery where the wife had refused to cease meeting another man and there was much evidence of intimate relations between the two.

Crilley v Crilley, 228- ; 292 NW 67

Corroboration required. Corroboration in a divorce action is required to prevent collusion between the parties. It may be by either direct or circumstantial evidence and need not alone sustain the decree nor support the plaintiff's testimony at all points. Sufficient testimony was produced, including corroboration, to sustain a petition for divorce on the ground of cruel and inhuman treatment, where it was shown that the husband was abusive and mistreated his wife during pregnancy.

Davis v Davis, - ; 292 NW 804

10477

Inhuman treatment not proved—cross-petition for adultery. In an action by the wife

for divorce on the ground of inhuman treatment, where the record failed to show that her life was endangered or her health impaired, the husband was entitled to the divorce on a cross-petition grounded on adultery where the wife had refused to cease meeting another man and there was much evidence of intimate relations between the two.

Crilley v Crilley, 228- ; 292 NW 67

10481

Alimony and support awards—lien from time of entry. In a divorce action in which the court had jurisdiction of the parties and subject matter, the entering of judgment for alimony and child support would in itself make the awards be liens on any real estate owned by the defendant. Whether the defendant's mother, who was not a party to the action, owned certain property not described in the petition, which the defendant had previously claimed in order that the mother's old-age pension would not be a lien on the property, need not be determined in the divorce action.

Davis v Davis, - ; 292 NW 804

10501.1

Inheritance — statutory right — compliance with adoption statutes. Adoption and the right of inheritance being statutory, it is the well-established rule in this state that rights of inheritance are not acquired, that is, a child does not become the heir of the adopting parent unless there is a compliance with the mandatory provisions of the adoption statutes.

Sheaffer v Sheaffer, - ; 292 NW 789

Heirs of predeceased child of intestate—inheritance by substitution, not representation. In partition where an alleged adopted child of a predeceased child of intestate contends that plaintiffs inherit as collateral heirs the share of adopted child's alleged father because the alleged adopting father, if living, would be estopped from denying the adoption, and that plaintiffs, his heirs, would be likewise estopped, a motion to strike such pleading was properly sustained, since where a child of an intestate has predeceased him, the heirs of such child, under statute providing for descent to children, inherit the share direct from the intestate, taking by substitution and not by representation.

Sheaffer v Sheaffer, - ; 292 NW 789

10501.2

Children in licensed homes, boarding homes or foster homes—residence—school tuition. AG Op July 12, '40

10501.6

Inheritance — statutory right — compliance with adoption statutes. Adoption and the right of inheritance being statutory, it is the well-established rule in this state that rights of inheritance are not acquired, that is, a child does not become the heir of the adopting parent unless there is a compliance with the mandatory provisions of the adoption statutes.

Sheaffer v Sheaffer, - ; 292 NW 789

10502

Marriage ceremonies—justice of peace—jurisdiction coextensive within county. AG Op Aug. 14, 1940

10636

Preliminary hearing as "trial" under subsection 21. AG Op July 16, '40

10761

Special appearance—subject matter of action challenged. The defendant may challenge the jurisdiction of the court over the subject matter of an action by a special appearance.

Schulte v Great Lakes Corp., - ; 291 NW 158

10803

Nunc pro tunc entry made without notice. When a foreclosure decree, which by mistake included not only the real estate owned by the defendant, but also other property covered by the mortgage but not involved in the litigation, was corrected on motion at the same term of court by a supplemental decree containing the correct description of the land, the defendant could not have the foreclosure set aside because no notice of the entry of the supplemental decree was given him, when it was in no way prejudicial to him and it merely corrected the mistake, making the decree conform to the evidence and the decision of the court.

Miller v Bates, - ; 292 NW 818

Extension of redemption period—estoppel to object to decree. A supplemental decree correcting an obvious mistake in the original decree of foreclosure of a mortgage could not be complained of by the mortgagor after he applied for and secured an extension of the period of redemption, as by his act he expressly recognized the binding effect of the decree.

Miller v Bates, - ; 292 NW 818

10837

Estate administered by trustee. AG Op July 25, '40

10922

Evidence received subject to objections—not recommended. Stipulations between the parties that all evidence be received by the court subject to all objections in order to save time not recommended either for the purposes of trial or of appeal.

Davis v Davis, - ; 292 NW 804

10941

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no

objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Multiplicity of suits avoided in equity—several drainage districts as defendants. In mandamus against several drainage districts, when all the districts were in court and the questions involved were the same for each district, equity has jurisdiction to fully settle the rights of the parties and avoid multiplicity of suits.

Board of Trustees v Board, - ; 291 NW 141

Fraud in note settlement—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

Joint tenancy—estoppel by conveyance of tenant—termination. A devisee under a will devising property to two daughters in equal shares with an undivided half interest to each, who, in a mortgage and other papers, refers to her sister's share as a life estate, is held to recognize that the interests of the two sisters is not a joint tenancy, but a tenancy in common. The mortgage conveyance conveyed all of her interest and would have terminated a joint tenancy had one existed.

In re Heckmann, - ; 291 NW 465

Heirs of predeceased child—inheritance by substitution, not representation. In partition where an alleged adopted child of a predeceased child of intestate contends that plaintiffs inherit as collateral heirs the share of adopted child's alleged father because the alleged adopting father, if living, would be estopped from denying the adoption, and that plaintiffs, his heirs, would be likewise estopped, a motion to strike such pleading was properly sustained, since where a child of an intestate has predeceased him, the heirs of such child, under statute providing for descent to children, inherit the share direct from the intestate, taking by substitution and not by representation.

Sheaffer v Sheaffer - ; 292 NW 789

Objection to decree extending redemption period. A supplemental decree correcting an obvious mistake in the original decree of foreclosure of a mortgage could not be complained of by the mortgagor after he applied for and secured an extension of the period of redemption, as by his act he expressly recognized the binding effect of the decree.

Miller v Bates, - ; 292 NW 818

Jurisdiction to compel accounting in proceeding on final report after sheriff's deed issued. Where receiver in mortgage foreclosure action continued to collect receipts and make disbursements some seven years after sheriff's deed was signed and acknowledged, which deed, however, was still held by sheriff at time trial court denied plaintiff's objections to receiver's final report, the court erred (1) in holding that it had no jurisdiction to determine in that proceeding whether the receiver and his bondsman were liable for funds so collected, and (2) in excluding evidence that he collected such funds as receiver and that he was estopped to claim otherwise, since the receivership had not been terminated by order of the court and the property was still in custodia legis.

Young v Miller, 228- ; 292 NW 845

Finding of agreement for equal contribution—estoppel by former admission. A partner who admitted owning half the business and who had previously filed a claim against the partnership asking an allowance for money, materials, and services furnished by himself, stating that there was an agreement that each partner would contribute an equal amount of labor and money, could not complain of a finding by the court that he had agreed to contribute to the partnership capital equally with the other partner.

Tacke v Jennewein, 228- ; 293 NW 23

Mental incompetency—evidence. In equity action to set aside a deed of conveyance on the ground of mental incompetency, the evidence sustained a decree for defendant where it is shown that while grantor was indeed a sick man, suffering with a heart ailment which made it difficult for him to talk and breathe, yet he understood the nature of business in hand and he was capable of transacting such business at the time the deed was executed.

Keune v McCauley, 228- ; 293 NW 25

Undue influence and fiduciary relationship—insufficient evidence to set aside deed. In equity action to set aside a deed of conveyance on the ground of undue influence or fiduciary relationship, testimony of a bare statement made by grantor that (1) grantee and his wife were his best friends and (2) the fact that grantee on behalf of some of grantor's friends prevailed upon a hospital nurse to grant them admittance into grantor's hospital room falls far short of showing undue influence, neither did the mere fact that grantor and grantee

were cousins amount to proof of a fiduciary relationship.

Keune v McCauley, 228- ; 293 NW 25

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Dismissal during time for filing brief—no final submission despite entry "cause submitted". The court in effect reopened a case by granting the plaintiff an extension of time to file a reply brief after the case had been tried and written briefs submitted and after making a calendar entry showing "cause submitted". Furthermore, the court could grant the plaintiff's motion to dismiss without prejudice, filed before the time for filing the brief had expired, as there had not yet been a final submission of the case.

Thompson v Schalk, 228- ; 292 NW 851

Mutual mistake of law—no relief in law action. A court of law properly refused to give relief on a counterclaim for a compromise agreement entered into because of mutual mistake of the law where there was room for differences of legal opinion as to decisions of the supreme court interpreting statutes.

Beh Co. v Des Moines, - ; 292 NW 69

10944

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

10946

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

10949

Law action for equitable lien—waiver by failure to object. When an action to recover on an equitable lien was not begun in equity and no objection was made to the forum, the objection was waived by the failure to make a motion to transfer the cause.

Central Natl. Bank v. Simmer. (Filed August 6, 1940)

Ch 484, Note 1 Negligence liability generally.

Icy street crossing—time to remedy defect not proved. In an action for damages for injuries sustained by a pedestrian in a fall while crossing an icy street intersection, the defendant city was entitled to a directed verdict when it was not shown how long prior to the accident the icy condition existed. Without such showing, in the absence of evidence of actual knowledge by the city of the icy condition, there was no basis for imputing such knowledge, nor for holding that there had been a reasonable opportunity for the city to remedy the situation.

Batie v Humboldt, 228- ; 292 NW 857

Exposition—reasonably safe place for visitors. In an action for personal injuries sustained by plaintiff, who became frightened and fell to the floor of an exhibition barn when an unattended horse trotted down the aisle of the barn, the evidence as to just what took place being uncertain as well as void of any showing of a defect in construction or arrangement of the barn, and showing no defect in the floor, nor any obstruction or obstacle to cause plaintiff to fall, the corporate defendant operating the exposition met its obligation to provide a reasonably safe place for its visitors.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Exposition—removing halter from horse to replace with bridle—negligence—exhibitioners' nonliability. In damage action for personal injuries sustained by plaintiff while attending an exposition where an unattended horse trotted down the aisle of a barn, frightening plaintiff and causing her to fall to the floor of the barn, and where the evidence shows the horse was a gentle, docile, and well-trained animal and had been previously exhibited at like expositions, the fact that the horse moved out of its stall while the groom removed a halter from the horse with intention of immediately slipping on a bridle, did not constitute such negligence as to sustain a verdict for plaintiff.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Bridge—degree of care in maintenance. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

"Asphalt plank" bridge flooring—approved construction — slippery when wet — nonnegligence. Where plaintiff, a motorist, attempting

to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded through the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

Animals' death from stock powder—contributory negligence—jury question. In law action to recover for the death of sheep on account of the feeding of a product purchased from defendant, where defendant complains of refusal to direct a verdict for the reason the plaintiff also fed a homemade mixture of salts and earth, but since veterinarians, who performed post-mortem examinations, testified that homemade remedy would not be harmful to sheep, and the court gave an instruction regarding other food and remedies, the court did not err in submitting the question of contributory negligence to jury.

Miller v Economy Co., 228- ; 293 NW 4

Ch 484, Note 2 Torts generally.

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

Lien—foreclosure—conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

Animals' death from stock food—jury question. In law action to recover damages for death of sheep allegedly caused by the feeding of a product purchased from defendant, evidence showing that veterinarians who examined the sheep found them to be free from disease or ailment except a gastritis and who testified that the feeding of a powder rich in proteins on a forced feeding, as recommended by defendant's sales manager, would be dangerous because some of the sheep would get too much of the mixture, sufficiently tended to prove that the death of such sheep was due to feeding them the powder so as to raise a question for the jury.

Miller v Economy Co., 228- ; 293 NW 4

Refusal to accept stock powder previously causing death—noneffect of rescission on previous damage. In law action to recover damages for the death of sheep allegedly caused by feeding stock powder purchased from defendant, the fact that plaintiff refused a shipment of powder which arrived after the death of many of the sheep did not constitute a rescission of the contract which would relieve defendant from liability upon its warranty.

Miller v Economy Co., 228- ; 293 NW 4

10960

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

10963

Motion to strike motion—effect. A motion to strike another motion is regarded as improper procedure, but it does not follow that an order sustaining a motion to strike another motion constitutes error. The effect of an order striking a motion amounts to no more than an order overruling it, and if an overruling order would have been proper, the order to strike will not be erroneous.

Ryan v Emmetsburg, 228- ; 293 NW 29

Drainage district action—misjoinder of county treasurer. In mandamus action by drainage bondholders against the board of supervisors to require an additional assessment for payment of bonds, in which action the county treasurer was joined as a party because of the claim that he wrongfully paid out certain moneys from the district fund, a dismissal of the

action against such treasurer was proper, since he was not an officer of the district and the action against the treasurer to make restoration was not proper in a mandamus action.

Hartz v Truckenmiller. (Filed August 6, 1940)

10966

Salary dispute—overdraft by employee—settlement. In an employer's action against an employee to recover alleged overdrafts, where there was a dispute as to the salary and commissions the employee was to receive, and the employer failed to sustain the burden of proving the overdrafts, it was not necessary to decide whether a settlement between them, which the employer had successfully pleaded as a defense to a counterclaim for an accounting by the employee in a previous case, was a good defense in the present case.

Economy Co. v Honett, 228- ; 292 NW 825

Agency—essential elements—acts constituting. In action against an Iowa corporation in county other than its principal place of business the two essential elements for venue were (1) agency of salesman for corporation in such county, and (2) that the transactions in question grew out of or were connected with such agency. So where salesman, on commission basis, sold stock remedies for corporation in certain county, delivered merchandise from own personal supply, or diverted shipments for convenience of customers, and also sent orders to company which were shipped direct to customers, such transactions constituted an agency as contemplated by statute for serving original notices, and a motion for change of venue was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Representations by city employee—knowledge of city. Representations by a city employee could not be considered as part of a contract by the city when there was no evidence that the city had knowledge of the representations nor that they had any part in the negotiations leading up to the contract.

Beh Co. v Des Moines, - ; 292 NW 69

Agency (?) or independent dealer (?)—jury question. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant through an alleged agent, where defendant complains of the overruling of its motion for directed verdict on ground that the court should have found as a matter of law that alleged agent was in fact an independent dealer, the evidence of the transactions was such as to constitute a jury question as to agency, and such motion was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Warranty—exchange of assessment certificates—authority of city employee. Statements by a city employee that certain street assessment certificates had no defects, and a memorandum by him that the regular taxes were paid, when made prior to an agreement between the city solicitor and the plaintiff's attorney for an exchange of the certificates, could not be considered as an express warranty by the city that there were no unpaid taxes against the properties, when the attorney failed to check the certificates altho the records were as available to him as to the employee, and there was no evidence that the city intended that the statements be relied on or that the employee had authority to make such representations, any reliance on them being at the plaintiff's peril, as he was bound to know the extent of the employee's powers.

Beh Co. v Des Moines, - ; 292 NW 69

10967

Dissolution of partnership—true party as intervenor. In an action for the dissolution of a partnership, where the defendant filed an answer alleging that the plaintiff was not the true partner and asking that the true partner be substituted as plaintiff, the defendant could not complain if his motion to dismiss because the plaintiff was not the true party in interest was not granted when the court ordered the true partner brought in, and he came in as intervenor.

Tacke v Jennewein, 228- ; 293 NW 23

10969

Construction of will — grantee of devised property as party. One who held a certificate of sale to property at the beginning of an action to construe a will devising the property, and who later acquired a trustee's deed, had a direct interest in the litigation and was entitled to join in the action.

In re Heckmann, - ; 291 NW 465

10972

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

Drainage district action—misjoinder of county treasurer. In mandamus action by drainage bondholders against the board of supervisors to require an additional assessment for payment of bonds, in which action the county treasurer was joined as a party because of the claim that he wrongfully paid out certain moneys

from the district fund, a dismissal of the action against such treasurer was proper, since he was not an officer of the district and the action against the treasurer to make restoration was not proper in a mandamus action.

Hartz v Truckenmiller. (Filed August 6, 1940)

Admissions by nominal defendant not binding on principal defendant. The admissions of a defendant are not admissible against his co-defendants unless they consent thereto, adopt the statements as their own, or there is privity between the defendant making such admissions and his co-defendants, and especially is this true where the interests of the defendant whose statements are sought to be admitted in evidence are merely nominal. Accordingly, an answer by a co-defendant who had no interest in the suit, admitting plaintiffs' cause of action, would not be binding on the principal defendant.

Graham v Williams. (Filed August 6, 1940)

Alimony and support awards—lien from time of entry. In a divorce action in which the court had jurisdiction of the parties and subject matter, the entering of judgment for alimony and child support would in itself make the awards be liens on any real estate owned by the defendant. Whether the defendant's mother, who was not a party to the action, owned certain property not described in the petition, which the defendant had previously claimed in order that the mother's old-age pension would not be a lien on the property, need not be determined in the divorce action.

Davis v Davis, - ; 292 NW 804

10975

Decedent's liability as guarantor of note even tho statute of limitations available to principal. In a probate proceeding wherein a claim is made on a note upon which the decedent was guarantor, the fact that the statute of limitations would be a bar to recovery as against the principal did not make such defense available to guarantor, nor relieve the decedent of liability on account of the principal's nonliability, since the claim in probate was filed within five years from the date of the demand note and within the time prescribed by statute for filing claims in probate.

In re Fuller, 228- ; 293 NW 55

10981

Multiplicity of suits avoided in equity—several drainage districts as defendants. In mandamus against several drainage districts, when all the districts were in court and the questions involved were the same for each district, equity has jurisdiction to fully settle the rights of the parties and avoid multiplicity of suits.

Board of Trustees v Board, - ; 291 NW 141

Dissolution of partnership—true party as intervenor. In an action for the dissolution of a partnership, where the defendant filed an answer alleging that the plaintiff was not the true partner and asking that the true partner be substituted as plaintiff, the defendant could not complain if his motion to dismiss because the plaintiff was not the true party in interest was not granted when the court ordered the true partner brought in, and he came in as intervenor.

Tacke v Jennewein, 228- ; 293 NW 23

10983

Finding of agreement for equal contribution—estoppel by former admission. A partner who admitted owning half the business and who had previously filed a claim against the partnership asking an allowance for money, materials, and services furnished by himself, stating that there was an agreement that each partner would contribute an equal amount of labor and money, could not complain of a finding by the court that he had agreed to contribute to the partnership capital equally with the other partner.

Tacke v Jennewein, 228- ; 293 NW 23

Excess contribution as partnership debt—repayment priority. In an accounting upon dissolution of a partnership in which profits and losses are shared equally, the amount contributed by one partner in excess of the contribution of the other should be treated as a partnership debt and repaid first.

Tacke v Jennewein, 228- ; 293 NW 23

True party as intervenor. In an action for the dissolution of a partnership, where the defendant filed an answer alleging that the plaintiff was not the true partner and asking that the true partner be substituted as plaintiff, the defendant could not complain if his motion to dismiss because the plaintiff was not the true party in interest was not granted when the court ordered the true partner brought in, and he came in as intervenor.

Tacke v Jennewein, 228- ; 293 NW 23

Set-off or counterclaim—partnership or individual interests. In action to recover for rent and heat furnished, which action by agreement was tried to the court as an equity case, the court properly overruled an objection to a counterclaim or offset of defendants on the theory that, if such a claim existed, it was the property of a law partnership rather than a claim of the individual lawyers who were defendants.

Read v Ferguson. (Filed August 6, 1940)

Receiver—defense of suit—nonparticipation in compromise—no breach of duty by incidental benefit. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on

notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

11007

Debt outlawed—remedy on mortgage also barred. When a debt is barred by the statute of limitations, the remedy upon the mortgage is also barred.

Monast v Manley, 228- ; 293 NW 12

Burden of proof to show demand made within statutory period. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, and it is shown that demand to repurchase was not made until eight years after the original transaction, the burden of proof was on plaintiff to show demand was made within five years as provided by statute of limitations on unwritten contracts. On account of plaintiff's failure to sustain such burden of proof, the trial court erred in directing a verdict for plaintiff.

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Accrual of action—demand on corporation to repurchase stock—oral agreement. Altho a cause of action accrues on demand notes and instruments as soon as they are executed and the statute of limitations runs from that time, when a corporation sold stock with verbal agreements to repurchase the stock upon demand, no cause of action accrued against the corporation until the demand to repurchase was made and refused, and until that time the statute of limitations did not begin to run on the oral agreement.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Demand to repurchase stock—"reasonable time" determined. In damage action where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiffs, and when demands to repurchase were all made within five years from date of purchase, and within the statutory period of limitations for actions on unwritten contracts, such demands, as a matter of law, were made within a "reasonable time".

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral agreement to repurchase corporate stock—action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Extension of maturity date also extends statutory period of limitation. A written acknowledgment of an existing debt and a new promise to pay, resulting in extending the time of maturity of a debt due under a written instrument, likewise extends the period in which an action would be barred by statute of limitations.

Hootman v Beatty, 228- ; 293 NW 32

Tolling statute—partial payments—checks—oral promises. Partial payments and oral promises will not toll the statute of limitations. Neither will the giving of checks as payment of principal or interest amount to an acknowledgment of a continuing unpaid indebtedness nor constitute an admission in writing or a new promise to pay.

Hootman v Beatty, 228- ; 293 NW 32

Note filed as probate claim—commencement of action tolling statute of limitations. In probate proceedings the filing of a note as a claim against an estate is the commencement of an action, and, as such, tolls the statute of limitations. It is not material that notice of hearing upon the claim is not given until the note has run more than ten years after maturity.

In re Fuller, 228- ; 293 NW 55

Decedent's liability as guarantor of note even tho statute of limitations available to principal. In a probate proceeding wherein a claim is made on a note upon which the decedent was guarantor, the fact that the statute of limitations would be a bar to recovery as against the principal did not make such defense available to guarantor, nor relieve the decedent of liability on account of the principal's nonliability, since the claim in probate was filed within five years from the date of the demand note and within the time prescribed by statute for filing claims in probate.

In re Fuller, 228- ; 293 NW 55

Pleading of statute—sufficiency. In equity action to foreclose a real estate mortgage, where defendant refers to the statute in his answer, and the facts upon which the plea of the statute was based were undisputed and fully set out by plaintiff's petition, the statute of limitations is properly pleaded, because there could be no doubt in the minds of either the court or the parties that defendant relied

upon that part of the statute referring to actions upon written contracts.

Monast v Manley, 228- ; 293 NW 12

Erroneous conclusions of law or fact—no assumption of truth. A demurrer or motion to dismiss admits only the well pleaded facts and does not admit erroneous conclusions of law or facts. So in a real estate foreclosure action under a plea of fraud to prevent the instruments being barred by statute of limitations, where the allegations of the petition were insufficient, the motion to dismiss by defendant did not admit the conclusion of the pleader that defendants perpetrated a fraud on plaintiff.

Hootman v Beatty, 228- ; 293 NW 32

Failure of evidence in avoidance of statute. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stocks worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for 3 years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

Continuous rental — new agreement — non-effect on limitation. In action to recover rent for a period from September 1, 1918, to December 31, 1926, the trial court erred in ruling the statute of limitations barred the claim for rent from September 1, 1918, to September 1, 1920, because on the latter date the defendants, desiring more space, made a new rental agreement, because there was no settlement of accounts, and because the occupancy during the entire period was with the full understanding that rent was to be paid.

Read v Ferguson. (Filed August 6, 1940)

Injunction against suit on notes—modification pending submission of appeal. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, - ; 289 NW 900

11010

Fraud—insufficient evidence to prevent instruments being barred. In equity action to foreclose a real estate mortgage, a motion to dismiss petition because barred by statute of limitations was properly sustained, since the allegations of plaintiff's petition, that mortgagor's son told the holders of note and mortgage that he would pay the instruments and that they relied on such statements, were not a sufficient plea of fraud to prevent the instruments being barred by statute. The essential elements of fraud are (1) false representations, (2) materiality, (3) scienter, (4) intent to deceive, (5) reliance, and (6) damage.

Hootman v Beatty, 228- ; 293 NW 32

11018

Tolling statute—partial payments—checks—oral promises. Partial payments and oral promises will not toll the statute of limitations. Neither will the giving of checks as payment of principal or interest amount to an acknowledgment of a continuing unpaid indebtedness nor constitute an admission in writing or a new promise to pay.

Hootman v Beatty, 228- ; 293 NW 32

Extension of maturity date also extends statutory period of limitation. A written acknowledgment of an existing debt and a new promise to pay, resulting in extending the time of maturity of a debt due under a written instrument, likewise extends the period in which an action would be barred by statute of limitations.

Hootman v Beatty, 228- ; 293 NW 32

11028

Statute of limitations on ancient mortgages construed. The statute of limitations relating to foreclosure of ancient mortgages was enacted for the purpose of avoiding the prosecution of stale claims and cannot be invoked to the exclusion of the 10-year statute of limitations on written contracts.

Monast v Manley, 228- ; 293 NW 12

Ancient mortgages — recorded assignment not within exception. In equity action to foreclose a real estate mortgage, a motion to dismiss petition because barred by the statute of limitations was properly sustained, since a recorded assignment of a note and mortgage is not sufficient compliance with the exception provided in the statute for the foreclosure of ancient mortgages.

Hootman v Beatty, 228- ; 293 NW 32

11036

Action against drainage districts in different counties—where cause of action arose.

Where several drainage districts were situated in more than one county, an action to compel them to levy assessments to pay their share of the cost of cleaning a main outlet ditch was properly brought in the county where the outlet ditch was located, such being the place where the work was done and where a commission to apportion the costs was appointed, as this was the county where the cause of action, or some part of it, arose.

Board of Trustees v Board, - ; 291 NW 141

11041

A bridge company is not a common carrier.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

11046

Agency—essential elements—acts constituting. In action against an Iowa corporation in county other than its principal place of business the two essential elements for venue were (1) agency of salesman for corporation in such county, and (2) that the transactions in question grew out of or were connected with such agency. So where salesman, on commission basis, sold stock remedies for corporation in certain county, delivered merchandise from own personal supply, or diverted shipments for convenience of customers, and also sent orders to company which were shipped direct to customers, such transactions constituted an agency as contemplated by statute for serving original notices, and a motion for change of venue was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

11056.1

Fraud in procuring party's presence in foreign state for service—no duty to defend. Where an action is commenced in a foreign state against a resident of Iowa, where service of notice is obtained through fraud in procuring the presence of such party in the foreign state, there is no duty devolving upon such party to either appear or defend in the foreign state, and a judgment so secured is void and not entitled to full faith and credit in this state.

Miller v Acme Feed Inc. (Filed August 6, 1940)

11088

Subject matter of action challenged. The defendant may challenge the jurisdiction of the court over the subject matter of an action by a special appearance.

Schulte v Great Lakes Corp., - ; 291 NW 158

Action against insurer—burden of proving jurisdiction. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

Fraud in procuring party's presence in foreign state for service—no duty to defend. Where an action is commenced in a foreign state against a resident of Iowa, where service of notice is obtained through fraud in procuring the presence of such party in the foreign state, there is no duty devolving upon such party to either appear or defend in the foreign state, and a judgment so secured is void and not entitled to full faith and credit in this state.

Miller v Acme Feed Inc. (Filed August 6, 1940)

Substituted service on nonresident motorist—dismissal of action—effect. In automobile damage action where original notice was served on a nonresident of this state, as provided by motor vehicle laws, in which action defendant entered a special appearance on account of defects in the notice, and, before it was submitted, the action was dismissed without prejudice, plaintiff recommencing her action by filing an identical petition and serving a new notice in the same manner, after correcting defects, a special appearance in the second action should have been sustained on account of statute barring the recommencement of same action unless accompanied by actual personal service on defendant in this state.

Gelvin v Hull. (Filed August 6, 1940)

11111

Lien—foreclosure — conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

Creditor's bill—fraudulent conveyance—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received, without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing

plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

11114

Admissions by nominal defendant not binding on principal defendant. The admissions of a defendant are not admissible against his co-defendants unless they consent thereto, adopt the statements as their own, or there is privity between the defendant making such admissions and his co-defendants, and especially is this true where the interests of the defendant whose statements are sought to be admitted in evidence are merely nominal. Accordingly, an answer by a co-defendant who had no interest in the suit, admitting plaintiffs' cause of action, would not be binding on the principal defendant.

Graham v Williams. (Filed August 6, 1940)

Affirmative defenses presenting jury questions—erroneous directed verdict. In damage action for alleged failure of defendant to repurchase from plaintiff certain shares of stock of defendant company, where defendant pleaded as affirmative defenses (1) that repurchase of stock would have impaired its capital in violation of Delaware laws under which corporate authority was granted, and (2) that plaintiffs did not own stock purchased, but had exchanged it, such defenses were questions for the jury, and the court was in error in directing a verdict for plaintiffs.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral agreement to repurchase corporate stock—action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Affirmative defense not established as matter of law—directed verdict denied. In damage action for failure to repurchase corporate stock and where defendant answered that plaintiffs had disposed of the stock prior to this action, defendant's motion for directed verdict was properly refused—the affirmative defense not having been established as a matter of law.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Note given for indebtedness to deceased—presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

11127

More specific statement—substantial compliance—motion to strike amendment properly overruled. In a damage action based on an alleged nuisance where plaintiff amends his petition in substantial compliance with an order sustaining defendant's motion for more specific statement, a motion to strike the amendment was properly overruled where plaintiff was not required by the ruling to itemize his damage—plaintiff having pleaded a permanent nuisance including past, present, future, and special damages, on account of a sewage disposal plant which was so located as to subject plaintiff to conditions which other more remote property owners, or the public generally, did not suffer.

Ryan v Emmetsburg, 228- ; 293 NW 29

11130

Erroneous conclusions of law or fact—no assumption of truth. A demurrer or motion to dismiss admits only the well pleaded facts and does not admit erroneous conclusions of law or facts. So in a real estate foreclosure action, under a plea of fraud to prevent the instruments being barred by statute of limitations, where the allegations of the petition were insufficient, the motion to dismiss by defendant did not admit the conclusion of the pleader that defendants perpetrated a fraud on plaintiff.

Hootman v Beatty, 228- ; 293 NW 32

11131

Setting aside ruling on disposal of points of law — nonerroneous. Where the trial court ruled on an application to determine the law in advance of trial, on November 10, 1937, and granted appellees an exception and time within which to plead further, move for new trial, or move to set aside and vacate or modify the ruling, and within such time appellees filed a motion to vacate the ruling, to which appellants filed resistance and the court ordered the motion submitted with the case and reserved it's ruling until after hearing, it was not error for the court to sustain appellees' motion and vacate the ruling on the 30th day of July, 1938, since the court had retained jurisdiction to decide the matter.

In re Tabasinsky. (Filed August 6, 1940)

11141

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

11151

Partnership or individual interests. In action to recover for rent and heat furnished, which action by agreement was tried to the court as an equity case, the court properly overruled an objection to a counterclaim or offset of defendants on the theory that, if such a claim existed, it was the property of a law partnership rather than a claim of the individual lawyers who were defendants.

Read v Ferguson. (Filed August 6, 1940)

Continuous rental—statement presented for partial period—not account stated. In action to recover rent for a period from September 1, 1920, to September 3, 1926, the fact that plaintiff presented a statement to defendants for rent under date of September 3, 1926, for rent from January 1, 1926, to September 1, 1926, did not result in the cancellation of all rents that had been due before January 1, 1926, and such presentation did not result in an account stated, since under the facts and circumstances the statement presented could not have had such effect for two reasons: (1) it was not so intended, and (2) it was not accepted as such, but was met with a claim of offset.

Read v Ferguson. (Filed August 6, 1940)

11155

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

11174

Default judgment—improper when answer on file. A judgment should not be entered by default while an answer is on file, so in replevin action in which a petition of intervention was filed and to which plaintiff filed a reply by way of general denial, the trial court erred in granting a motion for default against plaintiff, since the intervenor's relief depended upon her assertion of ownership, and this, being denied, raised an issue of fact.

Jasper Co. v Stergios, 228- ; 292 NW 855

Dissolution of partnership—true party as intervenor. In an action for the dissolution of a partnership, where the defendant filed an answer alleging that the plaintiff was not the true partner and asking that the true partner be substituted as plaintiff, the defendant could not complain if his motion to dismiss because the plaintiff was not the true party in interest was not granted when the court ordered the true partner brought in, and he came in as intervenor.

Tacke v Jennewein, 228- ; 293 NW 23

Equitable conversion of realty denied under will—executors' duty as to claims. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervenor's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one-third to widow, two-thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as

to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940.)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one-third to widow and two-thirds to children, and where an intervenor claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by the executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

11177

False pretenses—indictment charging property obtained from owner—proof shows from agent. Where a defendant obtains cattle by false pretenses, an indictment for cheating by false pretenses is not defective because it alleges the property was obtained from the owner, tho in fact the property was obtained from the owner's agent. Such facts do not create a fatal variance between the indictment and the proof, and a directed verdict based thereon is properly overruled.

State v Neuhart, - ; 292 NW 791

11194

Demand to repurchase stock—"reasonable time" determined. In damage action where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiffs, and when demands to repurchase were all made within five years from date of purchase, and within the statutory period of limitations for actions on unwritten contracts, such demands, as a matter of law, were made within a "reasonable time".

Smith v Middle States Utilities Co., 228- ; 293 NW 59

11197

Motion sustained generally—necessity of successfully challenging each ground on appeal. Where a motion to strike a reply was sustained generally, and on all grounds, the appellant on appeal to the supreme court cannot prevail unless each ground of the motion is successfully challenged.

Walling v Ins. Co., 228- ; 292 NW 157

Motion to strike motion—effect. A motion to strike another motion is regarded as improper procedure, but it does not follow that an order sustaining a motion to strike another motion constitutes error. The effect of an order striking a motion amounts to no more than an order overruling it, and if an overruling order would have been proper, the order to strike will not be erroneous.

Ryan v Emmetsburg, 228- ; 293 NW 29

11209

Note given for indebtedness to deceased—presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

Limitation of actions—failure of evidence in avoidance. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stocks worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for 3 years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

Heirs of predeceased child—inheritance by substitution, not representation. In partition where an alleged adopted child of a predeceased child of intestate contends that plaintiffs inherit as collateral heirs the share of adopted child's alleged father because the alleged adopting father, if living, would be estopped from denying the adoption, and that plaintiffs, his heirs, would be likewise estopped, a motion to strike such pleading was properly sustained, since where a child of an intestate

has predeceased him, the heirs of such child, under statute providing for descent to children, inherit the share direct from the intestate, taking by substitution and not by representation.

Sheaffer v Sheaffer, - ; 292 NW 789

Statute of limitations—sufficiently pleaded. In equity action to foreclose a real estate mortgage, where defendant refers to the statute in his answer, and the facts upon which the plea of the statute was based were undisputed and fully set out by plaintiff's petition, the statute of limitations is properly pleaded, because there could be no doubt in the minds of either the court or the parties that defendant relied upon that part of the statute referring to actions upon written contracts.

Monast v Manley, 228- ; 293 NW 12

Affirmative defenses presenting jury questions—erroneous directed verdict. In damage action for alleged failure of defendant to repurchase from plaintiff certain shares of stock of defendant company, where defendant pleaded as affirmative defenses (1) that repurchase of stock would have impaired its capital in violation of Delaware laws under which corporate authority was granted, and (2) that plaintiffs did not own stock purchased, but had exchanged it, such defenses were questions for the jury, and the court was in error in directing a verdict for plaintiffs.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Consideration—conditional delivery and payment—note given for services otherwise paid for. Where an oral contract for services was made, the salary being computed on the time actually spent in rendering the services, and, about three months after the services were begun, a note and mortgage were given the employee to secure payment, the note being of an amount to pay for a year of full time work, and thereafter the work was paid for in full each month, an action on the note and mortgage was properly dismissed, whether because no consideration was given when the note was made or because there was conditional delivery and a discharge by full payments for the services.

Kruse v Wickham, 228- ; NW (Filed June 18, 1940)

Affirmative defense not established as matter of law—directed verdict denied. In damage action for failure to repurchase corporate stock and where defendant answered that plaintiffs had disposed of the stock prior to this action, defendant's motion for directed verdict was properly refused—the affirmative defense not having been established as a matter of law.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral agreement to repurchase corporate stock—action accrues after demand. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, defendant's motion for directed verdict was properly overruled, since the sale of stock was a completed transaction, with no obligation upon or right of action against the seller until a demand to repurchase was made upon it and the demand refused. The action being brought within five years from the making of the demand to repurchase, there was no error.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

11210

Degree of care in maintenance of bridge. A bridge company, not being a common carrier, must exercise only ordinary care to keep the bridge in reasonably safe condition for travel.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

11211

Financial crises. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

Shrinkage in land values—judicial notice.

Hartz v Truckenmiller. (Filed August 6, 1940)

11226

Court's discretion. In a mortgage foreclosure action involving 160 acres of a 360-acre farm, an intervenor's motion to consolidate such action with another foreclosure action involving the other 200 acres, based on an alleged interest in both actions, was properly overruled since the consolidation of actions is discretionary with the court and the record shows no abuse of such discretion in the refusal to consolidate.

Sykes v Waring, - ; 293 NW 14

11229

Motion to strike motion—effect. A motion to strike another motion is regarded as improper procedure, but it does not follow that an order sustaining a motion to strike another

motion constitutes error. The effect of an order striking a motion amounts to no more than an order overruling it, and if an overruling order would have been proper, the order to strike will not be erroneous.

Ryan v Emmetsburg, 228- ; 293 NW 29

Judgment on pleadings—no statutory provision. The statutes of procedure in this state do not contemplate a motion for judgment on the pleadings.

Jasper Co. v Stergios, 228- ; 292 NW 855

More specific statement—substantial compliance—motion to strike amendment properly overruled. In a damage action based on an alleged nuisance where plaintiff amends his petition in substantial compliance with an order sustaining defendant's motion for more specific statement, a motion to strike the amendment was properly overruled where plaintiff was not required by the ruling to itemize his damage—plaintiff having pleaded a permanent nuisance including past, present, future, and special damages, on account of a sewage disposal plant which was so located as to subject plaintiff to conditions which other more remote property owners, or the public generally, did not suffer.

Ryan v Emmetsburg, 228- ; 293 NW 29

Separate actions on note and mortgage—insurance involved—motion to elect denied. Where plaintiff brings a separate action on a note (secured by a mortgage) and in another action involving the mortgage seeks to adjudicate a fire loss, the latter action is not an action "on the mortgage given to secure" the note such as authorizes the defendant to require the plaintiff to elect under §12375, C., '39, which action he will prosecute.

Parsons v Kitt, 228- ; 292 NW 831

11254

Testimony as to books showing corporate condition—prerequisites. Before one who has examined books of account or records can testify as to a finding on some particular matter, the books from which the testimony is based should be in evidence or at least available to the party against whom it is offered. Books of a central corporation which could not alone show the condition of the corporation without also using the books of the subsidiaries, which were not made available, were not admissible as a basis for proffered testimony concerning the financial condition of the corporation.

Gregg v Middle States Utilities Co., ; 293 NW 66

Account for rent proved. In an action to recover for rent, the testimony of one of the plaintiffs, who had charge of the property, that the rent was due and unpaid was sufficient to sustain a judgment for plaintiffs as against the testimony of defendants, by way of a general conclusion, that all bills were paid when their partnership was dissolved and that they had no books, checks, or other memoranda and that such matters were handled by office girls who were not called as witnesses and no explanation given as to why they could not be present to testify other than "they do not live here".

Read v Ferguson. (Filed August 6, 1940)

Admissions by nominal defendant not binding on principal defendant. The admissions of a defendant are not admissible against his co-defendants unless they consent thereto, adopt the statements as their own, or there is privity between the defendant making such admissions and his co-defendants, and especially is this true where the interests of the defendant whose statements are sought to be admitted in evidence are merely nominal. Accordingly, an answer by a co-defendant who had no interest in the suit, admitting plaintiffs' cause of action, would not be binding on the principal defendant.

Graham v Williams. (Filed August 6, 1940)

Dead man statute—applicability to defendant-surety. In law action upon a purported promissory note payable to plaintiff's decedent, where defendant answered by general denial and affirmative defenses of fraud in the inception of the instrument, in that delivery of note to plaintiff's decedent was in violation of the terms and conditions upon which defendant had signed the same, in that defendant signed the instrument as surety only, and in that such signing by him was wholly without consideration, the plaintiff's objections to the testimony of the defendant under the dead man statute were properly sustained where it is shown that the decedent and principal were present when defendant signed the note as surety, and all three took part in the negotiations concerning the circumstances under which the note was executed.

Enabnit v Hanson, 228- ; 292 NW 181

Cross-examination and argument on subject of other indemnity insurance—when nonerroneous. In law action to recover indemnity under an accident policy where plaintiff is cross-examined with reference to other indemnity insurance carried by him, to which objections were sustained, there was no error, since the court instructed the jury to consider only such evidence as was admitted, and the reference to such matters by defendant's attorney, in argument to the jury, was not erroneous, since plaintiff's attorney first mentioned the subject and the record supported the statements made.

Eller v Ins. Co., - ; 291 NW 866

Deed as mortgage—presumption—inadequate consideration. Principles reaffirmed that where a borrower, for a nominal consideration, executes a deed to the creditor, there is a presumption that the deed is a mortgage; that gross inadequacy of consideration for a deed consti-

tutes a strong circumstance that a deed is intended as a mortgage; and that evidence to prove that a deed, absolute on its face, is intended as a mortgage must be clear, satisfactory, and convincing.

Ross v Ins. Co., 228- ; 292 NW 813

Good faith—negativing—competency of evidence. In an action to set aside deed given to grantee where grantor expressed a desire that his grandson be taken care of, evidence that grantee had the grandson committed to an institution after grantor's death was admissible to negative the idea of any good-faith agreement to care for the boy after the death of the grandfather.

Sinco v Kirkwood, - ; 291 NW 873

Jurisdiction to compel accounting in proceeding on final report after sheriff's deed issued. Where receiver in mortgage foreclosure action continued to collect receipts and make disbursements some seven years after sheriff's deed was signed and acknowledged, which deed, however, was still held by sheriff at time trial court denied plaintiff's objections to receiver's final report, the court erred (1) in holding that it had no jurisdiction to determine in that proceeding whether the receiver and his bondsman were liable for funds so collected, and (2) in excluding evidence that he collected such funds as receiver and that he was estopped to claim otherwise, since the receivership had not been terminated by order of the court and the property was still in custodia legis.

Young v Miller, 228- ; 292 NW 845

Evidence received subject to objections—not recommended. Stipulations between the parties that all evidence be received by the court subject to all objections in order to save time not recommended either for the purposes of trial or of appeal.

Davis v Davis, - ; 292 NW 804

Consideration presumed from execution and delivery. In an action to collect a note, when execution and delivery of the note have been established, the note is presumed to have been issued for a valuable consideration, and the burden of showing lack of consideration is on the defendant.

Hoover v Hoover, - ; 291 NW 154

Action against insurer—jurisdiction. In an action by a third party on an insurance policy carried by a motor carrier pursuant to a statute which permits an action against the insurer only when service cannot be obtained within the state, where the defendant-insurer filed a special appearance challenging the jurisdiction of the court, asserting that the carrier had an agent within the state upon whom process could have been served, the plaintiff had the burden of proving the questioned jurisdiction, and, when he failed to do this, the special appearance should have been sustained.

Schulte v Great Lakes Corp., - ; 291 NW 158

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000 was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

Delivery of deed—deferred enjoyment—testimony of escrow holder. The burden of proving that a deed delivered to a third party to be given to the grantees on the death of the grantor vested a present title with possession and enjoyment deferred while the grantor lived was carried by supported testimony of the third party as to the transaction in which the deed was delivered to him.

Pickworth v Whitford, 228- ; 293 NW 47

Impeachment of delivery of deed — subsequent acts of grantor. When valid delivery of a deed to a third party for grantees was proved, the status of the grantee is as good as a grantee in possession of a deed who can rely on a presumption of good delivery, and the rule applies that subsequent acts and declarations of a grantor, not made in the presence of the grantee, are not admissible to impeach the title of the grantee.

Pickworth v Whitford, 228- ; 293 NW 47

Note given for indebtedness to deceased—presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to

go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

Policy provision—court order unnecessary. In law action to recover indemnity on an accident policy, plaintiff assigned as error an order of court, granted upon application of defendant, directing plaintiff to permit certain doctors to examine him respecting his injuries and their connection with any disability suffered by him. Such assignment of error was without merit where the policy provided "The company shall have the right and opportunity through its Medical Representative to examine the person of the insured while living when and so often as it may reasonably require during the pendency of a claim thereunder". Insurer was entitled to make such examination as the court ordered, without any such order.

Eller v Ins. Co., - ; 291 NW 866

Physician—testimony that patient had been attended—improper exclusion. Testimony by a physician that he had attended a patient on certain dates and had taken him to a hospital where he spent the night did not disclose any information obtained professionally, and for the court to sustain an objection to this testimony as being privileged was prejudicial error.

Cross v Equitable Life. (Filed August 6, 1940)

Insurance—false statements in application—proof erroneously refused. In an action on a life insurance policy issued without physical examination, it is error to refuse to permit the insurer to show that it relied on false statements in the insurance application and that, had the truth been revealed, the application would not have been approved nor the policy issued.

Cross v Equitable Life. (Filed August 6, 1940)

Blood test—specimen taken by coroner from another county. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

Lease as part of petition—introduction in evidence unnecessary. In law action to recover rent under a written lease, which lease is made a part of the petition, and where defendants' answer admitted the execution of such lease, it is not necessary that the lease be introduced in evidence.

Becker v Rute, 228- ; 293 NW 18

Conditional delivery of note—payment from specific fund. Parol evidence is admissible to show that a note was conditionally delivered, but it is not admissible to show that the payment of the note was to be made out of a specific fund.

Hoover v Hoover, - ; 291 NW 154

Ambiguity in will. The interpretation which a court is bound to give to a will is that which appears to have been the intent of the testator, and altho in some cases extrinsic circumstances are permitted in evidence to clear up ambiguity, or to identify subject matter, the court cannot make a new will.

In re Heckmann, - ; 291 NW 465

Conditional delivery — discharge. Principle reaffirmed that parol evidence is admissible to show conditional delivery or discharge of a written instrument.

Kruse v Wickham, - ; NW (Filed June 18, 1940)

Delivery—testimony of party holding in escrow for grantee. Where intervenors claimed title to land under a deed prior to the deed of the plaintiff, testimony by the intervenors' father that the first deed was given him to hold until the grantor's death, then to be given to the intervenors and recorded, is proof of what the grantor intended and what was accomplished when the deed was given, even tho substantiating testimony by the grantor be ignored.

Pickworth v Whitford, 228- ; 293 NW 47

Party first offering—estoppel to object to like testimony. Where plaintiff introduced expert opinion testimony, over objection, he cannot object to an offer of like testimony on the ground that it invaded the province of the jury. Once having opened the door to admit his testimony, he cannot be permitted to close it to the entrance of like testimony offered by defendant.

Eller v Ins. Co., - ; 291 NW 866

Oral contract with decedent for services—payment with realty—evidence requirements. In equity action for the specific performance of alleged oral agreement under which plaintiff, upon performance of certain services, was to receive a farm of which the other contracting party died seized, the evidence was insufficient to establish such contract by clear, substantial, satisfactory, and convincing evidence as required by law. Claims of this kind should be scrutinized with the greatest care and established only upon the most satisfactory evidence.

Williams v Harrison, 228- ; 293 NW 41

11255

Supported findings of fact in law actions—conclusiveness on appeal. In a law appeal the supreme court is not privileged to pass upon the credibility of witnesses nor to find the facts, but it is to determine from the record what the jury was warranted in finding the facts to be, considering the facts in the most favorable light for the defendant.

Ross v Ins. Co., 228- ; 292 NW 813

Nonright to impeach but right to contradict one's own witness. In an action to set aside as fraudulent a conveyance made by decedent to grandson wherein grandson as a witness for plaintiff directly and definitely denied plaintiff's contention that transfer had been agreed upon to defeat creditor's claim, held that plaintiff vouched for this witness in making him his own, and that since plaintiff did not exercise right to dispute the grandson's testimony with testimony of other witnesses, the testimony of the grandson stood uncontradicted.

Healey v Allen, - ; 290 NW 71

Evidence for impeachment erroneously admitted—no prejudice shown—no reversal. In a damage action to recover for personal injuries where witness testified that automobile struck a trolley coach, a previous written statement of such witness that trolley coach struck the automobile should not have been admitted in evidence—there being no such inconsistency as to make the statement admissible for purpose of impeachment. However, when appellant failed to make the necessary showing of prejudice, the error did not warrant a reversal.

Ceretti v Railway, 228- ; 293 NW 45

Impeachment by other witness—foundation laid in cross-examination. Where proper foundation was laid in the cross-examination of the defendant's wife, it was not error to admit, solely for purposes of impeachment, testimony of a sheriff regarding statements made by the wife.

State v Strable. (Filed August 6, 1940)

11257

Dead man statute—construction. The dead man statute does not relate to competency of evidence; it merely prohibits certain witnesses from giving evidence. Communications and transactions between a decedent and an adverse party, when pertinent to the issues, may be proved. The provisions of the statute go no further than to declare that to make such proof, certain witnesses are incompetent.

Enabnit v Hanson, 228- ; 292 NW 181

Oral contract with decedent for services—payment with realty—evidence requirements. In equity action for the specific performance of alleged oral agreement under which plaintiff, upon performance of certain services, was to receive a farm of which the other contracting party died seized, the evidence was insufficient to establish such contract by clear, substantial, satisfactory, and convincing evidence as required by law. Claims of this kind should be scrutinized with the greatest care and established only upon the most satisfactory evidence.

Williams v Harrison, 228- ; 293 NW 41

Decedent questioning claimant's wife—admissibility. In equity action for specific performance of alleged oral agreement under which plaintiff upon performance of certain services was to receive a farm of which the other contracting party died seized, and in which action the only evidence as to conversation between the parties was the testimony of plaintiff's wife, the fact that decedent, after the conversation with plaintiff, asked plaintiff's wife if plans discussed were agreeable to her did not constitute a part of the conversation, under the facts, so as to exclude her testimony under the dead man statute.

Williams v Harrison, 228- ; 293 NW 41

Dead man statute—applicability to defendant-surety. In law action upon a purported promissory note payable to plaintiff's decedent, where defendant answered by general denial and affirmative defenses of fraud in the inception of the instrument, in that delivery of note to plaintiff's decedent was in violation of the terms and conditions upon which defendant had signed the same, in that defendant signed the instrument as surety only, and in that such signing by him was wholly without consideration, the plaintiff's objections to the testimony of the defendant under the dead man statute were properly sustained where it is shown that the decedent and principal were present when defendant signed the note as surety, and all three took part in the negotiations concerning the circumstances under which the note was executed.

Enabnit v Hanson, 228- ; 292 NW 181

11263

Waiver of right—insurance application. A life insurance company has the right, before issuing a policy, to require a physical examination of an applicant and may incorporate in the application a waiver of the right to claim the privilege of confidential relation between physician and patient. It must take cognizance of the statute relating to privileged communications when it chooses to rely on representations as to health made in the application and does not require a physician's examination before issuing the policy.

Cross v Equitable Life. (Filed August 6, 1940)

Physician-patient relation—nonwaiver by insurance applicant. When it is made to appear to the trial court that the relationship of physician and patient existed, the statutory

bar to the admission of privileged communications should be held applicable. Statements made in an application for a life insurance policy that the applicant had consulted no physician and had no ulcer nor stomach trouble did not waive the privilege when the existence of the relationship appeared for the first time from the testimony of a physician appearing as the insurer's witness. Unless the assured had made an express waiver, or opened the door by introducing testimony on the privileged subject matter, the insurer could not enter the field.

Cross v Equitable Life. (Filed August 6, 1940)

Physician—testimony that patient had been attended—improper exclusion. Testimony by a physician that he had attended a patient on certain dates and had taken him to a hospital where he spent the night did not disclose any information obtained professionally, and for the court to sustain an objection to this testimony as being privileged was prejudicial error.

Cross v Equitable Life. (Filed August 6, 1940)

Physician-patient relation ends at death of patient—autopsy. The physician-patient relationship ends at the death of the patient. Testimony by a physician present at an autopsy, based solely on what he observed at the autopsy, is not privileged.

Cross v Equitable Life. (Filed August 6, 1940)

11281

Testimony as to books showing corporate condition—prerequisites. Before one who has examined books of account or records can testify as to a finding on some particular matter, the books from which the testimony is based should be in evidence or at least available to the party against whom it is offered. Books of a central corporation which could not alone show the condition of the corporation without also using the books of the subsidiaries, which were not made available, were not admissible as a basis for proffered testimony concerning the financial condition of the corporation.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Continuous rental—statement presented for partial period—not account stated. In action to recover rent for a period from September 1, 1920, to September 3, 1926, the fact that plaintiff presented a statement to defendants for rent under date of September 3, 1926, for rent from January 1, 1926, to September 1, 1926, did not result in the cancellation of all rents that had been due before January 1, 1926, and such presentation did not result in an account stated, since under the facts and circumstances the statement presented could not have had such effect for two reasons: (1) it was not so intended, and (2) it was not accepted as such, but was met with a claim of offset.

Read v Ferguson. (Filed August 6, 1940)

11285

Corporate note by individual for rent—oral guaranty. In law action to recover rent against an individual who originally leased premises and thereafter tendered in payment of back rent a note signed by a corporation of which such individual was president, a directed verdict for plaintiff as against such individual was sustained by undisputed evidence showing plaintiff refused to accept the note until after such individual orally acknowledged the debt as his own and understood his endorsement to be a guaranty of payment of such note in the event the corporate note was uncollectible.

Cummings v Iowa Household Credit Corp. (Filed August 6, 1940)

11329

Instruction—facts alone as substantive evidence. In criminal prosecution for forgery, an instruction on expert testimony was proper where the court points out the testimony upon which expert's opinion is based, such as characteristic similarities and physical facts, which may be observed by jury—such facts being substantive evidence and entitled to consideration by jury independent of expert's opinion.

State v Gibson, 228- ; 292 NW 786

Party first offering—estoppel to object to like testimony. Where plaintiff introduced expert opinion testimony, over objection, he cannot object to an offer of like testimony on the ground that it invaded the province of the jury. Once having opened the door to admit his testimony, he cannot be permitted to close it to the entrance of like testimony offered by defendant.

Eller v Ins. Co., ; 291 NW 866

11426

Certiorari—quashing writ—use of terms unimportant—actual issues control. Lower court's use of term "improvidently issued" in quashing writ of certiorari because of park board's noncapacity to sue is unimportant when the real issue is whether the court should have sustained the writ after learning of the questions actually before it and determining the legal status of the persons involved.

Des Moines Park Board v Des Moines, - ; 290 NW 680

11429

Motion by both parties for directed verdict—nonwaiver of jury without express or implied consent. In a damage action where, at the close of the testimony, defendant made a motion for a directed verdict and plaintiffs' coun-

sel immediately remarked, "Now, the plaintiffs agree with the defendant that the matter is a question of law for the Court, and we want to make a motion for a directed verdict too", the court, in overruling the defendant's motion and finding for the plaintiffs, thereby erred. The rule in this state is that, without an express or implied consent, a motion by both parties for a directed verdict is not a waiver of jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Judgment or order on trial to the court—conclusiveness. In probate proceedings, under the familiar rule relative to law actions tried to the court, the judgment and order of the court must necessarily have the effect of a verdict by a jury, and where evidence is sufficient to sustain such order or judgment it will not be disturbed on appeal.

In re Evans, - ; 291 NW 460

Supported findings of fact in law actions—conclusiveness on appeal. In a law appeal the supreme court is not privileged to pass upon the credibility of witnesses nor to find the facts, but it is to determine from the record what the jury was warranted in finding the facts to be, considering the facts in the most favorable light for the defendant.

Ross v Ins. Co., 228- ; 292 NW 813

Ownership—deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

Test for determining when jury question exists. A jury question is presented when different minds might reasonably reach different conclusions thereon. So held as to question of recklessness in action by automobile guest.

Fraser v Brannigan, 228- ; 293 NW 50

Affirmative defenses presenting jury questions—erroneous directed verdict. In damage action for alleged failure of defendant to repurchase from plaintiff certain shares of stock of defendant company, where defendant pleaded as affirmative defenses (1) that repurchase of stock would have impaired its capital in violation of Delaware laws under which corporate authority was granted, and (2) that plaintiffs did not own stock purchased, but had exchanged it, such defenses were questions for the jury, and the court was in error in directing a verdict for plaintiffs.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Stock feed sales—evidence of warranty. In law action to recover for the death of sheep caused by feeding a stock powder purchased from defendant, wherein evidence shows plaintiff called defendant's sales manager by long distance telephone and advised him as to the condition of the sheep and allegedly relied on statement by sales manager that it would be proper to feed the powder to the sheep, the question of warranty was for the jury, and a motion to direct a verdict was properly overruled. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Miller v Economy Co., 228- ; 293 NW 4

Animals' death from stock food. In law action to recover damages for death of sheep allegedly caused by the feeding of a product purchased from defendant, evidence showing that veterinarians who examined the sheep found them to be free from disease or ailment except a gastritis and who testified that the feeding of a powder rich in proteins on a forced feeding, as recommended by defendant's sales manager, would be dangerous because some of the sheep would get too much of the mixture, sufficiently tended to prove that the death of such sheep was due to feeding them the powder so as to raise a question for the jury.

Miller v Economy Co., 228- ; 293 NW 4

Sheep kept under contract—proper care. In a replevin action to recover sheep which had been furnished by the plaintiff under a contract by which the defendant was to feed and care for the sheep, with the right reserved in the plaintiff to take possession in case proper care was not given, jury questions were raised by conflicting evidence concerning whether proper care was given and whether wool was sold without the plaintiff's consent in violation of the contract.

Mead v Palmer, 228- ; 292 NW 821

Animals' death from stock powder. In law action to recover for the death of sheep on account of the feeding of a product purchased from defendant, where defendant complains of refusal to direct a verdict for the reason the plaintiff also fed a homemade mixture of salts and earth, but since veterinarians, who performed post-mortem examinations, testified that homemade remedy would not be harmful to sheep, and the court gave an instruction regarding other food and remedies, the court

did not err in submitting the question of contributory negligence to jury.

Miller v Economy Co., 228- ; 293 NW 4

Agency (?) or independent dealer (?). In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant through an alleged agent, where defendant complains of the overruling of its motion for directed verdict on ground that the court should have found as a matter of law that alleged agent was in fact an independent dealer, the evidence of the transactions was such as to constitute a jury question as to agency, and such motion was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Disputed venue. In criminal prosecutions where there is a dispute as to venue the question is for the jury.

State v Gibson, 228- ; 292 NW 786

Foreign corporation's stock repurchase agreement—impairment of capital. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

11433

Trial de novo — incomplete record — effect. The claim of appellants in a partition action that they are entitled to a trial de novo on appeal must fail where record shows that complete case is not before the supreme court and there is no showing of an attempt to make a record as authorized by §11456, C., '39. In such case, presumption obtains that decree of trial court is correct.

Enslow v Miner. (Filed August 6, 1940)

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

11435

Effect of jury verdict—most favorable evidence rule. In an action at law tried to the court, the finding of the court has the effect of a verdict of a jury, and upon appeal the evidence will be considered in the light most favorable to the appellee.

Tilden v Zanias, 228- ; 292 NW 835

Trial court's decision in equity—conclusiveness. On appeal the decision of a trial court in an equity case will not be molested to determine close questions where the trial court had the advantage of seeing and hearing the witnesses, unless such decision is contrary to the law and evidence.

Keune v McCauley, 228- ; 293 NW 25

Judgment or order on trial to the court—conclusiveness. In probate proceedings, under the familiar rule relative to law actions tried to the court, the judgment and order of the court must necessarily have the effect of a verdict by a jury, and where evidence is sufficient to sustain such order or judgment it will not be disturbed on appeal.

In re Evans, - ; 291 NW 460

Summary proceedings—executor's failure to pay—findings conclusive. In a summary proceeding in probate to fix the liability of a surety on the bond of a defaulting executor, tried to the court without a jury but not in equity, it is neither the privilege nor the duty of the supreme court, on appeal, to find the facts, but merely to determine from the evidence if the findings of the trial court were supported by substantial, competent evidence. If so, such findings are conclusive. The appellant recognized as much when it asked for and secured findings of fact and conclusions of law pursuant to statute.

In re Tabasinsky. (Filed August 6, 1940)

Fraud in obtaining foreign judgment—findings of trial court conclusive. In law action to recover commissions wherein defendant answered, alleging adjudication of the matters in an Illinois court, and by way of counterclaim sought to obtain judgment for an amount as adjudicated in Illinois, the findings of the trial court that the Illinois judgment was obtained by fraud and not entitled to full faith and credit are conclusive on appeal where a jury was waived and trial was to the court.

Miller v Acme Feed Inc. (Filed August 6, 1940)

11441

Dismissal during time for filing brief—no final submission despite entry "cause submitted". The court in effect reopened a case by granting the plaintiff an extension of time to file a reply brief after the case had been tried and written briefs submitted and after making a calendar entry showing "cause submitted". Furthermore, the court could grant

the plaintiff's motion to dismiss without prejudice, filed before the time for filing the brief had expired, as there had not yet been a final submission of the case.

Thompson v Schalk, 228- ; 292 NW 851

11443

Dismissal during time for filing brief—no final submission despite entry "cause submitted". The court in effect reopened a case by granting the plaintiff an extension of time to file a reply brief after the case had been tried and written briefs submitted and after making a calendar entry showing "cause submitted". Furthermore, the court could grant the plaintiff's motion to dismiss without prejudice, filed before the time for filing the brief had expired, as there had not yet been a final submission of the case.

Thompson v Schalk, 228- ; 292 NW 851

11456

Appeal—trial de novo—incomplete record—effect. The claim of appellants in a partition action that they are entitled to a trial de novo on appeal must fail where record shows that complete case is not before the supreme court and there is no showing of an attempt to make a record as authorized by this section. In such case, presumption obtains that decree of trial court is correct.

Enslow v Miner. (Filed August 6, 1940)

11485

Lease as part of petition—introduction in evidence unnecessary. In law action to recover rent under a written lease, which lease is made a part of the petition, and where defendants' answer admitted the execution of such lease, it is not necessary that the lease be introduced in evidence.

Becker v Rute, 228- ; 293 NW 18

11487

Cross-examination and argument on subject of other indemnity insurance—when nonerroneous. In law action to recover indemnity under an accident policy where plaintiff is cross-examined with reference to other indemnity insurance carried by him, to which objections were sustained, there was no error, since the court instructed the jury to consider only such evidence as was admitted, and the reference to such matters by defendant's attorney, in argument to the jury, was not erroneous, since plaintiff's attorney first mentioned the subject and the record supported the statements made.

Eller v Ins. Co., - ; 291 NW 866

Standing objection to remarks to jury—side agreement of counsel—unfair and unwarranted. A side agreement of opposing counsel as to a standing objection to remarks made in argument to a jury is unfair to the trial court, also an unwarranted and improper interference with orderly trial procedure and contrary to the best interests of the public and of the litigants. Objections should be made at such times as will permit the court to most effectively remedy any harm done.

Eller v. Ins. Co., - ; 291 NW 866

Consideration presumed from execution and delivery. In an action to collect a note, when execution and delivery of the note have been established, the note is presumed to have been issued for a valuable consideration, and the burden of showing lack of consideration is on the defendant.

Hoover v Hoover, - ; 291 NW 154

Action to set aside deed—burden of proving nondelivery. In action by collateral heirs of grantor to set aside on the ground of nondelivery a deed which grantor had deposited in a safety box for transmittal upon his death to the grantee, and which grantee had obtained and recorded immediately after grantor's death, the burden of proving nondelivery was on such collateral heirs.

Smith v Fay. (Filed August 6, 1940)

Common disaster—particular order of death—failure of proof—effect. There is no common-law presumption as to order of deaths in a common disaster, and the party having the burden of proving the particular order of death, in order to be preferred over his adversary, will fail where survivorship cannot be ascertained from the evidence.

In re Evans, - ; 291 NW 460

Remote heirs—burden of proof—insufficiency of evidence. In probate proceeding involving distribution of the estate of a decedent who died with her husband in a common disaster, the brothers and a niece of decedent-wife have the burden of proving, as against a son of decedent-husband by former marriage, not only all facts necessary to establish their rights as heirs and distributees of decedent-wife, but must also negative or prove the absence or nonexistence of others who, if existing, would be entitled to prior right. Under insufficient evidence to sustain such burden, the estate must necessarily go to husband's representative.

In re Evans, - ; 291 NW 460

Burden of proof to show demand made within statutory period. Where defendant fails to repurchase, as verbally agreed, its shares of stock sold to plaintiff, and affirmatively pleads the statute of limitations, and it is shown that demand to repurchase was not made until eight years after the original transaction, the burden of proof was on plaintiff to show demand was made within five years as provided by statute of limitations on unwritten contracts. On account of plaintiff's failure to sustain such burden of proof, the trial court erred in directing a verdict for plaintiff.

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Account for rent proved. In an action to recover for rent, the testimony of one of the plaintiffs, who had charge of the property, that the rent was due and unpaid was sufficient to sustain a judgment for plaintiffs as against the testimony of defendants, by way of a general conclusion, that all bills were paid when their partnership was dissolved and that they had no books, checks, or other memoranda and that such matters were handled by office girls who were not called as witnesses and no explanation given as to why they could not be present to testify other than "they do not live here".

Read v Ferguson. (Filed August 6, 1940)

Creditor's bill—fraudulent conveyance—lack of consideration. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Deed as mortgage—presumption—inadequate consideration. Principles reaffirmed that where a borrower, for a nominal consideration, executes a deed to the creditor, there is a presumption that the deed is a mortgage; that gross inadequacy of consideration for a deed constitutes a strong circumstance that a deed is intended as a mortgage; and that evidence to prove that a deed, absolute on its face, is intended as a mortgage must be clear, satisfactory, and convincing.

Ross v Ins. Co., 228- ; 292 NW 813

Guardian's burden—accounting for investments. A guardian could not object that there was no competent proof to support the ward's claim that taxes were due on real estate in which the guardian had invested guardianship property as the burden is upon the guardian to account for his stewardship.

In re Morris, 228- ; 292 NW 836

11493

Instruction on computation of indemnity—nonerroneous. In law action to recover indemnity under an accident policy, there was no error in court's instruction to the jury that it must determine for what period, if any, between March 21st and August 21st the plaintiff was disabled as alleged, and compute the indemnity for the period so found, but in no event to go beyond August 21, 1938.

Eller v Ins. Co., - ; 291 NW 866

Instruction as to amount of indemnity—nonerroneous — jury finding no liability. In law action to recover indemnity under an accident policy, where the court instructs the jury that any indemnity allowed for hospitalization should not exceed a certain amount, there was no error even tho the amount was incorrect, since the jury found there was no liability whatsoever.

Eller v Ins. Co., - ; 291 NW 866

Ownership denied in instructions—admitted in pleadings and evidence. In a replevin action to recover sheep which the defendant's pleadings and evidence admitted belonged to the plaintiff, it was error to give an instruction stating that the defendant denied ownership in the plaintiff, as it allowed the jury to speculate on the ownership of the sheep.

Mead v Palmer, 228- ; 292 NW 821

Jury admonition — assumption that jury obeyed admonition. In a damage action to recover for personal injuries where the court erred in admitting into evidence a previous written statement of a witness for purpose of impeachment and instructed the jury that such statement was for the purpose of impeachment only, it will be assumed (1) that the jury followed the admonition in the absence of any basis for a contrary assumption, and (2) that the jury disregarded the statement since there was no substantial variance between the testimony and previous written statement of the witness.

Ceretti v Railway, 228- ; 293 NW 45

Stock powder causing death — warranty — proper instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction by the court correctly stated that defendant would be bound by the representation of its general sales agent, made in furtherance of sales, that stock powder was harmless and not injurious to sheep in the condition of plaintiff's sheep. Such representation was not an unusual warranty nor a warranty of cure and was within the sales agent's scope of agency.

Miller v Economy Co., 228- ; 293 NW 4

Instructions—construction as a whole. In determining whether statements in instructions, which might under some circumstances appear to be erroneous, shall be deemed to constitute reversible error, the instructions must be read as a whole.

Ross v Ins. Co., 228- ; 292 NW 813

Abstract should contain all instructions—exception. For the supreme court to determine whether or not prejudicial error has been committed in the giving of instructions, the instructions must be considered as a whole, and where the abstract fails to set forth all the instructions, assignments of error pertain-

ing to instructions will not be considered, unless the error is such that it could not be cured by other instructions.

Thines v Kukkuck, - ; 293 NW 58

Animals killed or injured—measure of damage—instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction was erroneous which stated the measure of damages would be (1) the fair market value of such sheep as died at the time of feeding said powder to them, plus (2) the prospective and ascertainable loss of future profits upon the sheep so dying—the instruction being erroneous in that no allowance was made for the carcasses of such sheep, amounting to $435, and also in that plaintiff was not entitled to future profits which might have been made. The usual measure of damages from injury to an animal is the difference in value before and after injury.

Miller v Economy Co., 228- ; 293 NW 4

11508

Foreign corporation's stock repurchase agreement—impairment of capital—jury question. In damage action based on defendant's failure to repurchase from plaintiffs certain shares of stock in defendant company in accordance with a verbal promise made as a part of the consideration for the purchase of such stock, and when defendant pleaded that the repurchase of stock would impair its capital in violation of Delaware laws, under which it was organized, defendant's motion for a directed verdict was properly overruled, since the question of the impairment of its capital by such repurchase was one of fact for the determination of the jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Affirmative defense not established as matter of law—directed verdict denied. In damage action for failure to repurchase corporate stock and where defendant answered that plaintiffs had disposed of the stock prior to this action, defendant's motion for directed verdict was properly refused—the affirmative defense not having been established as a matter of law.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Oral guaranty of rent—corporate note by individual in payment. In law action to recover rent against an individual, who originally leased premises and thereafter tendered in payment of back rent a note signed by a corporation, of which such individual was president, a directed verdict for plaintiff as against such individual was sustained by undisputed evidence showing plaintiff refused to accept the note until after such individual orally acknowledged the debt as his own and understood his endorsement to be a guaranty of payment of such note in the event the corporate note was uncollectible.

Cummings v Iowa Household Credit Corp. (Filed August 6, 1940)

Mortgagee's rights against assignee — proceeds of fire policy. In an action by a chattel mortgagee against an assignee for the benefit of creditors who had received the proceeds from a fire insurance policy taken out by the mortgagor-assignor to secure the mortgage loan, a directed verdict against the assignee should be sustained to the extent of the net proceeds of the policy.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Action for damages—incompleted contract for mortgage loan. Where a farm loan application was approved providing that approval could be withdrawn at any time before completing the loan, and where the defendant sent out mortgages to the applicant who signed and recorded them without the knowledge or consent of the defendant, and the loan was later refused, then, in an action by the applicant to recover the amount of an equity in the land which was allegedly lost because of the failure to consummate the loan, the defendant was entitled to a directed verdict, as the mere approval of the application and the unauthorized recording of the mortgages did not result in a completed contract to make the loan.

Johnston v Federal Land Bank. (Filed August 6, 1940)

"Asphalt plank" bridge flooring—approved construction — slippery when wet — nonnegligence. Where plaintiff, a motorist, attempting to stop at the toll house on a descending incline of a toll bridge floored with "asphalt plank" and wet from dew or rain, skidded through the railing and fell to the street below, and where the evidence shows the "asphalt plank" to be a recognized, approved method of construction as safe as an asphalt or cement highway, and where the wetness of the roadway, known to the plaintiff, was its only dangerous condition, defendant held to have kept the bridge in a reasonably safe condition for travel, and the evidence under the most favorable view did not warrant submission to the jury.

Evans v Muscatine Bridge Corp. (Filed August 6, 1940)

Motion by both parties for directed verdict—nonwaiver of jury without express or implied consent. In a damage action where, at the close of the testimony, defendant made a motion for a directed verdict and plaintiffs' counsel immediately remarked, "Now, the plaintiffs agree with the defendant that the matter is a question of law for the Court, and we want to make a motion for a directed verdict too", the court, in overruling the defendant's motion and finding for the plaintiffs, thereby erred. The rule in this state is that, without an express or implied consent, a motion by both

parties for a directed verdict is not a waiver of jury.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Agency (?) or independent dealer (?)—jury question. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant through an alleged agent, where defendant complains of the overruling of its motion for directed verdict on ground that the court should have found as a matter of law that alleged agent was in fact an independent dealer, the evidence of the transactions was such as to constitute a jury question as to agency, and such motion was properly overruled.

Miller v Economy Co., 228- ; 293 NW 4

Rule 30—omnibus assignment for directed verdict. An assignment of error that the court erred in directing a verdict for the plaintiffs at the end of all the testimony, and referring to the motion, is an omnibus assignment not complying with Rule 30 and will not be considered, especially when the plaintiffs' testimony was not controverted and under the record a verdict against the plaintiffs could not possibly stand.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Ownership — deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

11515

Highway—vacation—damages to adjoining owners. In a proceeding to vacate a public highway, where an adjoining owner sustains damages not suffered by the public generally, the board of supervisors by statute has full authority and jurisdiction to determine the amount and allowance of such damages.

Magdefrau v Washington County. (Filed August 6, 1940)

Motor vehicle collision—damages limited to amount proved. Instructions on items of damages must limit the jury to an amount shown by the evidence but not exceeding the amount asked in the petition. In a personal injury action, instructions allowing damages for reasonable expense in the conduct of the injured party's business and for pain and suffering, the amount for both items not to exceed $7,312, were erroneous as the only limitation placed on the damages for the business was the full amount asked, and the evidence showed such damage to be only about $180.

Hinrichs v Mengel. (Filed August 6, 1940)

Animals killed or injured—measure of damage—instruction. In law action to recover damages for the death of sheep allegedly caused by feeding a product purchased from defendant, an instruction was erroneous which stated the measure of damages would be (1) the fair market value of such sheep as died at the time of feeding said powder to them, plus (2) the prospective and ascertainable loss of future profits upon the sheep so dying—the instruction being erroneous in that no allowance was made for the carcasses of such sheep, amounting to $435, and also in that plaintiff was not entitled to future profits which might have been made. The usual measure of damages from injury to an animal is the difference in value before and after injury.

Miller v Economy Co., 228- ; 293 NW 4

11548

Jury admonition — assumption that jury obeyed admonition. In a damage action to recover for personal injuries where the court erred in admitting into evidence a previous written statement of a witness for purpose of impeachment and instructed the jury that such statement was for the purpose of impeachment only, it will be assumed (1) that the jury followed the admonition in the absence of any basis for a contrary assumption, and (2) that the jury disregarded the statement since there was no substantial variance between the testimony and previous written statement of the witness.

Ceretti v Railway, 228- ; 293 NW 45

Evidence for impeachment erroneously admitted—no prejudice shown—no reversal. In a damage action to recover for personal injuries where witness testified that automobile struck a trolley coach, a previous written statement of such witness that trolley coach struck the automobile should not have been admitted in evidence—there being no such inconsistency as to make the statement admissible for purpose of impeachment. However, when appellant failed to make the necessary showing of prejudice, the error did not warrant a reversal.

Ceretti v Railway, 228- ; 293 NW 45

11562

Dismissal during time for filing brief—no final submission despite entry "cause submitted". The court in effect reopened a case by granting the plaintiff an extension of time to file a reply brief after the case had been tried and written briefs submitted and after making a calendar entry showing "cause submitted". Furthermore, the court could grant the plaintiff's motion to dismiss without prejudice, filed before the time for filing the brief

had expired, as there had not yet been a final submission of the case.

Thompson v Schalk, 228- ; 292 NW 851

11567

Pleadings sufficient to establish lien on assets other than described in mortgage. In action in equity for an accounting of the operation of a store jointly conducted by defendants and plaintiff, in which action defendants also asked an accounting and for the foreclosure of a chattel mortgage executed by plaintiff upon the fixtures in order to secure funds for said business, the pleadings were sufficient to support a decree of foreclosure establishing the lien of the judgment upon assets other than those covered by the mortgage.

Holden v Voelker, 228- ; 293 NW 32

Judgment on pleadings—no statutory provision. The statutes of procedure in this state do not contemplate a motion for judgment on the pleadings.

Jasper Co. v Stergios, 228- ; 292 NW 855

Probate allowance of mortgage indebtedness —res adjudicata in subsequent foreclosure action. In action to foreclose a real estate mortgage where plaintiff seeks to recover for amount advanced for fire insurance policy and it is shown mortgagee filed a claim in probate proceedings of deceased mortgagor in which the amount of principal and interest were established but claim for amount advanced for insurance was denied and no appeal therefrom was taken, the mortgagee is bound by the result in probate proceedings and is estopped from making such claim in a subsequent foreclosure action.

First JSL Bk. v Parker, 228- ; 292 NW 833

Decree in conflict with separate findings or opinion—decree prevails. Where trial court ordered an opinion to be filed but not to be recorded, and where decree subsequently entered makes reference to the opinion, any conflict between the two must be resolved in favor of the decree which is the final order of the court and determines the rights of the parties.

In re Evans, - ; 291 NW 460

Lien — foreclosure — conversion of property not attached. One who had brought an action for rent and established a landlord's lien, and in favor of whom a deficiency remained after sale of the attached property, could not later bring an action against a third party for conversion, charging the appropriation of property which had not been attached, as only one action may be brought to enforce a landlord's lien, and the petition and judgment must be broad enough to cover all property subject to the lien.

Jaenicke v Bank, 228- ; 292 NW 809

Mandamus—mayor compelled to call election on franchise. When a proposal to grant a franchise to an electric utility company was defeated in a municipal election and two petitions for subsequent elections were filed, altho mandamus to compel the mayor to call another election was refused in an action arising from the first petition, the writ should issue in an action based on the second petition, in which it was shown that a change in the voting population had taken place greater than the margin by which the proposition was defeated in the first election.

Iowa P. & L. v Hicks, - ; 292 NW 826

Fraud in procuring party's presence in foreign state for service—no duty to defend. Where an action is commenced in a foreign state against a resident of Iowa, where service of notice is obtained through fraud in procuring the presence of such party in the foreign state, there is no duty devolving upon such party to either appear or defend in the foreign state, and a judgment so secured is void and not entitled to full faith and credit in this state.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

Fraud in obtaining foreign judgment—full faith and credit denied. In law action to recover balance of commissions due plaintiff, wherein defendant by way of answer claimed the matter had been adjudicated in an Illinois court and demanded judgment by way of counterclaim in the sum of $250 as adjudicated in Illinois, and where evidence shows that plaintiff was invited into the state of Illinois for the purpose of adjusting the account, and while there was served with notice of suit, it was properly held that such judgment was void, since the jurisdiction in Illinois was obtained by fraud, and the judgment was not entitled to full faith and credit.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

Fraud in obtaining foreign judgment—findings of trial court conclusive. In law action to recover commissions wherein defendant answered, alleging adjudication of the matters in an Illinois court, and by way of counterclaim sought to obtain judgment for an amount as adjudicated in Illinois, the findings of the trial court that the Illinois judgment was obtained by fraud and not entitled to full faith and credit are conclusive on appeal where a jury was waived and trial was to the court.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

11573

Pleadings sufficient to establish lien on assets other than described in mortgage. In action in equity for an accounting of the operation of a store jointly conducted by defendants and plaintiff, in which action defendants also asked an accounting and for the foreclosure of a chattel mortgage executed by plaintiff upon

the fixtures in order to secure funds for said business, the pleadings were sufficient to support a decree of foreclosure establishing the lien of the judgment upon assets other than those covered by the mortgage.

Holden v Voelker, 228- ; 293 NW 32

11577

Fraud of principal in obtaining bond—nonduty of obligee. In summary proceeding in probate to determine liability of a surety on a bond of a defaulting executor bank, surety's contention that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment, which made them parties to the fraud, was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Probate order fixing executor's liability same as bank receivership proceedings—effect on surety. In probate proceeding to determine liability of a surety on a bond of a defaulting executor bank, no prejudice to the surety resulted from the entering of an order fixing the amount of its liability to the heirs, since such amount had been determined in the receivership proceedings of the bank and was conclusive upon the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Executor bank defaulting—computation of interest—surety's liability. In probate proceeding to determine liability of a surety on a bond of a defaulting executor bank, wherein interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed, such decree is binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Executor's new bond—liability for prior wrongful acts. In probate proceeding to determine liability of surety on the bond of a defaulting executor, wherein surety posted a new bond for the executor, as provided by statute, surety was released from liability for devastavits, misappropriations, or wrongful acts occurring prior to the filing, since the bond of an executor or administrator is an obligation to make a full and final accounting. So, where executor failed to perform such duty, the surety was liable for the default.

In re Tabasinsky. (Filed August 6, 1940)

Executor's stipulation of settlement with heirs—nonratification of maladministration—surety's liability. In probate proceeding to determine liability of surety on a bond of a defaulting executor, the fact that the heirs entered into a stipulation with an executor bank for the payment of distributive shares did not ratify the maladministration of the estate that preceded such stipulation, and such heirs were not estopped to assert a claim against the surety, altho the executor bank was in default under the stipulation when the bond was filed.

In re Tabasinsky. (Filed August 6, 1940)

Judgment or order against executor—conclusiveness on surety. A judgment or decree against an executor or administrator is conclusive against the sureties on the bond in the absence of fraud or mistake in procuring said order or judgment, so a decree entered in the receivership of an executor bank fixing the liability of the bank to the heirs is binding upon the surety for such bank.

In re Tabasinsky. (Filed August 6, 1940)

Executor—investing estate funds without court order—surety's liability. In a probate proceeding to determine liability of surety on the bond of a defaulting executor, held that the transaction between the executor bank and the heirs, without approval of the court, did not constitute an investment made in pursuance of statutory requirements for investment of funds, and therefore, the surety was liable on the default.

In re Tabasinsky. (Filed August 6, 1940)

Executor's stipulation of settlement with heirs—nondischarge of surety. In probate proceeding to determine liability of a surety on the bond of a defaulting executor, held that the transaction between the executor bank and heirs of the estate did not constitute a termination of the bank's functions as executor or a novation or pro tanto assignment, and was not equivalent to a distribution of assets and an accounting by the executor so as to release and discharge the executor, since the instrument specifically provided that upon the division and complete distribution the bank should file a final report and be discharged as executor or trustee and the order of court approving such stipulation provided for the executor's discharge on the performance of the terms of the stipulation.

In re Tabasinsky. (Filed August 6, 1940)

Summary proceeding against executor's surety—probate jurisdiction. In a summary proceeding to determine liability of a surety on a bond of a defaulting executor, the probate court had jurisdiction of the subject matter of a claim against the surety as authorized by §§11984, 11985, C., '39, and especially so where a surety, after first raising the question by special appearance, which was abandoned, eventually filed an answer and went to trial thereon.

In re Tabasinsky. (Filed August 6, 1940)

Bank as executor and depositor—defaulting as fiduciary, not as depository. In a summary proceeding in probate to establish a surety's liability on a bond of a defaulting executor,

the fact that funds of the estate were deposited in a bank, which bank was also the executor of the estate, and thereafter a stipulation was entered into to pay the funds of the estate to the heirs, which was approved by the court, was not such a transaction as constituted the selection of such bank as a depository, in compliance with statutory provisions, so as to relieve the surety of liability—the bank being accountable for such funds in its fiduciary capacity, and not as a depository.

In re Tabasinsky. (Filed August 6, 1940)

Extension of time as discharge—paid surety must show prejudice. An extension of time granted a bank as executor of an estate to settle the interests of the heirs was not such an extension as would release the surety on the bond, since, in order for such extension to discharge a paid surety, prejudice must be shown. Furthermore, the bond not being executed until several months after the execution of such agreement, and the executor bank being already in default under the terms of the agreement, the whole amount was due and payable at the time the bond was executed.

In re Tabasinsky. (Filed August 6, 1940)

Compromise and settlement—surrender of stock to obtain release as surety—nonbreach of receiver's duty. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

11581

Judgment or order on trial to the court—conclusiveness. In probate proceedings, under the familiar rule relative to law actions tried to the court, the judgment and order of the court must necessarily have the effect of a verdict by a jury, and where evidence is sufficient to sustain such order or judgment it will not be disturbed on appeal.

In re Evans, - ; 291 NW 460

Court findings—effect of jury verdict—most favorable evidence rule. In an action at law tried to the court, the finding of the court has the effect of a verdict of jury, and upon appeal the evidence will be considered in the light most favorable to the appellee.

Tilden v Zanias, 228- ; 292 NW 835

Foreign judgment—findings of trial court conclusive. In law action to recover commissions wherein defendant answered, alleging adjudication of the matters in an Illinois court, and by way of counterclaim sought to obtain judgment for an amount as adjudicated in Illinois, the findings of the trial court that the Illinois judgment was obtained by fraud and not entitled to full faith and credit are conclusive on appeal where a jury was waived and trial was to the court.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

11587

Default judgment—improper when answer on file. A judgment should not be entered by default while an answer is on file, so in replevin action in which a petition of intervention was filed and to which plaintiff filed a reply by way of general denial, the trial court erred in granting a motion for default against plaintiff, since the intervener's relief depended upon her assertion of ownership, and this, being denied, raised an issue of fact.

Jasper Co. v Stergios, 228- ; 292 NW 855

11602

Alimony and support awards — lien from time of entry. In a divorce action in which the court had jurisdiction of the parties and subject matter, the entering of judgment for alimony and child support would in itself make the awards be liens on any real estate owned by the defendant. Whether the defendant's mother, who was not a party to the action, owned certain property not described in the petition, which the defendant had previously claimed in order that the mother's old-age pension would not be a lien on the property, need not be determined in the divorce action.

Davis v Davis, - ; 292 NW 804

11646

Absence of affidavit—erroneous allowance. In equity action for an accounting in which the defendants prayed for the foreclosure of a chattel mortgage, which was granted, the taxation of attorney fees, in the absence of an affidavit as required by statute, was erroneous.

Holden v Voelker, 228- ; 293 NW 32

11760

Law favors protection of homestead. On question of whether or not a homestead has been abandoned, it is largely a matter of intent to be determined on the particular facts in each case. The holdings of the supreme court lean strongly to the protection of the homestead estate.

Charter v Thomas, 228- ; 292 NW 842

Rooms leased for temporary period and purpose—nonabandonment of homestead. In action to enjoin the sale under general execution

of real estate claimed exempt as a homestead, the evidence supported a decree enjoining such sale where plaintiff proved a definite and good-faith intention and plan to lease certain rooms of a dwelling for a temporary period and purpose only, and thereafter to again occupy such rooms as a part of his homestead.

Charter v Thomas, 228- ; 292 NW 842

11815

Tax deed—nonfraudulent sale by holder to mortgagee. When a tax deed was purchased for the purpose of resale and when, after talking to others about purchasing the tax deed, the holder sold to a bank which held a mortgage on the land, there was no fraud or collusion between the bank and tax deed holder, nor between the bank and the former owner of the land who did not know of the bank's purchase of the tax deed until after it was completed.

Koch v Kiron Bank, - ; 289 NW 447

Fictitious person in mortgage assignment. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

Setting aside deed—burden of proof. Ordinarily in an action to set aside a deed the burden is on plaintiff except where confidential or fiduciary relations are established, and where grantor was an old man, ill, discouraged and depressed by the recent death of an adopted daughter whom he loved, and had no one to turn to except that daughter's sister who was one of grantees, such confidential relationship existed as placed the burden of proof on defendants to establish the good faith and fairness of the transaction.

Sinco v Kirkwood, - ; 291 NW 873

Fraud of principal in obtaining bond—nonduty of obligee. In a summary proceeding in probate to determine the liability of a surety on a bond of a defaulting executor bank, wherein the surety contends that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment, which makes them parties to the fraud, such contention was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Creditor's bill—fraudulent conveyance—lack of consideration—burden of proof. In equity action, in the nature of a creditor's bill, wherein the petition alleges a bill of sale and realty conveyance had been made, delivered, and received, without consideration and with intent to hinder, delay, and defraud plaintiff in the collection of his claim, a decree dismissing plaintiff's petition was proper where he not only failed to show lack of consideration but offered each of the instruments in evidence, which recited the consideration of "$1.00 and other valuable consideration", the same being prima facie evidence of consideration, and the fact that defendants answered setting up contract for services of children to parents as consideration was not an affirmative defense so as to relieve plaintiff of the burden of proof.

Knabe v Kirchner. (Filed August 6, 1940)

Creditor's suit—fraud in conveyance by parents to children. In an equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and a conveyance of realty by parents to their children, a decree dismissing plaintiff's petition was proper where there was no evidence of any fraudulent intent nor any evidence that children knew of the financial condition of their parents. It must be shown that children-grantees were active participants in the fraud of the parent-grantors. Children cannot be considered creditor-purchasers without proof they were creditors of their parents.

Knabe v Kirchner. (Filed August 6, 1940)

Creditor's suit—fraudulent conveyances—relationship of grantor and grantee—effect. In equity action, in the nature of a creditor's bill, to set aside a bill of sale of personalty and conveyance of realty, the fact that there was a family relationship between the grantors and grantees is a matter for careful consideration and scrutiny, but it is not, in itself, determinative of the issue of fraud. To establish the issue of bad faith and fraud in such case the proof must be clear, satisfactory, and convincing, since fraud is not ordinarily presumed, nor is mere ground for suspicion sufficient to grant such relief.

Knabe v Kirchner. (Filed August 6, 1940)

Compromise and settlement—partnership receivership—surrender of stock to obtain release as surety. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

Partnership receiver—defense of suit—nonparticipation in compromise. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

Nonright to impeach but right to contradict one's own witness. In an action to set aside as fraudulent a conveyance made by decedent to grandson wherein grandson as a witness for plaintiff directly and definitely denied plaintiff's contention that transfer had been agreed upon to defeat creditor's claim, held that plaintiff vouched for this witness in making him his own, and that since plaintiff did not exercise right to dispute the grandson's testimony with testimony of other witnesses, the testimony of the grandson stood uncontradicted.

Healey v Allen, - ; 290 NW 71

11846

Grantor believing death imminent—gift by deed nontestamentary. In equity action to set aside a deed of conveyance on the ground that it was testamentary in character and did not comply with statutory requirements, a decree for defendant was sustained where the evidence showed, if anything, the transaction was a gift of a farm from grantor to grantee, since the deed was executed and delivered during the lifetime of grantor under belief that he was on his deathbed, and was an attempt to make a disposition of his property while living.

Keune v McCauley, 228- ; 293 NW 25

Devise to two daughters—request for guardianship—not trust. A will giving the residue to two daughters with the request that one be appointed guardian over the other with complete charge of her affairs during her lifetime did not create an express trust, nor was there language or extrinsic evidence to show fraud or unjust enrichment to indicate a constructive trust in favor of the life tenant.

In re Heckmann, - ; 291 NW 465

Grantee of devised property as party. One who held a certificate of sale to property at the beginning of an action to construe a will devising the property, and who later acquired a trustee's deed, had a direct interest in the litigation and was entitled to join in the action.

In re Heckmann, - ; 291 NW 465

Precatory request for guardianship in will. A provision in a will giving the residue to two daughters in equal shares and asking that one be appointed guardian over the other with full charge over her affairs and that she care for her during her lifetime referred only to the property taken under the will and gave half to the guardian-daughter and the other half to the sister for support during her life, the provision for the guardianship not being a condition attached to the devise, but merely precatory.

In re Heckmann, - ; 291 NW 465

Ambiguity in will—intent. The interpretation which a court is bound to give to a will is that which appears to have been the intent of the testator, and altho in some cases extrinsic circumstances are permitted in evidence to clear up ambiguity, or to identify subject matter, the court cannot make a new will.

In re Heckmann, - ; 291 NW 465

Fee limited by subsequent limitation—nonapplicability of rule. The rule of construction of limitation of a fee by a subsequent provision in a will has no application to a will which in one clause devises property without specifying any particular estate which the devisee shall take and in a subsequent clause specifies that the devised property shall be placed in trust.

In re Heckmann, - ; 291 NW 465

Devise of undivided half interest—not joint tenancy. A will devising an estate to two daughters "jointly in equal shares" does not create a joint tenancy when such interpretation would attach no meaning to another part of the provision, "to each an undivided one-half thereof", which explains just what the testator intended when he devised the land, as, by statute, estates vested in two or more persons are deemed tenancies in common unless a different intent is clearly expressed in creating the estate.

In re Heckmann, - ; 291 NW 465

Equitable conversion of realty denied under will—executors' duty as to claims. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Payment of claims—mandatory by statute—provision in will meaningless—equitable conversion of realty. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

Reciprocal wills—no evidence of contract—wife predeceasing husband. When a husband made a will giving his wife all his estate, and the wife made a will nine years later, giving the husband one half the remainder after making specific legacies, the wills were not reciprocal wills in the absence of evidence that they were executed pursuant to a contract that they be mutual and reciprocal, and the devise to the wife could be given effect altho she did not survive the husband.

In re Schroeder. (Filed August 6, 1940)

Predeceased spouse as devisee—clear intent—effect of anti-lapse statute. Under a husband's will which devised all his estate to his wife who predeceased him, when the terms of the will were not of doubtful construction, evidence of surrounding circumstances that the collateral heirs of the wife who will take are not as closely related to him as his own collateral heirs is not competent to show an intent contrary to the terms of the will, as the testator is presumed to know the law and the effect of the anti-lapse statute (§11861, C., '35).

In re Schroeder. (Filed August 6, 1940)

"Worthier title" rule—inapplicable when devise greater than distributive share. When a devise gives the same estate to a devisee as he would take under the descent statutes if there were no will, the devisee takes the worthier title by descent rather than by the will, but where the will gives more than the distributive share, the rule does not apply.

In re Schroeder. (Filed August 6, 1940)

Widow taking under will—nonwaiver of exemptions. In probate proceedings a widow, the sole beneficiary, by taking under a will, does not waive any exemption.

O'Day v O'Day, 228- ; NW (Filed June 18, 1940)

Lienholders must exhaust nonexempt property first. In probate proceeding a court order correctly required the nonexempt property be exhausted by the lienholders before proceeding against any of the exempt property.

O'Day v O'Day, 228- ; NW (Filed June 18, 1940)

11847

Widow taking under will—nonwaiver of exemptions. In probate proceedings a widow, the sole beneficiary, by taking under a will, does not waive any exemption.

O'Day v O'Day, 228- ; NW (Filed June 18, 1940)

11852

Reciprocal wills—no evidence of contract—wife predeceasing husband. When a husband made a will giving his wife all his estate, and the wife made a will nine years later, giving the husband one half the remainder after making specific legacies, the wills were not reciprocal wills in the absence of evidence that they were executed pursuant to a contract that they be mutual and reciprocal, and the devise to the wife could be given effect altho she did not survive the husband.

In re Schroeder. (Filed August 6, 1940)

11861

Remote heirs—burden of proof—insufficiency of evidence. In probate proceeding involving distribution of the estate of a decedent who died with her husband in a common disaster, the brothers and a niece of decedent-wife have the burden of proving, as against a son of decedent-husband by former marriage, not only all facts necessary to establish their rights as heirs and distributees of decedent-wife, but must also negative or prove the absence or nonexistence of others who, if existing, would be entitled to prior right. Under insufficient evidence to sustain such burden, the estate must necessarily go to husband's representative.

In re Evans, - ; 291 NW 460

Common disaster—particular order of death—failure of proof—effect. There is no common-law presumption as to order of deaths in a common disaster, and the party having the

burden of proving the particular order of death, in order to be preferred over his adversary, will fail where survivorship cannot be ascertained from the evidence.

In re Evans, - ; 291 NW 460

Predeceased spouse as devisee—clear intent —effect of anti-lapse statute. Under a husband's will which devised all his estate to his wife who predeceased him, when the terms of the will were not of doubtful construction, evidence of surrounding circumstances that the collateral heirs of the wife who will take are not as closely related to him as his own collateral heirs is not competent to show an intent contrary to the terms of the will, as the testator is presumed to know the law and the effect of the anti-lapse statute (§11861, C., '35).

In re Schroeder. (Filed August 6, 1940)

"Worthier title" rule—inapplicable when devise greater than distributive share. When a devise gives the same estate to a devisee as he would take under the descent statutes if there were no will, the devisee takes the worthier title by descent rather than by the will, but where the will gives more than the distributive share, the rule does not apply.

In re Schroeder. (Filed August 6, 1940)

11863

Predeceased spouse as devisee—clear intent —effect of anti-lapse statute. Under a husband's will which devised all his estate to his wife who predeceased him, when the terms of the will were not of doubtful construction, evidence of surrounding circumstances that the collateral heirs of the wife who will take are not as closely related to him as his own collateral heirs is not competent to show an intent contrary to the terms of the will, as the testator is presumed to know the law and the effect of the anti-lapse statute (§11861, C., '35).

In re Schroeder. (Filed August 6, 1940)

11876

Estate administered by trustee. AG Op July 25, '40

Compromise and settlement of probate loan —sound judicial discretion. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

11887

Executor's failure to pay—summary proceedings on bond—findings conclusive. On appeal from a proceeding to fix the liability of a surety on the bond of a defaulting executor, tried to the court without a jury but not in equity, the supreme court is not to find the facts, but merely to determine if the findings of the trial court were supported by substantial, competent evidence. If so, such findings are conclusive. The appellant recognized as much when it asked for and secured findings of fact and conclusions of law pursuant to statute.

In re Tabasinsky. (Filed August 6, 1940)

Executor bank defaulting—computation of interest. In proceedings to determine liability of a surety on a bond of a defaulting executor bank, wherein interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed—such decree is binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Investing estate funds without court order —surety's liability. In a probate proceeding to determine the liability of a surety on the bond of a defaulting executor, a transaction between an executor bank and the heirs did not constitute an investment made in pursuance of statutory requirements for investment of funds, and the surety was liable upon the executor's bond when the approval of the court was not obtained in compliance with statutory requirements.

In re Tabasinsky. (Filed August 6, 1940)

Executor's stipulation of settlement with heirs—nondischarge of surety. In proceedings in probate to determine the liability of a surety on the bond of a defaulting executor, wherein the surety contends that a transaction between a bank as executor and the heirs of an estate constituted a termination of the bank's functions as executor or a novation or pro tanto assignment, and was equivalent to a distribution of assets and an accounting by the executor so as to release and discharge the executor, such contention was without merit, since the instrument specifically provided that upon the division and complete distribution the bank should file a final report and be discharged as executor or trustee and the order of court approving such stipulation provided for the executor's discharge on the performance of the terms of the stipulation.

In re Tabasinsky. (Filed August 6, 1940)

Bank as executor and depositor—defaulting as fiduciary, not as depository. In a summary proceeding in probate to establish a surety's liability on a bond of a defaulting executor, the fact that funds of the estate were deposited in a bank, which was also the executor of the

estate, and thereafter a stipulation approved by the court was entered into to pay the funds of the estate to the heirs, such transaction did not constitute the selection of such bank as a depository, in compliance with the statutory provisions, so as to relieve the surety of liability—the bank being accountable for such funds in its fiduciary capacity, and not as a depository.

In re Tabasinsky. (Filed August 6, 1940)

Stipulation of settlement with heirs—nonratification of maladministration—surety's liability. In proceedings to determine the liability of a surety on a bond of a defaulting executor, the fact that the heirs entered into a stipulation with an executor bank for the payment of distributive shares did not ratify the maladministration of the estate that preceded such stipulation, and such heirs were not estopped to assert a claim against the surety, altho the executor bank was in default under the stipulation when the bond was filed.

In re Tabasinsky. (Filed August 6, 1940)

Judgment or order against executor—conclusiveness on surety. A judgment or decree against an executor or administrator is conclusive against the sureties on the bond in the absence of fraud or mistake in procuring said order or judgment, so a decree entered in the receivership of the bank fixing the liability of the bank to the heirs was not binding upon the surety for the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Probate order fixing liability same as bank receivership proceedings—effect on surety. In a proceeding to determine liability of a surety on a bond of a defaulting executor bank, there was no prejudice to the surety in the entering of an order in probate fixing the amount of its liability to the heirs, since such amount had been determined in the receivership proceedings of the bank and was conclusive upon the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Fraud of principal in obtaining bond—nonduty of obligee. In a proceeding to determine the liability of a surety on a bond of a defaulting executor bank, wherein the surety contends that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment making them parties to the fraud, such contention was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Extension of time as discharge—paid surety must show prejudice. In a proceeding to determine the liability of a surety on a bond of a defaulting executor, wherein the surety contends that an extension of time granted the executor bank to settle the interests of the heirs was such an extension as to release the surety, such contention was without merit since, in order for an extension of time to discharge a paid surety, prejudice must be shown. Furthermore, the bond not being executed until several months after the execution of such agreement and the executor bank being already in default under the terms of the agreement, the whole amount was due and payable at the time the bond was executed.

In re Tabasinsky. (Filed August 6, 1940)

Executor's new bond — liability for prior wrongful acts. The bond of an executor or administrator is an obligation to make a full and final accounting, so where executor failed to perform such duty, the surety was liable for the default and cannot avoid liability for prior acts of the executor by filing a new bond.

In re Tabasinsky. (Filed August 6, 1940)

Probate jurisdiction—summary proceeding against executor's surety. The probate court has jurisdiction of the subject matter of a claim against the surety as authorized by §§11984, 11985, C., '39, where a surety, after first raising the question by special appearance, eventually filed an answer and went to trial.

In re Tabasinsky. (Filed August 6, 1940)

11918

Lienholders must exhaust nonexempt property first. In probate proceeding a court order correctly required the nonexempt property be exhausted by the lienholders before proceeding against any of the exempt property.

O'Day v O'Day, 228- ; NW (Filed June 18, 1940)

11933

Realty conversion denied under will—executors' duty as to claims. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where

the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Equitable conversion — claims — payment mandatory by statute—provision in will meaningless. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11952

Equitable conversion of realty denied under will—executors' duty as to claims. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by this section.

In re Schwertley. (Filed August 6, 1940)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Payment of claims—mandatory by statute—provision in will meaningless. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11955

Realty conversion denied under will. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940)

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Equitable conversion — claims — payment mandatory by statute—provision in will meaningless. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11957

Claimants of a class—decedent's stock manipulations—accounting—insufficiency of evidence. In probate proceedings to establish a claim based on a petition in a class suit by plaintiffs against the executrices, on the ground that decedent, together with his brothers, had manipulated various transactions in exchange of capital stock between two corporations which resulted in rendering claimants' stock worthless, by reason of wrongful conversion of funds, and asking an accounting from the estate, the evidence as a whole failed to establish claimants' contentions.

In re Cass, - ; 291 NW 855

Limitation of actions—failure of evidence in avoidance. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stock worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for three years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

11961

Limitation of actions—failure of evidence in avoidance. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stocks worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for three years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

11962

Note given for indebtedness — presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

11963

Note given for indebtedness—presumption of settlement between parties. In probate proceedings to establish a claim for services rendered to decedent, to which beneficiaries filed answer and pleaded matters of affirmative defense, an instruction by the court, that in the giving of a note for indebtedness owing by claimant to decedent, the law presumes a mutual settlement to have been made between the parties, but such presumption being only prima facie evidence of settlement and the burden of proof being on claimant to show by preponderance of evidence that there was no mutual settlement, such instruction was erroneous, in that claimant was required to introduce evidence of a greater weight than necessary to put such presumption in equipoise, and relieved the objectors of their burden to go forward from point where the weight of evidence might have been in equipoise and prove by greater weight of evidence the affirmative defense pleaded.

In re Hill, - ; 289 NW 754

Claimants of a class—decedent's stock manipulations—accounting—insufficiency of evidence. In probate proceedings to establish a claim based on a petition in a class suit by plaintiffs against the executrices, on the ground that decedent, together with his broth-

ers, had manipulated various transactions in exchange of capital stock between two corporations which resulted in rendering claimants' stock worthless, by reason of wrongful conversion of funds, and asking an accounting from the estate, the evidence as a whole failed to establish claimants' contentions.

In re Cass, - ; 291 NW 855

Limitation of actions—failure of evidence in avoidance. In probate proceedings to establish a claim on the ground that decedent had manipulated the capital stock between two corporations, which rendered claimants' stocks worthless, and also asking for an accounting, where the evidence shows (1) that transactions occurred 12 years prior to the filing of the claim, (2) that claimants were stockholders in one of the corporations and had access to its records and access was never denied, (3) that the other corporation had been dissolved, and, being a Delaware corporation, it was only required under the laws of that state to preserve the records for three years, but such records were kept and were available for a period of 10 years, and since the defense of the statute of limitations was raised, and claimants having failed to establish any ground for avoiding the statute, the claim was rightfully dismissed.

In re Cass, - ; 291 NW 855

Probate allowance of mortgage indebtedness —res adjudicata in subsequent foreclosure action. In action to foreclose a real estate mortgage where plaintiff seeks to recover for amount advanced for fire insurance policy and it is shown mortgagee filed a claim in probate proceedings of deceased mortgagor in which the amount of principal and interest were established but claim for amount advanced for insurance was denied and no appeal therefrom was taken, the mortgagee is bound by the result in probate proceedings and is estopped from making such claim in a subsequent foreclosure action.

First JSL Bk. v Parker, 228- ; 292 NW 833

11970

Realty conversion denied under will—claims —executors' duty. In probate proceeding tried in equity for the sale of realty to pay debts, the personalty being inadequate, wherein a claimant intervenes alleging equitable conversion of realty into personalty by the terms of the will and that executors' duty was to sell a part of realty sufficient to pay intervener's claim, a decree ordering such sale was error where the will provided for (1) payment of just debts and (2) devise of residue one third to widow, two thirds to children—there being no finding that intention of testator was such as to create a conversion by the will, nor were the circumstances and conditions such as to create a conversion, and, furthermore, no reason appearing why the debts could not be taken care of under the duties and powers granted to executors by §11952, C., '39.

In re Schwertley. (Filed August 6, 1940)

Claims—payment mandatory by statute—equitable conversion of realty. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11972

Claimants of a class—decedent's stock manipulations—accounting—insufficiency of evidence. In probate proceedings to establish a claim based on a petition in a class suit by plaintiffs against the executrices, on the ground that decedent, together with his brothers, had manipulated various transactions in exchange of capital stock between two corporations which resulted in rendering claimants' stock worthless, by reason of wrongful conversion of funds, and asking an accounting from the estate, the evidence as a whole failed to establish claimants' contentions.

In re Cass, - ; 291 NW 855

11973

Residuary legatees' title to realty subject to divesture for payment of claims. In probate proceeding for the sale of realty to satisfy claims, the personalty being inadequate, where the will provided for (1) payment of just debts and (2) devise of residue one third to widow and two thirds to children, and where an intervener claimed an equitable conversion of realty for payment of his claim on the theory that residuary legatees receive no more than the residue after payment of debts, a decree ordering the sale of realty was in error, since the rule is that upon the death of testator real estate passes to devisees, subject to divesture for payment of claims—likewise indicated by the statute providing for possession of realty by executor where persons entitled to same are not present or competent to take.

In re Schwertley. (Filed August 6, 1940)

Payment mandatory by statute—equitable conversion of realty. In probate proceedings for the sale of realty to pay debts, the personalty being inadequate, the mere fact that a testator provides in his will for the payment of his just debts does not create an equitable conversion of realty for the payment of such debts, since the rule is that where a statutory provision makes the payment of testator's just debts mandatory, a direction in the will to pay such debts is meaningless and neither adds to nor detracts from the will. The law does not favor

conversion under wills and there is a presumption against it.

In re Schwertley. (Filed August 6, 1940)

11984

Probate order fixing liability same as bank receivership proceedings—effect on surety. In a summary proceeding in probate to determine liability of a surety on a bond of a defaulting executor bank, there was no prejudice to the surety in the entering of an order in probate fixing the amount of its liability to the heirs, since such amount had been determined in the receivership proceedings of the bank and was conclusive upon the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

Investing estate funds without court order—surety's liability. In a probate proceeding to determine the liability of a surety on the bond of a defaulting executor, a transaction between an executor bank and the heirs constituted an investment made in pursuance of statutory requirements for investment of funds, and a default in regard thereto would not make the surety liable, such contention was without merit when the approval of the court was not obtained in compliance with statutory requirements.

In re Tabasinsky. (Filed August 6, 1940)

Stipulation of settlement with heirs—nondischarge of surety. In a proceeding to determine the liability of a surety on the bond of a defaulting executor, wherein the surety contends that a transaction between a bank as executor and the heirs of an estate constituted a termination of the bank's functions as executor or a novation or pro tanto assignment, and was equivalent to a distribution of assets and an accounting by the executor so as to release and discharge the executor, such contention was without merit, since the instrument specifically provided that upon the division and complete distribution the bank should file a final report and be discharged as executor or trustee and the order of court approving such stipulation provided for the executor's discharge on the performance of the terms of the stipulation.

In re Tabasinsky. (Filed August 6, 1940)

Stipulation of settlement with heirs—nonratification of maladministration — surety's liability. In a proceeding to determine the liability of a surety on a bond of a defaulting executor, the fact that the heirs entered into a stipulation with an executor bank for the payment of distributive shares did not ratify the maladministration of the estate that preceded such stipulation, and such heirs were not estopped to assert a claim against the surety, altho the executor bank was in default under the stipulation when the bond was filed.

In re Tabasinsky. (Filed August 6, 1940)

Judgment or order against executor—conclusiveness on surety. A judgment or decree against an executor or administrator is conclusive against the sureties on the bond in the absence of fraud or mistake in procuring said order or judgment, so a decree entered in the receivership of an executor bank fixing the liability of the bank to the heirs was binding upon the surety for the bank.

In re Tabasinsky. (Filed August 6, 1940)

Fraud of principal in obtaining executor's bond—nonduty of obligee. In a proceeding to determine the liability of a surety on a bond of a defaulting executor bank, wherein the surety contends that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment, which makes them parties to the fraud, such contention was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Extension of time to executor as discharge—paid surety must show prejudice. In a proceeding to determine the liability of a surety on a bond of defaulting executor, wherein the surety contends that an extension of time granted the executor bank to settle the interests of the heirs was such an extension as to release the surety, such contention was without merit since, in order for an extension of time to discharge a paid surety, prejudice must be shown. Furthermore, the bond not being executed until several months after the execution of such agreement, and the executor bank being already in default under the terms of the agreement, the whole amount was due and payable at the time the bond was executed.

In re Tabasinsky. (Filed August 6, 1940)

Executor's new bond—liability for prior wrongful acts. The bond of an executor or administrator is an obligation to make a full and final accounting, so, where executor failed to perform such duty, the surety is liable for the default and cannot avoid liability for prior acts of the executor by filing a new bond.

In re Tabasinsky. (Filed August 6, 1940)

Executor bank defaulting—computation of interest. In proceeding in probate to determine liability of a surety on a bond of a defaulting executor bank, wherein interest was computed in accordance with a decree of court in the bank's receivership proceedings wherein the claim of the heirs against the bank as executor was allowed, such decree is binding on the surety of the bank as executor.

In re Tabasinsky. (Filed August 6, 1940)

11985

Probate jurisdiction — summary proceeding against executor's surety. In a summary proceeding in probate to determine liability of a

surety on a bond of a defaulting executor, the probate court has jurisdiction of the subject matter of a claim against the surety as authorized by §11984, and this section, C., '39, where a surety, after first raising the question by special appearance, eventually filed an answer and went to trial thereon.

In re Tabasinsky. (Filed August 6, 1940)

11990

"Worthier title" rule—inapplicable when devise greater than distributive share. When a devise gives the same estate to a devisee as he would take under the descent statutes if there were no will, the devisee takes the worthier title by descent rather than by the will, but where the will gives more than the distributive share, the rule does not apply.

In re Schroeder. (Filed August 6, 1940)

12006

Predeceased spouse—failure to elect—effect of anti-lapse statute. This section, stating "The survivor's share cannot be affected by any will of the spouse unless consent thereto is given as hereinafter provided", followed by statutes prescribing the surviving spouse's method of election between the will and the statutory distributive share, could not apply when a wife died before her husband, whose will devised her all his property. As she did not survive, there was no right to a distributive share, and, as there was no alternative upon which an election could be made, the failure of the heirs to make an election could not be prejudicial, and they could take only under the devise.

In re Schroeder. (Filed August 6, 1940)

12007

"Worthier title" rule—inapplicable when devise greater than distributive share. When a devise gives the same estate to a devisee as he would take under the descent statutes if there were no will, the devisee takes the worthier title by descent rather than by the will, but where the will gives more than the distributive share, the rule does not apply.

In re Schroeder. (Filed August 6, 1940)

Predeceased spouse—failure to elect—effect of anti-lapse statute. Section 12006, C., '35, stating "The survivor's share cannot be affected by any will of the spouse unless consent thereto is given as hereinafter provided", followed by statutes prescribing the surviving spouse's method of election between the will and the statutory distributive share, could not apply when a wife died before her husband, whose will devised her all his property. As she did not survive, there was no right to a distributive share, and, as there was no alternative upon which an election could be made, the failure of the heirs to make an election could not be prejudicial, and they could take only under the devise.

In re Schroeder. (Filed August 6, 1940)

12016

Inheritance by adopted child—compliance with adoption statutes. Adoption and the right of inheritance being statutory, it is the well-established rule in this state that rights of inheritance are not acquired, that is, a child does not become the heir of the adopting parent unless there is a compliance with the mandatory provisions of the adoption statutes.

Sheaffer v Sheaffer, - ; 292 NW 789

Heirs of predeceased child—inheritance by substitution, not representation. In partition where an alleged adopted child of a predeceased child of intestate contends that plaintiffs inherit as collateral heirs the share of adopted child's alleged father because the alleged adopting father, if living, would be estopped from denying the adoption, and that plaintiffs, his heirs, would be likewise estopped, a motion to strike such pleading was properly sustained, since where a child of an intestate has predeceased him, the heirs of such child, under statute providing for descent to children, inherit the share direct from the intestate, taking by substitution and not by representation.

Sheaffer v Sheaffer, - ; 292 NW 789

12017

Remote heirs—burden of proof—insufficiency of evidence. In probate proceeding involving distribution of the estate of a decedent who died with her husband in a common disaster, the brothers and a niece of decedent-wife have the burden of proving, as against a son of decedent-husband by former marriage, not only all facts necessary to establish their rights as heirs and distributees of decedent-wife, but must also negative or prove the absence or nonexistence of others who, if existing, would be entitled to prior right. Under insufficient evidence to sustain such burden, the estate must necessarily go to husband's representative.

In re Evans, - ; 291 NW 460

12027

Inheritance—compliance with adoption statutes. Adoption and the right of inheritance being statutory, it is the well-established rule in this state that rights of inheritance are not acquired, that is, a child does not become the heir of the adopting parent unless there is a compliance with the mandatory provisions of the adoption statutes.

Sheaffer v Sheaffer, - ; 292 NW 789

12050

Compromise and settlement of probate loan —sound judicial discretion. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound

judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

Fraud of principal in obtaining bond—non-duty of obligee. In a proceeding to determine the liability of a surety on a bond of a defaulting executor bank, wherein the surety contends that the bond was secured by fraud practiced upon it by the bank and that the heirs were guilty of concealment, which makes them parties to the fraud, such contention was without merit, since an obligee is under no duty to make disclosure to a prospective surety, in absence of inquiry by the surety, unless opportunity is afforded.

In re Tabasinsky. (Filed August 6, 1940)

Extension of time to executor as discharge —paid surety must show prejudice. In a summary proceeding in probate to determine liability of a surety on a bond of a defaulting executor, wherein the surety contends that an extension of time granted the executor bank to settle the interests of the heirs was such an extension as to release the surety, such contention was without merit since, in order for an extension of time to discharge a paid surety, prejudice must be shown. Furthermore, the bond not being executed until several months after the execution of such agreement, and the executor bank being already in default under the terms of the agreement, the whole amount was due and payable at the time the bond was executed.

In re Tabasinsky. (Filed August 6, 1940)

Compromise and settlement — partnership receivership—surrender of stock to obtain release as surety. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

12059

Compromise and settlement of probate loan —sound judicial discretion. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

12177

Ownership denied in instructions—admitted in pleadings and evidence. In a replevin action to recover sheep which the defendant's pleadings and evidence admitted belonged to the plaintiff, it was error to give an instruction stating that the defendant denied ownership in the plaintiff, as it allowed the jury to speculate on the ownership of the sheep.

Mead v Palmer, 228- ; 292 NW 821

Sheep kept under contract—proper care—jury question. In a replevin action to recover sheep which had been furnished by the plaintiff under a contract by which the defendant was to feed and care for the sheep, with the right reserved in the plaintiff to take possession in case proper care was not given, jury questions were raised by conflicting evidence concerning whether proper care was given and whether wool was sold without the plaintiff's consent in violation of the contract.

Mead v Palmer, 228- ; 292 NW 821

12285

Special assessment lien—defense against tax deed subject to lien. A statute providing that no person can question the title acquired by a tax deed without first showing that he, or the person under whom he claims title, had title at the time of sale, or that title was acquired from the state or United States after the sale, and that all taxes have been paid, does not preclude one from defending the lien of his special assessment certificate against a quiet title action based on a tax sale which was made subject to the prior lien of the special assessment.

Flanders v Ins. Co., - ; 292 NW 795

Plat by sheriff prior to execution sale. Where a sheriff, prior to execution sale of land, platted a homestead on the land, altho it had no buildings on it and was never used or occupied as a homestead, the former owner could not

quiet title in himself after the sale by claiming under the homestead, as a sheriff has no power to create a homestead by merely making such plat.

Dirks v Venenga, 228- ; 292 NW 841

12306

"Three inches east of wall"—measured from wall foundation. A boundary line "three inches to the east of the main east wall" of the plaintiff's building is located three inches from the footing of the wall, tho the footing extends six inches beyond the brick wall, since the footing is a part of the wall, since the window sills protrude to a point perpendicular with footing, and since the plaintiff has paid taxes on land three inches east of the foundation. Consequently, in an action to enjoin trespass, any part of defendant's building erected and attached to the plaintiff's wall must be removed to or east of such boundary line.

Keith Co. v Minear, - ; 293 NW 36

12310

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12325

Final decree confirming shares. A decree confirming the shares allowed in a partition action is final and appealable.

Enslow v Miner. (Filed August 6, 1940)

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12334

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12352

Attorney fees—absence of affidavit—erroneous allowance. In equity action for an accounting in which the defendants prayed for the foreclosure of a chattel mortgage, which was granted, the taxation of attorney fees, in the absence of an affidavit as required by statute, was erroneous.

Holden v Voelker, 228- ; 293 NW 32

Pleadings sufficient to establish lien on assets other than described in mortgage. In action in equity for an accounting of the operation of a store jointly conducted by defendants and plaintiff, in which action defendants also asked an accounting and for the foreclosure of a chattel mortgage executed by plaintiff upon the fixtures in order to secure funds for said business, the pleadings were sufficient to support a decree of foreclosure establishing the lien of the judgment upon assets other than those covered by the mortgage.

Holden v Voelker, 228- ; 293 NW 32

12372

Tax titles—liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

Deed as mortgage — presumption — inadequate consideration. Principles reaffirmed that where a borrower, for a nominal consideration, executes a deed to the creditor, there is a presumption that the deed is a mortgage; that

gross inadequacy of consideration for a deed constitutes a strong circumstance that a deed is intended as a mortgage; and that evidence to prove that a deed, absolute on its face, is intended as a mortgage must be clear, satisfactory, and convincing.

Ross v Ins. Co., 228- ; 292 NW 813

Ownership — deed to person paying back taxes—option to repurchase. Evidence that a deed was given to one who paid delinquent taxes on land with an oral agreement that the grantor could redeem and that an option to redeem was given to the grantor later was more than a scintilla of evidence and was sufficient to raise a jury question on whether the grantee was the sole and unconditional owner of the property, with the grantor's only interest arising from the option to repurchase.

Ross v Ins. Co., 228- ; 292 NW 813

Deed not mortgage—no secured debt. A deed given to one who paid delinquent taxes on the property satisfied the debt for the taxes, and no obligation existed under an option to repurchase given the grantor. There being no debt, there was nothing to be secured by the deed, and it could not be construed as a mortgage.

Ross v Ins. Co., 228- ; 292 NW 813

Jurisdiction to compel accounting in proceeding on final report after sheriff's deed issued. Where receiver in mortgage foreclosure action continued to collect receipts and make disbursements some seven years after sheriff's deed was signed and acknowledged, which deed, however, was still held by sheriff at time trial court denied plaintiff's objections to receiver's final report, the court erred (1) in holding that it had no jurisdiction to determine in that proceeding whether the receiver and his bondsman were liable for funds so collected, and (2) in excluding evidence that he collected such funds as receiver and that he was estopped to claim otherwise, since the receivership had not been terminated by order of the court and the property was still in custodia legis.

Young v Miller, 228- ; 292 NW 845

Fictitious person in assignment. In action to foreclose a real estate mortgage containing a valid chattel mortgage on rents, which was not indexed in the chattel mortgage index book, such chattel mortgage was superior to any right of an intervenor claiming under assignment of a lease on the mortgaged property where the assignor obtained such lease through a transaction involving the medium of a fictitious person. The intervenor-assignee had no greater right than his assignor.

Sykes v Waring, - ; 293 NW 14

Nunc pro tunc entry made without notice. When a foreclosure decree, which by mistake included not only the real estate owned by the defendant, but also other property covered by the mortgage but not involved in the litigation, was corrected on motion at the same term of court by a supplemental decree containing the correct description of the land, the defendant could not have the foreclosure set aside because no notice of the entry of the supplemental decree was given him, when it was in no way prejudicial to him and it merely corrected the mistake, making the decree conform to the evidence and the decision of the court.

Miller v Bates, - ; 292 NW 818

Estoppel to object to extension decree. A supplemental decree correcting an obvious mistake in the original decree of foreclosure of a mortgage could not be complained of by the mortgagor after he applied for and secured an extension of the period of redemption, as by his act he expressly recognized the binding effect of the decree.

Miller v Bates, - ; 292 NW 818

Stipulation permitting refusal of loan before finally made—validity—consideration. A stipulation in an application for a farm loan, providing that the approval of the application might be withdrawn at any time before the loan was finally made, was not void as an attempt to deprive the court of jurisdiction to hear disputes between the parties and was not void as a waiver of rights in futuro without consideration.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Refusal of loan after initial approval—action for damages — incompleted contract. Where a farm loan application was approved providing that approval could be withdrawn at any time before completing the loan, and where the defendant sent out mortgages to the applicant who signed and recorded them without the knowledge or consent of the defendant, and the loan was later refused, then, in an action by the applicant to recover the amount of an equity in the land which was allegedly lost because of the failure to consummate the loan, the defendant was entitled to a directed verdict, as the mere approval of the application and the unauthorized recording of the mortgages did not result in a completed contract to make the loan.

Johnston v Federal Land Bank. (Filed August 6, 1940)

Insurance proceeds — rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance policy—rights of mortgagee. A mortgagee has no interest in an insurance policy issued to the mortgagor upon the mort-

gaged property, unless such interest be created by a covenant or condition, and in the absence of such covenant the insurance contract is strictly personal between the insurer and insured. When a mortgagor, under the terms of the mortgage, is bound to keep the premises insured for the benefit of the mortgagee, an equitable lien arises in favor of the mortgagee.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance policy as security for mortgage loan. When a fire insurance policy made no reference to a mortgage on the property which required the mortgagor to insure as the mortgagee might direct, and provided that the mortgagee could insure if the mortgagor failed to do so, and the mortgagor did insure, evidence indicated that the parties understood that the insurance was taken out as security for the mortgage loan.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

12375

Insurance involved—motion to elect denied. Where plaintiff brings a separate action on a note (secured by a mortgage) and in another action involving the mortgage seeks to adjudicate a fire loss, the latter action is not an action "on the mortgage given to secure" the note such as authorizes the defendant to require the plaintiff to elect under §12375, C., '39, which action he will prosecute.

Parsons v Kitt, 228- ; 292 NW 831

12376

Separate actions on note and mortgage—insurance involved—motion to elect denied. Where plaintiff brings a separate action on a note (secured by a mortgage) and in another action involving the mortgage seeks to adjudicate a fire loss, the latter action is not an action "on the mortgage given to secure" the note such as authorizes the defendant to require the plaintiff to elect under §12375, C., '39, which action he will prosecute.

Parsons v Kitt, 228- ; 292 NW 831

12384

Tax titles—liens nullified—sale of tax deed to mortgagee. When land was conveyed by parents to a son on condition that after their deaths he would pay certain sums to the plaintiffs, after which the son mortgaged the land to a bank and permitted it to be sold at tax sale, the purchaser of the tax deed obtained title free of the liens of the plaintiffs and the bank. When the bank purchased the tax deed from the holder, it obtained a title equally as good as that of the tax deed holder, and could not be considered to have made a redemption to the extent of the amount paid for the deed, as it owed no duty to the plaintiffs to pay the taxes on the land.

Koch v Kiron Bank, - ; 289 NW 447

12417

Equity action to set aside transfer of corporate assets—quo warranto issues in reply improper. In an equity action to set aside a transfer and merger of assets of an insurance company and asking for appointment of receiver, and where plaintiffs, in an allegation in their reply, put in issue the validity of the dissolution of the insurance corporation, a motion to strike the reply was properly sustained on the theory that a quo warranto proceeding is the proper remedy to determine the validity of the dissolution of a corporation, as against the theory plaintiffs had a private right which could be maintained in equity.

Walling v Ins. Co., 228- ; 292 NW 157

Validity tested by quo warranto—exclusive remedy. The exclusive procedure for testing the validity of a corporate organization, merger or consolidation of corporations is by the statutory quo warranto proceeding, and such validity cannot be challenged in an equitable action, and especially not collaterally in a reply in such action.

Walling v Ins. Co., 228- ; 292 NW 157

12429

Equity action to set aside transfer of corporate assets—quo warranto issues in reply improper. In an equity action to set aside a transfer and merger of assets of an insurance company and asking for appointment of receiver, and where plaintiffs, in an allegation in their reply, put in issue the validity of the dissolution of the insurance corporation, a motion to strike the reply was properly sustained on the theory that a quo warranto proceeding is the proper remedy to determine the validity of the dissolution of a corporation, as against the theory plaintiffs had a private right which could be maintained in equity.

Walling v Ins. Co., 228- ; 292 NW 157

Extent of power under statutory proceedings. Quo warranto proceedings relating to corporations are not limited to the forfeiture of rights and privileges, but may provide judgment in certain other matters as circumstances may require.

Walling v Ins. Co., 228- ; 292 NW 157

12440

Compelling calling of utility election—change of circumstances. The issuance of a writ of mandamus being not a matter of right, but resting in the discretion of the court, a court properly refused to issue a writ to compel a mayor to call an election on the proposition of granting a franchise to a public utility company when a reasonable time had not elapsed

since a previous election in which the proposal was defeated, and there was no showing of a change of circumstances to warrant interference by the court.

Iowa P. & L. v Hicks, - ; 292 NW 826

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

Calling of re-election on municipal franchise. After a municipal election in which a proposal to grant a franchise to an electric utility company was defeated, and the mayor did not call another election on the same proposition altho proper petitions for such election were filed, a petition for a writ of mandamus to compel the mayor to call the election should have been granted unless peculiar facts presented some reason for refusing the writ.

Iowa P. & L. v Hicks, - ; 292 NW 826

Mayor compelled to call election on franchise. When a proposal to grant a franchise to an electric utility company was defeated in a municipal election and two petitions for subsequent elections were filed, altho mandamus to compel the mayor to call another election was refused in an action arising from the first petition, the writ should issue in an action based on the second petition, in which it was shown that a change in the voting population had taken place greater than the margin by which the proposition was defeated in the first election.

Iowa P. & L. v Hicks, - ; 292 NW 826

School district as trustee — individuals as cestuis—property not exempt. A school district which held real property in trust to use the income for college scholarships could not, in a mandamus action against the county supervisors, recover taxes paid on the property and prevent further collection of taxes on the ground that the property was exempt from taxation under §6944, C., '35, as the property and income were not used for a public purpose, the beneficiaries of the trust being the recipients of the scholarships, with the trust standing in the same position as if vested in any other qualified trustee.

Board v Board, 228- ; 293 NW 38

Multiplicity of suits avoided in equity—several drainage districts as defendants. In mandamus against several drainage districts, when all the districts were in court and the questions involved were the same for each district, equity has jurisdiction to fully settle the rights of the parties and avoid multiplicity of suits.

Board of Trustees v Board, - ; 291 NW 141

Drainage assessment—additional levy. In mandamus action by drainage bondholders against the board of supervisors to require an additional levy for payment of bonds, a writ was properly denied where the original special assessments were sufficient to pay the bonds "when collected" and a deficiency was occasioned by the failure to collect the assessments on two tracts of land. While drainage statutes provide for additional levies to pay bonds where work exceeds the estimate, or the levy is insufficient to pay the bonds, nevertheless the drainage law appears to recognize the rule that one who fully paid his share of a levy sufficient to meet a bond issue is not liable for deficiencies resulting from failure of other lands to pay the tax where property values would support the assessment when made. The court will take judicial notice of the great shrinkage in land values.

Hartz v Truckenmiller. (Filed August 6, 1940)

District funds intermingled—drainage fund deficiency—additional levy. In mandamus action by drainage bondholders against board of supervisors to require an additional levy for the benefit of the bonds, where district funds were intermingled in a consolidated account, a writ based on the theory there was a diversion of bond funds was properly denied where it is shown the deficiency was created by the failure to collect the special assessments on two tracts of land—the original assessment being sufficient to pay the bonds when collected.

Hartz v Truckenmiller. (Filed August 6, 1940)

Drainage district action—misjoinder of county treasurer. In mandamus action by drainage bondholders against the board of supervisors to require an additional assessment for payment of bonds, in which action the county treasurer was joined as a party because of the claim that he wrongfully paid out certain moneys from the district fund, a dismissal of the action against such treasurer was proper, since he was not an officer of the district and the action against the treasurer to make restoration was not proper in a mandamus action.

Hartz v Truckenmiller. (Filed August 6, 1940)

12441

City fire department — employees — promotional appointment. A public safety superintendent's promotional appointment to a city fire department of a person under civil service entitled to a soldiers preference is not, even

after an investigation under §1161, C., '39, such a discretionary appointment as will bar the court's right to interfere by mandamus.

Herman v Sturgeon. (Filed August 6, 1940)

12442

Multiplicity of suits avoided in equity—several drainage districts as defendants. In mandamus against several drainage districts, when all the districts were in court and the questions involved were the same for each district, equity has jurisdiction to fully settle the rights of the parties and avoid multiplicity of suits.

Board of Trustees v Board, - ; 291 NW 141

12448

Joinder of drainage districts as defendants. In an action in mandamus brought by the board of trustees of a drainage district which had cleaned out and repaired a main drainage ditch within the district, against other districts having tributary ditches emptying into the main ditch, to compel a levy of assessments to contribute to the costs of such cleaning and repairs, the other districts were properly joined in one action when they were all interested in the case, the same questions were involved in each district, and the relief prayed for against each was the same.

Board of Trustees v Board, - ; 291 NW 141

12450

Misjoinder of county treasurer—drainage district action. In mandamus action by drainage bondholders against the board of supervisors to require an additional assessment for payment of bonds, in which action the county treasurer was joined as a party because of the claim that he wrongfully paid out certain moneys from the district fund, a dismissal of the action against such treasurer was proper, since he was not an officer of the district and the action against the treasurer to make restoration was not proper in a mandamus action.

Hartz v Truckenmiller. (Filed August 6, 1940)

12456

Quashing writ—use of term "improvidently issued" unimportant—actual issues control. Lower court's use of term "improvidently issued" in quashing writ of certiorari because of park board's noncapacity to sue is unimportant when the real issue is whether the court should have sustained the writ after learning of the questions actually before it and determining the legal status of the persons involved.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Permanent park board—capacity to sue. In a dispute between the park board and the city council over who has right to hire custodian of a cemetery, a writ of certiorari sought by the board was properly quashed for the reason that the park board has no capacity to sue.

Des Moines Park Board v Des Moines, - ; 290 NW 680

Unemployment compensation commission employee—rescinding order for employment—discharge not illegal. Where the Iowa Unemployment Compensation Commission made an order which gave an employee a permanent position as an intermediate clerk, and subsequently, after rescinding that order as not having been made in compliance with regulation No. 19 governing the hiring of employees, discharged the employee, such action by the commission was not illegal but within the implied authority of the commission to correct its own mistakes. Certiorari will not lie to compel the employee's reinstatement.

Couch v Stanley. (Filed August 6, 1940)

12464

Quashing writ—use of term "improvidently issued" unimportant—actual issues control. Lower court's use of term "improvidently issued" in quashing writ of certiorari because of park board's noncapacity to sue is unimportant when the real issue is whether the court should have sustained the writ after learning of the questions actually before it and determining the legal status of the persons involved.

Des Moines Park Board v Des Moines, - ; 290 NW 680

12512

Suit on notes — injunction — modification pending submission of appeal—statute of limitations. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, - ; 289 NW 900

Fraud—burden of proof—failure to disclose assets. Where three mortgagors had executed notes for the full amount of an indebtedness with the other mortgagors as co-signers, and, in response to an offer of settlement by an agent of the plaintiff-noteholder, the defendant-maker gave the agent a statement listing assets which, because of the depression, had little value at the time, and said that $1,000

was all the cash he could raise, and a compromise settlement was reached by which the defendant gave certain assets and $1,000 in cash and obtained a receipt showing full payment, the plaintiff, in an action on the notes seven years later, failed to sustain the burden of proving fraud, and the defendant was entitled, on a cross-petition, to an injunction preventing plaintiff from assigning or suing on the other notes.

Dallas Real Estate Co. v Groves, - ; 292 NW 152

City renting water filters to consumers. An action to enjoin a city council from purchasing individual water softeners to be rented to water consumers in accordance with a city ordinance because the acts authorized by the ordinance had not been submitted to the voters for approval, was properly dismissed when it was conceded that the power to construct and operate the city waterworks plant had been granted by the voters.

Leighton Co. v Fort Dodge, - ; 292 NW 848

Injunction against issuing bonds for municipal light plant—not moot question. After the dismissal of a petition seeking to enjoin the construction of a municipal light plant and the issuance of revenue bonds in payment for it, altho the plant was completed, the question of enjoining the issuance of the bonds was not moot when the action had been appealed and a stay order obtained against the town accepting the work, using the premises, or issuing bonds to the contractor in payment of the contract price.

Gunnar v Montezuma, 228- ; 293 NW 1

Municipal light plant construction — moot question on appeal. When a municipal light plant was completed after a petition to enjoin such construction had been dismissed, with no stay order to prevent such construction having been obtained, an appeal from the refusal to enjoin the construction presented a moot question, as the threatened action had become an accomplished fact.

Gunnar v Montezuma, 228- ; 293 NW 1

Use tax—retail sales from stores just outside state boundaries. A foreign corporation doing a retail business within the state may not be required to collect a use tax on sales made in its retail stores located near, but outside, the state boundaries, where the purchaser is an Iowa resident and purchases the property for use in the state, and it may enjoin the members of the state board of assessment and review from undertaking to require it to collect a use tax on such sales.

Montgomery Ward v Roddewig, - ; 292 NW 142

Use tax—mail order sales outside state—board enjoined from canceling corporation permit. A foreign corporation doing a retail business within the state under a state permit may enjoin the members of the state board of assessment and review from canceling the corporation's permit for failure to pay a use tax on mail order sales made by it from stores outside the state, such cancellation being authorized by use tax statutes requiring the tax to be collected when sales are made, whether within or without the state, and making the tax a debt owed by the seller, with a failure to pay the debt being grounds for revoking a foreign corporation's license to do business within the state. The mail order sales, being consummated outside the state, do not constitute activities within the state, and the state has no power to regulate activities outside the state nor to regulate such activities as a condition to a foreign corporation's right to continue to do business in the state.

Sears, Roebuck v Roddewig, - ; 292 NW 130

"Three inches east of wall"—measured from wall foundation. A boundary line "three inches to the east of the main east wall" of the plaintiff's building is located three inches from the footing of the wall, tho the footing extends six inches beyond the brick wall, since the footing is a part of the wall, since the window sills protrude to a point perpendicular with footing, and since the plaintiff has paid taxes on land three inches east of the foundation. Consequently, in an action to enjoin trespass, any part of defendant's building erected and attached to the plaintiff's wall must be removed to or east of such boundary line.

Keith Co. v Minear, - ; 293 NW 36

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

12575

Precatory request for guardianship in will. A provision in a will giving the residue to two daughters in equal shares and asking that one be appointed guardian over the other with full charge over her affairs and that she care for her during her lifetime referred only to the property taken under the will and gave half to the guardian-daughter and the other half to the sister for support during her life, the provision for the guardianship not being a condition attached to the devise, but merely precatory.

In re Heckmann, - ; 291 NW 465

Devise to two daughters—request for guardianship—not trust. A will giving the residue to two daughters with the request that one be appointed guardian over the other with complete charge of her affairs during her lifetime did not create an express trust, nor was there language or extrinsic evidence to show fraud or unjust enrichment to indicate a constructive trust in favor of the life tenant.

In re Heckmann, - ; 291 NW 465

12581

Partition—life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

Unauthorized investment prior to statute requiring approval—court lacks approval power. After a statute was passed requiring investments of trust funds by fiduciaries to be first reported to the court for approval, the court did not have the power to approve a guardian's real estate investment which was made prior to the statute and without a court order.

In re Morris, 228- ; 292 NW 836

Investments in property outside jurisdiction of the court. Investments of guardianship funds in property beyond the jurisdiction of the court are not recommended. No guardian should assume to make such loan without a full and exact report of its nature so that he may have in advance the court's advice as to its advisability.

In re Morris, 228- ; 292 NW 836

Property offered to settle obligation—refusal by court—option of ward. When a guardian who has made an unauthorized and improvident real estate investment in his own name offers to discharge his obligations to the estate by transferring the property, the offer should be refused by the court and an accounting in cash required for the amount shown to be due. However, the ward may accept the property in lieu of cash, but he is not compelled to do so.

In re Morris, 228- ; 292 NW 836

Guardian's burden—accounting for investments. A guardian could not object that there was no competent proof to support the ward's claim that taxes were due on real estate in which the guardian had invested guardianship property as the burden is upon the guardian to account for his stewardship.

In re Morris, 228- ; 292 NW 836

12584

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In re Morris, 228- ; 292 NW 836

12587

Life estate involved—decree delaying partition. Courts hesitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of property and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12597

Guardian's burden—accounting for investments. A guardian could not object that there was no competent proof to support the ward's claim that taxes were due on real estate in which the guardian had invested guardianship property as the burden is upon the guardian to account for his stewardship.

In re Morris, 228- ; 292 NW 836

Property offered to settle obligation—refusal by court—option of ward. When a guardian who has made an unauthorized and improvident real estate investment in his own name offers to discharge his obligations to the estate by transferring the property, the offer should be refused by the court and an accounting in cash required for the amount shown to be due. However, the ward may accept the property in lieu of cash, but he is not compelled to do so.

In re Morris, 228- ; 292 NW 836

12713

Partition—life estate involved—decree delaying partition. Courts hestitate to decree partition where there are outstanding life estates, but may do it in order to preserve or protect the estate. Under a will which gave an incompetent daughter an undivided half of prop-

erty and the right to have it used for life in connection with the other half, which was given to another daughter who was to act as guardian, when the guardian conveyed the property subject to the right of use of the incompetent, and the grantee took subject to such use, it was better, for all the parties, not to decree immediate partition, but to appoint a receiver and reserve the question of the ultimate sale of the property.

In re Heckmann, - ; 291 NW 465

12716

Jurisdiction to compel accounting in proceeding on final report after sheriff's deed issued. Where receiver in mortgage foreclosure action continued to collect receipts and make disbursements some seven years after sheriff's deed was signed and acknowledged, which deed, however, was still held by sheriff at time trial court denied plaintiff's objections to receiver's final report, the court erred (1) in holding that it had no jurisdiction to determine in that proceeding whether the receiver and his bondsman were liable for funds so collected, and (2) in excluding evidence that he collected such funds as receiver and that he was estopped to claim otherwise, since the receivership had not been terminated by order of the court and the property was still in custodia legis.

Young v Miller, 228- ; 292 NW 845

Compromise and settlement—charge of surrender of stock to obtain release as surety—no breach of duty. A settlement between the administrator of an estate holding a judgment against a partnership in receivership, a bank to which money was owed by a corporation which was part of the partnership property, and sureties on a supersedeas bond entered into in prior litigation was not shown to have been fraudulently induced by the partnership receiver, altho he surrendered corporate stock and obtained his own release as surety through the settlement wherein the administrator received the stock free of all contested claims. There would have been no resulting benefit had the receiver retained the stock, and the release as surety was granted by the administrator, who believed the sureties were not liable in any event.

In re Fleming. (Filed August 6, 1940)

Defense of suit—nonparticipation in compromise—no breach of duty by incidental benefit. A partnership receiver who was also a director and stockholder in a bank to which the receivership owed money, who, as defendant in an action by the bank to collect on notes, filed an answer stating that he did not know whether the bank's claim was superior to a judgment against the partnership, was not guilty of failing to make a sufficient defense in the suit when it was compromised before trial. Also, when the receiver did not participate in the settlement, in the absence of evidence of fraud or lack of good faith, the incidental benefit he derived as bank stockholder did not sustain a charge of breach of his fiduciary duty.

In re Fleming. (Filed August 6, 1940)

12724

Insurance proceeds—rights against mortgagee. An assignee for the benefit of creditors has no greater rights in the proceeds of an insurance fund than the assignor, and, as between the mortgagee of the insured property and the assignee, the assignee has no greater rights than the mortgagor.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance policy covering all of insured's property—mere description. A fire insurance policy provision covering all property on the premises in which the insured had any interest does not make the policy cover only the interest of the insured's assignee for benefit of creditors, but is intended to complete the description of the property covered.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

Insurance proceeds — mortgagee's rights against assignee. In an action by a chattel mortgagee against an assignee for the benefit of creditors who had received the proceeds from a fire insurance policy taken out by the mortgagor-assignor to secure the mortgage loan, a directed verdict against the assignee should be sustained to the extent of the net proceeds of the policy.

Central Natl. Bank v Simmer. (Filed August 6, 1940)

12772

Investments in property outside jurisdiction of the court. Investments of guardianship funds in property beyond the jurisdiction of the court are not recommended. No guardian should assume to make such loan without a full and exact report of its nature so that he may have in advance the court's advice as to its advisability.

In re Morris, 228- ; 292 NW 836

Unauthorized investment prior to statute requiring approval—court lacks approval power. After a statute was passed requiring investments of trust funds by fiduciaries to be first reported to the court for approval, the court did not have the power to approve a guardian's real estate investment which was made prior to the statute and without a court order.

In re Morris, 228- ; 292 NW 836

Property offered to settle obligation — refusal by court—option of ward. When a guardian who has made an unauthorized and improvident real estate investment in his own name offers to discharge his obligations to the estate by transferring the property, the offer

should be refused by the court and an accounting in cash required for the amount shown to be due. However, the ward may accept the property in lieu of cash, but he is not compelled to do so.

In re Morris, 228- ; 292 NW 836

Compromise and settlement of probate loan —sound judicial discretion. In probate proceedings, an order authorizing the settlement for $2,500 of a $5,000 loan made by trustee under will, and approving trustee's final report, was not only in keeping with established legal principles but is in accord with sound judicial discretion where in the absence of fraud the trustee, who was cashier of a bank, made a loan to vice-president of same bank and took a third mortgage as security, and when note, at time loan was made, was considered a good investment without security, after which the bank failed and left the parties insolvent, so that a settlement was the best possible means of liquidating the estate. The courts have taken judicial notice of financial crises.

In re Seefeld, 228- ; 292 NW 843

Executor—investing estate funds without court order—surety's liability. In a probate proceeding to determine the liability of a surety on the bond of a defaulting executor, a transaction between an executor bank and the heirs did not constitute an investment made in pursuance of statutory requirements for investment of funds, and the surety was liable for the executor's default when the approval of the court was not obtained in compliance with statutory requirements.

In re Tabasinsky. (Filed August 6, 1940)

12787

Nunc pro tunc entry made without notice. When a foreclosure decree, which by mistake included not only the real estate owned by the defendant, but also other property covered by the mortgage but not involved in the litigation, was corrected on motion at the same term of court by a supplemental decree containing the correct description of the land, the defendant could not have the foreclosure set aside because no notice of the entry of the supplemental decree was given him, when it was in no way prejudicial to him and it merely corrected the mistake, making the decree conform to the evidence and the decision of the court.

Miller v Bates, - ; 292 NW 818

Foreign judgment obtained—full faith and credit denied. In action to recover balance of commissions due plaintiff, wherein defendant by way of answer claimed the matter had been adjudicated in an Illinois court and demanded judgment by way of counterclaim in the sum of $250 as adjudicated in Illinois, and where evidence shows that plaintiff was invited into the state of Illinois for the purpose of adjusting the account, and while there was served with notice of suit, it was properly held that such judgment was void, since the jurisdiction in Illinois was obtained by fraud, and the judgment was not entitled to full faith and credit.

Miller v Acme Feed, Inc. (Filed August 6, 1940)

12802

Appeal — assignment of error — failure to comply with rules—effect. The supreme court must refuse to search for errors which are not indicated or set out in the manner prescribed by its rules. Rule 30 requires that complaints against the rulings of the trial court must be set out specifically and in concise language.

Enslow v Miner. (Filed August 6, 1940)

12822

Partition—decree confirming partition shares final and appealable. A decree confirming the shares allowed in a partition action is final and appealable.

Enslow v Miner. (Filed August 6, 1940)

12823

Motion to strike motion—effect. A motion to strike another motion is regarded as improper procedure, but it does not follow that an order sustaining a motion to strike another motion constitutes error. The effect of an order striking a motion amounts to no more than an order overruling it, and if an overruling order would have been proper, the order to strike will not be erroneous.

Ryan v Emmetsburg, 228- ; 293 NW 29

More specific statement — substantial compliance—motion to strike amendment properly overruled. In a damage action based on an alleged nuisance where plaintiff amends his petition in substantial compliance with an order sustaining defendant's motion for more specific statement, a motion to strike the amendment was properly overruled where plaintiff was not required by the ruling to itemize his damage—plaintiff having pleaded a permanent nuisance including past, present, future, and special damages, on account of a sewage disposal plant which was so located as to subject plaintiff to conditions which other more remote property owners, or the public generally, did not suffer.

Ryan v Emmetsburg, 228- ; 293 NW 29

Motion sustained generally—necessity of successfully challenging each ground on appeal. Where a motion to strike a reply was sustained generally, and on all grounds, the appellant on appeal to the supreme court cannot prevail unless each ground of the motion is successfully challenged.

Walling v Ins. Co., 228- ; 292 NW 157

Ordinance — excessive penalty — imposition necessary to question validity. Question of

whether excessive penalties were provided in ordinances for violation of parking meter provisions is not justiciable in injunctive action by taxpayer questioning the legality of such ordinances, since no penalties were imposed upon plaintiff.

Brodkey v Sioux City, - ; 291 NW 171

Partition — decree confirming partition shares. A decree confirming the shares allowed in a partition action is final and appealable.

Enslow v Miner. (Filed August 6, 1940)

Injunction against suit on notes—modification pending submission of appeal—statute of limitations. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, ; 289 NW 900

12827

Moot question—facts must arise subsequent to entry of judgment. In the supreme court, a motion to dismiss on the ground that the question is moot is ordinarily made to depend upon facts arising subsequent to the entry of judgment, and where facts upon which such motion is based are asserted to have occurred before judgment was entered, but were not presented to the trial court, they are not properly presented to the supreme court. Consequently the motion to dismiss will be overruled.

Jasper Co. v Stergios, 228- ; 292 NW 855

Question first raised on appeal—not following trial theory—nonreviewability. In equity action to set aside a deed, the question of nondelivery of the deed cannot be raised in the brief and argument and considered on appeal when such question is contrary to the trial theory and not in harmony with the pleadings which predicate the right of recovery, not on the theory that the transaction was not completed, but on the theory that grantor was in such condition as to be incompetent to accomplish that which was done.

Keune v McCauley, 228- ; 293 NW 25

Competency of testimony—first challenged on appeal. The competency of testimony cannot be challenged for the first time on appeal when no objection was made at the trial.

State v Strable. (Filed August 6, 1940)

Search warrant proceedings—question first presented on appeal—no review. In an action commenced by search warrant proceedings to recover possession of an automobile, wherein both plaintiff and defendant alleged the right to possession and ownership of the car, and the record shows the action was tried, both in municipal court and on appeal therefrom to the district court, on the sole issue as to the rights of the parties to such possession or ownership, the questions as to the proper issuance of the search warrant and as to the form of the proceedings cannot be raised for the first time on appeal to the supreme court.

State v Doe. (Filed August 6, 1940)

12845

Assignment to one who paid taxes—policy not set out in abstract—coverage not determinable. In an appeal from an action for loss under a fire insurance policy which was assigned to one who was given a deed to the property when he paid delinquent taxes, the contention of the insurer that the coverage was limited to the plaintiff's investment in the property could not be determined without an interpretation of the policy, which could not be made when the policy was not set out in the abstract and only general reference to it was made in the pleadings.

Ross v Ins. Co., 228- ; 292 NW 813

Assigning error in instruction — abstract should contain all instructions—exception. For the supreme court to determine whether or not prejudicial error has been committed in the giving of instructions, the instructions must be considered as a whole, and where the abstract fails to set forth all the instructions, assignments of error pertaining to instructions will not be considered, unless the error is such that it could not be cured by other instructions.

Thines v Kukkuck, - ; 293 NW 58

Trial de novo—incomplete record—effect. The claim of appellants in a partition action that they are entitled to a trial de novo on appeal must fail where record shows that complete case is not before the supreme court and there is no showing of an attempt to make a record as authorized by §11456, C., '39. In such case, presumption obtains that decree of trial court is correct.

Enslow v Miner. (Filed August 6, 1940)

Presumption as to contents of abstract—when inapplicable. The presumption authorized by §12845.1, C., '39, that the abstract contains the record, cannot be expected to apply when such record shows on its face that it does not contain all evidence or matters before the court of which complaint is made.

Enslow v Miner. (Filed August 6, 1940)

12845.1

Contents of abstract—when presumption inapplicable. The presumption authorized by

this section, that the abstract contains the record, cannot be expected to apply when such record shows on its face that it does not contain all evidence or matters before the court of which complaint is made.

Enslow v Miner. (Filed August 6, 1940)

12845.2

Denial of abstract to be specific—requirements of Rule 17. Under Rule 17 a denial of abstract should be specific and should point to those parts of the abstract complained of, and should further point out and specify, by page or otherwise, the parts of the record or transcript which support the denial or complaint. The only object of the certification of the record is to settle the specific dispute raised by a denial. The burden should not be placed on the court to read the abstracts, the amendments, the entire transcript, and other certified records.

Tessman v Tessman, - ; 291 NW 530

12847

Appeal and error—submission on transcript of evidence—application after losing right to file abstract. On an appeal by the defendant in a criminal case, an application to submit the cause on the transcript of the evidence in lieu of a printed abstract will be denied when the application is filed after the right to file an abstract has been lost by not filing the abstract within the required 120 days.

State v Williams, 228- ; 290 NW 106

12858

Injunction against issuing bonds for municipal light plant—not moot question. After the dismissal of a petition seeking to enjoin the construction of a municipal light plant and the issuance of revenue bonds in payment for it, altho the plant was completed, the question of enjoining the issuance of the bonds was not moot when the action had been appealed and a stay order obtained against the town accepting the work, using the premises, or issuing bonds to the contractor in payment of the contract price.

Gunnar v Montezuma, 228- ; 293 NW 1

12860

Injunction against suit on notes—modification pending submission of appeal. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, ; 289 NW 900

12869

Directed verdict — omnibus assignment of error. An assignment of error that "the court erred to the prejudice of the defendant in directing a verdict * * *" is an omnibus assignment and will not be considered on appeal.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Evidence received subject to objections—not recommended. Stipulations between the parties that all evidence be received by the court subject to all objections in order to save time not recommended either for the purposes of trial or of appeal.

Davis v Davis, - ; 292 NW 804

Failure to comply with rules—effect—Rule 30. The supreme court must refuse to search for errors which are not indicated or set out in the manner prescribed by its rules. Rule 30 requires that complaints against the rulings of the trial court must be set out specifically and in concise language.

Enslow v Miner. (Filed August 6, 1940)

12870

Moot question—facts must arise subsequent to entry of judgment. In the supreme court, a motion to dismiss on the ground that the question is moot is ordinarily made to depend upon facts arising subsequent to the entry of judgment, and where facts upon which such motion is based are asserted to have occurred before judgment was entered, but were not presented to the trial court, they are not properly presented to the supreme court. Consequently the motion to dismiss will be overruled.

Jasper Co. v Stergios, 228- ; 292 NW 855

Injunction against suit on notes—modification pending submission of appeal. Pending the submission of an appeal from a decision of the trial court which enjoined the plaintiffs from bringing suit on certain notes, the plaintiffs were entitled, on motion, to a modification of the injunction to allow them to commence proceedings on the notes, but enjoining them from bringing such proceedings to trial prior to the final determination of the appeal, when, unless such stay were granted, the statute of limitations would have run against the notes, and, in the event of a reversal, the plaintiffs would have been deprived of the legal rights accorded them by the reversal.

Dallas Real Estate Co. v Groves, ; 289 NW 900

12871

Belated filing of briefs—privilege to file reply. Where appellant filed a motion to strike

appellee's additional brief containing additional authorities which in no material way aid the appellee, and when striking it would in no way aid appellant, the motion was overruled. If appellant cared to file anything further in reply he could have asked for that privilege, as the court is liberal in granting such a privilege in such cases.

Eller v Ins. Co., - ; 291 NW 866

Contractor for light plant—necessary party to action on contract. A contractor for the construction of a municipal light plant, who is required by the contract to accept all of the revenue bonds issued for the plant, is an indispensable party to an adjudication of the validity of the contract. Nonjoinder of necessary parties ordinarily must be raised by demurrer and will be waived if not so raised, but in an equity action to enjoin the issuance of such bonds, triable de novo on appeal, it is better to remand the case with leave to bring in the necessary parties.

Gunnar v Montezuma, 228- ; 293 NW 1

Appellee's supplemental brief and argument —filing disapproved. The filing of a supplemental brief and argument contrary to the rules of the supreme court is disapproved.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

12886

Moot question—facts must arise subsequent to entry of judgment. In the supreme court, a motion to dismiss on the ground that the question is moot is ordinarily made to depend upon facts arising subsequent to the entry of judgment, and where facts upon which such motion is based are asserted to have occurred before judgment was entered, but were not presented to the trial court, they are not properly presented to the supreme court. Consequently the motion to dismiss will be overruled.

Jasper Co. v Stergios, 228- ; 292 NW 855

Injunction against issuing bonds for municipal light plant—not moot question. After the dismissal of a petition seeking to enjoin the construction of a municipal light plant and the issuance of revenue bonds in payment for it, altho the plant was completed, the question of enjoining the issuance of the bonds was not moot when the action had been appealed and a stay order obtained against the town accepting the work, using the premises, or issuing bonds to the contractor in payment of the contract price.

Gunnar v Montezuma, 228- ; 293 NW 1

Municipal light plant construction — moot question on appeal. When a municipal light plant was completed after a petition to enjoin such construction had been dismissed, with no stay order to prevent such construction having been obtained, an appeal from the refusal to enjoin the construction presented a moot question, as the threatened action had become an accomplished fact.

Gunnar v Montezuma, 228- ; 293 NW 1

12919

Refreshing witness' memory by grand jury testimony re intoxication — denial — instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory by showing him the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Driving while intoxicated—evidence—instructions. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

12966

Prosecutrix's declarations to others — use when not res gestae. Testimony by the prosecutrix in a statutory rape prosecution that she told her sister of having intercourse with the defendant the first night it occurred was competent as affecting her credibility, but when such declaration goes further than to show the fact of the complaint and includes details of the complaint, the complaint must be a part of the res gestae in order to be admissible.

State v Strable. (Filed August 6, 1940)

13045

Introducing one person as another—nonexistent bank. False statements that a person named Van Carter was "Charles Miller" and that a check drawn by "Charles Miller" was good when in fact the bank named thereon did not exist are such false pretenses as may be the basis for a charge of cheating by false pretenses.

State v Neuhart, - ; 292 NW 791

False pretenses—indictment charging property obtained from owner—proof shows from

agent—no variance. Where a defendant obtains cattle by false pretenses, an indictment for cheating by false pretenses is not defective because it alleges the property was obtained from the owner, tho in fact the property was obtained from the owner's agent. Such facts do not create a fatal variance between the indictment and the proof, and a directed verdict based thereon is properly overruled.

State v Neuhart, - ; 292 NW 791

Instructions—construction as whole. In determining whether statements in instructions, which might under some circumstances appear to be erroneous, shall be deemed to constitute reversible error, the instructions must be read as a whole.

State v Neuhart, - ; 292 NW 791

Sufficiency of evidence to sustain verdict. In prosecution for obtaining money by false pretenses, there was ample evidence to support the verdict of the jury, and no error resulted from overruling defendant's motion for directed verdict.

State v Peck, - ; 291 NW 439

Incompetent testimony admitted but later stricken and jury admonished—nonerroneous. In prosecution for obtaining money by false pretenses, where secretary of alleged defrauded finance company testified that defendant told him there would be no bad paper, and that he relied on this statement, there was no error where defendant's objection was overruled but later, on defendant's motion, such testimony was stricken from the record and jury admonished.

State v Peck, - ; 291 NW 439

False automobile financing—prior conversation as to handling—admissibility. In prosecution for obtaining money by false pretenses, testimony of the secretary of the finance company, to whom alleged false automobile financing papers were sent by mail, was competent and material to show that he relied upon the papers being genuine, as on their face they purported to be, and that they complied with understanding and conversations with defendant as to handling such business.

State v Peck, - ; 291 NW 439

Bank records of defendant's transactions—admissibility. In prosecution for obtaining money by false pretenses from an automobile finance company, which transactions were handled by mail and drafts through banks, the testimony of assistant cashier of a bank, where defendant had an account, and certain bank records covering transactions were clearly admissible.

State v Peck, - ; 291 NW 439

13139

Disputed venue—jury question. In criminal prosecutions where there is a dispute as to venue the question is for the jury.

State v Gibson, 228- ; 292 NW 786

Forgeries—other checks admissible. In criminal prosecution for forgery evidence of other forged checks is admissible.

State v Gibson, 228- ; 292 NW 786

Defendant's exhibit of similar instrument—no foundation—exclusion. In criminal prosecution for forgery, an offer by defendant of an exhibit was properly refused when such exhibit was only a bare similarity in words and figures to the forged checks and no evidence or foundation was laid which would justify its admission.

State v Gibson, 228- ; 292 NW 786

Expert testimony—instruction—facts alone as substantive evidence. In criminal prosecution for forgery, an instruction on expert testimony was proper where the court points out the testimony upon which expert's opinion is based, such as characteristic similarities and physical facts, which may be observed by jury—such facts being substantive evidence and entitled to consideration by jury independent of expert's opinion.

State v Gibson, 228- ; 292 NW 786

Instruction as to venue in forgery prosecution. In criminal prosecution for forgery an instruction as to facts and circumstances on the question of venue was proper.

State v Gibson, 228- ; 292 NW 786

13441.03

Right of possession and ownership of automobile. In action commenced by search warrant proceedings to determine the right of possession and ownership of an automobile, where purchaser of an automobile under conditional sale contract duly recorded in the county of purchase also executed a chattel mortgage on the same car to secure a loan in another county, and, such chattel mortgage being duly recorded in such county, the holder of the conditional sale contract had prior right to the car, since the chattel mortgagee had no better right than his mortgagor, and a third party purchasing through the holder of the conditional sale contract was rightfully determined to be the owner of said car and entitled to its possession.

State v Doe. (Filed August 6, 1940)

13441.06

Issuance—form of proceedings—questions first raised on appeal—no review. In an action commenced by search warrant proceedings to recover possession of an automobile, wherein both plaintiff and defendant alleged the right to possession and ownership of the car, and the record shows the action was tried, both in municipal court and on appeal therefrom to the district court, on the sole issue as to the rights of the parties to such possession or ownership, the questions as to the proper issuance of the search warrant and as to the form

of the proceedings cannot be raised for the first time on appeal to the supreme court.

State v Doe. (Filed August 6, 1940)

13449

Instruction as to venue in forgery prosecution. In criminal prosecution for forgery an instruction as to facts and circumstances on the question of venue was proper.

State v Gibson, 228- ; 292 NW 786

Disputed venue—jury question. In criminal prosecutions where there is a dispute as to venue the question is for the jury.

State v Gibson, 228- ; 292 NW 786

13729

Refreshing memory by grand jury testimony —denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory from the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

13774

Board's authority to pay one attorney. AG Op June 20, '40

13876

Defendant as witness— nonerroneous. In criminal prosecution where, regarding the credibility of defendant as a witness, the court instructed, "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true, as made in good faith, or only for the purpose of avoiding conviction", such portion of the instruction, tho it may well have been omitted, nevertheless was not error.

State v Gibson, 228- ; 292 NW 786

Expert testimony—instruction—facts alone as substantive evidence. In criminal prosecution for forgery, an instruction on expert testimony was proper where the court points out the testimony upon which expert's opinion is based, such as characteristic similarities and physical facts, which may be observed by jury —such facts being substantive evidence and entitled to consideration by jury independent of expert's opinion.

State v Gibson, 228- ; 292 NW 786

Venue in forgery prosecution proper. In criminal prosecution for forgery an instruction as to facts and circumstances on the question of venue was proper.

State v Gibson, 228- ; 292 NW 786

Instructions—construction as whole. In determining whether statements in instructions, which might under some circumstances appear to be erroneous, shall be deemed to constitute reversible error, the instructions must be read as a whole.

State v Neuhart, - ; 292 NW 791

Refreshing memory by grand jury testimony —denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory from the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Manslaughter—driving while intoxicated—evidence. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

State v Neville. (Filed August 6, 1940)

13878

Part of testimony read to jury during deliberations. When the jury, during its deliberations, requested that the testimony of a sheriff, his deputy, and the defendant be read to them and, after the request was modified and only the testimony of the sheriff was read, the foreman said he believed that it was sufficient, there was no error in denying the request of counsel made after the jury had again retired that the other testimony also be read.

State v Strable. (Filed August 6, 1940)

13890

Instruction on defendant as witness—nonerroneous. In criminal prosecution where, regarding the credibility of defendant as a witness, the court instructed, "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true, as made in good faith,

or only for the purpose of avoiding conviction", such portion of the instruction, tho it may well have been omitted, nevertheless was not error.

State v Gibson, 228- ; 292 NW 786

13892

Impeachment by other witness—foundation laid in cross-examination. Where proper foundation was laid in the cross-examination of the defendant's wife, it was not error to admit, solely for purposes of impeachment, testimony of a sheriff regarding statements made by the wife.

State v Strable. (Filed August 6, 1940)

13897

Forgeries—other checks admissible. In criminal prosecution for forgery evidence of other forged checks is admissible.

State v Gibson, 228- ; 292 NW 786

Rape—prosecutrix's declarations to others—use when not res gestae. Testimony by the prosecutrix in a statutory rape prosecution that she told her sister of having intercourse with the defendant the first night it occurred was competent as affecting her credibility, but when such declaration goes further than to show the fact of the complaint and includes details of the complaint, the complaint must be a part of the res gestae in order to be admissible.

State v Strable. (Filed August 6, 1940)

Manslaughter—driving while intoxicated—evidence—instructions. Testimony by persons who had met the defendant driving on the highway about an hour before a fatal automobile collision that his car was then zigzagging back and forth across the paving was not erroneously admitted in a manslaughter prosecution arising from the collision, when the court instructed that the testimony was not to be considered as evidence of the manner in which the defendant was driving, but only for its bearing on the question as to whether the defendant was intoxicated at the time of the collision.

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Refreshing memory by grand jury testimony—denial—instructions. In a manslaughter prosecution arising from an automobile collision, when a witness at the trial testified that he did not know the defendant at all, it was not error for the state to attempt to refresh his memory from the minutes of his grand jury testimony, in which he had stated that he had seen the defendant in an intoxicated condition about two and one-half hours before the collision. Any possible error was removed by the court's admonition withdrawing the witness' testimony, telling the jury not to pay any attention to it, and by instructions that any testimony stricken or withdrawn during the trial should not be considered.

State v Neville. (Filed August 6, 1940)

Incompetent testimony admitted but later stricken and jury admonished—nonerroneous. In prosecution for obtaining money by false pretenses, where secretary of alleged defrauded finance company testified that defendant told him there would be no bad paper, and that he relied on this statement, there was no error where defendant's objection was overruled but later, on defendant's motion, such testimony was stricken from the record and jury admonished.

State v Peck, - ; 291 NW 439

False automobile financing—prior conversation as to handling—admissibility. In prosecution for obtaining money by false pretenses, testimony of the secretary of the finance company, to whom alleged false automobile financing papers were sent by mail, was competent and material to show that he relied upon the papers being genuine, as on their face they purported to be, and that they complied with understanding and conversations with defendant as to handling such business.

State v Peck, - ; 291 NW 439

Bank records of defendant's transactions—admissibility In prosecution for obtaining money by false pretenses from an automobile finance company, which transactions were handled by mail and drafts through banks, the testimony of assistant cashier of a bank, where defendant had an account, and certain bank records covering transactions were clearly admissible.

State v Peck, - ; 291 NW 439

13900

Prosecutrix's declarations to others—use when not res gestae. Testimony by the prosecutrix in a statutory rape prosecution that she told her sister of having intercourse with the defendant the first night it occurred was competent as affecting her credibility, but when such declaration goes further than to show the fact of the complaint and includes details of the complaint, the complaint must be a part of the res gestae in order to be admissible.

State v Strable. (Filed August 6, 1940)

Rape—admission by defendant to officers. In a prosecution for statutory rape, testimony by the sheriff and his deputy as to admissions of the acts of intercourse, made to them by the defendant, is sufficient corroboration of the testimony of the prosecutrix to warrant submission of case to the jury.

State v Strable. (Filed August 6, 1940)

13903

Rape—corroboration—admission by defendant to officers. In a prosecution for statutory rape, testimony by the sheriff and his deputy as to admissions of the acts of intercourse, made to them by the defendant, is sufficient corroboration of the testimony of the prosecutrix to warrant submission of case to the jury.

State v Strable. (Filed August 6, 1940)

Warning that statements may be used on trial—finding on special interrogatory. When a defendant made statements confessing his guilt to a sheriff and county attorney, the question as to whether the confession was freely and voluntarily made, being disputed, was properly a jury question, and when the jury, in answer to a special interrogatory, found that it was voluntary, the testimony of the sheriff and county attorney was admissible altho the defendant was not warned that his statements might be used against him.

State v Strable. (Filed August 6, 1940)

Disputed testimony—not shown to be involuntary. On disputed evidence as to whether a defendant's admission of the acts of the offense charged was made before or after he was advised to tell the truth and promises of leniency were made to him, and when he admitted that there was no loud talk at the time and that no one threatened to strike him, the evidence was not of the undisputed character required to show the confession to be involuntary because induced by promises of leniency and fear of threatened injury, and the securing of the confession was therefore held not to be a violation of the right of due process.

State v Strable. (Filed August 6, 1940)

13911

Part of testimony read to jury during deliberations. When the jury, during its deliberations, requested that the testimony of a sheriff, his deputy, and the defendant be read to them and, after the request was modified and only the testimony of the sheriff was read, the foreman said he believed that it was sufficient, there was no error in denying the request of counsel made after the jury had again retired that the other testimony also be read.

State v Strable. (Filed August 6, 1940)

13915

Obtaining money by false pretenses—ample evidence to sustain verdict. In prosecution for obtaining money by false pretenses, there was ample evidence to support the verdict of the jury, and no error resulted from overruling defendant's motion for directed verdict.

State v Peck, - ; 291 NW 439

13916

Warning that statements may be used on trial—confession—finding on special interrogatory. When a defendant made statements confessing his guilt to a sheriff and county attorney, the question as to whether the confession was freely and voluntarily made, being disputed, was properly a jury question, and when the jury, in answer to a special interrogatory, found that it was voluntary, the testimony of the sheriff and county attorney was admissible altho the defendant was not warned that his statements might be used against him.

State v Strable. (Filed August 6, 1940)

13917

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

13944

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

13951

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

13959

Atty. Gen. Opinion. See AG Op June 25, '40

13994

Ordinance — excessive penalty — imposition necessary to question validity. Question of whether excessive penalties were provided in ordinances for violation of parking meter provisions is not justiciable in injunctive action by taxpayer questioning the legality of such ordinances, since no penalties were imposed upon plaintiff.

Brodkey v Sioux City, - ; 291 NW 171

Appeal and error—submission on transcript of evidence—application after losing right to file abstract. On an appeal by the defendant in a criminal case, an application to submit the cause on the transcript of the evidence in lieu of a printed abstract will be denied when the application is filed after the right to file an abstract has been lost by not filing the abstract within the required 120 days.

State v Williams, 228- ; 290 NW 106

14010

Competency of testimony—first challenged on appeal. The competency of testimony cannot be challenged for the first time on appeal when no objection was made at the trial.

State v Strable. (Filed August 6, 1940)

Appeal and error—submission on transcript of evidence—application after losing right to file abstract. On an appeal by the defendant in a criminal case, an application to submit the cause on the transcript of the evidence in lieu of a printed abstract will be denied when the application is filed after the right to file an abstract has been lost by not filing the abstract within the required 120 days.

State v Williams, 228- ; 290 NW 106

Technicalities disregarded—lawbreakers not aided. In criminal cases the courts should not reverse where no substantial right has been affected and where technical errors do not affect the result.

State v Neuhart, - ; 292 NW 791

14027

Miscarriage of justice—county attorney and attorney general's duty to rectify. In criminal actions it is the duty of the county attorney and the attorney general, if they have discovered evidence showing there has been a miscarriage of justice, to act immediately and do what they can to right the injury done an innocent person.

State v Gibson, 228- ; 292 NW 786

ANNOTATIONS TO SUPREME COURT RULES

Rule 17

Denial of abstract to be specific—requirements of Rule 17. Under Rule 17 a denial of abstract should be specific and should point to those parts of the abstract complained of, and should further point out and specify, by page or otherwise, the parts of the record or transcript which support the denial or complaint. The only object of the certification of the record is to settle the specific dispute raised by a denial. The burden should not be placed on the court to read the abstracts, the amendments, the entire transcript, and other certified records.

Tessman v Tessman, - ; 291 NW 530

Rule 19

Moot question—facts must arise subsequent to entry of judgment. In the supreme court, a motion to dismiss on the ground that the question is moot is ordinarily made to depend upon facts arising subsequent to the entry of judgment, and where facts upon which such motion is based are asserted to have occurred before judgment was entered, but were not presented to the trial court, they are not properly presented to the supreme court. Consequently the motion to dismiss will be overruled.

Jasper Co. v Stergios, 228- ; 292 NW 855

Rule 24

Belated filing of briefs—privilege to file reply. Where appellant filed a motion to strike appellee's additional brief containing additional authorities which in no material way aided the appellee, and when striking it would in no way aid appellant, the motion was overruled. If appellant cared to file anything further in reply he could have asked for that privilege, as the court is liberal in granting such a privilege in such cases.

Eller v. Ins. Co., - ; 291 NW 866

Appellee's supplemental brief and argument—filing disapproved. The filing of a supplemental brief and argument contrary to the rules of the supreme court is disapproved.

Coakley v Dairy Cattle Congress. (Filed August 6, 1940)

Rule 30

Directed verdict—omnibus assignment of error. An assignment of error that "the court erred to the prejudice of the defendant in directing a verdict * * *" is an omnibus assignment and will not be considered on appeal.

Smith v Middle States Utilities Co., 228- ; 293 NW 59

Omnibus assignment for directed verdict. An assignment of error that the court erred in directing a verdict for the plaintiffs at the end of all the testimony, and referring to the motion, is an omnibus assignment not complying with Rule 30 and will not be considered, especially when the plaintiffs' testimony was not controverted and under the record a verdict against the plaintiffs could not possibly stand.

Gregg v Middle States Utilities Co., - ; 293 NW 66

Assignment of error—failure to comply with rules—effect. The supreme court must refuse to search for errors which are not indicated or set out in the manner prescribed by its rules. This rule requires complaints against the rulings of the trial court to be set out specifically and in concise language.

Enslow v Miner. (Filed August 6, 1940)

Substantial compliance. On appeal where appellee asserts noncompliance with Rule 30, regarding assignments of error, and the record shows that both appellee and appellant agreed that only one question is involved, and where failure to comply with the rule has in no way burdened either the court or counsel, there was substantial compliance with Rule 30—the purpose of the rule being to facilitate procedure.

Wilson v Iowa So. Util. Co., 228- ; 293 NW 77

Assigning error in instruction — abstract should contain all instructions—exception. For the supreme court to determine whether or not prejudicial error has been committed in the giving of instructions, the instructions must be considered as a whole, and where the abstract fails to set forth all the instructions, assignments of error pertaining to instructions will not be considered, unless the error is such that it could not be cured by other instructions.

Thines v Kukkuck, - ; 293 NW 58

Rule 31-b

Trial de novo—incomplete record—effect. The claim of appellants in a partition action that they are entitled to a trial de novo on appeal must fail where record shows that complete case is not before the supreme court and there is no showing of an attempt to make a record as authorized by §11456, C., '39. In such case, presumption obtains that decree of trial court is correct.

Enslow v Miner. (Filed August 6, 1940)

Rule 32

Appeal and error—submission on transcript of evidence—application after losing right to file abstract. On an appeal by the defendant in a criminal case, an application to submit the cause on the transcript of the evidence in lieu of the printed abstract will be denied when the application is filed after the right to file an abstract has been lost by not filing the abstract within the required 120 days.

State v Williams, 228- ; 290 NW 106